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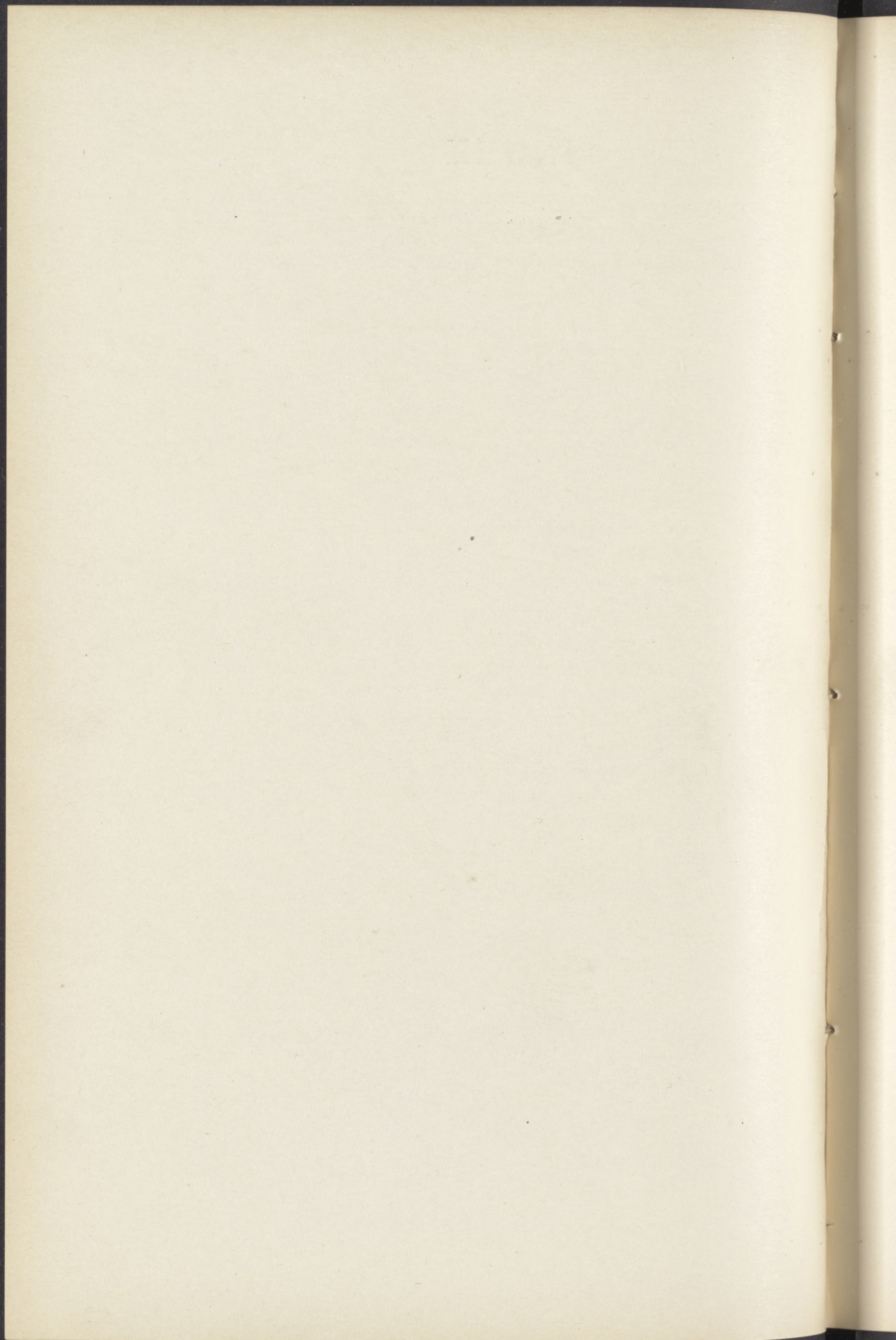


EXHIBIT D. 23.

Credit Memos.

YALE ELECTRIC CORPORATION
Successors to Franco Electric Corporation

Brooklyn, N. Y. **10**
Date 12/26/24
Credit No. 3335
Your Order No. 3045

CREDIT TO

Morrissey Storage Battery Service Co.
12 William Street
Newark N. J.

To allow price of 9.00 ea. net on 47-611 x 19
Yale Storage Batteries billed at 9.50 net on in- **20**
voice #49689. Special price A/C our inability
to supply 611 Z as ordered.23.50
Invoice rec'd
Terms
Extensions O. K.
Date goods rec'd
Quantity O. K.
Prices O. K.
Charged to Stock **30**

Exhibit D. 25.

EXHIBIT D. 25.

Items of Other Credit Memoranda.

	Date	No.	Item	Amount
	4-20-25	1	6 A 120B Yale Radio Storage Battery	
			11.22 net	11.22
10			Less .....	.56
				<hr/>
				10.66
	9-30-25		5% allowance on Storage Batteries sold direct by us during month of September to the following:	
		8-27	# 65913—Tri City Electric Co. . .	13.00
		9-10	# 66926—Lightning Electric Co. . .	194.50
		9-10	# 66931—Tri City Electric Co. . .	251.00
		9-25	# 68091—Tri City Electric Co. . .	10.00
				<hr/>
			468.50	
			5%	23.43
				<hr/>
			merchandise returned	
	11-30-25	1	611 ZR Storage Battery 9.20 net	9.20
			Less 5 .....	.46
				<hr/>
				8.74
20	11-21-24	3	1512V Yale B Batteries Metal 1.04 net	3.12
		1	3045 V Yale B Batteries 1.95 net	1.95
				<hr/>
				5.07
		9	6 Yale Dry Cells .24 net	2.16
			Less 5 .....	.11
				<hr/>
				2.05
				<hr/>
	11-12-25		5% comission on the following sold by us direct during the month of October 1925	7.12
			10- 6—#69016—Tri City Electric Co. Newark	230.00
			10-10 69451 Tri City Electric Co. Newark	8.00
30			10-14 69877 W. D. Hawk Elec- tric Co. Kingston	55.20
			10-21 70713 Lightning Electric Co. Newark	206.75
			10-22 70883 Columbia Music Store Newburgh	282.50
			10-27 71339 W. D. Hawk King- ston	15.70
			10-29 71637 Wilbur Sto. Batt. Trenton	47.10
			10- 6 69108 Wireless Equipment Stapleton	236.90
			10-12 69578 Wireless Equipment Stapleton	110.40
			10-29 71637 Wilbur Stor. Batty Co. Trent.	47.10

40

Exhibit D. 25.

Date No.	Item	Amount
10-31	71817 Guarantee Electric	
	Co. J. City	39.25
		1,278.90
	5%	

YALE ELECTRIC CORPORATION
 Successors to Franco Electric Corporation

10

Brooklyn, N. Y.
 Date 10-7-24
 Invoice No. 46023
 Your Order no Phone 10-7-
 Our Order No. 22810
 B. O. Form
 Salesman

SOLD TO

Morrisey Storage Battery Service Co.
 12 William Street
 Newark N. J.

No claims considered unless reported within five days after receipt of goods. All goods at owners risk of transportation. We positively refuse to allow credit on goods returned without our permission.

20

Terms:—2% 10 days, net 30 days, subject to sight draft if not paid when due.

20	6-A- 90		460.00
15	6-A-120		420.00
			880.00
	Less 50-10-7½		513.70
			366.30
5	6 11x19 Yale Storage Batteries	9.50 net	47.50

413.80

Entered in Stock Book

O.K. H P
 Via Truck 10-7-24.

30

Do not change this bill if not correct please return with full advice

40

Exhibit D. 25.

Items from Other Bills.

	Date	No.	Item	Amount
			12.10 net	12.10
	10- 8-24	2	6-A-90 Yale Radio Storage Batteries #90083-093 23.00	46.00
		1	6-13R19 Yale Storage Battery 31.00	31.00
			#78431	77.00
10			Less 50-10-7½	44.95
				32.05
		1	6-11 x 19 Yale Storage Battery 9.50 net.....	9.50
				41.55
		1	6-A-150 Yale Radio Storage Battery #64435 32.00	32.00
			Less 50-10-7½	18.68
				13.32
		9	6-A-60 Yale Radio Storage Batteries	193.50
			Less 50-10-7½	112.95
				80.55
		1	6-11 x 19 Yale Storage Battery 9.50 net ...	9.50
				90.05
		1	6-11-x 19 Yale Storage Battery 9.50 net	9.50
20	10-14-24	12	6-A-60 Yale Radio Storage Batteries	249.00
			Less 50-10-7½	145.35
				103.65
	10-15-24	1	6 A 120 Yale Radio Storage Battery	28.00
			Less 50-10-7½	16.34
				11.66
		2	6 A 90 Yale Radio Storage Batteries 23.00 #89981	46.00
			Less 50-10-7½	26.85
				19.15
		1	127 R 63 Yale Storage Battery	37.00
		2	6 A Yale Storage Batteries (Radio)	51.00
				88.00
			Less 50-10-7½	51.37
				36.63
	10-16-24	1	127 Z 63 Yale Storage Battery 11.50 net ..	11.50
			Frt Charges Carload Rate Indianapolis ..	.38
30				11.88
	" 18 "	25	6 A 90 Yale Radio Storage Batteries 23.00	575.00
		5	6 A 120 Yale Radio Storage Batteries 28.00	140.00
				715.00
			Less 50-10-7½	417.38
				297.62
	" 22 "	2	48 V. Yale Radio B. Storage Batteries \$10 net	20.00
		15	Yale Storage Batteries	230.00
			Less 50-10-7½	134.26
				95.74
			Ft. Charges carload rate Indianapolis to N. Y.	1.15
				141.39
	" 23 "	25	611 Z 19 Yale Storage Batteries 8.50 net	212.50
		2	615 R 19 Yale Storage Batteries 35.50 ...	71.00
40			Less 50-10-7½	41.45

Exhibit D. 25.

Date	No.	Item	Amount	
		#58347-404	29.55	
		Fr't Charles	6.92	
				248.97
10-23-24	6	6 A 90 Yale Radio Storage Batteries 23.00	138.00	
	1	6 A 120 Yale Radio Storage Battery 28.00..	28.00	
			166.00	
		Less 50-10-7½	96.90	
				69.10
	2	48 V Yale Radio B. Storage Batteries	20.00	10
	3	611 Z 19 Yale Storage Batteries	25.50	
			45.50	
		Fr't. Charges Carload Rate Indianapolis ..	.83	
				46.33
10-30-24	2	615 R. 19 Yale Storage Batteries 35.50	71.00	
		Less 50-10-7½	41.45	
		#58348 3.50		
	6	613 Z Yale Storage Batteries 9.50 net	57.00	
	2	127 Z " " " 11.50 " ...	23.00	
			109.55	
		Fr't. charges .....	.69	
			110.24	
11-10-24	1	611 R. 19 Yale Storage Battery 10.82	10.82	10.82
	6	6 A 90 Yale Radio Storage Batteries \$23.00	138.00	20
	1	613 R. 19 Yale Storage Battery 31.00	31.00	
			169.00	
		Less 50-10-7½	98.65	
				70.35
11-12-24	55	Yale Radio Storage Batteries	1,315.00	
		Less 50-10-7½	767.63	
			547.37	
	35	Yale Storage Batteries	312.46	
		Fr't. Charges	10.30	
				871.17
11-14-24	3	6 A 90 Yale Radio Storage Batteries 23.00	69.00	
		Less 50-10-7½	40.28	
				28.72
11-19-24	6	613 Z 19 Yale Storage Batteries 9.50	57.00	30
		Fr't charges	1.92	
				58.92
11-19-24	1	613 R 19 Yale Storage Battery \$31.00.....	31.00	
	1	6 A 120 Yale Radio Storage Battery 28.00..	28.00	
	4	6 A 90 Yale Radio Storage Batteries 23.00	92.00	
			151.00	
		Less 50-10-7½	88.15	
				62.85
11-22-24	2	611 Z 19 Yale Storage Batteries 8.50 net ..	17.00	
		Fr't. charges .....	.56	
				17.56
11-24-24	1	613 R 19 Yale Storage Battery 31.00	31.00	
	1	6 A 60 Yale Radio Storage Battery 18.00	18.00	
	2	6 A 120 Yale Radio Storage Batteries 28.00..	56.00	
			105.00	40

Exhibit D. 25.

Date	No.	Item	Amount
		Less 50-10-7½	61.29
			<u>43.71</u>
	3	611 X Yale Storage Batteries 9.50 net	28.50
	1	613 Z Yale Storage Batteries 9.50 net.....	9.50
			<u>81.71</u>
		Fr. Charges .....	.32
10	11-24-24	10 6 A 90 Yale Radio Storage Batteries 18.50	185.00
		65 6 A 90 " " " " 23.00	1,495.00
		20 6 A 120 " " " " 28.00	560.00
		5 6 A 150 " " " " 32.00	160.00
			<u>2,400.00</u>
		Less 50-10-7½	1,401.00
			<u>999.00</u>
		6 48 V Yale Radio B. Storage Batteries 10.00 net	60.00
			<u>1,059.00</u>
	11-25-24	1 6 A 120 Yale Radio Storage Battery 12.00	12.00
	29-24	70 Yale Storage Batteries	672.00
		Fr. Charles	7.53
			<u>679.53</u>
20		3 6 A 90 Yale Radio Storage Batteries 23.00..	69.00
		Less 50-10-7½	40.28
			<u>28.72</u>
	12- 2-24	6 Yale Radio Storage Battery	143.00
		Less 50-10-7½	83.48
			<u>59.52</u>
	12- 4-24	3 611 RR 19 Yale Storage Batteries 28.00 ...	84.00
		Less 50-10-7½	49.03
			<u>34.97</u>
	12- 5-24	25 6 A 60 Yale Radio Storage Batteries 18.50..	462.50
		50 6 A 90 Yale Radio Storage Batteries 23.00	1,150.00
		25 611 RR 19 Yale Storage Batteries 28.00	700.00
			<u>2,312.50</u>
		Less 50-10-7½	1,349.92
			<u>962.58</u>
30	15	611 Z 19 Yale Storage Batteries 8.50 net ..	127.50
	10	613 Z 19 9.50	95.00
			<u>1,185.08</u>
		Fr. charges	7.35
			<u>1,192.43</u>
	12- 9-24	6 6 A Yale Radio Storage Batteries 23.00 ..	138.00
		1 127 63 Yale Storage Battery 37.00	37.00
			<u>175.00</u>
		Less 50-10-7½	102.16
			<u>72.84</u>
	18	Yale Storage Batteries	201.00
	5	Y A 150 Yale Radio Storage Batteries 32.00	66.00
			<u>267.60</u>
		Fr. charges	6.64
40			<u>274.24</u>

Exhibit D. 25.

Date	No.	Item	Amount	
12-11-24	65	Yale Storage Batteries	1,336.00	
		Less 50-10-7½	779.89	
			<u>556.11</u>	
		Frts. charges	7.33	
			<u>786.44</u>	
12-12-24	3	6 A 90 Yale Radio Storage Batteries	29.25	29.25
12-16-24	7	6 A 90 R Yale Radio Storage Batteries	68.25	68.25
12-16-24	8	Storage Batteries	81.46	81.46
12-17-24	79	Storage Batteries	1,025.00	10
		Less 50-10-7½	598.34	
			<u>710.41</u>	
12-18-24	75	Storage batteries	\$ 747.63	
		Frts. charges	7.07	
			<u>754.70</u>	
12-20-24	5	6 A 90 Yale Radio Storage Batteries..		
		\$23.00	115.00	
		Less 50-10-7½	67.13	
			<u>47.87</u>	
12-22-24	5	Yale Storage Batteries.....	45.66	
		Frts. charges	1.13	
			<u>46.79</u>	
12-23-24	5	6 A 90 R Yale Radio Storage Batteries		
		9.75 net	48.75	48.75
12-30-24	6	6 A Yale Radio Storage Batteries \$23.....	138.00	
		Less 50-10-7½	80.56	
			<u>57.44</u>	20
1-20-25	9	Yale Storage Batteries	324.50	
		Less 50-10-7½	195.26	
			<u>139.24</u>	
1-20-25	275	Yale Storage Batteries.....	2598.96	
		Frts. charges	45.57	
			<u>2644.53</u>	
1- 3-25	6	Yale Storage Batteries.....	62.41	
		Frts. charges .....	.28	
			<u>62.69</u>	
1- 8-25	1	613 R. R. 19 Yale Storage Battery 33.00...	33.00	
		Less 50-10-7½	19.26	
			<u>13.74</u>	
1-10 25	20	6 A 90 Yale Radio Storage Battery Service		
		Co. 9.75 net	195.00	
		6 Yale Radio Storage Batteries.....	61.61	
1-14-25	1	6 A 12 or Yale Radio Storage Battery 12.00		30
		net	12.00	
		6 6 A 90 R. Yale Radio Storage Batteries 9.75		
		net	58.50	
1-15-25	1	611 R 19 Yale Storage Battery.....	26.00	
		Less 50-10-7½	15.18	
			<u>10.82</u>	
	50	6 A 90 R Yale Radio Storage Batteries 9.75		
		net	487.50	
1-24-25	1	6 A 12 or Yale Radio Storage Battery 12.00		
		net	12.00	
1-27-25	2	Storage Batteries	54.00	
		Less 50-10-7½	31.52	
			<u>22.48</u>	
	3	6 A 12 or Yale Radio Storage Batteries 12.		
		net	36.00	

Exhibit D. 25.

	Date	No.	Item	Amount
	1-23-25	6	611 Z Yale Storage Batteries 8.50.....	51.00
			Frts. charges	1.70
				<hr/> 52.70
	1-29-25	1	127 R 63 Yale Storage Battery 37.00.....	37.00
			Less 50-10-7½	21.60
				<hr/> 15.40
	2-18-25	74	Yale Radio Storage Batteries.....	738.02
			Less 5	36.90
10				<hr/> 701.12
		15	Yale Storage Batteries.....	183.69
			Less 5	9.18
				<hr/> 174.51
		1	6 A 90 M Yale Radio Storage Battery 9.85..	9.85
			Less 5 .....	.49
				<hr/> 9.36
	2-21-25	1	613 C Yale Storage Battery 21.65 net.....	21.65
			Less 5	1.08
				<hr/> 20.57
	2-24-25	6	Yale Radio Storage Batteries	51.53
			Less 5	2.57
				<hr/> 48.86
	2-25-25	3	6 A 12 or Yale Radio Storage Batteries....	36.30
	3- 3-25	4	Yale Radio Storage Batteries.....	41.65
			Less 5	2.08
				<hr/> 39.57
20	3- 4-25	20	Storage Batteries	251.29
			Less 5	12.56
				<hr/> 238.73
	3- 7-25	1	613 Z Yale Storage Battery 11.27 net.....	11.27
			Less 5 .....	.56
				<hr/> 10.71
	3-10-25	1	611 Zr Yale Storage Battery 9.95 net.....	9.95
			Less 5 .....	.50
				<hr/> 9.45
	3-12-25	6	6 A 90 R Yale Radio Storage Batteries 9.85 net	59.10
			Less 5	2.95
				<hr/> 56.15
	3-17-25	7	6 A 12 or Yale Radio Storage Batteries 12.10 net	77.95
			Less 5	3.90
				<hr/> 74.05
30	3-18-25	1	6 A 12 Om Yale Radio Storage Battery 12.10 net	12.10
			Less 5 .....	.60
				<hr/> 11.50
	3-31-25	10	613 Z Yale Storage Battery 11.27 net.....	112.70
	4- 9-25	1	6 A 12 or Yale Radio Storage Battery 12.10 net	12.10
			Less 5 .....	.60
				<hr/> 11.50
	4-14-25	30	Yale Storage Batteries.....	316.80
			Less 5	15.84
				<hr/> 300.96
		2	cases for 6 a 120 M Radio Storage Bat- teries \$1.00 net.....	2.00
	4-15-25	2	6 A 90 R Yale Radio Storage Batteries 9.85 net	19.70
		1	611 ZR Yale Storage Battery 9.95 net.....	9.95
40				<hr/> 29.65
			Less 5	1.48
				<hr/> 28.17

Exhibit D. 25.

Date	No.	Item	Amount	
4-17-25	40	Yale Storage Batteries.....	266.90	
		Less 5-5	26.02	
				403.09
4-25-25	3	6 A 90 R Yale Radio Storage Batteries		
		\$9.85 net	29.55	
		Less 5	1.48	
				28.07
	3	6 A 90 R Yale Radio Storage Batteries		
		9.85 net	29.55	
		Less 5	1.48	
				28.07
4-28-25	2	613 Z Storage Batteries 11.27 net.....	22.54	
		Less 5	1.13	
				21.41
5- 6-25	6	611 R R Yale Storage Batteries 10.45 net..	62.70	
	6	613 R R Yale Storage Batteries 12.45 net..	74.70	
			137.40	
		Less 5	6.87	
				130.53
	8	Yale Storage Batteries.....	95.60	
		Less 5	4.78	
				90.82
	4	611 R R Yale Storage Batteries.....	45.80	
		Less 5	2.29	
				43.51
5- 7-25	45	Storage Batteries	457.50	20
		Less 5-5 Special Discount.....	44.61	
				412.89
5-11-25	1	611 H Yale Storage Battery 15. net.....	15.00	
		Express charges	1.37	
				16.37
5-22-25	12	613 R Yale Storage Batteries Wood 10.45		
		net	125.40	
		Less 5	6.27	
				119.13
5-26-25	1	6 A 12 Or Yale Radio Battery 11.30 net....		11.30
6- 5-25	1	6 A 90 R Yale Radio Storage Battery 9.20		
		net	9.20	
		Less 5 .....	.46	
				8.74
	1	6 A 12 Or Yale Radio Storage Battery 11.30		
		net	11.30	
		Less 5 .....	.57	
				10.73
6-12-25	29	Yale Radio Storage Batteries.....	313.55	
		Less 5	15.68	
				297.87
6-12-25	1	6 A 90 R Yale Radio Storage Battery 9.20		
		net	9.20	
	1	611 Z R Yale Storage Battery 9.20 net.....	9.20	
			18.40	
		Less 5 .....	.92	
				17.48
6-18-25	3	611 Z R Yale Storage Batteries 9.20 net....	27.60	
		Less 5	1.38	
				26.22
				40

Exhibit D. 25.

	Date	No.	Item	Amount	
	6-26-25	2	611 ZR Storage Batteries 9.20 net.....	18.40	
			Less 5 .....	.92	
					17.48
	7- 2-25	1	615 R 19 Yale Storage Battery 14.25 net...	14.25	
			Less 5 .....	.71	
					13.54
	7- 3-25	2	611 Z R Storage Batteries 9.20 net.....	18.40	
			Less 5 .....	.92	
					17.48
10	7- 7-25	25	611 Ford Special Storage Batteries 7.60 net		190.00
	7-21-25	9	Storage Batteries		76.55
	7-22-25	22	Storage Batteries		269.77
	8- 5-25	11	Radio Storage Batteries 9.....	116.70	
			Less 5	5.83	
					110.87
	8- 6-25	43	Storage Batteries		369.74
	8-13-25	1	613 ZR Yale Storage Battery 10.45 net....	10.45	
			Less 5 .....	.52	
					9.93
	8-14-25	3	611 Ford Special Storage Batteries 7.85 net	23.55	
		3	613 ZR Yale Storage Batteries 10.45 net...	31.35	
			Less 5	1.57	
					53.33
	8-14-25	6	611 Ford Special Storage Batteries.....		45.60
		6	6 A 9 Or Yale Radio Storage Batteries		
			9.20 net	55.20	
20			Less 5	2.76	
					52.44
	8-14-25	25	611 Ford Special Storage Batteries 7.60 net		190.00
	8-20-25	1	619 R 39 Storage Battery 17.67 net.....		17.67
	8-25-25	4	Storage batteries	43.80	
			Less 5	2.19	
					41.61
	8-27-25	7	Yale Storage Batteries.....	69.40	
			Less 5	3.47	
					65.93
	8-27-25	10	611 Ford Special Storage Batteries 7.60 net		76.00
	8-29-25	12	6 A 90R Yale Radio Storage Batteries 9.20		
			net	110.40	
			Less 5	5.52	
					104.88
30		6	611 Ford Special Storage Batteries 7.85 net	47.10	
					151.98
	8-31-25	4	Yale Radio Storage Batteries.....	38.90	
			Less 5	1.95	
					36.95
	9- 1-25	2	617 R Storage Batteries 16.25 net.....	32.50	
		1	619 R 39 " " 18.60 "	18.60	
					51.10
			Less 5	2.55	
					48.55
	15		611 Ford Special Storage Batteries 7.60 net	114.00	
					162.55
		4	613 ZR Yale Storage Batteries 10.45 net....	41.80	
			Less 5	2.09	
					39.71
40					

Exhibit D. 25.

Date	No.	Item	Amount	
	1	613 C Storage Battery 21.65 net.....	21.65	
		Less 5	1.08	
				20.57
9- 4-25	1	613 ZR Storage Battery 10.45 net.....	10.45	
		Less 5 .....	.52	
				9.93
	12	611 Ford Special Storage Batteries 7.60 net		91.20
9-10-25	25	611 Special Storage Batteries 7.60 net.....		190.00
9-15-25	1	613 ZR Storage Batteries 10.45 net.....	10.45	
		Less 5% discount.....	.52	
				9.93
9-17-25	2	613 ZR Storage Batteries 10.45 net.....	20.90	
		Less 5	1.04	
				19.86
9-24-25	1	1273 ZR Yale Storage Battery 12.60 net...	12.60	
		Less 5% discount.....	.63	
				11.97
9-25-25	28	Storage Batteries		256.50
10- 2-25	28	Storage Batteries	190.00	
		Less 5	9.50	
				256.50
10- 6-25	6	611 Special Storage Batteries 7.60 net.....		45.60
	6	storage batteries		45.60
10- 9-25	47	Storage Batteries		413.63
	4	storage batteries	50.70	
		Less 5% discount.....	2.53	
				48.17
10-10-25	1	617 R Storage Battery 16.25 net.....	16.25	
		Less 5 .....	.81	
				15.44
10-16-25	1	613 RR Storage Battery 12.45 net.....	12.45	
		Less 5 .....	.62	
				11.83
10-17-25	35	Storage Batteries	357.45	
		Less 5% discount.....	12.17	
				345.28
10-19-25	1	6 A 90 R Yale Storage Battery 9.20 net...	9.20	
		Less 5%	\$.46	
				8.74
10-21-25	15	Ar 611 Yale Special Storage Batteries 7.60 net		114.00
	25	Ar 611 Special Storage Batteries 7.60 net...		190.00
11- 4-25	6	AR 611 Special Storage Batteries 7.60 net		45.60
11-10-25	12	Yale Storage Batteries.....		106.40
11-12-25	3	Yale Storage Batteries.....	34.40	
		Less 5	1.72	
				32.68
12-28-25	3	6 A 90r Yale Radio Storage 9.20. net.....	27.60	
		Less 5	1.38	
				26.22
12-30-25	9	Storage Batteries		171.68
1- 8-26	21	Storage Batteries		176.18
	3	3045V Yale B. Batteries 1.95 net...	5.85	
	1	3044 " " " 1.95 " ...	1.95	
				7.80
150	6	Yale Dry Cells Round .24 " ...	36.00	
		Less 5	1.80	
				34.20
				42.00

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Exhibit D. 25.

Date	No.	Item	Amount
1-9-26	5	6 A9 Or Yale Radio Storage Batteries 9.20 net.....	46.00
		Less 5	2.30
			<hr/> 43.70
	50	3045 V Yale B Batteries 1.95 net.....	97.50
	20	3044 " " " 1.95 "	39.00
			<hr/> 136.50
10	7	6A 9 Or Yale Radio Storage Batteries 9.20 net	64.40
		Less 5	3.22
			<hr/> 61.18
7-27-25	2	619 R 39 Storage Batteries 18.60 net.....	37.20
		Less 5	1.86
			<hr/> 35.34

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SUMMONS.

THE STATE OF NEW JERSEY, ss.

To William J. Morrissey, doing business under the trade name of Morrissey Storage Battery Service Co.:

(L. S.) YOU ARE SUMMONED to answer the annexed complaint of Yale Electric Corporation, a corporation, in an action at law in the New Jersey Supreme

Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

10

20

WITNESS, Honorable WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court, at Trenton, this 30th day of November, Nineteen Hundred and Twenty-five.

EDWARD J. KELLEHER,
Clerk.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys.

30

40

COMPLAINT.

Filed December 8, 1925.

New Jersey Supreme Court

ESSEX COUNTY.

10

YALE ELECTRIC CORPORATION,
Plaintiff,

vs.

WILLIAM J. MORRISSEY, doing
business under the trade name
of Morrissey Storage Battery
Service Co.,

Defendant.

*Action
at Law.
Complaint.*

20

Plaintiff, a corporation organized and existing
under the laws of the State of New York, says
that:

FIRST COUNT.

30

(1) On August 15, 1925, defendant trading under the name of Morrissey Storage Battery Service Co. at 12 William street, Newark, New Jersey, being indebted to the plaintiff for certain merchandise sold and delivered by plaintiff to the defendant, gave to the plaintiff his trade acceptance bearing date August 15, 1925, payable October 15, 1925, for \$2651.07, in the form following, to wit:

40

Complaint.

TRADE ACCEPTANCE

"No..... Newark, N. J., Aug. 15, 1925.
To Morrissey Storage Battery Service Co.,
Newark, N. J. On Oct. 15, 1925, Pay to the
order of ourselves Two thousand six hundred
fifty one and 07/100 Dollars (\$2651.07)

10

The obligation of the acceptor hereof arises
out of the purchase of goods from the
drawer. The drawee may accept this bill
payable at any bank, banker or trust com-
pany in the United States which he may
designate.

Accepted at Newark, N. J., on Aug. 15, 1925.
Payable at Federal Trust Co., Newark, N. J.

MORRISSEY STORAGE BATTERY

SERVICE CO.

W. J. MORRISSEY, Treas.

20

YALE ELECTRIC CORPORATION,

By C. S. HUTCHESON, Secretary."

ENDORSED:

Pay to the Order of
NATIONAL PARK BANK
YALE ELECTRIC CORPORATION

C. S. Hutcheson,
Secretary.

30

(2) Said trade acceptance was presented for
payment on the date it fell due, but was not paid
in full; the defendant paid on account thereof
\$1051.07, leaving a balance due thereon of \$1600,
with interest from October 15, 1925.

Plaintiff demands judgment on this count in
the sum of \$1600, with interest from October 15,
1925.

40

Complaint.

SECOND COUNT.

10 (1) On September 15, 1925, defendant trading under the name of Morrissey Storage Battery Service Co. at #12 William street, Newark, New Jersey, being indebted to the plaintiff for certain merchandise sold and delivered by the plaintiff to the defendant, gave to the plaintiff his trade acceptance bearing date September 15, 1925, payable November 15, 1925, for \$2488.18, in the form following, to wit:

TRADE ACCEPTANCE

20 "No..... Newark, N. J., Sept. 15, 1925.
To Morrissey Storage Battery Service Co.
Newark, N. J. On Nov. 15, 1925, pay to the
order of ourselves Twenty four hundred
eighty eight and 18/100 Dollars
(\$2488.18)

The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The drawee may accept this bill payable at any bank, banker or trust company in the United States which he may designate.

30 YALE ELECTRIC CORPORATION
By C. S. HUTCHESON,
Secretary.

Accepted at Newark, N. J. on Sept. 15, 1925.
Payable at Federal Trust Co.

MORRISSEY STORAGE
BATTERY SERVICE CO.
W. J. MORRISSEY, Treas."

Complaint.

ENDORSED:

Pay to the order of
 NATIONAL PARK BANK
 YALE ELECTRIC CORPORATION
 C. S. Hutcheson, Secretary.

(2) Said trade acceptance was presented for payment on the date it fell due, but was not paid. 10
 Plaintiff demands judgment on this count in the sum of \$2488.18, with interest from November 15, 1925.

THIRD COUNT.

(1) On October 15, 1925, defendant being indebted to the plaintiff for goods, wares and merchandise sold and delivered by the plaintiff to the defendant, gave to the plaintiff his trade acceptance, bearing date October 15, 1925, payable December 15, 1925, in the form following, to wit: 20

TRADE ACCEPTANCE

“No. . . . Newark, N. J., Oct. 15, 1925.
 To Morrissey Storage Battery Service Co.,
 Newark, N. J. On Dec. 15, 1925, Pay to the
 order of ourselves Eleven hundred ninety-one
 and 71/100 Dollars (\$1181.71) 30
 The obligation of the acceptor hereof arises
 out of the purchase of goods from the
 drawer. The drawee may accept this bill
 payable at any bank, banker or trust com-
 pany in the United States which he may des-
 ignate.

YALE ELECTRIC CORPORATION
 By C. S. HUTCHESON,
 Secretary.

Complaint.

Accepted at Newark, N. J. on Oct. 15, 1925.
Payable at Federal Trust Co.

MORRISSEY STORAGE
BATTERY SERVICE CO.

W. J. MORRISSEY,
Treas."

10

(2) That on the 20th day of April, 1925, the plaintiff and the defendant William J. Morrissey and Rose M. Morrissey, his wife, made and executed an agreement in writing, which among other things expressly provided, as follows:

20

"It is further expressly understood and agreed that all trade acceptances must be paid on the due date thereof, and that in the event any trade acceptance be not paid when due any and all moneys then owing by the said William J. Morrissey to the party of the second part (the plaintiff) shall be and become immediately due and payable, including all other trade acceptances which may have been received by the party of the second part from the said William J. Morrissey, notwithstanding that the same be not then due by the terms thereof."

30

(3) That as provided by the terms thereof the said trade acceptance dated August 15, 1925, has become due and payable, together with all other moneys owing by the said defendant to the plaintiff.

Plaintiff demands judgment on this count in the sum of \$1191.71.

FOURTH COUNT.

40

(1) That in the months of October and November, 1925, plaintiff on open account sold and

Complaint.

delivered to the defendant, at his request, certain goods, wares and merchandise, of the value of \$2095.68.

(2) That defendant became entitled to credits for certain commissions and merchandise returns in the aggregate of \$106.62, leaving a balance due on the merchandise account from the defendant to the plaintiff in the sum of \$1989.06. 10

Plaintiff demands judgment on this count in the sum of \$1989.06, together with interest from November 15, 1925.

Plaintiff demands judgment against the defendant in the sum of \$7268.95, and interest as hereinabove demanded, together with costs of suits to be taxed.

McDERMOTT, ENRIGHT & CARPENTER, 20
Attorneys of Plaintiff.

To the Within Named Defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you. 30

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

ANSWER AND COUNTER-CLAIM.

Filed December 30, 1925.

10 Defendant, William J. Morrissey, doing business under the trade name of Morrissey Storage Battery Service Co., residing in the City of Newark, County of Essex, and State of New Jersey, answering the complaint of the plaintiff, says that:

FIRST COUNT.

1. Defendant admits paragraph one, of the First Count.

2. Defendant admits paragraph two of the First Count.

20

SECOND COUNT.

3. Defendant admits paragraph one of the Second Count.

4. Defendant admits paragraph two of the Second Count.

THIRD COUNT.

30 5. Defendant admits paragraph one of the Third Count.

6. Defendant admits paragraph two of the Third Count.

7. Defendant admits paragraph three of the Third Count.

FOURTH COUNT.

40 8. Defendant admits paragraph one of the Fourth Count except that the defendant denies that the plaintiff sold and delivered to him cer-

Answer and Counter-claim.

tain goods, wares and merchandise of the value of \$2095.68.

9. Defendant admits paragraph two of the Fourth Count except that the defendant denies that the aggregate credits and commissions due defendant is \$106.62 and that the balance due plaintiff is \$1989.06 and this defendant further says that he is entitled to credits for certain commissions and merchandise returned in the aggregate of \$655.03 leaving a balance due on the merchandise account from defendant to the plaintiff in the sum of \$1750.53. 10

By way of counter-claim against the plaintiff, the defendant says that:

FIRST COUNT. 20

1. During the months of October and November, 1925, plaintiff sold and delivered to defendant certain goods, wares and merchandise and the defendant became entitled to credits for certain commissions and merchandise returns in the aggregate of \$655.03.

Defendant demands judgment on this count of counter-claim in the sum of \$655.03 together with interest on same. 30

SECOND COUNT.

1. During the months of October, November and December, 1924, and January, 1925, plaintiff sold and delivered to defendant certain goods, wares and merchandise of the value of \$12,868.74.

2. That defendant became entitled to credits for certain commissions and merchandise returns in the aggregate of \$643.43 which said 40

Answer and Counter-claim.

credits and commissions the plaintiff failed to pay.

Defendant demands judgment on this count of counter-claim in the sum of \$643.43 together with interest on same.

10

THIRD COUNT.

1. On or about January 10, 1922, and for a long time prior thereto and thereafter, the Permalife Storage Battery Company, Inc., manufactured, sold and distributed certain goods, wares and merchandise for, to and through the defendant, and carried on with the defendant a general business of manufacturing, buying, selling, distributing and dealing in said goods, wares and merchandise; that sometime after the above date, 20 The Yale Storage Battery Company purchased and became the successors of and took over the distribution and sales of the products of the said Permalife Storage Battery Company, Inc., and continued to trade with and carry on the aforesaid business, with this defendant until on or about October 1, 1924, when the Yale Electric Corporation, the above plaintiff, purchased and became the successors of and took over the distribution and sales of the products of the said 30 Permalife Storage Battery Company, Inc., and The Yale Storage Battery Company, since which latter date, continued and still continues to trade with and carry on the aforesaid business with this defendant.

2. On or about January 10, 1922, the defendant and the aforesaid Permalife Storage Battery Company, Inc., entered into a contract, copy of which together with certain written modifications is attached hereto and made part hereof, 40

Answer and Counter-claim.

wherein the defendant was appointed distributor of the aforesaid company and was granted exclusive sales rights on said goods, wares and merchandise, and wherein the defendant became entitled to certain discount and commissions on all sales, except certain sales of said goods, wares and merchandise to certain manufacturers as designated in said contract and as later modified, in the following territory: In New York State, Staten Island, Rockland County, Orange County, Sullivan and Ulster Counties; also the following counties in the State of Pennsylvania: Wayne, Pike, Monroe, Northampton, Lackawanna and Susquehanna; also the following counties in the State of New Jersey: Hunterdon, Somerset, Warren, Sussex, Middlesex, Union, Essex, Morris, Mercer, Passaic, Bergen, Hudson, Monmouth and Northern part of Ocean County including Lakewood, Toms River and Seaside Park; that the aforesaid contract was accepted, ratified and continued in full force and effect by the successors of the Permalife Storage Battery Company, Inc.; that the said successors, The Yale Storage Battery Co. and the Yale Electric Corporation, accepted the said contract, operated, traded and did business under the same, and at various times since the aforesaid date modified the same; plaintiff granted to the defendant exclusive sales right in other territory which entitled the defendant to the same aforesaid rights, profits and commissions and included the following counties in New York State: Putnam, Westchester, New York, Nassau, Bronx, Kings, Richmond and Queens; that although the defendant carried out his agreement, and although various sales were made by the aforesaid companies in the aforesaid defendant's exclusive territory, which said sales

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Answer and Counter-claim.

entitled the defendant to profit and commissions and although he demanded the same, the plaintiff refused to pay the defendant the amount due.

10 3. That from on or about October 1, 1924, the plaintiff, Yale Electric Corporation, the successors of the Permalife Storage Battery Company, Inc., and The Yale Storage Battery Company, took over the distribution and sales of the products of the aforesaid companies and from the aforesaid date did distribute, sell and deliver and continues so to do, the said goods, wares and merchandise in the exclusive sales territory of the defednant to the value of \$300,000.00 from and on which sales the defendant became entitled to profit and commissions of \$15,000.00.

20 Defendant demands judgment on this count of counter-claim in the sum of \$15,000.00 together with interest on same.

FOURTH COUNT.

1. Defendant repeats the allegations and matters and things set forth in paragraph one of the Third Count of this counter-claim.

30 2. Defendant repeats the allegations and matters and things set forth in paragraph two of the Third Count of this counter-claim.

40 3. That under the terms of the aforesaid contract and modifications thereafter, the plaintiff, Yale Electric Corporation agreed to pay to defendant an amount equal to fifty (50c) cents per battery for advertising, for each battery purchased by the defendant provided the defendant expended and spent an equal amount; that although the defendant complied with this agreement, and spent amounts far in excess of that re-

Answer and Counter-claim.

quired by the agreement and although the defendant demanded from the plaintiff the amount due from said advertisement, plaintiff refused to pay the same.

4. Plaintiff sold and delivered to defendant from about October 1, 1924, to date, two thousand one hundred and sixty-four (2,164) batteries for which the defendant expended diver large sums in excess of Fifty Cents per battery for advertisement and because of which, the defendant became entitled to receive from the plaintiff the sum of Fifty Cents for advertisement for each battery purchased by defendant and there is now due defendant the sum of \$1082.00 for the aforesaid advertisement. 10

Defendant demands judgment on this count of counter-claim in the sum of \$1082.00 together with interest on same. 20

FIFTH COUNT.

1. Plaintiff entered into a contract dated October 27, 1924, and modified April 20, 1925, and July 25, 1925, with the defendant wherein the plaintiff agreed to extend the defendant a continuing credit first in the sum of \$10,000.00 and later in the sum of \$7500.00 in consideration of the defendant complying with said contract and executing a mortgage on certain real estate located in the City of Newark, New Jersey; that although the defendant complied with the term of the aforesaid contract, on various occasions from the date thereof to the present the plaintiff without just cause and without legal right and in violation of his contract, stopped and refused to extend the said continuing credit to the defendant and that as a result thereof the de- 30
40

Answer and Counter-claim.

defendant was put to great expense; that his general credit was injured and that he sustained great damage to his business.

Defendant demands judgment on this count in the sum of \$10,000.00.

10

DEFENDANT COUNTER-CLAIMS.

1. \$655.03 damages on the First Count of this counter-claim.

2. \$643.43 damages on the Second Count of this counter-claim.

3. \$15,000.00 damages on the Third Count of this counter-claim.

20 4. \$1082.00 damages on the Fourth Count of this counter-claim.

5. \$10,000 damages on the Fifth Count of this counter-claim.

JAMES J. FARLEY,
Attorney for Defendant.

(Same as Exhibit D. 1.)

30

YALE BRAND STORAGE BATTERY
DISTRIBUTOR AGREEMENT.

AGREEMENT made by and between the Permalife Storage Battery Company, Inc., of Indianapolis, Indiana (Incorporated under the laws of the State of New York), hereinafter called the Company, and *Morrissey Storage Battery Service Co. of Newark, New Jersey*, hereinafter called the Distributor:

40

Answer and Counter-claim.

WITNESSETH:

(1) PRICE. The Company hereby agrees to allow the Distributor 50-5% discount on Yale "Ford Special" Batteries, and 50-10-5% discount on all other types and parts thereof, and 50-10-5-15% discount on Rental or Service Batteries, as per established list prices, which list prices and discounts are subject to change by the Company at its discretion. 10

(2) STOCK AND FACILITIES. In consideration of the prices allowed, the Distributor agrees, during the period of this Contract, to purchase and sell Yale Brand Storage Batteries and Parts thereof exclusively, manufactured by the Company, and to exert every reasonable effort to sell Yale Brand Storage Batteries and Parts thereof, and to maintain in its place of business, a complete and well assorted stock of said Batteries and Parts, sufficient to supply the demands of the trade, together with proper apparatus, labor and facilities to charge, repair and overhaul Storage Batteries, according to instructions of the Company, said Distributor agreeing furthermore, to maintain at least one such Service Station, thus equipped, at *Newark, New Jersey*, and such others in territory, hereinafter described, as the business may warrant. 20 30

(3) TERRITORY AND INQUIRIES. In consideration of the agreements of the Distributor, herein contained, and with the exceptions hereinafter expressed, the company grants the Distributor exclusive sales rights on said Batteries and Parts in the following counties in the State of New York: Staten Island, Rockland, Orange, Sullivan and Ulster; also the following counties in the State of Pennsylvania: Wayne, Pike Monroe, Northampton, Lackawanna and 40

Answer and Counter-claim.

Susquehanna; also all counties in State of New Jersey, north of and including Mercer and Monmouth.

and under the provisions hereof, the Company agrees to assist and co-operate with the Distributor in the sale of said products in every reasonable manner, such as the trade, in the estimation of the company may warrant, and furthermore the Company will refer all inquiries and orders it receives from said territory for said products, to the Distributor, with the exception that the company reserves the right to sell said products directly to all manufacturers of vehicles, boats, engines, or apparatus equipped with Storage Batteries, without compensation or commission of any nature to said Distributor.

20 (4) GUARANTEE. All products herein provided are guaranteed by the Company to be free from defective materials and faulty workmanship, and the Company agrees to replace, free of charge to the Distributor, any and all Batteries and Parts proving defective in Distributor's stock, during a period of 90 days from date of shipment from factory, and furthermore, agrees to compensate the Distributor for any and all adjustments made necessary in the fulfillment of the
30 published guarantee to the Consumer.

Distributors Agreement #2.

(5) ADVERTISING. The Company agrees to spend an amount equal to fifty cents (50c) per Battery, for each Battery purchased by the Distributor provided the Distributor spends an equal amount,—such advertising to be mutually agreed upon between the Company and the Distributor.

Answer and Counter-claim.

(6) **TERMS.** Thirty days net, two percent (2%) cash discount for payment semi-monthly. Shipments made from 1st to 15th inclusive, payable the 25th of same month; shipments made from 16th to 31st inclusive, payable the 10th of month following. Credit relations to be at all times subject to approval of Credit Department of the Company. 10

(7) **DURATION OF CONTRACT.** It is mutually agreed that this contract shall remain in full force and effect for one year from date of acceptance hereof, and it is further understood and agreed that the Distributor shall have the right to renew this agreement each year for a period of five (5) years, under same terms and conditions, upon giving a written notice to the Company thirty (30) days prior to the expiration, provided: That the Distributor's purchases from the Company during the period of twelve months from date of initial shipment, shall have exceeded 2,500 Batteries, and purchases each succeeding year have aggregated twenty percent (20%) increase each year in excess of the immediate preceding year. 20

(8) **DELIVERIES.** F. O. B. Cars, Indianapolis, Indiana, without charge for packing or cartage, and it is mutually agreed that all deliveries are subject to delays caused by labor disputes, interruptions, shortage of raw materials, fires, accidents or any causes beyond the control of the Company, and that any delays due to the above causes, shall in no way impose liabilities or penalties upon the Company. 30

There are no agreements or understanding between parties hereto not herein expressed, and no alterations or variations of the terms hereof

Answer and Counter-claim.

shall be binding upon either party, unless made in writing and signed by both parties.

IN WITNESS WHEREOF, The Company and the Distributor hereunto subscribe and witness their names to this agreement in duplicate, this agreement to become effective on date of acceptance
 10 by the Company.

PERMALIFE STORAGE BATTERY CO. INC.

By (SIGNED) L. H. KELLER
 VICE PRES.

Date: JAN. 10, 1922.

(SIGNED) MORRISSEY ST. BA.
 SERVICE CO.
 Distributor

20 BY (SIGNED) WM. J. MORRISSEY
 Prop.

(Same as Exhibit D. 2.)

“YALE BATTERY COMPANY”
 Indianapolis

January 5, 1922.

30 “Mr. W. J. Morrissey,
 Eveready Storage Battery Service Co.,
 12 William Street,
 Newark, New Jersey.

My dear W. J.:

I take pleasure in returning herewith accepted copy of Distributor's agreement.

You will note that I have included the county in which Trenton is located, also several counties in Pennsylvania, the most important of which is
 40 Lackawanna, in which Scranton is located.

Answer and Counter-claim.

As to quantity, I have inserted 2,500. I believe this is the figure we arrived at. I don't doubt but what your sales will be considerably in excess of this quantity in view of the increased territory that you now have, also the constant improvement in business conditions.

The contract is dated to take effect January 10th, which is the approximate date of our initial shipment. 10

Again thanking you for your favorable decision and assuring you you have made no mistake, I am,

Yours,

(Signed) L. H. Keller,
Vice President

YALE BATTERY COMPANY" 20

LHK-W

(Same as Exhibit D. 3.)

"February 2nd 1922.

Yale Battery Co.,
Indianapolis, Ind.
Mr. L. H. Keller:

30

Dear Mr. Keller:

Replying to your letter of Jan. 5th with which you enclose contract appointing us as distributor, beg to advise that you omitted to specify the northern part of Ocean County which includes, Lakewood, Toms River and Sea Side Park.

40

Answer and Counter-claim.

Won't you kindly authorize us to sell in this County, as we already have established some stations on the Eveready line.

Very truly yours,

10 MORRISSEY STORAGE BATTERY
SERVICE CO.
(Signed) Wm. J. Morrissey,
GENERAL MANAGER''
WJM:CM''

(Same as Exhibit D. 4.)

20 "YALE BATTERY COMPANY
Indianapolis
February 8, 1922
Morrissey Storage Battery Service Co.,
12 William Street,
Newark, N. J.

Attention Mr. W. J. Morrissey:

My dear Morrissey:

30 Replying to your letter of February 2nd, we are agreeable to assigning to you the northern part of Ocean County, New Jersey which includes Lakewood, Toms River and Seaside Park, and you may attach this letter as a rider to your contract covering this additional territory, and we will change our contract records accordingly.

Yours very truly,

(signed) H. B. Ramey,
Sales Manager

YALE BATTERY COMPANY''

H. B. RAMEY

W

Dictated 2-7-22."

40

**PLAINTIFF'S REPLY TO ANSWER AND
ANSWER TO COUNTER-CLAIM.**

Filed February 9, 1926.

The plaintiff, Yale Electric Corporation, replying to the answer of the defendant says that: 10

1. Plaintiff denies that part of paragraph numbered 9 of defendant's answer commencing with the words "and this defendant further says that" to the end of said paragraph.

ANSWER TO COUNTER-CLAIM.

The plaintiff, Yale Electric Corporation, answering the counter-claim of the defendant says that: 20

FIRST COUNT.

1. It denies the allegations of paragraph 1 of the first count of defendant's counter-claim.

SECOND COUNT.

1. It denies the allegations of paragraph 1 of the second count of defendant's counter-claim except that it admits sales to defendant as alleged of the agreed aggregate price of \$12,868.74 and which was not subject to commissions or merchandise returns. 30

2. It denies the allegations of paragraph 2 of the second count of defendant's counter-claim.

THIRD COUNT.

1. It denies the allegations of paragraphs 1, 2 and 3 of the third count of defendant's counter-claim. 40

Plaintiff's Reply and Answer to Counter-claim.

FIRST SEPARATE DEFENSE.

1. The contract dated January 10, 1922, referred to in paragraph 2 of the third count of defendant's counter-claim, specifically provides in paragraph 7 thereof as follows:

10 "It is mutually agreed that this contract shall remain in full force and effect for one year from date of acceptance hereof, and it is further understood and agreed that the Distributor shall have the right to renew this agreement each year for a period of five (5) years, under same terms and conditions, upon giving a written notice to the Company thirty (30) days prior to the expiration, provided: That the Distributor's purchases from the Company during the period of
20 twelve months from date of initial shipment, shall have exceeded 2,500 Batteries, and purchases each succeeding year have aggregated twenty per cent (20%) increase each year in excess of the immediate preceding year."

2. Defendant failed to give to Permalife Storage Battery Co., Inc., thirty days notice prior to the expiration on January 10, 1923, of his desire to renew the said contract.
30

3. Defendant's purchases from the Permalife Storage Battery Co., Inc., during the period of twelve months from the date of initial shipment under said contract, did not exceed 2,500 batteries nor did said purchases in each succeeding year aggregate 20% increase each year in excess of the immediate preceding year.

Plaintiff's Reply and Answer to Counter-claim.

4. Said contract further provides specifically as follows:

“There are no agreements or understanding between parties hereto not herein expressed, and no alterations or variations of the terms hereof shall be binding upon either party, unless made in writing and signed by both parties.” 10

5. The aforesaid contract between defendant and Permalife Storage Battery Co., Inc., was never renewed but expired by its own terms January 10, 1923.

6. Plaintiff never purchased nor succeeded to the rights under nor acted upon the said contract between defendant and Permalife Storage Battery Co., Inc. 20

FOURTH COUNT.

1. Plaintiff denies the allegations of paragraphs 1 to 4 inclusive of the fourth count of defendant's counter-claim.

FIRST SEPARATE DEFENSE.

1. Plaintiff repeats the allegations of paragraphs 1 to 6 inclusive of its first separate defense to the third count of defendant's counter-claim. 30

2. Defendant has done no advertising to the knowledge of the plaintiff within the last three years.

3. Plaintiff and defendant had never made any agreement with respect to allowance for advertising and no sum is due from plaintiff to the defendant therefor. 40

FIFTH COUNT.

1. Plaintiff denies the allegations of paragraph 1 of the fifth count of defendant's counter-claim.

10 Plaintiff reserves the right to move to strike out at any time at or before the trial, the defendant's counter-claim or any count or part thereof.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

**NOTICE OF MOTION FOR REFERENCE AND
INSPECTION OF BOOKS.**

Filed March 30, 1927.

20

To McDermott, Enright & Carpenter, Esqs., attorneys for plaintiff.

TAKE NOTICE that I shall apply to the Honorable William A. Smith, Judge of the Essex County Circuit Court, to whom the above matter has been referred for trial, on Friday, the 21st day of January, 1927, at 2 P. M., for the following relief:

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(1) For a Rule appointing a Referee to hear the cause and report on all matters of account between the parties hereto and the amount due from one party to the other.

(2) For an order permitting the defendant to inspect the books of account of the plaintiff, in its possession and control, containing records of the sales made by the plaintiff in the defendant's territory and the commissions due to the defendant from the plaintiff on said sales.

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(3) And for such other and further relief as may be just in the premises.

Defendant's Affidavit—James J. Farley.

Said application will be made on all the papers and proceedings in this cause and on the annexed affidavit of James J. Farley.

Dated, January 19, 1927.

Respectfully,

JAMES J. FARLEY,
Attorney for the Defendant.

10

Service acknowledged as within time, Jan. 19, 1927.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

AFFIDAVIT ANNEXED.

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

James J. Farley, being duly sworn according to law, on his oath deposes and says:

1. I am the attorney for the defendant in the above-entitled cause, and am duly authorized to make this affidavit. I made this affidavit instead of the defendant, because the defendant is temporarily without the State and is not available to make this affidavit.

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2. The plaintiff by its complaint herein seeks to recover from the defendant \$7,268.95 on several trade acceptances made by the defendant, and on open book account for merchandise alleged to have been sold and delivered. The alleged claim on open account amounts to \$1,989.06, and the balance represents the amount claimed on said trade-acceptances.

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Defendant's Affidavit—James J. Farley.

3. The amount due to the plaintiff is amply secured by a mortgage in the sum of \$10,000 made and delivered by the defendant to the plaintiff, pursuant to a certain agreement between the parties, dated October 27, 1924, which mortgage covers a one-family residence owned and operated by the defendant in the City of Newark, and which mortgage is recorded in the Essex County Register's Office in Book Y-52 of Mortgages for said County, page —. The plaintiff instituted foreclosure proceedings on said mortgage in the Court of Chancery of New Jersey and such proceedings were had in said cause that on the 9th day of February, 1926, a Decree Pro Confesso was entered therein, which among other things provided "that the matter of determining the amount, if anything due on said mortgage, be stayed, pending the determination of the amount found due by final judgment in this suit or until the further order of the Court of Chancery. The said Decree also provides that upon the establishment by final judgment in this suit, of the amount due to the plaintiff, the plaintiff may submit such finding to any Master of the Court of Chancery, including damages and costs and shall be entitled to foreclose for that amount, and that if, by final judgment in this cause, it is established that the defendant is not indebted to the complainant in any sum, then, the said foreclosure bill should be dismissed and all proceedings had thereon vacated with costs.

4. To the plaintiff's complaint herein, the defendant has filed an answer and counter-claims. The answer admits the making and delivery of the trade-acceptances sued upon but disputes the amount due on the book account.

Defendant's Affidavit—James J. Farley.

5. Since the institution of said suit, counsel for the plaintiff has informed counsel for the defendant that the defendant is entitled to some credits on the open book account, which have not been heretofore credited by the plaintiff.

6. By the first counter-claim, the defendant seeks to recover \$655.03 for commissions and merchandise returns sold and delivered by the plaintiff to the defendant during the months of October and November, 1925. By the second counter-claim the defendant seeks to recover \$643.43 for commissions and merchandise returns, sold and delivered by the plaintiff to the defendant. The third counter-claim, in substance, alleges as follows: That on or about January 10, 1922, the Permalife Storage Battery Company, Inc., plaintiff's predecessor in business, entered into an exclusive agency contract with the defendant, whereby the defendant was appointed distributor of the said Company, with exclusive sales rights for their goods, wares and merchandise and which provided that the defendant was entitled to receive certain discounts or commissions on all sales (excepting certain sales therein designated, in certain counties in the States of New York and New Jersey), that said contract was subsequently taken over and assumed by the plaintiff corporation; that the plaintiff operated, traded and did business with the defendant under said contract; that the plaintiff made numerous sales in the defendant's territory and has failed to account for the commissions on the same to the defendant. Under this counter-claim the defendant claims \$15,000 damages against the plaintiff.

7. By the fourth counter-claim the defendant claims \$1,082 for advertising costs expended by

Defendant's Affidavit—James J. Farley.

the defendant under an agreement with the plaintiff whereby the plaintiff was to reimburse the defendant for the same.

10 8. The fifth counter-claim prays for judgment against the plaintiff for breach of contract in failing to extend a continuing credit of \$10,000 under the aforementioned agreement dated October 27, 1924 and as modified on April 20, 1925 and July 25, 1925.

20 9. The third counter-claim is the most substantial counter-claim against the plaintiff, because the defendant has been informed and advised that the plaintiff deliberately evaded the defendant's territory and sold merchandise in the neighborhood of about \$300,000, without accounting to defendant for the commissions that the defendant was entitled to under said exclusive agency agreement. The particulars relating to said sales are unknown to the defendant and the books of account of the plaintiff contain such information and particularly the names and addresses of the purchasers, the dates and amounts of such sales and other particulars which are material to the establishment of the defendant's third counter-claim.

30 10. The plaintiff is a corporation organized and existing under the Laws of the State of New York, and its principal office is in Brooklyn, New York, and its books, papers and records, which are material on defendant's third counter-claim, are in the possession of the plaintiff and under its control in the State of New York, or elsewhere.

40 11. That prior to the making of this application, Israel B. Greene, Esq., of counsel with the defendant, requested Mr. Gilmore of the firm of

Defendant's Affidavit—James J. Farley.

McDermott, Enright & Carpenter, plaintiff's solicitors, to permit the defendant to make an inspection of the plaintiff's books, papers and records to ascertain said information and to make copies thereof, pursuant to the provisions of the Practice Act of this State, in such case made and provided, and said Mr. Gilmore refused to comply with said request. 10

12. The establishment of the third counter-claim will require, as I have been informed and believe, an examination of several hundred accounts, carried upon the books of the plaintiff corporation and calculations to determine the amount of commissions that are due to the defendant from the plaintiff on such sales, and that the discovery of said matters will involve so many separate items of account, and will involve such a vast amount of time to present to the Court, as to make it a very cumbersome task for any jury to properly comprehend the same and work out the amounts due from either party as against the other; that under these circumstances, I verily believe that this matter is one that should be referred to a Referee, pursuant to the provisions of the Practice Act. 20

I, therefore, respectfully pray that the defendant be permitted to make an inspection of the books, papers and records of the plaintiff, containing the evidence relating to the merits of the defendant's third counter-claim and be permitted to make a copy thereof, and that this matter, so far as the mutual accounts of the parties are concerned, be referred to a Referee in accordance with the Rules and Practices of this Court. 30

JAMES J. FARLEY.

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Plaintiff's Affidavit—Charles T. Hutcheson.

Sworn and subscribed to before me
this 19th day of January, 1927.

AARON VAN POZNAK,
An Attorney at Law of New Jersey.

10

PLAINTIFF'S AFFIDAVIT.

Filed March 31, 1927.

STATE OF NEW YORK, }
COUNTY OF KINGS. }*ss.*

CHARLES T. HUTCHESON, of full age, being duly sworn according to law, upon his oath says: I am secretary of the Yale Electric Corporation, the plaintiff in the above-entitled action, and have full charge of the books of account and of the finances of plaintiff company. I have examined said books and all accounts in any way pertaining to transactions between the plaintiff and defendant, and am familiar therewith. I have also examined a copy of the defendant's counterclaim and answer as set forth in the certified transcript of the pleadings. I have also examined the plaintiff's complaint and am familiar with the subject matter thereof.

In the fourth count of the plaintiff's complaint, there is alleged to be due from the defendant to the plaintiff on open account, the sum of Nineteen Hundred Eighty-Nine Dollars and six cents (\$1989.06), together with interest from November 15, 1925. I find from the books of account that the defendant is entitled to further credits on account of said sum of Nineteen Hundred Eighty-nine Dollars and six cents aggregating One Hundred Sixty-two and 27/100 Dollars, and leaving a balance due upon said fourth count in

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Plaintiff's Affidavit—Charles T. Hutcheson.

the sum of Eighteen Hundred Twenty-six and 79/100 Dollars, with interest from November 15, 1925, and defendant is entitled to no other credits whatsoever.

It is absolutely untrue that the plaintiff company purchased and became the successors of and took over the distribution and sales of the products of the Permalife Storage Battery Co. Inc., and/or of the Yale Storage Battery Company, as alleged in paragraph 1 of the third count of the above counter-claim. 10

As secretary of the plaintiff company, I am familiar with and write up the corporate minutes and know that all the statements which I have made are true.

It is untrue, as stated in the second paragraph of the third count of defendant's counter-claim, that the plaintiff ever operated and did business under or upon the terms of the Permalife contract therein referred to. 20

The Yale Storage Battery Company, referred to in defendant's counter-claim, and the Yale Electric Corporation, the plaintiff, are two entirely separate and distinct corporations.

Neither the Yale Electric Corporation or the Yale Storage Battery Company owns any of the other's stock, nor is either a subsidiary of the other. 30

On September 29, 1924, the Yale Electric Corporation made a contract with the Yale Storage Battery Company, whereby the former was given exclusive sales rights of all the products manufactured by the latter throughout the United States. The two companies have been acting under said contract from the date thereof to the present time. This contract will be in the possession of plaintiff's attorneys ready to be produced in court. Under it, no alleged special 40

Plaintiff's Affidavit—Charles T. Hutcheson.

agency contracts theretofore said to exist were either recognized, mentioned or adopted.

Prior to the filing by Mr. Morrissey of his counter-claim, in this action, he never made any claim against the Yale Electric Corporation, which is now mentioned in his counter-claim, and
 10 I verily believe that the said counter-claim was filed for the purpose of delaying the day when final judgment should be entered in favor of the plaintiff against the defendant, and the same is without any merit.

CHARLES T. HUTCHESON.

Subscribed and sworn to before
 me, at the City of New York,
 County of Kings and State of
 20 New York, a Notary Public in
 and for the said County of
 Kings and State of New York,
 this 20th day of January,
 1927.

(SEAL) JOHN W. WALLER,
 Notary Public, in and for
 the County of Kings and
 State of New York. #62.

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NOTICE OF MOTION.

Filed March 30, 1927.

To McDermott, Enright & Carpenter, Esqs., attorneys for plaintiff in the above-entitled cause.

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TAKE NOTICE that on February 5, 1927, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, I will move before the Honorable William A. Smith, Judge of the Essex County Circuit Court, to whom the above matter has been referred, for the issuance of a Commission to take the testimony of Mr. L. H. Keller and Charles T. Hutcheson, the vice-president and secretary of the plaintiff corporation, residing in the City, County and State of New York.

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AND TAKE FURTHER NOTICE that said motion will be based upon the annexed affidavits, which affidavits I will also read in support of the motions for a reference and inspection of books in this matter, which have been adjourned until said date.

Dated, January 29, 1927.

Respectfully,

JAMES J. FARLEY,
Of Counsel with Defendant.

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Defendant's Affidavit—William J. Morrissey.

DEFENDANT'S AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. }ss.

10 WILLIAM J. MORRISSEY, being duly sworn according to law, on his oath deposes and says:

1. I am the defendant in the above-entitled cause.

2. The plaintiff by its complaint herein seeks to recover from the defendant \$7,268.95 on several trade-acceptances made by the defendant, and on open book account for merchandise alleged to have been sold and delivered. The alleged claim on open account amounts to \$1,989.06, and the balance represents the amount claimed on said trade-acceptances.

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3. The amount due to the plaintiff is amply secured by a mortgage in the sum of \$10,000 made and delivered by my wife and I to the plaintiff, pursuant to a certain agreement between the parties, dated October 27, 1924, which mortgage covers a one-family residence owned by me in the City of Newark, and which mortgage is recorded in the Essex County Register's Office in Book Y 52 of Mortgages for said County. The plaintiff instituted proceedings on said mortgage in the Court of Chancery of New Jersey and such proceedings were had in said cause that on the 9th day of February, 1926, a Decree Pro Confesso was entered therein, which among other things provided "that the matter of determining the amount, if anything due on said mortgage, be stayed, pending the determination of the amount found due by final judgment in this suit or until the further order of the Court of Chancery." The said Decree also provides that upon

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Defendant's Affidavit—William J. Morrissey.

the establishment by final judgment in this suit of the amount due to the plaintiff, the plaintiff may submit such finding to any Master of the Court of Chancery, including damages and costs and shall be entitled to foreclose for that amount, and that if by final judgment, in this cause, it is established that the defendant is not indebted to the complainant in any sum, then the said foreclosure bill should be dismissed and all proceedings had thereon vacated with costs. 10

4. To the plaintiff's complaint herein I have filed an answer and counter-claim. The answer admits the making and delivery of the trade-acceptances sued upon, but disputes the amount due on the book account.

5. Since the institution of said suit, counsel for the plaintiff has informed one of my attorneys that I am entitled to some credits on the open book account, which have not been heretofore credited by the plaintiff. 20

6. By the first counter-claim, I seek to recover \$655.03 for commissions and merchandise returns sold and delivered by the plaintiff to me during the months of October and November, 1925. By the second counter-claim I seek to recover \$643.43 for commissions and merchandise returns, sold and delivered by the plaintiff to me. 30

7. By the third counter-claim I seek to recover about \$15,000 from the plaintiff, arising out of the following state of facts:

In January, 1922, I entered into a contract with the Permalife Storage Battery Company, Inc., a copy whereof is annexed to my counter-claim in this suit, whereby I was constituted the sole and exclusive agent of the said Permalife Stor- 40

Defendant's Affidavit—William J. Morrissey.

age Battery Company for their goods, wares and merchandise and which provided that I was entitled to receive discounts and commissions on all sales (except certain sales therein designated), in certain counties of New York and New Jersey. Said contract was renewed from year to year, and was in full force at all times hereinafter mentioned. In the fall of 1923, the Permalife Storage Battery Company was dissolved and the said contract was taken over and assumed by the Yale Storage Battery Company, the plaintiff's predecessor in said business, and the Yale Storage Battery Company continued to do business with me under said contract, until on or about October 1, 1924. The principal figure in the Yale Storage Battery Company was Mr. L. H. Keller, its vice-president and general manager, and I conducted practically all of my business with him.

In the month of September, 1924, just before the Yale Electric Corporation took over the selling end of the Yale Storage Battery Company, I had a conference with Mr. Keller, at the office of the Yale Electric Corporation, which was also the office of Mr. Keller, the vice-president and general manager of the Yale Storage Battery Company. Besides Mr. Keller and myself, there were present several of my associates. At that conference, Mr. Keller stated that the Yale Storage Battery Company had completed arrangements with the Yale Electric Corporation, the plaintiff in this suit, whereby the Yale Electric Corporation was to take over the entire storage battery sales department of the Yale Storage Battery Company, and would assume all the contracts in force with all distributors and exclusive agents of the Yale Storage Battery Company. He specified at that time that there were eight such distributing agencies and that I might expect

Defendant's Affidavit—William J. Morrissey.

much better co-operation from the Yale Electric Corporation than I had received from the Yale Storage Battery Company, for the reasons among others that the Yale Electric Corporation was very strong financially and had a very aggressive sales force in the field, selling the dry battery products of the Yale Electric Company, who would now co-operate and further the sales of the Yale Wet Battery products, manufactured by the Yale Storage Battery Company. Mr. Keller stated that he was the vice-president and general manager of the Yale Electric Corporation.

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On October 1, 1924, I received a letter from the Yale Storage Battery Company, a photostatic copy whereof is annexed hereto and made a part hereof and marked Exhibit "A"; and on or about October 16, 1924, I received a letter from the Yale Electric Company, the plaintiff in this suit, a photostatic copy whereof is annexed hereto and made a part hereof and marked Exhibit "B."

20

After October, 1924, all my storage battery business which had theretofore been done with the Yale Storage Battery Company, was done directly with the Yale Electric Corporation, the plaintiff in this suit. I was frequently visited by Mr. Cornell, the plaintiff's sales representative in the Eastern territory, with a view of co-operating with me in furthering the sales of the Yale Products under said contract, and on numerous occasions Mr. Cornell went with me to my dealers to talk up Yale products.

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On or about March 13, 1925, the Yale Electric Corporation made a shipment to E. W. Cobb of Ridgewood, New Jersey. Mr. Cobb was one of my customers and because of some defects in the merchandise, Mr. Cornell and I went to see Mr. Cobb, and on or about March 13, 1925, Mr. Cor-

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Defendant's Affidavit—William J. Morrissey.

nell wrote a letter to the Yale Electric Corporation, a photostatic copy whereof is annexed hereto and made a part hereof and marked Exhibit "C."

10 Some of the shipments made after October, 1924, were made to my dealers direct, and others were made to me, and I, in turn, made the deliveries.

20 The plaintiff and I continued to do business, under the contract, with the Yale Storage Battery Company, until sometimes in October, 1925 when the plaintiff, without justification, cut off my credit. During this period, the plaintiff paid me commissions on sales made by the plaintiff directly to the dealers in my territory, under the contract. Annexed hereto and marked Exhibit "D" is a photostatic copy of a credit memorandum sent by the plaintiff to me on or about April 30, 1925, showing commissions paid to me for the month of April. I have similar credit memoranda for each and every month that we did business with the plaintiff company to the time when they shut off my credit.

30 The average commissions received by me from the plaintiff, amounted to about \$100 per month, more or less. My difficulties with the plaintiff arose over demands made by me for commissions on sales effected by the plaintiff in my territory, for which they failed to account to me for commissions; and also over complaints that I made because of the fact that the plaintiff had been sending their agents in my territory, soliciting business direct, in competition with me, and refusing to account to me for my commissions.

40 On or about October 30, 1925, I wrote a letter to Mr. Keller, complaining about this unfair competition, and annexed thereto an affidavit sworn

Defendant's Affidavit—William J. Morrissey.

to by one of my dealers showing the unfair competition. A photostatic copy of said letter and said affidavit is hereto annexed and made a part hereof and marked Exhibit "E."

During my business dealings with the plaintiff I had occasion, from time to time, to ask for adjustments under the contract which had been taken over by the plaintiff, either for defective workmanship or materials in the merchandise of the Yale Storage Battery Company. Exhibit "F" annexed hereto and made a part hereof is a photostatic copy of a letter received by me from the Yale Electric Corporation respecting demands for certain adjustments, in which they recognize their obligations under said contract.

Between October, 1924 and December, 1925, the plaintiff, from time to time, directed to me inquiries of prospective customers in my territory, as provided under my contract. On August 6, 1925, the plaintiff referred to me the inquiry of the Dependable Electric Corporation of Newark, and in my files I probably have many similar references, which will be produced at the trial.

I discussed the plaintiff's unfair competition and refusal to pay commissions as aforesaid with Mr. Keller, the vice-president of the plaintiff corporation, on numerous occasions during the period that we did business with the plaintiff, and at no time did Mr. Keller ever deny that the plaintiff was bound under the contract, nor that we were entitled to the commissions and other rights and privileges under said contract. In fact, on a number of occasions he went out of his way to see that the contract was lived up to. He obtained adjustments and allowances for us from time to time and fought for our commissions.

Defendant's Affidavit—William J. Morrissey.

I was the first distributor for the Yale Storage Battery Company in this territory. I built up an exclusive business in my territory and I have considerable correspondence in my possession from Mr. Keller and other officers of the Yale companies, certifying to that fact and this business was destroyed and taken away from me by the Yale Companies—by its unfair competitive methods. The plaintiff has refused to give me an accounting of its direct sales, in my territory, for the period commencing on or about October 1, 1924 and ending January 10, 1927, the expiration date of the contract. The details of these sales, showing the names of the purchasers, the amount of the sales, etc., are in the possession of or under the control of the plaintiff, whose principal office is in Brooklyn, New York, and its books of account are necessary and material to establish my third counter-claim. I am advised by my attorneys that the plaintiff's attorneys have refused to permit an inspection of these books, nor to bring them within the State for the purpose of this trial.

From information derived by me from my dealers, I believe that the amount of the commissions to which I am entitled, for the unaccounted sales, will exceed the amount of the plaintiff's claim in this suit.

This counter-claim is the most substantial counter-claim against the plaintiff. The establishment of this counter-claim requires, as I am informed and believe, an examination of several hundred accounts carried upon the books of the plaintiff corporation, calculations to determine the amount of commissions due to me on said sales; and the discovery of said matters will involve so many separate items of account and will

Defendant's Affidavit—William J. Morrissey.

involve such a vast amount of time to present to the Court, as to make it a very cumbersome task for any jury to comprehend and determine the amount due from either of us to the other party.

Under these circumstances I verily believe that this matter is one that should be referred to a Referee, pursuant to the provisions of the Practice Act. 10

8. By the fourth counter-claim I ask for reimbursement of \$1,082 for advertising costs, under a special agreement with the plaintiff, whereby the plaintiff was to reimburse me for said advertising.

9. By the fifth counter-claim I ask for judgment against the plaintiff for breach of contract for failing to extend to me a continuing credit, according to agreements between the plaintiff and me dated October 27, 1924 and as modified on April 20, 1925 and July 25, 1925. 20

10. In connection with this suit I shall desire to call as witnesses in my behalf, Mr. L. H. Keller, the vice-president and general manager of the plaintiff corporation, and Mr. Charles T. Hutchinson, secretary of the plaintiff corporation. All of these gentlemen reside in the State of New York and are in the employ of the plaintiff corporation. The testimony of these gentlemen will be necessary to identify a great many letters, which I received from the Yale Corporations, which are material in this suit, and to prove the relation between the two Yale Companies, and also to establish that the plaintiff corporation assumed the performance of said contract and, did, in fact, operate under it. I shall require the production of the corporate minute book of each of these companies and the agency 30
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Defendant's Affidavit—William J. Morrissey.

contract between them. Unless the plaintiff will produce these gentlemen within this State, it will be necessary for a commission to issue to take their testimony.

10 I, THEREFORE, respectfully pray that I may be permitted to make an inspection of the books, papers and records of the plaintiff, containing the evidence relating to the merits of my third counter-claim and that I may be permitted to make a copy thereof; and that this matter so far as the mutual accounts of the parties are concerned, be referred to a Referee in accordance with the Rules and Practices of this Court; and that if the plaintiff refuses to produce the aforementioned gentlemen to testify in this State, together with the said books, papers and records,
20 that a commission issue to take such testimony.

WILLIAM J. MORRISSEY.

Sworn and subscribed to before
me this 29th day of January,
1927.

ISRAEL B. GREENE,
M. C. C. of N. J.

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Defendant's Affidavit—William J. Morrissey.

Exhibit A.

THE YALE STORAGE BATTERY COMPANY
Indianapolis

October 1, 1924.

Morrissey Storage Battery Service Co., 10
14 William St.,
Newark, N. J.

Attention: Mr. Wm. Morrissey.

Gentlemen:

We have consummated arrangements with the Yale Electric Corporation of Brooklyn, N. Y., to take over the distribution and sales of the products of this Company as of October 1st, 1924. Hereafter all correspondence and orders should be addressed to the Yale Electric Corporation, Pearl and Tillary Sts., Brooklyn, N. Y. or 1601 S. Michigan Ave., Chicago, Ills. 20

All unfilled orders on hand October 1st will be billed by the Yale Electric Corporation at present prices. The Yale Electric Corporation does not contemplate any radical change in selling policy at this time, but if any change should be made in the future you may rest assured it will be beneficial to you rather than harmful.

We have had this plan in view from the time that our Mr. L. H. Keller became director of sales for the Yale Electric Corporation in addition to his connection with the Yale Storage Battery Company and it is due to his untiring efforts that this plan has been effected and we are sure that it will work out to great advantage to all of our customers. 30

Yale Storage Batteries will now be distributed by a nation wide selling organization of the highest caliber which will be ready at all times to help 40

Defendant's Affidavit—William J. Morrissey.

10 you. Batteries will be carried in New York, Chicago, Kansas City and Dallas and more warehousing points will be established from time to time, which will enable you to receive improved service. Furthermore under this new plan Yale Electric Corporation salesmen will travel your territory making frequent calls not only on you but on your dealers and will be at hand at all times to help you with any special problems which may arise.

The Yale Electric Corporation, as our sales agent, will furnish more help and co-operation than we have been able to provide and we are confident that this *consolidation* will mean an era of increased business for you as well as for ourselves.

20 Thanking you for past favors and hoping your relations with the Yale Electric Corporation may be as pleasant as they have been with us, we remain

Yours very truly,

THE YALE STORAGE
BATTERY COMPANY.

By S. D. Murphy
Vice-President.

SDM:MP

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Defendant's Affidavit—William J. Morrissey.

Exhibit B.

YALE ELECTRIC CORPORATION
Brooklyn, N. Y.

October 16th, 1924.

The Morrissey Storage Battery Co., 10
12 William St.,
Newark, N. J.

Gentlemen:—

You have no doubt received advice from the Yale Storage Battery Company of Indianapolis announcing that arrangements have been completed whereby this Company has taken over the sale and distribution of Yale Storage Batteries.

We feel sure that you will be particularly interested in that part of the *letter which they sent you pointing out* that it will be the aim of this Company to perfect the distribution of Yale Storage Batteries through a chain of warehousing points throughout the country. These warehouses have already been established in New York, Chicago, San Francisco, Kansas City and Dallas, and additions will be made as soon as we find it to the interests of our customers so that they may receive the best service. 20

May we not take this means of soliciting your inquiries and assuring you that this entire organization stands ready to cooperate with you in every way possible to further the sale and distribution of Yale Storage batteries for automobile and radio use. This Company has sales representatives traveling in all parts of the country who will call upon your frequently. 30

Kindly address all inquiries, correspondence, orders, etc. to the Yale Electric Corporation's nearest branch,—Brooklyn headquarters, Chi- 40

Defendant's Affidavit—William J. Morrissey.

Cell and 2-“C” Batteries which they claim were defective. All do not measure up in voltage to that required for a sale to a customer.

I have had a personal interview with Mr. Cobb of this company and I believe that if we are to continue the outlet which is a desirable one in point of quantity of merchandise bought, that it will be necessary to make a policy adjustment on this merchandise. As a matter of fact, I was convinced that the loss of this account was eminent unless such adjustment was made, and Mr. Morrissey under my direction replaced these batteries free of charge, and any adjustment made should be made to him. 10

The return merchandise orders on which these batteries were shipped by the Morrissey Storage Battery Company are: Order #284-289-295- and 1755 on which your correspondence will show your disposition of the matter in each instance. With further reference to the question, I call your attention to a letter from Mr. Strelzin to me concerning batteries returned by the Automotive Equipment Company on which mention is made of the fact that some of the batteries returned were seven months old. I believe in stating that Automotive Equipment Company which has been an account of ours but *four* months should be ample proof for evidence to the effect that they have received batteries on which they have not received anywhere near the required dating to bring them within six months guarantee as authorized by us. 20 30

Very truly yours,

MORRISSEY STORAGE BATTERY
SERVICE CO.

Defendant's Affidavit—William J. Morrissey.

Exhibit D.

YALE ELECTRIC CORPORATION

Brooklyn, N. Y.

Credit to 5/8/25 as
 10 Date 4/30/25
Our Credit No. J 801
Your Debit No.

Morrissey Storage Battery Serv. Co.
 12 William Street,
 Newark, N. J.

Allowance on Storage Battery sales during
 April 1925 sold direct by us to

	W. D. Hawk	4/7	60.00
	Tri City	4/10	20.00
	Lighting Elec.	4/10	197.00
20	W. E. Kuntz	4/16	118.20
	W. D. Hawk	4/17	56.30
	Auto. Equip.	4/24	59.10

510.60

	Returns		
	Radio Shop	4/3	20.25

490.35@ 5% 24.52

30

40

Defendant's Affidavit—William J. Morrissey.

Exhibit E.

Oct. 30, 1925

Mr. L. H. Kellar,
General Sales Mgr.,
Yale Electric Corp.,
Pearl & Tillary Sts.,
Brooklyn, N. Y.

10

Dear Sir:

We have had many complaints regarding the soliciting of business on Yale storage batteries in our exclusive territory. We did not take stock in these complaints until a glaring case was brought home to us, and we are enclosing herewith an affidavit obtained from one of our Dealers appointed exclusively in his particular location in Newark.

20

This is furnished you for your information with the spirit of co-operation and we would like to have an expression from you regarding the incident.

Yours very truly,

MORRISSEY STORAGE
BATTERY SERVICE CO.

M. BERMAN

Sales Dept.

30

MB/G

TO WHOM IT MAY CONCERN

I Mr. S. C. Uchaez manager of the Queens Tire Shop, 96 Bloomfield Avenue, Newark, N. J. state that about three weeks ago, Mr. Atwater representing the Yale Electric Corporation called on me at my place of business and when I advised him that I was purchasing YALE Batteries type 6-11 Special from the Morrissey Storage Battery

40

Defendant's Affidavit—William J. Morrissey.

Service Company, 12 William Street, Newark, N. J., the distributor who appointed me as a Service Station exclusively in my location in Newark, they advising me that they were the Exclusive distributors.

10 He stated that in his canvass of the territory, he was unable to secure any business for his company because the Morrissey Storage Battery Service Company were cutting prices and selling the YALE 6-11 special battery for \$9.50 which is the price that I am paying the Morrissey Company for these batteries. He further stated that if conditions continued and he was unable to secure storage battery business in New Jersey the Morrissey Storage Battery Service Company did not play ball and change their policy, they
20 would lose their YALE franchise which he stated was not exclusive.

S. C. UCHAEZ.

Witness:

Max Berman.

Sworn to and subscribed before me
this 30th day of Oct. A. D.
1925.

30 FRED G. HAUPT,
Notary Public N. J.

Defendant's Affidavit—William J. Morrissey.

Exhibit F.

(Trade Mark)

YALE ELECTRIC CORPORATION
Brooklyn, N. Y.

January 9, 1925 10
Dict. Jan. 8, 1925.

The Morrissey Storage Battery Service Co.,
12 William St.,
Newark,
N. J.

Gentlemen:—

We received a few days ago from your office a batch of 20 adjustment reports, 18 of which are dated prior to October 1st on which date this Company took over the National Distribution of Yale Storage Batteries. 20

We note that a great many of these adjustment reports are dated way back in the early part of 1924, some of them in January of that year and it is the writer's opinion that the Yale Storage Battery Company to whom they must be referred will be rather reluctant about accepting them at this late date. We are, however, sending the eighteen to Indianapolis and will write you further when the factory is heard from. 30

Regarding the other two—one of these covering replacing a leaky jar is dated December 11th last and can not be taken into account for the reason that we wrote you prior to that date relative the necessity of returning such batteries to the factory and that no repairs could be authorized. This adjustment report is returned herewith.

The other one of these reports covers an amount of \$7.00 for Separator Renewal. In the 40

Defendant's Affidavit—William J. Morrissey.

first place Yale Storage Battery Company's guarantee and adjustment arrangement did not provide for any repairs other than jar replacements and secondly the amount of the claim seems excessive. This report is also returned herewith.

Yours very truly,

10

YALE ELECTRIC CORPORATION

AHP/JC By A. H. Potts,
Storage Battery Department.

DEFENDANT'S AFFIDAVIT.

20 STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

WILLIAM J. MORRISSEY, being duly sworn according to law, on his oath deposes and says:

1. I am the defendant in the above-entitled cause.

30 2. Mr. Farley, one of my attorneys in this matter has informed me that Mr. Gilmore, one of the attorneys for the plaintiff remarked to the Honorable William A. Smith, Judge of the above-named Court, before whom a motion for a reference in this matter was argued on January 22nd, 1927, that the object of my application for a reference of this matter, and for an inspection of the books was merely to delay the trial of this case and to obtain a list of the plaintiff's customers. This is absolutely untrue. In the first place, there could not be any object in attempting to delay this case, because the plaintiff is amply secured on its judgment, holding a \$10,000 mortgage on my property, as set forth in my main
40

Defendant's Affidavit—Max Berman.

affidavit, annexed hereto. And in the second place, a list of the plaintiff's customers would be of no value whatsoever to me, because I am now out of the battery business and have not been engaged in that business for about a year. I am now engaged as a sales manager in a business which has nothing to do with storage batteries, and the two businesses are not competitive in the slightest degree. 10

WM. J. MORRISSEY.

Sworn and subscribed to before
me this 29th day of January,
1927.

ISRAEL B. GREENE,
M. C. C. of N. J.

20

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

MAX BERMAN, being duly sworn according to law, on his oath deposes and says:

1. I was employed by William J. Morrissey, trading as Morrissey Storage Battery Service Co., the defendant in the above-entitled cause, during the years, 1924, 1925 and the early part of 1926. I was present at a conference between Mr. Morrissey and Mr. L. H. Keller, at the office of the Yale Electric Corporation, at Brooklyn, New York in September, 1924, just before the Yale Electric Corporation took over the Sales Department of the Yale Storage Battery Company. There were present besides myself, Messrs. Keller, Morrissey and another member of Mr. Morrissey Storage Battery Service Co. I distinctly remember Mr. Keller stating that the 30
40

Defendant's Affidavit—Max Berman.

10 Yale Storage Battery Company had consummated arrangements with the Yale Electric Corporation, the plaintiff in this suit, whereby the plaintiff would take over the selling of the entire storage battery department of the Yale Storage Battery Company and would take over and assume the performance of all contracts between
20 the Yale Storage Battery Company and its exclusive distributors. He, at that time, mentioned that there were eight such distributors, including Mr. Morrissey. He also stated that he expected that the Yale Electric Corporation would be in a better position to give better service and cooperation to the distributors than the Yale Storage Battery Company was about to do, because of its better financial standing and because
of its very aggressive sales force in the field, selling the dry battery products of the Yale Electric Company, who would also co-operate and further the sales of the Yale wet battery products manufactured by the Yale Storage Battery Company.

2. In the employ of Mr. Morrissey, I had charge of the books of account and am familiar with all the business transactions between the plaintiff and Mr. Morrissey. I know, as a fact,
30 that the plaintiff corporation allowed and paid to Mr. Morrissey, commissions on sales made by it either directly or indirectly in Mr. Morrissey's territory, and such commissions were the commissions provided for under the old contract between the Yale Storage Battery Company and Mr. Morrissey.

3. I personally know of numerous visits made by Mr. Cornell, the plaintiff's sales representative
40 in Mr. Morrissey's territory, who called for the

Defendant's Affidavit—Max Berman.

purpose of co-operating with Mr. Morrissey in the furtherance of the sale of the Yale products under said contract. Most of the friction between Mr. Morrissey and the plaintiff corporation arose largely over our demands for commissions on direct sales, made by the plaintiff corporation, without our knowledge, for which they refused to give us an accounting and upon which they refused to pay us commissions; and also for their unfair competitive methods in sending their salesmen into Mr. Morrissey's territory and refusing to account for commissions. This friction lasted for a long period of time and finally resulted in the plaintiff cutting off Mr. Morrissey's credit. I personally know that Mr. Morrissey received an average commission of \$100 per month on the Yale products from the plaintiff corporation, but these were only on the sale of which we had knowledge. On other sales in Mr. Morrissey's territory, the plaintiff refused to give an accounting.

10

20

MAX BERMAN.

Sworn and subscribed to before me
this 29th day of January, 1927.

ISRAEL B. GREENE,
M. C. C. of N. J.

30

40

**NOTICE OF MOTION TO STRIKE OUT
ANSWER AND COUNTER-CLAIM.**

Filed March 31, 1927.

To James J. Farley, Esq., attorney for defendant.

10 SIR:

TAKE NOTICE that on February 19, 1927, at ten o'clock in the forenoon or as soon thereafter as counsel may be heard, we shall move before the Hon. William A. Smith, Judge of the Essex County Circuit Court, to whom the above matter has been referred, for an order striking out the answer of the defendant to the Fourth Count of plaintiff's complaint and striking out the entire counter-claim of the defendant and each count thereof, and for the entry of summary judgment
20 forthwith in favor of the plaintiff and against the defendant for the sum of \$7,106.68 with interest thereon as follows:

- On \$1,600 from October 15, 1925;
- On \$2,488.18 from November 15, 1925;
- On \$1,191.71 from November 15, 1925;
- On \$1,826.79 from December 15, 1925.

Said motion will be made upon the following grounds, or one or more of them:

- 30 1. That said answer to the fourth count to the plaintiff's complaint and said counter-claim of the defendant are, and each is sham and filed for the purpose of delay.
2. That defendant's counter-claim is sham and/or frivolous and filed as a defense for purpose of delay.
3. That the defendant has no legal defense to said action on the merits of the case.

40 The annexed affidavits of Lawrence H. Keller and of Charles T. Hutcheson with Schedule "A"

Plaintiff's Affidavit—Laurence H. Keller.

annexed thereto will be filed herewith on the return of this motion and used in support thereof.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

Dated February 14, 1927.

10

STATE OF NEW YORK, }
COUNTY OF KINGS. } ss.

LAWRENCE H. KELLER, of full age, being duly sworn according to law, on his oath says:

I am Vice-President of Yale Electric Corporation, the plaintiff in the above-entitled action, and I have at various times had conferences with William J. Morrissey, the defendant in the said action. I never at any of said conferences, or in any other manner, told or informed the said defendant that the Yale Electric Corporation in taking over the exclusive sales agency for Yale Storage Battery Company, would assume all or any contracts in force between the said Yale Storage Battery Company and its distributors, and/or exclusive sales agents, and the statement to the effect that I did, contained in Mr. Morrissey's affidavit executed January 29, 1927, is untrue.

20

The Yale Electric Corporation, in becoming exclusive sales agent for the Yale Storage Battery Company did not assume any of the latter's contracts with distributors.

30

The contract under which the plaintiff company became the exclusive sales agent for the Yale Storage Battery Company was executed on or about September 29, 1924, and the two companies have been acting under said contract from the date thereof to the present time, and said written

40

Plaintiff's Affidavit—Lawrence H. Keller.

contract constitutes the entire and only agreement now or ever existing between the Yale Storage Battery Company and the Yale Electric Corporation since the execution thereof. The said contract is now in the possession of the plaintiff's attorneys, McDermott, Enright and
10 Carpenter, and will be tendered herewith for the Court's inspection. Under it no alleged special agency contracts theretofore claimed by Mr. Morrissey to have existed, were either recognized, mentioned or adopted.

For several years prior to September 29, 1926, the Yale Electric Corporation had been selling to the defendant Morrissey, dry batteries and flashlights, and after the consummation of the plaintiff's said contract with Yale Storage Battery
20 Company dated September 29, 1924, the plaintiff continued to sell to Morrissey flashlights and dry cells, and, in addition, sold him storage batteries. The plaintiff company never, however, extended to the said defendant, either by verbal or written agreement, exclusive rights in any territory.

I am also a Vice-President of the said Yale Storage Battery Company, an Indiana corporation, and no relation whatsoever exists between Yale Electric Corporation and Yale Storage Battery Company other than the sales contract here-
30 tofore mentioned, dated September 29, 1924. In fact, before the making of said contract, the Yale Storage Battery Company had a sales office of its own at No. 334 Fulton street, in the Borough of Brooklyn, City of New York, N. Y.

It is untrue that the Yale Storage Battery Company renewed with Mr. Morrissey the contract between him and the Permalife Company, a copy of which is alleged to be annexed to his counter-claim.

40

LAWRENCE H. KELLER.

Plaintiff's Affidavit—Charles T. Hutcheson.

Subscribed and sworn to before me,
 at the City of New York, County
 of Kings and State of New York,
 a Notary Public in and for the
 said County of Kings and State of
 New York, this 2nd day of Feb-
 ruary, 1927.

10

JOHN W. WALLER,
 Notary Public, in and for the County
 of Kings and State of New York. #62.
 (NOTARIAL SEAL)

STATE OF NEW YORK, }
 COUNTY OF KINGS. } ss.

CHARLES T. HUTCHESON, of full age, being duly
 sworn according to law, upon his oath deposes
 and says: 20

I am Secretary of the Yale Electric Corpora-
 tion, plaintiff in the above-entitled action and
 have full charge of the books of account and
 finances of the plaintiff corporation and am
 familiar therewith. I have examined the plain-
 tiff's complaint in the above-entitled action as
 set forth in the certified Transcript of Pleadings
 for trial and the matters and things therein set
 forth are all true, except that with respect to 30
 the allegations of the fourth count thereof, the
 defendant is entitled to further credits aggregat-
 ing \$162.27 on account of the sum of \$1,989.06
 therein claimed, making the true balance due on
 said fourth count the sum of \$1,826.79 with in-
 terest thereon from December 15, 1925.

On August 15, 1925, the defendant trading
 under the name of Morrissey Storage Battery
 Service Co., being indebted to the plaintiff for 40

Plaintiff's Affidavit—Charles T. Hutcheson.

certain merchandise sold and delivered by plaintiff to defendant gave to plaintiff his trade acceptance bearing date August 15, 1925, payable October 15, 1925, for \$2,651.07 as alleged in paragraph 1 of the first count of plaintiff's complaint, and a copy of which said trade acceptance is set forth in said paragraph 1. Said trade acceptance was presented for payment on the date it fell due and was not paid. The defendant has paid on account thereof \$1,051.07 leaving a balance due thereon of \$1,600 with interest from October 15, 1925, which is the amount due from the defendant to the plaintiff upon the said trade acceptance as alleged in the first count of plaintiff's complaint and against which defendant is entitled to no other credits, off-sets or counter-claims.

20 On September 15, 1925, said defendant being indebted to the plaintiff for certain merchandise sold and delivered by plaintiff to defendant, gave to plaintiff his trade acceptance bearing date September 15, 1925, payable November 15, 1925, for \$2,488.18 as alleged in paragraph 1 of the second count of plaintiff's complaint, and a copy of which is in said paragraph set forth. Said trade acceptance was presented for payment on the date it fell due but was not paid and the full amount thereof, namely \$2,488.18 with interest from November 15, 1925, is due and owing from defendant to plaintiff upon the said trade acceptance as alleged in the second count of plaintiff's complaint and against which defendant is entitled to no credits, off-sets or counter-claims.

30
40 On October 15, 1925, defendant being indebted to the plaintiff for goods, wares and merchandise sold and delivered by plaintiff to defendant, gave to plaintiff his trade acceptance bearing date October 15, 1925, payable December 15, 1925, for

Plaintiff's Affidavit—Charles T. Hutcheson.

\$1,191.71 as alleged in paragraph 1 of the third count and a copy of which is in said paragraph set forth. On April 20, 1925, plaintiff and defendant William J. Morrissey and Rose M. Morrissey, his wife, made and executed an agreement in writing, which among other things expressly provided as follows:

10

“It is further expressly understood and agreed that all trade acceptances must be paid on the due date thereof, and that in the event any trade acceptance be not paid when due any and all moneys then owing by the said William J. Morrissey to the party of the second part (the plaintiff) shall be and become immediately due and payable, including all other trade acceptances which may have been received by the party of the second part from the said William J. Morrissey, notwithstanding that the same be not then due by the terms thereof.”

20

The said trade acceptance dated August 15, 1925, became due and payable as aforesaid as did also the said trade acceptance dated September 15, 1925, and were not paid, and by reason whereof, under the terms of the aforesaid agreement, the said trade acceptance dated October 15, 1925, in the amount of \$1,191.71 became due and payable together with interest from November 15, 1925. There is due and owing to the plaintiff from the defendant upon the said trade acceptance dated October 15, 1925, the sum of \$1,191.71, as alleged in the third count of plaintiff's complaint, with interest thereon from November 15, 1925, and against which defendant is entitled to no credits, off-sets or counter-claims.

30

In the months of October and November, 1925, plaintiff on open account sold and delivered to

40

Plaintiff's Affidavit—Charles T. Hutcheson.

the defendant, at his request, certain goods, wares and merchandise of the value of \$2,095.68. Defendant became entitled to credits for certain commissions and merchandise returns in the aggregate of \$268.89 leaving a balance due on the merchandise account from the defendant to the plaintiff the sum of \$1,826.79 with interest thereon from December 15, 1925, and against which defendant is entitled to no credits, off-sets or counter-claims.

There is now due from the defendant to the plaintiff upon the said trade acceptances and open account alleged in the four counts of plaintiff's complaint the sum of \$7,106.68 together with interest as follows:

On \$1,600 from October 15, 1925;
 On \$2,488.18 from November 15, 1925;
 On \$1,191.71 from November 15, 1925;
 On \$1,826.79 from December 15, 1925. Interest computed as above to February 19, 1927, amounts to \$536.63 and which will make the amount due and owing from defendant to plaintiff on February 19, 1927, the sum of \$7,643.31.

It is untrue that the plaintiff corporation ever operated and/or did business under or upon the terms of the Permalife contract referred to in defendant's counter-claim. In fact, the said Permalife Company was adjudicated a bankrupt on August 8, 1923. Annexed hereto and made a part hereof and marked Schedule "A" is a copy of the order of the Referee appointed by the United States District Court adjudicating said company a bankrupt. Yale Storage Battery Company in said counter-claim referred to and the plaintiff Yale Electric Corporation are two separate and distinct corporations and neither own any of the other's stock nor is either a subsidiary of the other.

Plaintiff's Affidavit—Charles T. Hutcheson.

It is untrue that plaintiff breached the contract and/or modifications thereof alleged in paragraph 1 of the Fifth Count of defendant's counter-claim and plaintiff never, at any time, refused credit to the defendant in accordance with the terms of said contract and modifications thereof until the defendant failed to pay when due its trade acceptances in favor of plaintiff. I verily believe that the defendant's answer to the Fourth Count of plaintiff's complaint and defendant's counter-claim were filed for the purpose of delaying the day when final judgment should be entered in favor of the plaintiff against defendant, and that the same are without merit and I believe there is no defense to the plaintiff's action. 10

CHARLES T. HUTCHESON. 20

Sworn and subscribed to before me
at the City of New York, County
of Kings and State of New York,
a Notary Public in and for said
County and State, this 8th day of
February, 1927.

(SEAL) JOHN W. WALLER,
Notary Public in and for the County of Kings 30
and State of New York No. 62.

*Schedule A.***Schedule "A."**IN THE UNITED STATES DISTRICT
COURT

FOR THE DISTRICT OF INDIANA

10 IN BANKRUPTCY.

In the matter of
Permalife Storage Battery Company, Inc. Cause
Involuntary Bankrupt. No. 5492

20 BE IT REMEMBERED that on the 8th day of Au-
gust, A. D. 1923, at eight-thirty o'clock A. M.,
William P. Kappes, Clerk of the United States
District Court for the District of Indiana, filed in
my office the order of reference in the matter of
the involuntary bankruptcy of Permalife Storage
Battery Company, Incorporated, of Indianapolis,
in the County of Marion, State of Indiana, and
District aforesaid, which order of reference is as
follows:

In the District Court of the United States
for the District of Indiana.

30 In the matter of
Permalife Storage Battery No. 5492 In Bank-
Company, Inc. ruptcy.
Bankrupt

40 WHEREAS, On the 17th day of July, A. D. 1923,
a petition was filed to have Permalife Storage
Battery Company, Inc., of Indianapolis in the
County of Marion and district aforesaid, ad-
judged a bankrupt according to the provisions of
the Acts of Congress relating to Bankruptcy;
and whereas the Judge of said Court was absent
from said district upon the next day after the
last day upon which pleadings may have been
filed, and none have been filed,

Schedule A.

IT IS THEREUPON ORDERED THAT THE SAID MATTER BE REFERRED TO Harry C. Sheridan, one of the referees in bankruptcy of this Court, to consider said petition and take such proceedings therein as are required by said acts; and that the said Permalife Storage Battery Company, Inc., shall attend before said referee on the 11th day of August, A. D. 1923, at Frankfort, Indiana. 10

Witness my hand and the seal of said Court, at Indianapolis, in said District, on the 6th day of August, 1923.

(SEAL) William P. Kappes,
Clerk.

WHEREUPON, the Referee having read said petition and being sufficiently advised in the premises, the said Permalife Storage Battery Company, Inc., is hereby declared and adjudged a bankrupt accordingly, within the true intent and meaning of the Acts of Congress relating to Bankruptcy. 20

WITNESS my hand at Frankfort, in said District, this 8th day of August, A. D. 1923.

HARRY C. SHERIDAN,
Referee in Bankruptcy. 30

Defendant's Affidavit—William J. Morrissey.

DEFENDANT'S AFFIDAVIT.

Filed March 30, 1927.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

10 WILLIAM J. MORRISSEY, being duly sworn according to law, on his oath deposes and says:

1. I am the defendant in the above entitled cause.

20 2. Since filing of the original affidavits on the motion for a reference in this matter I have found some additional correspondence passing between the plaintiff and me, which are material in this cause, and tend to prove my assertion that the plaintiff corporation assumed the performance of the original contract between the Permalife Storage Battery Company and me, and that the plaintiff, under said contract, constituted and appointed me as its sole and exclusive agent or distributor in the territory referred to in my answer and counter-claim in this matter.

30 3. On or about January 10, 1925, I received letter from plaintiff corporation enclosing letter dated January 8, 1925, received by plaintiff corporation from Wm. Davis Hawk, a true copy whereof is annexed hereto and made a part hereof and marked Exhibit "A." Exhibit "B" hereto annexed, is a copy of plaintiff corporation's reply to letter of William Davis Hawk, and is self-explanatory.

40 4. Exhibit "C" annexed hereto and made a part hereof is a copy of a letter written by plaintiff corporation to Housers Auto Supply Co., Inc., dated January 22, 1925, and Exhibit "D" an-

Defendant's Affidavit—William J. Morrissey.

nexed hereto and made a part hereof is a copy of a letter written by plaintiff corporation to Messrs. James Hezyi & Co., dated January 22, 1925, both of which are self-explanatory.

5. The original letters are in my possession and will be produced when required by the Court. 10

WILLIAM J. MORRISEY.

Sworn and subscribed to before me
this 30th day of ~~March~~, 1927.

January.
ISRAEL B. GREENE,
M. C. C. of N. J.

Exhibit "A"

20

William Davis Hawk,
Electrical Supplied and Appliances,
284-286 Wall Street,
Kingston, New York

Jan. 8, 1925.

Yale Electric Corp.,
Brooklyn, N. Y.

Gentlemen:

Will you kindly send me full date in reference to Yale Storage "A" Battery together with our costs on the various sizes as we have a number of dealers over our territory who would like to buy their storage batteries from us and I know of no other battery that I would rather sell than Yale. 30

Trusting that you will favor me with an early reply,

Yours very truly,
(Signed) Wm. Davis Hawk.

WDH:-LR

40

Defendant's Affidavit—William J. Morrissey.

Exhibit "B"

Mr. W. D. Hawk,
284 Wall St.,
Kingston, N. Y.

Dear Sir:

10 We acknowledge with thanks receipt of your favor of the 8th instant requesting full data on Yale Storage Batteries for Radio Service.

In connection with same would advise that the Morrissey Storage Battery Company of 14 William Street, Newark, N. J. are distributors of this product for the territory in which you are located. We beg, therefore, to refer you to them.

A copy of this letter is being sent to the Morrissey Storage Battery Company who will be
20 pleased to get in touch with you immediately.

Again thanking you and requesting your kind indulgence until the Morrissey Company can be heard from, we are

Yours very truly,

YALE ELECTRIC CORPORATION

By A. H. Post,
Storage Battery Department

AHP/JC
30

Mr. Morrissey: Letter referred to above is attached hereto. This looks like a real live prospect. Will you please give same your prompt attention.

Defendant's Affidavit—William J. Morrissey.

Exhibit "C"

YALE ELECTRIC CORPORATION
Brooklyn, N. Y.

January 22, 1925.

Housers Auto Supply Co. Inc., 10
14 East Main St.,
Somerville, N. J.

Gentlemen:

We are in receipt of your Battery order 191 and take this opportunity to thank you for same.

Regarding the two items of Storage Batteries, would advise that we are unable to supply these, owing to an exclusive arrangement covering northern New Jersey with the Morrissey Storage Battery Company of 14 William Street, Newark, N. J., as distributors of this product. 20

The Morrissey Company is, however, in a position to serve you equally as well as we could on Storage Batteries and we are taking the liberty to ask them to call on you.

Again thanking you for the order, we are.

Very truly yours,

YALE ELECTRIC CORPORATION

By A. H. Pope, 30
Storage Battery Dept.

A. H. P/JC

Defendant's Affidavit—William J. Morrissey.

Exhibit "D"

YALE ELECTRIC CORPORATION,
Brooklyn, N. Y.

January 22, 1925.

10 Messrs. James Hezyi & Co.
18 Outwater Lane,
Garfield, N. J.

Gentlemen:

We are in receipt of your postal requesting list price and discounts on our Storage Batteries and thank you for same.

20 Replying would advise that we are represented in northern New Jersey as distributors by the Morrissey Storage Battery Company, 14 William Street, Newark, N. J. to whom we beg to refer you.

Again thanking you for the inquiry and hoping to be favored with your patronage thru the Morrissey Company, we are

Yours very truly,

YALE ELECTRIC CORPORATION

By, A. H. Post,
Storage Battery Department

30 AHP/JC

OPINION.

Filed March 23, 1927.

McDermott, Enright & Carpenter, attorneys
for plaintiff, for the motion.

Israel B. Greene, attorney for defendant,
opposed. 10

SMITH, C. C. J.

This is an application to strike out the answer
of the defendant to the fourth count of the plain-
tiff's complaint, and to strike out the entire
counter-claim of the defendant.

There is an issue of fact raised as to the
adoption by the parties of a contract theretofore
existing between another corporation and the
defendant, and the Court was informed on this
motion that if the motion to strike out was den-
ied the parties would agree to an order of
reference. 20

The case will be referred to a referee with
instructions to decide first the question of liability
of the plaintiff upon the alleged adopted con-
tract before attempting to take evidence or de-
termine the amount due upon the contract if
held to be adopted.

No costs will be allowed on the motion. 30

March 18, 1927.

C. C. J.

RULE FOR REFERENCE.

Filed April 1, 1927.

The following motions have been made before and heard by the Court:

10

1. A motion by the plaintiff to strike the defendant's answer and counter-claim and for a rule for summary judgment, in favor of the plaintiff and against the defendant.

20

2. A motion by the defendant, (1) for a rule appointing a referee to hear the cause and report on all matters of account between the parties hereto and the amount due from one party to the other; (2) for an order permitting the defendant to inspect the books of account of the plaintiff, in its possession and control, containing records of the sales made by the plaintiff in the defendant's territory and the commissions due to the defendant from the plaintiff on said sales; (3) and for such other and further relief as may be just in the premises.

30

3. A motion by the defendant to strike the interrogatories served upon him by the plaintiff on the 15th day of January, 1927.

4. A motion by the defendant for the issuance of a commission to take the testimony of certain witnesses residing without the State of New Jersey, and in the employ of plaintiff.

And the Court having considered the pleadings in this cause and the affidavits filed by said parties and having heard argument of counsel for the respective parties, it is on this 30th day of March, 1927,

40

Rule for Reference.

ORDERED AS FOLLOWS:

1. That the plaintiff's motion to strike the defendant's answer and counter-claim, and for a rule for summary judgment be denied.

2. That it be referred to Francis Child, Esq., a Supreme Court Commissioner to take testimony and report on the following: 10

(a) First to take testimony and decide the question of the liability of the plaintiff upon the contract referred to in the defendant's fourth counter-claim filed herein (alleged to have been adopted by the plaintiff) before taking evidence to determine the amount due upon said contract, if said contract is held to have been adopted by the plaintiff.

(b) If the said commissioner decides that the said contract was adopted by the plaintiff, he shall then proceed to take testimony and report upon the amount due to the defendant upon said adopted contract, and in connection therewith he shall take testimony, and report on all matters of account between the parties and the amount due from one party to the other. 20

3. That the said parties to appear and give testimony before said Supreme Court Commissioner at such times and places as may be fixed by him and that the said Commissioner may summon such witnesses and make such orders, relating to the inspection of the plaintiff's books of account as he may deem necessary and advisable. 30

4. That no costs are awarded on the motions.

Entered April 1, 1927.

WM. A. SMITH,
Circuit Court Judge. 40

REFEREE'S REPORT.

Filed September 13, 1928.

10 In pursuance of a rule for reference made in the above-entitled cause by the Honorable William A. Smith, one of the Circuit Court Judges, bearing date the 30th day of March, 1927, where-
by it was referred to the undersigned, one of the Supreme Court Commissioners of the State of New Jersey, to take testimony and report on the following matters:

20 (a) First, to take testimony and decide the question of the liability of the plaintiff upon the contract referred to in the defendant's counter-claim filed herein (alleged to have been adopted by the plaintiff) before taking evidence to deter-
mine the amount due upon said contract after said contract is held to have been adopted by the plaintiff.

30 (b) If the said Commissioner decides that the said contract was adopted by the plaintiff, he shall then proceed to take testimony and report upon the amount due to the defendant upon said adopted contract and in connection therewith, he shall take testimony and report all matters of account between the parties and the amount
due from one party to the other;

I do respectfully report as follows:

40 1. I have been attended by Howard C. Gilmore and James D. Carpenter, Jr., of the firm of McDermott, Enright & Carpenter, the attorneys for the plaintiff, and by Israel B. Greene, attorney for the defendant, and in their presence have taken the testimony of the witnesses and have examined into the matters referred to me by said rule of reference.

Referee's Report.

The plaintiff's cause of action is founded upon certain trade acceptances given by the defendant to the plaintiff for merchandise purchased by the defendant of the plaintiff and for the amount of money alleged to be due on an open account due from the defendant to the plaintiff, for goods, wares and merchandise sold by the plaintiff to the defendant. The trade acceptances are for the following amounts: 10

Trade Acceptance due October		
15, 1926.....	\$2,651.07	
Less (payment on account)....	1,051.07	
	<hr/>	
Amount claimed.....	\$1,600.00	
Trade Acceptance due November		
15, 1925, amount claimed.....	\$2,488.12	20
Trade Acceptance due December		
15, 1925, amount claimed.....	\$1,191.71	
Open account—November 15,		
1925	\$2,095.68	
Less (payment on account)....	268.89	
	<hr/>	
Amount claimed	\$1,826.79	

making the total amount of money claimed to be due from the defendant to the plaintiff, exclusive of interest, \$7,268.89. The defendant by answer claims that under the fourth count of the plaintiff's declaration, there is due but \$1,750.53. 30

The defendant's counter-claim in the third count sets out that on January 10, 1922, a corporation known as the Permalife Storage Battery Company, Inc., hereinafter referred to as the Permalife Company, entered into a contract with the defendant, Morrissey, whereby he became the exclusive distributor of certain electric batteries and parts thereof, known as "The Yale Brand" 40

Referee's Report.

Storage Batteries," recited in said contract to be manufactured by the Permalife Company. This contract gave to the defendant, Morrissey, the exclusive right to distribute said batteries in certain territory and gave to the said Morrissey certain price concessions particularly referred to in the contract. This contract was to remain in effect for one year, with the right in the defendant, Morrissey, to renew the same for a period of five years upon giving a written notice to the Permalife Company thirty days prior to expiration and with the proviso that the defendant's purchases from the Permalife Company should, during the period of twelve months from the date of the first shipment of batteries, exceed twenty-five hundred batteries, and purchases of each succeeding year should aggregate 20% increase each year in excess of the purchases of the preceding year. This contract was signed "Permalife Storage Battery Company, Inc., by L. H. Keller, Vice-President." There is no dispute or question but what this contract was duly executed.

The defendant contends that this contract was afterward adopted by a corporation known as the Yale Storage Battery Company and that thereafter the contract was adopted by the Yale Electric Corporation, the present plaintiff; that the contract has been breached by the Yale Electric Corporation, in that the exclusive territory granted to the defendant by the Permalife Company has been given over to other agents or distributors, and in consequence thereof the defendant has lost its profit or commissions on sales of storage batteries in the territory claimed to be exclusively Morrissey's.

Referee's Report.

In order to charge the plaintiff with liability under the Permalife Company contract, it is incumbent upon the defendant to show either a formal assumption of the Permalife contract by the plaintiff or to show that the plaintiff adopted the Permalife contract, received the benefits thereof and in consequence assumed the liability thereunder. 10

From the evidence, there is no proof whatever of the formal adoption of the Permalife contract by the present plaintiff and it is, therefore, necessary to show that the plaintiff company, by its acts, adopted and ratified the contract originally made between the Permalife Company and the defendant.

I find the following facts:

1. That the defendant, Morrissey, on the 10th day of January, 1922, entered into a contract with the Permalife Storage Battery Company for the sale of certain batteries known as "Yale Storage Battery." 20

2. That one L. H. Keller was the president of the Permalife Storage Battery Company.

3. That at the time this contract was entered into, there was another corporation known as "The Yale Battery Company," of which L. H. Keller was the Vice-President and that this company was closely connected with the Permalife Storage Battery Company; that the Yale Battery Company was presumably the sales company of the Permalife Company. 30

4. That on the 8th day of August, 1923, the Permalife Storage Battery Company, Inc., was adjudicated a bankrupt in the United States District Court for the District of Indiana and on September 10, 1923, one Isaac W. Meredith was 40

Referee's Report.

elected and thereafter qualified as trustee in bankruptcy of said company.

5. That after this bankruptcy, the Yale Storage Battery Company purchased the assets of the Permalife Company from the trustee in bankruptcy (testimony of Lawrence H. Keller, p. 8);
10 presumably the Yale Battery Company, and the Yale Storage Battery Company were one and the same corporation. Whether the name was changed from the Yale Battery Company to the Yale Storage Battery Company, does not appear. However, it does appear that the Yale Storage Battery Company manufactured Yale Storage batteries and transacted business with the defendant, Morrissey, on practically the same terms as to discounts, etc., as were provided for in
20 the Permalife contract, although it is denied that such business was transacted by the defendant under the contract, but that the defendant was merely one of the many distributors of the Yale Storage Battery Company. L. H. Keller was Vice-President of the Yale Storage Battery Company.

The records of the plaintiff corporation show, and I find that L. H. Keller was elected Vice-President of the plaintiff corporation on the
30 31st day of May, 1922, while the Permalife contract was admittedly in existence and while the Yale Battery Company was in existence. The plaintiff corporation was then known as the Franco Electric Corporation.

I find as a fact that the Yale Storage Battery Company is a separate and distinct corporation from the Yale Electric Corporation; that the Yale Electric Corporation has never manufactured storage batteries and had never sold storage batteries prior to the 29th day of September,
40

Referee's Report.

1924, on which date the Yale Electric Corporation entered into a contract with the Yale Storage Battery Company, whereby the Yale Storage Battery Company gave to the Yale Electric Corporation the exclusive right to sell the entire products of the Yale Storage Battery Company, which products consisted of all types of storage batteries now sold and known as "Yale" and "Permalife" brands, and any and all other brands that may be produced by the manufacturer, that is, the Yale Storage Battery Company. 10

I find as a fact that there is no connection between the plaintiff, Yale Electric Corporation, and the Yale Storage Battery Company; that the Yale Electric Corporation owns no stock in the Yale Storage Battery Company and that the officers and directors of the two companies are made up of different persons, with the exception of L. H. Keller, who is Vice-President of the Yale Storage Battery Company, and is also Vice-President of the Yale Electric Company, the plaintiff; that the Yale Electric Corporation knew nothing whatever of the contract entered into between the Permalife Company and the defendant, Morrissey, and the only connection that exists between the Yale Storage Battery Company and the Yale Electric Corporation arises out of the contract entered into between the Yale Storage Battery Company and the Yale Electric Corporation, under the terms of which the Yale Storage Battery Company agreed to manufacture Yale and other batteries and the Yale Electric Corporation, the plaintiff, agreed to sell the same. 20 30

I do not deem it necessary for the purpose of deciding this issue to determine whether the 40

Referee's Report.

Yale Storage Battery Company adopted the contract made by the Permalife Company with Morrissey, but the fact of the adoption of the contract is denied by the Vice-President of the Yale Storage Battery Company.

10 I find that the plaintiff did have business transactions with the defendant, Morrissey, and did give to the defendant, Morrissey, either commissions or discounts on storage batteries purchased and sold by him but that his business relations with the plaintiff corporation were not those of a distributor having exclusive territory and did not arise by reason of any adoption of the Permalife contract by the plaintiff, but were solely those of a jobber or distributor who was
20 recognized as such jobber or distributor in a certain district; that the relations existed between the plaintiff and the defendant did not arise out of any contract and could be terminated at the pleasure of either without notice.

I, therefore, find and report that the defendant is not entitled to maintain his counter-claim against the plaintiff and find that the plaintiff is entitled to judgment in the sum of \$8,312.16, for the principal, and interest, which is more particularly shown on Schedule "A" hereto annexed, for which amount judgment should be
30 entered.

Respectfully submitted this 10th day of September, Nineteen Hundred and Twenty-eight.

FRANCIS CHILD,
A Supreme Court Commissioner of New Jersey.

Referee's Report.

Schedule "A"

First Count

Trade acceptance dated August 15, 1925, due October 15, 1925.....	\$2,651.07	
Credit, payment on account.....	1,051.07	
	<hr/>	10
Balance due	\$1,600.00	
Interest from October 15, 1925 to Sep- tember 10, 1928	278.93	
	<hr/>	
Damages on first count.....	\$1,878.93	

Second Count

Trade acceptance dated September 15, 1925, due November 15, 1925.....	2,488.18	
Interest from November 15, 1925, to September 10, 1928.....	421.30	20
	<hr/>	
Damages on second count.....	\$2,909.48	

Third Count

Trade acceptance dated October 15, 1925, due December 15, 1925.....	\$1,191.71	
Interest from December 15, 1925, to September 10, 1928.....	195.88	
	<hr/>	30
Damages on third count.....	\$1,387.59	

Fourth Count

To open account, November 15, 1925....	\$2,095.68	
Less payment and credit on account....	268.89	
	<hr/>	
Amount due on open account.....	1,826.79	
Interest from November 15, 1925 to September 10, 1928.....	309.38	
	<hr/>	40
Damages on fourth count.....	\$2,136.17	

Referee's Report.

SUMMARY

Amount of damages on first count.....	\$1,878.93
Amount of damages on second count....	2,909.48
Amount of damages on third count.....	1,387.58
Amount of damages on fourth count....	2,136.17

10	Total for which judgment should be entered	\$8,312.16
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FRANCIS CHILD,
A Supreme Court Commissioner
of New Jersey.

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William J. Morrissey, direct.

DEPOSITIONS.

Transcript of testimony taken before Francis Child, Esq., a Supreme Court Commissioner of New Jersey, at his office, 24 Commerce street, Newark, N. J., pursuant to a rule for reference entered herein on March , 1927. 10

Ethel I. Jacobus, sworn as stenographer.

Appearances:

Howard C. Gilmour, Esq., of McDermott, Enright & Carpenter, Esqs., attorneys of plaintiff.

James G. Farley and Israel B. Greene, Esqs., for the defendant.

WILLIAM J. MORRISSEY, the defendant,
sworn. 20

Direct examination by Mr. Greene.

Q Mr. Morrissey, what was your business in 1922? A I was engaged in the distribution of Yale storage batteries along with other lines that I distributed on the exclusive basis in the State of New Jersey.

Q Under what name did you trade? A Morrissey Storage Battery Service Company. 30

Q Did you, in January, 1922, enter into a contract with the Permalife Storage Battery Company, Inc., of Indianapolis, Indiana? A Yes, I did.

Q I show you a paper consisting of two sheets, purporting to be dated January 10, 1922, and ask you if this is the contract which you entered into with that company? A It is.

Solicitor for defendant offers in evidence contract entered into between the Perma- 40

William J. Morrissey, direct.

life Storage Battery Company, Inc., and the Morrissey Storage Battery Service Company, dated January 10, 1922. Marked Exhibit D. 1.

10 Q I show you a paper dated February 8, 1922, appearing on the stationery of Yale Battery Company of Indianapolis, Indiana, and ask you what it is? A This is a rider to the contract extending the territory covered in the contract.

By the Referee.

Q Did you receive that letter? A I did.

20 Q Who is the Yale Battery Company? A The Permalife Storage Battery Company, as far as I know. They were trading as Yale Battery Company. My information from Mr. Keller, the vice-president and general manager of Permalife Storage Battery Company.

Q Is he here? A Yes.

Q You received that from his company? A Yes.

Solicitor for defendant offers in evidence paper dated February 8, 1922. Marked Exhibit D. 2.

30 Mr. Gilmour: I object to the admission of this letter.

Mr. Greene: On what ground?

Mr. Gilmour: It appears to be signed by Yale Battery Company and in no way mentions the Permalife Company.

Mr. Greene: The witness explained it is the same company.

40 Mr. Gilmour: I think I have a right to cross examine the witness before that is admitted.

William J. Morrissey, direct.

The Referee: I will exclude this letter at this time, for this reason, that it is not made or signed by the Permalife Storage Battery Company, Inc., and on the further ground that even if it be assumed that the Permalife Storage Battery Company and the Yale Battery Company are one and the same corporation, that there is no proof that H. B. Ramie, the sales manager of Yale Battery Company is authorized to bind the Yale Battery Company. 10

Mr. Greene: I ask for an exception to the ruling.

The Referee: Exception is noted.

Q (Mr. Greene, resuming examination of Mr. Morrissey.) Did you receive a letter from Mr. Keller who forwarded to you this Permalife Storage Battery contract—I show you a paper, and ask you if that was the forwarded letter? 20
A Yes. It was sent to me with the Permalife Storage Battery contract.

Solicitor for defendant offers in evidence letter appearing on the stationery of the Yale Battery Company, January 5, 1922, signed by L. H. Keller, vice-president and call the Referee's attention to the fact that L. H. Keller has also signed as vice-president of the Permalife Storage Battery Company and the witness has testified he received this contract with this letter. 30

The Referee: Let me see the letter. (To Mr. Greene.) Was that the letter that enclosed Exhibit D. 1?

Mr. Greene: Yes.

Mr. Gilmour: I object to the admission of that letter, as there is nothing in that 40

William J. Morrissey, direct.

letter at all to connect with the Permalife Company. It distinctly shows that the Yale Battery Company is a separate corporation. Mr. Keller signed as vice-president, whereas the witness testified it is a trade name.

10 The Referee: I will admit this letter, subject, however, to counsel's being able to show that the Yale Battery Company is one and the same corporation as the Permalife Storage Battery Company or is identical with it for all practical purposes.

Exception is noted for the plaintiff.

Letter on stationery of Yale Battery Company, January 5, 1922, signed L. H. Keller, vice-president, offered in evidence and marked Exhibit D. 2.

20

Q Did you have any conversation with Mr. Keller about as to whom this Yale Battery Company was? A Yes.

30 Q What did he tell you? A Mr. Keller told me because of a lawsuit that they were involved in where some officers of the Permalife Storage Battery Company embezzled or appropriated stock of that company, that you could not say anything else but that the Permalife Storage Battery would go bankrupt and they anticipated this bankruptcy and traded under the name of Yale Battery Company.

The Referee: When was that conversation had, Mr. Morrissey?

The Witness: At the time the contract was made.

The Referee: The time Exhibit D. 1 was made?

40

The Witness: Yes.

William J. Morrissey, direct.

The Referee: Why didn't you at that time insist upon some writing from this plaintiff to the effect that it was responsible for the contract of the Permalife Company or that it took it over?

The Witness: The Yale Storage Battery Company assumed that contract. 10

The Referee: Why didn't you ask the Yale Battery Company to do that?

The Witness: That was just a trade name they used in connection with Yale products.

Q (Mr. Greene resuming.) Upon receiving this Exhibit D. 1 and D. 2, did you write a letter to the Yale Battery Company, Indianapolis, Indiana? A Yes.

Q I show you a letter purporting to be a copy of that letter and also a letter from Yale Battery Company, dated February 8, 1922, referring to the letter which you sent, and ask you if this is a copy of your letter and reply thereto? A Yes, they are. 20

Solicitor for defendant offers in evidence copy of letter dated February 2, 1922, addressed to Yale Battery Company, signed by Morrissey Storage Battery Service Company and reply thereto dated February 8, 1922, and ask that these be marked in evidence. 30

Mr. Gilmour: I object to carbon copies going in evidence.

The Referee: I will admit the carbon copies of the letter of February 22, subject to its being stricken out for failure to connect the Yale Electric Corporation with the Yale Battery Company, and I will exclude 40

William J. Morrissey, direct.

the letter of February 8 from the Yale Battery Company to the Morrissey Storage Battery Company on the ground that I cannot assume that a sales manager has authority to bind the company.

10 Q Mr. Morrissey, do you know who Mr. Ramey is? A Yes.

Q Have you had any dealings with him? A Yes.

Q What was his business with the Yale Battery Company? A Sales manager of the Yale Battery and sales manager of the Permalife Storage Battery Company.

Q Did you personally see him and talk to him? A Yes.

20 Q Did you talk about him to Mr. Keller? A Yes.

Q What did Mr. Keller tell you as to his authority? A That he was coming with the Permalife Storage Battery Company and Yale Battery Company.

Q Did he tell you what his duties would be? A Yes, sales manager. I have a letter in my papers here some place where he notified me in writing of his appointment.

30 Q Did you carry on all your business transactions with Mr. Ramey? A At Indianapolis; at New York with Mr. Keller.

Solicitor for defendant again moves the admission in evidence of the letter of February 8, 1922.

Mr. Greene: Where a corporation places a man in charge of a department, his statements in the course of his employment are admissible in evidence against that corporation and bind it. This is all introductory.

William J. Morrissey, direct.

The Referee: I will admit it subject to being stricken out unless these corporations are connected.

(Carbon copy of letter of February 2, 1922, marked Exhibit D. 3. Copy of letter of February 8, 1922, marked Exhibit D. 4.)

10

Q Was this contract, Exhibit D. 1 and the supplements thereto renewed from year to year?

A Yes.

Q When did you first begin to do business with the Yale Storage Battery Company? A In the fall, 1923.

Q With whom did you open your negotiations with that company? A Yale Storage Battery Company informed us they had taken over the assets of Permalife Storage Battery Company and continued to do business under the Yale Storage Battery Company.

20

Q Did you have any conversations with any officers of the Yale Storage Battery Company? A Yes, Mr. L. H. Keller, vice-president.

Q Where did you confer with him? A His offices, Pearl and Tillary streets, Brooklyn.

Q When was that? A Every month.

Q That the contract was in force? A Sometimes every day.

30

Q What, if anything, did he say with respect to the assumption of this Permalife contract by his company? A He told me that they were buying out the business in private and they would continue under the Yale Storage Battery Company.

Q Did you continue business under that contract with the Yale Storage Battery Company? A Yes.

Q Until when? A October 1, 1924.

40

William J. Morrissey, direct.

Mr. Gilmour: I object.

Q Under what terms did you do business with the Yale Storage Battery Company? A On the same basis we did with the Permalife Storage Battery Company.

10 Q During that period, did you receive discount and commission under that contract? A No commission, because different arrangement of trading. The marketing was all done through us as distributors we purchasing the stock, bought on stock sale and consignment basis, and they doing the billing and carrying the accounts.

20 Q In October, 1924, what happened? A Just prior to October 1, 1924, I was at the office of Mr. Keller with Mr. Voelger and Mr. Berman, two of my men, and Mr. Keller told me he succeeded in having the old man, the president of the Franco Electric Corporation and Yale Electric Corporation in having the Yale Electric Corporation take over the selling of the output of the Yale Storage Battery Company, and that this new arrangement would afford us better service and better co-operation than we had been getting because of the fact that this new corporation, Yale Electric Corporation, was financially sound and with their big selling force would be able to give us plenty of co-operation in the field. He stated at that time in answer to my question, "Where did I stand in this new deal?" He stated that I was one of eight exclusive distributors that would be taken over by the Yale Electric Corporation. I asked him who the eight were. He mentioned in an off-hand way, Pettingill Anderson Company, Frank Stewart Electric Company of Philadelphia, Dire Dewees Company, Perry Motor Company, and stated that

30

40 Mr. Koehler would tell me who the rest were.

William J. Morrissey, direct.

Q Who was Mr. Koehler? A One of the associates in the office.

Q You say your associates were present at that time? A Yes, Mr. Voelger and Mr. Berman. Mr. Voelger was in and out of the office at the time because he was carrying on business with the clerks.

10

Q Did Mr. Keller say anything as to his place in the office? A I knew prior to that time Mr. Keller was vice-president of the Yale Electric Corporation because I traded with the Yale Electric Corporation on other products for some time prior to taking over the Yale Storage Battery Products.

Q About the time you had this conversation with Mr. Keller, did you receive a letter from the Yale Storage Battery Company? A I did.

20

Q I show you letter from Yale Storage Battery Company dated October 1, 1924, and ask you if you received that? A Yes.

Solicitor for defendant offers in evidence letter of Yale Storage Battery Company to the Morrissey Storage Battery Service Company dated October 1, 1924. Same is received and marked Exhibit D. 5.

Q Did you, on or about October 16, 1924, receive a letter from the plaintiff corporation, the Yale Electric Corporation? A Yes.

30

Q Signed L. H. Keller, vice-president? A Yes.

Q Is this the letter? A Yes.

Solicitor for defendant offers in evidence letter of Yale Electric Corporation to Morrissey Storage Battery Service Company dated October 16, 1924. Same is received and marked Exhibit D. 6.

40

William J. Morrissey, direct.

Q After on or about October 1, 1924, with whom did you carry on the business formerly conducted with the Storage Battery Company?
A Yale Electric Corporation.

Q The plaintiff in this case? A Yes.

10 Q On what terms did you carry on that business? A As an exclusive distributor.

Q Upon what arrangement? A That in addition to buying and selling direct from my business, that because of the change in marketing conditions, the company would give me credit of five per cent. on all direct business taken in my territory.

20 Q What territory are you referring to? A Covered by the Permalife Storage Battery contract and the subsequent agreements with Yale Storage Battery Company.

Q With whom did you have that understanding? A Mr. L. H. Keller.

Q At the time your associates were present?
A Yes.

Q Did you from time to time have sent to you by the plaintiff corporation inquiries by various dealers who desired to purchase their product in your territory? A Yes.

30 Solicitor for the defendant offers in evidence copy of letter of the plaintiff corporation sent to the Morrissey Storage Battery Company, the same being copy of letter sent by plaintiff to one W. D. Hauck, dated January 10, 1925, with original letter of Mr. Hauck to the plaintiff corporation attached. Letter is marked Exhibit D. 7.

40 Solicitor for the defendant also offers in evidence letter from plaintiff corporation sent to the defendant, being copy of letter

William J. Morrissey, direct.

of the plaintiff corporation to James Hezeye and copy dated January 2, 1925. Marked Exhibit D. 8.

Solicitor for defendant offers in evidence letter of the plaintiff corporation sent to the defendant dated January 26, 1925, being copy of letter sent by the plaintiff to the Wilbur Storage Battery Company of Trenton, N. J. Marked Exhibit D. 9. 10

Solicitor for the defendant also offers in evidence letter of the plaintiff corporation to the defendant, being copy of plaintiff's letter to the Hausers Auto Supply Company, Inc., Somerville, N. J., dated January 22, 1925. Marked Exhibit D. 10.

Solicitor for the defendant also offers in evidence copies of letters of the defendant dated February 5 and 7, 1925, addressed to Mr. A. H. Potts, c/o Yale Electric Corporation. Two marked as one, Exhibit D. 11. 20

Solicitor for defendant also offers in evidence letter of plaintiff corporation sent to the defendant, being a copy of plaintiff's letter to William W. Pope & Son, Netcong, N. J., dated March 11, 1925. Same is marked Exhibit D. 12. 30

Q Mr. Morrissey, I show you a paper purporting to be copy of letter sent by you to the plaintiff corporation on the date of March 13, 1925, entitled In re E. W. Cobb; will you tell us what caused you to write that letter? A That is not written by me. Mr. Cornell sent that to his company, the Yale Electric Corporation.

Q Where was it dictated? A In my office.

Q Is this a copy of a letter he sent to the plaintiff corporation? A Yes. 40

William J. Morrissey, direct.

Mr. Gilmour: I object to that.

Mr. Greene: By their own agent, dictated in our office, with respect to a certain account.

10 Mr. Gilmour: No authority shown for writing this letter, and in the second place it is a carbon copy.

Q (Mr. Greene.) What was the cause of Mr. Cornell's being in your office on the date this letter was written?

Mr. Gilmour: Objected to, calls for a conclusion.

The Referee: Objection is sustained.

20 Q How did you become acquainted with Mr. Cornell? A The Yale Electric Corporation's representative in my territory. He came in to visit us at least once a week during the time he was employed by that company and during the time we handled storage batteries for the Yale Electric Corporation. He came to advise us where we could get business and to assist in the handling of that business.

30 Q Were you ever told by Mr. Keller about Mr. Cornell's duties? A Yes.

Q When did he tell you that? A Mr. Keller spoke of Mr. Cornell just prior to October 1, 1924.

Q What did he tell you about Mr. Cornell? A Mr. Cornell would be the man to give us that co-operation. He was one of the sales force who assisted us.

Q How frequently did he come to see you? A Every week; sometimes every day.

40 Q On or about March 13, 1925, what was the cause of his being in your office that day? A

William J. Morrissey, direct.

We had just returned from a trip to E. W. Cobb at Ridgewood, N. J. I went in Mr. Cornell's car, with Mr. Cornell. He came for the purpose of adjusting some defective material with Mr. Cobb and to retain him as a customer.

Q Upon the return to your office, did Mr. Cornell dictate a letter to his corporation? A 10
Yes.

Q And is this letter, dated March 13, 1925, a copy of that letter? A Yes.

Copy of letter to Yale Electric Corporation dated March 13, 1925, offered in evidence and marked Exhibit D. 13.

Solicitor for defendant offers in evidence copy of letter to the plaintiff by the defendant attention A. H. Potts, dated July 16, 20
1925. Same is marked in evidence Exhibit D. 14.

Solicitor for defendant offers in evidence original letter of plaintiff corporation to the defendant, dated August 6, 1925, and the reply thereto by the defendant to the plaintiff dated August 7, 1925. Same is marked Exhibit D. 15.

Solicitor for the defendant offers in evidence copy of letter sent by the plaintiff 30
corporation to the defendant, being copy of the plaintiff's letter to Phil's Tire Shop, Asbury Park, N. J., dated October 16, 1925, with endorsement on the second page above the initials A. H. Potts. Same is marked Exhibit D. 16.

Solicitor for defendant offers in evidence letter of plaintiff corporation sent to the defendant, being copy of letter of plaintiff to Messrs. H. N. Smith Company, Paterson, 40

William J. Morrissey, direct.

N. J., dated December 5, 1924. Same is marked Exhibit D. 17.

10 Mr. Greene (to opposing counsel): Now, I demand that you produce the original, if you have it, of a letter sent by the defendant to the plaintiff corporation addressed L. H. Keller, dated October 30, 1925, with an affidavit of Mr. Euchtes attached.

Counsel produces letter and affidavit attached.

Mr. Greene: I also offer this letter and affidavit in evidence.

Mr. Gilmour: I object to the affidavit as binding in any way on the plaintiff company. I have no objection to the admission of the letter.

20 The Referee: I will admit the carbon copy of the letter and exclude the affidavit.

Copy of letter dated October 30, 1925, Exhibit D. 18.

Mr. Greene: The letter refers to that affidavit, whether or not the affidavit is true is another matter that will come up later, but I think it is material to show certain controversies between the parties and controversies are relevant in that issue.

30 The Referee: I will exclude the affidavit on the ground that it is immaterial.

Mr. Greene: I will ask for an exception.

The Referee: The exception is noted.

Solicitor for the defendant offers in evidence a letter from plaintiff corporation to the defendant dated May 1, 1925. Same is marked Exhibit D. 19.

40 Solicitor for defendant offers in evidence letter of plaintiff corporation to the defend-

William J. Morrissey, direct.

ant dated January 9, 1925. Same is marked Exhibit D. 20.

Q Mr. Morrissey, I show you a page of advertising and ask you who furnished that to your company? A Yale Storage Battery Company.

Q When was that? A 1923.

10

Mr. Greene: I offer this in evidence for the purpose of showing that in 1923 our contract was in full force and effect with the Yale Storage Battery Company, in view of the clash now appearing in the record between the companies.

Mr. Gilmour: I object to it as absolutely incompetent to show whether any contract was in evidence or of the contract.

20

The Referee: I will admit it for the purpose of showing that the Yale Storage Battery Company furnished advertising matter to the defendant for the sale of Yale storage batteries, and unless the defendant can show the following facts, I shall strike it out: The facts it must show are: That the Permalife Company was succeeded by the Yale Storage Battery Company; that that latter company assumed the liabilities of the Permalife Company, and that thereafter this plaintiff, the Yale Electric Company, assumed the liabilities of the Yale Storage Battery Company.

30

Mr. Greene: I think that the facts that you say have to be proven are entirely too full. We are not interested in any other liability in this company; all we are interested in is to show they adopted our contract.

40

William J. Morrissey, direct.

The Referee: I will limit it to this particular liability.

10 Mr. Greene: I think from what you say you would seem to infer that we would have to actually show a corporate act on this company whereas all we have to show is a course of dealing from which an adoption may be spelled out under the case. The corporation may not have taken any corporate act with respect to this contract at all, and yet by a course of dealing and admissions, has done acts and made statements and conducted its business in such a manner as to spell out an adoption of the contract. That is all we have to show for the purpose of sustaining our case. But for the present
20 time we will let it stand as is.

Sheet of advertising furnished by Yale Storage Battery Company offered in evidence and marked Exhibit D. 21.

Solicitor for defendant also offers in evidence another sheet of advertising furnished by the Yale Storage Battery Company to the defendant. Same is received and marked Exhibit D. 22.

30 The Referee: The same ruling applies to both.

Q (Mr. Greene.) Mr. Morrissey, until when did you continue to do business with the Yale Electric Company, the plaintiff in this case? A About December, 1925.

Q And during that period of time how did you conduct your business with respect to the Yale products? A We purchased and stored the Yale Storage Battery products and resold,
40 carrying the accounts ourselves on most of the

William J. Morrissey, direct.

business. The direct business was shipped and billed direct by the Yale Electric Company and at the end of each month they credited us with five per cent. commission on the shipments that they reported to us.

Q In what territory did you sell their products? A In the State of New Jersey north of and including Ocean, Monmouth and Mercer Counties, the Counties of Sullivan, Rockland, Ulster and Orange in the State of New York and the greater City of New York, Westchester and Putnam Counties. 10

Q And with respect to the territory fixed by the old Permalife contract and the supplements thereto, how did your territory compare?

Mr. Gilmour: I object. The contract speaks for itself. 20

Q There is nothing whatever relating in this Permalife contract to New York County or Putnam or Westchester. Was the territory in which you conducted your business for Yale products during the period that you did business with the plaintiff corporation, was it the same territory as the territory in the Permalife contract? A Yes, and the additional contract. 30

Q During that period did the plaintiff corporation direct any inquiries to you from dealers in that territory? A They gave us credit on shipments made in New York territory.

Q What credit did they give you? A It is in the credit memorandum.

Q You received a commission? A Yes.

Q Have you any commission sheets or notes sent to you from time to time by the plaintiff corporation? A Yes. 40

William J. Morrissey, direct.

The solicitor for the defendant offers all commission sheets, credit memoranda, and copies of invoices direct to the customers, as one exhibit.

10 Mr. Gilmour: I object, on the ground that they are irrelevant, incompetent and immaterial; that they do not show any adoption of the Permalife contract, which is the question to be determined here.

The Referee: I will admit the credit memoranda to show the course or method of dealing that may or may not be relevant.

The credit memoranda, etc., are marked as one exhibit, Exhibit D. 23, and consist of 21 sheets.

20 Mr. Greene: I take exception.

Q These credit memoranda which have been marked D. 23 in evidence and the invoices attached thereto show what, Mr. Morrissey? A Shipments direct to customers from the Yale Electric Corporation billed by the Yale Electric Corporation, and in some instances are the shipments to the concerns from whom they received inquiries and referred them to us and some others are direct shipments they made themselves.

30

Q You received commissions on all these orders? A Yes, sir.

Q During the period that you did business with this plaintiff corporation, did you have occasion to talk with Mr. Keller about various adjustments to customers in your territory? A Yes.

Q How often did you see him about adjustments? A At least once a month.

40

William J. Morrissey, direct.

Q Where were these conferences held? A In his office, Pearl and Tillary streets, Brooklyn, the office of the Yale Electric Corporation.

Q During these conferences, did you have any conversation about your commission under the Permalife contract? A Yes, under the Permalife contract as taken over by the Yale Electric Corporation. 10

Q With whom did you have those conversations? A Mr. Keller.

Q What was said about the contract? A Mr. Keller and I fought every time I went to see him at his office, and I usually came out with an adjustment.

Q Fought about what? A Our rights.

Q What was said? A When calling on Mr. Keller, we discussed business in the territory and we were not receiving our commissions, as we were getting rumors of business direct. 20

The Referee: What did you say to Mr. Keller and what did he say to you at any special time?

A I told Mr. Keller I did not believe we were receiving the commission we should receive under our contract, and Mr. Keller on many occasions went into the office and fixed our account and on many occasions got us additional credit. 30

Q For what? A Commissions due us.

Q For what? A On sales of Yale storage batteries made in our territory.

Q For which you had been sent no record?

A Yes, no record.

Q When was the last conference that you had with Mr. Keller about these alleged rumors? A At the time I wrote this letter, possibly two or three days later, I called at Mr. Keller's office 40

William J. Morrissey, direct.

and talked the matter of alleged sales in our territory.

Q The letter is dated October 30, 1925, what did Mr. Keller say to you? A He tried to assure me that they were not soliciting direct, but I told Mr. Keller that I was quite sure that they were
10 selling direct business and we were not getting our full commission. Mr. Keller and I quarreled.

Q Did you have any talk with Mr. Keller about the same matter after on or about October 30th? A I would say in November was about the last time I saw Mr. Keller.

Q Did you subsequently receive a letter from the Yale Storage Battery Company or from Mr. Keller on the stationery of the Yale Storage Battery Company on or about December 10,
20 1925? A I did.

Q Is this the letter? A Yes.

Solicitor for defendant offers in evidence letter dated December 10, 1925, from L. H. Keller, vice-president to Morrissey Storage Battery Company, D. 24.

Q Mr. Morrissey, I show you a batch of bills of the plaintiff corporation to you and ask you
30 what these represent? A They represent the purchases that I made from the Yale Electric Corporation from October 1, 1924, until latter part of 1925.

Q Were these purchases all delivered to you at your place of business or to customers in your territory? A From accounts we handled direct, but all for purchases bought and paid for by us.

Solicitor for defendant offers batch of invoices in evidence.
40

William J. Morrissey, direct.

Mr. Gilmour: I object on the ground that they are not relevant to show any adoption of the Permalife contract.

The Referee: There are two matters, I think, that must be decided: First—Whether this company or its predecessor adopted this contract; and secondly, whether assuming that they had adopted the contract, there had been a compliance with its terms, namely, that the batteries shall exceed 2,500 in number and each succeeding year an aggregate of twenty per cent. increase over the year before. 10

Mr. Greene: The difficulty with the situation is that they say there was no such contract and that we have that particular question. If they said, “We admit your contract, but you breach it—” The sole question now is, there is no such thing as a breach; they say they never accepted it. If the Court finds it was adopted, then the breach is out of the picture. 20

Batch of invoices marked in evidence, as Exhibit D. 25.

Mr. Greene: I ask for an exception to the ruling.

The Referee: Exception granted. 30

Q Did you have a place of business in the State of New York? A Yes.

Q Where? A While trading with the Yale Storage Battery Company at West 76th street and Broadway. While trading with the Yale Electric Corporation at Cooper avenue, Brooklyn, the address to which Yale made direct shipments to us. 40

William J. Morrissey, cross.

10 Solicitor for defendant offers in evidence copies of letters from the defendant to the plaintiff dated October 16, 1925; October 8, 1925; another letter dated October 8, 1925; letter dated September 29, 1925; letter dated September 24, 1925; October 8, 1925; October 8, 1925; October 21, 1925; November 17, 1925; December 16, 1925. All marked as one Exhibit D. 26.

Solicitor for defendant offers in evidence eight orders of the defendant upon the plaintiff to deliver certain merchandise more specifically therein referred to.

Same is marked as one, Exhibit D. 27.

Adjourned until two o'clock.

20 *Cross examination by Mr. Gilmour.*

Q You had some one working for you, a Mr. Voelker? A An employe, my New York manager, Mr. Voelker.

Q You had an office at 2539 Cooper avenue, Brooklyn? A Yes.

30 Q Did you do business under the name of Technique Battery and Ignition Service Company? A I did not.

Q Did you do business under that name? A I did not.

Q Your office was at the same address? A Yes.

Q In the same room? A In the same store.

Q The same store as the Technique Battery Company? A Yes.

40 Q The goods referred to in Exhibit D. 27 do not relate to storage batteries, do they? A Some do and some do not.

William J. Morrissey, cross.

Q Which item relates to storage batteries? A
(Witness indicates.)

Q That is the material mentioned in your letter of December 1, 1924, is the only material that relates to storage batteries, in this Exhibit D. 27? A Of that particular batch.

Q When did you first start having any relations with Yale Electric Corporation, the plaintiff? A I would say back about 1923; sometime in early part of 1923 or latter part of 1922. 10

Q What did you sell for it? A Our original purchases were Franco dry batteries.

Q You bought those from the plaintiff in this case? A Yes. I am of the opinion that we originally started with the Franco Electric Corporation when the plaintiff was doing business under the Franco Electric Corporation. I know we bought Franco products. 20

Q Was that before you signed this Permalife contract? A Oh, no.

Q The name of the Franco was changed to the Yale Electric in 1922, so it was along in that time that you were—(interrupted)? A I know we have right here where Franco advised us of change of name and change of corporation and referred to Mr. Keller as vice-president and general manager of the Yale Electric Corporation. 30

Q Did you sell any storage batteries at that time for the Yale Electric Corporation? A No.

Q What did you sell for the Yale Electric Corporation? A Dry products, such as dry cells and "B" batteries and flashlights and then we took on the Edison bulbs.

Q And you had been selling those for the Yale Electric Corporation long before you started selling storage batteries from the Yale Electric 40

William J. Morrissey, cross.

Corporation? A Yes. We started in the storage battery business originally, and it was through our connection with the Permalife Company and the Yale Storage Battery Company and Mr. Keller's connection with the Franco and Yale Electric Corporation that we took on the flash-light line and the "B" batteries, which was considered the dry products.

10 Q You first began selling storage batteries for the Yale Electric Corporation after October 1, 1924? A That is right.

Q What was it you said to Mr. Keller on the visit you testified to this morning when you claimed you quarreled with him about the Yale Electric Corporation's selling direct; what conversation took place? A I told Mr. Keller
20 that we had this affidavit which was a concrete indication that they are soliciting business in our exclusive territory. We had many altercations over the exclusive territory.

Q What date was this? A Along about the latter part of October or early November, 1925.

Q When was another one you had with him? A I quarreled with Mr. Keller on and off every month—every other month—both when I was alone and in the presence of witnesses.
30

The Referee: What did he say to you when you quarreled about your breach you claimed?

A Mr. Keller always told me he was playing fair with me and that they were giving me the conditions entirely justly due me.

The Referee: What did he say about an exclusive contract?
40

William J. Morrissey, cross.

A He always accepted the fact that I had an exclusive territory. He said they were not violating my contract for exclusive territory.

Q (Mr. Gilmour.) Did he use the word, under contract for exclusive territory? A Yes.

Q When did he say that? A The last time he said it was the last visit in the presence of Mr. Moore, the latter part of October or early November, 1925. Mr. E. K. Moore. 10

Q Who was he? A One of the Yale Electric Corporation. Mr. Keller mentioned contract to me in the presence of Mr. Berman and Mr. Voelker.

Q Is Mr. Voelker present, too? A No.

Q I think you testified you started business with the Yale Electric Corporation in the early part of December, 1925, that was just after this quarrel with Mr. Keller? A No, we started doing business in a credit basis, but we purchased material from the Yale Electric Corporation until some time in January, 1926, when we forwarded them an order with a certified check and Mr. Hutchinson returned the order with a letter stating that he declined the order. 20

Q There were several trade acceptances you had given at that time that had not been paid? A There were a few. 30

Q You had exhausted your line of credit with the company? A Yes, at that time.

Q At the time Mr. Hutchinson refused to deliver any more good to you? A No. There was a certified check accompanied the order.

Q Did you ever write any letters to the Yale Electric Corporation claiming any damages that you are now claiming? A Yes.

Q Let me see a copy of your letter. A It is in evidence. 40

William J. Morrissey, cross.

Q You refer to the letter of October 30, 1925, to Mr. Keller which enclosed an affidavit? A Yes, the affidavit made by Mr. Euchtes, one of our exclusive appointed service stations under the Yale contract.

10 Q Did you ever receive a reply? A No, but I discussed it with Mr. Keller.

Q What did you say to him? A I told him that we were not getting a square deal and there was concrete evidence. He said I was. I cited at that time to Mr. Keller instances. I called on a man named C. P. Rockwood that worked for the Yale Electric Corporation and Mr. Rockwood told me that the Yale Company gave him a rough deal and to watch myself. Mr. Rockwood said that orders had been handed
20 to Mr. Koehler where Mr. Rockwood should have received the commission and Mr. Koehler was trying to put the order through without letting Mr. Rockwood know anything about it and that I told Mr. Keller that that was probably being done with my orders.

Q Did Mr. Koehler handle your orders? A Yes.

Q Will you please look at that letter of October 30th and show me where it points out that the plaintiff corporation breached your contract?
30 A Yes, we say we have had many complaints in regard to Yale storage batteries in our exclusive territory. We did not take stock in these complaints until a glaring case was brought home to us, and we are enclosing herewith an affidavit obtained from one of our dealers appointed exclusively in his particular location in Newark.

Q Where does that say anything about the breach of your contract if there was such a
40

William J. Morrissey, re-direct.

contract with the Yale Electric Corporation? A It is self-evident; the fact that they were soliciting business in our exclusive territory is a breach of my contract.

Q At that time, December 10, 1925, your credit had been completely exhausted?

Mr. Greene: I object to that, first that it is not proper cross examination; secondly, that that particular question is not before the Referee now. We are only concerned whether this contract was adopted; whether it was breached is not within the purview of these pleadings; it doesn't set that up at all. The question furthermore does not indicate whether the credit that he refers to was the credit with the plaintiff corporation, or the Yale Storage Battery Company, with which no business had been done for over a year and a half.

The Referee: I do not think the question is proper cross examination.

Q Are you still in the storage battery business? A No, sir. I still own the Morrissey trade name, but I am not working at it.

Re-direct examination by Mr. Greene.

Q When did you retire from the storage battery business? A About March, 1926.

Q When they shut down any further sales to you? A Yes.

Q You said something about this dealer Eucheze as being one of the dealers under an exclusive Yale contract. What were you referring to when you spoke about exclusive Yale contract? A The Yale Storage Battery furnished us contracts and authorized us to go into

William J. Morrissey, re-direct.

a territory and appoint an exclusive Yale service in that particular and specified territory to operate under their form of contract through us.

Q In other words, you had this man, Eachez, execute one of their forms that they furnished you? A Yes.

10 Q Have you any copies of those forms? A I have many.

Q Give me a copy of one? A I have none here.

Q You testified that prior to the assumption of the Permalife contract by the plaintiff corporation you had been selling Yale products, such as dry batteries, bulbs and flashlights. In purchasing these items did you purchase them direct or have the company ship them to your customers? A I purchased them direct.

20 Q And paid for them direct? A Yes.

Q You received no commission on that? A No.

Q And the commissions you have heretofore testified to were commissions you claimed under the Permalife contract? A Yes.

Q You are not claiming any for any sales effected by or through you except on such items as are provided for under the contract? A No.

30 Q You also testified that you had been trading with the plaintiff corporation from the time that that company was known as the Franco Electric Corporation; is that correct? A Yes.

Q Have you any correspondence from the Franco Electric Corporation advising you of the change of name, and that Mr. Keller was appointed vice-president of the corporation under the changed name? A Yes.

40 Q You testified something about a Mr. Cornell, one of the salesmen of the Yale Electric Corporation.

William J. Morrissey, re-cross—re-direct.

Counsel for the plaintiff admits that Mr. Cornell was an employe of the plaintiff corporation.

Counsel for defendant offers in evidence letter dated September 1, 1926, from the plaintiff corporation to the defendant respecting advertising matter for a battery campaign. 10

Mr. Gilmour: I object on the ground that it is incompetent and irrelevant, and has nothing whatever to do with proving the contract if the Permalife was adopted.

Letter is admitted in evidence. (Circular letter on stationery of Yale Electric Corporation dated Sept. 1, 1926, re Yale Radio Battery Advertising, marked Exhibit D. 28.)

Mr. Gilmour's objection is noted. 20

By the Referee.

Q Did you get that letter? A Yes.

Re-cross by Mr. Gilmour.

Q You spoke about a form of contract that you said was sent to Mr. Eauchez; wasn't that form of contract a form of the Yale Storage Battery Company? A Yes. 30

Re-direct by Mr. Greene.

Q Were these forms furnished to you by the plaintiff corporation? A Yes, they supplied the same forms we received prior to the time we did business with the Yale Electric Corporation; same forms; same stationery and everything was used in connection with our advertising.

40

Max Berman, direct.

MAX BERMAN, sworn on behalf of defendant.

Direct examination by Mr. Greene.

10 Q Were you employed by Mr. Morrissey in 1922, '3, '4 and '5? A 1924 and 1925 and part of 1926.

Q What were your duties? A I was their bookkeeper there and handled the correspondence and took care of some of the sales.

Q Where was your office? A 12 William street, Newark, N. J.

Q Was there a Mr. Voelker employed at that time? A Yes.

Q What were his duties? A The New York manger.

20 Q Where was your New York office? A One time at 51st street and later on moved to 2539 Cooper avenue, Brooklyn.

Q Are you personally familiar with the various purchases and sales of the Morrissey Storage Battery Company? A Yes.

Q You kept the books, yourself? A Yes.

Q Do you remember being present with Mr. Morrissey at a conference with Mr. Keller in 1924? A Yes.

30 Q What date was that? A On or about October 1st.

Q Where was this conference had? A Mr. Keller's office, Yale Electric Corporation.

Q Who else was present at that time? A Mr. Morrissey was there and Mr. Voelker, who was in and out of the office, having some dealings with the clerks in the office.

Q And yourself? A Yes.

40 Q What was said at that conference? A Mr. Keller spoke about the Yale Electric Corporation taking over the sales of the Yale Storage

Max Berman, direct.

Battery Company, and Mr. Morrissey asked Mr. Keller, "How about my contract?" and Mr. Keller said, "Well, your contract is good, and as a matter of fact it will be better than it ever was," and at the time he showed him a display that was standing on the table which consisted of advertising material of the Yale dry batteries and Yale wet batteries together, and told Mr. Morrissey that Yale Electric Corporation being rich financially and having plenty of salesmen, it would be able to give him better co-operation than in the past which naturally would benefit him. 10

Q What did Mr. Morrissey say to that? A I don't remember definitely.

Q How long did this conference last? A About two hours. 20

Q What were you discussing during that two hours? A Discussing the way in which we were to operate.

Q After that conference from whom did the Morrissey Storage Battery Company purchase its batteries? A Yale Electric Corporation.

Q Prior to that period, from whom had it purchased them? A Yale Storage Battery Company.

Q To whom did Mr. Morrissey pay the bills for the storage batteries after on or about October 1, 1924? A Yale Electric Corporation. 30

Q From whom did you receive bills? A Yale Electric Corporation.

Q Did you ever sit in on any other conference after that time? A I think I was at another conference; I don't remember exactly what date.

Q Can you fix the time? A I don't think I could very well. 40

Max Berman, direct.

Q Do you remember what was discussed? A Yes, part of it. Mr. Morrissey was complaining about his contract being violated, and I remember Mr. Keller answering that that was on account of a change in marketing conditions; due to the change in marketing conditions.

10 Q Did he explain what the marketing conditions were? A Not that I remember.

By the Referee.

Q What did he say about the violation? A Mr. Morrissey said, "My contract is being violated," and Mr. Keller answered that it was due to a change in marketing conditions.

20 Q When was that, about? A I don't remember.

Q How long after your first interview with Mr. Keller? A Three or four months after.

Q What did Morrissey say when Keller said that? A Mr. Morrissey said, "That is no answer to give me."

By Mr. Greene.

30 Q Prior to on or about October 1, 1924, had the Morrissey Storage Battery Company received any commission from the Yale Electric Corporation on merchandise purchased by Mr. Morrissey? A No, sir.

Q After October 1, 1924, did Mr. Morrissey receive any commission from the Yale Electric Company? A Yes.

40 Q Did you ever have any occasion to adjust any commissions with Mr. Keller after October, 1924, or with the Yale Electric Corporation? A Not that I remember of.

Max Berman, direct.

By the Referee.

Q Before October, 1924, did the Yale Storage Battery Company pay any commissions to the Morrissey Storage Battery Company? A No.

By Mr. Greene.

Q Before October 1, 1924, what was the method of purchasing employed by the Morrissey Storage Battery Company from the Yale Storage Battery Company? A We were told certain price less certain discounts.

10

Q You bought direct? A Direct from the factory at exclusive distributors' prices.

Q So that the Yale Storage Battery Company shipped all merchandise to you and you in turn distributed it among your customers? A Yes.

Q What was the method of purchasing employed after October 1, 1924? A From the Yale Electric Corporation.

20

Q Did you purchase direct or did they ship to your customers? A Some direct and some shipped direct from the Morrissey to the customers.

Q On the merchandise which was shipped direct from the factory to your customers, did you receive a commission? A Yes.

Q Did you receive commissions on merchandise which you purchased and delivered direct to your office? A Yes.

30

Q What was the form of this commission that the Morrissey Storage Battery Company received when it made direct purchases from the Yale Electric Corporation? A It was stated right on the invoice.

Q And in the case of sales shipped direct from the factory to your customers, what was the form of the credit you received? A First of all,

40

Max Berman, cross—re-direct—re-cross.

we received a duplicate of the invoice and then at the end of the month we received a credit slip from the factory which jibed with all the slips during the month.

10 Q Exhibit D. 23 represents what? A These are credit sheets, sent at the end of the month, and attached are copies of the invoices.

Q Which were shipped direct? A At the end of the month.

Cross examination by Mr. Gilmour.

Q You sent orders to the plaintiff corporation to ship those goods direct; did you not? A Yes.

20 *Re-direct.*

Q Were all of these direct shipments to your customers shipped because of orders, or were some shipped without any special order from you? A They were shipped with letters from us.

Q Did you ever receive credit on shipments made to your customers where you had not ordered it, but where the customer ordered it direct? A I don't remember.

30 *Re-cross.*

40 Q Referring to letter dated September 29, 1925, which is a part of Exhibit D. 26, written by you to the Yale Electric Corporation, you state, "We are enclosing herewith order from the Lightning Electric Company calling for 25 Franco Storage Batteries on a jobbers' basis. Won't you kindly supply these batteries and credit us with 5% commission as per our agreement?" You wrote that letter? A Yes.

William J. Morrissey, recalled, re-direct.

Q And that is the sort of instance you refer to where the plaintiff company would ship direct? A Yes.

Q What agreement is it you refer to in this letter; what agreement did you mean; agreement between Mr. Keller and you? A Mr. Keller and Mr. Morrissey.

10

Q Was that letter, D. 26, written at the request of and direction of Mr. Morrissey? A I don't remember.

Q In all these cases where goods were shipped direct, they were so shipped upon letters sent from you or Mr. Morrissey to the company directing such shipment? A I wouldn't say every one, but most of them.

Q Do you know of any one that was not? A There might have been some where we received regular order from customer, we would personally send the order right in. Sometimes we would write a letter.

20

Q That would be the only exception? A Sometimes in the case of new customer, we would write a letter. Where a customer had been dealing right along, we probably would not write a letter.

Q Just send in the order? A Send the customer's order to the factory and they would ship it.

30

WILLIAM J. MORRISON, recalled.

Re-direct.

Q Mr. Berman testified that at the conference he was present with you and Mr. Voelker at the office of Mr. Keller, Mr. Keller said something about a new plan of selling that they were in-

40

William J. Morrissey, recalled, re-direct.

augurating; do you recall any such mention? Was anything said at that time with respect to new selling—

Mr. Gilmour: I object to that.

10 A I recall the conversation. Mr. Keller, in discussing the general situation, when we made these complaints, stated that the business was going south, and that due to the change in market conditions, things were going to change, and I told Mr. Keller that that did not justify breach of contract, and I got up and fought for more commission and to see that we got more commission, that was due to us.

20 Q Did he explain new market conditions? A He said—

The Referee: Where and when was the contract made that you were to get five per cent. of sales made by these people?

30 A At the office of Mr. Keller prior to October 1, 1924. There was never any evidence during the time that I did business with the Yale until the time we got proof; that they ever sent anybody officially to solicit business in our territory, until we got this Eachez proof. They always recognized our contract.

Q After they started in this practice of paying you five per cent. for sales that were made in the territory you claimed to be your territory under the contract, what discounts did they allow you? A We had a regular jobbers' sheet and they gave me an extra five per cent. on jobbers' prices.

40 Q The contract that you made with the Permalife Company provided that on certain type of

William J. Morrissey, recalled, re-direct.

batteries you were to get 50, 10 and 5; that on rental and service batteries you were to get 50, 10, 5 and 15 per cent. discount; were the terms of those discounts changed afterwards? A Yes, many, many times, with the change of marketing conditions and prices were changed many times with the Yale Electric Corporation, but the agreement made with Mr. Keller at the time they took over the sale of Yale storage battery products they issued sheets similar to these with the jobbers' prices, dealers' prices and consumers' prices, and we received all our direct purchases, we and we only received five per cent. in addition to these prices, these jobbers' prices, and on shipments that they made direct themselves or direct on our order, that we solicited and got, they gave us the five per cent. credit in those credit memoranda.

Q An extra five per cent.? A The price was to be the same and was the same, but in the event of their making direct shipment and carrying the account they billed at those prices and then sent us the five per cent. commission, but when they sent to us, they gave us the five per cent. commission right on the face of the invoice.

Q Did they give you five per cent. commission in addition to the discounts provided for in their trade sheets or in this contract? A Yes.

Solicitor for defendant offers in evidence price lists with letter of May 6, 1925 from Yale Electric Corporation to the defendant.

Letter is marked Exhibit D. 29 (price lists attached).

Q When a battery was sold to some customer of yours, in what you claimed to be your terri-

William J. Morrissey, recalled, re-direct.

tory, was the customer billed for the full retailers' price of the article? A This is the proposition: if the order came through, or went direct through us, they billed him on the jobbers' price as a basis, and they gave us a credit memorandum in this form. Here is a copy of their billing at the
10 jobbers' prices.

Re-cross.

Q In other words, on your order, the company would deliver direct to a jobber, they would charge regular jobbers' prices and give you five per cent. commission on those prices, is that correct? A Yes.

Q And when they would sell direct to you, they would charge you the jobbers' prices less
20 a discount of five per cent., so that you got the five per cent. whether it was on direct sales or on a sale through you? A Yes.

Q I understood you a moment ago to say that when they sold direct to you, that they not only gave you a discount from the list price of five per cent., but that they also paid you a commission of five per cent.; is that correct? A No. I explained that the prices were the same jobbers' prices. We got five per cent. in the form of a
30 credit memorandum when the shipment was made direct or by them direct in our territory on an order that we sent them, and where we purchased direct and shipment was made to us and billed to us, that five per cent. was allowed us on the face of the invoice.

Q And you are not claiming an additional five per cent. commission on those goods that were sent to you? A No, only on an adjustment.

Edward S. Cornell, Jr., direct.

May 14, 1927, 10:30 A. M. Continuing hearing.

EDWARD S. CORNELL, JR., SWORN.

Direct examination by Mr. Greene.

I live at 220 Thornden street, South Orange, N. J., I am in the manufacturing business, representing manufacturers and distributors. 10

Q Of what? A I am president of the Cornell Manufacturing Company of Newark, N. J., and I have charge of that concern. In addition I represent at the present time five manufacturers in the electrical field who I actually sell for in the territory east of Pittsburgh and Buffalo with the exception of New York and the metropolitan area. 20

Q Is your company handling any product of the Yale Corporation? A Yes, distributors for Yale at the present time.

Q Of what? A Yale batteries with the exception of the wet battery line we don't handle.

Q In 1924 and 1925 by whom were you employed? A Commencing in June, 1924, I was employed by the Yale Electric Corporation as senior salesman for the State of New Jersey.

Q What were your special duties? A At that time to sell Franco products which was one line of their manufacture. 30

Q When you speak of Franco you mean the Yale? A No, I mean the products manufactured by the Yale Electric Corporation under the name of Franco Batteries and Flashlights.

Q I show you a catalogue of Yale Electric Corporation, and ask you if this is a catalogue of their products? A No, that is not the catalogue of their products at that time I was 40

Edward S. Cornell, Jr., direct.

selling. Subsequently I was givin the Yale line to sell under like arrangements.

Q Will you kindly tell us in general the names of the products that you sold for them at that time? A Commencing in June, I took over the sale of the Franco products handling customers in this territory. Some time later—I cannot give the exact date—I informed Mr. Keller to the effect that I felt that I could put a Yale line over in the State of New Jersey. He doubted this assertion on my part, but finally gave me the Yale line.

Q What did that consist of? A Materials contained in that catalogue that you have in your hand.

Solicitor for defendant offers catalogue of Yale Electric Corporation “Finds it in a flash,” in evidence. Same is marked Exhibit D. 30.

Irrespective of the date, I would say that it was the catalogue I had, one of them. That catalogue doesn’t constitute the whole line.

Q I notice in this catalogue that on pages 13 and 15 are set up some advertising matter about the Yale wet batteries; did you have the right to sell these products in the State of New Jersey? A No.

Q With whom did you have this conversation or understanding? A Mr. Keller.

Q What officer was he of the Yale Electric Corporation? A I understood at that time he was sales manager and assistant to Mr. Hubert. I didn’t know whether he held any other title or not; it didn’t concern me.

Q Do you know whether he was at that time connected with the Yale Storage Battery Com-

Edward S. Cornell, Jr., direct.

pany? A At subsequent date, at a conversation had with me—I cannot remember the date; since that time I have represented some fifteen different companies putting their things across—at a subsequent date, I would say some time probably in October or November, 1924, when the question came up about my handling Yale line with the exception of wet storage batteries, Mr. Keller advised me that the Yale Storage Battery Company was a separate and distinct from that of the Yale Electric Corporation. 10

Q What if any understanding or agreement did you have with Mr. Keller about the sale of wet storage batteries in the State of New Jersey?

A That I could not sell them under any condition.

Q What reason was given to you? A Mr. Keller gave a reason and the reason definitely was because of arrangements with the Morrissey Storage Battery Company. 20

Q And did you, during the years 1924 and 1925, sell any wet storage batteries in the State of New Jersey for the Yale Electric Corporation? A No, I did not.

Q Do you know who did sell those storage batteries? A Morrissey Storage Battery Company and his agents. 30

Q Do you know of your own knowledge whether the Morrissey Storage Battery Company received commission on the sales? A To the best of my knowledge and belief they did, commission of five per cent.

Q Did you receive any commission on the sale of any storage batteries in this State? A I did not. What storage batteries I sold I turned the commission over to the Morrissey Storage Battery Company. 40

Edward S. Cornell, Jr., direct.

Q Did you have occasion to visit the Morrissey Storage Battery Company during that period? A Yes, several occasions in order to sell them Yale dry products.

10 Q Did you have any instructions from Mr. Keller or anyone connected with the Yale Electric Corporation about co-operating with the Morrissey Storage Battery Company to further the sale of Yale wet and storage batteries? A I did.

20 Q What negotiations? A To the best of my ability by endeavoring to not only favor them with orders that were taken by my men under me, but I made several trips with Bill Morrissey to Trenton, Ridgewood, Jersey City and other places in which our mutual efforts were made to not only obtain dry battery business but wet battery business. The two lines were alike in respect to a dealer desiring to sell both items.

Q To whom did you personally sell the Yale batteries? A To jobbers.

Q Or distributors? A Jobbers only.

Q Did you know of any exclusive distributors of Yale Storage Battery Company in New Jersey at that time? A There were none.

30 Q In the southern part of New Jersey? A It was my understanding that the Stewart Company covered southern New Jersey.

Q On wet batteries? A Yes.

Q And you didn't invade that part of the State for the sale of wet products? A No, I have no privilege whatsoever to sell wet products.

Q For the reason that you have given? A Yes.

Q On these trips that you took with Mr. Morrissey, who sold the dry batteries? A I did.

40 Q Who sold the wet batteries? A Morrissey.

Edward S. Cornell, Jr., cross.

Cross examination by Mr. Carpenter of McDermott, Enright & Carpenter, of the plaintiff.

Q Did you have any training in the wet battery business prior to your getting the agency?

A No; what do you mean by training?

Q Isn't it considered that you have got to have some special ability to sell wet batteries? A Not that I know of. I have been in the electrical industry for ten years. 10

Q When did you start handling wet batteries?

A As I recall I sold a firm in Jersey City Franco wet batteries only under the privilege extended me by the Yale Electric Corporation to do so, in January or February of 1925. Those were the first wet battery sales I made for a direct house account, where the orders went directly to the Yale Electric Corporation for fulfillment. 20

Q Did you know anything about Mr. Morrissey's financial transactions with the Yale Electric Corporation?

Mr. Greene: I object. It is not proper cross examination, and what his credit standing with the company seems to be wholly immaterial at this time because the sole question is to determine whether there was an assumption of the contract. 30

The Referee: I don't think it proper at this time.

Q You say you began in 1924 about June in the employ of Yale Electric Corporation? A Yes.

Q That was your first connection with the Yale Corporation? A Yes.

Q You have been in their employ ever since?

A I have not been in their employ since July, 1925. 40

Edward S. Cornell, Jr., cross.

Q Since that date you have been in your own? A Yes.

Q Were you on the payroll of the Yale Electric Corporation as a salaried employe? A No.

Q You sold on commission basis? A Yes, and my salesmen sold on commission basis.

10 Q For just about a year or a year and one month that you acted as salesman for the Yale Electric Corporation? A Yes.

Q In other words, sometime after June, 1924, you asked Mr. Keller to permit you to sell wet batteries in the State because you told him you thought you could sell a lot? A Yes.

Q And he said he didn't want you to do it? A On the wet products. He gave me the dry line.

20 Q From June? A No, I only had the Franco line at the commencement and subsequently when I requested the Yale line, it was given me.

Q It was in October or November, 1924, that you said you asked Mr. Keller to let you handle the Yale line, and that he told you the Yale Storage Battery Company was distinct and separate from the Yale Electric Company? A Yes.

30 Q You don't remember which month it was, do you? A I cannot recall the exact date.

Q You asked Mr. Keller why you couldn't handle them, he told you Morrissey was selling those? A Yes.

Q Tell you any more than that? A I would say he went to greater length than that.

Q Do you recall what he said? A I cannot remember Mr. Keller's exact words, but I was led to believe that from the course of conversation Mr. Morrissey had a contract or some instrument in writing that protected him in the territory.

40

Edward S. Cornell, Jr., cross.

Q Mention a contract or arrangement? A I would not say he mentioned contract nor arrangement definitely, but as I recall, the matter was strong enough to impress me that Mr. Morrissey had the full rights and only rights to sell Yale batteries in this territory, and that was prior to my having met or ever having known Mr. Morrissey or the Morrissey Storage Battery Company. 10

Q When did you first meet Mr. Morrissey? A I would say at least five months after I took charge of this territory with the Yale Electric Corporation.

Q And you took charge of New Jersey when? A In June, 1924, so I would say it was either just prior to Christmas or just after Christmas.

Q 1924? A 1924, or 1925 if it was in January. 20

Q You said you commenced to handle wet batteries in January or February, 1925? A Of the Franco trade mark, but not the Yale. I wasn't allowed to sell those. We could sell Franco but not Yale.

Q Did you ever sell any Yale? A Not wet batteries from direct shipment from the house.

Q Your connection with the Yale Electric Corporation ended about July 1, 1925? A July 10th or something like that. 30

Q Something like six or seven months later? A Yes.

Q You also said in response to some question that there were no exclusive distributors in New Jersey; what did you mean by that? A I don't recall that statement.

Q You said, "I sold jobbers only; there were no exclusive distributors in New Jersey." A 40

Edward S. Cornell, Jr., cross.

The Yale line was on more or less exclusive basis, even in the dry line.

Q What did you mean by the words "There were no exclusive distributors in New Jersey?"

A I don't recall. If you will tell me what it referred to—

10 Q You said you sold jobbers only and you added there were no exclusive distributors in New Jersey? A We were talking about dry batteries, and there were no exclusive distributors on dry batteries.

Q Mr. Morrissey handled dry batteries as well as you? A As a jobber. I sold Mr. Morrissey his dry products and I received a commission thereon, but on wet batteries Mr. Morrissey sold wet batteries and received a commission of five per cent., the same as I received on dry products. His arrangement called for a commission and when I sold a jobber dry products and Mr. Morrissey, or the Morrissey Storage Battery Company, later sold that same account wet batteries, the Morrissey Company acted as Yale agent in that transaction as a salesman, purely and simple, the same as I.

20 Q When he sold wet batteries, he got the same commission that you got if you sold somebody dry batteries without going through Morrissey?

30 A The five per cent. applied to his sales.

Q Matter of five per cent.? A Yes.

Q When you went to Ridgewood or Trenton with Mr. Morrissey, did you go to get business together, you selling the dry goods and Mr. Morrissey the wet batteries? A Not necessarily. We went to Ridgewood to see a firm by the name of Cobb, due to defective material, for one thing, and dissatisfaction with material, and secondly, because this man Cobb desired to buy his material at a better price.

40

Edward S. Cornell, Jr., cross.

Q You didn't go there to take an order from him? A To hold the business that Mr. Morrissey was obtaining on dry products. I was interested as I was selling Morrissey as a distributor.

Q You were selling Morrissey the dry goods that he was selling this man in Ridgewood? A Yes, but Morrissey went there to protect his wet battery interests. 10

Q To try to get him to buy? A He was only selling wet batteries, but Cobb wanted to know why he couldn't buy direct from me through the Yale plant.

Q Didn't want to deal with Morrissey? A That was not the question; all the jobbers wanted to buy their batteries direct. They couldn't see why Morrissey should get the five per cent. when he was a distributor himself. 20

Q Hasn't it always been a feature of the Yale Electric corporation's business that they always sold to jobbers and never to distributors direct? A That sounds good.

Q How is it done? A Just like all other manufacturers, after they have sold to jobbers they go out and take his business in all cases where they thought the credit was good.

Q Where they ever have shipped direct, haven't they always given a commission to the jobber? A No. 30

Q As far as you know? A As far as I know.

Q Do you know of a single instance? A Yes. I can show you instances.

Q Can you give us one name? A Kunz, Bergenline avenue, Union City, N. J.

Q What do you say about him? A I sold him direct, wet batteries and dry batteries, and as a dealer, pure and simple. 40

Edward S. Cornell, Jr., cross.

Q You sold him direct? A Yes, sold him direct.

Q Did the company sell him direct? A I was the company's representative, and the company is responsible for the acts of its representative.

10 Q You were not a salesman for the company, just on commission? A I was representing the Yale Electric Corporation.

Q Where did you have your office at that time? A Didn't have an office.

Q Where did you have a place of business? A Reported Saturday mornings to the Yale Electric Corporation's Brooklyn, N. Y. office.

Q Have any address in New Jersey? A No.

20 Q Where did your salesmen report? A Went to the Yale Electric Corporation office; their reports were mailed to my home.

Q Did you have them mail reports to your home? A I did.

Q That was your headquarters? A Yes, if you wish to call it that.

30 Q When you went to Trenton, what did you go there for? A To get a new account. I cannot think of the name. I would say dealer's account, but we were selling them under the guise of a jobber.

Q Morrissey was trying to sell wet batteries and you were trying to sell him dry? A Yes. In fact Morrissey was the one who discovered the account and asked me to go along and help sell the account because he wanted me to sell him dry and he was going to sell wet.

William J. Morrissey, direct.

SECOND DAY.

Continuation of taking of depositions in the above-entitled cause this 19th day of May, 1927, at the office of Francis Child, a Supreme Court Commissioner of New Jersey, pursuant to an order heretofore recited.

10

Appearances:

Israel B. Greene for defendant.

James D. Carpenter, Jr., of McDermott, Enright & Carpenter, for plaintiff.

The defendant states that he has closed his case with the exception of calling one witness who is ill, a Mr. W. Christopher, whose testimony will be limited to conversations had by said witness with Mr. Stake and Mr. Cornell; Mr. Stake being assistant sales manager of the Yale Electric Corporation, in which conversations Stake and Cornell are alleged to have said that Mr. Morrissey had the exclusive agency on Yale wet batteries; the testimony of the said witness being cumulative, the plaintiff does not object to his being called at a later date by the defendant, provided his testimony is limited to the subject matter above mentioned.

20

Witness Morrissey continuing.

30

Mr. Greene: I offer in evidence a form of Yale Storage Battery agreement with the dealers.

Mr. Carpenter: I object to that. Mr. Morrissey has got to depend on his own agreement.

Mr. Greene: We testified that your people furnished this form of dealers' contracts.

40

William J. Morrissey, direct.

The Referee: When was this form of agreement delivered to you?

A We have correspondence here that will show when we got supplies from the Electric Corporation. That was the same form we used from the
10 Yale Storage Battery, and we have correspondence which shows Yale Electric Corporation supplied us with the same forms and documents that we were supplied with while trading with the Yale Storage Battery Company.

Mr. Carpenter: I want to object unless he produces forms supplied by the Yale Electric Corporation.

Mr. Greene: The witness has already testified that this plaintiff corporation supplied
20 him with these forms, and I think that is sufficient basis for this exhibit to go in.

By the Referee.

Q Did the Yale Electric Corporation furnish you with this form entitled, "Yale Storage Battery Agreement"? A Yes, sir.

Q When? A After October 1, 1924, along with other materials.
30

Mr. Carpenter: I do not think that this has the slightest bearing on this particular matter. It is just a plain form furnished Mr. Morrissey of a type of agreement that he, if he wanted to, might make on his part with some of his customers on their part. It doesn't mention the plaintiff or Permalife Company or the Yale Battery Corporation. I don't see that it has the slightest relevancy or materiality.
40

William J. Morrissey, direct.

The Referee: It is only material to show that these people forwarded to him the usual literature and contracts that they forwarded to their dealers. Beyond that it has no value whatever. I will admit the agreement at this time.

Agreement form: "Yale" Storage Battery Agreement Official Service Station Contract, marked Exhibit D. 31. 10

Mr. Greene: I offer in evidence letter of the plaintiff corporation to the defendant dated March 25, 1925, relating to supply of literature to service stations.

Mr. Carpenter: No objection to that.

Letter of Yale Electric Corporation to The Morrissey Storage Battery Service Co. dated March 25, 1925, offered in evidence and marked Exhibit D. 32. 20

Mr. Greene: I offer in evidence letter of plaintiff corporation to the defendant dated February 11, 1925, and reply of the defendant to the plaintiff dated February 13, 1925; also with respect to the supply of displays to the service stations, in which letter the plaintiff refers to *dealers in your immediate vicinity* and to *your customers*. 30

Mr. Carpenter: I don't see what bearing that has on the question of the adoption of this contract. They are now offering a lot of form letters that were sent out by the plaintiff, not only to this man, but all people who sold their batteries. Form of letters sent by this plaintiff to all distributors, not only here but throughout the country. I don't see that it has any relevancy on the question of the adoption of this contract. 40

Motion to Dismiss.

The Referee: It isn't denied that this man was a distributor of Yale batteries?

Mr. Carpenter: Not at all.

Mr. Greene: It speaks of *your* territory; that is the important appropriate value to that. It speaks of *your* customers.

10

Mr. Carpenter: Every jobber they have sold has certain territory.

Mr. Greene: I think that letter has certain appropriate value taken in conjunction with other evidence to support the claim of the defendant that he had certain exclusive territory, and that these people adopted the territory under the old contract.

The Referee: I will admit it.

20

Letter of Yale Electric Corporation to Morrissey Storage Battery Service Co. dated February 11, 1925, and reply thereto marked in evidence as D. 33.

The plaintiff admits that it supplied Yale battery signs to its dealers.

DEFENDANT RESTS.

30

Mr. Carpenter: I suppose it is proper at this time to move for a dismissal on the ground that they have not shown anything that indicated an adoption of this old contract. It was made between Mr. Morrissey and the Permalife Company, an entirely separate corporation, indicates by its terms it has already separated; there is no writing indicating it has been renewed according, or extended according to its terms, and I submit that nothing constitutes legal proof of the adoption of that contract by this plaintiff corporation. On the contrary, we have

40

Motion to Dismiss.

testimony that the Permalife Company was one corporation, the Yale Battery Corporation was another corporation, and that the Yale Electric Corporation was still another corporation, and that the Yale Electric Corporation is now acting and has been since the date was given, I think, October 1, 1924, as sole sales agent of the Yale Battery Company. I think that appears from Mr. Morrissey's conversations of the conversations he had with Mr. Keller, and I submit there is absolutely no evidence that constitutes legal proof of the adoption of the Permalife contract by this plaintiff corporation. 10

The Referee: Mr. Greene, what have you to say as to the effect, in this Permalife contract, of the clause providing that it shall run for the period, from the tenth day of January, 1922, and shall be renewable each year for five years upon giving a written notice to the company thirty days prior to the expiration of each year? 20

Mr. Greene: I think the testimony is quite clear on that point, that that contract was renewed and continued under the name of the Yale Battery Company just before the Permalife Company dissolved and that it was recognized by the Yale Battery Company. The Permalife Company's business was subsequently taken over by the Yale Battery Company. Then, there is the testimony that various conversations with Mr. Keller about the effect of that contract, and then the most important piece of evidence on that subject is the fact that these people tried to cancel this contract in 1925. The Storage Battery Company attempted to cancel this contract. 30 40

Motion to Dismiss.

10 Now, if there is any evidence that there was an assumption of that contract by the Storage Battery Company it is the fact that it recognized the existence that it attempted to cancel it. This evidence that has been produced here is far more voluminous both in substance and in detail than the evidence which was produced before Judge Smith on the motion to strike this counter-claim which was a disputed matter, and Judge Smith, after hearing argument of counsel, submission of briefs, said that this was a question of fact. That he could not determine, as a matter of law, whether or not that there was an assumption of the contract and that is the reason it was referred to the Supreme Court Commissioner. Here we have a much stronger case than was submitted to Judge Smith both, I say, in substance and detail, and the defendant had not put in any—(interrupted).

20 The Referee: I am not interested in that. I am interested in what the legal effect of your claim is on your failure to give a written notice thirty days prior to the expiration of this contract.

30 Mr. Greene That is a provision of the contract which may be waived like in a lease. If no notice is given, the parties continue on which the contract; if not, it is a waiver of the contract.

The Referee: This provided that it may be renewed if the notice is given. That is what I am interested in there.

40 Mr. Greene: I say, notwithstanding that fact, the evidence of this case, if that is at all material, the evidence shows conclu-

Motion to Dismiss.

sively that there was a waiver, and secondly, that there has been an adoption by the company which it succeeded.

The Referee: What have you got to say that as a provision that the distributor purchases from the company during the time of the contract shall have exceeded 2,500 batteries and the purchases of each succeeding year shall have increased? 10

Mr. Greene: That is not the issue in this case, at all. Assuming that they breached that contract in every detail, it doesn't make a particle of difference. Any provision in the contract may be waived by the parties, and I say the evidence in this case shows that the old Permalife contract they began to trade under and under the Yale Battery, and later on the Yale Storage Battery Company, later on taken over by the plaintiff corporation, and the fact that the plaintiff corporation attempted to cancel that contract; it seems to me clear recognition. 20

Mr. Carpenter: You will find it doesn't refer to the Permalife contract at all; but it terminates any agreement that might be between— 30

Mr. Greene: The evidence shows they recognized this contract. The correspondence shows.

Mr. Carpenter: Nothing of the kind. The contract terminated of its own force and effect by its own weight. His right to renew was predicated on his sale of 2,500 batteries a year and increasing those sales 20% at least each year in excess of the preceding year. 40

Motion to Dismiss.

10 Mr. Greene: I will go one step further and say that, assuming for the purpose of this argument, that this contract did expire by its terms, I nevertheless say that if these people presumed to perform that contract according to its terms and did act under that contract, it is still binding on the contract.

The Referee: What is the date of the letter that you say attempted to cancel this contract?

20 Mr. Greene: December 10, 1925. I think that the Referee hasn't any right to pass on a dismissal, and I think that by that motion the defendant has precluded himself from offering testimony. The evidence shows we received commission. They must have had some arrangement.

30 The Referee: Assuming that I have the authority to grant the motion, which I am doubtful of, I feel that it is incumbent upon the present plaintiff to show its connection with the Yale Storage Battery Company which company succeeded to the assets of the Permalife Company and would accordingly be chargeable with the liabilities of the Permalife Company. The Yale Electric Corporation, the plaintiff, apparently had some close connection with the Yale Storage Battery Corporation which latter company on December 10, 1925, wrote a letter to the defendant relative to the Permalife Storage Battery Company's business.

40 For the information of counsel, I will here state that it is my present opinion that it is incumbent upon the defendant to show that the plaintiff in this case by proper corporate action or by authority of its duly

C. Bertram Plante, direct.

authorized officers or agents, assumed the contract made between the Permalife Storage Battery Company and Morrissey. There is, in my opinion, some evidence to show that officers of the company did so conduct themselves as to show that they regarded the Yale Electric Corporation to be under some corporate obligation by way of contract to the Morrissey Storage Battery Company. 10

Mr. Carpenter: I am going to offer in evidence first the certified copy of adjudication of the Permalife Storage Battery Company, Inc., an involuntary bankrupt, appointment of trustee, and the approval of the trustee's bond, certified to by the Clerk of the United States District Court for the District of Indiana, certificate bearing date January 15, 1927, exemplified copy, as a matter of fact. 20

The Referee: When was it adjudicated?

Mr. Carpenter: August 8, 1923.

Mr. Greene: After we claimed the contract was taken over. I have no objection to the record.

Exemplified copy of record of adjudication of Permalife Storage Battery Company, Inc., a bankrupt, marked Exhibit P. 1. 30

C. BERTRAM PLANTE, sworn.

Direct examination by Mr. Carpenter.

Q Where do you live? A 1050 Seventh avenue, Brooklyn, N. Y.

40

C. Bertram Plante, direct.

Q What is your position with the plaintiff corporation? A President of the Yale Electric Corporation.

Q How long have you been president? A Little over two years.

10 Q What was your position with the company before that? A In the year 1914 I became a director of the corporation and remained a director for about a year and a half, and then resigned and did not become a director until 1919, and since October 6, 1919, I have been a director and a large part of that time assistant secretary of the corporation. About the first of May, 1926, I became president of the corporation.

20 Q You acted as counsel for the corporation long prior? A I was general counsel about the 8th of October, 1919, down to the time I became president.

Q Have you got the minute book of the corporation with you? A I had it to bring over here and forgot it the last minute. Left it in my office, in the safe; I couldn't even telephone for it, as I am the only one who has access.

Q When was the Yale Electric Corporation, the plaintiff in this case, incorporated? A 1912.

30 Q What has been its business? A Manufacturer of flashlights, flashlight batteries, dry cells, which are the big six-inch batteries, power packs, radio batteries, both "B" and "C" and also some radio "A" dry batteries, and has never been engaged in manufacturing storage batteries and never sold them prior to the contract which was made with the—(interrupted).

Mr. Greene: I object to that.

The Referee: Sold them until what date?

40 The Witness: After October 1, 1924.

C. Bertram Plante, direct.

Q (Mr. Carpenter.) On that date what happened? A On the 29th day of September, 1924, the plaintiff, Yale Electric Corporation, entered into a contract with Yale Storage Battery Company of Indiana, which I have here.

Q Is that the duplicate original contract? A 10
It is one of the original contracts which I prepared and was executed.

Mr. Greene: I have no objection to that. Agreement between Yale Storage Battery Company and Yale Electric Corporation dated September 29, 1924, offered in evidence and marked Exhibit P. 2.

Q Is there any other contract between the plaintiff corporation the Yale Electric Corporation, and the Yale Battery Company? A None 20
except that one.

Q Was there ever any contract in existence between the plaintiff corporation and the Perma-life Storage Battery Company? A Never was.

Q When did you first meet Mr. Morrissey here, the defendant? A Prior to the 27th day of October, 1924.

Q How did you come to meet him? A Mr. 30
Morrissey was referred to me on question of credit.

Mr. Greene: I object to any further testimony with respect to credit question.

The Referee: I don't think that is proper at this time?

Mr. Greene: I think he said quite enough in answer to the question.

The Referee: Just limit it to the date. 40

C. Bertram Plante, direct.

Q How many times did you have contact with Mr. Morrissey from that time down to the starting of this suit? A I should judge about ten or twelve times.

10 Q Were those contacts with reference to his business connection with the Yale Electric Corporation? A Absolutely nothing else.

Q I wish you would now state when was the first time you ever heard of this contract that Mr. Morrissey had or alleged he had with the Permalife Company, marked D. 1 in this case.

20 Mr. Greene: I object to the question. This witness' stating as to when he first heard of it, is wholly incompetent and immaterial in this case. The question before the Referee is whether in fact, irrespective of whether this witness heard of it or not, there was an assumption of the contract in question. This witness' statement that he never heard of it or did, is wholly immaterial and incompetent.

The Referee: I think it is a proper question.

Mr. Greene: I ask for an exception.

The Referee: Noted.

30 A When I received a copy of the answer propounded by Mr. Morrissey in this suit from you, Mr. Carpenter.

Q Did Mr. Morrissey in any of the conversations you had with him between the dates you mention, 1923, or 1924, down to the time this suit was started, ever mention he had any such contract?

40 Mr. Greene: I object to the evidence in this case. Mr. Morrissey was under no

C. Bertram Plante, direct.

obligation to mention that fact to him; he was acting in the capacity of attorney and it doesn't appear that there was any obligation on the part of Mr. Morrissey to mention this contract. No evidence of any conversations about the contract, the mere fact that a person remains silent when he is not obligated to speak doesn't militate against him. I ask that the answer be struck and not ruled upon. 10

The Referee: I will allow the question.

Mr. Greene: I will ask for an exception.

A He never did.

Q I wish you would state what were the negotiations or relations that you had with Mr. Morrissey, you representing the Yale Storage Battery Company, between the time you first met him and the time this suit was started. 20

Mr. Greene: I object to the question unless counsel will state on the record what the object of this inquiry is.

Mr. Carpenter: To claim an estoppel to Mr. Morrissey. If he in negotiating for credit in this credit or extension of credit, may have had certain agreements with him in writing and never once afterward mentioned such a contract or asserted any rights under it, and I submit he is estopped now from asserting it was adopted by this corporation. 30

Mr. Greene: For that purpose I object to that question and all questioning tending to establish the point mentioned on the following grounds: 40

C. Bertram Plante, direct.

1st. That the subject of estoppel is not set up in the pleadings.

2nd. It was not referred to the Master; and

10 3rd. Because it is absolutely new matter, and any consideration that the Master may give to this kind of testimony would be outside of the scope of the reference to him.

Mr. Carpenter: Furthermore, it is corroborative of his conduct in not saying anything about it; is of the defendant's denial that there was any such contract.

Mr. Greene: For that purpose I object to it. I don't think it is relevant and competent on that issue.

20 The Referee: I am not going to allow the question as asked. I am going to permit counsel to ask this question:

Q What was your trading arrangement with the Morrissey Storage Battery Company?

30 Mr. Greene: I object to that unless counsel will state what the object of that question is. It is beyond the order of reference to the Commissioner and beyond the pleadings. The relations between this man and the defendant are wholly incompetent and immaterial. The issue is a very narrow one at the present time, and that is whether there was an assumption of this contract. The relations between these parties are wholly incompetent and immaterial on that issue.

The Referee: I will permit the question.

40 Mr. Greene: I ask for an exception.

C. Bertram Plante, direct.

The Referee: Noted.

The Witness: Between the Yale Electric Company?

Q Yes. A The only knowledge I had was that he was a jobber selling Yale Electric products, up to the time the contract of October, 1924, that I negotiated with him. 10

Mr. Greene: I object; that the answer is not responsive to the question; the witness was only asked as to what the trading terms with him were, not as to what his contract was.

The Referee: I don't think that the answer is quite responsive.

Mr. Greene: Referring to my original objection, I think I have a right to ask that this testimony be stricken out, on the ground that the answer is a surprise and was not anticipated. 20

Mr. Carpenter: Never know what a person is going to answer!

The Referee: I will permit the answer and question to stand.

Q You referred to an agreement with Mr. Morrissey. Did Mr. Morrissey make an agreement with the Yale Electric Company? A He did, several agreements. 30

Q Have you a copy? A First agreement Yale made with him was October 27, 1924.

Q Signed by Mr. Morrissey? A Mr. Morrissey and his wife, and by Yale Electric Corporation, Conrad Hewitt, president and treasurer.

Attorney of plaintiff offers agreement in evidence. 40

C. Bertram Plante, direct.

10 Mr. Greene: Objected to on the ground that the contract has nothing to do with the issue; relates to credit arrangements which are not material or competent on this issue. It may become competent later on, but at the present time, it is irrelevant and incompetent.

The Referee: I am not concerned with the credit terms or any agreement relating to credit terms between the Yale Electric Corporation and Morrissey. What I am interested in is any contract that may be existing or have been in existence between Morrissey and Yale Electric Corporation. I will exclude this paper.

20 Mr. Carpenter: I think it is relevant for the purpose, we offer absolutely every agreement that we know of between this corporation and Morrissey and in those you cannot find any reference to any such contract as a Permalife contract. I think it is some evidence from which you may conclude that it was never adopted by this corporation, and never recognized as adopted by him.

30 The Referee: This plaintiff corporation had some sort of a trading agreement with Morrissey that provided the terms of sale as to discount and credit and various other matters, either verbal or in writing, and that is the contract that I am concerned with. I am not concerned with credit contracts.

40 Q (By Mr. Carpenter.) Do you know what trading terms between the plaintiff corporation and Mr. Morrissey were as to what he should sell and what discounts, etc., he should receive?

C. Bertram Plante, direct.

Mr. Greene: I object to this course of examination, the witness has to find out what knowledge, whether it is second hand or first hand.

The Referee: I don't think it proper to go into unless you show what knowledge this man has.

10

Q (By Mr. Carpenter.) You were a director to what time? A Director or assistant secretary down to the present time since 1919.

Q Did Mr. Morrissey ever complain to you that he had a contract giving him certain exclusive—(interrupted).

Mr. Greene: I object on the ground too limited a question and secondly, the substance of the question is improper because the mere fact that this man may have failed to say something to him when he was under no duty to speak—

20

The Referee: The witness has already answered the question.

Q Is there anything on any of the records of the Yale Electric Corporation in any way referring to the adoption by the Yale Electric Corporation of the contract between Mr. Morrissey and the Permalife Storage Battery Company? A No record, and we never heard of a contract.

30

Q Are you willing to produce the minute book? A Yes.

The Referee.

Q Mr. Plante, do you know who the officers of the Permalife Storage Battery Company were? A No, sir.

40

C. Bertram Plante, direct.

Q When did you first know there was such a corporation as the Permalife Storage Battery Company? I am now referring to your knowledge as an officer of the Yale Electric Corporation? A I don't think I ever heard of it until the question came up on this suit. I knew there
10 was a product called Permalife, but why, it was never explained to me.

Q Did your company acquire the assets of the Permalife Company? A It did not. Never acquired any assets of the Yale Storage Battery Company, either. They still operate as an independent company in Indiana.

Q What connection, if any, is there between the Yale Electric Corporation and the Yale Storage Battery Company? A Absolutely none
20 except what is embodied in that contract which has been received in evidence.

Q Are the officers of the Yale Storage Battery Company the same as the Yale Electric Corporation? A No, with one exception.

Q Who is that exception? A Mr. Keller. Mr. Keller is vice-president of our company, and I believe he is also a vice-president of the Yale Storage Battery Company.

Q Does the Yale Electric Corporation hold
30 stock control of the Yale Storage Battery Company? A The Yale Electric Corporation has no stock of the Yale Storage Battery Company and no stockholders with the exception of Mr. Keller who is but a small stockholder of the Yale Electric Corporation, has any stock of the Yale Storage Battery Company. Not in any way allied or connected by virtue or any other agreement or arrangement other than that embodied in that contract.

Q Are any of the directors with the exception
40 of Mr. Keller directors of both the Yale Elec-

C. Bertram Plante, direct.

tric Corporation and the Yale Storage Battery Company? A I have no knowledge that any was a director and I am sure that they are not directors of the Indiana Yale Storage Battery Company.

Q Mr. Keller? A I presume so; I don't know that. I want to make perfectly clear that there is absolutely no connection— 10

Mr. Greene: I object to the witness volunteering information.

Q (The Referee continuing.) Is this contract, Exhibit P. 2, the only contract or arrangement in existence between the Yale Storage Battery Company and Yale Electric Corporation? A Absolutely. 20

By Mr. Carpenter.

Q Has there ever been any other arrangement? A Never has. In order to make the situation clear—(interrupted).

Mr. Greene: I think the minutes are the best proof.

The Referee: He is going to produce the minutes. It is to be admitted subject to being stricken out after an investigation of the minute book. 30

Mr. Greene: The secretary who kept the minute book certainly is the proper person to testify as to its contents.

The Witness: Mr. Hutchinson is the secretary. He is here.

C. Bertram Plante, cross.

Cross examination by Mr. Greene.

Q You were never the attorney for the Yale Storage Battery Company? A Never.

Q You don't know anything about its business affairs? A Absolutely nothing, except its
10 relations with my company.

Q Which were within your knowledge? A Yes.

Q You never saw their minute book? A I never did.

Q Just how much time and attention did you give to the affairs of the Yale Electric Corporation during the period you have been connected with the various capacities? A In the year 1914 I attended several directors' meetings running
20 into 1915, when I resigned. I made a personal investigation of the company, its assets and its business and personnel in the spring of 1919, and drew a contract whereby a client purchased all the stock control of that corporation and afterwards bought out the remaining interest and became the sole stockholder of that corporation. I was in continuous conferences with him on matters pertaining to that company for five—or, ever since that time.

30 Q Who is that gentleman? A Conrad Hubert, the president, and now chairman of our board.

Q Was he formerly connected with the Franco Company? A There has been only one company.

40 Q Which is that? A The corporation began doing business as the Interstate Electric and Novelty Company in the fall of 1919. I caused its name to be changed to Franco Electric Corporation, and subsequently, in August, 1922, after

C. Bertram Plante, cross.

Mr. Keller came into the corporation in charge of sales, I changed its name to Yale Electric Corporation.

Q What office did Mr. Keller have in the plaintiff corporation during its existence? A He began with the corporation actively on February 15, 1922. In the summer of 1922, change of directors and Mr. Keller became a director and vice-president of the company, and remained as a director and vice-president ever since. 10

Q Before Mr. Keller came with the company, in its present name or predecessor, what was his connection? A I don't know, except I knew he was with some battery company. I don't know the name at this time.

Q Don't you know, as a fact, Mr. Plante, that he was the leading spirit in the Permalife Company? A I never knew it. 20

Q Do you know it now? A Since this extra business came up he wasn't the leading spirit; don't misunderstand it. Mr. Murphy, the president of the company at the present time, has been as far as I know, from what I have been able to learn recently, always active in that business.

Q So was Mr. Keller? A I don't know. You told it. 30

Q I ask you whether you know the fact to be he governed the business of that company? A I don't know that. I know that at the time we entered into this contract with the Yale Storage Battery Company, that has been marked in evidence here Mr. Keller had a private office in Brooklyn where he was running the selling of the Yale storage batteries in this territory. Further than that, I don't know.

Q Is it not a fact, Mr. Plante, that the reason Mr. Keller became vice-president of the Yale 40

C. Bertram Plante, cross.

Electric Corporation was because he was to have charge of the storage battery end of the business?

A Absolutely not.

Q What were his duties? A Didn't have any storage batteries for two and a half years after he came with us.

10 Q Until October 1, 1924? A No.

Q What were his duties there from that date on? A No different than they had been before.

Q What were those? A In charge of the sales.

Q After he came there, you have no personal intimate knowledge of the work that was done by Mr. Keller, except in so far as matters were handed to you to adjust as attorney for the corporation; am I right about that? A I attended directors' meetings, prepared the minutes of the directors' meetings; I drew all contracts. I was continually consulted by Mr. Keller and Hubert and Hutchinson through the intervening years.

20 Q You say there were no arrangements between your company and the Yale Storage Battery Company when you took over the sale of the storage batteries; is that right? A I didn't say that.

30 Q What did you say? A We made a written contract embodying their agreement and which is in evidence here.

Q Wasn't there any agreement between your company and the Yale Storage Battery that all unfilled orders of the Yale Storage Battery among its distributors would be filled by your company? A I know nothing about that. Not so far as I know.

40 Q Perhaps this Exhibit D. 5 will refresh your recollection. I show you Exhibit D. 5; do you

C. Bertram Plante, cross.

recognize this letter? A I do not. Sent by Mr. Murphy who has no connection with our company.

Q He was vice-president of the Yale Storage Battery at that time? A That is another Mr. Murphy.

Q I want you to look at Exhibits D. 5 and D. 6, and I call your attention to the fact that D. 6 refers to D. 5, and ask you whether it is not a fact that the Yale Electric Corporation did assume the assumption of all unfilled orders of the Yale Storage Battery Company on October 1, 1924? 10

Mr. Carpenter: I object to that, that orders that might have been outstanding of the Yale Battery Company after the Yale Electric Corporation, was given exclusive sales rights, is one thing, but adoption of a contract is an entirely different thing. 20

Mr. Greene: The letter says all unfilled orders will be filled by Yale Electric Corporation.

The Witness: Will be billed by Yale Electric Corporation at present prices.

Q Was that an arrangement effected between your company and the Yale Storage Battery Company? A I know nothing of it. I have never seen either one of those letters before. 30

Mr. Greene: If the Master pleases, they were written right after this contract, and that is what they refer to.

Q Can you explain what that means? A Surely. 40

C. Bertram Plante, cross.

Q Explain it. A After the time fixed in the contract for our acting as sales agent they shipped all their product to us; they were compelled to by the contract, and any existing orders we filled and billed direct from ourselves to distributors or jobbers to whom the goods were sent.

10

Q Will you please point out a clause in that contract with respect to this understanding?

Mr. Carpenter: The terms imply that.

Mr. Greene: He says that is the only agreement they had.

The Witness: It says here, "Take over the products of sale."

Q Where is there any provision about your company fulfilling all unfilled orders and billing on your own billheads?

20

By the Referee.

Q What does the first clause of that contract say? A The eleventh paragraph of this contract provides under the head of duration of the contract: "This agreement shall be and remain in full force and effect for one year from the date hereof and shall automatically renew itself, etc.," dated September 29, 1924.

30

The Referee: It's the first clause, if any.

Q (By Mr. Greene.) Where is there anything in that contract which says that the Yale Electric Corporation shall fulfill unfilled orders of the Yale Storage Battery Company and bill for those unfilled orders? A There isn't a word about billing, but the contract in the first paragraph provides this:

40

C. Bertram Plante, cross.

“1. The manufacturer hereby gives unto the sales agent the exclusive right to sell the entire products of the manufacturer consisting of all types of storage batteries now sold and known as Yale and Permalife brands, and any and all other brands that may be produced by the manufacturer during the life of this agreement. The manufacturer agrees not to sell any of its products through any other person, copartnership, corporation or sales agent whatsoever and not to sell any of its products to any other person, copartnership or corporation with the sole exception that the manufacturer reserves to itself the right to sell its products to automobile manufacturers for the sole purpose of standard equipment on new automobiles manufactured by such manufacturers and to no other person whatsoever.”

10

20

By the second paragraph of this agreement, we agreed to purchase our entire requirements of said products from the manufacturer at the prices and upon the terms set forth here; and by the third paragraph, the manufacturer agreed to sell, that is, the Indiana company agreed to sell, its said products upon certain prices as there specified. By the ninth paragraph of the contract, under the hearing of terms, it provides that all payments shall be made without cash discount on or before the 10th of each month following the calendar month in which shipment shall have been made and shall be made by 30-day trade acceptance without interest.

30

Mr. Greene: I ask that the Master strike out all this testimony. The first and eleventh are the important ones.

40

C. Bertram Plante, cross.

Q When your company entered into this contract, did you get a list of customers of the Yale Storage Battery Company? A I don't know, but I presume we did.

10 Q Was Mr. Morrissey's name on these lists as one of the distributors? A I am unable to say except that he was a distributor that I learned, of the Yale Electric Corporation, for dry products before we entered into arrangements to sell the storage batteries.

Q Did your company receive a list of all the unfilled orders that were unfilled on the first of October, 1924? A I don't know, but I assume they did.

20 Q Did your company fulfill those orders? A If the people were entitled to credit; if they were not, we would not. That is what brought in this matter to me.

Q After October 1, 1924, did the Yale Storage Battery Company to your knowledge continue dealing directly with any of the former customers that they had? A I don't know.

Q They were prohibited from so doing under the contract with your company? A The contract speaks for itself.

30 Q They shipped all the merchandise to you? A We ordered from the Yale Storage Battery Company the quantity of batteries, types that we needed to sell to our trade, whatever our trade was.

40 Q When you speak of your trade, you mean the old customers, a list of which had been given to your company by the Yale Storage Battery Company and such new customers that you could induce to buy from you? A Or such of our existing customers and distributors that were and are still—

C. Bertram Plante, cross.

Q Your company continued to deal from old customers of the Yale Battery Company, did they not, after October 1, 1924? A If any of those customers of the Yale Storage Battery Company wanted goods at our prices and were entitled to our terms and credits, we supplied them.

10

Q Was there any understanding, either expressed or implied, between your company and the Yale Storage Battery Company, that you would continue to fulfill their requirements of the goods of the Yale Storage Battery Company under whatever arrangements they had with the Yale Storage Battery Company? A No. The Yale had no interest after they made that contract.

Q They breached all the contracts? A I have no understanding because I don't know anything about it. I don't know who their customers were, and I don't know what their contracts were, if they had any.

20

Q Did they not, when they signed this contract with your company, dated September 29, 1924, insist that your company should fulfill whatever contracts they had with their distributors or jobbers?

30

Mr. Carpenter: Objected to; calls for conclusion.

The Referee: This witness said there were no other contracts except this one.

Q Was there any understanding which was not embodied in any formal agreement about your company performing any of the agents' or distributors' contracts which they had with their customers? A None.

40

C. Bertram Plante, cross.

Q Then why did your company receive a list of their customers? A We would be glad to do business with anybody we could if they were entitled to credit from us.

10 Q Why did this letter, Exhibit D. 5 and D. 6, refer to the company fulfilling orders? A Mere trade.

Q On hand? A Trade announcements, went out to all the jobbers generally, like all the rest of those things. Went to every jobber on the books.

Q Why did your company pay five per cent. commission to Mr. Morrissey, on storage batteries? A Every jobber gets trade discounts. If you are doing business with jobbers exclusively, and goods are sold at retail prices less
20 certain discounts. Mr. Morrissey as a jobber in this territory got to receive this discount, except wet storage batteries.

Q Why did you pay him five per cent. commission on sales by him in this territory? A You mean other than shipped direct to him?

Q Yes. A Because Mr. Morrissey came and asked that we ship certain jobbers direct in this territory. He didn't have credit enough to handle the business, and arrangement was then
30 made that we would give him five per cent. on such orders referred to us direct and shipped direct, because that is the amount of profit he would have made if we had billed the goods to him and he bill to the jobber. We took the risk of collecting and he got the five per cent. difference, and his credit wasn't good enough to make the shipment direct.

Q When was that arrangement made with him? A I don't know. I know that was the
40 arrangement that was made.

C. Bertram Plante, cross.

Q Did you make that arrangement? A No.

Q What knowledge have you of that arrangement? A Talked with Mr. Keller and Mr. Morrissey.

Q So that Mr. Morrissey was entitled to commission of five per cent. on sales made direct to his customers—to your customers in this community? A We didn't have any other jobber in this line in this section, and as he couldn't handle those credits direct, because his credit was exhausted, he made that arrangement that we should ship the goods direct and bill them direct, and on those goods which we shipped and billed direct, as appears by written documents which are in evidence here, we gave him five per cent. commission. That was exactly the same as though we had shipped to him and he reshipped and rebilled and got the five per cent. 10
20

Q You didn't know anything about the credit ratings of these people you shipped, and you preferred to ship to them rather than ship to Mr. Morrissey? A I said to those whom we regarded as entitled to credit.

Q Did you ever refuse to ship any merchandise to any person designated by Mr. Morrissey? A I never did, but no doubt Mr. Hotchkiss did at special instance. 30

Q You are talking now not of your own knowledge, but what somebody told you? A The business, generally, as to how it was done.

Q Have you personal knowledge as to things you testified about the credit arrangement between Mr. Morrissey, the credit arrangement with Morrissey and your company? A Only what Mr. Morrissey and Mr. Keller have told me.

Q Mr. Morrissey tell you he had certain arrangement with your company? A Yes. 40

C. Bertram Plante, cross.

Q When? A These contracts, the three of them, which he made with me, giving him credit to the corporation on the strength of which he got some \$7,000 worth of goods which he never paid for.

10 Mr. Greene: I ask that everything except the date be stricken out, as not responsive.

The Referee: Give the date as nearly as you can recall. Strike out the rest of the answer.

A That conversation took place, I am sure, shortly before the last contract was negotiated with Mr. Morrissey by myself in July, 1925.

Q What stock interest have you in this plaintiff corporation?

20 The Referee: Objection sustained.

Mr. Greene: I think I have a right to show this man's interest. I want to know whether he has any proprietary interest in this company which will cause him to speak.

The Referee: I am not going to permit you to ask him how many shares. You can ask him if he has—(interrupted).

30 Q What financial interest have you in this plaintiff corporation?

Mr. Carpenter: I object again—

The Referee: Objection sustained.

Mr. Greene: I ask for an exception.

The Referee: I will permit you to ask him if he has stock in this corporation, but the amount thereof I will not. Ask him if he is a stockholder.

40 The Witness: Yes.

C. Bertram Plante, cross.

Q Are you a majority or minority? A I am a minority.

Mr. Carpenter: I object as immaterial.

Q Have you personally any financial interest in the outcome of this suit? A I don't think I have. The amount of this claim is infinitesimal. 10

Mr. Greene: I ask that the last part be stricken out.

Q You are the attorney for the plaintiff corporation, who forwarded this case for trial to Messrs. McDermott, Enright & Carpenter? A Yes.

Q You are very anxious to win this case? A I want to find out if Mr. Morrissey can get \$7,000 worth of our goods and not pay for them. 20

Mr. Greene: I object to the answer.

The Referee: I don't think it is a proper question. I will rule it out.

Mr. Greene: I ask for an exception.

Q You testified before that the only matters that were discussed between you and Mr. Morrissey were credit matters, and then later on you said he told you something about his business arrangements with the plaintiff corporation. How do you account for these two statements? A In the first place, the first part of your question is not so. Mr. Morrissey told me about a great many things besides mere credit. 30

Q Did you not testify the only thing was credit? A That is not my recollection of the testimony. 40

C. Bertram Plante, cross.

Q Is it not a fact that you on several occasions offered yourself willing to intercede on his behalf because he said Mr. Keller was giving him a raw deal on his commission? A I never made such a statement to Mr. Morrissey in my life. I never interceded; perhaps I offered, when
10 I thought concessions might be made under these agreements, with Mr. Morrissey, to assist him in his business.

Q Did you ever intercede on his behalf in discussing his affairs with Mr. Hubert, the president of the company? A I never did any interceding. I was acting for a client in a business in which I was interested, and I took it up as a matter of business as to whether it was advisable for good business to make certain financial ar-
20 rangements with Mr. Morrissey which embodied certain contract which I drew, from time to time, on the strength of which he got our property.

Q Have you spoken to Mr. Hubert about Mr. Morrissey? A Several times.

Q Did you ever discuss with him any complaints that Mr. Morrissey had against the plaintiff corporation about commission, or invading his territory and not paying him commission? A I don't know that I ever talked to Mr. Hubert
30 on that subject at all.

Q Did you talk to Mr. Hubert about any complaints? A Absolutely none.

Q I show you a letter dated April 10, 1925, and ask you if you wrote this letter? A I wrote the letter. I signed it, too.

Letter offered and marked for identification D. 1.

Q What do you mean in this letter when you
40 say you have spoken to Mr. Hubert about the

Charles T. Hutchinson, direct.

matter and if you will call upon him, etc.? He will take up any matter or complaint that you have; what do you refer to? A Mr. Morrissey came to me and complained that the original agreement of September 27, 1924, had not worked out; that he could not get along under that agreement because it didn't give him enough credit, and as Mr. Hutchinson was holding him strictly to that agreement and he wanted me to give him the opportunity of giving trade acceptances after the time when it became necessary for him to pay; that is, we would take a trade acceptance for a further period and that is the idea which refers to that letter and which was subsequently embodied in contract dated April 20, 1925. 10

Q You say he never complained to you about your company invading his territory without paying commission? A Never did at any time; not even when he was demanding trade acceptances from us on the open account. 20

Mr. Greene: I ask that the last part be struck out.

The Referee: It is responsive.

Mr. Greene: I ask for an exception.

30

CHARLES T. HUTCHINSON, sworn.

Direct examination by Mr. Carpenter.

Q Where do you live? A Massapequa, Long Island, N. Y.

Q What is your business with the Yale Electric Corporation? A Secretary.

Q How long have you been secretary? A Going on six years. 40

Charles T. Hutchinson, direct.

Q How long have you known Mr. Morrissey?

A Personally about five years.

Q When did you first take over the wet battery business? A When we made the contract with the Yale Storage Battery Company.

10 Q To your knowledge, has there been any other arrangement or agreement in effect at any time between your company and the Yale Battery Company than what is contained in that contract? A I have no knowledge whatever of any other agreement.

Q Does your corporation hold any stock in the Yale Battery Company or visa versa? A None whatever.

Q Just same officers? A Only exception of Mr. Keller.

20 Q How long has he been with the corporation? A Since February, 1922.

Q When did you first hear or learn of the contract that Mr. Morrissey says he had with the Permalife Storage Battery Company? A When Mr. Morrissey filed his answer to our suit.

Q Did you ever hear of it before that? A No.

Q You are a director, of course, of this corporation, too, are you? A Yes.

30 Q Prior to the institution of this suit, did you ever have any talk with Mr. Morrissey about his business relations with the company? A Only financially, or credit, way.

Q How often did you have those talks with him? A About once a month—time to settle.

Q How long talks would you have with him on those occasions? A Quite some length—arguments, sometimes.

40 Q Did he ever talk to you about commission he was entitled to? A He mentioned several

Charles T. Hutchinson, direct.

times small credits that were due him on direct shipments.

Q Did he ever at any time tell you he had a contract with the Permalife Company that was ratified or adopted or being acted upon by your company—

10

Mr. Greene: Objected to as leading question.

The Referee: He says he never knew of the existence of the contract; that the first knowledge he ever had of it was when the suit was started.

Q How long had Morrissey been a customer of your company? A 1922.

Q When was that with reference to the time you took over these Yale wet batteries? A Two years before.

20

Q What terms did you have with him in your relations before October, 1924?

Mr. Greene: Object to any relations prior to 1924, because the whole crux of this case depends on the issuance of the contract.

The Referee: Ask him whether any change as to relations between one date and the other.

30

Q Any change in the relations between your company and Morrissey after October, 1924, to what there had been before? A None, except as to terms.

Q What were the terms? A The first contract we made in October, 1924, stipulated cash discount terms.

Q Cash discount terms on what? A On his purchases.

40

Charles T. Hutchinson, cross.

Q What change was there after that? A We modified that and allowed him to settle on trade acceptances.

Q You mean in reference to the contract Mr. Plante drew up? A I do.

10 Q Except for those terms where cash discount or time, as contained in the contracts drawn by Mr. Plante, was there any change in your relations with Morrissey from what they had been in the two years before October 1, 1924? A Except, extended larger credit.

Q How about as far as commissions were concerned, did he get the same commission afterward as before? A With respect to commissions, I never recognized as commissions strictly commissions, direct billing with Mr. Morrissey's distributors' discount.

20 Q You call it discount and he called it commission? A Yes.

Q Anything on the minute book which relates to any contract between Mr. Morrissey and Permalife Company, or the adoption of any such contract? A Absolutely nothing.

Cross examination by Mr. Greene.

30 Q What are your duties? A Secretary, in charge of finances and credits.

Q You have nothing to do with Mr. Keller's department, have you? A No.

Q You don't know anything about what Mr. Keller says or does? A I couldn't say that; I know quite a lot.

Q You know by hearsay. You don't know of your own knowledge? A What Mr. Keller tells me.

40 Q I don't care; you don't know of your own knowledge except what you have heard from

Charles T. Hutchinson, cross.

others? A I know sometimes, as to what Mr. Keller tells me.

Q You don't know of your own knowledge any of the transactions carried on by Mr. Keller except what he tells you or what others tell you?

A Unless it is written agreements. I know.

Q But if Mr. Keller made a verbal agreement or made statements that have not come to your attention, you would not know anything about it?

A How could I?

Q Mr. Keller had charge of sales? A Yes.

Q He had the right to make agreements with jobbers and distributors about prices and shipments and everything else? A No question about it.

Q Are all the transactions or understandings of Mr. Keller in his department recorded in the minute book? A No.

Q What minutes, only, are recorded in your minute book? A Minutes passed on by the directors.

Q So far as Mr. Keller's department is concerned, he has full swing of that? A Just the same as any other sales manager.

Q And a great many of the matters that are adopted in his department are not even known at the board of directors' meeting or recorded in the minute book; is that right? A Yes. Same as any other business.

Q Mr. Keller's office in 1924, 1925 and 1926 was located where? A Where he is now.

Q In the office of the Yale Electric Corporation? A Yes.

Q And that is the same office as that of the Yale Storage Battery Company, of which he is vice-president; is it not? A The Yale Storage Battery Company has no office in the Yale offices,

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Charles T. Hutchinson, cross.

but when they discontinued selling batteries they closed up.

Q Mr. Keller uses the offices of the Yale Electric Corporation to transact his business of vice-president of the Yale Storage Battery Company?

10 A He has no business to transact with the Yale Storage Battery. They are not marketing any stuff. We send them the orders and get the goods and pay them. Mr. Keller has no connection with the transaction.

Q Mr. Keller is the connecting link of the Yale? A It just so happens he is a director in both companies.

Q As I understand it, Mr. Hutcheson, you take care of the office management and the book-keeping and details of that nature? A I have
20 general supervision.

Q But aside from your own particular department of keeping books, and drawing checks and recording what transpires at directors' meetings, you don't know anything about the workings of the others, first hand, am I right about that? A First hand, I would say yes.

Q You don't know anything about Mr. Keller's department first hand, except what you are told? A I frequently talked with Mr. Keller.

30 Q You were never present at any of the conversations between Mr. Morrissey and Mr. Keller that have been testified to, were you? A Yes. I was in Mr. Keller's office several times when Mr. Morrissey was there.

Q Particular conference on or about October 1, 1924, when talked about your company assuming the contracts? A I was brought in on them to the extent of extending credit.

40 Q But that is all? A I was there when the thing was talked over.

Lawrence H. Keller, direct.

Q Who was there at that time? A Some of his men.

Q Know their names? A Tom Voelker and Berman.

Q Did you sit through the whole conference? A No, I was too busy. I didn't have time to stay there all day.

10

Re-direct examination by Mr. Carpenter.

Q You take care of running the financial business of the company? A I do.

Q Who passes on the credit of the customers that the salesmen select? A I have a credit man and he is restricted, of course. Beyond those restrictions, I am the man that has the say.

Q Under whose direction and authority is the credit managed? A Mine.

20

LAWRENCE H. KELLER, sworn.

Direct examination by Mr. Carpenter.

Q Where do you live? A 258 Riverside Drive, New York City.

Q You are vice-president of the Yale Electric Corporation? A Yes.

30

Q How long have you been such? A About five years.

Q You are also a director? A Yes.

Q And a director for some time? A Yes.

Q Have any other position with the Yale Electric Corporation? A Nothing other than I am in charge of sales.

Q It was also brought out that you are vice-president of the Yale Storage Battery Company;

40

Lawrence H. Keller, direct.

how long have you held that position? A About six years. The Yale Storage Battery Company has only been in existence about five years; prior to that I was vice-president of the Permalife Storage Battery Company.

10 Q What became of the Permalife Storage Battery Company? A Went into bankruptcy.

Q Do you know the date that the Yale Storage Battery Company was formed? A I cannot say. I don't remember.

Q Did you ever tell any of your associates in the Yale Electric Corporation, I mean by that the president, vice-president, or secretary or treasurer, anything about Mr. Morrissey's contract with the old Permalife Corporation?

20 Mr. Greene: I object to that. What he told them is all immaterial.

The Referee: I think it is material.

Mr. Greene: I ask for an exception.

Q Ever tell them anything about it? A No.

Q You never told Mr. Plante or Mr. Hutcheson or Hubert, anything about the Morrissey's old contract with the Permalife Company? A No.

30 Q When you became an officer of the Yale Electric Corporation, do you know whether at that time Mr. Morrissey was a customer of the Yale Electric Corporation? A I don't know that he was.

Q Do you know when Morrissey became a customer of the Yale Electric Corporation? A I cannot say definitely, but I assume about two years prior to the Yale Electric Corporation taking over the sale of the Yale Storage Battery Company's products.

40

Lawrence H. Keller, direct.

Q Do you know what the arrangements were under which the Yale Electric Corporation sold goods to Mr. Morrissey? A As we would a jobber; the jobber same as we have several hundred throughout the country.

Q Any special arrangement with Mr. Morrissey? A Special arrangement. He happened to be the only jobber we had in New Jersey. You might call that a special arrangement. 10

Q When was he the only jobber you had in New Jersey? A Under the time that he bought from the Storage Battery Company, and also afterward, until the time we discontinued doing business with him.

Q I am speaking about Yale Electric Corporation. He was the only jobber you had in New Jersey prior to October 1, 1924; and afterward? A No, the Yale Electric Corporation had other jobbers in New Jersey selling our products which were not storage batteries prior to October 1st. 20

Q Did you handle any storage batteries prior to October 1, 1924, under the Yale Electric Corporation? A We did not.

Q It was under that contract between Yale Battery and Yale Electric Corporation dated September 20, 1924, that the Yale Electric Corporation first handled any wet batteries? A Yes. 30

Q After that date, was there any different arrangement made with Mr. Morrissey between Yale Electric Corporation than had been in existence before that? A None whatever.

Q I mean beyond the fact that there was added to what he could sell, wet batteries? A The storage battery became another item Yale Electric Corporation was selling him. 40

Lawrence H. Keller, direct.

Q Two or three witnesses have testified that you told him that Morrissey had an exclusive arrangement to sell wet batteries in New Jersey. Did you ever tell Mr. Cornell that? A No. There was no exclusive arrangement in existence. I did instruct not to solicit storage
10 business in New Jersey because we had one jobber there who understood the business thoroughly and I thought was able to fulfill and satisfy our requirements.

Q What commissioner discounts, whichever you call it, did Mr. Morrissey get for the sales that were made by him? A We allowed him the difference between his cost and his selling price on goods that he sold to customers in New Jersey, because we could not credit him sufficiently
20 to sell them to him. It was the difference between his discount and the price he sold the goods at.

Q What was that? A Five per cent.

Q What was your method of making sales to arrive at that figure? You had customers' prices? A We had a jobbers' price—printed price list—which were certain prices to a jobber. Morrissey received five per cent. better than the jobbers' price, the same as any other larger distributor received.
30

Q Distributors dealing with your company? A Yes.

Q He have anything better than that? A No, sir.

Q Mr. Morrissey spoke about your business sold direct by your company or shipments direct by your company to customers of his or people in the State of New Jersey that he might refer to you. What was the fact about that? A He referred orders to us for execution because he
40

Lawrence H. Keller, cross.

couldn't purchase the goods from us on account of the condition of his account.

Q You mean his credit account? A Yes.

Q What was done in those cases? A We shipped the goods direct to the customer after the credit department passed on the credit and send Mr. Morrissey a copy of the invoice and at the end of the current month we sent a credit statement for commission or that five per cent. difference in the selling price. 10

Q Even though you shipped the goods direct to his customers at his request, you nevertheless gave him the five per cent. of the sale when you collected it? A Yes.

Q In every case? A Yes.

By Mr. Greene.

Q What officer were you of the Permalife Company? A Vice-president. 20

Q Who else was associated with you in that company? A Mr. Harry Murphy, president; Bernard O'Connor, Treasurer. I think that was all.

Q Mr. Harry Murphy subsequently became connected with the Yale Electric Corporation? A No.

Q Did he become connected with the Yale Storage Battery Company? A Yes. 30

Q Well, you and he were practically the leading spirits in that company when that was formed? A Yes.

Q The Yale Storage Battery Company took over the obligations of the old Permalife Company?

Mr. Carpenter: I object to that.

A We bought the assets. 40

Lawrence H. Keller, cross.

Q And I suppose you took the list of customers? A Didn't mean anything to us.

Q Did you take the list? A They were available, yes.

Q And you continued doing the business? A Some orders.

10 Q Mr. Morrissey was one of the old customers? A Yes.

Q And you continued doing business with him as the Permalife did business with him? A Practically under the same basis.

Q There is no doubt your company, the Yale Storage Battery, recognized the existence of that old Permalife contract with him? A We did not.

Q Didn't you just say that you continued doing business as before? A Yes. He was a customer.

20 Q And you recognized the commission, etc., that he was entitled to under that contract? A We received about one hundred from Permalife or Yale Battery, naturally he did business with us.

Q He was one of the customers of the old Permalife Company? A Yes.

Q And you continued doing business with him as theretofore? A Practically so.

30 Q Before the Permalife Company went into bankruptcy, in anticipation of that event, you traded under the name of Yale Battery Company; isn't that so? A Yale Battery Company was the corporate name.

Q Wasn't the Permalife Company a corporate name? A Yes.

Q What caused you to assume the name of Yale Battery Company? Why did you use the two names.

40 Mr. Carpenter: Objected to.

Lawrence H. Keller, cross.

Q Didn't you do business with Mr. Morrissey under the name of Yale Battery Company while the Permalife Company was still in existence?

A We probably did, from a sales standpoint.

Q It was one and the same for all practical purposes? A Yes.

Q When the Permalife went into bankruptcy, the Yale Storage Battery Company, which was then organized, bought all the assets from the trustee in bankruptcy? A Yes.

10

Q What were your duties as sales manager of the Yale Electric Corporation? A That is a broad question.

Q Answer it broadly? A The duties of sales manager are to sell goods, employ and direct the work of the salesmen and everything that pertains to it.

20

Q You were given full swing of that department? A Not exactly. I had a superior.

Q Your judgment prevailed, generally? A Not always.

Q You had various understandings and various customers and dealers and jobbers which the Company honored that were filled, isn't that a fact? A That is possible.

Q What was the cause of the Yale Storage Battery Company abandoning its selling organization and turning over the sales to the Yale Electric Corporation? A That was because I was not satisfied with the way it was being handled, and being a stockholder, I was interested in the sales. My time was occupied with the Yale Electric Corporation and after discussion this contract was entered into.

30

Q There was an understanding, wasn't there, between the Yale Electric Corporation and the Yale Storage Battery Company that the Yale

40

Lawrence H. Keller, cross.

Electric Corporation would fulfill all unfilled orders of the Yale Storage Battery Company?

A That is natural.

10 Q You promised all the old customers of the Yale Storage Battery Company to give them better service. You established your offices in the office of the Yale Electric Corporation? A You're referring to the Yale Electric Corporation?

Q Your office arrangement? A My office was in the Yale Electric Corporation during the time I was associated with it.

Q You still are associated with it? A Yes.

Q You also perform your duties as vice-president of the Yale Storage Battery Company there? A The duties of vice-president of the
20 Yale Storage amount to nothing.

Q You are the connecting link between the two companies; is that so? A I was the missing link.

Q You say there was no contract between Mr. Morrissey and the Yale Storage Battery Company? A There was not.

30 Q Will you explain to me why you attempted to cancel a contract between the Yale Storage Battery Company and the defendant? A Because we didn't want any further dealings with Mr. Morrissey and if the Yale Electric Corporation ceased to do business with him I didn't suppose anybody connected with the Yale Storage Battery Company would do business with him.

Q On October 1, 1924, did the Yale Storage Battery Company have any contracts with any dealers or distributors? A It did not.

Q None at all? A No, sir.

40 Q Verbally or in writing? A No, sir.

Lawrence H. Keller, cross.

Q No contracts or understandings? A No, sir.

Q No contracts at all? A No.

Q What was the idea of the Yale Electric Corporation assuming the filling of the unfilled orders of the old company? A Naturally it was quite proper for the Electric Corporation to fill them. 10

Q Wasn't the real reason why they undertook to fulfill those unfilled orders because the Yale Electric Corporation didn't want to lay itself obligated for acts for breach of contract it had with those customers? A It was not.

Q And do you mean to say that the Yale Storage Battery had no contracts whatever, in writing or verbally, with any distributors or customers on October 1, 1924? A None in existence at that time. 20

Q Did they have any understanding or agreement, verbally or in writing; I didn't ask about existence? A They did not.

Q You know of Frank Stewart Electric Corporation? A Yes, very well.

Q Were they not distributors for products in New Jersey at the time Yale Electric Corporation took over the selling end of the Yale Storage Battery? A They were not. 30

Q Were there any distributors at that time? A There were many customers which we claimed as distributors, but no contracts, exclusive or other contracts, in force with them.

Q You said before you had certain big distributors? A Yes.

Q Who were they? A I cannot tell that. We have a lot of them.

Q You cannot mention one? A Pettingell Andrews Co., Boston. 40

Lawrence H. Keller, cross.

Q What agreement? A Same as we had with Morrissey during Permalife days.

Q What was that? A It was never renewed. Exclusive sale for period of a year, but it was never renewed. They are still customers because they pay their bills.

10 Q What territory did they have? A Exclusive arrangement in the New England States.

Q Do they still have that exclusive arrangement in the New England States, after October 1, 1924? A They have not and didn't have it for a year or more prior to that.

Q Did you hear Mr. Cornell testify that you told him not to infringe upon the territory of Frank Stewart Electric Company of Philadelphia? A I was not here when Mr. Cornell testified.

20

Q Assuming that he so testified, is it a fact? A No, it is not a fact. Mr. Cornell knew nothing about the storage battery business.

Q Did you ever tell Mr. Cornell not to infringe upon this company's territory?

Mr. Carpenter: I object. Cornell didn't say anything of the kind.

30 The Referee: Do you recall the Morrissey Storage Battery Company or Mr. Morrissey writing you a letter in which was enclosed an affidavit from some customer in which it was designated that you were selling direct in what Morrissey regarded as his distributor's territory?

A I don't recall the receipt of the letter, although it was discovered in our files just recently when we were taking out certain data.

40 Never saw the letter until that time.

Lawrence H. Keller, cross.

Q Did you have a conversation with Morrissey in the presence of Berman and Voelker with reference to the alleged breach of your agreement of sale to some man in Brooklyn? A I don't recall any such instance.

By Mr. Greene.

10

Q I show you this letter written by your corporation under the signature of A. H. Potts, marked Exhibit D. 10, and call your attention to the statement in this letter reading as follows: Letter to the Houser Auto Supply Co., Inc., "Regarding the two items of Storage Batteries would advise that we are unable to supply these, owing to an exclusive arrangement covering northern New Jersey with the Morrissey Storage Battery Company of 14 William Street, Newark, N. J., as distributors of this product." Do you wish to change your testimony any at all? A Not in the least.

20

Q Is this statement a fact or is it not a fact?

A It is an interpretation placed upon it by a clerk.

Q What position did Mr. Potts occupy? A A clerk.

Q Under whom? A In my department.

Q Did you communicate with Potts the arrangement your company had with Mr. Morrissey? A I would have.

30

Q I call your attention to another letter Mr. Potts addressed to the Wilbur Storage Battery Company, marked D. 9, and call your attention to this statement appearing therein: "We very much appreciate receiving your inquiry and have already requested our northern New Jersey distributor to get in touch with you. This distributor is located at Newark and is well equipped

40

Lawrence H. Keller, re-direct.

in the way of organization as well as stock and will give you unusual service, and we would be pleased indeed to be favored with your patronage through them." Then you mention the name Morrissey Storage Battery Company. Do you wish to change your testimony? A No. It indicates an excellent piece of co-operation on our part with the customer.

Q I call your attention to Exhibit D. 17, which is a letter from your company to H. M. Smith Co., in which you say, "We very much appreciate receiving your inquiry and in turn are referring same to the Morrissey Storage Battery Company who handle the Yale storage batteries as distributors for northern New Jersey," and ask you if this letter changes your testimony? A It does not.

Re-direct examination by Mr. Carpenter.

Q What is the significance, Mr. Keller, of this remark in the letter sent out to the Wilbur Storage Battery Company of Trenton, requesting that they get in touch with Mr. Morrissey as your northern New Jersey distributor?

Mr. Greene: I object to that. He didn't write this letter.

A I don't recall what the significance was. Mr. Potts wrote that.

The Referee: You had no knowledge of that letter?

A It is the first I have seen it.

Q What was the practice of your company when receiving orders for batteries from any-

Lawrence H. Keller, re-direct.

body in this section who was not on your books as one of your jobbers? A We marked our products through jobbers. Inquiries or orders received from dealers were referred to our jobbers. Morrissey happened to be the only jobber in New Jersey of storage batteries.

Q That is the way you did business? A That is the way we referred it to him. 10

Q Did you take orders direct from the local dealer without referring them to the jobber first?

A We did not.

Q There were certain jobbers that you have related where Morrissey asked you to do that; was that an exception to your rule? A Absolutely.

Q Why was it you did business that way through the jobber instead of the local dealer? A As a matter of business policy. 20

Q Did you sell to any jobbers? A No, we were very cautious in the selection of our distributors or jobbers.

By Mr. Carpenter.

Q You said on cross examination, Mr. Keller, that most of these separate contracts, such as Mr. Morrissey had with Permalife Company were renewed after they were matured. Did Mr. Morrissey ever give the Permalife Company notice of renewing the contract under your terms? 30

Mr. Greene: Objected to.

The Referee: I am called upon to ascertain the existence of this contract. I think it is proper.

A He did not.

Q Not at any time? A No, sir. 40

Lawrence H. Keller, re-cross.

Re-cross by Mr. Greene.

Q Notwithstanding the fact that he never renewed this contract, you notified him by your letter dated December 10th that you considered the contract to terminate as of December 10th of that year? A There is nothing like that in the letter.

The Referee: The letter speaks for itself. You have questioned him already.

Mr. Carpenter: I am going to offer the minute book.

20

30

40

*Exhibits D. 1—D. 6.***Exhibit D. 1.**

Distributor's agreement.

(Same as agreemetn commencing on page 14 of this book.)

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Exhibit D. 2.

Addenda to Distributor's Agreement.

(A copy of this addenda appears on page 18 of this book.)

Exhibit D. 3.

Addenda to Distributor's Agreement.

(A copy of this addenda appears on page 19 of this book.)

20

Exhibit D. 4.

Addenda to Distributor's agreement.

(A copy of this addenda appears on page 20 of this book.)

30

Exhibit D. 5.

Same as Exhibit A. annexed to affidavit of William J. Morrissey, at p. 43 of this book.

Exhibit D. 6.

(Same as Exhibit B. annexed to affidavit of William J. Morrissey, at p. 45 of this book.)

40

Exhibits D. 7—D. 9.

Exhibit D. 7.

Same as letters "A" and "B" annexed to affidavit of W. J. Morrissey, at p. 67 of this book.

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Exhibit D. 8.

Same as letter D. annexed to affidavit of W. J. Morrissey, at p. 70 of this book.

Exhibit D. 9.

20 Copy for Morrissey Storage Battery Company
YALE ELECTRIC CORPORATION
Successors to Franco Electric Corporation
Brooklyn, N. Y.

January 26, 1925.

The Wilbur Storage Battery Co.,
1205 East State St.,
Trenton, N. J.

Gentlemen:—

30 We are in receipt of your favor of the 26th
instant advising you are in the market for a
quantity of Storage Batteries and requesting
prices, etc.

We very much appreciate receiving your inquiry and have already requested our northern New Jersey distributor to get in touch with you.

40 This distributor is located at Newark and is well equipped in the way of organization as well as stock and will give you unusual service and we would be pleased indeed to be favored with your patronage thru them.

Exhibits D. 10—D. 11.

They are known as the Morrissey Storage Battery Company and their address is 14 William Street, Newark, N. J.

Thanking you for the inquiry, we are

Yours very truly,

YALE ELECTRIC CORPORATION 10

By A H Potts

Storage Battery Department.

AHP/JC

Exhibit D. 10.

Same as letter "C" annexed to affidavit of W. J. Morrissey at p. 69 of this book.

20

Exhibit D. 11.

Feb. 5, 1925

Mr. A. H. Potts,
c/o Yale Electric Corp.,
Pearl & Tillary Sts.,
Brooklyn, N. Y.

30

Dear Mr. Potts:

With reference to your letter of January 22nd to the Houser Auto Supply Company of Somerville, N. J. regarding Storage Batteries, would state that we have been communicating with them and the writer knows Mr. Houser personally, but for some reason we have not received a reply.

We note your letter stated that the order called for some Storage Batteries. Won't you kindly advise me what batteries they require?

40

Exhibit D. 11.

Perhaps I can attack them from some other angle.

Very truly yours,

MORRISSEY STORAGE BATTERY
SERVICE CO

10

SALES DEPT.

Feb. 7, 1925

Mr. A. H. Potts,
c/o Yale Electric Corp.,
Pearl & Tillary Sts.,
Brooklyn, N. Y.

Dear Mr. Potts:

20 The writer received your lead on Collings &
Company this morning and called on these people
immediately and find that in the meantime, the
Philadelphia Company secured their initial order
for 100 batteries, although they are very much
pleased with our line and there is no doubt that
they would have taken it on.

We hope to get them on the next order but
Philadelphia has the advantage of being in there
ahead of us.

30 In this connection would suggest that you have
the factory wire you on receipt of Leads in the
future as you will notice in this case there was
quite a delay between their letter of the 26th
and our call this morning.

Trusting that you will get the factory to co-
operate on this, we beg to remain

Very truly yours,
MORRISSEY STORAGE BATTERY
SERVICE CO
SALES DEPT.

40

WM/HG

*Exhibit D. 12.***Exhibit D. 12.**

Copy for Morrissey Storage Battery Service Co.

YALE ELECTRIC CORPORATION
 Successors to Franco Electric Corporation
 Brooklyn, N. Y.

10

March 11, 1925

Messrs. Wm. W. Pope & Son,
 Netcong,
 N. J.

Gentlemen:—

We acknowledge receipt of your favor of the 9th instant relative chargers of Yale Batteries—also requesting prices of tubes to the trade, etc.

In reply would advise that we do not handle anything in the way of chargers and instead confine our efforts to Batteries both dry and Storage and Flashlights. However, one of our largest distributors of Storage Batteries does handle a very fine line of charging apparatus and we have no doubt but what you can get just what you want from them.

20

This distributor is the Morrissey Storage Battery Service Company of 14 William Street, Newark, N. J. and to whom we are forwarding a copy of this letter and who will be pleased to get in touch with you immediately.

30

Thanking you for the inquiry and regretting that we are not in a position to serve you, we are

Yours very truly,
 YALE ELECTRIC CORPORATION
 By A H P
 Storage Battery Department.

AHP/JC

40

Exhibits D. 13—D. 14.

Exhibit D. 13.

Same as affidavit of Uchaez, Exhibit ^E annexed to affidavit of William J. Morrissey, at p. ~~46~~ of this book.

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Exhibit D. 14.

July 16, 1925

Mr. A. H. Potts,
c/o Yale Electric Corp.,
Pearl & Tillary Sts.,
Brooklyn, N. Y.

Dear Mr. Potts:

20 Your letter regarding the Columbia Music Store received, and we will give this our immediate attention.

The writer has personally called on these people many times without success and I will call on them again in answer to your inquiry.

You may rest assured that we will get the business if it is to be had.

Very truly yours,

30

MORRISSEY STORAGE BATTERY
SERVICE CO

W. J. MORRISSEY
Sales Dept.

WM/HG

40

Exhibit D. 27.

MORRISSEY STORAGE BATTERY
COMPANY,
2539 Cooper Avenue,
Brooklyn, N. Y.

November 17th, 1924.

Yale Electric Corp.,
Brooklyn, N. Y.

10

Gentlemen:—

Attention: Mr. Gott.

Will you kindly arrange to have shipped on
December 2nd/24 to "Charles H. Woop, Farm-
ingdale, L. I., N. Y.", the following and charge
to us:

2 #2001 F.L. Cases	2 #2002 F.L. Cases	
2 #2003 " "	2 #2004 " "	20
2 #2101 " "	2 #2102 " "	
2 #2103 " "	2 #3101 " "	
2 #3201 " "	2 #2201 " "	
1 #3302 " "	1 #3401 " "	
30 #101 Mono Cells	60 #102 Mono cells	
1 #300 Display Cabinet		
1 Window "YALE" F.L. Display.		

Yours very truly,

MORRISSEY STORAGE BATTERY
COMPANY

30

TAV-v
c/o Newark

Exhibit D. 27.

MORRISSEY STORAGE BATTERY
COMPANY,
2539 Cooper Avenue,
Brooklyn, N. Y.

November 15th, 1924.

10 Yale Electric Corp.,
Brooklyn, N. Y.

Gentlemen:—

Attention: Mr. C. Gott.

Will you kindly have shipped via truck on
November 20th, 1924, to "W. A. Schwartz, #600
Third Avenue, New York City." the following:

15— 3045V "B" Batteries
10— #116 F. L. Batteries
20 10— #312 Batteries,
charging same to us.

Yours very truly,

MORRISSEY STORAGE BATTERY
COMPANY

TAV-v
c/o Newark

30

40

Exhibit D. 27.

MORRISSEY STORAGE BATTERY
SERVICE COMPANY
#2539 Cooper Avenue,
Brooklyn, N. Y.,

Nov 5th/24

Yale Electric Corp.,
Pearl & Tillary Streets,
Brooklyn, N. Y.

10

Gentlemen:—

ATTENTION: Mr. C. Gott.

Will you kindly have the following material
shipped direct to:

“John J. Klein,

#600 Second Avenue,
College Point, L. I.”

20

2 2001 F.L. Cases	2 2002 F.L. Cases
2 2003 “ “	2 2004 “ “
2 2101 “ “	2 2102 “ “
2 2103 “ “	2 3101 “ “
2 3201 “ “	2 2201 “ “
1 3302 “ “	1 3401 “ “
30 101 Cells	60 102 Mono cells
1 Display Cabinet	

T A V

Copy for Newark

30

40

Exhibit D. 27.

MORRISSEY STORAGE BATTERY
COMPANY,
2539 Cooper Avenue,
Brooklyn, N. Y.

November 15th, 1924.

10 Yale Electric Corp.,
Brooklyn, N. Y.

Gentlemen:—

Attention: Mr. C. Gott.

Will you kindly arrange to have shipped on
December 2nd, 1924, to "W. A. Schwartz, #600
Third Avenue, New York City." the following:

	2 #2001 F.L. Cases	2 #2002 F.L. Cases
	2 #2003 " "	2 #2004 " "
20	2 #2101 " "	2 #2102 " "
	2 #2103 " "	2 #3101 " "
	2 #3201 " "	2 #2201 " "
	1 #3302 " "	1 #3401 " "
	30 #101 Mono Cells	60 #102 Mono cells
	1 Yale Display Cabinet #300, charging same to us.	

Yours very truly,

MORRISSEY STORAGE BATTERY
COMPANY

30

T. A. V.

TAV-v
c/o Newark

Exhibit D. 27.

MORRISSEY STORAGE BATTERY
COMPANY,

2539 Cooper Avenue,
Brooklyn, N. Y.

December 1st, 1924.

Yale Electric Corp.,
Brooklyn, N. Y.

10

Gentlemen:—

Attention: Mr. C. Gott.

Will you kindly ship direct, and charge to us,
50 #6 (Round) Dry Cells, to:

John J. Klein,
#600—2nd Avenue,
College Point, L. I.

Yours very truly,

20

MORRISSEY STORAGE BATTERY
COMPANY

c/o Newark

30

40

Exhibit D. 27.

MORRISSEY STORAGE BATTERY
COMPANY,

2539 Cooper Avenue,
Brooklyn, N. Y.

December 1st, 1924.

10 Yale Electric Corp.,
Brooklyn, N. Y.

Gentlemen:—

Attention: Mr. C. Gott.

Will you kindly have the following material
ready for delivery, and I will call for same on
Tuesday afternoon, December 2nd/24:

15—3045V "B" Batteries

1—6 A 120 Yale Radio Battery

20 5—6 A 90 " " "

Yours very truly,

MORRISSEY STORAGE BATTERY
COMPANY

c/o Newark

30

40

Exhibit D. 28.

Exhibit D. 28.

YALE ELECTRIC CORPORATION
Successors to Franco Electric Corporation
Brooklyn, N. Y.

September 1st, 1926.

10

SUBJECT: *YALE RADIO BATTERY
ADVERTISING.*

Gentlemen:

Here is the opening gun of the YALE "B" Battery campaign for this Fall—a double page spread in colors in the September 25th issue of The Saturday Evening Post. This is the most forceful—most expensive single piece of publicity that can be bought. In addition to this powerful smash, striking advertisements will appear in the October issue of The American Magazine and The Country Gentleman.

20

This entire campaign is based on the one, big dominant point of difference in YALE "B" Batteries—"THEY COST LESS PER HOUR OF RADIO RECEPTION." This is what the consumer of radio batteries wants—and this is what YALE "B" Batteries deliver.

So that YALE Distributors may tie-in with this programme, a new broadside featuring YALE Radio Batteries is now available. A copy is attached. Circularize your trade and tell them about this program. Wire your requirements and we will furnish these broadsides imprinted with your letter-head on the first page.

30

We also have complete window display material—envelope circulars, and a set of striking newspaper ads and lantern slides for use by the dealers, so that they may tie-in with this campaign, and get their full share of the business.

40

Exhibit D. 28.

We will gladly furnish an assortment of this material to dealers handling YALE Radio Batteries.

10 If you are not already pushing YALE "B" Batteries—if you are not already familiar with the YALE plan of jobber distribution, we wish to have the opportunity to talk to you. This plan will give you year in and year out, your share in the continued growth of this business, resulting from increased consumer acceptance of YALE "B" Batteries. It is a plan that protects you from unlimited competition.

Remember this campaign gets under way on September 25th. If you are not already featuring YALE Radio Batteries, communicate with us NOW.

20

Very truly yours,

YALE ELECTRIC CORPORATION.

W. W. Stake
Advertising Manager.

WWS-k.
1-encs.

30

40

*Exhibit D. 29.***Exhibit D. 29.**

YALE ELECTRIC CORPORATION
 Successors to Franco Electric Corporation
 Brooklyn, N. Y.

May 6th, 1925.

10

Morrissey Storage Battery Service Co.,
 12 William St.,
 Newark,
 N. J.

Gentlemen:—

We take pleasure in announcing a reduction in Storage Battery prices effective this date and subject to change without notice.

This is made possible by the recent decline in the market price of lead, and as always, we are seizing the opportunity thus afforded to cooperate with our customers.

20

The reduced prices are as per the new price sheets enclosed and apply on all orders shipped on or after May 6th. A supply of the new price sheets is being forwarded to you under separate cover.

As you will note, the reduction is a generous one and should enable you to increase your Storage Battery sales considerably—especially on the types for Auto starting service. The “Outdoor” season is now opening up and Mr. “Carowner” most everywhere is a “live” prospect for the sale of a Storage Battery now.

30

Yours very truly,

YALE ELECTRIC CORPORATION.

AHP/JC

Price list attached

40

Exhibit D. 31.

Exhibit D. 30.

Illustrated catalogue of flash lights and batteries.

10

Exhibit D. 31.

“YALE” STORAGE BATTERY AGREEMENT

**OFFICIAL
SERVICE STATION CONTRACT**

AGREEMENT, made by and between.....
ofhereinafter called the
Distributor, and....., of the
20 City of, State of.....,
hereinafter called the Service Station:

WITNESSETH:

(1) PRICE. For and in consideration of
order placed with the Distributor for.....
complete “Yale” Storage Batteries, and \$......
list value of Parts thereof, the Distributor hereby
agrees to allow the Service Station.....
percent discount on “Yale” Storage Batteries
30 and parts from the manufacturer’s established
list prices, which list prices are subject to change
by the manufacturer at its discretion.

(2) STOCK AND FACILITIES. In con-
sideration of the prices allowed and the other
provisions hereof, the Service Station agrees,
during the period of this contract to sell “Yale”
Storage Batteries and Parts, thereof exclusively,
and further to maintain an adequate stock of
“Yale” Batteries and parts at all times to
40 properly supply the demand, together with

Exhibit D. 31.

proper apparatus, labor and facilities to charge, repair, and overhaul Storage Batteries.

(3) TERRITORY. In consideration hereof the Distributor agrees not to appoint another official Service Station within a radius of..... miles of

10

(4) TERMS. Thirty days net or 2% ten days from date of invoice, credit relations to be at all times subject to approval of the credit department of the Distributor.

(5) DELIVERY, F. O. B.....

(6) GUARANTEE. All products herein provided shall be subject to the manufacturer's published Guarantee.

(7) DURATION OF CONTRACT. It is mutually agreed that this contract shall remain in full force and effect for one year from date of acceptance hereof, and it is further understood and agreed that the Distributor shall have the right to cancel this contract forthwith provided it shall appear to the said Distributor that the Service Station is not conducting the business of selling, maintaining and repairing Storage Batteries in a satisfactory manner. This contract shall be of full effect and binding only when signed by the Manager or Official of the Distributor and by an Official or Partner of the Service Station.

20

30

There are no agreements or understandings between the parties hereto not herein expressed and no alterations or variations of the terms hereof shall be valid or binding upon either party unless made in writing and signed by both parties hereto.

IN WITNESS WHEREOF, the Distributor and Service Station hereunto subscribe and witness their names to this agreement in duplicate,

40

Exhibit D. 32.

this agreement to become effective on date of acceptance by the Distributor.

ACCEPTED:

.....
 Official Service Station By.....
 10 By Date

Exhibit D. 32.

YALE ELECTRIC CORPORATION
 Successors to Franco Electric Corporation
 Brooklyn, N. Y.

March 25, 1925.
 Dict. Mar. 24, 1925.

20 The Morrissey Storage Battery Service Co.,
 12 William St.,
 Newark,
 N. J.

Att: Mr. W. J. Morrissey

Gentlemen:—

30 Replying to yours of the 23rd relative your circularizing campaign, if you refer to service station letter-heads, would advise that we will be able to supply these to you in about two weeks time.

There is a quantity of these being shipped to us from the factory this week, thus they will be available in two weeks at the most. If this is what you have in mind, please advise quantity you require.

40 If you do not refer to the service Station letter-head and instead mean the double page letter-head we used to use a couple of years ago

Exhibit D. 33.

and which had the two inner pages imprinted showing details of the Yale Battery, would advise that same is obsolete. These could not be used even if we had them now for they "said" in pretty large type that Yale was a new battery.

Yours very truly,

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YALE ELECTRIC CORPORATION

By A H Potts
Storage Battery Department.

AHP/JC

Exhibit D. 33.

YALE ELECTRIC CORPORATION
Successors to Franco Electric Corporation
Brooklyn, N. Y.

20

February 11th, 1925.

Morrissey Storage Battery Service Co.,
12-14 William St.
Newark, N. J.

Gentlemen:

Through Mr. Potts of our Storage Battery Division, we learn of your desire for a number of the new Yale Battery Window Displays for distribution to your customers who purchased Yale Batteries, and accordingly, we have shipped you 12 of these and hope that they reach you promptly. In sending this small number, it was merely to take care of *dealers in your immediate vicinity*; we believe you will find it preferable to order these displays shipped to *your* customers direct from here, and right now we put such orders through for immediate shipment.

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Exhibit D. 33.

In shipping from here, too, you are saved the transportation charges on such shipments, which we could hardly assume, if you were to make direct shipment from your Warehouse.

We trust, therefore, that you will send us orders for direct shipment of advertising material for your customers, and we will give them our best attention.

Yours very truly,
 YALE ELECTRIC CORPORATION.
 W. B. Wright
 Advertising Department

WBW:DTW

Exhibit D. 33.

20

Feb. 13, 1925

Yale Electric Corp.,
 Pearl & Tillary Sts.,
 Brooklyn, N. Y.

Attention: W. B. Wright, Adv. Dept.

Gentlemen:

We have your letter of February 11th in which you state that you have shipped to us directly 12 new YALE Battery Window Displays for which kindly accept our thanks.

We will greatly appreciate if you will forward these displays at once to our customers listed below.

Thanking you for your kind co-operation in this matter, we remain

Very truly yours,
 MORRISSEY STORAGE BATTERY
 SERVICE CO
 SALES DEPT.

40 MB/HG

Exhibits P. 1—P. 2.

Exhibit P. 1.

Record of bankruptcy proceedings of Permalife Storage Battery Co. Inc. Same as Schedule A annexed to affidavit of Charles T. Hutchinson at p. 64 of this book.

Certified copy of bankruptcy record shows that Permalife Storage Battery Co. Inc., was adjudicated a bankrupt and that a trustee was duly elected and qualified. 10

Exhibit P. 2.

AGREEMENT made at the City of New York this 29th day of September 1924, by and between 20

YALE STORAGE BATTERY COMPANY, a corporation organized and existing under the laws of the State of Indiana, and having its principal office at Indianapolis, Indiana, hereinafter designated as "Manufacturer"; and

YALE ELECTRIC CORPORATION, a corporation organized and existing under the laws of the State of New York, and having its principal office in the Borough of Brooklyn, City of New York, hereinafter designated as "Sales Agent." 30

WHEREAS, the Manufacturer is engaged in the manufacture and sale of storage batteries and is desirous of discontinuing its sales department and of procuring the above named Sales Agent to take over the selling of its products which such Sales Agent has agreed to do upon the terms hereof.

NOW THIS AGREEMENT, WITNESSETH: That for and in consideration of the respective covenants of the parties herein contained, the 40

Exhibit P. 2.

parties hereto have agreed and do hereby agree to and with each other as follows, to wit:

10 *First:* The Manufacturer hereby gives unto the Sales Agent the exclusive right to sell the entire products of the Manufacturer consisting of all types of storage batteries now sold and known as Yale and Permalife brands, and any and all other brands that may be produced by the Manufacturer during the life of this agreement. The Manufacturer agrees not to sell any of its products through any other person, co-partnership, corporation or sales agent whatsoever and not to sell any of its products to any other person, copartnership or corporation with the sole exception that the Manufacturer reserves to itself the right to sell its products to
20 automobile manufacturers for the sole purpose of standard equipment on new automobiles manufactured by such manufacturer and to no other person whatsoever.

30 *Second:* The Sales Agent agrees to market the said products of the Manufacturer, to the best of its ability and agrees during the term of this contract to purchase its entire requirements of said products from the Manufacturer at the prices and upon the terms and conditions hereinafter set forth. Nothing herein contained shall be construed as requiring the Sales Agent to purchase and market all possible production of the Manufacturer, the intent being that the Sales Agent will use its best endeavors to market the Manufacturer's said product through its selling department and shall take and purchase from the Manufacturer and the Manufacturer shall sell and supply such batteries as may be sold by the Sales Agent.

Exhibit P. 2.

Third: Price—The Manufacturer agrees to sell its said products to the Sales Agent and the Sales Agent agrees to pay therefor the actual factory cost as hereinafter defined of the Manufacturer plus \$1.00 per battery of all standard types; and actual factory cost as hereinafter defined plus 50c per battery on competitive types known as automobile “Z” type and radio special type, which prices are attached hereto and hereby made part of this agreement. It is expressly understood and agreed that the factory cost mentioned above shall be the actual cost of the Manufacturer of material, labor and factory overhead; that labor shall include in addition to the ordinary workmen engaged in manufacturing batteries, compensation paid to foremen, superintendent and for packing and carloading; that factory overhead shall include rent, insurance premiums, laboratory and engineering expenses, freight on incoming materials, light and power, tool and equipment repairs, fuel used in operation of boiler and shipping supplies; and that factory cost shall not include any other items of expense such as salaries to officers, bookkeepers, clerks or administrative expenses. It is further agreed that factory cost may be analyzed by the Sales Agent or by its duly authorized representative or accountant at any time during the life of this agreement and for that purpose the Sales Agent, its agents or accountant shall have the absolute right at any time to examine the books of the Manufacturer to ascertain such cost of manufacture.

Fourth: The Manufacturer hereby guarantees that the batteries produced, sold and delivered hereunder shall be at least equal to or better than present quality, that no change in the ma-

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Exhibit P. 2.

terial, mix or composition of such batteries or plates or other parts thereof shall be made without the written consent of the Sales Agent. The Sales Agent shall have the right to reject or return any and all of the products of the Manufacturer which shall not conform to the
 10 standard and quality hereinbefore specified and to return any and all batteries which may have been delivered by the Sales Agent's customers and which it shall have ascertained to be defective or which shall not conform to the quality and the standard hereinbefore specified.

Fifth: The Manufacturer also agrees at its own expense to do such investigation and developing in its laboratory and factory as the Sales Agent may in writing direct for the purpose of
 20 improving the product of the Manufacturer or of developing new lines of its product.

Sixth: Guarantee—The Manufacturer guarantees that all batteries supplied under the terms of this contract shall be perfect in all respects and of the grade and quality hereinbefore specified and further guarantees all of said products for ninety days after delivery to the ultimate consumer against any and all defects in materials or workmanship.

30 *Seventh:* Delivery—All shipments to be f. o. b. Indianapolis, Indiana without freight allowance and such products to be shipped to such points as the Sales Agent may, from time to time, direct.

Eighth: The prices attached to and made part of this agreement are based upon the cost of lead of 8c. per pound, and shall be the Manufacturer's base cost as long as the lead cost remains at 8c. per pound. In the event of a decline or increase in the cost of lead as published by the American
 40 Metal Market Report, the Manufacturer will re-

Exhibit P. 2.

adjust its cost in accordance with such fluctuation and with the basis therefor upon the schedule prices hereto attached and made a part of this agreement. All batteries shipped to the Sales Agent during any calendar month shall be billed to the Sales Agent at the prices specified in Schedule hereto annexed based on average lead cost for the previous month as quoted by the American Metal Market Report as aforesaid. 10

Ninth: Terms—Payments shall be made without cash discount on or before the 10th of each month following the calendar month in which shipment shall have been made and shall be made by 30 day trade acceptance without interest.

Tenth: War Tax—The Manufacturer shall bear and pay all taxes imposed upon any of its said products either by the Federal or State authorities and shall not include any such taxes in its cost as hereinbefore specified. 20

Eleventh: Duration of contract—This agreement shall be and remain in full force and effect for one year from the date hereof and shall automatically renew itself from year to year unless and except that if the Sales Agent's purchases during any contract year shall aggregate less than 35,000 batteries, either party may at the end of such contract year give ninety days notice of its intention to terminate this agreement and thereupon ninety days after the mailing of written notice of election to terminate by either party, this contract shall terminate and come to an end. 30

Twelfth: It is further expressly understood and agreed that in the event of any such termination of this agreement by either party as hereinbefore specified the Manufacturer shall repurchase from the Sales Agent any and all of 40

Exhibit P. 2.

its batteries or other products on hand on the date of the termination of the contract at the prices originally paid for such batteries plus actual freight charges from Indianapolis to Sales Agent's warehouses and shall take and transport the same away at its own expense.

10 *Thirteenth:* The Manufacturer agrees to exercise every effort to reduce its factory cost as hereinbefore specified; the prices upon the schedule hereto annexed being based upon the Manufacturer's actual cost and the Manufacturer's profits being in the plus charges of \$1.00 and 50c. per battery respectively, and in the event that the Manufacturer shall reduce its cost, such saving shall be equally divided between the Manufacturer and the Sales Agent and the
20 prices for such commodities reduced accordingly.

Fourteenth: It is expressly agreed that the Sales Agent shall have the right to designate new trade names for the products and commodities of the Manufacturer should it deem such change necessary or expedient. In the event that the Sales Agent should be enjoined, restrained or compelled to desist from using the name of Yale or Permalife in connection with the Manufacturer's commodities, it is agreed that all
30 damages suffered by the Sales Agent in connection therewith shall be borne by the Manufacturer as such loss or damage would have been sustained by the Manufacturer personally had the Sales Agent not taken over such selling agency hereunder; and the Manufacturer hereby covenants to indemnify, reimburse and hold harmless the said Sales Agent from any such cost, damage or liability arising by reason of its selling such commodities under either of said trade names, including any judgment or counsel fees.
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Exhibit P. 2.

Fifteenth: This agreement shall bind the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto attached their respective corporate seals and have caused these presents to be executed by their respective officers thereunto duly authorized, the day and year first above written. 10

In presence of:

YALE STORAGE BATTERY COMPANY
(CORPORATE SEAL) By HARRY MURPHY
Pres.

YALE ELECTRIC CORPORATION
(CORPORATE SEAL) By CONRAD HUBERT, 20
Pres.

Due corporate proofs of the parties attached.

Price schedule and consumers' net price list annexed.

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**NOTICE OF FILING OF REFEREE'S
REPORT.**

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

YALE ELECTREC CORPORATION,
Plaintiff,

vs.

WILLIAM J. MORRISSEY, doing
business under the trade
name of MORRISSEY STORAGE
BATTERY Co.,

Defendant.

*Action
at Law.*

*Notice of
Filing of
Referee's
Report.*

20

To James J. Farley, Esq., and Israel B. Greene,
Esq., attorneys for defendant.

SIRS:

TAKE NOTICE that the report dated September
10, 1928, in the above entitled action made by
Francis Child, Esquire, a Supreme Court Com-
missioner of New Jersey, to whom the matter
had been referred, and the depositions taken
before said Commissioner, were filed in the office
30 of the Clerk of the Supreme Court at Trenton,
New Jersey, on September 14, 1928.

Dated September 14, 1928.

McDERMOTT, ENRIGHT &
CARPENTER,
Attorneys of Plaintiff.

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**NOTICE OF MOTION TO SET ASIDE
REFEREE'S REPORT.**

Filed December 12, 1928.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

YALE ELECTRIC CORPORATION,
Plaintiff,

vs.

WILLIAM J. MORRISSEY, doing
business under the trade-
name of Morrissey Storage
Battery Co.,
Defendant.

*Action
at Law.*

*Notice of
Motion to
Set Aside
Referee's
Report.*

20

To McDermott, Enright & Carpenter, Esqs., so-
licitors for plaintiff:

TAKE NOTICE that on the 29th day of Septem-
ber, 1928, at 10 o'clock in the forenoon, or as
soon thereafter as counsel can be heard, I will
move before the Honorable William A. Smith,
Judge of the Essex County Circuit Court, to
set aside, vacate and declare null and void the
report of Francis Child, Esq., the Supreme
Court Commissioner to whom certain issues in
this cause were referred by order, dated April
1, 1927, for the following reasons:

30

1. That the testimony taken before said Com-
missioner has not been filed with said report.
2. That the said Commissioner erred in find-
ing that the plaintiff did not adopt the Perma-
life contract, whereas he should have found that
the plaintiff did adopt said contract.

40

Notice of Motion to Set Aside Referee's Report.

3. That said Commissioner erred in finding that the defendant is not entitled to maintain his third counter-claim against the plaintiff, whereas he should have found that the defendant is entitled to maintain his counter-claim as against plaintiff.

10 4. That said Commissioner erred in finding that the plaintiff was entitled to judgment in the sum of \$8,312.16 as shown in Schedule "A" annexed to his report, whereas he should have found that plaintiff adopted said Permalife contract, and should have proceeded to take testimony and report upon the amount due to the defendant from plaintiff upon said adopted contract, and in connection therewith he should have taken testimony and reported on all matters of
20 account between plaintiff and defendant, and the amount due from one party to the other.

5. That the said findings of said Commissioner are contrary to the weight of the evidence.

6. That the said findings of the Commissioner are not supported by the evidence.

7. That the said Commissioner admitted illegal evidence on the part of the plaintiff over
30 the defendant's objection, to wit:

Of the witness, Plant "What was your trading arrangement with the Morrissey Storage Battery Company?" (p. 54).

Of the witness, Keller "Did you ever tell any of your associates in the Yale Electric Corporation, I mean by that the president, vice-president, or secretary or treasurer, anything about Mr. Morrissey's contract with the old Permalife Corporation?" (p. 77).

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Notice of Motion to Set Aside Referee's Report.

8. That the said Commissioner rejected legal evidence offered by the defendant as follows:

(a) Affidavit of one Uchaez, attached to Exhibit D. 18 (p. 12).

(b) To the witness, Plant "What financial interest have you in the plaintiff corporation?" (p. 68).

10

AND TAKE FURTHER NOTICE that in any event, in addition to the grounds aforesaid, I will move to set aside so much of the report of said Commissioner which finds and reports that "the defendant is not entitled to maintain his counter-claim against the plaintiff and find that the plaintiff is entitled to judgment in the sum of \$8,312.16, for the principal, and interest, which is more particularly shown in Schedule 'A' hereto annexed, for which amount judgment should be entered," upon the following grounds:

20

A. That this finding and report is beyond the issues referred to said Commissioner and beyond his power to report upon.

B. That in any event there are other issues and counter-claims in this cause triable, before a jury.

AND TAKE FURTHER NOTICE that at said time and place, I will also move for a trial by jury of all the matters and issues raised by the pleadings in this cause, including the issues heretofore referred to said Commissioner.

30

AND TAKE FURTHER NOTICE that upon all papers and proceedings had in this cause, including the testimony before said Commissioner, I will move for the issuance of a commission to take the testimony of Mr. L. H. Keller and Charles Hutcheson, the vice-president and secretary of the plaintiff corporation, residing in the City, County and State of New York, and

40

Notice of Motion to Set Aside Referee's Report.

for an order permitting the defendant to inspect the books of account of the plaintiff, in its possession and control, containing records of the sales made by plaintiff in the defendant's territory, and commissions due to defendant from the plaintiff on such sales; and for such other and
10 further relief as may be just in the premises.

Dated, September 19th, 1928.

Respectfully,

ISRAEL B. GREENE,
Attorney for Defendant.

Service acknowledged by McDermott, Enright & Carpenter, attorneys of plaintiff, September 21, 1928.

20

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NOTICE TO CONFIRM REPORT.

Filed November 27, 1928.

NEW JERSEY SUPREME COURT.

 YALE ELECTRIC CORPORATION,
Plaintiff,
vs.
 WILLIAM J. MORRISSEY, doing
 business under the trade name
 of Morrissey Storage Battery
 Service Co.,
Defendant.

10

*Action
at Law.**Notice to
Confirm
Report.*
 To James J. Farley and Israel B. Greene, Esqs., 20
 attorneys for defendant.

SIRS:

TAKE NOTICE that on Saturday, September 29, 1928, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, we shall apply before the Hon. William A. Smith, Judge of the Essex County Circuit Court, for an order confirming the report of Francis Child, Esq., the Supreme Court Commissioner to whom an order of reference was made on or about March 30, 1927, by said Judge in the above action and shall, at the same time, move for an order entering and/or directing the entry of judgment in favor of the plaintiff and against the defendant in said action for the sum of \$8,312.16 plus interest from September 10, 1928 at the rate of 6% per annum together with plaintiff's costs to be taxed.

30

TAKE FURTHER NOTICE that at the same time and place, we shall also move for an order di-

40

Notice to Confirm Report.

recting that the sum of \$350 be paid by the defendant to said Francis Child as his compensation for services in connection with such reference and that unless said sum be paid by the defendant to the said Francis Child within two days from the entry of such order and proof of
10 such payment filed with the Clerk of the Supreme Court at Trenton, N. J. within the same time, said amount be included and taxed in the plaintiff's costs against the defendant.

Respectfully yours,

Dated September 26, 1928.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

20 Affidavit of service on attorney of defendant attached.

30

40

RULE ON REFEREE'S REPORT.

Filed December 22, 1928.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

 YALE ELECTRIC CORPORATION,
Plaintiff,
vs.
 WILLIAM J. MORRISSEY, doing
 business under the trade name
 of Morrissey Storage Battery
 Service Co.,
*Defendant.**Action
at Law.**Rule on
Referee's
Report.*

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20

Plaintiff having moved to strike the answer of the defendant to the fourth count of the plaintiff's complaint and to strike out the entire counter-claim of the defendant; and motion having been made by the defendant for a rule of reference and for other relief; and said motions having been heard and argued together; and the Court having denied plaintiff's motion, on condition that the case be referred to a referee; and the matter having been referred to Francis Child, Esquire, a Supreme Court Commissioner, as will more fully appear by the order of reference; and said Commissioner having taken testimony and filed his report, dated September 10, 1928, in and whereby he found that there was no adoption by the parties of the contract formerly made between the defendant and another corporation, to wit the Permalife Storage Battery Company, Inc., and that the plaintiff was entitled to judg-

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Rule on Referee's Report.

ment in the sum of \$8,312.16 for principal and interest up to September 10, 1928, the date of his report, as set forth in Schedule A thereto annexed; and the defendant's attorney or counsel after receiving notice of filing said report having served on plaintiff's attorneys a notice of motion to set aside, vacate and declare null and void the said report of Francis Child for the reasons in said notice stated, and which said notice was returnable September 29, 1928 before the Hon. William A. Smith, Judge of the Essex County Circuit Court; and after service of said notice, plaintiff's attorneys having served a notice of motion returnable at the same time and place, for an order confirming the report of said Supreme Court Commissioner and for an order entering or directing the entry of judgment in favor of the plaintiff and against the defendant for the sum of \$8,312.16 plus interest from September 10, 1928 and costs to be taxed; and both motions having been heard together on the return day; and it being then and there consented in open court that the grounds set forth in defendant's notice of motion might be treated as exceptions to the report; and briefs having been thereafter submitted by both parties with leave of Court;

IT IS THEREUPON, on this 19th day of December, 1928,

ORDERED that the report of Francis Child, Supreme Court Commissioner to whom the matter was referred on defendant's motion as aforesaid, insofar as the findings and determinations in said report are within the scope of the order of reference to him, be and it hereby is confirmed and that the motion of the defendant to set aside, annul and vacate said Supreme Court Com-

Rule on Referee's Report.

missioner's report be and hereby is denied to the extent aforesaid, and insofar as said report is not covered by the order of reference said exceptions are sustained.

FURTHER ORDERED that the said Francis Child be and hereby is allowed for his services on the order of reference the sum of \$350 which said amount shall be taxed in the costs and which costs will abide the outcome of this action. 10

FURTHER ORDERED that this order is made without prejudice to the plaintiff's right to renew its motion to strike out the answer and counterclaim of the defendant.

WM. A. SMITH,
Circuit Judge sitting as Supreme Court Commissioner.

20

Dated December 19, 1928.

On motion of
McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

Actually entered:

Service of copy of within rule acknowledged this 21st day of December, 1928.

ISRAEL B. GREENE, 30
Atty. for Deft.

40

**NOTICE OF MOTION FOR ENTRY OF
JUDGMENT.**

Filed January 25, 1929.

NEW JERSEY SUPREME COURT.

10

ESSEX COUNTY.

YALE ELECTRIC CORPORATION,

Plaintiff,

vs.

WILLIAM J. MORRISSEY, doing
business under the trade name
of Morrissey Storage Battery
Service Co.,

20

Defendant.

*Action
at Law.*

*Notice of
Motion for
Entry of
Judgment.*

To James J. Farley, Esq., attorney for defend-
ant.

Israel B. Greene, Esq, of counsel for defendant.

SIRS:

TAKE NOTICE that on the 9th day of January,
1929, at 9:30 o'clock in the forenoon, or as soon
thereafter as counsel can be heard, we shall re-
new our motion before the Hon. William A.
Smith, Circuit Judge sitting as Supreme Court
Commissioner, and to whom the above had been
referred for trial, for an order striking out the
answer of the defendant to the fourth count of
plaintiff's complaint and striking out the entire
counter claim of the defendant and each count
thereof and for the entry of summary judgment
forthwith in favor of the plaintiff and against
the defendant for the sum of \$7,030.42 with in-
terest thereon as follows:

40

Notice of Motion for Entry of Judgment.

On \$1,600 with interest from October 15, 1925.

On \$2,488.18 with interest from November 15, 1925.

On \$1,191.71 with interest from December 15, 1925.

On \$1,750.53 with interest from December 15, 1925.

10

Said motion will be made upon the following grounds, or one or more of them:

1. That said answer to the fourth count of plaintiff's complaint and said counter-claim of the defendant are, and each is, sham and filed for the purpose of delay.

2. That the defendant's counter-claim is sham and/or frivolous and filed as a defense for the purpose of delay.

3. That the defendant has no legal defense to said action on the merits of the case.

20

Said motion will be based upon all the papers filed in the above action including the affidavits heretofore served and used on plaintiff's original motion to strike and including the report of Francis Child, Supreme Court Commissioner, heretofore made and dated September 10, 1928, in the above matter and duly confirmed by rule or order dated December 19, 1928 made by the Hon. William A. Smith, Circuit Judge sitting as Supreme Court Commissioner.

30

TAKE FURTHER NOTICE that the notice heretofore served upon you dated December 24, 1928 which, through mistake, was made returnable January 29, 1929 be and it hereby is revoked.

Respectfully,

Dated January 4, 1928.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

Affidavit of service on attorney of defendant, annexed.

40

FINDINGS.

Filed January 25, 1929.

NEW JERSEY SUPREME COURT.

10

ESSEX COUNTY.

 YALE ELECTRIC CORPORATION,
Plaintiff,
vs.
 WILLIAM J. MORRISSEY, doing
 business under the trade name
 of Morrissey Storage Battery
 Service Co.,

20

Defendant.
 } *Action*
 } *at Law.*
 } *Findings.*

On application to strike out counter-claim and enter judgment on the pleadings.

McDermott, Enright & Carpenter, attorneys for plaintiff, for the motion.

Israel B. Greene, of counsel for defendant, opposed.

30

SMITH, Circuit Court Judge and Supreme Court Commissioner.

It appearing that as the pleadings now stand the answer admits that there is a sum due to the plaintiff from the defendant, and it further appearing that the counter-claim filed by the defendant is sham and frivolous, and leave having heretofore been granted to the plaintiff to renew this motion, the plaintiff may therefore enter final judgment for the sum admitted as due in

40

Rule for Judgment Final.

the answer and have an order striking out the counter-claim.

WILIAM A. SMITH,
Circuit Court Judge.

January 23, 1929.

10

RULE FOR JUDGMENT FINAL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

YALE ELECTRIC CORPORATION,
Plaintiff,

vs.

WILLIAM J. MORRISSEY, doing
business under the trade name
of Morrissey Storage Battery
Service Co.,
Defendant.

*Action
at Law.*

*Rule for
Judgment
Final.*

20

Plaintiff having been granted leave of Court to renew its motion to strike the defendant's counter-claim, and plaintiff having so moved upon due notice to the attorney for the defendant for the reasons in said notice of motion stated; and it appearing that as the pleadings now stand the answer admits there is due to the plaintiff from the defendant the sum of \$7,030.42 with interest as follows:

30

On \$1,600 from October 15, 1925.

On \$2,488.18 from November 15, 1925.

On \$2,942.24 from December 15, 1925.

40

Rule for Judgment Final.

and it further appearing that the counter-claim filed by the defendant is sham and frivolous,

IT IS ORDERED that the counter-claim of the defendant be and hereby is struck out.

10 FURTHER ORDERED that judgment final be and hereby is entered in favor of the plaintiff and against the defendant in the sum of \$8,370.04, being the amount with interest admitted by the defendant's answer to be due to the plaintiff from the defendant, together with costs to be taxed.

Let this rule be entered in the minutes.

20 WM. A. SMITH,
Supreme Court Commissioner and Circuit
Court Judge to whom the above case had
been referred for trial.

Dated January 24, 1929.

Rule actually entered January 25, 1929.

On motion of

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

30

40

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

YALE ELECTRIC CORPORATION,
Plaintiff,

vs.

WILLIAM J. MORRISSEY, doing
business under the trade
name of Morrissey Storage
Battery Service Co.,
Defendant.

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*Action
at Law.
Notice of
Appeal.*

To McDermott, Enright & Carpenter, attorneys 20
of plaintiff, or to whom it may concern:

SIRS:

PLEASE TAKE NOTICE that the defendant in the
above-entitled cause appeals to the Court of
Errors and Appeals in the last resort in all
causes in New Jersey (a) from the whole of the
rule or order for judgment final made or entered
in this cause on the 25th day of January, 1929,
and from each and every part thereof, and from
the judgment entered thereon, and (b) from the 30
whole of the rule or order entered in this cause
on the 19th day of December, 1929, and from
each and every part thereof.

Dated, February 18, 1929.

Respectfully,

ISRAEL B. GREENE,
Attorney for Defendant.

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Service of within notice is hereby acknowledged this 18th day of February, 1929.

McDERMOTT, ENRIGHT & CARPENTER,
Attys. of Plaintiff.

Filed April 17, 1929.

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GROUNDS OF APPEAL.

Filed May 8th, 1929.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

20	YALE ELECTRIC CORPORATION, <i>Plaintiff-Respondent,</i> <i>vs.</i> WILLIAM J. MORRISSEY, doing business under the trade name of Morrissey Storage Battery Service Co., <i>Defendant-Appellant.</i>	}	<i>On Appeal from Supreme Court. Grounds of Appeal.</i>
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30 The defendant-respondent hereby assigns the following grounds of appeal upon which he will rely:

1. Because the said judgment is contrary to the law.

2. Because said judgment is contrary to the weight of the evidence.

3. Because the Supreme Court Commissioner, sitting as Referee, erroneously admitted the fol-

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Grounds of Appeal.

lowing illegal evidence on the part of the plaintiff, over the defendant's objection, to wit:

(a) Of the witness Plant: "What is your trading arrangement with the Morrissey Storage Battery Company?" to which defendant duly took exception.

(b) Of the witness Keller: "Did you ever tell any of your associates in the Yale Electric Corporation, I mean by that, the president, vice-president or treasurer, anything about Mr. Morrissey's contract with the old Permalife Corporation?" to which defendant duly took exception.

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4. Because the said Referee erroneously rejected legal evidence offered by the defendant as follows:

(a) The affidavit of Ucheaz, attached to Exhibit D. 18.

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(b) To the witness Plant: "What financial interest have you in the plaintiff corporation?" to both of which rejections defendant duly took exceptions.

5. Because the said Referee erred in finding that the plaintiff did not adopt the "Permalife contract," whereas he should have found that the plaintiff did adopt the said contract.

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6. Because the said Referee erred in finding that the defendant is not entitled to maintain his counter-claim against the plaintiff, whereas he should have found that the defendant is entitled to maintain his counter-claim as against plaintiff.

7. Because the Referee's said findings are erroneous in that they are not supported by the evidence and are contrary to the weight of the evidence.

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Grounds of Appeal.

8. Because the Circuit Court Judge (the Honorable William A. Smith) erroneously denied defendant's motion to set aside the said findings of the said Referee, mentioned in grounds of appeal 5 and 6 hereof, whereas said Judge should have granted defendant's said motion for the reasons stated in defendant's notice of motion.

9. Because the order of said Judge made on the 19th day of December, 1928, is erroneous in so far as it confirms the findings and determination of said Referee's report, which were within the scope of the order of reference to him, and in so far as it orders that said order is made without prejudice to the plaintiff's right to renew its motion to strike out defendant's answer and counter-claim, for the following reasons:

(a) Because of grounds of appeal Nos. 3, 4, 5, 6 and 7.

(b) Because the Circuit Court Judge did not review the evidence before said Referee and did not consider defendant's motion to set aside said Referee's report as on an application for a new trial, but instead erroneously treated the defendant's motion to set aside the Referee's report, as exceptions to said report.

(c) Because in his opinion dated March 18, 1927, and in his rule for reference made on the 30th day of March, 1927, said Judge denied plaintiff's motion to strike out defendant's answer and counter-claim on the merits.

(d) Because plaintiff filed a reply to defendant's answer and an answer to his counter-claim, and thereby it elected to go to trial on the issues raised by the defend-

Grounds of Appeal.

ant's answer and counter-claim, and was barred from making a motion to strike defendant's answer and counter-claim.

10. Because the rule for judgment final made by said Judge, sitting as Supreme Court Commissioner on the 24th day of January, 1929, in so far as it adjudges that the defendant's answer and counter-claim is sham and frivolous and should be stricken out on said ground, and orders that judgment final be entered in favor of the plaintiff and against the defendant in the sum of \$8,370.04, together with costs, is illegal and erroneous for the following reasons:

(a) Because defendant's answer and counter-claim is not sham and/or frivolous.

(b) Because in his opinion dated March 18, 1927, and in his rule for reference made on the 30th day of March, 1927, said Judge denied plaintiff's motion to strike out defendant's answer and counter-claim on the merits.

(c) Because said Judge, sitting as Supreme Court Commissioner, had no power to strike out defendant's answer and counter-claim on said grounds, in a Supreme Court cause.

(d) Because said Judge, sitting as Supreme Court Commissioner had no power to enter final judgment in a Supreme Court cause.

(e) Because said Judge, sitting as Supreme Court Commissioner had no power to adjudge that the defendant's answer and counter-claim was sham, because he had no power to consider any evidence on that question, in a Supreme Court cause.

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Grounds of Appeal.

10 (f) Because (assuming the Supreme Court Commissioner's power to strike out sham pleadings, which is denied) the evidence before the Commissioner did not justify the striking out of the answer and the counter-claims as sham, and the defendant was entitled to a trial by jury on the issues raised by the pleadings.

(g) Because said cause was not referred for trial to the said Circuit Court Judge.

(h) Because the leave granted to plaintiff to renew its motion to strike defendant's answer and counter-claim was erroneously and improvidently granted for the reasons stated in ground of appeal 9 D.

20 (i) Because the motion to strike defendant's answer and counter-claim was not made at the trial of this cause.

ISRAEL B. GREENE,
Attorney of Defendant-Appellant.

May 6th, 1929.

Service acknowledged May 7th, 1929.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Plaintiff.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

YALE ELECTRIC CORPORATION,
Plaintiff-Respondent,

vs.

WILLIAM J. MORRISSEY, doing
business under the trade-name
of MORRISSEY STORAGE BATTERY
SERVICE Co.,
Defendant-Appellant.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This appeal brings up for review two orders made by a Circuit Court Judge *sitting as Supreme Court Commissioner*, in a Supreme Court case:

- (1) An order striking out appellant's counter-claim as *sham and frivolous* and entering *summary judgment final* in favor of plaintiff, and
- (2) An order confirming a Referee's report.

Nature and History of Suit.

For the sake of clearness, the parties will be referred to as *plaintiff* and *defendant*. The plaintiff brought this suit to recover \$7,268.89 on three trade-acceptances (aggregating \$5,269.89) and on a book account, for goods sold and delivered, amounting to \$1,989.06 (Complaint, p. 2).

The defendant's answer admitted the indebtedness on the trade-acceptances (Answer, p. 8), but disputed the amount claimed on the book account,

alleging that he owed thereon but \$1,750.53 (Answer, p. 9).

By way of set-off, the defendant filed a counterclaim containing five separate counts (Counterclaim, p. 9).

1. The *first* count claimed \$655.03 for commissions and returns on merchandise purchased by the defendant during the months of October and November, 1925.

2. The *second* count claimed \$643.43 for commissions and returns on purchases made by the defendant during October, November and December, 1924 and January, 1925.

3. The *third* count demanded \$15,000 damages for plaintiff's breach of an agreement hereinafter referred to as the "*Permalife contract.*" In substance this count alleged that on January 10, 1922 the Permalife Storage Battery Company, Inc., entered into an agreement with the defendant whereby he was appointed exclusive distributor for its batteries and parts known as "*Yale Brand Storage Batteries*" in certain designated territory; that while said agreement was in force, it was adopted by the Yale Storage Battery Company (plaintiff's predecessor), and thereafter by the plaintiff corporation, and that the plaintiff breached said agreement by invading the defendant's exclusive territory, in consequence whereof he lost the profits and commissions on the sales in his exclusive territory, amounting to \$15,000.

4. The *fourth* count demanded reimbursement of \$1,082 expended by defendant for advertising to promote the sale of storage batteries under the Permalife contract and the amendments thereto.

5. The *fifth* count demanded \$10,000 damages against plaintiff for its breach of a written contract made by it with the defendant, dated October 27, 1924, (as modified on April 20, 1925, and on July 25, 1925), relating to an extension of credit to the defendant.

The plaintiff joined issue by filing a reply and answer to the defendant's answer and counter-claim (p. 21), and noticed the case for trial at the Essex Circuit (December, 1927 term).

In advance of, and in preparation for trial, the defendant made a motion before Circuit Judge Smith for leave to inspect plaintiff's books of account to determine the total sales made by plaintiff in his territory, and for a reference to ascertain the commissions due him thereon (Notice, pp. 24-25). This was countered with a motion by plaintiff to strike out the defendant's answer and counter-claim as *sham and/or frivolous* and to enter summary judgment (Notice, pp. 56-57). Both motions were submitted and argued upon numerous affidavits and exhibits filed by the parties from time to time.

On March 18, 1927 Judge Smith filed a memorandum reading as follows: (Record, p. 71.)

"This is an application to strike out the answer of the defendant to the fourth count of the plaintiff's complaint and to strike out the entire counter-claim of the defendant.

"There is an issue of fact raised as to the adoption by the parties of a contract theretofore existing between another corporation and the defendant, and the Court was informed on this motion that if the motion to strike out was denied the parties would agree to an order of reference.

"The case will be referred to a referee with instructions to decide first the question of liability of the plaintiff upon the alleged

adopted contract before attempting to take evidence or determine the amount due upon the contract if held to be adopted.

“No costs will be allowed on the motion.”

In accordance with said memorandum, on April 1, 1927 Judge Smith entered an order denying plaintiff's motion to strike, and enter summary judgment, and referred the question of the adoption of the Permalife Contract to Francis Child, Esq., as Referee (Rule, p. 72).

The Referee, in his report filed September 10, 1928, reported that the plaintiff had business transactions with the defendant and gave him commissions and discounts on storage batteries purchased and sold by him, but that these business relations were not those of a distributor, having exclusive territory, and did not arise by reason of the adoption of the “*Permalife contract*” by the plaintiff, but were solely those of a jobber or distributor who was recognized as such in a certain district, and that their relations did not arise out of any contract, and could be terminated at the pleasure of either, without notice (Report, p. 80).

Having decided that the Permalife contract was not adopted by plaintiff, the Referee's report should have stopped at this point; but the Referee, mistaking his authority, went outside the scope of the reference and reported upon controverted issues not referred to him: For instance he reported that there was due on the book account \$1,826.79; that the defendant was not entitled to maintain his counter-claim, and that the plaintiff was entitled to judgment in the sum of \$8,312.16.

Upon the filing of the Referee's report, plaintiff moved before said Circuit Judge to confirm the report and enter judgment thereon (Notice,

p. 231), and defendant moved to set aside the report and demanded a trial by jury on the issues not referred on the grounds, among others, that the findings of the Referee were contrary to the weight of the evidence, that the Referee erred in admitting and rejecting evidence; that his findings on said issues not referred to him were improper, and for other reasons (Notice, p. 227).

Notwithstanding the fact that said motions were noticed and argued before Judge Smith, as *Circuit Court Judge*, he confirmed said report as *Supreme Court Commissioner* by an order, dated December 19, 1928, which provided as follows (pp. 234, 235):

“It is thereupon, on this 19th day of December, 1928,

ORDERED that the report of Francis Child, Supreme Court Commissioner to whom the matter was referred on defendant's motion as aforesaid, insofar as the findings and determinations in said report are within the scope of the order of reference to him, be and it hereby is confirmed and that the motion of the defendant to set aside, annul and vacate said Supreme Court Commissioner's report be and hereby is denied to the extent aforesaid, and insofar as said report is not covered by the order of reference and exceptions are sustained.

FURTHER ORDERED that the said Francis Child be and hereby is allowed for his services on the order of reference the sum of \$350 which said amount shall be taxed in the costs and which costs will abide the outcome of this action.

FURTHER ORDERED that this order is made without prejudice to the plaintiff's right to renew its motion to strike out the answer and counter-claim of the defendant.

WM. A. SMITH,
Circuit Judge sitting as Supreme Court Commissioner.

This order was followed at once with a motion by plaintiff before Judge Smith "*sitting as Supreme Court Commissioner*" to strike out the defendant's answer and counter-claim and to enter summary judgment in favor of plaintiff on the ground that said answer and counter-claim are *sham and/or frivolous*, said motion being based "*upon all the papers filed in the above action, including the affidavits heretofore served and used on plaintiff's original motion to strike, and including the report of Francis Child, Supreme Court Commissioner heretofore made and dated September 10, 1928, in the above matter and duly confirmed by rule or order dated December 19, 1928, made by the Honorable William A. Smith, Circuit Judge, sitting as Supreme Court Commissioner.*" (Notice, p. 237.)

Over the objection of defendant's counsel, the Supreme Court Commissioner entered the following rule for judgment: (Rule, p. 239.)

"Plaintiff having been granted leave of court to renew its motion to strike the defendant's counter-claim and plaintiff having so moved upon due notice to the attorney for the defendant for the reasons in said notice of motion stated; and it appearing that as the pleadings now stand the answer admits there is due to the plaintiff from the defendant the sum of \$7,030.42 with interest as follows:

On \$1,600 from October 15, 1925

On \$2,488.18 from November 15, 1925

On \$2,942.24 from December 15, 1925

and it further appearing that the counter-claim filed by the defendant is *sham and frivolous*

It is ORDERED that the counter-claim of the defendant be and hereby is struck out.

FURTHER ORDERED that judgment final be and hereby is entered in favor of the plaintiff and against the defendant in the sum of \$8,370.04, being the amount with interest

admitted by the defendant's answer to be due to the plaintiff from the defendant, together with costs to be taxed.

Let this rule be entered in the minutes.

WM. A. SMITH,
Supreme Court Commissioner and Circuit Court Judge to whom the above case had been referred for trial.

Dated, January 24, 1929."

ARGUMENT.

The appellant has assigned 10 grounds of appeal which attack the two orders above mentioned and the Referee's report. For the sake of brevity and coherence, we will argue these grounds under 3 points.

POINT I.

The Order made on January 24, 1929, insofar as it enters summary judgment final, is erroneous because the Honorable William A. Smith, sitting as Supreme Court Commissioner or Circuit Court Judge had no power to enter such judgment in a Supreme Court Issue.

Plaintiff's motion to strike and enter summary judgment was addressed to and decided by Judge Smith, *sitting as Supreme Court Commissioner* (Notice, p. 236, Rule, p. 240).

Rule 84 of the Supreme Court declares that "*no summary judgment shall be entered except by virtue of an order of the Court or a Justice in Chambers * * **" This Court has held that a Supreme Court Commissioner has no power to enter summary judgment in a Supreme Court cause. *Milberg v. Keuthe* (1923) 96 N. J.

L. 779, 121 A. 713; *National Surety Co. v. Mulligan* (1929) (not officially reported), 146 A. 373.

In signing the rule for judgment the Commissioner designated himself as "Supreme Court Commissioner and Circuit Court Judge." This is an anomaly for obviously he couldn't act in both capacities. But even if it be assumed that he acted as Circuit Court Judge, the judgment is illegal because a Circuit Court Judge has no power to enter a judgment in the Supreme Court. *McConnell v. Alpha Portland Cement Co.*, 74 N. J. L. 727, 67 Atl. 346.

It is therefore respectfully submitted that insofar as said order enters summary judgment final, it is erroneous and should be reversed.

POINT II.

The Order made on January 24, 1929, insofar as it struck out defendant's counter-claim is erroneous.

(A)

Because the Circuit Court had previously adjudged that defendant's counter-claim was not sham or frivolous, and denied plaintiff's motion to strike out on said grounds.

As hereinbefore pointed out, the Circuit Court, by order dated April 1, 1929 (p. 72), denied plaintiff's motion to strike out the defendant's counter-claim, as sham and/or frivolous, and held that there was an issue of fact raised as to the adoption of the Permalife contract. *The plaintiff acquiesced to the order and consented to the reference.* The plaintiff has never challenged said order by appeal. That order stands unreversed, and consequently settles the law of the case with respect to the legal sufficiency and

truthfulness of the counter-claim. See *Hale v. Lawrence*, 22 N. J. L. 72, 80. Plaintiff's motion to strike before the Supreme Court Commissioner was an attempt to litigate anew what had already been decided by the Circuit Court. The Supreme Court Commissioner had no power to review or reconsider the order of the Circuit Court.

(B)

Because said order condemned the counter-claim as both sham and frivolous.

The Commissioner adjudged that the defendant's counter-claim "*is sham and frivolous.*" Now a pleading cannot be both sham and frivolous. A frivolous pleading is always assumed to be true, while a sham pleading must be admittedly false or conclusively proved to be so. *Milberg v. Keuthe*, *supra*, *National Surety Company v. Mulligan*, *supra*, *Fidelity, etc. v. Wilkesbarre, etc. Co.*, 98 N. J. L. 507, 510, 120 A. 735. In the case last cited it was held that a plea might be condemned as sham or frivolous and could be stricken out on either ground, but could not summarily be dealt with on both grounds. The adjudication that the counter-claim was both sham and frivolous is a legal absurdity, a self-contradiction and cannot be sustained. Neither plaintiff's notice of motion, nor the Commissioner's memorandum, nor his order has apprised us why, or in what respects, the defendant's counter-claim is sham or frivolous. Had the Commissioner adjudged in clear and unequivocal language that the counter-claim failed to allege facts constituting a legal cause of action, his order might be treated as striking out the counter-claim as frivolous (see *National*

Surety Co. v. Mulligan, supra), but his order and memorandum are devoid of any such finding.

(C)

Because a Supreme Court Commissioner has no power to strike out a sham counter-claim.

Prior to June, 1926, a Supreme Court Commissioner had no power to strike out a sham or frivolous pleading. *Milberg v. Keuthe, supra*. By P. L. 1926, p. 103, the Legislature conferred upon the Supreme Court the power, by appropriate rules, to delegate to such Supreme Court Commissioners as shall occupy the position of Circuit Court Judge "full control over the pleadings in any matter then pending in said Court * * * and any motions addressed thereto, including motions to strike out, motions in lieu of pleas to the jurisdiction, or pleas in abatement, and also motions to dismiss or nonsuit for failure to file notice of trial, or for lack of prosecution, and if a decision be decisive of the whole case, the Commissioner may order judgment for the successful party or make such order as may be just; and the action of Court upon such motions may be reviewed on appeal after final judgment."

Pursuant to said statute, the Supreme Court in June, 1926, amended Rules 93 and 94 of the Supreme Court to read as follows:

"93. The several Circuit Court Judges of this State heretofore or hereafter appointed Supreme Court Commissioners are hereby severally designated as commissioners for the several counties of this State, with authority to hear and determine all motions preliminary to trial as specified in Rules 94 and 95 of this Court, and in such other rules as may be hereafter promulgated in the premises (June, 1926).

“94. Such commissioners respectively, after hearing the parties or their attorneys (*but not their evidence*) on due notice, shall, on the application of any party, make such order as the Court might make and as may be just in respect to the following matters subject to an appeal after final judgment:

Objections to pleadings, amendments thereof, striking out pleadings, and leave for additional pleadings.

Settlement of issue.

Bills of particulars.

Admissions.

Interrogatories.

Discovery of and inspection of books, papers and other documents.

Examination of parties before trial.

Any other interlocutory matter preliminary to and in preparation for trial (Rule 63, Pr. Act 1912, as amended June, 1926).”

(Rule 95 provides that motions before Commissioners may be made on 2 days' notice.)

The Commissioner took the view that Rules 93 and 94 empowered him to strike out sham pleadings. We contend that in this view he was in error. The statute itself confers no powers upon Supreme Court Commissioners. It merely vests the Supreme Court with the right, by appropriate rules, to delegate certain powers to Supreme Court Commissioners. The Supreme Court may or may not exercise that power. That it did not delegate to Commissioners the power to pass upon sham pleadings is clearly indicated by Rule 94 which provides that the Commissioners shall hear the parties or their attorneys (*but not their evidence*). This limitation precluded the Commissioner from considering the affidavits of the parties and their testimony before the Referee, and without this evidence, the Commissioner could not ascertain whether the counter-claim was true or sham.

But even if it be assumed for the purpose of argument that Rules 93 and 94 empower the Commissioner to strike sham pleas or answers under Rule 80, that did not give him power to strike a sham counter-claim, because when said rules were promulgated (June, 1926) the Supreme Court itself was without power to strike a sham counter-claim. The power to strike sham complaints and counter-claims was not conferred upon the Court until April 3, 1928 (P. L. 1928 Chap. 151 p. 306), and since then, the Court has not conferred its new power upon Supreme Court Commissioners.

(D)

The Order is illegal even if it be deemed the act of the Circuit Court Judge.

In view of the fact that said order was signed by "William A. Smith, Supreme Court Commissioner and Circuit Court Judge, to whom this case had been referred for trial," it may be contended by the plaintiff that said order, though void as the act of the Supreme Court Commissioner should be upheld as the act of the Circuit Court Judge.

To this argument it is a sufficient answer that a Circuit Court Judge, to whom the cause is referred for trial, has no power to strike out a counter-claim in the Supreme Court. *Dayton v. Boettner* (1911) 82 N. J. L. 421, 81 A. 726. It is true that under Rule 40, a Circuit Court Judge to whom a Supreme Court issue has been referred for trial, as authorized by Chapter 118 of P. L., 1906 (p. 209) has power, *at the trial* to strike out a "Defense" on the ground that it discloses no defense when the objection is raised by plaintiff's answering pleading. *Kep-*

pelon v. Ritter Flooring Co., 97 N. J. L. 200, 116 A. 491; *Milberg v. Keuthe*, *supra*. But this principle has no application in the case at bar, for here the action was taken *before the trial*, as against the counter-claim. Moreover the objection was not raised by plaintiff's pleadings.

(E)

The Order is illegal because it deprives the defendant of a trial by jury on the issues not referred to the Referee.

The Supreme Court Commissioner confirmed the Referee's report only "*insofar as the findings and determinations are within the scope of the order of reference to him*" (p. 234), and set it aside "*insofar as said report is not covered by the order of reference*" (p. 235). Since the adoption of the Permalife contract was the only issue referred to the Referee, all other issues raised by the defendant's counter-claim were triable before a jury. The defendant was therefore entitled to a trial by jury on the first, second and fifth counts. The issues raised by these counts of the counter-claim were not referred to the Referee, nor was any testimony taken thereon. Counts 1 and 2 claim credit for commissions and returns on purchases, and the fifth count claims \$10,000 damages against the plaintiff for breach of a written contract made by it with the defendant on October 27, 1924 (as modified), whereby the plaintiff agreed to extend to the defendant a continuing credit of \$10,000, subsequently reduced to \$7,500. Mr. Hutchinson, plaintiff's secretary, in his affidavit (verified January 20, 1927, p. 30) admits that the defendant is entitled to a commission credit of \$162.27 not credited to the defendant in the complaint. Since no testimony was offered on

these issues before the Referee how could the Supreme Court Commissioner adjudge that these counts of the counter-claim were sham, particularly in view of Hutchinson's admission that defendant was entitled to a credit of at least \$162.27 on the first and second counts of the counter-claim? The defendant is clearly entitled to a trial by jury on these issues.

(F)

The defendant's counter-claim is neither sham nor frivolous.

Neither plaintiff's notice of motion, nor the Commissioner's memorandum, nor his order striking out the counter-claim has apprised us why or in what respects the defendant's counter-claim is sham or frivolous. Plaintiff's answer to the defendant's counter-claim (p. 24) did not raise any objections to the legal sufficiency of the defendant's counter-claim, and consequently the plaintiff was barred from challenging the counter-claim as frivolous. Each of the five counts of the counter-claim, on its face, shows a good cause of action. The fact that the plaintiff consented to the reference indicates that he concluded that the counter-claim was legally sufficient. The testimony before the Referee was confined to the question of the adoption of the Permalife contract. An examination of the affidavits filed by the defendant and the testimony before the Referee hereinafter reviewed will show that the third and fourth counts of the counter-claim are well founded in fact but are in sharp dispute. The mere fact that the Referee decided the issue in favor of the plaintiff does not stamp these counts as sham. With respect to the first, second and fifth counts of the counter-claim, there was no evidence offered

before the Referee to justify the conclusion that these counts were sham.

POINT III.

The Order of the Supreme Court Commissioner made on December 19, 1927 confirming the Referee's Report, is erroneous.

(A)

Because the Commissioner had no power to enter said order.

Plaintiff's motion to confirm the Referee's report and defendant's motion to set it aside were both noticed before the *Honorable William A. Smith, Judge of the Essex County Circuit Court*. (Plaintiff's notice p. 231, defendant's notice p. 227. See also order confirming report p. 234, ll. 11-17.) The record shows, however, that the report was confirmed by "William A. Smith, Circuit Judge, sitting as Supreme Court Commissioner" (p. 235). In that capacity he was without power to confirm the report. The power to confirm the Referee's report is vested in the Supreme Court or any justice thereof, or in the Circuit Judge who made the reference.

In passing it is important to note two mis-statements appearing in the order confirming the Referee's report, which was prepared by counsel for the plaintiff. In the first place the order recites (p. 233, ll. 27-30) that the plaintiff's original motion to strike was denied "on condition that the case be referred to a referee." An examination of the opinion of the Circuit Court Judge (p. 71) and the rule for reference fails to disclose any such condition.

In the second place the order of confirmation recites that it was consented "in open court

that the grounds set forth in defendant's notice of motion (to set aside the report) might be treated as exceptions to the report" (p. 234, ll. 25-28). There was no such consent. At the hearing of the motion Judge Smith suggested that the method to challenge the Commissioner's report was by exceptions and not by motion to set aside, and that he would consider the defendant's motion to set aside the report as exceptions. Counsel for the defendant justified his procedure under the authorities of *Runyon v. Hodges*, 46 N. J. L. 359, *Clayton v. Levy*, 49 N. J. L. 577 and other decisions, but stated that if after examining these authorities the Court concluded that defendant's procedure was erroneous, that the Court might then treat the objections to the report as exceptions. The order of confirmation recites that briefs were submitted. Now in the brief submitted by counsel for the defendant he said the following:

"The defendant now moves to set aside the Commissioner's report and for a new trial, and for other relief stated in his moving papers. At the argument your Honor suggested that the method of challenging the Commissioner's report was by exceptions and not by motion to set aside the same, and that you would consider the matter as if exceptions were filed. I think, however, that the authorities sustain the view that where, as here, a reference was made upon consent, the proper remedy is by a motion to set aside the report and not by exceptions. See opinion of C. J. Beasley in *Runyon v. Hodges*, 46 N. J. L. 359, followed by Justice Magie in *Clayton v. Levy*, 49 N. J. L. 577. Also *City of Hoboken v. Laverty*, per Magie, 60 N. J. L. 86, *Bety v. David*, per Scudder, 40 N. J. L. 102."

No consent can be spelled out from the foregoing.

(B)

Because the Referee's Report is contrary to law, and the clear weight of the evidence.

In attacking the Referee's report, counsel for the appellant is not unmindful of the rule laid down in *Runyon v. Hodges*, *Clayton v. Levy* and *Hoboken v. Laverty* (*supra*), that the report of a referee can only be objected to by opposition to its confirmation or by motion to set it aside, and that the rulings of the Court thereon are not open to exception nor subject to be reviewed by writ of error. Had the Referee's report in the case at bar been confirmed by a court or judge having jurisdiction, no attack could be made on the report on appeal, but as heretofore pointed out, the Referee's report was confirmed by a Supreme Court Commissioner having no power to confirm it and consequently the plaintiff's motion to confirm the report and the defendant's motion to set it aside have not been adjudicated by any Court or Judge having jurisdiction and moreover defendant's objections to the report were improperly treated as exceptions, whereas they should have been treated as grounds for a new trial. Under these circumstances it is proper that this Court shall consider the report and the defendant's motion to set it aside.

The evidence shows the following facts:

On January 10, 1922, the defendant entered into a contract with the Permalife Storage Battery Company, Inc., for the exclusive sales rights for Yale Brand Storage Batteries and parts in a number of Counties in the States of New York, New Jersey and Pennsylvania. This contract was signed by L. H. Keller the then president of the Permalife Storage Battery Co. Inc.,

who now is the vice president of the plaintiff company (Exhibit D. 1, pp. 14-18). On February 8, 1922, the territory was extended by amendment to the contract (Exhibit D. 4, p. 20).

The Permalife Company ran into difficulties, and in anticipation of bankruptcy, the Yale Battery Company was organized and business was carried on under that name (pp. 84, 86, 174-175), and the Permalife Company and the Yale Battery Company were one and the same company (pp. 84, 86). The same officers of the Permalife Company became officers of the Yale Battery Company (p. 173). The Yale Battery Company assumed the Permalife contract and carried on said contract, according to its term (Exhibits D. 2, 3 and 4, pp. 18, 19, 20) and on the same basis as had the Permalife Company (p. 174). The Yale Storage Battery Company was then organized with the same officers as the Yale Battery Company and it purchased the assets of the insolvent Permalife Company, and continued doing business with the defendant under the same conditions and terms as had the Permalife Company (pp. 172-175).

That the Yale Storage Battery Company adopted the contract is conclusively proved by its attempt to cancel the contract. In a letter dated December 10, 1925, Mr. Keller, its vice president wrote the defendant as follows (p. 176; Exhibit D. 24, p. 196):

“So that there will be no misunderstanding as to this written agreement (referring to the Permalife contract), or any subsequent verbal agreement, this letter is to advise that we shall consider all written and verbal agreements terminated as of January 10, 1926.”

By endeavoring to rescind the contract, the Yale Storage Battery Company was estopped

from denying its existence and adoption. *Commercial Assurance Company v. New Jersey Rubber Company*, 61 N. J. L. 446, affirmed in this Court, 64 N. J. L. 580.

This brings us to the question of the adoption of the contract by the plaintiff. The evidence shows that in October, 1924, the Yale Storage Battery Company discontinued selling storage batteries direct, and turned over to the plaintiff its entire output of storage batteries (Exhibit P. 2, p. 219). At that time Keller was also the vice president of the plaintiff.

When the plaintiff took over the storage battery business of the Yale Storage Battery Company, it took over all the latter's unfilled orders (p. 177), and continued to do business with the old customers (p. 177). The plaintiff recognized the defendant as an exclusive distributor for the territory set forth in the contract. This is established by the fact that the defendant was paid commissions on sales made to customers within his territory. The correspondence between the plaintiff and defendant proves beyond a doubt that the defendant was recognized as an exclusive distributor (Exhibits D. 7, 8, 9, 10, 12, 16 and 17).

The defendant testified that immediately before plaintiff company took over the storage battery business, it informed him of the arrangements it was making with the Yale Storage Battery. Plaintiff inquired where he stood with his contract if this new deal went through and was told by Mr. Keller that he was one of the exclusive distributors, who would be taken over by plaintiff (p. 90). The plaintiff paid the defendant 5 per cent. commission on all storage batteries sold by him directly or indirectly. These commissions were paid under the Permalife con-

tract and amendments and supplements thereto (p. 92). The defendant also testified that the plaintiff forwarded inquiries to him concerning the sale and service of storage batteries in his exclusive territorial limits (p. 92). In a letter dated January 10, 1925, addressed to Mr. W. D. Hawk, answering his inquiry concerning the purchase of storage batteries plaintiff wrote among other things (Exhibit D. 7, p. 67):

"In connection with the same, would advise that the Morrissey Storage Battery Company, of 14 William Street, Newark, are *distributors of this product for the territory in which you are located*. We beg therefore, to refer you to them."

"Copy of this letter is being sent to the Morrissey Storage Battery Company, who will be pleased to get in touch with you immediately."

In answer to an inquiry by James Hezyi & Company, the plaintiff company sent the following reply (Exhibit D. 8, p. 70):

"Replying would advise you that we are represented in Northern New Jersey as *distributors* by the Morrissey Storage Battery Company, 14 William Street, Newark, New Jersey."

In answer to a similar inquiry of the Wilburn Storage Battery Company, the plaintiff wrote (Exhibit D. 9, p. 184):

"We very much appreciate your inquiry and have already requested our Northern New Jersey Distributor to get in touch with you.

"This distributor is located at Newark, and is well equipped in every way of organization as well as stock, and will give you unusual service and we would be pleased indeed to be favored with your patronage through them.

"They are known as the Morrissey Storage Battery Company, and their address is 14 William Street, Newark, N. J."

In reply to an inquiry of Housers Auto Supply Company, Inc., plaintiff wrote the following reply (Exhibit D. 10, p. 69):

“Regarding the two items of storage batteries, would advise that we are unable to supply those owing to an *exclusive* arrangement covering Northern New Jersey with the Morrissey Storage Battery Company of 14 William Street, Newark, N. J., as distributors of this product.”

In reply to the inquiry of H. M. Smith Co. (Exhibit D. 17, p. 193), the plaintiff sent the following answer:

“We very much appreciate receiving your inquiry and in turn are referring same to the Morrissey Storage Battery Company at 14 William Street, Newark, N. J., who handle the Yale Storage Battery as *distributors* for Northern New Jersey.”

The above correspondence proves beyond a doubt that the plaintiff corporation considered the defendant its *exclusive* distributor for the territory set forth in the old Permalife contract.

Perhaps the most significant evidence in the case is the letter of October 1, 1924, written by the Yale Storage Battery Company to the defendant (Exhibit D. 5, p. 43) in which it informed him that it had consummated arrangements with the plaintiff to take over the distribution and sales of its products. That letter says:

“Hereafter all *correspondence* and *orders* should be addressed to the Yale Electric Corporation, Pearl and Tillary Sts., Brooklyn, N. Y., or 1601 S. Michigan Ave., Chicago, Ill.

“*All unfilled orders on hand October 1st will be billed by the Yale Electric Corporation at present prices.* The Yale Electric Corporation does not contemplate any radical change in selling policy at this time, but if any change should be made in the future

you may rest assured it will be beneficial to you rather than harmful.

“We have had this plan in view from the time that our Mr. L. H. Keller became director of sales for the Yale Electric Corporation in addition to his connection with the Yale Storage Battery Company and it is due to his untiring efforts that this plan has been effected and we are sure that it will work out to great advantage to all of our customers.”

This letter was followed by a letter from the plaintiff dated October 16, 1924 (Exhibit D. 6, p. 45), confirming its arrangement as set forth in said letter. Thus we have a clear case of an adoption of the Permalife contract. The very fact that “all unfilled orders on hand October 1st” would be billed by the plaintiff, at present prices, that all future orders and correspondence should be addressed to the plaintiff, and that it did not contemplate any radical changes in the selling policy—clearly indicates an adoption of the contract by the plaintiff—for certainly the Yale Storage Battery Company didn’t intend to breach its contracts with its distributors and subject itself to liability. It intended to hold its customers and expected the plaintiff to fulfill its obligations under existing contracts.

The defendant further testified that when plaintiff shipped direct to customers, the commissions were credited to his account (Exhibit D. 23; See Supp. State of Case), which arrangement is corroborated by Mr. Keller and by Max Berman, defendant’s bookkeeper (p. 115). This is borne out by the credit slips.

It is not disputed that the defendant dealt with plaintiff before plaintiff became sole agent for the Yale Storage Battery Company. It is admitted that he purchased *dry* batteries and

flashlights from plaintiff years before the plaintiff had any arrangements with the Yale Storage Battery Company. But in purchasing dry batteries and flashlights he received no commissions or discounts from the plaintiff. After October 1, 1924, however, plaintiff began to pay commissions for the sale of storage batteries as he had previously received under the Permalife contract.

Mr. Cornell who was the senior salesman for the plaintiff in New Jersey testified that plaintiff instructed him not to sell wet storage batteries in New Jersey (p. 123). And the reason given was that plaintiff had a definite arrangement with defendant (p. 123). This was admitted by Keller (p. 172). Cornell further testified that whenever he sold storage batteries in New Jersey, he turned the commissions over to the defendant (p. 123), and that he was instructed by Mr. Keller to help the defendant in the sale of storage batteries (p. 124). Cornell further testified that the plaintiff in violation of its agreement, with its distributors, sold directly to the trade and failed to give commissions to distributors (pp. 129-130).

Taking the testimony of Mr. Cornell, who is undoubtedly the most disinterested witness in the entire case we find that he was specifically instructed not to disturb the defendant's exclusive right to sell storage batteries in New Jersey, but to aid him and work for his best interests within his territory. Is it likely that the plaintiff company would give such instructions to its salesmen within this territory if it did not recognize an exclusive arrangement with the defendant?

The defendant protested that plaintiff was violating its contract by invading his territory

(p. 118). When asked about a conversation between himself and the defendant concerning the breaching of defendant's contract, Keller did not deny the conversation, but evasively answered that he didn't recall the conversation (p. 179).

It is interesting to compare the Commissioner's views, as expressed in his report, with some of the things he said at the hearing. In his report he says,

"That the Yale Electric Corporation knew nothing whatever of the contract entered into between the Permalife Company and the defendant, Morrissey" (p. 79, ll. 26-29).

Yet at page 138 of the record it appears that the Commissioner said (ll. 29-35):

"The Yale Electric Corporation, the plaintiff apparently had some close connection with the Yale Storage Battery Corporation which latter company on December 10, 1925, wrote a letter to the defendant relative to the Permalife Storage Battery Company's business * * *" (p. 139, ll. 3-12).

"* * * There is, in my opinion, some evidence to show that officers of the company did so conduct themselves as to show that they regarded the Yale Electric Corporation to be under some corporate obligation by way of contract to the Morrissey Storage Battery Company."

In view of the uncontradicted testimony that Keller, the former president of the Permalife Company was the vice-president of the Yale Storage Battery Co. and that of the plaintiff company, that he had complete charge of the sales and conduct of his business with the defendant; that on October 16, 1924, he confirmed the selling arrangements between the plaintiff and the Yale Storage Battery Company; that all unfilled orders under the Permalife contract

were fulfilled by the plaintiff and billed for by it; and that on December 10, 1925, he attempted to cancel the Permalife contract, how can there be any doubt that the Permalife contract was adopted by the plaintiff? Keller's letter of December 10, 1925, was written at the time when the defendant was vigorously complaining of the plaintiff's conduct in violating his exclusive territorial rights and not paying him commissions. The defendant had not done any business with the Yale Storage Battery Company in over a year. The Yale Storage Battery Company had no grievance against the defendant. Why, therefore, did Keller attempt to cancel the Permalife contract on behalf of the Yale Storage Battery Company? He was vice-president of both companies. The use of the Storage Battery Company's letterheads may have been an inadvertence, or it may have been intentional, for to have used the plaintiff's stationery would clearly have estopped the plaintiff from denying that it adopted the Permalife contract, *Commercial Assurance Company v. New Jersey Rubber Company*, *supra*.

(C)

The Referee erred in rejecting the following evidence offered by the defendant:

1. The affidavit of Uchaez.

To support his claim that he had exclusive territory allotted to him, the defendant testified to complaints which he registered with Mr. Keller against the invasion of his territory by the plaintiff. In support of this testimony the defendant offered in evidence a letter sent by him to the plaintiff on October 30, 1925 (Exhibit D. 18, p. 49), reading as follows:

“Oct. 30, 1925.
 Mr. L. H. Kellar,
 General Sales Mgr.
 Yale Electric Corp.
 Pearl & Tillary Sts.
 Brooklyn, N. Y.

Dear Sir:

We have had many complaints regarding the soliciting of business on Yale Storage batteries in our exclusive territory. We did not take stock in these complaints until a glaring case was brought home to us, and we are enclosing herewith an affidavit obtained from one of our Dealers appointed exclusively in his particular location in Newark.

This is furnished you for your information with the spirit of co-operation and we would like to have an expression from you regarding the incident.

Yours truly,

MORRISSEY STORAGE BATTERY SERVICE Co.”

The affidavit referred to in the letter enclosed was one from S. Uchaez, reading as follows (pp. 49-50):

“TO WHOM IT MAY CONCERN:

I, Mr. S. C. Uchaez manager of the Queens Tire Shop, 96 Bloomfield Avenue, Newark, N. J. state that about three weeks ago, Mr. Atwater representing the Yale Electric Corporation calling on me at my place of business and when I advised him that I was purchasing YALE BATTERIES type 6-11 Special from the Morrissey Storage Battery Service Company, 12 William Street, Newark, N. J. the distributor who appointed me as a service station exclusively in my location in Newark, they advising me that they were the Exclusive distributors.

“He stated that in his canvass of the territory he was unable to secure any business for his company because the Morrissey Storage Battery Service Company were cutting

prices and selling the YALE 6-11 special battery for \$9.50 which is the price that I am paying the Morrissey Company for these batteries.

"He further stated that if conditions continued and he was unable to secure storage battery business in New Jersey the Morrissey Storage Battery Service Company did not play ball and change their policy, they would lose their YALE franchise which he stated was not exclusive."

S. UCHAEZ."

Sworn to before

FORD G. HAUPT,

Notary Public of N. J.

The Referee permitted the letter to go into evidence, but on objection of counsel for the plaintiff, rejected the affidavit, because it was not binding upon the plaintiff.

It is respectfully submitted that the action of the Referee was prejudicial and erroneous. The duty of the Referee was to ascertain the nature and terms of the contract between the parties. On that issue the conduct, conversations and communications between the parties were most material and admissible. See *Fletcher v. Interstate Chemical Co.* (1920) 94 N. J. L. 332 and cases therein cited. Assuming that the defendant was the exclusive distributor in his territory, it was most natural for him to complain to the plaintiff if the plaintiff invaded his territory; that such complaints were made and that the plaintiff promised to redress the grievance, would certainly indicate that the defendant's grievances were well founded and that he had exclusive territory. The affidavit of Uchaez was not offered for the purpose of proving that its contents were true, but solely for the purpose of showing that a complaint was made, based upon an

affidavit made by one of defendant's customers. If the letter was evidential, certainly the enclosed affidavit was evidential because it is referred to in the letter.

2. Testimony of Mr. Plant (p. 160, ll. 29-31):

In defense of the third counter-claim, the plaintiff called, as a witness C. Bertram Plant, at one time its attorney, and now its president. On cross examination, counsel for the defendant asked Plant "what financial interest have you in this plaintiff corporation?" The object of this question was to disclose the interest of the witness in the litigation. Upon objection of counsel for the plaintiff, the Referee overruled the question. We think that the question was proper for the purpose of affecting the credibility of the witness, and that the action of the Referee was reversible error.

(D)

The Referee admitted the following illegal evidence:

Of the witness, Plant: "What was your trade arrangement with the Morrissey Storage Battery Company?" (p. 144).

As heretofore observed, Plant was the attorney for the plaintiff corporation. His personal trading arrangement with the defendant was wholly immaterial. If the question is understood to refer to arrangement between plaintiff corporation and the defendant, it was wholly improper because, as attorney, he had no personal knowledge of the arrangement, and whatever information he had was purely hearsay. His answer to the question was prejudicial to the defendant.

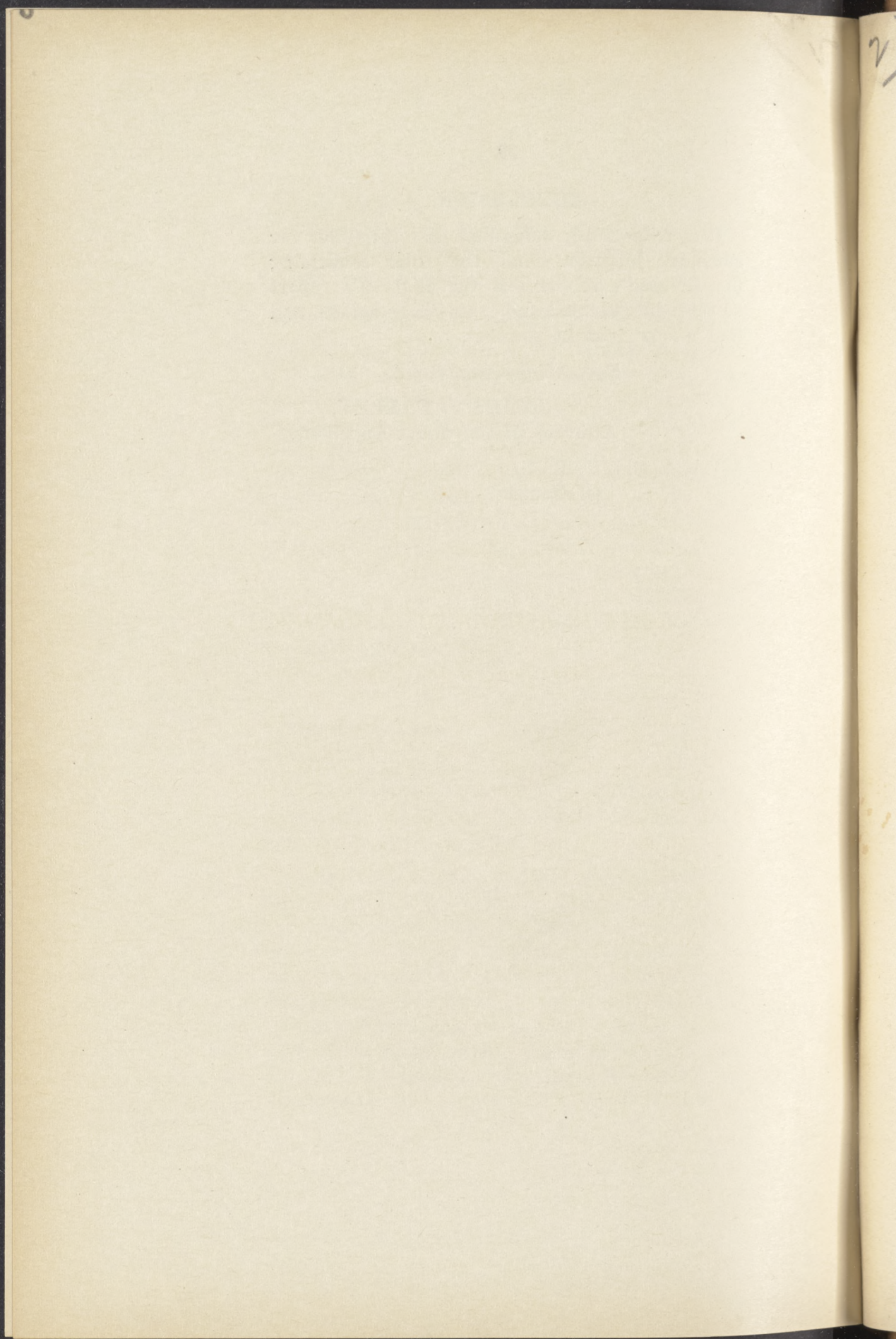
CONCLUSION.

It is respectfully submitted that the order for summary judgment final, the order confirming the Referee's report and the Referee's report be set aside, vacated and for nothing holden, and that a new trial be granted.

Respectfully submitted,

JAMES J. FARLEY,
Attorney of Defendant-Appellant.

ISRAEL B. GREENE,
Of Counsel.



New Jersey Court of Errors and Appeals.

YALE ELECTRIC CORPORATION,
Plaintiff-Respondent,

vs.

WILLIAM J. MORRISSEY, doing
business under the trade
name of Morrissey Storage
Battery Service Co.,
Defendant-Appellant.

Action at Law.
On Appeal from
Supreme Court.

BRIEF IN BEHALF OF PLAINTIFF.***Statement of the Case.***

On November 30, 1925 (Summons, p. 1) plaintiff brought its action to recover the amount due to it upon three trade acceptances and for goods sold on open account (Complaint, pp. 2-7). By his answer (pp. 8-9) defendant admitted the indebtedness claimed due upon the trade acceptances and to the extent of \$1,750.53 (Answer, p. 9, ll. 12-16) admitted the amount claimed due upon the open account, making the total admitted indebtedness the sum of \$7,030.42 with interest as claimed in the complaint. Plaintiff's judgment afterwards entered was for the amount so admitted due (Rule, pp. 239-240).

By way of defense, or set off, as counsel terms it at page 2 of his brief, defendant filed a counterclaim of five separate counts (pp. 9-20) and plain-

tiff's answer to same (pp. 21-24) expressly therein reserved the right to move to strike it at any time at or before the trial (p. 24, ll. 9-11). The contentions raised by the counterclaim will be treated *infra* under the heading "Argument".

The case was referred to the Hon. William A. Smith, Circuit Judge, for trial (Rule 240, Defendant's Notice of Motion, p. 24, ll. 23-26; Defendant's Notice of Motion, p. 33, ll. 12-15). After waiting until the case was about to be reached for trial, defendant served a notice of motion (pp. 24-25) based on the papers filed in the case and upon the affidavit of James J. Farley (p. 25, ll. 1-4), who was defendant's attorney of record, and pursuant thereto moved:

"(1) For a rule appointing a Referee to hear the cause and report on all matters of account between the parties hereto and the amount due from one party to the other.

(2) For an order permitting the defendant to inspect the books of account of the plaintiff * * *."

Plaintiff resisted this motion with an affidavit of Charles T. Hutcheson (pp. 30-32) and pointed out to the Court that the defendant's supporting affidavit failed to verify the allegations of his counterclaim. The Court then continued the motion to enable the defendant to present, if possible, an affidavit verifying the allegations of his counterclaim and meanwhile had the case held out of the trial call.

Defendant thereafter served the plaintiff with a new notice of motion returnable at the adjourned date of his other said motions for the issuance of

a commission to take testimony, stating in said notice of motion (p. 33, ll. 21-26) :

“AND TAKE FURTHER NOTICE that said motion will be based upon the annexed affidavits, which affidavits I will also read in support of the motions for a reference and inspection of books in this matter, which have been adjourned until said date.”

Due to the congestion of Judge Smith's motion calendar, defendant's said motions by agreement were laid over to February 19, 1927. Meanwhile, plaintiff duly served notice of motion (pp. 56-57) returnable on the same date before “the Hon. William A. Smith, Judge of the Essex County Circuit Court, to whom the above matter has been referred, for an order striking out the answer of the defendant to the Fourth count of plaintiff's complaint and striking out the entire counterclaim of the defendant and each count thereof, and for the entry of summary judgment” upon the following grounds or one or more of them :

- “1. That said answer to the fourth count to the plaintiff's complaint and said counterclaim of the defendant are, and each is sham and filed for the purpose of delay.
2. That defendant's counterclaim is sham and/or frivolous *and filed as a defense* for purpose of delay.
3. That the defendant has no legal defense to said action on the merits of the case.”

it being stated in said notice of motion that the annexed affidavits of Lawrence H. Keller and Charles T. Hutcheson and Schedule A annexed thereto would be used in support of the motion (p. 56, ll. 39-40; p. 57, ll. 1-3).

All of the said notices of motion were argued together before Judge Smith.

The affidavits presented in behalf of the plaintiff (Hutcheson, pp. 30-32; Keller, pp. 57-59; Hutcheson, pp. 59-63) negatived the allegations of the defendant's counterclaim and verified the plaintiff's cause of action with the exception that they conceded due as further credits to the defendant on the open ^{ac-}count the sum of \$162.27, making the true balance due upon the Fourth count of plaintiff's complaint the sum of \$1,826.79 with interest from December 15, 1925 (Hutcheson, p. 59, ll. 30-40).

The affidavits presented in behalf of the defendant (Farley, pp. 25-30; Morrissey, pp. 34-52; Morrissey, pp. 52-53; Berman, pp. 53-55) failed in any way to verify any of the counts of the defendant's counterclaim with the exception of the third count. For instance, paragraphs numbered 6 (p. 35), 8 and 9 (p. 41) of Mr. Morrissey's affidavit are as follows:

"6. By the first counter-claim, I seek to recover \$655.03 for commissions and merchandise returns sold and delivered by the plaintiff to me during the months of October and November, 1925. By the second counter-claim I seek to recover \$643.43 for commissions and merchandise returns, sold and delivered by the plaintiff to me.

8. By the fourth counter-claim I ask for reimbursement of \$1,082 for advertising costs, under a special agreement with the plaintiff, whereby the plaintiff was to reimburse me for said advertising.

9. By the fifth counter-claim I ask for judgment against the plaintiff for breach of contract for failing to extend to me a continuing credit, according to agreements

between the plaintiff and me dated October 27, 1924 and as modified on April 20, 1925 and July 25, 1925."

none of which averments verified his alleged causes of action.

With respect to the third count of his counterclaim, he made averments under paragraph numbered 7 (pp. 35-41) which the Court found raised a question of fact as to whether the parties to this suit had ever adopted as the contract between them the terms of a certain contract made back in 1922 between the defendant and the Permalife Storage Battery Company, Inc., of Indiana, a copy of which was annexed to his counterclaim (pp. 14-20) and under date of March 18, 1927, handed down the following opinion (p. 71):

"Smith, *C. C. J.*:

This is an application to strike out the answer of the defendant to the fourth count of the plaintiff's complaint, and to strike out the entire counter-claim of the defendant.

There is an issue of fact raised as to the adoption by the parties of a contract theretofore existing between another corporation and the defendant, and the Court was informed on this motion that if the motion to strike out was denied the parties would agree to an order of reference.

The case will be referred to a referee with instructions to decide first the question of liability of the plaintiff upon the alleged adopted contract before attempting to take evidence or determine the amount due upon the contract if held to be adopted.

No costs will be allowed on the motion."

Thereafter, a rule made by Circuit Court Judge Smith (pp. 72-73) was entered April 1, 1927,

denying the plaintiff's motion and referring the matter to Francis Child, a Supreme Court Commissioner, to take testimony and report on the following:

"(a) First to take testimony and decide the question of the liability of the plaintiff upon the contract referred to in the defendant's fourth counter-claim filed herein (alleged to have been adopted by the plaintiff) before taking evidence to determine the amount due upon said contract, if said contract is held to have been adopted by the plaintiff.

(b) If the said commissioner decides that the said contract was adopted by the plaintiff, he shall then proceed to take testimony and report upon the amount due to the defendant upon said adopted contract, and in connection therewith he shall take testimony, and report on all matters of account between the parties and the amount due from one party to the other.

3. That the said parties do appear and give testimony before said Supreme Court Commissioner at such times and places as may be fixed by him and that the said Commissioner may summon such witnesses and make such orders, relating to the inspection of the plaintiff's books of account as he may deem necessary and advisable.

4. That no costs are awarded on the motions. Entered April 1, 1927" (p. 73).

In his opening before the Reference Commissioner, which unfortunately was not taken down stenographically, defendant's counsel stated that if the Referee should find that the terms of the Permalife contract had not been adopted by the parties hereto, a judgment should be entered for

the plaintiff for the amount claimed, giving credit of course for the additional credits on the open accounts conceded due to the defendant in the affidavit of Mr. Hutcheson.

After the taking of testimony, submission of briefs and careful consideration of the matter, the Referee filed his report, which was dated September 10, 1928 (pp. 74-82) with the depositions taken before him thereto annexed (pp. 83-182) specifically finding in part (p. 80) as follows:

"I find that the plaintiff did have business transactions with the defendant, Morrissey, and did give to the defendant, Morrissey, either commissions or discounts on storage batteries purchased and sold by him but that his business relations with the plaintiff corporation were not those of a distributor having exclusive territory and did not arise by reason of any adoption of the Permalife contract by the plaintiff, but were solely those of a jobber or distributor who was recognized as such jobber or distributor in a certain district; that the relations existed between the plaintiff and the defendant did not arise out of any contract and could be terminated at the pleasure of either without notice.

I, therefore, find and report that the defendant is not entitled to maintain his counter-claim against the plaintiff and find that the plaintiff is entitled to judgment in the sum of \$8,312.16, for the principal, and interest, which is more particularly shown on Schedule 'A' hereto annexed, for which amount judgment should be entered.

Respectfully submitted this 10th day of September, Nineteen Hundred and Twenty-eight.

FRANCIS CHILD,
A Supreme Court Commissioner
of New Jersey."

On September 14, 1928, plaintiff served notice of the filing on September 14, 1928, in the Supreme Court Clerk's Office at Trenton, of the said report of Francis Child, Esquire, and the depositions taken before him (p. 226).

On September 21, 1928, defendant served notice of a motion returnable September 29, 1928 "before the Hon. William A. Smith, Judge of the Essex County Circuit Court" to set aside, vacate and declare null and void the said report of Francis Child, Esq., for the reasons in said notice specified (Notice of Motion, pp. 227-230).

Said notice of motion specifically stated in part (p. 229, ll. 28-32):

"And Take Further Notice that at said time and place, I will also move for a trial by jury of all the matters and issues raised by the pleadings in this cause, including the issues heretofore referred to said Commissioner."

and upon the return day, the defendant so moved for a trial by jury.

After service of said notice, plaintiff served upon the defendant a cross notice of motion, likewise returnable September 29, 1928, before "the Hon. William A. Smith, Judge of the Essex County Circuit Court", for an order confirming the report of said Francis Child and for an order entering and/or directing the entry of judgment and for an allowance to be paid by the defendant to the said Francis Child.

Pursuant to his notice of motion, counsel for the defendant moved to set aside the report of Francis Child on the grounds specified in the notice, and at the same time moved for a trial by jury.

When it was pointed out that Section 155 of the Practice Act, 3 C. S., page 4101, provides in part:

“The party demanding a trial by jury shall file his exceptions to the report within twenty days after notice that the same is filed, and no other exceptions shall be considered on the trial.”

Judge Smith said that if counsel would consent he would treat the grounds specified in defendant's notice as exceptions. Counsel for both parties then and there accordingly consented and agreed in open court that they be so treated.

At the same time, plaintiff moved, pursuant to its notice, to confirm the report and for allowance to the Referee and for judgment. The Court reserved decision granting right to file briefs and subsequently notified counsel that he had denied defendant's motion and granted plaintiff's motion to confirm the Referee's report.

Counsel for both parties thereafter appeared together before the Court, each submitting a form of rule to be entered. At that time, counsel for the defendant said to the Court that he had not consented that his grounds of objections be treated as exceptions to the Referee's report. Judge Smith then and there said to defendant's counsel: “Do you mean to tell the Court you did not consent to the objections being treated as exceptions?” and emphatically said “I heard you so consent”.

On December 19, 1928, a rule was entered confirming the Referee's report in so far as the findings and determinations therein were within the scope of the order of reference (p. 234, ll. 33-40) and denied defendant's motion to set aside, annul and vacate the report “to the extent aforesaid, and in so far as said report is not covered by the

order of reference said exceptions are sustained" (p. 234, ll. 37-40; p. 235, ll. 1-5). Said rule specifically provided in part as follows (p. 235, ll. 13-20) :

"Further Ordered that this order is made without prejudice to the plaintiff's right to renew its motion to strike out the answer and counterclaim of the defendant."

Thereafter, plaintiff duly served notice of motion (pp. 236-237), returnable January 9, 1929, for an order striking out the answer of the defendant to the fourth count of the complaint and striking out the entire counterclaim of the defendant and for the entry of summary judgment in favor of the plaintiff and against the defendant for the sum of \$7,030.42 with interest on the following grounds:

"1. That said answer to the fourth count of plaintiff's complaint and said counterclaim of the defendant are, and each is, sham and filed for the purpose of delay.

2. That the defendant's counter-claim is sham and/or frivolous and filed as a defense for the purpose of delay.

3. That the defendant has no legal defense to said action on the merits of the case."

As specified in said notice (p. 237, ll. 22-30), the motion was based upon all the papers filed in the action, including the affidavits theretofore served and used on plaintiff's original motion to strike and including the said report of Francis Child which was confirmed as aforesaid by rule, dated December 19, 1928. Defendant opposed the motion. Decision was reserved and the Court

under date of January 23, 1929 (pp. 238-239), handed down its findings as follows:

“On Application to strike out counter-claim and enter judgment on the pleadings.

McDermott, Enright & Carpenter, attorneys for plaintiff, for the motion.

Israel B. Greene, of counsel for defendant, opposed.

Smith, Circuit Court Judge and Supreme Court Commissioner.

It appearing that as the pleadings now stand the answer admits that there is a sum due to the plaintiff from the defendant, and it further appearing that the counter-claim filed by the defendant is sham and frivolous, and leave having heretofore been granted to the plaintiff to renew this motion, the plaintiff may therefore enter final judgment for the sum admitted as due in the answer and have an order striking out the counter-claim.

WILLIAM A. SMITH,
Circuit Court Judge.

January 23, 1929.”

Thereafter, on January 24, 1929, Judge Smith as “Supreme Court Commissioner and Circuit Court Judge to whom the above case had been referred for trial” (p. 240, ll. 17-21) signed the rule (pp. 239-240) striking out the counterclaim of the defendant and ordering judgment in favor of the plaintiff “in the sum of \$8,370.04, being the amount with interest admitted by the defendant’s answer to be due to the plaintiff from the defendant, together with costs to be taxed”. Said rule was actually entered January 25, 1929 (p. 240, l. 22).

It was from this rule and from the rule en-

tered December 19, 1928, upon the Referee's Report that the defendant has appealed (Notice of Appeal, p. 241).

Argument.

POINT I.

The first count of the counterclaim is frivolous and the other counts thereof are sham.

The first count of counterclaim claims due to the defendant \$655.03 for commissions and merchandise returns (p. 9, ll. 20-30). This is the same credit to which defendant claims to be entitled in his answer to the fourth count of the complaint and after the allowance of which credit he admits due from him to the plaintiff on said fourth count of the complaint the sum of \$1,750.53, as aforesaid (Answer, p. 9, ll. 10-15).

When judgment was entered, it was made up of the admitted amount due upon the trade acceptances, aggregating \$5,279.89, and the admitted amount due upon said open account, namely, \$1,750.53 making the total admitted amount due of \$7,030.42 to which interest was added as claimed in the complaint and admitted due by the answer, making the amount of the judgment on January 24, 1929 (the date of the rule therefor), the sum of \$8,370.04 (the rule for Judgment, pp. 239-240). In other words, the defendant seeks twice to obtain his claimed credit of \$655.03, once as a set-off in his answer and again in the first count of his counterclaim. Of course,

he is not lawfully entitled to twice receive the same credit and we accordingly submit that the first count of his counterclaim is frivolous.

The second count of counterclaim claims credit for commissions and merchandise returns of \$643.43 upon \$12,868.74 worth of goods sold by plaintiff to defendant during October, November and December, 1924, and January, 1925 (Counterclaim, p. 9, ll. 30-40; p. 10, ll. 1-10). Plaintiff's answer thereto (p. 21, ll. 26-34) admits the amount of sales and denies that the same was subject to commissions or merchandise returns. In his affidavit used on the motion for judgment, Mr. Hutcheson (p. 62, ll. 1-13) stated that there was a balance due on the merchandise account from the defendant to the plaintiff of the sum of \$1,826.79 (\$1,750.53 of which was admitted by defendant's answer) with interest thereon from December 15, 1925, and against which the defendant is entitled to no credits, offsets or counterclaims.

In none of the affidavits submitted on behalf of the defendant in opposition to plaintiff's motion to strike and enter judgment was any contention made under oath that the sum of \$643.43 or any part thereof was due as a credit to defendant as charged in the second count of his counterclaim. In fact, the only reference thereto in such affidavits is found in that of Mr. Morrissey (p. 35, ll. 29-31), where he says:

“By the second counterclaim I seek to recover \$643.43 for commissions and merchandise returns, sold and delivered by the plaintiff to me.”

The allegation is superfluous as the counterclaim itself alleges what the defendant is seeking to do.

We submit that the second count of the counterclaim is sham.

The third and fourth counts of counterclaim respectively for \$15,000 and \$1,082 are each for alleged damages for breach by plaintiff of the terms of the contract made between the defendant and the Permalife Storage Battery Company, on January 10, 1922, and which contract is alleged by defendant to have been adopted by the Yale Storage Battery Company and thereafter by the plaintiff (Counterclaim, 3rd and 4th counts, pp. 10-13).

Under the rule for reference (p. 73), the Referee was first to take testimony and decide the question of liability upon the so-called Permalife Storage Battery Company contract. The Referee found unfavorably to the defendant that the said contract was never adopted as the contract between the plaintiff and the defendant.

It falls, therefore, and we submit that the third and fourth counts of the counterclaim are sham.

The fifth count of the counterclaim alleges a contract between plaintiff and defendant, dated October 19, 1924, and modified April 20, 1925, and July 25, 1925, by which the plaintiff agreed to extend to defendant a continuing credit first for \$10,000 and later in the sum of only \$7,500 and further alleges that though defendant complied with its terms, plaintiff without just cause stopped and refused to extend a continuing credit and as a result defendant was put to great expense and his general credit injured and that he sustained great damage to his business and the defendant then demands judgment on this count in the sum of \$10,000.

Mr. Hutcheson in his affidavit (p. 63, ll. 1-20), which was used on plaintiff's motion to strike, specifically says:

"It is untrue that plaintiff breached the contract and/or modifications thereof alleged in paragraph 1 of the Fifth Count of defendant's counter-claim and plaintiff never, at any time, refused credit to the defendant in accordance with the terms of said contract and modifications thereof until the defendant failed to pay when due its trade acceptances in favor of plaintiff. I verily believe that the defendant's answer to the Fourth Count of plaintiff's complaint and defendant's counter-claim were filed for the purpose of delaying the day when final judgment should be entered in favor of the plaintiff against defendant, and that the same are without merit and I believe there is no defense to the plaintiff's action."

In none of the affidavits filed in behalf of the defendant was it alleged that the allegations of the fifth count of the counterclaim were true. In fact, the only mention thereof in any of the affidavits submitted for the defendant, is in that of Mr. Morrissey (p. 41, par. 9), which is as follows:

"By the fifth counterclaim, I ask for judgment against the plaintiff for breach of contract for failing to extend to me a continuing credit, according to agreements between the plaintiff and me dated October 27, 1924, and as modified on April 20, 1925, and July 25, 1925."

This, of course, does not attempt to verify that the plaintiff breached the contract therein referred to.

We submit that the fifth count of the counterclaim is sham.

POINT II.

The rule made January 24, 1929, is not erroneous as claimed in Point I of defendant's brief.

Plaintiff's notice of motion to strike and enter summary judgment was returnable before "the Hon. William A. Smith, Circuit Judge sitting as Supreme Court Commissioner, and to whom the above had been referred for trial" (Notice of Motion, p. 236, ll. 30-34), and the rule made pursuant to said notice was signed "Wm. A. Smith, Supreme Court Commissioner and Circuit Court Judge to whom the above case had been referred for trial" (Rule, p. 240, ll. 15-20).

Defendant cites and quotes from Supreme Court Rule 84 to the effect that "no summary judgment shall be entered except by virtue of an order of the Court or a Justice at chambers" * * * and then cites *Milberg v. Keuthe* (1923), 96 N. J. L. 779, 121 A. 713, and *National Surety Co. v. Mulligan* (1929), (not officially reported), 146 A. 372, as holding that a Supreme Court Commissioner is without power to enter summary judgment in a Supreme Court cause. Both of these causes were decided by this Court and so hold, but the latter case, namely, *National Surety Co. v. Mulligan*, cites as a precedent for its decision the former case of *Milberg v. Keuthe*.

In 1926, after the *Milberg* case had been decided, the Legislature passed as a supplement to the Practice Act the following statute which became effective March 22, 1926, and is contained in

Chapter 61 of the Pamphlet Laws of 1926, page 103 :

“1. The New Jersey Supreme Court shall have power, by appropriate rules, revocable or amendable at the pleasure of said Court to grant respectively to such Supreme Court Commissioners as shall respectively from time to time occupy the position of Circuit Court Judge, full control over the pleadings in any matter then pending in said Court, whether prior to or at the time of trial, and any motions addressed thereto, including motions to strike out * * * and if a decision be decisive of the whole case, the commissioner may order judgment for the successful party or make such order as may be just; and the action of the Court upon such motions, may be reviewed on appeal after final judgment.”

As no reference is made to this statute in the Court's opinion in *National Surety Co. v. Mulligan*, *supra*, presumably it was not pointed out to the Court's attention.

Undoubtedly to expedite and facilitate the handling of litigation, which has become so great that the Justices could not hear all of the motions preliminary to trial, the Supreme Court, pursuant to the authority of the aforesaid statute, by its Rule 93, appointed the Circuit Judges as Supreme Court Commissioners with power to hear and determine all motions preliminary to trial as specified in Rules 94 and 95. Said Supreme Court Rules 93 to 95, which became effective in June, 1926, are as follows:

“93. The several Circuit Court Judges of this State heretofore or hereafter appointed Supreme Court Commissioners are hereby severally designated as commis-

sioners for the several counties of this State, with authority to hear and determine all motions preliminary to trial as specified in rules 94 and 95 of this Court, and in such other rules as may be hereafter promulgated in the premises. (June 1926.)

94. Such commissioners respectively, after hearing the parties or their attorneys (but not their evidence), on due notice, shall, on the application of any party, make such order as the Court might make and as may be just in respect to the following matters, subject to an appeal after final judgment:

Objections to pleadings, amendments thereof, striking out pleadings, and leave for additional pleadings.

Settlement of issues.

Bills of particulars.

Admissions.

Interrogatories.

Discovery of and inspection of books, papers and other documents.

Examination of parties before trial.

Any other interlocutory matter preliminary to and in preparation for trial. (Rule 63, Pr. Act 1912, as amended June, 1926.)

95. Applications or motions in the cause before trial may be heard and determined by the commissioners on two days' notice. (Rule 64, Pr. Act 1912, as amended June, 1926.)"

The Supreme Court having appointed the Circuit Judges Supreme Court Commissioners pursuant to authorization under the afore-quoted act, the hereinabove italicized portion of said act specifically authorizes the commissioner to order judgment if a decision be decisive of the whole case,

and it was in this matter. We therefore with deference respectfully urge and submit that a Supreme Court Commissioner is by virtue of the statute authorized to enter judgment.

If the Court should decide that our contention in this regard is wrong, it is clear that the commissioner has power to strike the pleadings. He struck the counterclaim and there was admittedly due by defendant's answer the whole amount for which the rule for judgment was entered.

Section 27 of the 1912 Practice Act, P. L. 1912, page 377, at page 382, is as follows:

"No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party."

See also *National Surety Co. v. Mulligan* (E. & A. 1929), 146 A. 372, at page 373.

It is therefore submitted that the rule for judgment is not erroneous but should be sustained.

POINT III.

The rule made January 24, 1929, in so far as it struck out the defendant's counterclaim is not erroneous as contended under Point II of appellant's brief.

1. *Judge Smith had power either as a Circuit Court Judge or as a Supreme Court Commissioner to strike the counterclaim.*

In *E. O. Painter, etc., Co. v. Kil-Tone Co.*, 103 N. J. L. (Supreme Court 1927) 320, Mr. Justice Lloyd at page 321 says:

“Rules 93, 94 and 95 of the Supreme Court were amended in June of last year in conformity with the amendment of the Procedure Act (Pamph. L. 1926, p. 103) to meet just such a situation as is here presented by permitting judges of the Circuit Court (before one of whom the case in its entirety must ultimately be heard) to hear and determine the propriety and validity of pleadings. Such amendment of the rules was made necessary by the enormous burden of work (ever increasing) upon the justices of the Supreme Court due to the growth of population, industry and wealth in the state and the consequent litigation.”

2. *Reply to points raised by the defendant.*

The defendant's grounds for contending that the striking of the counterclaim was erroneous are set forth in subdivisions A to F inclusive of Point II of his brief. We shall now discuss them in the order therein mentioned.

A. *The Circuit Court never adjudged that the counterclaim was not sham nor frivolous.*

Upon the defendant's first motion to strike Judge Smith handed down his opinion (p. 71), which has been hereinabove quoted. The reference was ordered according to the opinion because an issue of fact was raised as to the adoption by the parties herein of the said Permalife Storage Battery Company contract (Opinion, p. 71, ll. 17-23).

The rule for reference (pp. 72-73) which was prepared by defendant's counsel, makes no adjudication or finding as to whether the defendant's au-

swer or counterclaim is sham or not, and, as appears by its opinion, the Court had not decided at the time of making the rule of reference whether it was sham or not. The reference was made solely because of the question of fact raised as to the adoption of the Permalife contract and the Referee found that said contract had not been adopted by the parties herein. The Court, by its rule dated December 19, 1928, confirmed this finding and granted leave to plaintiff to renew its motion to strike the answer and counterclaim (Rule, p. 235, ll. 13-16; Findings, p. 238, ll. 35-40).

B. *The counterclaim in this instance was both sham and frivolous.*

Defendant contends that a pleading cannot be both sham and frivolous at the same time. That is true with respect to any particular count of a pleading. The counterclaim here consisted of five counts and as shown under Point 1, *supra*, the first count is frivolous and the third, fourth and fifth counts are sham.

C. *The Supreme Court Commissioner has power to strike out a sham counterclaim.*

There is no doubt that a Supreme Court Commissioner is empowered to strike out pleadings. That question has been treated above under subdivision 1 of Point III.

The defendant contends, however, that though a Supreme Court Commissioner may have power to strike a frivolous pleading, he cannot strike a sham pleading because of the parenthetical insert in Rule 94. This rule provides:

“Such commissioners, respectively, after

hearing the parties or their attorneys (but not their evidence) on due notice shall on the application of any party make such order as the Court might make and as may be *just* in respect to * * * striking out pleadings."

The words in parentheses "(but not their evidence)" must presumably mean testimony taken before such commissioner. It does not mean *ex parte* affidavits which is the method provided for attacking sham pleadings. Otherwise, the very purpose of the rule, "which was made necessary by the enormous burden of work (ever increasing) upon the Justices of the Supreme Court due to the growth of population, industry and wealth in the State and the consequent litigation", *E. O. Painter, etc., Co. v. Kil-Tone Co.*, 103 N. J. L. 320, 321, would be thwarted.

The defendant next contends that if the commissioner has power to strike sham pleas or answers by virtue of Supreme Court Rule 80, that does not give him power to strike a sham counterclaim which was first conferred upon the Court on April 3, 1928, by Chapter 151, P. L. 1928, page 306.

The rules authorize the commissioner to strike pleadings. Chapter 151 of the Laws of 1928, page 306, which became effective April 3, 1928, amends Sections 15 and 16 of the 1912 Practice Act. With reference to counterclaims, said 1928 amendment to Section 15 reads as follows:

"(b) Subject to rules, any frivolous or sham complaint, or any frivolous or sham counterclaim heretofore filed, or which may hereafter be filed, or any portion or count of any such complaint or counterclaim, may be struck out" * * *

"Subject to rules" refers either to rules already in existence or to rules thereafter to be passed. Any other construction would be absurd.

We contend that even if the 1928 act had never been passed, this sham counterclaim, which was interposed as a defense for the purpose of delay, could be struck out under authority to strike a sham defense.

D. The rule striking the counterclaim would be legal though signed by Judge Smith solely as Circuit Court Judge.

The rule was signed "Wm. A. Smith, Supreme Court Commissioner and Circuit Court Judge, to whom the above case had been referred for trial" (Rule, p. 240, ll. 16-20). We have already pointed out under subdivision 1, Point III, *supra*, that the rule could be made by the Reference Judge either as Supreme Court Commissioner or as Circuit Court Judge. He was both and signed the rule as both.

E. The rule is not illegal as depriving the defendant of trial by jury.

The defendant applied "for a rule appointing a referee to hear the cause and report on all matters of account between the parties hereto and the amount due from one party to the other" (Notice of Motion, p. 24). The rule of reference clearly covered his claims advanced in the third and fourth counts of the defendant's counterclaim. The defendant did not at the time of the ordering of the reference enter in the minutes his reservation of a right to trial by jury. Had he done so, nothing could have stopped his procuring such a trial after the Referee's report, unfavorable to him, was made.

If the rule of reference was not broad enough to cover the claim set up in the first, second and fifth counts of defendant's counterclaim, it is elemental and sufficient to say that striking either a frivolous or sham pleading is not an infringement of the right to trial by jury. In *National Surety Company v. Mulligan* (not officially reported), 146 Atl. (E. & A. 1929) 372, Chancellor Walker, stating the opinion of this Court at page 373, says:

“Defendant-appellant claims that she is entitled to have the facts set up in her answer tried by a jury. She has no such right. In *Eisle & King v. Raphael*, 90 N. J. L. 219, at page 223, 101 A. 200, 202, this Court said:

‘Striking out a sham or frivolous plea is not an infringement of the right of trial by jury.’

See also *Wittemann v. Giele*, 99 N. J. L. 478, 123 A. 716.”

F. *The defendant's counterclaim is both sham and frivolous.*

Counsel for appellant states that neither the notice of motion, nor the commissioner's memorandum, nor his order striking the counterclaim has apprised him in what respects the counterclaim is sham and frivolous. We know of no law or practice requiring them or any of them so to do. The first count of the counterclaim was frivolous and the remaining counts thereof sham for the reasons stated under Point I, *supra*.

POINT IV.

The rule made December 19, 1928, upon the Referee's report is not erroneous.

Appellant's counsel contends that the above rule was erroneous for the reasons set forth under subdivisions A to D inclusive of Point III of his brief. We shall reply to his reasons in the order advanced.

A. *Judge Smith had power to enter said rule.*

Appellant first contends that the rule is erroneous because it was signed "Wm. A. Smith, Circuit Judge sitting as Supreme Court Commissioner" (p. 235, ll. 18-20). He admits that the Circuit Judge has power to confirm but claims that the further descriptive phrase following the words "Circuit Judge" nullifies the rule. We submit that appellant's contention is captious and ridiculous.

Judge Smith signed the rule and the further descriptive clause following his title as "Circuit Judge" cannot nullify the rule even if it were admitted, but it is not, that a Supreme Court Commissioner could not confirm. The essential thing was ruling upon the report and "no judgment shall be reversed or a new trial granted for error of procedure, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party (Practice Act (1912) P. L. 377, Section 27)." *National Surety Co. v. Mulligan* (not officially reported), 146 A. (E. & A. 1929) 372, 373.

Appellant next contends that the recital of the

rule contains two misstatements. First, that the plaintiff's motion to strike was denied "on condition that the case be referred to a referee". This is not a misstatement. An examination of the Court's opinion (p. 71) and of the rule of reference (pp. 72-73) both disclose that no finding was made at the time as to whether the counterclaim was sham or not. The Court found a question of fact raised as to the adoption of the Permalife contract, and when the Referee found that the contract had not been adopted, the Court properly granted the right to plaintiff to renew motion to strike. In other words, the rule of reference to Francis Child, made April 1, 1927 (pp. 72-73), and denying at that time plaintiff's motion to strike, merely did so because of the question of fact raised regarding the adoption of the Permalife contract. That question was referred and the Referee found that it had not been adopted.

Secondly, appellant contends that there was a misstatement in that the order of confirmation recites that it was consented "in open Court that the grounds set forth in defendant's notice of motion to set aside the report) might be treated as exceptions to the report".

This was not a misstatement but the truth. As pointed out above in the statement of facts when, upon the settling of the form of the rule, Mr. Greene denied, that he had so consented, Judge Smith in open Court said: "Why, I heard you so consent".

B. The Referee's report is not contrary to law and the clear weight of the evidence.

The appellant under subdivision B at page 17 of his brief attacks the Referee's report as being

contrary to law and the weight of the evidence. Though the Referee's report is clearly not contrary to law nor clear weight of the evidence, appellant is certainly advancing an anomalous contention.

In the first place, he consented in open Court that the grounds set forth in his notice of motion to vacate and set aside the Referee's report be treated as exceptions to the report (Rule, p. 234, ll. 25-28). He had not entered in the minutes a reservation of a right to trial by jury. Under those conditions he was not entitled to a jury trial and had no right of appeal from the Court's ruling on said exceptions.

He now contends that he did not so consent, but in any event he admits in the first paragraph of his brief under subdivision B at page 17, that the report of a referee can only be objected to by opposition to its confirmation, or by motion to set it aside and that the rulings of the Court thereon are not open to objection nor subject to be reviewed on appeal to this Court. His statement of the law in that regard is correct.

In *Consolidated Electric Lamp Co. v. The Lux Manufacturing Company*, 94 N. J. L. 1 (Supreme Court 1920), Mr. Chief Justice Gummere, at page 3, said:

"It is manifest from the statutory provision that a party who desires to place himself in a position where the report of the referee shall not be final and conclusive as to him, upon being confirmed by the court, can only do so by entering in the minutes *at the time of ordering the reference* his reservation of a right to trial by jury, and that if he fails to do this a demand made by him after the report is filed for such a trial will be bootless, not-

withstanding that he shall have made it at the same term in which the report is filed. The language of the statute is perfectly plain, and does not call for judicial construction. The dissent to have vitality must be entered in the minutes at the time when the rule of reference is made, and not a week, or month, or any longer time thereafter."

Furthermore, defendant can not now complain of any impropriety of the rule of reference which was entered on his motion, for he proceeded to trial before the Referee without objection.

In *New York Metal Ceiling Co. v. Kiernan* (E. & A.), 73 N. J. L. 763, Mr. Justice Swayze, at page 765, says:

"If the character of the plaintiff's claim is such that matters of account are in controversy, a reference is proper" * * *

"In behalf of the plaintiff it may fairly be said that the defendant, by proceeding to trial before the Referee, waived any objection on this score."

In view of the fact that the Referee's report is not subject to review on appeal, we deem it unnecessary to burden the Court with discussing the testimony taken before the Referee, an examination of which shows that the Referee's findings as confirmed were fully supported thereby.

The same rule applies with respect to the objections raised under subdivisions C and D of Point III of appellant's brief.

Under the former subdivision, he contends that the Referee erred in rejecting the affidavit of Uchaez. There was no error in this ruling. The affidavit does not even show that it was executed or even sworn to in the State of New Jersey.

Appellant next contends at page 28 of his brief, that the Referee committed reversible error for overruling, upon the objection of plaintiff's counsel thereto, the following question asked of the president of the plaintiff corporation:

"What financial interest have you in this plaintiff corporation?"

(p. 160, ll. 29-31). Of course, this was not a proper question, but in any event it was answered. After the objection had been sustained and exception granted, the examination proceeded as follows (p. 160, ll. 35-40; p. 161, ll. 1-28):

"The Referee: I will permit you to ask him if he has stock in this corporation, but the amount thereof I will not. Ask him if he is a stockholder.

The Witness: Yes.

Q. Are you a majority or minority? A. I am a minority.

Mr. Carpenter: I object as immaterial.

Q. Have you personally any financial interest in the outcome of this suit? A. I don't think I have. The amount of this claim is infinitesimal.

Mr. Greene: I ask that the last part be stricken out.

Q. You are the attorney for the plaintiff corporation, who forwarded this case for trial to Messrs. McDermott, Enright & Carpenter? A. Yes.

Q. You are very anxious to win this case? A. I want to find out if Mr. Morrissey can get \$7,000 worth of our goods and not pay for them.

Mr. Greene: I object to the answer.

The Referee: I don't think it is a proper question. I will rule it out.

Mr. Greene: I ask for an exception."

Under subdivision D, at page 28 of his brief, the appellant contends that the Referee admitted illegal evidence in allowing, against defendant's objection, the witness Plante to answer the question, "What was your trading arrangement with the Morrissey Storage Battery Company" (p. 144, ll. 23-24). The answer is as follows (p. 145, ll. 1-10):

"The Witness: Between the Yale Electric Company?

Q. Yes. A. The only knowledge I had was that he was a jobber selling Yale Electric products, up to the time the contract of October, 1924, that I negotiated with him."

That the words "your trading arrangement" did not refer to any individual arrangement of Mr. Plante is made clear by the answer to the witness's question which followed.

CONCLUSION.

For the reasons hereinabove urged, we respectfully submit that the defendant's appeal should be dismissed.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Plaintiff-Respondent.