

INDEX.

	PAGE
Notice of Appeal	1
Ground of Appeal	2
Writ of Summons	5
Complaint	6
Answer and Counterclaim	10
Reply	15
Postea	16
Order Entering Judgment	17
Judgment	18
Certificate of Clerk	19
Case	20
Motion for Nonsuit	53
Nonsuit	72
Consent as to Defendant's Exhibits	79

TESTIMONY.

Plaintiff's Witnesses:

Emma McCabe,	
Direct	20
Cross	23
James H. McCabe,	
Direct	24
Cross	35
Charles Yesworth,	
Direct	37
Cross	40
Re-direct	43
Recalled, direct	51
Recalled, direct	71

	PAGE
Dudley McCabe,	
Direct	43
Cross	48
Re-direct	49

Defendant's Witnesses:

Eugene Riotte,	
Direct	54
Cross	59
Edwin R. Wilson,	
Direct	66
Cross	69
Re-direct	70

EXHIBITS.

Plaintiff's Exhibits:

	Offered Page	Printed Page
P-1—Letter, dated May 8, 1926	31	74
P-2—Letter, dated May 19, 1926	33	76
P-3—Letter, dated June 22, 1926	34	77
P-4—Letter, dated July 23, 1926	34	78

Notice of Appeal.

(Filed, Nov. 19, 1928.)

New Jersey Supreme Court

HUDSON COUNTY.

10

EMMA McCABE, <i>Plaintiff,</i>	}	Action at Law.
vs.		
STANDARD MOTOR CONSTRUCTION COMPANY (a body corporate of New Jersey), <i>Defendant.</i>	}	Notice of Appeal.

20

To
STANDARD MOTOR CONSTRUCTION COMPANY,
Defendant,
and
DAVID F. EDWARDS, Esq.,
Attorney for Defendant.

Sirs:

PLEASE TAKE NOTICE that the above plain- 30
tiff hereby appeals to the Court of Errors and
Appeals of the State of New Jersey, from the
judgment entered in this action on December 12th,
1927, and especially from that part of said judg-
ment which grants a non-suit in favor of defend-
ant and against the plaintiff as to the cause of
action set forth in plaintiff's complaint.

Dated, September 13th, 1928.

40

FRANCIS A. CASTELLANO, JR.,
Attorney for Plaintiff.

Grounds of Appeal.

(Filed, Dec. 11, 1928.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

EMMA McCABE,
Plaintiff-Appellant,

vs.

20 STANDARD MOTOR CONSTRUCTION
COMPANY (a body corporate of
New Jersey),
Defendant-Respondent.

Action at Law.

On Appeal to
the New
Jersey Court
of Errors
and Appeals.

Grounds of
Appeal.

The plaintiff-appellant above named sets down the following as her grounds of appeal:

1. That the trial Court erred in holding and deciding:

30

“It appears conclusively from the testimony, that the sale in this case was the sale of a specified article under a patent or if not a patent then certainly under a trade name, and that therefore there would be no implied warranty arising out of the sale in question”

and in granting defendant's application for a non-suit herein.

40

2. The trial Court erred in holding and deciding to non-suit the plaintiff, and in holding and deciding as follows:

Grounds of Appeal.

“In the first place, as I read the complaint it is based upon the breach of an express and not an implied contract. If that is not so, however, and conceding that it be still held to encompass an implied contract as to the suitability of this engine for the boat in question, nevertheless there are two unsurmountable obstacles to allowing the case to go to the jury upon that theory. First, it appears conclusively from the testimony, that the sale in this case was the sale of a specified article under a patent, or if not a patent, then certainly under a trade name, and that therefore there would be no implied warranty arising out of the sale in question, but even if that is not so, still we are confronted with the plain provisions of the contract itself, which in part read as follows:

“ ‘The foregoing proposal is subject to the approval of an executive officer of the Standard Motor Construction Co., and shall not be binding upon it until so approved, all previous communications between the parties hereto, whether verbal or written, with reference to the subject matter of this proposal, are hereby abrogated, and this proposal, duly accepted and approved, constitutes the sole agreement between the parties hereto as to the subject matter hereof, and no modification of this agreement shall be binding upon the parties hereto, or upon either of them, unless such modification shall be in writing, duly accepted by the purchaser and approved by an executive officer of the company,’

Grounds of Appeal.

10 "I construe that much to mean, when they say, 'And this proposal, duly accepted and approved, constitutes the sole agreement between the parties hereto,' that it is not even an implied warranty, to say nothing of an express warranty, and for that reason the motion would have to be granted."

20 3. On the contrary, the Court should have held and decided that upon the testimony there was a case presented justifying submission of the issues to the jury as to whether the buyer (plaintiff) made known to defendant the particular purpose for which the marine engine was required by her, whether she relied upon the skill and judgment of the defendant as manufacturer thereof and whether upon the facts as proved there was an implied warranty by defendant that the marine engine was reasonably fit for the purpose of plaintiff, and as to whether such engine was in fact reasonably fit.

30 4. There was no proof in the case that plaintiff purchased the marine engine from defendant under any trade name known by the trade or under any patent name, or that she knew of the existence of any trade name or patent name for said marine engine, and it was error to non-suit the plaintiff for this reason.

40 5. The trial court should have submitted to the jury, as a question of fact, whether or not plaintiff had purchased the marine engine as an article known by its trade name or patent name, and as to whether for that reason she was barred from

Writ of Summons.

claiming that the transaction was one wherein there existed an implied warranty that the goods should be reasonably fit for the purpose of plaintiff.

FRANCIS A. CASTELLANO, JR., 10
Attorney for Plaintiff-Appellant.

Writ of Summons.

(Filed, Nov. 19, 1926.)

<p style="text-align: center;">THE STATE OF NEW JERSEY</p> <p style="text-align: center;">to</p> <p>STANDARD MOTOR CONSTRUCTION COMPANY (a body corporate of New Jersey).</p>	}	<p>Writ of Summons.</p>	20
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You are summoned to answer the annexed complaint of Emma McCabe, in an action at law in the Supreme Court, and take notice that (L. S.) unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

40

Complaint.

WITNESS, William S. Gummere, Chief Justice
of the Supreme Court, at Trenton, this 9th day
of November, 1926.

EDWARD J. KELLEHER,
Clerk.

10 FRANCIS A. CASTELLANO, Jr.,
Attorney for Plaintiff,
646 Tyler Place,
West New York, N. J.

New York Address:
299 Broadway,
Manhattan,
New York City.

20

Complaint.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

30

<p>EMMA McCABE, <i>Plaintiff,</i></p> <p>against</p> <p>STANDARD MOTOR CONSTRUCTION COMPANY (a body corporate of New Jersey), <i>Defendant.</i></p>	}	Complaint.
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Plaintiff, Emma McCabe, who resides at 136
Henry Street, in the Borough of Brooklyn, County
of Kings, City and State of New York, for her
cause of action against the defendant states:

Complaint.

I. That at all times hereinafter mentioned defendant, Standard Motor Construction Company, was and it is a New Jersey Corporation engaged in the business of manufacturing and selling machinery, motors and marine engines.

10

II. Heretofore and prior to April 7th, 1926, plaintiff ordered from defendant a certain motor or marine engine for her certain boat then lying at Massapequa, Nassau County, New York.

III. Theretofore defendant through its agents, servants and employees, examined, inspected and measured said boat and after such inspection said defendant represented to plaintiff that defendant's two cylinder standard 10-12 horse power Marine Engine was suitable, appropriate and fit for said boat, and was not too heavy for said boat and that if installed in said boat it would work with complete satisfaction and that it was suitable for the purpose of operating said boat, and that the same would operate said boat at the speed of 10 knots per hour.

20

IV. Plaintiff at said time had no personal knowledge or experience with motor engines and motor boats and stated to defendant that she would have to rely entirely upon defendant's expert knowledge with regard to the same and plaintiff did rely upon the representations made by defendant as aforesaid and believed the same to be true.

30

V. Thereupon plaintiff relying upon such representations so made to her by defendant, its

40

Complaint.

agents servants and employees purchased the said two cylinder standard 10-12 horse power Marine Engine, manufactured by said defendant, from said defendant on or about April 7th, 1926, and paid the entire purchase price for the same, to wit: Nine hundred and sixty Dollars (\$960) to defendant.

20 VI. In consummating the said purchase and in paying the said purchase price in full, plaintiff relied upon the representations made by the defendant that said marine engine was fit and suitable for plaintiff's boat and purpose as aforesaid; such representations were material; plaintiff believed such representations made by the defendant to be true and by reason thereof she was induced to purchase the said engine from defendant, and to have constructed a foundation in her boat therefor in accordance with said defendant's instructions and specifications and plaintiff had defendant's engine installed in her boat pursuant to defendant's instructions and specifications at a further cost to her of \$148.91.

30 VII. That although said defendant, before such purchase of defendant's engine, assured and guaranteed to plaintiff that her boat would make about 10 knots per hour, after the installation of the said engine of defendant, pursuant to the instructions and specifications given by defendant, plaintiff found that the said engine furnished by defendant was unfit for use; that although said defendant's engine was constructed with thirteen notches on the throttle of said engine, when the motor was turned on, only part of said throttle

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Complaint.

could be turned on or opened, and upon the throttle being further opened, due to the weight of said engine in said boat, the speed of operation of said boat caused sea water to wash over the stern of said boat and the engine vibration and power caused the seams of said boat to leak so that after said installation the boat was wholly unfit for use and unsafe; said engine permitted the operation of said boat in any event at no greater speed than 5 knots per hour and the motor could not be operated further than the third notch on said throttle as sea water washed into the said boat while being operated at a greater speed; and by reason of the premises, plaintiff's boat is now unfit for use as a motor boat and plaintiff has notified defendant of the premises and has offered to return to defendant the engine purchased as aforesaid, and has demanded repayment of purchase price and payment of the damages incurred by her in the installation of the same, which defendant has failed and neglected to do. 10

VIII. Plaintiff has expended \$240 in the installation of said defendant's engine in her boat and for repairs in her boat all to her great loss and damage. 20 30

WHEREFORE plaintiff demands judgment against defendant for the sum of One thousand two hundred Dollars (\$1,200) with interest from April 7th, 1926, together with the costs of this action.

FRANCIS A. CASTELLANO, JR.,
 Attorney for Plaintiff,
 646 Tyler Place, 40
 West New York, N. J.

Answer and Counterclaim.

(Filed, Dec. 16, 1926.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

EMMA McCABE, <i>Plaintiff,</i> against STANDARD MOTOR CONSTRUCTION COMPANY (a body corporate of New Jersey), <i>Defendant.</i>	}	Answer and Counterclaim.
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Defendant, Standard Motor Construction Company, answering, says:

FIRST.—It denies the truth of the matters contained in the complaint.

30

SECOND.—The agreement between the parties, plaintiff and defendant, as to the purchase and sale of the motor or marine engine referred to in the complaint is in writing, signed by the parties in the words and figures following:

Standard Motor Construction Co.

To

Mrs. James H. McCabe. Date, April 6, 1926.

40

The Standard Motor Construction Co., hereinafter called the Company, hereby proposes to furnish you upon the terms and conditions herein, the following described Standard Marine Engine Right Hand One 2 cylinder 5" bore by 6½" stroke.

Answer and Counterclaim.

Standard 10-12 Horse power Marine Engine. One 10-12 size exhaust muffler. One set Standard double high tension ignition equipment.

DELIVERY. Delivery will be made F. O. B. cars New York, N. Y., beyond the Company's control, on or about—immediately. 10

SHIPPING INSTRUCTIONS. Ship via Long Island R. R. to Amityville, N. Y., c/o Dudley McCabe. Shipment at Vendee's risk. Price as above described for the sum of Nine hundred sixty (\$960) Dollars. Payable in cash, New York funds, receipt of which is hereby acknowledged.

GUARANTEE. The company warrants the goods above described for one year following the date of shipment based upon the date of invoice, this warranty being limited to the replacement in its factory of the parts giving out under normal service in consequence of defect in material or workmanship and not due to carelessness or neglect. If the circumstances do not permit that the work shall be executed in the Company's factory, this warranty is limited to the shipment without charge of the parts intended to replace those acknowledged to be defective; Carburetors, Magnetos, Starters, Generators, Lubricators, Batteries, Distributors, and other trade accessories are warranted separately by their respective Manufacturers and are not included herein. 20 30

The Company guarantees 10-12 brake horse power with a fuel consumption not to exceed 10-12 pints per hour. Test to be made before shipment. The Company will not accept any responsibility 40

Answer and Counterclaim.

in connection with any of its engines or parts when they have been altered or repaired outside of its factory, representatives from the factory excepted.

- 10 THE TITLE and ownership of the property called for and furnished under the terms of this proposal shall remain in the STANDARD MOTOR CONSTRUCTION CO. until the full and final payment therefor shall have been made by the purchaser according to the terms agreed upon. In case of default in any of the payments above provided for, the STANDARD MOTOR CONSTRUCTION CO. may repossess itself of the
- 20 above mentioned property, wherever found, and shall not be liable in any action of law, on the part of said purchaser, for such reclamation of its property, nor for the re-payment of any money or moneys which may have been paid by said purchaser in part payment for installation and equipment.

The acceptance of the engine when delivered is understood to constitute a waiver of all claims for damages by reasons of any delay.

- 30 The foregoing proposal is subject to the approval of an executive officer of the Standard Motor Construction Co. and shall not be binding upon it until so approved, all pre-communications between the parties hereto, whether verbal or written, with reference to the subject matter of this proposal are hereby abrogated, and this proposal duly accepted and approved constitutes the sole agreement between the parties hereto as to
- 40 the subject matter hereof, and no modification of this agreement shall be binding upon the parties

Answer and Counterclaim.

hereto, or upon either of them, unless such modification shall be in writing duly accepted by the purchaser and approved by an executive officer of the Company.

Respectfully submitted,

10

STANDARD MOTOR CONSTRUCTION.

Approved at Jersey City, N. J., April 7, 1926, by H. V. Haymann, by Eugene A. Riotte, President.

ACCEPTANCE. The foregoing is hereby accepted at the price and the terms and conditions named therein.

Dated, April 6th, 1926. Signed, Mrs. James H. McCabe. 20

EXTRAS.

The labor and articles below not required cross off. All extras must be clearly defined as to cost, description of things wanted and sketch.

Installation, trials, running and delivery charged at the rate of \$13.50 per day of nine hours (extra for overtime).

Hotel bills, carfare, etc., charged at actual outlay. 30

Carting, carpenter work and boat builders' charges, charged at actual outlay.

Special machine work \$1.25 per hour and cost of material.

Copper gasoline tank extra—per gallon capacity.

Extras approved by STANDARD MOTOR CONSTRUCTION COMPANY. 40

Answer and Counterclaim.

FIRST.—Plaintiff will object that the contract for the purchase and sale of the motor or marine engine was in writing and that parol evidence will not be admitted to vary the terms of said agreement.

10 SECOND.—That any verbal representations or promises made by any agent, servant or employee that said engine was suitable appropriate and fit for said boat was without authority of said Corporation.

By way of counterclaim against the plaintiff, defendant says:

20 FIRST.—At the request of the plaintiff, defendant performed certain labor and furnished certain material in and about said engine as follows:

Labor—Outside man, wiring up engine; connecting up gas line; running engine...	\$19.25
Outside man's expenses	2.75
2 1/8" Brass Close Nipples, \$1020
	<hr/>
	\$22.17

For 10-12 H. P. 2 Cyl. engine #8437.

30 Labor—Outside man, putting on new cylinder head gasket; adjusting magneto	\$15.75
Outside man's expenses	2.72
1 cylinder head gasket	2.70
	<hr/>
	\$21.17

Defendant counterclaims damages in the sum of Forty-three dollars and thirty-four cents.

40

DAVID F. EDWARDS,
Attorney for Defendant.

Postea.

(Filed, Dec. 12, 1927.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

<p style="text-align: center;">EMMA McCABE, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">STANDARD MOTOR CONSTRUCTION COMPANY, a corporation, <i>Defendant.</i></p>	}
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The case was tried before Judge Ackerson with a jury, at the Hudson County Circuit on November 28th, 1927.

The Judge ordered a non-suit, and the defendant in open Court having withdrawn its counter-claim and consented thereto, it was also ordered that there be a judgment of non-suit on the counter claim.

30

HENRY E. ACKERSON, JR.

40

Order Entering Judgment.

(Filed, Dec. 12, 1928.)

NEW JERSEY SUPREME COURT.

EMMA McCABE, <i>Plaintiff,</i> vs. STANDARD MOTOR CONSTRUCTION COMPANY, a corporation, <i>Defendant.</i>	}	Action at Law. 10 On Postea. Judgment of Non Suit for Defendant and Plaintiff.
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It is ordered that judgment of non suit be and hereby is entered in favor of defendant and against the plaintiff on the plaintiff's complaint, without costs; and non suit in favor of plaintiff and against the defendant on the defendant's counterclaim. 20

Entered, December 12, 1927.

On motion of

FRANCIS A. CASTELLANO, JR., 30
 Attorney for Plaintiff.

DAVID F. EDWARDS,
 Attorney for Defendant.

Judgment.

(Filed, Dec. 12, 1927.)

NEW JERSEY SUPREME COURT.

10

<p style="text-align: center;">EMMA McCABE, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">STANDARD MOTOR CONSTRUCTION COMPANY, a corporation, <i>Defendant.</i></p>	}	<p>Action at Law. On Postea.</p> <p>Judgment of Non Suit for Defendant and Plaintiff.</p>
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No costs.

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Judgment of non suit entered this twelfth day of December, A. D., nineteen hundred and twenty-seven in favor of defendant and against the plaintiff on the plaintiff's complaint without costs; and non suit in favor of plaintiff and against the defendant on the defendant's counterclaim.

WM. S. GUMMERE,
C. J.

30

40

Certificate of Clerk.

(Dated, Jan. 15, 1929.)

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office. 10

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fifteenth day of January, A. D., nineteen hundred and twenty-nine.

(Seal)

FRED L. BLOODGOOD,
Clerk. 20

30

40

Emma McCabe—For Plaintiff—Direct.

Case.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

10

	}
EMMA McCABE,	
<i>Plaintiff,</i>	
vs.	
STANDARD MOTOR CONSTRUCTION	}
Co.,	
<i>Defendant.</i>	

20

Before—Hon. HENRY E. ACKERSON, JR., J., and
a jury.

Jersey City, N. J., November 28, 1927.

APPEARANCES:

FRANCIS A. CASTELLANO, Esq., for the plaintiff;
DAVID F. EDWARDS, Esq., by Mr. Rurode, for the
defendant.

30

EMMA McCABE, sworn.

Direct Examination by Mr. Castellano:

Q. Mrs. McCabe, where do you live? A. I live
at 136 Henry Street, Brooklyn.

40 Q. You are the wife of James H. McCabe who
sits behind me? A. Yes.

Emma McCabe—For Plaintiff—Direct.

Q. And the mother of Dudley McCabe who is in this court room? A. Yes, sir.

Q. Now in the month of April, 1926, did you own a dory? A. Yes.

Q. About twenty-three feet long, was it? A. About twenty-one feet I think, something like that. 10

Q. And where was it at that time? A. At Mas-sapaqua, Long Island.

Q. Do you remember telephoning to the Stand-ard Motor Construction Company? A. Yes, sir.

Q. And how long after that did Mr. Haymann call to see you? A. I think it was the next day; I am not quite sure.

Q. That was around the first part of April last year? A. Yes. 20

Q. Was your husband present when he came? A. Not when he came in, but he came later.

Q. Before Mr. Haymann went away your hus-band came in? A. Yes.

Q. Did you both talk to—what was said by Mr. Haymann about this 10-12 horse-power marine engine of this company? A. When he came he showed me some pictures and I told him I knew all about the engine, that I knew it was a good engine and we were tired of buying engines that didn't go and we wanted this particular engine, but we were not quite sure about the size of the engine, whether it was too heavy for the boat, so he said he would be very glad to go out there—that he had been with the company about twenty years—and he would be glad to go out there and see—that he was capable of measuring and all that sort of thing. 30

Q. You mean he wanted to make sure that the engine was not too heavy for your boat? A. Yes, 40

Emma McCabe—For Plaintiff—Direct.

that was the only question, whether the engine was too heavy for the boat.

Q. Now then were you with him when he went out to measure your boat? A. No.

10 Q. How long after that did he and Mr. McCabe go out to Massapequa to look at the boat? A. It may have been two or three days; I really don't know.

Q. Now after that visit and the trip by your husband with Mr. Haymann to Massapequa to look at the boat, did you pay for this engine \$960 to the company? A. Yes, he came back with the contract and I signed that and I paid him the money, cash. He said it was all right.

20 Q. Before you actually paid the money and before you signed the contract and agreed to purchase the engine, what did Mr. Haymann say about the engine suiting your boat? A. Why he said it was perfectly satisfactory, the weight was all right for the boat and it would go. He said it would make ten or twelve knots—is it? I don't quite know about engines.

30 Q. He said it would propel the boat at twelve knots per hour? A. Yes, he said it was perfectly suitable for the boat.

Q. You are sure he said that? A. Positive.

Q. And what did he say about its weight, whether it was too heavy or not? A. He said it was not too heavy.

Q. It was all right as to weight? A. It was all right.

Q. And when you paid the money and signed the contract did you rely upon his judgment? A.

40 Oh yes.

Mr. Rurode: I object, calling for a conclusion.

Emma McCabe—For Plaintiff—Cross.

The Court: Why did you sign the contract?

Q. Why did you sign the contract and pay the \$960 for this engine? A. I thought it was all right. I knew the engine for a number of years and thought of course the company was just as good as the engine was. We were accustomed to dealing with people of their word. 10

Q. And you took him at his word, did you? A. Why, yes.

Q. Did you know at that time that the engine was too heavy for your boat? A. Why, no.

Q. Now, after the engine was installed were you ever in the boat while it was going? A. No, I never saw the boat. 20

Mr. Castellano: Cross examine.

Cross Examination by Mr. Rurode:

Q. Mrs. McCabe, is this the paper you signed?
A. It is.

Mr. Rurode: I offer it for identification. Marked Exhibit D-1 for identification. 30

Q. That is the contract you refer to? A. I presume it is, that is my signature.

Q. You looked at it and identified it a minute ago? A. I only know that is my signature.

Q. This paper D-1 for identification which you have just identified, you have a duplicate of that, haven't you? A. Maybe I have. 40

James H. McCabe—For Plaintiff—Direct.

Mr. Castellano: I will concede we have it.

Q. And that came to you through the mail, did it not, from the company's office in Jersey City?

10 A. I don't remember whether it came through the mail, or whether Mr. Haymann gave it to me.

Q. So that after this talk with Mr. Haymann the first time this contract was presented to you and you signed two of them, did you not? A. I presume I signed two. He showed me one.

Mr. Rurode: That is all.

20

JAMES H. McCABE,*sworn.

Direct Examination by Mr. Castellano:

Q. Mr. McCabe, where do you live? A. 136 Henry Street, Brooklyn.

Q. And are you an Attorney and Counsellor at law of the State of New York? A. I am.

30 Q. And you are the husband of the witness who was just on the stand, are you not? A. I am.

Q. Were you present when your wife called up the Standard Motor Construction Company regarding an engine? A. I was not.

Q. Do you remember seeing a Mr. Haymann there within a few days after your wife telephoned? A. Mrs. McCabe told me she had telephoned this engine company, and that—

40

Mr. Rurode: I object to that.

The Court: Strike it out. Just what happened.

James H. McCabe—For Plaintiff—Direct.

A. On the afternoon in question when I came home Mr. Haymann was in my house. He was there talking about his engine. I said to him I knew the qualities of the engine, there was no question about that, that was the reason we wanted it, but the question in my mind was whether the engine was too big for the boat. The boat was approximately 22 feet long and six feet wide. I even asked him to make sure. He said "We will go down to Massapequa and measure the boat," so I accompanied him down to Amityville. 10

Q. Before you went away from your own house did he tell you what experience he had with engines and their installation? A. Yes, sir, he told me he was employed by this company for the past twenty years, that I knew the reputation of the company, that the company was back of him, that whatever he said the company would stand back of, and I said I understood all that, that I understood the company enjoyed a very good reputation. We went to Amityville where my son lives, and my son and I went to Massapequa where the boat was lying. 20

Q. Was Mr. Haymann with you? A. He accompanied me from the city. I met him at the Flatbush Avenue station. He then measured the length of the boat and the width of the boat and the depth of the boat, and asked me the question how much water she drew, to get her draft. Then to make sure I said, "Now, on the installation of this engine, since you have been with the company twenty years, and that is your business, will you mark in the boat where the engine should be installed." So he took a lead pencil and marked 30 40

James H. McCabe—For Plaintiff—Direct.

in the boat exactly where to put the timbers. Then I ordered the engine.

Q. Before you ordered the engine, Mr. McCabe, did Mr. Haymann say at how many knots this engine would propel the boat? A. Oh, yes, he stated that it would go so many knots. Of course as to that I have nothing to say, maybe it will and maybe it won't, but I could not say.

The Court: Just a minute. In the contract there is a guaranty of 10 to 12 brake horsepower, with a fuel consumption of 10 to 12 brake pints per hour. Did it come up to that guaranty?

20 The Witness: If the Court please, I could not find out.

The Court: You do not claim that there is any breach of that agreement regarding the gasoline consumption or speed of the boat?

30 The Witness: We do not know anything about it, because it was dangerous to go out in it. We could only run it about four notches on the quadrant, when the water would roll over the stern and you could not go any faster.

The Court: All right. What did you say about the weight of the engine after he measured it?

40 The Witness: When I asked the question of the man who was to install the motor and he told me that the engine was too large, Mr. Yesworth, then I took it up with Mr. Haymann and he said he would guarantee it from his twenty years experience, his knowledge, and if it was not satis-

James H. McCabe—For Plaintiff—Direct.

factory, to take his word for it, the engine company would take the engine back because they want every customer to be one of the family, as he put it, to be perfectly satisfied. Believing that we ordered the engine and paid cash for it, and installed it exactly as he directed. They even sent plans and specifications down to install it. The boat builder will tell how he installed it, how he ripped out the old foundation and put in the new foundation. 10

The Court: This conversation with Mr. Haymann, whom you claim represented the defendant, was after your wife had signed the contract? 20

The Witness: No, before.

The Court: I mean with reference to where you said it was too large, and he said it was not, that the company would guarantee it?

The Witness: He said it both before and after, about guaranteeing the engine.

The Court: What did he say after, what were his words?

The Witness: Afterwards he would not come to the place. All we could do was to get him over the telephone, but he told me that they would make good. I never could get Mr. Haymann to my place. I never could get him thereafter. In fact the company never even answered my communications or paid any attention to me. 30

Q. Now, Mr. McCabe, your visit with Mr. Haymann to Massapequa when you examined the boat 40

James H. McCabe—For Plaintiff—Direct.

and measured it, was that done before or after the contract was signed, or this paper? A. That was done before the signing of the contract.

10 Q. And when Mr. Haymann got through with his measurements and told you where to install the engine, what did he say about the engine with relation to that boat, as to whether it was too heavy or not? A. He said the engine was absolutely suitable, that it would do so many knots an hour.

20 Q. How about the weight? A. He said the weight was not too heavy at all, and he said it would be satisfactory. He said "This man who is going to install the engine also sells engines and he wants you to buy one of his engines." I said, "That is immaterial to me. I want this engine, so long as you are guaranteeing me that it is not too heavy for the boat."

Q. Did he guarantee you that before your wife signed the contract and before your wife paid the money? A. Yes, sir, in the presence of my wife. He even guaranteed it in the presence of my son who was with us, on that day.

30 Q. Did he say anything about the power of this engine, whether it was too strong or too weak for this boat? A. No, he said the boat was absolutely all right, the engine was acceptable and satisfactory for this boat.

The Court: Now, was there anything wrong, so far as you know, about this engine, except that it was too heavy for the boat?

40 The Witness: No, sir, there was nothing wrong with the engine. It was so heavy

James H. McCabe—For Plaintiff—Direct.

for the boat that it not only caused it to sink, but it loosened the seams and it was impossible to use it. If you used it you were risking your life. It was top heavy and it projected 12 to 13 inches above the gunwales. I requested that they send a man out to wire the engine and check up, so there would not be any trouble. I even went so far as to buy a propeller exactly as they described it in their diagram, a three blade propeller, so many inches in diameter, I think it is thirty inches, so Mr. Wilson came out there and he wired the boat and he did all these things. Then we took the boat out and he told me not to use it very much, and we didn't use it very much. We tried it up and down the creek for maybe a quarter of a mile. The next day my son took the boat out and then after he used it—

Q. Before Mr. Wilson went away was there any water which had to be bailed out of the boat? A. Not at that particular time, no sir, but the next day or the day after the gasket went bad and I again sent to the company and told them to bring out a new one and send a man out; I was not going to try to put in a gasket. So he came out and we tried it, then he—

The Court: Did he put in the gasket?

The Witness: Yes sir, he did.

The Court: Who was that, Mr. Wilson again?

James H. McCabe—For Plaintiff—Direct.

10 The Witness: Yes sir, the same man, Mr. Wilson. On that day the boat was leaking and we went down the creek and we had to bail water. Mr. Wilson did the bailing, and when we came back he said to me, "I am very sorry, but the engine is too big for the boat, and you cannot do anything with it." That was the conversation we had at that time about the engine. My son was present at that time.

20 Q. Now on this second occasion when Mr. Wilson had to bail water, were you in the boat? A. Yes, sir. He stated if I lowered the engine I think three quarters of an inch everything would be perfect.

Q. Now then on May 8, 1926, did you write to the company this letter? A. Yes, I remember this letter.

Mr. Castellano: Have you that letter, Mr. Rurode, May 8th, 1926?

Mr. Rurode: I have no objection to your using the carbon copy.

30 Mr. Castellano: I offer this carbon copy in evidence.

Mr. Rurode: I object as being immaterial in this case. I do not object to the copy as a copy.

The Court: Why do you object to that?

40 Mr. Rurode: Because it is simply a letter of complaint. This is a contract. The witness has testified that there was a written contract for the sale of this engine, and this is a letter complaining of how it worked in the boat. There is nothing in the con-

James H. McCabe—For Plaintiff—Direct.

tract guaranteeing this engine will do anything in that boat, or that it is suitable for the boat, or anything else. There is no connection between this letter and the contract.

The Court: For what purpose did you offer it? 10

Mr. Castellano: To show a demand for the return of the money because the engine was not fit for the boat.

The Court: It will be admitted for that purpose, and that purpose only. The jury will disregard the other matters complained of. The letter is admitted for the purpose of showing, if they can show it, that it was a rescission of the contract and a demand 20 for the money.

Marked Exhibit P-1.

(Letter read to the jury).

Mr. Rurode: I move that the court instruct the jury now to disregard that letter entirely because it says nothing about a rescission. It just complains about the manner in which the engine acted in the boat. 30

The Court: It does say something about getting the money back. My order will stand as already stated.

Mr. Rurode: Exception.

The Court: This engine which you bought was a Standard Marine engine, right hand—

The Witness: I don't understand about that.

The Court: Well, was it a Standard Marine engine? 40

James H. McCabe—For Plaintiff—Direct.

The Witness: Oh, yes.

The Court: Is that a patent or trade name of that engine?

The Witness: That is the name that they have.

10 The Court: Known by that name, I mean, that is a trade name?

Mr. Castellano: We do not know anything about that, your Honor. It is a Standard Engine.

The Witness: It is a Standard Marine engine. It is the smallest size, that is a 10-12.

20 Q. You do not know if they have any patent name for that, do you? A. No, I always heard it called the Standard engine, Standard Marine engine.

The Court: You knew it was made only by that company and under that name?

The Witness: I knew it was made only by that company.

The Court: And under that name?

30 The Witness: And under that name.

Q. On May 19th, did you send this letter to the Standard Motor Construction Company? A. Yes sir, I sent that letter.

Mr. Castellano: I offer this copy of the letter of May 19th.

40 Mr. Rurode: I object on the ground that it is immaterial. It is simply a letter complaining about Mr. Haymann coming there

James H. McCabe—For Plaintiff—Direct.

and failing to meet him, long after the contract was signed.

The Court: What is your purpose in offering it?

Mr. Castellano: It is following the offer to the company to have them take back the engine because it was unsuitable for the boat. 10

The Court: You do not object to the fact that this is a carbon copy?

Mr. Rurode: No.

The Court: I admit it for the same purpose as the previous exhibit and limit it to that effect.

Mr. Rurode: Exception. 20
Marked Exhibit P-2.

Q. After this letter of May 19, did you write these two letters of June 22nd and July 23rd, 1926, to this company? A. Yes sir, I wrote them, June 22nd and July 23rd.

Q. And you mailed these letters to the company? A. Yes, sir.

Mr. Castellano: I offer them. 30

The Court: Are they offered for the same purpose?

Mr. Castellano: Yes.

Mr. Rurode: Same objection.

The Court: These letters, June 22nd, and July 23rd, may be marked for the same purpose as the other two letters relative to the rescission of the contract?

Mr. Rurode: May I make a further objection now? The first letter was admitted 40

James H. McCabe—For Plaintiff—Direct.

for the purpose of showing that they attempted to rescind or did rescind. This is merely cumulative evidence of that attempt, and I object upon that ground also.

10 The Court: For that reason it is perfectly proper. You cannot have too much evidence.

Mr. Rurode: Exception.

Marked Exhibits P-3 and P-4.

Q. Did you ever get any answer to your letter of July 23rd from this company? A. No, sir.

20 Q. Now, on behalf of your wife what did you spend for freight and installation for this propeller which you mentioned, and which they suggested that you get? A. I have my returned vouchers here. I paid in April, 1926, a check to Mr. Charles Wentworth for freight and labor, the freight for the engine coming from Jersey City to Amityville, and labor putting it on the truck, nine dollars and ninety-one cents, freight four dollars and ninety-one cents; the labor was five dollars. The propeller cost \$45.18, then there was a Universal joint costing \$13, and there was a shaft, I believe, forty-five or forty-six dollars.

30

Q. How much did you pay the boatbuilder to install the engine? A. Mr. Yesworth got eighty dollars.

40 Q. Any other charges? A. There was a propeller shaft and a Universal that made a total of \$125, and Mr. Yesworth got eighty dollars for his labor, and \$9.91 for the freight and bringing the engine down to his place where he installed it.

James H. McCabe—For Plaintiff—Cross.

Q. How much is that altogether? A. Around two hundred and fourteen dollars.

Q. Two hundred and fourteen dollars and ninety-one cents? A. Yes.

Mr. Castellano: Cross examine. 10

Cross Examination by Mr. Rurode:

Q. You say you bought these things, you actually bought and paid for these things? A. Yes, my son bought them.

Q. I thought you said you bought them? A. I gave my check for it.

Q. You paid the money to your son? A. Yes. 20

Q. You gave the money to your son to buy these things? A. Yes, that is, he had to buy them at various places in Long Island, and he needed cash and I gave him a check which he then deposited, and in some cases he used his own check to pay for the individual articles, and in some places he paid cash.

Q. And these things are still in the boat, are they? A. Yes, sir.

Q. You have them? A. Yes. 30

Q. Now, you say when you hauled this boat out it was leaking? A. Yes, sir.

Q. And you hauled it out on the ways? A. No, on the ground.

Q. Why didn't you put it on the ways and put oakum in the seams; you could have done that?

A. You cannot put oakum in a lap-seamed boat.

Q. You cannot do anything with a lapped boat? 40

A. Not when it starts leaking, except to take off the sides and put on new ones, so I am informed.

James H. McCabe—For Plaintiff—Cross.

Q. Is this an old boat? A. I cannot give you the age, but perhaps my son could.

Q. You do not know anything about it? A. I do not know how old the boat is. I do not pretend to know.

10 Q. And who was the man installed the engine for you? A. Mr. Yesworth.

Q. Is he a carpenter? A. He is a boat builder and has a boatyard at Amityville.

Q. Was he the man you had in mind when you first spoke to Mr. Haymann about this boat as being a man who would install the motor for you? A. Yes, I considered he was the most competent man out there.

20 Q. And did he build an entirely new engine bed? A. So I understand.

Q. You do not know, do you? A. I do not really know. Mr. Yesworth will testify to that. I am not an expert in building. I know I asked him what he did for me and he told me, and I consider him a conscientious man and I am satisfied with what he did.

30 Q. Your only complaint is because as you say this engine is too heavy for the boat? A. Yes, sir; I believe I have been defrauded.

Q. The engine itself is all right? A. There is nothing the matter with the engine, but it is useless to me.

Q. It is just, as you say, unfit for the purpose for which you intended it? A. Unfit for use in that boat, where Mr. Haymann said it would be all right.

40 Q. Unfit for the use for which you intended it? A. It is not fit to propel that boat, that is my answer.

Charles Yesworth—For Plaintiff—Direct.

Q. You are a lawyer, are you? A. Yes, I am.

Mr. Rurode: That is all.

CHARLES YESWORTH, sworn.

10

Direct Examination by Mr. Castellano:

Q. What is your business or occupation? A. Boatbuilder.

Q. How long have you been a boatbuilder? A. Eighteen years.

Q. And during that period of time about how many engines have you installed in boats of different kinds? A. I could not exactly tell how many, but I have installed between thirty and fifty a year.

20

Q. And are you familiar with all sorts of boat engines? A. Yes.

Q. And did you install this particular engine which was purchased by Mrs. McCabe for her dory? A. Yes, sir.

Q. Before you installed it did you advise against installing it? A. I did.

30

Mr. Rurode: I object. What have we got to do with that?

The Court: Strike it out. What did you tell her?

The Witness: I told Mrs. McCabe that this motor was no motor for that boat. That it was too heavy. I told them it would shake the boat all to pieces, and that is what it has done.

40

Charles Yesworth—For Plaintiff—Direct.

Q. And when you told them that, did Mr. McCabe tell you to hold off for a while until he got in touch with the company? A. Yes, sir, to hold off for a while.

10 Q. And about how many days after that did you hear from Mr. McCabe again? A. Well, as nearly as I can recollect, four or five days, it might have been more.

Q. Did you find some markings in the boat as to where to place the engine? A. I did. I made him mark right where the flywheel was supposed to go, and I put it right to the mark.

20 Q. And how close is the flywheel to the floor on this dory now? A. The back end of the flywheel I should judge is one and one-half inches now, because it stands like on a slope, and the forward end of the flywheel is a little higher than the back end.

Q. Did you get that engine into the lowest possible place in that boat, did you have to cut away or raise the bed? A. I did. I had to even cut the cross timbers so that I could get the base of the motor down.

20 Q. In your judgment if this engine were lowered into the boat three-quarters of an inch will it propel this boat? A. No, sir, it will propel it but it is too heavy for the boat, and it would tear it to pieces. That would not make any difference.

The Court: That is all the trouble with the engine, it is too heavy?

The Witness: Yes, sir.

The Court: How about its power?

40

The Witness: Well, there is too much

Charles Yesworth—For Plaintiff—Direct.

power for the boat because the boat is only about 21 feet 6 inches, and about 5 feet 11 inches wide. She only has about 18 inches freeboard when the boat is sitting right.

The Court: Do you know anything about this engine in the trade? 10

The Witness: Why no, I don't know anything about the trade.

The Court: This description, "Standard Marine Engine, right hand," does that have a significance with reference to this particular kind of engine?

The Witness: Yes, sir.

Q. Well, is that taken from the name of the company, Standard Motor Construction Company? A. Why yes, I think it is. 20

The Court: Is that name known in the trade to designate that particular kind of an engine made by that company?

The Witness: Yes, sir.

Q. Is there any way in which you can set the flywheel lower so that you can use the engine in that boat? A. No, sir. 30

Q. Then in your opinion as a boatbuilder is that a suitable engine for this sized boat? A. No, sir.

Q. In what particular is it unsuitable? A. For one thing it is too heavy in the first place, and it is too powerful for another thing.

Q. And have you seen the boat or operated the boat after the installation of this engine, so as to tell the speed of the boat? A. I have, but I could not tell the speed. I didn't go out in the boat. 40

Charles Yesworth—For Plaintiff—Cross.

Q. Is it safe to ride in this boat, for a man like Mr. McCabe, or a woman like Mrs. McCabe? A. Why, it is not, no, not if there is any sea at all.

Q. What would happen in troubled waters? A. In very smooth water she will go, but you cannot open her up, if you do the water will boil right over her stern, that I know.

Q. And what does that do? A. That will sink the boat.

Q. Is there any tendency to turn over? A. It is top heavy, the motor sticks up over the side that high.

Mr. Castellano: That is all.

20 Cross Examination by Mr. Rurode:

Q. How high? A. That high above the ground.

Q. How many inches is that? A. I didn't measure it, but sticks up anywhere around fifteen or eighteen inches or more.

Q. Is that unusual to have a motor stick up fifteen or eighteen inches in a dory of this size? A. Yes, it is.

30 Q. You sell engines, too, do you not? A. Yes.

Q. You were trying to sell these people an engine for this boat, were you not? A. I was.

Q. I suppose you did not like when they bought somebody else's engine? A. No, that was not it at all. I would sell them a suitable engine for that boat.

40 Q. And you put this engine in according to your own ideas of how an engine should be put into a boat? A. I did not, I put it in according to the way they marked it out.

Charles Yesworth—For Plaintiff—Cross.

Q. Did you build a new engine bed? A. I did.

Q. You didn't use any part of the old engine bed? A. I used a part of it, the stringers, there was no use putting in another one when this was just as good as a new one.

Q. That was not according to the plan, was it? 10

A. He didn't say to take the old bed all out. I didn't have a plan.

Q. You were not shown any plan? A. No.

Q. Then you built the engine bed according to your own plan? A. I built it the same as I would build any other engine bed.

Q. And you did not build it according to any plan that was shown you? A. Why, there is only one way to build them, the way I build them. 20

Q. You built it according to your own idea, is that right? A. I put it up to his mark, that was all that was necessary.

Q. Did you change the line of the propeller shaft? A. I did not, it was not necessary.

Q. Weren't you told to sink it down lower? A. I could not because there is a bolt there as big as your finger.

Q. Didn't you tell Mr. Wilson the reason you did not drop it down lower was that it would have necessitated your cutting off a bolt or something of the kind? A. Yes, I would have to bore through the bolt. 30

Q. And that is why you did not drop the propeller shaft? A. There was no need of dropping it. I put a universal joint in there, and dropped my motor down.

Q. You have the boat up on your beach now? A. Yes. 40

Charles Yesworth—For Plaintiff—Cross.

Q. Has it been taken care of since it was pulled up? A. Yes, it has been covered up, the motor has been covered up.

Q. These leaks that developed could have been repaired? A. They could, I suppose; I didn't
10 look at them very closely.

Q. When a leak develops in a boat of this kind, you can seal up the leaks, can't you? A. You have to cut it out and put in a new piece of plank because they are lapped seams.

Q. Wherever it is necessary, you put a piece of new planking in? A. Yes, sir.

Q. And it was not done here, was it? A. No, sir.

Q. Does this boat run in shallow water? A.
20 She will not now.

Q. Did she run in shallow water? A. Yes.

Q. Is that all shallow water down there? A. Yes, all shallow water.

Q. And is that the reason that you have difficulty because of the shallow water? A. Not if you keep in the channel. It is all staked out. You have to keep in the channel with it.

Q. Did you see where the water came into this
30 boat? A. What do you mean, over the top of it or where it leaked?

Q. What do you call over the top? A. Over its stern when she was running, or when she was lying still?

Q. When she was running? A. I didn't go out in it, I only seen it when it went down the creek when he put the clutch in.

Q. You did not see where the water came in?
40 A. No.

Q. Did you put a new propeller on this boat? A. I did.

Dudley McCabe—For Plaintiff—Direct.

Q. How large was that propeller? A. 24 by 30, three blade weedless.

Q. Was that larger than the old propeller? A. That is the propeller that was selected for this motor.

Q. Was that larger than the old propeller? A. 10
Yes, sir.

Mr. Rurode: That is all.

Re-direct Examination by Mr. Castellano:

Q. Would it make any difference if you put in another propeller? A. What is that?

Q. You say you put in a propeller which was larger than the old propeller. Would it make any difference? Could the boat use the old one? A. 20
It would not make any difference.

Q. Well, this propeller was the proper propeller for this particular engine, is that right? A. Yes, sir.

Q. And there is no way that that engine could be used in this boat in your opinion? A. No, sir.

30

DUDLEY McCABE, sworn.

Direct Examination by Mr. Castellano:

Q. You are the son of the plaintiff in this action? A. Yes, sir.

Q. And you live where? A. Massapequa, Long Island.

Q. Were you present before your mother signed this paper regarding this engine and paid for the 40

Dudley McCabe—For Plaintiff—Direct.

engine, then Mr. Haymann came to Long Island to measure the boat? A. Yes, sir.

Q. And did you see Mr. Haymann measure the boat? A. Yes, sir.

10 Q. What part of the boat did he measure? A. He measured every possible part of the boat where he thought the motor should be. He measured the length, the width, the freeboard, and he marked with his pencil exactly where the front end of the flywheel should come. We had a stick which fits in the center of the boat and which acted as a steering wheel. We had to take this out so that the flywheel could set where the mark was.

20 Q. Did you hear Mr. Haymann say whether or not this engine would be suitable for this boat? A. Yes.

30 Q. What did he say about it? A. He said that the engine was absolutely suitable for the boat, and I told him I didn't think it was suitable, and he said yes. But afterwards he said, "If it is not suitable why just say so and we will buy a boat that will be suitable for it." He said, "There is absolutely no need of worrying, that engine will make a perfect little runabout out of the boat." I said, "Well, I guess you know better than I do about it."

Q. What did he say about the weight of the engine as affecting its suitability? A. He said it would be perfectly all right, that the boat would not draw any more water and that it would run along nice and smooth.

40 Q. Did he say anything about how many knots the boat would make? A. He said something like ten or twelve miles an hour.

Dudley McCabe—For Plaintiff—Direct.

Q. You are more familiar with motor boats than either your father or mother, are you? A. I think so.

Q. You live right there on Long Island? A. Yes, sir.

Q. And you have been going about the Bay with motorboats for years? A. Yes, sir. 10

Q. Were you present when the engine was installed in the boat by the builder? A. Yes, sir.

Q. And it was installed there according to the marks made by Mr. Haymann? A. Yes, sir, absolutely to the dot.

Q. And were you in the boat at various times? Did you try it out to see how it was? A. Yes, sir, I was in it every time it was tried out. 20

Q. Were you present when Mr. Wilson went out there from the Standard Motor Company? A. Yes, sir.

Q. How many notches on the quadrant could you open the throttle? A. I should say about four notches. As I remember, around one or two notches it went at a very slow speed. The slower you ran the motor the better it ran along. As soon as you opened the throttle the speed would not make much difference, but the terrible suction of this big propeller drew the stern down and the bow came out, and if you opened it all the way the water would boil over the stern of the boat and it was merely a waste of gasoline to open the throttle. 30

The Court: As I understand from your testimony there was nothing wrong with this engine excepting that it was too heavy and too powerful? 40

Dudley McCabe—For Plaintiff—Direct.

The Witness: Absolutely nothing wrong, it runs perfectly.

Q. And would the water wash over the stern if you opened the throttle? A. Yes, absolutely.
 10 The propeller would create such a suction that it would draw the stern down and the water would boil up over it. The only time we started out was in perfectly smooth water, and if we had a little stormy weather it would be but a short time until the boat was swamped.

Q. On one of these occasions when Mr. Wilson came out and inspected the engine and wired it, do you remember how far he went before he started bailing water out of the boat? A. I know
 20 we went down to the mouth of the creek, about a quarter of a mile. The water starts getting deeper there. Its average depth is around three or four feet except in the channels, and we were not in the channel, and when we reached the deeper water we opened the throttle and the water boiled over the stern and Mr. Wilson started to bail it out. The vibration from the engine also opened a
 30 seam.

Q. And what happened as the result of that?
 A. A leak.

The Court: I assume from what you say that this engine was powerful enough?

The Witness: Yes, sir.

The Court: And the complaint is not that it was not powerful enough or that it consumed too much gasoline, but because it
 40 was too heavy for the boat?

The Witness: That is it.

Dudley McCabe—For Plaintiff—Direct.

Q. Were some pictures taken of the boat and the engine, when the engine was installed in the boat? A. Yes, sir. This is one picture of it. This picture perhaps shows it best.

Q. How much of the engine protrudes above the gunwales of the boat, about? A. I should say about eighteen inches. 10

Q. How would that affect the boat? A. Make it top-heavy in the first place, and liable to turn over.

The Court: This engine, put in a boat and properly supported would be all right, is that it?

The Witness: Yes, sir. 20

Q. That was all that was the matter with it? A. Yes, sir, the engine would be perfectly all right in a suitable boat.

The Court: It had the horse power and everything else that was required?

The Witness: Yes, sir, absolutely.

Q. Now, did you try this engine and the boat in deep water? A. Yes, sir. 30

Q. And did it act any differently in deep water than it did in the shallow water? A. Yes. The more the throttle was open the more the boat would be drawn down in the rear.

Q. Is the boat usable with this engine? A. Only at slow speed. I would not care to operate it if conditions were not just right.

Q. You consider it actually dangerous for use? A. I do. 40

Mr. Castellano: That is all.

Dudley McCabe—For Plaintiff—Cross.

Cross Examination by Mr. Rurode:

Q. You knew the dimensions of this engine before it was purchased? A. I saw a picture of the engine, but I didn't have any idea as to its
10 dimensions.

Q. Didn't the picture show the dimensions of the engine? A. Yes, it did.

Q. It did give you the dimensions? A. Yes.

Q. Of course, you told your mother what the dimensions were? A. I told Mr. Haymann that the engine it seemed to me from the dimensions was entirely too big for the boat, and he said absolutely not.

Q. Did you know from those dimensions that it would be about ten or twelve inches above the gunwales? A. Yes, I knew that.
20

Q. What is the beam of this boat? A. Five feet eleven inches beam.

Q. What water did it draw? A. It drew twenty inches of water with the old wheel on it, and the old wheel was an 18 by 18, two blade, weedless. We put on a wheel 24 inches diameter, and I think 30 inch pitch.

Q. Who furnished that wheel? A. The Columbia Bronze Corporation. The Standard Motor Company recommended the use of a wheel 24 by 30.
30

The Court: Did you examine this engine carefully when it came?

The Witness: Yes, sir.

The Court: Did it have the name, "Standard Marine Engine" on it?

The Witness: Well, you see, we know that engine.
40

Dudley McCabe—For Plaintiff—Re-direct.

The Court: Did it have that on it?

The Witness: Yes, sir. It is the Standard engine.

The Court: Designating that it was made by that particular company?

The Witness: Yes, sir. It has a name-plate on the side of the cylinders. 10

The Court: You say that had a plate on it?

The Witness: Yes, sir.

The Court: And other engines you know of have plates on them?

The Witness: Yes, sir.

The Court: And they are used to designate the particular make or kind of engine? 20

The Witness: Yes, sir.

The Court: And they are known in the trade by that particular name plate, is that right?

The Witness: Yes, sir.

The Court: And is that the case with this engine?

The Witness: Yes, sir.

The Court: It has a trade name given to this particular kind of engine by this particular defendant company? 30

The Witness: Yes, sir.

Re-direct Examination by Mr. Castellano:

Q. What did it say on this plate? A. Why, I do not remember exactly. It says, "Standard Marine Engine, 10-12 horsepower." I am not sure whether it gave the R. P. M. or not, but I don't think it did. I never looked at it very carefully 40

Dudley McCabe—For Plaintiff—Re-direct.

because there is no need for it. The only time you look at the name plate on a motor would be if you wanted to order a spare part.

Q. Do you know if this was a trade name or not? A. No, that was a Standard engine. That is all mentioned there fully.

Q. Just as you know that the oil you buy is Standard oil? A. Yes, sir, if it says so on the can. That is all I know.

The Court: That is what I want to know. Is that the trade name for that particular type and kind of engine?

The Witness: Yes, sir.

Q. Do you know whether or not this particular engine has a trade name? A. I don't know whether it has a trade name, we all know it by—

The Court: Then why do you say it?

The Witness: Perhaps you confuse me.

The Court: Well, name some of the other kinds of engines you know of.

The Witness: There is the Palmer, the Redwing, the Packard.

The Court: Now, each of those designates an engine of a particular type, manufactured, patented and put out by those companies, is that so?

The Witness: Yes, sir.

The Court: And this Standard does the same thing for this engine, is that what you mean?

The Witness: Now wait a minute. For instance the Redwing put out an engine and they call it the "Redwing Thorough-

Charles Yesworth—For Pltff.—Recalled, direct.

bred.” That is what I have in my boat. Now, there is another Redwing engine with another name like that. The Standard engines, as I understand it, are all standard engines, whether it is 10-horsepower or 100-horsepower. It has no particular name for that engine. 10

The Court: But it designates an engine made under this trade name by this company. That is what I want to find out. You do not get those from any other company, or in any other make of engine? Are there any other engines made, known as Standard? A. Oh, no, no, not that I know of. 20

The Court: All right.

Q. How many standard engines do you know of? A. Four or five.

Q. And they are not manufactured by different companies, are they? A. All I know is that the so-called Standard engines look exactly alike.

Q. Do you know whether there is any trade name on this particular engine that your mother bought? A. I don't know just outside of “Standard, 10-12, 2-Cylinder, 4-cycle engine.” That is all I know. 30

CHARLES YESWORTH, recalled.

Direct Examination by Mr. Castellano:

Q. Do you remember this engine which you installed in Mrs. McCabe's boat? A. I do. 40

Charles Yesworth—For Pltff.—Recalled, direct.

Q. Is there any standard name for this engine, or any trade name for it? A. Only "Standard Marine Motor," that is all I know.

10 The Court: That is what it is known in the trade as?

The Witness: Yes.

The Court: And if you ask for that kind of an engine you would expect to get an engine from this company?

The Witness: From this company, yes.

The Court: And that is what it indicates to you, that it was manufactured by the Standard Company?

20 The Witness: Yes, sir.

Q. There is no patent name for it, so far as you know? A. No.

Q. Any trade name excepting the fact that the Standard Motor Company makes this engine? A. Yes.

The Court: Well, that is the trade name.

30 Q. Well, do you know of any trade name for it? A. Nothing but the Standard Motor Company.

The Court: And that is its trade name. That is what it is known as in the trade, is that right?

The Witness: That is right.

40 The Court: That particular kind of an engine is known by this particular name, isn't it?

The Witness: Yes, sir.

Charles Yesworth—For Pltff.—Recalled, direct.

The Court: And if you got one from another company it would be of a different type and different construction and made under different patents?

The Witness: Yes, sir.

The Court: That is what you mean when you say a trade name? 10

The Witness: Yes, sir.

The Court: Is there any such thing as a Standard model engine in the trade manufactured by other companies?

The Witness: Why, I don't think so. There was a Stanley, but I think they are out of business.

Q. And so far as you know the Standard Marine Engine covers more than this particular engine, doesn't it? A. Yes. 20

Q. It is an engine manufactured by this particular defendant? A. Manufactured by the Standard Company, yes.

Mr. Castellano: That is all.

Mr. Rurode: Counsel in opening up said there was a written contract in this case. He has not offered it in evidence, therefore he has not proved what he set out to prove by his opening. I am entitled to have him prove what he said in his opening, and what he sets out by his pleadings. 30

The Court: There has been some sort of a paper marked here, so I will deny your motion at this time.

Mr. Rurode: I move for a nonsuit now on the ground that it appears by the tes- 40

Eugene Riotte—For Defendant—Direct.

timony that there was a written contract which covers this subject matter, and that that is the gravamen of the action set out by counsel, and for that reason his case is not proved.

10 The Court: I think you are right about that, but under the discretion granted me I am going to hear your side of the case.

Defendant's testimony.

EUGENE RIOTTE, sworn.

20 Direct Examination by Mr. Rurode:

Q. You are president of the Standard Motor Construction Company? A. Yes, sir.

Q. That is a corporation of New Jersey? A. Yes, sir.

Q. And your place of business is where? A. 180 Whiton Street, Jersey City.

Q. Do you know Harry J. Haymann? A. Yes.

30 Q. Is he the salesman that has been mentioned here? A. Yes, sir.

Q. You know that, do you not? A. Yes, sir.

Q. Is he employed by your company now? A. No.

Q. How long has he been away from your company? A. About four or five months.

Q. Do you know where he lives? A. Yes.

Q. Where? A. Jersey City.

40 Q. Have you endeavored to get him here by subpoena? A. Yes, sir.

Eugene Riotte—For Defendant—Direct.

- Q. You have not succeeded? A. No.
- Q. How long did Mr. Haymann work for you?
A. Two years and six months.
- Q. What was his position? A. Salesman.
- Q. Was he a mechanical man, too? A. No.
- Q. Just a salesman? A. Yes. 10
- Q. What were his duties while he was with you as a salesman? A. To call on the different buyers and show them the catalogue, and go over the different items and bring in their proposals for our acceptance.
- Q. Do you manufacture an engine called the "Standard"? A. Yes.
- Q. Does anybody else manufacture that same kind of an engine? A. No. 20
- Q. Did you have any communication at any time from a Mrs. McCabe with reference to the purchase of an engine? A. Yes.
- Q. You remember that? A. Yes.
- Q. And in pursuance of that communication—by the way, was that communication in writing, or in what way? A. I think it was a telephone call, if I remember correctly.
- Q. And in pursuance of that what did you do?
A. Sent Mr. Haymann over to call on them with a description of the engines and pictures, and to give them any information they desired. 30
- Q. As to what? A. As to the different sized engines we made.
- Q. And prices? A. Prices. ,
- Q. Did your company simply manufacture engines and sell them? A. Manufactured engines and sold them.
- Q. Were you boat builders? A. No. 40

Eugene Riotte—For Defendant—Direct.

Q. Did you install engines, too? A. We do no
woodwork whatever at any time. Sometimes we
furnish mechanics to just pipe up an engine or
wire it for the electrical work.

10 Q. The installation of an engine is the duty of
what kind of a mechanic? A. That has to be
done by a boat builder, and the piping by a
machinist or a mechanic.

Q. Now, after you sent Mr. Haymann to see
Mrs. McCabe what next did you hear of this trans-
action? A. Why, the next I heard was,—pro-
posals were brought in, in duplicate to me, signed
by Mrs. McCabe, and offered to me for my accept-
20 over very carefully, signed them, accepted them,
and mailed to her a copy of the contract.

Q. A duplicate copy, was that? A. Yes.

Q. And mailed it to Mrs. McCabe? A. Yes.

Q. And then after that did she pay for the en-
30 gine? A. The money was brought along with the
proposal at the time for my acceptance.

Q. With this proposal, as you call it? A. Yes.

Q. Was that the only contract between the
30 parties, with reference to this engine?

Mr. Castellano: I object to Mr. Rurode
calling it a contract. We do not call it a
contract.

The Court: Why don't you offer it in
evidence?

Q. I show you a paper and ask you if that is
the paper you refer to? A. Yes.

40 Q. Is that the only contract you had with Mrs.
McCabe?

Eugene Riotte—For Defendant—Direct.

Mr. Castellano: I object to calling it a contract.

The Court: Is that the only writing you had?

The Witness: This is the written proposal made to her and accepted by ourselves. 10

The Court: Let it be marked as an exhibit.

Marked Exhibit D-1 in evidence.

Q. Did Mr. Haymann make any representations to you as to what he had told Mrs. McCabe with reference to what the engine would do in any particular boat when this contract was signed? 20

A. None.

Q. Did he have any authority as agent to make—

Mr. Castellano: I object.

The Court: What authority did you give him? What was the extent of Mr. Haymann's authority as agent or servant—What did you send him out to do?

The Witness: To give a description of the engine, and quote the prices, and make such necessary drawing of the proposal and bring it in for our signature. 30

The Court: Anything else?

The Witness: Nothing.

Q. Was Mr. Haymann authorized to represent to anybody what this particular engine would do in any boat? 40

Mr. Castellano: I object.

Eugene Riotte—For Defendant—Direct.

The Court: Overrule the objection.

Mr. Castellano: Exception.

10 A. No. He was not at any time empowered to make any statements as to the speed of the boat or the type of the boat or anything of that kind.

Q. Did the catalogs give the dimensions of those particular engines? A. Yes.

Q. After this contract was made and the engine paid for and delivered were you to do anything else? A. Nothing.

Q. That ended the contract?

Mr. Castellano: I object.

20

The Court: Sustain the objection.

Q. Did you have any communication after that from Mr. McCabe, representing his wife? A. Yes.

Q. Did you in pursuance of that do any work for him? A. We sent a man down to complete the wiring of the engine, and a few little pieces of work that they had not finished in the piping and wiring.

30 Q. Did you send him a bill for that? A. Yes, sir.

Q. I show you two invoices, and ask you if those are the invoices you sent him, or copies of them?

A. The first invoice is for the man sent down to start up the engine, and the second invoice is for the man who went down later to put in a new cylinder head gasket.

40

The Court: Was that part of your agreement?

Eugene Riotte—For Defendant—Cross.

The Witness: No.

The Court: Were you to be paid for this?

The Witness: The contract only supplied the engine. It was not in our contract to install or to do any work. 10

Mr. Rurode: I offer these in evidence.

Mr. Castellano: No objection.

Marked Exhibit D-2.

Q. Who did you send down to put this gasket and the wiring in? A. Mr. Wilson.

Q. Is he here in court? A. He is.

Mr. Rurode: That is all. 20

Cross Examination by Mr. Castellano:

Q. You said before that you sent Mr. Haymann to see Mrs. McCabe after you received her telephone call? A. Yes.

Q. Do you remember when he went there to see her? A. Yes.

Q. Did you see him either the same day or the following day? A. I don't know just how soon after. 30

Q. But he reported back to you after he called on Mr. and Mrs. McCabe, didn't he, before this proposal was signed? A. No.

Q. Did he tell you when he came back that Mrs. McCabe knew the engine, wanted your engine, but she was afraid it might be too heavy for her boat? A. He didn't make any such report at any time.

Q. You are sure about that? A. Yes. 40

Eugene Riotte—For Defendant—Cross.

Q. Did you see him during the two weeks that went by between the time that the proposal and the money came in, and the time he went over to Brooklyn to see Mrs. McCabe? A. Yes.

Q. And you saw him every day? A. Yes.

10 Q. Did you send him out to Massapequa to measure this boat of Mrs. McCabe's? A. No.

Q. Do you know that he went there? A. He told me so later.

Q. Did you know that before you received Mrs. McCabe's money, and her accepted proposal? A. No.

Q. Sure about that? A. Yes.

20 Q. Now, you received this letter of Mr. McCabe's, the very first letter that was introduced in evidence, did you not? A. Yes.

Q. And do you remember reading that letter? A. Yes.

Q. And it came in in the ordinary course of mail? A. Yes.

30 Q. And in that letter, when Mr. McCabe pointed out to you that on the very first call of your Mr. Haymann that the point came up as to whether or not this engine was not too heavy for his boat, and that Mr. Haymann came over to measure the boat, and he actually did measure it, then the boat builder raised the objection that it was too heavy, and in spite of the boat builder's opinion he took your opinion and installed the engine—you did not answer that letter, did you?

40 Mr. Rurode: I object, immaterial. The testimony here is now that there was a written contract signed, executed and completed, and the engine delivered. A letter

Eugene Riotte—For Defendant—Cross.

written, and which is a self-serving declaration—what difference does it make?

The Court: What is the purport of your question?

Mr. Castellano: It goes to the credibility of the witness. This witness says that Mr. Haymann did not return and give him a report that Mrs. McCabe said, "I know the engine is a perfectly good engine, but I am afraid it may be too heavy and not suitable for my boat." 10

The Court: The question is pretty well involved.

Mr. Castellano: I will withdraw the question. 20

Q. When you received this letter of May 8th, of Mr. McCabe's, where he points out the representations made by Mr. Haymann and the fact that he measured the boat out in Long Island, you did not reply to any of those statements therein, did you? A. No.

Mr. Rurode: I object.

The Court: Objection overruled. 30

Q. Did you at any time before today communicate to Mr. McCabe or Mrs. McCabe that Mr. Haymann had no authority to go out and measure this boat, or to make any representations regarding the fitness of this engine?

Mr. Rurode: I object as immaterial.

The Court: It has not been shown that he knows it was done. 40

Eugene Riotte—For Defendant—Cross.

Q. Did you know he had done those things? A. Not until after I had received this correspondence. After the contract was signed.

10 The Court: After that time did you object to it?

The Witness: I didn't tell them anything at all.

Q. Now, Mr. Hayman was in court here, was he not, last week, for about four or five days? A. Yes.

20 Q. Do you remember Friday, about ten days ago when this case was about to be reached, the very next case, when Mr. Haymann and the other witnesses were allowed to depart from the court room—you remember that, don't you? A. Yes, sir.

Q. And you didn't think of giving him a subpoena then, did you? A. I left that entirely with my attorney.

30 Q. And this issue was put over last week because Mr. Haymann went out to Cleveland? A. He told our attorney that morning that he would come.

Q. And last Monday the case was put over to this Monday because Mr. Haymann went away? A. Yes.

Q. And since then he has been back? A. Yes.

Q. Did you personally try to subpoena him? A. I did.

40 Q. Personally? A. Not personally to subpoena him. I tried to get him to come. I called up on the 'phone at his place of business in New York.

Eugene Riotte—For Defendant—Cross.

Q. You do not know whether or not a subpoena was sent out after him? A. A subpoena was sent out from Mr. Rurode's office.

The Court: With reference to these bills for labor on wiring the engine, are these reasonable charges? 10

The Witness: Yes, they are reasonable.

The Court: Now, with reference to the cylinder head gasket, what was the matter with that?

The Witness: I do not know at this time. Mr. Wilson can testify to that.

The Court: You were obliged to furnish anything of that character that was defective, weren't you? 20

The Witness: The contract says that we are to furnish f.o.b. the factory, any parts acknowledged to be defective, not to send mechanics out to put in any new materials.

The Court: You have charged here \$2.70 for the gasket?

The Witness: I do not understand it to be defective. 30

The Court: Well, if it was defective you were obliged to supply a new one?

The Witness: Yes.

The Court: And you do not know why this was put in?

The Witness: Mr. Wilson can testify to that.

The Court: And there is one 8-inch brass closed nipple? 40

Eugene Riotte—For Defendant—Cross.

The Witness: That was to complete the installation.

The Court: Anything to do with a defect in the engine?

The Witness: No, sir.

10 The Court: Now, what you agreed to sell, according to Exhibit D-1, was a Standard Marine Engine, right hand. Now, had that any significance in the trade?

The Witness: Yes.

The Court: What was it?

20 Mr. Castellano: I object to it if the court please, as not binding upon this plaintiff, as he knows nothing about any trade name. He didn't order by any trade name, he ordered an engine for the boat.

The Court: I overrule the objection.

The Court: You are president of this company, are you not?

The Witness: Yes.

The Court: And when you sell these engines with the word "Standard" on them, has that any significance in the trade?

30 The Witness: Yes. We are known as the builders of the Standard engine.

The Court: Is that a trade name for that particular type of engine?

The Witness: Yes.

The Court: Is that a patented engine?

The Witness: It is a patented engine, yes.

40 The Court: And when the word "Standard Marine Engine" appear on an engine of that type does it or does it not designate a particular type and character of en-

Eugene Riotte—For Defendant—Cross.

gine made by you and known in the trade by that name?

The Witness: Yes, sir.

By Mr. Castellano:

Q. Does it indicate anything more to the trade or to anybody else of the general public than that it is an engine manufactured by the Standard Motor Construction Company? A. It only indicates to the trade that it is of the type made under the patent by the Standard Motor Construction Company.

10

Q. And you make how many engines altogether? A. We have put out some eighty-five hundred engines over a period of thirty years.

20

The Court: All patented under that name?

The Witness: Yes, sir.

Q. And they are all called Standard engines? A. Yes, sir.

Q. And they are all called Standard engines because your company manufactures them? A. Yes, sir.

30

Q. Now, that trade mark or trade name has never been filed anywhere, so far as you know, has it? A. We have never registered it or had a registered trade mark for it, but it is the only engine built under that name, the only marine engine.

Q. And it is built under that name because it is the Standard Motor Construction Company that builds them? A. Yes.

Q. And that is the only type engine you build? A. Yes.

40

Edwin R. Wilson—For Defendant—Direct.

EDWIN R. WILSON, sworn.

Direct Examination by Mr. Rurode:

10 Q. You are employed by the Standard Motor Construction Company? A. Yes, sir.

Q. What is your business down there? A. Why, I am outside man, repair man, service man.

Q. You are not a salesman? A. No, sir.

Q. How long have you been with them? A. Thirty-two or thirty-three years.

Q. Did you ever go to see this boat of Mrs. McCabe's down at Massapequa? A. Yes, sir.

20 Q. Do you remember when you went there? A. I went on May 4th, May 7th and June 4th, 1926, and I was down there again on October 10th, 1927.

Q. The first time you went down there, what did you go down there for? What did you do?
A. I wired up the engine and made a test run of it.

Q. Was the engine installed in the boat at that time? A. Yes I linked up the wiring.

Q. Did you look at the engine bed? A. Yes.

30 Q. Was it a new engine bed? A. Not completely new, no, sir.

Q. Could that engine have been lowered in the boat further than it was? A. I believe it could, yes, if brought up further ahead.

Q. You mean if it were brought up further toward the bow of the boat? A. Yes, sir.

Q. More amidships, is that right? A. Yes.

Q. Did you go there again after that visit?
A. Yes, I went down to put in a new gasket.

40 The Court: Why did you do that?

Edwin R. Wilson—For Defendant—Direct.

The Witness: Why, Mr. McCabe's son claimed it was leaking, and I put in a new one to make him feel as if everything was all right.

Q. Did you see the gasket? A. Yes. 10

Q. What was the matter with it? A. Just a little oil leaking out through the two parts between the copper.

Q. What is a gasket? A. It is a piece of asbestos with copper covering on both sides, linked together.

The Court: Did you consider it defective at that time?

The Witness: No.

The Court: Then why did you put in a new one? 20

The Witness: To make him feel as though everything would be all right. He wanted a new gasket and I took one down and put it in.

Q. Did the engine run all right? A. Yes, sir.

Q. Did you go out in it? A. Yes, sir.

The Court: What about this one-eighth inch brass closed nipple? 30

The Witness: That was to complete the gasoline connection.

The Court: Was that part of the engine that was furnished?

The Witness: No, sir, we do not furnish that.

Q. You say you went down to the boat? A. 40
Yes, sir.

Edwin R. Wilson—For Defendant—Direct.

Q. And when did you see the boat again? A. After putting the gasket in?

Q. Yes. A. Well, that was in October of this year, October 5th.

10 Q. Why did you go to see it then? A. I went down to see what condition it was in.

Q. That was after this suit was started, is that right? A. Yes, sir.

Q. Did the boat leak while you were there and out in it? A. Yes, sir.

Q. Do you know what caused that? A. Well, some of the leaking came over from my running it opened up, and some of it was coming in through the rudder post.

20 Q. Did you tell Mr. McCabe at that time that the engine was set too high in the boat? A. I do not remember.

Q. How much could it have been lowered in the boat? A. About three inches.

Q. And did you talk to Mr. McCabe about the propeller shaft, lowering the propeller shaft? A. I thought if he changed the angle of the propeller shaft he could lower the engine.

Q. You told Mr. McCabe that? A. Yes, sir.

30 Q. What did he say? A. I believe the boat builder said he could not change it on account of a bolt being in the way, he would have to cut it away.

The Court: Was this engine suitable for the boat for which it was intended?

The Witness: Well, I would not say it was suitable for that boat, but I have put in the same sized engine in the same type of boat, the same length and beam of boat, with perfect satisfaction.

40

Mr. Rurode: That is all.

Edwin R. Wilson—For Defendant—Cross.

Cross Examination by Mr. Castellano:

Q. Did you say to Mr. McCabe, when you had to pump water the second time you went out there, that the engine was absolutely unfit for that boat?

A. No, I don't remember saying anything like that, unfit. 10

Q. Did you say to the boat builder last month when you went out to look at the engine, that in your estimation this engine was absolutely unfit for the boat? A. Unfit for the boat in the condition it is in now.

Q. Didn't you say it was no engine for this boat at all, or words to that effect? A. I do not remember saying anything like that, no, sir. 20

Q. Now, it is true that you had to pump water before you went out a half-mile on the day you went out to try the boat? A. Yes, sir.

Q. And some of that water came in through the crevices or the leaks caused by the power of this engine, isn't that true? A. Well, this leakage may have been there long before this engine was put in. I cannot say that. In the short run we ran the engine there would not be time for it to leak that bad. 30

Q. Anyway, it did leak, didn't it? A. It was leaking, yes.

Q. And when you opened the engine, even to one-quarter of its power, the water washed over the stern of the boat, did it not? A. Yes.

Mr. Castellano: That is all.

Edwin R. Wilson—For Defendant—Re-direct.

Re-direct Examination by Mr. Rurode:

Q. When you saw the boat the last time, the boat and the engine, where was it lying, on the beach? A. Part of it submerged in the creek.

10 Q. Was it covered over? A. It was covered over with a piece of canvas, and I believe a beer box laid over the top.

Q. Did you look at the engine? A. Only from the outside of the boat, that is all.

Q. Did you see its condition? A. Very poor condition, bad.

Q. Did the weather get at it? A. Yes, it was exposed to the weather.

20 Q. Just left outdoors, lying on the beach? A. Yes, sir.

Mr. Rurode: That is all.

Mr. Rurode: I would like to be sworn.

THEODORE RURODE sworn.

30 Mr. Rurode: Mr. Haymann, the witness who was here last week, was here four or five days under subpoena. The last day he was here was on Friday morning. He got away that morning and went over to New York and didn't telephone me again until late that afternoon. I didn't get a chance to subpoena him. Then he said he had to go to Cleveland, and I was not able to subpoena him, though I endeavored at that time to subpoena him. He then went away, and as soon as I thought he would be back

40

Charles Yesworth—For Pltff.—Recalled, direct.

I sent a process server out, who has been watching for him. We made every effort we could to get him here, but have not succeeded.

10

REBUTTAL.

CHARLES YESWORTH, recalled.

Direct Examination by Mr. Castellano:

Q. Mr. Yesworth, did you see Mr. Wilson when he came out to take a look at the engine? A. I did.

Q. By the way, was the engine covered against the weather? A. Yes, sir. 20

Q. Effectively covered, so that the rain could not get at it? A. Yes, sir; covered all over with canvas.

Q. Did Mr. Wilson make any statement to you about the fitness of this engine last month? A. He didn't say anything to me about the condition of the motor, the only one thing he said when we were talking about it was, "I was sent down here by the company to look at this motor." I said, "What do you think of it?" He said, "Well, between you and me this motor is not fit for this boat." 30

Mr. Castellano: That is all.

We rest.

Mr. Rurode: Mr. Wilson has already denied that. 40

Nonsuit.

The Court: Yes.

The Court: Do you base your claim upon an express warranty as to the fitness of this engine for this particular boat, and a breach of that warranty?

10 Mr. Castellano: I don't think it is expressed. It seems to me it is an implied warranty.

The Court: You are basing your claim upon an express warranty in your complaint.

20 Mr. Castellano: It is true enough it was expressed, but when they make such assertion or representation the statute says it is implied, that is, their representations as to fitness.

(Argued.)

The Court: I am going to grant this motion for a nonsuit for these reasons:

30 "In the first place, as I read the complaint it is based upon the breach of an express and not an implied contract. If that is not so, however, and conceding that it be still held to encompass an implied contract as to the suitability of this engine for the boat in question, nevertheless there are two unsurmountable obstacles to allowing the case to go to the jury upon that theory. First, it appears conclusively from the testimony, that the sale in
40 this case was the sale of a specified article under a patent, or if not a patent, then certainly under a trade name, and that therefore

Nonsuit.

there would be no implied warranty arising out of the sale in question, but even if that is not so, still we are confronted with the plain provisions of the contract itself, which in part read as follows:

“The foregoing proposal is subject to the approval of an executive officer of the Standard Motor Construction Co., and shall not be binding upon it until so approved, all previous communications between the parties hereto, whether verbal or written, with reference to the subject matter of this proposal, are hereby abrogated, and this proposal, duly accepted and approved, constitutes the sole agreement between the parties hereto as to the subject matter hereof, and no modification of this agreement shall be binding upon the parties hereto, or upon either of them, unless such modification shall be in writing, duly accepted by the purchaser and approved by an executive officer of the company.”

I construe that much to mean, when they say,

“ ‘And this proposal, duly accepted and approved, constitutes the sole agreement between the parties hereto,’ that it is not even an implied warranty, to say nothing of an express warranty, and for that reason the motion would have to be granted.”

Do you wish to sum up on the counterclaim?

Mr. Castellano: I don't think there is any question on the counterclaim.

Mr. Rurode: It is a small amount, forty odd dollars. I think we won't trouble the jury with it. I will withdraw it.

Exhibit P-1.

The Court: All right. The motion for nonsuit is granted.

Mr. Castellano: Exception. Is this nonsuit then without prejudice to an action being brought for fraud?

10 The Court: Yes.

Exhibit P-1.

May 8, 1926.

Standard Motor Construction Co.,
172 Whiton Street,
Jersey City, New Jersey.

Gentlemen:

20 Mrs. McCabe telephoned your office in April, 1926, and asked the price of your motors and she was informed that one of your representatives would call at her home, 136 Henry Street, Brooklyn, N. Y.

30 Your Mr. Haymond called and was told that the boat was a lap streak dory about 23 feet over all. When he stated the weight of your 10-12 two cylinder engine the question arose whether it was too large for the boat. Mr. Haymond agreed to accompany me to Massapequa, L. I., and measured the length and beam of the boat, directed where to locate the engine bed and assured me that the engine was not too heavy and it would give complete satisfaction, if the engine was installed as he directed.

40 The engine was purchased on a cash basis and when it reached Amityville, the boat builder refused to install it because it was too heavy. too powerful, would sit too high above the gunwales and in rough water turn over.

Exhibit P-1.

I telephoned Mr. Haymond and asked him to call at my home, which he did. I minutely described the statement of the boat builder and Mr. Haymond informed me he was employed by you for the past twenty years, was experienced in judging what Standard engine a boat could carry and guaranteed that the boat was amply large and would make about ten knots an hour. He said the boat builder was prejudiced and if I installed the engine, it would give full satisfaction. 10

Following your representative's advice—against the advice of the boat builder—the engine was installed. The cylinders protrude at least two feet above the gunwales, the propeller three inches below the bottom of the keel and when the motor is running only one notch on the throttle can be opened, and if another notch is opened the water washes over the stern. 20

Vibration has caused the seams to leak and on Friday, May 7th, 1926, your mechanic, Mr. Wilson, was running the motor and before the boat went one mile Mr. Wilson had to pump the water from the boat.

The boat leaks so badly that it must be beached overnight for fear of sinking. 30

I spent about one hundred and fifty dollars, (\$150.), for freight, cartage, propeller, universal joint and installation.

I had a boat without an engine when I purchased your motor—now I have an engine without a boat.

The boat and engine is beached at Amityville, L. I.

In all justice to me, it is incumbent upon you to take back the engine and refund me my money. 40

Very truly yours,

.....

Exhibit P-2.

May 19th, 1926.

Standard Motor Construction Co.,
172 Whiton Street,
Jersey City, N. J.

10

Gentlemen:

Your Mr. Haymond telephoned my home on Saturday morning, May 15th, 1926, and said he wished to see me relative to your two cycle engine which was purchased through him.

I said I was going to Amityville on the 8:33 A. M. train Monday and he said he would go with me but he did not.

20

On Monday, May 17th, Mr. Haymond telephoned my home and told Mrs. McCabe he was sick and unable to go with me to Amityville but would call at my home Tuesday afternoon, May 18th, but he did not.

I wrote you a letter May 8th, 1926, explaining your two cycle engine was too large, not suitable for the boat and asked that you take back the engine and refund the money.

Will you do me the courtesy to answer my letter?

30

Very truly yours,

.....
JHMcC:PS.

40

Exhibit P-3.

June 22nd, 1926.

Standard Motor Construction Company,
172 Whiton Street,
Jersey City, N. J.

10

Gentlemen:

Complying with your letter dated May 26th, 1926, and your telegram dated June 3rd, 1926, I met your mechanic Mr. Wilson at Amityville, Long Island, on June 4th, 1926.

Mr. Wilson examined the installation and engine bed so that he might arrange for a correct installation of the engine.

I asked Mr. Wilson whether I would hear from the Company after he made his report. He said I would.

20

I have patiently waited but to date I have not received any communication from you giving instruction to arrange for a correct installation of said engine.

During the interim the boat is beached, is unfit for use and the season for its use is waning.

When will I receive the instructions for proper installation?

30

Very truly,

JHMcC:LM

40

Exhibit P-4.

July 23rd, 1926.

Standard Motor Construction Company,
172 and 180 Whiton Street,
Jersey City, N. J.

10

Gentlemen:

Referring to your letter of June 29th, 1926, stating "it would be necessary for you to change your propeller shaft line so as to lower the engine in the boat so that the flywheel just clears the keelson." I showed the boat builder, who installed your 10-12 two cylinder marine engine, your letter and after carefully reading same stated that it would make no difference if the engine was lowered as directed because the engine is too heavy, too powerful, not practical and not usable for such a small boat and advised me to consult other boat builders, which I did.

20

Each builder agrees with the boat builder who installed the engine.

I again make my demand that you take back the engine and refund me the money.

30

Please answer whether you intend to take back the engine and refund the money.

Very truly yours,

.....
JHMcC:LM

40

Consent As to Defendant's Exhibits.

It is hereby consented that the printing of Defendant's Exhibits D-I and D-II be and the same hereby is dispensed with, for the reason that the first exhibit is made part of defendant's answer printed herein and the second exhibit has no bearing on this appeal.

10

Dated, January 24, 1929.

FRANCIS A. CASTELLANO, JR.,
Attorney for Plaintiff.

DAVID F. EDWARDS,
Attorney for Defendant.

20

30

101

Gordon As an Intellectual's Exhibit

It is perhaps somewhat surprising that the names of the
 students of the Institute (I-I) and (I-I) to and the same
 level of development which are the subject of this
 first exhibit is made known to the public. It is
 possible that it is the second exhibit which is
 the one on this subject.

10

The following is a list of the names of the
 students of the Institute (I-I) and (I-I) to and the same
 level of development which are the subject of this
 first exhibit is made known to the public. It is
 possible that it is the second exhibit which is
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 first exhibit is made known to the public. It is
 possible that it is the second exhibit which is
 the one on this subject.

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New Jersey Court of Errors and Appeals

<p style="text-align: center;">EMMA McCABE, <i>Plaintiff-Appellant,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">STANDARD MOTOR CONSTRUCTION COMPANY (a body corporate of New Jersey), <i>Defendant-Respondent.</i></p>	}	<p>On Appeal From the Supreme Court, Hud- son Circuit.</p>	10
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APPELLANT'S BRIEF.

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Statement. 20

Plaintiff appeals from a judgment of non-suit entered in favor of defendant after a trial had before Judge Henry E. Ackerson, Jr., and a jury, at the Supreme Court, Hudson Circuit, on November 28th, 1927.

The action was brought against a manufacturer of marine engines, to recover the purchase price of a certain marine engine purchased by plaintiff and for damages covering the expense of installation of said engine in her boat. 30

The Pleadings.

Plaintiff, in her complaint, charged that the defendant, as manufacturer, through its agent and representative, examined, inspected and measured her certain boat lying at Massapequa, Long Island, and after such inspection represented to her 40

that its "certain two cylinder standard 10-12 horse power Marine Engine was suitable, appropriate and fit for said boat, and was not too heavy for said boat and that, if installed, it would work with complete satisfaction; and that the same would operate said boat at a speed of 10 knots per hour; that plaintiff had no personal knowl-
10 edge or experience with motor engines and motor boats and stated to defendant manufacturer that she would have to rely entirely upon defendant's expert knowledge with regard to same, and that she did, in fact, rely upon defendant's representations and believed the same to be true in making the purchase and in paying the purchase price of \$960.00 for said engine; that such representa-
20 tions were material, and relying thereupon she paid the purchase price in full before having seen the engine and before delivery; and that she installed said engine in her boat at an expense of \$240.00 in complete reliance upon defendant's statements that the engine was suitable for her boat; that after the engine was properly installed she found the same was unfit for her boat, in that the engine was entirely too large for the same and that due to the great weight of said engine,
30 sea water washed over the stern of the boat when the boat was used, and the boat was top-heavy and thereby rendered unseaworthy, and because of the great power of the engine, seams opened in the side of the boat causing same to leak; all of which clearly indicated that the engine was not as represented by the manufacturer of same, and plaintiff demanded the return of her purchase price together with the expenses incurred by her in the installation of said engine, which damage
40 was occasioned by the conduct of defendant in

assuring her that its engine was suitable for her boat (State of Case, pp. 7, 8 and 9).

Defendant, by its Answer, denied the allegations of the complaint and although no separate defense was pleaded, it gave notice that since the agreement between the parties was in writing, it would object to any parol evidence which might be offered to "vary the terms of said agreement and that any oral representations or promises made by any agent as to the engine being suitable, appropriate and fit for said boat was without authority of said Corporation" (State of Case, pp. 10 to 14). 10

Proofs.

Upon the trial the following facts were proved by plaintiff: 20

Mrs. Emma McCabe, plaintiff, testified that before the purchase of the marine engine she telephoned to defendant, and a day or two later a Mr. Haymann came to see her at her home in Brooklyn. Mr. Haymann showed her some pictures of engines, and she told him, that she knew all about the engine, that she knew it was a good engine, that she was tired of buying engines that didn't go and that she wanted this particular engine, but was not quite sure as to the size of the engine, and as to whether or not it was too heavy for the boat that she owned. Whereupon Mr. Haymann said that he was capable of measuring and of making sure as to whether the engine was or was not too heavy for her boat (State of Case, p. 21, lines 25 to 40). That a few days thereafter her husband, James H. McCabe, a lawyer of Brooklyn, went to Masapequa with Mr. Haymann and examined the 30 40

boat (State of Case, p. 22, line 10). After such examination, Mr. Haymann assured her that the engine made by defendant was perfectly satisfactory, that the weight was all right for the boat; that it was not too heavy and that the engine would propel the boat at ten to twelve knots an hour and was perfectly suitable for the boat (State of Case, p. 22, lines 20 to 40). That relying upon such judgment she signed the writing presented to her by Mr. Haymann and paid the entire purchase price of \$960.00 for the same (State of Case, p. 23, lines 14 to 18).

James H. McCabe, her husband, testified that before the engine was purchased from defendant, he met Mr. Haymann at his home in Brooklyn, while he was discussing the qualities of the engine with his wife, the plaintiff. Mr. McCabe testified:

“I said to him I knew the qualities of the engine, there was no question about that, that was the reason we wanted it, but the question in my mind was whether the engine was too big for the boat. The boat was approximately 22 feet long and six feet wide. I even asked him to make sure. He said ‘We will go down to Massapequa and measure the boat,’ so I accompanied him down to Amityville.”

Mr. McCabe further testified that Mr. Haymann had stated that he was employed by defendant for some twenty years and that the company would stand by what he said; that a few days later he accompanied Mr. Haymann to Massapequa, where the boat was measured as to length, width and depth, and Mr. Haymann designated where the engine was to be installed by lead pencil

marks in the boat (State of Case, p. 25, lines 20 to 40); that Mr. Haymann stated the engine was absolutely suitable for the boat and that the weight was not too heavy at all and he said it would be satisfactory (State of Case, p. 28, lines 10 to 20); that when Mr. McCabe pointed out to Mr. Haymann that the man who was to install the engine had suggested that the engine was too large and too heavy for the boat, Mr. Haymann replied, "This man who is going to install the engine also sells engines and he wants you to buy one of his engines," whereupon Mr. McCabe answered, "That is immaterial to me. I want this engine, so long as you are guaranteeing me that it is not too heavy for the boat" (State of Case, p. 28, lines 16 to 24). 10

Dudley McCabe, a son of plaintiff, was called and testified that he was present at the time of the examination of plaintiff's boat at Massapequa by Mr. Haymann (State of Case, p. 44, line 7). He said that Mr. Haymann measured every possible part of the boat; he measured the length, the width, the freeboard, and he marked with his pencil exactly where the front end of the flywheel should come (State of Case, p. 44, lines 10 to 20), and he heard Mr. Haymann say to his father that the "engine was absolutely suitable for the boat," and that he (the witness) told him that he didn't think it was suitable, and he said, "yes * * * there is absolutely no need of worrying, that engine will make a perfect little runabout out of the boat"; and that Mr. Haymann further stated, as to the weight of the engine, that it was perfectly all right and that the boat would not draw any more water and that it would run along nice and smooth at ten or twelve miles an hour (State of Case, p. 44, lines 30 to 40). 20 30 40

Mr. Dudley McCabe further testified that he was more familiar with motor boats than either his father or mother and had been going about the bay with motor boats for years; that he was present when the engine was installed according to the marks made by Mr. Haymann, and that he was in the boat every time it was tried out; that

10 he was also present when Mr. Wilson of the Standard Motor Company came to try the boat out (State of Case, p. 45, lines 2 to 23); that when the boat was tried out and the boat run at part speed, because of the suction of the big propeller, the stern of the boat drew down and water boiled over into the boat (State of Case, p. 44, lines 30 to 40). That when Mr. Wilson came out and inspected the engine and wired it, the boat went a

20 quarter of a mile and when she reached deep water and the "throttle" was opened, the water boiled over the stern and Mr. Wilson started to bail it out; and the vibration from the engine also opened the seams causing a leak (State of Case, p. 46, lines 20 to 40). That the engine was too heavy for the boat and too large and about eighteen inches of the engine protruded above the gunwales of the boat making it top-heavy and liable to turn over (State of Case, p. 47, lines 2

30 to 20); and that the engine was not suitable for the boat and actually rendered the boat dangerous for use (State of Case, p. 47, lines 30 to 40).

Charles Yesworth, called as an expert by plaintiff, testified:

That he was a boat builder of eighteen years experience, during which time he had installed all sorts of engines in boats of different kinds,

40 and that he installed this particular engine for Mrs. McCabe in her dory (State of Case, p. 37,

lines 10 to 30). That before he installed the engine he advised against installing it, stating:

“I told Mrs. McCabe that this motor was no motor for that boat. That it was too heavy. I told them that it would shake the boat all to pieces, and that is what it has done.”

10

That when he gave Mrs. McCabe this opinion, Mr. McCabe held up the installation for four or five days while he communicated with defendant company (State of Case, p. 38, lines 1 to 13); that he thereafter installed the engine in accordance with the marks found in the boat, into the lowest possible place in the boat. As to the suggestion made by the manufacturer that the engine might be still lowered in the boat three-quarters of an inch, this expert testified as follows:

20

“Q. In your judgment if this engine were lowered into the boat three-quarters of an inch will it propel this boat? A. No, sir, it will propel it, but it is too heavy for the boat, and it would tear it to pieces. That would not make any difference.

“The Court: That is all the trouble with the engine, it is too heavy?”

30

“The Witness: Yes, sir.

“The Court: How about its power?”

“The Witness: Well, there is too much power for the boat because the boat is only about 21 feet 6 inches and about 5 feet 11 inches wide. She only has about 18 inches freeboard when the boat is sitting right.

“The Court: Do you know anything about this engine in the trade?”

40

“The Witness: Why no, I don’t know anything about the trade” (State of Case, p. 38, lines 30 to 40; p. 39, lines 2 to 12).

10 He further testified that in his opinion as a boat builder the engine was not a suitable engine for plaintiff’s boat, that it was “to heavy in the first place and too powerful for another thing” (State of Case, p. 39, lines 30 to 40); and that “it is not safe to ride in the boat, as in smooth water she will go, but you cannot open her up; if you do, the water will boil right over her stern and sink the boat, and the boat is top-heavy; the engine sticks up over the sides and is liable to turn over” (State of Case, p. 40, lines 2 to 20).

20 On the day after plaintiff’s boat was given a trial by defendant’s mechanic, Wilson, Mr. McCabe wrote defendant as follows:

“May 8, 1926.

“Standard Motor Construction Co.,
172 Whiton Street,
Jersey City, New Jersey.

Gentlemen:

30 Mrs. McCabe telephoned your office in April, 1926, and asked the price of your motors and she was informed that one of your representatives would call at her home, 136 Henry Street, Brooklyn, N. Y.

40 Your Mr. Haymann called and was told that the boat was a lap streak dory about 23 feet over all. When he stated the weight of your 10-12 two cylinder engine the question arose whether it was too large for the boat. Mr. Haymann agreed to accompany me to Massapequa, L. I., and measured the length

and beam of the boat, directed where to locate the engine bed and assured me that the engine was not too heavy and it would give complete satisfaction, if the engine was installed as he directed.

The engine was purchased on a cash basis and when it reached Amityville, the boat builder refused to install it because it was too heavy, too powerful, would sit too high above the gunwales and in rough water, turn over. 10

I telephoned Mr. Haymann and asked him to call at my home, which he did. I minutely described the statement of the boat builder and Mr. Haymann informed me he was employed by you for the past twenty years, was experienced in judging what Standard engine a boat could carry and guaranteed that the boat was amply large and would make about ten knots an hour. He said the boat builder was prejudiced and if I installed the engine, it would give full satisfaction. 20

Following your representative's advice—against the advice of the boat builder—the engine was installed. The cylinders protrude at least two feet above the gunwales, the propeller three inches below the bottom of the keel and when the motor is running only one notch on the throttle can be opened, and if another notch is opened the water washes over the stern. 30

Vibration has caused the seams to leak and on Friday, May 7th, 1926, your mechanic, Mr. Wilson, was running the motor and before the boat went one mile Mr. Wilson had to pump the water from the boat. 40

The boat leaks so badly that it must be beached overnight for fear of sinking. * * *

In all justice to me, it is incumbent upon you to take back the engine and refund me my money.

Very truly yours,

JAMES H. McCABE."

10

Defense.

Eugene Riotte, president of defendant, testified that he knew Harry J. Haymann who had been a salesman of defendant up to four or five months prior to the trial; that he had been in the employ of the company some two years and six months; that when plaintiff telephoned the company he sent Mr. Haymann over to call on them with a description of the engines and pictures, *and to give them any information they desired* (State of Case, p. 55, lines 30 to 33); that the next he heard was when Mr. Haymann brought in the "proposals" in duplicate signed by Mrs. McCabe with the payments made (in full) for his acceptance (State of Case, p. 56, lines 13 to 20); and that Mr. Haymann was given no authority to make statements as to speed or as to type of the boat or anything of the kind (State of Case, p. 58, lines 7 to 10).

20

30

In answer to questions almost always propounded by the Court this witness and other witnesses testified as follows (State of Case, p. 64):

"The Court: Now, what you agreed to sell, according to Exhibit D-1, was a Standard Marine Engine, right hand. Now; had that any significance in the trade?

40

"The Witness: Yes.

"The Court: What was it?

“Mr. Castellano: I object to it if the Court please, as not binding upon this plaintiff, as he knows nothing about any trade name. He didn't order by any trade name, he ordered an engine for the boat.

“The Court: I overrule the objection.

“The Court: You are president of this company, are you not? 10

“The Witness: Yes.

“The Court: And when you sell these engines with the word ‘Standard’ on them, has that any significance in the trade?

“The Witness: Yes. We are known as the builders of the ‘Standard’ engine.

“The Court: Is that a trade name for that particular type of engine? 20

“The Witness: Yes.

“The Court: Is that a patented engine?

“The Witness: It is a patented engine, yes.

“The Court: And when the word ‘Standard Marine Engine’ appears on an engine of that type does it or does it not designate a particular type and character of engine made by you and known in the trade by that name?

“The Witness: Yes, sir.” 30

* * * * *

“By Mr. Castellano:

“Q. And they are all called ‘Standard’ engines because your company manufactures them? A. Yes, sir.

“Q. Now, that trade mark or trade name has never been filed anywhere, so far as you know, has it? A. We have never registered 40

it or had a registered trade mark for it, but it is the only engine built under that name, the only marine engine.

“Q. And it is built under that name because it is the Standard Motor Construction Company that builds them? A. Yes.”

10 **Appellant's Conclusion as to Proof.**

Upon this record, appellant respectfully submits that the transaction is governed entirely by Section 1 of the Sale of Goods Act (Comp. St., Sec. 19, p. 4651), which reads as follows:

20 “Where the buyer, expressly or by implication makes known to the seller, the particular purpose for which the goods are required and it appears that the buyer relies upon the seller's skill or judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose.”

30 Plaintiff, a lady of refinement, had no knowledge of any trade name for the engine. Her husband, a lawyer, knew simply that it was called a “Standard” engine because defendant, Standard Motor Construction Company manufactured it (State of Case, p. 32, lines 1 to 20). Neither of them complains about the qualities of the engine. They concede it is a very superior engine. Their complaint is that for their particular boat it was found entirely unsuitable after the manufacturer had assured them to the contrary and induced them to purchase it, and that having relied upon defendant's superior skill and judgment, upon the breach of the implied warranty imposed by law for their protection by the Uniform Sales Act, they are entitled to a refund of the purchase price and expenses of installation.

40

POINT I.

The trial Court erred in holding that the transaction was one of the sale of an article under a patent or trade name, and in granting a non-suit on such ground.

In the first place such a defense as the learned trial Court raised during the course of the trial by questions to the various witnesses (see pp. 31, 32, 39, 48, 49, 50, 51, 52, 53, 64, 65), as to the existence of a trade or patent name for the engine, *was not within the pleadings* as defendant had not pleaded such matter as a defense. 10

Defendant was required to plead such matter as an affirmative defense. *Brown Co. vs. Pardee Works*, 88 N. J. L., 346. The Practice Act of 1912 (Pamph., L. 1912, p. 391, Sec. 40) requires that such a defense be pleaded. 20

Counsel for appellant objected to the line of questioning (see p. 65, lines 16 to 21) as not binding on the plaintiff as the engine had not been ordered by a trade name but *for a certain boat* (p. 32, lines 8 to 16); and when the Court nonsuited on the ground that the transaction was one of a sale of an article by a trade or patent name, an exception was duly taken on the record (p. 74, line 3). 30

The "proposal" or agreement (Defendant's Exhibit 1) attached to defendant's answer does not designate the engine by a trade name.

(See photostatic copy at end of this brief.)

Neither plaintiff nor her husband knew of any trade or patent name for the engine. They knew the reputation of the engine and of the company which manufactured it. Their only concern was, 40

as to whether it was or was not too powerful or too heavy for the small dory which plaintiff owned. Their complaint is not that the engine is defective or deficient in any of the qualities of such an article, but as set forth in the letter of Mr. McCabe, that upon installation it was found to be too heavy and too powerful and unfit for plaintiff's boat.

POINT II.

Evidence of statements and representations made by defendant's salesman, Haymann as to engine being fit for plaintiff's boat, was competent.

Stuart vs. Burlington Co. Farmer's Exchange, 90 N. J. L., 584; 101 Atl., 265.

An implied warranty may be sustained by parol evidence (17 Cyc., 595). It is an obligation imposed by law. *Craig vs. Pellet*, 209 Ill. App., 368.

In the case of *Stuart vs. Burlington County Farmer's Exchange* (supra), representations regarding certain fertilizer called "crude fish," were made to a buyer by a sales agent of defendant; plaintiff relying upon the representations that the product was a good fertilizer for sweet corn crops gave an order in the belief, and used the product received believing, that it was "crude fish." The crop failed and he sued for damages. Held that there was evidence of an implied warranty that the fertilizer supplied was "crude fish"; that on this point, evidence of statements to plaintiff by the sales' agent and another, a general manager of defendant, was competent.

POINT III.

It was error for the trial Court to non-suit plaintiff. Court should have submitted to the jury as a question of fact as to whether plaintiff purchased the engine as an article known by its trade or patent name, and therefore barred from claiming the benefits of the implied warranty that the engine should be reasonably fit for plaintiff's boat, or as to whether the buyer made known to the manufacturer the purpose for which the engine was required and relied on the seller's skill and judgment. 10

Grounds of Appeal, 3 and 5; State of Case, page 4.

It has been held that where the testimony was conflicting on the issue of the existence of an implied warranty, the question was properly submitted to the jury as to whether the article was sold simply under its trade name (subd. 4) or whether the buyer made known to the seller the purpose for which the article was required and relied on the seller's skill and judgment (subd. 1). 20

O. C. Barber Min. & Co. vs. Brown Hoisting Machinery Co., 285 Fed., 1 (construing Ohio Act). 30

POINT IV.

As to whether Mr. Haymann, defendant's salesman had authority to make the representations that defendant's engine was suitable and not too heavy for plaintiff's boat, was a jury question.

The president of defendant testified that when plaintiff communicated with him, he sent Mr. 40

Haymann to her with a description of the engines and pictures and *for the purpose of giving her any information desired* (State of Case, p. 55, lines 30 to 33).

10 Several days later Mr. Haymann accompanied Mr. McCabe to Massapequa, L. I., to measure plaintiff's boat and to settle the question raised by plaintiff as to whether the engine was too heavy or too large.

20 Shortly after the engine was installed, Mr. McCabe complained to defendant by letter as to the misrepresentations and entire unsuitability of defendant's engine. Mr. Riotte, president of defendant, received this letter and failed to respond to same and failed to deny Mr. Haymann's authority (State of Case, p. 61, lines 20 to 30), and failed to disaffirm any of his acts.

Did Mr. Haymann go out to Massapequa upon his own time and at his own expense? If he had no authority in the premises why did he call a second time and why was defendant's mechanic, Wilson, sent to operate plaintiff's boat?

These are all circumstances coming within the province of jury consideration.

POINT V.

30 The court erred in holding that an unsurmountable obstacle to allowing the case to go to the jury was presented by a clause in the "proposal" which provided that all previous communications between the parties whether verbal or written with reference to the subject matter of the proposal were abrogated.

40 *Ground of Appeal #2, State of Case, page 3.*

In the case of Thomson vs. Meyercord Company, 174 N. Y. Supp., 732, the written contract between the parties provided:

“It is further agreed that all agreements heretofore made between us are herewith abrogated.”

In an action for damages for failure to deliver transfer emblems known as “American Shield Transfer Emblems” which could be transferred to glass without cracking, a conversation had before execution of contract, wherein plaintiff asked defendant whether it could make emblems of a certain kind that could be transferred to any transparent substance, was held to be material and relevant, in view of Personal Property Law, Sec. 96, subd. 1, to show that defendant was informed of the purpose for which goods were intended, and that plaintiff relied upon defendant’s skill in manufacture of goods; and it was also held, that the written contract “abrogating” all prior agreements did not “abrogate” the statements of the seller as to quality of merchandise and the implied warranty arising thereon. 10 20

In the case of Wasserstrom vs. Cohen, 150 N. Y. Supp., 638 (165 App. Div., 171), the Appellate Division of the New York Supreme Court, stated the *rule to be applied* as to the implied warranty arising under Section 1 of the Sales Act (New York Personal Property Law, subd. 1 of Sec. 96). The Court said: 30

“This amendment reverses the rule which formerly obtained in this state, which recognized implied warranties of fitness upon sales by manufacturers, but not against mere deal- 40

ers, and brings our law into harmony with that prevailing in England and in many of the states in this country. See Am. & Eng. Encyclopedia of Law, volume 15, pages 1235, 1236, and cases cited. It will be observed that, in order to bring a case within the purview of the act, two things must appear:

10 First, that the seller must be informed, expressly or by implication, of the purpose for which the goods are purchased; and second, the buyer must appear to have relied on the seller's skill and judgment."

In the instant case the two elements mentioned appear in the case from beginning to end. In fact, plaintiff was advised by a skilled boat builder that defendant's engine was unfit for her boat and

20 when she apprised the manufacturer of the opinion of the boat builder, defendant manufacturer insisted that the boat builder was wrong and was "prejudiced" (State of Case, p. 38, lines 1 to 10; Pltf.'s Exh., p. 1), and to disregard his prejudiced opinion, and reassured her that its engine was fit and suitable for her dory (State of Case, p. 28, lines 16 to 24).

POINT VI.

30 Upon the several grounds of appeal taken by appellant, and upon the record presented, the judgment of non-suit entered herein should be in all respects reversed and a new trial ordered.

Respectfully submitted,

40 FRANCIS A. CASTELLANO, JR.,
Of Counsel for Plaintiff-Appellant.

Form No. 62
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YOUR ORDER NO.

PROPOSAL FROM

SHOP ORDER NO.

Standard Motor Construction Co.

180 Whiton Street, Jersey City, N. J.

TO *Mr James H McCabe*
(Name of Purchaser)

DATE *April 6 1926*

Post Office Address *236 Henry St Brooklyn N.Y.*

The STANDARD MOTOR CONSTRUCTION CO., hereinafter called the Company, hereby proposes to furnish you upon the terms and conditions herein, the following described Standard Marine Engine *Right hand*

One *2* cylinder *✓* " bore by *6 1/2* stroke Standard *10-12* horse-power Marine Engine

and one *Propeller shaft up to 12 ft long. Shaft length* _____ ft. _____ inches

One *Manganese bronze propeller* _____ Dia. _____ Pitch _____ No. of blades _____

One _____ shaft log sleeve _____ Sleeve _____ ft. _____ inches.

One *Standard bronze stern-bearing and bolts.* _____ One set *brass and copper gasoline fittings and piping.*

One *Standard bronze stuffing box and bolts.* _____ One set *brass water piping and fittings.*

One set *Standard tools and oil cans.* _____ One set *brass and galvanized iron whistle piping and fittings.*

One *brass reverse lever.* _____ One *brass chime whistle* _____ size.

One *starting bar.* _____ One *whistle air pump valve on engine.*

One *compressed air tank, 60 lbs. pressure, also* _____ One *10-12 size exhaust muffler.*

One *set of exhaust fittings and piping.* _____ One set *STANDARD double high tension ignition equipment.*

SPECIAL REQUIREMENTS: _____

DELIVERY. Delivery will be made F. O. B. cars New York, N. Y. or Jersey City, N. J. Subject to strikes, accidents or causes beyond the Company's control, on or about *immediately*

Shipping instructions:—Ship via *Long Island RR to Amityville N.Y. to Dudley Lake*

Shipment at Vendee's Risk. Price as above described for the sum of *Nine Hundred Sixty (960.00) + 100 Dollars*

Payable in cash New York funds as follows: *25% on acceptance of this proposal, receipt of which is hereby acknowledged; 75% on shipment, payable by sight draft against bill of lading.*

GUARANTEE. The company warrants the goods above described for one year following the date of shipment based upon the date of invoice, this warranty being limited to the replacement in its factory of the parts giving out under normal service in consequence of defect in material or workmanship and not due to carelessness or neglect. If the circumstances do not permit that the work shall be executed in the Company's Factory, this warranty is limited to the shipment without charge of the parts intended to replace those acknowledged to be defective; Carburetors, Magnetos, Starters, Generators, Lubricators, Batteries, Distributors, and other trade accessories are warranted separately by their respective Manufacturers and are not included herein.

The Company guarantees *10-12* brake horse power with a fuel consumption not to exceed *10-12* pints per hour. Test to be made before shipment.

The Company will not accept any responsibility in connection with any of its engines or parts when they have been altered or repaired outside of its factory, representatives from the factory excepted.

THE TITLE and ownership of the property called for and furnished under the terms of this proposal shall remain in the STANDARD MOTOR CONSTRUCTION CO. until the full and final payment therefor shall have been made by the purchaser, according to the terms agreed upon. In case of default in any of the payments above provided for, the STANDARD MOTOR CONSTRUCTION CO. may repossess itself of the above mentioned property, wherever found, and shall not be liable in any action of law, on the part of said purchaser, for such reclamation of its property, nor for the re-payment of any money or moneys which may have been paid by said purchaser in part payment for installation and equipment.

The acceptance of the engine when delivered is understood to constitute a waiver of all claims for damages by reasons of any delay.

The foregoing proposal is subject to the approval of an executive officer of the Standard Motor Construction Co. and shall not be binding upon it until so approved, all previous communications between the parties hereto, whether verbal or written, with reference to the subject matter of this proposal are hereby abrogated, and this proposal duly accepted and approved constitutes the sole agreement between the parties hereto as to the subject matted hereof, and no modification of this agreement shall be binding upon the parties hereto, or upon either of them, unless such modification shall be in writing duly accepted by the purchaser and approved by an executive officer of the Company.

Respectfully submitted,

STANDARD MOTOR CONSTRUCTION CO.

Approved at Jersey City, N. J.

STANDARD MOTOR CONSTRUCTION CO. _____ 19

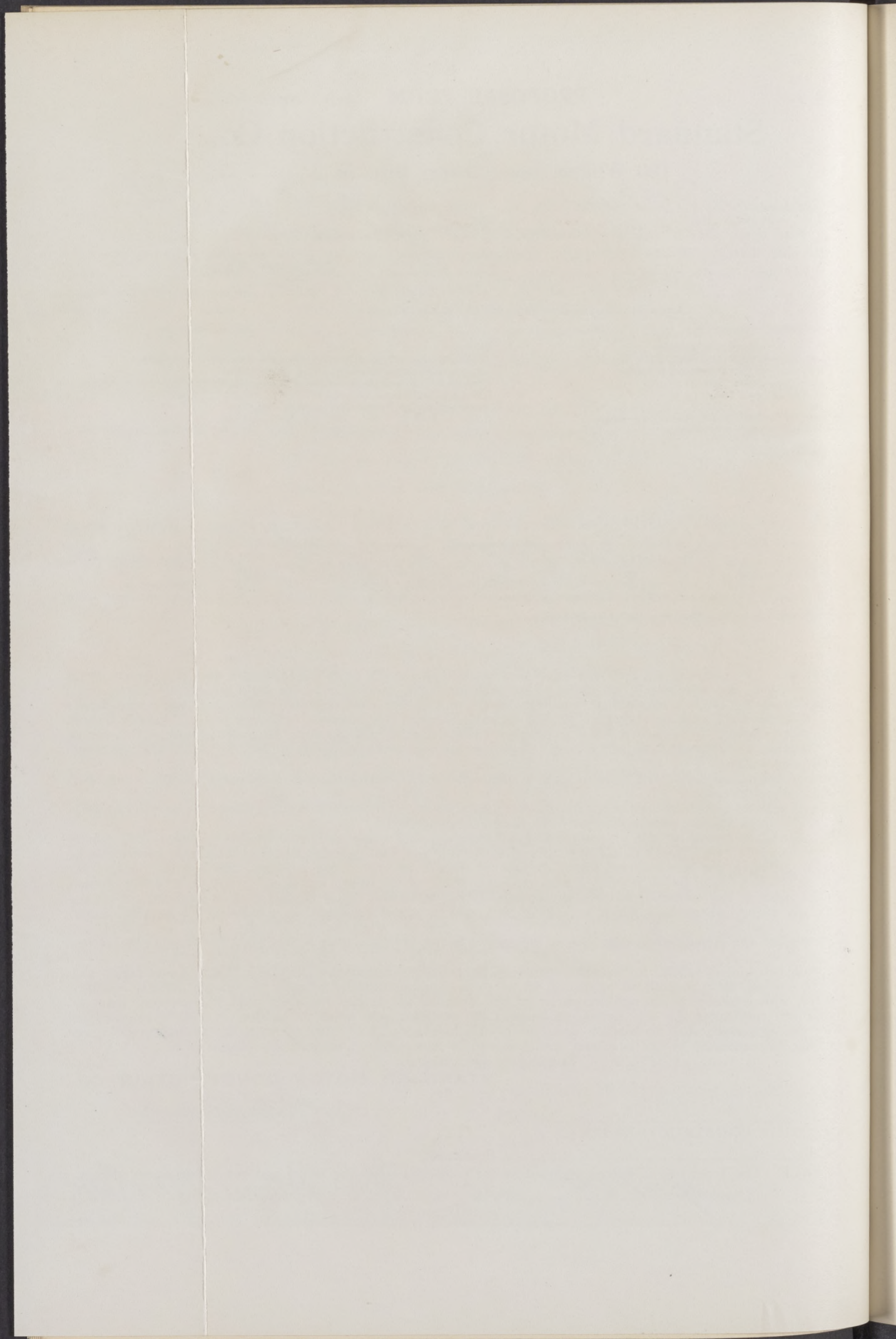
By *H. H. Haysman*

By _____ President.

ACCEPTANCE. The foregoing is hereby accepted at the price and upon the terms and conditions named therein.

Dated *April 6th* 1926

By *Mr James H McCabe*





New Jersey Court of Errors and Appeals

1

<p style="text-align: center;">EMMA McCABE, Plaintiff-Appellant,</p> <p style="text-align: center;">against</p> <p style="text-align: center;">STANDARD MOTOR CONSTRUCTION COMPANY (a body corporate of New Jersey), Defendant-Respondent.</p>	}	<p>On Appeal from the Supreme Court, Hud- son Circuit.</p>
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RESPONDENT'S BRIEF.

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Proofs.

About the first of April, 1926, one Haymann, a salesman for the defendant, called on the plaintiff, at her request, for the purpose of selling a motor (State of Case, p. 21, line 12). After some discussion, the plaintiff said that she wanted this particular make of engine as she knew all about it (State of Case, p. 21, line 25), but was not sure about the size of it. A day or two after, Haymann and plaintiff's husband went to Massapaqua to look at the boat in which the engine was to be installed (State of Case, p. 22, line 10); on their return from Massapaqua, plaintiff signed the contract which is marked Exhibit D-1, and paid the purchase price (State of Case, p. 22, line 12). This contract was then taken to the President of the defendant company, who signed the acceptance (State of Case, p. 56, line 12).

3

The plaintiff contends that she relied on Haymann's knowledge and on his assurance that the

4 engine was suitable for the boat. There is no dispute that she signed the contract, nor is there any claim that the engine failed to meet its specifications (State of Case, p. 28, line 33, and p. 36, line 38, and p. 45, line 40). The only claim made is that the engine is too heavy for the boat and consequently when run at speed the water comes over the stern of the boat (State of Case, p. 45, line 23), and that because of the weight the seams open and the boat leaked.

The defendant contends that the written instrument signed by the plaintiff after Haymann went and inspected the boat constituted the sole agreement between the parties. This contract is offered in evidence and marked Exhibit D-1, see Consent (State of Case, p. 79).

As to Haymann's authority to make any representations, Mr. Riotte, the President of the defendant company, testified as follows (State of Case, p. 57, line 20):

"By the Court: What authority did you give him? What was the extent of Mr. Haymann's authority as agent or servant—what did you send him out to do?

Witness: To give a description of the engine, and quote prices and make such necessary drawings of the proposal and bring it in for our signature.

The Court: Anything else?

Witness: Nothing.

Q. Was Mr. Haymann authorized to represent to anybody what this particular engine would do in any boat?

Mr. Castellano: I object.

The Court: Overrule the objection.

Mr. Castellano: Exception.

A. No, he was not at any time empowered to make any statement as to the speed of the boat or the type of the boat or anything of that kind."

Nor did the defendant know until after the contract was signed and engine installed that Haymann had made any representations (State of Case, p. 62, line 1). 7

The sale of this engine was the sale of a patented engine, or at least a sale under a trade name. The President of the defendant company testified as follows (State of Case, p. 64, line 22) :

“By the Court: You are President of the Company, are you not?

Witness: Yes.

By the Court: And when you sell these engines with the word ‘Standard’ on them, has that any significance in the trade? 8

Witness: Yes; we are known as the builders of the Standard engine.

By the Court: Is that a trade name for that particular type of engine?

Witness: Yes.

By the Court: Is that a patented engine?

Witness: It is a patented engine, yes.

By the Court: And when the words ‘Standard Marine Engine’ appear on an engine of that type, does it or does it not designate a particular type or character of engine made by you and known in the trade by that name?

Witness: Yes, sir.”

Defendant’s Conclusions as to the Proof. 9

That admitting Haymann made the representations as alleged, and that plaintiff relied on them, the written contract subsequently entered into constituted the sole agreement between the parties.

That Haymann had no authority to make the representations alleged, and that if he did that defendant had no knowledge thereof until some time after the contract was signed and the engine installed.

That the engine meets all of the specifications contained in the contract, and that it is a patented engine sold under a trade name.

10

POINT I.

The Trial Court did not err in holding that the transaction was one of the sale of an article under a patent or trade name, and in granting a non-suit on such ground.

11 “It appears conclusively from the testimony that the sale in this case was a sale of a specified article under a patent, or if not a patent, then certainly under a trade name * * *” (State of Case, p. 72, line 37), This being so, the Sales of Goods Act, Section 15, Sub-division 4, Compiled Statutes, page 4651, which provides “In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose,” governs and there is no implied warranty, and as the contract contains no express warranty, the Court was correct in granting a non-suit.

12 The fact that this defense was raised by the Court when it was not contained in the pleadings is not grounds for reversal. The Practice Act of 1912, P. L. 1912, page 391, Section 40, provides that “any defense which is not stated would be likely to cause surprise or would raise issues not arising out of the complaint” should be pleaded.

It is true that the answer does not specifically raise the defense of a patented article, but the contract of the parties was pleaded as a defense and from that it is clear that the article to be sold was patented or at least sold under a trade name as the engine is referred to in the contract as a “Standard Marine Engine,” and the contract is signed by the Standard Motor Construction Company. So there was no necessity to specifically raise the defense of

a patented article, as there could be no surprise to the plaintiff, for she testified that she knew all about the engine at the time she bought, that she was familiar with this "Standard engine". 13

In the case of *Brown Co. v. Pardee Works*, 88 N. J. Law 346, as cited by plaintiff, the defense attempted to raise as a defense a warranty of fitness for a certain purpose which was not included in the contract and was not pleaded as a defense in the answer. This certain purpose was not within the plaintiff's knowledge nor would the pleadings give any hint of it, so the Court is correct in saying that it should be specifically pleaded, as it would work a surprise to the plaintiff. In the case at bar, the plaintiff knew the engine, had the written contract, and any defense which might be raised from the terms of the contract certainly could work no surprise on the plaintiff. Hence, there was no need of raising this point in the pleadings. 14

POINT II.

Evidence of statements and representations of defendant's salesman as to the engine being fit for plaintiff's boat was incompetent. 15

Since this was the sale of a patented article or an article sold under a trade name (State of Case, p. 64, lines 22 to 40), and conclusions of the Trial Judge in granting the non-suit (State of Case, p. 70, line 40), there can be no implied warranty. Sales of Goods Act, Compiled Statutes 4651, as referred to more fully in Point I. In the case of *Que-mahoning Coal Co. v. Santary Co.*, 88 N. J. Law 174, the defendant agreed to purchase from the plaintiff a quantity of a certain kind of coal got

- 16 from a certain mine and *known by the trade name of "Ralphton Smokeless Coal,"* the defendant relied on the representations of the plaintiff that the coal was suitable for its business.

When sued for the purchase price, it was contended that the coal was unsatisfactory and not suitable for its business. Held that there was no implied warranty as to the quality of the coal, as it was a sale under a trade name, and Section 15, subdivision 4 of the Sales of Goods Act applied.

Defendants cite *Stuart v. The Burlington County Farmer's Exchange*, 90 New Jersey Law, 584. This case does not apply for the following reasons:

- 17
1. There was no written contract (see p. 585).
 2. This was a sale by description and hence there was an implied warranty (see p. 586, at bottom).
 3. It was not the sale of a patented article nor a sale under a trade name, but the sale of "crude fish" fertilizer.

- 18
- The *Quemahoning Coal Co.* case, above cited, is essentially a case in point, for in both cases there was an allegation of representation and reliance and an attempted implied warranty, and the Court in both cases held that it was a sale under a trade name and hence there could be no implied warranty.

POINT III.

It was not error for the Trial Court to non-suit plaintiff. Court should not have submitted to the Jury as a question of fact as to whether plaintiff purchased the engine as an article known by its trade or patent name, and therefore barred from claiming the benefits of the implied warranty that the engine should be reasonably fit for plaintiff's boat, or as to whether the buyer made known to the manufacturer the purpose for which the engine was required and relied on the seller's skill and judgment.

20

There was no testimony that the engine was not patented or sold under a trade name. In fact, all the evidence was that it was patented or at least sold under a trade name (State of Case, p. 64, lines 22 to 40), and the Court, itself, said, "First, it appears conclusively from the testimony that the sale in this case was the sale of a specified article under a patent, or, if not a patent, then certainly under a trade name" (State of Case, p. 72, lines 37 to 40).

There being no evidence contradicting the evidence of the defendant, there was no need of submitting this to the jury, as the fact was uncontroverted.

21

22

POINT IV.

It was not a Jury question whether Mr. Haymann had authority to make the representations as alleged.

The uncontroverted fact was that Mr. Haymann, the defendant's salesman, had no authority to make any representations (State of Case, p. 57, line 20, and p. 58, line 8). This testimony is set forth in defendant's statement of facts. Hence, it was unnecessary to submit this to the jury.

23

POINT V.

All of the alleged representations, previous communications, whether verbal or written, were merged in the written contract, which constituted the sole agreement between the parties.

24

It is a well known rule of law that where parties have put their contract in writing, the written contract shall be the only evidence of the contract as finally concluded, and that oral testimony of what was said or done during the negotiations will not be admitted either to contradict the written contract or to supply terms with respect to which the writing is silent. The only exceptions being (1) when the written contract is incomplete, and on its face does not purport to contain the whole agreement, (2) where the parole agreement is collateral to the written contract, and is on a subject distinct from that to which the written contract relates. *Naumberg v. Young*, 44 N. J. Law, 331. (Citation of further cases on this point seems unnecessary.)

In the case at bar, the contract was complete in its terms and therefore cannot be modified or added to by any parol evidence. Nor is the attempted parol agreement collateral to the main agreement, as it attempts to add to the terms of the written agreement itself. 25

Cases cited by plaintiff, *Thomson v. Meyercord Co.* 174 N. Y. Sup. 732, and *Wasserstrom v. Cohen*, 150 N. Y. Sup. 638, are cases decided under the New York personal property law and are therefore not in point, nor is the case at bar similar in fact to these cases, as there was no evidence that the defendant company had knowledge of the particular use for which the engine was to be used until after it had been sold. 26

CONCLUSION.

The judgment of the trial court should be affirmed because

(1) The sale was of a patented article under a trade name, and Section 15, subdivision 4, of the sales of goods act applies, and there is no implied warranty.

(2) Because the contract was in writing and by its very terms, of which the plaintiff had knowledge, abrogated any representations previously made and constituted the sole agreement between the parties. 27

DAVID F. EDWARDS,
Attorney for and of Counsel with,
Defendant-Respondent.

WILLIAM S. RURODE,
Of Counsel.



