

New Jersey Court of Errors and Appeals

ALEXANDER DALLAS,

Plaintiff-Appellee,

vs.

H. J. KOEHLER SPORTING GOODS CO.

AND MARK E. WINANS,

Defendants-Appellants.

On Contract.

Brief of Appellant.

The plaintiff sued the defendants jointly in the Essex County Circuit Court and a verdict was rendered for fifteen hundred and twenty-five dollars and forty-five cents as against the defendant, the Koehler Company, a non-suit having been granted to Winans.

DECLARATION.

As the record becomes of paramount importance we will analyze the declaration somewhat at length. It is found on page 6 and charges that the plaintiff purchased of the defendant, Koehler Company, a certain automobile referred to as the "Koehler 40" for which he agreed to pay \$670 in cash and to **TURN OVER AND DELIVER** to the defendant company a certain other automobile referred to as the E. M. F. Motor Car which was then of the value of \$1,200 and which the defendant agreed to accept, but that afterwards on or about March 1st at the special instance and request of the defendant Mark E. Winans and of the defendant company by and through its duly authorized agent said plaintiff delivered to the Koehler Company the E. M. F. car pursuant to said agreement so made between said parties defendant and

said plaintiff, and afterward, to wit on the first day of March, 1910, the plaintiff having paid to the defendant company the sum of \$275 the balance of the \$670 for the purchase price of the said "Koehler 40" and having demanded the delivery thereof to him, the said Mark E. Winans informed said plaintiff that it, said defendant company, was unable to carry out the agreement so made with him said plaintiff as aforesaid because said defendant company could not deliver said "Koehler 40" until it had received the sum of \$1,200 additional in cash. Whereupon on the 15th day of March, 1910, the plaintiff at the instance and request of the defendant paid to the defendant company the sum of \$1,200 in cash and thereupon received said "Koehler 40" so purchased by him as aforesaid and in consideration of the payment of \$1,200 as aforesaid said defendants undertook and then and there faithfully promised the plaintiff to pay him the sum of \$1,200 the value of the E. M. F. Motor Car on or before the 15th day of June, 1910, yet the defendant disregarding their promises have not paid the said sum of \$1,200 to the plaintiff or any part thereof wherefore he is damaged, &c. Then follows the common count. The defendants pleaded the general issue.

Various grounds of appeal are set up at length on page 2; the record shows rather a remarkable situation.

THE COURT IMPROPERLY ADMITTED EVIDENCE.

The plaintiff was the first witness called and he attempted to testify at random for the purpose solely of supporting his declaration. He admitted having signed a written contract for the purchase of the "Koehler 40" but said in moving he lost it (page 14, line 10). Over objections he was allowed to testify

as to his recollection of the contents of this paper and attempted to swear to a situation entirely at variance with the declaration saying (page 18, line 30) that the defendants were to take back the E. M. F. car for \$1,200.

The plaintiff's testimony from page 12 on covers his effort to swear through a case all of which is completely disposed of at page 25, line 35, where he said he did not read the contract he signed; page 26, line 15:

Q Was that in the contract?

A I don't know whether that was in the contract. I know what was the agreement; I know what the agreement was; I supposed I was dealing with honest people.

Q And as you dealt with honest people you did not pay particular attention to the written contract.

A I didn't read the written contract any more than I read a fire policy (page 26, line 20).

The contract the signature of which the plaintiff admitted later was offered in evidence D. 3, page 79. This contract makes it perfectly apparent that the plaintiff ordered a model "Koehler 40" automobile at list price of \$1,685, paid a deposit of \$395, approximately 20 per cent. which would be deducted from the price of the car on delivery, the balance to be paid in cash or by certified check. There were certain extras for accessories at prices agreed upon. This amount paid agrees with the testimony of plaintiff (page 19, line 20). Instead of paying the balance and taking the car plaintiff sent check for \$275, and purported to swap an E. M. F. for \$1,200 (Exhibit P. 2, page 75); this was sent on March 1st. This time Mr. Winans was ill and the matter laid over until his return to the office (see Exhibit P. 3, page 76, also testimony of Winans, page 45).

The plaintiff shows very clearly why his E. M. F. was sent down (on page 19, line 30; page 20, line 1). "They had a customer for it and they wished to demonstrate the car to him." Plaintiff testified that he notified the Koehler Co. that if the "Koehler 40" was not delivered by the 15th that his money should be returned (page 20, line 40); and on the night of the 14th late at night Winans and a salesman from the Koehler Company named Pfeifer called at the plaintiff's house (page 21, line 1). This time according to plaintiff's own story Winans and Pfeifer told him that they had sold the E. M. F. but that the purchaser had no money and would not receive it (page 21, line 10).

Q Continue, doctor. What took place that night?

A After some talk Mr. Winans told me that on account of threatening to cancel the order on the 15th, they not being able to get the money from the man to whom they sold the E. M. F., they were rather in a hole and wanted to know if I would help them out.

Q Yes.

A I asked them why they did not tell me about this sooner instead of telling me that Koehler wasn't ready. I agreed, then, to endorse a note for them, which Winans and Pfeifer agreed to sign, so as to allow this man who had sold some real estate to get some money to pay for the E. M. F. I endorsed a note for \$1,200 and the next morning I got the Koehler. I never thought any more of the matter until I received a notice of protest from the bank that the note was protested. I immediately went down to the Koehler place, saw Winans and asked him what the meaning of it was. Well, he couldn't give me any answer. I said, "I want either this note paid or I want my E. M. F. back." I went over

to the bank and paid the note; I didn't want a protested note to stand there against me. I demanded either the money or the car. Then Winans told me that Pfeifer had left their employ and he couldn't say where he was, I said "That doesn't make any difference to me. I delivered the E. M. F. to the Koehler people; I want my E. M. F." Then he told me that Pfeifer had taken the E. M. F. and sold it and put the money in his pocket. I was out the \$1,200 and the E. M. F.

Q I wish you would tell me a little more particularly what Mr. Winans or Mr. Pfeifer in Mr. Winans' presence said in regard to the necessity of giving this note?

A Well, they said that on account of my threatening to take steps, if I didn't get the Koehler to get my car back, that they were in a hole; that they had told Koehler they had had the money and this man to whom they had sold the E. M. F. hadn't got his money for the sale of property he had sold; and if I could help him out temporarily it would save them probably, disagreeableness with Koehler, after their saying they had the money for the E. M. F.

Q What had that to do with you?

A Really nothing to do with me except that they asked me if I wouldn't help them out.

The note referred to in this remarkable transaction is in evidence (Exhibit P. 1, page 74). It is a straight three months' note due June 15th made by Louis F. Pfeifer to Alexander Dallas and endorsed by Dallas. This note was made payable at the Greenville Banking and Trust Company, Jersey City, the same institution on which the plaintiff drew his checks, Exhibit D. 1, Exhibit D. 2.

At this conversation the plaintiff was told very clearly that he could not get the car unless he paid the money (page 27, line 1).

Page 28, line 1, the court becomes satisfied that the plaintiff had been testifying from recollection about a written agreement which he admitted he had not read at all.

Plaintiff repeats that on this night of March 14th Winans told him that he had sold the E. M. F. car but the purchaser did not have the money then to pay for it (page 28, line 35).

This in substance completed the plaintiff's case and the defendant moved for non-suit on various grounds (page 29). The case was then opened and the plaintiff swore Mark E. Winans one of the defendants who as plaintiff's witness swore that the car would not have been delivered without payment of the balance due on it (page 30, line 40). The motion for non-suit was then renewed (page 31) and the motion was denied.

This we claim was error.

Certainly the reference to testimony above set out needs no argument to show that the proof varies from the declaration; that the proof does not support the declaration and that the proof does not show any cause of action against the Koehler Company; that the money if paid was paid voluntarily with knowledge of the facts and so could not be recovered.

The defendant called Winans who testified that he did not have authority to take second-hand cars (page 32, line 40). The witness set forth his duties showing that he had no authority to exchange cars and never had exchanged a car while he was with the company (page 33, line 20). He further testified that he told Dr. Dallas that he was without authority to exchange cars and showed that the doctor expected Pfeifer to sell his car for him (page 33, line 31). Witness then showed that when he found that Pfeifer had the plaintiff's car at the Koehler place he ordered it taken away (page 34); that the Koehler Company never received any of the proceeds from the E. M. F. (page 34,

line 30), and had nothing to do with the sale of the E. M. F. car. This witness covers the transaction at the plaintiff's house on the night of March 14th (page 35, line 20). Page 36; this witness testifies that he informed the doctor that the company had nothing whatever to do with the car (E. M. F.) and what was done was done directly with Pfeifer (page 36, line 10). Neither Winans or the company ever agreed to pay back the \$1,200 or any part of it (page 36, line 20; page 38, line 20); this witness repeated that he told the plaintiff that the company would not take the E. M. F. car in under any circumstances; again on page 39, line 35.

Pfeifer had an E. M. F. of his own and Winans supposed that the plaintiff's E. M. F. was Pfeifer's until a squabble came up over the tools (page 47, line 15).

This witness repeated that the E. M. F. was never delivered to the Koehler Company (page 52, line 15). The Koehler place was a repair shop and did not deal in second-hand cars (page 52, line 20). When this witness discovered that the Dallas car was in the Koehler place he told Pfeifer that the company had nothing to do with it and that he did not want it in the place and it was immediately taken away (page 53, line 10); and it never came back to the Koehler place again.

The defendants rested and the plaintiff was recalled and followed by his wife who testified "we had the E. M. F. to be disposed of and he (Winans) said he would give us \$1,200 on account if we would take the Koehler. This witness was again permitted to contradict a written contract (page 58, line 20). Witness also showed that the subject matter of the suit was hers and not the plaintiff's (page 60). The court then granted a non-suit to Mr. Winans (page 60, line 40); and the court left to the jury the question whether or not this E. M. F. car was sold by Dr. Dallas to the company (page 60, line 40; page 61), and on this ground refused to direct a verdict.

Of course if the plaintiff had brought suit on this ground we should have at once pleaded the statute of fraud. There was no claim that there was any written contract covering the sale by Dallas to the Koehler Company of the E. M. F. for \$1,200 and being a sale of goods, wares and merchandise over the price of \$500 it would be subject to the defense under Section 6 of the Act relating to frauds and perjuries, Comp. Stats. of New Jersey, 2615.

But could it be conceived that under the declaration hereinbefore set out this defendant could finish this trial finding himself trying the sole question as to whether or not it had failed to pay for an automobile it had purchased. On page 18 the plaintiff over the defendants' objection was permitted to testify as to the terms of a written contract all of which went before the jury, a contract which on page 27, line 39, the court found that he did not read at all.

The admission of this testimony was highly injurious to the defendant and was error.

On page 19 the plaintiff was asked and permitted to answer over the defendants' objection.

Q What about your car? Your E. M. F.? What became of that?

A On the 27th of February Mr. Winans called me up and asked me to send down the E. M. F.

It was argued on this point that Winans had no authority to purchase automobiles for the defendant company and certainly could have no authority to exchange cars unless such authority was expressly given. An agent to sell is not an agent to purchase or exchange.

We contend that this admission of evidence is clearly erroneous.

A salesman authorized to make sales is not authorized even to collect the price in the name of his principal unless his expressed authority to collect is

shown. There must be shown authority beyond that necessarily implied in a mere power to make sales; *Law vs. Stokes*, 3 Vr., 249.

The principal is bound indeed by the acts of his agent within the authority actually conferred which includes the precise act authorized and also whatever usually belongs to the doing of it or is necessary to its performance and beyond that he is liable for his agent's acts within the appearance of authority he knowingly permits the agent to assume or holds the agent out to the public as having. But in whatever way the liability of the principal is established it must flow from the act of the principal; *Law vs. Stokes* at page 252.

There is no word of evidence in this case to show that Winans ever had any authority to buy cars; and to hold that an automobile salesman was authorized to bind his employer by exchange or purchase of second-hand cars without showing a single transaction of the kind previously having been brought to the employer's notice, would be to permit a monstrous and unjust doctrine.

The admission of this question is particularly pernicious under the pleadings of this case.

On page 22, as hereinbefore set out, plaintiff shows very clearly that he was aware of lack of knowledge on behalf of the principal for Winans and Pfeifer told him that they were in a hole and wanted him to help THEM out (page 22, line 10). And the plaintiff thereafter took Pfeifer's individual note and endorsed it personally; the company's name never appearing anywhere in that transaction. On page 21 objection was again made to the attempt to bind the Koehler Company by statement of its agents clearly beyond any authority express or implied. The court was under the impression that if a corporation had an agent that agent's authority was not limited (page 21, line 30).

Page 28, line 8, Mr. Reed wanted to ask the plaintiff about what was said by Winans at the time of signing the agreement in regard to its contents; this was, of course, objected to but was admitted on the ground that perhaps it was proper in as much as it is against Mr. Winans who is one of the defendants. The witness was then permitted to flatly contradict his written agreement and to contradict his own declaration and to say that he made an agreement to exchange the cars but did not read the small print (page 28, line 20).

The testimony which by no stretch of imagination could be relative or competent as against the Koehler Co., an unauthorized statement of an agent in excess of his authority directly contradicting a binding written contract, is admitted because this agent is a party and then at the completion of the case a non-suit is directed as against this agent. Could we readily find a more anomolous situation.

The admission of this testimony is clearly injurious and clearly in error.

Again on page 57 the plaintiff's wife, over the defendant's objection, was permitted to testify to discussions about the purchase of the car and was permitted to vary, alter and directly contradict the written contract then in evidence the signature to which the plaintiff fully admitted (page 57, line 20).

It is hard to conceive what argument could be made to support this testimony.

Again on page 58 the plaintiff's wife was permitted to testify to Mr. Winans' statement that he would allow \$1,200 for the E. M. F. (line 20).

This seemed objectionable as it varies the written contract and on the ground that Winans' authority to exchange had not been proved or even attempted to be proved and on the further ground that it was such a variation from the declaration as constituted an entirely new case.

THERE WAS NO QUESTION FOR THE JURY.

The declaration says that in consideration of the payment by Dallas of \$1,200 on March 15th (the night he endorsed Pfeifer's note) the plaintiff promised to pay him the sum of \$1,200 on June 15th (the date the note came due). There is, of course, no allegation that the defendant purchased and agreed to pay for the automobile and certainly the trial of that question could never have been anticipated in this transaction.

It is fundamental in the law of principal and agent that the power of every agent to bind his principal rests upon the authority conferred upon him by that principal. The trial court, we respectfully state, failed to realize "that every person who undertakes to deal with an alleged agent is put upon inquiry and must discover at his peril that such pretended agent has authority; that it is in its nature and extent sufficient to permit him to do the proposed act and that its source can be traced to the will of the principal." Cyc., Vol. 31, p. 1322.

At this point we would refer again to page 21 of the State of the Case. There was no word of testimony in this case that Pfeifer had ever exchanged a car or purchased an automobile for the Koehler Company, nor that Winans had ever exchanged a car or purchased a car for the Koehler Company. There was no word of evidence that the employer of these two ever had the slightest knowledge of this secret meeting late at night, at the home of the plaintiff, where this plaintiff was told by these agents that they were in a hole with their employer.

"The authority to sell confers power to sell for cash, not to exchange for other property or for part property and part cash." 31 Cyc., 1358, and long list of cases therein cited.

One who has knowledge of any fact which would lead him to doubt the general powers of an agent is

under the duty of making reasonable inquiry into the character of the relation between the principal and agent. *Smith vs. Perry*, 5 Dutcher, 74.

This principal is well settled. On the question of being put on reasonable notice the plaintiff here states that he was specifically informed by the company's agents that they were in a hole, and to help them out he endorsed the note of one of them.

The limitations of agency are well set forth in the opinion of Justice Depue in *Gulick vs. Grover*, 4 Vr., 463.

In this case there was no proof of agency except the declarations of the agent, which, even though they accompany his acts, constitute no evidence of the extent of his authority. *Dowden vs. Cryder*, 26 Vr., 329.

The facts of the agency in this case were in no wise in dispute, and where that is the situation the question as to whether an agent has the requisite authority to bind his principal is a question of law for the court, whether such authority is sought to be sustained by previous authorization or by a subsequent ratification. *Gulick vs. Grover, supra*.

In this case there can be no possible question of ratification. The only evidence on the subject goes to show that the Koehler Company never had the slightest knowledge of the clandestine, midnight transaction between the plaintiff and the agents who informed him that they were in a hole. Winans states that as soon as he himself had the slightest knowledge that the plaintiff's car was at the Koehler repair shop he ordered it removed at once.

THE CHARGE OF THE COURT WAS ERRONEOUS.

The court permitted the jury to determine whether it was within the scope of Mr. Winans' authority to

purchase the E. M. F. and if he had purchased it for the Koehler Company, and that if he did purchase it the jury might give Dr. Dallas the value of the car and there being no evidence of the car's value this was left to the jury's guess with statement that it had cost \$1,200 in December, 1909.

This charge is open to all the objections hereinbefore urged.

In the absence of counsel further instructions were asked by the jury.

Having no knowledge of this at the time the defendant could not, of course, note his objection, but this instruction is included as ground of appeal (page 5) and clearly this instruction is erroneous. It is repeated that the jury should consider whether Winans had authority to purchase the automobile and if so whether in fact he did purchase it.

We need, perhaps, here but to repeat that the plaintiff's own case shows a written contract to purchase and pay cash for a Koehler 40; that he had privately negotiated with one of the defendant company's agents for the sale of his own car an E. M. F.; that his Koehler car was not delivered and on March 14th late at night two agents of the defendant company called at his home and told him that they were in a hole, that he endorsed the personal note of one of them and then received his Koehler car.

Pfeifer did not pay this personal note of his on June 15th and it went to protest and the plaintiff took it up. If he could locate Pfeifer and that gentleman has any property he can of course sue him and recover the value of this note.

If he could possibly hold this judgment he would find this extraordinary transaction quite highly profitable.

It is respectfully insisted that the judgment should be reversed and a new trial granted and a verdict

directed on this evidence in favor of the defendant,
Koehler Company.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

ALEXANDER DALLAS,

Plaintiff-Appellee,

vs.

H. J. KOEHLER SPORTING GOODS
COMPANY,

Defendant-Appellant.

On Contract.

Brief for Appellee.

The plaintiff was the owner of an E.M.F. Motor car of the value of twelve hundred dollars, which he had, in December, nineteen hundred and nine, purchased of the defendant company (page 13, line 8). At the Automobile Show held in February, nineteen hundred and ten, he was persuaded by the agent of the defendant company, Mark E. Winans, to purchase a Koehler 40 motor car (page 13, line 30). In his successful effort to persuade the plaintiff to buy the new and more expensive car, the agent agreed that the defendant would accept the E.M.F. as part payment and allow on the price of the new car the sum of twelve hundred dollars therefor (page 18, line 30) (Exhibit P. 2, page 75). The sum of twelve hundred dollars was not an excessive price for a car which was listed at fifteen hundred dollars (page 38, line 33), which had been in the plaintiff's possession but two months and could have been but little used, because of the weather conditions. It consequently was practically new.

The agent thereupon produced a printed form which he asked the plaintiff to sign but which was not read, although the plaintiff states he saw the essential features of the contract he had made set down

therein (page 28, lines 18-25). The original of this contract was given to the plaintiff and is now lost. The defendant produces a paper, Exhibit D. 3, which is alleged to be a copy of the contract so signed and which calls for the payment of the whole consideration in cash (page 14, line 932). The plaintiff says that this is not the whole contract that he made nor all that was contained in the agreement signed by him (page 16, line 37), and a corroboration of his statement will be found in the fact that the E.M.F. car was sent to the defendant at the request of the defendant's agent, Mr. Winans, on February twenty-seventh (page 19, line 27), and on March first, plaintiff wrote to defendant, letter Exhibit P. 2, enclosing a check for two hundred and seventy-five dollars, Exhibit D. 2. The letter, Exhibit P. 2, set forth the terms of the contract as they are now stated to be by the plaintiff. The agent, Mr. Winans, was ill when this letter was received (page 43, line 4), and the letter was brought to the attention of Mr. Koehler himself, and he dictated the reply (page 43, line 10 *et seq.*) Exhibit P. 3. In that letter, dictated by Mr. Koehler, instead of repudiating the contract as the plaintiff stated it to be, plaintiff was asked to wait until Mr. Winans, the manager, returned, as he had handled the matter.

This letter had been written after a talk between Mr. Koehler and Mr. Winans over the phone and was subsequent to the delivery of the E.M.F. by the plaintiff to the defendant. Mr. Winans recovered within a few days and returned to the office. The E.M.F. was still in the Koehler garage and the plaintiff was very anxious to get the new car (page 45, line 18, *et seq.*), (page 20, line 32, *et seq.*), (page 55, line 18), but Mr. Winans, although he read both Exhibits P. 2 and P. 3 on his return from his illness (page 43, line 17) said nothing to Dr. Dallas, nor did he communicate with him in any way regarding the contents of Exhibit P. 3 (page 43, line 28).

Had the arrangement been as the defendant now states it to be, Mr. Koehler would, at the time of the writing of letter, Exhibit P. 3, have repudiated the statements in Exhibit P. 2 and Mr. Winans on his return, would have definitely told the plaintiff that the E.M.F. had no place in the contract between them and would not be accepted as part payment. On the contrary, the plaintiff threatened to cancel the order on the fifteenth if his new car was not delivered on that day (page 20, line 40, *et seq.*). On the night of the fourteenth, Winans came to the plaintiff's house (page 21, line 2), and said because of the plaintiff's threat to cancel the order they were in a hole and asked him to help them out temporarily as "it would save them, probably, disagreeableness with Koehler, after their saying they had the money for the E.M.F." (page 23, line 5). This the doctor did, and paid the defendant twelve hundred dollars by means of a note endorsed by him, discounted at his bank, and received the car.

It thus seems to me that the facts set out in the special count of the declaration are fully sustained by the proof submitted. Should I be in error in this, there are still the common counts, one of which is for the price and value of goods sold and delivered to the defendant.

It has appeared in the above recital that the plaintiff was the owner of an E.M.F. car; that the defendant agreed to allow or to give him twelve hundred dollars for it; that at the request of the defendant, the car was sent to the defendant and disposed of by it; that the car was of the value of twelve hundred dollars and that this sum has not been paid. Clearly this in itself is sufficient to sustain the verdict.

The jury evidently believed the plaintiff's testimony, and this is not surprising. It was corroborated by Mrs. Dallas (page 57) and the corroboration can also be drawn from the testimony of the defendant

Winans. No doubt the jury took into consideration the appearance and demeanor of the witnesses as they had a right to do.

The defendant contends that there should have been a non-suit, because the proof did not support the declaration or show any cause of action. It is submitted that the proof shows a cause of action under either the special or the common counts.

The trial court submitted to the jury the following questions:

First. Did Mr. Winans, the agent, have authority to purchase the E.M.F. car from the plaintiff?

The defendant contends that Winans had no such authority, yet Winans himself says on page 33, line 23, "we could never exchange cars except from putting Mr. Koehler in touch with all the conditions." He thus had secret instructions which would not permit him, under all circumstances, to take second-hand cars, though his apparent authority was that of general manager of this district. Under these circumstances, the defendant is bound by his apparent authority.

Law vs. Stokes, 32 N. J. Law, 249 at 252.

In addition to this, Mr. Koehler knew of this particular transaction for he saw the letter of March first, Exhibit P. 2, see page 43, line 8 to 12. He was therefore in touch with all the conditions, yet he did not repudiate the agreement and the defendant must therefore be held to have ratified it.

Looschen Piano Case Co. vs. Steinberg, 76 N. J. Law, 130.

The second question submitted to the jury by the court was:

Did he purchase from the plaintiff the E.M.F. car for the Koehler Company?

The jury found that he did and it was fully justified in so doing in any view of the case. On March 14, 1910, when Winans called at plaintiff's residence, the

defendant company already had plaintiff's E.M.F. in its possession, having requested its delivery (page 19, line 27). Defendant had a customer for it who was not ready to pay at that time but would do so shortly and who was ^{by inference} to pay twelve hundred dollars (page 23, line 1). Defendant's agent subsequently sold the car and pocketed the proceeds (page 22, line 31). It can hardly be contended that if those statements are true plaintiff is not entitled to recover the value of his car.

Defendant explains that the case as presented by the judge to the jury, varied from the declaration to such an extent that he was surprised and precluded thereby from interposing a plea of the statute of frauds which he would otherwise have done. Defendant, I think, forgets the declaration contained in the common counts and forgets further the E.M.F. car was delivered by the plaintiff to the defendant company, thus taking the case out of the purview of the statute of frauds.

Grounds of Appeal.

The motion for a non-suit and a direction of a verdict have been disposed of in the above statement. There remains the objections to the admission and rejection of testimony. The first objection, 3-a is as follows:

"What were the terms, doctor, of the contract upon which you purchased the car which you speak of?"

It had then appeared that a written contract had been made, handed to the plaintiff, who had lost it (page 18, line 14). The evidence was clearly admissible.

The objection, it may be noted, did not state the reasons for the objection.

3-b: "What about your car, your E.M.F.? What became of that?" "A On the 27th of February

Mr. Winans called me up and asked me to send down the E.M.F.”

“*Mr. Lum.* I object.”

This objection came too late. A counsel cannot wait until he hears the answer and then if not to his satisfaction, except to it.

It also appears that Mr. Winans had authority to exchange cars (page 33, line 24).

3-c: “Q Who was Pfeifer?” The objection here was also late. It was made after the question was answered. In any event, this conversation took place between plaintiff and two of the defendant’s agents, one the general manager. The balance of this ground was to the question “what was said by Mr. Winans at the time of the signing of the contract at the automobile show on February 24 as to its contents? A I saw that the price was put down correctly and that the allowance was made for the E.M.F.” Whether or not the question was proper, the answer, though not responsive, was entirely proper. There is nothing in it as to a conversation at the signing of the contract and even that might have been proper.

Dunston Lithograph Co. vs. Borgo, 87 Atl. Rep., 334.

3-d: “Do you remember any discussion about the purchase of a car there, a Koehler 40 car, by the doctor? A I do. Mr. Winans was very anxious that we should take a Koehler car and he offered us \$1,200 if we would turn in the E.M.F. We didn’t want it at first, but he showed us the car and got us quite enthusiastic about the Koehler; but we didn’t want it. We had the E.M.F. to be disposed of, and he said he would give us \$1,200 on account if we would take the Koehler.”

The objection was made after the answer was given and was too late.

The answer on the theory that the defendant purchased from the plaintiff his E.M.F. motor car and

agree to pay him twelve hundred dollars for it, was perfectly proper in any event.

FOURTH GROUND.

This ground is not urged in the brief of the defendant, and I assume it is therefore abandoned. The evidence was clearly proper.

FIFTH GROUND.

This is also apparently abandoned. In any event, it is discretionary with the trial judge whether testimony shall be stricken out or not.

SIXTH AND SEVENTH GROUNDS.

It was certainly within the power of the court to leave the question set forth in these grounds to the jury. There was ample evidence as set out above on which to base this charge, and the jury by its verdict decided the question submitted to it.

EIGHTH GROUND.

It is quite a common practice for the court to give the jury instructions in the absence of counsel, who are supposed to stay in court until the jury return a verdict. If they are absent, it is not the fault of the court.

Instructions in this case are practically a repetition of instructions given in the main charge. There seems to be no error in it.

In conclusion, I would say that taking the testimony of Mrs. Dallas alone (see pages 57 and 58), this shows that Winans on behalf of the defendant company, offered twelve hundred dollars for the E.M.F. motor car which plaintiff had purchased from the defendant but a short time before and which was worth fifteen hundred dollars. The testimony of the

plaintiff and Winans show that the car was delivered to the defendant company and has not been paid for.

This is a contest between a physician living in Pine Brook, who is, it is apparent, more notable for his good nature than his business acumen, and the agent for an automobile concern who is general manager for a sales company, covering territory of Newark, Montclair and Paterson. The defendant has received in cash the full price of the Koehler car and the E.M.F. car of the plaintiff. If any loss it has incurred, it has been through the agent of the defendant company. Under these conditions, it is not difficult to determine in whose favor the verdict should have been.

In conclusion, I wish to urge that none of the objections insisted upon on the part of the defendant company have been harmful to the defendant company's case, and that the jury by its verdict has done substantial justice.

It is respectfully submitted that the appeal should be dismissed.

HUGH B. REED,
Attorney for Plaintiff-Appellee.

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Notice of Appeal.

(Filed Feb. 27, 1914.)

Essex County Circuit Court.

ALEXANDER DALLAS,

Plaintiff,

vs.

H. J. KOEHLER SPORTING GOODS
COMPANY AND MARK E. WINANS,
Defendants.

On Contract.
*Notice of Ap-
peal.*

10

To HUGH B. REED, ESQUIRE,

Attorney for plaintiff.

Sir:

TAKE NOTICE that the defendant, H. J. Koehler Sporting Goods Company, appeals to the Court of Errors and Appeals on the whole of the judgment entered in this cause.

Yours etc.,

LUM, TAMBLYN & COLYER,

*Attorneys for defendant, H. J. Koehler
Sporting Goods Company.*

20

30

40

Grounds of Appeal.

Grounds of Appeal.

(Filed Feb. 27, 1914.)

New Jersey Court of Errors and Appeals

10

ALEXANDER DALLAS,

Plaintiff,

vs.

H. J. KOEHLER SPORTING GOODS
COMPANY AND MARK E. WINANS,
Defendants.

*On contract.
Grounds of
Appeal.*

20

To HUGH B. REED, ESQUIRE,
Attorney for plaintiff.

Sir:

TAKE NOTICE that the following are the grounds of appeal which the defendant, H. J. Koehler Sporting Goods Company, hereby assigns and upon which it will rely at the hearing.

1. Because the court refused to grant a non-suit.
2. Because the court refused to direct a verdict for the defendant, H. J. Koehler Sporting Goods Company.

30

3. Because the following questions were admitted over the defendant's objection.

(a) Q What were the terms, doctor, of the contract upon which you purchased the car which you speak of?

Mr. Lum. I object.

The Court. I suppose you refer now to the terms of the written contract which he admits that he signed and which is lost. You object to that, Mr. Lum?

40

Grounds of Appeal.

Mr. Lum. Yes, sir.

The Court. Objection overruled. Page 18.)

(b) Q What about your car, your E. M. F.,—
what became of that? A On the 27th of February
Mr. Winans called me up and asked me to send down
the E. M. F.

Mr. Lum. I object.

It is not shown that Mr. Winans had any authority 10
to bind the Koehler Company. This is a suit against
the Koehler Company and it could not be that an
employee or agent has authority to exchange cars
unless such authority is expressly given. An agent
to sell is not an agent to exchange, clearly, under our
cases, nor even an agent to collect. (Page 19.)

(c) Q Who was Pfeifer? A Koehler's sales-
man. I told him I thought it was rather an unusual
time; but after a good deal of talk they told me that
they had sold the E. M. F. but the purchaser had no 20
money and he would not receive it.

Mr. Lum. I object.

Argument and discussion, page 21.

Mr. Reed. I wanted to ask him about what was
said by Mr. Winans at the time of the signing of the
agreement in regard to its contents.

Witness. I saw—

Mr. Lum. I object.

The Court. Perhaps that is proper. It is against 30
Mr. Winans. I will overrule the objection.

Q Now will you continue? What was said by Mr.
Winans at the time of the signing of the contract at
the automobile show on February 24th as to its con-
tents? A I saw that the price was put down cor-
rectly and that the allowance was made for the E. M.
F. (page 28.)

(d) Q Do you remember any discussion about
the purchase of a car there? A Koehler 40 car by the
doctor? A I do. Mr. Winans was very anxious 40

Grounds of Appeal.

that we should take a Koehler car and he offered us \$1,200. if we would turn in the E. M. F. We didn't want it at first; but he showed us the car and got us quite enthusiastic about the Koehler; but we didn't want it. We had the E. M. F. to be disposed of, and he said he would give us \$1,200. on account if we would take the Koehler.

10 *Mr. Lum.* I object on the ground that the evidence very clearly tends to vary or alter the written contract.

4. Because the court permitted to be marked in evidence over objection letter of March first, nineteen hundred and ten, marked "Exhibit P 2," and letter of March fourth, nineteen hundred and ten, marked "Exhibit P. 3." (page 43.)

20 5. Because the court on motion of the defendant refused to strike out the following answer to the following question:

Q When did you reach the conclusion to take the car, just at that time or before? A We were quite a while dickering. Mr. Winans did some figuring first, then he said, "I will tell you what I will do; I will allow you \$1,200. for the E. M. F."

Mr. Lum. I move that that be stricken out. (page 58.)

30 6. Because the court left to the jury the question of wheher or not the E. M. F. car was sold by Dr. Dallas to the defendant company.

7. Because the court charged the jury, amongst other things,—

40 "The first question then for you to determine is, was it within the scope of Mr. Winans' authority, as the manager or agent of the Koehler Company, to purchase this car? If you find it was not then the plaintiff cannot recover in this suit. If so, did he purchase the plaintiff's E. M. F. car for the Koehler Company? If you find that he did not, then your verdict must be

Grounds of Appeal.

for the defendant; but if you find he did and that this purchase was within the scope of his authority, then the plaintiff is entitled to recover from the Koehler Company the value of this car, which it appears cost Dr. Dallas \$1,200. in December, 1909."

8. Because the court in the absence of counsel replied to the questions of juror No. 5, as follows:

Juror No. 5. Can we have your instructions once more as regards the sale to this Koehler Company of the automobile on March 14th? Has the stenographer got it or do you recollect it? As I understand your charge, you said this whole case hinged on whether Dr. Dallas sold to the Koehler Automobile Company the E. M. F. automobile on the night of March 14th. 10

The Court. No, the question in the case is; first, was Mr. Winans authorized to purchase for the Koehler Company this automobile and, second, if he was authorized to purchase it, did he actually purchase it, or was the transaction between Dallas and this man Pfeifer. Of course, if the transaction was between Doctor Dallas and Pfeifer, and if Pfeifer was to sell the machine for Doctor Dallas, as Mr. Winans said Doctor Dallas told him at the automobile show, and which Doctor Dallas denied, then Doctor Dallas cannot recover against the Koehler Company. So, as I have said the two questions in the case are really both involved in the one question, and that is whether or not you find that Winans had authority not only to be the manager and sales agent of the Koehler Company, but to purchase this automobile; and if he had that authority whether in fact he did purchase it. 20 30

Juror No. 5. At any time?

The Court. Yes; at any time. (pages 68 and 69.)

LUM, TAMBLYN & COLYER,
Attorneys for defendant, H. J. Koehler
Sporting Goods Company.

Judgment Record.

(Filed July 27, 1914.)

Declaration.

ESSEX COUNTY CIRCUIT COURT

10 of the first day of July, nineteen hundred and eleven.
ESSEX COUNTY, ss:

H. J. Koehler Sporting Goods Company, a corporation, and Mark E. Winans, the defendants in this action, were summoned to answer unto Alexander Dallas, the plaintiff therein, in an action upon contract; whereupon the said plaintiff by Hugh B. Reed, his attorney, complains for that whereas heretofore, to wit; on the twenty-fourth day of February, nineteen hundred and ten, the said plaintiff, at the special
20 instance and request of the said defendants, purchased of the said defendant, H. J. Koehler Sporting Goods Company, a certain automobile or motor car and appliances, which for the sake of convenience will hereinafter be referred to as the "Koehler 40," and for which the plaintiff then and there agreed to pay to the said defendant company the sum of six hundred and seventy dollars in cash and to turn over and deliver to said defendant company a certain automobile or motor car of great value then and there belonging
30 to said plaintiff, and which for the sake of convenience will hereinafter be designated the E. M. F. Motor car, which said E. M. F. Motor car was then and there of the value of twelve hundred dollars, and for which said sum the said defendants agreed it should be accepted by said defendant company as aforesaid and the plaintiff avers that afterwards, to wit, on or about the first day of March, nineteen hundred and ten, at the special instance and request of the said defendant Mark E. Winans, and of the said
40

Judgment Record.

defendant company, by and through its duly authorized agent, said plaintiff, delivered to said H. J. Koehler Sporting Goods Company, defendant, said E. M. F. Motor car, pursuant to said agreement so made between said defendants and said plaintiff, and the said plaintiff avers that afterwards, to wit, on or about the first day of March, nineteen hundred and ten, the said plaintiff having paid to said defendant 10
company the sum of two hundred and seventy-five dollars, the balance of six hundred and seventy dollars for the purchase price of said "Koehler 40," and having demanded the delivery thereof, to him, the said defendant, Mark E. Winans, informed said plaintiff that it, said defendant company, was unable to carry out the agreement so made with him, said plaintiff, as aforesaid, because said defendant company could not deliver said "Koehler 40,, until it had received the sum of twelve hundred dollars additional 20
in cash, whereupon, afterwards, to wit, on the fifteenth day of March, nineteen hundred and ten, said plaintiff, at the special instance and request of said defendants, paid to said defendant company the sum of twelve hundred dollars in cash and thereupon received said "Koehler 40" car so purchased by him as aforesaid, and in consideration of the payment of twelve hundred dollars as aforesaid, said defendants undertook and then and there faithfully promised 30
said plaintiff to pay him the sum of twelve hundred dollars, the value of said E. M. F. motor car on or before the fifteenth day of June, nineteen hundred and ten, yet the said defendants, disregarding their said promises in that behalf, though often requested so to do, have not, nor has either of them paid the said sum of twelve hundred dollars to the said plaintiff, or any part thereof, wherefore the said plaintiff says he is damaged in the sum of three thousand dollars and therefore he brings his suit.

Judgment Record.

And whereas also on the first day of June, nineteen hundred and eleven, the said defendants were indebted to the said plaintiff in the sum of three thousand dollars for the price and value of goods sold and delivered by the plaintiff to the defendants at their request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendants at their request; and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendants at their request; and in the like sum of money for money lent by the plaintiff to the defendants at their request; and in the like sum of money for money received by the defendants for the use of the plaintiff, and in the like sum of money for money paid by the plaintiff for the use of the defendants at their request; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff's having forborne moneys due from the defendants to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendants to the plaintiff on an account then and there stated between them, and the defendants afterwards, to wit, on the day and year last aforesaid, in the county aforesaid in consideration of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request, but though often requested has wholly failed and neglected so to do.

Wherefore and by reason of the premises the said plaintiff saith that he is damaged in the sum of three thousand dollars and therefore brings this suit.

HUGH B. REED,
Attorney for plaintiff.

Judgment Record.

TO THE WITHIN NAMED DEFENDANTS:

Take notice that if you intend to make a defense to this action you must file a plea or demurrer to this declaration within twenty days from date of the service hereof upon you and in default of the filing of such plea or demurrer judgment will be entered against you.

HUGH B. REED,
Attorney of Plaintiff.

10

Plea.

(Filed Aug. 14, 1911.)

And said defendants by Lum, Tamblyn & Colyer, their attorneys, come and defend the wrong and injury when &c., and say that they did not undertake or promise in manner and form as the said plaintiff hath thereof above complained against them, and of this they put themselves upon the country, &c. 20

LUM, TAMBLYN & COLYER,
Attorneys for defendants,

30

40

Judgment Record.

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

10 Herman J. Koehler being duly sworn upon his oath, according to law, says, that he is the president of the H. J. Koehler Sporting Goods Company, one of the defendants in the above entitled cause; that the above plea about to be filed by the said defendant is not intended for the purpose of delay; and deponent further says that he believes that the said defendant has a just and legal defense to the said action on the merits of the case.

HERMAN J. KOEHLER.

Subscribed and sworn to this
 12th day of August, nineteen hundred and eleven, before me,

20 CHARLES F. HOPKINS,
 A Notary Public for New Jersey.
 (SEAL)

30

40

Alexander Dallas, direct.

ESSEX CIRCUIT COURT.

ALEXANDER DALLAS,

vs.

H. J. KOEHLER SPORTING GOODS Co.,
AND MARK E. WINANS.

On Contract.

10

Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., Monday, January 5, 1914.

Before Hon. Nelson Y. Dungan, Judge, and a jury.
Hugh B. Reed, for plaintiff.

Lum, Tamblyn & Colyer, by Ralph E. Lum and William A. Wachenfeld for defendant.

20

Mr. Reed opens for the plaintiff.

Mr. Reed. Before I examine the plaintiff I desire to read some of the interrogatories into the record and the answers thereto.

(Mr. Reed reads interrogatories numbers 1, 2, 3, 4, 7, 8, 11 and 12, and the answers thereto, to the jury.)

ALEXANDER DALLAS, plaintiff, sworn in his own behalf.

30 *Direct examination* by Mr. Reed

Q Doctor Dallas, where do you live? A Caldwell, New Jersey.

Q In what business or profession are you engaged? A The practice of medicine.

Q For how long a time have you been engaged in that profession? A Since 1878.

Q Where did you live in February, 1910? A In Orange Road, in Montclair.

Q Were you practicing at that time? A Yes.

40 Q You are the plaintiff, are you not? A Yes.

Alexander Dallas, direct.

Q Do you know the defendants in this case, the H. J. Koehler Sporting Goods Company and Mark E. Winans? A I know Winans.

Q Did you have any business transactions with them, or either of them, during 1910? A I did.

Q What was it and when? A In December, 1909, I was brought to the Koehler Company's sales-rooms and introduced to Mr. Winans as the New Jersey representative, and bought from him an E. M. F. car. 10

Mr. Lum. I object to all this conversation had with either one of the defendants on the ground that it was a contract entered into between the plaintiff and defendant, and dated February 14, 1910.

The Court. That does not appear in the pleadings. Unless counsel desires to admit that point I will overrule the objection. 20

Q Doctor, I understood you to say that you had purchased an E. M. F. car in December. Continue. A I went to the automobile show that was opened on February 24, 1910. Immediately I entered the show room, Mr. Winans came and asked me to see a new Koehler car and insisted that I should exchange my E. M. F. for the new Koehler.

Q How long had you had your car? A I told him I didn't require it, that the E. M. F. was satisfactory, but after following me all over the whole evening I finally agreed to make the exchange and I agreed to purchase the new Koehler. 30

Mr. Lum. I object.

Q (*By Mr. Lum.*) Was that agreement in writing? A It was afterwards, yes, sir.

Mr. Lum. Then I object to this conversation.

Q (*By Mr. Reed.*) What was the writing, doctor?

Mr. Lum. I object. The writing is the best evidence of what it was. 40

Alexander Dallas, direct.

Q Where is the writing you speak of? A I signed a contract showing these terms. I was to pay eighteen fifty something.

Mr. Lum. I object.

The Court. Objection sustained.

Q No; I am asking what the contract was, where you signed it and when? A It showed that in it.

10 Q Have you it? A No. In moving I must have lost it. I haven't got my copy.

Q Have you looked for it? A I looked for it but we moved and I could not find it.

Q Where have you looked? A All over, among my papers.

Q Well, then, what were the contents of the paper?

Mr. Lum. I object. Mr. Reed may have the contract at any time he desires it.

20 *The Court.* You are in possession of it?

Mr. Lum. We are in possession of it, yes, sir.

The Court. He offers to produce it. Of course if you say that is not the contract perhaps your question will be proper.

Mr. Reed. We do not wish to be bound by it.

Mr. Lum. There is not sufficient proof of the loss of the contract. He has given notice more-over, to produce.

30 Q Doctor, do you know anything about any copy of this contract? A No; I don't.

Q Do you recall whether or not it was signed in duplicate? A Unless there was a carbon under it; I don't know. It was written over and torn out of the book and handed to me. He had a book about that (indicating) size; the terms were written out and the copy was handed to me.

40 *Mr. Reed.* I am perfectly willing, if Mr. Lum has a copy there, to have it shown to the doctor and have him state whether that was the contract he signed or a copy of it.

Alexander Dallas, direct.

Q (Handing paper to witness.) Will you look at this paper which Mr. Lum produces and tell me whether or not that is the contract or a copy of one which you signed?

Mr. Lum. The signature will help tell you.

A This is only a part of it, sir, because in the contract I signed it was distinctly and clearly stated that—

Mr. Lum. I object. 10

The Court. Yes; if this is not the contract then I will rule upon the other question.

Q Is that the contract which you signed, doctor?

A It is part of it, for the accessories, for the top.

Q Let us get at it in another way. Is that your signature? A It looks to be my signature, yes. In the contract I signed it was distinctly stated that the E. M. F.—

Mr. Lum. I object. 20

The Court. Objection sustained. The answer will be stricken out.

Q Is or is not this the contract on which you purchased the car? A It is part of the contract, sir; only a part; on the contract the terms were written down.

Mr. Lum. I object.

The Court. The answer may stand.

Q . What was the contract which you made with them? A I was to pay eighteen hundred— 30

Mr. Lum. I object.

The Court. I suppose his answer is equivalent to saying that that is not the complete contract.

Mr. Lum. Then I have a right to cross examine on that.

The Court. Yes; you may do that.

By Mr. Lum.

Q You say the contract was in book form? A It was torn out of a book. 40

Alexander Dallas, direct.

Q A book about that size (indicating)? A Longer than that, sir.

Q Longer which way? A In length—longer.

Q Has anything been torn off the top there? A I don't know, sir.

Q Will you examine it and tell me whether anything has been torn off the bottom there? A I couldn't say.

10 Q Has anything been torn off that (indicating) side? A I don't know.

Q Or that (indicating) side? A I don't know.

Q I have now shown you the four sides of what purports to be original order number 1534. Are you real sure that is your signature? A It looks like it.

Q Did you sign your signature more than once to that contract? A That I could not tell, sir; I couldn't recollect; that is not the only contract I signed.

20 Q Did you sign your name more than once? A I couldn't recall, sir, whether I did or not.

Q Now, you say this is not the full contract merely because as you want to remember it these terms don't suit you now, isn't that it? A The terms are not the terms made in the agreement, sir.

Q The contract you signed was partly printed with blanks filled in? A Yes, sir.

30 Q They were filled in in Mr. Winans' handwriting? A Winans wrote it out, yes, sir.

Q The original contract called for the purchase of an automobile, too, didn't it? A The exchange of an automobile, sir.

Q Well, this that I show you calls for the purchase of an automobile? A That is why I say that is not the contract I signed.

40 Q Then you mean to say that this is not the contract that you signed at all, is that it? A It states the accessories there; that is all that states.

Alexander Dallas, direct.

Q Just a moment. Perhaps you didn't read it. It says, "H. J. Koehler Sporting Goods Co., February 24, 1910, Gentlemen: Please enter my order for one model Koehler 40 automobile at list price of \$1,685, F.O.B., Newark, to be delivered on or about March 1st, on which I hand you—"

Mr. Reed. I object. I don't think counsel should read the contract into the record.

Mr. Lum. I cannot cross examine on this remarkable testimony unless I have it all on the record. 10

The Court. Objection sustained. The question will be stricken out.

Q You paid a certain amount of money to Mr. Winans at that time, did you not? A I did.

Q How much was that? A About \$395, I think.

Q You have a returned check for that? A I think so. 20

Q It is twenty per cent. of \$1,685, isn't it? A Not quite.

Q Well, you did pay \$395 cash? A I paid \$395 cash.

Q That is the amount called for by this order of February 24, is it not? A About \$1,850, yes, including accessories.

Q It was agreed by the contract you signed that that amount was to be deducted from the price of the car, on delivery, was it not? A Yes, sir. 30

Q And you paid the balance in cash, on delivery, when you got your car, did you not? A Yes.

Q So that this paper I show you, signed by you, is an order for the car and at the bottom it calls for accessories, does it not? A It calls for accessories, yes.

Q So that this one paper covers both an order for the car and extra for accessories, does it not? A I—

Alexander Dallas, direct.

Mr. Lum. I contend that it is very clearly shown that the witness is equivocating. He admits his signature covering the car and the accessories.

The Court. I understand that there is no question to rule upon. You may ask a question.

By Mr. Reed.

10 Q What were the terms, doctor, of the contract upon which you purchased the car which you speak of?

Mr. Lum. I object.

The Court. I suppose you refer, now, to the terms of the written contract which he admits that he signed and which is lost. You object to that?

Mr. Lum. Yes, sir.

20 *The Court.* Objection overruled.

Mr. Lum. I pray an exception.

The Court. An exception will be allowed if you need it.

Defendant's counsel prays an exception to the ruling of the Court; and the same is allowed, and signed and sealed accordingly.

Circuit Court Judge.

30 A The terms were to take back the E. M. F. for \$1,200. I paid twenty per cent. of the amount down. I was to pay the balance in cash on delivery of the car on the 1st of March.

Q I show you a letter addressed to the H. J. Koehler Company dated March 1, 1910, signed by Alexander Dallas and ask you if you recognize that? A That was exactly the statement of the agreement, sir.

The Court. You have not stated the agreed price for the new car.

Alexander Dallas, direct.

Witness. I think with the accessories it was \$1,850 or \$1,855. What is the exact amount there?

Mr. Reed. \$1,685.

Mr. Reed. I offer it in evidence.

Mr. Lum. I object to it. You cannot alter or vary a contract or written agreement; in the second place it is a self-serving declaration made by him. 10

The Court. I will sustain the objection unless some connection be shown.

Mr. Reed. It shows the enclosure of the check for the payment of \$275 in accordance with the contract.

The Court. The objection will be sustained. Exception to plaintiff.

Q Doctor, did you pay any money on account of this agreed purchase? A Yes, sir. 20

Q What was the first amount paid? A Paid \$395 the night I agreed to exchange the cars.

Q That was the same night? A That is the same night.

Q Then did you pay any more? A Paid \$275, the balance of the contract.

Q What about your car, your E. M. F.? What became of that? A On the 27th of February Mr. Winans called me up and asked me to send down the E. M. F. 30

Mr. Lum. I object. It is not shown that Mr. Winans had any authority to bind the Koehler Company. This is a suit against the Koehler Company and it could not be that an employee or agent has authority to exchange cars unless such authority is expressly given. An agent to sell is not an agent to exchange, clearly, under our cases, nor even an agent to collect. 40

Alexander Dallas, direct.

The Court. The objection will be overruled.

Q Continue, doctor. A As they had a customer for it and they wished to demonstrate the car to him.

Q Yes. What did you do? A I sent the car right down.

10 Q Well, what then happened? A On the 1st of March, according to the contract made by the Koehler Company, through Winans, I sent a man down with this letter and a check for the balance for delivery to the Koehler.

Q A check for how much, do you remember? A \$275, I think.

Q And what happened then? A Why, the man came back and said that the Koehler—

Q Well, I don't suppose you would be allowed to tell what the man said? A Well, he came back without the car.

20 *Mr. Reed.* Do you want him to tell what the man said?

Q Then you may continue.

Mr. Lum. I object.

Q He came back and told you what?

Mr. Lum. I object.

A About the car; it wasn't right.

Q He came back without the car?

Mr. Reed. I thought you said you consented.

Mr. Lum. No.

30 Q Go ahead and tell us what happened after that, whether you ever received the car, Doctor. A Well, I was without the car. They had my E. M. F., and they didn't deliver the Koehler. I was after them every day; I wanted the car. About the end of the week they sent me up an old car from their place to keep me going until the Koehler was ready. They told me the Koehler wasn't ready, although at the show they told me that the Koehler was ready to go right out on March 1st; and I kept after them; and finally I notified Winans that if the Koehler wasn't

40

Alexander Dallas, direct.

delivered by the 15th they would return my money I paid on the Koehler contract. On the night of the 14th, between half past eleven and twelve o'clock, I was called out of bed and, coming down, Winans was there with this man Pfeifer, the first time I had ever spoken to Pfeifer.

Q Who was Pfeifer? A Koehler's salesman. I told him I thought it was rather an unusual time; but after a good deal of talk they told me that they had sold the E. M. F., but the purchaser had no money and he would not receive it— 10

Mr. Lum. I object. Certainly a company or corporation cannot be bound by a statement of this kind, by their agents, unless some authority can be shown. I have a case which holds that an agent to sell is not an agent to collect. This evidence, if permitted would make it unsafe for any company in the world to do business. We can't get Pfeifer; we don't know anything about him. All we know about him is that he was entitled to make cash sales, with no other authority whatsoever. 20

The Court. I think on the other hand it would be absolutely unsafe for people to do business with corporations or firms if the transactions with their agents who assume to hold a contract of sale could not be shown. Objection overruled, and your objection will be noted. 30

Witness. (continuing.) I was introduced to Mr. Winans as the legal representative of Koehler and dealt with him as the New Jersey representative of Koehler. All my dealings with Winans were as representative of Koehler.
(Former answer read by the stenographer.)

Witness. I said Mr. Winans, not Pfeifer. I didn't know Pfeifer until Mr. Winans introduced me to him. I told Mr. Winans it was an unusual 40

Alexander Dallas, direct.

time to make a conversation. All my business was done with Winans.

Q Continue, doctor. What took place that night?

A After some talk Mr. Winans told me that on account of threatening to cancel the order on the 15th they not being able to get the money from the man to whom they sold the E. M. F., they were rather in a hole, and they wanted to know if I would help
10 them out.

Q Yes? A I asked them why they didn't tell me about this sooner instead of telling me that Koehler wasn't ready. I agreed, then, to endorse a note for them, which Winans and Pfeifer agreed to sign, so as to allow this man who had sold some real estate to get some money to pay for the E. M. F. I endorsed a note for twelve hundred dollars and the next morning I got the Koehler. I never thought any more
20 of the matter until I received a notice of protest from the bank that the note was protested. I immediately went down to the Koehler place, saw Winans and asked him what the meaning of it was. Well, he couldn't give me any answer. I said, "I want either this note paid or I want my E. M. F. back." I went over to the bank and paid the note; I didn't want a protested note to stand there against me. I demanded either the money or the car. Then Winans told me that Pfeifer had left their employ and he couldn't
30 say where he was. I said, "That doesn't make any difference to me. I delivered the E. M. F. to the Koehler people; I want my E. M. F." Then he told me that Pfeifer had taken the E. M. F. and sold it and put the money in his pocket. I was out the \$1,200 and the E. M. F.

Q I wish you would tell me a little more particularly what Mr. Winans or Mr. Pfeifer in Mr. Winans' presence said in regard to the necessity of giving this note? A Well, they said that on account of my
40 threatening to take steps, if I didn't get the Koehler,

Alexander Dallas, direct.

to get my car back, that they were in a hole; that they had told Koehler they had had the money and this man to whom they had sold the E. M. F. hadn't got his money for the sale of property he had sold; and if I could help him out temporarily it would save them, probably, disagreeableness with Koehler, after their saying they had the money for the E. M. F.

Q What had that to do with you? A Really nothing to do with me except that they asked me if I wouldn't help them out. 10

Q I show you a note dated March 15, 1910, and ask you if that is the note to which you refer as the note which you endorsed? A That is the note, yes, sir.

Q You see that is signed by Louis F. Pfeifer and endorsed by you? A Yes, sir.

Q What did Mr. Winans have to do with it? A When they left the house that night it was after twelve o'clock. Winans and Pfeifer were both to sign it; I understood they did; that was the agreement when I endorsed it after twelve o'clock that night. It was a cold night and I wanted to get back to bed. 20

Mr. Reed. I will offer this in evidence, the note made by Louis F. Pfeifer to the order of Alexander Dallas, dated March 15, 1910, for \$1,200.

(Marked Exhibit P. 1.)

Q Do you know whether or not the proceeds on this note were paid to the H. J. Koehler Company? A I presume so, yes. 30

Mr. Lum. I object.

The Court. That will be stricken out.

Q I asked you if you knew. Well, did you ever get your car back, your E. M. F.? A Never.

Q Did you ever receive this twelve hundred dollars or any part of it? A Never.

Q Have you seen Mr. Winans since the time you describe when you found the note was protested and 40

Alexander Dallas, cross.

paid it? A I went over to him and demanded the note or the car.

Q What did he say? A Then for the first time I heard that Pfeifer had left their employ three or four weeks previously.

Q What reply did he make to your demand that he either return the car or pay the money? A He said he didn't have the money to pay it. Then I said, "Then I will take my car back, my E. M. F." Then he told me that he didn't have the car. I asked him how that was that the car was delivered to the Koehler people and they were responsible for it. I didn't give the car to Pfeifer; I delivered the car to the Koehler people.

Q What was the amount that you were to be allowed for this E. M. F.? A \$1,200.

Cross examination by Mr. Lum.

Q Do you recall talking to Mr. Winans at the show, do you? A Yes.

Q Do you recall Mr. Winans saying to you that the company under no circumstances ever took second-hand cars in exchange? A No.

Q And you did sign a written contract, you say? A Yes.

Q And paid down \$395? A Yes.

Q That written contract was dated February 24, 1910, was it? A Yes.

Q And it provided for an order by you of a certain "Koehler 40" car, did it? A Yes.

Q At the price of \$1,685? A With accessories.

Q \$1,685 with accessories? A Yes.

Q The accessories were listed, what they were, they were written out at the top? A Yes.

Q Speedometer? A Yes.

Q Two wind shields? A Yes.

Q And there were prices fixed, extra, for those? A Yes, sir.

Q Top was 125? A Yes.

Alexander Dallas, cross.

Q The speedometer was to be a Stewart speedometer, wasn't it? A I do not recall.

Q Well, there was some kind? A I presume so.

Q That was to be \$25? A Yes.

Q The wind shield \$35? A Yes, sir.

Q It was to be delivered about when? A At the close of the show.

Q March 1st? A March 1st.

Q That was put in the order that you signed, was it? A It was. 10

Q Then you handed a deposit of \$395 to Mr. Winans? A Yes.

Q (*By the Court.*) How much was the car? A \$1,875.

Q No, the car itself? A \$1,685 with accessories.

Q (*By Mr. Lum.*) This is the check, dated February 24, made to the order of H. J. Koehler Company for \$395? A Yes. 20

(Said check marked Exhibit D. 1.)

Q On March 1st, you sent a check to the Koehler Company for \$275? A Yes, sir.

Q That is the check? (*Showing same to witness.*) A Yes, sir.

Mr. Lum. I offer it in evidence.

(Marked Exhibit D. 2.)

Q That \$395 you paid was to be deducted from the price of the car on delivery? A Yes.

Q You agreed to pay the balance on cash, or by certified check, when notified that the car was ready for delivery? A I was to pay the balance— 30

Q One minute. Answer yes or no. The balance between \$395 and \$1685? A No sir.

Q Did you read that order you signed? A I thoroughly understood the agreement.

Q Did you read that card or paper that you signed? A No.

Q You did not? Would you swear then that it didn't have "Cash or certified check" enlarged and in 40

Alexander Dallas, cross.

heavier, blacker ink than the rest of the order? A No.

Q You wouldn't swear to that? A I know the agreement I made.

Q Was there to be any warrantee, express or implied? A A warrantee for one year as all decent cars grant.

10 Q Was there any provision regarding the return of the defective parts? A A general understanding.

Q What did the agreement provide for that? A All defects and all imperfections within a year were to be remedied free of charge.

Q Was that in the contract? A I don't know whether that was in the contract. I know what was the agreement; I know what the agreement was; I supposed I was dealing with honest people.

20 Q You mean you know what was in the verbal agreement? A The agreement I made, yes.

Q And as you dealt with honest people you didn't pay particular attention to the written contract? A I didn't read the written contract any more than I read a fire policy.

Q I say you didn't read the written agreement, and when you wanted your car delivered you were told you couldn't get it without paying the balance in cash were you not? A No, sir.

30 Q When did you say you first met Pfeifer? A The first time I met him to talk to him was the night Winans brought him to my house, March 14th, between eleven and twelve o'clock at night.

Q Didn't you meet him at the show? A Not to my knowledge.

Q Will you swear you didn't talk with him about the car before the show? A I never did talk with him before the show.

40 Q You say that Winans came to your house late at night, on March 14th between eleven and twelve o'clock? A I was in bed.

Alexander Dallas, cross.

Q They said you couldn't get the car unless you paid the money? A That is the substance of it.

Q Then you sat down—whose handwriting is that note in, do you know? (Showing paper to witness.)

A I don't know whose writing that is, no.

Q A note was written out and dated that same night, March 15, to your order, for \$1,200 and signed by Louis Pfeifer, was it? A No, sir; it was to be— it wasn't signed by either; it was to be signed. 10

Q Never mind. Just answer my question. A It wasn't signed by either of them that night.

Q Then there was a blank note, was there? A

Yes.

Q A blank note made to your order? A Yes.

Q And you endorsed that blank note, did you? A

Yes.

Q For \$1,200? A Yes.

Q Then you sent and got your Koehler 40, did you? A Yes, sir. 20

Q You never got back your E. M. F.? A Never.

Q Did you personally deliver the E. M. F.? A No; I didn't personally deliver it.

Q Then you don't know of your own knowledge where it was delivered, do you? A I know that it was delivered.

Q Did you see it? A Yes.

Q When, later? A Down in Koehler's.

Q Did you ever see it at Pfeifer's place? A No, 30
sir; never knew Pfeifer had a place.

Q But you endorsed a note made to your own order for \$1,200, and you understood that both Winans and Pfeifer were to sign it, did you? A That was the agreement that night.

Q (By Mr. Reed.) I understand you to say that you didn't read the written agreement with care.

The Court. He did not read it at all.

Q What was said about it, anything?

Mr. Lum. I object.

Alexander Dallas, cross.

The Court. Objection sustained. I understood Dr. Dallas had been testifying from his recollection of what was in the last written agreement. Now he says he did not read it at all.

Mr. Reed. I wanted to ask him about what was said by Mr. Winans at the time of the signing of the agreement in regard to its contents.

10 *Witness.* I saw the—

Mr. Lum. I object.

The Court. Perhaps that is proper. It is against Mr. Winans. I will overrule the objection.

Q Now, will you continue? What was said by Mr. Winans at the time of the signing of the contract at the automobile show on February 24 as to its contents? A I saw that the price was put down correctly and that the allowance was made for the E. M. F.

20

Q No. What did he say as to the contents of the contract you were signing? A He didn't say anything. We made an agreement to exchange the cars. I didn't read that small print.

Q Did Mr. Winans say anything about what this was you were signing? A No; we understood the agreement; he was to take the E. M. F. for \$1,200. I was to pay the balance in cash. I paid twenty per cent. that night and on March 1st, I sent down the balance, \$275.

30

Q You saw the E. M. F. after you sent it down on February 7, 1910? A Saw it down in Koehler's place there in Halsey Street.

Q What did Mr. Winans say on the night of March 14, about the car, the E. M. F. car? A He told me—

Q Did he say whether he had it or not? A He told me that he had sold it but the purchaser didn't have the money then to pay for it.

40

PLAINTIFF RESTS.

Motion for Non-suit.

Mr. Lum. I think we are entitled to a non-suit in this case, and I will state my grounds.

1. That the proof varies from the declaration.
2. That the proof does not support the declaration.

3. That the proof does not show any cause of action against the defendants nor either of them.

4. That the money, if paid, was paid voluntarily with knowledge of the facts and so cannot be recovered back. 10

The Court. (After argument.) The suggestion is that this was a personal transaction, that that note was endorsed by Dr. Dallas to help these young men out, but was not chargeable to the Koehler Company.

Mr. Reed. He said he dealt with Mr. Winans as representative of the Koehler Company. If Mr. Winans was acting in that capacity in order to obtain that money from him, whatever was done with the money that was charged on the note he would be charged with. If your Honor thinks I should make that more clear I will call an officer for the company and show that the money was paid. 20

The Court. You may take your own course about that. I do not want to suggest how you should try your case.

Mr. Reed. Have you any objection? 30

Mr. Lum. No.

Mr. Reed. Then I will call Mr. Koehler. Is he here?

Mr. Lum. No.

Mr. Reed. Then I will call Mr. Winans.

Mr. Lum. Then the case is reopened?

The Court. A motion is made for the reopening of the plaintiff's case and that is allowed, and Mr. Winans is called. 40

Mark E. Winans, direct.

MARK E. WINANS, sworn in behalf of plaintiff.

Direct examination by Mr. Reed.

Q Mr. Winans, do you remember a transaction with Dr. Dallas in regard to the purchase by him of a Koehler 40 car? A Yes, sir.

Q How much money was paid to the company for that car, do you know? A I received a check from Dr. Dallas for \$375.

Q And what else? Anything further? A That is all the money I received.

Q It is all you received? A Yes, sir; the only check and the only money that I received from him.

Q You mean to say that the company received no more than that? A I believe the company received the rest.

Q (*By Mr. Lum.*) You say you "believe." Do you know? A No, I do not.

20 *Mr. Lum.* Testify only to your knowledge.

Q (*By Mr. Reed.*) What knowledge have you that leads you to form the belief, Mr. Winans? A One day when I was sick, shortly after the show, the office called me up on the 'phone and said they received a letter from Dr. Dallas. I think they said it contained a check; I wouldn't say surely about it; but I know they received another check from him.

Q You mean for the balance of the purchase price? A No, no. The \$275 I think, as the Doctor said this morning was the second check.

30 Q Well, how about the other \$1,200? Do you know whether they ever received that or any portion of it? A I believe they did; I never saw it.

Q You were manager of the Newark Branch? A Yes, sir.

Q Would the car have been delivered without it? A Yes, sir.

Q Without it? A Without my seeing it?

40 Q No; without payment. A No, the car would not have been delivered without the payment of it.

Mark E. Winans, direct.

Q So they must have received the balance or the car would not have been delivered, is that your idea?

A Yes.

Q Do you know anything about the proceeds of the note of which Mr. Pfeifer was the maker? A No.

Q You never heard of them? A Did I ever hear of the proceeds, where it went to?

Q Yes. A I assume the Koehler Company got it or the car would not have been delivered. 10

Q You were manager of the company at that time?

A Yes, sir; this branch; correct.

Q Unless that had been paid you would not have delivered the car? A Well, I didn't deliver the car myself.

Q You know the car was delivered, do you? A Yes, sir.

PLAINTIFF RESTS.

20

Mr. Lum. For the purpose of the record I desire to renew my motion on the same grounds as heretofore made, and to have the same force and effect as if they were stated anew.

The Court. It may be so stated. The motion for nonsuit will be held until the close of the defendant's case.

Mr. Lum opens for the defendant.

MARK E. WINANS, recalled in behalf of defendants. 30

Direct examination by Mr. Lum.

Q Mr. Winans, by whom are you employed at the present time? A By the Ellis Motor Company, agents for the Pierce Arrow Company.

Q Here in Newark? A Yes, sir, 416 Central Avenue.

Q You were formerly employed as salesman and general manager by the H. J. Koehler Company? A As manager, not general manager. 40

Mark E. Winans, direct.

Q Do you know Dr. Dallas? A Yes, sir.

Q Did you meet him at the show as testified? A Yes, sir.

Q I show you what appears to be order number 1534, signed by Dr. Dallas. By whom was that filled out? A Filled out by me.

Q Who took that order? A I took the order.

10 Q Does that paper I show you comprise the whole order as taken at that time? A Yes, sir.

Q Is there any other? A No, sir.

Q Is there anything taken away or abstracted from this? A The only thing that is taken away from that, we allowed him \$5.00 on the wind shield. There is nothing taken off that or altered in any way. I found out later that I could get him it for \$5 less.

Q I don't mean that; from the paper itself; was there anything torn off or altered? A No, sir.

20 Q This paper is the complete agreement? A Yes, sir.

Q That was given at the time of the transaction? A Yes, sir.

Q Dr. Dallas has testified that \$395 cash was paid at the time. Was he correct in that? A I received his check.

30 Q And the check is in evidence here. I call your attention to the words "cash" and "certified," and down further the word "cash." Were they in the copy that the doctor received, printed in the same form? A Yes, sir.

Q That is, with additional type, blacker and heavier? A Yes, sir; it shows up plainer on the other paper, being on yellow paper.

Q Did he have any conversation, or did you personally make any contract with him aside from this contract? A No, sir.

40 Q Did you have authority to take second-hand cars? A No, sir.

Mark E. Winans, direct.

Mr. Reed. I object. I don't think that this witness is capable of saying whether or not he had that authority.

Q What was the full scope of your authority? What were your duties?

Mr. Reed. I think that this witness cannot prove his agency. I object to the question.

The Court. Objection overruled.

Q State the scope of your employment? A My duties? 10

Q Your duties. A I employed the help there at the Newark Branch, and at the Montclair Branch, East Orange and the Paterson Branch; looked after things generally; I looked after sales. Is that the point you wish to make? If there is any particular point you wish to bring out I will be pleased to do it.

Q Did you employ their help? A Yes; I employed their help.

Q Did you give them their instructions? A Yes. 20

Q What were the instructions by yourself or any other salesman with reference to exchanging cars?

A We could never exchange cars except from putting Mr. Koehler in touch with all the conditions, and we never did exchange a car while I was with the company.

Q Did you make any statement to Dr. Dallas about exchanging his car? A No.

Q Did you say whether it could or could not be done? A At the show I told him it could not be done. 30

Q Do you know whether he had any dealings with Pfeifer personally? A Yes, he said to me that he expected Pfeifer to sell his car for him.

Q Did he tell you that? A At the show.

Q Did you ever agree to put your name on any note with the doctor? A No, sir.

Q Do you know whether the E. M. F. car of the doctor came down to the Koehler place? A I know that it did but I don't know when it came down. 40

Mark E. Winans, direct.

Q After you found that it was there what if anything did you do about notifying the doctor? A I found out it was there on account of a talk about tools with Dr. Dallas's chauffeur and Pfeifer. It seems that either Dr. Dallas, Pfeifer or the chauffeur had the keys and there was some tools in the car. The chauffeur came running in to me. I was in the office. He said, "Pfeifer has hold of my tools."

10

Mr. Reed. I object.

The Court. That will be stricken out.

Q What did you do with reference to the doctor? You say it was a conversation between Pfeifer and Dr. Dallas's chauffeur? A Yes, sir.

Q It was that that brought it to your attention, the fact that it was the doctor's car? A Yes.

Q What did you do, then, with reference to the doctor? A I didn't have any talk with the doctor.

20

Q What happened to the car then? A Pfeifer took it out of there.

Q Was it at your instructions? A Yes, sir.

Q Where did he take it, do you know?

Mr. Reed. I object.

Q Do you know? Testify to what you know. A I learned afterwards that the car was taken to his mother's.

Q How did you learn? A From Pfeifer.

30

Q That is only hearsay evidence? A Yes.

Q All you know is that Pfeifer took the car away?

A Yes, sir.

Q Did you ever see the car again? A No.

Q Did the Koehler Company ever receive any part of the proceeds from that E. M. F. car? A No, sir.

Q Did the Koehler Company have anything to do with the sale of the E. M. F. car? A No, sir.

Q Did Koehler undertake to have anything to do with the sale of the E. M. F. car? A No.

40

Mark E. Winans, direct.

Q Were you present when the doctor had any dealings with Pfeifer? A That night up to the doctor's house.

Q Tell us what the trouble was. A We got up to the doctor's house around nine o'clock. I remember it was a cold evening and I asked Pfeifer why the car had not been delivered, why we hadn't received the balance in cash or by certified check so we could sell the car. He said he had not sold the doctor's car yet. 10

Mr. Reed. I object.

Mr. Lum. You cannot give the conversation with Pfeifer.

The Court. That will be stricken out unless Mr. Winans says that the conversation took place in the presence of the doctor.

Q Let me explain to you that you can only testify to what was said with Mr. Pfeifer when Dr. Dallas was present? A I took Pfeifer to Dr. Dallas's house and asked him why the balance had not been paid as we wanted to deliver the car; we had other people waiting for the car, to take delivery. Just then we were away back on deliveries. After talking for a considerable time, different matters came up, and it was either Pfeifer or the doctor, I think it was the doctor, suggested that he give Pfeifer his note and Pfeifer endorse it, or the other way—I have just forgotten which way it was. Anyway, he said, "Come and see me tomorrow morning." I am very sure it wasn't later than eleven o'clock when we left there. 20 30

Q To whom did he say, "Come and see me tomorrow morning"? A To Pfeifer. It was left that way, Pfeifer should go and see him the next morning. Pfeifer said he had not sold the doctor's car yet. He had expected to sell it; he had tried to get his mother to mortgage some of her property so he could sell it; he was sure he could sell it at a profit. 40

Mark E. Winans, direct.

Q You say the doctor made arrangements for Pfeifer to come back the next morning? A Yes, sir; Pfeifer went back the next morning, I believe.

Q Did you ever have any conversation with the doctor after that? A When the doctor came in the office, as he stated on the stand here and asked me about the car, and asked me for either the money or the car, I think that was the next day.

10 Q Then what was the conversation? A I told him we had nothing whatever to do with the car and whatever was done was directly with Pfeifer.

Q Did you personally ever promise the doctor to sell his car? A No, sir.

Q Did you promise the Koehler Company to sell his car? A No, sir.

Q Did you personally ever have any dealings for the sale of his car? A No, sir.

20 Q Did you ever pay back the \$1,200 or any part of it? A No, sir.

Q Did you, for the defendant company, ever agree to pay him back the \$1,200 or any part of it? A No, sir.

Mr. Lum. I ask that this contract be marked in evidence.

The Court. It will be received.

(Said paper marked Exhibit D. 3.)

30 Q Will you tell me whether or not you did anything about explaining the contract, this contract, to Dr. Dallas? A Yes; I read the contract to Dr. Dallas at the time. It was on a very small table with a green blotter on it, right in back of the Koehler car, at the Armory. I always read all my contracts to anyone to make them clear.

The Court. That may be stricken out.

Q Did you have any conversations with Dr. Dallas when he first demanded delivery of the car? A When he first demanded delivery?

40 Q Yes. A I think I was sick at the time.

Mark E. Winans, cross.

Q When he offered the \$275? A No, I was in bed, sick at the time. At that time, the only way I know that his—

Q When you got out of bed, did you have any talk with the doctor about it then? A No; I didn't see the doctor about it.

Q When did you next see the doctor after he signed the order? A The next time I saw the doctor was when he came in the office and asked me for the \$1,200 and asked me for the E. M. F. car, isn't that correct, Doctor? 10

Cross examination by Mr. Reed.

Q Mr. Winans, you say you were manager of the Newark Branch of the defendant company? A Yes, sir.

Q How long a time had you been employed by them in that capacity? A This was 1910, wasn't it?

Q 1910. A I think it was since August previous; August 2, 1909. 20

Q That was when you first went in their employ? A Yes, sir.

Q Had you been engaged in the automobile business before that? A Yes, sir.

Q How long did you continue in their employ? A With the Koehler Company?

Q Yes. A I think I was with them two years.

Q You were the manager of the Newark Branch, you say? A Yes. 30

Q Did that include Montclair and Paterson as well? A I had charge of Montclair, Paterson and East Orange.

Q And you had exclusive right to sell cars in that district? A Yes. I could sell anywheres in the United States.

Q You could sell anywhere in the United States, but you had exclusive rights to sell Koehler cars in your district? A Yes. 40

Mark E. Winans, cross.

Q You knew the doctor had an E. M. F. car? A Yes.

Q How did you become acquainted with that fact?

A He bought it from the Koehler Company, I believe, either he or one of his friends, I forget which. Anyway, he got the E. M. F. car from them.

Q Do you remember when that was? A I think it was two or three months before the show.

10 Q December, I think you said. A It was December—I have just forgotten, November or December.

Q Did you know if he still had that car at the time of the show? A Yes.

Q You attended on the show, didn't you? You were there all the time? A Yes, sir.

Q Was any effort made on your part to sell any cars while the show was going on? A Certainly, we did that.

Q Did you see the doctor there? A Yes.

20 Q Did you talk to him about the purchase of a car? A Yes, sir.

Q Well, did you discuss the fact that he had any E. M. F.? A Yes, we talked about it. I told him we wouldn't take it in under any conditions.

Q You did talk about it? A Yes.

Q Well, did you urge him to buy a Koehler? A Yes.

30 Q Didn't he mention the fact that he had an E. M. F. as a reason for not buying a Koehler? A He mentioned he had an E. M. F., yes.

Q What was the cost of the E. M. F.? A He bought it at a greatly reduced figure, for about \$1,200. The figure would have been, with the equipment that was on it, around \$1,500. I don't just remember the figures exactly.

Q The Koehler was a better car? A A higher power car.

40 Q You called his attention to its superiority, did you not? A Yes, sir.

Mark E. Winans, cross.

Q And urged him to invest in one? A Yes; a much better car.

Q Did he tell you that he didn't need two cars?

A I don't remember.

Q Don't you remember his saying that he would have to dispose of his E. M. F., in order to enable him to purchase a car such as you wanted him to take? A Yes; he said he expected to sell it; he expected that Pfeifer would sell it for him. 10

Q He expected Pfeifer to sell it for him? A Yes, sir.

Q Pfeifer was your agent? You employed him? A Salesman, yes. I didn't employ him, no. He was there with the company when I came there.

Q Well, he was under your employment? You were manager and he was one of your subagents? A Yes.

Q He was working the game with you at the automobile show? That is, he was trying to sell cars with you? A Yes. 20

Q You and he were working in conjunction, were you not? A I worked in conjunction with all my salesmen, or try to work as near as I can with their minds.

Q You were working with him as well as the other salesmen while there? A Certainly; I had to; so did everybody in the company.

Q And this matter of the E. M. F. was brought up to you by one or the other? A Yes; brought up by the doctor. 30

Q He said he wanted you to take the car? A Yes.

Q So he did speak of your taking the car, E. M. F., that he had recently purchased of you? A Yes.

Q What was the value of it, do you remember? A He said Pfeifer expected to get \$1,200 for it. He spoke to me about it. I said we had no dealings, taking in cars. 40

Mark E. Winans, cross.

Q He asked you then, did he not? A I think he did; I made it very clear to him that we wouldn't take it in. Then he signed a new contract for a new car. I made it very clear to him that we wouldn't take in the E. M. F.

Q But you discussed the value of the E. M. F.? A He said \$1,200. I said, "If you get \$1,200 it is a very fine figure"—because he only paid around \$1,200 for it.

10 Q It was a \$1,500 car? A Yes.

Q Still, he had only had it a few months at that time? A Yes; the winter months it was.

Q You read the contract over to him, did you? A Yes, sir.

Q Do you remember what time of night it was? A I know particularly what time it was because I wanted to get out for dinner. It was just around dinner time, at night.

20 Q What time do you call dinner time at night? A I went for my dinner around six o'clock, but I was waiting for some of the salesmen to come in. They hadn't gotten in yet. I really expected Pfeifer to come in and one of the other salesmen.

Q Pfeifer wasn't there then? A No, sir. That's the reason I didn't go out to dinner until late that night.

Q The doctor was there then? A Yes.

30 Q Was anybody with him? A Mrs. Dallas, I believe.

Q Mrs. Dallas was there? A Yes.

Q Anybody else? A I think the chauffeur was with them.

Q Now, what time was it, again? A It was at dinner time.

Q After six? A Well, I think it was after six.

Q And you were anxious to get out? A Yes.

40 Q Had any mention been made of this E. M. F. at the time of signing the contract? A Yes.

Mark E. Winans, cross.

Q Was any mention made of what the doctor wanted for it—\$1,200—at that time? A I just said that he expected to get \$1,200, Pfeifer said.

Q All that conversation took place then at this one time, did it? A Yes.

Q Was that the only time you saw the doctor with regard to that car? A Yes. With regard to the Koehler car?

Q Yes. A Yes. 10

Q Had you seen him on any other occasion with regard to the sale of the E. M. F.? A No.

Q So your entire conversation took place with the doctor there at that automobile show on that evening while you were waiting for some of the salesmen to come in so that you could go to dinner, is that so? A Yes.

Q Then you made a contract with the doctor; that is, you made a sale? A I sold a car, a Koehler 40, to the doctor. 20

Q It wasn't through any salesman, then? It was your individual work? A No; it was for a salesman; it was for Pfeifer whose name I put on the contract at that time. It was for Pfeifer; he had been working with the doctor to buy the car.

Q How do you know that? A I didn't say—

Q That is the only way you knew it, what Pfeifer told you about it? A That is the only way I knew about any of the salesmen, what they told me.

Q Then the doctor came to you while Pfeifer was away? A Yes. 30

Q Without waiting for Pfeifer he came to you and made what you say was a contract with you? A Yes; I sold him a Koehler 40.

Q You took out your book, did you, of forms? You say you read it over to him? A Yes.

Q Read him every word of it, did you? A Yes, sir.

Q Although you were late for dinner you took the trouble to read it over word for word? A Yes. 40

Mark E. Winans, cross.

Q How long did it take you? A I think the doctor was there fully an hour. I sold him the car and one thing and another.

Q What time was it when you got through the preliminaries and started to make out the contract?

A I don't remember exactly.

Q Still no salesman had come in? A No.

10 Q Still you read this over word for word? A Yes; I had to in order to give him the top and wind shield, and ask him what he wanted.

Q I understood you to say that that didn't express the contract. A No, you didn't understand me to say that. That is the whole contract.

20 Q What about the wind shield? A I say we gave him the advantage of the five dollars; we could buy wind shields a little bit less; we found out we could buy wind shields of a cheaper type a little bit less than before.

Q So that so far as the wind shield was concerned the contract was not the contract at that time?

Mr. Lum. I object to that characterization of it.

A It was correct.

Mr. Lum. An allowance was made.

—*Witness.* An allowance was made.

30 Q I show you a letter produced by your counsel to the H. J. Koehler Company. Have you ever seen that? A I think I did. I wouldn't say positively.

Q Did you make any reply to it? A I don't just remember if I did. If I received that I would have made a reply to it; if I made a reply to it Mr. Lum has it there in the copies of his letters.

Mr. Reed. Have you a reply to this letter, Mr. Lum?

(Mr. Lum hands a paper to Mr. Reed.)

Mr. Lum. I will admit that.

40 Q I show you a letter signed by Miss Bennett and addressed to Dr. Dallas, dated March 4, 1910. That

Mark E. Winans, cross.

I understand your counsel admits. A I remember this letter was read to me over the 'phone, this other letter being written and signed by Miss Bennett.

Q This letter I showed you first was written to Dr. Dallas while you were sick at your home? A Yes.

Q You dictated this reply? A No; I didn't dictate it; I simply mentioned that I would be down later. I think Mr. Koehler dictated it. I may have said what this was. 10

Q You mean you may have given them— A I may have told him.

Q What to answer? A What to answer.

Q I see. A No; I didn't say yes. I remember that I didn't write this; that I didn't say what to write in the letter, because I read a copy of that letter after I came back from my sickness.

Q Then you read a copy of the letter of March 4th from the H. J. Koehler Company to Alexander Dallas? A The March 4th letter, yes. 20

Q When you returned from your illness, when was that? A I don't just remember right when that was.

Q You mean just a short time after the 4th of March? A Yes.

Mr. Reed. I offer the two letters in evidence.

Mr. Lum. I object to them as incompetent, immaterial and irrelevant.

The Court. They will be admitted. 30

(Letter of March 1, 1910, marked Exhibit P. 2; letter of March 4, 1910, marked Exhibit P. 3.)

Mr. Reed. I will read them. (Reads Exhibit P. 2 and Exhibit P. 3 to the jury.)

Q Within a few days after the 4th of March you returned to business and read over a carbon of this letter, Exhibit P. 3. Did you communicate in any way with Dr. Dallas? A I don't remember.

Q You don't remember? A No, I don't. 40

Mark E. Winans, cross.

Q You say your counsel would have any letter that you may have written him? A Yes.

Mr. Reed. Have you any other?

Mr. Lum. No.

Mr. Reed. Then we will assume that there was no other letter to him.

10 Q Did you communicate with the doctor in any other way, by 'phone or seeing him at that time? A Mr. Pfeifer and I went up to Dr. Dallas's house. I got tired of waiting for him to take delivery on it; other people were clamoring for delivery and seeing this car in there all this time wanted to know why they didn't get this car. I told Pfeifer we would either have to close the deal up and deliver it or deliver it to somebody else.

Q The car had been there how long? A When he took delivery on it?

20 Q The E. M. F. was delivered on February 27; the Koehler was not delivered to him until March 15. A It probably was there a week or ten days.

Q Do you think it was delivered at the time the letter of March 4th was written? A He took delivery on the 14th.

Q The 15th? A I wouldn't think so, no; I don't know, though; if the car had been there Dr. Dallas would have known about it because Pfeifer would have told him to come down and take delivery on it.

30 Q That is it? A That is the reason. It was there so long that we went up to the doctor's. I know Pfeifer said, "You ought to arrange this thing so we can deliver the car to the doctor." Everyone was coming in there.

Q You can't tell me when you got the car. It wasn't there on March 1st, you are sure of that? A No; I am not sure of that. The papers of the Koehler Company would show when it was received from the manufacturer. I don't know in my own mind just when it was received from the manufacturer.

40

Mark E. Winans, cross.

Q The doctor had been clamoring for the car, hadn't he? A We were clamoring for him to take delivery.

Q Hadn't he been clamoring for the car? A I only know from that letter there.

Q That is the only communication you had with him? A That is all I remember; I didn't remember that until I saw it.

Q You may have had some conversation with him that you don't recall? A No personal conversation, I know, because I didn't see the doctor at all. I remember now that you are talking that his chauffeur came in two or three times. 10

Q Who did? A The chauffeur came in two or three times and spoke about delivery.

Q He wanted the car to be delivered, didn't he? A Yes, the chauffeur wanted to get it. He wanted to get it before the car was in there.

Q He did want to? A Yes; he was very anxious to get it. 20

Q When was that, do you remember, with regard to March 1st, before or after? A I don't just remember.

Q When were you taken sick, Mr. Winans? A What date was that letter there; I can tell you.

Q The date of Exhibit P. 2, the doctor's letter to the company, was March 1st? A The letter that said that I was sick?

Q The letter which says that you are sick is dated March 4th. A Well, it was a few days before that. I think I was sick about a week or ten days; I forget exactly. 30

Q Then you were sick on March 1st? A I wouldn't say positively. I just told you I thought it was about a week or ten days.

Q Was it before or after you were sick, then, that you saw the chauffeur, that he came in? A It was after I came back. 40

Mark E. Winans, cross.

Q After your return from your illness he came in several times and inquired about the car? A Yes.

Q The car had not been delivered yet, then, by the company? A I just said I don't remember when the car was received by the company.

10 Q You told us a few minutes ago that it was standing around the place so long that people wanted to know why they couldn't have it. A You know if people expect delivery on an automobile they want to get it at a certain time because they want to go somewhere, and if you are back on deliveries and four or five people want to get their cars as quick as possible it makes feeling with these men if you don't deliver it to each one of them.

Q How long had this car been on the floor? For this whole show? A It was several days.

20 Q Prior to that, you say, the chauffeur had come in frequently and wanted delivery on the car? A Yes.

Q You returned about the 6th of March. Now this letter of Dr. Dallas to your company, you noted the answer to it in which it postponed the answer until your return from your illness. You say you didn't say anything further to the doctor at all? A I probably took it up with Pfeifer; had him take it up.

Q You didn't take it up with the doctor? A No; I didn't talk with the doctor.

30 Q You didn't make any further answer? A I say if I had I would undoubtedly have a copy.

Q You didn't write then and say this letter didn't contain the terms of the contract, did you? A There was no such thing.

Q Did you say that to the doctor? A No, I didn't.

40 Q Did you try to tell the doctor, for instance, that you had never received the E. M. F. that he said was delivered February 27th? A I don't think I did; I told you that I didn't; I said that I didn't remember

Mark E. Winans, cross.

writing a letter; if I did it would be there. That was no part of the contract whatever. He signed a contract at the show.

Q But you notice in this letter, P. 2, he says, "the E. M. F. delivered to you by request February 27th"?

A Yes.

Q Did you deny that that was so, that it had been delivered to you, or had it been delivered to you? A No. 10

Q It had not? A No.

Q Where was it? A Pfeifer had the car.

Q Where did he have it, at your Koehler Company's place? A I don't know where he first had it. He had an E. M. F. of his own, had owned an E. M. F. himself. I supposed it was his own car until this squabble came up over the tools.

Q Until the squabble came up? A Yes.

Q Then you discovered it was the doctor's car? A Yes. Those cars are in there for repairs and one 20

thing and another, that way, so Pfeifer came in with the car but I thought it was his own car.

Q Did you have any communication over the telephone with Dr. Dallas between the time of the sale of the car and the 4th of March? A I may have; I don't just remember.

Q You may have had a talk with him; I see. Now, it is a fact that the E. M. F. car was brought in by the doctor's chauffeur about the 27th of February, wasn't it? A No; I don't know that. 30

Q Well, it may have been? A I don't know anything about that; I don't know who brought it in. I am rather inclined to think that Pfeifer did; I don't know.

Q The doctor's E. M. F. then came in? A I found it was there when this squabble on the tools came up.

Q Do you remember when that squabble came up? A No. 40

Mark E. Winans, cross.

Q You don't remember whether it was before or after you were sick? A No.

Q It may have been before or after when you read this letter on the 6th of March, after your return, and noticed that the doctor claimed to have delivered to the H. J. Koehler Company the E. M. F. car? A Sure, I read the letter.

10 Q You didn't deny that fact? A What was the use of denying it when I had a written contract. That was Pfeifer's car.

Q You didn't deny it? A I had no occasion to.

Q You didn't deny? A Certainly not; I had no occasion to.

Q You never denied, either, his statement in his letter, Exhibit P. 2, that he was to be credited \$1,200, did you? A I think—

20 Q (*By the Court.*) Answer the question. A If I can.

Q (*Question read.*) A No.

Q (*By Mr. Reed.*) You didn't deny that? A No.

Q You say that that was a misstatement? A I didn't say anything about that at all. I was surprised to see it in that letter.

30 Q Yet, during your absence the matter had been deferred until your return because you were the man who made the sale and must know the details of it, you said nothing to the doctor about it after your return, is that it? A I don't remember.

Q Whether you did or not? A No.

Q Although the car came in, then you still didn't say anything to the doctor until the 14th of March, is that so? A When the car came in I think that his chauffeur was there the first time the car came in.

40 Q You think he was there? A I think so. I know he was there every day before the car came in to see if it was there ready for delivery. He was very anxious to get it.

Mark E. Winans, cross.

Q You went up to see the doctor, you say, on the 14th of March, late in the evening? A Around nine o'clock.

Q How long were you there? A We were there, I think, until about 11:30.

Q You were there two hours and a half? A I know my wife thought it was very late when I got home.

Q Do you know whether the doctor was called up out of bed to see you? A No, the doctor was not; he came downstairs very shortly. 10

Q He was upstairs. Won't you tell me again just what conversation took place at that meeting between you three? A Didn't I tell you?

Q I say won't you repeat that all to me again to refresh my mind? A I told the doctor that we would have to have cash or a certified check. There was a conversation about different matters. He lived in Bayonne. I know some people down at Bayonne, George Battle and some other man. We talked about these things first. 20

Q There was a little friendly conversation first?

A Yes. It was on account of knowing Mr. Pierce of the Union Trust Company.

Q Mr. Pierce introduced the doctor to you, didn't he, and told you to treat him well? A Yes; and I always did. Then I told him—I asked him about taking delivery of this car. I said the car was there and other people had not received delivery on their cars. We had concluded to make delivery to him or somebody, and I would have to have cash or certified check in order to make delivery on the car. He said he had tried to sell the car but couldn't. He didn't say that he had sold the car and couldn't get the money. He said he couldn't sell the car. He had expected to sell the car and get the money, but couldn't, but he felt that this man was shortly going to buy the car; that he had tried to get his mother to 30 40

Mark E. Winans, cross.

loan him the money in order to buy, and so on. Dr. Dallas agreed, after talking it over for a long time—

Q What did the doctor say to that? A I was just coming to that. After talking this thing over for sometime the doctor said that he would give Pfeifer his note, or that Pfeifer would give him his note and he would endorse it so he could get delivery on his car.
10 He arranged with Pfeifer to come the next morning to bring him the note, to make out the note and bring it to him to sign it. That was the doctor's own suggestion.

Q That was all that was said? A He said "Good night" I think, after that was over. It was late enough.

Q How long did your friendly conversation with the doctor, before you got down to business, take? Ten or fifteen minutes? A I don't know; it may
20 have been longer. It was at least ten or fifteen minutes; I am inclined to think it was very much longer. I think it was nearly half an hour.

Q You finished that up in half an hour. It took you two hours, then, to arrange about this note? A I didn't say that; I said I thought probably it took about that. We talked the whole evening about both things; occasionally talked about personal acquaintances; at other times the car was talked about.
30 Everybody was in a very decent mood. Pfeifer said, "You will have to arrange for the delivery of that car or we will arrange for delivery to someone else." That is the reason I took time to talk to the doctor so the thing would be cleaned up in that way. I didn't want any come back.

Q What do you mean by a "come back?" A I wanted to have everything clear between the doctor and the Koehler Sporting Goods Company.

Q Was there anything that was very murky then?
40 A I wanted him to take delivery of his car.

Mark E. Winans, cross.

Q Was that the only thing to be cleared up? A Yes.

Q You said you wanted everything to be clear and you wanted to secure delivery of the car. Is that all you mean? A I wanted to get the car delivered and paid for; that is all I wanted; I had no other dealings outside of that; I wanted to get the car delivered because I was having people come in every day for it.

Q That was no friendly call then, that you were making? A Yes. 10

Q Purely a business proposition? A Yes.

Q You went up there at nine o'clock at night with Pfeifer on purpose to make a settlement? A Yes, sir.

Q You had in mind what the doctor had written to the Koehler Company during your illness? A I don't just remember particularly; I might have; I don't just remember particularly. 20

Q You knew, then, that you hadn't made any reply to the doctor or to his letter? 20

Mr. Lum. I object to this repetition.

The Court. Yes; I think there is some repetition here.

Mr. Reed. Not at this time. I say at this time, on the 14th day of March, when he went up there, he knew that he had received and knew the contents—

The Court. What are you arguing now? 30

Mr. Reed. Whether I should ask this question.

Q You recalled on the 14th of March when you went to visit the doctor that you had made no reply to his letter of March 1st, a reply to which had been postponed until your return from your illness?

A I said that I didn't remember.

Q You said that? A As I remember now I said that I didn't remember. If I had the letter would be there. 40

Mark E. Winans, cross.

Q No; I am not asking you whether you made a reply, but whether on the 14th of March, when you went up to see the doctor you didn't recall that you had made no reply to it? A I don't think I thought about it. I wanted to get delivery of that car.

10 Q What you wanted to clear up with the doctor, wasn't it the question of this \$1,200 for the E. M. F. that he had delivered to your company? A No, sir; I had nothing to do with that.

Q Yet you say that the car had been delivered to the Koehler Company; you had seen it there? A No; it had not been delivered to the Koehler Company.

Q You had seen it there? A I had seen it in there, certainly, but it had not been delivered to the Koehler Company. There are cars running in our place all the time for gasoline and one thing and another; there are cars running in there for repairs.

20 Q Was this a repair shop? A Yes; we do a general repair business, too.

Q Do you deal in second hand cars? A No, sir.

Q Well, this car that you saw there was for sale, wasn't it, this E. M. F.? A It wasn't there for sale. Pfeifer brought it in there.

Q Well, it was for sale? A Yes; but it wasn't there for sale by the Koehler Company.

30 Q That is your distinction? The Koehler Company had it but it wasn't for sale there? A The Koehler Company didn't have it for sale.

Q But Pfeifer had it? A He had it in our garage when I found out about it.

Q (*By the Court.*) Where? A At 291 Halsey Street.

Q Was that your headquarters? A Yes, sir.

Q Where were Mr. Pfeifer's headquarters? A At 291 Halsey Street.

40 Q You say that was Mr. Pfeifer's headquarters. Did he have headquarters? A Yes, sir; he stopped

Mark E. Winans, re-direct.

in East Orange, and he stopped in Montclair. He was one of the general salesmen of the company.

Q His headquarters, then, were in all three places? A No; his headquarters were at 291 Halsey Street. He reported to me the condition of prospects every day.

Re-direct examination by Mr. Lum.

Q What did you do when you discovered Dr. Dallas's car was there? A I told Pfeifer that we had nothing to do with it; that I didn't want it in the place. 10

Q Was it taken away then? A Immediately.

Q Did it come back to the Koehler place again? A Not to my knowledge.

Q (*By Mr. Reed.*) What day was it taken away, Mr. Winans? A I couldn't tell you.

Q Was it before or after your illness? A I couldn't tell you positively whether it was before or after. 20

Q It might have been before or after? A It might have been.

Q Do you say that the car didn't come there until the 27th of February? A I never saw it.

Q What is that? A I didn't see it.

Q When did you first see it? A After it had been there for two or three days.

Q You didn't see it until after it had been there for two or three days? A No. 30

Q When was it that you did see it there? Do you remember the date? A No, I don't.

Q Was it before or after your sickness? A I don't know.

Q You can't tell? A No.

Q You can't tell us the date on which it was taken away? A No, I can't. Pfeifer was in and out all the time with his car; and he was in and out with this car, as I found out afterwards. I didn't know it was the doctor's car; I thought it was Pfeifer's car. He 40

Alexander Dallas, direct.

was in and out in his car and in and out with this car; I didn't know it was the doctor's car.

Q When did he purchase his car, do you know?

A Who, Pfeifer?

Q Yes. A I think it was about in October of the year before.

Q Then during this period he had two cars there, did he? A No, he didn't have them in our place all
10 the time. He would run them down to his own garage, or his mother's, in the yard, or wherever it was. Sometimes he would go out some place and come in and make his report, and leave his car there and maybe go to lunch, come back and get it; sometimes it was there all night. We allowed him to leave his car there. It facilitated matters. He covered a larger ground making sales with his car.

Q You allowed him to leave the doctor's car there
20 two or three days before he took it away? A He left it there; it wasn't there long; two or three days; I don't know how long.

DEFENDANT RESTS.

ALEXANDER DALLAS, plaintiff, re-called in his own behalf in rebuttal.

Direct examination by Mr. Reed.

Q Doctor, Mr. Winans testified, as I understood
30 him, that at the automobile show in 1910 when the sale of this Koehler 40 car was made to you that he told you that the company would not receive any car in exchange, that you must pay it all in cash; is that true?

Mr. Lum. I object; that is repetition. I asked the doctor that on cross examination and he denied it.

The Court. I do not recollect just the testimony.

40 *Mr. Lum.* I will withdraw the objection.

Alexander Dallas, direct.

Q Now, will you answer, doctor? A It is not true.

Q He says, further, that he read the contract over to you word for word, which was the contract just offered in evidence here, D. 3. A He did not.

Q Did he read it at all? A He did not.

Q He says that you told him that Pfeifer was to sell the car, your E. M. F. car, for you? A I did not.

Q He says that at a meeting at your house on the 14th of March he told you that this Koehler car was waiting there for you and that you must take it and pay the money for it? A He did not.

Q He did not? A No.

Q How often had you attempted to get delivery of the Koehler car between the date of your letters, March 1st, and the 14th of March, when he came to your house? A Every other day—eight or ten times.

Q Did you ever talk to Mr. Winans about it? A I did when I could see him.

Q Did he ever say to you that they would not allow \$1,200 for the E. M. F. car? A He did not.

Q Did he ever allege as a reason why he wouldn't deliver the Koehler 40, to you that you had not paid him the amount? A The first time I ever heard of it was today. He never said a word about it.

Q Did he ever make any objection to the terms of the contract as stated in your letter, Exhibit P. 2?

A He couldn't—

Q Well, did he? A No.

Q Did he, on the 14th of March, when at your house, say that the Koehler Company would not receive the E. M. F. in exchange? A No.

Q Well, now, as I understand it, he says that on that evening you finally suggested that you would indorse Mr. Pfeifer's note for the money, for the \$1,200; is that so? A I did not.

Q Who suggested the making of the note? A Winans asked me if I would—

Alexander Dallas, cross.

Q (*By the Court.*) No; the question is who suggested it? A Winans.

Q (*By Mr. Reed.*) Did he say who the note should be made by? A That if I would endorse a note they could get the money on it; endorse a note for them.

10 Q He says that he was there two hours and a half. Do you recollect the length of time he was there? A I know he was there a long time; two or three hours.

Q And he says that when he went away the arrangement was that Mr. Pfeifer should come around in the morning, that you told him to come around in the morning and make a note? A I never saw Pfeifer after that night.

Q Did Winans say that? A No, sir.

Q When was the note endorsed by you? A That night.

20 Q Who produced the note? A I couldn't say whether they had the note or whether I got one in my papers; I don't know.

Q Well, did Winans ever say to you that the sale of the car was wholly Pfeifer's matter? A No, sir.

Q Did he on that night say that your contract was that you were to pay the entire amount in cash? A He did not.

Cross examination by Mr. Lum.

30 Q No note was given on the night of the 14th, was there? A What is that?

Q No note was given on the night of the 14th? A The only note of any was given on that night.

Q Wasn't it the next day? A No, sir.

Q This note of the 14th was dated the 15th, was it? A Yes, sir.

Q What? A Yes, it was the 15th. Before they left it was between twelve and one o'clock.

40 Q I thought you said they left about eleven? A I did not; I say they came after eleven.

Mary Dallas, direct.

Q Pfeifer did not come back the next morning?

A No, sir.

MARY DALLAS, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Reed.

Q Mrs. Dallas, you are the wife of Dr. Dallas, are you not? A I am.

10

Q Do you remember an occasion in February, 1910, when you were at the automobile show—about there? A Yes.

Q Did you see Mr. Winans there? A I met Mr. Winans there, yes.

Q Do you remember any discussion about the purchase of a car there, a Koehler 40 car, by the doctor?

A I do. Mr. Winans was very anxious that we should take a Koehler car and he offered us \$1,200

20

if we would turn in the E. M. F. We didn't want it at first; but he showed us the car and got us quite enthusiastic about the Koehler; but we didn't want it.

We had the E. M. F. to be disposed of, and he said he would give us \$1,200 on account if we would take the Koehler.

Mr. Lum. I object on the ground that the evidence very clearly tends to vary or alter the written contract.

The Court. Objection overruled.

30

Defendant's counsel prays an exception to this ruling of the court, and the same is allowed and signed and sealed accordingly.

Circuit Court Judge.

Q Mr. Winans testifies, as I understand it, that the sale had been made by a man named Pfeifer, that he had nothing to do with the question of taking the E. M. F., that Winans had nothing to do with it. A

40

Mary Dallas, direct.

We had never seen Pfeifer. I never knew there was such a man as Pfeifer.

Q You didn't see him there at all? A I never heard of him.

Q Then all the transactions were made with Mr. Winans? A With Mr. Winans.

10 Q What time of night was it, do you remember? A Sometime before dinner. We got home about a quarter of seven, or half-past six perhaps.

Q He says he wrote up the contract and read it over word for word. A I did not hear him read it, no.

Q Do you know when the agreement was made to take the car? Was it at that time? A We were to have the show car delivered immediately on the close of the show.

20 Q When did you reach the conclusion to take the car, just at that time or before? A We were quite a while dickering. Mr. Winans did some figuring first, then he said, "I will tell you what I will do; I will allow you \$1,200 for the E. M. F."

Mr. Lum. I move that that be stricken out.

The Court. The motion to strike out will be denied.

Q When did Mr. Winans say that, that night? A That was the only time I ever saw him.

30 Q So that he worked up your enthusiasm in this way, over this car and got you to the point of buying it that night? A He showed it to us as soon as we got in; then we went around the show and saw other cars; then he got us back to the Koehler again.

Q Who did, Mr. Winans? A Mr. Winans did.

Q Was that the only night you were there? A That was the only night we were there.

40 Q Had you been considering the purchase of a Koehler before that? A I didn't know there was such a thing as a Koehler. It was going to be given to me as a present. The E. M. F. was given to me

Mary Dallas, cross.

as a Christmas present; so the Koehler was going to be given to me for the E. M. F.

Q So that you were interested? A I was interested; it was to be given to me.

Q So that you had never heard any talk about the Koehler until that night? A I never heard of it before that night.

Cross examination by Mr. Lum.

Q It was given you as a Christmas present, then, was it, that E. M. F.? A Well, I had it before Christmas, but it was considered my car. 10

Q It was your car, was it? That is why you paid such careful attention. You were present when your husband signed his name to the contract? A I suppose I was.

Q Did you see him sign the contract? A Well, they were doing some writing. I didn't pay particular attention to the signing part; I didn't hear it read. 20

Q You wouldn't swear that it was not read, would you? A I really couldn't say because we went right away after the contract was made out.

Q Did you see your husband put his name to the contract? A I couldn't say; I didn't see him.

Q You don't know whether he stood up or sat down to sign the contract? A I don't know.

Q It had been discussed before, had it, that it was to be your Koehler? A What do you mean by just before? 30

Q Before this wasn't it discussed? A Had not been agreed because I didn't know I was going to get it.

Q When was it agreed? A When we got the offer for the \$1,200. I didn't know I was going to get the car until we got it. We had to get rid of the E. M. F. first. We wouldn't have thought of it if we had not had a good offer for the E. M. F.

Q You didn't see your husband sign the contract? A I did not. 40

Motion to Direct Verdict.

Q You wouldn't swear that it wasn't read to him?

A I could not say about that.

Q (*By Mr. Reed.*) I understand you to say that this was your E. M. F. You mean actually given to you or how? Was it yours—actually your property?

A It was given to me as a present.

10 Q Do you know whose name it was registered under? A It was registered in my husband's name on account of his being a man. I didn't have it in my name because I wasn't going to run it. I thought it was better to put it in his name.

Q That was with your consent? A Yes.

Q And the trading of the car in was with your consent, too, then? A Yes.

DEFENDANT RESTS.

20 *Mr. Lum.* I move for the direction of a verdict on the grounds previously stated in the motion for a non-suit.

The Court. The motion for non-suit has not yet been disposed of.

Mr. Reed. It is very evident that Mr. Winans got both the money and the car.

The Court. Who do you say is responsible, Mr. Winans or the company?

Mr. Reed. The company.

30 *The Court.* Then you think there should be a non-suit as against Mr. Winans?

Mr. Reed. Not where the agent and the principal have both joined in taking advantage of a situation of this kind.

40 *The Court.* (After argument.) I am inclined to think that since it is agreed by counsel for the plaintiff that if either of these defendants can be held it is the Koehler Company only that can be held, a non-suit as to Mr. Winans must be granted. But I am inclined to leave to the jury

Charge to Jury.

the question of whether or not this E. M. F. car was sold, that single question, whether the E. M. F. car, under all the testimony in the case, was sold by Dr. Dallas to the company. Therefore, as to the company, the motion for a non-suit and the motion for a direction of a verdict will be denied and an exception will be noted.

Defendant, H. J. Koehler Sporting Goods Company's counsel prays an exception to the refusal of the court to non-suit the plaintiff, and the same is allowed, and signed and sealed accordingly. 10

Circuit Court Judge.

Defendant, H. J. Koehler Sporting Goods Company's counsel prays an exception to the refusal of the court to direct a verdict for the defendant and the same is allowed, and signed and sealed accordingly. 20

Circuit Court Judge.

At this point the court takes a recess from 1 to 2 p. m.

AFTER RECESS.

Mr. Lum sums up for the defendant. 30

Mr. Reed sums up for the plaintiff.

The Court charges the jury, as follows:

DUNGAN, J.

Gentlemen of the jury, there was an automobile show in Newark in February, 1910, at which it appears the H. J. Keohler Company was an exhibitor and to which the plaintiff in this case, Doctor Dallas, was a visitor. According to the admitted testimony 40

Charge to Jury.

on both sides, Doctor Dallas at that automobile show, on the 24th day of February, 1910, became the purchaser of a Koehler 40 automobile. His complaint or declaration in this case alleges that it was there agreed that he was to pay the sum of money, \$670, in cash, and to turn over the E. M. F. automobile of which he was then the owner at an agreed price of \$1,200, and that the Koehler 40 automobile was to be delivered on or about the 1st day of March, 1910. The complaint alleges that after having paid this sum of \$670 and after having delivered his E. M. F. automobile to the Koehler Company, and on or about the 15th day of March, he, at the special instance and request of the defendant, paid to the defendant company the sum of \$1,200 in cash and thereupon receive the said Koehler 40 car so purchased by him as aforesaid, and in consideration of the payment of \$1,200 as aforesaid, said defendants undertook and then and there faithfully promised said plaintiff to pay him the sum of \$1200, the value of said E. M. F. motor car on or about the fifteenth day of June, 1910.

In support of this declaration Dr. Dallas stated in his testimony that the agreement was in writing but that he had lost his copy, and thereupon he was permitted by the court to testify to the contents of that agreement which was substantially to the effect stated in the complaint which I have recited to you. But the Koehler Company produces a contract which was shown to the doctor, and which he says was not the contract. You will remember that upon cross examination the doctor stated that he put his name to it, but that he did not read the contract.

This contract which is produced by the Koehler Company provides that the price of the car shall be \$1,685 and that the price of the other articles mentioned shall be, top, \$125, speedometer, \$25, windshield, \$35, and that on all these amounts he shall pay \$395 in cash, which was the amount of the first check

Charge to Jury.

you will remember that he did pay at the time the contract was signed. This contract provides that this \$395 is to be deducted from the price of the car on delivery, and that the car is to be accepted by the doctor and balance to be paid by him in cash or by certified check when notified that the car is ready for delivery. That is the contract, gentlemen. When the contract is shown to Doctor Dallas he admits that this is his signature to it. The law of contracts is that where a person affixes his signature to a written contract that creates a conclusive presumption against the signer of it that he read, understood and accepted its terms. Doctor Dallas says that on March 14, 1910, Mr. Winans, the manager and salesman of the Koehler Company, called at his house with Mr. Pfeifer, another salesman of the defendant company, and stated that they wanted to make delivery of this car and that an arrangement was made by which the car would be delivered provided he would sign a note; that he had sold the E. M. F. car, but that the person to whom he had sold it had not made payment yet and that they could not deliver his car until they received the money, and it was proposed that he give a note substantially in this way. The note is in evidence. The note is signed by Mr. Pfeifer and endorsed by the plaintiff, and was delivered by him to Mr. Pfeifer, and it appears from the testimony of Mr. Winans in this case that the proceeds of that note really paid the balance of cash on this car; in other words, he says that the car would not have been delivered if the balance had not been paid and he assumes that the balance was paid from the proceeds of this note.

So that you can see, gentlemen, aside from the law of contracts which I have read to you, that Dr. Dallas was conclusively presumed to know the contents of this contract, he did agree to pay the balance in cash and that the effect of what took place according to

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Charge to Jury.

his own testimony, at his house, on March 14, was to carry out exactly the terms of this contract. The plaintiff's view of the case therefore as to what the original agreement was, which in effect I think he stated to you, must be ignored so far as its effect upon the contract concerned. But taking the plaintiff's case on the contract itself, the question, and the sole
10 question, which is presented to you to determine at this time is whether or not the defendant—not Winans or Pfeifer, but the Koehler Company—purchased this E. M. F. car of Dr. Dallas. In whatever took place between Dr. Dallas and the Koehler Company the Koehler Company was represented by Mr. Winans who was its salesman and manager of the Newark Branch, and he also testified that he managed in addition to the Newark branch, the branch at Paterson, and at East Orange and Montclair. But
20 an agent authorized to do one thing is not presumed to be authorized to act generally for a person or company. An agent authorized to make sales is not presumed to have authority to make exchanges or to make purchases. Mr. Winans says he had no authority to make exchanges or purchases.

But while that testimony is to be considered with all the testimony upon the subject of his agency it is not conclusive, but the agent's authority may be gathered from his position and apparent authority; that
30 is, a course of conduct which is apparently approved or ratified by the party or company which he represents.

While the testimony of Dr. Dallas as to what took place at the show is not to be considered as changing the written contract, you may consider it in connection with the testimony of Dr. Dallas, that on February 27, 1910, Mr. Winans, who was manager of the defendant company, and who negotiated the sale of the Koehler car (possibly in connection with Mr.
40 Pfeifer if you believe the testimony of Mr. Winans on

Charge to Jury.

that point) called Dr. Dallas on the 'phone and asked him to send down the E. M. F. car as they had a customer for it and they wished to demonstrate it. This I do not recall is denied by Mr. Winans; if it is you will recall it and give it its due weight in contradiction of this testimony of Dr. Dallas. Dr. Dallas says that when Winans and Pfeifer called on March 14th they told him that it had been sold but that they had not received the money for it. This entire testimony you will remember is denied by Mr. Winans, who is a witness produced on the part of the defendant. He himself was one of the defendants in the case, but he has been eliminated, a non-suit having been granted in his favor. He stated that there was no such conversation which took place at the show as testified to by Dr. Dallas and corroborated in part by his wife. He says that there was no agreement made that the E. M. F. car should be taken in exchange. He says that it was spoken of by Dr. Dallas, but that they told him they did not make exchanges. He says that not only was that statement made, but that he read this contract word for word to Dr. Dallas. This Dr. Dallas denies and his wife who was in the party says that she was present. She does not say that it was not read but says that she did not hear it.

Mr. Winans denies that this car was sent to the Koehler Company. He says that he saw the car in the Koehler garage but that Dr. Dallas had told him that Mr. Pfeifer had agreed to sell this car for him and he thought it was there for Mr. Pfeifer, and that when he, Winans, learned that the E. M. F. car that was in that garage was the car of Dr. Dallas he told him that he must take it out of there and that he did take it out, and that Mr. Pfeifer and Mr. Pfeifer only handled this car after this time. He denies also that when they had this conversation on the evening of March 14th he told him the car was sold. He testifies

Objections to Charge.

he said that they had a customer for the car and that they thought the car would be sold.

10 Gentlemen, as I have before said, the question is was this car sold to the Koehler Company? I have not attempted to recite all of the testimony, but it loses none of its importance by the fact that I have not recited it. You will consider all of the testimony in the case and give it its due weight, whether recited or not. It is only necessary for the court to recite such portions of the testimony as will bear upon the points which are mentioned by it.

20 There is a further question which presents itself in view of the testimony of Mr. Winans: was this car sold to Mr. Pfeifer? If it was the plaintiff cannot recover in this suit. This suit is not against Mr. Pfeifer; this suit as it now stands is not against Mr. Winans; it is against the Koehler Company, and unless the Koehler Company bought it the plaintiff cannot recover.

30 The first question then for you to determine is, was it within the scope of Mr. Winan's authority as the manager or agent of the Koehler Company to purchase this car? If you find it was not, then the plaintiff cannot recover in this suit. If so, did he purchase the plaintiff's E. M. F. car for the Koehler Company? If you find he did not, then your verdict must be for the defendant; but if you find he did, and that this purchase was within the scope of his authority, then the plaintiff is entitled to recover from the Koehler Company the value of this car which it appears cost Dr. Dallas about \$1,200 in December, 1909.

(The jury retire.)

Mr. Lum. May I note the following objections on the record?

I object to your Honor's leaving the case to the jury.

40 I object to your Honor's refusal to direct a verdict for the defendant, the H. J. Koehler Sporting Goods Company.

Objections to Charge.

I object to that which your Honor said with reference to the evidence of ratification of Winans' act on the ground that there is no evidence of any such ratification in this case.

I object to your Honor's leaving to the jury the question whether the car was sold to the Koehler Company on the ground that it is not within the scope of the declaration in the case and on the ground that there is no evidence to support it.

10

I object to what your Honor said in leaving to the jury the question as to whether the purchase of this car was within the scope of Winans' authority.

The Court. The objections will be noted.

Mr. Reed. I object to what your Honor said in relation to the rule being that there was a conclusive presumption as to Dr. Dallas in relation to the contract. Also what your Honor said, that the sole question was did the defendant purchase the E. M. F. car at the time of the March transaction.

20

The Court. The objections will be noted.

After deliberation the jury returns and addresses the court as follows.

Foreman. Your Honor, in regard to this note, has this thing any bearing on what became of this note after it was given that night? It has no endorsement except the doctor's on it.

The Court. It is insisted by the plaintiff that the proceeds of that note went to the Koehler Company, and Mr. Winans stated that unless the \$1,200 were paid the automobile would not have been delivered to Dr. Dallas. Of course the inferences from the testimony are for you; it is for you to decide. The inference from the testimony may be that the proceeds from that note actually went to the Koehler Company.

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Juror No. 12. There is no doubt, judge, but what the note was cashed, is there?

The Court. I do not know that the testimony was directly upon that point but I think that that may be

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Further Instructions to Jury.

the inference from all the testimony in the case that the note was cashed and that the proceeds went to the Koehler Company in fulfillment of this contract requirement, \$1,200 cash to be paid on delivery of the automobile.

10 *Juror No. 5.* It would make a difference in the consideration of the jury what became of the proceeds of that note, would it not?

The Court. I am afraid that question calls for the drawing of an inference from the testimony on the part of the court which I have no right to draw. As I have said, the facts are for the jury. The court must instruct the jury upon the law. I am unable to find facts for you; you have to find the facts from the testimony as produced.

20 *Juror No. 5.* Can we have your instructions once more as regards the sale to this Koehler Company of the automobile on March 14th? Has the stenographer got it or do you recollect it? As I understand your charge you said this whole case hinged on whether Dr. Dallas sold to the Koehler Automobile Company the E. M. F. automobile on the night of March 14th.

30 *The Court.* No, the question in the case is, first, was Mr. Winans authorized to purchase for the Koehler Company this automobile and, second, if he was authorized to purchase it, did he actually purchase it, or was the transaction between Dallas and this man Pfeifer. Of course, if the transaction was between Doctor Dallas and Pfeifer, and if Pfeifer was to sell the machine for Doctor Dallas, as Mr. Winans said Doctor Dallas told him at the automobile show, and which Doctor Dallas denied, then Doctor Dallas cannot recover against the Koehler Company. So as I have said the two questions in the case are really both involved in the one question, and is whether or not you find that Winans had authority not only to be the manager and sales agent of the Koehler Company,

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Further Instructions to Jury.

but to purchase this automobile, and if he had that authority whether in fact he did purchase it.

Juror No. 5. At any time?

The Court. Yes; at any time.

Juror No. 5. That is all the instructions I care to know about. The idea I had in my mind very clearly, that you had confined this to the night that Winans and Pfeifer went up to Dr. Dallas's house.

The Court. Not at all. You will remember I read 10
an extract from the testimony regarding the telephone call.

(The jury again retire.)

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Interrogatories.

ESSEX COUNTY CIRCUIT COURT.

ALEXANDER DALLAS

vs.

H. J. KOEHLER SPORTING GOODS
COMPANY, *et al.*

*Interrog-
atories.*

10

*To Messrs. Lum, Tamblin & Colyer,
Attorneys for Defendants:*

Gentlemen:—

20

Please take notice that I demand within ten days of the date of service hereof answers to the following interrogatories to be made under the oath of the defendant, Mark E. Winans, and under the respective oaths of such of the officers and agents of the defendant company as may have knowledge of the matters covered by the respective interrogatories and that you cause the same to be served upon me within the same time:

(1) Was defendant, Mark E. Winans, in the employ of the defendant, H. J. Koehler Sporting Goods Company, on or about the twenty-fourth of February, nineteen hundred and ten?

30

(2) Was said Winans in the employ of said company on or about the first day of March, nineteen hundred and ten?

(3) Was said Winans in the employ of said company on or about the fifteenth day of March, nineteen hundred and ten?

(4) If the answer to any of the foregoing interrogatories is "Yes" what were the powers and duties of said Winans during the term of his employment by said defendant company?

40

(5) Did the defendant company receive a certain E. M. F. motor car sent to it by the plaintiff on or

Interrogatories.

about the first day of March, nineteen hundred and ten?

(6) If answer to the foregoing interrogatory is "Yes," what disposition did said defendant company make of said E. M. F. motor car so delivered to it?

(7) Was a man passing under the name of Louis F. Pfeifer in the employ of the defendant company at any time between the twenty-fourth day of February, nineteen hundred and ten, and the first day of July, nineteen hundred and ten? 10

(8) If answer to above interrogatory be "Yes," during what period was said Louis F. Pfeifer in the employ of said defendant company and what were his powers and duties under such employment?

(9) Was a man passing under the name of Louis F. Pfeifer in the employ of Mark E. Winans during period from the twenty-fourth day of February, nineteen hundred and ten, to the first day of July, nineteen hundred and ten, or during any part of that period? 20

(10) If answer to the foregoing interrogatory be "Yes" what were his powers and duties thereunder during such employment?

(11) During the period from the twenty-fourth day of February, nineteen hundred and ten, to the fifteenth day of March, nineteen hundred and ten, where was the place of business of the defendant company? 30

(12) What was the registered office of the defendant company for the period beginning February twenty-fourth, nineteen hundred and ten, and ending March fifteenth, nineteen hundred and ten?

Respectfully,

HUGH B. REED,

Attorney of Plaintiff.

Answers to Interrogatories.

ESSEX COUNTY CIRCUIT COURT.

| | | | |
|----|---|--------------------|----------------------------------|
| | ALEXANDER DALLAS, | <i>Plaintiff,</i> | |
| | <i>vs.</i> | | |
| 10 | H. J. KOEHLER SPORTING GOODS COMPANY, <i>et als.</i> , | <i>Defendants.</i> | <i>On Contract. Answers.</i> |

To Hugh B. Reed, Attorney for Plaintiff, or whom it may concern:

TAKE NOTICE that the following are answers, so far as defendants are able to furnish the same, to the interrogatories heretofore served upon them by plaintiff.

- 20 Answer to first interrogatory: Yes.
 Answer to second interrogatory: Yes.
 Answer to third interrogatory: Yes.
 Answer to fourth interrogatory: Salesman and manager of Newark Branch.
 Answer to fifth interrogatory: No.
 Answer to sixth interrogatory: Never delivered to it.
- 30 Answer to seventh interrogatory: Yes.
 Answer to eighth interrogatory: Commission salesman. From February 24th, 1910, to May 12th, 1910.
 Answer to ninth interrogatory: No.
 Answer to tenth interrogatory: Never in his employ.
 Answer to eleventh interrogatory: 291 Halsey street.
 Answer to twelfth interrogatory: 33 South Munn avenue, East Orange, New Jersey.

40

Yours truly,
 LUM, TAMBLYN & COLYER,
Attorneys of Defendants.

Answers to Interrogatories.

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

Mark E. Winans being duly sworn, according to law, upon his oath, deposes and says: That he is one of the defendants in the above entitled action and that the answers to the interrogatories aforesaid are true.

M. E. WINANS. 10

Subscribed and sworn to before me,
 this first day of September, nine-
 teen hundred and eleven.

W. A. WACHENFELD,
A Notary Public for New Jersey.

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

20

Mark E. Winans, of full age, being duly sworn, according to law, upon his oath, says: That he is the manager and salesman of the Newark Branch of the above named defendant, H. J. Koehler Sporting Goods Company, and that he has personal knowledge of the facts referred to in the above interrogatories; that the answers to the interrogatories aforesaid and the information contained in said answers to the interrogatories is deponent believes the best information on the subject of such answers; which is now in the possession of the defendant company, and the said answers to the interrogatories are true to the best of his knowledge, information and belief. 30

M. E. WINANS.

Subscribed and sworn to before me,
 this first day of September, nine-
 teen hundred and eleven.

W. A. WACHENFELD,
A Notary Public for New Jersey.

40

Exhibit P. 1.

EXHIBIT P. 1.

\$1,200 00/100 Newark, N. J., March 15, 1910.

Three months after date I promise to pay to the order of Alexander Dallas twelve hundred dollars at Greenville Banking and Trust Co, J. C. Value received.

10 No. . Due June 15/10.

LOUIS F. PFEIFER.

Endorsed:

Alexander Dallas.

United States of America, }
 State of New Jersey. } ss.

20 On the eighteenth day of June, in the year of Lord one thousand nine hundred and ten, at the request of THE GREENVILLE BANKING & TRUST COMPANY, I, H. L. Cowdrey, residing at East Orange, N. J., a notary public duly commissioned and sworn, did present the original check hereunto annexed at THE GREENVILLE BANKING & TRUST COMPANY, and demanded payment of said check which was refused, the reason given; "Not good."

30 Whereupon, I, the said Notary, at the request of aforesaid, did PROTEST, and by these presents do publicly and solemnly PROTEST, as well against the Maker and endorser of the said check as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interests already incurred, and to be hereafter incurred, for want of payment of same.

THUS DONE AND PROTESTED, in Jersey City, N. J., in the presence of John Doe and Richard Roe, witnesses.
 In testimonium veritatis.

H. L. COWDREY,
Notary Public.

40

(SEAL)

Exhibit P. 2.

H. K. Koehler Co.,
 Mark Winans, Manager.
 Louis Theiss.
 Louis F. Pfeifer.

| | | |
|---------------|------------|------------|
| Note | \$1,200.00 | |
| Protest | \$1.50 | |
| Postage | .02 | |
| | | 1.52 10 |
| | | \$1,201.52 |

Dated, March 15/10.
 Indorsed,
 Pro. Non-Payment.

EXHIBIT P. 2.

20

105 Orange Road,
 Montclair, N. J., March 1st, 1910.

H. J. Koehler Company,
 Halsey Street,
 Newark, N. J.

Gent,

I enclose herewith check for \$275.00, balance due on
 "Koehler 40" Car purchased from you on Feby 24th 30
 at the Automobile Show and to be delivered to me,
 according to Contract, on March 1st, in perfect run-
 ning order.

| | |
|------------------------------------|------------|
| Purchase price of car delivered in | |
| Newark | \$1,685.00 |
| Extra Top | 125.00 |
| Speedometer | 25.00 |
| Special Wind-Shield..... | 35.00 |
| | \$1,870.00 |

40

Exhibit P. 3.

| | |
|-----------------------------------|-----------|
| Cash paid on signing Contract.... | \$ 395.00 |
| E. M. F. delivered to you by re- | |
| quest Feby 27th..... | 1,200.00 |
| | <hr/> |
| | 1,595.00 |

| | |
|---|-----------|
| Balance due on Car, being amount of check | |
| enclosed | \$ 275.00 |
| | <hr/> |

10 Kindly send receipted bill and deliver Car to my
Chauffeur, J. L. Bryer, on demand, for my account.

Yours truly,

Alexander Dallas.

Received 4, 1910. H J. Koehler S. G. Co.
File M. 1578.

EXHIBIT P. 3.

20

H. J. Koehler, President and Treas.

W. A. Koehler, Secretary.

H. J. KOEHLER CO.

Motor Cars

1709 Broadway, New York, N. Y.

Branches—New York, N. Y.; Brooklyn, N. Y.; Pat-
erson, N. J.; Newark, N. J.; East Orange, N. J; Mont-
clair, N. J.

30

293 Halsey St., Newark, N. J.,

March 4, '10.

Mr. Alexander Dallas,
105 Orange Road,
Montclair, N. J.

Dear Sir:—

40 Enclosed find your check sent this morning, which
it is impossible for us to accept, on account of the mat-
ter having been entirely handled by our manager, Mr.

Exhibit D. 1.

Winans, who is seriously ill with pneumonia at his home. We regret exceedingly any delay or inconvenience to which you might have been placed in this matter, but in view of Mr. Winans' serious illness, we trust you will allow the matter to stand in abeyance until Mr. Winans' return to business which we believe will be Tuesday or Wednesday of next week.

Thanking you in advance for the indulgence asked, we remain, 10

Very respectfully yours,
H. J. KOEHLER CO.
per M. M. Bennette,
Sec.

MMB.

EXHIBIT D. 1.

No. _____ 20

Jersey City, N. J., Feby 24, 1910.

GREENVILLE BANKING & TRUST COMPANY

PAY TO THE ORDER OF

H. J. Koehler Co.....\$395 00/100
Three hundred and ninety-five 00/100.....Dollars

ALEXANDER DALLAS.

Safe Deposit Boxes for Rent. 30

PAY TO THE ORDER OF

UNION NATIONAL BANK,

NEWARK, N. J.

H. J. KOEHLER SPORTING GOODS CO.,

H. J. KOEHLER,

President.

Exhibit D. 2.

FIRST NATIONAL BANK

PAID

March 1, 1910.

N. T.

Jersey City, N. J.

PAY ANY BANK OR TRUST COMPANY,

OR ORDER

10

February 28, 1910.

WITH FULL RECOURSE TO

UNION NATIONAL BANK, NEWARK, N. J.

A. W. CONKLIN, Cashier.

EXHIBIT D. 2.

No. _____

20

Jersey City, N. J., March 1st, 1910.

GREENVILLE BANKING & TRUST COMPANY

PAY TO THE ORDER OF

H. J. Koehler Company.....\$275 00/100

Two hundred and seventy-five 00/100.....Dollars.

ALEXANDER DALLAS.

Safe Deposit Boxes for Rent.

PAY TO THE ORDER OF

30

UNION NATIONAL BANK,

NEWARK, N. J.

H. J. KOEHLER SPORTING GOODS CO.,

H. J. KOEHLER,

President.

FIRST NATIONAL BANK

PAID

March 17, 1910.

N. T.

40

Jersey City, N. J.

Exhibit D. 4.

PAY ANY BANK OR TRUST COMPANY,
OR ORDER
March 16, 1910.
WITH FULL RECOURSE TO
UNION NATIONAL BANK, NEWARK, N. J.
A. W. CONKLIN, Cashier.

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EXHIBIT D. 3.

Branches:
NEW YORK, N. Y.
BROOKLYN, N. Y.
NEWARK, N. J.

Branches:
PATERSON, N. J.
EAST ORANGE, N. J.
MONTCLAIR, N. J.

ORIGINAL ORDER 1534.

H. J. KOEHLER SPORTING GOODS CO.

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Feb. 24, 1910.

H. J. KOEHLER SPORTING GOODS CO.

GENTLEMEN:—Please enter my order for one Model Koehler 40 Automobile at list price of \$1,685 F. O. B. Newark, to be delivered on or about March 1st, on which I hand you deposit of 20% (\$395) receipt of which is hereby acknowledged, to be deducted from the price of car on delivery, this car to be accepted by me and balance to be paid by me in **cash or by certified** check when notified that car is ready for delivery.

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The above order is given with the understanding that you give no warranty, express or implied, but that the manufacturer of said automobile guarantees it against manifest defects and agrees to replace free of charge (if reported within 60 days from date of sale) any part of such automobile made by said manufacturer showing defects in material or faulty workmanship. It is understood, however, that all parts

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Exhibit D. 4.

claimed to be defective must be returned, with charges prepaid, through you to the manufacturer for examination and inspection, whose decision shall be final and conclusive, and that in case of parts being replaced, the undersigned is to pay all return charges on delivery. It is understood further that the manufacturer's guarantee does not apply to parts not made by said manufacturer, such as Lamps, Magnetos, Coils, Chains, Tires, Batteries, etc., and that claims for defects therein must be made to the makers thereof by the undersigned direct. Terms of payment on parts, repairs and accessories **cash** on delivery.

In case of your inability to obtain said automobile from the manufacturer, you are to be under no liability except to return the amount of the deposit made by the undersigned.

The foregoing memorandum embodies the entire agreement between us.

EXTRA FOR ASSESSORIES

Top, \$125. Wind Shield, \$35. Stewart Speedometer, \$25. Tire Carrying Case.....Tire Chains..... Clock..... Tire Carrying Irons..... Gas Tank..... Extra Shoes..... Extra Tubes..... Trunk Rack..... Trunk..... Robe Rail..... Tool Box..... License and Pad..... Spark Plugs..... Foot Rail..... Round Tube Trunk..... Slip Covers.....

Purchaser sign here.

ALEXANDER DALLAS,

Address: 105 Orange Road.

Salesman—Pfeifer.



