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NOTICE OF APPEAL.

New Jersey Supreme Court

ESSEX COUNTY.

H. G. VOGEL Co., a corporation
of the State of New York, au-
thorized to do business in the
State of New Jersey,

Plaintiff,

vs.

THE 295 HALSEY STREET Co., a
corporation of New Jersey,

Defendant.

10

*Action
at Law.*

*Notice
of Appeal.*

20

To H. G. Vogel Co., and Maurice Bernstein, Esq.,
attorney of plaintiff, 129 Market street, Pater-
son, N. J.

SIRS:

PLEASE TAKE NOTICE, that The 295 Halsey
Street Co., a corporation of New Jersey, the de-
fendant in the above-entitled case, appeals to
the New Jersey Court of Errors and Appeals,
the Court of last resort of all causes in New
Jersey from the whole and each and every part
of the judgment entered in this cause in the New
Jersey Supreme Court, March 12, 1931.

30

Yours, etc.,

JACOB L. NEWMAN,

Attorney for and of Counsel with Appellant.

Dated: March 17, 1931.

40

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

10	H. G. VOGEL & Co., a corporation, <div style="text-align: center;"><i>Plaintiff-Respondent,</i></div>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
	295 HALSEY STREET CORP., <div style="text-align: center;"><i>Defendant-Appellant.</i></div>		<i>On Appeal.</i>
			<i>Grounds</i>
			<i>of Appeal.</i>

To Maurice Bernstein, Esq., attorney for the plaintiff-respondent:

SIR:

20 TAKE NOTICE, That the following are the grounds of appeal specified by 295 Halsey Street Corporation, the appellant in the above-entitled cause:

30 1. That the Trial Court denied the appellant's motion that the respondent elect upon which of the two causes of action alleged in the complaint it expected to proceed, because the causes of action alleged in the complaint were inconsistent, and the appellant was entitled to be apprised upon which ground the respondent intended to proceed in order to properly cross examine the witnesses of the respondent and present its defense thereto.

2. The Trial Court erred in admitting over appellant's objection testimony as to the cost of removing the sprinkler system, since that did not constitute a proper element of damages in this case.

40

Grounds of Appeal.

3. That the Trial Court erred in refusing appellant's motion for non-suit based upon the failure of the respondent to prove as a necessary part of its direct case that the sprinkler system was removable without material injury to the freehold.

10

4. That the Trial Court erred in refusing appellant's motion for non-suit based upon the failure of the respondent to prove as a necessary part of its direct case that the sprinkler system was removable without material injury to the public garage as the institution comprising the freehold.

5. That the Trial Court erred in refusing appellant's motion for non-suit based upon the failure of the respondent to prove as a necessary part of its direct case assuming that the sprinkler system was not removable without material injury to the freehold, that the appellant expressly assented to the reservation of title in the respondent.

20

6. That the Trial Court erred in refusing appellant's motion for a direction of a verdict in its favor at the close of the case because the uncontroverted testimony at that stage conclusively indicated that the removal of the sprinkler system would result in a destruction of the public garage, as the institution comprising the freehold.

30

7. That the Trial Court erred in its charge to the jury in stating that the adaptability of the premises to other uses was an element in ascertaining whether the sprinkler system could be removed with or without material damage to the freehold.

40

Grounds of Appeal.

8. That the Trial Court erred in including
in the postea an assessment of damages in the
amount of Nine Hundred Seventy-five Dollars
(\$975.00) in favor of the respondent and against
the appellant, since no motion was made there-
for by respondent and since the only motion
10 before the Court was the one made by appellant
for a direction in its favor.

Respectfully,

JACOB L. NEWMAN,
Attorney for Defendant-Appellant.

Dated: September 8, 1931.

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30

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SUMMONS.

THE STATE OF NEW JERSEY, to the
Sheriff of the County of Essex:

(SEAL) GREETING: We command you that
if H. G. Vogel Company, a corpora-
tion of the State of New York, author- 10
ized to do business in the State of New Jersey,
shall make you secure, you cause to be taken and
delivered to it, one "Estey Sprinkler System"
with all pipings, hangers, apparatus, accessories
and sprinkler heads thereunto belonging, which
The 295 Halsey Street Co., a New Jersey corpora-
tion took and unjustly detains as is said; and
that you summon the said The 295 Halsey Street
Co., a New Jersey corporation to answer the 20
annexed complaint of H. G. Vogel Company, a
corporation of the State of New York, authorized
to do business in the State of New Jersey in an
action at law in the Supreme Court. And that
you notify it that unless it files 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, the plaintiff may proceed in the suit
and judgment may be entered against it.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief 30
Justice of the Supreme Court, at Trenton, this
30th day of July, nineteen hundred and twenty-
nine.

FRED. BLOODGOOD,
Clerk.

MAURICE BERNSTEIN,
Attorney.

To Sheriff of Essex County:

TAKE NOTICE that plaintiff herein waives custody of goods and chattels mentioned herein before trial.

MAURICE BERNSTEIN,
Attorney for Plaintiff.

10

20

30

40

COMPLAINT.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

H. G. VOGEL COMPANY, a corporation of the State of New York, authorized to do business in the State of New Jersey,

Plaintiff,

vs.

THE 295 HALSEY STREET Co., a New Jersey corporation,

Defendant.

10

*Action
at Law.*

Complaint.

20

Plaintiff H. G. Vogel Company, a corporation of the State of New York, authorized to transact business in the State of New Jersey, alleges:

FIRST COUNT.

1. That it is engaged in the manufacturing and installing of sprinkler systems, and that its principal office is located in the City, County and State of New York.

30

2. That on the 3rd day of March, 1927, the plaintiff herein entered into a certain conditional sales agreement with one Equitable Properties Corporation, a corporation of the State of New Jersey, whereby the said plaintiff in consideration of the sum of \$5,000 to be paid by the said Equitable Properties Corporation, agreed to install a certain "Estey Sprinkler System" together with pipings, hangers, apparatus, acces-

40

Complaint.

sories, and sprinkler heads, upon the premises owned by the said Equitable Properties Corporation, and more particularly designated as No. 295 Halsey Street, in the City of Newark, County of Essex, and State of New Jersey.

10 3. That pursuant to said conditional sales agreement said plaintiff proceeded to and did install upon said premises the said "Estey Sprinkler System" together with pipings, hangers, apparatus, accessories and sprinkler heads, and the said Equitable Properties Corporation did pay on account of said conditional sales agreement the sum of \$3,600.00 leaving a balance due the said plaintiff the sum of \$1,400.00, which still remains unpaid.

20 4. That said conditional sales agreement was duly recorded in the Essex County Register's Office, bearing No. 22525.

30 5. That said conditional sales agreement provided amongst other things that the title in and to said Estey Sprinkler System together with pipings, hangers, apparatus, accessories and sprinkler heads, was to remain in the said plaintiff until the entire purchase price of \$5,000 had been fully paid only and at which time the title to said sprinkler system would pass to the said Equitable Properties Corporation.

40 6. That under and by virtue of said conditional sales agreement it was further provided that the said "Estey Sprinkler System" together with pipings, hangers, apparatus, accessories and sprinkler heads so installed upon the said premises at No. 295 Halsey street, in the City of Newark aforesaid, should at all times be considered as personal property.

Complaint.

7. That plaintiff will produce at the trial of this cause the said conditional sales agreement hereinbefore mentioned.

8. That the said premises known as No. 295 Halsey Street, in the City of Newark aforesaid were subsequently conveyed to defendant by deed dated the 26th day of January, 1929, and recorded in the Essex County Register's Office in Book B-79 of Deeds on pages 459-461 inclusive. 10

9. That the said defendant purchased said premises known as No. 295 Halsey Street, in the City of Newark aforesaid with full notice and knowledge of the conditional sales agreement above referred to, covering the said sprinkler system together with apparatus, sprinkler heads, accessories, pipings, and hangers, and also with full knowledge and notice that there was and still is due the said plaintiff the sum of \$1,400.00 under and by virtue of said conditional sales agreement. 20

10. That said plaintiff was and ever since has been lawfully entitled to the immediate possession of said sprinkler system together with apparatus, sprinkler heads, accessories, pipings and hangers, now upon the premises owned by the said defendant at No. 295 Halsey Street, in the City of Newark aforesaid. 30

11. That said defendant wrongfully took said sprinkler system together with apparatus, sprinkler heads, accessories, pipings and hangers from the possession of the said plaintiff, and has ever since wrongfully detained and still wrongfully detains the same.

12. That said plaintiff on the 15th day of July, 1929, did make written demand upon the 40

Complaint.

said defendant for the return of the said Estey Sprinkler System together with pipings, sprinkler heads, apparatus and hangers, but the said defendant refused and still refuses to return and deliver possession of the same to the said plaintiff herein.

10 Plaintiff demands possession of said "Estey Sprinkler System" together with accessories, pipings, hangers, apparatus and sprinkler heads thereunto belonging, and the sum of \$5,000 damages for their detention, and costs of suit.

SECOND COUNT.

1. Plaintiff repeats paragraphs one, two, three, four, five, six, seven, eight, nine and ten of the first count of the complaint, and makes the same
20 a part of this count.

2. That ever since the said 26th day of January, 1929, the said defendant has exercised unlawful dominion over said sprinkler system, together with apparatus, hangers, sprinkler heads, accessories, and pipes thereunto belonging, and has converted the same to its own use, and to the damage of the said plaintiff.

3. That on the 15th day of July, 1929, the
30 said plaintiff did make written demand of the said defendant for the return of the said "Estey Sprinkler System" together with all pipings, sprinkler heads, apparatus and hangers, thereunto belonging, but the said defendant refused and still refuses to return and deliver up possession of the same to the said plaintiff, notwithstanding that the defendant knows that the said sprinkler system together with apparatus, hangers, sprinkler heads, accessories and pipes thereunto belonging are the property of the plaintiff.
40

Complaint.

4. That the value of the said sprinkler system together with all pipings, sprinkler heads, apparatus, accessories and hangers so converted by the said defendant to its own use is the sum of \$5,000.

Plaintiff on the second count herein claims as damages the sum of \$5,000 together with costs of suit. 10

MAURICE BERNSTEIN,
Attorney for Plaintiff,
129 Market street, Paterson, New Jersey.

To 295 Halsey St. Co., Incorporated, a New Jersey corporation:

TAKE NOTICE that we herewith require and demand of you to deliver up to me the possession of the following: 20

“ONE ESTY WET PIPE AUTOMATIC SPRINKLER SYSTEM, together with piping, fittings, hangers, all sprinkler heads, accessories and apparatus, now on premises at No. 295 Halsey Street, Newark, New Jersey,

now in your possession belonging to us. 30

Dated: July 15, 1929.

H. G. VOGEL COMPANY,

By MAURICE BERNSTEIN,
Attorney for H. G. Vogel Company,
129 Market St.,
Paterson, N. J.

Received

July 15th, 1926.

40

ANSWER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10	H. G. VOGEL Co., a corporation of the State of New York, au- thorized to do business in the State of New Jersey, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
	THE 295 HALSEY STREET Co., a New Jersey corporation, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Answer.</i>

20 The 295 Halsey Street Co., a corporation of
 New Jersey, having its principal office in the
 City of Newark, New Jersey, says that:

IN ANSWER TO THE FIRST COUNT.

1. It has no knowledge of the matters set
 forth in paragraphs 1, 2, 3, 4, 5, 6 and 7 of the
 First Count, sufficient to form a belief, but puts
 the plaintiff to its proof.

30 2. It admits paragraphs 8 and 12 of the First
 Count.

3. It denies paragraphs 9, 10 and 11 of the
 First Count.

FIRST SEPARATE DEFENSE TO FIRST
COUNT.

40 1. The defendant is a bona fide purchaser
 for value of premises known as 295 Halsey

Answer.

street, Newark, New Jersey, without notice of the alleged claim of the plaintiff, and the goods sued for having been affixed to the said realty so as to become a part thereof, the alleged reservation of title in the plaintiff is void, as against this defendant, under the provisions of "An Act Concerning Conditional Sales, and to Make Uniform the law relating thereto." Pamphlet Laws of 1919, Ch. 210. 10

IN ANSWER TO SECOND COUNT.

1. Defendant repeats paragraphs 1, 2 and 3 of the Answer to the First Count.
2. It denies paragraphs 2 and 4.
3. It admits so much of paragraph 3 as alleges that a demand was made, and a refusal received, and denies the allegations contained in the balance of paragraph 3 of the Second Count. 20

FIRST SEPARATE DEFENSE TO SECOND COUNT.

1. It repeats the allegations of the First Separate Defense to the allegations of the First Count of the complaint, as a separate defense to the Second Count of the complaint. 30

WHEREFORE, the defendant demands judgment dismissing the complaint herein, with costs.

JACOB L. NEWMAN,
Attorney of Defendant.

Dated: August 27, 1929.

REPLY.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10	H. G. VOGEL Co., a corporation of the State of New York, au- thorized to do business in the State of New Jersey, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
	THE 295 HALSEY STREET Co., a New Jersey corporation, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Reply.</i>

20 The plaintiff H. G. Vogel Company, a corpora-
tion, by way of Reply to the Answer filed herein
by said defendant says:

1. That it denies the allegations contained in
the first separate defense to the first count.
2. That it denies the allegations contained in
the first separate defense to the second count.

30 MAURICE BERNSTEIN,
Attorney for Plaintiff.

POSTEA.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

H. G. VOGEL Co., a corporation
of the State of New York, au-
thorized to do business in the
State of New Jersey,

Plaintiff,

vs.

THE 295 HALSEY STREET Co., a
corporation of New Jersey,

Defendant.

10

*Action
at Law.*

Postea.

This case was tried before Judge Worrall F.
Mountain, with a jury at the Essex Circuit, on
the 26th day of February, 1931.

20

It was stipulated and agreed by and between
the attorneys for the plaintiff and defendant,
that the Court submit the following question to
the jury: "Are the sprinkler system, together
with sprinkler heads, accessories, pipings and
hangars severable wholly or in any portion with-
out material injury to the freehold?"

30

The Court thereupon submitted said question
to the jury and the jury answered the said ques-
tion: "Yes, the sprinkler system is severable
without material damage to the freehold."

Thereupon the Court entered judgment in
favor of the plaintiff and against the said defend-
ant herein, for the possession of the "Estey
Sprinkler System" together with accessories,
pipings, hangers, apparatus and sprinkler
heads, thereunto belonging, and in addition

40

Judgment.

thereto assessed damages in favor of the said plaintiff and against the said defendant in the amount of nine hundred seventy-five (\$975.00) dollars.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

10

Dated March 7, 1931.

JUDGMENT.

This case was tried before Judge Worrall F. Mountain, with a jury at the Essex Circuit, on the 26th day of February, 1931.

20

It was stipulated and agreed by and between the attorneys for the plaintiff and defendant, that the Court submit the following question to the jury: "Are the sprinkler system, together with sprinkler heads, accessories, pipings and hangers severable wholly or in any portion without material injury to the freehold?"

30

The Court thereupon submitted said question to the jury and the jury answered the said question: "Yes, the sprinkler system is severable without material damage to the freehold."

Thereupon the Court entered judgment in favor of the plaintiff and against the said defendant herein, for the possession of the "Estey Sprinkler System" together with accessories, pipings, hangers, apparatus and sprinkler heads, thereunto belonging, and in addition thereto assessed damages in favor of the said plaintiff and against the said defendant in the amount of nine hundred seventy-five (\$975.00) dollars.

40

Judgment.

Whereupon it is adjudged that the plaintiff H. G. Vogel Co., a corporation of the State of New York, authorized to do business in the State of New Jersey, do recover of the said defendant The 295 Halsey Street Co., a corporation of New Jersey, the possession of the "Estey Sprinkler System" together with accessories, pipings, hangers, apparatus and sprinkler heads, thereunto belonging, together with the sum of nine hundred seventy-five dollars damages and its costs which have been taxed at the sum of sixty-eight dollars and eighty-four cents making in the whole the sum of one thousand and forty-three dollars and eighty-four cents.

10

\$ 975.00	lars
68.84	been taxed at the sum of sixty-eight
—————	dollars and eighty-four cents making
\$1,043.84	in the whole the sum of one thousand and forty-three dollars and eighty-four cents.

Judgment signed and entered March 12, 1931.

20

WM. S. GUMMERE,
C. J.

30

40

TESTIMONY.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

February 25, 1931.

10

 H. G. VOGEL & Co., a corpora-
 tion,
vs.
 295 HALSEY ST. Co., a corpora-
 tion.

 } *Action*
 } *at Law.*

20 Before Hon. Worrall F. Mountain, *J.*, and a
 jury.

For plaintiff appears Maurice Bernstein.

For defendant appears Jacob L. Newman (by
 Lionel P. Kristeller).

(A jury is called and sworn.)

Mr. Bernstein opens for plaintiff.

Mr. Kristeller opens for defendant.

30 Mr. Kristeller: I ask that counsel for the
 plaintiff elect which count of the two in the
 complaint he expects to proceed on.

(Argument.)

The Court: I do not think counsel has to
 elect.

Defendant's counsel prays an exception to
 this ruling of the Court.

Exception noted as ground of appeal.

40 The Court: At the time you made the con-
 tract was the mortgage you foreclosed on record?

Walter Kay, for Plaintiff, direct.

Mr. Bernstein: Yes, but the conditional sale was recorded before the foreclosure within the period and approximately a month after it was made. It was made on March 3rd and recorded on April 12th, a year and a half before the foreclosure.

10

WALTER KAY, sworn in behalf of plaintiff.

Direct examination by Mr. Bernstein.

Q What is your occupation? A Sales engineer.

Q For whom? A H. G. Vogel & Co.

Q Where are they? A Ridgewood, New Jersey.

Q You say you are with the Vogel Company? A Yes, sir. 20

Q How long have you been with them? A Approximately 20 years.

Q What business is the Vogel Company engaged in? A In the manufacture of automatic sprinklers and their installation.

Q What position do you hold with them? A Sales engineer.

Q Have you always been sales engineer with the Vogel Company? A No, I have not always been a sales engineer. 30

Q What other position did you hold with the Vogel Company? A Estimator.

Q Are you familiar with the premises known as No. 295 Halsey Street, Newark, New Jersey? A Yes, sir.

Q When did you have occasion for the first time to go over there? A The first time?

Q Yes. A About 1927.

40

Walter Kay, for Plaintiff, direct.

Q Do you recall the month? A No, I couldn't say I do; probably in January.

Q Why did you go over there? A For the purpose of looking over the premises, to check them on an estimate which we submitted for installation of automatic sprinkler system.

10 Q Did you have any conversation with anyone there at that time? A No, sir.

Q Subsequently, did you, with anyone there? A Yes, sir.

Q With whom? A With Mr. Weisenger.

Q Who was he? A Treasurer of the Equitable Properties Corporation.

Q Do you know the type of building that was on the premises of 295 Halsey Street Company?

20 A I do.

Q What was the type? A Four-story brick building, open joist construction on the upper floor and concrete beams on the first floor.

Q Do you know what business it was used for at the time? A Occupied as a garage.

Q You say you entered into negotiations with whom, Mr. Weisenger, an officer? A I did.

Q Did you enter into a written contract with him? A I did.

30 Q I show you a contract bearing date March 3, 1927. Was that the contract (indicating)?

A Yes.

Q Was that contract signed by Mr. Weisenger? A It was.

Q Did you also sign it? A I did.

Mr. Bernstein: I offer this contract in evidence.

40 (Received in evidence and marked Exhibit P. 1.)

Walter Kay, for Plaintiff, direct.

Q Do you recall where this contract was signed? A On 37th street, New York City.

Q Who was present at the time it was signed?
A Mr. Weisenger.

Q Do you know where the contract was approved by the Vogel Company? A In New York City, at our executive office. 10

Q On what street was your executive office?
A 15 West 37th street.

(Exhibit P. 1 read to jury.)

Q How much was due and owing on that conditional sales agreement?

Mr. Kristeller: I object to that.

Q If you know? A \$1,400. 20

Q Did you ever have any conversation with any member of the Equitable Properties Corporation respecting the balance of \$1,400? A I did, sir.

Mr. Kristeller: I object to that as immaterial and not binding on this defendant.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Q Did you ever have any conversation with any officer of the 295 Halsey Street Company respecting the balance due on your contract? A I did.

Q With whom? A Mr. Sanderson.

Q What was the nature of that conversation?

Mr. Kristeller: I object, unless we know who Mr. Sanderson is. He simply says an 40

Walter Kay, for Plaintiff, direct.

officer. There is no proof as to what officer he is.

Q Do you know Mr. Sanderson? A No, I do not.

Q Do you know if he was an officer of the 295
10 Halsey Street Co.?

Mr. Kristeller: I object.

The Court: Objection sustained.

Mr. Kristeller: I move to strike out the answer that he had a conversation with an officer.

The Court: You must prove that he is an officer.

20 Q Do you know Mr. Kassel? A I saw him once.

Q Do you know what position he held with the 295 Halsey Street Company, or with the Equitable Properties Corporation? A I do.

Q What position? A President.

Q What office does he hold with the present company, do you know? A I do not.

30 Mr. Kristeller: I object, unless he shows how he knows.

The Court: He says he does not know. Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Bernstein: I wish to withdraw this witness for a moment.

Isaac Kassel, for Plaintiff, direct.

ISAAC KASSEL, sworn in behalf of the plaintiff.

Direct examination by Mr. Bernstein.

Q Were you an officer of the Equitable Properties Corporation? A Yes, sir. 10

Q Are you an officer today of the 295 Halsey Street Company? A Yes, sir.

Q What office do you hold in the 295 Halsey Street Company? A President.

Q What office did you hold in the Equitable Properties Corporation? A President.

Q When did you become an officer of the present corporation? A I don't recall the exact date of that.

Q Were you an officer at the time of the formation of the 295 Halsey Street Company? A No, sir. 20

Q You subsequently did become an officer of that company? A Yes, sir.

Q How long after the formation did you become an officer of the 295 Halsey Street Company? A Four or five months.

Q How long were you an officer of the Equitable Properties Corporation? A During its whole life. 30

Q From the time of its organization? A Yes, sir.

Q Until it passed out of existence? A Yes, sir.

Walter Kay, for Plaintiff, direct.

WALTER KAY, recalled in behalf of the plaintiff.

Direct examination by Mr. Bernstein.

Q You say you had a conversation with Mr.
10 Kassel? A I did.

Q When did you have that conversation with
him? A In April, 1929.

Q What was the substance of that conversa-
tion? A Why, it was about—

Mr. Kristeller: I object. I do not know
now whether it is with the Equitable Prop-
erties Corporation or with the 295 Halsey
Street Company.

20 The Court: Sustain the objection.

Plaintiff's counsel prays an exception to
this ruling of the Court.

Exception noted as ground of appeal.

Q Did you have a conversation with Mr.
Kassel respecting a sprinkler system? A I did.

Q At that time did you ask him if he was an
officer of the 295 Halsey Street Company?

30 Mr. Kristeller: I object as leading.

The Court: Sustain the objection.

Q What did Mr. Kassel say to you at that
time? A He said at that time that, inasmuch
as there was a foreclosure proceeding going on
and further than that, inasmuch as he paid out
of his own pocket as much as he felt he could
afford, as far as the Equitable Properties Cor-
poration was concerned, he would not pay the

40

Walter Kay, for Plaintiff, direct.

note. He further told me who to look for, the new owner, a man named Mr. Sanderson.

Mr. Kristeller: I move to strike that out on the ground it is not binding on this defendant. He testified to a conversation while foreclosure proceedings were going on. 10

The Court: I will strike it out. He has to prove that at the time the conversation took place Mr. Kassel was an officer of the defendant company.

Mr. Bernstein: Mr. Kassel said he was.

The Court: Yes, and he also said that he was an officer of another company. He might have had this conversation with him as an officer of the first corporation which would not bind the defendant in this case. 20

Q Do you know whether Mr. Kassel was an officer of the 295 Halsey Street Company at the time you had the conversation with him? A I don't know.

Q Did you ever have any conversation with Mr. Weisenger of the Equitable Properties Corporation respecting this equipment? A I did.

Q What was the substance of that conversation? 30

Mr. Kristeller: I object.

The Court: I sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Did you ever receive your property back from either the Equitable Properties Corpora- 40

Walter Kay, for Plaintiff, direct.

tion or the 295 Halsey Street Company? A No, sir.

Mr. Kristeller: It is admitted that the property is in the building.

10 Q You never received payment of your balance due? A No, sir.

Q You say you have been twenty years in the sprinkler system business? A Yes, sir.

Q Describe the business, the nature of the sprinkler system. A Why, it is a system of pipes and fittings that are fabricated for a certain number of feet each way and the object being that when fire occurs it melts the link in the sprinkler system, which allows the water to
20 pass through and let down water, thereby stopping incipient fires. This equipment is connected with the public water main on Halsey street.

Q Describe just how this sprinkler system is attached to the premises. A It is attached mostly by screws.

Q What kind of screws would you say? A Both drive and lag.

30 Q Describe the piping or hangers? A Well, of course the pipe is pipe and it is hung in this particular kind of job by two kinds of hangers, one called a "U" hanger, which is a wrought iron strap and fastened against the beam by drive screws. On the lower floors, being concrete we have what they call a side-beam casting and that is attached to the concrete by lag screws, the extension built to all these screws.

Q How is it removable? A By just unscrewing it.
40

Walter Kay, for Plaintiff, direct.

Q Is that the only method you pursue? A Yes.

Q Have you the plan of the sprinkler system? A There is a plan in the court room.

Q Are you familiar with the plan? A I am.

Q I show you a copy of the plan. Are those the plans? A Yes, sir. 10

Q On how many floors was the sprinkler system installed? A Throughout the entire premises.

Q Were there any sprinkler heads installed in that sprinkler system? A Yes, sir.

Q How many? A Six hundred and fifty.

Q Will you explain just how the sprinkler heads are attached to the piping. A The sprinkler heads are screwed into the fitting. 20

Q Show from the plans to the members of the jury how they are screwed into the fittings.

Mr. Kristeller: I object to the use of the plans as not binding on this defendant. I do not see anything in the contract which refers to any plans.

The Court: Admit it.

Q Show the members of the jury how they are attached to the fittings. A By these little circles denoting the automatic sprinkler head proper. This long line constitutes the piping arrangement. At every joint of the piping there is a fitting which is screwed on three sides, on the small sizes. Your pipe is screwed into the fitting on this side (indicating), the other side which represents an outlet on top to which the automatic is screwed into. 30

Q How do you remove this sprinkler head from the pipe? A By unscrewing them. 40

Walter Kay, for Plaintiff, direct.

Q What? A Each sprinkler head.

Q What size are those pipes you speak of?

A They are anywhere from three-quarters up to six inch on this particular job.

10 Q Do you know whether these pipes were standard pipes? A Yes, they are standard.

Q Standard in size? A Yes, in cut lengths they are standard.

Q Do you know from your own information whether these pipes can be used elsewhere? A No question about it.

Q They can be? A Yes, sir.

Q Together with the sprinkler heads? A Yes, sir.

20 Q What other parts are there in this sprinkler system aside from the pipes and the sprinkler heads? A You have your hangers and an alarm valve.

Q What do you mean by hangers? A Why, the method by which the piping is hung.

Q What do you mean when you say "hold"?

A I beg your pardon?

Q What do you mean when you say "hold"? They hold the piping in position? A Yes, sir.

30 Q How many times did you visit the premises at 295 Halsey Street, where the sprinkler system was installed? A That I couldn't say, because I am in Newark—

Q Approximately? A Oh, I would say fifty or seventy-five times.

Q Then you are familiar with the entire transaction? A Yes, sir.

Q Were you also familiar with the lay-out of the premises? A Yes, sir.

40 Q Aside from the piping and the sprinkler head, what else is there that makes up the sprinkler system? A Well, you have your pipes,

Walter Kay, for Plaintiff, direct.

you have your fittings, your hangers, your sprinkler head, your alarm valve and the electric alarm and water meter, fire connection and, incidentally, on this job, you have a city connection.

Q Do you know whether this alarm valve is removable? A It is. 10

Q In what way? A By unbolting the flanges which connect the piping. It is connected to the piping by flanges.

Q In your opinion, can that be used elsewhere? A It can.

Q Respecting the water source, was there more than one source of water? A One source.

Q Where was that source from? A Halsey street.

Q Was there any difficulty? A No difficulty. 20

Q Where does the water come from? A City main.

Q When you remove this, what do you do respecting this source of water.

Mr. Kristeller: I object to the question as immaterial and incompetent.

The Court: Admitted.

A That must be shut off. 30

Q How? A By applying to the City water authorities.

Q In your opinion, would you say the sprinkler system, taking into consideration the sprinkler head and the alarm valve, could that be removed from the premises without any injury to the premises?

Mr. Kristeller: I object.

The Court: Sustain the objection. 40

Walter Kay, for Plaintiff, direct.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Are you familiar with the method of removing that sprinkler system? A Yes, sir.

10 Q How is that done?

Mr. Kristeller: I object.

The Court: Admit it.

A By just unscrewing every pipe fitting on the sprinkler, taking out the flanges where flanges are installed.

Q Can you apply that to the present sprinkler system? A Yes, sir.

20 Q Would that be without injury to the property?

Mr. Kristeller: I object to the question as calling for a conclusion.

The Court: Sustain the objection.

Q In the event that you did pursue this form of removal would that leave any marks in the building? A Not that it couldn't be taken care of.

30

Q In your opinion, is this the common and usual way of removing sprinkler systems from premises?

Mr. Kristeller: I object.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40

Walter Kay, for Plaintiff, direct.

Q Taking into consideration the character of the building, at 295 Halsey Street, and taking into consideration the type of sprinkler system, could that be removed in the manner you spoke of? A Yes, sir.

Q Are you familiar with the course of removing these sprinkler systems? A Yes, sir. 10

Q In your opinion, how much would it cost to remove the sprinkler system at 295 Halsey Street?

Mr. Kristeller: I object.

The Court: I did not hear the question.
(Question read.)

The Court: How is that competent?

Mr. Bernstein: It goes to our damages; the cost of removal and the cost of installation elsewhere. 20

Here they are holding a sprinkler system which we claim belongs to us, so that I would say that we are entitled to damages, damages which would consist of the cost of removal, plus the cost of installation elsewhere.

The Court: I wouldn't say that you are entitled to the cost of installation elsewhere, besides the cost of removal. 30

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Argument.)

The Court: Let us get down to the meat of this.

That would be dispositive of the whole situation. When you put in this sprinkler system this mortgage was on record? 40

Walter Kay, for Plaintiff, direct.

Mr. Bernstein: Exactly, sir.

The Court: Not only when you put it in, but when you made the contract. Then, of course, after you had executed your contract, you filed it with the County Clerk?

10 Mr. Bernstein: Yes.

The Court: It was after that the mortgage was foreclosed?

Mr. Bernstein: Yes.

The Court: And purchased by either the defendant or someone for the defendant, I suppose?

Mr. Kristeller: One of the complainants purchased it and assigned the bid to this corporation.

20 Mr. Bernstein: Which consisted of a man named Kassel.

The Court: Then when the purchase was made at the foreclosure sale either the person who purchased it for the defendant, or for himself, knew that there was on record a mortgage and knew that there was on record a conditional bill of sale when he went to that sale. He had knowledge of that, is that true?

30 Mr. Bernstein: I do not know. We contend he had.

The Court: Was it on record?

Mr. Bernstein: Yes.

The Court: So if he had gone to that sale and looked up the records before he bought he would have known there was a mortgage on record and a conditional bill of sale on record?

40 Mr. Bernstein: Exactly, yes.

Walter Kay, for Plaintiff, direct.

The Court: That being the case, anybody who purchases at that sale, would they not have notice of this conditional bill of sale?

Mr. Kristeller: No, sir. A man will not search for personal property, he would search the records to see if there was any mortgage on there. 10

The Court: I think you are wrong about that.

(Argument.)

The Court: That is what they are put on record for, I understand.

Mr. Kristeller: No, that is only as to personal property.

(Argument.)

The Court: I do not think that you can make the defendant stand for damages for taking out this installation and putting it in elsewhere. 20

Mr. Bernstein: Then, what would your Honor say would be the damages?

The Court: I think that if the plaintiff can recover, assuming the plaintiff can, that the cost of taking this system out would be the proper measure of damages. 30

Mr. Bernstein: In the event possession was awarded to it?

The Court: It seems so, I may change my mind.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q You are familiar with the cost of the removal of sprinkler systems? A Yes, sir. 40

Walter Kay, for Plaintiff, direct.

Q On what do you base that cost of removal?

A Past experience.

Q How much would it cost to remove this particular sprinkler system?

10 Mr. Kristeller: I object to the question on the ground the cost is not assessable against this defendant.

The Court: It may not be, I am not sure whether it is or not.

Mr. Bernstein: Subject to being stricken out in that connection?

The Court: You may note your exception. I will admit the question.

20 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read.) A \$975.

Q How do you make up that item of \$975? A By past experience as to cost.

Q How do you base that cost? A To get down to it, it is \$1.50 a sprinkler.

Q \$1.50 a sprinkler? A Yes, sir.

30 Q How many sprinklers are there in this system? A Six hundred and fifty.

Mr. Bernstein: May I recall Mr. Bernstein, a member of the New York Bar, for the reason that he is going to be engaged tomorrow morning? He is simply to show the New York Law.

The Court: Yes, you may.

David Bernstein, for Plaintiff, direct.

DAVID BERNSTEIN, sworn in behalf of the plaintiff.

Direct examination by Mr. Bernstein.

Q Where do you live? A 12 West Seventy-second street, New York City. 10

Q What is your occupation? A Lawyer.

Q Where were you admitted? A In New York, in 1905.

Q In what courts are you licensed to practise?
A In all the State Federal courts.

Q Are you familiar with the conditional sales contract entered into between the Vogel Company and the Equitable Properties Corporation? A I am.

Q In what respect? A In every respect. 20

Q Are you familiar with the law of the State of New York respecting sprinkler systems, whether it is or it is not construed as personal property?

Mr. Kristeller: I object.

(Argument.)

Mr. Kristeller: Withdraw the objection.

A I am, and I am familiar with the contract involved in this suit in each term. 30

Q Are you familiar with provision 13 of the conditional sales contract, which provides that the title to the sprinkler system shall remain in the H. G. Vogel Company, and further, that the property is to be considered as personal property?

A I am.

Q What is the law of the State of New York—

Mr. Kristeller: I object to that as not material to this issue. 40

David Bernstein, for Plaintiff, direct.

Q Has there been a construction of paragraph or section 13 of the conditional sales agreement by the Courts of the State of New York? A On this particular clause?

Q Yes. A There is.

10 Q On what case has that question been determined?

Mr. Kristeller: I object to that as immaterial.

Mr. Bernstein: The reason I am asking this question is that we contend the contract was made and entered into under the laws of the State of New York. Consequently, it is to be governed by the laws of the State of New York, and my purpose is to show what the law of the State of New York is in regard to that position.

20

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q What is the law of the State of New York respecting sprinkler systems?

30

Mr. Kristeller: I object as immaterial.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Do you know where this contract was made and accepted? A As I understand it, it was made and accepted in New York State.

40

David Bernstein, for Plaintiff, direct.

Mr. Kristeller: I object and move that the answer be stricken out.

Q Of your own knowledge. A I saw the contract immediately after it was made, and I understand it was made in New York City.

10

Mr. Kristeller: I move to strike all that out.

The Court: Strike it out.

Q Has there been a construction of paragraph 13 (withdraw the question). Are you familiar with the conditional sales agreement of the H. G. Vogel Company? A I am.

Q Are they or are they not standard as to form?

20

Mr. Kristeller: I object to that as immaterial.

The Court: What difference does that make?

Mr. Bernstein: Because I am going to show that this contract comes under the laws of the State of New York and there has been a determination of this clause.

30

The Court: The laws of the State of New York haven't anything to do with my decision in this case and I am going to decide the question under one of the sections of the Conditional Sales Act of the Pamphlet Laws of 1919. I am not concerned with what the law of New York is.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40

Walter Kay, for Plaintiff, cross.

WALTER KAY, recalled in behalf of the plaintiff.

Cross examination by Mr. Kristeller.

Q You were the supervisor when this property
10 was installed? A Yes, sir.

Q You were around there quite a lot while
they were installing it? A Yes, sir.

Q How long did it take to install this system?
A Why, that system— two and a half months.

Q You are familiar, then, are you not, with
the building code in Newark? A I am, sir.

Q You have had a lot of work around this
part of the country, so you have become ac-
quainted with it, right? A Yes, sir.

20 Q Are you also familiar with the rules and
regulations of the Bureau of Combustibles in
Newark?

Mr. Bernstein: I object as immaterial
and improper.

The Court: Sustain the objection.

Q You say that you handled the making of
this conditional sales contract, is that right? A
30 To make that particular contract?

Q Yes. A Yes.

Q You had to cut some holes in the building
to get the piping through, did you not? A
Through the floors.

Q You also had to dig up part of the cellar
to get your pipe into the street? A Dig up the
sidewalk.

Q The pipes were connected from the city
water main under the sidewalk into the cellar of
this company's building? A Yes, sir.
40

Walter Kay, for Plaintiff, cross.

Q How big a pipe was that? A Six inches.

Q Well, the pipe was continued on through the four walls of that building, right? A Yes, sir.

Q And your contract provided, didn't it, that you had to drill steel beams?

10

Mr. Bernstein: I object to that. The contract speaks for itself.

The Court: I will admit it.

A Yes, sir.

Q You did drill some steel beams, didn't you?

A Yes, sir.

Q About how many screw holes would you say are in that building now? A I'll tell you approximately, about one thousand, approximately, more or less.

20

Q Some of these holes were in the beams and some were in the ceiling and some are in the walls, aren't they? A The screw holes?

Q Yes. A Very few in the walls.

Q But there are some? A No, I don't believe there are any in the walls.

Q So they are all in the ceiling and in the beams? A Yes, sir.

Q You have to cut the floors and steel beams in putting in this installation?

30

Mr. Bernstein: I object to that as a matter of defense. I think the defendant is a little premature.

The Court: I think this is proper cross examination.

A You cut the floors, but there are no steel beams to be cut.

40

Walter Kay, for Plaintiff, cross.

Q You do not have to cut any of the beams?

A Any of the beams?

Q Yes. A No steel beams were cut.

Q Did you cut any beams, whether they were steel or otherwise? A No.

10 Q Did you cut any cement beams? A We drilled through.

Q Did you drill through the steel beams? A No.

Q Did you drill through the cement beams? A No.

Q Did you drill through wooden beams? A No.

Q What did you drill through? A Through the floors.

20 Q In running your sprinkler along the ceiling, you had nothing to cut? A No, sir.

Q Why did you put it in the contract? A It is a standard clause.

Q Do you have standard clause 4 and 5 in this contract?

Mr. Bernstein: I object whether he did or not, the contract speaks for itself.

The Court: That question won't help us at all.

30 Mr. Kristeller: Withdrawn.

Q You prepared this contract, didn't you? A I did, sir.

Q All these clauses are numbered, are they?

A They are, sir.

Q You did not put in clause 4 and 5 in that contract, did you?

Mr. Bernstein: I object, on the ground that the contract speaks for itself.

40

Walter Kay, for Plaintiff, cross.

The Court: Sustain the objection.

Q Is there a clause 4 and 5 in that contract?

Mr. Bernstein: I object.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to
this ruling of the Court. 10

Exception noted as ground of appeal.

Q How many men did you have on the job
installing this sprinkler system?

Mr. Bernstein: I object as immaterial
how many men he had and further it is im-
proper cross examination.

The Court: Admit it. 20

A Various numbers. I couldn't tell you off-
hand. I made no record at the time. In other
words, I am a general supervisor; we have a
foreman on the job who provided for that.

Q About how many? A I couldn't tell you.

Q Three or four? A I don't know.

Q As many as ten? A I don't know, there
might have been two.

Q During the period of three and a half 30
months not less than two nor more than ten on
the job, putting the sprinkler system in? A I
don't say that particular time. We had to pre-
pare plans, the fabrication of materials and other
installation.

Q How much was the time on installation?

A About six weeks.

Q During the two and a half months or six
weeks were you busy installing this sprinkler
system in the building? A Yes, approximately. 40

Harry Ledward, for Plaintiff, direct.

Q I think you said it was a four-story brick building and it was used as a garage when you were there, is that right? A Yes, sir.

Q Do you know whether it was a public or private garage? A That I don't know.

10 *Re-direct examination by Mr. Bernstein.*

Q From what point was your sprinkler system to begin? A From what point?

Q Who was to bring it up to that point?

Mr. Kristeller: I object, for the reason that the contract speaks for itself.

(Argument.)

Mr. Bernstein: Withdraw the question.

20

HARRY LEDWARD, sworn on behalf of the plaintiff.

Direct examination by Mr. Bernstein.

30 Q What is your occupation? A Assistant to the Superintendent of Sprinkler Department, Schedule Rating Office of New Jersey, Fire Underwriters.

Q How long have you been assistant superintendent? A Three years.

Q Are you familiar with sprinkler systems? A Yes, sir.

Q Are you also familiar with the construction of sprinkler systems? A Yes, sir.

40 Q Are you familiar with the sprinkler system installed at 295 Halsey street? A I was in the building; I wouldn't say that I was entirely familiar with it.

Harry Ledward, for Plaintiff, direct.

Q What part are you familiar with? A In that particular building?

Q Yes. A I have been through the building and seen all the floors.

Q Did you make an inspection of the sprinkler system? A No, I didn't make an inspection of that particular system. 10

Q What did you do? What was your purpose of going there? A I went down to investigate a leak they had about a year or two ago.

Q How many floors are there at 295 Halsey street? A Four.

Q Were you there when the sprinkler system was installed? A No.

Q You were there after it was installed, is that right? A Yes, sir.

Q In your opinion, could that sprinkler system be removed? 20

Mr. Kristeller: I object to that, as he is not qualified to testify to that.

The Court: Sustain the objection. You may qualify him if you can.

Q You say you are familiar with sprinkler systems? A Yes, sir.

Q Are you familiar with the removal of sprinkler systems? A Yes, sir. 30

Q Are you familiar with the conditional sales agreement between the H. G. Vogel & Co. and the Equitable Properties Corporation? A No, sir.

Q Did you ever see that contract before? A No, sir.

Q Do you know how many sprinkler heads there are there approximately? A Five to six hundred. 40

Harry Ledward, for Plaintiff, direct.

Q Explain how the sprinkler system is made up or installed.

Mr. Kristeller: I object to the installation.

The Court: Admit it.

10

A The sprinkler system covered four floors of the building, supplied by city mains, which has a control valve inside the building and an alarm valve and sprinkler heads throughout the four floors.

Q Did you say that you were familiar with the removal of sprinkler systems, take this particular sprinkler system? A Yes, sir.

20

Q What do you say as to whether this particular sprinkler system can be removed?

Mr. Kristeller: I object to this witness as not being qualified to testify to any removal.

The Court: Sustain the objection. It may be he can testify if you qualify him.

30

Q You say that you are assistant to the superintendent, is that right? A At present, yes.

Q What is the nature of the work you do? A Approving and inspecting sprinkler systems.

Q Is that the only work you do—approving and inspecting sprinkler systems? A And also publishing rates for sprinkler risks.

40

Q How long have you been engaged in that particular kind of work? A With the insurance company seven years, and with the sprinkler company about eight years.

Harry Ledward, for Plaintiff, direct.

Q What sprinkler company were you connected with? A Grinnell Company, Inc., Providence.

Q How long were you with the Grinnell Company? A Approximately eight years.

Q What was the nature of your work with the Grinnell Company? A Engineering sprinkler systems and drawing plans and ordering material. 10

Q Did you remove any sprinkler systems while you were employed by the Grinnell Company? A No, sir.

Q By whom were you employed when you did remove sprinkler systems? A I didn't remove any.

Q Are you familiar with the construction of sprinkler systems? A Yes, sir.

Q Respecting the manufacture of sprinkler systems for the Grinnell Company, how did that differ from the sprinkler systems installed at 295 Halsey street? 20

Mr. Kristeller: I object.

The Court: Admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 30

A No difference.

Q Would you say they were practically the same?

Mr. Kristeller: I object as leading.

The Court: Admit it.

A Except the devices.

The Court: You can ask him what would have to be done to remove this system. 40

Harry Ledward, for Plaintiff, direct.

Q What would you have to do to remove this system at 295 Halsey street?

Mr. Kristeller: I object on the ground that he is not qualified to testify to that.

(Argument.)

10

A Remove the hangers from the beams, unscrewing the pipe, unscrewing the heads from the fittings, remove the alarm valve, disconnect the city connection and shut off the city connection.

By the Court.

Q On the first floor, there is a concrete or cement ceiling? A The first floor has a concrete ceiling.

20

Q How are they fastened on the first floor? A To the side of the concrete beams with extension castings.

Q Are they on the ceiling on the first floor? A The pipes?

30

Q Yes. A No, they are eighteen inches below the ceiling. They are suspended by some straps into the ceiling by wrought iron hangers which are placed on the side of the concrete beams and with extension castings and screws.

Q How are the pipes supported in the ceilings all stories above the first story? A The pipes are run at right angles to the joists, hung to the joists with "U" hooks and held into the beams by drive screws.

Q What kind of beams are these? A Wood beams.

40

Q On all three stories? A On all the three floors above the first.

Harry Ledward, for Plaintiff, direct.

Q Are there any of the ceilings on the first, second and third floors pierced by these pipes, or is it all open work? I don't mean the ceilings but the walls. Do you recall that? A No. I think on the top floor there is a three-quarter hole for the pipe to go up.

10

By Mr. Bernstein.

Q Would it refresh your recollection if I were to show you a copy of the plan? A Possibly.

Q I show you a copy of the plan. A Yes, sir. Regarding the holes?

Q Yes. A One hole.

Q One hole on the first floor? A No.

Q Where? A On the fourth.

Q With respect to the third floor, are there any holes? A No.

20

Q With respect to the second floor, are there any holes? A You were speaking of holes?

Q Yes. A No.

Q In respect to the first floor, are there any holes? A No.

Q Taking into consideration your past experience in the automatic sprinkler business and also taking into consideration your observation of this particular system, would the removal of this particular system injure or damage the property?

30

Mr. Kristeller: That is objected to on the ground that the witness is not qualified to answer.

The Court: I would suggest that you follow the statute which provides that the question is whether or not the fixtures or chattels in question are severable without material injury to the freehold.

40

Harry Ledward, for Plaintiff, direct.

Mr. Bernstein: I will add that on to my question, whether this particular sprinkler system is severable without material injury to the freehold.

10 Mr. Kristeller: I still object because I do not think that this man is qualified to testify to the injuries to the freehold unless he first qualifies as to what the freehold is.

By the Court.

Q By freehold it means the building. A It would not damage the building.

Adjourned until Thursday, February 26, 1931, at ten o'clock A. M.

20

SECOND DAY.

Thursday, February 26, 1931.

Met pursuant to adjournment.

HARRY LEDWARD resumes the stand in behalf of plaintiff.

30 *Direct examination (cont'd) by Mr. Bernstein.*

Q The sprinkler system installed on the premises at 295 Halsey street is a standard equipment? A Yes, sir.

Q In the event that the equipment were removed could another sprinkler system be installed there? A Yes, sir.

Q When was the last time you inspected the property at 295 Halsey street? A Within a
40 year.

Harry Ledward, for Plaintiff, cross.

Q What was your purpose or reason in going over this property?

Mr. Kristeller: I object to that as immaterial.

Mr. Bernstein: Withdraw the question.

10

Q Are you familiar with the pipe that is underneath the sidewalk which connects up with the city main? A It is buried. I am familiar with the pipe which comes through the wall.

Q Describe what that is. A A cast-iron pipe connected to the city main on Halsey street and runs into the building with a flanged outlet where the sprinkler system is connected to it.

Q In the event of removal of the sprinkler system, what would you do with the pipes that connect with the city main? A It can either be left there or removed.

20

Q In the event of removal, could another sprinkler system be installed and the city main connected up?

Mr. Kristeller: I object.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

30

Exception noted as ground of appeal.

Cross examination by Mr. Kristeller.

Q You say you are with the Schedule Rating Bureau? A Yes, sir.

Q What is their province? A Inspecting sprinkler systems and publishing rates in New Jersey.

40

Harry Ledward, for Plaintiff, cross.

Q They are connected in some way with insurance companies?

Mr. Bernstein: I object to that as being immaterial, whether they are or not.

10 The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q When you went to inspect this property a year ago, what did you find in reference to the ceilings on the first and second and third floors?

A The pipe was hanging there to the ceiling.

20 Q What kind of ceilings were there? A The first floor was concrete and the other three remaining floors are wood.

Q You say wooden ceilings. Do you mean wooden beams or wooden ceilings? A Both.

Q What color is the wood? A Ordinary wood color.

Q What color has it been painted? A I don't recall.

30 Q Do you recall whether or not there were metal ceilings there? A I think on the top two floors there are metal ceilings below the joists.

Q On the top two floors? A As I recall.

Q Do you mean the third and fourth floors? A Yes, sir.

Q You are not sure, are you? A I am not positive of that, no.

Q What about the second floor? A I am not positive.

40 Q Then, how do you explain your answer that these pipes can be taken from the ceiling or beams, if you are not sure what kind of ceiling

Harry Ledward, for Plaintiff, cross.

it was? A They were put up there; they can be removed.

Q You do not know what damage will be done to the metal ceilings, if there are any? A No damage but what could be fixed.

Q There would be damage to the ceilings, wouldn't there, if there was a metal ceiling there? A Slightly, yes. 10

Q Isn't it a fact that if this system was removed from the metal ceilings you would have to remove it all and replace it with new metal ceilings? A I am not familiar with how the metal ceilings are put up.

Q Can you patch a metal ceiling? A Yes.

Q How? A Put another piece of metal over the hole. 20

Q Would that be a nice workmanlike job? A No.

Q How many holes do you think there would be in this metal ceiling on the second floor? A I don't know.

Q You inspected it, didn't you? A I didn't inspect the ceiling; I inspected the sprinkler equipment.

Q Isn't it attached to the ceiling? A Yes.

Q Didn't you inspect the ceiling, and place where the sprinkler system was attached to it? A Only to look at it. 30

Q Yet, you want this Court and jury to understand that that sprinkler system could be removed without leaving any holes in the ceiling, is that right?

Mr. Bernstein: I object to that.

The Court: Sustain the objection. Reframe the question. 40

Harry Ledward, for Plaintiff, cross.

Q You want this Court and jury to understand that on your inspection of this property your testimony was that you could remove this sprinkler system without leaving any damage to the ceilings except the screw holes, is that correct? A Yes, sir.

10 Q Irrespective of whether there was a metal ceiling on there or not? A I don't understand the question.

Q You testified that these pipes were affixed to the beams or ceilings by hangers which were screwed into the beams by lag screws, and if they were removed the only damage would be the screw hole in the beam in any ceiling, is that right? A Yes, sir.

20 Q If there were metal ceilings, were these hangers screwed to the metal ceilings or to the beams?

Mr. Bernstein: I object; he didn't say there was a metal ceiling there as yet.

By the Court.

Q Were there? A I am not positive of that.

30 The Court: Sustain the objection.

Defendant's counsel prays an exception to the ruling of the Court.

Exception noted as ground of appeal.

Q Are you positive about anything that you examined there except the fact that you saw a sprinkler system and the sprinkler heads? A That is all I paid attention to.

40 Q So, you are not sure now whether the sprinkler system is attached by lag screws or in

Harry Ledward, for Plaintiff, cross.

some other manner? A I know they are attached by lag screws.

Q Did you see the lag screws? A No.

Mr. Kristeller: I move then to strike out the testimony that they were affixed by lag screws. 10

The Court: I will do so.

Q As a matter of fact, you do not know of your own knowledge, from your inspection of the property, how that sprinkler system is attached? A Yes, sir.

Q How is it attached? A To the beams.

Q Did you see it attached to the beams? A No, but I recall—

Q You do not know except from what you think is the condition as to how that is attached. 20

Mr. Bernstein: I object. He didn't say that.

The Court: Admitted.

A I didn't see the lag screws into the joists.

Q That is one of the ways it might be attached? A Yes, sir. 30

Q There were other ways of attaching the sprinkler system, wasn't there? A Yes, there are.

Q This is a public garage, isn't it? A I don't know.

Q You were there, weren't you? A There was a garage there when I was there, but I don't know whether it was public or not.

Q What kind of an inspection did you make? A For insurance purposes. 40

Carl Blackman, for Plaintiff, direct.

Q You inspected it for insurance purposes?

A Yes, sir.

Q And did you have anything to do with fixing the rate of insurance? A No, sir.

10 Q Did you make a report to your company as to what you found?

Mr. Bernstein: I object as immaterial.

The Court: Sustain the objection.

Q The rate of insurance depends on whether it is a public garage, doesn't it?

Mr. Bernstein: I object as immaterial.

The Court: Sustain the objection.

20 *Re-direct examination* by Mr. Bernstein.

Q Do you know how that sprinkler system is attached to the beams?

Mr. Kristeller: I object. He testified to that.

30 CARL BLACKMAN, sworn in behalf of plaintiff.

Direct examination by Mr. Bernstein.

Q What is your occupation? A Automatic sprinkler engineer.

Q How long have you been an automatic sprinkler engineer? A Eighteen to twenty years.

40 Q With whom are you employed at the present time? A H. G. Vogel Company.

Carl Blackman, for Plaintiff, direct.

Q With whom were you employed before H. G. Vogel Company? A Viking Sprinkler Company of Detroit.

Q How long were you with them? A Two years.

Q Before that? A Grinnell of Providence.

Q How long were you with them? A About seven years. 10

Q Before that? A The Dixon Company of Pittsburgh, about eighteen or twenty years.

Q What are your duties with the Vogel Company at the present time? A Laying out automatic sprinkler systems.

Q Are you familiar with the layout of the sprinkler system at 295 Halsey street? A I am, so far as the plans go. I have seen the plans and looked in at the property on the first floor. 20

Q Describe that sprinkler system at 295 Halsey street.

Mr. Kristeller: I object, unless it is only as to the first floor.

The Court: You will have to frame your question a little differently. He may testify as to the plans and then may testify as to what he saw at the garage, but I do not know whether the sprinkler system on the upper floors were put in in accordance with the plans. I assume he does not know if he did not see it. 30

Q Have you a copy of the plans? A I have.

Q Let me have them, please. Were these the plans accepted by the owner.

Mr. Kristeller: I object. They may have been accepted by the owner, but that wouldn't bind this defendant. 40

Carl Blackman, for Plaintiff, direct.

The Court: How do I know that?

Mr. Kristeller: There is no proof here that this defendant ever consented to these plans.

(Argument.)

10 The Court: The question is a little hard to rule on at this time because if I rule on it I have to decide that this case comes under the first or second sentences of the seventh paragraph of the conditional sales act. And assuming that it comes under that section, there was a mortgage on this property and the mortgage was foreclosed. The seller took, I presume, the same title that the mortgagee had. Under that section if the
20 mortgagee did not assent to this sprinkler system the conditional sale is void as to the mortgagee, so the seller under that section then would take the title and this sprinkler system would go along with the property that he received when he paid the sheriff his money. Under the second section the situation is a little different and you call upon me to decide a fact when I rule on that question.

30 Mr. Kristeller: I think if they are going to prove that, they are proving the cart before the horse just now.

The Court: This is the first time a case like this has been before me with a jury, counsel have usually tried them without a jury because of the complexity of that particular section and the difficulty of knowing just what question you are going to leave to a jury, and it is a little puzzling. I would
40 suggest that you let this testimony go in as

Carl Blackman, for Plaintiff, direct.

to this, subject to any request you want me to make to the jury, if the question is decided by the jury ultimately.

Mr. Kristeller: No objection.

(Question read.)

Mr. Kristeller: I think that question ought to be a little clearer. What does he mean by "owner"? 10

Q Were these plans accepted by the Equitable Properties Corporation? A Yes, sir, and signed by them.

Mr. Bernstein: I offer the plans in evidence.

Mr. Kristeller: Objected to on the ground that, having been signed by the Equitable Properties Corporation, Mr. Weisenger as treasurer, they are not binding on this defendant. 20

The Court: I will admit them.

(Plans are received in evidence and marked Exhibit P. 2.)

Q Read from those plans and describe the sprinkler system on the property at 295 Halsey street, Newark. 30

Mr. Kristeller: Object.

The Court: Sustain the objection.

Q Can you describe the nature of the sprinkler system installed on the premises 295 Halsey street? A A connection was made—

Mr. Kristeller: I object. 40

Carl Blackman, for Plaintiff, direct.

The Court: No, that will not do. He can only testify as to what he saw.

Mr. Bernstein: These plans were accepted by the owner.

10 The Court: Yes, many people have accepted plans and been disappointed.

Q Do you know whether those plans were carried out by the company? A I couldn't say for sure.

20 Q What did you see when you went to the premises at 295 Halsey street? A I saw a sprinkler on the ceiling fed by pipes in the base between the beams and also feed mains running at right angles to the beams, supported to the concrete beams. The lines in the base supported to the concrete beams. The lines in the base supported to the ceiling with extension shaft of wrought iron. The right angles beams that cut in are supported by wrought iron with side ring castings fastened to the side with lag screws and fastened through the bracket with a nut on the tapping that supports the feed mains.

Q In your opinion, is that part of the sprinkler system you saw, is that removable without injury to the freehold? A Absolutely.

30 Q What method would you use in removal? A Unscrew the lag screw which is inside the beams.

Q Is that the only method? A That is all you need.

Q The sprinkler system is of standard make? A Yes, sir.

Q Could another sprinkler system be installed without any alterations?

40 Mr. Kristeller: I object to that on the ground it is immaterial.

Carl Blackman, for Plaintiff, cross.

The Court: Admit it.

Q (Question read.) A They could.

Cross examination by Mr. Kristeller.

Q What would happen to the concrete beams you saw? A The holes were left there. There would be a hole there. 10

Q That would weaken the beam? A No, sir.

Q Would it look like a nice job after you had taken it out? A I do not think you would hardly notice it.

Q How many screw holes would there be on the first floor? A Offhand about thirty. That is for the mains in the concrete beams.

Q How many sprinkler heads on the first floor? A About a hundred and twenty-five I should say. 20

Q For one hundred and twenty-five sprinkler heads there would be only thirty screw holes? A In the concrete beams.

Q Where would the rest of the screw holes be? A In the other part.

Q You have been identified with this business for eighteen or twenty years? A Yes, sir.

Q Would another engineer lay out this sprinkler system in the exact same way this is laid out? 30

Mr. Bernstein: I object.

The Court: Admit it.

A You could.

Q But would you, as an engineer, construct a sprinkler system exactly the same as another engineer? A Our insurance rules governing 40

Walter Kay (recalled), for Plntff., direct—cross.

sprinkler systems are that they are to be laid out according to insurance rules. Therefore, the same rule would apply there now as well as ten years from now.

10 Q Wouldn't your ingenuity as an engineer change the construction and bring it down to date?

Mr. Bernstein: I object.

The Court: Sustain the objection.

Q Would they necessarily use the same type of hanger? A They would.

Q Are there any other types of hangers? A There are.

20 Q Some engineers use other kinds of hangers, don't they?

Mr. Bernstein: I object to what other engineers use.

The Court: Sustain the objection.

WALTER KAY, recalled in behalf of the plaintiff.

30 *Direct examination* by Mr. Bernstein.

Q Are you familiar with the plans of this automatic sprinkler system? A Yes, sir.

Q Do you know whether the plans were carried out? A Yes, sir.

Cross examination by Mr. Kristeller.

40 Q Tell us what your inspection of the property showed as to the ceilings on the second and

Walter Kay (recalled), for Plaintiff, cross.

third floors. A My recollections of it was that they had metal ceilings.

Q Where would the sprinkler pipes be affixed, on or under the metal ceilings? A Under the metal ceilings.

Q The metal ceiling is brought in large pieces, isn't it? A Assembly work. 10

Q Hangers going through the metal ceilings would necessarily result in tearing the metal ceiling out, wouldn't they? A No, sir.

Q That would be a good job, would it? A I think after we got it patched, it would be satisfactory to the owner.

Q I asked you if it would be a good job? A I believe so.

Q In order to get under the metal ceiling you would have to take quite big pieces out of each section to get the instruments under it to take out the screws? A I wouldn't say so. 20

Q How big a piece would you have to take out? A Out of the metal ceiling?

Q Yes. A Nothing.

Q Describe how the hangers on the second floor are affixed to the beams of the ceiling under it. A The metal ceiling is on the beam and the screws are through the metal ceiling. 30

Q The screws are through the metal ceiling? A Yes, sir.

Q Are you sure of that? A Yes, sir.

By the Court.

Q What do you mean by screws? A The screws that go on the hangers.

Q The hangers are not attached to the metal ceiling? A They go through the metal ceiling into the joists. 40

Walter Kay (recalled), for Plaintiff, cross.

Q Screwed into the joists? A Yes, sir.

Q If you have a metal ceiling between yourself and the screws, how can you get the screws out? A The head of the screw is underneath the metal ceiling. You take that beam as your joist (indicating), if you have a metal ceiling
10 under that, the hangers are underneath it.

Mr. Kristeller: Are you sure of that?

A I am, sir.

Q When did you last see it? A I would say some three years ago.

Q You want the Court and jury to understand that the attachment is through the metal ceiling to the joists?

20 Mr. Bernstein: I object to the question in that form.

The Court: Sustain the objection.

Q Do you want us to understand your testimony to be that the apparatus is screw to the metal ceiling onto the joists? A Yes, sir.

Q That is what you want us to understand as what you saw? A Yes, sir.

30 Q Isn't it a fact that the metal ceiling covers all the screws on the second and third floors? A Not at the time I saw the job, no, sir.

Q You saw it three years ago? A Yes, sir.

Q If there has been a change, so that the metal ceiling is over the screws so you cannot get at them, then there has been a new metal ceiling put there in three years? A Yes, sir.

Mr. Bernstein: I object.

40 The Court: Sustain the objection.

Motion for a Non-suit.

Q If you were to see it today, or at the time the demand was made on July 15, 1929, you would say that is not in the same condition you saw it three yars ago? A Correct, yes.

PLAINTIFF RESTS.

10

Mr. Kristeller: I respectfully move for a non-suit in favor of the defendant and against the plaintiff on the following grounds:

That in accordance with section 7 of the conditional sales act, in the first sentence of that section, unless it shall appear that the goods which were affixed, are severable without material injury to the freehold, the reservation of title is void as against the defendant who did not assent thereto. 20

The Court: Is the complaint brought under the first and second sentences?

Mr. Bernstein: I contend it comes under the provision which provides for removal. It would come under the second.

Mr. Kristeller: They are both the same with regard to removal.

On the further ground, that there is no proof that the mortgagee or its successor in title expressly assented to the reservation. 30

On the ground that the conditional bill of sale offered in evidence does not comply with that part of the conditional sales act respecting the filing of the conditional sales with a statement signed by the seller briefly describing the realty.

On the further ground that it is material whether these fixtures or appliances were 40

Motion for a Non-suit.

affixed by the plaintiff itself. By their own conduct I think the testimony was it took some six weeks to affix it and it has become real.

10 Upon the further ground that it does not appear by plaintiff's proof that a removal of the fixtures, so called, would not affect or destroy the property for the use for which it is used so that it could not function if the fixtures were removed, as a public garage.

(Argument.)

The Court: From the nature of the proof put in, I expect, as far as the case is concerned, that you rely on the second sentence of the seventh paragraph of the Conditional Sales Act of 1919.

20 Mr. Bernstein: Yes, your Honor.

The Court: I imagine, then, that you think it should be left to the jury to decide under that section, whether these goods so-called, under the statute, can be severable without injury to the freehold, on the theory that if the jury finds that was the fact, and it is proven that this contract, this conditional sales contract, is properly filed, with the statement set forth also in the Conditional Sales Act, then the sprinkler company can recover?

30 Mr. Bernstein: Yes.

The Court: I imagine the only statement you have as to that is contained in the contract?

Mr. Bernstein: Yes.

The Court: Whereabouts is it, please, the statement supposed to be signed by the seller?

40

Motion for a Non-suit.

Mr. Bernstein: Before going into that question, the answer does not plead that, the only defense they plead is that they were the bona fide purchaser, and this was affixed to the realty so that this becomes a part thereof.

The Court: If the numbers of the properties is all you have, as a description, that is not sufficient. I will say that without going any further. You see, numbers are frequently changed on streets, and reference to a number might lead you to an entirely different structure.

10

(Argument.)

The Court: The description in the conditional bill of sale satisfies the statute. It indicates the numbers on Halsey street and also sets forth, as counsel says, that this equipment is to be distributed through the four-story and basement garage building. I think that is sufficient to satisfy the statute.

20

As to whether the plaintiff has made out a case then, under the second sentence of the seventh paragraph, I think that the plaintiff has made out a prima facie case.

In deciding this motion, gentlemen of the jury, I am not deciding these questions at all. The section involved in this case is a little bit intricate and, for the purposes of this motion, and only for the purposes of this motion, I had to accept all the testimony as true, whether I doubt it or not, whether I accept it all or not, I have to, as a matter of law, accept it as true and give the plaintiff the benefit of every favorable inference I can draw, but you are in an entirely different situation when the case reaches you.

30

40

Motion for a Non-suit.

I merely say that to you so that you won't be biased. Plaintiff has made out a prima facie case, it seems to me.

(Argument.)

10 The Court: The only question is whether the defendant is in the position of a subsequent purchaser, or whether the defendant is not.

(Argument.)

The Court: I will deny the motion and hear the defense. That is probably the most satisfactory way to do it, so that your position will be defined and also whether you come under the first or second of these two sentences.

20 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Kristeller: I offer in evidence certified copy of a mortgage made by Equitable Properties Corporation to Mary Crane Sanderson and others, dated July 3, 1927, and recorded in the Office of the Register of Essex County January 4, 1927.

30 (Same is received in evidence and marked Exhibit D. 1.)

Offer in evidence deed of Conrad Deuchler, Sheriff of Essex County, to 295 Halsey Street Company, dated January 6, 1929, and being a Sheriff's deed, pursuant to writ of fieri facias, issued out of the Court of Chancery of New Jersey, in a foreclosure proceeding foreclosing a mortgage which has already been marked Exhibit D. 1.

40 (Same is received in evidence and marked Exhibit D. 2.)

John Arthur, for Defendant, direct.

JOHN ARTHUR, sworn in behalf of the defendant.

Direct examination by Mr. Kristeller.

Q What is your business? A Structural engineer. 10

Q With whom are you connected? A Division of Buildings, Newark.

Q Does that department have jurisdiction over the property 295-301 Halsey street, Newark?
A It has.

Q Tell us whether or not you examined that property recently at my request? A Yes, I did go over there.

Q When? A Tuesday.

Q What kind of a building is it? A Four-story brick building, non-fireproof, used as a garage. 20

Q What kind of a garage? A Public.

Q I show you a book and I ask you whether it is the official building code of the City of Newark? A It is.

Q Will you turn to the section covering garages.

Mr. Bernstein: I object to any reading from the ordinance. 30

Mr. Kristeller: I offer the ordinance in evidence.

Mr. Bernstein: Objected to as immaterial. (Argument.)

The Court: It may be that counsel wants to prove that there is an ordinance of Newark which requires this building to have a sprinkler system.

Mr. Bernstein: How would that affect us? I say it is immaterial. 40

John Arthur, for Defendant, direct.

10 The Court: Suppose we find it is a non-fireproof building and when you take out this entire system the building cannot function any more as a garage, any more than an apartment house can, without its stoves or ranges. If you wish to put that in evidence you may do so, but if the objection is to the way you are doing it or to the formality of it, of course, it is good.

Do you object to the formality of the introduction of this in evidence?

Mr. Bernstein: No.

20 Mr. Kristeller: I offer in evidence only section 21, paragraph 3, referring to alterations to non-fireproof buildings; section 22, paragraphs 1 and 2, referring to area limits of non-fireproof buildings. Section 23, paragraph 2, referring to public garages and hospitals, the area and height limit. Section 364, paragraphs 1, 2 and 5, referring to sprinklers, and section 442, referring to violation for this ordinance.

Mr. Bernstein: I object on the ground that it is incompetent, irrelevant and immaterial; (2) that the ordinance—

30 The Court: To all of it?

Mr. Bernstein: Yes.

The Court: I cannot rule on that. I do not know what is in these various sections.

Sustain the objection.

Q Is this an official book published by the Commissioners of the City of Newark, containing the building code of the City of Newark? A Yes, sir.

40

John Arthur, for Defendant, direct.

Q The one you work under in the Building Department? A It is.

Mr. Kristeller: I offer the Building Code in evidence.

Mr. Bernstein: I object to it as incompetent, irrelevant and immaterial and not binding on this plaintiff. 10

The Court: Do you object to having evidence produced without the formality of bringing someone up from the City Hall, indicating that a garage of this character has to have a sprinkler system? Do you object to that?

Mr. Bernstein: No, I object to any ordinance that tends to vary this contract.

The Court: I asked you if you object to the ordinance being introduced without the formality of getting somebody from the City Hall? 20

Mr. Bernstein: No, sir.

The Court: Put it in. I will admit it.

Mr. Kristeller: Those were the sections I referred to.

The Court: All right, I will admit those sections you referred to. 30

Q Tell us what is the section under which this building is operated as a garage.

Mr. Bernstein: I object, as the contract speaks for itself.

The Court: Sustain the objection.

Q What type of building is this? A Non-fireproof. 40

John Arthur, for Defendant, direct.

Q What is it being used for? A Public garage.

Q Is it being used in compliance with the ordinance just introduced?

10 Mr. Bernstein: I object.

The Court: Admitted.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A It is.

Q What is the area of the building, the square-foot area of the building?

20 Mr. Bernstein: I object to the question as being immaterial.

The Court: Sustain the objection.

Q Is there a sprinkler system in this building?

A There is.

Q Under the code, if the sprinkler system was removed, could the property be used for a public garage?

30 Mr. Bernstein: I object to whether it could be or not.

(Argument.)

The Court: You and I admit that this could not be used as a public garage without a sprinkler system.

Mr. Bernstein: There is nothing in the contract respecting any ordinance whatever, so I would say they are precluded from injecting any question about the ordinance.

40 The Court: I do not think you quite understand the situation.

John Arthur, for Defendant, cross.

(Argument.)

Mr. Bernstein: The effect of the ordinance would be to deprive us of our property and impairs our contract.

Plaintiff's counsel prays an exception to this ruling of the Court.

10

Exception noted as ground of appeal.

Q (Question read.) A It could not.

Q What is the penalty for the use of this man's fireproof building without a sprinkler system?

Mr. Bernstein: I object.

The Court: Sustain the objection.

Cross examination by Mr. Bernstein.

20

Q If the sprinkler system were taken out of the building you say it could not be used as a public garage? A It could not.

Q Assuming that the sprinkler system were taken out and a new one installed, could it be used as a public garage?

Mr. Kristeller: I object to that as not proper cross examination.

30

The Court: Admitted.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A It could not be used until it was sprinkled.

Q Assuming that the present sprinkler system was taken out, but that another sprinkler system was installed, could it then be used as a public garage?

40

John Arthur, for Defendant, cross.

Mr. Kristeller: I object to the question as improper and immaterial what might happen.

10 The Court: What takes place after the removal is of no consequence. It is whether the removal will reap a material injury to the freehold.

(Argument.)

The Court: You may ask that question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read.) A It could be used if the system was installed.

20 Q If the sprinkler system was taken out would you still have the city water there? A The city water would be in the street; the main would still be there.

Q Could the main be connected with the new sprinkler system in the event a new one were installed?

Mr. Kristeller: I object.

The Court: I admit it.

30 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Yes, sir, it could.

Q Are there garages in Newark equipped without sprinkler systems?

Mr. Kristeller: I object.

The Court: Sustain the objection.

40

William Gibbs, for Defendant, direct.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: No doubt they are, if fire-proof, but this is a different kind of building.

Q In March, 1927, there were garages in Newark equipped without sprinkler systems? 10

Mr. Kristeller: I object.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20

WILLIAM GIBBS, sworn in behalf of the defendant.

Direct examination by Mr. Kristeller.

Q What is your occupation? A Inspector in the Bureau of Combustibles, City of Newark.

Q Did you examine the properties 295-301 Halsey street? A I am.

Q You did? A Yes, sir. 30

Q What kind of a building is it? A Four-story, basement non-fireproof.

Q Did your department have charge and jurisdiction over public garages? A We do.

Q Is this property licensed to operate as a public garage?

Mr. Bernstein: I object as immaterial.

The Court: Sustain the objection. 40

William Gibbs, for Defendant, cross.

Q Is this property now being used as a public garage? A It is.

Q Is the property sprinkled? A It is.

Q If the sprinkler were taken out could the property be used under your department's jurisdiction as a public garage? A Can I have that again?
10

Q (Question read.) A It could not.

Q Would your department license this property as a public garage with no sprinkler system in it?

Mr. Bernstein: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustain the objection.

Q Under your department could this property be licensed as a public garage without a sprinkler system?
20

Mr. Bernstein: I object.

The Court: Admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A No.
30

Cross examination by Mr. Bernstein.

Q Did you say this was a fireproof building?
A Non-fireproof building.

Q As a matter of fact, the first floor is fireproof, is it not? A We do not class—

Q I say the first floor is fireproof, is it not?
A It is what we class as semi-fireproof.
40

William Gibbs, for Defendant, cross.

Q What do you mean by semi-fireproof? A There is some wood construction in the windows and in the floors and open ramps from one floor to another.

Q The second, third and fourth floors, are those fireproof or non-fireproof? A Non-fireproof. 10

Q Does the first floor require a sprinkler system? A It does.

Q Notwithstanding it is semi-fireproof it requires a system? A It does.

Q Turn to the provision of the building ordinance that provides that semi-fireproof buildings require a sprinkler system. A I might say this—

Q Just turn to the provision. A The question that you refer to here doesn't come in this building at all so we are only taking up time in reference to what you class as a semi-fireproof building. 20

Q Does a semi-fireproof building require an automatic sprinkler system? A A semi?

Q Yes. A According to the use of the building, and area of the building and construction of the building.

Q Is there any provision in the ordinance you now have which provides that a sprinkler system is to be installed in a semi-fireproof building? A According to the floor area. 30

Q You would say that the floor area of this building would require a sprinkler system, notwithstanding that it is semi-fireproof? A Yes.

By the Court.

Q What do you mean semi-fireproof? A Partly fireproof. 40

Rudolph Krueger, for Defendant, direct.

By Mr. Bernstein.

10 Q What did you call it? A Non-fireproof building. This building is what we class as an open building, according to the ramps from one floor to the other, which leaves an open area from the bottom to the top. Your question of the semi-fireproof building is this, that the first floor has concrete and steel beams; that does not put the entire building in a semi-fireproof class because unless that building was constructed under the building code it should be either semi-fireproof or non-fireproof.

Q Do you know when the ramps were installed?

Mr. Kristeller: I object as immaterial.

20 The Court: Sustain the objection.

Q There are ramps in this building? A Yes, sir.

Q Where are the ramps? A They extend, the first ramp on the south side of the building and the second on the north and so on to the fourth floor, open ramps.

Q If there were no ramps, would that building require a sprinkler system? A It would.

30 Q Notwithstanding the ramps? A Yes, sir.

RUDOLPH KRUEGER, sworn in behalf of the defendant.

Direct examination by Mr. Kristeller.

Q What is your profession? A Architect.

40 Q How long have you been an architect? A Eleven years.

Rudolph Krueger, for Defendant, direct.

Q Did you by request make an examination of the premises 295-301 Halsey street, owned by 295 Halsey Street Company? A Yes, sir.

Q When? A I made an inspection yesterday and one day last week.

Q In your experience as an architect, have you handled the construction of mercantile and commercial buildings as well as private dwellings? A I have. 10

Q Have you examined this building in respect to its condition as to whether or not it is fireproof or non-fireproof? A Yes, sir.

Q What is this building?

Mr. Bernstein: I object as immaterial as to whether it is fireproof or non-fireproof.

The Court: Objection overruled. 20

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Non-fireproof building.

Q Did you examine the sprinkler system in this building? A I did.

Q Tell us the type of ceiling on the first floor.

A Reinforced concrete ceiling, is what we call concrete beam joists, that is concrete beams are placed closer together than you would ordinarily put in a straight concrete building. 30

Q What is the ceiling on the second floor? A Wood floor beams with covered metal ceilings.

Q The third floor? A The same.

Q And the fourth floor? A Open. Just wood, rough beams.

Q Tell us how the sprinkler system is affixed to the property on the first floor. I am talking only of the ceilings. A It is fixed with bolts 40

Rudolph Krueger, for Defendant, direct.

to the ceilings and to the concrete beams it is fastened with what they call cast-iron brackets screwed into the concrete beams with lag screws.

Q Is the second and third floors constructed alike? A Yes, the second and third are identical.

10 Q How is the sprinkler system affixed on the second and third floors? A With cast-iron brackets screwed in with wood joists.

Q With reference to the metal ceiling, how is it affixed? A These brackets are through the metal ceiling, cutting into the metal ceiling.

Q Were the screws in the metal ceiling or in the beams? A Drove through the metal ceiling and fastened in the wood beams.

20 Q How? A Probably screwed into the beams.

Q You say "probably." A You cannot see the condition above the metal ceiling.

Q You heard testimony by Mr. Kay that the screws were inserted through the metal ceilings into the wood beams. Is that the condition in which you found it?

Mr. Bernstein: I object to any characterization.

30 The Court: Admit it.

A It seems they are screwed right into the beams.

Mr. Bernstein: I object to what it seems.

A You could not tell unless you tore the metal ceiling off.

40 Q You heard testimony that the screws were inserted through the metal ceiling to the wood beams so that you wouldn't have to destroy the metal ceilings. Is that the condition you found

Rudolph Krueger, for Defendant, direct.

there? A No, you would have to destroy the metal ceilings to pull them down.

Q On the fourth floor how was it affixed?

A Attached by a bracket to a joist with "U" hangers and strap hangers.

Q Let us go back to the first floor. How could the sprinkler system be removed? 10

Mr. Bernstein: I object to this witness testifying, as he is not qualified. He is an architect, and there is no testimony showing that he was ever engaged in the sprinkler business.

The Court: I will admit it. I do not think that calls for a very high degree of authority to answer. 20

A In order to remove that it would be necessary to disconnect the pipe, take off the heads and remove the bolts from the beams and ceilings and remove the hangers with the bolts, leaving holes in the ceilings and concrete beams.

Q On the second and third floors, what would you have to do to get it out on those floors? A Remove the hangers, unscrew them and probably in places remove the metal ceilings, take that off and put the metal ceilings back and patch up all the holes. 30

Mr. Bernstein: I object to the answer and ask that any testimony where he says probably be stricken out.

The Court: No, I will not strike it out.

Q Tell us what the damage would be on the second and third floors and how it could be repaired. 40

Rudolph Krueger, for Defendant, direct.

Mr. Bernstein: I object to how the metal ceilings could be repaired stated. This man is an architect.

The Court: Admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

10

Exception noted as ground of appeal.

Q In order to repair the ceiling you would have to get the metal ceiling man to cut the squares in every place and put a patch on where the holes are. From what you would observe on each floor, there would be approximately from two hundred and fifty to three hundred holes and each one of the holes would have to be patched up and the ceiling would look like a patch quilt after you got through with it.

20

By the Court.

Q How large are the holes? A From probably a half-inch up.

Q How many do you think there are? A Two hundred fifty to three hundred.

By Mr. Kristeller.

30 Q Tell us about the main pipes that feed the sprinkler on the ceiling, where are they placed on the building? A The ones on the first floor, or first that go through?

Q The first that go through. A The main duct or the basement alongside the first floor going through the floor runs out along the building until somewhere about one-third of the building and runs up to the second floor alongside a column and that main takes the sprinkler for the second floor and then there is a brick west

40

Rudolph Kreuger, for Defendant, cross.

building and runs up to the third floor, taking the line off the third floor to the fourth floor going through all the floors.

Q Where does the main originally come from?

A From the basement.

Q Where does it enter the building? A It enters the building through the basement floor against the wall on the north side of the building. 10

Q In what part of the building does this main break through part of the building? A It breaks through on every floor except the roof.

Q How big a pipe is it? A It varies from six inches—I think to the upper floors four inches.

Cross examination by Mr. Bernstein.

Q You are an architect? A I am. 20

Q You have been how long? A Eleven years.

Q In the City of Newark? A City of Newark and State of New Jersey.

Q Did you ever do any work for the 295 Halsey Street Company? A I did.

Q Where? A At the garage building 295 Halsey street.

Q What kind of work did you do there? 30

Mr. Kristeller: I object as immaterial.

Q You know Mr. Kassel, don't you? A I do.

Q Very friendly with Mr. Kassel, aren't you?

Mr. Kristeller: I object as immaterial.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

Rudolph Kreuger, for Defendant, cross.

Q You made a very close inspection of this building, didn't you? A I did.

Q How long did it take you to make the inspection? A An hour the first time and a half to three-quarters the second time.

10 Q You went from floor to floor? A Yes, sir.

Q Started at the basement and at the main? A Yes, sir.

Q Did you look at the basement? A Yes, sir.

Q The first floor up to the fourth? A Yes, sir.

Q Did you make a written report? A I did not.

20 Q Do you remember everything you saw? A I do.

Q The sprinkler system is connected with the main? A What do you mean "connected with the main"?

Q The attachment in the basement? A Yes, sir.

Q What does that attachment consist of? Or what is the nature of that attachment? A The question isn't clear.

30 Q The attachment with the city main. A Iron pipe and iron flange.

Q Where is the iron pipe? A Up near the front of the building.

Q Is it removable? A Yes, sir.

Q How about the valves, did you see any there? A Yes, sir.

Q Are they removable? A Yes.

Q Did you notice the sprinkler heads? A Yes, sir.

40 Q In fact, the entire system is removable, is it? A Yes.

Rudolph Kreuger, for Defendant, cross.

Q How would you remove these valves? A How would I remove the valves?

Q You saw the valves there. A Which ones? In the basement?

Q Yes. A Just unscrew them and take them apart.

Q A simple matter? A I don't know how simple it is. 10

Q How long would it take? A I am not a judge of that.

Q You do know they are part of the sprinkler system, don't you? A Yes, sir.

Q As a matter of fact, you simply unscrew them and lift the valves up? A I don't know the exact method that a pipe man would use to do that.

Q You are not familiar with the removal of any sprinkler systems, are you? A Never removed any. 20

Q You never saw any removed? A No.

Q With respect to the first floor, that is all pipes mostly, isn't it, on the first floor? A What do you mean by "mostly all pipes"?

Mr. Bernstein: Withdraw the question.

Q How many bolts on the first? You mentioned bolts on the first floor? A Yes, sir. 30

Q Just where are these bolts with respect to the main, are they near or away from the main?

A Well, the bolts are in the concrete floor and concrete beams that holds the hanger and the hanger holds the main.

Q Is that removable? A Yes, sir.

Q How would you remove those bolts? A Get a wrench and unscrew them.

Q They unscrew right out? A Yes. 40

Rudolph Kreuger, for Defendant, cross.

Q Respecting the hangers, are those removable? A Yes.

Q How would you remove those? A Take the pipes off first and unscrew the bolts and take the hangers off.

10 Q Would you unscrew the hangers, too? A Where?

Q On the first floor. A You don't have to bring this down, pipe and all.

Q How about the second floor? A You take the pipe out and unscrew the hangers. They are fastened on with bolts; you have to take the ceiling off and remove them.

20 Q You would remove the hangers the same as you would remove anything else? A What do you mean by "anything else"?

Q Nothing complicated about it; you simply unscrew them? A Yes.

Q You say there is a metal ceiling on the second floor? A Yes.

Q Also on the third? A Yes, sir.

Q Nothing on the fourth? A No.

Q And not in the basement? A No.

30 Q In order to take the metal ceiling out on the second and third floors that would cause holes in the ceiling? A No.

Q You unscrew the equipment on the second and third floors without hurting the metal ceiling? A Some hangers you could and some you couldn't. Some of the double hangers are bolted to the wood beams.

Q Approximately how many hangers on the second floor couldn't you remove without tearing the metal ceilings? A I don't know.

40 Q You didn't see that? A I didn't stop to count them.

Motion for Direction of a Verdict.

Q You didn't think that was important? A
I don't know.

Q Yet, you made a very minute inspection?

A A general inspection of the whole character
of the system.

PLAINTIFF RESTS.

10

DEFENDANT RESTS.

Mr. Kristeller: I move for a verdict in favor
of the defendant and against the plaintiff on the
ground it now appears by uncontroverted evi-
dence the property cannot be removed without
destroying the function of the property as a pub-
lic garage, and

Further, it comes within the section of the
conditional sales act that the reservations are
void as to the defendant because it appears that
the detaching of the fixtures would destroy the
property. 20

On the further ground that it affirmatively ap-
pears by the evidence of the defendant that the
defendant is the holder of the title to the prop-
erty by virtue of a foreclosure sale and deed
from the sheriff, which mortgage covered a sher-
iff's deed and antedates the filing of the condi-
tional sales agreement and there is no evidence
of express consent to the reservation of title by
the mortgagee nor his successors in title. 30

(Argument.)

The Court: It would seem it was a jury ques-
tion, to me.

Mr. Kristeller: Yes, if there was any dispute.
I don't think there is any dispute.

(Argument.)

40

Motion for Direction of a Verdict.

10 The Court: Isn't the only question to be submitted to the jury, "Do you find that the removal of the sprinkler system will cause material injury to the freehold"? Wouldn't the answer to that question solve the case before us, of course, with instructions to them that if they said "yes," they should find one thing and if "no," something else.

Mr. Kristeller: It seems that that question should be decided by the Court, plus the questions you must find, that there was no evidence of any assent.

The Court: No, there wasn't any assent.

(Jury retires.)

20 Mr. Bernstein: Counsel have entered into a stipulation to request or submit the question to the jury as to whether the goods which are the subject matter of this suit could be severed without material injury to the freehold and with proper instructions from the Court as to what that means.

Mr. Bernstein: May Mr. Bernstein of the New York Bar be permitted to sum up, your Honor?

30 The Court: Yes.

Defendant's counsel prays an exception to this ruling of the Court (denying motion for direction of verdict).

Exception noted as ground of appeal.

(The jury returns into court.)

40 The Court: The only question to be submitted to you gentlemen and the Court—we'll write it out—with the approval of counsel, is whether or not this sprinkler system can be removed with-

Court's Charge to Jury.

out material injury to the freehold, not using the words of the statute, and your answer will be either yes or no; that will be much easier than to involve you in the statute itself, and it is upon that point that counsel will sum up.

Mr. Bernstein: Do the damages as costs of removal enter into the question of verdict? 10

The Court: I will take care of that in the charge.

Mr. Kristeller sums for the defendant.

Mr. David Bernstein sums up for the plaintiff.

CHARGE OF THE COURT.

The Court charges the jury as follows: 20

MOUNTAIN, J.

The question which will be submitted to you is this, "Is the sprinkler system, with all the hangers, accessories, sprinkler heads, piping, severable wholly without any injury to the freehold?" and your answer to that will be "Yes" or "No."

This has simplified your work. The statute under which this case is brought is a little bit complicated. I would suggest most emphatically to you that when you retire to the jury room you regard this question as the issue, you are not supposed to go into what you may think are the rights or the wrongs or the claims of the separate individuals or company involved in this case, but simply to answer this question. The Court would like to indicate a background that may be helpful. If possible, I am going to take two or three cases to show you what might hap- 40

Court's Charge to Jury.

pen under certain conditions in actions similar to this.

10 Assume, if you will, that each one of you had \$10,000 to invest and you concluded that you would invest that money in a bond and mortgage and, we will assume, if you please, that a small apartment house was shown to you, and that you found in the apartment house old coal stoves in the kitchens and that it was lit by gas. I want to make this an extreme case, if I can. At any rate, after looking over the apartment you decided there was sufficient equity there for you to advance \$10,000 to the owner of the property. You said to yourself, "This property is worth \$20,000 to \$25,000 and my \$10,000 is amply protected," and so you advanced the money
20 and received a bond which was secured by a mortgage on the property and you put it in your safe deposit box. Assume, if you please, that you have held that mortgage four or five or six years. Assume that the owner decided he was not renting it any too well and that he concluded to make some improvements and he advanced the money out of his own pocket and removed these coal stoves and put in gas stoves and took out the gas fixtures and put in electric
30 fixtures and further that he piped his house, we will assume, for refrigerators, not only to refrigerate the iceboxes, but, perhaps, to refrigerate the water that flowed out of the cold water taps. All of this involved a certain amount of alteration in the apartment and, when it was completed, the tenants moved in and things went along as usual. Later, we will assume that the owner, unfortunately, got into financial difficulties and was not able to pay the interest on
40 his mortgage and you had to foreclose it. At

Court's Charge to Jury.

the time of the foreclosure sale, we will assume, that you were prepared to buy it in for \$10,000, the amount of your investment, when you were unexpectedly told that the refrigeration plant in the house was going to be torn out because it had been sold on a conditional bill of sale. That the faucets would be taken away and that the refrigerators would be removed and the necessary piping would be taken out and, suppose, you found that the same situation existed as to the gas stoves. Also, let us assume, that the value of the apartment had depreciated and you began to wonder what your house was going to look like after all these operations had come to pass. You wondered whether you were going to save your \$10,000 equity after these goods and chattels had been taken out, or whether you were not. Of course, that is an extreme case.

Let us assume a case that is the extreme the other way. Assume, perhaps, a similar situation where a man puts in a radio—I mean the owner of the building. Assume that you hold the mortgage and he puts in a radio and he simply attaches it to the necessary appliances, using electricity. It is a matter of ease to detach and remove that radio under a conditional sales contract, because one only has to unscrew the socket and there is no damage to the property. That is the other extreme.

I do not know whether those two examples will be helpful or not, but here we have a situation where we are asked to decide whether the removal of this sprinkler system can be done without material injury to the freehold; by that I mean injury to the structure to which it is attached. When you consider this situation you should consider, among other things, the fact

Court's Charge to Jury.

that it took some time to put that in and it will take some time to take it out, as indicating the character of the structure. Of course, it will take probably less time to take it out—I think the testimony was that it took six weeks to put it in. Necessarily, that was, in a way, a lot of work, because I imagine a lot of pipe had to be made and holes drilled which would not be necessary in taking the system down. Another thing you have to consider is this, you might find in your consideration that, in this particular non-fireproof garage, that the sprinkler system was a part of the plant, that the building, as a whole, or as a garage, could not function without it. You may consider whether this institution as a garage would be injured by taking out the sprinkler system, that is, whether or not taking out a part would injure the structure.

There are two aspects to this type of injury which you may consider; one is the physical injury, the taking or tearing out, however it may be done; the physical injury done to the property. The other is not exactly the physical injury, but the injury to the institution to which the structure is a part, an injury to the freehold of which the sprinkler system is a part. Among other things there is testimony to which I have referred indicating that this garage business cannot function without the system because the city requires it to be there. When you retire to the jury room perhaps this question can be answered a little easier, in view of the summing up of counsel and by what the Court has said. I hope I have not made it more difficult for you.

I might add that one of the jurists in this State has said, I think with considerable good sense, that, in a question of this kind, where something

Further Charge to Jury.

in the nature of a fixture is being considered, that it is not the intention, in attaching the fixtures, which is emphasized, but the material injury in detaching the fixtures.

(Jury retires.)

Mr. Bernstein: I respectfully pray an exception to that part of your Honor's charge which refers to the question as to the removal of the sprinkler system as affecting the garage, or the institution and the conducting of the garage itself. 10

Exception noted as ground of appeal.

Mr. Bernstein: I respectfully pray an exception to that part of the charge which goes into the two illustrated cases, the radio and the case of the gas and the stoves. 20

Exception noted as ground of appeal.

I respectfully pray an exception to that part of the charge respecting the use of the garage in the event that the sprinkler system was removed from the premises and the effect of the business on the premises.

Exception noted as ground of appeal.

(The jury returns into court.)

The Court: Gentlemen of the jury, you have sent me a communication which I will read: "This jury understands that there are two elements of material damage to the freehold: 30

1. Physical.
2. Use.

Are we to understand that the second element of damage is confined to the present use of the property, namely, that of garage, or does it apply to any general use to which the property 40

Further Charge to Jury.

might be put in its present condition, or by alteration? In other words, might not this building be used for other purposes where the removal of the sprinkler system would not affect its use for such other purpose?"

10 The Court: As to that question, gentlemen, the statute refers to a material injury to the freehold which will be occasioned by the removal of the property. When will that be occasioned? Obviously, the minute the property is removed; that is the time the injury is apparent. If you have this building fitted with a complete sprinkler system on four floors, your injury as to when this material injury to the freehold takes place, is directed to the moment, I should imagine, that it is taken out and you look at the property and say, "What is its condition now?" not
20 as to whether it might be two years after or when something else happens to it, it is changed, turned from a garage into a storehouse or something else. That is immaterial. The point is, does it apply to the condition of the premises just after the removal takes place?

Now, as to the application of this word "use," which you say is an element, and perhaps I put it a little strongly if I called it an element. It
30 isn't exactly an element; it is sort of a factor to be considered. To take another case, if you had an injury to the freehold, of course, the injury to the building is not only a physical injury, but the injury to the building for the purpose for which it is used. If you had an apartment house and it was rented, we will say, to thirty-two families, and it was mid-winter and you suddenly saw someone taking all the gas stoves out, is not that a factor to be considered, to determine
40 the injury to the freehold? I wouldn't say it was

Exceptions to Charge.

an element of damage. I would say it was a factor to be considered, to determine whether there was material injury to the freehold, if, as in this case, the sprinkler system was removed.

(The jury retires.)

Mr. Bernstein: I respectfully pray an exception to that part of the charge wherein the Court said that the use of the building is a factor in determining the question presented to it. 10

Exception noted as ground of appeal.

Also, I pray an exception to that part of the charge as to the purpose to which the building is put.

Exception noted as ground of appeal.

Also, I pray an exception to that part of the charge where in the case of the gas stoves in the apartment house was cited respecting its removal. 20

Exception noted as ground of appeal.

Mr. Kristeller: I respectfully pray an exception to that part of your Honor's charge in answer to the question by the foreman of the jury, that they may consider the immediate adaptability of the property for other use.

Exception noted as ground of appeal. 30

(The jury returns into court.)

Foreman: The answer to the question is "Yes."

Exhibit P. 1.

EXHIBIT P. 1.

Chicago
Philadelphia
Atlanta

Boston
Cincinnati
Buffalo

H. G. VOGEL COMPANY

10

Executive Office

Plant: 15 West 37th Street
Linden, N. J. New York City

Feb. 18th 1927.

Submitted by New York Department
To Equitable Properties Corporation
Address 295-301 Halsey Street, Newark, N. J.

H. G. Vogel Company proposes to equip the
property of Equitable Properties Corp.

20

Located at 295-301 Halsey St., Newark, N. J.
with a system of fire extinguishing apparatus as
described in the specifications which are attached
hereto and made part hereof.

30

(1) All the material is to be of standard
quality, and the work herein specified is to be
done in a thorough and workmanlike manner and
in conformity with the standard of construction
acceptable to the Schedule Rating Office, Newark,
New Jersey, and subject to inspection by them,
and whose inspection and report will be evidence
of proper and satisfactory completion of the
work.

40

(2) Sufficient space on the premises for
materials, and proper facilities for the proper
prosecution of the work, including water, light,
local telephone, and elevator service when avail-
able, shall be furnished to the H. G. Vogel Com-
pany by you at your expense as, and when, the
H. G. Vogel Company requires it.

Exhibit P. 1.

(3) Except when and where Dry Pipe System is specified you shall maintain sufficient heat or other protection thruout the premises to prevent freezing.

(6) All painting shall be furnished by you, unless specifically included in this proposal.

10

(7) The H. G. Vogel Company shall not be liable for any loss or damage from delay or otherwise, due to strikes, lockouts, action of the elements, or to any cause beyond the control of the H. G. Vogel Company.

(8) Any loss or damage from fire or any other cause not the fault of the H. G. Vogel Company, to materials, tools, equipment or work, while in or about the premises shall be borne by you.

20

(9) If, in connection with the performance of this contract, any damage be caused, or any claim be made for which the H. G. Vogel Company may be liable, notice with an itemized statement thereof must be given to the H. G. Vogel Company promptly, and in any event, within ten days thereafter, otherwise the H. G. Vogel Company is released from liability.

(10) If the work be discontinued by reason of strikes, lockouts, action of the elements, or any cause not the fault of the H. G. Vogel Company, there shall, at the option of the H. G. Vogel Company, be due and payable by you to the H. G. Vogel Company upon request of the H. G. Vogel Company, a sum equal to the full price stipulated in this proposal, less an allowance to be made by the H. G. Vogel Company for materials, labor and expense not supplied or incurred.

30

(11) Any default hereunder by you shall, at the option of the H. G. Vogel Company, make im-

40

Exhibit P. 1.

mediately due all sums then owing to the H. G. Vogel Company which otherwise would be there-after payable.

10 (12) At the H. G. Vogel Company's option, you shall be deemed to have made default hereunder if you be adjudicated a bankrupt or insolvent, or a Receiver in bankruptcy or insolvency of your property be appointed, or if you make a general assignment or trust for the benefit of creditors, or if a judgment be docketed against you or the aforesaid property, or if a lien in foreclosure or mechanic's lien be filed against the aforesaid property, or if you fail to make any payment hereunder as herein provided or to fulfill any of the conditions hereof.

20 (13) The H. G. Vogel Company retains title to the material and equipment until payment in full therefor, with the right in case of any default on your part to enter the premises and remove the same, whether or not attached to the realty (for which purpose the material and equipment, however attached, shall at all times be deemed personal property) and at the option of the H. G. Vogel Company, to sell the same at public or private sale with or without notice and apply the proceeds toward the balance due, 30 together with the expenses of removal and sale, including reasonable attorneys' fees, you being liable for any deficiency; the H. G. Vogel Company, however, having the privilege, at any time, to change this conditional sale to an absolute sale and to pursue any statutory or other remedies in such case made and provided.

40 (14) This proposal is subject to approval in writing by an executive officer of the H. G. Vogel Company, and in the meantime, and in case of your acceptance, and in consideration of the H. G.

Exhibit P. 1.

Vogel Company's making this proposal and of its preparation thereof, including the survey, you agree that such acceptance shall not be withdrawn or cancelled until after fifteen days from the date of its acceptance.

1. SPECIFICATIONS:

10

The H. G. Vogel Company will furnish and install an Esty Wet Pipe Automatic Sprinkler System, of first quality in every and all respects, together with the necessary pipe, fittings, hangers and other apparatus as hereinafter enumerated, all work specified to be done in a thorough and workmanlike manner on the premises aforesaid, and same when completed shall conform to the present standard of the Schedule Rating Office, and subject to inspection and approval of Equitable Properties Corp.

20

The sprinklers for the proposed equipment shall be distributed throughout the 4 story and basement garage building, and there will be the necessary number of sprinklers to comply with requirements of the above named approving bodies such requirements not to be less than Seven Hundred and One (701) Sprinklers.

2. ALARM VALVE:

1 6" Alarm Valve.

30

3. ALARM SYSTEM:

Electric Alarm System connected to the aforesaid Alarm Valve, with 1 electric gong.

4. WATER MOTOR ALARM:

1 Water Motor Alarm connected to the Alarm Valve.

40

Exhibit P. 1.

5. DRAW-OFF PIPING:

Draw-off piping to properly drain system to be run to accessible place for discharge as selected by the H. G. Vogel Company, to front outside of Building.

10 6. EXPANSION CASES:

Necessary Expansion Cases in place to support the sprinkler piping.

7. DRILLING OF STEEL BEAMS:

Drill and tap steel beams where necessary to attach hangers.

8. EMERGENCY SPRINKLERS:

A cabinet containing twelve (12) sprinklers and sprinkler wrench for emergency use.

20 9. FIRE DEPARTMENT CONNECTION:

1 two-way Fire Department Connection outside of building, connected to the Sprinkler System.

10. CITY WATER CONNECTION:

A 4x6 connection from the 6" low pressure city water main in Halsey Street to and connect with the Sprinkler System hereinbefore referred to.

11. FREIGHT-CARTAGE:

30 Deliver materials to local freight station and do all local carting and handling.

12. CUTTING OF HOLES:

Necessary cutting of holes for the passage of the sprinkler piping, and properly repairing and painting all patchwork.

NOTE: It is understood and agreed that the work in connection with the City water connection mentioned hereinbefore is based on ordinary good digging conditions, and should rock, water or

Exhibit P. 1.

other unforeseen conditions or obstacles be encountered, the H. G. Vogel Company is to receive as an extra to the contract price the additional sum, not to exceed one hundred dollars (\$100.00), providing however that notice in writing to the Equitable Properties Corporation is given by the H. G. Vogel Company with reasonable time to make inspection and approve. 10

It is agreed that the H. G. Vogel Company is to prepare working plans which shall be submitted to the Schedule Rating Office of Newark, New Jersey, and to Equitable Properties Corporation and the H. G. Vogel Company shall proceed with the work only upon receiving the signed approval of both of the foregoing parties, otherwise this contract becomes null and void.

It is further understood and agreed between the parties hereto that the installation of this Sprinkler System is to be complete in all respects as per the requirement of the Schedule Rating Office of Newark, New Jersey, without any additional cost whatsoever to the Equitable Properties Corporation, except as herein provided for. 20

That upon completing the installation of the Sprinkler System the H. G. Vogel Company is to furnish all necessary certificates of approval from the respective City Departments and Schedule Rating Office of Newark, New Jersey. 30

The H. G. Vogel Company agrees to save harmless the Equitable Properties Corporation from all encumbrances arising from sub-contracts and other expense involving City Permits and additional requirements of the Schedule Rating Office of Newark, New Jersey, and all work to be absolutely complete in all details for the agreed sum provided herein. 40

Exhibit P. 1.

It is agreed between the parties hereto that the installation of this Sprinkler System is to be completed no later than July 1st, 1927.

15. This proposal and acceptance expresses the whole agreement, and no obligation, other than set forth herein and made part of this proposal shall be binding upon the H. G. Vogel Company, and the price herein is subject to change without notice and this proposal withdrawn unless accepted within ten (10) days after the date hereof.

(16) The H. G. Vogel Company's price for its work as herein specified is Five Thousand and 00/100 (\$5,000.00) Dollars, based on the installation of necessary Sprinklers. The price shall not include the installation of extra sprinklers due to changes in the buildings or contents after the completion of the H. G. Vogel Company's survey.

H. G. Vogel Company,
By (S) W. L. Kay

ACCEPTANCE

(17) We hereby accept the above proposal this 24th day of Feb. 1927, and hereby authorize the H. G. Vogel Company to do the work herein specified, and we agree to make cash payments as follows,

1st Payment: \$1500.00 to be paid upon completion.

Balance (\$3500.00) to be paid in the form of two (2) Notes, in the sum of \$1750.00 each Notes to become due and payable six (6) and twelve (12) months respectively thereafter, and Notes to bear interest at 6% per Annum.

Equitable Properties Corporation,
(S) Albert J. Weisinger, Treas.

Exhibit P. 1.

APPROVAL

(18) Approved this 3rd day of March 1927.

H. G. Vogel Company.
By (S) F. C. Vogel, Secty.
Executive Officer

Received in the office April 12th A. D. 1927 at 10
9:44 A. M.

Office of
REGISTER OF DEEDS AND MORTGAGES
Essex County, New Jersey

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss. : 20

I, HOWARD S. DODD, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of a certain Conditional Sales Agreement made by Equitable Properties Corp. to H. G. Vogel Co. as the same may be found filed in my office under file No. 22525 for said County.

IN TESTIMONY WHEREOF, I have 30
(SEAL) hereunto set my hand and official seal
this 17th day of August A. D. 1929.

HOWARD S. DODD
Register of Deeds and Mortgages

Exhibit D. 1.

By 39 and 58.

Office of
REGISTER OF DEEDS AND MORTGAGES
Essex County, New Jersey

10 CERTIFIED COPY OF
Conditional Sales Agreement
Equitable Properties Corp.
to
H. G. Vogel Co.

Filed April 12, 1927, under File
No. 22525.

EXHIBIT D. 1.

20

EQUITABLE PROPERTIES CORP. \$69,500.00
TO THIS MORTGAGE,
MARY EMMA SANDERSON, ET AL made the third
day of January
One Thousand,
Nine Hundred and
twenty-seven

30 BETWEEN Equitable Properties Corporation, a
corporation of the State of New Jersey, having
its principal place of business in the City of
Newark in the County of Essex and State of
.....party of the first part, hereinafter
known as the mortgagor, AND Mary Emma San-
derson, Lucy G. Sanderson, Charles D. Sander-
son and Clarence M. Sanderson, of the City of
Orange in the County of Essex and State of New

Exhibit D. 1.

Jersey party of the second part, hereinafter known as the mortgagee,

WITNESSETH, that the said mortgagor, for and in consideration of the sum of Sixty-nine thousand five hundred (\$69,500.00) dollars, lawful money of the United States of America, to it in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said mortgagor therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said mortgagee and to their heirs, executors, administrators and assigns, ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

BEGINNING at a point on the Westerly side of Halsey Street distant Northerly forty feet and fifty-eight one-hundredths of a foot from Hill Street and running; thence North sixty-two degrees two minutes West one hundred twenty-two feet; thence North twenty-seven degrees forty-five minutes East eighty-six feet and fifty-two one-hundredths of a foot; thence South sixty-two degrees forty-one minutes East one hundred twenty-two feet to said westerly side of Halsey Street; thence South twenty-seven degrees forty-five minutes West along the same eighty-seven feet and ninety one-hundredths of a foot to the BEGINNING. Being the same premises conveyed to the said party of the first part by deed bearing date December 30, 1926 and to be recorded

1/28/'27

#14.

Assg't Rec'd

Bk. 186

Page 124

3/5/29 #4

Assg't Rec'd

Bk. 206

Page 359

Exhibit D. 1.

simultaneously herewith, this mortgage being given to secure a portion of the purchase price for said conveyance. Party of the first part, its successors or assigns, shall have the privilege to raise a new first mortgage to replace the present existing first mortgage under the following conditions: If said new mortgage is what is commonly known as a straight or standing mortgage and is in the principal sum of more than \$91,000.00, then and in that event, the mortgagor will immediately, upon procuring said new mortgage, pay in reduction of the principal of the within mortgage the sum of \$2500.00 semi-annually from the date thereof instead of \$500.00 semi-annually as hereinbefore provided; with the further proviso that the mortgagor will pay over to said mortgagees, their heirs, executors, administrators or assigns all moneys received on said new mortgage in excess of the principal sum of \$91,000.00 and upon notice to the said mortgagees at such time the new mortgage is procured, said mortgagees hereby agree to postpone the lien of the balance of principal due on their mortgage to the lien of said new mortgage. In the event that the mortgagor shall replace the present existing first mortgage with an installment mortgage with installments totaling at least those now provided for in the present existing first mortgage that then the payments on account of the second mortgage shall be as hereinbefore provided for and provided in the event of the said new first mortgage being in excess of \$91,000.00, that then and in that event, the excess is to be paid to the mortgagees in reduction of the second mortgage and that the second mortgagees will postpone the lien of the second mortgage to the new first mortgage to be procured. The

Exhibit D. 1.

mortgagor shall have the privilege of paying off the unpaid portion of the principal of the within mortgage at any time before maturity, upon giving to the mortgagees thirty days written notice of the intention so to do. The mortgagor will provide the mortgagees with fire insurance to an amount not less than \$125,000.00 except that it is understood that when the aggregate first and second mortgages on said premises are reduced to a sum less than \$125,000.00, then and in that event the owner or owners of the premises will pay for sufficient insurance to equal the amount of the unpaid balance due on the said first and second mortgages. The mortgagees shall assign the within mortgage upon payment to them of the full amount due to them upon request of the party paying off the same.

A.M.J.

A.M.J.

A.M.J.

A.M.J.

TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining. Also all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagor of, in and to the same, and of, in and to every part and parcel thereof, To HAVE AND TO HOLD all and singular the above described tract or lot of land and premises with the appurtenances, unto the said mortgagee, their heirs, executors, administrators and assigns, to the only proper use, benefit and behoof of the said mortgagee, their heirs, executors, administrators and assigns forever. Provided always, and it is agreed by and between the parties to these presents that if the said mortgagor, its successors and assigns do and shall well and truly pay, or cause to be paid, to the said mortgagee, their heirs, executors, administrators and assigns the sum of Sixty-nine thousand five hun-

Exhibit D. 1.

dred (\$69,500.00) dollars as follows: Five Hundred (\$500.00) Dollars on July 1, 1927 and Five hundred (\$500.00) Dollars every six (6) months thereafter until the principal sum is reduced to Sixty-five Thousand (\$65,000.00) Dollars and Twenty-five hundred (\$2500.00) Dollars every
10 six months thereafter until the full amount of said mortgage is paid, with interest on the unpaid portions of principal at the rate of six (6) per cent per annum, payable quarterly. according to the conditions of a certain bond, bearing even date herewith, in the penal sum of One hundred thirty-nine thousand (\$139,000.00) dollars, made by said party of the first part without
20 any deduction or defalcation for taxes, assessments, or any other imposition whatsoever, thence and from thenceforth, these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in
30 anyway notwithstanding. AND THE SAID MORTGAGOR, for itself, its successors or assigns does covenant and grant to and with the said mortgagee, their heirs, executors, administrators or assigns that it shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys
40 to secure payment of which this mortgage is made, for so much of the taxes assessed against said lands as is equal to the tax rate applied to the amount due on this mortgage or any part thereof. AND THE MORTGAGOR hereby warrants and defends the title to the said lands and premises. The mortgagor, its successors and assigns shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in

Exhibit D. 1.

an amount approved by the mortgagee, their heirs, executors, administrators and assigns, and assign the policy or policies and certificate or certificates thereof to the mortgagee, their heirs, executors, administrators and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagor, its successors and assigns, shall neglect to pay and permit to remain in default for a period of forty-five days, all or any installment or installments of principal or interest, or any sums payable under any lien superior hereto, or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the mortgagee, their heirs, executors, administrators and assigns, to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent. per annum, and, in the event of such payment, at the option of the mortgagee, their heirs, executors, administrators or assigns, the principal sum secured hereunder shall become due and payable, and agrees that if default be made in the payment of any installment of principal or of the said interest, or any part thereof, on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of forty-five days, or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate, charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall become due and payable, and should the same remain unpaid

A.M.J.

Exhibit D. 1.

and in arrears for the space of sixty days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage, or in the event that the owner of the mortgaged premises shall fail, within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal of prior mortgages or any carrying charges, or in the event that default shall be made in any of the terms, covenants and conditions herein contained, or contained in any mortgage constituting a lien upon the mortgaged premises prior and superior to the lien hereof, or should any action be commenced to foreclose any such prior mortgage, or should the owner of the mortgaged premises fail, for a period of thirty days, to begin compliance with any requirements, recommendation or recommendations of any of the Departments or authority of the State of New Jersey, or the municipality where such mortgaged premises are situate, such municipality or State Department or authority having jurisdiction over the mortgaged premises, or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charges paid by the holder of this mortgage, shall, at the option of the mortgagee and assigns, become and be due

Exhibit D. 1.

and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. AND agrees that the said mortgagee, their heirs, executors, administrators or assigns shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said mortgagor, its successors or assigns, or of any other person or persons whatsoever. AND agrees that if default shall be made, as aforesaid, the mortgagee, their heirs, executors, administrators and assigns, shall have the right forthwith after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the mortgagee, their heirs, executors, administrators and assigns and the mortgagee, their heirs, executors, administrators shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, their heirs,

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Exhibit D. 1.

executors, administrators or assigns without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts. AND it is agreed that the said mortgagor shall and will keep the building or buildings and improvements now on said premises or that may hereafter be erected thereon, in good and substantial repair. Upon failure so to do, the whole indebtedness secured and represented by this mortgage and the bond accompanying same shall at once become due and payable, and also the said mortgagee may enter upon the premises and repair and keep in repair the same, and the expense thereof shall be added to the principal sum secured hereby with legal interest. All of the covenants and conditions herein contained shall be for the benefit of and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said party of the first part hath caused its corporate seal to be hereto affixed and attested by its Secretary and these presents to be signed by its President, the day and year first above written.

EQUITABLE PROPERTIES CORPORATION

By: ISAAC KASSEL President

Signed, Sealed and Delivered
in the presence of

Attest:

ALBERT I. WEISINGER
(Company Seal) Secretary

Exhibit D. 1.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

BE IT REMEMBERED, That on this 3rd day of
 January Nineteen Hundred and twenty-seven
 before me the subscriber, a Master in Chancery
 of New Jersey personally appeared Albert I. 10
 Weisinger, who being by me duly sworn on his
 oath says that he is the Secretary of the Equita-
 ble Properties Corporation, the mortgagor named
 in the foregoing Instrument; that he well knows
 the corporate seal of said corporation; that the
 seal affixed to said Instrument is the corporate
 seal of said corporation; that the said seal was
 so affixed and the said Instrument signed and
 delivered by Isaac Kassel, who was at the date
 thereof the President of said corporation, in the 20
 presence of this deponent, and said President, at
 the same time acknowledged that he signed,
 sealed and delivered the same as his voluntary
 act and deed, and as the voluntary act and deed
 of said corporation, and that deponent, at the
 same time, subscribed his name to said Instru-
 ment as an attesting witness to the execution
 thereof.

ALBERT I. WEISINGER

Sworn and subscribed before me 30
 at Newark the date aforesaid.

A. MILTON JACOBS
 Atty at Law of N. J.

Received in the office, January 4th, A. D. 1927
 at 10:34 A. M. No. 30

Exhibit D. 1.

Office of
REGISTER OF DEEDS AND MORTGAGES
Essex County, New Jersey

STATE OF NEW JERSEY, }
10 COUNTY OF ESSEX. } ss.:

I, GEORGE STICKEL, Register of Deeds and
Mortgages of the County of Essex, State of New
Jersey, do hereby certify that the foregoing is a
true and correct copy of the record of a certain
mortgage made by Equitable Properties Corp.
to Mary Emma Sanderson, et al and also of the
certificate of acknowledgment thereto annexed,
as the same may be found recorded in my office
in book E-60 of Mortgages for said County on
20 pages 122-125

IN TESTIMONY WHEREOF, I have
hereunto set my hand and official seal
(SEAL) this 16th. day of February A. D. 1931.

GEORGE STICKEL,
Register of Deeds and Mortgages.

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Exhibit D. 2.

Compared by 46 & 73

Office of

REGISTER OF DEEDS AND MORTGAGES

Essex County, New Jersey

CERTIFIED COPY OF
MORTGAGE

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Equitable Properties Corp.

To

Mary Emma Sanderson, et al

Recorded January 4th. 1927

In Book E-60 of Mortgages

Pages 122-125

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EXHIBIT D. 2.

CONRAD DEUCHLER, SHERIFF. TO ALL PERSONS TO
TO WHOM THESE PRES-
THE 295 HALSEY STREET CO. ENTS SHALL COME,
OR WHOM THEY
MAY CONCERN: I,

Conrad Deuchler, Sheriff of the County of Essex
in the State of New Jersey, send Greeting:
WHEREAS, on the twenty-third day of November, 30
in the year of our Lord, nineteen hundred and
Twenty-eight, a certain writ of Fieri Facias was
issued out of the Court of Chancery of the State
of New Jersey, directed and delivered to me,
Conrad Deuchler then and still being Sheriff of
the said County of Essex, and such writ is in the
words or to the effect following THAT IS TO SAY:
New Jersey to wit: The State of New Jersey to
the Sheriff of the County of Essex: Greeting:

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Exhibit D. 2.

WHEREAS, on the Thirtieth day of
 (L. S.) October, in the year of our Lord nine-
 teen hundred and Twenty-eight, by a
 certain decree made in our Court of Chancery be-
 fore our Chancellor at Trenton, in a certain cause
 therein pending, wherein Mary Enna Saunder-
 10 son, Lucy G. Sanderson, Charles D. Sanderson,
 and Clarence M. Sanderson, were complainants,
 and Equitable Properties Corporation, a corpora-
 tion, was Defendants, it was ordered, adjudged
 and decreed that certain mortgaged premises
 with the appurtenances in the bill of complaint
 in the said cause particularly set forth and
 described that is to say, All the following tract
 or parcel of land and premises hereinafter partic-
 20 ularly described, situate, lying and being in the
 City of Newark, in the County of Essex, and
 State of New Jersey.

BEGINNING at a point in west side of Halsey
 Street distant North forty and fifty-eight hun-
 dredths feet from Hill Street; thence north sixty-
 two degrees two minutes west one hundred and
 twenty-two feet; thence north twenty-seven de-
 grees forty five minutes east eighty-six and fifty-
 two hundreds feet; thence south sixty-two degrees
 forty-one minutes east one hundred and twenty-
 30 two feet to said west side of Halsey Street; thence
 south twenty-seven degrees forty-five minutes
 west along same eighty-seven and ninety hun-
 dredths feet to BEGINNING. Being known as No.
 295 Halsey Street, Newark, N. J.

TOGETHER with all and singular the rights,
 liberties, privileges, hereditaments and appurte-
 nances, thereunto belonging, or in anywise apper-
 taining, and the reversions, and remainders, rents,
 issues and profits thereto, and also all the estate,
 right, title, interest, use, property, claim and
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Exhibit D. 2.

demand of the said Defendant, of, in, to and out of the same, be sold, to pay and satisfy in the first place unto the said Mary Emma Sanderson, Lucy G. Sanderson, Charles D. Sanderson and Clarence M. Sanderson, the principal and interest secured by a certain mortgage given by Equitable Properties Corporation, bearing date the Third day of January, in the year One Thousand Nine Hundred and Twenty-seven, together with lawful interest thereon from the Twenty-second day of October, Nineteen Hundred and Twenty-eight, until the same be paid and satisfied, and also the costs of the said complainants, and that for that purpose a writ of Fieri Facias should issue, directed to the Sheriff of the County of Essex, commanding him to make sale as aforesaid, and that the surplus money arising from such sale, if any there be, should be brought into the said Court, subject to the further order of the said Court, as by the said decree remaining as of record, in our said Court of Chancery, at Trenton, doth and may more fully appear. AND WHEREAS, the costs of the said complainants have been duly taxed at \$582.57; Therefore, you are hereby commanded, that you cause to be made of the premises aforesaid by selling so much of the same as may be needful and necessary for the purpose, the sum of Seventy Thousand Six Hundred Sixty-nine Dollars and Seventeen Cents, (\$70,669.17), and the same you do pay to the said complainant, together with lawful interest thereon as aforesaid, and the sum aforesaid of costs; and that you have the surplus money, if any there be, before our said Chancellor, in our Court of Chancery, aforesaid, at Trenton, on the Twenty-third day of February, next, to abide the further order of our said Court, according to the

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Exhibit D. 2.

decree aforesaid. And you are to make return at the time and place aforesaid, by certificate, under your hand, of the manner in which you shall have executed this our writ, together with this writ.

10 WITNESS, his Honor, Edwin Robert Walker, Esquire, our Chancellor, at Trenton aforesaid, the Twenty-third day of November, in the year of our Lord, one thousand nine hundred and Twenty-eight.

Jacob L. Newman, Complainant's Solicitor
Thomas Barber Clerk. As by the record of the said writ of Fieri Facias in the Office of the Clerk of the said Court of Chancery, in Book J-12 of Executions, page 479 &c., may more fully appear, AND WHEREAS, I, the said Conrad
20 Deuchler, as such sheriff as aforesaid, did, in due form of law, advertise the said lot of land and premises to be sold under and by virtue of the said writ of Fieri Facias, at public vendue, to be held at the Hall of Records, in the City of Newark, on Tuesday, the Fifteenth day of January A. D. nineteen hundred and Twenty-nine, at two o'clock in the afternoon of that day. By public advertisements signed by myself, and set up at five or more public places in the said County of Essex, one of which was in the Ward, where said
30 real estate is situated, of the time and place appointed for such sale, for at least three weeks preceding the time appointed for such sale, and publishing the same in the "Newark Evening News," and the "Jewish Chronicle," two of the newspapers printed and published in the said County, where the lands above described are situated, the same being designated for the publication of the Laws of this State, and circulating in the neighborhood of said real estate, for at least once a week during four consecutive calendar
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Exhibit D. 2.

weeks, the last publication within seven days next
 preceding the time so appointed for selling the
 same, one of which said newspapers to wit:
 "Newark Evening News," is printed and pub-
 lished at Newark, the County seat of said County,
 at which time and place I did accordingly offer
 and expose the said lot of land and premises for
 sale at public vendue under and by virtue of the
 said writ of Fieri Facias. And thereupon Charles
 D. Sanderson, of the City of Newark, County of
 Essex, and State of New Jersey, did bid for
 same the sum of Five Thousand Dollars
 (\$5,000.00); and no other person bidding as much,
 I did then and there, openly and publicly, in due
 form of law, between the hours of twelve and five
 in the afternoon, strike off and sell the said lot
 of land and premises for the sum of Five Thou-
 sand Dollars (\$5,000.00); to the said Charles D.
 Sanderson, he being then and there the highest
 bidder for the same, and the said sale having
 been confirmed by an order of the said Court of
 Chancery, dated the Twenty-sixth day of Janu-
 ary, A. D. nineteen hundred and Twenty-nine
 and said bid having been assigned by the said
 Charles D. Sanderson, to The 295 Halsey Street
 Co., a corporation, of the City of Newark, County
 of Essex, and State of New Jersey. Now, THERE-
 FORE, KNOW YE, That I, the said Conrad Deuchler,
 as such Sheriff, as aforesaid, under, and by virtue
 of the said writ of Fieri Facias, and in execution
 of the power and trust in me reposed and also
 for, and in consideration of the said sum of Five
 Thousand Dollars (\$5,000.00); to me in hand
 paid; the receipt whereof I do hereby acknowl-
 edge, and therefrom acquit, exonerate and forever
 discharge the said The 295 Halsey Street Co., a
 corporation, its successors and assigns, have

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Exhibit D. 2.

granted, bargained, sold, assigned, transferred and conveyed, and by these presents do grant, bargain, sell, assign, transfer and convey, unto the said The 295 Halsey Street Co. a corporation, its successors and assigns, all and singular, the said lot of lands and premises, with the appurtenance, privileges and hereditaments thereto belonging or in any way appertaining: To HAVE AND HOLD the same until the said The 295 Halsey Street Co. a corporation, its successors and assigns, to its and their only proper use, benefit and behoof forever, as in full, ample and beneficial a manner as by virtue of the said writ of Fieri Facias I may, can or ought to convey the same. And I, the said Conrad Deuchler, for myself, my heirs, executors and administrators, do hereby covenant, promise and agree to and with the said The 295 Halsey Street Co., a corporation, its successors and assigns, that I have not, as such Sheriff as aforesaid, done or caused, suffered or procured to be done, any act, matter or thing, whereby the estate hereby intended to be conveyed in and to the said lot of land and premises, with the appurtenances, is, may or can be changed, charged, encumbered, or defeated in any manner whatever.

IN WITNESS WHEREOF, I, the said Conrad Deuchler, as such Sheriff as aforesaid, have hereunto set my hand and seal this Twenty-sixth day of January, in the year of our Lord, nineteen hundred and Twenty-nine.

Conrad Deuchler, Sheriff
Seal

Signed, Sealed and Delivered
in the presence of

Philip R. Van Duyne

Exhibit D. 2.

NEW JERSEY, SS. I, Conrad Deuchler, Sheriff
 ESSEX COUNTY of the County aforesaid,
 do solemnly swear that the land and real estate
 described in this deed, made by me to The 295
 Halsey Street Co. a corporation of the City of
 Newark, County of Essex, and the State of New
 Jersey, was by me sold by virtue of a good and
 subsisting execution, as is therein recited, that the
 money therein ordered to be made has not been,
 to my knowledge or belief, paid or satisfied, that
 the time and place of sale of the said land and
 real estate was by me duly advertised, as re-
 quired by law, and that the same was cried off
 and sold to a bonafide purchaser for the best
 price that could be obtained.

10

Conrad Deuchler Sheriff.

Sworn before me, one of the Masters in
 Chancery of the State of New Jersey, on this
 eighth day of February in the year of our Lord
 nineteen hundred and twenty nine and I having
 examined the Deed above mentioned, do approve
 the same and order it to be recorded as a good
 and sufficient conveyance of the land and real
 estate therein described.

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Philip R. Van Duyne, Master in Chancery of
 New Jersey.

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Received in the Office February 11th, A. D.
 1929 at 11:56 A. M.

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Exhibit D. 2.

No. 23

Office of
 REGISTER OF DEEDS AND MORTGAGES
 Essex County, New Jersey

10 STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. }SS.:

I, GEORGE STICKEL, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by Conrad Deuchler, Sheriff to The 295 Halsey Street Co. and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book B 79 of Deeds for said County on pages 459-461

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IN TESTIMONY WHEREOF, I have
 (SEAL) hereunto set my hand and official seal
 this 14th day of February A. D. 1931

GEORGE STICKEL
 Register of Deeds and Mortgages.

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Exhibit D. 3.

Compared by 34 and 70

Office of

REGISTER OF DEEDS AND MORTGAGES

Essex County, New Jersey

CERTIFIED COPY OF
DEED

10

Conrad Deuchler, Sheriff

to

The 295 Halsey Street Co.

Recorded February 11th A. D. 1929

In Book B 79 of Deeds

Pages 459-461

EXHIBIT D. 3.

20

Sec. 21—When Buildings May Be Non-Fireproof

Alterations to

Non-Fire-

proof Build-

ings

III. Within "Business" and "Industrial" districts no non-fireproof building shall be altered, unless the altered portions and all of the building beneath the altered portions are made to conform to the requirements for non-fireproof or fireproof buildings.

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Sec. 22—Area Limits of Non-Fireproofed Buildings

Unsprinkled

I. Every building three stories or less in height which exceeds an area of 5,000 square feet when located on an interior lot facing only on

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Exhibit D. 3.

one street, or 8,000 square feet when facing on two streets, or 10,000 square feet when facing on three or more streets; and every building over three stories high which exceeds an area of 4,000 square feet when facing on one street or 7,000 square feet when facing on two streets, or 9,000 square feet when facing on three streets, shall be fireproof.

Sprinkled

II. When any such building is equipped throughout with an approved system of automatic sprinklers, fireproof construction shall be required only when the areas are sixty (60) per cent. greater than those herein specified.

20 Sec. 23—When Buildings Are Required to be Fireproof

Public
Garages
Hospitals
Jails, Etc.

30 II. Every building hereafter erected over one story high to be used as a public garage, or in which persons are to be harbored to receive medical, charitable or other care or treatment, or in which persons are to be held or retained under legal restraint, shall be fireproof.

Sec. 364—Sprinklers

Conflagration
Breeder's

I. Every existing and new building exceeding twenty-five hundred (2,500) square feet of area, which is occupied for mercantile or manufacturing purposes and which constitutes a fire hazard

Exhibit D. 3.

in the opinion of the Fire Commissioner and Superintendent of Buildings, shall be protected throughout with automatic sprinklers.

Explosives

II. Every existing and new building used or intended to be used for the storage or sale of explosive or inflammable material, such a gasoline, naptha, lacquer, gun cotton, benzole or toluol, shall be protected throughout with automatic sprinklers. 10

Garages

V. All garages having an area of ten thousand (10,000) square feet, or more, shall be sprinkled.

Sec. 442—Penalties

Ordinances

to be Com-

plied with

and Enforced

20

I. Any person or corporation, either as owner, contractor, builder or architect, or any agent, trustee, director, officer or employee of any person or corporation, and any and all persons who shall violate, or authorize a violation of, or assist in the violation of any provision of this Ordinance or fail to comply with any provision of this Ordinance, shall for each and every such violation be subject to a fine of fifty (\$50.00) dollars or to imprisonment not exceeding ten (10) days. After the first conviction for the violation of any provisions of this Ordinance any person or corporation aforesaid who shall continue to violate any provision of this ordinance shall for each and every day that such violations continue be subject to a fine of twenty-five (\$25.00) dollars. 30 40

In the morning of the 17th of October 1880
I left the city of Edinburgh for the
purpose of attending to some business

at the office of the Bank of Scotland
and in the afternoon I called on
my friends at the house of Mr. James
Guthrie, Esq. of the City of Edinburgh

and in the evening I attended a
concert at the Theatre Royal
and in the morning of the 18th of October
I left the city for the purpose of

attending to some business at the
office of the Bank of Scotland
and in the afternoon I called on
my friends at the house of Mr. James

Guthrie, Esq. of the City of Edinburgh
and in the evening I attended a
concert at the Theatre Royal
and in the morning of the 19th of October

I left the city for the purpose of
attending to some business at the
office of the Bank of Scotland
and in the afternoon I called on

my friends at the house of Mr. James
Guthrie, Esq. of the City of Edinburgh
and in the evening I attended a
concert at the Theatre Royal

and in the morning of the 20th of October
I left the city for the purpose of
attending to some business at the
office of the Bank of Scotland

and in the afternoon I called on
my friends at the house of Mr. James
Guthrie, Esq. of the City of Edinburgh
and in the evening I attended a

concert at the Theatre Royal
and in the morning of the 21st of October
I left the city for the purpose of
attending to some business at the

64 OCT. T. 1931

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

H. G. VOGEL Co., a corporation, <i>Plaintiff-Respondent,</i>	} <i>On Appeal from Supreme Court.</i>
<i>vs.</i>	
295 HALSEY STREET Co., a New Jersey corporation, <i>Defendant-Appellant.</i>	

BRIEF FOR DEFENDANT-APPELLANT.

(Italics ours unless otherwise noted.)

Statement.

This is an appeal from a judgment entered in the New Jersey Supreme Court, March 12, 1931, in favor of the respondent, and against the appellant, in an action in replevin, in which, the judgment awarded to the respondent the possession of an automatic sprinkler system, together with its accessories, and in addition thereto assessed damages in favor of the respondent, and against the appellant, for the sum of \$975.00, together with \$68.84 costs making a total of \$1,043.84 (S. C., pp. 16, 17).

This cause was tried before the Hon. Worrall F. Mountain, Circuit Judge, at the Essex Circuit, on February 25, 1931, and at the conclusion of the trial, the Court submitted to the jury the following question:

“Are the Sprinkler System, together with Sprinkler sub-heads, accessories, pipings and hangers severable wholly or in any portion, without material injury to the freehold?”
(S. C., pp. 86-87.)

Following the return of the jury's verdict answering the question affirmatively, the Court signed a postea directing that judgment be entered in favor of the respondent for the possession of the automatic sprinkler system and its accessories, and in addition thereto, assessing damages in favor of respondent in the sum of \$975.00.

Facts.

The complaint in this case (S. C., p. 7), sets out two counts. The first count sounds in replevin; the second, in trover.

It is alleged that the respondent, pursuant to an agreement in writing executed by the Equitable Properties Corporation (Exhibit P. 1, S. C., p. 94), installed and equipped an automatic sprinkler system in the four-story and basement brick building on the premises commonly known as 295-301 Halsey street, Newark. The contract with the Equitable Properties Corporation was a conditional sales agreement, dated February 18, 1927, and was filed in the Office of the Register of Essex County, on April 12, 1927, as file No. 22525. This agreement contained a general statement of the materials furnished. It is the possession of this material which respondent seeks.

Appellant is the owner in fee of the premises wherein the sprinkler system was installed, having acquired title from the Sheriff of Essex County by deed dated January 26, 1929, and recorded February 11, 1929, upon the foreclosure of a mortgage upon said premises dated January 3, 1927, and recorded January 4, 1927. Both of the latter dates are prior to the date of re-

spondent's conditional sales agreement and the recording thereof.

Appellant's answer, after denying the material allegations in the complaint, set up the separate defense that the appellant is a bona fide purchaser of the premises for value, and that the reservation of title in the respondent under the provisions of the "Uniform Conditional Sales Act" is void as against the appellant, it never having expressly assented thereto.

At the opening of the trial, counsel for appellant moved that respondent elect upon which of the two counts in the complaint it sought to proceed, *i. e.*, whether in replevin or conversion. This motion was based on the proposition that an action for damages for the unlawful conversion of property could not legally be tried with an action involving solely the question of title to property. The foregoing motion was denied and an exception taken (S. C., p. 18, l. 29).

Respondent's proof consisted of the making of the contract, the time required to install the system, and the expense incidental to its removal amounting to \$975.00. (Testimony of respondent's witness, Walter Kay, S. C., p. 34.)

Then followed respondent's other witnesses who testified that in order to remove the system it would be necessary to remove the castings which held the system in place, and the screws which held the hooks into the beams and ceilings. This, of course, would leave innumerable holes in the walls. Testimony was then offered as to the demand and refusal respecting the return of the system, and respondent rested its case.

At that point appellant moved for a non-suit upon the ground that it was part of the respond-

ent's case to prove affirmatively either that the present owner of the building, the appellant in this case, had expressly assented to the reservation of title, if the property could not be removed without material injury to the freehold, or that the property could be removed without material injury to the freehold or its use, and that respondent had failed in such proof (S. C., p. 63, etc.).

The motion was denied, and exception was taken. It is claimed by appellant that the Court below erred in this ruling as will appear in the argument herein presented.

Appellant introduced in evidence the mortgage through which the appellant made title (S. C., p. 102), and the Sheriff's deed on the foreclosure thereof (S. C., p. 113), and proved further that the building was a non-fire-proof, public garage, located in a congested area near the centre of the City of Newark. Appellant also placed in evidence certain sections of the building ordinance passed by the City Commission of Newark, known as the Official Building Code, requiring buildings corresponding to the one in question, a public garage, to be equipped with a sprinkler system (S. C., p. 69, l. 30; S. C., 121). John Arthur, a structural engineer connected with the Division of Buildings in the City of Newark, and William Gibbs, an inspector of the Bureau of Combustibles in the City of Newark, both testifying on behalf of appellant, said that if the sprinkler system were removed, the premises could not be used as a public garage (S. C., p. 71, l. 21; S. C., p. 74, ll. 8-12). Rudolph Krueger, an architect, testified on behalf of appellant that the sprinkler system could not be removed without material injury to the freehold (S. C., pp. 76-81).

At the conclusion of the case, appellant moved for a directed verdict in its favor on the ground that (a) the uncontroverted, uncontradicted and unrebutted testimony established that a removal of the sprinkler system would completely destroy the use of the building as a garage, thereby constituting a material injury to the freehold; and (b) the complete absence of any evidence of express assent by the appellant to the reservation of title in the respondent, rendering same invalid as to appellant. This motion was denied and exception thereto taken (S. C., p. 86, l. 30).

The lower court then proceeded to charge the jury, leaving to them the determination of a single question of fact, viz., whether the sprinkler system could be removed without material injury to the freehold (S. C., p. 87, l. 22). Before returning its verdict, the jury requested further instructions whereupon the Court charged the jury, that in deliberating, they could consider the adaptability of the building to other uses (S. C., p. 93, l. 1). Exception was duly taken to that portion of the charge. The jury returned a verdict answering the foregoing question in the affirmative. *The Court thereafter signed a postea awarding respondent possession of the sprinkler system, and in addition thereto assessed damages in favor of the respondent in the sum of \$975.00—the amount testified to as the cost of removal of the system* (S. C., p. 15).

The Grounds of Appeal (S. C., p. 2) will be argued under the following points of law.

POINT I.

The complaint setting forth inconsistent causes of action, the trial court erred in denying appellant's motion that respondent elect upon which of these it is expected to proceed, thereby preventing a proper cross examination and defense by appellant.

The complaint contains two counts: (1) replevin, and (2) trover (S. C., pp. 7, 8 and 9).

At the opening of the trial, appellant moved for an election by respondent as to which of the two counts it proposed to proceed upon. The Court ruled that respondent was not obliged to elect and an exception was noted (S. C., p. 13, ll. 29-38).

An action in trover, as distinguished from an action in replevin, is a separate cause of action, replevin being a purely possessory action (*McDade v. Reilly*, 102 N. J. L. 268); trover being an action for damages, satisfaction of which will pass title. (*Singer Manufacturing Co. v. Skillman*, 52 N. J. L. 263.

It is the contention of appellant that the value can be recovered in lieu of the property only in case a delivery of the specific property cannot be had, and this allegation must be pleaded in the same count.

"The purpose of replevin is not the recovery of damages for the seizure or for the value of the property, as in trespass or trover, but the value is to be recovered in lieu of the property only in case a delivery of the specific property cannot be had." 23 R. C. L., p. 855.

In the case *sub judice*, the first count of the complaint demands a return of the chattels and

damages for their unlawful detention, and *does not seek a recovery for the value of the chattels in the event the specific property cannot be had* (S. C., p. 10, ll. 10-15).

In the case of *King v. Morris*, 73 N. J. L., 279, Mr. Justice Swayze, speaking for the Supreme Court, in reversing the lower court for permitting separate and distinct counts for replevin and trover, in the same complaint, said:

“The object of a suit in replevin is to recover the specific property; of a suit in trover, to recover damages for the conversion. The pleas and the subsequent proceedings are altogether different. * * *

It would be incongruous to seek to recover in the same suit the specific property, and also damages for conversion, satisfaction of which would pass title to the defendant.”

While it is true the Practice Act permits the pleading of inconsistent causes of action in a complaint, the case of *Cleaves v. Yeskel*, 104 N. J. L. 497, holds,

“But this extends only to pleading separate matters, and does not extend to taking inconsistent positions as to one and the same matter.”

In the instant case respondent makes inconsistent demands in its complaint; in the first count, the specific article is demanded; in the second count, the value of the article is demanded, and damages are asked in both counts for the unlawful detention. In the first count appellant's title is disaffirmed; in the second, it is recognized and affirmed—no pleading could be more inconsistent. It was highly important therefor that appellant be apprised upon which count respondent intended to proceed to permit

of intelligent cross examination of respondent's witnesses, touching on the question of affirmance or disaffirmance of title by and in appellant.

In the case of *Kertesz v. Feldheim*, 6 Misc. 10; the Court said:

“It is the inconsistency of the demand which makes an estoppel against the assertion of the other, and not the fact that the forms of action are different.”

It is respectfully submitted the refusal to direct respondent to elect upon which count it intended to proceed constituted prejudicial and reversible error.

POINT II.

The trial court erred in admitting over appellant's objection, testimony of the cost of removing the sprinkler system as an element of damage.

Testimony of the cost of removing the sprinkler system as an element of damage in the replevin suit was permitted over the objection of appellant (S. C., p. 31, l. 10 to p. 33, l. 40).

The general rule as to what damages are recoverable for unlawful detention is stated in 23 R. C.L. at page 911:

“In those cases where the property is recovered to the owner, the damages are usually measured by interest and depreciation in value.” * * *

and at page 914:

“The amount of damage which the owner of goods wrongfully taken and retained is entitled to recover in ordinary cases is the value of the property, with damages, which is ordinarily the interest on the value * * * in case the property has a usable value, the

damages are measured by the value of the property, plus the value of the use during the period of detention.”

In *Knight v. Huber Inv. Co.*, 102 N. J. L. 359; Mr. Justice Kalisch, speaking for this Court in dealing with the question of damages in replevin cases, said:

“In *West, et al. v. Caldwell*, 23 N. J. L. 736, on p. 740, this Court declared:

‘Neither party can be presumed to have assented to the value mentioned in the bond except for the purpose for which it is there; and the plaintiff was, therefore, entitled to show the real value of the property at the time taken, and to recover such value with damages for its detention, which is, generally, the interest which has accrued up to the time of the final judgment, provided the whole does not exceed the penalty of the bond.’

In *Maguire v. Dutton*, 54 N. J. L. 597, at p. 598, this Court, speaking through GARRISON, J., said:

‘The measure of damages that a plaintiff may recover in an action of replevin is the real value of the chattel at the time the tortious possession of the defendant began, with damages for its unlawful detention. *West v. Caldwell*, supra.’ * * * To adopt any other rule would lead not only to absurd results, but to injustice.”

In the light of the foregoing determinations it is urged that the ruling of the lower court permitting the introduction of evidence respecting the cost of removing the sprinkler system as an element of damage, constituted reversible error. This evidence was objected to by appellant and exceptions taken to the Court’s rulings thereon (S. C., p. 34, l. 9).

POINT III.

The trial court erred in denying appellant's motion for non-suit based upon respondent's failure to prove, as a necessary part of its direct case, (A) that the sprinkler system was removable without material injury to the freehold, and (B) that the system was removable without material injury to the public garage as the institution comprising the freehold.

—A—

Respondent's derivative rights respecting title to the sprinkler system rest upon the Uniform Conditional Sales Act (P. L. 1919, Chap. 210). It must, therefore, meet the conditions prescribed by that Act in order to sustain its alleged reservation of title.

Section 7 of the Act is divided into three parts, and provides for three contingencies. It is an essential requirement that respondent come within one of these contingencies by requisite proof or suffer extinguishment of its claim to title. The contingencies are:

(a) if the goods are affixed to the realty so that they *cannot* be severed without material injury to the freehold, *the reservation is void as against any person who has not expressly assented thereto.*

(b) if the goods are affixed to the realty so that they *can* be severed without material injury to the freehold, *the reservation of title is void as against subsequent purchasers of the realty for value without notice unless the conditional sales contract is properly filed.*

(c) if the goods are affixed to the realty so that they *can* be severed without material injury,

the reservation of title is void as against the owners unless there has been a proper recording before affixation.

The third sub-division applies only to the rights of an owner when a tenant or third person affixed chattels to the owner's real estate without the latter's knowledge.

The first two sections are vital in the instant case. Either the sprinkler system is or is not severable without material injury to the freehold. If material injury results in the severance, the reservation of title is void against all who have not expressly assented to the reservation—and it is admitted *that neither appellant nor its predecessor in title (the mortgagee thru whom title is derived) ever expressly assented to the reservation of title.*

Therefore, respondent is relegated to the other sub-division, which provides for a severance without material injury to the freehold. Appellant insists, however, irrespective of the sub-division relied upon, respondent must satisfy all the conditions thereof to avail itself of its benefits.

Respondent obviously predicated its case on sub-division (b), but failed to present a prima facie case in omitting to produce any proof that the system could be removed without material injury to the freehold, respondent's proof (testimony of Walter Kay and Harry Ledward) establishing the fact to be that the installation of the system was such that only serious and material injury to the freehold would result in the removal thereof. The latter witnesses testified that it took six weeks to install the system at a total cost of \$5,000.00; that a removal would leave at least 200 holes in the

ceilings and floors; that the cost of removal was \$975.00, which is almost 20% of the entire cost of the system and installation.

In the case of *Bank of America v. La Reine Hotel Corporation*, 108 N. J. E. 567, Vice Chancellor Berry decided that refrigerators installed at a cost of \$2,500.00 could be repossessed only because they were severable without material injury to the freehold, since the cost of repairing the damage resulting therefrom was only \$6. In view of respondent's testimony, can it be said that respondent on its direct case, proved the essential element that the chattels were removable without material injury to the freehold?

It is submitted that on respondent's own testimony it was clearly evident that the sprinkler system could not be removed without material physical injury to the freehold; and that not only did it fail to establish a prima facie case in this respect, but by its own evidence established the facts set out in appellant's answer. Appellant's motion for a non-suit should have been granted and it was error for the lower court to deny the same.

—B—

It was also incumbent upon the respondent, on its direct case to prove that the sprinkler system could be removed without material injury to the garage which was the use to which the building erected on the freehold was put. It was just as important to prove that no material injury would result to the institution as to the freehold itself. This proposition was stated by Backes, V.-C., in *Future Building and Loan Association v. Mazzocchi*, 107 N. J. Eq. 422 (January 1931). In the latter case the

complainant was foreclosing a mortgage on property wherein there was installed refrigerators, gas ranges, cabinets and closets sold under a conditional bill of sale filed subsequent to the complainant's mortgage, thus presenting a case on all fours with the one at bar. The answer of the conditional vendor set forth that the articles sold comprised personal property which could be removed under the terms of the conditional sales agreement. The Court found that a removal of the fixtures in question would result in a destruction of the institution comprising the freehold and sustained complainant's contention that the fixtures had become part of the real estate and were covered by the mortgage under foreclosure. The pertinent portion of the opinion is as follows:

“Further, the complainant's mortgage antedates and was recorded before the defendant's conditional bill of sale was executed, and the fixtures were conditionally sold and annexed to the land without the complainant's express assent. If they are so affixed that they cannot be removed without material injury to the freehold, the conditional bill of sale is void as to the complainant, under the seventh section of the Conditional Bill of Sales Act (P. L., 1919, p. 462). Under the first subprovision of that section, material injury resulting from detaching fixtures determines the nature of their property here. THE INTENTION WITH WHICH THEY WERE AFFIXED BECOMES SECONDARY. MATERIAL INJURY IN DETACHING, NOT INTENTION IN ATTACHING, IS THE TEST. Now, when it is considered that the refrigerators and gas ranges are part of the plant of an apartment house, and that the building as an apartment house cannot function without them, it may well be doubted that they are removable without ma-

terial injury to the freehold as against a mortgagee which advanced its money in contemplation of a completed structure. See *General Electric Co. v. Transit Equipment Co.*, 57 N. J. E. 460. They are no more removable without material injury than would be the carrying away of the front door, although the unhinging of the door would be less difficult. THE WORD 'MATERIAL' AS USED IN THE STATUTE IN ONE SENSE MEANS MATERIAL INJURY TO THE STRUCTURE, BUT IT ALSO CONNOTES INJURY TO THE INSTITUTION OF WHICH THE STRUCTURE IS A PART."

It will be seen therefor, that under the interpretation of the Uniform Conditional Sales Act by Vice-Chancellor Backes, the question of material injury to the institution comprising the freehold is just as vital as a material physical injury to the freehold itself.

Respondent's witnesses further testified that the building in which the sprinkler system was installed was used as a garage (S. C., p. 42, l. 1, p. 53, l. 4). Appellant moved for a non-suit based upon the failure of respondent to prove as a necessary part of its direct case that the sprinkler system was removable *without material injury to the garage as the institution comprising the freehold*.

Just as it was incumbent upon the respondent to prove as part of its direct case that the sprinkler system could be removed without material physical injury to the freehold, it was equally incumbent upon it to prove that the removal would not result in material injury to the institution comprising the freehold. The case is entirely barren of any evidence on the part of respondent to prove that the sprinkler system could be removed without material injury to the

freehold. This burden was imposed upon respondent, which burden it did not sustain, hence, respondent's failure to establish these facts on its direct case justified the motion for non-suit and it should have been granted.

Respondent failed to establish its prima facie case, and the refusal of the lower court to non-suit was prejudicial to appellant constituting reversible error.

POINT IV.

The trial court erred in refusing appellant's motion for a non-suit upon the failure of the respondent to prove as a necessary part of its direct case (assuming that the sprinkler system was removable only with material injury to the freehold), that the appellant expressly assented to the reservation of title in the respondent.

Nowhere in the testimony does it appear that the appellant expressly assented to the reservation of title to the sprinkler system in the respondent, conditional vendor. In fact the respondent did not even attempt to introduce such testimony, having proceeded rather, from the start, on the theory that the sprinkler system could be removed without material injury to the freehold. The failure of the respondent to prove an express assent on the part of appellant was fatal to its case.

Appellant urges therefor, that, assuming that the sprinkler system *could not* be removed without material injury to the freehold, or to the institution comprising the freehold, the refusal of the trial court to grant a non-suit, upon respondent's failure to prove express assent by appellant to the reservation of title, was prejudicial, constituting reversible error.

POINT V.

The trial court erred in refusing appellant's motion for a direction of a verdict in its favor at the close of the entire case because the uncontroverted testimony, at that stage, showed conclusively that removal of the sprinkler system would result in a destruction of the public garage, as the institution comprising the freehold.

WILLIAM GIBBS, a witness for defendant-appellant, testified as follows:

Direct examination by Mr. Kristeller (S. C., p. 73, l. 21);

“Q What is your occupation? A Inspector in the Bureau of Combustibles, City of Newark.

Q Did you examine the properties 295-301 Halsey street? A I am.

Q You did? A Yes, sir.

Q What kind of a building is it? A Four-story basement, non-fireproof.

Q Did your department have charge and jurisdiction over public garages? A We do.

Q Is this property now being used as a public garage? A It is.

Q Is the property sprinkled? A It is.

Q If the sprinkler were taken out could the property be used under your department's jurisdiction as a public garage? A Can I have that again?

Q Question read. A It could not.

Q Under your department could this property be licensed as a public garage without a sprinkler system?

Mr. Bernstein: I object.

The Court: Admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A No."

In the case of *Future B. & L. Association v. Mazzocchi, supra*, the Court held that a material injury to the freehold may arise not only from the physical injury to the building, but from a destruction of the institution erected on the freehold. The foregoing testimony, as well as that of John Arthur (S. C., p. 70, l. 21, to p. 72, l. 19) was in nowise refuted, leaving the evidence at the close of the case, entirely uncontroverted, that upon the removal of the sprinkler system, the institution upon the freehold would be instantly destroyed. That being so, the motion for a direction of a verdict in favor of appellant should have been granted; and refusal by the trial court constituted reversible error.

POINT VI.

The trial court erred in charging the jury that the adaptability of the premises to other uses was a factor to be considered in ascertaining whether the sprinkler system could be removed with or without material injury to the freehold.

The Court, in its charge to the jury, said (S. C., p. 92, l. 9):

"As to that question, gentlemen, the statute refers to a material injury to the freehold which will be occasioned by the removal of the property. When will that be occasioned? Obviously, the minute the property is removed; that is the time the injury is apparent. If you have this building fitted with a complete sprinkler system on four floors, your injury as to when this material

injury to the freehold takes place, is directed to the moment, I should imagine, that it is taken out and you look at the property and say, 'What is its condition now?' not as to whether it might be two years after or when something else happens to it, it is changed, turned from a garage into a storehouse or something else. That is immaterial. *The point is, does it apply to the condition of the premises just after the removal takes place?*

Now, as to the application of this word, 'use,' which you say is an element, and perhaps I put it a little strongly if I called it an element. It isn't exactly an element; it is sort of a factor to be considered. To take another case, if you had an injury to the freehold, of course, the injury to the building is not only a physical injury, but the injury to the building for the purpose for which it is used. If you had an apartment house and it was rented, we will say, to thirty-two families, and it was mid-winter and you suddenly saw someone taking all the gas stoves out, is not that a factor to be considered, to determine the injury to the freehold? I wouldn't say it was an element of damage. I would say it was a factor to be considered, to determine whether there was material injury to the freehold, if, as in this case, the sprinkler system was removed.'

Appellant contends that the question as to whether the building could be used for other purposes, after the removal of the sprinkler system, was not a factor to be considered by the jury. Under the Uniform Conditional Sales Act, *Future B. & L. Ass'n v. Mozzochi (supra)* and *Bank of America Nat'l Ass'n v. La Reine Hotel Corp., supra*, the sole question to be considered was whether the removal of the sprinkler system would at the time of detaching, result in ma-

terial injury to the freehold and any charge by the Court that the jury might consider the immediate adaptability of the building to other uses in arriving at their conclusion was prejudicial to the appellant constituting reversible error.

POINT VII.

The trial court erred in assessing damages of \$975.00 in favor of the respondent and against the appellant.

It is not within the province of the Court to assess damages except in cases of assumpsit or debt.

In 26 R. C. L., p. 1156, par. 72, the rule is stated that:

“When the facts are in dispute, the question as to the amount of damages is peculiarly within the province of the jury, and a direction by the court to find a particular sum is erroneous.”

The Court in this case did, of its own motion erroneously assess and include in the postea, an assessment of damages in the amount of \$975.00.

Peacock v. Hanely, 37 N. J. L. 179 was an action on a replevin bond, and plaintiff was entitled to recover as damages the value of the goods. Damages in such cases cannot be assessed by the Court, but must be ascertained by a jury upon a writ of inquiry. Mr. Justice DEPUE, speaking for the Supreme Court, said:

“The 71st section of the Practice Act, which makes it the duty of the court to assess damages on interlocutory judgment by default, unless a writ of inquiry is requested, applies only to actions of assumpsit.”

The assessment of damages by the Court in the case at bar, was an improper exercise of the function of the Court and constituted reversible error.

CONCLUSION.

The trial court, having improperly denied appellant's motion at the inception of the trial to compel respondent to make an election upon which of the two inconsistent causes of action pleaded it would proceed; and having improperly admitted, over appellant's objection, testimony of the cost of removal of the sprinkler system as an element of damage; and having improperly denied appellant's motions for a nonsuit at the close of respondent's case, as well as the motion for a direction of verdict in favor of appellant at the close of the entire case; and having erroneously charged the jury that the adaptability of the premises to other uses might be considered by them in their deliberations; and having improperly assessed the damages of respondent at \$975.00, this not being a case of assumpsit or debt, and such rulings and conduct being highly prejudicial to appellant, these constitute error requiring a reversal of the judgment under review.

October, 1931 Term.

Respectfully submitted,

JACOB L. NEWMAN,
Attorney of Appellant.

LIONEL P. KRISTELLER,
SAUL J. ZUCKER,

On the Brief.

New Jersey Court of Errors and Appeals

H. G. VOGEL Co., a corporation
of the State of New York,
authorized to do business in
the State of New Jersey,

Plaintiff-Respondent,

vs.

THE 295 HALSEY STREET Co., a
New Jersey corporation,
Defendant-Appellant.

On Appeal
from Supreme
Court.

BRIEF OF PLAINTIFF-RESPONDENT.

Preliminary Statement of Facts.

The respondent instituted an action in the New Jersey Supreme Court to recover possession of a certain sprinkler system together with its accessories, and also asked damages for its detention. The complaint of the respondent contained two counts, viz: (1) in replevin for the possession of the said sprinkler system, etc. and damages for its detention, and (2) in conversion to recover damages sustained by the respondent by reason of the appellant's conversion of said sprinkler system, etc.

At the outset of the trial, the appellant made a motion that the respondent make its election as to which count it would proceed under the complaint. The trial court denied the motion of the said appellant and an exception was duly taken to such ruling.

After the plaintiff and defendant had rested, and

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in order to expedite matters, it was stipulated and agreed by and between the attorneys for the respondent and appellant, that the trial court submit the following question or instruction to the jury (reserving all other questions, matters or findings for the trial court for disposition) viz: "*Are the sprinkler system, together with sprinkler sub-heads, accessories, pipings and hangers severable wholly or in any portion, without material injury to the freehold?*" The jury then retired and subsequently reported that the sprinkler system, together with sprinkler sub-heads, accessories, pipings and hangers were severable wholly or in any portion without material injury to the freehold.

Subsequently the trial court in the postea presented to it awarded possession of such sprinkler system, etc., and in addition thereto, assessed damages in favor of the said respondent and against the said appellant in the amount of \$975.00, and judgment was thereupon entered upon the filing of said postea, and it is from the said judgment that the appellant now appeals to this Honorable Court.

Statement of Facts.

On the 3rd day of March, 1927, the respondent entered into a conditional sales agreement with the Equitable Properties Corporation of which one, Isaac Kassel, was the president, wherein and whereby the respondent in consideration of the sum of \$5,000 to be paid by the said Equitable Properties Corporation agreed to install a certain "Estey Sprinkler System" together with pipings, hangers, apparatus, accessories and sprinkler heads upon certain premises of the said Equitable Properties Corporation at 295 Halsey Street, Newark, N. J. The said conditional sales agreement

was executed by the said Equitable Properties Corporation through Isaac Kassel, its president, and Albert Weisinger, its secretary.

In accordance with the terms and provisions of said conditional sales agreement, the said respondent did install the said sprinkler system, etc., upon the said premises of the said Equitable Properties Corporation at 295 Halsey Street, Newark, N. J. and thereafter the said Equitable Properties Corporation did pay on account of the said conditional sales agreement the sum of \$3600, and did execute a promissory note made payable to the said respondent in the sum of \$1400, which note was not paid at maturity and which sum was due and owing to the said respondent at the time of the institution of the above suit.

The said conditional sales agreement was filed by the said respondent on the 12th day of April, 1927, in the Essex County Register's Office under file No. 22525.

The said conditional sales agreement which also was offered in evidence and known as *Exhibit P-1*, provided, among other things, as follows:

"The H. G. Vogel Company retains title to the material and equipment until payment in full therefor, with the right in case of any default on your part to enter the premises and remove the same, whether or not attached to the realty (for which purpose the material and equipment, however, attached, shall at all time be deemed personal property) and at the option of the H. G. VOGEL COMPANY, to sell the same at public or private sale with or without notice and apply the proceeds toward the balance due, together with the expenses of removal and sale, including reasonable attorney's fees, you being liable for any deficiency; the H. G. VOGEL COMPANY, however, having the privilege,

at any time, to change this conditional sale to an absolute sale and to pursue any statutory or other remedies in such case made and provided."

The appellant, prior to the institution of the above suit, was the owner of the premises known as 295 Halsey Street, Newark, N. J., and was in the possession of the said sprinkler system, etc. The said premises, on January 26th, 1927, were conveyed by Conrad Deuchler, Sheriff of Essex County, to the appellant herein. Subsequently a written demand was served upon the duly authorized agent of the appellant for the return of the said sprinkler system, etc., but the said appellant refused to deliver up and turn over said sprinkler system, etc., to the respondent herein.

The testimony disclosed upon the trial of this cause that Isaac Kassel, who was the president of the Equitable Properties Corporation, was subsequently president of the appellant corporation (S. C. page 23, ll. 9-34).

The respondent contends as follows:

1. That the trial court was not in error in denying appellant's motion to have respondent elect as to which count he expected to prove, to wit, the first count based on replevin, or the second count based in conversion.

2. That the sprinkler system, etc. is not part of the realty but is personal property and capable of being removed without material injury to the freehold.

3. That the said sprinkler system is removable without material injury to the freehold, which fact was found by the jury in favor of the respondent under and by virtue of an instruction based upon

a stipulation between the counsel for the respondent and appellant.

4. That it was a question for the jury as to whether the sprinkler system, etc. could be removed without material injury to the freehold, and the trial court was not in error in allowing this question to be determined by the jury.

5. That the jury, having found in favor of the respondent, upon the sole instruction submitted to it, the trial court was not in error in assessing the damages sustained by the respondent by reason of the unlawful detention of the said sprinkler system, etc., by the appellant, in view of the stipulation and consent of the attorneys for the appellant and respondent in permitting the trial court to determine and pass upon all questions and matters in dispute with the exception of the one instruction submitted to the jury on the question of whether the said sprinkler system, etc. could be removed without material injury to the freehold.

6. That the evidence clearly showed that the appellant was not a purchaser for value and without notice of the conditional sales agreement, the subject matter of this suit.

POINT ONE.

The trial court was not in error in refusing appellant's motion to have respondent elect as to whether it would proceed under the first count of replevin or the second count founded in conversion.

The complaint of the respondent contained two counts, the first of which was based in replevin asking for the possession of the said sprinkler system, etc. together with damages for its detention, and the second count was based in conversion asking for damages by reason of the conversion of the said sprinkler system by the said appellant. The appellant based its motion to have the respondent elect upon the ground that the appellant might properly cross-examine the respondent's witnesses and present its own defense thereto. From reading the testimony produced by the respondent, the conclusion is reached that the respondent abandoned its count in conversion and was contented to fall back on the count in replevin. This contention is borne out by the fact that the respondent did not offer any proof respecting the value of the sprinkler system, etc. at the time of the conversion, which is necessary in conversion suits. It merely showed its right to possession and offered proof respecting the cost of removal of said sprinkler system, etc. from the premises of the said appellant, which was properly an item of damage in replevin suits.

The attorney for the appellant apparently recognizes that the conversion count of the matter was abandoned and that the suit proceeded under the first count based in replevin for in his statement

of his brief, it is recited that it was appealing from a judgment entered in favor of the respondent and against the appellant *in an action in replevin*.

Furthermore, in view of the fact that the defendant had filed an answer to the complaint of the respondent, it thereby waived any objection or objections to the complaint of the said respondent for misjoinder of causes of action. There was no motion made by the said appellant to strike out the complaint of the said respondent for misjoinder of causes of action.

Under *section 116 of the Practice Act, (compiled statutes, page 4088)* inconsistent defenses are permitted; *Shallcross vs. West Jersey & Seashore Railroad*, 75 N. J. L. 395; *Rossi vs. Benedict*, 98 N. J. L. 81; *Wright vs. Stahbach*, 3 N. J. Misc. Report 10162.

Under the above cases inconsistent pleas and defenses are permitted and it necessarily follows that if such is the case, that the respondent has a right to plead inconsistent causes of action.

Objection for misjoinder of causes of action is waived unless made on motion, before answer or reply respectively. P. L. 1912, page 387, rule 15; S. C. R. 1913, rule 221, *Sheen's Practice Act*, page 223. There was no motion made by the said appellant objecting to the misjoinder of causes of action, and consequently the appellant is deemed to have waived any objection thereto.

POINT TWO.

That the sprinkler system, etc. is not part of the realty, and therefore is to be considered as personal property.

Under the conditional sales agreement, it was provided that the right to the said sprinkler system, etc. should remain in the appellant until the entire purchase price had been paid, and that at all times the said sprinkler system, etc. shall be considered as personal property, whether or not attached to the realty. As will later be shown, the sprinkler system in question could be removed without material injury to the freehold. The authorities in this state and some other jurisdictions have held in similar cases that the property in question is removable and, therefore, is to be considered as personal property. *DeBervoise vs. Maple Avenue Construction Co.* 228 N. Y. 496; *Kelvinator Sales Corporation vs. Byro Realty Corporation*, reported in Law Journal of April 18th, 1930, with reference to the case of *Madfes vs. Beverly Development Corporation*, 251 N. Y. 12; *Falaenan vs. Reliance Steel Co.* 74 N. J. E. 325; *Aimes vs. Trenton Brewing Co.* 56 N. J. E. 309; *General Electric Co. vs. Transit Equipment Co.* 57 N. J. E. 460; *Rahway Savings Institution vs. Irving Street Church*, 36 N. J. E. 61; *Lifschitz vs. Vorclone Corporation*, 8 N. J. Misc. Reporter 85.

In the case of *DeBevoise vs. Maple Avenue Construction Co.* supra, it was held:

“Where bills of sales of stationary tubs, bathtubs and similar articles, sold to be placed in houses in course of construction, disclose that it was the expressed intention

of both vendor and vendee that the chattels enumerated therein were to retain their character as personal property even should they be annexed to the realty, such contract is effectual, subject only to limitation where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of such articles, as where the property cannot be removed without destroying it, or where it or part of it is essential to the support of that to which it is attached.

“Where mantels, bookcases and consoles were placed in a building which was covered by a mortgage, under a conditional bill of sale, duly filed, by which the title was to remain in the vendor until paid for, and were attached to the buildings by screws and fastenings in such a manner that they could be detached without material injury to the building, the fact that, if the articles were removed, a small part of the wall would be exposed, leaving a space not plastered, while a circumstance to be considered, is not determinative of the question whether they were fixtures, especially in view of the intention of the vendor and vendee evidenced by the conditional bill of sale.”

On page 501 of the case last cited, the court quoting from *Davis vs. Bliss*, reported in 187 N. Y. 77-82, involving the installation of a gasoline engine under a conditional bill of sale, said:

“We shall assume that under ordinary circumstances the engine would have become a part of the realty. Upon the other hand, we regard it as too well settled to require discussion that the results which would ordinarily flow from attaching such a piece of personal property as this was to the real estate in such a manner as this was attached may be control-

led by special circumstances and the character of the article as personal property be preserved not only as against the vendee but also, in the absence of statutory provision, as against the mortgagee, owner and, under certain circumstances, the subsequent grantee of the real estate."

In 48 *A. L. R.* on page 1146, it is stated:

"In an action between subsequent grantee of realty and the conditional vendor of range and boiler, which had been connected with the water supply of the house by screw couplings, in the usual manner, for the purpose of furnishing hot water at the adjoining sink, it was stated that the manner in which the range and boiler were attached to the realty did not deprive them of their character as personal property. *Kerby vs. Clapp* (1897) 15 App. Div. 37, 44 N. Y. Supp. 116, *infra*. Said the Court, in this connection: "It is said that, if the ranges were detached from the water-pipe system of the houses, the water would flow from the connections, which is doubtless turned off; but so it might be urged that chandeliers are fixtures, because, if removed without first shutting off the gas, their removal would permit the gas to flow into the house. Yet it is settled that chandeliers are not fixtures." In this case, the court was apparently of the opinion that the apparatus in question was not a fixture, irrespective of the conditional sale."

On page 1147 of *A. L. R.*, it is said:

"However, as between the owner of a dwelling house and one to whom he had mortgaged the premises several years previously, it has been held that a hot-water heater set up by the owner (mortgagor) of the premises, and attached to the building only by plumbing connections made in the usual way, and so detachable without in any way

injuring the realty, does not constitute a fixture as a matter of law, but may be found by a jury to be removable by the owner (mortgagor) upon foreclosure of the mortgage and subsequent vacation of the premises by him. *Philadelphia Mortg. & T. Co. vs. Miller*, (1899) 20 Wash. 607, 44 L. R. A. 559, 72 Am. St. Rep. 138, 56 Pac. 382.

Following the decision in that case, it has been held that a hot-water tank affixed to a dwelling house by the mortgagor of the premises does not constitute a fixture, but may be removed by the mortgagor, notwithstanding foreclosure of the mortgage and expiration of the exemption period. *Hall v. Law Guarantee & Trust Soc.* (1900) 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643."

On page 1148, it is said:

"A hot-water boiler and heater may be the subject of a chattel mortgage given to secure the purchase price thereof, and showing that the parties intended it to retain its character as personalty notwithstanding installation in building owned by the purchaser, so that where the chattel mortgage, though made subsequent to the time of purchase, is executed and recorded before installation of the boiler and heater, the seller (chattel mortgagee) acquires an interest therein, unaffected by the record of an existing mortgage of the land; and the mortgagee of the land, chargeable with knowledge of the chattel mortgage before annexation, who stood by and saw the boiler and heater annexed to the realty, knowing that the seller (chattel mortgagee) expected to retain a lien upon said boiler and heater, will not be permitted to come into a court of equity and assert the superiority of her own lien over that of the seller (chattel mortgagee), who had no notice of any superior lien. *Croason vs. Flynn Plumbing & Heating Co.*, (1912) 139 N. Y. Supp. 1093.

A hot-water generating plant installed by mortgagor in mortgaged premises, under written agreement duly filed in the office of the registrar, and providing that plant should remain the property of the vendor thereof until fully paid for, remains personalty upon which mortgagee of premises has no lien, although said mortgagee was not a party to the contract. *Conduit vs. Goodwin* (1904) 44 Misc. 312, 89 N. Y. Supp. 827, affirmed without opinion in (1905) 107 App. Div. 616, 95 N. Y. Supp. 1122."

In the case of *Kelvinator Sales Corporation vs. Byro Realty Corporation*, it was held:

"That gas ranges which were installed, and, to the extent that the gas piping in each range was attached by a simple coupling to the gas service pipe which delivered gas to the various apartments, were annexed to the building, retain their character as personalty after such annexation, independently of any agreement between buyer and seller and that, where sold under a conditional sales contract, they are not subject to the lien of a mortgage placed on the building after the installation of the ranges without knowledge on the part of the mortgagee that title to the ranges had been reserved by the seller, even though the seller had failed to file the agreement as required by the statute, (*personal property law section 67, Cons. Laws, chap. 41; new section added by the laws of 1922, chap. 642, sec. 2*). It was the contention in the present case that the kelvinators rest on the floor and are movable in the same way as our ordinary ice boxes. The sole connection between each of the kelvinators and the premises is by an electric wire connecting the electrical apparatus inside the refrigerator with any ordinary wall, ceiling or socket electric outlet. The court said: "They have even less connection with the realty than the

gas ranges described in *Madfes vs. Beverly Development Corp.*" The court further held that the mortgage in question is upon the realty, and that it did not include the kelvinators which were intinsically personal and, therefore, were not converted into realty."

In the case of *Falaensu vs. Reliance Steel Co.*, it was held:

"A seller sold a machine on condition that the title should remain in him until the price was paid. The machine was delivered, and was set up on a foundation, and was put in actual operation as a part of the plant of the buyer, who, without paying the price, mortgaged his real estate. HELD, that the mortgagee, could not claim the machine, though the conditions of the sale were not expressed in writing and recorded, since he could only hold property which belonged to the buyer and became affixed permanently to the realty."

In the leading case of *Aimes vs. Trenton Brewing Co.*, which case has been referred to respecting the questions of fixtures it was held:

"An attachment of ornamental bars, complete in themselves when they were brought on the premises, to the floor and wall of a saloon, by adjustable screws and angle and stay-irons, for the sole purpose of retaining them in their places, and of a beer pump and accompanying pipes to pump beer from a cellar, is not such an annexation as will convert this personalty into realty, so as to become an improvement of the demised premises.

The fact that the lessor before and at the time of the purchase of these articles, and when he brought them on the demised premises, always treated them as personalty, and to obtain the purchase-money had agreed to mortgage them as chattels, and did so

mortgage them, is an indication that he did not intend the articles named to become part of the realty."

On page 318 the court said:

"The three rules of guidance to determine what in such a case the lien of a real estate mortgage covered, are there restated thus: First, that the articles must be actually annexed to the realty; second, they must be applied to the purpose which that part of the realty to which they were annexed was appropriated; third, they must be annexed with the intention to make them a permanent accession to the freehold."

On page 320 the court said:

"When thus disconnected the bars and their equipment, and the beer pump and its accompanying pipes, would be in substantially the same condition that they were when brought upon the premises, and capable of being placed in any other saloon large enough to hold them. This last characteristic is not conclusive as to the quality of the articles in question, but was held in the case of *Feder v. Van Winkle* to be a circumstance worthy of consideration."

On page 322 the court continuing said:

"In this case there are several undisputed facts which I think show conclusively that the lessee never intended to incorporate any of the articles claimed by the chattel mortgagee as part of, or an improvement upon, the realty. The original purchase of these articles was affected by means of the loan made to the lessee by the brewing company, upon an assurance given it that it should have the chattel mortgage here in question. This agreement to give the chattel mortgage, and its subsequent performance, show that

the lessee deemed the goods mortgaged to be, and intended them to continue to be, personal property. These acts were done by the lessee before the articles in question on the premises became his by purchase, before any dispute had arisen, and before any default in the payment of the rent might have tempted him to deny an intention to annex these things to the freehold. So the mode of annexation of the articles was adjustable and capable of easy disconnection."

This case was affirmed by the Court of Errors and Appeals in 57 *N. J. E. on page 347.*

In the leading case of *General Electric Co. vs. Transit Equipment Co.*, reported in 57 *N. J. E. page 460*, it was held:

"Motors, controllers and trolley poles belonging to an equipment company are not so mingled with the car to which they are attached, belonging to the railroad company, as to preclude the seller from maintaining a lien thereon as against judgment creditors, where they are of standard make, and their removal would leave the car ready to receive other equipments of similar character.

An electric generator, weighing fifteen tons, resting on rails on a wooden platform on brick piers built from the earthen floor of a building, through the doors of which the generator may be taken, leaving the structure on which it rested intact, ready for the reception of a similar generator, is not a fixture enabling a mortgage of the realty to claim it as against a vendor claiming title under a conditional sale.

A switchboard, consisting of a large metallic plate, set up on the side of a building, and affixed by spikes driven into a brick wall, on which is placed apparatus for the distribution of an electric current, is not a fixture enabling a mortgagee of the realty to claim it as against the vendor claiming title under a conditional sale."

A case which is similar to the case sub judice is that of *Lifschitz vs. Vorclone Corporation*, supra, wherein the court on page 85 said:

“My conclusion is that these goods are not so affixed to the realty as to become part thereof. The fastenings are simply for convenience, were not intended to make them part of the realty, and do not do so in fact. Moreover, they are clearly severable without material injury to the freehold, and hence complainants can suffer no irreparable damage.”

POINT THREE.

The respondent contends that the said sprinkler system, etc. was removable without material injury to the freehold and in order to prove this, produced Walter Kay, Harry Ledward and Carl Blackman, as its experts.

Walter Kay, a witness for the plaintiff-respondent testified as follows: Direct-examination by Mr. Bernstein (S. C. 26-11. 24-28; 38-40).

Q. *Describe just how the sprinkler system is attached to the premises.*

A. *It is attached mostly by screws.*

Q. *What kind of screws would you say?*

A. *Both drive and lag.*

Q. *How is it removable?*

A. *By just unscrewing it.*

Direct-examination by Mr. Bernstein: (S. C. 27-11. 4-5; 14-19; 29-40)

Q. *Is that the only method you pursue?*

A. *Yes.*

Q. *Will you explain just how the sprinkler heads are attached to the piping?*

A. The sprinkler heads are screwed into the fitting.

Q. *Show the members of the jury just how they are attached to the fittings.*

A. *By these little circles denoting the automatic sprinkler head proper. This long line constitutes the piping arrangement. At every joint of the piping there is a fitting which is screwed on three sides, on the small sizes. Your pipe is screwed into the fitting on this side (indicating), the other side which represents an outlet on top to which the automatic is screwed into.*

Q. *How do you remove this sprinkler head from the pipe?*

A. *By unscrewing them.* ..

On page 28 ll. 13-16, the witness, Walter Kay, testified:

Q. Do you know whether these pipes were standard pipes?

A. Yes, they are standard.

Q. Standard in size?

A. Yes, in cut lengths they are standard.

Q. Do you know from your own information whether these pipes can be used elsewhere?

A. No question about it.

Q. They can be?

A. Yes, sir.

On page 30, ll. 10-19 the witness further testified:

Q. *Are you familiar with the method of removing that sprinkler system?*

A. Yes, sir.

Q. *How is that done?*

Mr. Kristeller: I object.

The Court: Admit it.

A. *By just unscrewing every pipe fitting on the*

sprinkler, taking out the flanges where flanges are installed.

Q. Can you apply that to the present sprinkler system?

A. Yes, sir.

Q. Would that be without injury to the property?

Mr. Kristeller: I object to the question as calling for a conclusion.

The Court: Sustain the objection.

Q. In the event that you did pursue this form of removal would that leave any marks in the building?

A. Not that it couldn't be taken care of.

On page 31, ll. 4-8 the witness testified as follows:

Q. Taking into consideration the character of the building, at 295 Halsey Street, and taking into consideration the type of sprinkler system, could that be removed in the manner you spoke of?

A. Yes, sir.

Q. Are you familiar with the course of removing these sprinkler systems?

A. Yes, sir.

The plaintiff-respondent produced as another witness on the question of the removability of the said sprinkler system, etc., without material injury to the freehold, one, Harry Ledward, who testified on page 46 ll. 6-40 as follows:

Q. What would you have to do to remove this system at 295 Halsey Street?

Mr. Kristeller: I object on the ground that he is not qualified to testify to that.

(Argument.)

A. Remove the hangers from the beams, unscrewing the pipe, unscrewing the heads from the fit-

tings, remove the alarm valve, disconnect the city connection and shut off the city connection.

By the Court:

Q. On the first floor, there is a concrete or cement ceiling?

A. The first floor has a concrete ceiling.

Q. How are they fastened on the first floor?

A. To the side of the concrete beams with extension castings.

Q. Are they on the ceiling on the first floor?

A. The pipes?

Q. Yes.

A. No, they are eighteen inches below the ceiling. They are suspended by some straps into the ceiling by wrought iron hangers which are placed on the side of the concrete beams and with extension castings and screws.

Q. How are the pipes supported in the ceilings all stories above the first story?

A. The pipes are run at right angles to the joists, hung to the joists with "U" hooks and held into the beams by drive screws.

Q. What kind of beams are these?

A. Wood beams.

Q. On all three stories?

A. On all the three floors above the first.

On page 48 ll. 4-15, the witness further contended:

By Mr. Bernstein: *I will add that on to my question, whether this particular sprinkler system is severable without material injury to the freehold.*

By Mr. Kristeller: I still object because I do not think that this man is qualified to testify to the injuries to the freehold unless he first qualifies as to what the freehold is.

By the Court :

Q. By freehold it means the building.

A. *It would not damage the building.*

With respect to the system being used elsewhere, the witness testified that the system was a standard equipment and could be used elsewhere. (S. C. 48, ll. 30-40).

On page 52, ll. 4-18, the witness testified.

Q. *You want this court and jury to understand that on your inspection of this property your testimony was that you could remove the sprinkler system without leaving any damage to the ceilings except the screw holes, is that correct?*

A. *Yes, sir.*

Q. Irrespective of whether there was a metal ceiling on there or not?

A. I don't understand the question.

Q. *You testified that these pipes were affixed to the beams or ceilings by hangers which were screwed into the beams by lag screws, and if they were removed the only damages would be the screw hole in the beam in any ceiling, is that right?*

A. *Yes, sir.*

The respondent produced as a witness one, Carl Blackman, who on page 58, ll. 27-38, testified as follows:

Q. *In your opinion, is that part of the sprinkler system you saw, is that removable without injury to the freehold?*

A. *Absolutely.*

Q. *What method would you use in removal?*

A. *Unscrew the lag screw, which is inside the beams.*

Q. *Is that the only method?*

A. *That is all you need.*

Q. *The sprinkler system is of standard make?*

A. *Yes, sir.*

Q. *Could another sprinkler system be installed and without any alterations?*

A. Mr. Kristeller: I object to that on the ground that it is immaterial.

The Court: Admit it.

Q. (Question read).

A. *They could.*

On page 59, ll. 10-16, the witness further testified.

Q. What would happen to the concrete beams you saw?

A. The holes were left there. There would be a hole there.

Q. That would weaken the beam?

A. No, sir.

Q. *Would it look like a nice job after you had taken it out?*

A. *I do not think you would hardly notice it.*

The defendant produced as its witness John Arthur, who on page 71, ll. 22-40, testified as follows:

Q. If the sprinkler system were taken out of the building, you say it could not be used as a public garage?

A. It could not.

Q. *Assuming that the sprinkler system were taken out and a new one installed, could it be used as a public garage?*

Mr. Kristeller: I object to that as not proper cross-examination.

The Court: Admitted.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

A. *It could not be used until it was sprinkled.*

Q. Assuming that the present sprinkler system

was taken out, but that another sprinkler system was installed, could it then be used as a public garage?

Mr. Kristeller: I object to the question as improper and immaterial what might happen.

The Court: What takes place after the removal is of no consequences. It is whether the removal will reap a material injury to the freehold.

(Argument).

The Court: You may ask that question.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. (Question read).

A. *It could be used if the sprinkler was installed.*

POINT FOUR.

The sprinkler system is removable without material injury to the freehold, which fact was found by the jury in favor of the respondent under and by virtue of an instruction based upon a stipulation by the counsel for the respondent and appellant.

As previously recited under point three, the respondent at the time of the trial produced testimony which demonstrated that the sprinkler system, etc. was removable without material injury to the freehold. In an attempt to meet this, the appellant over objection of counsel for the respondent introduced an ordinance of the City of Newark, as tending to show that it would be a violation of said ordinance if the premises in question were operated

as a public garage without being equipped with a sprinkler system. (S. C. 70, ll. 25-40; S. C. 71, ll. 1-10; S. C. 74, ll. 1-30).

As previously stated, it was testified by John Arthur that in the event the sprinkler system, etc. were removed, another sprinkler system could be installed and the premises could again be used as a public garage. (S. C. 71, ll. 22-40; S. C. 72, ll. 1-19). It is the contention of the respondent that what the appellant is trying to do is to deprive the respondent of its property by showing the existence of a city ordinance, which prohibits the use of the premises in question as a public garage without a sprinkler system and prescribes a penalty in the event of a violation of said ordinance. The fact that there is such an ordinance in existence should play no part in the present controversy, the question whether the respondent is violating the ordinance is not in issue. The respondent contends that the only question before this Honorable Court is whether the sprinkler system, etc. can be removed without material injury to the freehold, and it is inconceivable how that question would be affected by the introduction in evidence of this city ordinance. There is nothing in the ordinance which prohibits the removal of a sprinkler system from one's premises. The ordinance merely provides for the licensing of the premises as a public garage and a penalty for a violation thereof.

With respect to the removal of the property without material injury to the freehold, we have the recent case of *Bank of America vs. L. A. Reine Hotel Corporation*, reported in 108 N. J. E. page 507, decided by Vice Chancellor Berry, and in it explains the decision of Vice Chancellor Backes in the case of *Future Building & Loan Association vs. Mazzocchi*, reported in 107 N. J. E. page 422, also see *Modern Secur. Co. v. Thwaites* 246 N. Y. Supp. 405.

On page 579 Vice Chancellor Berry said:

"The question before the master was whether or not the property could be removed without material injury to the freehold, as that was the test set up in the statute. I think it is clear, therefore, that the master's findings have been based upon a misconception of the law due to a misinterpretation of the opinion of this court in *Future Building and Loan Association v. Mazzocchi, supra*, and under such circumstances the court must decide the fact for itself and apply the law thereto. *Riverside Apartment Corp. v. Capitol Construction Co.*, 107 N. J. Eq. 405.

In the *Future Building and Loan Association case* the subject of the controversy consisted of refrigerators, gas ranges and cabinets installed in an apartment house. The vendors had entered into agreements subordinating their rights to the complainant's mortgage. The decision was based entirely upon that subordination agreement. What Vice Chancellor Backes said at page 425 of the report, beginning with the word "when you consider that the refrigerators and gas ranges are a part of the plant of the apartment house," was by way of obiter, and did not form the basis of his decision. If this case were to be controlled by the law of fixtures, then that comment would be pertinent; but, as has been shown, the issue here is controlled by the law of conditional sales, not by the law of fixtures. Whether or not the chattels were "an integral part of a common plant and with the building formed a unit for the prosecution of a common purpose" (*Chancellor vs. Cruse, supra*), is therefore entirely beside the mark. This leads to a consideration of the exceptions in the order of their statement above."

In the recent case of *Manufacturers' Building & Loan Association vs. Public Service Company*, re-

ported in 106 N. J. Eq. 68, the facts in that case are somewhat similar to those in the case under consideration. It appeared that the defendant had delivered certain gas ranges and refrigeration compressors, motors and ice-boxes, which were installed upon the premises of the conditional vendee. On page 69 of the opinion, the Court said: "Both conditional sales agreements provide that in the installation of said equipment, there shall be no permanent attachment thereof to the realty, but they shall be so attached by movable screws, joints or otherwise so as to be easily severable without material injury to the freehold." The purchaser having expressed the agreed could not be repudiated in his agreement and prevent removal. The complainant who succeeded to his interest, therefore, is in no better position and cannot repudiate. The retention of title under conditional sales agreement by vendor of chattels to be attached expresses the intention that such chattels shall not become part of the realty and therefore do not become part of the realty. In the case of *General Electric Co. vs. The Transit Equipment Co.* and *Metropolitan Trust Co. vs. The Union Traction Co.*, both 57 N. J. Eq. 460, it appears that motors, controllers, trolley poles, electric generators and a switchboard spiked into a brick wall were sold under a conditional sales agreement. A mortgagee contended that the property after being so affixed, was covered by its mortgage but Vice Chancellor Pitney held that the sale of personal property, under a conditional sales agreement, which personal property was later affixed to the realty, did not become a portion of the realty. *Lifschitz vs. Vorclone Corporation*, N. J. Misc. Reports, 83, is a similar case. See, also, *Kramer vs. Yocum*, 104 N. J. Eq. 79. On page 70 the Court said: "Complainant also contends that

the foreclosure action cut off defendant's rights. The mortgage, as I see it, covered only real property. Its foreclosure, therefore, could not affect personal property. See *General Electric Co. vs. The Transit Equipment Co.*, supra. I shall find that the property covered by the conditional sales agreements, it can be removed without injury to the freehold; that the parties agreed that the chattels should retain their character as personality and that the complainant's mortgage affected real estate only. I cannot see where any estoppel arises. I will, therefore, advise a decree that complainant's bill shall be dismissed.

It is contended by the respondent that the present case clearly falls within the above case of *Manufacturers' Building and Loan Association vs. Public Service Company*, and that the appellant, when he purchased said premises from the Sheriff, stepped into the shoes of the Equitable Properties Corporation, the former owner of said premises, and that as such purchaser, did not obtain any greater rights than its previous owner had in the premises, and, therefore, the appellant, who succeeded to the interest of the Equitable Properties Corporation, is in no better position and cannot repudiate. It will be observed in the case of *Manufacturers' Building and Loan Association vs. Public Service Company*, supra, that the Court spoke of material injury to the *freehold* and did not go into the question respecting the institution erected on the freehold.

After the respondent and appellant had rested their respective cases, a stipulation was entered in to the effect that the only question to be submitted to the freehold was as follows: "*Are the sprinkler system together with sprinkler sub-heads, accessories, pipings and hangers severable wholly*

or in any portion without material injury to the freehold?" (S. C. ll. 19-37; S. C. 87, ll. 1-9).

It is elementary that the trial court is entirely correct in submitting the above question to the jury, in view of the stipulation existing between counsel for the respondent and the appellant.

POINT FIVE.

The trial court was not in error in submitting to the jury the question as to whether the sprinkler system, etc. could be removed without material injury to the freehold.

In the case at bar, the respondent submitted proof as to the removal of said sprinkler system, etc. without material injury to the freehold, and the appellant then submitted proof to the contrary. Surely, under the proofs thus adduced, it became a disputed question of fact which was solely within the province of the jury. *Pope vs. Skinkley*, 45 N. J. L. 39; *Gibbs vs. Cooper*, 86 N. J. L. 226; *Browne vs. N. J. Conference*, 83 N. J. L. 622.

In the case of *Gibbs vs. Cooper*, supra, the court held as follows:

"The inference arising from the annexation of personal property to real estate is an inference of fact, not a conclusion of law; the question whether it becomes part of the realty is a question for the jury, and evidence is admissible to prove either that there was no intent to annex the personalty to the realty or that subsequently by agreement it again became personal property as between vendor and vendee."

In the case of *Browne vs. N. J. Conference*, supra, the Court on page 622 said:

“A trial court cannot direct a verdict where there is a substantial dispute as to the facts of the inferences to be drawn therefrom. *Carroll vs. Central Railroad Co.*, 52 N. J. L. 567.”

POINT SIX.

The trial court was not in error in assessing the damages sustained by the respondent.

As previously stated, the trial Judge, upon stipulation of counsel for the respondent and appellant, submitted one question to the jury for determination and left all other questions to be decided by him and not by the jury. The trial Judge properly took it for granted in view of the existing stipulation that it was to pass upon all other questions, including those of damages.

The appellant neither in a motion for non-suit or direction of a verdict, made any mention of the objection to the court assessing the damages, in fact the very absence of any mention should give rise to an agreement or consent on the part of the attorney for the appellant to have the trial Judge and not the jury pass upon all questions of damage.

At the trial, no objection was interposed by the appellant and it is only when judgment is entered against it that it attempts to object to the trial court assessing damages. It is conceded by the respondent that as a general rule, the trial court cannot assess damages in actions of this character, but the rule gives way when both parties to

the suit to their respective attorneys, stipulate and agree to the court assessing the damages sustained by the parties to the suit.

The attorney for the respondent called the attention of the trial Judge to the question of the damages sustained by the respondent (S. C. 87, ll. 9-12).

It is contended by the respondent that the cost of removal is a proper item of damage in the present replevin action. *Bruen vs. Ogden*, 11 N. J. L. 370; *Dils & Son vs. Waugh*, 43 A. L. R. 89; *Schnitzer vs. Russell*, 81 N. J. L. 146; *Schwartz vs. King Realty Co.* 93 N. J. L. 111, affirmed in 109 Atlantic Reporter 567; *Station Realty Co. vs. Englewood Laundry Co.*, N. J. 8 Misc. Reports 47.

In the case of *Bruen vs. Ogden*, supra, the court on page 374 said: "The action of replevin at the outset restores the possession of the property, and in the conclusion affords a recompense in damages for the wrongful deprivation.

In the case of *Schnitzer vs. Russell*, supra, it was held:

"For the unlawful detention of property having special useable qualities, when a judgment in replevin will compel the successful party to accept the property in kind and not its value, the damages may not be measured by the interest shown its value, but where the party, of his own volition, elects under the statute to recover, in money, the value of the property, and thereby prevents the other party from making a return in kind, interest on such value is a proper measure of damages.

In the case of *Schwartz vs. King Realty Co.*, supra, the court on page 113 said:

"It is well to observe here that in this state replevin lies not only for the unlawful taking of the goods, but also for unlawful deten-

tion. Compiled Statute page 4368, section 2."

In the case of *Station Realty vs. Englewood Laundry Co.*, supra, although not strictly a replevin action, the court allowed a recovery for the cost of the removal of the fixtures. The court on page 48 said:

"The sole argument for the appellant is that the boiler and pipes are "fixtures" and could not be removed without substantial damage to the real estate. But that fact does not seem to exonerate the defendant. The contract calls for the removal of all fixtures, machinery and fittings appurtenant to their business. The appellant says that the boiler is a fixture. No doubt it is, and that is just what the contract said was to be removed. The paper is drawn as a legal document and its language seems to be entirely clear."

In some cases it has been held that the value of the property plus damages for unlawful detention may be recovered. *Donlen vs. Lemmurman*, 87 N. J. L. 84; *Harwood vs. Smethurst*, 29 N. J. L. 195; *Field vs. Post*, 38 N. J. L. 346; *Maguire vs. Dutton*, 54 N. J. L. 597. If such is the case, it is respectfully contended by the respondent that in this case, damages should be given for the unlawful detention for the reason that the respondent did not desire damages but possession of the sprinkler system, and since possession was awarded to it, it necessarily follows that it should be entitled to damages for unlawful detention, it having shown by its proof that it was entitled to such damages.

The testimony adduced by the respondent showed that it would cost approximately \$975.00 to remove the sprinkler system, etc. from the appellant's premises (S. C. 34, ll. 1-30). This evidence

stands uncontradicted, it appearing that the appellant offered no testimony to the contrary. The cost of removal is the item of the damage sustained by the respondent, the appellant having willingly refused to turn over the sprinkler system, etc. to it.

The thirteenth provision of the conditional sales agreement in question makes mention of the cost of the removal and other expenses. (See S. C. 9, ll. 19-36 which agreement was on record prior to the conveyance of said premises to the appellant corporation, and the appellant, therefore, is chargeable with actual notice of the conditional sales agreement.

POINT SEVEN.

The appellant was not a purchaser for value and without notice, and consequently should not be given the protection afforded by the statute.

The State of the Case shows that the Equitable Properties Corporation, of which Isaac Kassel was the president, was the owner of premises known as 295 Halsey Street, Newark, N. J., and that on January 3rd, 1927, it had executed a mortgage in the sum of \$69,500 unto Mary Emma Sanderson, Lucy G. Sanderson, Charles D. Sanderson and Clarence M. Sanderson. (Exhibit D-1; S. C. 102-112 inclusive). That on the 3rd day of March, 1927, the conditional sales agreement, the subject matter of this suit, was executed by the Equitable Properties Corporation, also through Isaac Kassel, its president.

It next appears that there is a foreclosure of the mortgage and on November 23rd, 1928, the Sheriff of the County of Essex, by virtue of a writ of fieri facias, sold the premises in question and executed

a deed to the 295 Halsey Street Co., a corporation of New Jersey, the appellant in the present controversy.

About four months after the formation of the 295 Halsey Street Co., the said Isaac Kassel (who was formerly president of Equitable Properties Corporation) became president of the 295 Halsey Street Co. (S. C. 23, ll. 1-34).

The respondent contends that when the premises were conveyed to the present appellant, the latter had full knowledge of the existence of the respondent's conditional sales agreement, which was on record in the Essex County Register's Office, and having such knowledge, it purchased said premises with actual notice of the respondent's claim of the lien. The appellant should not be permitted to interpose the defense that it was a purchaser for value and without notice of the respondent's conditional sales agreement. By reason of this fact, it is the respondent's contention that the appellant, which was chargeable with such notice, is not in a position at this time to be protected by the provisions contained in *Section 7 of the Uniform Conditional Sales Act. (P. L. 1919, Chapter 210)*. Taking the above facts into consideration, an assent can be spelled out on the part of the present appellant, which would result in the case at bar falling within the first part of the statute, for the reason that the Equitable Properties Corporation (the former owner of the property) assented to the affixing of the said sprinkler system to the realty, and through the formation of the appellant corporation, elected the former president of the Equitable Properties Corporation as president of the appellant corporation. In other words, it is contended that the Equitable Properties Corporation, through its president one, Isaac Kassel, having assented to the affixing of the sprinkler system, that

this assent can be implied on the part of the appellant corporation of which the same Isaac Kassel was and still is president. There is nothing in the record which tends to show the reason for the formation of the second corporation with the same man as president thereof, and it is respectfully contended that it may be inferred that the purpose was to cut off all liens (including respondent's conditional sales agreement), which it is now resisting. The appellant corporation has not been guilty of the good faith required by the Uniform Conditional Sales Act, and therefore, should not be entitled to its protection.

POINT EIGHT.

The grounds now advanced by the appellant was not raised in the lower court.

The appellant in the trial court did not enter any objection or objections to the court assessing the damages, and did not make any objection to the court submitting the only question to the jury respecting the removing of the sprinkler system, etc. from the premises without material injury to the freehold. It has been held that questions not raised in the lower court will not be considered on appeal. *Ruggles vs. Ocean Accident Corp.*, 89 N. J. L. 180; *Shaw vs. Bender*, 90 N. J. L. 147; *Robertson vs. Crichfield*, 87 N. J. L.; *Transparent Rubber Works vs. International Glass Co.*, 92 N. J. L. 461; *Frisbie vs. Thomas Jefferson Counsel*, 74 N. J. L. 213; *Osborn vs. Gurtner*, 75 N. J. L. 224.

In the case of *Transparent Rubber Works vs. International Glass Co.*, *supra*, it was held:

“That in an action for difference between cost of goods, after seller breached contract to manufacture and deliver them, because it could perform contract wherein court directed a verdict for amount claimed, and counsel did not indicate whether there was any jury question, the only question on appeal was issue of impossibility of performance.”

Where a cause is submitted on an agreed statement of facts and no objection or exceptions of any kind appear in the record, Laws 1916, page 109, the purpose of which is to relieve counsel of the necessity of specifically submitting grounds of objection has no application. *Downs Co. vs. Owen*, 92 N. J. L. 93; *Sulzberger vs. Muller*, 87 N. J. L. 720.

It has been held that a finding of fact not contended to be without support in the evidence is not reviewable in the Court of Errors and Appeals; review in that court being confined to questions of law only. *Defiance Fruit Co. vs. Fox*, 76 N. J. L. 482; *Budgeton vs. Fidelity Co.*, 88 N. J. L. 645; *Duff vs. Prudential Insurance Co.*, 90 N. J. L. 646. There is a presumption in favor of the correctness of the judgment below. *Phillips vs. Borough of Longport*, 90 N. J. L. 212. There is nothing before this Honorable Court which in any manner tends to rebut this presumption of law.

It is contended by the appellant that the respondent, by his failure to elect, has proceeded in both the replevin and conversion counts. The respondent's proof, however, proceed on the theory of the replevin count, and abandon the conversion count as previously stated. It has been held that on appeal there are two theories of the case and rulings presented were proper under one, but improper under the other, they will consider it harmless error. *Furman vs. Feebelman Co.*, 88 N. J. L. 711.

It has also been held that where parties without objection, try and submit the question at issue on a theory apparently satisfactory to themselves, and suffer the case to go to the jury on the legal theory thus adopted, such course of procedure becomes the law of the case, and it is too late on appeal for either party, for the first time, to question the legal propriety of the course thus pursued. *Kaphen v. Schmitt*, 98 N. J. L. 803. In the case at bar, there was a special finding by the jury, and all other questions were reserved by the trial Judge to be disposed of by him. This procedure cannot be claimed to be harmful to the appellant. *Dickerson v. Levine*, 98 N. J. L. 313.

Conclusion.

It is respectfully contended by the respondent that the jury having found that the sprinkler system &c., could be removed without material injury to the freehold, and it appearing by the respondent's proofs that it suffered damage to the extent of \$975.00., which was rightfully assessed by the trial Judge, in view of the stipulation entered into by and between the counsel for the respondent and appellant, that the judgment of the trial court be affirmed, with costs.

Respectfully submitted,

MAURICE BERNSTEIN,
Attorney and of Counsel
for Respondent.

(DAVID BERNSTEIN,
of the New York Bar
on the brief).



