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Supreme Court

of the

State of New Jersey

Writ and Complaint

(Filed, November 24, 1916.)

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, NEW JERSEY. Plaintiff, vs. WEBSTER BRIGHT and CENTRAL TERRA COTTA COMPANY OF NEW JERSEY, a corporation. Defendants.	At Law. On Replevin.

Plaintiff, a municipal corporation organized under the laws of the State of New Jersey, says:

1. On November 9, 1915, plaintiff entered into a written contract with the Richman Construction Company, by which the latter agreed to erect a school house in the City of Wildwood.

2. Said contract, mentioned in the last preceding paragraph, contained the following provision:

"Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at Liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any

damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties."

3. In order to carry out and fulfill the terms of said contract with the plaintiff, the Richman Construction Company purchased of the Central Terra Cotta Company of New Jersey, the following goods and chattels, to wit:

Five Hundred Thirty-four (534) Pieces of Terra Cotta Cornice, of the value of $1225.00, which goods and chattels were delivered by the Central Terra Cotta Company of New Jersey to the Richman Construction Company on the premises where the said building was being erected, for the use by the said Richman Construction Company of the said terra cotta in the construction of said building, and the ownership of said terra cotta passed to the Richman Construction Company for said purpose.

4. Thereafter the Richman Construction Company refused and neglected to supply a sufficiency of properly skilled workmen or of materials of proper quality, and failed in every respect to prosecute the work with promptness and diligence, and failed in the work of constructing said school house, and in the performance of the agreement above referred to, and Clyde S. Adams, the architect employed by the plaintiff, certified that such refusal, neglect and failure were sufficient ground to terminate the employment of the contractor for said work. Whereupon, the plaintiff did terminate the employment of the said contractor, and entered upon the said premises, and took possession, for the purpose of com-

pleting the work included under the contract, of all materials, tools and appliances thereon, including the terra cotta above mentioned, which it had a right to do, under the terms of said contract, in order to finish and complete said building. Whereupon, the plaintiff on the 25th day of September, 1916, became the owner of the said terra cotta, for the purposes aforesaid.

5. On the 29th day of September, 1916, the said Central Terra Cotta Company of New Jersey, without the consent, and against the protest of plaintiff, wrongfully took from the lands and premises upon which said school house was being erected, the above mentioned terra cotta, and it and the said defendant, Webster Bright, with notice that the said terra cotta belonged to the plaintiff for the purposes aforesaid, has ever since the last mentioned date, refused to return said terra cotta, and wrongfully detained and still detains the same.

6. Plaintiff demands possession of the said goods and chattels, above referred to, and in case they cannot be returned, then the sum of $1225.00 damages for their value, and $200.00 damages for their detention.

SHARPLESS & WAY,
Attorneys for Plaintiff.

Order Amending Complaint

(*Filed, November 9, 1916.*)

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, NEW JERSEY, Plaintiff, vs. WEBSTER BRIGHT and CENTRAL TERRA COTTA COMPANY, Defendants.	Action in Replevin.

It is on this ninth day of December, 1916, ordered that the fourth paragraph of the complaint in this cause be amended, so as to read as follows:

4. Thereafter, and prior to the 20th day of September, 1916, the Richman Construction Company refused and neglected to supply a sufficiency of properly skilled workmen or of materials of the proper quality, and failed in every respect to prosecute the work with promptness and diligence, and failed in the work of constructing said school house, and in the performance of the agreement above referred to, and, on September 20, 1916, Clyde S. Adams, the architect employed by the plaintiff, notified the said Richman Construction Company, in writing, that inasmuch as the Richman Construction Company had failed to supply a sufficiency of skilled mechanics and materials on the said building,

it should consider such written communication sufficient notice, under Article V of said contract, that unless a marked showing was made within three days from the receipt of the notice, the said architect would certify to the Board of Education that the latter would be entirely within their rights to terminate the contract, and to enter and take possession of all materials, &c., for the purpose of completing the work included under said contract, and the said Richman Construction Company did not, within three days after receipt of said notice, or at any time thereafter, comply with the demands contained in said communication, and failed to prosecute the work with diligence, and failed in the work of constructing said school house, and in the performance of said contract. Whereupon, and on September 26, 1916, the said Clyde S. Adams certified to said plaintiff that such refusal, neglect and failure constituted sufficient ground to terminate the employment of the contractor for said work, and the said plaintiff, by resolution duly adopted on September 26, 1916, did terminate the employment of said contractor, and entered upon said premises, and took possession, for the purpose of completing the work included under the said contract, of all materials, tools and appliances thereon, including the terra cotta, above mentioned, which it had a right to do, under the terms of said contract, in order to finish and complete said building. Whereupon, the plaintiff, on September 26, 1916, became the owner of the said terra cotta, for the purpose aforesaid.

And it is further ordered that an uncertified copy of this order be served upon the defend-

ants, above named, or their attorneys, and that the complaint be considered as amended accordingly.

Let this rule be entered in the minutes.

C. G. GARRISON,
J. S. C.

We consent:

WILSON & CARR,
Attorneys of Defendants.

Answer Of The Defendant Central Terra Cotta Company

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, Complainant, vs. WEBSTER BRIGHT and CENTRAL TERRA COTTA COMPANY, Defendants.	Action at Law. In Replevin.

The defendant, Central Terra Cotta Company, a New Jersey Corporation, having its principal office and place of business at Moorestown, Burlington County, New Jersey, says that:

1. It neither admits nor denies the first paragraph of the complaint, but leaves the plaintiff to make such proof thereof as it may be advised.

2. It is without knowledge of the matters and things set forth in the second paragraph of the complaint, and therefore neither admits nor

denies the same, but leaves the plaintiff to make such proof thereof as it may be advised.

3. It denies the third paragraph of the complaint.

4. It denies the fourth paragraph of the complaint.

5. It admits the taking of the terra cotta mentioned and referred to in the fifth paragraph of the complaint, but denies that said taking was wrongful, and that the taking thereof gave to the plaintiff any cause of action whatsoever against this defendant, or the defendant Webster Bright.

FIRST DEFENSE

This defendant not being a party to the contract referred to in said complaint as having been entered into on November 9th, 1915, between the plaintiff and the Richman Construction Company is not bound thereby or concluded by any of the terms and provisions thereof; that this defendant is not bound or concluded by any notice given under said contract by plaintiff or its agents to the said Richman Construction Company, and had no knowledge that such notice was or had been given, and accordingly is not bound thereby.

SECOND DEFENSE

That said terra cotta was delivered by this defendant to the Richman Construction Company upon the express understanding and agreement that title to said terra cotta should remain and be reserved in this defendant until said terra cotta was paid for and that at the time of the removal of said terra cotta by this defendant,

said terra cotta had not been paid for by the Richman Construction Company, and was accordingly the property of this defendant, and this defendant was lawfully entitled to the possession thereof, and had a right to remove the same.

THIRD DEFENSE

That the provisions of said contract under which plaintiff asserts it became entitled to the possession of said terra cotta, are illegal, void, invalid and of no effect, because the taking of said property under said provisions is a taking of property without due process of law.

WILSON & CARR,
Attorneys for Defendant.

Reply

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, Complainant, vs. WEBSTER BRIGHT and CENTRAL TERRA COTTA COMPANY, Defendants.	Action at Law. In Replevin.

The complainant denies the facts set up in the answer of the defendant, Central Terra Cotta Company.

SHARPLESS & WAY,
Attorneys for Complainant.

Testimony

NEW JERSEY SUPREME COURT

CAPE MAY COUNTY

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, vs. WEBSTER BRIGHT, *et al.*	Action at Law. In Replevin.

Cape May Court House, N. J., April 11, 1917.

Before HON. HOWARD CARROW, Judge, and Jury.

Appearances:
Messrs. Sharpless & Way; Hon. Lewis Starr, for plaintiff.
Messrs. Wilson & Carr, for defendants.

Mr. Starr: I offer in evidence the contract dated the ninth of November, 1915, between the Richman Construction Company and the Board of Education of the City of Wildwood.

Mr. Carr: No objection.

Paper marked Exhibit 1.

JOSEPH T. SULLIVAN, sworn:

Direct-examination by Mr. Starr:

Q. Mr. Sullivan, where do you reside? A. Moorestown, New Jersey.

Q. What official connection have you with Central Terra Cotta Company? A. President of it.

Q. Were you president in 1916? A. Yes.

Q. In the month of September 1916? A. Yes.

Q. I show you what purports to be a lien claim and ask you whether or not that is your signature on the third page? A. That is.

Q. Joseph T. Sullivan? A. That is right.

Q. You signed that as president of the Terra Cotta Company? A. Yes, sir.

Q. I also call your attention to your signature on the last page and ask you whether or not you signed that? A. That is my signature.

Q. And you swore to the truth of that affidavit, did you? A. Yes, sir.

Q. Before Albert H. Stein, a notary public? A. Yes, sir.

Q. This affidavit bears dates the twenty-eighth of September 1916. Was that the date it was sworn to? A. Yes, sir.

Q. Do you know whether or not it was served on the Board of Education on the same day? A. I am not sure about the same day, but either that or the next day, I should say.

The Court: What is the paper?

Mr. Starr: This is a lien claim showing the contract in this case between the Terra Cotta Company. It is a municipal lien claim. I offer that in evidence.

Paper marked Exhibit P-2.

CROSS-EXAMINATION by Mr. Carr:

Q. Mr. Sullivan, I note the lien claim contains the statement that the material was used in the construction of a building. Did you afterwards find out whether that statement was correct or incorrect?

Mr. Starr: I object as not cross-examination.

The Court: I think that would be a part of the defense would it not?

Mr. Carr: Well, really, this out of its turn anyway. This is no part of the plaintiff's case. I did not object to it. He has put it in out of turn. I do not wish this to stand without any explanation.

The Court: Well, you will have a chance on your defense. You are anticipating.

Mr. Carr: I think Judge Starr has, by putting this witness on—

Mr. Starr: No, I do not concede that. We are obliged to show the contract, to show the sale and delivery of the material, and that appears by that paper.

The Court: I think that is a part of your defense.

Mr. Carr: If I may reserve this right—

Mr. Starr: I haven't any objection to examination on that point, but not at this time.

WALTER RICHMAN, sworn:

Direct-examination by Mr. Starr:

Q. Mr. Richman, where do you live? A. Moorestown, N. J.

Q. Are you William A. Richman who was President and Treasurer of the Richman Construction Company? A. Yes, sir.

Q. That is the corporation that has the contract for putting up the high school building at Wildwood? A. Yes, sir.

Q. When did you stop work on that building, do you remember? A. No, not exactly I don't.

Q. Can't give us the date? A. No.

Q. Well now, I show you what purports to be a copy of a letter written by Clyde S. Adams to the Richman Construction Company, dated September twentieth, 1916. A. Yes, sir.

Q. Have you the original of that letter? You were subpoenaed to produce that here today. A. No, I haven't got that letter.

Q. Where is the letter, do you know? A. I don't know.

Q. Look at that. Did you receive such a letter from Mr. Adams? A. I think I did, yes.

Q. Had you stopped work before the receipt of that letter? A. Yes, sir.

Letter offered in evidence and marked Exhibit P-3.

Q. You were also subpoenaed to produce the copy of the resolution passed by the Board of Education terminating the contract. Have you that copy with you? A. The resolution?

Q. Resolution of the Board of Education, terminating your employment under that contract? A. Yes, sir.

Q. Produce it, please.

Mr. Carr: If you have a copy of it, put it in.

Q. That is a copy of the resolution you received, is it not? Here is your registry receipt. A. Yes, I received it.

Paper offered in evidence and marked Exhibit P-4.

Q. You never finished this building, did you? A. No, sir.

Q. You abandoned the job? A. Yes.

No cross-examination.

Harry Witte—Direct

WILLIAM C. TODD, sworn:

Direct-examination by Mr. Starr:

Q. Mr. Todd, you live where? A. Wildwood, New Jersey.

Q. Have you any official connection with the Board of Education of Wildwood? A. I am the secretary of the Board of Education of Wildwood.

Q. How long have you been secretary? A. Two years or more.

Q. Were you secretary in the month of September 1916? A. I was.

Q. Won't you turn to the minutes of the Board of Education, meeting held on the twenty-sixth of September 1916?

Mr. Carr: Is that to prove the passage of the resolution?

Mr. Starr: Yes.

Mr. Carr: We will admit it. Make your offer. I will admit it.

Q. I show you what purports to be a copy of the resolution which was passed at that meeting. is that a copy of the resolution which was adopted by the Board of Education at that meeting? A. It is.

Q. That shows on your minutes? A. It does.

Q. It is copied on your minutes? A. It is.

No cross-examination.

HARRY WITTE, sworn:

Direct-examination by Mr. Starr:

Harry Witte—Direct

Q. Mr. Witte, where do you live? A. Wildwood.

Q. And what is your occupation? A. Carpenter.

Q. Do you remember in the month of September 1916, were you placed in charge of an unfinished school building by the order of the Board of Education? A. By orders of the President of the Building Committee.

Q. Who was it? A. Mr. Dowler.

Q. He was president of the Building Committee? A. And the Committee, too.

Q. Do you remember some terra cotta being taken away? A. I do.

Q. Won't you state the circumstances, how long you had been in charge there as a watchman under Mr. Dowler? A. I had been in charge about a week.

Mr. Carr: We admit we took the terra cotta, and it was replevied.

Mr. Starr: Do you also admit it was after the passage of this resolution?

Mr. Carr: Yes.

The Court: I understand it is conceded that the contractor defaulted on the job?

Mr. Carr: Yes, sir.

The Court: And the Board of Education took the job over and took this material?

Mr. Carr: Right.

The Court: And it was afterward replevied by the plaintiff?

Mr. Carr: Yes.

Plaintiff rests.

Defendants' Testimony

ALBERT ROGERS, sworn:

Direct-examination by Mr. Carr:

Q. Mr. Rogers, are you connected with the Central Terra Cotta Company? A. Yes, sir.

Q. What do you do? A. I am the manager of the plant.

Q. Do you know the Richman Construction Company? A. Yes, sir.

Q. Do you know Mr. Richman? A. Yes, sir.

Q. Did your company have a contract with the Richman Construction Company for the furnishing of certain terra cotta for the Wildwood School? A. Yes, sir.

Q. I show you a carbon copy of a letter dated Moorestown, New Jersey, second month fourth, 1916, addressed Richman Constructon Company and signed Central Terra Cotta Company of New Jersey. I ask you whether the original of that letter was sent to the Richman Construction Company? A. It was, yes.

Letter offered in evidence and marked Exhibit D-1.

Q. I show you a letter dated February fifth, 1916, addressed to the Central Terra Cotta Company, and signed the Richman Construction Company by Thomas C. McKenna, and I ask you whether that was received in reply to Exhibit D1? A. It was; yes, sir.

Letter offered in evidence and marked Exhibit D-2.

Q. Did you go ahead and make up the terra cotta? A. Yes, sir; according to the plans and specifications.

Q. And after you had it ready the first of July and had orders to ship it, but we held it—

Mr. Starr: I object. It is not responsive to the question.

Q. When did you ship it? A. Shipped it about the first of September.

A. Did you have arrangement with the Richman Construction Company prior to the shipping of the terra cotta?

Mr. Starr: I object. It seems to me the contract for the sale of this material is predicated upon the offer and the acceptance, and that being so, it seems to me that any testimony as to any terms that varied the conditions of this contract is not admissible.

The Court: The transaction is closed so far as the correspondence is concerned. This testimony must have reference to a subsequent pay roll arrangement with these parties regarding the payment.

Mr. Carr: That is the purpose.

(Question repeated.)

A. We had.

Q. When was that arrangement made? A. That was made during August, about the middle.

Q. Middle of August, 1916? A. That is, the final arrangement, yes.

Q. With whom was it made? A. With Mr. Richman.

Q. How was it made? A. Verbally.

Q. Go on and tell what the conversation was.

Mr. Starr: Do I understand the conversation was with this gentleman?

The Court: I understand you are the manager of the Central Terra Cotta Company? A. Yes,

sir. We had refused to ship the goods until satisfactory arrangements were made, and Mr. Richman then came to us, in the middle of August, and said that he must have the goods around the first of September, but we said if we shipped them then, it would have to be a cash transaction, he would have to pay for it or we would have to send it sight draft. He objected to this on the 20 strength, because he said he wanted the architect to see the goods before he paid for them, so we made the concession that we would send the goods down there as our property for him to have them inspected by the architect on the ground, and that he agreed then to pay for them as soon as they were inspected, and we agreed to do that, provided the goods should remain ours until they were paid for. We therefore shipped them and he delivered them at the building as our goods, 30 for the architect's inspection.

Q. He agreed to those terms, did he? A. He agreed to those terms in our office.

Q. Were the goods then shipped in accordance to those terms? A. The goods were shipped on the first of September, according to that arrangement, and we hadn't heard any more until inspection.

Q. Have they ever been paid for? A. They have never been paid for.

40 Q. Not a cent? A. Not a cent.

CROSS-EXAMINATION by Mr. Starr:

Q. Mr. Rogers, these goods were shipped, they were consigned to the Richman Construction Company, were they not? A. I believe they were.

Q. They were not consigned to your company? A. No.

Q. And the bill of lading and the freight bill and the way bill were made out in Richman's name? A. Yes.

Q. In the name of the Richman Construction Company? A. I believe so.

Q. Do you remember the exact day they were shipped? A. First of September.

Q. First day of September? A. Yes. We had to ship them to him to have him unload them and put them for inspection.

Mr. Starr: I move that be stricken out. It is not an answer to my question.

The Court: Strike it out.

Q. Did you go to Wildwood after the goods were shipped? A. I did.

Q. Where were they when you were there? A. They were partly on the premises and partly on the sidewalk.

Q. They were all—A. Scattered around.

Q. They were all at the place where the school house was being built? A. Yes.

Q. How soon after the first of September were they delivered on the ground? A. I couldn't tell you about that.

Q. When did you go down there? A. Sometime in September is all I could tell you.

Q. What part of the month? A. Well, I should say around the middle, as far as I can recall.

Q. And the goods were all on the ground? A. Yes.

Q. You didn't have any man down there to look after them or have control over them, did you? Nobody in the employ of your company was down there looking after this stuff? A. No.

Q. They were shipped to Richman and he took them from the station and put them on the ground? A. That is right.

Q. For the purpose of having them inspected and used? A. Inspected.

Q. Do you know whether they had been inspected or not? A. We haven't had that report.

Q. Well, do you know whether they had been or not? Hadn't the architect passed on them? A. Had he? We don't know.

Q. You don't know anything about that? A. No. We had nothing to do with it after that.

Q. Who was present when this conversation occurred between you and Richman? Anybody else? A. I don't think so. It was in our factory.

Q. Well now, what was the first thing he said to you about this situation, about the shipment of the terra cotta? A. He must have the goods.

Q. He must have the goods? A. Yes.

Q. What reply did you make to that? A. I told him nothing doing until we saw satisfactory arrangements.

Q. Well then, what happened? What did he say? A. Well, he said anything but a sight draft. He says that he had been loaded with sight drafts and wasn't in shape to take care of them, and we made him this other proposition.

Q. Was it your proposition that this arrangement was made or his proposition? A. It was our proposition.

Q. What did you say to him? A. Our proposition was that he take them on sight draft.

Q. Well, he declined that. Then what did you say to him? A. He declined that until the architect saw them. Then I said, "The only way to do is to let them go down there for the architect's inspection as our propertw." That was fully made clear, that they were to remain our property until they were inspected and paid for, and he agreed not to use them until he had paid for them.

Q. There was nothing put down in writing, no written communication between you to show the arrangement? A. No.

Q. Nothing at that time? A. No.

Q. Did you make any memorandum of it on any bills or your books to show what your arrangement was? A. Nothing at all.

Q. And the only thing you have in writing to show what the contract of the sale was are these two letters that have been introduced in evidence; is that right?

Mr. Carr: Objected to as calling for a legal conclusion.

(Question repeated.)

The Court: Are there any other writings?

Q. Are there any other writings that passed between you and the Richman Construction Company about this terra cotta except the two letters which were introduced in evidence? A. I think not.

Q. You are the general manager? A. Yes, sir.

By the Court: Q. Did I understand you to say in your cross-examination that you had a distinct arrangement with the Richman Construction Company that title was not to pass for the stuff until it was paid for? A. Yes, sir; with Mr. Richman. He is president of the company.

Q. That was the arrangement made on that August day in your place? A. Yes, when he came and said he must have the goods.

By Mr. Starr: Well now, Richman has paid part of this price, hasn't he, contract price? A. Not any in money.

Q. Well, he has paid part of it by doing some work for you, hasn't he? A. We owe him some money for work, yes.

Q. Didn't you credit on account of this amount of $1225 the value of the work he did for you? A. Yes.

Q. You credited that, didn't you? A. We haven't given him any receipt for it.

Q. You know what I mean. You have given him credit for it? He doesn't owe you $1225, does he? He owes you at most $1004.77, isn't that the exact amount of his indebtedness to you now? A. I think it is.

Q. What was this work he did for which you gave him credit? A. He did carpenter work on our factory.

Q. When was that done? A. That was done before this transaction took place.

Q. And you credited an account of this bill the $220.23, wasn't it? A. I don't know. I never credited it and I don't know what it is. He rendered us a bill and it was turned over to the bookkeeper.

Q. Don't you know it was $220.23? A. I couldn't remember exactly, but it might be that.

Q. Here is your lien claim, filed and sworn to by Mr. Sullivan. Look at paragraph six and see if that is not the exact amount.

Mr. Carr: We do not dispute that Mr. Sullivan says it is correct.

A. I should think it would be, if it is in there.

Q. That amount was credited on Richman's indebtedness to you as of the third of September, 1916, was it not? Look at the statement there and see if that is not a fact. A. It probably is.

Q. Were you there when this terra cotta was taken away? A. Yes, sir.

Q. And it was taken away about 4 o'clock in the morning, wasn't it? A. No, sir.

Q. What time was it taken away? A. Some of it in the afternoon.

A. Some of it in the morning, before the men got to work?

Mr. Carr: Objected to as not cross-examination. I have not examined the witness as to this, and we have admitted it.

Mr. Starr: I think it has a bearing as to whether or not this is a bona fide contention as to reservation of title.

The Court: Strictly it is not cross-examination.

RE-DIRECT-EXAMINATION by Mr. Carr:

Q. Why was it that the terra cotta was shipped in the name of the Richman Construction Company? A. So that they could handle it for us and take it to building for inspection. Otherwise we would have had to go down there and pay the freight and unload it and everything.

Q. That was a part of the bargain, was it? A. That was a part of the bargain.

Q. Did Richman make any statements with reference to payments which he expected from the Board of Education about that time?

Mr. Starr: I object. Unless it was part of the conversation in which this alleged reservation of title was agreed to, I think it is inadmissible, any other coonversation by Mr. Richman.

Mr. Carr: It was spoken of at the time.

The Court: He has a right and the jury have a right to know everything that was said so that it may be determined whether this was an out and out sale or only a conditional sale.

(Question repeated)

The Court: On that August day.

A. Yes, he said he heard he would get his payments shortly after the first of each month, and for us to ship these goods before the first, or thereabouts.

The Court: Did I understand you to say they were to be paid for in full before title was passed?

A. Yes. They were to be paid for in full as soon as the architect inspected them. He didn't know what date that would be, because he only came down from Philadelphia, but he agreed to pay for them in full before he used them, before he used any part of them. He agreed that the property should remain with us, the ownership until he paid for them.

RE-CROSS-EXAMINATION by Mr. Starr:

Q. Mr. Rogers, the freight bill on this terra cotta was paid by Richman, was it not? A. Yes.

Q. You never paid any freight? A. No.

RE-DIRECT-EXAMINATION by Mr. Carr:

Q. Do you remember what the freight bill amounted to? A. About $60.

WALTER RICHMAN, re-called:

Direct-examination by Mr. Carr:

Q. Mr. Richman, do you remember a talk between yourself and Mr. Rogers at the plant of the Central Terra Cotta Company? A. I do.

Q. When did that talk take place? A. Around December.

Q. When? A. Around December.

Q. Around December, you say? A. Yes.

Q. December of what year? A. 1916.

Q. I am referring to a time before the terra cotta was shipped. Did you have any talk with Mr. Rogers before the shipment of the terra cotta? A. Yes, sir.

Q. When was the terra cotta shipped? A. Well, I just don't remember what day it was shipped on.

Q. About when was it shipped? A. I couldn't say about when it was shipped, the day.

Q. Well, at any rate, did you have a talk with Rogers sometime shortly before the shipment of the terra cotta? A. I did, yes.

Q. Where did this take place? A. At Rogers' terra cotta place.

Q. What was that talk? A. Well, he wanted to ship it sight draft and I wasn't able to handle it at that time, for I had several other sight drafts on me and I couldn't handle it, and got him to ship it on approval of the architect and to be paid before I used it. Then we finally agreed on that.

Q. Was anything said as to who it should belong to until it was paid for? A. Yes.

Q. What was said about that? A. Well, he says, "Then the terra cotta is ours until you pay for it?" I says, "Yes."

Q. And how long after that talk was the terra cotta shipped? A. I suppose two or three days.

Q. What became of the terra cotta? A. it came to Wildwood and was unloaded.

Q. Was it ever used by you? A. No, sir.

Q. Was it ever paid for by you? A. No, sir

Q. You did pay the freight on it, however, did you not? A. Yes.

Q. How much did that amount to, do you know? No, I don't recall it just now. I think I have the freight bill home.

Q. Well, it has been testified it was about sixty dollars. A. suppose it was around that, carload lots.

CROSS-EXAMINATION by Mr. Starr:

Q. Mr. Richman, when this terra cotta came, it was billed in your name? A. Yes, sir.

Q. You paid the freight? A. Yes, sir.

Q. You unloaded it? A. Yes, sir.

Q. Had it carted up to the operation? A. Yes, sir.

Q. The building wasn't ready at that time to use the terra cotta, was it? A. No, we wasn't quite ready.

Q. It wasn't quite ready? A. No.

Q. That is the reason why you didn't put it in the building—A. Yes.

Q. —before you failed? A. Yes, sir.

Q. Was it inspected by the architect? A. I don't think it was. I don't think we had time.

Q. You mean from the time the terra cotta was received until the date you abandoned the job the architect hadn't time to inspect it? A. He hadn't inspected it to my knowledge. I got no word from the architect he had approved of it yet.

JOSEPH T. SULLIVAN, re-called:

Direct-examination by Mr. Carr:

Q. Mr. Sullivan, the stop notice filed by the Central Terra Cotta Company with the

Board of Education and signed by you contains the statement that the materials in question were actually used in the execution and completion of the city contract of the Richmond Construction Company with the Board of Education of the City of Wildwood, in the County of Cape May and State of New Jersey. Did you find that that statement was accurate or inaccurate? A. I found that it was not true. I had been misinformed.

Q. When you found it was inaccurate, what did you do with regard to the stop notice claim? A. I ordered it taken off.

Q. That is, you withdrew—A. Canceled. I met Mr. Richmond the day after that was signed, at his Bonding Company office in Philadelphia, where he had gone. I called him up from my office in Moorestown and found he had gone to his Bonding Company. I went there and found him and waited for him to come outside and questioned him about it, and he said as a matter of fact he hadn't used any of the stuff.

Mr. Starr: I object to any conversation with Mr. Richman.

The Court: No, conversation, Mr. Sullivan. From what you learned in a talk with Mr. Richman, what happened? A. Well, I then reported to our attorneys that the stuff had not been used. Thereupon we asked, or rather, drew up an order for Mr. Richman to sign, enabling us—

Mr. Starr: I object to this. I do not know anything about any order. We have never had any notice of that.

The Court: What does that paper say? Does it say that the Central Terra Cotta Company sold the stuff to Richmond?

Mr. Star: Yes, it is a perfect case of money due for goods sold and delivered.

Mr. Carr: It does not say that.

Q. Was it upon the assumption, or the information that Mr. Richmond had used the material, that this claim was filed? A. Yes, sir.

Q. And you found out afterwards that you were mistaken? A. That is the idea.

Q. Did you have any knowledge about the reservation of the title? A. Oh, yes.

Q. That was communicated to you, was it? A. Yes, sir.

Q. When? A. Well, before the goods were shipped. I haven't much to do with the practical part of the operation of the plant, but I do have a good deal to say about to whom we shall ship goods, and under what terms they shall be shipped, and decided—at least, I stated very positively that those goods must not be shipped—

Mr. Star: I object to any statement made by this gentleman to his officers.

Q. Was the question of the credit put up to you? A. Yes.

Mr. Star: I object to that as immaterial and improper.

Mr. Carr: I think it is proper. He is the president of the company and passes the credits.

Mr. Starr: It does not make any difference whether this man has good credit or bad credit. It is what they did.

The Court: It altogether resolves itself around the contract. The methods are unimportant.

Mr. Carr: Except so far as this paper is concerned. It will be argued, and certain deductions drawn from it.

The Court: He said that he signed that at the time under a misapprehension of the facts. Do you want to go any further?

Mr. Carr: Well, as your Honor states it, it would not seem to be necessary.

Q. Were instructions given by you as to the terms upon which delivery should be made? Answer that simply yes, or no.

Mr. Starr: Objected to. I assume that the instructions referred to in the question given him to some other member connected with the Terra Cotta Company?

Mr. Carr: That is correct.

Mr. Star: It seems to me we are not bound by that situation at all.

Mr. Carr: I simply want to show what instructions were given and they were carried out.

The Court: Does that make any difference, whether he gave instructions, if the manager was looking after the business of the concern and made the bargain which he says he made?

Mr. Carr: I think we are bound by it, but I think it coroborates the manager to some extent.

The Court: You cannot make evidence that way. The contract was made with an authorized person, as I understand it?

Mr. Carr: Yes.

The Court: Mr. Rogers was your authorized agent in the transaction? A. Yes, sir.

The Court: That is as far as you can go.

CROSS-EXAMINATION by Mr. Starr:

Q. With the exception of the statement in this affidavit, the lein claim that the terra cotta was actually used in the execution and completion of the contract, I suppose the rest of this claim is accurate? A. So far as I know. It was prepared by Wilson and Carr.

Q. You swore to it? A. Yes.

Q. And suppose you examined it carefully before you did take that affidavit to it? Now, what inquiry did you make before you verified the statement contained in paragraph eight of this claim to the effect that the materials used in the execution and completion of the contract, before you made such an affidavit? Did you make any inquiry from any source at all? A. Well, it was reported around Moorestown that the goods had gone into the building.

Q. Reported to you from what source? A. I am not right sure. It was all over Moorestown that Richman had failed and we started to get busy to see what had become of our goods.

Q. Did you go to Richman to find out whether the goods had been used in the building? A. I went to him but he wasn't in.

Q. Where did you inquire to ascertain whether or not these goods had been used? A. I went to his office, but he wasn't there.

Q. Where else did you inquire? A. I don't know, outside of our own people, amongst our own people at the factory.

Q. Well, who did you inquire of in the factory to ascertain whether the goods had been used or not? A. Mr. Rogers.

Q. Did he tell you whether they had been used or not? A. Well, he didn't know, but thought

maybe it had, because it had been several weeks since they were shipped.

Q. Not withstanding the statement that he didn't know, you made the bare, bald affidavit that they had been used in the building? A. Well, that was the best information I had at the time.

Q. Where did you get the information from that led you to believe they had been used in the building? A. I got it from Mr. Richman's office.

Q. Who told you there? A. McKenna, his man there.

Q. Told you they had been used? A. He thought some of them had been used, but he didn't say all.

Q. That he thought they had been used? A. Yes.

Q. On what day did you get that information? A. That was the day that that paper was signed.

Q. That is on the twenty-eighth? A. Yes, I reported that to our attorneys.

Q. And this was served on the twenty-eighth, sworn to on the twenty-eighth? A. I believe so, yes.

Q. And the goods were taken away on the morning of the twenty-ninth, weren't they? A. I am not sure about that, but the goods were taken away as soon as I saw Mr. Richmond after signing that paper, when he told me he hadn't used any of them.

Q. What I was trying to find out was this; this paper, you say, was sworn to on the twenty-eighth? A. Yes, sir.

Q. When did you see Mr. Richmond and ascertain that the goods were not actually used? A. I think that was the 29th; I am not sure.

Q. What time on the 29th did you ascertain that? A. In the morning.

Q. What time in the morning? A. About 9 o'clock, I should judge.

Q. About 9 o'clock in the morning? And that is the first information you had that the goods had not gone into the building? A. Yes, sir.

Q. Then what did you do? A. Then I consulted our attorneys.

Q. And what instructions did you give with reference to removing the terra cotta from the premises? A. Why, I instructed our manager to go down and remove the stuff.

Q. At what time on the 29th did you give those instructions? A. Now, when you talk about days, I am not sure, because I havn't anything before me, but I know it was after signing that paper that ascertained the fact that the goods had not been used.

Q. Don't you know as a matter of fact, Mr. Sullivan, that early in the morning of the 29th Rogers or somebody else representing you attempted to take this terra cotta away? A. I am not sure as to the date, but of course it was after the signing of that paper, after I got informed on the subject.

RE-DIRECT-EXAMINATION by Mr. Carr:

Q. You don't keep the books, do you, Mr. Sullivan, yourself? A. Well, I have general supervision over the books.

Q. You are not the actual bookkeeper? A. No. We have a young lady who keeps them.

Defendants rest.

Plaintiff's Testimony In Rebuttal

WILLIAM C. TODD, re-called:

Direct-examination by Mr. Starr:

Mr. Todd, I show you Exhibit P-2 and ask you on what day and what time of the day was that paper served on you as clerk of the Board of Education? A. On September 28th, at 3:45 p. m.

Q. Three forty-five in the afternoon? A. Yes.

Q. That paper was left with you? A. Left with me.

No cross-examination.

HARRY WITTE re-called:

Direct-examination by Mr. Starr:

Q. Do you know what time in the day on the 29th of September, 1916, this terra cotta was taken away by Bright? A. Why, I got there about 8 o'clock in the morning and they were working. They had a truck and a team there.

Q. Eight o'clock in the morning? A. Yes.

Q. And how much of the terra cotta had been removed when you got there? A. Why, I imagine about pretty near half of it.

Q. And who was actually moving it away? A. Bright's Express Company or Bright's Express.

Q. And where did they take it to, do you know? A. They stored it in Bright's yard.

The Court: Bright's Express Company was removing it on the day the notice was served?

Mr. Starr: Apparently the notice was served in the afternoon of the 28th and the complaint alleges that it was moved on the 29th, and the answer admits it. It was the day following, and it appears it was early in the morning.

CROSS-EXAMINATION by Mr. Carr:

Q. How do you fix the date as the 29th, Mr. Whitte? A. Well, the way I fix it was that we stopped work on the sixteenth and it was two weeks after that.

Q. You stopped work on the sixteenth and it was two weeks after that? That would make it the 30th, would it not? A. It was in the second week after we stopped work.

Q. Are you very positive as to the day, whether it was the 29th or 30th? A. It was Friday. I am pretty near sure it was on Friday.

Q. But you are not quite sure as to the date, whether it was the 29th or 30th, are you? A. No, I am not.

WEBSTER WRIGHT, sworn:

Direct-examination by Mr. Starr:

Q. Mr. Bright, you are one of the defendants in this action, are you not? A. I guess I am taken so.

Q. You are the man who took this terra cotta away? A. I am.

Q. Do you know what time in the morning you began to cart it away? A. Between 6 and 7 o'clock.

Q. Wasn't it earlier than that? A. No.

Q. Didn't you tell Mr. Witte it was early as—

Mr. Carr: You cannot cross-examine your own witness.

Q. Well, between 6 and 7 o'clock? A. Yes.

Q. Nearer 6 than 7, wasn't it? A. No, I think it was nearer 7.

Q. Who gave you the instructions to cart it away? A. Mr. Rogers.

Q. Mr. Rogers was down at Wildwood? A. Yes, sir.

Q. He was down there the night before, wasn't he? A. Yes, sir.

Q. He told you the night before he wanted you to get busy the next morning and cart this stuff away? A. Yes, sir.

Q. And you did? A. We did.

Q. And you had pretty much half of it away before Mr. Witte, the watchman, came there?

Objected to as leading.

A. It took us ten hours to move it all.

CROSS-EXAMINATION by Mr. Carr:

Q. Do you know what the date was, Mr. Bright? A. It runs in my mind it was the 30th, but I am not so sure. I don't know.

Q. You think it was the 30th? A. I do.

The Court: The 30th of September? A. Yes, sir.

Plaintiff rests.

Defendant's Testimony In Sur-Rebuttal

ALBERT E. ROGERS, re-called:

Direct-examination by Mr. Carr.

Q. Mr. Rogers, what was the date of the removal of the terra cotta from the school? A. I think you will find it was on Saturday, the 30th?

Q. I have here a copy of an order addressed to the Central Terra Cotta Company and dated September 29th, 1916, from Mr. Richmond. Do you know whether you had the original of that order at one time? A. I did. I carried that to Wildwood with me.

Q. On the day that you received it you took it to Wildwood? A. The next day, I think. Mr. Sullivan brought that—let me see. I used it the day after, but it was given to me that day in the city at Mr. Sullivan's office.

Q. So that would be September 30th as the date when the— A. Stuff was removed.

CROSS-EXAMINATION by Mr. Starr:

Q. You were down there on the 28th, weren't you? A. No, sir.

Q. Weren't you down there on the 28th when the notice was served? A. No, sir, I didn't serve the notice, had nothing to do with the notice.

Q. Were you down there the 29th? A. Yes, about 5 o'clock in the evening, the day I got this notice. Telephone messages from Philadelphia to go at one o'clock.

The Court: You say it was the 30th when this stuff was removed by the expressman? A. Yes, sir, on Saturday.

Motion to direct verdict

Q. Are you positive it was the 30th? A. I am, by the date that is, if that is dated right.

Q. Only by the date of that letter? A. I think I can prove it by the date the notice was served, also, if you want me to. Mr. Sullivan in that—

Q. I didn't ask you that.

RE-DIRECT-EXAMINATION by Mr. Carr:

Q. Do you feel reasonably positive it was on the 30th? A. Yes, sir, the stuff was removed on Saturday, the 30th. If the 30th was on Saturday, that is when that was removed.

Both sides rest.

Motion to direct verdict for plaintiff

Mr. Starr: There are two or three legal questions involved here. I move that the jury be instructed to find a verdict for the plaintiff on the ground that the reservation of title in the seller was illegal as against the plaintiff here, under the provisions of the Act of March fourteenth, 1895, which provides that all contracts for conditional sale, accompaniel by actual delivery and be followed by an actual and continued change of possession of these things contracted to be sold all conditions and reservations which are to leave title in the seller shall be absolutely void as against the judgment creditors of the person contracting to buy the same, and subsequent purchasers and mortgages thereof in good faith. We are

a subsequent purchaser under this act. I might say that I have made a very careful examination of the cases upon this point and I have failed to find any case in which the Courts have construed the provisions of article five in this contract, whether it is in the nature of a chattel mortgage or a pledge or a conditional bill of sale. My own judgment is that it is a conditional bill of sale. It is a bill of sale made by the general contractor to the owner at the time the contract is made, to cover any articles of personal property which may be brought upon the premises, to become effectual and to become absolute at the time of default. It seems to me that is the logical method by which a contract of this character can be construed. There is another ground which, it seems to me, militates against the assertion here of the reservation of title and that is that the defendant here is estopped from setting up the reservation of title after having served upon the Board of Education this lien claim in which it is alleged that the goods were sold and delivered to the contractor, and that there is so much money owing for them and demanding upon the Board of Education that that money be paid to them. It seems to me if there was a reservation of title, it was waived by the presentation of this claim.

So, upon those two grounds, the first ground being that the statute renders the

alleged reservation illegal, and invalid, because it is not recorded, and second, because they are now estopped from setting up that title in view of the claim that was served upon us, we move for a direction.

Mr. Carr: Yes, upon information that upon the proposition that even if you had made a conditional sale of this stuff, you waived the conditional part of it, so that it became an absolute sale, by the notice which you served? What have you to say about that? The president of the Terra Cotta Company served a notice upon the owner?

Mr. Carr: Yes.

The Court: That so much money was due him?

Mr. Carr: Yes, upon information that there had been incorporated into the building the terra cotta furnished by him, on a misapprehension.

The Court: Does the case show that that was withdrawn?

Mr. Carr: Yes, his testimony was that it was withdrawn. I understand that to be the fact, and that was the testimony of Mr. Sullivan.

The Court: There is any doubt about it, you had better clear it up. The Court will permit you to show what the truth is in regard to that. The Court wants to know whether there is an outstanding stop notice proceeding from the Terra Cotta Company to the Board of Education.

Further Testimony Of Defendants

ALBERT E. ROGERS, re-called:

Direct-examination by Mr. Carr:

Q. Mr. Rogers, what, if anything do you know about the cancellation of the stop notice? A. I went to the president, or looked up the president of the School Board on Saturaday night, the 30th, as soon as I found him, and told him to cancel our stop notice. He said he would do so, and the gentleman is present. I think he will confirm that.

Q. What is his name? A. Mr. Dowler. He had no office, but I found him at the Fire House that night about 9 o'clock.

CROSS-EXAMINATION by Mr. Starr:

Q. No written paper was ever prepared and served upon the Board, was there? A. No.

Q. There was no written paper prepared and served upon either the President of the Board, the finiancial officer of the Board of the clerk of the Board, was there? A. Mr. Wilson told me to go and cancel that—

Q. No. A. Let me answer that, won't you?

Q. No written paper was ever served upon any officer connected with this Board? A. I can't say that, but I can say that Mr. Dowler said, "I accept your cancellation."

Q. You still haven't answered my question? A. I can't answer it.

Q. To your knowledge, no paper was served? A. Not to my knowledge, but I can say that Mr. Dowler said, "I accept your cancellation." I reported so to Mr. Wilson, our attorney. He said, "I will record it and attend to it."

Further Testimony Of Plaintiff

HERMAN T. DOWLER, sworn:

Direct-examination by Mr. Starr:

Q. Mr. Dowler, you are president of the Board of Education? A. I am.

Q. Do you remember having a conversation with Mr. Rogers the latter part of September, 1916? A. Yes.

Q. He came to see you? A. He did.

Q. Did he at that time tell you he wanted to cancel the claim he had filed? A. He did.

Q. What did you say? A. Why, I told him that was up to him.

Q. Did you at that time agree to accept any cancellation? A. Why, I had no authority to accept any.

Q. You didn't accept any? A. Certainly not.

Q. Did he serve any written notice on you? A. He did not.

Q. And you never stated you would accept the cancellation? A. No, sir.

No cross-examination

WILLIAM C. TODD, re-called:

Direct-examination by Mr. Starr:

Q. Was any paper of any kind ever served upon you as the clerk of the Board of Education of Wildwood by the Central Terra Cotta Company, withdrawing the claim which had previously been served on you? A. Nothing that I remember. I don't remember ever receiving any such paper.

No cross-examination.

Further motion of direction of verdict for Plaintiff

Mr. Starr: Now, upon that point, the statute is specific in providing a method by which a Municipal lien can be acquired. It requires a paper of this kind served upon the financial officer of the Board, the clerk of the Board and the President of the Board, and I think ordinarily the Chairman of the Committee. That was done, evidently, in this case, and I contend there can be no withdrawal of a lien of this kind merely by going to Mr. Dowler and saying, "You can cancel or withdraw that notice." These gentlemen cannot play fast and loose. They cannot serve this lien claim and apparently rely upon that, because, so far as the record shows and so far as any legal action is concerned, they have never withdrawn it, and then at the same time claim that there was a conditional sale contract which would be inconsistant with the provisions of this notice, and get back the actual property.

(Mr. Carr replied)

The Court: Do you want to go to the jury upon the question of fact whether or not this was a conditional sale?

Mr. Carr: Yes, sir, I think we are entitled to go to the jury on that.

The Court: Proceed with the argument.

Mr. Starr: Will your Honor allow me an exception to your Honor's refusal to direct a verdict in favor of the plaintiff up-

Motion to direct verdict

on the grounds stated in the argument? That was my motion, to direct a vedrict in favor of the plaintiff on the grounds that the Statute renders the reservation of title absolutely void and that there was a waver or estoppel by reason of this lien claim.

The Court: Yes.

(Exception noted for plaintiff)

Motion to Direct Verdict for Defendants

Mr. Carr: I do not recall any testimony which contradicts the reservation of title. I would therefore like to ask for a directed verdict for the defendants.

The Court: Do you say there is any question of fact here for the jury, Judge Starr?

Mr. Starr: It seems to me, in view of your Honor's ruling, yes. It must necessarily go to the jury. My argument was predicated upon the theory that the testimony did show a conditional sale.

The Court: I am inclined to hold that the plaintiff was not a subsequent purchaser within the contemplation of the Statute, that the Central Terra Cotta Company did not waive any rights which it had as a conditional vendor. Now that leaves but a single question in the case.

Mr. Starr: Whether or not there was a reservation.

The Court: Was there or was there not?

Mr. Starr: That is a question of fact that I think must necessarily go to the jury.

Motion to Direct Verdict

Mr. Carr: It seems to me the testimony as to the reservation is uncontradicted. The only two parties who know about it have testified that there was such a reservation. One of them was a witness of Judge Starr's, whose veracity, of course, is not questioned, so that you have the uncontradicted testimony of witnesses who are unimpeached in favor of one fact.

The Court: It is an undisputed fact that Mr. Sullivan was in error when he took the ground that the material has been used in the building. Everybody seems to concede that that was an error on his part, and that seems to corroborate his present position. That notice was made under a misapprehension of facts. He swears to it and he seems to be corroborated, as I say, by the undisputed facts. That being so, what is there for a jury to decide? I cannot see any question of fact, nor can I see how the gentlemen of this jury could draw different conclusions from the facts.

The ruling of the Court, therefore, is that the motion for a direction in behalf of the defendants must prevail. Gentlemen of the Jury, you will return a verdict for the defendants.

Mr. Starr: Will your Honor allow an exception?

Mr. Carr: I think the damages have to be assessed in a case of this kind?

The Court: What damages?

Mr. Carr: The damages will be the contract price, I take it, less the credits which

have been testified to. In other words, in a replevin suit, they having taken them into their possession, we are entitled to a money verdict.

The Court: What is the amount you are entitled to?

Mr. Starr: As I figure it, it would be $944.77

The Court: Clerk, take a verdict for $944.77.

Mr. Starr: And your Honor will allow an exception?

The Court: Yes.

Exception noted for plaintiff.

Judgment for Defendant

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, NEW JERSEY, vs. CENTRAL TERRA COTTA COMPANY OF NEW JERSEY, Impleaded, etc.	Action at Law On Postea. Replevin. Wilson & Carr, Attorneys.

$944.77
39.10

$983.87

Judgment entered this eighteenth day of April, A. D., nineteen hundred and seventeen, for the sum of nine hundred and forty-four dollars and seventy-seven cents, damages and thirty-nine dol-

lars and ten cents costs in favor of the defendant and against the plaintiff.

WM. S. GUMMERE,
C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in above stated case which said judgment is recorded in the office in Vol. 10 of judgments, page 194.

In testimony whereof I have hereunto set my hand and the seal of said Court at
(Seal) Trenton, this ninth day of October, A. D., nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

Notice of Appeal

(*Filed, Oct. 11, 1917*)

NEW JERSEY SUPREME COURT

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, Plaintiff, vs. CENTRAL TERRA COTTA COMPANY, *et als.*, Defendants.	Action at Law. In replevin.

To Wilson & Carr, Attorneys of Defendant:

TAKE NOTICE that the plaintiff appeals to the

Court of Errors and Appeals from the whole of the judgment in this cause.

SHARPLESS & WAY,
Attorneys for Plaintiff.

Grounds of Appeal

(*Filed, Oct. 11, 1917*)

NEW JERSEY COURT OF ERRORS AND APPEALS

BOARD OF EDUCATION OF THE CITY OF WILDWOOD,
Plaintiff-Appellant,
vs.
WEBSTER BRIGHT, *et al.*,
Defendants-Respondents.

The appellant, Board of Education of the City of Wildwood, states the following grounds of appeal:

1. The learned trial judge erred in refusing to direct a verdict in favor of the plaintiff.

2. The learned trial Judge erred in directing the jury to find a verdict in favor of the defendants.

3. The learned trial Judge should have permitted the jury to pass upon the question of fact as to whether or not, by reason of the transaction between the Central Terra Cotta Company and W. A. Richman, the former reserved title to the articles sold.

4. The learned trial Judge erred in holding that the plaintiff was not a subsequent purchaser within the contemplation of the statute respecting conditional sales.

5. The learned trial Judge erred in holding that the Central Terra Cotta Company did not waive its right as a conditional vendor by the filing of the municipal lien claim to recover the amount due.

SHARPLESS AND WAY,

Attorneys of Plaintiff-Appellant.

Exhibit P-1

THIS AGREEMENT, made the NINTH day of NOVEMBER in the year one thousand nine hundred and FIFTEEN by and between RICHMANN CONSTRUCTION CO., MOORESTOWN, NEW JERSEY, party of the first part (hereinafter designated the Contractor), and THE BOARD OF EDUCATION OF THE CITY OF WILDWOOD, NEW JERSEY, party of the second part (hereinafter designated the Owner),

WITNESSETH, that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

ARTICLE I. The Contractor shall and will provide all the materials and perform all the work for the erection and completion of a two-story and basement brick and stone school building at Wildwood, New Jersey, as shown on the drawings and described in the specifications prepared by CLYDE S. ADAMS, 1509 ARCH STREET, PHILADELPHIA, PENNA., Architect, which drawings and specifications are identified by the signatures of the parties hereto, and became hereby a part of this contract.

ART. II. It is understood and agreed by and between the parties hereto that the work included in

this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owner.

Art. III. No alterations shall be made in the work, except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

Art. IV. The Contractor shall provide sufficient safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the

10 Exhibit P-1

Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

20 Art. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days' written notice to the Contractor, to provide any such labor or materials,
30 and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appli-
40 ances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid

balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit:

The building shall be completed and ready for occupancy within ONE HUNDRED AND SIXTY (160) WORKING DAYS from date of signing of this contract.

It is understood and agreed that this contract includes Sheet No. 5, dated September 22nd, 1915, in addition to sheet 1, 2, 3, and 4 dated April 26th, also the addenda dated September 22d, 1915.

It is further understood and agreed that this contract also includes Alternate No. 2, providing for the finishing of Boys' Locker Room as shown on second floor; but does not include the fire escape as originally shown.

ART. VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor

are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

ART. VIII. The Owner agree to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agree that they will reimburse the Contractor for such loss; and the Contractor agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then they shall reimburse the Owner for such loss. Should the Owner and Contractor fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art XII of this contract.

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be SIXTY-FOUR THOUSAND SIX HUNDRED NINETY-EIGHT AND 00/100ths ($64,698.00) DOLLARS, subject to additions and deductions as hereinbefore provided, and that such sums shall be paid by the Owner to the Contractor, in current funds, and only upon the certificates of the Architect, as follows:

Exhibit P-1

Upon the first day of each month, contractor will submit to Architect, statement of material furnished and erected the previous month and certificate will be issued for Eighty-five (85%) per cent of amount he approves.

An approved Surety Company, bond, satisfactory to the Owners in the amount of THIRTY-TWO THOUSAND THREE HUNDRED AND FORTY-NINE ($32,-349.00) DOLLARS is to be furnished Owners by the contractors within TEN (10) DAYS from date of signing of this contract, guaranteeing full payment of all just sub-contractors' claims.

The final payment shall be made within THIRTY days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If, at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claims after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default.

ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Exhibit P-1

ART. XI. The Owner shall during the progress of the work maintain insurance on the same against loss or damage by fire, the contractor will carry fire insurance the policies to cover all work incorporated in the building, and all materials for the same in and about the premises, and to be made payable to the parties hereto, as their interest may appear.

ART. XII. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architect referred to in Art. VII of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

ARTICLE XIII. It is mutually agreed by the parties hereto that the contracts shall be filed in the County Clerk's Office at Cape May House, N. J., immediately after the signing of the same, and it is further agreed that no liens shall be filed or maintained by any material men at work on the building or by any one except the party of the first part.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these pres-

ents have hereunto set their hands and seals, the day and year first above written.

RICHMANN CONSTRUCTION CO.,
W. A. Richman, Pres. & Treas.,
(Contractors)
(Corporate Seal).

BOARD OF EDUCATION OF WILDWOOD, NEW JERSEY,
S. T. Dowler,
(President.)
Wm. C. Todd.,
(Dis. Clerk)

In Presence of:
Thomas C. McKenna,
(Witness)
Acting Secty.
Joshua Bush,
(Witness.)

Exhibit P-2

To the Board of Education of the City of Wildwood, in the County of Cape May and State of New Jersey, and S. T. Dowler, President of said Board of Education, and W. C. Todd, Clerk of said Board of Education, and Robert J. Kay, Custodian of school funds of said Board of Education, and Financial Officer of the City of Wildwood:

TAKE NOTICE, that as a merchant or trader in pursuance of and in conformity with the terms of a certain contract for a public improvement consisting of a public school house erected and in process of erection in the City of Wildwood, known as

Exhibit P-2

the High School Building, made between Richman Construction Company, as contractor, and the Board of Education of the City of Wildwood, in the County of Cape May and State of New Jersey, authorized by law to make contracts for the making of said public improvement and other public improvements, the undersigned has furnished materials toward the performance and completion of said contract, and by reason thereof claims a lien for the full amount due the undersigned, as hereinafter set forth, for the materials aforesaid, upon the moneys in the control of said Board of Education of the City of Wildwood, in the County of Cape May and State of New Jersey, due or to grow due under said contract, to the full amount of said claim according to the statute in such case made and provided:

And Take Further Notice:

1. That the claimant is Central Terra Cotta Co., a corporation existing under and by virtue of the laws of the State of New Jersey, doing business in the Town of Moorestown, in the County of Burlington, and State of New Jersey.

2. That the amount claimed and due to the subscriber from the said Richman Construction Company is the sum of Ten hundred and four dollars and seventy-seven cents, which is now due and owing to the undersigned.

3. That the said amount is the just and true amount of the demand due said Central Terra Cotta Co., after deducting all just credits and offsets.

4. That the said materials were furnished to the said Richman Construction Company.

Exhibit P-2

5. That the terms, time given, and conditions of the contract of the said Richman Construction Company are contained and set forth in a certain contract in writing for the erection of said schoolhouse, entered into between the said Richman Construction Company and the Board of Education of the City of Wildwood aforesaid, bearing date on or about the ninth day of November, nineteen hundred and fifteen, and that the lien claimed by the subscriber herein is claimed on the money and to grow due under said contract.

6. That the said materials were furnished and delivered to the said Richman Construction Company by the undersigned pursuant to the terms of a written contract entered into between the said Richman Construction Company and the undersigned, on the fifth day of Februray, nineteen hundred and sixteen; the total contract price was Twelve hundred and twenty-five dollars, and payment was to be made on delivery of the goods; that said goods were shipped by the undersigned to the Richman Construction Company at Wildwood, Cape May County, New Jersey, on September 1st, A. D., 1916; that said Richman Construction Company is entitled to a credit of Two hundred and twenty dollars and twenty-three cents for work done and materials furnished by said Richman Construction Company to said Central Terra Cotta Co., leaving due the aforesaid balance of Ten hundred and four dollars and seventy-seven cents. Said balance became due on or about September third, A. D., nineteen hundred and sixteen, from which date interest is due on said balance.

Exhibit P-2

7. That the said Richman Construction Company has failed to pay the balance due claim and according to the terms of his said contract with claimant.

8. That the said materials were furnished to the contractor Richman Construction Company, and were actually used in the execution and completion of the said contract of the said Richman Construction Company with the Board of Education of the City of Wildwood, in the County of Cape May and State of New Jersey.

And the undersigned demands that payment be made to it for said sum due and owing to it by virtue of the statute in such case made and provided.

You will therefore, hold and retain from the said Richman Construction Company, the moneys aforesaid.

Dated, Camden, New Jersey, September 28, 1916.

Yours respectfully,
CENTRAL TERRA COTTA CO.,
By Jos. T. Sullivan,
President.

State of Pennsylvania, }
County of Philadelphia. } ss:

Joseph T. Sullivan, of full age, being duly sworn according to law, on his oath says, that he is President of the Central Terra Cotta Co., a corporation of New Jersey, doing business in the Town of Moorestown, County of Burlington, and State of New Jersey, and that he is the duly authorized agent of the said Central Terra Cotta Co. in this behalf, having full and competent

Exibit P-2

knowledge of the facts herein sworn to, and that the principal place of business of the claimant, the amount claimed, from whom due, when due, the name of the person or corporation to whom the materials were furnished, and the statement of the terms, time given and the conditions of the contract under which the said materials were furnished are set out in the foregoing notice.

The said materials were furnished to the said Richman Construction Company, and were actually used in execution and completion of the said contract by the said Richman Construction Company with the Board of Education of the City of Wildwood, County of Cape May and State of New Jersey, for the erection of a public school building, in the City of Wildwood, known as the High School Building; that the amount of the demand, to wit: Ten hundred and four dollars and seventy-seven cents, with lawful interest thereon from the third day of September, nineteen hundred and sixteen, is justly due and owing by the said Richman Construction Company to the said Central Terra Cotta Co., after deducting all just credits and offsets, and that all the other facts, matters and things set forth in the above notice are true and correct.

JOS. T. SULLIVAN.

Sworn to and subscribed before me,
a Notary Public in and for said County
and State, this 28th day of September,
A. D., 1916.
Albert H. Stein,
Notary Public,
Commission expires Feb. 15, 1919.

(Seal.)

Exhibit P-3

September
Twentieth
1916.

Richman Construction Company,
Moorestown, New Jersey.

Gentlemen:

Re: High School Building at Wildwood, New Jersey:

Inasmuch as you have failed to supply a sufficiency of skilled mechanics and material on the above building, you will consider this letter of sufficient notice under Article V of your contract, that unless a marked showing is made within three (3) days after receipt of this notice, I shall certify to the Board of Education, that they are entirely within their rights to terminate the contract, and to enter and take possession for the purpose of completing the work included under the contract.

Yours very truly,
CLYDE S. ADAMS.

CSA'G
Registered Mail.
Copy to Board of Education & Massachusetts Bonding & Insurance Co.

Exhibit P-4

Resolution Adopted September 26th, 1916.

"Whereas, The Richman Construction Company has failed to complete the contract entered into between them and this Board of Education by neglecting or refusing to supply a sufficiency of

skilled workmen and material to complete the contract according to the terms thereof.

And Whereas, The Architect, Mr. Clyde S. Adams, has certified to this Board of Education that on September 20th, 1916, he did notify the said Richman Construction Company in writing to supply a sufficiency of skilled mechanics and material on the above building, and that they should consider the said letter sufficient notice under Article V of their contract and that unless a marked showing was made within three (3) days after receipt of said notice, he would certify to the Board of Education that they were entirely within their rights to terminate said contract and to enter and take possession for the purpose of completing the work included under their contract.

Therefore, be it Resolved, that the contract between the Richman Construction Company and this Board of Education be terminated as per Article V of said contract,

And be it Further Resolved, that a copy of this resolution be sent to the Richman Construction Company and their Surety, The Massachusetts Bonding and Insurance Company, respectively."

Exhibit D-1

Moorestown, N. J. 2-4-16

Richman Construction Co.
Moorestown, N. J.

Gentlemen:

We propose to furnish you all Architectural

Exhibit D-2

Terra Cotta for Cornice for Wildwood Public School, as per plans and specifications by
Architects.
for the sum of Twelve Hundred and Twenty-five Dollars ($1,225.00) delivered f o b cars Wildwood, N. J.

Respectfully submitted,
CENTRAL TERRA COTTA CO. OF N. J.

Exhibt D-2

Moorestown, N. J., February 5, 1916.

Central Terra Cotta Co.,
Moorestown, N. J.
Gentlemen:

We hereby accept your bid for $1,225.00 for all the terra cotta cornice for the Wildwood High School, delivered F. O. B. cars Wildwood, N. J., according to the plans and specifications prepared by Clyde S. Adams, architect.

Yours very truly,
RICHMAN CONSTRUCTION CO.,
by Thos. C. McKENNA.

TCM/MAM

NEW JERSEY COURT OF ERRORS AND APPEALS

November Term, 1917.

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, *Plaintiff-Appellant,* vs. WEBSTER BRIGHT AND CENTRAL TERRA COTTA COMPANY, *Defendant-Respondent.*	ON APPEAL FROM SUPREME COURT.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court entered, after a trial of an action of replevin in the Cape May Circuit, upon a verdict, directed for the defendant, for the amount of $983.87, damages and costs.

The question involved refers to the action of the learned Judge of the Circuit Court in directing the jury to find a verdict for the defendant, and this question is raised by exceptions, taken at the trial, to the giving of binding instructions for the defendant, as well as the refusal of the learned trial Judge to direct a verdict in favor of the plaintiff.

SPECIFICATION OF ERRORS.

The grounds of appeal are found an page 47 of the state of the case, and are as follows:

1. The learned trial Judge erred in refusing to direct a verdict in favor of the plaintiff.

2. The learned trial Judge erred in directing the jury to find a verdict in favor of the defendants.

3. The learned trial Judge should have permitted the jury to pass upon the question of fact as to whether or not, by reason of the transaction between the Central Terra Cotta Company and W. A. Richman, the former reserved title to the articles sold.

4. The learned trial Judge erred in holding that the plaintiff was not a subsequent purchaser or mortgagee within the contemplation of the statute respecting conditional sales.

5. The learned trial Judge erred in holding that the Central Terra Cotta Company did not waive its right as a conditional vendor by the filing of the municipal lien claim to recover the amount due.

ARGUMENT.

Facts.

The suit below was an action of replevin brought by the Board of Education of the City of Wildwood against Webster Bright and the Central Terra Cotta Company (see complaint, c. p. 1, *et seq.*).

On November 9, 1915, the board of education entered into a contract with the Richman Construction Company, by which the latter agreed to build a high school at Wildwood. The contract contained the following provision, an interpretation of which is necessary for the settlement of some of the questions involved in this controversy (c. p. 50, l. 20):

Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to

finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties.

The contractor defaulted, and the board was obliged to proceed under Article 5 to terminate the employment. The resolution by which the employment was terminated was adopted March 26, 1916, (Exhibit P4, c. p. 60, l. 42). There is no dispute in the case of the fact that the building contract was rescinded, according to the terms thereof. This appears by admission of counsel (c. p. 15, l. 30).

At the time the contract was terminated, the contractor had in its possession, on the premises where the school was being erected, the pieces of terra cotta, to recover which the action of replevin was instituted. Three days after the contract was terminated, the defendant, Bright, by the direction of the terra cotta company, removed the terra cotta from the school premises.

The answer admitted that the material was taken as alleged in the complaint, but averred that the Ter-

ra Cotta Company was not bound by the provisions of the contract above set forth and that the material was delivered by the Terra Cotta Company to the contractor, upon the express understanding and agreement, that the title thereto should remain in and be reserved to the Terra Cotta Company until paid for.

It also appears in the case that on the day before the material was removed from the school premises, theTerraCotta Company served upon the Clerk of the Board of Education a notice of municipal lien claim, alleging that the construction company owed to the Terra Cotta Company for the terra cotta furnished, the sum of $1004.77, and that such amount, with interest from September 3, 1916, was then due (see Exhibit P2, c. p. 55). This claim was served upon the clerk of the Board of Education at 3.45 P. M. September 28, 1916.

It is also admitted that the Board of Education, after the default and discontinuance of employment, and before the removal by Bright, took possession of the materials (c. p. 15, l. 38).

ARGUMENT OF LAW.

THE TRIAL JUDGE ERRED IN DIRECTING A VERDICT IN FAVOR OF THE DEFENDANTS.

This point raises four questions:

A. The interpretation to be put upon Article 5 of the contract, which confers upon the owner, after default, the right to "enter upon the premises and

take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon," and to settle the question as to what right, title and interest the owner acquired in the materials on its premises at the time of default.

B. Whether the learned trial Judge was justified in taking away from the jury the question of whether or not there was a conditional sale of the terra cotta in question between the Terra Cotta Company and the Construction Company, by which the title thereto was reserved in the former until paid for.

C. Whether or not the statute regarding conditional sales, which reads as follows:

> "That in every contract for the conditional "sale of goods and chattels hereafter made, "which shall be accompanied by an actual de- "livery, and be followed by an actual and con- "tinued change of possession of the things con- "tracted to be sold, all conditions and reserva- "tions, which provide that the ownership of "such goods and chattels is to remain in the "person so contracting to sell the same, or "any person other than the one so contract- "ing to buy them, until said goods and "chattels are paid for, or until the happen- "ing of any future event or contingency, "shall be absolutely void as against the judg- "ment creditors of the person so contracting "to buy the same, and also such purchasers and "mortgagees thereof in good faith, and as to "them the sale shall be deemed absolute, unless "such contract for sale, with such conditions

"and reservations therein, be recorded as di-
"rected by the succeeding section of this Act,"
P. L. 1885, p. 302, Add. to Vol. 2, Comp. Stat.
p. 1561,

renders the reservation attempted to be asserted in this case null and void as against the Board of Education.

D. Whether the Terra Cottta Company waived its right to reclaim the merchandise, when it elected to proceed by municipal lien claim.

A.

So far as we have been able to discover by very careful research, there is no decision in New Jersey construing Section 5 of the standard building contract, although this article has been considered by courts of other jurisdictions, and the general rule is stated in 9 C. J., page 704, Section 24, as follows, *i. e.* Since the provision conferring upon the owner, in case of default, the right to terminate the contract and assume possession of the materials for the purpose of completing the work contemplated by the contract, is in the interest of the parties to the contract, it should be fairly construed so as to effectuate its purpose.

The leading case upon this question is *Duplan Silk Company vs. Spencer*, 115 Fed. 689, the facts of which were that A, contractor, agreed to build for B, owner. A brought materials on ground, commenced work, and then went into bankruptcy. Under Article 5 of the standard building contract, B took possession of the materials, and completed work, and the trustee in bankruptcy of A brought

an action of trover against B to recover the value of the materials so used. The Court held that under such a provision, materials brought by the contractor upon the owner's premises, and appropriated to the building contracted for, are to be considered as so far delivered in the possession of the owner as to make them a security for advances made by him on the contract, and to vest in him a qualified right of property in the same, consistent with the right of the owner to use them in the fulfilment of his contract. The Court also held that the provision permitting the assumption of possession of materials by the owner, in case of default, was not one of forfeiture which must be strictly construed against the owner, since it did not involve the taking of any property of the builder by way of punishment, but that it is in the interest of both parties, and is to be fairly construed, so as to effectuate its purpose.

This case was subsequently appealed to the Supreme Court of the United States, and the appeal was dismissed.

191 U. S. 526.

In the case of *Mahoney vs. Oxford Realty Company,* 118 N. Y. Supp. 216, the owner, under Section 5 of the standard contract, completed work after the default of the contractor, and used the latter's materials therefor. The validity of Section 5 of the contract was recognized and interpreted substantially in accordance with the general purpose laid down in 9 C. J., above referred to.

There are a number of English authorities upon this question, which seem to confer upon the owner the right, as against the contractor, to appropriate materials for the purpose of finishing the work contemplated by the contract.

In the case of *Brown vs. Bateman,* L. R. 2, C. P. 272, the following facts appeared:

Plaintiffs, having obtained a judgment against one H, a builder, caused the sheriff to levy on materials in the neighborhood of C, which were in the course of erection, and the sheriff there seized certain materials which were about to be used. The materials were to be used for the erection of a building belonging to one B. B contended that the sheriff could not sell under the execution because of a building contract between himself and H, the eighth article of which was as follows: "that in case H, his executors, etc., should fail to proceed with the erection and completion of the houses, or any of them, within the time specified, it should be lawful for B, his heirs, etc., to enter upon and take possession of the whole or any part of the land leased with all buildings and improvements thereon and all bricks and other building materials thereon for his and their own absolute use and benefit."

Court held that this article gave B such an equitable interest in the materials as to disentitle the sheriff to seize them under an execution against H and rendered judgment for B.

In *Byford vs. Russell,* 2 K. B. 522, the facts were as follows:

By building agreement, it was provided that if the builder should neglect to proceed with due diligence in the performance of the work and building, the owner should be at liberty to give notice in writing to the builder requiring him to proceed with the work with reasonable dispatch and that from the date of such notice the builder should not be at liberty to remove from the premises any plant belong-

ing to him placed there for the purpose of the work and that the building owner should have a lien upon such plant thenceforward, until the notice was complied with.

A judgment having been recovered by a third person against the builder, the sheriff entered under a *fi. fa.* and seized, in execution of the judgment, certain plant belonging to the builder, which had been brought by him to the premises for the purpose of the work after the seizure by the sheriff and while the plant was still on the premises and unsold, the owner gave to the builder, who had not proceeded with due diligence in the performance of the work, notice under the contract to proceed therewith and he thereupon claimed as against the execution creditor a lien on the plant.

The Court held that the intervening seizure by the sheriff prevented the owner's right of lien under the notice from taking effect. The Court said by way of dictum that if the notice had been given before the sheriff levied, there would be no question but that the owner would have a right to take the materials brought on his property.

In re Winter, 8 Ch. D. 225, the following facts appeared:

Under the terms of an engineering contract, certain materials used by the engineer were seized by the owner after notice had been given to the engineer in accordance with the usual building contract and after the engineer had gone into bankruptcy.

As against the assignee of the bankrupt the Court held that this did not come within the terms of the Bankruptcy Act of 1869 and that they could maintain no right of action or set-off as against the assignee.

In *Beeston vs. Marriott,* 4 Gifford, 435, 66 Reprint, 778, the following facts appeared:

Under the terms of a contract between a railroad company and B, it was provided that in the event of failure to complete the work within a given time or default on the part of B, that it should be lawful for the company to use and employ therein for the execution or prosecution of the same work, all or any part of the materials and plant making only such compensation therefor to the contractor, his heirs, executors and administrators as the principal engineer of the company should think just and should by writing under his hand, award to be paid.

B deposited on the lands of the company for the purpose of carrying out his contract, large quantities of materials. The attorneys for the company, claiming a bill for costs, issued execution to the sheriff to seize the materials of B, claiming that the ownership of the goods was absolutely invested in the company and that the goods were, therefore, liable to be taken into execution.

The contractor filed a bill for injunction to restrain the sheriff from selling the goods praying for declaration that neither the company nor their attorneys had any right or interest therein except subject to B's right to use and employ the same in the construction of the work.

The Court held that the materials were not liable to be taken in execution for the company's debts; that there were chattels upon the ground of the company dedicated to a particular purpose in which both the company and B were interested as to the use of the materials. Injunction granted restrained the sale by the company.

In re Waugh, 4 Ch. D., Ch. 534, the following facts appeared:

A builder contracted with a club to erect some houses on their land for them. The contract contained a stipulation that if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt or insolvent or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the builder, to appoint other persons to complete the work and to provide the requisite materials and also to seize and retain all materials, plant and implements provided that the contractor should have drawn money on account of his contract. Contractor commenced the works and carried them on for some time, receiving a considerable sum from the club. On the 30th of May he filed a liquidation petition; on the second of June the architect of the club gave notice to the contractor that as he had neglected to proceed with the works they should, on the expiration of two days, employ other means of completing the works and that he must not remove any materials, implements or plant from the works and at the expiration of this notice the club took possession of the materials, implements and plant.

The Court held that the club was entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being on protected transaction within the Section 94 of the Bankruptcy Act of 1869.

Under the authority of the above cases, we contend that the Board of Education was either a purchaser or a mortgagee in good faith, and, as against the Board, the reservation of title set up by the Terra Cotta Company would be absolutely void under the Act of 1885, page 302, above recited.

This disposes of the questions arising under subdivisions A and C argued under this point.

B.

We contend that there was sufficient doubt in the case to require the jury to determine whether or not there was a reservation of title to the material when it was delivered to the builder at Wildwood.

The contract between the Terra Cotta Company and the Construction Company was made February 4, 1916, and was the result of a letter written by the former to the latter (Exhibit D1, c. p. 61, l. 40), and a reply accepting the proposition dated February 5, 1916, (Exhibit D2, c. p. 62, l. 24). It will be observed that there was no express reservation of title contemplated by the terms of this written contract. It is true that witnesses for the defendant testified that after the materials were manufactured, the terms of the written contract were modified in August, 1915, when the Terra Cotta Company refused to ship until satisfactory arrangements as to settlement had been made, and it was then understood that if the Terra Cotta Company would send the material to Wildwood the same would remain their property until inspected by the architect, and the same was to be paid for when inspected. This arrangement was agreed to with the understanding that the goods should remain the sellers until they were paid for.

In contradiction of the contention made by the Terra Cotta Company, that there had been a reservation of title when the goods were shipped, the following facts were admitted in the case, or elicited on cross-examination of the defendant's witnesses:

1. That the materials were, on September 1, 1916, shipped from Moorestown and consigned to the contractor at Wildwood (c. p. 18, l. 46).

2. That the bill of lading was made out in the contractor's name (c. p. 19, l. 13).

3. That the Richman Construction Company had exclusive control over the goods after they reached Wildwood, and were taken to the premises where the building was being erected (c. p. 19, l. 40).

4. That there was no evidence to show that the architect had passed on the materials (c. p. 20, l. 7).

5. That the Terra Cotta Company owed the Construction Company $220.23 before the terra cotta had been shipped, and this amount was, on the books of the company, credited against $1225.00, the purchase price of the terra cotta, leaving a balance due of only $1004.77, which last mentioned amount was the sum owing the Terra Cotta Company according to the cross-examination of Rogers, the manager (c. p. 22, l. 19).

6. That the freight bill for shipping the terra cotta was paid by the contractor (c. p. 24, l. 31).

7. That on September 28, 1916, at 3.45 P. M. a notice of municipal lien claim was served upon the

Clerk of the Board of Education (c. p. 33, l. 19). This lien claim is Exhibit P2 (c. p. 55). The same was verified by the president of the Terra Cotta Company and contained the following statements, which are certainly contradictory of the contention made at the trial, that the transaction between the contractor and the Terra Cotta Company was a conditional and not an unconditional sale. The statement is made in the claim, as presented to the board, that the Terra Cotta Company furnished materials toward performance and completion of the contract, and by reason thereof had a lien for the full amount due for the materials furnished. That the amount claimed and due to the Terra Cotta Company from the Richman Construction Company was the sum of $1004.77, which sum was then due and owing to the Terra Cotta Company. That said amount was the just and true amount of the demand due, after deducting all just credits and offsets. That the materials were furnished to the Richman Construction Company. That the materials were furnished and delivered to the Construction Company by the Terra Cotta Company pursuant to the terms of a written contract dated February 5, 1916, at the total contract price of $1225.00, payment to be made upon delivery of goods. That the goods were shipped to the Construction Company at Wildwood on September 1st, and that the Construction Company was entitled to a credit of $220.00, leaving due the balance of $1004.77, which balance, with interest from September 3, 1916, was due. That the Construction Company has failed to pay the balance due claimant, according to the terms of its contract with the claimant. That the materials were furnished to the Construction Company, and actually used in the execution and completion of the contract with the Board of

Education, and the Terra Cotta Company demanded that payment be made to it for said sum due and owing to it by virtue of the statute.

8. The affidavit of Mr. Sullivan, president of the company, verifying the claim, states that he had full and competent knowledge of the facts sworn to, and that the amount claimed, from whom due, when due, the name of the person or corporation to whom the materials were furnished, and the statement of the terms and time given, and conditions of the contract under which the materials were furnished, were set out in the notice. That the materials were furnished and actually used in the execution and completion of the contract, and the amount of $1004.77, with lawful interest from September 3, 1916, was justly due and owing to the Central Terra Cotta Company after deducting all just credits and offsets; and all the other facts, matters and things set forth in the affidavit were true and correct.

It will be observed that the facts stated in the lien claim are evidential of a contract for the sale and delivery of merchandise without any reservation of title depending upon the performance of any conditions by the purchaser.

It will be further observed that the lien claim expressly alleges that the merchandise was delivered pursuant to a written contract dated February 5, 1916, which is Exhibit D2. The claim was made at the trial that the goods were delivered pursuant to a verbal contract made subsequently. Both of these statements cannot be correct; one or the other is inaccurate. The only explanation attempted to be made by Mr. Sullivan, with reference to the substantial difference between the facts sworn to by the officers of the Terra Cotta Company at the trial, and

those facts set up in the verified lien claim, was that Mr. Sullivan was unaware that the merchandise had not been actually used in the construction of the building. This, however, is not a sufficient explanation of the reason why he swore to the statement, in the lien, that the merchandise was furnished pursuant to a contract dated February 6, 1916, (Exhibit D2), when the claim was made at the trial that the materials were delivered pursuant to a verbal contract entered into thereafter.

All of the circumstances surrounding the transaction showing delivery, consignment, payment of freight, custody and control of the merchandise, as well as the facts set forth in the verified claim, prove conclusively that the transaction between the Terra Cotta Company and the contractor was an unconditional sale without reservation of title.

The only evidence in the case to contradict the inference to be deducted from these facts, was the testimony of Rogers, showing the making of the parole contract, when it was alleged that the reservation of title was made.

In view of this conflict of testimony upon the essential question at issue, we contend that it became the province of the jury to determine whether there was any conditional sale. The jury had a right to absolutely disregard the evidence of the defendant's witnesses, which purported to show a supplemental verbal contract creating a reservation of title, and define the transaction between the Terra Cotta Company and the contractor as evidenced by the lien claim which was filed nearly a month after the merchandise was delivered. The facts stated in the lien claim, as filed, show a perfect case of goods sold and delivered, absolutely, without reservation or condition.

We contend, therefore, that the testimony of the defendant's witnesses, and particularly Mr. Sullivan in his effort to explain why he alleged specifically in the claim that the goods were actually used in the construction of the building, was insufficient to establish, as a matter of law, that a reservation of title existed.

It seems to us that this question should have been submitted to the jury, to have them find what the contract was. This contention is supported by the opinion of this Court in the case of *Fox vs. 44 Cigar Company,* 101 Atl. 184. With the lien claim before them, the jury would be justified in finding that the transaction was not a conditional, but an absolute sale.

D.

The fifth reason for reversal refers to the error of the learned trial Judge in holding that the Terra Cotta Company did not waive its right as a vendor in a conditional sale by the filing of the municipal lien claim to recover the amount due.

We contend that the Terra Cotta Company was put to an election, either to reclaim the materials upon the theory that the title never vested in the Richman Construction Company, or proceed upon the idea that the sale was absolute, and, having once exercised an election, it would be estopped from acting otherwise.

The case of *Heller vs. Elliott,* 45 L. 564, in our judgment, is controlling upon this point. The only excuse asserted in the case at bar, to support an attempt to exercise the right to reclaim the materials upon the theory that the title thereto never passed,

is the fact that Mr. Sullivan when he swore to the municipal lien, he was under the impression that the goods had been actually used in the building. That claim seems to be almost identical with the contention of the plaintiffs in the Heller case, that what they did was in ignorance of the facts, and that ought not to be held to be evidence of waiver or election. This Court, however, held, in the last mentioned case, that the evidence showed that the reason why the plaintiffs did not pursue the remedy of reclamation was that they supposed the goods were out of reach, and they, therefore, chose to proceed by attachment for the recovery of the price. That is precisely the situation here. Assuming that a reservation of title existed, Mr. Sullivan, the president of the Terra Cotta Company, was of the impression, when he swore to the municipal lien, that the materials had been appropriated to the building, and he, therefore, chose to proceed by the lien claim to recover the price of the merchandise sold. No clearer case of waiver or election could be imagined. The fact that it was done in ignorance of the precise status of the materials at the time the lien claim was sworn to and filed does not alter the situation. The very purpose of the notice given to the Board of Education by the Terra Cotta Company was to acquire a lien upon the moneys due or to become due to the contractor from the municipality, and it is upon the theory that the price of the merchandise was due at the time the notice was filed. The claim could not be given any effect under the Municipal Lien Act unless, at the time the claim was presented, the money was so due.

It has also been held that the fact that goods are shipped in the name of the buyer as consignee, or the bill of lading is endorsed to him, is strong evi-

dence of intent to pass the property free of any reservation.

35 *Cyc.* 333.

The entire question of election and waiver of reservation of title is considered in 35 *Cyc.* pp. 673, 696.

This Court subsequently, in the case of *Campbell vs. Rockaway,* 56 L. 676, reaffirmed the doctrine of the Heller case.

SUMMARY.

Therefore, upon the whole case, we contend as follows:

1. That the reservation of title set up at the trial by the Terra Cotta Company was void as against the Board of Education, because the board was either a subsequent purchaser or mortgagee of the merchandise in good faith, and a verdict should have been directed for the plaintiff.

2. That the question of whether or not, under the evidence, there was a reservation of title was one for the jury, and the learned trial Judge erred in directing a verdict for the defendant.

3. That the evidence clearly showed that there had been a waiver of the alleged reservation of title, and there should have been binding instructions for the plaintiff, or at least the question of waiver should have gone to the jury.

Respectfully submitted,

SHARPLESS and WAY,
Attorneys of Appellant.
LEWIS STARR,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS

November Term, 1917.

Wildwood Board of Education, *Plaintiff-Appellant,* vs. Webster Bright and Central Terra Cotta Company, *Defendants-Respondent.*	On Appeal From Supreme Court.

BRIEF OF DEFENDANTS-RESPONDENT

STATEMENT OF CASE AND QUESTIONS INVOLVED.

Facts.

Plaintiff brought its action of replevin against the defendants, and on trial before the Supreme Court at the Cape May Circuit suffered a judgment against it and in favor of the defendants. From this judgment plaintiff has appealed.

Judgment rested upon the following facts proven in evidence. The Central Terra Cotta Company delivered to the Richardson Construction Company a quantity of terra cotta for the latter's use in the erection of a high-school at Wildwood. The material was delivered under an oral agreement between vendor and purchaser that title should remain in the vendor until the purchase price was paid. The contractor defaulted and the Board of Education, proceeding in accordance with that clause of the statutory contract which permitted the owner, on default of the builder, to "enter upon the premises and take possession of all materials, tools and appliances thereon," and supposing that the terra cotta was the property of the builder, seized it with the declared purpose of using it in the construction of the school building. Before such use had been made of it, the Terra Cotta Company retook possession of its material and sought to remove it. While so engaged, the Board replevied it. No bond was filed by the defendant and its defence was rested on the sole ground of its outstanding title in the terra cotta. A verdict for the amount of $944.77 with costs was rendered in defendant's favor, *S. of C. p.* 45.

Grounds of Appeal.

After stating the usual grounds of appeal (1) that the trial Judge erred in refusing to direct a verdict for plaintiff, and (2) in directing a verdict for defendants, the plaintiff-appellant specified the three following grounds of appeal which are made the theme of argument in its brief (also noted as points B, C and D in the brief, page):

> "(3) The learned trial Judge should have permitted the jury to pass upon the question of

fact as to whether or not, by reason of the transaction between the Central Terra Cotta Company and W. A. Richman, the former reserved title to the articles sold.

"(4) The learned trial Judge erred in holding that the plaintiff was not a subsequent purchaser or mortgagee within the contemplation of the statute respecting conditional sales.

"(5) The learned trial Judge erred in holding that the Central Terra Cotta Company did not waive its right as a conditional vendor by the filing of the municipal lien claim to recover the amount due."

Consideration of the questions of fact raised by these grounds of appeal may be conveniently included in our discussion on the law.

DISCUSSION OF APPELLANT'S POINTS.

A. Proof of Conditional Sale— Was There a Question of Fact?

Plaintiff argues under the third specification of error (and point B of its brief) that there was testimony contradicting the evidence of a conditional sale.

First, let us note briefly the evidence which proved the retention of title in the seller. This testimony was furnished both by Walter Richman, President of the Construction Company, and by Albert Rogers, manager of the Terra Cotta Company. Rogers testified that the Company had entered into a contract to supply the Richman Construction Company with terra cotta in accordance with the specifications of

its building contract, the contract being completed by the Construction Company's letter of February 5th, 1916 (*Exhibit D2, S. of C. pp.* 16, 62). Subsequent to the making of this contract, and before the goods had been appropriated to the buyer's use, the parties entered into another contract regarding delivery. This transaction, which took place in his factory (*S. of C. pp.* 10, 25), Mr. Rogers described in the following words.

> "We had refused to ship the goods until satisfactory arrangements for payment were made, and Mr. Richman then came to us, in the middle of August, and said that he must have the goods around the first of September, but we said if we shipped them then, it would have to be a cash transaction, he would have to pay for it or we would have to send it sight draft. He objected to this on the strength, because he said he wanted the architect to see the goods before he we would send the goods down there as our property for him to have them inspected by the architect on the ground, and that he agreed then to pay for them as soon as they were inspected, and we agreed to do that, provided the goods should remain ours until they were paid for. We therefore shipped them and he delivered them at the building *as our goods*, for the architect's inspection.
>
> Q. He agreed to those terms, did he? A. He agreed to those terms in our office.
>
> Q. Were the goods then shipped in accordance to those terms? A. The goods were shipped on the first of September, according to that arrangement and we hadn't heard any more until inspection." (*S. of C. p.* 18.)

Richman testified that the sale was to be on sight draft, and the terra cotta accepted on approval of the architect, and to be paid for before he used it. When questioned on the subject of title, he testified as follows:

> "Q. Was anything said as to who it should belong to until it was paid for? A. Yes.
>
> Q. What was said about that? A. Well, he says, 'Then the terra cotta is ours until you pay for it?' I says, 'Yes.'" (*S. of C. p.* 25.)

This arrangement with regard to the delivery of the terra cotta and the retention of title by the vendor took place about the middle of August, 1916. *Testimony of Rogers, S. of C. bottom of page* 17. The materials were shipped on the first of September. *Ibid, p.* 18.

This agreement with regard to the retention of title was in itself, and independent of the previous contract of sale, a valid obligation at law and binding upon both parties. Each side paid consideration, the Terra Cotta Company by an agreement to ship on the first of September (something they were not required to do their previous contract,) and the Richman Construction Company by its agreement that title should remain in the Terra Cotta Company until payment was made. It is well settled that parol evidence is admissible to show that subsequent to the time of reducing a contract to writing the parties by a new agreement on sufficient consideration added some new stipulation or varied the terms of the written contract.

McKinstry vs. Runk, 12 N. J. Eq. 60;
Sharp vs. Wyckoff, 39 N. J. Eq. 376;
Van Syckle vs. O'Hearn, 50 N. J. Eq. 173.

If this testimony regarding the condition of retained title was uncontroverted, defendant was entitled to have the fact of said condition charged to the Jury:

> "Where the evidence, introduced in support of facts is of a conclusive character, is not controverted by other evidence, the court in instructing the jury may assume that such facts are true. * * * The court may assume the existence of a fact where only one finding as to such fact would be justified under the evidence, or where under the evidence there is no ground for a difference of opinion as to the existence of the fact, or reasonable men could draw but one conclusion therefrom, * * * Instructions of this character are not open to the objection of charging in respect of matters of fact."
>
> 38 *Cyc.* 1667.
>
> *Hammill vs. Pennsylvania Railroad Co.*, 56 N. J. L. 370, (S. C. 1894),

and, this proof establishing a *prima facie* case for defendant, to have a verdict directed in its favor.

> "Where the questions of fact are clearly established by undisputed evidence; where there is no substantial evidence to overcome a *prima facie* case; where there is no disputed evidence on material points; * * *—a verdict should be directed."
>
> 38 *Cyc.* 1566, *et seq.*;
>
> *Polhemus vs. Prudential Realty Corp.*, 74 N. J. L. 570 (E. & A. 1906);
>
> *Belcher vs. Manchester B. & L. Assn.*, 74 N. J. L. 833 (E. & A. 1907);
>
> *Ryle vs. Manchester B. & L. Assn., Ibid*, 840.

Against the testimony offered by Messrs. Rogers and Richman, our opponent enumerates a number of facts which he claims to be inconsistent with the retention of title by the seller. We will answer these in the order in which they are set down by our adversary.

(1) That the materials were, on September 1, 1916, shipped from Moorestown and consigned to the contractor at Wildwood.

There is nothing, however, inconsistent with a delivery of possession to the buyer and a retention of the title by the seller. The particular point made by our opponent is answered by *Section* 20 (1) *of our Sales Act,* 4 Comp. St. 4652:

> "Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract of appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer."

The reason for shipping in the name of the buyer was, as stated by Rogers, that "they could handle it for us and take it to the building for inspection. Otherwise we would have had to go down there and pay the freight and unload it and everything. That was a part of the bargain." *S. of C. p.* 23.

(2) That the bill of lading was made out in the contractor's name.

This is answered by our reply to paragraph (1) above.

(3)That the Richman Construction Company had exclusive control over the goods after they reached Wildwood.

It was intended that they should have. Naturally someone had to have control of the goods, and the intent of the parties (as evidenced by the bill of lading for instance) was that the Construction Company should have possession and control. When approved by the architect, the goods were to be immediately paid for by the Richman Construction Company, and until paid for were to remain the property of the Terra Cotta Company. That a right of possession and control is not inconsistent with title withheld in another party is illustrated by the Section of the Sales Act quoted above, and indeed by both the judicial recognition (see *Elliot on Sales, p.* 764) and the legislative sanction of conditional sales (*see Section* 71 *of the Conveyance Act*).

(4) That the architect had not passed on the materials. We fail to see the relevancy in this point.

(5) That the Terra Cotta Company credited $220.-00 against the purchase price of the terra cotta and struck a balance.

Nor do we see the relevancy in this point. A buyer can bind himself at one and the same time to pay and to postpone taking title until he pays. Entry of this item of indebtedness was in no way inconsistent with a claim to title by the defendant.

(6) That the freight bill was paid by the contractor. This has been answered under (1).

(7) and (8) The plaintiff under these heads argues that the municipal lien claim filed with the Clerk of the Board of Education and the affdavit that accompanied it were inconsistent with an outstanding title in the claimant.

The filing of the mechanic's lien claim was an assertion of a right to collect from the contractor the contract price of the material which he had ordered; it was nothing more. It was not a claim of property, but it was not inconsistent with a claim of property. As we have shown, a right to receive a contract price on an article sold and the right to have the article itself may exist at one and the same time. *Campbell Mfg. Co. vs. Rockaway Pub. Co.*, 56 N. J. L. 676.

The filing of a stop notice under the mechanic's lien law is merely the assertion of a claim of moneys due. The affect of the notice is to work an assignment *pro tanto* of the debt due from the owner to the contractor to the extent of the amount due from materialmen. *Anderson vs. Huff*, 49 N. J. Eq. 349; *Whighton vs. Brenner*, 26 N. J. Eq. 489; *Shannon vs. Hoboken*, 37 N. J. Eq. 133.

The assertion in the affidavit that merchandise was delivered pursuant to the contract of February 5th, 1916, is not a denial of the fact that it was also delivered pursuant to the contract of August, 1916. It was, indeed, delivered in pursuance of both contracts. The contracts were not inconsistent with each other; the later amended the former merely by supplementing it; it did not change it.

Moreover, as we shall show more fully later, the lien claim was filed on a mistaken assumption of facts, viz,, that the terra cotta had been actually used in the completion of the contract. *S. of C., p.* 28.

It is apparent from what we have just said, that none of the eight facts noted by our opponent were in any way inconsistent with the defendant's testimony of a conditional sale, and it follows that the Court acted properly in refusing to allow the case to go to the jury.

B. Was Plaintiff Entitled to the Protection of Sec. 71?

Section 71 of the Conveyance Act, 2 *Comp. St.* 1561 provides that:

> "In every contract for the conditional sale of goods and chattels hereafter made, which shall be accompanied by an actual delivery and be followed by an actual and continued change of possession of the things contracted to be sold, all conditions and reservations which provide that the ownership of such goods and chattels is to remain in the person so contracting to sell the same, or other person than the one so contracting to buy them, until said goods and chattels are paid for, or until the occurring of any future event or contingency, shall be absolutely void as against the judgment creditors not having notice thereof, and subsequent purchasers and mortgagees in good faith not having notice thereof, whose deeds or mortgages shall have been first duly recorded, from the person so contracting to buy the same, and as to them the sale shall be deemed absolute * * *."

In order to successfully sustain the contention that the conditional sale was of no effect as against the plaintiff, it was encumbent upon plaintiff to

demonstrate that it was either a "judgment creditor," a "subsequent purchaser" or a "mortgagee in good faith," these being the only parties named by the act as entitled to the protection of recordation.

The learned counsel for the plaintiff has attempted to sustain this burden by the citation of certain English cases which deal with a wholly different question—the right of an owner, under a statutory contract, to take possession of the materials and supplies left on the ground by a defaulting contractor. Counsel has not, by the citation of any cases construing Section 71, sought to show that an owner is entitled to be classed with judgment creditors, subsequent purchasers, and mortgagees.

It is apparent that the statute cannot be stretched so far. The plaintiff who has had no relation whatsoever with the Terra Cotta Company was certainly not a creditor of that Company, much less a judgment creditor. The plaintiff had certainly not purchased the terra cotta and could not claim to be a "subsequent purchaser"; nor had it obtained a mortgage upon the property.

Against the attempt to extend the plain limitation of this act we must recall the rule that statutes in derogation of the common law or the common right will not be extended beyond their precise terms.

> "As the common law forms the basis of the Anglo-Saxon system of jurisprudence, and furnishes the rule of decision except so far as it has been changed by statute, the common law in regard to a particular matter is presumed to be in force until it affirmatively appears that it has been abrogated or modified by statute * * *. Where the statute not only effects a change in the common law, but is also in derogation of common rights, it must be construed with es-

> pecial strictness. Examples of such statutes are those which grant power to deprive persons of the ownership of property without their consent; which impose restrictions upon the control, management, use, or alienation of private property; which disturb vested rights in property or contracts; or which restrain the freedom of contract, the exercise of any trade or occupation, or the conduct of business. The rule to be applied in the construction of all such statutes is that they must not be deemed to extinguish or restrain private rights, unless it appears by express words or plain implication that it was the intention of the legislature to do so."
>
> 36 *Cyc.* 1178, 1180.

"When the common law and a statute differ, the common law gives way to the statute, but only when the latter is couched in negative terms or where its matter is so clearly repugnant that it necessarily implies a negative."

Hetfield vs. Central R. R. Co., 29 N. J. L. 571, 573;
Tinsman vs. Belvedere R. Co., 26 N. J. L. 148, 166;
Sinnickson vs. Johnson, 17 N. J. L. 129, 144;
Eayre vs. Earle, 8 N. J. L. 359.

Previous to the enactment of the statute requiring recordation of a conditional sale of personalty, full power of alienation existed, and the rule of *caveat emptor* prevailed.

> "At common law, executory contracts to sell goods on the condition precedent that title shall remain in the seller until the price is paid, and that possession shall immediately be delivered

> to buyer, are valid between the parties and against the buyer's creditors and subsequent purchasers. Such contracts may be in any form the parties may select, and need only be in writing, or, in the absence of statutory requirements, be filed or recorded. * * * When one obtains possession of goods which he did not have before, every one dealing with him concerning them is bound to ascertain at his peril upon what terms or conditions he holds them, before trusting to his apparent ownership of them."
>
> *Elliot on Sales*, pp. 765, 774.

Unless the language of the statute plainly admits of the construction placed upon it by our opponent, the defendant cannot claim its benefit. The few cases on the subject are all adverse to extending its terms.

It was held in *Reischmann vs. Masker*, 69 N. J. L. 353, that a landlord who caused a distress to be levied upon such goods and chattels in possession of the person agreeing to buy, for arrears of rent on the premises occupied by him, is not a judgment creditor within the meaning of the act.

There is also held in *Smith vs. Ritz Company*, 74 N. J. Eq., 616, that the section protected only judgment creditors, subsequent purchasers and mortgagees without notice. Receivers and general creditors of an insolvent corporation were not "judgment creditors."

With regard to the English cases that our opponent has seen fit to set forth in his brief, a word will suffice. They are one and all involved with a question relative to the rights of owner and builder. In no case do they involve a contest between owner and subcontractor as such.

Thus in *Brown vs. Bateman*, L. R. 2 C. P. 272, the contest was between a judgment creditor of the contractor and the owner of the land. The creditor claimed the right to resist a seizure of the property by the owner on the ground that the provision of the contract allowing seizure upon default was unconstitutional, but this right was asserted as the right of the contractor. In other words, the judgment creditor claimed to stand in the shoes of his debtor. He did not claim in his own right.

Byford vs. Russell, 2 R. B. 522, was similar to *Brown vs. Bateman*. *In re Winter*, 8 Ch. D. 225, was a contest between the assignee of a bankrupt contractor and the owner, in which the assignee merely stood in the shoes of the contractor. *Beeston vs. Mariott*, was a dispute between owner and builder. *In re Waugh* involved the claim of a trustee in liquidation who had taken over the assets of a contractor—a case substantially identical with the others cited by opponent.

In none of these English cases, nor in that of *Duplan Baker Co. vs. Spencer*, 115 Fed. 689, was there any claim of property asserted by a subcontractor or any other third party save such as was obtained through legal proceedings. If a subcontractor's claim was involved, it was a claim for contract price, not for goods. The question herein involved was, therefore, not decided by any of plaintiff's cases.

C. Did Defendant Waive Its Claim of Property?

The first answer to the argument of waiver is that the act alleged to constitute a waiver was done in

ignorance of the defendant's right to make an election.

The stop notice filed by the Terra Cotta Company alleged that "the materials were furnished to the contractor, Richman Construction Company, and were actually used in the execution and completion of the said contract." *S. of C. p.* 58.

Mr. Sullivan, president of the Terra Cotta Company, testified on the stand that this statement was inaccurate and made under a misconception of the facts. The mistake was discovered a day after affidavit to the stop notice had been signed.

> "I met Mr. Richmond the day after that was signed, at his Bonding Company office in Philadelphia, where he had gone. I called him up from my office in Moorestown and found that he had gone to his Bonding Company. I went there and found him and waited for him to come outside and questioned him about it, and he said as a matter of fact he hadn't used any of the stuff." *S. of C. p.* 27.

Mr. Sullivan then reported to his attorneys the fact that the terra cotta had never been used, and steps were taken to remove the material.

There was no contradiction of the fact that the mechanic's lien claim was filed upon the assumption that Richman had used the material. *S. of C. top of page* 28.

The Court so regarded the evidence:

> "It is an undisputed fact that Mr. Sullivan was in error when he took the ground that the material has been used in the building. Everybody seems to concede that that was an error on his part, and that seems to corroborate his present position. That notice was made under a

> misapprehension of facts. He swears to it and he seems to be corroborated, as I say, by the undisputed facts. That being so, what is there for a jury to decide?'' *S of C p.* 44.

With this understanding, there was no course open to the defendant company but to make its claim as a materialman. It could not attempt to assert a claim of property in the terra cotta when it was under the impression ''that its material had been actually used in the construction of the building,'' in other words, the goods had undergone the process of accession, and changing their nature from personalty to realty had passed to the owner of the realty. In such case there is no redress open to the owner of the personalty. 19 *Cyc.* 1057. The Terra Cotta Company therefore had no knowledge of its right or duty to make an election and its failure to exercise a right of which it was ignorant cannot constitute waiver.

> ''A waiver exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right of his intention to rely upon that right. Knowledge of the existence of the right, benefit, or advantage on the part of the party claimed to have made the waiver is an essential prerequisite to its relinquishment. No one can be said to have waived that which he does not know; or where he has acted upon a misapprehension of facts. Waiver or acquiescence, like election presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim.'' 40 *Cyc. pp* 259, 260.

Plaintiff relies upon the case of *Heller vs. Elliott*, 45 N. J. L. 564. The case is not in point. The seller, there, had the choice of two remedies and its election of one was held to constitute a waiver of the other. The case would have been in point had plaintiffs been able to prove an ignorance of his rights but as the Court pointed out, his evidence simply went to show that they "supposed that the goods were out of reach, and they therefore choose to proceed by attachment to recover the price." *p.* 565. A mere circumstance of inconvenience is not enough; the party must be misled to believe in the extinction of a right. In *Heller vs. Elliott*, the right of respossession may have been rendered difficult of realization, but it was not extinguished as it was to the mind of the defendant in the case at bar.

The second answer to the claim of waiver is that the defendant was not bound to choose between one of two inconsistent remedies. These remedies of repossession and of recovery on the contract price were supplementary and not inconsistent.

The case of *Campbell Printing Co. vs. Rockaway*, 56 N. J. L. 676 (E. & A. 1894), held that when goods were sold by conditional sale, title to remain in the vendor until a mortgage was given to secure the buyer's notes, that the seller could recover judgment on the notes, and after such judgment reclaim the goods by replevin.

The defendant has failed to establish his right to a reversal.

Respectfully submitted,

WILSON & CARR,
Attorneys for Defendants.