

INDEX.

	Page
Transcript of Pleadings for Trial.....	1
Complaint	1
Answer	3
Reply	4
Replication	5
Clerk's Certificate	5
Postea	6
Rule for Judgment	7
Notice of Appeal	8
Grounds of Appeal	9
Testimony	13
Plaintiff's Motion for Direction of Verdict...	90
Defendant's Motion for Direction of Verdict.	91
Court's Charge to the Jury	91
Plaintiff's Exceptions to Court's Charge.....	97
Defendant's Exceptions to Court's Charge...	98

WITNESSES FOR PLAINTIFF.

Alex Shapiro :	
Direct	15
Cross	21
Redirect	28, 29
Recross	28, 29
John L. Hill :	
Direct	30
Cross	30
William H. Trowbridge :	
Direct	31
Cross	33
Redirect	35, 38, 40
Recross	37, 39

WITNESSES FOR DEFENDANT.

	Page
John L. Hill:	
Direct	40
Cross	48
David L. Britt:	
Direct	56
Preliminary Cross	64
Cross	67
Redirect	75
Recross	76

TESTIMONY IN REBUTTAL.

William H. Trowbridge:	
Direct	77
Cross	80
Alex Shapiro:	
Direct	81
Cross	84

TESTIMONY IN SUR-REBUTTAL.

David L. Britt:	
Direct	87
Cross	89
Redirect	89
Recross	90

PLAINTIFF'S EXHIBITS.

	Off'd Page	Ptd Page
P-1—Deed	16	99

DEFENDANT'S EXHIBITS.

D-1—Contract	41	103
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Transcript of Pleadings for Trial.

Filed September 30, 1929.

New Jersey Supreme Court.

PASSAIC COUNTY.

10

WEST PATERSON SAND & GRAVEL
Co., a New Jersey Corporation,
Plaintiff,

vs.

GREAT NOTCH CORPORATION, a
New Jersey Corporation,
Defendant.

Transcript of
Pleadings
for Trial.

20

KIMMEL & KIMMEL,
Attorneys for Plaintiff.
HARLEY, COX & WALBURG,
Attorneys for Defendant.

Summons issued September 23, 1929.

The plaintiff, a corporation having its principal place of business in the City of Paterson, County of Passaic and State of New Jersey complaining of the defendant respectfully shows to this court: 30

1. The plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

2. The defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey. 40

Complaint.

3. On or about the 30th day of March 1929 the plaintiff was and still continues to be the owner of three (3) electric conveyors such as are used in the sand and gravel business, which said three conveyors were and still are located on certain premises situate in the Borough of West Paterson, County of Passaic and State of New Jersey, which said premises were on or about the 30th day of March 1929 conveyed to the defendant herein by the plaintiff.

4. The plaintiff did demand of the defendant that it be permitted and allowed to remove the said three conveyors but this the defendant has and still continued to refuse to do and unlawfully with-holds the said three electric conveyors from the plaintiff.

5. Notwithstanding said three electric conveyors are the property of the plaintiff the defendant has unlawfully used the said three electric conveyors in and about its business.

6. By virtue of the acts aforesaid the defendant has unlawfully and illegally and contrary to the law of the land converted to its own use the property of the plaintiff, to wit, the aforesaid three electric conveyors.

7. The said three electric conveyors are reasonably worth the sum of \$2,000.00.

Wherefore, plaintiff demands of the defendant as damages the sum of \$2000.00 besides costs of suit.

KIMMEL & KIMMEL,
Attorneys of Plaintiff.

Answer.

Filed Sept. 30, 1929.

The defendant, Great Notch Corporation, having its principal place of business in the City of Newark, County of Essex, and State of New Jersey, answering the plaintiff's complaint, says that:

10

1. It admits the allegations of paragraphs 1 and 2.

2. It denies the allegations of paragraphs 3, 4, 5, 6, and 7.

FIRST SEPARATE AND DISTINCT DEFENSE.

1. On and prior to the 18th day of March, 1929, the plaintiff corporation was the owner of certain property, upon which the plaintiff had created gravel pits.

20

2. The plaintiff had installed and used the said electric conveyors, mentioned in the plaintiff's complaint, in the operation of the gravel pits.

3. On the 18th day of March, 1929, the plaintiff company and the defendant company entered into a contract, whereby the plaintiff company agreed, in consideration of the payment of \$7,500. to it, that it would transfer to the defendant all its right, title, and interest to the said premises with the gravel pits upon them, and, in addition thereto, would transfer all its right, title, and interest to the defendant company to "all other personal property appurtenant to or used in the operation of the said premises."

30

40

Answer.

4. The defendant company, pursuant to the said agreement, paid to the plaintiff company the sum of \$7,500. and took title to the premises, gravel pits, and personal property appurtenant to the said premises and used in the operation of the said premises, in accordance with the agreement
10 aforementioned.

HARLEY, COX & WALBURG,
Attorneys for Defendant.

Reply.

Filed Oct. 1, 1929.

20 The plaintiff replying to the answer of the defendant says that:

1. Denies each and every allegation contained in the answer of the defendant.

2. The plaintiff did execute and the defendant did accept a Deed in full performance of the contract entered into between the plaintiff company and the defendant company on the 18th day of
30 March, 1929, which said Deed in conformity of the true understanding and intent of the plaintiff and defendant companies conveyed the sand-pit therein mentioned, but did not convey or mention the three (3) electric conveyors for which this suit is brought.

3. The said Deed did merge the contract and each and every one of its terms.

40

KIMMEL & KIMMEL,
Attorneys of Plaintiff.

Replication.

Filed Oct. 4, 1929.

The defendant, by way of replication to the reply of the plaintiff herein, says that:

1. It denies the allegations set forth in paragraphs 2 and 3 of the plaintiff's reply, except that it admits that a deed conveying certain premises, also mentioned in the contract referred to in the defendant's answer, was executed. 10

2. It joins issue with the plaintiff in all other matters.

HARLEY, COX & WALBURG,
Attorneys for Defendant.

Clerk's Certificate.

20

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

(Seal)

In testimony whereof I have set my hand and the seal of said Court at Trenton, this Nineteenth day of February, A. D. Nineteen hundred and Thirty. 30

FRED L. BLOODGOOD,
Clerk.

40

Postea.

Filed March 6, 1930.

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

10	WEST PATERSON SAND & GRAVEL Co., a New Jersey Corporation, Plaintiff,	}	Action at Law. Postea.
	vs.		
	GREAT NOTCH CORPORATION, a New Jersey Corporation, Defendant.		

20 The above entitled matter having come regularly on for trial before Circuit Court Judge William B. Mackay, to whom it had been referred for trial, and the jury having been drawn, and evidence having been submitted on behalf of the plaintiff and on behalf of the defendant, and the case having been referred to the jury, the jury returned a verdict of no cause of action in favor of the defendant against the plaintiff.

30 W. B. MACKAY,
Circuit Court Judge.

Dated: March 3rd, 1930.

Rule for Judgment.

NEW JERSEY SUPREME COURT,

GREAT NOTCH CORPORATION, a
New Jersey Corporation,
Defendant.
ads.

WEST PATERSON SAND & GRAVEL
Co., a New Jersey Corporation,
Plaintiff,

Action at Law 10
On Postea.

Costs, \$51.50.

It is Ordered that judgment be and hereby is
entered in favor of defendant and against the
plaintiff with costs to be taxed nisi. 20

Entered March 6, 1930.

On motion of
HARLEY, COX & WALBURG,
Attys.

30

40

Notice of Appeal.

Filed March 20, 1930.

NEW JERSEY SUPREME COURT,

10 WEST PATERSON SAND & GRAVEL
Co., a New Jersey Corporation,
Plaintiff,

vs.

GREAT NOTCH CORPORATION, a
New Jersey Corporation,
Defendant.

Action at Law.

Notice
of Appeal.

20 To: HARLEY, COX and WALBURG, Attorneys of
Defendant:

Take Notice that the plaintiff appeals from the whole of the judgment entered in this cause to the New Jersey Court of Errors and Appeals, in the last resort in all causes.

Dated: March 13th, 1930.

KIMMEL & KIMMEL,
Attorneys of Plaintiff.

30 Service of a copy of the within Notice of Appeal is hereby acknowledged this 17th day of March, 1930.

HARLEY, COX & WALBURG,
Attys. of Deft.

40

Grounds of Appeal.

Filed March 20, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

<p style="margin: 0;">WEST PATERSON SAND & GRAVEL Co., a New Jersey Corporation, Plaintiff-Appellant,</p> <p style="text-align: center; margin: 5px 0 0 40px;">vs.</p> <p style="margin: 0;">GREAT NOTCH CORPORATION, a New Jersey Corporation, Defendant-Appellee.</p>	}	<p style="margin: 0;">Action at Law. 10</p> <p style="margin: 0;">On Appeal from Supreme Court.</p> <p style="margin: 0;">Grounds of Appeal.</p>
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To: HARLEY, COX & WALBURG, Attorneys of De- 20
fendant.

Sirs:

Take Notice that the plaintiff-appellant hereby assigns the following as the grounds of appeal upon which the plaintiff-appellant will rely upon in this cause:

1. The court below erred in ruling at the opening of the case that the deed from West Paterson Sand and Gravel Co. to Great Notch Corporation, exhibit P-1, did not merge the contract between the same parties, exhibit D-1. 30

2. The court below erred in permitting the following question to the witness Alex Shapiro over plaintiff's objection:

"Q. And did you tell Mr. Hill and Mr. Brett all that they had to do was bring a crane in there; everything was ready to start?" 40

Grounds of Appeal.

3. The court below erred in admitting in evidence over plaintiff's objection the contract between West Paterson Sand & Gravel Co. and Great Notch Corporation, exhibit D-1.

10 4. The court below erred in permitting the following question to the witness John L. Hill over plaintiff's objection:

"Q. And at that time did you have any conversation with him as to the purchase of the sand pit?"

5. The court below erred in permitting the following question to the witness John L. Hill over plaintiff's objection:

20 "Q. The purchase of the conveyors. Limit it, now, to the personal property section of the contract."

6. The court below erred in permitting the following question to the witness John L. Hill over plaintiff's objection:

30 "Q. Yes, and what was said by Mr. Shapiro about the conveyors going with the sand pit?"

7. The court below erred in refusing to strike out on plaintiff's motion the answer of the witness John L. Hill to the question:

40 "Q. What was said, Mr. Hill? A. Why, when we discussed the price on it and the amount he wanted, why, we couldn't agree at all on what it was. And then he pointed out that all the stuff they had up there,

Grounds of Appeal.

the equipment, his house, his office, as he called it, and everything like that and the place already opened was worth quite a lot of money and that we had everything there and all we had to do is bring in our crane and start operation, and the understanding was—

10

Mr. Kimmel: Don't tell us the understanding.

Q. No, just what was said? A. Well, he said, "I am selling you everything up there."

Mr. Kimmel: I move to have it stricken out as not responsive, as limited by your Honor's ruling."

8. The court below erred in permitting the following question to the witness David L. Britt, over plaintiff's objection::

20

"Q. Mr. Britt, did you have any conversation with Mr. Shapiro before March 18, 1929, as to whether or not the electric conveyors were to be included in the agreement of sale to the Great Notch Corporation?"

9. The court below erred in permitting the following question to the witness David L. Britt, over plaintiff's objection:

30

"Q. Mr. Britt, what is the use of a conveyor around a sand pit?"

10. The court below erred in refusing to direct a verdict for plaintiff, said motion being made by the plaintiff at the close of the whole case.

40

Grounds of Appeal.

11. The court below erred in charging the jury over plaintiff's exception as follows:

10 "I have held as a matter of law that the giving of the deed did not bar the consideration on the question of the three conveyors. Counsel for the plaintiff claimed that the giving of the deed merged this contract so that the contract became absolutely void and of no effect and of course I held that that was not so because one part of it related to real estate and the other part of it related to personal property."

Dated: March 13, 1930.

KIMMEL & KIMMEL,
Attorneys of Plaintiff-Appellant.

20 Service of a copy of the within grounds of appeal is hereby acknowledged this 17th day of March, 1930.

HARLEY, COX & WALBURG,
Attys. of Deft.

30

40

Testimony.

NEW JERSEY SUPREME COURT,

PASSAIC CIRCUIT.

WEST PATERSON SAND & GRAVEL
Co., a New Jersey Corporation,
Plaintiff,

vs.

GREAT NOTCH CORPORATION, a
New Jersey Corporation,
Defendant.

10

At Law.

Paterson, N. J., February 26, 1930.

Before HON. WILLIAM B. MACKAY, Judge and a
Jury. 20

APPEARANCES:

For the Plaintiff: KIMMEL & KIMMEL,
ESQS., by DAVID KIMMEL, ESQ., and
MARTIN KIMMEL, ESQ.

For the Defendant: HARLEY, COX and
WALBURG, ESQS., by WM. H. D COX,
ESQ.

30

(A jury was called and sworn.)

(Mr. David Kimmel opened the case to the jury
on behalf of the plaintiff.)

(Mr. Cox opened the case to the jury on behalf
of the defendant.)

(Side bar discussion.)

Mr. David Kimmel: Do I understand, then, that
the Court rules that the contract did not merge in

40

Testimony.

the deed in so far as it affects the personal property?

10 The Court: I rule that this contract for the sale of property relates to the sale of two distinct kinds of property; first, the sale of real estate and the appurtenances appurtenant to the real estate, which might be fixtures; and the sale of personal
20 property; and that the deed of conveyance which was subsequently given for the real estate did not constitute a merger of the contract in so far as the sale of the personal property was concerned. My opinion is that the contract of sale relating to both real and personal property had to be carried out by the West Paterson Sand and Gravel Company and that they carried it out by deed for the real estate in so far as the land and appurtenances were
20 concerned, and it was then a duty to carry it out if there was such an agreement relating to these three conveyors and give a bill of sale for the personalty.

Mr. David Kimmel: I will take an exception to your Honor's ruling.

30 Now, if your Honor please, I would like a ruling on the construction as a matter purely of law with respect to what terms can be included in the words "other personal property," as used in the deed—in the contract rather. On that particular point I desire to call your Honor's attention—

The Court: That is due to the fact that the word "conveyors" is not specifically mentioned?

Mr. Kimmel: We say that referring to electric and gas fixtures and things of that type refers to a private dwelling.

40 The Court: You claim the words "other personal property" are superfluous and have no meaning?

Testimony.

Mr. Kimmel: That is correct.

(Discussion.)

Mr. Kimmel: I will move the Court at this time to rule that the paragraph in the contract—

The Court: You can't move me to rule anything, because you are not in a position to ask for a direction of a verdict. You are in a position to proceed with your case, if you want to proceed with it, but you are not in a position to demand that the Court do anything. 10

The Court, for your convenience, might take up the subject-matter, but as to a demand for a ruling at this time, you are entirely out of order.

Mr. Kimmel: I will make my motion at the proper time.

The Court: You will have to make it at the proper time, because you haven't even proven your case yet. 20

Mr. Kimmel: Yes.

ALEX SHAPIRO, sworn.

Direct-examination by Mr. David Kimmel:

Q. On March 30, 1929, you were the president of the West Paterson Sand and Gravel Company? A. Yes, sir. 30

Q. On that day was the West Paterson Sand and Gravel Company the owner of certain three electric conveyors? A. Yes, sir.

Q. Where were those conveyors located? A. In West Paterson.

Q. And on the 30th day of March, 1929, did you execute a deed for the property on which these conveyors were situated and located? A. Yes, sir. 40

Alex Shapiro—Direct.

Q. To the Great Notch Corporation? A. Yes, sir.

Mr. Cox: Why don't you mark the deed in evidence?

(Paper marked Exhibit P-1 in evidence.)

10 Q. Do you know Mr. Hill, the vice-president of the defendant company? A. Yes.

Q. Is he in court here? A. Yes.

Q. Where is he? A. Right there (indicating).

Q. Is that the man? A. Yes.

Q. Do you recall the day on which this deed, marked Plaintiff's Exhibit 1, was executed? A. Yes, sir.

Q. Where was it executed? A. Over in Mr. Hill's office in Passaic. I went over to—

20 Q. Where was the deed executed? A. At Newark, at their office.

Q. At the office of the Great Notch? A. Yes, sir.

Q. Do you remember the day it was executed on? A. It was the 30th of March.

Q. Now, prior to the execution of that deed did you have any conversation with Mr. Hill, the vice-president of the defendant company? A. Yes, sir.

30 Q. Now, just relate that conversation.

Mr. Cox: If the Court please, I object unless it is limited to what the conversation is about.

Q. Concerning—well, limit it to concerning the property to be conveyed and the conveyors in and about the premises, as well as the electric poles. A. Yes, sir.

40 Q. Now, just relate that conversation in so far

Alex Shapiro—Direct.

as those particular items called for. A. Well, I told Mr. Hill I put some electric poles up there which I had to pay to the Public Service, and he said, "How about those poles? Can we have them?" I said, "You might as well have the electric poles. I will let you have that." I also told him I got three electric conveyors and an old steam shovel there, and ask him if it is all right to leave them there until the weather will settle so I can get them out, or any time it is in their way to call me up and I will get them out of their way, and he said, "All right." 10

Q. And then the deed was executed? A. Yes, sir.

Q. Did you ever make demand upon the defendant company for the return of these conveyors? A. I did. 20

Q. When? A. Well, about two or three weeks after. Mr. Brett called me up at my house.

Q. Did you talk to Mr. Brett? A. Yes.

Q. Who is Mr. Brett? A. He is the superintendent of the Great Notch.

Q. Just relate this conversation.

Mr. Cox: If the Court please, I object to that. There is nothing in evidence yet which would show that Mr. Brett had the right to bind the Great Notch Corporation by anything he said. 30

The Court: No, I guess that is so.

Q. Do you know what work Mr. Brett is in charge of? A. Well, I know he is—he runs the place up there.

Q. What is he? A. I don't know what position he holds. 40

Alex Shapiro—Direct.

Q. What position 'does he hold? A. That I couldn't tell you exactly. He was the boss there, I know. He was the whole works of the whole plant.

Q. Was he the man that ran the plant? A. Well, he is always up at the Great Notch plant there, and deliveries or anything you always took up with Mr. Brett.

Q. And you spoke to him? A. Yes.

Q. Relate your conversation.

Mr. Cox: If the Court please, I will still have to object. I don't think it has been shown yet that he had a right to bind them.

The Court: I will sustain the objection.

Mr. Kimmel: Exception.

20 Q. Brett was the man that had charge of the premises that you conveyed by this deed; is that a fact? A. Yes, sir.

Q. And he had charge of the operation of the work at West Paterson? A. Yes, sir.

Q. Did he have charge of the conveyors in question? A. Yes.

Q. Did you have a talk with him over the telephone? A. I did.

Q. Relate that conversation.

30 Mr. Cox: I still object. Nothing has been shown but he is the superintendent in charge of operation. He is no party to this contract, didn't make it, doesn't know the terms of it. Anything he said wouldn't be binding on the defendant.

The Court: Sustain the objection.

Mr. Kimmel: Exception.

40 Q. Did you go up to the West Paterson—the

Alex Shapiro—Direct.

land that you conveyed—and make demand upon this company for the conveyors in question? A. I went up there a few times.

Q. Did you see the conveyors? A. Yes, sir.

Q. What was being done with them? A. Well, after he refused to let me have them I went up there. They were working on the bank, and the conveyors—one was discharging sand; another one was loading sand; and the third one was right on the pile of sand, loading trucks. 10

Q. Whose trucks were they? A. Well, that I couldn't say. They got a lot of hired trucks.

Q. Did you see Brett there? A. No, I didn't see him.

Q. Did you see any of the officers of the company there? A. No, just the engineer was there running the crane. 20

Q. What was his name? A. I couldn't tell you.

Q. Do you know the engineer? A. Yes, if I see him I know him.

Q. I see. Do you know whether or not he was in the employ of the Great Notch? A. Yes.

Q. How do you know that? A. I seen him. He used to work there steady.

Q. And these were in the same premises that you conveyed on the 30th of March? A. Yes, sir. 30

Q. Now, were these conveyors portable conveyors or stationary conveyors? A. Portable.

Q. Did they have wheels on? A. Yes, sir.

Q. Were you able to move them from one job to another? A. Yes.

Q. Did you move them from one place to another? A. I used to.

Q. What other places did you use to move them to? A. I used to move them—I got a lot over in 40

Alex Shapiro—Direct.

Preakness Road, I used to take them over there, and to Fourteenth Avenue, and I got another lot just about four or five blocks away, and I used to move them up and down.

Q. You say there was a steam shovel on the premises on March 30? A. Yes, sir.

10 Q. And did you have a talk with any of the officers of the company regarding that? A. The only time I talked on that, at that time—

Q. Did you have a talk? A. Yes.

Q. With whom? A. With Mr. Hill.

Q. Relate that conversation. A. Well, just as I said before. I told him when the weather will break I will come down and take them out of there, and he said, "All right."

20 Q. Did you go down to get the conveyors? A. Well, Mr. Brett called me up.

Q. Yes?

Mr. Cox: Just a minute. Not what Mr. Brett said.

Q. Did you go down to try to get the conveyors? A. I tried to get them, sure, I did.

Q. Were they delivered to you? A. No, sir.

Q. Possession was refused? A. Yes.

30 Q. And the Great Notch were using them? A. Yes, sir.

Q. Now, what kind of conveyors were these? When I say what kind, I am referring to the length of the belt. A. One was twenty-five foot, one thirty, and one a forty.

Q. In what condition were these conveyors? A. They were all right, in running condition.

40 Q. What condition was this forty-foot conveyor? A. Brand new.

Alex Shapiro—Direct.

Q. Was it ever used? A. It was used, about four or five loads we loaded with it.

Q. How about the thirty-foot conveyor? A. That was in good shape. We used that right along.

Q. How about the twenty-five foot conveyor? A. The same.

Q. How long have you been in the sand and gravel business? A. Since 1920. 10

Q. You are familiar with the prices of conveyors, are you not, Mr. Shapiro? A. I do.

Q. What did the forty-foot conveyor cost you? A. 1050.

Q. What did the thirty-foot conveyor cost you? A. 750.

Q. What did the twenty-five-foot conveyor cost you? A. Run about 650.

Q. And were those prices the fair price for those, if you had to go and buy them new in the open market? A. That is the standard price, mostly all alike. 20

Q. What would you consider—will you tell us the condition of these three conveyors? A. They were in good running order. They were in shape to load trucks.

Mr. Kimmel: Cross-examine. 30

Cross-examination by Mr. Cox:

Q. All those prices you just gave were the prices new, were they not? A. Yes.

Q. And new the price included an electric motor on the conveyor to run the conveyor? A. Yes.

Q. New belting? A. Yes.

Q. New gears, new pulleys, new idlers? A. Everything complete. 40

Alex Shapiro—Cross.

Q. Everything completely new? A. Yes.

Q. How long before this sale had you bought those conveyors? A. I bought those conveyors about a year and a half.

10 Q. All of them at the same time? A. Well, the one big one, that forty footer, I bought that about three or four months later.

Q. Which one? A. The big one I bought a few months later.

Q. Now, at the time that you sold this property the electric motors had been taken off the conveyors, had they not? A. Not that I know of.

Q. Did you see them just before that sale? A. Yes.

Q. Were there any electric motors on them at that time? A. Yes.

20 Q. And did you leave electric motors on conveyors while they were standing out in the sand pit? A. We do.

Q. You do? A. Yes.

Q. And you don't know whether they were there, though, on March 30 or not? A. No, not the exact day, but I seen them a couple of days before.

Q. What about the belting on those conveyors? A. What do you mean?

30 Q. Was the belting in good shape on those conveyors? A. In shape to load trucks.

Q. Well, on March 30? A. Yes.

Q. You are sure about that? A. Yes.

Q. You are sure some of the belts weren't off and buried under the sand and other parts of the belting broken? A. They might have been a little in the sand.

40 Q. Some were broken? Wasn't some of the belting broken, too? A. Well, they break. We used to put—

Alex Shapiro—Cross.

Q. Wasn't some of the belting broken at that time? A. Well, I don't remember.

Q. You don't know that, do you? A. No.

Q. How about the idlers? Weren't the idlers pretty well chewed up on two of those conveyors?

A. I didn't look in that closely. They were working.

10

Q. What is that? A. I didn't look over everything just exactly.

Q. Weren't the pulleys missing on some of those conveyors? A. Not that I know of.

Q. Now, on March 30, at the time this property was conveyed, there was only one of those conveyors nosed into the bank; isn't that right? A. Yes.

Q. The other two were standing free right in the middle of the same pit; isn't that correct? A. Yes. Yes, sir.

20

Q. And at that time you had another quarry, did you not? A. Yes, sir.

Q. And you signed the contract—

Mr. Cox: Is there any objection to this being marked for identification?

Mr. Kimmel: Yes.

Mr. Cox: There is an objection to it?

Mr. Kimmel: Yes.

30

Q. I show you this contract and I ask you if that "A. Shapiro" is your name (handing a paper to the witness). A. Yes.

Q. I see. And this contract is dated March 18; is that the date it was signed? A. Yes.

Q. About that time? A. Yes.

Q. In other words, signed about two weeks before the deed was signed? A. Yes, sir.

40

Alex Shapiro—Cross.

Mr. Cox: I offer this for identification.
(Paper marked D-1 for identification.)

Q. You had been using these three conveyors in taking the sand out of the sand pit, had you not?

A. Yes, sir, in the summer-time.

10 Q. For how many months had you been using them? A. We used them about four or five months of the year.

Q. I see. And you made no attempt from March 18 to March 30 to take those conveyors away to your other gravel pit, did you?

Mr. Kimmel: I object to the question as incompetent, irrelevant, and immaterial and has no bearing.

The Court: How is that relevant?

20 Mr. Cox: I will go back. Perhaps it is not at the present time.

Q. You had some conversations with Mr. Hill, the vice-president of the defendant company, before you signed that contract, did you not? A. I did.

30 Q. And didn't you tell Mr. Hill, as well as Mr. Brett, before this contract was signed that all they had to do was just take a crane in there and start operations; everything else was there? A. That is what they needed the crane for, to load the trucks.

Q. Everything else was there? A. They didn't need nothing else if they had a crane up there.

Q. A crane is used for digging the sand out? A. Yes.

Q. Loosening it up from the bank? A. Yes.

40 Q. And then after it is loosened from the bank

Alex Shapiro—Cross.

the conveyors load it on the trucks, don't they? A. Well, not all the time.

Q. That is the usual way, isn't it? A. At times.

Q. Isn't it the usual way? A. Not the usual. They load right from the hill, right to the trucks.

Q. What is that? A. They use the crane and load them right from the hill down to the trucks. 10

Q. Don't they use the crane to loosen up the sand from the bank so that it runs down and back a conveyor into the loose sand and load it on the truck? A. Yes, those are to load trucks. That is what I used to do. I had a crane in there, too.

Q. They do it both ways, don't they? A. Yes.

Q. And you did tell Mr. Hill and Mr. Brett all that they had to do was bring a crane in there; everything was ready to start? 20

Mr. Kimmel: I object to this line of questioning as absolutely incompetent, irrelevant, and immaterial. The question here is whether there was a conversion and whether the construction of that contract—I say that this is absolutely incompetent, irrelevant, and immaterial at this particular time.

Mr. Cox: May I say this: This witness has testified that just before this contract was signed that Mr. Hill—he said to Mr. Hill, "There are some conveyors there. I want you to leave them here." I want to show that the conversations always included conveyors to us. 30

Mr. Kimmel: If the Court please, the old parol evidence rule is fixed by Naumberg against Young, with which my adversary is well acquainted, and is dispositive of counsel's proposition here. He can't go ahead on 40

Alex Shapiro—Cross.

any proposition prior to the time of the contract where there is a written contract in evidence—and we say that that written contract is not admissible.

10 The Court: Didn't you bring out evidence on the part of this witness that there were three electric conveyors that he would like to have remain there on the premises until he could remove them?

Mr. Kimmel: That was at the time the deed was executed. He is talking prior to the contract now.

The Court: I will permit it to contradict those statements.

Mr. Cox: That is it.

20 Mr. Kimmel: I will take an exception.
(The question was read by the reporter.)

A. Ready to start, yes, but I didn't tell them about conveyors.

Q. And you told them that everything else was there? A. The roads was there and the shanty was there and the electric poles was there.

30 Q. Yes, and don't you recall telling Mr. Hill or Mr. Brett anything about these conveyors before you signed that contract? A. No.

Q. It was only just before the deed was signed? A. Yes, sir.

Q. I see. You are sure that Mr. Brett understood what you were talking about when you said something about those electric conveyors? A. Absolutely.

40 Q. Did you get over to the sand pits when the Great Notch Corporation was repairing those conveyors and putting new motors on them and putting new belting on them? A. No.

Alex Shapiro—Cross.

Q. Did you see the conveyors at the time that you went over to demand them back? A. I did.

Q. And they had new motors on at that time, didn't they? A. I didn't see if they had new.

Q. You say you saw the conveyors? A. I seen them running. They were running. I didn't go and examine them.

10

Q. The motors are right out in plain sight on the conveyors?

Mr. Kimmel: If counsel desires to testify I have no objection to him taking the stand. The man testifies he don't know whether they were old or new motors. Furthermore, it is not proper cross-examination. It wasn't brought out on direct.

The Court: I will permit that question.

20

Mr. Kimmel: I ask an exception.

(The question was read by the reporter.)

A. They are connected up with the conveyor, sure.

Q. Did you notice whether they were new or not? A. No, sir.

Q. How about the belting? Did you notice whether new belting had been put on? A. No, sir.

Q. Did you notice whether new pulleys had been put on? A. No, sir.

30

Q. You didn't notice anything about them? A. When?

Q. Although you stood there and saw they operating and were asking for them back? A. Yes, sir.

Q. How far were you standing away from them at the time that you demanded them? A. Just right around there, in the yard there.

Mr. Cox: I think that is all. Thank you.

40

*Alex Shapiro—Redirect.**Redirect-examination by Mr. Kimmel:*

Q. Hill was in the outside office at the time this conversation took place; is that the fact?

Mr. Cox: At the time which conversation took place, sir?

10 Mr. Kimmel: Relating to these conveyors.

Mr. Cox: In the outside office?

Mr. Kimmel: Yes.

Q. Of the Great Notch Corporation in Newark?

A. Yes.

Q. Who was present besides yourself? A. You were there.

Q. And the conversation was rather informal, wasn't it? A. Yes, sir.

20

Mr. Kimmel: That is all.

Recross-examination by Mr. Cox:

Q. The people that were in the office there at the time, they were doing work, were they not? It was a regular office force around there doing work? A. Yes.

30 Q. And the only conversation you had with Mr. Hill? A. Yes, that was on the inside.

Q. He was the man you were talking to? You weren't talking to the rest of the office force, were you? A. No.

Q. As far as you know, none of the rest of the office force heard what you said? A. No.

Q. No one else was called over to talk to you or anything else, were they? A. No.

40 Q. Your land had been opened up as a sand pit, had it not? A. Yes, that was opened up.

*Alex Shapiro—Recross.**Redirect-examination by Mr. Kimmel:*

Q. At that time Hill was looking at the stock quotations that morning and talking about stocks in general; isn't that a fact? A. Yes.

Q. And he sat down in a chair alongside of yourself and myself? A. Yes. 10

Q. When the talk about these conveyors arose? A. Yes.

Q. Is that correct? A. Yes.

Mr. Kimmel: That is all.

Recross-examination by Mr. Cox:

Q. He wasn't looking at the stock quotations at that time, was he? A. He was. 20

Q. He was? A. Yes.

Q. Didn't he understand what you said to him? A. Sure, he did. He must have.

Q. Did he stop looking at the stock quotations when you were talking to him? A. I suppose he did.

Q. You were right there. Don't you know whether he did or not? A. I can't exactly remember. 30

Q. Just stop and think. Did he or didn't he stop looking at the stock quotations at the time you talked to him about these conveyors? A. I suppose he did.

Q. Not suppose. Did he or did he not? A. Well, I guess he did.

Q. No, not what you guess, what you remember. Did he or didn't he? A. I couldn't tell you just exactly. He must have. He couldn't look at the stock and talk to me at the same time. 40

John L. Hill—Direct.

Q. Weren't you interested in those conveyors? You say you wanted them? Weren't you interested to make him stop and talk to you about them?

A. Make him stop?

Q. Make him stop reading the quotations long enough to tell you whether he— A. How can I make a man stop?

10

Q. Oh, I see. That is all, thank you.

JOHN L. HILL, sworn.

Direct-examination by Mr. David Kimmel:

Q. Mr. Hill, you are the vice-president of the defendant company? A. Yes.

20

Q. Your company still has possession of these three electric conveyors and you are using them?

A. Not at the present time.

Q. They are in your possession? A. Yes, they are in my possession.

Q. And you refuse to give them up to the plaintiff, the West Paterson Sand and Gravel Company? A. Yes.

Mr. Kimmel: Yes.

30

Cross-examination by Mr. Cox:

Q. Just one question. Mr. Hill, did you ever agree with Mr. Shapiro before the signing of the deed on March 30, 1929—

(Interruption.)

Mr. Cox: I will strike out that question.

Q. Before the time that the deed was signed,
40 conveying the property of the West Paterson Sand

John L. Hill—Cross.

and Gravel Company to the Great Notch Corporation, did Mr. Shapiro, the man who was just on the stand, say anything to you about—don't answer this question until after the Court rules—did Mr. Shapiro say anything to you about wanting to keep those three conveyors and you agreed to let him come in there at some future time and take them off the property? 10

Mr. Kimmel: I object to the question as improper cross-examination, not brought out on the direct.

The Court: Yes, I think that is so.

Mr. Cox: All right.

The Court: I will sustain the objection.

Mr. Cox: That is all.

20

WILLIAM H. TROWBRIDGE, sworn.

Direct-examination by Mr. David Kimmel:

Q. Mr. Trowbridge, you are connected with what company at the present time? A. Trowbridge Conveyor Company.

Q. And you have been in that business for how long? A. Since 1917. 30

Q. Are you familiar with portable conveyors? A. Yes, sir.

Q. Does your firm manufacture portable conveyors? A. Yes, sir.

Q. Did you have occasion in February of 1929 to take a look at the three conveyors owned by the West Paterson Sand and Gravel Company located upon this property in West Paterson? A. Well, we are supposed to call on all our customers and 40

William H. Tronbridge—Direct.

prospects every month, or twice a month if possible, and usually we get around to see all of our customers and inspect machines and look them over for the purpose of getting future business.

10 Q. Did you look over these three machines? A. I have been in the yard several times and seen the conveyors in there. In fact, we did considerable service on one of them.

By the Court:

Q. You are asked about February, 1929. What about February, 1929? That is what you have been asked about. A. Well, we have occasion to do work over there.

20 Q. No, no, what about February, 1929? A. Well, we have been in there in February; we have been in there in March.

Q. Were you there? A. Yes, sir, but that time I was on the selling force and I was selling conveyors.

The Court: All right.

By Mr. Kimmel:

Q. You were there in February, 1929? A. Yes.

Q. Did you see these three conveyors? A. Yes.

30 Q. What kind of conveyors were these, with reference to length? A. There was a thirty-footer with a sixteen-inch belt, and then there was a twenty-five-footer in there, too, and a forty-footer in there, belt conveyors.

Q. Did you look the conveyors over? A. Yes, I saw them there. I didn't give them—

Q. In what condition was the forty-foot conveyor?

40 The Court: What were you going to say? You didn't give them what?

William H. Trowbridge—Cross.

The Witness: We didn't give them close inspection; we just look them over to see if they are running, and as long as they are in a serviceable condition it is all right. We found that they were all what we call serviceable condition.

Q. What would you say was the fair market value of the forty-foot conveyor at that time? 10

Mr. Cox: May I cross-examine this witness as to the inspection he made first?

The Court: Yes.

Cross-examination by Mr. Cox:

Q. On March 1, 1929, they weren't running that sand pit, were they? A. Well, I have been in there a few times and I didn't see anybody there. I saw the conveyors in there. 20

Q. Did you go over and examine the conveyors minutely at that time? A. Well, we always look them over.

Q. Did you at that time? - A. Yes.

Q. You did? A. Yes.

Q. There wasn't anybody running it in February, either, was there? A. I didn't see anybody there. 30

Q. Did you examine them in February, too? A. That was in February.

Q. Now, there hadn't been any operations in the sand pit since the previous October or November, had there? A. Why, yes, there had been a little sand taken out of it from time to time.

Q. And you went over and made a minute inspection? A. No, we don't give what they call a detailed inspection. 40

William H. Trowbridge—Cross.

Q. What did you do at the time that you went over there in March to inspect these? A. We just walked in and looked around and didn't see anybody of the Great Notch; that is about all we can do.

10 Q. How close an inspection did you make of these conveyors? A. Well, we don't make an inspection; we just look them over.

Q. What did you do? Did you see them there on one end of the sand pit and see nobody around and turn around and go out? A. Yes, that is what we usually do.

Q. That is what you did in February, too? A. Yes.

20 Q. What about in December and January? A. We don't make a detailed or a thorough inspection unless we are told to do so.

Mr. Cox: If the Court please, I object to the question on the ground that this man is not familiar with their condition in March.

By the Court:

Q. Did you sell these conveyors? A. One of them, yes, sir.

Q. Which one? A. The thirty foot.

30 Q. Is that your business, selling conveyors? A. Yes, sir, building and selling, yes, sir.

Q. I see.

The Court: Well, it may go to the weight of the testimony, but I don't think it bars him from testifying on the subject. It may affect the weight of his testimony.

Mr. Cox: All right, sir.

*William H. Trowbridge—Redirect.**Redirect-examination by Mr. Kimmel:*

Q. In what condition was the forty-foot conveyor? A. It looked in very good condition.

Q. What would you say was the fair market value of that conveyor at the time you inspected the same? A. Well, in view of the fact that the conveyor is worth anywhere from a thousand to eleven hundred—

The Court: No, that is not the question.

A. It is worth six to eight hundred dollars as the resale value or trade-in.

Q. Is that what you would get for that conveyor in the open market if you went out and sold it at that time? A. Yes.

Mr. Cox: I object to it as being leading. 20

The Court: Yes.

Q. What would you say was the fair market value of the thirty-foot conveyor, the one that you sold to the West Paterson Sand and Gravel Company? A. About four or five hundred dollars.

Q. And the twenty-five-foot conveyor? A. About three or four hundred dollars.

Q. And you serviced these conveyors for the Great Notch people after March '29, didn't you? A. No, sir. 30

Q. Did you sell any parts to them? A. We sold them considerable parts.

Q. For these conveyors? A. I don't know whether they were for these conveyors or not. They bought the material and did the work themselves, I understand.

*William H. Trowbridge—Redirect.**By the Court:*

Q. Before or after March 30? A. This was—I have the records right here when the material was purchased.

Q. When was it? A. This was in August. \$126, August 29.

10 Q. What year? A. 1929. Then there was another invoice of August 12, 1929, of \$125; and then there is another little invoice of September, 1929, of \$1.30; the material was then merely delivered or called for. One was a belt for the twenty-five foot conveyor and a belt for the thirty-foot conveyor.

Q. That is new belts? A. Yes, sir.

The Court: All right.

20 *By Mr. Kimmel:*

Q. The Great Notch has other conveyors other than these three in question? A. The only machinery I saw there for handling sand was the crane or shovel, whatever you call it.

Q. But, I say, the Great Notch has other conveyors other than these three conveyors in question? A. Not of ours.

30 Q. Not of yours? A. They have other conveying material equipment over there, but not of ours.

Q. You don't know whether this material that they bought was used for their conveyors or not? A. I couldn't swear to it, because they took it themselves.

40 Q. Do you know whether or not these conveyors were in use between March and August of 1929? A. Yes, our men has reported that they have seen them in operation and I have seen them in operation.

William H. Trowbridge—Recross.

Q. Before August of 1929? A. Oh, yes.

Mr. Kimmel: That is all.

Recross-examination by Mr. Cox:

Q. At the time that you inspected these conveyors in March did you notice whether there were any electric motors on them at that time or not? 10

A. Why, I believe I saw two other—one had no motor on it and the other two had motors on.

Q. You are sure there wasn't one that had a motor on and the other two that didn't? A. What is it?

Q. Are you sure it is not the other way around? A. It has been so long ago that I don't quite recollect. 20

Q. Of course, the electric motor is quite an item in the value of a conveyor, isn't it? A. Surely, they would be useless without it.

Q. Did you see anything about the—notice anything about the belting on the conveyors? A. Well, the belting on the big machine looked fairly good, that is, the forty-footer. The others looked as if they had been used.

Q. Did you inspect the idler on the conveyor? A. What do you mean, idler? A conveyor has several idlers. 30

Q. Did you inspect any of them? A. They looked in what we call serviceable condition.

Q. Did you notice whether any of the idlers had been what they call chewed or not? A. Well, they showed considerable wear.

Q. Did you notice whether any pulleys were gone from these conveyors? A. Pulleys?

Q. Yes. A. You mean the head pulley and the tail pulley? 40

William H. Trowbridge—Redirect.

Q. Yes. A. No, they were all there when I saw them.

Q. On all three of them? A. Yes.

Q. You are sure about that? A. Quite sure. I saw the machines at different times, and it would be difficult for me to say what day I saw them.

10 Q. I see. Did you ever stop back at the sand pits after March of 1929? A. Yes, we delivered a machine to a neighbor there a short time ago, and we always occasionally run in to see the other customers when they happen to be near by.

Q. What were the dates you said you sold that material to the Great Notch Corporation on? A. What?

Q. The dates. A. The dates?

Q. Yes. A. August, 1929, and September.

20 Q. Do you know whether or not those conveyors were put in use by the Great Notch Corporation before July of 1929? A. They were using them—well, I don't know. I couldn't say whether they were using them or not. Whether they were running or not I couldn't say. I saw they were there and I supposed they were using them.

Mr. Cox: That is all.

30 *Redirect-examination by Mr. Kimmel:*

Q. Mr. Trowbridge, in the course of your work have you ever had occasion to do—to supply these machines, these conveyors, to the United States Government? A. Certainly.

Mr. Cox: If the Court please, I object to that as not being proper redirect, and being incompetent and immaterial, besides.

40

William H. Trowbridge—Recross.

The Court: What bearing has that on the subject? Strike it out.

Q. And when you say the—when you mentioned the values that you testified here to a moment ago, you took into consideration the condition of the machines as of the time that you saw them, that is, in February? A. Yes, sir. 10

Mr. Kimmel: That is all.

By the Court:

Q. But did you examine them closely? A. We don't inspect them unless we—we don't inspect them thoroughly unless we get an order to there and give a quotation on repairing them.

Q. And you had no order to that effect? A. No, sir, just called casually in order to pick up new business. 20

Mr. Kimmel: That is all.

Recross-examination by Mr. Cox:

Q. Your estimate of values might be incorrect, however, inasmuch as you didn't make a very thorough examination in March, might it not? A. I didn't get that. 30

Q. I say, your estimate of values of these machines, however, might be incorrect inasmuch as you didn't make a thorough examination in March to see what their condition was? A. No, lots of times we give a good liberal credit allowance on a trade-in without even inspecting the conveyors.

Q. We are not talking about trade-in allowance; we are talking about the market value. A. That 40

William H. Trowbridge—Redirect.

would be the market value, because we would probably get more than we allowed for it. If we allowed three or four hundred dollars we would be sure of getting more for it.

Q. Could you tell how much it was worth without going over and carefully inspecting it? A. Yes.

10 Q. Without going over and carefully inspecting it? A. Yes.

Q. Thank you, sir.

Redirect-examination by Mr. Kimmel:

Q. Have you ever done that during the past fifteen years? A. Lots of times.

20 Mr. Kimmel: That is all. The plaintiff rests.

The Plaintiff rested.

 DEFENDANT'S TESTIMONY.

JOHN L. HILL, recalled.

Direct-examination by Mr. Cox:

30 Q. Mr. Hill, you are the vice-president of the Great Notch Corporation? A. Yes.

Q. On March 18, 1928, was a contract made between the Great Notch Corporation and the West Paterson Sand and Gravel Company? A. Yes.

Q. I show you this contract which has been marked D-1 for identification and ask you if that is the contract that was made and signed by both parties at that time. A. Yes, that is the one.

John L. Hill—Recalled—Direct.

Mr. Cox: I now offer it in evidence.

Mr. Kimmel: I object to the offer on the ground that the contract merged in the deed and on the further ground it is incompetent, irrelevant, and immaterial for the purpose of the issues raised here.

The Court: Yes, I think we have reached 10
the point now where it is proper to consider it. Let me have the copy of the contract. On what theory, Mr. Cox, do you say it is admissible?

Mr. Cox: It is admissible, sir, in the first place, because the plaintiff has not shown any merger up to the present time, so I am rather surprised that he objects. In other words, if there was no contract there is nothing to be merged by the deed. Now, if he 20
objects that going in I feel that we have a right to show that there was—

The Court: I suppose that is so.

Mr. Kimmel: In his opening he says that there was a contract, that there was a deed. We say that that deed took in, merged the contract.

The Court: Suppose he did say it in his opening and suppose he didn't produce the 30
contract?

Mr. Cox: I didn't say the deed merged with the contract.

Mr. Kimmel: No, but you did say that there was a contract drawn on March 18.

The Court: Well, I think I will admit it and allow you an exception.

Mr. Kimmel: And allow an exception.
(Paper marked D-1 in evidence).

John L. Hill—Recalled—Direct.

10 Mr. Cox: May I ask the Court for a ruling on the other point brought up by Mr. Kimmel as to the interpretation of that section of the contract, to save time in the trial of this case? Whether the Court wants evidence to show what the intention of the parties was by that section. If so, I am prepared to offer it. Our contention is that the section is clear and speaks for itself; it needs no evidence to substantiate it, that it includes these conveyors.

20 Mr. Kimmel: I say it is a matter of strict legal construction, a Court question pure and simple, and the Courts have universally held that where general terms follow specific terms they refer specifically to the terms that preceded, and nothing else.

(Discussion).

The Court: I think we will take a recess at this time to consider the matter.

(A recess was taken until 1:15 o'clock P. M.)

30 Afternoon Session.

(Before court convened the Court and counsel conferred in chambers).

JOHN L. HILL, resumed.

Direct-examination (continued) by Mr. Cox:

40 Q. Mr. Hill, will you please talk up so we can all hear what you say? Did you meet Mr. Sha-

John L. Hill—Recalled—Direct.

piro, the man sitting right here, before March 18, 1929, the date on which that contract was signed?

The Court: Let me ask counsel at this time: Is there going to be any objection on the question of agency or is it going to be agreed?

Mr. Kimmel: As far as Hill being an agent of the company there is no question, and as far as Shapiro being an agent there is no question. 10

The Court: So that we will get that question straight.

Mr. Kimmel: There is no question about that, Judge.

(The question was read by the reporter).

A. Yes.

Q. And at that time did you have any conversation with him as to the purchase of the sand pit? 20

Mr. Kimmel: Now, if the Court please, I will object to that on the ground, first—

The Court: As to the purchase of the conveyors.

Mr. Cox: Yes, sir, I am leading up to that. 30

Q. The purchase of the conveyors? Limit it, now, to the personal property section of the contract.

Mr. Kimmel: I will object to that on the ground, first, that the contract merged in the deed.

The Court: Yes.

Mr. Kimmel: I want to take my exception to that. 40

John L. Hill—Recalled—Direct.

Second, because the construction of the words, "Other personal property," used in and about the premises, refer to that type of property mentioned before the use of those terms, to wit—

10 The Court: You had better get the exact wording of that contract. "And all other personal property appurtenant to or used in the operation of said premises are represented to be owned by the seller and included in this sale."

20 Mr. Kimmel: And that those words refer to the preceding terms, to wit: "Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleums, mats and matting in halls, screens, shades, awning, ash cans, heating apparatus, if any," and to such terms only, and that it could not be extended to include the three conveyors in question.

The Court: I will overrule the objection and allow you an exception.

Mr. Kimmel: Yes, sir.

30 And thirdly, on the ground that the question is in violation of the parol evidence rule as set down by Naumberg against Young, that the contract was consummated and already merged in the deed, and that no evidence can be introduced that would alter, vary, or impair, or contradict, rather, the written terms.

The Court: Yes, all right.

(The question was read by the reporter as follows:

40 "Q. Did you meet Mr. Shapiro, the man

John L. Hill—Recalled—Direct.

sitting right here, before March 18, 1929, the date on which that contract was signed?"

Q. That applies just as to conversation regarding the conveyors as to whether the conveyors went with the sand pit or not. A. Why, we discussed

Mr. Kimmel: Yes or no.

10

Q. Answer that yes or no. A. Sand pit and conveyors; is that it? Yes.

Q. Yes. And what was said by Mr. Shapiro about the conveyors going with the sand pit?

Mr. Kimmel: I object to it as a leading question. You should relate the conversation.

Q. All right, will you relate the conversation?

20

Mr. Kimmel: And I will ask the Court at this time to allow me an exception to this entire line of questioning.

The Court: Is this the sand pit again?

Mr. Cox: Yes.

The Court: No, the conveyors.

Mr. Cox: No, I said to him, "What was the conversation regarding the conveyors going with the sand pit?" Mr. Kimmel has objected to that as being leading and so I have asked him, "What was the conversation," at Mr. Kimmel's suggestion—

30

Mr. Kimmel: Conversation relating to these conveyors.

Q. All right, relating to the conveyors, what was the conversation? A. Why, I don't recall any conversation relating specifically to any convey-

40

John L. Hill—Recalled—Direct.

ors. It was the sand pit and all the stuff that was there.

Q. What was said? A. Why, that—

10 Mr. Kimmel: Now, if the Court please, I am going to object to the question on the ground they were to limit the conversation just to the conversation as to conveyors, and he says he doesn't recall anything said about the conveyors, and that is binding on counsel, this being his own witness. It is Mr. Hill being Mr. Cox's own witness.

Mr. Cox: That can be answered subject to being stricken out if it is not responsive.

The Court: If it is not responsive I will strike it out.

20 Q. What was said, Mr. Hill? A. Why, when we discussed the price on it and the amount he wanted, why, we couldn't agree at all on what it was. And then he pointed out that all the stuff that they had up there, the equipment, his house, his office, as he called it, and everything like that and the place already opened, was worth quite a lot of money, and that we had everything there and all we had to do is bring in our crane and start
30 operation, and the understanding was—

Mr. Kimmel: Don't tell us the understanding.

Q. No, just what was said? A. Well, he said, "I am selling you everything up there."

40 Mr. Kimmel: I move to have it stricken out as not responsive, as limited by your Honor's ruling.

John L. Hill—Recalled—Direct.

Mr. Cox: I think it is responsive.

Mr. Kimmel: He testified positively that there was nothing said about the conveyors. That is what I understood him to say at the outset, and your Honor has ruled that you would only permit—

The Court: No, I won't strike out the answer. 10

Mr. Kimmel: I ask an exception.

Q. Now, at the time that the contract was brought to you to sign, Mr. Hill, who brought the contract to you? A. Why, Mr. Shapiro and his attorney came in and, if I remember right, we drew up something for him to sign. His attorney studied it very closely and we changed, I would say, at least four times to suit the two of them. This was the final outcome. 20

Q. This contract I showed you is the contract which was signed after those alterations were made? A. Yes.

Q. Now, calling your attention to March 30, 1929, the time that you signed the deed, or, rather, at the time you received the deed, that was delivered to you where? A. Why, if I remember right, it was brought into our office in Newark, but Mr. Deans of Passaic made this deed up. 30

Q. Did Mr. Shapiro come at the time? A. Yes, he came down.

Q. At that time was anything said by Mr. Shapiro about his conveyors being frozen in the sand and his wanting to leave them up there until the season began and then come up and get them? A. No.

Q. Are you sure about that? A. Sure.

Q. Did you pay attention to what Mr. Shapiro 40

John L. Hill—Recalled—Direct.

said at the time? A. I thought I heard everything he said.

Q. You were with them until the deed was signed, were you? A. It was brought down and signed.

10 Q. Yes. Now, there has been some conversation here—withdraw the question.

There has been some evidence given this morning that at the time that you signed the deed or at the time they came and gave you the deed you were very much interested in the stock market report; is that so or not? A. I don't think it is possible.

Mr. Kimmel: Yes or no. Just let us have a yes or no answer.

20 The Witness: No.

Q. Did you own any stocks at that time? A. No.

Q. Do you know when those conveyors were put in use after March 30 of 1929? A. Why, it was near the first of July.

Q. Did you know or do you know when they were repaired? A. No.

Mr. Cox: Cross-examine.

30 *Cross-examination by Mr. Kimmel:*

Q. Mr. Hill, Mr. Brett is the general superintendent for the defendant, isn't he, in charge of operations? A. He is in charge of that particular operation.

Q. Yes, at West Paterson? A. Yes.

Q. Is he in court? A. Yes.

40 Q. Where is he? Point him out.

John L. Hill—Recalled—Cross.

Mr. Cox: Mr. Brett, will you stand up?
(A gentleman arose in the court-room).

Q. You are a pretty shrewd business man, aren't you, Mr. Hill?

Mr. Cox: I object to it as being immaterial and being an unfair characterization. 10

The Court: Yes, I hardly think that is relevant. I will sustain the objection.

Q. How long have you been in this business, Mr. Hill? A. Eighteen years.

Q. Yes. Why didn't you have the three conveyors inserted in the contract if you intended to get them, with the purchase of those goods? A. I didn't consider them worth it.

Q. You didn't consider them worth it so you didn't want them? A. Certainly. 20

Q. Why did you retain them if you didn't want them? A. Why, my understanding was we bought everything.

Q. Why did you retain them if you didn't want them, not what your understanding was? A. Why, they were rebuilt and put in service.

Mr. Cox: Just a minute.

Q. I didn't ask you that. Why did you retain them if you didn't want them? A. Because we paid for them. 30

Q. Because you paid for them? A. Yes.

Q. As a matter of fact, Mr. Hill, your company owns all the surrounding land back of this particular tract of land that was sold by the West Paterson Sand and Gravel Company; isn't that so? A. Yes.

Q. And the reason that you wanted this partic 40

John L. Hill—Recalled—Cross.

ular piece of land was so that you could get a road running to your back property onto the main highway, isn't that a fact? A. No.

Q. Have you made a road through the property?
A. No.

Q. Was there a road through that property? A.
10 Yes.

Q. And it leads to the back of your property?
A. There is a road leading to our property before.

Q. And you use that road, don't you? A. Certainly, we use it.

Q. As a matter of fact, you remember Mr. Shapiro and myself coming down to your office in Newark on the morning of March 30, 1929? A.
Yes.

20 Q. Do you remember me being there? A. Yes.

Q. Do you remember coming into the office and throwing a paper down on the desk nearest the window and looking over the stock sheet? Yes or no. A. No, I don't remember.

Q. This was on March 30, 1929, wasn't it? On March 25th and 26th of 1929 there was a severe crash in the market, wasn't there; that was the first big break?

30 Mr. Cox: If the Court please, I don't see how that is material to this issue.

A. I don't remember that. I wasn't enough interested at that time to keep the date. I know that there was a crash.

The Court: I will permit it.

Q. What is that? What is that?

40 Mr. Cox: I ask an exception.

John L. Hill—Recalled—Cross.

(The answer was read by the reporter).

Q. And Ryan or Raines, that little fellow—

Mr. Cox: Raines.

Q. And Raines was running in and out of his private office while you, Mr. Shapiro, and I were sitting in the chairs of the outside office—do you remember that—very busy, because it happened on a Saturday morning and he had a number of things to attend to? Do you recall that? A. Why, he was in and out. I didn't see how fast he traveled. 10

Q. Don't you recall the conversation you had with Mr. Shapiro in my presence in respect to his electric poles that Mr. Shapiro had installed on that property, and during which time you said, "Now, Shapiro, what is the use of you taking those poles out? They are no use to you? They will cost us forty dollars to put each pole in. Let us have them." And don't you remember that Shapiro said, "You can have them"? Don't you remember that? A. I don't remember that. 20

Q. You don't remember that? Now, you testified on direct-examination about changes being made in this contract; is that correct—marked plaintiff's exhibit 1? A. I testified to changes made? Yes. 30

Q. Yes. Where are the changes in this contract? A. I say before we finished it.

Q. Well, where are the changes? Just point them out.

Mr. Cox: I object. He didn't say it was on that particular contract.

Q. What changes were made? A. Why, some wording. 40

John L. Hill—Recalled—Cross.

Q. What wording was it? A. Why, my original draft was that we bought everything up there, something to that effect, and you wanted to change that a little, and I thought you covered everything in that clause.

10 Q. You didn't want to change it? A. I didn't want to change.

Q. But we did want to change; is that the idea? Is that what I understand you to say? A. Well, mostly—

Q. You say we wanted to change it? A. You changed wordings in a number of cases.

Q. Yes. And if the crane that was owned by the West Paterson Sand and Gravel Company, that big crane that was up there, that cost twenty thousand dollars, would you want that, too?

20 Mr. Cox: Just a minute. If the Court please, I object to it as being entirely immaterial.

Mr. Kimmel: You brought out the question of intent.

Mr. Cox: Oh, no.

The Court: I will sustain the objection.

Mr. Kimmel: I will ask for an exception.

30 Q. As a matter of fact, this contract was drawn in the office of the Title Guarantee Company of Passaic, wasn't it? A. That is my recollection.

Q. Yes, and the contract was drawn there by your attorneys; isn't that right? A. It is.

Q. And it was brought up to you for signature after your attorneys in Passaic had advised you in Newark that it was O. K. for you to sign it? A. Did you say deed or contract?

40

John L. Hill—Recalled—Cross.

Q. I said contract. A. That contract was drawn up in Newark.

Q. It was drawn up in Newark? Who drew it up? A. Why, it was a mixture between you and a few others.

Q. As a matter of fact, I wasn't there when the contract was drawn, Mr. Hill; I was only there when the deed was executed and delivered. A. Well, I might have your brother mixed up. It might be possible. 10

Q. And you might be wrong in other things that you have testified here today, too; isn't that right? You might be mistaken? A. It is possible.

Q. Yes, and it is possible that you never had any conversation with Shapiro about the other property on the premises going with the land, too? That is possible, too, isn't it? A. I am positive that we had that conversation, that all property was to go with all this stuff that was laid out for the operation of the sand pit. 20

Q. As a matter of fact, you had done business with the West Paterson Sand and Gravel Company before, hadn't you? A. Yes.

Q. And you had given them notes from time to time on some of the work that they had done; is that right? Is that right? A. We have done business together for some time. 30

Q. And you gave them notes at various times; is that right?

Mr. Cox: If the Court please, I object to that.

A. I didn't handle that. Pardon me.

Mr. Cox: I don't see how that is material. 40

John L. Hill—Recalled—Cross.

The Court: How is that relevant, Mr. Kimmel?

Mr. Kimmel: Will you allow me to ask the next question? I think it will answer it.

10 The Court: I don't know anything about the next question. I am asking you about the present question.

Mr. Kimmel: I haven't connected it up yet.

The Court: All right.

A. And you took two per cent. off on notes, didn't you?

Mr. Cox: I object to that. That is obviously immaterial.

20 Mr. Kimmel: It shows he is a shrewd business man, that is what it shows.

The Court: I will sustain the objection.

Mr. Kimmel: All right.

The Court: I don't know how shrewd he was if he got caught in this market crash.

30 Q. But yet you had nothing specifically set out in the contract with respect to these conveyors, did you? Yes or no. Yes or no. A. Well, if I understand the contract, yes.

Q. What do you mean there by the words "understand the contract"? A. Why, there was a lot of things such as pump handles and so forth and all up there in this place that I thought we were buying, everything, and I think the contract says that we were to get everything.

40 Q. You thought you were buying everything? A. As near as I could read the contract, that is what we were getting.

John L. Hill—Recalled—Cross.

Q. How many acres of land was this particular parcel of land that was conveyed to your company? A. Supposed to have five acres.

Q. And two thousand dollars is easily a fair price for that land, isn't it? A. Oh, no.

Mr. Cox: I object to that.

Mr. Kimmel: All right, withdraw the question. 10

Mr. Cox: Oh, no, leave the answer stand.

Q. And you are using these conveyors in the use of the company's business at the present time; is that right? Yes or no. A. I can't answer.

Q. What are you doing with those conveyors now? A. At the present time they are idle, if they are being used at present.

Q. They are being used at present? A. They are not. 20

Mr. Cox: I didn't hear that.

Mr. Kimmel: Pardon me?

The Court: "They are not," he said.

Q. Were they ever used by your company? A. Yes.

Q. Yes. For what purpose? A. For the purpose of operating the sand pit. 30

Q. And you have other sand pits, too, haven't you? A. No.

Q. You have got other land back of this tract, haven't you? A. We have got land, but I wouldn't call it a sand pit.

Q. And you can cart these conveyors from one place to another for use at various places, can't you, Mr. Hill?

John L. Hill—Recalled—Cross.

Mr. Cox: If the Court please, I don't see how this is material.

A. I don't think so. Possibly you can.

The Court: He says no.

10 Q. You don't think so? These conveyors have wheels on them; they are portable, aren't they?

Mr. Cox: Just a minute. I want to object as being immaterial. We are consuming a lot of time on immaterial issues.

The Court: How is it material?

20 Mr. Kimmel: In the first place, it shows the character of the property; in the second place, it goes to the credibility of the witness. The man says that he can't take them around from one place to another, a portable conveyor that has wheels on. Certainly, it goes to credibility.

Mr. Cox: We admit they are portable. It is immaterial whether he carried them or not.

The Court: I guess he answered that part of it.

A. Can I say a word?

30

The Court: No, just answer questions.

Mr. Kimmel: That is all.

DAVID L. BRITT, sworn.

Direct-examination by Mr. Cox:

40 Q. Mr. Britt, you are the superintendent in charge of operations for the Great Notch Corporation? A. Yes.

David L. Britt—Direct.

Q. And you were superintendent in March of 1929? A. Yes.

Q. And before that time how long had you been superintendent of operations? A. Nearly six years, practically six years.

Q. Six years. And prior to the time—prior to March 18, 1929, did you ever have any conversation with Mr. Shapiro regarding the electric conveyors on the sand pit of Mr. Shapiro, relative to the purchase of them? 10

Mr. Kimmel: A yes or no answer, please.

Q. Answer yes or no. A. Yes.

Q. Will you tell the Court and jury what that conversation was? A. Why, while we were dicker- ing for this sand pit, that is, he wanted to sell the sand pit— 20

Q. Yes? A. And he said he would sell—

Mr. Kimmel: Just a moment, before we go further. I would like to have the date fixed for this conversation. I think it is important.

Q. Do you remember the date?

The Court: He said prior to March 18. He didn't say how long prior. 30

Mr. Kimmel: I would like to have the date fixed.

The Court: All right.

A. It was either the latter part of February or the first of March, around.

Mr. Kimmel: I will ask that my excep- tions be sustained right down the line to this line of questioning, as I had originally 40

David L. Britt—Direct.

listed them, with the Court's permission.

The Court: You are going to produce evidence as to just what happened prior to the entering into the contract, aren't you?

Mr. Cox: None further than I have already produced.

10 The Court: I mean, you are not going into conversation a month before as to what they might be talking about?

Mr. Cox: No, these are general conversations right down to the time the contract was signed, and I think Mr. Shapiro first talked to Mr. Britt.

20 The Court: Well, a general conversation isn't going to be anything. As to what the agreement was that was to be put into the contract, I understand.

Mr. Cox: All right, I will withdraw the question, then.

Q. Mr. Britt, did you have any conversation with Mr. Shapiro before March 18, 1929, as to whether or not the electric conveyors were to be included in the agreement of sale to the Great Notch Corporation?

30 The Court: Yes or no.

Mr. Kimmel: I object to the question on the same ground, for the three reasons I have outlined previously.

The Court: That is right. I will overrule the objection and allow you an exception.

By the Court:

40 Q. Your answer will be either yes or no to that question. A. Yes.

David L. Britt—Direct.

Q. The answer is, "Yes"? A. Yes.

By Mr. Cox:

Q. Now will you tell the Court and jury what that conversation was?

By the Court:

Q. When was it? When was it? A. I can't say the exact date, but it was either the latter part of February or the first of March, around. About between the two months.

10

Q. All right. A. And he said if we got that we would get everything that would go along with it, all we would have to do was put the crane there and start to operate.

By Mr. Cox:

20

Q. Were you familiar with Mr. Shapiro's sand pit before it was purchased by the Great Notch Corporation? A. Yes.

Q. And the operation of the sand pit? A. Yes.

Q. Did Mr. Shapiro use a crane in operating his sand pit in addition to the electric conveyors before it was sold to the Great Notch Corporation?

Mr. Kimmel: I object to the question as incompetent, irrelevant, and immaterial.

30

The Court: I will sustain it.

Mr. Cox: If the Court please, I think it is very material for this reason, that Mr. Shapiro himself has said that he told Mr. Hill, and I am not sure whether he admitted he told Mr. Britt or not, that the only thing that would be necessary for the Great Notch Corporation to supply would be a crane. On the stand he testified that what

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David L. Britt—Direct.

10 he meant by that was that the only thing they had to do was to put a crane in there and load it on the trucks and we didn't need conveyors. I want to show that when he himself operated the sand pit all he did with the crane was loosen it up, that it was loaded on the trucks by these electric conveyors. That is the usual—

The Court: Was there evidence on that subject to that effect?

Mr. Martin Kimmel: That is their evidence on cross-examination of our witness.

Mr. Cox: That is what their witness said.
Mr. Martin Kimmel: On your cross-examination.

20 Mr. Cox: You are bound by what he said, whether it is cross-examination or not.

The Court: I will sustain the objection and allow you an exception.

Mr. Cox: I ask an exception, if the Court please.

Q. Was a demand ever made upon you by Mr. Shapiro for the return of those electric conveyors? A. No.

30 Q. And were you around the sand pit after its operation commenced? A. Yes.

Q. When were the electric conveyors repaired and put back into use?

Mr. David Kimmel: I object to the question as incompetent, irrelevant, and immaterial, and has no bearing on the issues raised by the pleadings.

40 Mr. Cox: Except this: that the plaintiff himself testified he was up there three weeks

David L. Britt—Direct.

after the sale and found that the conveyors were then being run at that time, and that is when he saw them and that is when he demanded—

Mr. David Kimmel: He didn't say anything of the kind.

Mr. Cox: If you want to, read back the testimony. 10

Mr. Kimmel: Yes, we will.

The Court: I think there was some evidence on your part regarding the conveyors.

Mr. Kimmel: There was some evidence that he went to the premises, I understand, some time after the deed was given and saw them in operation.

Mr. Cox: He said three weeks. 20

Mr. Kimmel: Not three weeks. I recall that specifically. The testimony was that he was there three weeks and made demand upon them, but they were in operation sometime after that. That was the testimony.

(Discussion.)

The Court: I will let you ask him if they were in operation then.

Q. When were those conveyors put in operation, Mr. Britt? A. After the 1st of July. 30

Q. Now, are you familiar with electric conveyors? A. Yes.

Q. How long have you been familiar with them? A. Why, I guess for the last ten or fifteen years. About ten years, anyhow.

Q. And what was the condition of these conveyors when you got there on March 30, 1929? A. 40

David L. Britt—Direct.

Why, the twenty-five-foot conveyor didn't have any belt on it.

Q. What else was the matter with them? A. The pulley was—the tail pulley was off, the idlers were very much worn. The thirty-foot conveyor was buried in the sand.

10 *By Mr. Kimmel:*

Q. What is that? A. The thirty-foot conveyor.

Q. How far was that buried? A. I would say about six feet.

Q. Buried six foot in the sand.

By Mr. Cox:

Q. The twenty-five-foot conveyor, where was that? In the sand or out? A. The twenty-five-foot conveyor was down near the office garage there.

Q. Was that buried at all? A. No, not a bit.

Q. What was the condition of the thirty-foot conveyor? A. The thirty-foot conveyor didn't have any motor on it. None of the conveyors had motors on it, not a single one of them.

Q. And what else was there? A. The belt was in bad shape; it had been covered up for the winter in the sand.

30 Q. Was it necessary to put a new belt on it before it could be operated? A. The thirty-foot conveyor could be by fixing up some of the idlers and lining it up; it could be operated at less than a full load. You couldn't put a full load on it.

Q. And the other conveyor, what size was the other conveyor? A. It was a forty-foot conveyor.

Q. What was the condition of that? A. The belt was cut in a couple of places. It was neces-

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David L. Britt—Direct.

sary to put in a six-foot piece before it could be operated.

Q. What was the condition of it other than that?

A. And the chain was off, no motor on it, and it was—several idlers had to be lined up, tuned up and put in good running condition.

Q. And do you have any connection with the buying and selling of material and equipment for the Great Notch Corporation? A. For the buying of supplies and things like that, yes. 10

Q. And disposing of used machinery?

Mr. Kimmel: Yes or no.

A. Yes.

Q. And for how long have you had charge of that? A. Well, that is along in my line since I have been superintendent of it. 20

Q. Do you know the market value of those conveyors on March 30, 1929, when you got over there? Just answer it yes or no.

Mr. Kimmel: I object to that.

A. Yes.

Mr. Kimmel: Well, it was just yes or no, sir.

Q. What was the value of the three conveyors on March 30, 1929? 30

Mr. Kimmel: I object on the ground that the witness has not been properly qualified.

A. Approximately,—

The Court: Do you want to cross-examine him?

Mr. Kimmel: Yes.

*David L. Britt—Preliminary Cross.**Preliminary cross-examination by Mr. Kimmel:*

Q. How many conveyors have you bought in the last year? A. How many conveyors?

Q. Yes. A. Only these conveyors that we have.

10 Q. How many did you buy last year, Mr. Britt? That is a simple question. A. Portable conveyors or stationary?

Q. Portable conveyors. A. Portable?

Q. Yes. A. Only this bunch was in the sand pit.

Q. How many did you buy the year preceding? A. No portables.

Q. How many in 1926? A. No portables. Never bought any portables.

Q. 1925? A. None.

20 Q. 1924? A. No, sir, no portable conveyors.

Mr. Kimmel: I object to the qualification of this witness as not showing a proper foundation for his expertness.

30 Mr. Cox: If the Court please, here is a man who went in and who was working in that general line of business, running that. He says he knows the value of this equipment new, and he must have some idea of what it cost to repair and put it back in running order. I think he can give some idea. It may not be as weighty evidence as other evidence might be, but I think he is qualified to give his opinion.

By the Court:

Q. Did you put them back in running order? A. We did.

40

David L. Britt—Direct.

The Court: Well, I suppose you can find out what expense he went to in putting them back in running order.

Direct-examination (continued) by Mr. Cox:

Q. How much did it cost the Great Notch Corporation to put those back in running order? A. About \$601, I believe it was, for the material; that don't include the motors. 10

Q. It doesn't include the motors? A. It doesn't include the motors.

Q. Where did you get the motors from? A. One of the motors we had already at the quarries; another one we bought with a feeder which we didn't use, and two of the motors we had at the quarry. 20

Q. So that you took motors from other places and put them on these machines? A. Yes.

Q. What were the value of those motors, if you know?

Mr. Kimmel: I object on the ground that the man has not been properly qualified.

The Court: If he bought or sold or dealt in conveyor motors—

Mr. Cox: I will withdraw the question. 30

Q. What did those motors cost the Great Notch Corporation? A. Well, we bought those motors at different times with other machinery.

Q. What machinery—all right.

Mr. Cox: I am going to ask the question again, for a ruling.

Q. What, in your opinion, were those three conveyors worth on March 30, 1929? 40

David L. Britt—Direct.

10 Mr. Kimmel: I object to the question, as the witness has not been properly qualified, and I point out to your Honor that the case of Teets v. Hahn, cited by counsel, refers to the repairs rather than value. I mean to say that we have got to have somebody that knows values in order that a basis for valuation can be fixed. Any outsider can't come in and fix a value on a conveyor when he has not dealt or traded in them.

(Discussion.)

The Court: You are not asking him on the theory that he bought them, are you?

20 Mr. Cox: No, not on the theory that he bought them, but as to what they were worth as they lay there in that sand pit before any repairs were made to them.

Mr. Kimmel: And that requires expert testimony.

The Court: I don't know that it does.

Mr. Kimmel: He says he never bought or sold any of these for the past five years; the only thing he knows is these three conveyors that came into possession of the Great Notch.

30 The Court: No, I will permit it.

Mr. Kimmel: I will take an exception.

By Mr. Cox:

Q. What was the value of those three conveyors as they were there in the sand pit in March, 1929?

A. In the condition they were in, not over five hundred dollars for the three of them.

40

Mr. Cox: Cross-examine.

*David L. Britt—Cross.**Cross-examination by Mr. Kimmel:*

Q. As a matter of fact, a forty-foot conveyor costs close on to twelve hundred dollars to build new?

Mr. Cox: I object to that on the ground their own testimony is only \$1,050.

10

Mr. Kimmel: What we paid for it and what it cost new is an entirely different proposition.

The Court: I will permit it.

(The question was read by the reporter.)

Q. Is that right? A. I wouldn't think it would cost that much.

Q. As a matter of fact, doesn't it cost twenty-five dollars a foot without the motor to build that forty-foot conveyor? A. That I couldn't say.

20

Q. So you don't know the prices, really, of this new machinery, if you sent out to buy them? A. I can't tell you the price on new machinery today, no.

Mr. Cox: I object to that.

The Court: I will permit it.

Mr. Cox: May I call the Court's attention to this: He is asking now about the cost of building. He may know the market value—

30

Mr. Kimmel: The cost to build a machine of that type or the selling price.

Mr. Cox: If you ask me how much it costs to build a Packard car I don't know; I can tell you what the market value is.

The Court: It may be an unfair question.

Mr. Cox: He says then he is discrediting my witness. It is not a fair comment.

40

David L. Britt—Cross.

Q. Do you know what the selling price per foot of that forty-foot conveyor was without the motor?

The Court: Now, you mean?

Mr. Kimmel: Now, yes.

A. Approximately, around—without the motor?

10 Q. Without the motor I am talking about now. It is a forty-foot conveyor. What would be the price per foot? A. Approximately, around \$875 without the motor. That is for the outfit, not per foot.

Q. It would cost about \$875 new without the motor? A. I imagine that is what it would. I couldn't tell you exactly the price.

Q. You can't say exactly?

20 *By the Court:*

Q. And what with the motor? A. The motor is a five-horsepower motor in the conveyor, and it costs around \$125 for a motor.

By Mr. Kimmel:

Q. So it would cost around a thousand dollars for that machine new, that forty-footer; is that right, Mr. Britt? A. I imagine in that neighborhood.

30 Q. And that machine was practically new when you took possession of it; isn't that a fact? A. No, sir, it had been used about a year and a half.

Q. How much money did you spend to put this conveyor in shape? A. I won't say just on that particular conveyor.

Q. I am talking about this particular conveyor. We will take them up one by one. A. Because we got them, all three of them together.

40

David L. Britt—Cross.

Q. How much did it cost to put this one conveyor in shape?

Mr. Cox: If you know, Mr. Britt.

Q. If you know. A. I can't tell you just exactly what it cost, that one particular one.

Q. Now, the twenty-five-foot conveyor, what is the selling price per foot of that conveyor, do you know? A. No, I don't know about the per foot. 10

Q. What would you say the twenty-five-foot conveyor cost, about? A. Around six hundred dollars without a motor.

Q. Without a motor? A. Yes.

Q. New? A. New.

Q. Yes. What would you say the thirty-foot conveyor cost new without a motor? A. Well, just a little bit more than that. 20

Q. How much more? A. Up around six-fifty.

Q. And the motors for the twenty-five-foot conveyor would cost how much? A. Around \$125.

Q. How about the thirty-foot conveyor? A. They are all five-horse motors on each conveyor.

Q. So that the aggregate of the three conveyors with motors would run in the neighborhood of twenty-seven or twenty-eight hundred dollars, according to your figures; is that right? You testified a thousand for the one conveyor; is that right—with the motor? A. Yes, approximately that. 30

Q. Approximately? A. Yes.

Q. You testified about six hundred for one conveyor, \$125 extra would be \$725; is that right? A. About that.

Q. And the other conveyor, you testified, would run a little over, we will say 650, and 125 would 40

David L. Britt—Cross.

be 775? A. All these prices are approximately: I haven't bought any.

Q. Approximately? A. Yes.

Q. Run close on to twenty-five or twenty-six hundred dollars, in that neighborhood? A. I won't say that.

10 Q. Well, a thousand, six hundred, and six-fifty is 2,250, and 250 for the two motors would be an additional 250, and would bring it up about twenty-five hundred; is that right? A. According to your figures.

Q. These are the figures you gave me; is that right? Is that correct? A. According to your figures. I didn't add it up.

Q. Now, Mr. Britt, you know Mr. Trowbridge? A. Yes.

20 Q. What business is he in? A. He is in the conveyor business.

Q. He builds them, manufactures them, doesn't he? A. Yes.

Q. And he sells parts for them? A. Yes.

Q. And you bought some stuff from his company, didn't you? A. Yes.

Q. The parts that you bought, were they for the repair of these three conveyors? A. Yes.

30 Q. How much money did you spend for parts with Mr. Trowbridge's company for the repair of these three conveyors? A. I can't tell you.

Q. Wasn't it approximately three hundred dollars? A. I couldn't tell you. I haven't added it up at all. In fact, I don't know, not just what it totals up.

40 Q. And all the stuff that you needed for these three conveyors you purchased from Mr. Trowbridge's company; is that right? A. No, sir. No, sir.

David L. Britt—Cross.

Q. Who else did you purchase the other material from? A. We bought some belts from the Manhattan Rubber Company.

Q. How many belts did you buy? A. We bought one and a piece for this—

Q. How many feet of belting did you buy for the one?

10

Mr. Cox: For which one?

Q. I am talking about the piece now. A. I don't recall exactly now just what the length was. It was the thirty-foot conveyor.

Q. And how much did you—how many yards or feet, as the case may be, did you buy for the piece? A. We bought six feet.

Q. Six feet. How much does a foot cost? A. About two dollars and a half or three dollars.

20

Q. And outside of the stuff that you bought from the Trowbridge Company and outside of the one full belt and the six-foot piece, you bought nothing else; is that correct? A. We used other stuff that we had over to the quarry for them.

Q. You used other stuff? A. Yes.

Q. But you bought nothing else? A. Well, only what we had on hand; we had bought it before.

Q. You had bought nothing other than what you have testified from Mr. Trowbridge's company and the Manhattan Rubber Company; is that right, and then in addition you used other stuff? A. I don't recall having bought anything else.

30

Q. What stuff did you use that you had on hand? A. Why, we used idlers, grease cups, and things like that for the idlers.

Q. Grease cups. What else besides grease cups? A. Pipes.

40

David L. Britt—Cross.

Q. Pipes? What did you use pipes for? A. Cross pipes.

Q. What else? A. That is about all I can recall.

10 Q. That is about all? And that amounted to about how much in cost? A. Well, I would say around—the cost of material and putting them on, around twenty-five dollars.

Q. Twenty-five dollars. And that is all you used to fix these conveyors and put them in serviceable condition? A. And the labor on them.

Q. And the labor? How much labor did you put on it? A. About \$161, I believe it was.

Q. \$161? How do you arrive at the figure of \$161? A. By the men's labor.

20 Q. Did you supervise this work? A. Yes.

Q. How many men worked on these three conveyors for how many days? A. We had—we had three men—three men on for a week, or three men on for seven days.

Q. Three men on for seven days altogether; is that it? A. Yes.

Q. That would be twenty-one working days for one man, do I understand you to say that? A. Yes, that is about right.

30 Q. How much do you pay a man? A. Why, one man is \$52.50 a week.

Q. And the other man? A. The other is \$29.70 a week.

Q. And the other man? A. The same.

Q. How do you come to the figure of \$161 for labor, then? A. I estimated that this morning.

40 Q. Now, if you are wrong in your testimony as to \$161, Mr. Britt, isn't it possible that everything you testified to here today might be as the result

David L. Britt—Cross.

of a mistaken idea in your mind? A. I don't think so.

Q. You don't think so? A. No, I know it is not.

Q. You know it is not? A. I know it is not.

Q. You are as positive about that as you are about the cost of the labor amounting to \$161; is that right? A. We had—here is the way—we had other labor. 10

Q. Just answer the question.

Mr. Cox: Just let him answer the question. Don't try to shut him off.

A. Put the question again.

(The last question was read by the reporter.)

A. Yes or no. A. No. 20

Q. Now, as a matter of fact, Britt, didn't you call Shapiro up on the telephone after March 30, 1929, with respect to—asking Shapiro over the telephone when he was going to take the steam shovel and the three conveyors out?

Mr. Cox: Just a minute, if the Court please. I object to that. I will withdraw the objection. Go ahead and ask it.

The Court: All right. 30

Mr. Cox: The question is, Did you ever call up Mr. Shapiro and ask him when he was going to take these conveyors and the steam shovel out?

Q. After March 30. I didn't ask him about the conveyors; I asked him about the steam shovel. A. Buried up, half buried up. 40

David L. Britt—Cross.

Q. What did Shapiro tell you about the steam shovel? A. He said he wanted to take it and I told him we had no use for it, we had three others just about in the same condition.

10 Q. Did you say you would use it and Shapiro told you that would be all right? A. No, I did not.

Q. Didn't you ask Shapiro when he was going to take the three conveyors out at the same time? A. No.

Q. You are positive about that? A. I am positive.

20 Q. About a month later didn't you go to Shapiro's place in Passaic—that is, Alex Shapiro—and look over the yard, the new yard that he had opened there?

Mr. Cox: If the Court please, I object to it as being immaterial, whether he did or not. How is that going to bind the defendant?

The Court: Yes, I will sustain the objection.

Q. Were the conveyors in use at the time—on March 30, 1929? A. No.

30 Q. Were they fit to be used at that time? A. No, how could they be?

Q. So they weren't being used in the operation of that particular sand pit at that time; that is right? A. They had to be repaired first.

Q. They were not being used? A. Not right at the time, no.

Q. And you repaired them? A. (The witness nodded.)

40

Mr. Kimmel: That is all.

*David L. Britt—Redirect.**Redirect-examination by Mr. Cox:*

Q. Mr. Britt, what is the use of a conveyor around a sand pit? A. What is the use of a conveyor around a sand pit?

Q. Yes.

Mr. Kimmel: I object to the question. It 10
it immaterial.

A. It is to—

Mr. Kimmel: Just a moment.

The Court: I will permit it.

Mr. Kimmel: Exception.

By the Court:

Q. What was it? Answer the question. A. The 20
use of a conveyor?

Q. Yes. A. Why, to load these conveyors with sand by the crane and they would screen it and load it on the trucks from the conveyor.

By Mr. Cox:

Q. Is there any way that screened sand can be loaded by a crane, or, rather, from a crane to a truck?

Mr. Kimmel: Objected to, on the ground 30
that a hypothetical question in this case is not competent and not proper.

The Court: Is that a hypothetical question?

Mr. Kimmel: Yes.

Mr. Martin Kimmel: It refers to screened sand solely.

The Court: Well, that is not hypothetical.

Mr. Martin Kimmel: The crane digs the 40

David L. Britt—Recross.

10 rough sand out of the ground and it can load it right onto the truck, as your Honor and I have frequently seen it done, but if it is to be screened first, of course, it must be taken out of the chute of the crane and screened and then put on the truck. If he wants to ask the question let him not limit himself to screened sand.

The Court: I will permit it.

Q. Were there screens upon the—were these screens in the sand pit on March 30, 1929? A. Were there screens on the conveyors?

Q. In the sand pit. A. No, no screens there.

Q. No screens there. That is all.

20 *Recross-examination by Mr. David Kimmel:*

Q. What day was March 30, 1929? A. I don't know.

Q. Was it a Monday? A. I couldn't tell you.

Q. It was a Saturday, wasn't it? A. I couldn't tell you.

30 Q. You weren't up at the premises of the West Paterson Sand and Gravel Company on March 30, 1929, were you? Yes or no. A. I was there just previous or after; I may have been there on that day. I couldn't tell you.

Mr. Kimmel: That is all.

Mr. Cox: That is the defendant's case.

The Defendant Rested.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

WILLIAM H. TROWBRIDGE, recalled.

Direct-examination by Mr. David Kimmel:

Q. Mr. Trowbridge, have you the records, your records, with you showing what material the Great Notch Company purchased from you since March 30, 1929? A. I believe I have, yes. 10

Q. What did they purchase? Just enumerate the items and the prices. A. On August 29 they got a belt for the twenty-five-foot conveyor, a complete belt.

Q. How much did that cost? A. That would cost about \$72 net.

Q. \$72? A. That is what we charged them.

Q. Yes? A. Then it was a complete tail end.

Q. Yes? A. That means the pulley and shaft. 20

Q. How much is that charged at? A. That means pulley, shaft, bearings, set screws, and the cast iron bolts and things like that. Came to about \$32.

Q. Yes. What else? A. Then there was five rollers.

Q. Yes? A. At six dollars—no, wait a minute. Ten rollers at six dollars.

By Mr. Cox: 30

Q. Six dollars a roller, you mean? A. No, complete. Sixty cents each.

By Mr. Kimmel:

Q. Yes? A. And there were fourteen brackets at fifty cents each; seven dollars.

Q. Anything else? A. And there were ten countershafts at ten cents each; a dollar. 40

*William H. Trowbridge—Rebuttal—Direct.**By the Court:*

Q. How many? A. What is it, sir?

Q. What was that, ten counter-shafts? A. Ten counter-shafts; we call them counter shafts; they are little shafts with the little idlers from one to eight or nine inches long.

10 Q. What was it, fourteen what at fifty cents?
A. Fourteen brackets that hold the small idlers; they are fifty cents each.

Q. That was seven dollars? A. Seven dollars.

By Mr. Kimmel:

Q. Yes? A. Then there was a complete chain idler with bolts and grease cups and things like that for \$4.50.

20 Q. Yes? A. And there were two grease pipes ready for alemite at sixty cents each; \$1.20. And there were two take-up bolts, fifty cents each; one dollar. And there were twelve assorted bolts at five cents each; sixty cents. And there were four one-inch bolts.

Q. What is that? A. Four one-inch bolts at five cents each; twenty cents. And I believe four cap screws, twenty-eight cents total. On September 5—

30 Q. What was the date that this here material was furnished? A. That was the 29th of August.

Q. 1929? A. 1929. This was September 5, 1929.

40 Q. Who bought this stuff? A. Well, a lot of this material was called for and it was signed. Here is the signature for the material. I don't know whose signature it is. Those are the signatures. Some of that material was ordered over the telephone.

William H. Trowbridge—Rebuttal—Direct.

The Court: What is the total? Do we need the items? What is the total altogether?

The Witness: Of that one account?

Mr. Martin Kimmel: The total of all that was bought, Mr. Trowbridge.

By the Court:

10

Q. What is the total of September 5 of the items? A. September 5 was \$1.30.

Q. Was that the total? A. Yes, that is the total of this September invoice.

Q. \$1.30? A. Yes, sir.

Q. Now, September 12? A. September 12, the total was \$152.

Q. \$152? A. Yes, looks like material for the thirty-foot conveyor.

20

Q. What is the next one? A. That is all we have here. Wait, there is another little item. July 22, \$4.20.

Q. Making a total altogether of how much? A. Well, I haven't the totals here. These are all separate items. Then on August 21 there was another item for forty feet of chain, forty dollars.

By Mr. David Kimmel:

Q. Anything further, Mr. Trowbridge? A. That is all we have.

30

Mr. Cox: Has your Honor got a complete list of those items?

Mr. Kimmel: It comes to \$332.28.

The Court: What do you make it?

Mr. Kimmel: It comes to \$332.28.

The Court: All right.

40

William H. Trowbridge—Rebuttal—Direct.

Q. Now, Mr. Trowbridge, you heard Britt testify on the stand that it would take twenty-one working days to put these three conveyors into shape?

10

Mr. Cox: Well, if the Court please, he didn't testify to that. He said it took three men seven days.

Mr. Kimmel: That is twenty-one working days for one man, isn't it?

Mr. Cox: Put it the way he did. Three men could have finished it—

Mr. Kimmel: I will withdraw the question.

Q. You heard Mr. Britt testify it took three men seven full days to recondition these machines? A. Yes.

20

Q. After having made your inspection in February of 1929 how much time would you say that your men would require to put these machines in condition? A. Well, if our two men couldn't do it in two days they would be looking for a new job.

Q. How much do you pay your men a day? A. Seventy cents an hour.

Q. How many working hours do you figure? A. Eight and a half hours.

30

Q. That will be \$23.80 for labor; is that correct? A. Approximately.

Mr. Kimmel: That is all.

Cross-examination by Mr. Cox:

Q. Mr. Trowbridge, having given us all these items that had to be put on these conveyors, do you still want to tell this Court and jury that your in-

40

William H. Trowbridge—Rebuttal—Cross.

spection, this casual inspection that you made of them, was an accurate one? A. I didn't say it was an accurate one; I just said a casual inspection.

Q. Not having made an accurate inspection of it, could you tell this Court and jury just how long it would take to put them in condition? A. Yes, sir, one—

10

Q. Without going over there to see whether those things were rusted in there or what was the matter with them, you can tell the Court and jury without that? A. Yes.

Mr. Cox: I think that is all.

By the Court:

Q. Two men two days would be how much? A. Two men two days would be—

20

Mr. Kimmel: \$23.80.

A. Seventy cents an hour, eight and a half hours each.

The Court: All right.

ALEX SHAPIRO, recalled.

Direct-examination by Mr. David Kimmel:

30

Q. Mr. Shapiro, subsequent to March 30 of 1929 did you have a telephone conversation with Mr. Britt relative to the steam shovel and three conveyors on the property in West Paterson? A. Yes, sir.

Q. Relate that conversation.

Mr. Cox: Just a minute. I object to that as not being binding upon this defendant.

40

Alex Shapiro—Rebuttal—Direct.

The Court: Well, I thought there was no question—

Mr. Cox: All right, I will withdraw the objection.

The Court: Had with whom?

Mr. Kimmel: With Mr. Britt.

10 The Court: Who is Mr. Britt?

Mr. Kimmel: The last witness for the defendant.

A. He called at my house on eight o'clock in the morning and he said, "Mr. Shapiro, we are getting ready to go up and that steam shovel and some of them conveyors are in the way, and if you could make arrangements to come up and get them out of the way or tell us what you wanted with them." 20 I said, "Why, what do you want?" He says, "Why, if you don't want that steam shovel we could use some of the parts of it." I told him if he could use it he could have it, because I didn't intend to get that steam shovel fixed up. He says, "How about the conveyors?" I says, "I am going to take them out." He says, "What for?" I says, "To take to some of my other sand pits." He says, "I didn't think you wanted them; we are 30 going to use them." I says, "You can't use them; I am going to take them out."

Q. What did he say when you told him that?

A. What?

Q. When you told him that you were going to use the conveyors? A. Well, he said the company told him to fix them up and use them and put them to work.

40 Q. Did you have any conversation with Britt after this? A. Yes, sir.

Alex Shapiro—Rebuttal—Direct.

Q. Where was this conversation?

Mr. Cox: I object to it, if the Court please.

The Court: I will permit it.

Mr. Cox: All right.

A. Mr. Britt stopped at my place and said he just passed by and wants to look the place over. I said, "All right." 10

By the Court:

Q. When was this? A. Oh, maybe about a week, two weeks after.

Q. After what? A. After the conversation I had with him through the telephone at my house.

Q. When was the conversation at your house?

A. Well, that was about a month or six weeks after the sale was made. 20

Q. After the deed was delivered? A. After the deed was delivered.

Q. I see. A. So he stopped in Passaic and looked the place over, and I said, "Well, them conveyors are in the way; I will send a man down to take them out." He says, "No," he said, "we put those conveyors to work." I says, "What do you mean, you put them to work?" "Why," he says, "I didn't think you wanted them and we could use them. We put them on the job." I said, "One of them is just brand new. It didn't load over five or six loads and it cost me \$1050." I says, "You can't use those conveyors; they are mine." I thought he was kidding me, so I went up there and sure enough I saw him on the bank and two of the conveyors under the bank were discharging and the other loading and the third was on the screen sand pile. 30 40

Alex Shapiro—Rebuttal—Direct.

Mr. Kimmel: That is all.

Cross-examination by Mr. Cox:

10 Q. Mr. Shapiro, these conveyors that we have been talking about, they were just portable, because you could take them up and push them around, couldn't you? A. Yes.

Q. Do you mean to tell me that a large-sized man like Mr. Britt, who has a force of men working under him, came all the way out to your house at eight o'clock in the morning and complained to you about those little portable conveyors being in his way? A. He didn't come to my house; he called up.

20 Q. He called up to your house and said— A. The steam shovel—

Q. Just a minute. Isn't it a matter of fact that the only conversation he had with you was about the steam shovel? A. And the conveyors.

Q. Isn't it—he also mentioned the conveyors? A. Yes, sir.

30 Q. He asked you how you could get the conveyors out of the way himself; is that right? A. No, he said, "What do you intend to do with those conveyors?" "I am going to take them and put in my other pits."

Q. He said they were in his way and he couldn't get them out of his way? A. The steam shovel.

Q. Did he say the conveyors were in his way? A. No.

Q. Didn't you just tell that to the jury less than five minutes ago? A. I don't remember.

40 Q. As a matter of fact, didn't he say this to you: "Mr. Shapiro, do you want that steam shovel? It is no good to us; we have got a whole lot of them

Alex Shapiro—Rebuttal—Cross.

like it," and you said, "No, I don't want it because it is junk," and he afterwards cut it up and sold it for junk? Isn't that what he asked you? A. What is it, again?

Q. Didn't he say to you, "Mr. Shapiro, do you want that steam shovel? We have got other like it and it is nothing but junk? A. Yes.

10

Q. That is what he asked you? A. Yes.

Q. He asked you, "Do you want it?" A. Yes, and I told him he could have it.

Q. He didn't say, "Come and take it out of our way?" A. He asked me what I intended to do with it, and I told him, "If you could use it for anything"—

Q. Did he ask you, "Do you want that steam shovel," or what did he ask you? A. He asked me what I intended to do with that steam shovel, if I could get it out of his way.

20

Q. Didn't he ask you if you wanted it? Didn't he say, "Do you want that steam shovel, Mr. Shapiro? It is no good to us"? A. "What are you going to do with it?"

Q. He told you these little, portable conveyors were in his way, too; is that right? A. He said something about it. He says, "What do you intend to do with them?"

30

Q. He did say that, didn't he? A. Yes.

Q. According to what you recollect? A. Sure, he did.

Q. And you say that down in Passaic you told him that you were going to come up and take them out of his way; is that right? A. Yes, yes.

Q. And the first time you came up to that sand pit after March was in July; isn't that right? A. No, it was earlier than that.

40

Alex Shapiro—Rebuttal—Cross.

Q. Weren't the conveyors running at the time that you came up? A. I was there a few times they were not running.

10 Q. Did you come up in a truck or anything to cart those conveyors away? A. No, I didn't. I drove up my car a few times to see if they were in their way; I would take them out.

Q. You went up with a car to see if they were in their way? A. Yes.

Q. Why didn't you take a truck? A. He told me if they get in his way, if they want to work on that part of the pit, they will call me up.

Q. You didn't go up there with a truck to take them away? A. When they are in their way I would take them out.

20 Q. You had plenty of land to store these conveyors on? A. Yes, I could have, if you insisted on it.

Q. When did Britt come down or call you up on the 'phone and tell you these conveyors were in his way? A. He called me up and he said the steam shovel is in his way.

Q. Well, now, you want— A. And when he got through with the steam shovel he asked me what I intended to do—

30 Q. Well, did he tell you the conveyors were in his way? A. Yes, sure, he said everything was in the way.

Q. When did he call you up and tell you the conveyors were in his way? What month? A. Well, I couldn't tell exactly the month. I know it was a little while after, maybe four or five or six weeks after the deed was delivered.

40 Q. So it was at that time you knew the conveyors and things were in his way, according to what he told you? A. Yes.

Alex Shapiro—Rebuttal—Cross.

Q. Did you go down there after that time with your car to see if they were in his way? A. Yes.

Q. Why didn't you take a truck down if they were in his way and take your conveyors out of there? A. He didn't complain about the conveyors as much as he did about the steam shovel.

Q. Did he tell you the conveyors were in the way? Did he? A. The conveyors he could push out of the way. 10

Q. And he impressed you so much with the fact that the conveyors were in his way that he came down to the yards in Passaic and told you they are in the way; kindly come up and get them out? A. Yes.

Q. That was after the 1st of July? A. No, it wasn't that late. 20

Mr. Cox: I think that is all.

The Plaintiff Rested in Rebuttal.

DEFENDANT'S TESTIMONY IN SUR-
REBUTTAL.

DAVID L. BRITT, recalled.

Direct-examination by Mr. Cox: 30

Q. Mr. Britt, did you ever call Mr. Shapiro on the 'phone and tell him that the conveyors left in the sand pit were in your way and ask him to come and get them? A. No.

Mr. Kimmel: I object to the question as not proper sur-rebuttal for the reason that he has denied on the direct case that he ever had such a conversation. 40

David L. Britt—Sur-Rebuttal—Direct.

Mr. Martin Kimmel: We have a right to close our case in rebuttal.

The Court: One counsel at a time.

He answered the question before you objected.

10 Mr. David Kimmel: But I object to this line of questioning.

Q. Mr. Britt, did you ever go down to Mr. Shapiro's yard in Passaic and have Mr. Shapiro tell you at that time that if these conveyors and the steam shovel were still in your way he would come up and get them?

Mr. Kimmel: I asked him that question on cross-examination and he denied it. What is the purpose of it?

20

The Court: I don't know. You said you had a right to do it before and I permitted you to do it.

Mr. Kimmel: All right, withdraw it.

Q. Did you ever go down and have that conversation with Mr. Shapiro? A. Ask the question again.

30 Q. Did you ever go down to Mr. Shapiro's Passaic yards and did you ever tell him down there those conveyors were in your way and he said he will come down and get them, and you said, "Oh, no, we fixed them up; you can't have them now?" A. I stopped at his place—

The Court: Yes or no.

Q. Yes or no, did that conversation ever take place? A. No.

40

Q. What became of that steam shovel that was

David L. Britt—Sur-Rebuttal—Cross.

David L. Britt—Sur-Rebuttal—Redirect.

there? A. The steam shovel was buried up. Mr. Shapiro left it that way, buried up to just about the cab.

Q. What was done with it by the Great Notch Company? A. Nothing.

Mr. Kimmel: Objected to as immaterial. 10

A. Nothing was done with it.

Cross-examination by Mr. Kimmel:

Q. But you did stop down to Shapiro's place in Passaic about five weeks after this deed was executed? A. No, I stopped there in July or after that time.

Q. You are sure about that? A. I am positive. 20

Mr. Kimmel: That is all.

Redirect-examination by Mr. Cox:

Q. Mr. Britt, were all repairs made to these conveyors at one time? A. No.

Q. Were any repairs made to the conveyors after these particular men worked for the seven days putting them in order? A. Why, we put a belt on one after. 30

Q. How long did it take the men to put the belt on that one afterwards? A. A couple or three hours, about a couple of hours.

Q. Any other work done on the conveyors after that time to put them in shape? A. Why, no more than just keeping the work on and keep the idlers running, because they were worn pretty badly.

*David L. Britt—Sur-Rebuttal—Recross.**Recross-examination by Mr. Kimmel:*

Q. And you only bought one belt for all of these three conveyors; is that right? A. No, we bought two belts.

10 Q. And you bought a piece for one? A. Two belts and a piece.

Q. You bought one belt from the Manhattan Rubber Company? A. Yes.

Q. You bought—that was a full belt, was it? A. Yes.

Q. And then you bought the piece from where? A. From the Manhattan.

20 Q. How about the belt that you bought from Trowbridge? A. That is all right, we bought another one. We bought two belts and one piece for the three conveyors.

Mr. Cox: That is the defendant's case.

(Testimony Closed).

MOTION FOR DIRECTED VERDICT.

30 Mr. David Kimmel: If the Court please, I move for a directed verdict, first, on the ground that the contract merged in the deed; secondly, on the ground of the question of the interpretation or construction of the words, "And all other personal property appurtenant to or used in the operation of the said premises is represented to be owned by the seller," and so forth; and, thirdly, on the ground that the conveyors were not put in operation on the premises as of March 30, 1929, because they needed repairs, and that was brought

40 out from the testimony of the defendant's own

Motion for Directed Verdict.

witnesses, and the repairs were necessary before they were put into serviceable use.

The Court: I will deny the motion and allow you an exception.

Mr. Cox: For the purposes of the record, I want to ask for a directed verdict for the defendant on the ground that the contract provides specifically for the sale of certain specific things and any other personal property used in the operation of the premises, and that being the written contract controlling in this case it is not merged in the deed, and it therefore gives the defendant complete title in this case. 10

The Court: I will deny the motion and allow you an exception. 20

(Mr. Cox summed up the case to the jury on behalf of the defendant).

(Mr. David Kimmel summed up the case to the jury on behalf of the plaintiff).

(The Court charged the jury as follows:)

COURT'S CHARGE TO THE JURY. 30

MACKAY, J.

Members of the Jury:

This is an action brought by the West Paterson Sand and Gravel Company, a corporation, against the Great Notch Corporation, the defendant, to recover the value of three conveyors which the plaintiff alleges were converted by the defendant to its own use. The plaintiff alleges that a de- 40

Court's Charge to the Jury.

mand was made by the plaintiff or its agents or servants upon the defendant, its agent or servant, and that the defendant refused to return the conveyors which were the property of the plaintiff. As the result of the refusal of the defendant to deliver these conveyors the plaintiff demands the value of them at the time of the conversion, which I think was some time subsequent to or about the 30th day of March, 1929.

The defendant contends that on and prior to March 18, 1929, the plaintiff was the owner of certain property on which there were gravel pits, and that the plaintiff had installed and used the electric conveyors, had installed them and used them in the operation of the gravel pit; that on the 18th of March a contract was entered into, which contract is in evidence in this case and is marked, I think, Exhibit D-1; that that contract provided for a sale of real estate and personal property, the real estate being the land which included the gravel pits, and the personal property being the conveyors and other personal property on the premises; and that the deed was given on March 30 for the land, but that no bill of sale or conveyance of any kind was given for the three conveyors, but that the possession was taken of the land by the defendants and the conveyors were on the land.

The defendant further contends that in this contract to convey, which was prior to the making and the execution and delivery of the deed, there was a clause which provided, "Gas and electric fixtures, gas stove, hot water heaters, chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awning, ash cans, heating appar-

Court's Charge to the Jury.

atus, if any," and then adds, "and all other personal property appurtenant to or used in the operation of the premises is represented to be owned by the seller and included in this sale."

That is where the dispute arises in this case, the dispute which you must settle, because if the property that is before you is the plaintiff's property then, of course, the plaintiff is entitled to a verdict, and if it is the defendant's property the plaintiff would not be entitled to a verdict. 10

There has been considerable evidence. There has been evidence as to the value of the conveyors at the time of the alleged conversion. I do not think it is disputed that there was a refusal to return the conveyors. In fact, the defendant says even now that the conveyors did not belong to the plaintiff at any time. I think Mr. Hill said that he refused to give up the conveyors. So the question of demand and refusal is not in this case. I mean, that is not disputed in the case. 20

Now, the testimony that relates to the repair of these conveyors would not be material in this case in so far as a verdict for the plaintiff is concerned on the question of the plaintiff's damages. My thought is that that evidence was offered for the purpose of showing a possession in the defendant and a control over the property, but would not affect the question of damages. 30

The burden of proof, of course, is upon the plaintiff to satisfy you by a fair preponderance of the testimony that the material allegations in its complaint have been proven, and that means by the greater and weightier evidence; it means by the more convincing testimony. If the plaintiff has sustained the burden of proof by the fair preponderance of the testimony it would be entitled 40

Court's Charge to the Jury.

to a verdict at your hands in this case, and if the testimony is evenly balanced or preponderates in favor of the defendant, then your verdict would be in favor of the defendant and against the plaintiff, no cause of action.

10 The dispute in this case revolves around that paragraph that I read to you from the contract in the suit. I have held as a matter of law that the giving of the deed did not bar the consideration on the question of the three conveyors. Counsel for the plaintiff claimed that the giving of the deed merged this contract so that the contract became absolutely void and of no effect, and, of course, I held that that was not so, because one part of it related to real estate and the other part of it related to personal property.

20 So the question for you to determine now, and one which you must determine from all of the evidence that is before you in the case, is the question of the ownership or title to these three conveyors. Of course, the plaintiff's claim is that these words in this contract of sale only related to gas and electric fixtures, gas stoves, hot water heaters, chandeliers, and so forth, and that the general words "and other personal property appurtenant to or used in the operation of the premises," simply meant such things as related to the premises in so far as the gas fixtures or electric fixtures or such things of a similar nature were concerned, such things as might be used in and about the premises or a building for those particular purposes, and not these conveyors that were on the premises and on the property.

30 The defendant, of course, contends that "and all other personal property appurtenant to or
40 used in the operation of the premises is represent-

Court's Charge to the Jury.

ed to be owned by the seller and included in this sale," meant the transfer of these conveyors under this contract of sale.

Both parties in this case, of course, have produced evidence to endeavor to maintain their particular point in the case. Now, my thought is that the defendant is setting up this as a special defense, as I read it, and that special defense places upon it in that respect, so far as that is concerned, the burden of proving that affirmatively by the fair preponderance of the testimony. So that if you find from the weight of the evidence that these three conveyors were included in this contract of sale, the sale to the defendant under that clause, if you find that to be so from the weight of the evidence, your verdict would be in favor of the defendant and against the plaintiff, no cause of action. Otherwise you would find a verdict in favor of the plaintiff and against the defendant for the value of the three conveyors at the time of the conversion of them, if you find there was a conversion of them and find that they were the plaintiff's property.

Of course, there is testimony in the case that when these conveyors were new they cost \$1,050, \$750, and \$650, respectively; that is, the forty-foot, the thirty-foot, and the twenty-five foot conveyors; that two of the conveyors were a year and a half old and that the big conveyor was bought three or four months later than the two smaller conveyors; that at the time of the conversion the forty-foot conveyor was worth \$600 to \$800, the thirty-foot conveyor \$400 to \$500, and the twenty-five-foot conveyor \$300 to \$400. That is as I have it before me.

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Court's Charge to the Jury.

So it would be for you to say, if you find for the plaintiff, what the reasonable value of these conveyors was at the time of the conversion and render a money verdict for that amount.

10 If I have misstated any of the evidence or any of the facts to you, you will disregard what I have said and be governed by your own recollection of what the facts are in the case, because you are the sole judges of all of the facts and you determine who is telling the truth, because it is from the conflicting testimony in the case that you determine where the truth lies.

20 Counsel for the plaintiff has requested me to charge, although I have already charged it, I think, "You are to eliminate from your deliberations any consideration of the fact which has been attempted to be brought before you that defendant has improved the three conveyors in question and if you find for the plaintiff, your verdict shall be for the value of the three conveyors at the time of conversion together with interest from that date till the present time."

30 I so charge you, subject, of course, to what I have already said as to the purpose for which that testimony might have been offered. But I do charge you that if you find for the plaintiff it would be entitled to interest. That is the law in our State.

Now take the case and give it your very careful and thorough consideration and render a verdict that will do justice to the parties.

40 Counsel for the plaintiff calls my attention that in mentioning the burden of proof on the special defense I used the word "plaintiff" instead of defendant, so I will withdraw what I said in using

Court's Charge to the Jury.

the word "plaintiff" and substitute defendant instead.

I did overlook the fact, members of the jury, that on the question of damages, if you find for the plaintiff, where I mentioned certain amounts that had been testified to as to value at the time of the conversion or the alleged conversion, that there is also evidence in the case to the effect that the value of the three conveyors in March of 1929 was only \$500. That you would take into consideration, too. I just mentioned, in charging you, the one side of the testimony, the plaintiff's side. I mention now this testimony on the defendant's side, the \$500 which was testified to as the value. That you take into consideration, too.

In fact, evidence on both sides on that question of value, if you find for the plaintiff, you take into consideration in determining the amount of damage.

Is that satisfactory to counsel?

Mr. Cox: Yes, sir.

The Court: Let the jury retire.

(The jury retired to consider of their verdict).

PLAINTIFF'S EXCEPTION.

Mr. Kimmel: Exception to the Court's charge in so far as the Court charged the jury that the deed did not merge in the contract.

DEFENDANT'S EXCEPTIONS.

10 Mr. Cox: I ask to take an exception to the part of the Court's charge which left to the jury the question as to whether or not the three conveyors passed under the contract to the defendant; and also take an exception to that part of the Court's charge in which the Court charged that the burden of proving that the conveyors passed under the contract to the defendant was upon the defendant, on the ground that it is always—the burden of proof is always upon the plaintiff to prove his case, which was in this case that he had title to these conveyors still.

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Exhibit P-1.

No. 479365.

WEST PATERSON SAND & GRAVEL
Co.
to

GREAT NOTCH CORPORATION.

This Indenture, made the 30th day of March in the year of Our Lord One thousand nine hundred and twenty nine. 10

Between West Paterson Sand & Gravel Co., a New Jersey corporation of the City of Paterson, in the County of Passaic and State of New Jersey, party of the first part, hereinafter known as the Grantor.

And Great Notch Corporation, a New Jersey corporation of the City of Newark in the County of Essex and State of New Jersey, party of the second part, hereinafter known as the Grantee. 20

Witnesseth, that in consideration of Seven thousand five hundred dollars (\$7500.00) the said grantor does grant, bargain, sell and convey unto the said grantee, its successors and assigns,

All those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Borough of West Paterson in the County of Passaic and State of New Jersey. 30

Beginning in the easterly line of the Morris Canal at the northeast line of the late Brower farm, thence running along said Brower farm south fifty five degrees thirty three minutes east one hundred and eighty one and twenty nine hundredths feet; thence still along the same south sixty six degrees, forty three minutes east fifty two and seven hundredths feet; thence south twenty seven degrees, fifteen minutes west six hundred 40

Exhibit P-1.

and seventy nine and eighty hundredths feet to the northerly side of a lane or road leading to the dwelling house of Peter Fritz; thence along the line of the same north sixty two degrees forty five minutes west three hundred and fifteen and forty six hundredths feet, to the easterly line of the Morris Canal; and thence running northerly
 10 along the same the several courses thereof to the place of beginning.

Being the same premises conveyed by Rachel Kammelhor and Morris Kammelhor, her husband, to Alex Shapiro by deed dated December 10th, 1926, and recorded in the Register's office of Passaic County in Book L 33 of Deeds for said County, page 159, and by the said Alex Shapiro and Rose Shapiro, his wife, to the party of the first
 20 part hereto by deed dated February 1st, 1927 and recorded in said office in Book L 33 of Deeds for said County, page 564.

To Have and to Hold said premises with the appurtenances unto the said grantee, its successors and assigns forever,

And the said West Paterson Sand & Gravel Co., a New Jersey corporation, for itself, its successors and assigns, does covenant:

30 1. That the title to said premises is vested in fee simple absolute in the said West Paterson Sand & Gravel Co., a New Jersey corporation.

2. That it has the right and authority to convey the said premises to the said Great Notch Corporation, a New Jersey corporation.

3. That the grantee shall have peaceable and quiet possession of the said premises free from all encumbrances.

40 4. That the same are now free and clear of all encumbrances whatsoever, except—

5. That the grantor will execute such further

Exhibit P-1.

assurances and conveyances of the said land as may be reasonably required.

6. That it will warrant and defend the premises hereby conveyed against all persons lawfully claiming the same.

In Witness Whereof, the said West Paterson Sand & Gravel Co. has caused these presents to be signed by its President and attested by its Secretary the day and year first above written. 10

West Paterson Sand & Gravel Co.
(Corp. Seal)
By Alex Shapiro
President.

Signed Sealed and Delivered
in the presence of

Attest: Molly Shapiro,
Secretary. 20

State of New Jersey, }
County of Passaic, } ss.:

Be it Remembered, that on this 30th day of March in the year of Our Lord One thousand nine hundred and twenty nine, before me, the subscriber, an Attorney at law of New Jersey, personally appeared Molly Shapiro who being by me duly sworn on his oath, says that she is the Secretary of the West Paterson Sand & Gravel Co., the grantor named in the within instrument; that Alex Shapiro is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his volutary act and deed, and as and for the volutary act and deed of said corporation, in presence of deponent who 30 40

Exhibit P-1.

thereupon subscribed his name thereto as witness.

MOLLY SHAPIRO.

Sworn and subscribed before me at
Paterson, N. J. the date aforesaid.

David Kimmel

An Atty at law of N. J.

10

Words "Co." "northeast" "Gravel Co." "Co."
twice written over erasures.

Received for record April 1st A. D. 1929 at 9.20
A. M.

JOHN R. MORRIS, Register.

State of New Jersey, }
County of Passaic, } ss.:

20

I, John R. Morris, Register of Deeds and Mortgages in and for said County and State, do hereby certify that the foregoing is a true copy of the record of the Deed, given by West Paterson Sand & Gravel Co. to Great Notch Corporation, as the same is taken from and compared with the original entry thereof, recorded in Book B 35 of Deeds on pages 507 &c. for said county and now remaining on record in this office.

30

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said County, at Paterson, this thirteenth day of February, A. D. Nineteen hundred and thirty.

(Seal)

JOHN R. MORRIS,
Register.

Fee: Two Dollars
and thirty cents.

40

514715

Exhibit P-1.

Endorsed:

Passaic County Register's Office
 Paterson, N. J.
 Certified Copy of a Deed.
 West Paterson Sand & Gravel Co.
 to
 Great Notch Corporation.
 John R. Morris, Register 10

Exhibit D-1.

This Agreement, made the 18th day of March,
 in the year of our Lord One Thousand Nine Hun-
 dred and Twenty-nine

Between West Paterson Sand & Gravel Com-
 pany, a New Jersey Corporation, of the City of
 Paterson in the County of Passaic and State of
 New Jersey, party of the first part; 20

And Great Notch Corporation, a New Jersey
 Corporation, of the City of Newark in the Coun-
 ty of Essex, and State of New Jersey, party of
 the second part;

Witnesseth, That the said party of the first
 part, for and in consideration of the sum of Seven
 Thousand Five Hundred Dollars (\$7,500.00) to 30
 be paid and satisfied as hereinafter mentioned,
 and also in consideration of the covenants and
 agreements hereinafter mentioned, made and en-
 tered into by the said party of the second part,
 doth agree to and with the said party of the sec-
 ond part, that the said party of the first part, will
 well and sufficiently convey to the said party of
 the second part, its successors and assigns by
 Deed of Warranty free of all encumbrances on or 40

Exhibit D-1.

before the 18th day of April, 1929, next ensuing the date hereof, All those certain lots, tracts, or parcels of land and premises, hereinafter particularly described situate, lying and being in the Borough of West Paterson in the County of Passaic and State of New Jersey.

- 10 Beginning in the easterly line of the Morris Canal at the southwest line of the late Brower farm; thence running along said Brower farm south fifty-five degrees thirty-three minutes east one hundred and eighty-one and twenty-nine hundredths feet; thence still along the same south sixty-six degrees forty-three minutes east fifty-two and seven hundredths feet; thence south twenty-seven degrees fifteen minutes west six hundred and seventy-nine and eighty hundredths feet to
- 20 the northerly side of a lane or road leading to the dwelling house of Peter Fritz; thence along the line of the same north sixty-two degrees forty-five minutes west three hundred and fifteen and forty-six hundredths feet to the easterly line of the Morris Canal; and thence running northerly along the same the several courses thereof to the place of beginning.

- 30 Being the same premises conveyed by Rachael Kammelhor and Morris Kammelhor, her husband, to Alex Shapiro, by deed dated December 10th, 1926, and recorded in the Register's Office of Passaic County, in Book L-33 of Deeds for said County, page 159.

- 40 And the said Great Notch Corporation for its successors and assigns, doth covenant, promise and agree to and with the said party of the first part, its successors and assigns, that the said party of the second part, will pay and satisfy

Exhibit D-1.

or cause to be paid and satisfied, unto the said party of the first part, the said sum of Seven Thousand Five Hundred Dollars (\$7,500.00) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On execution of this agreement for which		10
this is also a receipt	\$ 500.00	
On delivery of the deed, in cash,	\$7,000.00	
	<hr/>	
Total	\$7500.00	

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

20

And it is further agreed, by the parties to these presents, that the said party of the second part, its successors and assigns, may enter into and upon the said land and premises on the 18th day of April, 1929 next ensuing the date hereof, and from thence take the rents, issues and profits to and their use.

And it is further agreed, by the parties hereto, that the said deed shall be delivered and received at office of Citizens Title Insurance & Mortgage Company, 147 Prospect Street, Passaic, New Jersey, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on the said 18th day of April, 1929 next ensuing the date hereof.

30

The rents of said premises, insurance premiums, premiums or bonus for Building and Loan mortgage, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and

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Exhibit D-1.

allowed as of the day of delivery of said deed.

10 Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

20 It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House supervision, to be shown by the report of the department or board enforcing the same where
30 such ordinances, regulations and said act apply.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for nonpayment of the municipal taxes or assessments, or by adverse possession.

The premises above described are sold subject to zoning ordinances, if any.

40 If at any time before the delivery of the deed

Exhibit D-1.

the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

10

And it is hereby agreed by and between the parties hereto that in case any sewer or street improvements are made, or have been made, upon which the property mentioned herein is located, up to the time of the delivery of deed, but not assessed, such assessment shall be borne by the party of the first part, its successors and assigns.

20

And for the performances of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective successors and assigns.

In Witness Whereof, the said parties have here

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Exhibit D-1.

unto interchangeably set their hands and seals
the day and year first above mentioned.

West Paterson Sand & Gravel Company
A. Shapiro,
President.

10

Molly Shapiro,
Secretary (Seal)

Great Notch Corporation
John L. Hill,
President.

Signed, Sealed and Delivered
in the presence of
Jesse Kimmel
Jesse Kimmel

20

Charles H. Hollenbech,
Secretary (Seal)

State of New Jersey, }
County of Passaic, } ss.:

30 Be it Rememberd that on this 18th day of March
in the year of our Lord One Thousand Nine Hun-
dred and twenty-nine, before me, the subscriber,
personally appeared Molly Shapiro who, being by
me duly sworn on his oath, says that she is the
secretary of the West Paterson Sand & Gravel
Company, the grantor named in the within instru-
ment; that Alex Shapiro is the President of said
corporation; that deponent well knows the cor-
porate seal of said corporation; and the seal affix-
ed to said Instrument is such corporate seal and
was thereto affixed, and said Instrument signed
and delivered by said President, as and for his
voluntary act and deed and as and for the volun-
40 tary act and deed of said corporation, in presence

Exhibit D-1.

of deponent, who thereupon subscribed his name thereto as witness.

MOLLY SHAPIRO (Seal)

Sworn and subscribed before me at
Paterson, N. J. the date aforesaid
Jesse Kimmel,
Attorney at Law of New Jersey.

10

State of New Jersey, }
County of Essex, }ss.:

Be it Remembered, That on this 18th day of March in the year of our Lord One Thousand Nine Hundred and twenty-nine, before me, the subscriber, personally appeared Charles H. Hollenbech, who, being by me duly sworn, on his oath, says that he is the secretary of the Great Notch Corporation, the grantor named in the within instrument, that John Hill is the Vice President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said Vice President, as and for his volutary act and deed and as and for the volutary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

20

30

CHARLES H. HOLLENBECH.

Sworn and subscribed before
me the date aforesaid
Jesse Kimmel,
Attorney at Law of New Jersey.

40

MAY 1930

69

110

Exhibit D-1:

Endorsed:

CONTRACT

For Sale of Property.

West Paterson Sand & Gravel Company, a N. J.
corp.

10

to

Great Notch Corporation, a N. J. corp.

Dated March 18th, 1929.

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30

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New Jersey Court of Errors and Appeals

WEST PATERSON SAND & GRAVEL
Co., a New Jersey Corporation,
Plaintiff-Appellant,

vs.

GREAT NOTCH CORPORATION, a
New Jersey Corporation,
Defendant-Appellee.

Action at Law.

On Appeal
from New
Jersey
Supreme
Court.

BRIEF FOR PLAINTIFF-APPELLANT.

Statement of the Case.

This appeal brings up for review a judgment for the defendant in the above cause rendered in the Supreme Court, Passaic Circuit, on the verdict of a jury.

The action was brought by the above-named plaintiff corporation against the above-named defendant corporation to recover the value of three electric portable conveyors such as are used in the sand and gravel business on the ground that these three conveyors being the property of the plaintiff, the defendant converted them to its own use by withholding them from the plaintiff upon demand and using them in its business (S. C., pp. 1 and 2). It was admitted that defendant had refused to deliver up the three conveyors to plaintiff on demand and was using them in and about its business (S. C., p. 30, ll. 18-29; p. 18, l. 40 and p. 19, ll. 1-28; p. 93, ll. 14-23). In fact John L. Hill defendant's vice president and principal witness in the trial admitted this in open court:

“Q. Mr. Hill, you are the vice president of the defendant company? A. Yes.

Q. Your company still has possession of these three electric conveyors and you are using them? A. Not at the present time.

Q. They are in your possession? A. Yes, they are in my possession.

Q. And you refuse to give them up to the plaintiff, the West Paterson Sand & Gravel Company? A. Yes.” (S. C., p. 30, ll. 18-29)

The three conveyors were situated on certain unimproved land located in the Borough of West Paterson and came into the possession of the defendant when the plaintiff conveyed said land to the defendant by its deed on March 30, 1929. See the deed, Exhibit P-1 (S. C., pp. 99-102) offered in evidence (S. C., p. 16, ll. 1-8). See also the testimony of plaintiff's president (S. C., p. 15, ll. 29-40 and p. 16, ll. 1-8). At the time the deed was executed plaintiff's president asked the defendant's vice president for permission to leave the conveyors on the land until the weather would settle, so the three conveyors could be gotten out. See the testimony of plaintiff's president (S. C., p. 16, ll. 24-40 and p. 17, ll. 1-17). This was denied by defendant's vice president (S. C., p. 47, ll. 34-40 and p. 48, ll. 1-8) but defendant's superintendent of operations at West Paterson (S. C., p. 56, ll. 38-40 and p. 57, ll. 1-2) admitted that the three conveyors were not repaired and put into use by the defendant until well after July 1st, 1929 (S. C., p. 60, ll. 32-40 and p. 61, ll. 1-32) and that the thirty foot conveyor was buried six foot in the sand on March 30, 1929 the date when the deed for the land was executed (S. C., p. 61, ll. 39-40 and p. 62, ll. 1-15). The practical thing would have been to remove all three conveyors at one

time; since one was buried six feet in the frozen sand this could not possibly have been done when the deed was executed on March 30, 1929, that being early spring, at a time before the earth had thawed out the winter's frost.

The sole defense interposed by the defendant was that before the deed for the land was executed by the plaintiff and accepted by the defendant on March 30, 1929, date of closing the transaction, the plaintiff and defendant had entered into a written contract for the purchase and sale of said land (Exhibit D-1, S. C., pp. 103-110) which said contract, inter alia, contained the following provision:

"Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of the premises is represented to be owned by the seller and is included in this sale",

(S. C., p. 106, ll. 2-11), wherefore concluded the defendant, it took title to the three conveyors in question. See the defendant's answer (S. C., pp. 3-4) The answer in addition contains general denials of certain allegations of the complaint, but these, the actual trial of the cause showed to be purely formal and not supported by the facts.

To this defense the plaintiff replied that the true transaction between the parties was represented by the deed executed by the plaintiff and accepted by the defendant on March 30, 1929 (Exhibit P-1, S. C., pp. 99-103) and that all prior negotiations between the parties, including the contract of March 18, 1929 were merged in the deed so executed and accepted as aforesaid. See the plaintiff's reply (S. C., p. 4)

The three conveyors were proved on the trial to be worth at the time of the conversion between \$1300.00 to \$1700.00 by William H. Trowbridge of the Trowbridge Conveyor Co., he being engaged in building and selling portable conveyors since 1917 and having inspected the three conveyors in question in February and March 1929. (S. C., pp. 31-35). It is true that David L. Britt, defendant's superintendent of operations at West Paterson proved willing to swear that the three conveyors were worth only \$500.00 (S. C., p. 66, ll. 33-40); however there is serious doubt whether he was qualified to testify as to the value of the three conveyors. He couldn't point at any time that he had ever bought or dealt in portable conveyors (S. S., p. 64, ll. 1-25); his testimony as to the value of the three conveyors was introduced only over plaintiff's exception (S. C., p. 66); and the only reason why this exception was not made a ground of appeal was because a verdict was returned against the plaintiff on the question of liability, making the point immaterial. The land conveyed by the deed consisted of a parcel of five acres (S. C., p. 55, ll. 1-3); it was composed of unimproved land out of which sand was dug. (S. C., p. 19, ll. 5-14) There was no ~~shanty~~^{building} on the premises but there was a small shanty and some electric poles. (S. C., p. 26, ll. 23-25). The three conveyors were portable conveyors with wheels, capable of readily being moved from one place to another. (S. C., p. 19, ll. 30-40) as convenience required. In fact plaintiff's president testified that he used them on a lot on Preakness Road, on another lot on Fourteenth Avenue, and on still another lot four or five blocks away (S. C., p. 19, ll. 39-40 and p. 20, ll. 1-4). Plaintiff's president also testified that the three conveyors in addition to

these three places had last been used on the land on which they happened to be situate and for which the deed was executed, in the summertime, meaning of course the summer of 1928. (S. C., p. 24, ll. 1-5) The conveyors had been out of plaintiff's possession ever since March 30, 1929. The record is totally devoid of any testimony showing that the three conveyors had been used on the land for which plaintiff gave the defendant, the deed, on March 18, 1930 when the contract was executed, the last time it having been used there having been during the summertime of 1928 as previously pointed out. (S. C., p. 24, ll. 1-5).

Thus for almost fully three quarters of a year before the contract was executed the three conveyors had not been used on this land.

The sole question that was developed on the trial, was whether the defendant could justify its conversion of the conveyors by virtue of the provision of the contract heretofore set forth.

Grounds of Appeal.

The errors complained of will be found in the grounds of appeal at pages 9 to 12 of the State of the Case; they will now be argued in somewhat varying order.

ARGUMENT.

POINT I.

The Court below erred in refusing to direct a verdict for plaintiff, said motion being made by the plaintiff at the close of the whole case.

Ground of appeal 10 (S. C., p. 11, ll. 37-40); motion and exception (S. C., p. 90, l. 27 to p. 91, l. 4).

The plaintiff's motion for a directed verdict in its favor was made on three grounds (S. C., p. 90, l. 27 to p. 91, l. 4). The first was that the deed, Exhibit P-1 (S. C., pp. 99-103) merged the contract, Exhibit D-1 (S. C., pp. 103-110) and therefore the attempt to justify the conversion by the defendant of the three conveyors by virtue of the provision of the contract heretofore referred to failed. The second was that even should it be assumed that the deed did not merge the contract, the provision of the contract relied upon to justify the conversion could not be interpreted to include the three conveyors and therefore the alleged justification failed. The third was that independently of the first two grounds and applying the provision of the contract, in question, there was no proof that the three conveyors were being used in the operation of the premises covered by the contract at the time the contract was made.

(A). *The deed merged the contract.* Under the well settled law a deed for land executed and accepted by the parties merges any prior contract the parties may have made and the rights of the parties are to be determined solely by the deed.

- Long v. Hartwell, 34 N. J. L. 116 (Sup. Ct. 1870) ;
 Onderdonk v. Gray, 19 N. J. Eq. 65 (Ch. 1868) ;
 Davis v. Clark, 47 N. J. L. 338 (E & A 1885) ;
 Edelman v. Lamping, 105 N. J. Eq. 515 (E & A 1930).

In Long v. Hartwell, *supra*, at page 122 of 34 N. J. L. 116, the court said:

“The general rule will not be questioned that the acceptance of a deed for land is to be deemed *prima facie* full execution of an executory agreement to convey and thenceforth the rights of the parties are to be determined by the deed and not by the agreement.”

In Onderdonk v. Gray, *supra*, at page 66 of 19 N. J. Eq. 65, the court held:

“The parties in executing a contract have a right to depart from its terms. And if they do so, and by consent accept something different in execution of the contract, they are bound by the acceptance and cannot look back to the contract.”

An analysis of Long v. Hartwell, *supra*, is helpful at this time. In that case Carpenter agreed by agreement in writing to convey to Long a house and lot together with the adjoining lot. Carpenter executed a deed of the house and lot but failed to include in the deed the adjoining lot. Long sued Hartwell, Carpenter's administrator for damages for not conveying the adjoining lot. A motion was made for a non-suit on the ground that the deed merged the contract, which motion was

denied. The trial court charged the jury that Carpenter had only partly fulfilled the agreement in conveying merely the house and lot and that the plaintiff was entitled to recover the value of the adjoining lot. There was a verdict for the plaintiff for the value of the adjoining lot and interest. *Held.* The court reversed the judgment below, holding that the deed merged the contract and that consequently the contract could not be the basis for any action.

We respectfully submit that *Long v. Hartwell* is on all fours with the case at bar and controlling. There as here, it was claimed that the agreement included property not covered by the deed; there as here it was sought to claim the property thus alleged to have been omitted from the deed by virtue of the agreement; and we respectfully submit that the same result follows in this case as was reached in that, to wit, the deed which made no mention of the three conveyors merged the contract. Applying this unimpeachable conclusion to the case at bar it necessarily follows that the conversion of the three conveyors could not be justified by any provision of the executory agreement.

The reasoning of the trial court that the contract covered land and personal property and that the deed conveying the land only partially fulfilled the contract is difficult to understand. (S. C., p. 14, ll. 3-23). In fact it is precisely the same reasoning that the court below adopted in *Long v. Hartwell, supra*. See the charge at the top of page 120 of 34 N. J. L. 116. And this was the error for which a reversal was had in that case.

(B) *The contract cannot be interpreted to include the three conveyors.* The provision under which it is sought to justify the retention of the three conveyors by the defendant is as follows:

“Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.” (S. C., p. 106, ll. 2-11).

The contract is a printed form contract and such as is used in the case of the purchase and sale of a building and the land whereon it stands, from which it results that many of the contract provisions when attempted to be applied to the transaction in the case at bar where a bare five acres of land were transacted for will be found to be inapplicable. (S. C., p. 55, ll. 103; and p. 19, ll. 5-14). Thus the paragraph immediately preceding the paragraph being considered provides for the apportionment of rents, insurance premiums, premiums for Building and Loan mortgages, water rents, etc. (S. C., p. 105, l. 37 to p. 106, l. 1). The paragraph immediately following the one in question provides for the risk of loss or damage to the premises by fire pending the delivery of the deed (S. C., p. 106, ll. 12-13). The next provision provides for the repair by the party of the first part for damage to the premises beyond ordinary wear and tear (S. C., p. 106, ll. 14-20). Then follows a provision “that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as endorsed by the State Board of Tenement House Supervision, to be shown by the report of the de-

partment or board enforcing the same where such ordinances, regulations and said act apply" (S. C., p. 106, ll. 20-31). It will be observed that the provision under consideration falls in the same class with these.

The defendant's vice-president testified when examined by defendant's own counsel that the contract was drawn by defendant (S. C., p. 47, ll. 13-24).

The fact is highly significant that the three conveyors, property worth between \$1300.00 and \$1700.00, are nowhere specifically set forth in the contract which purports to be as complete as it is possible to make a real estate contract. Consider the provision under which the defendant seeks to justify its retention of the three conveyors. First comes an enumeration of specific items:—

"Gas and electric fixtures, gas stoves, hot water heaters, and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, * * *"

all items of comparatively minor importance, every one of which is an article of a miscellaneous character such as is used solely in connection with a building. Nowhere in the specific enumeration are mentioned the three electric conveyors, property worth, as has been said before, between \$1300.00 and \$1700.00. After the specific enumeration follows the general term:

"* * * and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and included in this sale."

And it is under this general term that the three

portable electric conveyors are claimed by the defendant.

There is a well settled rule of construction governing this state of affairs, sometimes known as the rule of *ejusdem generis*; other times brought under the head of the maxim "*noscitur a sociis*." Said Chief Justice Gummere in determining the effect a similar provision in a contract of insurance in *Kahn v. Aetna Casualty & Surety Company*, 99 N. J. L. 6 (Sup. Ct. 1924) at page 7:

"In determining the meaning of a contractual provision like that before us, the maxim "*Noscitur a sociis*" is usually applied; that is, the general words following words of a more particular character are regarded as limited in their meaning by the former. Stated in another way, general terms must be confined to the class to which their more specific associates belong."

Said this court per Justice Dixon in *Freeholders of Morris v. Freeman*, 44 N. J. L., 631 (E & A 1882) at page 633:

"By our act to regulate fees (Rev. p. 405), it is enacted that the Sheriff shall be entitled to receive for "every person committed to prison twenty-five cents", and for "discharging every person from prison, twelve cents"; and it is contended that under the rule these fees must be paid by the public save where they are clearly by statute chargeable to private persons and that the public is represented in this regard by the county. On this basis, the present charges are made, they being for services rendered in criminal or quasi-criminal proceedings, where the public is the party concerned. But an examination of the Sheriff's fees bill in the statute regulating fees, leads us to the conclusion that it has reference only to civil

proceedings. Every proceeding therein particularly described is one to be rendered in civil causes only, and all general terms used are also applicable to civil suits. According to the maxim "noscitur a sociis", these general terms must be confined to the class to which there more specific associates belong."

Livermore v. Board of Freeholders of Camden, 29 N. J. L. 245 (Sup. Ct. 1861), aff'd 31 N. J. L. 507 (E & A 1864) was an action against the Board of Freeholders of Camden to recover for injury to plaintiff's dam caused by the county bridge being out of repair, as a result of which it fell on plaintiff's dam. The action was predicated upon the statute which provided that "if any damage shall happen to any persons, his, her, or their team, carriage *or other property* by means of the insufficiency or want of repair of any bridge upon any public road in any township in this state, which such township, or the county in which the same shall be situate, is or shall be liable to make, or repair, the person or persons so sustaining such damage shall have the right to recover the same * * * against the board of chosen freeholders for such county." The Supreme Court sustained a demurrer to the declaration alleging these facts and this judgment was affirmed by this court on error. Said this court, per Beasley, Chief Justice, at page 512 of 31 N. J. L. 507:

"It was insisted that land and fixtures were embraced under the general words "other property". But such latitude in the application of these terms cannot be justified by any principle of construction. General terms, following a specification of things of a particular class, must be understood to

refer to things of the same class or at least to things of the same general character * *. The provision of the clause above cited, was evidently intended to apply to persons and animals passing, and property being carried over bridges; the particular terms used relate to that subject, and the general terms must be restricted so as not to embrace a subject of an entirely different character;"

Accord:

Syms v. West Hoboken, 90 N. J. L. 130
(Sup. Ct. 1900);

Baker v. Baker, 82 N. J. Eq. 150 (Ch.
1913).

We respectfully submit that *Livermore v. Board of Freeholders of Camden*, *supra*, covers this case completely; it is an authority of the highest order and imperatively dictates a reversal of the judgment below.

It is incredible that the parties after having taken the pains to make a specific detailed enumeration providing for:

"Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus if any * * * *"

should have failed to include in the specific enumeration, the three conveyors worth between \$1300.00 and \$1700.00 and yet have intended the three conveyors to pass by the general term.

" * * * and all other personal property appurtenant to, or used in the operation of *said premises* is represented to be owned by seller and is included in this sale."

The paragraph immediately preceding this one provides for the apportionment of "The rents of said premises, insurance premiums, etc." The paragraph following provides for "The risk of loss or damage to said premises by fire, etc." Obviously all these provisions have in contemplation a building. Every one of the articles specifically enumerated is such as is used in connection with the operation of a building; applying the well settled rule of construction the general term, "other personal property" cannot be held to include the three electric conveyors, property entirely foreign to and incapable of operation in connection with a building, indeed "a subject of an entirely different character." *Livermore v. Board of Freeholders of Camden, supra.*

(C). *Independently of the first two sub-divisions argued under this point and applying the provision of the contract, in question, there was no proof that the three conveyors were being used in the operation of the premises covered by the contract at the time the contract was made.* It will be noted that defendant specially and affirmatively pleaded the contract provision heretofore recited in justification of its conversion and retention of the three conveyors, thereby admitting and confessing the conversion. (S. C., p. 3, l. 17 to p. 4, l. 12). Under elementary rules, it was incumbent upon it to prove the alleged justification.

The record on careful search will be found to be barren of any proof that the three conveyors were "used in the operation of the said premises" when the contract was executed on March 18, 1929. The contract of course is to be construed in relation to the state of affairs existing when it

was executed. The plaintiff's president testified without contradiction that he used the three conveyors on a lot on Preakness Road, on another lot on Fourteenth Avenue and on still another lot four or five blocks away (S. C., p. 19, ll. 39-40; and p. 20, ll. 1-4). He also testified without contradiction that the three conveyors in addition to these three places had last been used on the land involved in this case, in the summertime, meaning, of course, summertime, 1928 (S. C., p. 24, ll. 1-5). The conveyors had been out of plaintiff's possession ever since March 30, 1929. Indeed defendant's own testimony brought to light the fact that three conveyors were in such a condition that they could not have been used at all when the contract was made. (S. C., p. 61, l. 30 to p. 63, l. 10). According to this testimony the belt on one was missing, one was buried six feet in the frozen sand, the belt on the third was cut. Defendant's testimony also showed that the motors on two of the conveyors were missing. (S. C., p. 65, ll. 15-22).

Thus it will be seen that there was no proof that when the contract was made, the three conveyors were used "in the operation of said premises." The fact was that they had not been used on the premises since summertime, 1928, almost three quarters of a year before the contract was made, as has been heretofore shown.

The three conveyors were not installed or used exclusively on any given place but were portable conveyors, with wheels capable of being moved from one place to another as convenience required. (S. C., p. 19, ll. 30-40; p. 20, ll. 1-4). Plaintiff's president uncontradictedly testified:

"Q. Now, were these conveyors portable conveyors or stationary conveyors? A. Portable.

Q. Did they have wheels on? A. Yes, sir.

Q. Were you able to move them from one job to another? A. Yes.

Q. Did you move them from one place to another? A. I used to.

Q. What other places did you use to move them to? A. I used to move them—I got a lot over in Preakness Road, I used to take them over there, and to Fourteenth Avenue and I got another lot just about four or five blocks away, and I used to move them up and down.” (S. C., p. 19, l. 31 to p. 20, l. 4).

When subjected to the test of the facts and uncontradicted testimony in the case, the allegations of the answer that:

“2. The plaintiff had installed and used the said electric conveyors, mentioned in the plaintiff’s complaint, in the operation of the gravel pits.” (S. C., p. 3, ll. 23-26).

falls flat, an unsupported myth.

We therefore respectfully submit that independently of the proposition argued under subdivisions (A) and (B) of this point the record is not only devoid of any proof that the three conveyors were used in the operation of the premises when the contract was made or were at any time installed for exclusive use on the premises, but it affirmatively excludes any such inferences; it is therefore most respectfully submitted that the attempt to justify the conversion of the three conveyors by this provision of the contract wholly fails.

The construction and effect of the deed, Exhibit P-1 and the contract, Exhibit D-1, was a question of law to be determined by the Court and not left to the jury.

What we are about to say here applies to all three sub-divisions presented under this point but in particular to sub-division "B", on the question whether under the wording of the contract provision hereinbefore recited the three conveyors passed to the defendant.

It is one of the first principles of law that the construction and effect of a written instrument is a matter of law to be determined by the court and not by the jury.

Said Chief Justice Green, speaking for this court in *Rogers v. Colt*, 21 N. J. L. 704, (E & A, 1848), at page 711.

"It is assumed as a further ground of error that the judge withdrew from the jury questions peculiarly within their province, and assumed to decide points which by law were exclusively for the consideration of the jury. If so, he clearly erred."

"The appropriate province of the court and jury are totally distinct. Neither may trench upon the province of the other, without a violation of legal principle and aggression upon the rights of parties. The maxim is coeval with the common law itself that to questions of law the court answers—to questions of fact the jury respond. A violation of the maxim is subversive of the system of trial by jury. Did the judge then withdraw from the jury the consideration of any question of fact material to the decision of the case?"

The construction of all written instruments, wills, deeds, bonds and contracts of every nature, belongs exclusively to the

court. The legal effect of a written instrument is a question of law to be decided upon established principles. It would indeed be placing all rights derived from written instruments upon a most unstable foundation to subject them to the varying opinion of jurors without reference to fixed rules and established principles of interpretation.

The defendant's counsel, by moving to non-suit, admit that the interpretation of the contract, was the province of the court. They asked the court to withdraw the whole question from the jury by non-suiting the plaintiff. And they now ask this court to reverse the judgment below because the judge refused so to do.

But it is said that parol evidence was introduced, and that the jury should have been left to judge of the effect of that evidence upon the interpretation of the contract. If the object of the parol testimony was to alter the construction and vary the plain meaning of a written contract, it was totally inadmissible for any such purpose. Parol evidence is not admissible to alter, vary or contradict a written instrument."

Declared this court in *Smith v. Fidelity & Deposit Co.*, 98 N. J. L. 534 (E & A 1922) at page 536:

"The construction and effect of a written instrument is a matter of law to be determined, by the court and not by the jury."

Accord:

Grueber v. Engineering Co. v. Waldron, 71 N. J. L. 597 (E & A 1904); *The J. C. Smith and Wallace Co. v. Gilbert H. Lunger*, 64 N. J. L. 539 (E & A 1900); *McLaren v. Marmon Oldsmobile Co.*, 95 N. J. L. 520 (E & A 1920); *Perth Amboy Mfg. Co. v. Condit &*

Bowle, 21 N. J. L. 659 (E & A 1847);
Mente & Co. v. Heller, 99 N. J. L. 475
(E & A 1924); Decker v. Smith & Co.
88 N. J. L. 630, 635 (E & A 1915).

This fundamental rule was admitted by the defendant's counsel who after plaintiff's motion for direction of a verdict was made, moved for a direction of a verdict on behalf of the defendant, (S. C., p. 91, ll. 10-20). Both motions were denied and as a necessary result the question of construction was left to the jury. Thus the judge said in his charge:

"The defendant further contends that in this contract to convey, which was prior to the making and execution and delivery of the deed, there was a clause which provided, "Gas and electric fixtures, gas stove, hot water heaters, chandeliers, carpets, linoleum, mats, and matting in halls, screens, shades, awning, ash cans, heating apparatus, if any" and then adds, "and all other personal property appurtenant to or be used in the operation of the premises is represented to be owned by the seller and included in this sale." *That is where the dispute arises in this case, the dispute which you must settle,* because if the property that is before you is the plaintiff's property then, of course, the plaintiff is entitled to a verdict, and if it is the defendant's property the plaintiff would not be entitled to a verdict." (S. C., p. 92, l. 33 to p. 93, l. 14).

The facts in the case with reference to (a) the execution of the deed in performance of the contract, (b) the terms of the contract, (c) the fact that the conveyors had not for three quarters of a year been used on the premises when the contract had been made and had never been perma-

nently installed on the premises or any other place, being portable conveyors were undisputed. The legal inferences inevitably attached that the deed merged the contract; that even should this not be assumed to be so the general term in the contract provision was limited to property of the same class as contained in the preceding specific enumeration; that independent of these two propositions the record is barren of proof that the conveyors were used in the operation of the premises when the contract was made or permanently or exclusively used in the operation of the premises or any other place and therefore the alleged justification failed. The facts on which the legal result depended or could depend were uncontradicted and the legal inference to be drawn therefrom was indisputable. In that situation it was the duty of the trial court to direct a verdict for the plaintiff.

Walls v. Christos, 104 N. J. L. 81 (E & A 1927).

We most respectfully submit that for all the reasons argued under this point the court below erred in refusing to direct a verdict for the plaintiff, on plaintiff's motion made at the close of the whole case.

POINT II.

1. The Court below erred in ruling at the opening of the case that the deed from West Paterson Sand and Gravel Co. to Great Notch Corporation, Exhibit P-1, did not merge the contract between the same parties, Exhibit D-1.

Ground of Appeal 1 (S. C., p. 9, ll. 28-32); ruling and exception (S. C., p. 14, ll. 3-25).

2. The Court below erred in admitting in evidence over plaintiff's objection the contract between West Paterson Sand and Gravel Co. and Great Notch Corporation, Exhibit D-1.

Ground of Appeal 3 (S. C., p. 10, ll. 1-4); admitted in evidence and exception (S. C., pp. 40-41); printed (S. C., pp. 103-110).

3. The Court below erred in charging the jury over plaintiff's exception as follows:

"I have held as a matter of law that the giving of the deed did not bar the consideration of the question of the three conveyors. Counsel for plaintiff claimed that the giving of the deed merged this contract so that the contract became void and of no effect and of course I held that was not so because one part of it related to real estate and the other part of it related to personal property."

Ground of Appeal 11 (S. C., p. 12, ll. 1-15); Charged (S. C., p. 94, ll. 11-20); exception (S. C., p. 97, ll. 30-35).

All three correlated grounds argued under this point present the question whether the deed, P-1 merged the contract, D-1. The admission of the contract in evidence was objected to by the plaintiff on the ground that the deed merged the contract (S. C., p. 41, ll. 2-9). If the deed had this effect then the contract was inadmissible in evidence as it could not then have had any effect on the rights of the parties.

We have shown under sub-division (A) of POINT I, that the deed merged the contract under well settled principles.

Long v. Hartwell, 34 N. J. L. 116 (Sup. Ct. 1870) ;

Onderdonk v. Gray, 19 N. J. Eq. 65 (Ch. 1868) ;

Davis v. Clark, 47 N. J. L. 338 (E & A 1885) ;

Edelman v. Lamping, 105 N. J. Eq. 515 (E & A 1930)

It follows that the court below erred in ruling and charging that the deed did not merge the contract and in admitting the contract in evidence.

We respectfully submit that each of the three grounds of appeal hereinabove recited constitutes reversible error.

POINT III.

The Court below erred in permitting the following question to the witness David L. Britt, over plaintiff's objection:

"Q. Mr. Britt, what is the use of a conveyor around a sand pit?"

Ground of appeal 9 (S. C., p. 11, ll. 30-34); question permitted and exception (S. C., p. 75, ll. 1-24).

The witness' answer was:

Q. Yes. A. Why to load these conveyors with sand by the crane and they would screen it and load it on the trucks from the conveyor". (S. C., p. 75, ll. 21-23)

The question was objected to as immaterial (S. C., p. 75, ll. 10-11). Evidence to be admissible must be relevant and material under some phase of the case as presented by the pleadings.

Fishman v. Consumers Brewing Co., 78
N. J. L. 300 (Sup. Ct. 1909);

Quellmalz v. Atlantic Coast Ry. Co., 94
N. J. L. 474 (E & A 1920).

In Fishman v. Consumers Brewing Co. at page 302 of 78 N. J. L. 300, the court per Justice Min-turn said:

"Relevancy of testimony, as defined by Stephen, is that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts proves or renders possible the

past, present or future existence or non-existence of the other". Steph. Dig. Ev. Art. 1."

In Wigmore on Evidence (1904) Volume 1, page 87, section 27 it is said:

"When a fact is offered in evidence the very offering of it is an implication that it has some bearing on the proposition at issue—that it tends naturally to produce a conviction about that proposition."

It is impossible to see how the evidence embraced by this question and resultant answer tended to prove or disprove any issuable fact under the pleadings in the case. The defendant had specially and affirmatively pleaded the contract provision as to "Gas and electric fixtures etc." heretofore recited in justification of the conversion of the conveyors. (S. C., p. 3, ll. 29-40). We believe we have shown under subdivision (C) of POINT I, of this brief that it was incumbent upon the defendant to establish the justification and therefore to prove that the three conveyors were being used in the operation of the premises when the contract was made or had been permanently and exclusively installed on the premises. The question, then, presented under the pleadings was whether the three conveyors in question had in fact been used in the operation of the premises when the contract was made or whether they had been permanently installed for exclusive use on the premises. The question under consideration does not even refer to the three conveyors in question. It inquired as to the use of *a conveyor* about a sand pit in general, and the answer was a general one to the effect that a conveyor is used by being loaded with sand from the crane, which sand it screens and in turn

loads on the trucks. *It must be apparent that this testimony does not even remotely tend to prove that the three conveyors in question were used in the operation of the premises when the contract was made or had been installed for exclusive use upon the premises.* The question was therefore utterly immaterial and irrelevant.

It was introduced obviously to show that conveyors are used in connection with a sand pit and are valuable for that purpose, all of which was prejudicial to the plaintiff, in that, it tended to impress the jury irregardless of the deed and the language of the contract that the defendant in some way or other acquired the conveyors in question with the premises. What legal purpose was served in bringing before the jury the fact that the conveyors were valuable and capable of service to the defendant in loading screened sand? It only tended to sway and prejudice the jury in defendant's favor. The trial judge also permitted the defendant to pursue this type of inquiry further, over plaintiff's objection in the ensuing questions (S. C., p. 75, l. 25 to p. 76, l. 20).

We respectfully submit that the permitting of this question was prejudicial and reversible error.

POINT IV.

1. The Court below erred in permitting the following question to the witness Alex. Shapiro over the plaintiff's objection:

“Q. And did you tell Mr. Hill and Mr. Brett all that they had to do was bring a crane in there, everything was ready to start?”

Ground of Appeal 2. (S. C., p. 9, ll. 33-40); question permitted and exception (S. C., p. 25, l. 17 to p. 26, l. 23).

2. The Court below erred in permitting the following question to the witness John L. Hill over plaintiff's objection:

“Q. And at that time did you have any conversation with him as to the purchase of the sand pit?”

Ground of Appeal 4. (S. C., p. 10, ll. 9-15); question permitted (S. C., p. 43, ll. 19-30)

3. The Court below erred in permitting the following question to the witness, John L. Hill, over plaintiff's objection:

“Q. The purchase of the conveyors. Limit it now to the personal property section of the contract.”

Ground of Appeal 5. (S. C., p. 10, ll. 17-22); question permitted and exception (S. C., p. 43, l. 30 to p. 44, l. 40).

4. The Court below erred in refusing to strike out on plaintiff's motion the answer of the witness John L. Hill to the question:

"Q. What was said Mr. Hill? A. Why when we discussed the price on it and the amount he wanted, why we couldn't agree at all on what it was. And then he pointed out that all the stuff they had up there, the equipment, his house, his office, as he called it, and everything like that and the place already opened was worth quite a lot of money and that we had everything there and all we had to do is bring in our crane and start operation, and the understanding, was

Mr. Kimmel: Don't tell us the understanding.

Q. Now, just what was said? A. Well, he said, "I am selling you everything up there."

Mr. Kimmel: I move to have it stricken out as not responsive, as limited by your Honor's ruling."

Ground of Appeal 7 (S. C., p. 10, l. 30 to p. 11, l. 20); answer, motion, and exception (S. C., p. 46, l. 20 to p. 47 l. 12).

5. The Court below erred in permitting the following question to the witness David L. Britt over plaintiff's objection:

"Q. Mr. Britt, did you have any conversation with Mr. Shapiro before March 18, 1929, as to whether or not the electric conveyors were to be included in the agreement of sale to the Great Notch Corporation?"

Ground of Appeal 8. (S. C., p. 11, ll. 20-30);

question permitted and exception (S. C., p. 58, l. 24 to p. 59, l. 18).

All five grounds of appeal argued under this point are correlated ones dealing with the trial court's admission of evidence as to alleged oral conversations between the defendant's vice president and superintendent of operations at West Paterson, John L. Hill and David L. Britt, respectively, with plaintiff's president, Alex Shapiro, all of which were introduced to show an oral agreement prior to the execution of the contract, D-1 between the parties on March 18, 1930, that the three conveyors were to be included in the transaction.

Thus take questions two and three for example, defendant's counsel asked defendant's vice-president if he met plaintiff's president before March 18, 1929, the date when the contract was signed (S. C., p. 42, l. 39 to p. 43, l. 2). If at that time, to wit, before March 18, 1929 the date on which the contract was signed he had any conversation with him with reference to the purchase of the sand pit (S. C., p. 43, ll. 20-23). Then came the question directed specifically to an alleged conversation as to the three conveyors (S. C., p. 43, ll. 30-33). The question was objected to among other grounds, as varying the contract in violation of the parol evidence rule. (S. C., p. 44, ll. 28-36). Then came the answer:

"Q. All right, relating to the conveyors what was the conversation? A. Why, I don't recall any conversation relating specifically to any conveyors. It was the sand pit and all the stuff that was there." (S. C., p. 45, l. 38 to p. 46, l. 2).

This line of inquiry the defendant was permitted over plaintiff's exception to pursue throughout the whole case.

Defendant's counsel attempted to justify the first question to plaintiff's president on cross-examination on the ground as he alleged that "This witness, (plaintiff's president) has testified that just before this contract was signed that Mr. Hill—he said to Mr. Hill, "There are some conveyors there, I want you to leave them here." (S. C., p. 25, ll. 28-34). But this was not the fact. What the witness had testified to was *that just prior to the execution of the deed* he asked Hill, defendant's vice-president, for permission to leave the three conveyors on the premises until the weather settled so they could be gotten out, to which defendant's vice-president assented. (S. C., p. 16, l. 26 to p. 17, l. 17). So that it will be seen that no testimony had been brought out about any conversation before the execution of the contract. Furthermore this testimony about leaving the three conveyors on the premises until the weather settled was introduced for the sole purpose of showing how the conveyors came to be on the premises after the deed was executed and not to show any alleged oral contract resting in conversations of the parties before March 18, 1929, the date when the contract, D-1 was executed.

All the other questions hereunder considered were admittedly introduced to show an oral understanding for the purchase of the three conveyors by the defendant made before the contract was executed. Thus defendant's counsel stated in open court:

"Mr. Cox: May I ask the court for a ruling on the other point brought up by Mr. Kimmel as to the interpretation of that section of the contract, to save time in the trial of this case? Whether the court wants evidence to show what the intention of the parties was by that section. If so, I am prepar-

ed to offer it. Our contention is that the section is clear and speaks for itself; it needs no evidence to substantiate it, that it includes these conveyors". (S. C., p. 42, ll. 1-14).

And the court adopted his subtle suggestion to admit the evidence as to the alleged conversations prior to the making of the contract (S. C., pp. 42-47).

The contract was a written and formal contract, solemnly executed by the president and secretary of each of the corporations, with the corporate seal of each affixed. It was acknowledged under oath by the secretary of each the corporations and it occupies eight pages of the printed book (S. C., pp. 103-110). It is complete in every detail; it names the parties, the consideration, describes the land by metes and bounds, was accompanied by a \$500.00 cash deposit which is recited, specifies the time and place for the delivery of the deed, provides for apportionment of rent and insurance premiums, etc., and provides for zoning laws and assessments etc. In short it is as complete a contract as one can imagine. That being the case the court below erred in admitting the testimony hereunder considered to show by alleged oral conversation prior to March 18, 1929 when the contract was executed, an alleged oral agreement whereby the three conveyors were included in the transaction. The contract was clear and unambiguous. As much was admitted by the defendant's counsel at the trial. He said:

"Our contention is that the section is clear and speaks for itself * * *" (S. C., p. 42, ll. 11-12).

The rule of law condemning the admission of the

type of evidence herein discussed is well stated by Justice Depue in the leading case of *Naumberg v. Young*, 44 N. J. L. 331 (Sup. Ct. 1882) at page 338:

“It is a rule founded on the obvious inconvenience and injustice that would result if matters in writing, made by advice and on consideration, and intended to finally embody the entire agreement between the parties were liable to be controlled by what Lord Coke expressively calls “uncertain testimony of slippery memory” 2 Taylor on Ev. Section 1035.

Where the terms of the agreement are reduced to writing, the document itself being constituted by the parties as the true and proper exposition of their admissions and intentions, is the only instrument of evidence in respect of that agreement which the law will recognize, so long as it exists, for the purpose of evidence. 3 Starkie on Ev. 1002”.

and at page 339:

“When parties have deliberately put their mutual engagements into writing in such language as imparts a legal obligation, it is only reasonable to presume that they have introduced every material term and circumstance; and consequently all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after, or at the time of the completion of the contract, will be rejected. 2 Taylor on Ev. Section 1035.”

In *Yentis v. Townsend*, 104 N. J. L. 109 (E & A 1927) this court dealing specifically with a contract for the sale of land held at page 111:

“It has been settled in this court, beyond discussion, the rule of evidence is that where

parties have put their contract in writing, the written contract shall be the only evidence of the contract as finally concluded, and that oral testimony of what was said or done during the negotiations, will not be admitted, either to contradict the written contract or to supply terms with respect to which the writing is silent. *Naumberg v. Young*, 44 N. J. L. 331. That case has been cited with approval, many times in this court."

An idea of the scope of the rule may be gleaned from *Lean v. Leeds*, 92 N. J. Eq. 455 (E & A 1920). In that case a contract to sell land otherwise complete did not express the time for final payment and final delivery of the deed. It was held that the law implied a reasonable time for doing these things and the contract could not be varied by attempting to show an oral stipulation that the money should be paid and deed delivered after the title company had passed the title. See in addition to the above cases the following cases in accord:

Decker v. Smith & Co., 88 N. J. L. 630, 635 (E & A 1915);

Walls v. Christos, 104 N. J. L. 81, (E & A 1927);

Castlebaum v. Wolfson, 92 N. J. L. 165 (E & A 1918);

Buglass v. Weber, 2 N. J. Mis. R. 795 (Sup. Ct. 1924)

We have pointed out before that the contract is clear and unambiguous. Even should it be assumed that there is an ambiguity, it is a latent ambiguity, if one at all.

"Being a latent ambiguity, if any, the agreement was for the courts interpretation,

and could not be supplemented by evidence of the intention of the parties, nor submitted to the jury. It is true that in cases both within the state and in other states of the union, the courts will look into the facts surrounding the making of an agreement as they may exist to clarify the meaning that may otherwise be obscure. (*Fletcher v. Interstate Chemical Co.*, 95 N. J. L. 543), but will never permit the agreement itself to be altered or changed by the conversations of the parties." *Buglass v. Weber*, 2 N. J. Mis. R. 795 (Sup. Ct. 1924)

Accord:

Griscom v. Evens, 40 N. J. L. 402, 410
(Sup. Ct. 1878);
Schwartzman v. Creveling, 85 N. J. Eq.
402 (Ch. 1915).

We respectfully submit the court below erred, and prejudicially so, in admitting in evidence alleged conversations of the parties before the written contract was executed on March 18, 1929 to vary, contradict or explain the written contract.

Conclusion.

Plaintiff feels itself seriously aggrieved by the rulings heretofore recited, made during the course of the trial. The court should have directed a verdict for the plaintiff at the close of the whole case under well settled principles. The deed merged the contract; even should that be assumed not to be so, under no circumstances could the contract be interpreted to include the three conveyors, as under primary principles of construction, the general term in the printed form contract related to property of the same class as that embraced by the preceding specific enumeration of articles; in-

dependently of either of these two propositions there was no proof that the three conveyors were used on the premises when the contract was made or that they had been permanently installed for exclusive use on the premises and therefore applying the provision of the contract, the alleged justification fell. Since the deed merged the contract the court below erred in ruling and charged that no merger took place and also in admitting the contract in evidence. Further, the court erred in permitting to be detailed, alleged conversations of the parties before the contract was executed to vary and contradict the contract.

As a result of the rulings of the trial judge, the deed was permitted to be attacked by the contract and then the contract itself was permitted to be counteracted by alleged prior conversations of the parties. If solemn instruments executed under the hands and seals of parties are to be thus frittered away by the frail efforts of a still frailer human memory, then, to use the vernacular, they are not worth the paper they are written on and parties are deceiving themselves in thinking that they are doing anything of value, in executing them.

We respectfully submit that in view of the errors apparent on the record, the judgment below be reversed to the end that a venire de novo issue to try this cause in accordance with the law of the land.

Respectfully submitted,

David Kimmel KIMMEL & KIMMEL, *by*
Of Counsel with Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

WEST PATERSON SAND AND GRAVEL
Co., a New Jersey Corporation,
Plaintiff-Appellant,

v.

GREAT NOTCH CORPORATION, a New
Jersey Corporation,
Defendant-Appellee.

ACTION
AT LAW.

ON APPEAL
FROM THE
NEW JERSEY
SUPREME
COURT.

BRIEF OF DEFENDANT-APPELLEE.

Statement of Facts.

Prior to March 18, 1929, the plaintiff corporation was the owner of about five acres of land, upon which it had opened and upon which it operated a sand pit. In operating the sand pit, it used a crane to loosen the sand from the bank and used the three electric conveyors, which are the subject matter of this suit, to load the loose sand upon trucks (p. 22, l. 30, p. 24, ll. 3-11, p. 25, ll. 12-30).

The defendant corporation, during this time, bought sand from the plaintiff company.

During the month of March, 1929, and prior to the 18th day of that month, the plaintiff company, through its president, entered into negotiations with the defendant company, through its vice-president, for the sale of the sand pit. The negotiations extended up until March 18, 1929, and, during the negotiations, various conversations were held by the officers of the parties to this suit.

In those conversations the defendant insists it was stated that the sale was to include everything upon the premises (p. 46, l. 20), including the electric conveyors above mentioned. This was denied by the president of the plaintiff company and the resulting contradiction was left as a question of fact for the jury under circumstances which we will outline later.

On March 18, 1929, the two parties to this suit entered into a contract, which provided for a sale of the property to the defendant. The contract is printed in the state of case.

The contract was drawn by the attorney for the plaintiff, and was redrawn several times before it was in a form satisfactory to the plaintiff. It is true that the vice-president of the defendant company, who was not a lawyer, was president and participated in drafting it; but the changes were made at the request of the attorney for the plaintiff (p. 47, ll. 13-24, p. 52, ll. 1-15).

The contract, as finally drawn, was upon a printed form such as is usually used for the sale of a house and land. It contained the following clause, which the defendant insists passed title to the conveyors to it:

“Gas and electric fixtures, gas stoves, hot water heaters, chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of the premises is represented to be owned by the seller and is included in this sale.”

Those drawing the contract crossed out such provisions printed thereon as they did not wish to apply. There appeared on the original contract the printed provision:

“And the said party of the * * * part hereby agrees to pay the licensed and authorized agent * * * a commission of % on the purchase price aforesaid.”

This, as well as other provisions printed on the contract, were crossed out before the contract was executed and do not appear in the state of case as they form no actual part of the contract.

It will be noted that the contract provides that “* * * the said party of the first part (the plaintiff), for and in consideration of the sum of \$7500. * * * will well and sufficiently convey to the said party of the second part (the defendant), its successors and assigns by deed of warranty * * *” (p. 103, l. 28). Pursuant to this provision, a warranty deed (exhibit P) was delivered to the defendant, conveying the land in question to it.

No provision was made by the contract for the inclusion of the personal property in the deed or for the delivery to the defendant of a bill of sale for it, and no mention was made of the personal property in the deed and no bill of sale was given for it.

The conveyors were in a rather ruinous condition on March 30, 1929, the day that title passed. They had motors missing from them (p. 62, ll. 24-26), belts were broken or missing, gears were worn or broken, pulleys were missing, and one of them had been left covered by sand (p. 61, ll. 38, p. 63, l. 6).

Subsequent to the 30th of March, the day on which title passed, the defendant spent over six hundred dollars repairing the conveyors (p. 65, l. 10). Up to the time that the conveyors were repaired, no demand for them was made upon the defendant. Later a demand was made and the defendant refused to surrender them, claiming title to them.

The suit in this matter was to determine whether or not the defendant converted the conveyors to its use, and it was determined that there was no conversion.

ARGUMENT.

The argument of the appellant falls generally under three divisions: A. the deed merged the contract, B. the contract cannot be interpreted to include the three conveyors, and C. there was no proof that the conveyors were being used in the operation of the premises covered by the contract at the time the contract was made. The appellant argues that because of this the Court erred in not directing a verdict in its behalf.

POINT I.

The Court did not err in refusing to direct a verdict for the plaintiff at the end of the case.

A. The deed did not merge the contract. The contract was specific in its terms as to what the subject matter of the deed should be. It provided concerning the deed, as has been pointed out above, that, “* * * the said party of the first part, (the plaintiff), for and in consideration of the sum of \$7500. * * * will well and sufficiently convey to the said party of the second part (the defendant), its successors and assigns by deed of warranty * * *” Nothing was said anywhere in the contract about including the personal property in the deed, and for that reason and for the further reason that the sale of the personal property was merely a collateral matter, the deed did not merge

the contract to the extent of preventing the conveyors from passing to the defendant.

The appellant cites from page 122 of *Long v. Hartwell*, 34 N. J. L. 116. He ends his quotation in the middle of a short paragraph. His quotation is: "The general rule will not be questioned that the acceptance of a deed for land is to be deemed prima facie full execution of an executory agreement to convey and thenceforth the rights of the parties are to be determined by the deed and not by the agreement." The very next sentence is "Covenants collateral to the deed are exceptions to this rule, and the cases may be stated where the deed would be considered only in part execution of the contract." The last sentence applies to the case at bar in that the agreement to convey the personalty is a collateral agreement and not intended to be embraced by the deed. To quote further from the case, on page 122 the decision continues, "* * * In all cases, the deed when accepted is presumed to express the ultimate intent of the parties to so much of the contract as it purports to execute." In the present case the deed purports to execute only that portion of the contract which provides for a conveyance of the land in question by a warranty deed.

In the case of *Ouderdouk v. Gray*, 19 N. J. E. 65, the question of whether a later instrument would merge a prior executory contract or only part of it was not raised. The issue in that case was a narrow one and was clearly set forth by the court in the balance of the paragraph quoted. The full paragraph is, "After delivery of the deed and mortgage Ouderdouker held possession of all that remained in his possession as tenant, and not as mortgagee. It makes no difference as to this result, what was the agreement at the time of the contract, about the possession of the place before

the first of April. Whatever was intended by the terms used in the contract, or the parol agreement then made as to the possession, was all done away with by the arrangement at the delivery of the deed. The parties executing a contract have the right to depart from its terms. And if they do so, and by consent accept something different in execution of the contract, they are bound by the acceptance, and cannot look back to the contract."

It appears from the above quotation that the question decided by this paragraph was that the agreement in the contract regarding possession had been altered at the time of passing title by a subsequent agreement upon that point.

The case of *Davis v. Clark* supports the appellee's contention. It holds, "Where a deed is made and accepted in pursuance of an executory contract, the law presumes that it fully expresses the final intentions of the parties as to so much of the contract as it purports to execute.

The case of *Edelman v. Lamping*, 105 N. J. E. 515, cited by the appellant, is entirely in accord with the appellee's contention. In that case the Court of Errors and Appeals reversed the decision of the Court of Chancery that a certain provision of the contract for sale of land was a collateral agreement and not merged in the deed. By doing so, it, in effect, held that if the agreement were a collateral one, it would not have been merged by the deed.

We, therefore, urge that, first, the contract itself did not contemplate that any mention should be made in the deed of the personal property, as the agreement to pass title to the personal property was entirely collateral to the other agreement contained in the contract, which was to convey the land. And, second, this being so, and the deed merely purporting to convey the realty, the agree-

ment to pass title to the personalty did not merge in the deed.

B. The appellant next argues that the clause "Gas and electric fixtures, gas stoves, hot water heaters, chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of the premises is represented to be owned by the seller and is included in this sale." (S. C. p. 106, ll. 2-11) is not broad enough to pass title to the electric conveyors in question. With this we do not agree.

The appellant states on page 9 of his brief "The contract is a printed form contract and such as is used in the case of the purchase and sale of a building and the land whereon it stands, from which it results that many of the contract provisions when attempted to be applied to the transaction in the case at bar where a bare five acres of land were transacted for will be found to be inapplicable."

The appellee agrees with the appellant that the printed form of contract was not particularly suited to the use to which it was put, in that it referred to an entirely different type of premises than those which were the subject of the sale. But before the contract was signed by the parties, certain clauses were crossed from the contract, and this clause, with others, was allowed to remain. Having been allowed to remain, it follows, of necessity, that the parties intended it to be a part of their agreement. In construing contracts, the courts always endeavor to learn the true intention of the parties and to give it a construction in accordance with the intention of the parties, unless to do so would be contrary to the clear written intention of the contract itself.

So, in this case, in construing the clause in question, it was the duty of the court, in view of the fact that the contract was on a printed form, which related to a different type of property than that in question in this case, and in view of the further fact that the parties had crossed out certain sections thereof, which they did not want to apply, and had left this section remaining, to seek the true intention of the parties to this contract and to so interpret that clause, providing that in so doing it was not violating the expressed intention of the parties themselves. The clause, being printed and not written by the parties and belonging to a contract which had to do with the conveyance of a house and land, taken as a whole, showed the distinct intention to pass title to all personal property usually found upon that type of premises and used in the operation of such premises.

It will be noted, in reading through the specific articles mentioned, that they are not confined to any one class but include all personal property usually found upon premises such as the contract was printed to cover. The fact that it covered various classes of articles, ranging from electroliers and rugs to heaters and ash cans, would, of necessity, give a broader meaning to the general phrases following thereafter than they otherwise would be entitled to, for it showed the intention of the parties to be to pass title of all personal property used in the operation of the premises. The clause was certainly broad enough to pass title to an electric water system, which might have been located upon the premises, and which might have been used to supply the house with water, although it was not specifically mentioned, and it would be broad enough to cover an ash removing system used to convey ashes from the cellar, although that was not specifically mentioned under the clause.

The obvious intention of the phrase was to pass title to all personal property appurtenant to and used in the operation of the premises, for the sale of which this contract was used. Each contract for the sale of land usually contains a clause similar to this by reason of the fact that each contract tries to dispose of the personal property appurtenant to and used in the operation of the premises. The mere mentioning of specific objects, which actually did not exist upon the premises in question, did not in any way alter the intention of the parties as expressed by this clause, especially in view of the fact that this was a printed form of contract originally designed for a type of property entirely different from the use under consideration.

A closer reading of the clause itself gives further evidence that this was the intention of the parties. It will be noticed that the clause reads "Gas and electric fixtures, gas stoves, hot water heaters, chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any." In other words, the clause itself indicates that it is considering two distinct classes of personal property: First, the specific objects which it mentions, if there are any of those, and, second, in addition thereto, all other property appurtenant to or used in the operation of the premises. In other words, the clear meaning of the clause, when read as a whole, is that even though there be none of the articles mentioned specifically, still all personal property appurtenant to or used in the operation of the premises would pass to the purchaser.

Corpus Juris lays down, as a general rule of contract law, the following:

"* * * A court will not resort to construction where the intent of the parties is ex-

pressed in clear and unambiguous language, but will enforce the contract according to its terms.

“A contract is not ambiguous where the court can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. A word or expression in the contract may, standing alone, be capable of two meanings and yet the contract may be unambiguous. *And, conversely, even an apparently unambiguous contract may be rendered ambiguous and open to construction if its words, taken literally, lead to absurdity or illegality when applied to the facts.*

“The primary rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may be done without contravention of legal principles. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.” (13 C. J. 520, paragraphs 481 and 482).

See also

Basic Iron Ore Company vs. Dahlke,
137 Atl. 423.

We concede that had the printed contract been intended for property of this type, a stricter interpretation of this clause would have been in order, because the contract having been drawn with the intention of covering a certain definite set of facts, the court's interpretation of the intention of the parties would not be complicated by the fact that the parties were trying to use it to cover a different situation, and thereby making their intention harder to determine.

All cases of the interpretation of a contract cited by the appellant in its brief are cases in which the contract was drafted to cover a certain definite situation, and none are cited where there is an attempt made to change a printed contract to cover a different situation.

As to the construction of statutes, statutes, of necessity, are given a strict construction in order to prevent the courts from reading into the statute something that was not the intention of the legislators themselves.

The appellant says in its brief that it is incredible that the parties, having taken the pains to make a specific detailed enumeration of certain objects, should have failed to include in its specific enumeration the three conveyors and yet have intended them to pass. This argument of the appellant, obviously, overlooks the fact that the clause in question was printed upon the contract and was not in any way changed by the parties themselves to either add or subtract from the clause.

The appellant also states that other clauses in the contract referred to the rents of the premises, insurance premiums, the risk of loss or damage to the premises by fire, and points out that each one of these terms has reference to the operation of a building. They could apply with equal force to the premises in question, for, of course, it is just as possible to rent out a sand pit, or the land upon which it stands, as it is a building, that it is entirely possible to insure a shanty, electric light poles, and other objects upon the premises, which would, of course, involve insurance premiums, and it is further logical that such premises involve a risk of loss or damage by fire, for the shanty and poles are as much subject to fire damage as any other building would be.

C. It is next argued by the appellant that, regardless of its first two points, there was no proof in the case that the conveyors were being used in the operation of the premises covered by the contract at the time that the contract was made.

The undisputed evidence in the case is that the appellant was not operating its premises at the time that the contract was made because it is not usual to operate a sand pit in the winter time. The evidence also showed that when the sand pit was operated the conveyors were used in the operation of the sand pit to load trucks. (See p. 24, ll. 9-11; p. 25, ll. 11-17).

It would be just as logical to say that in the sale of a house and land, the heating apparatus would not be included in the sale if the contract were signed in the summer time as it is in this case to say that the conveyors were not intended in the sale because they were not being actually operated at the time that the contract was signed. There is no evidence in the case that it was the intention of the appellant, if it had not sold the property, to remove the conveyors from the property. It was, therefore, the duty of the court to interpret the contract according to its obvious meaning, which the court did, and that meaning was that the property used in the operation of the premises, when the premises were in operation, passed under this contract.

POINT TWO in the appellant's brief mainly concerns the merger of the contract entered into by the parties with the deed, which was thereafter given by the vendor to the vendee. This point has already been covered in our brief.

The appellant, however, brings up one other point, and that is that the contract should not have been admitted in evidence because of the fact that it was merged by the deed. Leaving out for the

moment the question of whether the deed did or did not merge the contract, it is obvious that the contract was properly admitted in evidence, for, unless the contract were in evidence, the Court could not possibly pass upon the question of whether or not it was merged by the deed.

We, therefore, feel that point two of the appellant's brief is without substance.

UNDER POINT THREE, the appellant argues that the court erroneously permitted Mr. Britt to answer the following question:

“Mr. Britt: What is the use of a conveyor around a sand pit?” A. “Why to load these conveyors with sand by the crane and they would screen it and load it on the trucks from the conveyor.”

Mr. Shapiro, the president of the appellant, testified on p. 24, l. 34, in answer to the question:

“Everything else was there?” A. “They didn't need nothing else if they had a crane up there.”

Q. “A crane is used for digging the sand out?” A. “Yes.”

Q. “Loosening it up from the bank?” A. “Yes.”

Q. “And then after it is loosened from the bank the conveyors load it on the trucks, don't they?” A. “Well, not all the time.”

Q. “That is the usual way, isn't it?” A. “At times.”

Q. “Isn't it the usual way?” A. “Not the usual. They load right from the hill, right to the trucks.”

Q. “What is that?” A. “They use the crane and load them right from the hill down to the trucks.”

The testimony was, therefore, relevant to contradict the testimony of Mr. Shapiro that the usual way of loading trucks at a sand pit was by crane

alone. Furthermore, it was relevant and competent evidence to show that conveyors are used in sand pits to load trucks, and, therefore, create the inference that in this case the conveyors, which were in the sand pit at the time that it was bought, were used in the operation of the sand pit.

We, furthermore, do not feel that the argument of the appellant that the testimony swayed the jury is correct, for there seems to be little about the question and its answer to force upon the jury any inescapable conclusion in favor of the appellee.

The appellant argues under **POINT FOUR** that certain evidence admitted by the Trial Judge bearing upon conversations, which were had by officers of the two parties to the suit before the contract was signed, indicating the intention of the parties, was erroneously admitted, it being urged by the appellant that the admission of such testimony was, in effect, varying a written contract by parol evidence.

The Trial Judge, evidently, took the view of the clause concerning the personal property in the contract that it was not clearly enough stated, under the circumstances, to clearly disclose the intention of the parties. He, therefore, admitted evidence of certain circumstances surrounding the making of this contract, so that the intention of the parties could be ascertained.

In doing this, he was not attempting to change a written contract by parol evidence, but was merely trying to arrive at and give effect to the actual intention of the parties.

That he had a right to do so is well settled under the decisions of the State of New Jersey. That that section of the contract was doubtful has been pointed out by us above, the doubt of the intention of the parties arising mainly because a printed

form of contract designed for one type of property was used for an entirely different type after certain changes had been made.

In the recent case of *Basic Iron Ore Co. v. Dahlke*, 137 Atl. 423 this court, in affirming the judgment of the Supreme Court, said: "The cardinal rule for the construction of a written contract is to ascertain and give effect to the mutual intention of the parties." *R. C. L. 835, 13 Corp. Juris 521, paragraph 482 (2)*. "So, to ascertain the intention of the parties, if more than one construction of the language used is possible, the circumstances surrounding the transaction may be considered as well as the written document." See also *Fletcher v. Interstate Chemical Co.*, 94 N. J. L. 332, 6 R. C. L. 849, paragraph 239.

In the latter case the Supreme Court said:

"While a written instrument must be construed according to the intent of the parties as manifested by the instrument itself, yet, where the construction is doubtful, the court may look into the surrounding circumstances, and avail itself of such light as they may afford in ascertaining the true meaning of the language and terms employed."

The appellant, therefore, respectfully urges that the judgment should be affirmed by this court, first, because the contract was not merged by the deed, second, because the contract was broad enough to cover the electric conveyors, which were the subject matter of this suit, and, third, because the Trial Judge committed no legal error which was prejudicial to the interests of the appellant herein.

Respectfully submitted,

HARLEY, COX & WALBURG,
Attorneys for the Defendant-Appellee.



