

New Jersey Court of Errors and Appeals

CHESTER C. HAYES,
Plaintiff-Appellant,

vs.

EMILE H. KLUGE,
Defendant-Appellee.

On Appeal from
Bergen Circuit
Court.
Appellant's Brief. 10

In April, 1912, the parties to this action entered into a verbal contract by which the plaintiff agreed to paint a portrait of the defendant's wife and child, for the sum of \$750., and to furnish a frame therefor for the further sum of \$60. (case p. 11, fol. 1-2). The portrait was painted by the plaintiff and delivered to the defendant on October 25th, 1912 (case, p. 10). The defendant claims that the contract provided that the portrait should be to his entire satisfaction, or he would not have to accept it, and his defense is that it was not to his entire satisfaction. (Case, pp. 5-6.) 20

The portrait was inspected by the defendant a day or two after its delivery (case, p. 14; fol. 1; p. 22, fol. 3-4) and upon such inspection the defendant claimed to be dissatisfied (case, p. 14, fol. 1; p. 22, fol. 4; p. 23, fol. 1-2). After delivery of the portrait, and after its inspection by the defendant, he kept it and never thereafter did he make his objections known to the plaintiff (case, p. 26; fol. 1-2). His only excuse for this is that he tried to get into communication with plaintiff 30

by telephone and failed to do so until some time in January or February, 1913, a period of more than three months after the delivery of the portrait (case, p. 25; fol. 1-2). He says that he called up the plaintiff's studio and the telephone did not answer (case, p. 14; fol. 3-4). He telephoned about four times in all (case, p. 24; fol. 2-3) and finally in January or February following (case, p. 25; fol. 1) succeeded in getting into communication with the plaintiff and made an appointment for an interview, which the plaintiff failed to keep. In this conversation over the telephone, the defendant says that he stated that the picture was not satisfactory (case, p. 15; fol. 1), but he gives no reason for his dissatisfaction, and this telephone conversation was the only communication by the defendant to the plaintiff after delivery of the portrait (case, pp. 25 and 26).

The plaintiff on October 28th, 1912, wrote to the defendant requesting payment of his bill (case, p. 34; fol. 3-4, p. 61). He wrote again on November 16th, 1912 (case, p. 39; fol. 2, p. 62), and again on December 16th, 1912 (case, p. 39; fol. 3-4, p. 63). The defendant did not reply to any of these letters (case, p. 25; fol. 2-3). Subsequently came the telephone message making the appointment, which the plaintiff did not keep. His reasons for not keeping this appointment are good and sufficient (case, pp. 43-44-45). The day after the appointment was made the plaintiff's wife went to the defendant's office (case, p. 15-16; fol. 1), but what was then said does not appear. The plaintiff then placed his claim in the hands of his attorneys, who wrote two letters to the defendant (case, pp. 45-46-65), to neither of which the defendant replied (case, p. 51; fol. 1).

At the close of the case the defendant moved for a non-suit and the plaintiff moved for a direction of the verdict in his favor, and both motions were denied (case, pp. 55-56).

The motion for the direction of a verdict for the plaintiff was upon the ground that the defendant accepted the portrait, and kept it an unreasonable time without objecting. The denial of this motion is the only ground of appeal relied upon.

POINTS

I

Defendant accepted the portrait; all of the facts proving his acceptance were undisputed, and of such a nature that no contrary inferences could be drawn from them, and the question of acceptance was therefore for the court and not for the jury. 10

The following are the facts, absolutely undisputed, and upon which acceptance is based: 20

First: The portrait, pursuant to instructions given to the plaintiff by the defendant, was delivered to the defendant at his house on October 25th, 1912 (case, p. 10; fol. 2-3, p. 13, fol. 1-2).

Second: The defendant inspected the portrait within a day or two after its delivery (case, p. 14, fol. 1-2, p. 22, fol. 3-4).

Third: After inspection of the portrait the defendant for a period of at least fifty-five days failed to communicate with the plaintiff in any way, and failed to return or offer to return or make known to plaintiff his objections to the portrait, or to intimate his intention to reject it, and from the time of delivery of the portrait, up to the time when the plaintiff and defendant met in court on the trial of this action, the defendant had never told the plaintiff what his objections were (case, p. 26, fol. 1-2). 30

All that the defendant did after inspection of the portrait is set forth in his testimony, as follows:

10 "I came home and unfolded the picture and put it on a pedestal, and it was absolutely shocking to me to see that this picture was absolutely untouched, and in the same condition we found it at the studio. * * * The picture was unchanged. We, of course, could not understand why this was done, as long as Mr. Hayes was always very courteous and very willing and declared himself he would change it, and therefore we thought the picture would not be finally accepted" (Case, p. 14).

It clearly appears that his dissatisfaction was established the moment he saw the picture. He further says:

20 "I called up his studio and the telephone did not answer; some other time I called up the janitor and he told me that Mr. Hayes was out of town. I could not get Mr. Hayes. I finally came back from the West. I got hold of Mr. Hayes one day; telephoned over to him. I told Mr. Hayes 'I am anxious to see you. I want to straighten out the question of this picture. It is not satisfactory, and I want to see you right away.' Mr. Hayes said, 'We will be very glad to come down.' I said, 'When can you come down.' He said, 'I cannot come to-day, but will come to-morrow at twelve o'clock.' The next day I was sitting at my desk at twelve o'clock and waited an hour and Mr. Hayes did not appear. He did not send an excuse; he did not notify me why he did not appear; and I did not know why, what was his reason that he did not show up. I was ready and very anxious to talk this matter over with him; I had

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to go out of town again and wanted to settle it" (Case, p. 15).

On cross-examination he further said (Case, pp. 22, 23, 24, 25):

"Q. When your chauffeur brought the picture to your house you say that you unwrapped it and examined it? A. When I came home, yes.

Q. That was the same day or a day or two after? A. A day or two after I believe.

Q. You took the covering off, didn't you? 10
A. Yes.

Q. And you say you were absolutely shocked, as I understood your expression here? A. Yes.

Q. To find that it was untouched and in the same condition? A. As far as the baby is concerned.

Q. As far as the baby is concerned? A. Yes.

Q. Had it been touched in other particulars? A. No, it was exactly the same condition as it was before. 20

Q. It was exactly the same condition as it was when you saw it in the studio in August? A. Yes.

Q. And you were shocked about it? A. Yes.

Q. I assume you were very much provoked about it? A. I was.

Q. Why didn't you notify him immediately then? A. Because Mr. Hayes was not in town. I tried to get hold of him. 30

The Court: He told you that, and you objected to his telling it.

Q. Why didn't you write him a letter? A. Because I tried to telephone him. I thought it was much better to telephone and speak to him.

The Court: He said he telephoned to the janitor and you objected to what the janitor said. 40

Q. I want to know why you did not take some other means than telephoning to the janitor of the apartment, when you received this picture for which you agreed to pay this sum of money, and did not attempt to get into communication with Mr. Hayes, except by telephone? You did not write him a letter, did you? A. I did not.

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Q. Now, you received a letter—you received the picture on the 25th of October; when did you telephone? A. Right the next day after I opened it.

Q. The next day after you opened it? A. Yes.

Q. Did you telephone to his apartment? A. Yes, I telephoned to his apartment.

Q. When did you try to get into communication again? A. Now.

Q. I say when? A. A couple of days afterwards again.

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Q. Two days afterwards? A. About, I am not quite sure about that.

Q. You are not quite sure about that? A. But I tried several times to get in touch with him by 'phone.

Q. By 'phone? A. Yes.

Q. You never wrote him a letter about it? A. No, I did not.

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Q. Right after the delivery of this picture you got a letter from him asking you particularly if you would not send this money?

The Court: That is not cross-examination on the letters; that is not in evidence.

Q. Well, now, I want you to tell this jury what other attempts you made besides telephoning two or three times to get in communication with Hayes.

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The Court: Did you do anything except to telephone?

The Witness: I did not.

Q. You telephoned about four times, is that right? A. About, I believe.

Q. About four times? A. Yes, sir.

The Court: He said he called him up on the telephone and made an appointment, and your man did not keep the appointment.

The Witness: He did not keep the appointment; he said he would come the next day at twelve o'clock. I said I was very anxious to see Hayes, and he never showed up, and I waited one hour for him. 10

Q. On what day was this appointment made for? A. It was on a Thursday.

Q. What? A. On a Thursday.

Q. What month? A. I believe in the month of January.

Q. In the month of January? A. In the month of January or February, I am not quite sure. 20

Q. January or February? Three months after you had this picture? A. The conversation with Mr. Hayes that was over the telephone, Yes.

Q. Three months after? A. Yes.

Mr. Stalter: He says he does not know.

Q. That is to the best of your recollection? A. The best of my recollection is that it was after the holidays.

Q. So that between the 25th day of October, the time when you received the picture, and some time in January or February, you had no actual communication with Mr. Hayes with regard to this picture? A. No, except when I got him on the telephone." 30

It therefore clearly appears that all the defendant did was to try to get into communication with 40

You are I hope quite recovered from your indisposition and feeling quite yourself again.

I want to thank Mrs. Kluge for her patient and sympathetic cooperation in doing this portrait which was a pleasure to me.

With my best wishes to you both,

Yours very sincerely

Oct. 28, 1912 CHESTER C. HAYES.

My dear Mr. Kluge:

Some weeks ago after the delivery of the portrait I wrote to you at Englewood but presume the address was faulty as I have not 10 heard from you since.

I asked you in the letter to be good enough to favor me with a check covering the cost of portrait and the frame \$810.00.

I have a pretty heavy obligation to meet on December 1st and am counting on your check to meet it.

Will you be so kind as to send it to me without further delay. No doubt you are very busy with your own business again and do not 20 realize how time flies, but the matter is an important one to me at this moment, therefore, I trust you will oblige me.

Yours very truly,

Nov. 16/12 CHESTER C. HAYES.

My dear Mr. Kluge:

Having several times failed to find you at 30 your office, I wish to ask you to be good enough to send me your check for \$810.00, without further delay. In view of the fact that the portrait of your wife and daughter were done for you at a sum much below my price, through the interest and efforts of Mr. Taylor and that just as much time and care were given to the work as would have been had the full price been asked, and since you have had the portrait about three months, I 40

cannot believe you will not accede to my request.

Very sincerely yours,
Dec. 16/12 CHESTER C. HAYES.

Between the period of October 25th and December 16th, plaintiff called at the defendant's office three times, and failed to find him in (case, p. 40, fol. 1).

10 Two letters were subsequently written by plaintiff's attorneys (case, p. 45, fol. 2, 3, 4, p. 46), and defendant replied neither to the letters of the plaintiff or his attorneys (pp. 25-51).

It was clearly the duty of the defendant, upon inspection of the picture, to either offer to return it or at least to make known his objections to the plaintiff.

Woodward vs. Emmons, 61 N. J. L. 281.
Sturtevant Mill Co. vs. Kingsland Brick Co., 74 N. J. L. 492.

20 *Potter Printing Press Co. vs. Newark Advertising Company*, 82 N. J. L. 671.

II

Having accepted the portrait and keeping it for a period of fifty-five days, without any objections, any breach of promise or warranty was waived, and the defendant became bound to pay the entire purchase price to plaintiff.

30 *Timlan vs. Dilworth*, 76 N. J. L. 568.
Berg vs. Rapid Motor Vehicle Co., 78 N. J. L. 724.

Zeller vs. Delaney, 78 Atlantic 212.
Schnatterer vs. Bamberger, 79 Atlantic 324.

40 *Sales Act, Sections 48 and 49*, 4 C. S. 4658.

The underlying principle which controls the cases of *Timlan vs. Dilworth*, and *Berg vs. Motor Vehicle Company*, is thus expressed by this court:

“What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question for the court, not for the jury.”

Tilman vs. Dilworth, 76 N. J. L. at p. 572.

The principle thus stated applies strictly to the case at bar, and the question comes down simply to this: Was fifty-five days a reasonable or unreasonable time for the retention of the portrait by the defendant? 10

Innumerable cases might be cited where courts, applying this principle, have stated certain periods of time as falling within the rule, thus, twelve days was held to be an unreasonable time for keeping lumber, where the defects were apparent upon mere inspection.

Travis vs. Steward, 29 N. Y. Misc. 604. 20

A delay from February 19th to the 4th and 5th of March was excessive and held to amount to acceptance.

Neate vs. Ball, 2 Easts. Reports 117.

A delay of twenty days was held to amount to an acceptance.

Boughton vs. Standish, 48 Vt. 594.

A delay of one month waived the right of rescission, if such right existed. 30

Wagoner vs. McKee, 77 Pa. St. 228.

But in every case, its own peculiar circumstances must be taken into consideration to determine what is or what is not a reasonable time. In the case at bar, the defendant, being dissatis- 40

fied with the portrait the moment he inspected it, and having failed to reach the plaintiff by telephone, he could in ten minutes have written to the plaintiff that he was dissatisfied and did not intend to keep the portrait. By failing to intimate to the plaintiff in any way his intention to reject it, during this long period of time, he brought himself squarely within the provisions of the statute (4 C. S. 4658, Sec. 48-49):

10 48. "Acceptance by buyer. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them (P. L. 1907, p. 329)."

20 49. "Acceptance of goods. Liability for breach of promise or warranty; notice of breach. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach or any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know, of such breach, the seller shall not be

30 liable therefor (P. L. 1907, p. 329)."

III

At the close of the case the defendant, having moved for a non suit, and the plaintiff for a direction of a verdict, all questions of fact were left to the Court and there was nothing to submit to the jury.

The motion for a non suit admitted the truth of the plaintiff's evidence and of every inference that could be legitimately drawn therefrom. 10

Weston Electrical Instrument Co. vs. Benecke, 82 Atlantic, 878.

Fox vs. Great Atlantic & Pacific Tea Company, 87 Atlantic 339.

A verdict may properly be directed for the plaintiff.

Crosby vs. Wells, 73 N. J. L. 796 at 799.

A motion for the direction of a verdict for the plaintiff admits the truth of the defendant's evidence and of every inference that can be drawn therefrom. 20

McCormick vs. National City Bank of Waco, 6 American & English Annotated cases 544.

Wolf vs. Chicago Sign Printing Co., 13 American & English Annotated Cases 369. 30

Kinner vs. Whipple, 128 N. Y. Appellate Division 736.

The making of these two motions therefore left two questions of fact in this case entirely to the court. The first question: Did the plaintiff and the defendant agree that the portrait should be to the entire satisfaction of the 40

defendant? And the second question: Did the defendant by his conduct, even if he were dissatisfied, waive his dissatisfaction, and therefore become liable, even though the first question be answered in the affirmative. Throughout the entire case there was one disputed material fact, and that is whether or not the contract was that the portrait should be painted to the entire satisfaction of the defendant. Granting this was the contract, the defendant by his acceptance is concluded from asserting his dissatisfaction as a defense. It was
 10 clearly therefore the duty of the court to direct a verdict for the plaintiff.

IV.

The refusal of the trial court to direct a verdict for the plaintiff was error, and the judgment of the Bergen Circuit Court entered upon the verdict of the jury was erroneous, and should be reversed,
 20 set aside and for nothing holden, and judgment should be directed reversing the judgment of the Bergen Circuit Court and awarding a venire de novo with costs in this court and in the court below.

Respectfully submitted,

CHARLES W. HULST.
 Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

CHESTER C. HAYES,
Plaintiff-Appellant,

against

EMILE H. KLUGE,
Defendant-Appellee.

On Appeal
from Bergen
Circuit Court.

APPELLEE'S BRIEF.

In April, 1912, the plaintiff-appellant, who is an artist, orally agreed to paint a portrait of the defendant's wife and infant daughter for the sum of \$750, and to furnish a frame for said portrait for the sum of \$60 additional.

The defendant claims that the plaintiff agreed to make the portrait in every way satisfactory to the defendant, and if not satisfactory, defendant would not have to accept it; that plaintiff failed to make said portrait satisfactory, and defendant was not satisfied with it, and refused to accept it.

In the latter part of July or early part of August, plaintiff notified defendant that the portrait was finished, and defendant, his wife, her brother, and a Mr. Givernaud, then called upon the artist at his studio and inspected the portrait.

The portrait at that time was not satisfactory to the defendant or his wife. Several defects were pointed out by the defendant, and several changes were requested; all of which the plaintiff agreed to make, and when made, to let the defendant know and have the picture presented.

The plaintiff, by letter dated August 28, 1912, wrote to the defendant that "the portrait is ready for you at any time," and on October 25th portrait was delivered by the plaintiff to the defendant's chauffeur, after the plaintiff had previously notified the defendant and his wife, by telephone, that all changes requested had been made, and the portrait had been finished.

Two days after its delivery the defendant examined the portrait, and found that none of the changes had been made. Defendant was very much disappointed and dissatisfied. The following day defendant called up the plaintiff by telephone, and failed to reach him. Three or four times shortly thereafter defendant attempted to reach the plaintiff by telephone, and succeeded in getting the plaintiff's janitor, who informed defendant that plaintiff was out of town.

Defendant then went out West on a business trip, and on his return in December, telephoned the plaintiff, and succeeded in reaching him. Defendant informed plaintiff that he wanted to straighten out the question of the picture; that it was not satisfactory; that he wanted to see the plaintiff right away. The plaintiff thereupon agreed to meet the defendant at defendant's office, to go over the matter.

The plaintiff failed to keep this appointment; did not call the defendant up or explain his failure, or communicate his reasons for not keeping the appointment, and made no other or further

attempt to see the defendant, or communicate with him, but sometime in February started suit.

The day following the day of appointment, plaintiff's wife called at the office of defendant, but what was then said by her does not appear, as the plaintiff's attorney objected to any testimony by the defendant as to what Mrs. Hayes said at that time (Case, p. 15, l. 21). The plaintiff did not produce his wife as a witness at the trial.

At the close of the case the defendant moved for a non-suit on the ground that the evidence was overwhelming that the plaintiff had agreed to paint the portrait to the entire satisfaction of the defendant, and that the defendant was, therefore, the sole judge as to whether he was satisfied or not. This motion was denied.

The plaintiff moved for the direction of a verdict in his favor, upon the ground that the defendant accepted the portrait, kept it an unreasonable time without objecting. This motion was also denied, and its denial is the only ground of appeal relied upon for reversal.

POINTS.**I.**

Defendant did not accept the portrait; he made no use of it, but allowed it to remain stored away in a closet in his home pending his attempts to communicate to the plaintiff his dissatisfaction. The reasonableness of the time he took and the efforts he made to communicate with the plaintiff, were questions of fact for the jury, and were properly submitted by the Court for their determination as to whether there was an acceptance.

The admitted facts show that the agreement between the parties was made sometime in April, 1912; work on the portrait was commenced by the plaintiff shortly thereafter, and in the latter part of July or early part of August, he notified defendant that the portrait was finished. At that time defendant, his wife, her brother, and a Mr. Givernaud, called upon the plaintiff at his studio and inspected the portrait. The portrait at that time was not satisfactory to the defendant or his wife. Several defects were pointed out by the defendant and his wife, and several changes requested, all of which the plaintiff agreed to make, and to notify the defendant when they had been made (Case p. 12, ll. 35-40; Case, p. 13, ll. 1-19; Case, p. 19, ll. 15-40; Case, p. 28, ll. 10-40; Case, p. 30, ll. 10-28; Case, p. 32, ll. 4-9; Case, p. 40, ll. 20-30; Case, p. 47, ll. 20-40).

On August 28th, plaintiff wrote defendant a letter (Exhibit P-4) in which he advised defendant that the portrait was ready for him at any time.

At that time the plaintiff was staying at Wilton, Conn. On October 25th, after plaintiff had notified defendant, that the picture was ready for delivery (Case, p. 13, ll. 33-40) and after plaintiff had communicated with Mrs. Kluge and informed her that the picture was ready (Exhibit, p. 1, ll. 1-10), plaintiff delivered the portrait to defendant's chauffeur, who brought it to defendant's home at Englewood.

A day or two afterwards, defendant removed the coverings from the portrait in the presence of Mrs. Kluge and Mr. Givernaud, and found that the picture was unchanged and absolutely untouched, and in the same condition in which it had been at the studio when inspected the early part of August (Case, p. 14, ll. 15-40; Case, p. 23, ll. 5-25; Case, p. 29, ll. 5-19; Case, p. 30, ll. 1-20).

Defendant testified (Case, p. 14, ll. 23-40) :

The Witness: The picture was unchanged. We, of course, could not understand why this was done, as long as Mr. Hayes was always very courteous and very willing, and declared himself he would change it, and therefore we thought the picture would not be finally accepted. I tried to get in touch with Mr. Hayes several times.

Mr. Hulst: I object to that.

The Court: That is the natural thing.

The Witness: I called up his studio, and the telephone did not answer; some other time I called up the janitor, and he told me that Mr. Hayes was out of town.

Q. You could not get Mr. Hayes? A. I could not get Mr. Hayes. I finally came back from the West. I got hold of Mr. Hayes

one day; telephoned over to him. I told Mr. Hayes: "I am anxious to see you. I want to straighten out the question of this picture. It is not satisfactory, and I want to see you right away." Mr. Hayes said: "We will be very glad to come down." I said, "when can you come down?" He said, "I cannot come to-day, but will come to-morrow at twelve o'clock." The next day I was sitting at my desk at twelve o'clock and waited an hour and Mr. Hayes did not appear. He did not send an excuse; he did not notify me why he did not appear, and I did not know why, what was his reason that he did not show up. I was ready and very anxious to talk this matter over with him.

Up to the time of the delivery of the picture to the chauffeur, on the misrepresentation by the plaintiff, that the changes had been made and the portrait finished, the relations between the parties were most friendly. They had been brought together by a Mr. Taylor, a mutual friend, who was an uncle of the plaintiff's wife, and the dealings between the parties were not attended with the usual formalities that would ordinarily be expected in business transactions.

The plaintiff had been carrying on the work from April to October. In the latter part of July or the first of August, he had agreed to make certain changes. He seemed to be in no haste to have the picture delivered, and waited until three months after these changes were requested before he delivered the picture. The defendant, as he testifies could not understand why the changes had not been made, and did the natural thing by trying to get in touch with Mr. Hayes several times; called him up at the studio and got in touch with the

janitor, and learned that Mr. Hayes was out of town. After being unable to reach Mr. Hayes by telephone, the defendant went out West on a business trip, and did not return to his home until sometime in December, and almost immediately got in communication with Mr. Hales by telephone, and told him that he wanted to straighten out the question of the picture. That it was not satisfactory, and that he wanted to see Mr. Hayes right away.

In answer to questions on cross-examination by the plaintiff's attorney, the defendant testified as follows:

"Q. Why didn't you notify him immediately then? A. Because Mr. Hayes was not in town. I tried to get hold of him.

The Court: He told you that and you objected to his telling it.

Q. Why didn't you write him a letter? A. Because I tried to telephone him. I thought it much better to telephone and speak to him.

The Court: He said he telephoned to the janitor and you objected to what the janitor said."

It is clearly evident from the defendant's conduct, as he thus testified, that he made such efforts, as to him seemed reasonable, to get in communication with the plaintiff, although these efforts were interrupted and delayed by his absence out West. Immediately upon his return he got into communication with the plaintiff.

The plaintiff contends that the time thus consumed was not reasonable, and that the Court should have taken the question away from the jury

and decided that the acceptance was absolute as a matter of law.

There is no denial by the plaintiff that the defendant endeavored to reach him by telephone, nor does he produce the janitor of the building to deny that the defendant had called him up. Plaintiff's contention seems to be, however, that the attempt to communicate with him should have been by letter rather than by telephone. The plaintiff does not deny that the defendant was out West for most of the period between October 25th and December 21st, when defendant finally reached him by telephone.

In his letter of December 16, 1912, he writes, "Having several times failed to find you at your office" (Exhibit, p. 3). Plaintiff contends, however, that it was he, the plaintiff, who called up the defendant, rather than the defendant called him, as testified to by Mr. Kluge.

A careful reading of the plaintiff's testimony, however, will show that he clearly must have been mistaken, as the conversation he testifies to as having taken place over the telephone, could not have had its inception from a call by the plaintiff.

In answer to his own counsel's questions, plaintiff testifies as follows (Case, p. 43, ll. 31-40; Case, p. 44, ll. 1-3):

"Q. In your conversation with Mr. Kluge, what did you say to him, and what did he say to you? A. Mr. Kluge asked me—said he wanted to see me.

Q. What did you say to him? A. He said, 'May I come to your studio, or will you come to my office?'

Q. What did you say? A. I said that it was not convenient for me to see him at the

studio, but I would come to his office. He said that he wanted to fix up matters."

This clearly shows a desire on the part of the defendant to confer with the plaintiff over his dissatisfaction, even to the extent of going to the plaintiff's studio.

The plaintiff further testifies (Case, p. 44, l. 15): "So I made an appointment to meet Mr. Kluge on Tuesday noon," and at line 19, page 44:

"Q. Did you, as a matter of fact, meet Mr. Kluge on Tuesday noon? A. No, sir."

On cross-examination (Case, p. 46, l. 15) the plaintiff testifies as follows:

"Q. You could very easily have stepped to the telephone and called up Mr. Kluge and told him you could not come? A. I could have done so. I am very sorry that I did not do so."

Again (Case, p. 47, l. 10) he testified as follows:

"Q. And your idea of that demand then was simply to come down there and get a check, is that right? A. That was my idea, yes, sir.

Q. And there was nothing in what Mr. Kluge said to you that would lead you to believe that there were other matters to be discussed, is that right? A. Nothing whatever."

The plaintiff, although believing, as he testifies, that all he had to do was to go down to Mr. Kluge's office and get a check, nevertheless, made no attempt to keep his appointment; made no explana-

tion of his failure so to do, and made no further attempt to reach Mr. Kluge or get into communication with him.

These facts clearly present an issue for a jury's determination, and a question from which an inference can be drawn unfavorable to the plaintiff's contention of acceptance.

The Court, therefore, very properly denied the plaintiff's motion for a direction of a verdict for the plaintiff.

This Court has already established this principle in several cases.

In *Furniture Company v. Board of Education*, 58 N. J. L., page 646, at page 648, Mr. Justice GARRISON, speaking for the Court, said:

"The facts of the case are not in dispute, being for the most part the written communications between the parties, or the entries in the minutes of the defendant. This circumstance does not, however, of itself create a question of law for the Court, since if indisputable facts admit of two inferences, one favorable and the other unfavorable to the plaintiff, a question is presented that calls for the opinion of the jury."

And at page 652:

"The question of reasonable time is generally one of fact for the jury, and is always so when it rests upon conflicting inferences as to the mutual effect of the conduct of the parties to the transaction."

Subsequently in

Burr v. Adams Express Co., 71 N. J. L., 263, at page 269; 58 Atl. Rep., 609, at page 611,

Mr. Justice PITNEY, speaking for the Supreme Court, said:

“In this as in all cases where questions of reasonable time, opportunity or the like are at issue, the determination of what is reasonable where the facts are in dispute, or the inference to be drawn from undisputed facts is in doubt, is a question of fact and not of law.”

Again in the case of

Berg v. Rapid Motor Vehicle Co., 78
N. J. L., 724,

Mr. Justice MINTURN, speaking for this Court said:

“The question of acceptance of the machine and the rescission of the contract within a reasonable time were properly, under the conflicting testimony, left to the jury. These questions, where the facts are in dispute, or the circumstances are open to discussion, are invariably treated as jury questions.”

(Citing with approval, *Furniture Co. v. Board of Education*, 58 N. J. L., 646, and *Burr v. Adams Express Co.*, 71 N. J. L., 263.)

“Debatable questions, of reasonable time, acceptance and reasonable use for the purpose of inspection and acceptance, are for the jury.”

Woodward v. Emmons, 61 N. J. L., 281, cited by the appellant, in no wise contravenes this principle, because there the *ratio decidendi*, in the

language of the opinion, was that "the failure to return or offer to return the machines, together with their continued use for purposes of profit or convenience for almost a year, should be construed to be an election to accept and retain the machine."

Sturtevant Mill Co. v. Kingsland Brick Co., 74 *N. J. L.*, 492, cited by the appellant, does not support the contention of the appellant, as the question there involved was that the defendant could not substitute a right to rescind a contract for breach of the guarantee contained in it, upon notice to the plaintiff, for what he has agreed in his contract he will do upon the happening of such breach (*i. e.*, to load them on cars at defendant's plant immediately after the expiration of the time allowed for trial), nor can he add to the contract such additional right.

Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co., 82 *N. J. L.*, 671, cited by the appellant, also fails to sustain the appellant's contention, as the point therein raised was the charging by the Court as follows:

"It further appears that between the 21st of June, 1909, and the 24th of February, 1910, the defendant had used this machine commercially. There is evidence before you to show that for a large part of the time during that period they had used the machine in getting out their evening editions. Now that is a circumstance for you gentlemen to consider in saying whether or not they had accepted that machine; whether or not the use of that machine was inconsistent with their claim that they did not own it. If they did not own it, then they had no right to use it for any length of time or any longer

than was absolutely necessary to make a reasonable test."

This charge did not take the question away from the jury, but left the facts as brought out by the evidence, for the jury to determine whether there had been an acceptance.

In the present case there is absolutely no proof of any act on the part of the defendant from which an acceptance of the portrait could be inferred. It was stored away in a storeroom (as testified by Mrs. Kluge) (Case, p. 29, ll. 14-17), was never hung up or used for ornament or show; defendant endeavored several times to communicate his dissatisfaction to the plaintiff, on one occasion notifying the plaintiff's janitor, and after the return from his business trip out West, actually succeeded in notifying plaintiff of his dissatisfaction with the portrait, and his desire to have the same changed. The delay occasioned by his business trip and his efforts prior and subsequent to this trip, were properly left to the jury to decide as to whether he had made them within a reasonable time.

II.

The defendant, by permitting the portrait to remain in his home from October 25th, 1912, to December 21st, 1912, without making efforts to notify plaintiff of his objections, other than what it is admitted he made, did not, as a matter of law, result in a waiver of his objections or bind him to accept the portrait, but presented a question for the jury to determine.

The principle thus stated is practically covered by the cases cited under Point I, all of which estab-

lish that the question of acceptance or rescission within a reasonable time should be left to the jury.

Furniture Co. v. Board of Education, 58 N. J. L., 646.

Burr v. Adams Express Co., 71 N. J. L., 263.

Berg v. Rapid Motor Vehicle Co., 78 N. J. L., 724.

The following cases, cited by appellant, viz:

Timlan v. Dilworth, 76 N. J. L., 568, and
Schnatterer v. Bamberger, 79 Atl. 324.

support this doctrine by asserting its converse, *i. e.*, that "What is a reasonable time when the facts are undisputed and different inferences *cannot* reasonably be drawn from the same facts, is a question for the Court, and not for the jury."

Surely no fixed rule can be laid down that will apply and control in all cases where questions of reasonable time, opportunity or the like are at issue, but in each individual case it should be left to the jury to determine from the special circumstances and facts therein, what is or what is not a reasonable time.

Both sections 48 and 49 of the Sales Act, Compiled Statutes, Vol. 4, page 4658, provide that "the buyer has a reasonable time within which to make known or intimate to the seller that he has rejected the goods." This reasonable time is a question of fact for the jury, and not a question of law for the Court.

The plaintiff had not performed his agreement. He had not painted the portrait to the satisfaction of the defendant. He had not made the changes

he admits he agreed to make. The plaintiff himself admits that the defendant and his wife wanted the contrast between the mother's and child's hair to stand out distinct; that this was one of the main features of the portrait, and one that they asked to be modified at the time of the inspection of the portrait in the plaintiff's studio, yet, the plaintiff admits on cross-examination, that he did not touch the baby's hair at all after the inspection at his studio in July or August.

The plaintiff testified as follows (Case, p. 47, l. 27):

“Q. At that time wasn't there something said in regard to the baby's hair, making the dress more distinct? A. I think not, sir.

Q. Are you positive of that Mr. Hayes? A. I did not touch the baby's hair after that at all.

Q. And were you not asked to? A. No, sir, I was not asked to.

Q. Didn't they want as one of the main features of the portrait, both Mr. and Mrs. Kluge, and request you, Mr. Hayes, to make the contrast between the mother's and child's hair stand out distinct? A. Not any distincter than it was.

Q. Wasn't that one of the features that they wanted modified in this picture? A. It was.”

Notwithstanding this fact, and with the picture untouched, as the defendant claims from the time of the inspection in July, the plaintiff assures the defendant that the picture is completed and the changes made, and on this misrepresentation the painting was permitted by the defendant to be brought to his home.

The plaintiff was not entitled to his compensation until he had completed the changes and made the painting satisfactory to the defendant. The plaintiff was aware, when he delivered the portrait, that these changes had not been made. The defendant had a right to expect that the plaintiff would make these changes and make the painting satisfactory to him, as he had agreed. His desire was to accept the painting if these things were done. The efforts he made to reach the plaintiff by telephone were to bring about the completion of the portrait. The portrait, and both the wife and child, were before the jury for an inspection and comparison. The lump upon Mrs. Kluge's neck or throat, which she objected to at the inspection in August, was still there and was pointed out by Mrs. Kluge on the portrait.

Under such conditions the keeping of the portrait by the defendant in a storeroom for fifty-five days, was not doing any act in relation to it which was inconsistent with the ownership by the artist plaintiff, and was not an acceptance.

III.

The contention of the appellant that the defendant having moved for a non-suit and the plaintiff for a direction of a verdict, left all questions of fact to the Court and there was nothing to submit to the jury, is without merit.

In *Weston Electrical Instrument Co. v. Bencke*, 82 Atl., 878, cited by the appellant to support this contention, the writ of error brought up for review, a judgment of non-suit in a case tried by the Circuit Court Judge sitting without a jury.

The non-suit was granted by the Circuit Court judge on the ground that there had not been shown any authorization of the libelous publication of this document by the defendant.

This Court in considering this point held "that in a trial before the Judge sitting without a jury, a motion for a non-suit should be denied where the evidence and the inferences reasonably arising therefrom are legally sufficient to prove the allegations of plaintiff's declaration. It was the duty of the Trial Judge to weigh the testimony as would a jury. This he did not do. The motion for non-suit presented a question of law, namely, admitting the truth of the plaintiff's evidence and of the inferences favorable to the plaintiff that could be drawn therefrom, could the plaintiff recover? As was said by EARL, *J.*, speaking for the N. Y. Court of Appeals, in *Forbes v. Chichester*, 125 N. Y., 769: "The plaintiff may fail to satisfy any Court upon the evidence, that he is entitled to recover; but he has a right to have his evidence properly weighed."

This applies with equal force to the defendant's right to have his evidence weighed on a motion for a direction of a verdict in favor of the plaintiff.

In *Fox v. Great Atlantic & Pacific Tea Co.*, 87 *Atlantic*, 339, also cited by the appellant, this Court also held "That although a motion for a non-suit or a motion to direct a verdict in favor of the defendant, admits the truth of the evidence of the plaintiff, where the ground of the motions was the contributory negligence of the plaintiff, nevertheless it was obvious that the alleged negligence must be deduced from facts and circumstances in evidence, and this is usually sufficient to make it a jury question.

It is not contended by the appellee that there are no cases in which a verdict may properly be directed for the plaintiff, but the case of *Crosby v. Wells*, 73 *N. J. L.*, 796, cited by the appellant, does not present such a situation, nor does the case at bar.

Where fairminded men may honestly differ as to the conclusions to be drawn from facts whether controverted or uncontroverted, the question at issue should go to the jury.

Bennett v. Bush, 67 *Atl. Rep.*, 188.

Mumma v. Easton & A. R. Co., 65 *Atl. Rep.*, 208.

Nolan v. Bridgeton & Millville Traction Co., 65 *Atl. Rep.*, 992.

A judgment entered upon a directed verdict will be reversed on error, if by such direction any material matter in issue concerning which there was a substantial conflict in the testimony was resolved by the Trial Court adversely to the plaintiff in error.

To constitute such a conflict it is not necessary that the facts themselves be in dispute, for, if the inference to be drawn from undisputed facts is one about which there may reasonably be an honest difference, it is for the jury, not the Court, to draw such inference.

Bower v. Bower, 74 *Atl.*, 522.

The refusal of the Court below to grant the defendant's motion for a non-suit or the plaintiff's motion for a direction of a verdict, therefore, did not leave the two questions of fact in this case entirely for the Court and take these facts away from the jury.

The first question of fact, did the plaintiff agree that he would make the portrait absolutely satisfactory to the defendant, and if not satisfactory, he would make it satisfactory, and if not, defendant would not have to take it, was overwhelmingly borne out by the evidence. This was insisted by the defendant, by Mrs. Kluge, the defendant's wife, and by Mr. Givernaud, a disinterested witness. This agreement was made by the plaintiff both at the Plaza Hotel with the defendant, in April, and a week afterwards at the Apthorpe Apartment with both the defendant and his wife, and again reaffirmed at the time of the inspection of the portrait at the plaintiff's studio before the defendant, his wife, her brother and Mr. Givernaud.

The plaintiff makes no attempt to deny the conversation at his studio, or the agreement at the Apthorpe, and in his direct examination plaintiff testified as follows:

“By the Court: And then again did you say that you would do it to their entire satisfaction, meaning the Kluges?

The Witness: I think not.

The Court: And again did you say they would be perfectly satisfied with the picture, if not, they need not take it?

The Witness: I think not.”

This question of fact was submitted by the Court to the jury under an instruction using the wording of the Supreme Court in *Gwynne v. Hitchner and Yorkes*, 37 Vr., 97, and was determined by them in favor of the defendant, as was also the second question of fact, did the defendant by his conduct waive his dissatisfaction and accept the portrait, which second question was also properly submitted to the jury.

IV.

The Trial Court properly refused to direct a verdict for the plaintiff. The judgment of the Bergen Circuit Court entered upon the verdict of the jury should be affirmed.

Respectfully submitted,

EDMUND G. STALTER,
Of Counsel with Appellee.

New Jersey Court of Errors and Appeals

CHESTER C. HAYES,
Plaintiff-Appellant,

against

EMILE H. KLUGE,
Defendant-Appellee.

On Appeal from 10
Bergen Circuit
Court.

Appellant's Reply
Brief.

The attention of the Court is called to certain statements of facts in the Appellee's brief, which 20 ought to be corrected.

At the beginning of paragraph 3 on page 2, it is stated "Defendant then went out West on a business trip, and on his return in December, telephoned the plaintiff, and succeeded in reaching him."

On page 7, near the top, it is stated, "After being unable to reach Mr. Hayes by telephone, the defendant went out West on a business trip, and did not return to his home until some time in 30 December, and almost immediately got in communication with Mr. Hayes by telephone, and told him that he wanted to straighten out the question of the picture."

Towards the bottom of page 7, it is stated: "Immediately upon his return he got into communication with the plaintiff."

At the end of the first paragraph on page 8, it is stated: "The plaintiff does not deny that the defendant was out West for most of the period be- 40

tween October 25th and December 21st, when defendant finally reached him by telephone."

The respondent throughout is evidently attempting to impress upon the Court the fact that the reason why he did not communicate with the plaintiff is that he was away in the West upon a business trip.

10 The only evidence upon this point is contained in the evidence of the respondent, where on page 13, line 25, he says "I went out West" and again on page 15, line 2, he says "I finally came back from the West". There is no evidence whatever to show when he went out West or when he came back.

According to the respondent's own testimony, the telephone conversation occurred either in the month of January or February, 1913. (Case, p. 25; lines 3-10)

20 Of course it was the respondent's duty to fulfill his legal obligation to make his objections known to the appellant, no matter where he was, but it is hardly fair to the appellant that the respondent's brief should contain these statement of facts, which are not supported by the evidence.

Respectfully submitted,

CHARLES W. HULST,
Of Counsel with Complainant.

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Notice of Appeal.
(Filed May 8th, 1914.)

Bergen County Circuit Court.

CHESTER C. HAYES,
Plaintiff,

vs.

EMILE H. KLUGE,
Defendant.

10

To EDMUND G. STALTER,
Attorney for Defendant.

SIR:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds: 20

1. The trial court denied plaintiff's motion to direct a verdict for the plaintiff.

CHARLES W. HULST,
Attorney for Appellant.

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Notice of Appeal

(Indorsed).

BERGEN COUNTY CIRCUIT COURT.

CHESTER C. HAYES,
*Plaintiff,**vs.*

10

EMILE H. KLUGE,
Defendant.

NOTICE OF APPEAL.

CHARLES W. HULST,
Attorney for Appellant,
Englewood, N. J.20 Due service of the within notice admitted this
22nd day of April, 1914.EDMUND G. STALTER,
Attorney for Defendant...

Filed May 8th, 1914.

CHARLES F. THOMPSON,
County Clerk.

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Complaint.

(Filed February 19, 1913.)

CIRCUIT COURT OF BERGEN COUNTY.

CHESTER C. HAYES,
Plaintiff,

vs.

EMILE H. KLUGE,
Defendant.

10

Plaintiff residing at 130 West 57th, Borough of Manhattan, New York City, says that,

1. Plaintiff at all times hereinafter mentioned was and still is an artist.

20

2. In or about the month of April, nineteen hundred and twelve, the plaintiff and the defendant entered into an agreement by the terms of which the plaintiff agreed to paint a portrait of the defendant's wife and daughter, and the defendant agreed to pay to the plaintiff the sum of seven hundred and fifty (\$750) dollars therefor; and the plaintiff and the defendant further agreed that the plaintiff should furnish a frame for the said portrait, for which the defendant agreed to pay to the plaintiff the further sum of sixty (\$60) dollars.

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3. On the 25th day of October, 1912, the plaintiff duly delivered the said portrait and frame to the defendant and the defendant received and accepted the same.

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Complaint

4. Plaintiff duly performed all the conditions of the said contract upon his part.

5. Plaintiff has duly demanded the said sum of eight hundred and ten (\$810) dollars from the said defendant, but no part thereof has been paid.

Plaintiff demands as damages Eight hundred and ten dollars, with interest from October 25th, 1912.

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CHARLES W. HULST,
Atty. for Plaintiff.

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Answer.

(Filed March 14, 1913.)

CIRCUIT COURT OF BERGEN COUNTY.

CHESTER C. HAYES,
Plaintiff,

vs.

EMILE H. KLUGE,
Defendant.

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Defendant, Emile H. Kluge, residing at South Hills, Englewood, in the County of Bergen and State of New Jersey, answering says:

1. He denies the truth of the matters contained 20
in the complaint.

2. On or about the month of April, 1912, the plaintiff agreed to paint a portrait of the defendant's wife and daughter, which portrait plaintiff agreed he would make in every way satisfactory to the said defendant, and the defendant agreed that if the said portrait was made to his satisfaction he would pay the plaintiff the sum of \$750 therefor, and would also pay the plaintiff \$60 for 30
a frame for said portrait, if satisfactory to the defendant.

3. That the plaintiff has not performed his said agreement, and has failed to make said portrait satisfactory to the defendant, and the defendant is not satisfied with the said portrait, and has not accepted the same, but has refused to accept said

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Answer

portrait and the frame furnished therefor by the plaintiff.

4. That defendant notified plaintiff that the said portrait was unsatisfactory to him, and requested plaintiff to take it away and make it satisfactory; but the plaintiff has never done so though defendant has at all times been and still is ready to redeliver said portrait to the plaintiff.

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EDMUND G. STALTER,

Attorney for Defendant,

152 Market Street,

Paterson, N. J.

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Reply.

(Filed March 17, 1913.)

BERGEN COUNTY CIRCUIT COURT.

CHESTER C. HAYES,
Plaintiff,

vs.

EMILE H. KLUGE,
Defendant.

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Plaintiff, replying says:

1. He denies the statements of paragraph 2 of the answer, except as admitted in the following statement: On or about the month of April, 1912, the plaintiff agreed to paint a portrait of the defendant's wife and daughter, and the defendant agreed that he would pay the plaintiff the sum of \$750.00 therefor, and would also pay \$60.00 for a frame for said portrait. 20

2. He denies the 3rd and 4th paragraphs of the answer.

CHARLES W. HULST,
Attorney of plaintiff. 30

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Rule for Judgment.

(Filed January 30th, 1914.)

BERGEN CIRCUIT COURT.

10	<p style="text-align: center;">CHESTER C. HAYES, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">EMILE H. KLUGE, <i>Defendant.</i></p>	} Action at Law.
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20 This cause being regularly in the list for trial at this December Term, A. D. one thousand nine hundred and thirteen, and the case called, both parties appearing and the cause moved by the plaintiff, and a jury being empaneled and sworn, and the evidence of the respective parties offered, and respective Counsel being heard and the case submitted upon charge of the Court. The Jury retired to consider of their verdict having an officer sworn to attend them. The Jury came again into Court and being called all appeared and rendered a verdict in favor of the defendant.

30 It is thereupon ordered that judgment final be entered in favor of the defendant and against the plaintiff Chester C. Hayes for the sum of Forty-six dollars and fifteen cents.

Rule entered January 30, 1914

On motion of
EDWARD G. STALTER,
Deft. Atty.

Costs \$46.15

Judgment.

BERGEN CIRCUIT COURT.

CHESTER C. HAYES,

vs.

EMILE H. KLUGE,

Action
at Law.

10

EDMUND G. STALTER,
Deft. Atty.

Amount of damages for costs in favor of the
defendant and against the Plaintiff, Forty-six
dollars and fifteen cents.

Costs \$46.15.

Judgment signed and entered January 30, 1914, 20
at 10 A. M.

CHAS. C. BLACK,
Judge.

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Case.

BERGEN COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">CHESTER C. HAYES, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>against</i></p> <p style="text-align: center;">EMILE H. KLUGE, <i>Defendant.</i></p>	}	On Contract.
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Transcript of shorthand notes of testimony taken at trial of the above entitled cause, at the Court House, Hackensack, N. J., on December 22 and 23, 1913.

20 Before:
HON. CHARLES P. BLACK, *Judge*, and a Jury.

APPEARANCES:

For Plaintiff, C. W. HULST, Esq.

For Defendant, E. G. STALTER, Esq.

30 It is stipulated that there was a bargain between these parties for the painting of a portrait; that the portrait was painted, and the price was to be \$750, and the frame was to be \$60, and that the painting has been done and the picture delivered; and that the portrait was of the defendant's wife and child.

Mr. Hulst: And the picture was delivered on the 25th of October, 1912.

Mr. Stalter: Of course, we claim that the work has not been done, according to agreement.

The Court: Yes, certainly.

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PLAINTIFF RESTS.

Emile H. Kluge, for Defendant—Direct

EMILE H. KLUGE, sworn in his own behalf, testifies as follows:

Direct-examination by Mr. Stalter:

Q. You are the defendant in this case, Mr. Kluge? A. I am.

Q. Where do you reside? A. In Englewood, New Jersey.

Q. Some time during the month of April, 1912, did you have any conversation or arrangement with Mr. Hayes, the plaintiff? A. I did. 10

Q. Will you tell us just how that arrangement came about, and what the arrangement was? A. Some time in March, 1912, Mr. Taylor, a very intimate friend of my family, several times approached me—

Mr. Hulst: I object to anything Mr. Taylor proposed.

The Court: Yes, you cannot state what Mr. Taylor said. As the result of what Mr. Taylor said, you did what? 20

The Witness: He was very anxious to have my wife's picture painted by his nephew by marriage, Mr. Hayes, and he said he would speak to Mr. Hayes and bring about a meeting and try to get a special price. In the month of April we met Mr. Taylor and Mr. Hayes after a concert in the Plaza Hotel; Mr. Taylor mentioned in the presence of Mr. Hayes, that he had spoken to Mr. Hayes that he would be willing to paint that picture, and he was very anxious for Mr. Hayes to paint the picture perfectly satisfactory, and particularly bringing out the features of the hair of the child and the mother; and Mr. Hayes mentioned that he was willing to paint the picture, that he would give it his very best efforts, would make it absolutely satis- 30 40

Emile H. Kluge, for Defendant—Direct

factory to us, and if it was not satisfactory, it would not have to be taken; that his price usually was \$1,000, and that he would reduce it to \$750, and at that moment his wife stepped forward—

Mr. Hulst: I object to anything that the wife said.

The Court: In the presence of the plaintiff?

10 The Witness: Yes.

Q. Never mind that; simply go on with your story.

The Witness: That is all was said. Thereupon Mr. Hayes came over a few days afterwards, and in the presence of my wife, they selected some of the dresses that had to be chosen, and to be taken by the portrait, and again we pointed out to him that Mr. Taylor was particularly anxious, and we were anxious to have the picture of the hair properly painted; and he said he would surely do so, and would make it absolutely satisfactory to us, and if it was not satisfactory, it would be made satisfactory, or we would not have to take it. Mrs. Kluge then went to the studio for various sittings, and I believe it was towards the end of July that Mr. Hayes notified me that the picture was pretty nearly finished, and I could come up any time and look at it. I went up to his studio with Mrs. Kluge, and two other gentlemen were present, Mr. Givernaud and my brother-in-law, and immediately on entering the studio it was quite evident to us that Mr. Hayes had painted the picture of my wife, but had not painted the picture of the baby. The child looked absolutely unfinished; her hair had a sort of

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Emile H. Kluge, for Defendant—Direct

straw appearance; the face was lifeless and looked like a doll, and the dress and hands of the child was all indistinct, and we went and told him and pointed these things out to him, and asked him to change it. He was very courteous and very willing, and he said he would do them and would make it absolutely satisfactory to us, and we would not have to take it if it was not satisfactory. I took Mrs. Kluge aside and said to her— 10

Mr. Hulst: I object.

The Court: No, that is not in the presence of the plaintiff.

The Witness: Mrs. Kluge then spoke to him something, and Mr. Hayes agreed to make those changes, and as soon as he made them he would let us know and have the picture presented. We went afterwards out of town, and Mr. Hayes went out of town and he wrote me a letter— 20

Mr. Hulst: I object to that.

The Court: Only so far as you know this. You went out of town?

The Witness: He went out of town on an automobile trip, and I went out west; and in the meantime in my business a letter was received from Mr. Hayes which was forwarded to me afterwards, in which he said—

The Court: Have you got the letter? You cannot testify what is in the letter. 30

Q. Coming to the point when you were finally, if you were finally, notified that the picture was ready for delivery? A. Yes, he notified me that the picture was ready for delivery, and that I could send for it, and if Mr. Hayes was not at the studio himself, he would leave word with his janitor that he could call for it at any time. In the 40

Emile H. Kluge, for Defendant—Direct

course of a few days or a week, I had an opportunity to send to his apartment and sent for the picture; it was delivered at my home; the chauffeur had instructions to leave it there—

Mr. Hulst: I object to that.

Q. It was brought over, was it? A. It was brought over.

The Court: By your chauffeur?

10 The Witness: By my chauffeur.

Q. Had you seen it from the time you were at the studio in July up to the time it was delivered to your home? A. No, I had not seen it.

Q. Go on from that point? A. I came home and unfolded the picture and put it on a pedestal, and it was absolutely shocking to me to see that this picture was absolutely untouched, and in the same condition we found it at the studio. Mrs. Kluge
20 and Mr. Givernaud, who was at the studio at the time with us, and again in my house at the time the picture was brought there, we all agreed—

Mr. Hulst: I object to that.

The Witness: The picture was unchanged. We, of course, could not understand why this was done, as long as Mr. Hayes was always very courteous and very willing, and declared himself he would change it, and therefore we thought the picture would not be finally ac-
30 cepted. I tried to get in touch with Mr. Hayes several times—

Mr. Hulst: I object to that.

The Court: That is natural thing.

The Witness: I called up his studio and the telephone did not answer; some other time I called up the janitor and he told me
40 that Mr. Hayes was out of town.

Emile H. Kluge, for Defendant—Direct

Q. You could not get Mr. Hayes? A. I could not get Mr. Hayes. I finally came back from the West. I got hold of Mr. Hayes one day; telephoned over to him. I told Mr. Hayes: "I am anxious to see you. I want to straighten out the question of this picture. It is not satisfactory, and I want to see you right away." Mr. Hayes said: "We will be very glad to come down." I said, "When can you come down?" He said, "I cannot come to-day, but will come tomorrow at twelve o'clock." The next day I was sitting at my desk at twelve o'clock and waited an hour and Mr. Hayes did not appear. He did not send an excuse; he did not notify me why he did not appear, and I did not know why, what was his reason that he did not show up. I was ready and very anxious to talk this matter over with him; I had to go out of town again, and wanted to settle it. The next day at noon when I came from the office, Mr. Hayes' wife was there; she told me—

Mr. Hulst: I object. He says Mr. Hayes' wife was there.

The Court: This was by appointment that she came to his place?

Mr. Hulst: There is no evidence of that.

The Court: Do you know anything about how she got there, except what she said herself, Mr. Kluge?

The Witness: No, I do not know how she got there; she simply came there, your Honor—

The Court: Except what she said herself?

The Witness: No, nothing else.

The Court: Then you cannot testify what she said. Declarations of an agent are not sufficient to prove agency. If there was any

Emile H. Kluge, for Defendant—Cross

conversation by Mr. Hayes that he was going to send her there, that would be one thing.

Mr. Stalter: Will your Honor accept this offer, that Mrs. Hayes stated that she came there in behalf of her husband, because he was not a business man, and she would take care of it for him?

The Court: That won't do.

10 Q. Well, passing over what Mrs. Hayes said to you; did you ever succeed after that in getting in touch with Mr. Hayes?

Mr. Hulst: I object to that. That calls for a conclusion.

The Court: That may be; but he can summarize it.

Q. Did you get in touch with Mr. Hayes after that? A. No, never did.

20 Q. What was the next thing you knew, this suit? A. The next thing I knew was this suit.

The Court: I understood you to say that after this conversation on the telephone with Mr. Hayes, you then made a definite appointment for twelve o'clock the next day?

The Witness: Yes.

The Court: And you also said, as I recollect the testimony, that Mr. Hayes did not appear?

30 The Witness: Yes.

The Court: And he never did appear after that?

The Witness: No, he did not.

Cross-examination by Mr. Hulst:

40 Q. Mr. Kluge, I understood you to say that the conversation which you had with Mr. Hayes, the artist, was at the Plaza Hotel? A. Yes.

Emile H. Kluge, for Defendant—Cross

Q. Did you have an engagement to meet him there? A. No.

The Court: He said that he met there in accordance with some meeting. You haven't denied that?

Mr. Hulst: No, I don't deny that. He has made this statement very decidedly—

The Court: I won't stop you.

Q. That was on the occasion of a concert there? 10
A. It was.

Q. You and Mrs. Kluge were at that concert?
A. Yes.

Q. And Mr. and Mrs. Hayes were there, too?
A. Yes.

Q. And as I understand you, you happened to meet going out, and he spoke about this portrait? A. Yes, sir, that is right.

Q. And the price was then spoken of? A. Yes, 20
sir.

Q. And Mr. Hayes said he would try to do it to your entire satisfaction? A. That is right.

Q. That is practically the only time you saw him with regard to the portrait until you went to see the portrait itself? A. Except when he came to the apartment to select the dresses for Mrs. Kluge and the child.

Q. The relation between you and Mr. Hayes had always been exceedingly friendly? A. They 30
have been very friendly; they are to-day, as far as I know.

Q. The second conversation that you had was what? A. At the Abbotsford in New York, where I lived.

Q. That was for what purpose? A. For the purpose of selecting the dresses for Mrs. Kluge, in which he wanted to paint her, and for the child. 40

Emile H. Kluge, for Defendant—Cross

Q. And at that time did you insist that this was to be entirely to your satisfaction? A. Yes, sir, I did. I will tell you why I did—

Q. I did not ask you that.

The Court: He asked if he insisted upon his entire satisfaction, he said yes.

Q. Had you any reason to suppose that this would not be painted to your entire satisfaction?

10 A. Yes, I had.

Q. You had reason to believe that it would not be painted to your entire satisfaction? A. I had.

Q. I want to know what those reasons were? A. Because, that is what I was going to explain.

Q. Go ahead now and explain what your reasons were, why you felt this would not be to your entire satisfaction? A. I knew it was very difficult, a very difficult piece of work.

20 Q. You knew it was a very difficult piece of work? A. Yes.

.. Q. You knew Mr. Hayes' reputation as an artist? A. Yes.

Q. You knew he was going to undertake for you a very difficult piece of work? A. Yes.

Q. You said to him on this occasion, "This is to be done to my entire satisfaction, or I am not going to accept that picture?" A. Yes.

Q. That is what you said to him on that occasion? A. Yes.

30 Q. When he came to select the gowns? A. Yes.

Q. You were at that time suspicious that you were not going to get what you bargained for? A. I was not suspicious.

Q. What reason had you for thinking that you were not going to get what you bargained for? A. I know how very difficult it is to paint a portrait to satisfaction by an artist, for the portrait might be entirely different to my own point of view.

40

Emile H. Kluge, for Defendant—Cross

Q. Your suspicion was due to this man who told you— A. I was told—I never seen any of him before.

Q. You were told by Taylor? A. Yes.

Q. And other people who knew him? A. Yes.

Q. Is that practically all that occurred at this second conversation? A. I told him we were very anxious to have the hair—

Q. The hair of the child? A. Painted.

Q. Painted in a certain way? A. Yes. 10

Q. Your third conversation was at the studio?
A. Yes.

Q. That was when you and Mrs. Kluge and Mr. Givernaud and another gentleman went there to inspect the picture? A. Yes, sir.

Q. And at that time you pointed out certain defects, certain changes, which you wanted him to make? A. Yes, sir.

Q. Did Mr. Hayes say he would make them?
A. Yes, he said he would make them. 20

Q. Were those suggestions yours or Mrs. Kluge's? A. Both mine and Mrs. Kluge's.

Q. Generally friendly talk, was there? A. Yes.

Q. As to this little change, or that little change?
A. Yes.

Q. There was no particular unfriendliness in that meeting between any of the parties? A. No.

Q. All very agreeable? A. Yes.

Q. Mr. Hayes said it would be practical to make those changes? A. He did, yes. 30

Q. And that was some time in August? A. Yes. He said also—

Q. It was some time in August, wasn't it?
A. Some time in August.

Q. So that that was practically all that happened at that conversation? A. Well, besides, Mr. Hayes— I recollect mentioning that he wanted me and Mrs. Kluge to be perfectly satisfied with his picture for various reasons. 40

Emile H. Kluge, for Defendant—Cross

Q. You have emphasized that four times? A. Yes.

Q. That was the third time that you saw Mr. Hayes? A. Yes.

Q. What was the fourth time? A. I have not seen him.

Q. You have not seen him until this morning, have you? A. Yes.

10 Q. Not until this morning? A. Not to my recollection.

Q. Since the delivery of that portrait on the 25th of October? A. Not to my recollection.

Q. It was some time in August when you were there to view the picture; that was delivered to your house by your chauffeur, so that you got it on the 25th of October. A. Yes, I believe that was the date; I am not sure.

20 Q. After the 25th of October, you testified a moment ago that you had certain letters from Mr. Hayes.

Mr. Hulst: Will you please produce those letters?

Mr. Stalter: I don't know what letters you refer to?

Mr. Hulst: All the letters that you got from Mr. Hayes in reference to this transaction.

30 Mr. Stalter: Why didn't you notify me to produce them?

Mr. Hulst: I have notified you to produce them?

Mr. Stalter: That is news to me.

Mr. Hulst: I will show you the admission of service then.

I want the three letters written by Mr. Hayes between the painting of this picture and Christmas.

40 Mr. Stalter: Give me the dates.

Emile H. Kluge, for Defendant—Cross

Mr. Hulst: All the letters of the defendant, and all bills sent by plaintiff to defendant in relation to the subject matter of this action.

Mr. Stalter: Here is a letter dated August 28th.

Mr. Hulst: Yes.

Mr. Stalter: Here is one dated October 27th, do you want that letter?

Mr. Hulst: Yes.

Mr. Stalter: There is only one other, and that is December 16th.

Mr. Hulst: Did you ever receive any other letters from Mr. Hayes?

The Witness: No, I did not.

Q. This is a letter which you received, dated October 28th, 1912, Mr. Kluge, isn't it? A. (Referring) Yes.

Mr. Hulst: I ask to have that letter marked for identification. 20

(Marked Exhibit P-1 for identification.)

Q. Here is letter or card, dated December 16, 1912; that was written to you by Mr. Hayes? A. (Referring) Yes.

Mr. Hulst: I ask to have that marked for identification.

(Marked Exhibit P-2 for identification.)

Q. There was a letter written to you between October 28th and December 16th, was there not? 30

A. Not that I know of.

Q. You would not say that there was not, would you? A. I won't be sure; I never received one.

Q. At any rate you won't produce that now?

Mr. Stalter: He says he did not receive it.

A. I did not receive any other.

Q. You don't recollect receiving any letter from 40

Emile H. Kluge, for Defendant—Cross

Mr. Hayes in November between these dates? A. No, I do not.

Q. If Mr. Hayes produced a copy of a letter that was sent to you in regard to the same subject, I suppose you would not remember whether you received it or not? A. I don't think—I think you have all the papers in relation to the case; they were all turned over to my attorney at the time.

10 Q. At what time? A. I don't remember when it was.

Q. After the suit was started? A. Yes.

Mr. Stalter: February last.

Q. This suit was started in February of this year, was it not? A. Yes.

Q. With regard to this letter of October 28th, 1912, did you answer it? A. I don't think I did, because I was out West at the time.

20 Q. Well, you did not answer it, did you? A. I did not answer it, no.

Q. And this letter of the 16th of December you did not answer? A. I did not answer that, no.

Q. Did you ever write any letters to Mr. Hayes after the delivery of the picture? A. No, not to my recollection.

Q. Where is that picture now? A. It is here; I have it here.

30 Q. When your chauffeur brought the picture to your house you say you unwrapped it and examined it? A. When I came home, yes.

Q. That was the same day or a day or two after? A. A day or two after, I believe.

Q. You took the covering off, didn't you? A. Yes.

40 Q. And you say you were absolutely shocked, as I understood your expression here? A. Yes.

Emile H. Kluge, for Defendant—Cross

Q. To find that it was untouched and in the same condition? A. As far as the baby is concerned.

Q. As far as the baby is concerned? A. Yes.

Q. Had it been touched in other particulars?

A. No, it was exactly the same condition as it was before.

Q. It was exactly the same condition as it was when you saw it in the studio in August? A. Yes.

Q. And you were shocked about it? A. Yes. 10

Q. I assume you were very much provoked about it? A. I was.

Q. Why didn't you notify him immediately then? A. Because Mr. Hayes was not in town. I tried to get hold of him.

The Court: He told you that, and you objected to his telling it.

Q. Why didn't you write him a letter? A. Because I tried to telephone him. I thought it was much better to telephone and speak to him. 20

The Court: He said he telephoned to the janitor, and you objected to what the janitor said.

Q. I want to know why you did not take some other means than telephoning to the janitor of the apartment, when you had received this picture for which you agreed to pay this sum of money, and did not attempt to get into communication with Mr. Hayes except by telephone? You did not write him a letter, did you? A. I did not. 30

Q. Now, you received a letter—you received the picture on the 25th of October; when did you telephone? A. Right the next day after I opened it.

Q. The next day after you opened it? A. Yes. 40

Emile H. Kluge, for Defendant—Cross

Q. Did you telephone to his apartment? A. I telephoned to his apartment.

Q. When did you try to get into communication again? A. Now.

Q. I say when? A. A couple of days afterwards, again.

Q. Two days afterwards? A. About, I am not quite sure about that.

10 Q. You are not quite sure about that? A. But I tried several times to get in touch with him by 'phone.

Q. By 'phone? A. Yes.

Q. You never wrote him a letter about it? A. No, I did not.

Q. Right after the delivery of this picture you got a letter from him asking you particularly if you would not send this money?

20 The Court: That is not cross-examination on the letters; that is not in evidence.

Q. Well, now, I want you to tell this jury what other attempts you made besides telephoning two or three times to get in communication with Hayes.

The Court: Did you do anything except to telephone?

The Witness: I did not.

30 Q. You telephoned about four times, is that right? A. About, I believe.

Q. About four times? A. Yes, sir.

The Court: He said he called him up on the telephone and made an appointment, and your man did not keep the appointment.

40 The Witness: He did not keep the appointment; he said he would come the next day at twelve o'clock. I said I was very anxious to see Hayes, and he never showed up, and I waited one hour for him.

Emile H. Kluge, for Defendant—Cross

Q. On what day was this appointment made for? A. It was on a Thursday.

Q. What? A. On a Thursday.

Q. What month? A. I believe in the month of January.

Q. In the month of January? A. In the month of January or February; I am not quite sure.

Q. January or February. Three months after you had the picture? A. The conversation with Mr. Hayes, that was over the telephone, yes. 10

Q. Three months after? A. Yes.

Mr. Salter: He says he does not know.

Q. That is to the best of your recollection? A. The best of my recollection is that it was after the holidays.

Q. So that between the 25th day of October, the time when you received the picture, and some time in January or February, you had no actual communication with Mr. Hayes with regard to this picture? A. No, except when I got him on the telephone. 20

Q. You had not written him a letter in regard to it? A. I had not.

Q. Is it not a fact that this engagement which Mr. Hayes made with you was the result of Mr. Hayes telephoning to you and not your telephoning to him? A. No, it was not. I telephoned to him myself.

Q. You are sure about that? A. Yes, I am sure about that. 30

Q. Didn't Mr. Hayes telephone you, and get you on the wire, and ask you why you did not pay this bill? A. Not that I remember.

Q. And didn't Mr. Hayes then in that conversation say that he would meet you the next day? A. No, not the next day. 40

Olga H. Kluge, for Defendant—Direct

Q. Didn't he tell you that he could not meet you the next day, but would meet you on the 24th of December? A. No, no such conversation.

Q. Didn't Mr. Hayes tell you at that time that his wife was on her way home from Europe, and that her ship was due on Monday, the date upon which you wanted the engagement and that he would have to meet her, and therefore he would make it another day later? A. He decidedly did not.

Q. Now, from the date that you received that picture up to the present moment, you have never personally talked to Hayes, as to what your objections to it were, have you? A. Not except at the time at the studio.

Q. What? A. Not except at the time at the studio.

Q. I mean after the delivery of the picture, you have never personally told Mr. Hayes what your objections were? A. No.

Mr. Stalter: Do you refer to communication between you and me?

Mr. Hulst: I am asking Mr. Kluge.

The Court: That is what he said on direct-examination; he could not get into communication with him.

30 OLGA H. KLUGE, sworn for the defendant, testifies as follows:

Direct-examination by Mr. Stalter:

Q. Mrs. Kluge, you are the wife of Emile H. Kluge, the defendant in this case? A. Yes.

Q. You know Mr. Hayes, do you not? A. Yes, I do.

40 Q. Were you present in your apartment in the

Olga H. Kluge, for Defendant—Direct

Apthrop some time prior to your sitting for this portrait when Mr. Hayes came there? A. I was.

Q. Who else was present at that time besides you and Mrs. Hayes? A. Mr. Kluge was present.

Q. Will you just tell the Court and jury what conversation took place between you and your husband and Mr. Hayes at that time? A. Mr. Hayes came to the house to select some gowns to paint the picture, also for the child's picture, and that is all about the conversation I heard about it 10
at that time.

Q. Was anything said at that time in regard to the painting of the hair of the child, or anything of that sort? A. Yes, Mr. Kluge spoke to Mr. Hayes about the color, the shades of the two heads, because it was—just as Mr. Taylor was trying to have it shown on the picture, and Mr. Hayes said he was quite willing to do so.

Q. Did he say anything about painting the picture, or that you would not have to accept it in case certain things were not done? A. Mr. Hayes said he would make the picture satisfactory to us, otherwise we would not have to take it. 20

Q. Now, then, Mrs. Kluge, after that you gave Mr. Hayes several sittings, as I understand it? A. Yes, I did.

Q. Do you remember during the progress of these different visits of yours to the studio, ever having any conversation with Mr. Hayes as regards what Mr. Taylor thought of the picture? 30

The Court: How is that competent?

Mr. Stalter: A statement made to Mr. Kluge by Mr. Hayes.

Q. What did Mr. Hayes say to you in regard to the picture? A. Mr. Hayes told me, during one of the sittings, that the opinion of Mr. Taylor was that the picture was dead, that it had no expres- 40

Olga H. Kluge, for Defendant—Direct

sion at all, and Mr. Taylor was not satisfied with it.

Q. Now, then, in the course of these different sittings, of course, you came to the point where the painting was completed, didn't you? A. Yes.

Q. Do you remember going with Mr. Kluge and some others to see the picture after having been notified by Mr. Hayes that it was finished? A. I do.

10 Q. Do you remember about what time that was? A. At the end of July.

Q. Who was present at that conference? A. Mr. Kluge and Mr. Hayes, and Mr. Givernaud and my brother, who is now in Russia.

Q. At that time, what, if anything, was said by you or Mr. Kluge to Mr. Hayes, and by Mr. Hayes to you in regard to the condition of the painting?

20 A. We went to look at the picture, and we paid attention to the things that we did not like in the picture, and especially the portrait of the child, which we thought looked more like a doll than a living person, and did not like the color of the hair; hands, dress and other little details, and Mr. Hayes said he was quite willing to make it satisfactory to us both, and that when it was ready, he would notify us.

30 Q. Was there any other things, about your own portrait at that time that you desired changed, or simply in regard to the child? A. Well, we thought that there was different things in my portrait which were not quite satisfactory, but we did not emphasize it so much as the child's portrait. This lump on my throat, which I did not like, and we showed it to Mr. Hayes, and he said it was true, and it was an easy matter to rectify it.

Q. Now, I want you to tell us what Mr. Hayes said, when he said he was going to remedy these things that were not to your satisfaction? A.

40 Yes, he did.

Olga H. Kluge, for Defendant—Cross

Q. Do you remember his exact language at the time? A. I do not recall his exact language at the time, but Mr. Hayes was very anxious to make it satisfactory to us, he was very nice about it at the time.

Q. Now, then, when after did you again see the picture? A. When it came to our house.

Q. Had those changes been made that you requested at that time? A. They were not made.

Q. Were any of them? A. No, sir; none of the changes that we expected to see were made. 10

Q. None of the changes that you asked for? A. None of the changes that we asked for.

Q. What have you done with the picture since then? A. I put it in my storeroom and waited for what would come next.

Q. Have you the picture here? A. I have the picture right here, in the court room.

Q. Have you ever seen Mr. Hayes since that time? A. No, I have not. 20

Q. Is that the painting (showing)? A. Yes, it is.

The Court: Do you want to offer that in evidence?

Mr. Stalter: Yes.

(Admitted in evidence as Exhibit D-1.)

Q. Will you point out Mrs. Kluge, the lump which you spoke of in your neck? A. Right there (indicating). 30

Cross-examination by Mr. Hulst:

Q. Were you present when the picture came from New York to your house, Mrs. Kluge? A. No, I was not present, because I was in the City.

Q. Were you present when Mr. Kluge took the wrappings off? A. Yes, I was.

Q. At that time you observed the picture was 40

Olga H. Kluge, for Defendant—Cross

in exactly the same condition as it was before?

A. Yes.

Q. No changes whatever were made? A. No.

Q. Were any changes of any sort made? A. We did not see any changes.

Q. Could you tell from your examination in July, the latter part of July, from your observations of the picture there, and your observation when it came— A. I observed it.

10 Q. Let me finish the question. When you observed the picture in the studio, in the latter part of July, you suggested certain changes? A. I did.

Q. Now, when the picture came home and was opened in your house, had any changes been made at all? A. No.

Q. Not any? A. No.

Q. You are perfectly sure of that, that the picture was just exactly the same as it was when you saw it in the studio? A. Yes, sir.

20 Q. You did not like particularly the hair of the child, is that right? A. Yes, sir.

Q. That is what you particularly objected to? A. Yes.

Q. There were certain features of yours that you did not object to? A. I objected to that—

Q. You say in your direct-examination that you did not emphasize it? A. No, I emphasized more the things on the child.

30 Q. When the picture came home, were your feelings about it the feeling of very great disappointment? A. I was disappointed.

Q. You were disappointed? A. Yes.

Q. Have you seen Mr. Hayes from that time to this? A. No, sir.

Q. You got the picture in October? A. Yes.

Q. You heard your husband's testimony that he made an engagement to meet Mr. Hayes some time in the following January or February, as he put it? A. Yes.

40

Charles L. Givernaud, for Defendant—Direct

Q. You heard that testimony— During that time did you make any effort at all—

Mr. Stalter: I object to this question. Mrs. Kluge is not a party in issue. Why should she make any effort?

The Court: It is of no importance.

Won't you let the girl come down here and stand beside the picture?

(The little girl is brought down alongside of the portrait for the benefit of the jury.) 10

Mr. Hulst: I would suggest that the girl is a year and a half older now.

CHARLES L. GIVERNAUD, sworn for the defendant, testifies as follows:

Direct-examination by Mr. Stalter:

Q. Mr. Givernaud, where do you live at the present time? A. I am stopping at the Gotham Hotel.

Q. The Gotham Hotel in New York City? A. Yes, sir.

Q. Do you remember, some time during the month of July or August, 1912, being present at the studio of Mr. Hayes? A. Yes, sir.

Q. With Mr. Kluge and Mrs. Kluge? A. Yes, sir.

Q. Who else were present besides Mr. Hayes, and Mrs. Kluge and Mr. Kluge and yourself? A. Mr.

Q. The brother of Mrs. Kluge? A. The brother of Mrs. Kluge.

Q. Did you go there at the same time that Mr. and Mrs. Kluge did? A. No, later.

Q. They had been there some time before you came? A. Yes, sir.

Charles L. Givernaud, for Defendant—Cross

Q. When you came up into the studio, did you hear any conversation between Mr. Hayes and Mr. Kluge? A. Only heard Mr. Hayes.

Q. Just tell us what was said? A. I heard Mr. Hayes tell Mr. Kluge and Mrs. Kluge that he would make the painting to please them, and that if it was satisfactory it would be all right; if it was not satisfactory, they did not have to take it.

10 Q. You have heard what previous conversations had taken place between Mr. Kluge and Mr. Hayes, had you? A. No.

Cross-examination by Mr. Hulst:

Q. At whose request did you go there? A. I am not sure whether it was Mr. Kluge or Mrs. Kluge, or whether it was the artist who called me up; I was with Mr. Demarosky and Mr. and Mrs. Kluge were with me in my automobile, and I brought them over in the afternoon and I came
20 to get them; I was invited upstairs to view the picture.

Q. You were invited upstairs to view the picture? A. Yes, sir.

Q. Did you express any personal opinion of it to Mr. Hayes at that time? A. I don't think I spoke to Mr. Hayes at all.

Q. You don't particularly remember about that, do you? A. No, sir.

30 Q. You don't remember expressing any admiration for the work? A. No, I don't think I did.

DEFENDANT RESTS.

Chester C. Hayes, for Plaintiff—Direct

CHESTER C. HAYES, sworn in his own behalf, testifies in rebuttal as follows:

Direct-examination by Mr. Hulst:

Q. Mr. Hayes, you are the plaintiff in this action? A. I am.

Q. How long have you been an artist? A. Well I began to study about twenty-one years ago.

Q. And you made a special work of painting portraits? A. I have. 10

Q. Coming down now to the meeting between yourself and Mr. Kluge at the Plaza, will you please state the conversation which you had with Mr. Kluge as to painting this portrait? A. I cannot give the exact words that Mr. Kluge and I had.

Q. The substance of it, as well as you remember? A. Well, Mr. Kluge shook me by the hand and said he was glad I consented and would I promise to give the same careful consideration 20 to the work that I would if I had received the full price for this portrait; I said I would.

Q. Previous to this conversation with Mr. Kluge, I take it that you had some conversation with Mr. Taylor—

Mr. Hulst: Mr. Taylor is dead; that is the reason he isn't here. He was an uncle of Mr. Hayes' wife.

Mr. Stalter: That is true. 30

Q. Something was said about your painting that portrait at a price lower than your usual price? A. Yes.

Q. Had you ever stated to Mr. Kluge the words which he has used here—

The Court: You had better tell him the exact language.

Q. Did you hear Mr. Kluge state on the stand— 40

Chester C. Hayes, for Plaintiff—Direct

The Court: This is what he said: "Mr. Kluge said you said you would surely do it and make it absolutely satisfactory to us; if not satisfactory to us, you will make it satisfactory, and if not so, we would not have to take it." Did you say that to him?

The Witness: No, that is promising them too much.

The Court: Did you say that?

10

The Witness: No, I did not.

The Court: And then again did you say that you would do it to their entire satisfaction, meaning the Kluges?

The Witness: I think not.

The Court: And again did you say they would be perfectly satisfied with the picture, if not, they need not take it?

The Witness: I think not.

20 By Mr. Hulst:

Q. You have a distinct recollection of that conversation, haven't you? A. At the Plaza?

Q. Yes. A. Fairly distinct, yes.

Q. And it took place at a social gathering?

A. At the end of a concert, yes.

Q. Now, Mr. Hayes, after you had delivered this picture on the 25th of October, did you write this letter to Mr.— I show you the letter, dated October 28th, 1912, the letter P-1 for identification? A. (Referring) I did.

30

Mr. Hulst: I offer it in evidence.

(Admitted in evidence and marked Exhibit P-1 in evidence.)

(Mr. Hulst reads the letter.)

Q. Have you ever received from Mr. Kluge any answer to this letter? A. No.

40

Q. That was October 28th. Did you in the

Chester C. Hayes, for Plaintiff—Direct

month of November some time write a letter to Mr. Kluge? A. I did.

Q. Did you keep a copy of it? A. I did.

Mr. Hulst: I ask now the formal production of that letter—which they say they have not got.

The Court: They said they haven't got it.

Mr. Hulst: I offer now a copy in evidence.

The Court: You have got to prove the mailing of it in some way. 10

Mr. Stalter: May I ask at this time whether this is a carbon copy, or simply a copy which you made of the letter?

The Witness: A copy I made at the time, sir.

Mr. Stalter: But not a carbon?

The Witness: No, sir.

By Mr. Hulst:

Q. I show you a copy—this paper right in here 20—and ask you if this is in your handwriting?

A. (Referring) Yes, sir, it is.

Q. Is that a copy of a letter which you wrote in long hand with a pen? A. It is, yes.

Q. After you had written out that letter, what did you do with it? A. Mailed it in our mail chute.

Q. Where is your mail chute? A. On the same floor as my apartment.

Q. In one of the apartment houses of New York? A. Yes, sir. 30

The Court: Addressed to where?

By Mr. Hulst:

Q. Where did you address it to? A. The same address as appears on the first letter which was received.

The Court: What is that?

Chester C. Hayes, for Plaintiff—Cross

By Mr. Hulst:

Q. Do you remember what that address was?

A. I do not, no, I cannot give the address.

Q. Was that addressed the same as the other was? A. Yes.

Q. The same as this letter (showing)?

The Court: That won't do us any good at all.

10

The Witness: The address is on the reverse of the yellow paper at your right.

By Mr. Hulst:

Q. Oh, yes (referring), "Graystone, Englewood, New Jersey." A. That is the address, yes.

Q. That is the address that you put down, "Graystone, Englewood, New Jersey"? A. Yes, sir, in care of Mr. Hutchison.

The Court: Posted from there?

The Witness: Yes, sir.

20

The Court: What was there on the back of the envelope, if anything, to indicate, if it was not received, where it should be returned to? Was there anything?

The Witness: I think not.

The Court: Did you ever receive it back?

The Witness: No, sir.

The Court: What is the date of it?

The Witness (referring): November 16th, 1912.

30

The Court: Why should not this letter go in evidence?

Mr. Stalter: I would like to cross examine the witness jut a bit on it.

Cross-examination by Mr. Stalter:

Q. You say this letter was sent to the same address as the others? A. I believe so.

40 Q. Are you positive, Mr. Hayes? A. To the best of my knowledge, sir, yes.

Chester C. Hayes, for Plaintiff—Cross

Q. How many letters had you sent prior to this one? A. I had sent one.

Q. Only one? A. That was the one which was just received as evidence, yes, sir.

Q. How about the letter which you sent in August? A. I don't think I sent any letter about it; I don't recall one, at least.

Q. Well, I show you one, Mr. Hayes. A. (Referring) Yes, I wrote that, sir. I wrote that at the request of Mr. Kluge who asked me if I could have the picture right after the first of September for his wife's birthday. 10

Q. This letter was also sent (showing)? A. (Referring) Yes, that was the fourth letter, the first of the series of four.

Q. This relates to the picture, of course? A. Yes.

Q. And this was also mailed to the same address? A. Yes.

Q. That this letter (showing) was? A. Yes. 20

Q. So that you are positive that all four—this one, at least—were mailed to the same address?

A. To the best of my knowledge, they were all sent to the same address.

Q. I show you an envelope "Mr. Emile Kluge, 33 West 34th Street, New York City," is that your writing? A. (Referring) That is my writing, yes. "33 West 34th Street" is not mine, sir.

Q. You mean it was not put on there at your solicitation? A. Not to my recollection. To my recollection I have not seen that address before. 30

Q. Who put it there? A. I think I can tell. (Referring) I think I recognize the writing; it looks like the writing of the superintendent of my building.

Q. At any rate, it was not put on by Mr. Kluge? A. No, and it was not put on by me either.

Q. This envelope that I find the letter in, I pre- 40

Chester C. Hayes, for Plaintiff—Cross

sume is the envelope you sent it in? A. I think so.

Q. It could not be possible that you sent this letter somewhere else other than to Englewood?

A. It is possible, certainly, but it is not probable.

Q. What I mean is, you would not want to say positively that you had mailed this letter to Englewood, would you? A. Well, I might be positive, and yet be mistaken. To the best of my knowledge it was posted to Englewood,—all three
10 of the letters were.

Q. But you said before that it was mailed to the same place that this letter (indicating) was, and we find that this was mailed to New York City. A. That I had entirely forgotten about; I don't recall. That was long before they come to see the picture.

Q. When was it that they came to look at the picture?

Mr. Hulst: Before the delivery of the picture.
20

By Mr. Stalter:

Q. When was it they came to your studio to examine the picture that we have been talking about? Did Mr. Kluge come more than once? A. Mr. Kluge said it was in August; I think it was in August.

Q. It was certainly prior to the sending of this letter? A. Yes.

Q. So that this letter was sent after they had
30 been there in the studio?

Mr. Hulst: That is the letter notifying them that the picture was ready for inspection.

The Court: This letter you are trying to get in evidence was dated November 16, 1912.

Mr. Stalter: I object to the admission of this copy at this time, because it does not

C. C. Hayes, for Plaintiff (Resumed)—Direct

appear that the evidence is positive on the part of the witness that he had mailed the letter to Mr. Kluge. He said in response to my question that he thinks he might be mistaken.

Mr. Hulst: The evidence is, to the very best of his knowledge, he mailed these other letters to the "Graystone, Englewood".

The Court: You are now seeking to charge this defendant with evidence of a written communication which you allege was mailed to him. You have not got any copy of the letterhead; you are not altogether sure of the address. 10

I will leave this undisposed of until to-morrow morning.

Adjourned until to-morrow morning, December 23, 1913, at 10 A. M.

Hackensack, N. J., December 23, 1913, 10:00 A. M.

The point under discussion yesterday was the copy of the letter of November 16, 1912.

Mr. Hulst: That is admitted by consent.

The Court: What is the date of that letter?

Mr. Hulst: November 16th.

(Admitted in evidence and marked Exhibit P-2.)

30

CHESTER C. HAYES, resumes the stand.

By Mr. Hulst:

Q. Mr. Hayes, did you ever get a reply to that letter? A. No, sir.

Mr. Hulst: I offer in evidence Plaintiff's Exhibit P-2 for identification.

The Court: That will be Exhibit P-3.

(Mr. Hulst reads the letter.) 40

C. C. Hayes, for Plaintiff (Resumed)—Direct

Q. Mr. Hayes, did you ever receive any reply to that letter? A. No, sir.

Q. You said in this letter, "Having several times failed to find you at your office." Had you ever gone to Mr. Kluge's office? A. Three times.

Q. Between what dates? A. Between the 25th and the 16th of December—the 25th of October and the 16th of December.

Q. That is the date of this letter? A. Yes, sir.

10 Q. What was your purpose in going to his office?

The Court: That is immaterial, what the purpose was.

Q. Now, Mr. Hayes, coming back to the conversation which was had at the time that Mr. Kluge, Mrs. Kluge and Mr. Givernaud and the other man, who is now in Russia, came over to the studio to inspect the picture, did either Mr.
20 Kluge or Mrs. Kluge suggest any changes in the picture? A. Yes, sir.

Q. Will you please state what changes they suggested? A. The changes that they suggested were that I heighten the color—that is, make a little rosier the little girl's cheeks.

Q. Anything else? A. That a change should be made in the little girl's arms.

Q. Anything else? A. That the edge of the skirt in the little girl's dress might be made a lit-
30 tle crisper, a little sharper.

Q. Those were the changes that they suggested at that time? A. Yes, sir.

Q. Did you make those changes afterwards? A. I did.

Q. Mr. Kluge and Mrs. Kluge are not quite in agreement in their testimony as to the exact date when that conversation took place; was it the latter part of July, or the first part of August?
40

C. C. Hayes, for Plaintiff (Resumed)—Direct

Can you fix the date? A. I cannot fix the exact date.

Q. It was about that time? A. Yes, sir, it was in August, I think.

Q. Now, did you write this letter—this is a letter which is produced by the defendant under our notice to produce? A. (Referring) Yes, sir, I wrote it.

Mr. Hulst: I offer it in evidence.

The Court: What is the date of that? 10

Mr. Hulst: Dated August 28th before the picture was delivered.

The Court: That will be Exhibit P-4.

Q. Now, did you ever get an answer to this letter? A. No, sir.

Q. That was written on August 28th, 1912, and the portrait was then delivered on the 25th of October, I believe? A. Yes.

The Court: About the frame; there is no frame on the picture now. What is the explanation about that? Was there a frame on it when you received it? 20

Mr. Stalter: Oh, yes, there was a frame on it. The only point about it is that it was easier to carry in this form; it was quite a large, heavy frame.

Q. Mr. Hayes, Mr. Kluge testified yesterday that after the delivery of the picture, he attempted to reach you by telephone four times; where do you reside? A. 130 West 57th Street, New York City. 30

Q. And you resided all this time at that address, during 1912? A. Since that date.

Q. During the time that you were engaged on this picture? A. Yes, sir.

Q. You resided there on October 25, 1912. A. Yes, sir. 40

C. C. Hayes, for Plaintiff (Resumed)—Direct

Q. And continuously thereafter until the present time? A. Yes, sir.

Q. This letter, P-1, is dated October 28th, 1912; did you reside there continuously in your apartment, day after day, from October 28, 1912, on through the rest of the year, to January 1st? A. Yes, I did.

10 Q. Were you absent any day—of course, I don't mean out of the house for a little while, but was your apartment continuously open? A. It was.

Q. Was there a telephone in there? A. There was.

Q. This is an apartment, I understand? A. Yes, sir.

Q. The telephone service is connected with a switchboard downstairs, which connects with all the apartments? A. Yes, sir.

Q. Did you reside alone? A. No, sir; my family.

20 Q. And at that time, during all this period, from October 28th, when you wrote this letter, up to the first of the year, who was in your apartment? A. My children and my governess, and myself; my wife was absent until the 24th of December.

Q. How many children have you? A. Two children.

Q. And you had a governess there? A. Yes, sir; servant girl also there.

30 Q. At any time during that time did you, or have you any knowledge of any one receiving a telephone message from Mr. Kluge? A. No, sir.

Q. And you received no letters? A. No, sir.

Q. Mr. Hayes, Mr. Kluge testified yesterday that he telephoned to you to make an appointment, which you did not keep; do you remember a conversation over the telephone in which you made an appointment with Mr. Kluge?

40 A. Mr. Stalter: I object to that as leading.
(Question withdrawn.)

C. C. Hayes, for Plaintiff (Resumed)—Direct

Q. Did you have a conversation over the telephone with Mr. Kluge at which you made an appointment? A. I did.

Mr. Stalter: Isn't that leading?

The Court: That is the testimony of your side.

Q. At which an appointment was made?

Mr. Stalter: We made an appointment, yes.

Q. At which an appointment was made? A. Did counsel say he made an appointment? 10

Q. No, never mind what counsel says. You did have a telephone conversation with Mr. Kluge? A. Yes, sir.

Q. Over the telephone, at which an appointment was made? A. Yes, sir.

Q. Do you remember the date on which that telephone message occurred? A. I do.

Q. What was the date? A. The 21st of December. 20

Q. Did he call you up? A. No, sir.

Q. Did you call him up? A. I did.

Q. What refreshes your recollection as to that, the fact that you called him up? A. The presence of my aunt, Miss Taylor, at the time, and the official record of my call in the telephone book, showing that I called up Mr. Kluge.

Q. That was on December—what? A. December 21st. 30

Q. In your conversation with Mr. Kluge, what did you say to him, and what did he say to you? A. Mr. Kluge asked me—said he wanted to see me.

Q. What did you say to him? A. He said, "May I come to your studio, or will you come to my office?"

Q. What did you say? A. I said that it was not convenient for me to see him at the studio, but 40

C. C. Hayes, for Plaintiff (Resumed)—Direct

I would come to his office. He said that he wanted to fix up matters.

Q. What did you say? A. I said, "Why, Mr. Kluge, there is nothing to fix up. All I want you to do is to send me a check." He asked me if I would meet him—that was Saturday, about noon; I was waiting for my lunch with my aunt in the studio—he asked me if I could come to his office at noon on the following Monday, before Christmas. I said I could not do so, as I was expecting the arrival of my wife from Europe on Monday.

10 Q. On what steamer? A. On the George Washington, I think it was. I asked him if Tuesday would do, and he said, "Yes, Tuesday noon would do." So I made an appointment to meet Mr. Kluge on Tuesday noon. The paper said that the George Washington—

Q. One moment; never mind about the George Washington? Did you, as a matter of fact, meet Mr. Kluge on Tuesday noon? A. No, sir.

Q. Why not? A. I made an appointment with him for Tuesday, expecting the steamer would come in on Monday.

Q. The steamer being due on Monday? A. The steamer being due on Monday. The weather was too bad, and it was too foggy; the steamer was then noted as due at nine o'clock on Tuesday morning. I did not telephone Mr. Kluge, because I expected to be able to meet my wife at nine o'clock, and still keep my appointment at noon. The weather was so bad—that was the day of the worst storm that New York saw last Winter.

Q. The day before Christmas? A. The day before Christmas.

Q. A year ago to-day? A. A year ago to-day. The weather was so bad that the steamer was delayed. I waited on the wharf; I was there at nine o'clock in the morning, and I was there until

C. C. Hayes, for Plaintiff (Resumed)—Direct

five o'clock in the afternoon, expecting that the steamer would come in the channel in the morning between nine and eleven o'clock. I thought even if it came in by eleven o'clock I would still be able to keep my appointment with Mr. Kluge.

Q. And you could not keep the appointment with Mr. Kluge? A. I could not.

Q. A heavy snow storm was going on all day? A. I don't think it was going on all day, but it was a very bad, blisterly day. That is why I did not meet Mr. Kluge. 10

Q. That was on the 21st and your engagement was for the day before Christmas; your wife arrived on the 24th; did Mr. Kluge after that ever communicate with you with regard to this portrait? A. No, sir.

Q. What did you do next in regard to the matter? A. What did I do next?

Q. What did you do next, yes? A. I put the affair into the hands of the lawyer? 20

Q. What lawyer? A. Mr. Harlan F. Stone, of Englewood.

Q. Harlan F. Stone, of Satterlee, Canfield & Stone, of New York? A. Satterlee, Canfield & Stone of New York; yes, sir.

Mr. Hulst: I ask the defense, under the notice to produce, to produce two letters written by Mr. Harlan F. Stone, to Mr. Kluge; the first letter being dated January 28, 1913; the second letter December 31, 1913. 30

The Court: No, not December 31, 1913.

Mr. Hulst: I mean, December 31, 1912. The plaintiff, under the notice to produce, offers in evidence a letter written to Mr. Kluge, dated December 31, 1912.

The Court: That will be Exhibit P-5.

Mr. Hulst: That is addressed to E. H. Kluge, by Harlan F. Stone. 40

C. C. Hayes, for Plaintiff (Resumed)—Cross

(Mr. Hulst reads the letter.)

Mr. Hulst: I offer in evidence the letter produced by the defense, dated January 28, 1913, addressed to Mr. E. H. Kluge.

(Received in evidence and marked Exhibit P-6.)

(Mr. Hulst reads the letter.)

Cross-examination by Mr. Stalter:

10 Q. Mr. Hayes, this morning you spoke of, when you were waiting at the dock for Mrs. Hayes, and had promised to meet Mr. Kluge, there was a telephone there at the dock, wasn't there? A. I presume so.

Q. You could very easily have stepped to the telephone and called up Mr. Kluge and told him you could not come? A. I could have done so. I am very sorry that I did not do so.

20 Q. When this telephone conversation took place between you and Mr. Kluge, he told you that he wanted to see you in regard to these changes he desired you to make? A. No, sir; there was no reference in that telephone message to any changes to be made in the portrait, or that the portrait was not satisfactory.

30 Q. What were the references that he made at that time? You told him the only thing that you wanted, the only thing to discuss was the question of the check; what was it that he stated in regard to that? A. He did not say. Mr. Kluge's expression was "To fix up matter."

Q. And you want us to understand that there was no word said in regard to any changes in the picture? A. Not a word.

Q. Or that it was not satisfactory to him? A. Not any intimation, no, sir.

40 Q. Then what could have been the object of your going to his office, if it were simply to get a

C. C. Hayes, for Plaintiff (Resumed)—Cross

check? A. Why, because I had no response to any letters to Mr. Kluge.

Q. You had him on the telephone; you could as well have said "Please send a check"; you did not need to go down to his office; isn't that right?

A. That is what I did. I said there was nothing to fix up; "All I want you to do is to send me a check." There was no intimation that the portrait was not satisfactory, even then.

Q. And your idea of that demand then was simply to come down there and get a check, is that right? A. That was my idea, yes, sir. 10

Q. And there was nothing in what Mr. Kluge said to you that would lead you to believe that there were other matters to be discussed, is that right? A. Nothing whatever.

Q. You recollect at the time that Mr. Kluge and Mrs. Kluge came to your studio in July or August that has been testified to? A. Yes.

Q. You remember Mr. Givernaud being there? A. I do. 20

Q. You say that they did request the changes which you have mentioned? A. Yes, sir.

Q. At that time wasn't there something said in regard to the baby's hair, making the dress more distinct? A. I think not, sir.

Q. Are you positive of that Mr. Hayes? A. I did not touch the baby's hair after that at all.

Q. And were you not asked to? A. No, sir, I was not asked to. 30

Q. Didn't they want, as one of the main features of the portrait, both Mr. and Mrs. Kluge, and request Mr. Hayes to make, the contrast between the mother's and child's hair stand out distinct? A. Not any distincter than it was.

Q. Wasn't that one of the features that they wanted modified in this picture? A. It was.

Q. Wasn't there anything said about running 40

Emile H. Kluge, for Defendant (Recalled)—
Direct
Margaret McCavery, for Plaintiff—Direct

in together the colors on the back, and the child's hair, at the time that they were there? A. Not that I know of, sir.

Q. You would not say that there had not been?

A. I would not say that there had not been. I don't recall it.

10

EMILE H. KLUGE, recalled.

Mr. Hulst: I wish to prove by this witness the number of his telephone at the time in October and November.

By Mr. Hulst:

Q. Was it 1307 Bryant? Was that your telephone number? A. That is right.

MARGARET McCAUCRY, sworn for the plaintiff in rebuttal, testifies as follows:

Direct-examination by Mr. Hulst:

Q. Miss McCaucry, where do you reside? A. 772 Eighth Avenue.

30 Q. New York? A. Yes, sir.

Q. What is your business? A. Telephone operator.

Q. Where are you located? A. 130 West 57th Street.

Q. Were you the telephone operator there in December, 1912? A. Yes, sir.

Q. Did you keep a record of the calls which you made from your telephone station? A. Yes, sir.

40

Margaret McCavery, for Plaintiff—Direct

Q. Is this (showing) your record? A. (Referring) Yes, sir.

Q. Please look at that record and state whether or not you called up 1307 Bryant on the 21st of December? A. (Referring) Yes, sir.

Q. You called that number from your station? A. Yes, sir.

Mr. Hulst: I offer the record in evidence.

Mr. Stalter: I object to the admission of the record for the time being. 10

By Mr. Stalter:

Q. Is this the official record that you keep for the Telephone company? A. At that time it was.

Q. Don't you have a record of slips that the Telephone Company furnishes to operators? A. No, sir; the telephone Company don't furnish the slips; the house does this, and this is the book that we used at that time, but now the house has changed hands and we use a different record. But this is the record used for three years. 20

Q. You say that this book that you have is the record that you kept at that time? A. Yes, sir.

Q. And the only record that you kept? A. Of the calls, yes, sir.

Q. That is the only record you kept of the calls. By whom were you employed, by the Telephone Company or the house? A. No, the house.

Q. And the calls that the different tenants had were charged by the house to them, is that the custom? A. Yes, each tenant is charged. 30

Q. And you say from this record you can tell if a call was made there and on what date. A. On the 21st of December; it is dated there on the page itself.

Q. Will you find the page? A. (Referring) December 21st. 40

Margaret McCavery, for Plaintiff—Direct

Q. Where is the call that you refer to? A. (Referring) 1307 Bryant.

Q. Have you anything to indicate by whom that was called? A. No, sir, only Mr. Hayes' apartment itself, written opposite 27; it is an extension to the apartment.

Q. Outside of that you have no other way of recalling it? A. Simply from the apartment called.

10 The Court: What is the wording as you have it there? Just let her read it. Just read the exact wording as it is there.

The Witness: (Reads) "1307 Bryant, Extension No. 27 opposite."

The Court: And that is under the date of December 21st.

The Witness: 1912.

20 Q. You haven't any record of incoming calls.
A. No, sir, we don't keep a record of incoming calls.

Q. And if there had been a call for Mr. Hayes' apartment prior to that time, you would not have any record of it? A. No, we could not, unless there was no answer from the apartment, and then at that we would take the message.

30 Q. Did you ever have an occasion about this time when there was no answer from Mr. Hayes' apartment? A. No, there was always somebody there, when the family is in town.

Q. And if they are out of town— A. They are only out of town during the summer months.

Q. By summer months, what do you mean? A. Well, June, July, I suppose; part of August, perhaps.

Q. And that is all? A. There is always somebody in the apartment.

40 Q. And if there isn't— A. We take messages for them.

Mara P. Taylor, for Plaintiff—Direct

Q. They are not away later than August, are they? A. I believe they are always around the first of September, as far as I can remember.

EMILE H. KLUGE, recalled.

By Mr. Hulst:

Mr. Hulst: I only want to ask Mr. Kluge 10
with reference to Exhibits P-5 and P-6.

The Witness: I handed them to my attorney to answer.

Q. You never answered them? A. No, I handed them to Mr. Stalter.

MARA P. TAYLOR, sworn for the plaintiff in re- 20
buttal, testifies, as follows:

Direct-examination by Mr. Hulst:

Q. Miss Taylor, where do you reside? A. 130
West 57th Street.

Q. With Mr. Hayes? A. Yes.

Q. Are you related to him? A. I am.

Q. Did you reside there in that apartment with him continuously from October 28, 1912, until the end of the year? A. Yes, sir; I stayed there. I 30
may possibly have been out of town a day or two.

Q. But generally you are there? A. That is my residence, yes, in the City.

Q. You were in the apartment—or were you in the apartment on the 21st of December? A. Yes.

Q. Did you hear Mr. Hayes call up Mr. Kluge? A. I did.

Q. Did you hear the conversation which Mr. Hayes had with Mr. Kluge over the telephone? A. I did.

Q. So much of that conversation as you can remember, will you please tell it to the jury? 40

Mara P. Taylor, for Plaintiff—Direct

Mr. Stalter: Do you know of your own knowledge with whom Mr. Hayes was talking.

The Witness: I heard him call up Mr. Kluge; I heard him mention the name of Mr. Kluge.

Mr. Stalter: Do you know that it was Mr. Emile Kluge that he called up.

The Witness: I know of no other Kluge.

10

Mr. Stalter: You know of no other Kluge, but there are other Kluges, are there not?

The Witness: I don't know; I presume so.

Mr. Stalter: You don't know of your own positive knowledge that it was this Mr. Kluge that he was talking to, do you?

The Witness: I would like to answer this question, but I don't see how I could unless I were at Mr. Kluge's side.

20

Mr. Stalter: You don't know positively of your own knowledge that it was this Mr. Kluge, do you?

The Witness: Am I obliged to answer that question?

The Court: If you can, Miss Taylor.

The Witness: To my best knowledge and belief it was this Mr. Kluge.

30

Mr. Stalter: I said of your positive knowledge. You don't know that it was this Mr. Kluge, do you? It is a simple question.

The Witness: No, it is not a simple question.

Mr. Stalter: What is there that is not simple?

The Witness: I don't even know your name; if I had been talking to you, and your name was given, I could not say it, because I don't know your name; that would be a

40

Mara P. Taylor, for Plaintiff—Direct

simple question, but it is not when I do not know your name.

Mr. Stalter: That is not the point that I am asking Miss Taylor. It is not whether you know my name or not. I am asking you of your own knowledge whether you knew that the person on the other end of the telephone with whom Mr. Hayes was conversing was Mr. Emile Kluge.

The Witness: No. 10

Mr. Stalter: Then I object to this evidence.

Mr. Hulst: I submit that the evidence is competent. The evidence is that she heard what he said.

The Court: The cases don't go that far. Our cases hold that you must establish the fact that she knows that he was talking to Mr. Kluge. In all telephone conversations, in order that the testimony may be admissible, it must be established that the witness knows the person at the other end of the wire who is talking. In other words, it is a question of identity. I think all the cases uniformly hold that. 20

Q. Did you at any time while you were a resident in the apartment receive any telephone message from Mr. Kluge. A. No, sir. 30

Mr. Stalter: No cross-examination.

*Charles L. Givernaud, for Plaintiff (Recalled)—
Direct*

CHARLES L. GIVERNAUD, recalled, in behalf of the plaintiff, in rebuttal, testifies as follows:

Direct-examination by Mr. Hulst:

Mr. Stalter: You are now making Mr. Givernaud your witness?

Mr. Hulst: I don't believe you called him.

Mr. Stalter: Not just at present.

10

Q. Mr. Givernaud, some time in November, I think on a Sunday, did you go to the residence of Mr. Kluge to get a trunk, do you remember? A. In November?

Q. I think one Sunday in November; as nearly as I can get at the fact; do you remember whether you did it or not? A. I don't think so, I am not sure.

20 Q. You don't remember? A. No, I was at Mr. Kluge's house during the summer, but I don't know if I left any trunk there or not.

Q. Do you remember being at Mr. Kluge's house at any time in November, 1912? A. No, I don't remember; I have been there very often during the year, but I don't know exactly what month.

30 Q. You testified yesterday that you were there at about the time the portrait came? A. I? Oh, no, I was at the studio.

The Court: He testified that he got there about the time they got there, and he was invited to see the picture.

Q. Subsequent to that time, do you remember visiting Mr. Kluge? A. Oh, yes; very often; I spent Christmas there.

Q. You spent Christmas there? A. Oh, yes.

40 Q. Do you remember Madame Techion? A. I met the lady, yes, sir.

*Charles L. Givernaud, for Plaintiff (Recalled)—
Direct*

Q. Did you meet here at his house? A. Yes.

Q. Do you remember about when? A. I do not.
I met her several times.

Q. Pretty well along in the Winter, on or about
Christmas—or was it the early part, in the Fall?

A. I don't know; I could not really say; it was be-
tween September and December.

Q. Wasn't it after October? A. I could not
really say, sir. 10

Q. Did you go to his house quite frequently?
A. Oh, yes, very often.

Q. How often did you go to his house after
September, 1912? A. Oh, about once or twice a
week sometimes.

Q. Right there all the time? A. Sometimes
every two weeks; I don't know, I went there very
often.

Q. Did you go there once or twice a week? A.
I went there whenever I pleased, yes, sir. 20

Q. Did you ever see the portrait there? A. I
think I seen it once, yes.

Testimony closed.

Mr. Stalter: I respectfully ask for a non-
suit at this time, on the ground that the de-
fendant has testified positively to the fact
that this contract, that the painting was to be
to his entire satisfaction. This testimony
has been corroborated by two other witnesses,
one absolutely disinterested. The plaintiff 30
has not denied that contract. The plaintiff on
direct examination testified, to the best of my
recollection that he did not positively deny
that that was the agreement. So far as the
record shows, it is undisputed that the con-
tract was that the painting was to be to the
satisfaction of the defendant. If that is the

Motions for Non-Suit and Direction of Verdict

case, I feel that the defendant is the sole judge of whether he is to be satisfied or not. Undoubtedly your Honor is familiar with the case of Gwinne against Kitchner 37 Vroom p 97.

The Court: No, I cannot take it from the jury, because it involves a question of fact.

10

Mr. Stalter: I ask for an exception to your refusal on the ground that the plaintiff did not deny the bargain as testified to by the defendant.

The Court: Yes; or you can put it in another way, that the evidence is overwhelming that the bargain was as the defendant says it was, and therefore there ought to be a verdict directed for the defendant.

20

The Court: I will have to refuse your motion on the ground that it involves a question of fact.

Mr. Hulst: I have a motion to make. The real crux of this case is this—

The Court: You move to do what.

Mr. Hulst: I move for a direction of a verdict for the plaintiff.

The Court: First, on what ground.

Mr. Hulst: On the ground that the defendant accepted the portrait, kept it an unreasonable time without objecting.

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The Court: There is no use of taking any time about arguing the motion. I will have to deny the motion on the ground that it involves a question of fact for the jury.

Exception allowed.

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CHARGE.

The Court: Gentlemen of the Jury, you have heard the motions addressed to the Court as made by counsel, asking the Court to decide this case for each side, as questions of law, and the Court refused each of the motions on the ground that the questions involved were questions of fact, and questions of fact under the legal procedure that has been set up and maintained in this state, in actions such as this, can only be decided by a jury and the Court has no power to express an opinion or to decide questions of fact. The province of the Court is to decide questions of law, the admissibility or rejection of evidence, to give the jury the legal principles governing the rights of the parties, for the jury to apply those principles to the facts when found. 10

Now this all means, gentlemen, that this is a controversy between these parties; their rights resting upon disputed questions of fact. The alleged contract was by word of mouth and not in writing, and therefore, it is your province, your duty, to ascertain, first, what the facts are. 20

Now the plaintiff brings the suit against the defendant as you have gathered from the testimony, claiming that there is due him the sum of \$750 for the painting of the portrait, together with \$60 for the frame and he says that the defendant agreed to pay him that sum of money for the production of a picture with the frame and that he accepted it on the 25th day of October, 1912. Is that a fact? Have those facts been established by evidence to your satisfaction? If so, the plaintiff is entitled to a verdict for that sum, with interest from the 25th of October, 1912, to date, which, as I figure, amounts to \$56.70, making the plaintiff's total claim \$866.70. If that was all there was to the case, that would be all there would be to decide; but the defendant says 40

Judge's Charge

there was a bargain for the painting of the portrait for the sum of \$750 and \$60 for a frame, amounting to \$810; that the plaintiff agreed he would make it in every way satisfactory to the defendant, and the defendant agreed that if such a portrait was made to his satisfaction, he would pay the plaintiff the sum of \$750. You will recall that the defendant said that the plaintiff would make it absolutely satisfactory and “if not satisfactory to us, he would make it satisfactory, and if not we would not have to take it.” Is that true? Does the evidence commend itself to you and say that was the bargain. Now, if that was the bargain then the verdict should be for the defendant, because the plaintiff has not fulfilled his engagement and the law on that subject is this:

10 If the contract was to make the picture to the satisfaction of the defendant, and if the picture was to be satisfactory to the defendant, it was for him alone to determine whether it was done, and it is not enough to sustain an action for the price that his dissatisfaction was unreasonable, that the contract was not to make a picture which he *ought* to be satisfied with, but one that he would be satisfied with; that a contract to make a picture perfect in every respect and one with which he ought to be satisfied is one thing, and 20 undertaking to make one with which he will be satisfied, is quite another thing. The former can only be determined by experts; the latter only by the defendant himself. Is that clear to you Gentlemen?

30 So you see, to summarize, if the plaintiff's contention is correct, that the bargain was to make a picture and he agreed to pay \$750 and \$60 for the frame, then the plaintiff has complied with his contract and the verdict should be for the plain- 40

Judge's Charge

tiff. But if, on the other hand, the bargain and the contract was that it should be satisfactory to the defendant, and you find that was the bargain, then the verdict should be for the defendant—unless, as the plaintiff urges, on the 25th day of October, the defendant took the picture and kept it until the 31st of December, when a letter was sent by the plaintiff to the defendant requesting payment—unless you find from all the facts and circumstances in the case that there was an acceptance of an unreasonable delay in accepting, then you, could find for the plaintiff on that issue. The law here, as laid down by the Court of Appeals, is in this language:

“In this, as in all cases where questions of reasonable time, opportunity or the like are at issue, the determination of what is reasonable, where the facts are disputed or the inferences are drawn from undisputed facts, is a question of fact and not of law.”

Was the taking of this picture on the 25th of October, and holding it under the circumstances which have been shown in the evidence, an unreasonable delay? Was it an acceptance. That is a question of fact for you, and if you find that it was an acceptance, or an unreasonable delay on the part of the defendant, then again your verdict should be for the plaintiff, notwithstanding the terms of the bargain.

If you find for the plaintiff, your verdict should be, as I have calculated the interest, \$866.70. If, under these rules of law which I have given to you, after finding the facts, you find for the defendant, your verdict should be simply a verdict for the defendant. Is that clear to you, gentlemen? The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that the bargain, which he says was

Judge's Charge

made, was the bargain that the defendant made, and that he failed to show you that there was an acceptance, an unreasonable time, if you rest your verdict upon that ground. Take the case.

Are there any exceptions by the plaintiff?

Mr. Stalter: I have no exceptions, sir.

The Court: Any exceptions by the defendant?

Mr. Hulst: You have made it clear. No, I have no exceptions. I ask your Honor to instruct the
10 jury that if they want the exhibits, they may have them.

The Court: The exhibits go to the jury, whether they want them or not. You won't want the picture gentlemen will you? You have seen that.

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EXHIBIT P-1.

(COPY.)

130 West 57th Street,
N. Y. City.

My dear Mr. Kluge.—

Obedient to Mrs. Kluge's request I delivered the portrait to your chauffeur last week. The day was a rainy one but as it was covered as well as possible with rugs I trust the gilding in no wise suffered. 10

Mrs. Kluge asked me to send the bill to you.

The frame, hand carved, with glass was—\$60.00.

The painting as agreed is\$750.00

Making a total of \$810.00.

If you will have the kindness to accommodate me with an early check for this sum I will be very much obliged.

I returned from the Berkshires at the end of last week after a very beneficial rest.

You are I hope quite recovered from your indisposition and feeling quite yourself again. 20

I want to thank Mrs. Kluge for her patient and sympathetic cooperation in doing this portrait which was a pleasure to me.

With very best wishes to you both,

Yours very sincerely,

CHESTER C. HAYES.

Oct. 28 1912

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EXHIBIT P-2.

My dear Mr. Kluge.

Some weeks ago after the delivery of the portrait I wrote to you at Englewood but presume the address was faulty as I have not heard from you since.

I aksed you in the letter to be good enough to favor me with a check covering the cost of the portrait and the frame \$810.

10 I have a pretty heavy obligation to meet on Dec. 1st, and am counting on your check to meet it.

Will you be so kind as to send it to me without further delay. No doubt you are very busy with your own business again and do not realize how time flies, but the matter is an important one to me at this moment, therefore I trust you will oblige me

Very truly yours

CHESTER C. HAYES

20 Nov 16/12

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EXHIBIT P-3.

(COPY.)

130 West 57 N. Y.

My dear Mr. Kluge—

Having several times failed to find you at your office, I wish to ask you to be good enough to send me your check for \$810.00 without further delay. In view of the fact that the portrait of your wife and daughter were done for you at a sum much below my price through the interest and efforts of Mr. Taylor, and that just as much time and care were given to the work as would have been had the full price been asked, and since you have had the portraits about three months, I cannot believe you will not accede to my request.

Very sincerely yours,

CHESTER C. HAYES.

Dec 16/12

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EXHIBIT P-4.

(COPY.)

Belden Hill,
Wilton, Conn.

My dear Mr. Kluge—

I tried in vain to reach you by 'phone yesterday from New York to tell you that the portrait is ready for you at any time.

I received the new frame Tuesday.

10 Being wider and larger than the one you saw, it is certainly handsome and more effective, and I had it toned to suit the picture. The framer made it for \$60.00 net—artistis price.

The glass is the best I have had in a long time.

Do you wish the portrait packed and sent to you by express or could you stop for it in your motor car? Boxing and shipping would cost about \$6.00.

20 I do not expect to be in the city until the first week in September, but I will ask the Superintendent of 130 West 57 to deliver the portrait to you at any time if you prefer to call for it in the car.

Otherwise as soon as I hear from you I will have it shipped. The tel. no. o/130 W. 57 is 5520 Col. My tel. no. here is 1507-31 Wilton, Conn.

30 In remitting me your check for the \$750.00 if you will add the \$60.00 I will settle with the framer for you.

With very best wishes for yourself and kindest regards for Mme. Kluge, not forgetting little Alexandra believe me,

Very truly yours, CHESTER C. HAYES.

Aug. 28/12

EXHIBIT P-5.

SATTERLEE, CANFIELD & STONE
 Counselors at Law
 Atlantic Building
 49 Wall Street, New York

December 31st, 1912

E. H. Kluge, Esq.,
 133 West 34th Street,
 City.

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Dear Sir:—

Mr. Chester C. Hayes has placed in our hands for collection a claim against you for \$810.00., being the agreed price for a portrait painted by Mr. Hayes, together with the frame. Will you kindly give this matter your attention.

Yours very truly,
 SATTERLEE, CANFIELD & STONE

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EXHIBIT P-6.

SATTERLEE, CANFIELD & STONE
 Counselors at Law
 Atlantic Building
 49 Wall Street, New York

January 28th, 1913.

E. H. Kluge, Esq.,
 33 West 34th Street, City.

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Dear Sir:—

Will you kindly let us know whether you have any answer to our letter to you of December 31st last.

Yours truly,
 SATTERLEE, CANFIELD & STONE

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MEMORANDUM

TO: THE DIRECTOR, BUREAU OF REVENUE
FROM: [Illegible Name]
SUBJECT: [Illegible Subject]

Reference is made to the report of the [Illegible] dated [Illegible] and to the [Illegible] of the [Illegible] dated [Illegible]. It is noted that the [Illegible] of the [Illegible] dated [Illegible] is in accordance with the [Illegible] of the [Illegible] dated [Illegible]. The [Illegible] of the [Illegible] dated [Illegible] is in accordance with the [Illegible] of the [Illegible] dated [Illegible]. The [Illegible] of the [Illegible] dated [Illegible] is in accordance with the [Illegible] of the [Illegible] dated [Illegible].

Very respectfully,
[Illegible Name]

Approved: [Illegible Name]
Special Agent in Charge

