INDEX.

Reasons for Reversal.

(Filed December 16, 1926, correcting those previously filed December 11, 1926.)

NEW JERSEY SUPREME COURT.

APPLETON & ELDREDGE, INC., a New York Corporation, Plaintiff-Appellee, vs. CHARLES McCARTHY and GASSNER & ACKERLY MOTORS, INC., Defendant-Appellant.	On Appeal. Reasons for Reversal.

The following are the reasons of the defendant, Gassner & Ackerly Motors, Inc., for seeking reversal of the judgment entered in the District Court of the First Judicial District of the County of Essex, in the above entitled cause:

1. Because the court erred in rendering judgment for the plaintiff and against the defendant Gassner & Ackerly Motors, Inc., as its findings were not supported by law.

2. Because the note sued on by the plaintiff was not protested, and no timely presentment, protest, or notice of protest was ever given the defendant Gassner & Ackerly Motors, Inc., who were endorsers, as required by law.

3. Because the trial judge erred in finding, as he must have found to enter judgment against the defendant Gassner & Ackerly Motors, Inc., that the waiver embodied in the note applied to the endorser, Gassner & Ackerly Motors, Inc., and relieved the plaintiff of the necessity of a timely protest of the note.

PHILIP GOODELL,
Attorney for Defendant-Appellant,
Gassner & Ackerly Motors, Inc.

Certificate of Clerk of District Court.

(Filed December 11, 1926.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF ESSEX.

APPLETON AND ELDREDGE, INC., a corporation of New York, Plaintiff, vs. CHARLES MCCARTHY and GASSNER and ACKERLY MOTORS, INC., a New Jersey corporation, Defendants.	On Contract. Certificate.

I, JOSEPH F. MURPHY, Clerk of the District Court of the First Judicial District of the County of Essex, do hereby certify that attached hereto are true copies of the summons, state of demand, and state of the case agreed upon, filed in the above entitled cause, in said court, and the foregoing is a true transcript of the record and proceedings had therein as it appears on page 10631 in the Docket of said Court.

JOSEPH F. MURPHY,
Clerk.

(Seal)

Notice of Appeal.

(Filed December 2, 1926.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF ESSEX.

APPLETON & ELDREDGE, INC., a New York Corporation, Plaintiff, vs. CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC., Defendant.	Notice of Appeal.

To Samuel Heller, Esquire,
Attorney for Plaintiff.

SIR:

Take notice that the defendant the Gassner & Ackerly Motors, Inc., hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the First Judicial District of the County of Essex, at Montclair, rendered in the above stated action on the twelfth day of November, 1926.

Dated November 30, 1926.

PHILIP GOODELL,
Attorney for Defendant.

ENDORSEMENT.

Service of a true copy of the within notice acknowledged this 1st day of December, 1926.

SAMUEL HELLER,
Attorney for Plaintiff.

District Court Summons on Contract.

(Filed March 25, 1926.)

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

To any Constable of said County, or to the Sergeant-at-Arms of the District Court of the First Judicial District of the County of Essex:

SUMMON

Charles McCarthy and Gassner and Ackerly Motors, Inc., a New Jersey Corporation, to appear before the District Court of the First Judicial District of the County of Essex, to be held at the Council Chamber, No. 649 Bloomfield Avenue (second floor), in the Town of Montclair, on the first day of April, Nineteen Hundred and Twenty six, at Ten o'clock in the forenoon, to answer unto Appleton and Eldredge, Inc., a New York corporation, in an action upon Contract where the Plaintiff demands from the Defendant Three Hundred Dollars,

Hereof fail not.

Witness, EDWARD DILLON, Esq., Judge of said Court at Montclair, as aforesaid, the 25th day of March in the year One Thousand Nine Hundred and Twenty six.

JOSEPH F. MURPHY,
Clerk.

Summons on Contract.

(Filed March 25, 1926.)

135 Claremont Avenue, Montclair
10 Elm Street, Montclair

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF ESSEX.

APPLETON & ELDREDGE, INC., a corporation,

vs.

CHARLES MCCARTHY and GASSNER and ACKERLY MOTORS, INC., a corporation of New Jersey.

Demand	$225.00
Costs	4.00
Mileage	.16
Attorney's Fees	11.25

Returnable April 1st 1926.

Samuel Heller, 12-16 Lexington Ave., Passaic, New Jersey, Att'y for Plaintiff.

I served the within summons
192 , on the defendant by reading it to
and giving a copy thereof.

Charles McCarthy Sergeant-at-Arms.

The said defendant not being found, I served the within summons March 27, 1926, by leaving a copy thereof at his Residence with a member of his family above the age of fourteen years, informing her of its contents.

CHARLES REILLY,
Sergeant-at-Arms.

Summons on Contract.

I served the within summons March 25, 1926, at 10 Elm St. Montclair on Mr. Koff, he being Salesman in charge Gassner & Ackerly Motors, the within named defendant by reading it to him and giving him a copy thereof.

CHARLES REILLY,
Sergeant-at-Arms.

District Court of the First Judicial District of the County of Essex.

TAKE NOTICE, that the plaintiff's state of demand in the within action has been filed with the Clerk of this Court, and that a trial will be demanded upon the return day of this summons.

Yours, etc.,

Att'y for Pl'ff.

To the within named defendant
or to whom it may concern.

Montclair, N. J., 192 .

State of Demand.
(Filed March 25, 1926.)

MONTCLAIR DISTRICT COURT.

APPLETON & ELDREDGE, INC., a New York corporation, Plaintiff, against CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC., a New Jersey corporation, Defendants.	On Contract State of Demand.

The plaintiff, a corporation of the State of New York, demands from the defendants the sum of Five Hundred ($500.00) Dollars upon a certain promissory note of which the defendant Charles McCarthy is the maker and the defendant Gassner & Ackerly Motors, Inc., a corporation of New Jersey, is endorser, of which a true copy is hereto annexed.

Judgment will be claimed in the sum of Two Hundred Twenty-five ($225.00) dollars, together with lawful interest and costs of suit.

SAMUEL HELLER,
Plaintiff's Attorney.

NOTE

Do not make any corrections or erasures in note, as to do so may require it to be rewritten.

135 Claremont Avene, Montclair, New Jersey
(Street Address of Buyer) (Town) (State

August 10, 1925.

FOR VALUE RECEIVED and without defalcation, the undersigned promises to pay to the order of the undersigned, at APPLETON & ELDREDGE, INC., AGENT, 67 WALL ST., NEW YORK the sum of $225.00 Two
(Location)

State of Demand.

Hundred and Twenty-five 00/100 Dollars in installments as set forth in the schedule below, with interest at 6% per annum from dates of maturity only. In event of default in the payment of any of said installments the full amount then remaining unpaid, with interest thereon at the above rate from date of such default, shall be at the election of the holder and without notice or demand immediately become due and payable. The undersigned hereby waives presentment, protest, notice of protest and all benefits of valuation and exemption laws of any state. This note is negotiable and is evidence of the obligation of the undersigned under a contract of conditional sale bearing even date herewith between the undersigned as buyer and

Gassner & Ackerly Motors, Inc.,
Dealer's name

BUYER Charles McCarthy L.S.
by

OWNER, Officer or Firm Member

DO NOT DETACH FROM NOTE

Schedule of Payments Months After Date		Date	Amt. Paid	Balance	Schedule of Payments Months After Date		Date	Amt. Paid	Balance
$25.00	1				$25.00	7			
$25.00	2				$25.00	8			
$25.00	3				$25.00	9			
$25.00	4					10			
$25.00	5					11			
$25.00	6					12			

ENDORSEMENT

Charles McCarthy.
Gassner & Ackerly Motors, Inc.,
by W. T. Ackerly, Pres.

State of the Case.
(Filed November 12, 1926.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF ESSEX.

APPLETON & ELDREDGE, INC., a New York corporation,
Plaintiff,

vs.

CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC.,
Defendants.

On Contract
State of case agreed upon.

IT IS HEREBY STIPULATED AND AGREED in behalf of the parties that the following are the facts in the above entitled action on contract:

1. This action is to recover the sum of Two hundred and twenty-five dollars ($225.00) alleged to be the amount due the plaintiff by the defendants upon a certain promissory note, a copy of which is attached and marked Exhibit P-1.

2. On August 10, 1925, the defendant Charles McCarthy purchased from the defendant Gassner & Ackerly Motors, Inc. a certain automobile. To secure part of the purchase price the defendant McCarthy executed and delivered to the defendant Gassner & Ackerly Motors, Inc. an agreement of conditional sale, covering the balance due on said automobile, said agreement containing a provision as to monthly payments. On said date the said Gassner & Ackerly Motors, Inc. assigned the said agreement of conditional sale to the plaintiff. As evidence of the debt, the said defendant McCarthy

Transcript of Clerk's Docket.

APPLETON & ELDREDGE, INC., a New York corporation, Plaintiff, vs. CHARLES MCCARTHY and GASSNER AND ACKERLY MOTORS, INC., a corporation of New Jersey, Defendant.	#10631

Plaintiff's cost:

Summons	$2.50
Mileage	.16
Listing fee	1.50
Attorneys fee	11.25
Total cost	
Execution	

Plaintiff's Attorney,
SAMUEL HELLER.

Defendant's Attorney,
PHILIP GOODELL.

A summons in the above stated cause was issued on the 25th day of March, 1926, returnable on the 1st day of April, 1926, wherein the plaintiff demands of the defendant the sum of Three Hundred Dollars.

The plaintiff filed a state of demand March 25, 1926.

That summons was served and returned as follows:

I served the within summons March 25, 1926, on Mr. Koff, 10 Elm Street, Montclair, N. J. Mr. Koff being a salesman in charge Gassner & Ackerly

Motors, Inc. defendant by reading it to him and giving him a copy thereof.

CHARLES REILLY,
Sergeant at Arms.

The said defendant Charles McCarthy not being found, I served the within summons March 27, 1926, by leaving a copy thereof at his residence with a member of his family above the age of 14 years informing her of its contents.

CHARLES REILLY,
Sergeant at Arms.

This cause was adjourned by the plaintiff to April 16, 1926, and from time to time thereafter until September 24, 1926 and November 12, 1926.

The plaintiff appeared and the defendant appeared by their respective attorneys and submitted the case on an agreed state of facts.

Briefs submitted.

State of the case agreed upon filed.

Promissory note offered in evidence November 12, 1926.

The evidence being closed the court rendered judgment in favor of the plaintiff and against the defendant in the sum of Two Hundred Thirty-eight Dollars and Fifty Cents damages with costs whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of $238.50 damages with costs against both defendants.

December 2, 1926, Bond on appeal filed.
December 2, 1926, Notice of Appeal filed.

Exhibit P-1.

NOTE.

Do not make any corrections or erasures in note, as to do so may require it to be rewritten.

135 Claremont Avenue, Montclair, New Jersey Date Aug. 10, 1925. (Street Address of Buyer) (Town) (State)

FOR VALUE RECEIVED and without defalcation, the undersigned promises to pay to the order of the undersigned, at Appleton & Eldridge, Inc., Agent, 67 Wall St., New York (Location), the sum of $225.00/100 Two Hundred and Twenty-five 00/100 Dollars in installments as set forth in the schedule below, with interest at 6% per annum from dates of maturity only. In event of default in the payment of any of said installments the full amount then remaining unpaid, with interest thereon at the above rate from date of such default, shall be at the election of the holder and without notice or demand immediately become due and payable. The undersigned hereby waives presentment, protest, notice of protest and all benefits of valuation and exemption laws of any state. This note is negotiable and is evidence of the obligation of the undersigned under a contract of conditional sale bearing even date herewith between the undersigned as buyer and

Gassner and Ackerly Motors, Inc.
Dealer's name

BUYER Charles McCarthy L.S.
by

Owner, Officer or Firm Member.

Exhibit P-1.

DO NOT DETACH FROM NOTE.

Schedule of Payments Months After Date		Date	Amt. Paid	Balance	Schedule of Payments Months After Date		Date	Amt. Paid	Balance
				225	$25.	7			
$25.00	1	Sept. 10	25	200	$25.	8			
$25.00	2	Oct. 10	25	175	$25.	9			
$25.00	3	Nov. 10	25	150					
$25.00	4	Dec. 10	25	125					
$25.00	5	Jan. 11	25	100					
$25.00	6	Feb. 10, 1926	100	0					

ENDORSEMENT.

Charles McCarthy.
Gassner & Ackerly Motors, Inc.
by W. T. Ackerly, Pres.

Note: Exhibit P-2 as referred to in State of the Case Agreed Upon was not filed.

Stipulation.
(Filed December 11, 1926.)

NEW JERSEY SUPREME COURT.

APPLETON & ELDREDGE, INC., a New York Corporation, Plaintiff-Appellee, vs. CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC., Defendant-Appellant.	On Appeal. Stipulation.

It is hereby stipulated and agreed by and between Samuel Heller, Attorney for the plaintiff-appellee, in the above entitled cause, and Philip Goodell, Attorney for the defendant-appellant, Gassner & Ackerly Motors, Inc., that the State of the Case to be used on the hearing of said appeal be the same as the State of the Case agreed upon and filed in the District Court of the First Judicial District of the County of Essex from which this appeal is taken.

Dated Dec. 7, 1926.

SAMUEL HELLER,
Attorney for Plaintiff-Appellee.

PHILIP GOODELL,
Attorney for Defendant-Appellant,
Gassner & Ackerly Motors, Inc.

Opinion.
(Filed June 27, 1927)

No. 415, January Term, 1927.

NEW JERSEY SUPREME COURT.

APPLETON & ELDREDGE, INC., a New York Corporation, Plaintiff-Respondent, vs. CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC., Defendants-Appellants.	

Submitted January 28th, 1927; decided April 22nd, 1927.

On appeal from a judgment of the District Court of the First Judcial District of the County of Essex.

Before Justices Kalish, Katzenbach and Lloyd.

For the appellant: PHILIP GOODELL, Esq.

For the respondent: SAMUEL HELLER, Esq., and JACK E. RINZLER, Esq.

PER CURIAM.

This is an appeal from a judgment rendered by the District Court for the First Judicial District of the County of Essex in favor of the plaintiff. The appeal is taken by one of the two defendants below, Gassner & Ackerly Motors, Inc. (hereinafter called the appellant). The action was upon a promissory

note given in the purchase of an automobile. The appellant was the vendor. Charles McCarthy, the other defendant, was the purchaser. The note read as follows:

August 10, 1925.

For value received and without defalcation, the undersigned promises to pay to the order of the undersigned, at Appleton & Eldredge, Inc., Agent, 67 Wall St., New York (location), the sum of $225.00 Two Hundred and Twenty-five 00/100 Dollars in installments as set forth in the schedule below, with interest at 6% per annum from the dates of maturity only. In event of default in the payment of any of said installments the full amount then remaining unpaid, with interest thereon at the above rate from date of such default shall be at the election of the holder and without notice or demand immediately become due and payable. The undersigned hereby waives presentment, protest, notice of protest and all benefits of valuation and exemption laws of any state. This note is negotiable and is evidence of the obligation of the undersigned under a contract of conditional sale bearing even date herewith between the undersigned as buyer and Gassner and Ackerly Motors, Inc.

Dealer's name
Buyer Charles Mc Carthy, L. S.
by
Owner, officer or Firm Member

It was endorsed as follows:

Charles Mc Carthy,
Gassner & Ackerly Motors, Inc.
by W. T. Ackerly, Pres.

The agreement of conditional sale was assigned to the appellant. The note was delivered to the appellant who transferred it to the Economy Finance Company. It afterward came into the hands of the plaintiff.

The first payment was due on September 10th, 1925. It was not paid. McCarthy subsequently left the automobile on the premises of the appellant stating that he could not pay the installments. In January, 1926, payment of the entire note was demanded of the appellant by the plaintiff. The appellant stated that it would not pay the note because it had not been protested, and no formal presentment, protest or notice of protest was made until February 10th, 1926. There was then mailed and received on February 12, 1926, by the appellant a notice of protest which does not appear to have been made a part of the record.

The position taken by the court below, although no written opinion was filed, was that the provision in the note reading: "The undersigned hereby waives presentment, protest, notice of protest and all benefits of valuation and exemption laws of any state" applied to the appellant as well as to McCarthy. It was further contended that the appellant signed the note as maker. While the appellant appears to have signed the note, yet the space which was filled in by the appellant's signature merely finishes the sentence reading: "This note is negotiable and is evidence of the obligation of the undersigned under a contract of conditional sale bearing even date herewith between the undersigned as buyer and Gassner and Ackerly Motors, Inc." We are not, therefore, inclined to hold that the appellant is a co-maker with McCarthy of the note.

Opinion.

We are, however, of the opinion that the case was properly decided in the District Court, Section 110 of the Negotiable Instruments Act. (Vol. 3, C. S., p. 3747) provides that: "Where the waiver is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of the endorser it binds him only." The waiver in the note sued on was embodied in the instrument itself. It therefore follows that the appellant was liable as an endorser on the note. Crawford's Negotiable Instruments Law, p. 100; Owensboro Savings Bank vs. Haynes, 143 Ky. 534.

This view makes it unnecessary to consider the other points argued by the appellant. The judgment below is affirmed with costs.

Copy of Rule and Notice of Appeal.
(Filed July 19, 1927.)

NOTICE OF APPEAL.
(Filed July 18, 1927.)

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

APPLETON & ELDREDGE, INC., a New York Corporation, Plaintiff-Respondent, vs. CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC., Defendants-Appellants.	Action at Law. Notice of Appeal.

To Samuel Heller, Attorney of *Defendant,* or to whom it may concern:

Sir:

Please take notice that the defendant, the Gassner & Ackerly Motors, Inc., in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

PHILIP GOODELL,
Attorney of Defendant,
Gassner & Ackerly Motors, Inc.

Service of a copy of the within notice is acknowledged this 15th day of July, 1927.

SAMUEL HELLER,
Attorney of Plaintiff.

Rule of Affirmance and Remittitur.

(Entered July 2, 1927.)

NEW JERSEY SUPREME COURT.

JANUARY TERM, 1927.

APPLETON & ELDREDGE, INC., a New York Corporation, Plaintiff-Respondent, against CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC., Defendants-Appellants.	On Contract. Appeal from District Court. Affirmance.

Judgment having been entered in the District Court of the First Judicial District of the County of Essex in favor of the plaintiff and against the defendants in the sum of Two Hundred Twenty-five ($225.00) dollars, plus Four ($4.00) dollars costs, sixteen (16) cents, mileage and Eleven and 25/100 ($11.25) dollars attorney's fees, and the defendant Gassner & Ackerly Motors, Inc., having appealed to the court by notice of appeal dated November 30, 1926, and the matter having been submitted to this court in the January term, 1927, and the court having rendered its opinion affirming the judgment of the District Court,

It is, on this 2nd day of July, 1927, ORDERED that the judgment rendered herein be and the same hereby is affirmed with costs and the record be remitted to the Court below to be proceeded with according to law and the practice of said court.

Entered July 2, 1927

On motion of

SAMUEL HELLER,
Attorney.

Certificate of Clerk of Supreme Court.

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 notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

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

EDWARD J. KELLEHER,
Clerk.

(Seal.)

Grounds of Appeal.

(Filed August 16, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

APPLETON & ELDREDGE, INC., a New York Corporation, Plaintiff-Respondent, vs. CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC., Defendants-Appellants.	On Appeal. Grounds of Appeal.

The following are the reasons of the appellant, the Gassner & Ackerly Motors, Inc., for seeking a reversal of the judgment entered in the New Jersey Supreme Court, in the above entitled cause:

1. Because the appellate court erred in affirming the judgment of the District Court of the First Judicial District of the County of Essex.

2. Because the court erred in rendering judgment for the plaintiff-appellee, and against the defendant-appellant, the Gassner & Ackerly Motors, Inc., as its findings were unsupported by law.

3. Because the court erred in finding as it must have found in rendering judgment against the defendant-appellant, the Gassner & Ackerly Motors, Inc., that the provisions embodied in the face of the note constituted a general waiver which applied to the endorser and maker alike, although its very

terms expressly limited its effect solely to the maker of the note.

PHILIP GOODELL,
Attorney for Defendant-Appellant,
Gassner & Ackerly Motors, Inc.

ENDORSEMENT.

Service of a copy of the within is hereby acknowledged this 13th day of August, 1927.

SAMUEL HELLER.
Atty. of Pltf.

New Jersey Court of Errors and Appeals

APPLETON & ELDREDGE, INC., a New York corporation,
Plaintiff-Respondent,

vs.

CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC.,
Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT, GASSNER & ACKERLY MOTORS, INC.

Facts.

Suit was brought on a promissory note for $225.00 against the maker and endorser. The maker, Charles McCarthy, put in no defense. The endorser, Gassner & Ackerly Motors, Inc., defended the case on the ground that no proper notice of presentment, dishonor, and protest had ever been received by it.

The case was heard by the District Court of the First Judicial District of the County of Essex on an agreed state of facts, which is printed in the state of the case, and the verdict was given to the plaintiff without written opinion.

The main point in the case was whether protest had been waived by Gassner & Ackerly Motors, Inc., the endorser.

Gassner & Ackerly Motors, Inc., appealed to the New Jersey Supreme Court, and that Court af-

firmed the judgment, and Gassner & Ackerly Motors, Inc., has brought its appeal to this tribunal.

The note is as follows:

"August 10, 1925.

For value received and without defalcation, the undersigned promises to pay to the order of the undersigned, at Appleton & Eldredge, Inc., Agent, 67 Wall Street, New York (location), the sum of $225.00 Two Hundred and Twenty-five 00/100 Dollars in installments as set forth in the schedule below, with interest at 6% per annum from the dates of maturity only. In event of default in the payment of any of said installments the full amount then remaining unpaid, with interest thereon at the above rates from date of such default shall be at the election of the holder and without notice or demand immediately become due and payable. The undersigned hereby waives presentment, protest, notice of protest and all benefits of valuation and exemption laws of any state. This note is negotiable and is evidence of the obligation of the undersigned under a contract of conditional sale bearing even date herewith between the undersigned as buyer and Gassner and Ackerly Motors, Inc.

Dealer's name
Buyer CHARLES MCCARTHY, L.S.
by
Owner, officer of Firm Member"

It was endorsed as follows:

"CHARLES MCCARTHY,
GASSNER & ACKERLY MOTORS, INC.
by W. T. ACKERLY, Pres."

The agreed state of facts shows that it was an installment note calling for nine payments of $25.00 per month, the first one on September 10th, 1925; that the note contained a provision that the holder

reserved the right to declare the whole amount due in case of a default in any payment; that four payments being in arrear, the holder of the note, through its attorney, demanded payment of the entire balance of Gassner & Ackerly Motors, Inc., without protesting the note. This was shortly before January 25, 1926. On that date, Gassner & Ackerly Motors, Inc., through its attorney, refused payment, and gave as a reason the fact that the note had not been protested. Thereafter, on February 10, 1926, notice of protest was sent.

The note is a printed note, of which the form is peculiar. It is written in the third person. The maker is called throughout "the undersigned", and the word "maker" could be substituted in the note for the word "undersigned" without changing the sense. If changed to the first person, the personal pronoun "I" could be substituted wherever the word "undersigned" is used. The note was made payable to the maker McCarthy, and his endorsement is the first endorsement. The essential parts of the note may be paraphrased to read:

"The *maker* promises to pay to the order of the *maker* Two hundred and twenty-five dollars * * *. The *maker* hereby waives presentment, protest, notice of protest" &c.; or

"*I* hereby promise to pay to the order of *myself* Two hundred and twenty-five dollars * * *. *I* hereby waive presentment, protest, notice of protest" &c.

The Supreme Court found that Gassner & Ackerly Motors, Inc., could not be included within the term "the undersigned", and held that they were not co-makers with McCarthy.

It is safe to say that plaintiff's main point is that the note itself waived protest, relying on the words embodied in the note "The undersigned hereby

waives presentment, protest, notice of protest and all benefits of valuation and exemption laws of any state" and cites Section 110 of the New Jersey Negotiable Instruments Act:

> "Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an endorser, it binds him only."

The appellant's answer to this is that the waiver being special in form applies only to McCarthy. This is a question of law, and it is practically the only question in the case.

Other contentions of the plaintiff that the protest on February 10th was sufficient, and that there was an implied waiver by the acts of Gassner & Ackerly Motors, Inc., will also be discussed.

LAW.

The appellants were not given timely notice of dishonor and protest as required by law, nor was there an implied waiver of protest.

It is submitted that actual protest on February 10, 1926, the note having been called early in January, was ineffective, none of the reasons which permitted delay being present or claimed to be present. The notices of protest on the first three payments were at the time several months overdue.

Respondent's counsel argued in the District Court and in the Supreme Court that there was an implied waiver.

It is submitted that an implied waiver occurs "when the acts of the endorser, communicated to the holder, are such as to give the holder the right

to believe that the endorser consents that there shall be no presentment and no notice of dishonor." See Whitley on Bills, Notes and Checks, page 268, and cases cited.

The plaintiff below argued that when McCarthy abandoned the car (the purchase price of which was the consideration of the note) and stated to Gassner & Ackerly Motors, Inc., that he could not pay the installments, there was an implied waiver. It seems obvious that this action by McCarthy could not bind Gassner & Ackerly Motors, Inc. No acts whatever were attributed to Gassner & Ackerly Motors, Inc., on the subject either in the agreed state of facts or in the argument between the time when they endorsed the note and the time when they notified plaintiff's counsel that they did not consider themselves bound because the note had not been protested. Evidently the plaintiff did not consider that there was an implied or actual notice of waiver when it protested the note in February.

Plaintiff-respondent must rely, therefore, on the waiver, if such waiver existed as a matter of law.

The words of waiver contained in the note were so stated as not to affect the rights of appellant to have the note protested.

The Supreme Court has held that the waiver affected the appellant, citing Crawford's Negotiable Instruments Law, page 100 (should be page 186), and *Owensboro Savings Bank* v. *Haynes*, 143 Ky. 534. It is from this particular finding that Gassner & Ackerly Motors, Inc., are appealing.

The Kentucky case cited was based on a waiver as follows:

> "The parties hereto, including the makers and endorsers of this note, hereby expressly waive notice of protest" &c.

As there is no argument that such a general waiver is not binding on endorsers, the *Owensboro Savings Bank* case does not settle in any way the question as to whether a distinction should be made where the waiver is special or general.

Except for the *Winnebago County State Bank* vs. *Hustel,* decided by the Supreme Court of Iowa January 23, 1903, and reported in 93 N. W. 70, the appellant has not been able to find any case directly bearing on this distinction. It becomes a matter of reasoning and the application of the principles of law. The statement in Crawford's Negotiable Instruments Law, found on page 186, and cited by the Supreme Court, is practically a repetition of our statute. Section 111 in the same work, found on page 187, says:

> "But the waiver will not be extended beyond the fair import of the terms; and hence a waiver of notice of protest will not be deemed a waiver of demand"

citing the case of *Sprague* vs. *Fletcher,* 8 Oregon 367. In that case the Court said:

> "The general rule is that agreements of this character" (a waiver of notice of protest for non-payment held not to constitute a waiver of demand) "are to be construed strictly and not extended beyond the fair import of the terms thereof."

The Court, in the *Winnebago County State Bank* vs. *Hustel,* above quoted, says:

> "In construing the language of instruments, words which may reasonably be so interpreted as to aid in expressing the thought of the parties, ought not to be rejected as surplusage." 6 Amer. Rep. 673.

The addition of the words "the undersigned" in this waiver, which it is insisted confines the waiver

to the undersigned, i. e., the maker, i. e., McCarthy, should not be ignored. The usual form of waiver would have omitted them, and in that case it would not have been contended that any notice of protest to an endorser was necessary, but the parties did not see fit to omit them. An inspection of the note (Exhibit 1) would show it to be a printed form. The plaintiff-respondent bought the note, or accepted the note, from McCarthy, as the case may be, with full knowledge of its form, and failed to protest it in the regular way, and it is submitted that the force of the words "the undersigned" in the waiver should not be ignored.

The text books are not silent on the point. 8 Corpus Juris, p. 701

> "A waiver in the body of a bill or a note operates as a waiver as to the signers thereto, whether indorsers, makers, or payees, *unless it in terms expressly indicates the parties as to whom the waiver extends, in which case the waiver applies to them only.*"

and in Paton's Digest of Legal Opinions and Banking Law, published by the American Bankers Association, Vol. 2, page 2240, under Sec. 4150 (a), we find identically the same statement.

Vol. 2 of Daniel on Negotiable Instruments, 6th Ed., the chapter on Special Waivers at page 1246, par. 1092, states the general rule that where the waiver is embodied in the instrument, it enters into the contract, but adds:

> "But the word 'drawers' in a stipulation in a note that the 'drawers and indorsers severally waive presentment for payment protest and notice of protest' does not include the payee who may become an indorser but refers to the makers, including the principal and sureties."

These authorities are cited to show that the appellant's argument is not altogether a new idea.

The cases cited in 8 Corpus Juris are as follows:

Woodward vs. *Lowry,* 74 Ga. 148;
State vs. *Hughes,* 19 Ind. A. 266, 49 N. E. 393;
German-American Savings Bank vs. *Hanna,* 124 Iowa 374, 100 N. W. 57;
Phillips vs. *Dippo,* 93 Iowa 35, 61 N. W. 216, 57 Am. S. R. 254;
Bryant vs. *Lord,* 19 Minn. 396;
Central Bank, &c., Co. vs. *Hill,* 160 S. W. 1099 (Texas).

Part of these cases are cited in Paton's Digest.

In *Woodward* vs. *Lowry,* the language of the waiver was

> "Each of us, whether principal, security, guarantor, endorser, or other party hereto, waives and renounces" protest, etc.

In *State ex rel. Parks* vs. *Hughes,* the language of the waiver was

> "The drawers and indorsers severally waive presentment," etc.

and it is not strange that the Court held that it was binding.

In the *German-American Savings Bank* vs. *Hanna* case the words of the waiver were

> "the indorsers severally waive presentment," etc.

In *Phillips* vs. *Dippo,* the language of the waiver was

> "The makers, indorsers and guarantors of this note hereby waive presentment for payment, notice of non-payment," etc.

In *Bryant* vs. *Lord,* the language of the waiver was

> "the drawers and indorsers jointly and severally waive presentment for payment, protest and notice of protest," etc.

and the same way with the Texas case, *Central Bank* vs. *Hill.*

The only value of these cases is to show that the customary way to write the waiver and to have it generally binding is to have it in general terms.

This is not a new principle. It is the same principle which makes a general release become a special release when some special matter is mentioned therein.

A literal reading of the statute is dangerous. It cannot mean that any waiver whatever embodied in the note is binding on all parties. The waiver embodied in the note might be so blunt as to literally say that the maker and not the endorsers were bound by it. If the waiver by the maker alone is to be stretched to include the endorsers because of the wording of the statute, it is submitted that there is no reason why the waiver suggested in this paragraph, expressly excluding the endorsers, should not by a literal reading of the statute be held to include the endorsers also. In other words, the force of the words constituting the waiver in the note must not by application of the statute have their meaning broadened. The statute applies only where the wording of the waiver in the note can include the endorsers without violence to its meaning.

The Iowa Court in the *Winnebago County State Bank* vs. *Hustel* had before it a note reciting that the words "drawers and endorsers waive all defenses on the ground of any extension of the time for payment", and held that the words "drawers and endorsers" did not apply to either payees or subsequent endorsers, but should be construed as designating the original promissor and sureties,

and the payee (even though in the due course of business and after the utterance of the note he endorsed the same) was held to be exempt from the force of the waiver quoted.

This seems an analogous case to the one at bar, and, in the absence of any other precedent, controlling.

It was argued below that "the undersigned" applied to Gassner & Ackerly Motors, Inc., its name being written at the bottom of the note. In reply to this, it is pointed out that the verb used with "undersigned" is singular, and that Gassner & Ackerly's name appears on the face of the note only as a part of the last sentence of the note, which sentence for the fourth time in the note itself identifies McCarthy as the only possible person who could be intended by the word "undersigned" in the waiver.

This is a technical case, but important principles are involved. It is to be presumed that before endorsing the note Gassner & Ackerly Motors, Inc., read it, and when they read that only McCarthy had waived protest, it is to be presumed that they thought they would receive notice of protest should McCarthy dishonor his installments. They did not waive protest—only McCarthy. No timely protest was given, no implied protest was present, and it is insisted that the endorser Gassner & Ackerly Motors, Inc., were discharged from their liability, and that the verdict should have been originally for the defendants, and it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

PHILIP GOODELL,
Counsel for defendant-appellant,
Gassner & Ackerly Motors, Inc.

New Jersey Court of Errors and Appeals

Appleton & Eldredge, Inc., a New York corporation,
Plaintiff-Respondent,
against
Charles McCarthy and Gassner & Ackerly Motors, Inc.,
Defendant-Appellant.

Respondent's

APPELLEE'S BRIEF

FACTS

This is an action upon a promissory note of which the appellant was endorser. The note was dated August 10, 1925, and was payable in monthly installments commencing on September 10, 1925 (State of Case, p. 7). No installments were paid, and no written notice of presentment, protest or notice of protest was given until February 10, 1926.

The note was given as evidence of a debt existing under a contract of conditional sale bearing even date with the note between the maker, defendant McCarthy, and the endorser, defendant-appellant. The note and contract subsequently came into the hands of plaintiff-respondent, a purchaser for value without notice.

The maker did not contest the suit. The endorser disclaims liability upon the ground that no formal notice of protest was made until February 10, 1926, although the first installment of the said note was due on September 10, 1925.

The case was submitted to the District Court of the First Judicial District of the County of Essex on an agreed state of facts (State of Case, pp. 9-11). The court rendered judgment in favor of the plaintiff-respondent and against the defendant McCarthy and the defendant-appellant. On appeal to the January Term, 1927, of the Supreme Court the judgment was affirmed, the opinion of the Supreme Court being set forth in the State of Case (pp. 17-20).

Plaintiff-respondent submits the following:

1. The defendant-appellant waived presentment, demand and notice of dishonor by its very signature on the face of the instrument.

2. The defendant-appellant waived presentment, demand and notice of dishonor by implication.

3. The defendant-appellant is liable although no presentment and demand were made and notice of dishonor given until February 10, 1926.

LAW

I.

THE DEFENDANT-APPELLANT WAIVED PRESENTMENT, DEMAND AND NOTICE OF DISHONOR BY ITS VERY SIGNATURE ON THE FACE OF THE INSTRUMENT.

A reading of the note (State of Case p. 7) discloses the fact that a waiver of presentment, protest and notice of protest is contained on the face of the instrument. This waiver is in the following language:

> "The undersigned hereby waives presentment, protest, notice of protest and all benefits of valuation and exemption laws of any state."

Appellant's counsel's entire argument, both in the Courts below and here, is that the waiver does not affect the endorser because it provides that "the undersigned hereby waives."

C. S. 3, Sec. 110, provides (p. 3747):

> "Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of the endorser it binds him only."

Appellant seeks to limit the use of the words quoted to the party whose actual signature appears to have been affixed to the bottom of the instrument. Respondent contends, however, that the words apply also to all whose signatures appear on the instrument after the words quoted, and the trial court must have found this to be so as a matter of fact. The Supreme Court evidently joined in this view, for it considered no other phase of the case and held that the waiver was general (State of Case, p. 20).

If the words "the undersigned hereby waives" refer only to the maker, the entire waiver as contained in the instrument at bar would indeed be absolutely ineffective. The maker of a promissory note is not entitled to notice of dishonor. His obligation to pay is absolute and unqualified and is a primary obligation. C. S. 3, Sec. 60, provides (p. 3742):

> "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor."

The waiver contained in the instrument, if intended only for the maker, would be superfluous.

The liability of an endorser, however, is qualified and his obligation to pay is secondary. C. S. 3, Sec. 66, provides (p. 3743):

> "* * * he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it is dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent endorser who may be compelled to pay it."

The waiver contained on the face of the instrument would therefore apply only to the endorser. In **Owensboro Savings Bank v. Haynes**, 143 Ky. 534, it was held that a waiver inserted in the body of the paper becomes a part of the contract of the endorser as well as of the maker. (See **Crawford's Negotiable Instruments Law**, p. 186.)

Furthermore, appellant overlooks a very important provision in the note—in fact more important than the one he relies upon—the provision immediately preceding the one he refers to, to the following effect:

> "In event of default in the payment of any of said installments the full amount then remaining unpaid with interest thereon at the above rate from date of such default, shall be at the election of the holder and without notice or demand immediately become due and payable."

What is notice? C. S. 3, Sec. 109, reads as follows (p. 3747):

> "WAIVER OF NOTICE—Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied."

"Notice" in the case of a promissory note is "notice of dishonor," since by statute an endorser is only entitled to such notice. How appellant can overcome this provision in the instrument is inconceivable.

Appellant's counsel cites various authorities to the following effect:

> "A waiver in the body of a bill or a note operates as a waiver as to the signers thereto, whether endorsers, makers, or payees, **unless it in terms expressly indicates the parties as to whom the waiver extends, in which case the waiver applies to them only.**"

But a careful resume of these decisions throws absolutely no light upon appellant's contentions as they are cases in which the endorser was held liable. Appellant's case must stand or fall on one question: Did appellant have legal notice of dishonor or did it waive this notice either expressly or impliedly?

Paragraph 6 of the agreed state of facts (State of Case p. 10) states that the maker, the defendant McCarthy, after returning the automobile to the appellant, "gave * * * as his reason for the return of the car that he could not pay the installments" and further sets forth that the automobile is still outside the premises of appellant. Could appellant have better notice than an actual statement made to it and the acts accompanying, showing an absolute intention?

Where an endorser or drawer informs the holder that the drawee, acceptor or maker, as the case may be, will be unable to pay when the instrument becomes due, there is a waiver of demand unless it is otherwise provided by statute. 8 C. J. p. 703. So where a drawer of a check withdraws his funds and told the payee that the check would not be paid. **Sutcliffe v. McDowell,** 11 S. C. L. 251, **Los Angeles National Bank v. Bank of Wallace,** 101 Cal. 478, 37 P. 197.

II.

THE APPELLANT WAIVED PRESENTMENT, DEMAND AND NOTICE OF DISHONOR BY IMPLICATION.

C. S. 3, Sec. 109, provides (p. 3747):

> Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice and the waiver may be express or implied." '

The waiver may be either verbal or in writing. **Smith v. Lownsdale, 6 Oregon,** 78.

Nor is it necessary that the waiver should be direct and positive. It may result from implication or usage or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. **Cady v. Bradshaw,** 116 N. Y. 188, 191.

A reading of the note will indicate that it was given as evidence of an obligation existing under a contract of conditional sale bearing even date with the note. This contract was for the purchase and sale of an automobile, the same car which was returned to the appellant, and when the car in question was returned to it and nothing done or said by it with respect thereto (Sate of Case, p. 10), could any clearer case of a waiver be made out? And to indicate that this same set of facts had existed before it is clearly set forth in the agreed state of facts (State of Case p. 11, folios 1-10) that under similar circumstances the appellant had made payment of a note in another case where it was endorser.

Then to establish an implied waiver respondent submits the following circumstances:

1. A promissory note given as evidence of a debt under a contract of conditional sale of an automobile.
2. The automobile returned by the buyer to the conditional vendor (appellant) with the statement that he could not pay the installments.
3. Automobile remaining in the possession of the appellant.
4. Similar circumstances in another case indicating that it was customary that this be done.

In any event it is a question for a jury or for a

trial judge sitting without a jury to determine as a question of fact whether or not there had been a waiver by implication. Certainly the court would be justified in concluding that as a matter of fact there had been such a waiver.

III.

TH DEFENDANT-APPELLANT IS LIABLE ALTHOUGH NO PRESENTMENT AND DEMAND WERE MADE AND NOTICE OF DISHONOR GIVEN UNTIL FEBRUARY 10, 1926.

The note specifically provides for payment in installments. It further provides that in the event of default in the payment of any installment the entire amount shall become due **at the option of the holder.** The plaintiff was therefore under no obligation to protest the entire amount of said note unless it sought to exercise that option. That option could have been exercised according to the terms of the note on the due date of any installment. If this was done after four, five or six installments were due the option is exercised. Appellant cannot choose by the very terms of the instrument at what time the presentment and demand should be made and notice of dishonor given.

Appellant's counsel argues that the protest in February had no binding force, but cites no authorities for his contention. The note indicated the installments by which it was to be paid and left it to the choice of the holder as to when the full amount should become due and payable in the event of default in any one installment. In other words, in the event of a default it became a demand note. And when plaintiff's attorney addressed a letter calling for payment of the full amount it did not exercise its option, but merely gave notice to the endorser that the note had not been paid and that the plaintiff would exercise the option contained in the note, so that when the presentment and demand were made and the notice of dishonor was given the plaintiff then exercised the option contained in the said note. It was these acts which were necessary to complete the exercise of the option. So that if the court finds that the plaintiff did not waive, either expressly or impliedly the formal presentment, demand and notice of dishonor the protest of February 10, 1926, was sufficient.

Respectfully submitted,

SAMUEL HELLER,

Solicitor of Plaintiff-Respondent.

JACK [redacted]. RINZLER,

Of Counsel.

New Jersey Court of Errors and Appeals

APPLETON & ELDREDGE, INC., a New York corporation,
Plaintiff-Respondent,

vs.

CHARLES MCCARTHY and GASSNER & ACKERLY MOTORS, INC.,
Defendants-Appellants.

REPLY BRIEF FOR APPELLANT, GASSNER & ACKERLY MOTORS, INC.

Respondent makes three points. The first is the main point, that under the statute the endorsement waived the notice. He cites the case of *Owensboro Savings Bank* v. *Haynes,* 143 Ky. 534, which has already been distinguished as being a case where the waiver was general.

Respondent sets up another paragraph of the note:

> "In event of default in the payment of any of said installments the full amount then remaining unpaid, with interest thereon at the above rate from date of such default, shall be, at the election of the holder and without notice or demand, immediately become due and payable."

This he attempts to argue is another waiver of notice of protest, that it is not special in form, and therefore is binding on the endorsers. It is insisted that this cannot possibly be construed as a waiver of notice of protest, simply a consent that in case

of default in any of the $25.00 payments the whole balance shall become due and be at once payable, at the election of the holder, so that the holder could present the note at the proper place for payment in full, without notice that he was going to do so, and if it was not paid immediately begin suit against the maker and anyone else who is liable on the note, but this does not waive protest on the part of those entitled to protest. It simply waives any opportunity on the part of the maker, or others who might wish to do it, to pay the installment in default and thus restore the privilege of waiting until future dates to make the balance of the payments.

Let us suppose for a minute that there was no other provision in the note waiving protest. How could the respondent possibly contend that this was a waiver of protest of the note by those entitled to the same? He did not raise the point below.

He argues that the return of the automobile by McCarthy, because he could not pay future installments, was an implied waiver of protest by the defendant-appellant. It is respectfully urged that this argument is not sound, if for no other reason than the fact that the appellant was entirely passive in the matter. It is true that they learned that McCarthy did not, when he returned the car, intend to make future payments, but that was only an indication of his state of mind. It does not seem that it could possibly be argued that his action in bringing the car there, and his imparting that information, amounted to a waiver on the aprt of Gassner & Ackerly Motors, Inc. Respondent quotes from 8 Corpus Juris, 703, but that quotation applies only where the endorser informed the *holder* that he could not pay, and the text states that such action is a waiver of demand. This quotation does not attempt to state law that is binding on the

endorser. It is conceded that the maker, "the undersigned", had, and he alone had, in the face of the note waived notice of demand.

Respondent further argues in his last point that since calling the note for the unpaid installments was at the option of the holder and that he protested the note in February, that protest marks the date when payment of the balance was called for, and therefore the protest in February was timely. In reply to this it should be noted (1) that by February five installments had already fallen due, and if protest was necessary, there was no protest as to them; (2) that the state of the case shows that the note as a whole was called for payment in January. Even though the holder had the option of calling it or not, after he had once exercised his option the note was due and protest fifteen days later could avail the holder nothing.

It is again respectfully submitted that the Montclair District Court and the New Jersey Supreme Court erred in holding that protest had been waived by anyone but the maker.

Respectfully submitted,

PHILIP GOODELL,
Attorney for Defendant-Appellant,
Gassner & Ackerly Motors, Inc.