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Notice of Appeal and Ground.

New Jersey Supreme Court

HUDSON COUNTY.

HENRY R. ECKERT, doing business as HUDSON REFRIGERATING MACHINE COMPANY, Plaintiff-Appellant, *vs.* ANTHONY NAZZARO, Defendant-Respondent.	Action at Law. Notice of Appeal and Ground.

To Surosky & Surosky, Esqs., Attorneys of Defendant-Respondent:

Sir:

Henry R. Eckert, doing business as Hudson Refrigerating Machine Company, the above named plaintiff, gives notice that he appeals from the judgment of the New Jersey Supreme Court entered in the above entitled action May 25th, 1931, to the New Jersey Court of Errors and Appeals in the last resort in all causes, on the following ground:

1. The Supreme Court erred in giving judgment in favor of the above named respondent instead of in favor of the above named appellant.

Dated July 7th, 1931.

Respectfully yours,

RICHARD DOHERTY,
Attorney of Plaintiff-Appellant.

Complaint.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HENRY R. ECKERT, doing business as HUDSON REFRIGERATING MACHINE COMPANY,
Plaintiff,

vs.

ANTHONY NAZZARO,
Defendant.

Action at Law.
Complaint.

The complaint of Henry R. Eckert, doing business as Hudson Refrigerating Machine Company and residing at Jersey City, Hudson County, N. J., says:

1. May 11th, 1927, the Crescent Dyeing & Finishing Co., Inc., a corporation of the State of New Jersey, by its servants and agents entered into a contract in writing in and whereby in consideration of the furnishing and erection by the plaintiff of a certain refrigerating equipment on the premises of the said Crescent Dyeing & Finishing Co., Inc., at 51 Bleeker Street, Paterson, N. J., the said Crescent Dyeing & Finishing Co., Inc., undertook and agreed to pay to the plaintiff the sum of $2,175.00 on the following terms:

$200 on delivery of material;
$400 when machine was installed, and the balance of $1,575.00 in monthly installments of $100.00 each to be evidenced by fifteen negotiable, interest bearing, notes due on the 18th day of each month after installation and one note of $75.00 being the final note.

In and by said agreement it was further provided that title to the equipment so purchased thereunder should not pass from the plaintiff until full payment therefor should have been made in cash, in accordance with the terms of said agreement. A copy of said agreement is hereto annexed and made part hereof.

2. The plaintiff delivered the material necessary for the installation of said equipment and received from the said Crescent Dyeing & Finishing Co., Inc., the sum of $200.00 thereupon payable, and the plaintiff fully furnished, erected, installed and completed the said refrigerating equipment June 10th, 1927.

3. The said Crescent Dyeing & Finishing Co., Inc., did not pay the plaintiff the sum of $400.00 agreed to be paid when said machine was installed, nor has it paid, nor did it pay to the plaintiff any of the monthly installments by the contract provided, nor make or tender to the plaintiff any of the negotiable, interest bearing, notes therein also provided, but on the contrary neglected and refused so to do.

4. September 12th, 1927, the said Crescent Dyeing & Finishing Co., Inc., was by an order and decree of the Court of Chancery adjudged insolvent, and it, and its officers and agents enjoined from exercising any of its privileges or franchises, and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, monies, funds, lands, tenements or effects, and by said order and decree, Harry H. Mondon and Arthur R. Neale were appointed receivers of said corporation and the said corporation was divested of all right, title and interest in and to the said agreement and the same vested

in said receivers, in accordance with the statute in such case made and provided, as by reference to the said order and decree will more fully appear.

5. October 17th, 1927, the said receivers, Harry H. Mondon and Arthur R. Neale, at the special instance and request of the defendant, Anthony Nazarro, and with the consent thereto of the plaintiff, sold and assigned to the defendant, all the right, title and interest of the said receivers in and to said agreement and said refrigerating equipment, and the defendant, with the consent of the plaintiff and in consideration of said sale and assignment and the acquittance by the plaintiff of the said receivers, undertook and agreed to complete the performance of the terms of the said agreement and to pay to the plaintiff all sums due and to grow due thereon.

6. The said defendant did not pay to the plaintiff the said sums of money due and to grow due upon said agreement, and on December 9th, 1927, wholly repudiated the same and declared his intention not to comply with the terms thereof.

The plaintiff demands of the defendant the sum of $1,975.00 with interest from June 10th, 1927.

RICHARD DOHERTY,
Attorney of Plaintiff.

Agreement Annexed to Complaint.

HUDSON REFREGERATING MACHINE CO.

Engineers and Contractors

180-182 Clerk Street

Jersey City, N. J.

Telephone, Bergen 5306.

The Hudson Refrigerating Machine Co. hereinafter known as Company, proposes to furnish to the Crescent Dyeing & Finishing Co., Inc., 51 Bleecker Street, Paterson, N. J., hereinafter known as Purchaser the following equipment subject to conditions as herein stated; one complete 3 ton Vilter automatic refrigerating machine to cool one mixing tank, one storage tank, and one working tank by the indirect cooling system. The indirect cooling system shall consist of one insulated brine tank, one ammonia cooling coil, one brine pump, necessary lead coils in three present vats and interconnecting piping.

Water & Electric Connections: Purchaser is to furnish sufficient water and required electrical power to operate the plant, and is to make all water and electrical connections according to Company's specifications.

Erection: Company will furnish an Engineer to erect and start plant and after plant is put in operation Purchaser is to accept or reject the plant, it being understood that if it meets the requirements of this contract it is to be accepted. If rejected, Purchaser is to notify Company in writing thereof and permit Company to enter the premises and remove the equipment, without

charge to Purchaser and upon refunding to Purchaser whatever money has been paid to Company, there being no further liability on the part of the Company.

Guarantee: The Company guarantees the equipment herein specified to be of ample capacity to maintain required temperature 24 hours per day when supplied with sufficient condensing water (not to exceed 70 deg. F.) and power to operate the plant. Company further guarantees the equipment herein described against latent defects for a period of one year from date of installation, and will install without charge to the Purchaser, duplicate of any part or parts which prove to be defective within afore specified time.

Care of Machine: Purchaser guarantees to keep motor and machine clean and supplied with sufficient lubricant.

Insurance: Purchaser agrees to take all risks of loss by fire or other casualty of equipment herein specified and to keep such equipment insured for whose interests may appear.

Price: The price of the equipment herein specified is Twenty one hundred and seventy five dollars ($2,175.00).

Terms: Two hundred dollars on delivery of material. Four hundred dollars when machine is installed. Fifteen negotiable interest bearing notes due on the 18th day of each month after installation of $100. each. One note of $75. being the final note.

Title: Title to any equipment purchased under this agreement shall not pass from Company until full payment therefor shall have been made in

cash. Furthermore, Purchaser agrees to do all reasonable acts perfect and maintain retention of title in the Company.

Respectfully submitted,

HUDSON REFRIGERATING MACHINE CO.
(signed) By H. R. ECKERT.

Date, May 11, 1927.

Purchaser, Crescent Dyeing & Finishing Co., Inc.

(signed) By EDWARD GURSKY.

Witnessed by:
ANDREW PIPPIN
VICTOR WELSH.

Answer.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HENRY R. ECKERT, doing business as HUDSON REFRIGERATING MACHINE COMPANY,
Plaintiff,

vs.

ANTHONY NAZZARO,
Defendant.

Action at Law.
Answer.

Defendant, residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

1. As to paragraphs 1, 2 and 3 he has no information on which to form an opinion or belief and leaves the plaintiff to his proof.

2. He admits paragraph 4.

3. He denies paragraph 5 excepting to admit that he purchased of the receivers, all their right, title and interest in certain refrigerating equipment.

4. He admits paragraph 6.

HERMAN H. MOSKOWITZ,
Attorney for Defendant.

Demand for Admission of Facts and Admissions.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HENRY R. ECKERT, doing business as Hudson Refrigerating Machine Co., Plaintiff, *vs.* ANTHONY NAZZARO, Defendant.	Action at Law. Demand for Admission of Facts and Admissions.

To Herman H. Moskowitz, Esq., Attorney of Defendant.

Sir:

PLEASE TAKE NOTICE that the plaintiff demands of you within five days after the service of this notice upon you written admissions of the following specific facts material to the issue joined in the above entitled cause:

1. That on May 11th, 1927, the Crescent Dyeing & Finishing Co. entered into a contract with the plaintiff for the purchase of machinery, a copy of which is annexed to the complaint, and that the machinery thereby purchased was thereafter delivered by the plaintiff to the said Crescent Dyeing & Finishing Co.

2. That on or about July 20th, 1927, the Crescent Dyeing & Finishing Co. was a defendant in

proceedings brought for its dissolution in the Court of Chancery, and that there were appointed Harry H. Mondon and Arthur R. Neale as permanent receivers.

3. That on or about October 3rd, 1927, the receivers filed a report of the secured liabilities of the company as follows:

Victor Beuman, Chattel Mortgage	$14,500.00
Citizens Trust Co., Mortgage, Bleecker St.	15,000.00
George Abert, Mortgage, Peel St.	4,000.00
Max Solomon, Mortgage, Peel St.	2,000.00
Mrs. Nazzaro and Mrs. Galuccio, Mortgage, Bleecker St.	13,000.00
Leslie Elliott, Conditional Bill of Sale	1,277.75
Permittit Co., Conditional Bill of Sale	4,996.00
Van Landern Machine Co., Conditional Bill of Sale	12,000.00
Federal Truck Co., Conditional Bill of Sale	561.00
General Machine Co., Conditional Bill of Sale	4,650.00
Hull Products Co., Conditional Bill of Sale	1,150.00
Hudson Refrigerating Co., Conditional Bill of Sale	1,975.00
TOTAL	$75,109.75

4. That on October 1st, 1927, the defendant, Anthony Nazzaro, submitted to the said receivers an offer to purchase all the right, title and interest of the receivers in the property and assets of the said Crescent Dyeing & Finishing Co., according to copy of said offer annexed hereto.

5. That on October 17th, 1927, the said offer was approved by the Court of Chancery and the

receivers ordered to transfer a deed conveying all the right, title and interest in and to the effects, assets and property of the Crescent Dyeing & Finishing Co., exclusive of the accounts receivable, unpaid subscriptions and amounts on deposit.

6. That said property was purchased from the receivers in accordance with the terms of said offer and acceptance.

Dated April 22, 1929.

Yours respectfully,

RICHARD DOHERTY,
Attorney of Plaintiff.

The above are admitted:
HERMAN H. MOSCOWITZ,
Defendant's Attorney.

Offer, Annexed to Demand for Admission of Facts and Admissions.

Paterson, N. J., Oct. 1, 1927.

Henry H. Mondon and Arthur R. Reade, Esqs., Paterson, N. J.

Gentlemen:

I herewith offer for all the right, title and interest of the receivers in the property and assets of the Crescent Dyeing & Finishing Co., exclusive of the accounts receivable, unpaid subscriptions and amounts on deposit, the sum of $5,000.00 and herewith tender on account thereof the sum of

Contract, Anexed to Demand for Admission of Facts and Admissions.

$1,000; the balance is to be paid on approval of the court and securing the necessary documents.

This offer is made subject to the following liens:

Victor Beuman, Chattel Mortgage	$14,500.00
Citizens Trust Co., Mortgage, Bleecker St.	15,000.00
George Abert, Mortgage, Peel St.	4,000.00
Max Solomon, Mortgage, Peel St.	2,000.00
Mrs. Nazzaro and Mrs. Galuccio, Mortgage, Bleecker St.	13,000.00
Leslie Elliott, Conditional Bill of Sale	1,277.75
Permittit Co., Conditional Bill of Sale	4,996.00
Van Landern Machine Co., Conditional Bill of Sale	12,000.00
Federal Truck Co., Conditional Bill of Sale	561.00
General Machine Co., Conditional Bill of Sale	4,650.00
Hull Products Co., Conditional Bill of Sale	1,150.00
Hudson Refrigerating Co., Conditional Bill of Sale	1,975.00
TOTAL	$75,109.75

Yours truly,

ANTHONY NAZZARO.

Service of the within notice is hereby acknowledged this 25th day of April, 1929.

HERMAN H. MOSCOWITZ,
Attorney of Defendant.

Agreed State of Facts and Stipulation to Submit.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HENRY R. ECKERT, doing business as HUDSON REFRIGERATING MACHINE COMPANY, Plaintiff, *vs.* ANTHONY NAZZARO, Defendant.	Action at Law. Agreed State of Facts and Stipulation to Submit.

It is hereby stipulated and agreed that the above entitled matter be adjudicated by the court sitting without a jury, and that its determination be upon the following agreed state of facts.

1. The issue in the action is framed upon the complaint and answer, copies of which are annexed hereto and respectively marked Schedules A and B (see complaint and answer, pp. 2 and 8).

2. The action is for the recovery of $1,975.00 with interest from June 10th, 1927, being the amount of the unpaid purchase price of a refrigerating equipment sold by the plaintiff on May 11th, 1927, to the Crescent Dyeing & Finishing Co., Inc., upon a conditional bill of sale, a copy of which is annexed to the complaint. The full purchase price was $2,175.00 upon which $200.00 has been paid.

The equipment was delivered to the Crescent Dyeing & Finishing Co., Inc., and was in its pos-

session, when on July 20th, 1927, three stockholders of the Crescent Dyeing & Finishing Co., Inc., alleging that they had a controlling interest, filed a bill in the Court of Chancery of New Jersey to have the company declared insolvent. September 12th, 1927, an order was made in such proceedings appointing Harry H. Mondon and Arthur R. Neale receivers, who thereafter filed a report of the assets and liabilities of the corporation and included in the schedule of Secured Liabilities the following item: "Hudson Refrigerating Co., Conditional Bill of Sale $1,975.00". A copy of the schedule referred to is included in the defendant's admissions annexed hereto (see admissions and schedule, p. 10).

3. October 1st, 1927, the defendant submitted to the receivers an offer to purchase the receivers' right, title and interest in the property and assets of the company for the sum of $5,000.00 stipulating "This offer is made subject to the following liens" (setting forth a duplicate of the receivers' schedule of Secured Liabilities above referred to totaling $75,109.75). A copy of the offer is included in the said admissions by the defendant (see admissions, p. 11).

The receivers submitted the offer to the court and on October 3rd, 1927 an order was made that the parties show cause why the receivers should not be directed, upon payment to them of the said sum, to convey their right, title and interest to the defendant. The order to show cause contained a recital that the offer was for $5,000.00 over and above liens of $75,110.00. A copy of the order to show cause is annexed hereto and marked Schedule A.

Agreed State of Facts and Stipulation to Submit.

On the return day of the order to show cause an order was made that the offer of the defendant "be and is hereby accepted, and the receivers are hereby authorized to execute by proper instruments of conveyance all the right, title and interest of the receivers in and to the effects, assets and property of the Crescent Dyeing & Finishing Co., exclusive of the accounts receivable, unpaid subscriptions and amount on deposit". Upon the receipt of the money the receivers transferred to the defendant all their right, title and interest to the refrigerating equipment sold by the plaintiff.

Thereafter the defendant did not pay to the plaintiff the amount of the purchase price stipulated in the conditional bill of sale, or any part thereof, and when the same was demanded of him he directed that the plaintiff remove the refrigerating equipment from the premises of the defendant, and following said demand on December 9th, 1927, sent a letter to the plaintiff, a copy of which is annexed hereto and marked Schedule B.

Between the making of the conditional bill of sale and the transfer of the property to the defendant, the property was not subject to any lien acquired by attachment or levy.

4. The admissions of the defendant annexed hereto, and marked Schedule E, are referred to as part hereof (see admissions, p. 10).

Dated December 30th, 1930.

RICHARD DOHERTY,
Attorney of Plaintiff.

SUROSKY & SUROSKY,
Attorneys of Defendant.

Schedule A, Annexed to Agreed State of Facts and Stipulation to Submit.

IN CHANCERY OF NEW JERSEY.

Between

CHARLES NAZZARO, DOMENIC GALLUCCIO and GUISEPPE NAZZARO,
Complainants,

and

CRESCENT DYEING & FINISHING COMPANY, a corporation,
Defendant.

On Bill, &c.
Order.

This matter being opened to the Court by Surosky & Surosky, solicitors for Harry H. Mondon and Arthur R. Neale, Receivers herein and it appearing that from the duly verified petition of said Receivers an offer of $5,000.00 over and above liens of $75,110.00 has been made by Anthony Nazzaro, for the Receivers' right, title and interest in and to the affects, assets and property of the said Crescent Dyeing & Finishing Company, exclusive of the accounts receivable, unpaid subscriptions and sums on deposit. And it appearing that the request of said Receivers are reasonable and proper; it is therefore on this third day of October, 1927;

ORDERED, that all creditors, stockholders and parties in interest, show cause before me, the Chancellor at the Chancery Chambers in the City of Paterson, County of Passaic and State of New Jersey, on the seventeenth day of October, 1927, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the prayer of

the said Receivers should not be granted and why the offer of the said Anthony Nazzaro should not be accepted, and why the Receivers should not be directed, upon the payment to them of the said $5,000.00, by the said Anthony Nazzaro, to execute proper instruments of conveyance of the right, title and interest of the said Receivers, exclusive of the accounts receivable, unpaid subscriptions and sums on deposit in and to the property of the said Crescent Dyeing & Finishing Company; and it is further

ORDERED, that copies of this order be served upon all the creditors, stockholders and parties in interest of the defendant corporation by mailing an uncertified copy thereof to each of them at their respective and several post office addresses with postage prepaid thereon within five (5) days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,
VIVIAN M. LEWIS,
V. C.

Schedule B, Annexed to Agreed State of Facts and Stipulation to Submit.

VICTORY

DYEING AND FINISHING COMPANY, INC.

48 Bleeker Street

Paterson, N. J.

Dec. 9, 1927

Hudson Refrigerator Machine Co.,
180 Clerk St.,
Jersey City, N. J.

REGISTERED.

Gentlemen:

We are still waiting for your man to remove the Ice Machine from the plant of old Crescent Dyeing and Finishing Co., otherwise we shall have to remove this machine and put it in storage at your risk and expense. Please give this your immediate attention.

Yours very truly,

VICTORY DYEING & FINISHING CO. INC.
per A. NAZZARO

GH:MC

Postea.

(Filed May 25, 1931.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HENRY R. ECKERT, doing business as HUDSON REFRIGERATING MACHINE COMPANY, Plaintiff, *vs.* ANTHONY NAZZARO, Defendant.	Action at Law. Postea.

This case was tried before Judge Henry E. Ackerson, Jr., under an agreed state of Facts and on Briefs.

The Judge rendered a general verdict against the plaintiff and in favor of the defendant, as per the Judge's findings hereto attached and made a part hereof.

HENRY E. ACKERSON, JR.,
Judge.

A true copy.
FRED L. BLOODGOOD,
Clerk.

Findings.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HENRY R. ECKERT, doing business as HUDSON REFRIGERATING MACHINE COMPANY,
Plaintiff,

vs.

ANTHONY NAZZARO,
Defendant.

Findings.

This cause was submitted to Henry E. Ackerson, Jr., Circuit Court Judge, at the Hudson County Circuit, for trial without a jury upon an agreed state of facts contained in a stipulation signed by the attorneys for the respective parties.

It appears from the stipulated facts that plaintiff on May 11, 1927, sold to the Crescent Dyeing & Finishing Co., under a conditional bill of sale, certain refrigerating equipment for the price of $2,175.00, on account of which $200.00 was paid. Thereafter proceedings were taken in the Court of Chancery to have the Crescent Dyeing & Finishing Co. declared insolvent, and on September 12, 1927, receivers were appointed, to whom, on October 1, 1927, the defendant, Anthony Nazzaro, submitted an offer to purchase the receivers' "right, title and interest" in the property and assets of the company, with certain exceptions, for the sum of $5,000.00, stipulating that the offer was "subject to" certain liens, of which the plaintiffs' conditional bill of sale was one. This offer was sub-

mitted to the court, and an order was made on October 3, 1927, for the parties in interest to show cause why the receivers should not be directed, upon payment to them of said sum, to convey their "right, title and interest" to the defendant. On the return day of the order to show cause an order was made accepting said offer, and upon receipt of the money the receivers transferred to the defendant all their "right, title and interest" to the refrigerating equipment in question. The plaintiff thereupon demanded payment of the sums due under the conditional bill of sale, which was refused, and defendant then demanded that plaintiff remove the refrigerating equipment from the premises so purchased by the defendant, whereupon plaintiff brought this suit to recover from the defendant the unpaid balance of the purchase price of said equipment.

The fundamental question to be decided is whether the purchaser of the "right, title and interest" of the receivers of the original vendee under a conditional bill of sale is liable for the unpaid balance of the original purchase price, where the receiver's sale was subject to the outstanding liens including the conditional bill of sale in question.

The plaintiff relies very largely in support of his contention upon the following paragraphs of the Uniform Conditional Sales Act (2 Cum. Supp. to Comp. Stat., p. 3129):

> Paragraph 3, "The buyer shall be liable to the seller for the purchase price, or for installments thereof, as the same shall become due, and for breach of all promises made by him in the conditional sale contract, whether or not the property in the goods has passed to the buyer."

> Paragraph 1, "Buyer means the person who buys or hires the goods covered by the conditional sale *or any legal successor* in interest of such person."

The plaintiff insists that the defendant, by purchasing from the receivers their "right, title and interest" in the refrigerating equipment, became the "legal successor in interest" of the buyer, and, therefore, liable for the unpaid balance of the purchase price under the above quoted paragraphs of said act.

The statute in question was undoubtedly adopted to protect creditors and purchasers from the evils which had before resulted from the existence of lawful and valid conditional sales, but of which the public had no notice. It was never intended to extend the contractual obligations of the parties, much less of the assignees of such parties, beyond the limits voluntarily assumed in the treaty between them. Liquid Carbonic Co. *vs.* Black, 128 Atl. Rep. 514 (Conn.). In the case just cited the Court refused to extend the meaning of "personal representatives" to include the assignee of a conditional vendee.

It has been said that,

> "There are two sorts of successors—the successor by universal title, such as the heir; and the successor by particular title, such as the buyer, donee or legatee, of particular things, or the transferee. The universal successor represents the person of the deceased, and succeeds to his rights and *charges.* The particular successor succeeds to the *rights* appertaining to the thing sold, ceded or bequeathed to him." Vol. 7, Words & Phrases, p. 6748.

So in the statute we are considering *the words "any legal successor in interest" undoubtedly*

mean universal successor, and do not include one who has merely purchased the conditional vendee's rights, but has not assumed his obligations for the phrase in question only appears in connection with a general definition of the word "buyer". This interpretation is supported by section 22 of the act dealing with resales, which reads:

> "If the proceeds of the resale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligation of the buyer."

If the definition of "buyer", as contained in the first paragraph of the act as before quoted, is to include an assignee of the buyer, so as to impose upon such assignee the obligation of paying any unpaid balance of the purchase price, under the provisions of paragraph 3, *it is difficult to see the necessity of adding the clause "or from anyone who has succeeded to the obligation of the buyer"* after the word "buyer" at the end of paragraph 22 last above quoted.

On the most elementary principles of the law of contracts a purchaser of the conditional buyer's interest who has not promised the conditional seller that he will pay him the balance due on the price, may not be held liable, to the seller for all or part of the price. The purchase of the buyer's special property interest does not imply a promise to the conditional seller, and the statute should not be extended beyond its reasonable intendment, especially in view of the general purpose it was intended to accomplish. Quigley *vs.* Spencer

Stone Co., 143 Fed. 86; Van Allen *vs.* Francis, 123 Cal. 474, 56 Pac. 339; Central Kansas Motor Co. *vs.* Kline, 109 Kan. 227, 198 Pac. 949.

It would seem under the rule pronounced in Kirch *vs.* La Torette, 91 N. J. L. 35, that the right of a conditional vendor of goods to retake the same for non-payment of price is in the nature of a lien. The court there said:

> "The contract contemplates a double ownership similar to the double ownership of mortgagor and mortgagee— (1) the ownership of the vendee subject to the claim for unpaid purchase money, and (2) the ownership of the vendor as security for the payment of the unpaid purchase money. Any other theory would result in injustice. * * * To enforce this lien, the vendor is entitled to possession as the agreement * * * provides."

The defendant in the case *sub judice* only purchased the "right, title and interest" of the receivers of the vendee in the equipment in question for the sum of $5,000.00, and did not in the written transfer of such interest assume the payment of the outstanding liens thereon, nor was the amount of such liens or charges deducted from the purchase price. It would seem, therefore, that the defendant is in much the same position as the purchaser of an equity of redemption in mortgaged real estate who, it is settled in this state, merely "purchases a right, and does not assume an obligation to redeem. He may at his pleasure give up the mortgaged premises in satisfaction of the encumbrances". Tichenor *vs.* Dodd, 4 N. J. Eq. 454.

In view of what has been said the court, after considering the agreed state of facts and the

argument and briefs of counsel for the respective parties finds:

1. The statements in paragraphs 1, 2, 3, 4 and 6 of the complaint are supported by the evidence.

2. The statements in paragraph 5 of the complaint are not supported by the evidence, except the statement that the receivers sold and assigned to the defendant all the right, title and interest of the said receivers in and to the said agreement and refrigerating equipment, and the plaintiff has, therefore, failed to establish any liability on the part of the defendant.

The court, therefore, finds for the defendant and against the plaintiff.

HENRY E. ACKERSON, JR.,
Judge.

RULE FOR JUDGMENT

NEW JERSEY SUPREME COURT

Henry R. Eckert, doing business as Hudson Refrigerating Machine Company, Plaintiff, vs. Anthony Nazzaro, Defendant	Rule for Judgement

No. 2822

This action was submitted upon an agreed state of facts for determination by Henry E. Ackerson, Jr., judge, without a jury, at the Hudson County Circuit. A postea was duly signed, filed and entered wherein it appears that the plaintiff has failed to establish any liability on the part of the defendant and that the said court finds for the defendant, Anthony Nazzaro and against the plaintiff, Henry R. Eckert, doing business as Hudson Refrigerating Machine Company;

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff his costs, which are taxed at $

Rule actually entered
May 25, 1931

New Jersey Court of Errors and Appeals

HENRY R. ECKERT, doing business as Hudson Refrigerating Machine Company, Plaintiff-Appellant, *vs.* ANTHONY NAZZARO, Defendant-Appellee.	On Appeal from Supreme Court.

BRIEF FOR APPELLANT.

This appeal brings up for review the judgment entered for defendant in the Supreme Court in an action submitted to the Circuit Judge upon an agreed state of facts. The *postea* contains his finding of facts and rulings of law.

Facts.

May 11th, 1927, the plaintiff, by conditional bill of sale (p. 5), delivered to the Crescent Dyeing and Finishing Company, a corporation, a refrigerating equipment, title to remain in vendor until paid for (p. 5). The vendee made none of the installment payments provided and became insolvent. September 12th, 1927, its insolvency was decreed by the Court of Chancery, an injunction issued and receivers were appointed. Included in the assets were four pieces of real estate subject to mortgage, personal property subject to a chattel mortgage and seven items of personalty possessed on conditional bills of sale and the va-

rious amounts due thereon were inventoried by the receivers as liabilities (p. 10, ll. 11 to 30). Among the liabilities so listed was the amount of the purchase price due to the plaintiff on his conditional bill of sale (l. 29).

October 1st, 1927, the defendant submitted to the receivers a written offer of $5,000.00 for "all the right, title and interest of the receivers in the property and assets of the insolvent, exclusive of the accounts receivable, unpaid subscriptions and the amounts on deposit". The communication contained the following formula: "This offer is made subject to the following liens", and then followed a reproduction of the receivers' schedule of the chattel mortgage, the four real estate mortgages and the seven conditional bills of sale (p. 11, l. 30). On the receivers' petition for leave to accept the offer an order to show cause was made, directed to be served upon all the creditors, stockholders and parties in interest and was served on the plaintiff (p. 16). October 17th, on its return, the offer, unopposed by the plaintiff, was approved and receivers ordered to transfer to the defendant all the right, title and interest in and to the effects, assets and property of the Crescent Dyeing and Finishing Company (exclusive of the items reserved by bid) to the defendant, and by the sanction thereof the receivers delivered to the defendant the refrigerating equipment owned by the plaintiff (p. 10, l. 39; p. 11, ll. 1 to 13).

The plaintiff demanded of the defendant payments in fulfillment of the terms in the conditional bill of sale, which were refused (p. 15, l. 15), and on December 9th, 1927, after his possession of the property had continued about eight weeks, the defendant sent a letter to the plaintiff demanding that the machine be removed (p. 18). December 14th, 1927, the present action was commenced to recover from the defendant the amount of the

unpaid purchase price of the machine, the complaint alleging that the full amount was recoverable by reason of the defendant's repudiation of his obligation to perform the terms of the conditional bill of sale (p. 4, ll. 22 to 26).

The questions involved below were: whether by the provisions of Uniform Conditional Sales Act, 2 Cum. Supp. 3129, the defendant is liable for the amount of the unpaid purchase price; or whether he was so liable, in the circumstances, upon his express or implied undertaking to pay the same; and incidentally, whether the contract was novated either by the implications from the conduct of plaintiff, receiver and defendant, or was novated by the terms of the statute which controlled the transaction to all intents beyond the plain expression of the parties, or was novated by the concurrent force of the parties' conduct and the intendment of the statute.

In a case heard by the court the practice of assigning error on the giving of judgment is approved. Trenton B. Co. v. Rittenhouse, 96 N. J. L. 450

Uniform Conditional Sales Act, 2 Cum. Supp., p. 3129.

The pertinent provisions of this act considered below are as follows:

182-87. "Conditional Sale" means any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price.

"Buyer" means the person who buys or hires the goods covered by the conditional sale, or any legal successor in interest of such person.

"Seller" means the person who sells or leases the goods covered by the conditional sale, or any legal successor in interest of such person.

182-88. The buyer shall have the right when not in default to retain possession of the goods,

and he shall also have the right to acquire property in the goods on the performance of the condition of the contract.

182-89. The buyer shall be liable to the seller for the purchase price, or for installments thereof as the same shall become due.

182-99. Unless the contract otherwise provides, the buyer may, without the consent of the seller, remove the goods from any filing district and sell, mortgage or otherwise dispose of his interest in them; * * * not prior to the performance of the condition shall the buyer sell, mortgage or otherwise dispose of his interest in the goods, unless he, or the person to whom he is about to sell, mortgage or otherwise dispose of the same, shall notify the seller in writing * * * not less than ten days before such sale, mortgage or other disposal. If buyer does so remove the goods or does so sell, mortgage or otherwise dispose of his interest in them without such notice or in violation of the contract, the seller may retake possession of the goods and deal with them as in case of default in payment of part or all of the purchase price.

182-108. If the proceeds of the resale are not sufficient to defray the expenses thereof and also the expense of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer.

182-110. After the retaking of possession as provided in Section Sixteen the buyer shall be liable for the price only after a resale and only to the extent provided in Section Twenty-two (the deficiency). Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the judgment in such action nor the collection of a portion of the price shall be

deemed inconsistent with a later retaking of the goods as provided in Section Sixteen. But such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien on the goods or attached them or levied upon them as the goods of the buyer.

182-115. In any case not provided for in this act the rules of law and equity, including the law merchant * * * shall continue to apply to conditional sales.

Findings and Rulings by Court.

1. The Court held as a conclusion of fact that the plaintiff failed to prove that the defendant undertook and agreed to complete the performance of the terms of the conditional bill of sale and to pay the sum due thereon.

2. The Court made the following rulings of law, returned with the *postea*:

(A) That the conditional bills of sale act does not extend the contractual obligations of the parties, much less of the assignees of such parties, beyond the limits voluntarily assumed in the treaty between them (p. 22, ll. 20 to 25).

(B) In the statute defining what constitutes a buyer the words, "any legal successor in interest" means *universal successor*, and do not include one who has purchased the conditional vendee's rights but has not assumed his obligations.

(C) A purchaser of the conditional buyer's interest, who has not promised conditional seller that he will pay him the balance due on the price, may not be held liable to the seller for all or part of the price.

(D) The purchase of the buyer's special property interest does not imply a promise to the conditional seller.

(E) The defendant is in much the same position as the purchaser of an equity of redemption in mortgaged real estate who, it is settled in this State, merely purchases a right and does not assume an obligation to redeem. He may at his pleasure give up the mortgaged premises in satisfaction of the incumbrances.

POINT I.

The defendant, both by common law and the express prescription of the statute, purchased the property *com onere*.

The bare facts of the transaction were that the defendant offered to buy the entire property of the insolvent, according to his phrase, "subject to the following liens"; the plaintiff's goods were not the property of the insolvent and did not fall within the defendant's classification of incumbered assets. Nevertheless, in his bid, the defendant recognized the existence of the bill of sale as affecting his right to obtain possession and acquire future title. The plaintiff was notified by the receiver of the bid and gave silent consent to the proposed transfer. The receiver, under the Court's direction, transferred to the defendant "all his right, title and interest" in all the assets,—transferring "titles" subject to liens, and "rights and interests" as they existed under the conditional bills of sale.

Although defendant did not expressly assume the payment of incumbrances on the property to which he acquired title, it is contended that at common law in respect of the chattels of the plain-

tiff and in view of the existing legal relations in which he became a new participant with the consent of the others concerned, his assumption of liability must be implied. He is estopped to deny the same and the contract was novated by the conduct of the three parties concerned, as well as by the declared policy of the statute.

The general doctrine may be conceded to be that in the absence of an agreement, express or implied, or of a controlling statute, the party who buys property from a vendee who has not title, but to whom the owner has contracted to sell it, does not come under a personal obligation to the owner to pay the purchase price.

Adams v. *Wadhams,* 40 Barber 225.

Nevertheless, the immunity does not obtain where there exists between the original vendor and original vendee a continuing contract, with reciprocal obligations and the right to enforce which, against the vendor the new purchaser acquires.

Wiggins Ferry Co. v. *Chicago, etc., RR. Co.,* 73 Mo. 389;

Blue Star Nav. Co. v. *Emmons C. M. Corp.,* 276 Pa. 352, 120 Atl. 459, citing 5 *Corpus Juris* 977.

It cannot be questioned that the defendant had the right to tender the installments of the purchase price to the plaintiff and hold him to the fulfillment of his obligations under the contract; he had lawfully purchased from the receiver the insolvent's *interest, i. e.,* the right to retain possession and to acquire title. Enforcing this common law view of the defendant's right and of the plaintiff's disability to rescind the contract are the necessary implications from the statutory definitions and its prescriptions of rights and liabili-

ties, and particularly the implication of the provisions of par. 13 of the Act (182-99). This section provides for the sale of the goods by the vendee without the consent of the seller, but declares that when such sale is made without previous notification to the seller, the latter may retake possession of the goods from the secondary vendee, and do this apparently irrespective of whether the first vendee has, up to the time of resale, complied with the terms of the contract or not. The seller is thereupon authorized to deal with them as in case of default in payment of the purchase price—that is to say, he may sell them, take out what is due and close the transaction. The clear intendment of this section is that if the statute has been complied with through the giving of notice by either the first buyer or his intending purchaser, the seller may not, in that case, retake possession. He must abide by his contract for the benefit of the secondary vendee, who, obviously, has the right to hold him to the performance of the same. This paragraph prescribes the sole case in which the contract is rescindable by the vendor upon the resale of the goods, and it authorizes the assignee to forefend such contingency by giving the notice himself. It signifies cogently that the new vendee not only acquires the benefit of the contract, but may assert his rights thereunder against the vendor. While in case of sale without notice the vendor may exercise against the new purchaser only one remedy which he had against the original vendee, *i. e.*, retaking, yet when the sale is on notice, or waiver of notice, all rights are preserved in favor of both parties. To withhold this construction from the section referred to would render its language mere jargon and disregard the requirement that effect be given to every part of a statute, when possible.

The receiver stood in the shoes of the original vendee.

Depew v. *Depew,* 98 N. J. Eq. 461.

The purchaser from the receiver acquired whatever interest the receiver had.

Duplex Printing Co. v. *Clipper P. Co.,* 213 Pa. 207, 62 Atl. 841.

Of what the vendee's and receiver's interest consisted is succinctly stated and circumscribed by the statute quoted (182-88 and 182-89). It was the right to retain possession and the right to acquire property on performance of the condition relating to the payment of the purchase price (*Finance Corporation of New Jersey* vs. *Jones,* 98 N. J. L. 165). By the phraseology of the statute the vendee had the right to retain possession *when not in default* and to acquire property in the goods on the performance of the conditions; the liability for the purchase price was not merely *coupled* with the right to retain possession, it was a *condition precedent* and no right to possession existed, nor interest was acquired except through the performance of the condition respecting payment.

With this situation prevalent, and with a complete knowledge of it as evinced by his bid, the defendant offered to purchase the interest of the insolvent, and after obtaining, with the assent of the plaintiff, a possession which derived its legal vitality only from an obligation to pay, and after enjoying thenceforth an eight weeks' user of the property, he notified the plaintiff of his withdrawal from the transaction. In effect he justifies his possession, and its continuance, through the consideration paid to the receiver, who, as shown, had no legal right to dispose of any possession except one that could be vindicated by the

fulfillment of the condition as to payment. The receiver, himself, could not in this manner have disclaimed liability, nor defended his own possession on the immunity which the defendant claims. No justification is offered by the defendant except that he acquired title and possession of goods that were the subject of a mere lien. The view has no support beyond occasional *dicta* indulged in without regard to the peculiar circumstances of the present case or to the clear provisions of the statute.

To hold that this defendant could seek and accept the benefits of the existing contract and the benefit of the actual and continued possession of the property without the implication of a promise on his part, would annihilate all the reverable considerations upon which *indebitatus assumpsit* was evolved. A construction of a contract subversive of an established rule of law is to be avoided. *United B. & P. Co.* vs. *McEwan Bros.* (N. J. Ch.), 76 Atl. 560.

In cases fairly in point it has been held, aside from any statute, that the transferee of property takes the same *com onere.*

Atlantic, etc. R. R. Co. v. *Atlantic, etc. C. Co.,* 147 No. Car. 368, 23 L. R. A. (n. s.) 223;

Dingeldine v. *Third Avenue R. R. Co.,* 37 N. Y. 575;

Parsons Mfg. Co. vs. *Hamilton Ice Mfg. Co.,* 78 N. J. Ch. 309.

POINT II.

An express assumption of liability by the defendant was not necessary.

When the defendant negotiated to acquire the interest of the original vendee which had passed to the receiver, and did so admitting his notice of the existence of a conditional bill of sale, he must be held to have recognized what were the character and burdens of such interest as fixed by the contract and as defined by the statute; what legal obligations the contract and the statute attached to the enjoyment thereof; and to have known that no interest could exist apart from such obligations. With the knowledge of the rights and liabilities pre-existing between the plaintiff and the receiver, and acting in the face of a public statute which further dealt with such rights and liabilities, his acquisition of the interest and his acceptance of possession and user, without more, was an assumption of the statutory and contractual liability out of which the possession was evolved and the user legalized. It was not necessary that he should have expressly assumed the payment of the purchase price.

POINT III.

Defendant is estopped to deny liability.

The receiver was estopped to deny the validity of the contract by the privity of law existing between him and original vendee. Between the receiver and the defendant existed, at least, privity of contract whereby the defendant was estopped to deny that the interest which he purchased was charged with obligations to the same extent that

the receiver was so precluded. Furthermore his offer to buy the property, with knowledge of the plaintiff's rights therein, was an inducement to the plaintiff to forego the retaking of the property from the receiver; by such course of the defendant the plaintiff's position was changed for the worse and the defendant thereby is estopped in *pais.*

If the defendant's liability is fixed by estoppel in law or in *pais,* it is unnecessary to inquire whether he either expressly or impliedly assumed the obligation to pay.

In a case wherein one corporation took over the assets and business of another including an automatic blower, upon which was due a balance of the purchase price evidenced by a note of which the managers of the new company had knowledge, it was held that it was not necessary to uphold the liability of the assignee to pay such balance to establish an assumption of the same, since by novation as well as by estoppel resulting from the taking over of the entire assets of the business, the defendant's liability could be predicated.

Parsons Mfg. Co. v. *Hamilton Ice Mfg. Co.,* 78 N. J. L. 309.

In *Atlantic, etc., R. R. Co.* v. *Atlantic, etc., C. Co., supra,* it was held that the assignee of a contract to deliver goods assumes liability to pay for them on delivery and the assignee of a contract who acquires the right to enforce the executory provisions thereof, or to recover damages for the breach, assumes the burdens which are imposed upon the assignor by the contract as a consideration for the performance by the other party.

In *Dingeldine* v. *Third Avenue R. R. Co., supra,* it was held that where an assignee takes property subject to the payment of a debt, even though that

debt is not a lien on the property transferred, the assignee will be personally obligated to the holder of the debt to pay the same.

POINT IV.

The contract was novated either by the act of the parties or by the policy of the statute or both.

Upon the appointment of the receiver the plaintiff had an election to retake the goods or permit the receiver to dispose of them,

> *Crown* v. *Regna Construction Co.*, 146 Atl. 346, aff. 150 Atl. 918,

but he was required to exercise the option upon the return of the order to show cause why the receiver should not accept the bid of the defendant; he showed no cause, but on the contrary estopped himself from later disclaiming the receiver's right and authority to sell. He had such notice as complied with the requirements of Section 182-99 of the Act, and was disqualified to retake the property because of the mere fact of its resale. He accepted the situation created by the statute, wherein the defendant could hold him to the performance of the original contract. By established principles of law the defendant was bound by an implied promise to pay him for the benefits acquired, represented by the right to retain possession and eventually acquire title. Meanwhile the plaintiff was disqualified to enforce any legal rights against the insolvent because of the receivership, and the case is barren of any proof that he made any claim on the receiver for the amount of the debt. On the contrary, the admission is that he released his original debtor and

the receiver by promptly seeking from the defendant the full amount of his debt and asserting the latter's exclusive liability.

In this collocation of circumstances the four essential requisites of a novation are presented: (1) previous valid obligation; (2) assent of all the parties to a new contract; (3) the extinguishment of the old liability; and (4) the acceptance of a new one.

29 Cyc. 1130.

A novation results from a bilateral agreement for the substitution of a new party for an old party.

Parsons Mfg. Co. v. *Hamilton Ice Mfg. Co., supra.*

No contention can be made that the original debtor, the Crescent Company, was not released from the performance of its contract in face of an injunction by the Court of Chancery restraining all further transaction of its business. The plaintiff could not hold it to the performance of its contract, had he so desired.

Should any doubt prevail whether a conventional novation resulted, it is cleared up by the provisions of the statute imposing on the buyer's successor in interest all the obligations of the original buyer and by the force of Section 182-108 which prescribes that upon the resale of the goods where deficiency results it may be recovered from the buyer "or anyone who has succeeded to the obligations of the buyer".

These pertinent provisions of the statute are complementary of the agreement of the parties in so far as it was inexplicit.

Persons entering into contracts given special force and effect by statute are held to contemplate

and assent to the force and effect which the statute attributes to them.

> *Lorando* v. *Gethro,* 227 Mass. 181, 117 N. E. 185.

While the law will not imply promises unexpressed in a contract if the contract is complete within itself, where the parties have not fully expressed themselves the existing law pertinent to the subject matter of their treaty will supply the deficiency.

> *Berry* v. *Knights of Columbus Home Association* (E. & A.), 148 Atl. 644;
> *Prest* v. *Inhabitants of Farmington,* 117 Me. 348, 104 Atl. 521.

Novation, like all other contracts, may be expressed or implied, and when not expressed the statute will aid the implication of it.

POINT V.

It was error to hold that the conditional bill of sales act does not extend the contractual obligations of the parties, much less of the assignees of such parties, beyond the limits voluntarily assumed by the treaty between them.

The treaty between the defendant and the receiver was for the assignment of the receiver's interest. The defendant offered to buy "subject to the lien" of the conditional bills of sale. The use of the word "lien" was a barbarism if it applied to such conditional bills of sale, and was not limited to the chattel mortgage and realty mortgages to which it had a congruous application. In his offer the word "subject" had proper refer-

ence to the bills of sale, for the purpose of acknowledging notice and submission to their terms, but the word "lien" applied only to the mortgages. The defendant, consequently, bought the receiver's interest in the property subject to all the obligations provided by the statute in respect of the proposed transaction. The predominant incident was his knowledge that the interest was subject to a conditional bill of sale, and if his word "lien" extended to the bill of sale so as to import his understanding that the contract or statute conferred only a lien, his legal error in this regard cannot disparage the plaintiff. The defensive contention in this case is that his employment of the word "lien" paralyzed all contractual and statutory rights of the plaintiff.

In *Finance Corporation of New Jersey* vs. *Jones, supra,* it was held that a clause in a contract of conditional sale that the buyer shall not resell without the written consent of the seller is ineffective against the purchaser who buys without such written consent, and rules in general effect that all agreements of the parties in conflict with the act are nugatory.

In the same volume as the last case is the holding that the agreement of the parties in the transfer of personalty is not effectual when opposed to some statutory policy of the State.

> *Thayer Mercantile Co.* v. *First National Bank,* 98 N. J. L. 29.

There is in the present case no enterprise to extend the contractual liabilities of the parties beyond the limits voluntarily assumed by them in any express treaty. The contention is for the application of the statute to the contract so far as it is unexpressed by the parties, and to prevent the obtrusion by the defendant of a legal theory

of immunity contrary to express statutory direction.

The case relied upon by the trial Court for the ruling (*Liquid Carbonic Co.* v. *Black,* (Conn.) 128 Atl. 514) furnishes no authority. A Connecticut statute required that conditional bills of sale be acknowledged, and provided that, when not made in conformity therewith, they shall be held to be absolute sales, except as between vendor and vendee or *their personal representatives.* The buyer sold the goods and the seller contended that his vendee was a personal representative within the meaning of the statute. It was rationally held that the statute contemplated only executors, administrators, trustees in insolvency, assignees in bankruptcy and receivers, but did not include the vendee of a vendee. The holding was virtually the same as in *Depew* vs. *Depew, supra,* and did not relate to the inefficiency of a statute to overbear the express terms of a contract.

POINT VI.

The Court below erred in holding that the words of the statute "any legal successor in interest", means *universal successor* and did not include one who has purchased the conditional vendee's rights but has not assumed his obligations.

As pointed out, it is impossible under the statute for one to purchase the vendee's rights without assuming his obligations. When the statute places the obligations of the buyer upon "any legal successor in interest" of such person and thereafter authorizes the buyer to sell, without the consent of the seller, his interest in them, it is not easy to conceive who else besides such pur-

chaser might be the legal successor *in interest* (Sec. 182-99). There existed no necessity at the time of the enactment to prescribe the liability of administrators, executors or receivers for the debts of decedents or insolvents, but reasonable occasion did exist for a pronouncement that when one bought the interest of the vendee he acquired such interest to the same extent, and charged with the same liability as prescribed for the original buyer. No previous statutory provision or judicial holding had cast upon him such liability; yet he enjoyed the possession and use of property belonging to original vendor, with unhampered freedom to destroy it. Ethically, his immunity was grossly unjust, at the correction of which evil the statute aimed.

The learned Judge below rested his ruling on Volume 7, Words and Phrases, p. 6748. Reference to his quotation discloses that the only authority for the distinction between universal and particular successor is Bouvier's Law Dictionary, without the citation of any case. A distinction would appear to be drawn only between the liability of a universal successor to pay the charges of his deceased and the immunity of a particular successor, such as a buyer, from such charges. The distinction is not preserved in the statute and it is not strange that no judicial authority is cited. The Trial Judge seems to have accepted the definition as sanction for the rule that in no conceivable case may anyone be held for a purchase price except the original buyer and upon his death his executor or administrator. Reference is had to Point I of this brief to indicate that the mere lexicography relied on is wholly untenable. It is notable that the conditional bills of sale act avoids the use of the term, "personal representative", and the definition referred to by the Trial

Judge does not purport to deal with the more elaborate term, "legal successor in interest".

It has been held that the assignment of the seller's rights entitle his assignee to all remedies against the buyer and constitute him his assignor's legal successor in interest.

HARE & CHASE VS. GLASSNER & ACKERLY CO., 102 N.J.L. 499

Robinson v. *Pipe Organ Mfg. Co.*, 102 N. J. Eq. 79;

General Motors Acceptance Corp. v. *Smith*, 101 N. J. L. 154.

In the last case it was said by Justice Katzenbach:

> "A transfer of the seller's interest in the subject matter of the conditional sale is sanctioned by the first section of the act, which contains the definition of 'seller'. The act says:
>
> > Seller means the person who sells or leases the goods covered by the conditional sale, or any legal successor in interest of such person.
>
> The assignment of the Foley Company to the plaintiff gave the plaintiff every right the Foley Company had. It was an absolute transfer of the seller's property and interest in the conditional sale agreement, and the motor vehicle mentioned therein, without the right of redemption. By this assignment the Acceptance Corporation became the 'legal successor in interest' of the Foley Company. It was entitled to every right the Foley Company would have had, if it had not made the assignment."

In the present matter it is merely contended that by the force of identical language the defendant through the assignment of the vendee's interest acquired every right which the latter had, burdened with every liability on which such rights rested.

POINT VII.

The Court erred in its holding that the purchase of the buyer's special property interest did not imply a promise to the conditional seller.

Previous argument is referred to on the point of such promise being implied. It may here be stated that the fear of the court below that the plaintiff sought an extension of the statute beyond its reasonable intendment is baseless. On the contrary the plaintiff seeks to give effect to the entire statute. The cases cited in the *postea* do not support the ruling in connection with which they are cited, but on the contrary tend to overthrow the conclusion of the Court.

Quigley v. *Spencer Stone Co.*, 143 Fed. 86, was decided, January 2, 1906, wherefore no question of rights under any statute is involved. Quigley made a contract to supply the receiver of a railroad with a certain quantity of crushed stone, to obtain which Quigley acquired quarries and equipped the same with machinery. Having performed his contract in part he assigned it to Blue, independently granting him a license to use the quarry and selling him the machinery upon the terms of $2,000 cash and the balance in monthly installments. Subsequently Blue assigned his contract with Quigley, including the contract with the receiver for the furnishing of the stone, to Spencer Stone Company, which expressly assumed the execution of Quigley's contract with the receiver, but without any express undertaking to pay Quigley for the machinery;

> Held, that by this conduct the Stone Company assumed the payment of the purchase

price of the machinery and that it was liable therefor to Quigley.

In *Van Allen* v. *Francis,* 123 Cal. 474, 56 Pac. 339, the plaintiff, Van Allen, agreed to sell Langton a printing press, payment to be made by installment notes, to be secured by a mortgage on the press, and title to remain in the seller until full payment was made. Langton sold his interest to the Langton Corporation, which paid three of the installment notes at maturity and later defaulted on others. The property was retaken by the vendor and sold to the defendant, Francis. The Langton Corporation claimed that it having had no notice of the seller's right to retake the goods, he could not lawfully retake the same without restoring the unpaid notes which they had assumed. It was overruled on the ground that the transferee of the goods was not a party to the notes. It was further ruled that the seller was not estopped from retaking the goods because of the transferee's ignorance of his right of recapture, the seller having the right to suppose that the payments made by the transferee were with knowledge of the contract.

In *Central Kansas Motor Company* vs. *Kline,* 109 Kan. 227, 198 Pac. 949, it was held that a purchaser, or one who obtains possession of personal property on which there is a statutory lien evidenced by a duly recorded title note, is not personally liable on the note where his name does not appear thereon, and where he has not in any way agreed to it. The ruling proceeds upon a statute wholly different from the conditional sales act.

POINT VIII.

It was error to rule that the right of a conditional vendor of goods to retake the same for non-payment of purchase price is in the nature of a lien.

The policy of the statute is to the contrary; Sec. 182-110 sounds the solemn warning that the assertion of a lien by the seller affects the forfeiture of his right of retaking. The right to retake must be exercised in virtue of his title and sustained ownership.

The court below relied on *Kirch* v. *La Turette,* 91 N. J. L. 35, decided February 7, 1918, more than a year previous to the enactment of our statute. The language quoted in the *postea* is *obiter dictum* and is not the pronouncement of any rule of law. The question in the case was whether a conditional vendor waived his title as against the vendee by an attachment of the goods for the purchase price, and the holding was in the negative, distinguishing the case from *Heller* v. *Elliott,* 44 N. J. L. 467. The language of the *dictum* makes it plain that the court was indulging a *simile* only in the course of argument, and that it was not seriously adjudicating the legal quality of the seller's rights; the contemplation that both vendor and vendee were simultaneous owners, the one having a mere lien and the other holding title subject to the claim for unpaid purchase money, was not a happy *simile,* in either point of expression or argument, and was an uncalled-for preface to the succeeding statement that when vendor resorts to replevin it is not for the purpose of establishing title in himself, but merely to obtain possession of the goods to facilitate their resale. Even the latter observation was not necessary to the

resolution of the question of law involved. In a few equity reports the interest of a conditional seller has been *likened* to a lien, *arguendo,* but none rashly so decides.

The remaining authority relied upon in the *postea* is *Tichenor* v. *Dodd,* 4 N. J. Eq. 454. This case pronounces it as settled that a purchaser of an equity of redemption in mortgaged real estate purchases a right and does not assume an obligation to redeem. He may at his pleasure give up the mortgaged premises in satisfaction of the incumbrances. This reflection might be of some value in dealing with a chattel mortgage instead of a conditional bill of sale, but it has no pertinence to the present case, where by the terms of both the contract and the statute no title was translated to the original vendee and the latter had nothing similar to an equity of redemption. The case can have an influence on the present decision only by casting aside the statute and the wealth of judicial learning which has been expended upon the subject since the ruling in *Tichenor* v. *Dodd,* in 1854. Even in that case there were pointed intimations that good reason might exist for holding the present defendant to personal obligation. It was ruled that if, by the terms of sale, the mortgage money is to be taken as part of the consideration, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgaged debt. And if the debt be afterwards paid by the mortgagor equity will compel the purchaser to refund the money so paid.

The practical application of these equitable theories to the present case is that if the plaintiff resorted to the original vendee or to the receiver for the payment of the purchase price, the vendee or receiver could in equity have recourse to the defendant for reimbursement. These cum-

bersome requirements constituted a mischief which the Conditional Sale Act plainly designed to obviate.

It is submitted that the judgment below should be reversed and judgment entered in favor of the plaintiff-appellant and against the defendant-appellee.

RICHARD DOHERTY,
Attorney for and of Counsel with
Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

Henry R. Eckert, doing business as Hudson Refrigerating Machine Company, Plaintiff-Appellant, vs. Anthony Nazzaro, Defendant-Appellee.	On Appeal from Supreme Court.

Brief of Defendant-Appellee

STATEMENT OF FACTS

The appeal in this cause brings up for review in this court a judgment of the New Jersey Supreme Court entered on May 25, 1931, in favor of the defendant-appellee, Anthony Nazzaro, and against the plaintiff-appellant, Henry R. Eckert, doing business as Hudson Refrigerating Machine Company.

The record of the case indicates that the facts were agreed upon by the stipulation signed by the attorneys for the respective parties and submitted to Henry E. Ackerson, Jr., Circuit Court Judge of the Hudson Circuit, without a jury. From the facts as stipulated, it appears that the plaintiff appellant on May 11, 1927, sold to the Crescent Dyeing & Finishing Company, under a conditional bill of sale, certain refrigerating equipment for the price of $2,175.00, on account of which $200.00 was paid.

Thereafter proceedings were taken in the Court of Chancery to have the Crescent Dyeing

& Finishing Company declared insolvent and on September 12, 1927, receivers were appointed.

On October 1, 1927, defendant, Anthony Nazzaro, submitted an offer to purchase the receivers' right, title and interest in the property and the assets of the company, with certain exceptions, for the sum of $5,000.00, stipulating that the offer was subject to certain liens, of which the plaintiff's conditional bill of sale was one.

This offer was submitted to the Court of Chancery and an order was made on October 3, 1927, for the parties in interest to show cause why the receivers should not be directed, on payment to them of said sum, to convey their right, title and interest to the defendant.

On October 17, 1927, the return date of the order to show cause, an order was made accepting the said offer and upon receipt of the money, the receivers transferred to the defendant all their right, title and interest to the refrigerating equipment in question.

The plaintiff appellant thereupon demanded payment of the sums due under the conditional bill of sale, which was refused, and the defendant then demanded that the plaintiff remove the refrigerating equipment from the premises so purchased by the defendant, whereupon the plaintiff brought a suit to recover from the defendant the unpaid balance of the purchase price of said equipment.

That after hearing the argument of counsel on the agreed statement of facts, a judgment was entered in behalf of the defendant and against the plaintiff and it is this action of the court be-

low with which the plaintiff is aggrieved and therefore brings this appeal.

The defendant, for the reasons hereinafter stated, will contend that the judgment of the Supreme Court, entered upon the findings of Judge Ackerson of the Hudson Circuit, should be affirmed.

POINT ONE

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

A. The plaintiff appellant raises no ground of appeal which is cognizable in this court.

The alleged ground of appeal upon which the plaintiff relies is:—The Supreme Court erred in giving judgment in favor of the above named respondent instead of in favor of the above named appellant.

Page 1, State of the Case, lines 30-40.

An examination of the record indicates that the appeal in this case is from a judgment of the Supreme Court sitting as a trial court at the Hudson Circuit.

In this posture of affairs, the ground of appeal already referred to, assigns no errors to which this court may give any attention.

In the case of Van Horn vs. Huegel, 104 N. J. L., 106 Court of Errors and Appeals, a similar situation was presented as that in the case at bar and the court held:

> **"A ground of appeal: Because the Supreme Court gave judgment for the defendant-respondent when it should have given judgment for the plaintiff appellant is not a proper ground of appeal from the Supreme Court sitting in the first instance.** Driscoll vs. Carlin, 50 N. J. L. 26, approved and followed. **Otherwise on an appeal to this Court from the Supreme Court sitting as a Court of review."**

On page 107 Mr. Justic Black speaking for the Court states:

> **"Correct practice requires that the grounds relied upon for a reversal from a Court in the first instance should be specified in the Assignment of Errors. The common errors relate only to the record itself and not to the out branches of the record. Errors outside the strict record should be specifically assigned . . . ."**

To the same effect Trenton Banking Co. vs. Rittenhouse, 96 N. J. L. 450; Driscoll vs. Carlin, 50 N. J. L. 28.

From the foregoing citations there is no question that the ground of appeal stated in the case sub-judice is totally insufficient to permit this court to review the points raised in the appellant's brief.

B. THE DEFENDANT-APPELLEE IS NOT LIABLE FOR THE AMOUNT OF THE UNPAID PURCHASE PRICE CLAIMED BY THE APPELLANT.

An examination of the agreed statement of facts clearly shows that the defendant appellee bought the receivers' right, title and interest in and to the equipment of the appellant, together with other chattels, for the sum of Five Thousand Dollars, ($5,000.00), **subject to all liens of which the conditional bill of sale covering the refrigeration equipment, owned by the appellant, was one.**

The facts in the case also indicate that no payment was ever made by the defendant to the plaintiff and when a demand was made for payment by the appellant, the defendant-appellee offered to return, and in fact ordered that the refrigeration equipment of the appellant be removed forthwith, or else the same would be put in storage at the risk and expense of the appellant. (Page 18, State of the Case.)

In view of the express arrangement made by the defendant to purchase the assets from the receivers of the Crescent Dyeing and Finishing Company, **subject to all liens,** it is difficult to conceive how the appellant arrives at the conclusion that the defendant was bound to pay the balance due to him under the terms of the conditional bill of sale between the appellant and the Crescent Silk Dyeing & Finishing Company.

The defendant made no agreement to assume payment of any obligation concerning the assets

of the Crescent Silk Dyeing and Finishing Company, purchased by him from the receivers. Nor does it appear anywhere in the case that the obligations due on those assets or any part thereof were taken into consideration when the price was agreed upon.

The appellant contends that the defendant is obliged to pay the balance due on the conditional sales contract between the appellant and the Crescent Silk Dyeing & Finishing Company, by virtue of **Paragraph 3 of the Uniform Conditional Sales Act 2, Cum. Supp. 3129,** which provides as follows:

> "The buyer shall be liable to the seller for the purchase price or for the installments thereof, as the same shall become due and for breach of all promises made by him in the conditional sales contract, whether or not the property and the goods has passed to the buyer."

Paragraph 1 of that Act defines a buyer as follows:

> "Buyer means the person who buys or hires the goods covered by the conditional sale or any legal successor in interest of such person."

The appellant argues that by reason of the definition "buyer," as disclosed in Paragraph 1 of the Conditional Sales Act, the obligation of the

defendant is therefore complete under Paragraph 3 above referred to.

This contention of the appellant is somewhat strained and the authorities on the subject clearly indicate that a purchaser who does not assume expressly an obligation to pay the amount claimed to be due by a conditional seller is not bound therefor.

In the case of Quigley vs. Spencer Stone Co., 143 Federal, 86, it was held:

> **". . . . the mere acceptance of the buyer's property right ought not to be regarded as an implied promise to the original conditional seller to pay the balance of the price. Obviously the assignee may expressly assume the obligation making his contract with the buyer and such assumption will make him liable to the conditional seller."**

In the case at bar, there is no assumption on the part of the defendant herein and certainly no implied promise to pay the conditional seller can be foisted upon him since the express arrangement under which he bought the chattel was "subject to the following liens," one of which was that of the Hudson Refrigerating Company's conditional bill of sale.

Page 12, State of Case.

This arrangement was approved by the Court of Chancery. Page 15, State of Case.

In Bogert's Commentaries on Conditional Sales, Section 39, Volume 2A, Uniform Laws Annotated, Page 46, the author discussing the rights of one who has succeeded to the rights of the buyer under a conditional bill of sale says:

> **"On the most elementary principles of the law of contract, a purchaser of the conditional buyer's interest, who has not promised the conditional seller that he will pay him the balance due on the price may not be held liable to the seller for all or part of the price. The purchase of the buyer's special property interest does not imply a promise to the conditional seller."** Van Allen vs. Francis (1899) 123 Cal. 474; 56 Pac. 339; Central Kansas Motor Co. vs. Kline (1921); 109 Kan. 227, 198 Pacific, 949; . . . . . **The purchaser of the conditional buyer's interest is under a duty to pay the buyer for his interest and this interest may become of little or no value, if the balance of the price due the conditional seller is not paid, but it does not therefrom follow that there is any obligation on the part of the assignee of the buyer to pay the conditional seller . . . ."**

To the same effect, Breakstone vs. Buffalo Foundry Company (1915) 152 N. Y. S. 394.

The appellant's argument clings to the phrase "or any legal successor in interest of such person," as a basis of the liability of the defendant.

In Volume 7, Words and Phrases, page 6748, the term "successors" is discussed and defined:

> **"There are two sorts of successors, the successor by uniform title, such as the heir and the successor by particular title, such as the prior donee or legatee of particular things or the transferee. The universal successor represents the person of the deceased and succeeds to his rights and charges. The particular successor succeeds to the rights appertaining to the things sold, ceded or bequeathed to him."**

Now, in the statute, that we are considering, the words "any legal successors in interest," undoubtedly means universal successor and do not include one who has merely purchased the conditional vendee's rights, and who has not assumed his obligations, for the phrase in question only appears in connection with a general definition of the word "buyer."

This interpretation is supported by Section 22 of the Conditional Sales Act, dealing with resales which reads:

> "If the proceeds of the re-sale are not sufficient to defray the expenses thereof and also the expenses of re-taking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the **buyer or from anyone who has succeeded to the obligation of the buyer."**

If the definition of "buyer", as contained in the first paragraph of the Act, as before quoted, is to include an assignee of the buyer, so as to impose upon such assignee the obligation of paying any unpaid balance of the purchase price under the provisions of Paragraph 3, it is difficult to see the necessity of adding the clause, **"or from anyone who has succeeded to the obligation of the buyer,"** after the word "buyer" at the end of Section 22, as stated above.

If by any stretch of the imagination the contention of the appellant be sound, then the constitutionality of Section 3 may well be doubted, for clearly the appellant not only creates an obligation on the part of the defendant without his consent, but plainly impairs and interferes with the contract which he actually made with the receivers —that is, to purchase the receivers' right, title and interest, subject to liens, of which the conditional sale in this case was one.

The Statute was never intended to extend the contractual obligations of the parties much less of assignees of such parties beyond the limits voluntarily assumed in the treaty between them.

Liquid Carbonic Co. vs. Black, 128 At. (Conn.) 514.

In the case just cited, the Court refused to extend the meaning of "personal representatives" to include the assignee of a conditional vendee.

In Volume 1, Clark on Receivers, page 574, Section 423, the author states:

> **"The receiver is not, strictly speaking, the successor of the defendant, individual or corporation.** An executory contract of the defendant is not binding on receiver, but may be broken by the receivership and give rise to damages resulting in a claim against the assets in the hands of a receivership."

Surely if the receiver is not a "successor of the buyer" it follows that a purchaser of a receiver's right, title and interest subject to liens could not be a legal successor within the meaning and intent of Paragraph 1.

At this point, it should also be noted that the receivers did not elect to perform the conditional sales agreement between the appellant and the Crescent Silk Dyeing and Finishing Company, but instead had decided to sell whatever interest the buyer had in the chattels. Page 10, 14, 15, State of Case.

In Clark on Receivers, Volume 1, page 428, the author further observes that:

> "In order that the receiver may be absolutely bound by the contract of the debtor, the receiver must positively indicate his intention to take the contract over."

Thus, since the receiver has indicated no intention to perform the agreement of the buyer, he did not become a successor of the buyer and consequently the defendant did not become a legal successor to the interest of the original buyer within the meaning and intent of Paragraph 1 of the Conditional Sales Act.

The defendant in the case sub-judice only purchased the right, title and interest of the receivers of the vendee in the equipment in question, subject to liens, for the sum of Five Thousand ($5,000.00) Dollars, and did not, in the written transfer of such interest, assume the payment of the outstanding liens thereon, nor was the amount of such liens or charges deducted from the purchase price.

It would seem therefore that the defendant is in much the same position as the purchaser of an equity of redemption in mortgaged real estate, **who it is settled in this State, merely purchases a right and does not assume an obligation to redeem. He may, at his pleasure, give up the mortgaged premises in satisfaction of the encumbrances.**

This was the doctrine announced in the case of Tichenor vs. Dodd, 4 N. J. E., 454, which has been repeatedly followed by our courts. Reeves vs. Cordes, 108 N. J. E., 469; Smith vs. Colonial Woodworking Co., 108 N. J. E., 303; Friedman vs. Tuckerman, 104 N. J. E., 322; Kaplan vs. Wilderman, 95 N. J. E., 463; Woodbury Heights Land Co. vs. Loudenslager, 64 N. J. L., 405.

C. The Conditional Sales Contract between the

appellant and Crescent Silk Dyeing & Finishing Co., was not novated by the defendant either expressly or impliedly.

The argument of the appellant is that the defendant is liable to pay the balance due under the conditional sale agreement made with the Crescent Silk Dyeing & Finishing Co., on the theory of novation. **Incidentally, this question was not raised in the Court below.**

Four requisites are necessary for a novation:

(1) previous valid obligation; (2) assent of all the parties to a new contract; (3) the extinguishment of the old liability, and (4) acceptance of a new one.

29 Cyc. 1130.

The facts in the case plainly rebut the theory of express novation. There was no understanding or agreement to which both the appellant and defendant were parties. There is no arrangement in the entire record in which all the parties expressly agreed to the extinguishment of the obligation of the Crescent Silk Dyeing & Finishing Co. If the obligation of the Crescent Silk Dyeing & Finishing Co. were extinguished, that occurred by virtue of its insolvency and not by any agreement to which the appellant and defendant must necessarily have been parties in order to effectuate a complete express novation. Furthermore, there is no proof of the creation and acceptance of any

new liability on part of either the appellant or defendant.

The necessary requisites for express novation are therefore lacking.

Nor is there any proof that there was an implied novation. On the contrary, the record discloses positive evidence that there could not possibly be a novation by implication.

There is the **express contract** of the defendant to purchase the assets of the Receivers of the Crescent Silk Dyeing & Finishing Co., subject to liens, one of which was the Conditional Bill of Sale held by the Hudson Refrigerating Machine Company, the appellant, on which was due $1,975.00; (Page 12, State of Case; Page 14, State of Case) the approval of the defendant's arrangement by the Court of Chancery on October 17, 1927. Pages 15, 16 and 17, State of Case.

There is nothing in the offer made by the defendant to purchase the assets of the Crescent Silk Dyeing & Finishing Co. binding him to assume any obligation. (Page 11-12, State of Case.) Nor is there anything to that effect in the order accepting and approving the offer of defendant.

The mere purchase of receivers' right, title and interest, subject to liens, could not render the defendant liable on any implied contract.

In an analagous situation in the case of Kap-

lan vs. Wilderman, 95 N. J. E. 463, Vice Chancellor Buchanan held, on page 465:

> **". . . It is argued that upon some theory of implied contract, Wilderman became substituted as the covenantor in the mortgage by reason of his taking a deed subject to the mortgage. This also is without foundation for Wilderman by the conveyance to himself merely took title to the premises subject to the encumbrance . . . . there is no clause in the deed whereby he assumes payment of the mortgage, much less assumes performance of the covenant to insure. Under the law in this State, no agreement to pay a mortgage is implied from acceptance of a deed to property to property subject to the mortgage. The grantee is under no obligation to pay unless there be an express agreement so to do in his deed."** Tichenor vs. Dodd, 4 N. J. E. 454; Loudenslager vs. Woodbury Heights Land Co., 64 N. J. L. 405.

Nor is there any evidence of any act on part of the defendant from which an agreement to pay the appellant can be implied.

Instead, we have, as soon as the appellant requested payment, evidence of a registered letter mailed to the appellant by the defendant demanding that the appellant remove his equipment at once.

That letter which is undenied is made part of the Agreed State of Facts. It follows:

Dec. 9, 1927.

We are still waiting for your man to remove the ice machine from the plant of old Crescent Dyeing and Finishing Co., otherwise we shall have to remove this machine and put it in storage at your risk and expense. Please give this your immediate attention.

Page 18, State of Case.

The foregoing letter certainly negatives any idea that the defendant by his conduct impliedly agreed to pay the balance due under the conditional sales agreement between it and the Crescent Silk Dyeing & Finishing Co.

The appellant relies on the case of Parsons Mfg. Co. vs. Hamilton Ice Mfg. Co. 78 N. J. L. 309, to establish the liability of the defendant on the theory of implied novation.

At the outset, it will be observed that in that case, the Court ruled under the circumstances presented, it was for the **jury** to conclude whether there was an implied novation. **There was no novation as a matter of law.** The facts in the case cited are at great variance with those presented in the case at bar. There, a corporation known as **"The" Hamilton Ice Mfg. Co.** took over the assets of a corporation known as **Hamilton Ice Mfg. Co. The personnel of both corporations were the**

same. The officers and managing directors were the same. Representatives of the new company dealt with the plaintiff and requested extensions of time for paying obligations of the old company and in fact paid monies on account of obligations of the old company. Under these unusual circumstances, the Court said question of whether there was a novation was for the jury.

In the instant case, there is absolutely no relationship between the defendant and the original buyer under the conditional sales contract. If the question of implied novation be a jury question, then, that factual question has been settled by the Court sitting as both judge and jury and there is no challenge in the case or in law which assails such a finding.

The appellant was not misled by any action of the defendant, his position was not adversely changed by any action of defendant. The only action which the defendant took was to inform the appellant to remove the equipment from the premises of the old Crescent Silk Dyeing & Finishing Co. immediately. This the appellant did not do.

In this situation, there is neither basis for any implied novation or estoppel.

The question as to whether the rights of a conditional vendor are equivalent to a lien is raised by the appellant.

The facts in the case definitely establish that one of liens subject to which the defendant was purchasing the assets of the receivers of the Crescent Silk Dyeing & Finishing Co., was the

Conditional Bill of Sale of the Hudson Refrigerating Machine Co.

In the list of liens set forth in the defendant's offer to purchase, the Conditional Bill of Sale of the appellant is specifically set forth. In the mind of the defendant there was no doubt.

Page 12, State of Case 27-28.

On the question whether the right of a conditional vendor is in the nature of a lien, the case of Kirch vs. La Torette, 91 N. J. L. 35 is significant.

> **"The contract contemplates a double ownership of mortgagor and mortgagee. (1) the ownership of the vendee subject to claim for unpaid purchase-money, and (2) the ownership of the vendor as security for the payment of the unpaid purchase price. Any other theory would result in injustice . . . . To enforce this lien, the vendor is entitled to possession as the agreement provides."**

It is also argued that the defendant purchased the property "cum onere." This, as we have already seen in Point One B was not so.

However, assuming, but without conceding, that the property was purchased "cum onere" the defendant had the right to relinquish it "cum onere." Tichenor vs. Dodd, supra, P. 456. Reeves v. Cordes, 108 N. J. E. 469.

This the defendant did by virtue of his letter of December 9, 1927, when he ordered the appellant to remove the equipment forthwith from the premises of the Crescent Silk Dyeing & Finishing Co., the original vendee.

For all of the foregoing reasons, it is respectfully submitted that the judgment entered in the New Jersey Supreme Court in favor of the defendant-appellee be affirmed and that the appeal of the appellant be dismissed and for nothing holden.

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