# INDEX

| | Page |
|---|---|
| Notice and Grounds of Appeal | 1 |
| Judgment Record | 4-24 |
| Amended Complaint | 4 |
| Answer and Counter-claim | 7 |
| Answer to Defendant's Counter-claim | 14 |
| Replication | 20 |
| Postea | 22 |
| Certificate of Clerk | 23 |
| Substitution of Attorney | 24 |

TESTIMONY.

| | |
|---|---|
| Proceedings of January 3, 1927, before Judge William A. Smith | 25-35 |
| Verdict | 35 |

EXHIBITS.

| | | Off'd | P't'd |
|---|---|---|---|
| P. 1. | Acknowledgment of Order | 32 | 36 |
| P. 2. | Assignment from W. M. Crombie & Co. to Henry A. Krusen | 32 | 37 |
| P. 3. | Trade Acceptance for $1,-967.33 | 32 | 40 |
| P. 4. | Letter—Highland Park Lumber Company to W. M. Crombie & Co., dated Sept. 25, 1920 | 33 | 41 |
| P. 5. | Letter—W. M. Crombie & Co. to Highland Park Lumber Company, dated Sept. 27, 1920 | 33 | 41 |
| P. 6. | Letter—W. M. Crombie & Co. to Highland Park Lumber Company, dated Sept. 29, 1920 | 33 | 43 |


New Jersey State Library

| | | | |
|---|---|---|---|
| P. 7. | Letter—W. M. Crombie & Co. to Highland Park Lumber Company, dated October 8, 1920 | 34 | 44 |
| P. 8. | Letter—Highland Park Lumber Company to W. M. Crombie & Company, dated October 1, 1920 | 34 | 45 |
| P. 9. | Letter—Highland Park Lumber Company to W. M. Crombie & Company, dated October 12, 1920 | 34 | 45 |




## NOTICE AND GROUNDS OF APPEAL.

Filed January 14, 1927.

# New Jersey Supreme Court

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HENRY A. KRUSEN,
*Plaintiff,*
*and*
HIGHLAND PARK LUMBER COMPANY,
*Defendant.*

*Action at Law.*
*Notice of Appeal.*

TAKE NOTICE that the defendant, Highland Park Lumber Company, hereby appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in said cause on the following grounds: 20

1. That it was harmful error to deny and refuse defendant's offer of evidence to prove the following facts:

(A) That the lumber ordered by defendant from W. M. Crombie Co. Inc., plaintiff's assignor, in July, 1920, when it arrived in August, 1920, was found, and by the seller's duly authorized agent, the plaintiff, admitted to be, defective, and that by reason thereof the defendant refused to accept the same; 30

(B) That the defendant thereupon agreed with W. M. Crombie Co. Inc., through its duly authorized agent, the plaintiff, that the defendant would use such portion, if any, of said lumber as the defendant could use, and that the W. M. Crombie Co. Inc. would remove that 40

## JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

| | |
|---|---|
| HENRY A. KRUSEN, *Plaintiff,* *vs.* HIGHLAND PARK LUMBER COMPANY, *Defendant.* | *Judgment Record.* *Action at Law.* *On Postea.* |

Judgment of non-suit against defendant and in favor of plaintiff on counter-claim and verdict.

George D. Hendrickson, attorney.

Highland Park Lumber Company, the defendant in this cause, was summoned to answer unto Henry A. Krusen, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued August 9, 1925.)

Plaintiff, Henry A. Krusen, residing at 19 South Maple avenue, in the City of East Orange, in the County of Essex and the State of New Jersey, says that:

(1) On or about January 3, 1925, W. M. Crombie & Co. Inc. and the defendant entered into an agreement reduced to writing, copy of which is hereto annexed marked Schedule A, and made a part hereof whereby W. M. Crombie & Co. Inc. agreed to sell to defendant two (2) cars of White Fir #4 Boards D2S at a certain price and upon certain terms and conditions all shown on said Schedule A.

(2) That afterwards W. M. Crombie & Co. Inc. shipped and delivered to defendant car MC



#64124 containing 31443 feet, of said lumber of the value of $1171.25 and car St. P. $84408 containing 28239 feet, of said lumber of the value of $1051.90. That Highland Park Lumber Co. accepted said shipment in full performance of said contract.

(3) That no part of said sum has been paid except (1) defendant is entitled to a credit of $491.56 freight paid by it on shipment contained in car #64124 leaving a balance due and unpaid on said shipment of $679.69, and a credit of $432.39 freight paid by it on shipment contained in car #84408 leaving a balance due and unpaid on said shipment of $619.15; a total balance due and unpaid of $1299.20.

(4) On June 5th, 1925 W. M. Crombie & Co. Inc. duly assigned the amount due it from Highland Park Lumber Co., a corporation to wit, $1299.20 to this plaintiff of all of which the defendant had notice.

Plaintiff demands, as damages $1299.20 with interest thereon from January 23rd, 1925.

George D. Hendrickson,
Atty. of Pltff.

The following is a copy of the contract reduced to writing mentioned in the above complaint.

SCHEDULE A.

| | |
|---|---|
| W. M. CROMBIE & CO. INC.<br>Lumber Merchants<br>101 Park Ave., New York City | Crombie Order No. 10337<br>Contract No.<br>Your Order No. 7313 |
| New York Jan. 3, 1924. | Shipment Desired<br>To be made immediately |
| Messrs. Highland Park Lumber<br>Co. New Brunswick, N. J. | Consigned to you<br>at New Brunswick, N. J.<br>Via Pa. Ry. |

ACKNOWLEDGMENT OF ORDER—If not correct in every detail, advise us at once or we cannot be responsible for any errors or omissions.

WHITE FIR

Two (2) Cars 4/4x4 & W dr. #4 Boards D2S $37.25 Del

This acceptance is subject to sale of stock called for, previous to receipt of this order by the mill, and is contingent upon strikes, accidents, delays of carriers and other circumstances beyond our control.

TERMS: Freight Net. Balance 2%. 10 days from date of arrival or 60 day note.

Any claims for shortage or quality must be made within 5 days from arrival or they cannot be recognized.

Yours very truly,

W. M. CROMBIE & CO. INC.

(Filed November 30, 1925.)

Endorsed:

Defendant consents to the filing of within amended complaint.

Dated Nov. 24/25.

Edw. W. Hicks,
Atty. of Deft.



Defendant having its principal office and place of business in the Borough of Highland Park, County of Middlesex and State of New Jersey, says that:

1. It admits the first paragraph of amended complaint.

2. It admits the second paragraph of amended complaint.

3. It denies third paragraph in amended complaint except as admitted in following statement:

The credits for freight are correctly set forth in said third paragraph and said W. M. Crombie & Co. Inc. is entitled to credit as against defendant for the balance of $1299.20 in said paragraph mentioned, but neither said sum nor any part thereof is due from defendant to plaintiff because said W. M. Crombie & Co. Inc. at said time was indebted to defendant as more particularly set forth in the counter-claim annexed to this amended answer in a sum in excess of said $1299.20.

4. It denies fourth paragraph of amended complaint except so far as admitted in the following statement:

On June 12th, 1925 it received a letter from present attorney of plaintiff to the effect that he represented Mr. Harry A. Crusin and that letter was to advise defendant that Crusin was the assignee and owner of an account of W. M. Crombie & Co. against defendant amounting to $1299.20.

As to any assignment by Crombie & Co. to plaintiff of any alleged indebtedness of defendant, it has not any knowledge or information

thereof sufficient to form a belief and puts the plaintiff upon his proof.

It denies that at the time said assignment is alleged to have been made it was indebted to W. M. Crombie & Co. in the sum of $1,299.20, or in any other sum.

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

*FIRST COUNT OF COUNTER-CLAIM*

1. Before notice of any assignment by W. M. Crombie & Co. Inc., to plaintiff and on or about July 20th, 1920 said W. M. Crombie & Co. Inc. shipped to defendant a carload of white pine at an agreed price of $110.00 per thousand feet, delivered to defendant and warranted same to be 20 of good quality, of the sizes ordered and of a quality and kind known in the trade and in previous transactions between said W. M. Crombie & Co. Inc. and said defendant as Good Shorts.

2. Car shipped in accordance with paragraph one of this count arrived at the place of business of defendant on or about August 30, 1920 and without any acceptance thereof by defendant, said W. M. Crombie & Co. Inc., by its agent 30 made a partial examination of the shipment, stated that it was not of the quality contemplated or as warranted and agreed with defendant, that if latter would pay for same at the rate of $100.00 per thousand delivered as aforesaid, unload said car, store contents and accept so much thereof as complied with the terms of said sale and warranty, said W. M. Crombie & Co. Inc. would remove the balance and pay defendant at the rate of $100.00 per thousand feet 40 for said balance.



3. Relying on said promise and agreement, defendant paid said W. M. Crombie & Co. Inc., for contents of said car, 21,362 feet at the rate of $100.00 per thousand by paying freight charges of $168.87, giving its trade acceptance for $1967.-33 and paying amount of said acceptance on its due date, to wit, on December 20th, 1920 to the 10 bank to which said W. M. Crombie & Co. Inc., had transferred same. The amount of said shipment which complied with the terms of sale and which was used or sold by defendant was 8851 5/6/ feet amounting at $100.00 per thousand to $885.18 and leaving due to defendant from said W. M. Crombie & Co. Inc., $1251.02.

4. Defendant notified said W. M. Crombie & Co. Inc., prior to notice of said alleged assignment of the amount used and amount held for 20 it by defendant and said W. M. Crombie & Co., Inc., requested defendant to continue to store said balance for said Crombie Co. pending receipt of shipping instructions which it promised to furnish and promised to pay defendant said sum of $1251.02.

5. From time to time thereafter said W. M. Crombie & Co. Inc., informed defendant that said balance was to be shipped and promised 30 definite shipping instructions, but failed to furnish same and has not paid said sum of $1251.02 or any part thereof.

6. Said balance of merchandise is still being stored for said Crombie & Co. by defendant at its yard in said Borough of Highland Park and in addition to said $1251.02 there is due defendant the reasonable charges for such storage amounting to $233.82.

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*SECOND COUNT OF COUNTER-CLAIM*

1. Defendant repeats the statements in paragraph one of first count of counter-claim.

2. The goods were not as warranted, but differed therefrom and were inferior thereto in that, to comply with the terms of sale and warranty, said lumber should have been in pieces of not less than six feet in length, not less than six inches in width, and of bright clear stock of full dimensions with square cuts and well manufactured, whereas, said lumber was in pieces of less than six feet in length and as short as four feet in length and less than six inches in width and as narrow as four inches in width and were black and weather-beaten, showed black sap stains, were not well manufactured and were cut from the outside of logs with bark along the edges and defendant within a reasonable time after it knew or ought to have known of such breach gave notice of same to settle.

3. 12,510 1/6th feet of said shipment were worthless because of the difference and defects set forth in paragraph 3, and defendant sustained damage thereby in the amount of $1251.02 and there also became due to it the additional sum of $233.82 for storage as above set forth in paragraph six of first count of counter-claim, making a total due to it from said W. M. Crombie & Co. Inc., of $1484.84.

*THIRD COUNT OF COUNTER-CLAIM*

1. Defendant repeats statement in paragraph one of first count of counter-claim.

2. The goods were not as warranted, but were inferior thereto as set forth in paragraph 2 of second count of this counter-claim and because of same, defendant refused to accept ship-



ment, rescinded the contract for sale of same, offered to return goods to the seller in as substantially good condition as they were when transferred to defendant and notified seller within a reasonable time of defendant's election to rescind.

3. Seller accepted such rescission, directed defendant to store goods for seller, to use any of same that could be sold or used and defendant having paid for all of said goods, seller promised to return to defendant such sum as represented unused portion of shipment.

4. The amount so paid by defendant was $2136.20, the amount of goods used or sold was $885.18, the balance due from said W. M. Crombie & Co. Inc., to defendant was $1251.02 plus charges for storage as set forth in paragraph six of first count of counter-claim $233.82 making a total of $1484.84. Neither said amount nor any part thereof has been paid by said W. M. Crombie & Co. Inc., to defendant.

*FOURTH COUNT OF COUNTER-CLAIM*

1. Before notice of any assignment by W. M. Crombie & Co. Inc. to plaintiff, said W. M. Crombie & Co. Inc., was indebted to defendant in the sum of $338.00 for storage of certain other lumber, the contents of three railroad cars as follows:

Car #10630 O. S. L. from December 1, 1920, to December 31st, 1921.......13 months
Car #215311 N. Y. C. from November 1, 1920 to May 31st, 1922...........17 "
Car #9531 N. Y. & St. L. from November 1, 1920 to August 31, 1922..22

Total number of months.......52

2. Said W. M. Crombie & Co. Inc., requested defendant to store the contents of said three cars and agreed to pay defendant what said storage was reasonably worth.

3. Said storage was reasonably worth the sum of $6.50 per month for contents of each car, 10 amounting in all for said 52 months to $338.00.

4. Said W. M. Crombie & Co. Inc., has not paid said sum or any part thereof to the damage of defendant $338.00.

*FIFTH COUNT OF COUNTER-CLAIM*

1. Defendant repeats statements in paragraph one of first count of counter-claim.

2. Said W. M. Crombie & Co. Inc., agreed with defendant that portion of said carload was not as warranted and that defendant should 20 accept, use and pay for only so much thereof as complied with the terms of warranty and sale and that such payment should be made at the rate of $100.00 per thousand feet.

3. In paying for the accepted portion of said carload defendant on or about December 20th, 1920 by error overpaid said W. M. Crombie & Co. Inc., to the extent of $1251.02 and thereupon said excess payment became due and payable by 30 said W. M. Crombie & Co. Inc., to said defendant.

4. Said W. M. Crombie & Co. Inc., although demand has been made upon it by said defendant, has failed and refused to pay defendant said sum of $1251.02 or any part thereof to the damage of the defendant $1251.02.

*SIXTH COUNT OF COUNTER-CLAIM*

1. Plaintiff, at the time of transactions mentioned in paragraphs one to five inclusive of 40



first count of counter-claim was employed by said W. M. Crombie & Co. Inc., as a salesman and received from said company a salary as such and also commissions on orders secured by him and accepted by said Crombie Co.

2. Plaintiff personally inspected the shipment mentioned in paragraph one of first count of 10 counter-claim, stated to defendant that a mistake had been made in relation to kind and quality and promised defendant that if defendant would pay said Crombie Co. at the rate of $100.00 per thousand feet for same, would store the entire carload and use and sell any of it that was found to comply with the terms of sale and would continue to give plaintiff orders for shipments of other carloads of timber he would personally, if said Crombie Co. failed to do so, attend to the 20 shipment of the unsold and unused portion and the re-payment to defendant of the amount paid by it in excess of the amount so sold or used.

3. Relying on said promise of plaintiff, defendant paid said W. M. Crombie & Co. Inc., as in this counter-claim above set forth and continued to give said plaintiff orders for carloads of timber for a long time thereafter. Said W. M. Crombie & Co. Inc., failed to make payment for said balance of timber and said plaintiff 30 has failed to keep and perform his promise and agreement to personally attend to the re-shipment of said timber and to pay to defendant the amount due it for unsold and unused portion to the damage of defendant $1251.02.

*DEFENDANT COUNTER CLAIMS*

1. $1484.84 on the first, second and third counts of this counter-claim with interest on $1251.02 thereof from December 20th, 1920, the due date of trade acceptance above mentioned. 40

2. $338.00 on fourth count of counter-claim with interest thereon from August 31st, 1922.

3. $1251.02 on the fifth and sixth counts of counter-claim with interest thereon from December 20th, 1920.

10 BURNETT & MURRAY,
Attorneys for Defendant.

(Filed December 14, 1925)

Endorsed:

The filing of answer and counter-claim as within time is consented to.

GEORGE D. HENDRICKSON,
Attorney of Plaintiff.

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*ANSWER TO FIRST COUNT OF COUNTER-CLAIM*

1. Plaintiff denies paragraph #1 of the first count of defendant's counter-claim and alleges that on July 20th, 1920 W. M. Crombie & Co. Inc., accepted an order for the delivery of one car of good shorts, which was reduced to writing, upon certain terms and conditions and at a certain price, all shown by the acknowledgment of 30 order, true copy of which is hereto annexed and made a part hereof, and thereupon shipped and delivered such merchandise of a value of $2349-.82 in car NNW #27297.

2. Plaintiff denies paragraph #2 of the first count of defendant's counter-claim and alleges that after the merchandise was so delivered to Highland Park Lumber Company, it sold and delivered same to Cronk Mfg. Company, a corporation of the State of New Jersey. That there-40 after defendant requested a reduction in price



from W. M. Crombie & Co. Inc., defendant claiming it was not as good as contemplated and asked for a reduction of $10.00 per thousand off the agreed price which was allowed and thereupon defendant gave its trade acceptance or promissory note, after deducting said allowance and the amount of freight prepaid by defendant, 10 in the sum of $1967.33 which trade acceptance was on or about October 13th, 1920 accepted by W. M. Crombie & Co. Inc., in payment of the moneys due it under the compromise so previously effected; afterward and on or about October 26th, 1920 Highland Park Lumber Company paid to W. M. Crombie & Co. Inc., the further sum of $7.22 interest for over time taken; and that afterwards Highland Park Lumber Company paid in full, said promissory note, 20 on its due date.

3. Plaintiff denies paragraph #3 of the first count of defendant's counter-claim except it admits that defendant paid W. M. Crombie & Co. Inc. the sum of $1967.33 on December 20th, 1920, the amount due W. M. Crombie & Co. Inc. from defendant after crediting the amount of freight charges prepaid by defendant and the $10.00 per thousand reduction in price as above set forth.

30 4. Plaintiff denies paragraphs #4, 5 and 6 of the first count of defendant's counter-claim.

*ANSWER TO SECOND COUNT OF DEFENDANT'S COUNTER-CLAIM*

1. Plaintiff denies paragraph #1 of the second count of defendant's counter-claim and alleges the same facts as alleged in plaintiff's answer to the first count of defendant's counter-claim.

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2. Plaintiff denies the allegations in paragraph #2 of the second count of defendant's counter-claim but admits that defendant found fault with the lumber and alleges that said complaint was compromised by the allowance of $10.00 per thousand off of the contract price as hereinbefore alleged.

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3. Plaintiff denies paragraph #3 of the second count of defendant's counter-claim.

*ANSWER TO THIRD COUNT OF DEFENDANT'S COUNTER-CLAIM*

1. Plaintiff denies paragraph #1 of the third count of defendant's counter-claim and alleges the same facts as he alleges in his answer to the first count of defendant's counter-claim.

2. Plaintiff denies paragraph #2, of the third count of defendant's counter-claim and alleges that defendant compromised his objection to the merchandise delivered and thereafter paid the moneys due from it to W. M. Crombie & Co. Inc. under such compromise as hereinbefore alleged.

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3. Plaintiff denies paragraph #3 of the third count of defendant's counter-claim.

4. Plaintiff denies paragraph #4 of the third count of defendant's counter-claim.

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*REPLY TO FOURTH COUNT OF DEFENDANT'S COUNTER-CLAIM*

1. Plaintiff denies every allegation contained in the fourth count of defendant's counter-claim.

*REPLY TO FIFTH COUNT OF DEFENDANT'S COUNTER-CLAIM*

1. Plaintiff denies paragraph #1 of the fifth count of defendant's counter-claim and alleges the same facts as it alleges in his answer to the first count of defendant's counter-claim.

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2. Plaintiff denies paragraphs 2, 3 and 4 of the fifth count of defendant's counter-claim.

*REPLY TO SIXTH COUNT OF DEFENDANT'S COUNTER-CLAIM*

1. Plaintiff denies the first paragraph of the sixth count of defendant's counter-claim except he admits that he was a salesman employed by W. M. Crombie & Co. Inc.

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2. Plaintiff denies paragraph #2 of the sixth count of defendant's counter-claim but admits that he personally inspected said shipment and alleges that in compromise of defendant's complaint against said shipment he offered to defendant that W. M. Crombie & Co. Inc. would reduce the agreed price, $10.00 per thousand and thereupon defendant accepted such offer and made settlement with W. M. Crombie & Co. Inc. in accordance therewith as hereinbefore alleged.

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3. Plaintiff denies paragraph #3 of the sixth count of defendant's counter-claim.

*FIRST SEPARATE DEFENSE TO THE FIRST, SECOND, FIFTH AND SIXTH COUNTER-CLAIM*

1. On or about July 20th, 1920 W. M. Crombie & Co. Inc. entered into an agreement reduced to writing and shown by Exhibit A hereto annexed and made a part hereof and afterwards shipped and delivered to defendant one carload of White Pine known as good shorts and thereupon there became due from defendant to W. M. Crombie & Co. Inc. the sum of $2349.82 less freight amounting to $168.87 to be deducted, same having been paid by defendant, leaving the sum of $2108.95 due from defendant to plain-

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tiff, which the defendant then and there disputed and refused to pay because it claimed that the goods delivered were not as good as it expected.

2. That thereupon W. M. Crombie & Co. Inc. and defendant agreed to a compromise of said defendant's claim and that in compromise thereof the defendant should pay and W. M. Crombie & Co. Inc. should accept $1967.33 plus interest for over time taken in making settlement in accordance with the terms and provisions of said agreement in satisfaction thereof.

3. That thereafter defendant did so pay and W. M. Crombie & Co. Inc. so accepted said sum of money and thereby the said claim was satisfied and compromised.

Wherefore plaintiff demands judgment that the first, second, third, fifth and sixth counts of defendant's counter-claim herein be dismissed with the costs and disbursements in this action.

*FIRST SEPARATE DEFENSE TO THE FOURTH COUNT OF DEFENDANT'S COUNTER-CLAIM*

1. At the time or times mentioned in defendant's fourth count of counter-claim defendant was indebted to W. M. Crombie & Co. Inc. and W. M. Crombie & Co. Inc. gratuitously extended credit to defendant at defendant's request.

2. That during such time defendant gratuitously offered W. M. Crombie & Co. Inc. permission to store its lumber on defendant's premises at or near New Brunswick, N. J. without cost or charges.

3. W. M. Crombie & Co. Inc. accepted said offer and the only lumber stored by it on defendant's premises were so stored under such accepted offer.



Wherefore the plaintiff demands judgment that the fourth count of defendant's counter-claim be dismissed with the costs and disbursements in this action.

*THIRD SEPARATE DEFENSE TO THE FIRST, SECOND, THIRD, FOURTH AND SIXTH COUNTS OF COUNTER CLAIM*

1. That after the transactions herein set forth and *will* full knowledge of matters and things relating thereto defendant made no demand from W. M. Crombie & Co. or this defendant for more than one year thereafter for the re-payment to defendant of the moneys paid by it to W. M. Crombie & Co. Inc. or for the payment of any moneys for the storage of lumber.

GEORGE D. HENDRICKSON,
Attorney for Plaintiff.

W. M. CROMBIE & COMPANY, INC.
Lumber Merchants
101 Park Ave., New York City

Crombie Order No. 6103
Contract No.
Your Order No. 5054

Shipment Desired
To be made Car en route
Consigned to you
At New Brunswick, N. J.
Via Penna RR

New York July 20, 1920
Messrs. Highland Park Lumber Co. New Brunswick, N. J.

Gentlemen:—

ACKNOWLEDGMENT OF ORDER—If not correct in every detail, advise us at once or we cannot be responsible for any errors or omissions.

| | Price per M feet |
|---|---|
| One (1) car Good Shorts 5/4-6/4 and 8/4 | $110.00 Deld. |

PRICES delivered present rate of freight, Any increase in freight rate and also War Tax to be paid by you.

This Acceptance is subject to sale of stock called for, previous to receipt of this order by the mill,

and is contingent upon strikes, accidents, delays or carriers, and other circumstances beyond our control.

TERMS Freight net—Balance 2% 10 days from date of arrival or 60 days note.

Any claims for shortage or quality must be made within 5 days from arrival or they cannot be recognized.

W. M. CROMBIE & CO. INC.
By

(Filed January 13, 1926)

Endorsed:

The filing of the within answer to amended counter-claim is consented to this 7th day of January, 1926.

EDW. W. HICKS,
Attorney of Defendant.

1. Defendant denies paragraph 1 of answer to first count of counter-claim, except so much thereof as sets forth an acceptance of an order for delivery of one car of good shorts.

2. Defendant denies second paragraph of answer to said first count except so much thereof as sets forth payments by defendant to W. M. Crombie & Co. Inc.

3. Defendant makes the same reply to first paragraph of answer to second count of counter-claim as above set forth in reply to paragraph 1 of answer to first count.

4. Defendant denies so much of second paragraph of answer to second count of counter-claim as sets forth that complainant was com-



promised by an allowance of $10.00 per thousand off of the contract price.

5. Defendant makes the same reply to first paragraph of answer to third count of counter-claim as above set forth in reply to paragraph 1 of answer to first count.

6. Defendant denies paragraph 2 of answer to third count of counter-claim.

7. Defendant makes the same reply to first paragraph of answer to fifth count of counter-claim which answer is designated in plaintiff's pleading as "reply" as is above set forth in reply to paragraph 1 of answer to first count of counter-claim.

8. Defendant denies second paragraph of answer to sixth count of counter-claim designated in plaintiff's pleading as a "reply" except so much of said paragraph as admits that plaintiff personally inspected said shipment.

9. Defendant denies paragraphs 1, 2 and 3 of "first separate defense" to the first, second, fifth and sixth counter-claims, except so much thereof as sets forth a writing designated as exhibit A.

10. Defendant denies paragraphs 1, 2 and 3 of "first separate defense" to the fourth count of the defendant's counter-claim.

11. Defendant denies paragraph 1 of "third separate defense" to the first, second, third, fourth and sixth counts of counter-claim.

BURNETT & MURRAY,
Attorneys of Defendant.

(Filed January 27, 1926)

Endorsed:

Filing as within time is consented to this January 26, 1926.

GEORGE D. HENDRICKSON,
Attorney of Plaintiff.

This case was tried before Judge William A. Smith (to whom the same was referred for trial) with a jury, at the Essex Circuit, on January 3rd, 1927.

After the opening of counsel for the plaintiff and for the defendant on its counter-claim and in answer to plaintiff's opening and on the evidence submitted, the Court directed a non-suit on defendant's counter-claim and directed a verdict in favor of the plaintiff and against the defendant for Fourteen hundred fifty-five dollars and twenty cents ($1455.20).

The jury then returned a general verdict against the defendant and in favor of the plaintiff for Fourteen hundred fifty-five dollars and twenty cents ($1,455.20).

Whereupon it is adjudged that the defendant's counter-claim be dismissed and that the plaintiff Henry A. Krusen, do recover of the said defendant, Highland Park Lumber Company, on the complaint, the sum of one thousand four hundred fifty-five dollars and twenty cents damages, together with his costs, which have been taxed at the sum of forty-eight dollars and thirty-five cents, making in the whole the sum of one

$1455.20
48.35
———
$1503.55



thousand five hundred and three dollars and fifty-five cents.

Judgment entered January 12, 1927.

WM. S. GUMMERE,
C. J.

I, Edward J. Kelleher, 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.

(SEAL) In testimony whereof I have set my hand and the seal of said Court at Trenton, this nineteenth day of January A. D. nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

**SUBSTITUTION OF ATTORNEY.**

NEW JERSEY SUPREME COURT.

| | |
|---|---|
| HENRY A. KRUSEN, *Plaintiff,* *and* HIGHLAND PARK LUMBER COMPANY, (a corporation), *Defendant.* | *Action at Law.* *Substitution of Attorneys.* |

It is stipulated and agreed that Messrs. Burnett & Murray be and hereby are substituted as attorneys of the defendant in the above-entitled cause.

EDWARD W. HICKS,
Attorney of Record of Defendant.

BURNETT & MURRAY,
Substituted Attorneys of Defendant.

Dated, January 4, 1927.



NEW JERSEY SUPREME COURT.
ESSEX CIRCUIT.

Monday, January 3, 1927.

| | |
|---|---|
| HENRY A. KRUSEN, *vs.* HIGHLAND PARK LUMRER CO. | *Action at Law.* |

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appears George D. Hendrickson.

For the defendant appears Edward H. Hicks (by Norbury C. Murray).

(A jury is called and sworn.)

Mr. Hendrickson opens for the plaintiff as follows:

This suit was instituted by Mr. Krusen, the assignee of the Crombie Lumber Company in New York City, who are wholesale lumber merchants, against the defendant, Highland Park Lumber Company, for the recovery of the value of certain lumber delivered by Crombie & Company to the Highland Park Lumber Company of the value of $1,299.20 under a contract of sale reduced to writing in which the terms of credit fix it so that interest would run from January 23, 1925. There is a recoupment filed by the defendant on another item concerning which, of course, his attorney will speak. I may speak when he gets through so that you can grasp what we are trying in this case.

Mr. Murray opens for the defendant as follows:

As counsel has just stated to you, the Highland Park Lumber Company, which appears as defendant in this case, purchased from the Crombie Company, lumber to the extent of $1,299.20. The lumber which was thus purchased was all right in every particular. We did not pay for it and we have not paid for it for the reason that we have an offsetting claim against the W. M. Crombie Company. As counsel said, the plaintiff is Mr. Krusen, who appears here as assignee, or purchaser, from the Crombie Company with his claim against us for $1,299.20. Whether he has purchased that claim or not, or the circumstances, we do not know, and we put the plaintiff to his proof in that respect.

That brings us then to our offsetting claim and I will explain it at this time so the proofs will be clear to you. In the first place, the W. M. Crombie Company is a New York concern and has no place of business in New Jersey. The Highland Park Lumber Company has a place of business in Highland Park, just outside of New Brunswick, in Middlesex County. The Highland Park Lumber Company is closely affiliated with two other concerns: The Highland Park Building Company and the Cronk Manufacturing Company. The Highland Park Building Company devotes itself to the building of houses and the Cronk Manufacturing Company has a sash and door mill or factory at which it converts all lumber into sash and doors. The defendant in this suit does the purchasing for both concerns. The system is that when the building company needs lumber it is purchased in the name of the defendant in this suit and when it



arrives it is turned over to the building company. In order to keep track of what the building company uses, the lumber company charges the building company with the material so delivered. When the sash and door company desires lumber for its purposes the Highland Park Lumber Company likewise does the purchasing for that concern and it is charged on the books of the lumber company with so much material received. These three concerns are owned by substantially the same people and operate exactly the same as one concern with two departments, a mill department and a house construction department.

The salesman of the Crombie Lumber Company came out to the Highland Park Construction Company and represented to them that his firm, the Crombie Company, handled a class of lumber particularly suitable for the mill work done by the Cronk Manufacturing Company. He called that lumber ''good shorts.'' He represented that all of it was clear, good stuff; that none of it was less than six feet long—

Mr. Hendrickson: I don't want to interrupt counsel, but as the pleadings admit a contract I think he must confine his remarks to the contract and that does not admit of lengths or widths.

The Court: I can't pass on it now.

(Mr. Murray resumes opening.)

I want to make it clear to the jury. They represented further that this lumber was cut evenly on the edges so that the mill company could, without a particular amount of manufacturing cut it off into lengths for the making of sash

and doors; that it was not full of sap; that is, it was free and clear of sap. They bought several cars of these shorts and they turned out to be satisfactory.

Then along came a car in 1920 which was anything but what they represented it would be. It failed in all the particulars as to its representations. As soon as the car arrived we notified the plaintiff that it was not up to warranty. They told us to unload and they sent out Mr. Krusen, the plaintiff here, who was their agent, to look it over, and he admitted it was not what it ought to be. They came to the agreement that the price, instead of $110 for a thousand feet, would be reduced to $100 a thousand feet for any stuff that the Cronk Company could use, and to keep track of what they used and the Crombie Company would take off their hands what they could not use.

When that arrangement was made, or shortly thereafter, the Lumber Company gave the Crombie Company a trade acceptance for the amount of the entire lumber based on the price of $100 a thousand feet. The two concerns were friendly, as they had been for many years, and the Lumber Company, through Mr. Krusen, kept promising to take the stuff away. Finally, after two or three years, they did not move it. The two concerns had stopped doing business and we wanted our money back.

The Crombie Company delivered two cars of stuff that I mentioned and they refused to return our money. The defective car contained 21,360 lineal feet at $100 a thousand, or $2,136, less 851 feet which we used, so that we should have been paid $885.10. $2,136 is what we actually paid and we sue them for the difference.



Their claim against us is $1,299.20 and our claim is $1,251 and interest. In addition to that, we claim storage charge for storing this lumber from 1920 down to the present time.

The Court: You gave a trade acceptance for the full amount after the dispute arose?

Mr. Murray: That was given with the specific agreement, notwithstanding the payment, that they would take the stuff off our hands.

The Court: Is that your contention, Mr. Hendrickson?

Mr. Hendrickson: Yes.

The Court: There is nothing on the face of the trade acceptance to that effect. It seems to me foolish to go through the trial in view of that.

Mr. Murray: If your Honor please, at the very most, the fact that we gave our trade acceptance would possibly indicate that that was a final settlement. As a matter of law it does not so indicate. The mere fact, if your Honor please, that I sell you goods which are defective and you pay me in the meantime with the express understanding that I take them off your hands—

The Court: You changed the price of them and then you agreed to pay the balance by trade acceptance. That is your agreement.

Mr. Murray: We agreed to pay the balance subject to an adjustment.

The Court: If you can put the record in such form that you can appeal the case, you may do so.

Mr. Murray: Supplemental to the defendant's opening, the defendant now offers to prove that lumber was purchased by the defendant com-

pany from W. M. Crombie Lumber Company in 1920 under a term called "good shorts," which, by previous description by the seller to the purchaser, specified that it should be clear white material and evenly manufactured, of lengths not less than six feet and of widths not less than four inches; that when the material arrived it was at once discovered that it was discolored and was not clear white material; that it was different from the representation in material particulars; that the selling company's representative inspected the lumber, which was unloaded at its request, and agreed it was not up to representations, whereupon an oral agreement was made between the seller and the purchaser to the effect that the price should be reduced from $110 per thousand feet to $100 per thousand feet as to such portion, if any, as the lumber company could use; that the selling company agreed to remove that portion of the defective lumber which the purchasing concern could not use; that it was also then and there verbally agreed that a trade acceptance of the purchasing company should be given for the entire amount, based on the price of $100 per thousand feet; that when it was determined how much, if any, of the defective lumber could be used, a credit would be given by the seller to the purchaser on account of the tentative purchase price, which was paid. In short, that the giving in payment of the trade acceptance was a mere temporary arrangement until the amount which the purchaser could ascertain it could use should be determined and at that time the selling concern would pay back or give credit for, to the buying company, the unusable amount of the defective lumber at the rate of $100 per thousand feet.



The trade acceptance was subsequently paid. These companies were at that time doing an extensive business with each other and were on very friendly terms; the business between them was conducted more or less loosely, as measured by the highest standards of business practice.

The Court: The trade acceptance stipulated, I suppose, is the one attached to the answer to the counter-claim?

Mr. Hendrickson: Why not put into the case the various papers and mark them?

The Court: Introduce in evidence your assignment.

Mr. Hendrickson: I want the defendant to produce the original acknowledgment of the order.

Mr. Murray: It is admitted, is it not, that at the time of the purchase of this lumber for which the Highland Park Lumber Company makes claim, that Mr. Krusen was the authorized representative of the Crombie Lumber Company?

Mr. Hendrickson: To what extent?

Mr. Murray: For the purpose of making this agreement we propose to prove

Mr. Hendrickson: We will admit Mr. Krusen was the salesman who made the sale of this lumber and that a complaint against the lumber was made and that he went there and that he then reduced the price to $100 a thousand. We will admit that.

Mr. Murray: I stand ready and hereby offer to prove that at the time of the purchase by the defendant of the lumber for which it makes claim, that Mr. Krusen, the present plaintiff, had actual or apparent authority from the Crom-

bie Lumber Company, the seller, to enter into the agreement which I have here offered to prove.

The Court: Put in the assignment.

Mr. Hendrickson: First I want the original acknowledgment of order on the 5-4, 6-4 and 8-4 good shorts.

10

Mr. Murray: We haven't the original.

Mr. Hendrickson: Here is our office copy.

Mr. Murray: That's all right.

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

Mr. Hendrickson: I offer the assignment from the W. M. Crombie Company to Henry A. Krusen in evidence.

20

(The same is received in evidence and marked Exhibit P. 2.)

PLAINTIFF RESTS.

The Court: You have made your offer to prove according to your opening and I overrule that.

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

30

Exception noted as ground of appeal.

Mr. Hendrickson: I offer the trade acceptance for $1,967.33.

(The same is received in evidence and marked Exhibit P. 3.)

Mr. Hendrickson: I wish the defendant to produce letters from W. M. Crombie & Company dated September 20, 1920; October 8, 1920, and September 27, 1920.

Mr. Murray: I haven't the letter of September 20th.

40



Mr. Hendrickson: Have you the letter of October 8th?

Mr. Murray: I have.

Mr. Hendrickson: September 27th?

Mr. Murray: I have.

Mr. Hendrickson: September 29th instead of September 20th, it should be.

10

Mr. Murray: I have September 29th.

Mr. Hendrickson: I offer in evidence letter of September 25, 1920, from the Highland Park Lumber Company to W. M. Crombie & Company, which is the letter accompanying the trade acceptance.

Mr. Murray: I object to their admission on the ground that they are irrelevant, immaterial and incompetent.

20

Objection overruled.

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

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit P. 4.)

Mr. Hendrickson: I offer in evidence letter of September 27, 1920, from W. M. Crombie & Company to the Highland Park Lumber Company.

30

(The same is received in evidence and marked Exhibit P. 5.)

Mr. Hendrickson: I offer in evidence letter of September 29, 1920, from W. M. Crombie & Company to the Highland Park Lumber Company.

(The same is received in evidence and marked Exhibit P. 6.)

40

Mr. Murray: I object to these on the same grounds.

Same ruling.

Mr. Hendrickson: I offer in evidence letter of October 8, 1920, W. M. Crombie Company to Highland Park Lumber Company.

10 (The same is received in evidence and marked Exhibit P. 7.)

The Court: You do not object to the letters on the ground that they were not sent?

Mr. Murray: No.

Mr. Hendrickson: I offer in evidence letter from Highland Park Lumber Company to W. M. Crombie & Company dated October 1, 1920.

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

20 Mr. Hendrickson: I offer in evidence letter from the Highland Park Lumber Company to W. M. Crombie & Company dated October 12, 1920.

(The same is received in evidence and marked Exhibit P. 9.)

Mr. Hendrickson: The interest figures to $156.

30 Mr. Murray: May I correct an error I made? The warranty should be that the stuff should be not less than four inches wide, and not two inches as I stated.

Mr. Hendrickson: I would like to be permitted to put on the record the trade meaning of "shorts." I think there is a millman on the jury. Or else I should like to make a statement as to what "good shorts" consist of.

Mr. Murray: I have already put that on.

40 The Court: Does it make any difference?





Mr. Hendrickson: No, if it appears that the statement is what the salesman said.

The Court: I will direct a verdict in favor of the plaintiff and against the defendant in the sum of $1,455.20.

Defendant's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

SMITH, *J.*

Gentlemen of the Jury: At the direction of the Court, you will return a verdict in favor of the plaintiff and against the defendant in the sum of $1,455.20.

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## EXHIBIT P. 1.

W. M. CROMBIE & COMPANY,
INC.
Lumber Merchants
101 Park Ave., New York City

New York July 20, 1920
Messrs. Highland Park Lumber
Co. New Brunswick, N. J.

Crombie Order No. 6103
Contract No.
Your Order No. 5054

Shipment Desired
To be made Car en route
Consigned to you
At New Brunswick, N. J.
Via Penna RR

Gentlemen:—

We are booking your valued order for the following: If this order is not correct in every detail, advise us immediately or we cannot be held responsible for any errors or omissions.

One (1) car Good Shorts 5/4-6/4 and 8/4 $110.00 deld.

PRICES delivered present rate of freight. Any increase in freight rate and also War Tax to be paid by you.

This Acceptance is subject to sale of stock called for, previous to receipt of this order by the mill, and is contingent upon strikes, accidents, delays of carriers, and other circumstances beyond our control.

TERMS Freight net—Balance 2% 10 days from date of arrival or 60 days note.

Any claims for shortage or quality must be made within 10 days from arrival or they cannot be recognized.

Yours very truly,

W. M. CROMBIE & CO. INC.
By



## EXHIBIT P. 2.

If the Weight is Increased Appreciably, Refuse Acceptance and Advise Us Promptly. Claims for Shortage or Corrections Must be Made Within Ten Days After Receipt of Goods.

W. M. CROMBIE & CO.
INCORPORATED
LUMBER MERCHANTS

101 Park Avenue, New York
Consigned to New Brunswick, N. J. Jan. 10, 1924
Pa. Ry. Delivery
Sold to Highland Park Lumber Co.
New Brunswick, N. J.
Terms Frt. net bal 2% 10 days arrival.

| Rate | Weight | Your Order | WMC Order | Car Number |
|---|---|---|---|---|
| | | 7313 | 10337 | MC #64124 |

| Pieces | Thick | Wide | Length | Feet | Price |
|---|---|---|---|---|---|

CORRECTED INVOICE

WHITE FIR.

4/4x4 & wdr. #4 Boards. D2S. 31443 37.25 $ 1171.25

COPY

If the Weight is Increased Appreciably, Refuse Acceptance and Advise Us Promptly. Claims for Shortage or Corrections Must be Made Within Ten Days After Receipt of Goods.

W. M. CROMBIE & CO.
INCORPORATED
LUMBER MERCHANTS

101 Park Avenue, New York
Consigned to New Brunswick, N. J. Jan. 22, 1924
Pa. Ry. Delivery
Sold to Highland Park Lumber Co.
New Brunswick, N. J.
Terms Frt. net bal 2% 10 days arrival.

| Rate | Weight | Your Order | WMC Order | Car Number |
|---|---|---|---|---|
| | 49700# | 7313 | 10337 | St. P. #84408 |

| Pieces | Thick | Wide | Length | Feet | Price |
|---|---|---|---|---|---|

WHITE FIR.

4/4x4 & wdr. #4 Boards. D2S. 28239 37.25 $ 1051.90

COPY

*Exhibit P. 2.*

KNOW ALL MEN BY THESE PRESENTS, THAT WE, W. M. CROMBIE & CO., INCORPORATED, a New York corporation, of 101 Park Avenue, New York City in consideration of other valuable considerations and One ($1.00) Dollar, lawful money of the United States, to us
10 paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto HENRY A. KRUSEN of 19 South Maple Avenue, East Orange, New Jersey, his executors, administrators and assigns, to his and their own proper use and benefit, any and all sums of money now due or to grow due upon the annexed accounts, or upon the sales of merchandise therein mentioned,

20 AND we do hereby give the said Henry A. Krusen, his executors, administrators and assigns, the full power and authority for his and their own use and benefit, but at his and their own cost, to ask, demand, collect, receive, compound, and give acquittance for the same or any part thereof, and in his name or otherwise to prosecute and withdraw any suits or proceeds at law or in equity therefor.

30 IN WITNESS WHEREOF, we have caused these presents to be duly executed this 5th day of June, 1925.

W. M. CROMBIE & CO., INCORPORATED
(SEAL) By A C Crombie President.

In presence of

Thos Adre Secy

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*Exhibit P. 2.*

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

On this 5th day of June, 1925, before me came ARTHUR C. CROMBIE, to be known, who, being by me duly sworn, did depose and say that he resides in Bronxville, Westchester County, New York; that he is the president of W. M. 10 CROMBIE & CO., INCORPORATED, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOSEPH J. FUREY,
Notary Public Bronx Co. 66. 20

Cert N Y Co 457.

W. M. CROMBIE & CO.,
INCORPORATED

to

HENRY A. KRUSEN

ASSIGNMENT OF ACCOUNT 30

Dated June 1925

40

## EXHIBIT P. 3.

No. 292 New Brunswick, N. J., Aug 26 1920.
To Highland Park Lumber Co.,
New Brunswick, N. J.
On December 18, 1920. Pay to the order of W. M. Crombie & Co.
10 Nineteen hundred and sixty-seven and 33/100 Dollars, $1967.33

The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. The drawee may accept this bill payable at any bank, banker or trust company in the United States which he may designate.
Accepted September 23 1920.

W. M. CROMBIE & CO.
Incorporated
20 Geo E Sawyer Treas

Payable at New Brunswick Trust Co.
Highland Park Lumber Co.
H P Segoine P. L. Van Nuis
President Treasurer

Trade Acceptance
Revenue stamps—Dated 9-23-20
30 (Stamped) Crombie W. M. Crombie & Company Pay to the order of The Plainfield Trust Company Plainfield, N. J. W. M. Crombie & Co., Inc.
(Stamped) Pay to the order of Any Bank, Banker or Trust Co. The Plainfield Trust Company Plainfield, New Jersey De Witt Hubbell, Secretary 55-194 55-194
(Perforated) Paid 12 21 20 N B T C

40



## EXHIBIT P. 4.

HIGHLAND PARK LUMBER COMPANY
Builders' Supplies

Sept. 25/20

W. M. Crombie & Co.,
10 New York City.

Gentlemen:

We are enclosing trade acceptances and freight bills in payment for cars St. Paul 37,201, N. & W. 27,297, Wabash 64,939.

Interest adjustment will be made within a few days.

Very truly yours,

P. L. VAN NUIS. 20
PLVN/A

(Stamped) Sep. 27 1920

## EXHIBIT P. 5.

W. M. CROMBIE & CO.
Incorporated
Lumber Merchants 30
101 Park Avenue-New York

Sept. 27, 1920.

Messrs. Highland Park Lumber Co.
New Brunswick, N. J.

Gentlemen:—

Our quotations are made subject to prior sale or change of market. All orders are accepted subject to delay or cancellation by us in whole or part on account of strikes, accidents, delays 40 of carriers, or other causes beyond our control.

*Exhibit P. 5.*

We are in receipt this morning of your favor of the 25th inst. enclosing the following Trade Acceptances, together with the following freight bills, but with the exception of invoice, July 9th, car #64939, we cannot adjust them. We know there is an allowance on invoice, May 28th, car #27297, but do not seem to find any data that gives us the necessary information as to what this allowance was.

Will you therefore let us know how these Trade Acceptances fit in and would also call your attention to the fact that we have not received the freight bill on car #37201 with the exception of a bill for $14.00, covering demurrage and penalty charges.

| | | |
|---|---|---|
| Trade Acceptance | #291— | $964.85 |
| " " | #292— | 1967.33 |
| " " | #293— | 773.20 |
| Expense bill car #27297 to | #565572— | 232.46 |
| " " " #37201 | — | 14.00 |
| " " " #64939 | — | 384.85 |

If you will make out a statement giving us the necessary information regarding, invoices, May 28th and July 6th, we will appreciate it.

Yours very truly,

W. M. Crombie & Co., Inc.
Wm M Crombie
President.

WMC/HR.



*Exhibit P. 6.*

**EXHIBIT P. 6.**

W. M. CROMBIE & CO.
Incorporated
Lumber Merchants
101 Park Avenue-New York

September 29, 1920

Messrs. Highland Park Lumber Co.,
New Brunswick, N. J.

Gentlemen:

Our quotations are made subject to prior sale or change of market. All orders are accepted subject to delay or cancellation by us in whole or part on account of strikes, accidents, delays of carriers, or other causes beyond our control.

We are anxiously awaiting reply to our letter of September 27th. The information which you will give us we need in order to make the complete final settlements with our mill connections, so do not delay in giving us the statement asked for and oblige.

Yours very truly,

W. M. CROMBIE & CO. INC.
Wm M Crombie
President.

WMC-ssl

**EXHIBIT P. 7.**

W. M. CROMBIE & CO. INC.
Selling Agents for
E. H. Lemay-Montreal
Wholesale Lumber

10 101 Park Avenue-New York October 8, 1920

Messrs. Highland Park Lumber Co.,
New Brunswick, N. J.

Gentlemen:

Our quotations are made subject to prior sale or change of market. All orders are accepted subject to delay or cancellation by us in whole or part on account of strikes, accidents, delays of carriers, or other causes beyond our control.

20 We must again call your attention to our letter of September 27th. The last we heard from you was October 1st to the effect that your Mr. Van Nuis would be able to attend to this on Monday of this week. The delay is causing us quite a little inconvenience.

Yours very truly,

W. M. CROMBIE & CO. INC.
Wm M Crombie
30 WMC-ssl President.

P. S. Since writing we find that we have a letter from the Cronk Manufacturing Co. dated October 2nd with reference to our remitting you a credit memorandum for 727′ on car 27297, transferred to 565572, invoice of May 28th. As we cannot seem to interpret your settlement of the 25th of September properly, we will have to await your further advice.

40



**EXHIBIT P. 8.**

HIGHLAND PARK LUMBER COMPANY
Builders' Supplies

(Stamped) Oct 2 1920

Oct. 1/20 10

Messrs. Wm. Crombie & Co.,
New York City.

Gentlemen:

We acknowledge receipt of your letters of Sept. 27th and 29th. Mr. Van Nuis has been out of town for the past week but will be in the office on Monday morning when he will give your matter prompt attention.

Very truly yours, 20

THE HIGHLAND PARK LUMBER CO.
HRS/A H P Segoine.

**EXHIBIT P. 9.**

HIGHLAND PARK LUMBER COMPANY
Builders' Supplies

(Stamped) Oct 13 1920 30

Oct. 12/20

W. M. Crombie & Co.,
New York City.

Gentlemen:

We have your letter of the 8th referring to your letter of Sept. 27th and our reply thereto. The writer has gove over your account with the following results: Our trade acceptance #293 40

*Exhibit P. 9.*

in the amount of $773.20 together with paid freight bill in the amount of $384.85 is in full payment of your invoice of July 9, car, Wabash #64939, $1158.05, Trade Acceptance #291 in the amount of $964.85 is in settlement of your invoice of July 6, car St. Paul 37,201. In checking
10 over settlement, we find that we have over paid this invoice to the amount of $100.00. The total of your paid invoices was $1197.97. Our trade acceptances, as stated above, amount to $964.85 leaving a balance covered by freight charge of $213.00. There were two freight bills against this car, one of $14.00 and one of $299.12 making a total of $313.12. We will deduct this over payment of $100.00 in our next settlement. The paid freight bill, we find that we failed to include with our letter of Sept. 25 and are enclosing it here-
20 with. Trade acceptance #292 in the amount of $1967.33 is in settlement of your invoice of May 28, 1920, car N & W 27,297. The total of your invoice is $2349.82.

Mr. Krusen, on a recent visit to inspect the lumber in this car, made us an allowance of $10.00 per thousand feet. As the car contained 21,362 sq. ft. the allowance was $213.62 making the net of your invoice $2136.20. Deducting paid
30 freight bills, total $168.87 leaves $1967.33 the amount of our trade acceptance.

We trust that this information will enable you to properly credit our remittances and regret the delay in supplying you with this information due to the writer's absence from the office.

Very truly yours,

HIGHLAND PARK LUMBER CO.

P. L. Van Nuis.

40 PLVN/A

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| HENRY A. KRUSEN, *Plaintiff-Respondent,* | *Action at Law.* |
| *vs.* | |
| HIGHLAND PARK LUMBER COMPANY, *Defendant-Appellant.* | *On Appeal from Supreme Court.* |

Sat below: Smith, *C. C. J.*

## BRIEF OF HIGHLAND PARK LUMBER COMPANY.

This matter comes before this Court on appeal by the Defendant from a judgment of non-suit entered against it on its counter-claim. (State of Case, p. 4.)

### Facts.

The facts which the defendant offered to prove and on which the non-suit of defendant was granted (State of Case, pp. 25-35), summarized are: The plaintiff's assignor sold to the defendant certain lumber then in transit, which on arrival was rejected by the defendant on the ground that it did not conform to the description or to the warranties made by plaintiff's assignor concerning it; the plaintiff's assignor by the plaintiff as its agent and defendant then inspected it and verbally agreed that the price of the whole should be reduced from $110.00 to $100.00 per thousand feet thereof; that it would be tentatively paid for at the reduced rate by means of the defendant's Trade Acceptance; that defendant should then proceed to use such

if any portions as were susceptible of use by its mill and that the plaintiff's assignor would take back the unusable portions thereof and credit the defendant therefor at the reduced rate. The Trade Acceptance was given and paid accordinly. Of the total of 21,362 feet, 8,851 5/6 feet proved to be usable and were used by the defendant for which the defendant was liable for Eight Hundred Eighty-five Dollars, Eighteen Cents ($885.18) of the Two Thousand, One Hundred Thirty-six Dollars, Twenty Cents ($2,136.20) paid by defendant for the whole and the defendant was entitled to a credit or repayment of the balance of One Thousand Two Hundred Fifty-one Dollars, Two Cents ($1,251.02). The plaintiff's assignor unqualifiedly refused to credit defendant or to pay to it any part of such sum. The plaintiff's assignee brought suit for One Thousand, Two Hundred Ninenty-nine Dollars, Twenty Cents ($1,299.20) due from defendant to plaintiff's assignor on the purchase of an entirely different lot of lumber. The defendant counter-claimed for the One Thousand Two Hundred Fifty-one Dollars, Two Cents ($1,251.02). The transaction on which defendant's counter-claim was based was personally handled by the plaintiff as the agent of his assignor, Crombie Lumber Co. (State of Case, p. 28.)

### Ruling of the Trial Court.

At the conclusion of defendant's opening, in which the foregoing facts in amplified form were stated, the Trial Court stated (State of Case p. 29):

> "There is nothing on the face of the Trade Acceptance to that effect." (The Court was referring to the facts so stated on defendant's opening.) "It seems to me foolish to go through the trial in view of that." "You, (meaning the defendant,) changed the price of them, (meaning the lumber) and then you agreed to pay the balance by Trade Acceptance—that is your Agreement."



Defendant's counsel in reply:

> "We agreed to pay the balance subject to an adjustment."

Court:

> "If you can put the record in such form that you can appeal the case, you may do so."

The defendant then offered to prove the facts stated in its opening (State of Case, pp. 29-31) which offer was overruled (State of Case, p. 32) and exception was noted as ground of appeal (State of Case, p. 32) and a verdict was directed in behalf of the plaintiff; to which ruling an exception was taken by the defendant and noted as a ground of appeal. (State of Case, p. 35.)

### POINTS.

The reasons underlying or the basis for, the ruling of the Trial Court are not entirely clear. The reasons or basis for the rulings as we understand them are either:

1. That the facts sought to be proved by the defendant constituted an unqualified acceptance of the lumber and as such operated under the uniform Sale of Goods Act (Comp. St., p. 4645, etc.) to bar any right of recovery by the defendant; or

2. That the verbal agreement sought to be proved by the defendant, if proved, would operate to vary, alter or add to a written agreement in violation of the "Parole Evidence" Rule.

## ARGUMENT.

As to the first point:

Under sections 69 and 70 of the "Sale of Goods" Act (Comp. St., pp. 4663-4) even if there is an *unqualified* acceptance of the goods, the defendant's right of recovery against the seller, survives. In the case at bar, the acceptance was *qualified* by the express agreement sought to be proved. Further, the provisions of said Act apply only in the absence of an agreement to the contrary by the parties. Section 71 (Comp. St., p. 4664):

> "Where any right, duty or liability would arise under a contract to sell or a sale by implication at law; it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract of sale."

The agreement sought to be proved by the defendant, therefore, wholly negatived or excluded the operation and effect of the "Sale of Goods" Act.

As to the second point:

At the outset, we call attention to the facts: (a) that the defendant is neither seeking to enforce nor to avoid payment of the Trade Acceptance (the only written instrument in the transaction) and hence, is not seeking to alter, vary or ad to ITS terms; (b) that defendant seeks to recover on a verbal agreement, of which *performance* by the defendant consisted in part of its giving and paying the Trade Acceptance; (c) that the Trade Acceptance was delivered pursuant to and hence subsequent to (and not contemporaneously with) the making of the agreement; (d) the Trade Acceptance (the only written instrument involved in the transaction) had been paid and thereby wiped out of legal existence long before the time for performance by plaintiff's assignor arose.



The first requisite for the operation of the "Parole Evidence" Rule, is that the agreement must be "Complete on its face"; *Naumberg* v. *Young,* 44 N. J. L. 331, at p. 340.

In the case at bar, the Trade Acceptance was a promise to pay money, merely one step in the performance of the agreement in question. It did not purport to be anything but that; it did not attempt to define the purpose for or terms on which it was to be given or paid, nor the rights of the parties in respect to the acceptance or the return of the lumber; nor did it make any provision for the acceptance or return of the lumber, nor the giving of credit, nor the making of repayment therefor. At most, it imported or implied an indebtedness from the defendant to the plaintiff's assignor. It did not imply that there was no indebtedness or obligation from plaintiff's assignor to the defendant.

The facts at bar, are the legal equivalent of the following:

A, for the accommodation of B, gives to B, A's Trade Acceptance; B, then verbally agreeing that if A pay it, he, B, will reimburse A. The acceptance is endorsed and discounted by B. A pays it at maturity and sues B for the money thus paid thereon. B, under the ruling of the Trial Court would escape payment by reason of the "Parole Evidence" rule as the contemporaneous verbal agreement of B to reimburse A would vary, alter or add to the terms of the Trade Acceptance.

To state the proposition is to demonstrate its unsoundness. *Wilson* v. *Hendee,* 74 N. J. L. 640, at page 645 (E. and A. 1906).

We deem it pertinent at this point, to call attention to the fact that by virtue of section 19, Comp. St. p. 4056, assignment of choses in action are made subject to "All set-offs, discounts and defenses not only against the plaintiff but against the assignor before notice of such assignment shall be given to the defendant"; that the set-off or defense arose in the year 1920 and the assignment was not made until June 5th, 1925. (State of Case, p. 38.)

We respectfully submit that the judgment of non-suit against the defendant should be reversed and that the cause be remitted to the Trial Court for retrial in respect to the defendant's counter-claim and that proceedings on the plaintiff's judgment be stayed pending the trial of defendant's counter-claim.

Respectfully submitted,

BURNETT & MURRAY,
Attorneys of Defendant-Appellant.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| HENRY A. KRUSEN, Plaintiff-Respondent, *vs.* HIGHLAND PARK LUMBER COMPANY, Defendant-Appellant. | Action at Law. On Appeal from Supreme Court. |

## BRIEF OF HENRY A. KRUSEN

I.

**Defendant's opening discloses a complete accord and satisfaction.**

**There was no cause of action shown and non-suit for defendant was properly directed.**

II.

On September 25th, 1920, defendant delivered to W. M. Crombie & Co. from whom it had purchased lumber, its trade acceptance No. 393 dated August 26th, 1920, for $1,967.33, payable December 18th, 1920, at New Brunswick.

On September 27th, 1920, W. M. Crombie & Co. wrote Highland Park Lumber Company, "We know there is an allowance on invoice, May 28th, car 27297 but we do not seem to find any data that gives us the necessary information as to what this allowance was. Will you therefore let us know how these trade acceptances fit in?"

On October 12th, W. M. Crombie & Co. received from Highland Park Lumber letter which reads:

> Trade acceptance #393 in the amount of $1,967.33 is in settlement of your invoice of May 28th, 1920, car N#W27297. The total of your invoice is $2,349.82.
>
> Mr. Krusen, on a recent visit to inspect the lumber in this car, made us an allowance of $10.00 per thousand feet. As the car contained 21,362 sq. ft. the allowance was $213.62, making the net of your invoice $2,136.20. Deducting paid freight bills, total $168.87, leaves $1,967.33, the amount of our trade acceptance.
>
> We trust that this information will enable you to properly credit our remittance and regret the delay in supplying you with this information due to the writer's absence from the office.

III

Defendant admits in its pleadings it gave its trade acceptance and afterwards paid to W. M. Crombie & Co. the further sum of $7.20 interest for over time taken (which means that settlement by Highland Park Lumber Company was not made within the time fixed by the contract) (Case p. 36, Exhibit P-1) and which shows the terms to be "balance to be 2% 10 days from date of arrival or 60 day note."

IV

On page 29 of the case, the court asks: You gave a trade acceptance for the full amount after the dispute arose? Defendant's attorney answered and the court addressing plaintiff's attorney said "Is that your contention, Mr. Hendrickson?" Answer, "Yes," and the court ad-



dressing defendant's attorney said, "There is nothing on the face of the trade acceptance of that effect. It seems to me foolish to go through the trial in view of that."

V

There is nothing in this case which deals with the interpretation or variation of implied obligations which arise under a contract to sell or sale by implication of law. Page 71 of the Sales Act has no bearing on the situation in this case.

VI.

This trade acceptance cannot be termed an accommodation. The defendant tendered it in settlement and then explained the reason why the trade acceptance was for a less sum than the invoice value of the lumber delivered and then over three months afterwards voluntarily paid this trade acceptance.

VII.

**There was a complete accord and satisfaction.**

It is respectfully submitted that there was no reversible error committed by the trial judge and that the verdict of the Essex County Circuit Court should be affirmed with costs.

George D. Hendrickson,
Attorney of Plaintiff-Respondent.

# INDEX

PAGE

...ter for Specific Performance ..... 1

...swer and Counter-Claim ..... 9

...plication ..... 14

...AINANT'S TESTIMONY:

...arry Garber—Direct ..... 17
Cross ..... 28

...rank T. Perone—Direct ..... 33
Cross ..... 52
Recalled—Direct ..... 71, 83

...ulius Taylor—Direct ..... 63
Cross ..... 64
Recalled—Direct ..... 77

...in Shermer—Direct ..... 67
Cross ..... 71
Recalled—Direct ..... 85
Recalled—Cross ..... 86

...oseph Moore—Direct ..... 72
Cross ..... 74

...illiam G. Lambert—Direct ..... 78
Cross ..... 80

...NDANT'S TESTIMONY:

...ulius Taylor—Direct ..... 88
Cross ..... 93
Recalled—Direct ..... 111, 122
Recalled—Cross ..... 103, 124