

DOCKET NO. 173

NUMBER	TERM	YEAR
	NOVEMBER	
<u>261</u>	<u>September</u>	<u>1960</u>

G. Harold Hamer

VERSUS

The Capitol Equipment Company, Inc.

SIR:

The following three persons have been appointed Arbitrators in  
the case of G. Harold Hamer vs. The Capitol Equipment Company, Inc.

No. 261 November Term, 1960

the first named being the Chairman of the Board:

Dan P. Arnold, David S. Ammerman,

& Joseph M. Colavecchi

Hearing of the case has been fixed for Wednesday,

December 20, 1961 at 1:30 P.M.

in Court Room # Grand Jury Room

Very truly yours,

*Wm T. Hagerty*

Wm. T. Hagerty,  
Prothonotary

## ARBITRATION BOARD

Common Pleas Court  
of Clearfield County

I, Wm. T. Hagerty, Prothonotary of the Courts of Clearfield County  
hereby certify that Dan P. Arnold

A member of the Clearfield County Bar has served as an Arbitrator in the Court of Common Pleas of Case No. 261 Term, November 19 60 and has heard the evidence and has rendered an opinion, is now discharged from further attendance.

No. of days \_\_\_\_\_ \$35.00 \_\_\_\_\_

## Prethonotary

Approved:

**Date:** 10/10/2010

**County Commissioner**

By: \_\_\_\_\_

I hereby acknowledge receipt of

## ARBITRATION BOARD

Common Pleas Court  
of Clearfield County

I, Wm. T. Hagerty, Prothonotary of the Courts of Clearfield County  
hereby certify that David S. Ammerman

A member of the Clearfield County Bar has served as an Arbitrator in the Court of Common Pleas of Case No. 261 Term, November 19 60 and has heard the evidence and has rendered an opinion, is now discharged from further attendance.

No. of days \_\_\_\_\_ \$35.00

### Prethonotary

**Approved:**

Date:

**County Commissioner**

By:

I hereby acknowledge receipt of

above amount.

I hereby acknowledge receipt of the  
above amount.

ARBITRATION BOARD

Common Pleas Court  
of Clearfield County

I, Wm. T. Hagerty, Prothonotary of the Courts of Clearfield County  
hereby certify that Joseph M. Colavecchi

A member of the Clearfield County Bar has served as an Arbitrator in the Court of Common Pleas of Case No. 261 Term, November 19 60 and has heard the evidence and has rendered an opinion, is now discharged from further attendance.

No. of days \_\_\_\_\_ \$35.00

## Prethonotary

Approved:

Date:

**County Commissioner**

By:

I hereby acknowledge receipt of

H. Harold Hauer  
vs.  
The Capital Equipment,  
Company, Inc.

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY

No. 261 Nov. Term, 1960

PRAECIPE FOR APPOINTMENT OF ARBITRATORS (1)

TO THE PROTHONOTARY OF SAID COURT:

The undersigned, pursuant to the Act of June 16, 1836, P. L. 715, as amended by the Act of June 14, 1952 (1951-52) P. L. 2087 and further amended July 22, 1955, Laws 1955, Act No. 91 and Clearfield County Court Rule....., requests you to appoint a BOARD OF ARBITRATORS and certifies that:

- ( ) The amount in controversy is \$2,000 or less.
- ( ) The case is at issue.
- ( ) An agreement of reference has been filed of record.
- ( ) Judgment has been entered for want of an appearance.

RECORD APPEARANCES HAVE BEEN ENTERED FOR:

Plaintiff *Joseph J. Lee* Defendant *Richard Sharp*

Date *Dec. 7, 1960*

Attorney for Plaintiff *Joseph J. Lee*

TEN DAY PERIOD FOR APPOINTMENT OF ARBITRATORS IS WAIVED (2)

Attorney for Plaintiff *Joseph J. Lee*

Attorney for Plaintiff *Joseph J. Lee*

Attorney for Defendant *Richard Sharp*

Attorney for Defendant *Richard Sharp*

TIME AND PLACE OF HEARING and APPOINTMENT OF BOARD

Now, *Dec. 7, 1960*, hearing of the above case is fixed for Wednesday, *Dec. 20, 1960*, in Room, Clearfield County Court House, Clearfield, Pa., and the following Clearfield County Bar members:

Chairman

are appointed as the BOARD OF ARBITRATORS to hear testimony, make report, and render their award within twenty (20) days from date of hearing.

I hereby certify that notice by mail was duly given to said Arbitrators, Attorneys, and/or parties of record of said appointment, time, and place of hearing.

WITNESS MY HAND AND THE SEAL OF THE COURT

Prothonotary

by Deputy

(1) See Court Rule 27

(2) Waiver requires signatures of counsel for all parties.

In the Court of Common Pleas  
of Clearfield County

No. Term, 195

vs.

PRAECLPPE FOR APPOINTMENT OF  
ARBITRATORS



G. Harold Hamer

vs.

The Capitol Equipment Company, Inc.

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY

No. 261 November Term, 1964 1960

## OATH OR AFFIRMATION OF ARBITRATORS

Now, this 20th day of December, 1961, we the undersigned, having been appointed arbitrators in the above case do hereby swear, or affirm, that we will hear the evidence and allegations of the parties and justly and equitably try all matters in variance submitted to us, determine the matters in controversy, make an award, and transmit the same to the Prothonotary within twenty (20) days of the date of hearing of the same.

Dan P. Arnold

.....Chairman

David S. Ammerman

Joseph M. Colavecchi

Sworn to and subscribed before me

this..... day of.....,

195.....

.....  
Prothonotary

## AWARD OF ARBITRATORS

Now, this..... day of....., 195....., we, the undersigned arbitrators appointed in this case, after having been duly sworn, and having heard the evidence and allegations of the parties, do award and find as follows:

.....Chairman

## ENTRY OF AWARD

Now, this..... day of....., 195....., I hereby certify that the above award was entered of record this date in the proper dockets and notice by mail of the return and entry of said award duly given to the parties or their attorneys.

## WITNESS MY HAND AND THE SEAL OF THE COURT

.....  
Prothonotary

In the Court of Common Pleas  
of Clearfield County

No.

Term, 195

vs.

OATH OR AFFIRMATION  
OF ARBITRATORS  
AND AWARD

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

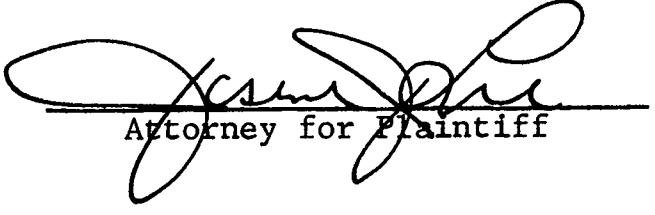
G. HAROLD HAMER :  
VS : No. 261 November Term, 1960  
THE CAPITOL EQUIPMENT : Assumpsit  
COMPANY, INC. :  
:

P R A E C I P E

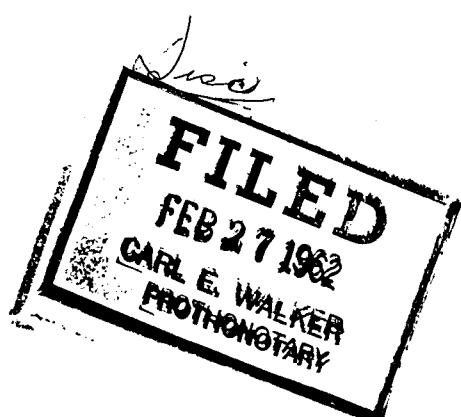
TO CARL E. WALKER, PROTHONOTARY

SIR:

Please mark the records in the above case settled and dismissed on payment of costs by the defendant.

  
Attorney for Plaintiff

Dated: February 12, 1962



*Sharp & Hagerich*

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNA. No. 261 November Term, 1960 Assumpsit	
G. HAROLD HAMER	
VS	
THE CAPITOL EQUIPMENT COMPANY, INC.	ANSWER TO PETITION TO OPEN JUDGMENT

*C*

**FILED**  
OCT 11 1961  
WM. T. HAGERTY  
PROTHONOTARY

JOSEPH J. LEE  
ATTORNEY-AT-LAW  
CLEARFIELD, PA.

Service accepted Oct 20, 1961  
*Sharp & Hagerich*  
*By S. B. Hagerich*

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

G. HAROLD HAMER :  
VS : No. 261 November Term, 1960  
THE CAPITOL EQUIPMENT : Assumpsit  
COMPANY, INC. :  
:

ANSWER TO PETITION TO OPEN  
JUDGMENT

COMES NOW, the plaintiff, and by his attorney, Joseph J. Lee, and files this Answer to the defendant's Petition to Open Judgment:

(1). Admitted.

(2). Admitted.

(3). Denied as stated, and on the contrary it is averred that judgment was entered in the amount of \$2083.62.

(4). It is admitted that during the first week of January, 1961, and prior to the expiration of twenty days from the date of service of the Complaint, a person representing himself as counsel for the defendant telephoned Joseph J. Lee, counsel for the plaintiff.

(5). The nature, character and extent of the telephone conference was as follows and not as pleaded in the Petition:

(a). Joseph J. Lee was requested for an extension of time for entering an appearance and filing an Answer on the part of the defendant, and the said Joseph J. Lee did state that he would grant a reasonable extension of time for the filing of a responsive pleading. It is denied that it was requested of Joseph J. Lee that no default judgment be taken for want of an appearance and Answer without the said Joseph J. Lee first communicating with Henry A. Torchia.

(b). The said Joseph J. Lee made no representation of any specific time to be allowed for filing an Answer, and on the contrary stated only that he would allow a reasonable time. If it is the implication of this subparagraph in the Petition that Joseph J. Lee agreed to notify counsel for the Petitioner of the amount of time to be allowed, the same is denied.

(c). Subparagraph (c) is denied as stated, and on the contrary it is averred that Joseph J. Lee questioned counsel for the defendant as to the possibility of settlement without further litigation, at which time counsel advised that he did not know enough about the case to discuss the matter.

(d). Subparagraph (d) is denied, and on the contrary Joseph J. Lee did not, either by implication, representation or otherwise, agree not to enter default judgment pending negotiations for settlement and until he would first notify counsel for the defendant of his intention to take judgment for want of an appearance and Answer.

(e). Subparagraph (e) is denied, and on the contrary it is averred only that counsel for the plaintiff would grant the defendant a reasonable extension of time for filing a responsive pleading to the Complaint.

(6). Paragraph (6) is denied if the implication thereof is that counsel for the defendant communicated in any manner with counsel for the plaintiff prior to June, 1961.

(7). The averments set forth in paragraph (7) of the Petition being matters of which the respondent has no knowledge or means of knowledge, the same are denied and strict proof is demanded thereof.

(8). Paragraph (8) of the Petition is denied, and on the contrary it is averred that counsel for the defendant never, either subsequent to or prior to the entering of judgment, communicated with counsel for the plaintiff and discussed negotiating a settlement.

(9). Admitted.

(10). It is admitted that judgment was entered on plaintiff's counsel's direction on February 28, 1961. It is admitted further that counsel for the defendant was not notified. It is denied that there was any understanding or agreement between counsel for the plaintiff and counsel for the defendant that notice would be given.

(11). Paragraph (11) of the Petition is impossible of answer, and strict proof is demanded.

(12). Paragraph (12) is admitted insofar as what the defendant intends to do if the judgment is opened. The respondent by this Answer, however, does not admit that Exhibit "A" is a complete answer on the merits to the plaintiff's claim.

(13). The prayer of the Petition <sup>should</sup> be denied, and on the contrary judgment should not be opened.

BY WAY OF FURTHER ANSWER, THE  
FOLLOWING IS AVERRED

(14). The Complaint having been served with a notice to plead attached thereto on December 20, 1960, under the Rules of Civil Procedure an Answer was required to be filed on or before January 10, 1961.

(15). Upon receipt of the telephone call from a party representing himself to be counsel for the defendant, and since determined to be Henry A. Torchia, counsel for the plaintiff granted orally an extension for a reasonable length of time for filing an Answer on the part of the defendant. Between January 10, 1961

and February 28, 1961, a period of forty-nine days, nothing further was heard from counsel for the defendant. Therefore, counsel for the plaintiff felt warranted in entering judgment for default and did not feel obligated to notify the defendant or defendant's counsel whose name, incidentally, had been forgotten by counsel for the plaintiff.

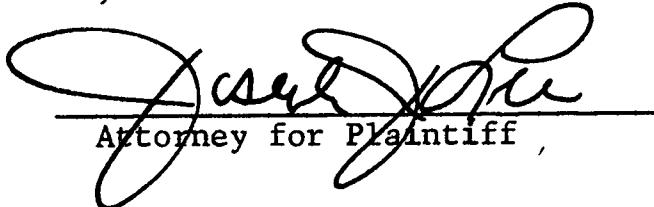
(16). On June 28, 1961 counsel for the plaintiff demanded payment on the plaintiff's judgment by letter directed to the defendant company in Harrisburg, and by letter dated July 6, 1961 J.F. Robbins, of the defendant company, advised counsel for the plaintiff that Henry Torchia had prepared an 'Answer to the judgment' presumably meaning an Answer to the Complaint, and that the same had been mailed to counsel for the plaintiff. In point of fact, a copy of what purported to be an Answer was delivered personally by J.F. Robbins to counsel for the plaintiff at the corner of Market and Second Streets in the Borough of Clearfield on or about September 6, 1961.

(17). From June 28, through August 23, 1961, counsel for the plaintiff had occasion to be in the City of Harrisburg a number of times, and he did discuss personally with J.F. Robbins the matter of the judgment against the defendant, and it was represented to counsel for the plaintiff that steps would be immediately taken by the defendant with respect to the subject. Nothing further was done until the Petition was filed on Wednesday, September 13, 1961.

(18). Prior to the filing of the Complaint, the said J.F. Robbins, by letter dated September 20, 1960, advised counsel for the plaintiff that no settlement would be made. Again, <sup>during</sup> the period June 28, 1961 through August 23, 1961, in discussing the matter with J.F. Robbins, counsel for the plaintiff was advised by the

said J.F. Robbins that no settlement of the claim would be made. Therefore, any representations in the Petition to open judgment that the defendant was inclined to settle the claim of the plaintiff are false and should not be made the grounds for opening judgment or granting the prayer of the Petition.

WHEREFORE, plaintiff prays that the Petition be denied and the rule issued thereon be dismissed, with costs on the defendant.



\_\_\_\_\_  
Joseph J. Lee  
Attorney for Plaintiff

STATE OF PENNSYLVANIA:  
:SS  
COUNTY OF CLEARFIELD :

G. HAROLD HAMER, being duly sworn according to law, deposes and says that the facts set forth in the within Answer to Petition to Open Judgment are true and correct to the best of his knowledge, information and belief.



\_\_\_\_\_  
G. Harold Hamer  
(G. Harold Hamer)

Subscribed and sworn to before  
me this 16 day of October, 1961.



\_\_\_\_\_  
Mrs. Dorothy H. Hille

MRS. DOROTHY H. HILLE, Notary Public  
CLEARFIELD COUNTY, PA.  
My commission expires Dec. 3, 1962

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PENNA.  
No. 26 / Sept. Term, 1960  
Assumpsit

G. HAROLD HAMER

VS

THE CAPITOL EQUIPMENT COMPANY,  
INC.

C O M P L A I N T

TO THE WITHIN NAMED DEFENDANT:

You are hereby notified to  
answer to the within Complaint  
within 20 days from service  
hereof.

Attorney for Plaintiff:

**FILED**  
DEC 15 1960  
WM. T. HAGERTY  
PROTHONOTARY

JOSEPH J. LEE  
ATTORNEY-AT-LAW  
CLEARFIELD, PA.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

G. HAROLD HAMER : : *Har.*  
VS : : No. 261 September Term, 1960  
THE CAPITOL EQUIPMENT : : In Assumpsit  
COMPANY, INC. : :

COMPLAINT

COMES NOW, the plaintiff, and by his attorney, Joseph J. Lee, brings this action against the above named defendant upon a cause whereof the following is a statement:

(1). The plaintiff, G. Harold Hamer, is an individual and resides at 114 Walton Street, Philipsburg, Pennsylvania.

(2). The defendant, Capitol Equipment Company, Inc., is a Pennsylvania corporation, with offices in Decatur Township, Clearfield County, Pennsylvania.

(3). On or about February 22, 1960 the plaintiff and the defendant, by its agent, J.F. Robbins, entered into a written contract, a copy of which is attached hereto, made a part hereof, and marked Exhibit "A".

(4). By the terms of the said contract the defendant leased a Koehring Model 304 Shovel, Serial No. 5936, complete with International Diesel Engine, for the period of six months, at a rental of \$682.60 per month, with an option in the plaintiff to purchase the said shovel at the termination of the lease upon payment of the difference between the market price and the amount paid as rent.

(5). The defendant, to induce plaintiff to agree to said contract, included in the termination thereof a promise to guarantee the said shovel against defective parts and defective workmanship for a period of ninety days, beginning March 1, 1960.

(6). After the said shovel had been delivered to the plaintiff, the plaintiff discovered on or about May 2, 1960 that the shovel was unsound in that the swing mechanism was worn and would not function properly and has so continued and is still unsound, and so is of no use or value to the plaintiff.

(7). The plaintiff could not, from an inspection of the shovel, tell that the swing mechanism was defective and unfit as aforesaid. The said defects were latent and could not be discovered until disclosed by use of the said shovel in plaintiff's mining operation.

(8). Immediately upon the discovery of the defects as aforesaid, the plaintiff notified the defendant of the said defects on or about May 2, 1960

(9). Upon receiving notice of the said defects the defendant attempted to put the machine in proper working condition, but was unable to do so.

(10). Because of the failure to repair the said shovel, on or about July 5, 1960 the plaintiff requested the defendant to take back its shovel, and demanded the return of the two months down payments made on the shovel, \$1365.00.

(11). The defendant then and there refused, and has refused ever since, to return the said payments for the shovel, or any part thereof.

#### FIRST COUNT

(12). As a result of the aforesaid defects, the defendant has failed to deliver a shovel which conforms with the contract as set out in Exhibit "A".

#### SECOND COUNT

(13). As a further result of the defendant's delivery of the defective shovel, the said defendant has failed to abide by

its warranty as stated in the aforesaid contract to guarantee all parts and workmanship against defects.

THIRD COUNT

(14). Finally, the defendant, because of the said defects, has failed to provide a shovel of merchantable quality fit for the purposes for which a shovel such as this was intended.

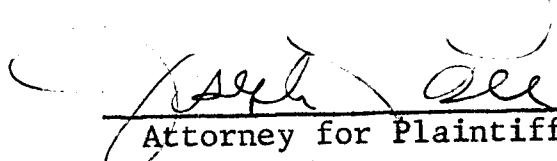
(15). Because of defendant's failure to provide a shovel in proper condition, the plaintiff has not been able to use the said shovel which has caused the plaintiff a loss of \$1365.00, the amount of the payments to defendant.

(16). The plaintiff has incurred further, the expense of transporting said shovel from the defendant's place of business to the plaintiff's operations, which amount to a total of \$248.16.

(17). Because of the defendant's refusal to take back the said shovel and to return the aforesaid payments, the plaintiff has not been able to meet his customers orders for coal, a state of circumstances of which the defendant was made aware by the plaintiff when he demanded a return of the said payments on July 5, 1960.

(18). By reason of the plaintiff's inability to meet his customers orders as aforesaid, the plaintiff has lost the profit on the said sale of coal, which amount to a total of \$400.00.

WHEREFORE, the plaintiff claims that there is due and owing by the defendant to the plaintiff the sum of \$2013.16, with interest from July 5, 1960.

  
\_\_\_\_\_  
Attorney for Plaintiff

STATE OF PENNSYLVANIA:  
COUNTY OF Clearfield:ss

G. HAROLD HAMER, being duly sworn according to law, deposes and says that the facts set forth in the within Complaint are true and correct to the best of his information, knowledge and belief.

G. Harold Hamer  
(G. Harold Hamer)

Subscribed and sworn to before  
me this 11 day of Dec. , 1960.

Mac Donahy & Hale

NOTARY PUBLIC  
Commonwealth of Pennsylvania  
My Commission Expires Dec. 3, 1962

CAPITOL EQUIPMENT CO., INC.

HARRISBURG, PA.

The Capitol Equip. Co. Inc.

Corporation of the City of Harrisburg

County of Dauphin, State of Pa.

hereinafter called the lessor, hereby proposes to lease and does lease to

G. Harold Hamer Strip Contracting & Excavating Co.

City of Philipsburg, County of Centre, State of Pa.

hereinafter called the lessee for a minimum period of 6 months or more, the equipment described

in the subdivision of this contract designated "Equipment Leased" according to the terms and provisions as stated on the reverse side of this page to-wit:

The lessee agrees to pay for use of the following equipment, rental as follows:

\$1365.00 Payable with order and covering 12 months Rental

for second month's rental

\$682.50 for third month's rental \$650.00 to apply on unpaid principal of \$17000=

\$682.50 per month thereafter, all rentals being due monthly in advance and payable at the office

of the lessor in the City of Harrisburg, County of Dauphin,

State of Pa.

The rental rates set forth in this contract do not include either sales or use tax. Where state laws provide for either sales or use tax, the rental rates set forth in this contract are subject to this tax if and when incurred. This tax provided for in paragraph 13 of this contract, lessee to insure equipment as provided for in paragraph 16 of this contract.

If this equipment is leased on a daily or weekly basis the rate shall be \$ per day payable per week.

EQUIPMENT LEASED

One Koehring Model 304 Shovel S/N 5936

Complete w/ International diesel engine

Machine to carry 90 day Guarantee against defective parts and workmanship.

At end of 6 mo. Rental period Customer has option to purchase machine for unpaid principal Bal.

F. O. B. Harrisburg

for use in construction operations or near Ralston, Pa.

at or near

Ship to

When March 1, 1960

Via Customers Pickup

Return to

Invoice to G. Harold Hamer

Street Address 114 Walton St.

Credit Reference

City and State Philipsburg

Pa.

## TERMS AND PROVISIONS OF LEASE

### Credit references

2.1.1. On local rentals, the rental period shall begin on and include the date of shipment to the lessee and shall end on and include the date of return to the lessor's warehouse or receiving point. On out-of-town shipments, the rental period shall begin on and include the date of bill of lading of shipment to the lessee and shall end on and including the date of return to the lessor's siding or receiving point. Both local and out-of-town rentals are subject to the minimum rental period provided for in this contract. If equipment is kept longer than the specified minimum rental period the rental will then be invoiced on a pro-rata basis.

2. The lessee agrees that the rates provided for in this contract are considered straight time rates based on eight (8) hours per day, seven (7) eight (8) hour days per week, or thirty (30) eight (8) hour days in any one thirty (30) consecutive day period. Should the machinery rented be used longer than the above specified hours in any specific period the over time rate shall be varied as follows:

1/8th of the daily rate for each hour worked in excess of eight (8) hours in any one day.

1/56th of the weekly rate for each hour worked in excess of fifty-six (56) hours in any one weekly period.

1/240th of the monthly rate for each hour in excess of two-hundred and forty (240) hours worked in any one thirty (30) consecutive day period.

3. It is understood between the parties that the lessor is not the manufacturer of the equipment herein leased, nor the agent of the manufacturer of said equipment and that no warranty against patent or invent defects in material, workmanship, or capacity is given; nor that said equipment will meet the requirements of any law, rules, specifications or contracts which provide for specific machinery or apparatus or special methods, other than that of original manufacturer of said equipment and as set forth in manufacturer's catalog and representations, wherein said machinery and equipment is listed and described.

2.4. The lessor shall use reasonable care to see that the equipment is in proper working condition before shipment to lessee. It is not to be actually operated or tested unless such operation or test is deemed necessary by lessor or unless lessee shall request such operation or test in writing, in which event the lessee will be notified of the time and place of said operation and test, and shall be permitted to be present during said operation and test. If having requested it, lessee fails to be present at the time of operation and test, lessee agrees that said equipment as turned out is in proper operating condition.

11. In the event the lessee accepts the machinery and equipment, as herein provided, and thereafter the said machinery proves defective or unfit for use, because of accident or otherwise, or, if for any other reason lessor desires to discontinue the use of said machinery or equipment, the only remedy of lessee shall be to return the machinery to lessor and terminate this contract as herein elsewhere provided for, which in no event shall be less than the transportation charges on said machinery and equipment and minimum rental herein provided for.

12. The lessee agrees to pay any charges for work or inspection required by any labor union. The lessor may, at its option, refuse to do any repair work on the equipment in time of strike, or any other cause beyond its control, or in violation of any rule affecting the equipment. The lessor reserves the right to remove the equipment from the job at any time when, in its opinion, the equipment is in danger because of strikes or any other condition.

13. The lessee agrees to comply with and conform to all municipal, state and federal laws relating to the operation of said machinery and to pay all costs and expenses of every character occasioned by or involving the use or operation of the machinery or equipment and to pay all legal assessments, taxes or public charges, either local, municipal, state or federal, which may be levied on said equipment while in the possession of the lessee. Nothing in this paragraph is to be construed as meaning that the lessee is to pay the personal property tax levied against the machinery until when said machinery is delivered within the home state of the lessor, as in this case the lessor is to pay his own personal property tax. In the event the equipment is rented outside of the home state of the lessor, any and all taxes assessed against the machinery, including personal property tax, are to be paid by the lessee. The words "home state" to mean any state in which the lessor has a home office or warehousing branch.

14. The lessee agrees to pay the lessor for all loss and damages occasioned by fire, theft, flood, accident, explosion, wreck, an act of God or any other causes that may occur during the life of this lease, and until such machinery has been returned into the possession of the lessor and accepted by it. For the purpose of finding the valuation of said property in order to determine the loss, damage or injury thereto, it is agreed by the parties hereto that the value as hereinbefore stated shall be a true and just value forming a basis for such adjustment. In making any adjustment

equipment shall constitute acknowledgement that said property has been accepted and found in good, safe and serviceable condition, and fit for use, unless the lessee makes claim to the contrary to the lessor by registered mail with return receipt demanded, addressed to the lessor's home office within three days after receipt of said equipment. The complaint as made shall set forth in detail its complete nature and the condition of the property received.

7. Should any of the machinery, equipment, or appurtenances be received and accepted by the lessee from any drayman, railroad company or any other carrier transporting same in a damaged condition, or with any of the machinery, equipment, parts or appurtenances missing, it shall be the duty of the lessee to obtain from said drayman, railroad company or other carrier, a written acknowledgement of the damage or shortage. The failure on the part of the lessee to obtain such statement or acknowledgement upon its receipt and acceptance of said machinery, equipment, parts and appurtenances shall be treated as an acceptance of said machinery, equipment, parts and appurtenances in good, safe, serviceable condition and fit for use. Any damage or loss which has occurred and is not covered by a written acknowledgement or statement as aforesaid, or which occurs after acceptance of said property, shall be repaired and replaced at the expense of the lessee. If the machinery, equipment, parts or appurtenances are damaged or lost in transportation and the lessee furnishes to the lessor a written detailed acknowledgement and statement from the carrier setting forth the character of damage and loss, the lessor agrees to use reasonable diligence in having said repaired and loss replaced within a reasonable time, but the equipment shall be deemed to have been delivered on date of acceptance thereof from carrier.

8. In the event of notice to the lessor by the lessee that the equipment is not in good, safe and serviceable condition and fit for use upon its arrival, the lessor shall have the right to put said equipment in good, safe and serviceable condition and fit for use, within a reasonable time, or to cancel this lease.

9. The lessor shall not be liable in any event to the lessee for any loss, delay or damage of any kind or character resulting from defects in, or inefficiency of equipment hereby leased or accidental breakage thereof.

10. In the event of accident to, or breakage of, any part of the equipment, lessee may have the same repaired by any competent person, firm or corporation at its own expense or, upon notice to the lessor as to such breakage or accident, the lessor may repair said machinery for the lessee, using reasonable diligence to make said repairs or replacement in the shortest possible time, and the lessee agrees to pay the lessor its regular charges for any material or labor furnished in making said repairs upon demand; in the event any work is done outside of lessor's regular hours, including work necessary by wear and tear, by reason of which lessor shall be required to pay double time or other overtime charges to its employees, or to anyone doing the work for lessee, all such charges will be paid by the lessee to the lessor.

We agree to all the above conditions which are thoroughly understood.

G. Harold Hamer Strip Contr. & Exc. Co.

By G. Harold Hamer

Date Signed by Lessee Feb. 22, 1960

Witness John Schwartz

which shall permit the lessor to remove the equipment from said property at any time during the life of, or after the expiration of, this contract. Should the lessee be lax in obtaining said landlord's release, the lessor reserves the right, and the lessee hereby grants permission to the lessor to obtain such release.

18. The lessee agrees, whenever requested by lessor, to give lessor the exact location of all of the machinery and equipment covered by this lease and further agrees to give lessor immediate notice of any levy attempted upon said equipment, or if said equipment from any cause becomes liable to seizure, and to indemnify lessor against all loss and damages caused by any such action. The lessor shall have the privilege at all times of entering any job, building or location where the above property is being used for the purpose of inspection and reserves the privilege of removing said machinery and equipment on twenty-four hours' notice if it is being overloaded or taxed beyond its capacity or in any manner abused or neglected.

19. The equipment hereby leased shall not be subject without the written consent of the lessor nor shall said property be moved out of the state specified in this contract without the written consent of the lessor.

20. Should any of the provisions of this lease be violated by lessee the rental for the entire period herein specified, shall become forthwith due and payable, and the lessor or its agents may, without notice, enter the premises occupied by lessee without being a trespasser thereon and take possession of and remove said equipment with or without process of law. In the event any action as hereinbefore set forth becomes necessary the lessor agrees to pay, in addition to other charges herein specified, all costs of removal of said machinery from the possession of the lessee and all freight, demurrage, storage, labor or other charges on or against said property incurred during or by the removal, shipping and return to the possession of the lessor at his designated receiving point, or equivalent point designated by the lessor.

21. The lessee agrees to pay all rentals when they are due and for all services and materials furnished and all damages and sums due the lessor under this contract as soon as the loss occurs or services are rendered or materials are furnished. The taking of notes, or renewals thereof, covering rentals herein specified shall not in any manner whatsoever change or invalidate the terms and conditions of this contract.

22. Lessee agrees that if any of the lease provisions are violated and lessor demands the return of the equipment that this lease shall constitute authority to the watchman or other persons responsible for the equipment to deliver all or any part of the equipment to the lessor or its agents.

23. Both lessor and lessee agree that no modification of this agreement shall be binding upon them or either of them, unless such modification shall be in writing and duly accepted in writing.

24. The lessor's designated receiving point referred to in this contract is shown on the first page of the contract in the space therein following the printed words "Return to."

Capitol Equipment Co. Inc.

Lessor.

By

Date Signed by Lessor Feb. 22, 1960

Approved by

J.F.R.

Authorized to Approve for Lessor

Date Approved by Lessor Feb. 22, 1960

*Joe Lee*  
No. 261 Nov. Term, 1960

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PA.

IN ASSUMPSIT

G. HAROLD HAMER

vs.

THE CAPITOL EQUIPMENT  
COMPANY, INC.

PETITION TO OPEN JUDGMENT

*C* AND RULE

**FILED**

SEP 14 1961

WM. T. HAGERTY  
FARNES PROTHORCHIA  
Attorneys at Law

310 Bergner Building  
Harrisburg, Pa.

Service accepted 9-14-61  
*Joseph Lee*  
Attorney for Plaintiff

SHARP & GILPATRICK  
ATTORNEYS AT LAW  
20 NORTH SECOND ST.  
PHILIPSBURG, PA.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA.

G. HAROLD HAMER : No. 261 November Term, 1960.  
vs. :  
THE CAPITOL EQUIPMENT :  
COMPANY, INC. : In Assumpsit.  
:

PETITION TO OPEN JUDGMENT.

AND NOW, comes the defendant by its attorneys, Ernest & Torchia, and Sharp & Gilpatrick, and respectfully makes the following to open judgment entered for want of an appearance and answer against The Capitol Equipment Company, Inc., and assigns the following reasons therefor:

(1) That on or about December 15, 1960, plaintiff filed its complaint in assumpsit to the above number and term, naming as defendant The Capitol Equipment Company, Inc.

(2) That on or about December 20, 1960, a copy of said complaint was served upon the defendant, The Capitol Equipment Company, Inc.

(3) That on or about February 28, 1961 Counsel for plaintiff directed that judgment be entered against the defendant above named for want of an appearance and answer, and on the same day judgment was entered as directed in the amount of \$2,013.16, with interest thereon.

(4) Your petitioner is informed that Henry A. Torchia, Harrisburg, Dauphin County, Pennsylvania, Counsel for your petitioner, communicated with Joseph J. Lee, Counsel for plaintiff above named, prior to the expiration of twenty (20) days from the date of the receipt of service of the aforesaid complaint by the defendant.

(5) Your petitioner is informed that the nature, character and extent of the aforesaid communication between Henry A. Torchia, Counsel for defendant, and Joseph J. Lee, Counsel for plaintiff, is as follows:

(a) That Henry A. Torchia respectfully requested Joseph J. Lee for an extension of time to enter an appearance and file an answer to the afore said complaint, and further respectfully requested of Joseph J. Lee that no default judgment be taken for want of an appearance and answer without first communicating with Henry A. Torchia, Counsel for defendant.

(b) That the defendant be given an opportunity to enter an appearance and make answer to the aforesaid complaint within such time specified or determined by Joseph J. Lee, Counsel for plaintiff.

(c) That as a part of the communication between Counsel for defendant and Counsel for plaintiff as aforesaid, the matter of arriving at a settlement of plaintiff's claim was discussed between said Counsel for plaintiff and Counsel for defendant.

(d) That pending a period of time extended for the entering of an appearance and making answer, Counsel for defendant and Counsel for plaintiff were to enter into negotiations for settlement of the claim of the plaintiff, and meanwhile default judgment for want of an appearance and answer not be taken except and until Counsel for plaintiff <sup>would</sup> so notify Counsel for defendant of his intention to take judgment for want of an appearance and answer, thus permitting defendant an opportunity to make answer to the complaint and enter an appearance.

(e) That all of the aforesaid was agreed to between Counsel for plaintiff and Counsel for defendant.

(6) That subsequently Counsel for defendant again communicated with the aforesaid Counsel for plaintiff concerning the plaintiff's claim and concerning the matters herein set forth in paragraph(5)hereof.

(7) That after the aforesaid conversations between Counsel for plaintiff and Counsel for defendant your petitioner was informed by its Counsel, Henry A. Torchia, that it was not necessary to enter an appearance and file an answer, and that negotiations for settlement of plaintiff's claim were being undertaken. Whereupon the defendant notified and authorized its Counsel to enter into negotiations for the settlement of plaintiff's claim and to report the result thereof to the defendant.

(8) That your petitioner is informed that subsequently and prior to the entering of the judgment in default, its Counsel again communicated with Counsel for plaintiff for the purpose of negotiating settlement as aforesaid.

(9) That prior to the entry of default judgment as herein set forth, no offer of settlement was received by either Counsel for plaintiff or Counsel for defendant.

(10) That subsequently, on or about February 28, 1961, Counsel for plaintiff directed that judgment be entered against the defendant for want of an appearance and answer without first communicating or notifying Counsel for defendant that default judgment would be taken, and without giving Counsel for defendant an opportunity to file an answer in accordance with the understanding and agreement made between Counsel for plaintiff and Counsel for defendant, as herein above set forth.

(11) Your petitioner avers that it had no reason to anticipate that judgment would be entered against the defendant by default without first having an opportunity to file its answer and enter its appearance.

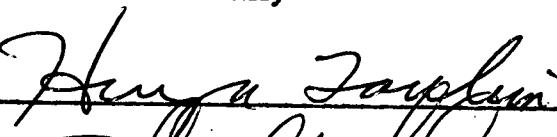
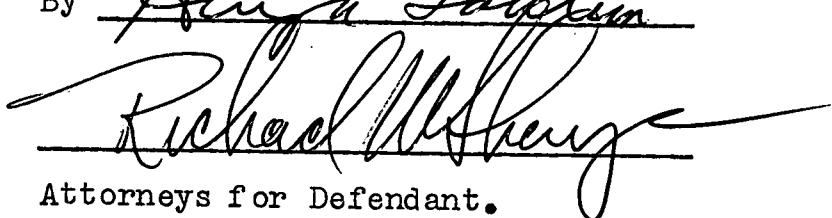
(12) It is further averred that in the event said judgment for want of an appearance is opened, the defendant, The Capitol Equipment Company, Inc., will make answer to the aforesaid complaint filed in assumpsit, in accordance with Exhibit "A", made a part hereof by reference, which Exhibit is a complete answer on the merits of plaintiff's claim.

(13) Your petitioner, therefore, respectfully requests that judgment entered against your petitioner for want of an appearance and answer, be opened and that your petitioner, The Capitol Equipment Company, Inc., be permitted to make answer to the complaint filed against it in assumpsit to the above captioned matter as herein set forth.

And it will ever pray.

EARNEST & TORCHIA,

By

Attorneys for Defendant.

STATE OF PENNSYLVANIA      )  
                                  ( SS:  
COUNTY OF DAUPHIN            )

Personally appeared before me, a Notary Public in and for said State and County, J. F. Robbins, President of The Capitol Equipment Company, Inc., who being duly sworn according to law, deposes and says that the facts set forth in the within petition are true and correct, and as to the averments contained in Paragraphs (3), (4), (5), (6), (7), (8), (9) and (10) they are true and correct, based upon information and belief.

  
\_\_\_\_\_  
J. F. Robbins

Sworn and subscribed to before  
me this 12th day of September,  
1961.

Mabel P. Wilbar

NOTARY PUBLIC  
My Commission Expires Jan. 20, 1963

IN THE COURT OF COMMON PLEASE OF CLEARFIELD COUNTY, PENNSYLVANIA

G. HAROLD HAMER

;

VS

: No. 261

November Term, 1960

THE CAPITOL EQUIPMENT  
COMPANY, INC.

:

In Assumpsit

A N S W E R

AND NOW COMES, the defendant, and by its attorneys, Earnest and Torchia, and and makes answer to the complaint filed in the above entitled matter.

(1). Admitted.

(2). Admitted.

(3). It is denied that on or about February 22, 1960, the plaintiff entered into a written contract with the defendant by or through its agent, J. F. Robbins. On the contrary, it is averred that on February 22, 1960, the defendant, The Capitol Equipment Company, Inc., entered into a written contract with G. Harold Hamer Strip Contracting and Excavating Co. It is further averred that the said contract, copy of which is attached to plaintiff's complaint, marked Exhibit "A", incorporated herein by reference, was executed by J. F. Robbins, President of The Capitol Equipment Co., Inc., and by G. Harold Hamer, on behalf of G. Harold Hamer Strip Contracting and Excavating Co.

(4). It is denied that by the terms of the alleged contract, attached to plaintiff's complaint, defendant leased a Koehring Model 304 Shovel, Serial No. 5936, complete with International Diesel Engine, for the period of six months, at a rental of \$682.60 per month, with an option in the plaintiff to purchase the said shovel at the termination of the lease upon payment of the difference between the market price and the amount paid as rent. On the contrary, it is averred that by terms of the contract, attached to plaintiff's complaint and marked

*Exhibit "A"*

Exhibit "A", the defendant did lease to G. Harold Hamer Strip Contracting and Excavating Co. one Koehring Model 304 Shovel, Serial No.5936, complete with International Diesel Engine, at a rental as more specifically therein stated said written contract incorporated herein by reference. It is further averred that G. Harold Hamer Strip Contracting and Excavating Co. was given the right under said written contract to purchase said shovel upon payment of \$17,000.00 less the sum of \$650.00 to be applied on the unpaid principal purchase price of \$17,000.00.

(5). It is denied that the defendant, to induce plaintiff to agree to said contract, included in the termination thereof a promise to guarantee the said shovel against defective parts and defective workmanship for a period of ninety days, beginning March 1, 1960. On the contrary, it is averred that the aforesaid written contract states "Machine to carry ninety day guarantee against defective parts and workmanship." It is further averred that the other provisions, conditions and covenants in the aforesaid written contract are applicable to the rights of the parties hereto and that said written contract marked Exhibit "A" to plaintiff's complaint is incorporated herein by reference.

(6). It is denied that after said shovel had been delivered to the plaintiff, the plaintiff discovered on or about May 2, 1960, that the shovel was unsound in that the swing mechanism was worn and would not function properly and has so continued and is still unsound, and so is of no use or value to the plaintiff. On the contrary, it is averred that the said shovel was delivered to G. Harold Hamer of G. Harold Hamer Strip Contracting and Excavating Co. on April 19, 1960. It is further averred that the Koehring Model 304 Shovel, the subject matter of the written contract, referred herein as plaintiff's Exhibit "A", was sound and in good working

order as a used machine. It is further averred that the mechanism of the aforesaid shovel had normal wear and tear as a used machine, and that as a used machine it did function and had use and value to G. Harold Hamer Strip Contracting and Excavating Co. It is further averred that the swing mechanism, referred to in paragraph 6, except for normal wear and tear, was not worn and did function efficiently and properly and that said swing mechanism continued to so function in that it was used by G. Harold Hamer Strip Contracting and Excavating Co. in the construction and building of a road by G. Harold Hamer Strip Contracting and Excavating Co., and that in said use the aforesaid shovel, including the swing mechanism, was used for loading gravel, shail and slate.

(7). It is denied that plaintiff could not, from an inspection of the shovel, tell that the swing mechanism was defective and unfit as aforesaid, or that said alleged defects were latent and could not be discovered until disclosed by use of the said shovel in plaintiff's mining operation. On the contrary, it is averred that the shovel, including the swing mechanism, was delivered as a used machine and that ordinary wear and tear was not within the guarantee as stated in the written contract between the defendant and G. Harold Hamer Strip Contracting and Excavating Co., to wit: "Machine to carry ninety day guarantee against defective parts and workmanship". It is further averred that G. Harold Hamer Strip Contracting and Excavating Co. did use aforesaid shovel, including the swing mechanism, for loading gravel, shail and slate in the course of the construction of a road. It is further averred that neither the plaintiff nor anyone acting for G. Harold Hamer Strip Contracting and Excavating Co. at any time attempted or admitted to using the Koehring Model 394 Shovel in any mining operation.

(8). It is denied that, immediately upon the discovery of the

defects as aforesaid, the plaintiff notified the defendant of the said defects on or about May 2, 1960. On the contrary, it is averred that at no time did G. Harold Hamer or anyone acting on behalf of G. Harold Hamer Strip Contracting and Excavating Co. notify the defendant of any defects in the swing mechanism of the aforesaid Koehring Model 304 Shovel; nor did the said G. Harold Hamer or anyone acting for G. Harold Hamer Strip Contracting and Excavating Co. notify the defendant of any defective parts or workmanship in connection with the aforesaid Koehring Model 304 Shovel. On the contrary, the nature and character of the complaints and notices received by the defendant from G. Harold Hamer were only in connection with the use of oil, the functioning of the radiator and the crawler mechanism at the four corners of the aforesaid Koehring Model 304 Shovel, and further it is averred that any other complaints or notices received by the defendant from G. Harold Hamer or anyone acting for G. Harold Hamer Strip Contracting and Excavating Co. were of a minor nature and within the scope of performance of a machine having normal wear and tear of a used machine or shovel.

(9). It is averred that upon receiving notice from G. Harold Hamer, or anyone acting for G. Harold Hamer Strip Contracting and Excavating Co., of complaints concerning the functioning and use of the said Koehring Model 304 Shovel, the defendant made certain repairs and adjustments of the said Koehring Model 304 Shovel in line with the complaints received by the defendant. It is further averred that at no time did the defendant receive any complaint concerning the functioning of the swing mechanism or that any parts of the said Koehring Model 304 Shovel were defective or that any of the workmanship on said shovel was defective, and by reason thereof the defendant at no time replaced any parts on the aforesaid Koehring Model 304 Shovel.

(10). It is denied that because of the failure to repair the said shovel, on or about July 5, 1960, the plaintiff requested the defendant to take back its shovel, and demanded the return of the two months down payments made on the shovel, \$1365.00. On the contrary, it is averred that the defendant was requested to take back its shovel, not because the said Koehring Model 304 Shovel did not properly function or that the swing mechanism thereof did not function, but because the party to the written agreement, to wit, G. Harold Hamer Strip Contracting and Excavating Co., had no mining operation or mining use of the aforesaid Koehring Model 304 Shovel at the time defendant was requested to take back its shovel.

(11). Admitted.

#### FIRST COUNT

(12). It is denied that as a result of the alleged defects, the defendant has failed to deliver a shovel which conforms with the contract as set forth in Exhibit "A" of plaintiff's complaint. On the contrary, it is averred that defendant did deliver to G. Harold Hamer Strip Contracting and Excavating Co., a party to the aforesaid contract, the used Koehring Model 304 Shovel, free from defective parts and workmanship, said shovel being used and useful and functioning in a proper manner at the time the said shovel was delivered by the defendant. It is further averred that said shovel functioned properly until it was returned to defendant on or about July 5, 1960.

#### SECOND COUNT

(13). It is denied that the defendant delivered a defective shovel, as alleged in paragraph 13, and that said defendant has failed to abide by its warranty as stated in the contract attached to plaintiff's complaint and marked Exhibit "A". On the contrary, it is averred that defendant delivered to G. Harold Hamer Strip

Contracting and Excavating Co. a used Koehring Model 304 Shovel, pursuant to said written contract, said shovel being free from defective parts and workmanship and being used and useful for the purpose or purposes for which the said contract was entered into, to wit, in the use of mining of coal or other mining operations. It is further averred that at the time of said delivery, to wit, April 19, 1960, said Koehring Model 304 Shovel, including its swing mechanism, was functioning properly and continued to so function until the said Koehring Model 304 Shovel was returned to the defendant, to wit, on or about July 5, 1960.

#### THIRD COUNT

(14). It is denied that the defendant, because of alleged defects, has failed to provide a shovel of merchantable quality fit for the purposes for which a shovel, the subject matter of plaintiff's complaint, was intended. On the contrary, it is averred that at the time of delivery of said shovel by the defendant to G. Harold Hamer Strip Contracting and Excavating Co., to wit, April 19, 1960, to and including the date when the aforesaid shovel was returned to the defendant, to wit, on or about July 5, 1960, the said shovel, including its swing mechanism and all movable parts, functioned in a proper manner and was fit for the purposes for which the said shovel was intended, to wit, the mining of coal and other mining operations. It is further averred that the said shovel, including its swing mechanism, was used by G. Harold Hamer Strip Contracting and Excavating Co. in the preparation of a road at which time the said shovel was used for loading gravel, shale and slate.

(15). It is denied that because of defendant's failure to provide a shovel in proper condition, the plaintiff or G. Harold Hamer Strip Contracting and Excavating Co., has not been able to use the said shovel, which resulted in a loss of \$1365.00, the amount of payments made to the defendant. On the contrary, it is averred

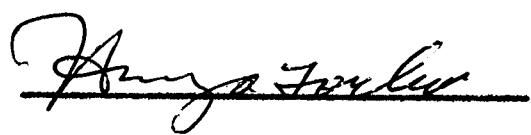
that defendant did provide a shovel in good functioning condition and fit for the purpose of coal mining operations. It is further averred that neither the plaintiff named in the complaint, nor G. Harold Hamer Strip Contracting and Excavating Co., made any attempt to use the said shovel in coal mining or any other mining operations and that the only use made of said shovel was in the preparation of a road and in the loading of gravel, shale and slate.

(16). The defendant, after reasonable investigation and inquiry made, is without knowledge or source of information concerning the facts alleged in paragraph 16 and by reason thereof demands proof of said allegations at time of trial.

(17). The defendant is without information or knowledge and without source of information or knowledge of the facts alleged in paragraph 17 of plaintiff's complaint. It is averred that after reasonable investigation and inquiry concerning the facts alleged in paragraph 17 of plaintiff's complaint, the defendant has been unable to determine the truth or accuracy of said allegations and by reason thereof denies the allegations contained in paragraph 17 and further demands that proof be made of same at the time of trial.

(18). The defendant is without information or knowledge and without source of information or knowledge of the facts alleged in paragraph 18 of plaintiff's complaint. It is averred that after reasonable investigation and inquiry concerning the facts alleged in paragraph 18 of plaintiff's complaint, the defendant has been unable to determine the truth or accuracy of said allegations and by reason thereof denies the allegations contained in paragraph 18 and further demands that proof be made of same at the time of trial.

WHEREFORE, the defendant claims that there is no amount due or owing by the defendant to the plaintiff and that by reason of the matters contained in this Answer the plaintiff's complaint be dismissed and judgement be entered in favour of the defendant.



Attorney For Defendant.

STATE OF PENNSYLVANIA      )  
                                  ( SS:  
COUNTY OF DAUPHIN            )

J. F. Robbins, President of The Capitol Equipment Co., Inc., being duly sworn according to law, deposes and says that the facts set forth in the within Answer are true and correct to the best of his information, knowledge and belief.

  
\_\_\_\_\_  
J. F. Robbins

Sworn to and subscribed before  
me this 30th day of June,  
1961.

Malv P. Wilbar

NOTARY PUBLIC  
My Commission Expires Jan. 20, 1963

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

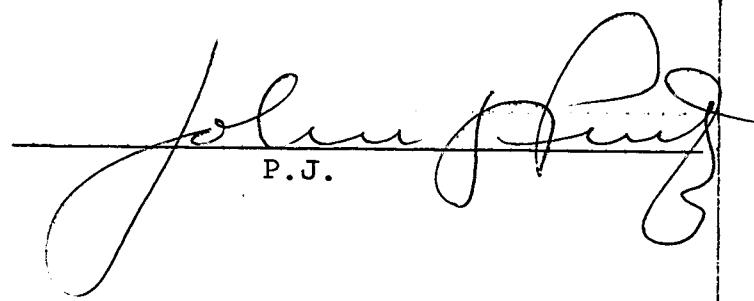
G. HAROLD HAMER :  
vs. : No. 261 November Term, 1960  
THE CAPITOL EQUIPMENT : In Assumpsit  
COMPANY, INC. :  
:

R U L E

AND NOW, this 14 day of Sept, 1961, the Court having read and considered the foregoing petition, and on motion of Sharp & Gilpatrick, Esqs., attorneys for defendant, grants a rule on the plaintiff to show cause why the judgment entered in the above entitled cause should not be opened, and defendant let into a defense, meanwhile all proceedings to stay.

Rule returnable at see leg o'clock on Sept 14, 1961

~~1961 at the Court House, Clearfield, Pennsylvania.~~

  
John P. J.  
P.J.