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NEW JERSEY } To wit.

10



*The State of New Jersey to the  
Chief Justice, and other Justices of  
our Supreme Court of Judicature.  
Greeting :*

For as much as in the records and proceedings and also in the giving of the judgment in a plaint which was in our said Supreme Court, before you, between John Palmateer and Amos Palmateer, plaintiffs and George N. Robinson trading as James Beggs & Com-<sup>20</sup>pany, defendant, on a writ of error issued out of our said Supreme Court, to the Judges of our Inferior Court of Common Pleas, in and for the County of Monmouth, directed, as is said, manifest error has intervened to the great damage of the said John Palmateer and Amos Palmateer, plaintiffs, as aforesaid, as by their complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid, in this<sup>30</sup> behalf, do command that if judgment be thereupon given then you send distinctly and openly, under your seals, the records and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals, before the Judges thereof, on the First day of April, next, and this writ, and that the records and proceedings aforesaid being inspected, we may cause to be further done thereupon what of right and according to law ought to be done.

40

WITNESS our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, the seventeenth day of March, in the year eighteen hundred and ninety-seven.

HENRY C. KELSEY, *Clerk.*

HAWKINS & DURAND, *Attorneys.*

The answer of WILLIAM J. MAGIE, Chief  
10 Justice, within named.

The record and proceedings of the plea, whereof mention is within named, with all things concerning the same, to the Court of Errors and Appeals in the last resort, in all causes within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

WILLIAM J. MAGIE, *Chief Justice.*

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40

# New Jersey Court of Errors and Appeals.

JOHN PALMATEER  
AND AMOS PALMATEER,  
*Plaintiff's in Error.*

vs.

GEORGE N. ROBINSON,  
(trading as Beggs & Co.)  
*Defendant in Error.*

ON WRIT OF ERROR.

10

HAWKINS & DURAND,

*Attorney's for Plaintiff's in Error.*

HEISLEY & MORRIS,

*Attorneys for Defendant in Error.*

20

## DECLARATION.

INFERIOR COURT OF COMMON PLEAS  
OF MONMOUTH COUNTY.

*Of the twenty-second day of October in the year of  
Our Lord, eighteen hundred and ninety-four.*

MONMOUTH, COUNTY, SS.

Amos Palmateer and John Palmateer, the defendants in this suit, were summoned to answer unto George N. Robinson, trading as James Beggs & Co.,<sup>30</sup> in an action of tort, and thereupon said George N. Robinson, trading as aforesaid, by Heisley & Morris, his attorneys, complain for that whereas said plaintiff heretofore, to wit: on the fifth day of October, eighteen hundred and ninety-four at Long Branch, to wit: at Freehold, aforesaid, was lawfully possessed as of his own property, of a certain boiler, machinery and goods and chattels, to wit:

One (1) horizontal tubular steam boiler, 60 in. diameter, containing eighty-two (82) tubes each 3 in.<sup>40</sup>

diameter by 16 feet long; shell of boiler 11-32 in. thick and heads of boiler 7-16 in. thick of homogeneous open-hearth flange steel plate. Manhole in top of boiler, handhole in each head of boiler below the tubes. Two lugs on each side of boiler. Cast-iron neck on top of boiler for 4-in. pipe. Nuts for feed and surface blow-off, and inside pipes for same. Boiler also fitted with low water detector and alarm. Boiler right-hand (if set in a battery with flush front and anchors) oval  
<sup>10</sup> flue plate fitted with damper, fig. D smoke connection, for one boiler only—but large enough in diameter to accommodate two of same size, and extend 3 ft. beyond side wall to the right, said wall not to be more than 24 in. thick; ash door and frame, plates and rollers. McClave patent grate bars 60 in. wide by 66-in. deep, and McClave argand steam blower, buckstays and tie rods, rear L bar, safety valve, gauge cocks, steam and water gauges, blow-off cock and valve, check and stop valves, 6 in. whistle and in-  
<sup>20</sup>jector. Also

One (1) 5  $\frac{1}{4}$  in. x 3  $\frac{1}{2}$  in. x 5 in. duplex steam pump. Also

One (1) No. 6 Standard feed-water heater. Also

One (1) No. 7 left-hand stationery engine, having cylinder 18 in. diameter x 22 in. length of stroke; speeded to run about 90 revolutions per minute,—with balanced band wheel 60 in. diameter x 24 in. face, automatic-stop Gardner governor, throttle valve, lubricator, oil cups and cylinder drip valves.

<sup>30</sup> Main driving belt connecting engine with main shaft. One governor belt. Packing for engine. Packing for pump. Belt lacing. Exhaust pipe for heater to atmosphere, with connection to main building, with back pressure valve. Main steam pipe from engine to boiler, including stop valve. Pipe and valve for whistle. Outlet left in main steam pipe for another boiler. Feed pipe from heater to boiler, also from injector to boiler. Steam pipe from pump to injector. Exhaust pipe from pump. Surface blow-off pipe with  
<sup>40</sup> valve. Bottom blow-off pipe with plug cock. Suction

for injector. Suction pipe from well to pump, with foot valve and stop valve. Suction and delivery pipe from pump to tank, with valve and strainer. Feed pipe from pump to heater. Surface and bottom blow-off pipes from heater.

And being so possessed the said plaintiff afterwards to-wit: on the day and year above mentioned at Long Branch, to-wit: at Freehold aforesaid, casually lost said boiler, machinery, goods and chattels out of his possession and the same afterwards, to-wit: <sup>10</sup> on the day and year last aforesaid at Long Branch, to-wit: at Freehold aforesaid, came to the possession of the said defendants by finding. Yet the said defendants well knowing the said boiler, machinery, goods and chattels to be the property of said plaintiff, and of the right to belong and appertain to him, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf hath not as yet delivered the said boiler, machinery, goods and chattels or any or either of them, <sup>20</sup> or any part thereof to the said plaintiff, although often requested so to do, and have refused so to do.

Afterwards, to-wit, on the day and year last aforesaid at Long Branch, to-wit, at Freehold aforesaid, converted and disposed of the said boiler, machinery, goods and chattels to their own use to the damage of the said plaintiff SEVEN THOUSAND DOLLARS, and therefore he brings his suit, &c.

HEISLEY & MORRIS,

*Attorneys for Plaintiff.* <sup>30</sup>

Plea of general issue filed by defendants.

Court of Common Pleas.

SUPREME COURT ISSUES.

JAMES BEGGS & CO.	}	BEFORE
vs.		J. Clarence Conover, P. J.
JOHN PALMATEER, et al.		<i>and</i> Associate Judges.

10

FREEHOLD, N. J., January 9th, 1895.

*Plaintiff's counsel offers in evidence the original contract, dated the 7th day of June, 1893, made by John A. Palmateer and Amos Palmateer to Leopold J. Lipman and Alexander Taylor; "Marked No. 1 for identification."*

*Also offers in evidence a paper bearing date August 31st, 1893, made by the defendants to the New Jersey Mill and Lumber Company; "Marked No. 2 for iden-*  
20 *tification."*

GEORGE N. ROBINSON, called on behalf of the plaintiff, being duly sworn testified as follows:

*By Mr. Heisley,*

*Ques.* You are the plaintiff in this case? *Ans.* Yes sir.

*Q.* Where is your residence? *A.* In Brooklyn.

*Q.* What is your business? *A.* A Machinist, engines and boilers.

*Q.* Where is your place of business? *A.* No. 9  
30 Dey Street, New York City.

*A.* Did you personally conduct the negotiations for sale of machinery, a boiler and so on, with the New Jersey Mill and Lumber Company of Long Branch? *A.* In connection with my salesman.

*Q.* I show you a paper dated October 4th, 1893. and ask if you know whose signature James Beggs—  
Objected to.

*The Court.* Is there a subscribing witness.

*Mr. Heisley.* Yes.

40 *By the Court.* Where is the subscribing witness?

*A.* He is not here; he is in New York. I saw him sign it; I do not know where he is in fact.

*Q.* Do you know whether he is within the State of New Jersey?

*A.* I do not.

HALCYON M. CLOSE, called on behalf of the plaintiff, being duly sworn, testified as follows:

*By Mr. Heisley.*

*Q.* You are a member of the bar of the State of New York? *A.* I am. 10

*Q.* Do you know a person by the name of A. L. Henthorn? *A.* Yes.

*Q.* What is his business? *A.* He is a lawyer; he was in my employ as my clerk for about eight years; he lives at 19 Park Place, New York City.

*Q.* Is that his residence? *A.* Yes sir; I had an office in the same building for years.

*By Mr. Arrowsmith.*

*Q.* When you say that is his residence, you mean his place of business? *A.* His residence is there; his father is the janitor of that building. 20

*Q.* Do you know whether he lives there? *A.* No. sir.

*Q.* How recently have you seen him there? *A.* I could not say; I have seen him there very often.

*Q.* How recently, I asked you? *A.* I could not say; three or four months.

*Q.* Then you do not know of your own knowledge; within three or four months.

*Q.* Do you know of your own knowledge whether he was there or not? *A.* No. sir, I do not. 30

*Q.* You are the New York counsel for the plaintiff? *A.* Yes.

*Q.* Have you made any attempt to try to get him here? *A.* Not the least.

*Br. Mr. Heisley.*

*Q.* Are you familiar with Mr. Henthorn's signature?

Objected to as incompetent to prove the handwriting of the subscribing witness in this manner. 40

Objection overruled. Exception by defendant.

*A.* I am.

*Q.* You have seen him write frequently? *A.* Yes, a thousand times.

*Q.* I ask you if you know whose signature the name of A. L. Henthorn is, opposite the name James Beggs & Co., on the instrument dated October 4th, 1893? *A.* It is the signature of A. L. Henthorn, a former clerk in my law office in New York City.

<sup>10</sup> *Q.* I ask you the same question as to the paper dated the 5th of December, 1893.

Same objection, ruling and exception.

*A.* Mr. Henthorn's signature does not appear upon this paper. Mr. Eells is present in court.

HENRY B. EELLS, called on behalf of the plaintiff, being duly sworn, testified as follows :

*Mr. Heisley.*

*Q.* Where do you reside? *A.* Jersey City.

<sup>20</sup> *Q.* I show you a paper dated the 5th of December, 1893, and ask you if you know whose signature is affixed directly under the words "in the presence of?" *A.* I do.

*Q.* Whose is it? *A.* Henry B. Eells.

*Q.* As to whose signature were you a witness?

*A.* I was a witness to those signatures ; it was signed in James Beggs' office.

*Q.* Were you a witness to the signature N. J. Mill & Lumber Co., J. Conneen president? *A.* I was.

GEORGE N. ROBINSON, resumed the stand.

<sup>30</sup> *By Mr. Heisley.*

*Q.* In what name do you trade in the city of New York? *A.* Under the name of James Beggs & Co.

*Q.* What is the object of your trading that way?

*A.* I was a partner of the firm of Mr. Beggs and Mr. Beggs died—

Witness withdrawn.

THOMAS P. FAY, called on behalf of the plaintiff, being duly sworn, testified as follows :

*By Mr. Heisley.*

<sup>40</sup> *Q.* You are an attorney at law of this State? *A.*

I am.

*Q.* I show you a paper dated the 5th of December, 1893, and ask if you witnessed the signature of that paper? *A.* That is my signature to it.

*Q.* Did you witness it or not? *A.* Yes sir.

*Q.* I also show you a certificate of acknowledgment? *A.* I took that acknowledgment.

*Q.* Of Mr. Conneen's; is that your signature as a Master in Chancery, to that certificate? *A.* Yes sir.

*Q.* What signature did you witness? *A.* Mr. James Conneen's, my recollection; James Conneen, president of the New Jersey Mill & Lumber Company brought this to my office and asked me to witness it and take his acknowledgment.

*Q.* You saw him write his name? *A.* Yes sir.

*Q.* You did not witness the other one? *A.* No sir.

*By Mr. Arrowsmith.*

*Q.* I understand you to say that Mr. Conneen brought that to your office and he signed it as president of the New Jersey Mill & Lumber Company, in your presence, alone? *A.* Yes sir.

*Q.* Then it was not signed in New York, in the presence of Mr. Eells? *A.* No sir; it was not.

*Q.* Mr. Eells's name appears here as a subscribing witness to these signatures and I ask you this; might it not be the fact that the paper was signed by Mr. Conneen, not in your presence, but that he came to your office and acknowledged the signature to be his and got you to take his acknowledgment on the next sheet?

Objected to.

*Q.* What is your explanation of that? *A.* My recollection is that Mr. Conneen brought the paper to my office and signed it there and I took his acknowledgment; he brought the paper in the office and signed it in my presence and asked me to take his acknowledgment and there was no one present in the office, if my memory serves me right, except Mr. Conneen and myself.

*Q.* You say that is your recollection as a matter of fact? would you say that you are positive of it or not?

Objected to. Objection sustained.

*Q.* Are you positive that Mr. Conneen really signed the paper in your presence or is it simply your impression? *A.* My previous answer to that is to the best of my recollection. Mr. Conneen signed the paper in my presence and requested me to witness it and take his acknowledgment.

GEORGE B. ROBINSON, resumed the stand.

*By Mr. Heisley.*

*Q.* You were about answering what your object was, in trading under the name that you do? *A.* I was a partner of the firm of Mr. Beggs, and Mr. Beggs died and I continued the name; I believe I consulted my attorneys.

*Q.* Pursuant to these agreements which I have shown you, did you furnish the material, engine, boiler and so on, therein mentioned, to the New Jersey Mill & Lumber Co.? *A.* Yes sir.

*Q.* Where did the sale take place? *A.* In New York.

*Q.* Where was the delivery of the goods? *A.* As per contract, Pier 4, North River.

*Q.* That is referred to in the contract? *A.* Yes sir.

Cross examination waived.

JOHN PALMATEER, called on behalf of the plaintiff, being duly sworn, testified as follows:

*By Mr. Heisley.*

*Q.* You are one of the defendants? *A.* Yes sir.

*Q.* You are in possession of the property which was formerly owned by the New Jersey Mill & Lumber Company of Long Branch, are you not? *A.* No sir.

*Q.* You are not in possession of it now? *A.* No sir.

*Q.* Is not the firm of Palmateer Bros. in possession of it? *A.* No sir.

*Q.* Who is in possession of it? *A.* In the hands of a receiver.

*Q.* Have you not ever been in possession of it?

*A.* Not since it went into the hands of the receiver.

*Q.* You have exercised control over it though?

*A.* No.

*Q.* Did you bring an ejectment suit? *A.* I think they did.

*Q.* Who brought it? *A.* I suppose Mr. Hawkins; I do not know. 10

*Q.* For whom? *A.* For us.

*Q.* For you and your brother? *A.* Yes sir.

*Q.* To recover the possession of this property?

*A.* Yes sir.

*Q.* Did you ever buy or claim to buy from Mr. Fay, any interest in this property? *A.* Not that I know of.

*Q.* You did not claim any interest in this property by virtue of any arrangement with Mr. Fay?

*A.* I had nothing to do with Mr. Fay that I know of. 20

*Q.* You are one of the men who originally owned this property, the real estate? *A.* Yes sir.

*Q.* And agreed to sell it to Lipman & Taylor; is that right? *A.* Yes sir.

*Q.* Do you mean to say that Mr. Fay did not assign any right that he claimed to have, to you?

*A.* He never did.

*Q.* Or to anyone else for you, at your request?

*A.* No sir.

Cross examination waived. 30

JAMES CONNEEN, called on behalf of the plaintiff, being duly sworn, testified as follows:

*By Mr. Heisley.*

*Q.* You were the president of the corporation known as the New Jersey Mill & Lumber Co.? *A.* Yes sir.

*Q.* Where was the property that they owned located? *A.* At the corner of Chelsea Avenue, Long Branch.

*Q.* Did that company agree to purchase of James 40

Beggs & Co., of New York, any machinery, a boiler and engine for that property? *A.* Yes sir.

*Q.* Was the property which was purchased of James Beggs & Co. placed on that property that you speak of, at Long Branch? *A.* Yes sir.

*Q.* Where was it placed on the property? *A.* In the engine room.

*Q.* In the engine room of the mill? *A.* Yes sir.

*Q.* What did the property consist of? *A.* An  
10 engine, boiler, hot water heater, pump, steam pipes and belts, etc.

*Q.* I show you these two papers, the two agreements; one dated the 4th of October and the other the 5th of December, 1893, and call your attention to the list of articles in these papers and ask you if you know whether those goods ever came into the possession of the mill and lumber company? *A.* They were furnished.

*Q.* Did they reach this property? *A.* Yes sir.

20 *Q.* Furnished to the New Jersey Mill & Lumber Company? *A.* Yes.

*Q.* Do you recollect at about what time? *A.* About two weeks after those dates.

*Q.* Was this property for which suit was brought used in the mill? *A.* Yes sir.

*Q.* For how long was it used? *A.* Three or four months.

*Q.* What kind of usage did it have? *A.* Ordinary usage.

30 *Q.* There was a receiver ultimately appointed for the concern, was there not? *A.* Yes sir.

*Q.* When was that, about? *A.* About the 5th of March last.

*Q.* Were you present at the sale? *A.* Yes sir.

*Q.* The sale held by the receiver? *A.* Yes sir.

*Q.* In what kind of condition was the property at that time? *A.* I should say that it was all right.

*Q.* Did you see it frequently? *A.* Yes sir.

*Q.* I mean the property described in those two  
40 agreements? *A.* Yes sir.

*Q.* In good condition, was it? *A.* I should say so.

*Q.* Was it in running order? *A.* Yes sir.

*Q.* Were you present at the sale when Mr. Morris came there and made some announcement? *A.* Yes sir.

*Q.* What did you hear him say in regard to the ownership of this property, if anything?

Objected to.

*Q.* Do you know whether the defendants, Palmateer Bros., were there at the sale? *A.* Yes sir.

*Q.* Were their attorneys there? *A.* I saw them there; I saw Mr. Durand there.

*Q.* Was he one of the attorneys of Palmateer Bros.? *A.* I presume so.

*Q.* Do you know? *A.* No; I do not know positively.

*Q.* Do you know whether he was attending to Palmateer's business? *A.* I know that he has done business for them; but whether he was on their business that day I do not know.

*Q.* You say Palmateer Bros. were there also? *A.* Yes sir.

*Q.* Both of them? *A.* I could not say.

*Q.* Was one of them there? *A.* Yes sir; one of them was there.

*Q.* Were they or one of them present when Mr. Morris made the announcement about which you are testifying? *A.* Yes.

*Q.* So that he could hear this announcement? *A.* Yes sir.

*Q.* What did you hear Mr. Morris say at that time, in regard to this property?

Objected to on the ground that what he may have said cannot affect the title.

Objection overruled. Exception by defendant.

*A.* The substance of it was that it belonged to James Beggs & Co., and anybody who bought it, bought it at their own risk.

*Q.* Did he state what the property was? *A.* 40

Yes sir.

*Q.* What did he state the property to be? *A.* Engine, boiler, pump, belts, piping, etc.

*Q.* Did he have any paper in his hand? *A.* Yes sir.

*Q.* Did he make any reference to the paper?  
*A.* It seems to me that he read it off the paper.

*Q.* What was the paper? *A.* I cannot tell you.

*Q.* He read some paper in connection with this  
10 notice? *A.* Yes sir.

*Cross Examination by Mr. Hawkins.*

*Q.* I understood you to say that the things mentioned in these two contracts, were actually delivered at Long Branch? *A.* Yes sir.

*Q.* And that they were placed in operation there?  
*A.* Yes sir, they were.

*Q.* And I understood you to say that they had been run for several months? *A.* Yes sir.

*Q.* By you or your representative? *A.* Yes sir.

20 *Q.* What kind of an engine was this? *A.* Slight valve engine.

*Q.* How many horse power? *A.* 150.

*Q.* How large a boiler? *A.* 80 horse power boiler.

*Q.* Did you see this engine and boiler placed in position? *A.* Yes sir.

*Q.* You were there every day? *A.* Not every day, but about every day.

*Q.* Was there a representative of the company  
30 down there, Mr. Lyons? *A.* Yes sir.

*Q.* He came there to superintend the putting in of the engine and boiler? *A.* Yes sir.

*Q.* He was sent down by Beggs & Company?  
*A.* Yes sir.

*Q.* You say you put this engine and boiler on this lumber yard property, where the mill is? *A.* Yes sir.

*Q.* When you put the engine up, did you put it in a building or did you put it up out doors? *A.* It  
40 was put up out doors and it was built up around it

afterwards.

*Q.* You put the engine up out doors and then you built the building around it? *A.* Yes sir.

*Q.* That is true also of the boiler? *A.* Yes sir.

*Q.* Do you know how deep the foundation of the engine is? *A.* About five or six feet.

*Q.* Was not the foundation of the engine about eight feet?

Objected to as not being cross examination.

*A.* Between six and eight feet. 10

*Q.* What is the foundation made of? *A.* Brick and cement.

*Q.* Solid brick masonry? *A.* Yes sir.

*Q.* And the engine was laid on that foundation?  
*A.* Yes sir.

*Q.* The foundation extended about 18 inches above the floor? *A.* I should judge so.

*Q.* The engine is bolted to the foundation? *A.* Yes sir.

*Q.* Do you know that there are ten bolts in it? 20  
*A.* Yes sir.

*Q.* Where do those bolts run from the foundation? *A.* Down to the bottom of the foundation.

*Q.* How are they fastened on the bottom? *A.* With anchors.

*Q.* That is true of all the bolts? *A.* Yes sir.

*Q.* How large in size are the bolts? *A.* About an inch.

*Q.* This engine is connected with a large wheel, is it not? *A.* A fly wheel. 30

*Q.* About eight feet in diameter? *A.* Yes sir.

*Q.* It is 96 inches, is it not? *A.* Yes sir.

*Q.* There is a shaft running out of this wheel to the north side of the building? *A.* Yes sir.

*Q.* There is a hole in the north side of the building? *A.* Yes sir.

*Q.* And the building is of brick? *A.* Yes sir.

*Q.* And the wall is 12 inches thick? *A.* Yes sir.

*Q.* The shaft of this large wheel goes out and is embedded into this wall, is it not? *A.* Yes sir. 40

*Q.* And holds it there? *A.* Yes sir.

*Mr. Heisley.* I object on the ground that the sale took place in New York and the delivery of the goods took place in New York and it is immaterial as to how the goods were placed in the mill.

Objection sustained.

*Mr. Heisley.* If your Honor is going to admit the line of testimony of the defense of this kind; if it is to be admitted I would as soon have it admitted  
10 now.

*The Court.* It is not proper cross examination. Exception by defendants.

*Mr. Heisley.* I then move to strike out all the testimony that has been given by the witness.

*The Court.* I will allow it to stand as far as it has gone and if you desire to re-direct, upon the testimony already in, you may do so.

*Mr. Heisley.* I move to strike out all the testimony of the witness as to the way in which this property was affixed or attached to the freehold. I make  
20 this motion in view of my previous objection, that it was incompetent and the ruling is now, that it is incompetent to ask this witness, now, on cross examination. Not that it may not be competent for them to show it in defense, but they have asked the witness certain questions in reference to the attachment to the realty and I do not want that testimony to stand, for it is incompetent to have it here on a cross examination under my previous objection sustained by the  
30 Court. I therefore move that the testimony of the witness on this point as a cross examination be stricken from the record or else I will have to re-direct on it.

*The Court.* I decline to strike it out at present; I may strike it out eventually; I want to hear what the other side have to say upon the point of the reason for the affixing of this personalty to the real estate.

*Mr. Heisley.* Will your honor allow me an exception to the ruling of the Court refusing to strike  
40 out the testimony.

*The Court.* Yes.

*Mr. Heisley.* Subject to that exception and protest against the ruling of the Court, I will re-direct the witness.

*By Mr. Heisley.*

*Q.* Is this property in dispute so located that it can be removed from the premises, without doing serious to injury the real estate.

Objected to. Objection overruled. Exception by defendants. 10

*The Court.* I will eliminate this now. I will strike out so much of the testimony.—I will grant the counsel's motion to strike out so much of the testimony as relates to the manner in which this machinery was put on that foundation.

*By Mr. Heisley.* Then I withdraw my exception and vuestion.

*Mr. Arrowsmith.* And the Court will allow us an exception for striking it out? 20

*The Court.* Yes.

*Mr. Heisley.* And the jury will be instructed to disregard that testimony?

*The Court.* Yes.

BENJAMIN P. MORRIS, called on behalf of the plaintiff, being duly sworn testified as follows:

*By Mr. Heisley.*

*Q.* You are an attorney at law at Long Branch?

*A.* I am.

*Q.* You are also one of the attorneys for the plaintiff in this case? *A.* Yes. 30

*Q.* Did you attend the sale held by Mr. Terhune as receiver of the New Jersey Mill and Lumber Company, held on the premises of the property last summer? *A.* I did.

*Q.* Did you give any notice of any kind to the persons then present and the receiver, regarding the property in dispute in this case? *A.* I did.

*Q.* Do you know the defendants? *A.* I know both of them.

*Q.* Do you know who their attorneys were at that 40

time? *A.* Yes, Messrs. Hawkins & Durand.

*Q.* Do you know whether at the time of your making this notice, either of the defendants or their attorneys were present? *A.* Mr. Durand was present.

*Q.* Do you know whether he heard the notice that you gave? *A.* Yes he was right by when the announcement was made after the sale was opened.

*Q.* Do you know whether either of the defendants were present? *A.* I think one of them was.

<sup>10</sup> *Q.* Which one? *A.* I am not sure, I do not remember, but I think I saw them on the premises; they may have both been there.

*Q.* What notice did you give, if any, at the time you refer to?

Same objection, ruling and exception.

*A.* I had a copy of the notice which I think you have in your hand; it was given to the receiver along in March.

<sup>20</sup> *Q.* Is that it? (handing paper). *A.* Yes, I had this copy of the notice with me and I notified, after the receiver had begun the sale, the auctioneer had opened the sale and I simply gave formal notice to all purchasers.

*By the Court.*

*Q.* Did you read anything? *A.* I read a memorandum; this boiler, pump, belting, etc.; I do not know that I read every item upon the list but I described the property to such an extent that they all knew what it was; I notified them that the title to <sup>30</sup> the property was claimed by James Beggs & Co.; claimed to be the owners and while I did not want to interfere with the receiver's sale or cast any reflection upon the balance of the title, I simply wanted to give them notice to protect the rights of our clients.

*By Mr. Heisley.*

*Q.* What did you say? *A.* That is what I said; that is part of the language and the receiver said he did not claim as receiver, the title to this property and his sale in no way conflicted with our rights.

<sup>40</sup> *Q.* Did the receiver make any announcement in

the presence of the attorneys of the defendant or one of them? *A.* He made it immediately; that he did not claim this property and did not intend to sell it.

*Q.* In the presence of the people assembled there?

*A.* Yes, this was in the mill.

*Q.* Did you remain at the sale? *A.* Simply made the announcement and then went away.

*Q.* Did you remain until the sale was completed?

*A.* No.

*Q.* This paper signed James Beggs & Co. by<sup>10</sup> Heisley & Morris attorneys, by whom was that signed? *A.* I signed that; I prepared these notices and had them served.

*Q.* A demand for delivery? *A.* There were two sets of notices served.

*Q.* Do you know where they are? *A.* No; I thought there was some informality and we had another set served; I think the other was thrown away.

*Q.* Which one was served? *A.* This one here.

*Cross Examination by Mr. Arrowsmith.* <sup>20</sup>

*Q.* I understood you to say that this notice was given in the building, in the mill where the machinery was? *A.* Yes sir.

*Q.* You say that you are not sure that the Palmateers were there at that time? *A.* I did not see them; either of them; Mr. Durand was there.

*Q.* You say that Mr. Durand was there as the counsel for the Palmateers at that time? *A.* Messrs. Hawkins & Durand always represented them.

*Q.* Do you know whether he was there in that particular matter at that time? *A.* Mr. Durand did not announce that he was. <sup>30</sup>

*Q.* And you have no knowledge that he was there in that particular matter? *A.* I talked with him about this case on that day and he talked with me.

*Q.* I ask you whether you know? *A.* I should judge so from his conversation with me and from his letters afterwards, written on the same subject, within a few days. <sup>40</sup>

*By Mr. Heisley.*

*Q.* What was the conversation from which you judge that he represented the defendant? *A.* I had a lengthy discussion with Mr. Durand about the rights of our client in this matter and he agreed with us at that stage of the game and practically consented to our taking out the machinery—

Objected to and stricken out.

*Q.* I asked you what was the conversation of  
10 Mr. Durand from which you inferred that he was there as the representative of Palmateer Bros.? *A.* I can only answer it in a general way, talking the matter over and saying what our client's rights were; he was representing other parties; he was not confined to one client and while he did not say in so many words that he represented Palmateer Brothers, but in talking about the title to the land and so on, I judged that he was.

*Q.* Do you know of your own knowledge, whether  
20 after that, Mr. Durand or his firm were representing Palmateer Brothers in the matter?

Objected to. Objection overruled.

*A.* We were referred to them by the receiver and by Mr. Garretson.

*Q.* Did you find out that to be so? *A.* As their attorneys, we had some correspondence with them on the subject.

*Mr. Hawkins.* I ask that that portion of the  
30 testimony which relates to the referring to the receiver and Mr. Garretson, be stricken out.

Stricken out by order of the Court.

*Question repeated:* Do you know of your own knowledge, whether after that, Mr. Durand or his firm were representing Palmateer Brothers in the matter? *A.* They claimed to be.

*Q.* Who claimed it? *A.* Hawkins & Durand, over their signature.

Objected to and stricken out.

*The Witness.* Well, they acted as their attor-  
40 neys.

*The Court.* That is objectionable, unless the paper is produced.

*Mr. Heisley.* We have the paper here.

*Q.* You say over their signature? *A.* Yes sir.

*Q.* In what way; by letters or what? *A.* They wrote us letters as attorneys for Palmateer Bros. and at the request of Palmateer Brothers they—

Objected to; “at the request of Palmateer Brothers,” is stricken out.

*Q.* I simply ask you whether it was by letters? <sup>10</sup>  
*A.* Yes sir.

*Q.* By one or more? *A.* Several; they wrote a number of letters.

*Q.* Did you see either of the attorneys and have a talk with them about the matter? *A.* I saw Mr. Durand several times.

*Q.* What was your conversation with Mr. Durand regarding this matter in controversy? *A.* He said they represented Palmateer Brothers and I told him that we proposed to go there and take the property <sup>20</sup> out as our client's property and he said that they would sue us for trespass if we did or whoever took it out, they would bring an action against them for trespass.

*Q.* Certain letters are admitted by Mr. Hawkins as being signed by Hawkins & Durand. I show you these two letters and ask you if those are the letters that you refer to? *A.* Those are two of them.

*Mr. Arrowsmith.* I ask to have stricken out, all that portion of the testimony in reference to the <sup>30</sup> notice that was given by Mr. Morris at the mill, upon the ground that it is not shown that it was made in the presence of either of these defendants or anyone representing them at that time.

*The Court.* I think Mr. Kings says that Mr. Palmateer was present.

*Mr. Arrowsmith.* But Mr. Morris swears that he did not see either of them in the mill.

Motion denied. Exception by defendants.

LEWIS LLOYD, called on behalf of the plain-<sup>40</sup>

tiff, being duly sworn, testified as follows :

*By Mr. Heisley.*

*Q.* You are a constable of this county? *A.* Yes sir.

*Q.* I show you this paper and ask you if you ever served that on the defendants or either of them, and if so, when did you serve it? *A.* I served two notices, each notice being the same. One on August 27th and the other on October 5th.

10 *Q.* I call your attention particularly to this notice which you have in your hand. I ask you if you ever served that notice on the defendants or either of them? *A.* I served one just the same as this, on October 5th, 1894.

*Q.* Upon whom? *A.* Mr. John Palmateer and Amos Palmateer, each of them personally.

*Q.* Did they deliver to you or either of them deliver to you the possession of this property, pursuant to that notice? *A.* They did not.

20 *Q.* Did they decline to deliver it to you? *A.* They did at that time; the first notice they did not.

*Q.* On August 27th, you say you served a similar notice? *A.* Yes sir.

*Q.* What did they do at that time? *A.* They were willing to come to some settlement.

*By Mr. Arrowsmith.*

*Q.* What did they say? *A.* I cannot give the exact words.

*By Mr. Heisley.*

30 *Q.* Were they willing to give it up—did they say whether they would give it up? *A.* They did not say that they would not or that they would.

*Q.* Did they give it up to you? *A.* They did not.

*Q.* What reply did they make to you, if any, when you served that notice on August 27th? *A.* That they wanted to come to some settlement in order to pay James Beggs & Co. for his machinery that was called for by this notice.

40 *Q.* On October 5th, when you served the notice,

you say that they refused to deliver you the possession? *A.* Yes sir.

*Q.* Did they say anything about their owning it? *A.* No sir.

*Q.* Did they say anything about their having possession of it? *A.* No sir.

*Cross Examination by Mr. Arrowsmith.*

*Q.* I understand that in August, you first served notice upon both of them? *A.* No sir.

*Q.* Upon which one? *A.* Amos. 10

*Q.* Did he not state to you at that time, that he did not want the property at that price? *A.* He wanted his lawyers, Heisley & Morris, to make a settlement; they did not want any lawsuit.

*Q.* That was the talk at that time, wholly in reference to a compromise? *A.* Yes sir.

*Q.* The second time, you served notice upon each of them? *A.* Yes sir.

*Q.* When was that? *A.* October 5th.

*Q.* Were they both together? *A.* No sir. 20

*Q.* Which one did you serve first? *A.* Amos.

*Q.* What did he say, when you served the notice upon him at that time? *A.* I cannot give his exact words.

*Q.* Give the substance of what he said? He wanted to come to some settlement and refused to give me possession.

*Q.* Give me his language to you? *A.* I cannot.

*Q.* Give it as near as you can? *A.* He wanted to pay Mr. Beggs. 30

*Q.* Did he say that? *A.* Yes sir.

*Q.* Give me what he said? *A.* He wanted to pay Beggs & Co.

*Q.* He said he wanted to pay Beggs & Co. what? *A.* For the machinery.

*Q.* That was October 5th? *A.* Yes sir.

*Q.* Did he say how much? *A.* No sir.

*Q.* You served this paper upon him and then he turned around and said "I want to pay Beggs & Company for this machinery?" *A.* Yes sir. 40

*Q.* Is that all? *A.* I asked him if he refused to give me possession of it and he said he did.

*Q.* What about John? *A.* I asked him the same question.

*Q.* What did he say? *A.* He refused to give me possession.

— *Q.* You asked him if he refused and he said he did? *A.* Yes sir.

*Q.* Was anybody present at either of those con-  
10 *versations?* *A.* No sir.

*By Mr. Heisley.*

*Q.* Did either of the defendants say to you that they had no possession of the property or did not claim to have any right in it? *A.* No sir.

*Q.* Was there anything else said by the Palma-teers, concerning their not having the property in their possession? *A.* There was nothing said in regard to the title of the property at all.

*By Mr. Hawkins.*

20 *Q.* Or to the possession either? *A.* No sir.

*By Mr. Heisley.* I offer for identification, a notice that was served upon Mr. Terhune, the receiver, which counsel consent to acknowledge was served on him on the 14th day of March, but do not admit the relevancy of it.

Marked No. 3 for identification.

HENRY S. TERHUNE, called on behalf of the plaintiff, being duly sworn, testified as follows :

*By Mr. Heisley.*

30 *Q.* You are the receiver for this corporation, the New Jersey Mill & Lumber Company? *A.* Yes sir.

*Q.* Do you remember at the time of the sale, of Mr. Morris coming there and making some announcement as to this property in question? *A.* Yes sir.

*Q.* Did you ever claim this property as your property, as the receiver? *A.* I never did.

Objected to.

*Q.* And they say that you had, you sold all your right and interest as receiver in the property of the  
40 New Jersey Mill & Lumber Company? *A.* We at first

sold all the personal property and then I had the auctioneer announce that he was about to sell whatever equity the New Jersey Mill & Lumber Company had in the real estate or balance of the property and that was sold.

*Q.* Did you say anything to Mr. Morris at that time, or did you say publicly, in the presence of the persons attending the sale, anything about whether you claimed to have any interest as receiver in this particular property which constitutes the basis of this suit? <sup>10</sup>

Objected to unless it was in the presence of the defendants or either of them.

*Q.* Did you, after the reading of this notice and the making of the statement by Mr. Morris at this public sale, make any statement in the presence of the persons attending the sale as to whether you, as receiver, claimed any interest in this property in question, in suit? *A.* I stated publicly that we did not propose to sell the property which is now involved and that I wanted all those present to distinctly understand that Mr. Morris made no claim to any other property, so as not to place any cloud on the title of any of the other property. <sup>20</sup>

*Q.* Do you know whether either of the defendants or their attorneys were present at that time? *A.* I do not.

*Q.* But it was made in the course of the sale? *A.* Yes.

*Q.* Did anybody make any claim to this property except James Beggs & Company, to you at any time? *A.* No, at no time, except through your firm. <sup>30</sup>

*By Mr. Hawkins.*

*Q.* You put up the interest of the New Jersey Mill & Lumber Company at auction and sold it as receiver. *A.* Yes sir.

*Q.* You sold the interest to whom? *A.* I believe to Mr. Thomas J. Fay.

*Q.* This is a certified copy of the order of receivership, is it not? *A.* Yes sir. 40

*Mr. Heisley.* There is no question but that he was appointed receiver.

LEWIS F. LYON, called on behalf of the plaintiff, being duly sworn, testified as follows:

*By Mr. Heisley.*

*Q.* What is your business? *A.* Mechanical engineer.

*Q.* Where is your residence? *A.* 307 Grove Street, Jersey City.

<sup>10</sup> *Q.* How long have you been a mechanical engineer? *A.* I served my time; beginning in 1866, as a machinist on the Pennsylvania Railroad for which I have the usual certificate.

*Q.* How long were you with the Pennsylvania Railroad Company? *A.* About two and a half years; my apprenticeship was shortened by reason of having previous experience.

*Q.* Where did you go after that? *A.* To the Delaware & Lackawanna Railroad Company; seven  
<sup>20</sup> years foreman of their shops.

*Q.* Where after that? *A.* The Jersey City Electric Light Company, and since then, superintendent.

*Q.* Where after that? *A.* Two years model maker; four years mechanical engineer of the American Machinist newspaper.

*Q.* What was your duty as mechanical engineer of the newspaper? *A.* I read manuscript; I approved articles or rejected them and was a witness in court when I was called as an expert.

<sup>30</sup> *Q.* Where are you employed now? *A.* By James Beggs & Co.

*Q.* How long have you been with them? *A.* Five years last September.

*Q.* Have you or not been called in various litigations as an expert, on questions of machinery and engines and boilers, their construction and operation? *A.* Yes sir.

*Q.* Have you ever been called by the United States Government? *A.* Yes sir.

<sup>40</sup> *Q.* When did you go with James Beggs & Co.?

*A.* Five years ago last September.

*Q.* Are you familiar with this property in suit?

*A.* Yes sir.

*Q.* Have you in your experience, bought and sold engines? *A.* Yes sir.

*Q.* Are you familiar with the prices and values of engines and boilers? *A.* Yes sir.

*Q.* When did you first see this property in question? *A.* In October, 1893.

*Q.* When have you last seen it? *A.* Last Saturday.

*Q.* Were you employed in the setting up of this machinery at Long Branch? *A.* I made the drawings of the general layout and superintended its erection.

*Q.* When did you see it last, prior to Saturday?

*A.* The early part of January, 1894.

*Q.* What was the condition of this machinery, engine and boiler, when you saw it last Saturday?

*A.* It was all right; the engine had been oiled in the usual way, when machinery is stopped, to prevent it rusting; the boiler was all right.

*Q.* Did you examine it carefully? *A.* Yes sir.

*Q.* Was there anything broken about it, that you noticed? *A.* The engine and boiler were all right; I noticed some steam pipes that were split; the head was gone from one of the pumps, done by the frost.

*Q.* Could it have been done by anything else than the frost? *A.* No sir.

*Q.* Was there any ice in the head? *A.* Yes, there was the ice protruding from the cracks in the pipes and from the end of the pump.

*Q.* Had the machinery, the engine and boiler, deteriorated much by reason of use? *A.* The engine and boiler had not.

*Q.* Had the machinery? *A.* The machinery is the engine.

*Q.* You know the property that was placed in the mill originally, do you not? *A.* I superintended putting it there.

*Q.* Was that same property in there last Saturday? *A.* Yes sir.

*Q.* Did you examine it with the idea of placing a value upon the machinery and of the property which was placed there by you last January? *A.* I made the examination that I always do in similar cases if required to give an estimate of the present valuation or injury.

*Q.* Did you form an estimate? *A.* I did.

10 *Q.* What in your judgment was this property in controversy worth, as it stood there last Saturday, the entire property; simply the property that you put there; the property that Beggs & Company put there; *A.* I should consider it worth about \$3,400.

*Cross Examination by Mr. Arrowsmith.*

*Q.* You are in the employ of Beggs & Company?

*A.* Yes sir.

*Q.* The plaintiff here? *A.* Yes sir.

*Q.* How long have you been in their employ?

20 *A.* Five years.

*Q.* You came here as an expert for the purpose of placing a value on this property for which they sue? *A.* I came here to be examined.

*Q.* What was that worth originally? *A.* I do not know.

*Q.* As it was placed there? *A.* I never saw a bill of it.

*Q.* If you are able to tell what it is worth now, you are able to tell what it was worth then? *A.* I  
30 do not consider that the boiler and engine has deteriorated one cent's worth.

*Q.* You are an expert acquainted with that kind of property and their values and I want to know what that property was worth? *A.* I consider that \$3,400 was the valuation then and is now; I do not consider aside from the pipes and the bursting of the pump, that there is any injury done to the machinery.

*Q.* You do not consider that the use of an engine and boiler for three months, takes it out of the category of new machinery and puts it into the category  
40

of a second-hand machine? *A.* There is a 150 horse engine reduced to half the—

*Q.* I ask you if using it for three months, does not take it out of the category of new machinery and put it into that of second-hand machinery? *A.* Yes sir.

*Q.* What is considered a deterioration of value in the market between new machinery and a second-hand value? *A.* I do not know of any general rule for that. 10

*Q.* Is there not a rule in the trade that it will depreciate anywhere from  $33\frac{1}{3}$ ; to 50 per cent? *A.* I never had any general rule; I examine machinery and see its condition.

*Q.* You go there to see how much it has actually deteriorated by the use? *A.* Yes sir.

*Q.* But as to its market value, you do not intend to place any estimate upon it as second-hand machinery as distinguished from that which is new? *A.* I have known boilers to be used up in six weeks and I <sup>20</sup> have known them to run 30 years; and I never place a valuation on machinery without examining it carefully.

*Q.* But you do know, whether or not, there has been a particle of injury to engine and boiler, if it has been in use three months, that it will not bring in the market as much as new machinery? *A.* That is true.

*Q.* Is not that deterioration  $33\frac{1}{3}$  to 50 per cent.? *A.* I do not know of any general rule; I never heard of one. 30

*Q.* Do you know anything about the flues of that boiler? *A.* Yes sir.

*Q.* Did you examine them? *A.* Yes sir.

*Q.* Did you examine the head of the engine? *A.* Yes sir.

*Q.* Did you examine that? *A.* Yes sir.

*Q.* Is it not a fact that machinery such as has been used there is lessened in value, from the time it was placed there, until the time you made the examination, on account of the diminution of the price of <sup>40</sup>

material; has not the price of material gone down in the market? *A.* No sir.

*Q.* You say that is not so? *A.* I do not believe that is the fact; I cannot get stuff any cheaper.

*Q.* Is not that so, between the time that was put there and now? *A.* No. sir.

*Q.* Have not the pipes deteriorated in value? *A.* No sir.

*Q.* Worth just as much to-day as when it was  
10 new? *A.* Practically.

*Q.* It is worth just as much in the open market as when new? *A.* No, I would not say that.

*Q.* You could take the engine and boiler in the open market and sell it and get as much as one which was new? *A.* No sir; I do not say that; you asked me the value and I take it as the true value; I would like to qualify my statement in reference to the flues. I examined the flues and I noticed that the sides had  
20 dropped off. That is not scale. Some persons might take that to be iron scale, that falling off the flues. but that is not so, it was the soot that dropped off.

*By Mr. Heisley.*

*Q.* Were you familiar with the price of this property in the market, in October and November, 1893? *A.* Yes sir.

*Q.* Were you familiar with the price during years previous to that? *A.* Yes sir,

*Q.* How did the prices of machinery at those dates, compare with the prices of machinery of like  
30 quality at the present time; higher or lower or the same? *A.* Times were dull when we furnished that machinery and I do not see any material difference. There are some things that are slightly lower now, but generally, there is very little difference, if any.

*Q.* The market is about the same? *A.* Yes sir.

*Q.* Is there anything special or out of the ordinary in the make of this engine; is it made by the trade generally? *A.* No sir; it is an engine for which I made the specifications several years ago when  
40 the patterns were first made of the engine, I went

over it and made some changes which we wanted to put into the engines which we furnished; I increased the weight of the fly-wheel about 20 to 25 per cent. and various portions of the engine are heavier and there are improvements in the valve, that are peculiar to our engines.

*Q.* I asked you whether this was made generally by the trade; you say it is not; do you know how many houses make that sort of an engine? *A.* None but ours.

10

GEORGE HEADLEY, called on behalf of the plaintiff, being duly sworn, testified as follows:

*By Mr. Heisley.*

*Q.* What is your business? *A.* Mechanical engineer

*Q.* How long have you been a mechanical engineer? *A.* About 16 years:

*Q.* Where have you been employed principally during that time? *A.* N. B. Quinzy's, Jersey City.

*Q.* Where are you employed now? *A.* In 20 business for myself in Jersey City.

*Q.* Are you familiar with the values of machinery of different kinds? *A.* Yes sir.

*Q.* Do you buy and sell engines? *A.* Yes sir.

*Q.* And boilers? *A.* Yes sir.

*Q.* Have you seen this property in suit? *A.* Yes, last Saturday.

*Q.* In what condition did you find this property?

*A.* The engine and boiler was in very fair condition, but I notice some cracks in the pipe, that was caused 30 by the frost and in the pump also.

*Q.* What about the pump? *A.* One was burst by the ice.

*Q.* Did you see any ice in the head? *A.* Yes sir.

*Q.* Did you make a careful examination of the pipe, as to its condition, with an idea of fixing in your mind, an estimate of its value? *A.* As far as I could, without going over and measuring everything closely.

*Q.* What in your judgment, was that property worth last Saturday? everything! *A.* Everything, 40

pipe and all, I should judge about \$3,000 or \$3,100.

*Cross Examination by Mr. Arrowsmith.*

*Q.* How did you come to go and examine this property? *A.* Mr. Robinson of the firm of James Beggs & Company, asked me to go.

*Q.* When? Last Saturday morning.

*Q.* Did you know them prior to that time? *A.* Yes sir.

*Q.* How long have you known him? *A.* I have  
10 known him several years.

*Q.* Ever work for him? *A.* No sir.

*Q.* Never in his employ? *A.* We have done small odd jobs for him when they have sent their men to Jersey City.

*Q.* What in your judgment was the value of the boiler and engine and attachment new, if it had been all new, when you examined it? *A.* I considered it worth about as much as when it was new, with the exception of the pump.

20 *Q.* Then your valuation was based upon the idea of its being new machinery, except the one item of the pump? *A.* Except a few little frozen pipes.

*Q.* How much did you take off for that? *A.* I did not take anything off at all, for it would not amount to much.

*Q.* Then although there is some slight depreciation there, your estimate was made up on the idea of new machinery; a new boiler and engine? *A.* Yes sir; that is it.

30 *Q.* What is your estimate of the value of the boiler? *A.* I suppose it would be about from \$600 to \$700.

*Q.* You are making an estimate? *A.* I am not making an estimate at all.

*Q.* You have given a valuation? *A.* Yes, but it would be an utter impossibility to sit here and give you the exact value of the engine, without referring to catalogues.

*Q.* How did you arrive at the valuation? *A.*  
40 Simply because I know the different horse powers.

*Q.* Then you ought to know what the boiler would be worth? *A.* I suppose it would cost about from \$1,300 to \$1,400; that is the engine—I gave the price of the boiler as \$600 or \$700.

*Q.* What is the power of that boiler? *A.* About 80 horse.

*Q.* You suppose; do you know? *A.* No sir; I have not measured it exactly.

*Q.* To get accurately at the estimate of it, you would have to know the measurements? *A.* Cer-<sup>10</sup>tainly.

*Q.* And that you have done by guess work? *A.* No I did not; I went over it roughly and found about the size and the length of it.

*Q.* How? *A.* With a two foot rule.

*Q.* Who was with you? *A.* Mr. Lyons.

*Q.* How did you arrive at the price of that—by the pound? *A.* No sir; by the general practice that I have had around boilers.

*Q.* In what way; how are prices fixed for boilers? <sup>20</sup>  
*A.* There is no particular practice at all; a man uses his own judgment.

*Q.* Not as to price; there must be some way of figuring your price? *A.* I am in the habit of dealing with engines and boilers every day.

*Q.* Does it not depend on weight? *A.* It depends on the style of the boiler.

*Q.* Without any regard to the quantity of material? *A.* Yes, it depends on the style of the boiler.

*Q.* You mean to say that it is made up entirely <sup>30</sup> of the style as to the price? *A.* Certainly it is.

*Q.* Take the engine; what do you say is the fair value of the engine? *A.* \$1,300 to \$1,400.

*Q.* Can you not tell me any better than that? *A.* No sir.

*Q.* Did you make the measurements of that? *A.* No, I found the size of it; I got the stroke of the engine; that is all that is necessary.

*Q.* Do you know of any sales of other engines or boilers of this kind, of that pattern and style, that <sup>40</sup>

have been made within a few years? *A* Yes sir; I sold one of these engines myself, about two years ago and put in and paid for another about a week ago.

*Q*. How did that compare as to size and pattern?

*A*. A smaller engine, but the same style.

*Q* You have been in the business? *A*. I am in the business.

*Q*. Is it not a fact, that in the business, second-hand engines and boilers are worth less in the market?

<sup>10</sup> *A*. That depends on the work on them.

*Q*. Without any regard to whether they have been actually injured or not; the mere fact that they have been set up and run, does it not depreciate the value of them? *A*. No, not by any means.

*Q*. You could go in the market and sell them the same as a new engine? *A*. Why certainly; I do not see why not.

GEORGE ROBINSON, recalled.

*By*. *Mr. Heisley*.

<sup>20</sup> *Q*. What is your business? *A*. In the engine and boiler business.

*Q*. What business have you had? *A*. I have been connected with the house of James Beggs & Co. since 1879.

*Q*. Are you familiar with the manufacture of engines, boilers and machinery? *A*, Yes sir, commercially,

*Q*. You know the value of them? *A*. Yes sir.

*Q*. You frequently make sales? *A*. Yes sir.

<sup>30</sup> *Q*. And have since 1879? *A* Yes sir.

*Q*. Have you a large business? *A*. We are considered the leading house in the city of New York, in our line.

*Q*. Have you been familiar with the value of what are called second-hand engines and boilers? *A*. Yes sir.

*Q*. This property in question, were you familiar with it? *A*. Yes sir.

*Q*. Did you fix the price of it? *A*. Not individually, but before the contract was made, I went over

<sup>40</sup>

the figures.

*Q.* As an expert, can you tell whether the value of an engine and boiler is depreciated by ordinary use, for the term of three months to six months? *A.* That depends of course upon the use it has had. A reasonable use—we always test our engines in the shop; you might say that was a use before they leave; a reasonable use instead of doing harm, does good: it gets it down to its bearings; a new engine is apt to run hot sometimes, it takes a month or two to get it<sup>10</sup> down to its bearing; I would consider it myself, better than a new engine.

*Q.* Have you frequently sold engines that have been used for a short time? *A.* Yes sir; we have.

*Q.* How do the prices of these engines compare with the price of a brand new engine? *A.* It all depends on circumstances. The attorney on the other side tries to create a difference between a new and a second-hand market; if you went into a second-hand boiler store on Water Street, looking for second-hand<sup>20</sup> boilers there, you might get one for 25 per cent. of its value, but with a house of James Beggs & Company's reputation I would sell it and get as much for it as if it came right from the shop.

*Q.* Have you ever done that with other engines? *A.* I do not remember.

*Q.* Could you get that price if you let the purchaser know that it had been used for three or four months? *A.* Yes, if we sold it and said it was all right.<sup>30</sup>

*Q.* You heard the testimony of Mr. Headley, as to the value of an engine, that it depended more on its pattern and style, than its actual size; is that so or not? *A.* He was speaking about the boiler; the style of the boiler; of course the style and the design has more to do with the boiler than the weight of the material, decidedly.

*Q.* Is this boiler made by any other house than the house of James Beggs & Company? *A.* This engine is not made by any house excepting our own.<sup>40</sup>

*Q.* The contract price mentioned as the consideration of the proposed sale in these two agreements, has that been paid? *A.* No sir.

*Q.* It is still due? *A.* Yes sir; that portion of it.

*Q.* According to the terms of the contract, are any payments past due? *A.* All of them.

*Q.* And were they past due on the 1st of July, 1894? *A.* Yes sir.

<sup>10</sup> *Q.* What would you say about the value of the other property which you sold, being depreciated by three or four months work? *A.* I would not consider that they were depreciated at all; we would take that whole business right into our work room; of course if the pump has been damaged by frost or any of the pipes, we could not sell them; we would not attempt to.

<sup>20</sup> *Q.* Are they easily replaced? *A.* It depends on the damage that is done; that is a very small part of the contract.

*Cross Examination by Mr. Hawkins.*

*Q.* Did you receive any money on the contract? *A.* Yes sir, there was some money paid.

*Q.* How much was paid? *A.* I have not got it in my mind: I think \$500 or \$600.

*Q.* Was there not \$1,000? *A.* No sir.

*Q.* When did they first make default? *A.* They gave us notes and I can tell by them.

<sup>30</sup> *Q.* You can tell the amount they defaulted in, too, can you not? *A.* I presume so; there is a note dated October 30th, 1893, for \$1,000, drawn three months after date; it must have been about January 3d and it was not paid: there is another note dated October 30th, 1893, four months after date, \$1,000.

*Q.* I am not asking you about those notes at all; if you will ascertain how much is paid and let me know, you will answer my question? *A.* I cannot tell from these notes how much has been paid, but I think my book-keeper can tell.

<sup>40</sup> *Q.* When was the first default made? *A.* The

first default was made on the payment of this note that was due in January, 1894.

*Q.* What time in January? *A.* This note is dated October 28th, 1893, at three months; that would come due January 2d or 3d.

*Q.* Was that note renewed? *A.* It was not.

*Q.* Did you have notes come due after that? *A.* We had a note due a month later.

*Q.* When did you first notify Conneen & Company, that they were in default and that you proposed<sup>10</sup> to claim this property?

Objected to.

*Q.* What is the total consideration of these two contracts? *A.* Add them together; I do not know.

*Q.* \$3,144.15? *A.* I believe that is it.

*Q.* And you say you have had of that, how much?  
*A.* About \$500, between \$500 and \$600; I think \$2,640 is due us.

HENRY B. EELLS, recalled.

*By Mr. Heisley.*

20

*Q.* Do you know the amount that has been paid on account of these two agreements? *A.* I can tell by looking at the first agreement—\$651.15, is the total amount that has been paid; the first two payments.

*Mr. Heisley.* I offer in evidence the two contracts, one dated October 4th, 1893, and the other the 5th of December, 1893, referring to the proposed sale of this property in dispute.

I also offer the contract for the sale of the real<sup>30</sup> estate by Palmateers to Lipman & Taylor and a copy of the contract between Palmateers and the Mill and Lumber Company; the copy by agreement, to be received as the original.

I also offer in evidence the notice of James Beggs & Company, signed by Heisley & Morris, which was served upon receiver Terhune, which paper is objected to as to its relevancy.

I also offer in evidence the notice dated October 3d, which Mr. Lloyd testified to serving on the Pal-40

mateers and all the notes which were given by the New Jersey Mill & Lumber Co. in payment of the property sold—the unpaid notes. Also the two letters of Hawkins & Durand, one dated August 25th and the other November 1st, 1894.

*Mr. Arrowsmith.* We object to the notice served upon Mr. Terhune, upon the ground that it is immaterial and irrelevant.

Decision reserved.

10 Plaintiff's rests.

RECESS.

*Mr. Hawkins.* I offer in evidence the deed of Amos and John Palmateer, to the property in question, from David C. Newing and wife and others, dated the 24th of March, 1888, which covers the lumber yard, the property in question. It is recorded in book 431, page 45.

Marked Defendants Ex. No. 1.

20 WILLIAM H. STAUFFER, called on behalf of the defendants, being duly sworn, testified as follows:

*By Mr. Hawkins.*

*Q.* What is your business? *A.* Photographer.

*Q.* How long have you been engaged in that business? *A.* About 23 years.

*Q.* Where are you located? *A.* Asbury Park.

*Q.* How long have you been located there? *A.* 15 years.

*Q.* Have you been in the habit of taking outdoor 30 views? *A.* Yes sir.

*Q.* Have you taken out door views for the purpose of being used in court? *A.* Yes sir.

*Q.* On other occasions beside this? *A.* Yes sir.

*Q.* I show you these three views; do they describe the property at Long Branch, known as the New Jersey Mill & Lumber Company, from the various stand-points taken? *A.* Yes sir.

*Q.* Does this view describe the engine room? *A.* Yes sir.

40 *Q.* The engine room with the exception of the

pump? *A.* Yes sir.

*Q.* Does this one show the boiler room? *A.* Yes sir.

*Q.* And this one shows the south side of the engine room in which the engine and boiler are located?

*A.* Yes sir.

Cross examination waived.

ADAM SMITH, called on behalf of the defendant, being duly sworn, testified as follows:

*By Mr. Hawkins.*

10

*Q.* What is your business? *A.* Machine hand.

*Q.* How long have you been engaged in that business? *A.* About nine years.

*Q.* Did you ever work for this mill company?

*A.* Yes sir.

*Q.* The Long Branch Mill Company? *A.* Yes

sir.

*Q.* Were you present on the occasion when the engine and boilers were being put in? *A.* Yes sir.

*Q.* Under whose supervision and instruction were they being put in? *A.* Mr. Lyons.

20

*Q.* The gentleman who was on the stand this morning? *A.* Yes.

*Q.* Is that the gentleman? (Mr. Lyons being requested to stand up.) *A.* Yes sir.

*Q.* Who was he there representing?

Objected to.

*Q.* Who did he say he was representing?

*A.* James Beggs & Co.

*Q.* Just state how this engine and boiler was constructed—in the first place, when the construction began, was there any building there in which they were to be placed? *A.* There was not—the mill was there, the wooden building.

30

*Q.* The wooden building which joins this brick building, on the east, as shown on a portion of this photograph was there? *A.* Yes sir.

*Q.* But this brick building, was not there? *A.* No sir.

*Q.* How was the engine put up?

40

Objected to.

*Mr. Heisley.* I object to that on the ground of it being immaterial, as to what use was made of the property after it was delivered by my clients in New York City. The contract of sale being completed in New York City, the plaintiff retained the ownership of the property. It is not competent for the defendants to affect the title of the plaintiff, by acts of the defendant or anybody else, in attaching them to real estate.

(After a lengthy discussion of the question, by counsel,) the Court said :

This elaborate argument, satisfies me that the whole determination of this case turns on the question of law and you want the Court to pass upon that, without any previous opportunity to examine the question as counsel have. I cannot see what there is in this case for the jury to pass upon, except the question of damages. I will make this suggestion, that this testimony be taken with the objection, reserving my ruling upon it and if you desire you can have the question of damages passed upon by the jury, reserving the question of law. That will give me an opportunity to examine it with the same detail that counsel have. I can pass upon it and give my views about it, but it will be unsatisfactory to me to do so. You can dispense with the jury and have the facts found by the Court or have the jury pass upon the question of damages and reserve the legal question.

*Mr. Hawkins.* I am willing to have the case conform to the ideas suggested by your Honor and it seems to me, without regard to what counsel say in the case, that your Honor's suggestion can be carried out. You can reserve the question of law and the jury can pass upon the question of damages.

*The Court.* Yes, that is frequently done.

*Mr. Hawkins.* I would prefer that it should be done that way.

*Mr. Heisley.* Counsel can readily appreciate why your Honor would like to look at the law on the

subject and it is a very reasonable suggestion that you should be given an opportunity to examine the question. We want to try to accommodate ourselves to the suggestion of your Honor, but we do not want to be prejudiced in any way by the admission of evidence. We are willing to consent to this, that the jury shall simply pass upon the question of the conversion and the question of damages if any, to be awarded to the plaintiff, but there shall be no testimony admitted as to how this property was attached<sup>10</sup> to the freehold; that fact and the effect of such affixing to the real estate, to be determined by your Honor afterwards.

*The Court.* If it should turn out that the turning point in this case, involved that very testimony, we would not be in position to determine it, I mean to say upon a question of law.

*Mr. Arrowsmith.* Mr. Heisley's idea is that the testimony should go in subject to their objection.

*Mr. Heisley.* No, I do not mean that; I mean<sup>20</sup> that the testimony shall not go in at all.

*Mr. Arrowsmith.* The testimony can be heard subject to your Honor's final decision as to whether it is competent or not and can leave the question of conversion and damages to the jury, reserving the legal question, which your Honor is obliged to do anyway.

*Mr. Heisley.* The only point is, in consenting to that is I do not want evidence to go before the jury which perhaps might prejudice them or influence<sup>30</sup> them, in determining the amount of damages that should be awarded.

*The Court.* Suppose we admit this testimony with your objection made and exception allowed and I can reserve my ruling upon the admissibility of it, for the final charge to the jury. I shall charge the jury to-morrow morning as to what the law is. In other words, I will admit this testimony, reserving my final ruling upon it, after I examine the question to-night.

*Mr. Close.* And strike it out or continue it to-morrow morning, before the jury is charged?

*The Court.* Yes, you will have your exception. We can receive this testimony this afternoon and you will be allowed your exception to it in case I determine that to stand and I will reserve the question of law, so that the jury may pass simply upon the question of fact.

*Mr. Arrowsmith.* The jury can then take  
10 into consideration only what was the value of the good at the time of the conversion.

*Mr. Heisley.* If the evidence goes in and to-morrow morning if your Honor says to the jury, you must not regard the testimony regarding the affixing, at all, if the jury is charged specifically on that point—

*The Court.* I will send the jury out to-night, upon the question of damages, reserving the other, if you want.

*Mr. Heisley.* No, I do not care to have you do  
20 that; then your Honor will admit this subject to our exception and reserve your decision of it, until to-morrow morning?

*The Court.* Assume that the jury bring in a verdict this afternoon for your clients, the question would then be left to be determined by the Court, whether under the law, the verdict should stand. Do you not so understand it? I think that is the more satisfactory way to let it stand. If my determination  
30 should be against you, you will have an exception, such that you could take advantage of in a higher court.

*Mr. Heisley.* Supposing the jury render a verdict of a certain amount under the admission of this evidence and then you afterwards concluded that the ruling was wrong, that the ruling should be as to the exclusion of this evidence as to the affixing, we would have then to apply to the Supreme Court to reverse it or have a new trial before your Honor.

*The Court.* Yes, one or the other.  
40

*Mr. Heisley.* I would rather have it understood that in case your Honor concludes that the ruling should be in favor of excluding the evidence, that there should be a new trial, if the plaintiffs want it.

*The Court.* If I exclude the evidence, then your verdict will stand.

*Mr. Close.* If the jury should bring in a small verdict under the ruling that it should have been excluded, the jury might have given us a larger verdict.

*Mr. Arrowsmith.* The award for damages, will be the value of the property less the payment that has been paid upon it, with interest for detention. <sup>10</sup>

*The Court.* That is what I should charge them.

*Mr. Heisley.* Yes, I think that is right.

*Mr. Close.* I understand the rule to be that the question of affixing and fixtures, is a fact for the jury. The Court cannot pass upon the question of intention; that is a fact that the jury must find; that is the rule in forty states out of the forty-four; it is a question of fact for the jury whether it was affixed and what the intention was in regard to the affixing, is a question for the jury. <sup>20</sup>

*Mr. Heisley.* The Court admits the evidence, subject to our objection and exception and charge the jury as to damages and if we are entitled to recover at all, to recover the value sued for, with interest.

*Mr. Arrowsmith.* We say there should be a deduction made of the amount that was paid, but that is a matter for the Court.

*Mr. Heisley.* Our objection and exception applies to every question, without stating it. <sup>30</sup>

*The Court.* I will admit this testimony as to affixing subject to your objection and exception and with the legal question reserved, so that if I determine that it is not a defense to this action, your case would then stand.

*Q.* You say that Mr. Lyons was there and said that he represented James Beggs & Co.? *A.* Yes sir.

*Q.* How long was Mr. Lyons there altogether, off and on? *A.* He was here at one time for a week <sup>40</sup>

and then two or three times he was only here a couple of days.

*Q.* By "here," you mean in Long Branch? *A.* Yes sir.

*Q.* And you mean superintending the work? *A.* Yes sir.

*Q.* Where did he board or did he go home? *A.* He boarded at the Third Avenue Hotel in Long Branch.

10 *Q.* Was he there every day or not, superintending the erection of this work? *A.* He was there from about eight o'clock in the morning, until noon and then went to his dinner and came back and stayed until five o'clock or later.

*Q.* How was he superintending it; in what way? *A.* He had all the details and plans and he told us what to do about it.

*Q.* Was he dissatisfied with any of the work that had been done and did he direct that it should be  
20 changed in any particular? *A.* Sometimes he did.

*Q.* Can you cite any particular instance? *A.* For instance the foundation of the engine was torn up after it had been finished.

*Q.* By whose direction? *A.* Mr. Lyons.

*Q.* He was dissatisfied with the manner in which it was constructed? *A.* With the material that was used.

*Q.* How deep does the foundation of the engine  
30 go down? *A.* About eight feet.

*Q.* What is it built of? *A.* Brick and cement.

*Q.* For the whole eight feet? *A.* Yes sir.

*Q.* How high above the floor does the foundation project? *A.* About 18 inches.

*Q.* About 18 inches above the floor of the engine room? *A.* Yes sir.

*Q.* How is the engine fastened to the foundation? *A.* By bolts.

*Q.* Do you know how many? *A.* Ten bolts and four to the pillar block.

40 *Q.* How are those bolts annexed to the founda-

tion? *A.* They have anchors.

*Q.* They run down through the foundation; through the whole eight feet? *A.* Yes sir.

*Q.* And then have anchor plates on the bottom?  
*A.* Yes sir.

*Q.* So that they cannot pull out? *A.* Yes sir.

*Q.* What do you mean by a pillar block? *A.* That is a bearing to hold up the shaft of the fly wheel.

*Q.* Is that a portion that goes in the building—how does that relate, to the engine or the building? <sup>10</sup>

*A.* To the building.

*Q.* You are speaking about this shafting which extends into the building? *A.* Yes sir, right through the wall.

*Q.* It goes through what wall? *A.* The outer wall of the building.

*Q.* How does it rest on the outer wall? *A.* By a pillar block by a bearing.

*Q.* There is a hole cut through the outer wall?  
*A.* It was not cut in; it was made there. <sup>20</sup>

*Q.* And this shaft sticks through the wall, out into the open air, except there is a wooden door outside? *A.* Yes sir.

*Q.* How is the shaft foundation built on that wall? *A.* Through bolts.

*Q.* Bolts down through the wall? *A.* Yes sir.

*Q.* How long are they? *A.* Eight feet.

*Q.* The bolts which hold this wall, go eight feet down in the foundation of the outer wall of the foundation? *A.* I suppose they do. <sup>30</sup>

Answer stricken out.

*Q.* You saw it constructed? *A.* It was constructed by the other men; I was right by.

*Q.* You mean that the bolts ran from the foundation up to the shaft? *A.* Yes sir.

*Q.* How large is that hole? *A.* About 2 feet 6 and 18 inches high.

*Q.* Supposing that shaft was taken out of there, that hole would be left in the building? *A.* Yes sir.

*Q.* How large is the wheel in diameter? *A.* 96 40

inches.

*Q.* Eight feet? *A.* Yes sir.

*Q.* How large is the largest door in that room?

*A.* Six feet, eight inches, I think.

*By Mr. Heisley.*

*Q.* Have you measured? *A.* No.

Objected to.

*By Mr. Hawkins.*

*Q.* Give us your best judgment? *A.* About 6  
10 feet 8 inches.

*Q.* How large is the largest window? *A.* I could not tell the exact measure.

*Q.* Eight feet? *A.* Not quite.

*Q.* Over five feet? *A.* They are over five.

*Q.* How much over? *A.* I should judge they were about 6 feet 8 inches.

*Q.* As big as the door? *A.* About that.

*Q.* Is there any way to get that wheel out of  
20 that room, without tearing down a part of the building?  
*A.* No sir.

*Q.* Do you know the size of the water heater; how much in diameter? *A.* About 3 feet 5 or 6.

*Q.* Do you know how wide the widest door in that room is? *A.* About three feet.

*Q.* Then that could not be gotten out without tearing down a portion of the building? *A.* You would have to tear down the jamb and some part of the brick.

*Q.* To get out the water heater? *A.* Yes sir.

*Q.* What is this pipe running from the engine out through the center wall? *A.* That is a steam pipe.

*Q.* The main steam pipe? *A.* Yes.

*Q.* Connecting the engine and what? *A.* The engine and boiler.

*Q.* That does connect the engine and boiler?  
*A.* Yes sir.

*Q.* What is this pipe running down from the head of the engine and coming up under the water  
40 chest? *A.* That is the exhaust pipe.

*Q.* How large is this pipe running in the boiler?  
*A.* Six inches.

*Q.* It would make a hole  $6\frac{1}{2}$  inches large in that wall? *A.* Yes sir.

*Q.* How large is the exhaust pipe running from the engine to the water heater? *A.* Seven inches.

*Q.* This pipe running from the engine to the water heater, runs down through the floor, along under the floor, in a diagonal direction—

Objected to.

10

*Q.* Where does the pipe run from, that goes under the end of the engine? *A.* It runs from the steam chest to the heater and there it is bolted fast.

*Q.* Where does it run, under or above the floor?  
*A.* Under the floor.

*Q.* If you want to get at it, what damage, if any, would you have to do to the building? *A.* Take up a portion of the floor.

*Q.* How many other pipes run from the water heater, through the floor? *A.* There is only one <sup>20</sup> under the floor, besides the steam pipe.

*Q.* Does not this outside pipe run through the floor and is not there one on the other side? *A.* One pipe goes outside; that is a drip pipe.

*Q.* That goes through the floor? *A.* Yes sir.

*Q.* Does not the pipe on the north side of the steam chest also run through the floor?

*Mr. Heisley.* I object to the counsel putting the question and answer in the mouth of the witness; the witness did not know any of the pipes on the photo-<sup>30</sup>graph, until counsel showed them to him.

*Q.* How many other pipes are connected with the steam chest?

*Mr. Heisley.* I object to the witness having the photograph.

*Q.* How many other pipes run from the steam chest through the centre wall, if any? *A.* There is the main steam pipe and a steam pipe to the pump and several feed water pipes and there are two pipes running through the floor, one to dump the water <sup>40</sup>

from the heater out into the sewer.

*Q.* This wall is a brick wall? *A.* Yes sir.

*Q.* Is there not also an exhaust pipe from the water heater? *A.* Yes sir.

*Q.* How large is that? *A.* Seven inches.

*Q.* How was the boiler put in the building; was it put there before the building was up or after? *A.* It was put there before anything was there, only the foundation was built, the foundation in the ground.

<sup>10</sup> *Q.* Do you say that the engine and boiler and the pump and so on, were put in the building before the building was up at all—put where the building is now and the building built around it? *A.* The engine and boiler was put in before anything was put up, except the pump; that was put in afterwards.

*Q.* How deep down does the foundation of the boiler go? *A.* Between four and five feet.

*Q.* What is the foundation of the boiler made of? *A.* Of brick and cement.

<sup>20</sup> *Q.* Do you mean to say that it goes down five feet below the level of the floor? *A.* Not from there down; it is not quite so deep there.

*Q.* How deep is it? *A.* About four feet there.

*Q.* Four feet from the bottom of the factory? *A.* Yes sir.

*Q.* What is there on the top of the boiler? *A.* Brick work; it is all inclosed with brick.

*Q.* Except in front? *A.* Yes sir

*Q.* Every side of the boiler is enclosed with <sup>30</sup>brick, except the front? *A.* Yes sir.

*Q.* Do you know how thick the wall is? *A.* About 12 inches, and on top there are 8 inches.

*Q.* It runs up how high, 12 inches thick? *A.* About 8 feet the height of the boiler is.

*Q.* Are there any buck-stays or anything of that sort? *A.* There are four.

*Q.* What is a buck-stay? *A.* A heavy mass of iron to hold the brick work together.

*Q.* Bolted where? *A.* Bolted through eyes, at <sup>40</sup>the top and bottom.

*Q.* Point out the buck-stays on this picture of the boiler? *A.* There it is.

*Q.* This iron column that sticks out here? *A.* Yes sir.

*Q.* And there are four of those? *A.* Yes sir.

*Q.* How is the boiler supported in the brick work? *A.* It hangs there by flanges.

*Q.* Boiler lugs as they are called in the declaration? *A.* Yes.

*Q.* How many flanges are there? *A.* Four. 10

*Q.* Two on each side? *A.* Yes sir.

*Q.* How are they set in the brick work? *A.* Set on plates.

*Q.* In the brick work? *A.* Yes sir.

*Q.* You say the boiler is bricked in on all sides but the front; what about the top? *A.* The top is also covered with brick.

*Q.* The top is bricked in also? *A.* Yes sir.

*Q.* What is there on top of the boiler, if anything, to take the smoke out? *A.* There is a mass 20 of iron—an iron pipe about three feet in diameter.

*A.* And it shows on the top of the boiler in this picture *A.* Yes sir the drum.

*Q.* Where does that drum run to? *A.* It runs out to the chimney.

*Q.* Through the wall of the building? *A.* Yes sir.

*Q.* There is a large smoke stack outside of the building? *A.* Yes sir.

*Q.* Part of this engine? *A.* Yes sir. 30

*Q.* Is there any floor above this drum head?

*A.* Yes sir.

*Q.* Any floor up stairs? *A.* Yes sir; the floor in that part of the building, is about three feet higher than the other part of the floor.

*Q.* Where is the floor that ought to be there—cut out? *A.* It was put up there so the floor would not catch fire.

*Q.* The floor is cut out? *A.* It was so constructed. 40

*Q.* How large is that space above the drum head?  
*A.* About 10 feet square.

*Q.* That is a break in the upper floor of the building? *A.* Yes sir.

*Q.* Why do you say the break is there? *A.* So the upper floor would not catch fire.

*Q.* Do you recollect whether or not there were any posts resting on the brick wall in the boiler room, to support the upper floor? *A.* Six or seven of  
 10 them there.

*Q.* Six or seven posts running from where? *A.* From the brick work of the boiler, under the floor.

*Q.* Then if the brick work of the boiler were taken down, what would become of those posts? *A.* I suppose they would drop down.

*Q.* The posts run from the top of the brick work up to the upper floor of the building? *A.* Up to under the floor, they support the floor.

*Q.* You say the foundation of the boiler goes  
 20 about four feet in the ground and that it is made of brick and cement. What is there in the foundation to hold the boiler in place? *A.* There are several anchor bolts.

*Q.* How are they laid in the foundation? *A.* Two of them were about one foot above the floor and the other is on top.

*Q.* How large are those bolts? *A.* About one inch iron.

*Q.* How long? *A.* About 18 and 20 feet.

30 *Q.* How are they fixed in the mason work?  
*A.* They run right through the centre of the mason work.

*Q.* What are they there for? *A.* To hold the brick wall together firmly.

*Q.* Do you know whether there are any openings in the building on the south side, connecting in any way with the boiler? *A.* There are two.

*Q.* About how large are those openings? *A.* About two feet six inches by eighteen inches.

40 *Q.* What are the openings for? *A.* One is

called a back connection to clean the place out.

*Q.* It has a door, to clean the boiler out? *A.* Yes sir.

*Q.* What is the other for? *A.* For a steam blower.

*Q.* Why were those holes left there; was that necessary? *A.* Yes sir.

*Q.* Are the holes that you refer to, pictured in these photographs? *A.* Yes sir.

*Q.* That represents the south side of the building? *A.* Yes. 10

*Q.* There is a pipe also running through the roof? *A.* Yes sir.

*Q.* How large is that pipe? *A.* Two inches.

*Q.* There is another pipe running through the roof, is there? *A.* Yes sir.

*Q.* What pipe is that? *A.* The exhaust pipe.

*Q.* How large is that? *A.* Seven inches.

*Q.* What does that connect with? *A.* With the heater. 20

*Q.* The water heater? *A.* Yes sir.

*Q.* If that pipe was taken away, there would be that hole left in the roof? *A.* I suppose so.

*Q.* In the engine room, where this large wheel revolves, is there any floor underneath it? *A.* No sir.

*Q.* What is there underneath it? *A.* Nothing but sand.

*Q.* How deep does it go down from the floor? *A.* Only about six inches; just enough to clear the 30 belt.

*Q.* This is about two feet, is it not—where the wheel revolves, how deep is the pit? *A.* About 18 inches or more.

*Q.* How long a hole is it? *A.* About nine feet long and about three feet wide.

*Q.* Where is the dummy pump? *A.* In the southwest corner of the engine room.

*Q.* Is that connected with anything by pipes? *A.* Yes sir. 40

*Q.* With what? *A.* Connected with pipes out to the well.

*Q.* What kind of a foundation is that built on?  
*A.* Brick.

*Q.* How far does it run down into the ground?  
*A.* About four feet.

*Q.* How is it fastened to the foundation? *A.* By means of bolts.

*Q.* How are the bolts fastened to the brick  
10 work? *A.* By anchors.

*Q.* Running from the bottom of the foundation? *A.* Yes.

*Q.* Up through it and then bolted on? *A.* Yes sir.

*Q.* You say it connects with the well; how does it connect with the well outside—by pipes?  
*A.* Yes sir.

*Q.* How large is that pipe? *A.* About  $2\frac{1}{2}$  to 3 inches.

20 *Q.* Then the pipe runs out through the side of the building? *A.* Yes sir.

*Q.* About 15 feet of it under ground? *A.* Yes sir.

*Q.* To a well, and down the well, to the water?  
*A.* Yes sir.

*Q.* Aer there any pipes connecting this dummy pump with anything else? *A.* There is a pipe from the water tank; that is not there any more.

*Q.* Running out through the building on the  
30 south side? *A.* Yes sir.

*Q.* How large is that pipe? *A.* The same,  $2\frac{1}{2}$  inches.

*Q.* That pipe also runs through the centre wall?  
*A.* Yes sir.

*Q.* And makes a hole there about three inches in diameter? *A.* Yes sir.

*Q.* Is there any other pipe connected with the dummy pump or engine? *A.* A steam pipe.

*Q.* Running from where? *A.* From the boiler.

40 *Q.* Where does it run, under or above the floor?

A. It runs about 8 feet above the floor.

Q. Is there any other pipe connected with the dummy pump? A. There is an exhaust pipe.

Q. Is there a pipe connected with the hot water chest, from the dummy engine? A. Yes sir.

Q. About how large is that pipe? A. 1½ in.

Q. Immediately back of this large wall, are there any holes in the wall? A. There are two.

Q. About how large are those holes? A. About 30 inches by 8. 10

Q. What are those holes there for? A. To run the belt through, to the main building.

Q. Were they put there after the building was constructed, or made in the building? A. Made in the building.

Q. How many pipes are there that run from the engine to the boiler outside of the steam pipe or to the water chest? A. About four.

Q. Connecting the boiler with the water heater? A. There is only one in that; I thought you said going through the wall. 20

*Cross Examination by Mr. Close*

Q. You are here at the request of the defendant? A. Yes sir.

Q. Are you paid for your time? A. I didn't get paid yet; I don't know anything about that.

Q. There was a promise made to pay you? A. Yes sir.

Q. Are you subpoenaed? A. Yes sir.

Q. But you are to get further pay, in addition 30 to the fee given you at the time the subpoena was served? A. I am supposed to get my day's wages.

Q. Were you present at all times, in putting in the foundation? A. Yes sir.

Q. Did you see the bolts go in? A. Yes sir.

Q. Did you help put them in? A. No the masons done that.

Q. Did you see the bolts extended down to the bottom of the foundation? A. Yes sir.

Q. Who furnished them? A. The New Jersey 40

Mill and Lumber Company had to furnish those.

*Q.* Is it not a fact that the New Jersey Mill & Lumber Company actually fixed the engine and boiler and attachments to the foundations? *A.* Mr. Lyons superintended it.

*Q.* They paid you, did they not? *A.* They paid me.

*Q.* In what capacity did you work there? *A.* Man all around; I worked at everything.

<sup>10</sup> *Q.* You say the shaft went through the wall, how large a hole did it make; the main shaft that was pointed out to you on the picture; the shaft to the fly wheel? *A.* About two feet 6 by 18 inches.

*Q.* How many brick would it take to fill up that hole, if the shaft should be taken out? *A.* I could not say.

*Q.* You went there with the idea and the instruction, to learn everything about the holes and openings that would be left, if the machinery should  
<sup>20</sup> be moved? *A.* I did not go there at all.

*Q.* Never been on the premises since the building was erected? *A.* I was on the premises last September.

*Q.* At whose request did you go there? *A.* At my own request.

*Q.* Did you tell the defendants that you had been there? *A.* They have seen me there.

*Q.* How did they know that you could tell so much about the case? *A.* I was working there.

<sup>30</sup> *Q.* Since the defendants took charge of it, have you been there? *A.* No sir.

*Q.* How did they know that you knew so much? *A.* I got acquainted with them at Long Branch in the mill.

*Q.* Did they send for you and talk over the case with you last September? *A.* No sir.

*Q.* Do you expect to be employed by the defendants after this case is over? *A.* No sir; I do not need two jobs; one is enough.

<sup>40</sup> *Q.* Do you not expect to get a better one with

the defendants? *A.* No sir.

*Q.* This hole you say is about  $2\frac{1}{2}$  feet square?

*A.* Two feet six, by 18 inches.

*Q.* These other holes; steam pipes and water pipes that have been spoken of, how large are they?

*A.* According to the size of the pipe.

*Q.* You have said there were some, seven inches?

*A.* The seven inch pipe did not go through the wall at all.

*Q.* Was there a larger hole, except where the fly <sup>10</sup> wheel is; that would measure a foot square? *A.* Not unless it was on the south side of the building.

*Q.* I am speaking of where any part of the machinery went out other than the shaft? *A.* No sir; I think that is the same size of that back connection.

*Q.* Those holes are already in the building?

*A.* They were constructed there.

*Q.* Would it injure the building any more to take the machinery out and leave the holes there still? *A.* You would have to close them up; that <sup>20</sup> is all.

*Q.* But they are open now? *A.* Yes sir.

*Q.* So it would not hurt the building any more, leaving them open, would it? *A.* I do not know.

*Q.* That was not part of the contract you had with the defendants, to go there and find out about that matter.

Objected to. Question withdrawn.

*Q.* This hole that you say the pipe went out through the roof, how large was that? *A.* A seven <sup>30</sup> inch pipe.

*Q.* How many shingle would it take to cover that up? *A.* It is a gravel roof.

*Q.* Would it seriously injure the building to cover that hole up? *A.* I don't think it would injure the building to cover up the holes any; it would improve it.

*Q.* In fact it would not injure the building at all to cover up any of the holes? *A.* It would not; it would improve a building.

*Q.* If properly done? *A.* Yes sir.

*Q.* You have said there are supports around this foundation of the floor that was cut out, resting on the brick work? *A.* Not where the floor was cut out, but back of that.

*Q.* How many supports were there? *A.* Six or seven.

*Q.* How far apart were they? *A.* About five feet.

<sup>10</sup> *Q.* Each of them five feet apart? *A.* No, not all; wherever one is necessary.

*Q.* How many were resting on the brick work? *A.* Six or seven.

*Q.* On both sides? *A.* Only in front.

*Q.* So if they wanted to remove that boiler, all they would have to do, would be to put supports reaching from the beams down to the floor and remove the brick work and restore the brick work and put back the supports; would not that be all? *A.*

<sup>20</sup> I suppose that could be done.

*Q.* Have you any doubt about it? *A.* No.

*Q.* You say there are no doors large enough to get out the boiler or engine? *A.* I did not say that. I said there was no door large enough to get out the fly wheel and engine. You can move the boiler all right, if you tear away the brick work; you can move it out of the big door.

*Q.* Do you know the size of the boiler? *A.* About 16 feet long, I believe.

<sup>30</sup> *Q.* Do you know how high it is, including the drum? *A.* I have no idea.

*Q.* Do you know that the boiler and engine are higher than the fly wheel? *A.* No sir.

*Q.* Did you measure them? *A.* No.

*Q.* If the boiler is higher than the fly wheel, why can you not get the fly wheel out too? *A.* No sir, because there is a center wall through the building, separating the boiler room from the engine room.

<sup>40</sup> *Q.* If that boiler should be removed, it would

simply leave a place for another boiler, would it not?

*A.* Certainly.

*Q.* Would the building be injured by leaving a place to substitute another boiler? *A.* They would have to tear down the brick work.

*Q.* Yes, but the law would require us to restore it?

Objected to. Question withdrawn.

*Q.* Would it injure the building any, to leave a place in there already bricked up for another engine? <sup>10</sup>

Objected to as a matter of opinion.

*Q.* You say the boiler is fastened to those bolts?

*A.* No sir, I said the boiler lays on the brick work by means of flanges and the buck-stays hold the brick work together with anchor plates.

*Q.* Could not they be easily removed? *A.* By tearing away the brick work.

*Q.* The engine is fastened down by bolts? *A.* Yes sir.

*Q.* And is there a nut on the bolt? *A.* Yes. <sup>20</sup>

*Q.* And could not the nut be unscrewed and the engine be lifted off? *A.* I am sure it could.

*Q.* So you would not destroy any brick work at all? *A.* Certain accidents may happen; you might have to tear some down.

*Q.* Barring accidents, you would not have to take any brick work down, would you? *A.* You could lift it down, certainly.

*Q.* Are you familiar with the class of work that you did there? *A.* Yes sir. <sup>30</sup>

*Q.* Have you done it before? *A.* Yes sir.

*Q.* Have you put in boilers and engines and taken them out? *A.* No sir, that was the first time.

*By Mr. Hawkins.*

*Q.* There was a boiler and engine there for what purpose? *A.* To generate steam.

Objected to.

*Q.* How was it used, in connection with what?

*A.* With a moulding and planing shop.

*Q.* In the factory generally? *A.* Yes sir. <sup>40</sup>

*Q.* To make what? *A.* We made all kinds of mill work.

*Q.* Where did the motive power to run this factory come from? *A.* From the engine and boiler.

*Q.* There was no other engine and boiler on the premises? *A.* No sir.

*Q.* What was the large building on the east of the engine and boiler room? *A.* That was the mill.

*Q.* What kind of a mill? *A.* A moulding mill.

<sup>10</sup> *Q.* What did they manufacture there? *A.* Doors, blinds and sash, and all kinds of mill work.

*Q.* Had this mill ever been run by any other kind of an engine and boiler, except this one? *A.* The machines were run in Brooklyn, at one time.

*Q.* I am talking about the machinery there? *A.* No sir; it was never worked there except by this engine.

*Q.* It was put there and operated by this engine and boiler? *A.* Yes sir.

<sup>20</sup> *Q.* The gearing of the factory was run by this engine? *A.* Yes sir.

*By Mr. Close.*

*Q.* Were you there at the time the New Jersey Mill & Lumber Company went in? *A.* Yes sir.

*By Mr. Heisley.*

*Q.* In order to take out the boiler—

Objected to on the ground that only one counsel should examine the witness.

<sup>30</sup> BENJAMIN ALBERTSON, being duly sworn testified as follows:

*By Mr. Hawkins.*

*Q.* What is your business? *A.* Contractor and builder.

*Q.* How long have you been engaged in contracting and building? *A.* 15 or 20 years.

*Q.* Have you examined these premises in question? *A.* Yes sir.

*Q.* How recently have you examined it? *A.* Yesterday.

*Q.* You went there at whose request? *A.* At

Mr. Palmateer's request.

*Q.* Do you know about the size of this building, in which the engine and boiler is situated? *A.* Yes.

*Q.* How large? *A.* 33 by 25 feet.

*Q.* What else has it outside? *A.* A smoke stack, six feet square.

*Q.* Did you measure the height of the boiler inside as it is bricked up now? *A.* Yes sir.

*Q.* How high is it? *A.* 10 feet 5 inches.

*Q.* Did you measure how broad it was across it? <sup>10</sup>  
*A.* The iron work is 8 feet 3 inches; the brick work is about a foot more.

*Q.* How long is it? *A.* The boiler is 16 feet long.

*Q.* How long is the boiler and brick work combined? *A.* About 21 feet.

*Q.* How is it situated in this building? *A.* Bricked in, in the ordinary manner of setting boilers.

*Q.* How thick is the wall? *A.* 12 inches partly and 8 inches the balance. <sup>20</sup>

*Q.* How many sides is bricked in? *A.* On both sides and one end, and the other end has a cast iron face where the doors are.

*Q.* Has it any back stays? *A.* Yes sir.

*Q.* How are they fastened? *A.* Bolted through and fastened to keep the wall from spreading.

*Q.* Anything else; anything on top of the boiler? *A.* A smoke drum.

*Q.* How large is that? *A.* Two feet ten inches in diameter. <sup>30</sup>

*Q.* Where does that run to? *A.* Through the wall, into the smoke stack.

*The Court.* Is this matter going to be contradicted?

*Mr. Heisley.* No.

*The Court.* Why, then, go into it by other witnesses?

*Q.* Are there posts from the brick wall to the beams of the floor above? *A.* Yes sir.

*Q.* How many posts? *A.* Five. <sup>40</sup>

*Q.* Along the outside of the wall? *A.* Yes.

*Q.* What do those posts do? *A.* Support the second floor.

*Mr. Heisley.* We have not objected to any of this testimony, but it is fair for us to know what the object of the testimony is and how it is relevant.

*Mr. Arrowsmith.* Upon the point of showing that the engine and boiler were so placed there, that they had become a fixture.

<sup>10</sup> *Q.* If those five posts were taken out, what effect would it have on the floor above? *A.* It would weaken it.

*Q.* To what extent would it weaken it? *A.* Nothing heavy could be put on the floor above.

*Q.* Why not? *A.* Because the stanchions that hold it up would be removed.

*Q.* Just above this smoke drum, was there any hole left in the floor? *A.* Yes sir.

<sup>20</sup> *Q.* How large a hole is that? *A.* Nine feet six by ten feet six inches.

*Q.* How many headers has it? *A.* One.

*Q.* Does that hole weaken or strengthen the floor? *A.* Weakens the floor by being cut.

*Q.* To what extent? *A.* It is supported from below, now.

*Q.* Taking for granted that those five posts were taken out, how would it weaken the floor? *A.* So nothing heavy could be put on the floor above.

*Cross Examination by Mr. Heisley.*

<sup>30</sup> *Q.* What are those five posts? *A.* Studding, on the brick work at the side of the boiler, put under the beams overhead.

*Q.* What are they; wooden posts? *A.* Yes sir.

*Q.* That boiler could be removed and those posts could be left there, could they not? *A.* No, they would have to take down the wall they stand on, to remove the boiler.

*Q.* But you could put up other posts in the place of them, which would stand on the floor?

<sup>40</sup> *A.* Yes.

*Q.* There would be no difficulty about preserving the solidity of the building? *A.* They would have to be supported from below.

*Q.* But it could be done without much trouble?

*A.* It could be done.

*Q.* Is it not a fact that the boiler and the fly wheel could be removed from that building, without doing any serious damage to the building? *A.* The walls would have to be torn away to get the property out of the engine room, but the boiler could be taken out without destroying the building any more than the wall inclosing the boiler.<sup>10</sup>

*Q.* The wall inclosing the boiler, is simply there for the purpose of retaining the heat of the boiler?

*A.* Yes, and to assist in the operation of the boiler.

*Q.* If they took down the brick work around the boiler, the room would be intact as a room of the building? *A.* With the exception of the supports.

*Q.* And they could be replaced? *A.* Yes sir.

*Q.* There would be no great difficulty about that?<sup>20</sup>  
*A.* No.

*Q.* You could do it easily? *A.* Yes sir.

*Q.* And if the brick work was not disturbed and the boiler was taken off, there would be no harm done at all? *A.* No harm to that part of the building.

*Q.* Where the engine is, that is fastened to rods running down through the foundation? *A.* Yes.

Objected to as not being cross examination.

*Q.* Where the engine is fastened to the rods that run down through this mason work underneath; could<sup>30</sup> not the engine be unscrewed from its rods and removed from the building, without doing any injury whatever to the building?

Objected to.

*Q.* Could not all the property that is in that mill, be readily removed from the mill, by taking out a few brick by one of the doors, so as to make the opening a little wider? *A.* Anything that is in the room could be taken out by removing the wall.

*Q.* By removing the wall next to the door?<sup>40</sup>

*A.* Yes.

*Q.* Have you made measurements of the different articles in this building and also measurement of the door? *A.* Yes.

*Q.* How much of the wall by the door would be required to be removed, in order to get out the largest piece? *A.* About five inches on the side; the door stands close to the corner and five inches taken out of the wall on one side of the door and  
 10 the fly wheel is 8 feet in diameter and the door is 6 feet 8 high, so you would have to take the difference out to get that out. There would be some to be taken out if you did not take the engine apart.

*Q.* The only injury that would be done to the building, in order to remove all of this property that is in there, would be to take out the bricks on the side of the door, five inches, and a foot and a half above the door? *A.* I think with five inches taken  
 20 out by the side of the door and two feet from the top of it, if the thing was taken apart, it could be removed.

*Q.* Is that a serious or a difficult piece of work to do, by a competent mechanic?

Objected to. Objection sustained.

*Q.* What effect would it have upon the building, or its durability, if brick on the side of the door five inches wide should be removed and two feet above the door should be removed and then replaced again?

30 Objected to.

*Q.* What would be the injury to the building if the brick on the side of the door, five inches wide and two feet over the door were removed? *A.* I do not know that there would be any other injury than taking out the brick.

*Q.* That would be all and could be repaired by simply replacing the brick?

Objected to. Objection overruled. Exception by defendant.

40 *A.* I do not know of any other injury; the same

answer as before given.

*Q.* What would it cost in your judgment as a contractor, to replace the brick taken out which has just been spoken of?

Objected to. Objection sustained.

*By Mr. Hawkins.*

*Q.* If this wheel which is 8 feet in diameter was taken out, how large a hole would it leave in the floor?

*A.* I think the hole in the floor is three feet six wide and nine feet long. 10

*Q.* If the shaft was taken out of the building on the north side, how large a hole would be left there?

*A.* Three feet ten and two feet four inches.

*Q.* In the main wall of the building? *A.* Yes sir; that is where the journal is, that carries the main shaft.

*Q.* If these pipes that run down from the engine and steam chest were taken out, how much of the floor would it tear up?

Objected to. 20

*A.* I should think there would be about 100 feet of flooring taken up.

*Q.* If the engine were taken off of the bed, how far above the floor would the bed of the engine project? *A.* About 18 inches.

*Q.* How long is this bed? *A.* I should judge about nine feet.

*Q.* How wide? *A.* About three and a half feet wide.

*Q.* How deep is it, so far as you could see? *A.* 30  
It is below the bottom of where it is excavated.

*Q.* You can see about four feet down, can you not? *A.* About two and a half feet, you can see.

*Q.* If the engine were taken out there would be a pile of brick masonry with ten bolts standing up there in the room? *A.* Yes sir.

*Q.* You say you could strengthen the floor in the boiler room by putting up stanchions under it; would they not obstruct the floor in the room? *A.* They would. 40

Q. It would practically divide one part from the other? A. Yes sir.

Q. How far apart are the stanchions? A. They are not equal distance; some  $2\frac{1}{2}$  feet apart and others 4 feet apart.

Q. They are different distances apart? A. Yes sir.

Q. They reach now, from the ceiling, down to the top of the wall surrounding the boiler? A. Yes  
10 sir.

Q. But if the walls were torn down, they would be obliged to reach from the ceiling, clear down to the floor? A. Yes sir.

Q. They do not obstruct the floor now, in any way? A. No sir.

Q. If the boilers were taken out, would not it leave this large hole in the side of the wall; three feet in diameter, where the smoke drum goes?

Objected to.

20 A. Yes sir.

Q. How many holes are there in the side of the wall? A. Two.

Q. If the boiler was removed, they would remain there?

Q. How large are those holes? A. One is I think two feet six wide and two feet high and the other is two feet wide and about the same height.

Q. There is a pipe running from the engine to the boiler? A. Yes sir.

30 Q. That passes through what? A. The center wall.

Q. Made of what? A. Brick.

Q. How many other pipes are there running from the water heater?

*Mr. Heisley.* I will admit that those pipes run through the walls, just exactly as the witness Smith stated; I have not asked a word about it.

*The Court.* That admission is on the record.

*Mr. Hawkins.* That is satisfactory, but you  
40 wanted to examine the witness before, when I stopped.

at the suggestion of the Court.

*Mr. Heisley.* That was as to the effect of removing the things.

*Q.* To get the boiler out, what would it be necessary to do? *A.* Tear down the wall and then you could take the boiler out through the large door.

*Q.* It would be necessary to remove those stanchions? *A.* Yes, they would come down with the wall.

*Q.* Would it not also be necessary to disconnect the pipes which are now connected with the engine <sup>10</sup> and the water heaters? *A.* Yes sir.

*Q.* It would also be necessary to disconnect the pipes with the steam chest? *A.* Yes.

*By Mr. Heisley.*

*Q.* In tearing down this wall to get the boiler, you do not mean to tear down the wall of the building, you mean simply to tear down the little wall that is put about the boiler, in order to retain the heat? *A.* That is what I mean.

*Q.* He has asked you about the foundation that <sup>20</sup> is left for the engine. This property is adapted to the use of a saw and planing mill? *A.* Yes sir.

*Q.* If this boiler was removed and the brick foundation which supports it left there, it would be the proper thing to put another boiler on by Palmtree Bros., if they wanted to continue the use of the property as a planing mill? *A.* It would only be suitable for an engine of the same pattern and I never saw one like it before.

*Q.* I am speaking of the boiler? *A.* You said <sup>30</sup> engine. If you take the boiler, you can remove it out of the door after you take down the brick work around it.

*Q.* The foundation for the engine you say would be adapted to another engine of the same pattern as this? *A.* Yes; this has a peculiar frame.

*Q.* And the foundation could be easily removed, nothing but brick? *A.* If it is well put up, it is pretty hard to remove.

*Q.* They do remove brick, do they not, right <sup>40</sup>

along? *A.* Yes.

*Q.* They tear down brick houses? *A.* Yes, but this is harder than a house; it looks to me as if you would have to use dynamite; I don't think you could get it apart with a hatchet.

*Q.* Could not get it apart without using dynamite? *A.* I think it would be a very difficult matter to get it apart.

*Q.* You think it would be a difficult matter to remove that foundation from the room? *A.* Yes sir.

*Q.* Suppose they were going to put in another engine in there, this foundation could be used as a part of the necessary foundation, could it not? *A.* It could be if the bed plate would fit these irons that come up from the bottom; it has got to be just right in order to fit the bed plate and if it did not fit, you could not bolt it fast.

*Q.* If the stanchions in the boiler room were replaced, they would take up no more room or as much room as the brick wall that is there now, would they? *A.* There would not be much difference; they would come down instead of the brick part; they would come down part way and the brick wall the rest of the way.

*Q.* It would leave the boiler room with a partition made entirely of stanchions, instead of partly brick wall and partly of stanchions; is that right? *A.* Yes sir.

JAMES CONNEEN, called on behalf of the defendants, being duly sworn, testified as follows:

*By Mr. Arrowsmith.*

*Q.* You are the President of the New Jersey Mill & Lumber Co.? *A.* Yes sir.

*Q.* Which company went into possession of these goods made by Palmateer Brothers? *A.* Yes sir.

*Q.* You afterwards made this contract with the plaintiff's in this suit for this boiler and engine? *A.* Yes sir.

*Q.* For what purpose? *A.* For milling purposes.

*Q.* It was placed in the building there for the

purpose of running the mill? *A.* Yes sir.

*Q.* Permanently? *A.* Yes sir.

*Cross Examination by Mr. Close*

*Q.* Is it not a fact that about the time your company failed, you consulted counsel to see whether you could not lawfully remove those articles?

Objected to.

*A.* I did not.

*Q.* Did you not call upon Heisley & Morris concerning that matter? *A.* Not at the time of the failure. 10

*Q.* When was it? *A.* After Mr. Fay bought the right to take the engine out.

*Q.* About what time was that? *A.* After the sale by the receiver.

*Q.* You said that you put the property in there with the intention of its being permanent? *A.* Yes sir.

*Q.* Explain why in that contract, you said in any event it should become a permanent fixture to the property. State why your contract states it has not become, and yet you answer your counsel that you did intend it to be a permanent fixture? *A.* I meant when I put the engine and boiler in there, I did not mean to take it out; I did not anticipate failure. 20

*Q.* Do you mean that the parties could take it out? *A.* Not if I paid for it.

*Q.* But if you did not, you did? *A.* Yes sir.

*Q.* So your intention was upon condition upon your paying for it? *A.* Yes sir. 30

*Q.* So you really in fact did think that the thing should be in there permanently? *A.* If it was paid for I did.

*Q.* And unless it was paid for, you did not intend that it should remain there, did you? *A.* No sir; according to the contract.

*Q.* You could not go back on your contract? *A.* No sir.

*By Mr. Arrowsmith.*

*Q.* I understand that at the time, you put it 40

there expecting to pay for it? *A.* Yes sir.

*Q.* You did not anticipate failing then? *A.* No sir; if I had I would never have gone to the expense that I did.

*Q.* But your whole intention was to go on and use your property there indefinitely? *A.* Yes sir.

*Q.* For your company? *A.* Yes sir.

*Q.* And you expected to make your payments, and everything would be right? *A.* Yes sir.

<sup>10</sup> *Q.* Before or at the time you placed that property in there, did you get the consent of either of the Palmateers' that that should be placed there and remain as to them as personal property.

Objected to. Question withdrawn.

*By Mr. Close.*

*Q.* Of course you anticipated to pay for the boiler and engine, but if you did not pay for it you did not expect it to become a permanent fixture? *A.* No sir.

<sup>20</sup> *It is admitted that neither of the contracts of sale were recorded in Monmouth county—Plaintiff's contracts of sale.*

*Defendants' counsel offers in evidence the three photographs and the deed and rest.*

JAMES CONNEEN, recalled on behalf of the Plaintiff.

*By Mr. Close.*

*Q.* At the time you made this condition contract of sale, was the duplicate original given to you? *A.*

<sup>30</sup> Yes sir.

*Q.* And of each of them? *A.* Yes sir.

*Q.* Where was that delivered to you? *A.* The first one, was, I think, given to me in New York and the second one was mailed.

*Q.* Did you get a duplicate original of each one? *A.* Yes sir.

GEORGE N. ROBINSON, recalled.

*By Mr. Close.*

*Q.* Are you acquainted with a Mr. Otto, of Long  
<sup>40</sup> Branch? *A.* Mr. Otto Vangaine.

*Q.* A truckman at Long Branch? *A.* Yes sir.

*Q.* State what transactions took place between you and him, concerning the removal of this boiler and engine and the cost of doing it?

Objected to. Objection sustained. Exception by plaintiff's.

LEWIS F. LYON, recalled on behalf of the plaintiff, testified as follows:

*By Mr. Heisley.*

*Q.* They say you were there directing the erection of this machine and boiler? *A.* Yes, I was. <sup>10</sup>

*Q.* You are familiar with how it is attached to the building, where the different rods run and the pipes run and so on, are you not? *A.* Yes sir, I gave directions how it was to be done and they performed the labor; furnished by the New Jersey Mill & Lumber Company.

*Q.* The New Jersey Mill & Lumber Company did the work at their own instance, but under your supervision? *A.* Yes sir; that was the understanding. <sup>20</sup>

*Q.* Who built the foundation for this engine? *A.* A mason named Bream.

*Q.* For whom? *A.* The New Jersey Mill & Lumber Company; I had the engine blocked up and they built the foundation up to it.

*Q.* Who put in the rods which bolted the engine to the foundation? *A.* The New Jersey Mill & Lumber Company had those rods made by a blacksmith there, and they put them in position. <sup>30</sup>

*Q.* With your knowledge of the various connections of the machinery to the building and through the building, in what way would that building be damaged or the freehold injured, by disconnecting this property from the freehold?

Objected to. Objection withdrawn.

*A.* I can take out the boiler without tearing down the side wall; just slip the front off the bolts and remove it. Take the nuts off the ends of the bolts and leave the bolts in the mason work. <sup>40</sup>

*Q.* How could you get the boiler out? *A.* Then I can remove the cover from the top of the boiler, just one course of brick and there is four inches space each side of the boiler and by raising it clear of the brick, I can block it up and roll it out without disturbing any of the side walls.

*Q.* Have you any doubt of that? *A.* No sir; I have done it and can repeat the operation. There is eight inches space each side of the boiler to allow it to roll it out endways. Then I had a large door placed there for the purpose of putting in another boiler if it should be required and that boiler can come out of the same door: there is plenty of room, so nothing would be disturbed in removing the smoke connection from the chimney, the opening would be left there of course; but there would be no damage at all to the fire room. These supports on top of the brick wall that hold up the floor, when they had it loaded with glass as they did, there were no supports there before at all, but they loaded it down with glass and they put those under; they would not be disturbed in removing the boiler. In regard to the engine, I can take the wheel out without tearing up the floor, by pulling the shaft out, raising the wheel up and rolling it along and taking out the door casing and the top of the door without disturbing the arch at all there.

*Q.* Have you looked at the doorway and the wheel, for the purpose of finding out whether you could remove the wheel without injury to the door above? *A.* Yes sir.

*Q.* Is your testimony the result of that examination? *A.* Yes sir, that floor is simply laid on the ground and a strip can be taken up along from the wheel pit by simply withdrawing the nails and they could be replaced and the bottom bricks of the door, and you can take the engine out through the same opening.

*Q.* Would you have to take out any brick from the side of the door? *A.* Not for the wheel; in re-

moving the heater, I would have to take out a half a dozen brick in addition to the door casing; the door casing is simply put in there with four 20 penny nails; they could be drawn out and the door casing slipped out and a half a dozen brick taken out one side, to allow the circumference of the heater to pass through.

*Q.* You say half a dozen brick; do you mean that literally? *A.* Yes sir, because we put it in that way; it had to go through the same opening and it 10 will come out the same way.

*Q.* You heard Mr. Albertson speak about that did you not? *A.* He did not say all the way up; he knows the heater is round and it would only take a few brick right at one point to allow it to slip through.

*Q.* These pipes that they speak of running through the walls, what about them? *A.* They are loose; they would not disturb any brick by withdrawing them; there is half an inch space all around.

*Q.* Could they be removed without injury to the 20 freehold? *A.* Yes sir; the holes would be left.

*Q.* And the holes are there now; *A.* Yes sir.

*Q.* What other injury, if any, would be done that you can think of by the removal of these pipes, for instance under the floor? *A.* When I had the floor up to take out the wheel I would have to take up the floor beams and I would then take up the pipes and replace the floor.

*Q.* Could that be done without injury to the 30 freehold?

Objected to.

*Q.* How much of this floor would have to be taken up to remove the pipes? *A.* I should take up only half of it across from the wheel pit to the door.

*Q.* How much would that be, about how many square feet? *A.* 18 to 20 feet in length and about three feet wide. The pipes run from the heater to the pump and is laid in a notch in the floor beams, so that can be raised up; raised out by lifting one floor board. I did not unload the boiler; Otto put it there. 40

*Q.* Did Beggs & Company have anything to do with it? *A.* No.

*Cross Examination by Mr. Hawkins.*

*Q.* How long were you at Long Branch superintending putting up this engine? *A.* Off and on; I first went there one day and took measurements and then I made my drawings and then after the stuff was delivered I was there about one consecutive week and then one day and two days after that.

<sup>10</sup> *Q.* Did you state to Mr. Robinson where you were going? *A.* Yes sir.

*Q.* He sent you down there? *A.* I was instructed to superintend the erection of the plant all complete and report when it was done.

*Q.* You were instructed by Beggs & Company? *A.* Yes sir.

*Q.* To superintend the erection of the engine and boiler? *A.* Yes sir, they were to furnish a man gratuitously to do that work and I was the individual.  
<sup>20</sup>

*Q.* You said it would take a strip three feet from this fly wheel to the door of the floor and the timbers, to remove the fly wheel; you would have to take out some of the earth too would you not? *A.* Not until you got to the door.

*Q.* The fly wheel has a floor under it? *A.* It is about 12 inches; it is brick work underneath the wheel; no, I would take this strip out here, there are no mouldings in the wall, the floor was simply laid  
<sup>30</sup> on the ground; it was put down in the cheapest possible way, because they did not want to incur any more expense than was necessary.

*Q.* It is a board floor like any floor of that kind is it not? *A.* It was put down very quick and with very few nails.

*Q.* This pipe runs diagonally from the engine to the heater, does it not? *A.* Yes.

*Q.* How many boards as appears on that photograph would you have to take up? *A.* Four boards;  
<sup>40</sup> there is a trap door there.

*Q.* Do you swear there is a trap door there?

*A.* There is a hole in the floor.

*Q.* Do you swear there is a trap door between the engine and the steam heater? *A.* I will say this, there is a board there that you can take up.

*Q.* Do you say that there is a board that is loose there? *A.* It was, when I left it.

*Q.* When, Saturday? *A.* No, when I left the plant.

*Q.* Do you not see if the board is loose, you could not take up pipes that run diagonally under the floor?

*A.* That is true.

*Q.* Then it would not answer any purpose, except for that particular pipe? *A.* No.

*Q.* Then you would have to take up four boards from the engine to the heater? *A.* Yes sir.

*Q.* You would have to take up the boards for the whole length or break them? *A.* No sir; I would take the heater off the foundation and those boards there were loose and they are very short; they are cut off here, on account of the exhaust pipe and the leg and the drip pipe and the blow-outs, so you would not have to take the boards up the whole length.

*Q.* The boards that run under the water heater, run back to the back end of this building, can you not see that? *A.* No.

*Q.* Do you swear that they do not run back to the back end of the building? *A.* I sawed them off in around the exhaust pipe.

*Q.* Do you swear there are any short boards under that steam heater and just cut out for the legs of that heater? *A.* Tell me what you call a short board.

*Q.* Do you swear that those boards were not laid regularly and then nothes cut in them afterwards, for the legs of the heater? *A.* That heater was set up first, and the boards fitted around it.

*Q.* Just notches cut out, but the board runs the full length? *A.* We took any boards that we could get.

*Q.* You would have to take up four boards whether long or short? *A.* Yes sir.

*Q.* You would leave the brick foundation where the dummy pump is, about four feet high? *A.* No, about three feet.

*Q.* Do you swear it is not four feet? *A.* Yes sir; I will swear it is not four feet.

*Q.* There is a hole right alongside of the dummy engine about a foot wide, is there not? *A.* There is  
 10 a pipe that run to the well and that runs below the bottom of the pump foundation.

*Q.* This brick foundation would also remain there, would it not? *A.* Yes, unless taken down.

*Q.* Somebody would have to take this down? *A.* Yes.

*Q.* That would be an injury to the building? *A.* No sir.

*Q.* You could leave a brick foundation there nine feet long and 18 inches above the floor and that would  
 20 not be an injury to the building? *A.* In less than half a day, I could take it down to the floor and the floor could be put over it.

*Q.* And if anybody else wanted to put a cellar there, they would have to dig it out? *A.* Yes sir.

*Q.* And if they wanted a cellar where the boiler was taken out, they would have to take out all that solid masonry? *A.* No sir; there are two parallel walls; those walls ran down about three feet on an average, below the surface of the ground.

30 *Q.* This boiler is laid on a solid brick foundation; I ask you whether or not if you took the boiler out, you would not leave all that brick work there and masonry in that form? *A.* I understand you to say that it was a solid masonry; I say it is not. Between the two extremes of those walls, there is a bridge wall which is 40 inches wide forward and back of that it is all natural ground; it is not solid masonry.

*Q.* How deep is it down? *A.* About three feet on an average below the surface.

40 *Q.* How wide? *A.* The average below the sur-

face is 24 inches wide, each wall at the base.

*Q.* Both sides and back? *A.* 24 inches each side and 22 feet 6 inches long and a cross wall at the back 20 inches wide and a bridge wall 40 inches wide.

*Q.* If you took the engine and boiler out, here is a wall 12 feet high, is it not, in the centre of the building, that would have to be taken down? *A.* Yes sir.

*Q.* Somebody would have to take that down?  
*A.* Yes sir. 10

*Q.* These buck-stays would have to be taken down? *A.* Yes, the buck-stays are a part of the boiler fittings.

*Q.* I ask you if they would not remain there, if by your process, you did not intend to take them down? *A.* I would take them off first, before I moved the boiler.

*Q.* You would take off the front and back buck-stays? *A.* I would take the nuts off the front and the anchor plates. 20

*Q.* You would take the bolts out too? *A.* No sir.

*Q.* You would take off the buck-stays on the side of the boiler to get the boiler out? *A.* Yes.

*Q.* You could not get the boiler out without taking those off could you? *A.* Yes, I can.

*Q.* Why then, would you take them off? *A.* Because I would want them; they are part of the boiler fixtures.

*Q.* You would want them to go with the boiler?  
*A.* Yes sir. 30

*Q.* You would have to take the brick off the top?  
*A.* Yes sir.

*Q.* Do you not know that the boiler is too high to go out of the door and you would have to lower it to get it out of the door? *A.* Yes, certainly.

Testimony closed.

Adjourned to to-morrow.

# Court of Common Pleas.

## SUPREME COURT ISSUE.

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	JAMES BEGGS & CO.	} BEFORE J. Clarence Conover, P. J. <i>and</i> <i>Associate Judges.</i>
10	vs.	
	JOHN PALMATEER, et al.	

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Freehold, N. J., January 10, 1895.

### CHARGE.

GENTLEMEN OF THE JURY ;—This is an action of trover and conversion brought to recover the value of  
20 certain machinery belonging to the plaintiff, which came to the possession of the defendants and was retained by them, against the demand of the plaintiff for the delivery to them of the same.

Under the arrangement by which the legal questions involved in this case have been reserved for the Court's determination, your duty will be confined to the question of ascertaining the damages sustained by the plaintiff.

30 You will assume for the purpose of this case, that the plaintiff were entitled to this property at the time they demanded it of the defendants and that by the refusal to deliver it when demanded, there was a conversion.

In trover and conversion, the rule of law is that the plaintiff is entitled to recover the true value of the goods taken at the time and place of detention, together with interest thereon for their detention. This you will ascertain and determine and render your verdict accordingly.

40 Defendants' counsel excepts to that portion of

the charge which stated that the jury had a right to take into consideration the true value of the property and that they had a right to ignore the payment of \$650 which was made.

Defendants' counsel also excepts to that part of the charge, wherein the Court refused to charge the second request of defendants' counsel.

*The Court:* That is refused otherwise than as charged.

Defendants' counsel excepts to the refusal of the <sup>10</sup> Court to charge the fourth request of defendants' counsel, the Court having stated that it was refused.

*The Court:* The fourth request was refused except as otherwise charged.

*Mr. Hawkins.* We are allowed an exception?

*The Court:* Yes, that is right.

The jury returned a verdict for the plaintiff in the sum of \$2,348.85, with interest from October 3d, 1894, making a total of \$2,386.80.

Case adjourned to January 24th, for submission <sup>20</sup> of briefs.

The Court finds on the question of law reserved for the plaintiffs and directs judgment to be entered accordingly.

To which finding and decision of the Court the counsel for the defendants prays an exception, which is allowed and signed and sealed accordingly.

J. CLARENCE CONOVER,

A. H. HIGGINS, 30

CHAS. MORRIS,

Judges.

## JUDGMENT.

Monmouth Common Pleas, January Term, 1895.

GEORGE N. ROBINSON trading as JAMES BEGGS & CO., vs. AMOS PALMATEER and 10 JOHN PALMATEER, Defendants.	{ In Tort  on  Verdict. }	Pleas before the Court of Common Pleas holden at Free- hold on the Ninth day of January A.D. Eighteen Hundred and Ninety - Five. As yet of the Term of January, 1895.
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*Inferior Court of Common Pleas of Monmouth County  
of the Twenty-Second Day of October, in the year of  
our Lord eighteen hundred and ninety-four.*

MONMOUTH COUNTY—SS.

Amos Palmateer and John Palmateer the Defen-  
dants in this suit were summoned to answer unto  
George N. Robinson, trading as James Beggs & Co.,  
20 in an action of tort, and thereupon the said George N.  
Robinson, trading as aforesaid, by Heisley & Morris,  
his attorneys, complains for, that whereas said plain-  
tiff heretofore to wit: on the fifth day of October,  
eighteen hundred and ninety-four, at Long Branch, to  
wit: at Freehold, aforesaid was lawfully possessed as  
of his own property of a certain boiler, machinery,  
and goods and chattels to wit:

One (1) horizontal tubular steam boiler, 60 in.  
diameter, containing eighty-two (82) tubes each 3 in.  
30 diameter by 16 feet long, shell of boiler 11-32 inch  
thick and heads of boiler 7-16 inch thick, of  
homogeneous open hearth, flange steel plate manhole,  
in top of boiler, hand hole in each head of boiler, be-  
low the tubes, two legs on each side of boiler, cast  
iron neck on top of boiler for 4 in pipe, nuts for feed  
and surface blow-off and inside pipes for same, boiler  
also fitted with low water detector and chain. Boiler  
right hand set in a battery with flush front and an-  
chor, oval flue plate fitted with damper, Fig. D smoke  
40 connection for one boiler only, but large enough to

accommodate two of same size and extend 3 feet beyond side wall, to the right, said wall not to be more than 24 in. thick, ash door and pane plates and rollers, McClare patent grate, bars 60 in. wide and 66 in. deep and McClare argand steam blower. Buckstays and tie rods, Reach Bar, safety valve, guage cocks, steam and water guages, blow-off cock and valve, check and stop valves, 6 in. whistle and injector, also one (1)  $5\frac{1}{4}$  in. x  $3\frac{1}{2}$  in. x 5 in. duplex steam pump also one (1) \$6 standard feed water heater, also one (1) <sup>10</sup> \$7 left hand stationery engine, having a cylinder 18 in. in diameter x 22 in., length of stroke, speeded to run about 90 revolutions per minute with balanced band wheel 96 in. diameter x 24 in. face. Automatic stock Gardner Governor Throttle, valve, lubricator, oil cups, and cylinder drip valve. Main driving belt, connecting engine with main shaft, one governor belt, pricking for engine, packing for pump, belt lacing; exhaust pipe for heater to atmosphere with connection to main building, with back pressure valve <sup>20</sup> main steam pipe from engine to boiler, including stop valve. Pipe and valve for whistle outlet left in main steam pipe for another boiler. Feed pipe from heater to boiler, also from injector to boiler. Steam pipe from pump to injector. Exhaust pipe from pump to surface blow-off pipe with valve. Bottom blow-off pipe with plug, cock-suction for injector, suction pipe from well to pump with foot-valve and stop valve, suction and delivery pipe from pump to tank with valve and strainer. Feed pipe from pump to heater <sup>30</sup> surface and bottom blow-off pipes from heater—and being so possessed the said plaintiff afterwards, to wit: on the day and year above mentioned, at Long Branch, to wit: at Freehold aforesaid, casually lost said boiler, machinery, goods, chattels out of his possession and the same afterwards to wit: on the day and year last aforesaid at Long Branch, to wit, at Freehold aforesaid, came to the possession of the said defendant by finding. Yet the said defendant well knowing the said boiler, machinery, goods and <sup>04</sup>

chattels, to be the property of said plaintiff and of the right to belong and appertain to him, but contriving fraudulently, intending craftily and subtly to deceive and defraud the said plaintiff in his behalf hath not as yet delivered the said boiler, machinery, goods and chattels or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do and have refused so to do.

Afterwards to wit, on the day and year first aforesaid at Long Branch, to wit, at Freehold aforesaid, converted and disposed of the said boiler, machinery, goods and chattels to their own use to the damage of said plaintiff, seven thousand dollars, and therefore he brings his suit; &c.

HEISLEY & MORRIS,

*Attorneys for Plaintiff.*

And the said defendants, by Hawkins & Durand, their attorneys, come and defend the wrong and injury, when etc., and say that they are not guilty of the said supposed grievances above laid to their charge, or any or either of them, or any part thereof in manner and form as the said plaintiff has above thereof complained against them the said defendants, and this they put themselves upon the country, &c.

Therefore let there come a jury thereof before the said Court at Freehold aforesaid, on the first Tuesday of January, A. D. eighteen hundred and ninety-five, by whom &c., and who neither &c., to recognize &c., because as well &c., the same day is given to the parties aforesaid at the same time and place at which day before the Court aforesaid, at Freehold aforesaid, come the parties aforesaid, and the jurors of that jury whereof mention is within made who being duly summoned also come, who to speak the truth of the matters within contained, being chosen, tried and sworn upon their oaths that the defendants Amos Palmateer and John Palmateer are guilty of the trespasses above laid to their charge in manner and form as the said plaintiff hath above thereof complained against them and they assess the damages of the said plaintiff by

reason of the trespasses and injury to him committed, to two thousand three hundred and eighty-six dollars and eighty cents over and above his costs and charges by him about his suit in this behalf expended.

Therefore it is considered that the said George N. Robinson, trading as James Beggs & Co., do recover against the said defendants Amos Palmateer and John Palmateer his said damages to two thousand three hundred and eighty-six dollars and eighty cents, and also the sum of fifty dollars and thirty-three<sup>10</sup> cents by the Court now here adjudged to the said plaintiff for his costs and charges by him about his suit in this behalf expended, which damages, costs and charges in the whole amount to two thousand four hundred and thirty-seven dollars and thirteen cents, and the defendant in mercy, &c.

Judgment signed this ninth day of January, A. D. eighteen hundred and ninety-five.

STATE OF NEW JERSEY, }  
COUNTY OF MONMOUTH, } ss.

20

I, THEODORE AUMACK, Clerk of said County, and also Clerk of the Court of Common Pleas of said County, (the same being a Court of record,) do hereby certify that the foregoing copy Judgment is a true and correct copy thereof, as the same remains of record in my office, in Book 25 of Common Pleas Judgment, page 218 of the ninth day of January, A. D. 1895.

In Witness Whereof I have hereunto set my<sup>30</sup> hand and affixed the seal of said County and this Court, this eleventh day of November, A. D. 1896.

THEO. AUMACK, *Clerk.*

## EXHIBITS.

ARTICLES OF AGREEMENT, made and entered into the seventh day of June, in the year one thousand eight hundred and ninety-three, BETWEEN John Palmateer and Amos Palmateer, of the Borough of Asbury Park, in the County of Monmouth and State of New Jersey, parties of the first part and Leopold J. Lippman and Alexander Taylor of the City of <sup>10</sup>Brooklyn, in the County of Kings and State of New York, parties of the second part, in manner following:

The said parties of the first part, in consideration of the sum of one thousand dollars to them duly paid, hereby agree to sell unto the said parties of the second part, All that certain tract of land situate, lying and being at Long Branch, in the Township of Ocean, County of Monmouth and State of New Jersey.

BEGINNING at a point on the North side of Chelsea Avenue in the West line of a tract of land <sup>20</sup>formerly belonging to Henry VanDyke, deceased, said point being five feet and two inches West of the West side of Fourth Avenue; thence (1) along the West line of said VanDyke tract North thirty-two degrees and twenty-five minutes East (as the magnetic needle pointed March 6th, A. D. 1888) ten feet to the West side of said Fourth Avenue; thence (2) along the West side thereof North one degree and fifty minutes East one hundred and twenty-two feet and two inches to the South line of a lot of land belonging to <sup>30</sup>Patrick Keaton; thence (3) along said line North seventy-two degrees and fifteen minutes West seventy-five feet to the southwest corner of said lot; thence (4) along the West line of said lot North thirty-four degrees and fifty-five minutes East one hundred and thirty-two feet and eight inches to the West side of said Fourth Avenue; thence (5) along the West thereof North one degree and fifty minutes East twentytwo feet and six inches to the South line of lands belonging to Nathaniel W. Troutman; thence (6) along said line <sup>40</sup>and the line of other lands North eighty-eight degrees

and forty-five minutes West three hundred and fourteen feet to the East side of Fifth Avenue; thence (7) along the East side thereof South three degrees West two hundred and sixty-five feet and six inches to the easterly line of the New York and Long Branch Railroad Company's land; thence (8) along said line South forty-eight degrees and thirty-five minutes East forty-six feet and nine inches to the North side of the aforesaid Chelsea Avenue; thence (9) along the North side thereof North eighty-nine degrees East two hundred and seventy-nine feet to the place of beginning.<sup>10</sup> Being the lumber yard property on Chelsea Avenue and the New York and Long Branch Railroad, including building and office fixtures, excepting safe, stove and clock, for the sum of twelve thousand dollars, which the said parties of the second part hereby agree to pay to the said parties of the first part, as follows: one thousand dollars on the execution of this agreement, the receipt whereof is hereby acknowledged, by the parties of the first part; three thousand dollars on the delivery of the deed for said property on the seventh day of July, 1893, and the balance by a purchase money mortgage on said premises, to be the first lien, payable three thousand dollars in two years and five thousand dollars in three years with interest at five per centum per annum, payable semi-annually; said mortgage to contain the usual thirty day interest default and insurance clauses, insurance to be fifteen hundred dollars, and an agreement on the part of the mortgagors and their legal representatives to pay all<sup>20</sup> taxes and assessments levied and assessed against said premises, said mortgage to be accompanied by the bond of the said Lippman & Taylor, bearing even date therewith, in the penal sum of \$16,000, with same condition as mortgage.<sup>30</sup>

The said parties of the first part also hereby agree to sell to the parties of the second part, and the said parties of the second part agree to purchase from the parties of the first part, all the stock in said lumber yard consisting of lumber, hardware, blinds,

mason materials and all other stock in and about said premises at the cost price of said stock [the quantity of said stock to be ascertained by an inventory thereof to be made by two persons, each representing one of the parties hereto, and the prices to be taken from the bills of the same of said Palmateers] less the sum of one hundred dollars, which shall be paid for one-third of said price in cash, upon the completion of said inventory, and by the said Lipp-  
 10 man & Taylor giving their two notes payable to said Palmateers, each for one-third of said price payable in three months and six months, with legal interest.

The said parties of the first part further agree to and with the parties of the second part that the prices paid for said lumber yard and stock shall include the purchase of the good will of the lumber business heretofore carried on by them, upon said premises, and that they will not directly, or indirectly, engage in the lumber business within the limits of Long Branch  
 20 within five years from this date.

The said parties of the first part agree that the parties of the second part may take possession of said lumber yard, stock, &c., on the twentieth day of June, 1893.

The parties of the second part agree to pay the taxes levied and assessed upon said premises for the present year.

It is further agreed that said deed and bond and mortgage shall be delivered and received at the office  
 30 on said lumber yard, on the seventh day of July next; between 10 a. m. and 2 p. m., when the balance of the purchase money shall be paid in cash.

And the said parties of the first part, on receiving such payment, at the time and in the manner above mentioned, shall at their own proper cost and expense, execute, acknowledge and deliver to the said parties of the second part, or to their assigns, a proper deed for the conveying and assuring to them the fee simple of the said premises, free from all incumbrances, which  
 40 deed shall contain a general warranty and the usual

full covenants.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands and seals the day and year first above written.

Sealed and delivered }  
in the presence of }

(Signed)

JOHN PALMATEER,  
AMOS PALMATEER,  
LEOPOLD LIPPMAN, 10  
ALEXANDER TAYLOR.

Words "Insurance to be in fifteen hundred dollars," interlined before execution.

FRANK DURAND.

ARTICLES OF AGREEMENT, made and entered into the thirty-first day of August, in the year one thousand eight hundred and ninety-three, BETWEEN John Palmateer and Amos Palmateer of the Borough of Asbury Park, in the County of Monmouth and State of New Jersey, parties of the first part, and <sup>20</sup> The New Jersey Mill and Lumber Company, party of the second part, in manner following :

The said parties of the first part in consideration of the sum of five thousand nine hundred and sixty-four and 50-100 dollars, to them duly paid, hereby agree to sell unto the said party of the second part, ALL that certain tract of land, situate, lying and being at Long Branch, in the Township of Ocean, County of Monmouth and State of New Jersey. BEGINNING at a point on the North side of Chelsea <sup>30</sup> Avenue in the West line of a tract of land formerly belonging to Henry VanDyke, deceased; said point being five feet and two inches West of the West side of Fourth Avenue; thence (1) along the West line of said VanDyke tract North thirty-two degrees and twenty-five minutes East (as the magnetic needle pointed March 6th, A. D., 1888) ten feet to the West side of said Fourth Avenue; thence [2] along the West side thereof North one degree and fifty minutes East one hundred and twenty-two feet and two inches <sup>40</sup>

to the south line of a lot of land belonging to Patrick Keaton; thence [3] along said line North seventy-two degrees and fifteen minutes West seventy-five feet to the southwest corner of said lot; thence [4] along the West line of said lot North thirty-four degrees and fifty-five minutes East one hundred and thirty-two feet and eight inches to the West side of said Fourth Avenue; thence [5] along the West side thereof North one degree and fifty minutes East <sup>10</sup> twenty-two feet and six inches to the South line of lands belonging to Nathaniel W. Troutman; thence [6] along said line, and the line of other lands North eighty-eight degrees and forty-five minutes West three hundred and fourteen feet to the East side of Fifth Avenue; thence [7] along the East side thereof South three degrees West two hundred and sixty-five feet and six inches to the easterly line of the New York and Long Branch Railroad Company's land; thence [8] along said line South forty-eight degrees and <sup>20</sup> thirty-five minutes East forty-six feet and nine inches to the North side of the aforesaid Chelsea Avenue; thence [9] along the North side thereof North eighty-nine degrees East two hundred and seventy-nine feet to the point or place of beginning. Being the same premises conveyed to the said Amos Palmateer and John Palmateer by Dewitt C. Newing and others, by deed dated March 24th, 1888, and recorded in the Monmouth County Clerk's office, in Book 431 of Deeds, page 45, &c. Subject to the taxes levied and <sup>30</sup> assessed upon said premises for the year eighteen hundred and ninety-three. Together with the stock of lumber of the parties of the first part, on said premises, and the good will of the business heretofore carried on upon said premises by them, for the sum of twenty thousand six hundred and forty-three and 44-100 dollars, which the said party of the second part hereby agrees to pay to the said parties of the first part, as follows: five thousand nine hundred and sixty-four dollars and fifty cents, in cash, upon the <sup>40</sup> execution hereof, the receipt whereof is hereby ac-

knowledged; \$1,226.31, with interest thereon in one month from the date hereof; \$1,226.31 with interest thereon in two months from the date hereof; \$1,226.31 with interest thereon in three months from the date hereof; and \$1,000 in six months from the date hereof, with interest on the sum of eleven thousand dollars; and when said payments have been made the deed for said premises shall be delivered, and the balance of said purchase money shall be secured by a purchase money mortgage on said premises, bearing <sup>10</sup> even date with said deed, payable two thousand dollars in one year from the date thereof; three thousand dollars in two years from the date thereof, and five thousand dollars in three years from the date thereof, together with interest on the principal sum at five per cent. per annum, payable semi-annually; said mortgage to contain the thirty days interest default clause, and insurance clause, in the sum of twenty-five hundred dollars, and clause for payment of taxes in use in the County of Hudson. Said mortgage to be ac- <sup>20</sup> companied by the bond of said party of the second part, in the penal sum of twenty thousand dollars, with same condition as said mortgage.

It is agreed that the said deed and bond and mortgage shall be delivered and received at the office of Hawkins & Durand, Asbury Park, on or before the first day of March, 1894.

It is agreed that the title and possession of said stock of lumber shall pass upon the execution of this agreement, and that the party of the second part may <sup>30</sup> enter into possession of said real estate upon the execution hereof.

The parties of the first part further covenant and agree to and with the party of the second part, not to engage in the lumber business in Long Branch, for five years from the date hereof, provided all payments herein mentioned are made by the party of the second part. And the said parties of the first part, on receiving such payment at the time and in the manner above mentioned, shall at their own proper cost and expense, <sup>40</sup>

execute, acknowledge and deliver to the said party of the second part, or to its assigns, a proper deed for the conveying and assuring to it or them, the fee simple of the said premises, free from all incumbrance; subject, however, to the taxes thereon for the year 1893, which deed shall contain a general warranty, and the usual full covenants.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF the parties of the first part to these presents have hereunto set their hands and seals the day and year first above written, and the party of the second part has caused its common seal to be hereto affixed, and these presents to be subscribed by its President, and attested by its Secretary, done the day and year first above written.

Sealed and delivered } (Signed)

in the presence of } JOHN PALMATEER, (SEAL)  
20 AMOS PALMATEER. (SEAL)

New Jersey Mill and Lumber Co.

JAMES CONNEEN, Prest.

Attest:—L. J. LIPPMAN, Sec'y. (SEAL)

THIS INDENTURE made this 4th day of October, eighteen hundred and ninety-three by and between James Beggs & Company of the city of New York, (hereinafter designated the "Vendors" parties of the first part and the New Jersey Mill & Lumber  
30 Company of Long Branch, Monmouth County, New Jersey (hereinafter designated the "Vendee" party of the second part.

WITNESSETH, that in consideration of the sum of one dollar and of the covenants and agreements herein contained being fully kept and performed, the parties hereto have mutually and severally agreed and do hereby agree as follows:

First:—The Vendors agree to sell to the Vendee, one (1) Horizontal Tubular Steam Boiler, 60 in. diam-  
40 eter, containing eighty-two (82) tubes each 2 in. diam-

eter by 16 ft. long. Shell of boiler 11x32 in. thick, and heads of boiler 7x16 in. thick, of homogeneous open-hearth flange steel plate. Manhole in top of boiler, handhole in each head of boiler below the tubes. Two lugs on each side of boiler. Cast-iron neck on top of boiler for 4 in. pipe. Nuts for feed and surface blow-off, and inside pipes for same. Boiler will also be fitted with low water detector and alarm. Boiler to be a right-hand (if set in a battery) with flush front and anchors, oval flue plate fitted<sup>10</sup> with damper, Fig. D smoke connection, for one boiler only—but large enough in diameter to accommodate two of the same size, and to extend 3 ft. beyond side wall to the right, said wall not to be more than 24 in. thick; ash door and frame, plates and rollers, McClave patent grate bars 60 in. wide by 66 in. deep, and McClave Argand steam blower, buckstays and tie rods, rear "L" bar, safety valve, gauge cocks, steam and water gauges, blow-off cock and valve, check and stop valves, 6 in. whistle, and in-<sup>20</sup>jector. Also,

One (1) 5 $\frac{1}{4}$  in. by 3 $\frac{1}{2}$  in. by 5 in. duplex steam pump. Also,

One (1) No. 8 standard feed-water heater. Also,

One (1) No. 7 left-hand stationary engine, having cylinder 18 in. diameter by 22 in. length of stroke; speeded to run about 90 revolutions per minute; with balanced band wheel 96 in. diameter by 24 in. face, automatic-stop Gardner governor, throttle valve, lubricator, oil cups, and cylinder drip<sup>30</sup> valves: For the sum of two thousand, six hundred and fifty-one dollars and fifteen cents (\$2,651.15) payable as hereinafter provided; said goods and machinery to be delivered f. o. b. wharf of Pennsylvania Company, Pier 4, North River, in the city of New York, and to be located, used and employed by the Vendee at Long Branch, Monmouth County, New Jersey. And the Vendee agrees to purchase and buy said goods and machinery, and to pay therefore the said sum of two thousand, six hundred and fifty-one<sup>40</sup>

dollars and fifteen cents (\$2,651.15) at the times and in the manner following :

On the execution and delivery of these presents, three hundred and fifty-one dollars and fifteen cents, (\$351.15) in cash, and the balance, to wit: the sum of two thousand, three hundred dollars (\$2,300.00), by giving their three certain promissory notes, all dated on the day of such delivery of the said goods and machinery, and payable at times and amounts as herein-  
10 after provided.

One note in the sum of three hundred dollars (\$300.00) payable one month after date, and to bear interest at the rate of six per cent. per annum, to the order of the Vendors.

One note in the sum of one thousand dollars (\$1,000.00) payable three months after date and to bear interest at the rate of six per cent. per annum, to the order of the Vendors.

One note in the sum of one thousand dollars  
20 (\$1,000.00) payable four months after date and to bear interest at the rate of six per cent. per annum, to the order of the Vendors.

All of the above notes, or any renewal or renewals thereof, to be endorsed by Messrs. Lippman, Taylor and Conneen in their individual capacity.

It is further agreed between the parties hereto that should the Vendee fully keep and perform all the conditions of this contract, then the Vendors will renew the note for one thousand dollars (\$1,000.00)  
30 given at three months after date for three months longer, this renewal to be covered by the promissory notes, in writing, of the Vendee, said note to be dated the same date as of the maturity of the aforesaid note for one thousand dollars (\$1,000.00) and to run three months thereafter, to bear interest at the rate of six per cent. per annum, to the order of the Vendors, and to be endorsed by Messrs. Lippman, Taylor and Conneen, in their individual capacity.

Second:—The Vendee hereby agrees immediately  
40 upon delivery and receipt of the said goods and mach-

inery, as aforesaid, to insure the same in a sum not less than the balance of the purchase price then remaining unpaid, and have the loss, if any, made payable to the Vendors in their said firm name, and to deposit with the Vendors policy of insurance thereon, which they shall retain as collateral security for the payment of the unpaid purchase price ; otherwise the Vendors may insure the same as owners in their own name, and the Vendee will pay the premium therefore as so much additional price of the said goods and <sup>10</sup> machinery.

Third :—It is further agreed between the Vendors and Vendee that the title to the above described goods and machinery remains and shall remain in the Vendors, and shall be, and be deemed to be, personal property, notwithstanding the same may be attached or affixed to the realty upon which same shall be placed, until the full payments of the said purchase price and interest shall have been made as above agreed and that the delivery by the Vendee to the Vendors of <sup>20</sup> any promissory note or notes or renewals thereof or any commercial paper shall not be deemed a payment of any of the aforesaid sums, or purchase price, until said note or paper shall be fully paid with interest ; and in no event shall the said goods and machinery or any part thereof be, or become, or be taken to be, real estate or appurtenances to real estate, notwithstanding the same may be fixed to real estate, or lands or premises of any person or persons whomsoever but that the said goods and machinery at all times <sup>30</sup> shall be, and remain, personal property until the same shall be fully paid for as herein provided. And the Vendee further agrees that neither of the said goods or machinery or any portion hereof shall be removed from the premises where the same is placed, as aforesaid, without the consent in writing of the Vendors.

Fourth :—And it is further agreed that in case any default shall be made in the payment of the said purchase price, or any part thereof, or of the sum <sup>40</sup>

mentioned in any promissory note as aforesaid, or of either or any of them or any renewal or renewals thereof with interest thereon or on the days whereon the same or either or any of the said payments or promissory notes shall be due and payable, or in case of default in the performance of any covenant herein contained on the part of the Vendee to be kept and performed, then, and in such case, the Vendors may, at their option, retake the said goods and machinery  
<sup>10</sup> wherever the same may be, and repossess themselves of the same without any let or hindrance of, or by the Vendee, its successors, or assigns, or its officers, agents or servants, and without any liability or responsibility by the Vendors to the Vendee, or to any person or persons by reason of such retaking. and in case the Vendors so retake possession, then, and in that event the Vendee shall forfeit and waive all payments made to the Vendors on account of said purchase price, who may retain the same, as liquidated  
<sup>20</sup> damages for such breach of contract by the Vendee ; or at the Vendors' election in case of any such default by the Vendee, the Vendors may declare and cause to become at once due and payable all balance of purchase price then unpaid, notwithstanding any extension of time for such payment by means of promissory note, or otherwise, and may maintain an action, or actions, at law or in equity for such balance of the purchase price with interest thereon from the date of the last cash payment on account, and the  
<sup>30</sup> bringing of such action shall be sufficient notice of such election by the Vendors, but the bringing of such action, or the recovery of judgment, therein, shall not operate as a transfer of the title to the aforesaid goods and machinery above mentioned, or any part thereof, to the Vendee, nor shall it affect the title and the status of the said property, as personality, as above provided for, but the title thereof shall remain in the Vendors, as hereinbefore, and the same shall be personal property, only until full payment of said purchase price and in case of failure to fully collect by  
<sup>40</sup>

execution or other process or writ issued in any such action or upon any judgment therein, the Vendors may retake the said goods or machinery and appurtenances, and repossess themselves of the same and retain all payments made by, or for the benefit of, or on account of, the Vendee, of the said purchase price, as liquidated damages for such breach of contract by the Vendee.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this four-<sup>10</sup>teenth day of October, in the year 1893.

Signed, sealed and delivered

IN THE PRESENCE OF JAS. BEGGS & CO.  
A. H. HENTHORN, New Jersey Mill & Lumber Co.,  
JAMES CONNEEN, Prest.

STATE OF NEW YORK, }  
City and County of New York. } ss.

On this 14th day of October, in the year eighteen hundred and ninety-three, before me personally came <sup>20</sup> George N. Robinson, to me known, and known to me to be the individual doing business under the name and style of James Beggs & Company, and described in, and who executed the foregoing instrument in the said firm name, and he then to me acknowledged that he had executed the same.

A. L. HENTHORN,  
Notary Public, New York Co.

STATE OF NEW YORK, } 30  
City and County of New York. } ss.

On this 14th day of October, in the year eighteen hundred and ninety-three, before me personally came James Conneen, to me known, and known to me to be the President of the New Jersey Mill & Lumber Company, of Long Branch, Monmouth County, New Jersey, who being duly sworn by me, did depose and say: that he resided at Long Branch, New Jersey, that he was the President of the New Jersey Mill & Lumber Company, and that he signed his name <sup>40</sup>

thereto, as president of said company, by the authority of the Board of Directors of said company.

A. L. HENTHORN,

Notary Public, New York Co.

THIS AGREEMENT made and entered into this 5th day of December, 1893, by and between James Beggs & Company of the City of New York, party of the first part, and the New Jersey Mill & Lumber Company of Long Branch, Monmouth county, New  
<sup>10</sup> Jersey, party of the second part.

WITNESSETH:

Whereas, the parties hereto have entered into an agreement or conditional Bill of Sale, under date of October 4th, 1893, whereby the party of the first part is to furnish certain engine, boiler, etc., for which the party of the second part is to pay to the party of the first part the sum of two thousand six hundred and fifty-one dollars and fifteen cents, by giving certain promissory notes in writing, as therein agreed and  
<sup>20</sup> specified.

Whereas, the said party of the second part is desirous of purchasing from the party of the first part, the connections and belting for the said engine, boiler, etc., as described in a certain letter from the party of the first part to the party of the second part, and dated December 4th, 1893, and acceptance of the party of the second part dated December 5th, 1893, of said letter, for which the party of the second part agrees to pay to the party of the first part the sum of four  
<sup>30</sup> hundred and ninety-three dollars, by the party of the second part giving their certain promissory notes to the party of the first part, as therein described and specified, said notes or any renewal, or renewals thereof, to be endorsed by Messrs. Lippman, Taylor and Conneen, in their individual capacity.

It is agreed by and between the parties hereto, that should any default be made in the payment of the notes or renewal, or renewals thereof, and interest thereon, that such default shall operate as provided in  
<sup>40</sup> the conditional Bill of Sale above referred to, and shall

bring all payments and notes, including notes mentioned in agreement dated October 4th, 1893, due immediately upon such default, and the party of the first part shall have the power to act as provided in said conditional Bill of Sale aforesaid, dated October 4th, 1893.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 12th day of December, in the year 1893.

Signed, sealed and delivered

10

IN THE PRESENCE OF JAS. BEGGS & CO.  
HENRY B. EELLS. New Jersey Mill & Lumber Co.  
JAMES CONNEEN, Prest.

THOMAS P. FAY,  
Witness to James Conneen, President  
of the New Jersey Mill & Lumber Co.

STATE OF NEW YORK, }  
City and County of New York. } ss. 20

On this 12th day of December, in the year eighteen hundred and ninety-three, before me personally came GEORGE N. ROBINSON, to me known, and known to me, to be the individual doing business under the name and style of James Beggs & Company, and described in, and who executed the foregoing instrument in the said firm name, and he then to me acknowledged that he had executed the same.

A. L. HENTHORN,  
Notary Public, New York Co. 30

STATE OF NEW YORK, }  
City and County of New York. } ss.

On this 22d day of December, in the year eighteen hundred and ninety-three, before me personally came James Conneen to me known, and known to me, to be the President of the New Jersey Mill & Lumber Company, of Long Branch, Monmouth county, New Jersey, who being duly sworn by me, did depose and say: that he resided at Long Branch, that he was 40

the President of the New Jersey Mill and Lumber Company; that he signed his name as president of said company by the authority of the Board of Directors of said company.

THOMAS P. FAY,  
Master in Chancery of New Jersey.

NEW JERSEY SUPREME COURT.

10 JOHN PALMATEER, ET AL.

*Plaintiffs in Error,*

vs.

GEORGE N. ROBINSON,

*Def. in Error.*

PLEADINGS, ETC.

WRIT OF ERROR.

STATE OF THE CASE.

The following additional facts, not disclosed by the evidence in the printed book, are hereby certified  
20 by the court as a part of the case to wit:

That at the time of the making of the agreement for sale of the personal property, described in the declaration of the plaintiffs, and which agreements are dated October 4, 1893, and December 5, 1893, the New Jersey Mill & Lumber Company was in the possession of the land upon which the property referred to, was placed as stated in the evidence.

That such possession of the said company was by virtue of the contract made between the plaintiffs in  
30 error, and said mill and lumber company, providing for the proposed sale to said company by said Palmateers of said land.

That said contract did not provide, in any way, for the disposition or control of any building or property which might be placed upon said land of said company; but upon the said point was absolutely silent

That said contract did not impose upon said company the duty of placing any property of any kind upon said land; but the Mill Company placed  
40 upon said land certain buildings to be used as a saw

mill and planing factory, and to conduct a general lumber business.

That the machinery and property, referred to in the declaration, were to be used in connection therewith.

That the said mill company failed to complete its purchase of said land, and the plaintiffs in error entered into possession thereof, and still were in possession; and prior to the bringing of this suit Robinson made a formal demand upon said Palmateers for said property, and that said Palmateers refused to permit Robinson to take away said property. <sup>10</sup>

J. CLARENCE CONOVER, *P. J*

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[COPY.]

Aug. 25th, 1894.

MESSRS. HEISLEY & MORRIS:

Gentlemen:—We have seen Palmateer in reference to the Beggs' matter, and stated to them the offer made to us that they do not care to accept the offer, and that they will retain possession of the engine and boiler as part of their property until their right to same is determined by law. <sup>20</sup>

Yours truly,

HAWKINS & DURAND.

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[COPY.]

ASBURY PARK, N. J., Nov. 1st, 1894. <sup>30</sup>

MESSRS. HEISLEY & MORRIS:

Gentlemen:—In the Beggs-Palmateer case, Messrs. Palmateer Bros. have requested us to say that they will pay your clients \$1,500.00 for the engine, boiler, and other things, and that if they do not accept it, that they, your clients, can remove them from the premises.

Yours truly,

(Sgs.) HAWKINS & DURAND. <sup>40</sup>

[COPY.]

MESSRS. HEISLY &amp; MORRIS :

Gentlemen:—In the Beggs-Palmateer case, Messrs. Palmateer Bros. have requested us to say they will pay your clients \$1,500.00 for the engine, boiler, and other things, and that if they do not accept it, that they, your clients, can remove them from the premises.

Yours truly,  
HAWKINS & DURAND.

10

Nov. 1st, 1894.

---

To JOHN PALMATEER :

We hereby demand of you the following goods and chattels, which are our property, to wit :

One horizontal tubular boiler, sixty inch diameter containing eighty-two tubes with all the fixtures and appurtenances thereunto belonging.

20 Two lugs on each side of the boiler, cast iron work, etc., connected therewith; back stays; safety valves; gauge cocks; injectors, etc., attached to, and used in connection with said boiler.

One  $5\frac{1}{4}$  by  $3\frac{1}{2}$  duplex steam pump.

One number 8 standard feed water heater.

One number 7 left hand stationary engine, having cylinder 18-inch diameter by 22-inch length of stroke.

30 Throttle valves; lubricator; oil cups, etc., connected therewith. Also all connections and belting of the said engine, boiler, etc., and unless you deliver the same to us forthwith, we shall commence legal proceedings of the same or the value thereof.

Dated October 3d, 1894.

(Signed) JAMES BEGGS & CO.

By HEISLEY & MORRIS,  
*Attorneys.*

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To AMOS PALMATEER :

40 We hereby demand of you the following goods

and chattels, which are our property, to wit :

One horizontal tubular boiler, sixty-inch diameter containing eighty-two tubes with all the fixtures and appurtenances thereunto belonging.

Two lugs on each side of the boiler, cast iron work, etc., connected therewith; back stays; safety valves; gauge cocks; injectors, etc., attached to, and used in connection with said boiler.

One  $5\frac{1}{4}$  by  $3\frac{1}{2}$  duplex steam pump.

One number 8 standard feed water heater. 10

One number 7 left hand stationary engine, having cylinder 18-inch diameter by 22-inch length of stroke.

Throttle valves; lubricator; oil cups, etc., connected therewith. Also all connections and belting of the said engine, boiler, etc., and unless you deliver the same to us forthwith, we shall commence legal proceedings of the same or the value thereof.

Dated October 3d, 1894.

(Signed) JAMES BEGGS & CO.

By HEISLEY & MORRIS, 20  
*Attorneys.*

30

40

# New Jersey Supreme Court.

GEORGE N. ROBINSON  
trading as  
JAMES BEGGS & CO.  
ads  
10 JOHN PALMATEER  
and  
AMOS PALMATEER.

In Error.  
On Dismissal and  
Affirmance.  
HEISLEY & MORRIS,  
*Attorneys.*

As yet of the term of June A. D. eighteen hundred  
and ninety-five.

Witness

MERCER BEASLEY, Esquire, *Chief Justice.*

BENJAMIN F. LEE, *Clerk.*

20 NEW JERSEY } s.s.

*The State of New Jersey send to the Judge of  
our Inferior Court of Common Pleas in and for the  
County of Monmouth its writ in these words to wit :*

NEW JERSEY } ss.

⌘  
⌘  
L.S.  
⌘  
⌘

*The State of New Jersey to our  
Judges of our Inferior Court of  
Common Pleas, in and for the  
County of Monmouth. Greeting:*

30 For as much as in the record and proceedings  
and also in the giving of judgment in a certain plaint,  
which was in our said Court of Common pleas before  
you, between George N. Robinson trading as James  
Beggs and Company, plaintiff; and John Palmateer  
and Amos Palmateer, defendants, in an action of tort,  
manifest error hath intervened to the great damage  
of the said John Palmateer and Amos Palmateer, as by  
their plaint we are informed, we being willing that  
the error, if any there be, should in due manner be  
40 corrected and full and speedy justice done to the par

ties aforesaid, in this behalf, do command you that if judgment be thereupon given then you send to our Justices of our Supreme Court of Judicature at Trenton, on the Twentieth day of August, eighteen hundred and ninety-five, distinctly and openly, under your seal the record and proceedings of the plaint aforesaid, with all things touching and concerning the same, together with this writ, that the record and proceedings, aforesaid, being inspected we may further cause to be done thereupon for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done. <sup>10</sup>

WITNESS, MERCER BEASLEY, Esquire,  
Chief Justice of said Supreme Court, at Trenton, the  
First day of August, in the year eighteen hundred and  
ninety-five.

HAWKINS & DURAND, Attorneys,  
BENJAMIN F. LEE, Clerk.

[Endorsed]

*To the Justices of the Supreme Court of Judicature of  
the State of New Jersey, at Trenton.* <sup>20</sup>

The record and proceedings of the plaint aforesaid with all things touching and concerning the same we send in a schedule hereto annexed as within we are commanded.

* { L.S. } * * { } *	J. CLARENCE CONOVER, P. J. (L.S.)	(L.S.)
	CHARLES MORRIS,	(L.S.)
	A. A. HIGGINS.	(L.S.)

30

GEORGE N. ROBINSON,  
(trading as James Beggs & Co.)

vs.

JOHN PALMATEER  
AND AMOS PALMATEER,  
*Defendants.*

IN TORT ON VERDICT

Pleas before the Court of Common Pleas, hol- <sup>40</sup>

den at Freehold on the 9th day of January, A. D., eighteen hundred and ninety-five, as yet of the term of January 1895.

Inferior Court of Common Pleas of Monmouth County of the twenty-second day of October in the year of our Lord, eighteen hundred and ninety-four.

MONMOUTH COUNTY, } ss. Amos Palmateer and John Palmateer the defendants in this suit were summoned to answer unto George N. Robinson, trading as James Beggs & Co., in an action of tort, and thereupon the said George N. Robinson trading as aforesaid, by Heisley & Morris, his attorneys, complain for that whereas said plaintiff heretofore to wit, on the fifth day of October, eighteen hundred and ninety-four, at Long Branch, to wit, at Freehold aforesaid, was lawfully possessed as of his own property of a certain boiler, machinery and goods and chattels to wit :

One (1) Horizontal Tubular Steam Boiler, 60 in. diameter, containing eighty-two (82) tubes each 2 in. diameter by 16 ft. long. Shell of boiler 11-32 in. thick, and heads of boiler 7-16 in. thick, of homogeneous open-hearth flange steel plate. Manhole in top of boiler, handhole in each head of boiler below the tubes. Two lugs on each side of boiler. Cast-iron neck on top of boiler for 4 in. pipe. Nuts for feed and surface blow-off, and inside pipes for same. Boiler also fitted with low water detector and alarm. Boiler right-hand (if set in a battery) with flush front and anchors, oval flue plate fitted with damper, Fig. D smoke connection, for one boiler only—but large enough in diameter to accommodate two of the same size, and extend 3 ft. beyond side wall to the right, said wall not to be more than 24 in. thick; ash door and frame, plates and rollers, McClave patent grate bars 60 in. wide by 66 in. deep, McClave Argand steam blower, buckstays and tie rods, rear "L" bar, safety valve, gauge cocks, steam and water gauges, blow-off cock and valve, check and stop valves, 6 in. whistle, and in

jector. Also,

One (1)  $5\frac{1}{4}$  in. by  $3\frac{1}{2}$  in. by 5 in. duplex steam pump. Also,

One (1) No. 6 standard feed-water heater. Also,

One (1) No. 7 left-hand stationary engine, having cylinder 18 in. diameter by 22 in. length of stroke; speeded to run about 90 revolutions per minute; with balanced band wheel 96 in. diameter by 24 in. face, automatic-stop Gardner governor, throttle valve, lubricator, oil cups, and cylinder drip<sup>10</sup> valves:

Main driving belt, connecting engine with main shaft. One governor belt. Packing for engine. Packing for pump. Belt lacing. Exhaust pipe for heater to atmosphere, with connection to main building, with back pressure valve. Main steam pipe from engine to boiler, including stop valve, pipe and valve for whistle. Outlet left in main steam pipe for another boiler. Feed pipe from heater to boiler, also from injector to boiler. Steam pipe from pump to injector.<sup>20</sup> Exhaust pipe from pump. Surface blow-off pipe with valve. Bottom blow-off pipe with plug cock. Suction for injector. Suction pipe from well to pump, with foot valve and stop valve. Suction and delivery pipe from pump to tank, with valve and strainer. Feed pipe from pump to heater. Surface and bottom blow-off pipes from heater.

And being so possessed the said plaintiff afterwards, to wit, on the day and year above mentioned, at Long Branch to wit, at Freehold, aforesaid,<sup>30</sup> casually lost said boiler, machinery, goods and chattels out of his possession and the same afterwards to wit, on the day and year last aforesaid, at Long Branch to wit, at Freehold aforesaid came to the possession of the said defendants by finding. Yet the said defendants well knowing the said boiler, machinery, goods and chattels to be the property of said plaintiff, and of the right to belong and appertain to him, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in<sup>40</sup>

this behalf, hath not as yet delivered the said boiler, machinery goods and chattels or any or either of them or any part thereof, to the said plaintiff although often requested so to do, and have refused so to do.

Afterwards to wit, on the day and year last aforesaid at Long Branch to wit, at Freehold aforesaid, converted and disposed of the said boiler, machinery, goods and chattels to their own use to the damage of the said plaintiff, seven thousand dollars, and  
 10 therefore he brings his suit, &c.

HEISLEY & MORRIS, Atty's for Pl'tf.

And the said defendants, by Hawkins & Durand their Attorneys come and defend the wrong and injury when etc., and say that they are not guilty of the said supposed grievances above laid to their charge or any or either of them or any part thereof, in manner and form as the said plaintiff has above thereof complained against them, the said defendants, and of this they put themselves upon the country, etc.

20 Therefore let there come a jury thereof before the said Court at Freehold aforesaid, on the first Tuesday of January, A. D. eighteen hundred and ninety-five by whom etc., and who neither etc., to recognize etc., because as well etc., the same day is given to the parties aforesaid at the same time and place at which day before the Court aforesaid, at Freehold aforesaid come the parties aforesaid and the jurors of that jury whereof mention is within made who being duly summoned also come, who to speak the truth of the mat-  
 30 ters within contained be chosen tried and sworn say upon their oaths that the said defendants Amos Palmateer and John Palmateer are guilty of the trespasses above laid to their charge in manner and form as the said plaintiff hath above thereof complained against them and they assess the damages of the said plaintiff by reason of the trespasses and injury to him committed to two thousand three hundred and eighty-six dollars and eighty cents over and above his costs and charges by him about his suit in this behalf expended.

40 Therefore it is considered that the said George N.

Robinson trading as James Beggs & Co. do recover against the said defendants Amos Palmateer and John Palmateer his said damages to two thousand three hundred and eighty-six dollars and eighty cents and also the sum of fifty dollars and thirty-three cents by the Court now here adjudged to the said plaintiff for his costs and charges by him about his suit in this behalf expended which damages costs and charges in the whole amount to two thousand four hundred and thirty-seven dollars and thirteen cents. And the de-<sup>10</sup> fendants in mercy, etc.

Judgment signed this ninth day of January, A. D. eighteen hundred and ninety-five.

J. CLARENCE CONOVER, *P. J.*

And now at this day, the plaintiffs in error assign the following causes of error :

*First*:—Because the court held that the property, described in the agreement dated October 4th, 1893, and the property described in the supplemental agreement, dated December 5th, 1893, were the properties<sup>20</sup> of James Beggs & Company, notwithstanding it had been annexed to the freehold of Palmateer Bros., the defendants.

*Second*:—Because the court held that the annexing of the property described in said agreements, or any portion thereof, did not destroy its personal character, and that it still remained the property of the vendor.

*Third*:—Because the court held that the property, described in said agreements, did not become a fix-<sup>30</sup> ture, and constituted a part of the realty.

*Fourth*:—Because the court held that said agreements preserved the personal character of the property described therein, and entitled the vendors to follow it, and seize it upon default in payment, even if annexed to the realty.

*Fifth*:—Because the said Court decided, as a matter of law, that the property described in said agreements, did not become annexed to the freehold, and constituted a part of the realty.

*Sixth*.—Because the said court decided that the property in question belonged to the plaintiffs.

And hereupon afterwards to wit, on the Tuesday of \_\_\_\_\_, A. D. eighteen hundred and ninety-\_\_\_\_\_, the said George N. Robinson trading as James Beggs & Co. by Heisley & Morris, his attorneys, comes into Court and says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here,  
 10 that the Court here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid in the matter aforesaid given, may in all things be affirmed, etc.

But because our said Supreme Court now here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, to wit, until the sixth day of November, A. D. eighteen hundred and ninety-six to hear  
 20 the judgment of the said Court thereupon. At which day before the said Court at Trenton come the parties aforesaid by their attorneys aforesaid, whereupon all and singular the premises being seen and by the Court now here fully understood, and as well the record and proceedings aforesaid and the judgment in form aforesaid given as the matters aforesaid by the said John Palmateer and Amos Palmateer above for error assigned being diligently examined and inspected and mature deliberation being thereupon had, it appears to  
 30 our said Court now here that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and that said writ of error should be dismissed.

Therefore it is considered that the judgment aforesaid in form aforesaid given be in all things affirmed and stand in full force and effect, the said causes and matters above for error assigned in any wise notwithstanding. And it is further considered that the said George N. Robinson trading as James  
 40 Beggs & Co. do recover against the said John Palma

teer and Amos Palmateer as well his damages aforesaid as also forty-two dollars and four cents for his double costs and charges which he hath sustained and expended by reason of the delay of execution of the judgment aforesaid on pretense of prosecuting the said writ of error; by our said Supreme Court now here adjudged to the said George N. Robinson trading as James Beggs & Co. and with his assent according to the form of the statute in such case made and provided and that the said George N. Robinson trading as James Beggs & Company have execution thereof. <sup>10</sup>

Judgment signed this fifth day of November, A. D. eighteen hundred and ninety-six.

M. BEASLEY, *C. J.*

I, BENJAMIN F. LEE, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office. <sup>20</sup>



In testimony whereof I have hereto set my hand and the seal of said Court at Trenton this sixteenth day of April, A. D. eighteen hundred and ninety-seven.

BENJ. F. LEE, *Clerk.*

PALMATEER, ET AL. }  
 vs. }  
 ROBINSON. }

*Before Beasley, C. J.; Lippincott  
 and Garrison, J. J.*

10 BEASLEY, C. J.

Conditional sale of engine, &c. It was attached to real estate and the question is did it thereby become a fixture, &c.

This case seems to have resulted legally the verdict being in favor of the vendor of the chattels.

The vendee held the equitable title to the lands in question, and it seems to be incontrovertible that when the chattels were annexed to the realty that  
 20 neither the vendor of the chattels or the vendee had any intention of converting them into realty.

There is no reason to believe that the vendor had the least intention of passing the title until the chattels had been paid for, nor that the vendee meant to assume title in himself. The mere annexation would not per se convert the chattels into fixtures contrary to the intention of parties, when no person has been deceived by their conduct.

30 What the effect would have been with respect to a stranger who without knowledge of the condition of the annexation would be is not the question before this court. The owner of the legal title to the land has lost nothing which he had a right to look for, and the purchaser took title at the receiver's sale with the knowledge that the receiver did not intend to sell the chattels in question.

Judgment should be affirmed.

A true copy,

BENJ. F. LEE, *Clerk*

# New Jersey Court of Errors and Appeals.

JOHN PALMATEER and  
AMOS PALMATEER,  
*Plaintiffs in Error.*

vs.

GEORGE N. ROBINSON,  
Trading as Beggs & Co.  
*Defendant in Error.*

ASSIGNMENTS  
OF ERRORS.

And now, at this day, the plaintiffs in error as-<sup>10</sup>  
sign the following causes of error :

*First*:—Because the court held that the property, described in the agreement dated October 4th, 1893, and the property described in the supplemental agreement, dated December 5th, 1893, were the properties of James Beggs & Company, notwithstanding it had been annexed to the freehold of Palmateer Bros.

*Second* :—Because the court held that the annexing of the property described in said agreements, or any portion thereof, did not destroy its personal char-<sup>20</sup>  
acter, and that it still remained the property of the vendor.s

*Third* :—Because the court held that the property, described in said agreements, did not become a fixture, and constituted a part of the realty.

*Fourth* :—Because the court held that said agreements preserved the personal character of the property described therein, and entitled the vendors to follow it, and seize it upon default in payment, even if annexed to the realty. <sup>30</sup>

*Fifth* :—Because the said Court decided, as a matter of law, that the property described in said agreement, did not become annexed to the freehold, and constituted a part of the realty.

*Sixth* :—Because the said court decided that the property in question belonged to Beggs & Company, and not to Palmateer Bros.

Dated March 27, 1897.

HAWKINS & DURAND,  
*Attorney's of Plaintiff's in Error.* <sup>40</sup>

# New Jersey Court of Errors and Appeals.

GEORGE N. ROBINSON  
trading as  
JAMES E. BEGGS & CO.  
*Defendant in Error.*

ads.

10 JOHN PALMATEER  
and  
AMOS PALMATEER,  
*Plaintiffs in Error.*

IN ERROR.  
JOINDER.

AND hereupon afterwards, to wit, on the first  
Tuesday of March, A. D. eighteen hundred and  
ninety-seven, the said George N. Robinson, trading  
as James Beggs & Co. by Heisley & Morris, his at-  
torneys, comes into Court and says, that there is no  
error either in the record and proceedings aforesaid, or  
20 in giving the judgment aforesaid, and he prays here,  
that the Court here, may proceed to examine as well  
the record and proceedings aforesaid, as the matters  
aforesaid assigned for error, and that the judgment  
aforesaid in the matter aforesaid given, may in all  
things be affirmed, etc.

HEISLEY & MORRIS,  
*Attorneys Plaintiffs in Error.*

WILBUR A. HEISLEY,  
*Of Counsel with Defendant.*

30

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# New Jersey Court of Errors and Appeals.

JOHN PALMATEER  
and  
AMOS PALMATEER,  
*Plaintiffs in Error.*  
ads.  
GEORGE N. ROBINSON  
trading as  
BEGGS & COMPANY,  
*Defendant in Error.*

IN ERROR.

10

BRIEF OF HAWKINS & DURAND,  
*Counsel for Plaintiffs in Error.*

This is an action of trover, brought in the Mon-20  
mouth Common Pleas Court, by Beggs & Co. vs.  
Palmateers for the value of a steam engine and boiler  
with the attachments.

Beggs & Co. claim the property by virtue of two  
agreements with the New Jersey Mill & Lumber Co.  
(see printed case pages 89-97) which contain clauses  
of conditional sale, and that the title to the property  
was to remain in the said Beggs & Co. until paid for.

The property was sold by Beggs & Co. in New  
York, and shipped to New Jersey with knowledge of 30  
the manner in which it was to be used and how and  
where it was to be erected, and it was taken to the  
premises then occupied by said New Jersey Mill &  
Lumber Co. at Long Branch and erected on said prem-  
ises under the supervision of Beggs and Co's agent.

Said engine and boiler were erected upon said  
premises in the open air and after their completion a  
brick building was erected around them. The build-  
ing as the evidence shows was built specially for the  
engine, boiler and attachments and would be of little 40

or no value without them. The engine and boiler were erected in the most substantial manner, bolted on solid brick masonry set many feet in the ground. The evidence shows that it would be impossible to remove the engine and boiler without doing material injury to the building in which they were enclosed. Conneen, President of the New Jersey Mill & Lumber Co., who erected them, stated that he intended that the engine and boiler should remain there permanently and that their foundations were constructed accordingly.

At the time of purchase of said engine and boiler and their annexation to said premises said New Jersey Mill & Lumber Co. was in possession of the premises under an agreement of purchase from the Palmateers (see printed case pages 85-88) and this agreement to purchase continued in operation for about a year thereafter when because of the failure of said New Jersey Mill & Lumber Co. to carry out the terms of purchase the said Palmateers brought an action of ejectment and resumed possession of said premises and the building containing the said engine and boiler and attachments.

After such resumption of possession by the Palmateers said Beggs & Co. brought this suit.

It is contended by Beggs & Co. that the engine and boiler sued for having been sold under a conditional bill of sale and the condition not having been performed that the title to the engine and boiler still remains in Beggs & Co. the vendors.

We insist for the Palmateers, the plaintiffs in error, that this property by the manner and circumstances of its erection and annexation to the freehold lost its character as personalty and became a part of the realty and that this transformation, so to speak, took place so completely that the said agreements between the said Beggs & Co. as vendors and the New Jersey Mill & Lumber Co. as purchaser that the property should remain personal cannot avail as against them; that while as between the said vendor and pur.

chaser the agreements would be binding, that a different rule prevails when the rights and interest of third parties as those of the Plaintiffs in *Er* or in this suit become involved.

We shall assume for the purpose of this argument that the evidence establishes that the property in dispute is so attached to the building as to make it a fixture and a part of the realty.

What constitutes a fixture has been so frequently determined in this State that it is unnecessary to advert to the authorities.<sup>10</sup>

The principles of law relating thereto are clear and pronounced. The difficulties which have arisen have been in application of those principles to the particular facts of each particular case. Sometimes an engine has been declared personal property, at other times a fixture. In those instances, however, in which it has been declared personal property the facts have almost always shown it to be portable and capable of being moved from place to place, or that it was evident from all the facts that it was not intended originally to be annexed to and form a part of the realty.<sup>20</sup>

If this property in dispute is ordinarily a fixture in law, as we contend it is, then the question arises, do the agreements between Beggs & Co. and the New Jersey Mill & Lumber Co. still preserve the original character of the property as against us and to the material injury of our property?

The case of *Fryatt & Campbell vs. The Sullivan Co.*, reported in *5 Hill, p. 116*, is a case exactly in point. The plaintiffs in that case sued the defendants in trover for a steam engine and two boilers.<sup>30</sup>

The New York Mining Company formerly owned certain real estate in the county of Sullivan, upon which they had buildings and works for the smelting of lead ore. They purchased the engine and boilers in question of William Jones, in the city of New York, for \$1,803.50, and Jones gave a bill of sale to the plaintiffs in which he stated that the plaintiffs had<sup>40</sup>

given him their note at thirty days for \$603.50, and the Company had given their note for \$1,200.00, which notes, when paid, would be in full for the property. On the same day the Company executed a writing stating that they had hired and taken from the plaintiffs the engine and boilers for one month, to commence that day, for the sum of \$20.00, payable at the expiration of the month. The Company promised to make punctual payment, and to quit and surrender<sup>10</sup> up the property at the expiration of said term in as good state and condition as reasonable use and wear thereof would permit. The Company immediately took the engine and boilers to their works in Sullivan county, and affixed the same permanently to the freehold, so that they could not be removed without injury to the building in which they were placed; and in that condition the engine and boilers have remained ever since.

The plaintiffs knew what use the Company made<sup>20</sup> of the engine and boilers.

In August, 1839, the Company mortgaged their lands, with all the buildings, fixtures and machinery, to one Henry Cotheal, to secure the payment of \$20,000.00. The Cotheals had no notice of the claim of plaintiffs upon the engine and boilers. The mortgage was foreclosed and the property was purchased by A. J. Cotheal. In January, 1842, the plaintiffs demanded the engine and boilers, and the defendants refused to deliver them. The court below non-suited the plaintiffs, and they now bring error on a bill of exceptions.<sup>30</sup>

Judge Bronson, in rendering the opinion of the court, said: "The non-suit was clearly right. A man cannot maintain an action against me by proving that the person from whom I purchased my house wrongfully took or converted the brick, stone, timber, lime or other materials, of which my house was constructed. Nor can he enter and tear down my house for the purpose of regaining that portion of it which once belonged to him. His only remedy is against the wrong<sup>40</sup> doer. Now, here, the New York Mining Company

affixed the engine and boilers so firmly to the earth and building, that they clearly became a part of the freehold. After having thus converted the property into real estate the Company mortgaged the lands, with all the appurtenances, to the Cotheals, who had no notice of the plaintiff's claim; and the defendants have since purchased from A. J. Cotheal, to whom the property was sold, on the foreclosure of the mortgage. They clearly cannot enter upon the Cotheals, or those claiming under them, nor can any action be maintained<sup>10</sup> against them. The remedy of the plaintiffs is against those who wrongfully converted this personal property into real property and then sold it.

This same case was afterward carried to the Court of Errors in the State of New York, and the judgment affirmed in 7 *Hill*, p. 530.

The case of *Voorhees, et al., vs. McGinnis, et al.*, 48 *N. Y.*, 278, is another case exactly in point. That was an action brought to recover the possession of a steam engine and boilers, gearing, etc., alleged to<sup>20</sup> have been wrongfully severed from the freehold, and removed by the defendants from certain buildings in the town of Coeymans, called the "Kimney Mills." The plaintiff, Callanan, claimed to be the general owner, deriving title through the foreclosure of two mortgages, both executed by Phillip Kimney, covering the premises upon which said mills were situated. Kimney had erected on the premises a grist mill and a saw mill, situate upon the opposite sides of a small stream, and propelled by water therefrom; desiring<sup>30</sup> to enlarge his business, and wanting more power, he concluded to erect a building for a steam engine and the requisite machinery, shafting, gearing, etc. He borrowed \$6,000.00 for the purpose of J. J. Callanan, and to secure the same, executed his bond and mortgage upon the premises, dated April 5, 1850. A strong and durable building was erected, well adapted for the purpose, with a stack of chimneys built into the wall into which the flue of the boilers was fastened; said boilers and engine and shafting and gearing and<sup>40</sup>

other machinery were placed in and attached to the building. In the winter of 1860 the old boilers, having become worn out, Kimmey made an arrangement with the defendant, McGinnis, to make new boilers, taking the old ones in part payment. In April, 1861, while the new boilers were being built, and were in the shop of McGinnis, in Albany, where were also portions of the engine being repaired, Kimmey executed to the defendant, Westcott, a chattel mortgage<sup>10</sup> upon the boilers and engine to secure \$2,000.00. The new boilers were then put in the building. In 1861 Kimmey executed another real estate mortgage, covering the mill premises, to the plaintiff, and in October, 1861, he executed a chattel mortgage to McGinnis to secure a balance of his account, covering the property mentioned in Westcott's mortgage, and also the shafting and gearing, etc.

Justice Hunt, in rendering the opinion of the court, said: "In relation to the engine and boilers,<sup>20</sup> shafting and gearing, it would seem to be clear that they are actually and permanently annexed to the freehold; adapted to use in that position, and intended to be a permanent accession to the freehold. Kimmey, who was the owner, and who erected them, had no intention of removing them. That he had no special intent to make them a part of the freehold is in harmony with general experience. A man who builds a mill or house for his own use and occupation, with everything useful and convenient for the purpose, seldom has any special intent that the creation shall be a<sup>30</sup> part of the freehold, or that the auxiliaries shall constitute a part of the freehold. He builds as he wishes, having no selection as to the legal character of the structure, thinking nothing, and generally knowing nothing, and therefore having no special intent on the subject. I am of the opinion," he says, "that upon general principles the boilers and engine, shafting and gearing, become a part of the realty, and passed to the plaintiffs upon his purchase. It is said that the execution by Kimmey of a chattel mortgage upon the<sup>40</sup>

boilers and engine, before they were placed in the mill, would be sufficient to preserve their personal character. Although unknown to the plaintiff this fact existed in the case. It comes to this: A man employs a carpenter and mason to build a brick house for him upon his lot, and pays them in full the price agreed upon. The mason puts his brick in the wall; the carpenter placed his joists and timbers in the proper places in the house. The house is finished and occupied by the owner. It then appears that the maker of the brick <sup>10</sup> held a chattel mortgage upon them, executed by the mason, and that the sawyer of the timber held a chattel mortgage upon it, executed by the carpenter. Are these articles now a part of the house, still held upon the chattel mortgages, so that the creditors can despoil the house to obtain their possessions, or compel the owner to pay their value? I take it they are not. Their character as personal property is changed. They have become a part of the house; they are real estate; will pass under a deed of the land; may be <sup>20</sup> subject to mortgage of the land, or may be held by the owner of the house. The remedy of the party is against those who wrongfully converted the personal property into real property."

The same principle is laid down in the case of *Southbridge Savings Banks vs. Exeter Machine Works*, in 127 Mass., page 542.

The defendant in July, 1877, delivered to one Stevens, to be used on trial at his machine shop, an Exeter or sectional boiler, which by agreement be- <sup>30</sup> tween them, was to remain the personal property of the defendant until paid for. On August 6, 1877, Stevens made a mortgage to the plaintiff of the machine shop and land, including in express terms the boiler, and for failure to comply with the conditions of the mortgage the plaintiff foreclosed the same, and claimed to hold the boiler by virtue of the mortgage and foreclosure.

Justice Morton, in rendering the opinion of the court, said: "The rights of the parties in this case <sup>40</sup>

are determined by the rules as to fixtures, which apply in cases between the mortgagor and the mortgagee. The boiler, which the plaintiff contends was annexed to and became a part of the realty, was placed in the building, which was used as a machine shop by Stevens, the mortgagor, for the purpose of furnishing motive power for the machinery. It was firmly attached to the land; was in connection with the steam engine, shafting and machinery; adapted to

<sup>10</sup> said machine shop and business, and was essential to the enjoyment and use of the building for the purpose for which it was intended. It, therefore, became a part of the realty, and passed to the plaintiff by its mortgage. The fact that the sections of the boiler could be removed without disturbing the brick work, by which it was supported and incased, is immaterial. The boiler, as a whole, had become a part of the realty. As stated in *McConnell vs. Blood* whatever is placed in a building by the mortgagor to carry

<sup>20</sup> out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes a part of the realty, although not so fastened that it cannot be removed without serious injury to itself or to the building. The defendant contends that the boiler did not become a fixture because it was delivered to Stevens to be used on trial, with the agreement that it should remain the personal property of the defendant until it was paid for. Such an agreement would prevent Stevens from claiming it as

<sup>30</sup> a part of the realty. But where, as in this case, personal property is sold for the purpose of being annexed to the realty, and it is so annexed, an agreement between the seller and the buyer that it shall not become a part of the realty, but shall remain personal to the seller, will not bind or effect a vendee or mortgagee without notice. Notwithstanding such agreement, property will pass to such vendee or mortgagee as a part of the realty."

In the case of *Richardson vs. Copeland*, 6 Gray, <sup>40</sup>page 536, the court said: "A steam engine set upon

a granite block, and fastened down by a bolt, and a boiler set in bricks in such a manner that it cannot be removed without taking down the bricks, both of which were purchased and set up by the owner of the freehold, and were used for running the machinery in an adjoining shop, became a part of the realty; and a mortgage thereof to the manufacturer, as personal property, executed contemporaneously with a bill of sale from him, passes no title in them as against a subsequent purchaser of the realty, although with<sup>10</sup> notice of the mortgage."

In the case of *Pierce vs. George*, 108 Mass., page 78, the court said: "The question between these parties is governed by the rules which apply to the case of mortgagor and mortgagee; the defendant claiming the contested property by virtue of a mortgage of the real estate, and the plaintiff under an earlier conveyance from the mortgagor, in which the machinery is described as personal property."

The syllabus of the case is as follows: "A mort-<sup>20</sup>gage on machinery in a building was given in contemplation of the machinery being annexed to the realty; and after it was annexed a mortgage was given on the land and building. Held that the second mortgagee could hold the machinery against the first mortgagee."

The case of *Hunt vs. The Bay State Iron Company*, 97 Mass., p. 282, seems to be a leading case on this subject in Massachusetts. That was a case in which rails for a railroad were delivered under an<sup>30</sup> agreement that they should be laid down on a specific part of the railroad, and continue the property of the vendors until a specific price was paid for them.

The court said: "There can be no doubt that the rails, when laid upon the road bed and fastened there, so that engines and cars could pass over them, would have become annexed to the realty, and ceased to be personal property in the absence of any agreement changing the ordinary rule of law. The legal character of the rails, when once laid down, is deter-<sup>40</sup>

mined by the law to be that of real estate. Mortgagees, as well as all other parties interested, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver. Land owners having a lien upon the location for their damages, and a right to take possession for default of payment, stand in the same position as long as their right remains to enforce payment by entering upon the land."

<sup>10</sup> He says upon the question whether the character of property can be changed by agreement from realty to personalty, as against a bona-fide purchaser, without notice: "There is no entire harmony of the authorities, but we regard the better opinion as being that such purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and to hold everything which appears to be, and by its ordinary nature is, a part of the realty."

In the case of *Thompson vs. Vinton*, 121 Mass., <sup>20</sup>*p.* 142, the court said: "When the new wheel, shaft and headgear were put into the mill, although they were to be paid for by F. E. Vinton and Purdy, who were then co-partners, they must be considered as annexed by the mortgagor, Purdy. He was in actual occupation of the premises, and the only title which Vinton had therein was by virtue of his co-partnership with him. This annexation was of such a character as to make these articles, as between mortgagor and mortgagee, a part of the freehold. It was not in <sup>30</sup>the power of the mortgagor by an agreement made at that time, or subsequently, when he leased the property to Vinton, to bind the mortgagee to treat them as personalty."

In the case of *Ridgeway Stove Co. vs. Way*, 141, Mass., *p.* 560, the court said: "It is quite clear that the Superior Court was justified in finding that the property claimed in the plaintiff's writ was annexed to and became part of the realty, and passed to the defendant by his deed. The property claimed consisted of two portable furnaces, with the pipes and <sup>40</sup>

registers attached to them. They were put in as a part of the houses, were essential to the enjoyment and use of them as dwelling houses, and were intended by the owner to be a part of the realty as soon as they were paid for. The fact that there was an agreement between the owner and the plaintiff that the furnaces should remain the property of the plaintiff until they were paid for, and that both so intended, is immaterial, unless the defendant had notice of such agreement and intentions. Notwith-<sup>10</sup> standing such an agreement, the property annexed to the realty will pass to an innocent purchaser without notice."

In the case of *Powers vs. Denison*, 30 Vermont, p. 752, the court said: "If one erects a building for his own use upon the land of another, by virtue of a parole license from the owner, with the understanding that the licensee is to remove it upon notice from the owner of the land, and the building is thereupon annexed to the freehold so as to be a fixture, a subsequent<sup>20</sup> mortgagee, without notice of such license, will, upon the expiration of a decree of foreclosure of his mortgage, be entitled to the building as well as the land, and may maintain trespass against the person erecting the building if he remove it. And if one purchase the title of such a mortgagee he will hold all the title to the building which the mortgagee had, and will not be affected by his own knowledge that the building was erected under such a license granted by the owner of the land."<sup>30</sup>

In the case of *Pierce vs. Emory*, 33 N H., page 521, the court said: "This is a case in which a railroad bought a lot of rails on a conditional sale, the condition being that the rails were to remain the property of the vendor until paid for. The bargain that the road might take the iron and lay it in the track, and the complainants have a right to take it up and remove it if the money advanced for the duties was not paid within the time limited, would create no lien on the iron as against third persons, who had not 40

received notice, and did not assent thereto, although it would be binding between the parties themselves.’

In the case of *Dobschultz vs. Holliday*, 87 Ill., p. 371, it was held that a steam engine, machinery and fixtures, attached to the soil by the lessee for the purpose of hoisting coal, became a part of the freehold. In that case it was contended that the engine was personal property, and that hence a Mechanic's Lien could not be enforced against it. The court said:

10 “ Whatever may have been the private agreement of the parties, it is clear that the engine, when set up and attached to the realty, as it was in this case, became a part of the realty. No doubt the parties could agree among themselves that they would treat the engine and other fixtures as personalty, but their private agreement could not change the character of the property, so far as third parties are concerned. So here, the court continues, “ when the machinery was placed in the factory and became attached, the private agree-

20 ment made between Day and the appellants, to the effect that the machinery should remain the property of the vendor until paid for, could not change the character of the property so far as the right of third parties are concerned.”

The same principle is laid down in 93 Ill., p. 153, and in 75 Ill., p. 365. Justice Craig, in rendering the opinion of the court in the case of *Fifield vs. The Farmers' National Bank*, 148 Ill., p. 171, after laying down the law in the language we have quoted above,

30 said: “ The same doctrine is laid down in Massachusetts in the case of *Pierce vs. George*, reported in 108 Mass., p. 78; in the State of Maine in the case of *Parsons vs. Copeland*, vol. 38, p. 537; in the State of Iowa in the case of *Ottuma Woollen Mills vs. Howey*, vol. 44, p. 57; in the State of Michigan in the case of *Tolgi vs. Palmer*, vol. 42, p. 314; in the State of Wisconsin in the case of *Taylor vs. Collins*, vol. 51, p. 123; in the State of Maryland in the case of *Dudley vs. Hunt*, vol. 67, p. 44.”

40 In the case of *Tylee vs. Palmer*, 42 Mich., p. 314,

the court said: "Machinery specially adapted for use in connection with the realty, and put up for use, and actually used on it, is a part of the realty, without regard to how the parties may regard it, as against the rights of third parties."

In the case of *Hamilton vs. Hunnly*, 78 Ind., page 521, "A was in possession but was not the owner of a flouring mill, and was permitted by the manufacturers of machinery to put into and annex to it, in such temporary manner as to admit of removal without injury to the mill, certain machinery, which, if found satisfactory, after sixty days' trial, was to become his property, upon giving his notes for the price and notice of his acceptance of the machinery. The mill and real estate were, at the time, subject to two mortgages. A refused to accept the machinery, or to give his note, as he had agreed, and when he quit the possession of the machinery it remained in the mill." The court held that, as between the manufacturers of the machinery and the mortgagee, the machinery was a part of the realty, and was subject to the mortgage, and could not be taken out or sued for by the manufacturers.

In the case of *Rowland vs. Anderson*, 33 Kan., page 264, the court said: "A fence built by one person upon the land of another, under a license or agreement that it might be removed at the will of the builder, becomes a fixture which will pass with grant of the land to a bona-fide purchaser without notice of the adverse title to such conveyance. The legal effect of attaching an improvement of a permanent character to land may be controlled by the agreement of the parties, as between themselves and those who have knowledge of such an agreement, but such an agreement cannot be held as binding upon a subsequent vendee who had not notice of the agreement under which the fence was constructed."

See also Case in Vol. 35, *Northwestern Reporter*, 802.

The Supreme Court in considering this case 40

manifestly proceeded to a conclusion on the theory that the premises were purchased by the Palmateers at the sale held by the Receiver of the New Jersey Mill & Lumber Co. and with the knowledge that the Receiver did not intend to sell the chattels in question and that the Palmateers were not therefore injured or deceived by the agreement that said engine and boiler and attachments should remain the property of the vendors. This was not the question before

10 the court. The facts in the case are that the Palmateers had not parted with their title but came into possession of the premises because of the failure of the New Jersey Mill & Lumber Co. to carry out their agreement to purchase in not paying them the purchase price for said premises. This misconception of the facts in the case is very apparent from the language of the opinion of the court (see printed case page 108) and raises an entirely different question from that offered for solution between these parties.

20 *The question presented here is what are the rights of the owner of property where a presumptive purchaser contracting to buy enters into possession and makes a permanent annexation to the freehold, without the consent of the owner, by attaching property acquired under a conditional sale that it is to continue personal and to remain the property of the vendor to such agreement until paid for, upon retaking possession of his property for default, as to such property so annexed to the freehold?* Under their agreement of sale, if carried out,

30 the Palmateers would have received a mortgage on the premises for a portion of the purchase money (see printed case page 86) which under the cases above cited would have enabled them to hold the engine, boiler and attachments in question as part of the realty. By the failure of the New Jersey Mill & Lumber Co. to carry out its contract with them they lost the profit on their bargain; they necessarily sustained a loss and the court cannot conclude they were not injured. Because of such failure of their presump-

40 tive purchaser and necessary resumption of possession

of their property they should not be left in a worse position as to such engine and boiler and attachments than they would have been if the contract had been completed and they have received their purchase money mortgage, and from our examination of the authorities we find that the same rule prevails in this class of cases. In the case of *Hunt vs. The Bay State Iron Co., supra*, this right of the owner on resuming possession because of default to hold as his property what has been annexed to the freehold is very clearly re-<sup>10</sup> cognized and stated.

In this case the Defendant in Error, Beggs & Co. permitted their property to be annexed to the freehold in such a substantial and permanent manner as to leave no doubt that under the ordinary rule of law it became a part of that realty, under an agreement that it was to remain personal and continue their property made with the New Jersey Mill & Lumber Co., then only in possession under an agreement of purchase, and with notice that the title of such freehold was in<sup>20</sup> the Plaintiffs in Error and with knowledge that in case of failure of said New Jersey Mill & Lumber Co. to carry out their contract of purchase the Plaintiffs in Error would be entitled to resume possession of the premises with said engine and boiler and attachments annexed thereto.

*The Palmateers were not parties to this agreement. They did not consent to it. They held the legal title and any annexation was made subject to their superior right to resume possession upon default. It was not<sup>30</sup> in the power of the New Jersey Mill & Lumber Co. by its agreement to bind them to treat any such annexation which under the ordinary rule became a part of the realty as personalty. The legal character of such annexation is undoubtedly that of real estate, and the Plaintiffs in Error having the right to take possession for default of payment and having enforced their right by entering upon the land and taking such possession are entitled to the benefit of this rule of law and to hold said land and premises with the said annexation as<sup>40</sup>*

*their realty against any claim of the said Beggs & Co. under said agreement.* Indeed the Supreme Court in dismissing the writ of error of the Plaintiffs in Error when the case was first before that Court, because defectively so, in commenting on the merits of the case said, "If the case is to be regarded as to the rights of an owner of property contracting to sell it who puts this presumptive buyer in possession who then annexes anything to the land without the consent of the  
 10 owner the better rule would seem to be that such annexation with respect to the owner is a fixture irrespectively of the buyer or of any third party who has permitted such annexation." *Ch. J. Beasley in Palmateer vs. Beggs & Co., Sup. Ct., June T., 1896.*

This is, we insist, the correct rule to be adopted in this case, and we respectfully submit that the theory on which the final conclusion of the Supreme Court is based is not supported by the facts, and that the judgment below should be reversed.

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HAWKINS & DURAND,  
*Counsel for Plaintiff in Error.*

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New Jersey Court of Errors and Appeals.

JOHN PALMATEER *et al.*,  
Plaintiffs in Error,

v.

GEORGE N. ROBINSON, trading  
as BEGGS & Co.,  
Defendant in Error.

On Writ of Error.

Brief of Defendant  
in Error.

This is an action in trover to recover the value of certain machinery, boiler, &c., which the defendant in error agreed to sell to the N. J. Mill and Lumber Company, as per the agreements referred to in the evidence.

All of this personal property was taken to Long Branch, and placed by the Mill and Lumber Company upon land which the company was in possession of by virtue of an agreement for the purchase thereof made by it with the plaintiffs in error.

It appears by the testimony that the real estate agreed to be sold by the plaintiffs in error to the Mill and Lumber Company consisted, at the time of the making of the agreement for its sale, of some vacant land upon which the Mill and Lumber Company

while in possession under their agreement for purchase, erected a mill and other buildings and improvements. It also appears that the Mill and Lumber Company never completed their purchase nor acquired title to the land, but that they subsequently lost possession of it, and that the plaintiffs in error have, or claim to have, possession thereof.

The agreements providing for the sale of the personal property by the defendant in error to the Mill and Lumber Company expressly provide that in no event shall the personal property be considered as realty by reason of it being affixed in any way to real estate, and that the ownership of such personal property should remain absolutely in the defendant in error until the full amount of the purchase price thereof should have been paid.

It is also to be observed that the agreements for the sale of the personal property were made in the City of New York, where it was situated, and where was the residence of the defendant in error, the owner of the property.

Marvin Safe Co. *vs.* Norton, 19 Vr., 410.  
Campbell *vs.* Roddy, 17 Stew., 244.

It also appears by the evidence and the printed state of facts agreed upon by the attorneys, that the Mill and Lumber Company were under no obligation or duty to the plaintiffs in error, to in anywise improve the real estate so agreed to be sold to them.

That after the Mill and Lumber Company had defaulted in making the payments for the real estate so to be purchased by it, and after having made default in the payment of the purchase price agreed to be paid for the personal property in question, the plaintiffs in error being, or claiming to be, in possession of the real estate, refused to permit the defendant in error, upon proper demand being made, to remove the personal property from the premises. Thereupon this suit was instituted.

It is claimed by the plaintiffs in error that the personal property in question became so affixed to

the real estate as to form a part thereof, and that the defendant in error had no right to remove the same therefrom by reason thereof.

There was a judgment of the Court below in favor of the defendant in error for twenty-three hundred and eighty-six dollars and eighty cents.

It is respectfully submitted that this personal property never changed its character to that of real estate. The evidence shows that the boiler was placed upon the ground and a small brick enclosure erected around it; that the engine and machinery and the boiler can be easily removed from the premises, and with but trivial injury to the realty, and that such injury could be readily remedied.

The testimony of Lewis F. Lyon, beginning on page 67 of the printed book, is very strong on this point.

This witness is certainly an expert on this subject, as will be found by reference to his testimony, commencing on page 24 of the printed book.

It is submitted that independent of any agreement between the parties this personal property was so placed upon said real estate that it would be declared by law to be personal property and not real estate, and it does seem, in view of the circumstances of this case, that there can be no question as to it being personal property.

The case of *Campbell vs. Roddy*, 17 Stew., 244, is a case where the engine rested upon a brick foundation let into the ground, about two feet in width by twelve feet in length and carried above ground three feet, held into position by bolts running through the brick work and the bed plate of the engine, and by nuts screwed on top. The building was designed for use as an iron foundry, and the engine, &c., were purchased under a conditional bill of sale or chattel mortgage, which was not refiled as required by the statute. As against the realty mortgagee the conditional sale or chattel mortgage was held valid, and the Court said: "The mortgage was good as between the parties thereto at the time of the an-

nexation of the chattels, and the mortgagee of the real estate stands neither in the light of creditors nor of subsequent purchasers." Certainly the personal property in that case was much more firmly affixed to the realty than was the personal property in the present case.

*Ford v. Cobb*, 20 N. Y., page 344, followed in 17 Stew., 244:

"Machinery annexed in a substantial manner to a building is not a fixture unless there is a unity of title to the realty and machinery, so that a conveyance of the realty would of necessity convey the fixtures also."

*Globe Marble Co. vs. Quinn*, 76 N. Y., page 23.

In the present case such unity of title was absolutely lacking.

In the case of *Hill vs. Sewall*, 53 Penna. St., p. 271, the plaintiff contracted with Sewall to put boilers in his mill in place of worn out old ones, to be paid \$4 per month for their use and to have the right to remove them at pleasure, and they could be removed without other injury than taking down the boiler wall built of brick, and standing under a shed outside of the mill, and it was held that such personal property did not become subject to a prior mortgage on the land and did not pass by a sale of the land on execution.

In the present case the boiler was placed upon the ground and a wall built around it; it did not become a part of the mill. It was not in the mill, nor was it incident to it.

The boiler could be easily detached from the bolts holding it to the foundation, as disclosed by the testimony; and even if the entire wall which surrounded the boiler had to be removed, it would seem that such removal would not change the personal character of the boiler, because the wall

acted not as a building but merely as a covering or protection to the boiler. But it is seen, by the evidence, that it is not necessary to take down the wall in order to remove the boiler.

“ Whether a building erected by one person on the land of another, with the latter’s permission, is real or personal property, is a question of fact to be decided according to the actual or imputed intention of the parties.”

*Pope v. Skinkle*, 16 Vr., 39.

The Court below, in reaching its judgment, must have found this question of fact in favor of the defendant in error.

If it is true that the character of the property is “ to be decided according to the actual or imputed intention of the parties,” the agreement for the sale of this personal property certainly must be conclusive on that point (and see testimony of Conneen, line 30, &c., p. 66 of Printed Case; and *Tift v. Horton*, 53 N. Y., 377); and it seems that if this construction of the law could be modified in any way, it must be only as regards some third person, who has advanced money in the belief that the personal property formed a part of the real estate. No such condition of affairs existed in this case.

In the case of *Eaves vs. Estes*, 10 Kan., 314, where E. & Company built a steam engine for the mill of K, and while it was still at their shop, took a chattel mortgage on it, with a stipulation of their right to take possession of the same whether it was affixed to the freehold or not. Held, that where the facts leave the Court in doubt as to whether the engine had, by its attachment to the realty, become a fixture, the intention of the parties, as evidenced by the chattel mortgage, might be looked to as controlling in the determination of the character of the property, and that the Court below properly held that it remained personal property and subject to the chattel mortgage. There was a mortgage already on the real estate which was foreclosed. The seller

of the engine tried to take possession of it and the delivery of it was refused.

In *Tiffit vs. Horton*, 53 N. Y., 377, at page 380, near the foot, the Court says: "While there is no doubt but that the intention of the owner of the lands was that the engine and boiler should ultimately become a part of the realty and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs, that the act of annexing them to the freehold should not change or take away the character of them as chattels until the price of them had been fully paid. And at the foot of page 383, it is said: "Hence I conclude that the agreement of the owner of the land with the plaintiffs, as it did duly express their distinct purpose that these annexations of boilers and engines should not make them a part of the real estate, was sufficient to that effect without any concurring intention of the defendants as prior mortgagees."

"When the building is but an accessory to the fixtures, both are removable; hence, when the building is erected over an engine for its protection, both can be removed as trade fixtures; nor does it matter whether the buildings are wood or brick."

*Lawton vs. Lawton*, 3 Atk., p. 15.

*Foley vs. Addenbrooke*, 13 M. & W.,  
173.

Also *Brown vs. Reno Electrical, &c.*, 55 Fed. Rep., at page 233, where the Court says: "The buildings were erected for the sole purpose of protecting the machinery. It would seem upon sound reason that if this portion of the machinery could be removed, the right to remove the dynamo house and the boiler house ought not to have been questioned."

In *Tiffit vs. Horton*, 53 N. Y., at page 384, the Court holds "that the fact that the personal property could not be removed without some injury to the walls built up about them, would not debar the

the plaintiffs from retaking their property, because the removal of the property would not take away or destroy that which is essential to the support of the main building; nor will the injury to the walls about them be great in extent or amount.

“The law of removal is, that it must be without serious injury, that is, no more injury than is necessary to remove the fixtures. If excessive damage is done, the party doing it is liable to an action for the injury, but it does not affect his right to remove.”

Ewell on Fixtures, pp. 10 and 11.

But the chief case of all, and one most similar to the case under discussion, is the case of *Handy vs. Dinkerhoff*, 57 Cal., p. 3. This case is almost identical in all respects with the present, and was decided in favor of the owner of the chattels.

The case of *Campbell vs. Roddy*, 17 Stew., p. 244, is very pertinent.

“Buildings erected with the consent of the owner of the land by one in possession under a parol contract of sale have been held to be the personal property of the party erecting them.”

*Yates vs. Mullin*, 33 Ind., 563.

The Mill and Lumber Co. occupied towards the plaintiffs in error the position of tenants at will (see *Den vs. Drake*, 2 Gr., p. 523). “All general and indefinite tenancies, whether they originate simply by permission, or being let into possession pending a treaty for a purchase, are now held to be tenancies.”

Also see *Moore vs. Smith*, 24 Ill., p. 512: “A purchaser let into possession may remove trade fixtures placed upon the premises by him at any time during the continuance of the contract.” Such purchaser, failing to make payment so as to lose the benefit of his purchase, is held to be a tenant from year to year, or at will, and therefore entitled to remove

fixtures which he may have attached to the freehold while in possession.

See also

Dean *vs.* Hutchison, 13 St., 87.

Foley *vs.* Wheth, 84 Mass., 131 and 134.

Gould *vs.* Thompson, 45 Mass., 228.

“A tenant at will is not a wrongdoer, and neither trespass nor ejectment will lie against him, unless his tenancy be determined before the commencement of the suit.”

Before the right of a tenant to remove fixtures is lost by re-entry and forfeiture by landlord, the forfeiture must be judicially determined.

Keogh *vs.* Daniell, 12 Wis., 163.

Where the tenancy is uncertain in duration, as when it depends upon a contingency, or when the lessee is a tenant for life or at will, the laws allow a reasonable time for the removal of fixtures.

Loughran *vs.* Ross, 45 N. Y., 792.

See also

124 Mass., 571.

120 “ 193.

143 “ 108.

It does not appear that the plaintiffs in error ever had the right to re-enter into possession of the property, and we submit that it would be manifestly unfair and unjust to the defendant in error if the Mill and Lumber Co. could surrender their rights in this property to Palmateer, and thereby absolutely deprive Robinson of his property.

In *McKensie vs. McDonald* (61 Miss., 459), the Court says: “We concur in the view held by the learned Judge below that it is not allowable by a subsequent agreement to convert the relation of vendor and vendee into that of landlord and tenant, so as to defeat supervening rights.” And in *Loan and Dics. Co. vs. Drake* (6 C. B., 796), it is said: “A tenant having mortgaged his fixtures during an un-

expired term cannot, by surrender of his lease before the end of the term, prevent the mortgagee from entering and removing them."

Even if Palmateers did take possession, it did not affect Robinson.

Handy *vs.* Dinkerhoff, 57 Cal., p. 3.

In *McEntee vs. Harrison* (58 N. Y., 654), it was held that even if annexation of fixtures was a bar to an action for the recovery of the fixtures, it was no bar for an action for the conversion.

### **Rescission:**

What right had Palmateers to retake possession of the property without a judicial decree, and without they tendered a deed to the Mill Company and gave the company an opportunity to comply?

See 71 N. Y., 333; 44 N. Y., 618 and 691; also *Cleary vs. Folger*, 24 Pac. Rep., page 280 (Cal.).

When the vendor claims to rescind he must in general offer to return the purchase money if it has been paid.

*Longworth vs. Taylor*, 1 McLean, 395.

"We have before indicated that a vendee is entitled on a rescission to pay for lasting and beneficial improvements."

*Patrick vs. Roach*, 21 Tex., 251, p. 255.

"The right of a vendee in possession of land under a contract of sale to recover the full value of his improvements upon a rescission of the contract by the vendor rests upon principles of equity."

*Eberling vs. Deutcher*, 12 S. W. Rep., 205 (Tex., 1888).

It is respectfully submitted that as between Robinson and the Mill Co., the chattels absolutely retained their personal character. This would be so if the Mill Co. owned the land, no matter how firmly and permanently the chattels might have been affixed to the realty.

It is submitted that Palmateers could succeed to no more rights than the Mill Co. had.

Palmateer agreed to sell the land to the company, and permitted the company to enter into possession. The company had the right to place any property which came to its possession upon the real estate; and it unquestionably had the right to remove it if it did not complete its purchase.

There is no clause in the agreement for the sale of the property from Palmateer to the company which makes it the duty of the company to improve the property in any way, or provides for a confiscation, or surrender of any property, or of any improvements which they might put upon the property in case they failed to complete the purchase of the land. And even if there were, it would give the Palmateers no rights in the property (57 Cal., 3).

We contend that there is no reason or justice in permitting Palmateers to appropriate the one thousand dollars paid them on account of this purchase of the land, and all the mills and buildings placed upon the land by the Mill Co., and then also confiscate nearly three thousand dollars' worth of personal property of Robinson.

If Palmateers succeed to the interest of the Mill Co., they must also assume the Mill Co.'s liabilities. If they appropriate property which was in possession of the Mill Co., they must take it subject to all the charges and equities of the company; otherwise it would be possible for the Mill Co. to collude with Palmateer in the surrender and misappropriation of this personal property.

All the cases cited by the attorneys of Palmateers in their brief, were cases in which a third party had advanced money upon the faith of the property in-

volved in the suit, either as purchasers or mortgagees without notice, on property put in by owner of the fee, and that feature was the distinguishing characteristic and groundwork upon which the respective decisions were based.

In this case Palmateers not only did not advance any money or stand in the position of purchasers, but they do appear as confiscators, chargeable with notice of the fact that this property was subject to prior claims. Certainly it does appear that at the time of the Receiver's sale of some personal property on the premises, and long before Palmateers had gained, or claimed to have gained, possession of the land, they knew by virtue of a public notice made at the Receiver's sale, that this property in question was claimed by Robinson.

It does seem reasonable to say that certainly at any time before the date named for the delivery of the deed from Palmateers to the Mill and Lumber Co., the latter company could have torn down and destroyed or removed all of the buildings and fixtures which it had placed upon the property. And it does not seem to be at all unreasonable to presume that because they chose to let their property and improvements go to Palmateers, that they could by any act of their own defeat and deprive Robinson of the rights remaining to him by virtue of his agreements with the Mill Co.

If the Mill Co. did not own this personal property, how was it possible for them to convey or transfer its ownership to any other person, and especially to a person who paid no consideration whatever for it?

Respectfully submitted,

HEISLEY & MORRIS,  
Attorneys of George N. Robinson,  
Defendant in Error.





