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WRIT.

THE STATE OF NEW JERSEY, to the Sheriff of
the County of Atlantic

GREETING: We command you that if Lee Nusbaum shall make you secure, you cause to be taken and delivered to him 1-nine ton triumph belted ammonia compressor; 1-twenty horse power electric motor; belt for driving same; 42 galvanized brine tanks; 42 welded pipe coils; 1-double pipe ammonia condenser; 1-charge of ammonia; 1-charge of brine; 1-oil interceptor, liquid receiver, ammonia pipe connections, ammonia pipe coverings; together with pipes, connections &c., making the refrigerating plant now in the apartment house on East side of Vermont Avenue facing the Boardwalk, Atlantic City, New Jersey, which said H. G. Harris and Company, a corporation, took and unjustly detains as is said; and that you summon the said H. G. Harris and Company, a corporation, to answer the annexed complaint of Lee Nusbaum in an action at law in the Atlantic County Circuit Court. And that you notify it that unless it files its answer to said complaint with the Clerk of the Atlantic County Circuit Court, at May's Landing, within twenty days after service upon it of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against it.

Witness, Howard Carrow, Judge of the Atlantic County Circuit Court, at May's Landing, this Twenty-seventh day of August, nineteen hundred and eighteen.

EDWIN A. PARKER,
Clerk.

HERBERT R. VOORHEES,
Attorney.

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

	LEE NUSBAUM,	} Action at Law.
	<i>Plaintiff,</i>	
10	vs.	
	H. G. HARRIS and COM-	
	PANY, a corporation,	In Replevin.
	<i>Defendants.</i>	Complaint.

Lee Nusbaum, of the City of Philadelphia, State of Pennsylvania, complaining of the defendant says:

20 1. Complainant is the owner of the goods and chattels hereinafter referred to, which are now in the possession of H. G. Harris and Company, a corporation, defendant.

30 2. That the said defendant on the 26th day of August, 1918, in the City of Atlantic City, in the County of Atlantic, at a certain apartment house located on the east side of Vermont Avenue facing the Boardwalk, took the goods and chattels, to wit, 1-nine ton triumph belted ammonia compressor; 1-twenty horse power electric motor; belt for driving same; 42 galvanized brine tanks; 42 welded pipe coils; 1-double pipe ammonia condensor; 1-charge of ammonia; 1-charge of brine; 1-oil interceptor, liquid receiver, ammonia pipe connections; ammonia pipe coverings; together with pipes, connections &c., mak-

ing the refrigerating plant now in said apartment house, of him, the said plaintiff of great value, to wit, the value of \$6200.00, and unjustly detains the same against sureties and pledges.

3. Prior to the institution of this suit plaintiff demanded possession of said goods and chattels from the said H. G. Harris and Company, Incorporated, and possession was refused to this plaintiff.

10

Wherefore plaintiff says he is injured and has sustained damages to the amount of \$12,000.00 and therefore he brings his suit.

HERBERT R. VOORHEES,
Attorney of Plaintiff.

20

30

NOTICE.

To Alfred J. Perkins, Sheriff of Atlantic County:

Notice that in the case of Lee Nusbaum, plaintiff against H. G. Harris & Company in replevin, Atlantic Circuit Court, that said H. G. Harris & Company, defendant, claims as against the plaintiff, the right, title and possession of the goods and chattels in said writ named, to wit; 1-nine ton triumph belted ammonia compressor; 1 twenty horse power electric motor; belt for driving same; 42 galvanized brine tanks; 42 welded pipe coils; 1 double pipe ammonia condenser; 1 charge of ammonia; 1 charge of brine; 1 oil interceptor, liquid receiver, ammonia pipe connections, ammonia pipe coverings; together with pipes, connections &c., making the refrigerating plant of the value of \$6200, &c., and that the said company claims in the right of John Stafford and S. W. Strauss & Company, owners of the same.

C. L. COLE,

Attorney for Defendants.

August 30th, 1918.

WAIVER.

ATLANTIC COUNTY CIRCUIT COURT.

LEE NUSBAUM,

Plaintiff,

vs.

H. G. HARRIS and COM-
PANY, a corporation,
Defendants.

In Replevin.

10

To Alfred J. Perkins, Esq., Sheriff of Atlantic
County.

20

Upon the tender to you of demand for possession
in writing and a proper re-replevin bond in the sum
of twelve thousand, four hundred dollars (\$12,400),
by or on behalf of the above-named defendant, I
hereby waive the tender of such bond and demand
within twenty-four hours of the time of service of
the writ in the above cause, and authorize you to
accept the bond and return the chattels to the de-
fendant and make return on the writ as though such
action had been taken by the defendant within the
usual limit of twenty-four hours.

30

HERBERT R. VOORHEES,
Attorney of Plaintiff.

Dated September 4th, 1918.

SHERIFF'S RETURN.

By virtue of the annexed writ, the plaintiff having given sufficient surety to prosecute the said suit with effect, etc., I took the goods and chattels mentioned in the said writ, and summoned the said defendant as within I am commanded, and also served
10 upon said defendant the complaint annexed to said writ with the notification thereon and delivered to him true copies thereof on the 28th day of August, 1918, and within twenty-four hours thereafter the said defendant did deliver to me a written claim of property in said goods and chattels, which claim is hereto annexed, and also a bond, with sufficient surety, to deliver the said goods and chattels in as good condition as the same were at the time of making said claim, to the plaintiff or his lawful
20 representatives, if the same shall be adjudged to the plaintiff, and I thereupon delivered the said goods and chattels to the defendant, in accordance with the statute in such case made and provided.

ALFRED J. PERKINS,
Sheriff.

Sheriff's fees \$5.24.

30

[ENDORSED]

Filed Sept. 12, 1918 at 2 P. M.

EDWIN A. PARKER,
Clerk.

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

LEE NUSBAUM,

Plaintiff,

vs.

H. G. HARRIS & COMPANY,

Defendants.

Action at Law.

Answer.

10

H. G. Harris and Company, a corporation of the State of New Jersey, answering the complaint says:

1. It denies that the plaintiff is the owner of the goods and chattels referred to in the complaint.

2. It denies that it took the goods and chattels referred to in the second count of the complaint, or any of them, or that it unjustly detains the same as alleged. 20

3. It denies the averments in paragraph 3 of the complaint.

Defenses.**First Defense:**

1. The goods and chattels set out in the complaint was sold by the plaintiff to John Stafford and were installed in the premises known as Vermont Apartments, Atlantic City, New Jersey, by the plaintiff pursuant to contract of sale. 30

2. Before the sale, delivery and installation of said goods and chattels in said apartment, said John

Stafford, then owner, executed three several mortgages, two to S. W. Strauss & Company and one to Marine Trust Company, all of which granted and conveyed the said apartment house together with the hereditaments, appurtenances and fixtures then existing or that might thereafter exist in and upon said premises, which mortgages were recorded before the sale and delivery and installation of said goods, which said goods after installation became
10 fixtures in said apartment house.

3. Plaintiff knew of the existence of said mortgages before said contract of sale and before said installation.

4. At the time of the alleged demand and institution of this suit this defendant had no relation with John Stafford, owner, of the said apartment house and the goods and chattels referred to in the complaint which were installed in the same, but was
20 agent for said S. W. Strauss & Company for the collection of rents of said apartment house pursuant to an assignment of rents made by said Stafford to said Strauss & Company.

5. Defendant could not deliver the goods referred to in the complaint for the reason that the same were installed in and became a part of said apartment house.

C. L. COLE,
Attorney for H. G. Harris
& Company.

30

[ENDORSED]

Filed Sept. 6, 1918 at 8 A. M.

EDWIN A. PARKER,
Clerk.

NOTICE.

ATLANTIC COUNTY CIRCUIT COURT.

LEE NUSBAUM,	}	Action at Law.	10
vs.			
H. G. HARRIS & COMPANY,			
Defendants.			

Plaintiff, Notice.

Herbert R. Voorhees and U. G. Styron, Esquires, Attorneys of Plaintiff.

Take Notice that at the trial of the above stated cause on Monday, February tenth, I shall apply to his Honor Howard Carrow, Judge of the Circuit Court, to amend the claim of property heretofore filed, on behalf of the defendant in accordance with the copy of the proposed amendment attached hereto. 20

I shall apply to amend the plea or answer heretofore filed, on behalf of the defendant in accordance with the copy of the proposed amendment attached hereto.

I shall apply to the Court for leave to intervene as party defendants Nicholas Roberts, trustee, mortgagee, Simon W. Strauss, mortgagee, and the trustees of the estate of John Stafford bankrupt, to wit: David Dallam, Webster K. Wetherill and Edgar Elliott. 30

I shall present to the Court as reasons for the intervention of these parties, that Nicholas Roberts,

trustee, is the holder of a mortgage against the Vermont Apartment house, in which the property claimed by the plaintiff is situate and annexed to the free-hold. That the mortgage is held for the benefit of certain bond-holders for whose security it was given. That the mortgage was an advance-money mortgage made by the then owner, John Stafford, containing a condition that the Vermont Apartment House should be built and completed in
10 accordance with certain plans and specifications theretofore prepared by Bertram Ireland, architect, and which plans and specifications include as part of the building the refrigerating plant now claimed by the plaintiff.

That the mortgage was an advanced-money mortgage, and that the proceeds thereof were paid to the said John Stafford as the building advanced, and that payments under said mortgage continued down to March 30th, 1918, a period of time subsequent to
20 the making of the conditional bill of sale, of which conditional bill of sale the mortgagee had no notice.

That Simon W. Strauss is a subsequent mortgagee without notice of the existence of the conditional bill of sale. That his mortgage was made on the 25th day of January, 1918, and recorded on the 4th day of February, 1918.

That the creditors of John Stafford have rights in the property adverse to the interest of the plaintiff, and that the trustees of the estate of John Stafford,
30 bankrupt, represent the rights of the existing creditors of John Stafford, who are creditors without notice of the existence of the conditional bill of sale as alleged by the plaintiff.

Respectfully,

THEO. W. SCHIMPF,

C. L. COLE,

Attorneys of Defendants.

AMENDMENT TO ANSWER.**ATLANTIC COUNTY CIRCUIT COURT.**

LEE NUSBAUM,

Plaintiff,

vs.

H. G. HARRIS & COMPANY,

*Defendants.*Action at Law.
Amendment to
Answer.

10

DEFENSE.

2. Before the sale, delivery and installation of said goods and chattels in said apartment house John Stafford, then owner, executed a mortgage to Nicholas Roberts, trustee, in the sum of \$250,000 to secure the re-payment of that sum, and by said mortgage conveyed to said Nicholas Roberts, trustee, the said apartment house together with the hereditaments, appurtenances, and fixtures then existing or might thereafter exist in and upon said premises, which mortgage was a mortgage to secure advances, which by the terms thereof and by other paper-writings between the said Nicholas Roberts and John Stafford, owner, were to be paid to the said John Stafford, as the building should progress toward completion, in accordance with the plans and specifications of the architect in said papers named. That the proceeds of said mortgage were paid to John Stafford for the purpose of erecting the building mentioned as said apartment house, and that a

20

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large part of the proceeds of said mortgage was paid subsequently to the making of the agreement mentioned in the complaint.

Subsequently to the making of the complaint the said John Stafford mortgaged the said apartment house to one Simon W. Strauss in the sum of \$100,000, and later the said Stafford mortgaged the premises to the Marine Trust Company, both of which last mentioned mortgages were subsequent in
10 point of time to the making of the said agreement.

THEO. W. SCHIMPF,

C. L. COLE,

Attorneys of Defendants.

NOTICE.

To Alfred J. Perkins, Sheriff of Atlantic County:

Notice that in the case of Lee Nusbaum, plaintiff against H. G. Harris & Company in replevin, Atlantic Circuit Court, that said H. G. Harris & Company, defendant, claims as against the plaintiff, the right, title and possession of the goods and chattels in said writ named, to wit: 1-nine ton triumph 10
belted ammonia compressor 1-twenty horse power electric motor; belt for driving same; 42 galvanized brine tanks; 42 welded pipe coils; 1 double pipe ammonia condenser; 1 charge of ammonia; 1 charge of brine; 1 oil interceptor, liquid receiver, ammonia pipe connections; ammonia pipe coverings; together with pipes, connections; &c., making the refrigerating plant of the value of \$6200, &c., and that the said company claims in the right of John Stafford, owner, and Nicholas Roberts, trustee, mortgagee, 20
and Simon W. Straus, mortgagee.

C. L. COLE,

Attorney for Defendants.

February , 1919.

[ENDORSED]

Service acknowledged.

30

HERBERT R. VOORHEES,

Atty. of Plaintiff.

Filed July 2, 1919 at 8 A. M.

EDWIN A. PARKER,

Clerk.

AMENDED NOTICE.

ATLANTIC COUNTY CIRCUIT COURT.

10	LEE NUSBAUM,	}	Action at Law. Amended Notice.
	<i>Plaintiff,</i>		
	vs.		
	H. G. HARRIS & COMPANY,	}	
	<i>Defendants.</i>		

NOTICE:

20 *To Alfred J. Perkins, Sheriff of Atlantic County:*

Notice that in the case of Lee Nusbaum, plaintiff against H. G. Harris & Company in replevin, Atlantic Circuit Court, that said H. G. Harris & Company, defendants, claims as against the plaintiff, the right, title and possession of the goods and chattels in said writ named, to wit: 1-nine ton triumph belted ammonia compressor; 1-twenty horse power electric motor; belt for driving same; 42 galvanized brine tanks; 42 welded pipe coils; 1 double pipe ammonia condenser; 1 charge of ammonia; 1 charge of brine; 1 oil interceptor, liquid receiver, ammonia pipe connections; ammonia pipe coverings; together with pipes, connections; &c., making the refrigerating plant of the value of \$6200 &c., and that the said company claims in the right of John Staf-

30

ford, owner, and Nicholas Roberts, trustee mortgagee and Simon W. Straus, mortgagee.

C. L. COLE,

THEO. W. SCHIMPF,

Attorneys for Defendants.

February , 1919.

[ENDORSED]

10

Filed with leave of the Court.

HOWARD CARROW.

Filed Aug. 15, 1919 at 8 A. M.

EDWIN A. PARKER,

Clerk.

20

30

AMENDMENT TO ANSWER.**ATLANTIC COUNTY CIRCUIT COURT.**

	LEE NUSBAUM,	} Action at Law. Amendment to Answer.
	<i>Plaintiff,</i>	
10	vs.	
	H. G. HARRIS & COMPANY,	} Answer.
	<i>Defendants.</i>	

DEFENSE.

2. Before the sale, delivery and installation of said goods and chattels in said apartment house

20 John Stafford, then owner, executed a mortgage to Nicholas Roberts, trustee, in the sum of \$250,000 to secure the repayment of that sum, and by said mortgage conveyed to said Nicholas Roberts, trustee, the said apartment house together with the hereditaments, appurtenances and fixtures then existing or might thereafter exist in and upon said premises, which mortgage was a mortgage to secure advances, which by the terms thereof and by other paper-writings between the said Nicholas Roberts and John

30 Stafford, owner, were to be paid to the said John Stafford owner, as the building should progress toward completion, in accordance with the plans and specifications of the architect in said papers named. That the proceeds of said mortgage were paid to John Stafford for the purpose of erecting the building mentioned as said apartment house, and that

a large part of the proceeds of said mortgage was paid subsequently to the making of the agreement mentioned in the complaint.

Subsequently to the making of the complaint the said John Stafford mortgaged the said apartment house to one Simon W. Strauss in the sum of \$100,000 and later the said Stafford mortgaged the premises to the Marine Trust Company, both of which last mentioned mortgages were subsequent in point of time to the making of the said agreement. 110

C. L. COLE,
THEO. W. SCHIMPF,
Attorneys of Defendants.

[ENDORSED]

Filed with leave of the Court.

HOWARD CARROW.

20

Filed Aug. 15, 1919 at 8 A. M.

EDWIN A. PARKER,
Clerk.

30

ORDER AMENDING PLEADINGS.

ATLANTIC COUNTY CIRCUIT COURT.

10	LEE NUSBAUM, vs. H. G. HARRIS & COMPANY,	}	Plaintiff, Defendants.	Action at Law. Order Amending Pleadings.
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20 Application having been made, pursuant to notice duly served, to amend the claim of property heretofore filed in the above-entitled cause, and to amend the plea or answer heretofore filed on behalf of the defendant, and also for leave to intervene as parties defendant, Nicholas Roberts, trustee, mortgagee, Simon W. Straus, mortgagee, and the trustees of the Estate of John Stafford, to wit, David Dallem, Webster K. Wetherill and Edgar J. Elliott and argument having been heard thereon;

30 It Is, on this 13th day of August A. D. 1919, on motion of C. L. Cole and Theo. W. Schimpf, attorneys for defendant, H. G. Harris Company, and for the said intervening defendants, Ordered, that the claim of property heretofore filed by the defendant, H. G. Harris Company, be amended in accordance with the copy of the proposed amendment attached to said notice.

And It Is Further Ordered, that the plea or answer heretofore filed on behalf of the defendant be

amended in accordance with the copy of the proposed amendment attached to said notice.

And It Is Also Further Ordered, that Nicholas Roberts, trustee, mortgagee, Simon W. Straus, mortgagee, and the trustees of John Stafford, bankrupt, to wit, David Dallem, Webster K. Wetherill and Edgar J. Elliott, be admitted as parties defendant, and that said parties defendant have leave to file their pleas or answers as they may be advised.

HOWARD CARROW, 10
Judge.

On motion of
C. L. COLE,
THEO. W. SCHIMPF,
Attorneys of Defendants.

[ENDORSED]

Filed with leave of the Court.

HOWARD CARROW,
Judge.

Filed Aug. 15, 1919 at 8 A. M.

EDWIN A. PARKER,
Clerk.

20

30

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

10	LEE NUSBAUM,	}	Action at Law. Answer.
	vs.		
	H. G. HARRIS & COMPANY,		
	<i>Plaintiff,</i>		
	<i>Defendants.</i>		

20 The answer of Nicholas Roberts, trustee, mortgagee, Simon W. Straus, mortgagee, and the trustees of the Estate of John Stafford, bankrupt, to wit, David Dallam, Webster K. Wetherill and Edgar J. Elliott, to the bill of complaint.

These defendants deny all of the statements in the complaint.

DEFENSES.

30 1. The defendant, Nicholas Roberts, trustee, mortgagee, further answering the complaint, says that; Before the sale, delivery and installation of said goods and chattels in said apartment house, John Stafford, then owner, executed a mortgage to said Nicholas Roberts, trustee, in the sum of \$250,000.00 to secure the re-payment of that sum, and by said

mortgage conveyed to said Nicholas Roberts, trustee, the said apartment house, together with the hereditaments, appurtenances and fixtures then existing or which might thereafter exist in and upon said premises, which mortgage was a mortgage to secure advances, which by the terms thereof and by other paper writings between the said Nicholas Roberts and John Stafford, owner, were to be paid to the said John Stafford as the building should progress toward completion, in accordance with the plans and specifications of the architect in said papers named. That the proceeds of said mortgage were paid to John Stafford for the purpose of erecting the building mentioned as said apartment house, and that a large part of the proceeds of said mortgage was paid subsequently to the making of the agreement mentioned in the complaint. 10

2. The defendant, Simon W. Straus, mortgagee, further answering the complaint, says that: 20

Subsequently to the making of the agreement mentioned in the complaint, the said John Stafford mortgaged the said apartment house of the said Simon W. Straus in the sum of \$100,000.00.

3. The said defendants, Nicholas Roberts, trustee, mortgagee, Simon W. Straus, mortgagee, and the trustees of the Estate of John Stafford, bankrupt, to wit, David Dallam, Webster K. Wetherill and Edgar J. Elliott, further answering the complaint, say that they had no notice or knowledge, whether actual or constructive, of the existence of 30

any such paper as that alleged as a conditional bill of sale in the complaint.

C. L. COLE,

THEO. W. SCHIMPF,

*Attorneys of defendants,
Nicholas Roberts, trustee,
mortgagee, Simon W.
Straus, mortgagee, and
David Dallam, Webster
K. Wetherill and Edgar J.
Elliott, trustees, John
Stafford, bankrupt.*

10

[ENDORSED]

Filed with leave of the Court.

HOWARD CARROW,

Judge.

20

Filed Aug. 15, 1919 at 8 A. M.

EDWIN A. PARKER,

Clerk.

30

FINDING.

ATLANTIC COUNTY CIRCUIT COURT.

 LEE NUSBAUM,

Plaintiff,

vs.

 H. G. HARRIS and COM-
 PANY, a corporation,
Defendants.

Finding.

10

 FOR PLAINTIFF:

 HERBERT R. VOORHEES, Esq., and U. G. STYRON,
 Esq.

FOR DEFENDANTS:

 HON. C. L. COLE, THEODORE W. SCHIMPF, Esq.,
 ROBERT R. HOWARD, Esq.

20

 CARROW, J.:

The feature of the order providing for a reservation of title in plaintiff until full payment, etc., was abandoned afterward when the parties made the final agreement, this, it seems to me, has been demonstrated by plaintiff himself, for when testifying about the last contract he said: "I had this contract typewritten. We had drawn up several contracts and Mr. Stafford spoke about different things and this is the final result of conference between Mr. Stafford and myself." I therefore find from

30

the proof as gathered from the testimony and writing that the typewritten contract to which plaintiff referred superseded the order and conditions therein. It covered the entire contractual situation. The sale was absolute.

I find for defendants.

Exception is noted for plaintiff to the refusal of the Court to find for plaintiff as requested.

HOWARD CARROW,
J.

10

[ENDORSED]

To be filed and entered on the record.

HOWARD CARROW,
Judge.

Filed and entered Aug. 15, 1919 at
12 M.

20

EDWIN A. PARKER,
Clerk.

30

RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

LEE NUSBAUM,

Plaintiff,

vs.

H. G. HARRIS & COMPANY,

et al.,

Defendants.

Action at Law.
Rule for Judgment.

10

This case was tried before Honorable Howard Carrow, Judge, without a jury at the Atlantic County Circuit, on March 28th, 1919;

After hearing the evidence and counsel for plaintiff and for defendants, the Court found for the defendants;

Whereupon it is adjudged that judgment be entered for defendants and that the defendants recover of the plaintiff their costs, which are taxed at forty dollars and fifty-six cents.

HOWARD CARROW,
Judge.

On motion of

C. L. COLE,

THEO. W. SCHIMPF,

Attorneys of defendants.

Judgment entered.

30

[ENDORSED]

Filed and entered Sept. 3, 1919 at 8
A. M.

EDWIN A. PARKER,
Clerk.

JUDGMENT.**ATLANTIC COUNTY CIRCUIT COURT.**

May Term, 1919.

13656

10	LEE NUSBAUM, <i>Plaintiff,</i> vs. H. G. HARRIS & COMPANY, <i>Defendants.</i>	}	Action at Law. On Verdict. C. L. Cole and Theo. W. Schimpf, Attys.
----	---	---	--

Judgment entered Sept. 2, 1919, at 8 A. M.

20 Costs \$40.56.

This case was tried before Honorable Howard Carrow, Judge, without a jury at the Atlantic County Circuit Court on March 28th, 1919:

This cause having been heard and submitted to the Court it finds for the defendant H. G. Harris Company and against plaintiff, Lee Nusbaum.

Whereupon it is adjudged that judgment be entered for the defendant and that defendant recover of the plaintiff its costs which are taxed at forty dollars and fifty-six cents.

30

HOWARD CARROW,
Judge.

Circuit Judgments 12, page 533.

NOTICE OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

LEE NUSBAUM,

Plaintiff,

vs.

H. G. HARRIS & COMPANY,
a corporation, NICHOLAS
A. ROBERTS, trustee,
mortgagee, SIMON W.
STRAUS, Mortgagee, and
DAVID DALLAM, WEBSTER
K. WETHERILL and EDGAR
J. ELLIOTT, trustees of
the Estate of JOHN STAF-
FORD, bankrupt,

Defendants.

10

Notice of Appeal.

20

*To Clarence L. Cole and Theodore W. Schimpf, at-
torneys of defendants:*

Take notice that the plaintiff appeals from the
whole of the judgment entered in this cause to the
New Jersey Supreme Court.

30

HERBERT R. VOORHEES,

U. G. STYRON,

Attorneys of Appellant.

[ENDORSED]

Service acknowledged by C. L. Cole
for H. G. Harris Co., and by Theo. W.
Schimpf, for Nicholas A. Roberts, Si-
mon W. Straus, mortgagees and David
Dallam, Webster K. Wetherill, and Ed-
gar J. Elliott, trustees of the Est. of
John Stafford, bankrupt.

10

Filed Nov. 12, 1919, at 3.30 P. M.

EDWIN A. PARKER,
Clerk.

20

30

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

LEE NUSBAUM,

Plaintiff,

vs.

H. G. HARRIS and Com-
pany, a corporation,

Defendants.

Action at Law.

10

Law Library, Real Estate and Law Building, At-
lantic City, N. J., February tenth, 1919.

20

Before HON. HOWARD CARROW, Judge, without a
jury.

APPEARANCES:

For Plaintiff: HERBERT R. VOORHEES, Esq., U.
G. STYRON, Esq.

For Defendant: HON. C. L. COLE, THEODORE W.
SCHIMPF, Esq., ROBERT R. HOWARD, Esq.

30

Mr. Schimpf: At this time I want to move to amend the claim of property heretofore filed in the case on behalf of the defendant, and also the plea. The claim of property which was filed by H. G. Harris and Company, the defendants, was filed on behalf, as the claim said, in the right of John Stafford and S. W. Strauss and Company, owners. The claim which I desire to amend changes only that language as follows: "That the said company claims
10 in the right of John Stafford as owner and Nicholas Roberts, trustee-mortgagee and Simon W. Strauss, mortgagee." The interest of S. W. Strauss and Company was incorrectly stated, because at the time counsel did not have accurate knowledge of the facts.

I also want to move to amend the plea by filing an amendment to the answer, which amends paragraph two of the answer as follows: "Before the sale, delivery and installation of said goods and chattels
20 in said apartment house John Stafford, then owner, executed a mortgage to Nicholas Roberts, trustee, in the sum of \$250,000 to secure the re-payment of that sum, and by said mortgage conveyed to said Nicholas Roberts, trustee, the said apartment house together with the hereditaments, appurtenances and fixtures then existing or which might thereafter exist in and upon said premises, which mortgage was a mortgage to secure advances, which by the terms thereof and by other paper writings between
30 the said Nicholas Roberts and John Stafford, owner, were to be paid to the said John Stafford as the building should progress toward completion, in accordance with the plans and specifications of the architect in said paper named. That the proceeds of said mortgage were paid to John Stafford for the purpose of erecting the building mentioned as

said apartment house, and that a large part of the proceeds of said mortgage was paid subsequently to the making of the agreement mentioned in the complaint.

Subsequently to the making of the agreement the said John Stafford mortgaged the said apartment house to one Simon W. Straus in the sum of \$100,000, and later the said Stafford mortgaged the premises to the Marine Trust Company, both of which last mentioned mortgages were subsequent in point of time to the making of said agreement.” 10

I want to submit to the Court that the authority to make those amendments is contained in the cases of *Chambers vs. Hunt*, 18 N. J. L. 339, *Kregl vs. Duerr*, 25 N. J. L. 202, *Bishop, etc. vs. Keffer*, 69 N. J. L. 47 and 54 *Atlantic* 402. All of the questions, however, passed upon in those cases, were questions of amendment of pleas, but the pleas were necessarily founded upon the same statement of facts as were made in the claim of property. In one case 20 the claim of property was for an indivisible interest in a sloop and the Court subsequently held that notwithstanding the fact that the claim was for a thing which could not be had, that the plea should thereafter be amended so that it would set up that the parties to the suit were tenants in common in the property, and that the defendant should set up his plea in that fashion.

Our statute concerning amendments is as follows: “No civil suit or proceeding in any court of common law shall fail or be dismissed on the ground 30 that the plaintiff or any party therein has mistaken the remedy or procedure, if the court in which the matter is pending shall have jurisdiction to grant the proper remedy by any procedure; but in such case, the Court shall, upon terms, order the writs,

pleadings and other proceedings to be so amended, or new writs, pleadings, or other proceedings to be respectively so issued, filed or taken, that the court may completely and finally hear and determine all matter in controversy between the parties, and grant the proper remedy." It could not be broader than that.

10 The Court: I have not the slightest doubt about amending the answer. The only question in my mind was whether I had the power to amend the claim of property. That statute seems to be broad enough to comprehend an amendment of anything that is necessary to get at the justice of the situation.

Mr. Styron: Do you represent the trustees of John Stafford?

20 Mr. Schimpf: I do, yes, sir, in this proceeding.

Mr. Styron: I object to the proposed amendment on the ground first that there is no power in this Court to amend the claim of property and as to the pleas, there is no necessity for the amendment.

30 The Court: I want to ask counsel this question: is it practicable for the Court to take all these matters and consider them altogether when I consider the case, or is it necessary that this matter should be disposed of preliminarily?

Mr. Schimpf: I do not see any particular fault with that suggestion.

Mr. Styron: I see no difficulty in it myself.

The Court: I would like to take these questions and consider them.

Mr. Styron: I should like, however, the record to show my objections and what they are based on.

The Court: The record will be made up so that you will have the benefit of an exception if the ruling is against you, providing you are entitled to an exception. I think the granting of amendments rests in the sound discretion of the Court. If the Court has the power, you cannot assign the action of the Court for error. However, you will be protected as far as the law will permit. I will say without hesitation if I have the power to grant these amendments I am going to do it. 10

Mr. Styron: Is your Honor now proceeding on the assumption that tentatively the amendments are allowed? 20

The Court: Yes.

Mr. Styron: I should like the record to show my objection.

The Court: The record does show your objection, of course. If these amendments are allowed, they will be allowed over objection of counsel for the plaintiff, and he will have the benefit of an exception if he is entitled to it. 30

Mr. Styron: I have a written statement of my objections which I would like the record to show.

The Court: You understand that I have not granted the amendment yet?

Mr. Styron: Oh, yes, surely.

Mr. Schimpf: I want to move for the admission as parties defendants in this suit of Nicholas Roberts, trustee-mortgagee, Simon W. Strauss, mortgagee, and also as trustee, and David Dallem, Webster K. Wetherill, and Edgar Elliott, trustees of the bankrupt estate of John Stafford.

- 10 Mr. Styron: That is objected to on the ground first that on the face of the plea they show no right to be admitted as parties because they show no interest in the property in controversy. If we assume that the property in controversy consists of chattels, and the defendants are estopped from saying that it does not, because everything they have done up to this time has been upon that theory, otherwise the case could not be heard as a case in replevin, if Nicholas Roberts and those others whom he has
- 20 named, who wish to be admitted in the right of mortgagees are the holders of a real estate mortgage, manifestly they have no interest in these chattels, if they are the holders of a chattel mortgage—they do not claim on the face of the plea to be a chattel mortgagee. They show no interest whatever in the property, and no right to be made a party defendant.

- The Court: If the amendment is allowed, it will
- 30 be allowed over objection and you will have the benefit of an exception if you are entitled to one. I do not say it will be allowed, but I think I ought to have an opportunity to examine the questions, since there is no jury trial.

Mr. Styron: That is perfectly satisfactory.

(The statement of Mr. Styron's objections, which he mentioned previously as desiring to be incorporated in the record, reads as follows: As to the trustees of John Stafford, bankrupt. Their presence on the record as a party defendant is not necessary nor have they consented to be made such party. There could be no impropriety in suggesting on the record the bankruptcy of Stafford and the appointment of trustees but that can be done only by direct application by them for that purpose. If they are not made parties that action could only result in superseding the authority of the defendant Harris to defend for Stafford. As the record now stands the rights of Stafford and of all who have legally succeeded to his rights are protected through Harris Co., the defendant in the record. These gentlemen appear for the defendant Harris Co. I assume that they do not speak by authority for the trustees for the purpose of making them parties defendant in this suit and thus subjecting them, it may be, to liability for the payment of costs without their express authority. It should not be overlooked that replevin is a lost action and by the statute, subjects the wrong doer to the effects of a body execution.

As to the amendment of the claim of property. The objection is fundamental and rests upon the entire absence of all power in the Court, either inherent or statutory to make the amendment. Courts exercise authority in the matter of amendments either by force of the very general powers conferred by section 126 of the Practice Act of 1903, which applies only to pleadings and proceedings in suits, or some special statutory authority where the thing or matter to be amended is not a pleading; such for example as a claim filed to enforce a mechanic's lien for

labor and materials. That a "claim of property" delivered to the sheriff by a defendant in replevin is not a pleading in a suit is too plain for argument and that there is nothing in the "act to regulate the action of replevin" to authorize its amendment is equally plain. The office of the claim of property is merely that of a statutory justification of the sheriff for disobeying the mandate of his writ that he "cause to be taken and delivered to the plaintiff the goods and chattels," &c., and he is required to exhibit that justification, for the 10th section of the act provides that he shall "annex the said claim of property to the said writ and return the same therewith." The claim of property also serves the purpose of establishing with certainty in the existing suit, whether the defendant claims the property as his own or in the right of another, for the 10th section of the act provides that if he claims property in himself it shall not be lawful for him to justify the taking as the property of any person other than himself.

A claim of property in replevin bears a close analogy to a lien claim under the mechanic's lien law, which having been held not subject to amendment (*Vreeland vs. Boyle*, 37 N. J. L. 346, 39 N. J. L. 1) it became necessary to pass an act, approved January 1, 1875 to authorize such amendments to be made.

In *Vreeland vs. Boyle*, 37 N. J. L. 346, a suit commenced prior to the act authorizing amendments, motion was made to join a plaintiff, and the lien claim, summons, pleadings and all proceedings be amended accordingly. The motion was certified for the advisory opinion of the Supreme Court, whether the same could be legally granted in the whole or in part. The Supreme Court advised that this could not be done.

The opinion says:

"It" (the lien claim) "is the foundation of the action, but no part of the suit. The record in the Circuit Court begins with the issue of the summons, and continued with the filing of the declaration, pleas, &c. * * * * * Only proceedings in actions in courts can be altered by joining an omitted plaintiff, or striking out one improperly joined, where it shall appear that injustice will not be done by such amendment, and the person affected by the amend- 10
ment consents."

Bartley vs. Smith, 29 N. J. L. 321, decided in 1881, and of course after the enactment of the statute of 1875, authorizing the amendment of lien claims, was a motion reserved and certified to the Supreme Court to amend all proceedings in a mechanics lien case by striking out the name of Smith and inserting the name of Ward, as builder, in the lien claim, summons, pleadings &c. The Justice who spoke for the Supreme Court said: "That the Court has 20
large powers to make amendments in lien cases is manifest, for section 209 of the Mechanics Lien Law (now sec. 25 Comp. Stat. 3310) says that it shall be lawful for the court, or any judge thereof, at all times to amend all defects and errors in any suit or proceeding under the act, so that the merits of the controversy between the parties may be determined.

* * * * * These terms are quite as comprehensive as those used in section 138 (now 126) of the Practice Act, which have been construed so liberally. * * 30

* * * This section (20) relates to any suit or proceeding under the act, and section 14 (now 9) extends the power of amendment * * * * * to the lien claim. This latter section remedied the objection to the amendment of the lien claim, which was sustained in Vreeland vs. Boyle, 8 Vroom 346, that it

was not a part of the proceedings in the suit * * * * * and therefore not amendable under certain sections of the practice act relative to amendments of any proceedings in civil causes."

10 The judge further held that it was within the discretion of the Court, under Sec. 20, whether to allow the amendment or not, and that such discretion would not be exercised favorable to amendment, where "a party with full knowledge of the facts, files a lien claim and brings suit against the wrong person, as builder" by substituting the name of another person.

The claim of property is a statutory requirement, the statute does not authorize it to be amended and the power to amend it does not exist.

20 The objection to the amendment of the answer or proceedings by adding the name of Nicholas Roberts, Trustee, mortgagee, as a party defendant is two-fold. First, it is an attempt of the defendant to justify the taking by the defendant to the record in the right of one not named in the claim of property, and second, as a mortgagee of the realty he has no interest in the property and no standing to defend the suit.

(1) The first proposition has already been discussed.

30 (2) As to the second proposition, viz., that Roberts as the holder of a mortgage on real estate has no interest in the subject-matter of this suit and is neither a necessary nor a proper party. A moment's reflection will demonstrate the soundness of this position.

(a) The object of Mr. Roberts in desiring to intervene doubtless is to assert the character and protection of a "subsequent mortgagee" under the "Conditional Sales Act." But he cannot have that

character or protection for that statute deals with the subject of "goods and chattels" and the mortgagees mentioned and protected by that act are "subsequent mortgagees thereof," i. e., of goods and chattels, and it is perfectly manifest that a mortgagee of real estate has no lien upon the chattels that may be upon the mortgaged premises, either before or after he takes his mortgage, unless of course the goods and chattels have by annexation become incorporated into the realty as part thereof. 10

That, however, cannot be the case here, because the defendant Harris has claimed them as goods and chattels, "in the right of John Stafford and S. W. Strauss & Co., owners of the same" and they were re-delivered to Harris & Co., upon a claim of property specifying them goods and chattels, and the very condition of the bond he gave as "to deliver the said goods and chattels in as good condition as the same were at the time of making such claim." 20 Harris & Co. is therefore estopped to deny the character of the property as personalty and yet Roberts desires to come in as a party upon the suggestion that Harris Co., who made this claim and gave this bond is defending for him and say through Harris & Co. that the property is not personal property at all, but real estate.

The situation presented here is that of one who seeks to intervene in a suit where the issue is and must be, from the nature of the suit, the right to the present possession of goods and chattels and in which the party in whom that right is found may at his election have an "order that the goods and chattels be restored to him" for the sole purpose of denying that there is any controversy over goods and chattels at all. In other words, the position of Mr. 30

Roberts is this: he will admit for the purpose of being made a party to this suit that the controversy is over goods and chattels but on being made a party he will deny that there are any goods and chattels to contest over and that the controversy is over real estate.

It is perfectly clear that Roberts as the holder of a mortgage on the real estate could have no possible interest in personal property and especially
10) in this suit, where all the parties to the suit treat it as personalty and are estopped to assert the contrary.

(b) But assuming the goods and chattels in suit to be fixtures and therefore real estate, how does that fact improve the situation of a real estate mortgagee in a proceeding of this kind? The fact alone leaves him no right to the present possession of the land described in his mortgage or to the fixtures annexed to it.

20) No case can be found in New Jersey where the conflicting claims of a conditional vendor and a mortgagee of the real estate respecting fixtures has ever been tried out or decided in a replevin suit for the reason that no such contest has arisen or can arise except after entry and possession by a mortgagee after conditions broken by the mortgagor. Those controversies can only arise so as to affect the mortgagee where he is seeking to foreclose his mortgage or is in possession of the mortgaged premises.
30) ises.

The reason he has no such interest in the land as to make him a necessary or even a property in a suit like this is that the legal title is in the mortgagor and that his mortgage is a mere security for the debt due him. *Kircher vs. Schalk*, 39 N. J. L. 335, *Jackson vs. Turrell*, 29 N. J. L. 329, *Woodside vs. Adams*, 40 N. J. L. 417, 422.

Kircher vs. Schalk, *supra*, was a suit in replevin, the syllabus read:

A mortgagee of real estate, whose debt is due, but who has not entered into possession, cannot maintain replevin for a specific chattel, which the mortgagor or his assigns has severed and removed from the realty, and which, before severance, was a fixture or a part of the realty and subject to the mortgage.

The remedy a mortgagee can have before or after forfeiture, is in equity by injunction to restrain apprehended waste, and after forfeiture he may maintain ejectment at law and therein prevent similar destruction. 10

Kircher vs. Schalk, *supra*. Or the mortgagor may maintain an action on the case for an injury to the security resulting from the removal of fixtures or other waste by the defendant.

Jackson vs. Turrell, *supra*.

In Campbell vs. Roddy, 44 N. J. Eq. 244, 14 Atl. 20 278, in a contest between the holder of an unregistered chattel mortgage of chattels which the mortgagor afterward annexed to real estate and a prior mortgagee of the real estate to which they were annexed, it was held that the lien of the chattel mortgage would be protected so far as it would not diminish the security the real estate mortgagee would have had if the annexation had not been made.

(c) The real estate mortgagee cannot be affected by the suit for the reason that the plaintiff can have no remedy upon the bond if the issue of property be with him, for the court can always control the question of whether an order restoring the goods should be made. 30

The court can also protect the interest of parties not before the court, by the express provisions of the statute, section 35, of the Replevin Act provides:

That if in any such action it shall appear to the court that parties not before the court have some ownership in the property replevined the court may require a bond or other security for their protection before awarding the property to the plaintiff.

This provision affords Mr. Roberts all the protection he could possibly have by being admitted a party and is a clear intimation that he cannot properly be made a party to the suit even were his interests in the subject-matter of the litigation such as to give him the standing under ordinary circumstances of a party thereto.)

The Court: The amendments are allowed.

(Exception noted for plaintiff.)

Mr. Styron: Any objection to the offer of that paper, Mr. Schimpf?

Mr. Schimpf: Yes, that is objected to.

20 Mr. Styron: On what ground?

The Court: What is it?

Mr. Styron: On the ground of defective proof of the signature.

Mr. Schimpf: Yes.

Mr. Cole: What is the purpose?

30 Mr. Styron: You have rather led me into a misapprehension. I supposed our agreement was when we began that there would be no objection to any matters of that sort, no technical objection.

The Court: What is the paper?

Mr. Styron: It is the conditional sale. In his opening it is admitted.

LEE NUSBAUM, SWORN.

Direct examination.

By Mr. Styron:

Q. Are you the plaintiff in this suit?

A. I am.

Q. I show you what purports to be a contract of
conditional sale, made between John Stafford, of
the City of Philadelphia, of the first part, and Lee
Nusbaum, trading as Pennsylvania Engineering
Company, of the City of Philadelphia, of the second
part, dated on the twenty-ninth of October, 1917, ac-
knowledged by both parties on the twenty-ninth of
October, 1917, before Eleanor G. McCarthy, a foreign
commissioner of deeds of New Jersey in Pennsyl-
vania, and afterwards recorded on August twenty-
seventh, 1918, in the Atlantic County Clerk's office, 20
in book sixty-four of chattel mortgages, page 80, etc.

Mr. Styron: I ask that that be admitted in evi-
dence on the ground that it is a recorded instrument
and therefore admissible under the statute.

Mr. Cole: The objection is first that there is no
authority on the statute to record such an instru-
ment in a chattel mortgage book. Secondly, that the
paper purports to be a contract between John Staf-
ford and Lee Nusbaum, trading as the Pennsylvania
Engineering Company. It is not shown that it was
executed by John Stafford, so that if the purpose
is to bind him, it is ineffectual. 30

The Court: Have you your witness here to prove
the execution?

Mr. Styron: I think I can prove it. This is admissible under the statute by reason of its being an acknowledged instrument, not by reason of it being a recorded instrument.

Mr. Cole: There is nothing in the statute which authorizes a certain instrument to be acknowledged. If you do acknowledge it, that does not give you the right to record it, and if you record it, you have
10 to record it where you would naturally look for the record.

The Court: If there is any question about it, you had better prove it in the regular way.

Mr. Styron: I am going to prove it, but I have the right to have it admitted on the basis of it being an acknowledged instrument.

20 Q. Do you know who Eleanor G. or Y. McCarthy is?

A. I believe she is a foreign commissioner for New Jersey in Pennsylvania.

Q. Do you know where she lives?

A. No, I don't.

Q. Do you know where she was at the time that this was signed?

A. I think it was Stafford's office.

Q. Was it signed in your presence as to Stafford?

30 A. I believe it was.

Q. Won't you state the circumstances under which this paper was signed?

A. Under which it was signed?

Q. Yes, and where it was signed.

A. This was signed in Mr. Stafford's office by John Stafford, Junior, and previous to that John

Stafford, Senior closed out this thing verbally with me.

Q. Were you there when it was signed by John Stafford, Junior?

A. Yes.

Q. Did you afterward see John Stafford, Senior?

A. I saw him a number of times.

Q. Did you see him on that day?

A. I couldn't tell you that.

Q. Did you ever discuss with him or mention to 10 him the fact that that had been signed?

A. Oh, yes, he talked about the contract and about the work.

Mr. Cole: I object to any testimony by Mr. Stafford about the execution of this contract by his son. That is hearsay.

Q. Did you afterwards receive notes from John Stafford or any acknowledgment based upon the 20 fact of that contract having been signed?

A. I did.

By the Court:

Q. Did the son sign for his father?

A. Attorney for his father.

Q. What is that?

A. He signed as attorney for his father.

The Court: Then anything his father said about 30 it would be relevant evidence.

A. His father closed with me verbally before the contract was signed by his son.

Q. Did he tell you how it would be signed and by whom it would be signed?

A. Yes, I had a previous contract of the same character in Philadelphia, which was followed up and signed in the same way.

Q. But did he talk to you? Did you talk about the subject as to how the paper would be signed?

A. Not this particular paper, no.

10 By Mr. Styron:

Q. Can you say whether or not John Stafford, Senior, knew either at the time or shortly after the time that this paper had been signed by John Stafford, Junior, as his attorney?

A. Yes. John Stafford talked to me about this contract after it was signed.

Q. After it had been signed?

A. Yes.

20 Q. Did he know it had been signed at the time he was talking to you?

A. Certainly, because he told his son to draw up the papers for it.

Q. Did he know it had been signed at the time he gave you his notes based upon this contract?

A. Certainly.

Mr. Styron: I offer it in evidence, if your Honor please.

30 Mr. Cole: We still object, and for the further reason that it appears to have witnesses.

The Court: You mean subscribing witnesses?

Mr. Styron: They are not subscribing witnesses.

The same one who took the acknowledgment, and is described as being a foreign commissioner of deeds, the presumption is that the residence is there, because she could not be a foreign commissioner of deeds otherwise.

The Court: If there is any question about it, you had probably better prove that she is without the jurisdiction of a court.

Mr. Styron: I do not see how we can do that.

10

The Court: I will give you another opportunity, if there is any question about it.

Mr. Styron: If your Honor thinks on looking it over that it ought to be supplied, we can supply it, doubtless. We can find out where she is.

Mr. Cole: And I may withdraw the objection so far as it deals with the question of the execution of it by John Stafford, Junior, attorney. In other words, I may not force counsel to either produce that subscribing witness or show that she is in fact foreign at this time. To that extent I withdraw the objection. I withdraw the objection so far as the formal execution by John Stafford, Junior, is concerned as attorney.

20

The Court: But you still stand upon the objection that the proof is not adequate to show that he was acting for his father?

30

Mr. Cole: Yes, and I do not want to be charged with admitting this paper as though it had been duly recorded.

The Court: I understand.

Mr. Styron: I understand you withdraw the objection to the technical proof of it by the subscribing witness?

Mr. Cole: That is right.

Mr. Styron: Then I offer it in evidence.

10

Mr. Cole: Reserving still the objections heretofore made.

Mr. Styron: As to the authority of the attorney?

Mr. Cole: Yes.

The Court: It will be admitted.

20

Mr. Cole: And also as to the record of it not being binding upon us.

(Paper marked Exhibit P1.)

Q. I show you the contract that has been offered in evidence and I ask you whether you supplied the articles mentioned in that contract?

A. I have.

30 Q. When did you commence to deliver the materials?

A. On the twenty-second day of February, 1918.

Q. And when did you conclude your delivery of materials?

A. On or about the fifth of June, 1918.

Q. On what date was it that you delivered the plant complete?

A. Fifth of June, 1918.

Q. And that was the date you delivered it to Stafford?

A. That was the day it was delivered to Stafford.

Q. Had you then tested the machine to see whether it worked properly?

A. At that time, yes.

Q. How is that machine annexed, if it is annexed to the building?

A. The machine is bolted down to a foundation provided by the owner. The rest of the apparatus stands right on the floor, connected by piping to the machine. 10

Q. How could it be detached?

A. By disconnecting a flange at the main valve of the machine and taking off the nuts from the foundation bolts.

Q. Would it be necessary in any way to injure or deface the building by doing that?

A. No. 20

Q. Would it require more than unscrewing the nuts which, by means of bolts, fasten it to the foundation?

A. That is all.

Q. Could it be removed out of the building without widening doors or interfering with doors?

A. Yes.

Q. Without making any change in the methods of ingress or egress?

A. Without making any change at all. That is the way it was put in. 30

Q. Could a machine similar in character be replaced after that was removed?

A. Yes.

Q. Without anything additional being done to the foundation?

A. Yes.

Q. Will you tell me how the material that went into that plant was assembled and where it came from?

A. The material was shipped from different points and assembled in the building, as stated. The machine was bolted on to the foundation, the motor was bolted on to another foundation, and the condenser stood on the floor in the room, the inter-
10 ceptor and liquid ammonia receiver, nothing attached in any way. In fact, the room was all ready for us when we put the apparatus in.

Q. Where was that material at the time the contract was signed?

A. It wasn't made yet.

Q. It had not then been manufactured?

A. It had not been fabricated.

Q. And how long after the date of the contract was it before any of the material was brought with-
20 in the state?

A. In February, 1918.

Q. What part of it was brought into the state at that time?

A. I couldn't tell you exactly what part was. I can't remember that any more, but we were bringing parts all along in the time of the installation.

Q. Did you work steadily between the date when you first brought material into the state and the date when you finally delivered the plant completed?

30 A. No, we had to stop in between.

Q. Do you know where Mr. Stafford lived at that time?

A. Philadelphia, as near as I know.

Q. Has the machine been paid for in accordance with the contract?

A. No.

Q. Did you receive notes for it or for any part of it?

A. For some part of it, yes.

Q. For what part?

A. Five thousand dollars.

Q. Have you those notes now?

A. Yes, I have them.

The Court: What was the total cost?

10

Mr. Styron: \$5900.

Q. None of these notes have been paid, have they?

A. The first note, I believe, was for a thousand dollars, and that was renewed for five hundred dollars. Five hundred dollars was paid off on that first note.

Q. I show you a note under date of May first, 1918, dated at Philadelphia, to the order of Pennsylvania Engineering Company, and payable at 1112 Chestnut Street, Philadelphia, signed or purported to be signed by John Stafford, and I ask you if that note was given in renewal of the one thousand dollar note, a portion of which was paid? 20

A. That was, yes.

Q. And except that payment there has been no payment at all?

A. Except that payment there has been no payment at all.

The Court: Does the contract provide for notes? 30

Mr. Styron: Yes, sir.

The Court: Does it say if the notes are not paid

Mr. Styron: It is one of those contracts, if your Honor please, that reserves title in the vendor until the notes are paid in full.

Mr. Cole: We dispute that.

Q. Did you see Mr. Stafford from time to time with relation to this matter?

A. Yes. Saw all of them, the father and two
10 sons.

Q. Did Mr. John Stafford, Senior, see you at work in assembling that machine?

A. He was down at the building, yes.

Q. See you putting it in? Do you happen to know whether the note that I showed you carries the signature of John Stafford, Junior, or John Stafford, Senior?

A. I think that is John Stafford, Senior.

20 Mr. Schimpf: Junior or senior?

A. I don't know. I think it is John Stafford, Senior.

Mr. Styron: That is the note in payment of one-half of the first thousand dollar note. The note itself is a renewal for five hundred dollars of the original one thousand dollar note. Any objection to offering it?

30 Mr. Cole: I guess not.

(Note offered in evidence and marked Exhibit P2.)

Q. Now, what was the reason for bolting that machine?

Mr. Cole: That is objected to.

A. Well, for several reasons, for that —

Mr. Cole: Objected to as being irrelevant and immaterial.

(Objection overruled.)

(Exception noted for defendant.)

10

A. The machine is bolted down to prevent vibration, and in this particular case it is necessary to have it bolted down on account of a belt which was driving from a motor to the machine, to keep the belt in line.

Q. What was the value of that machine on the twenty-seventh day of August, 1918? Value of the goods and chattels which you delivered and afterwards assembled in to the machine?

20

A. Well, the fair value I figured to be about sixty-two hundred dollars at that time.

Cross-examination.

By Mr. Cole:

Q. Are you familiar with the contract offered in evidence?

A. Am I familiar with it?

30

Q. Yes.

A. Yes, I signed it.

Q. Did you read it before you signed it?

A. Did I read it? Yes.

Q. You were familiar with the terms at that time, were you not?

A. I beg your pardon.

Q. You were familiar with the terms at that time, were you not?

A. Yes.

Q. You knew that this material that you were to provide had to be installed as a refrigerating plant in the Vermont Apartment, at Vermont Avenue and the Beach, Atlantic City, didn't you?

A. Yes.

Q. You knew that your contract wouldn't be performed until you did that, didn't you?

A. Yes.

Q. So that it was your intention at the time the contract was signed, and it was also the intention of Stafford that this refrigerating plant provided for in the contract was to be installed in the Vermont Apartment at Atlantic City, New Jersey?

A. That was my intention. I don't know what Mr. Stafford's intention was.

Q. And you knew that you couldn't perform the contract until that was done, you said?

A. I beg your pardon?

Q. And you knew that the contract couldn't be performed by you until that was done, didn't you?

A. Until what was done?

Q. The refrigerating plant was installed in the Vermont Apartment?

A. The way I assume it, we were carrying on our contract as we installed it.

Q. What?

30 A. We were carrying on our contract as we installed it. We couldn't finish the contract until it was all completed, of course.

Q. And you knew that your contract wouldn't be performed until you had completed the installation of this refrigerating plant in the Vermont Apartment, Atlantic City?

Mr. Styron: I object to that. That is a legal question.

(Previous question and answer repeated.)

The Court: Does not that answer it?

Mr. Styron: That calls for the opinion of the witness on a legal question.

The Court: Well, the Court must determine as a matter of law from all the facts what the situation was and how it affects the rights of parties concerned.

10

Mr. Styron: My objection is that I want the Court to determine that question and not the witness.

Q. Now, Mr. Nusbaum, this contract provides that the purchaser, for and in consideration of the payments hereinafter specified and agreed to be made by the purchaser, hereby covenants and agrees to furnish and erect all the necessary refrigeration and cold storage plant required in the erection and completion of the building erected at Vermont Avenue and the Boardwalk, Atlantic City, New Jersey, at the price hereinafter set forth, in strict conformity with the plans prepared by Bertram Ireland, architect, and the specifications hereunto annexed and made a part hereof. Did you see the plans prepared by Bertram Ireland, architect?

30

A. Bertram Ireland, architect, didn't prepare any plans for the refrigerating plant, as far as I know. All I saw were the plans of the building.

(Question repeated.)

A. Bertram Ireland, architect, didn't prepare any plans on the refrigerating plant.

Q. I didn't ask you that. You have said you were familiar with this contract. You were at the time you signed it and you are now. I have quoted from the contract you signed, which provides that you are to erect this refrigeration and cold storage plant
10 in strict conformity with the plans prepared by Bertram Ireland, architect, and I have asked you the simple question did you see —

A. I have answered it, stating that Bertram Ireland, architect, didn't prepare any plans for it, and therefore I couldn't erect it in conformance with plans of Bertram Ireland.

Q. Did you see any plans prepared by Bertram Ireland?

A. I saw the building plans, yes, sir.

20 Q. Did you see those before you signed this contract?

A. Yes.

Q. Where did you see them?

A. Stafford's office.

Q. In Philadelphia?

A. Yes.

Q. And you had looked at them and examined them and the specifications before you signed this contract?

30 A. He didn't have any specifications of the refrigerating plant. They are our own specifications on the refrigerating plant.

Q. If you will be kind enough to notice my question and not undertake to argue with me, we will get along. You saw plans prepared by Mr. Ireland, didn't you?

A. Building plans, yes.

Q. I don't care what they were. Did you see plans prepared by him?

A. Yes, sir.

Q. And they were the plans referred to in this contract of yours, weren't they?

A. No, I wouldn't say they were.

Q. Then you saw plans prepared by Mr. Ireland for this building, didn't you?

A. Saw the plans of the building, yes, sir. 10

Q. And those plans provided for a refrigeration plant, didn't they?

A. The plans provided for them? I couldn't say whether they did or not.

Q. Did you look at them?

A. I may have, yes. Sure, I looked at them.

Q. Did they provide for a refrigerating plant?

A. I couldn't tell you. It showed a place on the plan marked "Refrigerating plant" but that isn't the refrigerating plant that was put in. I saw these 20 plans.

Q. Well, do they provide for a refrigerating plant?

A. They mark out—you can judge for yourself as well as I can. I couldn't install a refrigerating plant from these plans.

Q. I am not the witness, Mr. Nusbaum. You are.

A. I don't know how to answer you in any other way.

The Court: Just wait a minute, Mr. Nusbaum. 30
You must answer the questions and not carry on any discussion with counsel.

A. I am trying to answer it as well as I can.

Q. I ask you whether or not those plans provide for a refrigerating plant for this apartment house?

A. They are marked "Refrigerating plant." I don't know how to answer it, your Honor. I am trying to answer it.

The Court: It will not help your case any unless you answer correctly and properly.

A. Yes, sir.

10 The Court: There is no use quibbling about your answer. You know whether or not your contract required you to construct this refrigerating plant according to plans and specifications.

A. Your Honor, we put this refrigerator plant in a building which these plans cover.

The Court: I have not asked ou anything about it. I have not asked you any question.

20

A. There is a place in here marked "Refrigeration plant."

Q. Then the plans do provide for a refrigerating plant?

A. They are marked "Refrigeration plant," yes, sir.

Q. If you had answered that, we would have gotten along.

30 A. I wanted to explain that our plant wasn't put in in accordance with that.

Q. You don't have to explain. If you will just answer my questions. If you don't understand, say so. Did you see the specifications for this apartment house, prepared by Bertram Ireland?

A. No, I didn't.

Q. Well, you knew, didn't you, that there were specifications?

A. On what, on the building? Yes, I supposed there were.

Q. You knew your contract said you were to build this refrigerating plant in accordance with specifications, didn't you?

A. Yes.

Q. Why didn't you ask for the specifications prepared by Mr. Ireland? 10

A. Because our contract don't call for the specifications prepared by Mr. Ireland. It calls for the specifications annexed to our own specifications.

Q. I show you what purports to be specifications for this building and refrigerating plant, prepared by Mr. Bertram Ireland, and I ask you to look at page fifty and read there about this plant and say whether or not you ever saw those specifications before. 20

Mr. Styron: I object to this line of questions as not within the issue claimed by the original pleadings. Of course, the objection goes to the amendment of the pleadings and under the pleadings as originally framed, this line of cross-examination would be objectionable.

The Court: I am inclined to receive the evidence and if I find it is improperly received I will reject it, or, if it remains, it will be subject to your objection and an exception will be allowed. 30

(Exception noted for plaintiff.)

The Court: This evidence is allowed to stand. Plaintiff's exception will also stand.

A. I never saw these specifications.

Mr. Styron: I move to strike out the answer.

The Court: Motion is denied with exception for plaintiff.

Q. Did you ever ask to see them?

A. No, because —

10 Q. I didn't ask you because, sir. Now, this agreement says, "Which plans and specifications are hereby made a part of this agreement as fully and completely and with the same effect as if the same had been set forth at length in the body of this agreement." How could you install a refrigerating plant in this building in accordance with the plans and specifications prepared by Bertram Ireland, which your agreement says is a part of it, without having the plans and specifications before you to work from?

20

Mr. Styron: I object to that on the ground that there is nothing in the pleadings set up that there is anything objectionable in the manner of his performance.

Mr. Cole: He has pleaded performance of his contract.

(Objection overruled.)

30

(Exception noted for plaintiff.)

A. What was the question?

(Question repeated.)

A. The plans are necessary on account of the location of different rooms in the house. The specifications were drawn up by us, and they are the specifications mentioned in the contract, and they are the specifications under which we worked. The plans were drawn by Mr. Ireland for the building, and we installed the refrigerating plant in the building which was erected according to those plans. The specifications, we made our own specifications on it, and it is a different system entirely from those 10 shown, that you just showed me.

Mr. Styron: I move to strike out the answer.

The Court: Motion is denied.

(Exception noted for plaintiff.)

Q. You knew this was to be an apartment house?

A. Yes.

20

Q. And you knew this refrigerating plant was a necessary part of the apartment house, didn't you?

A. I wouldn't say that.

Q. Well, isn't it?

A. No.

Q. Do you mean to say that a plant of this character is not an essential part of an apartment house such as this?

A. No.

Q. At all events, you saw it on the plans?

30

A. Yes.

Q. You knew it had to be a part of this particular apartment house, didn't you?

A. Yes.

Q. Now, you say you have never been paid anything on account of this contract?

A. No.

Q. I show you a writing dated March first, 1918, one dated March twenty-sixth, 1918, purporting to be signed Pennsylvania Engineering Company, Lee Nusbaum, in which you say that you received from John Stafford the sum of one thousand dollars in cash to be applied on account of contract for refrigeration system at the Vermont, and so forth. I ask you to look at those two and say whether or not you signed them?

10 A. March twenty-sixth, I signed that. March first, I signed that.

Mr. Cole: I ask those be marked.

(Papers marked D1 for identification and D2 for identification.)

Q. Those receipts say you got a thousand dollars on March first and a thousand dollars on March
20 twenty-sixth. Did you get it?

A. Got notes.

Q. Did you get the cash?

A. No.

Q. Why did you say you got it?

A. Because I took his note for cash.

Q. Do you give receipts saying in cash, is that your custom, when you get a note?

A. We have done it.

Q. Is that your custom?

30 A. I never paid any attention to it before, Mr. Cole.

Q. Did you ever before, Mr. Nusbaum, give a receipt saying it was in cash when in fact it was a note you got?

A. Yes.

Q. Frequently?

A. We don't very often take notes.

Q. I ask you, frequently?

A. Well, I couldn't answer that.

Q. Don't you know at the time that you gave these two receipts to Mr. Stafford that he was receiving money from Roberts, trustee, or from Strauss under an advance money mortgage?

A. I do not.

Q. Did you know what he was going to do with these receipts?

10

A. I did not.

Q. Didn't you know that these receipts were to be handed to Strauss and Company or Roberts?

A. Positively did not. I never knew that Strauss and Company were interested in it at the time.

Q. Did you write the word "Triplicate" on these?

A. I did, because he handed me three sheets and I marked one "Original," "Duplicate" and "Triplicate." I didn't know what he wanted to do with them at all.

20

Q. Did you ask him?

A. No, because he didn't hand it to me. His clerk handed it to me.

Q. Did you think it was unusual that he should ask you to sign three receipts?

A. No, because sometimes we have to make out bills in duplicate and specifications in duplicate and we sign often receipts in duplicate.

Q. Tell me who it was handed you these receipts?

A. Mr. Elliott.

30

Q. And he didn't tell you what he wanted with them?

A. No, not a word.

Q. And you didn't ask him?

A. I didn't.

Q. And you didn't know at that time that these

receipts, or at least, one of them, was to be sent to Strauss and Company or to the mortgagees to show that this amount of money had been paid on account of this contract?

A. I positively did not. I had no idea of it at all.

Q. You didn't even know where Mr. Stafford was getting this money from, did you?

A. I positively didn't know, no.

10 Q. Do you know now?

A. No, I don't.

Q. Do you know now that there are mortgages against this property?

A. Yes.

Q. When did you find it out?

A. After he went into bankruptcy.

Q. Will you please tell me if you can recall when ever before you gave a receipt to anybody and give us the name and the place and the amount, for cash,

20 when what you got was a note?

A. I couldn't state that now.

Q. You have no recollection of any other case, have you?

A. Yes.

Q. Well, if you have, won't you tell us?

A. Well, I have given it to some architects already.

Q. Well, tell me one person, if you please, to whom you gave a receipt in cash when what you got was a note.

30 A. I couldn't state that off-hand, because I might make a mistake.

Q. Do you think you will be able to recall before the day is gone?

A. No, I don't. I would have to look up my books.

Q. Do you think you could tell if you looked at your books?

A. I might.

Q. Won't you look at your books —

A. You see, we don't take notes, Mr. Cole.

Q. Will you look at your books and be prepared to tell us when and where and to whom you ever gave a receipt for cash when what you got was a note?

A. Yes, I will look at them.

Q. You feel quite certain you have done that before?

A. I think so, yes. I wouldn't say positively, because I would have to look that thing up. 10

Q. How long have you been in business, Mr. Nusbaum?

A. Since 1905.

Q. As a business man does it strike you as being rather singular to give a receipt and say cash when you received a note?

A. I will explain.

Q. No. Answer the question.

20

(Question repeated.)

A. I want to say when I signed that I never noticed the word "in cash" on them.

By the Court:

Q. Who got the papers up?

A. Elliott.

Q. Who is Elliott?

A. Stafford's office. He was a clerk at the time. 30
I think he is one of the trustees in bankruptcy.

By Mr. Cole:

Q. What you say now is you didn't see the receipt? Isn't that it?

A. I say I didn't notice that I signed for it in cash.

Q. When did you first find out that you signed for it in cash?

A. The other day when Mr. Howard showed it to me.

Q. Then there is some question about your signing receipts for cash when you take a note?

A. We take notes and we have a bill head of our
10 company, and we will take a note and still receipt that paid up. We have done that lots of times, and I can instance right now that. They were just made out in a form like that—I can't tell you, but I can give you the names of people where we have made out bills and signed receipts that way.

Q. Didn't you read this part of the receipt before you signed it?

A. No, I just signed it and he handed me the note.

Q. You have a very clear and a distinct recollection
20 tion you didn't read these receipts before you signed them?

A. No, I won't say that. I will say I didn't notice the word "in cash" on it. I don't say I wouldn't have signed it if I had noticed it, because we do take notes and we do receipt these bills. We take a bill in duplicate and we have receipted those things, "Received in payment," and taken the notes for them. I didn't know what he was going to do with them or what he wanted them for at all.

30 Q. Coming back to these plans and specifications a moment, how could you determine how much to charge for this work without seeing the plans and specifications?

A. I saw the plans.

Q. Would that be enough?

A. From the plans I figured it out. Our refrig-

erating plant is put in on our own specifications, and I didn't need those specifications to figure it out.

Q. But you did need the plans?

A. Oh, yes. I saw them in Mr. Stafford's office. I want to explain that we put in the refrigerating plant —

The Court: I have cautioned you, Mr. Nusbaum, that it does not improve your case in the least with the Court to have any explanations that are not 10 asked for.

Q. You expected these things that you sold to Mr. Stafford to remain chattels until you were paid, did you?

A. I don't understand that question. In fact, I don't know what a chattel is, exactly.

Q. Well, goods. You expected them to remain personal property?

A. I expected to retain title to them until they 20 were paid for.

Q. As personal property?

A. What do you call personal property? I don't know how to answer that.

Q. Anything that isn't real estate?

A. Yes.

Q. You expected that, did you?

A. Yes.

Q. And you read this contract, before you signed it? 30

A. Yes.

Q. How long have you been in business?

A. 1905.

Q. You know, don't you, you can't file a lien for personal property?

Mr. Styron: I object to that. That is another legal question.

The Court: I think it is proper cross-examination.

(Exception noted for the plaintiff.)

(Question repeated.)

10

A. I don't know.

Q. Do you know why this provision was put in the contract?

A. Not to file a lien?

Q. I will read it to you. "The builder agrees to file no lien for any labor or materials furnished under this contract, and expressly waives the right to file the same. It is further agreed that no subcontractor for work or materials shall have a right to
20 file any lien for any sum which may be due or become due to him, any right to file such lien being hereby expressly waived." Why did you have that put in?

A. Well, in the Pennsylvania contracts that we sign, they have provisions like that, to prevent persons from filing a lien on a property, and this thing was copied from a Philadelphia contract I had completed with Mr. Stafford at Thirteenth and Spruce Street.

30 Q. Did you draw this contract?

A. Yes.

Q. This is your contract?

A. From the wording Mr. Stafford gave me.

Q. And you yourself put a clause in here, or caused it to be put in, that you wouldn't file any lien against this building?

A. Mr. Stafford asked ——

Q. I have asked a question

A. Yes, I drew it up.

Q. And you caused it to be inserted in this contract?

A. Yes.

Q. So you didn't expect to file any lien against this building for your claim, did you?

A. No.

Q. Well, if you knew that this property was to remain personal property and title was not to go out of you, why did you put a clause in that you wouldn't file a lien? 10

A. Mr. Stafford asked me to put it in.

Q. Well now, you say Mr. Stafford asked you to put it in. You have already testified you put it in yourself. It was a part of your scheme. Which is correct?

A. Mr. Stafford—I drew the contract. I didn't testify that I drew up this—I had this contract typewritten. We had drawn up several contracts, and Mr. Stafford spoke about different things, and this is the final result of conference between Mr. Stafford and myself. We typewrote that contract, though. 20

Q. Then my question is that since you say you were to retain the title to these goods as personal property, why did you have a provision inserted in this contract that you would have no right to file a lien?

A. Mr. Stafford asked that to go in there. 30

Q. And you agreed to it?

A. Yes.

Q. What did you understand was the purpose of it going in?

A. I don't know. I don't know what he did want it for.

Q. Did you ask?

A. No.

Q. Didn't you care?

A. We signed contracts —

Q. Did you care or didn't you?

A. Did I care? What do you mean?

Q. Anything about this clause going in the contract?

A. Well, I was willing for it to go in.

10 Q. What did you think it meant, Mr. Nusbaum?

A. Why, Mr. Stafford asked me to put that in.

Q. I don't care what Mr. Stafford asked you. What did you think that meant?

A. It meant no liens could be filed on that property.

Q. And that you hadn't any right to file a lien, didn't it?

A. No mechanic's lien, yes.

20 The Court: Well, would you have considered that you would have had a right to file a lien if that **pro**-vision had not been in the contract?

A. No.

Q. Why not?

A. Because we were acting on this, that these goods belonged to us and our way of getting them would be to take them out.

Q. Why did you have it put in?

30 A. Mr. Stafford asked that it go in.

Q. You knew you would have the right to take these goods out anyhow, didn't you?

A. Yes.

Q. And still you signed the contract providing there should be no liens filed?

A. Yes.

Q. Because Mr. Stafford wanted it that way?

A. Yes.

Q. He evidently thought you would have a right to file a lien, didn't he?

A. I don't know.

(Objected to.)

Q. Did you discuss that?

A. No.

10

Q. Why did he say he wanted it in there?

A. Didn't go into any question about it. The uniform architects in Philadelphia —

Q. I haven't asked you anything about that.

A. I want to explain why we had it in there. It is put in there from the Philadelphia contract we use in Philadelphia.

The Court: You have gone all over that.

(Recess taken until 1.30 P. M.)

20

(Afternoon Session, 1.30 P. M.)

LEE NUSBAUM, resumed.

Cross-examination, continued.

By Mr. Cole:

30

Q. What do you say is the value of the property you replevined?

A. At what time?

Q. At the time you replevined?

A. About sixty-two hundred dollars, I estimated it.

Q. How do you arrive at the figure?

A. Market value of the different materials, labor, which entered into it.

Q. Is that the value of the stuff in the building as it is now?

A. Yes.

Q. What is its value out of the building?

A. I didn't figure that up.

Q. Well, can you tell us what the value of this material is out of the building?

A. I couldn't off-hand. I could figure it up if I had time.

Q. You fix a value in the building in excess of what you agreed to install it for, do you?

A. Yes.

Q. Do you allow anything for depreciation?

A. In fixing the value of sixty-two hundred dollars?

Q. Yes.

20 A. Yes.

Q. How much depreciation do you allow?

A. Well, at that time I think we figured about five per cent depreciation.

Q. Did you figure depreciation really?

A. Oh, yes, we have got to do that.

Q. I know you have got to do it, but did you?

A. Oh, yes.

Q. Tell us, please, how you got the figure of sixty-two hundred dollars?

30 A. I would have to get you that list. I haven't got it with me.

Q. Did you make up a list?

A. I figured it up roughly at the time.

Q. Did you make up a list to show this sixty-two hundred dollars?

A. I didn't keep the list.

Q. I didn't ask you whether you kept it. Did you make up a list?

A. Yes.

Q. Where is it?

A. I haven't got it. I figured it up for Mr. Voorhees.

Q. Where was it?

A. With Mr. Voorhees.

Q. Did that list figure the stuff in the building or out?

10

A. My recollection is that it figured the stuff in the building.

Q. You knew, of course, if you were entitled to have these things back, you were entitled to have them out of the building, didn't you? Why didn't you figure the value out of the building rather than in?

A. Well, there would be a certain amount of labor taking that out.

Q. Then you haven't allowed for that, have you, 20 the value of the labor taking the stuff out?

A. Yes, that enters into that.

Q. How much of the sixty-two hundred dollars did you account for in labor taking it out?

A. Oh, about a hundred and fifty dollars.

Q. Did you put that down on paper?

A. My recollection is that I did.

Q. Why did you destroy the paper?

A. I often make notes of things like that.

Q. Didn't you know you had to testify to value 30 when you came into this court?

A. No, I didn't.

Q. You didn't?

A. No.

Q. Weren't you told you had to show the value of this stuff?

A. No, I don't remember being told that.

Q. Then for the first time this morning you learned you had to swear what the value of this stuff was, did you?

A. No, I can't say that that is so, either. I knew it before this morning.

Q. When did you find it out?

A. That I had to swear to the value of it?

Q. Yes.

10 A. I think it was last week at Mays Landing.

Q. Then you sat down, didn't you, and deliberate-
figured how much the value of these things was?

A. Yes.

Q. And then you destroyed the memorandum —

Mr. Styron: He does not say that.

The Court: What does he put the figures at now,
what damages?

20

Mr. Cole: The question is the value.

A. The value of that material now is still more
than it was at the time it came out. Things have
been jumping in price. Formerly materials was —

The Court: When was the suit brought?

Mr. Schimpf: August, 1918.

30

A. Labor has jumped up —

By the Court:

Q. Not new, but what was the stuff worth in Au-
gust, when this suit was brought?

A. Sixty-two hundred dollars, I figured it up.

Q. How much was the contract price?

A. Fifty-nine hundred dollars.

Q. And how long had it been used?

A. It had been used from June. Practically all of June, July, and part of August.

Q. Well, do you mean that as second-hand property it was worth sixty-two hundred dollars?

A. No, I didn't consider it as second-hand property at that time. It was too new for that.

10

By Mr. Cole:

Q. How much did it cost you to put it in, I mean labor?

A. I haven't got those figures with me.

Q. Have you any idea?

A. No, I haven't.

Q. Mr. Nusbaum, you pretend to tell this court you haven't any idea at all what the cost was?

A. What do you mean by the idea, within thou- 20
sands?

Q. Yes. Just give an awful guess of how much labor it cost to put that in. Make a rash guess.

A. Well, I wouldn't want to do that, because I might be wrong on that.

Q. You are not willing to estimate?

A. I would rather give it to you exactly. I can give you that.

Q. Can you?

A. Yes.

30

Q. When?

A. Later on, when I get at my books.

Q. How much will it cost you to take it out?

A. Cost about a hundred and fifty dollars to take it out.

Q. And when you take it out, will the pipe be in the same condition as when you put it in?

A. Yes, there is no deterioration on the pipes.

Q. With that pipe out of that building, I ask you how much you can get for that. What can you sell it for?

A. I can get as much as that plant, at least, if I had another plant to put it into.

Q. Suppose you didn't have another plant to put
10) it into, how much would you get for it?

A. I would get the value of the pipes, but there would probably be a little loss on the pipes on account of not fitting into another place.

Q. What was the value of that pipe in August when you brought this suit, out of the building?

A. I couldn't tell you that exactly.

Q. When did you first know that Mr. Stafford was in bankruptcy?

A. When did I know?

20

Mr. Styron: I object to that because it is wholly irrelevant.

The Court: I cannot tell whether it is irrelevant or not at this time. The objection is overruled.

(Exception noted for plaintiff.)

A. The first I knew of Mr. Stafford being in bank-
30 ruptcy was up in Philadelphia when the proceedings were brought there.

Mr. Styron: I move the answer be stricken out.

Q. Did you know as soon as the proceedings were brought?

A. Within a few days.

Q. Did you know they were going to be brought?

A. No, I didn't.

Q. Why did you wait until the bringing of this suit to record this sale at Mays Landing?

A. I didn't have any special reason for waiting.

Mr. Styron: I object to that because it is not a statement of fact.

Mr. Cole: He is under cross-examination.

10

Mr. Styron: Well, I object to it because it is not responsive to anything in chief, and because it is a misstatement of fact as to the time when the contract was filed.

Q. When was the suit brought, do you know?

A. Not exactly. August, some time.

Q. I will ask you why you waited from October twenty-ninth 1917, until August twenty-seventh, 20 1918, before having this agreement recorded?

A. Well, there isn't any special reason except this: that I thought it was recorded. Mr. Stafford filed that agreement and I thought that was the same as recording.

Q. How do you know he filed it?

A. Because he took that acknowledgment and said he was going to file it.

Q. You took his word for it?

A. Yes.

Q. What did he say he was going to file it for?

A. I didn't know. He didn't say anything to me about it.

Q. Didn't he tell you he was going to file it because he didn't want any liens against the building?

A. No, he didn't say anything about it. It isn't

30

usual for them always to take acknowledgments on these contracts, but he took it in this case, and he wanted an extra copy and he told me at the time that he wanted to have it filed.

Q. Why did you finally have this recorded?

A. Because we found out it wasn't properly recorded in the first place. My idea of how it was recorded and how it should have been were different.

Q. Did you think it was necessary to have it re-
10 corded?

A. I thought it was recorded.

Q. Did you think it was necessary to have it recorded?

A. Did I think it was necessary? Yes.

Q. Then if you thought it was necessary to have it recorded, why didn't you see it was done?

A. I thought it was done. Mr. Stafford had it done. Mr. Stafford had that recorded—I thought it was recorded. I find now there is a difference be-
20 tween recording and filing. Mr. Stafford had that filed right after the contract was signed.

The Court: Had it filed where?

A. Mays Landing.

The Court: Does it show it was filed?

Mr. Voorhees: Yes.

30

Mr. Cole: Undoubtedly it was filed at Mays Landing, with the idea of avoiding liens.

Mr. Styron: On account of it carrying a waiver of liens.

The Court: And it was afterwards recorded, was it, in the chattel mortgage book?

Mr. Styron: Yes. It seems to have been drawn in duplicate and the original retained by Mr. Nusbaum and the copy that the witness is now speaking of was filed by Stafford.

Q. Now, Mr. Nusbaum, what is this plant? What is its function?

A. To furnish refrigeration to the various refrigerators throughout the apartment house. 10

Q. Do you know how many apartments there are there?

A. I believe there is forty-two.

Q. How tall is the building?

A. Five stories, I think.

Q. If this plant wasn't there to refrigerate, how would the people keep their food?

A. Use ice.

Q. And how would they get the ice there? 20

A. Taken to the different apartments.

Q. Have to be carried there, wouldn't it?

A. Yes.

Q. So that this plant is quite a valuable asset to that apartment house, isn't it?

A. I consider it such, yes, sir.

Q. And to take it out and not to have it would work great inconvenience to everybody, wouldn't it?

A. Not after it is out. Use ice after it is out. 30

Q. You don't understand my question, do you? Would it be just as convenient for people to carry ice up and down all these apartments as it would to have the refrigeration plant in?

Mr. Styron: I object to that. This witness is not an expert on the matter of convenience, and that is an inference, as to whether it is more convenient to carry than to have it supplied.

The Court: There is something lacking in the proof respecting that matter. I have not a very clear conception of what this contrivance was like. You talk about a refrigerator. Is that what it was?

10

A. The refrigerator is the refrigerator in the apartment. Each apartment has a refrigerative box, just like an ordinary household refrigerator, with a compartment where ice is ordinarily put in, but we do away with that ice under our system and put a tank and a coil in there which takes the function of the ice, and it is operated from this machine in the basement.

20 By the Court:

Q. This runs throughout the building?

A. The pipes go into the apartments.

Q. Every apartment is connected with this system?

A. Yes.

By Mr. Cole:

30 Q. So that if that system is removed and there is no other system installed in its place, the only way for the people to get the refrigeration is by having ice carried to the several apartments, isn't it?

A. Yes, sir.

Q. Aren't these plants installed in nearly, if not all, the modern apartment houses?

A. No.

Q. How many have you installed in apartment houses in the last four or five years?

A. I should say about six or eight, I think.

Q. In Philadelphia?

A. Mostly all in Philadelphia except this one down here. They were all in Philadelphia except this one down here.

By the Court:

10

Q. I suppose the fact of the matter is, Mr. Nusbaum, that if an apartment house did not have this refrigerating plant, then the ice man would have to go upstairs with his ice and deliver it to the various apartments, and it would be used in the old fashioned way in a refrigerator?

A. They do it in the majority of apartments.

Q. That way?

A. With ice, yes, sir. The vast majority of them. 20

Mr. Styron: Have you those plans that have been referred to as the Bertram Ireland plans?

Mr. Cole: Yes. The defendant offers for identification the plans of Ireland about which the witness was cross-examined.

(Plans marked D3 for identification.)

30

Re-direct examination.

By Mr. Styron:

Q. Mr. Nusbaum, will you take those plans and say what appears thereon in relation to the re-

frigerating plant installed by you in the Vermont apartments?

A. On sheet marked one with a circle around it, sheet one, is a space on the basement plan marked "Refrigeration plant" and it has got two squares in there and two circles, and over the two circles is marked the word "motor."

Q. Over the two circles is marked the word "motor"?

10 A. Yes.

Q. What mark appears over the two squares or either of them?

A. No mark.

Q. And what did that indicate to you at the time you examined them previously?

A. Indicated that that room was set aside for a refrigerating plant.

Q. Was the refrigerating plant placed in that room in according with the plans?

20 A. Yes.

Q. And so far as the plans are concerned, was the work performed by you in accordance therewith?

A. How is that?

(Question repeated.)

A. Yes.

Q. Were there any specifications attached to those plans at the time you examined them?

30 A. No.

Q. Were any specifications shown you by any one?

A. No.

Q. Are there any specifications in existence, so far as you know, that relate to the materials that enter into the construction of the completed plant?

A. The specifications attached to that contract are the only ones.

Q. Are those the only specifications you had before you and you followed in the construction of that plant?

A. They are.

Q. When you commenced the construction of that plant did you find everything ready about the building to receive it?

A. Yes, to a certain extent. Everything was not ready. (1)

Q. Well, what was to be made ready by you?

A. Well, what was to be made ready by me?

Q. To be made ready by you?

A. We were to put the plant in place.

Q. Who was to erect the piers or whatever foundation there was on which the plant was to rest?

A. The owner.

The Court: What sort of a plant was this, in 20 brief?

A. The plant consists of a compressor, an ammonia compressor, which is driven by a belt from a motor. This plant drives ammonia, that is, in a general sense, drives ammonia up to these different apartments, these different coils in the apartments in the refrigerators, and that ammonia is taken back into this machine, compressed and goes through that same operation. It is a continuous cycle. (2)

Q. What is it made of?

A. The machine?

Q. Yes.

A. The machine is made out of cast iron and steel parts.

Q. Is it very heavy?

A. This particular machine is approximately seven thousand pounds, something like that, with everything together. It is shipped in parts.

Q. Has to be fastened to some stationary concern, doesn't it, to keep it in place?

A. We have put them on wooden skids already.

Q. Have you?

A. Yes. They put them on upper floors of buildings.

10 Q. This machine was bolted down to piers?

A. To a foundation; one foundation.

Q. How was that constructed?

A. That foundation was made out of concrete.

Q. Placed on a concrete foundation?

A. Yes, sir.

By Mr. Cole:

Q. Built to receive this very plant, wasn't it?

20 A. Yes.

Q. You knew that when you put it in?

A. Oh, yes.

By Mr. Styron:

Q. Did you find the bolts already in place ready to receive the machine when you went there?

A. Yes, they were in place.

30 Q. And if you were to remove the machine, would the bolts still remain there to receive another machine if one should replace it?

A. Yes.

Q. The foundations, you say you found in place, or were in place before you set up the machine?

A. Yes.

Q. So you had nothing to do with that construction?

A. No.

Q. When you had finally set up the plant and made the test, as you explained this morning, and delivered it to Mr. Stafford, did you suppose you had completed your contract?

A. Yes.

Q. And that occurred, you say, along about June?

A. First part of June.

Q. And it was your intention to perform your contract fully according to its terms?

10

A. It was carried out.

Q. And you supposed you did it?

A. Yes.

Q. Did Mr. Stafford either at that time or at any other time object to you that you hadn't performed your contract in accordance with its terms?

A. No, never.

Q. And were any of the notes which you have shown us given after the time when you delivered the plant to him as completed?

20

A. Yes.

Q. And at that time or any other time was any objection made that the contract hadn't been carried out or fully performed?

A. None at all.

Q. You have those notes, have you?

A. Yes.

Q. Will you produce them?

(Witness produces papers.)

30

Q. Were any of those notes dues and unpaid at the time that you commenced this suit?

A. Yes.

Q. Which ones?

A. One dated March twenty-eighth for one thou-

sand dollars; one dated April fifteenth for one thousand dollars; one dated May first for five hundred dollars. That is all.

Q. Let me have those three.

Mr. Styron: I will have those three marked for identification.

(Notes marked P3 for identification, P4 for identification, and P5 for identification.)

Q. Was there any portion of that contract price due for which you never received a note in accordance with the terms of the contract?

A. Yes. Final payment.

Q. That amounted to how much?

A. Nine hundred dollars.

The Court: Let me ask you this question, gentlemen: if the the plaintiff is entitled to succeed in this case, he is entitled to a return of the property or its value, and the measure of damages is the reasonable value of the property at the time?

Mr. Styron: The value of the property at the time of the conversion. The conversion, of course, is the time when demand was made and it was refused.

The Court: Has he shown what the reasonable value of this property was? He said it was worth sixty-two hundred dollars. The contractual consideration was fifty-nine hundred dollars, but the stuff had been put in and was in the building and had been used for some period of time, and now he says it was worth sixty-two hundred dollars, worth more after it had been used three months, evidently,

from his statement, than it was worth when it was put in.

Mr. Styron: You see, the contract is a year old, and I presume—I do not know without asking him, but I will ask him—I presume he bases his statement of value on the fact that prices had risen, and, of course, the damages for the detention will be estimated and probably make up the difference, so it will doubtless readjust itself in the end. 10

Q. Why do you say that the value of that property at the time of its conversion, which we will say was August twenty-seventh, was greater than at the time that you estimated to put it in complete under your contract for fifty-nine hundred dollars, or we will say October twenty-ninth? What caused the difference in value?

A. From October twenty-ninth, 1917, all materials and labors were steadily rising all through the year 1918, up till the time the armistice was declared. 20

By the Court:

Q. Yes, but, Mr. Nusbaum, this plant was designed for this particular place, was it not?

A. No. The machine is a standard machine, and the tanks and coils, we use them in all these different apartments, the same sizes.

Q. Could you use a second-hand property like 30 that?

A. Could we use it?

Q. Yes.

A. Certainly. Any number of them being bought and sold every day.

Q. Well, could you get an original price for it?

A. At the time this came up in cost, there were refrigerating plants that had been in use five or six or ten years, all which were selling for more money after being used that time than what they sold for originally. That is, you see, things had gone up in price. It was all in a short space of time that these things went up in price so quickly.

By Mr. Styron:

10

Q. Could that machine be removed from that building and used elsewhere?

A. Yes.

Q. Without alteration?

A. Yes.

Q. And at the prices as they were on August twenty-seventh last, could you have obtained as much for that plant installed in another apartment house as your contract provided for, fifty-nine hundred
20 dollars?

A. Could have obtained more for it.

Q. How much more?

A. Values were approximately about fifty per cent more at that time from the time the contract was made.

Q. How long would it take you to remove —

By the Court:

30 Q. Was the machine built purposely for this job?

A. No, a machine of that size, there will maybe be fifty or seventy-five of them built at one time.

Q. Are you a manufacturer?

A. We manufacture part of the apparatus, and the machine is built for us at Cincinnati. We build the ammonia condensor and things like that.

By Mr. Styron:

Q. And in removing that machine it would not be necessary to cause any defacement of the building in any form?

A. No.

Q. And the foundations on which it rests could remain there to accommodate another machine, Mr. Nusbaum, either of that or of like type?

A. Same design.

10

Re-cross examination.

By Mr. Cole:

Q. In answer to my question I tried to have you tell me how much that material would be worth or was worth on the day you brought this suit, out of the building, and you said you couldn't tell. Now, was that true or not?

20

A. I could tell, but I said it would take me time to figure it up.

Q. Have you figured it up since I asked you?

A. No, I haven't figured it up exactly.

Q. Then why do you persist in saying now it is worth more than it was when you put it in, if you couldn't tell when I asked you?

A. Because all materials and labor were going up steadily week after week all during the year 1918.

Q. Have you demanded payment of these notes from Mr. Stafford?

A. Yes.

Q. When did you make the demand?

A. At various times.

Q. Before or after he went into bankruptcy?

A. Before.

Q. What did he tell you?

A. Well, he didn't have the money.

Q. Did you ask him why he didn't have it?

A. No.

Q. Did you ask him where he was getting his money to pay for the building?

A. No.

Q. Did you care?

A. Certainly I cared.

10 Q. Why didn't you ask him?

A. Because I didn't consider it was any of my business.

Q. Wasn't it some of your business?

A. He might not have considered it such.

Q. Well, you knew, didn't you, that he had to borrow the money to pay for the building?

A. No, I didn't know that.

Q. Did you think he had the cash to pay for it?

A. Well, he was considered very good.

20 Q. Did you think he had the cash to pay for it?

A. Yes, I did.

Q. Then, if you thought he had the cash to pay for it, why did you think he wasn't paying you?

A. Because he has been doing business this way for years. Stafford took notes, took notes and paid them off time and time again.

Q. You want this Court to believe, do you, that when you made the demand on Mr. Stafford, to pay these notes, you thought he had the cash to pay for
30 that building?

Mr. Styron: I object to that. There was no duty on him to make the demand. I object to that as irrelevant.

(Question repeated.)

Mr. Styron: It is irrelevant and nonsensical.

(Objection overruled.)

A. I thought he had the cash to pay for our plant.

(Question repeated.)

Mr. Styron: I object to it. He was not concerned 10
with the building.

(Question allowed.)

(Exception noted for plaintiff.)

The Court: What is your answer?

A. My answer is that I thought Stafford had 20
enough money to pay for that plant.

Mr. Styron: I ask that the answer be stricken
out.

The Court: Motion is denied.

(Exception noted for plaintiff.)

Q. At the time you made the demand for these
notes? 30

A. Yes.

Q. If you thought he had the money with which
to pay and didn't pay you, why didn't you tell him
so?

Mr. Styron: I object to that as irrelevant.

The Court: I do not know just exactly the relevancy of this evidence.

Mr. Cole: This witness has testified that he had these notes. They were not paid, that he made demand. It seems to me I have a right —

The Court: You went into that in your examination.

10

Mr. Styron: Yes.

The Court: I think you opened the door wide enough, Mr. Styron, to permit this examination. I do not know whether it has any essential bearing upon the questions involved. This case, after all, comes down to a narrow issue, it seems to me, although I am not going to overlook any facts.

20

Mr. Styron: I did not ask him if he made any demand. I asked him if the notes were paid. The notes themselves show they were past due, and Judge Cole himself asked that question, and now he is cross-examining upon it.

(Question repeated.)

Mr. Styron: I object to that. It is absolutely irrelevant. It makes no difference why he did not
30 ask him another question after he received his answer that he didn't have the money.

The Court: I think that objection is sound.

(Exception noted for defendant.)

Q. If you knew that Mr. Stafford had money enough with which to pay your notes at the time you made the demand, why didn't you sue him to recover the money?

Mr. Styron: I object to that as a mis-statement of fact. He did not say he knew he had money enough to pay.

Q. If you thought Mr. Stafford had money enough 10
with which to pay your notes at the time you made
the demand, why didn't you sue him to recover?

Mr. Styron: I object to that on the ground that if he has a cause of action he can bring suit at any time.

(Objection sustained.)

(Exception noted for defendant.)

20

Mr. Styron: Do you gentlemen admit that there was a demand on August twenty-sixth, 1918?

Mr. Cole: No, sir, we do not.

HERBERT R. VORHEES, SWORN.

30

Direct examination.

By Mr. Styron:

Q. Mr. Voorhees, I show you a paper that purports to be an original or a copy of a demand for

certain chattels, it being addressed to Harris and Company, incorporated, individually and as agent for John Stafford, having control and possession of the property hereinafter enumerated, and then enumerating certain property, signed, "Lee Nusbaum, Herbert R. Voorhees, attorney of complainant," and ask you if you served a copy of that paper upon anyone, and if so, upon whom you served it?

A. I served it upon Mr. Zimmerman, who was
10 secretary of the H. G. Harris Company, and upon

Mr. Cole: The question was upon whom you served it.

A. Served it upon Mr. Zimmerman and Mr. H. G. Harris.

Q. Did you talk to Mr. Harris about it?

A. I did.

20 Q. What did he say about it?

A. Well, he said—he refused to give me the goods.

Q. And is that a copy of the notice that you served?

A. That is a copy of the notice.

Cross-examination.

By Mr. Cole:

30 Q. Now, Mr. Voorhees, you were the attorney of Mr. Nusbaum at that time, were you?

A. I was.

Q. Where did you serve the notice?

A. In the office of H. G. Harris and Company, first floor, Guarantee Trust Building.

Q. How far is that away from this Vermont Apartment, where this plant is installed?

A. About the equivalent of eight city blocks.

Q. What date did you serve it?

A. On the twenty-seventh of August.

Q. Is that the day the suit was brought?

A. Day before the suit was brought.

Q. Won't you give us the exact words that you used to Mr. Harris and the exact words he answered?

A. I had three different conversations. Do you mean at the exact time I served the paper? 10

Q. At the time you served the notice.

A. Both Mr. Harris and Mr. Zimmerman were together and my conversation was directed to both of them, that I was making demand for the possession of that refrigerating plant in the Vermont Apartments, and I asked them if they would give it to me, and there was some conversation before I got a definite answer that I can't just relate, and the outcome was that they refused to deliver it to me.

Q. Won't you tell us what was said, not the outcome? 20

A. I finally said, "Then you won't give me possession?" and they said "No."

Q. You finally said. What did they say before you said that?

A. Mr. Zimmerman said, "Let me have this notice; I want to send it to Mr. Stafford's attorney, Mr. Bell, of Philadelphia." That was one thing was said. Mr. Harris said, "It may be that Mr. Stafford has made a trust deed to Mr. Strauss." 30
Then one or the other in the conversation had said they were placed in possession of these goods by both Mr. Stafford and Mr. Strauss. That was another phase.

Q. What else?

A. I asked Mr. Zimmerman—not at this time.

That is about all I can remember at this time. I had had a prior conversation.

Q. On that occasion did either Mr. Harris or Mr. Zimmerman say to you that they had no authority to turn this property over to you?

A. No.

Q. At that time didn't you know that this property was so installed in that building that they couldn't have given you possession if they wanted
10 to?

A. Oh, I knew personally nothing about that. I supposed it was like any other fixture.

Q. Do you mean to say you didn't know at the time you served this notice that this was a refrigerating plant in the Vermont apartment house?

A. I knew that, yes.

Q. You knew also, didn't you, that they couldn't have turned these things over to you if they had wanted to?

20 A. If their statement was true I knew they could.

Q. How could they?

A. Before I served that, being anxious to get the one in possession of it, I went to Mr. Zimmerman and I said, "Have you charge of the Vermont apartments?" He said, "We have." I said, "If I want to take anything out of there or put anything in, to whom would I have to go to get possession?" He said, "To us." He said, "Mr. Stafford displaced his son in charge of the building and placed us in
30 charge of it and we are in charge there for both Mr. Stafford and Mr. Strauss and you would have to get permission from us."

Q. You knew at the time that Harris and Company was a corporation of the State of New Jersey?

A. Yes.

Q. At the time you made this demand upon them were you prepared to take this stuff out?

Mr. Styron: That is objected to.

Q. Had you made any provision to take this stuff out?

Mr. Styron: I object to that on the ground it is irrelevant, and inasmuch as the demand was refused, it is unimportant. 10

(Objection sustained.)

(Exception noted for defendant.)

Q. I understand you served it on the twenty-seventh?

A. Yes.

Q. That is the same day you instituted the suit? 20

A. I went afterwards and tested the summons.

Q. Same day the summons was served, wasn't it?

A. Yes; I went and prepared it afterwards.

Q. You had the writ in your office, didn't you, at the time you served this notice?

A. No. Prepared it afterwards and sent it over the following morning. Stayed that night and prepared it. It is dated the twenty-seventh, but I sent it to the sheriff the following morning by someone going on the nine o'clock train. 30

Mr. Styron: I offer that notice in evidence.

(Paper marked Exhibit P6.)

Mr. Styron: I also offer in evidence the three notes marked for identification.

(Notes previously marked for identification now marked Exhibits P3, P4 and P5.)

Mr. Styron: Unless there is objection, I will offer these notes in evidence also.

Mr. Cole: No objection.

Mr. Styron: Two notes, one dated June sixth, 10 1918, and the other July fifteenth, 1918, each for a thousand dollars.

(Notes marked Exhibits P7 and P8.)

Mr. Styron: Will you admit that H. G. Harris is president of the H. G. Harris Company and Zimmerman is secretary?

Mr. Cole: Yes.

20

Mr. Styron: Now, if your Honor please, with the reservation of permission by your Honor to introduce further testimony as to the value of the property at the time of its conversion, we rest our case. That is, if we shall deem it necessary to do so. I want to offer in evidence the copy of the contract in this case, which appears by the file mark to have been filed in the county clerk's office on the ninth of November, 1917, at eight A. M.

30

Mr. Cole: What what purpose?

Mr. Styron: Showing it was there on the files.

Mr. Cole: Objected to.

ANTHONY SIRACUSA, SWORN.

Direct examination.

By Mr. Styron:

Q. Are you connected with the office of the County Clerk of this county?

A. I am.

10

Q. In what capacity?

A. Deputy county clerk.

Q. Were you requested to bring the files of certain contracts filed by John Stafford or in his behalf in the county clerk's office?

A. I was.

Q. Is the paper which you hold in your hand, which purports to be a copy of the contract between Nusbaum and Stafford, taken from the files in your office?

20

A. It was.

Mr. Styron: Now I offer it in evidence.

Mr. Cole: Objected to as irrelevant and immaterial.

The Court: I do not see upon what theory the filing of a contract can be of any consequence.

Mr. Styron: It might be a little premature, but I wanted the proof of where it came from, with a view of offering it later.

30

The Court: It has already appeared that the contract was on file in the county clerk's office.

Mr. Styron: I ask to have it marked for identification at this time, with the privilege of offering it later.

The Court: I think it is the recording of the instrument that has legal significance.

Mr. Styron: That is not a recorded instrument. It is a filed paper. It will probably become important later on the question of notice that the other side may have had as to the existence of this contract, not the constructive notice of the recording, but the actual notice.

(Paper marked P9 for identification.)

PLAINTIFF RESTS.

20

DEFENDANT'S TESTIMONY.

Mr. Cole: Defendant offers in evidence Exhibit D1 and D2 which were offered for identification, and also D3.

Mr. Styron: They are objected to on the ground they are irrelevant, the testimony being that they do not truly represent the fact, there having been no payment.

30

The Court: I do not know how the evidence can be excluded. There is an admission that cash was received to the amount of a thousand dollars. Of course, whether that is so or not is for the Court to ascertain from all the facts. What difference would it make?

Mr. Styron: It would make all the difference in the world if you have a paper there that your Honor thinks enough of to admit in evidence in the face of the testimony that it does not mean anything at all, that there was not a thousand dollars paid. If the other side can show there was any cash paid, then it becomes a question for the jury, but not at present. There is nothing for a jury to pass on in that paper at the present time, because it is discredited by the testimony.

10

Mr. Cole: While that is not in my mind, I think the jury have a perfect right to take this receipt and take the testimony and say which time they think the witness was telling the truth.

The Court: I do not see how I can keep it out of the case. There was testimony. He was examined about it without objection. I think the receipt will be admitted. It may be connected up and have some other evidential value, but even if he was paid a thousand dollars and default was made in the rest of the payment, that would not prevent his recovery.

20

Mr. Styron: Would not make a particle of difference, but I was not objecting to it on that ground. I was objecting to it on the ground that up to this time it is repudiated and there is not anything to create a conflict of testimony.

30

The Court: Upon that ground it would be admissible. However, I fancy that these receipts are offered for the purpose of use in some sense respecting the mortgages, and if that is so, it may be admissible evidence.

Mr. Styron: That is so. They are offered for the purpose of laying a ground for an estoppel, a purely equitable remedy.

The Court: Well, I do not know. Estoppel is also cognizable by a court of law.

Mr. Styron: When the whole thing is entered into, the mortgages themselves, it might be admissible, but it is not at this time, because it does not mean anything.

(Papers marked Exhibits D1, D2 and D3.)

Mr. Styron: I suppose you limit your offer as to the plans to the sheet that has anything to do with this particular thing?

Mr. Cole: We offer the whole plan. We may limit the printing, but we would rather limit the printing than the offer.

BERTRAM IRELAND, SWORN.

Direct examination.

By Mr. Schimpf:

30

Q. Mr. Ireland, what is your profession?

A. Architect.

Q. And are you licensed to practice architecture in New Jersey?

A. Yes, sir.

Q. Where is your office?

A. Guarantee Trust Building.

Q. You do practice in Atlantic City?

A. Yes.

Q. Were you the architect employed by John Stafford to draw the plans for the Vermont Apartment house?

A. I was.

Q. Did you draw the plans?

A. Yes.

Q. I show you what purports to be the original tracings of the plans and ask you if those are the 10 plans of the Vermont apartment house?

A. Yes.

Mr. Schimpf: We offer them in evidence.

Mr. Styron: I object. There is nothing to show the relation between that and the refrigerating plant.

Q. Do these plans show the refrigerating plant 20 in the Vermont apartment house?

A. Yes.

Q. Was that refrigerating plant according to these plans installed by the plaintiff in this suit?

A. Yes.

Mr. Schimpf: Now I renew the offer.

(Plans admitted in evidence.)

30

(Plans marked Exhibit D4.)

Q. Now I show you some blueprints which have been marked for identification as D3 in this case, and ask you if those blueprints were taken from these original tracings?

A. Yes.

Q. They then represent the plans of the Vermont apartment house?

A. Yes.

Q. Will you look at the blueprints and indicate the sheets on these plans that show the refrigerating plant in that apartment house?

A. Sheet one.

Q. What does sheet one show?

A. Sheet one shows the plans, including the motors, tanks, and so forth. Sheet number two shows location in the first floor plan of each and every terminal of the system.

Q. And the terminals are in the ice boxes in each one of the apartments?

A. Yes. Sheet three likewise. Sheet four likewise.

Q. What sort of a building is the Vermont apartment house?

A. Apartment house.

20 Q. How many apartments are there in it?

A. Forty-two.

Q. Forty-two separate apartments?

A. And one janitor's apartment in the basement.

Q. How many rooms does each of those apartments consist of?

A. Well, they vary from two rooms, three rooms, four rooms and five rooms and bath and kitchen.

Q. So there are forty-two apartments, the least of which is two rooms and the largest of which is
30 five rooms and bath and kitchen?

A. Yes.

Q. How are they designed, for housekeeping?

A. Full housekeeping, yes.

Q. Dining room, kitchen, pantry?

A. Yes. With the exception of two which have kitchenettes two on each floor. Two on the first floor only.

Q. They are housekeeping apartments?

A. Yes.

Q. Is there an ice box in every apartment?

A. Yes.

Q. How high is the building?

A. Five stories and basement.

Q. What are the dimensions of the building?

A. I will have to refer to the drawings to give you the dimensions.

Q. I am satisfied with an approximate dimension. 10
I don't want the exact dimension.

A. I would say one hundred and twenty-seven on the front by one hundred and seventy-five in depth.

Q. One hundred and twenty-seven front by one hundred and seventy-five in depth? Is it a modern apartment house?

A. Yes, sir.

Q. An apartment house that brings comparatively large rents?

A. Yes.

20

Q. How is it with regard to ordinary conveniences of modern apartment houses? Has it a heat plant?

A. Yes.

Q. Electric lights?

A. Yes.

Q. Elevator?

A. Yes, freight and passenger.

Q. Freight and passenger elevators? Is there any means for tenants in that building to get ice without taking it up in the elevators?

30

Mr. Styron: Objected to. It is entirely irrelevant. They can go without ice.

(Objection overruled.)

(Exception noted for plaintiff.)

(Question repeated.)

A. At the present, through this refrigeration system.

Mr. Styron: I ask to have the answer stricken out.

The Court: Plaintiff's motion is denied.

10

(Exception noted for defendant.)

Q. What does the refrigeration system consist of?

A. Consists of ammonia tanks, compressors, motors, piping and coils to each and every apartment.

Q. And where are the motors and ammonia tanks and compressors located?

A. In the refrigeration room as marked on the refrigeration plan, sheet one.

20

Q. That is in the basement?

A. That is in the basement.

Q. How many pieces of machinery are there in that room?

A. Four or five.

Q. How large are the different pieces, the motors and compressors and oil separators and so forth?

A. Well, I should say the largest piece might be three feet is width.

Q. And how high?

30

A. Six feet.

Q. Six feet high and three feet in width?

A. Yes.

Q. And the other pieces, are they large, too?

A. Yes.

Q. How large?

A. Well, not quite as large as the one I mentioned.

Q. Are they heavy, these things?

A. The motor.

Q. The motor is heavy?

A. Yes.

Q. How much would the motor weigh?

A. Oh, I should say around a thousand pounds.

Q. Around a thousand pounds? How about the ammonia compressor; isn't that heavy?

A. Yes.

Q. Is that heavier than the motor?

10

A. Yes.

Q. How much would that weigh?

A. I should say around four thousand pounds.

Q. Necessary to have permanent foundations in order to place this machinery?

A. Yes, sir.

Q. And do your plans call for permanent foundations?

A. Yes, sir.

Q. How were those foundations built? Of what material?

A. Concrete.

Q. And how is the machinery fastened to the concrete?

A. Bolted.

Q. Will you describe to the Court how those bolts are put in the concrete and how the machinery is attached to the bolts?

A. The concrete is left in a rough state until the bolts are protected, and the bolts are set according to templets, and then concrete is filled in around these bolts and tamped down.

Q. Poured in around the bolts?

A. Yes.

Q. And becomes set?

A. Yes.

30

Q. So that the bolts and the concrete become a permanent structure together?

A. Yes, sir.

Q. Will you state to the Court what you mean by templet?

A. A templet is a sort of a sketch that gives us the dimension of all the bolts, and it is laid out in wood according to the sketch of dimensions.

Q. It is a wooden pattern, isn't it?

10 A. Yes.

Q. Where do you get that templet from, Mr. Ireland?

A. That was made from a sketch furnished by the refrigeration people.

Q. And that sketch shows the placing of these bolts, in the concrete permanently, does it?

A. Yes. Each motor has a different tie to its foundation.

Q. Has a different what?

20 A. Tie.

Q. By a tie you mean a different method of counter-sinking the bolts in the concrete foundation?

A. Yes, sir, according to the motor base.

Q. Who furnished the bolts in this case?

A. The refrigeration people.

Q. The Pennsylvania Engineering Company, Mr. Nusbaum, furnished the bolts?

A. Yes.

30 Q. Who furnished the sketch from which the templets were made, showing the location of the bolts and the tie and the different pieces of machinery?

A. Pennsylvania Engineering Company.

Q. And were the bolts furnished by them located in the concrete permanently?

A. Yes.

Q. Is there any way to take those bolts out of the concrete without destroying it?

Mr. Styron: I object to that. It is not within the papers at all. There is not any demand made in this suit for bolts, and I object to that question.

Mr. Schimpf: There is a demand for a refrigeration plant, of which these bolts are a part.

10

Mr. Styron: I will withdraw that objection.

The Court: The machine was evidently fastened to a concrete pier of some sort.

Mr. Schimpf: At this point let me call your attention to the fact that this is not a suit for a machine. Mr. Styron continually refers to this as a suit for a machine. It is for a plant. It is for all the piping and coils and tanks and everything that goes with it. 20

Mr. Cole: These bolts we are talking about are bolts they furnished as a part of the plant that are in the concrete and cannot be taken out without destroying the foundation.

Mr. Styron: Neither you nor we called the bolts personal property for which this suit was instituted. We do not claim the bolts at all any more than we do the cement that is beneath them. 30

The Court: In your demand and in your writ of replevin are the bolts a feature of your case?

Mr. Styron: Oh, no. We make no request for them.

Mr. Cole: But they are claiming a default in not paying for this thing as an entity, of which these bolts are a part.

Mr. Schimpf: They are not separating the price they are charging us. They could not come and pick out one or two pieces of machinery and say, "Because these pieces of machinery are detachable we claim that under a writ of replevin." They must
10 claim all or none.

Mr. Styron: We are not claiming any bolts, and we are not charging any price. This suit is to recover specific chattels. That is admitted on both sides, the pleadings show it and the Court cannot go beyond it. We are not asking to have returned to us any bolts, and they are not giving any bond for bolts.

Q. Now, after these foundations are put in and
20 the bolts are permanently fastened to them, how are the machines set on the foundation?

A. Set right down on —

Mr. Styron: I object to the form of that question. It contains the assumption that they are permanently fastened, and that is the very question we are here to determine.

The Court: Strike out permanently and say after
30 they are fastened, and the Court will say—the test is whether they were a part of the freehold.

Q. Now, how is the machine set down with relation to the foundation and the bolts?

A. They set right down on these bolts, the bolts come through the engine base and they are bolted down.

Q. You spoke sometime ago of the terminals. What did you mean?

A. The coils that come in each and every refrigerator through each and every apartment.

Q. There is an ice box placed in every apartment?

A. Yes.

Q. And there is a coil and a brine tank placed in each ice box?

A. Yes.

Q. How are they connected with the ammonia compressor and the ice machinery generally downstairs?

A. With a direct pipe.

Q. So there is a feed pipe and a return pipe that runs from this ice machine all through this apartment house, isn't there?

A. Yes.

Q. I say one. There are many, aren't there?

A. Several.

Q. How do they go? Go all the way to the top 20 floor?

A. Yes.

Q. How do they get through the other floors?

A. They go right straight up on a vertical line right up to the air space and then cross over and come down and return.

Q. So they pierce all of the floors all the way up to the ceiling and above the ceiling?

A. Yes.

Q. And then cross over the air space and come 30 down and return?

A. Yes.

Q. The air space is between the ceiling and the roof, is it?

A. Yes.

Q. How many feet of pipe are there, approximately, in this house?

A. Approximately I should say between —

Mr. Styron: I object to that.

A. —twelve hundred —

Mr. Styron: On the ground it is wholly unimportant how many feet of pipe there are in the house. The question is how many do we claim and are they all there?

(Objection overruled.)

(Exception noted for plaintiff.)

Q. Now answer it, Mr. Ireland.

A. I should say around twelve hundred.

20

Mr. Styron: I ask to have the answer stricken out.

The Court: Plaintiff's motion denied.

(Exception noted for defendant.)

Q. Any fittings along with that pipe?

A. Oh, yes.

30

Q. What do the fittings consist of?

A. Regular joints, offset T's, return T's.

Q. Unions and bends and so forth?

A. Yes.

Q. Were there any electrical connections with this plant?

A. Yes, electrically driven.

Q. It is an electrically driven plant?

A. Yes.

Q. How do the feed wires come in? Where do they come from?

A. They come from Vermont Avenue.

Q. Are they located in pipe conduits?

A. Yes.

Q. Do the pipes go through the walls?

A. Yes.

Q. Now, this plant was contemplated by you as 10
part of the general construction of the apartment
house in making your plans and specifications?

A. Yes, sir.

Q. Is such a plant necessary to the use and enjoyment of that apartment house?

A. It is.

Q. Could this plant be taken out of the apartment house without doing any injury to the building?

A. It could not.

Q. Why couldn't it be taken out, Mr. Ireland? 20

A. Well, it would leave big holes in the floor and ceilings, tear the walls to pieces throughout.

Q. Is it possible to get the plant out of the house without taking down the doors or part of the walls?

A. It is not.

Q. And why isn't it?

A. Couldn't get in in the beginning. Had to tear the doors apart to get it in.

Q. It is too big, isn't it, to come out, without taking out part of the walls or doors? 30

A. Yes.

Cross-examination.

By Mr. Styron:

Q. What would it be necessary to do, Mr. Ireland, to disconnect that refrigerating plant in the building? In other words, how could you disconnect it?

A. You would have to unbolt it in the basement.

Q. You are now speaking of the machine below?

10 A. Yes. Then you would have to disconnect your electrical system.

Q. In unbolting it what would you have to do, what form would you have to go through; merely unscrewing a nut?

A. Yes.

Q. Couldn't you unscrew a nut and then lift it right off its foundation?

A. You would have to put a jack under it to lift it.

20 Q. Could you unscrew the nut by which it is secured to the foundation and if you had power enough lift it off?

A. Yes.

Q. What injury would that cause to the building, the mere doing of that?

A. Why, it would put all the refrigeration out of order.

Q. Yes. Assuming that it would put the refrigeration out of order, it wouldn't injure the building in
30 any other way, would it, by unscrewing those nuts and lifting it off?

A. That one process of lifting the motor off wouldn't injure the building.

Q. Are you speaking now of the motor?

A. Yes.

Q. That may be lifted off by merely unscrewing the nuts?

A. Yes.

Q. And if the door were wide enough, it could be taken through without hurting the building?

A. Yes, but the door isn't wide enough.

Q. Never mind. If it were wide enough, that could be done?

A. Yes.

Q. What else is there that may be lifted without doing any particular hurt to the building?

A. There is nothing except the tanks. The tanks 10
may be.

Q. Where are the ammonia tanks located that are down there?

A. In the refrigeration room.

Q. Don't you know there are no ammonia tanks in the refrigeration room?

A. Brine and all together.

Q. Don't you know there are no brine tanks down there, too? Don't you know that?

A. Supposed to be.

20

Q. Don't you know that there never were any down there and there aren't any now?

A. No, I do not.

Q. Well, do you know that there is?

A. Yes.

Q. Where are they located in that room?

A. Supposed to be located on the ——

Q. I say are they there, not whether they are supposed to be, but are they there?

A. They may be removed, but it was the inten- 30
tion to be there.

Q. Intention when? When was it intended they should be there?

A. When we designed this building.

Q. What sort of a refrigerating plant did you have in mind when you drew those plans?

A. I had compressors and a brine tank and so on.

Q. Did you have this particular type in mind at the time?

A. Not particular. I made it general so any person could figure on it as near as possible.

Q. You had charge of the building during the time of construction, didn't you?

A. Yes.

Q. Wasn't the building ready to receive this
10 plant?

A. Yes.

Q. And wasn't it constructed especially so as to receive it?

A. No.

Q. Everything done that had to be done up to the time that the plant was to be installed?

A. Yes.

Q. And weren't the floors pierced by you folks?

A. They were put in according to the templets.

20 Q. Whatever the templets were, but weren't they actually pierced either by you or by Mr. Stafford or by someone acting for him, and not by the plaintiff?

A. Well, they were put in according to the templet and also for a flywheel.

Q. I am asking you whether or not all the holes were not ready, made for the refrigerating people to run their pipes through?

A. No.

30 Q. They weren't?

A. No.

Q. And don't you know that the contract calls for the holes in there for the running of the pipe through to carry this ammonia?

A. I haven't seen the contract.

Q. Then you don't know about that?

A. No.

Q. Now, how high did you say that machine is in the cellar?

A. Well, taking the over-all dimensions, about six feet.

Q. You are including the foundation?

A. Yes.

Q. And how high were the foundations?

A. I would say about that high. (Indicating.) 10

Q. And how much did you say it weighed?

A. I should say the whole thing, around about five thousand pounds.

Q. And you spoke of twelve hundred feet of pipe. What sort of pipe did you mean?

A. The risers, feeds, and returns.

Q. Did you mean the pipe connected with this refrigeration plant?

A. Yes.

Q. You didn't have in mind gas pipe or other pipe? 20

A. No.

Q. How many motors are there on that job?

A. One.

Q. Tell me in what respect it would injure that building to move that plant.

A. To begin with, we would have to take down our door between the public hall and the basement and a cold storage room.

Q. Is that an inner door?

A. Yes. 30

Q. What else?

A. Next we would have to tear the refrigerators all to pieces.

Q. Whose refrigerators?

A. Through the building.

Q. You mean these refrigerators that are now being sued for?

A. Not the refrigerators, the box, I will say, in which they enter.

Q. When were the refrigerators placed there?

A. The refrigerators, I should say, in February.

Q. Before this machine was put in or afterwards?

A. Well, the pipes were put in there and run up to these boxes.

10 Q. Run through holes in the boxes?

A. Yes.

Q. When you speak of refrigerators, do you mean the boxes to which these pipes run?

A. Yes.

Q. And they were placed there by the owner of the building, were they not?

A. Provided under the contract.

Q. And the holes through which the pipes run were made by the owner of the building or contractor, were they not?

20

A. Some of them were. Some were made by the other people.

Q. And those coils could be merely disconnected inside and lifted out and the pipe withdrawn through that hole that was made by the owner or the contractor, could it not?

A. Not unless it deteriorated the box.

Q. In what way would it deteriorate the box?

A. On account of its insulation, cork insulation.

30 Q. Are you sure it touches the insulation?

A. Yes.

Q. Have you examined it?

A. Yes.

Q. Are you saying on oath that it does?

A. Yes.

Q. When did you examine it?

A. Why, the fact that it had to go through the insulation to get in. There is one condition where a hole, big riser goes right up through the whole box.

Q. You say it would destroy the insulation?

A. Some of it. Injure it, I say.

Q. In what respect would it injure it, Mr. Ireland?

A. Well, it would cause a vent, and if we used 10 ice in there, we would have to put in floor vents and floordrains which are not there.

Q. Would that damage be great?

A. Yes.

Q. How great in each box?

A. In each box?

Q. Yes.

A. Well, I should say to put it in condition so we may use ice it may cost twenty-five dollars a box.

Q. Do you know what the cost of installing the 20 box was?

A. I never had the cost of it.

Q. How do you happen to know the cost of repairing the box from which the coils are removed?

A. I am saying what would have to be done. About that.

Q. How many are there of them?

A. Forty-three altogether.

Q. How many boxes would the removal of the coil injure in the way you have described? 30

A. Forty-three.

Q. All of them?

A. Yes.

Q. Didn't you say a few minutes ago only a portion of them?

A. No. Then I haven't understood your question. You asked me how many boxes?

Q. Each box in the removal of the coil would be injured, you say?

A. Yes.

Q. And how were those boxes fastened to the wall?

A. Nailed.

Q. Merely by nails?

A. Yes.

Q. Do they stand on legs, those boxes?

10 A. Yes.

Q. And are you sure that they are nailed to the wall?

A. Yes.

Q. How many nails?

A. That I don't know.

Q. How do you know they are nailed?

A. They are supposed to be a stationary box.

Q. How do you know it?

A. I saw it.

20 Q. When did you see it?

A. When they were building them.

Q. Did you do the nailing yourself?

A. No.

Q. Or superintend it?

A. Yes.

Q. What was the reason for nailing them if they had feet or legs on which to stand or other support?

A. Sanitary purposes.

30 Q. Why does it conduce to sanitary purposes to nail them?

A. So the box would be stationary.

Q. Then it wasn't sanitary purposes?

A. Yes. That is the reason they were on legs.

Q. Why does the fact that the box is stationary conduce to its being sanitary?

A. It would be stationary on account of the pipes coming through, so as not to make any leaks.

Q. Wouldn't the pipes themselves hold it in place?

A. No.

Q. Now, what sort of an arrangement is there for connecting or disconnecting the coil within the box?

A. I didn't get your question.

(Question repeated.)

10

A. I don't think there is any.

Q. Do you know whether there is or not?

A. No.

Q. You don't know?

A. No.

Q. Did you look in the box and look at the coil?

A. I never took particular—I did, but I didn't take particular notice of it.

Q. Then you are not able to say whether it could be done or not, are you?

20

A. I am speaking of the hole that would be left there where the pipes enter.

Q. I am speaking of the coil that is in the box. Could that be removed?

A. The coil may be, yes.

Q. And it is so attached that it could be detached without injury, isn't it?

A. To the coil, possibly, yes, but not the box.

Q. And without injury to the box itself?

A. To the box.

Q. So that another coil might be substituted for it?

30

A. Of course, they could attach another coil to it.

Q. So in that way the injury that you speak of could be avoided, could it not?

A. The injury I have in mind, yes.

Q. That injury that you have in mind would result from removing the pipe that entered the box through the floor?

A. Yes.

Q. And if that pipe were left at the point where it enters the box, or just inside of the box, then the coil might be removed without injury?

A. Yes.

10 Q. Now, what did the refrigerating plant contractor have to do with the electrical apparatus, electrical connection?

A. I don't think he any more than made his electrical connections right from the room.

Q. Inside?

A. Yes.

Q. Mr. Ireland, you are not familiar with this type of refrigerating plant, are you?

A. Not so very well.

20 Q. Have you seen others like it?

A. Not exactly. I have seen others, but none exactly like it.

Q. Do you know how many there are in Atlantic City?

A. Oh, no.

Q. Do you know whether there are any here or not?

A. I don't know whether there is any more exactly like this system.

30 Q. This is standard, isn't it, as far as you know, a standard type?

A. It is one of the standards, yes.

Q. One that could be moved from one place and used at another?

A. Well, he would have to do a lot of cutting of

pipe, I suppose, and different connections and different joints and different layout.

Q. If the building was the same, it could be used?

A. If the building was exactly the same.

Q. And the building was such as required that size and type, it could be used on a foundation similar, couldn't it?

A. You could use second-hand stuff anywhere.

Q. You could move in again another machine of the same kind to put it on this same foundation? 10

A. No, sir.

Q. What would prevent?

A. How would you bolt it down? Each motor has different bolt holes.

Q. I mean assuming it is a standard type, would the new motor be of the same size?

A. They all have different spaces for bolting.

Q. Of the same type?

A. If you had the same motor, of course not.

Q. Wouldn't it be possible to purchase another of 20 the same type, same motor?

A. I don't know.

Q. If it were, couldn't it be used on those foundations?

A. If you had an exact duplicate, of course you could.

Q. This is supposed to be nine ton refrigeration plant. Would there be anything to prevent another nine ton refrigerating plant of the same type put there? 30

A. Not of the same type.

Q. It wouldn't destroy the foundations a particle, you say, to remove this by unscrewing the nut and removing it from its bed?

A. No, sir.

Q. The only difficulty would be in removing it from the building?

A. Yes.

Q. Weren't all the doors on at the time the machine was put in?

A. They were all framed up.

Q. Weren't the doors hung?

A. No.

Q. That you are sure of?

10 A. Yes, because we had to take the door and door jamb out to get in there.

Q. Well, at the time it was moved in, you had to take the door off and the door jamb?

A. Door jamb.

Q. And it could be removed by going through that same process?

A. Yes. It would injure the building.

Q. And that would be the extent of the injury, so far as moving it out was concerned?

20 A. Yes.

FRANK A. TUCKER, SWORN.

Direct examination.

By Mr. Schimpf:

30 Q. Mr. Tucker, were you the superintendent of construction on this Vermont apartment house?

A. I was.

Q. And you were employed at that time by Mr. Stafford?

A. Yes.

Q. You are familiar with the plans of the building, aren't you?

A. Yes, sir.

Q. And are you familiar with the character and type and location of the refrigerating plant?

A. Yes, sir.

Q. Will you describe to the Court what that plant consists of and how it is located in the building?

A. It is located in the basement off of the Vermont side of the house, installed on foundations, consists of motor, engine, brine coils, pipes leading from the coils to the boxes in each apartment.

10

Q. And how are the boxes constructed in each apartment?

A. Boxes are constructed of cork bottom, sides and top.

Q. Cork?

A. Yes, sir.

Q. How are they fastened to the building?

A. They are fastened by cement.

Q. There is a brine tank and coil located in each box?

20

A. Yes, sir.

Q. Is there any way to get them out without destroying the box?

A. No, there isn't.

Q. Now, will you explain to the Court why they can't be taken out without destroying the box?

A. The brine coil is inside of a metal casing. The coil is connected with the intake pipe by a little connection which you can unscrew, which drops down, but we have to relieve this metal box, which is built up above, we would have to tear the metal box apart to get the coil out. The coil then could be removed through the large opening, but the boxes are so constructed and the shelves are so put in there that this metal box which holds the brine would have to be pulled apart, taken apart before you can get the coils out.

30

Q. And you say the boxes are part of the building, cemented fast to the building?

A. Yes, sir.

Q. Could those pipes and fittings be withdrawn from that building without doing any injury to the building?

A. No, sir.

Q. Could the bolts be taken out of the foundation without destroying the foundations?

10

Mr. Styron: I object to that on the ground that we are not asking to take out the bolts. We are making no demand for bolts.

Mr. Schimpf: Bolts are specifically part of our contract.

Mr. Styron: Not part of our demand, however.

20 Mr. Schimpf: I take it that they must demand the goods they put in, not part of them.

30 The Court: Upon the theory that the case is being tried on, the evidence, I think, is relevant. The defense now is undertaking to show that this so-called property which, according to plaintiff's contention, was to be regarded as personal, and the title not passed to the vendee until payment was made, became a permanent fixture attached to the freehold and therefore a part of the freehold. That is the theory of the defense. Whether it is a legally sound contention or not is something we have to deal with afterwards. That is another question. We are taking the proof now.

Mr. Styron: If your Honor please, we concede

that the foundations that came up from the ground, on which this rested, are real estate. We concede that the bolt is real estate, because that is fastened in the foundation, but we are not asking for it and it is not in the case at all, and we cannot see the relevancy of asking into that.

The Court: Granting all that to be true, it may throw light upon the character of this plant. It may throw light on it, that is all. Its bearing may have that aspect. I do not know. 10

Mr. Schimpf: We are insisting, of course, that the foundation bolts are part of the nine ton refrigerating plant which they put in.

The Court: Your theory is that the plant became a part of the freehold and the legal estate in the freehold went with the mortgages, a defeasable conveyance, went with the mortgages. That is your defense. I do not know whether it is sound or not. I am not expressing any opinion. I do not entertain any opinion on the subject. I am going to wait until I am instructed by counsel. 20

Mr. Styron: I am objecting to that on the further ground that if that is the purpose and that is the reason for having that examination and the basis of it is a real estate mortgage, that it is also irrelevant from the fact that they can make no claim under a real estate mortgage in this suit. 30

Mr. Schimpf: It is recorded both ways, so that need not concern you very much.

Mr. Cole: The mortgage is recorded both as a real estate and chattel mortgage.

Mr. Styron: That does not help you any, because it is recorded as such, if it is not such.

Mr. Cole: It is such.

Mr. Styron: It covers these chattels.

— Mr. Schimpf: Yes. Not by name, but it covers them all in the building.

10

(Question repeated.)

(Objection overruled.)

(Exception noted for plaintiff.)

A. They could not.

Mr. Styron: I move the answer be stricken out.

20

The Court: Plaintiff's motion denied.

(Exception noted for defendant.)

Q. Who furnished the bolts, Mr. Ireland?

(Objected to.)

A. Pennsylvania Engineering.

30

Mr. Styron: On the ground it is irrelevant and on the ground there has been no basis furnished showing an interest on the part of the defendant.

(Objection overruled.)

Q. Now you may answer it.

A. Pennsylvania Engineering Company.

Mr. Styron: I move the answer be stricken out.

The Court: Plaintiff's motion is denied.

The Court: Who furnished the bolts?

A. Pennsylvania Engineering Company. 10

Mr. Schimpf: Lee Nusbaum trades as the Pennsylvania Engineering Company.

Q. Mr. Tucker, at whose direction were these foundation bolts set?

A. At the direction of the Pennsylvania Engineering Company.

Q. And by what method did they indicate how they should be set? 20

A. They submitted a plan showing the foundation. We built a form of wood and those bolts were dropped into this wooden form and the concrete foundation poured around them.

Q. According to a plan furnished by the Pennsylvania Engineering Company?

A. Yes.

Cross-examination.

30

By Mr. Styron:

Q. Of how many pieces does that plant consist in the refrigerating room, I think you call it?

A. In the refrigerating room?

Q. Yes.

A. Do you mean the refrigerator itself?

Q. In the refrigeration room, of how many pieces does the plant consist at present? What is there down there in the basement?

A. In the basement you are talking?

Q. Yes.

A. Well, there is an engine, a motor, the brine coils.

Q. What else?

A. The electrical appliances for starting the motor.
10

Q. What else?

A. Fly wheel in connection with the engine.

Q. That is on the engine, isn't it?

A. It didn't come on.

Q. It is on it now?

A. It is on it now.

Q. I am speaking about its present physical appearance. As the machine now appears, it consists of what?

20 A. I have enumerated what it consists of.

Q. Those things, joined together, make the plant, do they?

A. Yes.

Q. When did you last see that plant?

A. Last September.

Q. At that time did you find ammonia tanks?

A. Surely.

Q. Did you find brine tanks?

A. No.

30 Q. Did you find brine coils?

A. Found coils, certainly.

Q. Before you spoke of them as brine coils. Is that what they were that you found?

A. Well, I don't know what you term them.

Q. I am asking what you term them.

A. They are coils of pipe.

Q. How did you find that the motor ——

A. Coolers, possibly you would term them.

Q. How did you find that the motor was fastened, if it was fastened?

A. It was fastened on a concrete foundation.

Q. How high?

A. About two feet.

Q. By whom had that been built?

A. The concrete foundation?

Q. Yes.

10

A. By John Stafford.

Q. Built ready to receive the motor?

A. The motor.

Q. And the bolts were put in by whom?

A. John Stafford.

Q. At the suggestion or request of the ——

A. Pennsylvania Engineering Company.

Q. Is there any way of getting that bolt out?

A. The bolt?

Q. Yes.

20

A. Break the foundation.

Q. Couldn't it be gotten out otherwise than by breaking the foundation?

A. Not the bolt.

Q. Couldn't it be dropped through?

A. Where?

Q. Anywhere?

A. No, sir.

Q. Isn't there a nut on the lower end so you could unscrew it?

30

A. No, sir.

Q. That you are sure about?

A. Yes, sir.

Q. Now, how could you remove the motor from the foundation without doing any injury?

A. Unscrewing the nuts at the top of the bolts.

Q. And that could be done without causing any injury at all to the foundation, could it not?

A. Yes, sir.

Q. And then what other thing could be removed without causing injury, that you find in the basement or refrigerating room?

A. Injury to the machine?

Q. Injury to the house, building?

A. Well, you could loosen everything that is in
10 the room.

Q. You could loosen it and it would cause no injury to the building?

A. Not to the foundations, no.

Q. What injury would it cause and to what portion of the building?

A. Why, it would disturb the refrigeration portion of the building.

Q. Yes, but assuming that the refrigeration portion was disturbed, as it would be if you were about
20 to remove it, how would the building itself, the structure itself be injured by removing that plant?

A. We would have to take down walls that would permit of the egress of the machine.

Q. What portion of the walls would have to be removed?

A. The walls to the refrigerating room and whatever point was determined on that it would be taken out.

Q. Now, that machine was brought there in parts,
30 wasn't it?

A. Yes, sir.

Q. And set up, assembled while there?

A. Yes, sir.

Q. Couldn't it be taken down the same way and removed without causing this injury you are speaking of?

A. No; we didn't have these walls up when the machine was brought in and set.

Q. What portion of the machine is in the walls that would have to be repaired?

A. It isn't in the walls. You would have to take the walls down to get it out of the room and out of the building.

Q. How wide is this machine, you say? What is its dimensions?

A. Well, that cooling system, I suppose, is about 10 ten feet long and possibly five or six feet high. The engine in itself is possibly ten feet long. The fly-wheel is six feet high, possibly.

Q. The flywheel could be taken off and rolled out, couldn't it?

A. Well, it could be rolled out, yes, but you are asking for dimensions.

Q. The flywheel could be removed, taken off and removed without injury to the building, couldn't it, taken through the doors as they now are? 20

A. I don't think it would go through the door to the refrigeration room.

Q. Would it go through any other door to get it out in the street?

A. There is no other door it could be taken out of except the door to the refrigeration room.

Q. Were the openings then at the time it was put in as they now are?

A. No, sir.

Q. What difference has occurred? 30

A. The brick wall was built afterwards, a portion of it, that permitted the machine to go in there.

Q. Were you there at the time that the machinery was put in?

A. Yes, sir, a portion of the time.

Q. Did you see any of it put in?

A. Yes, sir.

Q. And you say the wall wasn't built at that time?

A. Not all of it.

Q. What part of it wasn't built?

A. I can't answer that.

Q. Was the door there at that time?

A. I won't say. I won't answer the question.

Q. Are you willing to say now that that engine
can't be removed through the door, that that plant
10 can't be taken down, dissembled and moved through
the door? Are you willing to say that?

A. No, sir.

Q. I want to ask you one more question about
the ice box upstairs. Is that what you call them,
those things that are in the rooms that receive the
coils?

A. Refrigeration boxes.

Q. Were they there at the time the coils were put
in?

20 A. They had to be.

Q. Well, why can't the coils be disconnected and
removed from the refrigeration boxes without in-
jury?

A. Well, we have put other things in those boxes
since the coils were put in, and they would have to
be disturbed.

Q. What have you put in?

A. Compartments between the boxes and the re-
frigeration portion and shelves underneath. They
30 have all been cemented. Doors put on.

Q. In other words, you have put in different com-
partments, shelvings and other compartments?

A. Yes, sir.

Q. And they are composed of what?

A. Cement and metal.

Q. Are they so placed that they couldn't be re-

newed from time to time without disturbing the whole system in there? In other words, suppose one of those shelves breaks down, could it be repaired or a new one put in?

A. Why, surely. You can repair anything.

Q. Well, why can't that coil be disconnected from the inside and removed?

A. It can, but you will have to disturb the box to do it.

Q. Disturb it in what way?

A. You will have to pull a portion of it out and pull a portion of it down.

Q. What would that involve as to cost?

A. I don't know.

Mr. Schimpf: That is objected to. The question is whether it would be necessary to destroy any part of the building to take them out, not what it would cost to put it back again.

Q. Tell me how that box is attached to the building.

A. It is built of cork on bottom, top and three sides, cemented, covered with cement and plaster.

The Court: He has gone over that before.

Mr. Styron: He has not told me how it is fastened to the building.

A. Cement.

Q. Just by cement?

A. Cement will hold anything.

Q. Is it to the side of the wall, the floor, ceiling, or where is it fastened?

A. Against the side wall and the floor.

Q. And if it were necessary to detach that, could it be done by softening the cement?

A. No, sir.

Q. What would be necessary in order to remove that?

A. Break the cement.

Q. Could the coil be taken out without breaking the cement?

A. Yes, the coil could, but not the pipe connecting
10 with the coil.

Q. I am not asking about that. The coil could be removed, then, by merely leaving the pipe as it comes up through the floor and enters the box?

A. It doesn't come up through the floor. Yes, it comes up through the floor in some instances and down from the ceiling in others.

20 KENNETH THOMPSON, SWORN.

Direct examination.

By Mr. Schimpf:

Q. Mr. Thompson, what was your employment with relation to the Vermont Apartment?

A. Well, I had charge of the construction of the whole thing, over all. I was what you might call a
30 —I had charge of the construction part of it. Charge of the whole thing.

Q. Did you build the foundations for this ice plant?

A. Yes, sir.

Q. Under whose directions did you build them?

A. I built them from a plan sent, which I made a

templet from, from Mr. Nusbaum or from the Pennsylvania Engineering Company.

Q. Did Nusbaum furnish as a part of his plan the bolts that went in that foundation?

A. Yes, sir.

Mr. Styron: Objected to.

(Objection overruled.)

10

(Exception noted for plaintiff.)

Q. And they were attached to the foundation in such a way that they can't be taken out?

A. Yes, sir.

Q. Without destroying the foundation or part of it?

A. Yes, sir. Have to destroy it all.

Q. How were the bolts and the foundation built together?

20

A. We first made a templet of the size of the bed of the machine and the bolts are marked on that templet. That templet is stood up level. The bolts will come within about eight inches of the bottom of the concrete. Then about one-third of that bolt is bedded in the concrete solid and then there is a pipe, probably a two-inch pipe in diameter, put over the top of that bolt so if there is any variation the bolt can come and go. After the engine is set on that bed, those pipes are filled full of concrete and the machine bed is grouted up level. 30

Q. A templet is a wooden pattern, isn't it?

A. The same as the base of the machine.

Q. And it shows the bolt holes already bored in the base?

A. Yes, sir.

Q. And the bolts then are sunk in this concrete?

A. In that concrete.

Q. With reference to the holes that are bored in the machine?

A. Yes, sir.

Q. Couldn't put a machine on a foundation in any other way, could you?

A. No, sir.

Q. And these foundations and the setting of the
10 bolts was done according to a plan furnished you by the Pennsylvania Engineering Company?

A. Yes, sir.

Q. And you say the bolts were furnished by them?

A. Bolts were furnished by them.

Q. Mr. Thompson, how big are these machines which are down in the refrigerating room in the Vermont apartment house?

A. Well, the ice machine, taking the flywheel off, which can be detached, is not more than two foot
20 six wide, if it is that. I couldn't give the exact width—and I think it is about probably from seven to eight feet long.

Q. How high is it?

A. The height would be not more than four feet at the highest part, I don't think. Probably not more than three after the flywheel is off.

Q. How high is the flywheel?

A. I should say somewhere in the neighborhood of five and a half to six feet.

30 Q. How about the motors, what size are they?

A. The motor is not more than two foot square on the base.

Q. Could you get these machines out of the refrigerating room without taking down the doors?

A. I don't think so, because the time the machines were put in there was two piers and the machine

went in between and we couldn't put the brick work up between those two piers, which is about four feet in width, and the face of the elevator comes so close, narrows the hall up so that I don't think the machine would turn through a twelve inch wall and turn up by the elevator. I couldn't say positive, but I don't think it would.

Q. If you got them out, how would you have to take them out?

A. You would have to tear that brick wall out, if it 10 wouldn't turn out by the face of the elevator. The door of the refrigerating room is very close to the end of the hall, right at the end of the hall, and to get it out you would have to turn it again, and I don't think you could turn it in front of the elevator. I am not sure.

Q. And that would make it necessary to tear down the wall?

A. Tear down the wall, yes, sir.

Q. How many lines of pipe run from this refrig- 20 erating machine?

A. Nine.

Q. Nine separate lines?

A. Yes, sir.

Q. What is the size of those pipes?

A. The pipe is about a two-inch pipe, covered with a thick cork that makes the pipe about seven inches in diameter, and that cork goes right through the floor, as well as the pipe going through the floor. It has to be continuous.

Q. So that the pipes, with their insulation, are about seven inches in diameter?

A. Yes, sir.

Q. And they go from the basement all the way to the roof?

A. From the basement to the top of the box in the fifth floor.

Q. Don't those pipes go up through the ceiling?

A. The main ammonia pipe runs up into the air space, the loft, and drops down from there to the box. That is a smaller pipe.

Q. There are pipes that go all the way up to the air space between the ceiling and the loft?

A. Yes.

10 Q. How many floors do they pierce?

A. They pierce five floors nine times.

Q. Are there any other pipes running from this plant?

A. No, sir.

Q. What is the system? Is it a matter of a feed pipe running all the way up to the top floor and then feeding off as it comes down?

A. Yes, sir.

Q. So there is a main feed pipe and a return pipe?

20 A. Yes, sir, there is a main feed pipe up and that return pipe comes down through the box, feeding down through the box to the machine again.

Q. When you get to the fifth floor with that main feed pipe, the return pipe comes down and comes into the ice box and through the ice box and out the other side?

A. Out the side and down into the other box again.

Q. In other words, it pierces the floor again each
30 time?

A. Yes, sir.

Q. So there is a main feed pipe and return pipe that pierces every floor in the building?

A. The feed and return is the same pipe.

Q. Are they covered in the same insulation?

A. Yes, sir.

Q. What sort of boxes are these? How are they built?

A. They are built of cork with a wood front. The three sides, top and bottom on the floor is cork. The cork is nailed to the back, to the studding.

Q. Nailed to the studding?

A. With twenty penny nails. It is a three-inch cork and that is put up with cement between the layers of cork, and the sides are built of cement between the layers of cork, and the front is put up 10 against that with metal lath put on the wood on the front which runs back to the cork, and that is plastered with wet cement on the outside and inside, the boxes are. The floor is covered with asphalt and then has cement on top of the asphalt, on the cork.

Q. All this is a part of the floor and wall, is it?

A. It is all fast. It would have to be torn to pieces to be taken out.

Q. You say the pipe in some cases comes in the side and out the other side, and in other cases comes 20 in the top?

A. In one or two cases it does, but in most cases it comes out of the top of the box.

Q. And then out the other side toward the bottom?

A. Yes, sir.

Q. What is the inside construction of those boxes?

A. In the brine tank there is a coil that sits in that brine tank, and that tank is filled with about two-thirds full of brine that covers the coil, the ammonia 30 coil, and then on the other side there is shelves for the use of the tenants.

Q. How are those shelves built in and what are they of?

A. The shelves are a wire shelf fastened in on clips put in the cement.

Q. Clip that is put in the cement?

A. Yes, sir.

Q. Could you take those brine tanks and coils out without destroying the rest of the box?

A. You could take the coils out and the tank, yes, sir.

Q. What about the shelving?

Mr. Styron: I object to that.

10

A. The shelving is no part of the tank.

Mr. Styron: There is no demand for the shelving. It is not in the suit.

The Court: Is the shelving a part of this suit?

Mr. Styron: No, sir.

20 Mr. Schimpf: No, but what I gathered from the witness, the shelves are built into these boxes over the coils and the coils could not be taken out without destruction of the shelf.

The Court: Is that so?

The Witness: No, sir; the shelf is no part of the coil.

30 Q. I mean could you take the coils out of the box without destroying any part of the box?

A. Yes, sir.

Q. The shelves, then, are not permanently fastened in the box?

A. They are in a separate chamber.

Q. How about the tank?

A. The tank will come right out of the door, too. The door is large enough to take the coil and tank out. The coil is put up with a grouted joint. It has a bolt on each side. You take the bolts out and you can pull the coil and brine tank out together.

Q. How about the pipes?

A. You can't take the pipes out and leave the boxes any good, because I don't think you could patch that broken cork and cement so as to make the box any good again.

Q. You think the boxes would be wholly destroyed if the pipes were taken out of them?

A. I don't think they would be much good.

Q. What would be the condition of the floors?

A. The floors would have to be repatched and the ceilings would have to be repatched where the pipes go in.

Q. Where the pipe goes from the top of the ceiling through the air space, how about that? How would you get that out?

A. I don't believe you could get that part out of there.

Q. If you had to take it out, Mr. Thompson, what would you have to do to take it out?

A. You would either have to break the ceiling or break the roof.

Cross-examination.

By Mr. Styron:

Q. How wide is the door from the refrigerating plant room out?

A. I think it is two foot six. Two foot six or two foot eight. It is a standard door, and they are both standard sizes.

Q. How high?

A. It is six foot six or six foot eight. Can't remember the exact size, but that is a stock size.

Q. The flywheel, you say, is five feet high?

A. Five foot six or six feet, I think. Something in that neighborhood.

Q. Wouldn't that pass out the door?

A. Yes, sir.

Q. And the other machines you speak of, would
10 they not pass out that door?

A. I don't think the base of the compressor would go out, on account of the elevator.

Q. Do you know what the width of the compressor is?

A. No. I think it is about two feet. Somewheres in that neighborhood.

Q. Would it pass out if it were two feet?

A. It would pass out if you had a straightaway space, but the elevator comes so close to it I don't
20 think you can turn it.

Q. Suppose it were eighteen inches, would there be any difficulty in passing out?

A. Well, it would be pretty close to get it out. The elevator front coming up so close there narrows the hall up there.

Q. Was the elevator there at the time that this was introduced into the building?

A. Yes, sir.

Q. And do you know whether there was any diffi-
30 culty in getting it in the building?

A. They had a larger space, twice as large to get it in.

Q. Where was the space?

A. Between two piers which are bricked in now and a door put in there.

Q. Since it was introduced in there?

A. Yes.

Q. You spoke of the pipes piercing the floor. Who made those apertures in the floor?

A. The Pennsylvania Engineering Company.

Q. In every case?

A. Yes, sir.

Q. That you are sure of?

A. I am positive of it, because I was there and had charge of all the men. I know the man that they employed.

10

Q. So that through the holes that were pierced there for the purpose of introducing the pipes, those pipes could be taken down again and leave it practically uninjured save the patching?

A. How was that?

Q. I say those pipes could be withdrawn through that hole that was made and leave the floor practically uninjured save the patching that would be required to cover it.

A. Yes, sir.

20

Q. Now, is there any reason why that motor and engine which constitute the refrigerating plant might not be taken off that foundation or base without injury to the base?

A. No, sir.

Q. No reason at all why it might not be done?

A. No, sir.

Q. And there is no reason at all why the foundation or base might not be used for another plant of similar type and for the same purpose, is there?

30

A. Providing their bolt holes were exactly the same.

Q. Leaving the bolts as they are?

A. Yes, sir, providing the bolt holes in the base of the other machine were exactly the same, which is not always the case.

Q. Isn't it with a standard type?

A. Not always the case, no, sir.

Q. Do you mean to say a nine ton machine, such as this, would be different?

A. Every time you get a machine they will send you a templet for it. If you get a dozen of the same make machine, they will send you a templet or drawing for the bolts.

Q. Are you sure that Mr. Nusbaum or the Engineering Company sent you the templet?

A. Yes, sir, it was sent direct to me and mailed direct to me.

Q. But if it were possible to have a machine of the same type, it could rest on that foundation?

A. Provided the bolt holes were the same, yes, sir.

Q. But there could be no injury in the mere physical movement of this present plant from its present foundation?

20 A. Not lifting it off the foundation.

Q. And you are quite sure that it couldn't be gotten through the door into the street?

A. I don't think that it could. I won't say positive, because I am not sure of the dimensions.

Q. Are you sufficiently familiar with the structure of the thing to say that it can't be taken apart sufficiently to be removed without injury?

A. The base can't be taken apart.

Q. That is the base you refer to as being about
30 two feet, you think?

A. About two feet wide.

Q. And would it make any difference in your opinion if it were less than two feet wide?

A. It would all help to get it out, of course.

Q. If in point of fact it were eighteen inches wide, would that make any difference?

A. I wouldn't say it would, because the space is narrow there.

Q. You are not certain whether it could be removed or not, are you?

A. No, sir.

ANSLEY B. BOWEN, SWORN.

10

Direct examination.

By Mr. Cole:

Q. Where do you live?

A. 16 South Delancey, Atlantic City.

Q. What is your business?

A. Contractor and builder.

Q. How long have you been a contractor?

A. Thirteen years.

20

Q. Here in Atlantic City?

A. Yes, sir.

Q. Do you know the Vermont Apartment at Vermont and the Beach?

A. Yes, sir.

Q. Have you seen this refrigerating plant in question?

A. Yes, sir.

Q. Do you know its construction?

A. Yes.

30

Q. When did you last see it?

A. About two weeks ago.

Q. Did you make an examination for the purpose of testifying in this case?

A. Yes.

Q. Will you, as briefly as you can, describe that plant from the foundation to the roof and back?

A. Well, the plant consists of machinery in the basement about five pieces, set on concrete foundation, with pipes running from this machinery to the fifth floor and return, going through each refrigerator in each apartment.

Q. Can you remove the bolts which are in the foundation without doing damage to it?

(Objected to.)

10

(Objection overruled.)

(Exception noted for plaintiff.)

Q. What would happen if you undertook to remove the bolts?

A. You would have to break the foundation to get the bolts out, I should judge.

20 Q. Do you know whether or not you can remove the machinery in the room without doing any damage to the building itself?

A. Take it out of the room, you mean?

Q. Yes.

A. Why, I don't know, no. I didn't measure that.

Q. You didn't examine with that in view?

A. No, I did not.

Q. What would be the effect of removing the pipes that go through this building?

30 A. Well, you would leave holes in the floor and ceiling and also holes in the refrigerators.

Q. Can you remove the pipes that go in and out these ice boxes without doing damage to the walls?

A. Not where they go through the walls, no.

Q. What would happen?

A. You would have to break around them or you would have to break the holes large enough to get the pipes out.

Q. That would require replastering?

A. Yes, and the floor refinished.

Q. What are the floors made of?

A. Wood floor on top of concrete, I understand.
I didn't see under the wood floor.

Q. So it would work destruction more or less to the concrete, would it not?

A. Yes.

Q. Can you take that plant out from top to bottom without doing damage to the building? 10

A. You would have to do the damage I spoke of.

Q. That would be substantial damage, too, would it not?

A. I should think so, yes.

Cross-examination.

By Mr. Styron:

Q. Can you take any part of that plant out without doing damage? 20

A. Well, the machinery in the basement could go out if it would go out the door. I don't know. I didn't measure that.

Q. How about the coils in the boxes upstairs?

A. Well, I think you could disconnect the unions and slide them out.

Q. And the brine tanks also?

A. I didn't measure them. I saw them but I didn't measure them. 30

Q. So that in your opinion all that entire plant could be removed with the exception of the pipes that run up through the walls, and that, of course, would necessitate the breaking of plaster to get them out?

A. Yes.

Q. That couldn't be done otherwise?

A. I don't think so, no.

Q. Now, did you examine as to the method of the fastening of the plant in the basement on the concrete foundation?

A. I saw it was fastened down by nuts on bolts.

Q. And would it be possible to unscrew those nuts and lift it right from the foundation?

A. Yes, sir.

10 Q. And that could be done—by leaving the bolts there it could be done without injury to the foundation, could it not?

A. Yes, if you didn't take the bolts out.

Q. And that applies to all the parts of the plant that you found in the refrigerating room?

A. I don't know.

20 HOWARD G. HARRIS, SWORN.

Direct examination.

By Mr. Schimpf:

Q. Mr. Harris, what sort of a building is the Vermont apartment house?

A. Five-story brick, semi-fireproof housekeeping apartments.

30 Q. What are the floors composed of? What material are they built out of?

A. As far as I know, they are wood.

Q. Weren't they concrete with wood coverings?

A. Not to my knowledge. They may be.

Q. Is it a rather fashionable apartment house?

A. It is the highest rated apartment house in the

city. Get higher rents there by a third than any other building in the city.

Q. It is constructed in such a way as to furnish very modern conveniences to the tenants?

A. The most up-to-date building in town in its appointments.

Q. Does it have, in addition to a system of refrigeration, other modern conveniences?

A. It does.

Q. All of them that you know of?

10

A. Hot and cold sea water, heat, excellent elevator service, service closets, a great many appointments that other buildings don't have.

Q. Electric lighting throughout?

A. Electric lighting throughout.

Q. Is there any means whereby the tenants in that building could keep their ice boxes cold except through this refrigerating plant?

Mr. Styron: I object to that as irrelevant and immaterial. 20

The Court: I will receive that testimony.

(Exception noted for plaintiff.)

A. The only other way would be to have service by the ice man dripping and carrying his ice through the hallways, and serving each ice box. If this plant was removed, the ice box would have to be changed and converted into a different class of box. 30

Mr. Styron: I move to strike the answer out.

The Court: Plaintiff's motion denied.

(Exception noted for defendant.)

Q. There is no provision in the house for the use of ice in place of the refrigeration plant at the present time?

Mr. Styron: I object to that.

The Court: That opens up a question. Of course,
10 Mr. Nusbaum said himself when he was on the stand that if this system were not there, the occupants of these apartments would have to use ice like anybody else and the ice man would have to take the ice upstairs. I have allowed that to go in that far because that was proved in the plaintiff's case. Now, you want to go further. The question of convenience has nothing to do with it.

Mr. Schimpf: I want to show that there is not at
20 the present time any other means provided for keeping those refrigerators cold in that house and that none could be provided without changing the house around by the installation of an entirely different sort of ice box in those apartments.

The Court: You say according to the design of the structure this is the only practicable system?

Mr. Schimpf: Exactly, and that nothing else
30 could be used in its place without changing forty-two apartments to receive a different method.

The Court: Well, is not that so? Do you have to prove it? Is not that already a fact?

Mr. Schimpf: I think it is.

Mr. Styron: I object to it on the ground it has nothing whatever to do with the claim of property.

(Exception noted for plaintiff.)

The Court: That would be a fact about which there could be no dispute, but the question is whether it has any legal significance.

Mr. Styron: We will admit it is the best system 10 yet discovered.

Q. Now, Mr. Harris, you have examined the plant, haven't you?

A. I have.

Q. And you know how it is put in. Could the plant be removed, in your judgment, without doing injury to that building?

A. It would do great injury to the building and cause great loss and annoyance to the tenants now 20 under contract.

Mr. Styron: I ask to have the last portion of that answer stricken out because it is not responsive and it has no relevancy.

The Court: Strike it out.

Q. How many tenants are there now in the building? 30

Mr. Styron: I object to that because it has no bearing on the issue of the property in this case.

Mr. Schimpf: It has a great bearing on the case. A part of this plant is in the possession of each one

of those tenants, all of whom have leases on this building, and it would require an invasion of the premises leased to each one of those tenants and a destruction of a part —

The Court: Does not that appear already in the case?

10 Mr. Schimpf: I do not think it does. At the present time it does not appear that this house is occupied, as far as I know.

The Court: I thought it did. I thought Mr. Harris said the house was so modern and thoroughly up-to-date that the apartments were rented for a third more than any other apartments in the city. Didn't you say that, Mr. Harris?

20 The Witness: That the rate on the building is a third higher than any other building in the city per room.

Mr. Schimpf: I want to show that it is occupied and the tenants are in possession of all or nearly all of these apartments.

Mr. Cole: Under leases made before the record of this bill of sale.

30 The Court: All right.

Mr. Styron: I object to it on the ground it has no tendency to prove the issue of property in this case and it is wholly irrelevant.

The Court: That may be so, but I am inclined, since we are here, to accept this proof, subject to

your objection, and I will pass upon its materiality afterwards.

(Exception noted for plaintiff.)

The Court: I cannot tell how far the defense will be permitted to go, not having examined the legal question involved.

(Question repeated.)

10

The Court: Is there any doubt about the fact that this is a well constructed, up-to-date popular apartment house and well occupied with tenants who were there with leases prior to the recording of this conditional bill of sale? Is there any doubt about the fact? Whether it has any legal significance or not I will pass on afterwards.

Mr. Styron: No doubt in my mind. I just simply 20
say it has no place there.

Mr. Schimpf: We will consider it as conceded,
that part of it.

Mr. Cole: And that these tenants had no notice
of the existence of a conditional bill of sale. I want
that to go in.

The Court: Whether they had notice or not is a 30
matter of no consequence, I think.

Mr. Styron: I am not consenting that that go in
the record, but it is doubtless a fact. I cannot con-
trovert it.

The Court: I do not see that this testimony has any legal effect.

Mr. Styron: I understand your Honor's attitude, but I merely want to preserve my rights on the record.

The Court: Note an exception.

10 Q. Mr. Harris, in your judgment from an examination of the plant and a knowledge of the building, is it possible to remove this plant without doing great injury to the building and to the boxes which are built in there?

Mr. Styron: I object to that because he has not qualified himself.

(Objection overruled.)

20

The Court: Exception for plaintiff.

A. It would in my judgment do considerable damage to the floors and ceilings in removing the piping, and certainly cause loss and damage to the ice boxes, refrigerators, in each apartment.

Mr. Styron: I ask that the answer be stricken out.

30

The Court: Motion denied.

(Exception noted for defendant.)

Q. And the refrigerators are part of the building, are they not?

Mr. Styron: I object to that. That is a legal question.

Mr. Schimpf: I think that is a matter of fact. A man can state whether they are part of the building or not.

The Court: Well, I think the Court had better decide that. Give me the facts and I will say whether they are part of the building.

10

Q. Mr. Harris, what is your position with relation to the building, the Vermont apartments?

A. We are authorized agents for the placing of tenants and management of the building.

Q. And the collection of rents?

A. And the collection of rents.

Q. Do you have in your possession the leases on the building?

A. We have copies of leases. We forward leases both to New York and Philadelphia, I think is the custom.

20

Q. Are there tenants in that building whose leases were made prior to August twenty-seventh, 1918?

Mr. Styron: I object to that on the ground it is wholly irrelevant. If it is intended to base that upon the provisions of the conditional sales, they are not within the protected class and it would be irrelevant and immaterial from every other standpoint.

30

The Court: I will deal with this testimony like the other. I will take the testimony and note a motion to strike it out and the Court will deal with it.

(Question repeated.)

A. There are.

Mr. Styron: I ask to have the answer stricken out.

The Court: Motion is granted.

Q. Mr. Harris, do you remember the day that the demand was served on you in this case?

10 A. I don't remember the date.

Q. I don't mean the date, but I mean the time when it was.

A. Yes.

Q. Who served it on you?

A. My recollection is Mr. Voorhees and Mr. Nusbbaum.

Q. Were they together?

A. That is my recollection.

Q. Was there anyone else present at the time?

20 A. I don't recall.

Q. Do you remember whether Mr. Zimmerman was there?

A. I don't recall his presence at the time. He may have been in the office.

Q. You don't remember the date?

A. No.

Q. Do you remember whether a second paper was served on you?

A. I seem to have a hazy recollection of a second
30 paper being served on me by the sheriff.

Q. Do you remember whether that was done at the same time the demand was served or not? Do you remember, if you can remember at all, how much time elapsed between the service of the demand and the service of the second paper by the sheriff?

A. As far as my recollection goes, I only have

recollection of the one service and yet I am pretty sure the sheriff wasn't with them when the first demand was made. That is, I haven't any recollection of the second demand or the second paper except I do seem to recall that the sheriff was in there, but in our office there are so many services going on that I am easily mixed.

Q. You don't remember whether the two services occurred on the same day or not?

A. I can't help you on that.

10

Q. What actually took place between you and Mr. Voorhees at the time the first paper was served on you?

A. As near as I can recall, the conversation ran something like this: I told him I was afraid he was barking up the wrong tree, that I wasn't the owner of the property, and he asked whether or not we wasn't agents for the property and I told him yes we was agents designated by both sides, a sort of a trusteeship to take care of the rents and manage the property, but we hadn't any right to grant permission to remove property, and certainly ought to have time to get in communication with the real interested parties. Well, he said there would be time, it was a matter of form, and immediately as he left I called up Strauss and Company in New York City. 20

Q. Did you explain to him who you meant by both parties?

A. Yes.

30

Q. Who did you say you meant?

A. The Stafford interest as owners and S. W. Strauss and Company representing mortgagees.

Q. Did you ever definitely refuse to deliver these goods?

Mr. Styron: I object to that because his claim of property shows that he definitely refused it because there is an affirmative claim. He is estopped from saying that.

Mr. Schimpf: It does not show that he definitely refused, however, until they undertook to take them away from him by a writ of replevin.

10 The Court: What does that have to do with it?

Mr. Cole: It has a lot to do with it, in my judgment. I think we ought to have an answer to the question.

(Question repeated.)

The Court: I will permit the question to be answered.

20 Mr. Styron: I object.

(Objection overruled.)

A. I hardly know what my answer is. I told them I certainly hadn't any right to deliver the goods. If there was two papers served, that was on that first service, but there was no forcible demand made on me, as I remember, to deliver any goods, so it was a matter of form service, as I understood it.

30 Q. Did Mr. Voorhees tell you it was only a matter of form?

A. He told me I would have time to communicate with the interested parties, that he thought I was the proper person to serve on.

Q. Did you have time to communicate with the

interested parties before the second paper was served on you?

A. It is the second paper I can't remember.

The Court: What legal significance has the demand?

Mr. Cole: There cannot be a replevin suit brought until there is a conversion.

Mr. Styron: It is the basis of the whole suit.

10

Q. Mr. Voorhees testified he served the first paper on you, on the twenty-seventh of August and that the second paper was issued by the sheriff and presumably served on the twenty-eighth of August.

Mr. Styron: I do not think he stated when it was done. The files will show when it happened.

Q. His return says that he served it on the twenty-eighth day of August. Did you have time between the twenty-seventh of August and twenty-eighth of August to communicate with the interested parties in this matter?

20

Mr. Styron: I object to it on the ground it makes no difference whether he had time or not, wholly irrelevant.

The Court: It is very obvious that he did not have time.

30

Mr. Schimpf: Yes, but I am obliged to put in the record the facts. It is obvious to us who are listening.

(Question repeated.)

Mr. Styron: The plaintiff cannot be bound by that. If he proceeded according to law, he is within his rights.

(Objection sustained.)

(Exception noted for defendant.)

10

Q. Where did you attempt to communicate with S. W. Strauss and Company?

Mr. Styron: Objected to.

Mr. Schimpf: If the person serving the demand told him he would have time to communicate with the interested parties, and then immediately issued the writ —

20

The Court: Do you take the position that this man ever had any intention of delivering this property over to the plaintiff?

Mr. Schimpf: I am not taking that position, because I do not believe it is necessary. I am taking the position that he never converted this property to his own use, so that a writ of replevin ever could have issued against him.

30

Mr. Styron: This is not the manner in which to effect that. Move to quash the writ is the way that should be done.

(Question repeated.)

(Objection sustained.)

(Exception noted for defendant.)

Q. Did you attempt to communicate with John Stafford?

A. No.

Q. Where is the office of S. W. Strauss and Company?

Mr. Styron: Objected to on the ground it is immaterial.

10

The Court: Is that question pressed? Is it a matter of any consequence?

Mr. Schimpf: The purpose is to show their office was in New York and it was impossible to communicate with them in the meantime.

The Court: All right. I will allow you to prove that.

20

(Exception noted for plaintiff.)

A. One hundred and fifty Broadway, New York.

Mr. Styron: I move to strike out the answer.

The Court: Motion denied.

(Exception noted for defendant.)

30

The Court: Strauss and Company are one of the defendants in this case if the amendment goes through?

Mr. Schimpf: Yes. Not in that name, but in the

name of two others, Roberts, Trustee, and Simon W. Strauss.

Cross-examination.

By Mr. Styron:

Q. Mr. Harris, upon what do you base your opinion that the refrigerating plant could not be removed, either in whole or in part, without great injury to the property?

A. Well, it is self evident if you inspect the building, the large opening made necessary to pass through floor and ceiling those covered pipes.

Q. Is that all that is involved, the covered pipes that pass through the floor and ceiling?

A. That does considerable damage in having to repatch and replace those ceilings and repaper, redecorate, whatever damage there would be.

20 Q. Could any other portion of the machinery be removed, leaving the pipes which you say would cause the damage by their removal?

A. I can't see why the machinery in the basement couldn't be removed, unless it might mean the widening of a doorway or something of that sort.

Q. Do you actually know by personal measurement whether or not that machinery could be removed?

A. No.

30 Q. You don't?

A. No.

Q. Then your opinion is based on a mere guess as to that?

A. Well, I am familiar with the machinery and I never thought of the question of damage coming up in reference to removal of it.

Q. What do you think of it now? Do you say with certainty whether it could or could not be moved?

A. I should say it would be doubtful whether it could be taken out without widening the doorway.

Q. You base that on what?

A. My recollection of the size of the engine base.

Q. What do you recollect as to its size?

A. I should think it was about two feet six, maybe a trifle less, by a possible six feet in length. 10

Q. You never measured it?

A. No.

Q. Do you know in point of fact it is only eighteen inches wide?

A. No.

Q. Do you know in point of fact it is more than eighteen inches wide?

A. I should say it was about two feet six wide.

Q. Then you really don't know anything about it, do you? 20

A. Except that I saw it and that is my recollection of the size.

ALBERT SANDS, SWORN.

Direct examination.

By Mr. Howard:

30

Q. Where do you reside, Mr. Sands?

A. New York.

Q. You are connected with S. W. Strauss and Company?

A. Yes.

Q. In what capacity? What was your capacity

The Court: What do you want to prove by this witness?

Mr. Howard: Payments we made subsequent to the time the contract was made.

10 Q. What was your capacity during the year 1918 and the latter part of the year 1917?

A. Connected with the loan department, negotiating loans and making payments on loans.

Q. Checking up the payments that you have made, and so forth? You are familiar with the Vermont apartments?

A. Yes.

Q. You were down there from time to time as the work progressed?

20 A. Yes.

Q. Do you recollect the transactions leading up to the Roberts' mortgage on the Vermont apartments? That is the two hundred and fifty thousand dollar mortgage.

A. Yes.

Q. Were there any conferences between Strauss and Company, and Stafford, in advance of the execution of the mortgage?

30 Mr. Styron: How are we affected by conferences that took place between Strauss and Company and Stafford?

Mr. Howard: Should it be alleged there is an ambiguity in the mortgage in any respect as to fixtures, the intention of the parties between the ven-

dor and the borrower that they were part of the security and on the faith of which the money was advanced would then become relevant.

Mr. Styron: We have not seen any mortgages.

Mr. Howard: They will be introduced in evidence in due time.

Mr. Styron: Suppose you do that in the orderly way. I object to a conference between Strauss and somebody else. 10

The Court: Of course, the conference would not be binding upon this plaintiff unless the plaintiff was present. Is there anything about the mortgage that shows ambiguity?

Mr. Howard: Not from our point of view, but everything is being reserved in this case and I did not want to keep the witness over until tomorrow unless I had to. 20

The Court: I cannot see that that has any bearing upon the case.

Mr. Howard: I will withdraw the question, then.

Mr. Styron: I move to strike out the previous testimony so far as it relates to conferences. 30

Mr. Howard: There has been none, I think.

Q. Are you familiar with the payments that were made on the Roberts' mortgage subsequent to October twenty-seventh, 1917?

Mr. Styron: I object to it on the ground that it does not appear in this case that there is any Roberts' mortgage.

Mr. Howard: I would ask the courtesy of the Court on that situation in order that the witness shall not be kept over night.

Mr. Schimpf: May we offer these mortgages now?
10 I offer a mortgage made by John Stafford, Eliza H. Stafford, John Stafford, James G. Stafford, and John Stafford, Junior, to Nicholas Roberts, called trustee, dated March first, 1917, in the sum of two hundred and fifty thousand dollars, and recorded April third, 1917, in the Clerk's Office at Mays Landing, in book of mortgages number 162, page 392, and recorded again in the Clerk's office at Mays Landing on April third, 1917, in book 58 of Chattel Mortgages, page 197.

20 I offer also a bond and mortgage made by John Stafford to Simon W. Strauss, the bond being in the sum of two hundred thousand dollars and the mortgage in the sum of one hundred thousand dollars, both of which papers are dated the twenty-fifth day of January, 1918, made by John Stafford, and Eliza H. Stafford, his wife, to Simon W. Strauss of New York City. This mortgage was recorded in the clerk's office at Mays Landing, on February fourth, 1918 in book 172 of mortgages, page 85.

30 The Court: You want to prove by this witness, I suppose, what payments were made.

Mr. Schimpf: I have some other writings I want to offer in evidence. I want to offer also the original application for this mortgage, signed by John Stafford and addressed to S. W. Strauss and Company.

Mr. Styron: All of these things are objected to until we have the opportunity of examining them.

Mr. Howard: Do you object to them on the ground that we have not proven the signatures?

Mr. Styron: No, certainly not. If they are admissible at all, they are admissible without proof of the signatures. I object to this on the ground it is not a chattel mortgage, although recorded in the chattel mortgage book, but it is simply a mortgage upon real estate, and as such it shows no interest in Nicholas J. Roberts in the controversy in this suit. 10

The Court: I will receive this proof, subject to objection and final ruling. If the evidence is allowed to remain, an exception will be noted for the plaintiff. If it is excluded, an exception will be noted for the defendant.

20

The Court: The evidence stands.

(Exception noted for defendant.)

(First mortgage mentioned marked Exhibit D5.)

Mr. Styron: I object to this bond and mortgage, the second one offered, on practically the same ground, and on the same objections as appear in our motion this morning.

30

The Court: The Court will deal with this bond and mortgage the same way. You will be amply protected by an exception if the evidence is retained. If it is excluded the other side will be protected by an exception.

(Bond and mortgage marked Exhibit D6 and D7.)

Mr. Schimpf: I offer the original application for the loan signed by John Stafford.

The Court: Same ruling in regard to that. I understand that is offered over objection?

Mr. Styron: Yes.

10

The Court: Exception overruled.

(Exception noted for plaintiff.)

(Application marked Exhibit D8.)

20 Mr. Schimpf: I offer in evidence an exemplified copy of the petition in bankruptcy affecting John Stafford, which petition was filed, according to the clerk, on the thirty-first day of August, 1918, an exemplified copy of the order of adjudication, an exemplified copy of the order appointing David E. Dallam, Webster K. Wetherill, and Edgar J. Elliott trustees of the estate of Stafford, and a certified copy of the order of the United States Court for the District of New Jersey appointing David E. Dallam, and Webster K. Wetherill ancillary receivers in this state.

30 (Papers marked Exhibit D9.)

Q. You are familiar with the payments made under the Roberts' mortgage?

A. Yes.

Q. Between what dates were the payments made, the money payments?

Mr. Styron: I object to that testimony on the ground it has nothing to do with the issue to be proved in this case, which is one of property between the plaintiff and Harris, the defendant.

The Court: The evidence will be received over objection, subject to be ruled upon later on.

The Court: Objection overruled.

10

(Exception noted for defendant.)

Q. Between what dates? When did you make your first payment and when did you make your last one?

A. March third, I think.

Q. The first?

A. Yes.

Q. 1917?

A. 1917.

20

Q. And when was your last payment made?

A. October twenty-seventh.

Q. The last payment?

A. March thirtieth, 1918.

The Court: You say that while this advance money mortgage was of record, put there March, 1917, the money was advanced on it before and after this contract or conditional sale?

30

Mr. Howard: Exactly.

Q. What payments were made by Strauss and Company after October twenty-seventh, 1917, in amount?

A. October twenty-seventh, eleven thousand five

hundred dollars. December fourteenth, four thousand dollars.

The Court: This testimony the record must show is subject to objection and further ruling.

(Objection overruled. Exception noted for plaintiff.)

10 A. January twenty-fourth, five thousand dollars.

Mr. Cole: What year?

A. 1918. February fourth, twelve thousand five hundred dollars.

Q. February fourth, 1918?

A. Yes.

Q. All right. State it.

20 A. February fourth, 1918, again five thousand dollars. March thirtieth, 1918, ten thousand nine hundred and thirty dollars.

Mr. Styron: You are going to offer those in evidence?

Mr. Howard: I do not think so.

Mr. Styron: I think you had better.

30 Mr. Howard: I would rather keep these.

Q. Have you ever seen these two receipts before marked D1 and D2? Have you ever seen them before?

A. Yes.

Q. They came from Mr. Stafford's office?

A. Yes.

Q. About what time?

A. They came when he came for his payment. I don't recall the exact date they came in.

Q. About the date that appears on the face of them?

A. Yes, around the date.

Q. You made payments to him after those receipts?

A. Yes.

Q. Did you consider those receipts as payments 10 for cash?

Mr. Styron: I object to what he considered them. They speak for themselves.

Mr. Howard: Question withdrawn.

Q. In making the subsequent payments did you rely on those receipts?

A. Yes.

20

Q. And were so induced to make the payments?

A. Yes.

Q. Strauss and Company, how are they connected with Roberts, trustee?

Mr. Styron: I object to it on the ground it has no relevancy to the issue.

The Court: The objection is overruled.

30

(Exception noted for plaintiff.)

Q. How is Strauss and Company connected with Roberts, trustee of the two hundred and fifty thousand dollar mortgage?

A. Nicholas Roberts?

Q. Yes.

A. He is employed by Strauss and Company.

Mr. Styron: I ask that the answer be stricken out.

Q. Strauss and Company handled the bonds under that mortgage?

A. Yes.

10

Mr. Styron: I object to that. You are testifying instead of the witness.

The Court: The objection is overruled. What do you mean by the bonds?

(Exception noted for plaintiff.)

Mr. Howard: It is a trust mortgage and bonds
20 were issued under it. It so recites.

Q. In accepting the mortgage of two hundred and fifty thousand dollars, Roberts, as trustee, represented Strauss and Company or not?

Mr. Styron: I object to that as leading and as immaterial.

The Court: Well, is it a fact?

30

A. Yes.

The Court: The objection is overruled.

(Exception noted for plaintiff.)

Q. Do you know if Strauss and Company were the owners of the bonds issued under that mortgage?

Mr. Styron: Objected to as irrelevant, immaterial and incompetent.

(Question allowed.)

(Exception noted for plaintiff.)

A. Do I know whether they were the owner of the bond? 10

Q. Yes; under the Roberts' mortgage?

A. Yes.

Mr. Styron: I move that the answer be stricken out.

The Court: Motion is denied.

(Exception noted for defendant.)

20

Q. Will you tell the Court the procedure on the sale of the bonds under the Roberts' mortgage?

Mr. Styron: Objected to on the ground that it is wholly irrelevant.

Mr. Howard: I want to show that these bonds were sold throughout the United States, relying on circulars gotten out, quoting portions of this mortgage, containing a large cold storage plant, were purchased throughout the country by bond holders, in line with that trust company case, Continental Trust Company case. 30

The Court: I am inclined to receive this testimony the same as I received other testimony, subject to further consideration and further ruling, and if it goes against you, Mr. Styron, you will get an exception.

The Court: Evidence stands.

(Exception noted for defendant.)

10

A. The mortgage is divided up in bonds of different denominations and maturities —

Mr. Styron: Does not the mortgage state that?

Mr. Howard: Yes.

A. —and sold throughout the country.

Q. Sold by whom?

20

A. Sold by S. W. Strauss and Company.

Q. Throughout the country to customers?

A. Yes. This is one of the circulars that we issued, we did issue on that particular mortgage on the Vermont building.

Q. And you received replies from that circular, from people who purchased the bonds upon the receipt of that circular?

A. Oh, yes.

30

Mr. Howard: I wish to have the circular marked for identification.

(Paper marked D10 for identification.)

The Court: I suppose it would all be answered by his saying that the bonds were sold to innocent

purchasers throughout the country. I suppose that is the theory upon which you are proceeding?

Mr. Howard: Yes.

Cross-examination.

By Mr. Styron:

Q. I show you D5 and I ask you if that is the mortgage under which these payments were made that you have just testified to? 10

A. Yes.

Q. Is that the advance money mortgage under which these payments were made?

A. I don't know what you mean by advance money mortgage.

Q. Is that the mortgage under which these payments were made to Stafford?

A. Yes.

Q. How many properties does that describe? Describes two, doesn't it? 20

A. In part it does. Describes the Vermont building.

Q. How many operations were under way at that time? I refer to the time of the payments of these moneys.

A. How many operations?

Q. Yes.

A. In our house?

Q. In which Strauss and Company were interested. Operations carried on by Stafford? 30

A. Two at that time.

Q. Where were they?

A. Two in Atlantic City.

Q. Where?

A. One at Brighton Avenue and one at Vermont Avenue.

Q. Look at the checks that you have read amounts from and dates and say which of those checks were paid on the Brighton Avenue operation.

A. None of them.

Q. And which on the Vermont?

A. They were all paid on the Vermont and none on the Brighton Avenue.

10 Q. Why do you say that?

A. Why do I say it?

Q. Yes.

A. Familiar with the payments.

Q. It was all paid on that mortgage, was it not, under that mortgage?

A. Under this mortgage?

Q. Yes.

A. Yes.

Q. And that mortgage describes two properties?

20 A. Yes. The properties are subject to that.

Mr. Styron: I will have these marked for identification.

(Papers marked P9, P10, P11, P12, P13, P14 and P15 for identification.)

Re-direct examination.

30 By Mr. Howard:

Q. When was the first time that Strauss and Company knew anything about the conditional sale now before the Court?

Mr. Styron: Objected to. How can he know what Strauss and Company knew?

The Court: What was his relation with Strauss and Company?

Mr. Styron: I withdraw the objection.

Q. When did you first hear of this present conditional sale? When did Strauss and Company first know of this conditional sale of the refrigerating plant? 10

A. I don't recall.

Q. When did you first personally hear of it?

A. Sometime during August or September, I think. I don't recall very plainly.

Q. Of 1918?

A. Yes.

Q. That was after the final payment on the Roberts' mortgage had been made? 20

A. Yes.

Re-cross examination.

By Mr. Styron:

Q. Do you know whether or not the records at Mays Landing were examined for encumbrances, conveyances in respect to the property described in the mortgage to Roberts, which we call the advance money mortgage? 30

A. In other words, you mean a search made?

Q. Yes.

A. As I recall there were searches made from time to time.

Q. Were there searches made for mechanics liens

or waivers of mechanics liens prior to the placing of that mortgage?

A. That I don't know.

Q. Did you have anything to do with passing upon that mortgage?

A. Yes.

Q. Were you informed by anyone that the property was lienable or was not lienable?

A. I can't recall that particular feature now. You
10 mean whether it was subject to mechanics lien?

Q. Yes. Do you know whether the records were examined to ascertain whether it was subject to mechanics liens, any of the buildings described in that trust mortgage?

A. No, I don't.

Q. Did you have enough interest in the matter or were you concerned with it sufficiently to ask that question?

A. Yes, and I quite likely did, but I don't recall
20 at this time.

Q. Do you remember whether or not at that time you knew, either personally or by information, that the Nusbaum contract was on file at Mays Landing waiving liens against the real estate?

Mr. Howard: At what time, please?

Mr. Styron: At or about this date.

30 A. No, I don't recall at that time just how that was.

Q. Did you make any inquiry as to whether or not there was to be a refrigerating plant at the time this trust mortgage was gotten up and executed?

A. Yes.

Q. Did you make any inquiry as to who was supplying it?

A. Yes, I did inquire at that time as to who was going to supply the plant, and it was not decided.

Q. Had not been decided?

A. At least, that is what I was told.

Q. And did you afterwards make any inquiry of Stafford or anyone else as to whether there was any waiver of mechanics lien for supplying the refrigerating plant?

A. Did I ask Stafford if there was a waiver of lien, if they had waived their lien right? 10

Q. Yes.

A. I don't recall this particular contract, but it was my understanding that they were to be waived.

Q. That is, the liens for the refrigerating plant were to be waived?

A. I can't answer that definitely. It has been too long ago.

Q. Did you make any examination in the clerk's office to see whether or not it had been waived?

A. I did not. That was attended to by our legal department. 20

Q. Did your legal department report to you that they had made the examination and that the lien had been waived?

A. They didn't report to me.

Q. Why did you pay Stafford moneys when you knew a building was in course of erection which you knew might be lienable?

A. Thought he was entitled to it.

Q. You knew, of course, of the provisions of the New Jersey law for mechanics liens, didn't you? 30

A. I knew of such a thing, but I am no authority on it. I am not a lawyer. We have a legal department for that.

Re-direct examination.

By Mr. Howard:

Q. Did you in the Vermont building take possession of these contracts of Stafford's as fast as he made them, or was that only as to the Brighton? Did you have Stafford give you his building contracts as fast as he made them?

10 A. On the Vermont we didn't have them.

Q. Didn't have them?

A. I don't think so. Not all of them. We may have had a few of them.

Chancery Chambers, Atlantic City, N. J. March
28, 1919.

20

Further testimony before HON. HOWARD CARROW,
Judge.

APPEARANCES:

For plaintiff: H. R. VOORHEES, Esq.; U. G.
STYRON, Esq.

30 For defendant: HON. C. L. COLE; THEODORE W.
SCHIMPF, Esq.

Mr. Cole: In going over the papers I find we omitted to offer in evidence the third receipt of Mr.

Nusbaum, and I would like to offer it now, the one of April thirteenth.

Mr. Styron: That is objected to on the same ground as the other objections.

The Court: It will be admitted tentatively, and if the Court thinks it is proper evidence, it will be so indicated in the record and exception noted for the plaintiff, and if it is rejected, an exception will 10 be noted for the defendant.

(Paper marked Exhibit D20.)

The Court: When this case was before me, it seemed to be proper that the witnesses who were then in the room should be examined just as if the amendment had been allowed, with the understanding upon all sides that the Court was to take the proof and rule upon it and indicate in the record 20 such rulings as the Court might determine. That applied not only to the admission of evidence but to the question respecting the amendment. Is that not so?

Mr. Cole: That is my understanding.

The Court: Is that so, Mr. Styron?

Mr. Styron: Yes, your Honor please, it was 30 taken, as I understand it, tentatively, all subject to objection and a motion later to strike it out.

The Court: I did not want to touch this record one way or the other, the stenographer's notes, unless it was understood definitely by counsel that I might

indicate with my pen just exactly what the ruling was. I have the testimony here and when I come to a final consideration of the case I will say, "The testimony is excluded," or "admitted," and note an exception for the losing party.

Mr. Styron: I think your Honor indicated very fully at the time the evidence was received the manner in which it was received and what disposition
10 you might later make of it.

Mr. Cole: I think this may be a proper time, perhaps, to submit our requests for a finding of facts. I think that ought to be the practice.

The Court: The first question I want to hear discussed is the question respecting the proposed amendment.

20 Mr. Styron: If your Honor please, before we come to that, I asked to have reserved the right of producing one or two witnesses on the question of value, and I have those witnesses this morning and I ask that they be heard on that question.

The Court: All right. The case, if it was marked closed, may be reopened for the purpose of receiving further testimony. I do not intend to shut out any light in the case.

JOHN J. LARNEY, SWORN.

Direct examination.

By Mr. Styron:

Q. Mr. Larney, what is your business?

A. Superintendent.

Q. For whom?

10

A. Pennsylvania Engineering Company.

Q. Did you have anything to do with the installation of the plant in the Vermont apartments?

A. Supervised it in a general way.

Q. Can you say what the value of that plant was on the twenty-sixth of August, 1918?

A. I would say in the neighborhood of about \$6500.

Cross-examination.

20

By Mr. Cole:

Q. How do you arrive at that?

A. Well, it is in an apartment house. We have done quite a number of those and they run about \$225 in an apartment, complete installation.

Q. That value you fix is the value of the plant in the building?

A. What is that?

30

Q. That value you fix is the value of the plant in the building?

A. Yes, sir.

Q. What is the value of the stuff out of the building?

A. Outside of the building?

Q. Yes, if you had to take it out?

A. I don't understand your question. Is that the original cost, less the profit, or the cost of taking it out?

Q. What would be the value of the—I call it stuff—the material—what would have been the value of that material on August twenty-sixth, 1918, if taken out of the building as scrap, if you please, or however it might have been gotten out.

10

Mr. Styron: I object to that on the ground it is immaterial. If there was conversion at all, it was an entire plant on that date, and it is immaterial what would be its value as scrap.

The Court: I will take the testimony tentatively, the same as I took the other testimony, reserving the right to rule upon its admissibility and protecting you with an exception if it goes against you.

20

(Question repeated.)

A. I would say approximately the same value.

Mr. Styron: I move to strike out the answer.

Q. Well, was it the same value?

A. Yes.

Q. You make no allowance for the cost of removing it? What would it have cost to have removed it?

30 A. Well, I am not prepared to say off-handed what the cost would be. What would the conditions be? That would determine the cost.

Q. Then you don't know?

A. Under known conditions, yes; otherwise no.

Q. I ask you if you know what was the cost of

taking those goods out on August twenty-sixth, 1918?

A. I couldn't tell you what the conditions were.

Q. Then you can't answer my question, can you?

A. If I know the conditions I can answer you definitely, otherwise I must answer you indefinitely.

Q. Have you taken into consideration taking out the foundation —

A. Yes.

Q. —on which that rests? You are a practical 10 man, are you not?

A. Yes, sir.

Q. And you can't tell this Court what it would cost to have taken that plant out on August twenty-sixth, 1918?

A. What would be the labor conditions and what would be the cost of the labor, that we couldn't say off-handed. I can't tell what the conditions would be.

Q. Having these things out, irrespective of the 20 cost, how much could you have sold them for?

A. Sold them for a new plant, practically new.

Q. The foundation, could you have sold that for a new plant?

Mr. Styron: I object to that. The testimony is that the foundation was put in by the owner of the building. We are not suing for the foundation.

The Court: If my recollection serves me rightly, 30 the plant was bolted to a foundation.

Mr. Cole: And they were their bolts, for which they are suing. They omitted them from the claim.

Q. In determining that it is worth \$6500, do you include the bolts in the foundation?

A. Yes.

Q. Well, if you had to leave the bolts there, would the plant still be worth \$6500, removed from the property?

A. We don't have to leave the bolts there. They can be screwed out.

Q. Screwed out of a cement foundation?

10 A. Yes, sir. They are put in in such a way that they can be screwed out. In other words, all foundation bolts, from a practical standpoint, must be put in in such a way that you can screw them to adjust them either higher or lower them.

Q. Have you seen how these were put in?

A. I haven't seen how they were put in but I know the bolts.

Q. Have you seen this plant since it has been installed?

20 A. No, sir.

Q. Did you have anything to do with the installation of it?

A. Supervised it in a general way. Not directly on the job.

Q. How general?

A. Looking after it in the Philadelphia end, getting out the stuff for it.

Q. Did you have anything to do with the installation of that plant I asked you?

30 A. Directly on the job, no.

Q. Well, indirectly on the job, did you?

A. Supervised the men, looked over their reports and kept in touch with the details of it from our office.

Q. Have you at all seen that plant since it was installed?

A. No, sir.

Q. Do you know anything about its condition on August twenty-sixth?

A. I can't say that I do.

Q. That is what I am asking you, if you know anything about its condition on August twenty-sixth?

A. No.

Q. Not having seen it installed, not knowing anything about its condition, of use on August twenty-sixth, you say it is worth \$6500? 10

A. Yes, sir.

Re-direct examination.

By Mr. Styron:

Q. You are speaking now of the value of the material on that day as a completed plant, are you not?

A. Yes, sir.

20

Re-cross examination.

By Mr. Cole:

Q. You are speaking of the value of the material? What kind of material was in that plant?

A. Compressor.

Q. What was that worth on that day?

A. The compressor I would say off-handed was worth about a thousand dollars. 30

Q. You are trying to tell us the value of this property. Why do you say off-hand? Don't you know?

A. I haven't the figures definitely. I haven't studied any figures on the job lately.

Q. Didn't you know you were coming here to swear to the value of that property?

A. I didn't know anything about it until last night, no, sir, yesterday.

Q. Then you haven't looked it up at all, have you?

A. No.

Q. Then you are in a measure guessing, aren't you?

A. I am giving you an approximate figure.

10 Q. Are you in a measure guessing?

A. No, I am not guessing. I would take the job for that. This company would take the job on those figures, which I very frequently give. We approximate them. I couldn't say the value I have put on it is worth so much installed.

Q. You have given \$6500 as the value of the property out of the plant. The first item you said was compressor. How much was that worth on August twenty-sixth?

20 A. I would say about a thousand dollars.

Q. What is the next item?

A. Pipe.

Q. How much piping was there?

A. I don't know.

Q. What was it worth on that date?

A. There was forty-three pipe coils in there.

Q. How does that sell, by the foot?

A. No, I have approximated that, I have bunched it.

30 Q. If this had been out of the building and you had tried to sell it on August twenty-sixth, would you have sold it by the foot?

A. No; you charge by the job.

Q. Suppose you hadn't had another place to put it in, then what?

A. Well, I would have no cause to give a price for it, then.

Q. In other words, your idea of the value of the \$6500 was that you had another place in which to put it?

A. Maybe not have. We would keep it until we did have.

10

JOHN MAYER, SWORN.

Direct examination.

By Mr. Styron:

Q. Mr. Mayer, what is your business?

A. I am building refrigerators, cold storage buildings, and so on.

Q. How long have you been in the business? 20

A. About thirty-five years.

Q. Did you have anything to do with the installation of the refrigerator in the Vermont apartment?

A. I had.

Q. What did you have to do with it?

A. Well, as district manager of our company, I had everything to do with it, making the contract and preparing plans and specifications and seeing that the work was done.

Q. Did you oversee the installation of the refrigerator there? 30

A. About once a week.

Q. How are those refrigerators constructed?

A. Well, the fronts are of wood construction, what we call shop work, and the walls are cork board, and cement finish.

Q. How is the temperature produced there?

A. Produced by ice machine, or ice, either one.

Q. Now, are there any coils in these particular refrigerators?

A. Yes, sir, there is a coil in each bunker.

Q. Are they so annexed or connected that the coils may be removed without injury to the box, refrigerating box?

A. If I recall, the coils were made of a proper size
10 to pass through the ice door, or the door to the ice bunker.

Q. Well, will they do it? Can they be put in and taken out without injury to the box?

A. That is the way they were installed.

Q. If those coils were removed, could ice be used to produce or reduce the temperature?

A. Yes, sir.

Q. In its place?

A. Yes, sir.

20 Q. And that can be done without injury to the building, you say?

A. Yes, sir.

Cross-examination.

By Mr. Schimpf:

Q. What are these coils connected to, Mr. Mayer?

A. They are connected with the supply pipes.

30 Q. And how do the supply pipes enter the box?

A. Through the side wall. Two small pipes.

Q. And they go entirely through the box?

A. They enter the box and the coils are connected with a flange connection.

Q. How is the side of the box made tight around the pipe?

A. The walls of the box being cork. If my recollection serves me, they simply bore, or it is customary when it is a cork installation, to bore a hole through the cork the size of the pipe, then after the work is tested up and everything satisfactory, they just simply seal up the plastering around the pipe.

Q. Seal up the plastering around the pipe?

A. Yes.

Q. These ice boxes are built of wood work on the front, you say, and cork boards on the sides and top?

A. Yes, sir.

Q. And the cork boards are afterwards plastered over, are they not?

A. Yes.

Q. To conform with the walls?

A. Yes.

Q. And these pipes are sealed into the box by the plaster covering?

A. Yes.

Q. Could you remove those pipes without doing any injury to any part of the box?

A. Yes, they could be removed without injury to the box.

Q. And no injury to the plaster?

A. Oh, just simply an item of plugging up those holes and putting a little plaster finish over them.

Q. I am not now talking about what the condition of the box would be after you got through with it. I am talking about what the condition of the box would be after you removed the pipes.

A. There would be two small holes there.

Q. And the plaster would be broken on the outside of the box?

A. Yes.

Q. The cork sides of the box might also be injured, might they not?

A. No, not particularly.

Q. How would you get the connections out?

A. Which connections?

Q. The connections between the pipe and the box.

A. The connections are a part of the coils.

10

THOMAS BRADLEY, SWORN.

Direct examination.

By Mr. Styron:

Q. What is your occupation?

20 A. Erecting engineer.

Q. Did you have anything to do with the installation of the refrigerating plant in the Vermont apartment?

A. I installed it. That is, I was in charge of the installation of it.

Q. Can you say whether or not that plant can be removed without injury to the building?

A. I am positive it can.

Q. It can?

30 A. Yes.

Cross-examination.

By Mr. Schimpf:

Q. What did the plant consist of?

A. Refrigerating machine, condenser, liquid receiver, oil interceptor, piping, coils in the refrigerators.

Q. You say you are an erecting engineer?

A. Yes, sir.

10

Q. Where did you go to school?

A. I went to school in Philadelphia.

Q. Did it have a name?

A. Yes. Mother of Sorrows Parochial School, Catholic High School.

Q. I had reference to an engineering school. Did you ever go to an engineering school?

A. No, I never went to an engineering school.

Q. Did you ever take an examination or acquire a license as an engineer?

20

A. No.

Q. Well, how did you get to be an erecting engineer?

A. Through practical experience.

Q. Who conferred the title on you?

A. Well, it isn't really a title that I have had conferred on me by anybody. It is simply a title that—I have been known as an erecting engineer through working on these plants.

Q. Just elected yourself?

30

A. Yes, possibly.

Q. How old are you?

A. Thirty-eight.

Q. What have you erected in your life as erecting engineer?

A. Erected several refrigerating plants.

Q. Wouldn't you rather call that an installation than an erection?

A. Possibly. I don't believe that it makes any difference. An installation and an erection is practically the same thing.

Q. I am trying to find out what you have erected that would entitle you to the name of erecting engineer. Have you ever erected a building?

A. No.

10 Q. Do you know anything about the erection of buildings?

A. Somewhat.

Q. Did you ever work in the erection of a building?

A. I did.

Q. Ever have charge of one?

A. No.

Q. Well, what kind of work did you do in a building?

20 A. Well, I have done several different kinds of work. Helped to build walls.

Q. Helped to build walls?

Mr. Styron: I object to that as not cross-examination. I asked him about erecting machines, and not buildings.

30 Mr. Schimpf: Well, if your Honor please, the man says he is an erecting engineer and that he can take the refrigerating plant out of a building without damaging the building, and I want to find out what he knows about buildings.

The Court: I think that is proper cross-examination. He is giving an opinion as an expert.

Mr. Styron: I withdraw the objection.

Q. You answered the question, I think. You worked on the walls. What did you do on the walls?

A. Oh, I have worked around buildings for the last twelve years, possibly.

Q. What have you done in connection with the erection of a building?

A. Well, I can't say that I have done anything in particular.

10

By the Court:

Q. What is your trade?

A. I am erecting engineer for the Pennsylvania Engineering Company.

Q. Are you a practical mechanic?

A. Yes.

Q. What kind of mechanic?

A. I install refrigerating machines or erect refrigerating plants.

Q. You don't build buildings?

A. No, your Honor, I do not.

Q. Did you ever see this machine?

A. I installed it, yes, sir.

Q. Well now, it has been testified here by some witnesses that the machine cannot be taken out of that building without taking down some parts of the building, dismantling the building to some extent. What do you say about that? Is that so or not? How are you going to get the machine out without taking something down?

30

A. Is it necessary for me to tell how I would get it out, or can I get it out?

Q. I am asking you the question. How would you get it out? It has been said here you can't get it

out without taking down some part of the building, I think the entrance part.

A. I would take it out the same way I put it in. I took it in through the doorways, and I would take it out the same way. I didn't have any trouble in getting it in, so I don't expect I would have any trouble in getting it out.

By Mr. Schimpf:

10

Q. You put it in in an uncompleted building, didn't you?

A. No. Well, the building wasn't finished entirely, but there is nothing that could be done to the building unless walls were built across the hallways or something like that, that would interfere with my taking it out.

Q. When did you see the building last?

A. In June. June or July.

20

Q. Don't you know there was a brick wall built around this ice plant room after your ice plant was in there?

A. No, not the last time I saw it there wasn't.

By the Court:

Q. Have you seen it since it was installed?

A. Yes, I saw it in either June or July.

Q. You haven't seen it lately?

30

A. No.

By Mr. Schimpf:

Q. Well, suppose a brick wall had been built around those machines, could you get it out without damaging the brick wall?

A. According to where the brick wall was built. If I could get around it, I could.

Q. I mean a brick wall surrounding the machines and enclosing them within a room built out of the brick walls. Could you get it out?

Mr. Styron: I object to the question as irrelevant, immaterial and absurd.

The Court: He has already said he does not 10 know what the building is like now, he has not seen it. Is it necessary to pursue that examination? He does not know what the building is now, he is testifying from what his recollection is regarding the time when the plant was put in. It was an unfinished building, was it not?

A. It was unfinished in this way, your Honor, that possibly there wasn't all the plastering done, all the doors weren't hung, but outside of that I can't 20 see where there was any other finishing to be done. As to brick walls or anything like that, I can't see where there could have been any built or any reason for building them.

By the Court:

Q. Did you put that plant in as a completed contrivance, or did you take it in in parts?

A. I took it in in parts.

Q. And is that the way you say you would remove 30 it?

A. Certainly. We would have to.

Q. You would take it apart and remove it in parts?

A. Yes, your Honor.

By Mr. Schimpf:

Q. Your pipes from this plant go right up through five floors, do they not?

A. Yes.

Q. And those floors are concrete?

A. No.

Q. Did you see this building when you put the plant in?

10 A. Yes, sir.

Q. You say the floors in that building are not concrete floors?

A. No.

Q. Well, what are they?

A. Well, they are wood and there are cinders in between. It may be cinder concrete in parts. All of them aren't concrete floors, that is, there isn't concrete in all the floors. Some of them are only just a plain board floor.

20 Q. Well, are they concrete where the pipes go through?

A. No, not all.

Q. At least, they weren't concrete when you put the pipes through.

A. They would have to tear the floors up to make them concrete since.

Q. That isn't my question.

A. No, they weren't.

30 Q. They weren't concrete floors when you put the pipes in?

A. No.

Q. So that if they are concrete floors now you might have more trouble to get your pipes out?

A. Not at all, no; no more trouble.

Q. Now, those pipes go all the way up on one side

of the building to a blind loft above the top floor, do they not?

A. Go up through the elevator shaft, that is, going up. The supply line goes up through the elevator shaft.

Q. Well, the return line comes down through the floors, doesn't it?

A. Through each floor.

Q. The supply line goes all the way up through and into a blind loft and then across and down again, 10 did they not?

A. Yes.

Q. You could get those pipes out of the blind loft without doing any damage to it?

A. Certainly.

Q. How would you get in there?

A. There is a doorway in there.

Q. Where is the doorway located?

A. Up on the top floor, a stairway.

Q. Where does that doorway run to? 20

A. Comes out on to the stairway and you go from the stairway into the loft.

Q. How high is the loft above the ceiling?

A. What do you mean, above the top floor ceiling?

Q. Above the top floor ceiling, yes.

A. I judge about eight feet.

Q. Eight feet?

A. Eight feet or nine feet.

Q. I show you — 30

Mr. Styron: I object. There is nothing to show that that plan is the same as it was at the time.

Mr. Schimpf: Is there any objection to using the original tracings? The blueprints were marked and these are the same.

Mr. Styron: If they have not been changed since.

Mr. Schimpf: We have not changed them.

Mr. Styron: I do not mean you.

Mr. Schimpf: May I ask him a question from this elevation, or do you object to it?

10 Mr. Styron: If you give me your personal assurance that it is absolutely correct and unchanged from the beginning. That is all I have to go by.

Mr. Schimpf: I do.

Q. I show you a sheet of the plans of this building showing the elevation of the building and ask you to indicate where the blind loft is above the top floor of that building?

20 Mr. Styron: I object to that. That is no proof that there is a blind loft anywhere except from your examination.

Mr. Schimpf: This man says there was and it is eight feet high above the ceiling.

Mr. Styron: He said there was a door there that he could get in and out, so it could not be blind.

30 (Objection overruled.)

A. The loft is above the top floor.

Mr. Styron: I move to strike the answer out.

Mr. Schimpf: Will you show me on this plan where there is any loft eight feet high above that top floor?

A. I don't say it was eight feet high. I said above the ceiling of the top floor. I didn't mean to say it was eight feet high above the ceiling. I mean it was eight feet—the top floor, the ceiling was eight feet above the floor. Above that is the loft.

Q. How high is it?

10

A. It is different heights in there. There is one place where you have to crawl, you can't stand erect.

Q. Yet you say there is a stairway leading up there with a door at the top of the stairway?

A. No. There is a stairway leading up to the roof and this door is on the landing of that stairway there.

Q. And leads where?

A. Leads from the loft on to this landing. The stairway runs up to the roof.

20

Q. How high is that door?

A. Why, it is about, I judge, five feet from the floor.

Q. The bottom or the top of the door?

A. I mean from the floor of the landing. The bottom of the door.

Q. Bottom of the door is five feet from the floor of the landing?

A. Yes.

Q. Then how high is the door from the bottom to the top?

30

A. I judge about two feet six or something like that.

Q. About two feet six?

A. Yes.

Q. Now, is there any loft up there that is higher than two feet six at any point?

A. Oh, yes.

Q. How would you go in there and get your pipes out of a place two feet six?

A. I have got in smaller places than that. That is just the doorway. I didn't say the loft was two feet six. I said the doorway.

Q. You don't know how high the loft is, do you?

10 Q. No, I couldn't guess off-hand just what height it is. I know you can get up there, though. I have been in it.

Q. Did you ever take a refrigerating plant out of an apartment house like this?

A. No.

LEE NUSBAUM, recalled.

20

Direct examination.

By Mr. Styron:

Q. Mr. Nusbaum, have you visited the Vermont apartments since the installation of that plant?

A. I have.

Q. When?

A. The day that the material was replevined.

30 Q. Has there been any change since the time of the installation of the plant and the time you visited it?

A. There was none.

Q. There was none? That you noted?

A. I know.

Q. Can you state now what was the value of that

plant on the twenty-sixth or twenty-seventh of August, 1918, as a going plant?

A. Sixty-three hundred dollars.

Cross-examination.

By Mr. Cole:

Q. Your testimony is addressed to the plant in 10
the building.

A. Yes.

Q. That is all?

A. Addressed to the material in the plant.

Q. You have answered my question.

The Court: Strike it out.

Mr. Styron: If your Honor please, I ask to have 20
stricken from the record all testimony given on the
part of the defendants except the testimony in sup-
port of the justification of the defendant repre-
senting the owner of the building. That includes, of
course, all testimony relating to the mortgages and
all testimony in behalf of the trustee in bankruptcy.
The grounds on which I ask that have been previous-
ly stated. They are generally that those mortgages
are mere mortgages of the realty and therefore have
no interest in the subject-matter of this suit at this 30
time, and that so far as the trustees are concerned,
they merely represent creditors of Stafford and are
not protected by the Conditional Sales Act; and, fur-
ther than that, there is no proof before the Court
that Stafford is in bankruptcy. We have the mere
assertion of counsel, but there is absolutely no proof

in the record. So I ask that all that testimony be stricken from the record and that will eliminate all except the question of the issue in replevin, which is the possession or right of possession or not of these goods and chattels.

The Court: Your motion will be dealt with properly so that you will have the benefit of a ruling and an exception if it goes against you. My inclination
10 is to hear the case in full before making these specific rulings.

Mr. Cole: The defendant, of course, gets the benefit of an exception in the event that the testimony is stricken?

The Court: Yes.

20

EXHIBIT "P1."

THIS AGREEMENT made this twenty-ninth (29th) day of October, in the year of our Lord, One thousand nine hundred and seventeen (1917), between JOHN STAFFORD of the City and County of Philadelphia, State of Pennsylvania, hereinafter called the Purchaser, party of the first part, and LEE NUSBAUM, trading as the PENNSYLVANIA
30 ENGINEERING COMPANY, also of the said City and County of Philadelphia, State of Pennsylvania, hereinafter called the Company, party of the second part, WITNESSETH:

(1) That the Purchaser for and in consideration of the payments hereinafter specified and agreed to be made by the Purchaser, hereby covenants and

agrees to furnish and erect all the necessary refrigeration and cold storage plant required in the erection and completion of the building erected at Vermont Avenue and the Boardwalk, Atlantic City, New Jersey, and at the price hereinafter set forth, in strict conformity with the plans prepared by BERTRAM IRELAND, Architect, and with the specifications hereunto annexed and made a part hereof, which plans and specifications are hereby made a part of this agreement, as fully and completely and with the same effect as if the same had been set forth at length in the body of this agreement. 10

(2) That the said Purchaser hereby agrees to pay to the said Company for the performance of the above work as follows: The sum of Five Thousand nine hundred dollars (\$5,900.00) payments on account thereof to be made monthly on or about the tenth of each month, by three months' notes bearing interest at the rate of five per cent. (5%) the amount of each payment to be based on the amount of work and materials furnished and erected, less twenty per cent. (20%). Statements of the same to be furnished by the said Architect, and the retained percentage shall be paid thirty days after the completion of the work and materials in accordance with the specifications. 20

It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. 30

No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Purchaser or allowed by the Company by virtue of such alterations to be stated in said or-

der. Should the purchaser and company not agree as to the amount to be paid or allowed, the work shall go on under the order required above and in case of failure to agree, the determination of said amount shall be referred to the Architect, whose decision in the matter shall be final.

Should the Company at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality, or fail in any
10 respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, except on account of fires, strikes, accidents, Providential interferences, or other delays beyond their control, then such refusal, neglect or failure being certified by the Architect, the Purchaser shall be at liberty, after ten days written notice to the company, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become
20 due to the company under this contract.

The said Company shall procure and pay for sufficient and proper liability insurance, to hold the said Purchaser harmless from any claim for injuries to persons or for structural damage to property happening from any neglect, default want of proper care, or misconduct on the part of the Company, or any one in his employ, during the execution of the work, and shall save the said Purchaser harmless by reason of any claim which anyone in the employ of the said
30 Company shall make under the Workmens Compensation Act of the State of New Jersey.

The Company shall not let, sublet, assign or transfer this contract or any interest therein without the written consent of the said Purchaser.

The said Purchaser shall maintain insurance on the work during the progress thereof, against loss or

damage by fire, the policies to cover all work incorporated in the building and all materials for the same in or about the premises; these policies to be made payable to the parties hereto as their interests may appear.

Should the Company be delayed in the prosecution or completion of the work by the act, neglect or default of the Purchaser of the Architects or of any other contractor employed by the Purchaser upon the work, or by any damage caused by fire or other casualty for which the Company is not responsible, or by combined action of workmen in no wise caused by or resulting from default of collusion on the part of the Company, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay. 10 20

The Purchaser agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure to do so, thereby causing loss, to the company agrees that he will reimburse the Company for such loss, and the Company agrees that if they shall delay the progress of the work so as to cause loss for which the Purchaser shall become liable, then they shall reimburse the Purchaser for such loss. 30

And also that in case any disagreement shall arise between the said parties touching or relating either to the said buildings or works, or to any other matter or thing arising under this contract, the same, and every of them shall be referred to the Architect of

the said work, who alone shall consider, value and determine the same, and whose certificate shall be binding and conclusive upon both the said parties.

The Builder agrees to file no lien for any labor or materials furnished under this contract, and expressly waives the right to file the same. It is further agreed that no sub-contractor for work or materials shall have any right to file any lien for any sum which may be due or become due to him, any right to file such lien being hereby expressly waived.

The said parties hereto for themselves, their heirs, executors, administrators, successors and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

John Stafford (SEAL)

J. Stafford Jr. Atty

20

Pennsylvania Engineering
Company

By Lee Nusbaum (Seal)

SIGNED, SEALED AND DELIVERED

in the presence of

Eleanor M. G. McCarthy

G. M. Hughes

30 STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } SS:—

BE IT REMEMBERED that on this 29th day of October, in the year of our Lord, One thousand nine hundred and seventeen (1917) before me the subscriber, a Foreign Commissioner of Deeds of New Jersey, in Pennsylvania, personally appeared JOHN

STAFFORD, LEE NUSBAUM (trading as PENNSYLVANIA ENGINEERING COMPANY) who I am satisfied are the persons named in and who executed the foregoing agreement or contract, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as and for their voluntary act and deed for the uses and purposed therein expressed.

All of which is hereby certified.

John Stafford
J. Stafford, Jr. Atty.
Lee Nusbaum

10

Eleanor M. G. McCarthy
as J. S. J. R.

CONTRACT ORDER

PENNSYLVANIA ENGINEERING COMPANY,
1119-21 North Howard St., Philadelphia, Pa.
October 29th, 1917.

20

Gentlemen:—We John Stafford of Philadelphia, Pa. hereby authorize you to enter our order for material for a nine ton refrigerating plant, in accordance with conditions and material specifications attached and made a part hereof.

DELIVERY—The material herein specified is to be delivered and erected at Vermont Ave. & the Boardwalk, Atlantic City, N. J.

SHIPMENT—The material herein specified is to be shipped from your works in about ninety days after acceptance of this order. 30

PRICE Five Thousand Nine Hundred (\$5900.00) Dollars, United States currency.

TERMS—All payments to be made in the form of notes for three months bearing interest at 5% The

work to be paid for on the 10th day of each month for 80% of the previous month's work, and balance to be paid 30 days after completion.

It is understood that this is not binding upon you until accepted by you at your Philadelphia office by a member of your firm.

Respectfully yours,

John Stafford, Purchaser.

J. Stafford, Jr. Atty.

Lee Nusbaum

Representing Pennsylvania
Engineering Co.

10

Eleanor M. G. McCarthy

Witness G. M. Hughes

Accepted Oct 29 1917 in Phila-
delphia, Pa., by Pennsylvania
Engineering Company
By Lee Nusbaum

20

CONDITIONS

The Pennsylvania Engineering Company, of Philadelphia, Pa., shall be referred to hereinafter as the "Company."

30

Should any part of the material furnished by the Company be found within one year from date of shipment to have been defective at the time furnished, the Company will repair said part, or will furnish without charge a similar part to replace it, provided the original part is returned and its inspection establishes the claim.

The Company is not liable for delays or defects of designs, material or workmanship other than to remedy same as and within the period mentioned in the preceding paragraph, and it will make no allowance for repairs or alterations made without its written consent.

The title to all material furnished by the Company shall remain in it until full purchase price has been paid in cash, with full right of repossession by the Company upon Purchaser's default of any act or payment due under this contract; and Purchaser agrees that Company shall have the right to retain all the moneys, that may have been paid by the Purchaser, as liquidated damages for Purchaser's default, and use of said machinery. Purchaser agrees to do all acts necessary to protect such retention of title in the Company, and the taking of any security whatsoever shall not operate as a waiver nor as otherwise affecting this retention of title. 10

Should Purchaser fail to make any of the payments when due, or to execute notes as agreed upon, or to pay them when due, the whole of the unpaid portion of the purchase price, however secured or whenever payable, shall become immediately due and payable. In case of such default on Purchaser's part, the Company is authorized, at its option, to enter upon Purchaser's premises and remove the machinery, the Purchaser to afford every facility necessary for so doing, paying all expenses so incurred, including damages to the machinery caused by the use of same or by the removal, including cost of shipment to Company's place of business. 20

The Purchaser agrees to take all risk of loss of or to this material by fire or other casualty. He agrees to keep it fully insured against such loss or damage by fire or other casualties.

No modification of, addition to, or waiver of any term of this contract shall be binding on the Company unless in writing and approved at the Company's Philadelphia office by a member of the firm. 30

Any promise of delivery of material herein specified is subject to fires, strikes, accidents, providential

interferences or other delays beyond the Company's control.

Any freight chargeable to the Company is to be paid by Purchaser and deducted from last payment.

Any change in the construction and design of this material mutually agreed upon shall not affect the title and rights of the Company as previously stipulated.

10 Purchaser agrees to furnish all necessary work and materials not herein specified to be furnished by the Company.

Purchaser is to receive the material immediately upon arrival and furnish suitable storage for same and is to be responsible for any loss or damage caused by his failure to do so.

20 Company is to erect the material within 150 days after acceptance of this contract, provided purchaser has, as aforesaid, his buildings, foundations and other work completed and ready to receive same within said 50 days after acceptance and immediately notifies the Company in writing at its home office of such completion and readiness.

Purchaser is to furnish such supplies as fuel, light, oil, waste, etc., as may be necessary.

Company is to furnish an erecting engineer to superintend the erection of the material which it supplies, it being understood that Company's engineer shall have entire control of such material during erection.

30 Company's engineer is to remain in charge of the plant for a period of 3 days succeeding date of erection, to make any needed adjustments to material it supplies. At the end of these days, the material shall be considered as fully accepted by the Purchaser, unless the latter, within three days thereafter, notify the Company in writing, particularly

specifying items wherein Purchaser claims that the material does not fulfill the requirements of this agreement. Upon receipt of such notice, the Company is to be permitted to remedy such defects, if any, Purchaser allowing a reasonable time therefor. As soon as Company has rectified said defects, Purchaser shall accept the material.

No fault found by Purchaser with the material or Company's engineer during the erection shall excuse the Purchaser from full performance of this agreement and payment of purchase price unless he notifies the Company at its home office, in writing, of such complaint within three days after such alleged fault was or could have been discovered by him. 10

Purchaser is to furnish at all times an adequate supply of pure water under sufficient pressure to the required parts of the plant, at a temperature not to exceed temperature of City Water.

The material herein specified to be supplied by the Company is to be of 9 tons refrigerating capacity when run continuously and operated according to Company's directions, or is to cool the various rooms to the temperatures herein specified. For maintaining such temperatures, the boxes are to be properly insulated by the purchaser. 20

Performance of above capacity guarantees to be conditioned upon Purchaser's furnishing such work, material and machinery for operation in conjunction with the material furnished by Company as will permit of such performance. 30

Company will furnish one 20 H. P. Motor, 220 volt, direct current, compound wound about 850 RPM, complete with slide rails, pulley and double leather belt for driving ice machine.

Company will furnish #14 galvanized iron brine tank for each of the forty two refrigerators.

Owner is to furnish foundations, electrical and water connections, and refrigerator boxes with openings in same for pipes to enter and leave.

MATERIAL SPECIFICATIONS.

AMMONIA COMPRESSOR.

The Ammonia Compressor is of the Triumph Heavy Duty Tangye Type, having a double-acting cylinder 6½ inch bore by 10 inch stroke, provided
10 with a water cooling jacket, main stop valves, by-pass connections, pump and nickel-plated oil cups.

The Cylinder is constructed of very close grain semi-steel, perfectly centered to the Compressor Frame. The Suction and Discharge Valves are of the Triumph patented type, which permit of the regulation of both the Cushion and Working Springs.

A patented safety collar is fitted to the suction valve Cages. These valves are provided with steel cage seats ground to a perfect fit in the Cylinder
20 Heads, from which the valves may be quickly removed.

The Stuffing Box contains three compartments for packing and two chambers for oil. The outer set of packing is subject to the suction pressure only.

The Piston is of the cored type, free from parts liable to work loose and fitted with metallic rings. The Piston Rod is of the best spindle steel.

The Connecting Rod is of forged steel, fitted with Brass Boxes of the removable type.

30 The Main Bearing is lined with best babbitt metal and is fitted with quarter boxes and wedges for taking up wear.

One complete set of foundation bolts and wrenches.

The compressor will be filled and rubbed down smooth before shipment.

STEAM ENGINE. NONE FURNISHED.

The Steam Engine for operating the compressor is of the.....type, having a heavy frame of neat and attractive appearance. Steam Cylinder is.....inches in diameter by.....inch stroke and fitted with a light and durable piston. Piston and connecting rods are of a superior grade of machinery steel and the cross head and crank are of heavy casting. Cross head pin and crank pin are of forged steel and fitted with bronze or babbitted boxes. The main journal is lined with best babbitt metal and engine is fitted throughout with nickel-plated sight feed lubricators, oil cups, crank pin oilers and full set of foundation bolts and wrenches for adjusting any part. 10

CRANK SHAFT.

The Crank Shaft has a diameter in the bearing of $3\frac{1}{2}$ inches, is $4\frac{1}{4}$ inches between bearings and is made of best machinery steel, turned perfectly true and finished all over. 20

FLY WHEEL.

The Fly Wheel, of heavy cast iron, is split. Size 60 inches in diameter, weighing approximately 1200 pounds, made to be firmly fitted and keyed on to the shaft and turned to run true.

GAUGE BOARD.

A Marble Gauge Board is furnished, to which is attached one high pressure and one low pressure ammonia gauge, complete with all valves and fittings.

OUTBOARD BEARING. (To be furnished if steam engine is not furnished.) 30

The Outboard Bearing is of the adjustable type, lined with best babbitt metal.

AMMONIA CONDENSER

The Ammonia Condenser is of the double pipe type, built in one section of 2" and $1\frac{1}{2}$ " inch Ammonia Pipe.

Each section to be 10 pipes high and approximately 20 feet over all.

Each section of condenser contains one gas, one liquid and one purge valve, which permits of any single section being completely evacuated of ammonia, without interfering with the operation of the remaining coils. These valves are so arranged as to allow any valve to be repacked while under pressure.

- 10 Each section of the condenser is supported by improved condenser stands.

The double pipe condenser water return bends are so arranged with brass plugs, that the condenser can be cleaned by simply unscrewing the brass plugs, without pumping out the ammonia.

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.....
.....

CONDENSER PAN (For Atmospheric Condenser

- 20 Only.) NONE FURNISHED

The Condenser Pan is shipped in sections, made of 3/16 inch steel,.....feet long,.....feet wide, by.....inches high.....

.....
AMMONIA—The initial charge of anhydrous ammonia is to be furnished by COMPANY

BRINE—The initial charge of calcium chloride brine is to be furnished by Company.

.....
.....

- 30 OIL INTERCEPTER

The Oil Interceptor is made of best lap welded wrought iron pipe with heads welded in and is 8 inches in diameter, by 3 feet high, tested to 300 lbs. pressure per square inch.

LIQUID RECEIVER

The Liquid Receiver is made of best lap welded wrought iron pipe with heads welded in and is 10 inches in diameter by 7 feet long, tested to 300 lbs. pressure per square inch.

AMMONIA CONNECTIONS

The Ammonia Connections for connecting all of the ammonia apparatus are to be fitted with all necessary ammonia pipe, valves and fittings for completely connecting same up. 10

The return piping where exposed to be covered with sectional compressed cork covering 2" thick with mineral rubber finish. Sufficient risers to be installed, each under separate control. Expansion valves to be placed at the top.

BRINE COOLER NONE FURNISHED

.....sections of Double Pipe Brine Cooler,pipes high x.....feet long over all. This cooler is built of 2-inch and 3-inch full weight Ammonia Pipe and steel return bends, complete with 20 all stands, valves and headers, ready for connecting to the ammonia and brine systems.

BRINE PIPING None FURNISHED

.....lineal feet of 1¼-inch Brine Piping, with cast or malleable return bends, pipe couplings, unions, valves or cocks, etc., and iron hangers of a neat and durable construction.

All brine piping for making the connections between the brine tank, pump and piping in the rooms hereinafter specified. 30

.....
.....
.....

BRINE PUMP NONE FURNISHED

One.....Duplex Brine Pump, having Tobin bronze rods, and brass valves of latest improved construction.

DIRECT EXPANSION PIPING

1"

The Direct Expansion Piping is to be of x-inch Direct Expansion Ammonia Piping, and to total 1100 lineal feet, including return bends, fittings, pipe, etc. The Piping is to be thoroughly tested to 120 lbs. per square inch air pressure, and to be tight and free from all ammonia leaks. The pipes are to hang on P. E. C. Wrought Iron Hook Hangers, unless otherwise specified.

10 The piping is to be distributed between 42 boxes furnished by purchaser.

EXHIBIT "P6."

To H. G. Harris and Company, Incorporated, Individually and as agent for John Stafford, having possession and control of the property hereinafter enumerated:

20 TAKE NOTICE that I hereby demand possession of you of the following goods and chattels:

30 1—nine ton triumph belted ammonia compressor; 1—twenty horse power electric motor; belt for driving same; 42 galvanized brine tanks; 42 welded pipe coils; 1 double pipe ammonia condenser; 1 charge of ammonia; 1 charge of brine; 1—oil interceptor, liquid receiver, ammonia pipe connections, ammonia pipe coverings; together with pipes, connections &c. making the refrigerating plant now in the apartment house on East side of Vermont Avenue facing the Boardwalk, Atlantic City, New Jersey. That said chattels are my property and to which I have the right of possession and unless you deliver same to

me forthwith I shall institute proper proceedings to recover possession of same.

Dated August 26, 1918.

Lee Nusbaum

Herbert R. Voorhees

Attorney of claimant.

Exhibits P2, P3, P4, P5, P7 and P8 having been lost since the trial are omitted from the state of the case by consent. 10

EXHIBIT "D1."

Philadelphia, March 1st, 1918.

RECEIVED from John Stafford the sum of One thousand Dollars (\$1000.00) in cash, to be applied on account of contract for Refrigeration system at the VERMONT APARTMENT BUILDING, Vermont Avenue and the Boardwalk, Atlantic City, N. J. 20
(Sgd) PENNSYLVANIA ENGINEERING CO.

Lee Nusbaum

Triplicate Receipt—March 1st, 1918

D2

2/10/19

30

EXHIBIT "D2."

Philadelphia, March 26th, 1918.

RECEIVED from John Stafford the sum of One thousand Dollars (\$1000.00) in cash, to be applied

on account of contract for Refrigeration system at
the VERMONT APARTMENT BUILDING, Ver-
mont Avenue and the Boardwalk, Atlantic City, N. J.
(Sgd.) PENNSYLVANIA ENGINEERING CO.

Lee Nusbaum

\$1000.00.

D1

2/10/19

Triplicate.

10

EXHIBIT "D4."

Office Copy.
ORIGINAL
SPECIFICATION
OF THE

20 Material and Labor to be Used and Employed
IN THE ERECTION OF A
APARTMENT HOUSE
TO BE BUILT FOR
MR. JOHN STAFFORD

AT

N. W. COR. VERMONT AVE. & BOARDWALK,
ATLANTIC CITY

ACCORDING TO PLANS AND DETAILS
PREPARED BY

BERTRAM IRELAND
ARCHITECT

30

BARTLETT BUILDING, ATLANTIC CITY,
NEW JERSEY

Plans and Specifications are the property of the
architect and must be returned upon com-
pletion of building

REFRIGERATION PLANT AND SYSTEM:

Provide an alternate estimate for this system.

This entire system to be installed in every detail and guaranteed.

COMPRESSOR:

Ammonia compressor to be of the vertical belt drive single acting enclosed type, all points of wear to be easily accessible for adjustment. Compressor is to be complete with extra set of sectional packing, spare valve springs and complete set of wrenches 10 to suit all points of machine.

Compressor shall have a displacement for revolutions not less than 300 cubic inches. Contractor shall guarantee capacity and horse power at 125 and 150 R. P. M., 20 lbs. suction pressure and 175 lbs. discharge pressure, and submit detailed description and dimensions of compressor.

POWER:

Slow speed motor for 2 phase, 220 volt, 60 cycle alternating current, complete with paper pulley, 20 slide rails and starting box. Motor may be Westinghouse, General Electric or Wagner make.

Leather, light double, and of very best grade and equal to "Alexanders." The special heavy single belt "Alexander the Great" may be used. The belt is to be made endless, at the finish of test by contractor, the motor to first be pushed forward as far as possible on slide rails. The centers of drive shall be approximately 12 feet.

CONDENSER, ETC:

Double pipe counter current ammonia condenser 30 1-1/4" and 2" ammonia pipe and steel fittings, not over 12 feet long nor less than 10 pipes high.

Oil trap with internal baffles purge and drain connection for discharge from compressor.

Liquid receiver of welded head type, complete with glass gauge, guards and safety cocks, with capacity for not less than 250 lbs. of liquid ammonia.

Gauge Board of ornamental iron, with compound high and low pressure gauges of not less than 5-1/2" diameter.

- 10 High pressure side connections shall all be of extra heavy pipe, and entire high side shall be demonstrated tight under 300 lbs. air pressure.

BRINE COILS, &C:

Double pipe counter current brine cooler, 2 x 3" ammonia pipe and steel fittings, not over 12 feet long or less than 10 pipes high.

2'0"

Brine tank 12'0" / x 5'0" made of 1/4" steel hot riveted and caulked water tight, with angle iron around top, and provided with flanged outlet for overflow, pump suction and drain connection.

- 20 Brine pump of two stage centrifugal or turbine construction, Worthington or equal, to deliver 50 gallons of brine against 50 lbs. head, without noise or vibration. Extended base, flexible coupling and direct connected motor for 2 phase, 220 volt, 60 cycle alternating current, including starting box. Base of pump shall be cast to act as drip pan, or a cast iron drip pan provided and connected to drain.

- 30 Brine connections between tank, pump, brine cooler and distributing mains, including relief pressure valve and by pass connection. Thermometers shall be provided on discharge line when it leaves pump and after leaving brine cooler. Pressure gauge shall be provided for pump discharge.

BRINE COILS, &C:

In the forty-four (44) compartments to be refrigerated a total of not less than 2500 lineal feet of 1"

brine coils are to be distributed, to secure a temperature of 38 to 40 degrees. The coils are to be extra heavy, welded, wrought iron, of a shape not to consume excessive space in boxes. Brine mains to and from compartments, shall be of size and run approximately as indicated on drawings. Returns shall leave top of coils, and a brass cock for purging inserted in highest point of line just after it leaves the box.

Iron hangers, adjustable type shall be furnished for all pipe lines, and on brine and ammonia suction must suit outside diameter of covering. The use of jack chain will not be permitted. 10

MISCELLANEOUS:

Initial charge of ammonia shall be furnished by contractor (not less than 300 lbs.).

Calcium shall be supplied to make brine in sufficient quantity to put new system in satisfactory operation.

Contractor shall do all hauling and rigging, pay all freights on equipment, and furnish all skilled and unskilled labor to erect plant, including running test of one week's duration. 20

INSULATION:

Cover all exposed ammonia suction and brine lines with brine thickness Nonpariel Cork Covering. Insulate brine cooler and brine tank with 10" of granulated cork or equivalent, exposed exterior to be finished with selected, matched T. & G. Y. P. treated with carbolineum. Top of brine tank to be constructed of 3 x 4 with 4" sheet cork between, then two layers of W. P. paper and two layers of 7/8" T. & G. boards with paper between applied to both side of 3 x 4. Hinged, beveled manhole is to be provided. 30

OWNER WILL PROVIDE:

Suitable space and concrete foundation for receipt of all equipment, contractor to furnish blue print, template, bolts and sleeves.

Water and drain connections will be brought to compressor and condenser, contractor to make final connections.

Wiring to motors and starting boxes.

GENERAL:

Contractor shall state best time of completion that can be promised, and give a guarantee on all workmanship for a period of one year.

- 10 All the above refrigerators to be built and arranged so that coils can be put on the back wall of boxes.

Openings are to be supplied in each box as directed, for the feed and supply brine pipes.

Insulation of boxes to be composed of 2 linings of $\frac{7}{8}$ " T. & G. boards, 2" of Nonpariel sheet work and 4 layers of insulating paper.

The exposed linings on the front and sides, also top of the low boxes to be of oak, well filled and varnished. The unexposed linings to be of pine.

- 20 The interior finish to be of white spruce and to have three coats of white shellac.

The floors of all of these boxes to be covered with Toncan metal turned up on the sides and made tight and supplied with drain with water seal, the pipe leading from same to be of at least $\frac{1}{2}$ " galvanized wrought iron pipe, let outside of the box as directed.

- 30 The backs of all of these boxes on which pipes are to be placed, to be covered with Toncan metal and joints made tight, to protect the woodwork from the frost on the coils.

The boxes with pipe chambers overhead are to be lined with Toncan metal and drained to the floor drain in box.

All the boxes to be supplied with heavy wire racks and heavily tinned. The number in each box and quality to be approved by owner.

OWNER TO FURNISH:

The space where these refrigerators are to be placed will be left free and easy of access for the builder to install his work.

He will supply a floor drain in the space where the refrigerator is to go and the drain from the refrigerator to be lead to this point.

The openings for pipe connections in the boxes to be cut to suit the brine mains and when pipe covering is installed, the space between covering and box to be filled in tight to prevent the admission of air. 10

EXHIBIT "D5."

MORTGAGE

John Stafford et al,
to
Nicholas Roberts, Trustee

Dated March 1 1917
Recorded April 3
1917
Book #162 page 392

20

of mortgages of real estate and in Book 58 of Chattel mortgages page 197. Amount \$250,000 Describes two parcels of land viz: Parcel 1 being Vermont Apartments property and Parcel 2 being the Hotel Ambassador property. (See Exhibit D8.)

This mortgage contains the following provisions relating to the construction of the Vermont Apartment House:

Page 22—

ARTICLE IV.

ERECTION AND MAINTENANCE OF
BUILDINGS.

Section 1. The Mortgagor covenants that he will erect and fully complete with all reasonable dispatch and within one year from the date hereof, upon that

30

portion of Parcel 1 hereinabove described which lies directly northerly of the Boardwalk, a five story brick and steel non-fireproof apartment building occupying substantially all of Parcel 1 which lies northerly of the Boardwalk; that said building will be constructed in all respects in accordance with the plans and specifications thereof heretofore prepared by Bertram Ireland, Esq., and submitted to S. W. Straus & Co., Incorporated, and by it identified and
10 approved. That no changes will be made in said plans or specifications without the approval of the Trustee."

Page 23—Section 3. "The Mortgagor covenants and agrees that said buildings when completed will be free from all liens or claims for liens and comply with the laws of the State of New Jersey."

Page 8—

FIXTURES AND IMPROVEMENTS.

20 "TOGETHER with the rights, areas, alleys, ways, waters, privileges, appurtenances and advantages thereto belonging or in any wise pertaining, and any and all buildings and IMPROVEMENTS NOW OR HEREAFTER ERECTED OR SITUATE UPON SAID LAND OR ANY PART THEREOF, INCLUDING ELEVATORS, SHAFTING, ENGINES, BOILERS, FITTINGS, MACHINERY, APPARATUS AND FIXTURES OF EVERY KIND NOW ATTACHED OR HEREAFTER TO
30 BE ATTACHED TO OR CONNECTED WITH SAID BUILDINGS AND IMPROVEMENTS AND SAID LAND, AND ANY AND ALL OTHER OR PERSONAL PROPERTY BELONGING TO THE MORTGAGOR NOW OR HEREAFTER USED OR TO BE USED IN CONNECTION WITH SAID BUILDINGS AND IMPROVEMENTS; and also together with all the rents, issues and profits thereof

(all of which are hereby specifically assigned and pledged to the Trustee); and also together with all the estate, right, title, interest, claim and demand whatsoever of said parties of the first part, either in law or in equity, either in possession or expectancy of, in and to the above described land and estate and the tenements, hereditaments and appurtenances thereof."

Page 19.

ARTICLE III.

Section 1. TITLE, POSSESSION, TAXES, ETC. 10

"That this Indenture is and will be kept a valid first lien upon said premises, subject only as aforesaid; that he will not at any time create or allow to accrue or exist any debt, lien, or charge, which would be prior to the lien of this Indenture upon said premises or any part thereof."

Page 24. Section 5. "If the Mortgagor shall for any reason abandon or unreasonably delay the construction of such buildings or fail to complete or by any cause whatsoever be prevented from completing the same, or if the Mortgagor shall be in default with respect to the acts and things required by him to be done under Sections 1, 2, 3 and 4 of this Article, the Trustee may at his option, but without prejudice to any other right hereunder of the Trustee or the bondholders arising in consequence of such default, complete the construction of said buildings or do all acts and things which in his sole discretion may seem necessary or proper to make good any default under Sections 1, 2, 3, and 4 of this Article, all at the expense of the Mortgagor." 20 30

Annexed to the mortgage is an affidavit as follows:

State of Pennsylvania, County of Philadelphia, SS.

NICHOLAS ROBERTS, The Trustee in the foregoing Indenture named, being duly sworn, on his

oath deposes and says: That the true consideration in the within Mortgage is the sum of Two Hundred and fifty thousand dollars (\$250,000), as evidenced by certain bonds executed by the parties of the first and second parts in the aggregate amount of two hundred and fifth thousand dollars (\$250,000) as follows:

	Numbers	Denomination	Amount	When Due
	(both Inclusive)			
10	1 to 10	\$1,000.	\$10,000.	March 1st, 1919.
	11 to 21	\$1,000.	\$11,000.	March 1st, 1920.
	22 to 32	1,000.	\$11,000.	March 1st, 1921.
	33	500.	500.	March 1st, 1921.
	34 to 44	1,000.	11,000.	March 1st, 1922.
	45 to 46	500.	1,000.	March 1st, 1922.
	47 to 57	1,000.	11,000.	March 1st, 1923.
	58 to 60	500.	1,500.	March 1st, 1923.
	61 to 71	1,000.	11,000.	March 1st, 1924.
	72 to 75	500.	2,000.	March 1st, 1924.
20	76 to 125	100.	5,000.	March 1st, 1925.
	126 to 175	500.	25,000.	March 1st, 1925.
	176 to 325	1,000.	150,000.	March 1st, 1925.

Deponent further says that there is due and owing on account of the same the sum of Two hundred and fifth thousand dollars (\$250,000.) besides legal Interest thereon from the 1st day of March, 1917.

Nicholas Roberts

Sworn to before me this
30th day of March, 1917.

30 Edgar J. Elliott, (seal)
Notary Public,

Commission expires Apr.
13, 1919

Prothonotary Certificate as to Notary.,
Philadelphia County Pa., Seal.
March 31, 1917.

EXHIBIT "D6."

Bond of John Stafford to Simon W. Straus, dated January 25th, 1918. \$100.000. The condition reads, in part:

(Page 2)—"And do and perform all acts and things required to be done and performed by the mortgagor under or by virtue of the prior mortgage upon the mortgaged premises described in the accompanying Indenture of Mortgage, so that there shall be no default therein." 10

EXHIBIT "D7."

Mortgage of John Stafford to Simon W. Straus covering Vermont Apartments. Recorded February 4, 1918 in Book No. 172 of mortgages of real estate page 85 &c.

Page 1—"And for the doing and performance of all acts and things required to be done under or by virtue of the prior mortgage upon the mortgaged premises hereinafter described, so that there shall be no default therein." 20

Page 2—The said obligation providing further, "And it was thereby expressly agreed that if default should be made x x x x x x x x x in the doing or performing of any act or thing required to be done or performed by the mortgagor under or by virtue of the provisions of the prior mortgage upon the mortgaged premises hereinafter described as therein agreed as aforesaid." 30

EXHIBIT "D8."

No. X-157

APPLICATION FOR LOAN

Name

Location Vermont Avenue and the Boardwalk,
Atlantic City, N. J.

Amount \$250,000

10

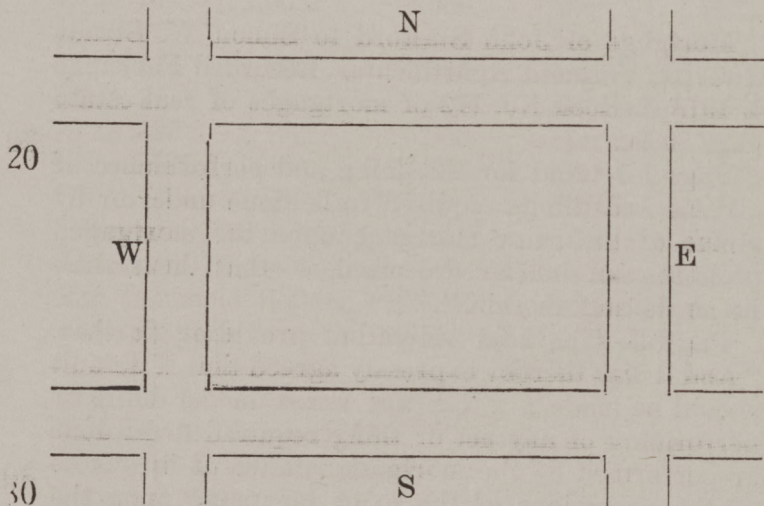
S. W. Straus & Co.

Incorporated

150 Broadway

New York City

APPLICATION FOR LOAN



.....BUILDING

CONSTRUCTION

LOCATION:

Corner of Vermont Avenue and the Boardwalk,
Borough City Atlantic City, N. J.

DIMENSIONS:

Land 186 ft. on Vermont Avenue
115 ft. on Boardwalk

Building:

Width 115 ft.

Cubic Contents 716,000 Cu. Ft.

VALUE:

Furnishings	\$ 15,000	
Land	\$115,000	
Building	\$250,000	10
Total	\$380,000	

LOAN:

Amount \$250,000

Rate 6%

(Interest payable semi-annually)

Term eight years

Date of bonds and mortgage March 1st, 1917

MATURITIES:

\$ 10,000	March 1st, 1919	
\$ 11,000	March 1st, 1920	20
\$ 11,500	March 1st, 1921	
\$ 12,000	March 1st, 1922	
\$ 12,500	March 1st, 1923	
\$ 13,000	March 1st, 1924	
\$180,000	March 1st, 1925	

TOTAL \$250,000

ADVANCES: (Shown in annexed Schedule A)

Title now in John Stafford

MORTGAGOR John Stafford

Where incorporated..... 30

Address 1112-4 Chestnut St., Philadelphia, Pa.

Telephone Filbert 3858 Walnut 6800 (Hotel)

GUARANTORS James D. Stafford and John Stafford, Jr.

BUILDING DESCRIPTION:

Material Brick, steel and stone
 Type Semi-fireproof
 Purpose Apartments
 No. Stories Five
 No. Rooms 178
 No. Stores Six

TIME FOR COMPLETION:

Twelve Months

10

(In lead pencil)

J. S. Jr says, 100 Rooms to be furnished @ 300.
 57 R. unfurnished @ 240. Stores \$6000.

EARNINGS:**Annual Income:**

178 Rooms @ \$225 Each \$40,050
 6 Stores \$ 4,500

Total Gross Income \$44,550.

Total Expenses \$12,100

Total Net Income \$32,450

20 PRESENT MORTGAGES:

First \$90,000 Held by

MEMORANDA.

- To evidence said loan, applicant must execute and deliver to Broker coupon bonds, in denominations to be determined by Broker, secured by first mortgage to Simon W. Straus, as Trustee, upon above property, free and clear of liens and incumbrances; bonds and mortgage to be in such form and to contain such provisions, not inconsistent herewith, as
- 30 Broker may determine.

Plans and specifications are to be submitted to and approved by Broker and to conform to all laws, ordinances, rules and regulations of the Tenement House and Building Departments of the City or other Public Department. No advance shall be due hereunder until Borrower shall file with Broker certifi-

cates that same have been approved by all Public Departments. In case of changes, the like approval shall be obtained and proof thereof made to Broker.

Redemption 102½% after one years on sixty days' notice.

Surety Bond of John Stafford in amount of loan to be furnished conditional on completion of building free from claims or liens.

One-twelfth of amount of principal and interest for next current year beginning March 1st, 1918 must be deposited monthly with the Broker as a sinking fund to meet such payments, payments for the last year to be the same as the next to last year. 10

Interest on all of the bonds, regardless of time of advances on the loan, shall start at the date of the bonds.

The bonds and mortgage shall contain clauses requiring the mortgagor to pay the Federal Income Tax on the bonds.

The Broker is expressly authorized to sell all or any of said bonds at any time after their issuance whether prior to or subsequent to the preparation and execution of permanent bonds. Sales made prior to the issuance of permanent bonds may be made through interim receipts or other convenient method. 20

Insurance.—All buildings partially or wholly constructed must be insured against fire to full insurable value; upon completion, policies for 3 years must be furnished. Policies shall be made payable and delivered to mortgagee; plate glass. employees' compensation and public liability or casualty (and, when in use, high pressure steam boiler or fly wheel) are also required. All policies are to be procured or renewed by Broker and premiums thereon may be paid out of loan. 30

Title guaranty policy, showing clear title, in a company to be approved by Broker, a satisfactory survey and a water color drawing of the building must be furnished. In case of a building loan, applicant must execute building loan agreement, for filing of record, in the form used by Broker.

Closing must be within fifteen days from March 1st, 1917. and time is of the essence. In case of default by the applicant, a commission of two per cent. of the loan and all expenses incurred by Broker, hereunder, shall be due and payable forthwith, as liquidated damages.

The Broker referred to herein is S. W. Straus & Co., Incorporated.

This loan also to be secured by a second mortgage on the St. James Apartment Hotel Building at the corner of Brighton Avenue and the Boardwalk, Atlantic City, N. J., said property to be released from mortgage on payment to broker of \$50,000 to be represented by the redemption of bonds in reverse of their numerical order at the premium and on the dates set forth in the trust mortgage.

To S. W. Straus & Co.,

Incorporated,

150 Broadway,

New York City.

We hereby apply for, and agree to take, a loan on the terms hereinbefore set forth and specified, and agree to pay you for procuring the same a commission of Ten percent to cover all expenses.

J. W. Stafford.

Dated, New York February 6, 1917

The undersigned accepts the above application on

the foregoing terms, provided the data furnished be found to be correct.

S. W. STRAUS & CO., Incorporated.

By W. Thomas Koon.

Dated, New York February 6, 1917

SCHEDULE A.

Annexed to and forming part of foregoing application.

1st Payment:

10

85000 (In pencil)

\$75,000 upon closing: Property to be free and clear. To take up existing mortgages, any commission or other expenses to be taken out of this payment.

Subsequent payments:

60% of certificate of Architects, Clinton & Russell, of New York City, as to actual work done. Certificate to be approved by owner, and property guaranteed free of all liens.

20

Remainder upon completion of building, free and clear of all liens, and when all necessary certificates of occupancy etc., have been issued by the various city departments of Atlantic City, New Jersey.

30

EXHIBIT "D20."

D20

3/28/19

Philadelphia, April 13th, 1918.

RECEIVED from John Stafford the sum of One
thousand Dollars (\$1000.00) in cash, to be applied
on account of contract for Refrigeration system at
10 the VERMONT APARTMENT BUILDING, Ver-
mont Avenue and the Boardwalk, Atlantic City, N. J.
(Sgd.) Pennsylvania Engineering Co.
Lee Nusbaum

\$1000.00

Triplicate.

20

30

GROUND OF APPEAL.

(Filed January 5, 1920.)

NEW JERSEY SUPREME COURT.

LEE NUSBAUM, <i>Plaintiff-Appellant,</i>	10
vs.	
H. G. HARRIS CO., NICHOLAS A. ROBERTS, Trustee, Mortgagee; SIMON W. STRAUS, Mortgagee, and DAVID DALLAM, WEBSTER K. WETHERILL and EDGAR J. ELLIOTT, Trustees of the Estate of JOHN STAF- FORD, Bankrupt, <i>Defendants-Respondents.</i>	20

Grounds of Appeal.

The appellant states the following grounds of appeal:

1. The Court below on the trial allowed an amendment of the defendants' claim of property. 30

2. The Court below on the trial allowed Nicholas Roberts, trustee, mortgagee and Simon W. Straus, mortgagee, to intervene as parties defendant, and as the holders of mortgages on real estate to file answers and defend the suit.

The following questions were admitted:

3. To the witness, Lee Nusbaum. Q. I show what purports to be specifications for this building and refrigerating plant, prepared by Bertram Ireland, and I ask you to look at page fifty and read there about this plant and say whether or not you ever saw these specifications before?

10 4. To the witness, Bertram Ireland. Q. Is there any means for tenants in that building to get ice without taking it up the elevators?

5. To the witness, Frank A. Tucker. Q. Could the bolts be taken out of the foundations without destroying the foundations?

20 6. To the witness, Ausley B. Bowen. Q. Can you remove the bolts which are in the foundations without doing damage to it?

7. To the witness, Howard G. Harris. Q. Is there any means whereby the tenants in the building can keep their ice boxes cold except through this refrigerating plant?

8. To the witness, Howard G. Harris. Q. How many tenants are there now in the building?

30 9. To the witness, Howard G. Harris. Q. Mr. Harris, in your judgment, from an examination of the plant and a knowledge of the building, is it possible to remove this plant without doing great injury to the building and to the boxes which are built in there?

10. To the witness, Albert Sands. Q. What payments were made by Straus and Company after October twenty-seventh, 1917, in amount?

11. To the witness, Albert Sands. Q. Straus and Company, how are they connected with Roberts, trustee?

12. To the witness, Albert Sands. Q. In accepting the mortgage of two hundred and fifty thousand dollars, Roberts, as trustee, represented Straus and Company, or not? 10

13. To the witness, Albert Sands. Q. Do you know if Straus and Company were the owners of bonds issued under that mortgage?

14. To the witness, Albert Sands. Q. Will you tell the Court the procedure on the sale of the bonds under the Roberts mortgage? 20

The following writings were admitted in evidence:

15. Receipt dated March 1, 1918, signed Lee Nusbaum, Pennsylvania Engineering Company (Exhibit D1).

16. Receipt dated March 26, 1918, signed Lee Nusbaum, Pennsylvania Engineering Company (Exhibit D2). 30

17. Plans of construction drawn by Bertram Ireland, architect (Exhibit D3).

18. Mortgage dated March 1, 1917, made by John Stafford et al to Nicholas Roberts, trustee, recorded April 3, 1917 (Exhibit D5).

19. Bond and mortgage made by John Stafford et al to Simon W. Straus, dated January 25, 1918, recorded February 4, 1918 (Exhibits D6, D7).

20. Application for loan, John Stafford to S. W. Straus and Company (Exhibit D8).

21. Receipt dated April 13, 1918, signed Lee Nussbaum, Pennsylvania Engineering Company (Exhibit 10 D20).

The following motions were overruled:

23. To strike out the defense based upon the mortgages.

24. For a finding for the plaintiff at the close of the case.

20

HERBERT R. VOORHEES,
U. G. STYRON,
Attorneys of Appellant.

[ENDORSED]

Service of the within grounds of appeal is acknowledged and the filing thereof, out of time, is consented to.

30

C. L. Cole,
Theo. W. Schimpf,
Attys. of Respondent.

JUDGMENT OF AFFIRMANCE.

(Entered March 8, 1921.)

This cause was heard before our Supreme Court at the November Term A. D. Nineteen Hundred and Twenty and Judgment of Affirmance was rendered against said Plaintiff-Appellant and in favor of the Defendants-Respondents.

Whereupon it is adjudged that the said defendants-respondents H. G. Harris & Co., Nicholas A. Roberts, Trustee Mortgagee, Simon W. Straus, Mortgagee, and David Dallam, Webster K. Wetherill and Edgar J. Elliott, Trustee of the Estate of John Stafford, Bankrupt, do recover against the said Plaintiff-Appellant Lee Nusbaum the sum of Forty dollars and fifty-six cents costs in the court below, together with costs in this Court which have been taxed at the sum of Nineteen dollars making in the whole the sum of Fifty-nine dollars and fifty-six cents.

Judgment entered March 8, 1921.

WM. S. GUMMERE, C. J. 20

Costs below	\$40.56
Costs Sup. Ct.	19.00
	\$59.56

A true copy.

ENOCH L. JOHNSON,
Clerk.

No. 49, November Term, 1920.

NEW JERSEY SUPREME COURT.

Lee Nusbaum,
Plaintiff-Appellant,

vs.

10 H. G. Harris Company,
Nicholas A. Roberts,
Trustee, Mortgagee;
Simon W. Straus, Mort-
gagee, and David Dal-
lam, Webster K. Weth-
erill and Edgar J. Elliott,
Trustees of the Estate of
John Stafford, Bankrupt,
Defendants-Respondents.

Argued November, 1920, before Chief Justice Gum-
mere and Justices Bergen and Katzenbach.

HERBERT R. VOORHEES,
U. G. STYRON, For Appellant.
HON. C. L. COLE,
THEODORE W. SCHIMPF,
20 ROBERT R. HOWARD, For Respondents.

PER CURIAM.

30 This is an appeal from a judgment entered for the
defendants below in a suit instituted in the Atlantic
County Circuit Court. The action was one of replevin
to recover possession of a cold storage plant placed by
the appellant in an apartment house in Atlantic City
known as the "Vermont Apartments" under a contract
made between the plaintiff below (hereinafter referred
to as the plaintiff) and one John Stafford. The plain-
tiff, in the final contract made with Stafford, dated
October 29th, 1916, agreed "to furnish and erect all
necessary refrigeration and cold storage plant requir-
ed in the erection and completion of the building
..... in strict conformity with the plans pre-

pared by, architect, and with the specifications hereunto annexed and made a part hereof, which plans and specifications are hereby made a part of this agreement as fully and completely and with the same effect as if the same had been set forth in the body of the agreement". Annexed to the agreement is what is termed a contract order containing conditions and specifications for the machinery, etc., to be furnished, unsigned by the parties. In the conditions appears the following: "The Title to all materials furnished by the company (the Plaintiff) shall remain in it until full purchase price has been paid in cash with full right of repossession by the company upon the purchaser's default of any act or payment due under this contract". The theory upon which the replevin suit was instituted was that as Stafford had not paid for the refrigerating plant the plaintiff could replevin it under this provision of the contract. 10

The judge before whom the case was tried without a jury found as a fact that the contract order so called had been superseded by the contract of October 29th, 1917, under which the title to the cold storage plant upon installation passed to Stafford without the reservation contained in the contract order. We are of the opinion that the evidences justifies this finding of the trial court. In the case of *Ingersoll-Rand Co. vs. United Fidelity and Guaranty Company*, 92 N. J. L., 403, the Court of Errors and Appeals held that the reservation of title to machinery in unsigned specifications annexed to a contract was no part of the contract and ineffective to reserve title in the vendor. In the present case the reservation of title is found in the conditions unsigned and although annexed to the contract not referred to therein. We are of the opinion that such reservations of title in the conditions form no part of the contract of October 29th, 1917, made between the plaintiff and Stafford and are ineffective to give to the plaintiff the present right of possession necessary to maintain an action of replevin. 20 30

For these reasons we affirm with costs the judgment.

NEW JERSEY SUPREME COURT.

Lee Nusbaum,

Plaintiff-Appellant,

vs.

H. G. Harris Company,
Nicholas A. Roberts,
Trustee, Mortgagee;
Simon W. Straus, Mort-
gagee, and David Dal-
lam, Webster K. Weth-
erill and Edgar J. Elliott,
Trustees of the Estate of
John Stafford, Bankrupt,

Defendants-Respondents.

NOTICE OF APPEAL.

To C. L. COLE, Esq.,

Attorney of Defendants-Respondents.

Take notice that the plaintiff-appellant appeals to
the Court of Errors and Appeals from the judgment
entered in the cause above entitled.

HERBERT R. VOORHEES,
Attorney of Plaintiff-Appellant.

(ENDORSED.)

Service acknowledged.
Feb. 23rd, 1922.

C. L. COLE,
Atty. Respds.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Lee Nusbaum,

Plaintiff-Appellant,

vs.

H. G. Harris Company,
Nicholas A. Roberts,
Trustee, Mortgagee;
Simon W. Straus, Mort-
gagee, and David Dal-
lam, Webster K. Weth-
erill and Edgar J. Elliott,
Trustees of the Estate of
John Stafford, Bankrupt,

Defendants-Respondents.

GROUND OF
APPEAL.

10

The appellant states the following grounds of appeal:

1. The trial court allowed an amendment of the defendants' claim of property. The amendment should have been refused.

2. The trial court allowed Nicholas Roberts, trustee, and Simon W. Straus, mortgagees, to intervene as parties defendants and as the holders of mortgages of real estate to file answers and defend the suit. 20

The following writings were admitted in evidence:

3. Mortgage dated March 1, 1917, made by John Stafford et al. to Nicholas Roberts, trustee. (Exhibit D5.)

4. Bond and mortgage made by John Stafford et al. to Simon W. Straus, dated January 25, 1918. (Exhibits D6, D7.)

5. Application for loan by John Stafford to S. W. Straus & Company. (Exhibit D8.) 30

The following motions were over-ruled:

6. To strike out the defense based upon the mortgages.

7. For a finding for the plaintiff at the close of the case.

8. The Supreme Court decided that the evidence justified the finding by the trial court that the contract order and acceptance had been superseded by the contract dated October 29, 1917, (Exhibit P1), whereas such finding was not justified by the evidence.

10 9. The Supreme Court decided that the reservation of title found in the conditions forming part of the contract order and acceptance annexed to the contract dated October 29, 1917, formed no part of said contract, whereas the same was part thereof and intended to be read therewith.

20 10. The Supreme Court decided that the contract of October 29, 1917, worked an abandonment of the title reserved in the conditions of the contract order and acceptance of even date annexed thereto, whereas by the true construction of said writings the title was retained.

11. The Supreme Court affirmed the judgment of the Atlantic County Circuit Court, whereas it should have reversed the said judgment.

HERBERT R. VOORHEES,
Attorney of Appellant.

(ENDORSED.)

Service acknowledged.

3/21/22

30

C. L. COLE,
Atty.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

LEE NUSBAUM,
Plaintiff-Appellant,

vs.

H. G. HARRIS
COMPANY, et al.,
Defendants-Respondents

ON APPEAL.

BRIEF FOR APPELLANT.

A judgment was entered in the Atlantic County Circuit Court in favor of the defendants, H. G. Harris Co., in an action of replevin.

The case was commenced February 10th and concluded March 28th, 1919, before his Honor Judge Carrow, then Circuit Court Judge, sitting without a jury. He decided the case and filed his finding on August 15, 1919, and on September 2, 1919, the judgment appealed from was entered. The plaintiff appealed from the judgment to the Supreme Court, where the judgment of the Circuit Court was affirmed. The question upon this appeal is whether that judgment so entered and affirmed can stand.

General Statement.

The action was replevin and the undisputed facts, disclosed by the record, are these:

Prior to October 29, 1917, John Stafford had in course of construction, and nearly complete, a large apartment house building on Vermont Avenue at the Boardwalk in Atlantic City, according to plans and detailed specifications prepared by one Bertram Ireland, the architect employed. The plans of construction provided for forty-two separate apartments designed for family occupation and house-keeping, and the building was to be equipped with refrigeration to be supplied into each apartment from a central plant located in the basement and thence circulated throughout the building by means of a system of piping into coils contained in specially constructed boxes placed in each apartment to receive the same. No particular type of refrigerating plant was designated in the plans or specifications as prepared by the architect. The specifications prepared by the architect describe in a general way the mode of refrigeration, but not the type of plant required for the building, and the plan of construction merely indicates by the words "refrigeration plant" that the plant is to be set up in the basement and by circles and squares indicates the precise location in the basement where the plant is to be erected. (Case, page 82.)

By a contract in writing, made at Philadelphia, October 29, 1917, between John Stafford, (called the purchaser) and Lee Nusbaum, trading, &c. (called the company), the latter agreed to "furnish and erect all the necessary refrigeration and cold storage plant required in the erection and completion of the building erected at Vermont Avenue and the Boardwalk, Atlantic City, New Jersey, and at the price hereinafter set forth, in strict conformity with the plans prepared by Bertram Ireland, architect,

and with the specifications hereunto annexed and made a part hereof, which plans and specifications are hereby made a part of this agreement, as fully and completely and with the same effect as if the same had been set forth at length in the body of this agreement," for the sum of \$5900, to be paid monthly, in interest bearing notes, each payable in three months, excepting a retained percentage of 20%, which was to be paid thirty days after final completion.

No specifications were in fact annexed to this instrument. There was annexed to and permanently fastened to it another document, to which specifications were annexed and referred to as forming part. That document, designated "contract order", is in the form of a proposal and acceptance and consists of three parts, viz: (1) Order and acceptance, (2) conditions and (3) material specifications. The proposal, dated October 29, 1917, is contained in a letter by John Stafford, addressed to Lee Nusbaum, representing Pennsylvania Engineering Company as follows:

We, John Stafford * * * hereby authorize you to enter our order for material for a nine-ton refrigerating plant, in accordance with conditions and material specifications attached and made part hereof.

And after specifying place of delivery and erection, time of shipment, price and terms of payment precisely as in the first mentioned writing to which it is annexed, it concludes with this paragraph:

It is understood that this is not binding upon you until accepted by you at your Philadelphia office by a member of your firm.

Immediately below are the words:

Accepted Oct. 29, 1917, in Philadelphia, Pa.,
by Pennsylvania Engineering Company. By
Lee Nusbaum.

Following which are the "conditions" and "material specifications" referred to in the proposal.

The following is set forth under the caption "Conditions":

The title to all material furnished by the company shall remain in it until full purchase price has been paid in cash, with full right of re-possession by the company upon purchaser's default of any act or payment due under this contract.

Under the caption, "Material Specifications" is found a detailed description of the materials and labor embraced in the contract. These specifications were prepared by the company (appellant) and were the only specifications used in the erection of the plant. The plaintiff below never saw those prepared by the architect. The first materials were delivered February 22, 1918, and the refrigeration plant was turned over to Stafford, installed, tested out for perfection and fully completed on June 5, 1918. Several notes were given pursuant to the contract, both before and after the completion and acceptance of the work, but none were ever paid excepting the first note given, which was for \$1,000, which at its first due date was reduced by the payment of \$500 and a renewal note given for the \$500 balance, leaving still unpaid \$5200 of the original contract price.

Stafford having defaulted in the payment of notes given by him under his contract with Nusbaum, the appellant, the latter demanded possession of the refrigeration plant of H. G. Harris Company, defendant below, who was then in possession in the right of Stafford, and possession being refused, an action was commenced in the Atlantic County Circuit Court to recover possession. The learned Judge disposed of the case on the ground, according to his findings, that the evidence disclosed an abandonment of the contract by the parties.

The contract (Exhibit P1) is found, case pp. 206-220
 Finding " " " page 23
 Opinion Supreme Court " " " " 244

I.

There is no evidence to sustain the finding that reservation of title in the plaintiff was abandoned.

The learned trial Judge in his finding says:

The feature of the order providing for a reservation of title in plaintiff until full payment, etc., was abandoned afterward when the parties made the final agreement, this, it seems to me, has been demonstrated by plaintiff himself, for when testifying about the last contract, he said, "I had this contract typewritten. We had drawn up several contracts and Mr. Stafford spoke about different things and this is the final result of conference between Mr. Stafford and myself." I, therefore, find from the proof as gathered from the testimony and writing that the typewritten contract to which plaintiff referred superseded the order and conditions therein. It covered the entire contractual situation. The sale was absolute.

With great deference that we venture to insist that there is nothing whatever to be gathered either from the testimony or the writing capable of supporting the interpretation which the trial Judge has given to the contract in his finding or which even remotely suggests that the parties to it had any intention of abrogating or abandoning any feature of it. In the first place there is not a word of testimony supporting the judicial assumption involved in the phrase "afterwards when the parties made the final agreement." There is no evidence that the parties made more than one agreement or modified or changed in any way their agreement as originally concluded. The agreement when produced in evidence consisted of the typewritten paper firmly attached with permanent fasteners to the face of the so called contract order, containing the "conditions" and "material specifications." The contract order consisted of a printed form with blank spaces filled in with typewriting. The typewritten paper mentioned in the finding referred to "plans prepared by

Bertram Ireland, architect" and to "specifications hereunto annexed and made a part thereof." It does not refer to the plans as annexed nor to the specifications as having been prepared by Bertram Ireland, architect. In point of fact neither the plans nor the specifications were annexed to the typewritten paper, but specifications prepared by the plaintiff were annexed to the printed and typewritten contract order, and both plans and specifications were in the express language of the typewritten contract, made part thereof as "fully and completely" as if set forth in the body of the agreement. In the second place, the two papers bear date the same day and there is no evidence of any kind that they were not signed at the same time. In fact, it does not appear by the testimony at what precise time either paper was signed. All that appears is that they have the same date and were signed in Mr. Stafford's office, and there is no evidence that they were signed at different times. In the third place the testimony to which the learned trial Judge points as the basis of his finding is wholly incapable of the construction he has given to it. The attention of the witness was being directed to that feature of the contract which operated as a waiver of his right to file a mechanic's lien to enforce payment for labor and materials furnished under the contract. The plaintiff's cross-examination was thus interrogated (by Mr. Cole) on pages 67, 68, 69, Case:

"Q. You expected these things that you sold to Mr. Stafford to remain chattels until you were paid, did you?

A. I don't understand that question. In fact, I don't know what a chattel is, exactly.

Q. Well, goods. You expected them to remain personal property?

A. I expected to retain title to them until they were paid for. * * * * *

Q. And you read the contract before you signed it?

A. Yes. * * * * *

Q. You know, don't you, you can't file a lien

for personal property?

A. I don't know.

Q. Do you know why this provision was put in the contract?

A. Not to file a lien?

Q. I will read it to you: 'The builder agrees to file no lien for any labor or materials furnished under this contract, and expressly waives the right to file the same,' etc.

A. Well, in the Pennsylvania contracts that we sign, they have provisions like that to prevent persons from filing a lien on a property; and this thing was copied from a Philadelphia contract I had completed with Mr. Stafford at Thirteenth and Spruce Streets.

Q. Did you draw this contract?

A. Yes.

Q. This is your contract?

A. From the wording Mr. Stafford gave me.

Q. And you yourself put a clause in here, or caused it to be put in, that you wouldn't file any lien against the building?

* * * * *

A. Yes, I drew it up.

Q. So you didn't expect to file any lien against this building for your claim, did you?

A. No.

Q. Well, if you knew that this property was to remain personal property and title was not to go out of you, why did you put a clause in that you wouldn't file a lien?

A. Mr. Stafford asked me to put it in.

Q. Well, now, you say Mr. Stafford asked you to put it in. You have already testified you put it in yourself. It was a part of your scheme. Which is correct?

A. Mr. Stafford—I drew the contract. I didn't testify that I drew up this—I had this contract typewritten. We had drawn up several contracts, and Mr. Stafford spoke about different things, and this is the final result of conference between Mr. Stafford and myself. We typewrote that contract though. * * * * *

Q. What did you undersand was the purpose of it going in?

A. I don't know. I don't know what he did want it for.

* * * * *

Q. Did you ask?

A. No.

* * * * *

Q. Did you care, or didn't you?

A. Did I care? What do you mean?

A. Anything about this clause going in the contract?

A. Well, I was willing for it to go in.

Q. What did you think it meant, Mr. Nussbaum?

* * * * *

A. It meant that no liens could be filed on that property.

Q. And that you hadn't any right to file a lien, didn't it?

A. No mechanic's lien, yes.

The Court: Well, would you have considered that you would have had a right to file a lien if that provision had not been in the contract?

A. No.

Q. Why not?

A. Because we were acting on this, that these goods belonged to us and our way of getting them would be to take them out.

Q. Why did you have it put in?

A. Mr. Stafford asked that it go in.

Q. You knew that you would have the right to take these goods out anyhow, didn't you?

A. Yes.

Q. And still you signed the contract providing there should be no liens filed?

A. Yes.

Q. Because Mr. Stafford wanted it that way?

A. Yes.

Q. He evidently thought you would have a right to file a lien, didn't he?

A. I don't know."

Above is quoted the whole of the testimony, including that quoted by the learned Judge, upon which rests his finding that the plaintiff abandoned the feature of his contract providing for retention of title in himself. It is sufficient, we think, to say that the testimony proves exactly the contrary. The attention of the witness was at no time directed to the feature of the contract providing for a reservation in himself of title to the property until fully paid for—a right he constantly maintained throughout his examination.

Counsel, doubtless, in his cross-examination and the Court, perhaps, in its finding, proceeded upon the theory that the chattels had become by annexation incorporated in and part of the freehold and that the right to file a mechanic's lien was the only remedy remaining to the plaintiff to enforce his claim for labor and materials and by waiving that right, he had deprived himself of all remedy to enforce his claim. That, however, ignores the fact that the contract order and acceptance, with its conditions and specifications was not a contract of sale to Stafford of the chattels, but was a contract for their conditional sale to him, and that the mere fact that they were annexed to or even incorporated with the real estate is unimportant, since they remain chattels as to him, notwithstanding annexation and notwithstanding the contract was not even recorded. Of course, if the contract were open to attack by the mortgagee defendants, the result might be otherwise, but they have no such interest in the controversy as gives them a status to litigate in this proceeding and as against Stafford the chattels must continue impressed with the character bestowed upon them by the contract.

Bearing in mind that the parties executed two instruments on the same day relating to the same subject matter and annexed one to the other, a consideration of their relation and purpose as bearing upon the question of repugnancy is useful so far at least as concerns the question of the reservation of title. If both can stand, they must be so interpreted as to give effect to both. We contend that the writ-

ings are consistent in their provisions and that their purpose is entirely manifest. The great object of interpretation is to determine the intention of the parties, and to do this, the following subordinate rules are pertinent, viz:

(1) That consideration be given to the whole instrument rather than to any particular clause.

(2) That every clause and every word be given effect, if possible, and that no part be rejected unless absolutely repugnant to the general intent, which rule will lead to a construction of the whole in harmony with all of its parts; and

(3) The principle that the instrument shall be considered as whole applies when a transaction is incorporated in or evidenced by more than one writing, in which case all the writings are treated as if they were parts of one instrument and are considered together for the purpose of determining the meaning of the parties.

17 Am. & Eng. Enc. L. (2 Ed.) 1-9.

Other aids to construction are the presumed intention of the parties that the instrument should have effect and operation, and that arising from a consideration of the facts and surrounding circumstances attending execution. Tested by these rules, the object of the collateral writing, i. e., the waiver of mechanic's lien, is at once apparent. Reading both instruments in the light of the surrounding circumstances, there is disclosed a clear purpose of restricting the conditional vendor to his remedy of removing the personal property in accordance with his conditional contract, if default should occur, instead of permitting him to file a mechanic's lien upon the real estate to which the property was annexed. In other words, the collateral contract was designed to deprive the plaintiff of the right to elect to treat the transaction as one of absolute sale of the chattels and to proceed by mechanic's lien upon the

building, lot and curtilage upon which the plant was installed. The right to file such a lien is not a right reserved in and secured by the contract consisting of the order, acceptance, conditions and specifications, but subsists independently of that instrument. *Erdman vs. Moore*, 58 N. J. L. 445, 33 Atl. 958. Wherefore, the express waiver of such a right by a separate instrument was neither repugnant to nor inconsistent with the instrument reserving the right to resort to the chattels. Nor is it necessary for the Court, putting itself in the place of Stafford at the date of the execution of the "order and acceptance" contract to remain long in doubt touching his reason for desiring an express waiver of mechanic's liens upon the building and land, for referring to Exhibit D5 (Case p. 227) we find that the mortgage made by Stafford to Roberts, trustee, was made March 1, 1917, prior to the date of the contract, and by its terms obliges him to erect and fully complete the building within one year from that date, and he covenants that the building when completed "will be free from all liens or claims for liens." It is perfectly plain therefore, why Stafford desired a waiver of mechanic's lien to be executed by the plaintiff below and why he attached that waiver to the conditional sale contract and filed his copy in the county clerk's office as the case discloses he did.

Reading these two writings together and considering them as a whole, no inconsistency nor ambiguity appears. They simply provide that the conditional vendor, if the vendee default in the terms of the conditional contract, may remove the personal property furnished and installed by him, but may not lien the building for the unpaid price or unpaid balance of the price thereof.

In *Bailey, Trustee vs. Baker Ice Machine Co.* (U. S. Sup. Ct., Oct. Term, 1915) affirming 126 C. C. A., 209 Fed. 603, a contract for conditional sale of an ice making and refrigerating machine containing precisely the provisions contained in the present contract, and in addition stipulated that the vendor should have the right to file a mechanic's lien for

the materials and labor furnished under the contract. The Court said, speaking of this latter provision:

"We think it did no more than to reserve to the vendor a privilege or option to file and enforce such a lien. It may well be that the exercise of this privilege would have been inconsistent with a continued assertion of title by the vendor. But the privilege was not exercised, and it hardly can be said that its mere reservation nullified the express words of the stipulation concerning the title. That it was not intended to do so seems manifest when the entire contract is considered.

We, therefore, are of opinion that the contract was rightly held to be one of conditional sale."

It seems to us that an interpretation of the several writings composing the contract, which imputes to the appellant the intention of abandoning the reservation of title to the plant with its right of re-possession is too narrow, and we respectfully submit that the judgment of the Supreme Court should have been one of reverse to the judgment of the Circuit Court.

NEW JERSEY Court of Errors and Appeals.

LEE NUSBAUM, <i>Plaintiff-Appellant,</i> <i>vs.</i> H. G. HARRIS & CO., A CORPORA- TION, &C., ET AL., <i>Defendants-Respondents.</i>	}	On Appeal from Supreme Court.
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Respondents' Brief.

STATEMENT.

The opinion of the Supreme Court sufficiently states the facts. The primary question is, was the trial judge who heard the case without a jury justified in finding a verdict for the defendant.

ARGUMENT.

If at the time appellant made demand for the goods he had no title, the judgment cannot be disturbed, and we are not concerned with the other points discussed.

The trial judge found as a fact that appellant had no title. Is there any evidence to support such finding?

We submit there is. Appellant relies upon a claim of reservation of title in him until the goods in question are paid for. The judge found that there was no agreement that title was to remain in the appellant, and that the sale was absolute. There is legal evidence in support of such finding. The agreement under seal refers to Stafford as purchaser, and it expressly provides against the filing of mechanics liens. Such a provision is opposed to the notion of the materials remaining chattels. If they were to preserve their identity as chattels it was wholly superfluous to anticipate a mechanics lien. Indeed a mechanics lien could not have been supported as against a mortgage, at least. It is not clear that the parties intended that the materials were to be incorporated in and become a part of the freehold and necessarily lose their chattel character? The sealed agreement is complete in itself and does not provide for retention of title in the appellant. That provision is in a separate and independent paper. Appellant contends that the papers were attached and constituted a single agreement. But that was a question of fact. Was it attached before the trial or intended to be and made a part of the sealed instrument? The reference to Stafford as purchaser and the mechanics lien feature permit the inference that it was not. Moreover, appellant's evidence, quoted in his brief, and other which appears in the case, warranted the inference that the sealed instrument represented the final and completed agreement between the parties. Appellant must appeal to the alleged annexed paper to support his claim. It is tremendously significant that the sealed instrument does not pretend to draw to it the conditions or reservations of title feature contained in the "annexed paper." Appellant agrees to furnish, etc., "in strict conformity with the plans prepared by Bertram Ireland, architect, and with the *specification* hereunto attached and made a part hereof, *which plans and specification are hereby made a part of this agreement.*" Only the plans and specifications are made a part of the agreement. This

express language, by necessary inference, excluded the "conditions" upon which appellant relies to recover. Again, appellant gave "cash" receipts in triplicate when, in fact, as he now claims, he received no cash. As an experienced business man he must have known these receipts were to be passed to the mortgagees by Stafford for the purpose of obtaining money on the advance money mortgage. This fact warranted a finding that he waived his right to retain title, if ever it existed. These facts, and others that might be suggested, with the legitimate inferences therefrom, certainly presented a jury question as to whether it was ever agreed that appellant was to retain the title, and if so, if he did not waive such right. It should be added that the plant in question was installed in a very large apartment house. It was not like a case where a plant is built independent of any other structure. Here the plant was an integral part of the apartment house and to remove it meant to materially destroy the usefulness and convenience of the house. It is not to be presumed in the absence of most convincing evidence that the owner intended to agree that the plant should be subject to removal. If it be found that he did so agree, only very slight evidence of a waiver should be required.

There is a clear repugnancy between retaining title as chattels and filing a lien against real estate.

Where such repugnancy exists in the same instrument, the recognized rule is to disregard the latter and regard the earlier language of the agreement.

Vickers v. Electrozone, Etc., 67 Law 675.

The first reference in the contract under consideration is to filing a lien.

TWO.

The conditional sale feature was no part of the agreement between the parties.

If there should have been a judgment for the defendants or either of them it is of no consequence that the trial judge gave an improper or insufficient reason.

The question of the attempt by appellant to reserve title in himself is disposed of by the Court of Errors in *Ingersoll v. Rand, United States, &c.*, 105 A. R. 236.

There, as here, the specifications were not signed. There, as here, there was a provision in the specifications reserving title, and there, as here, the specifications were prepared by the contractor.

The Court said:

"But it is also the rule that, where the specifications are referred to for a specific purpose only, they become a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes."

"The word 'specifications' when used in such a contract ordinarily means a specific and detailed description of the thing to be furnished or the work to be done."

The hereinabove quotation from the sealed contract between the parties is all that appears or has relevancy to the paper annexed. It will be noted that the reference to the plans and specifications is for the sole purpose of fixing the kind of plant appellant is required to construct.

The cited and instant cases are analogous, and as a legal consequence the judgment must be affirmed.

THREE.

There was no sufficient demand before suit brought.

As defendant was lawfully in possession of the premises he was entitled to a legal demand before being required to surrender or refuse. (*Woodside v. Adams*, 40 N. J. Law, p. 417.)

The demand was upon the president of H. G. Harris Company, a corporation, which was not the owner of the building in which the machinery was incorporated and which was acting only as agent for the collection of

rents, and it was not in a position to deliver possession. Moreover, the demand and service of the writ were practically simultaneous. The plant was so affixed to and incorporated into the apartment house as to make delivery of the entire thing an utter impossibility and certainly within the short space of time between the demand and the service of the writ. There is nothing in the case to show that the president of the Harris Company had any authority to refuse to deliver possession of the property in question, the legal title of which was in the trustees of Stafford, a bankrupt. Before one can be put in default and their act of refusal to turn over property be made a ground for the charge of conversion, they are entitled to a demand and time to consider its scope and effect.

It will be noted in the answer of Harris & Co. (page 7) that they distinctly set up the defense that they were not the owners of the property, that they had no relation with Stafford, owner, and were acting solely for Straus & Co., mortgagees, for the collection of rents. The owners of the property never had a demand upon them to return same to the appellant. While the record is silent, this point was made one of the grounds in a motion for judgment for defendants.

FOUR.

The trial court found as a fact that that part of the contract relied upon by plaintiff to reserve title in himself was not any part of the contract actually made between plaintiff and Stafford. See his conclusions at page 23.

The Supreme Court found that there is sufficient in the record to justify that finding, and we submit that such a conclusion is justified. Its finding is that all orders and conditions were superseded by the final type-written contract.

Respectfully submitted that the judgment of the
Supreme Court is without error and should be affirmed.

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Of Counsel.



