

No. 12 or D. 12 bare.....	18 50
“ “ or D. 12 bare & H. T.....	20 00
“ “ “ “ F. table .....	24 00
“ “ “ “ G. table .....	24 25
“ “ “ “ G. A. K.....	27 50
“ “ “ “ F. table and cover.....	25 50
“ “ bare and trimmer.....	26 50
“ “ “ “ and H. T.....	28 00
2 needle stay H. T.....	50 00
2 stitch zigzag.....	45 00
3 “ “ .....	77 00
German Universal polytype.....	55 00
Buttonhole machine, bare and T.....	95 00
“ “ D. table foot power.....	90 00
2 needle vamping machine H. T.....	55 00
11/21/89. Wax thread machine, 10% on amt. f. o. b. Chicago.	

Said machines to be disposed of in Minneapolis and Anoka ——— for cash, notes, or leases (the latter to be sent to you, to be held as collateral security), at regular retail prices, as shown on your printed price list, with the following exceptions:

No. 12 or D. 12 bare at.....	\$25 or \$28 if with transmitter
Buttonhole machine complete.....	\$125 00
2 needle stay & H. T.....	65 00
2 stitch zigzag.....	55 00
3 stitch zigzag.....	100 00
2 needle vamping & H. T.....	75 00

—or family machines to dealers at same prices and terms as per your printed contract machines to manufacturers on 30 days for cash.

On Saturday of each week I will render to you at Chicago, Ills., a true account of all machines disposed of and collections made, with all notes or leases or other evidences of indebtedness inclosed, and remit therewith, by sight draft on Chicago or New York, at my expense, all the cash I have on hand after paying the legitimate expenses of the business, and \$25 for my own personal expenses; hereby guarantying to you the payment in cash for the full amount for each machine at the above-named prices (and for which you may hold collateral) within twelve months after date of shipment or invoice. As soon as you receive the full price above mentioned on a note or lease, you are to assign same to me, without recourse, unless I am otherwise indebted to you. Then said notes and leases may be held by you, and the proceeds collected on the same applied on my indebtedness. I to do the collecting and instructing, and pay all expenses, including all taxes, insurance, licenses, rent, &c., incurred in the prosecution of the business during the continuance of my handling your machines under this contract, and will transact all business hereunder in my own name and for my own account, you to give me free use of all office fixtures here during the continuance of this contract. I am to receive fifteen per cent. on cash collected by me on leases, notes, or book accounts dated prior to July 22nd, 1889, which shall also be pay for my services in instructing parties in the use of machines already sold or leased in the city, and repairing the same free of charge in all cases when promises have been made to by you or your agents. I agree not to handle or sell any make of sewing machines or parts during the continuance of this contract, except I get them through you, except old machines I get in trade. I agree to purchase from you all parts and attachments at twenty per cent. discount from your wholesale prices, and will pay for same ninety days from date of shipment; I to have the privilege to return all new parts and merchandise at 20 per cent. discount from your wholesale price list. You are, at the termination of this contract, to have the privilege of buying of me any or all of the machines I may have on hand, at the prices as above, less cost of parts there may be short, or damage there may be to machines, stands, or woodwork. If, at any time hereafter, there may be any change in the style or prices to me of machines, you may insert such change of style or price in this contract. I distinctly

understand and agree that the performance of this arrangement depends upon the entire satisfaction with my business, and I hereby state there is no verbal or written agreement between us other than is contained herein. This agreement may be terminated by either party, by giving thirty days' written notice.

Yours, respectfully,  
Your contract or proposal as above is accepted.  
Yours, respectfully,

[Signed] Frank McCloud.

Wheeler & Wilson Mfg. Co.,  
[Signed] J. L. Flannery, Agt.

(3) I find that on the same day the following guaranty was duly executed and delivered by defendant, accepted by plaintiff, and appended to and made a part of said contract; also, that, at the time of the execution and delivery thereof, defendant had full knowledge of the contents of the contract itself, and signed the guaranty at the request of McCloud, and as a matter of friendship to him.

For value received, and in consideration of the within-described contract, we hereby guaranty to Wheeler & Wilson Mfg. Co. (a corporation duly incorporated by the state of Connecticut), its successors or assigns, the full and faithful performance of the terms of said contract by the said Frank McCloud, and the payment by the said Frank McCloud of all notes which may be given, or indebtedness or damage which may arise, to Wheeler & Wilson Mfg. Co., from the said Frank McCloud; hereby consenting to any changes in prices or styles of machines, extensions or renewals of notes or leases or accounts, without notice. Witness our hands and seals this twenty-second day of July, 1889.

Witness: J. L. Flannery.  
Witness: J. L. Flannery.  
Witness: J. L. Flannery.

Walter A. Smith. [Seal.]  
Wm. H. Lyon. [Seal.]  
Mrs. Jennie McCloud. [Seal.]

(4) I find that immediately thereafter McCloud carried on and conducted the business of selling and leasing sewing machines, and of settling up the old business of the company in that vicinity, under said contract, until December 7, 1892, when the contract was terminated, and there was claimed to be due plaintiff thereunder the sum of \$8,636.32 from said McCloud, no part of which has been paid. The termination of the contract on December 7, 1892, was made forthwith, at the request of McCloud, by an arrangement between him and plaintiff, but without any previous notice from one to the other, and without any notice to defendant.

(5) I find that on December 19, 1890, McCloud wrote a letter to plaintiff, at Chicago, in which he says:

"The 17th of January, my present contract closes. That gives you 30 days to put a man in my place. And on the 27th of December I shall discharge all my salaried help, excepting the office lady, unless I hear from the company, and they wish to retain them."

But no further action was taken with reference to the termination of the contract by either party, and McCloud continued his relations with plaintiff under the contract.

(6) I find that at certain times prior to March, 1891, and from that time until the termination of the contract, McCloud retained \$30 instead of \$25 per week; but this was done, not only without the consent, but under the objection of plaintiff, who frequently remonstrated in writing against such retention on the part of McCloud.

(7) I find that, after the execution of said contract and the instrument appended thereto, the following words were added, without

the knowledge of defendant, at the end of the list of machines contained in said contract: "11/21/89. Wax thread machines 10% on amt. f. o. b. Chicago,"—which means, November 21, 1889, wax thread machines, ten per cent. on amount, free on board, Chicago; but that said addition was made by the head bookkeeper of plaintiff as a memorandum for the guidance of the bookkeepers of plaintiff, in case any such machine were ordered by McCloud, and was not made for any other purpose whatsoever.

(8) I find that, after July 22, 1889, plaintiff had no written communication with defendant until December 7, 1892, at which time defendant was notified by plaintiff that McCloud was indebted to it in the sum above named, of \$8,636.32, and that it would look to him for payment, and that no part thereof has been paid.

(9) I find that the amounts paid by McCloud to plaintiff after January 17, 1891, were more than sufficient to repay the plaintiff the sums due and owing it by McCloud on January 17, 1891.

(10) I find that, prior to December 7, 1892, no written notice was given to defendant that any goods, wares, or merchandise were furnished to said McCloud pursuant to the contract in suit.

Upon suit being brought, a bill of particulars was filed by plaintiff, which is a part of the record in this case.

As conclusions of law:

1. I find that the contract between the plaintiff and McCloud of July 22, 1889, was a valid and subsisting contract between the parties, according to the terms thereof.

2. I find that the instrument executed by defendant, appended to and of equal date with the contract last named, constituted a valid and subsisting agreement, whereby, for a valuable consideration, defendant undertook to and did guaranty the full and faithful performance of the contract executed by Frank McCloud.

3. I find that said instrument of guaranty is in full force and effect; that defendant is liable to plaintiff thereunder, and has not been in any way released from the obligation thereof by anything that has occurred since the execution and delivery of said contract of guaranty.

4. I find that defendant cannot be held liable or answerable to plaintiff, under the contract of guaranty, for the following items, to wit: \$433.90 for horses, wagons, etc.; \$164.03 for oil, tools, etc.; \$512.47 for tabling and shafting; \$684.80 for pulley, etc.; \$111.68 for cotton thread, etc.,—items mentioned in Exhibit XXX of the record, amounting in all to the sum of \$1,906.88; nor for the sum of \$200.50, for machines furnished not of plaintiff's manufacture; nor for \$38.28, abandoned on the trial.

5. I find that plaintiff is entitled to a judgment against defendant in the sum of \$6,490.66, with interest thereon at the rate of 7 per cent. per annum from the 7th day of December, 1892, together with the costs and disbursements of this action. Let judgment be entered accordingly.

Mem. With regard to the point urged by defendant, that there is no mutuality in the contract, the authorities cited are not applicable,

because the contract had become executed, and was not executory. *Logging Co. v. Robson*, 16 C. C. A. 400, 69 Fed. 775.

Under the contract, McCloud agreed to purchase from plaintiff "all parts and attachments," and, in my opinion, none of the items disallowed come under that heading. By the word "parts" is meant portions or pieces of machines such as may be used for repairs; and by "attachments," mechanism belonging to the original machine. While it may be true that some of the items disallowed were turned over to McCloud, charged and afterwards credited to him at certain prices, the defendant cannot be held liable therefor.

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TEXAS & P. RY. CO. v. ELLIOTT et al.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1895.)

No. 422.

1. MASTER AND SERVANT—UNSAFE MACHINERY—INJURY TO RAILROAD EMPLOYEES.

A railway company is liable for injuries resulting to its employes from its failure to use ordinary care to furnish safe machinery and appliances for their use in operating the road. Ordinary care in this connection means such care as an ordinarily prudent man would use under the circumstances, and it is to be measured by the character and risks of the business. The company is not, however, bound to insure the absolute safety of its machinery, or to provide the best, safest, or newest machinery.

2. SAME—NEGLIGENCE OF INSPECTOR.

Where the person whose duty it is to repair the appliances and machinery used in operating a railway knows, or ought to know, by the exercise of reasonable care, of defects in such machinery, the company is responsible for his negligence, if he fails to repair it.

3. SAME—EXPLOSION OF LOCOMOTIVE—TRIAL—INSTRUCTIONS.

In an action to recover damages for the death of a railroad engineer by the explosion of his locomotive, plaintiff's evidence tended to show that the company had failed to use reasonable care to keep the boiler in good condition, and had allowed it to become defective, from which cause the explosion resulted. The company's evidence was directed to showing that it used ordinary and reasonable care in selecting the locomotive and in causing reasonable supervision of it by diligent inspectors, and that deceased was guilty of contributory negligence. *Held*, that the court properly charged the jury that if defendant's servants, whose duty it was to repair the locomotive, knew, or by reasonable care might have known, of the defects therein, then their negligence was imputable to it, and it was liable if deceased in no way, by his own neglect, contributed approximately to his death; but if the locomotive was reasonably safe, and deceased negligently let the water get too low in the boiler, and then injected fresh water, thereby causing the explosion, the company was not liable.

4. TRIAL—INSTRUCTIONS.

There is no error in refusing requested instructions which are substantially the same as instructions already given in the general charge.

Speer, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Action by Rosa Elliott and others against the Texas & Pacific Railway Company. There was a judgment for plaintiffs, and defendant brings error.