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Notice of Appeal and Grounds.

Filed August 12, 1931.

Passaic County Circuit Court.

GENERAL EQUIPMENT Co., a corporation, Plaintiff, vs. HARRY H. ZEIN and THOMAS CARLESS Defendants.	}	10 Action at Law. Notice of Appeal and Grounds. 20
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To FEDER & RINZLER, ESQS.,
Attys for defendants.

Sirs:

Please take notice that the plaintiff in the above cause appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause on the following grounds:

1. That the trial court erred in refusing to grant the plaintiff-appellant's motion for the direction of a verdict. 30
2. That the trial court erred in entering judgment in favor of the defendant instead of the plaintiff-appellant.

Respectfully yours,

JACOB LIPMAN,
Attorney for Plaintiff. 40

Judgment Record.

IN THE PASSAIC COUNTY CIRCUIT COURT.

10	GENERAL EQUIPMENT Co., a corporation, vs. HARRY H. ZEIN and THOMAS CARLESS.	}	Judgment Record.
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20 Harry H. Zein and Thomas Carless, the Defendants in this cause, were summoned to answer unto General Equipment Co., a corporation, the Plaintiff therein, in an action at law, upon the following complaint.

Complaint.

Filed June 21, 1929.

Plaintiff, a corporation organized and existing under and by virtue of the laws of the State of New York, says that:

30 1. On or about September 26, 1928, the plaintiff was the owner of a certain Erie Type A, full revolving steam shovel, serial number 1744, mounted on traction wheels, and said plaintiff still is the owner of said steam shovel and ever since said date has been, and is rightfully entitled to possession thereof.

40 2. On December 19, 1928, while the said steam shovel, belonging to the plaintiff, was located in Preakness, New Jersey, the defendant, Harry H. Zein, through his servant or agent, Thomas Car-

Complaint.

less, Sheriff of Passaic County, New Jersey, who, under color of a writ of attachment issued out of the Passaic County Circuit Court, in an action wherein Harry H. Zein is plaintiff and Dudley Gordon is defendant, did then and there wrongfully take said steam shovel and has ever since wrongfully detained the same.

10

Plaintiff demands possession of said steam shovel, together with damages for its unlawful detention.

JACOB LIPMAN,
Attorney for Plaintiff.

Answer.

Filed October 26, 1929.

20

Defendants, Harry H. Zein and Thomas Carless, residing in the City of Passaic, in the County of Passaic and State of New Jersey, and in the City of Paterson, in the County of Passaic and State of New Jersey, respectively, answering the complaint filed by the plaintiff in the above entitled matter, say that:

1. Defendant deny each and every allegation contained in paragraphs one and two.

30

FIRST SEPARATE DEFENSE.

Defendants further answering say that the plaintiff was not the owner of the steam shovel referred to in the complaint.

SECOND SEPARATE DEFENSE.

Plaintiff has not made demand for the return

40

Answer.

of the steam shovel upon either of the defendants before instituting this action.

THIRD SEPARATE DEFENSE.

Plaintiff is not entitled to possession of said steam shovel.

10

FOURTH SEPARATE DEFENSE.

The said steam shovel is now in custodia legis and the action of replevin instituted by the said plaintiff is wrongfully taken against the said defendants.

FEDER & RINZLER,
Attorneys of Defendants.

20

Notice of Deposit.

Filed November 9th, 1929.

To MESSRS. FEDER & RINZLER,
Attorneys for Defendants
Passaic, New Jersey.

Gentlemen:

30

Please Take Notice that the plaintiff has this day deposited with the Clerk of this Court a bond in the penal sum of \$200.00, conditioned for payment, if the plaintiff herein shall fail to prosecute the said action with effect and pay the Court, if it discontinue, be non-suited and a judgment pass against it.

Take Further Notice that the surety appearing on said bond is the National Surety Company, a

40

Notice to Strike out as Sham.

corporation, whose office is at 4 Albany Street,
New York, New York.

Dated: October 30, 1929.

JACOB LIPMAN,
Attorney for Plaintiff.

10

Notice to Strike Out Answer as Sham.

Filed November 9th, 1929.

Messrs. FEDER & RINZLER,
Attorneys for Defendants.

Please Take Notice that on Saturday, November 9th, I shall appear before Honorable Newton H. Porter, Judge of the Passaic County Circuit Court, at ten o'clock in the forenoon or as soon thereafter as the matter can be heard, at the Court House, Paterson, New Jersey and move to strike out the answer filed in the above entitled cause, upon the following grounds:

20

1. That the same is sham, in that the said defendants or either of them, do not intend to support the allegations therein set forth with legal proof thereof.

30

2. That the same is sham, in that the defendants, or either of them, do not intend to controvert the allegations set forth in the complaint filed herein.

3. That the same is sham and is interposed solely for the purpose of delay.

4. That the First Separate Defense therein set forth does not constitute a defense in law.

40

Notice to Strike out as Sham.

5. That the First Separate Defense therein set forth is a conclusion and fails to set forth any facts affording a defense to the cause of action set forth in plaintiff's complaint.

10 6. That the matters and things set forth in the First Separate Defense do not constitute a defense in this action.

7. That the matters and things set forth in the Second Separate Defense do not constitute a defense to the cause of action set forth in plaintiff's complaint.

20 8. That the matters and things set forth in the Third Separate Defense do not constitute a legal defense to the cause of action set forth in plaintiff's complaint.

9. That the matters and things set forth in the Third Separate Defense constitute a conclusion.

10. That the Third Separate Defense fails to set forth any defense constituting a defense to the cause of action set forth in plaintiff's complaint.

30 11. That the matters and things set forth in the Fourth Separate Defense do not constitute a defense in law.

12. That the Fourth Separate Defense and the matters and things therein set forth constitute a conclusion in law.

13. That the Fourth Separate Defense fails to set forth fact or facts constituting a defense to the cause of action set forth in plaintiff's complaint.

40 Take Further Notice that if the said Answer is struck out, a motion will be made to enter judg-

Affidavit annexed to Notice to Strike out as Sham.

ment interlocutory against the defendants and in favor of the plaintiff.

Take Further Notice that appended hereto are copies of affidavits which will be used in support of said motion.

Respectfully yours,

JACOB LIPMAN,
Attorney for Plaintiff.

10

Dated: November 4th, 1929.

State of New York,)
County of New York,) ss.:

David E. Leonard, of full age, being duly sworn, according to law, upon his oath deposes and says that he is the President of General Equipment Co., a corporation of the State of New York and is personally familiar with all the matters and things herein set forth.

20

Deponent says that he is in active charge of the business of the plaintiff, which is the sale of rebuilt machinery, which is carried on at No. 342 Madison Avenue, New York, New York.

On September 26th, 1928, a gentleman appeared at plaintiff's place of business and he introduced himself to deponent as Dudley Gordon, who informed deponent that he was President of the Gordon Engineering Company, stating that he was interested in purchasing a steam shovel. After considerable discussion, he finally decided to purchase the shovel referred to in the annexed agreement and they proceeded to reduce their understanding to writing.

30

For the purpose of preparing said agreement,

40

Affidavit annexed to Notice to Strike out as Sham.

deponent inquired of Mr. Gordon when and where the Gordon Engineering Company was incorporated and he informed deponent that the company had been organized under the laws of the State of New Jersey several days prior to this call and that the papers had been signed and that the certificate of incorporation had, in fact, been mailed to Trenton, New Jersey, on that day. Deponent thereupon prepared an agreement which embodies their understanding, a copy of which said agreement is hereto annexed, under the terms of which, plaintiff agreed to sell to Gordon Engineering Company, a New Jersey Corporation, one Erie Type A, full revolving steam shovel, serial number 1744, mounted on traction wheels, for the sum of \$1500.00, payable \$300.00 upon the signing of the contract; \$1200.00 to be evidenced by promissory note dated the date of the agreement and maturing ninety days thereafter. The said agreement provided among other things, that title unto the said machinery shall remain in the seller, the plaintiff herein, until the full purchase price thereof shall have been paid. Mr. Gordon then informed deponent that he had already inspected the machine at their plant in Paterson, N. J., and deponent introduced him to Mr. William B. Dunphy, and requested him to have the contract executed, which was done after having been read by Mr. Gordon. Mr. Gordon then stated that owing to the fact that the Gordon Engineering Company had secured a large contract, that it had expended a great deal of money and requested that the initial payment of \$300.00, provided for under the terms of the contract, be deferred and deponent consented to this arrangement and in accordance therewith, two promissory notes were executed to

Affidavit annexed to Notice to Strike out as Sham.

cover the consideration referred to in said contract, copies of which are annexed hereto.

The steam shovel referred to in the contract cost \$6,000.00 new and the plaintiff had expended \$1200.00 in remodeling the same for delivery, under the terms of the contract, which was effected about ten days subsequent to the date there- 10
to. The business of the plaintiff is buying and selling used machinery and deponent says that he has been in this business for upwards of 18 years, during which period of time, he has from time to time sold steam shovels and kindred items of machinery and equipment. Deponent says that he is conversant with outlets for equipment of that type, including that referred to in the contract annexed hereto and that, in his opinion, the market 20
value of the same, at the time of the sale to Gordon Engineering Company was \$2100.00. Thereafter, the said steam shovel was delivered, at the request of Dudley Gordon to a sand pit erected near Preakness, New Jersey, where it remained up to and following the date of its seizure by the defendants herein. Thereafter, from time to time, deponent called on the Gordon Engineering Com- 30
pany for the purpose of interviewing Dudley Gordon, in order to secure payments of the promissory notes hereinbefore referred to, one of which visits occurred on December 26th, 1928, the date one of said notes became due. Deponent was unable to find Dudley Gordon on that date and returned about ten days thereafter, when he was informed by someone in the neighborhood that the Sheriff of Passaic County, New Jersey, had levied upon said machinery by virtue of a writ of attachment, issued by the defendant, Harry H. Zein herein. On 40
all occasions, the deponent called at the sand pit

Affidavit annexed to Notice to Strike out as Sham.

at Preakness, New Jersey, and at all times found the machine which is the subject matter of this suit upon the premises.

10 On the occasion of a visit to Preakness, New Jersey, about ten days after December 26th, 1928, deponent saw the said machine and on the basis of his experience in the sale or purchase of similar machines, says that, in his opinion, the reasonable value of the same, at that time was \$1700.00.

Deponent says that no portion of the consideration referred to in said contract, has been paid to plaintiff, the entire sum therein provided for remains due to plaintiff.

DAVID E. LEONARD.

20 Sworn and subscribed to, before me,
this 31st day of October, 1929.

W. B. Dunphy,
Notary Public.

Queens Co. Clk's No. 409, Reg. No. 4920
New York Co. Clk's No. 125, Reg. No. 1D155
Commission expires March 30, 1931
(L.S.)

AGREEMENT

30 Made this 26th day of September, 1928, between the General Equipment Company, Inc., of 342 Madison Avenue, New York, N. Y., a New York Corporation, hereinafter called the seller, and the Gordon Engineering Company of Clifton, N. J., a New Jersey corporation, hereinafter called the purchaser.

40 (1) The seller hereby proposes to furnish to purchaser, subject to inspection and acceptance before shipment the following described equip-

Agreement annexed to Affidavit.

ment, on terms and conditions hereinafter outlined:

1 - Erie type A full revolving steam shovel, serial #1744, mounted on traction wheels.

(2) The price of said steam shovel is Fifteen Hundred (\$1500.00) Dollars F.O.B. our shops, Paterson, N. J., payable in New York Exchange as follows: 10

Three Hundred (\$300.00) Dollars on signing of contract.

Twelve Hundred (\$1200.00) Dollars on December 26, 1928.

The deferred payment to be evidenced by a ninety (90) day note dated Sept. 26, 1928, with interest at 6% per annum, which shall be considered as evidence to pay and not as payment thereof. 20

(3) Title shall remain in seller until full purchase price shall have been paid, during which period ownership plates on said steam shovel are to be maintained thereon by purchaser, and purchaser also agrees to keep said steam shovel in good operating condition and not sell, transfer or move same without written consent of seller, first had and obtained. 30

(4) It is agreed that within thirty (30) days from Sept. 26, 1928, purchaser may upon due notice to the seller return said steam shovel to our Paterson, N. J., shops, all transportation charges paid. In event that the purchaser exercises this privilege, a joint inspection of said steam shovel is to be made by representatives of seller and purchaser to determine whether or not said 40

Agreement annexed to Affidavit.

steam shovel has been maintained in condition specified in the preceding paragraphs.

10 (5) After joint inspection is made and steam shovel returned to our Paterson, N. J., shops, this agreement will be cancelled and the Three Hundred (\$300.00) Dollars paid will be considered as rental, and purchasers note returned.

(6) In the event of default in payment the seller may at their option, take possession of and remove said steam shovel without process of law or notice, in which case all payments previously made shall be considered as rental for period used.

(7) This proposal, when properly executed by parties hereto will constitute an agreement that there are no understandings other than as specified herein.

20 (8) In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

GENERAL EQUIPMENT COMPANY, INC.,
W. B. Dunphy (Signed)
Vice President.

Attest:

W. B. Dunphy (Signed)
Secretary.

30

We, the Gordon Engineering Company, hereby accept above proposal of the General Equipment Company, Inc., and having inspected and accepted the steam shovel, instruct them to ship said steam shovel to the vicinity of Paterson, N. J.

GORDON ENGINEERING COMPANY,
Dudley Gordon (Signed)

Attest:

40 D. E. Leonard (Signed)

Agreement annexed to Affidavit.

State of New York, }
 County of New York, } ss.:

Be it remembered, that on this 25th day of September, 1928, before me Carlo Carlino, personally appeared W. B. Dunphy, who, being by me duly sworn, doth depose and make proof to my satisfaction that he is the Secretary of, and well knows the seal of General Equipment Co. Inc., the seller, named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto and the said instrument signed and delivered by W. B. Dunphy, Vice President of said corporation in the presence of said deponent, as the voluntary act and deed of the said corporation, and that the said deponent thereupon signed the same as subscribing witness.

Subscribed and sworn to before me, the day and year first above written.

CARLO CARLINO (signed)

(Seal)

State of New Jersey, }
 County of Essex, } ss.:

Be it remembered, that on this 26th day of Sept. 1928 before me, Carlo Carlino, personally appeared Mr. Dudley Gordon, who being by me duly sworn, doth depose and make proof to my satisfaction that he is the President of and well knows the seal of the Gordon Engineering Company the purchaser named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto and the said instrument signed and delivered by Dudley Gordon, President

Agreement annexed to Affidavit.

of said corporation, in the presence of said deponent, as the voluntary act and deed of said corporation, and that the said deponent thereupon signed the same as subscribing witness.

Subscribed and sworn to before me, the day and year first above written.

10 CARLO CARLINO (signed)
(Seal)

NOTES

\$300.00 Clifton, N. J. Sept. 26, 1928

On November 1st, 1928 we promise to pay to the order of General Equipment Company, Inc., Three Hundred and no/100 — Dollars
20 Payable at 342 Madison Avenue, New York, N. Y.
Value received with interest at 6% per annum.

GORDON ENGINEERING COMPANY,
Dudley Gordon,
President.

No. 1 Due 11/1/28

30 \$1,200.00 Clifton, New Jersey, September 26, 1928
Ninety days after date, we promise to pay to the order of General Equipment Company, Inc.
One Thousand Two Hundred and no/100 —Dollars
Payable at 342 Madison Avenue, New York, N. Y.
Value received with interest at 6% per annum.

GORDON ENGINEERING COMPANY,
Dudley Gordon,
President.

No. 2 Due 12/26/28

40

Affidavit of Harry H. Zein.

Filed February 24, 1930.

State of New Jersey, }
 County of Passaic, } ss.:

I, Harry H. Zein, of full age, being duly sworn, according to law, upon my oath depose and say that:

1. I am one of the defendants in the above entitled cause. 10

2. On the 19th day of December, 1928, I caused a writ of attachment to be issued out of the Sheriff's Office of the County of Passaic, attaching the steam shovel of one, Dudley Gordon, for an indebtedness of the said Dudley Gordon to me in the sum of Two Thousand (\$2,000.00) Dollars.

3. Said steam shovel is the same as the one made the basis of the replevin action in the above entitled cause. 20

4. On the 19th day of December, 1928, an inventory and appraisal of the rights, credits, monies, effects, goods, chattels, lands and tenements of the defendant in said attachment action was made by the Sheriff of the County of Passaic.

5. On the 21st day of January, 1929, S. Donald Perlman, Esq., was appointed auditor in said attachment action and notice of said attachment was advertised in the Passaic Daily Herald, a newspaper published in the City of Passaic, County of Passaic and State of New Jersey. 30

6. On the 17th day of April, 1929, the report of said auditor was filed in the Passaic County Clerk's Office, certifying that no creditor other than myself had applied to the court or to said auditor to have his accounts audited.

7. On the 29th day of April, 1929, judgment was entered in my favor in the sum of Two 40

Affidavit of Harry H. Zein.

Thousand Two Hundred and Sixty (\$2,260.00) Dollars, in said attachment cause and in pursuance to said judgment an execution was issued and a levy made on the steam shovel made the basis of the above entitled replevin cause and a date set for the sale of said steam shovel, same
 10 being the 12th day of June, 1929, at two o'clock in the afternoon, same being described as follows: One Erie Steam Shovel, 1/2 Yard Type A Complete 25 H. P.

HARRY H. ZEIN.

Sworn to and Subscribed before me,
 this 25th day of July, 1929.

Aubrey J. Elias,
 An Attorney at Law of N. J.

20

Affidavit of Irving Rinzler.

Filed February 24, 1930.

State of New Jersey,)
 County of Passaic,) ss.:

I, Irving Rinzler, of full age, being duly sworn,
 30 according to law, upon my oath depose and say that:

1. I am associated and affiliated with the Office of Feder & Rinzler, Esqs., attorneys of the above named defendants.

2. On the 22nd day of July, 1929, at the request of Feder & Rinzler, Esqs., I made a search for conditional bill of sale on the steam shovel made the basis of the above action.

3. I found that under date of September 26th,
 40 1928, a conditional bill of sale was executed from

Order Denying Motion to Strike Out Answer.

the Gordon Engineering Company to the General Equipment Company, Inc., which conditional bill of sale covers one Erie type A full revolving steam shovel, Serial No. 1744. Said conditional bill of sale was recorded on the 15th day of February, 1927, in the Passaic County Register's Office, and was signed in the following maner, 10
 "Gordon Engineering Company, Dudley Gordon."

IRVING RINZLER.

Sworn to and Subscribed before me,
 this 24th day of July, 1929.

Morris Dobrin,
 An Attorney at Law of N. J.

20

Order Denying Motion to Strike Out Answer.

Filed April 22, 1930.

Application being made in the above entitled matter to strike out the answer filed by the defendants, and no sufficient reason appearing therefor;

It is, on this 21st day of April, 1930, Ordered, 30
 that the motion to strike out the answer, be and the same is herewith denied, with costs against the plaintiff herein.

NEWTON H. PORTER,
 Judge.

40

Amended Answer.

Filed May 1, 1930.

Defendants, Harry H. Zein and Thomas Carless, residing in the City of Passaic, in the County of Passaic and State of New Jersey, and in the City of Paterson, in the County of Passaic and State of New Jersey, respectively, answering the complaint filed by the plaintiff in the above entitled matter, say that:

1. Defendants deny each and every allegation contained in paragraphs one and two.

FIRST SEPARATE DEFENSE.

Defendants further answering say that the plaintiff was not the owner of the steam shovel referred to in the complaint.

20 SECOND SEPARATE DEFENSE.

Plaintiff has not made demand for the return of the steam shovel upon either of the defendants before instituting this action.

THIRD SEPARATE DEFENSE.

Plaintiff is not entitled to possession of said steam shovel.

30 FOURTH SEPARATE DEFENSE.

The said steam shovel is now in custodio legis and the action of replevin instituted by the said plaintiff is wrongfully taken against the said defendants.

FIFTH SEPARATE DEFENSE.

Defendants have a superior title to that of the plaintiff herein and a superior lien, in that the defendant, Harry H. Zein, heretofore obtained title by virtue of an attachment issuing out of the

40

Amended Answer.

Passaic County Circuit Court, attaching the chattel involved in the writ of replevin and complaint herein, which attachment was issued on December 16th, 1928.

SIXTH SEPARATE DEFENSE.

The only title acquired by the plaintiff herein is by reason of a conditional bill of sale dated September 26th, 1928, but filed February 15th, 1929, sometime after the attaching lien of the defendant herein on the shovel involved in said suit. 10

FEDER & RINZLER,
Attorneys of Defendants.

20

Notice of Motion to Amend Complaint.

Filed February 6, 1931.

To: Messrs. Feder & Rinzler, Attorneys for Defendants:

Take Notice that on Friday, the sixth day of February, 1931, at two o'clock in the afternoon or as soon thereafter as counsel can be heard, I shall appear before the Honorable William B. MacKay, Judge of the Passaic County Circuit Court, at Paterson, N. J., and move to amend the complaint filed in the above entitled cause, to read as set forth in the amended complaint hereto annexed. 30

JACOB LIPMAN,
Attorney for Plaintiff.

Dated: January 30th, 1931.

40

Complaint, annexed to Notice of Motion.

Plaintiff, a corporation organized and existing under and by virtue of the laws of the State of New York, complaining of the defendants, says that:

FIRST COUNT.

10 1. On or about September 26th, 1928, the plaintiff was the owner of a certain Erie Type A, full revolving steam shovel, serial number 1744, mounted on traction wheels, and said plaintiff still is the owner of said steam shovel and ever since said date has been, and is rightfully entitled to possession thereof.

20 2. On December 19th, 1928, while the said steam shovel, belonging to the plaintiff, was located in Preakness, N. J., the defendant, Harry H. Zein, through his servant or agent, Thomas Carless, did then and there wrongfully take said steam shovel and has ever since wrongfully detained the same.

Wherefore, plaintiff demands possession of said steam shovel, together with damages for its unlawful detention, on this First Count.

SECOND COUNT.

30 1. Plaintiff repeats Paragraph #1 of the First Count, and makes same a part hereof as if the same were herein fully set forth.

40 2. On or about September 26th, 1928, the plaintiff sold to the Gordon Engineering Co., of Clifton, N. J., a corporation of the State of New Jersey, the aforementioned steam shovel under a written agreement, a copy of which is annexed hereto, and under the terms of which title of said steam shovel was reserved in the Seller, the plain-

Complaint, annexed to Notice of Motion.

tiff herein, until the entire purchase price was paid; under the terms of the said contract, the Purchaser, Gordon Engineering Co., agreed to pay to the plaintiff herein the sum of Fifteen Hundred (\$1500.00) Dollars, payable as follows: Three Hundred (\$300.00) Dollars at the signing of the contract, and Twelve Hundred (\$1200.00) Dollars on December 26th, 1928. Upon the execution of the agreement of sale, the aforesaid steam shovel was delivered to the Purchaser at Preakness, N. J. 10

3. The Purchaser has failed to make any payment under the contract, the entire amount remaining unpaid and due.

4. By reason of the said purchaser's default and failure to make the payments called for by the contract, the plaintiff has become, and now is, lawfully entitled to immediate possession of the said chattel. 20

5. That on or about December 19th, 1928, the aforesaid steam shovel was found by the defendant, Harry H. Zein, through his agent or servant, the defendant, Thomas Carless, and said chattel has been in his possession since December 19th, 1928. 30

6. That on or about December 19th, 1928, the plaintiff made a demand upon said Harry H. Zein for the return of said chattel, but said defendant refused, and still refuses, to deliver said chattel to the said plaintiff, and then and now wrongfully detains the same.

Wherefore, plaintiff demands judgment for the possession of said steam shovel, together with dam- 40

Agreement annexed to Notice of Motion.

age for its unlawful detention, on this Second Count.

JACOB LIPMAN,
Attorney for Plaintiff.

10

AGREEMENT.

Made this 26th day of September, 1928, between the General Equipment Company, Inc., of 342 Madison Avenue, New York, N. Y., a New York Corporation, hereinafter called the Seller, and the Gordon Engineering Company of Clifton, N. J., a New Jersey Corporation, hereinafter called the Purchaser.

(1) The Seller hereby proposes to furnish to
20 Purchaser, subject to inspection and acceptance before shipment, the following described equipment, on terms and conditions hereinafter outlined:

1—Erie type A full revolving steam shovel, serial #1744, mounted on traction wheels.

(2) The price of said steam shovel is Fifteen
30 Hundred (\$1500.00) Dollars F. O. B. our shops, Paterson, N. J., payable in New York Exchange as follows:

Three Hundred (\$300.00) Dollars on signing of contract.

Twelve Hundred (\$1200.00) Dollars on December 26th, 1928.

The deferred payment to be evidenced by a ninety
40 (90) day note, dated September 26th, 1928, with interest at 6% per annum which shall be consid-

Agreement annexed to Notice of Motion.

ered as evidence to pay and not as payment thereof.

(3) Title shall remain in seller until full purchase price shall have been paid, during which period ownership plates on said steam shovel are to be maintained thereon by purchaser, and purchaser also agrees to keep said steam shovel in good operating condition and not sell, transfer or move same without written consent of seller, first had and obtained. 10

(4) It is agreed that within thirty (30) days from September 26th, 1928, purchaser may upon due notice to the seller return said steam shovel to our Paterson, N. J. shops, all transportation charges paid. In event that the purchaser exercises this privilege, a joint inspection of said steam shovel is to be made by representatives of seller and purchaser to determine whether or not said steam shovel has been maintained in condition specified in the preceding paragraphs. 20

(5) After joint inspection is made and steam shovel returned to our Paterson, N. J., shops, this agreement will be cancelled and the Three Hundred (\$300.00) Dollars paid will be considered as rental, and purchasers note returned.

(6) In the event of default in payment, the seller may at their option, take possession of and remove said steam shovel without process of law or notice, in which case all payments previously made shall be considered as rental for period used. 30

(7) This proposal, when properly executed by parties hereto, will constitute an agreement that there are no understandings other than as specified herein.

(8) In witness whereof the parties have here- 40

Agreement annexed to Notice of Motion.

unto set their hands and seals the day and year first above written.

GENERAL EQUIPMENT COMPANY, INC.,
 (Signed) W. B. Dunphy,
 Vice President.

Attest:

10 (Signed) W. B. Dunphy,
 Secretary.

We, the Gordon Engineering Company, hereby accept above proposal of the General Equipment Company, Inc., and having inspected and accepted the steam shovel, instruct them to ship said steam shovel to the vicinity of Paterson, N. J.

20 GORDON ENGINEERING COMPANY,
 (Signed) Dudley Gordon.

Attest:

(Signed) D. E. Leonard.

State of New York, }
 County of New York, } ss.:

30 Be it remembered, that on this 25th day of September, 1928, before me, Carlo Carlino, personally appeared W. B. Dunphy, who, being by me duly sworn, doth depose and make proof to my satisfaction, that he is the Secretary of, and well knows the seal of General Equipment Co., Inc., the seller, named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto, and the said instrument signed and delivered by W. B. Dunphy, Vice
 40 President of said corporation, in the presence of

Agreement annexed to Notice of Motion.

said deponent, as the voluntary act and deed of the said corporation, and that the said deponent thereupon signed the same as subscribed witness.

Sworn and subscribed to before me, the day and year first above written.

CARLO CARLINO (Signed) 10

(Seal)

State of New Jersey, }
County of } ss.:

Be it remembered, that on the 26th day of September, 1928, before me, Carlo Carlino, personally appeared Mr. Dudley Gordon, who, being by me duly sworn, doth depose and make proof to my satisfaction that he is the President, of and well knows the seal of the Gordon Engineering Company, the purchaser, named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto, and the said instrument signed and delivered by Dudley Gordon, President of said corporation, in the presence of said deponent, as the voluntary act and deed of said corporation, and that the said deponent thereupon signed the same as subscribing witness. 20 30

Subscribed and sworn to before me, the day and year first above written.

CARLO CARLINO (Signed)

(Seal)

Order to Amend Complaint.

Filed February 16, 1931.

10 This matter having been argued before me on February 7th, 1931, by counsel for the respective parties hereto, the purpose of the motion having been to amend the complaint filed in the above entitled cause, it is on this 16th day of February, A. D. 1931,

ORDERED, that the complaint in the above entitled cause be amended to read as the copy of the amended complaint hereto annexed.

W. B. MACKAY,
Judge.

20 Plaintiff, a corporation organized and existing under and by virtue of the laws of the State of New York, complaining of the defendants, says that:

FIRST COUNT.

30 1. On or about September 26th, 1928, the plaintiff was the owner of a certain Erie Type A, full revolving steam shovel, serial number 1744, mounted on traction wheels, and said plaintiff still is the owner of said steam shovel, and ever since said date has been, and is rightfully entitled to possession thereof.

2. On December 19th, 1928, while said steam shovel, belonging to the plaintiff, was located in Preakness, N. J., the defendant, Harry H. Zein, through his servant or agent, Thomas Carless, did then and there wrongfully take said steam shovel, and has ever since wrongfully detained the same.

40 Wherefore, plaintiff demands possession of said

Amended Complaint, annexed to Order.

steam shovel, together with damages for its unlawful detention, on this First Count.

SECOND COUNT.

1. Plaintiff repeats Paragraph #1 of the First Count, and makes same a part hereof as if the same were herein fully set forth. 10

2. On or about September 26th, 1928, the plaintiff sold to the Gordon Engineering Co. of Clifton, N. J., a corporation of the State of New Jersey, the aforementioned steam shovel under a written agreement, a copy of which is annexed hereto, and under the terms of which title of said steam shovel was reserved in the Seller, the plaintiff herein, until the entire purchase price was paid; under the terms of the said contract, the Purchaser, Gordon Engineering Co., agreed to pay to the plaintiff herein the sum of Fifteen Hundred (\$1500.00) Dollars, payable as follows: Three Hundred (\$300.00) Dollars at the signing of the contract, and Twelve Hundred (\$1200.00) Dollars on December 26th, 1928. Upon the execution of the agreement of sale, the aforesaid steam shovel was delivered to the Purchaser at Preakness, N. J. 20 30

3. The purchaser has failed to make any payment under the contract, the entire amount remaining unpaid and due.

4. By reason of the said purchaser's default and failure to make the payments called for by the contract, the plaintiff has become, and now is, lawfully entitled to immediate possession of the said chattel.

5. That on or about December 19th, 1928, the 40

Amended Complaint, annexed to Order.

aforesaid steam shovel was found by the defendant, Harry H. Zein, through his agent or servant, the defendant, Thomas Carless, and said chattel has been in his possession since December 19th, 1928.

10 6. That on or about December 19th, 1928, the plaintiff made a demand upon said Harry H. Zein for the return of said chattel, but said defendant refused, and still refuses, to deliver said chattel to the said plaintiff, and now wrongfully detains the same.

Wherefore, plaintiff demands judgment for the possession of said steam shovel, together with damages for its unlawful detention on this Second Count.

20

JACOB LIPMAN,
Attorney for Plaintiff.

 AGREEMENT

30 Made this 26th day of September, 1928, between the General Equipment Company, Inc., of #342 Madison Avenue, New York, N. Y., a New York Corporation, hereinafter called the Seller, and the Gordon Engineering Company of Clifton, N. J., a New Jersey Corporation, hereinafter called the Purchaser.

(1) The Seller hereby proposes to furnish to Purchaser, subject to inspection and acceptance, before shipment, the following described equipment, on terms and conditions hereinafter outlined.

40 1 Erie Type A full revolving steam

Agreement, annexed to Order.

shovel, serial #1744, mounted on traction wheels.

(2) The price of said steam shovel is Fifteen Hundred (\$1500.00) Dollars F. O. B. our shops, Paterson, N. J., payable in New York Exchange as follows:

Three Hundred (\$300.00) Dollars on signing of contract. 10

Twelve Hundred (\$1200.00) Dollars on December 26th, 1928.

The deferred payment to be evidenced by a ninety (90) day note, dated September 26th, 1928, with interest at 6% per annum which shall be considered as evidence to pay and not as payment thereof.

(3) Title shall remain in seller until full purchase price shall have been paid, during which period ownership plates on said steam shovel are to be maintained thereon by purchaser, and purchaser agrees to keep said steam shovel in good operating condition and not sell, transfer or move same without written consent or seller, first had and obtained. 20

(4) It is agreed that within thirty (30) days from September 26th, 1928, purchaser may upon due notice to the seller return said steam shovel to our Paterson, N. J. shops, all transportation charges paid. In event that the purchaser exercises this privilege, a joint inspection of said steam shovel is to be made by representatives of seller and purchaser to determine whether or not said steam shovel has been maintained in condition specified in the preceding paragraphs. 30

(5) After joint inspection is made and steam shovel returned to our Paterson, N. J. shops, this 40

Agreement, annexed to Order.

agreement will be cancelled and the Three Hundred (\$300.00) Dollars paid will be considered as rental, and purchaser's note returned.

10 (6) In the event of default in payment, the seller may at their option, take possession of and remove said steam shovel without process of law or notice, in which case all payments previously made shall be considered as rental for period used.

(7) This proposal, when properly executed by parties herein, will constitute an agreement that there are no understandings other than as specified herein.

20 (8) In witness whereof the parties have hereto set their hands and seals the day and year first above written.

GENERAL EQUIPMENT COMPANY, INC.,

(Signed) W. B. Dunphy,
Vice President.

Attest:

(Signed) W. B. Dunphy,
Secretary.

30 We, the Gordon Engineering Company, hereby accept above proposal of the General Equipment Company, Inc., and having inspected and accepted the steam shovel, instruct them to ship said steam shovel to the vicinity of Paterson, N. J.

GORDON ENGINEERING COMPANY,
(Signed) Dudley Gordon.

Attest:

(Signed) D. E. Leonard

Agreement, annexed to Order.

State of New York, }
 County of New York, } ss.:

Be it remembered, that on this 25th day of September, 1928, before me, Carlo Carlino, personally appeared W. B. Dunphy, who, being by me duly sworn, doth depose and make proof to my satisfaction, that he is the Secretary of, and well knows the seal of General Equipment Co. Inc., the Seller, named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto, and the said instrument signed and delivered by W. B. Dunphy, Vice President of said corporation, in the presence of said deponent, as the voluntary deed and act of the said corporation, and that the said deponent thereupon signed the same as subscribed witness. 10

Sworn and subscribed to before me,
 the day and year first above written. 20

(Signed) CARLO CARLINO.

(Seal)

State of New Jersey, }
 County of } ss.:

Be it remembered, that on the 26th day of September, 1928, before me, Carlo Carlino, personally appeared Mr. Dudley Gordon, who, being by me duly sworn, doth depose and made proof to my satisfaction that he is the President of and well knows the seal of the Gordon Engineering Company, the purchaser named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto, and the said in- 30

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Amended Answer.

strument signed and delivered by Dudley Gordon, President of said corporation, in the presence of said deponent, as the voluntary act and deed of said corporation, and that the said deponent thereupon signed the same as subscribing witness.

10 Subscribed and sworn to before me, the day and year first above written.

(Signed) CARLO CARLINO.

(Seal)

Amended Answer.

Filed February 19, 1931.

20 Defendant, Harry H. Zein, residing in the City of Passaic, in the County of Passaic and State of New Jersey, and defendant, Thomas Carless, residing in the City of Paterson, in the County of Passaic and State of New Jersey, answering the amended complaint filed in the above cause, say that:

AS TO FIRST COUNT.

They deny each and every allegation of paragraphs one and two.

30 **AS TO SECOND COUNT.**

They deny each and every allegation of paragraphs one to six, inclusive.

**FIRST SEPARATE AND DISTINCT
DEFENSE TO BOTH COUNTS.**

Plaintiff was not, and is not the owner of the chattels, articles and things referred to in the complaint.

40

*Amended Answer.*SECOND SEPARATE AND DISTINCT
DEFENSE TO BOTH COUNTS.

Plaintiff has not demanded the return or possession of said chattels, articles and things before the commencement of this action.

THIRD SEPARATE AND DISTINCT
DEFENSE TO BOTH COUNTS.

10

Plaintiff is not entitled to possession of said chattels, articles and things.

FOURTH SEPARATE AND DISTINCT
DEFENSE TO BOTH COUNTS.

Said chattels, articles and things are in the custody of the law and come into the custody of the law and into the custody of the said defendants under and by virtue of a writ of attachment issued out of and under the Seal of this Court, and therefore plaintiff is not entitled to maintain this action or any replevin proceedings, and is not entitled to possession or repossession of the said chattels, articles and things.

20

FIFTH SEPARATE AND DISTINCT
DEFENSE TO BOTH COUNTS.

30

Defendants have a prior and superior right and title to the said articles, chattels and things and the possession thereof, and they have a prior and superior lien and also interest therein, in that at the suit of the defendant, Harry H. Zein, a writ of attachment issued out of and under the Seal of this Court, under and by virtue whereof, defendant, Thomas Carless, as Sheriff of the County of Passaic, as directed in, and by virtue of, and com-

40

Amended Answer.

manded by said writ, attached the said chattels, articles and things, which said writ of attachment was issued prior to the commencement of this action, to wit, on or about December 16th, 1928, and the said attachment was issued, and said chattels, articles and things were attached, and the levy under the said writ of attachment was made, before the alleged conditional bill of sale of September 26th, 1928 was filed.

SIXTH SEPARATE AND DISTINCT
DEFENSE TO BOTH COUNTS.

The only interest in, or right to possession of the said chattels, articles and things or title thereto, which the plaintiff claims, or can claim, is by reason of the said alleged conditional bill of sale dated December 26th, 1928, but inasmuch as the said conditional bill of sale was not filed until February 15th, 1929, namely, after December 16th, 1928, when the aforesaid writ of attachment was issued and the said chattels, articles and things were attached and levied upon under the said writ, although the defendant, Harry H. Zein, had no notice or knowledge of the said alleged conditional bill of sale, or of any provision in said, or any conditional sale reserving property in the seller after possession of the chattels, articles and things was delivered to the buyer, and the possession of the chattels, articles and things, having been delivered to the Gordon Engineering Company of Clifton, N. J., the buyer, said defendant, Harry H. Zein, now, and before the filing of the said conditional bill of sale, being a creditor of the said buyer. The buyer in said conditional bill of sale did not default in the terms, conditions

Reply to Amended Answer.

or provisions thereof, but fully complied therewith, and made full payment of the sum or sums thereby required to be made.

FEDER & RINZLER,
Attorneys of Defendants.

10

Reply to Amended Answer.

Filed February 27, 1931.

Plaintiff replying to the amended answer filed by the defendants herein says that:

1. It reserves the right at any time at or before the trial herein to move to strike out the Fourth, Fifth and Sixth Separate Defenses filed by the defendants herein upon the ground that the same do not constitute valid defenses to the plaintiff's cause of action.

20

2. Plaintiff denies each and every alleged fact contained in the answer of the defendants filed herein.

JACOB LIPMAN,
Attorney of Defendants.

30

40

Rule for Judgment.

Filed May 6, 1931.

10 "The above matter came on before me on the regular list of causes, and was heard before me without a jury by stipulation of counsel, and in the presence of Jacob Lipman, Esq. Attorney for plaintiff, and Jack Rinzler, Esq., of the firm of Feder & Rinzler, Attorneys for defendants; and after hearing the testimony submitted, and after reading the pleadings, I have determined that a judgment of no cause for action should be entered in favor of the defendants and against the plaintiff, together with their costs;

20 "And I find as a fact that a conditional bill of sale was executed by Gordon Engineering Company of Clifton, N. J., a corporation, to the plaintiff herein, on the 26th day of September, 1928, which said conditional bill of sale was not recorded after its making until the 15th day of February, 1929, which was more than the required time allowed to said plaintiff under the statute regulating and controlling the recording of such instruments;

30 "And I further find as a fact that an attachment was issued out of this court by the defendant, Harry H. Zein, against Dudley Gordon, on the 20th day of December, 1928, without any notice or knowledge of said conditional sale contract levying upon the goods and chattels embraced in the aforesaid conditional bill of sale, and that the attachment lien was, therefore, prior in time to that of the conditional vendor, thereby obtaining a superior right in and to the aforesaid chattels, upon which a levy had been made, by the Sheriff of the County of Passaic;

40 "And I further find as a fact that the said de-

Rule for Judgment.

fendant, Harry H. Zein, was not estopped from showing that Dudley Gordon, doing business as Dudley Engineering Co., was the purchaser of the steam shovel;

“I do, therefore, on this 4th day of April, 1931, Order, that judgment of no cause for action be entered in favor of the defendants and against the plaintiff herein, together with the defendants’ costs to be taxed;” 10

Whereupon, it is adjudged that the Complaint of the Plaintiff be dismissed, and that the Defendants, Harry H. Zein and Thomas Carless, recover of the Plaintiff, General Equipment Co., a corporation, their costs, which are taxed at the sum of Fifty-nine Dollars and Twenty-five Cents, (\$59.25). Judgment entered and signed May 6th, A. D. 1931, at 8 A. M. Action No. 13065, Docket L, pages 250 &c. 20

W. B. MACKAY,
Judge.

30

40

Clerk's Certificate.

State of New Jersey, }
 County of Passaic, } ss.:

10 I, Lloyd B. Marsh, Clerk of said County and Clerk of the County Courts thereof, Do Hereby Certify, that the foregoing is a transcript of the Judgment Record, in re: General Equipment Co. a corporation, Plaintiff, vs. Harry H. Zein and Thomas Carless, Defendants, as the same is taken from and compared with the original entry thereof in Book "C-2" of Circuit Court Judgments, for said County and now remaining of record in my Office.

20 In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County, at Paterson, this Twenty-first day of August, A. D. Nineteen Hundred and Thirty-one.

(L.S.)

LLOYD B. MARSH,
 Clerk.
 By Floyd E. Jones,
 Deputy Clerk.

30

40

Testimony.

PASSAIC COUNTY CIRCUIT COURT.

GENERAL EQUIPMENT Co., a corporation,

Plaintiff,

vs.

HARRY H. ZEIN and THOMAS,
CARLESS.

Defendants.

At Law.

10

Paterson, N. J., February 27, 1931.

Before—HON. WILLIAM B. MACKAY, Judge,
without a Jury. 20

APPEARANCES:

For the Plaintiff: JACOB LIPMAN, ESQ.

For the Defendants: FEDER & RINZLER,
ESQS., by JACK RINZLER, ESQ.

Mr. Lipman: Before we agree on a stipulation I would make an application addressed to the answer, for the purpose of the record. And to save time we will go to the facts which are to be subject to the ruling of the Court, with respect to their admissibility. 30

An agreement was made on September 26, 1928, between the plaintiff, General Equipment Company, Incorporated, and Gordon Engineering Company, of Clifton, New Jersey, referred to in that contract as a New Jersey corporation, called the purchaser, providing— 40

Testimony.

Mr. Rinzler: A New York corporation.

Mr. Lipman: No, I am talking about this.

Mr. Rinzler: Oh, pardon me.

10 Mr. Lipman (Continuing)—providing for the delivery to the Gordon Engineering Company of one Erie Type A full revolving steam shovel, serial 1744, for the sum of \$1,500, payable in deferred installments, the contract reserving to the seller title in the chattel. The contract is offered in evidence and marked P-1.

(Paper marked Exhibit P-1 in evidence.)

20 Mr. Lipman: At the same time there were executed and delivered by the purchaser two promissory notes representing the consideration provided for by the contract, P-1. The notes are offered in evidence.

(Papers marked Exhibits P-2 and P-3 in evidence, respectively.)

30 Mr. Lipman: The steam shovel, the subject-matter of the litigation, was then delivered by the plaintiff to a lot or plot of land in Preakness, New Jersey, where it was thereafter seized by the Sheriff of Passaic County, New Jersey, by virtue of a writ of attachment issued out of the Passaic County Circuit Court, in an action between Harry H. Zein, plaintiff, versus Dudley Gordon, defendant, the writ of attachment being issued on December 19, 1928, and a levy made—

Mr. Rinzler: Levy was made in accordance with the command of the writ by the Sheriff of Passaic County upon the goods and chattels which are the subject-matter of the contract, P-1, on December 19, 1928.

40 Mr. Lipman: Shortly thereafter, sometime in

Testimony.

January, the plaintiff made a demand for possession of the subject-matter of the suit, on the defendants, which was refused.

Mr. Rinzler: Although the demand for possession was made before this replevin action was commenced, it was not made until after the above-mentioned writ of attachment was issued and after the aforesaid levy was made. 10

Mr. Lipman: That is right.

Mr. Rinzler: There is no certificate of incorporation on file in the office of the Secretary of State of the office of any of the County Clerks of the State of New Jersey relative to incorporating the Gordon Engineering Company. There is no certificate on file in the Secretary of State's office indicating that it is a foreign corporation. No certificate of incorporation was filed anywhere. 20

Mr. Lipman: No, there isn't any filed anywhere.

Mr. Rinzler: That is what I am saying. There is no certificate of incorporation filed in any State.

Mr. Lipman: On file.

Mr. Rinzler: For the incorporation of the Gordon Engineering Company.

Mr. Lipman: No, not in any state.

Mr. Rinzler: Show me that there is.

Mr. Lipman: No, I won't show you. I won't concede something that is ridiculous. We will argue that later. That is the fact, anyway, and the admissibility we will argue. 30

Mr. Rinzler: The conditional sales contract—

Mr. Lipman: No, put him on the stand.

Mr. Rinzler: All right. The conditional sales contract, P-1, was not filed until after the aforesaid writ of attachment was issued and the aforesaid levy made. That is correct, isn't it?

Mr. Lipman: Yes. 40

Testimony.

10 Mr. Rinzler: I offer in evidence the whole file in the aforementioned suit, the writ of attachment brought in this court by Harry H. Zein against Dudley Gordon, the same being docket number L-12611, and was stamped on the back of the paper 216,541, and the writ of attachment is stamped filed, December 7, 1928, John McCutcheon, Clerk. I will examine the judgment record in the County Clerk's office to ascertain the date when the judgment in the attachment suit was entered and reported to the Court.

(Docket referred to consider marked Exhibit D-1 in evidence.)

20 Mr. Lipman: For the purpose of the record I would like to address myself to the answer with respect to a number of separate defenses that are set up in the answer. In my reply I reserved the right to—

Mr. Rinzler: I haven't seen it.

30 Mr. Lipman: Here it is. To strike out the fourth, fifth, and sixth separate defenses upon the ground that they are not defenses in law. Without devoting too much time to the subject, I would say that the cases hold—and I don't believe there is a single exception—that chattels are not in custody when they are seized by virtue of a writ of attachment, only when the mandate of the Court expressly refers to that particular chattel. I don't want to devote too much time to that, because, as I say, this is merely for the purpose of the record.

The fifth separate defense is in substance similar to the fourth. There is a recital of facts from which it appears that the goods were seized—

Mr. Rinzler: That is not a similar defense.

40 Mr. Lipman: And that— simply that goods were

Testimony.

seized under a writ of attachment, and I submit, sir, that that is not enough, that it must appear affirmatively that not only were the goods seized but that the person in whose possession the goods were had a right in the goods which was subject to execution or levy. In other words, the mere naked right of possession is not sufficient to support a levy on a writ of attachment, the bare, naked right, without some property right in the article itself. 10

With respect to the sixth separate defense our objection is that the defendant Zein, at whose instance the chattel was seized, does not appear to have been a creditor of the purchaser. It is claimed in that defense that by reason of our failure to record a sale, conditional sales contract, in which we reserved title to the chattel. 20

Mr. Rinzler: The fifth line from the bottom.

Mr. Lipman: There is no allegation in this defense that he is a creditor of the Gordon Engineering Company, the purchaser of the article. Oh, I beg your pardon. Yes, they do say that he is a creditor of the buyer, so that I will withdraw that objection.

Mr. Lipman: Now, briefly, the facts are these: On September 26, 1928, a contract in writing was entered into, which is marked Exhibit P-1, between the plaintiff and Gordon Engineering Company, referred to in that contract as a New Jersey corporation hereinafter called the purchaser and providing for the delivery of the chattel which is the subject-matter of this suit to the Gordon Engineering Company, in consideration of the sum of \$1,500, payable in deferred installments, and the contract provided that the title in the chattel was 30 40

Testimony.

to remain in the seller until the entire purchase price had been paid.

The Court: Who was the vendor?

Mr. Lipman: The vendor is the plaintiff, General Equipment Company.

The Court: And they sold to?

10 Mr. Lipman: Gordon Engineering Company, referred to in this agreement as a New Jersey corporation.

In December of 1928—the exact date is in our agreement of facts—the chattel referred to in P-1 was seized by the Sheriff of this County on a writ of attachment issued in a suit initiated by the other defendant, Zein, and shortly thereafter, in January of 1929, the plaintiff made a demand for possession of the machine, which was refused, and
20 followed that by the institution of this suit. The machine originally had been delivered by the plaintiff to a plot of land at Preakness, New Jersey, where it had been levied on and had been seized by the Sheriff.

The Court: Under the attachment?

Mr. Lipman: Under the attachment. The conditional sales contract was not recorded until after the levy under the writ of attachment. That,
30 in substance, is the entire case. We have agreed on some of the facts, their admissibility, however, to be passed upon by your Honor.

Mr. Rinzler: Your Honor, while the conditional sales contract—

Mr. Lipman: I might also add—

Mr. Rinzler: Pardon me.

Mr. Lipman: —that the chattel is re-replevined in this suit by the defendant. Whether that has any bearing I don't know, but it is part of the
40 case.

William B. Dunphey—Direct.

The Court: I suppose the verdict would be in damages if there is a verdict for the plaintiff.

Mr. Lipman: Exactly.

The Court: I think the question of the return of the goods is waived, isn't it?

Mr. Lipman: The question of the return of the goods?

10

The Court: I don't know that it is waived exactly.

Mr. Lipman: Well, it is not waived. There has been no offer to return yet. If there is an offer made I would probably take a position, but until such an offer is made I can't.

The Court: There is no offer to return, and I think the verdict would be for the value.

Mr. Lipman: Exactly.

The Court: Have you agreed on the value?

20

Mr. Lipman: No, sir. That is subject to proof.

The Court: Can't you agree on that?

Mr. Rinzler: We haven't really talked about it.

(Interruption.)

The Court: All right, call your witnesses.

WILLIAM B. DUNPHEY, sworn.

30

Direct-examination by Mr. Lipman:

Q. You are associated with the General Equipment Company? A. Yes.

Q. You are familiar with the transaction between the General Equipment Company and the Gordon Engineering Company? A. Yes.

Q. The promissory notes P-2 and P-3 were given to you in connection with the transaction referred

40

William B. Dunphey—Direct.

to in exhibit P-1? A. Were given to the company, not to me personally.

Q. Yes, for the company? A. Yes.

Q. And were either of them paid? A. They were not.

10 Q. Mr. Dunphey, have you been buying machines of the type in question, buying and selling them?
A. Yes, sir.

Q. And the nature of your business is what? A. Is the rebuilding and selling of contractors' and railroad equipment.

Q. How long have you been in that business? A. Personally since 1920.

Q. 1920. And, in your opinion, what was the value of the one Erie Type A—

20 Mr. Rinzler: I thought we were to hold that in abeyance.

Q. —full revolving steam shovel, sold to, or referred to in exhibit P-1, at the time— or in January, 1929? A. The value of that machine as a second-hand machine?

Q. As it stood. A. As it stood? About \$2,500 to \$3,000.

30 Q. Now, this is when you saw the machine after the attachment suit? A. Well, the condition of the machine then would warrant a value placed on it less than that.

Q. What was the value? A. Well, I should say eighteen hundred or two thousand dollars.

Q. Yes. And what was the— do you know the price of the machine new? A. At the time of the sale?

Q. Yes, new. A. About \$5,750 f.o.b. factory.

40 Q. Now, with respect to the condition of that machine when new, in what condition was it at

William B. Dunphey—Cross.

the time it was delivered, or at the time delivery was made by the plaintiff in connection with the contract referred to as P-1? A. I should say at least fifty per cent. of its new value.

Cross-examination by Mr. Rinzler:

Q. How much did you say was due under the contract, Mr. Dunphey? A. \$1,500. 10

Q. When did you see these chattels after the attachment suit was started? A. Sometime in January.

Q. Of 1929? A. 1929.

Q. And what was their condition then? A. Why, I should say that they would need considerable overhauling, due to the fact that they had been worked hard and wasn't in condition as when shipped. 20

Q. How old was the machine at that time? A. As I recollect, the machine was built in 1922, but it didn't work all of that time.

Q. Well, how old was it? A. Built in 1922, I believe.

Q. And you saw its condition in 1929? A. Yes.

Q. Did they have more improved machines manufactured in that interim? A. I don't think there was any change in that type. 30

Q. Haven't there been more improved machines built? A. Yes, but not of that type of machine.

Q. What is the annual depreciation on such a machine? A. Depends on the work it has done.

Q. Supposing it did no work and just stood idle, not cared for? A. Depreciation would be mighty little.

Q. This was a second-hand machine? A. A second-hand machine. 40

William B. Dunphey—Cross.

Q. Some seven years old? A. Correct.

Q. And you say it was badly and sorely in need of repairs? A. In January when I saw it, it was.

Q. Yes, because of the way it had been used? A. Correct.

Q. Worked hard, you say? A. Correct.

10 Q. Considering the age as approximately seven years, the age of the machine, and its sore need of overhauling and repairs, what would you say the value of that machine was? A. I should say the value of that machine was around eighteen hundred to two thousand dollars at the time I saw it.

20 Q. How much would it have cost to repair that machine and put it in good working order and condition? A. I should say probably a thousand dollars would put it back in shape.

Q. Could you go out in the market and get a buyer for that machine in that condition? A. At that time?

Q. Yes. A. I believe I could.

Q. Would you pay it? A. I might if I had need for it.

Q. That is a machine which is hard to sell in the market, isn't it? A. Not particularly.

30 Q. In fact, you could only sell it to a person who has a particular need for it? A. Correct, but it is a general purpose machine.

Q. Pardon me? A. I say, it is a general purpose machine.

Q. What is it used for? A. It is used for any kind of work, digging sand—

Q. Excavating? A. Excavating work, cellar work.

40 Q. It is really an excavating machine? A. It is

William B. Dunphey—Redirect.

really an excavating machine; it is a standard steam shovel.

Mr. Rinzler: That is all.

Mr. Lipman: That is the plaintiff's case.

By Mr. Rinzler:

Q. Just one more question, please. What is the purchase price mentioned in the conditional sales contract? A. Fifteen hundred dollars. 10

Q. \$1,500; is that right? A. Yes.

Q. And the contract was made in 1928? A. Correct.

Q. And the machine had been in use from September 26, 1928, the date of the conditional sales contract, until sometime in January of 1929? A. Yes. 20

Q. Hadn't it lost some value during that time? A. If I can make an explanation—

Q. Had it lost any value? A. Why, no.

Q. Well, it was in good condition when it was sold under that conditional sales contract? A. Yes, sir. It had been completely overhauled.

Q. So it was in perfect condition? A. Yes.

Q. But when you saw it in January, 1929, it was in poor condition? A. Yes.

Q. And yet you still say it was of the same value as it was when it was in good condition at the time it was sold under the contract, P-1; is that correct? A. Correct. 30

Mr. Rinzler: That is all.

Redirect-examination by Mr. Lipman:

Q. What was the value of the machine at the time it was sold? A. At least \$2,500. 40

William B. Dunphey—Recross.

Q. What is that? A. Will you repeat again?

By the Court:

Q. At least \$2,500? A. Yes.

By Mr. Lipman:

10 Q. Can you account for the fact that although the machine was worth \$2,500 and you sold it for \$1,500? A. The reason that we— we had a repair bill on the machine amounting to practically thirteen hundred dollars, and we took the machine over for the value of the repair bill.

Q. You salvaged it, in other words? A. Yes.

Recross-examination by Mr. Rinzler:

20 Q. If it had a value of \$2,500 in the market there was no need of you making somebody a present of a thousand dollars, was there?

Mr. Lipman: Just a minute. I think that is entirely argumentative, your Honor.

Mr. Rinzler: That is what it amounts to.

The Court: It is argumentative.

By Mr. Rinzler:

30 Q. Well, weren't you able to get more than \$1,500 in the general market for that machine? A. There was no apparent customers in sight at the time and we closed the deal with Gordon.

Q. If you couldn't get more than \$1,500 at that time, that is all it was worth; isn't that right? A. Not necessarily. If an effort had been made to sell that machine, gone out and definitely gone to work to sell it, we could probably at least get \$2,500.

40

Harry H. Zein—Direct.

Q. Hadn't you made an effort to sell it? A. Why, sure, we had.

Q. Hadn't you made an effort to sell it to a particular buyer? A. Correct.

Mr. Rinzler: That is all.

Mr. Lipman: That is our case.

The Plaintiff rests.

10

DEFENDANTS' TESTIMONY.

HARRY H. ZEIN, sworn.

Direct-examination by Mr. Rinzler:

Mr. Rinzler: I don't suppose there is any need of testimony with respect to the attachment. 20

Mr. Lipman: No, it is all in.

Q. Mr. Zein, at the time when you issued this writ of attachment did Dudley Gordon, trading as the Gordon Engineering Company, owe you any money?

Mr. Lipman: I object to it as calling for a conclusion. That is not in the evidence.

Mr. Rinzler: Withdraw the question. 30

Q. Before the issuance of this attachment who did you work for? A. Dudley Gordon.

Q. Was he conducting a business under a particular name? A. Yes, he was.

Q. What name? A. Gordon Engineering Company.

Q. Did he have that name on his place of business?

Mr. Lipman: I object to it.

40

Harry H. Zein—Direct.

A. He had it painted on the steam shovel and he had it on the door of his office.

Mr. Lipman: I object to it. Just a minute. I don't think it is material whether he traded under one name or other.

10 Mr. Rinzler: We say there is no such corporation as the Gordon Engineering Corporation.

Mr. Lipman: That is not the proper method of proving it, if it can be proven.

The Court: I think I will permit it.

Mr. Lipman: May I have an exception, sir?

By Mr. Rinzler:

20 Q. You say that name appeared where? A. On the steam shovel and on the door of the office.

Q. And you worked for that man trading under that name for how long? A. I worked for him when he started, from the beginning.

Q. Which was when? A. I think it was in September.

Q. And how much money did he owe you by way of salary? Did he owe you money? A. Yes.

30 Q. And for the amount that he owed you, you started the attachment suit against him; is that correct? A. That is right.

Q. And at the time when the writ of attachment was issued and the levy under that writ was made on the goods in question, did you have any notice or did you know of or have any intimation as to a conditional sales contract at all, or the contract in question? A. I did not.

40 Mr. Rinzler: That is all.

Harry H. Zein—Direct.

Q. Oh, do you know about the value of this type of machine, Mr. Zein? A. I know a little.

Q. What do you know about it?

Mr. Lipman: I object. Just a minute.

The Court: Sustain it

Q. What experience have you had in connection with such machines, Mr. Zein? A. I worked— I work under a steam shovel. I am around steam shovels every day. 10

Q. For how long now? A. For, I should say, since 1918.

Q. And are you familiar with the values and prices of such machines? A. Yes.

Q. And do you know what the value of this machine was at the time of the attachment? 20

Mr. Lipman: Just say yes or no.

A. Yes.

Q. What was its condition at that time?

Mr. Lipman: Now, if I may cross-examine,—

The Court: No, he didn't ask the question you expected.

Q. What was its condition at that time? A. The condition at the time it was delivered to the sand pit was what you would call passable. 30

Q. Yes? A. It was fit for that particular job, but no other job.

Q. And was it in a condition that needed a considerable overhauling and rebuilding? A. Yes, it did. It needed overhauling.

Q. Have you any idea as to what it would cost to put it in condition and rebuild it? Yes or no.

A. No. 40

Harry H. Zein—Direct.

Q. Now, are you able to state or give an opinion as to the value of that machine at the time that writ of attachment was issued? A. Well, to me it would be worth more than—

Mr. Lipman: Just yes or no.

10 Q. Not to you. I mean in the market, the fair value. A. About \$800.

Mr. Lipman: No, I object.

The Court: Strike it out.

Q. Your answer is you are able to give an opinion; is that correct? A. Yes.

Q. Now, what is your opinion as to the value of the machine at the time when the writ of attachment was issued?

20

Mr. Lipman: I object because the witness has not been properly qualified.

The Court: Sustain it.

Mr. Rinzler: He has been working at it since 1918.

By Mr. Rinzler:

30 Q. Do you know what prices they bring? Have you seen them bought and sold? A. I have seen them bought and sold. I have been around and priced them myself.

Q. How many have you seen bought and sold? A. Oh, about ten.

Q. And over what period of time? A. Since 1918 up until the present time.

By the Court:

40 Q. But you are not in that business, Mr. Zein? A. No, I don't deal in it. I work around it and I am familiar with it.

Harry H. Zein—Cross.

Q. You are very familiar with the workings of the machine, but you don't deal in them? It is not your business to buy and sell? A. No, I don't buy and sell. No.

Mr. Rinzler: That is all.

Cross-examination by Mr. Lipman:

10

Q. What is your business? A. My business? I am a truck driver. I was in the trucking business.

Q. How long had you known Mr. Gordon? A. Mr. Gordon? I knew him about five years.

Q. And did you lend him any money? A. Did I lend him any? No.

Q. This was all for salary, you say? A. Yes.

Q. And how much is due to you for salary? A. Why, the bill is about \$1,750, something like that. I don't remember.

20

Q. What work did you do for him? A. I ran the sand pit and I hired my truck to him.

Q. And was that by written agreement or oral agreement? A. Verbal.

Q. Verbal agreement. And you say you entered his employ sometime in September, 1928? A. I believe it was around that time.

Q. Yes. And he skipped, so to speak, in December, 1928, didn't he? A. I just didn't see him any more.

30

Q. Well, you looked for him and couldn't find him? A. That is it.

Q. You couldn't find him; is that right? A. I haven't seen him since.

Q. When did you look for him? How long prior to the time that suit was brought, your suit? A. I looked for him the second week in December, and he didn't show up.

40

Harry H. Zein—Cross.

Q. The second week in December? A. He didn't come around.

Q. What was your salary weekly? A. My salary weekly?

Q. Yes. A. \$45.

10 Mr. Rinzler: I object to it as immaterial, your Honor please, because the fact that he was a creditor is already a matter of *res adjudicata*.

The Court: No, I think I will let it go in.

Mr. Lipman: It must be established that he is a bona fide creditor.

Mr. Rinzler: All right.

By Mr. Lipman:

20 Q. \$45 a week? A. I think it was \$45 a week.

Q. Did you have a record at the time? A. I have got some files.

Q. Are they here? A. I think they are. I think they were in the file.

By Mr. Rinzler:

Q. Have I them? A. Yes, I think you have.

30 Mr. Lipman: I didn't ask for them.

By Mr. Lipman:

Q. Did you do some work in addition to the—
A. I hired a truck every day to him.

Q. What were you to get for that? A. \$25 a day.

Q. \$25 a day and you would pay, I suppose, the salary of the chauffeur? A. Yes.

Q. You bore the expense of that? A. Yes.

40 Q. What was Gordon's business? What was

Harry H. Zein—Cross.

Gordon's business? A. He was in the sand business.

Q. Running the sand pit? A. Yes.

Q. At Preakness? A. Yes.

Q. That is where the machine was seized. Were you employed by him when this machine was delivered to him? A. I was to start when the machine was delivered. 10

Q. Did you see the machine brought there? A. Yes.

Q. Yes. And was there an iron plate on this machine? A. Not that I know of.

Q. I am asking you. Was there an iron plate on it? A. No.

Q. Did you look? A. Yes.

Q. Isn't there an iron plate on it now? A. No.

Q. Isn't there an iron plate on it with the name "General Equipment Company, owners?" A. No. 20

Q. You never saw that plate? A. No.

Q. But you saw the machine the day it was delivered? A. Yes.

Q. Did you look at it? A. Yes.

Q. You inspected it thoroughly? A. Yes.

Q. And you can say that that plate wasn't on? A. Yes.

Q. Is that right? A. That is right. 30

Q. Where is the machine now? A. Still at Preakness.

Q. Still at Preakness, at the sand pit? A. Yes.

Q. You are operating the sand pit? A. I am operating the sand pit.

Q. What is the machine doing there? Standing idle? A. Standing idle.

Q. You operated the machine, though, for some time, didn't you? A. I did, yes. 40

Harry H. Zein—Cross.

Q. You operated it after it was seized by the Sheriff, didn't you? A. Yes.

Q. How long after it was seized by the Sheriff did you operate the machine? Immediately; isn't that right? A. Yes.

10 Q. Immediately after the Sheriff seized it you operated it? A. Yes.

Q. And you continued operating it? A. Yes.

Q. And you put up a bond in this case? A. Yes.

Q. To get the machine back so that you could continue to use it? A. Yes.

Q. Weren't you in partnership with Mr. Gordon? A. No.

Q. Weren't you working with him under some arrangement in which you were to participate in the profits with him? A. No.

20 Q. Sure about that? A. Positive.

Q. You simply jumped in after the machine was seized and continued to operate the sand pit? A. I started to operate after he left.

Q. Yes. Now, who owns the sand pit? A. Henry Donowitz.

Q. You pay rent to him?

Mr. Rinzler: I object to it as not material to this issue.

30 A. I pay him a royalty.

Mr. Rinzler: Just a moment. I don't see the materiality of this in this case.

The Court: I will permit it.

Mr. Rinzler: Exception.

By Mr. Lipman:

40 Q. Did you pay rent to him? A. I don't pay him no rent; I pay him for what I take out of the place.

Harry H. Zein—Cross.

Q. Do you know how much Mr. Gordon paid him? A. Yes, I know what he paid.

Q. How much? A. Twenty cents a yard.

Q. How much are you paying? A. The same thing.

Q. Did you ever pay any money to the owner of that land prior to the time the machine was levied on? A. I did, in order to take over the old agreement. 10

Q. No. I say, prior to the time the machine was levied on. A. I don't know just when that was levied on, but I know when I paid the farmer some money.

Q. Was that before you had the machine? A. That was before I had the machine.

Mr. Lipman: Yes. That is all. 20

Redirect-examination by Mr. Rinzler:

Q. Did you know until this replevin suit was started that there was a conditional sales contract claimed to be in existence? A. No.

Q. Will your bill refresh your recollection as to the amount to which you were a creditor of Mr. Gordon?

Mr. Lipman: Just a minute. May I look at the bill? 30

Mr. Rinzler: You can look at it, sure.

By Mr. Lipman:

Q. You prepared these bills from your records? A. Yes.

Mr. Rinzler: That is not the way to qualify the witness to testify to something that will refresh his recollection. 40

Harry H. Zein—Redirect.

The Court: You assume he is going to offer it in evidence.

Mr. Lipman: Yes.

Mr. Rinzler: No, I merely want to refresh his recollection.

By Mr. Lipman:

10

Q. Is this in your handwriting? A. I think it is.

Q. Look at it and see.

The Court: It doesn't have to be in his handwriting.

A. It is either mine or my wife's handwriting.

The Court: It can be in anybody's handwriting. It doesn't have to be in his. What is the amount of it?

20

Mr. Rinzler: \$2,260.

By Mr. Rinzler:

Q. Is that correct, Mr. Zein? A. I believe it is.

Q. Was Mr. Gordon in business alone or with someone else?

Mr. Lipman: I object. I don't think that is competent.

30

The Court: Didn't you ask him that?

Mr. Lipman: No, sir.

The Court: You asked him if he was in business with Gordon.

Mr. Lipman: Yes. Not anyone else. I asked if he was.

The Court: I will permit it, then.

By Mr. Rinzler:

Q. Was he in business all alone or with somebody else? A. All alone.

40

Harry H. Zein—Recross.

Q. And did he ever use a corporate name, to your knowledge?

Mr. Lipman: I object. It is immaterial.

The Court: Sustain it.

By Mr. Rinzler:

Q. How did he sign his checks?

10

Mr. Lipman: I object. It is immaterial.

A. I never saw one.

The Court: He said he never saw one.

Mr. Rinzler: All right. That is all, your Honor.

Recross-examination by Mr. Lipman:

Q. Didn't you get any money at all from Gordon during all that time? A. No, sir. 20

Q. Nothing? A. Nothing.

Q. And you were paying a chauffeur and gas and oil? A. Yes.

Q. And never got any money? A. Never got any money.

Q. Did you ever ask him for it? A. Huh?

Q. Did you ever ask him for it? A. Yes, sure.

Q. When did you ask him? A. I asked him two or three times. 30

Q. Two or three times? A. Yes.

Q. When is the first time you asked him? A. Why, I gave him a bill after the first month.

Q. After the 1st of October, you mean? A. When the bill was due. It was a month after I worked.

Q. That was the first of the month succeeding the day you started to work for him; is that what you mean? A. What is that? 40

Harry H. Zein—Recross.

Q. That was the first of the month succeeding the day you started to work for him? A. Yes.

Q. You gave him a bill and asked for the money; is that right? A. Yes, that is right.

Q. And you didn't get it? A. Didn't get it.

10 Q. And what did he say to you? A. He says he was tied up and as soon as he got straightened out, why, he will pay the bill.

Q. I see. And then you continued for— A. I put in another month's work.

Q. —another month. Did you ask him for some money at the end of that month? A. I did.

Q. Then what happened? Did he give you any? A. He was going to bring some money in two weeks.

20 Q. Didn't you ask for any money during October? A. Huh?

Q. Didn't you ask for any money during October? A. No.

Q. You simply let him go on? A. Yes.

Q. Now, you say you have records— books? A. I have records of that.

Q. I mean books. Have you got books? Have you got books? A. A book to show where the truck worked every day, yes.

30 Q. You have a book to show what? A. Where my truck worked every day.

Q. And you have books showing the entries that appear on the papers that you looked at a minute ago?

Mr. Rinzler: Referring to these bills.

A. I only looked at the handwriting on that.

Q. But you have books showing these entries, the entries that are on these papers; is that right?

40 A. Yes, sir.

Harry H. Zein—Recross.

Q. Show me those books. A. Home.

Q. What kind of a book—

Mr. Rinzler: The books wouldn't be evidential. This is not a suit on a book account.

Q. What kind of a book or how many books have you? A. Now, just got a record of what I do and what I got coming to me. 10

Q. Can you describe that book? A. Can I describe it?

Q. Yes. A. It is just a plain book.

Q. Well, would you say it was an oblong book or square? A. It is an oblong book.

Q. And about how long is it? A. How long? I never measured it. I don't know. 20

Q. You are a mechanic, aren't you? A. A mechanic? No.

Q. You have worked around machines, haven't you? A. I am handy around machines. I am no mechanic.

Q. You can guess at a foot, approximately, when you see it— or judge, couldn't you? A. Yes.

Q. Well, now, is this book that you have longer or shorter than a foot? A. Longer than a foot.

Q. It is longer than a foot. How much longer? A. About fifteen inches, I guess. 30

Q. About fifteen inches. And how wide is it? A. About eight.

Q. What color is the cover? A. The color of the cover?

Q. Yes. A. I guess it is a gray color.

Q. It has a gray cover. How many pages are in this book? A. How many pages in it? I never counted the pages, Mr. Lipman. 40

Harry H. Zein—Recross.

Mr. Rinzler: Well, if the Court wants to see it I will have him submit it to the Court for inspection.

Mr. Lipman: If he will describe it then you can produce it.

10 *By Mr. Lipman:*

Q. Is it ruled paper? A. Yes.

Q. Ruled paper.

The Court: I think if this is going to go into the question of the size and shape and weight and the number of holes in the book cover, you had better stop now.

Mr. Lipman: I am sorry we went over.

20 The Court: I know, but we don't want to waste time.

Mr. Lipman: I will simply forego this.

Mr. Rinzler: Judge, I have one question.

Redirect-examination by Mr. Rinzler:

Q. We used the word "salary." You are in the dump truck business; you cart and convey sand and so forth? A. Yes.

30 Q. And when I said "salary," the money was used for that kind of service; is that correct? A. Yes.

Mr. Rinzler: That is all.

(Extended discussion between both counsel and the Court.)

(Briefs to be submitted to the Court and decision to follow.)

Harry H. Zein—Redirect.

Paterson, N. J., Saturday, July 11, 1931.

The Court: Make note that in the case of General Equipment Company vs. Zein and Carless, you can say that at the close of the entire case I recall that motion was made by the plaintiff for the direction of a verdict in the plaintiff's favor, and a motion was made by the defendant for a verdict. I think Mr. Rinzler said that he moved for direction of a verdict or he asked for a verdict for the defendant. I remember you made a motion for the direction of a verdict for the plaintiff. I do not remember which motion was made first, but they were made about one after the other, and I think I reserved decision, and think you presented briefs, and I think I sent a memorandum at some time or other, decided in favor of the defendant. Is that correct?

10

20

Mr. Lipman: Yes.

30

40

Exhibit P-1.**AGREEMENT**

10 Made this 26th day of September, 1928, between the General Equipment Company, Inc., of 342 Madison Avenue, New York, N. Y., a New York Corporation, hereinafter called the seller, and the Gordon Engineering Company of Clifton, N. J., a New Jersey corporation, hereinafter called the purchaser.

(1) The seller hereby proposes to furnish to purchaser, subject to inspection and acceptance before shipment the following described equipment, on terms and conditions hereinafter outlined:

20 1 - Erie type A full revolving steam shovel, serial #1744, mounted on traction wheels.

(2) The price of said steam shovel is Fifteen Hundred (\$1500.00) Dollars F.O.B. our shops, Paterson, N. J., payable in New York Exchange as follows:

30 Three Hundred (\$300.00) Dollars on signing of contract.
Twelve Hundred (\$1200.00) Dollars on December 26, 1928.

The deferred payment to be evidenced by a ninety (90) day note dated Sept. 26, 1928, with interest at 6% per annum, which shall be considered as evidence to pay and not as payment thereof.

(3) Title shall remain in seller until full
40

Exhibit P-1.

purchase price shall have been paid, during which period ownership plates on said steam shovel are to be maintained thereon by purchaser, and purchaser also agrees to keep said steam shovel in good operating condition and not sell, transfer or move same without written consent of seller, first had and obtained.

10

(4) It is agreed that within thirty (30) days from Sept. 26, 1928, purchaser may upon due notice to the seller return said steam shovel to our Paterson, N. J., shops, all transportation charges paid. In event that the purchaser exercises this privilege, a joint inspection of said steam shovel is to be made by representatives of seller and purchaser to determine whether or not said steam shovel has been maintained in condition specified in the preceding paragraphs.

20

(5) After joint inspection is made and steam shovel returned to our Paterson, N. J., shops, this agreement will be cancelled and the Three Hundred (\$300.00) Dollars paid will be considered as rental, and purchasers note returned.

(6) In the event of default in payment the seller may at their option, take possession of and remove said steam shovel without process of law or notice, in which case all payments previously made shall be considered as rental for period used.

30

(7) This proposal, when properly executed by parties hereto will constitute an agreement that there are no understandings other than as specified herein.

40

Exhibit P-1.

(8) In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

GENERAL EQUIPMENT COMPANY, INC.,
W. B. Dunphy (Signed)
Vice President.

10 Attest:

W. B. Dunphy (Signed)
Secretary.

20 We, the Gordon Engineering Company, hereby accept above proposal of the General Equipment Company, Inc., and having inspected and accepted the steam shovel, instruct them to ship said steam shovel to the vicinity of Paterson, N. J.

GORDON ENGINEERING COMPANY,
Dudley Gordon (Signed)

Attest:

D. E. Leonard (Signed)

30

40

Exhibit P-1.

State of New York, }
 County of New York, } ss.:

Be it remembered, that on this 25th day of September, 1928, before me Carlo Carlino, personally appeared W. B. Dunphy, who, being by me duly sworn, doth depose and make proof to my satisfaction that he is the Secretary of, and well knows the seal of General Equipment Co. Inc., the seller, named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto and the said instrument signed and delivered by W. B. Dunphy, Vice President of said corporation in the presence of said deponent, as the voluntary act and deed of the said corporation, and that the said deponent thereupon signed the same as subscribing witness.

Subscribed and sworn to before me, the day and year first above written.

CARLO CARLINO (signed)

(Seal)

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20
30
40

Exhibit P-1.

State of New Jersey, }
 County of Essex, } ss.:

Be it remembered, that on this 26th day of Sept. 1928 before me, Carlo Carlino, personally appeared Mr. Dudley Gordon, who being by me duly sworn, doth depose and make proof to my satisfaction that he is the President of and well knows the seal of the Gordon Engineering Company the purchaser named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said corporation, and that the same was so affixed thereto and the said instrument signed and delivered by Dudley Gordon, President of said corporation, in the presence of said deponent, as the voluntary act and deed of said corporation, and that the said deponent thereupon signed the same as subscribing witness.

Subscribed and sworn to before me, the day and year first above written.

CARLO CARLINO (signed)

(Seal)

30

40

Exhibit P-2.

\$1,200.00

Clifton, New Jersey -September 26th, 1928

Ninety Days after date we promise to pay to
 the order of General Equipment Company, Inc.
 One Thousand Two Hundred and no/100 Dollars
 Payable at 342 Madison Avenue, New York, N. Y.
 Value received with interest @ 6% per annum 10

GORDON ENGINEERING COMPANY,
 Dudley Gordon,
 No. 2 Due 12/26/28 President.

Exhibit P-3.

\$300.00

Clifton, N. J. Sept. 26, 1928

On November 1st, 1928 we promise to pay to the
 order of General Equipment Company, Inc. 20
 Three Hundred and no/100 Dollars
 Payable at 342 Madison Avenue, New York, N. Y.
 Value received with interest @ 6% per annum.

GORDON ENGINEERING COMPANY,
 Dudley Gordon,
 No. 1 Due 11/1/28 President.

Endorsed: Dudley Gordon. 30

Memorandum.**PASSAIC CIRCUIT COURT CHAMBERS**

Paterson, New Jersey

William B. Mackay

Judge

GENERAL EQUIPMENT Co., a corporation,

Plaintiff,

10

vs.

HARRY H. ZEIN and THOMAS
CARLESS.

Defendant.

April 13, 1931.

JACOB LIPMAN,
Attorney for Plaintiff,
17 Academy Place,
Newark, New Jersey.

20

FEDER & RINZLER,
Attorneys for Defendant,
Liggett Building,
Passaic, New Jersey.

Gentlemen :

30 This is an action in replevin. The plaintiff, a New York Corporation, sold to the Gordon Engineering Co., alleged to be a corporation, a steam shovel by conditional bill of sale on September 26th, 1928. The conditional sales contract was not filed as required by Section 5 of the Conditional Sales Act.

40 The steam shovel was delivered to the premises occupied by one Dudley Gordon, doing business as the Gordon Engineering Co. In September, 1928, defendant Harry Zein, entered the employ of Dudley Gordon, doing business as the Gordon Engineering Co., and operated the steam shovel in question, and in addition thereto used his trucks to cart material obtained by operating such shovel. Dur-

Memorandum.

ing the course of this employment Zein asked Dudley Gordon to pay him for services rendered in operating the steam shovel and for the use of the trucks and carting. Gordon failed to pay as promised, although requested on a number of occasions, and finally in December, 1928, left for parts unknown. Zein caused a writ of attachment to be issued for the sum of approximately \$2,200., the amount claimed to be due for operating the steam shovel, for the use of his (Zein's) trucks and carting, and the Sheriff of Passaic County levied upon the steam shovel by virtue of this writ and is therefore also made a defendant in this case. 10

Shortly after the issuance of the writ of attachment, the plaintiff replevied the steam shovel, making Zein and Sheriff Carless parties defendants. Zein gave bond and re-replevied. 20

Plaintiff contends it is entitled to judgment on the theory that Dudley Gordon did not buy the steam shovel; that it was bought under a written conditional bill of sale by the Gordon Engineering Co., a corporation, and therefore, Zein is estopped from showing the contrary. 30

Defendant Zein contends that the conditional bill of sale is void as against creditors. *Thayer Mercantile Co. Inc., v. First National Bank of Mill-Town*, 98 N. J. Law 29. It is true that if the conditional bill of sale is not filed within the time required by statute, that it is void as against creditors of the purchaser. 40

Defendant further contends that Dudley Gordon, doing business as the Gordon Engineering Co., was in possession of the steam shovel at the time the attachment was issued and that he had no knowledge of any claim of the present plaintiff either actual or constructive. Further, that it is not necessary for the sale of personal property to have an instrument in writing; that the steam shovel was delivered to Gordon's premises; that it

Memorandum.

was used by Gordon in his business and that he had possession and exercised dominion over it; that there is no corporation in the United States by the name mentioned in the conditional bill of sale and that therefore, he is entitled to a verdict in his favor.

10 Possession of chattels is presumptive proof of ownership.

By the express terms of the Conditional Sales Act, Section 5 of the Uniform Conditional Sales Act, Pamphlet Laws of 1919, page 461, C. P. 210:

20 "Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale."

30 In this case the attachment was acquired December 16th, 1928. By reason of this lien defendant Zein, as a creditor, obtained a judgment. He therefore, established a prior lien because the plaintiff did not file its conditional bill of sale until February 15th, 1929, which was more than ten days after the making and execution of the conditional bill of sale. See *Koerner v. United States Waxed & Coated Paper Co.*, 121 Atl. Rep. 338.

I am of the opinion that defendant Zein is not estopped in this case from showing that Dudley Gordon, doing business as the Gordon Engineering Co., was the purchaser of this steam shovel.

40 Judgment will be entered for the defendants and against the plaintiff in this case—no cause for action.

Very truly yours,

W. B. MACKAY,
(C. C. J.)

Opinion of New Jersey Supreme Court.

Filed March 22, 1932.

NEW JERSEY SUPREME COURT.

No. 60, Oct. T., 1931.

GENERAL EQUIPMENT CO.

vs.

HARRY H. ZEIN, *et al.*

10

Appeal from Passaic Circuit Court.

Argued before GUMMERE, Chief Justice, and
Justices PARKER and CASE.

20

For the appellant, JACOB LIPMAN.

For the respondent, FEDER & RINZLER.

Per Curiam:

This was an action in replevin. In September, 1928, the General Equipment Company sold by a conditional sales agreement a steam shovel to the "Gordon Engineering Company, of Clifton, N. J., a New Jersey corporation." The agreement was signed, so far as the purchaser was concerned, by "Gordon Engineering Company, Dudley Gordon." It had attached to it an affidavit made by Dudley Gordon which contained a statement that he was the president of the Gordon Engineering Company, the purchaser of the steam shovel, and was familiar with its corporate seal, and that the same was affixed to the instrument as the voluntary act and

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Opinion of New Jersey Supreme Court.

deed of the corporation. Subsequent to the sale of this steam shovel under the conditional sales contract, the defendant Zein entered into the employ of Gordon, and the latter, having failed to pay him the compensation earned by him, agreed to turn over to him in discharge of his obligation
10 this steam shovel. Gordon failed to do this, and then Zein sued out an attachment against the steam shovel. When the General Equipment Company learned of the situation, and also was informed that the alleged purchaser of the steam shovel had no legal existence—that is, that there was no such corporation as that named in the conditional sales contract as the purchaser—which was the fact, it brought the present action of replevin to
20 recover the possession of the steam shovel. The case was tried before the court without a jury, and resulted in a finding in favor of the defendant Zein, principally upon the ground that the General Equipment Company had failed to file the conditional contract of sale within the ten days required by the statute.

It seems to us that this was erroneous. Gordon never had any title whatever to this steam shovel. He obtained possession of it through a fraud perpetrated by him upon the General Equipment Company; that is, by representing that he was acting
30 for a corporation known as the Gordon Engineering Company, of Clifton, N. J., in negotiating the purchase. He completed the fraud by executing the conditional sales contract in the name of the corporation and falsely swearing that he was its president. In this situation, it seems to us, the

Opinion of New Jersey Supreme Court.

General Equipment Company was entitled, at any time after discovering the fraud and learning that it had sold the steam shovel to a nonexisting purchaser, to retake possession thereof, and that the conditional sales statute has no relevancy to the present situation. If we are right in this view, then the trial court was in error in finding in favor of the defendant and directing judgment to be entered on such finding. 10

The defendant below, and the respondent here, claims that this matter is not properly before us because there was no exception taken to the refusal of the plaintiff's motion to direct a finding in its favor, and that, unless there was such exception, no appeal will lie. We think this contention is without merit. The case was tried in February, 1931, and at the close of the case there was a motion made by each party for a favorable finding. No action was taken upon these motions until April, when the court filed a memorandum holding that the motion of the defendant Zein should be granted and that a judgment should be entered in his favor. The principal ground of appeal is that the trial court erred in directing such a judgment to be entered instead of directing a judgment in favor of the appellant. In the case of *Smith v. Cruse*, 101 N. J. L. 82, the Court of Errors and Appeals held that where the trial court sits without a jury it cannot enter judgment for one party without finding in favor of that party, and that there is no requirement that the defeated party must have made a request for a finding of law or fact and excepted to an adverse finding in order to se- 20 30

Opinion of New Jersey Supreme Court.

cure a reversal of the judgment, and that an appeal is given to him as a matter of right, although he did not submit the grounds for objection to the trial court, where the objection relates only to the final judgment and not to alleged errors occurring in the proceedings on the trial.

10 For the reasons indicated, we conclude that the judgment under review should be reversed.

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**Order of Reversal and Remittitur and Judgment
of Reversal.**

Entered April 28, 1932.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">GENERAL EQUIPMENT Co., a corporation, Plaintiff-Appellant,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">HARRY H. ZEIN and THOMAS CARLESS, Defendants-Respondents.</p>	}	<p>Action at Law.</p> <p>On Appeal from the Passaic County Circuit Court.</p> <p>Remittitur.</p>	10
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This cause having been submitted on brief at the
September, 1931, term of this Court by Jacob Lip-
man, attorney for appellant, and Harry Unger, of
counsel for appellant, and Feder & Rinzler, attor-
neys for the respondents, and the Court having in-
spected the record and judgment below, and con-
sidered the causes assigned for error on the
grounds of appeal thereon, it is, on this 28 day of
April, 1932. 20

ORDERED that the judgment of the said Passaic
County Circuit Court be in all things reversed, set
aside, and for nothing holden, and to be remitted to
the said Passaic County Circuit Court to be pro- 30

Notice and Grounds of Appeal.

ceeded with in accordance with this judgment and
the procedure of the said Court.

Entered this 28 day of April, A. D. 1932.

On motion of

JACOB LIPMAN,

10 Attorney for Appellant.

Judgment reversing judgment of trial court, en-
tered April 28, 1932.

Notice and Grounds of Appeal.

Filed May 6, 1932.

NEW JERSEY SUPREME COURT.

20

GENERAL EQUIPMENT Co., a cor-
poration,
Plaintiff-Appellant,

vs.

30 HARRY H. ZEIN and THOMAS
CARLESS,
Defendants-Appellees,

Notice and
Grounds of
Appeal.

To: JACOB LIPMAN, ESQ.,
Attorney of Plaintiff-Appellant:

Sir:

40 PLEASE TAKE NOTICE that Harry H. Zein and
Thomas Carless, the defendants-appellees in the
above stated cause, hereby appeal to the New Jer-

Notice and Grounds of Appeal.

sey Court of Errors and Appeals, from the whole of the judgment entered in this court, on the following grounds:

1. This court erred in reversing the judgment of the trial court.
2. This court erred in failing to affirm the judgment of the trial court. 10

Dated: May 5th, 1932.

FEDER & RINZLER,
Attorneys of Defendants-Appellees,
(Appellants on the appeal to the
New Jersey Court of Errors and Appeals).

Due and legal service of the within instrument is hereby acknowledged this 5th day of May, 1932. 20

JACOB LIPMAN,
Attorney for General Equipment Co.

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The first part of the report is devoted to a general survey of the situation in the country. It is followed by a detailed account of the work done during the year. The report concludes with a summary of the results and a list of the names of the members of the committee.

REPORT OF THE COMMITTEE

The committee has the honor to report that it has completed its work during the year. It has held several meetings and has received many suggestions from the members of the society. It has also conducted a number of experiments and has obtained some interesting results.

LIST OF MEMBERS

The following is a list of the names of the members of the committee:

- Mr. A. B. C.
- Mr. D. E. F.
- Mr. G. H. I.
- Mr. J. K. L.
- Mr. M. N. O.
- Mr. P. Q. R.
- Mr. S. T. U.
- Mr. V. W. X.
- Mr. Y. Z. A.
- Mr. B. C. D.
- Mr. E. F. G.
- Mr. H. I. J.
- Mr. K. L. M.
- Mr. N. O. P.
- Mr. Q. R. S.
- Mr. T. U. V.
- Mr. W. X. Y.
- Mr. Z. A. B.
- Mr. C. D. E.
- Mr. F. G. H.
- Mr. I. J. K.
- Mr. L. M. N.
- Mr. O. P. Q.
- Mr. R. S. T.
- Mr. U. V. W.
- Mr. X. Y. Z.
- Mr. A. B. C.
- Mr. D. E. F.
- Mr. G. H. I.
- Mr. J. K. L.
- Mr. M. N. O.
- Mr. P. Q. R.
- Mr. S. T. U.
- Mr. V. W. X.
- Mr. Y. Z. A.
- Mr. B. C. D.
- Mr. E. F. G.
- Mr. H. I. J.
- Mr. K. L. M.
- Mr. N. O. P.
- Mr. Q. R. S.
- Mr. T. U. V.
- Mr. W. X. Y.
- Mr. Z. A. B.
- Mr. C. D. E.
- Mr. F. G. H.
- Mr. I. J. K.
- Mr. L. M. N.
- Mr. O. P. Q.
- Mr. R. S. T.
- Mr. U. V. W.
- Mr. X. Y. Z.

The committee is very grateful to the members of the society for their kind and generous contributions. It is also very pleased to have received so many suggestions and criticisms. It is confident that the work done during the year has been of great value to the society and that the results obtained will be of great interest to the members.

The committee is very pleased to have received so many suggestions and criticisms. It is confident that the work done during the year has been of great value to the society and that the results obtained will be of great interest to the members.

New Jersey Court of Errors and Appeals

GENERAL EQUIPMENT Co., a corporation,
Plaintiff-Respondent,

vs.

HARRY H. ZEIN and THOMAS
CARLESS,
Defendants-Appellants.

On Appeal
from Supreme Court

Sat Below:
Gummere, *C. J.*
and Parker
and Case, *J. J.*

BRIEF FOR DEFENDANTS-APPELLANTS.

This was an action in replevin brought by the plaintiff against the defendants to recover a steam shovel which the plaintiff, a New York corporation, had sold, on September 26th, 1928, by conditional bill of sale, to Dudley Gordon, who was trading and doing business as the Gordon Engineering Co. The conditional sales contract was not filed as required by Section 5 of the Conditional Sales Act (P. L. 1919, p. 461).

The steam shovel was delivered to the premises occupied by Dudley Gordon, trading and doing business as the Gordon Engineering Co. In September, 1928, defendant, Harry Zein, entered the employ of Dudley Gordon, doing business as Gordon Engineering Co., and operated the steam shovel in question, and in addition thereto used his trucks to cart material obtained by operating such shovel. During the course of this employment Zein asked Dudley Gordon to pay him for services rendered in operating the steam shovel and for the use of the trucks and carting. Gordon

failed to pay as promised, although requested on a number of occasions, and finally in December, 1928, left for parts unknown. Zein caused a writ of attachment to be issued for the amount of money due him for operating the steam shovel, and for the use of his (Zein's) trucks and carting, and the Sheriff of Passaic County levied upon the steam shovel by virtue of this writ.

Shortly after the issuance of the writ of attachment, the plaintiff replevied the steam shovel, making Zein and Sheriff Carless parties defendants. Zein gave bond and re-replevied.

The facts just stated are as cited in the memorandum and conclusions filed by the trial judge (pp. 72-74), where he also said:

"Plaintiff contends it is entitled to judgment on the theory that Dudley Gordon did not buy the steam shovel; that it was bought under a written conditional bill of sale by the Gordon Engineering Co., a corporation, and therefore, Zein is estopped from showing the contrary.

"Defendant Zein contends that the conditional bill of sale is void as against creditors. *Thayer Mercantile Co., Inc. v. First National Bank of Mill Town*, 98 N. J. Law 29. It is true that if the conditional bill of sale is not filed within the time required by statute, that it is void as against creditors of the purchaser.

"Defendant further contends that Dudley Gordon, doing business as the Gordon Engineering Co., was in possession of the steam shovel at the time the attachment was issued and that he had no knowledge of any claim of the present plaintiff either actual or constructive. Further, that it is not necessary for the sale of personal property to have an instrument in writing; that the steam shovel

was delivered to Gordon's premises; that it was used by Gordon in his business and that he had possession and exercised dominion over it; that there is no corporation in the United States by the name mentioned in the conditional bill of sale and that therefore, he is entitled to a verdict in his favor.

"Possession of chattels is presumptive proof of ownership.

"By the express terms of the Conditional Sales Act, Section 5 of the Uniform Conditional Sales Act, Pamphlet Laws of 1919, page 461, C. P. 210:

'Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale.'

"In this case the attachment was acquired December 16th, 1928. By reason of this lien defendant Zein, as a creditor, obtained a judgment. He therefore, established a prior lien because the plaintiff did not file its conditional bill of sale until February 15th, 1929, which was more than ten days after the making and execution of the conditional bill of sale. See *Koerner v. United States Wax-ed & Coated Paper Co.*, 121 Atl. Rep. 338.

"I am of the opinion that defendant Zein is not estopped in this case from showing that Dudley Gordon, doing business as the Gordon Engineering Co., was the purchaser of this steam shovel.

"Judgment will be entered for the defend-

ants and against the plaintiff in this case—no cause for action.”

The Supreme Court reversed the judgment, and defendants now appeal and allege that the Supreme Court erred (1) in reversing the judgment of the trial court; (2) in failing to affirm that judgment.

The Supreme Court misconceived the theory of the case, and based its reversal upon facts which it assumed existed, but which in fact did not exist, and were not supported by the record.

This is demonstrated by the fact that the Supreme Court said that in its opinion:

“When the General Equipment Company learned of the situation, and also was informed that the alleged purchaser of the steam shovel had no legal existence—that is, that there was no such corporation as that named in the conditional sales contract as the purchaser—which was the fact, it brought the present action of replevin to recover the possession of the steam shovel.”

Our examination of the amended complaint shows that it was based upon the theory that there was a default in payments (Case, p. 27). Paragraphs three and four of the complaint read:

“3. The purchaser has failed to make any payment under the contract, the entire amount remaining unpaid and due.

4. By reason of the said purchaser’s default and failure to make the payments called for by the contract, the plaintiff has become, and now is, lawfully entitled to immediate possession of the said chattel.”

The plaintiffs' case consisted of a stipulation of facts dictated into the record at the trial, and the testimony on the part of one witness relating to the value of the steam shovel. *There was no testimony to the effect that the plaintiff rescinded the transaction because of fraud, or that the plaintiff claimed any fraud to exist, or upon discovering any fraud instituted this replevin action urging it as the basis for the action. There was nothing in the stipulation of facts (Case, p. 45) to indicate such a claim or theory.*

When the motion for the direction of the verdict for the plaintiff was made, fraud was not claimed as a ground for rescission, nor was a claim for rescission made. The word fraud was not even mentioned in the argument.

It is consequently clear that the Supreme Court erred in its reversal.

POINT I.

The Supreme Court erred in reversing the judgment of the trial court.

The Supreme Court fell into error when it reversed the judgment, this no doubt due to the fact that it mistook the theory of plaintiff's case. The Supreme Court *assumed* the theory to be that plaintiff was defrauded by Gordon claiming to represent himself as acting for Gordon Engineering Company, a corporation, and that there being no such corporation, the plaintiff had the right to retake possession of the machine. This is demonstrated by the following statements contained in the opinion of the Supreme Court:

“When the General Equipment Company

learned of the situation, and also was informed that the alleged purchaser of the steam shovel had no legal existence—that is, that there was no such corporation as that named in the conditional sales contract as the purchaser—which was the fact, it brought the present action of replevin to recover the possession of the steam shovel.”

Also:

“He (Gordon) obtained possession of it (steam shovel) through a fraud perpetrated by him upon the General Equipment Company; that is, by representing that he was acting for a corporation known as the Gordon Engineering Company, of Clifton, New Jersey, in negotiating the purchase. He completed the fraud by executing the conditional sales contract in the name of the corporation and falsely swearing that he was its president. In this situation, it seems to us, the General Equipment Company was entitled, at any time after discovering the fraud and learning that it had sold the steam shovel to a non-existing purchaser, to retake possession thereof, and that the conditional sales statute has no relevancy to the present situation. If we are right in this view, then the trial court was in error in finding in favor of the defendant and directing judgment to be entered on such finding.”

We shall now demonstrate that there was no evidence to support this finding of the Supreme Court. The theory of plaintiffs' case was not a claim of fraud, but that there was default in payment, and that by reason of such default, the plaintiff elected to retake possession of the steam shovel according to the express provisions of the conditional sales contract. An examination of the amended complaint (Case, p. 27) shows that it contains the following allegations:

"3. The purchaser has failed to make any payment under the contract, the entire amount remaining unpaid and due.

4. By reason of the said purchaser's default and failure to make the payments called for by the contract, the plaintiff has become, and now is, lawfully entitled to immediate possession of the said chattel."

Clause six of the conditional sales contract (Case, p. 30) reads:

"In the event of default in payment, the seller may at their option, take possession of and remove said steam shovel without process of law or notice, in which case all payments previously made shall be considered as rental for period used."

The only testimony adduced on the plaintiff's case was that given by the witness Dunphey. His testimony was limited to the value of the steam shovel and to the default in the terms of the conditional sales contract. As to the latter phase of the case, he testified that two notes, Exhibits P-2 and P-3, were given in connection with the conditional sales contract, P-1, and that neither of these notes were paid (Case, p. 45, ll. 32-40; 46, ll. 1-10). An examination of his testimony shows that after testifying to this phase of the case on the direct examination, the remainder of his direct and cross examination was solely confined to the value of the steam shovel.

His testimony is devoid of any claim or even mention of fraud. He did not testify or even suggest that any fraud existed, or that upon the discovery of any fraud, he rescinded the contract and made it the basis of this suit.

The only other evidence produced in support of the plaintiff's case, aside from the testimony given by plaintiff's witness, is the stipulation of facts dictated into the record at the trial of the case, and this may be found in the record (Case, pp. 39 to 45, inclusive). It is useless to detail here the facts thus stipulated, but an examination of the record will show that the stipulation contains no mention, claim, or even suggestion of any fraud, and that no claim was made then or at any stage of the trial that Gordon had defrauded the plaintiff by representing himself to be acting for Gordon Engineering Company, a corporation, or that fraud was made the basis for a rescission of the agreement or the recovery of the steam shovel.

At the close of the case (Case, p. 64), there was a discussion between both counsel and the court, and it was understood that briefs would be submitted to the court by counsel. This was done, whereupon the trial judge filed his opinion and conclusions, and on May 6th, 1931, a rule for judgment was signed by the trial judge and entered. On July 11th, 1931, the trial judge instructed the stenographer to have the record show that at the conclusion of the case, counsel for the plaintiff moved for a direction of a verdict for the plaintiff, and that counsel for the defendant had made a motion for a direction of a verdict in defendant's favor (Case, p. 65).

There was not even then a suggestion of any fraud. The alleged motion for a direction of a verdict in favor of the plaintiff was not grounded upon fraud. How then is there any justification, in this state of the record, for the Supreme Court to conclude:

“When the General Equipment Company learned of the situation, and also was in-

formed that the alleged purchaser of the steam shovel had no legal existence—that is, that there was no such corporation as that named in the conditional sales contract as the purchaser—which was the fact, it brought the present action of replevin to recover the possession of the steam shovel.”

And also:

“He (Gordon) obtained possession of it (steam shovel) through a fraud perpetrated by him upon the General Equipment Company; that is, by representing that he was acting for a corporation known as the Gordon Engineering Company, of Clifton, New Jersey, in negotiating the purchase. He completed the fraud by executing the conditional sales contract in the name of the corporation and falsely swearing that he was its president. In this situation, it seems to us, the General Equipment Company was entitled, at any time after discovering the fraud and learning that it had sold the steam shovel to a non-existing purchaser, to retake possession thereof, and that the conditional sales statute has no relevancy to the present situation. If we are right in this view, then the trial court was in error in finding in favor of the defendant and directing judgment to be entered on such finding.”

Surely, if the basis of plaintiff's action was a default in the terms of the conditional sales contract in the respect that the plaintiff did not make the payments as therein provided, then the trial judge was legally right in entering judgment for the defendants.

Even if the plaintiff's case was based upon the theory of fraud, the judgment of the trial court was correct, and the reversal of that judgment by the Supreme Court is erroneous because there is no evidence in the record of any claim made that

the defendants had any notice of fraud on the part of Gordon. Defendant, Zein, was an innocent third person, a creditor of Gordon who acquired a lien against the steam shovel by attachment, and the defendant, Carless, as sheriff, executed the writ.

“The fact that the subject matter of a sale induced by the fraud of the buyer has passed into the hands of a third person or that a third person has acquired a lien thereon from or under such buyer does not preclude the seller from rescinding the sale and recovering the property if such third person is not entitled to protection as a bona fide purchaser for value. * * * Any unreasonable delay on the part of the seller in the rescission of the sale will deprive him of the right to do so as against third persons claiming under the fraudulent buyer, for the reason that even as against the buyer the seller must properly exercise his right of rescission after discovery of the fraud.”

24 R. C. L. Section 596, page 311.

In the instant case, defendants had no notice of any fraud on the part of Gordon, and the plaintiffs did not act with reasonable diligence. The conditional sales agreement was executed September 26th, 1928, and one note was payable November 1st, 1928, and the other, ninety days from September 26th, 1928, and the complaint in the action was filed on June 21st, 1929.

In 24 R. C. L., Section 597, page 312, it is said:

“The seller may avoid the sale as against third persons claiming under the fraudulent buyer with notice of the fraud.”

And 24 R. C. L., Section 599, at page 315:

“But where the debt of the attachment or

execution creditor was contracted after the fraudulent purchase and in reliance on the buyers' ownership of the property, it has been held that he would be entitled to protection as against the defrauded sellers' right to rescind."

Moreover, we do not understand how the plaintiff could even make a claim of fraud. Mr. Gordon appeared personally and signed the contract. There is no claim made that he made any representations as to who, aside from him, composed the corporation or what the financial status was. If he alleged himself to be an agent for the corporation, and the plaintiff did not inquire, and Gordon did not say, who else represented or who composed the corporation, and if the plaintiff did not know or care to know, how could the plaintiff claim to be defrauded.

Thus it is said:

"On the other hand if the buyer personally appears before the seller misrepresenting his identity and personally receives the delivery of the goods, this has been treated as a fraudulent purchase under which the legal title would pass by the delivery to the imposter and enable him to transfer a good title to a bona fide purchaser, and the same has been held true where the imposter made the purchase in person under the assumed name and the goods were shipped to and received by him under such assumed name."

24 R. C. L., Section 601, page 317.

Again, suppose there was fraud. What evidence is there when the plaintiff discovered the fraud or that the plaintiff acted within a reasonable time after it came to learn of the alleged fraud? There is none.

Thus it is said:

“A sale induced by the fraud of the buyer is voidable merely at the option of the seller, and to entitle him to rescind and avoid the sale he must do it within a reasonable time after coming to the knowledge of the fraud.”

24 R. C. L., Section 610, page 325. Citing cases, including *Arnold v. Hagerman*, 45 N. J. Eq. 186.

CONCLUSION.

We respectfully submit that the judgment of the trial court should be affirmed and that the reversal of that judgment by the Supreme Court should itself be reversed.

Respectfully submitted,

FEDER & RINZLER,
Attorneys of Defendants-Appellants.

FEDER & RINZLER,
Of Counsel.

111OCT. 1932

New Jersey Court of Errors and Appeals

GENERAL EQUIPMENT Co., a corporation,
Plaintiff-Respondent,

vs.

HARRY H. ZEIN and THOMAS
CARLESS,
Defendants-Appellants.

On Appeal
from
Supreme
Court.

Sat below:
Gummere, C.J.
and Parker
and Case, J.J.

BRIEF FOR PLAINTIFF-RESPONDENT.

This is an appeal by the defendants-appellants from a judgment of the Supreme Court reversing the judgment of the trial court which found for the defendants-appellants in an action tried in the Circuit Court of Passaic County, decided by the Court sitting without a jury. The defendants-appellants in the trial court, in their brief filed again before the Supreme Court, and now persistently claim that the chattel which is the subject matter of this action was purchased by *Dudley Gordon who was trading and doing business as Gordon Engineering Co.*, an assertion which is not borne out by the facts. Reference is made to this claim by reason of the fact that the Supreme Court in its consideration of the issue disposed of the entire matter upon this very claim.

Facts.

On September 26, 1928, plaintiff-respondent was the owner of a steam shovel which was on

that date sold by agreement in writing to what is described therein as, "Gordon Engineering Co., of Clifton, N. J., a New Jersey corporation" (Ex. P-1) for the sum of \$1500.00, title to the chattel being reserved in the vendor, pending payment of the purchase price. The agreement bears an acknowledgment of execution by Dudley Gordon, President of Gordon Engineering Co., acting on behalf of the purchasing corporation.

Although the agreement provided for the payment of \$300.00 upon the signing of the contract and \$1200.00 on December 26, 1928, the parties effected a change, in that two promissory notes aggregating \$1500.00 were executed, signed "Gordon Engineering Co., Dudley Gordon, president" (Ex. P-2 and 3) and were accepted by the plaintiff-respondent. Thereafter the chattel was delivered by the plaintiff-respondent at the request of the purchaser, to a point at Preakness, near Paterson, New Jersey, where it remained until December 16, 1928, when it was seized by the defendants-appellants, Thomas Carless, the Sheriff of Passaic County, N. J., by virtue of a writ of attachment issued in a certain action pending in the Circuit Court of that County, wherein the defendant-appellant, Harold H. Zein, was the plaintiff, and one, *Dudley Gordon*, an absconding debtor, the defendant.

Default having been made in the payment of the purchase price, plaintiff-respondent, under the terms of Section 6 of the agreement of sale (Ex. P-1) became entitled to immediate possession of the chattel and demand for same was made sometime in January, 1929, (p. 41, ll. 1-10) and prior to the institution of the action from which this appeal develops. The plaintiff-respondent recorded the agreement (Ex. P-1) on

February 15, 1929, subsequent to the seizure of the chattel by the defendants-appellants. At the time the defendants-appellants were in possession of the chattel and demand for possession of same was made by plaintiff-appellant, the undisputed value of the chattel was the sum of \$1800.00 (p. 46, l. 34).

4. Plaintiff-respondent's suit is in two counts and sounds in trover for a wrongful taking and in detinue for a wrongful detention, to which the defendant-appellants answered: (Amended answer to amended complaint, p. 32)

1. By general denial.

2. That the plaintiff-respondent was not the owner of the chattel.

3. That demand for return had not been made prior to the institution of replevin action.

4. Plaintiff-respondent was not entitled to possession of the chattel.

5. That the chattel was at the time of the institution of the plaintiff-respondent's action, in custodia legis.

6. That the defendants-appellants asserted a superior lien by virtue of an attachment issued out of the Passaic Circuit Court under which levy was effected upon the chattel prior to the recording of the agreement (Ex. P-1).

7. That the only title acquired by the plaintiff was by reason of the conditional bill of sale dated September 26, 1928, but recorded February 15, 1929, subsequent to the attaching levy of the defendants-appellants.

By way of reply the plaintiff-respondent denied each allegation of fact and prior to trial moved to strike out the answer upon the ground that the same did not disclose a claim of property in the chattel, which motion was denied.

At the trial it was conceded that nowhere in the United States does there appear *upon record* a certificate of incorporation in the name of Gordon Engineering Co. (p. 41, l. 14). There was meagre testimony tending to establish that Dudley Gordon conducted a business at Preakness, N. J., and used the name "Gordon Engineering Co." (p. 51, l. 20 to p. 52, l. 20).

It was also established that the lien, asserted and referred to by the defendants-appellants in the Fifth and Sixth Separate Defenses of their Answer (Amended Answer) arose out of a levy effected by virtue of a writ of attachment directed to the defendant-appellant, Thomas Carless, Sheriff of Passaic County, N. J., in an action instituted by the defendant-appellee, Harry H. Zein, in the Circuit Court of that County, against one, *Dudley Gordon*, (p. 40, ll. 23 to 39) an absconding debtor.

Following the institution of plaintiff-respondent's action in which possession of the chattel was obtained, the defendants-appellants rebonded and retook possession.

At the conclusion of the trial a motion was made for the direction of a verdict in favor of the plaintiff-respondent upon the ground that the defendants-appellees and all persons claiming under Gordon Engineering Co., a corporation, were estopped to deny its corporate de facto existence and that the evidence had not established that Dudley Gordon had acquired any property right in the chattel susceptible to levy by execution or

otherwise. The defendants-appellants contended that the absence of a certificate of incorporation as conceded, established the non-existence of the Gordon Engineering Co., the purchaser, and that therefore Dudley Gordon was the purchaser against whose interest the attaching levy was effected and that plaintiff-respondent's reservation of title was void under Section 5 of the Conditional Sales Act by reason of the failure to record the agreement of sale (Ex. P-1) prior to the date of defendants-appellees' levy:

The Court found that the conditional bill of sale (Ex. P-1) was executed by Gordon Engineering Co. of Clifton, N. J., a corporation to the plaintiff-respondent, which was recorded subsequent to defendants-appellants' levy; that the defendant-appellant, Harry H. Zein, was not estopped from showing that Dudley Gordon doing business as Gordon Engineering Co. was the purchaser of the chattel, and that plaintiff-respondents' reservation of title was therefore void under the act above referred to; denied the plaintiff-respondent's motion for a verdict and found no cause of action from which an appeal was taken by the plaintiff-respondent to the Supreme Court which reversed the judgment upon the ground that Dudley Gordon was not the purchaser but that Gordon Engineering Co., a corporation, was the purchaser and that the representation by Dudley Gordon of the existence of the purchasing corporation constituted a fraud and that no title therefore passed to the purchaser and that the Conditional Sales Act had no relevancy to the situation.

It is submitted that the present judgment should be affirmed upon the findings of the Supreme Court, if not upon the points urged by the

plaintiff-respondent in its appeal, and reference therefore is respectfully made to the entire situation as it existed in the first instance.

Introductory.

A consideration of the controversy would seem to require an analysis of the relationship between the parties in order to determine the legal effect of the facts presented and beginning with the judgment of that Court, the logical sequence would seem to be:

1st: The existence of a property, using the term in its most inclusive legal sense, asserted by the defendants-respondents.

2nd. The nature of that property.

3rd. The derivation of that property.

4th. The character of that property at its source.

5th. Changes in the character of that property from its source to the defendants-appellants, either through operation of law or fact.

POINT 1.

A property in a chattel, sought to be asserted, must be pleaded by stating the facts upon which the right is based and must be supported by evidence establishing that right.

It will be noted at once, that the defendant-appellant herein, Harry H. Zein, was not a creditor of the buyer, Gordon Engineering Co., a corporation, but rather of Dudley Gordon.

The proof establishes that the defendant-appellant, Harry H. Zein, was not a creditor of the buyer, but rather of Dudley Gordon, and the only conceivable legal claim justified by the language employed is that the right sought to be asserted is that the position of the defendant-appellant, Thomas Carless, at least, was that of *custodia legis*.

As to the assertion of a property right in the chattel subject to levy, it would appear that the pleading is within the rule laid down in *Brown vs. Bissett*, N. J. Supreme Court, 21 N. J. Law, page 46, in which the distinction between a cognizance and an avowry was defined in the following language:

“An avowry as distinct from a cognizance, imports a taking in one’s own right: a cognizance imports a justification under the authority of another.”

“In actions to recover personalty, title (in plaintiff or defendant) which rests on a special property, must be pleaded by stating the facts constituting the special property. Rule 51, Practice Act of 1912.

It would seem therefore that the mere claim of right to possession by virtue of a writ of attachment is insufficient and that a justification for a seizure must have been pleaded to have established a legal defense.

Any possible justification by the defendants-appellants of their right to possession must of necessity lie within the scope of the language employed by them, namely, that the taking was by virtue of a writ of attachment issued "against a creditor of said buyer," (Sixth Separate Defense of the Amended Answer), to which it is a *complete answer that the action was brought by the defendant-appellant, Harry H. Zein, against one, Dudley Gordon, who was not the purchaser of the chattel.*

That the mere possession of a chattel under color of a seizure by a writ of attachment does not of itself establish any right of property therein is well established.

While the trial court found that possession of chattels is presumptive proof of ownership, it is submitted that this finding was an error, the correct statement of the law being that possession is merely prima facia evidence of ownership and that upon presentation of proof of ownership, the legal force of inference arising from mere possession is destroyed.

The distinction between presumption at law and a prima facia case is vast, the former retaining probative value at all times and the latter being a mere device in the mechanical structure of the presentation of evidence.

In *Figoli vs. Halpern*, 88 N. J. Law 58, 95 Atl. Rptr. 739, the Court held, that possession was merely prima facia evidence of ownership.

In *Wiener vs. Van Rensselaer*, N. J. Supreme

Court, 43 N. J. Law, 547, the status of personalty seized on execution or by attachment is defined in the following language:

“And so there is a difference between a replevin and other process of law with respect to the officers, for in the first case, viz., in replevin, they are expressly commanded what to take in specie, but in writ of execution, the words are general, to levy of the goods of the party, and therefore 'tis at their peril if they take another man's goods, for in that case an action of trespass will lie. The distinction between goods taken on execution and by replevin is marked. In the latter case, the identical goods are in custody of the law, and are before the law to be disposed of as it shall see proper, and the proceeding is so far in rem that the goods cannot be seized by any process until the court shall have taken action. If, therefore, a party finds his goods in the hands of an officer upon a valid writ of replevin, his remedy is by application to the court to be permitted to come in and set up his claim to them, and not by an independent replevin. Whereas, if goods are wrongfully seized by execution, it cannot be said to confer any lien on them or to bear any resemblance to a proceeding in rem.

The distinction is also treated at greater length in the case of *Hawk, et al. vs. Lepple*, N. J. Supreme Court, 51 N. J. Law, 203, in which the thorough consideration of a problem justifies an extended quotation from the opinion which reads in part as follows:

“Whatever diversity of view has elsewhere existed regarding the right to use the writ of replevin to take goods from the custody of an officer who holds them under seizure

of legal process, it may be regarded as settled in this state that the fact that such goods are in the custody of an officer holding process of seizure will not, in law, preclude a stranger to the process from the use of the writ of replevin to assert against the officer of the law the title of such third person to the property taken; accordingly, it has been held, that *to an action of replevin, it is not a sufficient avowry by the defendant that the goods were seized by him as an officer, under process of execution, as the property of the plaintiffs in replevin, without the further averment of title, at the time of the seizure, in the plaintiff.* Citing *Bruen vs. Ogden*, 6 Halst. 370; *Brown vs. Bisset*, 1 Zab. 267."

"An execution in the hands of an officer commanding a levy to be made of the goods of A, in its satisfaction, will not permit such officer to seize the goods of B, and against such levy B may assert his title through the action of replevin. Such goods are not taken by command of the writ; their seizure is wholly a trespass and it would seem like sanction of the wrongful action to consider such goods as being in the custody of the law. For this rule there is to be found ancient authority in England. In *Winnard vs. Foster*, 2 Lutw., 1190, a third person not the defendant, in the process of seizure, was permitted to maintain replevin against the sheriff's bailiff * * *. In this state, by statute, the action of replevin lies for the unlawful taking or the unlawful detention of goods, and generally, whenever the action of *de bonis asportatis*, or the action of *trover* may be maintained, replevin is a concurrent remedy.

The cases which hold, as in this state, that replevin will lie at the instance of a third person, distinguish and quite proper, as I think, between the seizure of the goods

of the defendant and of a third person, the former being regarded as done in virtue of the execution; caption of the goods of a seizure being not in virtue of the execution and a trespass.

In *Morey & Co. vs. Schaad, et al*, Court of Errors and Appeals of N. J., 98 N. J. Law, page 799, the rules enunciated in the case of *Brown vs. Bissett*, supra, and *Hawks vs. Lepple*, supra, were regarded as equally applicable to property seized by virtue of a writ of attachment. That the allegation and proof of a property right in a chattel is essential to justify the mere taking of the property of another is clearly recognized in the case of *Herzog Cloak & Suit Co. vs. Fedorko*, N. J. Supreme Court, 92 N. J. Law, page 34, in which the opinion delivered by Swayze, J., provides in part as follows:

“If the constable’s possession was lawfully obtained, a demand was necessary. He claimed by virtue of writs against Wiener and clearly he had the right by virtue of those writs to levy on any interest Wiener might have in the property. Whether a mere bailee has an interest in the bailment which is subject to levy, is sometimes a question of nicety * * *. In the present case, we think the bailee’s interest was sufficient to be subject to levy. We assume that the contract was as the plaintiff claims and that the title remained in the plaintiff. It was, of course, subject to the right of Wiener to make up the goods into ladies’ suits and to his lien thereon for his pay. There was nothing to show a termination of this special property and it may have had a value available for Wiener’s creditors.”

It is submitted therefore that nowhere in the pleadings is it asserted and nowhere in the evi-

dence is it demonstrated that any property in the chattel in question resided in *Dudley Gordon*, the defendant in the attachment action, and the proof discloses (p. 55, ll. 25 to 40) that the seizure was made by virtue of the fact that the said Dudley Gordon had absconded, manifesting that when the action in attachment was brought, Dudley Gordon was not in possession of the machine either individually or in a representative capacity and that the defendants-appellants have perhaps mistakenly assumed that a writ of attachment is in the nature of a roving commission authorizing them to seize and bring into custody of the law whatever property they desired to select in satisfaction of their claim, and that the mere seizure, as such, is tantamount to a property right therein.

POINT 2.

The lawful existence of a corporation cannot be impeached collaterally.

The rule has been outlined in the case of *Stout vs. Zubick*, decided by the N. J. Court of Errors and Appeals, 48 N. J. Law, page 599, in which the defendant sought to escape liability upon the ground that the plaintiff had not complied with the requirements of the law in the formation of the corporation. The Court in the course of the opinion stated:

“That it is entirely settled that the corporate existence of such corporation de facto cannot be inquired into collaterally. It is, as to all who contract with it, to be assumed to be a corporation de jure. The legality of its corporate existence may be inquired into by the state, but by no one

else, and this is true where the corporation is formed under a general law, as it is where the corporate existence is claimed under a special charter.”

The rule was re-affirmed in the case of *Belvidere Water Co. vs. Belvidere, N. J.*, decided by the N. J. Court of Errors and Appeals, and reported in 82 N. J. Law, page 601, in which it was said:

“Its right to exist can be questioned by the Attorney General acting for the state, but not by anyone who contracts with it as a corporation, providing there is a statute under which such a corporation may exist.” Citing *Stout vs. Zulick*, supra, *Vanneman vs. Young*, 23 Vroom, 403; *McCarter vs. Ketcham*, 43 Vroom 247.

POINT 3.

The failure to record a certificate of incorporation is not proof of the non-existence of a corporation.

The evidence bearing upon this point indicates that no certificate of incorporation of Gordon Engineering Co. was filed anywhere in the United States, (p. 41, l. 14) proof which is entirely negative in character.

In addition the defendant-appellant, Harry H. Zein, testified that Dudley Gordon used the name Gordon Engineering Co., in connection with his business, (p. 51, l. 20 to p. 52, l. 20).

Wigmore on Evidence, 2nd Ed. Vol. 1, page 239, par. 30, states:

“The process of adducing evidence and

passing upon probative value is and must be based ultimately on the canons of ordinary reasoning * * *."

On page 251, par. 36, he states:

"It has thus been seen that every evidentiary fact or class of facts may call for two processes and raise two sets of questions:

1. The admissibility of the original fact from the proponent.
2. The admissibility of explanatory facts from the opponent.

The first is subjected to the test whether the claimed conclusion is a probable or a more probable one, having regard to conceivable interpretations of the fact * * *.

The second process consists in explaining away the original fact's force by showing the existence and probability of other hypotheses * * *. But the principles underlying these rulings are the principles of applied logic that have just been outlined."

On page 794, par. 448, under the subject of "Negative and Affirmative Instances, Evidencing an Impossibility," he states:

"1. Occasional possibility — nothing short of a universal negative will suffice.

2. General or usual tendency—an equal or greater or less number of negative instances or perhaps even a single instance would help to show that no usual or general tendency could be predicated and this would be practically available to answer the showing made by the proponent.

3. Fair certainty or inevitableness of effect. Here even a single negative instance would suffice to dispose of his contention. The proponent cannot claim that an effect

is invariably found, if an instance is shown in which the effect is not found.”

Greenleaf on Evidence. 16th Ed. page 24, par. 13, treats with circumstantial or presumptive evidence and on page 35, par. 14, states:

“The notion of circumstantial evidence as already explained, is that any fact, not a human assertion, taken as a basis of inference for or against a proposition of fact, the subject of dispute.

Certain preliminary distinctions are necessary. It is not the law which furnishes the test of relevancy, but logic. Probative value, or capability of supporting an inference, is a matter of reasoning and the modes of reasoning must be the same in the court room as in a laboratory * * *. Nevertheless, these notions of logic * * * become the law.”

In *Eagle vs. Bond-Foley Lumber Co.*, 189 S. W. 1146, 173 Ky. 35, it was said:

“Where it is incumbent upon a litigant in order to succeed to establish a series of acts to show a legal connection, such connection is not stronger than the weakest point in it.”

In *Tarter vs. Boston Ins. Co.*, 215 Mo. App. 564, 256 S. W. 1079, it was said:

“Circumstantial evidence in a civil case need not exclude every other reasonable hypotheses than the truth of the fact or facts sought to be proved thereby, but it is enough that the jury can reasonably find such fact or facts from the circumstances, without compiling inference on inference.”

“Evidence must be weighed according to the means and opportunities of knowledge

of the witnesses of the facts whereof they testify." *Black vs. Black*, Court of Chancery, 30 Equity, 215.

The authorities therefore indicate that negative proof ranges intellectually from mere possibility to certainty and if the testimony does not come within that scope, it lacks the legal force requisite to its recognition as the basis for the establishment of a legal conclusion, either by way of inference or presumption. It may therefore properly be said at the outset that the testimony of the defendant, Harry H. Zein, concerning the use of the name Gordon Engineering Co. by Dudley Gordon, lacks the weight necessary to its legal recognition, in that, of necessity, his opportunity of learning of the existence of a corporate body bearing the name, Gordon Engineering Co., was limited entirely to observation which did not permit of the acquisition of the full knowledge upon the subject and the existence of such a corporate body might well have taken place without his knowledge or by operation of law, and it is therefore submitted that such testimony cannot be used as a legal basis for any fact in issue.

The failure to find a certificate of incorporation of record as the basis for the conclusion that no corporation existed, presupposes the failure to file a certificate of incorporation beyond the borders of the United States, the impossibility of loss of the certificate of incorporation by the officer with whom it was filed, as well as the impossibility of existence of the corporate body by operation of law or special charter.

It is submitted therefore that the evidence bearing upon this point must range demonstratively from a mere possibility to the certainty that no corporate body known as "Gordon Engi-

neering Co." existed, either de jure, de facto or by estoppel. As to the de jure existence, it is sufficient to state that the filing of a certificate of incorporation is not a prerequisite to the existence of such a corporation which might easily exist by special legislative act, special charter, or circumstances as above outlined, and the efforts of the courts to avoid confusion and uncertainty has given birth to the theory of corporate existence de facto and by estoppel, of which the first depends upon the existence of a law under which a corporate body might be formed, an attempt to conform with the requirements of the law and user, the second, the result of private act or agreement. As to de facto existence, judicial notice will be taken of the existence of a law under which a corporate body may be formed. Evidence of user is present by reason of the execution of the contract. (Ex. P-1).

No evidence has been presented negating an attempt to conform, nor has there been any evidence negating the possibility of corporate existence by estoppel, and it is submitted therefore that the evidence bearing upon this point is trivial, uncertain, conjectural, and therefore legally insufficient to support the legal conclusion that Gordon Engineering Co. was not a corporation.

POINT 4.

If the property in the chattel sought to be asserted is that of Dudley Gordon, the defendants-appellants are estopped to deny the existence of the Gordon Engineering Co., a corporation.

Estoppel is broadly treated in 21 Corpus Juris, page 1059, citing authorities, reference to which would further encumber this record.

“It is defined in the broadest sense of the term, as a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers or by the act of the party himself either by conventional writing or by representations, expressed or implied, in pais * * *. The purpose of estoppel is to prevent inconsistency and fraud resulting in injustice.”

In *Cason vs. State*, Court of Appeals of Ga. 16 Ga. A. 820, 86 S. E. 644, the Court stated:

“Corporations have been divided into three classes—corporations de jure, corporations de facto and corporations by estoppel. A ‘corporation de facto’ is one exercising corporate powers under color of a more or less legal organization. The term ‘corporation by estoppel’ is applied where a person who has contracted or otherwise dealt with a body purporting to be a corporation is by reason of having dealt with it as such, estopped from denying its corporate existence or the legality of its organization.

In *Phillipsburgh Bank vs. Fulmer*, 31 N. J. Law, 52, the Court held:

“To constitute an estoppel in pais there

must be an admission intended to influence or of such nature as will naturally influence the conduct of another and so change his condition as naturally to injure him, if the party making it is allowed to retract it.

In *Kuhl vs. Mayor of Jersey City*, 23 Equity, page 84, the theory was recognized in the language:

“I take the doctrine established by the decided weight of authority, that there must be such intent or that it must be so apparent that the misrepresentation will have that effect, that the intention must be presumed.”

Estoppel to either allege or deny corporate existence has been established and recognized in the following cases:

Munter vs. Ideal Peerless Laundry, 24 N. Y. S. 411, 229 Appel. Div. 56.

Burrows Shoe Co. vs. Brotherton, 288 P. 879.

Reynolds vs. St. Johns Grand Lodge, 171 La. 395-131 So. 186.

Erskine Motor vs. Chevrolet Motor Co., 180 N. C. 619-105 S. E. 420.

Russian Renaissance Co. vs. Stoddard, 207 N. Y. S. 574-211 App. Div. 132.

In *Parmels vs. Rowe*, Circuit Court of Appeals, 8th District, 145 F. 296, a suit to quiet title by the grantee of the corporation who with some of the defendants acquired title from a common source, the Court said:

“The contention that the railroad company was not a corporation and therefore took no title because the laws of Arkansas were not in some respects complied with, in

its organization cannot be sustained. It is not for the defendant or those under whom they claim and who dealt with the corporation as such to make the objection."

In *Lorrillard vs. Van Houten*, 10 N. J. Law, page 270, in an opinion by Chief Justice Ulin, it was said:

"A number of cases were cited to prove that in an action by a corporation on a plea of the general issue, proof must be made of the existence of the corporation. There may be strong reasons for requiring a corporation in bringing a suit to show it has legal existence and therefore a capacity to come into court and maintain such suit. The present action however, is not by a corporation but by an ordinary person on a mortgage assigned to it by a corporation. In such case the admission by the defendant himself in the deed of the mortgage under his hand and seal is as against him sufficient proof, when there is no contradiction of the existence of the corporation."

Citing *Henriques vs. The Dutch West Indies*, 2 Lord Raym. 1535. *Duchess Cotton Mfg. Co. vs. Davis*, 14 John 235, in which latter case Chief Justice Thompson said:

"The defendant having undertaken to enter into a contract with the plaintiffs in their corporate name, he therefore admits them to be duly constituted a body politic and corporate under such name."

In *Cotten vs. Meyer*, N. J. Supreme Court, 1910, in an opinion by Justice Swayze, the doctrine is expressly recognized as in the case of *Vanneman vs. Young*, 52 N. J. Law, 403, in which it was said:

"No private persons having dealings with

a de facto corporation can be permitted to say that it is not also a corporation de jure."

To the same effect is the case of *Rafferty vs. Bank of Jersey City*, 33 N. J. Law, 368, in which the doctrine was invoked against a receiver in Chancery to prevent a fraud.

In *First National Bank vs. Zolley*, decided by N. J. Court of Errors and Appeals, and reported in 150 Atl. Rptr. 413, a situation somewhat analogous to that of the instant case is presented in which the plaintiff brought replevin for recovery of possession of six automobiles claimed under bills of sales executed by Reid and Denight, a partnership. The partners had intended to form a corporation and having failed to do so, entered into an agreement to become associate dealers of Eastern Motor Co., describing themselves in the agreement as Reid & Denight, Inc., under the terms of which the cars in question were purchased and shipped and thereafter bills of sale were given to the plaintiff by the partnership. The opinion by Justice Bodine, in part provides as follows:

"A fully executed contract cannot be re-
ceded from on the mere ground that one of
the parties was not a corporation or exceed-
ed its power."

Citing *Camden & Atlantic Railroad Co.
vs. Mays Landing, etc. Railroad Co.*, 48 N.
J. Law, 530.

"The grantor in a deed to a corporation
or one claiming under him is estopped to
deny the corporate existence of the grantee
for the purpose of defeating the deed." 14
C. J. 233.

Greenleaf on Evidence, 16 Ed. Vol. 1, par. 22, says:

“A man is said to be estopped when he has done some act which the policy of the law will not permit him to gainsay or deny * * *. Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case and in the policy of the law to prevent the great mischiefs resulting from the uncertainty, confusion and want of confidence in the intercourse of men, if they were permitted to deny that which they have definitely and solemnly asserted and received as true. If it be a recital of facts in a deed, there is implied a solemn engagement that the facts are so as they are recited * * *.

In regard to recitals in deeds the general rule is that all parties to a deed are bound by the recitals therein, which operates as an estoppel working on the interest in the land, if it be a deed of conveyance and binding both parties and privies; privies in blood, privies in estate and privies in law.”

Par. 23:

“In regard to recitals in deeds, the general rule is that all parties are bound by the recitals therein which operates as an estoppel * * *, binding the parties and their privies.”

Privies have been defined in the following language:

Black's Law Dictionary, 2nd Ed.

“Persons connected together or having a mutual interest in the same action or thing, by some relation between them other than that of actual contract between them; persons whose interest in an estate is derived from the contract or conveyance of others.”

50 C. J. page 403, defines privy by stating :

“Although it has been said that there is no definition of the term that can be applied to all cases ‘privy’ as most generally defined, and it has been said, in its broadest sense, denotes mutual or successive relationship to the same right of property. Also ‘privy’ has been defined as a diversified kind of interest, founded upon a growing out of the contract of another, a successive relationship to or ownership of the same property from a common source, a succession of relationships by deed or other act or by operation of law. Thus it has been said that privy implies succession: that privies accept that relation to others because of derivative rights of property; that a privy must come after him to whom he is privy, and never precedes; that ‘Privies’ must mean nothing more than claiming under * * *.

To constitute one person or privy in estate to another, such other must be a predecessor in respect to the property in question from whom the privy derives his right and title.”

14 C. J. page 226, par. 234 D, states :

“Although as against the state, a corporation cannot be created by the mere agreement, admission, assent or other act or omission of private persons, yet as between themselves and for the purposes of their own private litigations and contestations, they may, by their agreements, their admissions, or their conduct, estop themselves from denying the fact of the existence of the corporation so that for the purpose of such private litigations the body claiming to be a corporation may become such to all intent and purpose as much as though it were a corporation de jure.”

POINT 5.

Chapter 210 of the Laws of 1915, known as "Conditional Sales Act" does not require the recording of an instrument of sale reserving title in the vendor as a prerequisite to its validity.

Paragraph 5 of the Act provides as follows:

"Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them before the contract or copy thereof shall be filed
* * *,"

At common law it was not necessary to record a conditional sales contract. *Bank of America vs. Lorraine Hotel Corp.*, decided by the Court of Chancery, Aug. 6, 1931, in an opinion written by Vice Chancellor Berry, citing *Campbell vs. Roddy*, 44 N. J. Equity, 244; *Cole vs. Berry*, 42 N. J. L. 308; *Thayer Mercantile Co. Inc. vs. First National Bank of Milltown*, 98 N. J. L. 29, and affirmed in 98 N. J. L. 907; *Lifschitz vs. Varicone Corp.*, 148 Atl. Rptr. 899; 8 N. J. Mis. Rpts. 83 and other authorities.

The defendant in the attachment action brought by the defendant-appellant, Harry H. Zein, was not the purchaser under plaintiff-appellant's conditional sale contract and it does not appear either by the pleadings or the proof that the defendant-appellant, Harry H. Zein, for whom the defendant, Thomas Carless acted, was either a

creditor of or the purchaser from the buyer of the chattel. While it is true that the defendant in the attachment action purchased the chattel in question on behalf of the Gordon Engineering Co., a corporation, he was a mere instrumentality and with respect to the chattel, its possession and custody, a total stranger.

Nowhere in the pleadings is it asserted or in the proof of the defendants is it established that any property right in the chattel was vested in Dudley Gordon, and the chain of title of property in the chattel is definitely broken between Gordon Engineering Co., a corporation, and Dudley Gordon, with whom there is neither allegation or proof of interest in the chattel. In the absence of proof of property in the chattel vested in Dudley Gordon, it is contended, that the "Conditional Sales Act" has no application to the instant case, and that the reservation of title against the purchaser retains its validity.

POINT 6.

A special property right in a chattel is sufficient to support an action in replevin.

In *General Motors Acceptance Corp. v. Smith*, decided by the N. J. Court of Errors and Appeals, 101 N. J. Law, page 154, the opinion in part provides as follows:

“An absolute legal title to a chattel is not required to maintain a replevin action * * *. A special property in the title is all that is required to maintain an action in replevin, as pointed out by Mr. Justice Kalisch, in the opinion written by him in the case of *Conlen vs. Lemmerman*, 87 N. J. Law, page 84.

It is submitted therefore that the plaintiff-respondent's reservation of title is sufficient to maintain the action for repossession of the chattel in accordance with the terms of the agreement of sale, and default having been made in the payment of the purchase price, a judgment for the value of same at the time of the seizure should have been rendered in its favor.

POINT 7.

If Gordon Engineering Co. was not a corporation in law, no property in the chattel passed from the vendor, plaintiff-respondent.

In *Cohen vs. Savoy Restaurant, Inc.*, decided by the N. Y. Supreme Court, Appellate Term, (189 N. Y. Sup. 71), there were no disputed questions of fact which was submitted substantially on written documents and a few concessions. By reason of its relationship to the present issue, it is submitted practically in extenso.

“Plaintiff has replevined certain furniture, which he originally disposed of under a conditional bill of sale dated Sep. 19, 1919, executed by himself on one hand, and ‘Savoy Restaurant, Inc. by Philip Gottesman, President’ on the other. This instrument provides that title to the goods shall remain in the plaintiff until they are fully paid for, which it is conceded has not been done. The impleaded defendant, Glaser, claims title to the same goods by virtue of a chattel mortgage executed Dec. 9, 1919, to himself by Savoie French Pastry Shop, Inc., a domestic corporation.

It was conceded at the trial that there is no such corporation as the Savoy Restaurant, Inc., and of course, it appeared that the defendant could not have had constructive notice of the conditional bill of sale to Savoy Restaurant, Inc., when he took a mortgage from the Savoie French Pastry Shop, Inc. It is also conceded that at the time Glaser took his mortgage, a search in the Register’s Office disclosed no instruments of any kind as against the Savoie French Pastry Shop, Inc. Finally, it was

shown that the plaintiff delivered the goods under the conditional bill of sale presumably at the place of business of the Savoie French Pastry Shop, and that the receipt is signed by one Rosenbaum and reads "Received from Louis Cohen for Savoy Restaurant, Inc." It also appears that Rosenbaum is secretary of Savoie French Pastry Shop, Inc.

The question which presents itself for determination is whether the Savoie French Pastry Shop, Inc. acquired title to the goods. If so, defendant Glaser was a bona fide mortgagee without notice actual or constructive. If not, the goods still belong to the plaintiff. It is evident however, that plaintiff never parted with his title to the goods to anyone.

This is not a case where the intent of the vendor is to sell to the person who presents himself even though he misrepresents his name or other indicia of identity, for in that case, it being the intent to deal with the person present, title would pass to him. It is a case of misrepresentation concerning the identity of one with whom the sellor is asked to deal but who is not present * * *, and in the instant case, non-existent. It is clear that in that event no title passed for the only intent of the vendor being to pass title to the absent identity, which it develops does not exist, it follows naturally that no title passes."

Directly in point is *Phelps vs. McQuade*, 220 N. Y. 232, 115 N. E., 441, L. R. A. 1918, B. 972.

"It is superfluous to add that since the plaintiff never parted with title, the Savoie French Pastry Shop, Inc. did not acquire it, and defendant Glaser by the mortgage from the Savoie French Pastry Shop, Inc. could not receive more than the Savoie French Pastry Shop itself had.

The principle does not vary, whether the mistake is due to negligence, fraud, or error on the part of the other party. From the record here it is evident that the plaintiff intended to pass title, not to Philip Gottesman, whom it said, but to the Savoy Restaurant, Inc., of which he, intentionally or unintentionally represented himself to be president.

There was and is no such entity. The necessary conclusion is that no title passed and that plaintiff is still the owner of the chattels sought to be recovered."

Elliott, in his N. J. Law on Sales, on page 723, states:

"Obtaining goods by impersonating another is fraudulent and such a transaction is void *ab initio*. The fraud doer obtains no title and can convey none, however innocent the sub vendee."

Perhaps the leading case on the subject is *Rodliff vs. Dallinger*, 141 Mass. 1, in which the opinion was written for the Supreme Judicial Court by the present, Mr. Justice Oliver Wendell Holmes, of the United States Supreme Court, in which it was said:

"The invalidity of the transaction in the case at bar does not depend on fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motive of making a contract and not to its existence, but when one of the formal constituents of a legal transaction is wanting, there is no question of rescission, the transaction is void ab

initio, and fraud does not impart to it against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake.”

In *Ashton vs. Arlen*, 70 N. J. L. 117, decided by the N. J. Supreme Court, a person unknown to plaintiff and representing himself as the agent of O. O. Bowmann or of O. O. Bowmann & Son, requested the plaintiff to deliver property to the stable of Bowman, where the unknown picked up the property and sold it to the defendants who were bona fide purchasers for value without notice of misdoing in connection with the transaction. In the course of the opinion written by Justice Trenchard the Court said:

“It is not one of these cases in which the owner of goods, relying upon the false representations which he believes to be true, parts with the title and possession of his goods, intending to transfer them to the *maker* of the false representations. In such case the title to the goods actually passed out of the owner and he intends it shall so pass to the one making the false representations. In such case he may avoid the contract, but if before that is done, the wrongdoer has parted with the title to an innocent purchaser, the original owner is without remedy against such innocent purchaser.”

“In 1 Benj. on sales (Corbin notes) paragraph 648, the rule is stated to be:

“Whenever goods are obtained from the owner by fraud, we must distinguish whether the facts show a sale to the party guilty of the fraud or a mere delivery of the goods into his possession induced by fraudulent devices. * * * If on the contrary the intention of the vendor was not to pass the property but merely to part with the pos-

session of the goods, there is no sale and he who obtains possession by fraud can convey no property in them to a third person, however innocent, for no property has passed to himself from the true owner."

In the instant case it was manifestly the intention of the plaintiff-respondent to pass title to Gordon Engineering Co., a corporation, and not to Dudley Gordon.

It is submitted therefore that the plaintiff-respondent never parted with any interest in the chattel in question and that proof if any of the non-existence of the purchasing corporation would in effect result in a destruction of the agreement restoring the plaintiff-respondent to its original position as absolute owner with respect to the chattel in the same manner as though the contract had never been made.

The judgment of the Supreme Court should be affirmed.

The defendants-appellants argue first, that the plaintiff-respondent did not assert the right to recovery on the ground of fraud and second, that it failed to repudiate the sale upon knowledge of the fraud.

As to the first question, it is submitted that the answer of the defendants-appellants failed to apprise the plaintiff of the defense which is now the basis of their theory. The only reference to any defense is embodied in the fifth and sixth separate defenses to both counts, (Case, pages 33 and 34) wherein the defendants-appellants claim a superior lien by virtue of a levy made upon the subject matter of the suit in an action between

the defendant-appellant, Zein, "a creditor" of said buyer.

The purchaser of the chattel was referred to in the plaintiff's complaint as "Gordon Engineering Co. of Clifton, N. J., a corporation of the State of New Jersey" and by the defendants-appellants in their amended answer as "Gordon Engineering Co. of Clifton, N. J., the buyer."

It was only in answer to the defendants-appellants' contention that Dudley Gordon was the owner, that the plaintiff-respondent argued and now argues as the Supreme Court found, that if the evidence adduced by the defendants-appellants proved the non-existence of the purchasing corporation that the original sale was the result of a fraud perpetrated by Dudley Gordon. When this contention was raised by the defendants-appellants, the plaintiff-respondent replied at once.

The authorities cited by the defendants-appellants are substantially correct, except that in those instances where it is claimed that an innocent purchaser without notice acquires a good title, it is submitted that these authorities refer only to voidable sales and not to transactions of the character involved in the case at bar, that is, those void *ab initio*.

The plaintiff-respondent has not and does not rely upon its right to recover upon the ground of fraud, but on the basis of its contract and its claim of fraud is entirely a reply to the defendants-appellants' contention which was asserted as soon as the fact of the non-existence of the purchasing corporation appeared to be possible. The defendants-appellants plainly misapprehend the distinction which lies between fraud in fact and fraud at law.

The issue of fraud was raised by the plaintiff-

respondent at once in its original argument on its motion for direction of a verdict and in its appeal, where its views were presented by brief substantially similar to the foregoing.

It is submitted therefore that the judgment of the Supreme Court in its finding of fraud is amply sustained by both proofs and principle and that its judgment should be affirmed.

Summary.

It is therefore submitted that no property in Dudley Gordon and hence in the defendants-appellants has been asserted or adduced. The only proof of the transfer of property interest lies between plaintiff-respondent and Gordon Engineering Co., a corporation whose existence as a corporation has not been validly challenged by evidence warranting the legal conclusion that such corporation did not exist either *de jure*, *de facto* or by estoppel.

Opposed to this scanty evidence are the principles of law tending to promote understanding, to discourage misunderstanding and confusion, and to suppress fraud. The theories of fraud, *de facto* corporate existence as well as existence by estoppel, are admirably applicable to the instant case by reason of the fact that their rejection would work the very hardship injustice and possible fraud which their postulation and application have been designed to prevent.

Moreover, the bare assertion is an attempt to collaterally impeach the existence of a corporate body, in contravention of established authority and sound reasoning.

There being no property relationship, as such, between Gordon Engineering Co., a corporation,

and Dudley Gordon with respect to the chattel in question, any property of the defendants-appellants must be traced to Dudley Gordon in whose position they must stand, and there is no evidence of his relationship to a property in the chattel by reason of the application of any theory of law which has not, it is respectfully submitted, been entirely overcome by reference to the principles above outlined.

Stripping the problem of all other considerations, the bare assertion of the non-existence of the purchasing corporation immediately invokes the principle restoring the vendor to its original position of having retained complete property in the chattel subject to no outstanding rights or interest which through the forfeiture of a retained right might become paramount to its own, and it is respectfully submitted therefore that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

JACOB LIPMAN,
Attorney of Plaintiff-Respondent.

HARRY UNGER,
Of Counsel.

