

NEW JERSEY  
COURT OF ERRORS AND APPEALS.

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A. H. AND F. H. LIPPIN-  
COTT, INC.,

*Plaintiff and Respondent,*

VS.

JOHN SCHNEIDER,

*Defendant and Appellant.*

ACTION AT LAW.

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BRIEF OF DEFENDANT AND APPELLANT.

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ABSTRACT OF THE CASE.

On June 15, 1912, John Schneider, the defendant and appellant (hereafter called the appellant), and the plaintiff and respondent (hereafter called the respondent), entered into a written contract whereby the respondent agreed to sell the appellant a carbonator, to be used upon a soda fountain, upon a conditional bill of sale. A copy of the bill of sale (Exhibit "A") is to be found on page thirteen State of Case. The terms or conditions were: Ten dollars (\$10.00) cash down; twenty dollars (\$20.00) upon delivery; and the balance in ten promissory notes of ten dollars (\$10.00) each, dated June 15, 1912, payable monthly, with interest added at the rate of six per cent., the last note falling due on April 15, 1913. Nothing

was said in the agreement as to the payment of cash, but after the signatures the following memorandum was written:

"The option is reserved by the vendee to pay cash \$120.00 in full settlement upon receipt or tender of goods or bill of lading for same." At the execution of this agreement the appellant paid the respondent ten dollars (\$10.00) cash.

On June 20, 1912, the respondent wrote the Tradesmen's Bank of Vineland, N. J., appointing it its agent to transact the business, and enclosed the bill of lading for the carbonator, which had been shipped, and ten promissory notes of ten dollars each, falling due monthly, an insurance note and the conditional bill of sale to be executed before a Master in Chancery. At the foot of the letter to the Tradesmen's Bank was written the following:

"P. S. According to Mr. Schneider's contract, he has the privilege of paying \$120.00 cash in full settlement upon the tender of the bill of lading, and we therefore authorize you to accept \$120.00 less cash payment of \$10.00 already made, or \$110.00, from Mr. Schneider, if he decides to pay cash for the carbonator, in which event the notes are not to be signed nor the contract acknowledged, but returned to us." A copy of this letter of instruction is found on page seventeen State of Case.

On June 20th, the respondent wrote the appellant, the letter containing the following:

"We have also advised the bank that you have the option of paying \$120.00 in full settlement upon tender of bill of lading. That is, \$120.00 less the cash payment of \$10.00 already made."

A copy of this letter is to be found on page nineteen State of Case. Upon receipt of this letter, on notice by the bank, Schneider, the appellant, went to the bank in compliance with the written letter of respondent, and at

the instance of Parker, the bank's assistant cashier, ignored the notes, took his discount and paid the bank \$110.00 cash, took the bill of lading for the carbonator (by virtue of which the appellant claims title. See affidavit of Parker on page twenty-two State of Case). The bank remitted the \$110.00 to respondent, whereupon the respondent claimed a mistake had been made and claimed \$10.00 more as due. The appellant, claiming he had settled in full, ignored the claim.

On September 25, 1912, the respondent caused a writ of replevin to be issued out of the Cumberland County Circuit Court (see complaint, State of Case, page three). The Sheriff executed the writ and replevied the carbonator. The appellant answered (see page six, State of Case), claiming the carbonator as his property and a counter-claim for damages. The respondent thereupon gave notice that it would apply to the Honorable Clarence L. Cole, Circuit Court Judge, to strike out appellant's answer as sham and frivolous, and enter a rule for summary judgment. Judge Cole in his conclusion (see State of Case, page twenty-seven) found the answer sham and frivolous, ordered the same struck out and summary judgment entered that the carbonator belonged to the respondent.

The result:

The respondent has in its possession:

1. One hundred and twenty dollars cash paid by the appellant for carbonator.
2. The carbonator.
3. A judgment for \$46.02.

## POINTS.

1. The appellant's answer was not a sham or frivolous plea.
2. The carbonator replevied was the property of the appellant because he accepted and acted upon the offer made to him by the respondent, and paid its agent, the Tradesmen's Bank of Vineland, New Jersey, \$110.00 and took his document of title, the bill of lading.
3. The respondent should have returned the money (or offered to return the money) before entering suit, i. e., put him in *statu quo*.
4. The respondent ratified its contract by accepting and still retaining the \$120.00 paid by the appellant.
5. The pleadings of the respondent do not show or allege that the appellant took title to the carbonator fraudulently, or any act of fraud on the part of the appellant or any fault on the part of the appellant.

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I.

THE APPELLANT'S ANSWER WAS NOT A SHAM OR FRIVOLOUS PLEA.

There was no other plea that the appellant could make under the circumstances of the case. In *Scott vs. Hall*, 15 *Dick.* p. 451 (reversing *Scott vs. Hall*, 13 *Dick.* p. 42), the complainant, Scott, sold Hall a printing press on a conditional bill of sale for \$1800. Until the full instalments were paid title was to remain in Scott. The de-

fendant, Hall, defaulted in the payment of nineteen notes of \$43.05 each, aggregating \$818.00. The collection agent of Scott called on Hall and arranged with Hall to sell and transfer the press for \$525.00 in full for the claim. Before agreeing to accept said sum of \$525.00, the collection agent of Scott telephoned the office of his principal and was informed that the amount due was \$650.00. Acting upon the supposition the collection agent agreed to settle with Hall's attorney at what he supposed was a deduction of \$125.00. After the amount was agreed upon Hall placed a check for \$525.00 at the disposal of Scott's agent. Before the bill of sale was signed a call upon the telephone was made for the agent by Scott, who informed him the amount due was \$950.00. The agent at once offered to return the check and refused to execute the bill of sale. Scott brought a suit in replevin against Hall's vendees for the printing press. Hall's vendees plead title and the case was tried in Passaic Circuit and Scott lost the case and Hall's vendees received a verdict.

Surely if a plea of title was good in that case it would be good in this instance. Here the respondent wrote the appellant, Schneider, that if he, Schneider, would pay \$110.00 for the carbonator at the Tradesmen's Bank at Vineland, it would be his property. See letters, State of Case, Ex. "B," p. 17; Ex. "C," p. 19. The offer of Lippincott was accepted by Schneider and he paid the sum of \$110.00 to the Tradesmen's Bank and took his document of title, the bill of lading, for the carbonator.

"The document of title to goods includes a bill of lading."

*Sale of Goods. Comp. Stat. par. 76, p. 4665.*

"A person to whom a document of title has been transferred but not negotiated, acquired

thereby, as against the transferrer, the title to the goods, subject to the terms of any agreement with the transferrer."

*Sale of Goods. Comp. Stat. par. 34, p. 4655.*

## II.

THE CARBONATOR REPLEVIED WAS THE PROPERTY OF THE APPELLANT BECAUSE HE ACCEPTED AND ACTED UPON THE OFFER MADE TO HIM BY THE RESPONDENT, AND PAID ITS AGENT, THE TRADESMEN'S BANK OF VINELAND, N. J., \$110.00 AND TOOK HIS DOCUMENT OF TITLE, THE BILL OF LADING.

The terms of the original contract were altered when the Lippincott Company wrote Schneider to go to the bank and pay \$120.00 less \$10.00; when the Lippincott Company wrote the Tradesmen's Bank to collect \$110.00 cash in lieu of the notes from Schneider. See Ex. "B," p. 17, and Ex. "C," State of Case.

"After an agreement has been reduced to writing, however, it is by the rules of the common law, competent to the parties at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to or subtract from or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted on what will then be left of the written agreement."

*Chitty on Contracts, 11th Ed. Vol. 1, p. 154.*

Schneider paid the Tradesmen's Bank \$110.00 with the complete and full understanding the carbonator was to be his property. See affidavit of Parker, cashier, pp.

22 and 23, State of Case. He took the bill of lading as his document of title. See Parker's affidavit. It, the Lippincott Company, now has the \$110.00. See Walter C. Carr's affidavit for the company, p. 12, State of Case, line 19. The offer of the Lippincott Company was honestly accepted by Schneider.

The rule is:

"Where a person by word or conduct wilfully induces another to act on the belief of the existence of a certain state of facts, he will be estopped as against him to allege a different state of facts."

*Enc. of Law, Vol. 7, 2nd Ed. p. 19.*

### III.

THE RESPONDENT SHOULD HAVE RETURNED THE MONEY (OR OFFERED TO RETURN THE MONEY) PAID BY THE APPELLANT BEFORE ENTERING SUIT, I. E., PUT HIM IN STATU QUO.

Under the terms of its original agreement the last instalment on the note of \$10.00 would come due in April, 1913. (See Ex. "A," p. 13, State of Case.) The complaint of the respondent (p. 3, State of Case) does not aver any fraud or wrongful act on the part of the defendant. The respondent admits it still retains the sum of \$110.00 paid by the appellant. (See Ex. "A," affidavit of Walter C. Carr, p. 12, State of Case, line 19.) Even though the respondent had alleged fraud or misconduct on the part of the appellant, by still retaining the \$110.00 paid by the defendant, it could not maintain its action, and the title of the carbonator would still be in the defendant.

There is a long line of cases in New Jersey, holding:

"A party seeking to rescind a contract must put

the opposite party in *statu quo* so far as he is able to do it as soon as practicable after discovery of fraud. As long as he retains anything received under the contract and which he might have returned, there will be no rescision."

*Baird vs. Holmes*, 4 *Vr.* p. 119;

*Grant vs. Stone*, 9 *Dick.* p. 387;

*Russell vs. Russell*, 18 *Dick.* p. 382;

*Doughton vs. Camden Bldg. Association*, 14 *Stew.* 556.

#### IV.

THE RESPONDENT RATIFIED ITS CONTRACT BY ACCEPTING AND STILL RETAINING THE \$120.00 PAID IT BY THE APPELLANT.

The case is simply one of offer and acceptance. As set forth, the plaintiff offered to accept the \$110.00 cash payment in full. (See Ex. "B," letter to Tradesmen's Bank of Vineland, N. J., p. 18, State of Case, and letter to John Schneider, Ex. "C," State of Case, p. 19.)

"There is, in fact, no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air; in the other written signs carried by the mail or by telegraph. The vital question is, was the intention manifested by any overt act, not by what kind of messenger it was sent. The bargain, if ever struck at all, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance or the instrument itself intended for the other party, is certainly such an act."

*Hallet vs. Ins. Co.*, 2 *Dutch.* p. 282, citing

*Adams vs. Linsdell*, 1 *Bard. & Ald.* 681;

*Dunlap vs. Higgins*, 1 *House of Lords Cases*,  
381;

*Duncan vs. Topham*, 8 *C. B.* 225;

*Potter vs. Saunders*, 6 *Hare*, 1;

*Tayloe vs. Merchants' Ins. Co.*, 9 *How.* 390;

*Hamilton vs. Lycombing Co.*, 5 *Barb.* 339;

*Vassor vs. Camp*, 14 *Barb.* 341;

*Mactier vs. Frith*, 6 *Ward*, 103.

"If the proposal be clear and definite and one to which a simple assent is a complete answer, such assent may be given either by writing, by acts or by words."

*Houghtwout vs. Boisanbue*, 3 *C. E. Gr.* 315.

#### V.

THE PLEADINGS OF THE RESPONDENT DO NOT SHOW OR ALLEGE THAT THE APPELLANT TOOK TITLE TO THE CARBONATOR FRAUDULENTLY, OR ANY ACT OF FRAUD ON THE PART OF THE APPELLANT OR ANY FAULT ON THE PART OF THE APPELLANT.

The respondent, in its pleadings, alleges a mistake. The appellant contends he took title to the carbonator by accepting the offer of the respondent.

"The law judges of an agreement between two parties exclusively from those expressions of their intentions which are communicated between them; consequently an agreement cannot be affected by the mistake of either party in expressing his intention or his motives of which the other party has no knowledge, and the party who has entered into an agreement under such mistake is

bound by the agreement actually made and cannot assert his mistake in avoidance of the agreement."

*Chitty on Contracts*, 11 *Am. Ed. Vol. 2*, p. 1022.

The Court of Errors and Appeals speaking in the case of *Scott vs. Hall*, 15 *Dick.* at page 454, sets forth:

"There is no charge that Hall, the vendee, was cognizant of the mistake or took any fraudulent or unfair advantage. When, under such circumstances, Scott's agent accepted the purchase price fixed by the contract and the title to the machinery passed to Hall, as must now be conceded, then that contract cannot be disturbed by a court of equity because one of the parties was led to make it by a mistake due to his own fault and in no wise participated in or caused by the other party."

For the foregoing reasons the judgment below should be reversed.

EDWIN F. MILLER,  
*Of Counsel with the Defendant  
and Appellant.*

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NOTICE OF APPEAL.  
COURT OF ERRORS AND APPEALS.

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A. H. AND F. H. LIPPIN-  
COTT, INC.,

*Plff.,*

VS.

JOHN SCHNEIDER,

*Deft.*

ACTION AT LAW.  
NOTICE OF APPEAL.

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To WILSON & CARR, ESQS., attorneys of plaintiff:

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this cause in the Cumberland County Circuit Court, wherein it is adjudged that the carbonator replevied is the property of the plaintiff on the following grounds:

20

1. That the defendant's answer was not a sham or frivolous plea.

2. The carbonator replevied was the property of the defendant because he accepted and acted upon the offer made to him by the plaintiff, and paid its agent, The Tradesmen's Bank of Vineland, N. J., \$110.00, and took his document of title, the bill of lading.

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3. The plaintiff should have returned the money (or offered to return the money) paid by the defendant before entering suit, i. e., put him in *statu quo*.

4. The plaintiff ratified its contract by accepting and still retaining the \$120.00 paid it by the defendant.

5. The pleadings of the plaintiff do not show or allege that the defendant took title to the carbonator fraudulently, or any act of fraud on the part of the defendant or any fault on the part of the defendant.

EDWIN F. MILLER,  
*Attorney of Appellant.*

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[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 9th day of January, 1913.

WILSON & CARR,  
*Attys. of Plff.*

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JUDGMENT RECORD.

CUMBERLAND COUNTY CIRCUIT COURT.

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A. H. & F. H. LIPPINCOTT,  
INC.,

vs.

JOHN SCHNEIDER.

JUDGMENT RECORD. 10

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John Schneider, the defendant in this cause, was summoned to answer unto A. H. & F. H. Lippincott, Inc., the plaintiff herein, in an action at law, upon the following complaint:

Plaintiff, a corporation of the State of Pennsylvania, carrying on business in the City of Philadelphia, in said State, says that:

1. It sues to recover the possession of a certain carbonator, delivered by plaintiff to defendant under and by virtue of the terms of a certain written agreement, entered into by and between plaintiff and defendant, on May 25th, 1912, wherein and whereby it was, among other things, provided that the defendant should pay to the plaintiff for said carbonator the sum of \$130.00, of which said sum, \$10.00 was to be paid at the time of executing said agreement, and \$20.00 was to be paid upon the receipt by or tender to the defendant of said carbonator, and the balance then remaining due, namely, \$100.00, was to be paid in monthly instalments of \$10.00 each

in the months of August, September, October, November and December, 1912, and January, February, March, April and May, 1913, until said carbonator should be fully paid for, with interest at six per cent. per annum from the date of shipment on each payment, and for which said balance and interest the defendant agreed, by said agreement, upon receiving or being tendered said carbonator, or bill of lading for the same, to execute and deliver to the plaintiff, ten promissory notes, for \$10.00 each, dated as of the date of shipment of said carbonator, and maturing respectively in the months aforesaid, and by which said agreement, there was reserved to said defendant, the privilege at his option, instead of making payment as aforesaid, to pay \$10.00 at the time of executing said agreement, and the further sum of \$120.00 in cash, in full settlement of said carbonator, upon his receiving or being tendered the same, or bill of lading therefor; and by which said agreement, it was further agreed that title to said carbonator should not pass to the defendant until the full purchase price thereof, and any moneys expended by the plaintiff for insurance thereof, or any judgment for the purchase price thereof, together with the costs of insurance or any judgment upon the aforesaid notes, or any one or more of them, should be paid in full and that the said carbonator should remain the property of the plaintiff until that time.

2. That said defendant paid to plaintiff the sum of \$10.00, upon the execution of said agreement, and that said carbonator was duly delivered by the plaintiff to the defendant and accepted by the defendant, pursuant to and subject to the terms and conditions of the written agreement aforesaid mentioned, and that said plaintiff might exercise the option reserved to him as aforesaid, the plaintiff forwarded to the Tradesmen's Bank of Vineland, New Jersey, upon due notice thereof given to said

defendant, a draft on said defendant for \$20.00, payable on arrival of said carbonator at Vineland, New Jersey, and the aforesaid promissory notes properly prepared for execution by said defendant, and also a draft upon said defendant which plaintiff intended to be for \$120.00, but which, through inadvertence and mistake, was erroneously made out for only \$110.00; that thereupon the said defendant elected to exercise his option to pay the balance due on said carbonator, in cash, and paid the aforesaid draft for \$110.00 to said bank, which payment was duly remitted to plaintiff by said bank, but the plaintiff then for the first time discovering the error that had been made in making out said draft for \$110.00, instead of \$120.00, refused to accept and has never accepted the bank's remittance, but at once caused the defendant to be notified of the error that had been made and requested him to pay the sum of \$120.00, which was justly due, as he well knew, or to pay the sum of \$20.00, and to execute the notes as aforesaid; but that defendant has refused to do either, and while continuing so to refuse, retains possession of said carbonator. 10 20

3. That prior to the service of the annexed writ, demand was made on behalf of the plaintiff upon the said defendant for the return and surrender of said carbonator, which demand the said defendant refused to comply with.

Plaintiff demands the possession of said carbonator, and that property therein may be adjudged to be in the plaintiff. 30

WILSON & CARR,  
*Attorneys for Plaintiff.*

The defendant answered as follows:

## CUMBERLAND COUNTY CIRCUIT COURT.

10	A. H. AND F. H. LIPPINCOTT, INC., <i>Plaintiff,</i>	}	ACTION AT LAW.
	vs.		ANSWER AND COUNTER-CLAIM.
	JOHN SCHNEIDER, <i>Defendant.</i>	}	

1. The defendant resides at Vineland, New Jersey.
2. The defendant denies the truth of the matter contained in the plaintiff's complaint wherein it is set forth that the carbonator was delivered to this defendant under and by virtue of the agreement therein mentioned.
- 20 3. The defendant claims title to the carbonator by virtue of a bill of sale handed and delivered to this defendant by the plaintiff's duly authorized agent, appointed by the plaintiff in writing, to wit: The Tradesmen's Bank, of Vineland, N. J., which agent, acting within the scope of its authority and direction by the plaintiff, made a supplementary agreement that if this defendant would pay it (The Tradesmen's Bank) the sum of one hundred and ten dollars (\$110.00) cash
- 30 money, the title of the carbonator would pass to this defendant and that the same would be his property. Upon the representation made to this defendant by the Tradesmen's Bank, agent as aforesaid, that the title to the carbonator would pass to this defendant upon the payment of one hundred and ten dollars, this defendant paid the Tradesmen's Bank the sum of one hundred and ten dol-

lars cash money, and thereupon the title of the said carbonator passed to this defendant and became his property.

4. The defendant demands a return of his carbonator.

5. By way of counter-claim against the plaintiff the defendant says that the plaintiff well knowing the defendant was a business man of means conducting a bakery and soda fountain business in Vineland, N. J., and without any probable cause to support an action of replevin, and well knowing such fact, in order to harass, annoy, vex, oppress, wrong this defendant and destroy the soda water business and credit of this defendant, maliciously and with intent caused the writ of replevin above mentioned to be issued and delivered to the Sheriff of the County of Cumberland to be executed; that the Sheriff of the County of Cumberland, in obedience to the command of the writ of replevin hereinbefore mentioned has ripped out and carried off the carbonator of this defendant, thereby destroying the soda water business of this defendant and the profits thereof, and greatly wronging, hindering, annoying, vexing and oppressing this defendant. 10 20

6. Judgment will be claimed by the defendant of the plaintiff in the sum of two thousand five hundred dollars (\$2500.00) damages.

EDWIN F. MILLER,  
*Attorney of Defendant.* 30

The plaintiff gave notice as follows:  
To Edwin F. Miller, attorney for the defendant above named:

SIR:

TAKE NOTICE that we shall apply to the Honorable,

Clarence L. Cole, Judge of the Circuit Court of the County of Cumberland, at the Court House, in the City of Camden, on Monday, the 2nd day of December next, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order striking out as sham and frivolous the answer heretofore filed by the defendant in the above stated cause, and granting leave to the plaintiff to enter judgment in said cause as in default of an answer; and that  
 10 plaintiff will support said application.

Your obedient servants,

WILSON & CARR,  
*Attorneys for Plaintiff.*

On December 24th, 1912, the following rule for summary judgment was entered herein:

CUMBERLAND COUNTY CIRCUIT COURT.

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A. H. AND F. H. LIPPINCOTT, INC.,

*Plaintiff,*

vs.

JOHN SCHNEIDER,

*Defendant.*

ACTION AT LAW.

RULE FOR SUMMARY  
 JUDGMENT.

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It appearing by affidavit filed in the cause that the defense made by defendant's answer is sham and frivolous, and the defendant after due notice having failed to show facts as entitle him to defend;

IT IS, thereupon, on motion of Wilson and Carr, attor-

neys for the plaintiff, ORDERED, that the defense be struck out and that final judgment be entered for plaintiff with costs.

It is further ordered that upon the plaintiff's motion to strike out the defendant's answer, the attorneys for the plaintiff be and they are hereby allowed a counsel fee of five dollars, to be taxed as a part of the costs.

C. L. COLE,  
Judge.

WHEREUPON it is here adjudged that the said defendant did take the goods and chattels to wit, one carbonator, mentioned and described in the summons and complaint in this cause, in the manner and form as the plaintiff hath within complained against him and that the said plaintiff do recover against the defendant its costs which are taxed at forty-six dollars and two cents.

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Judgment entered this twenty-fourth day of December, A. D. 1912, at 8 o'clock A. M.

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

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I, SAMUEL M. SHELDON, Clerk of the County of Cumberland, also Clerk of the Circuit holden in and for said county, do hereby certify the foregoing to be a true copy of the judgment record, therein recited as taken from and compared with the original judgment record as found recorded in my office in Book 20 of Judgments, page 681.

IN WITNESS WHEREOF, I have hereunto  
[SEAL] set my hand and affixed the seal of said county and court this                    day of December, A. D. 1912.

30

SAMUEL M. SHELDON,  
Clerk.

By ROBT. S. SCHILLER,  
Dep. Clerk.

## AFFIDAVIT.

## CUMBERLAND COUNTY CIRCUIT COURT.

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10	A. H. AND F. H. LIPPINCOTT, INC.,	}	ACTION AT LAW.
	<i>Plaintiff,</i>		ON MOTION TO STRIKE OUT ANSWER.
	VS.		
	JOHN SCHNEIDER,	}	AFFIDAVIT.
	<i>Defendant.</i>		

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20 STATE OF PENNSYLVANIA, }  
 COUNTY OF PHILADELPHIA, } ss.:

30 WALTER C. CARR, of full age, being by me duly sworn according to law, on his oath says that he is the treasurer of A. H. and F. H. Lippincott, Inc., the plaintiff in the above stated cause, and its duly authorized agent in this behalf, having full and competent knowledge of the facts herein sworn to; deponent further says that on the 29th day of May, 1912, said plaintiff entered into a certain agreement in writing with the said defendant, a copy of which is hereunto annexed, hereby made a part hereof and marked Exhibit "A," wherein and whereby it was, among other things, provided that the defendant should pay to the plaintiff for a certain carbonator in said contract mentioned and referred to, the sum of \$130.00, of which said sum \$10.00 was to be paid at the time of executing said agreement, and \$20.00 was to be paid upon

the receipt by or tender to the defendant of said carbonator, and the balance then remaining due, namely, \$100.00, was to be paid in monthly instalments of \$10.00 each, in the months of August, September, October, November and December, 1912, and January, February, March, April and May, 1913, until said carbonator should be fully paid for, with interest at six per cent. per annum from the date of shipment, on each payment, and for which said balance and interest, the defendant agreed by said agreement, upon receiving or being tendered said carbonator, or bill of lading for the same, to execute and deliver to the plaintiff ten promissory notes, for \$10.00 each, dated as of the date of shipment of said carbonator, and maturing respectively in the months aforesaid, and by which said agreement there was reserved to said defendant the privilege, at his option, instead of making payment as aforesaid to pay \$10.00 at the time of executing said agreement and the further sum of \$120.00 in cash, in full settlement of said carbonator, upon his receiving or being tendered the same, or bill of lading therefor, and by which said agreement it was further agreed that title to said carbonator should not pass to the defendant until the full purchase price thereof, and any moneys expended by the plaintiff for insurance thereof, or any judgment for the purchase price thereof, together with the costs of insurance or any judgment upon the aforesaid notes or any one or more of them, should be paid in full, and that the said carbonator should remain the property of the plaintiff until that time.

That said defendant paid to plaintiff the sum of \$10.00 upon the execution of said agreement, and that said carbonator was duly delivered by the plaintiff to the defendant, and executed by the defendant pursuant to and subject to the terms and conditions of the written agreement aforesaid mentioned, and that in order that said defendant might exercise the option reserved to him as afore-

said, the plaintiff forwarded to the Tradesmen's National Bank of Vineland, New Jersey, in a letter of instructions to said bank, a copy of which is hereunto annexed and hereby made a part hereof, and marked Exhibit "B," upon due notice thereof given to the said defendant by a letter, a copy of which is hereunto annexed and hereby made a part hereof, and marked Exhibit "C," a draft on said defendant for \$20.00, payable on the arrival of said carbonator at Vineland, New Jersey, and the

10 the aforesaid promissory notes, properly prepared for execution by said defendant, and also a draft upon said defendant which plaintiff intended to be for \$120.00, but which, through inadvertence and mistake, was erroneously made out for only \$110.00; that thereupon, the said defendant elected to exercise his option to pay the balance due on said carbonator in cash, and paid the aforesaid draft for \$110.00 to said bank, which payment was duly remitted to plaintiff by said bank, but the plaintiff then for the first time discovering the error that had

20 been made in making out said draft for \$110.00, instead of \$120.00, at once caused the defendant to be notified of the error that had been made and requested him to pay the sum of \$120.00, which was justly due, as he well knew, or to pay the sum of \$20.00 and execute the notes as aforesaid, but that defendant has refused to do either, and while continuing so to refuse, retains possession of said carbonator; that on the 25th day of September, 1912, plaintiff caused a writ of replevin to issue out of the Cumberland County Circuit Court against the said

30 John Schneider, and annexed to said writ its complaint, as required by law, and that under and by virtue of said writ, the Sheriff of Cumberland County has seized the said carbonator and has delivered the same to the plaintiff, in whose possession it now is.

That defendant has filed an answer to the complaint filed by the plaintiff in the above entitled cause, a copy of

which answer is hereunto annexed and marked Exhibit "D."

Deponent further says that he verily believes that the defendant has no real defense to the action.

WALTER C. CARR.

Sworn to and subscribed before me a notary public in and for said county and State, this first day of November, 1912.

H. G. HOOVER, 10  
Notary Public.

[SEAL]

Commission expires end of next session of Senate.

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EXHIBIT "A."

Submitted through Mulford.

City of Vineland, County of Cumberland, State of New Jersey, No. 8th & Landis Ave. Date 5-29, 1912. 20  
To A. H. AND F. H. LIPPINCOTT, INC., of Philadelphia, Penna. (hereinafter called the VENDOR)

Please forward the following described Soda Water Apparatus and Appurtenances soon as possible, or about .....

To John Schneider (hereinafter called the VENDEE) to address given above, via (state how goods are to be shipped) frt.

Description of Apparatus:

Carbonator—Style auto carb., voltage (AC or DC) 30  
110 V., cycles 60.

Terms and Conditions.

IN CONSIDERATION WHEREOF THE VENDEE AGREES TO PAY THE SUM OF \$130.00 (Net Price) as follows: \$10.00 deposit with this order, \$20.00 upon receipt or tender of goods hereinbefore described or bill of lading

for the same, and the balance of \$100.00 the Vendee agrees to pay as follows, viz.: monthly instalments of \$10.00 in the months of April, May, June, July, August and September, and \$10.00 in the months of October, November, December, January, February and March of each year until fully paid for, with interest at 6 per cent. per annum from date of shipment, with each payment, and for such balance and interest the Vendee agrees, upon receipt or tender of goods or bill of lading for the same, to execute and deliver notes maturing as above set forth. The Vendor is authorized to date the above-mentioned notes as of date of shipment and to insert such date either prior to or after the execution of said notes.

10

The goods furnished by Vendor are to be used in the place of business of the Vendee at 8th & Landis Ave., City of Vineland, State of New Jersey, and are not to be removed therefrom without the consent of the Vendor.

20 The Vendee agrees to insure the goods from date of arrival against loss or damage by fire for full value until all deferred payments are made, and have the policies approved by and deposited with the Vendor, which policies shall provide for the payment of any loss under the same to A. H. & F. H. Lippincott, Inc., as its interest may appear; and that in default thereof the Vendor may cause same to be insured at Vendee's expense, and shall have a lien upon said goods for the cost of said insurance.

30 In the event of Vendee's refusal to accept goods when tendered, it is agreed that the sum first above mentioned, less any previous actual cash payment, shall at once become due and payable. The delivery of goods herein referred to to be conditional upon the terms and conditions of this order.

Should Vendee fail to make first payment, or to execute the notes, or default in the payment of any of the notes when the same fall due, or if the Vendee shall sell or offer to sell, remove or attempt to remove the goods

from the place of business in the City and State above mentioned, without the consent in writing of the Vendor, or if the Vendee shall suffer or permit any attachment or process against property to be issued against him, or permit or suffer any judgment to be entered up against him, or if a petition in bankruptcy be filed by or against the Vendee, then the full principal sum herein mentioned, less any instalments theretofore paid, shall become instantly due and payable, any condition herein contained to the contrary notwithstanding, 10  
and the Vendor shall be entitled to immediate possession of the goods, and the Vendee hereby authorizes and empowers the Vendor or its agents to enter any premises of the Vendee, wherever the goods may be and take and carry the same away.

Upon default in payment of any instalment all payments theretofore made by the Vendee shall be deemed and considered as having been made for the use of the goods while the same were in the possession of the Vendee. 20

The acceptance of the goods when delivered is understood to constitute a waiver of all claims by Vendee for damage by reason of delay. 20

It is understood that settlement will not be withheld on account of temporary delay in shipment of articles not essential to the drawing of Soda Water, except as to actual value of such articles, and then only from first notes falling due, or because of delay for any reason in the installation of said apparatus.

The goods to be f. o. b. Philadelphia and to be entirely at Vendee's risk at all times from and after delivery to Vendee or to a Carrier or Transportation Company. 30

The Vendee agrees to pay freight and, unless stated in this order, the Vendor does not agree to erect Apparatus.

The acceptance by the Vendor of any overdue instalments shall not operate as a waiver of the right to declare

the remaining instalments due by reason of default as hereinabove provided, but shall be construed solely as an act of indulgence to the Vendee.

10 Title to the goods shall not pass to the Vendee until the full purchase price thereof, and any moneys expended by the Vendor for insurance thereof, or any judgment for the purchase price, together with the cost of insurance, or any judgment upon the note or notes is paid in full, and the goods shall remain the property of the Vendor until that time.

It is understood by the Vendee that this order cannot be countermanded, and that no invoice will be rendered other than a copy of this order, which is to be furnished to Vendee on request.

The Vendor shall not be responsible for any reasonable delay in manufacture or any other delay in the fulfillment of this order, due to strikes or any cause beyond its control.

20 All liability of the Vendor upon any warranty, express or implied, is limited to the supplying of any part or parts returned to it, and which the Vendor shall upon inspection find to be defective in material or workmanship.

All claims of the Vendee other than those made in writing shall be deemed to be waived.

It is understood by the Vendee that no plumbing or electrical connections, or other plumbing or electrical work, shall be ordered, done or made by the Vendor, and that the Vendor does not supply electric lamps on electric fixtures.

30 It is agreed that this instrument evidences the whole contract, and that the Vendor shall not be bound by any representation or promise made by any agent relative to this transaction, which is not embodied herein.

This order shall not become binding and effective until its acceptance by the Vendor, at its office in the City of Philadelphia, State of Pennsylvania.

Collection to be made through Tradesmen's Bank of Vineland, N. J.

Signature (Signed) JOHN SCHNEIDER.

Witness:

(Signed) H. V. MULFORD.

.....  
Corporations must sign per officer, giving title; if Firm, full name per member signing.

10

Accepted this 5th day of June, 1912.

A. H. & F. H. LIPPINCOTT, INC.,

By (Signed) C. Z. Hoffman,  
Secretary.

(To be signed only by an officer of this Corporation.)

The option is reserved by the Vendee to pay cash \$120.00 in full settlement upon receipt or tender of goods or bill of lading for same.

20

EXHIBIT "B."

June 20th, 1912.

Tradesman Bank,  
Vineland, N. J.

Gentlemen:

We enclose herewith settlement papers for the attention of John Schneider, 8th & Landis Ave., Vineland, N. J.

30

These papers consist of ten lien notes, one insurance note, draft in the amount of \$20.00, conditional sale contract, and original bill of lading covering carbonator shipped to our order notify Mr. Schneider.

Please have John Schneider sign each of the notes (both lien and insurance), as well as acknowledge the conditional sale contract before a Master in Chancery of New Jersey, and collect from him the amount of the draft, after which surrender to him the original bill of lading and forward to us all the signed notes together with proceeds of the draft less your charge and expenses for securing settlement. The conditional sale contract is then to be forwarded to the County Clerk for record and returned to us.

10

These notes will be sent to your bank for collection as they mature.

In the event of this party objecting to our receiving settlement before the carbonator is received, it will be satisfactory to us for him to make settlement with you as outlined above, which may be held in escrow by yourselves until the carbonator arrives in accordance with the contract, after which settlement is to be forwarded to us as heretofore stated.

20

We wish to explain in reference to the insurance note which accompanies this settlement. This note is to be signed by him along with the other lien notes before surrender of the bill of lading. The signing of this note does not necessarily mean that you are to pay same, but it does mean that after signing and before maturity thereof, he has the privilege of taking out satisfactory insurance and depositing the policy with us. In the event of his doing this, then the note becomes void, otherwise to be paid when due.

30

Thanking you in advance for your attention of this matter, we remain,

Yours very truly;

HGH-C.

P. S. According to Mr. Schneider's contract he has the privilege of paying \$120.00 cash in full settlement

upon tender of bill of lading, and we therefore authorize you to accept \$120.00 less the cash payment of \$10.00 already made, or \$110.00 from Mr. Schneider if he decides to pay cash for the carbonator, in which event the notes are not to be signed nor the contract acknowledged, but returned to us.

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EXHIBIT "C."

10

June 20th, 1912.

Mr. John Schneider,  
8th & Landis Ave.,  
Vineland, N. J.

Dear Sir:

We are pleased to advise that on the 19th instant we made shipment of carbonator, per your order of recent date.

Papers covering settlement, including bill of lading, have been sent to the Tradesmen Bank and we kindly ask that you give same your attention. **20**

We have also advised the bank that you have the option of paying \$120.00 in full settlement upon tender of bill of lading, that is, \$120.00 less the cash payment of \$10.00 already made.

In the event of your accepting the deferred payment plan, we wish to explain in reference to the insurance note which accompanies this settlement. This note is to be signed by you along with the other lien notes. The signing of this note does not necessarily mean that you are to pay same, but it does mean that after signing and before maturity thereof, you have the privilege of taking out satisfactory insurance and depositing the policy with us. In the event of your doing this, then the note becomes void, otherwise to be paid when due. **30**

Trusting that you will receive the outfit promptly and that it will prove to be all that you had anticipated, we remain,

Yours very truly,

HGH-C.

10

## EXHIBIT "D."

CUMBERLAND COUNTY CIRCUIT COURT.

A. H. AND F. H. LIPPINCOTT, INC.,

*Plaintiff,*

20

vs.

JOHN SCHNEIDER,

*Defendant.*

ACTION AT LAW.

ANSWER AND COUNTER-CLAIM.

30

1. The defendant resides at Vineland, New Jersey.
2. The defendant denies the truth of the matter contained in the plaintiff's complaint wherein it is set forth that the carbonator was delivered to this defendant under and by virtue of the agreement therein mentioned.
3. The defendant claims title to the carbonator by virtue of a bill of sale handed and delivered to this de-

defendant by the plaintiff's duly authorized agent, appointed by the plaintiff in writing, to wit: The Tradesmen's Bank, of Vineland, N. J., which agent, acting within the scope of its authority and direction by the plaintiff, made a supplementary agreement that if this defendant would pay it (The Tradesmen's Bank) the sum of one hundred and ten dollars (\$110.00) cash money, the title of the carbonator would pass to this defendant and that the same would be his property. Upon the representation made to this defendant by the Tradesmen's Bank, agent 10 as aforesaid, that the title to the carbonator would pass to this defendant upon the payment of one hundred and ten dollars, this defendant paid the Tradesmen's Bank the sum of one hundred and ten dollars cash money, and thereupon the title of the said carbonator passed to this defendant and became his property.

4. The defendant demands a return of his carbonator. 20

5. By way of counter-claim against the plaintiff the defendant says that the plaintiff, well knowing the defendant was a business man of means conducting a bakery and soda fountain business in Vineland, N. J., and without any probable cause to support an action of replevin, and well knowing such fact, in order to harass, annoy, vex, oppress, wrong this defendant, and destroy the soda water business and credit of this defendant, maliciously and with intent caused the writ of replevin above mentioned to be issued and delivered to the Sheriff 30 of the County of Cumberland to be executed; that the Sheriff of the County of Cumberland, in obedience to the command of the writ of replevin hereinbefore mentioned, has ripped out and carried off the carbonator of this defendant, thereby destroying the soda water business of this defendant, and the profits thereof, and greatly

wronging, hindering, annoying, vexing and oppressing this defendant.

6. Judgment will be claimed by the defendant of the plaintiff in the sum of two thousand five hundred dollars (\$2500.00) damages.

EDWIN F. MILLER,  
*Attorney of Defendant.*

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AFFIDAVIT.

CUMBERLAND COUNTY CIRCUIT COURT.

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A. H. AND F. H. LIPPINCOTT, INC.,

*Plff.,*

vs.

JOHN SCHNEIDER,

*Deft.*

ACTION AT LAW.  
AFFIDAVIT.

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30 STATE OF NEW JERSEY, }  
CUMBERLAND COUNTY, } *ss.:*

SAMUEL C. PARKER, of the Township of Landis, county and State aforesaid, being duly sworn according to law, on his oath deposes and says that he is the assistant cashier of the Tradesmen's Bank of Vineland, N. J.;

this deponent further says that he well knows the defendant, John Schneider, who is a reputable and prominent business man of the Borough of Vineland; this deponent further says that the said John Schneider paid the sum of one hundred and ten dollars (\$110.00) to this deponent, pursuant to the instructions of the A. H. & F. H. Lippincott Co. to the Tradesmen's Bank of Vineland, N. J., with the full and complete understanding that the carbonator for which the money was paid was to become the property of the said John Schneider, and that the bill of lading was handed to him by this deponent as his document of title; this deponent further says that the said John Schneider went over the matter fully with this deponent and that this deponent dissuaded the said John Schneider from executing twelve promissory notes of ten dollars each, and persuaded the said John Schneider to take his discount and pay the sum of one hundred and ten dollars cash money and get through with the transaction; this deponent further says that he verily believes that the carbonator for which the said John Schneider paid one hundred and ten dollars cash money, is the property of the said John Schneider and not the property of the A. H. and F. H. Lippincott Co., the plaintiffs above named.

SAMUEL C. PARKER.

Sworn to and subscribed before me this 29th day of November, 1912.

HENRY S. ALVORD,  
*Master in Chancery of* 30  
*New Jersey.*

## AFFIDAVIT.

## CUMBERLAND COUNTY CIRCUIT COURT.

10	A. H. AND F. H. LIPPINCOTT, INC.,	} <i>Plff.,</i>	ACTION AT LAW. AFFIDAVIT.
	VS.	}	
	JOHN SCHNEIDER,	} <i>Deft.</i>	

20 STATE OF NEW JERSEY, }  
 CUMBERLAND COUNTY, } *ss.:*

30 JOHN SCHNEIDER, of full age, being duly sworn according to law, on his oath deposes and says that he is the defendant in the above entitled cause; this deponent further says that he signed a contract of some description with the plaintiff for the purchase of a carbonator for the sum of one hundred and thirty dollars (\$130.00) to be paid for in instalments of ten dollars (\$10.00) and the balance in promissory notes of ten dollars (\$10.00) each, payable monthly; this deponent further says that on or about June 21, 1912, he received a notice from the Tradesmen's Bank of Vineland, N. J., stating that there was a draft with a bill of lading at the said bank, and in response to the notice he went to the said bank and there met Mr. Samuel C. Parker, assistant cashier of the

Tradesmen's Bank aforesaid; this deponent further says that the plaintiff company had sent the bank written instructions that if this defendant signed the notes and executed some papers, he could have the bill of lading for the carbonator, or if this deponent paid one hundred and ten dollars cash, he would have the bill of lading and the carbonator would belong to him. This deponent further says that he had a talk with Mr. Parker, assistant cashier of the Tradesmen's Bank of Vineland, N. J., and that Mr. Parker told this deponent to take his discount and pay in cash and not bother with the notes and end the transaction. 10

This deponent further says that the plaintiff company knew full well that the payment of one hundred and ten dollars was intended to induce this deponent to pay the said sum and end the transaction.

This deponent further says he is a business man of long experience and he certainly would be foolish to pay one hundred and twenty dollars cash when he could pay the same amount in instalments of ten dollars each, the last payment coming due in May, 1913, and thereby have the use of his money during that period; this deponent further says that if the plaintiff company had not written the letter instructing the Tradesmen's Bank of Vineland, N. J., to collect the sum of one hundred and ten dollars in full settlement he would have executed the notes, making the last payment for which this suit is ostensibly brought, in May, 1913; this deponent further says that the writ of replevin in this action was issued without any probable cause whatever, and was done to break up the soda water business belonging to this deponent, and also to vex, annoy, injure and oppress this deponent, and by reason thereof this deponent is entitled to damages. 20 30

This deponent further says that the carbonator replevied by the plaintiff is his property and that his document of title consists of the bill of lading given to him by the

Tradesmen's Bank of Vineland, N. J., upon the payment of one hundred and ten dollars, which was in full settlement. This deponent further says that his answer and counter-claim is not frivolous and that the cause should be retained in this court for trial.

JOHN SCHNEIDER.

Sworn to and subscribed before me this 27th day of November, 1912.

10

HENRY S. ALVORD,  
*Master in Chancery of  
New Jersey.*

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

20 I, SAMUEL M. SHELDON, Clerk of the County of Cumberland, also Clerk of the Circuit Court, holden in and for said county, do hereby certify the foregoing to be a true copy of the affidavits, agreement, letters, etc., used by the plaintiff and defendant herein on the motion to strike out the defendant's answer, as taken from and compared with the originals thereof on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said  
[SEAL] county and court this day of December, A. D. 1912.

30

SAMUEL M. SHELDON,  
*Clerk.*

By ROBT. S. SCHILLER,  
*Deputy Clerk.*

CONCLUSION.

CUMBERLAND COUNTY CIRCUIT COURT.

A. H. & F. H. LIPPINCOTT,  
INC.,

vs.

JOHN SCHNEIDER,

ON MOTION TO  
STRIKE ANSWER.  
CONCLUSION.

10

WILSON & CARR for the motion.  
EDWIN F. MILLER opposed.

20

Plaintiff's claim is grounded upon a written agreement dated 5-29-12 and which is claimed to have been violated by defendant.

Defendant's answer denies that the title to the property in dispute is to be tested by the written agreement and avers that his title rests upon a bill of sale delivered to him by an alleged agent of the plaintiff. 30

A careful reading and consideration of the affidavits used upon the hearing of the motion convinces me that the defendant cannot escape the written agreement. By its terms plaintiff is to sell a carbonator and it is then provided: "in consideration whereof the vendee agrees to

pay the sum of \$130.00 (net price) as follows, \$10.00 deposit with this order, \$20.00 upon receipt or tender of goods herein above described or bill of lading for the same, and the balance of \$100.00 the vendee agrees to pay as follows, monthly instalments of \$10.00, &c."

The title is to remain in the vendor until the amount is paid in full and in the event of default by defendant the vendor may re-invest itself of the property. It is further provided that "the option is reserved by the vendee to  
10 pay cash \$120.00 in full settlement upon receipt or tender of goods or bill of lading."

The carbonator was shipped and a letter written June 20th, 1912, to the Tradesmen's Bank of Vineland, inclosing, among other things, the original bill of lading with instructions to deliver when certain things were done. A postscript to the letter reads "according to Mr. Schneider's contract he has the privilege of paying \$120.00 cash in full settlement upon tender of bill of  
20 lading and we therefore authorize you to accept \$120.00 less the cash payment of \$10.00 already made, or \$110.00 from Mr. Schneider if he decides to pay cash for the carbonator, &c."

Defendant paid to the bank \$110.00 in cash and received the bill of lading which is the bill of sale referred to in his answer.

Upon receiving the \$110.00 from the bank the plaintiff claims to have discovered a mistake in the letter of authorization in that the bank should have been told to deliver the bill of lading upon receiving \$120.00 in cash.  
30 Defendant was promptly notified and requested to remit the further sum of \$10.00 or execute and deliver the notes as provided in the agreement. To this no attention was paid whereupon plaintiff sued in replevin after demand for possession.

It will be noticed that by the arrangement as consummated plaintiff received \$120 as a consideration for the

carbonator instead of \$130.00 as expressly provided in the agreement.

The amount named in the letter was a clear mistake and I so find.

Plaintiff was not estopped to have the mistake rectified by having the defendant pay the balance of \$10.00 in cash or tender the notes upon being reimbursed the \$110.00 paid to the bank. His refusal created a breach which by the plain terms of the agreement conferred the right of possession in the plaintiff. Defendant contends 10 that no advantage accrued to him to pay in cash if required to pay the full \$130. But this is not so, because by the terms of the agreement the notes bear interest from their date. Had the letter to the bank authorized delivery upon payment of \$10.00 rather than \$110.00 it would not be seriously contended that such a payment would satisfy an agreement to pay \$130.00.

Motion granted to strike answer and for judgment for plaintiff.

20

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

I, SAMUEL M. SHELDON, Clerk of the County of Cumberland, also Clerk of the Circuit Court holden in and for said county, do hereby certify the foregoing to be a true copy of the conclusions filed by the Court on the application of plaintiff to strike out the defendant's answer as taken from and compared with the original on file in my office.

30

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said county and court this            day of December, A. D. 1912.

SAMUEL M. SHELDON,

*Clerk.*

By ROBT. S. SCHILLER,

*Deputy Clerk.*





