INDEX

NOTICE OF APPEAL.

ATLANTIC CITY DISTRICT COURT.

DANIEL STEELMAN, vs. FRANK FARKAS.	Action at Law. Notice of Appeal.	10

To William H. Smathers, Esq.,
Attorney for Plaintiff.

Sir:

Take notice that the defendant Frank Farkas hereby appeals to the New Jersey Supreme Court from the judgment of the Atlantic City District Court rendered in the above stated action on the eighteenth day of February, A. D. 1919. 20

Dated February 24th, 1919.

Yours respectfully,
BABCOCK & CHAMPION,
Attorneys for Defendant.

Filed Feb. 26, 1919.

[ENDORSEMENT]

30

Due and legal service of a copy of the within notice is hereby acknowledged this 24th day of February, A. D. 1919.
Wm. H. Smathers,
Attorney for Plaintiff.
Per Y.

TRANSCRIPT OF JUDGMENT.

IN THE

DISTRICT COURT OF THE CITY OF ATLANTIC CITY.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ATLANTIC, }

DANIEL STEELMAN,
Plaintiff,
vs.
FRANK FARKAS,
Defendant.

In an action upon
Demand, $500.00.
Real Debt, $450.00.

Wm. H. Smathers,
Att'y. of Pt'ff.
Babcock & Champion,
Att'y. of Def't.

A summons was issued in the above stated cause, Jan. 29, A. D. 1919, returnable Feb. 5, A. D. 1919, at ten o'clock A. M., and was returned by the Sergeant-at-Arms as follows:

The said defendant not being found, I served the within summons Jan. 30, 1919, by leaving a copy thereof at his place of abode with his daughter a member of his family above the age of 14 years, informing her of its contents.

D. S. BROWN,
Sergeant-at-Arms.

Feby. 3, 1919, complaint filed.

Feby. 5, 1919. The plaintiff appeared ready for trial. The defendant appearing, and it further appearing by the return endorsed thereon that the summons was duly served, the Court proceeded to hear and determine the cause.

Daniel Steelman, Dennis J. Spillane and Dennis McNichol sworn and testified on the part of the plaintiff.

Receipt admitted in evidence and marked exhibit P1.

Registered letter receipt, letter, envelope and check admitted in evidence and marked exhibit P2.

Order admitted in evidence and marked exhibit P3.

Frank Farkas sworn and testified on the part of the defendant.

Hearing continued to Feb. 14, 1919.

Feby. 14, 1919. Hearing continued. Anderson Bourgeois, Andrew Marcus, John T. Herbert and Edwin Woolbert sworn and testified on the part of the plaintiff.

Allen Melvin sworn and testified on the part of the defendant.

Decision reserved.

The evidence being closed and submitted to the Court, decision was reserved, and on February 18, 1919, judgment was given by the Court in favor of the plaintiff and against the defendant upon the first count for one hundred and one dollars and twenty cents, debt, and upon the second count for one hundred and forty dollars, debt, and fifteen dollars and sixty-six cents, cost of suit, to wit:

Defendants Costs.

Summons	$ 2.10
Additional Defts.	
S.-at-A., Mileage	
Subpoena	
Entering Judgment	1.50
Attorney's Fees	12.06
	$15.66

190 . Upon the demand of the plaintiff, an execution was issued to , Sergeant-at-Arms, against the goods and chattels of the defendant for the aforesaid debt and costs, the execution being endorsed as follows:

Judgment	$
Costs	
Interest	
Execution	
Mileage	
S.-at-A. Commission, 5 per cent.	
	$

Execution returned as follows:

190 . I return this execution in Court wholly unsatisfied, not having found any goods or chattels of the within-named defendant wherein to levy to make the same or any part thereof.

Sergeant-at-Arms.

190 . I return this execution in Court fully satisfied as appears by the receipt of the plaintiff hereon endorsed.

Sergeant-at-Arms.

$1.00 Feby. 26, 1919. Notice of appeal and appeal bond duly approved by the Court filed.

COMPLAINT.

ATLANTIC CITY DISTRICT COURT.

DANIEL STEELMAN, vs. FRANK FORKAS.	)	In Action at Law. Complaint.

Plaintiff says that he is resident of the City of Atlantic City, Atlantic County, State of New Jersey, and that defendant is resident of City of Atlantic City, Atlantic County, State of New Jersey.

First cause of action. On or about the 20th of January, 1919, defendant sold to plaintiff 150 tons of manure for the purchase price of $50.00. Plaintiff says that the defendant, after having made the above contract resold the said manure to one Andrew Burgess, at a much greater figure than what the defendant had agreed to sell to the plaintiff for. Plaintiff says that after contracting with said defendant to purchase said manure that plaintiff contracted with other parties to sell the said manure at a profit of $250.00.

Second cause of action. Plaintiff says that on or about the same date above mentioned defendant sold and converted to his own use 100 tons of manure belonging to plaintiff.

Plaintiff demands $500. Real debt, $450.00.

WM. H. SMATHERS,
Attorney for Plaintiff.

EXHIBITS.

Exhibit P1.

$36.00 Estellville Jan. 10, 1919.

Received of Anderson Bourgeois thirty-six dollars in full payment for all the manure at Camp No. 25 at Cedar Branch.

F. Farkas.

Exhibit P2.

Pleasantville
N. J. Jan 9,
1919, Registered

Registry receipt.

Receipt for Registered Article No. 1300. 1/9, 1919.
From 19 Georgia Ave.
Pleasantville, N. J.
Addressed to Mr. Frank Farkas,
Camp 25, Belcoville, Mays Landing, N. J.
Return receipt desired.....1.
Delivery restricted) To addressee in person——
) To addressee or order——
Postmaster, per T. H. O.

Letter.

Pleasantville, N. J., Jan. 8th, 1919.

Please find enclosed check for all manure at stable at Camp 25 to Feb. 8th, 1919. Will start to load on cars on Monday the 10 as I have a special rate on freight to Bakersville.

Yours Respt.
D. C. Steelman
19 south 2nd St.

Envelope.

Ten cent stamp 3 cent stamp

If not Del. in 5
Days return to D. C. Steelman
19 Georgia Ave.
Pleasantville, N. J.

Return receipt requested.

Returned to writer.

Mr. Frank Farkas
Camp 25, Belcoville,
Mays Landing, N. J.
Removed,
address unknown

Registered
No. 1300.

Stamped on Back:
Pleasantville, N. J.,
Jan 9, 1919,
Registered

Mays Landing, N. J.
Jan 10, 5 P M
1919

Check.

Pleasantville, N. J. Jan 8th 1919 No.

The First National Bank of Pleasantville, N. J.
Pay to the order of Frank Farkas fifty .....00/100 dollars For all manure in Farkas stable at Camp 25 to Feb. 8th 1919

D. C. Steelman

Exhibit P3.

Philadelphia, Dec. 6, 1919.

Bethlehem loading Co.

Gentlemen:

Please let bearer Mr. Steelman have manure at stable formerly occupied by me at Camp No. 25.

I remain, yours

D. J. McNichol,
2235 Fernon St.,
Phila.

CERTIFICATION OF DISTRICT COURT CLERK.

THE STATE OF NEW JERSEY.

County of Atlantic, *ss.*

I, W. L. Risley, clerk of the District Court of the City of Atlantic City, in the County of Atlantic, do certify that the foregoing is a true copy of the whole record in the cause wherein Daniel Steelman is plaintiff and Frank Farkas is defendant: Case No. 31744 as full, entire and complete as the same remains on file in said Court in the case there stated.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court this fifth day of March, in the year of our Lord, one thousand nine hundred and nineteen.

William L. Risley,
Clerk.

(Seal)

AGREED STATE OF THE CASE.

ATLANTIC CITY DISTRICT COURT.

DANIEL STEELMAN,
Plaintiff-Appellee,
vs.
FRANK FARKAS,
Defendant-Appellant.

On Appeal.
Agreed State of the Case.

It is stipulated and agreed by and between the attorneys for the respective parties that the following constitutes all of the evidence produced by the respective parties upon the trial of the above cause, and that this agreed stipulation of the testimony of the said witnesses, as hereafter detailed, shall have the same effect as though the testimony had been stenographically taken and the following were a true transcript thereof, duly certified, etc., as required by law.

Daniel Steelman, the plaintiff-appellee, being duly sworn testified:

On January 8th, 1919, I had an agreement with Mr. Farkas. I bought all the manure he had at two stables at Camp 25, Belcoville, New Jersey. He was to sell me the manure for $50.00 up to the eighth day of February. I was to either hand a check to Dennis Splain for said sum on January 8th or to mail it the next day to Mr. Farkas at Belcoville, Mr. Farkas sold the manure to Mr. Bourgeois. Mr. Farkas agreed to accept my check in payment of the $50.00 and instructed me to mail it to him at Belco-

ville on Jan. 9th in event I did not give it to Mr. Splain.

Counsel for plaintiff offered in evidence receipt dated January 10th, 1919, signed by Frank Farkas for $36.00 of Anderson Bourgeois for manure at Camp 25, which receipt was admitted in evidence and marked (Exhibit P1).

I mailed my check to Mr. Farkas in a letter addressed to him at Belcoville on January 9th by registered letter.

The witness produced a receipt for the delivery of said registered letter to the Post Office in Pleasantville, letter of January 8th from plaintiff to defendant, check of plaintiff to order of defendant for $50.00 and envelope addressed to defendant, which papers were offered and admitted in evidence and marked as one exhibit (P2) over the objection of counsel for defendant, which was made upon the ground that said receipt, letter, check and envelope were not relevant and were no evidence of performance of plaintiff's contract and an exception was allowed to counsel for defendant upon their admission.

There were one hundred and seventy-seven tons in a pile in the lower barn and five or six tons in the pile at the upper barn. I buy and sell manure and have for quite a number of years and am familiar with the market value of manure. The market value of the manure sold by Mr. Farkas to me on or about January 8th, was $3.50 per ton. I owned another pile of manure at Camp 25 through Mr. McNichol. He had a lot of horses at Camp 25. In this pile there were one hundred and twenty-five or one hundred and thirty tons of manure. I received an order from Mr. McNichol to the Bethlehem Loading Company to deliver the said manure to me. (Order offered

and admitted in evidence and marked Exhibit P3.) Mr. Farkas sold the manure to Mr. Bourgeois. The market value of the manure was $3.50 per ton.

Upon cross-examination, he testified as follows:

The registered letter was not delivered to Mr. Farkas and was received by me from the Post Office about nineteen days after I mailed it. I do not know of my own knowledge that Mr. Farkas sold the manure I owned from Mr. McNichol's stables. There was an automobile truck carting the manure away. I did not know that it belonged to Mr. Farkas. When I stated, the market value of the manure to be $3.50 per ton, I meant delivered at Pleasantville, New Jersey. I would allow $1.50 for loading and unloading and hauling, making the market value $2.00 per ton.

I made no tender or offer of payment other than the mailing of said check by said registered letter.

Dennis Splain, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows:

On January 7th, 1919, I was present at a conference between Mr. Farkas and Mr. Steelman. Mr. Farkas sold Mr. Steelman some manure and Mr. Steelman promised to pay him $50.00 for the manure. I was to meet Mr. Steelman the next day at Atlantic City and he was to hand me the check and I was to hand it to Mr. Farkas or else Mr. Steelman was to mail Mr. Farkas a check. I came to Atlantic City the next day and Mr. Steelman did not show up.

Dennis McNichol, witness produced on the part of plaintiff, being duly sworn, testified as follows:

I owned a lot of manure at Camp 25. I gave an order to Mr. Steelman upon the Bethlehem Loading

Company to deliver the manure to Mr. Steelman. There were three or four car loads. There were thirty-five or forty tons in each car load.

Plaintiff thereupon rested and counsel for defendant moved for a non-suit as to the first count, upon the ground that the plaintiff had not performed his contract; that the consideration agreed upon had not passed to defendant and that, therefore, plaintiff had failed to make out his case, which motion, the Court denied and allowed an exception to defendant upon his refusal to non-suit.

Frank Farkas, the defendant, being duly sworn, testified as follows:

Sometime in January, 1919, I sold the manure I had at Camp 25 to Daniel Steelman for $50.00. He was to pay for same in cash or by certified check. He was to make payment to Dennis Splain the next day or mail said certified check to me at Atlantic City. I never received the check, Mr. Steelman nexer offered or paid me for the manure. Mr. Splain never handed me cash or certified check in payment for the manure. Not receiving payment of the same at the time agreed, I sold the manure to Anderson Bourgeois for $36.00. I did not use or sell to Mr. Bourgeois or anybody else any manure at Camp 25 that belonged to Mr. McNichol or Mr. Steelman. All that I sold came from stables where my own horses were stabled. I had twenty-six horses in one stable and ten horses in the other stable. I kept the manure for about four weeks after the sale before I sold it to Mr. Bourgeois. I did not receive any notice of registered letter at Belcoville and did not call at the Post Office at Belcoville to see if there was mail there for me.

By consent, the trial was continued to February 14, 1919, at which time the following testimony was produced:

Anderson Bourgeois, a witness produced on behalf of the plaintiff, testified as follows:

On January 10, 1919, I bought all manure at Camp 25 from Frank Farkas and paid him $36.00 for it, receipt exhibit P1 is the paper I received. There were two piles. There were about one hundred loads in the first pile and forty loads in the second pile, in all there were about one hundred and eight tons. I sold the manure one week after I had purchased it for $95.00 net. I sold some of the manure for $1.40 per ton. I sold thirty-six loads out of the McNichol pile and there were nine or ten loads left.

Andrew Marcus, a witness sworn on behalf of the plaintiff, testified as follows:

I buy and sell manure and have for years. I know the market value of manure at Belcoville. On or about January 8th it was worth $1.00 per ton.

John Herbert, witness produced on the part of the plaintiff, testified as follows:

I am a farmer and I know the market value of manure at Belcoville. On or about January 8th it was worth $2.00 per ton on the field.

Edwin Woolbert, witness produced on the part of the plaintiff, testified as follows:

I am a farmer and know the market value of manure at Belcoville on or about January 8th. Most of it is saw dust, and shavings. I would pay $1.50 per ton if I could got the best of it.

Allen Melvin, witness produced on the part of the defendant, testified as follows:

I work for the Board of Health at Belcoville, hauling manure. I know the stable where Mr. McNichol stabled his horses. The Board of Health ordered me to haul all of the manure away from the stables where Mr. McNichol had his horses which I did with the exception of some five or six tons. It was in very bad condition.

Both sides rested. Counsel for defendant requested the Court to find a verdict in favor of defendant upon the first count, because plaintiff had failed to perform his contract; that he did not hand check to Mr. Splain or mail check to defendant as he agreed, but mailed check by registered letter; that said check was not received by defendant; that the defendant did not receive any consideration from plaintiff therefore, as a matter of law, plaintiff could not recover; that the evidence did not warrant a recovery under second count.

Dated March 4th, 1919.

WM. H. SMATHERS,
Attorney for Plaintiff-Appellee,
BABCOCK & CHAMPION,
Attorneys for Defendant-Appellant.

POINTS.

NEW JERSEY SUPREME COURT.

DANIEL STEELMAN,
(*Plaintiff*) *Appellee*,
vs.
FRANK FARKAS,
(*Defendant*) *Appellant*.

On Appeal from District Court.
Points.

Comes now the defendant-appellant, by Babcock and Champion, his attorneys, and assigns the following reasons why the judgment rendered by the Atlantic City District Court in the above-stated cause should be reversed and set aside.

1. The judgment rendered by the Court upon the first count of plaintiff's complaint, filed in the Court below, is erroneous in law because,

(a) Plaintiff below did not perform his contract with defendant.

(b) No consideration passed from defendant to plaintiff either for the making or the performance of the contract.

(c) The evidence is not sufficient to support the finding of the trial Court.

2. There was no evidence to support the judgment upon the second count.

Yours respectfully,
BABCOCK & CHAMPION,
Attorneys for Appellant.

NEW JERSEY SUPREME COURT.
JUNE TERM.

DANIEL STEELMAN,
Respondent,
vs.
FRANK FARKAS,
Appellant.

Argued June 3, 1919; decided June, 1919.

Appeal from District Court.

Before Justices Swayze and Parker.

For the Appellant, Babcock & Champion.

PER CURIAM:

The suit is for damages for alleged breach by defendant of an agreement to sell certain manure to plaintiff; and also (second count in the state of demand) for the conversion by defendant of certain other manure, the property of plaintiff. The trial court sitting without jury, awarded damages to plaintiff on each count.

As to the first count the facts are concededly that defendant orally agreed to sell the manure mentioned in that count for $50.00, and that plaintiff was to hand this check the same day to one Splain, or mail the check the next day to defendant at Belcoville. It appeared that plaintiff did mail the check on the day specified, addressing it to defendant, Camp 25, Belcoville, which, so far as appears, is the correct address. The letter was registered. Defendant testified that he did not inquire at the post office for the letter, and received no notice of its ar-

rival. Defendant sold the manure to another party the day after plaintiff mailed the letter.

It is claimed that plaintiff cannot recover on this count because he did not carry out his part of the agreement. But the court was fully justified in finding that he did. He mailed the check, at the time specified, to the address stipulated (adding Camp 25, which appears immaterial). It is proper to find that if the defendant did not get the check it was his fault in not asking for his mail. The check and letter enclosing it were returned by the post office to plaintiff about nineteen days later, and it is now claimed that he should have tendered payment to defendant, as a condition precedent to suit. But as defendant had sold the manure this would have been futile and hence under the well settled rule was not required. The finding for plaintiff on the first count was justified; the amount of damages is not before us for review.

As to the second count, it is said there is no evidence that defendant sold manure belonging to plaintiff. This is erroneous. Defendant admitted selling manure "out of the McNichol pile", and plaintiff and McNichol both testified as to plaintiff's ownership, either general or special, of that manure. Either will support trover. The amount of damages is likewise not before us.

The judgment is affirmed with costs.

NEW JERSEY SUPREME COURT.

DANIEL STEELMAN,
Appellee,
vs.
FRANK FARKAS,
Appellant.

ON APPEAL.
RULE ON AFFIRMANCE.

This cause having been duly argued at the June Term, 1919, of this court, by Babcock & Champion of counsel for the Appellant and William H. Smathers of counsel for the Appellee, and the court having inspected the record and proceedings in the court below and having considered the causes assigned as grounds for setting aside the said judgment and being of the opinion that the said judgment should be affirmed with costs.

It is, thereupon, on motion of William H. Smathers, Attorney for the Appellee, ORDERED that the judgment had before the Atlantic City District Court be in all things affirmed and that the said Appellee do recover his costs in the Supreme Court to be taxed and that the record and proceedings be remitted to the Atlantic City District Court to be proceeded with in accordance with this order and the practice of the said Court.

June 20, 1919.

Entered on motion of
WILLIAM H. SMATHERS,
Attorney for Appellee.

A true copy:
ENOCH L. JOHNSON,
Clerk.

NEW JERSEY SUPREME COURT.

DANIEL STEELMAN, Appellee, (Plaintiff), vs. FRANK FARKAS, Appellant, (Defendant)	ACTION-AT-LAW. APPEAL. NOTICE OF APPEAL.

TO WILLIAM H. SMATHERS, ESQ., Attorney for (Plaintiff) Appellee.

TAKE NOTICE that the Appellant (Defendant) hereby appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause upon the following grounds:

1. The judgment rendered by the Court upon the first count of plaintiff's complaint, filed in the Court below, is erroneous in law because,

(a) Plaintiff below did not perform his contract with defendant.

(b) No consideration passed from defendant to plaintiff either for the making or the performance of the contract.

(c) The evidence is not sufficient to support the finding of the trial court.

2. There was no evidence to support the judgment upon the second count.

Yours respectfully,
BABCOCK & CHAMPION,
Attorneys for Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

Daniel Steelman,
Plaintiff-Appellee.

vs

Frank Farkas,
Defendant-Appellant.

On Appeal from the New Jersey Supreme Court.

BRIEF FOR APPELLEE.

This case was first tried in the Atlantic City District Court and the trial court gave a verdict for the plaintiff on the first count for $101.20. On the first count the trial court found that there was 108 tons of manure which the defendant agreed to sell plaintiff and that the market value of this manure was $1.40 per ton, making a total of $151.20, from which amount the trial court deducted the sum of $50.00 which the defendant agreed to accept from plaintiff for the said manure, leaving a balance of $101.00 for which the court entered judgment.

On the second count the court found that there was 100 tons of manure at Camp 25 which belonged to plaintiff and which the defendant sold and converted to his own use. That the market value of this manure was $1.40 per ton, making a total of $140.00 on the second count.

The total judgment entered on both counts being $241.21.

ARGUMENT.

The defendant appealed to the Supreme Court and the Supreme Court affirmed the trial court's finding, now the defendant appeals to the Court of Errors and Appeals on the following points.

1. THE JUDGMENT RENDERED BY THE COURT UPON THE FIRST COUNT OF PLAINTIFF'S COMPLAINT, FILED IN THE COURT BELOW, IS ERRONEOUS IN LAW BECAUSE.

(a) Plaintiff below did not perform his contract with Defendant.

The plaintiff testified that he bought of the defendant all of the manure at Camp 25 for the sum of $50.00 and that the defendant agreed to accept plaintiff's check in payment of the said purchase price and instructed plaintiff to mail said check to him, the defendant, at Belcoville, New Jersey. (page 9, line 30, of the state of the case). The plaintiff was corroborated in this statement by one Dennis Splain, who testified that "I was to hand the check to Mr. Farkas or else Mr. Steelman was to mail Mr. Farkas a check." page 11, line 30, of the agreed state of the case.) The defendant now comes by appeal to this court and says as a matter of law that altho he agreed to accept plaintiff's check in payment of the $50.00 and instructed plaintiff to mail said check to him at Belcoville, New Jersey, that he, plaintiff, did not perform his contract, in that payment was made by check as agreed and not by legal tender. The defendant admits in his brief that defendant's promise to sell for $50.00 and plaintiff's promise to pay $50.00 constitutes a good consideration for a contract, but contends that there was no performance because the plaintiff tendered his check which the defendant agreed to accept in payment of the purchase price. It is a settled proposition of law in this state that a party may agree to accept

a check in payment and thereby waives his right to insist upon a legal tender. (Freeholder of Middlesex vs Thomas and Martin, 20 N. J. Equity, page 39. Swain vs Frazier, 35 Equity, page 331. In 30 Cyc, page 1199, under the subject of payment it is held: "Where there is an agreement to take a bill or note or check as an absolute payment the acceptance of a promissory note, bill or exchange, or order even of a third person, constitutes a payment so as to preclude an action upon the original indebtedness. "The rule as usually stated that the acceptance of a bill or note does not constitute a payment unless expressly so agreed is not supported by the decisions where that question has been specifically considered, they holding that it is not necessary to show an express agreement to take the bill or note as absolute payment, but that it is sufficient that there is an understanding to such effect."

The defendant in instructing plaintiff to mail said check to him at Belcoville, New Jersey, selected and constituted the United States Mail as his agent and the deposit of said check in the United States Mail by plaintiff directed to the said defendant as instructed by him constitutes a delivery to the defendant.

2. THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT THE FINDING OF THE TRIAL COURT.

This point raises a question of fact depending upon the veracity of the witnesses. The defendant repeatedly swore under oath that he held the manure for at least four weeks for the plaintiff to come for it. (page 12, line 30, of the agreed state of the case.) Whereupon counsel for plaintiff requested an adjournment of the case for one week for the purpose of producing one Anderson Bourgeois to whom the said defendant sold the said manure which

said request the defendant and counsel consented to. Upon the following week the plaintiff produced in court one Anderson Bourgeois who produced a receipt signed by Frank Farkas, the defendant, showing that the defendant instead of holding the said manure for four weeks for plaintiff to come for it, as testified by him, in fact only held the manure one day. The plaintiff testified that there was at least 177 tons of the manure which he bought from the defendant and that the market value of it on the ground where it lay was $2.00 per ton. (page 10, line 30 of the agreed state of the case). John Herbert, witness produced on the part of the plaintiff, testified that the manure was worth $2.00 per ton on the field, (page 13, line 20, of the agreed state of the case). From this evidence the trial court was justified in finding that there were 108 tons of the manure in question and that the market value of it was $1.40 per ton.

3. THERE WAS NO EVIDENCE TO SUPPORT THE JUDGMENT UPON THE SECOND COUNT.

Plaintiff testified that McNichol had 125 tons of manure at Camp 25 which the said McNichol sold to plaintiff, (page 10, line 30, of the agreed state of the case). Dennis McNichol produced on the part of the plaintiff, testified that he had three or four car loads of manure and that there were 35 or 40 tons in each car load at Camp 25. Anderson Bourgeois, a witness produced on the part of the plaintiff, testified that he bought *all* the manure at Camp 25 from Frank Farkas, (page 13, line 6, of the agreed state of the case). If the defendant as testified to by one Anderson Bourgeois sold all the manure at Camp 25, he sold and converted to his own use the McNichol manure which plaintiff owned. Anderson Bourgeois a witness produced on behalf of plain-

tiff also testified on (page 13, line 10, of the agreed state of the case) "I sold 36 loads out of the McNichol pile and there were 9 or 10 loads left."

It is therefore respectfully submitted that the judgment should be affirmed with costs.

WM. H. SMATHERS,
Attorney for Appellee.

ENDICOTT & ENDICOTT,
Of Counsel with Appellee.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Daniel Steelman,
Plaintiff-Appellee,
vs.
Frank Farkas,
Defendant-Appellant.

ON APPEAL FROM
DISTRICT COURT.

BRIEF FOR APPELLANT.

This is an appeal from the judgment of the District Court of the City of Atlantic City. Suit was instituted by Plaintiff against Defendant upon two counts. The complaint is found upon page 5 of the State of Case. The first count charges in effect that on or about January 20th, 1919, Defendant sold to Plaintiff, one hundred and fifty tons of manure for the purchase price of Fifty ($50) Dollars; that Defendant after having so agreed, resold said manure to one Anderson Bourgeois, at a greater figure than that agreed with the Plaintiff; and that Plaintiff, after contracting with Defendant, contracted with other parties to sell said manure at a profit of Two Hundred and Fifty ($250) Dollars.

The second count charges that the Defendant on or about the same date, sold and converted to his own use One hundred tons of manure belonging to Plaintiff.

The testimony taken upon the hearing will be found upon page nine and succeeding pages.

Plaintiff testified (page 9), that on January 8th,

1919, he had an agreement with Mr. Farkas to buy all of the manure he had at two stables at Camp 25, Belcoville, New Jersey, for the sum of Fifty ($50) Dollars up to February 8th; that he was to either hand a check to one Dennis Splain for said sum on January 8th or to mail it the next day to Defendant at Belcoville; that Defendant agreed to accept his check in payment of the Fifty ($50) Dollars; that the Defendant sold the manure to Mr. Bourgeois; that he mailed his check to Mr. Farkas in a letter addressed to him at Belcoville on January 9th by registered letter; that there were one hundred seventy-seven (177) tons in the lower barn and five or six tons in the upper barn; that he had bought and sold manure for quite a number of years and was familiar with its market value which on January 8th was $3.50 per ton; that he owned another pile of manure at Camp No. 25 through a Mr. McNichol, in which there were one hundred and twenty-five or one hundred and thirty tons of manure for which he received an order from Mr. McNichol to the Bethlehem Loading Company to deliver to him the market value of which was $3.50 per ton; that the registered letter mailed by him was not delivered to Mr. Farkas and was received by him from the Post Office about nineteen days after he had mailed it; that he did not know of his own knowledge that Mr. Farkas sold the manure he owned from Mr. McNichol's stables; that there was an automobile truck carting the manure away, but that he did not know it belonged to Mr. Farkas. When he stated the market value of the manure to be $3.50 per ton, he meant delivered at Pleasantville, allowing $1.50 for loading and unloading and hauling, making the market value $2.00 per ton; that he made no tender or offer of payment other than the mailing of said check by said registered letter.

Dennis Splain, Plaintiff's witness testified (page 11) that he was present when the defendant sold

Plaintiff the manure for $50.00 and that it was on January 7, and that Mr. Steelman promised to pay the Defendant $50.00; that he was to meet Mr. Steelman the next day in Atlantic City where he was to hand him the check which he was to hand to Mr. Farkas, or Mr. Steelman was to mail Mr. Farkas a check; that he came to Atlantic City the next day and Mr. Steelman did not appear.

Dennis McNichol, Plaintiff's witness, testified, (page 11), that he owned manure at Camp 25 and gave an order to Mr. Steelman upon the Bethlehem Loading Company to deliver same to Mr. Steelman; that there were three or four car loads and there were thirty-five or forty tons in each car load.

Plaintiff rested his case and motion for non-suit was made by Counsel for Defendant as to the first count upon the ground that Plaintiff had not performed his contract; that the consideration agreed upon had not passed to the Defendant and that, therefore, Plaintiff had failed to make out his case, which motion was denied and exception was allowed, (page 12).

The Defendant, (page 12), admitted he had agreed to sell manure to Plaintiff for $50.00, claiming, however, that payment was to be made in cash or by certified check; that he never received the check and Mr. Steelman never paid him for the manure; that not receiving payment at the time agreed, he sold same to Anderson Bourgeois for Thirty-six Dollars ($36.00); that he did not sell Mr. Bourgeois any manure at Camp 25 belonging to Mr. McNichol or Mr. Steelman.

The hearing by consent was continued to February 14th, at which time Anderson Bourgeois testified, (page 13), that he bought all the manure at Camp 25 from Defendant and paid him Thirty-six Dollars ($36.00) for it; that there were two piles there, be-

ing one hundred loads in the first pile and forty loads in the second pile, in all there were about one hundred and eight tons; that he sold thirty-six loads out of the McNichol pile and there were nine or ten loads left.

Plaintiff then introduced the various witnesses testifying as to the market value of manure on January 8th. Andrew Marcus testified it was worth on said date $1.00 per ton. John Herbert that it was worth $2.00 per ton on the field. Edwin Woolbert, that he would pay $1.50 per ton if he could get the best of it.

Defendant's witness, Allen Melvin, testified (page 14) that he worked for the Board of Health at Belcoville; that he knew where Mr. McNichol stabled his horses and that the Board of Health directed him to haul all of the manure away from the stables of Mr. McNichol, which he did with the exception of some five or six tons.

Both sides having rested, Counsel for Defendant moved that the Court find a verdict for the Defendant because the evidence submitted in support of the first count showed that Plaintiff had failed to perform his contract; that he did not hand check to Mr. Splain or mail it to Defendant as agreed, but mailed it by registered letter; that the check was not received by Defendant; that the Defendant did not receive any consideration from the Plaintiff; and that the evidence submitted in support of the second count did not warrant a recovery thereunder, which motion the Court denied.

The receipt given by Mr. Farkas to Anderson Bourgeois marked P. 1. is found upon page six. The receipt for delivery of registered letter, letter of January 8th, check of Plaintiff to order of Defendant for $50.00 and envelope addressed to Defendant, marked as Exhibit P. 2, are found on pages six

and seven of the case. The order of Mr. McNichol to the Bethlehem Loading Company is found upon page eight.

The Court found a verdict in favor of Plaintiff upon the first count for One hundred one Dollars and twenty cents ($101.20) and upon the second count for One Hundred forty Dollars ($140.00).

ARGUMENT.

The points are found upon page twenty and will be considered in their order.

1. THE JUDGMENT RENDERED BY THE COURT UPON THE FIRST COUNT OF PLAINTIFF'S COMPLAINT, FILED IN THE COURT BELOW, IS ERRONEOUS IN LAW BECAUSE,

(a) Plaintiff below did not perform his contract with Defendant.

Since the Trial Court found a verdict for the Plaintiff below for the sake of this Appeal, Plaintiff's testimony should be accepted as being true. Plaintiff testified, (page 9):

> "I bought all the manure he had at two stables at Camp 25, Belcoville, New Jersey. He was to sell me the manure for $50.00 up to the eighth of February. I was either to hand a check to Dennis Splain for said sum on January 8th or to mail it the next day to Mr. Farkas at Belcoville. Mr. Farkas sold the manure to Mr. Bourgeois. Mr. Farkas agreed to accept my check in payment of the $50, and instructed me to mail it to him at Belcoville on January 9th in event I did not give it to Mr. Splain."

With respect to performance, Plaintiff testified:

> "I mailed my check to Mr. Farkas in a letter ad-

dressed to him at Belcoville on January 9th by registered letter."

There is no doubt but that there was a valid contract made between Plaintiff and Defendant, whereby Defendant agreed to sell to Plaintiff certain manure for which Plaintiff agreed to pay the sum of $50.00 by mailing to him the next day his check for said sum. It, therefore, is apparent that while a promise may be a sufficient consideration for a promise, creating a valid contract, the consideration for which is the promise, that principal of law has no application to the facts in the case in hand. Under the terms of the contract testified to by Plaintiff, performance by the Plaintiff of the contract was made a condition to the completion thereof and before Plaintiff should be permitted to recover for a breach thereof, he is obliged to fully perform his contract.

Plaintiff did not perform his contract. Plaintiff says, (page 9):

"He was to sell me the manure for $50.00 up to the 8th day of February."

Defendant was, therefore, to receive from Plaintiff $50. Plaintiff says that defendant agreed to accept his check in payment and instructed him to mail it to him at Belcoville in event he did not give it to Mr. Splain. Plaintiff then states that he mailed his check to Mr. Farkas in a letter addressed to him at Belcoville on January 9th by registered letter.

Where a check is given and accepted as an absolute payment, it is considered as a conditional payment only to become absolute when paid.

7 Cyc. 1007.

Ordinarily the delivery of the check of the debtor or of a third person will not be presumed to have been accepted as absolute payment, but the presumption is

that it was accepted merely as a conditional payment.

30 Cyc. 1272.

Performance of a contract has been defined to be such a fulfillment of its duties as puts an end to its obligation by leaving nothing more to be done.

13 C. J. 673.

It is submitted that had Mr. Steelman actually delivered the check to Mr. Farkas, it would have amounted to but a conditional payment and the contract, therefore, was not completed until the check should have been paid. No credit was extended to Plaintiff by Defendant and the necessary intendment of the agreement from a consideration of all its terms was that the consideration, namely $50.00, was to be paid to Defendant before the contract was completed.

Plaintiff did not deliver his check to Defendant at the time agreed upon and, therefore, should not have been permitted to maintain his suit. Under the contract as testified to by the Plaintiff, the parties agreed that the Plaintiff should mail a check to Defendant the day following the making of the contract. It is well known that there are at least three methods by which mail may be carried by the Postal Department, first, ordinary mail; second, special delivery mail; and third, registered mail. Both parties selected the Postal Department as their agent for the performance of the contract. Therefore, there would have to be delivery to the Defendant by the agent selected before the consummation of the contract. It should be borne in mind that the facts in this case do not come within the class of cases which hold that where a person uses the Postal Department to make an offer or to accept an offer, the Department becomes his agent to carry the offer, because here by the express agreement of the parties,

the Postal Department became the agent of both. The intention of the parties was that there should be a delivery to the Defendant. That this was the intention of the parties is manifest both from the testimony of the Plaintiff and of the Defendant. Plaintiff testified, (p. 9), that he mailed his check to Mr. Farkas by registered letter and produced a receipt for the delivery thereof to the Post Office, his letter, dated January 8, 1919, his check and the envelope addressed to the Defendant, which were offered as Exhibits in the case. Examination of Exhibit P. 2, being the registry receipt, letter, envelope and check, will show that the Plaintiff mailed said registered letter from Pleasantville on January 9, 1919, and upon the registry receipt required a return receipt to be signed by the Defendant. Upon the envelope, (p. 7), the Plaintiff required that if the letter should not be delivered in five days, it should be returned to him and required a return receipt from Defendant.

Plaintiff, therefore intended that there should be a delivery before the contract was completed or he would not have taken the precaution to have had the letter registered and required a receipt from the Defendant. Furthermore, assuming that delivery by Plaintiff to the Postal Department was delivery to the defendant, Plaintiff did not mail said check by ordinary mail as agreed, but mailed a registered letter, requiring from the Postal Department that it should deliver the letter to Mr. Farkas and procure from him a receipt for its delivery. He addressed said letter to Camp 25, Belcoville, N. J., in violation of his agreement. Plaintiff retained control over the letter, therefore, until actual delivery and receipt should be given by Defendant therefor. The Postal Department thus became the sole agent of Plaintiff to deliver said letter, which delivery was undertaken at Plaintiff's risk. That this is true is apparent from the fact that Plaintiff subsequently

accepted from the Post Office Department his letter which was returned to him because there had been no delivery, no return receipt given by Defendant and in accordance with Plaintiff's instruction to the Department.

(b) No consideration passed from Defendant to Plaintiff either for the making or the performance of the contract.

It has already been sufficiently argued that Defendant received no consideration from the Plaintiff for the making or performance of said contract and it will not be here further discussed.

(c) The evidence is not sufficient to support the finding of the trial Court.

This reason is not pressed.

2. THERE WAS NO EVIDENCE TO SUPPORT THE JUDGMENT UPON THE SECOND COUNT.

The Court gave judgment upon the second count for One Hundred and forty dollars ($140) debt. Plaintiff testified that in this pile there were one hundred and twenty-five or one hundred and thirty tons of manure, (p. 10, line 33). Mr. McNichol testified, (p. 12), that there were three or four car loads and that there were thirty-five or forty tons in each carload. Mr. Bourgeois testified, (p. 13) that there were one hundred and eight tons in all including the manure involved in both counts. Upon direct examination, Plaintiff (p. 11) testified that Mr. Farkas sold the manure to Mr. Bourgeois. Upon cross examination, he testified (p. 11, line 8),

> "I did not know of my own knowledge that Mr. Farkas sold the manure I owned from Mr. McNichol's stables. There was an automobile truck carting the manure away. I did not know that it belonged to Mr. Farkas."

There is no other evidence in the case to show that Mr. Farkas sold the manure involved in the second count to Mr. Bourgeois, unless it be inferred from the testimony of Mr. Bourgeois. It is denied by the defendant, (p. 12, line 26).

Allen Melvin, Defendant's witness, testified that he worked for the Board of Health hauling manure and that he knew where Mr. McNichol stabled his horses; that the Board of Health ordered him to haul all of the manure away from Mr. McNichol's stables, which he did with the exception of some five or six tons. Mr. Melvin's testimony was uncontradicted and it, therefore, follows that there should not be a verdict against Mr. Farkas upon the second count because there is no proof of conversion upon his part, but the proof is uncontradicted that there was nothing to convert.

Attention is called to the fact that Mr. Bourgeois purchased for Thirty-Six ($36) Dollars manure from Defendant, the value of which the Court judicially finds is Two Hundred forty-one Dollars and twenty cents ($241.20).

IT IS RESPECTFULLY URGED that the verdict in the Trial Court in both counts be reversed and set aside.

BABCOCK & CHAMPION.
Attorneys for Appellant.