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N. J. Court of Errors & Appeals.

CAMPBELL PRINTING PRESS AND MANUFACTURING CO.,
Plaiantiff in Error and below,

v.

ROCKAWAY PUBLISHING CO.,
Defendant in Error and below.

On Writ of Error.

CASE.

CORTLANDT & WAYNE PARKER, plaintiff's attorneys.

E. A. QUAYLE, defendant's attorney.

WRIT OF ERROR.

NEW JERSEY, *to wit:*

The State of New Jersey, to the Judges of our Morris County Circuit Court, greeting:

[L. S.]

Because in the record and proceedings, and also in the giving of the judgment, in a plaint which was in our said Court before you, between the Campbell Printing Press and Manufacturing Company, plaintiffs, and the Rockaway Publishing Company, defendants, in an action of replevin, as is said manifest error hath intervened to the great damages of the said plaintiffs as aforesaid, as by their complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice be done

to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you send distinctly and openly under your seal the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals, before the Judges thereof, on the thirtieth day of December instant, and this writ, and that, the records and proceedings aforesaid being inspected, we may cause to be further done thereupon what of right and according to law ought to be done.

Witness, ALEXANDER T. MCGILL, Chancellor of the State of New Jersey, the eighteenth day of December, one thousand eight hundred and ninety-three.

HENRY C. KELSEY, *Clerk.*

CORTLANDT & WAYNE PARKER, *Attorneys.*

THE JOHN L. MURPHY PUBLISHING CO., Printers, Trenton, N. J.

N. J. Court of Errors and Appeals.

CAMPBELL PRINTING PRESS AND MANUFACTURING COMPANY,
Plaintiff in Error,
vs.
ROCKAWAY PUBLISHING COMPANY,
Defendant in Error.

Error to Morris Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff sold a press to defendant under contract that deferred payments be secured by chattel mortgage and that till such mortgage be given the title should remain in plaintiff, with the right to *possession* on default in payment, but that on delivery of mortgage or payment, a bill of sale should be given.

Plaintiff took judgment for the deferred payments. The court below held plaintiff could not take possession.

The opinion is on page 20. The contract, page 12, and especially page 13, lines 15–30.

POINTS.

This contract is not, as held by the court below (page 20), a conditional sale, with right of *rescission* (*i. e., forfeiture*) by the vendor on the vendee's default.

It is no agreement for forfeiture such as disgraces the trade in many articles.

It reserves title and the right to possession simply as *security* for payment.

After possession we are still bound by the contract.

That contract gives the same lien only as if bill of sale were given and mortgage taken back, in which case there would be no question.

This construction does equity and avoids forfeiture.

See Brewer *v.* Ford, 54 Hun 116; affirmed, 126 N. Y. 643.

Miller *v.* Steen, 30 Cal. 402.

Cole *v.* Berry, 13 Vr. 308.

Marvin *v.* Norton, 19 Vr. 410.

Roddy *v.* Brick, 15 Stew. 218; 17 Id. 245.

The principles appearing from these cases are as follows:

The retention of title and right of possession in the seller will, if possible, be construed to be by way of security only. A contract will not be construed as a conditional sale with right of forfeiture, unless it be absolutely necessary.

Second. The particular contract in this case involves no words of forfeiture. The vendor retains title as security. He may retake possession as additional security.

There is nothing in the contract to say that such retaking of possession is an avoidance of the contract or a rescission of the contract. The property remains in his hands as if by way of pledge or chattel mortgage, or as if he had never delivered possession and was not bound to deliver possession until he was paid, but still subject to the terms of the contract.

The plaintiff is entitled to judgment.

RICHARD WAYNE PARKER,
Of Counsel.

March 22d, 1894.

RETURN.

Pleas before the Morris County Circuit Court, holden at Morristown, in and for the county of Morris in the term of October, in the year of our Lord one thousand eight hundred and ninety-three.

HON. WILLIAM J. MAGIE,
Presiding Judge.

ELIAS B. MOTT, *Clerk.*

Morris County Circuit Court, of the eighteenth day of August, in the year of our Lord eighteen hundred and ninety-one.

THE ROCKAWAY PUBLISHING COMPANY, *ads.* THE CAMPBELL PRINTING PRESS AND MANUFACTURING COMPANY.	}	*In Replevin.*

MORRIS COUNTY, *ss:*

The Rockaway Publishing Company, the defendant in this suit, was summoned to answer the Campbell Printing Press and Manufacturing Company, the plaintiff in this suit, of a plea whereof they took the goods and chattles of the said plaintiff, and unjustly detained the same against sureties and pledges, until, &c.; and thereupon the said plaintiff, by FORD D. SMITH, its attorney, complains for that, the said defendant, on the tenth day of August, in the year A.D. eighteen hundred and ninety-one, in the township of Rockaway, in the county of Morris, in a building on the westerly side of Wall street in Rockaway in said township, took one No. 3 new improved hand cylinder country printing press, manufactured by the plaintiff; also two sets of roller stocks, one set cast with

composition, wrenches, rubber blankets and all the regular attachments of such a press, the goods and chattles of the plaintiff, of great value, to wit, of two hundred dollars, and unjustly detains the same against sureties and pledges, until, &c. ; wherefore, the said plaintiff saith that it is injured and hath sustained damages to the amount of eight hundred dollars, and therefore it brings its suit.

And the said defendant, by EUGENE J. COOPER, its attorney, comes and defends the wrong and injury when, &c., and says that it admits that on the tenth day of August, in the year A.D. 1891, in the township of Rockaway, in the county of Morris, in a building on the westerly side of Wall street in Rockaway in said township, it took one No. 3 new improved hand cylinder country printing press, manufactured by the plaintiff ; also two sets of roller stocks, one set cast with composition, wrenches, rubber blankets, and all the regular attachments of such a press ; but says they were not the goods and chattles of the said plaintiff, but were owned and now detained by this defendant in its own legal right at the time of the alleged taking thereof. And of this it puts itself upon the country, &c.

Therefore, let a jury come before the Judge of our said Circuit Court, to be holden at Morristown, in and for the county of Morris, on the first Tuesday of May, in the year one thousand eight hundred and ninety-three, until which day the cause aforesaid between the parties aforesaid was continued from term to term in due form of law. By whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, then, &c., at which day before the said Judge of our said Court at Morristown, comes the parties aforesaid, and thereupon by the assent and consent of the parties and their attorneys aforesaid, a trial by jury was waived, and all matters of difference between the parties was submitted to the Court for determination and adjudi-

cation; and because the said Court now here was not yet advised what judgment to give upon the premises, a day is therefore given to the parties aforesaid, at Morristown aforesaid, until the fourth day of December, eighteen hundred and ninety-three, to hear the judgment of the said Court; thereupon for that the said Court now here are not yet advised thereof at which day before the Judge aforesaid, come the parties aforesaid, by their attorneys aforesaid, and thereupon all and singular, the premises having been duly considered and mature deliberation being thereupon had, it is considered that the said Campbell Printing Press and Manufacturing Company, when, &c., was not entitled to the possession of the said goods and chattles nor any of them, and that it take nothing by its said writ, but that it be in mercy, &c., and that the said Rockaway Publishing Company do go thereof without day, &c.

And it is further considered by the Court now here, that the said The Rockaway Publishing Company do recover against the said The Campbell Printing Press and Manufacturing Company, forty-two dollars and sixty-eight cents for its costs and charges by it laid out about its defence in this behalf, before the Court now here adjudged to the said Rockaway Publishing Company, and with its assent, according to the form of the statute in such case made and provided, and that the said defendant have execution thereof. And the said Campbell Printing Press and Manufacturing Company, in mercy, &c.

Judgment signed December 4, 1893.

W. J. MAGIE, *J.*

STATE OF NEW JERSEY, }
MORRIS COUNTY. } *ss:*

I, ELIAS B. MOTT, clerk of the county of Morris, and also clerk of the Circuit Court holden in and for said county, do hereby certify that the forego-

ing is a true and correct copy of the record of the judgment recovered in said Court by the Rockaway Publishing Company *ads.* the Campbell Printing Press and Manufacturing Company, as fully as the same remains in my office in Book T of Circuit Court judgments for said county, on pages 247, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Morris-
[L. S.] town, this twenty-ninth day of December,
10 eighteen hundred and ninety-three.

ELIAS B. MOTT, *Clerk.*

Morris Circuit Court.

THE CAMPBELL PRINTING PRESS AND MANUFACTURING CO., *v.* THE ROCKAWAY PUBLISHING COMPANY.	*In Replevin.*

BILL OF EXCEPTIONS.

Messrs. CORTLANDT & WAYNE PARKER, (Mr. C. Parker, Jr.) for the plaintiff.

Mr. E. A. QUAYLE, for the defendant.

Be it remembered, that on the fifth day of May, 1893, at the session of said Court, holden at the Court House, in Morristown, in the county of Morris, before his Honor, WILLIAM J. MAGIE, Judge of said Circuit Court, the issue joined in the above stated case between the above stated parties, (*pro ut* the pleadings,) came on to be tried before the Court, a jury being waived, and thereupon the attorneys of the said plaintiff, to maintain the said issue on its part, offered in evidence certain deeds, records, documents and evidence as hereinafter contained.

Mr. Parker: I offer in evidence the certificate of the organization of the Rockaway Publishing Company, Book A of Incorporations, page 347, showing the names of the original directors, and among them George C. Deats.

Joseph F. Tuttle, sworn for the plaintiff.

Direct examination, by Mr. Parker:

I reside at Rockaway, N. J.; I am the Secretary of the Rockaway Publishing Company.

Q Who is the President of that company?

A George C. Deats.

Q Where is the business of the Rockaway Publishing Company conducted?

A In Rockaway.

Q At the office of George C. Deats?

A Yes, sir.

Q Where is that?

A On what we call Wall street.

Q On which side of Wall street?

A On the left-hand side.

Q Are you employed in that office, too?

A No, sir; nothing to do with it.

Q There is a Campbell printing press in that office, is there not?

A I don't know; I suppose there is, of course; I don't know anything about the press.

Q How long has Mr. Deats been President?

A Ever since the company was organized; I have forgotten the date.

Q Organized on May 10th, 1890, was it not?

A Yes, sir.

Counsel: That is all.

Mr. Quayle: I have no questions.

Not cross-examined.

Otis F. Wood, sworn for the plaintiff.

Direct examination, by Mr. Parker:

I reside in New York; I was in the employ of the Campbell Printing Press Company up to a year and a half ago as salesman.

Q Did you make any sales to Mr. George C. Deats, of Rockaway?

A Yes, sir.

Q When did you make them?

A July—I think about 1889.

Q What did you sell him?

A I sold him what they call a new improved hand cylinder press.

Q Was there any contract or writing drawn up between the company and Mr. Deats in reference to that sale?

A Yes, sir.

Q I show you a contract, George C. Deats, between him and the Campbell Printing Press Company; do you recognize that contract?

A Yes, sir.

Q When was it made?

A July 16th, 1889.

Q Is that your signature?

A Yes, sir.

Q "Otis F. Wood?"

A That is my signature.

Q Did you see George C. Deats sign that contract?

A Yes, sir; I think I handed him the pen to do it.

Q Have you been to the office of Mr. Deats or the Rockaway Publishing Company since that time?

A Yes, sir; I was there within three or four days.

Q What day were you there?

A Day before yesterday.

Q And where was it—in Rockaway?

A It was in Rockaway, yes sir; Wall street, I think.

Q Did you see George C. Deats there?

A Yes, sir.

Q The same person that signed that contract?

A Same person.

Q Was there any conversation between anybody and Mr. Deats in your presence there?

A Yes, sir, a party asked him if that was the

contract that he signed, and if the press in his office that we saw was the same machine; he says yes.

Q He said it was the same machine mentioned in the contract?

A Same machine mentioned in the contract.

Q Was there any conversation in reference to whether the amount stipulated to be paid in that contract, had been paid?

A I think he was shown two or three notes that he said had not been paid.

Q I show you some notes, one dated October 23d, 1890, for $33.69; another dated February 3d, 1891, for $148.94; another dated January 27th, 1890, for $83.33. Were those notes shown to him?

A Yes, sir, I think those are the notes, pinned to the contract; they were shown him at that time.

Q And he said those notes had not been paid, did he?

A Yes, sir, he took them in his hand and said he thought they had not been paid.

Q What was the number of the printing press in the office at Rockaway?

A I think 4854.

Q 48 what?

A 4845.

Q Does every press that is manufactured and sold by the Press Company bear a number?

A Yes, sir; it has the number of each machine stamped on the end of the cylinder shaft.

Q Did you observe the number of the machine in the house on Wall street, occupied by Mr. Deats and the Publishing Company?

A Yes, sir, 4845.

Counsel: That is all.

Cross-examination, by Mr. Quayle:

Q Were those notes all given at the same time?

A That I can't say; I don't think they were.

Q Did you see Mr. Deats sign these notes?

A No, sir.

Q You are not working for the Company now?

A No, sir.

Q When did you say you were at Rockaway?

A I was there once in 1889, and I was there two days ago.

Q The last time, two days ago?

A Yes, sir.

Q And you had these notes with you?

A They were not in my possession; they were in the possession of another party, Mr. Brower.

Q Do you know whether these are the notes that were shown to him?

A I can swear to that.

Q And he said he still owed them?

A He said he believed they were unpaid.

Q Did he say anything else?

A In regard to what?

Q These notes?

A No, nothing.

Q Did he say there had been judgments entered on these notes?

A I believe he did make some remark of that kind, what it was exactly I don't know; he took the contract with these notes pinned to it in his hands and looked at them.

Q Were you interested in any way on the trial of the case before; were you here as a witness?

A Yes.

Q Do you know whether or not the suit on these notes was contested?

A No, sir, I do not.

Counsel: That is all.

The contract and notes above referred to are as follows:

CAMPBELL PRINTING PRESS AND M'F'G CO.

Factory, Taunton, Mass. } 160 William Street, New York. 325 Dearborn Street, Chicago.

No. 20,031.

The Campbell Printing Press and Manufacturing Company hereby agrees to sell at the sum of $525 and one 25x41 Cm. Washington Hand Press, to G. C. Deats, Esq., of Rockaway, Morris County, N. J., one of its No. 3 New Improved Hand Cylinder Country Printing Presses, to be delivered, boxed on cars at its factory in Massachusetts, about as soon as possible, warranted free from defects of material and manufacture, and with the following attachments: Two sets of roller stocks, one set cast with composition in lieu of moulds, wrenches, rubber blanket, and all regular attachments.

Mr. G. C. Deats hereby agrees to buy said press as above specified, and to pay therefor, thirty days from receipt of bill of lading of same, $25, and the balance in payments evidenced by purchaser's notes of even date with said bill of lading, and bearing six per cent. interest and exchange on New York, as follows:

Three	months	from	receipt	of	press,	$83 33
Six	"	"	"	"	"	83 33
Nine	"	"	"	"	"	83 33
Twelve	"	"	"	"	"	83 33
Fifteen	"	"	"	"	"	83 33
Eighteen	"	"	"	"	"	83 35
						$525 00

($33.67, in pencil.) *Cr.* Eight col. Washington hand press, (as above) $75.00.

Main shaft, diameter inches; speed ; turns per minute; to belt from

The purchaser to deliver the said notes on receipt of bill of lading. The seller to send erector to

superintend erection of press; purchaser paying for erector's time, hotel bills and all traveling expenses. Any second-hand machinery taken in part payment, to be delivered by purchaser, complete in all parts, free of encumbrance, and boxed, f. o. b. cars at place of execution of this contract.

The purchaser agrees to insure said press fully, immediately upon its receipt, (loss, if any, first payable to the Campbell Printing Press and Manufacturing Company,) and to deposit such policy with the seller.

It is also agreed that the deferred payments above mentioned shall be secured by first mortgage on the property herein contracted to be sold.

It is further agreed that the title to the said property shall remain in the seller until such mortgage be given, or until the purchase price, with interest, has been fully paid; and in case of any default in any of the terms of this contract, the seller shall have the right to take immediate possession of said property.

Upon the execution and delivery of the aforesaid mortgage, or the payment of the purchase price in cash, the Campbell Printing Press and Manufacturing Company agree to execute and deliver a good and sufficient bill of sale of the above described property.

Subject to Campbell Press Co.'s approval.

(Signed,)

Campbell Printing Press and Mn'f'g Co.,

By Otis F. Wood,

G. C. Deats.

Rockaway, N. J., July 16, 1889.

Crossed. Note—it is agreed that the whole agreement between the parties is contained in this contract, and that all representations and warranties, unless reduced to writing and inserted herein, are void.

ENDORSED. No. 20,031. Contract of G. C. Deats. Entered July 16, 1889. Order book No. 17.
Entered Sec. I. Ins. record.
Press shipped,
Cash received,
Notes received,
T. C. Security ; not to file a B, 12-8-90.
Ins. received,

$83.33.
8.00 Int. } 91.33.

Rockaway, N. J., Jan. 23, 1890.

Fifteen months after date, I promise to pay to the order of Campbell Printing Press and Manufacturing Co., eighty-three and $\frac{33}{100}$ dollars, negotiable and payable at Nat. Union Bank, Dover, N. J., with interest at the rate of 6 per cent. per annum from date; if not paid at maturity and collected by attorney, I agree to pay ten per cent. attorney's fees. Value received.

Due April 26, 1891.

(Signed) G. C. DEATS.

Endorsed: Campbell Printing Press and M'f'g Co., by J. L. BROWER, *Pres.*

$33.69.
1.51 Int. } 35.20.

Rockaway, N. J., Oct. 23, 1890.

Nine months after date, I promise to pay to the order of Campbell Printing Press and Manufacturing Co., thirty-three $\frac{69}{100}$ dollars, negotiable and payable at the National Bank, Dover, N. J., with interest at the rate of 6 per cent. per annum from date; if not paid at maturity and collected by attorney, I agree to pay ten per cent. attorney's fees. Value received.

Due July 26, 1891.

(Signed) G. C. DEATS.

Endorsed: Pay to the order of National Bank for collection. The Campbell Press and M'f'g Co. OGDEN BROWER, *Treasurer.*

$148.94
1.70 Int. } 150.64

Rockaway, N. J., Feb. 3d, 1891.

On April 10th, 1891, after date, I promise to pay to the order of Campbell Printing Press and Manufacturing Co., one hundred and forty-eight $\frac{94}{100}$ dollars, negotiable and payable at Rockaway, N. J., with interest at the rate of 6 per cent. per annum from date, and current rate of exchange on New York; if not paid at maturity and collected by attorney, I agree to pay ten per cent. attorney's fees. Value received.

Due April 13th, 1891.

(Signed) G. C. Deats.

Ogden Brower, sworn for the plaintiff.

Direct examination, by Mr. Parker:

I reside in Montclair, New Jersey; I am Treasurer of the Campbell Press Printing Company, and have been since 1884.

Q Have you had any negotiations with George C. Deats in regard to the contract which has been shown this former witness?

A Yes, sir.

Q What negotiations did you have?

A In regard to what—the payment of the notes?

Q Yes?

A Why, the negotiations covered principally a renewal of the payments as they came due.

Q Were the notes mentioned in the contract ever in your possession?

A Yes, sir.

Q And what became of them?

A They were—well, they are in our possession yet, except—unless any of them have been paid in part; that I could not tell.

Q Were there any notes given in renewal of any of them?

A Yes, sir.

Q I show you these three notes which have been shown to the former witness?

A Those are the three renewal notes that represent Mr. Deats' indebtedness to us now.

Q And what is his indebtedness?

A In the neighborhood of $227, without accrued interest.

Q Which has been unpaid on that contract?

A Yes, sir.

The Court: How much?

A $227.17, without figuring the accrued interest.

Cross-examination, by Mr. Quayle:

Q What is the amount of the original contract?

A Well, it was partially in money, and partially a second-hand press; $525 and a Washington hand press.

Q Well, did the Company ever take any means to collect the notes which you hold in your hands there?

A I believe they did.

Q What proceedings, if you know, did they take?

A Well, the notes were given to our attorney, and I believe judgment was taken on them.

Q On all three of them?

A That is my impression; yes, sir.

Q Was that suit or suits contested?

A Well, I can't say, of my own knowledge, whether they were or not.

Q Were you present in Rockaway?

A No, sir, I never was in Rockaway.

Q I didn't know but what you went up there the day before yesterday with the last witness. Then you have judgment against Mr. Deats for the amount of these notes?

A I am so informed.

Q You are the Treasurer of the Company, and ought to know the condition of the thing?

A I am Treasurer of the Company, but at present I am not thoroughly cognizant with matters of this kind, because they are in the hands—our President has attended to this particular part of the business just at present.

Q Is the President in Court here?

A No, sir; but it is a matter of record, I imagine.

Q Who is the attorney in the case?

A Mr. C DeHart Brower, that is the attorney for the Company; I don't know, never did know what attorney he might employ.

Q You don't know anything about the suit—

A Personally I don't.

Q That was brought on these notes?

A No, sir.

Counsel: That is all.

Re-direct examination:

Q You have no information about any judgment having been obtained on these notes?

A No, sir.

Counsel: That is all.

The Court: Was the contract for $525 cash and a machine, or was the machine—the second-hand machine—a credit on the $525.

Mr. Parker: It was $525, and a credit "eight column press as above, $75."

The Court: Yes; I thought Mr. Brower put it the other way.

Mr. Parker: I think the incorporation is admitted by the plaintiff, but I offer the certificate of the incorporation of the Campbell Printing Press Company. I offer the notes and the contract in evidence.

Ogden Brower, recalled.

Further direct examination, by Mr. Parker:

Q Do you know the number of the press that was sent to George C. Deats in performance of his contract?

A Yes, sir.

Q What was the number?

A 4845.

Counsel: That is all.

Further cross-examination:

Q Have you got a record of that number?

A Yes, sir.

Q Does it appear in this contract anywhere?

A No, sir; I don't think it does.

Q I see there is a clause in this contract which refers to the giving of a chattle mortgage; was that ever done?

Mr. Parker: I think not.

A I think that the contract was all sufficient at that time in New Jersey.

Q Was this ever put on record?

Mr. Parker: No.

A No, sir; never was recorded.

By the Court:

Q So far as you know, Mr. Brower, then, no mortgage was given?

A No, sir.

Mr. Parker: After having offered these papers I rest.

The Court: Now, the view I took of the case before, if the fact that there had been judgments on these notes was admitted, the whole question will be before me that I had before.

Mr. Parker: Yes, sir; I think it would be.

Mr. Quayle: Are you willing to admit the judgments?

Mr. Parker: I do not like to furnish ammunition for my adversary, but if that is all the gentleman wants to put in, and we have to go over to another day, I do not know but perhaps I had better furnish it.

The Court: There may be something else in the case.

Mr. Quayle: I would not rather close it up now, anyhow.

The Court: I will hear the case on the 15th, if all that is to be put in is the judgment.

Mr. Parker: I do not want to bring any further evidence. If the gentleman will notify me he is only going to put in the judgment, and I think that in this case that is all he will do, I think he should notify me.

The Court: Yes; you may do that, Mr. Quayle.

Adjourned.

And thereupon the defendant, to maintain and prove the issue aforesaid, on its part, offered in evidence the following testimony, records and documents as hereinafter contained—that is to say, the defendant offered a transcript of record and judgment, recovered by the plaintiff against George C. Deats, June 12th, 1891, on the above note of February 3d, 1891, said judgment being for $167.49 debt and $3.19 costs of suit, before Cornelius B. Gage, Justice of the Peace.

The defendant also offered like judgment for $99.45 debt and $3.19 costs of suit, recovered June 12th, 1891, on said note of January 3d, 1890.

And thereupon the said Judge, having taken time to consider the cause, both upon the facts and the law, did decide and render his opinion as follows:

Mem. MAGIE, *J.*

When this cause was previously tried, I concluded that it fell within the doctrine of *Heller* v. *Elliott*, 15 Vr. 467; S. C. 16 Vr. 564.

Upon review I remain of the same opinion.

Leaving out of view the express stipulations of the contract between plaintiff and Deats, respecting the giving of a chattle mortgage to secure the unpaid purchase money, and the right of plaintiff to take possession of the press on any default by Deats, the transaction is what *C. J.* WAITE called (using with approval the language of an Illinois Court) "a conditional sale, with a right of rescission on the part of the vendor in case the purchaser shall fail in payment of his instalments." *Fosdrick* v. *Schall*, 99 U. S. 235.

If on such a contract the buyer failed to make the stipulated payments, the parties thereafter stand in the same relation to each other and to the subject matter of the contract, as did the parties in *Heller* v. *Elliott*. The buyer has the goods but has no right to them, because he has failed to perform the conditions of the contract. The seller has the right of reclamation, which right is indistinguishable from that held to be in the seller in *Heller* v. *Elliott*, and may therefore be waived in the same manner.

Brewer v. *Ford*, 54 Hun. 116, is adverse to this view. It is said to have been affirmed in the Court of Appeals, (126 N. Y. 243, *sed quaere*), but if for the reasons given in the prevailing opinion of the General Term, I deem them inconsistent with *Heller* v. *Elliott*.

The express stipulations above referred to, do not change this view.

The right to take possession upon default on the part of the buyer, was not for the purpose of enabling seller to hold possession as security for the unpaid purchase money, for the parties expressly contracted that such security was to be furnished by

a chattle mortgage, and the right of reclamation followed on a default in giving such mortgage.

Doubtless the parties could have agreed that, upon default, the seller might reclaim and the contract remain enforceable against the buyer, *i. e.*, that there might be reclamation without rescission. But such is not the stipulation. The contract in giving seller the right to reclaim, merely expresses what would otherwise have been implied, and the right so expressed could also be waived by the seller.

The seller has, by proceedings to collect the purchase price, waived his right of reclamation.

Judgment must therefore be entered against the plaintiff—who, however, may have such exceptions as will best enable him to review my rulings.

And the plaintiff, by his counsel aforesaid, prays exceptions to the following rulings of the said Judge as hereinbefore contained:

First. To the ruling of said Judge that the transaction in evidence is a conditional sale, with right of rescission by the vendor in case the purchaser shall fail in payment of his installments, and said exception is sealed accordingly.

Witness my hand and seal.

W. J. MAGIE, *Judge.* [L. S.]

Second. To the ruling of said Judge that the seller's right of rescission in this case is undistinguishable from that which belongs to the seller in case of fraud by the purchaser, and said exception is sealed accordingly.

W. J. MAGIE, *Judge.* [L. S.]

Third. To the ruling of said Judge that the right to take possession upon default on the part of the buyer was not for the purpose of enabling the seller to hold possession as security for the unpaid purchase money, and said exception is sealed accordingly.

W. J. MAGIE, *Judge.* [L. S.]

Fourth. To the ruling of said Judge that the contract in this case is not for reclamation without rescission, and merely expresses what would otherwise be implied, and said exception is sealed accordingly.

W. J. MAGIE, *Judge.* [L. S.]

Fifth. To the ruling of said Judge that the seller has, by proceedings to collect the purchase price, waived his right of reclamation, and said exception is sealed accordingly.

W. J. MAGIE, *Judge.* [L. S.]

Sixth. To the ruling of the said Judge that judgment must, therefore, be entered in favor of the defendant and against the plaintiff, and said exception is sealed accordingly.

W. J. MAGIE, *Judge.* [L. S.]

N. B. At a previous attempt to try this cause the Judge was of opinion that the plaintiff should be nonsuited. The opinion is hereto annexed. But as no judgment was entered by defendant and the question had not been fully argued, the cause was renoticed and tried as above.

The following is the former opinion:

MORRIS CIRCUIT,

OCT. TERM, 1891.

CAMPBELL PRINTING, &C., CO.
v.
ROCKAWAY PUBS. CO.

Mem.

Upon the trial of this cause before the Court, (a jury having been waived), a motion to nonsuit was made at close of plaintiff's case. Decision on the motion was reserved, and defendant was permitted to go into its defence, which was directed

toward showing that it was a subsequent purchaser of the printing press, &c., in good faith, under the provisions of the act of May 9, 1889, (Laws 1889, p. 421.)

As I have reached the conclusion that plaintiff's proofs showed no right to the property sued for, I shall express no opinion on the sufficiency of the defence.

Under the terms of the article of July 16, 1889, between plaintiff and Deats, I think there was a sale of the press, &c., on a condition, viz. that the purchase price should be paid. Thereby plaintiff had an option to enforce its claim to the price or to assert title to the property. It chose to enforce its claim to the price by bringing suit upon notes given for the price and securing judgment thereon.

This was an election to enforce the claim for price, and necessarily a waiver of the right to reclaim the property. *Heller* v. *Elliott*, 15 Vr. 467, and 16 Vr. 564, is a case in point, and must govern this case.

See also *Bach* v. *Tuch*, 126 N. Y. 53.

The plaintiff must be called.

The plaintiff respectfully excepts to the ruling of the Court that judgment of nonsuit should pass against the plaintiff.

And said exception is sealed accordingly.

W. J. MAGIE, *J.* [L.S.]

ASSIGNMENT OF ERRORS.

Filed January 25, 1894.

Afterwards, that is to say, at the term of November, eighteen hundred and ninety-three, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, come the said The Campbell Printing Press and Manufacturing Company, by CORTLANDT & WAYNE PARKER, its attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in the giving of the verdict aforesaid, there is manifest error in this, to wit, that the said Judge at the trial of said cause ruled that the transaction in evidence is a conditional sale with right of rescission by the vendor in case the purchaser should fail in the payment of his installments.

Second. There is also error in this, that the said Judge at the trial of said cause ruled that the seller's right of rescission in this case is undistinguishable from that which belongs to the seller in case of fraud by the purchaser.

Third. There is also error in this, that the said Judge at the trial of said cause ruled that the right to take possession upon default on the part of the buyer was not for the purpose of enabling the seller to hold possession as security for the unpaid purchase money.

Fourth. There is also error in this, that the said Judge at the trial of said cause ruled that the contract in this case is not for reclamation without rescission, and merely expresses what would otherwise be implied.

Fifth. There is also error in this, that the said Judge at the trial of said cause ruled that the seller has, by proceedings to collect the purchase price, waived his right of reclamation.

Sixth. There is also error in this, that the said Judge at the trial of said cause ruled that judgment must, therefore, be entered in favor of the defendant and against the plaintiff.

Wherefore, and for other errors appearing in the record and proceedings aforesaid, the Campbell Printing Press and Manufacturing Company prays that the judgment aforesaid may be reversed, annulled and for nothing holden, and that it may be restored to all things it has lost on account of said judgment, and that the said The Rockaway Publishing Company may rejoin to the said errors aforesaid.

CORTLANDT & WAYNE PARKER,
Attorneys for and of Counsel with Plaintiff in Error.

JOINDER IN ERROR.

And hereupon afterwards, to wit, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and ninety-three, the said The Rockaway Publishing Company, by Edward A. Quayle, its attorney, comes into court and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and it prays here that the Court may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid, assigned for error, and that the judgment aforesaid in manner aforesaid given, may in all things be affirmed, &c.

E. A. QUAYLE,
Att'y and of Counsel with Def't.

March term 94

Ward & Tichenor, Law Case Printers, 832-834 Broad St., Newark, N. J.

N. J. Court of Errors & Appeals.

THE CAMPBELL PRINTING PRESS COMPANY,
Plaintiff below,
v.
THE ROCKAWAY PUBLISHING COMPANY,
Defendant below.

In Error to the Morris Circuit Court.

Supplemental

BRIEF FOR PLAINTIFF IN ERROR.

POINTS.

The plaintiff claims possession merely, not by way of forfeiture, or as the Court held, by rescission of the contract, but under the terms of the contract, and as security merely. It is entitled thereto, as one of its concurrent means of collecting its debt, and the judgment should be reversed.

This is an action of replevin for a printing press sold by plaintiff for notes, to be secured by chattel mortgage—title to remain in the seller till the mortgage be given or the price paid, with right to retake possession in case of default, and with agreement to give a bill of sale on receiving the price or the mortgage.

The notes are in default, and have been put in judgment. The plaintiff brought replevin. Trial was moved October 19, 1891, and the Court was of the opinion (*Case*, pages 22, 23,) that the plaintiff should be called under *Heller* v. *Elliott*, 15 Vroom, 468; 16 Vroom, 564; but no judgment was entered.

As the point now presented was not taken at that time, the case was retried on notice, before the Court, and judgment given for defendant on the opinion, (page 20.)

This is an action of replevin. The goods are admitted by the plea to be in the possession of the defendant, which obtained such possession through George C. Deats, its president and principal stockholder, under agreement of July 16th, 1889, (*Case*, pages 12, 13,) by which the plaintiff "agrees to sell" these goods to George C. Deats for $525, payable in various notes, at three to eighteen months, with the following provision (page 13, line 12):

"It is also agreed that the deferred payments above mentioned shall be secured by first mortgage on the property herein contracted to be sold.

"It is further agreed, that the title to the said property shall remain in the seller until such mortgage be given, or until the purchase price, with interest, has been fully paid. And in case of any default in any of the terms of this contract, the seller shall have the right to take immediate possession of said property.

"Upon the execution and delivery of the aforesaid mortgage, or the payment of the purchase price in cash, the Campbell Printing Press and Manufacturing Company agrees to execute and deliver a good and sufficient bill of sale of the above described property, subject to Campbell Press Co. approval."

It is understood that judgment has been recovered on some of these notes, which were unpaid.

Judgment being entered for the defendant, the plaintiff assigns errors to the Judge's rulings. (p 25.)

(1.) That this was a conditional sale with right of *rescission*, by the vendor, on failure to pay installments. (p. 20, l. 12.)

(2.) That the seller's right is indistinguishable from that which the seller has on fraud by the purchaser. (p. 20, l. 25.)

(3. That the right of possession under the contract was not for the purpose of security. (p. 20, l. 38.)

(4.) That the contract was not for reclamation, without rescission, and that it merely expresses what would otherwise be implied. (p. 21, l. 4.)

(5.) That therefore the seller, by proceeding to collect the purchase price, waived the right of reclamation.

These rulings are erroneous.

This contract is not for forfeiture, for rescission, for the right to retake and forfeit payments made. It is for security for a mortgage, for a lien and reservation of title for such security, until such mortgage and the right of *possession* after default, as further security.

Every consideration of public policy favors construing contracts as providing security, not penalties.

The case *Heller* v. *Elliott*, was one of a sale for cash, and the plaintiff after bringing attachment for the price and attaching these goods, desired to revoke the sale and recover the goods. It was rightly held that he had treated the sale as absolute and could not revoke it.

This case entirely differs from *Heller* v. *Elliott*, as also from the ordinary sales by installment, where the seller reserves the right to revoke the sale, forfeit payments and hold the goods as his own.

There is no revocation here. The contract is not revoked, nor the agreement to sell. *Possession* merely is to be taken *under* the contract. There is no forfeiture. If we take possession, we are still bound by the contract. The possession is only a security.

The whole contract practically gives the same lien on the goods for purchase money that would exist if a bill of sale were delivered and chattel mortgage given as therein provided. If this were done there could be no question of the right to sue on the notes, and at the same time to take possession under the chattel mortgage. It provides the same lien till that is done.

In case of a note and mortgage, the creditor can sue on the note, foreclose the mortgage and bring ejectment or replevin at once. Suit for possession, foreclosure and judgment, are all for the same remedy—for payment of the debt—not in abrogation of the contract, but in its enforcement.

This contract distinctly differs from the odious contract of installment sales, by which, after part payment made, it is provided that the contract may be abrogated and the purchaser lose both the goods and the money paid. If the possession be here recovered, the goods are still subject to the contract. They are held only by way of lien for the payment of the money. Whether this lien can be enforced by the ordinary chattel mortgage auction sale, or must be foreclosed, need not now be discussed. It is sufficient that there is no abrogation of the contract. The plaintiff only seeks possession as a means of enforcing payment.

If possession *had not been delivered*, indisputably the plaintiff need not have given possession until the money was paid. There is no inequity in allowing them to retake it on the same condition.

The principle is that, in this case, possession is sought, not in abrogation of the contract, but as security for its performance under its express terms. The fact that payment was likewise sought to be enforced by a suit at law, is not inconsistent with the right of possession as security.

The cases on the whole subject fully bear out this view. They differ according to the terms of the sale.

1. In an ordinary sale, title passes on delivery. The property can only be retaken when the sale was induced by fraud, and not then as against *bona fide* purchasers from the vendee, because until rescission the vendee had title. And in such case the seller can either ask his money under his contract, or avoid the contract and take back the goods. He cannot do both.

2. There is the case where the sale is *conditioned* to be void on non-payment of the purchase price. In this case the seller can take the goods at any time and forfeit what has been paid; and this even against honest purchasers, because the vendee's title was never good. (*Cole* v. *Berry*, 13 Vr. 313.)

This is the common case of conditional sales—a most inequitabe kind of contract, endeavored to be enforced in *Heller* v. *Elliott*.

3. The third case is where the sale is on terms that the seller retains a *lien* on the goods for his purchase money, just as if he has a mortgage, and *under* the contract he may take possession, not to revoke it, but under it and so as to secure his rights.

In such case the vendor's right is good as against the vendee, or his purchasers, but only as security for the money due him and by way of mortgage. This being so, he may foreclose and sue and use every remedy, and at once.

This is the fairest contract—the one to which all courts lean, because it avoids forfeiture.

See *Roddy* v. *Breck*, 15 Stewart, 221.

The rights and remedies in these three cases are so different that we must always distinguish them. This third case is the one the learned Judge mentions when he says, (21, line 3,): Doubtless the parties "Could have agreed that, upon default, the seller might reclaim and the contract remain enforceable against the buyer, *i. e.* that there might

be reclamation without rescission, but such is not the stipulation."

But this *is* the stipulation—we may take possession—but, the contract *proceeds*, that on payment we must convey.

This is the law.

In *Brewer* v. *Ford*, 54 Hun. 116, affirmed 126 P. L. 243, the case was on contract of the same character.

The case came up differently, but involved the same principle. In that case the seller recovered in trover the value of the goods from the assignee of purchaser without first tendering the unpaid notes. The Court held that the doctrine that suit for the notes or suit for the property would be an election of one or the other of the remedies, is not a true one. I quote: "This view of the legal effect of the contract denies to the vendor the full benefit of his agreement and deprives him of the right to enforce the vendee's promise to pay for the property, and at the same time retain the title thereto *as a security* for the performance of the vendor's promise. In other words, the rule, as stated, would be equivalent to a denial of the validity of the contract." The Court then put the case of a sale without delivery of possession, and says that the seller could sue on the promise to pay and hold the title and possession as security for the payment of the judgment; that such suit is not inconsistent with his right to retain title and possession until the promise be performed, and that if not, it would in effect declare the contract nugatory as to the vendor. And he then distinguishes the case from those wherein the contract is induced by fraud, and the vendor must elect whether to declare it void and sue for the goods, or to maintain the contract and sue for the money.

This whole case should be read.

But this distinction, between the retaking of pos-

session as security for the purchase price, and a rescission of the sale for non payment of the purchase price, is fully sustained by the case of *Miller* v. *Steen*, 30 Cal. 402, where property was sold by a so-called lease with a stipulation that title should remain in the vendor until payment was made, and that on failure thereof the vendor might *take possession*, and, at his *option, terminate a lease.* After part payment the vendor took possession and the purchaser tendered the balance due, and sued in replevin. It was adjudged that he could recover ; that taking possession had not rescinded the contract unless the vendor further exercised his option so to do. The Court says, "Admitting that the vendor was authorized to retake the property upon default and hold it for his security, still, unless the contract was rescinded, upon the full payment of the price, it would become the property of the vendees. There is also, it is true, a stipulation that the vendor might, 'at option, terminate the lease.' This, if it means anything more than to terminate the possession for the time being, is something in addition to retaking possession of the property, and may, perhaps, be construed into a right to rescind the contract. If so, then the vendor might take the property and have it sold in a proper proceeding to pay the balance due him, or he might take possession, and at the same time rescind the contract."

In *Cole* v. *Berry*, 13 Vroom, 308, where the purchaser of a sewing machine agreed that the machine should remain the property of Cole, and be subject to his control until actually paid for in cash, the agreement was held good as against an execution creditor, and the distinction between *rescinding* the contract and resuming possession *under* the contract, is laid down at the bottom of page 313. The question whether, under the special terms of that contract the sale was to become void or the possessions taken as security, was not in question.

The disposition of the courts to hold such contracts to be, by way of security only, is shown in *Roddy* v. *Brick*, 15 Stew. where a man holding a mortgage upon a mill, sold machinery to the mortgagor by bill of sale with condition that if the notes given should not be paid the sale should be void. This was held to be a chattel mortgage, because the mortgagee had recorded it as such, and the Court says: "This view is not at all in conflict with the case of *Cole* v. *Berry*, where the rights of the vendor, when it is intended that possession shall pass to the vendee but not the title to the thing agreed to be sold, are most clearly defined." The doctrine was affirmed in *Roddy* v. *Campbell* and others in the Court of Errors, 17 Stewart, 245, so far as the chattels had not been irrevocably affixed to the land.

The principles appearing from these cases, are as follows:

The retention of title and right of possession in the seller will, if possible, be construed to be by way of security only. A contract will not be construed as a conditional sale with right of forfeiture, unless it be absolutely necessary.

Second. The particular contract in this case involves no words of forfeiture. The vendor retains title as security. He may retake possession as additional security.

There is nothing in the contract to say that such retaking of possession is an avoidance of the contract or a rescission of the contract. The property remains in his hands as if by way of pledge or chattel mortgage, or as if he had never delivered possession and was not bound to deliver possession until he was paid, but still subject to the terms of the contract.

I add certain further points, as follows, from a brief of New York counsel: Mr Charles de Hart Brauer

POINT I.

THE JUDGMENT IN THE ACTION ON NOTES IS NOT A BAR TO THE MAINTENANCE OF THIS ACTION.

By a line of adjudication, which it is unnecessary to discuss in detail, it has been determined that a vendor, in a *title contract, is at law* the absolute owner, and the vendee but a bailee, and that upon default the vendor is entitled to the immediate possession, and that his retaking possession is but *the enforcement of the provisions of the contract.*

Herring *v.* Hoppock, 15 N. Y. 409.
West *v.* Bolton, 4 Vt. 558, (563).
Marston *v.* Baldwin, 17 Mass. 605.
Heath *v.* Randall, 4 Cush. 195.
Ballard *v* Burgett, 40 N. Y. 314.
Reed *v.* Upton, 10 Pick. 522.
Cole *v.* Berry.

Moreover, it has repeatedly been held that the vendor's right to retake possession does not proceed upon the theory of a *rescission* of the contract because repayment of the installments received is never necessary in order to maintain an action for the possession.

Campbell P. P. & Mfg. Co. *v.* Walker, Sup. Ct. 1st Dept.; decision filed June, 1886.
Brown *v.* Haynes, 53 Me. 578, (581.)
Fleck *v.* Warner, 25 Kans. 492.
Johnston *v.* Whittemore, 27 Mich. 463.

The former judgment cannot, therefore, be a bar to this action upon the ground that the contract is thereby rescinded.

The plaintiff by bringing the replevin action does not elect to enforce a forfeiture. The defendant has an equity in the nature of a right of redemption, and no election on plaintiff's part, or any proceeding whatever, except a foreclosure and sale, can bar such equity. This is a fundamental equitable rule.

Whether or not, then, the former action is a bar, depends solely upon the question whether defendant will still have contract rights in the replevied chattels.

POINT II.

[redacted], DEFENDANT, [redacted], ACQUIRED AN EQUITABLE INTEREST IN THE CHATTELS REPLEVIED.

The question now submitted, namely, the rights of a vendee, after default under a "Title Contract," is now for the first time in this State squarely presented for determination. We say the rights of a vendee, because if the vendee has no rights this action cannot be maintained, but if he has any rights, be they in the nature of an equitable lien or of an equity of redemption, then plaintiff, upon well settled equitable principles, is entitled to both foreclose those rights and collect his money.

The three views which have been advanced in regard to the rights of the parties may be stated as follows:

That the vendee forfeits all sums paid.

That the vendee is entitled to recover all sums paid, less a deduction for depreciation, &c.

That the vendee is the equitable owner and the vendor a trustee of the *legal* title, holding it as security for the debt.

The learned Justice below evidently adopted the view that the vendee forfeits all payment.

Surely, vendors have no cause of complaint with with such a ruling, but legalized robbery is none too strong a term to characterize the practices which such a rule of law would sanction. Plaintiff also, with its hundreds of presses upon which seventy, eighty and ninety per cent. have been paid, might well rest content if the adjudication below established the law throughout the State.

But let us consider this doctrine of forfeiture in the light of history, and note how equity in the case of mortgages, starting from the maxim that equity would relieve against forfeitures, has finally stripped the mortgagee of every vestige of a legal estate.

Prior to the intervention of equity, the mortgagee upon default became the absolute owner, and all rights of the mortgagor were forfeited ; then equity, because of the hardships and knavery fostered by this rule, declared that it would relieve against forfeiture and would allow a right of redemption. Subsequently it was determined that the equity of redemption could not be cut off except by a foreclosure. At length the courts of equity declared that the mortgagee had no estate whatever in the land, but merely a lien to secure his debt, and, finally, the doctrine was enunciated that every conveyance made with the intent to secure a debt was a mortgage.

The history of chattel mortgages is the same, except that equity still recognizes a legal estate in the mortgagee. We respectfully submit that history will repeat itself, as equity is called upon to deal anew with old ideas presented under new forms in these contracts

The position of a vendor under a title contract, is at law precisely that of a mortgagor at common law, and his rights as declared by the Court below are the same as the law courts adjudged to a mortgagor. The legal status of a vendor is also precisely the same as was formerly that of a mortgagee. Moreover, all the injustice and hardships, and all the causes which induced the interposition of equity in the past are again present under these contracts, and already more capital is liable to forfeiture under them than was held under mortgage when equity first declared the existence of an equity of redemption.

But the Court below declares that the contract at bar was a conditional sale, and the condition not

having been fulfilled there was no sale, and consequently nothing to adjudicate upon. The argument of the Court would be sound if the contract at bar was a contract of conditional sale, because in such a contract the *sale is conditional* upon the performance of some act, and if that is not performed there is no sale.

But in such sales there is *no debt* for the *purchase price*, and the condition is not a *security* for any debt. *No action for an installment of the price can be maintained*, because upon default the *sale* falls.

Such a conditional sale was the contract passed upon by the Court of Appeals of New York in 1871.

Austin *v.* Dye, 46 N. Y. 500.

In the case at bar the contract which the learned Justice below described as a conditional sale, has no *condition* whatever in it. It provides for an *absolute* sale in the future; it contains an *absolute agreement* to pay *the price:* and to *secure* such payment it retains the title to the chattel *agreed to be sold.*

To hold such an agreement conditional is to make a new contract for the parties, not to construe the language of their contract

It must, therefore, be evident that agreements, such as the contract at bar, are in no sense *conditional* sales.

These contracts, therefore, in which the title is reserved as security for an absolute debt, and the rights of the parties under them, must be determined without reference to the law applicable to conditional sales.

Having, therefore, freed the contract under review from the false attributes which the name "conditional" would attach, it is evident that the real question is, whether this is a contract for a forfeiture, or whether the intent of the parties is that the retention of title is by way of security merely, re-

serving to the vendee an equitable interest in the nature of a lien or right of redemption, and to the vendor all remedies, both in personam and in law.

Upon this question the appellant would submit the following cases, in which the decisions, although not involving the precise point here presented, yet declare the views of many eminent jurists.

Heryford *v.* Davis, 102 U S. 235.
Arosemena *v.* Hinckley, 11 J. & S. 43.
Keeny *v* Swan, 24 Weekly Digest, 454.
Preston *v.* Whitney, 23 Mich. 260.
Humeston *v.* Cherry, 23 Hun. 141.
West *v.* Bolton, 4 Vt. 558.
Fleck *v.* Warner, 25 Kans. 492.
Everett *v.* Hall, 67 Me. 497.
Estey *v.* Graham, 46 N. H. 169.
Mott *v.* Havana Nat. Bank, 22 Hun. 354, (357)
Dunning *v.* Stearns, 9 Barb. 630.
Brewster *v.* Baker, 20 Barb 364, (370).
Talmadge *v.* Oliver, 14 S. C. 522, (527).
Bragelman *v.* Daue, 69 N. Y. 69.

In *Heryford* v. *Davis*, (102 U. S. 235), the Court held that a lease of chattels, with an agreement to deliver bill of sale upon payment of all rent, was a sale, with a retention of a *lien* for the purchase price.

Humeston v. *Cherry*, (23 Hun. 141), was an action to recover installments paid under a title contract, and the Court declare that a retaking, after default by the vendor, does not violate or break the contract, provided the vendor is willing to redeliver the chattel upon receiving payment, and therefore dismissed the complaint, but at the same time the Court pointedly declare that they purposely refrain from expressing any opinion as to the course which the parties should take to *close the matter* between them, and "*finally settle their right.*"

In *Fleck* v. *Warner*, (25 Kans. 492), the Court affirm the right of the vendor to maintain replevin

without returning the payments received, and then declare that if the retention of title was *by way of security*, an *equity of redemption* might still remain in the vendee.

In *Estey* v. *Graham*, (46 N. H. 169), the Court declares that a vendee acquires an *equitable interest* in the chattels; that the title of the vendor is merely a collateral security for the payment of the price, not differing materially from security by way of *mortgage or pledge*, AND MUST BE SO REGARDED.

In *Mott* v. *Havana Nat. Bank*, (22 Hun. 354), it appeared that an engine had been sold and delivered under a title contract, the unpaid balance of the purchase price being evidenced by a note. Default being made in payment, judgment was taken, execution issued and levied upon the chattel in the vendee's possession. At the sheriff's sale the vendor bought in. The Court says: "Yet it is impos- "sible not to see that under the agreement, * * * "the engine was a mere security for the payment of "the note. It was, in fact, a collateral security for "the payment of the purchase price. Though not "technically a chattel mortgage, the (contract) gave "rise to relations * * * of a similar character. "* * * We think the vendor * * * cannot "be in a better position * * * in respect to the "property which he held as collateral security "* * * than though he simply held a mortgage "or pledge." Then the Court proceed to declare that the judgment of the vendor should be reduced by crediting thereon the fair value of the engine at the time of the sheriff's sale. Surely the above case recognizes a most tangible equity in a vendee, even after the vendor had taken *possession under hostile process.*

In *Dunning* v. *Stearns*, (9 Barb. 630,) a contract of sale retaining a lien until the purchase price was paid (the contract having been filed in the town

clerk's office,) was declared to be in the *nature* of a chattel mortgage.

Brewster v. *Baker*, (20 Barb. 264,) was an action upon a title contract, which provided that upon default the vendor should take possession, sell, apply the proceeds upon the original purchase price and pay over the surplus, if any, to the vendee. The Court held that the provisions for sale, &c., did not make the contract a chattel mortgage, because *the law would have compelled the same application if the writing had been silent on the subject.*

In *Talmadge* v. *Oliver*, (14 S. C. 522,) the Court declares that a title contract is in the nature of an equitable mortgage, and, although unrecorded, to be a prior claim to a subsequent recorded mortgage.

In *Bragelman* v. *Daue*, (69 N. Y. 69,) the facts were as follows: Daue & Bragelman, being co-partners, Bragelman sold all his interest in the firm assets to Daue. Daue then agreed to sell the *whole* of the firm assets to Bragelman, payments to be made at stated periods, and title to remain in the vendor until the purchase price should be fully paid. Bragelman took possession immediately upon execution of the agreement, and after paying several installments, made default. Daue then re-took possession, and Bragelman brought suit *in equity*, to have the title contract declared a mortgage, for an accounting, &c. Judgment was given below as prayed. The Court of Appeals reversed the judgment on technical grounds, but declares (p. 74) that the real nature of the transaction was that of a mortgage, and that an *equity of redemption* remained in the vendee, which could only be *extinguished* by a valid sale of the property.

It may be urged that this result was due to considering the sale to Daue by Bragelman and the sale back as parts of the same transaction, but the sale to Daue was of only one-half interest in the firm assets, while the sale back was of *all* the assets.

If the criticism were sound, the equity of redemption could extend only to the one-half interest first conveyed by Bragelman to Daue, but the Court of Appeals declares the existence of an equity of redemption in *all* the assets, that is, in those in which Bragelman had *never had any title.*

It will have been observed, in the cases above cited, that the Court have advanced step by step from a hesitating intimation of the possible existence of some equitable rights in the vendee (*Humeston* v. *Cherry*) to the absolute assertion of an equity of redemption *which can be extinguished only by a sale.* (*Bragelmam* v. *Daue; Talmadge* v. *Oliver; Mott* v. *Havana National Bank.*)

The rule thus asserted is in accord with justice, prevents forfeitures, and accords with immemorial equitable principles, in that it carries out the intent of the parties, disregarding the *form* of their contracts.

It is submitted, therefore, that there exists in a vendee under a title contract after default, an equity of redemption.

POINT III.

THE VENDEE'S EQUITY OF REDEMPTION CAN BE EXTINGUISHED ONLY BY A VALID SALE OF THE CHATTELS, AS IN THE CASE OF A CHATTEL MORTGAGE.

In the discussion as to the procedure which should be adopted to bar the vendee's rights, the appellant would here state that the proposition is not in any manner controverted.

That in equity these contracts give rise to rights which are analogous to the rights of mortgagors and mortgagees.

A case indicating the proper procedure to bar the vendee's equity, is that of *Bragelman* v. *Daue*, (69 N. Y. 69,) in which the Court states (p. 74) that

the procedure in foreclosing a chattel mortgage is the proper one to follow. The respondent may, however, urge that this declaration was a dictum, and therefore, reference will now be made to the decisions of the tribunals of the Western and Southwestern States, where the courts have been called upon to interpret these contracts when applied to land, and determine the procedure under them.

In the case below cited, land was sold on the installment plan, the title being reserved in the vendor until payment of the purchase price; and the possession was delivered to the vendee upon execution of the contract.

The rule laid down in all the cases is that the vendee's equity can be barred only by a foreclosure, conducted according to the forms prescribed for the foreclosure of mortgages.

Gaston *v.* White, 46 Mo. 486.
Pugh *v.* Holt, 27 Miss, 461.
Markoe *v.* Andras, 67 Ill. 34.
Pattison *v.* Linde, 14 Iowa, 414.
Kings *v.* Young Men's Ass'n, 1 Woods, 386.

Pugh v. *Holt*, (27 Miss. 461), decides that the reservation of title, though not in form a technical mortgage, yet must *in equity* be so regarded, and *all the incidents* of a mortgage given it.

The Court in *Markoe* v. *Andras*, (67 Ill. 34), declares that a reservation of title as security for the purchase price is, *in equity*, to all intents and purposes, a mortgage, "nothing more, nothing less," and is subject to all the consequences resulting from the foreclosure and sale of an ordinary mortgage.

The Circuit Court of the United States, (1 Woods, 386), declares that in Texas the vendee has an equity of redemption precisely as if he had received a deed and given a mortgage back for the purchase price, and that this equity cannot be cut off except by judicial process or a release.

It is therefore submitted that in view of the above authorities the only method to foreclose the equities of Mr. Tousey and of defendant, is by a judicial or other sale.

If the respondent objects that the cases above cited are inapplicable because the contracts there passed upon related to real estate, we would challenge him to state any valid reason for the *creation* of a rule governing a chattel contract diametrically opposite to the *established* rule governing the *same contract* when relating to real estate.

POINT IV.

THE RIGHTS OF PARTIES UNDER TITLE CONTRACTS ARE IN ALL RESPECTS ANALAGOUS TO THE RIGHTS ACCRUING UNDER CHATTEL MORTGAGES.

Returning now to the close analogy which it has been shown exists between these contracts and chattel mortgages, counsel would submit the following tabulated statement:

TITLE CONTRACTS.	CHATTEL MORTGAGES.
I. Vendor at law absolute owner.	I. Mortgagee at law absolute owner.
II. Vendor after default may maintain replevin or trover.	II. Mortgagee after default may maintain replevin or trover.
III. Vendor's title a security merely.	III. Mortgagee's title a security merely.
IV. Vendee has an equity of redemption when contract concerns land.	IV. Mortgagor has an equity of redemption.
V. Vendor can maintain an action to foreclose when contract concerns land.	V. Mortgagee can maintain an action to forclose.

What valid reason, therefore, can there be for denying to the vendee of chattels an equity of re-

demption and the vendor a right to maintain all actions, whether for the money, or to foreclose, especially when the established doctrine of equity, as announced by Judge STORY, is that "any transaction that resolves itself into a *security*, whatever its form and whatever *name* the parties may choose to give to it, is, *in equity*, a mortgage?"

Flagg *v.* Mann, 2 Sumner, 486, (533).
3 Pomeroy's Equity, § 1,237.

Another plea in behalf of the rights contended for is, that a construction which grants an equity of redemption makes of these contracts a just and fair means of an honorable commerce and not traps to rob unwary purchasers.

It is, therefore, submitted that an equity of redemption does exist in the vendee under a title contract, and that the nature of that equity, and the character of the rights arising therefrom, are in all respects analagous to the equity of redemption under a chattel mortgage.

This conclusion effectually disposes of respondent's argument, that the recovery in the action on notes is a bar to this, because the equity of a mortgagee and of a vendee cannot be cut off by any act of the vendor except a valid sale.

But meanwhile all rights remain.