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THE HISTORY OF THE UNITED STATES

OF AMERICA

BY

JOHN F. JOHNSON

OF THE

UNIVERSITY OF CALIFORNIA

AT

SAN FRANCISCO

1876

THE HISTORY OF THE UNITED STATES

Notice of Appeal.

Filed February 18, 1914.

New Jersey Court of Errors and Appeals

STEPHENS-ADAMSON MANUFACTUR-
ING COMPANY,

Plaintiff-Appellant,

vs.

MOSES BIGELOW, *et al.*, partners
&c.,

Defendants-Appellees.

On Appeal.

10

*Notice of
Appeal.*

To Hugh B. Reed, Esq., Attorney of Defendants:

Take notice that the plaintiff appeals from the
whole of the judgment entered in this cause on the
following grounds: 20

1. Because the said judgment decrees that the
judgment appealed from which was entered in the
First District Court in the City of Newark in favor
of the plaintiff and against the defendant be reversed.

2. Because the said judgment should have decreed
that the judgment aforesaid of said District Court be
affirmed.

3. Because said judgment decreed that there be
a new trial in said District Court of the issues in-
volved in said cause. 30

Dated February 18, 1914.

WIMMER & WIMMER,
Attorneys of Appellant.

Service of within notice of appeal is hereby admit-
ted, February 18, 1914.

HUGH B. REED,
Attorney of Appellees. 40

Record of the Case.

Record of the Case.
FIRST DISTRICT COURT.
NEWARK, N. J.

10	STEPHENS-ADAMSON MFG. Co., a corporation,		<i>Plaintiff,</i>
	<i>and</i>		
	MOSES BIGELOW AND GEORGE R. SWAIN, partners, trading as Bige- low & Swain,		<i>Defendants.</i>

20 A summons in the above-stated cause was issued on the 14th day of December, 1911, returnable on the 21st day of December, 1911, wherein the plaintiff demands of the defendant the sum of \$500.00.

 The plaintiff filed its state of demand on December 20, 1911.

 The summons was served and returned as follows:

30 I served the within summons December 15, 1911, on the defendant and each of them by reading it to them and giving them a copy thereof.

JOHN MCNELLEN, *Sergeant-at-Arms,*
First District Court.

 December 21, 1911. This cause was adjourned to December 28, January 4, 11, 18, 25, February 8, 15, 29, March 15, 29, April 19, 23.

 February 8, 1912. Notice of recoupment filed by defendant.

 Waiver of excess over \$500 filed by defendant.

Record of the Case.

April 23, 1912. The plaintiff and the defendant appearing, the cause was tried and determined at this time.

J. E. Marcrum, sworn.

George R. Swain, Daniel C. Seymour and Moses Bigelow sworn.

Court reserved decision.

April 26, 1912. The evidence being closed the court rendered judgment in favor of the plaintiff and *vs.* the defendants in the sum of \$314.09 damages with costs. 10

May 3, 1912. Rule to show cause granted.

May 10, 1912. Rule to show cause filed.

December 10, 1912. Rule for new trial dismissed.

December 18, 1912. Notice of appeal filed.

December 18, 1912. Defendant filed appeal bond, \$700.00.

The rule to show cause above mentioned expressly reserved the right to appeal, on all grounds, and provided that judgment should not be considered as entered until said rule should be disposed of. 20

Notice of Appeal.

Notice of Appeal.

Filed December 18, 1912.

New Jersey Supreme Court.

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STEPHENS-ADAMSON MFG. Co., a
corporation,

Plaintiff,

vs.

MOSES BIGELOW AND GEORGE R.
SWAIN, partners, trading as Bige-
low & Swain,

Defendants.

On Contract.

20

*To Stephens-Adamson Mfg. Co. or Messrs. Wimmer &
Wimmer, Attorneys of Stephens-Adamson Mfg. Co.*

Sirs:

Take notice that the defendants, Moses Bigelow
and George R. Swain, hereby appeal to the New Jer-
sey Supreme Court from the judgment of the First
District Court rendered in the above stated action
on the 25th day of April, 1912, a rule to show cause
30 why a new trial should not be granted having been
allowed and the same discharged by an order of the
said court entered December 10, 1912.

HUGH B. REED,

Attorney for Defendants.

Dated December 11, 1912.

*Order Granting Extension of Time.*FIRST DISTRICT COURT OF THE CITY OF
NEWARK.

STEPHENS-ADAMSON COMPANY,

*Plaintiff,**vs.*MOSES BIGELOW, *et als.*,*Defendants.**Extension
of Time.*

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I, Oliver K. Day, District Court Judge before whom, sitting as Judge of the First District Court of the City of Newark, the above stated cause was tried, and the rule to show cause why a new trial should not be granted, argued, do hereby extend the time within which the state of the case on appeal from said judgment in said cause may be settled, until the fifteenth day of January, nineteen hundred and thirteen.

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Dated December 21st, 1912.

OLIVER K. DAY,
Acting Judge, etc.

The time for setting the above state of case is hereby extended until the twenty-fifth day of January, nineteen hundred and thirteen.

30

Dated January 13th, 1913.

OLIVER K. DAY,
Acting Judge, etc.

40

*State of the Case for Appeal.***State of the Case for Appeal.**FIRST DISTRICT COURT OF THE CITY OF
NEWARK.

10	STEPHENS-ADAMSON MFG. CO., a corporation, <i>Plaintiff,</i>	} <i>On Contract.</i>
	<i>vs.</i>	
	MOSES BIGELOW AND GEORGE R. SWAIN, partners, trading as Bigelow & Swain, <i>Defendants.</i>	

20 The parties hereto by their respective attorneys,
 being unable to agree upon the state of the case for
 appeal, I do hereby settle the case as follows:

The action was to recover the amount alleged to be
 due on a certain contract of which the following is
 a copy:

"PROPOSAL FROM STEPHENS-ADAMSON
 MFG. CO.

50 Church Street.

New York, May 12th, 1911.

30 To Bigelow & Swain,
 Newark, N. J.

The undersigned, Stephens-Adamson Mfg. Co., pro-
 poses to furnish and deliver f. o. b. Aurora, Ill., the
 following property, all to be in accordance with the
 accompanying specification or description, and sub-
 ject to the terms and conditions herein stated, viz.:

- 1 Shaft 3 7/16" x 6' K.S. as per sketch.
 1 " 2 7/16" x 23' " " " "
 1 " 3 15/16" x 34' made up of a 16' and 18'
 40 length K. S. as per sketch.

State of the Case for Appeal.

- 1 Flanged coupling 3 15/16".
- 2 Collars 3 7/16".
- 1 Sprocket 18 T. No. 103 2 7/16" Bore, K.S.K. & S.S.
- 1 Sprocket 16 T. No. 103 3 7/16" Bore, " "
- 40 Feet of No. 103 chain with coupling.
- 1 Double belt iron pulley 102" x 18" Crowned,
3 15/16" Bore, K.S.K. & S.S.
- 1 Double belt iron pulley 72" x 12" Crowned,
3 15/16" Bore, K.S.K. & S.S.
- 2 3 15/16" Plain ball and socket pillow blocks with
standard base plates without wedges.
- 2 Special keys and 3 standard keys.
- 4 18" x 18" Style No. 37 Gates.

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1. The price shall be TWO HUNDRED AND SEVENTY-NINE AND 50/100....and 101.20.... (\$279.50) dollars.
and 101.20

2. The payments shall be made in cash in thirty 20 days from date of shipments.

3. The time of delivery (which is to be the date of shipment from our works at Aurora, Illinois), to be about
from receipt by us of your acceptance of this proposal and final information necessary for completion of order; provided, however, that the time of delivery is contingent upon delay occasioned or contributed to by strikes, fires, accidents, or other causes beyond the control of the undersigned; the undersigned shall not be responsible for any loss or damage arising from delay from such causes; and the acceptance by you of said property when delivered shall constitute a waiver of all claims for damages by reason of any delay. 30

4. The title and ownership of the property furnished under the terms of this proposal shall remain in Stephens-Adamson Mfg. Co. until the full and final payment thereof shall have been made to it, according to the terms agreed upon and notes, if any, given 40

State of the Case for Appeal.

therefor shall have matured and been settled in full. The Stephens-Adamson Mfg. Co. shall have the right in case of default in any of the terms or payments herein provided for, to repossess itself of the above mentioned property, or any part thereof wherever found, and shall not be liable in any legal action for such reclamation of its property, nor for the repayment of any moneys or property which have been
10 paid by you in part payment for said machinery or equipment, which part payments shall be deemed and held to be compensation only for the use, wear and tear of said property. The title of said property shall vest in you only upon condition that the terms and payments herein provided for are specifically complied with. This proposal shall be construed by the laws of Illinois and any contract based hereon shall be held to have been made within the State of Illi-
20 nois. Any loss or damage suffered by said property, or any part thereof, after the same has been delivered to a transportation company at Aurora, Illinois, by the undersigned, shall be borne by you.

5. The undersigned will replace or repair any material proved within six months from the date of shipment to have been defective at such time of shipment, but no liability shall attach to the undersigned on account of the damages and delays caused by such defective material, nor will any allowance
30 be granted for any repairs or alterations made by you without the written consent of an executive officer of the undersigned. The workmanship and material entering into the construction of the said property is guaranteed by the undersigned to be first-class in every respect for the purposes for which it is furnished by the undersigned.

6. This contract shall not be binding upon the undersigned until it and the acceptance thereof shall have been approved by an executive officer of the
40 undersigned at its offices at Aurora, Illinois, and an

State of the Case for Appeal.

acceptance hereof by you shall constitute an agreement that there are no understandings, representations or agreements outside the terms of this instrument and that the same shall not be hereafter modified except by writing executed by you and approved by an executive officer of the undersigned.

Respectfully submitted,

STEPHENS-ADAMSON MFG. CO.,

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By J. G. MARCRUM.

Accepted upon all the terms and conditions herein
above set forth this day of May 15, 1911.

BIGELOW & SWAIN.

"Approved:

STEPHENS-ADAMSON MFG. CO.,

By F. G. Adamson,

Vice-President."

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The defendants filed notice of recoupment under the statute alleging damages for the failure of the plaintiff to carry out the terms of the contract in an amount exceeding the jurisdiction of the court, the excess over such jurisdiction being thereby waived.

Witnesses for the plaintiff testified that of the property described in the contract, all had been delivered to the defendants by the seventeenth day of June, nineteen hundred and eleven, with the exception of one item, the large pulley for which credit was allowed, the defendants having secured a pulley to take its place because of alleged delay in delivery and that in computing the amount due to the plaintiff, the value of that pulley as estimated by the plaintiffs, eighty-one dollars and fifty-seven cents (\$81.57) had been deducted leaving the balance of two hundred and ninety-nine dollars and thirteen cents (\$299.13) due.

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State of the Case for Appeal.

The witnesses for the defendants showed (over the objection of the plaintiff, the court admitting the testimony, but reserving the right to strike it out if it, upon further consideration, deemed it inadmissible) that at the time of the making of the contract above mentioned, plaintiff agreed that all of the articles mentioned therein would be shipped on a day in May sufficiently early to insure their arrival in Ogdensburg, New Jersey, so that they might be set up and installed in the plant of the defendants by June first, nineteen hundred and eleven, on which day the defendants were under contract with the Erie Railroad Company to commence the excavation and shipment of ballast. That said contract with the Erie Railroad provided for shipments of ballast to the full capacity of the plant of the defendants of which the machinery mentioned in the contract with the plaintiff was to form a part, from the first day of June, nineteen hundred and eleven, to the first day of November, nineteen hundred and eleven, to wit, six hundred finished tons a day. That without all of the articles mentioned in the contract with plaintiff or similar ones, the defendants were unable to start their plant; that the articles mentioned in the contract with the plaintiff were not shipped as agreed, and in fact did not arrive until about the fifteenth or seventeenth day of June, 1911, that each day's delay after the time set for their arrival entailed a loss upon the defendants; that the plaintiff when its attention was called to the delay, assured the defendants that the property in question was on the way and would surely arrive, and thus prevented the defendants from supplying themselves elsewhere; that all of the material except the big pulley finally arrived at Ogdensburg, and in order to make the loss as small as possible, all of the material except the big pulley had been accepted; that the defendants had obtained a pulley elsewhere to supply

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State of the Case for Appeal.

the place of that mentioned in said contract, for which they necessarily paid the sum of one hundred and twenty-nine dollars and thirty-two cents (\$129.32); that the loss of the defendants, by reason of the failure of the plaintiff to ship and deliver the property as agreed, exceeded the jurisdiction of the district court, the excess above the jurisdiction of the court being waived by the defendants, in writing.

Witnesses for the defendant further showed that certain of the articles delivered under the contract sued on, to wit, certain shafting because of improper preparation for the keys which secured the pulley to be placed thereon, was of no value, and that by reason of the delay caused by the failure of the plaintiff to deliver the goods at the time agreed upon, the Erie Railroad Company refused to receive any stone during the month of June thus shortening by one month the term during which under the contract between the defendants and said Erie Railroad Company, the defendants were to deliver six hundred tons of stone per day, by which defendants lost the profits on that amount.

The following exhibits among others were placed in evidence.

"June 7, 1911.

Stephens-Adamson Manufacturing Company,

50 Church Street, New York City.

Gentlemen:

Referring to order which we placed with your Mr. Marcum on May 11th, and which you accepted with the understanding that same should be delivered within two weeks, beg to say that we have already suffered damages by your failure to ship as agreed, and we are holding you responsible for damages accruing from same. We are advised by the D., L. & W. that you failed to make shipment on Monday in carload

State of the Case for Appeal.

as per instructions, and wish to say that if you can hurry shipment any, that same will revert in your favor.

Yours very truly,
BIGELOW & SWAIN,
GRS. C.J. G. R. Swain."

"June 11, 1911.

10 Stephens-Adamson Mfg. Co.,
New York City.

Gentlemen:

Beg to advise that shafting and gates reached Franklin Furnace on the 17th inst. In order to minimize as far as possible our losses, we have accepted shafting, but as we advised you on the 9th inst., we have secured 102" pulley elsewhere and in this connection would say that we have not as yet received
20 either memorandum of shipment from your company nor shipping receipt for this pulley. As the writer advised you in our letter of June 7th, we have been put to considerable expense, and have been greatly damaged as well, all due to the fact that you did not make shipment in one lot from Aurora, Ill., on May 24th. This order was given to your Mr. J. G. Marcum on understanding that it would be so shipped and he was fully aware that we were under obligations to have our plant completed by the 31st of May,
30 and accepted the order under those conditions. He stated to the writer that order had been submitted to the factory with instructions to ship not later than May 24th and to cancel order and wire him if unable to do so. In a short time, we will send you a statement of the loss you have caused us, and have no doubt that as a matter of fairness, you will recompense us.

Yours truly,
BIGELOW & SWAIN,
40 GRS. C.J. (Signed) G. R. Swain."

State of the Case for Appeal.

Witness for the plaintiff showed in rebuttal, that the big pulley in question was at the station in Franklin Furnace, early in July, nineteen hundred and eleven.

Witnesses for defendants in reply testified that the pulley had never been shipped from Aurora, Illinois, as specified in the contract, but had been made by W. A. Jones Foundry & Machine Company, Chicago, Illinois; that no notice of its shipment or bill of lading had ever been forwarded to or received by them until July tenth, nineteen hundred and eleven, when the plant had been completed and was running with a pulley obtained elsewhere, of which plaintiff had been notified. 10

After the case was closed, the court struck out all of the evidence of the defendants relating to the oral agreement in regard to the time of delivery and shipment of the property mentioned in the contract between plaintiff and defendants, on the ground that the contract in question being in writing and complete upon its face, parol evidence such as that struck out, was not admissible. 20

The court found the following facts:

That the plaintiff and defendants entered into the contract dated May twelfth, 1911, hereinabove set forth; that all of the articles mentioned in said contract were shipped from Aurora, Illinois, by June sixth, 1911, except the big pulley, and were delivered by the plaintiff and accepted by the defendants at Ogdensburg, New Jersey, by the seventeenth day of June, nineteen hundred and eleven; that all the goods, except the pulley, were shipped within a reasonable time; that the big pulley was not received or accepted by the defendants, but that credit upon the contract at the contract price was made by the plaintiff in this suit; that the value of the remaining articles so delivered and accepted at the contract price was two hundred and ninety-nine dollars and thirteen cents 30 40

State of the Case for Appeal.

(\$299.13) which, with interest to the date of judgment, amounts to three hundred and fourteen dollars and seven cents (\$314.07), being the amount claimed by the plaintiff and interest. I thereupon gave judgment for the plaintiff and against the defendants, for said sum of three hundred and fourteen dollars and seven cents (\$314.07).

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OLIVER K. DAY,
Acting Judge, etc.

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Specification.

Specification.

NEW JERSEY SUPREME COURT.
ON APPEAL FROM THE FIRST DISTRICT
COURT OF THE CITY OF NEWARK.

STEPHENS-ADAMSON MFG. Co., a
corporation,

Plaintiff and Appellee,

vs.

MOSES BIGELOW AND GEORGE R.
SWAIN, partners, trading as
Bigelow & Swain,

Defendants and Appellants.

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The following is a specification of the determinations and directions of the First District Court of the City of Newark in the above stated case with respect to which the above mentioned appellants are dissatisfied in point of law.

1. That the said court at the trial thereof struck out testimony of the witnesses for the defendants as to the agreement between the plaintiff and defendants made at the time of the making of the contract respecting the time of shipment and delivery of the articles described therein.

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2. That the said court at the trial refused to admit testimony offered on behalf of the defendants, showing representations made by the plaintiff or its agents prior to the making of the contract between them offered in evidence in this case, that the property described therein would be shipped on a day sufficiently early to insure the delivery thereof at Ogdensburg, New Jersey, before June 1st, 1911.

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Specification.

3. That the court at the trial refused to admit the testimony offered on behalf of the defendants to show that at the time of the making of the agreement between the parties, in evidence in this case, the plaintiff guaranteed to defendants that goods described in the contract would be shipped from Aurora, Illinois, on a day sufficiently early to insure delivery of all of said property and installation of same in the plant of the defendants before June 1st, 1911.

4. Because the said court at the trial, struck out testimony supplied by witnesses of the defendants showing damages suffered by defendants by reason of delay on the part of the plaintiffs in the delivery of the goods described in the contract between them in evidence in the case.

5. Because the court at the trial refused to permit evidence offered on behalf of the defendants showing damage suffered by the defendants by reason of the delay caused by the plaintiffs in the delivery of articles described in the contract between plaintiff and defendants upon which recovery was sought by the plaintiff in the case.

6. Because said court at the trial thereof, gave judgment for the plaintiff therein, when judgment should have been for the defendants therein.

7. Because said court at the trial, gave judgment for the plaintiff notwithstanding the fact that it appeared that the plaintiff had not carried out the terms of the contract sued on in that the property mentioned therein or a portion thereof was not shipped as prescribed by the terms thereof.

8. Because said court gave judgment for the plaintiff for the alleged value of certain portion of the goods mentioned in the contract sued on alleged to have been delivered to the defendants, although under the terms of the contract sued on, the title of the property described therein remains in the plaintiff,

Specification.

and said contract never has been completely performed by the plaintiff.

9. Because said court gave judgment for the plaintiff for the portion of the articles described in the contract sued on alleged to have been delivered to the defendants at the contract price thereof instead of the value thereof to the defendants.

10. Because it appears that the court at the trial gave judgment to the plaintiff for an amount found by deducting from the contract price, a sum alleged by the plaintiff to be the value of the pulley, which it was conceded formed part of the contract sued on and was not delivered to defendants, to wit, eighty-one dollars and fifty-seven cents (\$81.57), whereas it appeared that the defendants had necessarily expended the sum of one hundred and twenty-nine dollars and thirty-two cents (\$129.32) to supply the place of the pulley in question. 10 20

11. Because the said court found for the plaintiff when by the terms of the contract nothing was yet due from the defendants to the plaintiff.

HUGH B. REED,
Attorney for Appellant.

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Opinion.

Filed June 14, 1913.

NEW JERSEY SUPREME COURT.

February Term, 1913.

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 STEPHENS-ADAMSON MFG. Co., a
 corporation,
*Plaintiff and Appellee,**vs.*
 MOSES BIGELOW and GEORGE B.
 SWAIN, trading as Bigelow &
 Swain,
Defendants and Appellants.

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Submitted February Term, 1913.

Decided June 9th, 1913.

Where contracting parties have put their contract in writing, the written agreement, if complete on its face, is the only evidence of such contract. Oral testimony is admissible only where the written contract is not complete and does not purport to cover the whole contract.

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On appeal.

For the plaintiff, Messrs. Wimmer & Wimmer and Mr. S. J. MacDonald.

For the defendant, Mr. Hugh B. Reed.

Before Justices Trenchard, Parker and Voorhees.

The opinion of the court was delivered by Voorhees, *J.*

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In the trial of a District Court suit founded upon a written contract, dated May 12, 1911, for the sale and purchase of machinery, the following clause oc-

Opinion of Supreme Court.

curred: "The time of delivery (which is to be the date of shipment from our works at Aurora, Illinois), to be about from receipt by us of your acceptance of this proposal and final information necessary for completion of order."

There was a plea of recoupment. The court heard parol testimony regarding the time of delivery, but finally struck it out as not admissible. *Naumberg vs. Young*, 15 Vr., 331, is in point upon this question. It holds that the written agreement, if complete, is the only evidence of the contract between the parties, and that parol evidence of such contract is admissible only where the writing is not complete and does not purport to cover the whole contract. 10

The contract under review left in blank the time of delivery of the purchased machinery, and so it appears that the consideration of the testimony of witnesses as to it was clearly within the rule. See also the following cases, *Bruce vs. Pearsall*, 59 L., 62; *Emmett vs. Penoyer*, 151 N. Y.; *Camden Iron Works vs. Fox*, 23 Fed., 200; *Dennett vs. Slack and Gibson*, 78 Ver., 439. The action of the court therefore, in excluding it amounted to error as far as defendant's case was concerned and is sufficient to warrant a reversal. 20

But again the court found an acceptance of the goods within a reasonable time except as to the large pulley, and that the plaintiffs had credited the value of this article at the contract price made by the parties, but ignored the testimony which tended to prove the purchase of another pulley at a cost of \$129.12. The court thereupon found for the plaintiff, allowing to the defendants the credit given them by the plaintiff on the state of demand. I think this was a question of fact and should have been treated as such. It was not so done, but the credit was considered as establishing between the parties all that the defendants could claim. This again was error. 30

There must be a reversal and a new trial ordered. 40

Rule for Judgment.

Rule for Judgment.

Entered June 25, 1913.

NEW JERSEY SUPREME COURT.

10	STEPHENS-ADAMSON MFG. Co., <i>Plaintiff-Appellee,</i> <i>vs.</i> MOSES BIGELOW and GEORGE B. SWAIN, trading as Bigelow & Swain, <i>Defendants-Appellants.</i>	<i>On Appeal from First District Court of the City of Newark. Order.</i>
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20 The court having heard the argument of counsel on the appeal filed in the above cause and having duly considered the same and being of the opinion that there must be a reversal of the judgment for error upon the trial thereof,

30 It is ordered that the judgment appealed from which was entered in the First District Court in the City of Newark in favor of the plaintiff and against the defendant be reversed; that the record be remitted *by* said First District Court in the City of Newark and that there be a new trial in that court of the issues involved in said cause, the costs of this appeal to abide the event of the suit.

Rule actually entered June 25, 1913.

On motion of

HUGH B. REED,
Attorney for Defendants and Appellants.

New Jersey Court of Errors and Appeals

STEPHENS-ADAMSON MANUFACTUR-
ING COMPANY,

Plaintiff-Appellant,

vs.

MOSES BIGELOW, *et al.*, partners,
&c.,

Defendants-Appellees.

On

Appeal.

Brief for Appellant.

The Questions.

Two errors were found by the Supreme Court in the rulings of the District Court, viz :

1. In excluding oral testimony which was offered to prove an alleged agreement between the parties upon a subject upon which the written agreement was silent.

2. In finding an acceptance of the goods within a reasonable time, excepting a pulley for which the court gave credit.

Two questions, therefore, are now presented to this court upon this appeal, to wit :

1. Was oral testimony legally admissible to supply a term left blank by the parties in their written contract?

2. Did the District Court err in its findings as to the acceptance?

The Contract.

The contract was a printed form, with numerous blank spaces to be filled with the necessary terms and particulars, when agreed upon in specific instances.

In the case now before the court these blank spaces were all filled, except the one for the time of delivery, which was left blank.

The contract was duly executed by the parties, with this particular space left blank and unfilled.

The Rule.

The rule is so well settled that it is now never questioned:

Written contracts cover all prior parol negotiations.

17 Cyc., 567.

Naumburg vs. Young, 44 N. J. L., 331.

Bandholz vs. Judge, 62 N. J. L., 526; 41a., 723.

The Exception.

It is claimed that this contract comes within one of the exceptions to the rule, in that it is

“not complete and does not purport to cover the
“whole contract.”

This view of the contract was upheld by the Supreme Court (Case, p. 18).

This raises the first and principal question, upon this appeal, viz.:

Was this contract legally complete?

Points.

1. The contract was complete.

All the elements of a complete legal contract are here present, viz., parties, consideration, object, promise, acceptance.

Such a contract being executed by the parties, how can it be said to be incomplete legally?

2. The fact that the time of delivery was left blank did not make the contract incomplete, because the law completed it.

Sales Act, sec. 43 (2).

Elliott's N. J. Law of Sales, 485, 488.

9 *Cyc.*, 251, 611.

3. The Supreme Court cites the following cases to sustain its view:

Naumburg vs. Young, 44 N. J. L., 331.

Bruce vs. Pearsall, 59 L., 62.

Emmett vs. Penoyer, 151 N. Y.

Camden Iron Works vs. Fox, 23 Fed., 200.

Dennett vs. Slack & Gibson, 78 Ver., 439.

A careful examination of these cases will show that they do not support the conclusion of the Supreme Court in this case; but that, on the contrary, they show that conclusion to be erroneous.

In *Naumburg vs. Young* the court says (p. 339):

"It cannot be assumed that the written contract was designed as an imperfect expression of the parties' agreement from the mere fact that the written agreement contains nothing on the subject to which the parol evidence is directed. On that assumption, that part of the rule which excludes parol proof as a means of adding to the written contract would be entirely abrogated."

And, further (p. 339):

"When parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance."

And the court sums up the whole subject thus (p. 341):

“I think it may be considered as settled, upon
 “principle as well as by the weight of authority,
 “that where the written contract purports on its
 “face to be a memorial of the transaction, it su-
 “persedes all prior negotiations and agreements,
 “and that oral testimony will not be admitted of
 “prior or contemporaneous promises on a subject
 “which is so closely connected with the principal
 “transaction with respect to which the parties
 “are contracting, as to be part and parcel of the
 “transaction itself, without the adjustment of
 “which the parties cannot be considered as hav-
 “ing finished their negotiations and finally
 “concluded a contract.”

Bruce vs. Pearsall, 59 N. J. L., 62; 34A, 982, was a case in which the contract was incomplete on its face, there being no written acceptance. The acceptance was oral, and it necessarily followed that oral testimony was not only admissible but necessary to show whether there really was a meeting of the minds, *i. e.*, whether there was a contract at all.

Emmett vs. Penoyer, 151 N. Y., 45 N. E., 1041, was a case in which the contract was ambiguous and uncertain.

The court says:

“It may be, and probably is, impossible to af-
 “firm with any degree of confidence what the fig-
 “ures mean, but that is the reason why oral tes-
 “timony was admissible to explain terms which
 “in themselves expressed no intelligible idea.”

Camden Iron Works vs. Fox, cited by the Supreme Court as in 23 Fed., 200, will be found in 34 Fed., 200.

This was a case in which defendant sent a telegraphic order for goods, leaving time for delivery

blank, but adding that the date would be supplied next day. This was done and the order, as thus completed, was entered by the plaintiff.

The court "*held*, in an action by the manufacturer "for damages for refusal to accept, that time was of "the essence, and that the manufacturer, having entered the order after the blank was filled, was bound "thereby and could not recover."

4. Two cases in this state clearly define the limits of the exception permitting oral testimony, and show conclusively that in the case at bar the testimony was rightly excluded.

In *Society vs. Haight*, 1 N. J. Eq., 399, the court says:

"Where there is a clear, subsequent and independent agreement varying the original one, evidence of it may be received; *but not where it is of a matter passing at the same time with the written agreement.*"

In *Bandholz vs. Judge*, 41A, 723, the court says:

"A collateral contemporaneous agreement by "parol may indeed be given effect, *but only when it is on a subject distinct from that to which the written agreement relates.*"

See, also *Kruger vs. Brown*, 75A, 171.

II.

As to the Acceptance.

1. The District found, as facts:

- (a) Acceptance of part of the goods.
- (b) That the goods accepted were shipped within a reasonable time.
- (c) That proper credit was given for the pulley not accepted.
- (d) The value of the goods accepted to be \$299.13, for which amount, with interest, the court gave judgment (Case, p. 13, l. 26, *et seq.*).

No question can be raised but that there was sufficient evidence to warrant these findings of fact.

2. The decision of the District Court on questions of fact is final and unappealable.

Best vs. Smith, 54 N. J. L., 434, 24A, 556.

Young vs. Spagnuola, 77 N. J. L., 434, 72A, 28.

3. It is well settled that if the buyer accept and keep a part, with the seller's consent, he must pay for it, although the seller does not deliver the residue, but may recoup damages for the seller's default.

Elliott's N. J. Law of Sales, p. 539 and cases cited in note 25.

4. The District Court found, as a fact, that defendant suffered no damages, as to the pulley, beyond the contract price, which was allowed and deducted.

It is respectfully submitted, that the judgment of the Supreme Court should be reversed, and the judgment of the District Court should be affirmed.

SAMUEL J. MACDONALD,

Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

STEPHENS - ADAMSON MFG. COM-
PANY, a corporation,

Plaintiff and Appellant,

vs.

MOSES BIGELOW AND GEORGE R.
SWAIN, trading as Bigelow &
Swain,

Defendants and Respondents.

Brief for Defendants and Respondents.

STATEMENT.

The defendants purchased of the plaintiff certain machinery under a written contract in the form of a written proposal and acceptance, dated May fifteenth, nineteen hundred and eleven.

In the proposal the terms of the contract are set forth with the exception of the time of delivery which was left blank, as follows:

(3) The time of delivery (which is to be the date of shipment from our works at Aurora, Illinois) to be about.....from the receipt by us of your acceptance of this proposal and final information necessary for the completion of the order.

The reason for the blank space was the uncertainty as to the time it would be necessary to ship the machinery so as to arrive in time for its installation in the plant of the defendants before June first, nineteen hundred and eleven. At and before the time of the acceptance of the proposal by the defendants the necessity of the shipment of the machinery so that it should be delivered to the defendants at Ogdensburg,

New Jersey, before June 1, 1911, was made known to the plaintiff and plaintiff thereupon agreed that such shipment should be made upon such date in May, nineteen hundred and eleven, as would insure its delivery at Ogdensburg, New Jersey, on a date long enough before June first, nineteen hundred and eleven, to enable the defendants to set it up in their plant so that they might begin to operate on June first, nineteen hundred and eleven, as they were under contract to do. The plaintiff failed to ship the machinery in May as agreed and did not ship until June sixth, nineteen hundred and eleven; part of the machinery arrived at Ogdensburg on June seventeen, nineteen hundred and eleven, and defendants accepted this part because they were unable to procure machinery elsewhere, on short notice, and thus sought to lessen the damage which they had suffered and would suffer by reason of the delay. A part of the machinery, to wit—a large pulley, was not delivered at all but credit was given by plaintiff at what it alleged was the contract price, \$81.57, because of the failure to deliver this. Defendants procured a pulley elsewhere at the expense of \$129.32, and by means of the delay in shipment and delivery of the machinery, and failure to deliver the pulley, were damaged in an amount exceeding the amount for which plaintiff sued.

The trial court refused to admit, or, after receiving, struck out the testimony of the defendants as to the agreement and representations in regard to the dates on which the machinery in question was to be shipped and delivered, and refused to consider the damage suffered by the defendants in consequence.

A more complete statement of the evidence will be found in the state of the case commencing on page 6. The defendants appealed to the Supreme Court, and the judgment of the District Court was there reversed and a new trial ordered. (See opinion, State of Case, page 18.)

The Evidence.

The evidence is set forth in the state of the case in detail because it is contended, as will hereafter appear, that the findings of the court, as set forth on page 13 of the state of the case, are in many respects without any foundation in the evidence and that the court disregarded, in his findings, uncontradicted evidence presented by the defendants.

THE CONTRACT IS UPON ITS FACE INCOMPLETE AND PAROL EVIDENCE IS ADMISSIBLE TO SUPPLY THE MISSING TERM.

The rule laid down in *Naumberg vs. Young*, 44 N. J. L., page 331, that parol evidence to vary the terms of a written contract is inadmissible is subject to certain exceptions set forth therein, the first of which is as follows:

(1) Where the contract is incomplete and on its face does not purport to contain the whole agreement—for where it is apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence is admissible (see page 339).

I will repeat the clause in question.

“3. The time of delivery (which is to be the date of shipment from our works at Aurora, Illinois) to be about.....from receipt by us of your acceptance, etc.”

It seems clear to me that it is apparent from this writing that something is left out to be supplied by extrinsic evidence.

The extrinsic evidence offered by the defendants, which was uncontradicted, explains and supplies this omission.

The defendants necessarily relied upon the plaintiff to fix the date of shipment, as that was a matter

within its knowledge, but it was to be upon a date sufficiently early to assure its arrival at Ogdensburg before June first, nineteen hundred and eleven.

If the testimony offered by defendants is admissible it is controlling and plaintiff cannot recover because the damage suffered by defendants by reason of the delay in shipment exceeded the amount claimed by plaintiff.

The following extracts from cases seem to me to bear out the contention of defendants.

In *Bruce vs. Pearsall*, 59 N. J. L., pages 62-65, there was a written offer to do mason work for the sum of fifty-one hundred and twenty-five dollars which was accepted orally. Oral testimony that it was agreed between the owner and contractor that payments were to be made as the work progressed was admitted.

“Where the paper appears to be incomplete in any respect parol evidence is admissible to supply the incomplete term.”

Emmet vs. Penoyer, 151 N. Y., 45 N. E., 1041, 564.

Niles vs. Sire, 94 N. Y. L., 586.

In *Varner vs. Dexter Gin & Mill Co-op. Asso.* (Texas Court of Appeals), 39 S. W. Reporter, page 206, contract provided for shipment “on or before1894” and parol evidence was held admissible to show date upon which shipment was to be made.

In *Camden Iron Works vs. Fox*, 34 Federal Reporter, 200 (a case in the Circuit Court of the United States for the District of New Jersey), defendant ordered pipe of the plaintiff in writing and the order was accepted in writing but provided that delivery should be completed “within.....weeks from date.” Parol evidence was admitted to show that the blank was left because the parties were unable to agree upon the time, which was left open

until the defendant could ascertain the utmost limit of time to be allowed and that he wired the next day to the plaintiff to insert the word "nine." The court held that there was an obscurity about the contract as originally written which required to be removed before the contract between the parties could be rightly interpreted and for this purpose only was testimony *de hors* the written agreement received, and judgment was for defendant.

The above case is similar to the one under consideration for plaintiff was to ship the machinery on or before May twenty-fourth, nineteen hundred and eleven, or cancel the order. The date of shipment was left blank because Mr. Marcum was uncertain how long before May twenty-fourth, the shipment could be made. See state of case, page 10, line 10 *et seq.*: page 11, lines 34, 35; page 12, line 22 *et seq.*

In *Landry vs. Adaline S. F. Co.*, 26 Southern Reporter, 824, contract between cane grower and factory for sale and delivery of cane failed to mention upon whom the obligation was to provide cars for transportation. The court held that this omission left it open for parol proof.

In *Louisville & Nashville Railroad Company vs. Duncan & Orr*, 34 Southern Reporter, 137, the written contract failed to specify the route by which goods were to be shipped. Parol evidence was admitted.

In *Dannett vs. Slack & Gibson*, 63 Atlantic Reporter, 141, 78 Vermont, 439, the memorandum was silent as to the time and manner of making a certain payment. The court held that the case came within the rule that when it appears that the parties to a written contract did not intend to reduce the whole contract to writing and the part omitted is consistent with the writing, such omitted part may be proved by parol evidence.

In *Sandford & Wright vs. Newark & Hudson Railroad Company*, 37 N. J. L., at page 3, a written con-

tract was entered into to build a bridge which was not described. Chief Justice Beasley held it might be shown by parol evidence that at the time of the contract the parties referred to a plan or draft of a bridge then in existence.

In the case of *Harrison vs. Vreeland*, 38 N. J. L., page 366, the court held that where a doubt arises upon the meaning of the words of a written contract or any difficulty as to their application under surrounding circumstances the meaning of the language may be ascertained by evidence *de hors* the instrument itself by reading the contract in the light of the situation of the contracting parties at the time of its execution.

In some states parol evidence is admitted in a case of this kind on the ground that where the time for performance is not stated in the written memorandum the court will imply a reasonable time and that parol evidence of the surrounding circumstances is admissible to aid in determining what is a reasonable time.

In *Sloop vs. Wabash Railroad Company*, Kansas City Court of Appeals, 84 S. W. Reporter, page 111, the written contract did not provide for time of arrival of a shipment of cattle and it was held that if a written contract does not provide for the time within which an act is to be done it is also a familiar rule that performance must be within a reasonable time under the circumstances, that since writing did not provide for the time when the transportation of the cattle should be completed the court must look into the facts and circumstances to determine the matter, and parol evidence was admitted to show that it was the understanding that the cattle should arrive in time for the market the next morning.

In *Martin vs. Clark*, 181 Mass., page 134, and 63 N. E., page 409, it was held that where a contract is silent as to the time of payment, payment on deliv-

ery is implied but under proper pleading oral testimony is competent to determine terms of credit.

In *Pratt & Co. vs. Frasier & Co.* (South Carolina Supreme Court), 51 S. E. Reporter, page 983, there was a written contract for sale of drugs which was silent as to the time of shipment but contained a clause stating there was no agreement or understanding, except as set forth in the memorandum. The defendants offered parol testimony that goods were ordered on October thirtieth, nineteen hundred and two, and to be shipped immediately, but the plaintiff had failed to ship as agreed and that thus the goods had not been received in time for the holiday trade for which they had been ordered. The court held that parol evidence of the facts and circumstances attending the sale was admissible in order to determine what was a reasonable time and cited 2 Benjamin on Sales, 1023.

The doctrine in these cases is that the parol evidence is not accepted for the purpose of modifying the terms of the written contract but to aid in interpreting them.

The appellant contends that although the time of delivery is left blank the law completes the contract by implying a reasonable time, but what is a reasonable time must be determined from the facts and circumstances surrounding the case supplied by parol evidence under the cases above cited.

It is true that the District Court found as follows: (See page 12, State of the Case) "That all the goods, except the pulley, were shipped within a reasonable time."

There is absolutely no evidence to support this finding, however.

Marcus vs. Graver, 71 N. J. L., 95.

Since the court struck out all evidence of the facts and circumstances he must have based his decision

as to what time was reasonable solely on the contract itself, and hold that under such a contract the reasonable time is always of the same duration.

In any event the District Court by implication found that the big pulley, an essential part of the machinery mentioned in the contract, was not shipped within a reasonable time. It was not shipped from Aurora, Ill., at any time and was never delivered to defendants. How then can the finding that the plaintiff was entitled to recover be sustained upon the evidence?

In addition the court excluded evidence, competent under the decisions cited above, as to what under the circumstances constituted a reasonable time.

The contract is an entire contract. The machinery was not shipped in one shipment as agreed, page 10, line 26; page 11, lines 30 to 40. The remainder of the property was accepted merely for the purpose of keeping down the damage which would be very much increased had the defendants waited to obtain that part of the machinery elsewhere. Indeed the defendants are bound to keep the damage as small as possible and to use every available means for that purpose.

The defendants notified the plaintiff that they were accepting the goods under those conditions, page 12, line 15.

THE JUDGMENT FOR THE PLAINTIFF IN THE DISTRICT COURT WAS UNWARRANTED.

The District Court gave judgment to the plaintiff for two hundred and ninety-nine dollars and thirteen cents, which it found to be the value of that part of the machinery covered by the contract which was received by the defendants, thus deducting from the contract price for the pulley the sum of eighty-one dollars and fifty-seven cents (page 9, line 40). In

order to replace this pulley, it cost defendants one hundred and twenty-nine dollars and thirty-two cents (page 11, line 3).

It is inconceivable that the plaintiff should be permitted to recover its estimate of the contract price for the goods delivered when it has failed to complete an entire contract, regardless of the damages suffered by the defendants through its failure, especially where the defendants accepted the goods delivered in order to save both themselves and plaintiff from further loss.

It was through the fault of the plaintiff that the contract was not fulfilled and in view of the provisions of paragraph four of the contract (see page 7, line 40), since title has not passed to defendants, plaintiff should not be permitted to recover in this action.

In the case of *American Soda Fountain Company vs. Vaughn*, 69 N. J. L., 582, and the cases which have followed that decision, there was a complete performance by the vendor. Here the performance was incomplete. The plaintiff should not therefore be permitted to take advantage of its own wrong.

Nor should any implication of a promise to pay the defendants be raised, for the title to the goods is still in the plaintiff.

Even could the plaintiff recover, the measure of damages adopted by the District Court is wrong, for the damage suffered by the defendant should have been deducted.

The fair value, as used in the Sales Act, means the reasonable market value, less the injury for defective performance.

"Elliott on The Sales Act at page 477."

Haslack vs. Mayers, 26 N. J. L., 284.

In this connection the District Court in arriving at its findings must have totally disregarded the testi-

mony of the defendants that certain of the shafting received by the defendants was of no value because of certain defects therein (see page 10, line 11, *et seq*). This evidence was uncontradicted and should have controlled.

It is respectfully submitted that the judgment of the Supreme Court reversing the judgment of the District Court should be affirmed.

HUGH B. REED,

Attorney for Defendants and Respondents.



