166 VA 398

Record No. 1714

In the
Supreme Court of Appeals of Virginia
at Richmond

PHILIP GREENBERG, INCORPORATED, &c.,

v.

ROBERT M. DUNVILLE.

FROM THE CORPORATION COURT OF THE CITY OF DANVILLE

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1714

PHILIP GREENBERG, INCORPORATED, &c.,

versus

ROBERT M. DUNVILLE.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioners, Philip Greenberg, Incorporated, and Philip Greenberg, show unto the Court that they are aggrieved by a final judgment of the Corporation Court of Danville, Virginia, entered against them on the 10th day of June, 1935, in an action at law in which Robert M. Dunville was plaintiff and your petitioners were defendants.

Errors of law were made and committed during their trial in the court below and they pray that a writ of error and *supersedeas* may be issued in his behalf; and that said judgment of the Corporation Court of Danville, Virginia, may be reviewed, reversed, and that this Court may enter such judgment as the said Corporation Court should have rendered.

STATEMENT OF FACTS.

The defendant, Philip Greenberg, operates a fresh meat establishment, or butcher shop, and has operated said establishment since prior to January 21, 1935. On the 21st day of January, 1935, the plaintiff, Robert M. Dunville, as agent

of the Allied Store Utilities Company, Distributors of Hussman-Ligonier Products, negotiated a contract between the defendant, Philip Greenberg, and the Allied Store Utilities Company, by the terms of which said contract the defendant, Philip Greenberg, agreed to buy and the Allied Store Utilities Company agreed to sell certain equipment for the fresh meat establishment of the defendant, Philip Greenberg, for the sum of Two Thousand, Three Hundred Sixty-five ($2,365.00) Dollars, as will appear from the contract which is made a part of the record (page 6 of Record). The Allied Store Utilities Company agreed in the contract to allow Greenberg the sum of Eight Hundred Sixty-five ($865.00) Dollars for certain old equipment belonging to Greenberg, as will appear from the aforementioned contract (page 6 of Record), to be shipped to Richmond, Virginia.

When the new equipment ordered arrived, Greenberg, according to his testimony, found it to be defective, a scale counter designed to support a butcher's scale collapsing and thereby causing considerable damage. Greenberg notified the Company, through Dunville, its agent, of this defect and damage. Dunville promised to adjust the matter, but failed to do so; whereupon, Greenberg refused to deliver the old equipment to the Company until adjustment was made. No such adjustment has yet been made (page 10 of Record).

Dunville testified that it is a custom of the Allied Store Utilities Company, for which he is agent, that "when an agent sells new equipment, he must account to the Company for the purchase price and the old equipment becomes the property of the agent" (page 7 of the Record).

C. T. Carter, for several years salesman for the Hussman-Ligonier Products, testified to the same effect, i. e., that it was the custom of that Company that the salesman, in taking in old equipment, "be responsible to the house for the purchase price',, and Carter added that he "never mentioned the old equipment in the contract made with the customer" (page 9 of Record).

Dunville further testified that he "had accounted to the Company for the trade-in value of the old equipment in this case, same having been deducted from his commissions and reserve account when the goods shipped by Dunville's principal were delivered to Greenberg" (page 7 of Record).

The plaintiff, Robert M. Dunville, introduced, as further evidence of his ownership, a letter dated March 14, 1935, written by J. Ezell of the Credit Department, Allied Store Utilities Company, to Dunville in reply to letters of the latter dated February 25th and March 8th (pages 8 and 9 of

Record). The sections of this letter upon which the plaintiff is evidently relying are the following:

"It does not seem to us as though this man (Philip Greenberg) can have any claim against you or our Company because it seems as though he would have a difficult time proving that because the scale fell off the case it was due to some defect to the equipment and he would certainly have to prove his charge.

"We do not feel any responsibility but as far as writing Mr. Greenberg, this we hesitate to do because he has not been in touch with us at all. The equipment traded in on this job and which is your property, and which is being retained by Mr. Greenberg unlawfully would probably be secured more quickly if you handled the situation yourself from Richmond. * * *

"Furthermore, if there is any way that we can assist you in securing your property, we will be glad to have you write us again."

Greenberg testified that he was "never advised by anyone that the old goods to be returned to the Company were the property of Robert M. Dunville and that he, Greenberg, was awaiting the adjustment of his claim when he was served with notice of this suit" (page 10 of Record). Under cross examination, Dunville stated that he "did not recall whether or not at a conference with Greenberg and his counsel he, Dunville, had made any claim to the property for which he is now suing" (page 7 of Record).

There is no evidence in the record to show that the Allied Store Utilities Company ever assigned the old equipment to Robert M. Dunville.

There is no evidence whatsoever in the record to show that Philip Greenberg, Incorporated, was a party to any contract with the plaintiff or his principal or that Philip Greenberg, Incorporated, was ever in possession of the property sued for.

ASSIGNMENTS OF ERROR.

The Court erred in overruling the objection of the defendants to the testimony of the plaintiff concerning the "custom", and in overruling the motion to strike out all of the plaintiff's evidence, and in the giving of the instructions, and in overruling the motion of the defendants to set aside the verdict and enter a final judgment for defendants, and in entering up judgment in accordance with the verdict.

ARGUMENT.

The basis of the action of detinue is the unlawful detention of the property in question.

Talley v. *Drumheller,* 135 Va. 186; 115 S. E. 517.

The plaintiff must have immediate right of possession when the action is brought.

Hefner v. *Fidler,* 58 W. Va. 159; 52 S. E. 513.

The detention by the defendant cannot be unlawful if the plaintiff has no right of possession. The plaintiff, Robert M. Dunville, has failed to prove an immediate right of possession of the equipment in dispute at any time. The evidence shows that Greenberg was the owner of the equipment and that he contracted to deliver it to the Allied Store Utilities Company. The contract for the purchase of new equipment is between Greenberg and the Allied Store Utilities Company. This contract between buyer and seller includes the allowance given Greenberg on his old equipment. There can be no question but that this contract is between Greenberg and the Allied Store Utilities Company. Dunville, in dealing with Greenberg, acted only as agent of the said Company. As agent he negotiated the contract, and signed the contract for his principal in his capacity as agent. There was no evidence showing any agreement made by anybody with Greenberg with reference to the old equipment save the aforementioned contract. The letter of March 14, 1935, from the Allied Store Utilities Company to Dunville states that the property belongs to Dunville, but there is no evidence to show that Greenberg was ever so notified, and the logical conclusion to be drawn from the letter is that Dunville's claim of ownership of the property rests, if indeed it rests on anything, upon a private agreement between himself and the Allied Store Utilities Company, which said private agreement could in no way affect the written contract between the Allied Store Utilities Company and Greenberg. If such an agreements exists, no notice of it has been given to Greenberg, so far as the evidence shows, and the plaintiff has neither alleged nor attempted to prove such an agreement.

In the absence of any evidence proving a contract or other agreement between Greenberg and Dunville in his own proper person and not as agent of the Allied Store Utilities Company, by which contract or agreement Dunville would have obtained a right of possession of the old equipment traded in,

the jury, in order to render a verdict for the plaintiff, must perforce have given weight to the evidence tending to prove a custom in the Allied Store Utilities Company that such traded in equipment became the property of the agent who negotiated the deal. The defendants, by counsel, objected to the introduction of such evidence and later moved that it be struck out, which objection and motion the Court overruled. The defendants' objection to the evidence concerning the custom of the Company rested on two (2) grounds, to-wit: (1) Such a custom was not binding upon the defendants unless they were shown to have had knowledge of same; and (2) to admit such evidence would change the terms and purport of the written contract.

(1) It is a settled rule in this state that customs are inadmissible in evidence unless it be proven that they were known to both parties to the suit or were so general and notorious that both parties may be presumed to have been cognizant of them.

Rosenberg v. *Turner*, 124 Va. 769; 98 S. E. 763.
Bowles v. *Rice*, 107 Va. 51; 57 S. E. 575.
Syer v. *Lester*, 116 Va. 541; 82 S. E. 122.
Scott v. *Chesterman*, 117 Va. 584; 85 S. E. 502.

No evidence was submitted in this case to show that Greenberg had any knowledge of such custom as the plaintiff attempted to prove existed. On the contrary, when defense counsel asked Dunville whether or not he had made any claim to the property in the conference with Greenberg and the latter's counsel, he replied that he did not recall. Neither was there any evidence that the custom was general or notorious. The evidence did not show that the custom relied upon was in existence outside the Hussman-Ligonier Products and the Allied Store Utilities Company, distributor of those products. Two (2) witnesses testified to the existence of the "custom": the plaintiff himself and C. T. Carter, salesman for the Hussman-Ligonier Products. Neither witness attempted to prove or even stated that this "custom" was one common to the trade.

(2) It should be observed that the plaintiff neither alleged nor attempted to prove an assignment to him of the contract or part of the contract by the Allied Store Utilities Company. Certainly, the letter introduced as part of the record (pages 8 and 9 of Record) does not warrant an inference of an assignment. If any inference at all can be drawn from the letter, it is that the Allied Store Utilities Company preferred

that, for purposes of convenience, Dunville, its agent, rather than the Company itself should sue Greenberg. Dunville, then, based his claim to the disputed equipment on a "custom" by which he automatically obtained a right of possession of the old equipment when the new equipment arrived. This position is untenable. Custom or usage, if sufficiently proved, may serve to control the mode of performance of a contract, but cannot change its intrinsic character.

Scott v. *Chesterman, supra.*
Consumers' Ice Co. v. *Jennings,* 100 Va. 719; 425 S. E. 879.
Rosenberg v. *Turner, supra.*

The contract in this case is clearly a contract between Philip Greenberg and the Allied Store Utilities Company. Robert M. Dunville's part in it is limited to that of agent for the Allied Store Utilities Company and he is not a party to the contract in his individual capacity. To uphold the plaintiff's contention that he has a right of possession to the old equipment because of the "custom" of his Company is to permit a custom of trade, confined, so far as the evidence shows, to one particular company, to alter the essential nature of a contract—to substitute, in one phase of the contract, a third party for one of the two original parties to the contract. It is to say: "You thought that you were making a contract with X; but, no, X has a custom of permitting Y to replace him in a part of the contract—so that you have unintentionally made a contract with both X and Y".

Usage may be resorted to in order to clarify what is doubtful, uncertain, or ambiguous; but where the terms of the contract are clear they cannot be varied or contradicted by evidence of custom or usage.

Standard Oil Co. v. *Wright Oil Service Co.* (W. Va.), 26 F. (2d) 895.

Philip Greenberg entered into a definite, explicit, and unambiguous contract with the Allied Store Utilities Company for the purchase and sale of certain new equipment to be used in Greenberg's fresh meat establishment. The seller, Allied Store Utilities Company, allowed Greenberg a certain sum of money on the purchase price in return for certain old equipment belonging to Greenberg. The words "F. O. B. Richmond" found immediately following the allowance are not ambiguous nor do they tend to confuse. Obviously, the meaning is that the old equipment is to be shipped to

the agent of the Allied Store Utilities Company at Richmond. If the Company had intended the equipment to become the property of Dunville, it seems probable that the contract, explicit in all its terms, would have stated that the goods were to be shipped to Robert M. Dunville. Usage or custom is not necessary to explain the terms of this contract; and the "custom" which was introduced into the evidence has the effect, if accepted, of varying and contradicting the terms of the contract.

After dealing continually with the Allied Store Utilities Company through its agent, Robert M. Dunville, Greenberg is now sued by the aforesaid agent in his own proper person. The plaintiff has failed to show any right of possession of the property sued for, right of possession of said property resting either in Greenberg or in the Allied Store Utilities Company. To permit the plaintiff to maintain this action would deprive Greenberg of his right under the law of detinue to such offset as to which he would have been entitled had he been properly sued by the Allied Store Utilities Company.

The plaintiff's evidence tending in no way to show a right of possession in the plaintiff except for the evidence as to the custom of trade which was clearly inadmissible, the defendant moved to have the plaintiff's evidence struck out upon the ground that it was not material to the issue herein involved and that it showed on its face no connection with the written contract filed with it, which contract dealt with the property in the equipment sued for.

Since the plaintiff has not now and has never had any right of possession in the said equipment, the defendant by counsel objected to the giving of any instructions upon which a recovery for the plaintiff might be had.

Of course, it is manifest that there is a complete failure of the evidence to sustain the judgment as to Philip Greenberg, Incorporated.

Petitioners aver that a copy of this petition was delivered in person to Mr. Grasty Crews, Counsel of record for Robert M. Dunville in the trial court, on August 23, 1935.

Counsel for petitioners desire to be heard orally on the application for a writ of error and *supersedeas* and will appear before the Honorable H. B. Gregory, Judge of the Supreme Court of Appeals of Virginia, on the 23rd day of August, 1935, and present said petition and state their reasons for an appeal orally; and will adopt this petition as their opening brief.

For these reasons, it is respectfully submitted that your petitioners are entitled to a writ of error and *supersedeas*

to the judgment complained of, and that the same may be reviewed and reversed.

Respectfully submitted,

PHILIP GREENBERG, INCORPORATED,
and
PHILIP GREENBERG,
By Counsel.

CARTER & WILLIAMS,
Counsel for Petitioners.

We, John W. Carter, Jr., and Hugh T. Williams, practicing attorneys in the Supreme Court of Appeals of Virginia, do certify that in our opinion there is error in the judgment complained of, for which error the said judgment and action of the said Court should be reviewed and reversed.

JNO. W. CARTER, JR.,
HUGH T. WILLIAMS.

Filed before me this 23rd of Aug., 1935.

H. B. G.

September 20, 1935. Writ of error and *supersedeas* awarded by the Court. Bond $750.00.

M. B. W.

RECORD

VIRGINIA:

Pleas before the Judge of the Corporation Court of Danville, at the Courthouse thereof on the 10th day of June, 1935.

BE IT REMEMBERED, that heretofore, to-wit: At rules held in the Clerk's Office of the Corporation Court of Danville, on the Third Monday in May, 1935, came Robert M. Dunville, by his Attorney, and filed his Declaration *In Detinue* against Philip Greenberg, Inc., and Philip Greenberg, which Declaration is in the following words and figures, to-wit:

DECLARATION *IN DETINUE.*

Robert M. Dunville complains of Philip Greenberg, Inc., and Philip Greenberg of a plea that they render unto the said plaintiff certain goods and chattels of the said plaintiff of great value, to-wit, of five hundred dollars ($500.00), which they unjustly detain from him; for this, to-wit: That on or about January 21, 1935, said plaintiff, as agent for Allied Store Utilities Company sold said defendants various equipment consisting of ammonia coils, wrapping shelf, stands, chopper blocks and refrigeration counters, which were in due course duly delivered to said defendants, pursuant to said sale agreement; that as a part and parcel of said sale transaction defendants agreed to deliver to said plaintiff, in his individual capacity, three used Hussman-Ligonier freezer counters, for which said used freezer counters defendants were allowed substantial credit on the purchase price of said equipment heretofore described as having been purchased on January 21, 1935, said plaintiff furnishing said credit in his individual capacity and personally accounting to Al-
page 2 } lied Store Utilities Company for said credit so given said defendants; yet the said defendants, although they were afterwards requested by said plaintiff so to do, hath not as yet delivered the said goods and chattels, or any of them, or any part thereof unto the said plaintiff, who is entitled to recover the same, and has the present right of possession, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, and still wrongfully and unjustly detains the same from the said plaintiff, to the damage of the said plaintiff of two hundred and fifty dollars ($250.00) and therefore he institutes this action.

ROBERT M. DUNVILLE.
By GRASTY CREWS, Counsel.

GRASTY CREWS, p. q.

Whereupon said cause having been regularly matured at Rules:

page 3 } And at another day, to-wit: At a Corporation Court of Danville, held at the Courthouse thereof on the 10th day of June, 1935, being the day and year first herein mentioned.

This day came the parties by their Attorneys, thereupon the said defendants filed a written Plea of *Non Detinet,* and of this they put themselves upon the Country and the plaintiff doth the like.

Whereupon came a jury, to-wit: E. C. Thacker, H. L. Ramey, W. L. Hodnett, J. W. Jaudon, H. H. Norton, H. R. Jones, and C. F. Tucker, who being elected tried and sworn according to law, well and truly to try the issue joined and having heard the evidence, upon their oath do say, "We the jury find that the defendant unalwfully detains from the plaintiff Three used Hussmann-Ligonier Freezer Containers, and we find that the alternative value of said Articles at $350.00 and assess damages in plaintiff's favor the detention of said Articles at $125.00".

Whereupon the said defendants moved the Court to set aside said verdict and enter final judgment in their favor or grant them a new trial on the grounds that the same is contrary to the law and the evidence and is without evidence to support it, which motion having been considered by the Court is overruled.

Therefore it is considered by the Court that the plaintiff recover of the defendants the Hussmann-Ligonier Counters aforesaid of the value aforesaid together with the damages of the plaintiff assessed as aforesaid, and his costs by him about his suit in this behalf expended. And the said defendant Philip Greenberg in Mercy, &c.

To which action of the Court in overruling the defendants' motion to set aside said verdict and enter final judgment in their favor, or grant them a new trial; and in entering up judgment on said verdict the said defendants by counsel except.

And the said defendants intimating to the Court their intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judg-
page 4 } ment aforesaid, it is ordered that the same be suspended for sixty days, upon the said defendants or some one for them executing before the Clerk of this Court bond with approved security in the penalty of $750.00 payable and conditioned according to law.

WRITTEN PLEA OF *NON DETINET*.

The said defendants, by their attorneys, come and say that they do not detain the said goods and chattels in the declaration in this action mentioned, or any or either of them, in manner and form as the said plaintiff hath complained.

And of this the said defendants put themselves upon the Country.

PHILLIP GREENBERG, INC.,
and
PHILIP GREENBERG.

page 4½ } NOTICE OF APPLICATION FOR BILL OF EXCEPTION.

To Grasty Crews, Esquire, Attorney of Record for Robert M. Dunville:

Take notice that on the 19th day of July, 1935, at 10:00 A. M. in the offices of the Honorable Henry C. Leigh, Judge of the Corporation Court of the City of Danville, Danville, Virginia, I shall tender to the said Judge of the said Court my Bills of Exception in the case in which I am defendant and your client, Robert M. Dunville, is plaintiff, which notice is given you in compliance with Section 6252 of the Code of Virginia and Acts Amendatory thereof, and;

Please take further notice that promptly thereafter, I shall apply to the Clerk of the Corporation Court of the City of Danville for a transcript of the record in said cause for the purpose of applying to the Supreme Court of Appeals of Virginia for a writ of error therein, which notice is given in compliance with Section 3339 of the Code of Virginia and acts amendatory thereof.

Given under my hand this 17th day of July, 1935.

PHILIP GREENBERG,
By Counsel.

CARTER AND WILLIAMS, Counsel.

I herewith accept legal service of the above notices this 17th day of July, 1935.

GRASTY CREWS,
Attorney for Robert M. Dunville.

page 5 } BILL OF EXCEPTION NO. 1.

Robert M. Dunville
v.
Philip Greenberg.

Be it remembered that, after the jury was sworn to try the issue joined in this cause, the plaintiff to prove and maintain the said issue on his part introduced the following evidence:

The plaintiff stated that his name was Robert M. Dunville and as agent of the Allied Store Utilities Company, Distribu-

tors of the Hussman-Ligoner Products, on the 21st day of January, 1935, he negotiated a contract between Philip Greenberg of Danville, Virginia, and the Allied Store Utilities Company, to sell him certain equipment for his fresh meat establishment for two thousand, three hundred sixty-five ($2,365.00) dollars.

The plaintiff stated that the said Company allowed Mr. Greenberg eight hundred sixty-five ($865.00) dollars for his old equipment which Mr. Greenberg was to ship to Richmond, Virginia, upon receipt of the new equipment. This contract was signed by Mr. Greenberg and the said Company by the plaintiff as its agent. The contract in question was in writing and is as follows:

Page 6 } ASSIGNABLE CONTRACT OF CONDITIONAL SALE. Original

Allied Stores Utilities Co.
Hussmann-Ligonier Products

2401 N. Leffingwell Ave., St. Louis, Mo.

ALLIED STORES UTILITIES CO. (A Missouri Corporation) (hereinafter called Seller)

Please ship to the undersigned at address below, the following chattels, which you hereby agree to sell, and the undersigned agrees to purchase, subject to the terms and conditions hereinafter set forth, which are hereby agreed to:

Sold to Philip Greenberg Street Address Pine St
City Danville County Pittsylvania State Va
Ship via Southern When On Notice Bank American National City Danville

Quantity	Model No.	Fixture	Finish	Price
1	F-510	10 & 12 ft. long Refrigerator Counters {With Coils, Amonia}	In. Por.	
1	F-512	Platters, Wrapping Shelves.....		
		One 2 ft. Rapping Stands.....		
		2 Four ft. " "		2,365.00
		4-30x30 Blocks.....		
		1-1 Hp. Grinder (Large Feed).....		
		Allowance for 3 Hussmann.....		865.00
		Cases—Coils F. O. B., Richmond....		
	F. O. B. Danville	State make of mechanical refrigeration to be purchased from others—Name.....		
		Meat Cooler.....		
		.....ft. Front.....ft. Depth		
		.....ft. Height.....		
		Location entrance door—Right or left facing front of cooler...		
Store ceiling height.....ft. Insulation.....				
Location coil or ice door.....Location drain.....				
(Through wall or floor—Right or left—Front, back or side)				
The above prices F. O. B., Danville Depot				

In Consideration Whereof the undersigned, hereinafter referred to as Purchaser, agree(s) to pay you or your assigns the total of Fifteen Hundred $1,500.00 as follows: Cash paid with order Two Hundred Twenty-Five $225.00. Cash on arrival $225.00.

The balance of said purchase price, to-wit: Twelve Hundred Seventy-five $1,275.00 to be paid in Sight Draft monthly payments evidenced by one promissory installment note bearing interest at the rate of 6% per annum on each installment after maturity until paid.

Inspection Allowed.

This contract is not effective until accepted and approved by an officer at the Home Office of the Seller.

The Seller shall not be responsible for any delay in delivery caused by fires, strikes, floods or by any circumstances or accidents beyond the Seller's control, and in any such case, the time for delivery shall be correspondingly extended. The use of the property described herein for a period of five days constitutes an acceptance of same as complying with all the

terms and specifications of this contract, and all claims for damage or errors are hereby waived if not filed within the time stated.

The property shall remain personal property, whether attached to realty or otherwise. The title thereto shall remain in the Seller until the entire purchase price, including the above described promissory note, which is given not in payment but solely as further evidence of the indebtedness for the balance of said purchase price, shall have been fully paid in cash.

Subject to the conditions of this agreement, possession is to be retained by the Purchaser, but the Purchaser agrees to perform any act necessary to keep the title in the Seller until final payment is made under this contract; and the Purchaser expressly agrees that until then Purchaser will not, without the written consent of the Seller, either remove the property from the above designated premises or sell, mortgage or otherwise dispose of Purchaser's interest therein.

The Purchaser will fully insure said property for the benefit of the Seller as its interest may appear, in standard insurance companies, and will at all times use said property in a careful and prudent manner. Purchaser shall pay all taxes, levies, license fees, or assessments imposed thereon by any legal authority and if the Seller is required to pay any such items Purchaser shall reimburse the Seller therefor as part of the purchase price, before or with the final payment. If the property is lost, stolen, destroyed or injured, from any cause whatsoever, the Purchaser shall be responsible for the same and shall complete the payments stipulated above. The Seller's responsibility for the property shall cease upon delivery in good condition to the transportation company. THIS CONTRACT IS NOT SUBJECT TO CANCELLATION.

It is agreed that time and the other terms of this agreement are of the essence, and if Purchaser fails to make any of the payments herein provided when due, or fails to perform each and every of the terms of this agreement, the entire indebtedness hereunder, both principal and interest shall, at the option of the Seller, and without notice to Purchaser, become immediately due and payable, and Seller may immediately, with or without notice, and without legal process, enter the premises where the property is located and retake said property.

It is agreed that the act of Seller in retaking possession of said goods in any of the above events, shall not constitute a rescission of this contract or operate in any manner to release or diminish the liability of Purchaser for the payment

of the unpaid balance of the purchase price, nor in any wise entitle Purchaser to the return of any payments theretofore made, and it is expressly agreed that upon so retaking possession, the Seller shall have the following options:

(a) To accept said property in full satisfaction of all obligations of Purchaser then existing, and retain all payments made by Purchaser as and for rent of same and as and for agreed compensation and liquidated damages for Purchaser's breach.

(b) To remove, sell and dispose of said property at public or private sale, with or without notice, and out of the proceeds of such sale pay all costs and expenses, including reasonable attorney's fees, together with the amount due and unpaid upon the purchase price, rendering the surplus, if any, to the Purchaser. Seller may purchase at such sale. In case there is a deficiency, the Purchaser agrees to immediately pay the same, with interest.

(c) In addition to the aforesaid rights and remedies, Seller shall have the right to enforce payment by the Purchaser of the unpaid balance due on the purchase price by any proceedings in law or in equity, and may attach or in any way levy on said property as property of the Purchaser, and shall have all other rights and be entitled to pursue all other remedies given by law to a conditional vendor of similar property. The Purchaser hereby expressly waives all notices, demands, tenders or other rights not expressly given hereunder, whether prescribed by statute or otherwise, provided, however, that if in any state said waiver of the Purchaser shall be invalid and unenforcible, the Purchaser shall in that event be given all such notices, demands, tenders or other rights as are required by law.

(d) If in any state the rights, powers and remedies of Seller, upon so retaking possession are prescribed by statute, Seller in such state may proceed in accordance with such statute.

It is expressly agreed that if any of the above remedies are prohibited to Seller by the law of any state, they shall as to said state be ineffective only to the extent of such prohibition, without invalidating the remainder of this contract.

It is further agreed that the rights and remedies given the Seller hereunder are cumulative and not alternative, and that the enforcement of one remedy or the commencement of one proceeding by the Seller shall not constitute an election so as to bar an enforcement of any other remedy or the com-

mencement of any other proceeding; that the retaking of the property by Seller as herein provided shall not deprive Seller of its right to collect the unpaid balance due, nor shall the beginning of a suit against Purchaser for any unpaid balance or any part or installment thereof, or the acceptance of any note, with or without endorsements thereon to evidence said indebtedness, prevent the taking of possession of said property by the Seller.

Nothing herein contained shall require the Seller to exercise any of its options or enforce any of its rights hereunder within any particular period of time, and no act or omission to act shall be deemed a waiver of any condition hereunder, unless such waiver shall be in writing, signed by the Seller.

Purchaser admits notice of the intended assignment of this contract and/or note and agrees that if this contract and/or note be assigned all payments shall be made to assignee absolutely, hereby waving all rights now or hereafter existing in Purchaser's favor against Seller to make any defense, counterclaim or cross-complaint to any demand or action brought by assignee to recover payments due under this contract and/or upon said note or to recover possession of said chattels, and Purchaser further agrees that all claims or demands on Purchaser's part against Seller shall be independent of any action by assignee against Purchaser.

ALL PROMISES, VERBAL AGREEMENTS, UNDERSTANDINGS OR REPRESENTATIONS OF ANY KIND, PERTAINING TO THIS PURCHASE, AND NOT CONTAINED HEREIN, ARE EXPRESSLY WAIVED, AND THIS INSTRUMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE SELLER AND THE PURCHASER.

THE PURCHASER HEREBY AUTHORIZES THE SELLER TO FILL IN THE SERIAL NUMBERS OF ABOVE EQUIPMENT FOR FILING PURPOSES.

It is further agreed that if any paragraph, provision, clause, condition or any other part of this contract shall be invalid or unenforcible, this will not invalidate or in any way affect the remaining provisions, conditions and other parts of this contract.

This agreement, when accepted, shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

In Witness Whereof, the Purchaser has executed this instrument and hereby acknowledges the receipt of a full, true,

perfect and complete copy of this instrument, this 21st day of January, 1935.

PHILIP GREENBERG.
(Firm or Corporation)

By.....
(Individual Signs Here)

Witness:.....
.....

Accepted Jan 23 1935

ALLIED STORE UTILITIES CO. (Seller)
(HUSSMANN-LIGONIER PRODUCTS)

By.....
Secretary-Treasurer

ALL PAYMENTS ARE TO BE MADE BY CHECK OR DRAFT PAYABLE TO THE ORDER OF THE ALLIED STORE UTILITIES CO.

ROBT. M. DUNVILLE.

HL 15 200 Bks. 2-32 C.

ALLIED STORE UTILITIES CO.
(HUSSMANN-LIGONIER PRODUCTS)

This Note Given Under Contract of Conditional Sale of Even Date

$1,275.00 City of Danville State of Va 1-21, 1935

I, we, or either of us, for value received, promise to pay to the order of the ALLIED STORE UTILITIES CO. $1,275.00 in Sight Draft consecutive monthly installments being for the sum of $ Cash each and the last installment being for the sum of $....., the first installment being due on the.....day of....., 193.., and one each of the remaining installments on the same day of each month thereafter until all are paid, with interest on each installment after maturity until paid at the rate of six per cent per annum. Failure to pay any installment of this note, or to fulfill any of the obligations herein undertaken, shall *ipso facto* without demand or notice, mature all remaining installments on this

note together with interest, costs, and attorney's fee as hereinafter set out. Should this note not be paid at maturity or when due or demandable as herein provided, and it be placed in the hands of an attorney for collection, the makers, endorsers, guarantors, and sureties and each of them hereby agree jointly and severally to pay the fees of such attorneys, which fees are hereby fixed at fifteen per cent (15%), on the amount then due on this note, with interest and costs. Demand for payment, protest and notice of dishonor are hereby waived by all parties.

PHILIP GREENBERG (Seal)
(Sign Here)

.....(Seal)

page 7 } After the new equipment came, Mr. Greenberg contended that the equipment was put up with the screws sent with the equipment, causing the scale counter to fall and damage his scale. Mr. Greenberg refused to ship the old equipment until some adjustment had been made for what he claimed was defective new equipment.

The plaintiff stated that it was the custom of his company that when an agent sells new equipment, he must account to the company for the purchase price and the old equipment becomes the property of the agent; that he had accounted to the Company for the trade-in value of the old equipment in in this case, same having been deducted from his commissions and reserve account, when the goods shipped by Dunville's principal were delivered to Greenberg.

To which said statement of the witness as to the custom of his company, the defendant by counsel objected to upon the ground that such a custom was not binding upon the defendant unless he was shown to have had knowledge of same; and on the further ground that to admit such evidence would change the terms and purport of the written contract; which objection, the Court overruled and the defendant by counsel excepted.

Upon cross examination, the plaintiff was asked if he had not had a conference with Mr. Greenberg in the offices of Carter and Williams, Attorneys, in an effort to adjust the differences between Mr. Greenberg and his company and if at that time, he had claimed that he personally owned the old equipment or had made any statement to Mr. Greenberg that he personally owned the said equipment, to which question

the plaintiff replied that he did not recall whether or not at a conference with Mr. Greenberg and his counsel he had made any claim to the property for which he is now suing.

Upon re-direct examination, the plaintiff offered the following letter:

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ALLIED
STORE UTILITIES CO.

HUSSMAN-LIGONIER REFRIGERATORS—STEINER, PRODUCTS

General Office, 2401 N. Leffingwell Ave.
SAINT LOUIS MO.

March 14, 1935.

Mr. Robt. M. Dunville

Re: Philip Greenberg
Danville, Va.

Dear Sir:

We have received your letters of February 25th and March 8th concerning the above transaction and wish to apologize for not answering your first letter promptly. However, we have now gone over the situation carefully and are pleased to give you the following information.

In the first place, this equipment was sold F. O. B. Danville, Virginia depot and the contract does not read installed. Therefore, the responsibility for satisfactorily installing this equipment rests solely with Mr. Greenberg.

The scale stand on the F line counters were fabricated in such manner that two screw holes are provided at the top center of the stand for fastening the stand to the counter and four screw holes, two on each side, are provided at the bottom for fastening the bottom of the stand to the counter.

To facilitate shipment, the stand is detached before shipping but a small bag holding six screws is tied to the stand and there can be no question in anybody's mind that the screws attached are to be used in applying that stand to the counter. Two of the screws are 2½″ long and four of the screws are 1½″ long and anybody would know that the two longest screws are to be applied at the top and the four shorter screws at the bottom, two on each side. Furthermore, the screw holes are not completely drilled at the factory

but are only bored sufficiently to start the screw and if the proper screws are applied in the proper places and the screws are applied in the proper places and the screws are tightened up the stand will bear under a far greater weight than a scale.

It does not seem to us as though this man can have any claim against you or our Company because it seems as though he would have a difficult time proving that because the scale fell off the case it was due to some defect to the equipment and he would certainly have to prove his charge.

We do not feel any responsibility but as far as writing Mr. Greenberg, this we hesitate to do because he has not been in touch with us at all. The equipment traded in on this job and which is your property, and which is being retained by Mr. Greenberg unlawfully would probably be secured more quickly if you handled the situation yourself from Richmond.

The name of our attorneys representative in Danville, Virginia, is Mr. Grasty Crews, Danville, Virginia, and our attorneys here tell us that he is a capable lawyer and would doubtless be glad to handle your claim. It would be our recommendation that you make official demand upon Mr. Greenberg for the release of the used equipment you traded in and then if he refuses to give up the property, place the matter in the hands of Mr. Crews advising him that you
page 9 } are doing so upon recommendation of our attorneys in St. Louis, the Credit Clearing House Adjustment Corporation.

Also, in the event you do place this matter with Mr. Crews please advise us and we will have Credit Clearing House Adjustment Corporation write him a letter asking him to give your claim special care and attention.

Furthermore, if there is any way that we can assist you in securing your property, we will be glad to have you write us again.

It does not seem as though very much benefit would result by our Company opening up correspondence with Mr. Greenberg as long as you state that he has already placed the matter in the hands of his own lawyer, and we believe that if you turn the matter over to an attorney to represent you that it will very likely be possible to straighten the matter out without very much difficulty.

Yours very truly,

(Signed) J. EZELL,
Credit Department.

JE:IK

The witness, C. T. Carter, testified that he had been a salesman for the Hussman-Ligonier Products for several years; that it was the custom that when a salesman made a sale of equipment, in taking in old equipment to become responsible to the House for the purchase price and that he never mentioned the old equipment in th contract made with customer.

At the conclusion of the plaintiff's testimony, the defendant, by counsel, moved the Court to strike out all of the plaintiff's evidence upon the round that it was not material to the issue herein involved and that it showed on its face no connection with the written contract filed with it; that the plaintiff was not entitled to recover in this action; which motion, the court overruled and the defendant, by counsel, excepted.

And the defendant to prove and maintain the said issue on his part, offered to introduce the following evidence, to-wit:

The defendant, Philip Greenberg, testified in substance that he purchased the equipment as per the contract, filed as evidence in this cause, from the Allied Store Utilities Company, Distributors of the Hussman-Ligonier Pro-
page 10 } ducts, and agreed to deliver to that company, as per the terms of said contract, the goods being sued for by Robert M. Dunville in his individual capacity; That the new goods purchased were defective and by reason of the weakness of their structure, a scale counter especially ordered and supposed to be designed for a heavy butcher's scale collapsed thereby causing considerable damage and that he took the matter up with the Company through its agent, Robert M. Dunville, who promised to adjust the matter and that he has failed to do so. Therefore, the defendant refused to deliver the goods sued for to the said Company until such adjustment was made; that he was never advised by anyone that the old goods to be returned to the Company were the property of Robert M. Dunville and that he, Mr. Greenberg, was awaiting the adjustment of his claim when he was served with notice of this suit.

Upon the conclusion of the defendant's evidence, the defendant, by counsel, renewed his motion to strike out the plaintiff's evidence for the same reasons assigned at the conclusion of the plaintiff's evidence, which motion the court overruled and the defendant, by counsel, excepted.

At the conclusion of the evidence, the Court gave the jury the following instructions:

The Court instructs the jury that if they believe from the greater weight of the evidence that the three Hussman-Ligonier Freezer Counters described in the declaration are the property of Robert M. Dunville, and that the defendant has refused to deliver same to him, you should find your verdict for the plaintiff, and if you find your verdict for the plaintiff, you must fix the value of the property involved in an amount not exceeding five hundred dollars, and in addition thereto in your discretion, assess such damages, as page 11 } you may believe from the evidence, plaintiff has sustained by their wrongful detention, in a sum not exceeding two hundred and fifty dollars.

To the giving of which instructions, the defendant, by counsel, objected to for the reason that the evidence in this cause does not warrant the giving of any instructions upon which a recovery for the plaintiff might be had; which motion the Court overruled and the defendant, by counsel, excepted.

The foregoing was the only instruction given by the Court to the Jury in this cause.

Whereupon, the jury returned a verdict in the following words and figures, to-wit:

We, the jury find that the defendant unlawfully detains from the plaintiff three used Hussman-Ligonier Freezer Counters, and we find that the alternative value of said articles at $350.00 and assess damages in plaintiff's favor, the detention of said articles at $125.00.

C. F. TUCKER, Foreman.

After the return of said verdict, the defendant, by counsel, moved the Court to set such verdict aside and enter a final judgment for defendant because such verdict was contrary to the law and evidence and because the evidence plainly shows that the plaintiff is not entitled to recovery in this action; which motion the Court overruled and the defendant, by counsel, excepted.

The foregoing was the only evidence introduced by either party.

The defendant therefore tenders this, his bill of exception #1 and ask the court to certify that it contains the evidence and all of the evidence introduced at the trial of the said cause, and prays that the same be signed, sealed and made a part of the record, which is accordingly done.

Given under my hand and seal this 19th day of July, 1935.

HENRY C. LEIGH,
Judge of the Corporation Court of
Danville, Virginia.

page 12 } State of Virginia,
City of Danville, to-wit:

I, Otis Bradley, Clerk of the Corporation Court of Danville, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record and judicial proceedings of said Court in a certain action of *Detinue* lately pending in said Court between Robert M. Dunville, plaintiff, and Philip Greenberg, Inc., &c., defendants. And I further certify that the defendants Philip Greenberg, Inc., &c., has filed with me a written notice to the plaintiff's Attorney of their intention to apply for a transcript of said record, which notice has been duly accepted by Grasty Crews, Attorney for said plaintiff.

Given under my hand this 1st day of August, 1935.

OTIS BRADLEY, Clerk.

Clerk's Fee for Copy of Record $8.50.

A Copy—Teste:

M. B. WATTS, C. C.

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