

1940

Max Fausett v. General Electric Contracts Corporation and William Holdaway : Abstract of Record

Utah Supreme Court

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Fabian, Clendenin, Moffat & Mabey; Attorneys for General Electric Contracts Corporation, Defendant and Appellant; S. J. Sweetring; Attorney for William Holdaway, Defendant and Appellant; F. B. Hammond; Attorney for Plaintiff and Respondent;

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In the Supreme Court of the State of Utah

MAY TERM 1940

MAX FAUSETT,

Plaintiff,

—vs.—

GENERAL ELECTRIC CONTRACTS
CORPORATION, a foreign corpora-
tion, and WILLIAM HOLDAWAY,
Defendants.

No. 6251

Appeal from the Seventh Judicial District Court
in and for Carbon County, State of Utah,
George Christensen, Judge

ABSTRACT OF RECORD

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Corporation, Defendant and Appellant.*

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*Attorney for William Holdaway, Defendant
and Appellant.*

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*Attorney for Plaintiff
and Respondent.*

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In the Supreme Court of the State of Utah

MAX FAUSETT,

Plaintiff and Respondent,

—vs.—

GENERAL ELECTRIC CONTRACTS
CORPORATION, a foreign corpora-
tion, and WILLIAM HOLDAWAY,

Defendants and Appellants.

No. 6231

ABSTRACT OF RECORD

Tr. Page

AMENDED COMPLAINT

On September 9, 1939, plaintiff filed in the District Court of the Seventh Judicial District, in and for Carbon County, Utah, his verified complaint, as follows:

14 Comes now the plaintiff after Demurrer filed and before the trial of this case and files this his Amended Complaint and alleges as follows:

1. That the defendant General Electric Contracts Corporation is a foreign corporation duly and regularly authorized to do business within the State of Utah with its main office in New York

City, New York, and its branch office at 109 West Second South Street, Salt Lake City, Utah; and that the defendant William Holdaway is a resident of Price, Utah.

2. That on or about the 7th day of July, 1938, the defendant, William Holdaway, and one Earl Fausett, as co-partners, were selling refrigerators and other household appliances at Price, Utah, under the firm, name and style of Carbon Furniture and Appliance Company.

3. Plaintiff is informed and believes and upon that information and belief alleges that between and including July 7, 1938, and June 19, 1939, the defendants were bound by an agreement in writing referred to in Exhibit "B" herein by the terms of which the said Earl Fausett and William Holdaway, as co-partners, were privileged to purchase Hot Point Refrigerators from the Graybar Electrical Company of Salt Lake City, Utah, and pay said company therefor 10% of the wholesale price on such refrigerators, and upon the sale of the same to the customers of the said co-partners upon Conditional Sales Contracts on forms furnished them by the defendant, General Electric Contracts Corporation, and upon the assignment of such contracts by said co-partners to the defendant, General Electric Contracts Corporation, the defendant General Electric Con-

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15 tracts Corporation was bound by said agreement to pay to said Graybar Electrical Company the balance of the wholesale price of such refrigerators for the said co-partners; it is further provided for in said agreement that upon the assignment of said contracts to it, as aforesaid, the defendant General Electric Contracts Corporation is bound to pay to said co-partners the sale price mentioned in said contracts less the down payment therein set out and less 10% of the balance of the purchase price set out in such contracts; it is further provided in said agreement that the purchasers of Hot Point Refrigerators under such sales contract may pay the monthly installments provided for in such contracts either to the defendant General Electric Contracts Corporation or to said co-partners and that if the purchasers fail to make payments as provided in said contracts, the defendant General Electric Contracts Corporation may cancel assignments of said contracts and return to said co-partners said conditional sales contract and demand from them the balance due on such contracts; and that thereupon and thereafter the said contracts are and shall be the property of said co-partners and they are given thirty (30) days by the defendant General Electric Contracts Corporation in which to repossess and sell said refrigerator and pay the balance due thereon to the defendant General

Electric Contracts Corporation and if the said co-partners fail to collect from the purchasers and/or pay to the defendant General Electric Contracts Corporation the balance due on such contracts, the defendant General Electric Contracts Corporation may thereupon demand full payment of the balance due on such contracts from said co-partners.

16 4. That on or about the 7th day of July, 1938, the said Earl Fausett and the defendant William Holdaway, as co-partners, as aforesaid, were acting as dealers for the defendant General Electric Contracts Corporation and as such dealers sold to the plaintiff one Hot Point Refrigerator, Model No. 12OEC52, Serial No. Cab. 7723487 for the sum of \$216.64 and delivered the same to the plaintiff at Price, Utah, on a written Conditional Sales Contract, the forms of which were furnished said co-partners by the defendant General Electric Contracts Corporation, a copy of which is marked Exhibit "A" and attached hereto and by this reference is made a part of this Amended Complaint, and ever since the 7th day of July, 1938, the plaintiff has been, and he is now, entitled to the possession of said refrigerator.

5. That the plaintiff paid to said partners the sum of \$75.00 cash at the time of the purchase of said refrigerator and by the terms of said con-

tract agreed to pay \$10.00 on said purchase price on the 25th day of July, 1938, and \$10.00 on the 25th day of each succeeding month thereafter for thirteen consecutive months and \$11.64 on the 25th day of August, 1939; that said contract provides that if said payments are not made upon the due dates as set out above, the plaintiff agreed to pay late charges of five (5) cents per dollar in addition to the regular installments.

6. That thereafter, to-wit, on the 8th day of July, 1938, said co-partners, for a valuable consideration and pursuant to said contract mentioned in paragraph (3) above, sold, assigned and delivered to the defendant General Electric Contracts Corporation, the said Conditional Sales Contract, which assignment is in writing, a copy of which is marked Exhibit "B" and attached hereto and by this reference is made a part of this Amended Complaint, and ever since said date the said defendant has been the owner of and in the possession of said contract.

7. That pursuant to the terms of said Conditional Sales Contract and said contract mentioned in paragraph (3) above, the plaintiff paid to the defendant General Electric Contracts Corporation part of the monthly installments required by said contract, the number of such installments so paid to the defendant General Electric Con-

tracts Corporation plaintiff does not know but the number thereof is well-known to the defendants, until on or about the 25th day of February, 1939, at which time the plaintiff paid said defendant General Electric Contracts Corporation the sum of \$5.00 leaving a balance due on said monthly installment of \$5.00; that on the 25th day of March, 1939, the plaintiff was unable to pay and did not pay the \$10.00 installment due on that date; that under date of April 7, 1939, the said defendant General Electric Contracts Corporation granted the plaintiff an extension of time to and including April 15, 1939 in which to pay the arrears on said contract; that under date of April 27, 1939 the plaintiff was in arrears on said contract the sum of \$25.00 and on said date the defendant General Electric Contracts Corporation granted the plaintiff a further extension of time, to suit the plaintiff's convenience, in which to pay the said arrears.

8. That the plaintiff paid part of said monthly installments to the defendant William Holdaway as the agent of the defendant General Electric Contracts Corporation, which procedure was ratified by the defendant General Electric Contracts Corporation, the number of such installments so paid to the defendant William Holdaway plaintiff does not know but the number thereof is well known to the defendants.

9. That at no time did the defendants, or either of them, notify the plaintiff that they, or either of them, would not grant further extensions of time to the plaintiff in which to pay said installments; that at no time did the defendants, or either of them, notify the plaintiff that it intended to repossess the refrigerator for any unpaid balance thereon; that on or about the 1st day of May, 1939, the defendant William Holdaway, as agent of the defendant General Electric Contracts Corporation demanded of the plaintiff \$15.00 on arrears on the payment of said contract; that the plaintiff paid said sum to him as such agent on said date.

10. That on or about the 30th day of May, 1939, the plaintiff and his family were absent from his residence at Price, Utah, and without the consent and approval of the plaintiff, the defendant William Holdaway, acting for himself and for the defendant General Electric Contracts Corporation, willfully, and without the consent of the plaintiff, entered the plaintiff's said residence, took possession of said refrigerator and the defendants have continuously since said date wrongfully withheld and detained and they now wrongfully withhold and detain the said refrigerator from the plaintiff's possession.

18 11. That under date of May 3, 1939, the defendant General Electric Contracts Corporation advised the plaintiff that the total balance due on said contract was \$66.64 and on or about the 1st day of June, 1939, the plaintiff tendered said sum to the defendant William Holdaway, as agent of the defendant General Electric Contracts Corporation, and demanded a return of said refrigerator but that said William Holdaway refused to accept said sum and return to the plaintiff the refrigerator unless the plaintiff would pay said William Holdaway the balance he claimed the plaintiff owed him on another and different account.

12. That on or about the 19th day of June, 1939, the plaintiff tendered to the defendant General Electric Contracts Corporation at its branch office in Salt Lake City, Utah, the sum of \$66.64, which sum the defendant General Electric Contracts Corporation advised the plaintiff was the total balance due on said refrigerator, and demanded title to said refrigerator from said defendant; that said defendant then refused to give the plaintiff title to said refrigerator and return said refrigerator to him, and at all times since said date has refused and it now refuses to give plaintiff title thereto and return said refrigerator to him.

13. That the defendants have damaged the plaintiff in the sum of \$250.00 by the wrongful taking and detention of said refrigerator by the defendants.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

1. For the return to plaintiff of said refrigerator; that if return thereof cannot be had that the defendants pay the plaintiff the sum of \$216.64.

2. That the defendants pay the plaintiff the sum of \$250.00 as and for his damages for the wrongful taking and detention of said refrigerator by the defendants.

19 3. That the plaintiff have his costs incurred in this action and such further relief as is just under the circumstances.

F. B. HAMMOND

Plaintiff's Attorney.

Duly Verified.

EXHIBIT "A"

GECC	Dealer No.
Budget Payment Plan	Buyer Max Fausett
Original	Address Price, Utah
For General Electric	Telephone 433
Contracts Corporation	

Buyer below named, buys from Seller, below named, and Seller sells to Buyer for the Total Time Price stated below, on the following terms and conditions:

To be kept and/or installed at.....
(Number and Street)

.....
(City or Town) (County or State)

<i>Quantity</i>	<i>Description of Appliances</i>	<i>Model</i>	<i>Serial No.</i>
1	Hotpoint Refrigerator	12OEC52	Cab. 7723487
		Unit 7845627	\$199.50
	Sales Tax		3.99
			<hr/> \$203.49

Be sure to fill in all columns above. Where Refrigerator is sold—enter Model and Serial No. of Cabinet only. "Unit" Model and Serial Number unnecessary.

TIME PRICE

Cash on or before delivery \$75.00, and balance payable in 14 consecutive monthly instalments, beginning July 25, 1938 and thereafter on the corresponding day of each succeeding month. Each instalment shall be in the amount of \$10.00, except the final instalment which shall be \$11.64.

The aggregate amount of monthly instalments, plus the down payment is the total time price of the chattels, and all payments shall be made at the place designated by the Seller, its successors or assigns.

Buyer acknowledges acceptance of delivery, after thorough examination, of foregoing chattels complete with attachments and equipment, to be kept and/or installed at place mentioned.

Title to said property shall not pass to the Buyer until said Total Time Price is fully paid in cash. Said property shall remain strictly personal property. The Buyer agrees not to misuse, secrete, sell, encumber, remove or otherwise dispose of or lose possession of said property, nor permit nor suffer any loss, encumbrance or charge against said property, and shall be responsible for any loss of or damage to said property. Should the Buyer fail to pay said Time Price or any part thereof when due, or breach this agreement, or,

should the Seller feel itself or said property insecure, or if any execution or writ be levied on any of the Buyer's property, or if a Receiver thereof is appointed, or if a petition in bankruptcy be filed by or against the Buyer, the entire unpaid balance shall at once become due and payable at the Seller's election, and the Seller may, without notice or demand, by process of law or otherwise, take possession of said property wherever located, and retain all moneys paid thereon for the reasonable use of said property, and the Buyer agrees to pay for necessary repairs because of damage thereto; or the Seller may sell the same at public or private sale and apply the proceeds after deducting expenses, liens and an attorney's reasonable fee paid or incurred by the Seller, to the payment of said Time Price, and pay the Buyer the surplus, if any, or in case of a deficiency the Buyer agrees to pay the amount thereof to the Seller at once. The Buyer waives all claims, damages and demands against the Seller arising out of the repossession, retention and sale as aforesaid.

Time is of the essence of this contract. All rights and remedies hereunder are cumulative and not alternative. This agreement may be assigned without notice to the Buyer and when assigned shall be free from any defense, counterclaim, or

cross-complaint by the Buyer. Any part of this agreement contrary to the law of any state shall not invalidate other parts of this agreement in that state.

IF PAYMENTS ARE NOT MADE WITHIN 15 DAYS AFTER DUE DATE, BUYER AGREES TO PAY LATE CHARGES OF 5c PER DOLLAR IN ADDITION TO REGULAR INSTALMENT.

THERE IS NO WRITTEN AGREEMENT, VERBAL OR OTHERWISE, WHICH IS NOT SET DOWN HEREIN; NO WAIVERS OR MODIFICATIONS SHALL BE VALID UNLESS WRITTEN UPON OR ATTACHED HERETO.

THE BUYER HEREBY CERTIFIES THAT THE STATEMENTS ON THE REVERSE SIDE OF THIS AGREEMENT ARE TRUE.

This agreement shall apply to and inure to the benefit of, and bind the heirs, executors, administrators, successors and assigns of both parties hereto.

This instrument supersedes and replaces any instrument affecting any or all of the equipment herein described, heretofore executed by Buyer to Seller, and any such previously executed instruments is for all purposes merged in this instrument.

Executed in quadruplicate, one copy of which was delivered to and retained by the Buyer, this 7 day of July, 1938.

(Signed) Carbon Furniture & Appl. Co. (L. S.)
Seller.

By Earl Fausett

(Signed) Max Fausett (L. S.)
Buyer

(On Reverse Side)
Buyer's Credit Statement

Name—Max Fausett

Residence—Price, Utah

How long there—life Rented? Owner—yes

Name and address of nearest relative
with whom not living—Roy Fausett

Age 23 Married—White—No. of dependents
including wife—3

If the Buyer is a married woman, the information should refer to the husband:

Husband's Name—Max Fausett

Occupation—Trucker

Employer—Self

Business Address—Price, Utah

Business phone 433 Monthly Income 150.00

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List below the names of Finance Companies and other trade references from whom you have purchased merchandise on credit in the past:

<i>Name</i>	<i>Address</i>	<i>Articles Purchased</i>
Universal C. Co.		Trucks
D.T.R. Furn.	Price	Furniture
Price Comm. Co.	"	Hay and Grain
Frank Hanson	"	

Name of Bank where Savings—Checking— account is carried—Carbon Emery Bank—
Check Street Address 40 West Main

In whose name is account carried?—Max Fausett
Insurance Co. Tr.

Location of Real Estate owned—Park Dale Sub.
Price

In whose name is title?—Max Fausett
Assessed valuation—\$500.00

EXHIBIT "B"

20

ASSIGNMENT BY DEALER TO GENERAL ELECTRIC CONTRACTS CORP.

For the purpose of inducing you to purchase the within contract signed by the within named Buyer, the undersigned submits the above statement which he certifies to be substantially true, unless otherwise hereinafter stated, and certifies that the said contract arose from the sale of the

within described property, warranting to you that the down payment was made by the Buyer in cash and not its equivalent, that no part thereof was loaned directly or indirectly by the undersigned to the Buyer; that title of the aforesaid property is vested in the undersigned free and clear of all liens and encumbrances whatsoever, except the within contract; that the Buyer was at least twenty-one years of age at the time of the execution of said contract; that the undersigned has the right to assign said contract; and that there is now owing thereon the amount as set forth therein.

For value received the undersigned does hereby sell, assign and transfer to General Electric Contracts Corporation his, its or their right, title and interest in and to the within contract and the property covered thereby and authorizes said General Electric Contracts Corporation to do every act and thing necessary to collect and discharge the same.

All the warranties, terms and provisions of an agreement between the undersigned and General Electric Contracts Corporation are made a part hereof by reference, and upon which General Electric Contracts Corporation relies in making this purchase. Neither the repossession of the with-

in described property from the Buyer for any cause, nor failure to file or record this contract when required by law (it being the duty of the undersigned to file or record the contract) shall release the undersigned from the obligations herein and in said agreement between it and General Electric Contracts Corporation.

Dated July 8, 1938.

Carbon Fur. & Appl. Co. (L. S.)

By Earl Fausett,
Partner

26

On October 3, 1939, Defendant General Electric Contracts Corporation filed its
ANSWER TO AMENDED COMPLAINT

(Title of Court and Cause)

Comes now General Electric Contracts Corporation, one of the Defendants above named, and answering Plaintiff's Amended Complaint admits, denies and alleges as follows:

1. Admits that this answering Defendant is a corporation authorized to do business in Utah.
2. Admits that on the 7th day of July, 1938, Defendant William Holdaway and Earl Fausett

were co-partners, doing business under the assumed name of Carbon Furniture & Appliance Company.

3. Answering paragraph No. 3 this answering Defendant admits that from August 25, 1937, until after June 19, 1939, there was an agreement between William Holdaway and Earl Fausett and this answering Defendant whereby this answering Defendant purchased certain negotiable paper from said Holdaway and Fausett. Further answering paragraph No. 3 this answering Defendant alleges that the abstract of said agreement set forth in paragraph No. 3 of Plaintiff's Complaint, as amended, is not even a reasonably accurate description of said agreement.

27 4. Answering paragraph No. 4 this answering Defendant admits that on July 7, 1938, Earl Fausett and William Holdaway sold to Max Fausett a certain Hot Point refrigerator and took his contract representing the balance due on said refrigerator, a copy of which said contract is marked Exhibit "A" and attached to plaintiff's Complaint. Further answering paragraph No. 4, this answering Defendant specifically denies that William Holdaway or Earl Fausett, or either of them, ever acted as agent for this answering Defendant.

5. Answering paragraph No. 5 this answering Defendant alleges that Exhibit "A," attached to Plaintiff's Complaint, sets forth the terms and conditions of the contract of sale referred to in Plaintiff's Complaint.

6. Answering paragraph No. 6 this answering Defendant alleges that it purchased from William Holdaway and Earl Fausett said contract of sale on the 8th day of July, 1938, and remained the owner of said contract of sale until the 12th day of May, 1939, when said contract was sold to William Holdaway.

7. Answering paragraph No. 7 this answering Defendant admits that Plaintiff made certain payments under said contract, and that all payments made upon said contract were duly credited to Plaintiff's account. Further answering said paragraph No. 7, this answering Defendant alleges that it never at any time during the time it was the owner of said contract, granted any extension of time to Plaintiff, or consented that Plaintiff could make any payments on said contract other than provided by the terms of said contract.

8. Answering paragraph No. 8 this answering Defendant admits that it received from William Holdaway certain moneys which it credited

to Plaintiff's account. Further answering paragraph No. 8, this answering Defendant alleges that William Holdaway never at any time acted as agent for this answering Defendant and that this answering Defendant has no information as to how many installments were paid to said William Holdaway.

9. Denies each and every allegation of paragraph No. 9.

28 10. Answering paragraph No. 10 this answering Defendant alleges that it has no information concerning any of the acts of William Holdaway in repossessing the refrigerator referred to in Plaintiff's Complaint from Plaintiff and on that ground denies each and every allegation of paragraph No. 10.

11. Denies each and every allegation of paragraph No. 11.

12. Answering paragraph No. 12 this answering Defendant alleges that after it had sold the contract referred to in Plaintiff's Complaint to William Holdaway on the 12th day of May, 1939, Plaintiff offered to pay the balance due upon said contract and Defendant advised Plaintiff that it was no longer the owner of said contract and that it had no interest in the same, but

that said contract has been sold to William Holdaway.

13. Denies each and every allegation of paragraph No. 13.

This answering Defendant denies each and every allegation of Plaintiff's Amended Complaint not herein otherwise specifically admitted or modified.

WHEREFORE, this answering Defendant having fully answered Plaintiff's Amended Complaint, prays that Plaintiff take nothing by his said Complaint and that Defendant General Electric Contracts Corporation be dismissed, with its costs herein expended.

FABIAN, CLENDENIN, MOFFAT & MABEY,

*Attorneys for Defendant General Electric
Contracts Corporation*

Duly verified.

On December 13, 1939, Defendant William Holdaway filed his

ANSWER TO AMENDED COMPLAINT

33 *(Title of Court and Cause)*

Comes now the Defendant, William Holdaway, and answering the Amended Complaint of the Plaintiff, Max Fausett, admits, denies and alleges as follows:

1. Answering paragraphs 1 and 2 of said Plaintiff's Amended Complaint, said Defendant admits the same.

2. Answering paragraph 3 of said Plaintiff's Amended Complaint, said Defendant admits that from August 25, 1937, until after June 19, 1939, there was an agreement between himself, Earl Fausett and the General Electric Contracts Corporation whereby said General Electric Contracts Corporation purchased certain negotiable paper from him and Earl Fausett. Further answering paragraph 3 of said Plaintiff's Amended Complaint, said Defendant alleges that the abstract of said agreement set forth in paragraph 3 of said Plaintiff's Complaint, as amended, is not even a reasonably accurate description of said agreement.

3. Answering paragraph 4 of said Plaintiff's Amended Complaint, said Defendant admits that on July 7, 1938, he and Earl Fausett

sold to Max Fausett a certain Hot Point refrigerator and took his contract representing the balance due on said refrigerator, a copy of which said contract is marked Exhibit "A" and attached to Plaintiff's Complaint. Further answering said paragraph 4, said Defendant denies that he and Earl Fausett, or either of them, ever acted as agent for the General Electric Contracts Corporation; and denies that said Plaintiff is now entitled to the possession of said refrigerator.

4. Answering paragraph 5 of said Plaintiff's Amended Complaint, said Defendant denies that said Plaintiff paid to him and Earl Fausett the sum of of \$75.00 cash at the time of the purchase of said refrigerator; and said Defendant affirmatively alleges that said Plaintiff paid \$30.00 in cash, and was given a credit of \$15.00 for certain furniture turned in to said Defendant and Earl Fausett; and further answering said paragraph 5 of said Plaintiff's amended Complaint, said Defendant admits the same.

5. Answering paragraph 6 of said Plaintiff's Amended Complaint said Defendant alleges that he and Earl Fausett sold said contract of sale on the 8th day of July, 1938, to the General Electric Contracts Corporation, and that said Corporation remained the owner of said contract of

sale until the 12th day of May, 1939, when they repurchased the same from said Corporation.

34 6. Answering paragraph 7 of said Plaintiff's Amended Complaint, said Defendant admits that said Plaintiff made certain payments under said contract to the General Electric Contracts Corporation, and that all payments made upon said contract were duly credited to said Plaintiff's account. Further answering said paragraph 7 of said Defendant's (Plaintiff's) alleged Amended Complaint, said Defendant alleges that he has insufficient information upon which to base a belief as to the truth or falsity thereof, and for that reason he denies the same.

7. Answering paragraph 8 of said Defendant's (Plaintiff's) Amended Complaint, said Defendant admits that said Plaintiff paid part of said monthly installments to him, and that he sent the money so paid to the General Electric Contracts Corporation. Further answering said paragraph, said Defendant alleges that he never at any time acted as agent for the General Electric Contracts Corporation, and that the number of such installments so paid to him by said Plaintiff are not known to him, but that all payments so received by him were, as aforesaid, sent to the General Electric Contracts Corporation.

8. Answering paragraph 9 of said Defendant's (Plaintiff's) Amended Complaint, said Defendant alleges that he never, at any time, granted said Plaintiff an extension of time in which to pay said installments; that he repeatedly notified said Plaintiff that he intended to repossess the refrigerator for the unpaid balance thereon; and further answering said paragraph 9, said Defendant denies the same and each and every allegation therein contained.

9. Answering paragraph 10 of said Defendant's (Plaintiff's) Amended Complaint, said Defendant admits that on or about the 30th day of May, 1939, that he, acting for himself, but not as agent for the General Electric Contracts Corporation, took possession of said refrigerator.

10. Answering paragraph 11 of said Defendant's (Plaintiff's) Amended Complaint, said Defendant, for lack of information upon which to base a belief, denies that under date of May 3, 1939, the General Electric Contracts Corporation advised the Plaintiff that the total balance due on said contract was \$66.64; admits that on, or about, the 1st day of June, 1939, that said Plaintiff tendered said sum to him, and demanded a return of said refrigerator, but that he refused to accept said sum and return to the said Plain-

tiff the refrigerator. Further answering said paragraph 11, said Defendant denies the same, and each and every allegation therein contained.

11. Answering paragraph 12 of said Defendant's (Plaintiff's) Amended Complaint, said Defendant, for lack of information upon which to form a belief as to the truth or falsity thereof, denies the same, and each and every allegation therein contained.

12. Answering paragraph 13 of said Defendant's (Plaintiff's) Amended Complaint, said Defendant denies the same and each and every allegation therein contained.

13. Further answering said Defendant's (Plaintiff's) Amended Complaint, said Defendant denies the same, and each and every allegation therein contained except as same may herein be specifically admitted.

WILLIAM HOLDAWAY

Defendant.

Duly verified.

(Title of Court and Cause)

REPLY TO ANSWER

of Defendant General Electric Contracts Corporation as follows:

Comes now the plaintiff and replies to the Answer of the Defendant General Electric Contracts Corporation and admits, denies and alleges as follows:

1. As to the allegations in Paragraph (6) of said Answer, wherein said defendant alleges that on the 12th day of May, 1939, it sold the Conditional Sales Contract mentioned in Paragraph (4) of the plaintiff's Amended Complaint to the defendant William Holdaway, the plaintiff denies the same and the whole thereof.

2. Replying to the allegations in Paragraph (12) of the said defendant's Answer, the plaintiff denies that the said defendant sold the said Conditional Sales Contract to the defendant William Holdaway on the 12th day of May, 1939, or at any time before the commencement of this action; admits that the plaintiff offered to pay the balance due on said contract but denies that said defendant advised the plaintiff that it was no longer the owner of said contract; denies that the defendant advised the plaintiff that it had no interest in said contract; denies that the defend-

ant had advised that said contract had been sold to William Holdaway but on the contrary alleges the fact to be that on or about the 19th day of June, 1939, the said defendant advised the plaintiff that the contract and the title to said refrigerator was, at that time, in its main office in New York City.

WHEREFORE, plaintiff prays judgment against defendant as set out in the prayer of his said Amended Complaint.

F. B. HAMMOND,
Plaintiff's Attorney.

Duly verified.

On January 16, 1940, Plaintiff filed his
REPLY TO ANSWER OF DEFENDANT
WILLIAM HOLDAWAY

40 *(Title of Court and Cause)*

Comes now the plaintiff and replies to the Answer of the defendant William Holdaway and admits and denies and alleges as follows:

1. As to the allegations in Paragraph (5) of said Answer, wherein the said defendant alleges that he and one Earl Fausett, on the 12th day of May, 1939, repurchased the conditional Sales Contract set out in Paragraph (4) of plaintiff's Amended Complaint from the defendant General Electric Contracts Corporation, the plaintiff denies the same and the whole thereof.

2. As to the allegations in Paragraph (8) of said Answer, to-wit: that the said defendant repeatedly notified the plaintiff that he intended to repossess the refrigerator mentioned in Paragraph (4) of the plaintiff's Amended Complaint for the unpaid balance thereon, the plaintiff denies the same and alleges that the said defendant never at any time notified the plaintiff that he intended to repossess said refrigerator.

WHEREFORE, plaintiff prays judgment against the defendant William Holdaway as set out in the Plaintiff's prayer in his Amended Complaint.

F. B. HAMMOND,

Plaintiff's Attorney.

Duly verified.

51 On January 23, 1940, George Christensen, Judge of the Seventh Judicial District Court in and for Utah County, Utah, in which District the above case was tried, delivered instructions to the jury as follows:

Instruction No. 1:

LADY AND GENTLEMEN OF THE JURY:
The plaintiff in this cause, Max Fausett, has brought this action against the defendants, General Electric Contracts Corporation, a foreign corporation, and William Holdaway, to recover possession of a five-foot Hot Point Refrigerator which it is alleged the plaintiff purchased from the defendant, General Electric Contracts Corporation, a foreign corporation and which refrigerator it is alleged that the defendant, General Electric Contracts Corporation, through its agent, the defendant William Holdaway, willfully and without consent of the plaintiff, took possession of and has continuously thereafter wrongfully withheld and detained said refrigerator from the plaintiff's possession; or, in case delivery cannot be had, plaintiff asks for judgment in the sum of \$224.00, the alleged value thereof, together with \$250.00 in damages for wrongful detention.

The Plaintiff, in his Amended Complaint, in substance, alleges: That the defendant, General

Electric Contracts Corporation, is a foreign corporation, duly and regularly authorized to do business in the State of Utah, with its principal office in this state at 109 West Second South Street, Salt Lake City, Utah, and that the defendant, William Holdaway is a resident of Price, Utah. That on or about the 7th day of July, 1938, the defendant William Holdaway and one Earl Fausett, as co-partners, were selling refrigerators and other household appliances at Price, Utah, under the firm name and style of Carbon Furniture and Appliance Company. Upon information and belief, plaintiff further alleges that between and including July 7, 1938, and June 19, 1939, the defendants were bound by an agreement in writing referred to in Exhibit B, by the terms of which the said Earl Fausett and William Holdaway, as co-partners were privileged to purchase Hot Point refrigerators from the Graybar Electric Company of Salt Lake City, Utah, and pay said company therefor ten per cent of the wholesale price on such refrigerators, and upon the sale of the same to the customers of the said co-partners upon conditional sales contracts on forms furnished them by the defendant General Electric Contracts Corporation, and upon the assignment of such contracts by said co-partners to the defendant General Electric Contracts Corporation the defendant, General Electric Contracts Corporation, was

bound by the said agreement to pay to said Graybar Electrical Company the balance of the whole-sale price of such refrigerators for the said co-partners; and that it is further provided for in said agreement that upon the assignment of said contracts to it as aforesaid, the defendant General Electric Contracts Corporation is bound to pay to the said co-partners the sale price mentioned in said contracts, less the down payment therein set out, and less ten per cent of the balance of the purchase price set out in such contracts. That it is further provided in said agreement that the purchaser of Hot Point refrigerators under such sales contract may pay the monthly installments provided for in such contract either to the defendant, General Electric Contracts Corporation, or to said co-partners; and that if the purchaser fails to make payment as provided for in said contracts the defendant, General Electric Contracts Corporation, may cancel said assignments of said contracts, and return to said co-partners said conditional sale contract and demand from them the balance due on such contracts, and that thereupon and thereafter the said contracts are and shall be the property of the said co-partners, and they are given thirty days by the defendant General Electric Contracts Corporation in which to repossess and sell said refrigerator and pay the balance due thereon to the

defendant, and if the said co-partners failed to collect from the purchaser and/or pay to the defendant General Electric Contracts Corporation the balance due on such contracts, the defendant General Electric Contracts Corporation may thereupon demand full payment of the balance due on such contracts from said co-partners; and further alleges that on or about the 7th day of July, 1938, the said Earl Fausett and the defendant William Holdaway, as co-partners as aforesaid, were acting as dealers for the defendant, General Electric Contracts Corporation, and as such dealers sold to plaintiff one Hot Point refrigerator Model 120 E. C. 52, Serial number CAB 7723487, for the sum of \$216.64, and delivered the same to the plaintiff at Price, Utah, under written conditional sales contract, the forms of which were furnished said co-partners by the defendant, General Electric Contracts Corporation, a copy of which is marked Exhibit A and attached to said complaint and made a part thereof. That plaintiff paid to said co-partners the sum of \$75.00 cash at the time of the purchase of said refrigerator and, by the terms of said contract, agreed to pay ten dollars on said purchase price on the 25th day of July, 1938, and ten dollars on the 25th day of each succeeding month thereafter for thirteen consecutive months, and \$11.64 on the 25th day of August, 1939; and that said contract pro-

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vided if said payments are not made on the due date, as set out, the plaintiff agreed to pay late charges of five cents per dollar in addition to the regular installments; that thereafter, on the 8th day of July, 1938, said co-partners, for valuable consideration, sold, assigned and delivered to the General Electric Contracts Corporation, the said conditional sales contract, and ever since said date the said defendant has been the owner of and in possession of said contract; that plaintiff paid to the defendant, General Electric Contracts Corporation, part of the monthly installments required by said contract, the number of such installments paid the plaintiff does not know, but is well known to the defendants; on the 25th of February, 1939, plaintiff paid to the defendant General Electric Contracts Corporation the sum of five dollars, leaving a balance due on said monthly installment of five dollars.

That under the date of April 7, 1939, the said defendant granted the plaintiff an extension of time to and including April 15, 1939, in which to pay the arrears on said contract; and that thereafter, on April 27, 1939, the defendant, General Electric Contracts Corporation, granted plaintiff a further extension of time to suit the plaintiff's convenience; that plaintiff paid part of said monthly installments to defendant William Hold-

away as the agent of the defendant, General Electric Contracts Corporation. That at no time did the defendants, or either of them, notify the plaintiff that they would not grant any further extensions of time, nor did the defendants, or either of them, notify the plaintiff that they intended to repossess the refrigerator for any unpaid balance thereon; that on or about the first day of May, 1939, the defendant William Holdaway, as agent of the defendant, General Electric Contracts Corporation, demanded \$15.00 of the plaintiff and that plaintiff paid said sum to him as such agent on said date. That on or about the 30th day of May, 1939, the plaintiff and his family were absent from his residence in Price, Utah, and without the consent and approval of the plaintiff the defendant William Holdaway, acting for himself and for the defendant, General Electric Contracts Corporation, willfully entered the plaintiff's said residence, took possession of said refrigerator, and the defendants have continuously since said date wrongfully withheld and detained, and now wrongfully withhold and detain, said refrigerator from the plaintiff's possession. That under date of May 3, 1939, the defendant, General Electric Contracts Corporation, advised the plaintiff that the total balance due on said contract was \$66.64, and
55 on or about the 1st day of June, 1939, the plaintiff tendered said sum to the defendant, William

Holdaway, as agent of the defendant, General Electric Contracts Corporation, and demanded a return of said refrigerator, but said William Holdaway refused to accept said sum and return to the plaintiff the said refrigerator unless the plaintiff would pay to said William Holdaway the sum he claimed the plaintiff owed him on another and different account. That on or about the 19th day of June, 1939, the plaintiff tendered to the defendant, General Electric Contracts Corporation, at its branch office in Salt Lake City, Utah, the sum of \$66.64, and demanded title to said refrigerator. That said defendant then refused to give plaintiff title to said refrigerator and return said refrigerator to him, and at all times since refused to do so. That the defendants have damaged the plaintiff in the sum of \$250.00 by the wrongful taking and detention of said refrigerator, and plaintiff prays judgment against the defendants for the return of the refrigerator, and if such return cannot be had, that the defendants pay the plaintiff the sum of \$216.64 and the sum of \$250.00 as and for damages for said wrongful taking and detention, and plaintiff prays for costs. To this complaint, there is attached Exhibit A, copy of contract of sale, and Exhibit B, a communication to the General Electric Contracts Corporation by Carbon Furniture and Appliance Company.

The defendant, General Electric Contracts Corporation, has filed answer to plaintiff's said complaint, wherein it admits the corporate existence, the co-partnership of William Holdaway and Earl Fausett, the agreement between William Holdaway and Earl Fausett whereby the General Electric Contracts Corporation purchased certain negotiable paper from said Holdaway and Fausett; that Earl Fausett and William Holdaway sold to Max Fausett a certain Hot Point refrigerator and took his contract representing the balance due on said refrigerator; admits that the plaintiff made certain payments under his contract, and that such payments were duly credited to plaintiff's account; admits that it received from William Holdaway certain moneys which it credited to plaintiff's account. Alleges that plaintiff's Exhibit A sets forth the terms and conditions of the contract of sale referred to in plaintiff's complaint; alleges that said defendant purchased from William Holdaway and Earl Fausett the said contract of sale and remained the owner of said contract of sale until the 12th day of May, 1939, when said contract was sold to William Holdaway. Alleges that it never at any time, while it was the owner of said contract, granted any extension of time to plaintiff. Alleges that William Holdaway never at any time acted as agent for this answering defendant; that it has no information

concerning the act of William Holdaway in repossessing the refrigerator referred to in plaintiff's complaint; alleges that after it had sold the contract referred to in plaintiff's complaint to William Holdaway, plaintiff offered to pay the balance due upon said contract, and defendant advised plaintiff that it was no longer the owner of said contract, that said contract had been sold to William Holdaway; and denies each and every other allegation in said amended complaint contained.

The defendant, William Holdaway, has filed an independent answer to the amended complaint of the plaintiff, wherein he admits the corporate existence of the defendant, General Electric Contracts Corporation and the co-partnership of Holdaway and Fausett; admits the agreement between said Holdaway and Fausett and the General Electric Contracts Corporation whereby said General Electric Contracts Corporation purchased negotiable paper from Holdaway and Fausett; admits that he and Earl Fausett sold to Max Fausett a certain Hot Point refrigerator and took his contract therefor; alleges that he and Earl Fausett sold said contract of sale to the General Electric Contracts Corporation, and that said corporation remained the owner thereof until the 12th day of May when Holdaway and Fausett repurchased

the same. Alleges that the defendant never at any time acted as agent for the General Electric Contracts Corporation, and that he never at any time granted plaintiff an extension of time in which to pay his installments. Alleges that he repeatedly notified said plaintiff that he intended to repossess the refrigerator. Admits that on or about the 30th day of May he, acting for himself, but not as the agent of the General Electric Contracts Corporation, took possession of said refrigerator. Admits that on or about the 1st day of June, 1939, the plaintiff tendered the balance due on said contract to him, and demanded a return of said refrigerator, but that he refused to accept said sum and return the plaintiff the refrigerator. And denies each and every other allegation in plaintiff's said complaint contained.

As a reply to the answer of the defendant General Electric Contracts Corporation, the plaintiff admits that the plaintiff offered to pay the balance due on said contract; alleges that on or about the 19th day of June, 1939, the said defendant advised plaintiff that the contract and the title to said refrigerator was at that time in its main office in New York City. And denies each and every other allegation in the answer of the defendant, General Electric Contracts Corporation.

In plaintiff's reply to the answer of the defendant William Holdaway, he alleges that the said defendant never at any time notified the plaintiff that he intended to repossess said refrigerator; and denies each and every other allegation in said answer contained.

58 *Instruction No. 2:*

The issues, therefore, for you to determine, are:

(a) Whether or not, in the light of the evidence which has been presented to you, the defendant Holdaway was justified in taking possession of the refrigerator in question, or whether his act in so doing was wrongful.

(b) Whether or not the defendant Holdaway, in so taking possession of the refrigerator and removing it, was acting for himself and/or for the defendant, General Electric Contracts Corporation.

(c) Whether or not the plaintiff, by reason of said acts of the defendant William Holdaway—whether acting for himself alone or also for the General Electric Contracts Corporation—suffered any damages, and if you shall find and believe from the evidence that the defendant William Holdaway and/or the defendant General Electric

Contracts Corporation did remove, as charged the refrigerator, and you shall further find that by such act on the part of the defendant William Holdaway said plaintiff suffered damages, then you must next determine the extent and amount of such damages. And if you find that such damage was so suffered by the wrongful act of said defendants, or either of them, then you should return a verdict in favor of the plaintiff and against the defendants, or either of the defendants, who you may find caused the damage, and assess against them the amount of the damages so suffered, not to exceed \$216.64, the alleged value of the said refrigerator, and as damages suffered for the wrongful taking and detention of said refrigerator by the defendants not to exceed \$250.00.

59 *Instruction No. 3:*

You are instructed that the defendants concede and admit that the possession of the refrigerator in question was taken from the plaintiff, without his consent, on the 30th of May, 1939. You are further instructed that if you find from the evidence that the plaintiff was entitled to the possession of said refrigerator on that date, you must find and determine from the evidence the value of said refrigerator on that date and if you find that the plaintiff has suffered any damages by being deprived of the use and possession

of said refrigerator, you must find and determine such damages.

60 *Instruction No. 4:*

The Court instructs the jury that if you find for the plaintiff, then it will become your duty to assess the damages; and in finding damages you should assess such amount as will compensate him for being deprived of the use and possession of said refrigerator.

61 *Instruction No. 5:*

You are instructed that the plaintiff and the defendants concede and admit that the plaintiff bought the refrigerator in question upon the conditional sales contract, a true copy of which is part of the evidence in this case, and is marked plaintiff's Exhibit A. You are further instructed that said sales contract provided that if the installment payments enumerated therein are not made within fifteen days after due date the plaintiff agreed to pay a charge of five cents on the dollar in addition to the refrigerator installment. You are further instructed that by such provision in said contract the plaintiff was granted by the defendants an undetermined and additional amount of time beyond that provided for the payment of each of such installment in said contract, provided he paid five cents on the dollar in addition to each such regular installment.

62 *Instruction No. 6:*

You are instructed that the defendants admit in their pleadings that on the 8th day of July, 1939, the defendant William Holdaway and one Earl Fausett, as co-partners, sold and assigned the conditional sales contract covering the refrigerator in question to the defendant General Electric Contracts Corporation. You are further instructed that because of such sale, the defendant William Holdaway, on that date, lost all right, title and interest in said refrigerator.

63 *Instruction No. 7:*

You are instructed, Gentlemen of the Jury, that the plaintiff, Max Fausett, has the burden of proving that he had the right to immediate and exclusive possession of the refrigerator at the time of the commencement of this suit. If, after the consideration of all of the evidence in this case, the proof is in your minds equally balanced, then the plaintiff has failed to sustain the burden of proof which is a prerequisite to his recovery, and your verdict must be in favor of the defendant William Holdaway.

64 *Instruction No. 8:*

The burden is upon plaintiff to establish in this case that the defendants, or one of them, unlawfully seized and converted for his own or

its own use the Hot Point Refrigerator described in plaintiff's Complaint. If, upon all of the evidence in this case, the proof is in your minds equally balanced as to whether or not the defendants or either of them so unlawfully seized said refrigerator, then plaintiff has failed to sustain the burden of proof which is a prerequisite to recovery of damages by him.

65 *Instruction No. 9:*

I instruct you that the burden is on plaintiff to prove not only that William Holdaway unlawfully seized the refrigerator described in plaintiff's Complaint, but must also prove that at said time that William Holdaway was acting as the agent for defendant General Electric Contracts Corporation before any verdict may be returned against defendant General Electric Contracts Corporation.

66 *Instruction No. 10:*

You are instructed that if you find from a preponderance of the evidence that the defendant William Holdaway and one Earl Fausett sold, assigned, and delivered the conditional sales contract, covering the refrigerator in question, to the defendant General Electric Contracts Corporation, you are then further instructed that thereby the said General Electric Contracts Corporation be-

came the sole owner of said contract of sale and held the title in said refrigerator until it was paid for according to the terms of said contract, and said defendant continued to be the sole owner of said contract, and continued to hold said title as aforesaid up to and including the date on which said refrigerator was taken from the plaintiff, unless you find from the evidence that the defendant General Electric Contracts Corporation reassigned, resold and redelivered said contract of sale to the defendant William Holdaway, or to some other person before said date.

67 *Instruction No. 11:*

You are instructed, Gentlemen of the Jury, that if you believe from the evidence that the plaintiff was delinquent in his payments under the conditional sales contract covering the purchase of the refrigerator, that he then had no right to immediate and exclusive possession of the refrigerator.

68 *Instruction No. 12:*

You are instructed that if you find that the plaintiff tendered to the defendant William Holdaway the balance due on said conditional sales contract for said refrigerator, the said William Holdaway had no right to refuse said balance and hold said refrigerator for moneys he claimed the

plaintiff owed him on any other account or for any other purpose.

69 *Instruction No. 13:*

You are instructed, Lady and Gentlemen of the Jury, that if you believe from the evidence that the plaintiff had the right to immediate and exclusive possession of the refrigerator when the defendant William Holdaway repossessed the same; and if you further believe the testimony of S. G. Lyon that a refrigerator depreciates 40% the first year, and 30% of the remaining balance each succeeding year; then you should accept such valuation in determining the value of the refrigerator at the time it was repossessed.

70 *Instruction No. 14:*

Lady and Gentlemen of the Jury, if you find from the evidence that \$66.64 was the correct amount due on the conditional sales contract in question on or about June 19, 1939, and if you find that the plaintiff, or anyone for him, tendered that sum to the General Electric Contracts Corporation as full payment of said conditional sales contract and then demanded title to the refrigerator mentioned in said contract, and if you further find that the defendant, General Electric Contracts Corporation, had possession of said title either in its main office at New

York City, or at its branch office in Salt Lake City, you are instructed that the plaintiff was entitled to said title and that it was the duty of said defendant to deliver said title to the plaintiff, and your verdict must be for the plaintiff and against the defendant, General Electric Contracts Corporation, for the possession of said refrigerator in as good condition as it was on the date of said tender, and if such possession cannot be delivered that the said defendant pay to the plaintiff the value of said refrigerator at the date of such tender and such damages as you shall find that the plaintiff has suffered by being deprived of the use and possession of said refrigerator. You must find and determine the value of said refrigerator from the evidence in this case.

71 *Instruction No. 15:*

The Court instructs the jury that it is immaterial who was the actual owner of said refrigerator on May 30, 1939, yet, if you find that the plaintiff was entitled to the possession of said refrigerator on that date, then your verdict must be for the plaintiff and against the defendants for the possession of said refrigerator in as good condition as it was in on that date. Your verdict must further provide that if such possession cannot be delivered to the plaintiff, that the

defendants pay the plaintiff the value of said refrigerator on said date, together with such damages as you shall find that the plaintiff has suffered by being deprived of the use and possession of said refrigerator. You must find and determine the value of said refrigerator from the evidence in this case.

72 *Instruction No. 16:*

The Court instructs the jury that by the pleadings in this case all the parties hereto agree and admit that on or about July 7, 1938, the plaintiff was in the rightful possession of the refrigerator in question under a conditional sales contract whereby title to said refrigerator was retained by the seller thereof, to-wit, Earl Fausett and the defendant William Holdaway, as co-partners; and that on the 8th day of July, 1938, said co-partners sold said contract to the General Electric Contracts Corporation and it then held the title to said refrigerator and had a right to retain said title until said refrigerator was fully paid for according to the terms of said contract. You are further instructed that if the defendant General Electric Contracts Corporation, while it held title to said refrigerator, as aforesaid, granted the plaintiff more or additional time than that provided for in said contract, to pay any or all installments therein provided, then and in that

event neither of the defendants had a right to repossess said refrigerator from the plaintiff until such additional time had expired, and unless the plaintiff had failed to pay any such installments due and unpaid within that extended time; and if you further find that the defendant William Holdaway took said refrigerator from the residence of the plaintiff without his consent during a period of time in which plaintiff was allowed to make any installment payment on said refrigerator, then your verdict must be for the plaintiff and against the defendant William Holdaway for a return of said refrigerator to the plaintiff in as good condition as it was when so taken, and if such return cannot be had, that the defendant William Holdaway pay to the plaintiff the reasonable value of said refrigerator at the time it was so taken, together with legal interest thereon from May 30, 1939.

73 *Instruction No. 17:*

The Court instructs the jury that to entitle the plaintiff to recover, under the issues joined in this case, it is necessary that he prove by a preponderance of the evidence that he was entitled to the possession of the refrigerator in question when this suit was commenced, and that it had been wrongfully taken from his possession by the defendants, or either of them, and that it

was then wrongfully detained from him, and that he has been damaged thereby.

74 *Instruction No. 18:*

The Court instructs the jury that if you find for the plaintiff, then it will become your duty to assess the damages; and in finding damages you should assess such amount as will compensate him for being deprived of the use and possession of said refrigerator.

75 *Instruction No. 19:*

By a preponderance of the evidence is meant that which to your minds is of the greater weight. The evidence preponderates to the side which to you seems to be the most convincing and satisfactory. The preponderance of the evidence is not alone determined by the number of witnesses, nor the amount of the testimony, but the convincing character of the testimony weighed by the impartial minds of the jury.

76 *Instruction No. 20:*

The jury are instructed that allegations admitted in open court by the parties to the action, or their attorneys, or in the pleadings, are to be taken by the jury as established and proved on the trial without any other proof.

77 *Instruction No. 21:*

You are instructed, gentlemen of the jury, that the burden is upon the plaintiff to establish in your minds by a preponderance of the evidence the truth of the allegations of his complaint that are denied in the answer.

78 *Instruction No. 22:*

You are instructed, gentlemen of the jury, that in determining any question of fact presented to you in this case, you should be governed solely by the evidence introduced before you. You have no right to indulge in any mere speculations or conjectures not supported by the evidence.

Evidence which has been offered but not admitted and evidence admitted but afterwards stricken out by order of the Court, must not be considered by you for any purpose and must be entirely disregarded.

And as to the law, you are to be controlled by the instructions of the Court given you. It is solely and exclusively for the jury to find and determine the facts and this they must do from the evidence, and, having done so, then apply to them the law, as stated in these instructions.

79 *Instruction No. 23:*

You are instructed, gentlemen of the jury, that you have a right to consider all of the cir-

cumstances surrounding the occurrence referred to in this case and shown by the evidence, and to draw such reasonable inferences from the facts and circumstances proven as are natural and reasonably follow therefrom.

You should consider all of the evidence impartially, fairly and without prejudice or sympathy, or fellow feeling to influence your judgment, and from such consideration, in connection with the instructions of the court, you should reach such a verdict as will do justice between the parties.

80 *Instruction No. 24:*

You are instructed, gentlemen of the jury, that you are the sole judges of the facts, of the credibility of the witnesses and of the weight to be given to their testimony. In determining the weight to be given to the testimony of the different witnesses, who have testified in this case, you should take into consideration their feelings, or bias, if any has been shown; their demeanor while testifying; their intelligence or lack of intelligence; their means of information or knowledge with reference to the matters testified to; the apparent fairness or want of fairness; the interest, if any has been shown, in the result of the trial, and the reasonableness of the testi-

mony of the different witnesses; and from all the facts and circumstances given in evidence before you, determine what weight should be given to their testimony.

81 *Instruction No. 25:*

You should consider carefully all of the testimony given in the case, bearing upon the issues submitted to you. If you find it practicable to deduce from the evidence any theory of the case which would harmonize the testimony of all the witnesses, it will be your duty to adopt that theory, rather than one which would require the rejecting of any testimony as intentionally false. You are not bound to believe or give weight to the testimony of any witness, unless it satisfies your judgment as to its truth. You are not bound to believe all that a witness may have testified to, nor are you bound to believe any witness. You may believe one witness as against many, or many witnesses as against one. If you believe that any witness, who has testified before you, has willfully and knowingly testified falsely as to any material fact in the case, you are at liberty to disregard the whole of the testimony of such witness except as it may be corroborated by other credible witnesses or credible evidence in the case; or you may give to the testimony of such

witness, on other points, such weight as you may deem it fairly entitled to.

82 *Instruction No. 26:*

These instructions, though numbered separately, are by the jury to be considered and construed as one connected whole. Each instruction should be read and understood with reference to and as a part of the entire charge, and not as though any one instruction separately were intended to present the whole law of the case upon any particular point.

Instruction No. 27:

Upon retiring to your jury room, your first duty will be to select one of your number as foreman. In this case, three-fourths of your number may agree on a verdict. If your foreman is among the agreeing number, he, only, need sign the verdict, but if the foreman is not among the agreeing number, then all those who agree upon the verdict should sign it.

You may take these instructions with you to your jury room, and return them with your verdict. I will hand you blank forms of verdict, and then when you have agreed upon your verdict, notify the officer having you in charge, and he will conduct you into Court.

These 27 instructions dated this 23rd day of January, A. D. 1940.

GEORGE CHRISTENSEN,
Judge.

126 On January 23, 1940, the jury handed in its verdict, which is as follows:

We, the Jury, duly empaneled and sworn in the above entitled cause do find in favor of the plaintiff, and against the defendants General Electric Contracts Corporation and William Holdaway, and assess damages in the sum of \$75.00 for wrongful possession and detention; and assess damages in the sum of \$184.14, the value of the refrigerator, in the event said refrigerator is not returned to the plaintiff.

CLARENCE REID,
Foreman

132 On January 24, 1940, Judgment on Verdict was filed in the Seventh District Court of Carbon County, Utah, as follows:

(Title of Court and Cause)

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of eight persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and, being called, answered to their names, and say they find a verdict for the plaintiff, and against the defendants General Electric Contracts Corporation and William Holdaway, and assess damages in the sum of \$75.00 for wrongful possession and detention; and assess damages in the sum of \$184.14, the value of the refrigerator, in the event said refrigerator is not returned to the plaintiff.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff, Max Fausett have and recover from said General Electric Contracts Corporation, a foreign corporation, and William Holdaway the sum of TWO HUNDRED FIFTY-NINE AND 14/100 (\$259.14) DOLLARS, with interest thereon at the rate of legal per cent per annum from the date hereof till paid, together with said plaintiff's costs and disburse-

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ments incurred in this action, amounting to the sum of Dollars.

Judgment entered January 24, 1940.

Duly certified by Donald Hacking, Clerk of said Court.

136 On January 26, 1940, Defendant General Electric Contracts Corporation filed a Motion for New Trial, as follows:

(Title of Court and Cause)

Comes now General Electric Contracts Corporation, one of the Defendants above named, and moves for a new trial on the following grounds:

1. Excessive damages appearing to have been given under the influence of passionate prejudice;

2. Insufficiency of the evidence to justify the verdict and its arguments;

3. Errors in law occurred at the trial and excepted to by this Defendant .

FABIAN, CLENDENIN, MOFFAT & MABEY,
*Attorneys for Defendant General Electric
Contracts Corporation.*

141 On the 6th day of February, 1940, Plaintiff filed his

REMITTITUR

(Title of Court and Cause)

Comes now the plaintiff and remits from the verdict of the Jury, heretofore rendered and filed in this court and cause, the sum of \$66.64.

Dated this 6th day of February, 1940.

F. B. HAMMOND,

Plaintiff's Attorney.

142 On February 6, 1940, Plaintiff filed his
MOTION TO REDUCE JUDGMENT
(Title of Court and Cause)

WHEREAS, a judgment on the verdict was entered in this court and cause on the 24th day of January, 1940, in the total sum of \$259.14; and,

WHEREAS, the defendants have moved for a new trial and alleged, as one of the grounds therefore, "excessive damages appearing to have been given under the influence of passionate prejudice;" and,

WHEREAS, the plaintiff has, this date, filed a Remittitur in this court and cause of the sum of \$66.64, a copy of which is attached hereto and by this reference is made a part of this Motion.

NOW, THEREFORE, comes the plaintiff by his attorney F. B. Hammond and moves the court for an order confirming the action of the plaintiff in remitting the sum of \$66.64 from the verdict of the Jury heretofore rendered and filed herein and that judgment herein be reduced from \$259.14 to \$192.50, together with plaintiff's costs and disbursements incurred in this action.

Dated this 6th day of February, 1940.

F. B. HAMMOND,
Plaintiff's Attorney

On February 19, 1940, Order granting motion to reduce judgment and approving Remittitur was signed and entered by George Christensen, Judge.

(Title of Court and Cause)

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In the above entitled action, a Judgment on the Verdict of the jury was entered in this court and cause on the 24th day of January, 1940, in the sum of \$259.14, and costs. To this judgment,

the plaintiff has on the 6th day of February, 1940, filed his Motion to Reduce Judgment in the sum of \$66.64, and also filed Remittitur from said judgment in said sum of \$66.64. Plaintiff's said Motion was duly submitted to the Court on the 19th day of February, 1940, and by the Court taken under advisement. The Court, now being advised, orders as follows:

That the said Motion to Reduce Judgment be and the same is hereby granted, and that the Remittance of said \$66.64 is by the court approved.

Dated at Price, Carbon County, State of Utah, this 19th day of February, 1940.

GEORGE CHRISTENSEN,
District Judge.

On February 19, 1940, Judge Christensen signed

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ORDER DENYING MOTION FOR NEW TRIAL

(Title of Court and Cause)

In the above-entitled action, the defendant, General Electric Contracts Corporation, a for-

eign corporation, has filed Motion for a new trial, and counsel for the respective parties have submitted said Motion in open court this 19th day of February, 1940, and said Motion was taken under advisement by the Court. The Court, now being advised, makes the following order:

That the said Motion for New Trial be and the same is hereby denied, and said defendant is granted a five-day stay of execution.

Dated at Price, Carbon County, State of Utah, this 19th day of February, 1940.

GEORGE CHRISTENSEN,
District Judge.

On February 21, 1940, Defendant General Electric Contracts Corporation filed its

NOTICE

(Title of Court and Cause)

TO MAX FAUSETT, PLAINTIFF ABOVE
NAMED, AND F. B. HAMMOND, HIS
ATTORNEY:

You and each of you will please take notice
that the Defendant General Electric Contracts

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Corporation, a corporation, has this day filed its undertaking on appeal and stay bond in the above entitled action.

Dated this 20th day of February, 1940.

FABIAN, CLENDENIN, MOFFAT & MABEY,
*Attorneys for Defendant General Electric
Contracts Corporation.*

On February 21, 1940, Defendant General Electric Contracts Corporation filed its

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NOTICE OF APPEAL

(Title of Court and Cause)

TO MAX FAUSETT, THE PLAINTIFF ABOVE
NAMED, AND TO F. B. HAMMOND, HIS
ATTORNEY:

You and each of you are hereby notified that the above named Defendant General Electric Contracts Corporation, a corporation, appeals to the Supreme Court of the State of Utah from the judgment entered in the above entitled cause on the 24th day of January, 1940, and from the whole thereof.

This appeal is taken upon questions of both law and fact.

Dated this 20th day of February, 1940.

FABIAN, CLENDENIN, MOFFAT & MABEY,
*Attorneys for Defendant General Electric
 Contracts Corporation.*

On February 21, 1940, Defendant William Holdaway filed his

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IMPECUNIOUS AFFIDAVIT

(Title of Court and Cause)

STATE OF UTAH }
 COUNTY OF CARBON } SS

I, William Holdaway, do solemnly swear that owing to my poverty I am unable to bear the expenses of the appeal which I am about to take, and that I verily believe I am justly entitled to the relief sought by such appeal.

WILLIAM HOLDAWAY

(Duly acknowledged.)

On February 21, 1940, Defendant William Holdaway filed his

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NOTICE

(Title of Court and Cause)

TO MAX FAUSETT, THE PLAINTIFF ABOVE
NAMED, AND TO F. B. HAMMOND, HIS
ATTORNEY:

You, and each of you, will please take notice that the Defendant, William Holdaway, has this day made and filed with the Clerk of the District Court of the Seventh Judicial District, in and for Carbon County, State of Utah, an affidavit in the form set out in section 28-7-3 Revised Statutes of Utah 1933, in lieu of an undertaking on appeal and stay bond in the above entitled action.

Dated this 21st day of February, A. D. 1940.

S. J. SWEETRING,

Attorney for the Defendant

William Holdaway

On February 21, 1940, Defendant William Holdaway filed his

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NOTICE OF APPEAL

(Title of Court and Cause)

TO MAX FAUSETT, THE PLAINTIFF ABOVE
NAMED, AND TO F. B. HAMMOND, HIS
ATTORNEY:

You, and each of you, are hereby notified that the above named Defendant, William Holdaway appeals, and joins in the appeal of the above named Defendant, General Electric Contracts Corporation, a corporation, to the Supreme Court of the State of Utah, from the judgment entered in the above entitled cause on the 24th day of January, A. D. 1940, and from the whole thereof.

This appeal is taken upon questions of both law and fact.

Dated this 21st day of February, A. D. 1940.

S. J. SWEETRING,

*Attorney for the Defendant
William Holdaway.*

On March 16, 1940, Judge Christensen signed

153 ORDER EXTENDING TIME FOR FILING
BILL OF EXCEPTIONS

(Title of Court and Cause)

Upon application of FABIAN, CLENDENIN, MOFFAT & MABEY, attorneys for Defendant General Electric Contracts Corporation, praying for additional time in which to prepare, serve, settle and file Bill of Exceptions in the above entitled case and good cause appearing therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED That Defendant do have to and including the first day of May, 1940, in which to prepare, serve, settle and file its Bill of Exceptions in the above entitled case.

BY THE COURT

GEORGE CHRISTENSEN,
Judge.

108 Defendant General Electric Contracts Corporation's Requested Instructions.

Instruction No. A.

You are instructed to return a verdict against Plaintiff and in favor of Defendant General Electric Contracts Corporation, no cause of action.

In the event of the refusal of the Court to give the above requested instruction, the Defendant General Electric Contracts Corporation requests the following instructions:

109 *Instruction No. 1.*

You are instructed that on the 7th day of July, 1938, Defendant William Holdaway and Earl Fausett were doing business as Carbon Furniture & Appliance Company and on said day they sold one Hot Point Refrigerator to the Plaintiff Max Fausett who gave to said Carbon Furniture & Appliance Company a conditional sales contract in which he agreed to pay a balance due on said refrigerator in the sum of Two Hundred Three and 49/100 Dollars (\$203.49). That said contract among other things provided that should the buyer fail to pay the installments therein provided for that the seller could repossess said refrigerator with or without process of law. That said contract further provided that the Plaintiff should make payments of Ten Dollars (\$10.00) per month commencing July 25, 1938, for thirteen months and that on the 14th month

pay the sum of Eleven and 64/100 Dollars (\$11.64). The contract also provided that in the event any payment was more than fifteen days delinquent the Plaintiff would pay five cents per dollar in addition to the regular installments. In this connection, you are instructed that if you find from a preponderance of the evidence that the Plaintiff had failed to make payments provided in said contract and that Defendant Holdaway in the exercise of the rights given him by said contract went to the home of the Plaintiff and there took possession of the refrigerator herein questioned and that he did so without disturbing the peace, you are then instructed to return a verdict in favor of Defendants and against Plaintiff of no cause of action.

110 *Instruction No. 2.*

You are instructed that under the evidence in this matter Plaintiff purchased from Defendant William Holdaway a certain Hot Point Refrigerator and gave to said Holdaway a conditional sales contract representing the unpaid balance on said refrigerator, which contract among other things provided for the payments of Ten Dollars (\$10.00) on the 25th day of July, 1938, and \$10.00 on the 25th day of each month thereafter for thirteen months and a payment on the 14th month of Eleven and 64/100 Dollars (\$11.64). That said

contract provided that should the Plaintiff Faussett fail to pay any of the installments when due that the seller Holdaway could without notice or demand by process of law or otherwise take possession of said refrigerator wherever located; and if you find that at the time Defendant Holdaway repossessed said refrigerator that the Plaintiff was in default on his contract and you further find from the evidence that Defendant Holdaway did take possession of said refrigerator without disturbing the peace, then you are instructed that he repossessed said refrigerator lawfully and you are instructed to return a verdict against Plaintiff and in favor of Defendants.

111 *Instruction No. 3.*

The burden is upon Plaintiff to establish in this case that the Defendants or one of them unlawfully seized and converted for his or its own use the Hot Point Refrigerator described in Plaintiff's complaint. If upon all the evidence in this case the proof is in your minds equally balanced as to whether or not the Defendants or either of them so unlawfully seized said refrigerator, then Plaintiff has failed to sustain the burden of proof which is a prerequisite to recovery of damages by him and the verdict must be in favor of Defendants.

112 *Instruction No. 4.*

You are instructed that Plaintiff has alleged in his amended complaint that on the 30th day of May, 1939, when Plaintiff was absent from his resident in Price, that Defendant William Holdaway acting for himself and General Electric Contracts Corporation entered Plaintiff's residence and took possession of the refrigerator here in litigation. In this connection, you are instructed that before you can find any verdict against Defendant General Electric Contracts Corporation it is necessary that you find that William Holdaway was authorized by General Electric Contracts Corporation to act on its behalf. In other words, you must find that General Electric Contracts Corporation consented that said William Holdaway act on its behalf and in so acting William Holdaway was subject to the control of said General Electric Contracts Corporation and that said William Holdaway had consented and agreed to be subject to the control of said General Electric Contracts Corporation, and if you find the foregoing then you must also find that General Electric Contracts Corporation authorized and directed said William Holdaway to go to the home of Plaintiff and take into his possession a refrigerator in the manner in which it was seized by said William Holdaway. If you fail to find any of the foregoing, then you are instructed to return

a verdict against plaintiff and in favor of Defendant General Electric Contracts Corporation.

113 *Instruction No. 5*

I instruct you that the burden is on Plaintiff to prove not only that William Holdaway unlawfully seized the refrigerator described in Plaintiff's complaint, but must also prove that at said time that William Holdaway was acting as the agent for Defendant General Electric Contracts Corporation before any verdict may be returned against Defendant General Electric Contracts Corporation. The burden is on Plaintiff to prove both of these allegations affirmatively as charged in the complaint and if you find that Plaintiff has not met that burden or the evidence leaves you in doubt in regard thereto, then your verdict must be for Defendant General Electric Contracts Corporation.

114 *Instruction No. 6.*

You are instructed that Plaintiff has alleged in his complaint that on May 29, 1939, when the refrigerator in question was repossessed by Defendant William Holdaway, that Plaintiff was entitled to the possession of said refrigerator and in this connection you are instructed that it is necessary for Plaintiff to prove by a preponderance of the evidence that at the time the refrigerator was

repossessed by said Defendant William Holdaway Plaintiff was entitled to the possession of said refrigerator and in this connection you are instructed that the said contract of purchase entered into by the Plaintiff and said Defendant William Holdaway, which was subsequently sold to the Defendant General Electric Contracts Corporation, among other things provided that should the Plaintiff fail to make any of the payments as provided in said contract at the times when due, that the holder of the said contract could repossess said refrigerator with or without process of law, and in this connection you are instructed that the undisputed evidence shows that on the 29th day of May, 1939, one-half of the installment for the month of February, 1939, was unpaid, and that no moneys whatever had been paid upon the installments due March 25, April 25 and May 25, and if you further find from the evidence that the failure to make the payments herein specified constituted a default in the payment of the installments provided in said contract, then you are instructed that at the time said refrigerator was repossessed by Defendant William Holdaway Plaintiff was not entitled to the immediate possession of said refrigerator and you must return a verdict against Plaintiff and in favor of Defendants William Holdaway and General Electric Contracts Corporation.

115 *Instruction No. 7.*

You are instructed that in this case the contract between Plaintiff and Defendant William Holdaway provided that time was of the essence of said contract, and that no waivers or modifications would be valid unless written upon or attached to said contract and in this connection you are instructed that the mere fact that the owner or holder of said contract accepted the installments due thereon at times other than as specified in the contract did not constitute a waiver or a modification of the terms of said contract relative to the prompt payment of said installments.

116 *Instruction No. 8.*

You are instructed that Plaintiff has alleged in his complaint and must prove that there has been a waiver of prompt payment of the installments, provided in the contract of purchase executed by Plaintiff with the Defendant William Holdaway, and in this connection you are instructed that said contract of purchase, among other things, provides that time was of the essence of said contract and that no waivers of the terms thereof should be valid unless written upon or attached to said contract, and in this connection you are instructed that unless you find from the evidence that there was a written waiver of the prompt performance of said contract attached

to or affixed upon said contract, or unless you find that there was some new and independent consideration, such as money or something else of value given by the Plaintiff to the Defendant General Electric Contracts Corporation for said extension of time, that there was no waiver of the requirement of prompt performance of installments of said contract and on this question you should find for Defendants and against Plaintiff.

Defendant William Holdaway's Requested Instructions.

118 *Instruction No. 1.*

You are instructed, Gentlemen of the Jury, that if you believe from the evidence that the Defendant WILLIAM HOLDAWAY was not in possession of the refrigerator at the date of the bringing of this suit, to-wit, on the day of, 1939, then you will find for the Defendant William Holdaway no cause of action.

119 *Instruction No. 2.*

You are instructed, Gentlemen of the Jury, that the Plaintiff, Max Fausett has the burden of proving that he had the right to immediate and exclusive possession of the refrigerator at the

time of the commencement of this suit. If, after the consideration of all of the evidence in this case, the proof is in your minds equally balanced, then the Plaintiff has failed to sustain the burden of proof which is a prerequisite to his recovery, and your verdict must be in favor of the defendant WILLIAM HOLDAWAY.

120 *Instruction No. 3.*

You are instructed, Gentlemen of the Jury, that if you believe from the evidence that the plaintiff was delinquent in his payments under the Conditional Sales Contract covering the purchase of the refrigerator, that he then had no right to immediate and exclusive possession of the refrigerator.

121 *Instruction No. 4.*

You are instructed, Gentlemen of the Jury, that the plaintiff, Max Fausett, signed a Conditional Sales Contract covering the purchase of a certain refrigerator, which, among other things provided, that should he fail to make the payments therein provided for, or any part thereof when due, that the Seller might, without notice or demand, by process of law or otherwise, take possession of said refrigerator wherever located; and that said provisions of the conditional sales contract constituted an irrevocable license in the

seller to enter in and upon the Plaintiff's premises at any reasonable time for the purpose of retaking the refrigerator if said Plaintiff was delinquent in the making of any payments provided for by said contract.

122 *Instruction No. 5.*

You are instructed, Gentlemen of the Jury, that if you believe from the evidence, that on, or about, the 30th day of May, 1939, that the Plaintiff was delinquent on that certain Conditional Sales Contract signed by him, and payable to the Carbon Furniture and Appliance Co., that the Defendant, WILLIAM HOLDAWAY, was licensed to enter in and upon the Plaintiff's premises at any reasonable hour for the purpose of retaking and repossessing the refrigerator covered by said Conditional Sales Contract.

123 *Instruction No. 6.*

You are instructed, Gentlemen of the Jury, that the assignment of the Conditional Sales Contract by the Carbon Furniture & Appliance Co. was made subject to the agreement between the Carbon Furniture & Appliance Co. and the General Electric Contracts Corporation, and that by such assignment the Carbon Furniture & Appliance Co. guaranteed payment of said Conditional Sales Contract if the Plaintiff failed to pay it

as therein agreed; and that said Carbon Furniture & Appliance Co. did not waive its rights to repossess if the Plaintiff failed to pay the Conditional Sales Contract as agreed.

124 *Instruction No. 7.*

You are instructed, Gentlemen of the Jury, that if you believe from the evidence that the Plaintiff had the right to immediate and exclusive possession of the refrigerator when the Defendant WILLIAM HOLDAWAY repossessed the same; and if you further believe the testimony of S. G. Lyon that a refrigerator depreciates 40% the first year, and 30% of the remaining balance each succeeding year; then you should accept such valuation in determining the value of the refrigerator at the time it was repossessed.

125 *Instruction No. 8.*

You are instructed, Gentlemen of the Jury, that if you believe from the evidence that the Plaintiff had the right to immediate and exclusive possession of the refrigerator when the Defendant William Holdaway repossessed the same, that you may allow such damages to the Plaintiff which you believe from the evidence will compensate him for the actual loss he sustained by being wrongfully deprived of the possession of the refrigerator from the date of its repossession by WILLIAM HOLDAWAY to the date of the in-

stitution of this suit; and if you believe from the evidence that the Plaintiff suffered no damages that can be established with reasonable certainty, then you may not make any allowance of damages.

January 16, 1940 Minute Book 8 at page 505

155

This cause came on regularly for trial this day. Plaintiff is present in person and by his attorney, F. B. Hammond. Defendant General Electric Contracts Corporation is present by one of its attorneys, D. Howe Moffat. Defendant William Holdaway is present personally and by his attorney, S. J. Sweetring. The parties indicate their readiness for trial. The empanelling of a jury is proceeded with and the following jurors are selected and sworn to try the issues herein: Louis Dellacourt, La Mar Jewkes, Clarence Reid, Joe Limone, Jennie Barboglio, Melvin Young, Fred Zwahlen and Wm. Baird. The remaining jurors are by the Court excused until January 30, 1940 at 10 a. m. In the absence of the jury the Motion to set Aside the default of the defendant William Holdaway and the application of plaintiff for a default judgment against each of the defendants is argued by counsel and said matters are by the Court held in abeyance. The jury is returned into court and now sitting together listen to the evi-

dence. Testimony on the part of the plaintiff is offered by Earl Fausett.

January 17, 1940 Minute Book 8 at page 505

The trial of this cause is resumed. The jury is present. The parties are present as on previous day. Further testimony on the part of the plaintiff is offered by Earl Fausett, Max Fausett, and Silvia Fausett. The Court permitted plaintiff to file his application for judgment by default, denies plaintiff's request to file his proposed Judgments. Further testimony on the part of the plaintiff is offered by Silvia Fausett, Margaret Woolsey, Sherman Taft Hill, Mrs. Earl Fausett, Elva Fausett, Myron Woolsey and Clara Pierce.

January 18, 1940 Minute Book 8 at page 505

The trial of this cause is resumed. The jurors are all present and sitting together. The appearances of the parties is the same as heretofore. Further testimony on the part of the plaintiff is offered by Alice Smith, Earl Fausett and Thomas S. Johnson. Plaintiff rests. In the absence of the jury comes now the defendants and each separately moves the Court for a judgment of non-suit. Said
156 motions are argued by counsel for respective parties and they are each by the Court denied. Plain-

tiff is permitted to reopen his case. Further testimony on the part of plaintiff is offered by Thomas S. Johnson. Plaintiff rests. It is agreed by the parties that the motions for non-suit be deemed as made and denied by the Court at the close of plaintiff's case in chief and it is by the Court so ordered. An opening statement to the jury is made by D. Howe Moffat, one of the attorneys for the defendant General Electric Contracts Corporation. Testimony on the part of the defendants is offered by Stephen Lyon. Further proceedings herein are ordered continued to January 20, 1940 at 10 a. m.

January 20, 1940 Minute Book at page 506

The trial of this cause is resumed. The appearances of the parties is the same as heretofore. The jurors are all present and sitting together. Further testimony on the part of defendant General Electric Contracts Corporation is offered by Stephen Lyon. Defendant General Electric Contracts Corporation rests. Testimony on the part of the defendant William Holdaway is offered by William Holdaway and Clarence Elmer Packer. Defendant William Holdaway rests. Stephen Lyons is recalled by plaintiff for further cross examination. All parties rest. The Court being now advised it is ordered that Motion to Set Aside the default of the defendant William Holdaway be

granted. In the absence of the jury the defendants separately move the Court for a directed verdict. Said motions are argued by counsel and are each by the Court denied. The jury is returned into the Court Room. Plaintiff's request to re-open for rebuttal evidence is granted. Rebuttal testimony on the part of plaintiff is offered by William Campbell. All parties rest. It is stipulated by the parties and ordered by the Court that defendant's motions for directed verdict shall be deemed to have been made and denied at the close of the evidence. Further proceedings herein are ordered continued to January 22, 1940 at 10 a. m.

January 23, 1940 Minute Book 8 at page 508

The trial of this cause is resumed. The appearances for the parties is the same as on previous trial days. The jurors are all present and sitting together. The jury listens to the Court's Instructions and the arguments of counsel and retire in the charge of the sworn officer to consider of their verdict and subsequently return into court and being called, answer to their names and announce the following to be their verdict: We, the Jury, duly empaneled and sworn on the above entitled cause do find in favor of the plaintiff, and against the defendants, General Electric Contracts Corporation and William Holdaway, and

assess damages in the sum of \$75.00, for wrongful possession and detention and assess damages in the sum of \$184.14, the value of the refrigerator, in the event said refrigerator is not returned to the plaintiff.

Dated January 23, 1940.

CLARENCE REID,
Foreman.

Said verdict is by the Court ordered entered upon the records and judgment docketed in accordance therewith. The jurors are excused from further services in this cause and excused until January 30, 1940 at 10 a. m.

February 19, 1940 Minute Book 8

The defendant General Electric Contracts Corporation's motion for a New Trial, and the separate motions of each of the defendants to re-tax costs, and the plaintiff's motion to reduce judgment, coming on regularly for hearing this day, said matters are fully argued by counsel. Testimony on the part of plaintiff, on the motions to re-tax costs is offered by F. B. Hammond, The said motion to reduce judgment is by the Court granted, said Motion for New Trial is denied and

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the motions to re-tax costs are by the Court taken under advisement.

April 25, 1940 Minute Book 8 at page 533

The defendants having each separately filed motions to re-tax costs herein, and said matters having been heard and argued on February 19, 1940 and by the Court taken under advisement, and the Court being now advised, it is ordered that the fees of witnesses Sylvia Fausett, Margaret Woolsey, Rose Fausett and Elva Fausett, each be reduced in the sum of \$3.00, that the fee of witness Elvan Woolsey be stricken and that the fees of witness Clara Pierce be reduced in the sum of \$3.20.

159

CLERK'S CERTIFICATE

(Title of Court and Cause)

STATE OF UTAH }
COUNTY OF CARBON } ss

I, B. H. Young, County Clerk and Ex-Officio Clerk of the District Court of the Seventh Judicial District of the State of Utah, in and for

Carbon County, do hereby certify that the foregoing and hereto attached papers and file constitute all of the original papers filed in the above entitled Court and Cause, including Notices of Appeal but excepting Undertakings for Costs on Appeal and Stay Bond, which Undertaking and Stay Bond has been duly filed in the sum of \$1115.08, and which attached papers constitute the Judgment Roll and other papers filed in the above entitled Action.

I further certify that said Judgment Roll and other papers, together with all Exhibits offered at the trial of said action, is by me transmitted to the Supreme Court of the State of Utah, pursuant to said Notices of Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said District Court at my office in Price, Carbon County, State of Utah this 29th day of April, A. D. 1940.

B. H. YOUNG,

Clerk

By DONALD HACKING,

(SEAL)

Deputy Clerk.

BILL OF EXCEPTIONS

(Title of Court and Cause)

BE IT REMEMBERED that on the 16th day of January, 1940, at ten o'clock A. M. the above entitled cause came on regularly for trial before the Honorable George Christensen, Judge of the above entitled Court, sitting with a jury.

WHEREUPON the following proceedings were had:

11 EARL FAUSETT, being first duly sworn,
testified as follows on direct examination.

12 My name is Earl Fausett. I am an uncle of
Plaintiff Max Fausett. I was a partner of Wil-
13 liam Holdaway on July 7, 1939, at Price, Utah. The
business was new and second hand furniture and
appliances, under the name of Carbon Furniture
& Appliance Company. As a partner of William
14 Holdaway I sold Max Fausett a Hot Point re-
frigerator on a conditional sales contract. (Plain-
tiff's Exhibit "A", being a copy of the condition-
al sales contract, is marked and identified.) The
contract was sold to Defendant General Electric
15 Contracts Corporation. (Exhibit "B" is marked
and identified.) (Originals of Exhibits "A" and "B"
are so marked and, there being no objection, were
16 received in evidence. (Exhibit "C" marked)

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17 (Exhibit "C" received in evidence.)

18 We were selling refrigerators for Graybar
Electric Company. We had an agreement with
19 The General Electric Contracts Corporation,
whereby they agreed to take the conditional
sales contracts. I made collections on the Max
20 Fausett contract after it had been sold to General
Electric. While General Electric owned the Max
Fausett contract they asked us to contact him.
This request was by letter. The letter was left in
William Holdaway's possession when I sold my
interest in the partnership to him.

24. I have no idea how much a refrigerator of
the kind sold to Plaintiff would depreciate dur-
ing a period of time from July 8, 1938 to June
1, 1939. The last time I saw the refrigerator was
in May, 1939 in Max's house in Parkdale—in
Price.

(COUNSEL for Defendant General Electric
Contracts Corporation makes demand on Plaintiff
to produce letters that were written to him by
Defendant General Electric Contracts Corpora-
tion on the following dates: October 19, 1938;
October 27, 1938; November 3, 1938; November 9,
25 1938; November 16, 1938; November 28, 1938;
December 1, 1938; December 16, 1938; Decem-

Tr. Page

ber 22, 1938 December 28, 1938; February 27, 1939;
 March 7, 1939; March 13, 1939; March 23, 1939;
 March 29, 1939 March 29; 1939; April 7, 1939;
 April 27, 1939; May 4, 1939; May 11, 1939.)

29

General Electric Contracts Corporation furnished us with the forms upon which the Max Fausett sales contract was written. I do not remember any payments being made by Max Fausett or his wife as small as \$2.00 or \$3.00.

CROSS EXAMINATION OF EARL FAUSETT BY MR. MOFFAT

30

My partnership with William Holdaway was dissolved on October 27, 1938. The only collection I made from Plaintiff before the dissolution of the partnership was the down payment. I talked with Max a couple of times about delinquencies on his contract. The letter I received from General Electric Contracts while I was in partnership told me that Max was behind and I understood I was to go see him and see if he would not make a payment on his contract. This was sometime between

31

July 29, 1938 and October 27, 1938.

(Defendant's Exhibit 1, being a photostatic copy of the application and agreement between

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General Electric Contracts Corporation and Carbon Second Hand Store, dated October 25, 1937, is marked. Witness identifies his signature and that of his partner, William Holdaway. Witness identifies photostatic copy as a true copy of the agreement signed by him and William Holdaway and the contract under which he discounted his instalment paper with General Electric Contracts Corporation.) (Exhibit 1 offered in evidence.) (Objection by Plaintiff. Objection sustained.)

34 (Exhibit 2, being a copy of letter addressed to Max Fausett, dated October 19, 1938, is marked.)

It could be that I received a copy of this letter. It may be the letter I had in mind on my direct examination.

(Exhibit 3, being a copy of letter dated October 27, 1938, addressed to Max Fausett, was marked and shown to the witness.)

35 I remember receiving a copy of this letter. It is my opinion that these two exhibits are the ones I had in mind on my direct examination.
36 (Exhibits 2 and 3 offered in evidence. Objection by Mr. Hammond. Objection overruled and Exhibits 2 and 3 received.)

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37 CROSS EXAMINATION OF EARL FAUSETT
BY MR. SWEETRING

The first contract I took from Max Fausett was turned down by General Electric Contracts Corporation because the down payment was not large enough.

38 Mr. Holdaway and I opened a ledger ac-
count on Max Fausett when we sold this refrig-
39 erator. (Defendants' Exhibit 4, referring to page
142B is exhibited to the witness, who identifies
it as Max Fausett's account which was kept by
the partnership.) We also kept another account
book in which we set up the account between
Max Fausett and ourselves and General Electric
Contracts Corporation. (Defendants' Exhibit 5
40 marked and exhibited to the witness, who iden-
tifies it as the other account book). The account
41 in one ledger is for furniture and the other ac-
count is the refrigerator account. The furniture
account is connected with the refrigerator ac-
count in that we did not receive all of the down
42 payment on the refrigerator.

REDIRECT EXAMINATION OF EARL
FAUSETT BY HAMMOND

47 I could not have seen Defendants' Exhibit 3
before the partnership was dissolved. The part-

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48 nership made collections from Max Fausett but I
do not know how many. One of the reasons the
first Max Fausett contract was returned by Gen-
eral Electric Contracts Corporation, was because
49 it wasn't signed by Mrs. Fausett.

RECROSS EXAMINATION OF EARL FAUSETT BY MOFFAT

(Defendants' Exhibit 6 is marked and handed
to the witness, who identifies it as a copy of a
letter written June 16, 1938 by General Electric
Contracts Corporation to Carbon Furniture and
Appliance Company at Price, which states one
of the reasons why the first Max Fausett con-
tract was returned.)

I do not recall any other letter being received
from General Electric Contracts Corporation set-
ting forth any additional reason for the return
50 of the first contract. (Defendants' Exhibit 6 offer-
57. ed in evidence.) (Exhibit 6 received in evidence.)

MAX FAUSETT, being the Plaintiff, testified
as follows:

DIRECT EXAMINATION BY HAMMOND

51 My name is Max Fausett. Exhibit "A" is the
conditional sales contract I signed in connection

52 with the purchase of a Hot Point Refrigerator
on July 7, 1938. I made some payments on the re-
frigerator. My wife made most of them. Bill
Holdaway contacted me and requested payments
at my mother-in-law's home in Price. This was
the last of March or the first of April, 1939. When
he contacted me I believe Mrs. Woolsey, my wife
and Curtis Woolsey were present. Mrs. Woolsey
is my mother-in-law. At this time Holdaway told
53 me the Company was after him for some pay-
ment on the refrigerator and something had to be
done about it. I told him I would come up to his
office in a short while and fix it up with him.
The same day I went to his office, made him a
check, as I recall \$15.00 to be applied on the Hot
Point refrigerator and \$10.00 on my account at
the store. The check was cashed by Holdaway. I
do not have the check. The check was burned with
my home about four months ago with all my
letters and private effects. Neither Holdaway nor
General Electric Contracts Corporation has of-
fered me any money since they repossessed the
refrigerator.

CROSS EXAMINATION BY SWEETRING

55 The payment to Holdaway was \$25.00—\$10.00
of the \$25.00 check went on my open account at
the Carbon Second Hand Store. The open ac-

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56 count was not made up partly of the down payment on the refrigerator.

REDIRECT EXAMINATION BY HAMMOND

58 I know Sherman Hill. I was present with
59 Sherman Hill in Provo in the fore part of June, 1939, when he telephoned General Electric Contracts Corporation concerning the repossession of my refrigerator.

50 RECROSS EXAMINATION BY MOFFAT

This conversation was 4 to 6 days after the refrigerator was repossessed. And the call was placed from Station 1512 at Provo, Utah.

61 SYLVIA FAUSETT, being a witness called by Plaintiff, testified as follows:

DIRECT EXAMINATION BY HAMMOND

My name is Sylvia Fausett. I am the wife of Max Fausett, Plaintiff. In June, 1939 we were living in Parkdale, Price, in Carbon County, Utah. In the latter part of May we had a Deluxe Hot Point refrigerator, purchased from the Carbon Furniture and Appliance Store, which was the refrigerator referred to in the conditional sales contract dated July 7, 1938.

62 On Sunday, May 28, 1939, I left Price for Provo, Utah. I did not lock the house, but I closed all the doors. My husband, Max Fausett, was in Cedar City and I was going to join him there. I left my mother to take care of the house. She was to stay there with one of my daughters. We had been cleaning our house and it was all finished but one room, where we had the curtains down and had to wall paper. The rest
63 of the house was in order. The refrigerator was in the unfinished room. Our receipts and files were kept in a dresser drawer.

64 I returned about five days later, about the 6th or 7th of June, and I found that the refrigerator was gone. Bill Holdaway took the refrigerator. I found my kitchen door open, broken from its hinges, the linoleum was scratched, the dresser drawer was pulled open and the contents spilled on the floor. The contents of the refrigerator were laid out on the floor and had spoiled. I noticed the papers concerning the refrigerator were gone. I do not know who took the papers.

67 I talked with Bill Holdaway over the telephone after I returned, about the 5th or 6th of June, and asked him what business he had going in my home and taking my refrigerator. He said he was acting under orders.

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80 (Plaintiff's objection to Defendants' Exhibit
81 1 withdrawn. Defendants' Exhibit 1 received in
evidence.)

81 "Q. (By Mr. Hammond) What was stated
in that conversation between you and Mr. Hold-
away?

"Mr. Moffat: Now, your Honor, I object to
that as incompetent, irrelevant and immaterial;
not binding upon this defendant, and that there
is no showing of any agency as alleged in their
complaint between the defendant Holdaway and
the defendant General Electric Contracts Cor-
poration."

82 (Objection overruled.)

83 Mr. Holdaway told me he was acting under
orders. I asked him if he would bring the refrig-
erator back if we were able to pay the \$66.64
the balance due. He said it was too late, as he
had sold the refrigerator. I told him I was going
to take it to court and he told me to go ahead
and take it anywhere I pleased. I made a pay-
ment to Mr. Holdaway that was not credited upon
my refrigerator contract. It was for \$10.00. He
84 gave me a receipt for it which I did not examine.
I told him it was a refrigerator payment. Two

85 days after this payment I received a request from General Electric Contracts Corporation for a payment. I went to Mr. Holdaway's and told him I had received a dunner and asked him if he had sent the payment in yet. He said, "Well, I have forgotten it" and he said "Have you got a receipt?" and I said "Yes." He said "That is all you need. If you have a receipt it is as good as money." When I went home I looked at the receipt and noticed that it said it was applied on the open account.

86 In the fore part of May Holdaway came to see me at my mother's house, and asked for Max. He said he had to have some money or he would take the refrigerator. He said the Company had been writing him for payments. I told him I did not have a cent. He asked if I could get in touch with Max and I said I did not think so. I borrowed \$15.00 from mother and gave it to him. He gave me a receipt but I haven't it. The receipt was taken out of my dresser drawer while I was away at
87 the time the refrigerator was repossessed.

88 I talked with some agents of the General Electric Contracts Corporation in their office in Salt Lake City, on June 19. Mr. Lyon was one of them. Another man's name was Hughes.

(It is admitted by Defendant General Electric Contracts Corporation that Lyons and Hughes are its agents.)

89 My sister, Mrs. Pierce, who lives in Salt Lake, was with me. (Objection by Sweetring that the conversation between Mrs. Fausett and Mrs. Pierce and the agent of General Electric Contracts Corporation, was not binding upon Defendant Holdaway.) I went to the office of the General Electric Contracts Corporation and asked for Mr. Hughes and told him I had come to pay off the balance on my refrigerator contract. Mr. Hughes called Mr. Lyon and asked if I had the money with me. I told him I had a check and he asked if it were certified, and I said no. He said they couldn't accept such a check. I said I would be glad to call the bank at Price and have them acknowledge the check. But he said he could not get the title to it because it was still in New York and it would take several days to get here. I asked him if he would give me a written receipt that it was paid in full. He said it would be all right with them, but they would have to get in touch with Holdaway and see how it stood with him. 90 I said I see, its clear as far as you are concerned and he said yes. I asked if the amount I had would clear me with them and he said yes, but that he did not know how we stood with Holdaway.

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He also stated that Holdaway had requested that title be sent to him.

(Exhibit "D" is marked, exhibited to the witness, who identifies it as the check tendered Lyons.) It was a check to Fausett & Hill written by
91 Viola Oberto.

92 (Exhibit "D" received. Exhibit "E" and "F" marked for identification). Exhibit "F" is a letter I received from General Electric Contracts Corporation under date of April 7, 1939. I tore out the corner to give the address to my brother, who was going to Salt Lake.

93 (Exhibit "F" offered and received in evidence. Witness identifies Exhibit "E" as letter written by witness to General Electric Contracts Corporation, under date of April 27, 1939. Exhibit "E" offered and received in evidence.) I have no other letters received from General Electric Contracts Corporation. Such other letters as I received disappeared with the other papers.

95 Q. (By Mr. Hammond) How much, in your judgment, did you lose per month in the spoiling of veteables, meat, and milk, and so forth, by being deprived of the use of the refrigerator?

(Objection by Moffat on the grounds that it is incompetent, irrelevant and immaterial, in which objection Holdaway joined.)

96 The Court:—The witness may answer.

A. I should say to the best of my judgment, it would be about \$12.50 a month.

CROSS EXAMINATION BY MOFFAT

97 I have not seen any General Electric advertisements that a refrigerator will save \$4.50 a month. I save \$12.50 a month because I buy two quarts of milk every day and then one sours before I use it and then I have to throw it out.

98 Even though I throw out part of the milk I purchase on June 3 I still bought more on June 4 than would stay sweet. When I had the refrigerator I bought meat on specials. Without it I had to buy meat every day. Buying it on specials I could save 2 cents or 3 cents per pound. I lost about 4 cents a day not being able to buy meat

99 on Saturdays. I lost some butter, and cooked vegetables. When I cooked more vegetables than I needed for a meal some would spoil before the next one. I made no attempt in June to buy another refrigerator nor at any time since then.

100 Nor did we buy an ice box. I do not know when the payments were made on the refrigerator.

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102 (Defendants' Exhibit 7 is marked for identification and shown to witness, who recognizes it as a letter she wrote to General Electric Contracts Corporation about April 6, 1939. The letter from General Electric Contracts Corporation dated April 7, 1939 was in response to this letter. Exhibit 7 offered and received in evidence.)

103

In this letter I said "in the future I will send payments direct to you and not through Mr. Holdaway. In this way there will be no unnecessary delay."

On direct examination I said that I gave Mr. Holdaway \$15.00 about the 1st of May. On April 27 I received a letter from General Electric Contracts Corporation inquiring as to why I had not made the payment promised in the letter of April 6. I made no payment on the refrigerator between April 6 and May 28, when the refrigerator was repossessed. We did not write any letter to General Electric Contracts Corporation at that time.

104

When I left home I left it in charge of mother, who lives seven blocks away. No one was living at my house between May 28 and June 6 or 7, while I was away. During the day time my brothers and my mother often went there.

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105 I went to the hospital in April and to my
mother's house early in May. I do not know every-
106 one who went to my house while I was away
between May 28 and June 6 or 7.

107 CROSS EXAMINATION BY SWEETRING

My husband was away during the same time
that I was. In my opinion while I was away my
mother, brother, sister, and brother-in-law were
in my house.

The \$10.00 payment that I made that was
not applied on the refrigerator but on the open
account was made some time during the winter.
108 The open account did not cover the balance of
\$75.00 down payment recited in the note. It cov-
110 ered material that we had bought from the Car-
111 bon Furniture and Appliance Company. I be-
lieve the account was around \$30.00.

All of my receipts and cancelled checks in
connection with the refrigerator were kept in
the dresser drawer. After returning to Price after
the repossession I talked with Mr. Holdaway just
once. He did not tell me that I could have the
refrigerator if I would pay the balance due of
\$66.64.

REDIRECT EXAMINATION BY HAMMOND

112 I had two close neighbors and never missed
anything from the house before the refrigerator
was taken. While I was away Earl Fausett fin-
113 ished painting the house.

114 RECROSS EXAMINATION BY MOFFAT

Earl Fausett was the man who testified in
this matter.

MARGARET WOOLSEY, a witness called on
behalf of Plaintiff, being first duly sworn, testi-
fied as follows:

DIRECT EXAMINATION BY HAMMOND

My name is Margaret Woolsey, and I am the
mother of Mrs. Max Fausett. Some time in May
Mr. Holdaway came to my house and I gave my
daughter \$15.00 to give to him.

115 SHERMAN TAFT HILL, a witness called on
behalf of Plaintiff, being first duly sworn, testi-
fied as follows:

DIRECT EXAMINATION BY HAMMOND

116 My name is Sherman Taft Hill and I live in
Provo, I am in the service station and trucking
business and I sell gas to Max Fausett at Provo.

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At the request of Max Fausett I called General Electric Contracts Corporation in the fore part of June, 1939, over the telephone. I asked to
117 speak with someone in authority. He said he was
118 speaking in behalf of General Electric Sales Contract Corporation and I told him I was Max Fausett. I asked him why he took my refrigerator, and
119 he said on account of delinquent installments. I asked how much it would take to put the account in good standing and he said he would have to look it up. I offered him \$30.00 and he said he would have to have the full amount, in the neighborhood of \$60.00, before he could replace the refrigerator. Nothing was said about having resold the title or contract to Bill Holdaway. I told him I would get the money for the refrigerator and
120 he said that would be all right.

CROSS EXAMINATION BY MOFFAT

I do not remember the name of the party I talked to. There was not anything said in regard to the Carbon Second Hand Store. I did
121 not inquire as to where the refrigerator was or
122 who had it. I am sure he did not ask me whether the refrigerator had been repossessed.

I have been a partner of Max Fausett. We bid on some government contracts together. We have been friends for 4 or 5 years. He came to

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123 my place of business and asked me to represent myself as Max Fausett.

ROSE FAUSETT, witness called on behalf of Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY HAMMOND

My name is Rosella Wilson. I am the wife of Earl Fausett, who testified at the beginning of this lawsuit. I went to Max Fausett's house on Monday, the 29th of May, 1939. When I drove up
124 I noticed the kitchen door was swinging. The bottom hinge was loose. There was no refrigerator in the house. There was egg plant, milk, butter and eggs on a chair. The dresser drawers were pulled out the things were pulled out. I reported these facts to Mrs. Leroy Fausett, mother of Max
126 Fausett. There were bumps on the doors like something had been jammed into it.

ELVA FAUSETT, a witness called on behalf of Plaintiff, being first duly sworn, testified as follows:

127 DIRECT EXAMINATION BY HAMMOND

My name is Elva Fausett. I am the wife of Leroy Fausett and mother of Max Fausett. After

128 I was advised of the condition of Max's house by Rose, I called General Electric Contracts Corporation in Salt Lake. I asked for the manager and the girl said he was on his vacation but she would get me someone to talk to. A man answered the phone and if he told his name I don't remember it. I asked him if he told Mr. Holdaway to get the refrigerator and he said "no, but we received word that he had taken it." I asked him what right he had going into a party's house when they wasn't home and he said "Well, the house was vacant and he took the refrigerator to protect it." I asked him if we could pay on the refrigerator and he said we would have to pay the full amount, which is \$66.00 and some odd cents. He didn't say that he had sold the contract or title to Holdaway. He said we could get the refrigerator back.

130 The fore part of May there was a letter delivered to my house from General Electric Contracts Corporation for Max Fausett. I opened the letter but I don't have it. I gave it to Pete
132 Woolsey. The letter wanted to verify the balance due on the refrigerator contract, which it said was \$66.00 and some odd cents.

CROSS EXAMINATION BY MOFFAT

133 I do not remember any other letters coming to my house from General Electric Contracts Corporation during May. All of Max's mail comes to my home.

Pete Woolsey is a brother-in-law of Max Fausett's by marriage.

134 MYRON WOOLSEY, a witness on behalf of Plaintiff, being first duly sworn testified as follows:

DIRECT EXAMINATION BY HAMMOND

My name is Myron Woolsey. I am a brother of Elvin Woolsey, sometimes known as Peter Woolsey, and a brother of Sylvia Woolsey, the wife of Max Fausett. I contacted Mr. Holdaway about the 1st of June, 1939 with my brother Pete on Main Street in Price. My brother asked Holdaway if he took the refrigerator from my sister's
136 home and he said yes. Holdaway said he figured
137 the house was empty because the door was open, and he said he had to protect his rights and the Company's. My brother then offered Holdaway the balance due on the contract. Holdaway said "No, you can't pay it off for \$66.00; you will have to pay me \$99.00." I don't know whether Holdaway told us what the difference between

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the \$66.00 and \$99.00 was for, but I think he said it was on account of a private account that was due. My brother then said he would not pay him. He would pay the balance on the contract and
138 that was all. Holdaway said nothing about the title to the refrigerator.

CROSS EXAMINATION BY MOFFAT

Holdaway said that if Pete would pay him \$99.00 he would bring the refrigerator back.

139 CLARA PIERCE, a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY HAMMOND

My name is Mrs. Clara Pierce, and I am a sister of Mrs. Max Fausett and reside in Salt Lake City. I accompanied Mrs. Max Fausett to the offices of General Electric Contracts Corporation in Salt Lake City about the middle of June, and talked with Mr. Lyon. As we went in Mrs. Fausett asked for Mr. Hughes and said she had come to pay
140 the balance on her refrigerator.

(Objection on behalf of Holdaway to this conversation, which was overruled.)

141 Mr. Hughes called Mr. Lyon and he asked if she had the money and she said yes. She told him it was in a check and he said he would not accept a check and she offered to call or have him call the Price bank to find out if it were good. She wanted to know if he would give her the title to the refrigerator and he said he could not do that as title was in New York and it would take several days before they could get title. She asked for a receipt as paid in full. He said he could not do that because he did not know how she stood with Holdaway. Nothing was said about Bill Holdaway's having the title, but that the title was in New York.

CROSS EXAMINATION BY MOFFAT

All they say about the title was that it was in New York.

ALICE SMITH, a witness called on behalf of Plaintiff, being first duly sworn, testified as follows:

142 DIRECT EXAMINATION BY HAMMOND

143 My name is Alice Smith and I live in Price. I am the Commercial Teacher at Carbon County High School.

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145 I have never worked in a law office or a
finance company office, or in a bank. I do not
146 think it is the custom to put "CC" on the copy
and not on the original of a letter.

147 EARL FAUSETT, Being recalled by Plain-
tiff, testified as follows:

DIRECT EXAMINATION BY HAMMOND

149 The refrigerator in question was purchased
from Graybar Electric Company on what is call-
ed a floor plan. I do not remember the date.

(Plaintiff's Exhibit "G" marked for identi-
fication.)

150 Exhibit "G" is very similar to the trust re-
ceipts we signed when we bought these boxes
from Graybar Electric Company. We signed the
trust receipts with the Graybar Electric Com-
151 pany. As I understand, we sold the contract on
equipment to the General Electric Contracts Cor-
poration, who held out the wholesale price of
the box and sent us the balance of the contract.
We paid 10% of the price of the equipment at
the time we signed the trust receipts. After I
152 paid 10% to the Graybar Electric people I made
no further payments to them.

(Exhibit "G" is offered in evidence. Objection by Moffat, as being incompetent, irrelevant and immaterial and improperly identified.)

VOIR DIRE EXAMINATION BY MOFFAT

154 I executed a promissory note in connection
with the trust receipts and delivered them to the
Graybar Electric Company. There is no promissory
155 sory note with Exhibit "G". I do not remember
about when we bought the refrigerator from Gray-
bar Electric Company. It was after April, 1937.
157 I am not positive whether the form of trust
receipt was that of General Electric Contracts
Corporation or the Graybar Electric Company.

159 (Objection to the introduction of Exhibit
"G" sustained.)

DIRECT EXAMINATION OF EARL FAUSETT CONTINUED BY HAMMOND

When we sold the contract that particular
box was paid for when the contract was accepted.
160 General Electric Contracts Corporation held the
wholesale price of the box out of our check for
the contract or paid Graybar the balance on the
wholesale price of the box.

CROSS EXAMINATION BY MOFFAT

When we bought the refrigerators we did not have enough money to pay for them, so we borrowed money to get them on the floor. We executed a note and trust receipt for the balance and made a 10% down payment to the Graybar people. When we sold the refrigerator at retail we then paid the balance off to the Graybar Electric Company. When we sold the Max Fausett refrigerator and discounted the note through the General Electric Contract Corporation we got enough money to pay off the floor plan note.

We handled the Hotpoint line and another dealer handled the General Electric line. We did not handle any General Electric equipment.

THOMAS S. JOHNSON, a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY HAMMOND

My name is Thomas S. Johnson and I live in Price, Utah. I sold some Hotpoint refrigerators on the floor plan as explained here. Sometimes I paid cash; sometimes I signed trust receipts.

"Q. Can you explain to the jury just what the procedure was with respect to those trust receipts and notes, if given along with them, and so on?"

(Objection by Moffat, as being incompetent, irrelevant and immaterial. Objection overruled by the Court.)

We purchased from Graybar in 1928 and we arranged with General Electric to purchase the machines and issued 10% of the wholesale price and signed a trust receipt for the other 90%, payable to General Electric Contracts Corporation, which put us in possession of the Hot Point refrigerator. General Electric received the check and note and trust receipt. Exhibit "G" is the form used by General Electric Contracts Corporation in 1928.

(Exhibit "G" again offered in evidence.)

VOIR DIRE of witness by Moffat.

I sold Hot Point refrigerators during the spring and summer of 1928.

(Exhibit "G" received in evidence.)

I have an idea as to the depreciation value of a refrigerator in a family with three children.

“Q. In your judgment, how much depreciation would there be on a refrigerator used under those conditions, in one year?”

(Objection by Moffat, as to its being an improper hypothetical question and not including all the facts.)

“The Court: Used one year?”

“Hammond: Yes.”

“The Court: If the witness can answer, he may.”

170 My estimate is that it will depreciate about 10% of its value each year.

“Q. Mr. Johnson, have you a judgment as to how much less would be sustained by being deprived of that refrigerator—by Mr. Fausett and his wife and those three children—from the spoiling and destruction of food and material that is kept in the refrigerator, how much a month? Have you a judgment as to how much a month they would lose?”

(Objection by Moffat, on the grounds that the question asked calls for a conclusion by the witness and the witness has not shown himself to be qualified to answer. Also that it is an improper hypothetical question.)

“The Court: The witness may answer as to whether or not he has a judgment.”

“A. I have a judgment.”

“Q. And in your judgment, what loss would these people sustain per month, by being deprived of the use of that refrigerator?”

(Objection by Moffat on the grounds the witness is not competent; that it is an improper hypothetical question and calling for a conclusion of the witness.)

“Mr. Sweetring: We join in that objection and add that it is not the proper measure of damage in this case.”

“The Court: Objection overruled. The witness may answer.”

I estimate that a refrigerator should save \$2.00 per month per member of the family.

CROSS EXAMINATION BY MOFFAT

I am sure I did business with General Electric Contracts Corporation in 1928.

THOMAS S. JOHNSON recalled.

DIRECT EXAMINATION BY HAMMOND

175 I wish to correct my testimony in that I sold
Hot Point refrigerators in 1938 and not in 1928.

176 CROSS EXAMINATION BY MOFFAT

During the spring and summer of 1938 I
was selling Hot Point refrigerators in competition
with Earl Fausett and William Holdaway.

PLAINTIFF RESTS

173 "Mr. Moffat: Comes now Defendant General
Electric Contract Corporation and moves for a
non-suit on the following grounds:

First: That there is no evidence of a con-
version of the personal property described in the
plaintiff's complaint.

Second: That there is no evidence to go to
the jury as to any damages suffered by the de-
fendants.

Third: That there is no evidence that the
defendant, William Holdaway, was, at the time
that he repossessed the refrigerator, acting as
the agent of this defendant."

(Motion for non-suit denied by the Court.)

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180 STEPHEN LYON, called as a witness on behalf of Defendant General Electric Contracts Corporation, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MOFFAT

181 My name is Stephen Lyon. I am manager of the Salt Lake office of General Electric Contracts Corporation. The territory under the Salt Lake office includes most of the area in the seven surrounding states, and includes Carbon County, Utah also. The business of General Electric Contracts Corporation is the purchase of installment obligations representing sales of merchandise on conditional sales basis, and other obligations of a like nature, all designed to promote the flow of credit to dealers, furthering and enhancing the sales of electric appliances and providing credit facilities.

I am acquainted with Defendant Holdaway.

182 In June, 1939, we had five employees in our Salt Lake office, which is the same number employed since July, 1938.

When we purchase a contract from a dealer under the terms of an agreement, which has already been introduced in evidence as our application and agreement form, the dealer assigned

183 to us all right, title and interest he may have in the contract, we purchase the account represented by the contract and accepted the assignment of the contract as collateral security only for the account. When an account such as Plaintiff's Exhibit "A" is received by us, we investigate it to see that it is in proper form and also the underlying credit, character and responsibility of the applicant for the credit. We inspect the contract to determine if it is in proper form, properly completed as to date, signature, etc. and then investigate the credit responsibility of the applicant to determine whether the account represents good investment. If it represents good investment we purchase it by outright payment to the dealer who offered it to us under the terms and conditions in the agreement referred to, known as our application and agreement form. We purchase contracts only from dealers with whom we have an agreement similar to the application and agreement form in evidence here.

184 After purchasing the contract it is mailed to our general offices in New York City and held there for safekeeping. It is returned to us when our company no longer has any interest in it, or it is returned at our request. When a contract is paid out it is returned to me and I then

forward it to the dealer. An individual file is kept on every contract.

Defendants' Exhibits 8 and 9 marked for identification.)

187 The agreement referred to in the assignment by the dealer, which is marked Plaintiff's Exhibit "B", is the same as Defendants' Exhibit 1.

188 When a buyer is in default on his contract, as Mr. Fausett was in this case, we send copies of all correspondence directed to the purchaser to the dealer. We also send the dealer semi-monthly detailed statements of the delinquent condition of each and every account of his. We sometimes call on dealers to repurchase their contracts, after every opportunity for payment has
189 been offered to the purchaser.

(Exhibit 8, consisting of the following letters, or copies of letters, is handed to the witness:

Copy of letter dated November 3, 1938, addressed to Max Fausett;

Copy of letter dated November 9, 1938, addressed to Max Fausett;

Copy of letter dated November 16, 1938, addressed to Max Fausett;

- Copy of letter dated November 22, 1938, addressed to Max Fausett;
- Copy of letter dated December 1, 1938, addressed to Mrs. Max Fausett;
- Copy of letter dated December 16, 1938, addressed to Mrs. Max Fausett;
- Copy of letter dated December 22, 1938, addressed to Mrs. Max Fausett;
- Copy of letter dated December 28, 1938, addressed to Mrs. Max Fausett;
- Copy of letter dated February 27, 1939, addressed to Max Fausett;
- Copy of letter dated March 7, 1939, addressed to Max Fausett;
- Copy of letter Dated March 13, 1939, addressed to Max Fausett;
- Copy of letter dated March 23, 1939, addressed to Max Fausett;
- Copy of letter dated April 7, 1939, addressed to Mrs. Max Fausett;
- Copy of letter dated April 27, 1939, addressed to Mrs. Max Fausett;
- Copy of letter dated May 4, 1939, addressed to Max Fausett;
- Copy of letter dated May 11, 1939, addressed to Max Fausett.)

193. This first sheet of Exhibit 8 is a copy of letter written in our Salt Lake office on November 3, 1938, addressed to Max Fausett, at Price, Utah,

deposited in the United States mail that day, a copy of the same being sent to Carbon Furniture & Appliance Company. The notation at the bottom of the letter "CC to CBN" was placed on the copy but not on the original.

195 The second sheet of the Exhibit is a copy of a letter dated November 9, 1938 and similar in nature to the first letter. It is a copy of letter sent from our office November 9, 1938, addressed to Max Fausett with a copy to Carbon Appliance & Furniture Company. On the bottom of the letter appears some writing "Dear Mr. Holdaway" which was not on the original letter sent to Mr. Fausett, but it was on the copy that was mailed to Carbon Furniture & Appliance Company.

197 The letter of November 16, 1938 was prepared in our office on that day and mailed to Max Fausett of Price, Utah, with a copy to the Carbon Furniture & Appliance Company. On the bottom of the letter are some additions addressed to Mr. Holdaway that are not on the original letter; but were on the copy sent to Holdaway.

The letter dated November 22, 1938 was a letter prepared in our office on that date, addressed and mailed to Max Fausett, with a copy to Carbon Furniture & Appliance. There is an

additional memo on the bottom of the letter which was not on the original but was on the copy sent to Holdaway.

198 The letter dated December 1, 1938, addressed to Mrs. Max Fausett was prepared in our office December 1, 1938, addressed and mailed to Mrs. Max Fausett, with a copy to Carbon Furniture & Appliance.

The letter of December 16, 1938 was prepared in our office, mailed and addressed to Mrs. Max Fausett at Price, Utah, with a copy to Carbon Furniture & Appliance Company.

The letter of December 22, 1938 was prepared in our office in Salt Lake City, Utah, addressed and mailed to Mrs. Max Fausett, at Price, Utah, with a copy to Carbon Furniture & Appliance.

199 The copy of the letter dated December 28, 1938 is a copy of letter prepared in our office on that date, addressed and mailed to Mrs. Max Fausett with a copy to Carbon Furniture & Appliance. There is a memo on the bottom of this letter which was not on the letter sent to Mrs. Max Fausett, but was on the copy sent to Carbon Furniture & Appliance Company.

The copy of the letter dated February 27, 1939 is a copy of a letter prepared in our office on that date, mailed to Max Fausett at Price, with a copy to Carbon Furniture & Appliance Company.

The copy of the letter dated March 7, 1939 is a copy of a letter prepared on that date, addressed and mailed to Max Fausett, with a copy to Carbon Furniture & Appliance Company.

200

The copy of the letter dated March 13, 1939 is a copy of letter prepared in our office on that date, addressed and mailed to Max Fausett. No copy of this letter was sent to Carbon Furniture & Appliance Company.

The copy of the letter dated March 23, 1939, is the copy of a letter prepared in our office on that date, addressed and mailed to Max Fausett with a copy to Carbon Furniture & Appliance. The memo on the bottom was on the copy to Carbon Furniture & Appliance, but not on the letter sent to Max Fausett.

A copy of the letter dated April 7, addressed to Mrs. Max Fausett is a copy of a letter prepared in our office on that date, addressed and mailed to Mrs. Max Fausett with a copy to the Carbon Furniture & Appliance Company.

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201 A copy of the letter dated April 27, 1939 is a copy of the letter prepared in our office on the same date, addressed and mailed to Mrs. Max Fausett with a copy to Carbon Furniture & Appliance Company.

The copy of letter of May 4, 1939 is a copy of letter prepared in our office on that date, addressed and mailed to Max Fausett, with a copy to Carbon Furniture & Appliance Company.

The copy of letter dated May 11, 1939 is a copy of letter prepared in our office on that date, addressed and mailed to Max Fausett with a copy to Carbon Furniture & Appliance Company. The memo on the bottom was on the copy sent to the Carbon Furniture & Appliance Company but not on the original sent to Max Fausett.

202 I have now identified all of the letters constituting Defendants' Exhibit 8. Some of the letters bear the signature of J. Earl, who was an employee of our company, some bear the signature of A. G. Hughes, who is also an employee of our company, and some bear the signature of H. P. Gough, who is an employee of our company, and one bears the signature of L. Bridge, who is also an employee of our company, all in our Salt Lake office. Not all of the copies were mailed to the Carbon Furniture & Appliance Company on

the date of the letter, because we usually send all of the copies together about twice a week.

203

(Defendant's Exhibit 8 offered in evidence. Objection by Hammond, on the ground that they are incompetent, irrelevant and immaterial.

206 Objection overruled. Exhibit 8 received in evidence.)

210 (Defendant's Exhibit 10 marked for identification.)

Exhibit 9 is a letter received from Mrs. Max Fausett at our office in Salt Lake City some time immediately after November 24, 1938, and there was \$15.00 enclosed with the letter.

(Defendants' Exhibit 9 offered and received in evidence.)

211 Defendants' Exhibit 10 consists of two pages. The first page is a copy of letter prepared in our office on May 12, 1939, addressed to William Holdaway, of the Carbon Furniture and Appliance Company, at Price, Utah. The original was mailed on that date to the addressee. The second sheet is the original enclosure that accompanied the original letter to Mr. Holdaway. The second sheet
213 of Exhibit 10 is a form regularly used by our

company to request the dealer to repurchase a defaulted contract.

214 Payments were due on the Max Fausett contract on the 29th of each month, beginning July 29, 1938. Each payment was in the sum of \$10.00, with the exception of the final payment of \$11.64. I have in my hand an account card which is used in detailing the account on the Max Fausett contract, showing payments and balance due. It indicates when payments were actually received in our Salt Lake office. Entries were made upon
215 the card by employees of General Electric Contracts Corporation under my direction in the Salt Lake office.

Payments when due and when received are as follows: The first payment due July 29, 1938, was received August 15, 1938. The second payment, due on August 29, 1938 was received on September 19, 1938. The third payment, due on September 29, 1938, was received on December 1, 1938. The fourth payment, due on October 29, 1938, was paid one-half on December 1, 1938 and one-half on February 21, 1939. The payment due on November 29, 1938, was paid on February 21, 1939. The payment due on December 29, 1938, was paid on February 21, 1939. The payment due on January 29, 1939 was paid on April 7, 1939. One-half only of the payment due on February 29, 1939

was paid on April 7, 1939. There were no further payments received for credit to that account.

217 I remember Mrs. Max Fausett and Mrs. Clara
Pierce coming to my office in Salt Lake on June
19, 1939, where I had a conversation with them.
Mr. Hughes was also present. I do not remember
the conversation in detail but I do remember
that it contained an offer on the part of Mrs.
218 Fausett of the unpaid balance on the account to
us and the request of Mrs. Fausett for the original
contract. Mrs. Fausett asked Mr. Hughes for the
the return of the contract and Mr. Hughes stated
that it was in New York City and could not be
219 produced. I told Mrs. Fausett that we were not
then in a position to accept the tender for the
simple reason that we no longer owned or had
any interest in the account represented by the
contract or in the contract itself, and advised her
that the owner was the Carbon Furniture & Ap-
pliance Company and suggested that she make
tender to them.

220 Mrs. Fausett asked several times if she could
pay the balance and have a receipt paid in full.

To the best of my belief the contract, on July
19, 1939, was in transit from New York to our
Salt Lake office.

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On June 19, 1939 the balance due on the Fausett contract had been paid to us by the Carbon Furniture and Appliance Company. Exhibit 10 shows that the contract was resold to the Carbon Furniture and Appliance Company May 12, 1939.

It does not make any difference to us, after a dealer has repurchased a contract from us, whether the dealer repossesses the refrigerator, refinances the contract, or attempts to collect the balance due on the contract. The only interest we have in the contract after it is repurchased by the dealer is to hold it as security for the payment by the dealer of the balance due on the contract. We were advised by Mr. Holdaway on June 2, 1939 that he had repossessed the Fausett refrigerator.

The conversation with our office testified to by Sherman Hill, was not held with me but I did hear the end of the conversation occurring in our office. The conversation was with Mr. A. G. Hughes, and I heard what he said over the telephone. Mr. Hughes' answer to Mr. Hill was "Yes, it is all right for you to pay the balance to the Carbon Furniture & Appliance Company."

The Carbon Furniture & Appliance Company paid the balance due us on the Max Fausett con-

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tract on June 17, 1939. After this payment was made the Max Fausett contract was sent to the Carbon Furniture & Appliance Company by our office.

226 The Graybar Electric Company is not owned by General Electric Contracts Corporation or General Electric Company. The brand of electrical appliances sold by Graybar Electric Company is known as the Hot Point line, while the General Electric Company brand is known as General Electric or GE. The two lines are definitely competing lines of electrical appliances. In Price
227 in 1938 and 1939 there was a General Electric-appliance dealer as well as a Hot Point dealer.

228 Electric refrigerator manufacturers claim that an electric refrigerator will save on food in the average household of \$5.00 per month.

229 I have had thirteen years experience in the electric appliance field, four and one-half years as a merchandiser, the last being in the fall of 1936, and as a merchandiser I have had occasion to appraise refrigerators and fix prices for used refrigerators.

(Voir Dire by Hammond) (Moffat continues.)

230 The testimony I am about to give is based upon resale of refrigerators. The refrigerator de-

precipitates 40% of its value the first year and 30% of the remaining value each succeeding year. Defendants' Exhibit 1 is a reproduction of an agreement, which, at the present time, is in our files, between the Carbon Second Hand Store and Earl Fausett and William Holdaway and the General Electric Contracts Corporation, executed on the date it bears, August 25, 1937. Between that date and June 19, 1939 it was not cancelled or revoked by either party, nor amended or changed in any regard, nor any contract substituted therefor, so that all of our dealing between those dates with the Carbon Furniture & Appliance Company were pursuant to that agreement.

CROSS EXAMINATION BY HAMMOND

CBN indicates copy sent to Carbon Furniture & Appliance Company.

232 After the dealer paid us the account it made no difference to us what he did with the refrigerator.

233 I maintain that on May 12, 1939, pursuant to our request for repurchase agreement Mr. Holdaway repurchased the account. On that date we transferred the account from a receivable against Max Fausett to a receivable against Carbon Furniture & Appliance Company.

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235 On page 2 of Exhibit 10 there is a pencil
notation "Customer refuses to pay as agreed. You
are repossessing." That was not an order from us
236 to William Holdaway.

Some of the payments were made direct by
the Fausetts to us. The payment of \$10.00 on
August 15, 1938 was not made direct by the Faus-
etts to me, nor were the payments of September
19, 1938 in the sum of \$10.00 and February 21, 1939
in the sum of \$25.00. These payments were made
to us by the Carbon Furniture & Appliance Com-
pany. The final payment of \$66.64, under the
repurchase of the account on June 17, 1939, was
paid by the Carbon Furniture & Appliance Com-
237 pany. I received a payment on February 21, 1939
and on April 7, 1939, but no payment in March.
These payments were made directly by the Faus-
238 etts. We made a charge of 5 cents on the dollar for
late payments. In our letter of December 1 we
said, "According to your letter, we are marking
your account to receive another \$15.00 remittance
plus \$1.50 late charge promptly on or before De-
cember 15th."

(Witness then reads the letter of December
1, 1938, as follows:)

"We wish to acknowledge receipt of \$15.00
which has been applied against your September

239 29th installment and partial payment of your October 29th payment. According to your letter, we are marking your account to receive another \$15 remittance plus \$1.50 late charge promptly on or before December 15th. Your account has been very seriously delinquent and we must ask that you give us your prompt cooperation on these arrangements. Very truly yours."

We granted the Fausetts until December 15 to make payment in the amount stated, to-wit: \$16.50. This amount had been partially due since October and November. \$15.00 was paid on account on April 7, 1939. Nothing was paid on April 27. In our letter of March 23, 1939 we stated in a memorandum to Carbon Furniture & Appliance Company that "It will be impossible for you to take the refrigerator without having to take replevin action. If you once get hold of it, don't give it back to him until he pays the entire balance of \$81.64, plus \$2.50 late charges. Will you please advise me what results you have on this account."

241 On May 11 we wrote Max Fausett as follows: "You may still keep the merchandise if you wish, upon payment of \$66.64, which represents the balance due on the account." This was 18 days prior to the date of repossession.

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242 When we wrote the note on Exhibit 10 it was merely a direction to repurchase to Mr. Holdaway of the Carbon Furniture & Appliance Company. It was not an order of repossession. Our letter of May 11 addressed to the purchaser was merely to give him an opportunity to pay the account. The transactions had no connection whatsoever. In a conversation with Mr. Holdaway on May 8 we were informed that he intended to replevin this refrigerator.

247 REDIRECT EXAMINATION BY MR. MOFFAT

248 There was never any late charge paid by the Plaintiff in this case. There was never any late charge tendered by the Plaintiff.

 On July 13, 1939, when this suit was started, our Company did not have in its possession the refrigerator in question.

 WILLIAM HOLDAWAY, being one of the Defendants in this action, being first duly sworn, testified as follows:

 My name is William Holdaway and I am a resident of Price, Utah. I am a defendant in the foregoing action.

249 On June 7, 1938 I was in the furniture and appliance business, doing business as Carbon Furn-

iture & Appliance Company. On that date I had a partner named Earl Fausett.

Plaintiff's Exhibit A is the original contract made out between Max Fausett and the Carbon Furniture & Appliance Company, covering a five-foot refrigerator. After receiving this contract from Max Fausett we sold it to General Electric Contracts Corporation at Salt Lake. Defendants' Exhibit 1 is an application and agreement which Earl Fausett, my partner, and I signed to enable us to sell paper to this finance company. We kept track of the payments on this account by correspondence with the General Electric Contracts Corporation. I received copies of the letters making up Exhibit 8.

Defendants' Exhibit 10 is a repurchase request from General Electric Contracts Corporation to the Carbon Furniture & Appliance Company. I repossessed the Fausett refrigerator on May 28 or 29. I do not recall the exact date but I believe it was the 29th of May in 1939. The refrigerator was in Max Fausett's home in Price. Elmer Packer of Price went with me at the time. When we got to the Fausett home no one was home and the door was open and I could see the refrigerator. I told Mr. Packer to come in with me and we carried the refrigerator out. Nothing else was taken from the Fausett home but the

Tr. Page●

refrigerator. We emptied the refrigerator before moving it. We took the refrigerator to the warehouse of William Campbell and stored it. It remained there about two weeks and I eventually resold it. I resold it during the latter part of June,
256 to J. R. Moyle. I believe I received \$100.00 for it.

Defendants' Exhibit 5 is page 24 of a small ledger that we use to keep track of accounts that we had sold when we had sold the paper to the General Electric Contracts Corporation. Page 24
257 is in my own handwriting. By looking at page 24 of this book I can tell the amount due on the Max Fausett contract.

(Exhibit 5 offered in evidence.)

258 VOIR DIRE by Hammond.

The payment of February 20, 1939 in the
259 sum of \$25.00 was paid to me. The pencil notation of \$15.00 without a date was the \$15.00 sent by Mrs. Fausett directly to General Electric Contracts Corporation.

260 (Exhibit 5 received in evidence.)

DIRECT EXAMINATION of HOLDAWAY resumed.

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261 There were no further payments made after those noted on Defendants' Exhibit 5 and the balance was \$66.64.

266 Defendants' Exhibit 11 is a duplicate of a receipt issued to Max Fausett.

268 (Defendants' Exhibit 11 offered and received in evidence.)

269 Defendants' Exhibit 11 was made on February 20, 1939, and is a receipt for \$25.00 as a refrigerator payment. In the endorsement "Pd. BH" the initials are my own.

271 Defendants' Exhibit 12, consisting of two pieces of paper, is a check stub and a canceled check covering \$25.00 Max paid to me and I remitted to the General Electric Contracts Corporation.

(Exhibit 12 offered and received in evidence.)

272 It is a check I mailed to the finance company for \$39.20, dated February 28, 1939 for payment on three different accounts, one for Max Fausett, one for Jorgenson and one for a trust receipt. The \$25.00 payment referred to on the check stub on Exhibit 12 is the same \$25.00 received from Plaintiff, as indicated by Defendants' Exhibit 11.

Exhibit 13 is a duplicate receipt I prepared.

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It is to explain the payments appearing in the ledger.

(Exhibit 13 offered and received in evidence.)

273 The initials "BH" appearing on the receipt are mine and it is a receipt for payment on the Faussett open account.

282 Defendants' Exhibit 14 is a ledger sheet set up against Max Fausett in the course of the business of Carbon Furniture & Appliance Company and is kept in my own handwriting.

(Exhibit 14 offered in evidence.)

284 (Exhibit 14 refused.)

285 I was not in possession of the refrigerator in question when this suit was started on July 13, 1939. I had a conference with Pete Woolsey in Price, Utah, in the early part of June, 1939.

286 Woolsey offered me a check of \$66.64 to pay for the refrigerator and I turned him down. I told him it was not enough. He asked why I took the refrigerator and I told him I had reason enough. They were leaving it in a house with the door open and no one around, and that it was one of my responsibilities. He asked me how much was owed on it and I said \$96.64, and he refused to pay that amount.

Tr. Page

287 I had a conference over the telephone with
Mrs. Max Fausett after the repossession of the
refrigerator. She offered to pay the \$66.00 and
some odd cents and I turned her down, stating
that I had an equity of \$30.00 for the down
payment.

288 CROSS EXAMINATION BY HAMMOND

I haven't the letter sent by the General Electric Contracts Corporation to me returning the first Fausett contract or the letter returning the contract in question to the General Electric Contracts Corporation. I never offered to return to Max Fausett any part of the \$100.00 received from
290 the sale of the refrigerator.

Page 24 of Exhibit 5 includes all of the entries made in connection with the Max Fausett account, showing balance due General Electric Contracts Corporation.

CROSS EXAMINATION BY MOFFAT

291 I received other letters from General Electric Contracts Corporation besides those represented by the copies introduced in evidence as Exhibit 12. In addition to these letters I had numerous conversations with representatives of the General Electric Contracts Corporation concerning the Max Fausett account.

At the present time I am an employee of the Price Lumber & Hardware Company. I discontinued the Carbon Furniture & Appliance Company in March, 1939. When I repossessed this refrigerator I had closed my store and was just disposing of the balance of my merchandise and making collections.

REDIRECT EXAMINATION OF HOLDWAY BY SWEETRING

294 Out of the \$100.00 I received for the resale of the refrigerator I figured my unpaid balance was \$96.00 and I think the repossession and the trouble I was put to, including a trip to Salt Lake, was worth more than a \$4.00 difference.

The ledger in evidence represents the account of Max Fausett with General Electric Contracts Corporation and does not represent Max's indebtedness to me personally.

295 Clarence Elmer Packer, a witness called on behalf of Defendant William Holdaway, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY SWEETRING

My name is Clarence Elmer Packer and I live at Price, and I am employed by the Hanson Furniture Company. I accompanied William Holdaway

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296 on May 30 to the Max Fausett residence. I backed the truck up to a little porch. Mr. Holdaway rapped on the door, then he just opened the door, picked up the refrigerator and walked out. I didn't see Mr. Holdaway take anything else out of the Fausett home. I do not recall bumping or damaging anything.

297 STEPHEN LYON recalled on cross examination by HAMMOND.

298 In the upper right hand corner of Exhibit "A" is an assignment blank signed by J. H. Strube.

299 (Exhibit "H" marked for identification, offered in evidence.)

REDIRECT EXAMINATION BY MOFFAT

The stamp of endorsement was affixed to the contract before it was returned to me from New York.

308 WILLIAM CAMPBELL, called as a witness by Plaintiff on rebuttal, being first duly sworn, testified as follows:

My name is William Campbell. I am a resident of Price, Utah. I have storage facilities in Price. During the spring and summer of 1939 I
309 stored a refrigerator for William Holdaway. I

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do not know whether I picked it up or whether he delivered it to me. I know Max Fausett. I
310 don't think I picked the refrigerator up at Max's house or at William Holdaway's home. I don't know when it was picked up. I remember when Mr. Holdaway came and wanted to store it. The only thing I have is a record of when the storage was paid. The storage was paid on May 3, 1939. I
311 remember I mailed the statement to a company in Salt Lake and they sent me the money for the storage and a letter to deliver to Holdaway. I don't know whether or not it was General Electric Contracts Corporation. That is the only thing I have stored for Mr. Holdaway.

CROSS EXAMINATION BY MOFFAT

I don't believe I could describe the property that was stored with me. I do not keep any record
312 of any serial number or anything.

Mr. Moffat moved that the testimony of William Campbell be stricken on the ground that it was immaterial and irrelevant to any issue in this case. Mr. Sweetring joined on behalf of Defendant Holdaway. Motion overruled by the Court.

306 Comes now Defendant General Electric Contracts Corporation, and moves for a directed verdict in this matter, for the following grounds:

First: That there is no evidence to go to the jury of any conversion of the refrigerator in question by the Defendant, General Electric Contracts Corporation.

Second: That there is no evidence of damage, if any, suffered by plaintiff, to be passed upon by the jury.

Third: That there is no evidence to be considered by the jury relative to the question whether the defendant Holdaway, at any time, acted as agent for the General Electric Contracts Corporation.

Fourth: That counsel for plaintiff has stated that his action is an action in claim and delivery, and the evidence affirmatively and without dispute shows that at the time of the commencement of the action that this defendant was not in possession of the refrigerator in question.

Mr. Sweetring as attorney for Mr. Holdaway, joined in the motion of the defendant, General Electric Contracts Corporation; with the additional ground that the defendant Holdaway was not in possession of the refrigerator in question upon the date of the institution of the action.

IN THE SEVENTH JUDICIAL DISTRICT
COURT OF THE STATE OF UTAH
IN AND FOR CARBON COUNTY

MAX FAUSETT,

Plaintiff

vs.

GENERAL ELECTRIC CON-
TRACTS CORPORATION, A
foreign corporation, and WIL-
LIAM HOLDAWAY,

Defendants.

Civil
No. 4986

ORDER SETTLING BILL OF
EXCEPTIONS

IT IS HEREBY CERTIFIED that the fore-
going Bill of Exceptions in the above entitled case
consisting of 446 pages, together with the Exhibits
introduced at the trial thereof, which are made a
part hereof, contains a true and correct transcript
of all the evidence in this case, together with the
proceedings, orders and ruling of the Court and
Stipulations of the parties made subsequent to the
trial thereof, and that the same is hereby allowed,

signed and settled as a true and correct Bill of
Exceptions in this case.

Dated this 12th day of April, 1940.

BY THE COURT

GEORGE CHRISTENSEN,
Judge

LIST OF EXHIBITS

Tr.
No.

PLAINTIFF'S EXHIBITS

389	A—Conditional Sales Contract	Received in Evidence
393	B—Back of Exhibit A	Received in Evidence
396	C—Copies of Conditional Sales Contract 3 pages	Received in Evidence
397	D—Check \$66.75	Received in Evidence
398	E—Letter of G. E. Co.	Received in Evidence
399	F—Letter	Received in Evidence
400	G—Trust Receipt	Received in Evidence
404	H—(On same sheet with Exhibit A & B).....	Received in Evidence

DEFENDANTS' EXHIBITS

405	1—Contract	Received in Evidence
414	2—Letter Oct. 19, 1938	Received in Evidence
415	3—Letter Oct. 27, 1938	Received in Evidence
416	4—Page 142 B of Ledger	Not Received in Evidence
417	5—Page 24 of another ledger	Received in Evidence
418	6—Letter June 16, 1938	Received in Evidence
419	7—Letter April 6, 1939	Received in Evidence
420	8—About 25 letters	Received in Evidence
435	9—1 letter	Received in Evidence
436	10—Copy of letter May 12th, on one sheet; and Request for Repurchase of Account on another sheet	Received in Evidence
438	11—Copy of receipt	Received in Evidence
439	12—Check and check stub	Received in Evidence
440	13—Copy of receipt	Received in Evidence
441	14—Page 60-A of ledger	Not Received in Evidence

ASSIGNMENTS OF ERROR

(Title of Court and Cause)

Comes now Defendant General Electric Contracts Corporation and assigns the following prejudicial and manifest errors appearing on the record and in the bill of exceptions and upon which this Defendant and Appellant will rely for reversal and the orders, ruling and judgment in said case made by the lower court:

1. That the Court erred in denying Defendant General Electric Contracts Corporation's motion for a non-suit. (Tr. 173)

2. That the Court erred in refusing and denying Defendant General Electric Contracts Corporation's motion for a directed verdict. (Tr. 312)

3. That the Court erred in its instructions to the jury and particularly Instruction No. 2, No. 3, No. 4, No. 5, No. 6, No. 10, No. 14, No. 15, No. 16 and No. 18.

4. That the Court erred in refusing Defendant General Electric Contracts Corporation's requested instructions, and particularly Instructions No. A, No. 1, No. 2, No. 4, No. 5, No. 6, No. 7, and No. 8.

5. That the Court erred in refusing to grant Defendant General Electric Contracts Corporation's motion for new trial. (Tr. 146)

6. That the Court erred in making and entering its order granting Plaintiff's motion to reduce judgment and approving Remittitur, said order being dated February 19, 1940. (Tr. 145)

WHEREFORE, by reason of errors above assigned, Appellant prays that the rulings made against it in this cause be reversed and that the lower court be directed to vacate the judgment heretofore entered and that the court be directed to dismiss said cause or to grant a new trial, as to the court may seem proper in the premises.

FABIAN, CLENDENIN, MOFFAT & MABEY,
Attorneys for Defendant and Appellant
General Electric Contracts Corporation.

(Affidavit of mailing of copy to attorney for Plaintiff.)