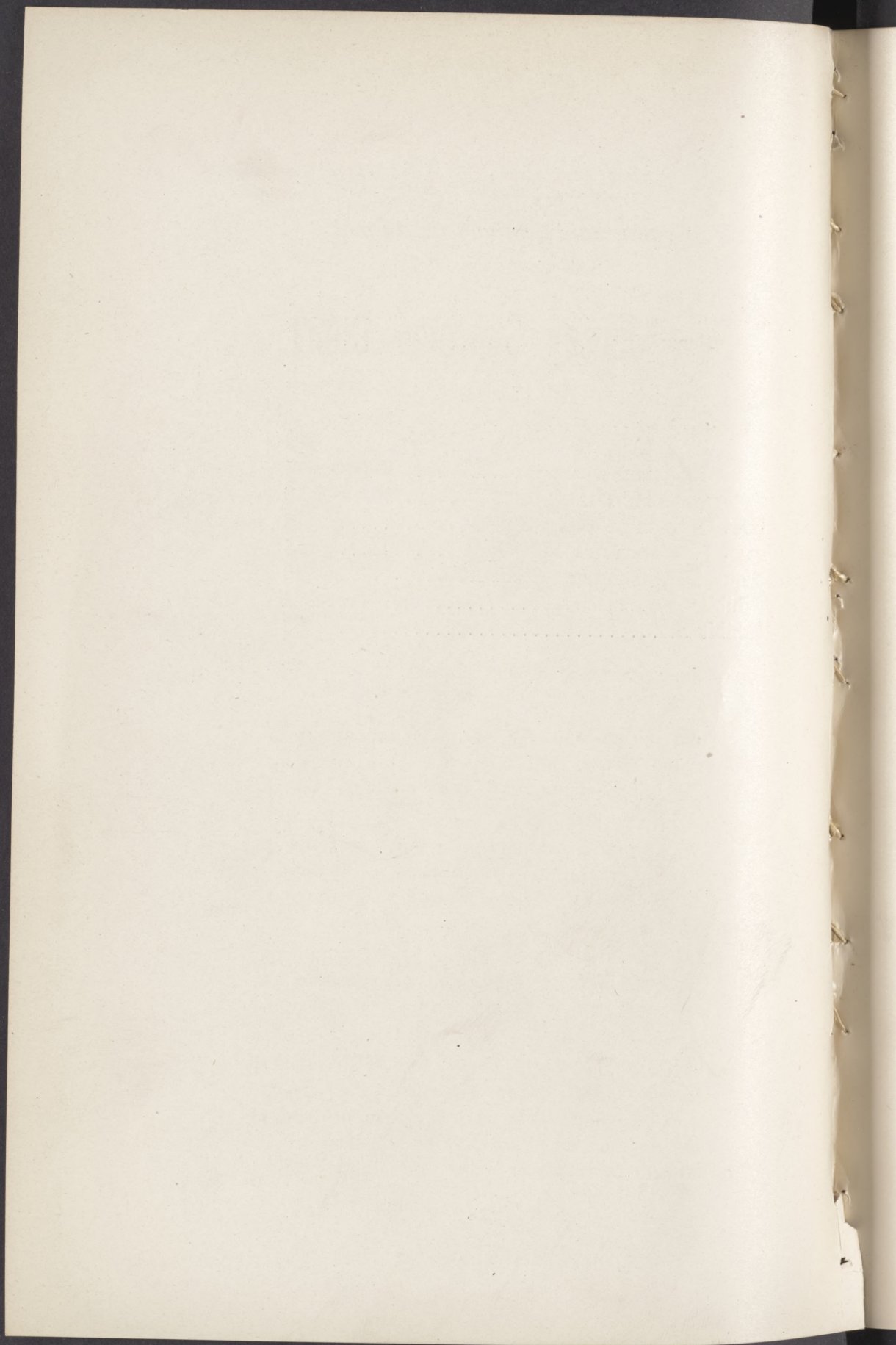


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New Jersey State Library



Notice and Grounds of Appeal.

Filed April 18, 1918.

New Jersey Supreme Court.

INGERSOLL-RAND COMPANY, a
corporation,
Plaintiff,

vs.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
Defendant.

*Action at
Law.*

*Notice of
Appeal.*

10

To McDERMOTT & ENRIGHT,
Attorneys of Defendant.

20

Take notice that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The court held that the specifications attached to Exhibit A are no part of Exhibit A except to the size and dimensions of the compressors mentioned in Exhibit A.

30

2. Over objection of plaintiff Paragraph 3½ of the Statement of Facts was admitted in evidence.

3. Over objection of plaintiff the following portion of Paragraph 5 of the Statement of Facts was admitted in evidence:

“and of which contract the defendant had no notice or knowledge until after the date of the institution of this suit.”

40

Notice and Grounds of Appeal.

4. The plaintiff requested the court to make the following rulings (Paragraphs Number 5 to 16 inclusive) and the court refused to rule as requested, whereas each of said rulings should have been made.

10 The legal effect of the undisputed evidence is stated in said requested rulings and entitled the plaintiff to judgment against the defendant, that is to say:

5. That the whole of the unsigned specifications attached to the signed contract (Exhibit A) and referred to in Paragraphs 6 and 7 of the Statement of Facts constitute a part of that contract.

20 6. That the compressor in question in this case was delivered to Prendergast and Clarkson under a contract which provided that the title and right of possession to said compressor should remain in the Ingersoll-Rand Company until the compressor should be fully paid for in cash.

30 7. That when the United States Government took possession of the compressor in question, it took it subject to the rights of the plaintiff under its contract with Prendergast and Clarkson.

8. That when the United States, on September 28th, 1906, turned over to the defendant, United States Fidelity & Guaranty Company, the plant of Prendergast & Clarkson, the defendant thereby acquired no greater rights in the compressor in question than Prendergast & Clarkson had had at the time it delivered up possession of the same to the United States Government.

40 9. That the plaintiff by reason of its contract with Prendergast & Clarkson had at all

Notice and Grounds of Appeal.

times both the title and right of possession to the compressor.

10. That Prendergast & Clarkson by the written agreement referred to in Paragraph 3½ of the Statement of Facts, granted to the defendant no rights in the compressor as against the plaintiff. 10

11. The written agreement referred to in Paragraph 3½ of the Statement of Facts, insofar as it applies to the compressor in question, was an attempt to convey Prendergast & Clarkson's right, title and interest in after acquired property and was void

12. That the defendant was not a "purchaser or judgment creditor of the vendee or lessee in possession without notice" within the purview of Section 3745 of Compiled Statutes of 1910 of Wyoming. 20

13. That the plaintiff's contract with Prendergast & Clarkson was valid as against the defendant and the reservation therein of the title and right of possession to the compressor was valid as against the defendant although said contract was not recorded.

14. The written agreement referred to in Paragraph 3½ of the Statement of Facts is a "chattel mortgage, bond or other instrument intended to operate as a chattel mortgage" and the plaintiff is a "creditor of the mortgagor" within the purview of the Wyoming Chattel Mortgage Act, Wyoming Compiled Statutes, Section 372, *et seq* and said agreement is void as against the plaintiff. 30

15. That the defendant's rights in said compressor were subject and subordinate to the plaintiff's title and right of possession. 40

Notice and Grounds of Appeal.

16. That on October 1st, 1906, the defendant unlawfully converted said compressor to its own use to the damage of the plaintiff.

17. Upon the whole case the court found in favor of the defendant and against the plaintiff.

10 18. The court ordered judgment for the defendant, whereas judgment should have been for the plaintiff.

COLBY, WHITING & MOORE,
Attorneys of Appellant.

Endorsed:

NEW JERSEY SUPREME COURT.

20

INGERSOLL-RAND COMPANY, a
corporation,

*Plaintiff,**vs.*

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

*Defendant.**Action at
Law.**Notice of
Appeal.*

30

COLBY, WHITING & MOORE,
Attorneys of Plaintiff,
Essex Bldg.,
Newark, N. J.

Service of the within Notice of Appeal is hereby acknowledged this 12th day of April, 1918.

40

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

*Complaint.*IN THE SUPREME COURT OF NEW
JERSEY.

HUDSON COUNTY.

 INGERSOLL-RAND COMPANY, a
 corporation,
*Plaintiff,**vs.*UNITED STATES FIDELITY AND
GUARANTY COMPANY,*Defendant.*

10

*Judgment
Record.*

United States Fidelity and Guaranty Com-
 pany, the defendant in this cause, was summoned
 to answer unto Ingersoll-Rand Company, the
 plaintiff therein, in an action at law, upon the
 following complaint:

20

Complaint.

Filed September 13th, 1912.

Plaintiff, a corporation organized and existing
 under the laws of the State of New Jersey, and
 having its principal office at 15 Exchange Place,
 in the City of Jersey City, in the County of Hud-
 son, says:

30

1. That on or about the 13th day of April,
 1906, plaintiff, at the express instance and re-
 quest of Prendergast & Clarkson, a corporation
 organized and existing under the laws of the
 State of Illinois, shipped to said Prendergast
 & Clarkson, free on board at Cody, in the State
 of Wyoming, for use in connection with the con-
 struction of the Shoshone Dam in that State,

40

Complaint.

under a contract between said Prendergast & Clarkson and the United States Government, the following machinery and accessories:

10 One Ingersoll-Rand (Cross Compound Steam & Air) Imperial Type 103 Air Compressor having Meyer Cut Off Steam Valves.

One Vertical Steel Air Receiver, 54 inches in diameter by 12 feet high, strongly made and tested up to 165 pounds water pressure, with manhead, safety valve, pressure gauge, drain cock and flanges for inlet and discharge pipes made of best 60,000 pounds tensile strength steel, side seams double riveted and heads dished;

20 One Greenway Steel Separator with Davis or equal trap for automatically removing water from Separator;

One Exhaust heater attached to Feed Water Heater for exhausting steam into the atmosphere;

One Cochrane Feed Water Heater of about 350 Boiler Horse Power capacity;

30 One Boiler Feed Pump of ample capacity for pumping feed water into 350 Horse Power of Boilers; One Duplex Steam Pump having a capacity of 50 Gallons per minute against a head of 100 feet; to be arranged for operating with Compressed Air;

Switchboard and fittings;

40 of the reasonable value and at the agreed price of \$5,771.00, payable one-third in cash upon shipment; one-third sixty days thereafter, and the balance one hundred and twenty days after the shipment, and upon the condition that title to said machinery and accessories should not vest in said Prendergast & Clarkson on delivery thereof

Complaint.

to it, but should remain in plaintiff as security for the further payment on account of the purchase price of such machinery and the accessories until the price thereof was fully paid in cash.

2. That said Prendergast & Clarkson received and accepted the said machinery and accessories upon the terms aforesaid and retained the same at or near the said Shoshone Dam. 10

3. That no part of the \$5,771.00, the agreed price and reasonable value of said machinery and accessories, has been paid except the sum of \$2,000.00, although demand for same was duly made.

4. That title in and to the said machinery and accessories has at all times remained in plaintiff and on or about August 13th, 1906, and at all times thereafter, by reason of the default on the part of said Prendergast & Clarkson in making payments as aforesaid, plaintiff was and has been entitled to the possession of said machinery and accessories, and that defendant had knowledge thereof and therein prior to the commission of the acts by the defendant hereinafter set forth. 20

5. That thereafter and on or about October 1st, 1906, at or near the said Shoshone Dam, in the said State of Wyoming, defendant unlawfully and wrongfully took said machinery and accessories so delivered to said Prendergast & Clarkson as aforesaid by plaintiff and took and converted the same to its own use. 30

6. That thereafter and on or about October 1st, 1906, plaintiff duly demanded of the defendant that it return said machinery and accessories to it, but defendant neglected and refused so to do and has since continually so re- 40

Amended Answer.

fused to do and has converted and disposed of the same to its own use.

The plaintiff demands as damages \$3,771.00 together with interest from October 1st, 1906, and the costs of this suit.

10

SOMMER, COLBY & WHITING,
Attorneys of Plaintiff.

The defendant answered as follows:

Amended Answer.

Filed March 4th, 1913.

20 Defendant, a corporation organized and existing under the laws of Maryland having its principal office in the City of Baltimore in the State of Maryland, says that:

FIRST DEFENSE.

1. As to the statements of the first paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.
2. As to the statements of the second paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.
- 30 3. As to the statements of the third paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.
4. Defendant denies the fourth paragraph.
5. Defendant denies the fifth paragraph.
6. Defendant denies the sixth paragraph.
7. Plaintiff's claim is barred by the first section of "An Act for the Limitation of Actions" (Revision of 1877).

40

Amended Answer.

8. Said machinery and accessories mentioned in the complaint were seized and taken by the United States Government in the exercise of its rights.

SECOND DEFENSE.

1. It repeats the statements contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first defense. 10

2. The machinery and accessories mentioned in paragraph one of the complaint were taken possession of by it as a purchaser in good faith without notice of the rights of the plaintiff therein.

3. The agreement or contract between plaintiff and Prendergast and Clarkson mentioned in paragraph one of the complaint was not filed, in accordance with the laws of the State of Wyoming, Laws 1895, Chapter 40, Paragraph 1, provided as follows: 20

“No sale, contract or lease wherein the transfer of title of ownership of personal property is made to depend upon any condition shall be valid against any purchaser or judgment creditor of the vendee or lessee in possession without notice unless the same be in writing signed by the vendee or lessee and the original or a copy thereof filed in the office of the County Clerk of the county wherein the property is; said instrument so filed shall have attached thereto an affidavit of such vendor or lessor or his agent or attorney which shall set forth the names of the vendor or vendee or lessor or lessee with a description of the property transferred and the full and true interest of the vendor or lessor therein. All such sales or transfers shall cease to be valid against purchasers in good faith or 30 40

Reply.

judgment or attaching creditors without notice at the expiration of one year from the date of such sale, unless the vendor or lessor shall within thirty days prior to the one year from the date of such sale or transfer file a similar affidavit to the one above provided for, in the office
 10 of the clerk, and the said vendor or lessor may preserve the validity of his said sale or transfer of such personal property by an annual refiling in the same manner as aforesaid of such copy."

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

THE PLAINTIFF REPLIED AS FOLLOWS:

20

Reply to Amended Answer.

Filed April 9th, 1913.

Plaintiff by way of reply to defendant's amended answer says:

REPLY TO FIRST DEFENSE.

1. Plaintiff denies paragraph 7 of said defense.
2. Plaintiff alleges that paragraph 8 of said
 30 defense discloses no defense to the complaint in this case.

REPLY TO SECOND DEFENSE.

1. Plaintiff denies that its claim is barred by the first section of "An act for the limitation of actions," Revision of 1877.
2. Plaintiff denies paragraph ~~8~~² of said defense.
3. Plaintiff denies paragraph 3 of said
 40 defense except as to the provisions of such statute

Postea.

in Wyoming therein mentioned, as to which plaintiff has not knowledge or information sufficient to form a belief, and that plaintiff admits that the agreement or contract between plaintiff and Prendergast & Clarkson therein mentioned was not filed.

SOMMER, COLBY & WHITING,
Attorneys of Plaintiff.

10

Postea.

Filed September 28th, 1917.

NEW JERSEY SUPREME COURT.

INGERSOLL - RAND COMPANY, a
corporation,

Plaintiff,

vs.

UNITED STATES FIDELITY &
GUARANTY COMPANY,

Defendant.

20

Action at Law.

Postea.

30

This case was tried before Circuit Judge William H. Speer, without a jury at the Hudson Circuit, August 31, 1917. The court upon the request of the plaintiff in the annexed requests for rulings refused to rule as requested. Upon the whole case the court found in favor of the defendant and against the plaintiff.

WM. H. SPEER,
Judge.

Dated, September 28th, 1917.

40

Plaintiff's Request for Rulings.

NEW JERSEY SUPREME COURT.

HUDSON CIRCUIT.

10	INGERSOLL-RAND COMPANY, a corporation, vs. UNITED STATES FIDELITY & GUARANTY COMPANY, 	Plaintiff, Defendant.	}	<i>Action at Law.</i> <i>Request for Rulings.</i>
----	---	----------------------------------	---	--

The plaintiff respectfully requests the court to make the following rulings:

- 20 1. That the whole of the unsigned specifications attached to the signed contract (Exhibit A) and referred to in paragraphs 6 and 7 of the statement of facts constitute a part of that contract.
- 30 2. That the compressor in question in this case was delivered to Prendergast & Clarkson under a contract which provided that the title and right of possession to said compressor should remain in the Ingersoll-Rand Company until the compressor should be fully paid for in cash.
3. That when the United States Government took possession of the compressor in question, it took it subject to the rights of the plaintiff under its contract with Prendergast & Clarkson.
- 40 4. That when the United States, on September 28th, 1906, turned over to the defendant, United States Fidelity & Guaranty Company, the plant of Prendergast & Clarkson, the de-

Plaintiff's Request for Rulings.

fendant thereby acquired no greater rights in the compressor than Prendergast & Clarkson had had at the time it delivered up possession of the same to the United States Government.

5. That the plaintiff by reason of its contract with Prendergast & Clarkson had at all times both the title and right of possession to the compressor. 10

6. That Prendergast & Clarkson by the written agreement referred to in Paragraph 3 $\frac{1}{2}$ of the Statement of Facts, granted to the defendant no rights in the compressor as against the plaintiff.

7. The written agreement referred to in Paragraph 3 $\frac{1}{2}$ of the Statement of Facts, insofar as it applies to the compressor in question, was an attempt to convey Prendergast & Clarkson's right, title and interest in after acquired property and was void. 20

8. That the defendant was not a "purchaser or judgment creditor of the vendee or lessee in possession without notice" within the purview of Section 3745 of Compiled Statutes of 1910 of Wyoming.

9. That the plaintiff's contract with Prendergast & Clarkson was valid as against the defendant and the reservation therein of the title and right of possession to the compressor was valid as against the defendant, although said contract was not recorded. 30

10. The written agreement referred to in Paragraph 3 $\frac{1}{2}$ of the Statement of Facts is a "chattel mortgage, bond or other instrument intended to operate as a chattel mortgage" and the plaintiff is a "creditor of the mortgagor" within the purview of the Wyoming Chattel Mortgage Act, 40

Plaintiff's Request for Rulings.

Wyoming Compiled Statutes, Section 372, *et seq.*, and said agreement is void as against the plaintiff.

11. That the defendant's rights in said compressor were subject and subordinate to the plaintiff's title and right of possession.

10 12. That on October 1st, 1906, the defendant unlawfully converted said compressor to its own use to the damage of the plaintiff.

The plaintiff further requests that the rulings of the court upon the foregoing propositions or points of law be stated in the findings and included in the *postea*.

COLBY, WHITING & MOORE,
Attorneys of Plaintiff.

20

30

40

Judgment.

NEW JERSEY SUPREME COURT.

INGERSOLL-RAND COMPANY, <i>vs.</i> UNITED STATES FIDELITY & GUARANTY COMPANY.	}	<i>Action at Law. On Postea. (Judgment for Defend- ant.)</i>	10
		<i>McDermott & Enright, Attorneys.</i>	

Judgment entered this twenty-ninth day of September, A. D., nineteen hundred and seventeen, Costs \$39.10 for the sum of thirty-nine dollars and ten cents costs in favor of the defendant and against the plaintiff. 20

WM. S. GUMMERE, C. J.

30

40

Statement of Facts.

This action was tried before Judge William H. Speer by consent without a jury upon the following agreed Statement of Facts supplemented by evidence hereinafter set forth:

Statement of Facts.

10

NEW JERSEY SUPREME COURT.

INGERSOLL-RAND COMPANY, a
corporation,

*Plaintiff,**vs.*

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

*Defendant.**Action at
Law.**Statement
of Facts.*

20

(1) The plaintiff, Ingersoll-Rand Company, is a corporation, duly organized and existing under the laws of the State of New Jersey and is engaged in the business of manufacturing and selling drills, compressors, generators, pumps and machinery for the use of contractors upon public work and elsewhere, and sells and deals in all kinds of machinery used in such kind of work.

30

(2) Shortly prior to February, 1906, the said Ingersoll-Rand Company had been formed and had commenced business. Such company was formed by the consolidation of two previously existing companies, namely, the Ingersoll-Sergeant Company and the Rand Drill Company and the consolidated company, the Ingersoll-Rand Company, had taken over and had continued to use and was then using the forms of contracts and agreements theretofore used by the Ingersoll-Sergeant Company and the Rand Drill Company.

40

Statement of Facts.

(3) On September 23rd, 1905, Prendergast & Clarkson, a corporation duly organized and existing under the laws of the State of Illinois, entered into a contract with Thomas Ryan, Acting Secretary of the Interior, and acting on behalf of the United States of America for the construction and completion of the Shoshone Dam and auxiliary works, Shoshone Project in the State of Wyoming, and duly entered upon the performance of said contract. On the same day the United States Fidelity and Guaranty Company, the defendant, became surety on the bond of Prendergast & Clarkson, guaranteeing to the said Thomas Ryan, Acting Secretary of the Interior, the completion of this contract according to the terms and conditions thereof, and the prompt payment by said Prendergast & Clarkson to all persons supplying labor and materials for the prosecution of the work.

(3½) Before executing as surety on behalf of the said Prendergast & Clarkson, the bond mentioned in the last paragraph, the said United States Fidelity & Guaranty Company entered into a written agreement with the said Prendergast & Clarkson, which contained the following provision; namely,

“And for the better protection of the said company (U. S. Fidelity & Guaranty Company), we do, as of the date hereof, hereby assign, transfer and convey to it, the said United States Fidelity & Guaranty Company, all our right, title and interest in and to all the tools, plant, equipment and materials of every nature and description that we may now or hereafter have upon said work, or in, on or about the site thereof, including as well, materials purchased for

Statement of Facts.

10 or chargeable to said contract, which may now be in process of construction on storage elsewhere, or in transportation to said site, hereby assigning and conveying also all our rights in and to all sub-contracts which have been or may hereafter be entered into, and
20 the materials embraced therein, and authorizing and empowering said Company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials and subcontracts, and in force, use and enjoy such possession upon the following conditions, viz: this assignment shall be in full force and effect as of the date hereof, should we fail or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on our part under the said contract."

(4) Said contract was to be performed in accordance with the proposal and specifications attached to the contract and made part thereof. By Section 22 of the Specifications made a part of said contract, under the head of "General Conditions," it was provided as follows:

30 "Suspensions of contract. Should the contractor fail to begin work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or should any question arise as to whether or not the contractor is properly carrying out the provisions of his contract in their true
40 intent and meaning, at any time during the progress of the work, notice thereof in

Statement of Facts.

writing shall be served upon him, and upon his neglect or refusal to provide means for a more energetic and satisfactory compliance with the contract within the time specified in such notice, then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper; or hire such force and buy such machinery, tools, appliances, materials and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. The failure to order improvement of methods or increase of force, plant, or efficiencies will not relieve the contractor from his obligation to perform good work or finish in the time agreed upon."

(5) As a part of the preparation for actual work of construction under said contract, it was necessary for the said Prendergast & Clarkson to contract for, procure and use certain

Statement of Facts.

machinery in the way of air compressors, tanks, boilers, steam pumps, generators and other similar machinery. To such end, it opened negotiations with the Ingersoll-Rand Company to supply a portion of such machinery, plant and equipment, and on February 24th, it entered into
10 a contract which has not been filed or recorded in the office of any Clerk, County Clerk, Register or other public recording official, with said Ingersoll-Rand Company, and of which contract the defendant had no notice or knowledge until after the date of the institution of this suit, and which contract, a copy whereof is hereto annexed marked "Exhibit A," consisting of two pages commencing with the words "Estimate for Prendergast & Clarkson, Cody, Wyoming," and ending
20 with the signatures of the Ingersoll-Rand Company by M. W. Priseler, the words "Accepted February 24th, 1906" and the signature "Prendergast & Clarkson, by T. J. Prendergast, President," is to be admitted in evidence without proof.

(6) Attached to the contract mentioned in the last paragraph were certain unsigned specifications referred to in the first and second paragraphs of said contract, such specifications having been theretofore used by the Rand Drill Company, one of the constituent companies of the newly formed Ingersoll-Rand Company, the said Rand Drill Company having been the manufacturer of the particular machines mentioned in the first and second paragraphs of said contract. Said unsigned specifications used the name "Rand Drill Company," but such name at the time of entering into said contract meant and intended in fact the "Ingersoll-Rand Company."
30
40

Statement of Facts.

(7) The plaintiff claims that of said three documents, the said two partially printed and partially typewritten, but unsigned, forms of "proposal" or "specifications" were attached to said typewritten and signed contract, and that the whole thereof constitute one contract. The defendant claims that the two partially printed and partially typewritten, but unsigned, forms of "proposal" or "specifications" were used in connection with the signed contract to the extent only referred to in said signed contract.

(9) On March 10th, 1906, the said contract was by agreement modified by the substitution in the place of the 14 x 24 x 24 x 13 x 16 Type 10 Imperial Compressor (which was never delivered) of a 15 x 25 x 15 x 20 Type 10 Imperial Compressor and the price of such Compressor remaining the same, which last named Imperial Compressor was the Compressor actually delivered to Prendergast & Clarkson and the Compressor referred to in the complaint in this cause, and by substituting at an additional price of Ninety (90) Dollars a Cochrane Feed Water Heater open type 300 H. P. capacity, instead of a brass tube feed water heater of the closed type. The Cochrane Feed Water Heater of the open type to be of 350 H. P. capacity a copy whereof, attached hereto, marked Exhibit B is to be admitted in evidence without proof.

(10) Although the contract entered into between said Ingersoll-Rand Company and Prendergast & Clarkson provided one price for the entire material embraced in the contract, namely, \$13,001.00, such amount was merely the aggregate of the prices of each article or group of articles contracted for, the figures agreed upon

Statement of Facts.

by the contracting parties as the reasonable value of the various articles being as follows:

10	One Ingersoll-Rand (Cross Compound Steam & Air) Imperial Type 103 Air Compressor having Meyer Cut Off Steam Valves.....	\$ 4,630.00
	One Ingersoll-Rand Corliss Cross Compound Steam and Air, Class BB3 Air Compressor, one complete set of pressure gauges for high pressure steam, Steam Receiver High Pressure Air and Intercooler, all suitably mounted on a gauge board.....	6,683.00
20	One Vertical Steel Air Receiver, 54 inches in diameter by 12 feet high, strongly made and tested up to 165 pounds water pressure, with man-head, safety valve, pressure gauge, drain cock and flanges for Inlet and Discharge pipes made of best 60,000 pounds tensile strength steel, side seams double riveted and heads dished	261.00
30	One Cochrane or equal Steam Separator with Davis or equal trap for automatically removing water from separator	110.00
	One Exhaust Heater to be attached to the feed water heater for exhausting steam in the atmosphere.....	50.00
	One brass tube feed water heater of about 350 boiler horse power capacity	354.00
40	One boiler Feed Pump of ample capacity for pumping feed water into 350 Horse Power of Boilers; One	

Statement of Facts.

Duplex Steam Pump having a capacity of 80 gallons per minute against a head of 100 feet, to be arranged for operating with Compressed Air	210.00	
One Sturtevant 10 K. W. Generating Set consisting of a 6 x 6 W.S. Automatic enclosed engine direct connected to a 220 volt Direct Current Generator	637.00	10
With Switchboard and fittings all complete	66.00	
	\$13,001.00	

(11) After the execution of the aforementioned contract, its performance was entered upon and whenever any of the machinery above specified was shipped by the Ingersoll-Rand Company to Prendergast & Clarkson, it was charged and a memorandum bill sent for the amount set opposite each item so shipped. By August 10th, 1906, such performance had so far proceeded that the following was the situation on that day: 20

The Ingersoll-Rand Company had shipped to Prendergast & Clarkson the following portions of the machinery in such contract and above specified: 30

One Ingersoll-Rand (Cross Compound Steam & Air) Imperial Type 103 Air Compressor having Meyer Cut Off Steam Valves	\$ 4,630.00	
One Vertical Steel Air Receiver, 54 inches in diameter by 12 feet high, strongly made and tested up to 165 pounds water pressure, with man-		40

Statement of Facts.

	head, safety valve, pressure gauge, drain cock, and flanges for inlet and discharge pipes made of best 60,000 pounds tensile strength steel, side seams double riveted and heads dished	261.00
10	One Greenway Steel Separator with Davis or equal trap for automatically removing water from Separator	110.00
	One Exhaust Heater attached to Feed Water Heater for exhausting steam into the atmosphere.....	50.00
20	One Cochrane Feed Water Heater of about 350 Boiler Horse Power capacity (this was delivered in place of the Brass Tube Feed Water Heater at an additional price of \$90.00 as per supplemental agreement of March 10, 1906, hereinbefore mentioned)	444.00
30	One boiler Feed Pump of ample capacity for pumping feed water into 350 Horse Power of Boilers; One Duplex Steam Pump having a capacity of 50 gallons per minute against a head of 100 feet, to be arranged for operating with Compressed Air	210.00
	Switchboard and fittings.....	66.00
		\$5,771.00

(12) Said machinery was shipped directly to said Prendergast & Clarkson at Cody, Wyoming, had been received by them and had been taken to the site of the Shoshone Dam and had
40 been partly or wholly set up, but its operation

Statement of Facts.

had not been commenced. And said Prendergast & Clarkson had paid, and the Ingersoll-Rand Company has received on account of the aforesaid deliveries, the sum of Two Thousand (\$2,000) Dollars, which was paid

The next payment on account called for by said contract had not been made 10
by Prendergast & Clarkson though due and payable under the terms of said contract, and the Ingersoll-Rand Company had not shipped the balance of the order and was pressing the said Prendergast & Clarkson for a further payment on account of the portion already shipped when on or about August 10th, 1906, the following events occurred: A serious washout at the site of the Shoshone Dam disabled the said Prendergast & Clarkson from continuing the work, and 20
Prendergast & Clarkson defaulted on its contract referred to in Paragraph 3 of this Statement. Thereupon the following letter was written by the Acting Secretary of the Interior to the Director of the Geological Survey:

“Department of the Interior,

Washington, August 10th, 1906.

THE DIRECTOR OF THE GEOLOGICAL SURVEY, 30

Sir: In a letter of the 8th instant to the department the acting director stated that the supervising engineer in charge has reported by wire that Prendergast & Clarkson have shown neither ability nor intention of carrying on the work under their contract of September 23, 1905, for the construction of the Shoshone Dam and auxiliary works, Shoshone Project, Wyoming, under the act of June 17, 1902 (32 Stat. 388).

Statement of Facts.

It appears from the letter due notice was served on the contractors under paragraph 22 of the specification forming a part of the contract allowing them ten days to comply with the requirements; that the time allowed expired on the 8th instant; and that the contractors have
 10 not only neglected or refused to carry on the work, but have shown their intention to remove a portion of the equipment prior to suspension of the contract.

On the request of this department the Attorney General has directed the U. S. Attorney to be ready to take action in the premises, and in view of the conditions as they exist the acting director has recommended that the contract be suspended and that authority be given the engineers to take possession of all machinery, tools, appliances and animals employed on the works, and of all materials belonging to the contractor delivered on the ground.
 20

In view of the foregoing and in accordance with the recommendation of the acting director, I hereby suspend the operation of the contract of September 23, 1905, with Prendergast & Clarkson, and hereby authorize the engineers to take possession of all machinery, etc., as specified above.
 30

I have taken this action under the authority conferred by paragraph 22 of the specifications, and direct also that you inform the contractors and the surety on their bond of this action.

Very respectfully,

(Sgd) THOS. RYAN,
Acting Secretary."

Statement of Facts.

That on August 11th, 1906, Mr. Daniel Webster Cole, Chief Engineer of the United States Government, notified Prendergast & Clarkson in writing that the Secretary of the Interior had suspended the contract for the construction of the Shoshone Dam. That on the same day Mr. Daniel Webster Cole, acting for and on behalf of the United States and under the direction of the Secretary of the Interior of the United States, took possession of the entire plant at the site of the dam, including the machinery delivered as aforesaid by plaintiff in this case. That on August 13th, 1906, Prendergast & Clarkson signed a written agreement yielding possession of this plant to the United States Government. The United States then called upon the United States Fidelity & Guaranty Company to immediately proceed with the completion of the contract.

(13) On September 28th, 1906, the United States Government turned over to the United States Fidelity & Guaranty Company, the defendant herein, the plant of the contractors, including the compressor and machinery above described, for use in the completion of the contract referred to in paragraph 2 hereof, and the said defendant took possession of said property on that day.

(14) Neither the United States Government nor the United States Fidelity & Guaranty Company, nor any officer, agent or servant of either of them, has paid to the Ingersoll-Rand Company the reasonable value of said machinery, nor any part thereof.

(15) On October 1st, 1906, and many times thereafter plaintiff demanded of defendant that

Statement of Facts.

it return to plaintiff the compressor and machinery above described, the defendant being in possession of the same at that time, but defendant neglected and refused so to do and has since continually refused to do so.

10 (16) The said machinery had been set up only a short time prior to the date when the United States took possession of it and had been used slightly or not at all and its value then was the value of new and unused machinery, viz: \$5,771.00.

(17) Either party may at the trial of the cause make any legal objection to the admissibility in evidence of any fact herein stated.

20 (18) The parties hereto, plaintiff and defendant, by their respective attorneys, admit the facts hereinabove stated as though proved before the Court in this cause, for the purpose of the trial of this cause and appeal from the judgment herein, and for no other purpose, subject to any legal objection as stated in paragraph 17, and reserve the right to introduce further testimony, subject to any legal objection thereto.

BORDEN D. WHITING,
Attorney of Plaintiff.

30 McDERMOTT & ENRIGHT,
Attorneys of Defendant.

Oct. 26, 1915.

Annexed to the Statement of Facts were copies of the documents hereinafter set forth at pages 51 to 69 inclusive.

40 4. The defendant put in evidence a statute of the State of Wyoming relating to conditional

Statement of Facts.

sales which provides as follows (Wyoming Compiled Statutes 1910, page 915, Section 3745):

“Section 3745. Conditional Sale. When not valid. No sale, contract or lease wherein in the transfer of title of ownership of personal property is made to depend upon any condition shall be valid against any purchaser or judgment creditor of the vendee or lessee in possession without notice, unless the same be in writing, signed by the vendee or lessee, and the original, or a copy thereof, filed in the office of the county clerk of the county wherein the property is contained. Such instrument so filed shall have attached thereto an affidavit of such vendor or lessor or his agent or attorney which shall set forth the names of the vendor and vendee, or lessor and lessee with a description of the property transferred and the full and true interest of the vendor or lessor therein. All such sales or transfers shall cease to be valid against purchasers in good faith, or judgment or attaching creditors, without notice, at the expiration of one year from the date of such sale, unless the vendor or lessor shall, within thirty days prior to the one year from the date of such sale or transfer, file a similar affidavit to the one above provided for in the office of such clerk; and the said vendor or lessor may preserve the validity of his said sale or transfer of such personal property by an annual re-filing, in the same manner as aforesaid of such copy.”

5. The plaintiff offered in evidence the signed document marked Exhibit A (page 51 *post*)

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Statement of Facts.

and the unsigned specifications attached there-
 to (pages ~~54-66~~ *post*). There was no objection
 to the admission of the signed document, but the
 defendant objected to the reception of the un-
 signed specifications, contending that the speci-
 fications are usable and admissable only to the
 10 extent that they disclose the size and dimen-
 sions of the compressor. After hearing counsel
 for both parties the court took the papers and
 reserved decision. Later the court held that the
 unsigned specifications attached to Exhibit A are
 no part of Exhibit A except as to the size and
 dimensions of the compressors mentioned in Ex-
 hibit A and that they are referred to in the con-
 tract only for the purpose of fixing the size and
 dimensions of the compressors. See second de-
 20 cision.

6. Exhibit B (page 69 *post*) was received
 in evidence without objection.

7. The plaintiff objected to the admission in
 evidence of Paragraph 3½ of the Statement of
 Facts and asked that it be stricken out on the
 ground that the provision of the agreement
 therein quoted did not make the defendant a
 "purchaser without notice" of the compressor
 30 in question, within the purview of the Wyoming
 statute concerning conditional sales and also on
 the ground that, at the time this agreement was
 made, Prendergast & Clarkson had no title to
 the property in question and the agreement was
 therefore an attempt to assign after-acquired
 property and void.

The court overruled plaintiff's objection and
 admitted the paragraph in evidence.

Statement of Facts.

8. The plaintiff objected to the admission in evidence of the following portion of Paragraph 5 of the Statement of Facts:

“And of which contract the defendant had no notice or knowledge until after the date of the institution of this suit”

on the ground that the defendant is not a purchaser within the meaning of the Wyoming statute concerning conditional sales and it is therefore immaterial whether or not it had notice of the contract. 10

The court overruled plaintiff's objection and admitted the clause in evidence.

9. The plaintiff put in evidence the chattel mortgage act of the State of Wyoming (Compiled Statutes of Wyoming, 1910, page 909) the relevant portions of which are as follows: 20

Section 3727 provides that “Every mortgage, bond, conveyance or other instrument intended to operate as a mortgage of goods, chattels or personal property which shall not be accompanied by immediate delivery and be followed by an actual and continued change of possession of the goods, chattels or personal property so mortgaged shall be absolutely void as against the creditors of the mortgagor and as against subsequent mortgagees or purchasers in good faith, unless such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be filed as hereinafter provided.” 30

Section 3728. “Every such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be filed in the office of the county clerk where the property is and shall be indexed by the clerk of such 40

Statement of Facts.

county in a book to be kept by such clerk, to be called the Chattel Mortgage Index.”

10 Section 3732. “Every such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall take effect and be in force from and after the time of delivering same to the clerk for filing, and not before, as to all creditors and subsequent purchasers and mortgagees in good faith for valuable consideration and without notice, and any such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be void as to any subsequent mortgagee, and without notice, whose mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be first filed; provided 20 that any such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be valid between the parties, anything contained in this chapter to the contrary notwithstanding, until the debt thereby secured is fully paid.”

30 10. After hearing arguments of counsel on the whole case the court reserved its decision. At the close of the oral argument defendant’s counsel submitted a brief and plaintiff’s counsel was given two weeks within which to file brief. After considering the briefs the court rendered the following decision:

First Decision of Judge Speer.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

INGERSOLL-RAND COMPANY, a corporation,	}	<i>Plaintiff,</i>	<i>Action at Law.</i>	10
UNITED STATES FIDELITY & GUARANTY Co.,				
<i>vs.</i>				
		<i>Defendant.</i>	<i>Decision.</i>	

Colby & Whiting, attorneys for plaintiff.

McDermott & Enright, attorneys for defendant.

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WILLIAM H. SPEER, Circuit Judge:

This action was tried before me by consent without a jury. The decision is to be made upon an agreed statement of facts, which is hereto annexed, eked out by some evidence introduced at the trial.

The theory of the plaintiff's case, as briefly stated in his memorandum, is as follows:

“The machinery in question was delivered 30
to Prendergast and Clarkson under a contract which provided that the title and right to possession of the compressor, furnished in accordance with the contract, should remain in the plaintiff until the compressor should be fully paid for in cash. Thereafter, and at a time when Prendergast and Clarkson was in default in its payments on account of the compressor, the United States Government took possession of this ma- 40

First Decision of Judge Speer.

10 chinery. The United States did not take possession by virtue of its right of eminent domain, but by virtue of an agreement with Prendergast and Clarkson. It therefore obtained only such right to possession as Prendergast and Clarkson had. This right was subject to the rights of the plaintiff. When the United States, on September 28th, 1906, turned over to the defendant, the United States Fidelity and Guaranty Company, the plant of Prendergast and Clarkson, the defendant acquired only such rights in the machinery in question as the United States had acquired through Prendergast and Clarkson. Neither Prendergast and Clarkson, nor the United States, had any
 20 right to possession as against the plaintiff and therefore neither could grant such right to the defendant. The plaintiff by reason of its contract with Prendergast and Clarkson had at all times both the title and the right of immediate possession to the compressor. The defendant's refusal to recognize the plaintiff's title, and more particularly, its refusal on October 1st, 1906, to return the compressor and machinery to the plaintiff upon demand, was an unlawful
 30 conversion of such compressor and machinery."

Upon the best reflection which I have been able to give the case in the limited time at my disposal for that purpose I have concluded that the theory of the plaintiff's case as hereinbefore stated is the correct theory and that plaintiff is entitled to judgment in this action for reasons
 40 which I will briefly state hereinafter.

First Decision of Judge Speer.

The case of the plaintiff has been attacked, on behalf of the defendant, upon three different grounds. First, it is denied that that part of the specifications which reserves in the plaintiff title to the compressor was a part of the contract between the plaintiff and Prendergast and Clarkson. Second, it is contended that the defendant is a "purchaser" within the meaning of the Wyoming statute. Third, it is claimed that the defendant obtained a good title through the United States Government. I am satisfied that none of these contentions of the defendant is well founded, and I will deal with them briefly in the order of their presentation. 10

FIRST, as to the contention of the defendant that the specifications attached to Exhibit A are no part of Exhibit A except as to the size and dimensions of the compressors mentioned in Exhibit A, and that they are referred to in the contract only for the purpose of fixing the size and dimensions of the compressors. The ground upon which defendant urges this contention is that "where unsigned specifications are not under the terms of the contract made a part of the contract, they may be used to amplify the contract only to the extent that the contract refers to it and only for the purpose that the contract refers to it. They cannot add additional terms to the contract." 20 30

I have stated the contention in the language of defendant's counsel in order that it may not be minified by my unintentional misstatement. It seems to me, however, that defendant's counsel in stating the rule as broadly as he does, begs the very question which it is my duty to decide and assumes that as proved which it is 40

First Decision of Judge Speer.

- his function to establish. The point is purely one of construction. Rules of construction are "principles deduced from men's general conduct and motives." Powell Cont., p. 223. They are the "conclusions of good logic and sound reasoning applied to the agreement of the parties."
- 10 Kent's Com. Vol. II, p. 553. "These rules, however, for the most part, look only to the ascertainment of the probable intention of the parties, and derive their authority from the fact that they are just conclusions drawn from the ordinary conduct of men." The object of interpretation and construction is to find the intention of the parties. "Where the language of a contract refers directly to some other document or paper, and makes it clear that the
- 20 parties contracted with reference to such writing, it will constitute a part of their agreement." Bradley v. Marshall, 54 Ill. 173; Wilson v. Randall, 67 N. Y. 338; Babbit v. Globe, etc. Co. 66 N. C. 71; Smith v. Turpin, 22 Ohio St. 478; Adams v. Hill, 16 Me. 215; Edwards v. Farmers' Ins. Co. 74 Ill. 84; McGeragle v. Broemel, 53 N. J. L. 59.

- 30 It is manifest, therefore, that in order to ascertain to what extent the specifications are intended to be incorporated and operative resort must be had to the intention of the parties as it existed at the time of their annexation. That they were intended to have some effect in the case now on trial is admitted by both parties, and it is my duty to ascertain what their intention was with respect to the extent of that effect. I cannot doubt, after looking
- 40 closely into the internal evidence furnished by the documents themselves, that the contract and

First Decision of Judge Speer.

specifications in their entirety were intended to be one instrument; in other words that the specifications in their entirety were intended to be made a part of the agreement. The specifications in their entirety were attached to the contract and referred to therein as attached. They were dated in typewriting synchronously with the contract. They were addressed in typewriting to Prendergast and Clarkson, Cody, Wyoming. Many of the descriptive data are not reasonably referable to mere "size and dimensions" but were yet obviously intended to be operative, as appears by the printed matter being eked out by typewriting. Some matter therein is excised therefrom. The specifications were obviously specifications of "The contract," or a more detailed statement of its terms, and, as such, constitute a complementary statement of intentions and details. When looked at as an entirety they constitute an harmonious statement of the terms and conditions of the contract, each of which has received the attention and revision of the parties intended to be bound thereby. The mere fact that they are not signed, if it be considered that they are not, is inconsequential. The obligation of the parties depended on the signature to the contract. Its identification, which such signing would have effected, was manifest from its annexation, and its incorporation wholly was a matter of intention. All this is made clear in *McGeragle v. Bromel*, 53 N. J. L. 61. Furthermore, the manner of reference gives some indication of an intention to incorporate them in their entirety and not for a merely limited purpose. It does not refer to them as attached for the mere purpose of the ascertainment of size and dimensions, but refers

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First Decision of Judge Speer.

to them unlimitedly as attached and indicates that the size and dimensions may be ascertained therefrom.

10 The principles underlying the above conclusions find support in *Cyc* (Vol. 9), p. 852; *Hutcheon v. Johnson*, 33 Barb. 392; *Franklin Savings Institution v. John Reed*, 125 Mass. 365; *Close v. Clark*, 16 Daly, 91, 9 N. Y. Suppl, 538; *Sawyer v. Hammatt*, 15 Me. 40.

20 Several cases have been cited by defendant in the very able brief of his counsel, but I think it will be found that none of them supports the rule contended for by him in the broad generality of the language in which he has stated it, and that all of them when closely
 20 examined will disclose that in the case then under consideration the guiding principle in the mind of the court in making the decision was that he was bound to ascertain the probable intention of the parties from the language used by them in the contract then under consideration and from the circumstances which surrounded the parties at the time they entered into it, and that viewed in the light of those circumstances and of the language of the contract
 30 itself it was unreasonable to conclude that the probable intention of the parties was that the specifications in their entirety were intended to be incorporated into and form a part of the contract itself.

It is next contended by the counsel for defendant that if I should hold, as I have held, that the specification attached constitutes a conditional bill of sale, that the same was not recorded as required by the statute of Wyoming,
 40 and that the same was void as against a bona

First Decision of Judge Speer.

fide purchaser. That statute (Sec. 3745 of the compiled statutes of 1910 of Wyoming) dealing with conditional sales, reads as follows:

“No sale, contract or lease wherein the transfer or title of ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee in possession, without notice, unless the same be in writing, signed by the vendee or lessee, and the original or a copy thereof filed in the office of the County Clerk of the county wherein the property is; said instrument so filed shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney, which shall set forth the names of the vendor or vendee, or lessor or lessee, with a description of the property transferred and the full and true interest of the vendor or lessor therein. All such sales or transfers shall cease to be valid against purchasers in good faith, or judgment or attaching creditors without notice at the expiration of one year from the date of such sale, unless the vendor or lessor shall within thirty days prior to the one year from the date of such sale or transfer, file a similar affidavit to the one above provided for in the office of said Clerk, and the said vendor or lessor may preserve the validity of his said sale or transfer of such personal property by an annual re-filing in the same manner as aforesaid of such copy. (Laws 1895 Ch. 40, Par. 1; R. S. 1899, Par. 2837.)”

It is admitted in the statement of facts that the contract Exhibit A was not recorded in Wyoming, nor did the defendant have notice of it. It is contended that the defendant under the written agreement set out on page 2 of the

First Decision of Judge Speer.

statement of facts was a purchaser within the purview of the statute. But I have concluded that the defendant is not a "purchaser without notice" within the meaning of the conditional sales act of Wyoming. Counsel for plaintiff in his very able brief has accurately stated the reasons which have induced me to arrive at this decision, as follows:

10 "The defendant claims to be a purchaser by virtue of the written agreement with Prendergast and Clarkson, set forth on page 2 of the Statement of Facts. This agreement, in terms, assigns only the right, title and interest of Prendergast and Clarkson. It will also be noticed that this agreement is an assignment upon condition or a conveyance as security. Bouvier's Law Dictionary (Rawles Third Edition) defines 'Purchaser' as follows: 'A buyer; a vendee. A mortgagee or a conditional vendee is not a purchaser,' citing *Campbell Printing Press & Mfg. Co. v. Dyer*, 46 Neb. 830; 65 N. W. 904. See also *Racine-Sattley Co. v. Mehen*, 114 N. W. 602, 604.

20 "A conditional sale of goods is valid at common law even against a bona fide purchaser for value. *Cole v. Bery*, 42 N. J. Law, 308; *Warner v. Roth*, 2 Wyoming 63.

30 "The statute upon which the defendant relies is in derogation of the common law and should be strictly construed. It provides that an unrecorded conditional sale shall be void against 'any purchaser or judgment creditor of the vendee or lessee in possession without notice.' The intent of the statute is obviously to protect subsequent purchasers who part with value re-

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First Decision of Judge Speer.

lying on the apparent ownership of the conditional vendee. At the time the agreement was made on which the defendant relies, Prendergast and Clarkson was neither a 'vendee in possession' nor had it contracted for the machinery in question. The defendant obtained these goods without ever having parted with any value or given any credit for them. Surely this statute was never intended to aid one in an attempt to obtain something for nothing.

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"The courts of this state have construed a similar statute in the following cases: *Wooley v. Geneva Wagon Co.*, 59 N. J. L. 278; *Reischman v. Masker*, 69 N. J. L. 353; *General Electric Co. v. Transit Equipment Co.* 57 N. J. Eq. 460; *Faleanau v. Reliance Steel Co.*, 74 N. J. Eq. 325; *Smith v. Hotel Ritz Co.*, 74 N. J. Eq. 616.

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"*Reischman v. Masker*, *supra*, is directly in point. The New Jersey statute when that case was decided, declared unrecorded contracts of conditional sale to be 'absolutely void as against the judgment creditors of the person so contracting to buy the same, and subsequent purchasers and mortgagees in good faith.' The Court of Errors and Appeals held that this statute did not protect ordinary creditors of the vendee.

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"At the time the defendant claims to have 'purchased' the machinery in question neither Prendergast and Clarkson nor the United States Government was in possession of it or had any title to or right to the possession of it. The attempted purchase was a purchase of after acquired property, and at law, void. *Smithurst v. Edmunds*,

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First Decision of Judge Speer.

1 McCarter, 408, at 413; *Looker v. Peckwell*, 9 Vr. 253, affirmed in 10 Vr. 134; *McFarland v. Stanton Mfg. Co.*, 8 Dick. Ch. at 650.”

10 This brings us to consider the last point urged by the defendant, which is that the United States Government having taken the property and transferred it to the defendant, the defendant cannot be held guilty of a conversion thereof.

20 Assuming it to be true that the United States Government had a right to take possession of the machinery claimed in this case and therefore could lawfully turn it over to the defendant, it is also true that the right of possession claimed by the United States, if it existed, was derived from its contract with Prendergast and Clarkson, was subject to the plaintiff's title and right of possession, and terminated when demand was made for the return of the goods. The statement of facts in this case makes it perfectly manifest that the United States Government, acting through the Department of the Interior, took possession of this property under the authority conferred by paragraph 22 of the specifications, which paragraph expressly provides that a suspension of the contract may be declared for reasons therein specified, and that in case of such suspension “he may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry
30 the contract to completion, substitute other
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First Decision of Judge Speer.

machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon."

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The assumption, therefore, of the defendant that the United States Government, under its right as sovereign, took the absolute title to the machinery and a few days later gave it to the surety company is contrary to the stipulated facts. It is true that, if this machinery were necessary for the public use, the United States had a right to take the absolute title upon the payment of just compensation therefor. But it is not true that it ever exercised that right. In the case in question the Government of the United States acted solely under its contractual and proprietary rights and made no pretense of taking the property under the right of eminent domain. Inasmuch, therefore, as it expressly rested its rights to possess itself of the property upon the contract, it cannot now be held that those rights had any other origin or are subject to any other limitations.

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I am constrained to hold, therefore, that the United States Government never indicated in any way that it intended to take any rights in this machinery other than those it had obtained from Prendergast and Clarkson. It neither expressly nor impliedly promised to pay the Ingersoll-Rand Company for its title and right of possession. Its possession was either tortious or dependent upon the rights granted to it by Prendergast and Clarkson. If the Government's

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First Decision of Judge Speer.

taking possession of the property was tortious. it follows that the retention of the property by the defendant is likewise tortious, and that the plaintiff would be entitled to recover from the defendant the value thereof.

10 Such being the conclusions to which I have arrived, it results in my finding that the value of the machinery converted by the defendant was \$5,771. Of this amount \$2,000 had been paid. I am of opinion that the reservation of title to the "compressor, etc." is not sufficient to include the accessories, and therefore that the judgment should be for \$3,025.43 with interest from October 1, 1906; and such will be the order.

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Second Decision of Judge Speer.

Thereafter, with the consent of the plaintiff, the case was reopened for the purpose of permitting the defendant to submit a supplemental brief. Upon reconsidering the case the court rendered the following decision:

NEW JERSEY SUPREME COURT.

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HUDSON CIRCUIT.

INGERSOLL-RAND COMPANY, a
corporation,

*Plaintiff,**vs.*

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

*Defendant.**Action at Law.**Decision.*

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Colby & Whiting Esqs., attorneys for plaintiff.

McDermott & Enright, Esqs., attorneys for defendant.

WILLIAM H. SPEER, Circuit Judge.

This action was tried before me by consent without a jury. Some considerable time ago, 30
under great pressure of business, I wrote a memorandum of decision favorable to plaintiff. Thereupon defendant's attorneys, with consent of plaintiff's attorneys, sought and obtained the privilege of filing a supplemental brief. I acceded to this readily because I felt that the ends of justice would be thereby best subserved, in view of the fact that the great pressure of court business which was well-nigh overwhelming me at the time of my previous consideration of the 40
cause, had given me insufficient time for such

Second Decision of Judge Speer.

deliberation thereon as the importance at once of the cause and the legal questions involved therein required. My subsequent consideration of the cause has compelled me to the conclusion that I did right in granting the privilege of filing the supplemental brief, for, aided by it and
10 my own unhurried independent investigations, I have come to the conclusion that my previous decision was erroneous and that judgment in this case should be given for the defendant.

I shall only deal in this memorandum with one of the questions involved. It must not, however, be supposed because I deal with only one question in this memorandum that upon the others my findings are for the plaintiff. Such is not the case. My finding upon the whole case
20 is for the defendant. Plaintiff was furnished with a copy of defendant's supplemental brief and filed no answer thereto. In that brief the questions involved in the cause were exhaustively discussed, and, consequently, plaintiff will be in possession of the authorities bearing upon the subject much more fully than I shall, or need to, cite them here. The question with which I shall briefly deal is the one involved in the first round of defendant's attack on the case of
30 the plaintiff, viz: "It is denied that that part of the specifications which reserves in the plaintiff title to the compressor was a part of the contract between the plaintiff and Prendergast & Clarkson." I think that this contention of defendant is sound and dispositive of the case. I think that the specifications attached to Exhibit A are no part of Exhibit A except as to the size and dimensions of the compressors mentioned in Exhibit A, and that they are referred to in the contract only for the purpose of
40 fixing the size and dimensions of the compress-

Second Decision of Judge Speer.

ors. I think that defendant is right in its contention that "where unsigned specifications are not, under the terms of the contract, made a part of the contract, they may be used to amplify the contract only to the extent that the contract refers to them and only for the purpose that the contract refers to them." And I said in my previous memorandum of decision, "the point is purely one of construction. Rules of construction are principles deduced from men's general conduct and motives. They are 'the conclusions of good logic and sound reasoning applied to the agreement of the parties.' 'These rules, however, for the most part, look only to the ascertainment of the probable intention of the parties, and derive their authority from the fact that they are just conclusions drawn from the ordinary conduct of men.' The object of interpretation and construction is to find the intention of the parties. 'Where the language of a contract refers directly to some other document or paper, and makes it clear that the parties contracted with reference to such writing, it will constitute a part of their agreement.'"

It now seems clear to me that a due attention and obedience to these institutional doctrines in their application to the facts in the case *sub judice* should have led me to the conclusion which has now been arrived at by me, rather than to the one announced in my first memorandum of decision. The intent to incorporate into the contract documents physically apart from the contract must be expressed in the contract and must be clear of all doubt. In a contract a reference to another document, whether annexed or not, will not be legally sufficient to incorporate the document for any other purpose than that indicated in the reference. That these

Second Decision of Judge Speer.

two propositions state sound rules of the law of construction is manifest from the cases so copiously cited and quoted from in defendant's supplemental brief. Perhaps as strong a case as can be found in support of the rule enunciated in the second proposition is *Short v. Van Dyke*, 50 Minn. 286. What alien documents the written contract is to include and to what extent those documents are to be incorporated must be determined by a reference to the contract itself. It is the sole expositor of the extent of its obligations. This rule, it seems to me, is to be deduced from the cases of *Short v. Van Dyke*, 50 Minn. 286; *Stocker v. Partridge*, 25 N. Y. Sup. Ct. 193, and *Noyes v. Butler Bros.*, 98 Minn., as well as *Cruthers v. Donohue*, 84 Atl. 323, where the court said "But in the absence of an express provision in the contract the specification can neither restrict nor extend the scope of the contract to subjects other than those covered by the contract." Analogies may be found in the parol evidence rule as enunciated in *Naumberg v. Young*, 15 Vr., and in the Statute of Frauds rule, where a connection is not allowed to be established between several documents, where such connection does not appear on their faces. The protection of the contracting public requires, it seems to me, that the rules as above stated should not be relaxed.

I think that in my previous consideration of the case I based my conclusions upon improper data, *i. e.*, on the internal evidence furnished by the specifications themselves; and upon the application of too broad rules of construction—broader than the decided cases would warrant. The true rules which should have been applied by me will be found in the supplemental brief of defendant, pages 3 *et fol.* as far as point 2,

Second Decision of Judge Speer.

to which this reference is made so that plaintiff, who possesses that brief, may refer to them without my citing them here.

These rules result in my ordering judgment for defendant.

The plaintiff, in writing, requested the court to make the following rulings:

1. That the whole of the unsigned specifications attached to the signed contract (Exhibit A) and referred to in paragraphs 6 and 7 of the Statement of Facts constitute a part of that contract.

2. That the compressor in question in this case was delivered to Prendergast & Clarkson under a contract which provided that the title and right of possession to said compressor should remain in the Ingersoll-Rand Company until the compressor should be fully paid for in cash.

3. That when the United States Government took possession of the compressor in question, it took it subject to the rights of the plaintiff under its contract with Prendergast & Clarkson.

4. That when the United States, on September 28th, 1906, turned over to the defendant, United States Fidelity & Guaranty Company, the plant of Prendergast & Clarkson, the defendant thereby acquired no greater rights in the compressor in question than Prendergast & Clarkson had had at the time it delivered up possession of the same to the United States Government.

5. That the plaintiff by reason of its contract with Prendergast & Clarkson had at all times both the title and right of possession to the compressor.

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Second Decision of Judge Speer.

6. That Prendergast & Clarkson by the written agreement referred to in Paragraph 3½ of the Statement of Facts, granted to the defendant no rights in the compressor as against the plaintiff.

10 7. The written agreement referred to in Paragraph 3½ of the Statement of Facts, insofar as it applies to the compressor in question, was an attempt to convey Prendergast & Clarkson's right, title and interest in after acquired property and was void.

8. That the defendant was not a "purchaser or judgment creditor of the vendee or lessee in possession without notice" within the purview of Section 3745 of Compiled Statutes of 1910 of Wyoming.

20 9. That the plaintiff's contract with Prendergast & Clarkson was valid as against the defendant and the reservation therein of the title of possession to the compressor was valid as against the defendant, although said contract was not recorded.

30 10. The written agreement referred to in Paragraph 3½ of the Statement of Facts is a "chattel mortgage or other instrument intended to operate as a chattel mortgage" and the plaintiff is a "creditor of the mortgagor" within the purview of the Wyoming Chattel Mortgage Act, Wyoming Compiled Statutes, Section 372, *et seq.*, and said agreement is void as against the plaintiff.

11. That the defendant's rights in said compressor were subject and subordinate to the plaintiff's title and right of possession.

40 12. That on October 1st, 1906, the defendant unlawfully converted said compressor to its own use to the damage of the plaintiff.

Exhibit A.

And further requested that the rulings of the court upon the said propositions or points of law be stated in the findings and included in the postea.

The court refused to make each of said requested rulings and upon the whole case found in favor of the defendant and against the plaintiff. 10

13. Judgment was entered for the sum of \$39.10 costs in favor of the defendant and against the plaintiff.

14. Annexed are copies of the documentary evidence relevant to the questions on review.

COLBY, WHITING & MOORE,
Attorneys of Appellant.

20

EXHIBIT A.

ESTIMATE FOR PRENDERGAST & CLARKSON,

Cody, Wyoming.

ORDER DEP'T.

JUL 25 1906

Received

Answered

30

We propose to furnish you:

One INGERSOLL RAND CORLISS (Cross Compound Steam & Air) Class 'BB3' Air Compressor of the size and dimensions as set forth in the attached specifications.

One INGERSOLL RAND (Cross Compound Steam & Air) Imperial Type 103 Air Compressor having Meyer Cut Off Steam Valve, of the size and dimensions as set forth in the attached specifications.

40

Exhibit A.

One Vertical Steel Air Receiver, 54 inches in diameter by 12 feet high, strongly made and tested up to 165 pounds water pressure, with manhead, safety valve, pressure gauge, drain cock, and flanges for Inlet and Discharge pipes. Made of best 60,000 pounds tensile strength
 10 Steel, side seams double riveted and heads dished.

One complete set of Pressure Gauges for High Pressure Steam, Steam Receiver, High Pressure Air and Intercooler, all to be suitably mounted on a gauges Board.

One Cochrane or equal Steam Separator with Davis or equal Trap for automatically removing water from Separator.

One Exhaust Header to be attached to the
 20 Feed Water Heater for exhausting steam into the atmosphere.

One Brass Tube Feed Water Heater of about 350 Boiler Horse Power Capacity.

One Boiler Feed Pump of ample capacity for pumping feed water into 350 Horse Power of Boilers.

One Duplex Steam Pump having a capacity of 80 Gallons per Minute against a head of 100 feet. This pump to be arranged for operating
 30 with Compressed Air.

One Sturtevant 10 K. W. Generating Set consisting of a 6 x 6 V. S. Automatic enclosed engine direct connected to a 220 Volt Direct Current Generator, with Switch Board and Fittings all complete as per their Specifications dated Jan. 19th, 1906.

Price *Thirteen Thousand and One Dollars,*
 \$13,001.00.

F. O. B. Cody, Wyoming, Carload Freight.

Exhibit A.

Delivery,

Shipment on the Imperial Type 10, 3 Meyer Cut Off Valve Compressor to be made within 10 days from Denver, Col.

Shipment on the Corliss Class BB3 Compressor to be made in 90 days from receipt of order. 10

Shipment on balance of machinery to be made with the Class BB3 Compressor from Chicago.

Terms/

One Third Cash on Shipment, One Third Cash Sixty days thereafter, Balance One Hundred and Twenty Days after Shipment.

ORDER DEP'T.

JUL 25 1906

Received 20
 Answered

The above machinery not of our manufacture shall be of Standard Make and Construction and we will warrant it to be of First Class Material and Workmanship.

Erecting Engineer.

We will furnish you the services of an Erecting Engineer to superintend the erection of the Air Compressors for a period not exceeding 4 weeks, you furnishing him board. 30

Yours Respectfully

THE INGERSOLL RAND CO.

M. W. Priseler

ACCEPTED Feb. 24th, 1906.

Prendergast & Clarkson

By T J Prendergast President

Exhibit A.

Unsigned specifications attached to Exhibit A and referred to in paragraphs 6 and 7 of Statement of Facts.

ORDER DEP'T.

JUL 25 1906

Received

Answered

10

PROPOSAL

From

RAND DRILL COMPANY,

128 BROADWAY

~~New York,~~ Feb, 24th, 1906

For and in consideration of the hereinafter named amount, we propose to furnish

To *Prendergast & Clarkson*

Cody, Wyoming.

20

Type.

One Rand-Corliss (Cross Compound Steam and Air) Class "BB₃" Air Compressor of the size and dimensions as set forth in the following

SPECIFICATIONS:

Cylinder Dimensions.

	High Pressure Steam Cylinder	14....." dia. by	} 30" stroke.
30	Low Pressure Steam Cylinder	24....." dia. by	
	Low Pressure Air Cylinder	24....." dia. by	
	High Pressure Air Cylinder	14....." dia. by	

Capacity.

The capacity of this compressor in free air per minute is 1500 cubic feet, when running at its nominal speed of 96 revolutions per minute. (Cylinder displacement.)

40

Exhibit A.

Working Pressures.

Indicated Horse-Power.

With 125 pounds steam pressure at the engine and delivering the above quantity of free air under a pressure of 100 pounds, this compressor will develop 230 indicated horse power.

10.

High Pressure Half

When the high pressure half of this compressor is sold as a single compressor, the same specifications apply with the addition that the outboard pillow block is that of the low pressure half, and is fitted for the reception of the second frame at any future time when it is desired to compound both steam and air cylinders.

General Description of
Corliss Engine

20.

Engine to be compounded *non-condensing* of the twin type, with H. P. engine and L. P. engine set parallel and connected to one crank shaft, with cranks set at right angles; both cylinders fitted with Corliss valves, with improved releasing gear for operating the same.

Steam Cylinders.

Steam cylinders to be of extra strong, close grained iron (cast in loam), the castings to be good and sound; the exhaust chambers in both cylinders to be separated from trunk of cylinder and insulated; the cylinder walls to be protected from radiation by a heavy coat of non-conducting material and lagged all over with a neat ornamental iron casing.

30

The cylinder heads to have corrugated or ground joints. The valves to be of cylindrical form with ample wearing surface so located in ports as to render the use of springs unneces-

40

Exhibit A.

sary and make steam passage short and direct, reducing clearance to a minimum.

Pistons and Piston Rods.

10 Pistons in H. P. and L. P. cylinders fitted with bull rings having large bearing surfaces, centered in cylinders with steel set screws and bronze metal jamb nuts, packed with self-adjusting rings, and light springs, and all joints scraped and fitted steam-tight.

Steam Valve Gear and Governor.

20 Valve gear to be of releasing type, the point of cut-off in both cylinders being regulated by governor. The hooks for operating the trips for releasing the steam valves to be faced with hardened steel, the form of steel plates allowing eight wearing surfaces to be used on each one before it is necessary to replace them with new ones; the hooks and valve stems to be of steel; the valve connection heads to be of bronze metal. These last to be provided with *wedge* adjustment for taking up wear.

All pins made of best machinery steel.

30 The dash pots for closing the steam valves to be of the vacuum type with air check valve in vacuum chamber; the pots to be bolted to cylinder feet in regular manner.

The governor to have sliding weight speed adjustment, and automatic stop motion operated in case of governor belt breaking.

40 The L. P. cylinder, also, to be operated from H. P. governor by a mechanism which permits of the adjustment of the receiver pressure, still retaining the automatic control of the cut-off mechanism.

Exhibit A.

The steam and exhaust valves of the L. P. cylinder to be operated by independent eccentrics and wrist plates.

Frames and Guides.

The frames and guides to be of standard pattern of the girder type, the guides being bored and ends squared up true with the boring. 10

The main pillow block to be cast in one piece, with extra large bearing surface on foundation to support the weight of the wheel, and firmly bolted to girder bed.

The end of guide and each end of main pillow block to have provision made for catching all drips.

The main pillow block boxes to be made in four pieces, the bottom and quarter boxes to be lined with genuine babbitt metal peined in, all bored and fitted to shaft, and *all* cheek boxes to be adjustable by *wedges*. 20

Crank and Shaft.

Cranks to be made of charcoal cast iron, forced and keyed on shaft; crank pins to be made of best forged crucible steel, 4" diam, $4\frac{3}{4}$ " long in bearing.

Shaft to be made of the best hammered iron or steel; the bearings to be 7" diam. by 14" long; the wheel seat to be 9" diam.; length as required. 30

Cross-Head.

Cross-head to be made of cast iron, furnished with bronze or babbitt metal shoes having exceptionally large wearing surfaces, and adjustable by means of wedge blocks and screws, the shoes being turned and fitted to guides; pin to be made of steel and to be $3\frac{1}{2}$ " diam., and 4" 40

Exhibit A.

long in bearing. Cross-head fitted to piston rod.

Connecting Rod.

10 Connecting rod to be made of the best hammered open hearth steel. *Both* ends to be made with solid end and wedge adjustment.

Crank pin boxes to be made of the very best quality of bronze, lined with genuine babbitt metal.

Cross-head boxes to be of the best quality of phosphor bronze, without lining and to be bored and scraped to a true surface.

Fly Wheel.

20 Fly wheel to be 12ft. diam. by 10" face; made in *halves* with *one* sets of oval arms; to weigh 12,000 pounds; the joints all to be (*broken joint*) secured with Burden iron bolts, and to be secured at rim by dowel pins and keys.

Receiver.

A *horizontal* steam receiver to be placed between the high and low pressure steam cylinders.

ORDER DEP'T.

JUL 25 1906

30

Received

Answered

Air Pump and Condenser.

No Condenser

Cylinder Connections.

40 Air and steam cylinders to be tied together by *insert* arranged to secure perfect alignment of cylinders, perfect rigidity of structure, and arranged to be readily disconnected, to make cylinders easy of access.

Exhibit A.

Regulator.

The compressor to be fitted with an air regulator acting in conjunction with the speed governor, thus retaining all desirable features of an automatic cut-off and regulating the speed by air pressure.

10

Air Cylinders and Pistons.

Air cylinders to be of extra strong iron, bored perfectly true and parallel, tested with hydraulic pressure, and fitted with cast iron water jackets properly fitted for circulation of water, and *hand holes for cleaning.*

Pistons of box type and ample depth, fitted with self-adjusting packing rings.

Hooded Heads.

Low pressure air cylinder heads to be hooded so as to form a closed inlet passage to connect to a conduit leading outside of building to admit cold air to cylinder.

20

Air Valves.

The low pressure air cylinder to be fitted with *Corliss* inlet valves and *Direct Lift* outlet valves. The high pressure air cylinder to be fitted with *Corliss* inlet valves and *Direct Lift* outlet valves.

30

Oiling Devices.

Nathan's glass, self-acting oil cups (or equivalent) on all bearings and pins where possible; the crank to have centrifugal oiler, and cross head pins to be lubricated by stationary cups with stands and wipers; all bearings for continuous running cylinders to be provided with approved sight feed lubricators or with sight feed fittings for connecting main oil storage reservoir.

40

Exhibit A.

Steam and Air Gauges.

High pressure steam, steam receiver, and high and low pressure air gauges to be provided.

Foundation Bolts and Plates.

10 All necessary wrought iron foundation bolts and plates for anchoring the engines to foundation, with template for setting them, to be provided.

Wrenches.

A full set of steel wrenches for all nuts liable to adjustment, also eye bolts, to be provided.

Painting.

20 All parts of engine, not finished, to have a coat of filler and priming coat of paint before leaving shop.

Shipping.

All parts of engine, not painted, to be well slushed before leaving shop; small parts to be boxed, and large parts to be skidded and shipped in good order.

Weight.

30 Gross estimated weight of compressor 75000 pounds.

Over all Dimensions.

Extreme length 29 feet 6 inches; extreme width 14" feet 6" inches. High pressure half, extreme width.....feet.....inches.

Plans.

Plans for foundation and general plan to be furnished without extra cost.

Exhibit A.

In General.

The workmanship and material to be of the best quality for the purpose intended; and the performance to be equal to that of the best compressors of this type.

Delivery.

10

This compressor to be delivered f. o. b. cars
Cody, Wyoming

Price.

(For prompt acceptance only.)

~~For the sum of (\$ _____)~~

ORDER DEP'T.

JUL 25 1906

Received

20

Answered

Terms.

This contract supersedes all verbal agreements and understandings, and includes all attachments furnished with the compressor, and no variations from or additions to same will be made, unless specially agreed upon in writing. Delivery is contingent upon any delays caused by fires, strikes, floods, accidents, or other causes unavoidable or beyond our control.

30

This contract is subject to the approval of an officer of the RAND DRILL Co.

It is understood that the acceptance of this compressor when delivered constitutes a waiver of all claims for damage by reason of any delay; and it is further agreed that the compressor, etc., above specified, shall remain our property

40

Exhibit A.

as security for deferred payments until fully paid for in cash.

RAND DRILL COMPANY,

By.....

ACCEPTED:.....190

10
.....

PROPOSAL

From

RAND DRILL COMPANY

128 BROADWAY,

New York, Feb. 24th, 19 06

ORDER DEP'T.

JUL 25 1906

20 Received
Answered

For and in consideration of the hereinafter named amount, we propose to furnish

To *Prendergast & Clarkson*

Cody, Wyoming,

Type.

30 One Compound Steam and Compound Air (Imperial Type 10_s) Corliss Air Compressor of the size and dimensions as set forth in the following

SPECIFICATIONS:

Cylinder Dimensions.

High Pressure Steam Cylinder	14....." dia. by	} 16 " stroke.
Low Pressure Steam Cylinder	24....." dia. by	
Low Pressure Air Cylinder	24....." dia. by	
High Pressure Air Cylinder	13....." dia. by	

Capacity.

40 The capacity of this compressor in free air per minute is 1100 cubic feet, when running

Exhibit A.

at its nominal speed of 131 revolutions per minute.

(Cylinder displacement).

Working Pressures.

Indicated Horse-Power.

With 125 pounds steam pressure at the engine and compressing the above quantity of free air under a pressure of 100 pounds, this compressor will develop 180 indicated horse-power. 10

Main-Frame.

Main-frame to be cast in one piece up to and including the 16 inch stroke; on larger sizes, it is to be cast in halves with flanged joints, which are to be accurately planed and firmly bolted together. Frame to be strongly ribbed to insure rigidity, and to be built with a broad base to rest upon the foundation. 20

Main-Bearings.

Main-bearings to be cast solid with the frame, bored and faced for removable bronze or babbitt bushings at the same setting that the ends of the frame are bored and faced for the steam and air cylinders. The bushings are to be in three sections so as to make adjustment in two directions, always insuring perfect alignment regardless of wear. 30

Steam Cylinders.

Steam cylinders to be made of a special mixture of charcoal iron and selected scrap, bored true and parallel. Side exteriors to be covered with mineral wool and neatly lagged with planished steel. Steam cylinder heads to be carefully finished. 40

*Exhibit A.***Receiver.**

A steam receiver to be placed between the high and low pressure steam cylinders.

Air Pump and Condenser.*No Condenser*10 **Steam Valve Gear.**

Steam cylinders to be provided with Corliss valves, carefully scraped and fitted to a good bearing on valve seat, and arranged to allow for adjustment when required by wear. The gear to be operated without the use of releasing cams and dash-pots.

Governor and Regulator.

20 Compressor to be provided with a combined speed governor and air regulator, the function of which is to maintain a constant speed until the air receiver pressure exceeds a predetermined amount, at such time reducing the speed, and again increasing it to normal as the pressure in receiver falls, by the air pressure acting through a link mechanism and controlling the point of cut-off through the high pressure steam valves.

30 **Air Cylinders.**

Air cylinders to be made of a special mixture of charcoal iron and selected scrap, and heavy enough to permit of reborring. Water jackets, for free circulation of water, to be provided for taking up the heat of compression.

Air cylinder-heads to be made of close grain cast iron, with provision for water circulation. They are to contain the inlet and outlet valves, to be hooded, and arranged for taking air from
40 outside of the compressor room.

Exhibit A.

ORDER DEP'T.

JUL 25 1906

Received

Answered

Air Valves.

Inlet valves to be of the Corliss type, operated by eccentrics from the main shaft. Port areas to be sufficiently large to insure free admission under maximum speed. Valves to be accessible without disturbing the valve gear, by the removal of the bonnets at the ends of the valve chambers. 10

Outlet valves to be of the poppet type, drop forged, or pressed from special steel. They are to work vertically and to be fitted with light tension springs. 20

Intercooler.

An efficient intercooler to be provided between the air cylinders, having ample cooling surface for abstracting the heat generated by compression in the low pressure cylinder.

On the 16" stroke, and smaller compressors, intercooler is to consist of two shells containing removable iron tubes placed in the base of the frame, one on either side. On the larger sizes, it is to consist of one shell with removable iron tubes placed crosswise of the compressor above the air cylinders. Water circulation to be through the tubes. 30

Pistons and Piston-Rods.

Pistons to be of solid type, provided with snap rings of special construction. Piston-rods to be made of steel turned true and polished, and screwed into crossheads and forced into piston heads where they are to be held by large steel nuts. 40

Exhibit A.

Connecting-Rods.

Connecting-rods to be forged with solid or strap ends, and made of open-hearth steel; to be fitted with removable bronze bushings, and both ends to be provided with suitable means for adjustment.

10

Crossheads.

Crossheads to be of the slipper type, made of special material and to have very large wearing surfaces, accessible for adjustment. Cross-head-pins to be of special steel, hardened and ground, and to be.....diameter by.....long.

Crank-Shaft Cranks and Pins.

20

Crank-shaft to be made of open-hearth steel turned true and polished. The journals to be.....diameter by.....long.

Cranks to be of the disc pattern, made of cast iron and counterbalanced, forced on shaft by hydraulic pressure, and keyed.

Crank-pins to be made of special steel, hardened and ground, and so fitted as to secure parallelism with shaft, and to be.....diameter by.....long.

30

Fly-Wheel.

The fly-wheel on the 12 x 16, and smaller sizes, to be cast in one piece; on the larger sizes to be cast in halves with flanged joints, which are to be securely bolted together. Wheel to be keyed to shaft. Diameter *66 ins/* ; Weight (approximately) *4500* pounds.

Lubrication.

40

An efficient form of bath lubrication to be provided, by which the principal bearings and

Exhibit A.

pins are automatically supplied with oil from the crank-cases, to which it again drains, making a continuous operation.

Air and steam cylinders to be fitted with adjustable automatic sight feed lubricators.

Foundation Details.

10

All the necessary foundation bolts, plates and plans to be provided, together with template for locating foundation bolts.

Weight.

Gross weight of the compressor to be 30,000 lbs. (Approximately)

Over-all Dimensions.

Extreme length 13 feet.....inches; extreme width 9 feet.....inches.

20

In General.

The workmanship and material to be of the best quality for the purpose intended; and the performance to be equal to that of the best compressors of this type.

Delivery and Price.

(For prompt acceptance only).

This compressor to be delivered f. o. b. *Cody*
~~New York City,~~
for the sum of (\$—————)

30

ORDER DEP'T.

JUL 25 1906

Received

Answered

Terms.

This contract supersedes all verbal agreements and understandings, and the price specified includes all fittings mentioned above (unless stated

40

Exhibit A.

to the contrary). No variations from, or additions to, this contract will be made, unless especially agreed upon in writing.

Delivery is contingent upon any delays caused by fires, strikes, floods, accidents or causes unavoidable, or beyond our control.

10 It is understood that the acceptance of this compressor, when delivered f. o. b. as herein above stated, constitutes a waiver of all claims for damage by reason of any delay, and it is further agreed that the title and right of possession to the compressor, furnished in accordance with this contract, remains in the RAND DRILL Co. until the comperssor has been fully paid for in cash.

20 This contract is subject to the approval of an officer of the RAND DRILL Co.

RAND DRILL COMPANY,

By.....

ACCEPTANCE.

The above proposal is hereby accepted
this.....day of....., 19....

.....
.....

30

40

Exhibit B.

EXHIBIT B.
INGERSOLL-RAND COMPANY
OLD COLONY BUILDING

Main Office
11 Broadway
PM New York 10
Chicago *March 10, 1906.*

ESTIMATE FOR
Ingersoll-Rand Co.,
Chicago, Ill.

Gentlemen:—

Referring to our contract dated Feb. 24th, 1906, we authorize you to substitute in place of the 14 & 24 & 24 & 13 x 16 type 10 Imperial compressor, a 16 & 25 & 15 x 20 type 10 Imperial compressor, and you are further authorized to add \$90.00 additional to our contract price of \$13001.00 for the Cochrane Feed Water Heater open type, instead of a brass tube Feed Water Heater of the closed type. The Cochrane Feed Water Heater of the open type to be of 350 h.p. capacity. 20

Very truly yours,

PRENDERGAST & CLARKSON 30
By *Jas. F. Clarkson*
Secy & Treas.

ORDER DEP'T.

JUL 25 1906

Received

Answered

01

02

03

04

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.....
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New Jersey Court of Errors and Appeals

INGERSOLL-RAND COMPANY, a corporation, <i>Plaintiff-Appellant,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		
UNITED STATES FIDELITY & GUARANTY COMPANY, a cor- poration, <i>Defendant-Respondent.</i>	}	<i>On Appeal from Supreme Court.</i>

Brief on Behalf of Appellant.

This case was tried before Judge William H. Speer by consent without a jury upon an agreed statement of facts supplemented by evidence such as the Conditional Sales and Chattel Mortgage Laws of the State of Wyoming. All of the facts of the case are agreed upon. The only controversy is as to the rights of the respective parties in view of those facts.

The court's first decision was in favor of the plaintiff (p. 33). With the consent of the plaintiff the case was re-opened to allow the defendant an opportunity to submit a supplemental brief. After reconsidering the case, the trial court reversed its former decision and decided in favor of the defendant upon the whole case (p. 45). Judgment was entered accordingly and from this judgment the plaintiff brings the present appeal.

Statement of Facts.

In 1905 Prendergast & Clarkson, an Illinois corporation, entered into a contract with the United States Government for the construction

of the Shoshone Dam in the State of Wyoming. The defendant, the United States Fidelity and Guaranty Company, became surety on the bond of Prendergast & Clarkson, guaranteeing to the United States Government the completion of its contract according to its terms and conditions.

The plaintiff, Ingersoll-Rand Company, is a manufacturer of, and dealer in drills, air compressors and other machinery used by contractors. In 1906 Prendergast & Clarkson obtained from the plaintiff an air compressor and certain other machinery for use in prosecuting the work at the Shoshone Dam.

Section 22 of the specifications of the contract between Prendergast & Clarkson and the United States Government, provided as follows:

“Suspensions of contract. Should the contractor fail to begin work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or should any question arise as to whether or not the contractor is properly carrying out the provisions of his contract in their true intent and meaning, at any time during the progress of the work, notice thereof in writing shall be served upon him, and upon his neglect or refusal to provide means for a more energetic and satisfactory compliance with the contract within the time specified in such notice, then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other

parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. The failure to order improvement of methods or increase of force, plant, or efficiencies will not relieve the contractor from his obligation to perform good work or finish in the time agreed upon."

In the summer of 1906 a serious washout at the site of the Shoshone Dam disabled Prendergast & Clarkson from continuing the work and it defaulted on its contract with the Government. The Government thereupon served Prendergast & Clarkson with notice and suspended the contract under the authority conferred by paragraph 22 of the specifications (pp. 25, 26 and 27).

On August 11th, 1906, the chief engineer of the United States Government took possession of the entire plant at the site of the dam, including the machinery delivered to Prendergast & Clarkson by the Ingersoll-Rand Company. A day or two later Prendergast & Clarkson signed a written agreement yielding possession of this plant to the United States Government.

The Government then called upon the United States Fidelity & Guaranty Company, the surety on the contractor's bond, to immediately proceed with the completion of the contract, and on September 28th, 1906, turned over to the

Surety Company the plant of the contractor including the air compressor and other machinery obtained from the Ingersoll-Rand Company.

This machinery was sold to Prendergast & Clarkson by a written contract. The specifications of this contract contained a clause providing that the title and right of possession to the compressor remains in the Ingersoll-Rand Company until the compressor has been fully paid for in cash. The defendant contends that this provision is no part of the contract between Prendergast & Clarkson and the Ingersoll-Rand Company, but the plaintiff insists that it is, and points to this provision as the basis of the rights which it is now asserting.

But \$2,000 has been paid on account of the machinery sold to Prendergast & Clarkson. The compressor has never been paid for in full. On October 1st, 1906, plaintiff demanded the return of the compressor then in defendant's possession. Defendant refused and plaintiff brought the present suit.

The theory of the plaintiff's case, briefly stated, is as follows: The machinery in question was delivered to Prendergast & Clarkson under a contract which provided that the title and right to possession of the compressor, furnished in accordance with the contract, should remain in the plaintiff until the compressor should be fully paid for in cash. Thereafter, and at a time when Prendergast & Clarkson was in default in its payments on account of the compressor, the United States Government took possession of this machinery. The United States did not take possession by virtue of its right of eminent domain, but by virtue of an agreement with Prendergast & Clarkson (pp. 18, 19, 25, 26 and 27). It therefore obtained only such right to pos-

session as Prendergast & Clarkson had. This right was subject to the rights of the plaintiff. When the United States, on September 28th, 1906, turned over to the defendant, the United States Fidelity and Guaranty Company, the plant of Prendergast & Clarkson, the defendant acquired only such rights in the machinery in question as the United States had acquired through Prendergast & Clarkson. Neither Prendergast & Clarkson, nor the United States, had any right to possession as against the plaintiff and therefore neither could grant such right to the defendant. The plaintiff by reason of its contract with Prendergast & Clarkson had at all times both the title and the right of immediate possession to the compressor. The defendant's refusal to recognize the plaintiff's title, and more particularly, its refusal on October 1st, 1906, to return the compressor to the plaintiff upon demand, was an unlawful conversion of such compressor.

The case of the plaintiff has been attacked, on behalf of the defendant, upon three different grounds. First, it is denied that that part of the specifications which reserves in the plaintiff title to the compressor was a part of the contract between the plaintiff and Prendergast & Clarkson. Second, it is contended that the defendant is a "purchaser" within the meaning of the Wyoming statute. Third, it is claimed that the defendant obtained a good title through the United States Government.

POINT I.

The whole of the Unsigned Specifications attached to the Signed Contract constitutes a part of that Contract.

The basis of the plaintiff's claim to the compressor involved in this action, is the written contract under which the compressor was delivered by the Ingersoll-Rand Company to Prendergast & Clarkson. This contract is embodied in three documents. The first document (p. 51) consists of two typewritten sheets of paper. The second sheet is signed at the bottom by both parties to the contract and these two sheets taken together are referred to in this action as the "signed contract."

Attached to the signed contract are two printed forms of "Proposals" or "Specifications" (pp. 54 and 62). The blanks in the printed forms are filled out by typewriting and some parts of the printing are crossed out by typewriting. These typewritten insertions are indicated in the printed case by italics.

The forms of specifications respectively describe the two compressors mentioned in the signed contract and contain provisions (among others) for wrenches, shipping, plans for foundation and delivery (pp. 60, 61 and 67).

The compressor which was actually delivered to Prendergast & Clarkson and which is the subject of this controversy, is the Imperial type 103 Air Compressor (p. 23). The specifications which describe this compressor contain the following provision (p. 68):

" * * * it is further agreed that the title and right of possession to the compressor, furnished in accordance with this contract, remains in the Rand Drill Com-

pany until the compressor has been fully paid for in cash."

The specification which describes the other compressor contains a similar provision (p. 61).

By the name "Rand Drill Co." the parties meant and intended the Ingersoll-Rand Company (p. 20, par. 6).

There is no dispute upon the facts. The dispute is upon the legal effect of the conceded facts.

Higgins v. Goerke-Kirch Co., 103 Atl. 37.

The plaintiff contends that the parties intended to adopt as a part of their contract the provision retaining in the plaintiff the title and right of possession to the compressor until it should be fully paid for. The defendant denies that this provision is a part of the contract. The first question to be determined therefore is of what documents or writings the contract consists.

As evidencing the parties' intention to adopt the provision in question, plaintiff relies, (A) upon its existence in the document annexed to the so-called signed contract, (B) the reference in the signed contract to attached specifications, and (C) to internal evidence of intention in the specifications themselves.

POINT I A.

The existence of the provision in question, Annexed to the Signed Document, cannot be ignored.

A written contract may be proved by showing any word or act of the parties which would indicate that they intended to adopt it as their contract.

"For the purpose of evidencing execution, where no requirement as to attesting wit-

nesses is involved, an extra-judicial admission of the party has always been regarded as sufficient; the only question could be whether the party's words or conduct, under the circumstances, amounted to an admission."

Wigmore on Evidence, Sec. 2132 (3).

The most convenient and usual way of proving that parties have assented to the terms of a written contract is to show that they have signed the contract. But this is not the only way of proving their assent. Nor is it necessary that their signatures appear at the bottom of the contract or on each sheet where there are more than one sheet. The signing of a paper is an act showing assent to something. What is assented to depends upon the circumstances under which it is signed.

For example: The so-called signed contract in this case consists of two typewritten sheets of paper only one of which is signed. But no one would think of asserting that the first sheet is not part of the contract because only the second sheet is signed. The first sheet is annexed to the second; it clearly relates to the same subject matter; and both would be meaningless unless read together. These circumstances make it clear that the parties by signing the one sheet intended to adopt both as their contract.

Where the signed paper would not be rendered meaningless by excluding papers attached to it or provisions appearing below the signatures, the intention of the parties to adopt all, as one contract, is perhaps not so obvious. But the law recognizes that business men of ordinary prudence do not sign papers with provisions attached either above or below their signatures unless they intend to be bound by such provi-

sions, and it may be stated as a general rule based upon common experience, and supported by ample authority, that the very existence of a paper or provision attached to or immediately following a signed contract, and relating to the same subject matter, is sufficient to show that the parties intended such paper or provision to constitute a part of their contract, especially where there would otherwise be no reason for the existence of such paper or provision.

9 *Cyc* 582.

Shaw v. Camp, 163 Ill. 144; 45 N. E. 211;
36 L. R. A. 112.

Franklin Savings Institution v. Reed, 125
Mass. 365.

Howe v. Schmidt, 90 Pac. 1056 (Cal).

Hutcheon v. Johnson, 33 Barb. 392.

Close v. Clark, 16 Daly, 91; 9 N. Y. Sup-
plement, 538.

*In the matter of Commissioners of Wash-
ington Park*, 52 N. Y. 131.

*General Fire Extinguisher Co. v. Moores-
ville Cotton Mills*, 132 N. C. 424; 43 S. E.
942.

McGeragle v. Broemel, 53 N. J. L. 61.

Buohl v. Commissioners of Beverly, 89 N.
J. L. 378, 379.

Smith v. Runkle, 97 Atl. 296, 301 and 302;
affd. 98 Atl. 1086.

In *Hutcheon v. Johnson*, *supra*, the New York Supreme Court held that the annexation, by an auctioneer, of a printed slip to the terms of sale and the contract of purchase made such slip a part of the contract. At page 395 the court quoted from the opinion in *Tallman v. Franklin*, (4 Kern, 584), part of which is as follows:

“The point is whether the two papers were signed as one by the signature of the

auctioneer. As they were pinned together, as together they contain the terms necessary to complete the contract, as they plainly relate to the same subject, they ought to be construed together as forming one document, unless some rule of law forbids it."

In *Franklin Savings Institution v. John Reed*, 125 Mass. 365, the plaintiff sued on the following note:

"\$2,600. December 5th, 1870. For value received we jointly and severally promise to pay Edward A. Robbins or order, \$2,600 on demand with interest annually at 7 per cent, interest to commence April 1st, 1871."

Benjamin W. Reed,
John Reed, Surety."

"It is understood and agreed that the said B. W. Reed is not to be compelled to pay said note before April 1st, 1881."

The court held that,

"the memorandum written upon the note before its delivery was a part of the contract; and by its manifest intention and legal effect neither Benjamin W. Reed, the principal, nor John Reed, who appeared, on the face of the note to be a surety, was bound to pay the note until April 1, 1881." And that the action was prematurely brought.

In *Close v. Clark*, 16 Daly 91; 9 N. Y. Supplement 538, the court held that a postscript added after the signing of a contract was a part of the contract.

In *Shaw v. Camp*, *supra*, the court in the course of its opinion said,

"The jury was justified, by the evidence in finding that the testator wrote and attached sheet B to the original prior to the execution of the codicil. That being so, the reference by the codicil to the will was also a reference to that sheet."

In the present case the provision retaining the title and right of possession to the compressor in the plaintiff, was attached to the paper which the parties signed; it clearly relates to the same subject as the signed paper; and it would be meaningless verbiage, with no reasonable excuse for its existence, except in connection with the signed contract. These circumstances, we submit, show that the parties by their signatures adopted this provision as a part of their contract.

POINT I B.

The reference to Attached Specifications indicates the intention of the parties to include the provision in question as a part of their contract.

To prove a document it is not necessary to prove that the parties had actual knowledge of its contents and assented thereto. A presumption of knowledge and assent arises upon proof of certain facts.

3 *Wigmore on Evidence*, Sec. 2134.

If a contract in writing expressly refers to a written instrument, the law will imply that a party to the contract has notice of the contents of such instrument.

Sawyer v. Hammatt, 15 Me. 40.

The contract between the plaintiff and Prendergast & Clarkson refers to "attached specifications." It must therefore be presumed that when they signed this contract, they knew that "specifications" were attached and that in those specifications was the provision retaining title to the compressor in the Ingersoll-Rand Company.

This provision had no meaning whatever unless it referred to the contract annexed to it. There was no reason for its existence if the parties did not intend to be bound by it. If they did not assent to it they had both motive and opportunity to express their dissent. They could very easily have torn it off, or they could have crossed it out as they did other less important parts of the printed form (pp. 54, 61, 62 and 67). Under the circumstances, we submit, their assent to this provision must be inferred from their failure to express their dissent.

3 *Wigmore on Evidence*, Sec. 2134 and foot note referring to principle of "assent by silence."

Turner v. Yates, 16 How. 14 at 27.

Donnelly v. State, 26 N. J. L., 463; *Id.* 601.

The defendant's argument is that the reference in the signed contract, Exhibit A, to the attached specifications, is only for the purpose of ascertaining the size and dimensions of the compressors, and that, therefore, the specifications are a part of the contract only for that purpose. Even if this premise were true, the conclusion would not necessarily be correct. In this connection it is important to distinguish between the purpose of a reference and the intention of the parties as disclosed by that reference. Whether or not the provision in question is a part of the contract depends upon whether or not the contracting parties intended it to be a part. If the reference to "attached specifications" discloses the fact that the parties intended the attached papers to be specifications of the contract, effect should be given to that intention though it be disclosed incidentally or even unconsciously. For example: The con-

tracting parties may have thought that they had shown their intention sufficiently by changing the printed forms to conform to their signed contract and attaching them to it. If in referring to the documents so attached, for any purpose whatever, they use a term which shows that they considered those documents a part of their contract, this evidence of their intention should not be disregarded because of the purpose of the reference.

The signed contract refers to the specifications as follows:

We propose to furnish you:

One Ingersoll Rand Corliss (Cross Compound Steam & Air) Class 'BB3' Air Compressor of the size and dimensions as set forth in the attached specifications.

One Ingersoll Rand (Cross Compound Steam & Air) Imperial Type 103 Air Compressor having Meyer Cut Off Steam Valves, of the size and dimensions as set forth in the attached specifications.

It will be noticed that the "size and dimensions" are not the specifications but are "set forth *in*" the specifications. The remainder of the attached documents must therefore also be a part of the specifications. And if the documents, in their entirety, are specifications, what are they specifications of, if not of the contract to which they are attached?

To construe this reference to the specifications as the defendant insists it should be construed, is to ignore the ordinary and commonly accepted meaning of the word "specifications." If the reference were to "attached papers" or "attached documents" or "attached forms," the defendant's argument would have greater force.

But from the use of the word "specifications" it is evident that the parties intended that the attached documents should be specifications, *i. e.* a more particular enumeration of the terms of their contract.

Defendant's counsel would limit the meaning of the word "specifications." The gist of his argument is that as here used "specifications" means specifications of the compressors mentioned and not specifications of the contract. It is true that specifications of a contract to sell machinery would consist very largely of "an enumeration of the descriptive qualities of the articles referred to," and specifications of a contract to perform certain work would naturally contain for the most part "a detailed statement of the manner and method of doing the work contemplated." But it is very common for specifications to also contain additional and distinct terms and provisions which would not be consistent with the defendant's restricted definition of the word.

In this connection it is significant to note that the provision of the contract between Prendergast & Clarkson and the United States by virtue of which the Government took possession of the machinery involved in this suit, was Section 22 of the "specifications" (p. 18).

It will also be noted that the specifications of the contract between Prendergast & Clarkson and the Ingersoll-Rand Company contain new and distinct provisions such as:

"A full set of wrenches for all nuts liable to adjustment, also eye bolts, to be provided" (p. 60).

"Plans for foundation and general plan to be furnished without extra cost" (p. 60).

“This compressor to be delivered f. o. b. cars Cody, Wyoming” (p. 61).

as well as the provision relied upon by the plaintiff.

In the case of *Gray v. Cotton, et al.*, 134 Pac. 1145 (Cal), the court held that where the plaintiff undertook by his writing the “excavating and back-filling necessary for trunk line sewer and lateral main sewers in accordance with the plans and specifications as prepared by city engineer * * *,” this reference adopted the plans and specifications and made them, so far as they were applicable, a part of the plaintiff’s contract so that he was bound by a provision in the specifications which stated, “Payments to be made at the rate of seventy-five per cent monthly upon engineer’s estimate.”

In *McGregor v. J. A. Ware Construction Co.*, 188 Mo. 611, 87 S. W. 981, a construction contract required the work to be done according to certain “specifications” under which the manner of doing the work and materials to be used were particularly set out. The contract then contained several paragraphs under the designation “general stipulations.” The contractor’s contract with a sub-contractor declared the “specifications” of the construction contract to be a part thereof and to govern the same. The court held, that the “general stipulations” of the construction contract constituted a portion of the “specifications,” within the meaning of the sub-contractor’s contract and consequently constituted a part thereof.

It has been held to be the rule that in cases of express agreements in writing, a reference by the contracting parties to an *extraneous* writing for a particular purpose makes it a part

of their agreement only for the purpose specified. *Guerini Stone Co. v. Carlin*, 240 U. S. 264. From an examination of the cases, however, it is clear that by "extraneous writings" the court had in mind writings which have an existence independent of the contract which contains the reference. Cases which frequently occur are where sub-contracts refer to specifications of the general contract for part of their terms. In such cases the reference does not incorporate such specifications in their entirety into the sub-contract unless the intention to do so is clear. Such situations are very different from the present one, where the reference is to a document attached to the main contract and having no force or meaning whatever unless in connection with the contract.

POINT I C.

An inspection of the Specifications themselves discloses the intention of the parties.

The defendant takes the position that the parties intended to incorporate into their contract only those parts of the specifications which state the size and dimensions of the compressor. It is very apparent, however, by an inspection of these documents that the parties treated the specifications, in their entirety, as a part of the contract. This is evidenced by insertions in the printed forms, which could not possibly under any reasonable construction refer to "size and dimensions." For example, note the insertions of "Prendergast & Clarkson," "No condenser" "f. o. b. Cody." Provisions for wrenches, shipping, furnishing plans and a general guarantee of quality are intermingled with provisions as to weight and over all dimensions.

It will also be noted that they took care to cross out certain parts of the printed forms so that they would conform in all respects to the signed document and that the parts crossed out do not refer to size or dimensions. Why did they do this if they did not intend the whole of the specifications to be a part of their contract? And why did they not also cross out the provision in controversy if they did not intend to be bound by it?

The trial court in its second opinion concluded that it was improper to consider the internal evidence furnished by the specifications themselves. It states that "analogies may be found in the parol evidence rule as enunciated in *Naumburg v. Young*, 15 Vr. and in the Statute of Frauds rule where a connection is not allowed to be established between several documents, where such connection does not appear on their faces" (p. 48).

We submit that in the present case the connection between the signed contract and specifications does appear on their faces, and that when the trial court assumes that the signed paper is the contract of the parties and refers to the specifications as "alien documents" it falls into the error pointed out in its first opinion of begging the very question at issue (p. 35).

The question at issue is, of what writings does the contract consist. Have the specifications including the provision retaining title in the plaintiff been sufficiently authenticated; have they been properly proved to have been executed as part of the contract? No signatures appear upon the specifications, but this is of no importance. "Proof of execution involves merely proof of signature or of *whatever else constitutes the act of adoption.*" 3 *Wigmore on Evidence*,

Sec. 2134 (the italics are Wigmore's). The acts of filling in those parts of the specifications which have nothing to do with size and dimensions and of annexing them to the signed document show the intention of the parties as clearly as though they had signed each sheet at the bottom.

See *Smith v. Runkle*, 97 Atl. 296, 301 and 302; affd. 98 Atl. 1086, where the court in determining whether or not a sheet of paper was part of a will considered the internal evidence furnished by the paper itself.

POINT II.

The defendant is not a "purchaser without notice" within the meaning of the conditional sales act of Wyoming.

The statute relied on by the defendant is as follows:

Wyoming Compiled Statutes 1910, page 915,

Section 3745. Conditional Sale. When not valid. No sale, contract or lease wherein the transfer of title of ownership of personal property is made to depend upon any condition shall be valid against any purchaser or judgment creditor of the vendee or lessee in possession without notice, unless the same be in writing, signed by the vendee or lessee, and the original, or a copy thereof, filed in the office of the county clerk of the county wherein the property is contained. Such instrument so filed shall have attached thereto an affidavit of such vendor or lessor or his agent or attorney which shall set forth the names of the vendor and vendee, or lessor and lessee with a description of the property transferred and the full and true interest of the vendor or lessor therein. All such sales

or transfers shall cease to be valid against purchasers in good faith, or judgment or attaching creditors, without notice, at the expiration of one year from the date of such sale, unless the vendor or lessor shall, within thirty days prior to the one year from the date of such sale or transfer, file a similar affidavit to the one above provided for in the office of such clerk; and the said vendor or lessor may preserve the validity of his said sale or transfer of such personal property by an annual re-filing in the same manner as aforesaid of such copy."

The defendant claims to be a purchaser by virtue of the written agreement with Prendergast & Clarkson set forth in paragraph 3½ of the Statement of Facts (p. 17).

POINT II A.

This Agreement, in terms, assigns only the right, title and interest of Prendergast and Clarkson.

POINT II B.

This Agreement is an assignment upon condition or a conveyance as security.

Bouvier's Law Dictionary (Rawles Third Edition) defines "Purchaser" as follows: "A buyer; a vendee. A mortgagee or a conditional vendee is not a purchaser," citing

Campbell Printing Press & Mfg. Co. v. Dyer, 46 Neb. 830; 65 N. W. 904.

See also *Racine-Sattley Co. v. Mehen*, 114 N. W. 602, 604.

POINT II C.

The Statute should be strictly construed.

A conditional sale of goods is valid at common law even against a *bona fide* purchaser for value.

Cole v. Bery, 42 N. J. Law, 308.

Warner v. Roth, 2 Wyo. 63.

The statute upon which the defendant relies is in derogation of the common law and should be strictly construed. It provides that an unrecorded conditional sale shall be void against "any purchaser or judgment creditor of the vendee or lessee in possession without notice." The intent of the statute is obviously to protect subsequent purchasers who part with value relying on the apparent ownership of the conditional vendee. At the time the agreement was made on which the defendant relies, Prendergast & Clarkson was neither a "vendee in possession" nor had it contracted for the machinery in question (p. 17 and p. 20, l. 9, and p. 23). The defendant obtained these goods without ever having parted with any value or given any credit for them. Surely this statute was never intended to aid one in an attempt to get something for nothing.

The courts of this state have construed a similar statute in the following cases:

Wooley v. Geneva Wagon Co., 59 N. J. L. 278.

Reischman v. Masker, 69 N. J. L. 353.

General Electric Co. v. Transit Equipment Co., 57 N. J. Eq. 460.

Falaenau v. Reliance Steel Co., 74 N. J. Eq. 325.

Smith v. Hotel Ritz Co., 74 N. J. Eq. 616.

Reischman v. Masker supra, is directly in point. The New Jersey statute when that case was decided, declared unrecorded contracts of conditional sale to be "absolutely void as against the judgment creditors of the person so contracting to buy the same, and subsequent purchasers and mortgagees in good faith." The Court of Errors and Appeals held that this statute did not protect ordinary creditors of the vendee.

POINT II D.

At the time the defendant claims to have "purchased" the machinery in question neither Prendergast and Clarkson nor the United States Government was in possession of it or had any title to or right to the possession of it. The attempted purchase was a purchase of after acquired property, and at law, void.

Smithurst v. Edmunds, 1 McCarter, 408, at 413.

Looker v. Peckwell, 9 Vr. 253, affirmed in 10 Vr. 134.

McFarland v. Stanton Mfg. Co., 8 Dick. Ch. at 650.

POINT II E.

The alleged conveyance to the Defendant is a "chattel mortgage, bond or other instrument intended to operate as a chattel mortgage," and the Plaintiff is a "creditor of the mortgage" within the meaning of the Wyoming Chattel Mortgage Act. (Wyoming Compiled Statutes, Sec. 3727, *et seq.*)

The revelant provisions of this act are as follows:

Section 3727 provides that

"Every mortgage, bond, conveyance or other instrument intended to operate as a mortgage of goods, chattels or personal property which shall not be accompanied by immediate delivery and be followed by an actual and continued change of possession of the goods, chattels or personal property so mortgaged shall be absolutely void as against the creditors of the mortgagor and as against subsequent mortgagees or purchasers in good faith, unless such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be filed as hereinafter provided."

Section 3728.

"Every such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be filed in the office of the county clerk where the property is and shall be indexed by the clerk of such county in a book to be kept by such clerk, to be called the Chattel Mortgage Index."

Section 3732.

"Every such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall take effect and be in force from and after the time of delivering same to the clerk for filing, and not before, as to all creditors and subsequent purchasers and mortgagees in good faith for valuable consideration and without no-

tice, and any such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be void as to any subsequent mortgagee, and without notice, whose mortgage bond, conveyance or other instrument intended to operate as a chattel mortgage shall be first filed; provided that any such mortgage, bond, conveyance or other instrument intended to operate as a chattel mortgage shall be valid between the parties, anything contained in this chapter to the contrary notwithstanding, until the debt thereby secured is fully paid."

1 *Word & Phrases*, 654.

1 *Bowyer's Law Dictionary* (Rawles Third Revision), 671.

"Where there is an indebtedness, and the effect of contemporaneous writings executed by the debtor and creditor is merely to transfer the property of the debtor to the creditor for the purpose of securing the debt and to leave in the debtor a right to all that remains after the debt is paid, it constitutes a chattel mortgage." *Hastings v. Fithian*, 71 N. J. L. 311.

POINT III.

Whatever rights the Defendant obtained through the United States Government were subject to the title and right of possession in the Plaintiff.

The defendant claims that the United States Government had a right to take possession of the machinery claimed in this case and therefore could lawfully turn it over to the defendant. The answer to this is that this right of possession, if it existed, was derived from Prendergast & Clarkson, was subject to the plaintiff's title and right of possession, and terminated when demand was made for the return of the goods.

The defendant assumes that the United States government, under its right as sovereign, took the absolute title to the machinery and a few days later gave it to the surety company. This assumption is contrary to fact. It is true that, if this machinery were necessary for the public use, the United States had a right to take the absolute title to it upon the payment of just compensation therefor. But it is not true that it ever exercised that right.

The defendant was the surety on the bond of Prendergast & Clarkson. When Prendergast & Clarkson defaulted the United States called upon the defendant to immediately proceed with the completion of the contract and turned over to it the plant of the contractors for that purpose. The defendant had guaranteed the completion of the contract according to its terms and conditions and was substituted in the place of the contractor to fulfill its guarantee. The United States was under no obligation whatever to buy machinery for the defendant and never assumed such a burden. It merely turned over such property as the contractor had, relying upon its proprietary right derived from Prendergast & Clarkson. (See Agreed Statement of Facts, especially at pages 17, 18, 25, 26 and 27.)

On August 10th, 1906, the acting Secretary of the Interior in his letter to the Director of the Geological Survey said:

“I hereby suspend the operation of the contract of September 23, 1905, with Prendergast & Clarkson, and hereby authorize the engineers to take possession of all machinery, etc., as specified above.

I have taken this action under the authority conferred by paragraph 22 of the specifications, and direct also that you inform the contractors and the surety on their bond of this action” (p. 26).

The Agreed Statement of Facts then continues (p. 27):

“That on August 11th, 1906, Mr. Daniel Webster Cole, Chief Engineer of the United States Government notified Prendergast & Clarkson in writing that the Secretary of the Interior had suspended the contract for the construction of the Shoshone Dam. That on the same day Mr. Daniel Webster Cole, acting for and on behalf of the United States and under the direction of the Secretary of the Interior of the United States, took possession of the entire plant at the site of the dam, including the machinery delivered as aforesaid by plaintiff in this case. That on August 13th, 1906, Prendergast & Clarkson signed a written agreement yielding possession of this plant to the United States Government. The United States then called upon the United States Fidelity & Guaranty Company to immediately proceed with the completion of the contract.

On September 28th, 1906, the United States Government turned over to the United States Fidelity & Guaranty Company, the defendant herein, the plant of the contractors, including the compressor and machinery above described, for use in the completion of the contract referred to in paragraph 2 hereof, and the said defendant took possession of said property on that day.”

The United States never indicated in any way that it intended to take any rights in this machinery other than those which it had obtained from Prendergast & Clarkson. It neither expressly nor impliedly promised to pay the Ingersoll-Rand Company for its title and right of possession. Its possession was either tortious or dependent upon the rights granted to it by Prendergast and Clarkson.

In *Langford v. United States*, 101 U. S. 341, it was held that when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the government, the taking was tortious and the United States could not be charged upon an implied obligation to pay for its use and occupation.

Langford v. United States was followed in *Hill v. United States*, 149 U. S. 593. In the latter case it was held that the government could not be held liable upon an implied contract where it had never in any way acknowledged any right of property in the plaintiff as against the United States.

In *Harley v. United States*, 198 U. S. 229, it was held that in order to recover under the Tucker act there must be some meeting of the minds of the parties upon the fact that compensation will be made. In that case the plaintiff was not allowed to recover because the officers of the government had supposed that he would neither expect nor demand remuneration.

In the cases of *United States v. Buffalo Pitts Co.*, 193 Federal 905, affirmed in 234 U. S. 228; *United States v. Lynch*, 188 U. S. 445, and *J. G. White & Company v. Ball Engineering Co.*, 223 Fed. 618, cited by the defendant, compensation was allowed for goods seized by the United States Government. But in each of those cases the court found that the government took possession, not by virtue of any proprietary right, but by virtue of its governmental right of eminent domain.

In the *Buffalo Pitts* case, especially relied upon by the defendant at the hearing, the court

found the following facts to be true: (See 234 U. S. at page 232.)

“As to the plaintiff it specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed and upon the representations made to it, and consented to the defendants retaining possession of the property in expectation of receiving compensation for it; as to the Government it is found that it was well known to it that the chattel mortgage existed and its validity was undisputed, and that it would continue the use of the engine and appurtenances, and if left in its possession payment would be recommended for such use.”

It will also be noted that in that case, the Buffalo Pitts Company, whose position was that of a chattel mortgagee, had made a demand for the possession of the machinery which the United States refused, thereby showing that it intended to take the absolute title, including the rights of the mortgagee, and not merely the chattel mortgagor's right to possession subject to the rights of the chattel mortgagee.

The case of *Tinker & Scott v. United States Fidelity and Guaranty Company*, 169 Federal Reporter, 211, was different from the case at bar in so far as it related to the machinery claimed in that case. *Tinker & Scott* was a sub-contractor of Prendergast & Clarkson. In their contract it was agreed

“that they should be bound by the plans, specifications and instructions furnished by the United States Government to Prendergast & Clarkson in their entirety, and with no exception whatever, such plans and specifications being attached thereto.”

Both Prendergast & Clarkson and Tinker & Scott were bound by the provisions of section 22 of the specifications of the main contract. The machinery claimed in that case was "machinery employed on the works." The court held that the government therefore had a right under its contract to take possession of the machinery sued for in that case and to turn it over to the surety company.

In the present case the plaintiff was not bound by the agreement between Prendergast & Clarkson and the United States. The agreement was neither attached to nor referred to in the contract between the plaintiff and Prendergast & Clarkson. It does not appear that the plaintiff ever knew of the existence of such an agreement.

Moreover, the compressor sued for in the present case was not "employed on the works" at the time it was taken over by the Government. On August 10th, 1906, the day before the Chief Engineer of the United States Government took possession of the plant of Prendergast & Clarkson (p. 27), the machinery in question "had been taken to the site of the Shoshone Dam and had been partially or wholly set up, but its operation had not been commenced." (Bottom of page 24 and page 25. See also page 28, paragraph 16.)

In the Tinker & Scott case, the court held (at page 216) that certain rock taken from the spillway, which was not "machinery employed on the works," was the property of Tinker & Scott.

"This being the case, the Government was without authority under its contract with Prendergast & Clarkson, to take the rock into possession or to deliver the same over to the defendant. Therefore the defendant's

possession thereof is wrongful as against the plaintiffs and the latter are entitled to recover its value."

It will be noted that in the Tinker & Scott case the rights of the United States in the property there in question, were limited not by its right of eminent domain, but by its authority under its contract with Prendergast & Clarkson. As above pointed out, Tinker & Scott were bound by the provisions of this contract. They had subordinated their rights in "the machinery employed on the works" to the rights given to the United States by Prendergast & Clarkson. But they had released no rights in the rock taken from the spillway.

So far as the rock is concerned the Tinker & Scott case is similar to the one at bar.

Respectfully submitted,

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IRA C. MOORE, JR.,
Of Counsel.

THE HISTORY OF THE
CITY OF BOSTON

FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
NATHANIEL BENTLEY

VOLUME I
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VOLUME III
FROM THE YEAR 1700
TO THE PRESENT TIME

New Jersey Court of Errors and Appeals.

JUNE TERM, 1918.

INGERSOLL-RAND COMPANY, a corporation,

Plaintiff-Appellant,
vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

Defendant-Respondent.

Action at Law.
On Appeal from Supreme Court.
Sat below SPEER, Circuit Judge.

10

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

20

The plaintiff-appellant claims the value of certain machinery which it asserts belonged to it and was converted by defendant a little less than six years before it began its suit. The theory of its case is stated on pages 3 and 4 of the opposing brief.

It is admitted this machinery was sold to Prendergast & Clarkson by a written contract, Exhibit A, which is printed on pages 51, 52 and 53. It was in the form of a proposal and acceptance, both of which were duly executed. In this contract, Exhibit A, there is no language whatever to indicate that title to the compressor in question was to remain in Ingersoll-Rand Company. Attached to this executed contract of sale were two unsigned papers referred to in the agreed statement of facts (p. 20) as "certain unsigned specifications referred to in the first and second

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paragraphs of said contract". These papers were apparently printed long before and had been in use by Rand Drill Company, which became one of the constituent companies of the plaintiff-appellant. The first of these so-called specifications has no relation whatever to the compressor (Imperial type 10 3), which is the principal subject matter of this suit. In the second of said unsigned papers annexed to the written contract

10 (pages 62 to 68) there may be found under the caption "terms" on page 68 these words:

"It is further agreed that the title and right of possession to the compressor, furnished in accordance with this contract, remains in the Rand Drill Co. until the compressor has been fully paid for in cash."

The basis of plaintiff-appellant's action is that these words in this unsigned paper became incorporated into and constituted a part of the signed

20 contract, Exhibit A, by reason of the fact that such unsigned paper was attached to the signed contract and the latter contains this reference (page 51):

"One INGERSOLL-RAND (Cross Compound Steam & Air) Imperial Type 10 3 Air Compressor having Meyer Cut Off Steam Valve of the size and dimensions as set forth in the attached specifications."

There is no other reference in the signed contract to this unsigned paper. The defendant-respondent has insisted throughout this litigation and now insists that the unsigned proposals or specifications attached to the signed contract are to be taken in connection with it only to the extent referred to in said signed contract, and that that part of said proposals or specifications which seeks to reserve title to the compressor in the plaintiff-appellant was no part of the contract

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40 between the original seller and buyer.

POINT I.

The so-called "specifications" attached to the signed contract (Exhibit A) did not in their entirety form a part of the contract.

POINT 1-A.

The intent to incorporate must be clear of all doubt.

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Short vs. Van Dyke, 50 Minn., 286.

Stocker vs. Partridge, 25 N. Y. Superior Court, 193, at page 204:

"The first rule applicable to the importation of a written document whether subscribed or not, into a writing or correspondence duly subscribed, so as to charge the parties, is that the reference to it in such correspondence must be clear of all doubt."

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See *Harvey & Bro. vs. Radkey*, 1 White and W. Tex. civil cases, par. 277; also *Noyes vs. Butler Bros.*, 98 Minn., 448.

The rule is thus stated in *Cruthers vs. Donohoe*, 84 Atl., 323:

"But in the absence of an *express provision in the contract* the specification can neither restrict nor extend the scope of the contract to subjects other than those covered by the contract * * *."

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The contract itself and not the so-called specifications must be resorted to in order to ascertain what the intent of the reference is. There is nothing in the signed contract, Exhibit A (pp. 51, 52, 53), dealing with the subject of reservation of title, nor is there any language in the signed contract reasonably indicating an intent to incorporate the so-called specifications for all purposes.

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POINT 1-B.

The annexation of a document to a contract merely serves the purpose of identifying the document referred to.

In *McGaragle vs. Broemel*, 53 N. J. L., 59, our Supreme Court, referring to a letter which was originally attached to a contract, says (at page 61):

10 "Its annexation supplied one of the specified modes of identification."

Where there is a reference in a contract to attached specifications and the reference is apparently for a particular specified purpose, the presumption is that the specification is attached for the purpose of identifying the paper referred to and not for the purpose of incorporating it in its entirety. The mere annexation of a document to a bilateral contract, does not warrant its incorporation.

20 In *Riley vs. City of Brooklyn*, 46 N. Y., 444, plaintiff contracted to grade a street for defendant and agreed to furnish all the material and all the work agreeable to a profile on file in the Street Commissioner's office. Attached to the profile was an unsigned statement estimating the amount of material required. The contractor required 30,000 cubic yards more of earth than

30 stated in the estimate and sued for this extra work. It was held that the estimate though attached to the profile did not form any part of the contract. See also *Short vs. Van Dyke*, *supra*.

The cases cited by the plaintiff may be readily distinguished and are no authority to the contrary:

40 In *Hutcheson vs. Johnson*, 33 Barb., 392, neither of the papers alone contained the terms necessary to constitute a contract and either paper would have been meaningless without the other. That

is not a question of incorporating another document into a complete bilateral contract.

"The rule as to the admissibility of parol testimony to affect that which is written has no application to cases where a part only of the contract was reduced to writing. Where a written agreement is incomplete and per se unintelligible verbal testimony is admissible where it is not inconsistent with the written terms."

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St. Clair Co. B. Soc. vs. Fretsam, 6 Ill. App., 151.

In *Franklin vs. Reed*, 125 Mass., 365, there was no annexation and all the writing sought to be incorporated was written upon one piece of paper and upon the same side. The contract was unilateral and consequently there was no evidence of a meeting of the minds unless the subscription was considered part of the note.

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In *Close vs. Clark* 16 Daly, 91, a building agreement was signed by both parties and subsequently one party with the consent of the other added a postscript. Subsequently verbal agreements were made embodying changes in the original contract and it was held that the agreement as modified by the postscript and also subsequent oral agreements not evidenced by any writing, all constituted one agreement.

In *Howe vs. Schmidt*, 90 Pac., 1056, the reference in the contract itself to the annexed drawings and specifications indicated clearly an intent to incorporate them and the annexation of the drawings to the specifications served as a mode of identifying the papers referred to.

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In *Shaw vs. Camp*, 163 Ill., 144, 36 L. R. A., 112, after a will was executed testator attached an unsigned sheet making an additional bequest. Subsequently he attached a duly executed codicil and republished the will. It was held that the

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reference in the codicil to the will was intended to include the attached sheet. The codicil which was duly executed in all respects could properly incorporate other papers by reference. The reference in the codicil was to the will and parol evidence was properly admitted to show that by the word "will" testator meant the will originally executed plus the paper subsequently annexed. That is a different proposition from the one involved in this case.

10 *Smith vs. Runkle*, 97 Atl., 296, is based on the same principle. The codicil was duly executed and published. It had attached to it a will, the first two pages of which were apparently torn off and two other pages substituted. The court considered the internal evidence in the two substituted pages to demonstrate that the substitution was before the execution of the codicil (page 302). Consequently if the substitution destroyed the validity of the original will the codicil re-executed it with the substituted papers. The codicil was necessarily a codicil to some will and the question was what will did testator intend to republish.

20 *In the Matter of Commissioners of Washington Park*, 52 N. Y., 131, a verified petition was filed with the court under condemnation proceedings. The petition contained a reference to the effect that the real estate was thereafter fully described and the names and addresses of the parties thereafter named. There were no such descriptions in the body of the petition but in schedules annexed. The verification also referred to the description of lands and names and addresses of witnesses. It was held that the schedules were a part of the petition. The references in the body of the petition were sufficiently clear to incorporate the schedules and in addition the petition and affidavit were meaningless without the schedules.

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In *Fire Extinguisher Co. vs. Cotton Mills*, 132 N. C., 424, the body of the contract provided that "any additional work or apparatus which may be required not included in our specifications should be supplied by the defendant, or if by the plaintiff at prices to be agreed upon". The body of the contract referred to "the within specifications" which were attached. It was held that additional work described in the specifications at prices therein set forth constituted part of the contract. The references in the body of the contract were sufficiently clear and specific to show that the specifications were made part of the contract in respect to additional work. 10

The most recent of the cases cited in plaintiff's brief, *Buohl vs. Beverly*, 89 N. J. L., 378, 379, does not seem to be in point.

POINT 1-C.

In a contract a reference to another document, whether annexed or not, will not be legally sufficient to incorporate the document for any other purpose than that indicated in the reference. 20

Short vs. Van Dyke, 50 Minn., 286, is a strong case in point. Short and his assignee brought an action for accounting and specific performance against Van Dyke. Short had entered into a contract to convey to Van Dyke a one-half interest in certain lands. If the contract was construed as merely one to convey land it was barred by the statute of limitations. If it was declaratory of a trust, the action for accounting was proper and the case was within the statute of limitations. The contract had the following endorsement: 30

"Description of lands located by A. J. Short and entered on joint account by W. J. Van Dyke, Taylor's Falls, office, June 18, 1873". (Then followed a description of the land). 40

If this endorsement were incorporated in its entirety into the contract the court said that the contract would then be sufficient to declare a trust and permit a recovery. The references in the contract to the endorsement are as follows:

10 “For and in consideration of * * *
 watching and seeing if there is any trespass
 committed on the within described lands *
 * * W. J. Van Dyke agrees to quitclaim
 one equal undivided one-half interest to the
 within described lands; if Andrew J. Short
 shall pay * * * \$9498.21, that being the
 costs and expenses paid by said W. J. Van-
 Dyke to secure the *within lands*, if paid with-
 three years from *date of entry of said lands*
 as shown on the within described lands
 * * *”

20 It was held that the endorsement could only
 be incorporated in so far as it furnished a des-
 cription and fixed the date of entry of the lands
 and could not be incorporated for the purpose
 of declaring a trust. At page 288:

30 “There are some expressions in the contract
 suggestive of the fact that the lands were
 acquired and were to be held by defendant
 for the joint benefit of the parties; such
 for instance as this: after stating a sum
 half of which is to be paid by plaintiff to
 defendant are the words: ‘That being the
 cost and expenses paid by said Van Dyke to
 secure the within lands’, and the right re-
 served to defendant to sell lands or stumpage
 and credit half of the proceeds upon the
 amount of the purchase price. But such ex-
 pressions are too indefinite for more than
 mere speculation or conjecture that perhaps
 the parties intended something further than
 the unambiguous terms of the contract ex-
 press; that perhaps they intended to create
 or declare some trust other than such as
 exists between vendor and vendee while the
 former holds the legal title. Endorsed on
 40 the contract was a list of certain lands with

this caption: 'Description of lands located by A. J. Short and entered on joint account by W. J. Van Dyke Taylor's Falls office, June 18, 1873', and the respondent claims that by reference this is made a part of the contract. In a written contract a reference to another writing if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, it is to be taken as a part of it just as though its contents had been repeated in the contract. But if the reference be made for a particular purpose expressed in the contract, it becomes a part of it only for that purpose. The reference in this contract to the writing endorsed is to 'the within described lands' showing that its purpose was for the descriptions and as to those descriptions they were thereby incorporated in the contract. There is also a reference to the endorsed writing for the date of entry for the purpose of fixing the time for payment by respondent, and as to those dates the writing became a part of the contract. We therefore hold the contract to be only a contract to convey and that it was not intended to, and did not create or declare any trust other than such as arises on an ordinary contract to convey. It follows that the cause of action was barred before the action was commenced."

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This case was approved in the subsequent case of *Noyes vs. Butler Brothers*, 98 Minn. 448 (Minn. 1906).

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In the case of *Guerini Stone Co. vs. P. J. Carlin Construction Co.* 240 U. S. 264, 60 L. Ed. 636, it was sought to incorporate some of the terms of a general contract into a sub-contract because of a reference in the sub-contract that the work was to be done according to the drawings and specifications of the main contract. It was held that the general contract was admissible only for the purpose of showing what drawings and speci-

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fications were referred to. To quote from the opinion at page 642:

10 "The reference in the subcontract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the subcontractor. Notwithstanding occasional expressions of a different view (see *Shaw v. First Baptist Church*, 44 Minn. 22, 24, 46 N. W. 146; *Avery v. Ionia County*, 71 Mich. 538, 546, 547, 39 N. W. 742; *Stein v. McCarthy*, 120 Wis. 288, 295, 97 N. W. 912) in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.

20 *Woodruff v. Hough*, 91 U. S. 596, 602, 23 L. ed. 332, 335; *Neval v. Cowell*, 36 Cal. 648, 650; *Mannix v. Tryon*, 152 Cal. 31, 39, 91 Pac. 983; *Moreing v. Weber*, 3 Cal. App. 14, 20, 84 Pac. 220; *Short v. Van Dyke*, 50 Minn. 286, 289, 52 N. W. 643; *Noyes v. Butler Bros.* 98 Minn. 448, 450, 108 N. W. 839; *Modern Steel Structural Co. v. English Constr. Co.* 129 Wis. 31, 40, 41, 108 N. W. 70 * * *.

30 "We therefore hold that the general contract was not admissible in evidence against plaintiff, unless for the purpose of showing (if, indeed, it did show) what drawings and specifications were referred to in the subcontract; and that the rulings of the trial judge holding plaintiff bound by the provisions of the general contract, so as to be obliged to submit to delays resulting from the action of the government, were erroneous."

Plaintiff-Appellant tries to distinguish this case because the papers referred to were not attached as in the present case. It will be noticed that the

Supreme Court approves of *Short vs. Van Dyke* supra, where the reference was to an endorsement on the contract and the endorsement was incorporated only for the purpose specified in the reference. The physical attachment is not important the essential query being whether the signed contract indicates a purpose to use a paper to which it refers, generally or for a specific purpose: identity of the paper referred to is requisite in any event; annexation is a mere incident through which identification may be rendered more simple and certain. 10

In *White vs. McLaren* 24 N. E. 911 (Mass. 1890) *unsigned specifications attached to the contract contained a warranty not referred to in the contract*. It was held that the specifications did not become part of the contract except for the purpose referred to in the contract and that the warranty was not enforceable. 20

See:

Woodruff vs. Hough, 91 U. S. 596 at 602,
23 L. Ed. 332 at 335.

Mannix vs. Tryon, 152 Cal. 31.

In *Modern Steel Co. vs. English Construction Co.* 129 Wis. 31, a subcontract provided for furnishing iron work according to the plans and specifications of the principal contract. The specifications contained a provision that all certificates given by a designated superintendent were to be binding and conclusive. It was held that this provision was not a part of the subcontract. 30

In *Neuwal v. Cowell*, 36 Cal. 648, suit was brought on a contract made by Menant & Company with defendant for grading a street in front of defendant's house. The work was to be done in accordance with the specifications in a certain contract awarded to B, or in accordance with 40

another contract made by various property owners. The Court said, at page 650:

10 "It (the contract awarded to B) is only referred to in the agreement sued on for the purpose of ascertaining what the work to be done under the contract sued on was, how it was to be done and the price to be paid for the work to be done by Menant & Company; for the plaintiff was to do the same work described in the supposed contract between the street contractor and property holders, and it was done according to the specifications therein contained and for the price there specified, less \$50. That instrument contained a specification of what was necessary to be done and the price and it was simply referred to in the contract sued on as containing those matters. * * * As
20 the contract sued on referred to the others for the matters to be performed—as matter of description—they were admissible as part of that agreement to show what the contract was and for any other purpose they were foreign to the case."

In *Harvey & Bro. vs. Radkey*, 1 White & W. Tex. Civil Cases, par. 277, it is stated:

30 "Where the plans and specifications of an architect were expressly made parts of a written contract in so far as certain matters were concerned, to hold that other matters not embraced *in terms in the contract*, would become parts of the contract simply because they appeared in the plans and specifications, and would have properly come under the head of one of the items mentioned in the contract (as, for instance where it was sought to make 'cresting' come under the item of 'galvanized iron work') would be to make for the parties a contract they had not made for themselves."

See also *Hopkins v. Rogers*, 11 Tenn. 363:

40 In *Wiggins vs. Columbian Fireproofing Co.* 76 Atl. 742 (Pa. 1910), Wiggins & Co. agreed to

concrete floors in accordance with two letters written by Columbian Fireproofing Company to the architect. The letters contained specifications of the details of construction and also a guarantee. It was held that the guarantee did not form part of the contract.

In *Moreing vs. Weber*, 3 Cal. App. 14, the rule is thus stated:

“The rule seems so well established that it may be said to be elementary that where in a contract reference is made to another writing for a particular specified purpose, such other writing becomes a part of the contract for such specified purpose only and therefore this writing known as the ‘specifications’, can serve no other purpose than to furnish the plan and specifications as to how the grading should be done, and is foreign to the contract for all other purposes.” 10

In *Cruthers vs. Donahoe*, 84 Atl. 322 (Conn. 1912) the specifications in addition to the work referred to in the contract required extra work on the roof. It was held that the specifications could not extend or add terms to the contract. At page 323: 20

“The specifications served the purpose of explaining and amplifying the provisions of the contract to which they refer. In fact they show what the contract really was. They speak in the contract as it is; they cannot add to it terms unless the intent, as manifested in the contract, so to do, is clear.” 30

In *Baltimore & Ohio R. R. Co. vs. Stewart*, 29 Atl., 984 (Md.) the contract referred to a printed form of specifications in use by the company. The specifications contained a provision permitting the company to annul the contract upon certain conditions. It was held that the specifications formed part of the contract for the purpose of amplifying the terms of the contract, but not for the purpose of adding new terms to it. 40

In *Schwoerer vs. Zimmermann* 63 N. Y. Supp. 1020, a contractor bid to do certain work according to specifications. It was held that the contract did not include work referred to in the specifications, but not referred to in the bid. At page 1021 the court approves of the following language of the court below.

10 “The specifications are not the contract. They may be resorted to elucidate the contract where it is obscure, but they are no part of the contract, except so far as they are incorporated in it.”

See *Hayes vs. Wagner*, 113 Ill. App. 299 (affd.) 220 Ill. 256; 77 N. E. 211).

See also *Harlow vs. Borough of Homestead* 45 Atl. 87 (Pa. 1899).

Riley vs. City of Brooklyn, 46 N. Y. 444.

20 Plaintiff cites case of *Gray vs. Cotton*, 134 Pac. 1145, as an authority, and states that the specifications referred to in plaintiff's contract in the Gray case were incorporated “so far as they were applicable”—“so that he (plaintiff) was bound by a provision in the *specifications* which stated ‘payments to be made at the rate of 75% monthly upon engineer's estimate.’ ” A careful reading of this case will show that the *sub-contract* between plaintiff and defendant contained this clause:

30 “Payments to be made at the rate of 75% monthly upon engineer's estimates, balance upon completion and acceptance of each section by the City”. (Pages 1146 and 1147). It was held that the plaintiff was bound by the estimates of the engineer as to the amount of work done by him. The Court referred to the above language in the *sub-contract* (page 1147): “This clause shows plainly that the parties were looking to the engineer's estimate as fixing the amount of excavation upon

40 which payments were to be computed, 75%, as

shown in that estimate, was to be paid monthly and the balance (which could mean only the remaining 25%) was to be paid upon completion and acceptance of each section by the City."

The case of *Sawyer vs. Hammatt*, 15 Maine 40, cited by plaintiff, does not deal with the question of incorporating one document into another, but simply deals with the proposition whether or not reference in one contract to another contract was sufficient notice of the existence of the latter.

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Turner vs. Yates, 17 How. 14, and *Donnelly vs. State*, 26 N. J. L. 463, cited by plaintiff, merely hold that under certain circumstances oral statements made in the presence of defendant if of such character as required them to be denied if untrue are admissible as evidence. The analogy is too far fetched to apply here. From this it is argued that the purchaser was bound to express its dissent from the terms of the specifications or its assent must be inferred. This leaves out of sight the fact that the reference to the specifications was not general, but restricted to the size and dimensions of the compressor. Again, no actual notice of the existence of the clause retaining title to the purchaser is shown, and the rule invoked by plaintiff cannot reasonably apply to declarations of which a party may be deemed to have constructive notice.

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The intent to incorporate specifications in their entirety into a contract must be clearly expressed in the contract and not established by hazy inferences.

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In the case of *McGeragle vs. Broemel*, 53 N. J. L. 61, cited by plaintiff, the contract referred to annexed specifications. It was sought to introduce in evidence a letter originally attached to the contract, and accidentally detached, containing, among other things, specifications of the work and

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material. It was held that the refusal of the Court below to admit the letter in evidence was erroneous. "It appears that the letter did specify among other things the quality of the materials and the mode of doing the work agreed on. In this respect it performed the function of a specification." * * * "Its annexation supplied one of the specified modes of identification". In so far as the letter showed "the quality of the materials and the mode of doing the work" it "performed the function of a specification". There was no contention that the rest of the letter, which dealt with "other things" was deemed incorporated into the contract. In fact, the inference is that the Court intended to show that the letter was incorporated only in so far as it specified the quality of the materials and the mode of doing the work performing in this respect the function of a specification. The statement on page 61 "When a contract refers to another writing which it identifies and makes that writing a part of its terms, it is well settled that the writing referred to is incorporated into and must be read as part of the contract," refers to a writing expressly making another document a part of its terms. This rule is not open to controversy but in the present case it is not pertinent, because here the specifications were not, as a whole, made a part of the signed contract. What Justice Magie actually decided in the cited case was that in so far as the letter specified the materials &c., it came within the scope of the reference to specifications in the contract.

In the first decision of Judge Speer, several cases are cited (p. 36) which may readily be distinguished.

Bradley v. Marshall, 54 Ill. 173, simply sustains the doctrine that separate signed contracts enter-

ed into at the same time and as part of the same transaction constitute one agreement.

In the case of *Wilson vs. Randall*, 67 N. Y. 338, it was held that the contract showed an intent to sell by the acre and was ambiguous and could be explained by contemporaneous agreements, such as the deed.

In the case of *Babbitt vs. Globe & Co.*, 66 N. C., 71, the intent to incorporate clearly appears from the express language of the reference. 10

Adams vs. Hill, 16 Maine, 215, is a case of an express reference in terms.

In *Edwards vs. Farmers Insurance Company*, 74 Ill. 84, the policy of insurance "by apt words makes it (the application) a part of this contract of insurance." "The application having thus been made a part of the policy the two instruments must be construed together."

The case of *Smith vs. Turpin*, 20 Ohio State, 20 478, stands for the proposition that in a Court of equity in a suit to reform an instrument the Court will admit in evidence oral and written statements showing the surrounding circumstances

The defendant insists that the unsigned specifications attached to Exhibit A are no part of said Exhibit A, except as to the size and dimensions of the compressors mentioned in Exhibit A, said specifications not being made in terms a part of the contract, Exhibit A, and being referred to only for the purpose of fixing the size and dimensions of the compressors. As above indicated the rule is clearly established that where unsigned specifications are not under the terms of the contract made a part of the contract, they may be used to amplify the contract only to the extent that the contract refers to them and only for the purpose that the contract refers to them. They cannot add additional terms to the contract. 30 40

The only reference in the contract, Exhibit A, to the specifications is contained in the first two paragraphs:

“One INGERSOLL RAND CORLISS (Cross Compound Steam & Air) Class ‘BB3’ Air Compressor of the size and dimensions as set forth in the attached specifications.

10 “One INGERSOLL RAND (Cross Compound Steam & Air) Imperial Type 103 Air Compressor having Meyer Cut Off Steam Valves, of the size and dimensions as set forth in the attached specifications.”

It is evident that the reference to the specifications is only for the purpose of ascertaining the size and dimensions of the compressors. The terms of the contract are distinctly set out in Exhibit A. The specification attached to Exhibit A, has the following words at the end:

20 “And it is further agreed that the compressor, etc., above specified, shall remain our property as security for deferred payments until fully paid for in cash.”

There is nothing in the contract to indicate that the sale was conditional. To add the above words to the contract would be using the specifications for the purpose of creating new terms to the contract. Under the authorities quoted this clearly could not be done.

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POINT 1-D.

The word “specification” as used in contracts means an enumeration of the descriptive qualities of the articles referred to, or a detailed statement of the manner and method of doing the work contemplated.

In *State vs. Kendall*, 15 Neb. 262, 18 N. W. 85, at page 90, it is stated:

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“The phrase ‘plans and specifications’ has

a well defined meaning in this State at least
 * * * (Defining plan) * * * The
 word 'specifications' when applied to a build-
 ing means a specific and detailed statement of
 the materials to be used in the building and
 the manner of performing the work. Any
 matter that does not relate to either of these
 is not included in the phrase 'plans and speci-
 fications.' "

In *McGeragle vs. Broemel*, 53 N. J. Law, 59, the
 Court, referring to the letter sought to be incor- 10
 porated into the contract, said: (page 61)

"It appears that the letter did specify,
 among other things, *the quality of the mate-
 rials*, and the *mode of doing the work* agreed
 on. *In this respect* it performed the function
 of a specification."

In *Fowler vs. Bushby*, 125 N. Y. Supp. 890
 (N. Y. 1910), the word "specification" is defined
 at page 891 as follows:

"The word 'specification' when used in a 20
 contract for construction or alteration of
 buildings, has a well defined and settled mean-
 ing. It is a detailed statement of each par-
 ticular of the work to be done, usually pre-
 pared by the architect in amplification of the
 details of drawings or plans."

In *Baltimore & Ohio R. R. Co. vs. Stewart*, 79
 Md. 487, 29 Atl. 964, the word is thus defined, at
 page 965:

"The term 'specification' as thus used in 30
 contracts of this kind, ordinarily means a
 detailed and particular account of the struc-
 ture to be built, including the manner of its
 construction and the materials to be used."

In *Young vs. Borzone*, 66 Pac. 135 (Washing-
 ington 1901), the defendant and others entered
 into a contract with Hatfield and Roberts (plain-
 tiff's assignors) whereby Hatfield and Roberts
 agreed to improve a street at the expense of de-
 fendant and others, in accordance with certain 40

specifications. One of the clauses of the specifications sought to be incorporated into the contract was that the contractor would not assign. It was held that this did not come within the meaning of the word "specification," and consequently formed no part of the contract, the contract incorporating only the *working details*. At page 138:

10 "The things to be done and for which pay was to be exacted were clearing, grubbing, building, sidewalks, culverts, box drains and bulkheads and grading the street and moving the earth necessary to such grading. The typewritten paper says these things that we have enumerated were to be done 'according to the plans and specifications of the Civil Engineer and under his directions.' The term 'plans and specifications' here used refers to working details. * * * "

20 In the present case the reservation of title to the compressor is not a specification, within the ordinary meaning of the term.

POINT 1-E.

The parties to the contract in question did not intend to include the papers attached to Exhibit "A" as part of the contract.

30 It will be noticed that both the signed contract made between the plaintiff and Prendergast & Clarkson (Exhibit A) and the papers annexed, refer to the words "size and dimensions" in a generic sense, intending to designate "descriptive characteristics."

In the papers attached to the signed contract, it is proposed to furnish "air compressor of the size and dimensions as set forth in the following specification." Then follow a number of descriptive characteristics relating to the mechanical qualities of the air compressor.

40 In this viewpoint, all the descriptive data would be reasonably referable to "size and dimensions," but not a clause retaining title in the seller.

It will also be noticed that there are no type written insertions in that part of the annexed papers relating to the terms of the contract, although there is ample space left to fill in terms. It may be also significant that the words "Order Department July 25, 1906—received—answered" are stamped above the last two paragraphs of the annexed papers which relate to the terms (p. 67).

The unsigned papers annexed to the signed contract Exhibit A refer only to the air compressors. The signed contract itself embraces in addition a number of accessories of large value. The contract deals with all the machinery as an entirety, fixes one lump sum for all the articles (p. 52) and the terms of payment include all. These terms (p. 53) embrace the time of shipment of the compressors and machinery in separate items, and provide for the payment of the purchase price, one-third cash on shipment, one-third cash 60 days thereafter, balance 120 days after shipment. It is clear from this that no matter what view may be taken as to the compressors, the contract extended credit to Prendergast & Clarkson for the machinery other than the compressors. Had it been the intention to make this sale a conditional one and to extend no credit to purchaser, the parties would have so stated in the signed contract and made provision covering all the articles sold.

The effect of incorporating in the signed contract that portion of the annexed papers in which title was reserved to the plaintiff would be to assume that the parties intended, without saying so, that part of the articles included in one lump contract were to be sold absolutely and part conditionally.

The contract itself fixes no separate price for the air compressors and payments are to be made on account of the entire contract.

There are no typewritten or any other kind of insertions in the papers annexed to the signed contract under the section dealing with "Terms," although space was left in the annexed papers for the insertion of such terms. The reasonable inference from this is that the signed contract, and not the annexed papers, was intended to enumerate the terms. This construction would result in making the terms of the contract harmonious and
 10 consistent.

Appellant states that the provisions as to title contained in the papers attached to Exhibit A, could have been torn off or crossed out, and the fact that this was not done indicates that the parties assented to its being a part of the contract. It will be observed that these papers attached to Exhibit A also contain provisions that they are subject to approval by an officer of the Rand Drill Company. Then follow blank forms of acceptances
 20 unsigned. If plaintiff's argument is sound the fact that the parties did not tear off, strike out or sign this provision as to acceptance would indicate that there was no intention to incorporate the paper in its entirety into the contract.

POINT II.

If it be assumed that the contract between plaintiff and Prendergast & Clarkson was a sale upon condition, the statutory requisites of the State of Wyoming as to conditional sales were not complied with, and the condition is void as to the defendant as a purchaser without notice.
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Point 2-A.

The Wyoming statute as to recording contracts for the conditional sale of goods applies.
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The machinery was shipped from a point out-

side of Wyoming directly to Prendergast & Clark-son at Cody, Wy. (par. 12 of Statement of Facts) and at the time the contract was made it was contemplated that the machinery was to be delivered in Wyoming. It follows that the Wyoming statute as to recording contracts for the conditional sale of goods, applies.

In *Studebaker Bros. Co. vs. Mau*, 14 Wy. 68, 82, Pac. 2, the Court quotes with approval Section 255 B. of Wharton on Conflicts of law as follows:

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"The weight of authority holds in accordance with the rules relating to chattel mortgages, that unless the local law of the latter state with reference to filing or recording conditional contracts of sale expressly or by clear implication applies to contracts made out of the state with reference to property subsequently brought into the state, it is not necessary to file or record the mortgage in that state, unless it is contemplated at the time of the sale that the property should be removed to such state, in which case filing or recording seems to be necessary notwithstanding that the contract of sale was completed in another state."

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In *Knowles Loom Works vs. Vocher* 57 N. J. 490, it was held that where a contract of sale is made in New York for property to be delivered and held by a purchaser within the state of New Jersey, the recording acts of New Jersey as to conditional sale of personal property applied.

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In note to succession of Welsh 64 L. R. A. at page 835 the editor refers to the above exceptions where at the time the contract is made it is contemplated that the goods be delivered in another state.

"It will be observed that the rule supported by the foregoing cases does not apply when the contract, which is made in one state, contemplates the delivery of the property in another state. Thus:

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"A state statute requiring conditional sales of personal property to be recorded applies

to a contract of sale, made in another state, of property to be delivered and held within the former state."

Section 3745 of Compiled Statutes of 1910 of Wy. dealing with conditional sales reads as follows:

10 "No sale, contract or lease wherein the transfer or title of ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee in possession, *without notice*, unless the same be in writing, signed by the vendee or lessee, and the original or a copy thereof filed in the office of the County Clerk of the County wherein the property is; said instrument so filed shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney, which shall set forth the names of the vendor or vendee, or lessor or lessee, with a description of the property transferred and the full and true interest of the vendor or lessor therein.

20 All such sales or transfers shall cease to be valid against purchasers in good faith, or judgment or attaching creditors without notice at the expiration of one year from the date of such sale, unless the vendor or lessor shall within thirty days prior to the one year from the date of such sale or transfer, file a similar affidavit to the one above provided for in the office of said Clerk, and the said vendor or lessor may preserve the validity of his said sale or transfer of such personal property by an annual re-filing in the same manner as aforesaid of such copy. (Laws 1895, Ch. 40, Par. 1; R. S. 1899, par. 2837.)"

30

It is admitted in the statement of facts that the contract, Exhibit A, was not recorded in Wyoming, nor did defendant have notice of it, and it is apparent from an inspection that no affidavit is attached as required by the statute.

40 The defendant under the written agreement set out in paragraph 3½ of the Statement of Facts (p. 17), was a purchaser within the purview of the Statute.

Point 2-B.

Assuming that the assignment by Prendergast & Clarkson to defendant (p. 17) is a chattel mortgage, defendant, being a mortgagee, is a "purchaser" within the meaning of the Act.

In *Jones vs. Light*, 86 Maine, 437; 30 Atl. 71, at page 73, it is stated: "A mortgagee is a purchaser."

Chapman vs. Emery, 1 Cowp. 278;

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Hill vs. Ahern, supra, 135 Mass. 158, 159.

"That the plaintiff was a purchaser in good faith within the meaning of the law relating to fraudulent conveyances there can be no doubt. He actually paid \$3600, receiving a mortgage upon property not worth more than that sum."

In *Gill's Estate*, 79 Iowa, 296, 9 L. R. A. 126, the Court construed Section 2442 of the Iowa Code, providing that a widow of a non-resident "shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser." The Court held that mortgagees were purchasers within this section.

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See *Halbert vs. McCullough*, 79 Am. Dec. 556 at page 558 (Ky.).

In *Eason, Trustee, vs. Garrison & Kelly*, 36 Tex. Civ. Ap. 574, it is stated in referring to a statute declaring unrecorded chattel mortgages to be void under certain circumstances that the word "purchaser" includes "mortgagee". "The word 'purchaser' includes mortgagees for value."

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In *Bowen vs. Wagon Works*, 91 Tex. 385, it was held that a mortgagee of real estate is a purchaser within the recording Acts.

In *Brown vs. Wagon Works*, 71 Tex. 385, it was held that Section 3327 relating to conditional sales was intended to include mortgagees. At page 391: "The word 'purchasers' has been held to include mortgagees and holders of claims secured by trust deeds, and while this holding was

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originally probably based upon the ground that by such instruments in other States the legal title passed, still we are of opinion that when our statute used the same well understood word it should receive the same construction as elsewhere".

In *Hill vs. Ahern*, 135 Mass. 158, it was held that mortgagees were bona fide purchasers within the law relating to fraudulent conveyances.

- 10 In *Lancaster vs. Dolan*, 18 Am. Dec. 625, it was held that a mortgagee is a purchaser within the intent of the statute, 27 Elizabeth, respecting voluntary conveyances. "It must be admitted that a mortgagee is a purchaser within the intent of the statute. *Chapman vs. Emery*, Cowp. 278 is in point".

- 20 In *Atlanta National Building and Loan Association vs. Gilem*, 128 Fed. 293, it was held that a mortgagee of real estate is a purchaser for value. Page 296: "The mortgagee having no notice of her equities had a right to rely on the legal title shown by the record to be in the mortgagors. Jones quotes and approves Lord Hardwicke, who said: 'When I speak of a purchaser for a valuable consideration I include a mortgagee, for he is a purchaser protanta'. Jones on Mortgages, Section 458, id. Section 549".

- 30 In *Waskey vs. Chambers*, 224 U. S. 564, 56 L. E. 885, (decided in 1912) the Court dealt with an Act of Congress respecting conveyances in Alaska. The Act reads: "Every conveyance of real estate within the District hereafter made which shall not be filed for record as provided in this Chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property or any portion thereof whose conveyance shall be first duly recorded". It was held that a lessee
- 40 of a mining claim who agreed to work the mine

and pay the lessor a certain percentage of the value of the metals extracted was a purchaser for value within the meaning of the above recording Act.

The contention that a mortgagee is a purchaser within the Wyoming Act relating to conditional sales is fortified by the fact that in other legislation passed by the State of Wyoming prior to the conditional sales Act the word "purchaser" was defined as follows: "The term 'purchaser' as used in this Chapter shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration, and also for assignee of a mortgage or lease or other conditional estate". (Com. Stat. Wyoming, 1910, Sec. 3621: same statute in Rev. Stat. 1899, Sec. 2729 and Rev. Stat. 1887, Sec. 27) 10

Plaintiff contends that the assignment by Prendergast & Clarkson to defendant was a chattel mortgage and void at law as to after acquired property. Even assuming this to be so, defendant certainly had a right to establish its lien in a Court of equity and was therefore at least an equitable mortgagee. 20

"It is a settled American rule following an early decision of Judge Story that a mortgagee of future property although invalid at law, is good in equity as against the mortgagor and all persons claiming through him with notice." 30

6 Cyc. 1052.

An equitable mortgagee is a purchaser within the meaning of the Wyoming conditional sales Act.

In *Triumph Electric Company vs. Empire Furniture Co.*, 70 W. Va. 164, it was held that the word "purchaser" under a recording Act relating to chattel mortgages includes one who acquires title through an equitable mortgagee of after acquired property. 40

POINT 2-C.

Assuming that the assignment by Prendergast & Clarkson to defendant was a chattel mortgage and void at law as to after acquired property it became valid at law by ratification.

As indicated above, defendant as assignee of Prendergast & Clarkson, had at least an equitable mortgage. An equitable mortgage may become a valid mortgage at law by ratification. 6
 10 Cyc. 1051. The rule is there stated: "Although a mortgage of future chattels is void at law yet if the mortgagor after acquiring possession does some new act in furtherance of the original grant showing an intention to have the property pass thereto the mortgage becomes valid". After Prendergast & Clarkson acquired the property included in their assignment to defendant they proceeded to operate under the contract upon which the de-
 20 fendant was surety. This sufficiently indicated an intent to ratify the assignment of after acquired property.

On page 27 of the Statement of Facts it appears that Prendergast & Clarkson signed a written agreement yielding possession of the entire plant to the United States Government. Appel-
 30 lant contends that this right was exercised pursuant to the contract upon which the defendant was surety, and that the United States turned over the plant to the defendant in recognition of defendant's right as surety on this contract. (Appellant's brief, pages 23 and 24). If this contention is correct, it would follow that these acts constituted a sufficient ratification of the mortgage. "And an actual transfer of possession to the mortgagee either by voluntary delivery from the mortgagor or by the exercise of a power to take possession contained in the mortgage is such a new
 40 act as will constitute a ratification of the mortgage" 6 Cyc. 1051.

POINT 2-D.

If appellant's contention be correct that the United States acquired the plant of Prendergast & Clarkson pursuant to the terms of a contract, defendant, claiming through the government is a purchaser within the meaning of the Wyoming conditional sales Act.

The contract between the United States and Prendergast & Clarkson provided that the Secretary of the Interior in case of a default under the contract "May take possession of all machinery, tools, appliances and animals employed on any of the works to be constructed under the contract, and of all materials belonging to the contractor delivered on the ground and may use the same to complete the work, or he may employ other parties to carry the contract to completion substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor".

Statement of Facts, page 19.

Under the section of the contract above quoted, the United States had the right to take possession of all machinery on the works, or it could buy new machinery at the contractor's expense, and any excess of the cost over the contract price would be charged against the contractor.

Assuming the appellant's contention to be correct that the Government took the plant of Prendergast & Clarkson under the terms of the contract, the Government by electing to take the machinery, on the works, saved the necessity of buying

new machinery, and, therefore, reduced the amount which the United States could otherwise have charged against the contractor and his sureties.

If the appellant's insistent be accepted as correct, the Government then certainly parted with value under this arrangement, and is a purchaser within the Wyoming Conditional Sales Act. Defendant obtained its rights through the Government.

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POINT III.

The United States took the machinery in dispute rightfully and lawfully turned it over to the defendant-respondent.

The facts in this relation are set forth in the agreed statement in Paragraphs 3 (not 3½), 4, 12 and 13, on pages 17, 18, 19, 24, 25, 26, and 27. Those paragraphs read in order and together complete the narrative.

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POINT 3-A.

Congress authorized the Secretary of the Interior to let contracts, acquire property and make all necessary regulations in the construction and completion of the Shoshone project in the state of Wyoming, and similar projects in a number of other states.

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Authority is given to the Secretary of the Interior in Act of Congress of June 17, 1902, Chap. 1093, 32 Stats. at Large, 388, 7 Fed. Stats. Annotated 1098, wherein it is provided,

Section 1: "That all moneys received from the sale and disposal of public lands in certain states mentioned beginning with the fiscal year ending June 30, 1901, shall be reserved, set aside and appropriated as the Special Fund in the Treasury to be known as the 'Reclamation Fund' to be used in the examination and survey for, and the construc-

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tion and maintenance of irrigation works, etc."

Section 2: "The Secretary of the Interior is authorized and directed to make examinations and surveys for, and to locate and construct irrigation works for the storage, etc. of waters and to report to Congress at the beginning of each session as to the results of such examinations and surveys giving estimates of cost, etc."

Section 4: "Upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the Reclamation Fund, and thereupon he shall give public notice of the lands irrigable under such project * * *"

Section 6: "The Secretary of the Interior is hereby authorized and directed to use the Reclamation Fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act * * * provided that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government, until otherwise provided by Congress."

Section 7: "Where, in carrying out the provisions of this Act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the Reclamation Fund the sums which may be needed for that purpose."

Section 10: "The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

58 L. E. (N. S.) 1290, at 1293, referring to the Hondo project, it is said:

“Furthermore, the Government was authorized by Section 7 of the Act of June 17, 1902, (32 Statutes at Large 388, Chapter 1093 U. S. Compiled Statutes Supp. 1911, page 662) under which this improvement was being made, to acquire any property necessary for the purpose and if need be to appropriate it.”

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In *United States vs. O'Neill*, 198 Fed. 677, at 682, the Court, referring to the question of determining upon the necessity of appropriating property under this Act, says:

“The legislative branch may delegate the determination of the question of necessity. The Reclamation Act imposes that duty upon the Secretary of the Interior.”

20

Under Act of March 3, 1905, 33 U. S. Stats. at Large, p. 1016, Congress, in ratifying a Treaty with the Shoshone Indians, in the State of Wyoming, refers to the construction of an irrigation system. The title of the Act is: “An Act to ratify and amend an agreement with the Indians residing on the Shoshone * * * Reservation in the State of Wyoming, and to make appropriations for carrying the same into effect.” The following provision in Section 4 of the Treaty (page 1017) is ratified:

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“The sum of \$150,000, or so much thereof as shall be necessary, shall be expended under the direction of the Secretary of the Interior for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of the said Indians.”

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It is apparent from the foregoing legislation that Congress authorized the expenditure of public money on the Shoshone project and delegated wide discretionary powers to the Secretary of the Interior.

Pursuant to this legislative authority the Secretary of the Interior entered into a contract with Prendergast & Clarkson, which provided, among other things, that in case of default "the Secretary of the Interior shall have the power to suspend the operation of the contract and he may take possession of all machinery, tools, appliances and animals employed on any of the works to be constructed under the contract, and of all materials belonging to the contractor delivered on the ground and may use the same to complete the work * * *" Agreed Statement of Facts par. 4, p. 19. 10

POINT 3-B.

The words "employed on the works" refer not only to machinery in actual use but also machinery intended for use.

Paragraph 12 of the statement of facts states that the machinery in question "was shipped directly to said Prendergast & Clarkson at Cody, Wy., had been received by them and had been taken to the Site of the Shoshone Dam and had been partly or wholly set up, but its operation had not been commenced." 20

In *United States vs. Morris*, 39 U. S. 464 at 475, the court construed the meaning of the word "employed".

"The question in this case is, whether a vessel on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is 'employed or made use of' in the transportation or carrying of slaves from one foreign country or place to another, before any slaves are received on board." 30

"To be 'employed' in anything, means not only the act of doing it but also to be engaged to do it; to be under contract or orders to do it. And this is not only the ordinary meaning of the word, but it has frequently 40

been used in that sense in other acts of Congress."

To the same effect see *United States vs. Catherine* (U. S. 25, Fed. 332 at 338) holding that to be employed in anything meant not only the act of doing it; to be engaged to do it, to be under contract or order to do it.

10 In *Inhabitants of Farmingdale vs. Barlin Mills Co.*, 45 Atl., 39 (Maine, 1899), a court construed the meaning of the words "employed in trade" and said at page 40:

"The logs were intended for manufacture in that mill, and were in fact manufactured there. They had been cut, hauled to the landing, and were in transit to the mill, and may therefore be fairly considered as employed in the trade or business of that mill on that day, within the meaning and purpose of the statute.

20 "If the occupant of a store for sale of ordinary merchandise had bought goods for that store, which were in transit to it, it would hardly be questioned that such goods were employed in the trade and business of that store."

In *Regina vs. Freke*, 5 El. and Bl. 944 at 949, 119, Eng. Reprint 732 at 734 the court held that the word "employed" meant not only in actual use "but designed for use".

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POINT 3-C.

The courts have construed the default clause in the contract between Prendergast & Clarkson and the United States to mean that the Secretary of the Interior intended in case of default to take the machinery employed on the works, irrespective of who owned it and that he possessed such power.

40 The object of the default clause (Statement of Facts, page 19) was to enable the Government,

in case of the contractor's default, to complete the work as quickly as possible, and this could best be accomplished by seizing all the machinery employed on the works.

In *Tinker & Scott vs. U. S. Fidelity & Guaranty Co.*, 169 Fed. 211, the identical paragraph 22 of the specifications of Prendergast & Clarkson's agreement with the United States was construed as intending to recognize the right of the Secretary of the Interior and as actually giving him authority to take possession of machinery employed on the works irrespective of who owned it.

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At page 214:

"As I construe paragraph 22 of the specifications of Prendergast & Clarkson's agreement to construct the dam and auxiliary works, Shoshone project, the Secretary of the Interior was authorized, upon a failure by Prendergast & Clarkson to carry forward the work with reasonable dispatch, to take possession of all machinery, tools, appliances and animals employed on any part of the works to be constructed under the contract. The contract does not read 'employed by the contractor', but all machinery &c., 'employed on any of the works', comprehending by fair and unmistakable intendment, employment by anyone, whether by the contractor or any subcontractor, so that they were employed upon the works. This rendition becomes more apparent by a further reading of the clause as follows: 'And of all materials belonging to the contractor delivered on the ground'—thus limiting the materials that might be taken to such as were owned by the contractor and then upon the ground. But as to the machinery, tools, appliances and animals there is no restriction except that they should be employed upon the work."

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It will be noticed that the Tinker case referred to machinery set up for use on the Shoshone

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Dam in the same construction operations as are involved in the present suit and the court paid much attention to the words "employed on the works". In that case the crusher taken by the Government was not shown in actual operation but delivered on the ground and either wholly or partly set up and intended for use in the construction of the Dam.

10 The property in controversy was "machinery employed on the works" as distinguished from materials belonging to the contractor delivered on the ground. As to the materials on the ground not belonging to the contractor, the Secretary by the terms employed by him in the contract indicated an intention not to take or appropriate the latter.

20 Appellant in criticising the Tinker case loses sight of this distinction between machinery employed on the works and materials delivered on the ground. The crushed rock in the Tinker case did not belong to the contractor, and the Secretary expressly bound himself under the contract not to take that class of material, thus notifying all furnishing materials under the contract that he would not exercise the right of eminent domain as to that kind of property.

30 Section 33 of the contract in the case of *White vs. Ball*, 223 Fed. 618 at 620 is distinguishable from the corresponding section in the Tinker case because the Hubbard contract did not differentiate between machinery employed on the works and materials belonging to the contractor, both machinery and materials prepared for use or in use in the prosecution of the work being subject to seizure by the United States.

Point 3-D.

The Secretary of the Interior did not intend to place a meaningless provision in a contract, and if the clause is subject to two constructions, that one which would result in giving it a rational meaning should govern.

Appellant contends that the Government had no right under the contract to take the property of third parties. As indicated above, in *Tinker v. Scott*, the Court construed this identical contract to mean that the Secretary of the Interior intended to take machinery employed on the works, no matter to whom it belonged. 10

If the Secretary had no legal right to insert this provision as thus construed, as a pure matter of contract, we must not reject the clause as meaningless, but reach an interpretation under which it was not meaningless but placed there for a purpose. 20

The reasonable conclusion is that the Secretary, conscious of the full power he possessed and intending to use it to drive the work forward in case of default, had this clause inserted in this and similar contracts, not merely to indicate his contractual rights, but also to make clear to all subcontractors and parties furnishing machinery that the clause embodied an administrative regulation, thus conveying notice that in case of emergency he would exercise the sovereign right of seizing all machinery employed on the works in order to complete the job quickly, and as to the contractor he would resort to seizure under his contractual rights. 30

The machinery, animals, etc., employed on the work, whether owned by the contractor or not, must be kept there—are necessary there. It may take months to replace them, and the sovereign power provides in its contract that it will keep them there, if owned by the contractor under a 40

contractual right; if owned by others, under its sovereign right. It is an announcement of its right and purpose which makes it liable to others than the contractor for such taking, which is not tortious, but imperial, so that if the Government takes possession under clause 22, the action becomes as to the contractor and other parties bound by it, with knowledge of the contract, action under the contractual right, but as to others not bound

10 by the contract, or with knowledge of it, the action is under its sovereign right—and this almost automatically.

It is significant that in the case of *U. S. vs. Buffalo Pitts Co.*, 193 Fed. at 910, the Government was apparently acting under the terms of its contract in seizing the machinery of one not a party to the contract, and it was held that the seizure was under sovereign right. Circuit Judge Noyes in his dissenting opinion reviews the testimony

20 and finds:

“It seems to me entirely clear that the Government officials used the engine, because the contract with the defaulting contractors gave the Government the right to use the machinery upon the works.”

To the same effect, see *White vs. Ball*, 223 Fed. 618. The Government in that case also apparently acted under the contract.

30 “The trial was before a Referee, called in Connecticut a Committee, and, therefore, the only question before us for consideration is whether his findings of fact sustain the judgment.”

In the report of this case in the Court below, 212 Fed. 1009, at page 1012, it is stated that the Committee found the following fact:

40 “17. On June 6, 1910, Captain A. E. Waldron, United States Engineer in charge of said work, notified the Hubbard Building & Realty Company that the defendant had re-

requested the United States to take the articles of personal property specified in the complaint and a portion of the materials, pursuant to the provisions of the contract with the Hubbard Building & Realty Company, and that they 'are taken possession of under the provisions of Paragraph 33 of the original specifications which form a part of the contract' * * * "

See also the same case in 223 Fed. 618 at 620 top.

In the present case the letter of August 10, 1916, written by the Secretary of the Interior to the Director of the Geological Survey (page 25 Agreed Statement of Facts) indicates that the Secretary intended to act pursuant to the statute and pursuant to the contract. The main idea which the Secretary has in mind is not the seizure of the machinery but the suspension of the contract—a big undertaking involving a large sum of money—the right to suspend which he could only exercise by virtue of the contract and consequently it was necessary for him to refer to his contractual rights. As to the machinery the contract gave him the right to take the machinery of Prendergast and Clarkson and also recognized his statutory right of eminent domain as to third parties. So that when the Secretary referred to action under the contract he had in mind the fact that the contract recognized his statutory right. This contention is confirmed by the fact that in the first paragraph of the same letter of August 10, 1906, the Secretary refers to the statute under which he is acting (the Reclamation Act) and states that the contract is "for the construction of the Shoshone Dam and auxiliary work, Shoshone Project Wyoming, under the act of June 17, 1902 (32 Stat. 388)" and that the contractor has shown neither "ability nor intention" of carrying on the work under that statute. The Statement of Facts then proceeds (page 27):

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10 “That on August 11, 1906, Mr. Daniel Webster Cole, Chief Engineer of the United States Government, notified Prendergast & Clarkson in writing that the Secretary of the Interior had suspended the contract for the construction of the Shoshone Dam. That on the same day Mr. Daniel Webster Cole, *acting for and on behalf of the United States and under the direction of the Secretary of the Interior of the United States took possession of the entire plant at the site of the dam, including the machinery delivered as aforesaid by plaintiff in this case, etc.*”

Can it be presumed that the United States acted tortiously rather than rightfully? The legal presumption is that it acted rightfully.

In *Young vs. Wemple*, 46 Fed. 354 it is stated:

20 “The law authorizes the deputy comptroller of the currency of the United States to act in place of the comptroller in certain contingencies stated and the court will presume in the absence of any showing to the contrary that the deputy has acted (in the particular instance before the court) in conformity with law.”

In *Butler vs. Maples*, 76 U. S. 766, 19 L. Ed. 822, it was held that a treasury agent in granting a permit which could be granted on certain conditions presumably acted lawfully. At page 727:

30 “It is to be presumed that he acted rightly, and as he could not lawfully grant the permit in the absence of such military occupation, his grant of it raised a presumption that the occupation existed.”

This case was followed in *Nofire vs. United States*, 164 U. S. 657, 41 L. Ed. 588 at 590.

In *Rankin vs. Hoyt*, 45 U. S. 4 How. 327, 11 L. Ed. 996 at 999, it is stated:

40 “In saying that the appraisers had no right to act without previous request of the collector, and that no such request appears in the evidence, nothing is stated beyond the truth. But in the absence of testimony to

the contrary, the legal presumption is, that the appraisers and collector both did their duty, he requesting their action, as by law he might, and they complying."

In *Salzer Lumber Co. vs. Claflin*, 113 N. W. 1036 (N. D. 1907), the venue of an affidavit read: "State of North Dakota, County of Stutsman." The affidavit was sworn to before C. M. Porter, who under his signature stated his title to be "Auditor Foster County." It was held that the presumption that an affidavit is sworn to in the county stated in the venue is overcome by the stronger presumption that an officer acts legally. At page 1038: 10

"If the County Auditor of Stutsman County administered the oath in Foster County it would be an illegal act. The presumption that an officer acts within his jurisdiction and that his acts are lawfully performed, will prevail over the prima facie presumption that the venue of the affidavit is the place where the oath is administered." 20

See also *Spencer vs. Smith*, 201 Fed. 656; *Keyser vs. Hitz*, 133 U. S. 138, 33 L. Ed. 531 at 536.

In *Klein vs. Cohen*, 142 App. Div. N. Y. 500, plaintiff, a conditional vendor, sued in trover for property alleged to be converted by the defendant. The plaintiff had contracted to place iron work in the building for the owner and reserved title until he received payment. The defendants bought the owner's equity of redemption in the building on a foreclosure and then conveyed to Grabscheid. The Court held that the evidence did not show a conversion: 30

"The presumption is that the defendants committed no tortious act and the burden was on the plaintiffs to overcome it."

If this presumption exists in the case of a private party the presumption would be even greater that the Government of the United States, acting through the Secretary of the Interior, in carrying 40

out work under the Reclamation Act which authorizes him to appropriate property, acted pursuant to the authority conferred upon him to seize the machinery in question for the public purpose mentioned in the statute.

Point 3-E.

10 Plaintiff had notice of the provisions of the contract between Prendergast & Clarkson and the United States.

The Courts take judicial notice of administrative regulations of the Secretary of the Interior.

Caha vs. United States, 152 U. S. 211,
38 L. Ed. 415.

In that case the Court says:

20 "The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which courts take judicial notice."

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40 The work entrusted to the Secretary of the Interior under the Reclamation Act is a vast public

undertaking in which the public is interested. The vastness of the power delegated to the Secretary of the Interior is indicated in the case of *Swigart vs. Baker*, 229 U. S. 187 (57 Law Ed. 1143). At page 193 we find:

"The official reports show that in 1902 there were in sixteen States and Territories 535,486,731 acres of public land still held by the Government and subject to entry. A large part of this land was arid, and it was estimated that 35,000,000 acres could be profitably reclaimed by the construction of irrigation works. The cost, however, was so stupendous as to make it impossible for the development to be undertaken by private enterprise; or, if so, only at the added expense of interest and profit private persons would naturally charge. With a view, therefore, of making these arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of all public lands in these sixteen states and territories should constitute a trust fund to be set aside for use in the construction of irrigation works—the cost of each project to be assessed against the land irrigated, and as fast as the money was paid by the owners back into the trust, it was again to be used for the construction of other works. Thus the fund, without diminution except for small and negligible sums not properly chargeable to any particular project, would be continually invested and reinvested in the reclamation of arid land. See H. R. Report No. 1468, 57th Congress, 1st session.

"The general outline of this plan was approved by Congress, which, on June 17, 1902 (32 Stat. at Large 389, Chap. 1093), passed 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the Reclamation of Arid Lands.' * * * "

The administrative regulations were delegated to the Secretary of the Interior and are of such public importance that the courts will take judicial

notice of them. Judicial notice is based upon the fact that the matter judicially noticed is generally known or ought to be known.

“Facts which are so generally known that every well informed person knows them or ought to know them need not be proven and will be judicially recognized without proof.”

Perovich vs. Perry, 167 Fed. 789.

- 10 One is presumed to know that which is judicially known. *Perovich vs. Perry*, supra. In that case the Act for the Government of Alaska provided that the Governor of Alaska may “grant reprieves for offences, committed against the laws of the district or of the United States, *until the decision of the President therein shall be made known.*”

- 20 Appellant had been sentenced to death and the Governor had granted a reprieve. Subsequently the President denied the petition for a commutation of sentence and the Alaska officials were notified of this action by means of a telegram signed “Bonaparte.” Appellant applied for a writ of Habeas Corpus on the ground that the Alaska officials were not properly notified of the president’s decision as required by the statute. It was held that the telegram signed “Bonaparte” was sufficient notice to the Alaska officials as the courts will take judicial notice, and the Alaska
- 30 officials are presumed to know that Bonaparte was the Attorney General of the United States, and that the President would act through Bonaparte, and that this was sufficient presumptive notice under the statute.

- 40 Since what is judicially known is presumptively known, it follows that plaintiff must be presumed to know of all administrative regulations of the Secretary of the Interior with respect to the Shoshone Project. This presumption is even stronger in the absence of positive proof that plaintiff did not know of these regulations.

The contract form is one in general use in public undertakings of that kind. The Secretary of the Interior is required to report to Congress at the beginning of each session as to the results of his work under the Reclamation Act (Section 2), and when he determines upon a project he is required to give public notice of the lands irrigable under such project (Section 4).

In paragraph 5 of the Statement of Facts it is recited:

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“As a part of the preparation for actual work of construction under said contract, it was necessary for the said Prendergast & Clarkson to contract for, procure and use certain machinery in the way of air compressors, tanks, boilers, steam pumps, generators and other similar machinery. To such end it opened negotiations with the Ingersoll-Rand Company to supply a portion of such machinery, plant and equipment, and on February 24th, 1906 it entered into a contract.”

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referred to as Exhibit A.

This contract, Exhibit A, (pp. 51 to 53) provides, among other things, for the shipment of the machinery F. O. B. Cody, Wyoming, and its caption reads: “Estimate for Prendergast & Clarkson, Cody, Wyoming.”

In Paragraph 12 (p. 24) it is stated that said machinery was shipped directly to said Prendergast & Clarkson at Cody, Wyoming.

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It is apparent that the plaintiff knew that the machinery claimed in this action was being shipped to, and was to be used by Prendergast & Clarkson on the Government contract at or near Cody, Wyoming.

Section 22 of the Government specifications (p. 18) made a part of the contract between the United States and Prendergast & Clarkson is familiar to all contractors for Government work, and

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this particular section, or one similar thereto, has been incorporated in Government contracts for many years and frequently construed by the Courts.

It must be assumed, therefore, that the plaintiff entered into negotiations with Prendergast & Clarkson with full notice that the United States had reserved to itself the rights provided for in said Section 22.

10 It "is engaged in the business of manufacturing and selling drills, compressors, generators, pumps and machinery for the use of contractors upon public work and elsewhere, and sells and deals in all kinds of machinery used in such kind of work." (Par. 1, Statement of Facts p. 16).

20 It knew what Government work means and especially work done under the Reclamation Act and cannot be assumed to be ignorant of Section 22 and similar paragraphs to be found in Government contracts of this class, and this assumption will apply equally whether Section 22 is deemed to embody a declaration of mere contractual rights or a blending of contractual rights and notice of administrative regulations.

We may assume therefore that the contract made by the plaintiff with Prendergast & Clarkson was made with knowledge of such section, or the existence of a similar condition in the contract.

30 In *Tinker & Scott vs. U. S. Fidelity & Guaranty Co.*, 169 Fed. 211, the Court says (referring to Section 22) at page 215:

"Tinker & Scott are by their specific agreement with Prendergast & Clarkson as much bound by this condition as the latter, for it is made a part of their contract; *but if it were otherwise, having taken a subcontract to do a portion of the work, Tinker & Scott would be bound by a condition so general in its operation.*"

40 Whether plaintiff had notice of Section 22 is

a material fact in the case peculiarly within the knowledge of the plaintiff. That plaintiff failed to offer proof in this respect raises the natural inference that it knew the evidence would have been unfavorable to it.

1 *Wigmore on Evidence*, par. 289.

It follows from the foregoing that plaintiff would be bound by the provisions of Section 22 either as embodying administrative regulations, 10
or contractual rights.

Point 3-F.

Where the Secretary of the Interior is authorized by Congress to take property, or money is appropriated by Congress for that purpose and the Secretary working under this authority does acts which result in a taking of property for the object contemplated, the fact that the officer 20
mistakenly relies upon a contract for the source of his power, will not defeat the right to recover in the Court of Claims, on an implied contract.

It must be remembered that in order that the United States may exercise the right of eminent domain pre-payment of compensation is not a prerequisite. In this respect the governmental right of eminent domain differs from the right exercised by some of the states and by private corporations working under limitations imposed by 30
state constitutions. See 15 Cyc. 775 and 776.

In order to constitute a lawful appropriation of property by the government an actual assertion of intent to appropriate is not necessary and mere consequential damage arising from a public improvement will be deemed an appropriation of property under sovereign right. *United States vs. Lynch* 188 U. S. 445, 47 L. E. 539. In that case compensation was allowed against the United 40
States for consequential damage to land resulting

from the backing up of water upon the claimant's land as a result of a public improvement. See at page 541.

The appropriation of money by Congress for a public improvement is equivalent to an express direction to take property for the purpose and if an officer duly authorized does acts which result in a taking for the public use the promise to pay is implied therefrom.

10 In *United States vs. Lynah*, 188 U. S., 445, 47, L. E. 539, Justice Brown in a concurring opinion at page 551 refers to the case of *Great Falls Mfg. Co.* 112 U. S. 645. The Government in that case took possession of land in the construction of an aqueduct. Judge Brown, explaining this case says:

20 "The claimant was held to be entitled to recover upon the ground that the appropriation of the money for the construction of the improvements was equivalent to an express direction by Congress to take this particular property for the objects contemplated by the scheme * * *."

Judge Brewer in *United States vs. Lynah*, referring to the *Great Falls* case says at page 545:

30 "In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation."

In the present case the Reclamation Act, the subsequent appropriations of money by Congress, the delegation of authority to the Secretary of the Interior to enter into contracts and make all necessary regulations, and the execution by the Secretary of a contract providing for the taking of machinery employed on the works belonging to anyone, are equivalent to an express direction by

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the Government to take the property for the object contemplated, and an implied promise arises on the part of the Government to pay for the value of machinery so taken.

Under the Tucker Act plaintiff could have waived the tort, if any, and sued the Government on an implied contract.

The Tucker Act is explained in the case of *Dooley vs. United States*, 182 U. S. 222, 45 L. Ed. 1074 at 1078: 10

“By an act passed March 3, 1887, to provide for the bringing of suits against the government, known as the Tucker Act. (24 Stat. at L. 505, Chap. 359), the Court of claims was vested with jurisdiction over, ‘first, all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable * * *’” 20

“The first section evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. *The words ‘not sounding in tort’ are in terms referable only to the fourth class of cases.*” 30

This interpretation is approved in *United States v. Buffalo Pitts Co.*, 193 Fed. 905 at 908. It is evident from the foregoing that a pure tort, that is a wholly unauthorized act of an officer would 40
come under the fourth class and an implied ob-

ligation on the part of the government could not arise. Under the first two classes it has been held that if a tort is committed and the officer acts under an act of Congress or a regulation of an executive department, the injured party may waive the tort and claim on an implied promise.

10 In the Dooley case there was an illegal seizure and sale of merchandise by a collector acting under a statute. It was held that under this act, whether the taking was tortious or not, the injured party would have claim against the government.

In *United States vs. Lynah*, 188 U. S. 446, 47 L. Ed. 539 at 545, the court quotes with approval the following language from *Great Falls Manufacturing Co. vs. Attorney General*, 124 U. S. 581.

20 "It was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract
* * *"

In the present case there were acts of Congress authorizing the Secretary of the Interior to take property for the purpose indicated in the act, acts of Congress appropriating money for the Shoshone project and administrative regulations made by the Secretary of the Interior. There is no proof in this case that the Secretary of the Interior did not take the machinery under sovereign right.

30 The statement of facts discloses that on August 11, 1906 Daniel Webster Cole, acting for and on behalf of the United States, took possession of the entire plant at the site of the Dam including the machinery delivered by the plaintiff. On September 28, 1906 the United States Government turned over to the defendant the Compressor and machinery claimed by plaintiff for use in the completion of the contract.

40 It cannot be said, we insist, that the statement

of facts in this case precludes the idea that the machinery was taken by the Government under its sovereign right. The presumption is that the Government acted lawfully. Furthermore, as indicated above, even if the Secretary acted tortiously since the taking resulted in a public use for the objects mentioned in the Reclamation Act and the administrative regulations of the Secretary of the Interior under this act, it would be perfectly competent under sections 1 and 2 of the Tucker act for the plaintiff to waive the tort and claim on an implied promise. 10

A distinction should be made between acts of officers resulting in the seizure of the property without authority from the government and similar acts under governmental authority the officer mistaking the source of his right but the seizure resulting in the public benefit contemplated by Congress. 20

In *United States vs. Buffalo Pitts Co.* 234 U. S. 228, 58 L. E. 1290 at 1293, the court quotes the following from *United States vs. Lynch*, supra:

“The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to 30 40

10 pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution, in the 5th Amendment guarantees that when this governmental right of appropriation—this asserted paramount right is exercised, it shall be attended by compensation.”

20 The above quoted statement that when an officer takes possession of property under the claim that it belongs to the government when in fact it does not, there can be no implied promise on the part of the government to pay, has no reference to property which the officer is authorized by Congress to take for a particular purpose and the property is taken in furtherance of that purpose, though the officer mistakenly relies upon contract rights to carry out the public purpose contemplated by the act. The statement refers simply to a claim that property is governmental when in fact it is not, and the officer had no statutory authority to exercise the right of eminent domain.

30 It will be seen from an examination of the cases that in no case did the court refuse compensation where there was a statute authorizing the officer to appropriate property for a particular purpose, and the property was in fact used in furtherance of the purpose contemplated by the act though the officer mistakenly relied upon contract rights. Thus in *United States vs. Lynah supra*, as indicated above, recovery was allowed though the

40 damage was consequential resulting from water

backing up upon land during the construction of the dam. The reason for this holding was that the intent to pay was implied from the act of Congress authorizing the improvement.

So in *United States vs. Buffalo Pitts Co.*, 234 U. S. 228, 58 L. E. 1290 at 1293, the court draws this distinction :

“In *Hooe v. United States*, 218 U. S. 322, 54 L. ed. 1055, 31 Sup. Ct. Rep. 85, the attempt to make the government liable for rent was in the face of a statute of the United States which provided that no contract be made for rent until an appropriation for that purpose had been made by Congress. In the present case, the government had the right to contract for this work under statutory authority, and to acquire property necessary to that end.” 10

In the *Buffalo Pitts* case in the court below, 193 Fed., 905 at 909, the court makes this distinguishing reference to the *Hooe* case: 20

“*Hooe vs. United States*, 218 U. S. * * * 54 L. Ed. 1055 involved the taking of property by the Secretary of the Interior in direct violation of the act of Congress under which he acted. Of course there could be no pretense that he was authorized by the United States to do what he did. There was no taking by the government and no promise to pay could be implied.”

In *Langford vs. United States* 101 U. S., 431, relied on by plaintiff, the officer had no authority to seize the building which he claimed belonged to the government. This was, of course, a pure tort on the part of the officer and no implied obligation would arise on the part of the government to pay for the officer's unauthorized act. However, the court in the *Langford* case recognizes the above distinction. At page 1012: 30

“The reason for this restriction is very 40

obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contract, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one."

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It will be noticed, also, that the Langford case was decided in 1880 before the Tucker act, which distinctly allows compensation for tortious acts done under acts of Congress or administrative regulations.

In *Harley vs. United States*, 198 U. S., 229, cited by plaintiff, the claimant who permitted his patent to be used by the government slept on his right for fourteen years without complaining.

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In *White & Co. vs. Ball Eng. Co.*, 223 Fed., 618, the United States Government entered into a written contract with the Hubbard Building & Realty Company to construct a lock and dam in the Trinity River, Texas, in July 1906. The predecessor in title of the plaintiff placed on the site of the lock and dam a considerable amount of machinery, &c. Later the work was discontinued and the government in accordance with the contract provisions annulled the contract with the

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Hubbard Company. Later the Government entered into a written contract with the defendant to complete the work. The contract between the United States Government and the defendant contains the following provision:

"There is at the lock site approximately the following invoice of plant and material left at the site of the work by the defaulting contractor the Hubbard Building & Realty Company:" (Then follows a list of the materials, &c.) "If so requested in writing by

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the contractor, *the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract* with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, &c., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the Engineer Officer in Charge and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the Engineer Officer in Charge." (Finding 15, Record of Case, page 25, and pages 375 to 400 for contract made part of said Finding. Finding 15 is also given in 212 Fed., at p. 1012.)

10

The government, professing to act under Section 33 of its contract with the Hubbard Company, took the property belonging to the plaintiff (Finding 17, page 25, Record of Case, also given at 212 Fed., at 1012), and leased it to the defendant, who used same to complete the work, and after completion returned substantially all of it to the government. The government then credited the Hubbard Company, and not the plaintiff, with a final valuation of the property as determined by the Engineer (Finding 32, given at 212 Fed., page 1014). These Findings of the Committee were conclusive upon the court (223 Fed. at 619) and the Committee found as a matter of law that the defendant had unlawfully converted the property of the plaintiff and judgment below was entered in accordance with this report.

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It will be observed that the government professedly acted under a clause of the contract and took the property of a third party, the plaintiff in the cause. It professed to act under Section 33 of the contract with the Hubbard Company, which reads:

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10 "In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in the use by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, &c., or any part or parts of same, prepared for use or in use in the prosecution of the work, together with any or all leases, rights, or way or quarry privileges, under purchase, at a valuation to be determined by the engineer officer in charge."

White vs. Ball, 223 Fed., 618 at 620.

20 We have seen the brief of said plaintiff, Ball Engineering Company, and it vigorously assails the claim of the defendant below, made for the first time on the appeal, that the taking of the plaintiff's property was in the exercise of a governmental right as distinguished from a proprietary right. It asserts that the act of the government, under the defendant's answer, was pursuant to the terms of the agreement and that the plaintiff was obviously not called upon to meet any claim that the property was taken in any other way or by any other right than a right which the government claimed to have as a party to the contract with the Hubbard Company.

This statement of fact is quoted from page 7:

30 "No allegation of the answer and no proof in the case in any way suggested that the Government attempted to take the property in any way or by any right other than in the attempted exercise of such proprietary and contractual right as it might have under paragraph 33."

40 The appeal was heard by Circuit Judges Lacombe, Ward and Rogers of the Second Circuit, and the lower court was reversed. It was held that the fact that the officer mistakenly relied upon contract rights was offset by the fact that

the property was devoted to a public use and the taking would be deemed an appropriation under sovereign right.

"We think the Committee and the Court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in the contract with the Hubbard Company. All the same it did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this, subject to the obligation to make just compensation as required by the Fifth Amendment to the Constitution. It made no proprietary claim and therefore is bound to pay the real owner for the property whether the taking was *tortious or not*." 10

"The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the Government was justified in acting as against the plaintiff under the contract with the Hubbard Company." 20

See also memorandum decision in *Ball Engineering Co. vs. White*, 241 Fed., 989 (April, 1917), following above case.

In *United States vs. Buffalo Pitts Co.*, 234 U. S., 228 58 L. Ed., 1290, the government also acted under the contract. (See Point III-D of this brief.) The court at page 1293 says: 30

"Under the contract it might take possession of the construction company's property, and, it may be conceded, finish the contract with such property, but it had no right to use the property of others without compensation, and in this case it did not assume to do so. * * * While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation." 40

When it takes property under such circumstances for an authorized governmental use, it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this court, and arises because of the Constitutional obligation embodied in the 5th Amendment to the Constitution of the United States, guaranteeing the owner of property against its appropriation for a governmental use without compensation."

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From this we may readily deduce the proposition that a taking under the contract does not preclude the idea of a taking under sovereign right at the same time. In that case, as in ours, there was nothing to indicate that the government expressly denied the right of the owner to compensation.

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In fact there is no evidence in the case indicating whether or not plaintiff made a demand upon the Government for the machinery. If a demand was made upon the Government the continued use of the machinery by the Government thereafter for a public use constituted a sufficient appropriation under sovereign right to raise an implied obligation to pay.

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"The trial judge held as a matter of law that the refusal of the Government to deliver possession of the engine to the plaintiff after its right to possession under the chattel mortgage accrued raised an implied promise to pay for its use. * * *

"Assuming that the law applicable to the present situation is the same as it was before the passage of the Tucker act, we think the judgment of the court below was right."

United States vs. Buffalo Pitts Co., 193
Fed., 905 at 907.

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Counsel of appellant recognize the correctness of this proposition in their brief (p. 27).

If no demand was made upon the Government

by the plaintiff the failure to make such demand constituted an acquiescence in the use of the machinery by the Government.

In *United States vs. Lynah*, 188 U. S., 445, 47 L. Ed., 539, the doctrine of acquiescence is thus stated at page 547:

“It does not appear that the plaintiffs took any action to stop the work done by the Government, or protested against it. Their inaction and silence amount to an acquiescence—and assent to the appropriation by the Government.” 10

It will be recalled that the Government had actual possession of the property claimed from August 11th to September 28, 1906, and that thereafter the possession was turned over to the defendant for the purpose of completing the governmental work. The Government was entitled to have demand made upon it for the machinery and a failure to recognize this right to a demand would constitute an acquiescence. Defendant's rights are acquired through the Government and defendant is entitled to set up these defenses. 20

POINT 3-G.

The United States having taken possession of the machinery claimed by plaintiff by lawful authority and having turned the same over to defendant for use in the completion of the contract, the defendant is not chargeable with a conversion of the plant. 30

It may be taken as conceded that in order to recover, the plaintiff in an action for damages for the wrongful conversion of personal property is bound to establish by legal proof general or special property and possession, or a right to immediate possession in the plaintiff, at the time of the alleged seizure and conversion. 40

Debow vs. Colfax, 10 N. J. Law, 128;

Gaskill vs. Barbour, 62 N. J. Law, 530;
Tuttle vs. Jackson, 4 N. J. Law, 128.

He must show that he has not only the title, but also the possession or right to immediate possession.

In *Gaskill vs. Barbour*, supra, it is stated at page 531:

10 " * * * if the plaintiff as we think is properly the case, is to be considered as succeeding to the legal title of chattels by assignment of the mortgage, he has no standing to maintain trover when he alleges a conversion prior to his right of possession. The holder of a mortgage entitled to possession may sustain trover for the mortgaged chattels, and the mere statement of a mortgage without naming its terms will imply a right of possession; but it is fundamental in trover that the plaintiff must have had his right, whatever its character, at the time of the conversion."

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The plaintiff has failed to meet the requirements of this test. It is not by any supposed weakness of the title of the property in question in the defendant that the plaintiff may succeed, but solely upon the strength of its own title and its right, if it had any, to the immediate possession of the property on September 28, 1906.

30 *Wildwood Board of Education vs. Bright*,
 103 Atl., 422.

The plaintiff had neither the title nor actual or constructive possession of the property at that time, the United States having acquired both title and possession of it six weeks before.

We respectfully submit that the judgment of the Supreme Court should be affirmed.

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MCDERMOTT & ENRIGHT,
 Attorneys of Defendant-Respondent.

BOND

FORM D