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New Jersey State Library

Summons.

(Filed March 19, 1930)

THE STATE OF NEW JERSEY
(L. S.)

To:

The Sheriff of the County of Bergen, GREETING: 10

We command you that if Arthur G. Teweles shall make you secure, you cause to be taken and delivered to him 60—No. 814 Finish No. 6 Cadillac, low cab with grease absorber and 8 No. 426 Grey Cadillac with broiler & canopy, including pot compartment with safety rod, which said Clearance Holding Corporation took and unjustly detains as is said; and that you summon said Clearance Holding Corporation to answer the annexed complaint of Arthur G. Teweles in an action at law in the Supreme Court, and that you notify it that it shall file its answer to said complaint with the Clerk of the Supreme Court at Trenton within twenty days after service upon it of this writ and the annexed complaint or the plaintiff may proceed in the suit and judgment may be entered against it. 20

WITNESS: WILLIAM S. GUMMERE, Esquire, Chief Justice of the Supreme Court, at Trenton, N. J., this 19th day of March, 1930. 30

FRED BLOODGOOD,
Clerk.

HERSHENSTEIN & FINNERTY,
Attorneys.

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Complaint.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

| | | | |
|----|---|---|-------------------|
| 10 | ARTHUR G. TEWELES, Plaintiff, vs. CLEARANCE HOLDING CORPORATION, Defendant. | } | Action at Law. |
|----|---|---|-------------------|

Plaintiff, Arthur G. Teweles, residing in the City of Jersey City, County of Hudson and State of New Jersey, says:

20 FIRST COUNT.

(1) On or about February 16, 1928 he was engaged in the business of selling gas ranges with their appurtenances and was the owner and ever since has been the owner of the following described goods and chattels:

30 60— No. 814 Finish No. 6 Cadillac, low cab with grease absorber
 8—No. 426 Grey Cadillac with broiler & canopy, including pot compartment with safety rod

which are of the value of \$2,806.00.

40 (2) On said date, the plaintiff did enter into a written conditional sales agreement with the Magnolia Construction Company whereby the said plaintiff did sell and the said Magnolia Construc-

Complaint.

tion Company did purchase the said goods and chattels described in paragraph one for the said sum of \$2,806.00, to be paid as follows: \$1,206.00, thirty days after delivery and the balance at the rate of \$100.00 per month.

(3) By the terms of said contract it was agreed that the said gas ranges and equipment are to be affixed to the realty of No. 64 Orient Way, Rutherford, New Jersey, but shall be severable therefrom, without material injury; that the said ranges were to remain the property of the said plaintiff until the price is fully paid. It was further provided that if default were made in payments or in case the gas ranges should become subject to any levy by any officer, or if for any reason the said plaintiff shall deem himself unsecure, then, in such event, the said plaintiff may retake possession of said ranges and take and carry same away. The said conditional sales agreement did further have a statement annexed thereto in which the said plaintiff did state that he was the seller of the said gas ranges, that the same are to be affixed to the realty known as No. 64 Orient Way in the City of Rutherford, New Jersey, which is a four story sixty-eight family house, and that the said ranges may be severable from said realty without material injury.

(4) The said plaintiff did receive on account of said contract the sum of \$1,371.00, leaving a balance due under said conditional sales agreement of \$1,435.00. No monthly payments have been made since March 22, 1929 and said sum of \$1,435.00 is therefore due with interest from said date.

(5) Said conditional sales agreement was duly filed in the office of the Bergen County Clerk on

Complaint.

February 18, 1928, pursuant to the statute made and provided for such cases. That thereafter, said defendant did acquire title to the premises of said Magnolia Construction Company and are now the owners of the same and are in possession of the said gas ranges so delivered to the building known as No. 64 Orient Way, Rutherford, New Jersey.

10

(6) That by reason of the said defendant's default and failure to make the payments called for by the conditional sales contract, plaintiff has been and now is lawfully entitled to the immediate possession of the said goods and chattels described in paragraph one hereof.

20

(7) Plaintiff has made demand upon the said defendant for the return of said goods and chattels, but said defendant refused to deliver same to the plaintiff and then and now wrongfully detains same.

Wherefore plaintiff demands judgment for possession of the said following described property:

60—No. 814 Finish No. 6 Cadillac, low cab with grease absorber,

30

8—No. 426 Grey Cadillac with broiler & canopy, including pot compartment with safety rod,

or in case it cannot be returned to the said plaintiff, then the sum of \$2,806.00, damages for said detention.

SECOND COUNT.

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(1) Plaintiff reiterates and realleges the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7

Complaint.

of the First Count and makes them part of this count.

(2) The defendant purchased the lands and buildings at a foreclosure sale by the Sheriff of the County of Bergen, who sold the premises subject to the conditional sales agreement held by the plaintiff, as more particularly described in paragraphs 1, 2 and 3 of the First Count. 10

(3) The said defendant did further thereafter agree to pay to the plaintiff the balance remaining due in the sum of \$1,435.00, but defendant has failed so to do.

Wherefore plaintiff demands judgment on the second count in the sum of \$1,435.00, together with interest from March 22, 1929. 20

HERSHENSTEIN & FINNERTY,
Attorneys for Plaintiff.

Due timely and legal service acknowledged
3/19/30 for Clearance Holding Corporation.

MCCARTHY & McTAGUE,
Attorneys for Defendant. 30

Answer.

(Filed July 9, 1930)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

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| | | |
|--|---|-------------------|
| <p style="text-align: center;">ARTHUR G. TEWELES, Plaintiff, vs. CLEARANCE HOLDING CORPORATION, Defendant.</p> | } | Action at Law. |
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The CLEARANCE HOLDING CORPORATION, a corporation of the State of New York, duly authorized to transact business in the State of New Jersey, answering the complaint herein, says:

FIRST COUNT.

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1. It has no knowledge, information or belief concerning the allegations contained in paragraphs 1, 2, 3 and 4, and therefore neither admits nor denies the same, but leaves the plaintiff to his proof thereof.

2. It denies the allegations contained in paragraphs 5 and 6.

3. It denies the allegations contained in paragraph 7 except that a demand for some property was duly made upon the defendant on March 1st, 1930.

SECOND COUNT.

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1. In answering the allegations contained in paragraph 1 of this count, the defendant repeats

Answer.

and reiterates all of the answers made by it to the respective paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first count, and makes them a part hereof.

2. It denies all of the allegations contained in paragraphs 2 and 3.

FIRST SEPARATE DEFENSE TO FIRST AND SECOND COUNTS. 10

This defendant says that it purchased the premises known as 58-60-62-64 Orient Way, also known as 58-60-62-64 Ettrick Terrace, Rutherford, New Jersey, from James A. McTague, Jr., by deed dated November 22nd, 1929, which deed was recorded in the Clerk's office of Bergen County on November 23rd, 1929 in book 1684 of deeds at page 380, and by virtue of the said deed, received all the right, title and interest of the said James A. McTague, Jr., who in turn received title to the said premises by deed of Harry C. Harper, Sheriff of Bergen County, by deed dated November 15th, 1929 and recorded on November 23rd, 1929 in book 1684 of deeds at page 368, which latter conveyance was as a result of a sale under foreclosure proceedings wherein the Realty Foundation, Inc., a corporation of the State of New York and the Magnolia Construction Company, et al. were complainant and defendants respectively, which suit was instituted in the Court of Chancery of this State on March 26th, 1929, the purpose of which suit was to foreclose a certain mortgage made by the Magnolia Construction Company to the Realty Foundation, Inc. on August 31st, 1928, and at the time the said latter mortgage was placed as a lien upon the said premises. The said mortgage covered not only lands but as well as personal property obtained in 20 30 40

Answer.

10 the said lands, and if the said gas ranges were contained therein, the said mortgage conveyed the said lands to the mortgagee, and in turn the title has passed to this defendant, and at the time of the placing of the mortgage and subsequently thereto, the right of this defendant and its predecessors has been paramount to the gas ranges in question, and
10 the said conditional bill of sale was never filed or indexed properly to give any notice of any such conditional sale to this defendant or to the persons through which it has received title to the same.

SECOND SEPARATE DEFENSE TO FIRST AND SECOND COUNTS.

20 The said conditional bill of sale contract referred to herein was not filed and indexed or recorded in any manner until August, 1929, and as a result thereof, constitutes no notice and reserves no title to the alleged vendor which is paramount to that of this defendant.

THIRD SEPARATE DEFENSE TO FIRST AND SECOND COUNTS.

30 The amount due upon the alleged conditional sales contract is Fourteen Hundred and Thirty-five (\$1,435.00) Dollars.

FOURTH SEPARATE DEFENSE TO FIRST AND SECOND COUNTS.

The said conditional sales contract was not filed, indexed or recorded in accordance with the Uniform Conditional Sales Act Laws of 1919, Chapter 210 and its supplements and amendments thereto.

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MCCARTHY & McTAGUE,
Attorneys for Defendant.

Reply.

(Filed July 9, 1930)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

| | | | |
|--|---|-------------------|----|
| <p style="text-align: center;">ARTHUR G. TEWELES, Plaintiff, vs. CLEARANCE HOLDING CORPORATION, Defendant.</p> | } | Action at Law. | 10 |
|--|---|-------------------|----|

Plaintiff, ARTHUR G. TEWELES, replying to the answer of the defendant, says:

ANSWER TO FIRST SEPARATE DEFENSE FIRST AND SECOND COUNTS: 20

1. He admits the allegations thereof except that he denies the right of this defendant and its predecessors to the gas ranges is paramount to the right of the plaintiff thereto.

ANSWER TO SECOND SEPARATE DEFENSE FIRST AND SECOND COUNTS:

1. He denies the allegations therein contained.

ANSWER TO THIRD SEPARATE DEFENSE FIRST AND SECOND COUNTS: 30

1. He admits the allegations therein contained.

ANSWER TO FOURTH SEPARATE DEFENSE FIRST AND SECOND COUNTS:

1. He denies the allegations therein contained.

HERSHENSTEIN & FINNERTY, 40
Attorneys for Plaintiff.

Findings of the Court.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

| | |
|----|---|
| 10 | ARTHUR G. TEWELES, Plaintiff, vs. CLEARANCE HOLDING CORPORATION, Defendant. |
|----|---|

ACKERSON, J.:

This is a replevin suit, brought under Section 33
 of the Replevin Act (3 Comp. Stat. 4368), and
 comes before the court for trial without a jury,
 upon an agreed statement of facts, which is made
 a part hereof as though fully repeated herein, from
 which it appears, inter alia, that the plaintiff sold
 and delivered to the Magnolia Construction Com-
 pany, owner of a building at 64 Orient Way, Ruther-
 ford, New Jersey, 68 gas ranges for \$2,806, under a
 conditional sales agreement dated February 16,
 1928, which was delivered to and filed by the Clerk
 of Bergen County on February 18, 1928. The plain-
 tiff complied with the terms of the Uniform Sales
 Act, (P. L. 1919 Chap. 310), in the sale of the gas
 ranges and duly delivered said conditional sales
 contract to said Clerk for filing, prior to the de-
 livery and installation of the gas ranges, and they
 were affixed to the realty, but severable therefrom
 without material injury.

The conditional sales agreement was incorrectly
 indexed by the County Clerk, in that the Magnolia
 Construction Company, the purchaser of the gas

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Findings of the Court.

ranges, was indexed as the seller and Arthur G. Teweles, the seller, was indexed as the buyer.

Subsequent to the delivery and installation of said gas ranges, and on August 31, 1928, the Magnolia Construction Company executed and delivered to the Realty Foundation, Inc., a mortgage for \$65,000., covering the real estate in question "together with the buildings and improvements, fixtures, equipment and appliances erected or to be erected thereon now or hereafter attached to or used in connection with said premises". This mortgage was later foreclosed, and pending such proceedings, plaintiff informed the attorney for the defendant therein, of the existence of said conditional sales agreement, and in June, 1929, the County Clerk corrected said index. At the foreclosure sale the Sheriff announced that the premises were sold subject to the said conditional sales agreement held by the plaintiff herein, and said premises and the appertenances as covered by the aforesaid mortgage were thereupon purchased by James A. McTague, Jr., as attorney for the Realty Foundation, Inc., and transferred to the Clearance Holding Corporation, the defendant herein, which is the holding company of the aforesaid mortgagee, Realty Foundation, Inc.

Default having been made in the payment of the purchase price of said gas ranges, as provided for in said conditional sales agreement, the plaintiff demanded possession of said gas ranges, but defendant, which had taken possession thereof following said foreclosure sale, refused to permit the plaintiff to take possession thereof, whereupon this replevin suit was brought.

In this situation the defendant contends that, inasmuch as the conditional sales agreement was not properly indexed, at the time of the execution and

Findings of the Court.

10 recording of the mortgage through the foreclosure of which it obtained title to said premises, which mortgage also covered the fixtures, equipment and appliances therein and thereon, that, therefore, the defendant's claim to said gas ranges, is superior to that of the plaintiff, because the filing of said conditional sales agreement afforded no notice thereof to the defendant or those through whom he claims title.

The question thus presented, however, has been decided adversely to the defendant's contention by this court in the cases of *Plavick vs. R. Oliver Co., Inc.*, 148 Atl. Rep. 624, wherein the court said:

20 "These statutes may be divided into two classes, viz., those statutes the provisions of which make the index and essential part of the record, and those which do not. We think the statute, P. L. 1919, P. 461, the one drawn here into question, falls within the latter class. It is the filing by the vendor of the contract, and not the indexing by the register or clerk which is the vendor's protection. We therefore hold affirming the trial court, that the mistake by the register of the name in the index does not deprive the defendant of its protection."

30 So far as this phase of the case is concerned, I consider myself bound by the foregoing decision.

From the agreed statement of facts and the record before me, I find as follows:

1. The statements in Paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first count of the complaint are supported by the evidence.
2. The statements in Paragraphs 1 and 2 of the
40 second count of the complaint are supported by the

Findings of the Court.

evidence, but the statements in Paragraph 3 thereof are not.

3. From the statement of facts, and especially in view of the admission in Paragraph (14) thereof that, "the plaintiff, Arthur G. Teweles, complied with the terms of the Uniform Conditional Sales Act Laws of 1919, Chapter 210, Page 461, and any errors which occurred in the indexing was due to the fault or neglect of the Clerk of Bergen County", and also in view of the decision of this court in *Plavick vs. R. Oliver Inc.*, supra, I find that the defendant has not established any defense to the cause of action set forth in the first count of the plaintiff's complaint. 10

As to the second count, which is founded upon the theory of a promise to pay by the defendant, herein, I find that this is not established by the proof. 20

The Court, therefore, finds a verdict in favor of the plaintiff and against the defendant upon the first count in the complaint, for the sum of \$1,542.62, being the value of the goods in question as per the supplemental stipulation of facts. The court also finds a verdict of no cause of action in favor of the defendant and against the plaintiff upon the second count of the complaint. 30

HENRY E. ACKERSON, JR.,
Judge.

Dated, June 22, 1930.

Postea.**NEW JERSEY SUPREME COURT,**

HUDSON COUNTY.

| | | | |
|----|--|---|-------------------|
| 10 | ARTHUR G. TEWELES, Plaintiff, | } | Action at Law. |
| | vs. | | |
| | CLEARANCE HOLDING CORPORATION, Defendant. | | |

20 This matter was tried before the Honorable Henry E. Ackerson, Judge of the Hudson County Circuit Court without a jury, upon an agreed statement of facts, and the Court having determined that the plaintiff, Arthur G. Teweles, is entitled to a verdict and did render a general verdict in favor of the plaintiff, Arthur G. Teweles, against the defendant, Clearance Holding Corporation, upon the first count of the complaint for the sum of \$1,542.62; and did also render a verdict of no cause of action upon the second count.

30 It is therefore on this 3rd day of July, 1930, ORDERED that judgment be entered in favor of the said plaintiff, Arthur G. Teweles, and against the Clearance Holding Corporation in the sum of Fifteen Hundred Forty-two Dollars and Sixty-two Cents (\$1542.62) on the first count of the complaint, and that a judgment of no cause of action be entered upon the second count of the complaint.

HENRY E. ACKERSON, JR.,
Judge.

Postea.

| | | |
|---------|-----------|--------|
| Damages | \$1542.62 | A.G.T. |
| Costs | 62.00 | |
| | <hr/> | |
| | \$1604.02 | |

No costs agst. Pltff.

Whereupon it is adjudged that the plaintiff Arthur G. Teweles do recover of the defendant, Clearance Holding Corporation on the first count the sum of Fifteen hundred and forty-two dollars and sixty-two cents damages together with his costs which have been taxed at the sum of Sixty-two dollars making in the whole the sum of Sixteen hundred and four dollars and sixty-two cents; And it is further adjudged that the second count of the plaintiff's complaint be dismissed.

Judgment signed and entered July 9, 1930.

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Notice of Appeal.

(Filed Sept. 8, 1930)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY CIRCUIT.

10

ARTHUR G. TEWELES,
Plaintiff-Appellee,

vs.

CLEARANCE HOLDING CORPORATION,
Defendant-Appellant.

Action
at Law.

To:

20

CHARLES HERSHENSTEIN, Esq.,
Attorney for Plaintiff.

SIR:

PLEASE TAKE NOTICE that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause.

30

Respectfully,

MCCARTHY & McTAGUE,
Attorneys for Defendant.

Dated, August 6th, 1930.

Due, timely and legal service of within instrument acknowledged this 7th day of August, 1930.

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CHARLES HERSHENSTEIN,
Attorney for Plaintiff.

Grounds of Appeal.

(Filed Sept. 8, 1930)

NEW JERSEY COURT OF ERRORS AND APPEALS.

| | | | |
|---|---|---|----|
| <p style="text-align: center;">ARTHUR G. TEWELES, Plaintiff-Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">CLEARANCE HOLDING CORPORATION, Defendant-Appellant.</p> | } | Action at Law. On Appeal from New Jersey Supreme Court, Hudson Circuit. | 10 |
|---|---|---|----|

To:

CHARLES HERSHENSTEIN, Esq.,
Attorney for Plaintiff-Appellee.

20

SIR:

PLEASE TAKE NOTICE that the defendant appeals in the above entitled cause on the following grounds, to wit:

1. Because the trial court erred in finding that the conditional sales agreement was duly filed in the office of the Clerk of Bergen County pursuant to the statute in such case made and provided.

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2. Because the trial court erred in finding that the failure of the County Clerk to properly index the conditional sales agreement was not an essential part of the filing, indexing and recording of the conditional sales agreement in question, even in view of the specific provisions of the conditional sales act governing such a matter.

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Grounds of Appeal.

3. Because the trial court erred in finding that the plaintiff-appellee was entitled to a money verdict arising out of the action for replevin in question.

10

4. Because the findings of the trial court were contrary to and against the weight of the evidence submitted to the said court.

5. That the findings of the trial court upon the matter submitted is contrary to law.

Yours respectfully,

McCARTHY & McTAGUE,
Attorneys for Defendant-Appellant.

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FRANK P. McCARTHY,
Of Counsel.

Testimony.

This cause was submitted to the Court upon an agreed stipulation of facts which follow hereto.

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Stipulation of Fact.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

| | | |
|--|---|----|
| <p style="text-align: center;">ARTHUR G. TEWELES, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">CLEARANCE HOLDING CORPORATION, Defendant.</p> | } | 10 |
|--|---|----|

It is hereby stipulated and agreed between the parties hereto that the above entitled action be presented to the Honorable Henry E. Ackerson, Judge of the Hudson County Circuit Court, for determination and decision, the trial of the case with a jury being hereby waived, and it is further stipulated that the facts upon which the determination and decision shall be based are agreed as follows: 20

(1) The plaintiff is engaged in the business of selling gas ranges with their appurtenances, and on February 16, 1928 he did enter into a written conditional sales agreement with the Magnolia Construction Company whereby the plaintiff did sell and the said Magnolia Construction Company did purchase the following described goods and chattels for the price set out after each item; to wit: 30

| | | |
|--|-----------|----|
| 60—#814 Finish #6 Cadillac, low cab with grease absorber, \$42.50 | \$2550.00 | |
| 8—#426 Grey Cadillac with broiler & canopy, including pot compartment with safety rod, \$32.00 | 256.00 | 40 |
| | \$2806.00 | |

Stipulation of Fact.

The said sum of \$2806.00 was to be paid as follows: \$1206.00—thirty days after delivery and the balance at the rate of \$100.00 per month, a copy of which conditional sales agreement is hereto annexed, made part hereof, and referred to as Schedule I.

- 10 (2) On said February 16, 1928 the Magnolia Construction Company owned an apartment house at 64 Orient Way, Rutherford, Bergen County, N. J. and by the terms of the said conditional sales agreement, it was agreed that the gas ranges and equipment were to be affixed to the said realty, but severable therefrom, without material injury and that the said ranges were to remain the property of the plaintiff until the price is fully paid. It was further agreed if default were made in the payments, 20 or in case the gas ranges should become subject to any levy by any officer, or if for any reason the said plaintiff shall deem himself unsecure, that in such event the said plaintiff may retain possession of said ranges and take and carry same away. Said conditional sales agreement did have annexed to it a statement in which the plaintiff stated that he was seller of the gas ranges and that the same were to be affixed to the realty known as 64 Orient Way, 30 Rutherford, N. J., which is a four story, sixty-eight family house, and that the ranges may be severable from the realty without material injury.

- 40 (3) The conditional sales agreement bore the date of February 16, 1928 and was delivered to the Clerk of Bergen County on February 18, 1928 for filing under the conditional sales statute and was filed by the said Clerk of Bergen County on said date, and the plaintiff received from the Bergen

Stipulation of Fact.

County Clerk's Office a receipt bearing date February 18, 1928 for the filing of said conditional sales agreement, which receipt is hereto annexed, made part hereof, and referred to as Schedule II.

(4) After the filing of the said conditional sales agreement in the Clerk's Office of Bergen County, the plaintiff made delivery of the merchandise covered by the conditional sales agreement and did receive the sum of \$1371.00 on account, leaving a balance due of \$1435.00, which is the amount now due to the plaintiff, together with interest from March 22, 1929. 10

(5) Neither the Magnolia Construction Company nor the defendant, its successor in title, made any payments in accordance with the conditional sales agreement subsequent to March 22, 1929 and the plaintiff did by reason of the default and failure to make the said payments duly demand of the defendant the return of the goods and chattels prior to the bringing of this action, but the defendants refused to either pay to the plaintiff the amount so due or deliver possession of the merchandise to the plaintiff. 20

(6) On August 31, 1928 the Magnolia Construction Company did execute and deliver to the Realty Foundation Inc., a corporation of New York, an indenture of mortgage in the principal sum of \$65,000.00, which mortgaged the premises in question known as 64 Orient Way, Rutherford, New Jersey, which mortgage was recorded in the Clerk's Office of Bergen County on September 4, 1928 in Liber 1097 of Mortgages, page 226, which mortgage contained the provision that the mortgage covered 30
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Stipulation of Fact.

the real estate in question "together with the buildings and improvements, fixtures, equipment and appliances erected or to be erected thereon now or hereafter attached to or used in connection with said premises, all of which are covered by this mortgage".

10 (7) That by reason of a default, in accordance with the terms of the mortgage just above described, foreclosure proceedings were instituted by the Realty Foundation Inc. resulting in a fi fa being issued upon a final decree, by virtue of which fi fa the Sheriff of Bergen County advertised the premises for sale.

20 (8) The plaintiff, Arthur G. Teweles, was not made a party to these foreclosure proceedings.

(9) At the sale, the Sheriff of Bergen County did announce that the premises would be sold subject to the rights if any of the conditional sales agreement held by the plaintiff, Arthur G. Teweles, upon which there was due the sum of \$1435.00.

30 (10) The premises were purchased by the defendant, The Clearance Corporation, since which time and up to the present time the said defendant, Clearance Holding Corporation, was and still is in possession of the merchandise described in the plaintiff's conditional sales agreement.

40 (11) At the time of the making of the mortgage by the Magnolia Construction Company to the Realty Foundation Inc., a search of the records was made by the said Realty Foundation Inc. and its search failed to disclose the conditional sales agreement on file in the Bergen County Clerk's Office.

Stipulation of Fact.

(12) Prior to August 1929, however, pending the foreclosure proceedings of the said real estate mortgage, plaintiff did inform the defendant's attorney that he did duly file in the Clerk's Office of Bergen County the conditional sales agreement marked Schedule I, and he did hold a receipt marked Schedule II, and upon investigation it was discovered that the Clerk of Bergen County filed the conditional sales agreement of the plaintiff, marked Schedule I, but indexed the conditional sales agreement erroneously, in that the Magnolia Construction Company was indexed as the Seller and Arthur G. Teweles indexed as the Buyer. Immediately upon the discovery of the error, the Clerk of Bergen County corrected the index, which correction was made, according to the statement of the County Clerk, in June 1929.

(13) On August 31st, 1929, James W. Mercer, County Clerk of Bergen County, in a written communication to the Peoples Trust and Guaranty Co., the title company which examined the title for the predecessor in title of the defendant corporation, acknowledged the error and explained the error in the indexing, which communication is hereto annexed, made part hereof, and referred to as Schedule III.

(14) The plaintiff, Arthur G. Teweles, complied with the terms of the Uniform Conditional Sales Act, Laws of 1919, Chapter 210, page 461, and any error which occurred in the indexing was due to the fault or neglect of the Clerk of Bergen County.

(15) It is further stipulated and agreed that at the foreclosure sale that James A. McTague, Jr.,

Stipulation of Fact.

as attorney for the Realty Foundation, Inc. purchased the premises and transferred the same to the Clearance Holding Corporation, the defendant herein, which is the holding company of the mortgagee, Realty Foundation, Inc., and that they are controlled by the same parties.

- 10 (16) It is further stipulated and agreed that the gas ranges, the subject of the bill of sale, are admitted to be severable from the premises, without injury.

CHARLES HERSHENSTEIN,
Attorney for Plaintiff.

MCCARTHY & MCTAGUE,
Attorneys for Defendant.

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30

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Schedule I.**Order and Conditional Sale Contract**

Telephone Delaware 1832

ARTHUR G. TEWELES
 Manufacturer's Representative
 Office and Show Rooms
 913 Bergen Avenue
 Jersey City, N. J.

10

Feb. 16th, 1928

Sold to Magnolia Construction Company
 Address 90 Waldo Avenue, Jersey City, N. J.
 Deliver to 64 Orient Way, Rutherford, N. J.

We Magnolia Construction Company do hereby
 purchase from ARTHUR G. TEWELES,

20

| Quantity | Description | Price | | Total | |
|----------|--|-------|------|---------|----|
| | | \$ | Cts. | | |
| 60 | #814 Finish #6 Cadillac, low cab with grease ab- sorber | 42.50 | | 2550.00 | |
| 8 | #426 Grey Cadillac with broiler and canopy, in- cluding pot compartment with safety rod | 32.00 | | 256.00 | 30 |
| | | | | 2806.00 | |

for the sum of TWO THOUSAND EIGHT HUNDRED SIX
 DOLLARS (\$2806.00) which is to be paid \$1206.00
 30 days after delivery, balance at the rate of \$100.00
 per month at the office of ARTHUR G. TEWELES, 913
 Bergen Avenue, Jersey City, N. J. which gas

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Schedule I.

10 ranges are to be affixed to the realty but severable therefrom, without material injury; said ranges to remain the property of said ARTHUR G. TEWELES until price is fully paid. If default is made in payments, or in case gas ranges shall become subject to any levy by any officer, or if for any reason ARTHUR G. TEWELES shall deem himself insecure, then in such event, ARTHUR G. TEWELES may re-take possession of such gas ranges, and for that purpose, he and his agents are authorized to enter the building hereinafter described or wherever they may be, and take and carry the same away.

MAGNOLIA CONSTRUCTION COMPANY

By JACOB STILLMAN Treas.

Purchaser

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I, ARTHUR TEWELES, Seller of above ranges, do hereby state that the said gas ranges are to be affixed to the realty known as No. 64 Orient Way in the city of Rutherford, New Jersey, which is a four story sixty-eight family house; said ranges may be severable from said realty without material injury.

30

ARTHUR G. TEWELES,
Seller

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Schedule II.

BERGEN COUNTY CLERK'S OFFICE

Feb. 18, 1928

Received \$1.00 fees for Filing
Con B S

From A. G. Teweles
To Magnolia Con Co.

10

JAMES W. MERCER,
County Clerk

Form 109

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Schedule III.OFFICE OF THE COUNTY CLERK
County of BergenJames W. Mercer
County ClerkHackensack, N. J.
August 31st, 1929.10 Peoples Trust & Guaranty Co.,
Hackensack, N. J.

Gentlemen:

One of your title examiners has called my attention to a certain Conditional Bill of Sale, which was lodged in my office for filing on February 18th, 1928, between the Magnolia Construction Co. as the Buyer and Arthur G. Teweles as the Seller, for equipment in the amount of \$2806.00.

20 This Conditional Bill of Sale was indexed originally on February 18th, 1928, incorrectly as follows:

Magnolia Construction Co. indexed as Seller
and Arthur G. Teweles indexed as Buyer.

This entry of course should have read the reverse. The error was called to the attention of the indexer some time in June, 1929, who immediately changed same to show the name of Magnolia Construction Co. in the Buyer Index Book of Conditional Bills of Sale and Arthur G. Teweles in the Seller Index Book of Conditional Bills of Sale.

30 The entry as it originally appeared, being incorrect would not enable anyone to discover that same was ever filed in my office until some time after June 1929.

Yours very truly,

JAMES W. MERCER,
County Clerk.

40 EU:JR.

Stipulation of Fact.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

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| ARTHUR G. TEWELES, Plaintiff, | } | 10 |
| vs. | | |
| CLEARANCE HOLDING CORPORATION, Defendant. | | |

It is hereby stipulated and agreed in addition to the facts as have heretofore been stipulated, that the following facts be agreed upon:

(1) That the action was started under the 33rd Section of the Replevin Act and the property was permitted to remain in the possession of the defendant. 20

(2) That the plaintiff makes no claim for damages for the detention of the property, but that if the plaintiff is entitled to judgment, there shall be a judgment rendered in his favor in the sum of \$1435.00, with interest from March 22, 1929, which is the value of the property, under the authority of Conlen vs. Lemmerman, 87 N. J. L. at page 84. 30

CHAS. HERSHENSTEIN,
 Attorney for Plaintiff.

McCARTHY & McTAGUE,
 Attorneys for Defendant.

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New Jersey Court of Errors and Appeals

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| ARTHUR G. TEWELES, Plaintiff-Respondent, | } | Action at Law. |
| vs. | | On Appeal from New Jersey |
| CLEARANCE HOLDING CORPORATION, a corporation, Defendant-Appellant. | } | Supreme Court, Hudson Circuit. |

BRIEF OF McCARTHY & McTAGUE, IN BEHALF OF DEFENDANT-APPELLANT.

This cause was originally submitted upon stipulation of facts and without a jury, by the attorneys for the respective parties, to the Supreme Court at the Hudson Circuit, to the findings of which Court, the defendant takes this appeal, without the grounds of objection having been specifically submitted to the lower Court under Rule 25 of Practice Act of 1912, as amended, P. L. 1916, page 109.

Statement of the Case.

On September 4th, 1928, the Realty Foundation, Inc., as mortgagee, received a mortgage upon the premises in question from the Magnolia Construction Company, which mortgage was recorded on said day in the office of the County Clerk of Bergen County in book 1097 of mortgages, page 226, and at the time that this mortgage was placed, the mortgagee made an examination of the record, which disclosed no conditional bill of sale filed of record in the name of Arthur G. Teweles as vendor. This

mortgage was later foreclosed, a bill of complaint and *lis pendens* being filed against the premises in question on March 26th, 1929, and at that time, an examination of the record showed no conditional bill of sale of record in the name of Arthur G. Teweles, as vendor. While the said foreclosure proceedings were pending, somewhere between June and August, 1929, Arthur G. Teweles, produced a receipt from the County Clerk of Bergen County to the attorneys of the Realty Foundation, Inc., which receipt purported to be a receipt for the filing of a conditional bill of sale on February 16th, 1928, effecting the premises in question. Subsequently thereto, the County Clerk of Bergen County, on inquiry in behalf of this defendant, wrote a letter to a representative of this defendant, under date of August 31st, 1929, stating that the bill of sale in question was incorrectly indexed, in that Arthur G. Teweles, was indexed as the buyer and Magnolia Construction Company indexed as the seller, which was a reverse of the actual fact, and in the said letter says that the record was corrected in June, 1929 (See Stipulation of Fact, Schedule III). The plaintiff was at no time a party defendant in said foreclosure proceeding and the said foreclosure proceeded to sale by the Sheriff of Bergen County and the premises were bought in on behalf of the Realty Foundation, Inc., by James A. McTague, Jr., as attorney for said mortgagee, and conveyed by the said attorney to the defendant herein, a holding corporation of the Realty Foundation, Inc. At the said foreclosure sale, this defendant's attorney announced as one of the conditions of sale, that the premises would be sold subject to the rights if any, of Arthur G. Teweles.

THE GROUNDS OF APPEAL RAISED BY THE DEFENDANT-APPELLANT TO THE FINDINGS OF THE LOWER COURT, ARE AS FOLLOWS:

1. Because the trial court erred in finding that the conditional sales agreement was duly filed in the office of the Clerk of Bergen County pursuant to the statute in such case made and provided.

2. Because the trial court erred in finding that the failure of the County Clerk to properly index the conditional sales agreement was not an essential part of the filing, indexing and recording of the conditional sales agreement in question, even in view of the specific provisions of the conditional sales act governing such a matter.

3. Because the trial court erred in finding that the plaintiff-appellee was entitled to a money verdict arising out of the action for replevin in question.

4. Because the findings of the trial court were contrary to and against the weight of the evidence submitted to the said court.

5. That the findings of the trial court upon the matter submitted is contrary to law.

ARGUMENT.

POINT I.

The Trial Court erred in finding that the conditional sales agreement was duly filed in the office of the Clerk of Bergen County, pursuant to the statute in such case made and provided.

It is admitted that on February 18th, 1928, Arthur G. Teweles, went to the Clerk of Bergen County and deposited a conditional sales agreement effecting the premises in question (See par. III of Stipulation of Facts), for which he received a receipt as shown by Schedule II of Stipulation,

and it is also admitted that the goods in question were installed in the premises covered by the mortgage of the Realty Foundation, Inc., and it is further admitted that the Clearance Holding Corporation is a holding corporation of the Realty Foundation, Inc., and as such, have the same rights as the Realty Foundation, Inc., had at the time of placing its mortgage on September 4th, 1928 (See par. 15 of Stipulation of Facts). Therefore, the Clearance Holding Corporation has the same rights as the Realty Foundation, Inc., had on September 4th, 1928, at which time it is also admitted that the conditional sales agreement of the plaintiff, Arthur G. Teweles, was not properly indexed, upon the record of the County Clerk. It is also admitted that the mortgage of the Realty Foundation, Inc., in addition to mortgaging the land, contained the following provision concerning personal property and fixtures therein, which was as follows:

“Together with the buildings and improvements, fixtures, equipment and appliances erected or to be erected thereon, now or hereafter attached, to be used in connection with the said premises, all of which are covered by this mortgage” (See Stipulation, par. 6).

The Uniform Conditional Sales Act provides under section 6, laws of 1919, Chapter 210, page 462, C. S. S., page 3130, that the contract, or copy, shall be filed in the office of the County Clerk, and further provides that the filing officer shall mark the contract, or copy, filed with him, the day and hour of filing and shall file the contract or copy in his office for public inspection. He shall keep a separate book in which he shall enter the names of the seller and buyer, the date of the contract, the day and hour of filing, a brief description of goods, the price named in the contract and the date of can-

cellation thereof (See Laws of 1919, Chap. 210, p. 464, as amended, Laws 1920, Chap. 68, p. 120, C. S. S. 3131. Therefore, we contend that this statute should be strictly construed, and that the said bill of sale was not filed and indexed according to provisions of the aforesaid statute. It would be insufficient to consider that the mere placing of a contract in the hands of the County Clerk will be public notice, and we contend that it is the duty of the vendor to see that the County Clerk, as his agent, properly establishes the contract upon the record in order that public inspection may be readily obtainable. This contract was not noticed publicly as the statute provided and we contend that the failure of the County Clerk to so list Arthur G. Teweles as the vendor, and the Magnolia Construction Company as the purchaser, was not a compliance with the statute. When the examination of the title was made at the time of placing of the mortgage, it would be impossible for a title searcher to find such a listing of this conditional bill of sale. The usual practice is to look under the name of the vendee or the owners of the premises in question and from that, the record will show the purchases made by the respective owners. Such an examination would not disclose the purchase or the existence of a conditional bill of sale on September 4th, 1928, or at the subsequent institution of the foreclosure proceeding and the County Clerk admits himself that the said sales agreement was not properly put into the record (See Stipulation of Facts, Sched. III). We therefore charge that the errors or omissions of the County Clerk are chargeable to the vendor, Arthur G. Teweles.

“The application to give notice rests upon the party holding the title, and if his duty is imperfectly performed he and not an innocent purchaser must suffer the consequences” (See 39 Cyc., p. 1738,

ll. 3 to 10), and further continuing says, "The recorder is the agent of the grantee and the errors and omissions of the recorder in making such transaction, are his errors and omissions in the same manner as are the errors of a Sheriff in executing a writ, or of a Clerk in recording an order of a judgment."

Cady vs. Purcer, 131 California, 552, 63 Pac. 844; 82 Am. St. Rep. 391.

We further contend that the Realty Foundation, Inc., as mortgagee, was an innocent purchaser and that the Clearance Holding Corporation today stands in the same position as the Realty Foundation, Inc., did on September 4th, 1928. Under the provisions of the Uniform Conditional Sales Act, Laws 1919, Chapter 210, page 461, purchaser includes mortgagee or pledgee.

POINT II.

Because the Trial Court erred in finding that the failure of the County Clerk to properly index the conditional sales agreement was not an essential part of the filing, indexing and recording of the conditional sales agreement in question, even in view of the specific provisions of the conditional sales act governing such a matter.

The trial court relied upon the case of *Pavlick vs. Reginald Oliver Co.*, 148 Atlantic 624, in which the Supreme Court of this State contended that the mistake of name in index of a conditional sales contract when filed, does not deprive the assignee or

mortgagee as in this case, of the protection of the statute. In this respect, we contend that if said decision is permitted to stand, it is not at all necessary that an indexing of a sales agreement be made, or if it is made incorrectly, it makes no difference. We therefore submit to this Court, how is an innocent purchaser or mortgagee to determine whether or not conditional sales agreements exist, if the same is not brought to the attention of the public in the manner as provided by the statute?

We therefore contend that the indexing by the County Clerk is an essential part of the record, because the statute should be strictly construed to protect both an innocent purchaser or mortgagee.

Where, however, by statute, indexing is required and made part of the record, a record not properly indexed does not operate as constructive notice (See 39 Cyc., p. 1739, ll. 9 to 11, with numerous citations thereto referred). 39 Cyc., page 1740, lines 8 to 14 further contend, "it is well settled that an omission to make proper entries in the general index at the time the instrument is spread upon the record may be corrected after such recording, by making the proper entries, and when so made, the entry will be good from that date, and it will not be necessary to again record the instrument at length". In this case, if the foreclosure is through, the conditional sales agreement in question was not properly of record until June, 1929, subsequent to the executing and filing of the mortgage and subsequent to the filing or institution of the foreclosure proceedings upon the said mortgage, and it was not necessary in any event, if the filing was to be considered as of June, 1929, to make Arthur G. Teweles a defendant in said foreclosure action. It was his duty to apply to be made a party defendant to protect his own interests.

39 Cys., page 1740, section 11 further says:

"The recording acts, however, generally provide that a subsequent purchaser without notice of a prior unrecorded conveyance shall be protected against it."

(Citing *Atlantic City vs. New Auditorium Pier Co.*, 67 N. J. E. 610;
Kappes vs. Rutherford Park Association,
 60 N. J. E. 129;
Cressee vs. Security Land Improvement Co., 35 Atlantic 451.)

POINT III.

Because the Trial Court erred in finding that the plaintiff-appellee was entitled to a money verdict arising out of the action for replevin in question.

The plaintiff, Arthur G. Teweles, made no claim for damages for the detention of the property, but that if he was entitled to a judgment, there should be a judgment in the sum of \$1,435.00, and interest (See Supplemental Stipulation of Fact, Sec. II, par. 2). In view that the plaintiff made no specific claim, the trial court erred in so granting him a money judgment. The plaintiff in the action sought only the recovery of the goods and permitted the goods to remain in the possession of the defendant corporation. Under the above stipulated fact, the court assumed, under the authority of *Conlen vs. Lemmerman*, 87 N. J. L., page 84, that the plaintiff is entitled to a money judgment even in view of the fact that as the plaintiff claims therein, he made no claim for damages for the detention of the property. Plaintiff in the first count of the complaint

demanded possession of the goods and in the event that they could not be returned, he then sought damages, but it is admitted that the goods are severable from the real estate under paragraph 16 of the stipulation of facts. It is therefore incumbent upon plaintiff, according to his demand, to be entitled to only the return of the property sought to be replevined.

POINT IV.

Because the findings of the Trial Court were contrary to and against the weight of the evidence submitted to the said Court.

Under this contention, we find that the trial court found from the statements of facts that paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first count of the complaint are supported by the evidence.

We beg to submit that it is admitted for the purposes of presentation of this matter, that paragraphs 1, 2, 3 and 4 of the first count are admitted and as to paragraph 5, it is admitted that the plaintiff, Arthur G. Teweles, on February 18, 1928, did obtain a receipt for the filing of the conditional bill of sale in question, but we repeat and reiterate herein that the same was not filed according to the provisions of the statute in such case made and provided, as set forth in our arguments, under points 1 and 2 of the grounds of appeal, *supra*.

As to the allegations in paragraph 6 of the first count, we deny that the plaintiff is entitled to possession of the goods in question, and we also refer this Honorable Court to our arguments under Points 1 and 2, and at the same time, we call this Court's attention to the fact that in the said para-

graph, the plaintiff seeks only possession. In proceeding further, we see that under the allegations of paragraph 7 of the first count, the plaintiff has demanded the return of the goods and chattels, and if the same cannot be returned, he then seeks money damages. The trial court on the allegations of this section of the complaint erred in finding that the plaintiff Teweles was entitled to a money verdict because it is expressly stipulated under paragraph 16 of the stipulation of facts that the said goods were severable from the premises without injury and in view of this admission or stipulation, the plaintiff is not entitled to a money verdict, which is clearly against the weight of the evidence submitted. Therefore, in view of the fact that the defendant herein, the Clearance Holding Corporation, had the same rights as the Realty Foundation, Inc., at the time of the filing of the mortgage on September 4th, 1928 (See stipulation of facts, sec. 16), and further, that under the conditional sales act as cited above herein, that the mortgagee was an innocent purchaser in this case, and as such, the Clearance Holding Corporation herein was an innocent purchaser, and in view of the admission of the County Clerk of the error in the indexing and recording of the conditional sales instrument in question at the time of delivery to him, and its subsequent correction upon the record in June, 1929, at which time it is agreed for the purposes of argument that the said conditional sales agreement became a proper lien, we feel that this evidence does not support the finding of a verdict either for possession or for any money damages in behalf of the plaintiff, Arthur G. Teweles.

POINT V.

That the findings of the Trial Court upon the matter submitted is contrary to law.

Under this section, the defendant-appellant repeats and reiterates all of the arguments briefly set forth and cited herein.

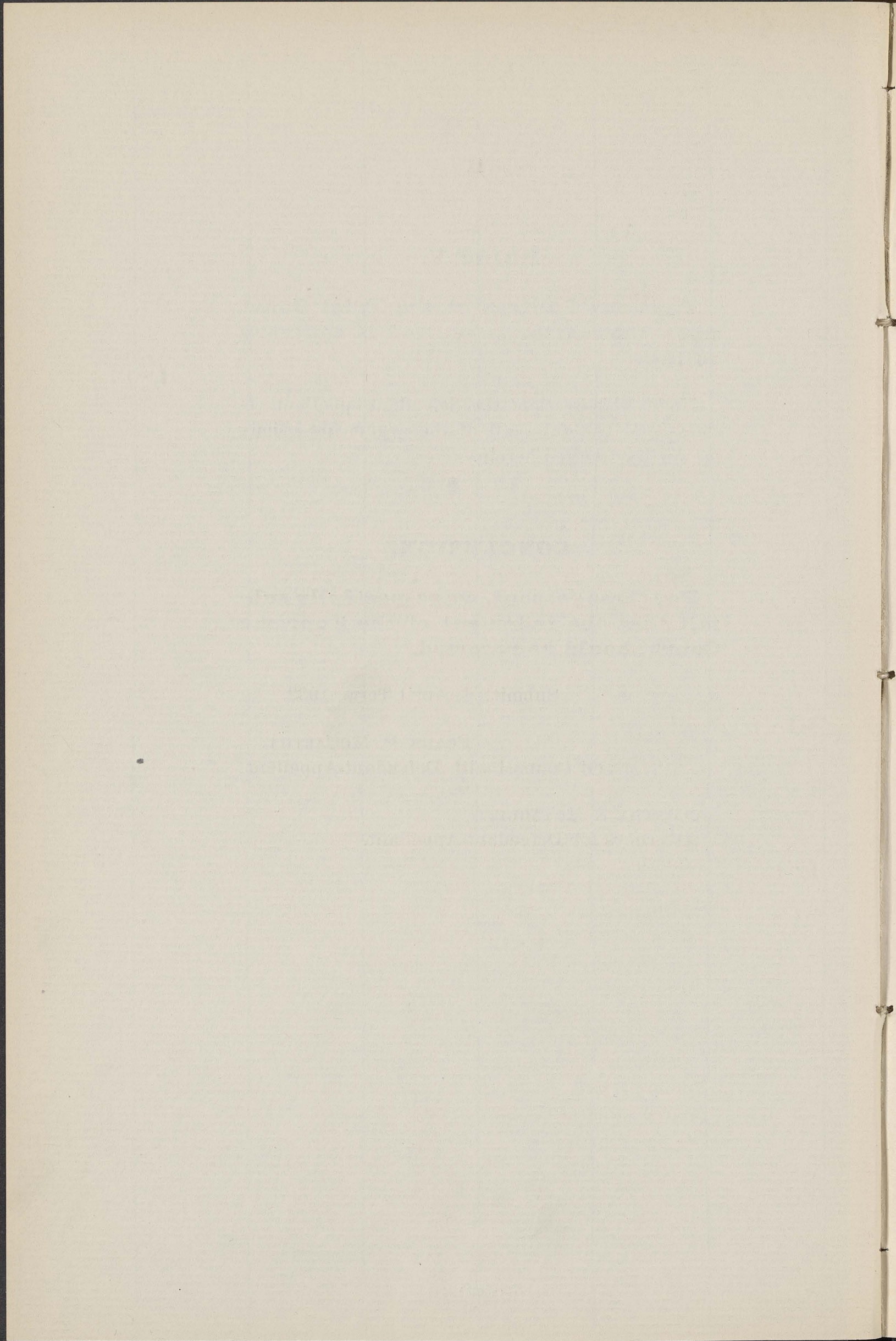
CONCLUSION.

For these reasons, we respectfully submit that the judgment of the Supreme Court should be reversed.

Submitted, April Term, 1930.

FRANK P. MCCARTHY,
Of Counsel with Defendant-Appellant.

MCCARTHY & MCTAGUE,
Attorneys for Defendant-Appellant.



New Jersey Court of Errors and Appeals

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| ARTHUR G. TEWELES, <i>Plaintiff-Appellee,</i> <i>v.</i> CLEARANCE HOLDING CORPORATION, <i>Defendant-Appellant.</i> | } | Action at Law. On Appeal from the Supreme Court, Hudson Circuit. |
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BRIEF OF CHARLES HERSHENSTEIN IN BEHALF OF PLAINTIFF-APPELLEE.

Statement.

The plaintiff-appellee (to whom we will hereafter refer as the plaintiff) brought an action against the defendant-appellant (to whom we will hereafter refer as the defendant) in replevin for gas ranges delivered to the premises known as 64 Orient Way, Rutherford, N. J. After issue was joined, the facts having been stipulated, the case was presented to Honorable HENRY E. ACKERSON, the Circuit Court Judge, for his determination without a jury. In order to enable the trial judge to render a proper verdict, he requested counsel to stipulate whether there should be a judgment for possession or a money judgment, and if a money judgment was to be awarded, to indicate the present value of the personal property. Accordingly, an additional stipulation of fact was entered into (Case, p. 29) in which the parties agreed that although the action was started under

the 33rd Section of the Replevin Act and the property was permitted to remain in the possession of the defendant, that if the plaintiff was entitled to judgment, there should be a money judgment rendered to him in the sum of \$1,435.00 with interest, which was the value of the property. The trial judge, after considering the matter, made his findings which were duly filed, and having found for the plaintiff, directed that a verdict be entered in his favor and against the defendant upon the first count of the complaint in the sum of \$1,542.62, which was the value of the goods agreed upon between the parties, together with interest from March 22, 1929, in accordance with the supplemental stipulation of facts (Case, p. 13, ll. 22-30). A postea was then duly filed and judgment entered, from which judgment the defendant appeals.

Facts.

The plaintiff sold and delivered to the Magnolia Construction Company, owner of a building at 64 Orient Way, Rutherford, N. J., sixty-eight gas ranges for \$2,806.00 under a conditional sales agreement dated February 16, 1928, which was delivered to and filed by the Clerk of Bergen County on February 18, 1928. The plaintiff complied with the terms of the Uniform Sales Act, Laws of 1919, Chapter 210, in the sale of the gas ranges, and duly delivered said conditional sales contract to said Clerk for filing prior to the delivery and installation of the gas ranges, and they were affixed to the realty, but severable therefrom without material injury (Par. 14 Stipulation, Case, p. 23; Par. 16 Stipulation, Case, p. 24). The conditional sales agreement was incorrectly indexed by the County Clerk in that the Magnolia Construction Company, the purchaser of the gas

ranges, was indexed as the seller and Arthur G. Teweles, the seller, was indexed as the buyer.

Subsequent to the delivery and installation of the gas ranges and on August 31, 1928, the Magnolia Construction Company executed and delivered to the Realty Foundation, Inc., a mortgage for \$65,000.00 covering the real estate in question "together with the buildings and improvements, fixtures, equipment and appliances erected or to be erected thereon now or hereafter attached to or used in connection with said premises." This mortgage was later foreclosed and pending such proceedings, plaintiff informed the attorney for the defendant herein of the existence of said conditional sales agreement, and in June, 1929, the County Clerk corrected said index (Par. 12 Stipulation, Case, p. 23). At the foreclosure sale the Sheriff announced that the premises were sold subject to said conditional sales agreement held by the plaintiff and said premises were thereupon purchased by the attorney for the Realty Foundation, Inc., the mortgagee, and transferred to this defendant, a holding company of the aforesaid mortgagee.

Default having been made in the payment of the purchase price of said gas ranges, as provided for in said conditional sales agreement, the plaintiff demanded possession of said gas ranges, but defendant had taken possession thereof following said foreclosure sale and refused to permit the plaintiff to take possession thereof, whereupon a replevin action was brought under Section 33 of the Replevin Act (3 Comp. Stat. 4368), which action was submitted to the trial judge without a jury upon an agreed statement of facts.

All of the facts were agreed upon between the parties, and the only legal question which was presented to the Court in this case was the conten-

tion of the defendant that inasmuch as the conditional sales agreement was not properly indexed at the time of the execution and recording of the mortgage, through the foreclosure of which it obtained title to the premises, which mortgage also covered the fixtures and equipment of the building, that therefore the defendant's claim to said gas ranges is superior to that of the plaintiff because, as is alleged, the filing of said conditional sales agreement afforded no notice thereof to the defendant or those through whom it claims title.

In order that the Court might render a proper verdict in this case, there having been no stipulation as to whether or not possession was obtained by the plaintiff of the ranges by the filing of a bond in replevin, the trial judge requested counsel to stipulate whether there should be a judgment for possession or a money judgment for the value of the goods. Whereupon, counsel by a supplemental stipulation agreed that if plaintiff was entitled to judgment, there should be a money verdict in his favor in the sum of \$1,435.00 with interest from March 22, 1929, under the authority of *Conlen v. Lemmerman*, 87 N. J. L., page 84 (Par. 2 Supplemental Stipulation, Case, p. 29).

The trial judge held that the contention of the defendant has been adversely determined against it by the Supreme Court in the case of *Pavlick v. R. Oliver Co.*, 148 Atl. Rep. 624, and in accordance with the agreed stipulation, found a verdict in favor of the plaintiff and against the defendant upon the first count of the complaint in the sum of \$1,542.62, being the value of the goods in question with interest.

Whereupon defendant prosecutes this appeal.

In reply to its brief, we respectfully allege:

(1) The trial judge did not err in finding that the conditional sales agreement was duly filed in

the office of the Clerk of Bergen County, pursuant to the statute in such case made and provided;

(2) The trial judge did not err in finding that the failure of the County Clerk to properly index the conditional sales agreement was not an essential part of the filing, indexing, and recording, in view of the decision of the Supreme Court in *Pavlick v. R. Oliver Co.*, 148 Atl. Rep. 624;

(3) The trial judge did not err in finding that the plaintiff was entitled to a money verdict arising out of the action for replevin;

(4) The findings of the trial judge were not contrary to or against the weight of the evidence, nor are the findings contrary to law.

POINT I.

The trial judge did not err in finding that the conditional sales agreement was duly filed in the office of the Clerk of Bergen County, pursuant to the statute in such case made and provided.

It is contended by the defendant under Point I of its argument that the trial court erred in finding that the conditional sales agreement was duly filed in the office of the Clerk of Bergen County, pursuant to the statute in such case made and provided. Defendant cannot, however, at this time make such a contention because, by the stipulation of fact, it was agreed that the plaintiff did comply with all of the provisions of the Conditional Sales Act and that said agreement was duly filed in the office of the Clerk of Bergen County.

Paragraph 3 of the Stipulation (Case, p. 20) provides as follows:

“(3) The conditional sales agreement bore the date of February 16, 1928, and was delivered to the Clerk of Bergen County on February 18, 1928, for filing under the conditional sales statute and was filed by the said Clerk of Bergen County on said date, and the plaintiff received from the Bergen County Clerk’s Office a receipt bearing date February 18, 1928, for the filing of said conditional sales agreement, which receipt is hereto annexed, made part hereof, and referred to as Schedule II.”

Paragraph 14 of the Stipulation (Case, p. 23) provides as follows:

“(14) The plaintiff, Arthur G. Teweles, complied with the terms of the Uniform Conditional Sales Act, Laws of 1919, Chapter 210, page 461, and any error which occurred in the indexing was due to the fault or neglect of the Clerk of Bergen County.”

The finding, therefore, of the trial court that the conditional sales agreement was duly filed in the office of the Clerk of Bergen County, pursuant to the statute in such case made and provided, is based upon the agreed statement of fact.

Moreover, the defendant confuses the provisions of Section 6 of the Uniform Conditional Sales Act with the provisions of Section 7 of said Act (Chapter 210, Laws of 1919; C. S. S. 3130). The provisions of Sections 5 and 6 of the Conditional Sales Act apply only to personal property which at no time can be affixed to the realty, such as automobiles, furniture, and the like; whereas paragraph 7 applies to property such as is involved in the case *sub judice* and which may become fixtures if not severable from the realty without injury thereto.

Section 7 of the Uniform Conditional Sales Act provides as follows:

“If the goods are so affixed to realty, at the time of a conditional sale or subsequently as

to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation. *If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof, but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are or are to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty.* As against the owner of realty the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof, but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed, in the office where a deed would be recorded or registered to affect such realty."

It is conceded by the stipulation of fact that the plaintiff complied with all of these provisions of the Conditional Sales Act. The conditional sales agreement was properly executed, contained all the necessary statements as is required by the Act, and then the agreement was *filed* with the County Clerk. It is the Clerk's duty to do something further after the plaintiff has complied with the provisions of the statute. The Clerk, under Section

10 of the Act, must index the contract. The plaintiff, however, has no control over the Clerk after he has filed the instrument. The plaintiff performs all that is required of him to do under the statute when he files a proper contract with the Clerk or Register, as the case may be. That is all which the statute provides must be done by the vendor. That the plaintiff complied with all of these provisions of the Act is stipulated and agreed by paragraph 14 of the stipulation (Case, p. 23).

The defendant, however, contends that by reason of the incorrect indexing, the defendant had no notice of this conditional sales agreement. But again we respectfully submit that the stipulation of fact discloses that prior to the foreclosure sale, and pending the foreclosure proceedings, the plaintiff did inform counsel for the defendant that he held a conditional sales agreement against these premises. The County Clerk was informed of the mistake and the correction was made in June, 1929, prior to the sale of the premises under the *fi fa* (Par. 12 Stipulation, Case, p. 23). The defendant, therefore, had notice of this conditional sale at that time. Thereafter more particular notice was given to the defendant of this conditional sales agreement, because, at the sale, the Sheriff of Bergen County did announce that the premises would be sold subject to the rights, if any, of the conditional sales agreement held by the plaintiff, upon which there was due the sum of \$1,435.00 (Par. 9 Stipulation, Case, p. 22). The premises therefore were purchased by the defendant or its nominee with explicit notice of this conditional sales agreement and cannot, we submit, now contend that it had no knowledge or notice of the plaintiff's conditional sales agreement, even though the record prior to June, 1929, incorrectly indexed the names of the parties.

POINT II.

The trial judge did not err in finding that the failure of the County Clerk to properly index the conditional sales agreement was not an essential part of the filing, indexing and recording, in view of the decision of the Supreme Court in *Pavlick v. R. Oliver Co.*, 148 Atl. Rep. 624.

The factual situation in this case is similar to the case of *Pavlick v. R. Oliver Co.*, 148 Atl. Rep. 624; Volume VIII, No. 8, Adv. Rep., page 172, decided January 31, 1930, by the Supreme Court, wherein it was held:

“These statutes may be divided into two classes, viz., those statutes the provisions of which make the index an essential part of the record and those which do not. We think the statute (Pamph. L. 1919, p. 461), the one drawn here into question falls within the latter class. It is the filing by the vendor of the contract and not the indexing by the register or clerk which is the vendor’s protection.

“We therefore hold, affirming the trial court, that the mistake by the register of the name in the index does not deprive the defendant of its protection.”

The decision in that case is practically *stare decisis* of the question involved here and was recognized by the trial judge as adjudicating the rights of the parties to this action, and held that the question thus presented “has been decided adversely to the defendant’s contention by the Supreme Court so far as this phase of the case is concerned.”

Counsel for the defendant now questions the soundness of the Supreme Court decision in the

Pavlick case. But we respectfully contend that not only is this decision based upon sound reasoning, but that it is the law, for the *Pavlick* case has not been appealed, so far as we have been able to ascertain, and we respectfully contend that this Court will not *in this action* undertake to reverse the decision of the Supreme Court in another case.

It is to be observed that under Section 7 of the Uniform Conditional Sales Act, the provision is that the reservation of title is void as against subsequent purchasers unless the contract or a copy thereof shall be filed before such purchase. The requirement is that it shall be *filed*. The conditional sales agreement of the plaintiff was *filed*. There was no error as to the filing. The error occurred in the indexing by the filing officer, as is provided in Section 10 of the Act, but the Supreme Court has unequivocally stated that an error in the indexing does not in anywise deprive the conditional vendor of his protection under the Conditional Sales Act if it is *filed* in accordance with the statute. Upon the authority, therefore, of the *Pavlick* case, the plaintiff having complied with all of the provisions of the Conditional Sales Act, the error of the County Clerk in indexing cannot deprive him of his rights under the conditional sales agreement; nor does such error make it void as against a subsequent mortgagee.

As a matter of fact this conditional sales agreement was indexed. It may have been improperly indexed, but, under Section 10 of the statute, the filing book is indexed under the names of both seller and buyer. Even, therefore, if the indexing was incorrect, if the mortgagees would have examined the index both under buyers and sellers for both names, they would have discovered, with due diligence, that the conditional sales agreement of the plaintiff had been filed.

POINT III.

The trial judge did not err in finding that the plaintiff was entitled to a money verdict arising out of the action for replevin.

We cannot understand how the defendant can justly raise the point that the trial judge erred in rendering a money judgment. After the stipulation of fact was presented to the Court, the trial judge inquired of counsel whether the judgment should be for possession or whether there should be a money judgment for the present value of the goods, if the plaintiff was entitled to a judgment. A supplemental stipulation was therefore entered into between the parties, as follows (Case, p. 29):

“It is hereby stipulated and agreed in addition to the facts as have heretofore been stipulated, that the following facts be agreed upon:

(1) That the action was started under the 33rd Section of the Replevin Act and the property was permitted to remain in the possession of the defendant.

(2) That the plaintiff makes no claim for damages for the detention of the property, but that if the plaintiff is entitled to judgment, there shall be a judgment rendered in his favor in the sum of \$1,435.00, with interest from March 22, 1929, which is the value of the property, under the authority of *Conlen v. Lemmerman*, 87 N. J. L., at page 84.”

The trial judge found in favor of the plaintiff, carried out the agreement of counsel, and rendered a judgment in favor of the plaintiff for the value of the goods, the plaintiff having waived any damages for their detention.

Not only is the defendant bound by the stipulation upon this point but, as a matter of fact, it

was conceded by counsel that under the authority of *Conlen v. Lemmerman*, 87 N. J. L., at page 84, a judgment for the value of the property may be rendered, even though an action is started under the 33rd Section of the Replevin Act. That case, therefore, is authority for this judgment, even though counsel did not stipulate that there should be a money judgment for the plaintiff.

We do not believe that counsel for the defendant intentionally sought to mislead the trial judge in stipulating that a money judgment should be rendered in case the Court found for the plaintiff, by anticipating that, should such a money judgment be rendered, they would attack the same after the verdict. But we do respectfully allege that if counsel for the defendant in this case could take advantage of that situation, it would amount to a clear deception upon their part.

The trial judge desired to be informed as to what judgment should be rendered. Counsel stipulated the form of the judgment. We, therefore, respectfully contend that the defendant should not be heard at this time to contest the validity of such a judgment, especially in view of the *Conlen* case, *supra*, which is ample authority for the rendition of a money judgment in an action begun under the 33rd Section of the Replevin Act.

POINT IV.

The findings of the trial judge were not contrary to or against the weight of the evidence, nor are the findings contrary to law.

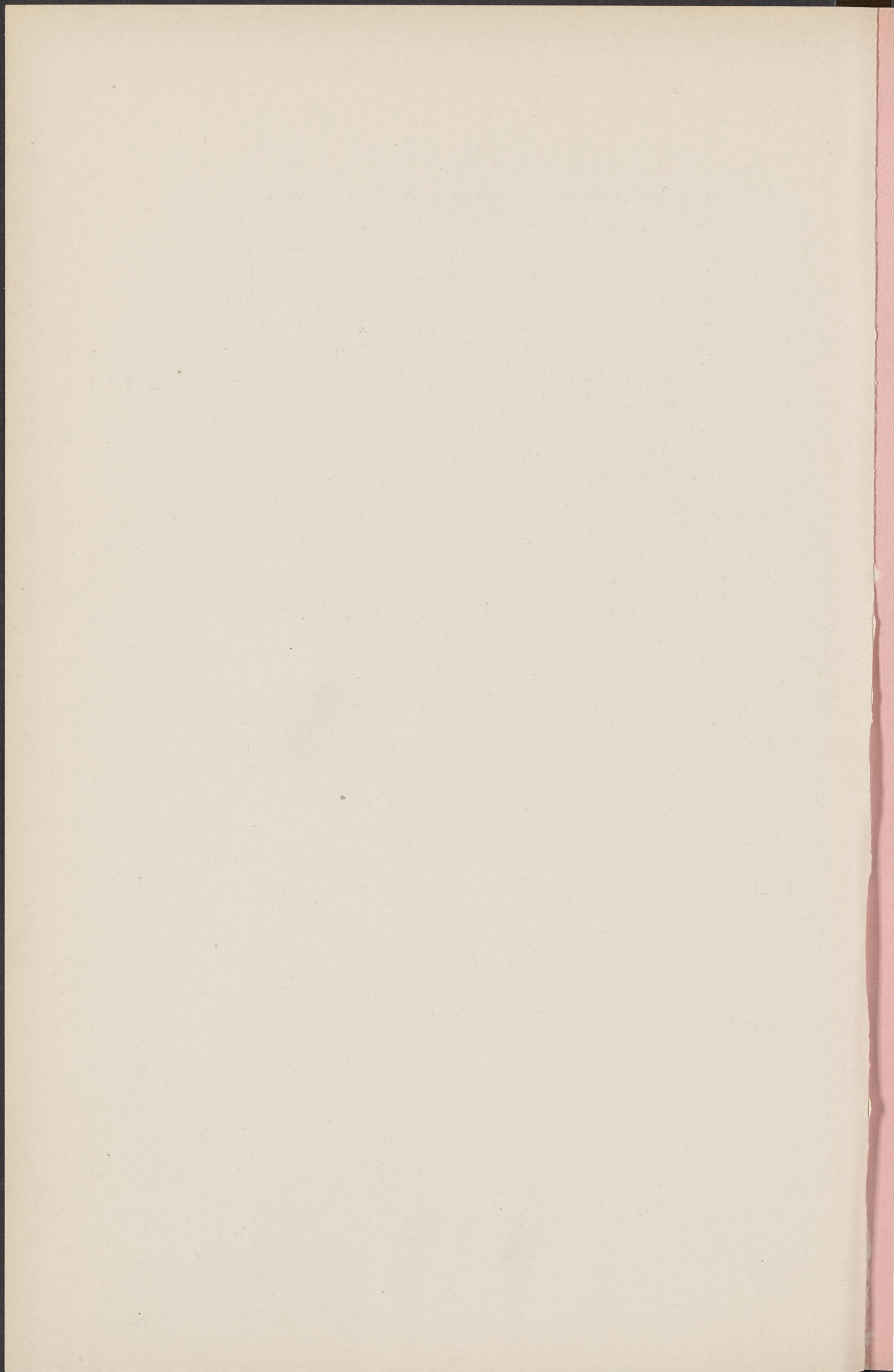
All of the findings of the Court were based upon the agreed stipulations of fact. The findings of the Court, therefore, cannot be contrary to the weight of the evidence, for there was no dispute

as to the evidence in the case. Nor are the findings contrary to law, because the findings of the trial court were merely as to the findings of the facts which had been stipulated and upon which the trial judge based his verdict. The only law involved in the case was the application of the rule laid down in the *Pavlick* case, *supra*, which determined, on all fours, the exact question raised by the defendant, namely, whether the error of the County Clerk in indexing the names, after the conditional sales agreement had been duly filed, makes the instrument void as against this defendant. Surely the trial judge committed no error in having applied the rule of law laid down in the *Pavlick* case to the facts in the case *sub judice*.

We, therefore, respectfully submit that the judgment in favor of the plaintiff should be affirmed.

Respectfully submitted,

CHARLES HERSHENSTEIN,
Attorney for and of Counsel
with Plaintiff-Appellee.



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