INDEX

NOTICE OF APPEAL.

(Filed Dec. 4th, 1922.)

NEW JERSEY SUPREME COURT.

WALES ADDING MACHINE COMPANY, *Defendant,* v. CHARLES G. HUVER, *Prosecutor.*	On Certiorari.

To Linwood W. Errickson, Esq., Attorney of Defendant-in-Certiorari:

Take notice, that the above prosecutor, appeals from the whole of the judgment entered in the above cause, to the Court of Errors and Appeals in the last resort in all causes in New Jersey, upon the ground, that,

The Supreme Court erred in giving judgment in the above cause in favor of the said defendant instead of for the said prosecutor.

REX A. DONNELLY,
Attorney of Prosecutor.

Dated December 1, 1922.

[ENDORSED]

Service acknowledged Dec. 2nd, 1922.
Linwood W. Errickson,
Atty. of Deft.-in-Certiorari.

WRIT.

NEW JERSEY, *ss.*

The State of New Jersey to our Judge of the Court of Common Pleas in and (SEAL) for the County of Cumberland and Leonidas H. Hogate, clerk of said Court.

GREETING:

We being willing for certain reasons to be certified of a certain judgment and proceedings entered in the Court of Common Pleas of the County of Cumberland, in a certain action, cause or proceedings, between Wales Adding Machine Company, plaintiff, and Charles G. Huver, defendant, in which judgment was entered in favor of said plaintiff against said defendant, said action being on contract and on appeal to said Common Pleas from the Small Cause Court of said county, do command you that you certify and send under your seal, to the Justices of our Supreme Court of Judicature, at Trenton, on the sixth day of June, A. D. 1922, the said judgment, together with all the pleadings, exhibits and testimony and all other proceedings in said cause, and all things, by whatsoever name called, touching or concerning the same, as fully and entirely as they remain before you, by whatsoever name the parties may be called therein, together with this writ, that we may thereupon cause to be done, what of right and according to law ought to be done.

Witness, WILLIAM S. GUMMERE, ESQ., Chief Justice of our Supreme Court at Trenton, this twenty-ninth day of May, A. D. 1922.

ENOCH L. JOHNSON,
Clerk.

REX A. DONNELLY,
Attorney.

[ENDORSED]

I allow this writ. Let it be sealed. On condition that it brought in for argument at the June Term of said Court, 1922.

Chas. C. Black,
J. Sp. Ct.

Dated May 25, 1922.

RETURN.

To the Honorable Justices of the Supreme Court of the State of New Jersey:

In obedience to the command of within writ to be directed I do hereby certify and send to the Honorable Justices of the Supreme Court of Judicature of New Jersey above mentioned, the judgment and proceedings, between Wales Adding Machine Company, plaintiff, and Charles G. Huver, defendant, in the Court of Common Pleas of the County of Cumberland, in an action on contract, in which judgment was entered in favor of said plaintiff and against said defendant on appeal from the Small Cause Court of said county, together with all the pleadings, exhibits and testimony and all other proceedings in said cause, as fully and entirely as they remain before me in said court, as Judge of the Court of Common Pleas of the County of Cumberland, as within I am commanded.

Witness my hand and seal this first day of June, A. D. 1922.

WM. A. LOGUE, (Seal)
Judge of the Court of Common Pleas of the County of Cumberland.

THE STATE OF NEW JERSEY.

CUMBERLAND COUNTY, *ss.*

To any constable of said county summon C. G. Huver, personally to be and appear before me, the subscriber, one of the justices of the peace in and for the said county, at my office No. 83 East Commerce St., in the City of Bridgeton, on Wednesday the fourth day of May, 1921, at eleven o'clock in the forenoon to answer unto Wales Adding Machine Company, a corporation, in an action on contract. Demand $118.68.

Given under my hand and seal this twenty-eighth day of April, 1921.

JOSEPH M. STRATTON,
Justice of the Peace.

(Seal)

CONSTABLE'S RETURN.

On defendant, C. G. Huver, I served the within summons April the 28, 1921, by reading it to him and giving him a true copy thereof.

FRANK O. BACON,
Constable.

[ENDORSED]

Filed June 17, 1921.
L. H. Hogate,
County Clerk.

DEMAND.

THE SMALL CAUSE COURT
Before Joseph M. Stratton, Esquire, Justice of the Peace.

WALES ADDING MACHINE COMPANY, *Plaintiff*, vs. C. G. HUVER, *Defendant*.		On Contract. Demand.

Plaintiff, a corporation of the State of Pennsylvania, having its principal place of business in the City of Wilkes-Barre, in the said state, says that:

1. It sues for the price of goods sold and delivered to the said defendant under a conditional bill of sale, a copy of which is hereto annexed and made part hereof.

2. A copy of said conditional bill of sale was duly filed in the Cumberland County clerk's office on April 9th, 1921.

3. Defendant has paid on account of said conditional bill of sale only $12.50, leaving due a balance of $112.50.

Plaintiff demands as damages, the amount still due on said conditional bill of sale, being $112.50, with interest from June 1, 1920.

CLAUDE D. HOLLINGER,
Attorney of Plaintiff.

State N. J.,—County, Cumberland—City, Bridgeton.
Wales Adding Maching Company, Wilkes-Barre, Pa.
(Hereinafter called Vendor) Date Aug. 12. 1919

Please ship or deliver as soon as convenient, to C. G. Huver (hereinafter called vendee) at Bridgeton, N. J. business Elec. Engineer,
The following described property. 1 of your Wales Visible Adding and Listing Machines, Model 19B, Second Hand, Serial No. and No. Combination) stand.
(regular)

In consideration of which vendee agrees to pay vendor one hundred twenty-five Dollars ($125.00), as follows: For full cash payment within 10 days from date of invoice, a discount of 2 per cent. is to be allowed. (No cash Discount on Exchange Allowance.) Unless otherwise specified hereinafter, payment to be made net cash 30 days from date of invoice.
$12.50 cash with this order, and twelve consecutive monthly payments of $9.38 starting 30 days after date of invoice.

If the full purchase price is not paid within six months from date of invoice, interest at the legal rate per annum to be charged on the unpaid balance from and after the expiration of the said six months.

Nothing but acceptance in writing from vendor's Home Office, Wilkes-Barre, Pa., shall constitute an acceptance of this order by vendor. It is agreed that title to said property shall not pass to vendee or any other person, firm or corporation, until paid for in full which shall include the payment of any judgment secured. If cash payment is not made as agreed, or if there be default at any time in any payment, or other condition of this agreement, or upon

refusal or neglect of vendee to accept said property when tendered by vendor or its agent, or any transportation agency, the full amount unpaid hereon shall become due and payable forthwith, and vendee agrees to accept and pay draft for the amount. In default of any payment or other condition herein expressed said property may be removed by the vendor or its agents without legal process, and all payments made shall be retained by vendor as liquidated damages for the use thereof and not as a penalty. When payment in full shall have been received the property shall belong to the vendee.

It is agreed this order shall not be subject to countermand or rescission by vendee and that it covers all agreements concerning this transaction of every name and nature, and no representations or agreements made by an agent or any other person not included herein, shall be binding.

The loss, injury or destruction of said property shall not operate in any manner to release vendee from payment as provided herein, and renewals or extensions in time of payment shall not release vendee from the conditions of this agreement. The vendee expressly waives as against this agreement all exemptions and homestead laws, and all claims for damages of whatever nature, and further expressly waives any and all provisions of law wherein and whereby it is required any sum of money shall be repaid to vendee, or that said property shall be sold at public or private sale upon notice to vendee, and any part of the proceeds accounted for or paid over to vendee. Nothing contained herein shall prevent vendor from taking such legal action as it may deem fit for the recovery of the money agreed to be paid hereunder. The delivery of a duplicate of this agreement to vendee is hereby acknowledged.

One Year Guarantee

Vendor agrees to guarantee said machine to undersigned vendee for one year from date of invoice. Should it get out of working order through ordinary use, during the period of this guarantee, vendor will make all repairs and adjustments without charge. (This guarantee does not include stands or trade accessories, nor the replacement of machine parts damaged by accident, abuse or violence; nor does it include the furnishing of ribbons or other supplies.)

It is expressly understood that all payments hereunder are to be made by check, draft or money order payable to the Wales Adding Machine Company, Wilkes-Barre, Penn'a. For any payment not so made vendee agrees to accept and pay sight draft when presented.

Signed C. G. Huver.
By

Witness
R. M. Vanderh

Official Title.
W. H. McFarland
District Mgr.
R. M. Vanderh
Sales Agent Credited
R. M. Vanderh
Sales Agent Closing

Accepted at Wilkes-Barre, Pa.,
6-3-1920.
Wales Adding Machine Company,
By Id
Wol.

A cash payment of at least 10 per cent. must accompany all orders except those payable within the discount period.

[ENDORSED]

Filed June 17, 1921.
L. H. Hogate, Clerk.

NOTICE OF APPEAL.

THE SMALL CAUSE COURT.

Before Joseph M. Stratton, Esquire, Justice of the Peace.

CUMBERLAND COUNTY, *ss.*

WALES ADDING MACHINE COMPANY, a corporation, *Plaintiff,* vs. C. G. HUVER, *Defendant.*	On Contract. Notice of Appeal.

To JOSEPH M. STRATTON, ESQ., or whom it may concern:

Whereas on May 28, 1921, judgment was rendered in the above cause in favor of plaintiff against defendant for the sum of one hundred and eighteen dollars and sixty-eight cents and $3.15 costs.

Now take Notice that I hereby appeal from said judgment and each and every part thereof to the

next Court of Common Pleas of the County of Cumberland.

CHARLES G. HUVER,
Defendant,
By REX A. DONNELLY,
Attorney.

Dated June 14, 1921.

[ENDORSED]

Filed June 17, 1921.
L. H. Hogate,
County Clerk.

Know All Men by These Presents, that we Charles G. Huver and William Irwin, both of the City of Bridgeton, and both of the County of Cumberland and State of New Jersey, are held and firmly bound unto Wales Adding Machine Company, a Corporation of the State of Pennsylvania in the sum of Two Hundred and Seventy-Five Dollars to be paid to the said Wales Adding Machine Company, its successors and assigns; to which payment we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the Fifteenth day of June A. D. 1921.

The Condition of the Above Obligation is, that whereas the above bounden Charles G. Huver hath appealed from the judgment of Joseph M. Stratton Esquire, one of the Justices of the Peace of the County of Cumberland, rendered against him in an

action on contract, wherein the said Charles G. Huver was defendant and the said Wales Adding Machine Company was plaintiff. The action being in The Small Cause Court, being for the sum of One Hundred & Eighteen Dollars and Sixty-Eight Cents and Three Dollars and Fifteen Cents, costs. Now Therefore if the said Charles G. Huver shall appear in the next Court of Common Pleas to be holden in and for the County aforesaid, and prosecute his appeal, shall stand to and abide the judgment of the said Court, and pay such costs as shall be taxed, if the judgment be affirmed, then this obligation to be void, otherwise to remain in force.

"Cumberl" struck out before signing.

Charles G. Huver (L. S.)
William Irwin (L. S.)

Sealed and Delivered
in the presence of
As to signature of
Charles G. Huver,
Rex A. Donnelly
As to signature of
Wm. Irwin
Rex A. Donnelly

[ENDORSED]

Filed June 17, 1921.
L. H. Hogate,
County Clerk.

TRANSCRIPT.

THE SMALL CAUSE COURT
Before Joseph M. Stratton, Esquire, Justice of the Peace.

WALES ADDING MACHINE COMPANY, a corporation, *Plaintiff*, vs. C. G. HUVER, *Defendant*.	Action on Contract.

CUMBERLAND COUNTY, *ss.*

April 28, 1921.

Issued summons in above cause returnable before me at my office in the City of Bridgeton, on Wednesday, May 4, 1921, at eleven o'clock in the forenoon. Same day plaintiff filed their state of demand.

April 28, 1921.

Frank O. Bacon, constable, returned the summons with the following indorsement, "On defendant, C. G. Huver, I served the within summons April 28, 1921; by reading it to him and giving him a true copy thereof.

May 4, 1921.

At the request of the plaintiff the cause is adjourned until Wednesday, May 25, 1921, at two o'clock in the afternoon.

May 25, 1921.

By consent of all the parties, they all appearing, I heard and tried this cause at the Court House in the City of Bridgeton. The plaintiff produced the following witnesses who were duly sworn according to law; Ray M. Vanderherchen, C. G. Huver, and Ida Huver, Rex A. Donnelly, for the defendant, stated that he did not care to have any witnesses sworn. After hearing the evidence I reserved my decision.

May 28, 1921.

After carefully considering all the facts in the case, and in view of the fact that the defendant ofered no testimony to disprove or neutralize the evidence as produced by the plaintiff, I gave judgment in favor of the plaintiff and against the defendant for the sum of one hundred and eighteen dollars, and sixty-eight cents, together with three dollars and fifteen cents costs.

June 16, 1921.

The defendant having presented a notice of appeal, and having presented an appeal bond with sufficiant security, I accepted the same and granted the appeal.

I do hereby certify that the foregoing is a true and correct copy taken from my docket, and that the annexed papers, consisting of the summons, state of demand, notice of appeal and bond, are all the papers filed in the cause before me.

Witness my hand and the seal of this Court this sixteenth day of June, nineteen and twenty-one.

JOSEPH M. STRATTON,
Justice of the Peace.

(Seal)

[ENDORSED]

Filed June 17, 1921.
L. H. Hogate,
County Clerk.

STATE OF NEW JERSEY, }
CUMBERLAND COUNTY, } *ss,*

I, L. H. HOGATE, clerk of the Court of Common Pleas of the County of Cumberland, the same being a court of record, do hereby certify the foregoing to be a true copy of the summons and return, state of demand, notice of appeal, appeal bond and transcript of docket therein recited, as taken from and compared with the original summons and return, state of demand, notice of appeal, appeal bond and transcript of docket on file in my office.

In Witness Whereof I have hereunto set my hand and the seal of said court this 31st day of May, A. D. 1922.

L. H. HOGATE,
Clerk.

(Seal)

CUMBERLAND COUNTY COURT OF COMMON PLEAS.

WALES ADDING MACHINE COMPANY, a corporation, *Appellee,*		On Contract.
vs.		On Appeal.
C. G. HUVER, *Appellant.*		

LINWOOD W. ERICKSON, attorney for appellee.
REX A. DONNELLY, attorney for appellant.

This cause coming on to be heard the 10th day of May, A. D. 1922, before HON. WILLIAM A. LOGUE, Common Pleas Judge, the following persons were called and sworn as jurors to try the issue:

1. Thomas Corson
2. Frank Groube
3. John S. Beckett
4. John Barretta
5. Harry Hood
6. John Blackstone
7. Walter G. Barber
8. John Gosa
9. George P. Harris
10. Watson DeHart
11. James Charlesworth
12. Mortimer Campbell.

The following persons were called and sworn as witnesses:

Witnesses for Appellee

1. R. M. Van Derherchen S.

Rests.

Witnesses for Appellant

Motion for non-suit by atty. for defendant denied.

(Adjourned until 10 A. M. Thursday, May 11th, 1922.)

1. C. G. Huver S.
2. Miss Ida Huver S.

Rests.

The evidence being closed, counsel for defendant renewed his motion for non-suit, which was denied by the Court.

After argument by counsel, the Court charged the jury who retired at 11.10 o'clock A. M. to a private room in the custody of Lorenzo D. Woodruff, a constable sworn to attend them and after an absence of about fifteen minutes, they returned to the Court and being called, all answered to their names and being asked if they have agreed upon a verdict say they have and by their foreman, Thomas Corson, say they find for the appellee in the sum of one hundred and twenty-two dollars and sixty-two cents ($122.62).

And afterwards, to wit, on May 12th, upon the finding of the jury, it is ordered by the Court that the judgment below be affirmed and judgment entered in this court in favor of the appellee against the appellant for one hundred and twenty-two dollars and sixty-two cents ($122.62) damages, the costs below and in this court to be taxed, and

Therefore, it is considered that the appellee recover of the appellant the sum of one hundred and

twenty-two dollars and sixty-two cents ($122.62), three dollars and fifteen cents ($3.15) the costs below and costs in this court to be taxed and that judgment be recorded.

Rule entered May 12, 1922.

On motion of

LINWOOD W. ERICKSON,
Attorney of Appellee.

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

I, L. H. HOGATE, clerk of the Court of Common Pleas of the County of Cumberland, the same being a court of record, do hereby certify the foregoing to be a true copy of the minutes therein recited as taken from and compared with the original minutes as recorded in my office in Common Pleas Minute Book, page 673, &c.

In Witness Whereof I have hereunto set my hand and the seal of said court this 31st day of May, A. D. 1922.

L. H. HOGATE,
Clerk.

(Seal)

JUDGMENT FOR APPELLEE ON VERDICT OF JURY.

CUMBERLAND COUNTY COURT OF COMMON PLEAS.

WALES ADDING MACHINE COMPANY, a corporation, *Appellee,*

vs.

C. G. HUVER, *Appellant.*

On Contract.
On Appeal.
Judgment for Appellee on Verdict of Jury.

LINWOOD W. ERICKSON,
Attorney.

Judgment below affirmed and judgment entered in this court this 12th day of May, A. D. 1922, in favor of Wales Adding Machine Company, a corporation, appellee, against C. G. Huver, appellant, for one hundred and twenty-two dollars and sixty-two cents ($122.62) damages, three dollars and fifteen cents ($3.15) the costs below and ten dollars and ninety-eight cents ($10.98) the costs taxed in this court, making in the whole the sum of one hundred and thirty-six dollars and seventy-five cents ($136.75).

L. H. HOGATE,
Clerk.

$122.62
3.15
10.98

$136.75

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

I, L. H. HOGATE, clerk of the Court of Common Pleas of the County of Cumberland, the same being a court of record, do hereby certify the foregoing to be a true copy of the judgment therein recited as taken from and compared with the original judgment as found recorded in my office in Book 21 of Common Pleas Judgments, page 355.

In Witness Whereof I have hereunto set my hand and the seal of said court this 31st day of May, A. D. 1922.

L. H. HOGATE,
Clerk.

(Seal)

EXHIBIT P1.

State N. J., County, Cumberland City, Bridgeton.
Wales Adding Machine Company, Wilkes-Barre, Pa.,
(Hereinafter called vendor) Date Aug. 12, 1919

Please ship or deliver as soon as convenient, to C. G. Huver (hereinafter called vendee) at Bridgeton N. J., business Elec. Engineer, The following described property: 1 of your Wales Visible Adding and Listing Machines, Model 19 B, Second Hand, Serial No..... and No.... (combination) stand. (regular)

In consideration of which vendee agrees to pay vendor one hundred twenty-five Dollars ($125.00)

as follows: For full cash payment within 10 days from date of invoice, a discount of 2 per cent. is to be allowed. (No cash Discount on Exchange Allowance.) Unless otherwise specified hereinafter, payment to be made net cash 30 days from date of invoice.

$12.50 cash with this order, and twelve consecutive monthly payments of $9.38 starting 30 days after date of invoice.

If the full purchase price is not paid within six months from date of invoice, interest at the legal rate per annum to be charged on the unpaid balance from and after the expiration of the said six months.

Nothing but acceptance in writing from vendor's Home Office, Wilkes-Barre, Pa., shall constitute an acceptance of this order by vendor. It is agreed that title to said property shall not pass to vendee or any other person, firm or corporation, until paid for in full which shall include the payment of any judgment secured. If cash payment is not made as agreed, or if there be default at any time in any payment, or other condition of this agreement, or upon refusal or neglect of vendee to accept said property when tendered by vendor or its agents, or any transportation agency, the full amount unpaid hereon shall become due and payable forthwith, and vendee agrees to accept and pay draft for the amount. In default of any payment or other condition herein expressed said property may be removed by the vendor or its agents without legal process, and all payments made shall be retained by vendor as liquidated damages for the use thereof and not as a penalty. When payment in full shall have been received the property shall belong to the vendee.

It is agreed that this order shall not be subject to countermand or recission by vendee and that it

covers all agreements concerning this transaction of every name and nature, and no representations or agreements made by an agent or any other person not included herein, shall be binding.

The loss, injury or destruction of said property shall not operate in any manner to release vendee from payment as provided herein, and renewals or extensions in time of payment shall not release vendee from the conditions of this agreement. The vendee expressly waives as against this agreement all exemptions and homestead laws, and all claims for damages of whatever nature, and further expressly waives any and all provisions of law wherein and whereby it is required any sum of money shall be repaid to vendee, or that said property shall be sold at public or private sale upon notice to vendee, and any part of the proceeds accounted for or paid over to vendee. Nothing contained herein shall prevent vendor from taking such legal action as it may deem fit for the recovery of the money agreed to be paid hereunder. The delivery of a duplicate of this agreement to vendee is hereby acknowledged.

One Year Guarantee

Vendor agrees to guarantee said machine to undersigned vendee for one year from date of invoice. Should it get out of working order through ordinary use, during the period of this guarantee, vendor will make all repairs and adjustments without charge. (This guarantee does not include stands or trade accessories, nor the replacement of machine parts damaged by accident, abuse or violence; nor does it include the furnishing of ribbons or other supplies.)

It is expressly understood that all payments hereunder are to be made by check, draft or money order payable to the Wales Adding Machine Company, Wilkes-Barre, Penn'a. For any payment not so

made vendee agrees to accept and pay sight draft when presented.

Signed C. G. Huver.
By

Witness
R. M. Vanderh

Official Title.
W. H. McFarland
District Mgr.
R. M. Vanderh
Sales Agent Credited
R. M. Vanderh
Sales Agent Closing

Accepted at Wilkes-Barre, Pa.,
6-3-1920.
Wales Adding Machine Company,
By Id
Wol.

A cash payment of at least 10 per cent. must accompany all orders except those payable within the discount period.

EXHIBIT D1.

THE ADDER MACHINE COMPANY
Main Office and Factory, Wilkes-Barre, Pa.
Manufacturers of
WALES VISIBLE ADDING and LISTING MACHINES

When Answering Address
District Office
1035 Chestnut Street
Philadelphia, Pa.

Philadelphia, Pa., May 15, 1920

Mr. C. G. Huver,
Bridgeton, N. J.

Dear Sir:

We beg to advise that the Wales adding machine that you have, No. 54519, has been sold to a Philadelphia concern and it is necessary to ask that you ship it at once to our Philadelphia office so that delivery can be made as promptly as possible.

We trust that you will give this your prompt attention and advise us on day shipment goes forward so that we may know that it is on its way as we are anxious to make delivery as soon as possible.

Yours very truly,
Wales Adding Machine Company
W. H. McFarland
District Manager

McF/L

TESTIMONY.

CUMBERLAND COUNTY APPEALS TO COMMON PLEAS.

WALES ADDING MACHINE COMPANY,
Appellee,
vs.
C. G. HUVER,
Appellant.

Bridgeton, N. J., May 10, 1922.

TESTIMONY

Before HON. WILLIAM A. LOGUE, Judge, and jury.

APPEARANCES:
For the appellee, LINWOOD W. ERICKSON, ESQ.
For the appellant, REX A. DONNELLY, ESQ.

(Jury impanelled and sworn.)

R. M. VANDERHERCHEN, sworn for appellee.

Direct examination.

By Mr. Erickson:

Q. Mr. Vanderherchen, where do you live?
A. Ventnor, New Jersey.
Q. And that is in Atlantic City?
A. That is in Atlantic City, just below.
Q. What is your business?
A. Sales agent for the Wales Adding Machine Company in Southern Jersey.
Q. Do you know Mr. Charles Huver of the City of Bridgeton?
A. Yes, sir.
Q. You had some dealings with Mr. Charles Huver?
A. Yes, sir.
Q. Under what conditions did you, if you ever went to see Mr. Huver?
A. My junior salesman placed a machine on trial with Mr. Huver.

Mr. Donnelly: Do you know this of your own knowledge?

A. Yes, because I signed the shipping receipt for having the machine leave Philadelphia. In other words we signed our own shipping receipt for the shipment. Then I afterwards called on Mr. Huver and demonstrated that machine in his office.
Q. That was the machine for which you signed the order?
A. Yes.

Q. You found that machine in the office of Mr. Huver in the City of Bridgeton?

A. Yes, sir.

Q. All right; go ahead.

A. Now I made one call after that and then on August twelfth—

Q. When did you call first?

A. I will have to look at my prospective card.

Q. What is the card you are now looking at?

A. It is a card which we use, which we call it a prospect card?

Q. What have you on that card?

A. The city, Bridgeton, New Jersey.

Q. Notes or memorandums of what you have done?

A. Yes.

Q. You are using that for the purpose of refreshing your memory?

A. Yes.

By Mr. Donnelly:

Q. When was that memorandum made?

A. That memorandum was made at the time before the, I think at the time the demonstration was called for or trial was made.

Q. Did you make it yourself?

A. No, it was made by my junior, reverse side was made by myself.

Mr. Donnelly: I object to the use of that card.

By Mr. Erickson:

Q. There is a part of that card you made yourself?

A. Yes, sir.

Q. At the times you made the various trips there?
A. Yes, sir.
Q. You are regarding the card now as to dates?
A. Yes, sir.
Q. Go ahead.
A. I called on him on July eighth and demonstrated the machine to him and then called on the twenty-first and called on the thirty-first.
Q. Called on the twenty-first of what?
A. Of July, then I called on him on July thirty-first.
Q. For what purpose?
A. To try and secure the order.
Q. And demonstrate the machine?
A. I demonstrated it July eighth.
Q. Did Mr. Huver apparently seem pleased with it?
A. Seemed to.

The Court: What year was this?

A. This was in 1919.

Mr. Donnelly: I object; here is something took place a month before the signing of this contract as to another machine all together from the one that was purchased and I think it is immaterial.

Mr. Erickson: If your Honor please, it is a matter drawing up to the signing of this order and I think it is all perfectly competent for the purpose of showing the transactions that took place.

The Court: I will admit it long as it does not vary the terms of the contract.

(Exception noted for appellant.)

A. Then August twelfth I called on Mr. Huver and he wanted a cheaper machine than the one we had on trial. I told him of what we term a 19B machine, which is the model number of that machine.

Mr. Donnelly: I object to conversations in regard to something that took place just previous to the signing of the contract; the contract speaks for itself.

The Court: I think there is some more of it, though, that is competent.

Mr. Erickson: This calls for, which I expect to offer in evidence, the 19B machine, and I haven't got to the signing of the contract.

Q. Did Mr. Huver sign a contract?

A. He signed a contract for a 19B second-handed machine.

Q. I show you a paper writing purporting to be a contract and ask you what it is?

A. It is a contract for a second-handed 19B machine for $125.

Q. Made between who?

A. Mr. Huver and the Wales Adding Machine Company.

Q. And you were the agent for the Wales Adding Machine Company?

A. Yes, sir.

Q. Was Mr. Huver's signature signed to this contract in your presence?

A. Yes, sir.

Q. Did you see his signature?

A. Yes, sir.

Q. Is that his signature at the bottom?

A. That is his signature.
Q. And what does that contract call for?
A. $125. $12.50 cash with the order and twelve—

Mr. Donnelly: Contract speaks for itself. I don't think we can go into a verbatim statement of the contract.

Mr. Erickson: I will offer the contract in evidence.

(Contract admitted and marked P1.)

Q. At the time Mr. Huver signed that contract, as I understand you, he had a machine in his possession?
A. Yes, sir.
Q. What kind of a machine was that?
A. That was a higher priced machine.
Q. A different kind of a machine from what he had asked for?
A. Yes, sir; it was a model 20 construction, when the one second-handed would be a model 10 construction.
Q. Did you have—this contract calls for a second-handed machine; did you ever talk with Mr. Huver in reference to when you might be able to deliver to him the kind of a machine which he had asked for?

Mr. Donnelly: I object; contract speaks for itself.

The Court: The question is permissible. I will admit the question.

(Exception noted for appellant.)

A. I didn't have any 19B's on my second-handed list, so I agreed to loan him a machine until we could secure him a machine for him to apply on the order.

Q. You agreed to loan him the machine then in his possession?

A. Yes, sir.

Q. Until such time as you could deliver to him the second-handed 19B machine?

A. Yes, sir.

Q. Was that satisfactory to him? 10

A. Seemed to be. He signed the order.

Mr. Donnelly: I object and move that be stricken out.

(Question allowed and exception noted for appellant.)

Q. When was Mr. Huver delivered a 19B machine?

A. It was shipped from Philadelphia on May— 20 our express receipt shows it was shipped May 28, 1920.

Q. That was ten months afterwards?

A. Ten months afterwards.

Q. During that time he had had the use of the other machine?

Mr. Donnelly: I object. He doesn't know he had the use of it.

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Q. During that time the other machine was in the possession of Mr. Huver?

A. Yes, sir.

Q. What happened to the machine, the 19B machine which was delivered to Mr. Huver?

A. That came back with the machine that we had loaned him by express.

Q. Both machines were returned at the same time?

A. Yes, sir.

Q. On the same express order?

A. Yes, sir; I don't know whether they were billed on the same express order; they were delivered at our office at the same time.

Q. By whom?

A. By Adams express.

Q. After that did your company write—did you write or your company write under your directions anything to Mr. Huver in reference to that machine?

A. I called Mr. Huver's office up either that day or the day following.

Q. Yourself?

A. Myself.

Q. And what did you tell them?

A. And Mr. Huver, he could not answer the phone, but whoever answered the phone told me Mr. Huver was sick and would write us a letter in writing, making an explanation by letter in a day or so.

Q. And what did you say to him in reference to the machine?

A. Told him we had received the machine but would not accept cancellation of the contract, that we were holding the machines subject to his order, that we had the machines in our office.

Q. Subject to his order?

A. Yes, sir.

Cross-examination.

By Mr. Donnelly:

Q. When did Mr. Huver have this second-handed model 19B machine demonstrated to him?

A. Never. I never demonstrated it; never was demonstrated to him.

Q. It was never demonstrated to him?

A. No.

Q. It was immediately returned as soon as it was received?

A. Must have been, came right back about three days afterwards.

Re-direct examination.

By Mr. Erickson:

Q. Has there ever been anything paid on account of this contract except the original $12.50 paid by Mr. Huver?

A. No, sir.

Q. Then the amount now due is $112.50 and, under the terms of the contract, interest thereon for the six months period dating after the delivery of the machine, which was in May of 1921?

A. I didn't quite catch that question.

Q. The machine was delivered in accordance with the terms of this contract in May, 1920?

A. Yes.

Q. And under the terms of this contract it bears interest six months after the date of invoice?

A. Yes.

Q. And that would be interest from November, 1920, so that there is now due on this contract $112.50 plus interest from November of 1920?

A. Yes, sir.

PLAINTIFF RESTS.

MOTION FOR NON-SUIT.

Mr. Donnelly: If your Honor pleases, we now move to non-suit this case on the ground that this contract or this paper writing or order has a clause in it that reads as follows: "Nothing but acceptance in writing from vendor's home office, Wilkes-Barre, Pa., shall constitute acceptance of this order by vendor." There is absolutely no proof whatever in the case to show that the home office in Wilkes-Barre, Pa., of the Wales Adding Machine Company ever accepted this order in writing—

The Court: That is for the protection of the vendor, isn't it?

Mr. Donnelly: But I want to call your Honor's attention to the situation that if the vendor of a contract, one of the parties to a contract is not bound until acceptance, there is no acceptance of that contract, neither is the purchaser bound. In other words Mr. Huver could not have been bound on this contract if the Wales Adding Machine Company was not bound, otherwise it would be a unilateral contract which all authorities hold is unlawful and void and that, hence, there could be no contract between the Wales Adding Machine Company and Mr. Huver until there was a meeting of the minds and assent, and that assent in this case was specific and provided that there must be acceptance in writing from the vendor's home office at Wilkes-Barre, Pa. Now undoubtedly that was a dumping clause that was put in this contract by this manufacturing company for the purpose of protecting this company from any

contract which its salesmen might make on the road which they did not want to accept, so that, when this order was taken it was merely an order, it was a one-sided contract, and could not become valid and binding upon both the parties until there was an acceptance and meeting of the minds. Now there could not have been any meeting of the minds in this case until there was an acceptance of this contract and assent to the terms of it by the home office of the Wales Adding Machine Company at Wilkes-Barre, Pa.

If your Honor please, I overlooked to call your Honor's attention to the fact that this question of acceptance, while it may not have been acceptance within the meaning of the contract, because the contract provides for acceptance in writing, a very lame and clumsy attempt was made to create an acceptance of this contract, which appears right in the state of demand or the pleadings themselves, which I call your Honor's attention to, which clearly puts them out of court and entitles us to a non-suit. At the bottom of the contract appears: "Accepted at Wilkes-Barre, Pa., 6/3/20." This contract was made on August 12, 1919; this machine was returned, the contract rescinded on the first day of June, 1920, two days before there was ever any indication of any kind of an acceptance from the Wilkes-Barre, Pa. home office. Now that appears in the pleadings themselves and so clear it seems to me that we are entitled to a non-suit.

The Court: I will deny the motion to non-suit.

(Exception noted for appellant.)

Adjourned until 10 A. M.

Bridgeton, N. J., May 11, 1922.

Trial of the cause resumed at 10 A. M.

Mr. Donnelly: If your Honor please, I am not sure whether the record shows there was a complete ruling upon one of the points in the case yesterday, although probably it was an oversight on the part of counsel, and I think there ought to be a direct ruling upon the point. I refer to the clause which says that the machine shall be shipped as soon as convenient. You recall your Honor allowed evidence to go in yesterday over objection to the effect that another machine was left there until the second-handed machine arrived. There was some such arrangement as that between the agent and Mr. Huver and the objection to that was that, first, the contract spoke for itself, and, second, that would clearly make a new contract. Now I don't think that I explained to your Honor fully what I meant when I made the objection that the contract spoke for itself and for that reason I ought to state my objection more fully to be fair to all of us, and it is that, that there is a clause in the contract itself in regards to agreements of that nature and it reads like this: "It is agreed that this order shall not be subject to cancellation or rescission by vendee and that it covers all agreements concerning this transaction of every name and nature and no representations or agreements made by an agent or any other person not included herein shall be binding." Now it seems to me, in view of that clear language of the contract itself, that that evidence can't be admissible and should not be allowed to stand and I

think it is important we have a ruling of your Honor on the point before we go into a defense, because that was apparently the understanding between the parties and in the face of the contract so it would appear that this evidence in regards to this second-hand machine can't be admissible.

The Court: What do you refer to now, some evidence that was produced by the plaintiff?

Mr. Donnelly: Some evidence produced by the plaintiff to the effect that this demonstrating machine was left there and it was to be left there until the second-hand machine arrived because it conflicts with the contract because the contract is complete in itself.

The Court: Any ruling I made on the evidence when it was offered will stand.

Mr. Donnelly: Does your Honor still hold that that evidence under the terms of the contract still is admissible? I didn't call your Honor's attention to it.

The Court: I understood your motion for a nonsuit was based upon that clause in the contract which says nothing but acceptance in writing from vendor's home office, Wilkes-Barre, Pa., shall constitute acceptance of this offer by vendor?

Mr. Donnelly: That was the ground for that nonsuit, your Honor please, but this other went into the admissibility of the evidence at the time it was objected and I did not call your Honor's attention specifically to those words of the contract.

The Court: I will deny the motion.

(Exception noted for appellant.)

C. G. Huver, sworn for defendant.

Direct examination.

By Mr. Donnelly:

Q. Mr. Huver, are you the defendant in this suit?
A. Yes, I am.
Q. You recall at the time this order was given in reference to this machine that is involved in this case?
A. Yes.
Q. And the signing of an order in reference to it? Is that the order that you signed, Mr. Huver?
A. Yes, I assume it is. It is my signature.
Q. Do you recall the gentleman who took the order for that contract?
A. Yes.
Q. Is the gentleman sitting here?
A. Yes.

Mr. Donnelly: Now I understand from your Honor's rulings that it is admissible to prove arrangement in regards to this demonstrating machine in connection with this suit in this case?

The Court: Preliminary to making the agreement?

Mr. Donnelly: Yes.

Q. Was there any arrangements of any kind between you and Mr. Vanderherchen in reference to this machine outside of the terms of the contract? If there were, what were they?

A. Well, it is my understanding or at least my thought at this time, due to the length of time, that the new machine was simply to be left there as originally was as a demonstrator.

Mr. Erickson: If your Honor please, I object to that. That is directly in contradiction of the contract which this man admits that he signed.

The Court: Objection sustained.

Mr. Donnelly: I do not understand what force the objection has after the witness has answered the question.

Mr. Erickson: I now move it be stricken from the record, to be technical about it.

The Court: Motion allowed.

Mr. Donnelly: I surely object to that because the answer, the witness is telling now his recollection of what took place.

The Court: The motion has been allowed.

Mr. Donnelly: The witness yesterday was allowed to testify in regards to this other machine, clearly outside of the terms of the contract and would appear to be inadmissible. Now your Honor has admitted that evidence; that being so, we surely have a right to go back and show this Court and jury what our understanding was, if there was any understanding about. We surely have a right to meet any recollection or any statement made by the agent.

Q. Mr. Huver, was there any arrangement made outside of the contract in reference to any other machine but this machine?

A. Not as my memory serves me.

Q. As the best of your recollection there was not?

A. No.

Q. How did this other machine come to be in your place?

A. It was brought there, as machines of that type usually are, for demonstration.

Q. How long was it there before this contract was signed, do you recall?

A. Not exactly, no. I would think some couple of weeks, something like that. I would imagine; I just can't recall exactly.

Q. Was there more than one of the plaintiff's agents at your place of business in reference to this machine or either of them?

A. Not with me.

Q. Not with you present?

A. No.

Q. Now you signed this contract with this gentleman here?

A. Yes.

Q. There is a clause in this contract that says that it shall be shipped or delivered as soon as convenient. What was your understanding as to the meaning of those words?

Mr. Erickson: Just what was the conversation that took place at that time?

A. As I recall it ——

Mr. Donnelly: I didn't ask about the conversation. I asked what his understanding was of the meaning of those words to which he put his name.

A. My understanding was that we use the machine ——

(Question repeated.)

A. It was explained to me by the salesman that they furnished rebuilt machines at the figures understood between him and I and at times they carried those in stock and at times it might be possible to get one, and on the strength of that I signed the contract. I supposed the machine would arrive within a reasonable length of time.

Q. Did the agent state to you within what time the machine should arrive?

A. At what time?

Q. Within what time it should arrive?

A. I think not, not specifically as to the date.

Q. What was that?

A. There was no specific date set forth as to what time as I recall it.

Q. When was this contract signed?

A. The exact date, 1919—dated in August, I assume it was around that time.

Q. When did this machine arrive?

A. Sometime in May, 1921.

Q. Then the machine was not delivered until May of the following year?

A. I would like to add to that that I was sick at the time the machine arrived, so the exact date I can't give you.

Q. Don't you know the time of the delivery of this machine?

A. Beg pardon.

Q. Don't you know the time of the delivery of this machine?

A. Yes, but I didn't receive the machine; I thought that is what you meant.

Q. I know, but the time it was received at your store or got there at the store, arrived at the store, probably the better words, arrived?

A. About May twenty-seventh, something like that.

Q. Of the following year?

A. Yes.

Q. It was ordered in August of 1919 and was not left at the store until May of the year following?

A. That is right.

Q. That is correct, is it?

A. That is correct.

Q. Now you were not at the store when it got there, were you?

A. No.

Q. Where were you?

A. Home, sick.

Q. Who had charge of the matter, do you know?

A. Mrs. Huver was at the office.

Q. Mrs. Huver had charge of the matter?

A. Yes.

Q. Now, Mr. Huver, did you ever receive any notice, after you signed this contract, that your order had been accepted by the Wilkes-Barre office of this company?

A. Not to my knowledge, no.

Q. Did you ever receive any bill from these people for rental of this machine?

A. No.

Q. At any time?

Mr. Erickson: Which machine, Mr. Donnelly?

Mr. Donnelly: The machine in suit.

Mr. Erickson: He only had that four days.

A. No.

Q. Did the plaintiffs ever present to you any sight draft?

A. No.

Q. For the amount of the bill?

A. No.

Q. Have you ever refused to pay any sight draft that has ever been presented to you for the amount of the bill?

A. There hasn't been any received that I know of.

Q. You never received any?

A. No.

Q. Did you ever receive any written notice from these people in regard to this machine after the first day of June, 1920?

A. The only papers that I have pertaining to the transaction is this form that is there.

Q. Did you receive a letter from the plaintiff sometime in May of 1920?

A. Yes.

Q. Will you say whether that is the letter?

A. Yes.

Mr. Donnelly: I offer it in evidence.

Mr. Erickson: I object to it. It has no bearing on this case.

The Court: Objection sustained.

(Exception noted for appellant.)

Q. Mr. Huver, you didn't ship these two machines back, did you?

A. No, I didn't.

Q. Do you know who did?

A. Mrs. Huver attended to it.

Q. This machine that was left there, this new machine, we will call it, was that ever in use around your office while it was there?

Mr. Erickson: I object to that; don't make any difference whether it was in use or not. He had the machine and it was there for his use if he wanted to use it, whether or not he used it don't enter into this case.

The Court: This is the machine that was left on trial?

Mr. Erickson: The question, as I understand it, is, did he use the machine that was left there? The machine was left there for his use and he had the possession of it for about eleven months; whether or not he saw fit to use it is no fault of ours. We don't know whether he used that or not. We have no way of contradicting him regardless of what his answer is and it has no significance in the case.

(Objection sustained. Exception noted for appellant.)

Q. Who was in your office during the time this machine was there, Mr. Huver?

A. Mrs. Huver.

Cross-examination.

By Mr. Erickson:

Q. Mr. Huver, you say this machine was left at your office for demonstrating purposes?

A. Yes.

Q. The agent brought it to your office for the pur-

pose of making a sale to you of this first machine, did he not?

A. Well, the machine was left there originally the same as ——

Q. Just answer the question, or was ——

Mr. Donnelly: He is answering the question. You can't get an answer the way you want it. He has a right to answer it in his way.

(Question repeated.)

A. I wouldn't say yes to that.
Q. Would you say no to it?
A. No.
Q. All right.

Mr. Donnelly: How is that material? Your Honor has already ruled this other machine is not material to the case? How is that question material anyhow? I object to it.

(Objection overruled. Exception noted for appellant.)

Q. Now, Mr. Huver, there is a clause in this contract that they will deliver to you this machine in question as soon as convenient, is there not?

A. I think there is. I can't recall just now the words of the contract.

Q. And there was an understanding between you and the agent in whose presence you signed this contract in reference to when a delivery of the machine, which you here contract to buy, would be delivered, was there not?

A. There was no specific date mentioned, as I recall it.

Q. Did he not tell you at that time that he had no second-hand machines of this kind on his list?

A. As I recall it he made a statement that they occasionally did have machines and occasionally had to take in machines and rebuild them.

Q. And he told you at this time he had no machine of this kind on his list, did he not?

A. I think he did.

Q. And because of the fact that you needed an adding machine and that he had not this kind of a machine on his list, he agreed to leave that for your use, the adding machine which you then had until such time as a delivery of the machine could be made in accordance with your contract, did he not?

A. Well, if he made it, I wouldn't like to say he didn't.

Q. And a delivery of the machine was made to you in accordance with this contract, was there not?

A. The machine arrived several months afterwards.

Q. And during all of this time you had had the use of the other Wales adding machine if you saw fit to use it?

A. The other machine was there in the office.

Q. And you say you had never paid any sight draft, neither have you ever paid the balance due on this contract, have you?

A. No.

Mr. Donnelly: If your Honor please, I want to renew my offer in regards to the admissibility of that letter in view of counsel's specific question in regards to this conversation about this other machine, purely admissible.

Mr. Erickson: If your Honor please, this man admits that was the conversation and just did ad-

mit it. I don't see how you are going to contradict your own witness.

Mr. Donnelly: He says it may have happened. He does not say it did not.

The Court: What possible materiality has this letter? It refers to an order to ship back the machine which he had on trial. Now it was shipped back, wasn't it?

Mr. Donnelly: If your Honor please, plaintiff don't claim we had it on trial, claim we had it there under this contract arrangement. The letter shows it was there on trial; that is the reason I think it is proper to go in.

The Court: Is there any question but what it was there on trial?

Mr. Donnelly: Mr. Erickson says it was left there for the specific purpose so this man could use it until the other arrived, not on trial.

The Court: We will save time by letting the letter go in.

(Letter admitted and marked Exhibit D1.)

MRS. IDA HUVER, sworn for appellant.

Direct examination.

By Mr. Donnelly:

Q. Mrs. Huver, are you the wife of the defendant?
A. Yes.
Q. You recall at the time this adding machine arrived at your husband's place of business?
A. No.
Q. Do you know about when it was?
A. No, I don't know anything about that.
Q. Were you at the store during the time Mr. Huver was ill in June of 1920?
A. Yes.
Q. Or the last part of May?
A. Yes.
Q. Did a machine arrive from the Wales Adding Machine?
A. In 1920?
Q. Yes.
A. Yes.
Q. Do you recall about when it was?
A. Yes, it was on June 1st.
Q. When was it?
A. June 1st.
Q. June 1st?
A. Yes.
Q. 1920?
A. Yes.
Q. Have you any way of fixing that date?
A. Yes, I have little instances happened, I entered it in my cash book where I had paid the men for taking this back and I sent the others back the same day that they came.

Q. And you fix that date with a memorandum in the cash book for the expressage on the machines?

A. Yes.

Q. Where did you ship those machines?

A. Adams Express.

Q. Where to?

A. Some place ten hundred and something Chestnut Street.

Q. Philadelphia?

A. Yes.

Q. That is the new machine that has been talked about in this case and another machine; did you examine it?

A. Never opened it.

Q. Were you at the store or Mr. Huver's place of business when it arrived?

A. No, sir.

Q. Where were you?

A. Home, at lunch time.

Q. Do you know about what time it arrived?

A. Yes, at lunch time, between twelve and one.

Q. Who was there, do you know, if anybody, at Mr. Huver's place when it arrived?

A. There wasn't anybody there.

Q. Now, when you returned to the store did you find it there?

A. Yes, it was sitting outside.

Q. It was already crated and ready for shipping?

A. I sent it back just as it came.

Q. And you returned the two machines at the same time?

A. Same time.

Q. To the Chestnut Street office?

A. Yes, sir; in one shipment.

Q. Did you ever receive any word from either the Wales people or the express company as to whether

those machines had been received by the Wales Adding Machine?

Mr. Erickson: I object to that. This woman is not a party to the suit.

Mr. Donnelly: She is in the office.

The Court: I will admit the question.

A. No, sir.

Q. Mrs. Huver were you in the office during the year 1919?

A. Part of the year.

Q. Part of the time?

A. Yes.

Q. Did you have any charge of Mr. Huver's office or correspondence?

A. I had charge of all of it.

Q. During the time that you were there, to your knowledge did you ever receive any notification from the Wales people in writing from their Wilkes-Barre office that they had accepted any order for any second-handed machine?

A. No, sir, never heard a word from them.

Q. Did any of the salesmen call at Mr. Huver's office while you were there in reference to either one of these machines?

A. There was a gentleman came in one morning and asked me how I liked the machine.

Q. When was that? Which machine was that, the new machine?

A. The first machine.

Q. How long was that after it had been put in the place, do you know, or left there?

A. This was about the beginning of October or the latter part of September.

Q. Beginning of October?
A. As I recall.
Q. What was the conversation?

Mr. Erickson: Who was this man came to see you?

A. I don't know who it was.

Mr. Erickson: Then I object to the question.

Q. Who did he state he was?
A. He said he was a salesman from the Adding Machine Company.
Q. Wales Adding Machine?
A. Yes.
Q. And what did he ask you?
A. He asked me how I liked the machine.
Q. What did you tell him.
A. I told him I didn't never use it.
Q. What did he say in reply to that?
A. He said, "I will send for it." He said, "It can stay here until we get a place to put it."
Q. He said he would send for it as soon as he got a place to put it?
A. Yes.
Q. This was in October, 1919?
A. Yes.

Cross-examination.

By Mr. Erickson:

Q. You say Mr. Huver never received any notice of the acceptance of this contract?
A. No.
Q. It is entirely possible Mr. Huver may have received the notice without your knowing it?
A. No.

Q. It is entirely possible Mr. Huver may have received the notice without your knowing it?

A. No, he couldn't get any notice.

Q. Then you took charge of his entire matters?

A. I did at that time.

Q. You are with him every day?

A. Yes.

Q. And every minute, so it would be absolutely impossible for him to receive any letters without you knowing it?

A. I am not with him every minute but I get all the mail.

Q. And you are willing to swear that it would be absolutely impossible for him to have received any notice without you knowing it?

A. Yes.

Q. And you do know that he received the Wales Adding Machine, do you not?

A. Yes, I saw it there.

Q. You don't know anything about who this man was?

A. No.

Q. You don't know where he came from?

A. He told be from the Wales Adding Machine.

Q. You don't know of your own knowledge where he came from?

A. No.

Q. And you don't know who he was?

A. No.

Q. Where he went?

A. No.

Q. Never have seen him since?

A. I wouldn't know him if I saw him again, only tall and thin.

APPELLANT RESTS.

TESTIMONY CLOSED.

MOTION FOR DIRECTION.

Mr. Donnelly: If your Honor please, I want to renew my motion to direct a verdict on the ground already stated in my motion to non-suit and on the further grounds that it is one of the conditions precedent that will appear in this case that a draft should be sent to this defendant and the payment of that refused before an action can be brought under this order, if I understand the reading of it. "If cash payment is not made as agreed or if there be default at any time in any payment or other condition of this agreement * * * the full amount unpaid hereon shall become due and payable forthwith and vendee agrees to accept and pay draft for the amount." The last clause provides, "It is expressly understood that all payments hereunder are to be made by check, draft or money order payable to the Wales Adding Machine Company, Wilkes-Barre, Pa. For any payment not so made vendee agrees to accept and pay sight draft when presented." Now, the contract says in case of default the method of payment shall be a draft and it would seem to me, that a sight draft should be sent and presented to the defendant and he should refuse to make payment before there was really a default under the contract. Of course where no method whatever is provided in the contract as to the manner of payment in case of default, it would make no difference, but where the parties agree in writing under their solemn signature as to the method in which presentation and payment is to be made; it would seem to me that it should be of such binding force that an action could not be maintained until that part of the contract had been carried out.

There is another feature of the case that I think raises a legal question and that is, there is a provision in this contract that in case of default the party can take possession of the property. I don't know whether that is binding or not, but I do want the record to show that where a party has taken possession or retains possession of the property after a default. Now, there is nothing in this case to show but what these people are holding this machine under the power which they have in their contract to take this machine for the amount in default on the payment, and I submit that the evidence should show clearly and beyond peradventure that they are not holding this machine for the purpose of this default clause in their contract of taking the machine back and in the next breath sue us for the price of it.

The Court: Motion denied.

(Exception noted for appellant.)

CHARGE OF THE COURT.

LOGUE, J.:

Gentlemen, the plaintiff sues for the recovery of $112.50, balance due on a contract for the sale and delivery of a Wales Adding machine to the defendant, the price of which was to be $125. It seems that the defendant has paid on account $12.50, leaving a balance due of $112.50 which the plaintiff claims to be still due and payable to him. Now, the contract is offered in evidence, signed by the defendant and the plaintiff relies upon that contract to recover. The contract is dated August twelfth, 1919, and delivery, as I recollect it, of the machine called for in the contract was in June, 1920. The delay is explained by the representative of the company due to the fact that defendant wanted a second-hand machine and they did not always have these second-hand machines in stock, but he agreed to send him one just as soon as they got one, and they did send one in June, 1920. In the meantime there was a machine left in the possession of the defendant for his use until the Wales Adding Machine could get the kind of machine he wanted and send him. I do not recall any other evidence, any other complaint by the defendant of the delay in the receipt of the machine called for by the contract. You may recall some; I don't. Now, when the machine, which the contract called for, arrived in June, for some reason the defendant shipped it back within four days, also returned, as he was bound to do, the machine which he had had on trial for several months. I do not recall in the evidence any explanation which has been made

by the defendant as to why he failed to receive the new machine called for by the contract. You may recall some; I don't.

Now, the defense seeks to avoid the payment of the balance due on this contract because of failure on the part of the plaintiff to perform on its part the contract which they made with the defendant.

I am requested to charge on the points raised by the defense as an excuse on the part of the defendant for not receiving and keeping this machine which was called for in the contract. The first is that, "When a written order for the sale and delivery of goods is obtained by a vendors agent and the terms of the same provide that 'nothing but acceptance in writing from vendors home office, Wilkes-Barre, Pa., shall constitute an acceptance of the order by vendor,' the buyer is not legally bound by said order until it is so accepted by vendor." Now, the contract in the printed part says what I have read in the request to charge with regard to the acceptance by vendor, that is the Wales Adding Machine, in writing on the contract made by it. With respect to that I charge you, gentlemen, that the fact of the shipping of the machine called for by the contract by the Wales Adding Machine was sufficient acceptance of that contract without having actually accepted it in writing on the contract itself or by letter to the defendant.

The next request to charge is, "If any of the terms of the written order in suit have not been complied with by plaintiff, plaintiff cannot recover." I assume that by the written order the counsel for the defendant means the contract which is the subject of this suit. I will charge you that the plaintiff, to entitle it to recover, is bound to show to your satisfaction a substantial compliance with this contract

and it must appear on the part of the plaintiff no failure to comply with the terms of this contract to the prejudice of the defendant.

Third: "If the understanding for the delivery of the machine was as claimed by defendant under the terms of the written order 'as soon as convenient,' that means within a reasonable time, and if the machine was not delivered within a reasonable time plaintiff cannot recover." Now, the delay in the delivery of this machine, as I have already stated, is explained by the agent of the Wales Adding Machine as due to the fact that the machine to be delivered under the contract was a second-hand machine which they did not always have in stock. You will take that provision of the contract and the explanation of the agent of the plaintiff and reconcile them, if you can. And I do not, as I have said, understand that the defendant ever found fault with the failure on the part of the Wales Adding Machine to comply with this part of the agreement and ship the machine within a reasonable time.

"4. Not only must plaintiff show defendant has made default under the terms of the order in suit, but that plaintiff sent to defendant a draft payable at sight for the amount of the default and that defendant when the draft was presented to him refused to pay the same." I understand it to be the contention of the counsel for the defendant that the presentation of a sight draft was a necessary condition precedent to the bringing of a suit. I decline to charge anything of the kind. The presentation of a sight draft generally follows default in making payments provided for in a contract of any kind.

"5. The burden of proving every essential element of the plaintiff's case as alleged by its pleadings is upon plaintiff and if plaintiff has not done

so by the preponderance of evidence, it cannot recover." Of course, gentlemen, in all suits to recover by the plaintiff, he must satify you by the preponderance of evidence that he is entitled to recover. That burden of proof is always upon the plaintiff, so that, if you should find that the plaintiff has failed to convince you by assuming the burden of proof and the preponderance of evidence that he is entitled to recover, you should not give him a verdict, but, on the other hand, if you find that the plaintiff has substantially complied with this contract and is entitled to recover, you will render a verdict in favor of the plaintiff for $112.50 with interest from June first, 1920, which I believe is the date of the delivery of the machine called for under the contract.

Mr. Erickson: I call your Honor's attention to the contract that only calls for interest six months after the date of invoice, so the interest is payable from November first, 1920.

The Court: The state of demand calls for interest from June first; that is a mistake?

Mr. Erickson: Yes, six months after the date of invoice.

The Court: Then the plaintiff's claim is $112.50, interest from November first, 1920. On the other hand, if you find plaintiff has not delivered the machine in compliance with that contract and is not entitled to recover, your verdict will be no cause of action.

APPELLANT'S EXCEPTIONS.

Mr. Donnelly: I want an exception to the refusal of the Court to charge the first request as requested.

(Exception noted.)

I want an exception to the refusal of the Court to charge the defendant's second request, as requested.

(Exception noted.)

I want an exception to the refusal of the Court to charge the defendant's fourth requested as requested.

(Exception noted.)

I want an exception to that part of the Court's charge in which the Court said that no explanation had been given by the defendant why he had not received the machine.

(Exception noted.)

Also an exception to that part of the Court's charge in which the Court charged the jury that the shipping of the machine was a sufficient acceptance of the contract.

(Exception noted.)

Also an exception to that part of the Court's charge in which the Court said that the plaintiff

must carry out all the parts of the contract, the failure of which are prejudicial to the defendant.

(Exception noted.)

Also an exception to that part of the Court's charge in which the Court says that the explanation of the agent in regards to the delivery of this machine was sufficient explanation as to the clause in the contract as to reasonable time.

(Exception noted.)

Also an exception to that part of the Court's charge in which he says that the defendant did not find any fault with the machine when it arrived. The main objection to these comments of the Court were that they were prejudicial to the defendant and contrary to law.

(Exception noted.)

REASONS.

NEW JERSEY SUPREME COURT.

WALES ADDING MACHINE COMPANY, *Defendant-in-Certiorari,* vs. CHARLES G. HUVER, *Prosecutor-in-Certiorari.*	On Certiorari. Reasons.

The judgment below is unlawful and should be set aside for the following reasons:

1. Because the trial Court refused to non-suit plaintiff on the motion of defendant.

2. Because the trial Court refused to direct a verdict in favor of defendant at the close of the case.

3. Because the trial Court refused to charge the jury as requested in defendant's first request.

4. Because the trial Court refused to charge the jury as requested in defendant's second request.

5. Because the trial Court refused to charge the jury as requested in defendant's fourth request.

6. Because the Court erroneously charged the jury as follows:

"I will charge you that the plaintiff, to entitle it to recover, is bound to show to your satisfaction a substantial compliance with this contract and it must appear on the part of the plaintiff no failure to comply with the terms of this contract to the prejudice of the defendant."

7. Because the Court erroneously charged the jury, as follows:

"With respect to that I charge you gentlemen that the fact of the shipping of the machine called for by the contract by the Wales Adding Machine was sufficient acceptance of that contract without having actually accepted it in writing on the contract itself or by the letter to the defendant."

8. Because the Court erroneously charged the jury, as follows:

"Now, the delay in the delivery of this machine, as I have already stated, is explained by the agent of the Wales Adding Machine as due to the fact that the machine to be delivered under the contract was a second-hand machine which they did not always have in stock, you will take this provision of the contract and the explanation of the agent and reconcile them if you can. And I do not as I have said, understand that the defendant ever found fault with the failure on the part of the Wales Adding Machine to comply with this part of the agreement and ship the machine within a reasonable time."

9. Because the trial Court admitted illegal evidence over objection and exception of defendant, as follows:

"Did you have—this contract calls for a second-hand machine, did you ever talk with Mr. Huver in reference to when you might be able to deliver to him the kind of machine which he had asked for?

A. I didn't have any 19 B's on my second-hand list, so I agreed to loan him a machine until we could secure him a machine for him to apply on the order.

Q. You agreed to loan him the machine then in his possession?

A. Yes, sir.

Q. Until such time as you could deliver to him the second-handed 19 B machine?

A. Yes, sir.

Q. Was that satisfactory to him?

A. Seemed to be. He signed the order."

10. Because the testimony of the plaintiff was not within the issue made by the pleadings.

11. Because the trial Court misdirected the jury upon the law and the facts.

REX A. DONNELLY,
Attorney of Prosecutor-in-Certiorari.

Dated June 1, 1922.

OPINION.

(Filed Nov. 8, 1922.)

NEW JERSEY SUPREME COURT.

No. 219. June Term, 1922.

WALES ADDING MACHINE COMPANY,
Defendant,
v.
CHARLES G. HUVER,
Prosecutor.
On Certiorari.

Submitted: June Term, 1922.
Decided: November 8th, 1922.

Before JUSTICES KALISCH, BLACK and KATZENBACH.

For prosecutor, REX A. DONNELLY, ESQ.
For defendant, LINWOOD W. ERRICKSON, ESQ.

Per Curiam:

The suit in this case was instituted to recover, under a written contract or order, dated August 12, 1919, the price of a second-hand Wales Adding Machine. The trial in the Common Pleas Court of Cumberland County, on an appeal from the judgment rendered for the plaintiff, in the Small Cause Court, resulted in a verdict of a jury for the plaintiff for $122.62. There are eleven reasons filed for a new trial. No. 9 admitting evidence, as to the loan of another machine, until the delivery of the one in suit. This was not error. Nos. 1 and 2 refusal to non-suit the plaintiff or direct a verdict in favor of the defendant. This was not error. No. 3 is the same as No. 7, i. e. an exception to a refusal to charge request. No. 1, No. 7 is an exception to the charge as made instead of the request No. 1 "the fact of the shipping" of the machine called for by the contract, etc., was a sufficient acceptance of that contract without having actually "accepted it in writing." This was not error; next under point 3 reasons Nos. 2 and 5 it is argued, the presenting of a sight draft and refusal to pay was necessary before an action could be commenced. Not so. Point 4. The Court's charge was contrary to the law and facts. We find no error here. A consideration of the Court's charge in its entirety, is quite as favorable to the defendant as he could ask. The disputed questions of fact were left to the jury. The Court at the close of the charge said to the jury, "if you find the plaintiff has not delivered the machine in compliance with that contract and is not entitled to recover, your verdict will be no cause of action."

The judgment of the Cumberland County Court of Common Pleas is affirmed with costs.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

WALES ADDING MACHINE COMPANY, *Defendant,* v. CHARLES G. HUVER, *Prosecutor.*	On Certiorari. Rule for Judgment.

The Court having inspected the transcript and the proceedings of the Court of Common Pleas of the County of Cumberland returned with the certiorari in this cause, and reasons for reversing the judgment below, and heard the arguments of counsel therein, and having duly considered the same, do order the judgment of the Court of Common Pleas of the County of Cumberland be in all things affirmed, with costs and the record be remitted to the Court below to be proceeded with according to law and practice of said court.

On motion of

LINWOOD W. ERRICKSON,
Attorney for Defendant.

Entered Nov. 24. 1922.

New Jersey Court of Errors And Appeals

MARCH TERM, 1923

WALES ADDING MACHINE COMPANY, *Defendant-Respondent,* vs. CHARLES G. HUVER, *Prosecutor-Appellant.*	ON APPEAL FROM SUPREME COURT

BRIEF OF RESPONDENT

FACTS

In addition to the facts in Prosecutor's brief, the following facts should be included as material to the case.

1. The contract was admitted in evidence without objection of the appellant, and marked "P 1." State of the Case, page 28.

2. It was testified by respondent, and admitted by the appellant in the suit below, that the respondent did not have in hand a second-hand machine, nor was there any guaranty when such machine would be in hand for delivery. State of the Case, pages 29, 39 and 44.

3. It was also testified by the respondent and admitted by the appellant that the respondent had loaned the appellant the use of another machine pending the delivery of the second-hand machine. State of the Case pages 29, 44.

4. It was also testified by respondent and admitted by appellant, that there was delivery made of the machine under contract on or before the first day of June, nineteen hundred and twenty. State of the Case, pages 29, 39, 40, 46 and 47.

ARGUMENT

1. Appellant claims that the evidence regarding the loan of another machine until the delivery of the one under contract should not have been admitted by the Court, and cites to substantiate his claim *Naumberg vs. Young,* 44 *New Jersey Law, page* 331.

We submit that the case at bar comes within the exception to the rule in the case cited.

The court on page 335, citing *Lindley vs. Lacey,* 17 *C. B.* (*N. S.*) 578, says "there is a class of cases where the parties concluding an agreement which is reduced to writing, have, at the same time and on the same consideration, negotiated by parol another agreement which is collateral and on a subject distinct from that to which the written contract relates, in which oral evidence of such an agreement is held to be competent."

The contract called for delivery "as soon as convenient." The time of delivery being indefinite, and the contract not complete in that respect, parol evidence was properly admitted to explain the indefinite time of delivery and the clear intention of the parties when making the contract as to the reason for the indefinite time of delivery.

Stephens-Adamson Mfg. Co. vs. Bigelow, et. al., 84 *Law* 585, and the cases cited thereunder.

ACCEPTANCE

At the making of the contract, the uncertainty of the time of delivery was understood by both parties thereto. Respondent not having a "19 B" machine in stock. State of the case, pages 29 and 44, the shipping

or delivery of the machine was an acceptance of the order or contract by the seller.

Acceptance of a contract may be either by writing, by acts or by words.

> *Houghwout vs. Abboisauvin,* 3 *C. E. Green,* page 315.
>
> *Hallock vs. Commercial Insurance Company, 2 Dutcher, page* 268, 35 *Cyc. page* 55.
>
> "The fact that one party may have expected that this time would be shorter than the other did, does not constitute a failure of the meeting of the minds of the parties necessary to a valid contract."
>
> *Atlantic Pebble Company vs. Lehigh Valley Railroad Company,* 89 *N. J. Law, page* 336.

Respondent delivering the machine was an acceptance of the contract, and the acceptance comes within the ruling laid down in *Potts vs. Whitehead,* 8 *C. E. Green, page* 512. (This case was also cited by appellant.) The Court at page 514 saying

> "Acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties. And to do this, it must in every respect meet and correspond with the other, neither failing in or going beyond the terms proposed, but exactly meeting that at all points, and closing with them just as they stand."

We submit that in the delivery of the machine on or about June first, nineteen hundred and twenty, it was an acceptance and full performance of the contract by the respondent.

THE PRESENTING OF A SIGHT DRAFT UNNECESSARY

We submit that there was nothing in the contract which makes the presentation of a sight draft a requisite to the bringing of an action for a breach of the contract. Vendee agrees to accept and pay sight draft when presented. Vendor does not agree to first present sight draft.

We submit that there was no error in the admission of evidence and the verdict of the jury was in accordance with the law and facts.

Appellant's appeal should be dismissed and judgment of the Supreme Court confirmed.

Respectfully submitted,

LINWOOD W. ERICKSON.

New Jersey Court of Errors and Appeals

WALES ADDING MACHINE COMPANY, *Defendant-Respondent,* v. CHARLES G. HUVER, *Prosecutor-Appellant.*	On Appeal from Supreme Court.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the Supreme Court, affirming, on certiorari, a judgment recovered by respondent against appellant, in the Cumberland Common Pleas on the verdict of a jury, on appeal from the Small Cause Court (15, 17, 62, 64). The action was for the balance of the purchase price alleged to be due under a conditional bill of sale of a second-hand Wales adding machine (4, l. 21). It was made on August 12, 1919 (18, 27), and provided, that nothing but a written acceptance from vendor's home in Wilkes-Barre, Pa., bound the vendor (5, l. 28). No acceptance was ever received (40, l. 26), nor is there any proof that one was ever sent. On May 28, 1920 (29, l. 21), nearly ten months after making the con-

tract, the machine arrived in Bridgeton, but was immediately shipped back to the Philadelphia office, from which it came, without being opened or examined (46, l. 25; 47, ll. 20 to 30). The pleadings are based on the conditional contract of sale, the same being made part thereof (4). In the trial Court, the requests to charge (54, 55), being refused and the law stated to be otherwise, acted in effect, as a direction of a verdict against appellant.

ARGUMENT.

The Supreme Court erred in giving judgment in favor of the above respondent instead of for the appellant, for the following reasons.

Point 1.

ILLEGAL EVIDENCE WAS ADMITTED OVER OBJECTION IN THE TRIAL COURT, HIGHLY INJURIOUS TO APPELLANT.

(Reasons 1, 2 and 9, pp. 59, 61, l. 1, in the Supreme Court.)

This evidence appears on p. 28, l. 25 to p. 29, l. 19, and admitted evidence of another contract, *not mentioned in the pleadings,* as to the loan of another machine until the delivery of the one in question, directly against the express terms of the contract, which reads:

"1. Please ship or deliver as soon as convenient" (p. 5, l. 4).

"2. It is agreed this order *shall not be subject to countermand or rescission by vendee* and that *it covers all agreements concerning this transaction of every name and nature, and no* representations or *agreements made by an agent* or any other person *not included herein shall be binding.*"

The objection to this evidence was not only taken in the usual manner, by objection and exception (p. 28, l. 29) but also on a special motion for a ruling thereon (p. 34).

It should be particularly noticed, that this alleged oral agreement admitted against the express terms of the contract, is alleged to have been made just before appellant signed the order, on p. 29, ll. 10, 11, immediately after testifying to this oral contract, the agent was asked regarding the same:

"Q. Was that satisfactory to him?
A. Seemed to be. He signed the order."

This evidence was in direct conflict with the rule laid down in *Naumberg v. Young,* 44 N. J. L. 331, which rule, this Court said, in *Grueber Engineering Co. v. Waldron,* 71 N. J. L. 598, "*is now so well settled in this state that it is axiomatic.*"

In the recent case of *Shinn v. Black,* 117 A, 143, in this Court, Justice Parker, says, that the rule is subject to but two exceptions:

> "First, where the contract was *on its face incomplete,* and secondly, parol evidence of a collateral contract on a subject distinct from that of the written contract may be received."

In three respects, *Naumberg v. Young, supra,* seems especially applicable to this case:

(1) The reason for the rule is the injustice which results from allowing matters in writing, made into

a final and entire agreement, to be controlled by "*the uncertain testimony of slippery memory,*" p. 338.

Appellant frankly says, that the agent may have made the statement claimed (44, l. 15), but he did not remember (38, l. 4). He testified on May 11, 1922 (34, l. 1), on August 12, 1919, he signed the order in question (18, l. 27).

(2) "The only safe criterion *of the completeness of a written contract* as a full expression of the terms of the parties agreement, *is the contract itself.* When parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, *it is only reasonable to presume* that they have introduced into the written instrument *every material term and circumstance* and consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after, or at the time of the completion of the contract, will be rejected. * * * If the written contracts *purports to contain the whole agreement* and it is not apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence *to vary or add to its terms* is not admissible" p. 339.

This contract says, 19, l. 37; 20, l. 1, "*that it covers all agreement concerning this transaction of every name and nature.*"

(3) "If the instrument, says Chief Justice Erle in *Lindley v. Lacey,* shows *that it was meant to contain the whole bargain between the parties,* no extrinsic evidence shall be admitted to introduce a term which does not appear there" p. 340.

And in *Crane v. Elizabeth Library Asso.*, 5 Dutch, 305, Chief Justice Whelpley said, "That where the written paper purported to be complete that is to be a full agreement, parol evidence ought not to be admitted *"to add a single stipulation or vary the legal effect of those contained in it"* p. 340.

The Uniform Conditional Sales Act, Laws of 1920, p. 462, Sec. 6, provides that, "The conditional sale contract shall be filed in the office of the county clerk," hence from the very necessity of the thing, the same *must be in writing,* but if the written contract so filed, can be overthrown or any of its terms materially changed, by a parol contract made before the written contract was signed, it is hard to understand how the act of filing is a protection to anybody. This contract of sale was not filed until April 9th, 1921 (State of Demand, p. 4, l. 26), almost a year after the machine was returned (46, l. 26), so that there does not appear to be any reason why the same should not have contained all the terms between the parties.

Other reasons against the admissibility of this evidence are considered under Point 2.

Point 2.

THERE NEVER HAVING BEEN AN ACCEPTANCE AS PROVIDED IN THE CONTRACT, THERE WAS NO CONTRACT UPON WHICH TO BASE A RECOVERY.

(Reasons 1, 2 and 3, p. 59, in Supreme Court.)

This was raised in the trial Court on motion to non-suit (32) on motion for a direction (51) and in

the first request to charge (54, l. 12) exceptions being noted in each case.

The contract provided for a specific form of acceptance (14, l. 14).

> "Nothing but acceptance in writing from vendor's home office, Wilkes-Barre, Pa., shall constitute an acceptance of this order by vendor."

In *Potts v. Whitehead,* 23 N. J. Eq. 514, this Court held, that "an acceptance, to be good, must be such as to conclude an agreement between the parties; and to this it must, in every respect, meet and correspond with the offer, neither falling within nor going beyond the terms proposed, *but exactly meeting them at all points and closing with them just as they stand.*"

In *Eliason v. Henshaw,* 4 Wheat. (U. S.) 225, 4 L. Ed. 556, the defendant, by letter sent by the wagoner, offered to purchase flour from plaintiffs, the letter stating that the answer should be sent by the return of the wagon which brought the offer. The plaintiffs mailed their acceptance to a place other than the destination of the wagon. *The United States Supreme Court* held that the acceptance was not sufficient as it was not sent to the place described.

2. Appellant, under the contract, had no right to rescind or countermand, it providing (6, l. 13), "*It is agreed that this order shall not be subject to countermand or rescission by vendee.*" The new machine was left with appellant for demonstration purposes, plaintiff's agent so testifying (26, l. 11). The uncontradicted evidence was, that appellant did not use it and so told plaintiff's agent, who said, "I will send for it." "It can stay here until we get a place to put it." Witness had entire charge of

appellant's office at the time (40, ll. 4 to 7). There was hence no occasion for the return of the new machine until sent for. When the sceond-hand machine arrived, it was returned "*just as it came*" (47, l. 29). There was no waiver of the acceptance as provided for in the contract.

3. There being a clause in said contract (20, l. 2), providing, "*No representation or agreement made by an agent or any other person not included herein, shall be binding,*" the question of ratification becomes included in the question of acceptance.

In *Gulick & Holmes v. Grover,* 33 N. J. L. p. 471, this Court held:

> "A subsequent ratification of an act done by another, assuming to act in the capacity of an agent, though without any preceding authority creates the relation of principal and agent, and after such ratification the principal is bound by the act, to the same extent as if it had been done by his previous authority. But *in order to a ratification, a full knowledge of all the facts and circumstances attending the transaction is essential.*"

Were these contracts ratified by the principal? As far as the evidence is concerned, there is nothing to show that the Wilkes-Barre office of the company, had any knowledge of either contract, until June 3, 1920, when there was written upon the written order or conditional bill of sale, the words, "*Accepted at Wilkes-Barre, Pa.,* 6-3-1920 *Wales Adding Machine Company, By Id, Wol*" (21, ll. 14 to 19, 7, ll. 28 to 33). This was two days after appellant had returned the machines to Philadelphia office. Over this attempted acceptance appears the name, "W. H. McFarland District Mgr.," who by the

letter (22) appears to be the manager of the Philadelphia office, which is the district office. This attempted acceptance though coming too late, shows that the written order or condition sale was the only contract recognized by the offices of respondent, *what then becomes of the parol contract* offered in evidence over objections, but unratified? What knowledge did the Philadelphia office have of this parol contract? In the letter just referred to (22, l. 20), which is dated May 15, 1920, the office calls for the return of the new machine *"at once,"* when under the parol contract, this machine was loaned until delivery of the second-hand one (29, ll. 1 to 11). *This was not ratification but repudiation of the parol contract.* The letter does not show any knowledge of the loan of the new machine or the future delivery of the second-hand one. It would seem to be significant that no explanation was made of this letter and that the managers of the offices were not called as witnesses. The Philadelphia office of the company seems to have been intentionally kept in the dark by the witness Vanderherchen, for when the new machine left Philadelphia, he says (24, l. 29), *"I signed the shipping receipt for having the machine leave Philadelphia."* When the machines arrived back in Philadelphia, it was Vanderherchen who phoned and said, "We had received the machine but would not accept cancellation" (30, l. 23). This refusal to cancel made it useless for appellant to demand the return of the payment made upon the contract. From the evidence mentioned, it would appear, *that Vanderherchen was the entire transaction.*

On April 9, 1921 (4, l. 25), respondent filed the written order or conditional sale in the county clerk's office, *this was long after any transaction with appellant,* it contained the clause, which will bear re-

peating, "that it covers all agreements concerning this transaction of every name and nature" (19, l. 37, 20, ll. 1 and 2). On the trial, respondent *was allowed to go back to August* 12, 1919, to contradict this conditional sale so filed, by a parol contract, alleged to have been made at the last aforesaid time; surely respondent was estopped from so doing, the contract in writing and so filed, speaking for itself (28, l. 29), and the said parol contract being clearly inadmissible.

Point 3.

THE PRESENTING OF A SIGHT DRAFT AND REFUSAL TO PAY WAS NECESSARY BEFORE AN ACTION COULD BE COMMENCED.

(Reasons 2 and 5, p. 59, in Supreme Court.)

There are two clauses in the written order bearing upon this point.

> "1. If cash payment is not made as agreed, or if there be default at any time in any payment, or other condition of this agreement, or upon refusal or neglect of vendee to accept said property when tendered by vendor or its agents, or any transportation agency, the full amount unpaid hereon shall become due and payable forthwith, and vendee agrees to accept and pay draft for the amount" (19, ll. 20 to 28).
>
> "2. It is expressly understood that all payments hereunder are to be made by check, draft or money order payable to the Wales Adding Machine Company, Wilkes-Barre, Penna. For any payments not so made vendee agrees to

accept and pay sight draft when presented" (20, l. 33).

This latter clause is the last clause of said written order.

There is no proof in the case that respondent ever drew upon appellant as provided or that appellant has ever refused to pay sight draft and until this is done, it is hard to understand how the action can be maintained, if such clauses are of any consequence in a contract.

As the evidence showed the machine in suit, when it arrived at appellant's place of business was returned at once, "just as it came" (47, l. 29), and the company acknowledged its receipt, when cancellation was refused (30, l. 23), and the contract provided that no title passed until the machine was fully paid for, *"which shall include the payment of any judgment secured"* (19, l. 18), it has been heretofore urged that an action for the purchase price (4, l. 21) was impossible.

In *Massman v. Steiger,* 79 N. J. L. p. 442, 75 A. 746, the Supreme Court lays down the rule, that where it becomes the duty of the buyer under an executory contract to purchase, to accept the goods and take title, such buyer can, by refusing such acceptance, prevent the transfer of the title to him, thus limiting the seller to an action for damages, and attention is called to the fact, that this principal was upheld by this Court, in *Kelsea v. Ramsey & Gore Mfg. Co.,* 55 N. J. L. 320, and that the New York rule that tender passes the title, is not countenanced by any case that could be found in this state.

There surely was no intention of passing the title to appellant by bringing a suit for the purchase price, for the contract was filed as a conditional

sale on April 9, 1921 (4, l. 26), and suit stated on April 28, 1921, according to the date of the summons (3, l. 15). The clause in the contract just quoted, shows title is claimed in the vendor until judgment is paid, which would seem to settle the question of intention.

Point 4.

THE CHARGE OF THE COURT WAS CONTRARY TO THE LAW AND THE FACTS.

(Reasons 3 to 11, Inc. pp. 59, 60, 61 in Supreme Court.)

The Court's refusal to charge the first, second and fourth request was error, for the reasons already given and also, because:

1. The trial Court not only admitted the illegal evidence already referred to in Point 1 (55, l. 9), to which exception was taken (58, ll. 6 to 10), but told the jury (55, l. 9) that the agent's explanation brought out by such illegal evidence, satisfactorily explained the delay in the delivery of the machine, though there was not a particle of proof, that if such an agreement had been made, *that it had ever been ratified* by the principal.

2. The Court's charge as to acceptance (54, l. 13), not only conflicted with *Potts v. Whitehead, supra,* but was equivalent to a direction. Appellant testified (39, l. 10) that his understanding of the contract, was, that "as soon as convenient" meant, "the machine would arrive within a reasonable length of time," which induced him "to sign the

contract'' and that the new machine was left for demonstration purposes only. *This was his defense to the action.* To draw it particularly to the attention of the jury, there was a request to so charge (55, l. 4). Instead of so charging, the jury was told the agent's explanation answered the same, this was particularly excepted to (58, ll. 6 to 11). Reasonable time is a question for the jury.

Stephens Adamson Mfg. Co. v. Bigelow, 84 N. J. L. 585.

It was the duty of the Court to explain to the jury that there were two different aspects of the case, one claimed by respondent, based on the conditional sale contract, with the alleged supplemental parol contract as to delivery, and the other as claimed by appellant and that it was for the jury to say, which was the agreement, but appellant's testimony and defense *was not even commented upon,* which *excluded it from the consideration of the jury,* so that, as far as the charge was concerned, appellant accomplished nothing by his testimony and defense, on the other hand the learned trial Judge twice comments at length on the ''explanation of the agent'' of respondent, over the delay in delivery. (53, ll. 18 to 30, 55, ll. 9 to 22).

3. The learned trial Judge was asked to charge, by the second request (54, l. 30):

> ''If any of the terms of the written order in suit have not been complied with by plaintiff, plaintiff cannot recover.''

The charge was that ''a substantial compliance'' (54, l. 37), with the terms of the contract was sufficient, this was repeated (56, l. 10). Exception was taken to the refusal to charge as requested (57, l.

10). The Uniform Conditional Sales Act, Sec. 2, p. 462, Laws of 1919, provides:

> "The seller shall be liable to the buyer for the breach of *all promises* and warranties, *express or implied,* made in the conditional sale contract, whether or not the property in the goods has passed to the buyer."

4. The learned trial Judge said (53, l. 35):

> "I do not recall in the evidence any explanation which has been made by defendant as *to why he failed to receive the new machine called for by the contract.* You may recall same, I don't."

This was repeated (55, l. 17):

> "I do not, *as I have said,* understand that the defendant ever found fault with the failure on the part of the Wales Adding Machine to comply with this part of the agreement and ship *the machine* within a reasonable time."

The suit was over the second-hand machine only (Demand 4 to 8). *The new machine was not in the contract at all.* No "explanation" or "fault finding" was necessary. *But the charge placed a burden on appellant not in the case.* When final reference is made *"to that contract"* by the Supreme Court, when they endeavor to show how favorable the charge was to appellant (63, l. 30), the greatest error is brought out, as reference was to a contract regarding a new machine not in suit. The rule that parol evidence is not admissible to explain or alter a written contract is of too much importance in this state, to be overthrown by the clumsy method used in this case.

POINT 5.

For the reasons above mentioned, the judgment of the Supreme Court, should be reversed.

Respectfully submitted,
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Attorney for and of Counsel with Prosecutor-Appellant.