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10

DISTRICT COURT SUMMONS.

City of Passaic,
County of Passaic. } ss.

To wit: THE STATE OF NEW JERSEY, To Sergeant-at-Arms of District Court or any Constable of said County: 20

SUMMON:

(L. S.) MICHAEL BLANDA

to appear before the DISTRICT COURT OF THE CITY OF PASSAIC, to be held at the District Court Room, in the Municipal Building, corner of Howe Avenue and Prospect Street, in the said City, on the first day of December, A. D., 1915, at ten o'clock in the forenoon, to answer unto Consolidated Gas & Gasoline Engine Co., a corporation, in an action on Contract, Demand Five Hundred Dollars. Hereof fail not. 30

Witness, W. CARRINGTON CABELL, Esquire, Judge of said Court, at Passaic, aforesaid, the 24th day of November, in the year of our Lord, One Thousand Nine Hundred and Fifteen. 40

T. M. BUSTARD,

Clerk

10 **PASSAIC DISTRICT COURT.**

Summons in an action of contract.

Consolidated Gas & Gasoline Engine Co., a corporation,
Plaintiff,
vs.
Michael Blanda,
20 Defendant.

Demand $500.00
Costs 2.10

Returnable December 1, 1915.

Served this summons November 26, 1915, by reading the same to the defendant, and delivering to him a copy thereof.

DOMINICK DE MURO,
30 Sergeant-at-Arms.

Passaic District Court.

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 of summons.

40 Yours, etc.,

HERMAN C. RUST,
Attorney of Plaintiff.

To the within named Defendant or whom it may concern.

Passaic, N. J., Nov. 24, 1915.

Filed Nov. 24th 10

PASSAIC DISTRICT COURT.

Consolidated Gas & Gasoline Engine Co., a corporation, Plaintiff, vs. Michael Blanda, Defendant.	On Contract, State of Demand.

20

The plaintiff demands of the defendant the sum of Five Hundred Dollars on a contract of which a true copy is hereto attached.

Judgement will be claimed for the sum of Two Hundred and Fifty Dollars with interest and costs of suit.

HERMAN C. RUST,

Attorney for Plaintiff. 30

To Consolidated Gas & Gasoline Engine Co., New York City. Dated, New York City.

January 27th, 1915.

You will please ship to Michael Blanda, at Passaic, New Jersey, when———, or as soon thereafter as possible, one 10 H. P. Excelsior (Used at Syracuse) Engine, and the following extras: One pully for deep well pump; one pully for generator, and magnate with belt in-separate coil with gas attachment. 40

Total price, $250.00.

Cash herewith to bind contract; check, $25.00.

Balance to be paid as follows after 30 days.

Above engine is guaranteed to me by the Manufacturers and as per Guarantee in their catalogue Delivery f. o. b. cars factory. This

10 order is not subject to cancellation and their are no agreements or understanding other than mentioned in the above all verbal agreements of any name or nature are merged in this contract as above written.

Approved: Consolidated Gas and Gasoline Engine Co.

By (Signed) MICHAEL BLANDA.

20 L. F. City, State,

Street.

Full title and ownership of articles mentioned in this agreement to remain in and with the Consolidated Gas & Gasoline Engine Co., or assignees, till all payments are made with interest, and said mentioned goods to not become a fixture by reason of being attached to
30 or made part of any land, building, etc.

40

Filed Dec. 9th 10

PASSAIC DISTRICT COURT.

Consolidated Gas & Gasoline Engine Co., a corporation, Plaintiff, vs. Michael Blanda, Defendant.	On Contract, Notice of Appeal.

20

To The Consolidated Gas & Gasoline Engine Co., a corporation, or Herman Rust, its attorney:

SIR:

Take notice that the defendant, Michael Blanda, hereby appeals to the New Jersey Supreme Court from the judgment of the Passaic District Court rendered in the above stated action on the eigth day of December, nineteen hundred and fifteen. 30

WEINBERGER & WEINBERGER,

Attorneys of Defendant.

40

10 **PASSAIC DISTRICT COURT.**

Consolidated Gas & Gasoline Engine Co., a corporation, Plaintiff, vs. Michael Blanda, Defendant.	In an Action upon Contract, Transcript of Judgment Record.

20

1915. November 24th—Summons was issued in the above stated cause, returnable December 1st, 1915, at ten o'clock A. M. and was returned by the Sergeant-at-Arms as follows:—

1915. November 26th—Served this summons by reading the same to the defendant and delivering to him a copy thereof. D. De Muro, Sergeant-at-Arms.

30 1915. November 24th—Plaintiff filed state of demand.

1915. November 30th—Demand for venire dated November 29th, received November 30th, together with jury fees in the sum of Five Dollars and Seventy-Five Cents.

1915. Dec. 1st—Listing.

1915. Dec. 1st—Adjourned to December 8th, 1915.

40 1915. Dec. 8th—Hearing by court.

1915. Dec. 8th—Administered oath to John C. Barbour, Stenographer.

1915. Dec. 8th—Motion for jury denied because it should have been made two days before return day.

1915. Dec. 8th—Adjourned, denied exception by defendant.

1915. Dec. 8th—Administered oath to James A. Scanlon, P. 10

1915. Dec. 8th—Exhibit P-1 Bill of Lading in evidence.

1915. Dec. 8th—Receipt offered in evdence.

1915. Dec. 8th—Administered oath to Michael Blanda, Def.

1915. Dec. 8th—Administered oath to Chas. O'Neil, Def. 20

1915. Dec. 8th—Administered oath to Geo Leitwin, Def.

1915. Dec. 8th—Judgment for $225.00 for plaintiff.

1915. Dec. 9th—Defendant atty. Weinberger & Weinberger filed notice of appeal.

I Thomas M. Bustard, Clerk of the District Court of the City of Passaic, W. Carrington Cabell, Esq., Judge, do hereby certify that the foregoing is a true copy of the Summons, State of Demand, Transcript of Judgment, and Notice of Appeal of said Court. 30

IN WITNESS WHEREOF I do hereby set my hand as Clerk of said Court and affix the seal of said Court this 21st day of December, Nineteen Hundred and Fifteen.

40

T. M. BUSTARD,

Clerk.

10 **NEW JERSEY SUPREME COURT.**

Consolidated Gas & Gasoline Engine Co., a corporation, Plaintiff, vs. Michael Blanda, Defendant.	On Contract, Specifications.

20 The defendant is dissatisfied with the judgment rendered in the above cause for the following reasons and assigns the same as error:

1. The Court erred in refusing the defendant the right to a trial by jury.

2. The Court erred in holding that an application for a trial by jury must be made two days before the return day.

30 3. The Court erred in refusing to non-suit upon motion of the defendant.

4. The Court wrongfully refused an adjournment thereby prejudicing the rights of the defendant.

5. The Court erred in proceeding to try said action without a jury, in view of the fact that the defendant demanded a trial by jury at least
40 two days before the time fixed for trial accompanying the said demand with the statutory fee.

6. The Court erred in permitting certain testimony, to wit:

(a) the introduction of the contract which had not been properly proved,

(b) testimony relating to a bill of lad-

ding which was never introduced in evidence, 10

(c) testimony secondary in character as to the delivery of the machine.

7. The Court erred in refusing to non-suit for the following reasons:

(a) Insufficiency of evidence to establish a prima facie cause at the close of the plaintiff's case.

20

(b) No proof showing a compliance with the written order upon which suit was instituted.

8. The Court in denying the defendant the right of a trial by jury, in view of the compliance in all respects with Section 149 of the District Court Act, confiscated property rights and Constitutional right of the defendant.

9. The Court in proceeding to dispose of the subject matter made the basis of the above entitled action without a jury, acted in derogation of paragraph four, section seven, article four of the State Constitution. 30

10. That the said judgment is defective, illegal and contrary to law in divers other respects and should be set aside and a new trial granted.

WEINBERGER & WEINBERGER, 40

Attorneys of Defendant-Appellant.

TESTIMONY.

BY MR. WEINBERGER:

I move at this time, your Honor, that we be

10 given the privilege to try this case by a jury in view of the fact that we have conformed to section 149 of the District Court Act which provides that a trial by jury may be had any time before the fixed trial day by giving two days' notice in writing to the Clerk accompanied by the regular amount required by law for the empanelling of a jury. The Notice was served and filed with the Clerk. The Notice was not filed by the Clerk of our District Court but was left
20 with him on the thirtieth day of November, 1915.

BY THE COURT:

And that is the Notice? (Designating a paper).

MR. WEINBERGER:

Yes, sir.

30

BY THE COURT:

Let the stenographer copy the notice into his record.

BY MR. WEINBERGER:

I would like to have it noted also on the record that this case was an adjourned case from the first day of December until today, the
40 eighth.

BY THE COURT:

The Court denies your motion because you have not given the notice required by statute.

BY MR. WEINBERGER:

I take an exception to your Honor's ruling.

NEW JERSEY ~~SUPREME COURT~~ Court of Errors and Appeals.

Consolidated Gas & Gasoline Engine Company, a corporation, Plaintiff Appellee,	:	
-vs-	:	Brief of Appellant.
Michael Blanda, Defendant Appellant.	:	

Statement of Facts.

This was an action brought to recover the sum of Two Hundred and Twenty-five Dollars, on a contract for the sale of one ten-horse power engine sold by the plaintiff to the defendant on the twenty-seventh day of January, nineteen hundred and fifteen. Suit was instituted on the twenty-fourth day of November, nineteen hundred and fifteen, and the summons made returnable on the first day of December, nineteen hundred and fifteen. On the thirtieth day of November, a demand was filed with the clerk of the Passaic District Court requiring the summoning of a jury of twelve men, together with jury fees of Five Dollars and Seventy-five Cents.

See state of case, page 13, and also transcript of judgment, page 8, line 32.

On the first day of December, the case was adjourned until the eighth day of December, On that day a motion was made by the attorneys for the defendant, insisting that the court had no right to try said action without a jury, in view of the fact that the defendant had in all respects complied with Section 149 of the District Court Act. The motion of counsel was overruled and a jury denied on the theory that application for jury should have been made two days before the return day.

See transcript of judgment, page 8, line 43.

The Court thereupon proceeded to hear the evidence and determine the cause without a jury, over objection of counsel for the defendant, and rendered a judgment in favor of the plaintiff and against the defendant, in the sum of Two Hundred and Twenty-five Dollars.

See state of case, pages 11, 12 and 13.

This judgment was affirmed by the Supreme Court under the theory that a notice in writing to the clerk that the party demands a venire for a jury to try the cause on a specified date which was the return day of the summons, is not operative as a general demand of a jury trial on any date whereon such trial is held. With this contention we disagree.

A R G U M E N T I.

A NOTICE STATING A SPECIFIC DATE WOULD SURELY BE OPERATIVE WHERE BY CONSENT OF BOTH PARTIES, THE CASE IS ADJOURNED.

On the first day of December, nineteen hundred and fifteen, by consent of both parties, we find this case was adjourned until December eighth, nineteen hundred and fifteen.

See state of case, page 8, line 39.

We also find that jury fees, in accordance with the statute, was paid, Five Dollars and Seventy-five Cents, for the calling of a jury, which moneys have not been returned, and are still in the hands of the clerk.

See state of case, page 8, line 33.

It is also undisputed that the Court denied the right to a trial by jury, because the demand should have been made two days before the return day.

See state of case, page 8, line 44.

This was the rule which the Passaic District Court made in application for jury trials. The Court held that it was necessary and essential to make a demand for a jury at least two days before the return day. Notice was never challenged. There is nothing in the

record to indicate that the notice was ever challenged. We were absolutely astounded to learn that the Supreme Court should have decided the case on the point that it did. The Supreme Court, speaking through Mr. Justice Parker, in its opinion, states the rule of law to be, "That a demand for a trial by jury for acspecific date, would necessitate, in the event of an adjournment, a new demand being made". Our contention is that any error which may have existed in the notice would have been cured by an adjournment, which was mutually agreed to by counsel. But in this case, the payment of the jury fees and the retention thereof by the clerk, and the approval of the adjournment by the Court, surely establishes a case where the appellant would clearly be entitled to a trial by jury.

It is our contention that the phraseology referring to the date is absolutely surplusage. The only question involved is "Was there a demand made for a trial by jury, accompanied by the statutory fees?" It may be well at this point to give the notice filed in this case.

To Thomas M. Bustard, Clerk of the Passaic District Court.

You will hereby take notice, that the undersigned attorneys of the defendant demand and you are hereby required to issue a venire of twelve men to hear the issue in the above entitled matter on Wednesday, the

first day of December, nineteen hundred and fifteen.
Dated, November 29th, 1915.

Weinberger & Weinberger,
Attorneys of defendant.

The Supreme Court holds that the above notice would have been a perfectly valid compliance with the Act and that the appellant would have been entitled to a trial by jury, if he had stopped after the word "matter" and said nothing more. With this, we must disagree, because our contention is that where a demand for a jury has been made, and the fees accompanying the same are in accordance with the statute, the Court ipso facto is ousted from jurisdiction, and is necessarily compelled to have this cause tried by a jury. The Clerk had notice on the first day of December that the case was to be tried on the eighth day of December. It will be presumed that an adjournment entered in the records of the Court, is a sufficient notice to apprise the Clerk of the fact that the case would be tried on the eighth day of December. This notice, coupled with the fact that he retained the fees, would unquestionably entitle the appellant to a trial by jury. The appellee consented to the adjournment. Any defect which would have existed in the notice would have been cured by an adjournment.

It is almost inconceivable that this court would deprive a man of a trial by jury, where a notice has been given alleging a specific date, consent

of the opposing party is had to an adjournment, the Court approves of the adjournment and fixes the trial day, the jury fees are paid and retained by the clerk, he makes an entry of such adjournment in his records, and the Court upon the trial day denies the right to such trial, not because the notice is defective, but because of the fact that the notice was not made two days before the return day. There is nothing in Section 149 which demands that a written demand be made, and we fail to see where it was necessary to give a new written demand.

The point involved is one of first impression in this state, and we are of the opinion that the appellant should not be denied a constitutional privilege, in view of the circumstances above mentioned. The result is that for the error complained of, the judgment rendered in the above entitled cause, and affirmed by the Supreme Court, should be reversed and a new trial by jury awarded the defendant-appellant.

Very respectfully submitted,

Weinberger & Weinberger
Attorneys of appellant.

Harry H Weinberger
Of Counsel.

NEW JERSEY ~~SUPREME COURT.~~ Court of Errors & Appeals

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Consolidated Gas & Gasoline Engine Company, a corporation,

Plaintiff
Appellee,

-vs-

Michael Blanda,

Defendant
Appellant.

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Brief of Appellant.

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Weinberger & Weinberger, Esqs
Attorneys of Appellant,
50 Second St., Passaic, N. J.

Filed Nov. 30th 10

PASSAIC DISTRICT COURT.

Consolidated Gas & Gasoline Engine Co., a corporation, Plaintiff, vs. Michael Blanda, Defendant.	On Contract, Venire.

20

To Thomas M. Bustard, Clerk of the Passaic District Court.

You will hereby take notice, that the undersigned attorneys of the defendant demand and you are hereby required to issue a venire of twelve men to hear the issue in the above entitled matter on Wednesday, the first day of December, ninteen hundred and fifteen. 30

Dated, November 29th, 1915.

WEINBERGER & WEINBERGER,

Attorneys of Defendant.

GEORGE H. SCANLON, a witness produced on behalf of the plaintiff herein, being first duly sworn according to law, on his oath testifies as follows: 40

DIRECT EXAMINATION, BY MR. RUST:

Q. What is your business, Mr. Scanlon?

A. Selling gas and gasoline engines.

Q. For the Consolidated Gas Company?

A. Yes, sir.

10 Q. Do you know Mr. Michael Blanda, the defendant?

A. I do.

Q. Did he call at your place of business?

BY THE COURT: Are you employed by the Consolidated Gas Co.?

A. I am the president of the company.

20 Q. You saw Mr. Blanda there?

A. Yes, sir.

Q. And what did Mr. Blanda ask you for?

A. Mr. Blanda had some business with me before. I had sold Mr. Blanda a pump along in the summer——

30 BY MR. WEINBERGER: I object to that, it is not responsive.

Q. What did Mr. Blanda say he wanted?

A. He said he wanted to buy an engine.

Q. Did you show him one?

A. I showed him quite a few.

40 Q. Did he select one?

A. He selected one.

Q. What did he say?

A. We talked more or less about the price and finally he made an offer.

Q. What was the offer?

A. Two Hundred and Fifty Dollars.

Q. Did you then enter into a contract with Mr. Blanda? 10

A. He did.

Q. Did he sign it?

A. Yes, sir.

Q. Is that Mr. Blanda's signature? (Showing witness paper).

A. Yes, sir. 20

Q. Is that the contract you entered into?

A. Yes, sir.

BY MR. RUST: I offer it in evidence.

BY MR. WEINBERGER: I object to it, your Honor, on the ground that it is not properly proven. 30

BY THE COURT: You saw Mr. Blanda sign it?

A. Yes, sir.

BY THE COURT: Admitted. Marked Exhibit P-1.

BY MR. WEINBERGER: I take an exception. 40

Q. Mr. Scanlon, how much is due on that contract?

A. Two hundred and twenty-five dollars.

Q. $225 still due?

A. Yes, sir.

10 Q. That engine, was that shipped—how was the terms of the engine—where was it supposed to be shipped to?

MR. WEINBERGER: I object; the contract speaks for itself, your Honor.

BY THE COURT: Is it a matter in the contract? If it is a matter in the contract it is not a subject for oral testimony. Is it a matter
20 provided for in the contract? It is objected to on the ground that it is in the contract.

A. The contract says delivery F. O. B. cars factory.

Q. That's all.

CROSS EXAMINATION, BY MR. WEINBERGER:

30

Q. What is your business?

A. I sell gas and gasoline engines.

Q. Are you incorporated?

A. Yes, sir.

Q. Have you a license to do business in New Jersey?

40 A. No.

Q. Who was present at the time this contract was signed?

A. I was.

Q. Who else?

A. Nobody else; don't have but one president.

Q. Where was this engine at the time you made this contract? 10

A. In the store.

Q. In the store; on the floor?

A. Yes, sir.

Q. Exposed to view?

A. Yes, sir. 20

Q. Did you send that engine?

A. Yes, sir.

Q. You personally?

A. Let me understand you.

Q. Who packed that engine?

A. The man who does that. 30

Q. Is he here in court?

A. No.

Q. All you know is that you gave orders to send that engine?

A. I saw it go on the wagon and go out.

Q. Did you see it packed? 40

A. I was around the store while it was being packed.

Q. Did they do the the packing the same place?

A. Yes, sir.

Q. What are your duties as president?

10 A. Anything that is proper; sell engines, direct affairs of the company; so on.

Q. Do all this at one time?

A. Only one thing at a time.

Q. When was this packed?

A. First day of February, I think.

20 Q. Have you any records?

A. Bill of lading.

Q. Have you your books here in court?

A. Yes.

Q. Where are your books?

A. Right on the chair there.

30

Q. Who got this receipt from the expressman?

A. The truckman.

Q. Were you there?

A. No, sir.

Q. Who addressed the package, the box and
40 all?

A. The shipping clerk.

Q. You weren't there?

A. I was in the store.

Q. You didn't see him do this?

A. No, sir.

Q. You didn't see him put that engine on the wagon either, did you? 10

A. Yes, sir.

Q. After it was all packed?

A. Yes, sir.

Q. Packed up—wrapped up?

A. Crated; two boards on the side and two on the top, and the package is easily viewed by anybody. 20

Q. Are there any engines similar to that in your place of business?

A. Similar in what respect?

Q. Similar. Didn't you ever see an engine like it?

A. Yes, sir. 30

Q. Have you any other engines like that in your place?

A. Only one engine of a size.

Q. Ever sell any engines to anyone else?

A. Lots of them.

Q. Sell any engines on the same day? 40

A. I don't know.

Q. Have you your records to show who you did sell your engines to on that day?

A. No, sir.

Q. Is this a new engine?

10 A. No.

Q. Did you tell him it was new?

A. No.

Q. Did you sell it for new?

A. No.

Q. What did you have it on hand for, sec-
20 ond-hand?

A. Both.

Q. Wasn't it a new machine for demonstrating?

A. No.

Q. One you had been using for demonstrating there?

30 A. No.

Q. Didn't you tell Mr. Blanda that?

A. No; I told him it was second-hand. I gave him a special price because it was second-hand.

Q. Didn't you tell him it was a demonstrating machine?

40 A. It was used at the Syracuse Fair for demonstrating one week.

Q. Did Blanda see you on the day following the shipment?

A. No.

Q. How many days after?

A. Three, four five.

Q. Might have been two days? 10

A. No; I remember it was several days.

Q. What did Mr. Blanda say on that day?

A. First time I see him afterwards I made him a quotation on a generator which was to be used in connection with this engine——

BY MR. WEINBERGER: I ask it to be stricken out. 20

A. You didn't ask me anything about the engine.

MR. WEINBERGER: I withdraw the question.

Q. Did Mr. Blanda tell you that was not the machine he ordered?

A. Never; not at that time or any other time. 30

Q. Didn't he come there with anybody?

A. No, sir; never with anybody.

Q. Do you mean to tell the Court he didn't come there with a certain gentleman?

A. No, sir.

Q. At the time he bought it was he with anybody? 40

A. No, sir; alone.

Q. Have you a signed receipt?

A. Yes, sir.

Q. Where is it?

10 MR. RUST: Right here.

Q. Do you know whether Mr. Blanda ever received that machine?

A. Yes, sir.

Q. Have you his signature for it?

A. We have a copy of the Erie Railroad's receipt.

20 Q. Have you that here?

A. Yes, sir.

Q. With Mr. Blanda's signature?

A. The Erie Railroad Company gave me that as the express company that took it.

Q. Is Mr. Blanda's signature on here?

30 A. No; that is the express company who hauled the engine.

Q. I asked you if you had Mr. Blanda's receipt.

A. That is the receipt that the Erie Railroad Company took for the delivery of that.

Q. Have you a receipt from the Erie Rail-
40 road Company with Mr. Blanda's signature?

A. That is the only receipt we have. The bill of lading is our receipt.

Q. That is your receipt that you sent it?

A. Yes, sir.

Q. What is the price of a new engine of that type?

A. $350.00. 10

Q. How long was this engine used?

A. One week.

Q. Didn't Mr. Blanda come to you two days after and say that he didn't order this machine, that it was a different machine?

A. No. He came to me three days later for a generator to use with this engine. He told 20 me he had decided to use a generator. He told me he had made a reduction with the Public Service for the lights, so would use the engine for the pump.

Q. Didn't you say to Mr. Blanda: "Mr. Blanda, it is a mistake; we will rectify it"?

A. Never; Mr. Blanda never made the state ment that it was not the engine. The engine 30 speaks for itself.

Q. That's all.

RE-DIRECT EXAMINATION, BY MR. RUST:

Q. Is this the bill of lading? (showing witness paper).

A. That is the bill of lading. 40

MR. RUST: If your Honor please, if there is no objection I offer it in evidence.

MR. WEINBERGER: I object; I don't see the relevancy. No proof that Mr. Blanda ever received that machine. It is not properly proven.

10 BY THE COURT: It is relevant; the Court overrules the objection.

BY MR. WEINBERGER: I ask an exception on the ground that it is not properly proven.

BY THE COURT: You objected on the ground of relevancy and the Court overrules the objection, but then you object on the
20 ground that it is not properly proven.

Q. What is that paper which you have there?

A. That is a bill of lading signed by the freight agent of the Erie Railroad——

BY MR. WEINBERGER: I object.

30 BY THE COURT: How did you get that?

A. That was delivered back to us by the truckman. When we pay the truckman every Monday morning he delivers the bills of lading to us as vouchers for his payment.

Q. That's all.

BY MR. RUST: I want to put it in evidence.

40 BY MR. WEINBERGER: I object on the ground that it is not properly proven.

BY THE COURT: Objection sustained.

BY MR. WEINBERGER:

I would like to ask at this time, your Honor, for a non-suit, first on the ground that there is no proof here to show that Mr. Blanda received

that machine; that there is no evidence to show that the goods were delivered to the proper place; and that they were signed by the party to be charged in writing, or that there was any acceptance on the part of anyone duly authorized by Mr. Blanda. 10

BY THE COURT:

Motion denied.

BY MR. WEINBERGER: 20

I take an exception.

MICHAEL BLANDA, the defendant herein, being first duly sworn according to law, on his oath testifies as follows:

DIRECT EXAMINATION, BY MR. WEINBERGER:

Q. Mr. Blanda, what is your business? 30

A. My business is liquor.

Q. How long have you resided in the City of Passaic?

A. Twenty years.

Q. Do you know Mr. Scanlon?

A. Yes, I do. 40

Q. Do you remember having a conversation with him at his place of business with reference to buying this engine?

A. Yes, sir; I went to this man's place and I took a man with me that he is expert in that line of business.

Q. Is that man in court?

10 A. Yes, sir. I went there with this man and I picked out the engine on the floor. That engine I offer to him $250, but when I received the engine from the store the engine was not worth $50. Engine stays in the yard and anybody could see what it is worth. They didn't deliver it on my property.

Q. Is that the engine that you ordered?

A. No, that ain't the engine what I ordered.
20 The engine what I ordered was good.

Q. Did you tell Mr. Scanlon three or four days after——

A. Right on second day take automobile from here to his office.

Q. Who did you go with?

A. Got man here.

30

Q. What did you do?

A. I say that not the engine what I bought. He say "All right, Mr. Blanda, I fix it; I send engine," but never sent any.

Q. Did you ever receive that engine—did you ever sign a paper for the express company?

A. No, sir.

40

Q. Where is that engine?

A. Suppose in the same place.

Q. Did you ever atuhorize anybody to sign your name?

A. No, sir.

Q. Is that the engine you ordered?

A. That is not the engine I ordered. 10

Q. That's all.

CROSS EXAMINATION, BY MR. RUST:

Q. Who ordered the expressman to go get the engine?

A. The contract is for itself.

20

Q. Do you know Mr. Bromberg, the expressman?

A. Yes, sir.

Q. Did you ever order him to get it?

A. Never have anything to do with the engine because they were supposed to deliver it to my place; it was free delivery from their place.

30

Q. By the Erie Railroad?

A. I don't know how it was sent by Erie Railroad.

Q. Mr. Blanda, you say that that is not the engine you ordered?

A. No, sir; that is not the engine what I ordered.

40

Q. What is the difference—did you examine the engine that you got—did you examine this engine that Mr. Scanlon sent to you?

A. Two examine it and stand by it an hour and a half.

Q. I mean down by your place where the engine is, did you examine that engine?

10 A. Yes, sir.

Q. You say that is not the engine you ordered?

A. No, sir.

Q. What is the difference?

A. Same difference when buy shoes and wear whole year——

20 Q. What is the difference?

A. One engine was practically new engine, and this engine run for years. All paint off and machine wore out, wore out and dirty.

Q. When you examined it, what parts were worn?

A. All the way through.

30 Q. What parts—mention the parts.

A. I couldn't mention the parts.

Q. Do you know anything about the parts?

A. Yes, I didn't have to take the engine apart because that is not the engine what I bought.

40 Q. What parts are worn? You say that the engine that you received was worn. What parts are worn?

A. You said that worn. It is different second-hand engine. You can tell different from second-hand engine.

Q. You said that the engine you received had been used for a number of years, that it was dirty and worn—what parts were worn?

A. That ain't engine part. 10

Q. You mean to tell the Court that by looking at the engine you can tell the Court what condition it is in?

A. I want to tell the Court it was a second-hand engine.

Q. Is that the contract you signed? (Showing witness Exhibit P-1). 20

A. That is the contract.

Q. Did you read the contract before signing —what does it say in the contract; "one used engine"——

A. It says only demonstrating and you know it only use new engine for demonstrating.

BY THE COURT: Why argue? There is the contract which speaks for itself. The counsel very properly objects. 30

Q. Couldn't you tell us where that engine was worn?

OBJECTED TO. Objection overruled.

A. I ain't going to take the engine apart.

Q. Did you take the engine apart? 40

A. It is like a different coat——

BY THE COURT: Answer the question.

A. I didn't look at the inside of the engine but outside of the engine I can tell. The only one day I bought it and the engine was shipped in two days. I have it in my place and it was different color engine.

10 BY THE COURT: It seems he is unable to answer your question.

Q. Mr. Blanda, did you engage Mr. Bromberg?

MR. WEINBERGER: I object; it is repetition.

A. No, sir; I didn't. Bring him in.

20 BY THE COURT: Ask your question.

Q. Did you engage the expressman, Mr. Bromberg, to get that engine for you?

A. No, sir, I didn't.

Q. You did not?

A. No, sir.

30

Q. Did anybody under your employ?

A. No, sir; nobody.

Q. Where is the engine now?

A. On Rosenteur's property on Fifth Street.

Q. And you saw the engine there?

40 A. I did; yes, sir.

Q. Why, Mr. Blanda, you contracted for this engine in February, last year, 1915, this year.

A. Yes, sir.

Q. Why did you keep that engine practically for ten months if it was not the engine that you ordered?

BY MR. WEINBERGER: I object. 10

A. I give him a deposit of twenty-five dollars——

BY MR. WEINBERGER: I object to it, your Honor, any reason he might have here is not evidential.

BY THE COURT: Objection overruled.

Q. Did you ever, Mr. Blanda, write to Mr. Scanlon of the Consolidated Gas Company telling him that you did not want that engine? 20

BY MR. WEINBERGER: Object; if he did write the letter is the best evidence.

BY THE COURT: Objection overruled.

Q. Mr. Blanda, I ask again whether you ever notified these people that you did not want that gas engine? 30

A. Yes, sir; I went especially right to his place.

Q. Did you write a letter?

A. Not that I remember; I don't remember. They must have a letter if I write one. That I don't remember. I went personally, but I don't remember it is so long I can't remember. 40

Q. Mr. Blanda, did you ever get an engine —is an engine now on your premises, another kind of engine?

BY MR. WEINBERGER: I object; it is irrelevant to this issue.

BY THE COURT: Cross examination. Objection overruled.

10 Q. Mr. Blanda, have you another engine on the premises?

A. I have another engine on the place.

Q. When?

A. It is about two months after when I couldn't get any satisfaction from them.

Q. Did you ever run this engine that you
20 bought from the Consolidated Gas Company?

A. Never touched it; never on my property.

Q. Did you, Mr. Blanda, did you ever have a conversation with Mr. Scanlon telling him that if you installed that engine on your premises that the mortgagee who holds the mortgage on your property would object to it?

A. No, sir.

30 Q. Did you ever go and see the public Service Corporation?

A. Never did.

Q. Sure of that?

A. I say sure.

Q. You know Mr. Newman of the Public
40 Service?

A. I don't care the whole crowd——

Q. Where he showed to you that you were foolish to install that engine?

A. No, sir.

Q. That's all.

BY THE COURT:

Q. Where did you see this engine the first time, the engine that you purchased? 10

A. What do you mean—in the store or——

Q. Where did you first see it?

A. In the store.

Q. Where is that?

A. In New York. 20

Q. What part of the store is it?

A. Right at the station or the subway, Fulton Street, whatever you call them.

Q. Was the engine in a place in the store where you could see it?

A. Yes, sir.

Q. Did you look it over? 30

A. Yes, sir; an expert from Paterson went. He works on engine for years and years. I had him at same time I bought the engine.

Q. Anything further?

CHARLES O'NEIL, a witness produced on behalf of the defendant herein, being first duly sworn according to law, on his oath testifies as follows: 40

DIRECT EXAMINATION, BY MR. WEINBERGER:

Q. Mr. O'Neil, where do you live?

A. Paterson, New Jersey.

Q. How long have you resided there?

10 A. Forty years.

Q. What is your business?

A. Gasoline engine expert.

Q. How long have you been at that?

A. About twenty-two years.

Q. How long have you been at that?

20 A. About twenty-two years.

Q. Were you with Mr. Blanda when he went to the Consolidated Gas Company?

A. Yes, sir.

Q. When he purchased the engine?

A. Yes, sir.

30 Q. Did you inspect that engine?

A. Yes, sir.

Q. You heard the price agreed upon was $250?

A. Mr. Blanda told me it was $250.

Q. You heard him talking to Mr. Scanlon?

A. They were talking to this man.

40

Q. Did you examine the machine?

A. I examined the machine quite carefully.

Q. What was the condition of the machine?

A. That machine I saw was practically new.

Q. Practically new?

A. Yes, sir. 10

Q. You saw the machine later on in the City of Passaic?

A. I was doing some work for Mr. Blanda later on and saw the machine in the yard.

Q. You looked at that machine?

A. Yes, sir.

Q. Was that the same machine? 20

A. No, sir; not the same.

BY THE COURT:

Q. How long after?

A. It was in the latter part of January that we were there in the store; I remember Mr. Blanda being there. 30

Q. How long after was it that you saw the machine in Passaic?

A. Two or three weeks after.

Q. In February?

A. Yes, sir.

BY MR. WEINBERGER: 40

Q. That was the only machine you saw on the premises?

A. Yes, sir.

Q. You are positive that is not the machine that Mr. Blanda purchased?

A. That is not the machine that Mr. Blanda showed me.

10 Q. What would you say were the differences between the two machines, as an expert?

BY THE COURT: Is he an expert? Qualify him.

Q. Have yo uever sold or handled any machines?

A. Oh, yes.

20 BY THE COURT:

Q. What is really your business?

A. Engineer, expert on such matters.

Q. What do you do?

A. Repairing; expert on repairing.

30 Q. You have been attending to gas engine troubles for many years?

A. Yes, sir.

Q. You know the different kind of gas engines?

A. Yes, sir.

BY MR. WEINBERGER:

40 Q. Will you tell the Court what were the differences between the machine that Mr. Blanda purchased in New York and the machine you saw on the adjoining property?

A. The machine I saw was practically a new machine; that is all I could see from observation and going over very carefully. The machine I saw in the yard was entirely different. Looked like the machine had been used a long

time. The paint was off and dirty and greazy. That was the only difference. 10

BY THE COURT:

Q. What part of the yard was it in?

A. Sort of an areaway going from the back of the property to the next street.

Q. No roof over it?

A. A protection over the engine for the top? 20

Q. No sides?

A. No sides; no closed crating; just a few boards.

Q. It was still crated?

A. Yes, sir.

BY MR. WEINBERGER: 30

Q. Did you notice the difference in any other ways? What was the color of the original engine you saw?

A. It was kind of a brown or drab. A light color.

Q. What was the color of the engine you saw in the adjoining yard? 40

A. The head end of it had some of the original paint on it but it was darker in color.

Q. From your knowledge as an expert they were not the same machines?

A. Not the two machines I saw.

Q. That's all.

10 CROSS EXAMINATION, BY MR. RUST:

Q. Mr. O'Neil, as an expert you went with Mr. Blanda to the Consolidated Gas Company and examine the engine, is that right?

A. Yes, sir.

Q. What did you do when you examined that engine?

A. Just looked it over.

20

Q. How do you mean?

A. Just looked it over.

Q. Did you take any parts out?

A. No, sir.

Q. What color was that engine painted?

30 A. I think it was gray. I know the machine when I see it.

Q. Did you know that was the engine that Mr. Blanda was dickering for to buy?

A. That was the understanding.

Q. Did Mr. Scanlon tell Mr. Blanda that that engine was used?

40 A. I didn't hear him tell him that.

Q. The engine that Mr. Blanda has over in his yard——

BY MR. WEINBERGER: I object; never made such a statement.

Q. The yard adjoining Mr. Blanda's yard. What color was that engine?

A. It would be the same color as the one I seen in the store only it had been used considerably and showed wear. 10

Q. Where did it show the wear?

A. Showed the wear on the crank and other parts.

BY THE COURT:

Q. The what? 20

A. Crankshaft.

Q. Did you examine the crankshaft?

A. The machine that Mr. Blanda has now.

Q. When did you do that?

A. The time I was down working. 30

BY MR. RUST:

Q. Where was the engine, Mr. O'Neil; crated in the box?

A. The engine I saw in Blanda's yard there——

Q. Was that boxed?

A. No; it wasn't boxed; it had a wooden top and a couple of boards; it wasn't crated. 40

Q. How did you take off the box to examine the crankshaft?

A. I didn't take off the box.

Q. How did you know that the machine was worn?

10 A. I didn't say it was.

Q. You said the crankshaft was worn.

A. Certainly it was worn because it was used.

Q. How did you know it was used?

A. Condition would prove that.

20 Q. Just because the dirt and grease was on the outside?

A. Yes.

Q. That is the only reason you say it was worn, because it had dirt on it?

A. No, sir.

Q. Did you ever take the crankshaft box off
30 that engine?

A. No, sir.

Q. Do you know the condition of the cylinder?

A. No, sir.

Q. How do you know the engine was worn if you didn't examine it?

40 A. It was used.

BY THE COURT:

Q. What you have in mind is that any engine which is used is worn?

A. Yes, sir.

BY MR. RUST:

Q. You didn't take the crankshaft off? 10

BY THE COURT: He has answered the question plainly.

Q. Who asked you, Mr. O'Neil, to come over and examine that engine when it was over in Mr. Rosenthal's yard?

BY MR. WEINBERGER: I object; it is immaterial. 20

BY THE COURT: Objection overruled.

A. There was no one asked me to go see the machine. I went down to work for Mr. Blanda on a pump and the machine was out in the yard.

Q. Did you examine the machine without anyone asking you to?

A. Yes, sir. 30

Q. Did you advise Mr. Blanda not to take the machine?

A. I didn't advise anything. I told Mr. Blanda that was not the machine I saw in the store.

Q. Then you examined that engine without Mr. Blanda asking you to?

A. Yes, sir. 40

Q. That's all.

BY MR. WEINBERGER:

Q. But you are sure that was not the engine you saw in the place of business of Mr. Scanlon?

BY THE COURT: He has answered that

10 twice. You put your witness on the stand and we are not going to have a second session of the same thing.

BY MR. WEINBERGER: I take exception to the ruling.

Q. That's all.

GEORGE LITWIN, a witness produced on behalf of the defendant herein, being first duly sworn according to law on his oath testifies as follows:

20

DIRECT EXAMINATION BY MR. WEINBERGER:

Q. What is your business, Mr. Litwin?

A. I am painter.

30

Q. Do you know Mr. Blanda?

A. Yes, sir.

Q. Do you know Mr. Scanlon?

A. No.

Q. Were you in New York with Mr. Blanda?

40

A. Yes, sir.

Q. When about?

A. Next day after the machine came.

Q. What did Mr. Scanlon say to Mr. Blanda, and what did Blanda say to Mr. Scanlon?

A. Mr. Blanda say that the machine what I got. (Pointing).

Q. And the machine that Blanda bought he pointed out in the place? 10

A. Yes.

Q. It was there yet?

A. Yes, sir.

Q. What did Mr. Scanlon say?

A. He say "I make a mistake; I send it over." 20

Q. He made a mistake and will fix it?

A. Send it over again.

Q. That's all.

CROSS EXAMINATION BY MR. RUST:

Q. You went with Mr. Blanda—what day? 30

A. Next day when the machine came.

Q. Next day when the machine came?

A. Come today and tomorrow it was in New York. I got no much work and Mr. Blanda go to New York with my machine.

Q. What else did they say?

A. Didn't hear anything. 40

Q. Didn't hear anything except that the engine was no good?

A. Hear that machine——

Q. What then did Mr. Blanda do; did he go out?

A. No.

10 Q. Did they say anything else?

A. I didn't hear.

Q. Did Mr. Blanda come right into the store and say to Mr. Scanlon that the engine was no good?

A. "This engine I bought, the other one that come was not the same." (Witness pointing).

20 Q. What did Mr. Scanlon say?

A. "All right; I make mistake; I fix it."

Q. What did Mr. Blanda say?

A. Nothing; that was all I hear.

Q. That was the first conversation you heard—he came in and told Mr. Scanlon that the engine was no good?

30 A. That is all.

Q. Where was the engine?

A. In the front, on the floor.

Q. How many more?

A. I say couple over there. I don't know how much. I didn't count; I am stranger in New York.

40 Q. You saw two engines?

OBJECTED TO.

Q. How many engines in the store?

A. I don't know how much. I see couple. I see something over there and I see color dark red with brown. I know brown because I am painter.

Q. What part of the store were they in? 10

A. I don't know; I see the front.

Q. They were in the front?

A. Yes.

Q. How many engines in the front?

A. Just come in the door.

Q. Mr. Blanda came in the door first, did he? 20

A. Yes, sir. I come in and stood.

Q. Did Mr. Blanda keep right on walking? Mr. Blanda opens the door; did you go with Mr. Blanda into the store?

A. Behind him.

Q. How far did you walk to the back of the store? 30

A. To the inside; I don't know maybe five or six feet.

Q. Where was Mr. Scanlon?

A. Mr. Scanlon was some place over there.

Q. Did Mr. Blanda walk in and speak to Mr. Scanlon?

A. Mr. Blanda didn't go far; Mr. Scanlon come. 40

Q. You stood still?

A. Yes.

Q. What did Mr. Blanda do?

A. Say Mr. Blanda, "I bought that machine," and tell to him "I send you over." That is all.

10 Q. When Mr. Blanda opened the door did he ask for anybody?

A. No.

Q. He is the first man he saw?

A. I don't remember; I stranger there. I don't know who sell, who buy; I don't know anything; only I am stranger; I see Mr. Blanda say with finger "This machine you sold me, not
20 the other."

Q. How long did they talk together?

A. Not long time.

Q. How long have you been in this country?

A. About six, seven years.

30 Q. Can you speak any better English than you speak now?

A. I speak Polish.

Q. Did Mr. Blanda speak to Mr. Scanlon in Polish?

A. No.

Q. What language?

40 A. English.

Q. Did you work for Mr. Blanda?

A. No, for the other guy what got the restaurant.

Q. You work for him?

A. I work for myself.

Q. How is it Mr. Blanda asked you to go with the automobile? 10

OBJECTED TO. Question overruled.

A. The machine come and Blanda come to me, "You busy much?" I say not much. I help him take machine down, and two men help, and don't do much. Mr. Blanda, "Please," he says, "put the machine down on the ground." He ask me to help him; he blow me.

20

Q. Then the engine was taken out and you help take the engine out?

A. Yes, sir.

Q. Take the boxes off?

A. No; only from the wagon and the wagon go home.

Q. Is that all you saw about the engine? 30

A. That's all.

Q. Did Mr. Blanda examine the engine?

A. I don't see.

Q. Tell us how you happened to go to New York?

A. I come in night time. Mr. Blanda say "That is not same machine what I buy," and he says "I go tomorrow morning in New York," and I says "All right, I finish my job and go with you; have ride in automobile." I don't know what street. I know it is in station; elevated station. 40

Q. Did you go by the elevated station or automobile?

10 A. By automobile from Passaic to New York. I came in the store and Mr. Blanda show that finger "I bought that machine and not the other one." Maybe somebody speak Polish.

Q. When you went to the store, how big is the store of the Consolidated Gas Company?

A. I don't know how big,——

OBJECTED TO. Objection overruled.

20 A. I don't know how big the store.

Q. How big is the store of the Consolidated Gas Company?

A. I don't know.

BY THE COURT:

Q. You know the place you went with Mr.
30 Blanda to see this engine?

A. Now when you bring me maybe I find it

Q. Do you remember how large a place it was?

A. No, I don't remember how big it was. I just come in the door.

BY MR. RUST:

40

Q. You don't know how big the place was?

A. No; I don't know.

Q. Is it on the corner?

A. I don't know whether on the corner or not. Just stopped machine and come out.

BY THE COURT: The Court does not ques-

tion your right, but it does seem an awful waste of time. Of course, it is a test of his accuracy, but I don't think it is much of a test. We could proceed in infinitum. 10

Q. That is all.

GEORGE H. SCANLON, a witness heretofore produced and sworn on behalf of the plaintiff herein, upon being recalled in rebuttal, testifies as follows: 20

BY MR. RUST:

Q. Now, Mr. Scanlon, we take up in regards to Mr. Blanda. While Mr. Blanda was there examining that engine was there anyone in the store with him?

A. No, sir; there may have been a man in the store, but not with him. This Mr. O'Neil may have been in the store, but there was nobody with Mr. Blanda. 30

Q. When you pointed that engine out to Mr. Blanda did anybody go up and look at the engine?

A. Not with Mr. Blanda.

Q. Did he speak to anybody?

A. Not that I saw. 40

Q. Is that the same engine that you sent out, the same identical engine that Mr. Blanda contracted for?

A. It was used at Syracuse. It was out in the rain at Syracuse. The fair at Syracuse had no cover and it rained several days. At the fair we oil very much; the boys have a lot to look

10 out for and we oil them ten times more than when one man has only one machine to care for.

Q. Did Mr. Blanda notify you about the engine?

A. Mr. Blanda never in his life found any fault with the engine. I wrote a dozen letters asking him why he did not pay for it, but he never answered and never said that the engine was not satisfactory in any way.

20

BY THE COURT:

Q. Did he say it was not the engine contracted for?

A. Never.

BY MR. RUST:

30 Q. The following day, this gentleman says he was in the store with Mr. Blanda.

A. Mr. Blanda never had anybody with him Mr. Blanda came in to try to induce me at the end of about a month to take back the engine because the trust company that had his mortgage——

OBJECTED TO. Objection sustained.

40 Q. You heard this man testify that there was a couple of engines on the floor of the Consolidated Gas Company?

A. We have from 150 to 250 engines on the floor.

Q. At all times?

A. At all times.

Q. That day you talked to Mr. Blanda was that man with him? 10

A. I don't say he was not in the store. Mr. Blanda and I was always alone. My office is in the back. This man may have come in with him because the store has always several people in there, sometimes a dozen or more.

Q. If he did, Mr. Scanlon, would you say he heard the conversation? 20

OBJECTED TO.

Question withdrawn.

Q. That's all.

BY THE COURT:

Q. When Mr. Blanda came down after receiving the engine he saw you, did he? 30

A. After receiving the engine; yes, sir.

Q. Did he point out any engne on the floor and say that was the engine he bought?

A. No, your Honor, because we have not another 10 horse power engine.

Q. Not because; but did he?

A. No, he did not. 40

Q. That's all .

BY MR. WEINBERGER:

Q. You say you did not see Mr. O'Neil with him in there?

A. I did not say Mr. O'Neil was not there.

10 Q. You saw him there?

A. Never saw him in my life. I did not see him or know that he was there.

Q. You would not say that he was not there?

A. No, sir.

Q. You would not say that this man was not there?

20 A. I would say absolutely that Mr. Blanda never had any other man with him.

Q. Do you see everybody that comes in the place?

A. No, sir; not by any means.

Q. How many lofts have you?

30 A. One floor.

Q. How many employees have you?

A. Seven or eight.

Q. You don't see half of the people that come in, do you?

A. No, sir.

40 Q. You are in the office most of the day?

A. Yes, sir.

Q. What part of the store are you always in?

A. I am in all parts of it.

BY THE COURT: He told you that he is generally in the office. Once telling that ought to be enough.

Q. That's all. 10

BY MR. WEINBERGER:

I will urge your Honor, a non-suit once more at this time, on the ground, first that they have not proved first an acceptance of this engine by either Mr. Blanda or any person duly authorized to do the same for him; secondly, on the ground that the plaintiffs have not shown that the goods were ever received properly by the 20 proper authorities; they have not proven that these goods were ever delivered to Mr. Blanda. I also would urge a non-suit on the ground that the plaintiff in this action is suing on a contract and they are trying to recover the sum of two hundred and twenty-five dollars; there is no proof before this Court at this time that they have ever tried to sell that engine, take it back, or in any way claim damages to which they would be entitled. I ask that on that ground 30 they be non-suited.

BY THE COURT

The Court denies the motion.

BY MR. WEINBERGER:

I take an exception.

BY THE COURT: 40

Before going into the case the Court will say that if it believed the testimony of George Litwin, who speaks not very good English, it would have little difficulty in deciding the case because, it would decide it for the defendant and would decide so promptly, but it does not possess quite the confidence in this witness'

10 testimony that would justify basing any conclusion on his testimony.

This defendant entered into a contract with plaintiff about the purchase of an "Excelsior (used at Syracuse) engine" and certain extras. The contract reads, "You will please ship to Michael Blanda, at Passaic, New Jersey" Plaintiff says that he did ship the engine selected, which was a specific engine picked out on the floor. He shipped it according to the terms
20 of the agreement. Defendant comes in and says he never received that engine, that an engine came there but it was a different engine, and he goes on and gives reasons why he concludes it was a different engine. Mr. O'Neil's testimony—Mr. O'Neil is an expert,—might assist the Court if his testimony that the engine he saw in this alley-way was not the engine that he saw, and he saw the engine purchased under the contract he says, if he did not qualify
30 his statement by stating how he arrived at that conclusion. He arrived at that conclusion by this process: "any person can see that this engine had been used; any engine that is used must be worn, therefore, and that is why I say this engine was worn". According to the terms of the contract it was a used engine. The written agreement says so both plaintiff and defendant say so; and under all testimony the Court would conclude that if this engine in the
40 neighborhood of Blanda's store now is not the engine purchased by him under the written agreement and as testified to by the plaintiff, it must be because the carrier substituted another engine, but the Court does not think that there has been another engine substituted and believes this is the same engine.

Two hundred and twenty-five dollars; judgment for the plaintiff.

(EXHIBIT P-1) 10

To Consolidated Gas & Gasoline Engine Co.,
New York City. Dated, New York City,

January 27th, 1915.

You will please ship to Michael Blanda, at Passaic, New Jersey, when ....., or as soon thereafter as possible. one 10 H. P. Excelsior (Used at Syracuse) Engine, and the following extras one pully for deep well pump; one pully for generator, and magneto with belt in separate coil with gas attachment. 20
Total price $250.00
Cash herewith to bind contract checks $25.00.
Balance to be paid as follows after 30 days.

Above engine is guaranteed to me by the Manufacturers and as per Guarantee in their catalogue Delivery f. o. b. cars factory. This order is not subject to cancellation and there are no agreements or understandings other than mentioned in the above all verbal agreements of any name or nature are merged in this contract as above written. 30

Approved CONSOLIDATED GAS & GASOLINE ENGINE CO.

By Signed Michael Blanda 40

(L. F.) City

State

Street

Full title and ownership of articles mentioned in this agreement to remain in and wth the Consolidated Gas & Gasoline Engine Co., or as-

10 signees, till all payments are made with interest, and said mentioned goods to not become a fixture by reason of being attached to or made part of any land, building, etc.

20

30

40

10

AN OPINION
NEW JERSEY SUPREME COURT

Consolidated Gas & Gasoline Engine Co.,
Appellee,
VS.
Michael Blanda,
Appellant.

20

Argued February 15, 1916—Decided June 1916.

Under Section 149 of the District Court act as amended (P. L. 1913, p. 619) a notice in writing to the clerk that the party demands a venire for a jury to try the cause on a specified date which was the return day of the summons, is not operative as a general demand of a jury trial on any date whereon such trial is held.

30

Appeal from District Court.

Before Justices Parker, Minturn and Kalisch. For the appellant, Weinberger & Weinberger. The opinion of the court was delivered by Parker, J:

40

This appeal is submitted on briefs, but we have the brief only of appellant. The question raised is whether the court below erred in refusing the appellant, defendant, a jury trial. Appellant was entitled to such jury trial if a proper demand was made in due season. The record shows that the summons

10 was returnable December 1st, and duly served; that demand for jury was made by defendant with deposit of jury fees on November 30; on December 1 the return day, there was an adjournment until December 8, at which time trial was had without jury against defendant's objection.

The point argued in appellant's brief is that by section 149 of the District Court Act, 20 a demand for jury trial is in time if made at least two days before the time fixed for the trial, and that December 8 was "the time fixed for the trial." To this we agree. Formerly the demand was sufficient if made one day before the time fixed for the trial. P. L. 1898, p. 613. This was altered to two days in 1903. P. L. p. 505. In 1905 a further act was passed relating mainly to landlord and tenant proceedings but entitled as a supplement to the District Court Act. (P. L. p. 30 493) the fourth section of which provided that in any proceedings had by virtue of the act to which it was a supplement, the court should try the case without jury unless demand was made at least one day before the return day of the summons. This section was treated as applicable to District Court proceedings generally, in several cases, Walnut V. Newton, 82 N. J. L. 290 and cases cited on o. 291. The distinction between the phrases "return day 40 of the summons" and "time fixed for the trial" is obvious. Still later, the legislature limited this section by amendment to landlord and tenant cases only, and revived section 149 as to other cases. P. L. 1913, p. 618. That section accordingly controls; and we are clear that the phrase "day fixed for the trial" means the return day of the summons if trial be then had, or any later day to which the

trial may be adjourned and on which it is actually held. So that appellant's demand for a jury was not out of time because of being made only one day before return of the summons, in view of the fact that the trial was adjourned to a later date at least two days subsequent to the demand.

This however, does not help the appellant because the demand was not of a jury trial generally, but was limited by its terms to a specific date, to wit, the return day of the summons; and this seems to be the reason for its rejection by the court. The transcript shows that on December 8, when the case was moved, The notice was served and filed with the clerk.

Mr. Weinberger: I move at this time, your Honor, that we be given the privilege to try this case by a jury in view of the fact that we have conformed to section 149 of the District Court Act which provides that a trial by jury may be had any time before the fixed trial day by giving two days' notice in writing to the Clerk accompanied by the regular amount required by law for the empanelling of a jury. The notice was not filed by the clerk of our district court but was left with him on the thirtieth day of November, 1915.

The Court: And that is the notice? (designating a paper.)

Mr. Weinberger: Yes, sir.

The Court: Let the stenographer copy the notice into his record.

the following colloquy took place:

10 To Thomas M. Bustard, Clerk of the Passaic District Court.

You will hereby take notice, that the undersigned attorneys of the defendant demand and you are hereby required to issue a venire of twelve men to hear the issue in the above entitled matter on Wednsday, the first day of December, nineteen hundred and fifteen.
Dated, Novembr 29th, 1915.

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Weinberger & Weinberger,

Attorneys of Defendant.

Mr. Weinberger: I would like to have it noted also on the record that this case was an adjourned case from the first day of December until today, the eighth.

30 The Court: The Court denies your motion because you have not given the notice required by statute.

If the trial had been held on December 1, it is manifest that the court would not have committed error in trying the case without jury, because the two days' notice had not been given. Condon V. Royce, 68, N. J. L. 222, is a case predicted on this section as it stood before 1898, but its reasoning is applicable.
40 Now there is nothing in the record to show a demand for a jury at any stage of the case, except the notice of the clerk, and the request on December 8. The latter was of course too late. The former, is sufficient as a demand at all, was by its express terms limited to a jury trial on December 1st and did not relate to any other date; so that in order to hold that

the District Court committed legal error in refusing a jury on December 8, it would be necessary to say that this notice, although invalid as a demand for a jury trial on December 1, operated as a general demand of jury trial on any date to which such trial might be adjourned. We are unwilling to take that view. The normal and usual method of trial in a small cause court or District Court is without a jury. Either party is entitled to a jury, but he must ask for it, or, as held by a number of cases, his right is waived. Originally the procedure was perfectly simple and informal, viz. to state to the court either orally or in writing, that the party demands a jury. No written notice was required until the amendment of 1903, p. 505. See General Statutes, 1221, Sec. 38; 1251, pl. 198; 1871, Sec. 33; compiled Statutes, 2992, Sec. 33. By the act of 1905 the court was deprived of power to call a jury unless demand was made at least one day before the return of the summons; and this regulation was held constitutional. Haythorn v. Van Keuren, 79 N. J. L. 101. Then in 1913, as we have seen, the legislature went back to Sec. 149, which requires a demand to be made, and notice thereof to be given to the clerk at least two days exclusive of Sundays and holidays, before the time fixed for the trial, and prepayment of fees; failing which, the demand shall be deemed to be waived. We find no such demand, but only notice of a demand (ineffective because out of time) that a venire issue to try the case on December 1.

10 The court was not required to treat this as applicable to any subsequent date, and in the absence of any repetition of it was entitled to regard the right to a jury trial as thereafter waived.

No other ground of appeal being urged the judgment will be affirmed.

20 RULE FOR JUDGMENT

NEW JERSEY SUPREME COURT

Consolidated Gas and Gasoline Engine Co., a corporation, Plaintiff-Appellee vs. 30 Michael Blanda, Defendant-Appellant.	**ON CONTRACT** **On Appeal from the Disfrict Court of the City of Passaic.** **Judgment of Dismissal**

This cause having been duly argued at the February term, 1916, by Harry H. Weinberger, of counsel with the appellant, and E. M. Applegate, of counsel with the appellee, and the court having inspected the records 40 and judgment below, and having considered the same, it is thereupon on this 13th day of June, 1916, ORDERED that the appeal from the judgment of the District Court of the City of Passaic be affirmed with costs to be taxed, and that a record of the proceedings be remitted to the said District Court of the City of Passaic, to be proceeded with in accordance with the practice of said court.

Rule entered this 13th day of June, 1916 10
On motion of

Herman C. Rust,

Attorney of Appellee.

A true copy,

Wm. C. Gebhardt

Clerk. 20

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NOTICE OF APPEAL

NEW JERSEY SUPREME COURT

Consolidated Gas & Gasoline Engine Co., a corporation, Appellee, vs. Michael Blanda, Appellant.	NOTICE OF APPEAL

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To Herman C. Rust, Esq.,

Attorney of Appellee.

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Take notice that the appellant Michael Blanda, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this case on the following grounds:

1. Because the Supreme Court has improperly held that the demand made by the appellant for a trial by jury was not the demand of a jury trial generally, but was limited by its terms to a specific date, to wit, the return day of the summons.

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2. Because the Supreme Court improperly held that the notice served by the appellant for a trial by jury was limited to a specific date and did not relate to any other date.

3. That the Supreme Court improperly held that there was no demand for a trial by jury but only a notice of a demand. 10

4. The Supreme Court improperly held that the appellant, not having made any repetition of his application for a trial by jury, had waived his right to the same.

5. That the Supreme Court in affirming the judgment of the District Court of the City of Passaic, acted in derogation of paragraph four, section seven, article four of the said constitution. 20

Weinberger & Weinberger
Attorneys for Appellant.

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