

## INDEX.

	Page
Notice of Appeal .....	1
Grounds of Appeal .....	2
Complaint .....	5
Order Amending Complaint .....	9
Answer .....	10
Order Amending Answer .....	16
Reply .....	17
Judgment .....	18
Clerk's Certificate .....	18
Complaint .....	19
Order Amending Complaint .....	23
Answer .....	23
Order Amending Answer .....	28
Reply .....	29
Judgment .....	30
Clerk's Certificate .....	30
Testimony .....	31
Plaintiff's Opening .....	32
Plaintiff's Motion for Direction of Verdict... ..	96
Charge of the Court .....	106
Defendants' Exceptions to Court's Charge... ..	115
Plaintiff's Exception to Court's Charge.....	116

### WITNESSES FOR DEFENDANTS.

Edward Kelley:

Direct .....	39
Cross .....	48
Redirect .....	51

Wilbur S. Crane:

Direct .....	52
Cross .....	55

	Page
Ira F. Kelley:	
Direct .....	55
Cross .....	63
Redirect .....	66
Recross .....	67
Grace L. Kelley:	
Direct .....	68
Cross .....	74
Jennie Kelley:	
Direct .....	79
Cross .....	80

PLAINTIFF'S TESTIMONY IN REBUTTAL.

Alonzo DeVoe:	
Direct .....	81
Cross .....	87
William C. Monro:	
Direct .....	90

DEFENDANTS' TESTIMONY IN SUR-REBUTTAL.

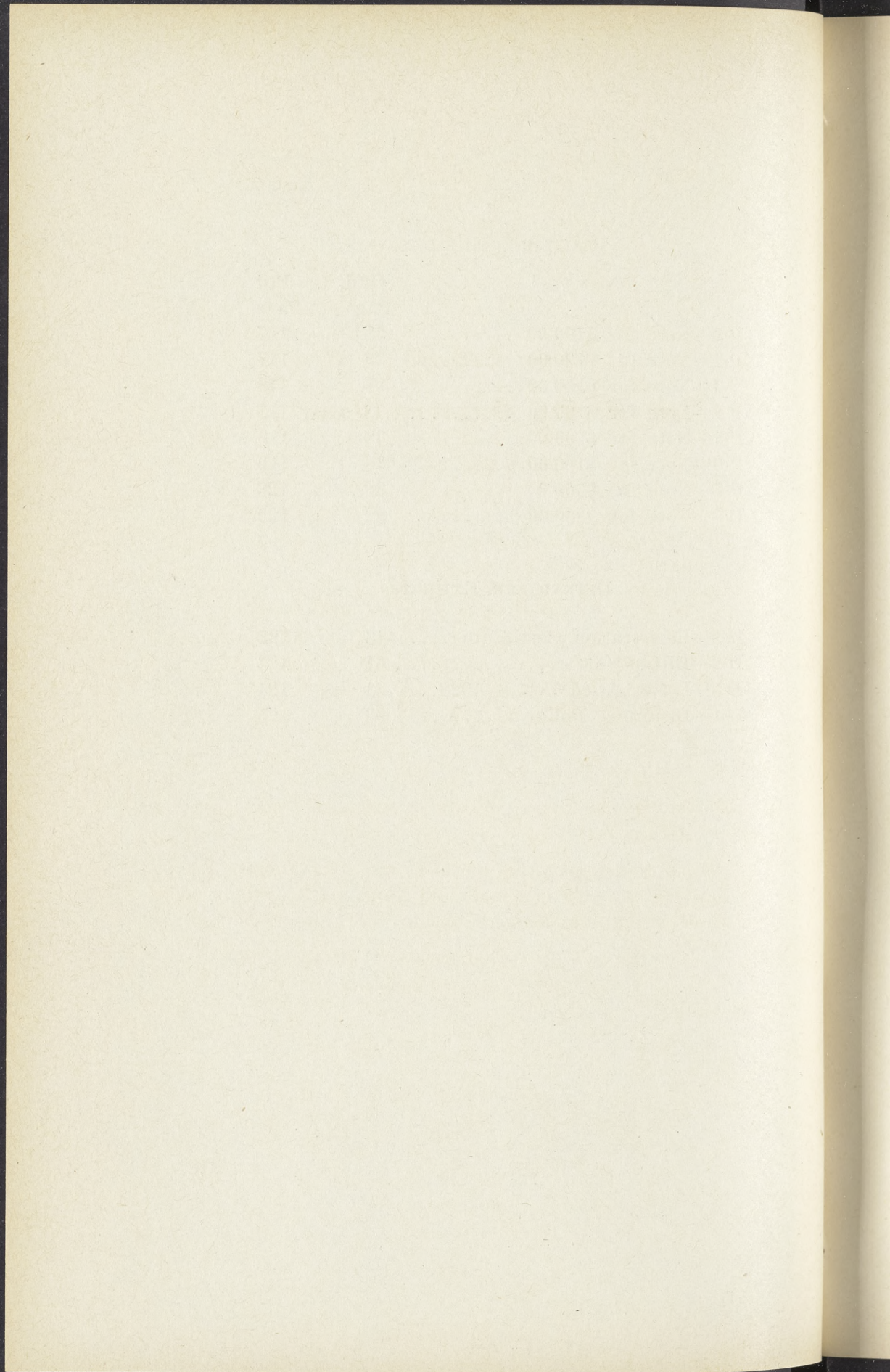
Edward Kelley:	
Direct .....	92
Cross .....	92
Carroll B. Kelley:	
Direct .....	94
Cross .....	95
Redirect .....	95
Recross .....	96

## PLAINTIFF'S EXHIBITS.

	Offd Page	Ptd Page
P-1—Note for \$100.00 .....	38	117
P-2—Note for \$100.00 .....	38	117
P-3—Note for \$100.00 .....	38	118
P-4—Note for \$100.00 .....	38	118
P-5—Note for \$100.00 .....	38	119
P-6—Note for \$100.00 .....	38	119
P-7—Note for \$500.00 .....	38	120
P-8—Note for \$800.00 .....	82	120

## DEFENDANTS' EXHIBITS.

D-1—Registration Certificate ....	43	121
D-2—Bill of Sale .....	67	123
D-3—Letter dated Feb. 8, 1928...	81	124
D-4—Insurance Policy .....	93	125



Notice of Appeal.

New Jersey Supreme Court.

10

ESSEX COUNTY.

THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation,

Plaintiff,

vs

GRACE L. KELLEY and IRA F. KELLEY,

Defendants.

Action at Law.

Notice of Appeal.

20

To the Defendants or WHITING & MOORE, their Attorneys:

Take Notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

30

CORN & SILVERMAN,  
Attorneys of Plaintiff.

40

### Grounds of Appeal.

#### NEW JERSEY COURT OF ERRORS AND APPEALS.

(Two Cases Tried Together).

10	<p>THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation,</p> <p style="text-align: center;">Plaintiff-Appellant,</p> <p style="text-align: center;">vs.</p> <p>GRACE L. KELLEY and IRA F. KELLEY,</p> <p style="text-align: center;">Defendants-Respondents.</p>	<p style="font-size: 4em;">}</p> <p>On Appeal from Supreme Court.</p> <p>Grounds of Appeal.</p>
----	--	---

20 To the Defendants-Respondents, or WHITING & MOORE, their Attorneys:

Plaintiff-appellant appeals from the whole of the judgment entered in this cause on the following grounds:

1. (a) The answer discloses no defense as to defendant Grace L. Kelley.

30 (b) The answer discloses no defense as to defendant Ira F. Kelley, in that rescission cannot be set up by way of defense.

2. The following questions were admitted:

To the witness Edward Kelley:

(a) "How did the truck work?"

(b) "Where did you take the truck to have it repaired?"

(c) "How did it work after that, after the new magneto was put in?"

40 (d) "How did the truck work after that?"

*Grounds of Appeal.*

To the witness Wilbur S. Crane:

(e) "Can you tell us what work you did?  
Give us the dates."

To the witness Ira F. Kelley:

(f) "When did you first find out that it  
had been through a fire?" 10

To the witness Grace L. Kelley:

(g) "Would you tell us when those notes  
were signed?"

(h) "Can you tell us the circumstances  
surrounding the signing of those notes, if  
you recall?"

To the witness Carroll B. Kelley: 20

(i) "What did you find the condition of  
the serial number to be?"

3. A bill of sale on the Columbia truck was admitted in evidence.

4. The Court denied plaintiff's motion for direction of verdict, made on the following grounds as to defendant Grace L. Kelley:

(a) There was no proof that she was acting as surety or accomodator. 30

(b) There was no proof of any debt for which she was surety or accomodator.

(c) There was no proof that plaintiff or its predecessors knew she was acting as surety or accomodator.

(d) The proofs showed the sale, in which the notes were given, was made to her.

(e) None of the defenses set up in the 40

*Grounds of Appeal.*

answer or attempted to be proved were available to her.

And made on the following grounds as to defendant Ira F. Kelley:

- 10 (f) There was no proof of fraud.  
 (g) There was no proof that the truck was other than as represented.  
 (h) There was no proof as to the materiality of the representation.  
 (i) There was no proof of scienter.  
 (j) There was no proof of damage.  
 (k) Rescission is not a defense.  
 (l) There was no counterclaim for rescission.
- 20 (m) The notes were endorsed after the alleged rescission.  
 (n) There was no proof of a rescission.  
 (o) The defense of failure to deliver bill of sale was not available to him.  
 (p) The defense of mutilation of car number was not available to him.  
 (q) There was no proof that plaintiff or its predecessor mutilated the car number.

30 CORN & SILVERMAN,  
 Attorneys of Plaintiff-Appellant.

**Judgment Record.**

## NEW JERSEY SUPREME COURT,

THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation, <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs</p> GRACE L. KELLEY and IRA F. KELLEY, <p style="text-align: right;">Defendants.</p>	}	Judgment Record. Action at Law. On Postea. Judgment for Defendants.  Whiting & Moore, Attorneys.	10
---	---	--	----

Grace L. Kelley and Ira F. Kelley the defendants in this cause, were summoned to answer unto The Model Plan Finance Corporation, a New Jersey corporation the plaintiff therein in an action at law upon the following complaint: 20

(Summons issued February 10, 1926).

**Complaint.**

Filed March 1, 1926.

Plaintiff, a corporation of the State of New Jersey having its principal office in the City of Newark, County of Essex and State of New Jersey, says that: 30

**FIRST COUNT.**

1. On October 1, 1923 defendant Grace L. Kelley made her note of that date in the sum of One Hundred Dollars (\$100), due November 1, 1923, with interest at 6% per annum, to the order of A. DeVoe. payable at First National Bank of Ridgewood, N. J.

2. Said note was presented at the place where 40

*Complaint.*

payable and payment thereof was refused, and the same was protested for non-payment.

3. Said note is the property of plaintiff and is unpaid.

## SECOND COUNT.

10 1. On October 1, 1923 defendant Grace L. Kelley made her note for that date in the sum of One Hundred Dollars (\$100), due December 1, 1923, with interest at 6% per annum, to the order of A. DeVoe, payable at First National Bank of Ridgewood, N. J.

2. Said note was presented for payment at the place where payable, and payment thereof was refused, and the same was protested for non-payment.

20 3. Said note is the property of plaintiff and is unpaid.

## THIRD COUNT.

1. On October 1, 1923 defendant Grace L. Kelley made her note of that date in the sum of One Hundred Dollars (\$100), due January 1, 1924, with interest at 6% per annum, to the order of A. DeVoe, payable at First National Bank of Ridgewood, N. J.

30 2. Said note was presented for payment at the place where payable, and payment thereof was refused, and the same was protested for non-payment.

3. Said note is the property of plaintiff and is unpaid.

## FOURTH COUNT.

40 1. On October 1, 1923 defendant Grace L. Kelley made her note of that date in the sum of Eight

*Complaint.*

Hundred Dollars (\$800), due February 1, 1924, with interest at 6% per annum, to the order of A. DeVoe, payable at First National Bank of Ridgewood, N. J.

2. Said note was presented for payment at the place where payable, and payment thereof was refused.

10

3. Said note is the property of plaintiff, and is unpaid.

## FIFTH COUNT.

1. On February 1, 1924 defendant Grace L. Kelley made her note of that date in the sum of One Hundred Dollars (\$100) due June 1, 1924, with interest at 6% per annum, to the order of A. DeVoe payable at First National Bank of Ridgewood, N. J.

20

2. Before delivery of said note, defendant Ira F. Kelley endorsed the same, and thereby became liable for the payment thereof, together with the maker.

3. Said note was presented for payment at the place where payable, and payment thereof was refused, and the same was protested for non-payment.

4. Said note is the property of plaintiff and is unpaid.

30

## SIXTH COUNT.

1. On February 1, 1924 defendant Grace L. Kelley made her note of that date in the sum of One Hundred Dollars (\$100) due July 1, 1924 with interest at 6% per annum, to the order of A. DeVoe, payable at First National Bank of Ridgewood, N. J.

2. Before delivery of said note, defendant Ira 40

*Complaint.*

F. Kelley endorsed the same, and thereby became liable for the payment thereof, together with the maker.

3. Said note was presented for payment at the place where payable, and payment thereof was refused, and the same was protested for non-payment.

10

4. Said note is the property of plaintiff and is unpaid.

## SEVENTH COUNT.

1. On February 1, 1924 defendant Grace L. Kelley made her note of that date in the sum of One Hundred Dollars (\$100), due August 1, 1924, with interest at 6% per annum, to the order of A. DeVoe, payable at First National Bank of Ridge-

20

wood, N. J.

2. Before delivery of said note, defendant Ira F. Kelley endorsed the same, and thereby became liable for the payment thereof, together with the maker.

3. Said note was presented for payment at the place where payable, and payment thereof was refused, and same was protested for non-payment.

4. Said note is the property of plaintiff and is unpaid.

30

Plaintiff demands damages:

1. On the First Count, One Hundred Dollars (\$100) besides interest from October 1, 1923 and protest fees, against defendant Grace L. Kelley.

2. On the Second Count, One Hundred Dollars (\$100) besides interest from October 1, 1923 and protest fees, against defendant Grace L. Kelley.

3. On the Third Count, One Hundred Dollars (\$100) besides interest from October 1, 1923 and

40

protest fees, against defendant Grace L. Kelley.

*Complaint.*

4. On the Fourth Count, Eight Hundred Dollars (\$800) besides interest from October 1, 1923, against defendant Grace L. Kelley.

5. On the Fifth Count, One Hundred Dollars (\$100) besides interest from February 1, 1924, and protest fees against both defendants.

6. On the Sixth Count, One Hundred Dollars (\$100) besides interest from February 1, 1924 and protest fees, against both defendants. 10

7. On the Seventh Count, One Hundred Dollars (\$100) besides interest from February 1, 1924, and protest fees, against both defendants.

CORN & SILVERMAN,  
Attorneys for Plaintiff.

---

**Order Amending Complaint.** 20

Filed March 1, 1926.

On motion of Corn & Silverman, Attorneys of plaintiff, and with the annexed consent of Whiting & Moore, attorneys of defendants:

It is, on this 13th day of February, 1929, ORDERED that the complaint be amended as follows: 30

1. By adding to the Fifth Count, Paragraph 3, "and notice thereof was duly sent to defendant Ira F. Kelley."

2. By adding to the Sixth Count, Paragraph 3, "and notice thereof was duly sent to defendant Ira F. Kelley."

3. By adding to the Seventh Count, Paragraph

*Answer.*

3, "and notice thereof was duly sent to defendant Ira F. Kelley."

NELSON Y. DUNGAN,  
Circuit Court Judge.

Entered February 15, 1929.

On motion of

10

CORN & SILVERMAN,  
Attorneys of Plaintiff.

---

**Answer.**

Filed March 16, 1926.

20 The defendants, residing at Glen Rock, in the County of Bergen and State of New Jersey, say that:

**ANSWER TO FIRST COUNT.**

1. They have not knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the First Count except in so far as they are admitted by paragraph 2 hereof.

30 2. The defendant, Grace L. Kelley admits that she executed and delivered to one A. DeVoe, notes aggregating \$1500.00, payable at the First National Bank of Ridgewood, New Jersey, bearing interest at the rate of six per cent per annum. The alleged indebtedness for which said notes were given has been reduced by the payment of \$400.00, leaving notes to the amount of \$1100.00 still outstanding and unpaid. The notes sued on in this complaint aggregate \$1400.00, and defendants have not knowledge or information sufficient to form a belief as to which of the notes alleged are the ones

40

*Answer.*

which were executed as aforesaid and remain unpaid.

3. They have not knowledge or information sufficient to form a belief as to the allegations of paragraphs 2 and 3 of the First Count.

## ANSWER TO SECOND COUNT.

10

4. They have not knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the Second Count except in so far as they are admitted by paragraph 5 thereof.

5. The allegations of paragraph 2 of the answer to the First Count are repeated and made a part of the answer to this count.

6. They have not knowledge or information sufficient to form a belief as to the allegations of paragraphs 2 and 3 of the Second Count.

20

## ANSWER TO THIRD COUNT.

7. They have not knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the Third Count except in so far as they are admitted by paragraph 8 hereof.

8. The allegations of paragraph 2 of the answer to the First Count are repeated and made a part of the answer of this count.

30

9. They have not knowledge or information sufficient to form a belief as to the allegations of paragraphs 2 and 3 of the Third Count.

## ANSWER TO FOURTH COUNT.

10. They have not knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the Fourth Count except in so far as they are admitted by paragraph 11 hereof.

40

*Answer.*

11. The allegations of paragraph 2 of the answer to the First Count are repeated and made a part of the answer to this count.

12. They have not knowledge or information sufficient to form a belief as to the allegations of paragraphs 2 and 3 of the Fourth Count.

10

## ANSWER TO FIFTH COUNT.

13. They have not knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the Fifth Count except in so far as they are admitted by paragraph 14 hereof.

14. The allegations of paragraph 2 of the answer to the First Count are repeated and made a part of the answer to this count.

20

15. They deny paragraph 2 of the Fifth Count except that they admit that there was a note of \$100.00 due June 1, 1924, which was endorsed by the said Ira F. Kelley.

16. They have not knowledge or information sufficient to form a belief as to the allegations of paragraphs 3 and 4 of the Fifth Count.

## ANSWER TO SIXTH COUNT.

30

17. They have not knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the Sixth Count except in so far as they are admitted by paragraph 18 hereof.

18. The allegations of paragraph 2 of the answer to the First Count are repeated and made a part of the answer to this count.

19. They deny paragraph 2 of the Sixth Count except that they admit that there was a note of \$100.00 due July 1, 1924, which was endorsed by  
40 the said Ira F. Kelley.

*Answer.*

20. They have not knowledge or information sufficient to form a belief as to the allegations of paragraphs 3 and 4 of the Sixth Count.

## ANSWER TO SEVENTH COUNT.

20. They have not knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the Seventh Count except in so far as they are admitted by paragraph 21 hereof. 10

21. The allegations of paragraph 2 of the answer to the First Count are repeated and made a part of the answer to this count.

22. They deny paragraph 2 of the Seventh Count except that they admit that there was a note of \$100.00 due August 1, 1924, which was endorsed by the said Ira F. Kelley. 20

23. They have not knowledge or information sufficient to form a belief as to the allegations of paragraphs 3 and 4 of the Seventh Count.

## FIRST SEPARATE AND DISTINCT DEFENSE TO THE FIRST, SECOND AND THIRD COUNTS.

1. There is another action pending in the Second Judicial District Court of Bergen County for the causes of action alleged in the First, Second and Third Counts of the complaint, which action remains undisposed of. 30

## SECOND SEPARATE AND DISTINCT DEFENSE TO ALL COUNTS OF THE COMPLAINT.

2. The notes referred to in the First, Second and Third Counts of the complaint were replaced by the notes referred to in the Fifth, Sixth and 40

*Answer.*

Seventh Counts of the complaint; the said notes referred to in the Fifth, Sixth and Seventh Counts being given in renewal of the notes referred to in the First, Second and Third Counts and there is nothing due and owing on said notes referred to in the First, Second and Third Counts.

10        **THIRD SEPARATE AND DISTINCT DEFENSE TO THE FIRST, SECOND AND THIRD COUNTS.**

3. The defendant, Grace L. Kelley, is a married woman and was a married woman at the time of the execution and delivery of the notes referred to in the complaint, being the wife of the defendant, Ira F. Kelley. Neither the said defendant, Grace L. Kelley, nor her separate estate, received any benefit whatever from said notes, and all of said notes are void as against said defendant, Grace L. Kelley.

20

**FOURTH SEPARATE AND DISTINCT DEFENSE TO ALL COUNTS OF THE COMPLAINT.**

4. The notes referred to in the complaint were given in part payment of a motor vehicle, to wit, a Schacht truck which one A. DeVoe purported to sell and deliver to the defendant, Ira F. Kelley. There was not delivered to the said purchaser the manufacturer's bill of sale containing the manufacturer's number on the engine or motor of the motor vehicle so sold, nor was the original bill of sale assigned by the said seller to the said purchaser by an assignment witnessed by two persons and acknowledged by the seller in accordance with the provisions of the act of the legislature of the State of New Jersey, entitled "An Act relating to

30

40

*Answer.*

and regulating the sale and purchase of motor vehicles requiring presence of manufacturer's number on the same, requiring issuance of bill of sale and assignment of same and providing penalties therefor," being Chapter 168 of the Pamphlet Laws of 1919, at page 357, as amended by Chapter 247 of the Pamphlet Laws of 1920, at page 463, and said sale of said truck was illegal and said notes are void. 10

FIFTH SEPARATE AND DISTINCT DEFENSE TO ALL COUNTS OF THE COMPLAINT.

5. On or about May 18th, 1923, one A. DeVoe sold and delivered to the defendant, Ira F. Kelley, a motor vehicle known as a Schacht truck, at the agreed price of \$2500.00, upon the representation made by said A. DeVoe to said Ira F. Kelley that said truck was a new truck, having been used only for demonstration purposes, and that it was a 1923 model. 20

6. That said defendant, Ira F. Kelley, bought said truck relying upon said representations made by said A. DeVoe, and the notes sued on in the complaint were given in part payment of said truck, or in renewal of other notes which were given in part payment of said truck. 30

7. Said Schacht truck was not a new truck and was not a 1923 model and said representations to that effect made by said A. DeVoe were false and said DeVoe knew that said representations were false at the time they were made, and said DeVoe made said representations for the purpose of inducing said defendant, Ira F. Kelley, to purchase said truck, knowing that he relied upon the same. 40

8. Said defendant, Ira F. Kelley, upon learn-

*Answer.*

ing of the falsity of said representations, notified said DeVoe that he would not pay said notes and rescinded said contract of sale and offered to return said truck to DeVoe, but said DeVoe failed and neglected to return the notes referred to in the complaint.

10

WHITING & MOORE,  
Attorneys of Defendants.

**Order Amending Answer.**

Filed March 15, 1926.

Motion having been made to amend the answer filed in the above entitled cause upon notice to and in the presence of plaintiff's attorneys, it is

20

ORDERED, that the answer filed in the above entitled cause which was started by summons issued February 10th, 1926, be and it is hereby amended as follows:

By adding to the Fifth Separate and Distinct Defence to all counts of the complaint, a new paragraph as follows:

"9. Plaintiff is not a holder in due course of the notes sued on in the complaint."

30

Dated December 1st, 1928.

Let this rule be entered in the minutes.

WM. S. GUMMERE,  
*C. J.*

Rule actually entered this  
1st day of December, 1928.

On motion of

40

WHITING & MOORE,  
Attorneys of Defendants.

**Reply.**

Filed March 16, 1926.

Plaintiff replying to defendants' answer, says that: It joins issue on the answer.

REPLY TO FIRST DEFENSE.

1. Paragraph 1 is denied. 10

REPLY TO SECOND DEFENSE.

1. Paragraph 2 is denied.

REPLY TO THIRD DEFENSE.

1. Plaintiff admits that defendant Grace L. Kelley, at the time of the execution and delivery of the notes was a married woman, the wife of defendant Ira F. Kelley, and denies the remainder of Paragraph 3. 20

REPLY TO FOURTH DEFENSE.

1. Paragraph 4 is denied.

REPLY TO FIFTH DEFENSE.

1. Paragraph 5 is denied.
2. Paragraph 6 is denied.
3. Paragraph 7 is denied. 30
4. Paragraph 8 is denied.

CORN & SILVERMAN,  
Attorneys for Plaintiff.

**Postea.**

This case was tried before Judge Nelson Y. Dungan, (one of the Circuit Court Judges to whom the cases on the list at the December Term of 1928 of the Essex Circuit of the Supreme Court were referred for trial by a Justice of the Supreme Court holding the Essex Circuit, the above cause being one of the cases on said list), with a jury on the  
 10 the thirteenth day of February, Nineteen hundred and twenty-nine.

The jury rendered a general verdict against the plaintiff and in favor of the defendants.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendants Grace L. Kelley and Ira F. Kelley do recover of the said plaintiff The Model Plan Finance Corporation, a New Jersey corporation their costs which  
 20 have been taxed at the sum of forty-six dollars.

Costs \$46.00.

WM. S. GUMMERE,  
*C. J.*

Judgment signed and entered February 26, 1929.

**Clerk's Certificate.**

*I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.*  
 30

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fourteenth day of April, A. D., nineteen hundred and thirty.  
 (Seal)

40

FRED L. BLOODGOOD,  
 Clerk.

**Judgment Record.**

NEW JERSEY SUPREME COURT,

<p>THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>GRACE L. KELLEY and IRA F. KELLEY,</p> <p style="text-align: right;">Defendants.</p>	<p>Judgment Record. Action at Law. On Postea. Judgment for Defendants. Whiting &amp; Moore, Attorneys.</p>	<p>10</p>
--	--	-----------

Grace L. Kelley and Ira F. Kelley, the defendants in this cause were summoned to answer unto The Model Plan Finance Corporation, a New Jersey corporation the plaintiff therein in an action at law upon the following complaint: 20

(Summons issued February 29, 1928).

**Complaint.**

Filed March 20, 1928.

Plaintiff, a New Jersey corporation having its principal office in the City of Newark, County of Essex and State of New Jersey, says that: 30

**FIRST COUNT.**

1. It sues on a promissory note made by defendant Grace L. Kelley, a true copy of which here follows:

\$100.00                      Ridgewood, N. J. Feb. 1, 1924  
 June 1 ..... after date.... I.. promise  
 to pay to the order of A. DeVoe

*Complaint.*

One Hundred and 00/100 ..... Dollars  
at the First National Bank of Ridgewood.

Value received with int.

I hereby charge my separate estate with the  
payment hereof.

Due June 1/24 GRACE L. KELLEY.

10

2. Defendant Ira F. Kelley endorsed said note.

3. On the date said note fell due it was pre-  
sented for payment at the place where payable and  
payment thereof was refused and said note was  
protested for non-payment.

4. Plaintiff is the holder of said note and it is  
unpaid.

SECOND COUNT.

20

1. It sues on a promissory note made by de-  
fendant Grace L. Kelley, a true copy of which here  
follows:

\$100.00 Ridgewood, N. J. Feb. 1, 1924

July 1 ..... after date .... I.. promise  
to pay to the order of A. DeVoe

One Hundred and 00/100 ..... Dollars  
at the First National Bank of Ridgewood.

Value received with int.

30

I hereby charge my separate estate with the  
payment hereof.

Due 7/1/24 GRACE L. KELLEY

2. Defendant Ira F. Kelley endorsed said note.

3. On the date said note fell due it was pre-  
sented for payment at the place where payable and  
payment thereof was refused and said note was  
protested for non-payment.

40

4. Plaintiff is the holder of said note and it is  
unpaid.

*Complaint.*

## THIRD COUNT.

1. It sues on a promissory note made by defendant Grace L. Kelley, a true copy of which here follows:

\$100.00                      Ridgewood, N. J. Feb. 1, 1924  
 August 1 ..... after date .... I promise                      10  
 to pay to the order of A. DeVoe  
 One Hundred and 00/100 ..... Dollars  
 at the First National Bank of Ridgewood.

Value received with int.

I hereby charge my separate estate with the payment hereof.

Due Aug. 1, 1924                      GRACE L. KELLEY.

2. Defendant Ira F. Kelley endorsed said note.

3. On the day said note fell due it was presented for payment at the place where payable and payment thereof was refused and said note was protested for non-payment.                      20

4. Plaintiff is the holder of said note and it is unpaid.

## FOURTH COUNT.

1. It sues on a promissory note made by defendant Grace L. Kelley, a true copy of which here follows:                      30

\$500.00                      Ridgewood, N. J. Feb. 1, 1924  
 Sept. 1 ..... after date .... I.. promise  
 to pay to the order of A. DeVoe  
 One Hundred and 00/100 ..... Dollars  
 at the First National Bank of Ridgewood.

Value received with int.

I hereby charge my separate estate with the payment hereof.

Due 9/1                                      GRACE L. KELLEY.                      40

*Complaint.*

2. Defendant Ira F. Kelley endorsed said note.

3. On the date said note fell due it was presented for payment at the place where payable and payment thereof was refused and said note was protested for non-payment.

10 4. Plaintiff is the holder of said note and it is unpaid.

Plaintiff demands as damages against both defendants:

1. On the First Count, One Hundred Dollars (\$100) besides interest thereon from February 1, 1924 and Two Dollars and Forty-eight Cents (\$2.48) protest fees.

20 2. On the Second Count, One Hundred Dollars (\$100) besides interest thereon from February 1, 1924 and Two Dollars and Sixty Cents (\$2.60) protest fees.

3. On the Third Count, One Hundred Dollars (\$100) besides interest thereon from February 1, 1924 and Two Dollars and Sixty Cents (\$2.60) protest fees.

30 4. On the Fourth Count, Five Hundred Dollars (\$500) besides interest thereon from February 1, 1924 and Two Dollars and Forty-eight cents (\$2.48) protest fees.

CORN & SILVERMAN,  
Attorneys of Plaintiff.

### Order Amending Complaint.

On motion of Corn & Silverman, attorneys of plaintiff, and the annexed consent of Whiting & Moore, attorneys of defendants:

It is, on this 13th day of February, 1929, Ordered that the complaint be amended as follows:

1. By adding to the Fourth Count, paragraph 3, "and notice thereof was duly sent to defendant Ira F. Kelley." 10

NELSON Y. DUNGAN,  
Circuit Court Judge.

Entered Feb. 15, 1929.

On motion of  
CORN & SILVERMAN,  
Attorneys of Plaintiff.

20

---

### Answer.

Filed March 19, 1928.

The defendants, residing in Glen Rock, in the County of Bergen and State of New Jersey, say that:

#### ANSWER TO FIRST COUNT.

30

1. They admit paragraphs 1 and 2 of the First Count.
2. They have not knowledge or information sufficient to form a belief as to paragraphs 3 and 4 of the First Count.

#### ANSWER TO SECOND COUNT.

3. They admit paragraphs 1 and 2 of the Second Count.

40

*Answer.*

4. They have not knowledge or information sufficient to form a belief as to paragraphs 3 and 4 of the Second Count.

## ANSWER TO THIRD COUNT.

5. They admit paragraphs 1 and 2 of the Third  
10 Count.

6. They have not knowledge or information sufficient to form a belief as to paragraphs 3 and 4 of the Third Count.

## ANSWER TO FOURTH COUNT.

7. They admit paragraphs 1 and 2 of the Fourth Count.

8. They have not knowledge or information sufficient to form a belief as to paragraphs 3 and 4  
20 of the Fourth Count.

## FIRST SEPARATE AND DISTINCT DEFENSE TO THE FIRST, SECOND AND THIRD COUNTS.

1. There is another action pending in the New Jersey Supreme Court for the causes of action alleged in the First, Second and Third Counts of the complaint, which action remains undisposed of.  
30

## SECOND SEPARATE AND DISTINCT DEFENSE TO ALL COUNTS OF THE COMPLAINT.

2. The defendant, Grace L. Kelley, is a married woman and was a married woman at the time of the execution and delivery of the notes referred to in the complaint, being the wife of the defendant, Ira F. Kelley. Neither the said defendant, Grace  
40 L. Kelley, nor her separate estate, received any

*Answer.*

benefit whatever from said notes, and all of said notes are void as against said defendant, Grace L. Kelley.

THIRD SEPARATE AND DISTINCT DEFENSE TO ALL COUNTS OF THE COMPLAINT.

10

3. The notes referred to in the complaint were given in part payment, or in renewal of other notes which were given in part payment of a motor vehicle, to wit, a Schacht truck which one A. DeVoe, purported to sell and deliver to the defendant, Ira F. Kelley. There was not delivered to the said purchaser the manufacturer's bill of sale containing the manufacturer's number on the engine or motor of the motor vehicle so sold, nor was the original bill of sale assigned by the said seller to the said purchaser by an assignment witnessed by two persons and acknowledged by the seller in accordance with the provisions of the act of the legislature of the State of New Jersey, entitled "An Act relating to and regulating the sale and purchase of motor vehicles requiring presence of manufacturer's number on the same, requiring issuance of bill of sale and assignment of same and providing penalties therefor," being Chapter 168 of the Pamphlet Laws of 1919, at page 357, as amended by Chapter 247 of the Pamphlet Laws of 1920, at page 463, and said sale of said truck was illegal and said notes are void.

20

30

FOURTH SEPARATE AND DISTINCT DEFENSE TO ALL COUNTS OF THE COMPLAINT.

4. The notes referred to in the complaint were

40

*Answer.*

10 given in part payment, or in renewal of other notes which were given in part payment of a motor vehicle, to wit, a Schacht truck which one A. DeVoe, purported to sell and deliver to the defendant, Ira F. Kelley. Said motor vehicle contained an obliterated and erased manufacturer's number and the purported sale of said truck was illegal and the said notes are void, and the consideration for said notes has wholly failed. Defendants learned of the fact that said motor vehicle contained an obliterated and erased manufacturer's number, to wit, on January 25th, 1928, and immediately thereafter, to wit, on January 27th, 1928, rescinded said sale and offered to return said truck.

20 FIFTH SEPARATE AND DISTINCT DEFENSE TO ALL COUNTS OF THE COMPLAINT.

30 5. The notes referred to in the complaint were given in part payment, or in renewal of other notes which were given in part payment of a motor vehicle, to wit, a Schacht truck which one A. DeVoe, purported to sell and deliver to defendant, Ira F. Kelley. Said DeVoe did not have title to said truck and did not give the purchaser title to said truck and did not give the purchaser title of any nature whatsoever and the consideration for said notes has wholly failed. Defendants learned of the fact that said DeVoe did not have title to said truck on or about February 7th, 1928, and immediately thereafter, to wit, on February 8th, 1928, rescinded said purported sale and offered to return said Schacht truck.

*Answer.*

SIXTH SEPARATE AND DISTINCT DEFENSE TO ALL COUNTS OF THE COMPLAINT.

6. On or about May 18th, 1923, one A. DeVoe sold and delivered to the defendant, Ira F. Kelley, a motor vehicle known as a Schacht truck, at the agreed price of \$2500.00, upon the representation made by said A. DeVoe to said Ira F. Kelley that said truck was a new truck, having been used only for demonstration purposes. 10

7. That said defendant, Ira F. Kelley, bought said truck relying upon said representations made by said A. DeVoe, and the notes sued on in the complaint were given in part payment of said truck, or in renewal of other notes which were given in part payment of said truck. 20

8. Said Schacht truck was not a new truck and had not been used only for demonstration purposes, but on the contrary, said truck was a rebuilt truck and said representations made by the said A. DeVoe were false and said DeVoe knew that said representations were false at the time that they were made, and said DeVoe made said representations for the purpose of inducing said defendant, Ira F. Kelley, to purchase said truck, knowing that he relied upon the same. 30

9. Said defendant, Ira F. Kelley, upon learning of the falsity of said representations, notified said DeVoe that he would not pay said notes and rescinded said contract of sale and offered to return said truck to DeVoe, but said DeVoe failed and neglected to return the notes referred to in the complaint.

WHITING & MOORE,  
Attorneys of Defendants. 40

### Order Amending Answer.

Motion having been made to amend the answer filed in the above entitled cause upon notice to and in the presence of plaintiff's attorneys, it is

10 ORDERED, that the answer filed in the above entitled cause which was started by summons issued February 29th, 1928, be and it is hereby amended as follows:

By adding to the Fourth Separate and Distinct Defense to all counts of the complaint, a new paragraph as follows:

"4-a. Plaintiff is not a holder in due course of the notes sued on in the complaint."

20 And by adding to the Fifth Separate and Distinct Defense to all counts of the complaint, a new paragraph as follows:

"5-a. Plaintiff is not a holder in due course of the notes sued on in the complaint."

And by adding to the Sixth Separate and Distinct Defense to all counts of the complaint, a new paragraph as follows:

30 "10. Plaintiff is not a holder in due course of the notes sued on in the complaint."

Dated December 1st, 1928.

Let this rule be entered in the minutes.

WM. S. GUMMERE,  
C. J.

Rule actually entered this  
first day of December, 1928.

On motion of

40 WHITING & MOORE,  
Attorneys for Defendants.

**Reply.**

Filed April 10, 1928.

Plaintiff, replying to the defendants' answer, says that:

1. It joins issue on the answer.
2. It denies the allegations contained in the First Defense.
3. As to the allegations contained in the Second Defense, it has no knowledge or information whereof to form a belief as to the matters contained in the first sentence and denies the matters contained in the second sentence. 10
4. It denies the matters contained in the Third, Fourth, Fifth and Sixth Defense.

**OBJECTION IN POINT OF LAW:**

Plaintiff hereby gives notice that before, at, or after the trial, it will move to dismiss the answer on the ground that the same discloses no defense to the action. 20

CORN & SILVERMAN,  
Attorneys of Plaintiff.

30

40

### Judgment.

10 This case was tried before Judge Nelson Y. Dungan, (one of the Circuit Court Judges to whom the cases on the list at the December Term of 1928 of the Essex Circuit of the Supreme Court were referred for trial by a Justice of the Supreme Court holding the Essex Circuit, the above cause being one of the cases on said list), with a jury, on the thirteenth day of February, Nineteen hundred and twenty-nine.

The jury rendered a general verdict against the plaintiff and in favor of the defendants.

20 Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendants Grace L. Kelley and Ira F. Kelley do recover of the said plaintiff The Model Plan Finance Corporation, a New Jersey corporation their costs which have been taxed at the sum of Fifty-one dollars and fifty cents.

Costs \$51.50.

Judgment signed and entered February 26, 1929.

---

### Clerk's Certificate.

30 I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fourteenth day of April, A. D., nineteen hundred and thirty.

(Seal)

FRED L. BLOODGOOD,

Clerk.

**Testimony.**

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

Wednesday, February 13, 1929.

THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation, <p style="text-align: right;">Plaintiff,</p>	}	10
---	---	----

vs.

Action at Law.

GRACE L. KELLEY and IRA F. KELLEY, <p style="text-align: right;">Defendants.</p>	}	
---	---	--

THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation, <p style="text-align: right;">Plaintiff,</p>	}	20
---	---	----

vs.

Action at Law.

GRACE L. KELLEY and IRA F. KELLEY, <p style="text-align: right;">Defendants.</p>	}	
---	---	--

30

Before NELSON Y. DUNGAN, *J.* and a Jury.

## APPEARANCES:

For Plaintiff appear CORN & SILVERMAN,  
(by JOSEPH J. CORN).

For Defendants appear WHITING &amp; MOORE, (by IRA C. MOORE).

---

 Mr. Corn: It is admitted that all the defenses 40

*Plaintiff's Opening.*

which the defendants set up in the second suit may be set up the same way in the first suit.

Three, that the endorser Ira F. Kelley received due notice of the dishonor of the notes in question.

The fourth in the first case and the first, second and third counts in the second case are abandoned.

(A jury is called and sworn.)

(Mr. Corn opens for plaintiff as follows:)

Mr. Corn: May it please the Court, and gentlemen of the jury:

This is an action by the Model Plan agency on seven notes. Six of these were each for \$100 and the seventh is for \$500. All of these notes were made by the defendant Grace L. Kelley. She admits that. Of these notes, the last four—that is, three for \$100 each and one for \$500 making a total of \$800—were endorsed by her husband Ira F. Kelley. There is no contest so far as the notes having been signed, having been endorsed, and that notice was given to the endorser and these notes have not been paid. Therefore with those facts we will ask a judgment at your hands.

30

(Mr. Moore opens defendants case as follows:)

Mr. Moore: May it please the Court, gentlemen of the jury:

These notes which are being sued upon are drawn to the order of one A. DeVoe, the full name being Alonzo DeVoe as I understand it. They were given as part of the purchase price of the Schacht automobile. We have interposed several defenses

40

*Plaintiff's Opening.*

to the suit on these notes. Perhaps the principal defense arises out of the circumstances surrounding the sale of this Schacht truck. The defendant Ira F. Kelley had an ice business up in Ridgewood or Glen Rock. He had bought a Columbia truck for use in this business from DeVoe, DeVoe being in the automobile business. The Columbia truck was not satisfactory. It was a second hand truck. So he took it up with DeVoe and made it clear to DeVoe that this time he did not want a second hand truck. He was through with second hand trucks. He wanted a new truck. DeVoe had a Schacht truck. He said it was a new truck but that it had been used for demonstration purposes, demonstration purposes only, but it was a 1923 truck, this being in May, 1923, and that he could save a little money if he would take that truck since it had been used for demonstration purposes. Kelley was persuaded to buy the truck, the purchase price being \$2500. He turned back the old Columbia truck. He allowed him what he paid on account of that, I believe it was \$400, and he paid \$600 more and then he gave notes—I say he gave notes; he did not sign the notes, but Mrs. Kelley gave notes for the balance.

The notes which were first given were signed by Mrs. Kelley alone. They were for \$100, three notes for \$100 each and then another note, a larger note, for the balance, the \$100 notes being payable monthly and the final note being payable in October. Then those first three notes for \$100 each were paid, and another \$100 was paid on account of the big note, which must have been for \$1200, leaving \$1100 due. Renewal notes were then given, and it is these renewal notes which are being sued on. The renewal notes were also signed by Mrs.

*Plaintiff's Opening.*

Kelley, not by Mr. Kelley. There were three notes for \$100 each, one for \$800.

10 Later—I do not know the date—but my understanding of it is that about that time, around October or a little prior thereto, other notes were given three for \$100 each and one for \$500. The reason for that, as I understand it, was this. As you can see the plan was to make the payments in monthly installments, and they would give three notes for \$100 each and then a big note for the balance, and then when a big note came due they would give more notes for \$100 and a big note for the balance, with the result that DeVoe had come around every so often to get new notes signed. So when the October notes were due or shortly thereafter he said, “You might as well sign another series of notes for February,” and that was done, the third series being \$300 only instead of \$1100.

20 Kelley had not had the truck very long before he again had trouble with it. I do not know that I can give you the actual sequence of trouble. In the first place he had a little trouble in the starting. Then I think it was attended to for him. The next thing I think was the clutch, the facing of the clutch was—no, the tires went first, and the explanation was that the wheels were out of alignment and that was the trouble. When the tires were put on, then the clutch went, and that was explained somehow or other and Kelley gladly accepted the explanation, got the truck, and that was fixed. Finally one the gears went, and by that time Kelley, who was rather an easy going sort of fellow and who accepted some of the stories, finally made up his mind that that was not a brand new truck that was giving him all that trouble. 30 So he told DeVoe that he would not pay the notes 40

*Plaintiff's Opening.*

and DeVoe was notified that the notes would not be paid and he could have the truck. The contract was rescinded. Of course Kelley did not say it in so many words, but that was the effect of it.

Now that, if you can see, is the real merit behind this case. The man was defrauded. He paid \$1400 for this truck and he refuses to pay the balance because he says the truck is not what it is represented to be. 10

Now, in addition to those facts, which after all are the real merits of the case, we have other defenses which are technical.

The first series of notes sued on, which would be the second series given, were signed by Mrs. Kelley only. Mrs. Kelley was a married woman. She receive no benefit whatever from the purchase of this truck, and we are raising the technical defense that a married woman cannot be an accommodation maker of a note and that those notes are void. 20

Another defense which is technical and which you can see in view of the fraud we are putting in—as long as we are going about it we are putting in all the technical defenses that we can think of or that we are warranted in putting in. Another defense is this, that Kelley was never given a bill of sale for this truck, and under our Motor Vehicle Act, a sale without a bill of sale is void; and the notes were given for that. We had a number of notes go under such a transaction, and for that reason we are saying the notes cannot be paid. It is a part of the transaction that is made illegal by statute, the statute of course being for the purpose of protecting people from stolen automobiles. 30

Another defense we have put in—and I will tell you frankly I don't know whether we can prove this defense or not; we have got enough evidence, 40

*Plaintiff's Opening.*

however, to raise a sufficient—that is, that DeVoe did not own the truck and therefore there was no consideration for the notes. Now, I am not disclosing all the events now because I would rather have you get the story from the witnesses.

10 Another defense is that the serial number and the motor number had been tampered with. I think we can prove conclusively that the serial number was obliterated and that another number was put on, and the motor number also was tampered with. If that is true it is a violation of the Motor Vehicle Act, the act being to protect people from purchasing stolen automobiles, and the transaction is brought within the statute.

20 I think those are all the defenses set up. If we are able to prove one or all of these defenses, we will ask a verdict at your hands at the end of this case.

Plaintiff's counsel moves for the suppression of the defense as to Grace Kelley on the ground that there is nothing in the answer which sets up any defense as to her.

30 Plaintiff's counsel moves for a direction of a verdict against the defendant Ira F. Kelley on the ground that the notes and the fact that nothing has been paid on them are admitted and that none of the defenses set up are proper defenses in that they all state that it is a rescission and is not a defense but a counterclaim or a separate suit.

(Argument.)

40 Mr. Moore: I move to amend the answer by alleging that Grace L. Kelley was an accomodation maker of said notes, the notes being made for the accomodation of her husband, Ira F. Kelley.

*Plaintiff's Opening.*

The Court: I do not think that would help you. I do not think that an accomodation maker may not be recovered against, but as surety she may.

(Citing case.)

The Court: In other words, that as a surety for her husband, if she is the maker of the note as such surety, she is discharged because of the Fifth Section of the Married Women's Act, unless it was for her benefit or for the benefit of her separate estate. 10

Mr. Moore: Your Honor's view would be that we would have to allege that she was not only an accomodation maker but that she was surety for her husband.

The Court: I think so.

Mr. Moore: I would like to so amend it.

The Court: I suppose as to each one of these notes. 20

Mr. Moore: As to each note.

The Court: Is there any objection to that?

Mr. Corn: I do not think I was surprised by the amendment, so I won't object except this, that as to the last four notes, the notes themselves say, "I hereby charge my separate estate with the payment thereof." Of course what I am doing now is replying to the answer as amended. I have the notes themselves here. That would not be a defense. 30

Mr. Moore: If your Honor please, I think we can save some time as to the notes which were endorsed by Mr. Kelley. It really makes no difference to us whether Mrs. Kelley is held liable on them or not.

The Court: He is entirely responsible?

Mr. Moore: We do not admit responsibility and we do not admit the notes, but as far as the mar- 40

*Plaintiff's Opening.*

ried women's defense is concerned.

The Court: I mean if judgment go against Mr. Kelley he would be financially responsible?

Mr. Moore: It might as well be against the both as against the one. So I will ask that my amendment go only to those notes which were signed by Mrs. Kelley only. Does that answer your objection?

Mr. Corn: No objection to that. The motion as to Ira Kelley, that he has set up no defense in that all his defenses are rescission and rescission cannot be a defense.

(Argument.)

Motions denied.

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

Exception noted as ground of appeal.

Mr. Corn: I offer in evidence all the notes in question, seven of them.

(The papers referred to are received in evidence and marked Exhibits P-1, P-2, P-3, P-4, P-5, P-6 and P-7 respectively.)

The Court: I would like you to state what they are.

Mr. Corn: On the first note—that is the note set up in the first count—there is \$100 principal, \$32.16 interest, and \$2.36 protest fees; total of \$134.52. On the note in the second count there is the same principal, interest and protest fees, making the same total of \$134.52.

The Court: How do you get the same interest?

Mr. Corn: It is interest from the date of the note.

*Edward Kelley—Direct.*

The Court: All drawn with interest?

Mr. Corn: Yes, sir. On the third note it is the same principal, interest and protest fees, same total of \$134.52. Now, on the note in the fifth count, the fourth count having been waived, there is \$100 principal, \$30.16 interest and \$2.48 protest, making \$132.64. On the note in the sixth count there is \$100 principal, \$30.16 interest and \$2.60 protest, making \$132.76. On the note in the seventh count there is \$100 principal, \$30.16 interest and \$2.60 protest, making \$132.76. On the note in the fourth count of the second complaint the principal is \$500, interest \$158.33 and protest fees \$2.48, making a total of \$660.81. The total is \$1463.53. 10

The Court: The notes described in the fifth, sixth and seventh counts of the first complaint are endorsed by Mr. Kelley? 20

Mr. Corn: Yes, sir.

The Court: How about the one in the fourth count of the second complaint?

Mr. Corn: That is endorsed by Mr. Kelley too. That makes the \$800 which he endorsed.

Plaintiff Rests.

30

EDWARD KELLEY sworn in behalf of defendant.

*Direct-examination by Mr. Moore:*

Q. Mr. Kelley, where do you live? A. Glen Rock, 5 Ferguson Place, Glen Rock.

*By the Court:*

Q. Where is that? A. New Jersey. 40

*Edward Kelley—Direct.*

Q. Passaic County? A. No, Bergen.

*By Mr. Moore:*

Q. Just the other side of Ridgewood? A. This side of Ridgewood.

Q. Between Ridgewood and— A. That is right next to Ridgewood, yes, that is right.

10 Q. Are you the son of Ira F. Kelley and Grace L. Kelley, the defendants in this suit? A. Yes, sir.

Q. In 1923, what was your occupation? A. Chauffeur, driver for my father.

Q. What were you doing? A. In the ice business.

Q. What was your father's business? A. Ice business.

20 Q. Wholesale or retail? A. Retail.

Q. What part of the business did you take care of? A. Driver; took care of the route for him.

*By the Court:*

Q. Took care of what? A. Took care of the ice route for the ice business.

*By Mr. Moore:*

Q. You delivered the ice? A. I did.

30 Q. At that time what did your father do? A. He was connected with the Model Dairy, New York, at that time.

Q. Was he in New York most of the time? A. Most of the time; yes, sir.

Q. What did you use to deliver ice with? A. We used a Schacht truck.

Q. Before you used the Schacht truck what did you use? A. Columbia.

*Edward Kelley—Direct.*

Q. Did you have any trouble with that? A. Plenty, lots of it.

Q. When did you discontinue using it? A. Along in May, the last part of May.

Q. From whom was it purchased, if you know? A. Mr. DeVoe, Alonzo DeVoe.

Q. Then after that you say you used a Schacht truck? A. Yes, we bought a new Schacht truck. 10

Q. From whom was that purchased, if you know? A. Alonzo DeVoe.

Q. Did you have anything to do with the purchase of that truck? A. Just by going and seeing it.

Q. When did you go and see it? A. It was about the middle of May, along about the latter part of May.

Q. 1923? A. Yes. 20

Q. Where did you go? A. Down to Prospect Street where Mr. DeVoe lived.

*By the Court:*

Q. What town? A. Ridgewood.

*By Mr. Moore:*

Q. Where was the truck? A. Right down there in back of his residence.

Q. Did you talk to Mr. DeVoe about it? A. Yes, sir. 30

Q. What was the conversation? A. Why, I told him that the Columbia truck had proved a failure, that it was no use of trying to go on with it; the second gear went in the transmission and the housing broke; and we were sick of second handed trucks and ordered a new one. So he said he had a new two-ton truck, I believe it was, that he would sell for the price of \$2500. 40

*Edward Kelley—Direct.*

Q. Did he show you the truck? A. He showed me it.

Q. What was its appearance? A. Its appearance was very good. It had been newly painted, which he said had just been used for demonstrating, and it was a new truck, but he would sell it at that price of a little off.

10

Q. Did he say anything about what year it was? A. It was a 1923, I believe.

Q. What did you do about it? A. We were fixed so we had to do something, so we told him that we would take the truck.

Q. Did you report that to your father? A. Yes, sir.

Q. Did you tell your mother about it too? A. Surely.

20

Q. Did you report your conversation with DeVoe? A. Yes, sir.

Q. What was the next thing you knew about the purchase of the truck, of your own knowledge? A. Well, that is about all I know, only the trouble with it thereafter, the driving of it.

Q. Your father did take the truck? A. He did; surely.

30

Q. And you used it? A. I used it. I done the driving and the delivering.

Q. Did you have a license for the old Columbia truck? A. Yes, sir.

Q. Have you got a license for the Schacht truck? A. Yes.

Q. Who got the license? A. Mr. DeVoe and I. In fact, Mr. DeVoe had the most to do about it. I was there but I didn't play much of a part in it.

40 Q. Where did you go? A. To Ridgewood to the motor vehicle office of which Mr. Murphy is the head.

*Edward Kelley—Direct.*

Q. What happened there in the motor vehicle office? A. Why, Mr. DeVoe told me that he would get the license for me, and in fact I just stayed there but I did not take any interest in it at all. He done the proceedings and gave me the card.

Q. Is this the card which he gave you? A. Yes, sir.

10

Mr. Moore: I offer it in evidence.

(The same is received in evidence and marked Exhibit D-1.)

Q. I note that that license card is made out Ira F. Kelley and son. Can you explain how that happened? A. Why, at that time I was anticipating going in business with my father.

Q. And you were actually making the deliveries at that time, delivering ice at that time? A. Yes.

20

Q. Did you go in business with your father? A. No, sir.

Q. When did you start to use this Schacht truck? A. Latter part of May.

Q. Did you have any trouble with it at all?

Objected to.

(Question withdrawn.)

Q. How did the truck work?

30

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

A. When I first drove the truck it could not be started. I would crank it about an hour every

40

*Edward Kelley—Direct.*

morning before I could start it off, and finally we had to have a different magneto put in. The first magneto was no good absolutely.

Q. Where did you take the truck to have it repaired?

Objected to as not part of the defense.

10

Mr. Moore: My purpose is to tie it up with another witness.

Objection overruled.

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

Exception noted as ground of appeal.

A. Took it to Ridgewood.

Q. To whom? A. Mr. Thomas, who run the Wilsey Square garage at that time.

20

Q. How did it work after that, after the new magneto was put in?

Objected to as immaterial and as not part of the defense.

Objection overruled.

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

Exception noted as ground of appeal.

30

A. After the new magneto was put on in June the front tires went, the pneumatic tires. Brand new tires came with the truck, and we had to replace them.

*By the Court:*

Q. What do you mean the front tires went? A. They wore out, your Honor. About a whole month's use.

40

Q. When was that? A. That was in June, about the middle of June.

*Edward Kelley—Direct.**By Mr. Moore:*

Q. June, 1923? A. Right.

*By the Court:*

Q. How many miles had you run it since you started? A. We hauled our ice four miles from Paterson and our route covered about twenty miles a day. 10

*By Mr. Moore:*

Q. What did you do about that? A. Why, we asked Mr. DeVoe about them and he replaced them with solid rubber tires.

Q. But they were pneumatics before? A. They were pneumatics.

Q. Do you know where that work was done? A. That work was done down in Mr. DeVoe's yard, down in Ridgewood. 20

Q. Do you know who did the work? A. Mr. DeVoe was there and I cannot say who else was with us. I was there myself.

Q. Did DeVoe give any explanation as to why the tires should wear out? A. He said the wheels were out of alignment, and that is the reason the tires went so soon.

Q. How did the truck work after that? 30

Objected to as irrelevant and immaterial.

Objection overruled.

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

Exception noted as ground of appeal.

A. After that along about the middle of July, some part, I couldn't just state the certain part of the month, the facing on the clutch went. 40

*Edward Kelley—Direct.*

*By the Court:*

Q. How is that? A. About the middle of July, your Honor, the clutch facing went. It is a leather on the clutch that has to do with the clutch going in and out, one of the main parts you cannot use the truck without it.

10 Q. What do you mean by "went"? A. Give out, worn out.

*By Mr. Moore:*

Q. What did you do about that? A. Why, we again took it to Mr. DeVoe and we took it down to a man who had charge of his trucks repairing them, Mr. Crane, had a little place, and we had to have it repaired at our own expense.

20 Q. That happened in July of 1923? A. Right.

Q. How did the truck work after that?

Objected to as irrelevant and immaterial.  
Objection overruled.

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

Exception noted as ground of appeal.

30 A. It went along very good until the—there is a taut rod riding from the rear wheels to the chassis, and the bolt in that wore out, just wore out, which could not happen to a truck which was new.

Q. Was that fixed? A. No. That was still the same way it was. We kept on going with that the best way we could.

*By the Court:*

40 Q. You say after that. How long after that was it? That was after the middle of July? A. That was in August.

*Edward Kelley—Direct.*

*By Mr. Moore:*

Q. How did the truck work in August thereafter?

Objected to as irrelevant and immaterial.

Objection overruled.

A. After August we went along until about the first part of October, the latter part of September, and the low gear went. 10

Q. When you say the low gear went, what do you mean by that? A. That wore out. The notches came right off from it.

Q. What did you do about it? A. We took that to Little Falls to Mr. Crane, the same mechanic that repaired the other work, and had that fixed. If I am not mistaken I think Mr. DeVoe paid for that. I couldn't say. 20

Q. Do you know whether this matter was brought to Mr. DeVoe's attention? A. It was, surely.

Q. When? A. Along the latter part of September, 1st of October.

Q. By whom? A. Why, I went to see him and my father went to see him and also my mother went to see him.

Q. Were you with your father when he went to see him? A. I was. 30

Q. When did he go to see him? A. When?

Q. Yes. A. About that time, about along the 1st of October, first week in October.

Q. Where did he see him? A. At his house on Prospect Street, Ridgewood, New Jersey.

Q. What did he tell him? A. We told him that we had come to the conclusion that the truck wasn't what he said it was, that it couldn't be a new truck, that these things could not happen, that we were through with it, that we wished he would 40

*Edward Kelley—Cross.*

come to some agreement, that we were willing to do anything at all. We were willing to accept the loss of \$1400 we paid in, but we were completely sick of the deal. We couldn't use it.

Q. What did DeVoe say? A. We could not get him to come to any agreement at all. He practically answered nothing.

10 Q. Was there any reference at all to the notes, if you recall? A. No.

Q. You say "No." There was no reference or "No," you don't recall this, which? A. I don't recall.

Q. What did you do with the truck after that? A. The truck after that was taken to a garage in Glen Rock and stored there for about a year. We paid out \$60 rental, I think. So finally we couldn't stand that any more so we covered it up and kept it in back of my father's house, and it stands there now.

20

*By the Court:*

Q. You mean you have not used it since the 1st of October, 1923? A. Right.

*By Mr. Moore:*

30 Q. Did you tell DeVoe where it was? A. Yes, sir.

*Cross-examination by Mr. Corn:*

Q. Why did you have to have Mr. DeVoe to get your license? A. Why did I have to have him?

Q. Yes. A. No reason than he volunteered to go and get it. Being a personal friend of ours at that time we trusted him and thought that he was working in our interest.

40

*Edward Kelley—Cross.*

Q. Didn't you go to Mr. DeVoe's house on Prospect Street, Ridgewood, and tell him that you couldn't get a license for the truck? A. No, sir.

Q. When you saw this truck in Mr. DeVoe's place you say you spoke to your father about it? A. Yes, sir.

Q. And also to your mother? A. Yes. 10

Q. What did you tell your father and mother about the truck? A. I didn't tell them anything because they saw the truck themselves. All the talk was over whether we would take the truck or not.

Q. And your mother saw the truck too? A. Yes, sir.

Q. Did you see this Schacht truck at the time you bought the Columbia truck? A. No, sir. 20

Q. Are you sure about that now? A. Yes.

Q. You say that around September or October, 1923, you went to see Mr. DeVoe about the misbehavior of this truck? A. Yes, sir.

Q. And your father and mother were along? A. My father was with me.

Q. Your mother along too? A. No, not at that time. We were there several times to find Mr. DeVoe, but we never could get to talk business with him. 30

Q. You went with your mother too? A. No, just my father was there at the time I think you have reference to.

Q. And at the other time did your mother go there? A. I also went with my mother to find him, but we didn't find him.

Q. You are not a member of I. F. Kelley & Son? A. No, sir.

Q. Is your mother a member of that? A. No, sir. 40

*Edward Kelley—Cross.*

Q. Who is the son? You? A. No. I spoke of it before, if you remember. Mr. Moore asked me and I said I was thinking of going in business at the time so I didn't go with it, so we just took the "Son" from it and we called it the I. F. Kelley business.

10 Q. What did your mother have to do with this?

A. As far as that I can't say. I don't know nothing about it. I was working and driving for a salary for them just as an outsider.

Q. You had this license card given to you by Mr. DeVoe? A. Yes, sir.

Q. Did you examine it? A. No, sir, I did not.

Q. Will you look at it now and see what year that truck is? A. 1922.

20 Q. You have had this in your possession since 1923, did you not? A. Yes, sir, in fact it has been home. I have not had it in my possession because I have not been working for them.

*By the Court:*

Q. When did you first notice that that had 1922 as the year make of that car? A. I didn't notice it at all, your Honor. In fact, I never looked at this card when I put in my name.

30 Q. You know it now? A. I know it now. That is the first time just now.

Q. When did you first know it? A. Right now.

Q. And never saw that on there before? A. No, sir; never noticed it. In fact, I never had it only for a short time there. It was only for a few months.

*By Mr. Corn:*

40 Q. Isn't it a fact that you couldn't get a license for this truck because you wanted it changed from

*George Kelley—Redirect.*

Grace Kelley to Ira F. Kelley & Sons? A. I don't know nothing about that.

Q. Wasn't the Columbia truck in the name of I. F. Kelley? A. I couldn't say.

Q. Have you the card for the Columbia truck? A. No, sir.

Q. Mr. DeVoe didn't tell you this was a new truck, did he, at the time? A. Yes, sir. 10

Q. A new truck? A. A new truck, just been used for demonstrating.

Q. Just been used for demonstrating? A. Yes.

Q. Did he tell you what the price of a new truck was? A. Yes.

Q. How much? A. \$3200.

Q. That is delivered? A. I believe so; I couldn't say.

Q. And you paid for this how much? A. We were supposed to pay \$2500. 20

Q. So you knew you weren't buying a new truck. A. We weren't buying a new truck, but being a personal friend I believed just what you would think about it. You probably would take his word more than we would now.

*Redirect-examination by Mr. Moore:*

Q. After you saw the truck and talked with Mr. DeVoe about it, did you have a talk with your mother and father? A. After I had seen the truck? 30

Q. Yes. A. Yes.

Q. What did you tell him? A. I told him just what the truck was and how it looked and what Mr. DeVoe had said, and that was all that needed to be said, because at that time as I say there wasn't a bit of feeling at all and we believed that everything he said was absolutely the truth. 40

*Wilbur S. Crane—Direct.*

WILBUR S. CRANE, sworn in behalf of defendants.

*Direct-examination by Mr. Moore:*

Q. Mr. Crane, where do you live? A. Little Falls, New Jersey.

10 Q. What is your business? A. Repair and sale of motor trucks.

Q. In 1923 what was your business? A. Same thing.

Q. Did you do any work on this Schacht truck of Kelley's? A. Yes, sir.

Q. When? A. 1923.

Q. Can you tell us what work you did? Give us the dates.

20 Objected to as irrelevant and immaterial. Objection overruled.

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

Exception noted as ground of appeal.

A. I can't tell from memory. I will have to look it up.

30 Q. What book are you referring to? A. The book that I put the charges for all work done by the garage.

Q. When were the entries made? A. At the time the work was done.

Q. And that is your office book? A. That is the only book I have.

Q. Referring to that book to refresh your recollection, will you tell us what work you did on this truck and the dates?

*Wilbur S. Crane—Direct.*

*By Mr. Corn:*

Q. Did you make those entries yourself in that book? A. Yes.

Mr. Corn: Let me see it.

*By the Court:*

Q. Tell us what you did and the date. A. On 10  
June 8th we tuned up the motor and went over the  
magneto and valves, carburetor, spark plugs, uni-  
versal and crank. August 16th, one clutch leather,  
rivet three motor valves, reface valves.

Q. Now about what it says. What is it? A.  
One clutch leather and the rivets for same, three  
motor valves, reface valves.

Q. Replace? A. Reface. That is machine work  
on some of them, to put them in the shop. 20

Q. Why did you need to do that? A. We put in  
three new vales, and the ones we didn't put in new  
we refaced them so as to make them almost new,  
as good as new. In other words, take the worn  
surfaces off them. Eight port plug gaskets. This  
was just small items went with the work. One  
universal boot clamp, and burn the carbon, and  
nineteen hours time. I skipped one on July 16th.  
Tram the front wheels and change them.

Q. What did you do? A. Tram them; that is, 30  
aligning them.

Q. Front wheels and what? A. Change the  
tires, change front wheels. One universal boot at  
that time; and on October 2nd repaired all trans-  
mission, one first gear, two shift locks, gallon of  
gear oil, cotter pins, fifteen hours time. That is  
all.

*By Mr. Moore:*

Q. Were all of those items in 1923? A. Yes, sir. 40

*Wilbur S. Crane—Direct.*

Q. Prior to May, 1923, had you ever seen this truck? A. Yes, sir.

Q. Where did you first see it? A. Poineer Street in Newark.

Q. In a garage or not? A. Yes, sir; in a garage.

10 Q. Do you know whose garage it was? A. No; Mr. DeVoe at that time used part of it.

Q. How do you know he used part of it? A. He said he did, and he kept his trucks and parts there.

Q. When was this you say you saw it? A. Why, at the time I saw it I was working for Mr. DeVoe and I was moving parts from that garage to Ridgewood, working for Mr. DeVoe, and I have the date in my book, December 22, 1922. That is when I charged the time to him for moving those parts.  
20 That is the only way I know.

Q. What was the condition of this truck at that time? A. It was partially dismantled, and it showed the effects of being on fire.

Q. You say it showed the effects of being on fire. What did it show? A. Well, part of the truck was burned up, the cab, the paint was burned off it and practically all the woodwork around the center of the truck was damaged.

30 Q. How do you know this is the same truck as the one you saw on Poineer Street? A. Well, I saw this truck several times down at Poineer Street, and when it was being rebuilt, and then it was repainted, and they painted it an odd color, and I happened to see that truck in Ridgewood the next spring, and I said to Mr. DeVoe, I said, "There is that truck that burned up in Newark." And he admitted that that was it. He did not admit it, he said, "Yes, that is the truck."  
40

*Wilbur S. Crane—Cross.**Cross-examination by Mr. Corn:*

Q. Mr. Crane, you are being sued now by the Jersey Motors Corporation, are you not? A. Yes, sir.

Q. Of which Mr. DeVoe is an officer? A. Yes, sir.

10

IRA F. KELLEY, one of the defendants, sworn in his own behalf.

*Direct-examination by Mr. Moore:*

Q. Mr. Kelley, where do you live? A. 79 Rock Road, Glen Rock.

Q. You have lived there how long? A. I think it is six years.

Q. You are one of the defendants in this case? A. Yes, sir. 20

Q. What is your wife's name? A. Grace L. Kelley.

Q. She is the other defendant in this case? A. Yes, sir.

Q. In 1923 what was your business? A. 1923?

Q. Yes. A. Until the 1st of June—

*By the Court:*

Q. In May, 1923. What was your business in May, 1923? A. In May I was with the Model Dairy Company in New York. 30

*By Mr. Moore:*

Q. Did you have any other business? A. I was starting the business, an ice business in Glen Rock. My son was starting it for me.

Q. Who was actually delivering the ice? A. My son. 40

*Ira F. Kelley—Direct.*

Q. Had your wife anything to do with your business? A. Nothing to do with that business. I will tell you why things are as they are.

Mr. Corn: I object to any further testimony, if your Honor please.

10 Q. How did it happen that Mrs. Kelley signed these notes?

Mr. Corn: I object, if your Honor please, unless this witness can say exactly how he knows.

The Court: Well, I suppose if it involves conversations between Mrs. Kelley and him it would be improper to state. I think that question involves improper testimony, doesn't it?

20

Mr. Moore: Perhaps it is a little bit too broad, your Honor.

Q. In May, 1923, did you have any dealings with one Alonzo DeVoe? A. Yes, sir.

Q. What were those dealings? A. We bought a Schacht truck of him.

30 Q. Before you bought that Schacht truck had you had any dealings with him? A. Yes, we had a Columbia truck from him.

Q. How many trucks did you use in your ice business? A. Only one.

Q. Why did you get another truck? A. That one broke down. I had to get another.

Q. What did you do about it? A. We went to see Mr. DeVoe, and it was coming on hot weather and we had to do something right away quick.

40

*Ira F. Kelley—Direct.*

*By the Court:*

Q. By "we" whom do you mean? A. Well, my son was working for me.

Q. You say "We went to see Mr. DeVoe." A. My son and I.

*By Mr. Moore:*

10

Q. What took place? A. Well, we decided to buy this Schacht truck.

Q. Did you have any conversation yourself with Mr. DeVoe with reference to this Schacht truck before you bought it? A. Well, most of that conversation—

The Court: No. Won't you answer that question?

Q. Did you have any conversation with DeVoe about this Schacht truck before you bought it? A. Yes, I did. 20

Q. How did you go about buying this truck? Tell us just what happened. A. Well, we went to see Mr. DeVoe when the other one broke down.

Q. Who went to see him? A. You see, when this truck was bought I was in New York and my son really had to do the business.

*By the Court:*

30

Q. The question is who went to see Mr. DeVoe? A. My son went first because I was in New York. I couldn't go. I went to New York before daylight and got back after dark every day.

*By Mr. Moore:*

Q. Your son went to see Mr. DeVoe. Did your son report to you what transpired when he saw Mr. DeVoe? A. Yes. 40

*Ira F. Kelley—Direct.*

Q. Then what did you do? A. Well, Mr. DeVoe came up to the house.

Q. Mr. DeVoe came to your house? A. Yes.

Q. Did he see you? A. Yes, my wife and I.

Q. What happened then? A. Well, we made an agreement for the truck.

10 Q. What did Mr. DeVoe tell you, if anything?  
A. We wanted a new truck because we had enough of old trucks.

The Court: Now, we will have to strike that out.

Q. Tell us what Mr. DeVoe told you and what you told him. A. We told him we would like a new truck.

20 Q. Go ahead. Tell the conversation. A. He said this was a new truck, only been used a little for demonstrating, just as good as new, and we could have it for around \$700 less, I think, something like that.

Q. What else was said, if anything? A. Well, we agreed to take it.

Q. What did you do with the Columbia truck? A. He took that back.

30 Q. Well, now, what did you give DeVoe for the new truck? A. \$2500.

Q. Well, you say \$2500. How did you give it to him? Cash or what? A. Well, we paid \$300 the 18th of May, I think, and \$260 the 19th, and there was \$40 team work hire, that made it \$600, and \$400 for team and horses and dumping made it a thousand dollars.

Q. You say for team and horses and dumping. What has that to do with it? A. We turned those in on the Columbia before.

40

*Ira F. Kelley—Direct.*

Q. That is what you put in on the Columbia?

A. Yes.

Q. So he really took back the Columbia truck, is that right? A. Yes.

Q. At what price? A. There was nothing said about price on that.

Q. Did you give him anything else? A. What is that? 10

Q. Did you give him anything else? You have spoken of some checks and the Columbia truck, and so forth. What else did you give him?

The Court: It all amounts, he says, to a thousand dollars.

Q. How was the \$1500 made up? A. \$1500? In hundred dollar notes. I don't know as I could tell. There is \$100 notes—I don't know as I can tell just how those notes came. 20

Q. Whose notes were they? A. They were my notes. They were my wife's, I suppose you would call them.

Q. Who signed the notes? A. My wife.

Q. Why didn't you sign them?

Objected to as improper and irrelevant.  
Objection overruled.

A. Why did she sign them? 30

Q. The question was why didn't you sign them?

The Court: The question is not why did not he but why did she.

Q. Why did Mrs. Kelley sign the notes? A. Because the account in the bank was in her name.

Q. Whose money was it? A. It was my money.

Q. Why was the account in her name.

Objected to as immaterial. 40

*Ira F. Kelley—Direct.*

Objection overruled.

A. As I said before, I was not in Ridgewood in banking hours from one week's end to another. I was in New York from early morning until late at night—banks all closed.

10 Q. Whose ice business was this in which the truck was used? A. Mine.

Q. Now, you did not actually drive this truck, I understand, or did you? A. I never drove a truck.

Q. Who did drive it? A. My son.

Q. Your son Edward? A. Yes, sir.

Q. Did he report to you the trouble he had with it? A. Yes, sir.

20 Q. Now, coming down to the latter part of September or October, when he said the low gear went, did he report that to you? A. Yes, sir. Of course, I knew about that. I was on the truck at that time.

Q. You were on the truck at that time? A. Yes, when he first started I was in New York. The 1st of June I was on with him. You see I quit my job in New York and went on with him.

Q. You rode on the truck with him? A. Yes, sir.

30 Q. And you were on the truck when that happened? A. Yes, sir.

Q. Did you talk to Mr. DeVoe about it? A. Yes, sir.

Q. What did you tell him?

The Court: Suppose you tell us when that was.

Q. When was that? A. The first?

40 Q. When the low gear went. A. The low gear?

*Ira F. Kelley—Direct.*

Oh, that went in October, last part of September.

Q. How soon after that did you see DeVoe? A. Why, right away, because we could not run it without a low gear.

Q. Where did you see him? A. I can't just tell where we saw him, but I know we took the truck down to Little Falls to Mr. Crane and he put in a low gear. 10

Q. Where did you see DeVoe? A. Why, I don't know where we did. Really, I couldn't tell where we did see him. I know we found him somewhere.

Q. Do you recall the conversation. A. Yes, surely. He said it might have been some of the war stuff put in. It wasn't tempered right.

*By the Court:*

Q. He said it might have been what? A. Put 20  
in during the war when they was rushing things and it wasn't tempered right, poor stuff.

*By Mr. Moore:*

Q. What did you say to him? A. Well, I didn't say so much to him then. We got it fixed and went on.

Q. Did you have any talk with him afterward? A. Sure. 30

Q. When? A. When we went over to his house on Prospect Street.

Q. When was that? A. This was in October, I think. I couldn't say just the date.

Q. What was the conversation there? A. I told him that everything is going to pieces and it didn't look like a new truck. I wanted him to do something about it.

Q. Tell the whole conversation as near as you can recall it. A. I couldn't tell all I said to him 40

*Ira F. Kelley—Direct.*

at that time; only the substance of it.

Q. Did you use the truck after that? A. Very little, I think.

Q. I didn't get that. A. Very little, I think.

Q. Where was it after that? Where did you keep it? A. At my house.

10 Q. Did you tell DeVoe where it was? A. I don't know as I told him especially. He knew where it was.

Q. How do you know he knew? A. It was right by the house. He could see it sitting right by the garage, and he did often.

Q. Now, when you bought this truck from DeVoe did he tell you that it had been through a fire? A. No.

Q. Did you know that? A. No.

20 Q. When did you first find out that it had been through a fire?

Objected to as immaterial and irrelevant and on the ground that the allegation in the defense has nothing to do with any such representation about the truck having been through a fire or anything of that kind.

Objection overruled.

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

Exception noted as ground of appeal.

A. Why, I don't know as I can tell. I think it was in October.

Q. What year? A. 1923.

Q. How did you find out? A. Mr. Crane.

40 Q. Have you any recollection of the date? A. I couldn't tell. This case has been in court three years. There are chances to forget a lot in that time.

*Ira F. Kelley—Cross.**Cross-examination by Mr. Corn:*

Q. Mr. Kelley, in May, 1923, did you have an account in the First National Bank of Ridgewood?

A. Joint account with my wife.

*By the Court:*

Q. I thought you said it was in your wife's name. A. Well, it was in my wife's name, but she was doing it for me. 10

Q. But now you say it was a joint account. What is the fact about it? Was it a joint account or was the account in your wife's name? A. Well, I don't know as you could call it a joint account. Perhaps you could not.

Q. The question is whose name was it in in the bank? A. My wife's. 20

Q. You weren't in it at all, were you? A. No.

*By Mr. Corn:*

Q. Did you have any bank account at all at that time? A. No.

Q. And your wife had an account in the First National Bank of Ridgewood? A. Yes.

Q. And you did not? A. No, sir.

Q. Now, when Mr. DeVoe came up to your house, your wife was there? A. Yes, sir. 30

Q. You were there? A. Yes, sir.

Q. With whom were the arrangements made for the purchase of this truck, with you or with your wife or with both of you? A. We talked it over together, my wife and I.

Q. Did you tell Mr. DeVoe that you had no account but your wife had an account? A. No, sir.

Q. Did you tell Mr. DeVoe that you were buy-

*Ira F. Kelley—Cross.*

ing it and not your wife? A. No, I didn't tell him that.

Q. But your wife signed the notes? A. Yes, sir.

Q. And you did not sign them or endorse them? A. Not the first ones.

10 Q. And a bill of sale was made to your wife? A. We had no bill of sale.

Q. The original bill of sale. A. Didn't have no bill of sale.

Q. So all that happened then when Mr. DeVoe came up, he saw you and your wife? A. Yes, sir.

Q. You talked over the purchase of this truck? A. Yes, sir.

Q. And your wife gave the checks for the balance of the transaction? A. Yes, sir.

20 Q. And you did not sign the checks nor endorse the notes? A. Not the first ones, no.

Q. Nor sign the notes. A. No.

Q. In other words, your name did not appear anywhere in the transaction. A. Not on the notes.

Q. Or on the checks? A. No.

30 Q. And you learned all about this truck in October, 1923; that is, that it was not as represented? A. I wouldn't swear to the date. I couldn't do it.

Q. Would you say it was after October, 1923? A. It was somewhere around there. I couldn't say. Yes, it was after that, yes.

Q. How much after that? A. Oh, I don't know. It might have been a month.

Q. Was it in January? A. No.

40 Q. You did not get a new license in the year 1924, did you? A. No. We never had but one license.

*Ira F. Kelley—Cross.*

Q. So it was in the year 1923 that you discovered this? A. Yes, sir.

Q. And you saw Mr. DeVoe and told him about it. Did you tell Mr. DeVoe that the truck was not as represented? A. Certainly. I told him several times.

Q. And you told him to take the truck back? 10  
A. Yes.

Q. And you wanted your money back? A. I didn't tell him that much. I was willing to do anything with it if he would have taken the truck back. It cost me \$1400 to serve my ice route for less than five months.

Q. After you told Mr. DeVoe to take the truck back you used it again, did you not? A. Very little.

Q. But you used it? A. We might have once or 20  
twice.

Q. Was that truck in October, 1923 in the same condition it was in May, 1923? A. Well, aside from the wear and tear. It couldn't be exactly the same after you use it three or four month.

Q. Now, when you bought this truck, did Mr. DeVoe tell you how long he had used it for demonstration purposes? A. He had used it very little for demonstrating. 30

Q. Did he tell you how much he had used it?  
A. No, sir; very little. He would stand behind it like a new truck.

Q. Did Mr. DeVoe pay for the repairs of the truck for the first ninety days? A. No, sir, he did not. We paid about \$40 to Mr. Crane for the second thing that happened to it, the clutch.

Q. Were you at the Motor Vehicle Department at the time that the license was issued for this truck? A. Was I there? 40

*Ira F. Kelley—Cross.*

Q. Yes. A. No, sir; I was in New York.

Q. You did not sign the application for your license? A. No, sir.

Q. Do you know who did? A. No, I don't. I suppose my son did. He and Mr. DeVoe got the license.

10 Q. The Columbia truck license was in your name, wasn't it? A. Yes.

Q. Did you try to change that license to Grace Kelley? A. Try? No, I never did. Why should I do that?

Q. Do you know if this Schacht truck carried any insurance? A. Did I know it?

Q. Yes. A. Yes, sir.

20 Q. In whose name was it insured as owner? A. I think it was put in my wife's name for some reason. I don't know why.

Q. You knew that? A. Yes.

*Redirect-examination by Mr. Moore:*

Q. This Schacht truck I believe you say was bought to replace the Columbia truck? A. Yes.

Q. The Columbia truck was turned back to DeVoe? A. Yes, sir.

30 Q. Have you a bill of sale for the Columbia truck? A. The Columbia; yes, sir.

Q. The Columbia? A. Yes, we had a bill of sale.

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

Mr. Moore: I offer this in evidence.

Mr. Corn: I object to its admission. This is a bill of sale on a truck that is not involved in this suit, and it is not signed by the plaintiff or Mr. DeVoe. It is a bill of sale.

*Ira F. Kelley—Redirect.*

The Court: He says its sole purpose is to show that it was issued in the name of himself, and the question of his wife being an issue in this case, according to your questions upon cross-examination, it would seem that is a matter of some importance at this time.

10

Mr. Corn: But this is not on the truck in question.

The Court: I understand that. This is the Columbia truck, which was traded in upon this truck. It will be admitted for that purpose, to show in whose name the Columbia truck was.

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

20

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit D-1.)

*Recross-examination by Mr. Corn:*

Q. How is it that you have this bill of sale on this Columbia truck? A. How is it I had it?

Q. Yes. A. I don't know, unless I bought the truck.

30

Q. Is that the truck that you exchanged for the Schacht truck? A. Yes, sir; that is the truck.

Q. And that is the truck that belongs to DeVoe now? A. Yes, sir.

Q. How is it that you have that bill of sale? A. How is it?

Q. Yes. A. Because I bought the truck, traded it for the truck.

Q. That is a Columbia truck you traded to Mr.

40

*Ira F. Kelley—Recross.*

DeVoe for the Schacht? A. Yes, went in on the trade; yes, sir.

Q. So that you do not own that Columbia truck now. A. No, sir.

10 Q. What I want to know is why you have this bill of sale. A. Why, it was left with us. Mr. DeVoe never called for it and we simply kept it: that is all. We didn't want it. I was surprised myself that we had it.

Q. There is no transfer on this bill of sale from you to DeVoe, is there, or to anybody else? A. No, sir.

Q. According to this bill of sale the title is still in you on this truck?

20 The Court: I suppose that is a legal question you are asking.

Q. You never executed any transfer of this bill of sale or any other instrument? A. No, sir.

---

GRACE L. KELLEY, one of the defendants, sworn in her own behalf.

*Direct-examination by Mr. Moore:*

30 Q. Mrs. Kelley, you are one of the defendants in this suit? A. I am.

Q. And you live at Glen Rock? A. Yes, sir.

Q. Are these notes all signed by you that are being sued on? A. I signed several notes.

Q. Now, in October, or around October, 1923, did you make any endeavor to get in touch with DeVoe? A. I did.

40 Q. What did you do? A. I telephoned everywhere for him. I telephoned his home. I tele-

*Grace L. Kelley—Direct.*

phoned the place where he usually stopped in Newark, and I couldn't reach him anywhere, and then I went back to his wife again, and she says, "I know nothing about where he is. I cannot reach him myself." I said, "Haven't you any address that I might write to him?" and she says no.

Objected to.

10

The Court: It will be stricken out, the conversation with Mrs. DeVoe.

Q. Did you finally get in touch with him? A. Yes, one day in Ridgewood. Mrs. Edward Kelley and I just got off the bus and walking down Ridgewood Avenue Mrs. Kelley says, "There is—"

Q. Please do not tell what she said. A. Oh, all right. I didn't know that you could understand the story unless I did.

20

Q. Just tell us what happened. A. Then I will say we saw him. I did not see him. She saw him, but if I can't tell it just as it happened then—

*By the Court:*

Q. The question is did you talk with Mr. DeVoe. That is the question. A. Yes. He went into the First National Bank and we hurried and reached him, and I went up to him and told him that the low gear of the truck had gone and it was a total wreck and asked him if he wouldn't do something about it, and I got no satisfaction out of him at all. I says, "Won't you see Mr. Kelley and see what you can do, come to some decision? We cannot keep the truck, can't do nothing more with it." It was gone, ruined. It was ruining us. And he said yes, he would see Mr. Kelley; but he didn't see Mr. Kelley, didn't go near him, and he was

30

40

*Grace L. Kelley—Direct.*

lost for a while again until finally Mr. Kelley found him.

*By Mr. Moore:*

Q. Was anything at that time said about the notes? A. No.

10 Q. Did you have any talk with him afterward?  
A. No, I did not.

Q. Mrs. Kelley, there are three notes of \$100 each, dated October 1, 1923, one payable December 1, 1923, one payable November 1, 1923, one payable January 1—it is dated October 1st, 1923, it says—it is payable January 1, 1923. I take it that is meant for 1924. They all appear to be signed by you. Were any of those notes paid? A. November, December and January, no.

20 Q. After October 1st was anything paid on account of this truck? A. No, sir. October was paid no more.

Q. Why not? A. We had, or Mr. Kelley had no funds to pay them with.

Q. Is that the only reason? A. No. We couldn't pay any more. Why should we pay any more on a truck that was all to pieces, nothing left of it very much.

30 Q. Did you tell Mr. DeVoe or make any endeavor to tell him that you weren't going to pay him?

The Court: She said that she did not see Mr. DeVoe except that one time in the bank.

*By the Court:*

Q. That is right, isn't it? A. That is right.

*By Mr. Moore:*

40 Q. Did you make any attempt to get in touch with him after that? A. I did.

*Grace L. Kelley—Direct.*

Q. What did you do? A. I telephoned everywhere, everywhere I knew, why, I telephoned.

Q. Well, now, Mrs. Kelley, the plaintiff is also suing on four notes, three for \$100 each, one for \$500, making an aggregate of \$800; and these notes are dated February 1, 1924 and signed by you. Would you tell us when those notes were signed? 10

Objected to on the ground that the instruments speak for themselves.

Objection overruled.

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

Exception noted as ground of appeal.

*By the Court:*

Q. The question is when were those notes signed? A. I don't remember. 20

*By Mr. Moore:*

Q. Have you any recollection with reference to them, when they were signed? A. Yes. I would say in September they were signed.

Q. Why would you say that? A. Because I signed six notes one time and I know it was in the early part of the fall.

Q. Have you any way of fixing the time? A. 30  
Not just the date.

Q. Have you any way of fixing the approximate time? A. In September, I think.

Q. Can you tell us the circumstances surrounding the signing of those notes, if you recall?

Objected to as irrelevant.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court. 40

*Grace L. Kelley—Direct.*

Exception noted as ground of appeal.

A. I know Mr. DeVoe came to the house to sign them and I didn't want to sign them because the truck had gone to pieces, and I didn't want to sign any more notes.

10 Q. I didn't get that answer. A. I objected to signing the notes, the last six, but Mr. Kelley thought they would be all right, so he signed them.

Q. Have you any recollection as to whether or not these notes were before or after the low gear went? A. It is about that time—before, I would say before that time, for I wouldn't sign any after.

*By the Court:*

20 Q. If it was before the low gear went why did you object to that then? Why did you object to signing if it was before the low gear went? A. Because we did not have the funds to pay for them, Mr. Kelley did not. It was a new business and it did not do what we expected it would do. It did not pay what we expected it would pay. I was with him, because I was always trying to do what I could to help him out, and that is the reason why I took the checks to the bank, not that I had any money; I had not a cent. It was Mr. 30 Kelley's money, but just to help him out I did the work, because he did not have any time to do it.

*By Mr. Moore:*

Q. Now, I direct your attention to the fact that after the payment of October 1st, the unpaid balance of this truck was \$1100. These notes signed in February aggregate \$800. Can you give us some explanation as to why you should be signing 40 notes for \$800 when the unpaid balance was \$1100? Have you any recollection as to that? A. No.

*Grace L. Kelley—Direct.*

Q. You have made some reference to the account at the bank. What are the facts with reference to that account? A. Should I tell the story?

Q. In whose name did it stand? A. May I tell the story?

Q. I am perfectly willing to have you tell the story.

10

Mr. Corn: I would like the question to be answered.

The Court: I am afraid the telling of the story would involve her transactions with other persons.

Mr. Moore: That is the reason I express it that way. I feared it would.

The Court: I think you had better just answer the questions as they are asked by Mr. Moore and then we will be sure that they will be kept within proper range.

20

Q. Who opened that account? A. Mr. Kelley took me to the bank and I went in to see about it.

*By the Court:*

Q. In whose name was the account in the bank? A. What I said to the man—

Q. In whose name was the account in the bank? A. The president of the bank said I could do it—

30

Q. No, not what anybody said. In whose name was the account in the bank? A. My name was put in.

Q. How is that? A. My name was put in.

Q. Whose money was used to open the account?

Objected to.

Objection overruled.

A. Whose money?

40

*Grace L. Kelley—Direct.*

Q. Yes. A. Ira F. Kelley's money.

Q. Did you have any funds of your own in that bank? A. Never. I never had any funds of any description at any time.

Q. How far is that bank from your home? A. Why, about a mile.

10 Q. At that time where was Mr. Kelley working?  
A. Up to June 1st, he was in New York. After that he was in the ice business, trying to build it up.

*By the Court:*

Q. I understood Mr. Kelley to say that after the 1st of June he was in Glen Rock, having given up his business in New York; is that right? A. That is right.

20 Q. Well, then, after the 1st of June why was the account, which contained Mr. Kelley's money, continued in your name? A. Because I did the business. He had no time to do it in banking hours. He never could get there.

Q. Wasn't he on the ice wagon in Glen Rock? A. Yes, but he couldn't stop to go to the bank with the funds, the business he did.

30 *Cross-examination by Mr. Corn:*

Q. Mrs. Kelley, did you have an account in the Little Falls National Bank? A. No.

Q. And you say now that you did have an account in the First National Bank of Ridgewood?

A. No. It wasn't my account. It was my husband's account in my name.

Q. Was it in your name? A. I signed the checks.

40 Q. Do you recall that you were examined on January 28, 1929, before Florence I. Carman, a

*Grace L. Kelley—Cross.*

Supreme Court Examiner of New Jersey, and you were then asked, "Did you have an account in the First National Bank of Ridgewood?" and you said, "I did not." You were then asked, "Did Mr. Kelley have one?" and you said, "Yes." Is that the fact? A. Yes, that is what I said.

Q. And in June your husband came back and was working around Glen Rock in the ice business. 10

A. Yes, he was working very hard.

Q. And Glen Rock is right next to Ridgewood, is it not? A. Yes, about a mile this side, or a mile and a half.

Q. He delivered ice in Ridgewood too? A. Not much, no.

Q. And still the account was kept in your name. A. Yes.

Q. In your name, still continued that way, and it is still in your name now. A. No. 20

Q. When did you change the account? A. Didn't change it. We have no account there at all. Have not had since October, 1923.

Q. You say that in September, 1923, you signed six notes? A. I said I didn't just remember.

Q. You don't know whether it is these notes there now in evidence or some other notes, do you? Do you know they were these notes here that you signed in September, 1923? A. That is my signature. 30

Q. But could you say that these notes which you have before you, these last four notes, three of \$100 and one of \$500, that they were signed in September, 1923, or at a later date? A. I would say it was in September earlier, early date.

Q. And you objected to signing these notes, did you not? A. Some of them, yes. 40

*Grace L. Kelley—Cross.*

Q. Because the truck didn't perform the way it should have? A. I told you we had no more funds to pay. We could pay without money.

Q. But you did sign that eventually, did you not? A. Yes. That is my signature.

10 Q. And you signed these notes because your husband told you it would be all right? A. I don't remember. I guess he did. I couldn't say how it was going to be. He thought he could.

Q. And you objected to signing these notes because the truck wasn't as represented, did you not? A. That was one very strong reason.

Q. And then in spite of that objection you still signed them? A. Because my husband wanted me to.

20 Q. Now Mrs. Kelley you had this truck insured, did you not? A. No, I did not have it insured. It was insured in my name. I had nothing to do about it and knew nothing about it until the paper came up to the house.

Q. And at the time the truck was purchased you were present at the negotiations, were you not? A. Some negotiations.

Q. Were you present then? A. At what time do you mean?

30 Q. In May, 1923. A. No. I wasn't there when it was decided.

Q. Were you there before it was decided? A. I was present once when they were talking about it.

Q. And it was your check that was paid on account of the purchase price, was it not, the check signed by you? A. Undoubtedly.

40 Q. Did you at that time tell Mr. DeVoe that you had nothing to do with the truck? A. Mr. DeVoe knew—

*Grace L. Kelley—Cross.*

*By the Court:*

Q. No, no. Did you tell Mr. DeVoe? A. No, I didn't tell him. I said nothing to him.

*By Mr. Corn:*

Q. You signed the notes too for the balance of the \$1500 of the consideration, did you not? A. 10  
I signed certain notes.

Q. Didn't you get a bill of sale for this truck from Mr. DeVoe at the time you gave him the check and the notes? A. We have no bill of sale.

Q. Did he show you a bill of sale made to your name? A. No.

Q. What then induced you to take out a policy on this truck and name yourself as the owner?

Mr. Moore: I object, if the Court please. 20  
She has not so testified.

The Court: She said she did not know anything about it.

Q. Do you know who took out that policy? A. Mr. DeVoe, I suppose. I suppose he considered himself the owner.

Q. When did you first know about that policy? A. The insurance policy? 30

Q. Yes. A. When it was sent to my house.

Q. When was that? A. I forget the date it was insured.

Q. Was it in the early part of 1923? A. Yes, it was the summer time.

Q. In the summer time of 1923 you saw a policy on this car and you then saw it was made payable to you as owner? A. Well, Mr. Kelley didn't have the policy because that was sent to Little Falls 40

*Grace L. Kelley—Cross.*

bank, but we had notice of the insurance and what it was for and what it cost.

Q. Did you pay the insurance? A. Yes, sir.

Q. With your check? A. I signed the check.

Q. And you at that time saw that the policy read to you as the owner? A. I didn't see the policy. Never saw it.

10 Q. But the bill was sent to you for the insurance? A. The bill was sent.

Q. And you paid it with your check? A. I signed the check.

*By Mr. Moore:*

Q. Was the bill of sale given to you for this truck? A. We had no bill of sale.

20 *By Mr. Corn:*

Q. What do you know about the bill of sale for this truck? A. There is no bill of sale.

Q. Were you present at the time the license was taken out? A. No.

Q. You don't know, that is, that at that time there was a bill of sale produced to the licensing officer? A. No.

30 Q. So all that you know is that so far as you know there was no bill of sale. A. There was no bill of sale.

Q. So far as you know. A. I don't think there was no bill of sale; there wasn't any.

Q. You say you did not purchase this truck and you weren't interested in the bill of sale, were you? A. No, I didn't purchase it.

Q. So you weren't interested in the bill of sale? A. No.

40 Q. So all you know is that you didn't get a bill of sale. A. There was no bill of sale.

*Jennie Kelley—Direct.*

Q. Do you know how the license was issued? A. I don't understand your question.

Q. Do you know in what manner the license came to be issued?

The Court: In whose name?

Mr. Corn: In the name of I. F. Kelley.

A. No.

10

JENNIE KELLEY, sworn in behalf of defendant.

*Direct-examination by Mr. Moore:*

Q. Mrs. Kelley, you are a daughter-in-law of Mr. and Mrs. Ira F. Kelley? A. Yes, sir.

*By the Court:*

Q. Are you the wife of Edward? A. Yes. 20

*By Mr. Moore:*

Q. Were you with your mother-in-law at the time she followed Mr. DeVoe into the bank at Ridgewood? A. Yes, sir.

Q. Tell us what happened on that occasion. First when did that happen? A. Why, somewhere in the middle of October, 1923.

Q. What occurred? A. Why, I knew mother and father and all had been looking for Mr. DeVoe, and we were in Ridgewood one day and I said, "Mother, there is Mr. DeVoe," and she said, "Yes." I said, "He is going into the First National Bank." 30

Q. Don't relate the conversation, please. A. I told her he went into the First National Bank, and she said, "You run ahead and hold him."

Q. Don't relate the conversation, please. Just tell us what happend. A. We went into the First 40

*Jennie Kelley—Direct.*

National Bank, and mother told Mr. DeVoe that the truck was all apart and they weren't going to pay any more on it, she wished that he could come up to see Mr. Kelley and talk it over with him.

*Cross-examination by Mr. Corn:*

10 Q. When was this conversation? A. About the middle of October, 1923.

Q. How do you fix that date? A. How do I fix it?

Q. Yes. A. Why, I knew it was just around that time.

Q. When did you know it was around that time? A. Because I remember it was somewhere within that time. I know it was in October.

20 Q. Did you talk this matter over with your husband? A. No.

Q. You didn't talk to him at all, not since October, 1923? A. Certainly I talked to him.

Mr. Moore: If your Honor please, I have one more witness. I understand that he is the state manager of the Schacht Motor Truck Company. He has examined this truck and he is an important witness. They tell me he is on his way. He is not here.

30

The Court: Perhaps there will be no objection to calling him during the defense of the case. Will there be any objections?

Mr. Corn: Why, no. The whole case is just about through now. All I have is some rebuttal. I have no objection if he comes in later, except I may want to use my witness again to rebut.

40

*Jennie Kelley—Cross.*

The Court: You may do that. You may recall him after that.

Mr. Moore: Before I close the case I would like to offer in evidence the original of this letter to Mr. DeVoe.

Mr. Corn: I have seen it. You can put that in.

10

Mr. Moore: It is the carbon copy. The original is probably signed by Whiting & Moore. To Alonzo DeVoe, February 8, 1928.

(The paper referred to is received in evidence and marked Exhibit D-3.)

---

ALONZO DEVOE, sworn in behalf of plaintiff in rebuttal. 20

*Direct-examination by Mr. Corn:*

Q. Mr. DeVoe, you are the payee of the notes?

A. Yes, sir.

Q. Can you tell us when those notes were executed, the three notes bearing date October 1, 1923; when they were signed? A. They were signed the day before Octobr 1st, whether it was the 31st or 30th. I forget whether there was thirty or thirty-one days in September. 30

Q. When were these four notes dated February 1, 1924 signed? A. About February 3rd.

Q. Those three \$100 notes and that \$500 note were given to pay an \$800 note, were they not?

Objected to as leading.

Q. What were the circumstances under which that \$800 note was given, those notes totaling \$800 40

*Alonzo DeVoe—Rebuttal—Direct.*

were given? A. They were given to renew the larger note of the series before.

*By the Court:*

10 Q. Which was how much? A. The series before, if I remember right, was \$1100. The large note would be \$800.

*By Mr. Corn:*

Q. Is this the note they were given to renew?  
A. Yes, sir.

Mr. Corn: I offer this in evidence.

Mr. Moore: No objection.

(The same is received in evidence and marked Exhibit P-8.)

20 Q. With whom did you have negotiations for the sale of this Schacht truck? A. Well, with Mr. Ira F. Kelley and Mrs. Grace L. Kelley and her son—I don't know his first name, whether it is Edwin or Edward.

Q. Edward. A. Edward Kelley.

Q. Did you represent to them that this was a new truck? A. No, sir, I did not.

30 Q. Did you represent to them that this was a 1923 truck? A. No, sir, I did not.

Q. What was the condition of that truck at the time it was sold to the Kelleys? A. It was in good condition.

Q. Had it been in a fire? A. No, sir, it had not.

40 Q. What year was it? A. Well, it is so long ago that I can't just recall the year it was built, but it seems to me it was built in the year 1921 and to be sold 1922. We go more on models than we do by years.

*Alonzo DeVoe—Rebuttal—Direct.*

Q. What was the price of that truck new, the sale price? A. \$3200 at the factory plus war tax and freight, which would make it \$3400.

Q. Did you tell the Kelleys what kind of truck this was; that is, as to its condition? A. Well, I guess I told them that the truck was in good condition. I always try to have trucks in good condition when I sell them. 10

Q. Did you tell them what year the truck was? A. Well, if I remember right when the Kelleys first saw this truck was in the fall around November of 1922. They came to me and they had a team of horses and they wanted to get rid of the team of horses for feeding over the winter. They wanted to swap that team in on a truck and they asked me to take that in. I had sold them this team prior to this time, about maybe three or four years that they had owned this team of horses. I told them yes, I would take it in. Then they bought the Columbia truck on account of it being cheaper than the Schacht truck. They took out a license in the early spring of 1923 for the Columbia truck and ran it, I would say, a couple of months, and they had some trouble with it, and young Mr. Kelley that was on the stand came to me and he says, "They have got to get me a better truck or I am going to quit." Well I says, "The truck you should have bought is the Schacht truck that you looked at." We went over, we went out. We took a ride. He brought his father and mother—I don't know whether they had anyone else or not, but they had a Cadillac car. They came around to the building where I was working, and I made an appointment to have the truck at the building at that time. He and his father both got on and took a ride around 20  
30  
40

*Alonzo DeVoe—Rebuttal—Direct.*

the block. Then they said, "We will let you know in a day or so." Then young Mr. Kelley came to me and he said, "Now, come on over to the house. We want to buy that truck," and that was about the whole transaction in the sale of the truck.

10 Q. Did you go up to the house and make the sale of the truck? A. The sale was made in the house, yes.

Q. What is your relation to the Schacht Motor Truck Company? What was it at that time? A. Well, I had the state agency at that time.

Q. Did you issue a bill of sale on this truck? A. Yes, sir..

Q. Whom did you issue that to first? A. Mrs. Grace Kelley.

20 Q. When was that bill of sale issued? A. As nearly as I can recall it was around the 1st of May.

Q. Were you with Edward Kelley at the time the license was issued? A. Around the 23rd of May or the time that this license was issued—

*By the Court:*

Q. You see that question can be answered yes or no. A. I was with him when he got the license finally; yes, sir.

30 *By Mr. Corn:*

Q. Did you have a bill of sale on this truck? A. I don't quite understand.

Q. Had you signed the bill of sale on this truck? A. Had I signed one?

Q. At the time you were at the Motor Vehicle Department. A. I was there twice with him. The first time I had already signed one; yes, sir.

40 Q. And to whom had you signed that bill of sale? A. To Mrs. Grace Kelley.

*Alonzo DeVoe—Rebuttal—Direct.*

Q. What happened to that bill of sale? A. I don't know. They have it somewhere with their papers, I suppose.

Q. Did you have any conversation with the Kelleys about the change in the bill of sale? A. Yes, sir. This day that young Mr. Kelley came to Prospect Street to get the license he had his Cadillac car and he told me that he couldn't get the license because there had been a new clause in the law of transferring a license from one name to another. For instance the license on the Columbia was in Ira F. Kelley and Son, if I recall it right, and he couldn't change that from Ira F. Kelley and Son to Grace Kelley because that was the beginning of the period when licenses could not be changed from one owner to another. They could be changed from one car to another, but must be held by the same owner. So he wanted me to go up to the License Bureau with him, which I did. 10 20

Q. Did you have an executed bill of sale on this truck at that time? A. I went up to the License Bureau, to Mr. Robert Murphy's place—I think that is his name—and Mr. Murphy knew me pretty well and he knew the Kelleys pretty well, and he said to save the Kelleys from losing the money that they had put on their Columbia license, that I could issue a new bill of sale, temporary bill of sale, long enough for them to get their license, and then take it back in Kelley and Son, and then when they put on a new license the following year they would buy the license under Grace Kelley the same as their original bill of sale called for. 30

*Alonzo DeVoe—Rebuttal—Direct.**By the Court:*

Q. What did you do after that? A. What did I do?

Q. Yes. A. Well, we went down to the bank, Mr. Kelley and I went down to the bank to a notary public, made out a new license, a new bill of sale.

Q. A new license? A. A new bill of sale and went back to the license bureau, and then Mr. Murphy granted Mr. Kelley a license for the truck.

Q. What did you do with that bill of sale? A. I have that bill of sale.

Q. What? A. I have that bill of sale.

Q. You have that? A. Yes, sir. That was the instructions of the motor vehicle man, to just issue it long enough for them to get their license.

*By Mr. Corn:*

Q. Have you the first bill of sale that you made to Grace Kelley? A. No, I have not.

Q. Where did you see it last? A. When I delivered the truck I delivered the bill of sale and took the notes.

Q. To whom did you deliver that bill of sale? A. Well, to Mr. and Mrs. Kelley. They were both there at the time.

Q. Did you tell Mrs. Kelley of the change in the bill of sale to Ira Kelley and Son? A. Did I tell Mrs. Kelley?

Q. Did she know about the issuance of a new bill of sale on this car? A. Yes. Her son and I had to go down there before this new bill of sale was made up and explain it to her, and she said it was perfectly all right. It was a question of saving the \$40 or \$50 that they had already paid for

*Alonzo DeVoe—Rebuttal—Direct.*

the license that they had only used a month.

Q. At the time these notes were given to you, did Mr. and Mrs. Kelley or the son tell you that the truck was not as represented? A. Oh, Mr. Kelley's main trouble was the—the main kick was about the tires. Now, when they bought this—

Q. Just a minute. Did he tell you that the truck was not a new truck? A. No. It was never sold as a new truck. 10

Q. Did he tell you that it wasn't a 1923 truck? A. No, sir. There was never anything said about the year of it.

Q. Did Mrs. Kelley say anything at that time? A. No.

*Cross-examination by Mr. Moore:*

Q. Prior to 1923 how long had you been agent for Schacht trucks? A. Oh, I think I took the agency over in 1916, if I remember right, 1916 or 1917. 20

Q. You think that this truck was probably built in 1921? A. I would imagine that I received that truck in the year of 1921, or it was built at the factory in 1921.

Q. Was it repainted after you received it? A. If it was used for a demonstrator; yes, sir. 30

Q. Had it been repainted? A. Well, it is so long ago I can't recollect now. They came from the factory in a gray color and I can't recall what color was on the truck when I saw it.

Q. This was a blue color, wasn't it? A. Then it has been painted. That is my standard color, blue.

Q. Isn't it your recollection that this truck was blue? A. As I say, I can't recall the color of the 40

*Alonzo DeVoe—Rebuttal—Cross.*

truck. If it was sold when it was blue, it had been painted blue and white.

Q. You referred to some insurance that was taken out on the truck. Who took out that insurance? A. Why, the buyer generally takes the insurance out.

10 Q. Who took out this insurance? A. I imagine Mr. Kelley.

Q. How did you know that the insurance had been taken out? A. Because the bank notified me that they had received the policy for the truck.

*By the Court:*

Q. You didn't take it out? A. No, sir.

*By Mr. Moore:*

20 Q. Have you that policy? A. I believe the policy is amongst the notes which were turned over to me after the bank had been paid in full.

Q. Will you produce it please? This is the policy to which you refer? A. Yes, sir; that is the one.

Mr. Moore: I ask that it be marked for identification.

(The same is marked Exhibit D-4 for identification.)

30

Q. Now, you say you did give Mrs. Kelley a bill of sale for this truck? A. Yes, sir.

Q. Although at that time she owed you, she or Mr. Kelley or someone owed you \$1500 on it? A. Yes, sir. I had to give her a bill of sale or they can't get a license for a truck.

Q. You had only received \$1000 at the time this transaction was made, is that right? A. Well, in

40

*Alonzo DeVoe—Rebuttal—Cross.*

exchanges and all I had, yes, and \$1500 worth of notes.

Q. \$1500 in notes? A. Yes.

Q. So that the greater part of the purchase price was still unpaid, is that right? A. Yes.

Q. And yet you say you did give a bill of sale?  
A. Absolutely; yes, sir. 10

*By the Court:*

Q. It was an absolute bill of sale, not a conditional bill of sale? A. Well, I couldn't tell you whether you call it conditional. It is a bill of sale so that they can get a license anyway for the truck subject to a lien of \$1500 of notes.

Q. What was it? You say you gave him a bill of sale. Was it a conditional bill of sale or an absolute bill of sale? A. What is the difference 20  
between—Well, a conditional bill of sale it must have been on account of not being all paid for.

*By Mr. Moore:*

Q. Do you know which it was? A. It is whatever is customary that goes with the truck. I am not familiar with the conditional bill of sale or absolute bill of sale, whatever you call them.

Q. You had been the state Schacht agent since 1916 or so? A. Yes. 30

Q. You aren't sure whether it is a conditional bill of sale? A. Well, it is the same as we issue on all trucks, whatever that might be.

Q. I notice this insurance policy refers to the Little Falls National Bank. What had they to do with this transaction? I told the Kelleys that it was customary for the bank that was financing to have insurance on the trucks made payable to the buyer and also the bank, so if anything happened, 40

*William C. Monro—Rebuttal—Direct.*

that the buyer was protected and the bank was protected. In other words, it is like a mortgage policy where if you have a fire insurance policy on a piece of property that has a mortgage. It is made payable to both.

10 Q. The Little Falls National Bank was financing this sale for you, is that right? A. They discounted the notes, yes, sir.

---

WILLIAM C. MONRO, sworn in behalf of plaintiff, in rebuttal.

*Direct-examination by Mr. Corn:*

20 Q. Mr. Monro, what is your business? A. Trucking and house moving.

Q. Were you in that business in 1923? A. Yes, sir.

Q. Do you know this Schacht truck that was sold by DeVoe to Kelley? A. I looked at it before he sold it to Kelley.

Q. You saw it before it was sold? A. Before he sold it.

30 Q. About when did you look at it? Do you recall? A. I couldn't exactly say, but it was just shortly before it was sold to Kelley.

Q. And you saw it in Mr. DeVoe's place at that time? A. Yes, sir.

Q. And you saw it after it was sold to the Kelleys, did you not? A. I seen Kelley use it.

Q. When you first saw the car in Mr. DeVoe's place, did that car look like a new car? A. No, it wasn't a new car.

40 Objected to as calling for a conclusion.  
The Court: He says it was not a new car.

*William C. Monro—Rebuttal—Direct.*

Q. Could you tell whether that was a new car or a used car by looking at it? A. Well, it had been used.

Mr. Moore: I object. I think the witness ought to tell the condition of the car as he saw it.

The Court: The answer may remain. It had been used, he says. 10

Q. Did you examine the tires? A. Well—

*By the Court:*

Q. Did you examine the tires? A. I looked at the tires.

Q. The question is did you examine them. A. Well, I just seen them. They were in good condition. 20

*By Mr. Corn:*

Q. Mr. Monro, how were you interested in this truck? A. Well, I was going to buy it, but it was too light. I bought a heavier one, a new one.

Q. And you looked at this truck for the purpose of buying it, did you not? A. Yes.

Q. How many trucks have you owned, Mr. Monro? A. Schacht trucks? 30

Q. Yes. A. Five, I think.

Q. Have you owned any other kind of trucks? A. Yes.

Q. About how many? A. Oh, probably six or eight.

Q. Can you tell from looking at a truck whether it is new or used? A. Yes, I could.

Q. Did you look at this truck? A. Yes, sir.

Q. Can you say whether it was new or used? 40

*Edward Kelley—Sur-Rebuttal—Direct.*

The Court: He has already answered that question.

Q. Did you speak to Mr. Kelley about this truck?

A. Well, I went to—

*By the Court:*

10 Q. Did you speak to Mr. Kelley about it? A. Sometime after that date.

*By Mr. Corn:*

Q. What was your conversation with him about this truck? A. I wanted to hire it and he wouldn't hire it. He said he would sell it, but he wouldn't hire it.

Cross-examination Waived.

20

EDWARD KELLEY, recalled in behalf of defendant in sur-rebuttal.

*Direct-examination by Mr. Moore:*

Q. Mr. Kelley, what color was this Schacht truck when you bought it? A. A blue.

30 Q. Do you recall going to the bank with Mr. DeVoe to get a new bill of sale at the time the license was taken out? A. No, sir, I was never to the bank.

Q. Did you see a bill of sale at the time the license was taken out? A. No, sir.

Q. Have you ever seen a bill of sale for this truck? A. No, sir.

*Cross-examination by Mr. Corn:*

40 Q. Have you ever owned any trucks, Mr. Kelley? A. No, sir.

*Edward Kelley—Sur-Rebuttal—Cross.*

Q. Any other cars? A. No, sir.

Q. Did you see Mr. DeVoe hand anything to the motor vehicle inspector at the time that the license was applied for? A. No, sir. He did that dealing with Mr. Murphy all by himself. I had nothing to do with it. I was just along with him.

Q. You weren't interested in the bill of sale? You weren't buying a truck? A. No, sir, I was driving the truck. 10

Q. You were driving the truck but you weren't buying it. A. No, sir.

Q. And you know that a license was issued for this truck. A. I do; otherwise we couldn't drive it.

Mr. Moore: I offer in evidence the insurance policy.

Mr. Corn: No objection. 20

(The paper heretofore marked Exhibit D-4 for identification is received in evidence and marked Exhibit D-4.)

Mr. Moore: That is our case except I would like to call Mr. Shay.

At 12:45 P. M. the court takes a recess until 1:45 P. M.

---

AFTER RECESS. 30

Mr. Moore: They told me that Mr. Shay was here during the noon recess, but I do not see him here. I can't ask any more indulgence. I have one witness who can testify to one fact, and one fact only.

*Carroll B. Kelley—Sur-Rebuttal—Direct.*

CARROLL B. KELLEY, sworn in behalf of defendant in sur-rebuttal.

*Direct-examination by Mr. Moore:*

Q. Mr. Kelley, you are another son of Mr. and Mrs. Ira F. Kelley? A. I am.

10 Q. Have you been rendering assistance to them in preparation for the trial of this case? A. I have.

Q. In the course of your investigations did you examine this Schacht truck? A. I have on several occasions.

Q. Did you take occasion to ascertain the serial number of the truck? A. I did, yes.

Q. Where is the serial number? A. Is on the front cross member of the frame.

20 Q. Was anyone with you when you examined it? A. There was.

Q. Who? A. Mr. Shay, Benjamin Shay.

Q. Who is he? A. I understand he is the manager of the Le Blond Schacht Truck Company, who are the distributors of Schacht trucks for the State of New Jersey.

Q. What did you find the number of the truck appearing upon the chassis to be? A. 1964C.

30 Q. Did you make a note of the engine number? A. My memory does not serve me on that, but I have a paper here, if I may refer to it.

*By the Court:*

Q. You made a memorandum at the time, did you? A. Yes.

Q. This is the paper? A. Yes.

The Court: All right. Look at it. Doesn't your policy give all that?

*Carroll B. Kelley—Sur-Rebuttal—Cross.*  
*Carroll B. Kelley—Sur-Rebuttal—Redirect.*

Mr. Moore: That is just the point, your Honor.

The Witness: 71809, that is the motor number.

*Cross-examination by Mr. Corn:*

10

Q. When did you examine this truck? A. Just about eight, six to eight months ago.

Q. You don't know what number was on there at the time the truck was sold, do you? A. No, I don't.

*Redirect-examination by Mr. Moore:*

Q. What did you find the condition of the serial number to be? 20

Objected to as improper.

Objection overruled.

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

Exception noted as ground of appeal.

A. There was a spot where the serial number should be that was badly mutilated, and the serial number I have quoted appeared to the left of that mutilation. 30

Q. Could you make out the number to the right of the mutilation? Could you make out what number was to the right of the mutilization? A. That had been mutilated you mean?

Q. Yes. A. No, there was no one could make that out. That had been thoroughly chopped out.

40

*Carroll B. Kelley—Sur-Rebuttal—Recross.**Recross-examination by Mr. Corn:*

Q. You don't know who mutilated that number, do you? A. I haven't the slightest idea, no.

DEFENDANTS REST.

10

Mr. Corn: I would like to make a motion of direction of verdict, your Honor. First, as to Mrs. Kelley, I make a motion for a direction against her. She has not shown that she was surety for anybody, or accomodation, under the Married Women's Act. All that she showed was that—

20 The Court: Let me ask you this. Hasn't it been held that the making of a note which is for the accommodation of another is in effect becoming surety for that person?

Mr. Corn: I believe it has been held that it does not matter whether they are the maker or the endorser.

The Court: Yes, I think that is so.

30 Mr. Corn: But, I say that accepting her testimony, that is entirely true. She does not say that, nor is there any testimony of either her or her husband that she was surety for her husband at all. It does not show that the debt was her husband's. As a matter of fact, there is nothing that appears in the whole transaction as to whether there was any debt due from her husband, and it not having been a debt from her husband, she could not be surety for him. It appears from her testimony and her husband's testimony that they were there with Mr. DeVoe. They did not tell Mr. DeVoe that Mr. Kelley was buying the truck. That appears clearly from the testimony, that she gave the

40

*Plaintiff's Motion for Direction of Verdict.*

checks, and she signed the notes. It is clear that it is a contract of hers. If later on title was taken in somebody else, that did not change it. At the time when this transaction was made she was the one, and there is not any evidence whatsoever from either Mr. or Mrs. Kelley or anybody that Mr. DeVoe was told or had any information that anybody but Mrs. Grace Kelley was the one who was transacting this business and buying it. 10

She was, as testified, the one who gave the checks. The check account was in her name. The notes were made by her. That only goes to the first three notes of \$300, because as to the others she has not put in that defense—that is, as to the \$800 worth of notes.

As to those \$800 worth of notes, there is no defense, as I made the motion at the beginning of the trial, and I want to renew that motion now. None of the defenses that have been interposed affect her, because in all of these defenses as I read them, it all states that there was a truck sold by DeVoe to Ira F. Kelley, Ira Kelley, her husband, and that there was a misrepresentation in the one case; then there was no bill of sale furnished, and then there was a mutilated number. But in the defense as drawn it is continually that it is a truck sold to Ira Kelley. She does not make that defense and she cannot prevail under that defense. She cannot take advantage of it. 20 30

Now, I also have a motion to make as to Ira Kelley for a direction. Shall I make that at the same time?

The Court: Yes.

Mr. Corn: As to Ira Kelley, there is no fraud shown. The elements of fraud are missing. First as to false representation; the representation as 40

*Plaintiff's Motion for Direction of Verdict.*

we have it is that it was a new truck used for demonstration purposes, and they have not shown that it was anything but that.

Next, they have not shown its materiality.

The Court: The testimony of Mr. Crane.

10 Mr. Corn: Mr. Crane states that it had been in a fire, but he has not shown that anybody has used it or that it was anything but a truck that had been used for anything but demonstration purposes.

The Court: They go further than that and say that they told him it was in first class condition.

20 Mr. Corn: But that is not the allegation in the defense, sir. The allegation in the defense is that it was represented to have been a truck used only for demonstration purposes and a 1923 truck. In the sixth separate defense in the second action—

30 The Court: I understood Mr. Crane to say that it was rebuilt. He said when he saw it in December, 1923—no, 1922—no, I guess it was later than that. He was working for Mr. DeVoe, he says, December 2, 1922. He said that the truck then was partially dismantled at that time and showed effects of having been in a fire; the cab was burned up; paint and woodwork was damaged. The next spring he saw it when it was repaired and repainted. I guess that is as far as his testimony goes.

Mr. Corn: Now, the other elements which I consider lacking, the next is materiality, that these representations were material; that is, that Kelley would not have been a purchaser of the truck had these representations not been made.

40 Now, there is no testimony to that, and the Court cannot assume nor can the jury assume that that was material unless they were so to say that

*Plaintiff's Motion for Direction of Verdict.*

that was the inducing cause for their making the bargain.

Then of course they have not shown scienter whatsoever. They have not shown that DeVoe well knew the falsity if it was a false statement. They have not shown their reliance on the truth of the statement. Nor have they shown, and that I think the most serious, any injury, any damage. Now, 10  
certainly, even if this is material, this is not an executory contract. It is an executed contract, the truck has been delivered and these notes are given. Now, even if there were some damage, could the Court say or could the jury say that the \$1100 is forfeited? If the damage were ten or fifteen or forty or a hundred dollars, that is not a complete defense. If this is to be a defense they must show how much they lost by it. 20

The Court: Not if they rely upon rescission.

Mr. Corn: If it is a rescission, certainly if this is an action in rescission, or if the defense is rescission, they certainly cannot prevail because the rescission means, "We hand you back the truck and we want what we paid for it."

The Court: You have got an entirely wrong slant upon that, Mr. Corn, as I told you at the outset of the case. They are not demanding anything back. If they are demanding money back, 30  
then they would have to set up a counterclaim, but when they are not they may defend against the amount which you claim without it being in the counterclaim, without it being on the ground of fraud.

Mr. Corn: The Sales Act says that it shall be by counterclaim or by a cross action.

The Court: It does not say any such thing, and I doubt very much if you can show it to me. I 40

*Plaintiff's Motion for Direction of Verdict.*

mean that I have never seen it there.

Mr. Corn: The remedies of buyers.

The Court: Tell us the section.

Mr. Corn: I unfortunately ran away and I left all my notes in the office.

10 The Court: I never like to state too confidently that a thing is not so because it may be there and I have not seen it, but that is what I mean to say.

Mr. Corn: I can find it very quickly by looking at the Sales Act.

20 The Court: If you want to recover any money back, then undoubtedly you must file a counterclaim, but why a counterclaim if you are just defending on the ground of fraud and do not seek to recover money? A counterclaim is an affirmative action against another, isn't it? They do not claim any affirmative action against you at all. They are just defending against your claim. Why should that be the subject of a counterclaim?

Mr. Corn: Because they say that we have returned or offered to return the truck and we have demanded the money, what we paid for it.

30 The Court: They do not seek to recover it back in this suit, nor is there any testimony in this case that they demanded back the money. Mr. Kelley distinctly says that he said to him, "I am willing to lose \$1400 that I paid."

Mr. Corn: There is this contract—

The Court: There is that letter, of course, from the attorneys.

Mr. Corn: They introduced that in evidence and they have demanded it back.

40 The Court: But they have not demanded it in this suit, have they? In this suit they have not demanded that back, whatever the letter of the attorney may be.

*Plaintiff's Motion for Direction of Verdict.*

Mr. Corn: Well, no, they could not very well do that.

The Court: Then if they have not demanded anything from you, why file a counterclaim?

Mr. Corn: Because that is a separate and distinct action. That is an action in rescission.

The Court: Action for what?

10

Mr. Corn: For a fraud and as a result of the fraud they disaffirm the contract.

The Court: Can you not defend on the ground of fraud?

Mr. Corn: Yes, by proving damage that you have sustained.

The Court: Then when you defend upon the ground of fraud you can do one of two things. You can rescind your contract and thereby claim, and if proven the plaintiff cannot recover anything. You must rescind in order to put it in that position. Or you may retain the benefit of what you have and defend for the damage, may you not?

20

Mr. Corn: Yes, sir.

The Court: That is, I mean by that failure of consideration.

Mr. Corn: Yes, sir; failure of consideration if that is pleaded.

The Court: Now, that is not pleaded in this case. What they claim is that they offered you back the automobile, the truck, upon the ground that you have made fraudulent representations to them. They are waiving \$1400 which they paid, but they say that if this truck was not as represented and you fraudulently misrepresented it to them, you cannot collect anything more. That is all they say, isn't it?

30

Mr. Corn: That would be, I suppose, an interpretation of the case.

40

*Plaintiff's Motion for Direction of Verdict.*

The Court: See if you can find that in the Sales Act.

Mr. Corn: Yes, sir. Another thing that I wanted to bring out, your Honor, in the rescission, their ground now of fraud rests in rescission and not in damages for fraud, and if we take rescission they cannot recover.

10

The Court: They are not seeking to recover.

Mr. Corn: No, I mean they cannot defend, they cannot prevail. Mrs. Kelley has stated that a rescission could go in her favor, which I believe she cannot, because she did not set it up as a defense. She stated that when she executed these notes and gave them she knew all about it.

The Court: All about what?

20

Mr. Corn: About the fraud. She said she did not want to sign these notes, knowing that there had been fraud in the transaction, that she wanted to return the truck, and then she executed the notes and gave them. Mr. Kelley stated that he told Mr. DeVoe in October, 1923, that he did not want it.

30

Now, Mr. Kelley is here as an endorser on four notes dated February 1, 1924, and he does not state when he endorsed those notes, and we must assume that they were endorsed on or after their date. Now, if he rescinded in October, 1923, and makes notes in February, 1924, that rescission has been clearly wiped out. There can be no more rescission. Having once elected to rescind and then executing the notes, there can be no more rescission in that respect.

40

The Court: Now, suppose you find that section of the Sales Act. I will hear you, Mr. Moore. The first question is whether, if this jury should find that Mrs. Kelley was the purchaser of this automo-

*Plaintiff's Motion for Direction of Verdict.*

bile, as they would have a right to find under the evidence of Mr. DeVoe, do you think that there have been any defenses interposed which would save Mrs. Kelley from the effect of this judgment?

(Argument.)

The Court: As I view this case at the present time, if the jury should find that the sale in this case was to Mrs. Kelley, no defense has been established. If the sale was to Mr. Kelley, then do you think that the delivery of a bill of sale was not necessary to your right of recovery? 10

Mr. Corn: Against Mrs. Kelley, yes, because she has not interposed that as a defense.

The Court: How about Mr. Kelley?

Mr. Corn: Against Mr. Kelley I believe that that is a question. 20

The Court: Suppose the jury should find that no bill of sale was delivered to Mr. Kelley except as an endorser for Mrs. Kelley, you can't recover against him.

Mr. Corn: I do not think that that is a defense which an endorser could have.

The Court: I do not think as endorser he would be entitled to a bill of sale.

Mr. Corn: No, and then the same as to the mutilation of the numbers of the car. As an endorser that is not a defense to him, and furthermore, there has been no proof that it has been mutilated by the plaintiff or Mr. DeVoe, simply there is a number which appears to be mutilated, by testimony now five years after the car was sold. 30

The Court: I think the issues then in this case are these: The plaintiff has proven his notes. Prima facie they are due from the defendants in proportion to the notes which they have signed. That is, Mrs. Kelley has signed notes to the amount of 40

*Plaintiff's Motion for Direction of Verdict.*

\$1100, Mr. Kelley has endorsed notes to the extent of \$800 of that \$1100.

10 If Mrs. Kelley was the purchaser, no defense has been made out as to her. If Mr. Kelley was the purchaser, then the questions for this jury to determine are whether or not any bill of sale was delivered to him or on his account of that purchase; and second, whether or not there was a false representation made by him which would entitle him, if the automobile truck was not as represented, to rescind the sale and to defend against any amount due from him to the plaintiff. I think there are only those questions. Do you think there are any more?

Mr. Moore: No, your Honor.

20 The Court: I think no rescission would have been proven in this case were it not for two items of testimony that Mr. Corn brought out, one in the testimony of Mr. Ira Kelley where Mr. Corn said to him, "Then you told Mr. DeVoe that the truck was not as represented and to take the truck back?" He said he did. Mr. Kelley up to that time had not testified that he had ever said to DeVoe that he wanted him to take the truck back. Then in Mrs. Kelley's testimony he asked her substantially the same thing. I am going to ask the stenographer  
30 to write it out so that I have it exactly as it was testified.

If you agree that those are the three questions in the case, then you may proceed to the argument.

Mr. Corn: May I note an exception that those defenses are not proper to be raised by Ira Kelley as an endorser on these notes?

40 The Court: Oh, no, that is right about that. They cannot be raised by him as an endorser of

*Plaintiff's Motion for Direction of Verdict.*

the notes. They are only defenses if he is the purchaser of the truck, Ira Kelley.

The question with this jury is who was the purchaser. Now, was it Mr. Kelley or Mrs. Kelley? If Mr. Kelley, then he has a right to raise these two defenses that no bill of sale was ever delivered to him and that the truck was not as represented and that he rescinded his contract and now defends against the plaintiff's claim, and that is provided the jury first find that the sale was to him. Now, if the jury find that the sale was to Mrs. Kelley, then no defense as to her has been established in this case. That is my view of it. 10

Mr. Corn: I do not know whether I understand your Honor properly, that then if the jury find that the sale was to Ira Kelley his defenses can come in and the judgment must be against Mrs. Kelley, and if on the opposite side the sale was to her— 20

The Court: I did not say that at all. I did not say any such thing and I have not intended to, because the testimony on behalf of the defendants is, if I understand it, that all that Mrs. Kelley did was for her husband.

Mr. Corn: That is right.

The Court: That is all that she did.

Mr. Corn: I pray an exception. 30

Mr. Moore: May I pray an exception to your Honor's ruling to the effect that if the jury finds that Mrs. Kelley was the purchaser there is no defense?

The Court: You may. Of course I will have to say that to the jury, and I think the time to except is when I do say that.

Mr. Moore: I see.

*Charge of the Court.*

(Mr. Moore sums up in behalf of defendants.)

(Mr. Corn sums up in behalf of plaintiff.)

---

CHARGE OF THE COURT.

10 The Court charges the jury as follows:

DUNGAN, *J.*

Gentlemen: This suit is brought upon seven protested promissory notes, the first three of which are dated October 1, 1923, and are for \$100 each with interest. The other four are all dated on the 1st day of November, 1924, three of which are for \$100 each with interest and the other for \$500 with interest. All are made by the defendant Grace L. Kelley, and the last four, aggregating \$800, are endorsed by the defendant Ira F. Kelley.

20

The plaintiff produces these notes and proves them in evidence, and if nothing else should appear in the case, the plaintiff would be entitled to your verdict for the full amount of these notes, \$1,100 with interest amounting to \$362.53, making altogether \$1,462.53 against Grace L. Kelley, of which \$800 with interest, which is \$258.97, aggregating \$1,058.97, should be against Mr. Kelley as the endorser of those last four notes. Without any defense that proof alone establishes the plaintiff's case and its right to recover against the defendants as indicated.

30

But the defendants interpose several defenses to this suit. One is that Mrs. Kelley, being a married woman, is not liable upon any of these notes because she was merely an accommodation maker of those notes for her husband, Ira F. Kelley, and if that be true and if that has been established in

40

*Charge of the Court.*

the case by the greater weight of the evidence (for the burden of establishing the defenses by the greater weight of the evidence is upon the defendants) then the defendant Mrs. Grace Kelley is entitled to your verdict, because the Fifth Section of the Married Women's Act in force in this state at that time and still in force, while it permits a woman to make contracts in her own behalf, provides that such married woman shall not become an accomodation endorser, guarantor or surety, nor shall she be liable on any promises to pay the debt or answer for the default or liability of any other person. So if when she made these notes they were made for her husband and the plaintiff knew that she made them for her husband, then under this section, this Fifth Section of the Married Women's Act, there can be no recovery at all against her. 10

Another defense is that this truck was sold to the defendant Ira Kelley under false pretenses and by reason of false representations.

Suppose we go back a moment and take this situation: It is insisted on behalf of the plaintiff that it was not Mr. Kelley at all who was the purchaser of this automobile truck but that it was Mrs. Kelley, and it appears beyond question in this case, admitted by the Kelleys, who testified upon that subject, that the bank account of the Kelleys was in the name of Mrs. Kelley. It appears that there was a payment by check made upon this automobile and that the check was the check of Mrs. Kelley upon the bank account standing in her name in, I think it was the First National Bank of Ridgewood. She signed the notes as the maker of the notes. Mr. DeVoe says he made out to her the 30 40

*Charge of the Court.*

bill of sale for this truck in her own name, and it appears here that the insurance policy which was issued to protect the bank is in her name, and Mr. DeVoe insists that the same was made to her. Now, the Married Women's Act says this, that any married woman shall after the passing of this act, which was in 1877, have the right to bind herself by contract with any person in the same manner and to the same extent as though she were unmarried, which contract shall be legal and obligatory and may be enforced at law or in equity by or against such married woman in her own name apart from her husband. So she had a right to make this contract; and if she did make this contract, then she is liable upon all of these notes for the \$1100 with interest, and her husband as endorser upon those notes would be liable for \$800 of that amount with interest; or to put it with interest to date, she would be liable for \$1462.53 of which he would be liable for \$1058.97.

But they say that the bank account was in her name simply for purposes of convenience. Before June, 1923, he was engaged in business in New York, the Model Dairy. He said he was not at home during banking hours at all, and that the money that was in that bank was his money. His wife corroborates that and says that when she gave a check from that bank account she checked out upon his request his own money. She admits she signed the note, but she says she signed the note at the request of her husband.

It is denied that these defendants ever received a bill of sale from Mr. DeVoe, and there is produced here the license for this car, which appears to be in the name of I. F. Kelley and son. Mr.

*Charge of the Court.*

Edward Kelley says he at that time was thinking about going in business with his father. He never did. Mr. DeVoe explains that by saying that after this bill of sale was given to Mrs. Kelley they went to the license bureau to have the license transferred on the old Columbia which they had had, to Mrs. Kelley. He explained to them that it would be necessary to take out a new license because at that time a license from one person to another was not permitted, but only from one car to another by the same person; and therefore to save the \$40 or \$50 which they had paid only a couple of months before for that license on the Columbia, it was agreed that temporarily he was to make out a new bill of sale which he was to retain and the license was to be issued in the name of Mr. Kelley; but of course that would make no difference if there was an arrangement like that simply for purposes of saving money on the license transferred if as a matter of fact the sale at the time it was made, and the check and notes given, was in fact to Mrs. Kelley.

Now, if the sale was to Mrs. Kelley, then there has been no defense interposed in this case which would excuse Mrs. Kelley from paying this \$1462.53 or any part of it, or which would excuse Mr. Kelley from paying \$1058.97 of that amount. If you decide that, then your verdict should be in favor of the plaintiff and against the defendants for those respective amounts.

But it is insisted on behalf of the defendants, as I have already indicated, that the sale was made to Mr. Kelley; and if it was, as I have already indicated to you, and the signatures to these notes was made by Mrs. Kelley simply for the accommo-

*Charge of the Court.*

dation of her husband, then under the Married Women's Act which I have read to you, there can be no recovery against her upon these notes, but your verdict should be against Mr. Kelley for the \$1058.97 unless he has succeeded in establishing one of the two defenses which have been interposed in this case and which I shall now mention to you. Of course you cannot hold him in any event upon the first three notes aggregating with interest \$405 and some cents, because he is neither a maker nor endorser of those first three notes which were made in October, 1923.

Now, in the first place he says that no bill of sale was ever given by Mr. DeVoe for this automobile; and the law in force at that time provided that in order to transfer title to an automobile a manufacturer's bill of sale was necessary, or if it had gone through other hands than the original dealer, then it might be a separate personal bill of sale. That was the law at that time. The present law is a little different from that, requiring the assignment of the manufacturer's bill of sale, the original bill of sale. But no automobile then or now could be legally transferred without a bill of sale. It is contended on behalf of the defendants that no bill of sale was ever delivered. If that be true then the plaintiff cannot recover in this case. But I have already called your attention to the testimony of Mr. DeVoe upon that subject. He said that there was a second bill of sale made out to Mr. Kelley, which he still retains in his possession, but that the agreement between them was that that bill of sale was to be held by him because of its temporary character when the license was issued.

40

The next is that this automobile was obtained by false representations. The answer alleges this in the sixth separate defense: That Mr. DeVoe sold and delivered to the defendant Ira F. Kelley a motor vehicle known as a Schacht truck at the agreed price of \$2500 upon the representation made by DeVoe to said Ira F. Kelley that said truck was a new truck, having been used only for demonstration purposes. Now, where a person falsely represents the kind, character, quality or condition of an article which he is selling, then if there were attached to that sale the elements of fraud which I shall mention, the person purchasing has the right to one of two or three remedies. One of them is to rescind the sale and either demand his money back or defend a suit brought for the purchase price. But fraud of that kind to be actionable or to constitute a defense must have consisted of a false representation, and it must have been, in order for the defendants in this case to successfully defend, fraud in the respects I have just mentioned to you—namely, that this was a new automobile and that it had been used simply for purposes of demonstration. No other fraud is alleged. That is the fraud which must be established, and in order to establish it it must appear that that representation was made and that it was false, that he knew it was false at the time and that he intended that that representation should be acted upon by Mr. Kelley. It must appear that Mr. Kelley was ignorant of its falsity and that he relied upon the truth of the statement made by Mr. DeVoe.

The testimony upon the part of Mr. Edward Kelley is this: He said he went to see Mr. DeVoe in May. He had bought the Columbia truck some time before. He said, "I told him that the Colum-

*Charge of the Court.*

10      bia truck has proved a failure, that it was no use of trying to go on with it; the second gear went in the transmission and the housing broke, and we were sick of second handed trucks and ordered a new one. So he said he had a new two-ton truck, I believe it was, that he would sell for the price of \$2500. Question: Did he show you the truck? Answer: He showed it to me. Question: What was its appearance? Answer: Its appearance was very good. It had been newly painted, which he said had just been used for demonstrating, and it was a new truck, but he would sell it at that price of a little off." It appears the price was \$3200 for a new truck, to which war tax and freight should be added, making \$200 more or \$3400 altogether.

20      Mr. Ira Kelley said, "He said this was a new truck, only been used a little for demonstrating, just as good as new, and we could have it for around \$700 less, I think, something like that. Question: What else was said, if anything? Answer: Well, we agreed to take it. Question: What did you do with the Columbia truck? Answer: He took that back." Then he is asked later: "Question: Do you recall the conversation? Answer: 30      Yes, sure. He said it might have been some of the war stuff put in; it wasn't tempered right."

40      Now, Mr. DeVoe testifies that he never represented that it was a new truck. He says that it was not a new truck, that he thinks it was a truck which was made in 1921 for 1922 sale; and he denies making any such representations as that. It appears that on the very license card which was issued to these defendants or to Mr. Kelley and his son the day the truck was purchased, it shows

*Charge of the Court.*

it was a 1922 truck. But Mr. Edward Kelley, who was present when that was issued, said he never saw that upon that card until it was shown to him upon the witness stand here today, almost five and a half or six years after the issuing of that card.

If this truck was sold to Mr. Kelly as a new truck having been used only for demonstrating purposes, and if it was not, then that is a false representation, if it is covered by these elements of fraud I have mentioned, which would prevent the plaintiff in this case from recovering. 10

However, I want to call your attention to Mr. Crane's testimony. He says before May he repaired this truck three or four times. He tells you the dates when he made repairs to it. Of course that may be considered by you, whether or not a new truck was likely to have all these things the matter with it. Admittedly it was not a new truck, so the question is whether or not a representation was made that it was. He says that before May, 1923, he saw this truck in the garage at Poinier Street and it was partially dismantled and showed the effects of having been on fire. The cab was burned up and the paint and woodwork was damaged, "and the next spring after it was repaired and repainted I said to Mr. DeVoe that was the truck that was burned and he said it was." 20 30

Now, if this was sold as a new truck and if it was in that condition and was repaired, it will be for you to say whether or not it was a correct representation on behalf of Mr. DeVoe that it was a new truck. If it was so represented that it was a new truck, that would be a fraudulent representation in its application to this case which would 40

*Charge of the Court.*

prevent the plaintiff from recovering, in which event if you find that the contract was made by Mr. Kelley that would prevent this plaintiff from recovering against him.

10 Perhaps I ought to recapitulate what I have said about it so that we may have it all together, without any comment. If you decide that Mrs. Kelley was the purchaser of the truck, then the plaintiff is entitled to your verdict for the full amount of the notes against her, of which \$1058.97 should be assessed against Mr. Kelley as the endorser of the last four notes. If you decide that Mr. Kelley was the purchaser and that Mrs. Kelley was simply an accommodation maker of these notes for him and that Mr. DeVoe knew that she was simply  
20 an accommodation maker, then your verdict should be in her favor and against Mr. Kelley for \$1058.97 unless you decide that the greater weight of the evidence establishes one or the other or both of these defenses; namely, that there was no bill of sale and that the truck was sold to him under false representations and that he rescinded the sale, in which event your verdict should be in favor of Mr. Kelley and against the plaintiff.

(The jury retires.)

30

(The jury returns to the jury box.)

The Court: Gentlemen, as soon as you had retired, I was reminded that the defense of the Married Women's Act was only interposed as to the first three notes. After you had gone out I recalled, when it was called to my attention by both attorneys, that it had been agreed at the outset of  
40

*Exceptions to Court's Charge.*

this suit, if you should decide that this was a sale to Mr. Kelley and that your verdict should go against him for \$1058.97, that it might also go against Mrs. Kelley for that amount. I told you there could be no recovery against her under the Married Women's Act, but that should apply now to only the first three notes.

10

If this is complicated and you want any further instructions, you may have them, or if it is complicated so that any of you now want to ask any questions you might do so.

First is the question whether or not the sale was to Mrs. Kelley; second, if it was to Mr. Kelley, whether or not the defenses which have been interposed have been established. If they have not, then your verdict should be against both Mr. Kelley and Mrs. Kelley for the \$800 with interest, which amounts to \$1058.97. If either of the defenses has been established, then your verdict should be against the plaintiff and in favor of the defendants.

20

---

Defendants' counsel prays an exception to that portion of the charge in which the Court stated in effect that if DeVoe and the defendants knew that Mrs. Kelley made the notes for her husband, there could be no recovery against Grace L. Kelley, on the ground that it is immaterial whether or not DeVoe knew that she was acting as an accommodation maker when in fact she was an accommodation maker.

30

Exception noted as ground of appeal.

Defendants' counsel prays an exception to

40

*Exceptions to Court's Charge.*

10 that portion of the charge where the Court said in several places that if Mrs. Kelley made the contract—that is, if the sale were to Mrs. Kelley—she is liable on all of the notes in the suit and is not entitled to any of the defenses, on the ground that the defenses are so worded that while it is true that they refer to the sale being to Ira F. Kelley, nevertheless they set out defenses for both defendants of which the defendant Grace L. Kelley could take advantage.

Exception noted as ground of appeal.

20 Plaintiff's counsel prays an exception to the refusal by the Court to direct a verdict against Mrs. Grace L. Kelley for the notes aggregating \$800.

Exception noted as ground of appeal.

30

40

**Exhibit P-1.**

\$100.00

Ridgewood, N. J.

Oct. 1st, 1923.

For Value Received, on November 1st, 1923, the undersigned promises to pay to the order of A. DeVoe

One hundred and no/100 Dollars (\$100.no/100) in funds current in the City of Newark at First National Bank, City of Ridgewood, State of New Jersey with interest thereon at the rate of six per cent. per annum from date. This note is one of a series of (4) notes of like date and of the aggregate principal amount of Eleven hundred and no/100 Dollars (\$1100.00/100), all executed by the undersigned to the same order. 10

GRACE L. KELLEY.

---

20

**Exhibit P-2.**

\$100.00

Ridgewood, N. J.

Oct. 1st, 1923.

For Value Received, on December 1st, 1923, the undersigned promises to pay to the order of A. DeVoe

One hundred and no/100 Dollars (\$100.no/100) in funds current in the City of Newark at First National Bank, City of Ridgewood, State of New Jersey with interest thereon at the rate of six per cent. per annum from date. This note is one of a series of (4) notes of like date and of the aggregate principal amount of Eleven hundred and no/100 Dollars (\$1100.00/100), all executed by the undersigned to the same order. 30

GRACE L. KELLEY. 40



**Exhibit P-5.**

\$100.00                      Ridgewood, N. J., Feb. 1, 1924  
 July 1 ..... after date .... I.. promise  
 to pay to the order of    A. DeVoe  
 One hundred and 00/100 ..... Dollars  
 at the First National Bank of Ridgewood. Value  
 received, with int.  
 I hereby charge my separate estate with the pay-    10  
 ment hereof.  
 Due 7/1/24                                      GRACE L. KELLEY.

**Exhibit P-6.**

\$100.00                      Ridgewood, N. J., Feb. 1, 1924  
 August 1 ..... after date .... I.. promise  
 to pay to the order of    A. DeVoe                                      20  
 One hundred and 00/100 ..... Dollars  
 at the First National Bank of Ridgewood. Value  
 received, with int.  
 I hereby charge my separate estate with the pay  
 ment hereof.  
 Due Aug. 1, 1924                                      GRACE L. KELLEY.



**Exhibit D-1.**

This Registration Expires December 31st, 1923.

STATE OF NEW JERSEY  
Office of Secretary of State

Department of Motor Vehicle Registration and  
Regulation.

Commercial Registration No. 15110 X  
Issued to I. F. Kelley & Son  
of Glen Rock, N. J.

10

In pursuance of "An Act defining motor vehicles and providing for the registration of the same and the licensing of the drivers thereof; fixing rules regulating the use and speed of motor vehicles; fixing the amount of license and registration fees; prescribing and regulating process and the service thereof and proceedings for the violation of the provisions of the act and penalties for said violations." Approved April 8, 1921.

20

(over)

This Certificate must be Carried when Vehicle is Operated.

## DESCRIPTION OF VEHICLE

Made by Schacht Wt. of Veh. 7,400  
Serial No. C-5275 Wt of Load 6000  
Model H U Year 1922 Gross Wt. 13400  
Motor No. 71809 Max. Speed 14  
Width 5/10 Height 4½ Ft. Length 18/10  
Tires 36 x 6  
36 x 10

30

40

*Exhibit D-1.*

In Testimony Whereof I have set my hand and  
my seal of office the May 24 1923.

Signed

	51	WM. L. DILL,
Fee \$	(39)	Commissioner
	12. excess	Motor Vehicles.
10	1. transf.	
	—	
	13.	

(*On side of Certificate*)—Robert B. Murphy,  
Ridgewood, N. J.

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

20 Frederick A. Tetor, of full age, being duly sworn  
doth declare, that he is the Receiver of the Lincoln  
Lumber Company, and that the above within men-  
tioned motor vehicle was purchased by the said  
Lincoln Lumber Company prior to July 1st, 1919.

FREDERICK A. TETOR,  
Receiver of  
Lincoln Lumber Co.

Sworn and subscribed this 11th day of  
Dec. 1922, before me

30 Stanley S. Hazzard,  
Commissioner of Deeds  
(Seal) of N. J.

**Exhibit D-2.**

Know All Men by these Presents, that Lincoln Lumber Company, Frederick A. Tetor, Receiver, of Ridgewood, in the county of Bergen, and State of New Jersey, party of the first part, in consideration of the sum of One dollar and other valuable consideration, paid by Ira Kelley of Ridgewood, in the county of Bergen and State of New Jersey, party of the second part, has bargained, sold, granted and conveyed and by these presents do bargain, sell, grant and convey unto the said party of the second part, his heirs, executors, administrators and assigns,

Columbia Truck  
 (name of car) (type of car)  
 (model) 693 (motor number) 682764 to have and to hold the same unto the said party of the second part, his heirs, executors, administrators and assigns forever, and said Lincoln Lumber Company, Frederick A. Tetor, Receiver, does for himself, his heirs, executors, administrators or assigns, covenant and agree to and with the said party of the second part to warrant and defend the said described motor vehicle hereby sold unto the party of the second part, their executors, administrators and assigns against all and every person or persons whatsoever.

In Witness Whereof, the said Frederick A. Tetor, Receiver, have hereunto set my hand and seal this eleventh day of December, one thousand nine hundred and twenty-two.

Signed, Sealed and Delivered  
 in the presence of

C. A. Ferguson,  
 Edw. M. Schmutts.

FREDERICK A. TETOR (Seal)  
 Receiver of Lincoln Lumber Co.

*Exhibit D-2.*

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

Be it Remembered, that on this eleventh day of December, 1922, before me a Commissioner of Deeds of N. J., personally appeared Frederick A. Tetor, Receiver of The Lincoln Lumber Company, who, I am satisfied, is a Receiver of said Company (which) is the seller in the foregoing Bill of Sale, and I having personally made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

STANLEY S. HAZZARD,  
 Commissioner of Deeds of N. J.

20

**Exhibit D-3.**

February 8, 1928.

Mr. Alonzo DeVoe,  
 100 Melrose Ave.,  
 Irvington, N. J.

Dear Sir:

30 We represent Mr. Ira F. Kelley and his wife, Mrs. Grace L. Kelley, who are being sued by Model Plan Finance Corporation in the New Jersey Supreme Court upon certain promissory notes which were given to you. Mr. and Mrs. Kelley have recently learned that the Schacht truck, in part payment of which these notes were given, has a mutilated serial number. They have also just learned that you had not good title to the truck and that  
 40 you gave to them no title of any kind or nature,

*Exhibit D-4.*

and that the consideration for all of the notes given in connection with this transaction has wholly failed.

We are therefore writing to advise you, on behalf of both Mr. and Mrs. Kelley, without admitting any existing liability, that the entire contract and transaction has been and is hereby rescinded and the return of the truck which is now in their back yard is hereby tendered, and we demand that you return the full consideration already paid to you as well as the original notes which were given in connection with this transaction. 10

Yours very truly,

WHITING & MOORE.

ICM/RCC

*Copy to Corn & Silverman.*

20

---

**Exhibit D-4.**

Fire, Theft and Transportation Form.

No. A974533

Automobile Policy

ATLAS INSURANCE COMPANY

Limited, of London.

Founded A.D. 1808.

30

In Consideration of the Premium Hereinafter Mentioned Does Insure

The Assured named herein, and legal representatives, for the term herein specified, to an amount not exceeding the amount of Insurance herein specified, against direct loss or damage, from the perils insured against, to the body, machinery and 40

*Exhibit D-4.*

equipment of the automobile described herein while within the limits of the United States (exclusive of Alaska, the Hawaiian and Philippine Islands and Porto Rico) and Canada, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits. The following are the perils insured against:

- 10 Perils insured against (a) Fire, arising from any cause whatsoever; and lightning;
- (b) While being transported in any conveyance by land or water, the stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the Assured is legally liable.
- 20 (c) Theft, robbery or pilferage, excepting by any person or persons in the Assured's household or in the Assured's service or employment, whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion, embezzlement, or secretion by a mortgagor or vendee in possession under mortgage, conditional sale or lease agreement, and excepting in any case, other than in case of the theft of the entire automobile described herein, the theft, robbery or pilferage of tools and repair equipment,
- 30

Amount, \$2560.00. Rate, .90. Premium, \$23.04.

Name of Assured: Mrs. Grace L. Kelley &/or Little Falls National Bank, Little Falls, N. J.

Address of Assured: 79 Rock Road, Glen Rock, N. J.

The term of this policy begins at noon on the 22

*Exhibit D-4.*

day of May, 1923, and ends at noon on the 22 day of May, 1924.

Amount of insurance, Twenty-five-hundred-sixty dollars (\$2560.00)

## Warranties

1. Assured's occupation or business is ice business. 10
2. The following is the description of the automobile:
 

Year, 1923. Trade Name, Schacht. Type of Body, 3½ ton truck. Factory or Serial No. 5275c. Motor No. 71809.
3. The facts with respect to the purchase of automobile described are as follows:
 

Purchased by the Assured May, 1923. 20  
 New or Second Hand: New.  
 Actual Cost to Assured, including Equipment: \$2560; chas. \$2500; body, 60.  
 The Automobile described is fully paid for by the Assured and is not Mortgaged or otherwise Encumbered, except as follows: Loss if any payable to the Little Falls National Bank, Little Falls, N. J.
4. The uses to which the automobile described is and will be put are: commercial. 30
5. The automobile described is usually kept in private garage, located on Ferguson Avenue, Glen Rock, N. J.

17  
18  
1

17 OCT. 1930

18 OCT. 1930

## New Jersey Court of Errors and Appeals

THE MODEL PLAN FINANCE COR-  
PORATION,

Plaintiff-Appellant,

vs.

GRACE L. KELLEY and IRA F.

KELLEY,

Defendants-Respondents.

On Appeal  
from New  
Jersey Su-  
preme Court.

### BRIEF OF PLAINTIFF-APPELLANT.

#### Facts.

Two suits were brought by the same plaintiff against the same defendants, on different notes, and were tried together.

The two actions were to recover on three notes of \$100 each made October 1, 1923 by defendant Grace L. Kelley to the order of A. DeVoe, due November 1, and December 1, 1923, and January 1, 1924; and on three notes of \$100 each and one of \$500 made February 1, 1924 by defendant Grace L. Kelley to the order of A. DeVoe and endorsed by defendant Ira F. Kelley, due June 1, July 1, August 1 and September 1, 1924.

The answer of Grace L. Kelley admits the execution of the notes, and defends because she was a married woman and signed as surety for her husband, without receiving any benefit to her separate estate.

The answer of Ira F. Kelley admits the endorsement of the notes, and defends because (1) the notes were given in the sale of a truck to him by DeVoe in which the bill of sale was not delivered, (2) that DeVoe falsely represented the truck was new and built in 1923, (3) that the truck had a mutilated manufacturers' number, and (4) that DeVoe did not have title to the truck.

The reply denies the defenses raised by the answers.

At the trial Mrs. Kelley waived her defense of the Married Woman's Act to the last four notes, the ones endorsed by her husband.

No proof was submitted that DeVoe did not have title to the truck, this defense having been evidently abandoned by defendants.

DeVoe testified he sold the truck to Mrs. Kelley under a conditional bill of sale. Defendants did not allege or testify that they ever asked for a bill of sale.

From the evidence it appears that on May 18, 1923 A. DeVoe sold a Schacht truck—he insists the purchaser was Mrs. Kelley, and Mr. and Mrs. Kelley say the purchaser was Mr. Kelley. Their son first saw the truck and told his parents about it. DeVoe went to defendants' house to arrange for the sale. Mr. and Mrs. Kelley conducted the negotiations, the down payment was by check made by Mrs. Kelley to DeVoe, the notes for the balance were signed only by Mrs. Kelley, and neither husband nor wife told DeVoe that Mr. Kelley was the real purchaser of the truck. Defendants testified that Mr. Kelley gave his money to his wife, for convenience, with which she opened a bank account and made payments for him. A policy of insurance was placed on the truck in the name of Mrs. Kelley, as owner, and she paid the

premium. The notes in suit are renewals of the original note given at the sale.

Defendants insist that DeVoe told them the truck was a demonstrator, like new, and of the year 1923. In September, 1923 they discovered the fraud and rescinded. However, Mr. Kelley testified that thereafter he used the truck. Mrs. Kelley testified she signed the last four notes, which bear date February 1, 1924, in September 1923 and that she hesitated signing them because the truck was not as represented, but finally signed when her husband requested her to do so.

Plaintiff moved for a directed verdict on the grounds that there was no proof that Mrs. Kelley was acting as surety for her husband or of any debt for which she was surety, that none of the other defenses were available to her, that she was the purchaser of the truck, that none of the elements of fraud—false representation, materiality, inducement, scienter and damage—were proved, that rescission cannot be set up as a defense, that defendants did not and could not rescind, that the defense of failure to deliver bill of sale was unavailable and that the defense of mutilation was unavailable and unproved. This motion was denied.

The Court, at the close of the case, found the issues raised by the pleadings and proofs to be: if the sale was to Mr. Kelley, was he defrauded and was bill of sale delivered; if the sale was to Mrs. Kelley, neither defendant had any defense.

The jury found their verdict for defendants.

The grounds of appeal are (1) the answer disclosed no defense as to defendant Grace L. Kelley; (2) rescission cannot be set up by way of defense; (3) questions as to repairs made on the truck, and the performance of the truck, and as to its having been in a fire, should not have been allowed; (4)

question as to the circumstances surrounding the signing of the notes should not have been allowed; (5) question as to the condition of the serial number should not have been allowed; (6) bill of sale on the Columbia truck should not have been admitted; (7) there was no proof that Grace L. Kelley was acting as surety, or of any debt for which she was surety; (8) Grace L. Kelley was the purchaser of the truck; (9) there was no proof of fraud; (10) defendants did not and could not rescind; (11) defense of failure to deliver bill of sale was not available and not proved; (12) defense of mutilation of manufacturer's number was not available and not proved.

#### POINT I.

##### **The answer disclosed no defense as to defendant Grace L. Kelley.**

All the seven notes were made by Grace L. Kelley. As to the first three, Ira F. Kelley is neither co-maker nor endorser, nor does his name appear thereon. As to the last four, the defense of the Married Woman's Act was abandoned (Case, p. 37, l. 24 to p. 38, l. 10).

In her answers, Mrs. Kelley alleged she was a married woman when the notes were signed and received no benefit from the notes (p. 14, l. 13; p. 24, l. 34). At the trial (p. 36, l. 22 to p. 38, l. 21) plaintiff moved to strike out her defense, and she moved to amend by stating that she signed as accommodation maker; the Court held that as accommodation maker she may be recovered against, and then the answers were amended to allege she was surety for her husband; thereupon the motion to strike out was denied.

There is no allegation that Mr. Kelley was liable for the debt of which Mrs. Kelley was surety. On the face of the first three notes there was nothing to indicate the maker was surety; hence she was obliged to allege (which she does not) and prove that the payee knew she was acting as surety.

“The bond is in the usual form. There is nothing upon its face to indicate the existence of suretyship. It is incumbent therefore upon the surety, in order to entitle himself to exemption from his liability as obligor, to show that the fact of the suretyship was communicated to the creditor; for, as the privilege of surety is a mere equity, it can only be binding on those who have notice of its existence.”

Kaighn v. Fuller (Chanc. Ct. 1862) 14  
N. J. Eq. 419.

As to the other defenses in the answer—that bill of sale was not delivered, fraud, mutilation of car number and lack of title of the seller to the truck—she could not take advantage of any of these, for the answer alleges that Ira F. Kelley purchased the truck, and there is no statement that she derived any title or interest in the truck through him.

It is interesting to notice the legal situation arising on the first three notes, if her defense is permitted to stand. The Court charged the jury that Mr. Kelley could not be held in any event upon these three notes, because he is neither maker nor endorser (p. 110, ll. 10 to 15). So that even though the debt may be justly due to the payee, Mrs. Kelley can escape under the Married Woman's Act and Mr. Kelley is relieved by the absence of his signature thereon.

## POINT 2.

### **Rescission cannot be set up by way of defense.**

Defendants' answer sets forth by way of defense that because of the fraud, because of the absence of title in the truck in the vendor, because of the failure to deliver bill of sale, because of the mutilation of the number of the truck, defendants rescinded the sale. They bring no counterclaim, set-off or recoupment.

At the trial plaintiff moved for direction of verdict on the ground that rescission is not a defense, which motion was denied (p. 36, l. 19 to p. 38, l. 20; p. 99, l. 20 to p. 105, l. 30).

In a contract of sale as well as any other contract, as long as neither party has executed the contract, the defrauded party may defend an action brought by the other and fraud will be a complete defense; the contract is thus made unenforceable and neither party is enriched at the expense of the other. But if, after a vendor has delivered the subject-matter to the vendee, the latter may interpose a complete defense on the ground of fraud, the vendor has parted with his property and received nothing in return; and the law would thus permit the defrauded vendee to perpetrate a fraud on the vendor. Justice requires the vendor to abate the purchase price to the extent of the difference in value between the article as agreed to be sold and as actually delivered; or the vendee may rescind the sale, return what he has received, receive return of what he has paid and be relieved of payment of the unpaid purchase price. In either event, whether the vendee affirm or disaffirm the sale, he can procure relief only by original action

or by cross-action (recoupment or counterclaim), for damages cannot be assessed to a defendant on a mere defensive pleading. A defendant cannot, by answer alone, maintain that plaintiff should not recover the purchase price because the article sold was falsely represented or the sale was otherwise voidable; if he affirms the sale he can recover only the difference in value, and if he disaffirms the sale he can recover the purchase price on placing the plaintiff in statu quo—these remedies necessitate affirmative action. Suppose the vendee, in action by the vendor to recover a balance of \$1000 on a sale, proved the difference in value to be \$50, should he be absolved from payment of all of the \$1000? How can the judge or jury find the amount of damages for the deceit, if defendant files no recoupment or counterclaim? And similarly, where the vendee claims the right to rescind, he must plead it in an original complaint or in a counterclaim.

“The defendant stands on the conveyance, and claims damages, not on any covenant against incumbrances therein contained, but because of alleged misrepresentation preceding and inducing the purchase. Such a claim may not be asserted, by way of answer, but may be asserted by cross-bill, or, under our present practice, by counterclaim.”

Mortgage & Investment Co. v. Romel Realty Co., (E. & A. Ct. 1930) 106 N. J. Eq. 185.

By statute, the buyer is given definite remedies on breach of warranty by the seller.

“(1) Where there is a breach of warranty by the seller, the buyer may, at his election—(a) accept or keep the goods and set up against the seller the breach of warranty

by way of recoupment in diminution or extinction of the price; (b) accept or keep the goods and maintain an action against the seller for damages for breach of the warranty; (c) refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty; (d) rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

“(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.”

Sales Act, sec. 69 (4 C. S. 4663).

The same remedies apply where the seller has deceived the buyer or where the sale is otherwise voidable. It will be noticed that nowhere in the Sales Act (or in any other statute that we have found) may the buyer recover, after delivery, in deceit or by rescission, by way of defense. The Act allows him to set up “by way of recoupment” or “maintain an action”, but does not provide other mode of procedure.

In the instant case defendants, by their notice of rescission, demanded return of the consideration paid (p. 125, l. 13) which the proofs showed to be \$1400, as the notes sued upon totaled \$1100 and the sale price was \$2500.

### POINT 3.

**Questions, as to repairs made on the truck, and the performance of the truck, and as to its having been in a fire, should not have been allowed.**

The fraud alleged was that the Schacht truck sold was represented to be a demonstrator and of the year 1923 (p. 15, 5th defense; p. 27, 6th defense).

Edward Kelley, son of the defendants, testified to this representation having been made by DeVoe (p. 42, ll. 3 to 11). He was asked "How did the truck work?" (p. 43, l. 30). His answer being that the magneto was bad, he was asked "Where did you take the truck to have it repaired?" (p. 44, l. 7). He went on to state where and by whom it was repaired, and then was asked "How did it work after that, after the new magneto was put in?" (p. 44, l. 20). The tires, he said, were replaced, and then he was asked "How did the truck work after that?" (p. 45, l. 30; p. 46, l. 21). Wilbur S. Crane was asked "Can you tell us what work you did? Give us the dates" (p. 52, l. 17), referring to work done on the truck. Ira F. Kelley was asked "When did you first find out that it (the truck) had been through a fire?" (p. 62, l. 20).

Each of these witnesses were called by defendants, and the foregoing questions were asked on direct-examination and each question was objected to by plaintiff.

These questions were all beyond the issue, and served only to try to show that the truck did not perform well. But there was no allegation in the answers that the seller had warranted the condi-

tion or suitability of the truck or guaranteed freedom from repairs. The questions objected to were irrelevant, for the proofs could go no further than the truth or falsity of the alleged misrepresentation. Defendants did not, anywhere in the case, attempt to prove that if the truck had been as represented, that is if it had been a demonstrator truck of the year 1923, it would have performed differently or that it would not have required these repairs. Nor did defendants offer any evidence that a truck which had been through a fire was no longer a demonstrator.

“Relevancy of testimony—is: That any two facts to which it is applied are so related to each other, that, according to the common course of events, one, either taken by itself or in connection with other facts, proves, or renders possible, the past, present or future existence or non-existence of the other.”

Fishman v. Consumer's Brewing Co. (Sup. Ct. 1909) 78 N. J. Law 300.

A truck used for demonstrating remains such as long as it is used for demonstratnig purposes. A truck may be through a fire or a collision and still remain a demonstrator. Not until it is sold and used by a person other than the dealer does it lose its character as a demonstrator.

**POINT 4.**

**Question, as to the circumstances surrounding the signing of the notes, should not have been allowed.**

Over objection, Grace L. Kelley was asked, on direct-examination "Can you tell us the circumstances surrounding the signing of those notes, if you recall?" (p. 71, l. 35).

The notes were clear and unambiguous. They could not be varied by parol testimony. It mattered not what were the circumstances surrounding the signing of the notes.

"The question was: 'Will you explain to the court what the circumstances were under which this note was given?' The court refused this, because he said the defendant was bound by the contract as to the purpose for which the note was given. This was correct."

Bockian v. United Candy Co. (E. & A. Ct. 1917) 91 N. J. Law 314.

**POINT 5.**

**Question, as to the condition of the serial number, should not have been allowed.**

Defendants called Carroll B. Kelley to substantiate the defense of mutilation of car number. The truck was sold on May 18, 1923. The witness testified he examined the truck six to eight months prior to the trial (on February 13, 1929) and did not know what number was on the car at the time

the truck was sold (p. 95, ll. 10 to 15). There was no evidence anywheres in the case that the car number had not been tampered with between the date of the sale and the date of the witness' inspection of the truck. This witness was, over plaintiff's objection, asked "What did you find the condition of the serial number to be?" (p. 95, l. 20).

A period of more than five years elapsed while the truck was in defendants' possession before the witness looked at the car number. What he then saw was not connected up with proof (which defendants could easily have made if such had been the case), that the serial number of the truck had not been changed to their knowledge in the interim. Defendants saw fit not to offer such testimony, and it must therefore be presumed that their failure to testify to absence of change is equivalent to an admission that the portion of the truck containing the number was not the same when the witness saw it as when the truck was delivered by DeVoe.

While there is a presumption that a condition once shown to exist, continued so to exist, this presumption runs only forwards and not backwards.

"As a general rule proof of the existence of a present condition or state of facts does not raise any presumption that the same condition or facts existed at a prior date."

22 C. J. 92, sec. 30.

So, in *Dixon vs. Dixon*, 24 N. J. Eq. 133, it was held that proof of subsequent living in adultery affords no inference of such prior living in adultery.

**POINT 6.****Bill of sale on the Columbia truck should not have been admitted.**

Over objection, defendant introduced in evidence a bill of sale of a Columbia truck made by Lincoln Material Company to Ira Kelley (pp. 123 to 124), this truck, according to Mr. Kelley's testimony, having been exchanged for the Schacht truck. (p. 66, l. 24 to p. 67, l. 20).

This was a self-serving declaration. DeVoe was not bound by it. Ira F. Kelley testified that he still has this bill of sale and that it had not been transferred out of him (p. 67, l. 25 to p. 68, l. 22). There is no proof that DeVoe saw this bill of sale or knew its existence or contents. The question of title to the Columbia truck was not raised in the pleadings or proofs; it was foreign to the issue. The circumstances that Ira F. Kelley had previously purchased a Columbia truck in his own name has no bearing on the issue whether he or his wife later bought the Schacht truck. No more could plaintiff show that Mrs. Kelley bought the Schacht truck from proof that at a prior date she had purchased another truck.

Had this bill of sale been executed by DeVoe, it might perhaps be considered proper as showing a course of business conduct. But here the party who executed this paper was not connected up with DeVoe.

## POINT 7.

**There was no proof that Grace L. Kelley was acting as surety, or of any debt for which she was surety.**

The burden of proving the defense of the Married Woman's Act was on Mrs. Kelley.

"The burden is on the married woman who is sued on her contract to set out and prove that she is within the exception to the proviso."

Reeves v. Morgan (Chanc. Ct. 1891) 48  
N. J. Eq. 415.

The presumption is that she is bound as if she had been a femme sole.

"That any married woman shall, after the passing of this act, have the right to bind herself by contract with any person in the same manner and to the same extent as though she were unmarried, which contracts shall be legal and obligatory, and may be enforced at law or in equity, by or against such married woman, in her own name, apart from her husband."

Married Woman's Act, sec. 5, (3 C. S. 3226).

From her acts (more fully covered under Point 8), in entering into the negotiations of sale, in giving her own checks on account of the purchase price, in signing the notes, in paying the premium for insurance on the truck written in her name as owner, in having sent notice of rescission, she was the buyer and the one liable for the debt.

While she does state that the moneys with which she opened the bank account and paid DeVoe was her husband's, she does not say that this was not a gift to her by her husband. There is a presumption that a payment by husband to wife is a gift.

"A gift from husband to wife will be presumed where he \* \* \* makes a bank deposit in her name."

30 C. J. 702, sec. 298.

Nor does she say that her husband bought the truck, or that she guaranteed to DeVoe the payment by her husband of the purchase price.

Both Mr. and Mrs. Kelley say that they did not tell DeVoe that the truck was being purchased by Mr. Kelley (p. 63, l. 40; p. 76, l. 38). She can therefore not set up the statute, for notice of the fact that she was acting as surety must be brought home to the creditor (*Kaighn vs. Fuller*, 14 N. J. Eq. 419, *supra*). The Court correctly so charged the jury:

"If you decide that Mr. Kelley was the purchaser and that Mrs. Kelley was simply an accomodation maker of these notes for him *and that Mr. DeVoe knew that she was simply an accomodation maker* then your verdict should be in her favor." (p. 114, ll. 15 to 20).

DeVoe testified that the sale was to Mrs. Kelley.

While it may be (although there is nothing in the testimony to that effect) that Mr. and Mrs. Kelley had a private understanding amongst themselves to the effect that he was to own the truck, this does not bind DeVoe because such understanding was not communicated to him.

**POINT 8.****Grace L. Kelley was the purchaser of the truck.**

Edward Kelley, her son, testified that he reported to his mother about the Schacht truck DeVoe offered for sale (p. 42, l. 18; p. 49, l. 10).

Ira F. Kelley testified:

“Q. Mr. DeVoe came to your house? A. Yes.

Q. Did he see you? A. Yes, my wife and I.

Q. What happened then? A. Well, we made an agreement for the truck.

Q. What did Mr. DeVoe tell you, if anything? A. We wanted a new truck because we had enough of old trucks.

Q. Tell us what Mr. DeVoe told you and what you told him? A. We told him we would like a new truck—

Q. What else was said, if anything? A. Well, we agreed to take it.” (p. 58, ll. 3 to 25).

“Q. With whom were the arrangements made for the purchase of the truck, with you or with your wife or with both of you? A. We talked it over together, my wife and I.

Q. Did you tell Mr. DeVoe that you had no account but your wife had an account? A. No, sir.

Q. Did you tell Mr. DeVoe that you were buying it and not your wife? A. I didn't tell him that.

Q. But your wife signed the notes? A. Yes, sir.

Q. And you did not sign them or endorse them? A. Not the first ones.” (p. 63, l. 33 to p. 64, l. 8).

He further testified that his wife gave the checks for the balance of the transaction, that he did not sign the checks or endorse the notes and that his name did not appear on the checks or the notes (p. 64, ll. 18 to 26); that he knew the truck was insured in his wife's name as owner (p. 66, ll. 14 to 22).

Mrs. Kelley testified that she was present at the negotiations for purchase of the truck, she signed the check given Mr. DeVoe on account of the purchase price and she did not tell Mr. DeVoe she had nothing to do with the truck (p. 76, l. 32 to p. 77, l. 5), that she paid by her check the insurance premium on the truck on presentation to her of a bill (p. 77, l. 26 to p. 78, l. 14). This policy was offered in evidence by defendants (p. 93, l. 18), is abstracted on pp. 125 to 127 of the State of the Case and shows the name of the insured to be Grace L. Kelley (p. 126, l. 33) and the business of the insured as "ice business" (p. 127, l. 11); and that the truck was "purchased by the assured May 1923" (p. 127, l. 20).

The notice of rescission which defendants had their attorneys send to DeVoe (pp. 124 to 125) recites that "you (DeVoe) gave to them (Mr. and Mrs. Kelley) no good title"; that Mr. and Mrs. Kelley have rescinded the sale and demand return of the consideration paid.

The last four notes (P-4, P-5, P-6, P-7—pp. 118 to 120) signed by her recite "I hereby charge my separate estate with the payment hereof."

Mrs. Kelley was the purchaser of the truck. She acted, so far as the world (other than perhaps her immediate family) knew, for herself and not for Mr. Kelley, and on the credit of her separate estate. She is therefore liable.

"If a married woman, having separate

property, enters into an engagement, which if she was a feme sole would constitute a personal obligation against her, and in entering into such engagement she purports to contract, not for her husband but for herself and on the credit of her separate estate, and it was so intended by her and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable."

Dreier vs. Pomeroy (Chanc. Ct. 1929)—  
not yet officially reported—7 A. R. 888,  
146 Atl. 178.

Moreover, she is estopped by her conduct from denying that she was the purchaser. She led DeVoe to believe that she was the purchaser; neither she nor her husband told him otherwise. She acknowledged ownership by paying the premium on the policy which recites her as the owner.

"The principle is familiar law that the court will refuse its aid to one who remains silent when duty, candor and fair dealing require him to speak out, and such estoppel, in pais may be set up in actions at law as well as in equity."

Sun Dredging & Const. Co. v. Ottens (E.  
& A. Ct. 1913) 84 N. J. Law 740.

The last-cited case resulted in an affirmance of a directed verdict for plaintiff.

**POINT 9.****There was no proof of fraud.**

The elements of actionable deceit are a false representation, knowingly made, and believed to be true and relied upon by and causing damage to the one to whom made.

“To maintain an action on the case for deceit, the plaintiff must allege with reasonable certainty, and be prepared to prove (1) that the defendant made some representation to the plaintiff, meaning that he should act upon it; (2) that such representation was false, and that the defendant when he made it, knew it to be false, and (3) that the plaintiff believing such representation to be true, acted upon it and was thereby injured.”

Kosobucki v. McGarry (E. & A. Ct. 1927)  
104 N. J. Law 65.

In the instant case the presence of these elements were not disclosed by the proofs.

There was no false representation. Defendants knew they were not buying a new truck (p. 51, l. 22) and there is nothing to show the truck was not a demonstrator.

There was no guilty knowledge. Defendants did not show that DeVoe knew or should have known that the truck was not as he represented it to be.

There was no proof of reliance by defendants on the representations made by DeVoe. Defendants testified that they examined the truck before purchase, but do not prove that the misrepresentation was of such character as not to be apparent on simple inspection.

There is no proof that defendants believed the

representations to be true. Defendants do not say that they would not have purchased the truck had they known its real condition.

There was no proof of damage. Proof of damage must go further than a mere general statement that the article sold was worth less than it had been as represented. The amount of the difference must appear by competent testimony. The wronged is entitled to recover this difference, but, if he does not definitely prove what this is, he can obtain only nominal damages. There is not an iota of evidence as to the difference in value between the truck received by defendants and a truck of the kind it was represented by DeVoe to be. This difference may have been six cents, so far as the proofs show. The only amount we can find in the testimony which may have any bearing on damages is \$40. (p. 65, l. 36) for repairing a clutch, yet this does not appear to have been caused by the truck not having been as represented. Whether an action for deceit or in rescission, damage must be shown. It could hardly be that a vendee may rescind a sale of a \$2500 truck because the difference in value between the truck as represented and as delivered is evidenced by a \$40 repair bill.

Whether or not there had been false representations made at the time of the sale, there was no fraud at the time the notes in question were made. The fraud had been completely waived. Mr. Kelley testified that about October 1923 he learned the truck was not as represented (p. 64, l. 27 to p. 65, l. 8). He endorsed the last four notes, dated February 1, 1924, presumably on or after their date. While Mrs. Kelley says she signed these notes in September 1923, neither she nor he state when the endorsement was made. Hence Mr. Kelley became liable on the notes in question after he knew of the alleged fraud in the sale.

Mrs. Kelley testified that she did not want to sign the last six notes "because the truck had gone to pieces" (p. 72, ll. 3 to 11); that she objected to signing the notes because the truck was not as represented, but in spite of this she signed (p. 75, l. 25 to p. 76, l. 18). The remaining notes in this suit were dated October 1, 1923, and there being no evidence that they were signed on any earlier or later date, they are presumed to have been signed on October 1, 1923. Hence Mrs. Kelley became liable on the notes in question after she knew of the alleged fraud in the sale.

The defense of fraud is untenable where, as here, it is proffered by the defrauded party who knew of the fraud prior to executing the notes attesting his liability. The elements of actionable fraud disappeared completely when the notes were signed. There was no false representation, for the Kelleys had the truck and knew its true condition and testify to no representations made by DeVoe at the time of the execution of the notes; the representation was not knowingly made for DeVoe is not said to have made any representation known by him to be false; the representation was not relied upon, for, with full knowledge that the truck was not as originally represented, she signed and he endorsed the notes; there was no damage, for there were no representations made when the notes were signed.

Defendants, by executing the renewal notes here sued upon, after knowing of the fraud alleged to have been perpetrated in the sale of the truck, are estopped from setting up that fraud and waived any right of action or defense they may have had by reason of that fraud.

"The law is well settled that if the party who has been defrauded in any way acquir-

ed knowledge of the fraud while the contract remains executory, and thereafter executes the contract, he thereby condones the fraud and waives his right of action."

Lembeck vs. Gerken (Sup. Ct. 1914) 89  
N. J. Law 698.

### POINT 10.

#### Defendants did not and could not rescind.

Ira F. Kelley testified:

"Q. When was that? A. This was in October, I think. I couldn't say just the date.

Q. What was the conversation there? A. I told him that everything is going to pieces and it didn't look like a new truck. I wanted him to do something about it.

Q. Tell the whole conversation as near as you can recall it. A. I couldn't tell all I said to him at that time; only the substance of it.

Q. Did you use the truck after that? A. Very little, I think.

Q. I didn't get that. A. Very little, I think." (p. 61, l. 32 to p. 62, l. 5).

"Q. So it was in the year 1923 that you discovered this? A. Yes, sir.

Q. And you saw Mr. DeVoe and told him about it. Did you tell Mr. DeVoe that the truck was not as represented? A. Certainly. I told him several times.

Q. And you told him to take the truck back? A. Yes.

Q. And you wanted your money back? A. I didn't tell him that much. I was willing to do anything with it if he would have taken the truck back. It cost me \$1400 to serve my ice route for less than five months.

Q. After you told Mr. DeVoe to take the

truck back you used it again, did you not?

A. Very little.

Q. But you used it? A. We might have once or twice." (p. 65, ll. 3 to 21).

By continuing to use the truck after knowledge of the fraud and a demand for rescission, the right to rescind is lost, for use of the truck is incompatible with a return or offer to return it to the seller.

"There can be no rescission so long as he (the buyer) retains anything received under the contract which he might have returned, and the withholding of which might be injurious to the other party."

Byard v. Holmes (Sup. Ct. 1868) 33 N. J. Law 119, at p. 127.

"The failure of the vendees to return or offer to return the machines, together with their continued use for purposes of profit or convenience for almost a year, should be construed, under the admitted facts of this case to be an election on the part of the vendees to accept and retain the machines, and rely upon their warranty."

Woodward v. Emmons (E. & A. Ct. 1898) 61 N. J. Law 281.

It does not appear why Mr. Kelley did not return the truck to DeVoe. No doubt he would be justified in not returning the truck if DeVoe said he would not accept the return, but merely telling DeVoe to take the truck back is neither a return nor an offer to return the truck. This evidence, apparently the entire evidence as to rescission, does not make out a case for rescission, for there was no notice of a rescission or that Mr. Kelley considered himself no longer bound by the sale.

“Where a contract is sought to be rescinded by one of the parties thereto, it is the settled law that he must within a reasonable time after discovery of the fact which entitles him to a rescission notify the other party of his intention to do so. He must also, so far as he can restore or offer to restore everything of value that he has received under the contract, to the end that the other party may be put in statu quo as nearly as may be possible.”

Gerli v. Mistletoe Silk Mills (Sup. Ct. 1912) 83 N. J. Law 7.

Mrs. Kelley testified that the last four notes, although dated February 1, 1924, were signed in September 1923, that she objected to signing them because the truck had gone to pieces (p. 71, l. 3 to p. 72, l. 11; page 75, l. 25 to p. 76, l. 12) :

“Q. And you objected to signing these notes because the truck wasn't as represented, did you not? A. That was one very strong reason.

Q. And then in spite of the objection you still signed them? A. Because my husband wanted me to.” (p. 76, ll. 13 to 18).

Since the Kelleys knew of the misrepresentation when the notes were signed, they lost the right to rescind; they affirmed the contract and reiterated their intention to be bound to payment of the purchase price.

“Where a vendee ascertains that he has been induced to make a contract of purchase by the fraudulent misrepresentations of his vendor, he has a choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, and recover

the damages he has sustained by the fraud. He cannot, however, do both."

Kvedar v. Shapiro (E. & A. Ct. 1922) 98  
N. J. Law 225.

"It is well settled that a defrauded party to a contract has but one election to rescind, and that he must exercise that election with reasonable promptitude after discovery of the fraud, and that when he once elects he must abide by his decision. Delay in the rescission of the contract is evidence of a waiver of the fraud, and an election to treat the contract as valid."

Kvedar v. Shapiro, *supra*.

The notice of rescission is dated February 8, 1928 (pp. 124 to 125). Surely this is not a reasonable time, after discovery of the fraud in September 1923, within which to rescind.

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

Timlan v. Dilworth (E. & A. Ct. 1908)  
76 N. J. Law 568.

**POINT 11.****Defense of failure to deliver bill of sale was not available and not proved.**

In the instant case failure to deliver a bill of sale was no defense. The truck was sold for \$2500, of which part was paid on the delivery and the balance was to be paid later. The sale was not absolute, but conditional.

Alonzo DeVoe testified that the bill of sale he made to Mrs. Kelley was a conditional bill of sale, "subject to the lien of \$1500 of notes" (p. 89, ll. 12 to 33). It is common knowledge that an automobile dealer does not furnish the buyer with an absolute bill of sale until the purchase price is entirely paid.

In *General Motors Acceptance Corp. v. Smith* (101 N. J. Law 154), this Court went deeply in the matter and concluded that the statutory requirement for delivery of a bill of sale by the vendor to the purchaser of a motor vehicle does not apply where the sale is conditional.

The only evidence as to absence of bill of sale is by Mr. Kelley who says "We had no bill of sale" (p. 64, ll. 10 to 14), and by Mrs. Kelley who says "There was no bill of sale" (p. 78, ll. 17 to 40). They do not say they ever asked DeVoe for a bill of sale and did not receive it. One who desires to take advantage of the statute must prove more than that he had no bill of sale, for he may not have wanted it or the seller may have forgotten for the moment to deliver it. It would seem more reasonable to require the buyer to demand the bill of sale, and, on refusal by the seller to furnish it, the

buyer's right under the statute would be complete.

Defendants do not state when they discovered they had no bill of sale; if they were interested in having it, they would have known of its absence shortly after the sale in May 1923. Yet they make no demand of DeVoe, nor notify him of rescission on that account until (if the answer filed herein be construed as such notice) March 16, 1926—an unreasonably long time thereafter. Such claim is unjust, for it affords the seller no opportunity to furnish a bill of sale which he may have inadvertently forgotten to deliver at the time of sale. The evil which the statute seeks to rectify is the sale of stolen automobiles to the innocent public; our Legislature did not intend that the Act be used to assist a purchaser, after using the car, in being relieved of his bargain without demand and refusal to deliver the bill of sale.

**POINT 12.****Defense of mutilation of manufacturer's number was not available and not proved.**

This defense was, in effect, struck out by the trial judge for during plaintiff's argument on the motion to direct a verdict on the ground (among others) of failure to prove this defense, he confined the issues to be decided by the jury to the defenses of the Married Woman's Act, deceit in the sale and failure to furnish bill of sale (p. 105, ll. 3 to 16) and the charge to the jury makes no mention of this defense, (p. 114, ll. 8 to 28).

The only evidence as to mutilation was furnished by Carroll B. Kelley who testified he examined the truck six to eight months prior to the trial (p. 95, l. 12)—about five years after the sale. He could not tell who mutilated the number (p. 96, l. 4). There was no testimony that the number was not mutilated during the time the Kelleys had the truck. Nor is there any evidence in the case as to when defendants first discovered the mutilation, and hence no proof of notice to DeVoe of rescission within a reasonable time thereafter.

**The judgment should be reversed.**

Respectfully submitted,

CORN & SILVERMAN,  
Attorneys and Counsel of  
Plaintiff-Appellant.

17 OCT. T. 1930

18 OCT. T. 1930

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation,

*Plaintiff-Appellant,*

*vs.*

GRACE L. KELLEY and IRA F. KELLEY,

*Defendants-Respondents.*

*Action  
at Law.*

*On Appeal  
From New  
Jersey  
Supreme  
Court, Essex  
Circuit.*

### BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS.

#### Facts.

These suits were brought on two series of promissory notes. The first series was given in renewal of the unpaid balance of a prior series which had been given to one A. DeVoe in part payment of a Schacht motor truck. The second series was intended to renew the last note of the first series (bottom of p. 81, and top p. 82).

Plaintiff contends that the sale of the truck was to Grace L. Kelley; defendants say that it was to her husband, Ira F. Kelley. The notes sued on were signed by Mrs. Kelley, but this is explained by the fact that Mr. Kelley was working in New York at the time and his bank account was in Mrs. Kelley's name as a matter of convenience (pp. 59, 60, 73, 74 and 75). The defendants' contention is corroborated by the fact that a Columbia truck which had previously been purchased from DeVoe (p. 56, l. 30 and p. 83, l. 20) was turned back in part payment of the Schacht truck (p. 56) and the bill of sale for this Columbia truck was in the name of Ira

Kelley (p. 66 and Exhibit D. 2, p. 123). The license for the Schacht truck was taken out for the purchaser by DeVoe and is in the name of I. F. Kelley & Son (pp. 42 and 43 and Exhibit D. 1, p. 121). The truck was insured in the name of Mrs. Grace L. Kelley and/or Little Falls National Bank. Mrs. Kelley did not take out this insurance (p. 76, l. 20, p. 77, ll. 18-40 and p. 78, ll. 1-12), DeVoe did not take it out (p. 88, ll. 3-20) and Mr. Kelley thought it was put in his wife's name for some reason but didn't know why (p. 66, l. 20). The notes were discounted by DeVoe at the Little Falls National Bank and the insurance was taken out to protect the bank (p. 89, ll. 34-40, and p. 90, ll. 1-11). The policy was held by the bank until the notes were paid when it was turned over to DeVoe and produced by him at the trial (p. 88, ll. 20-30). The policy was apparently taken out by the bank and since the notes were signed by Mrs. Kelley it was assumed that the insurance should be in her name. It would appear that there was ample evidence to justify a finding that the sale was to Ira F. Kelley.

The Columbia truck which had been previously purchased was a second-hand one. It proved to be so unsatisfactory that Edward Kelley, who drove the truck, was unwilling to go on with it (pp. 41, ll. 30-40 and p. 83, ll. 22-30). He conducted the negotiations with DeVoe to replace the Columbia truck with a new one telling DeVoe that they "were sick of second-hand trucks" (p. 41, l. 35) and insisting on getting a new one this time (p. 41). DeVoe told Kelley that he had a new 1923 model (this being in May, 1923) Schacht truck which had just been used for demonstrating which he would sell for less than the regular price. Kelley communicated this information to

his father, and relying on it, and on similar statements made directly by DeVoe, the father bought the truck (pp. 41, 42, 51 and 58). DeVoe denies that he represented this truck to be new, but admits that he told the Kelleys it was in good condition (p. 83, l. 9). The insurance policy taken out by the Little Falls National Bank to secure the notes discounted there represents this truck to be a 1923 model and a new one (Exhibit D. 4, p. 127). Whether this information came from Kelley or from DeVoe does not appear.

The Kelleys began to have trouble with the "new 1923 Schacht truck" almost immediately after its purchase. The truck was put in use by them the latter part of May, 1923 (p. 43). There was so much trouble in starting it, that a new magneto had to be put in (p. 44).

On June 8th, we find the truck in Crane's repair shop. In June or July the front tires wore out and the wheels had to be aligned (pp. 44 and 53); a month later the facing on the clutch wore out and had to be replaced; (pp. 45 and 53), a little later a bolt in the taut rod wore out (p. 46); and finally on October 2, 1923, the low gear wore out (pp. 47 and 53). After this series of mishaps culminating in the breaking down of the first gear, Mr. Kelley became convinced that the truck was not a "new 1923 model," as had been represented and that he had been defrauded. As a matter of fact DeVoe admits that it was built in 1921 (p. 82, l. 35) and the witness Crane says that on December 22, 1922, he saw this truck in a garage on Poinier street, Newark, partially dismantled and showing the effects of being on fire. "Part of the truck was burned up, the cab, the paint was burned off it and practically all the woodwork around the center of the truck was damaged" (p. 54). It was not until October,

1923, that Kelley learned that the truck had been through a fire (p. 62, ll. 20-34).

In October Mr. Kelley told DeVoe "that everything is going to pieces and it didn't look like a new truck" (p. 61, l. 35) and that he wanted him to do something about it. He told him that it was not as represented and told him to take the truck back. At p. 65—

"Q And you told him to take the truck back? A Yes.

Q And you wanted your money back? A I didn't tell him that much. I was willing to do anything with it if he would have taken the truck back. It cost me \$1400. to serve my ice route for less than five months."

In other words, promptly after learning of the fraud, Mr. Kelley rescinded the contract and offered to return the truck. At about the same time Mrs. Kelley, in effect also rescinded the contract—whether before or after Mr. Kelley, is not clear. (See her testimony pp. 68 and 69, and the testimony of her daughter-in-law, Jennie Kelley, pp. 79-80).

No bill of sale of any kind was given for the truck, and since the sale was not a conditional one, the provisions of the Motor Vehicle act, requiring a bill of sale to be given, were violated. This in itself made the notes sued on unenforceable.

The jury found in favor of the defendants and we submit that the evidence amply justified this verdict.

**POINT I.**

All defenses which would have been available against the original payee are available against the plaintiff.

The notes sued on were given to one A. DeVoe in part payment of a Schacht automobile truck. They were afterwards transferred to the plaintiff, Model Plan Finance Corporation. The answers as amended (pp. 16 and 28) allege that the plaintiff is not a holder in due course of the notes sued on. This is not denied and the case was tried on the theory that plaintiff was not a holder in due course. The notes are therefore subject to all the defenses that are available as between the original parties.

*Sec. 58 of Negotiable Instruments Law, 3 N. J. C. S. 3741;*

*Cumberland Bank v. Hann, 18 N. J. L., 222;*

*Little v. Cooper, 11 N. J. Eq., 224.*

**POINT II.**

As to the defense of the Married Women's Act.

In her answers the defendant, Grace L. Kelley, sought the benefit of the Fifth Section of the Married Women's Act, 3 N. J. C. S., 3226, by pleading as follows: (pp. 14 and 24)

"The defendant, Grace L. Kelley, is a married woman and was a married woman at the time of the execution and delivery of the notes referred to in the complaint, being the wife of the defendant, Ira F. Kelley. Neither the said defendant, Grace L. Kelley, nor her separate estate, received any benefit whatever from said notes, and all of said notes are void as against said defendant, Grace L. Kelley."

At the trial the Court was of the opinion that this pleading was not sufficient but that it was necessary to allege that Grace L. Kelley was surety for her husband (p. 37).

The answers were accordingly amended as to all notes except those endorsed by the husband (pp. 37 and 38). As to those notes, if the other defenses available to both were sustained, there would be no recovery against Mrs. Kelley and if they were not sustained, there would be no practical advantage in freeing the wife while holding the husband liable. The amendment suggested by the Court therefore was not made as to the notes endorsed by Mr. Kelley.

We contend that no amendment was necessary and that the pleadings as filed properly set up this defense as to all notes.

*Bishop v. Bourgeois*, 58 N. J. Eq. 417 in which the second section of the Syllabus reads—

“A wife’s promissory note is forceful only when some beneficial consideration proceeds to her or to her estate,” and see page 420 of that opinion. Also *Perkins v. Elliott*, 22 N. J. Eq., 127.

But in any event this defense was pleaded and proven as to the notes not endorsed by the husband.

*Bank v. Schepflin*, 73 N. J. L., 29;  
*Vliet v. Eastburn*, 64 N. J. L. 627, 645, 646;  
*Perkins v. Elliott*, (*supra*).

Whether or not the payee knew that Mrs. Kelley was a mere accommodation maker or surety is immaterial. A married woman’s accommodation note is void even in the hands of a bona fide purchaser. It is in the same class as a note given in payment of a gambling debt.

*Fisher v. Brehm*, 100 N. J. L. 341, 344;

In *First National Bank v. Shumard*, 91 N. J. L. 379, it was held that a married woman is not estopped from setting up coveture as a defense even by her representation, made at the time of such endorsement, that she was then a widow.

### POINT III.

#### The Defense of Fraud.

This defense is pleaded in the answers at pages 15 and 27.

The defendants claim that the notes sued on were given in part payment of a truck sold by one A. DeVoe to the defendant, Ira F. Kelley; that the sale was induced by DeVoe's fraudulent representations; and that upon learning of the fraud, Kelley rescinded the contract and offered to return the truck.

This defense is, of course, available to both defendants. If the sale was rescinded for fraud there can be no liability on the notes given as partial consideration for the sale.

*C. A. Lippincott & Bro. v. Matazzo*, 150 Atl. 216, 8 N. J. Misc. Rep. 330;

*Auto Brokerage Co. v. Ulrich*, 102 N. J. L. 341;

*Crosby v. Walls*, 73 N. J. L. 790.

Defendant contends that this defense cannot be availed of because it is set up by way of answer and no counter-claim has been filed. It is true that had DeVoe not transferred the notes and sued on them himself, defendants might properly have counter-claimed against him for the moneys paid on account. But as clearly shown in *C. A. Lippincott & Bro. v. Matazzo, supra*, "the right of the plaintiff to recover was one issue, and

the right of the defendant was another." Fraud and rescission is a defense as well as a basis for counter-claim.

It is alleged in the answers and supported by the proofs that DeVoe falsely represented that the truck was a new truck, having been used only for demonstration purposes and that it was a 1923 model and that Kelley bought the truck relying upon such representations.

Sec. 12 of the Sales Act, 4 N. J. C. S., 4650, provides:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. \* \* \*"

Sec. 69 of the Sales Act, 4 N. J. C. S., 4663, provides:

"(1) Where there is a breach of warranty by the seller, the buyer may at his election—\* \* \*

(d) "Rescind the contract to sell or sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

and at page 4664:

"(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods \* \* \*"

If the buyer is not liable, *a fortiori* the maker of the accommodation note given in part payment is not liable.

**POINT IV.**

**The failure to deliver a bill of sale was a complete defense available to both parties.**

The Motor Vehicle act as it stood at the time of the sale here in question provided as follows:

“4. In all sales or purchases of a motor vehicle directly from the manufacturer or through an agent or agency of such manufacturer there shall be issued to the purchaser a manufacturer’s bill of sale, which bill of sale shall contain the manufacturer’s number on the engine or motor of the motor vehicle so sold.” L. 1919, c. 168, p. 357; 1924 Supp. to C. S. p. 2013.

“5. In all other sales or purchases of motor vehicles the original bill of sale shall be assigned by the seller to the purchaser by an assignment witnessed by two persons and acknowledged by the seller before any person authorized, at the time of the taking such acknowledgment, by the laws of this State to take the proofs and acknowledgments of deeds or conveyances of lands, tenements and hereditaments. All such assignments shall at all times be kept and attached to the original manufacturer’s bill of sale; provided, however, that in the event the said motor vehicle was purchased from the manufacturer or his agent, prior to the going into effect of this act, then, instead of assigning the original bill of sale and attaching said assignment to said original bill, the seller shall execute a new bill of sale, witnessed by two persons, and acknowledged by the seller before any person authorized, at the time of taking such acknowledgment, by the laws of this state, to take the proofs and acknowledgments of deeds or conveyances of lands, tenements and hereditaments.” P. L. 1920, Chap. 247, p. 463.

A sale made in violation of these provisions is absolutely void and a check or note given in part

payment for a motor vehicle where no bill of sale is given or assignment, is unenforceable being a feature of the unlawful sale.

*Stein v. Scarpa*, 96 N. J. L. 86;

*Arotzky v. Kropnitzky*, 98 N. J. L. 344;

*Security Credit Corp. v. Whiting Motors Co.*, 98 N. J. L. 45;

*Merchants Securities Corp. v. Lane*, 147 Atl. 385, and 150 Atl. 559.

Counsel for plaintiff contends that this act does not apply because the sale was a conditional one. But there is no evidence that it was a conditional sale. The proof is to the contrary.

If a conditional bill of sale was given why was the vendor's signed copy not produced? Nowhere in the testimony is there any indication that the intention was to reserve title in the vendor. DeVoe himself testified he did not know whether he gave an absolute or a conditional bill of sale (p. 89, ll. 10-33).

Under Sec. 19 of the Sales Act, 4 N. J. C. S. 4651, unless a different intention appears:

“Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.”

At no time in the course of the conversations and negotiations does it appear that the sale was to be conditional. The section of the Sales Act above quoted expressly provides that the fact that the time of payment is postponed is immaterial.

See also *VanHouton v. Gizang*, 127 Atl. 681, 3 N. J. Misc. Rep. 233.

DeVoe claims that he gave a bill of sale and although he had been state agent for Schacht trucks for about seven years (p. 89, l. 30), he did not know whether the sale was absolute or conditional. Both Mr. and Mrs. Kelley testified that there was no bill of sale of any kind (p. 64, ll. 10-12, and p. 78, ll. 10-40). The verdict of the jury would indicate that Mr. and Mrs. Kelley's version and not DeVoe's was believed.

#### POINT V.

##### **Evidence as to the condition and performance of the truck was admissable.**

As tending to prove that the truck was not a new one and was not a 1923 model, defendants offered evidence which showed,

(a) that "the first magneto was no good absolutely" (pp. 43 and 44) and it had to be taken to a repair shop to have a new one put in.

(b) "After the new magneto was put on in June, the front tires went" (p. 44).

(c) "After that along about the middle of July \* \* \* the facing on the clutch went" (p. 45).

(d) "It went along very good until the—there is a taut rod riding from the rear wheels to the chassis, and the bolt in that wore out, just wore out, which could not happen to a truck which was new" (p. 46).

(e) "After August we went along until about the first part of October, the latter part of September, and the low gear went. \* \* \* That wore out. The notches came right off from it" (p. 47).

This testimony was corroborated by the witness Wilbur S. Crane, a repair man who by refreshing his recollection from his charge books, gave the dates when he made various repairs and replacements.

Crane also testified that he saw this truck in a garage in Poinier street, Newark, in December, 1922, and that it had been through a fire (p. 54), proving conclusively that the truck was a rebuilt and not a new truck and that it was not a 1923 model.

Plaintiff objects to this testimony as irrelevant but we submit that it is clear and convincing proof that the truck was not what it was represented to be.

The evidence objected to is almost identical with that relied on by the Court to sustain the verdict in *C. A. Lippincott & Bros. v. Matazzo*, 150 Atl. 216, 8 N. J. Misc. Rep. 330.

The time defendant learned that the truck had gone through a fire (p. 62) was relevant to show that he rescinded promptly after learning of the fraud.

#### POINT VI.

**Testimony to explain the circumstances surrounding the signing of the notes dated February 1, 1924 was property admitted.**

The question objected to by plaintiff (p. 71, l. 35) was obviously asked for the purpose of helping the witness to fix a date.

Plaintiff's counsel later asked the same question of his own witness (bottom p. 81).

The suits in this case are upon two series of four notes each. The first series bear date

October 1, 1923, three being for \$100 each and the fourth for \$800 or \$1,100 in all. The last by its terms fell due February 1, 1924. The second series bear date February 1, 1924 (*i. e.*, the date the last note of the first series fell due) three being for \$100 each and the fourth for \$500 or \$800 in all. The first series was given in renewal of a prior series. The aggregate of the two series sued on is \$1,900, but plaintiff has abandoned its suit as to certain notes of each series (p. 32, l. 8) and claims on notes aggregating only \$1,100 which is the total of the first series. The question naturally arises, if only \$1,100 is due, how does it happen that the plaintiff holds notes aggregating \$1,900? And since the first series aggregating \$1,100 was admittedly not paid, why was a second series executed aggregating only \$800? The Kelleys claim to have rescinded in October, 1923 (pp. 61, 65, 68, 69, 79 and 80), closed the account at the First National Bank of Ridgewood, where the notes were made payable (p. 75) and refused to pay the notes of the first series and yet plaintiff produces notes dated February 1, 1924, aggregating \$800. Surely some explanation as to how this series of notes came into existence is in order. And the explanation is a simple one. The series of February 1, 1924, was signed in September, 1923 (p. 71, l. 32, and p. 75) before the low gear "went" (p. 53, ll. 34 and 35), before Kelley learned that the truck had been in a fire (p. 62, ll. 20-34), before the sale was rescinded and payment of the series of October 1, 1923, refused. When the series of February 1, 1924, was signed it apparently was expected that the three \$100 notes of the earlier series would be paid by February 1, 1924, leaving a balance of \$800 and the second series aggregating \$800 would then be used to take up the \$800 note due on February

I, 1924 (p. 81, l. 39; p. 82, l. 29). But in October, 1923, the Kelleys came to a realization that they had been defrauded and refused to make further payments and this accounts for the existence of both series of notes in the hands of the plaintiff which had been signed *prior to that time*.

#### POINT VII.

**Evidence as to the condition of the serial number was properly admitted.**

Carroll B. Kelley testified that he examined the serial number and the motor number of the truck. He found the motor number to be 71809 (p. 95). This corresponds with the motor number as given on the license card (p. 121) and on the insurance policy. He found the serial number to be 1964 C. This does not correspond with the serial number as it appears on the license card (p. 121) and on the insurance policy (p. 127). On both of those documents the serial number is stated to be C-5257.

The witness was then asked "What did you find the condition of the serial number to be?" The question was "Objected to as improper" (p. 95, l. 21). No ground of objection was specified.

This objection may therefore be disregarded.

*Travisano v. Stefanelli*, 84 N. J. L. 767;

*Prout v. Prout*, 82 N. J. L. 537;

*Zeliff v. North Jersey St. Ry. Co.*, 69 N. J. L. 541;

*Turrell v. Elizabeth*, 43 N. J. L. 272.

Moreover this testimony was admissible to corroborate the claim that this was not a new truck and to prove that the truck had an "obliterated and erased manufacturer's number" as pleaded in the answers (p. 26, l. 8) in violation of the

Motor Vehicle Act, P. L. 1919, c. 168, p. 357, which provides as follows:

“3. No motor vehicle shall be sold or purchased unless it contains the manufacturer's number, nor shall there be a sale or purchase of a motor vehicle containing an obliterated, erased or mutilated manufacturer's number.”

### POINT VIII.

The Bill of Sale of the Columbia Truck was properly admitted in evidence.

An important issue was whether the sale of the Schacht truck was to Mr. Kelley or to his wife. Kelley had previously bought a Columbia truck through DeVoe (p. 56, l. 28, and p. 83, l. 22) which had proven unsatisfactory. This truck was taken back by DeVoe in part payment of the Schacht truck (p. 58, l. 27). It was therefore material to show that the Columbia truck belonged to Mr. and not Mrs. Kelley, as indicating the intention of the parties.

*Thoss v. Olb*, 98 N. J. L. 842.

Respectfully submitted,

WHITING & MOORE,  
Attorneys of Defendants-Respondents.

IRA C. MOORE, JR.,  
Of Counsel.

