

27 MAY 1927

## New Jersey Court of Errors and Appeals

Between,

GREENWOOD A. ROBINSON,  
Complainant-Appellant,

and

PIPE ORGAN MAINTENANCE  
COMPANY,  
Defendant-Respondent.

On Appeal  
from Chancery.

On Bill, etc.

### BRIEF FOR RESPONDENT.

#### Statement.

This is an appeal from a decree of the Chancellor advised by the late Vice Chancellor Griffin. The decree is printed on page fifty of the record, and finds that there is due to the respondent from the appellant the balance of the purchase price of the organ referred to in the pleadings.

For the sake of convenience I shall in this brief refer to the appellant as the complainant, and the respondent as the defendant.

On June 14th, 1916, complainant entered into a contract with American Master Organ Company, Inc., for the installation of an American Master organ at a purchase price of \$5,650.00. Under the terms of the contract \$250.00 of the purchase price was to be paid upon the signing of the contract;

\$400.00 upon the erection of the organ and the balance in installment payments of \$150.00 per month.

The proofs show that the complainant upon the execution of the contract paid the sum of \$250.00 on account of the purchase price. That the organ was installed, and on October 28th, 1916, the complainant paid the sum of \$400.00 as provided in the contract. That from the date the organ was installed on or before October 28th, 1916, until the present time, the complainant has continued in possession of the organ and equipment. That he did not keep his monthly payments up regularly but that he made payment of the installments of \$150.00 on December 12th, 1916, January 23rd, 1917, February 14th, 1917, March 11th, 1917, September 6th, 1917 and September 18th, 1917. That on or about the 5th day of October, 1917, the American Master Organ Company, Inc., was decreed to be insolvent and Wood McKee in Paterson, was appointed as receiver of said Corporation. That by order of the Court of Chancery, dated May 27th, 1918, the said receiver was authorized to sell and transfer to the defendant all the right, title and interest of the American Master Organ Company, Inc., under said agreement and contract, and that under said order the said receiver duly executed an assignment of said contract. This is printed as Exhibit 4, annexed to the bill of complaint, on page 26. Complainant kept and used said organ and, as a matter of fact, took said organ apart and leased the piano which was attached thereto.

Defendant at the request of the complainant, made repairs to the organ, even after it had been disconnected by complainant. At no time, until the institution of the replevin suit, did complainant make any objection to the fact that the contract

had been assigned by the receiver to defendant. On November 12th, 1917, when the receiver demanded money, complainant wrote a letter, Exhibit D-19, to the American Master Organ Company, Inc., in which he stated that the organ needed repairs, which would cost \$45.00 installed (see p. 269). This was after the appointment of the receiver.

After repeated requests were made on behalf of defendant to complainant for the payment of the purchase price, demand was made for the return of the organ, as under the contract, the title did not pass until the purchase price was paid, and on February 24th, 1919, suit in replevin was instituted in the Hudson County Circuit Court. The pleadings in said suit are printed as Exhibit 7 on page 36, etc., of the record. To this suit answer and counterclaim were filed. Upon the matter coming up before Judge Campbell in the Hudson County Circuit Court, an order was made transferring the cause to the Court of Chancery. When the matter came before Vice Chancellor Griffin in the Court of Chancery on the pleadings in the law suit, he suggested that equity pleadings should be filed, and on the 26th day of February, 1923, the bill of complaint was filed by complainant. The bill of complaint prays that the contract may be declared to be rescinded on the part of the complainant and for incidental relief. Answer was filed to the bill of complaint, to which was attached a counterclaim praying for a decree against complainant for the amount of the unpaid purchase price, and that complainant may have a lien upon the organ for the payment thereof, and for incidental relief.

After a lengthy hearing before Vice Chancellor Griffin, the Vice Chancellor determined that defendant was entitled to the relief prayed for in its

counterclaim, and to recover the balance of the purchase price, and to have a lien upon the organ and equipment therefor. From this decree this appeal is taken.

The Vice Chancellor did not file a formal opinion, but upon motion made in this court by counsel for respondent, acquiesced in by counsel for appellant, this court directed that the memorandum of the Vice Chancellor be printed.

### **Argument.**

I have not received the completed brief of appellant, but have received a typewritten memorandum of the points. These are five in number and have been fully disposed of in the memorandums of the Vice Chancellor.

The court will note from an examination of the record, that every technical objection that could be raised was raised in this case, both in the replevin suit and in this suit. Several have been abandoned on this appeal.

The only real question in issue was as to whether or not the organ and its equipment had been accepted by complainant.

The Vice Chancellor held that there had been an acceptance and there is no question but that he was correct in so finding from a reading of the record.

The organ was delivered and installed in October, 1916. From that day to this complainant has continued in possession of the organ and its equipment and received the benefit therefrom. He paid the installment of \$400.00 upon the delivery and installation of the organ and continued paying installments up until the time of the appointment of the receiver in October, 1917. Thereafter upon de-

mand being made for the payment of the money due, he called attention to certain alleged defects which he claimed would cost \$45.00 to repair. He took the organ apart and removed it. He then detached the piano and leased it for several years. He at no time, until the institution of this suit offered to return the organ or claim a rescission of the contract. As a matter of fact as pointed out by the Vice Chancellor in his memorandum, he even refused at the time of the final hearing to divulge where the organ was until directed by the court to tell (see p. 262). When the suit in replevin was instituted he refused delivery of the organ. Not only that, but he claimed the benefit of a clause in the contract which prevented the installing of an organ of the same kind within a certain locality, and the President of the Organ Company approached him at one time asking permission to sell another instrument, which he refused to give, even though the Organ Company was willing to pay him some money for it. This was long after the installation of the organ and it had been used by complainant. The contract contained a clause against the installing of an American Master Organ within a certain territory (see p. 13).

Mr. Robinson testified on page 259 that the organ was in constant use by him. He was asked whether in the summer of 1917 when Mr. White, the President of the American Master Organ Company, Inc., played the organ for a week, he told the American Master Organ Co. people to take their organ out of there, that he did not want it. He answered that he did not. That he did want it.

As stated by the Vice Chancellor:

“It is a significant fact that if Robinson had knowledge of all these defects, he declined to

allow the Organ Company to build an organ for someone else in his neighborhood, claiming the sole right to have such an organ in that vicinity; and thus he elected to stand under the contract. He also made payments under the terms of the contract, and, as I recall it, never at any time, *down to the commencement of the suit*, did he by any act, elect to treat the contract at an end and demand a return of his money. Again, the contract was not divisible; and he is continuing to this day, even, to take the benefit of the contract by using the piano. \* \* \* Thus as I see it, until the commencement of the suit, he never notified the Organ Company that its organ did not comply with the terms of the contract, but continued to use the organ down to the time that he finally dissembled it, which was about the time that he went into the Roosevelt Theatre, except the period when the cables were cut and he used the piano alone, and during this period (unless it appears in the letters) there is nothing in the case that shows that he then elected to treat the contract as at an end and seek a return of his money. I am rather inclined to the view that, covering a long period of time from the installation of this organ down to the commencement of this suit, the conduct of Robinson shows an election to accept the organ as in compliance with the contract, and therefore he is bound to pay."

Under the case of Wurlitzer Mfg. Co. v. United R. & A. Company, 87 N. J. L., 656—decided by this court, there is no question but that the conclusion of the Vice Chancellor in this respect, was correct. As to the other points raised by complainant, I

cannot do better than to quote from the memorandum of the Vice Chancellor under date of October 19th, 1926, where he effectively disposes of these contentions in the following language:

"1. The first point made by the complainant is that the validity of the sale is challenged because the receiver has not complied with the terms of sale as directed by the Court of Chancery. This provision in the order was not made for the benefit of the purchaser—it was made for the benefit of the insolvent corporation; and the defendant says that it is living up to the terms of the order and intends so to do. Counsel has cited no case to support his theory, and I know of none. I will decide against the complainant on this point. It may be, also, that the complainant is estopped by reason of dealing with the defendant, without protest, for a long period after the bill of sale was made.

"2. The next point is that the contract between the American Master Organ Company and the complainant was an executory contract of such a nature as to be incapable of assignment without the consent of the complainant. This probably is the rule; but after the defendant took over the contract it proceeded to do the work which the American Pipe Organ Company was bound to do under the contract, without protest from the complainant, who thereby acquiesced in the transfer, and is now estopped from setting it up.

"3. The complainant also, I think, sets up that although the defendant is named as the purchaser in the bill of sale made by the receiver, dated June 30th, 1918, yet the defendant did not become a corporation until Janu-

ary 13, 1919, a period of seven months later. The validity of this sale, so made by the receiver, is therefore challenged because the receiver has not complied with the terms of sale as directed by the Court of Chancery. This, while not directly raising the question as to the validity of the bill of sale before the incorporation, yet as the persons who bought for the corporation and took it in the corporate name, I do not understand that this is invalid; on the contrary, it is my view that when the corporation was formed it took over the property. This is testified to by Mr. Kilgen."

### Conclusion.

It appears from the testimony and particularly from the testimony of the complainant himself, that the organ in question was duly delivered and installed as provided for in the contract; that complainant accepted the organ and made payment of installments for a period of one year on it; that he has kept the organ continuously and has received the benefits from it; that he claimed the benefit under his contract of not having another organ of similar nature installed in the locality and that even at the time of the final hearing, that he was leaving the piano which was attached to the organ and yet is endeavoring through all kinds of technical defenses not to pay for it.

The Vice Chancellor was clearly correct in his conclusion and it is respectfully submitted that the decree should be affirmed.

Respectfully submitted,

HARRY LANE,  
of Counsel with Defendant.

May Term, 1927.

# New Jersey Court of Errors and Appeals

Heard Below before CAUSEY, F. C.

Wm. MULLER, Receiver in Bankruptcy of the Hamilton Wapping and Winding Co., Inc., a Corporation,

Complainant-Appellee,

vs.

Bernard Schram and Anna Schram, his wife, Irving Sirota and Lottie Sirota, his wife,

Defendants-Appellants.

On Appeal from the Court of Chancery.

## BRIEF OF APPELLANTS.

That in a bill brought by the Receiver of a certain Corporation against its former officers, Bernard Schram and Irving Sirota, and also Schram and Lottie Sirota, their wives, in which he expressed a trust on certain lands situated in the City of Paterson, N. J., which now appear to have title in the aforementioned wives. It is alleged that the officers, in the months of October and November of the year 1922 took away and moneys of the said corporation aggregating \$2500.00 and for it purchased certain premises, known as #161 Godwin Street, Paterson, N. J., taking title thereto in the names of their wives. The property was purchased on December 27th, 1922, and the corporation filed

ary 13, 1919, a period of seven months later. The validity of this sale, so made by the receiver, is therefore challenged because the receiver has not complied with the terms of sale as directed by the Court of Chancery. This, while not directly raising the question as to the validity of the bill of sale before the incorporation, yet as the persons who bought for the corporation and took it in the corporate name, I do not understand that this is brought on the contrary, it is my view that when the corporation was formed it took over the property. This is testified to by Mr. Kilgen."

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