INDEX

EXHIBITS

AMENDED STATE OF DEMAND

Elizabeth District Court

JOHN H. ROLFE and ISAIAH ROLFE, Trading as Standard Non-Skid Grip Company, Plaintiff. —vs— EMIL T. FINGERHUT, Defendant.	ON CONTRACT Amended State of Demand.

The Plaintiff demands from the Defendant, the sum of Five Hundred ($500) Dollars upon a certain promissory note of which the Defendant E. T. Fingerhut is the maker, and of which the following is a true copy:

$415.25 Plainfield, N. J., Jan. 6, 1922.

Thirty days after date I promise to pay to the order of Standard Non-Skid Grip Co.,

Four hundred and fifteen.....25/100 Dollars at the City National Bank of Plainfield, N. J., Value received in Merchandise.

Due 2/6/222 E. T. Fingerhut.

Judgment will e claimed for the sum of $415.25 together with lawful interest and costs of suit.

WHITTEMORE & McLEAN
Attys. for Plaintiff.

DOCKET ENTRIES

STATE OF NEW JERSEY
COUNTY OF UNION } ss

In the District Court of the City of Elizabeth

JOHN H. ROLFE and
ISIAH ROLFE,
Trading as Standard
Non-Skid Grip Co.
Plaintiff.

—vs—

EMIL T. FINGERHUT,
Defendant.

In an action
at-law
Demand, $500.00
Att'y of Pl'f,
Vail & McLean
Att'y of Deft.,
E. Hoos

A Summons was issued in the above stated cause Feb. 18th, A. D. 1922, returnable Feb. 27th, A. D. 1922, at 10 o'clock A. M., and was returned by the Constable as follows:

I served the within Summons Feb. 21, 1922, on the defendant by reading it to him and giving him a copy

THOMAS J. BURKE, Constable.

Demand filed Feb. 18-1922. Amended State of Demand Filed March 9-1922. Demand for Jury by defendant Feb. 24-1922. Adjourned to March, 9-23-1922. John H. Saxon was sworn as Stenographer. The following were sworn as Jurors: Ferdinand Christensen, Steve Langauer, A. A. Block, Steve

Docket Entries

Beslic, Jos. B. Clamer, Chas. Haug, F. Hass, Solomon Jacobi, Felix Detriolo, Siman Mack, Jos. Soltys, & Walter Adams.

John H. Rolfe and Russell Rolfe, were sworn for the plaintiffs. Exhibits P 1-2 were put in evidence by the plaintiffs. Emil T. Fingerhut, Walter Price, Harold Haley, Morris Gortin, & Oscar Fingerhut, were sworn for the defendant. Exhibits D 1-2-3 were put in evidence by the defendant Counsel summed up, Court charged Jury, Jury retired and returned with a veridct in favor of the said plaintiffs and against the said defendant in the sum of Four hundred and Twenty-five ($425.15) Dollars and Fifteen cents and costs. Court gave judgment in favor of the said plaintiffs and against the said defendant in the sum of Four hundred and Twenty-five ($425.15) Dollars and Fifteen cents and costs.

$425.15

Notice of Appeal filed, April 7-1922.

Cash deposit for security covering appeal filed April 6-1922.

TESTIMONY

Elizabeth District Court

Union County Court House
Elizabeth, New Jersey

JOHN H. ROLFE and
ISIAH ROLFE,
Trading as Standard
Non-Skid Grip Company.
Plaintiff.

—vs—

EMIL T. FINGERHUT,
Defendant.

Transcript of stenographer's notes of evidence in the above entitled matter taken before HON. CHARLES MORGAN, District Court Judge, at the Elizabeth District Court, Union County Court House, Elizabeth, New Jersey, on the 23rd day of March, A. D. 1922 at 10 a. m.

APPEARANCES:

MESSRS. VALE & McLEAN,
(Mr. Emerson appearing) For the Plaintiff.

EMIL J. HOOS, Esq. For the Defendant.

THE COURT: You may proceed.

John H. Rolfe Direct—

MR. EMERSON: If Your Honor please, the plaintiff manufactures chains for automobiles, and in November they made a contract to deliver a quantity of chains to the defendant, manufactured by the plaintiff. The first batch was to be delivered as soon as possible. On January a part of them were delivered and a note for $415.25 was given by the defendant to the plaintiff, dated January the 6th, 1922, for thirty days, "value received in merchandise." At the time the goods were delivered the defendant stated that he did not want the goods. He did not inform the plaintiff before delivery, but upon the delivery he advised them that he did not want the goods. He accepted the goods, however, and gave the note in payment. Before the note came due he stopped payment and this action is brought for the note. It also appears that at the time of delivery the plaintiff advised the defendant that he would help him get salesmen and help him to sell the chains and give him the exclusive agency in the City of Plainfield.

(Opening statement on behalf of the defendant)

JOHN H. ROLFE, one of the plaintiffs, sworn.

DIRECT EXAMINATION BY MR. EMERSON:

Q. What is your business. A. Manufacturing and selling skid chains and devices for automobiles and trucks.

Q. Who are you associated with? A. The Standard Non-Skid Grip Company.

Q. Are you a member of the partnership comprising the Company, A. Yes, sir.

John H. Rolfe Direct—

Q. Do you know the defendant in this suit? A. Yes.

Q. Did you conduct transactions with him? A. Yes.

Q. I show you this note. Whose note is that? A. It was given to me by Mr. Fingerhut in payment on merchandise delivered to him on January 6th.

Q. Did you see him sign that? A. Yes, sir.

Q. What was sold to him? A. Two hundred sets of Rolfe Hoops, and another order to be delivered later. The first order was to be delivered as soon as possible and the other after having started to dispose of these—

Q. What is that book I show you? A. My order book.

Q. Turn to the order signed by Mr. Fingerhut. A. Yes, sir.

Q. Read what is in that order. A. Oredr No. 102, November 4th, 1921, made out to the Standard Non-Skid Grip Company, Newark, New Jersey, sold to the Economy Vulcanizing Company, Plainfield, shipped by express C. O. D., Salesman John H. Rolfe, Delivery as soon as possible, two hundred sets Rolfe Chain Hoops at $5.00, and two hundred sets of chains, same size, corresponding to hoops, discount 40%, delivery one hundred sets as soon as possible and one hundred sets about January 15th, 1922. Ten per cent additional discount to case lot shipment, fifty sets to dealers. This order is placed with the understanding that the undersigned is to be the exclusive agent in the City of Plainfield, New Jersey, as agreed. J. H. Rolfe."

John H. Rolfe Direct—

Q. Did you sign that? A. Yes, sir.

Q. What part of the order was delivered? A. The first one hundred sets of hoops.

Q. When was that delivered? A. January the 6th.

Q. What was the amount of that order? A. $415.25.

Q. Being the same as the note?. A. No, there was a credit allowance for a tire which I purchased from him and he took it off the bill.

MR. HOOS: I object to the testimony as to the allowance on the tire. They sued on the note.

MR. EMERSON: I just wanted to show it. Counsel has intimated his defense and I am anticipating what he is going to prove. It is just a question of calling him back anyway.

THE COURT: Do you want the Court to rule on it?

MR. HOOS: Yes.

THE COURT: Objection sustained.

Q. What was this note given for? A. In payment for the one hundred sets of grips and chains.

Q. Were you present when this order was delivered? A. Yes, sir, I delivered it.

Q. Who was with you? A. My brother.

John H. Rolfe Direct—

Q. What is his name? A. Russell Rolfe.

Q. What took place when you delivered these chains. A. I took the chains over to Plainfield. On getting there Mr. Fingerhut seemed a little surprised to see me. I came in with the merchandise and he rather hesitated about taking it on account of, he said we were late in the season, and after explaining the situation to him, that it was not as late as he thought it was, due to his not being familiar with the business, he agreed to take the merchandise and told me during the converastion that one of the reasons why he was not ready to take it was that he did not have sufficient cash and so I suggested, to make it as lenient as I could that I would take a note and he gave me the note in payment for the merchandise.

Q. After the note was given what transpired? A. After the note was given by Fingerhut he continued to talk about the sales possiblity, we both did, and I suggested that I would send someone over to Plainfield to let him have the sales talk on the merchandise, as it was a new line and would also assist him in securing salesmen to dispose of the merchandise That seemed to be satisfactory to him.

Q. Did you make any representation to him,— this all transpired after the note was given—

MR. HOOS: I object to that.

THE COURT: Objection sustained. The question is leading.

Q. Was there any representation made by you

as to guaranteeing the chains or any special qualifications that they had?

MR. HOOS: I object to that. It is on the same line, suggesting to the witness.

THE COURT: Objection sustained.

Q. Did you make any guarantees at the time of the delivery A. No guarantee. They were delivered at that time.

Q. You stated that you would send someone to assist the defendant. Did you do that? A. Yes.

Q. Who did you send? A. My brother.

Q. Your brother Russell? A. Yes, sir.

Q. That is all. Did you sell the balance of the order? A. No, sir.

Q. Why not? A. Because Mr. Fingerhut had not requested the final shipment up until the time it was due and when he stopped payment on the note, and he has not requested the additional shipment and I would not ship it anyway if he would not pay for the first lot.

THE COURT: Is the note offered in evidence?

MR. EMERSON: Yes.

MR. HOOS: I would like to cross examine him first on that.

John H. Rolfe, cross—

CROSS EXAMINATION BY MR. HOOS:

Q. Who was present, Mr. Rolfe, when this note was signed, beside yourself and Fingerhut. A. My brother.

Q. Is he in Court? A. Yes, sir.

Q. Who else? A. Someone out in the front room,, but I don't recall anybody being in the back room.

Q. What do you mean by the front room? A. His store is divided. There is a store, and then in back of that is the living quarters and he keeps his desk there and transacts his confidential business inside.

Q. This took place where the desk is? , A. Yes sir.

Q. You are positive there was no one else present but your brother and yourself and Fingerhut? A. There had been a gentleman in before the deal was closed, before the note was given, but he went out before the note was signed.

Q. Are you sure about that? A. I am not positive about that.

Q. You would not say that he was not there? A. No, sir.

THE COURT: Are you through with your cross examination on the note?

MR. HOOS: Yes.

THE COURT: The note will be received

John H. Rolfe, cross—

in evidence and an exception granted.

MR. HOOS: Exception.

Q. You said that Fingerhut objected to the goods coming late. Isn't it a fact that he told you you that you agreed to deliver the goods between November the 5th and December 1st?
A. No, sir.

MR. EMERSON: I object to that as leading.

MR. HOOS: It is cross examination.

THE COURT: Objection over ruled.

Q. Didn't you so say when you took the order?
A. No, sir.

Q. Positive? A. No.

Q. What do you mean by "as soon as possible"? A. I explained that we were just starting to manufacture this merchandise and there were manufacturing elements which came in and I could not guarantee any date, but I would do the best I could by him and get it to him as soon as possible.

Q. You told him that it was a new thing and the dies were being made. A. Yes, and we practically completed—

Q. Isn't it a fact that at the time this note was signed and before, that you told Fingerhut if he signed the note and did not dispose of these goods that you would both supply him with salesman, and,

John H. Rolfe, cross—

if he did not sell them, take them off his hands and send them to Texas? A. No, sir; I didn't say so.

Q. What did you mean when you said that Fingerhut seemed surprised to see you? A. Because it was a cold night and this was around six o'clock. I left Newark around three and I had two blow outs on account of the load on the truck. And I came in late and it was stormy, and I came in myself, rather late.

Q. He was surprised to see you on that account? A. I presume that that was his surprise, yes.

Q. You did state that you said you would procure salesmen for Fingerhut?

MR. EMERSON: I object to that. He didn't say that.

THE COURT: Objection sustained. We will refer to the record.

(Record read.)

MR. HOOS: I renew the question.

THE COURT: He said that he would help him secure salesmen. He didn't say that he would procure them.

Q. What did you do to help to procure the salesmen? A. I sent my brother over to Plainfield to take care of that, to see what he could do.

Q. Is that all A. Yes.

John H. Rolfe, cross—

Q. Do you know whether or not any salesmen were procured? A. The report was to me that they were.

Q. Did he say how many?

MR. EMERSON: This is not from the witness' knowledge and I object to the question.

THE COURT: Objection sustained.

Q. Do you know how many were procured? A. Only what was reported to me that they had two men promised to go to work for him.

Q. Did you later learn that there was no men procured? A. Not directly. I heard indirectly.

Q. Didn't he tell you that no salesmen were procured? A. About a month or six weeks later he did.

Q. He did? A. Yes, sir.

Q. Didin't he write you a letter about it? A. Yes.

Q. You have the original with you? A. No, sir.

MR. HOOS: I will offer this copy then.

MR. EMERSON: No objection.

Q. I show you a copy of a letter dated 1/24, and ask you if you received the original of that? A. I remember getting the original of that.

John H. Rolfe, re-direct—

MR. HOOS: I would like to have that marked for identification.

THE COURT: Mark it D-1 for identification.

Q. Who are the members of your firm? A. My father and myself.

Q. You are not incorporated A. No, sir.

Q. You have filed your certificate to do business? A. Yes, sir, in Essex County.

MR. HOOS: That is all.

REDIRECT EXAMINATION BY MR. EMERSON:

Q. When did you receive this letter? A. I don't recall, but judging from the date I would say it must have been a few days later than the 24th.

Q. When were the goods delivered? A. January the 6th.

MR. EMERSON: I would like to offer this order in evidence.

MR. HOOS: And I offer the letter in evidence.

THE COURT: Mark the letter D-1 and the Book P-1.

Russell Rolfe, direct—

RUSSELL ROLFE, a witness on behalf of the plaintiff, sworn.

DIRECT EXAMINATION BY MR .EMERSON:

Q. Where do you live? A. Metuchen.

Q. By whom are you employed? A. The Standard Auto Grip Company.

Q. In what capacity? A. Clerk and assisting in any way I can.

Q. Do you know the defendant, Mr. Fingerhut? A. Yes.

Q. When did you first meet him? A. I don't remember the date, but it was on the date this order was taken.

Q. Were you present when the order was given by him? A. Yes.

Q. Was there any time mentioned for the delivery of the goods excepting the time mentioned in the order?

MR. HOOS: I object to that.

THE COURT: Objection sustained.

When were the goods delivered A. As I remember it was January the 6th, the day of the note. They were delivered the day that note was signed.

Q. Were you with your brother when he delivered them? A. Yes.

Q. What transpired at that time. Tell the

Russell Rolfe, direct—

Court and Jury what happened. A. We delivered the goods to Fingerhut and he was surprised to see us there and some conversation occurred between my brother and Fingerhut which I don't know. Finally the note was brought up as payment and Mr. Fingerhut went to his desk, and my brother and I went in and the note was signed and I witnessed the signing.

Q. Was anybody present when the note was signed? A. I don't remember.

Q. After the note was signed do you know what the note was given for? A. Yes, sir.

Q. What for? A. In payment for the hundred sets of grips with chains which were delivered on that date.

Q. Did anything else transpire after the note was given? A. No. We started for home a very short time after that. We were out in the front room and I put my hat and coat on and there was a short conversation between Mr. Fingerhut and my brother and I remember him leaving and my brother said "If you cannot find salesmen, we will do what we can to get salemen for you and I will let my brother come over and help you find them and give them the sales talk."

Q. Did you ever go to Plainfield to see Mr. Fingerhut? A. Yes, sir.

Q. When did you go? A. I don't remember the date.

Q. Do you remember about when? A. Approximately a week or ten days after.

Russell Rolfe, direct—

Q. What did you do. Did you call on Mr. Fingerhut? A. Yes, sir.

Q. Then what did you do? A. I told Mr. Fingerhut that I had come over to try and procure salesmen and to help him get rid of his merchandise. I went to the Y. M. C. A. and different organizations and I finally found one man through the American Legion, and I dropped a card to him and made an appointment with him for the following day.

Q. What was his name? A. Erlich.

Q. Did you meet him? A. Yes, sir.

Q. Did you take him to Fingerhut? A. Yes, sir, I did. He came to Fingerhut's office and I met him there.

Q. Did you make the appointment at the store with him? A. Yes, sir.

Q. What transpired then? A. When he came in I happened to be there exactly at the time he came in, and I proceeded to show him what the merchandise was, and told him what we wanted, wanted a salesman to see the individual car owners as well as the fleet owners to sell Fingerhut's stock of our merchandise and this man said that he liked the merchandise and it was a fair proposition, but he was at that time employed by the American Legion selling some sort of a ticket and would not be free until the following Tuesday, when he said he would come in to see Fingerhut and go to work.

Q. What did Fingerhut say? A. I don't remember what it was; very little, and acted very indifferent to the whole transaction.

Russell Rolfe, direct—

Q. Do you remember what he said to this man, to Erlich? A. No, excepting that it would be all right to go ahead and sell it.

Q. Did he make any arrangements with him? A. I made the arrangement that he would be there on the following Tuesday when he had finished with the American Legion and would be there when he finished.

Q. What was Mr. Fingerhut's attitude toward Erlich? A. Very indifferent. He did not seem to take any interest in what I was doing or trying to do.

MR. HOOS: I move that that be stricken out. I don't see how it is material.

THE COURT: It is very material. He was interested in the selling.

MR. HOOS: This is his conclusion, the conclusion of the witness, as to what the man's attitude was.

THE COURT: He had a right to conclude. He was there to interest the salesman.

MR. HOOS: Exception.

THE COURT: The exception will be granted.

Q. Do you know if Mr. Erlich—did you get any other help for Mr. Fingerhut? A. Not at that particular time. At a later date. Two or three

days later I got another man from Westfield. I don't remember his name. The way I got his name was through my brother.

Q. It don't make any difference how you got him. Did you procure another man or bring a man in. A. Fingerhut saw this man on his way home from Newark one day and I was to meet him at Fingerhut's office the following morning, which I did. The man came there and looked the merchandise over and was to go ahead but he had another proposition over in New York, and if he didn't procure that he would go ahead with Fingerhut's.

Q. What was Mr. Fingerhut's attitude toward the other man? A. Exceptionally indifferent. As I recollect I don't think he even came into the room where he was. He went out of the room when the man came in.

MR. HOOS: I move that be stricken as a conclusion.

THE COURT: For the same reason stated it will remain.

MR. HOOS: Exception.

Q. Did you inform Mr. Fingerhut who the gentleman was and what his office was? A. Yes.

Q. How many times did you call on Mr. Fingerhut all told? How many days did you spend at his place? A. As I recollect it was part of three days.

CROSS EXAMINATION BY MR. HOOS:

Q. As a result of this did you have anybody go

to work on the chains? A. No, sir.

Q. What time of the month was it when you went to Fingerhut's place? A. About the middle of the month.

Q. Before the 24th of January when the letter was written? A. Yes.

Q. Directing your attention to the fact that nothing transpired after the note was taken, the main conversation between your brother and Mr. Fingerhut took place before the note was signed. A. As I recollect it.

Q. What was said after the note was signed? That was general conversation as your brother left the place. Is that true? A. I presume so.

Q. You didn't hear the conversation? A. No, sir.

Q. After the note was signed? A. (Either before or after.)

Q. Where did you get all your knowledge from as to the details if you didn't hear the conversation? A. The details I testified to were the orders I received from my brother after we left there.

Q. Your brother told you. A. That I was to go to Plainfield to procure the salesmen.

Q. And your brother told you the details after you left? A. Yes, sir.

MR. HOOS: Now I move for all that testimony to be stricken out on the ground of hearsay.

Russell Rolfe, cross—

THE COURT: Surely it was not hearsay what transpired in his presence. What he said to his brother and what his brother said to him outside of the presence of the defendant will be stricken out.

MR. HOOS: The witness has testified that he heard none of the conversation either before or after the note was signed.

THE COURT: The Jury will be instructed that the testimony as to events which did not take place in the presence of the defendant will be stricken out.

Q. You have said that you heard none of the conversation either before or after the note was signed. A. I only heard the part of the conversation that my attention was called to and that was the signing of the note, when they went in to sign the note. I was present at that particular time and then I said I went out in the front room to put on my hat and coat. My brother and Mr. Fingerhut lingered and when they came to the front part of the store I overheard my brother say that he would send a man to help him procure salesmen. That was what I was to do.

Q. The rest of it your brother told you on the way to Newark.

MR. EMERSON: I must insist that counsel be specific.

THE COURT: The Court will instruct the Jury to disregard the conversation of the wit-

Motion for non-suit—

ness that did not take place in the presence of the defendant.

Q. Did you hear anything said about sizes? A. No, sir.

Q. Did you see Fingerhut sign this order? A. Yes, sir.

Q. You were present that day? A. Yes.

Q. Did you hear all the conversation that day? A. I heard it, yes, sir, on that day.

Q. Who was present on that day outside of yourself, your brother and Fingerhut? A. As I recollect it there was—

Q. Do you know? A. Yes, I know there was a man there part of the time, that Mr. Fingerhut had in his store to sell for him.

Q. Is he here in Court? A. Yes, sir.

Q. Going back to the time the note was signed was anybody there besides your brother and Fingerhut and yourself? A. Part of the time the second man from the end over there, was there.

MR. EMERSON: That is all. The plaintiff rests.

MR. HOOS: I move for a verdict of non-suit as to the defendant on the ground that the testimony of the plaintiff's own witnesses is contradictory. They have not sustained the burden of proof on the consideration. One witness testifies that the entire representations made were made after the signing of the note

Emil F. Fingerhut, direct—

and the brother testifies that all the conversation took place before with the exception of stating that he would send down men. That is contradictory. The same witness said that he made the representations afterward and the corroborating witness says before. I think the plaintiff has failed to sustain the burden of proof and he has contradicted himself.

THE COURT: The motion will be denied.

MR. HOOS: Exception.

DEFENDANT'S CASE.

EMIL F. FINGERHUT, the defendant sworn.

DIRECT EXAMINATION BY MR. HOOS:

Q. You are the defendant in this case? A. Yes, sir.

Q. What is your business? A. I am selling tires and tubes and eccessories and repairing tires.

Q. What is the name of your firm? A. The Economy Vulcanizing Company.

Q. Have you filed your certificate? A. Yes, sir.

Q. Where do you conduct your business? A. 208 Watchung Avenue, Plainfield.

Q. How long have you been in that business? A. Thirty-two years.

Emil F. Fingerhut, direct—

Q. Do you know the plaintiff in this case? A. Yes, sir.

Q. Do you know both of them? A. Yes, sir.

Q. How did you come to know them? A. Both of them came in on November 4th and they had a sample of the new chains.

Q. You recognize the sample. (producing chains). A. Yes, sir.

Q. Is that it? A. Yes, sir. They offered me a proposition on the chains.

Q. Who did? A. Mr. John Rolfe.

Q. What was his proposition? A. Mr. Rolfe told me that these were a new sort of chain. That they were going to put out and that it was a very good proposition, and that it was for my own benefit to handle them. They said they would give me the exclusive rights for Plainfield.

Q. When was it that this conversation took place? A. On November the 4th.

Q. Who was present when it took place? A. Present was Mr. Rolfe, Mr. Walter Price and myself.

Q. At that time they were at your place of business. A. Yes, sir.

Q. What else was said? A. I told him I realized it was a new proposition that I would probably have a hard time to sell them and I told him I was not in a position to take them and after much conversation he told me that I was taking no chance,

Emil F. Fingerhut, direct—

that they would give me all the sales assistance and would procure salesmen for me or if it had to be, they would sell them themselves, and everything else failing they would take them off my place and they could not afford to have them idle on my hands because they had orders for two thousand sets they could not fill.

Q. What else was said to you about the chains. A. He told me they were manufacturing them in all different sizes and they would fit any rim where pneumatic tires were used.

Q. Who made out the order? A. John Rolfe.

Q. What did he say about delivery? A. He told me that they were having dies cast and they would be ready in a few days and they would be delivered between the 25th of November and the 1st of December and in the meantime he would send me circulars and a sample set so that I could start to work.

MR. EMERSON: I object to that answer. The order speaks for itself and he is trying to vary the terms of it.

THE COURT: Does the record show when the conversation took place? He may answer.

MR. EMERSON: Exception.

Q. You say that John Rolfe told you that he would send you the set of descriptive literature and samples? A. Yes.

Emil F. Fingerhut, direct—

Q. Did he do so? A. No.

Q. You got neither literature nor samples? A. No, sir.

Q. When November the 25th and January the 1st came around—November 25th to December the 1st came, did you get the goods? A. No, sir.

Q. When did you see either of the Rolfes? A. The next time I saw him was on January the 6th.

Q. What time of day? A. It was, if I recollect right, around seven o'clock in the evening.

Q. Where? A. In my store.

Q. Who was present? A. I was there alone myself.

Q. Who came in after? A. Mr. Healey.

Q. Who is he? Is he employed by you? A. No, sir.

Q. Does he do any work for you? A. He llooks after my bookkeeping.

Q. He is an accoountant? A. Yes, sir.

Q. What transpired then. What did you say to Rolfe when he came in? A. told him that I would object to accepting the goods as the time was too short now to make any attempt to sell them.

Q. That was on January the 6th. A. Yes. I told him I would not eccept them.

Q. Then what did you say or what did he say? A. He tried to explain to me that the season was not

too late. He said that it really had not started as we hadn't had any snow yet.

Q. What else did he say? A. He told me "You can easy sell those chains as we have plenty of orders on hand, and our salesmen, out of every four cars make three sales."

Q. What else did he say? A. Of course he went into the same conversation again and repeated the same way as before. He told me that the first hundred sets would not be any trouble and that he would give me all the business necessary in order to dispose of these chains.

Q. What else was said? A. He said "If you cannot sell them I will come up here myself and sell them for you."

Q. Who said that? A. John Rolfe.

Q. Did he say anything else? A. Yes, he said "We haven't got any trouble to sell these chains. If you cannot sell them we will take them off your hands. You don't need to be afraid."

Q. Did he say anything about shipping an order to Texas? A. Not on that particular day.

MR. EMERSON: I object to that as leading.

A. That didn't take place on that day.

Q. When did it take place? A. On the day when Mr. Russell Rolfe came to Plainfield trying to secure salesmen.

Emil F. Fingerhut, direct—

Q. What have you got to say about that. You have testified that the order was to cover the different sizes for tires and rims. Did they send you—withdraw that. When did all this conversation take place, before or after signing the note. A. Which conversation?

Q. The one we have just gone over with John Rolfe. A. Before I signed the note.

MR. EMERSON: I object to that. The witness has just testified that he was told by Russel Rolfe when he called there after the transaction was concluded, that if he could not sell them he would take them back.

Q. The question preceding that, with Rolfe, and the representations made by John Rolfe will fix the time when that took place.

MR. EMERSON: I certainly have a hazy idea just what took place as to the time. There was no mention made at what time it was said and he has testified to a great deal when the order was taken and the goods were delivered.

THE COURT: Have him fix the time.

Q. Directing your attention to the night of January the 6th when Mr. John Rolfe came there with the chains, did you have any conversation with him? A. Yes, sir.

Q. And what was the conversation? A. I put up my argument with regard to being nuable to

Emil F. Fingerhut, direct—

handle the chains. I objected to taking them and he told me then that there was no danger whatever. I told him that I could not take the chains at that time as I had some other business on hand and that I would hesitate in taking the chains. I would not take them.

Q. Did you tell him why? A. He said there was no chance for me to be stuck on the chains. He told me that the season had just started in.

Q. What else did he say? A. He said "If I thought I could not sell them I would not think of leaving them here. But I think you are the right kind of a man to sell them and if I could not, I will give you assistance and procure salemen for you or come up here myself if necessary." He said he knew that he could sell them or he would take them off my hands, because it would not pay him to have things laying around in stores.

Q. Was this before the note was signed or after? A. Before.

Q. Who was present when this conversation took place? A. I believe there was nobody present but myself at that time.

Q. You have testified about the different sizes. Did they send you the size to fit all tires? A. All they were manufacturing, but after I went to work on them I found on several occasions that I could not fit the hooks on different rims.

Q. Are any of the parties in Court that you tried to sell to? A. Yes, sir.

Q. Let me have the chains, will you. A. This

Emil F. Fingerhut, direct—

is the largest, and this is the samllest size. There are other sizes between the two.

Q. Now will these—. A. These chains I tried to put on several Ford trucks, which used pnneumatic tires and it was one-eighth of an inch too small.

Q. How about this one? A. This one I tried to sell to my brother, and they were too big.

Q. So you could not make any sales. A. Not in those cases..

Q. What have you got to say about their supplying you with men. Did they supply you with any? A. After I wrote Mr. Rolfe on the 24th of January, a day or two later, the younger Mr. Rolfe came to my store.

Q. Did he supply you with any salesmen? A. He tried to but he didn't.

Q. So there was no salesmen operating from the store? A. There was no salesmen made any attempt to sell.

Q. Did you notify Mr. Rolfe? A. Yes, I did.

Q. Is this the letter which you sent him? A. Yes.

Q. You stopped payment on the note? A.Yes.

Q. Why did you do that. A. Because Mr. Rolfe did not live up to his agreement.

Q. Was that after you notified him by that letter. A. Yes, sir.

MR. HOOS: Take the witness.

Emil F. Fingerhut, cross—

CROSS EXAMINATION BY MR. EMERSON:

Q. Did you notify Mr. Rolfe that you did not want the chains, before he delivered them? A. No, sir.

Q. When did you see Rolfe next? A. After I gave the order I saw him on the night of January the 6th.

Q. Is that the time when the goods were delivered? A. He had the goods on his car and I told him to leave them on the car.

Q. He came to see you on the night of January the 6th to deliver the goods? A. Yes, sir.

Q. He had the goods on the wagon? A. Yes.

Q. Did you ever notify him before that time that you did not want them? A. I did not.

Q. Did you ever return the goods to him or bring the goods back to Newark? A. I did not.

Q. Did Mr. Russell Rolfe come to see you after he delivered the goods. A. He came to see me after I notified him through this letter.

Q. Do you know when it was? A. It was a day or two after the date of this letter.

Q. What did Mr. Russell Rolfe do? A. He tried to procure salesmen. He called up the City Employment Office and tried to get a man to work for me to sell these things in Plainfield.

Q. Did he ever bring anybody in? A. One party stopped in my store and he made an appoint-

ment with him for the next day, and the man showed up.

Q. It was through his efforts that he came? A. Yes, sir.

Q. What was the object of his visit? A. His object was to procure salesmen.

Q. I mean the other man, that Rolfe brought there, what was the object of his visit? A. His object was if the proposition appealed to him to take it up.

Q. Did you talk to the man? A: I din't have no chance, Mr. Russel Rolfe did all the talking.

Q. Did you remain there when he was talking? A. I was there all the time. I was not out of the store a minute.

Q. Did you make any proposition to the man? A. No.

Q. Was any proposition made to you by Mr. Rolfe and this man as to how he should sell, on what terms? A. No.

Q. Did you mention any terms to this man? A. No, sir, I did not.

Q. When was Mr. Healy present in your store? A. The night of the delivery. He was not there when they were delivered but he stopped in later on after Mr. Rolfe had been there about an hour.

Q. Before or after the note was given? A. Before.

Q. Healey was there at that time? A. Yes, sir.

Emil F. Fingerhut, re-direct—

Q. Was anybody present when the order was given November the 4th? A. Yes, sir.

Q. Who was there? A. Walter Price, a man who works for me.

Q. Did you make an effort to sell them? A. I did.

REDIRECT EXAMINATION BY MR. HOOS:

Q. Did you advertise? A. In the local paper,I advertised to procure salesmen also.

Q. Is this a copy of the add which you put in the paper? A. Yes, sir.

Q. Is this it? A. Yes, sir.

Q. You did not return the goods? A. No, sir; they are still in my store.

Q. Did you tender them? A. I told Mr. Rolfe to take them off my hands in that letter.

Q. When was the note due? A. It was due February the 6th.

Q. What next did you hear? A. Rolfe came to me, Febraury the 6th, in my store, and he asked me about the note.

Q. What did you hear after that? A. The next day I got a letter from his attorney.

Q. Is that the letter? A. Yes, sir.

Q. What is it dated, February 7th? A. Yes, sir.

Walter Price, direct—

MR. HOOS: I offer that in evidence.

MR. EMERSON: No objection.

THE COURT: Very well.

MR. EMERSON: I would like to offer the chains of the hooks in evidence also.

WALTER PRICE, a witness on behalf of the defendant, sworn.

DIRECT EXAMINATION BY MR. HOOS:

Q. Where do you live? A. 141 East Fifth Street, Plainfield.

Q. By whom are you employed? A. Mr. Fingerhut.

Q. The defendant in this case? A. Yes, sir.

Q. For how long have you been employed by him? A. As near as I can recollect the 15th of July last.

Q. Do you know the plaintiff, John Rolfe? A. Yes, sir.

Q. When did you first see him? A. On the 4th of November.

Q. Where? A. In Fingerhut's place of business.

Q. Tell us what transpired there that you know of. A. The two brothers, John and his

Walter Price, direct—

brother came in with this new chain hook, which was a new proposition, and tried to induce him to take the proposition up in Plainfield, the exclusive agency, and he hesitated in the sense that it was a new thing and he would not likely be able to handle it. They made it appear as though it was an easy matter to sell them. They also said that the other territory surrounding Plainfield, every place was closed excepting Plainfield, and he said he was doing Fingerhut a favor by allowing him to take the contract in Plainfield.

Q. Who said that? A. John Rolfe. He said he was doing Fingerhut more of a favor than he was doing Rolfe. It was in his own interests.

Q. What else was said? A. The order was taken to be delivered—

MR. EMERSON: I object to the testimony as to the delivery of the order. It speaks for itself.

THE COURT: I think the order says S. A. P. and the witness explained what it meant, as soon as possible, and his explanation was that it meant delivery as soon as possible and he did deliver it January the 6th and that was as soon as possible. This witness is going to tell us what he understood the s. a. p. was at the time of taking the answer. He may answer.

A. The order was marked s. a. p. and that meant as soon as possible, and that was talked over by Mr. Rolfe to be not later than the last of November or

Walter Price, direct—

the first of December for the first hundred sets and the next hundred sets to be delivered between the 1st and 15th of January.

Q. What else was said? A. They said that the dies were being made in Newark at the time and just as soon as the dies were completed they would send the samples and circular literature so that we could start working and taking orders until the chains were delivered.

Q. Do you know of your own knowledge whether or not the sample was sent and the literature furnished? A. There was nothing sent and I heard nothing until the 6th of January when the goods were delivered.

Q. What was said about sizes when the order was taken? A. That he would send sizes to fit all sized wheels.

Q. Who said that? A. John Rolfe.

Q. You heard him say that? A. Yes, sir.

Q. Tell us if you ever had any expeirence trying to fit the hooks? A. I had one particular experience with Mr. Gordan.

Q. When was that? A. Fingerhut had left a set with him on Saturday and on Monday when I wasn't working I came in and I went down to measure the wheels to see if they could be fitted and he had a big touring car and a truck that he would like to fit. They fitted the touring car but not the truck. They were a quarter of an inch too small.

Walter Price, cross—re-direct—

Q.That was a pneumatic tire? A. Yes, sir.

Q Which of the brackets did you take to fit? A. The large one.

Q. Is that the largest size? A. Yes, sir.

CROSS EXAMINATION BY MR. EMERSON:

Q. Did you every try to attach that arrangement on any other car? A. Yes, sir.

Q. What car? A. On the brother's car for one. This is too large. It is the smallest size. It won't fit the touring car..

Q. What is it a Ford? A. Yes, sir.

Q. What other cars did you try to fit the chains on? A. I didn't try to fit them definitely on any other excepting the glass man.

Q. What kind of a car was that? A. A Buick truck.

Q.You testified that the chains did fit on the touring car? A. Yes, sir.

Q. What kind was that? A. I don't recollect.

Q. So those are the only three cars that you tried to fit the chains on? A. Yes, sir.

REDIRECT EXAMINATION BY MR. HOOS:

Q. Did any others, any other car owners apply to be fitted, that you recollect of? A. I can't answer that.

Walter Price, re-cross—

Q. You were present how many days a week? A. Three days a week.

Q. From December 1st to February 1st do you recall any other car owners applying to be fitted. Do you remember? If you don't, say so. A. No, sir.

RECROSS EXAMINATION BY MR. EMERSON:

Q. On November the 4th where were you? A. At Fingerhut's place of business?

Q. There is a storeroom in the rear? A Yes, sir.

Q. Where is your desk? A. I don't have any desk. I do the repair work.

Q. You are usually in the store? A. Yes, sir.

Q. Where were you when this conversation took place between Rolfe and Fingerhut? A. Part of the time I stood and listened to them, when I was not busy. Icould listen and hear them.

Q. Fingerhut told you just what transpired between Rolfe and himself. A. No, sir.

Q. Never had a conversation with you with reference to that? A. No. I knew what the order was given for. I heard that.

Q. How could you hear it all if you were in the outer room, part of the time? A. The transaction was all done in the outer room while I went about my work, maybe I went out to the gas tank or something.

Q. Where is that? A. Out in front.

Walter Price, re-direct—

Q. It is impossible for you to hear out there? A. No, sir, because if a customer came up I got what he wanted.

Q. How long were the Rolfes there? A. Two and a half hours and maybe longer.

Q. You were in and out during that time? A. Yes.

Q. You are sure you remember everything you have testified as to the terms of this contract? A. Positively.

Q. Were the terms thrashed out at one particular time or did they argue about the matter during the two and a half hours? A. Mostlly through the two and a helf hours because when the order was signed they left.

REDIRECT EXAMINATION BY MR. HOOS:

Q. What you have testified to you heard with your own ears? A. Yes, sir. No hearsay at all.

MR. EMERSON: When was this, in the morning or the afternoon? A. I should judge it was about ten o'clock to about one thirty.

Q. Were they in the store all that time? A. Yes, sir.

Q. Isn't it a fact that Fingerhut went out to lunch with them or went out of the store and weren't you out during that time? A. No, sir. Mr. Fingerhut, every day I have worked there, he

H. L. Healey, direct—

takes a pan and goes to the restaurant and brings in the lunch.

Q. How long was he gone? A. Not over fifteen minutes.

H. L. HEALEY, a witness on behalf of the defendant, sworn.

DIRECT EXAMINATION BY MR. HOOS:

Q. Where do you live? A. Plainfield.

Q. What is you business? A. Accountant.

Q. Do you know this defendant? A. I do.

Q. How long have you known him? A. Approximately one year.

Q. Have you been employed by him? A. I do his public accounting work.

Q. Do you know the plaintiff, Mr. Rolfe. A. I do.

Q. When did you see him? A. I met him first on the night of this transaction, when the note was given.

Q. When was this? A. January the 6th.

Q. Where? A. In the store of Mr. Fingerhut's.

Q. Tell us what transpired. A. He came in shortly after seven o'clock. Mr. Rolfe and his brother was there and I was introduced to them and Mr. Fingerhut told me that they were gentlemen with whom he had had some conversation, or

H. L. Healey, direct—

had signed a contract for the selling of these chains. He said they had been delayed in the delivery and he didn't want them.

Q. That was in the presence of Mr . Rolfe? A. Yes, sir. During the course of my time there, there was some discussion between Mr. Fingerhut and Mr. Rolfe as to whether or not he should take them. He didn't want them. Rolfe gave him a sales talk and said as has been stated, that he would assist him all possible in the disposing of them, and if Fingerhut could not, he would have men come over from Newark. During the conversation Fingerhut repeatedly said that he did not want the chains and then the conversation finally came up, he finally said that he would take them on the understanding made, that they would be taken off his hands if he did not dispose of them, and then the question of the note came up.

Q. Who said that? A. Mr. John Rolfe. He said that he would send salesmen out to dispose of the chains.

Q. This was when, before or after? A. Before the note was signed.

Q. What did you say? A. I told him that he should not give a note and further more I said "You should get in writing a statement of what he says he agrees to do for you." Mr. Rolfe went to the telephone to telephone his father, saying that Mr. Fingerhut was willing to give the note. I believe it was his father. Anyway he said it was.

Q. What else? A. There was some more dis-

H. L. Healey, cross—

cussion, after which the note was handed to Rolfe by Fingerhut.

Q. Was any writing made as you observed? A. No, sir.

Q. But the representations were made in your hearing. A. Yes, sir. Mr. Rolfe then unloaded his materials and departed and I remained there.

CROSS EXAMINATION BY MR. EMERSON:

Q. Just before the note was signed you testified Mr. Rolfe said he would assist Mr. Fingerhut to dispose of the chains? A. He said that he would assist and also that he would take them off his hands. As I understand this thing, it was put up to Mr. Fingerhut as if it was a great favor being done him. Mr. Rolfe was saying repeatedly that he could not afford to have things tied up if they were not going to sell. Mr. Fingerhut later told me that he gave him the note because he didn't want to appear unbusinesslike.

MR. EMERSON: I move that that be stricken out.

THE COURT: Stricken out.

Q. Where were you. Were you standing about with Mr. Fingerhut and the Rolfes? A. Yes, sir, I was there, right there by the cash register.

Q. Talking to all of them. A. Yes, sir.

Q. Did he tell you in what way that he would

dispose of the chains? A. Only as I have heretofore stated.

REDIRECT EXAMINATION BY MR. HOOS:

Q. And further that he would take them off his hands if they did not sell? A. Yes, sir.

Q. You heard that, and you heard Rolfe say it? A. Yes, sir.

BORIS GORKIN, a witness on behalf of the defendant, sworn.

DIRECT EXAMINATION BY MR. HOOS:

Q. Where do you live? A. Plainfield.

Q. What is your business? A. Painting and glass store.

Q. You are the owner of several automobiles? A. Yes, sir.

Q. How many? A. Three.

Q. Do you know the defendant? A. Yes, sir.

Q. Do you know the plaintiff? A. No.

Q. Have you had any business dealings with the defendant? A. I know him as a resident of Plainfield and a business man there.

Q. Did you have any occasion to call on him for anything? A. Sometimes for gasolinne.

Q. Directing your attention to the chains, did you have anything to do with them? A. He stopped

O. Fingerhut, direct—

at my store one day and offered me those chains and as I didn't have any I thought I would need them. He made a price and he left the package and said he would send somebody to fit them.

Q. Did he come back? A. Somebody else did.

Q. Would you recognize that man if you saw him. Is that the man? A. Yes, on the end. He came in to the store and asked me where the chains were and I showed him the package and he went out to fit them and he came back and said he could not fit them.

Q. Were you present when he tried to fit them? A. No, sir. He said he would come back to the store and get another pair and then he would come back and he did.

Q. Could he fit them the second time? A. No, and that was the end of the order; I never asked him again and he didn't come back.

MR. HOOS: Take the witness.

MR. EMERSON: No questions.

O. FINGERHUT, a witness on behalf of the defendant, sworn.

DIRECT EXAMINATION BY MR. HOOS:

Q. Where do you live? A. Mount Pleasant.

Q. What is your business? A. Farmer.

John Rolfe, recalled—direct—

Q. You are a brother of the defendant? A. Yes, sir.

Q. Do you own an automobile? A. Yes.

Q. What kind? A. A Ford, 1914.

Q. Is it a truck or a touring car? A. A truck model.

Q. Is it a truck? A. A commercial body.

Q. Did you arrange with your brother to get a set of chains? A. Yes. They appealed to me and I tried to put them on, but they were too large.

MR. HOOS: That is all.

MR. EMERSON: No question.

MR. HOOS: The defendant rests.

REBUTTAL TESTIMONY

JOHN ROLFE, recalled in rebuttal.

DIRECT EXAMINATION BY MR. EMERSON: .

Q. You have heard it testified that these chains which you manufactured were to fit all rims. Is that a fact? A. The chains are made for passenger cars, the hooks are made for passenger cars, and the large grip is made for trucks. The Rolfe Passenger Car Hook is made to fit all felloes up to 2¼ inches in width, from 1½ to 2¼, scaling every one-eighth of an inch. Cars above that, we have no records

John Rolfe, recalled—direct—

from the wheel manufactures of any manufacturer making passenger cars with a wider rim. Neither have we any record of any wheel being made for a passenger car narrower than 1½ inch, excepting it be a few old models, and as the dies were very expensive I would not make dies for cars over five years old.

Q. Did you explain that to Fingerhut at the time? A. Yes, sir. He has the circular showing the exact sizes which we manufacture and the sizes that he was to receive.

Q. Did you show it to him on November the 4th at the time the order was given? A. Yes.

Q. Do you remember Mr. Price being present on November the 4th. A. Yes, sir, the gentleman that worked for him.

Q. Was he present during your conversation? A. No, he was out somewhere.

MR. HOOS: Just a moment. I move that be stricken out. It is not rebuttal.

THE COURT: This is the plaintiff's rebuttal.

MR. HOOS: Exception.

Q. How long were you there on November the 4th at Fingerhut's shop? A. Close to two or three hours.

Q. How much of that time was Mr. Price within hearing distance of you?

John Rolfe, recalled—~~direct~~—

MR. HOOS: I object to that. That is direct examination.

MR. EMERSON: It is rebuttal to the testimony of the defendant.

THE COURT: The plaintiff should have a right to rebut what Mr. Price said about being there and show that he could not hear. He has the right to show where he was. Objection overruled. Exception allowed.

Q. How much of that time was Price within hearing distance of you? A. I would say about half the time.

THE COURT: That is a conclusion as to Mr. Price's being in hearing distance. Where was he is the question, not his hearing distance.

A. He was in the store and out, in and out all the time, waiting on customers. I would say that he was in the store about half the time that I was there.

Q. Where did you have your conference that day? A. We started in the center of the store and wound up in the back in Mr. Fingerhut's office, or living apartments, and there there was just my brother and myself and Fingerhut.

Q. How long were you in the back room? A. Three quarters of an hour.

Q. Was Mr. Price there at any time during that time? A. No, sir.

John Rolfe, recalled—cross—

Court's Charge to the Jury—

Q. What transpired during that three quarters of an hour? A. The deal was completed.

Q. When was the note given? A. When the material was delivered.

CROSS EXAMIATION BY MR. HOOS:

Q. Was anything put in the order relative to the size of the chains? A. He didn't buy any truck grip.

THE COURT: The order speaks for itself.

MR. HOOS: That is all.

(Testimony closed and case argued to the Jury.)

THE COURT: Gentlemen of the Jury, this is a suit by the Standard Grip Company, two plaintiffs, who manufacture a patented device to keep automobiles from skidding, on a promissory note of $415.25 which was made by the defendant, Mr. Fingerhut, to them, which represented the purchase price of the chains which he ordered. You have listened to all the testimony. **These gentlemen who represented the plaintiff company were salesme and they came to sell the goods**, and they evidently succeeded in their persuasion in getting the defendant to buy them. Now the defendant in the case says that certain representations were made to him

Court's Charge to the Jury—

and for the reason that they were made, he gave the note. You are the judges of the fact. You are to carefully weigh the evidence and if you believe that he was induced to sign the note because of certain representations and from the evidence that you find, that the plaintiff did not live up to the representations, your verdict would be for the defendant. If on the other hand you believe the representations were made by the plaintiffs and they did try to live up to them, with the defendant's assistance, then your verdict should be for the plaintiffs. There is nothing in this case about any fraudulent representations. They only claim that certain representations were made which were not complied with. For that reason the defendant did not pay the note when it came due. It is a question of fact. The only thing for you to remember is that the plaintiffs have the burden of proving their case by a preponderance of the evidence. You will take the Exhibits along with you, which are marked in evidence, as well as the note. Take the case.

(Jury retires.)

MR. HOOS: I want to take an exception to Your Honor's instruction that the gentlemen were salesmen and also that they tried to live up to their representations as much as they could.

THE COURT: Very well. Take your exception.

Certificate of Judge—

CERTIFICATE OF JUDGE

Elizabeth District Court

JOHN ROLFE and ISIAH ROLFE, partners, trading as Standard Non-Skid Grip Company, Plaintiffs, —vs— EMIL T. FINGERHUT, Defendant.	ON CONTRACT Certificate to State of the Case

Pursuant to the statute, in such case made and provided, I, Charles L. Morgan, Judge of the Elizabeth District Court, do hereby certify on this 6th day of April, as the State of the case for appeal in the above-entitled action, the transcript of stenographer's notes made on the 23rd day of March, 1922, at the trial of the above-stated action, which transcript accompanies this certificate.

Charles L. Morgan,

Judge of the Elizabeth District Court.

Plaintiff's Exhibits—

EXHIBITS

EXHIBIT P-1

ORDER NO. 102. DATE Nov.4, 1921
M Standard Non-Skid Grip Co. 293 Halsey St., Newark, N. J.
SHIP TO Economy Vulcanizing Co.
AT 208 Watchung Ave., Plainfield, N. J.
HOW SHIP Ex.
TERMS C. O. D. Ex prepaid WHEN S. A. P.
SALESMAN J.H.R. BUYER E. F.
200—Sets Rolfe Chain Hooks @ 5.00
and
200—Sets Chains (same sizes) $1.80 to $2.10
Discount 40%.
Delivery 100 sets soon as possible
" 100 " about Jan 15th 1922.
10% additional discount to case lot shipments (50 sets) to dealers.

This order is placed with the understanding that the undersigned is to be the exclusive dealer in the City of Plainfield, N. J., as agreed with Mr. J. H. Rolfe, this day.

E. T. FINGERHUT

EXHIBIT P-2

$415.25 Plainfield, N. J., January 6th, 1922

Thirty days after date I promise to pay to the order of Standard Non-Skid Grip Co.
Four Hundred and Fifteen.....25/100 Dollars at the City National Bank of Palinfield, N. J.
Value received in Merchandise.
No. Due 2/6. 22 E. T. Fingerhut

Defendants' Exhibits—

EXHIBIT D-1

1/24/22.

Standard Non Skid Grip Co.
293 Halsey St.
Newark, N. J.

Gentlemen.

Your Rolfe Chain Hooks proposition has turned out in utter failure as far as Plainfield is concerned. We have been unable to sell even a single set so far, neither have we been able to get a salesman in this town. Will you kindly stop in some time this week, so we can make some other arrangement in this matter.

Yours very truly
Economy Vulcanizing Co.
Per E. T. Fingerhut

EXHIBIT D-2

USE ROLFE CHAIN HOOKS FOR AUTOS

Chains can be applied in one minute, anywhere, any time. No jack or tools required. No soiling hands or clothes. Save money, time and temper.

ECONOMY VULCANIZING CO.

208 WATCHUNG AVE. Opp. Post Office

EXHIBIT D-3

Feb. 7, 1922.

E. T. Fingerhut, Esq.
208 Watchung Ave.,
Plainfield, N. J.

Dear Sir:

The Standard Non-Skid Grip Company of

Defendants' Exhibits—

Newark has placed in our hands for collection your note dated January 6th, for $415.25. This note is long past due and we feel that this matter can be amicably settled without incurring any Court costs, and therefore ask that you send us a check by return mail. Unless we hear from you within a few days we shall be compelled to institute proceedings to collect the same.

Very truly yours,
Vail & McLean

Notice of Appeal—

NOTICE OF APPEAL

Elizabeth District Court

Between
JOHN ROLFE and ISIAH ROLFE, trading as Standard Non-Skid Grip Company,
Plaintiffs.
—and—
EMIL T. FINGERHUT,
Defendant.

ON CONTRACT

Notice of Appeal.

To
Messrs. Whittemore & McLean
Attorneys for Plaintiff
Elizabeth, New Jersey

Gentlemen:

TAKE NOTICE, That the defendant, Emil T. Fingerhut, trading as Economy Vulcanizing Company, hereby appeals to the New Jersey Supreme Court from the verdict of the jury and the judgment of the Elizabeth District Court, rendered in the above-stated cause on the 23rd day of March, 1922.

Emil J. Hoos,
Attorney for the Defendant.

Specification of Objections—

SPECIFICATION OF OBJECTIONS

New Jersey Supreme Court

JOHN H. ROLFE and ISAIAH ROLFE, trading as Standard Non-Skid Grip Co., Plaintiffs-Respondents —vs— EMIL T. FINGERHUT, Defendant-Appellant.	ACTION AT LAW On Appeal Elizabeth District Court Specification of Objections.

The following is a specification of the rulings, determinations, or directions of the District Court of the City of Elizabeth with respect to which the defendant-appellant is dissatisfied in point of law:

1. The Court sustained the plaintiff's objection to the following question asked on cross-examination by defendant's counsel of John H. Rolfe, one of the plaintiffs:

"You did state that you would procure salesmen for Fingerhut?"

2. The Court sustained the plaintiff's objection to the following question asked on cross-examination by defendant's counsel of John H. Rolfe, one of the plaintiffs:

"Did he state how many?"

Specification of Objections—

3. The Court ruled that the plaintiff's witness Russell Rolfe had a right to conclude as to defendant's attitude on two occasions and to state such conclusions on his direct examination.

4. The Court refused to strike out the testimony of plaintiff's witness Russell Rolfe after he admitted on cross-examination that "the details I testified to were the orders I received from my brother after I left there."

5. The Court mistated a fact in charging the jury by saying:

"These gentlemen who represented the plaintiff company were salesmen and they came to sell the goods."

6. The Court charged the jury that:

"If, on the other hand, you believe the representations were made by the plaintiffs, and they did try to live up to them, with the defendant's assistance, then your verdict should be for the plaintiffs.

7. The Court charged the jury that:

"There is nothing in this case about any fraudulent representations. The only claim that certain representations were made which were not complied with."

8. The Court charged the jury that:

Specification of Objections—

"The only thing for you to remember is that the plaintiff's have the burden of proving their case by a preponderance of the evidence."

9. The Court's charge to the jury was not consistent.

EMIL J. HOOS,

Attorney for Defendant-Appellant.

Opinion

No. 444 June Term 1922

OPINION

(Filed November 8, 1922)

New Jersey Supreme Court

EMIL J. FINGERHUT.

vs.

JOHN H. ROLFE, et al,

ON APPEAL ELIZABETH DISTRICT COURT

SUBMITTED JUNE TERM 1922

DECIDED NOVEMBER TERM 1922

EMIL J. HOOS,
For Appellant,

WHITTEMORE & McLEAN,
For Respondent.

ARGUED BEFORE PARKER, BERGEN and MINTURN, J: J:

PER CURIAM:

Opinion

The plaintiffs alleged that they sold to the defendant a number of chain hooks, to be used on automobiles; that they were delivered and accepted by the defendant and that he gave his promissory note to the plaintiffs for the amount due. The note not being paid plaintiffs brought suit to recover, and the jury found in their favor, and judgment was entered from which the defendant appeals.

It is argued that the court erred in over-ruling the question asked by the defendant of the plaintiff, "You did state that you said you would procure the salesmen for Fingerhut?" The record discloses that the plaintiff has not so testified; what he did testify to was that he would assist him in securing salesmen to dispose of the merchandise, and he had not said he would procure them. The plaintiff was also asked on cross-examination "Q. Did you know whether or not any salesmen were procured? A.The report was to me that they were," and then the defendant asked, "Did he state how many?" This was objected to because it required an answer given when the plaintiff was not present, and was a conversation between the two brothers, brought out by defendants cross examination. The court's ruling upon these questions was not error.

It is argued that the court erred in refusing to strike out the following: "Q. What was Mr. Fingerhut's attitude toward Erlick? A. Very indifferent. He did not seem to take any interest in what I was doing or trying to do." We think the court's action correct. This question related to an interview between one of the plaintiffs and Erlick, whom he was trying to induce to act as a salesman for the defend-

ant who was present, and the purpose of the testimony was to show that the defendant took no interest in the effort to secure salesmen. The argument is that this testimony was that of conclusions of the witness, but manifestly it was not, but offered as proof of the attitude of the defendant.

The next point is that the court refused to strike out testimony upon the ground that it was hearsay. The defendant had brought out by cross-examination that there was a conversation between the two brothers, the plaintiffs, after they had left the presence of the plaintiff. The defendant then moved to strike out all of that testimony, including matters clearly not hearsay. If the defendant wanted any part of the evidence stricken out upon the ground that it was hearsay, it was his duty to indicate it with particularity.

The remaining objections are directed to alleged errors in the charge of the court. It must suffice to say that we have examined them all and find them insubstantial.

The charge covered the entire case, and dealt with specific questions in detail, but not in such manner as to lead the jury to believe that in any instance the court was seeking to impose any limitation upon the judgment of the jury.

Upon the whole case, and following the direction of the Practice act we perceive no legal error which injuriously affected the substantial rights of the defendant.

New Practice Act L. 1912 sect. 27.

The judgment will be affirmed.

RULE FOR JUDGMENT

(Entered November 24, 1922)

NEW JERSEY SUPREME COURT

John H. Rolfe and Isiah Rolfe, trading as Standard Non-Skid Grip Co.,

Plaintiff-Appellees,

-vs-

Emil J. (or T.) Fingerhut,

Defendant-Appellant.

ON APPEAL FROM ELIZABETH COURT

RULE FOR JUDGMENT.

This cause having been submitted to the Supreme Court on brief, at the June term, 1922, judgment of affirmance was entered in favor of the plaintiffs at the November Term, 1922, whereupon it is adjudged that the said plaintiffs respondents, John H. Rolfe and Isiah Rolfe, trading as Standard Non-Skid Grip Company, recover of the said defendant-appellant, Emil J. Fingerhut the sum of $450.96 debt, and costs, with interest thereon from March 28th, 1922, and also the costs in the Supreme Court.

Judgment entered November 24, 1922,

On motion of

Whittemore & McLean, Attys.

Debt and Costs below	$450.96
Costs Sup. Ct.	53.50
	$504.46

Int. on Debt Costs below from Mar. 28, 1922

A true copy,

EDWARD J. KELLEHER

CLERK.

Judgment

JUDGMENT

(Entered November 24, 1922)

New Jersey Supreme Court

STATEMENT

JOHN H. ROLFE and ISIAH ROLFE, trading, etc.,

vs.

EMIL J. (or T.) FINGERHUT

ON APPEAL

Judg't entered Nov. 24, 1922
Debt & costs below $450.96
Costs Sup. Ct. Attorney 14.00
Disbursements 39.50
$504.46

Int. on Debt & costs below from Mar. 28, 1922.

ENOCH L. JOHNSON,
Clerk.

Notice of Appeal

NOTICE OF APPEAL

(Filed December 11, 1922)

New Jersey Supreme Court

Between John Rolfe and Isiah Rolfe, partners trading as Standard Non-Skid Grip Company, Plaintiffs-Respondents, —and— Emil T. Fingerhut, trading as Economy Vulcanizing Co. Defendant-Appellant.	ON CONTRACT NOTICE OF APPEAL

GENTLEMEN:

TAKE NOTICE, That the defendant-respondent hereby appeals to the New Jersey Court of Appeals from the whole of the judgment entered by the New Jersey Supreme Court in the above-stated cause, affirming the judgment of the Elizabeth District Court.

EMIL J. HOOS,

Attorney for defendant-respondent

To

Messrs. Whittemore & McLean
Attorneys for Plaintiffs-Appellant
215 Broad Street
Elizabeth, N. J.

Grounds of Appeal

GROUNDS OF APPEAL

(Filed January 23, 1923)

New Jersey Court of Errors and Appeals

John Rolfe and Isiah Rolfe, partners trading as Standard Non-Skid Grip Company, Plaintiffs-Respondents, —and— Emil T. Fingerhut, Defendant-Appellant.	On Appeal From Supreme Court GROUNDS OF APPEAL

TAKE NOTICE, that the following are the grounds of appeal in the above-entitled cause:

1. Because the Supreme Court held that the sustaining of plaintiffs' objection to the following question asked on cross-examination by defendant's counsel of John H. Rolfe, one of the plaintiff's, "You did state that you would procure salesmen for Fingerhut?" was not reversible error.

2. Because the Supreme Court sustained the plaintiffs' objection to the following question asked on cross-examination by defendant's counsel of John H. Rolfe, one of the plaintiffs. "Did he state how

many?'' and hold that the sustaining of this objection was not reversible error.

3. Because the Supreme Court sustained the District Court's ruling, that the plaintiffs' witness, Russell Rolfe, had a right to conclude as to the defendant's attitude on two occasions and to state such conclusions on his direct examination to the jury.

4. Because the Supreme Court sustained the District Court in its ruling that the witness, Russell Rolfe, might testify as to his conclusions in proof of defendant's attitude, although the witness was not a party to the suit.

5. Because the Supreme Court sustained the refusal of the Judge of the District Court to strike out hearsay testimony, and hold the action of the Judge of the District Court not reversible error.

6. Because the Supreme Court held the charge of the Judge of the District Court proper.

7. Because the Supreme Court held the charge of the Judge of the District Court consistent.

8. Because the Supreme Court sustained the judgment of the District Court, when such judgment should have been reversed.

9. Because the Supreme Court held that upon the whole case, there was no legal error which injuriously affected the substantial rights of the defendant in the District Court; whereas, the Supreme

Grounds of Appeal

Court should have held that defendant's substantial rights were injuriously affected.

EMIL J. HOOS,

Attorney for Defendant-Appellant.

To

Messrs. Whittemore & McLean
Attorneys for Plaintiffs-Respondents
Elizabeth, New Jersey

The Henry Cook Printshop, Elizabeth, N. J.

New Jersey Court of Errors and Appeals

JOHN H. ROLFE AND ISAIAH ROLFE, trading as Standard Non-Skid Grip Co., *Plaintiffs-Respondents,* *vs.* EMIL T. FINGERHUT, *Defendant-Appellant.*	*Action at Law.* *On Appeal from the New Jersey Supreme Court.*

ANSWERING BRIEF OF PLAINTIFFS-RESPONDENTS.

Whittemore & McLean, Attorneys for Plaintiffs-Respondents.

Appeal from the judgment of the New Jersey Supreme Court (Parker, Bergen and Minturn, *JJ., per curiam* opinion), affirming the judgment of the Elizabeth District Court (Morgan, Judge) in favor of the plaintiffs-respondents against defendant-appellant for $450.15 and costs on the verdict of a jury.

Facts.

The suit was based on a promissory note which was given to the plaintiffs by the defendant for merchandise sold and delivered. *See Case. State of Demand, page* 3. *Case Order Slip Exhibit P.* 1, *page* 53. *Case Testimony John H. Rolfe, page* 9, *line* 35.

Defendant on page 2 of his brief purports to state the facts in the case at bar and cites various portions of the testimony to support his statement.

The statement of the defendant and plaintiffs diverge widely.

Plaintiff John H. Rolfe, in his testimony, *Case, page* 10, *lines* 7 *to* 30, says:

> "Q What took place when you delivered these chains?
>
> A I took the chains over to Plainfield. On getting there Mr. Fingerhut seemed a little surprised to see me. I came in with the merchandise and he rather hesitated about taking it on account of, he said, we were late in the season, and after explaining the situation to him, that it was not as late as he thought it was, due to his not being familiar with the business, he agreed to take the merchandise and told me during the conversation that one of the reasons why he was not ready to take it was that he did not have sufficient cash and so I suggested, to make it as lenient as I could, that I would take a note and he gave me the note in payment for the merchandise.
>
> Q After the note was given what transpired?
>
> A After the note was given by Fingerhut he continued to talk about the sales possibility, we both did, and I suggested that I would send someone over to Plainfield, to let him have the sales talk on the marchandise, as it was a new line, and would *also assist him in securing salesmen* to dispose of the merchandise. That seemed to be satisfactory to him."

It should be noted that in any event, the statement, whatever it may have been, could have had no effect in inducing the giving of the note as the note was given before the statement in question was made. *Case, page* 10, *lines* 22 *to* 30, *and page* 18, *line* 29.

That there was no guarantee made by the plaintiffs. *See Testimony Case, page* 11, *line* 13.

"Q Did you make any guarantees at the time of the delivery? A No guarantee. They were delivered at that time."

That plaintiffs did make an honest effort to assist the defendant in marketing the goods as shown by the testimony of John H. Rolfe. *Case, page* 11, *lines* 13 *to* 22, reads as follows:

"Q you stated that you would send someone to assist the defendant. Did you do that? A Yes.

Q Who did you send? A My brother.

Q Your brother Russell? A Yes, sir."

It also appears in detail from the testimony of Russell Rolfe, uncontradicted in any material particular (*commencing Case, page* 18, *line* 34, *and through pages* 19 *and* 20 *to line* 36 *on page* 21), that plaintiffs did all in their power to assist the defendant in the sale of the goods in question, but that defendant was indifferent to their efforts and therefore no results were obtained.

In respect to defendant's statement that plaintiffs agreed to procure salesmen to sell the goods, we would refer again to that portion of the testimony of John H. Rolfe, above quoted from appearing in the case. *Page* 10, *lines* 25 *to* 30.

"and I suggested that I would send someone over to Plainfield to let him have the sales talk on the merchandise, as it was a new line, and would also *assist him in securing* salesmen to dispose of the merchandise."

The agreement was to *assist defendant* in procuring salesmen, not that plaintiffs would themselves procure them. That they performed their part of the agreement, but that defendant failed

to perform his part will appear from the testimony above referred to.

In regard to defendant's contention that plaintiffs agreed to take the goods off his hands, we refer the Court to testimony on the *bottom of page* 13 *of the Case, line* 36, *and top of page* 14, where plaintiff John H. Rolfe testifies as follows:

> "Isn't it a fact that at the time this note was signed and before, that you told Fingerhut if he signed the note and did not dispose of these goods, that you would both supply him with salesmen, and, if he did not sell them, take them off his hands and send them to Texas? A No, sir; I didn't say so."

On page 32 *of Case, lines* 20 *to* 22, the defendant mentioned a letter he wrote to Mr. Rolfe on the 24th day of January.

It will be seen on reference to Exhibit D. 1, *Case, page* 54, that the letter referred to is the one constituting that Exhibit as it bears the same date, namely January 24th, and is the only letter in evidence written by defendant to plaintiffs. Later in his testimony, *Case, page* 35, *lines* 25 *and* 26, referring to that letter and in answer to the question: "You did not return the goods?" he stated, "I told Mr. Rolfe to take them off my hands in that letter."

By again referring to the letter it will be seen that nothing whatever was said about the plaintiffs taking back the goods.

Defendant stated in his brief that plaintiffs promised to deliver goods between November 25 and December 1st. This statement is contradicted by the plaintiff. *Case J. R. Rolfe, page* 13, *lines* 9 *to* 13.

We have gone thus far into the testimony in order to show that there were facts on which the judgment of the District Court was based.

Findings of the District Court will not be reviewed by this Court upon the questions of fact beyond inquiring whether there was any legal evidence to support them, if so the judgment will be affirmed. *Williams* vs. *Connolly Contracting Company,* 74 *N. J. E.* 105; *Nupe* vs. *Crew Levick Company,* 85 *N. J. L.* 377; *Nordstrom* vs. *Payne,* 86 *N. J. L.* 361.

Questions of facts determined by the verdict of the jury are final and conclusive between the parties. *Paonessa* vs. *Ruh,* 78 *N. J. L.* 253; *Best* vs. *Smith,* 54 *N. J. L.* 434; *Spargo* vs. *Central Railroad Company,* 84 *N. J. L.* 251.

Answer to the first ground of appeal, page 5, defendant-appellant's brief.

1. Defendant objects to the Court's action in sustaining the objection to the following question: "Q You did state that you would procure salesmen for Fingerhut?"

The Court in sustaining the objection stated that the record would be referred to and read, which was done. It is submitted that the Court's action in this matter was justified inasmuch as it is elemental law that the record speaks for itself. We would refer to the case of *Sayre* vs. *Sayre,* 14 *N. J. L., page* 487. In that case it was held by the Court on appeal that a witness should not have been allowed to state what his former testimony was, unless such former testimony did not appear in the record. The record in the present case upon being read showed that the witness had testified that he had said "*he would help* the defendant to secure salesmen," not that he would procure them himself.

Answer to the second ground of appeal, page 5, defendant-appellant's brief.

2. The defendant objects to the Court's action in sustaining the plaintiff's objection to the question asked by defendant's counsel in examination of John H. Rolfe. In the course of the testimony the following question was asked: "Q Do you know whether or not any salesmen were procured?" "A The report was made to me that there were." "Q Did he say how many?" Upon objection the Court overruled this question and such ruling is the one objected to. We believe there can be no doubt as to what this question called for, and the answer involved hearsay evidence, and while it is elemental that hearsay evidence such as is called for in this question is inadmissible, we would refer to the case of *Hershburg, Hollander & Co.* vs. *Robinson & Co.*, 75 *N. J. L.* 256. A statement well in point is contained in the head note of that case. "Hearsay evidence is incompetent to establish any specific fact which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge."

As the person who reported to the witness could have testified as to the contents of such verbal report himself, we believe this ruling applies and justifies the Court's action in sustaining the objection in question.

Answer to the third ground of appeal, page 6, defendant-appellant's brief.

3. Defendant's third objection was that the Court allowed plaintiffs' witness to state his conclusion as to the defendant's attitude. (The testimony involved in this objection appears on page 20, Case, lines 15-37, and page 21, lines 18

to 30.) The testimony objected to was as follows: "Q What was Mr. Fingerhut's attitude towards Erlich? A Very indifferent. He did not seem to take any interest in what I was doing or trying to do." The next question and answer was: "Q What was Mr. Fingerhut's attitude towards the other man. A Exceptionally indifferent. As I recollect it he did not even come into the room where he was. He went out of the room when the man came in."

We submit that both these questions called for the opinion of the witness as to the attitude of the defendant as evidenced by his action. A witness may testify to his observations of such attitude. See 17 *Cyc., pages* 91-92, reading as follows: "An observer may testify as to appearances indicative of mental condition and his inference from them. A person with adequate intelligence and opportunity for observation may testify as to the indicia of the operation of emotion, as that a person appeared to be afraid, angry, surprised or manifested other mental operations."

We would also refer to Vanauken's case, 10 *N. J. Equity,* 186. In this case it was held that a witness, not an expert, may, in a case of insanity, state facts as to the look of the eye or the actions of the alleged lunatic, and then tell what in his opinion they indicate. It will be noted that in the case at bar the witness specified in both instances, the actions of Fingerhut, on which he based his statement that Fingerhut was indifferent. See *Gastner* vs. *Slicker,* 32 *N. J. L.* 95.

The above citations amply support plaintiffs' contention that the Court was justified in refusing to strike out the witness' testimony in the above respect.

Answer to the fourth ground of appeal, page 7, defendant-appellant's brief.

The defendant's next objection as to the refusal of the Court to strike out certain testimony of plaintiff Russell Rolfe. The motion to strike out same being found at the bottom of page 22 of case, where the following appears:

"Q Your brother told you? A That I was to go to Plainfield to procure salesmen. Q And your brother told you the details after you left? A Yes, sir." *By Mr. Hoos.* "Now I move for all that testimony be stricken out on the ground of hearsay."

It appears that defendant's attorney did not specify which evidence he wished stricken out in such a way that the Court could tell with certainty just which testimony was objected to. It will be observed that the last question reads: "Q And your brother told you the details after you left? A Yes, sir." Just what testimony relates to the details mentioned, we confess we are unable to clearly determine, and presume the Court was in the same situation when asked to rule on the motion.

As to the motion to strike out testimony, testimony sought to be stricken out must be specifically pointed out to the Court, and as that was not done in this instance, we submit that the Court did not err in his ruling. See *Travisana* vs. *Stefanelli*, 84 *N. J. L.* 767.

It appears from the record that the witness Russell Rolfe was present when the facts testified to by him occurred, and the instructions which he received from his brother regarding his visit to the defendant after the consummation of the deal was in relation to aiding defendant in procuring salesmen.

Answer to the fifth ground of appeal, page 9, defendant-appellant's brief.

The next objection is to that portion of the Court's charge appearing towards the bottom of page 50 of the case, where the Court states: "These gentlemen who represent the plaintiff Company were salesmen, and they came to sell the goods." We fail to see as a matter of common sense how this instruction could in any wise prejudice the defendant. The men admittingly came to sell goods, and by reason thereof certainly were salesmen, incidentally one of these salesmen is also one of the plaintiffs in the present action.

Answer to the sixth ground of appeal, page 10, defendant-appellant's brief.

The defendant further objects to that portion of the Court's charge reading as follows:

"If on the other hand you believe that representations were made by the plaintiffs, and they did try to live up to them with the defendant's assistance, then your verdict should be for the plaintiffs."

It should be borne in mind that the evidence which has been previously referred to shows that plaintiffs had agreed to do no more than to *help* defendant to secure salesmen, it can be seen that this was what was in the Court's mind, viz.: that Rolfe promised that he would do what he could to aid the defendant. There can be but little question that the jury took the Court's words in this sense, as it was the only thing that those words could operate upon. Therefore, there was no harmful error.

Answer to the seventh ground of appeal, page 10, defendant-appellant's brief.

The next objection relates to that portion of the Court's charge reading as follows: "There is nothing in this case about any fraudulent representation; they only claim that certain representations were made, which were not complied with." The defendant raises the point in his brief that the question of fraud should have been left to the jury. This is quite true where the question of fraud has been raised. As a matter of fact the question of fraud was never raised by the defendant in the case at bar, therefore, when the Court charged that there was nothing in the case about fraudulent representation, he stated the truth. It is true that it may have been surplusage for the Court to have mentioned the question of fraud at all. Even so, this is certainly not a harmful error and is not ground for objection.

The cases cited in counsel's brief do therefore not apply.

Answer to the eighth ground of appeal, page 11, defendant-appellant's brief.

The Court at the conclusion of its charge, after properly instructing the jury in the method of arriving at a finding, stated that "The only thing for you to remember is that the plaintiffs have the burden of proving their case by a preponderance of evidence." This statement in conjunction with the remainder of the charge was a proper instruction to the jury, as the burden of proof rests on the plaintiff.

On pages 11 and 12 of the defendant's brief he refers to a portion of the Court's charge reading as follows: "If you believe that he was induced to sign the note because of certain representations, and from the evidence you find that the plaintiff did not live up to the representations, your verdict should be for the defendant." (Cites portion of case where this testimony occurs.) We wish to point out to the Court that the above-quoted matter is not based on any specification of objection in the state of the case, and therefore can not be considered on appeal. *U. S. Transfer Advertising Company* v. *Young,* 80 N. J. L. 151.

The matter appearing on page 12 of the brief is a duplication of the matter objected to in the sixth ground of appeal and was covered by us under that head.

The Supreme Court held "Upon the whole case, and following the direction of the Practice Act we percieve no legal error which injurously affected the substantial rights of the defendant.

Respectfully submitted,

WHITTEMORE & McLEAN,
Attorneys for Plaintiffs-Respondents.

New Jersey
Court of Errors and Appeals

John H. Rolfe and Isaiah Rolfe, partners, trading as Standard Non-Skid Grip Company, Plaintiffs-Respondents, vs Emil T. Fingerhut, Defendant-Appellant.	Action-at-Law Appeal from the New Jersey Supreme Court. Brief of Defendant-Appellant.

Brief of Defendant-Appellant

This appeal is from a judgment of the New Jersey Supreme Court (Parker, Bergen and Minturn, JJ., per curiam opinion), affirming a judgment of the Elizabeth District Court (Judge Morgan), in favor of plaintiffs-respondents against defendant-appellant for $425.15 and costs on the verdict of a jury.

Case, Docket Entries, p. 5, lines 15-22.

Case, Supreme Court Opinion and Judgment, pp. 60-63.

FACTS

The suit was based on a promissory note for $415.25, given by defendant to plaintiffs on January

6, 1922, on which payment had been stopped, because the agreement and representations under which the note had been given, had not been lived up to.

Case, State of Demand, p. 3.

Case, Defendant's Testimony, p. 32, lines 30-39.

Case, Letter, Exhibit D-1, p. 54, lines 1-20.

The note was given under the following circumstances:

On November 4, 1921, the plaintiff, John H. Rolfe, and his brother, Russell Rolfe, who was employed by plaintiff, John H. Rolfe, called at the defendant's place of business, and John H. Rolfe told defendant that they were putting out a new sort of chain for automobiles, which was a very good proposition, that defendant would not be taking any chance, that they would give him all the sales assistance and procure salesmen for him, and that if it had to be they would sell them themselves, and everything else failing they would take them off his place, as they could not afford to have them idle as they had orders they could not fill, that they were manufacturing them in all different sizes and they would fit any rim where pneumatic tires were used, that they were having dies cast, and that the chains would be delivered between November 25th and December 1st, and in the meantime they would send defendant circulars and a sample set, so that he could start to work.

Case, Defendant's Testimony, pp. 26, 27.

Case, Russell Rolfe's Testimony, p. 17.

Case, Price's Testimony, p. 36, lines 39, 40; pp. 37, 38, 39.

Case, Healey's Testimony, pp. 42, 43, 44, 45.

Case, Gorkin's Testimony, p. 46.

Case, Fingerhut's Testimony, p. 47.

As a result of the representations made, defendant gave an order to John H. Rolfe for the chains.

Case, Order, Exhibit P-1, p. 53, lines 1-30.

Nothing further was heard by defendant until January 6th, when plaintiff, John H. Rolfe, delivered at defendant's place of business the first half of the order, which defendant declined to accept as it was too late in the season.

Case, Defendant''s Testimony, p. 28, lines 31-38.

But, upon plaintiff, John H. Rolfe, repeating and emphasizing the representations made when the order was secured, and adding to them, defendant was induced to take the chains on sale and to give the note in suit.

Case, Defendant's Testimony, p. 29, lines 8-30; p. 30, lines 39, 40; p. 31, lines 1-24.

The representations were not lived up to, as the sample set and literature were never sent, salesmen were not obtained, the chains would not fit all rims, no assistance was given in the sale of the chains, though a slight attempt was made in this direction, the chains did not sell, notwithstanding defendant's efforts in advertising and otherwse, the chains were

not taken back, but the day after the note became due defendant was threatened with suit by plaintiff's lawyers, and twelve days after the note became due this suit was instituted without plaintiffs making any effort to adjust matters.

Case, Defendant's Testimony, p. 28; lines 1-3; p. 32, lines 3-30; p. 35, lines 10-20.

Case, Advertisement, Exhibit D-2, p. 54, lines 25-31.

Case, Letter, Exhibit D-3, p. 54, lines 33-40; p. 55, lines 1-14.

Case, Docket Entries, p. 4, lines 25-27.

Testimony of defendant and that of witnesses called by defendant was in many particulars not denied by plaintiff, John H. Rolfe, or his brother, a witness produced in his behalf.

GROUNDS OF APPEAL.

There are nine grounds of appeal:—two to the overruling of questions on cross examination of one of the plaintiffs; two to allowing plaintiffs' witness, Russell Rolfe, to testify as to his conclusions; one to the refusal to strike out testimony that the witness later acknowledged to be hearsay; two to the Court's charge to the jury; one to sustaining the judgment; and one to holding that there was no legal error injuriously affecting defendant's substantial rights.

OVER-RULING OF QUESTIONS.

Two questions asked of the plaintiff John Rolfe on cross-examination were objected to by his counsel, and the objection in each instance was sustained.

Case, Specifications of Objections, p. 57, lines 26-40.

Case, Grounds of Appeal, p. 65, lines 30-40; p. 66, lines 1, 2.

The questions were:

1. "You did state that you would procure salesmen for Fingerhut?"

Case, John H. Rolfe's Testimony, p. 14, lines 19-20.

2. "Did he say how many?"

Case, John H. Rolfe's Testimony, p. 15, line 9.

Cross-examination especially of a party to the suit, as was the witness, John H. Rolfe, is a substantial right, and any denial of proper cross-examination is the denial of a substantial right, and therefore, cause for reversal.

A reading of the record will show that the court had no right to break the force of the first question by sustaining the objection to the question, and referring to the testimony given in the direct examination for an answer to the question. If this were not so, cross-examination could be limited to questions or statements not made on the direct, and any parrot-committed statement would practically be immune from attack by cross-examination.

As to the second question, the objection that it was hearsay was not well taken, as the question relates to a statement made by one of plaintiffs' wit-

nesses to the plaintiff, John Rolfe, relative to a matter in controversy.

IN THE CASE OF PROUT vs. BERNARD'S LAND AND SAND COMPANY, 77 *N. J. LAW,* p. 719, 721, (*ERRORS AND APPEALS,* 1919, *PARKER, J.*), *THE COURT SAID, "THE DISCRETION OF THE TRIAL COURT IN REGULATING AND LIMITING THE RANGE OF CROSS-EXAMINATION IS VERY GREAT*** BUT AS TO MATTERS EITHER DIRECTLY IN ISSUE OR DIRECTLY RELEVANT TO THE ISSUE, THERE IS NO DISCRETIONARY POWER."*

That the two questions overruled were directly relevant to the issue there can be no doubt; and, therefore, under the case cited their exclusion was harmful error, especially so when it is remembered that this case was being tried before a jury.

The question presented here is similar to the one presented in the overruling of two questions in *BATURA* vs. *McBRIDE,* 77 *N. J. LAW,* 779, 780, 781 (*ERRORS AND APPEALS,* 1909, *VREDENBURGH, J.*)

TESTIFYING TO CONCLUSIONS.

The Court allowed plaintiffs' witness, Russell Rolfe, a brother of John Rolfe, to state his conclusions as to defendant's attitude on two occasions.

Case, Specification of Objections, p. 58, lines 1-4.

Case, Grounds of Appeal, p. 66, lines 8-13.

When defendant's counsel moved to strike out testimony as given by plaintiff's witness as to defendant's attitude, the Court ruled, ''He had a right to conclude,'' to which ruling and statement of the Court in the presence of the jury, defendant took an exception.

Case, Russell Rolfe's Testimony, p. 20, lines 15-37.

And when a similar question was later asked in relation to another occasion, a similar ruling was made, and exception taken by defendant.

Case, Russell Rolfe's Testimony, p. 21, lines 18-30.

That it is solely the jury's province to draw conclusions, and that of the witness, to testify as to the facts from which the jury may draw conclusions is to elemental to need argument. To allow a witness to testify to his conclusions from undisclosed facts is clearly reversible error; especially so, when the ruling is made that not only had the witness a right to conclude, thus giving the witness' statement as to his conclusion the standng of a fact.

REFUSING TO STRIKE OUT HEARSAY.

The Court refused to strike out testimony after the witness had admitted that the details of that testimony had been told to him by another.

Case, Specification of Objections, p. 58, lines 10-14.

Case, Grounds of Appeal, p. 66, lines 21-24.

Russell Rolfe, a brother of the plaintiff, John Rolfe, had testified as to certain details, his answers being scattered over five pages of testimony, when the question was asked on cross-examination:

"Where did you get all your knowledge from as to the details if you didn't hear the conversation?"

And the witness answered:

"The details I testified to were the orders I received from my brother, after we left there."

Case, Russell Rolfe's Testimony, p. 22, lines 27-31.

Defendant's counsel moved to strike out the testimony on the ground that it was hearsay, but the most the court would do was to say:

"Surely it was not hearsay what transpired in his presence. What he said to his brother, and what his brother said to him outside of the presence of the defendant will be stricken out."

Case, Court's Ruling, p. 23, lines 1-10.

"The jury will be instructed that the testimony as to the events which did not take place in the presence of the defendant will be stricken out."

Case, Court's Ruling, p. 23, lines 15-19.

This was erroneous, because it left to the jury to pick out first the hearsay before rejecting it, and, as it appeared up to that time that the witness was testifying of his own knowledge, the only fair way to the defendant to remove the impression made on the jury by such improper testimony was to strike it

all out and allow the witness to be freshly examined as to such matters as he knew of his own knowledge.

THE COURT'S CHARGE.

There are five objections to the Court's charge to the jury, and two grounds of appeal based on the Supreme Court's holding relative to these objections.

Case, Specification of Objections, p. 58,, lines 18-40; p. 59, lines 1-10.

Case, Grounds of Appeal, p. 66, lines 26-31.

1. The Court misstated a fact in saying; "These gentlemen who represented the plaintiff company were salesmen, and they came to sell the goods."

Case, Court's Charge, p. 50, lines 35-37.

They undoubtedly came to sell the goods, but they were not salesmen in the ordinary acception of that term. Neither was there a plaintiff company: one was a partner of the plaintiff firm, John H. Rolfe, and other his brother, not a member of the firm, and any statements or representations made by John Rolfe would bear more strongly against the firm than would the statements or representations of a mere agent, the brother. A charge, therefore, which would lead the jury to believe that the statements and representations made were only such as salesmen would make to sell plaintiffs' goods has not that impartial quality about it that a Court's charge to a jury should have. Manifestly, the Court did not have a clear conception of the case in charging the jury of the actual facts of the case, and, therefore, could not and did not correctly convey in such a

charge what were the facts, very much to the injury of the defendant.

2. The Court charged:

"If, on the other hand, you believe the representations were made by the plaintiffs, and they did try to live up to them, with the defendant's assistance, then your verdict should be for the plaintiffs."

Case, Court's Charge, p. 51, lines 12-15.

Representations must be lived up to, not merely attempted to be lived up to, unless a legal excuse is shown.

3. The Court charged:

"There is nothing in this case about any fraudulent representations. They only claim that certain representations were not complied with."

"Certain representations" having been made "which were not complied with," the question whether these representations were fraudulent or not, was a question for the jury. It is not the duty of the Court to usurp the province of the jury, nor to withdraw from the jury the facts in any of their aspects. It was for the jury to say, without interference by the Court, whether the representations made by the plaintiff constituted fraud, and for the Court by its charge to preclude the jury from considering whether or not the representations were fraudulent was injurious error.

COLE vs. *TAYLOR*, 22 *N. J. L.* 59, 61.
(Supreme Court, 1849, Green, Ch. J.)

COWLEY vs. *SMYTH*, 46 *N.J.L.* 380, 388, 389.
(Supreme Court, 1884, Depue, J.)

CROSBY vs. *WELLS*, *N. J. L.* 790, 801, 811.
(Errors and Appeals, 1906, Green, J.)

BATURD vs. *McBRIDE*, 75 *N. J. L.* 480.
(Errors and Appeals, 1907, Magie Ch.)

Fraud has been defined by Bouvier (Rawle's 3rd Edition, vol. 2, at page 1304) as follows:

"Fraud, in its ordinary application to cases of contracts, includes any trick or artifice employed by one person to induce another to fall into or to detain him in an error, so that he may make an agreement contrary to his interest; and it may consist in misrepresenting or concealing material facts, and may be effected by words or by actions." Citing, *TAYLOR* vs. *SAVAGE*, 143 *U. S.*, p. 79.

CONLAN vs. *ROEMER*, 52 *N. J. L.* 53, 56.
(Supreme Court, 1889, Van Syckel, J.)

4. The Court charged:

"The only thing for you to remember is that the plaintiffs have the burden of proving their case by a preponderance of the evidence."

Case, Court's charge, p. 51, lines 23-26.

Which statement narrows a jury's duty and limits functions which are ordinarily understood to be rather broad. It is clearly not a proper statement of what the jury should "remember."

5. The Court's charge was not consistent.

The Court charged:

"If you believe that he was induced to sign the note because of certain representations and from the evidence you find, that the plaintiff did not live up to the representations your verdict would be for the defendant."

Case, Court's Charge, p. 51, l ines 3-12.

Then again,

"If on the other hand, you believe the representations were made by the plaintiffs and they did try to live up to them, with the defendant's assistance, then your verdict should be for the plaintiffs."

Case, Court's Charge, p. 51, lines 12-16.

In the first statement, the Court charged that if the plaintiffs did not live up to their representations, the verdict should be for the defendant. In the second statement, the Court charged, that if the plaintiffs simply tried to live up to their representations, whether they did or not, the verdict should be for the plaintiffs. Two inconsistent propositions.

SUSTAINING JUDGMENT.

The Supreme Court sustained the judgment of the District Court when such judgment should have been reversed.

Case, Grounds of Appeal, p. 66, lines 34-37.

The entire argument in this Brief is applicable to this point.

INJURIOUS LEGAL ERROR.

The Supreme Court held that upon the whole case there was no legal error which injuriously affected defendant's substantial rights.

Case, Grounds of Appeal, p. 66, lines 36-40; p. 67, lines 1, 2.

Case, Supreme Court Opinion, p. 62, lines 34-37.

And relied for this ruling on Sec. 27 of the 1912 Practise Act. That section reads:

"No judgment shall be reversed, or new trial granted on the ground of misdirection, or 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 effected the substantial rights of a party." (P. L. 1912, pp. 337, 382, Sec. 27.)

It is respectfully submitted that the Supreme Court took a wrong view of the scope of this section. This section does not mean to substitute the view of the Court for that of the jury, but merely puts in concrete shape what theretofore had been the law established by many decisions. It does not, and can not, mean that a court can abridge the right of cross-examination, refuse to strike out hearsay, allow a witness to testify as to conclusions, and give an inconsistent charge, and the resulting adverse judgment allowed to stand because the Court hearing the appeal thinks the errors in those important particulars did not affect the verdict of the jury on which the judgment is founded. The right to so hold must be clear and free from speculation.

It is most respectfully submitted that the judgment of the Supreme Court affirming the judgment of the Elizabeth District Court should be reversed.

March Term, 1923.

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