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New Jersey Court of Errors and Appeals

Notice of Appeal

(Filed)

NEW JERSEY SUPREME COURT

GEORGE A. McLAREN,

Plaintiff,

vs.

MARMON-OLDSMOBILE COMPANY,
a corporation,

Defendant.

Action at Law

20

The defendant hereby appeals to the Court of Errors and Appeals of New Jersey from the judgment in the sum of Thirteen hundred ninety-three dollars and sixty-one cents (\$1393.61), exclusive of costs, rendered on the First Count of the complaint filed in said cause in the New Jersey Supreme Court, Essex County Circuit, on or about June 3d, 1920. 30

SAUL COHN,
Attorney of Defendant.

New Jersey State Library

Grounds for Appeal

(*Filed*)

NEW JERSEY COURT OF ERRORS AND APPEALS

10

GEORGE McLAREN, Plaintiff-Appellee,	}	
vs.		
MARMON-OLDSMOBILE COMPANY, Defendant-Appellant.	}	

Defendant states the following grounds of appeal:

20

1. Because the Supreme Court granted the motion made by the plaintiff to strike out the answer interposed by the defendant to the first and second counts of the complaint.

2. Because the Supreme Court adjudicated the answer of the defendant as being untrue, sham and frivolous, when a disputed question of fact was presented by the said answer.

30

3. Because the Supreme Court struck out the answer of the defendant on the ground that it disclosed no defense to the action when the said answer presented a disputed question of fact.

40

4. Because the answer of the defendant set up a verbal agreement supplementing the agreement in writing made between the parties, which supplemental agreement should have been submitted to a jury for determination as to the fact thereof.

Summons

5. Because the defendant was denied the right of trial by jury.

6. Because the Supreme Court, striking out the answer of the defendant, precluded it from submitting to the determination of a jury the existence of the facts set forth in the answer filed by it, which facts constituted a good and legal defense to the action. 10

7. Because the Supreme Court erred when it struck out the answer of the defendant and entered summary judgment for the plaintiff.

SAUL COHN,
Attorney for Defendant.

Summons

The State of New Jersey to Marmon-Oldsmobile Company, a corporation.
(L. S.) You are summoned to answer the annexed complaint of George A. McLaren in an action at law in the Supreme Court. And take notice that 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. 30

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 25th day of March, Nineteen Hundred and Twenty.

ENOCH L. JOHNSON,
Clerk. 40

Haines & Chanalis
Attorneys.

Complaint

SUPREME COURT OF NEW JERSEY

ESSEX COUNTY

10	GEORGE A. McLAREN,	}	
	Plaintiff,		
	vs.		
	MARMON-OLDSMOBILE COMPANY, a corporation,	}	
	Defendant.		Action at Law.

George A. McLaren, residing at No. 136 Lincoln Avenue, in the City of Newark, Essex
 20 County, New Jersey, says that:

FIRST COUNT:

1. On June 25, 1919 the plaintiff and the defendant the Marmon-Oldsmobile Company, a corporation, entered into a written contract in the City of Newark, a copy of which is annexed hereto and made a part hereof, wherein the defendant agreed to sell and the plaintiff agreed to buy
 30 for a price not over Three thousand, nine hundred and fifty dollars, F. O. B. Newark, an automobile manufactured by the Marmon Automobile Company and more specifically described as Type 34, four passenger Roadster, 1920 Model.

2. On July 7, 1919, pursuant to said contract, the plaintiff surrendered to the defendant his Marmon automobile 1918 model, valued by the
 40 plaintiff and the defendant at Two thousand five hundred dollars, and the defendant credited the

Complaint

plaintiff with the said amount on account of said purchase price; a copy of the receipt from the defendant for said car is annexed hereto and made a part hereof.

3. On March 19, 1920, when the said Marmon automobile described in said contract, arrived in Newark for the plaintiff the plaintiff tendered to the defendant the balance of the said purchase price pursuant to said contract and demanded the delivery of said car; the defendant refused said tender and also refused and neglected to deliver said car to the plaintiff, and continues to refuse, to do so, to the damage of the plaintiff.

SECOND COUNT:

1. Plaintiff repeats Paragraph 1 of the first count.

2. Plaintiff repeats Paragraph 2 of the first count.

3. Plaintiff repeats Paragraph 3 of the first count.

4. Although the defendant has wholly failed to comply with the terms of the said contract it still retains the said automobile mentioned in Paragraph 2 of this complaint and valued by the plaintiff and the defendant at Two thousand five hundred dollars and has neglected to pay to the plaintiff the said sum of Two thousand five hundred dollars, or any part thereof.

Plaintiff demands:

1. On the first count \$5000. damages.
2. On the second count \$2500. damages with

Complaint—Receipt

interest from July 7, nineteen hundred and nineteen.

HAINES & CHANALIS,
Attorneys for Plaintiff.

To the within named defendant:

- 10 Take notice that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits, within ten days of such service and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you. Lawful service upon a corporation is deemed personal service.

20 HAINES & CHANALIS,
Attorneys for Plaintiff.

Receipt

Annexed to complaint.

Newark, N. J., 7/7, 1919.

- 30 RECEIVED from George A. McLaren
Marmon Touring Car dollars
to apply on Contract June 25 1919.
\$— MARMON-OLDSMOBILE COMPANY.

Contract*Annexed to complaint*

The Marmon-Oldsmobile Company, Newark, N. J.

You are hereby authorized to enter my order
on your books for one Marmon Type 34-4 Pas.
Roadster as per specifications given below for 10
which I agree to pay the sum of List price of
1920 Model, Price Guaranteed to be not over
\$3950.00

Credit for used car 1918 Marmon \$2500.00

Credit by Deposit

(Payable on notification that)

Balance

(the Car is ready for delivery)

Delivery date on or about Sept. 15, 1919 F. O. B.
Newark, N. J. 20

(See Catalogue for regular equipment, etc.)

Remarks 1918 Marmon to be delivered to us
not later than July 7/19 in as good condition as at
present time.

In the event of the failure or refusal of the
purchaser promptly to carry out this contract
and pay the balance due thereon, the payment
already made, may, at the option of the seller,
be retained as liquidated damages. 02

This contract expresses the entire agreement 30
between the parties; all previous verbal or writ-
ten communications between the parties, with
reference to the subject matter hereof are hereby
abrogated; no modification of this contract shall
bind either party unless such modification shall
be in writing signed by the purchaser and ac-
cepted by the Company. All contracts and sales 40
are made without liability on our part for delay
arising from strikes, accidents or other causes be-

GEORGE A. MCLAREN,
(Purchaser).

10 Accepted June 25th, 1919
Marmon Olds Co.
by C. W. Oathout, Treas.

Affidavit of Merits

NEW JERSEY SUPREME COURT

ESSEX COUNTY

20

GEORGE A. McLAREN,
Plaintiff,
VS.
MARMON-OLDSMOBILE COMPANY,
a corporation,
Defendant.

State of New Jersey } ss:
30 County of Essex

Charles W. Oathout, of full age, being duly sworn, according to law, on his oath deposes and says: That he is the Treasurer of the Marmon-Ooldsmobile, a corporation of the State of New Jersey and authorized by its Board of Directors to make this affidavit; that the said corporation, defendant in the above stated action, has a just and legal defense to the said action on the merits of the case.

Sworn to and subscribed before me
this day of April, 1920
Charles W. Oathout.

Answer

NEW JERSEY SUPREME COURT

Essex County

(Purchaser)

GEORGE A. McLAREN,

Plaintiff,

vs.

MARMON-OLDSMOBILE COMPANY,
a corporation,

Defendant.

The defendant, a corporation of New Jersey, with its principal office in the City of Newark, New Jersey, answering the complaint herein filed, 20
says:

FIRST COUNT

1. The defendant admits the making of the contract referred to in Paragraph 1 of the said complaint.

2. The defendant denies the allegations of Paragraph 2 of the said complaint, so far as it refers to the value of the Marmon automobile 30
which the plaintiff delivered to the defendant.

3. The defendant denies the allegations of Paragraph 3 of the said complaint.

SECOND COUNT

1. The defendant admits the making of the contract referred to in paragraph 1 of the said 40
complaint.

Application to Strike out Answer, etc.

2. The defendant denies the allegations of Paragraph 2 of the said complaint, so far as it refers to the value of the Marmon automobile which the plaintiff delivered to the defendant.

3. The defendant denies the allegations of Paragraph 3 of the said complaint.

4. The defendant denies the allegations of Paragraph 4 of the second count.

Dated: April 9th, 1920.

SAUL COHN,
Attorney for Defendant.

**Application to Strike out Answer,
etc.**

NEW JERSEY SUPREME COURT

ESSEX COUNTY

GEORGE A. McLAREN, vs. 30 MARMON-OLDSMOBILE a corporation,	Plaintiff, COMPANY, Defendant.	Action at Law. Notice and Affidavits.
--	---	--

*To the Marmon-Oldsmobile Company Defendant
or Saul Cohn its attorney:*

Please take notice, that on Saturday the eighth day of May, 1920, at ten o'clock in the forenoon,
or as soon thereafter as counsel can be heard, we

Application to Strike out Answer, etc.

shall apply to the such Justice of the New Jersey Supreme Court as shall hear motions for the Essex Circuit of said Court, at the County Court House, in the City of Newark, for an order striking out the answer interposed by the defendant to the first and second counts of the complaint, in the above entitled action and entering Judgment final for the reasons that the allegations set forth in said answer are untrue, sham, frivolous and disclose no defense to the above entitled action. 10

Respectfully yours,
HAINES & CHANALIS,
Attorneys of the Plaintiff.

State of New Jersey, } ss:
County of Essex, }

George A. McLaren being duly sworn according to law, on his oath, deposes and says that he is the plaintiff in the above entitled action; that on June 25, 1919, this deponent agreed in writing with the defendant the Marmon Oldsmobile Co. to purchase from it for a sum not to exceed Three Thousand Nine Hundred and fifty dollars, a Marmon four-passenger Roadster automobile, type 34, 1920 model, f. o. b. Newark; a copy of which contract is annexed hereto and made a part hereof; that on July 7, 1919, this deponent pursuant to said contract surrendered his Marmon automobile, 1918 Model to the defendant and received a written receipt for the same from the defendant, a copy of which is annexed hereto and made a part hereof; that the deponent's automobile which he surrendered was appraised by Charles W. Oathout, the treasurer of the defendant at 20 30 40

Application to Strike out Answer, etc.

twenty-five hundred dollars (\$2500) and was agreed to by this deponent; that said amount of twenty-five hundred dollars was credited on account of said purchase price in said agreement; this deponent was informed thereafter by the said

10 Charles W. Oathout that this deponent's Marmon car which he surrendered was sold by the defendant for Three thousand dollars (\$3000) that said automobile agreed to be purchased by the deponent from the defendant did not arrive in Newark until March 19, 1920, at which time this deponent tendered the balance of said purchase price in cash and amounting to One thousand, four hundred and fifty dollars (\$1,450) and demanded the delivery of the said car; that the said Charles W.

20 Oathout as treasurer of said defendant refused the said tender and also refused to deliver the said car, stating as his only reason for said refusal that there was due from this deponent in addition to the balance of said contract price, amounting to \$1,450, the war tax and the freight charge from Indianapolis where the automobile was manufactured, to Newark, amounting to approximately three hundred dollars (\$300); that the said Charles W. Oathout also stated to this

30 deponent that if he would pay the said war tax and freight charge he would have immediate delivery of said car; that said tender, demand, and said statements by the said Charles W. Oathout were made in the presence of Michael N. Chanalís, this deponent's counsel; that defendant still refuses to deliver said automobile pursuant to said contract and has failed to return deponent's automobile or the value thereof; that there is due from

40 the defendant to this deponent the sum of Thirteen

Contract

Hundred and Eighty Three Dollars (\$1383) besides interest from March 19, 1920 on the first count of his complaint and the sum of Two thousand five hundred dollars with interest from July 7, 1919, on the second count of his complaint, no part of which amounts have been paid. That defendant believes that there is no defense to this action.

GEORGE A. McLAREN.

Sworn and subscribed to before me

at Newark, N. J., this

29th day of April, 1920.

Warren L. Jacobus,

Master in Chancery of New Jersey.

Receipt

Annexed to Application of George A. McLaren

Printed in full at page 6 *supra*

Contract

Annexed to Application of George A. McLaren

Printed in full at page 7 *supra*.

Affidavit of Martin F. Murphy

State of New Jersey, }
County of Essex. } ss:

10 Martin F. Murphy being duly sworn according
to law on his oath deposes and says that he is the
General Manager of the Carvan Motors Corpora-
tion at Newark, which has been the Sales Agent
for the Marmon Automobile since January 1, 1920;
that this deponent has sold Marmon Automobiles
of every type since January 1st, 1919 and is fully
familiar with the market price of said automo-
biles; that the market price of a Marmon four-
passenger Roadster automobile, Model 34, 1920
f. o. b. Newark, including Excise Tax was \$5333,
20 on March 19, 1920 and during the entire said
month of March.

M. F MURPHY.

Sworn and subscribed to before me

at Newark, N. J., this
28th day of April, 1920.

Kent Bender,
Notary Public, N. J.

(Seal)

Affidavit of Michael N. Chanalís

State of New Jersey, } ss:
County of Essex.

Michael N. Chanalís being duly sworn says that he is a counsellor at law of the State of New Jersey and a member of the firm of Haines & Chanalís the attorneys of the above named plaintiff; that on March 19, 1920, the said plaintiff George A. McLaren informed this deponent that the defendant had refused on that day to deliver to him a Marmon Automobile which he had agreed to purchase from it, although he was willing to pay the contract price and desired to know from this deponent what to do in the matter; that thereafter and on said day this deponent went with the plaintiff to the store of the defendant on Broad Street in the City of Newark, and said plaintiff in the presence of this deponent tendered in cash to Charles W. Oathout as treasurer of the defendant, the sum of Fourteen Hundred and Fifty Dollars and demanded the delivery of a Marmon four-passenger Roadster Automobile, type 34, 1920 Model; that said Charles W. Oathout refused the tender and also to deliver the said car, giving as his reason that there was due from the plaintiff under the contract of sale in addition to the sum of Fourteen Hundred and Fifty Dollars the war tax and freight charges from Indianapolis to Newark, said Charles W. Oathout stated also to the plaintiff in deponent's presence that if plaintiff would pay the said additional charges he could have immediate delivery of said automobile.

MICHAEL N. CHANALIS.

Sworn and subscribed to before me
at Newark, N. J., this

29th day of April, 1920.

Frederick J. Israel,

Master in Chancery of New Jersey.

Affidavit of Charles W. Oathout

NEW JERSEY SUPREME COURT

10	GEORGE A. McLAREN, Plaintiff,	}	Affidavit.
	vs.		
	MARMON-OLDSMOBILE COMPANY, Defendant.		

State of New Jersey, } ss:
 County of Essex.

20 Charles W. Oathout, of full age, being duly sworn, on his oath says that he is Treasurer of the Marmon Oldsmobile Company, a corporation, the defendant in the above action: Deponent further says that it is true, as alleged in the plaintiff's affidavit, that he agreed to purchase a Marmon automobile pursuant to the contract annexed to his affidavit and that he surrendered his 1918 Marmon automobile and received a credit of twenty-five hundred dollars for the same; Deponent denies that he told plaintiff that his car had been sold for Three thousand dollars, but avers the fact to be that it was actually sold for \$2500.00

30 Deponent further says that in June, 1919, at the time of the making of the contract, the following circumstances existed, of which circumstances the plaintiff was fully apprised by deponent prior to and at the time of the acceptance of the order by the defendant;

40 Defendant was sub-agent or sub-distributor for the county of Essex and other counties in New Jersey of Marmon automobiles under a contract

Affidavit of Charles W. Oathout

with the Marmon Automobile Company of New York, which latter company was the general distributor of Marmon Automobiles in the State of New York and (of New Jersey for the Nordyke-Marmon Company of Indianapolis, Indiana, the manufacturer of the said car; that at the time that said order was accepted, the manufacturer was not engaged in the prosecution of its regular business of producing Marmon automobiles, but had recently finished its contracts with the United States Government, under which contracts it had, during the World War, manufactured motors for aeroplanes and accessories thereto, and at the time of the acceptance of the order in question, the manufacturers had not yet resumed the normal manufacture of pleasure cars, and was then in the process of arranging its factory and its machinery therein for this purpose; that in view of this situation, the plaintiff was advised that the date of the delivery of the car was problematical and that if delivery was not made on or before September 15th, 1919, the defendant would not be liable for the delivery of the car and would be compelled to take advantage of the clause in the contract by which the defendant was not responsible for failure of delivery if beyond its control.

Deponent further says that prior to the acceptance of Plaintiff's order, deponent had ordered a number of cars of a similar type, and although it made every effort so to do it was unable to procure a delivery of the cars not only up to September 15th, 1919, but during the entire year of 1919, and frequently apprised the plaintiff of the fact that it had made such efforts and that its only source of supply, as plaintiff well knew, was the general distributor in New York.

Affidavit of Charles W. Oathout

Deponent further says that from time to time the plaintiff called at defendant's place of business and that between the date of the acceptance of the order and March, 1920, the price of the automobile continued steadily to rise, and Defendant told Plaintiff in September, 1919 that it would not be responsible for the delivery of the car, and that if the plaintiff was able to procure a delivery to him of the car by the New York distributor he was welcome to do so, as the defendant was bound by its arrangements with the Marmon Automobile Company to accept a delivery from no other source.

Deponent offered at that time to return the \$2500 received for the sale of plaintiff's car, together with interest, and plaintiff said he would not accept the offer at that time, but left the matter open without any determination. On several occasions after September 15th and during the year 1919, deponent reiterated to the plaintiff the position of the defendant company, and told him that in view of the fact that the car was steadily rising in price and that no deliveries of the car were being made in the territory of the defendant corporation, the company would be unable to make delivery.

Deponent further says that it is untrue that he refused the tender of \$1450, alleging that his only reason for said refusal was that there was due to his company, in addition to the \$1450, the war tax and freight rate from Indianapolis, and that it is untrue that deponent told plaintiff that if he would pay the war tax and freight charge he could have immediate delivery of the said car; that deponent had told plaintiff at the time of ac-

Affidavit of Charles W. Oathout

cepting order, and on several occasions thereafter that the contract provided that a list price of \$3950 was to be charged for the car and that it was up to plaintiff to pay the Government tax, and that in fact the contract expressly referred to the cost of the car as being not in excess of the list price of \$3950 and that the sum mentioned in the contract was to be the price of the car exclusive of the transportation and tax; that on several occasions prior to the day on which plaintiff called with Mr. Chanalis, the plaintiff offered to pay the tax, and on the occasion of his calling with Mr. Chanalis also offered to pay the tax, although his affidavit does not make mention of this fact. 10

Deponent further says that when Messrs. Chanalis and plaintiff called, the automobile was not in the possession of the defendant company, but was in the hands of the New York distributors, and deponent so apprised plaintiff; that several days after, when the automobile was in the possession of the defendant company and it was able to make delivery, this deponent notified the plaintiff that his company would be willing to make a delivery of the car on condition that the war tax would be paid for and that plaintiff then refused to make payment of the war tax. 20

Deponent further says that between September, 1919 and March, 1920, in his frequent talks with plaintiff, he told him that if the occasion ever presented itself when the car could be procured, he would, without assuming any liability to deliver it, procure a car for him at the old price, \$3950, exclusive of war tax and transportation costs, and that plaintiff agreed that just as soon as defendant could get a car that deponent should notify plain- 30 40

Supplemental Affidavits

tiff and that then the car would be delivered on this basis. It was pursuant to this arrangement that deponent tendered the case as soon as he was informed that a delivery of it would be made by the company.

10

CHARLES W. OATHOUT,

Sworn to and subscribed before me, this
5th day of May, 1920.

Morris Isserman,

An Attorney at Law of N. J.

Supplemental Affidavits

20

NEW JERSEY SUPREME COURT

GEORGE A. McLAREN,

Plaintiff,

VS.

MARMON-OLDSMOBILE COMPANY,
Defendant.

State of New Jersey, }
30 County of Essex. } ss:

George A. McLaren, replying to the affidavit of Charles W. Oathout on behalf of the defendant, being duly sworn upon his oath according to Law deposes and says that this deponent in the presence of his Counsel Michael N. Chanalis and prior thereto offered to pay for said Marmon car in addition to the contract price, the amount of the excise tax; that this offer was made however after

40

Supplemental Affidavits

the tender of the balance of the contract price was refused by Charles W. Oathout, Treasurer of the defendant and after he had demanded besides the contract price, not only the excise tax, but also the freight charge on said car from Indianapolis to Newark; this offer was made also because this deponent needed the car badly and it was his desire to avoid litigation; Charles W. Oathout however, refused the said compromise offer and continued to demand the freight charge; that thereafter the said defendant did not again offer to deliver the said car to this deponent until after this deponent had brought suit and even then demanded in addition to the contract price, the excise tax; that this deponent did at no time enter into any new agreement with the defendant nor did he at any time release the defendant from the said contract. 10 20

GEORGE A. McLAREN.

Sworn and subscribed to before me

at Newark N. J., this

7th day of May, 1920.

Warren L. Jacobus,

Master in Chancery of New Jersey.

Supplemental Affidavits

NEW JERSEY SUPREME CAURT

10	GEORGE A. McLAREN, vs. MARMON-OLDSMOBILE COMPANY, Plaintiff, Defendant.	}	Supplemental Affidavit
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State of New Jersey, }
 County of Essex. } ss:

20 Michael N. Chanalis, replying to the affidavit of Charles W. Oathout on behalf of the defendant, being duly sworn according to law upon his oath deposes and says that the plaintiff, in the presence of this deponent on March 19th, nineteen hundred and twenty, offered to pay to the said Charles W. Oathout the excise tax, stating at said time, that although he was not bound to pay the same he needed the car badly and would do so; that this offer was made after a tender by the plaintiff of the balance of the contract price had been refused by Charles W. Oathout, Treasurer of the defendant, who demanded in addition to the said amount the excise tax and the freight charges from Indianapolis to Newark; that said Charles W. Oathout refused said offer of the plaintiff and demanded the freight charges in addition; that at said time this deponent endeavored to point out to the said Charles W. Oathout that the defendant was not entitled to the additional charges, but said Charles W. Oathout refused to listen to him; that not until suit had been brought was an offer made by the defendant's counsel to this deponent to de-

40

Supplemental Affidavits

liver the said car provided the excise tax was paid in addition to the amount tendered; that at no time was anything mentioned concerning the defendant's liability to deliver the said car or concerning any abrogation of the said contract by the plaintiff or defendant.

10

MICHAEL N. CHANALIS.

Sworn and subscribed to before me

at Newark, N. J., this

7th day of May, 1920.

Michael N. Chanalis,

Master in Chancery of New Jersey.

20

State of New York, }
County of New York. } ss:

D. L. Decker of full age being duly sworn according to law upon his oath deposes and says:

That he is the manager of the New Car Department of the Marmon Automobile Company of New York, the general distributors of Marmon automobiles of part of the States of New York and New Jersey; that on March 18th nineteen hundred and twenty, a Marmon automobile, Type 34, 4 passenger Roadster, 1920 Model was delivered by this deponent's company to the Marmon Oldsmobile Company of Newark, and that on the same date there was another Marmon automobile, Type 34, 4-passenger Roadster, 1920 model for delivery to the Marmon Oldsmobile Company of New-

40

Order Striking out Answer, etc.

ark, and that the said Marmon Oldsmobile Company of Newark refused delivery.

D. L. DECKER.

Sworn and subscribed to before me

10 at New York this
7th day of May, 1920.

Goldye Miller,
Notary Public,
Kings Co.

Cert. filed in N. Y. Co.

(Seal)

New York County Clerk's certificate attached.

20

Order Striking out Answer, etc.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

GEORGE A. McLAREN,

Plaintiff,

vs.

30

MARMON-OLDSMOBILE COMPANY,
a corporation.

Defendant.

Action at Law,

40 It appearing by affidavits filed in this cause that the defendant's answer is sham and discloses no valid defence to the action; and the defendant, after due notice, having failed to show such facts as to entitle it to defend.

It is on this 15th day of May, nineteen hundred

Notice for Assessment of Damages

and twenty, ordered that the answer be and is hereby struck out and that final judgment be entered for the plaintiff for the sum of Two thousand six hundred and twenty eight and 34/100 dollars on the second count of his complaint.

It is further ordered that the plaintiff be and he is hereby permitted to prove, in accordance with the rules of this Court, his damages on the first count of his complaint. 10

Let this rule be entered in the minutes.

WILLIAM S. GUMMERE.

Notice for Assessment of Damages

NEW JERSEY SUPREME COURT

20

Essex County

GEORGE A. McLAREN,

Plaintiff,

and

MARMON-OLDSMOBILE COMPANY,
Defendant.

Action at Law.

30

Please Take Notice that on Wednesday, June second, nineteen hundred and twenty at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Court House in the City of Newark, Essex County, before such Justice of the Supreme Court as shall hold the Essex Circuit, we shall apply to have the damages assessed by a jury, drawn from the general panel and for an Order entering judgment thereon. 40

Respectfully yours,

HAINES & CHANALIS,

Testimony

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

10	GEORGE A. McLAREN, Plaintiff, vs. MARMON OLDSMOBILE COMPANY, Defendant.	}	Action at Law.
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Transcript of shorthand notes of testimony &c.
 taken in the above stated cause on the trial there-
 of at the Court House, Newark, N. J., on Thurs-
 20 day, June 3, 1920.

Before HON. NELSON Y. DUNGAN, Judge, and a
 jury.

Haines & Chanalis for the plaintiff.
 Michael Silver for defendants.

Mr. Chanalis: In this case it is contested only
 in so far as some of the evidence goes regarding
 30 the extent of the damages.

The Court: I understood this was only an as-
 sessment of damages?

Mr. Chanalis: That is all.

The Court: Is it a negligence case?

Mr. Chanalis: No, a contract case.

The Court: Well, the answer admits liability,
 so the only thing you are obliged to prove is dam-
 40 ages. You say that the matter of damages is
 contested.

Mr. Chanalis: It is, sir.

George A. McLaren—Direct

Mr. Chanalis opens for the plaintiff.

Mr. Silver opens for the defendant.

The Court: Is it also intended to show that he could have obtained delivery of a car at that time, or between those dates? 10

Mr. Silver: We do not intend to show that, no; it would be impossible.

The Court: Then how would your mere insistence that he ought to have gone out and purchased another car between those dates, without showing that he could have obtained delivery, avail?

Mr. Silver: It is our contention that we were to deliver in September, 1919, and he was obliged to minimize his damages and go out and get a car if he could. 20

The Court: Do you expect to show that he could have gotten one?

Mr. Silver: No, we do not, but we say that all he is entitled to is the difference in value, according to the contract and the market price of the car in September, 1919, at the time we were to deliver, and not six months hence.

GEORGE A. McLAREN sworn in behalf of plaintiff: 30

Direct-examination by Mr. Chanalis:

Q. You are the plaintiff, Mr. McLaren in this suit? A. Yes, sir.

Q. On June 25, you entered into a contract with the Marmon Oldsmobile Company to purchase a car? A. Yes, sir. 40

Q. I show you this paper, dated that day, and

George A. McLaren—Direct

ask you what that is? A. That is a duplicate original of the contract Mr. Oathout signed.

Mr. Chanalis: I offer that in evidence.

Marked Exhibit P-1.

Q. What was the purchase price?

10 The Court: It is in the contract.

Mr. Chanalis: No; it says "not over" guaranteed to be "not over."

The Court: All right.

By the Court: Q. What was it to be? A. \$3950.

By Mr. Chanalis: Q. On September 15, 1919, did you make a demand of the car? A. Yes, sir; I did.

Q. Of the defendant? A. Yes, sir.

Q. What were you told? A. Told that they 20 couldn't deliver the car just then; that they didn't know just how soon they would be able to.

Q. Did you make any further demand for the delivery of the car? A. Yes, sir, every once in awhile I would call in and find out if any cars came through.

Q. How long did you continue to make those demands? A. Right up until the time they notified me.

Q. Who were the defendants in connection with the sale of this car? A. The Marmon Oldsmobile 30 Company.

Q. Were they the sole agents for the sale of it? A. In this community; yes, sir.

Q. When were you notified that the defendants could deliver this car for the first time? A. On March 19th—

Q. Nineteen— A. 1920.

Q. What did you do? A. I immediately went 40 down to purchase the car.

George A. McLaren—Direct

Q. What kind of a notice did you get? A. They telephoned to me.

Q. What did they telephone? A. They told me that they had a car there for delivery, for me; that I could come down and they would make delivery of the car.

By Mr. Chanalis: Q. The contract calls for the delivery of a 1918 model, owned by you, to the Marmon Company. Did you make that delivery to the defendant? A. Yes, sir; I did. 10

Q. Was that car ever returned to you? A. No, sir.

Q. What did you do then, on March 19th. Did you make a tender of the purchase price? A. Yes, sir.

By the Court: Q. When was that car delivered, the 1918 model? A. On July 7th, sir. 20

Q. What year? A. 1919.

By Mr. Chanalis: Q. Did you make a tender of the purchase price? A. Yes, sir.

Q. How much was it that you tendered? A. \$1450.

By the Court: Q. When did you tender that? A. On March 19, 1920.

Q. Why didn't you tender your old Marmon on that date? A. I expected to get the car November 15th. I had to forfeit the car; I had to turn in the car on July 7th. 30

Q. And was the car delivered to you? A. No, sir.

Q. What do you claim to be the damage? \$1383.

Mr. Silver: I object; This man was not an expert as to what the damages are.

The Court: No. 40

Robert W. Wood—Direct

Mr. Chanalis: I simply asked him what he claims.

The Court: No.

Mr. Chanalis: That is all.

10 CROSS-EXAMINATION by Mr. Silver:

Q. Mr. McLaren, you of course read this contract that is offered in evidence here when it was given to you? A. Yes, sir.

Q. You notice particularly that in the clause on the bottom of this contract this contract expresses the entire agreement between the parties? A. Yes, sir.

Q. You say you called on the Marmon Oldsmobile people in September, 1919? A. Yes, sir.

20 Q. What was it they told you at that time? A. They didn't have a car for delivery for me. If I would be a little patient they probably would have them in at any time. They didn't know just when they would get it.

Q. That was the entire conversation? A. As near as I can recollect that was all that was said.

Q. You would know whether that was all the conversation or not? You would recall? A. That was all that was put in the message to me.

30

ROBERT W. WOOD, sworn in behalf of plaintiff:

Direct-examination by Mr. Chanalis:

Q. Mr. Wood, what is your business? A. I am 40 a Marmon salesman, in Newark.

Q. With what company are you connected? A. Carvan Motors Corporation.

Robert W. Wood—Cross

Q. They are the sole agents for the Marmon car? A. Northern New Jersey distributors, yes.

Q. How long have you been connected with the company? A. Since they have the agency in this state.

Q. When was that? A. January 1st, 1920. 10

Q. Are you familiar with the market price of the four-passenger roadster, type 34 of the 1920 model? A. I think so.

Q. You have cars of that type? A. Yes.

Q. Do you know what the market price on March 19, 1920, of that car, was? A. \$5333, delivered, f. o. b., Newark.

CROSS-EXAMINATION by Mr. Silver:

Q. You are an employee of the Marmon Oldsmobile Company, and were in September, 1919? 20
A. No, sir; I was not.

Q. Were you employed by the Marmon Oldsmobile people prior to January 1, 1920? A. The Marmon Oldsmobile?

Q. Yes? A. No; I was not.

Q. Or the concern with which Mr. Oathout was connected in the selling of the Marmon car? A. He wasn't connected, that I know of, with the company that I was with. 30

Q. You have been with this New Jersey concern you speak of since January 1, 1920? A. Yes, sir.

Q. How many cars have you sold of this particular type since January 1, 1920? A. Of these four-passenger roadsters?

Q. The car in question, type 34, four-passenger roadster, 1920 model? A. I don't just know how many I have sold. 40

Q. Did you sell one? A. Well, I might have sold one; I might have sold three or four.

Robert W. Wood—Cross

Q. You might have sold one, you might have sold three or four during your entire connection with this concern? A. Yes; I have sold a number of cars.

Q. No; I am just asking you about this particular type of car? A. Is that four-passenger four door or four-passenger roadster?

Q. That I cannot say. The order calls for (reads) "Four-passenger roadster, 1920 model."

A. I cannot really say whether I have sold that particular type or not.

Q. You don't know, now, as a matter of fact, Mr. Wood—you don't know what the market price of that car was? A. Absolutely, I do; yes, sir.

Q. Where do you go for that information? A. From the Marmon Company, Indianapolis, Indiana.

Q. Do you want me to understand that you went to Indianapolis, got these particulars and came back? A. No; we get our prices right here in Newark.

Q. How? A. Just the same as you get anything.

Q. How did you get it? A. I got it from the Vice-President of our Company right here in Newark.

Q. What he told you? A. No; we have a printed price to go by.

By the Court: Q. It comes from where? A. It is the price that is issued by the Marmon Company at Indianapolis to us here in Newark. Then we have to sell according to that price.

Q. Were you with any Marmon Company before January, 1920? A. No, sir; the company was not formed then, the new agency that started on January 1st.

Robert W. Wood—Cross

By Mr. Silver: Q. Did you know the price of Marmon cars before January 1st, 1920? A. Well, to a certain extent I did; yes, sir.

Q. Well, I don't want it to a certain extent. I want you to be certain about it. Would you be willing to rely upon the information, to sell upon the information which you had before that time, as to the price of Marmon cars? A. What do you mean; of the 1920 type? I know the 1920 prices; I know these. 10

Q. How do you know that this is the same price list? A. Because I sold them.

Q. You didn't begin to sell before January, 1920? A. No, 1920.

By the Court: Q. Suppose you give us the market price each month, say the 1st of October to the 1st of November, the 1st of December, and the 1st of each succeeding month, down to March, 1919? A. I don't know the prices of the previous year; I wasn't with the company. 20

Q. Give us the prices then, beginning January 1st, of this model? A. \$4970.

Q. \$4970? A. Yes.

Q. What was the February price? A. \$4970, I believe; I am not positive. There was a raise in the price around that time, just around January 1st or February 1st. 30

Q. What was March 1st? A. \$5333. That is the delivery price, Newark.

By Mr. Silver: Q. Now, Mr. Wood, do you know, as to this information that you just gave to the Court as to the prices of these cars in the various months you refer to, that that information from the price list is forwarded from the manufacturer? A. Well, I gathered it from the prices that I have told to a good many of our people. 40

Robert W. Wood—Cross

Q. You refer to a price list which was forwarded? A. I don't know whether the price list is forwarded or not. That is the management's prices right here in Newark; that is what I must go by. I cannot change that in any way; that is

10 what I must do.

Q. Do I understand that the head of your concern gives you the price of a certain car? A. Absolutely.

Q. And says it must be sold in that way? A. Yes. We have a printed form. I can show it to you right here if you want to see it.

Q. And that is the only means you have of ascertaining value? A. It is not the only means, no.

20 By the Court: Q. Do the Marmon Company fix their selling price to their agent? A. Yes, sir.

Q. By what? A. I haven't seen the correspondence, but I suppose the manufacturer—

Q. Is there a printed list furnished by the Marmon Company? A. Yes, sir.

Q. Have you that with you? A. Yes, sir; I think I have. It is all there (indicating).

Q. That is your memorandum? A. That is all right; you can see right there.

30 The Court: No, that is not what I want.

Mr. Chanalis: I have a catalogue here of the Marmon car. That is February edition.

Q. (Showing paper to witness) What is that? A. I have a catalogue, if that is what you want.

Mr. Chanalis: That is f. o. b., Indianapolis.

40 Q. (Showing paper to witness) Here is a Marmon Catalogue. Does that show this four-passenger roadster? A. Yes, sir.

Robert W. Wood—Cross

Q. Does it show the price?

Mr. Silver: Do I understand this catalogue is offered in evidence now?

The Court: It has not been yet.

A. May I just take and read this catalogue? It is just what we call an advance folder; it is not a catalogue with prices in it. 10

Q. There are no prices in it? A. I don't believe there are any prices in it—Yes; the prices are here; yes, sir, they are.

Q. Who furnishes that catalogue? A. That comes from Indianapolis.

Mr. Chanalis: I would like to offer it.

The Court: Do you object to it?

Mr. Silver: I object to it.

The Court: It will be received.

20

Marked Exhibit P-2.

By Mr. Silver: Q. Now, Mr. Wood, this is the edition of February, 1920. It does not give you any prices here for 1919. First, in September, 1919? A. No; it does not.

Q. This is only 1920? A. Yes, sir; 1920, yes, sir.

By the Court: Q. What is the price stated in there? A. Do you want me to tell from my mind?

Q. No, just look. A. I know what it is; it is \$5000, and \$330 War tax and transportation, \$5350 would be the delivery price here. 30

Q. What is the present war tax? A. Five per cent. That would be \$250.

Q. The transportation is how much? A. It varies. Sometimes it advances. It is war tax and transportation, \$5330.

Q. Eighty-three dollars transportation? A. Yes, sir, that is it. 40

George A. McLaren—Direct

By Mr. Silver: Q. Can you give us the price of that type of car in September, 1919? A. No; I don't know.

By the Court: Q. Do you know anything about deliveries of Marmon cars in 1919? A. I wasn't with the Marmon Company then, I was with another company.

Q. Do you know the condition of deliveries of cars in the latter part of 1919? A. I know somewhat.

Q. I don't want you to guess at it. A. You want to know something about the Marmon car?

Q. I want to know whether you know about the condition of deliveries of automobiles, generally, in the latter part of 1919? A. I would say it was poor, if that is what you want. It was difficult to get a car.

Mr. Silver: I desire to re-call Mr. McLaren for one question.

GEORGE A. McLAREN re-called:

By Mr. Silver: Q. Did I understand you to say, on direct-examination, that in September, 1919, you went to the Oldsmobile people and tendered them \$1450? A. No, sir, I didn't say that.

Q. What was your statement, please? A. I said on March 19th I tendered them \$1450.

Q. Did you also tender them the war tax at that time? A. No, sir; I did not.

Q. Was it asked of you? A. Yes, sir.

Q. Did you refuse to pay it? A. Yes, sir; I did, at that time.

George A. McLaren—Direct

Mr. Silver: May it please your Honor, I desire at this time to move for a nonsuit on the following grounds.

The Court: There cannot be such a thing.

Mr. Silver: I mean, for the direction of a verdict for the defendant on the following grounds. 10

The Court: I could not direct a verdict for the defendant, that would be impossible. The only thing I could do would be to direct a verdict for the amount of damages. You have admitted liability.

Mr. Silver: Yes; but if your Honor please, I am going to state to the Court, the amount of damage which your Honor will undoubtedly put before the jury, has not been proved in this case. My contention is that there has been no evidence produced on behalf of the plaintiff in this case to show what the market value was of a Marmon car of this type in September, 1919, which was the time we contracted to deliver. 20

The Court: (After argument.) What is your motion?

Mr. Silver: My motion is that because they did not set up by expert testimony the value of the car on or about September 15th, that therefore we are entitled to a verdict in our favor.

The Court: The motion to direct a verdict will be denied. 30

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Chanalis: If your Honor please, I would like to make a motion to direct a verdict in favor of the plaintiff, on the ground that we are not suing for damages— 40

The Court: I think this presents a question for

Charge

the jury. It was not for the Court to say what a reasonable time was. It was your duty to minimize your damages. It was your duty, as has been suggested, to go out and get another car as cheap as possible. Whether you did know, or whether you ought to have known by what was said to you, whether delivery was tendered to you within a reasonable time, or whether you knew or ought to have known, is a question for the jury. The motion will be denied.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Silver sums up for the defendant.

Mr. Chanalís sums up for the plaintiff.

The Court charges the jury as follows:

Charge

DUNGAN, J.

Gentlemen of the jury. By a contract dated June 25, 1919, the defendant, in this case, the Marmon-Oldsmobile Company, agreed to sell to the plaintiff, George McLaren, a type 34 four-passenger roadster, 1920 model, for a price guaranteed to be not over \$3950, on or about September 15, 1919, f. o. b. Newark; which means that that was to be the completed price including freight and all war taxes paid. That is the amount which it was agreed on to be paid by the plaintiff for this automobile. And it was also agreed that the defendant should take and the plaintiff should

Charge

deliver, on July 7, 1919, his 1918 model car at an agreed price of \$2500. As the pleadings now stand all this is admitted by the defendant. It is also admitted that they failed to deliver this 1920 Marmon car on September 15th or at any other time. It is also 10 admitted that they retained the plaintiff's 1918 Marmon car, for which they had agreed to pay \$2500.

It appears by the undisputed testimony in this case that on September 15, the date mentioned in this contract, the plaintiff made a demand upon the defendant for his automobile. They did not tell him that they could not deliver the automobile, that is, he does not say that they did; but what they said to him was that they could not deliver 20 it just then and did not know just how soon they would be able to deliver. He said he made demands at various times, and at those times it does not appear that they tendered back this 1918 model or the price for it, but told the plaintiff that they could not deliver this 1920 car; and they told him that if he would be patient they would probably have a car for him.

Now, gentlemen, of course, as soon as the plaintiff knew that the defendant was not going to live 30 up to its contract, as soon as the plaintiff knew that the defendant was not going to deliver his car to him, it was his duty to minimize his damages by an endeavor to get another car of the same type for the lowest price for which it could be obtained. You will observe, however, that this contract, which I have read, does not oblige the defendant to deliver this car on September 15th, 40 for the words used are "delivery date on or about September 15, 1919." That means that they

Charge

must deliver the automobile on or before September 15th, or that they would deliver it to the plaintiff within a reasonable time thereafter. And taking into consideration the condition of deliveries it is a question for you to say what was a reasonable time thereafter. It is a question for you to say whether or not March 18, in view of the condition of deliveries, was not a reasonable time thereafter. The fact is that on March 18th they did tender to the plaintiff in this case a car of the very model which he had purchased. Was that an indication that they considered this contract at an end, taking it in connection with what they said to him beforehand, when he had made a demand for the car, that if he had patience they would probably be able to deliver him a car—did it, in connection with the fact that they had retained his 1918 Marmon, indicate that they considered this contract at an end, or that they considered it still in full force, and in view of the condition of deliveries believed this was a reasonable time, then there was no reason—if it was a reasonable time—why the plaintiff should have endeavored before that time to have obtained another automobile. If it was not a reasonable time, and you find in view of all the circumstances of the case that the contract had expired before that time, then it was his duty, within that reasonable time, or at the expiration of that reasonable time, in view of what the defendant said to him, when he ought to have known that they considered the contract at an end, and they weren't going to fulfill it, to obtain another automobile.

Now, taking all the circumstances into consideration, it is for you to say whether or not what the plaintiff did was what a reasonably prudent and

Charge

careful man would have done under the same or similar circumstances and conditions, whether he did what a reasonably intelligent, careful and prudent man would have done in endeavoring to obtain another car. If what he did was what would ordinarily be done under these circumstances, then it is not disputed in this case that the price of this Marmon car on March 19th, when it was tendered to the plaintiff by the defendant was \$5333, the difference being \$1383, and interest from the date of tender, March 18th, to this date, \$10.61, making \$1393.61. If you decide that the contract was considered in force between these people and that the plaintiff did what he should have done to minimize his damages, and that this is his minimum of damages that is the amount which the plaintiff may recover in this case.

10

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The jury retires.

Mr. Silver: Will your Honor allow me an exception to the charge?

The Court: I will allow you an exception to any part, if you point it out. We are not trying a criminal case. We do not allow general exceptions.

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Postea**NEW JERSEY SUPREME COURT****ESSEX COUNTY**

10	GEORGE A. McLAREN, vs. MARMON-OLDSMOBILE Co., Defendant.	}	Plaintiff, Action at Law. Defendant.
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A fifteen days' notice of motion to have the plaintiff's damages assessed upon the first count in his complaint before a judge holding this Court, by a jury drawn from the general panel, having been duly served upon the defendant, and the matter having been heard on an adjourned date of the return day and submitted to the jury, they return a verdict as follows: They say that they find for the plaintiff and against the defendant on the first count of the plaintiff's complaint and they assess the damages of the plaintiff at the sum of One thousand three hundred and ninety-three dollars and sixty-one cents (\$1393.61).

NELSON Y. DUNGAN

30

Circuit Court Judge

Whereupon it is adjudged that the plaintiff recover from the defendant on the first count of his complaint, the sum of One thousand three hundred and ninety-three dollars and sixty-one cents (\$1393.61) with costs to be taxed.

Judgment entered June 12, 1920.

Let this rule be entered on the minutes.

40

W. S. GUMMERE

C. J.

On motion of
 Haines & Chanalís,
 Attorneys of the Plaintiff.

Stipulation

NEW JERSEY SUPREME COURT

 GEORGE A. McLAREN,

Plaintiff,

vs.

 MARMON-OLDSMOSBILE COMPANY,
 Defendant.

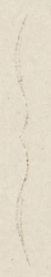
10

It is stipulated and agreed by and between the undersigned respective counsel that the payment of the judgment entered May 17th, 1920 on the second count of the complaint in this cause shall not in any manner or form affect the proposed appeal which the defendant desires to prosecute, in the event that a recovery of a judgment on the Second count of the said complaint and that in all manner and things the said appeal shall proceed in the same manner and form as though no judgment had been entered or paid on the said first count. 20

 HAINES & CHANALIS,
 Counsel for plaintiff.

 SAUL COHN,
 Counsel for defendant. 30

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New Jersey Court of Errors and Appeals

ESSEX CIRCUIT.

GEORGE A. McLAREN,

Plaintiff-Appellee,

vs.

MARMON-OLDSMOBILE COMPANY, a corporation,

Defendant-Appellant.

Action at Law.

*On Appeal from
Order Striking
Out Answer.*

PLAINTIFF-RESPONDENT'S BRIEF.

The facts as set forth in the defendant's brief are substantially correct, with the exception of the statement on page 2 which is reiterated on page 5, that "in the affidavit of Michael Chanalis (p. 22, case) the willingness of the plaintiff to pay the excise tax is set forth." This, as quoted, is grossly misleading. The offer referred to on the part of the plaintiff to pay the excise or war tax, was made by way of compromise after the defendant had refused the tender of the purchase price of the automobile. The plaintiff was greatly in need of a car and was willing to pay the additional charge to avoid litigation and delay. This offer was also refused by the defendant who demanded the transportation charge of the car from Indianapolis to Newark, in addition (p. 15, case).

POINT ONE.

The Supreme Court did not err when it entered an order striking out the answer of the defendant and when it entered summary judgment on the affidavits read.

The contention of the defendant that the contract in the case presents a question of construction of technical language, which was not within the province of the Court to determine, is without merit.

It is submitted that a brief examination of the pertinent clause of the contract, shows clearly the fallacy of the defendant's contention.

The clause reads as follows:

"The Marmon-Oldsmobile Company, Newark, N. J.

You are hereby authorized to enter my order on your books for one Marmon Type 34—4 Pas. Roadster for which I agree to pay the sum of List price of 1920 Model, Price Guaranteed to be not over \$3950.00

Credit for used car 1918 Marmon \$2500.00

Balance

(the Car is ready for delivery)

Delivery date on or about Sept. 15, 1919 F.O.B. Newark, N. J." (P. 7, case.)

It is unnecessary in order to determine the meaning of this clause to define the words "list price." Whatever definition is submitted, does not alter the fact that the purchase price of the Marmon is "Guaranteed to be not over \$3950.00." the amount tendered by the plaintiff.

The clause quoted above is not ambiguous nor is it necessary to define any technical words or phrases to understand its meaning and hence comes under the rule set forth in the first part of the quotation on page 3 of the defendant's brief, from the opinion in *Smith & Wallace Co. v. Lunger*, 64 N. J. L. 539, as follows:

"The general rule of law undoubtedly is that the construction of written contracts devolves upon the Court as a matter of law. It follows that the meaning of the words employed in the contract must be ascertained and determined by the Court as a matter of law."

The only issue in this case is whether or not the defendant was justified under the terms of the contract to demand, in addition to the price designated therein as the purchase price, a war tax and the transportation charge for the car from Indianapolis to Newark.

It is submitted that the following stipulations in the contract, "delivery ** F.O.B. Newark, New Jersey," and "This contract expresses the entire agreement between the parties" not only prove that the defendant was not justified in making the additional demands but also shows a contrary intention, particularly, as the contract was prepared by the defendant.

The construction placed upon the contract by Chief Justice Gummere in striking out the answer was also adopted by Judge Dungan in his charge to the jury which assessed the damages.

"Gentlemen of the jury. By a contract dated June 25, 1919, the defendant, in this case, the Marmon-Oldsmobile

Company, agreed to sell to the plaintiff, George McLaren, a type 34 four passenger roadster, 1920 model, for a price guaranteed to be not over \$3950. on or about September 15, 1919, f.o.b. Newark which means that that was to be the completed price including freight and all war taxes paid." (P. 38, case.)

POINT TWO.

The affidavit submitted on behalf of the defendant does not present facts which require determination by a jury.

The defendant contends as a defense to the complaint that the affidavit submitted in its behalf sets forth an abandonment of the written contract, and the creation of a new oral contract.

It is submitted that such a defense is affirmative and special and should have been pleaded in its answer, which simply contains an admission of the written contract and a general denial of the other allegations in the complaint (p. 9, case). Supreme Court Rule 58.

At the hearing before Chief Justice Gummere no attempt was made by the defendant to amend its answer, and therefore, it is urged that the defendant is precluded from such a defense and the answer was properly stricken out.

It is further submitted that the defendant's attempt to set up a subsequent oral agreement is merely an effort to vary by parol evidence the terms of the written contract. The very terms of the contract prohibit this:

"No modification of this contract shall bind either party unless such modification shall be in writing, signed by the purchaser and accepted by the Company." (P. 7, case.)

The alleged parol agreement again demonstrates how sham, frivolous and false the defendant's position is. If the written contract is what the defendant intended it to be there was no necessity to create the alleged parol agreement, which merely provided, according to the defendant's affidavit that the defendant would deliver the car when it was able to do so, upon the payment by the plaintiff of the excise tax and transportation charges in addition to the sum mentioned in the written contract (p. 19, case).

It is further urged by the plaintiff that the demand for the additional amounts by the defendant was the result of an after-thought and was caused by the rise in the market price of Mar-

mon cars by reason of which the defendant attempted to increase its profits on the sale to the plaintiff, or in other words to profiteer.

The defendant is also laboring under the misapprehension that the terms of the written contract permitted it to abandon the contract without the consent of the plaintiff and bases the creation of a parol agreement upon this alleged privilege.

The only clause in the contract which might pertain to the matter at all, simply protects the defendant from damages resulting from delays in delivery (p. 7, case).

But this suit was not brought for damages as a result of delay in delivering the car, but for the failure by the defendant to deliver the car when it had arrived and was available. This was not a contingent duty but an absolute one under the contract, hence the damages awarded by the jury were the difference between the contract price and the market value of the car on the date the defendant was able and refused to deliver the car (p. 41, case).

POINT THREE.

The only jury question in this case was submitted to a jury.

The contract in this case was clear, unambiguous and "expressed the entire agreement of the parties."

The only affidavit submitted by the defendant stated that it refused to deliver the car unless the excise tax and transportation charge was paid in addition to the price mentioned in the contract. It is therefore urged by the plaintiff that the defendant admitted the allegations set forth in the complaint as to the breach of the contract and only a question of damages remained in dispute. This question was submitted to the jury and was determined by it in favor of the plaintiff to be the sum of \$1,393.61.

For the above reasons it is respectfully urged that the order of the Supreme Court striking out the answer should be sustained.

Respectfully submitted,

HAINES & CHANALIS,
Of Counsel with Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

ESSEX CIRCUIT

GEORGE A. McLAREN, Plaintiff-Appellee,	} Action at Law. On appeal from order striking out answer.
vs.	
MARMON OLDSMOBILE COMPANY, a Corporation, Defendant-Appellant.	

DEFENDANT-APPELLANT'S BRIEF

Briefly the facts in this case are as follows: This is an appeal from the judgment entered for the plaintiff at the Essex Circuit in the Supreme Court, on motion to strike out the defendant's answer as sham and frivolous. Plaintiff sued upon a written agreement (p. 7, case) under which, he agreed to purchase a Marmon automobile and to pay for the same the "list price" of the 1920 model, price guaranteed not to be over \$3950. Complainant (p. 4, case) alleges the tender of the moneys required to be paid under the contract, and the failure of the defendant to deliver the car.

The answer (p. 9, case) admits the making of the contract, but denies that the plaintiff tendered the moneys required to be paid thereunder.

Before reply was filed, application was made to

strike out the answers filed to both counts on the Complaint for the reason that the allegations set forth in the answer were untrue, sham, frivolous and disclosed no defense to the action.

The affidavits filed on behalf of the litigants (pp. 10-23, case) disclose a dispute as to what the purchase price was, the plaintiff insisting that it was \$3950 less \$2500 allowed to him for the old Marmon car which he had delivered up, pursuant to the aforesaid agreement, and that \$1450 was all he was obliged to tender. The defendant, through its officers, contended that the "list price" of the car as set forth in the contract, meant the manufacturers' catalogue price exclusive of the cost of transportation and the Government Excise Tax. In the affidavit of Michael N. Chanalis, (p. 22, case), the willingness of the plaintiff to pay the excise tax is set forth.

On the basis of the affidavits filed, and after argument, Chief Justice Gummere sitting at Circuit, made an Order striking out the answer of the defendant.

POINT ONE

The Supreme Court erred when it entered an order striking out the answer of the defendant, and when it entered summary judgment on the affidavits read.

The first controversy in the case as disclosed by the affidavits and the pleadings, relates to the true price intended by the parties, a question of construction of technical language which was not within the province of the Court to determine on an application for summary judgment. In *Smith & Wallace Co. vs. Lunger*, Court of Errors and Appeals, 65 N. J. L., 539, at page 541, it was held as follows:

“The general rule of law undoubtedly is that the construction of written contracts devolves upon the Court as a matter of law. It follows that the meaning of the words employed in the contract must be ascertained and determined by the Court as a matter of law. *Prima facie*, the Court will attribute to words the meaning fixed by general usage. But since words which have in common usage a well-defined meaning are known to be frequently employed in a particular business or trade, in a meaning different from the ordinary one, it is equally well settled that in dealing with written instruments involving subjects connected with any particular business or trade, evidence that the words used in the instrument have acquired in such business or trade a peculiar, or, as it were, a technical sense, is

admissible. Upon such evidence an ambiguity is disclosed, and it becomes a question for the jury to determine—first, whether the words have acquired a peculiar meaning by such usage and what that meaning is; second, whether the words were used in the instrument in their ordinary sense or in the peculiar sense which they may find the usage of the trade has ascribed to them.”

It is contended by the defendant, that the contract in question was a typical illustration of the principle of construction which bereaves the Court of sole jurisdiction, and thrusts the determination of the meaning of the contract upon the jury, after extrinsic evidence of technical acceptance of the words in question, is adduced. The defendant had the right to submit evidence to the jury of the meaning in the automobile trade of the words “list price,” and the act of the Court in striking out its answer, precluded it from any demonstration as to the true meaning of the words.

A dispositive construction of a contract involving a peculiar meaning according to the custom and usage of a particular trade or business, cannot be effected through the legal machinery of a motion to strike out.

It is contended by the defendant, that in contracts of this class, the door cannot be shut in the face of the litigant, because the law intends that upon any question of ambiguity which results from the technical language, there shall be the intervention of the jury's opinion. The case above mentioned, cites the case of *Halsey vs. Adams*, Court of Errors and Appeals, 34 Vr., 330, which enunciates a similar doctrine.

POINT TWO

The Supreme Court erred in striking out the defendant's answer because it denied the right of the defendant to a trial by jury, and precluded the defendant from submitting to a jury the determination of the existence of the facts set forth in the affidavit.

The affidavits of the defendant set up an agreement between the parties relating to the purchase price which was definitely made subsequent to the original agreement, and in general confirmation and amplification thereof. Assuming that it was within the province of the Court to construe the contract, the agreement in question (see affidavit Charles W. Oathout, p. 19, case), was valid, in view of the contingent liability of the defendant for the delivery of the car, which was originally prevented by causes beyond the control of the defendant (see contract, p. 7, case). The circumstances which the defendant set forth in its answer disclosed that delivery of the car would be indefinitely delayed. In view of those circumstances, there was a good consideration for the oral understanding of the parties that the freight and war tax would be paid. The situation presented by affidavits, shows that the defendant was ready to abandon the contract, which the plaintiff elected to revive, he agreeing to pay the war tax and freight, and, according to the defendant, in the revival of the contract, it was definitely understood that the war tax and freight would be paid.

The defendant does not squarely contradict this allegation, but in the affidavits filed on his side of the controversy admitted that he was willing to

pay the excise tax. Whether this agreement existed, was really a question for the jury and neither party could be precluded from narrating his version of the matter. See *Connelly vs. Devoe*, 37 Conn., 570.

It is respectfully urged that the Order of the Supreme Court should be reversed.

Respectfully submitted,

SAUL COHN,
of Counsel with Defendant-Appellant.

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