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WRIT OF REPLEVIN.

THE STATE OF NEW JERSEY TO THE SHERIFF OF THE COUNTY OF CAMDEN, GREETING:

(SEAL)

We command you that if F. Bedell Wills and Michael G. Garrity, co-partners trading as "Consolidated Trucking Company" shall make you secure, you cause to be taken and delivered to them, 1 Blaw-Knox 65-ton hopper type bin, all steel, with 4-opening bottom and 2-cover plates; 1 #200 Blaw-Knox Batcher and 1 #201 Blaw-Knox Batcher, with double gate arrangement—wide discharge, which Camden Lime Company unjustly detains from them as is said; and that you summon the said Camden Lime Company to answer the annexed complaint of the said F. Bedell Wills and Michael G. Garrity, co-partners trading as Consolidated Trucking Company, in an action at law in the Camden County Circuit Court; and that you notify the said Camden Lime Company that unless it files its answer to said complaint with the Clerk of the said Circuit Court at Camden, New Jersey, within twenty days after service upon it of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against it.

Witness, HONORABLE RALPH W. E. DONGES, Judge of the Camden County Circuit Court, at Camden, this 18th day of February, 1926.

LOUIS B. LEDUC, *Attorney.*

WILLIAM D. BROWN, *Clerk.*

COMPLAINT.

CAMDEN COUNTY CIRCUIT COURT.

F. Bedell Wills and Michael G. Garrity, co-partners trading as Consolidated Trucking Company,
Plaintiffs,
v.
Camden Lime Company,
Defendant.

Action at Law.
Complaint.

Plaintiffs, F. Bedell Wills, of Haddonfield, New Jersey, and Michael G. Garrity, of Gloucester City, New Jersey, co-partners trading as Consolidated Trucking Company, say:

1. On or about December 10, 1925, plaintiffs were and ever since have been the owners of the following goods and chattels, to wit: 1 Blaw-Knox 65-ton hopper type bin, all steel, with 4-opening bottom and 2-cover plates; 1 #200 Blaw-Knox Batcher and 1 #201 Blaw-Knox Batcher, with double gate arrangement—wide discharge.

2. On or about that day plaintiffs were, and ever since have been, lawfully entitled to the immediate possession of the said goods and chattels.

3. On or about that day, defendant wrongfully detained the said goods and chattels on or near its wharf on the Cooper River in Camden, New Jersey, from the possession of the plaintiffs, and has ever since wrongfully detained and still wrongfully detains the same.

4. Plaintiff demands possession of the said goods and chattels and $2500 damages for their detention, or in case they cannot be returned to the plaintiffs, then $2500 damages for their value and $2500 damages for their detention.

Louis B. LeDuc,
Attorney for Plaintiffs.

ANSWER AND COUNTER-CLAIM.

CAMDEN COUNTY CIRCUIT COURT.

F. Bedell Wills and Michael G. Garrity, co-partners trading as Consolidated Trucking Company, *Plaintiffs,* v. Camden Lime Company, *Defendant.*	Action at Law. Answer and Counter-Claim.

Defendant, Camden Lime Company, a corporation of the State of New Jersey, having its principal office in the City and County of Camden, says that:

1. It denies the truth of the matters contained in the complaint.

2. It denies that the property claimed is subject to replevin, as the same is permanently attached to the freehold.

3. Defendant reserves the right to move before the Court, at the trial of this cause, to strike off said writ and complaint on the ground that the property sought to be replevied is not personal property, but is permanently attached to the lands of the Camden Lime Company.

By way of counter-claim against the plaintiff, defendant says that:

1. At the time of the alleged taking it was and still is the owner, and entitled to the immediate possession, of the goods and chattels described in the complaint.

Defendant demands possession of the said goods and chattels and five thousand dollars damages.

Wescott & Weaver,
Attorneys for Defendant.

REPLY AND ANSWER TO COUNTER-CLAIM.

CAMDEN COUNTY CIRCUIT COURT.

F. Bedell Wills and Michael G. Garrity, co-partners trading as Consolidated Trucking Company, *Plaintiffs,* v. Camden Lime Company, *Defendant.*	Action of Replevin. Reply and Answer to Counter-claim.

Plaintiffs deny all the allegations of the defendant's answer and counter-claim.

Louis B. LeDuc,
Attorney for Plaintiffs.

TESTIMONY.

CAMDEN CIRCUIT COURT.

F. Bedell Wills and Michael G. Garrity, *Plaintiffs,*
v.
Camden Lime Company, *Defendant.*

Action at Law.

May 20, 1926.

Appearances:
For the plaintiffs, Louis B. LeDuc, Esq.
For the defendant, Wescott & Weaver, Esqs.

Before Donges, J., and a jury.

(Mr. LeDuc opens the case for the plaintiff to the jury.)

(Mr. Weaver opens the case for the defendant to the jury.)

THE CASE FOR THE PLAINTIFF.

Michael G. Garrity, sworn.

By Mr. LeDuc:

Q. Mr. Garrity, where do you live, sir?
A. 212 Mercer Street, Gloucester.
Q. Are you a member of the firm known as the Consolidated Trucking Company?
A. Yes.
Q. The plaintiff in this cause?
A. Yes.
Q. And who is the other partner that composes that firm?
A. F. B. Wills, I think—right.
Q. What is the business of this firm?
A. We have trucks that engage in hauling road and street materials, mostly, trucking of any kind.
Q. Were you organized and operating in the early spring of 1925?
A. Yes, sir.
Q. And did you have occasion to bid for the contract with the City of Camden for the delivery of street materials?
A. Yes, sir.
Q. In that year?
A. Yes.
Q. With what results?
A. Well, we were the low bidders.
Q. And did you as a result enter into a contract with the City of Camden?
A. We did.
Q. Now, I show you a paper writing and ask you to look over that and tell me what it is.

A. This is the contract, the agreement.

Q. Just a minute; I will ask you look over this page that I am handing you and tell me what that is.

A. Those are the specifications made by the city to the contracting bidders.

Q. Which accompanied this contract?

A. Yes, sir.

Mr. LeDuc: I think we will attach the two together and offer them as one Exhibit. These are offered.

(Said paper is marked Exhibit P1.)

Mr. LeDuc: I will ask you, Mr. Weaver, to produce the contract with the Camden Lime.

(Said paper is produced and handed to examining counsel.)

Q. Now, Mr. Garrity, do you know who secured the contract with the city for the sale or furnishing of the materials for street construction?

A. Yes, sir.

Q. The materials that you were to deliver?

A. Yes.

Q. Who?

A. The Camden Lime Company.

Mr. LeDuc: I offer in evidence the contract of the City of Camden with the Camden Lime Company including the specifications attached thereto and ask that it be marked. I will not offer, Mr. Weaver, this purchase order or the bond because that is immaterial.

Mr. Weaver: All right. Do you mark them for identification?

Mr. LeDuc: No, I offer them in evidence. (Said paper is marked Exhibit P2.)

Mr. LeDuc: I want to read certain sections of these contracts to the jury. In the first place, the contract with the Camden Lime Company provides hat the Camden Lime will furnish and deliver special mixture for the year 1925 all in accordance with the specifications attached hereto, and the specifications include this: "The bidder must have measuring boxes of such type that same can be adjusted for one bag, two bag or three bag batch; that is, the box must be capable of being adjusted to deliver three cubic feet, six cubic feet or nine cubic feet of sand, also six cubic feet, twelve cubic feet or eighteen cubic feet of stone or pebbles. These boxes must be so made that same can be adjusted in the specified time of not over two minutes. All boxes must obtain the exact amount called for."

Now, in the contract Exhibit P1 with the plaintiffs, "The party of the first part"—the Trucking Company or partnership—"agrees with the city that it shall and will haul during the year 1925 all in accordance with the specifications attached hereto." These specifications provide: "First, paragraph one. Description of work. The work to be done calls for the furnishing the necessary number of two and a half and five-ton trucks for hauling sand, stone and cement from bins to point of operation." In paragraph two the trucks are described. Paragraph three, "Loading. The trucks shall receive from the bins first the necessary amount of stone for each compartment, then proceed to the bins and

receive the necessary amount of sand for each compartment. Then proceed to the cement car whereever the same may be placed, and receive the necessary amount of cement. This material shall then be hauled to the point of operation, the material from one compartment dumped into the skip of the mixer,'' and so forth. Paragraph eight I want to read: ''Bins. The contractor will be required to furnish his own bins for loading sand and stone.'' The rest of it is not so important. Now, the dates of these contracts—the contract with the Camden Lime is March 26, 1925, and with the plaintiffs April 9, 1925.

Q. Now, Mr. Garrity, when you had secured this contract, when you had been advised that you were the low bidder, I take it the contract was signed sometime after that, wasn't it?

A. Yes, sir.

Q. Did you get in touch with the Camden Lime Company?

A. Yes.

Q. Whom did you see at that company?

A. I first called on Mr. Heinlein, Sr.

Q. Yes, and what was said by you to Mr. Heinlein, Sr., on that occasion?

A. I mentioned my business to him, and we talked a little bit about it, and he referred me to Mr. Heinlein, Jr.; he says that anything, any arrangement I made with Mr. Heinlein, Jr., would be O. K. We chatted, I guess, for an hour or more and talked about my age,—talked about immaterial stuff—I don't recall, but I bid him goodbye, and Mr. Heinlein, Jr., was not then in the building. Later, I don't recall now whether it was that evening or the next morning, I met Mr. Heinlein, Jr., in his office; Mr. Wills was with me at the time, my partner, F. B. Wills.

Q. Just a minute, you are going on to another conversation. Before you leave this first conversation with Mr. Heinlein, Sr., was anything said as to the supplying of a bin for the contract with the city?

A. Why, Mr. Heinlein, Sr., I don't think allowed me to go into detail when he found out what —— It seemed he understood that we were to be the contracting hauler, and he simply stopped me and referred me to Mr. Heinlein Jr., as I recall it. I don't think I had time to tell Mr. Heinlein, Sr.

Q. Now, had you at this time of your conversation with Mr. Heinlein, Sr., made any preparations for ordering a bin?

A. Yes.

Q. You had?

A. We had.

Q. What had you done?

A. We had ordered a bin.

Q. What kind of bin?

A. A Blau-Knox loader, new.

Q. How did you come to select that type of bin? Had you had any conversation with any one from the Camden Lime in regard to that?

A. Previous to that talk was my partner's talk with young Mr. Heinlein.

Q. Oh, your partner had a talk with young Mr. Heinlein?

A. Yes.

Q. At which you were not present?

A. No, sir, I don't recall being present.

Q. Now, then, you went back you say after this talk with Mr. Heinlein, Sr., either that day or the next day, you can't recall which, and had a talk with Mr. Heinlein, Jr.

A. Yes.

Q. At that time had your bin been delivered to you or not?

A. Yes, sir, the bin was in the Pennsylvania yard.

Q. In the Pennsylvania yard—all right. Now, do you recall the date when you had this conversation with Mr. Heinlein, Jr.?

A. No, sir, I cannot.

Q. Very well; now, will you state what was said on that occasion?

Mr. Weaver: I object to that, if the Court please. Now, there is a written agreement in this matter, and if these conversations tend to vary the terms of this written instrument they are inadmissible, and if they are prior to the making of the agreement they are inadmissible on the ground that the minds of the parties had met in the agreement.

The Court: But it does not yet appear that there is a written agreement.

Mr. Weaver: I know, but if he is to be permitted to get in these conversations that are inadmissible in this way, we are going to take up an awful lot of time and there is nothing left for me but to move to strike them out when the agreement appears.

The Court: I suppose that is so; I suppose we have got to proceed in an orderly way until it appears that there is a written agreement.

(Question repeated.)

A. I called on young Mr. Heinlein.

Mr. Weaver: Have you got the date fixed here?

Mr. LeDuc: No, he was not able to fix the date.

Q. Can you say what month it was in, Mr. Garrity, about what date it was?

A. It was in April, wasn't it? I can't recall the date.

Mr. LeDuc: We will fix that later, Mr. Weaver.

The Court: Very well, proceed.

The Witness: I called on Mr. Heinlein, Jr.; my partner, Mr. Wills, was with me. We sat down over at Mr. Heinlein's desk, the desk I noticed he always used; after that I had been in there a number of times. We sat over in the corner at his own desk, and I told him we were ready to place our Blau-Knox loader and he told me that we would have to make a written agreement that the Blau-Knox loader become the property of the Camden Lime as soon as it was set up on their premises. I says, "What do you mean, Mr. Heinlein—do you mean that we are going to give you our new Blau-Knox loader?" "Oh, no, no," he says, "the Camden Lime Company require that any machinery set up on their premises—require that so that any machinery set up on their premises will be under their control; they want to have full control, and," he says, "later we will fix a rental, and at the expiration of your contract we will have a settlement." I think that is word for word.

Q. Well, now, what did you say to that?

A. Well, then, I said, "All right," if he wanted it for that purpose, in order to have control, that we would agree to that, not to give him our loader, to give him control.

Q. What was said, if anything, about who should set up the loader or bin?

A. There was nothing said; we intended to set it up. We bought it and hauled it up there and intended to set it up; there was nothing said about who would set it up, erect it.

Q. Now, something has been said about a writing; do you know anything about that, something that was signed by Mr. Wills?

A. I sat here and Mr. Heinlein here and Mr. Wills there (indicating) and he dictated.

Q. Who is "he?"

A. Mr. Heinlein dictated a note to Mr. Wills and Mr. Wills wrote it there. I thought it was a—what I would call a skeleton dictation or something that he wanted us to sign and deliver in agreement with this full control that they wanted, and I didn't know, but I found that Mr. Wills signed that longhand note that he wrote there. I didn't see it; I did not know what was in it; I have never seen it, that note that was written at his desk.

Q. Now, what happened with regard to the setting up of the motor or bin after this conversation that you have described? I think you said that the loader or bin had been delivered by you to the plant or the property of the Camden Lime Company—was that correct?

A. We took our own trucks, two trucks, two large trucks to the Pennsylvania yard, loaded this stuff on them, hauled it up and placed it where the Camden Lime directed. I did not go with the trucks and did not assist at the unloading, but I was down a while in the morning when they were loading the Blau-Knox loader in knocked down condition in our trucks.

Q. And was the loader set up?

A. The next day ——

The Court: Was it set up?

Q. Yes or no.

A. No.

Q. Was it set up at all?

A. Not by us.

Q. By whom was it set up?

A. By the Camden Lime.

Q. Did you give the Camden Lime authority or instructions in regard to setting it up?

A. I did not.

Q. Can you tell us what the cost of this bin was?

A. The cost of the bin?

Q. Yes, did you pay for it? Excuse me—strike that out. Did you pay for this bin?

A. Yes, sir.

Q. What did you pay for it?

A. Fifteen hundred and seventy dollars.

Q. Were there any other costs in connection with its delivery?

A. Yes, sir, there was a freight cost of fifty-two dollars.

Q. Any other cost connected with its delivery to the premises of the Camden Lime?

A. Our own cost of sixty dollars.

Q. For moving it?

A. For moving it.

Q. Now, did you proceed after that to make deliveries under your contract with the City of Camden?

A. Yes, sir.

Q. When was that contract completed?

A. In early December.

Q. Of last year?

A. Of 1925; I don't recall the date.

Q. I think I would like you to describe briefly, Mr. Garrity, just how this bin or loader worked so the jury will know just exactly how it was operated.

Mr. Weaver: I object; what difference does that make how the machine operated?

The Court: How is it material?

Mr LeDuc: I think it is simply interesting to know; possibly it is not material.

The Court: Well, then, don't let's take time to do that.

Mr. LeDuc: Very well, the question is withdrawn.

Q. Did you have a conversation with any one at the Camden Lime Company after the completion of this contract?

A. No, sir.

Q. In December of last year?

A. Yes, sir, at the completion of the contract.

Q. And with whom?

A. With Mr. Heinlein, Jr.

Q. What did you say and what did he say on that occasion?

A. I told him I up to settle with them, final settlement about the Blau-Knox loader, about our Blau-Knox loader—that is the way I put it.

Q. Yes; what did he say?

A. Why, he says, "That Blau-Knox loader belongs to the Camden Lime, and," he says, "you owe us $190.00 for erecting it."

Q. Was anything else said?

A. Well, it kind of struck me—it struck me hard, in fact, I says, "Well," I says, "that is a kind of surprise, but," I says, "it is all right, but I tell you, Mr. Heinlein, I don't think I will let you—I am going to think it over but I don't think though I will let you keep our Blau-Knox loader."

Q. What did he say to that

A. He said, "All right; don't you recall signing a letter?" I believe he called it. I said, "I recall sitting down over there with you and you telling me that you wanted control right over there at your desk, Mr. Heinlein, you and I and Mr. Wills, that letter." "I will get the letter," he says. I says, "You don't need to get it, I recall it, but," I says, "you told me that that was for the Camden Lime to have complete control of any machinery erected on their property, and that you would fix a rental later and at the expiration of our contract there would be a settlement." That was about all we said.

Q. Where is the bin now?

A. It is still on the Camden Lime's property; I saw them loading trucks there recently.

Q. How has that bin set up, briefly, Mr. Garrity—how does it rest on the ground?

A. It is about twenty feet high, sets on four legs, room to back under it with a large truck. You pull a string, and you get the right amount of sand and you pull another one and you get the right amount of gravel.

Q. What I meant was, how was it set on the ground? Is it fastened on the ground or not?

A. It sets on two twelve by twelve blocks—it may be less or more—but on two big stringers.

Q. What is the material of those blocks?

A. Wood.

Cross-examination.

By Mr. Weaver:

Q. Mr. Garrity, you said, you have testified that you saw Mr. Heinlein, Jr., in December?
A. Yes, sir.
Q. You were talking to him about the bin?
A. Yes, sir.
Q. You have testified that you said to him you did not think that you were going to let him keep that bin?
A. Yes, sir.
Q. Now, why did you say that?
A. Because he said it was his.
Q. Well, didn't you know it was their property?
A. No. Did I know it?
Q. Yes, didn't you know it was their property?
A. No, sir, I knew it was not their property.
Q. Now, were you present the day Mr. Wills wrote the letter I show you?
A. I was present the day he wrote a letter.
Q. Did you hear what was said?
A. I heard it back and forth, a little of it; I didn't give it much attention, thought it was a skeleton being framed up for later.
Q. Your interest was involved?
A. Yes, sir.
Q. And you pay attention when your business is of a nature such as this was?
A. Yes.
Q. You pay very close attention, don't you?
A. Yes, sir.
Q. Now, do you recall whether this letter stated, "Dear Sir—

Mr. LeDuc: Just a minute, if the Court please; I object to the reading of the letter before the jury. It is not in evidence yet.

The Court: I suppose he may be cross-examined about it. I suppose he may be asked whether or not in his presence certain things were not stated and put in the paper.

Q. Did you hear this read in your presence: "This is to advise that we are ready to place ——

Mr. LeDuc: Just a minute; I think it should be shown that two words appear, one being stricken out and the other one written over.

Mr. Weaver: I will read the letter as it was originally: "This is to advise that we are ready to place a Blau-Knox bin at your Federal Street wharf ——"

Mr. LeDuc: The word "your" does not appear on the original.

Mr. Weaver: I understand that; I am not reading that. I beg your pardon—"at Federal Street wharf as per our conversation with you this date. It is understood that the bins are to become your property as soon as placed on the ground. Yours truly, Consolidating Trucking Company, F .B. Wills, manager." Did you hear that read there in your presence on that day?

A. No, sir.
Q. You did not?
A. No, sir.

Q. You were there?
A. Yes.
Q. Mr. Wills was present?
A. Yes.
Q. What were you doing?
A. I was sitting on this side. That was a very quiet conversation. It seems to me that they read it and I recall part of it; it was not read out as you read it now. My partner ——
Q. Now, don't you recall ——

Mr. LeDuc: I think he had not finished, Mr. Weaver.

Q. Go ahead—your partner what?
A. My partner and Mr. Heinlein attended to that, as I understand it; as I was getting it, Mr. Heinlein was dictating it and I presumed it was for us to take to our office and write on our letterhead in typewritten form as they had that and to be delivered; in fact, young Mr. Heinlein said that was to be done with the letter, delivered to them.
Q. Now, then, is it not true, that at that time, you being present, that Mr. Heinlein, Sr., objected to the form of that letter? Did you hear him object to the form of that letter as I read it?
A. Mr. Heinlein, Sr.?
Q. Yes?
A. I don't recall Mr. Heinlein, Sr., objecting at no time to anything or anybody objecting at that time to the form of that letter. There was nobody there to object.

The Court: Well, did anybody?

The Witness: No.

Q. Now, isn't it true right at that time, on that day, that Mr. Heinlein, Jr., called your attention to the fact that there was certain wording in that letter that did not meet with his approval—isn't that right
A. No.
Q. Nobody called your attention to that?
A. No, sir.
Q. You were there?
A. Yes.
Q. Mr. Wills was there?
A. Yes, sir.
Q. So you recollect nothing further about that letter?
A. Than what I have mentioned?
Q. Than what you have testified?
A. No.
Q. Now, isn't it true, Mr. Wills, at that very time or just subsequent to that that there was a letter prepared changing the original letter, following the suggestions in pencil mark which are as follows ——

Mr. LeDuc: Just a minute; is this the letter that was signed, executed and delivered that you are referring to?

Mr. Weaver: Yes.

Mr. LeDuc: That you are about to read?

Mr. Weaver: Yes. Well, I can ask him, is that your signature, Mr. Garrity?

The Witness: Yes, sir.

Q. That is your signature?

A. Yes.

Q. Now, immediately subsequent to the conversation which took place in your presence, as I understand, was not this letter prepared to meet the objections made by the lime company or some one representing them to the former letter—look at it, April 2nd.

A. Yes, sir.

Q. And that is your signature?

A. Yes, sir.

Q. Wasn't this letter submitted to you?

A. Sometime afterward.

Q. On the same day?

A. No, sir.

Q. Not the same day?

A. No, sir.

Q. Well, I have no doubt you want to be correct in this matter. Won't you look at the dates on both of these letters, April 2nd.

A. Yes, sir, I was notified two different times by lawyer DeMaris to please come up and sign this letter. It was at least two weeks after this or more when I went up and signed that.

Q. You did sign this letter as you have stated?

A. Some weeks afterward.

Q. Well, did you sign it or not?

A. I did.

Q. Now, then, it reads as follows: "This is to advise that we are ready to erect a Blau-Knox bin on your Federal Street wharf as per our conversation with you this date. It is understood that this bin is to become your property, as soon as erected on the ground. Yours truly, Consolidated Trucking Company by F. B. Wills and M. J. Garrity." Is that Mr. Wills' signature?

A. Yes, sir.

Q. You signed that letter?

A. Yes, I understood it as per our conversation, as I stated, sir.

Q. Well, was that your conversation?

A. As per our conversation.

Q. Is that your conversation: "It is understood that this bin is to become your property as soon as erected on the ground?"

A. As per our conversation, yes.

Q. That is not your conversation, is it—that did not express your conversation?

A. That was Mr. Heinlein's dictation; I signed it as per our conversation.

Q. You can answer this question: This does not represent your conversation, does it?

A. Yes.

Q. It does?

A. Yes, sir.

Q. Now, is it not true, Mr. Garrity, that you could not have obtained the contract that you obtained with the city unless you could erect this Blau-Knox bin?

Mr. LeDuc: I object to that; the contract speaks for itself. I don't think his estimate of necessity is relevant.

The Court: I suppose so; the contract requires, I suppose, the erection of it.

Q. Had you any other place to erect this bin than on the land of the Lime Company?

Mr. LeDuc: I object to that for the same reason.

The Court: The objection is overruled; I think that may be answered.

Q. Could you have erected the bin anywhere else?
A. Not unless somebody else furnished the stuff.
Q. Then you could not have got the contract could you, unless you had obtained the permission of the lime company to put this bin on their land?

Mr. LeDuc: I object to that.

The Court: I think that may be answered.

(Exception noted for the plaintiff.)

A. Yes, sir, I could have got the contract.
Q. Without erecting it on the lands of the lime company?
A. Yes.
Q. Where would you have erected it?
A. As a citizen, I would have made the city buy their sand and lime from somebody that did not require that.
Q. Well, the lime company already had the contract; how would you have controlled the city authorities in that respect?
A. United we stand; I think if they sell the city sand and lime they have to furnish a way for the city to get it.
Q. Now, Mr. Garrity, you signed this letter here willingly, didn't you?
A. Yes.
Q. Nobody forced you to sign it?
A. No, sir.
Q. You were very glad to sign it, weren't you?
A. Yes.
Q. Because you wanted to get along with your work, didn't you?
A. Yes, sir.

Q. And the contract at least looked profitable to you, didn't you?
A. Yes, sir.
Q. Whether you made money out of it or not, that is none of our affairs, but at that time you were enough attracted by the work to be done by the city to make a bid for the work, weren't you?
A. Yes.
Q. And you knew at that time that you had to erect this piece of machinery, didn't you?
A. Yes, sir.
Q. So you went into the operation with your eyes open?
A. Yes.
Q. Nobody made any remarks to you that tended to deceive you in any respect?
A. No, sir.
Q. Nobody deceived you in any way, did they?
A. No, sir.
Q. Now, when did you finish your work there—when was this bin erected in the first place?
A. In April.
Q. And how long did you use it?
A. Until December.
Q. Of the same year?
A. Of the same year.
Q. That was nearly eight months?
A. Yes, sir.
Q. And all that time, to carry out your contract, you were using this bin?
A. Yes.
Q. And you were using the lands of the lime company, weren't you?
A. Yes, sir.
Q. Was it not explained to you by the city officials that it was necessary to have this bin erected and have it erected promptly?

Mr. LeDuc: I object to that; explanations by the city officials are not relevant in view of the contract with the city.

The Court: I think it all goes to the question of the reasonableness of this contract, whether it was made.

Mr. LeDuc: Are we going to interpret reasonableness by hearsay testimony of certain city officials who are not produced here?

The Court: No, this witness is asked now whether speed was not necessary. He may answer the question.

Mr. LeDuc: That is a question, I suppose, that is regulated by the terms of the contract.

The Court: I suppose that is true.

Mr. Weaver: I call on the other side for the original of this letter if you have it. This is a letter dated April 2nd, addressed to the Consolidated Trucking Company by the Camden Lime Company.

Mr. LeDuc: We haven't got that letter.

Q. Do you recall receiving a letter in these words addressed to your firm which is as follows: "We hereby acknowledge receipt of your letter of even date. We will allow you to install an aggrameter on our Federal Street wharf at Cooper Creek. It is understood that this aggrameter will be of a type acceptable to us and suitable to city requirements for 1925, and it will be used for Camden highway work.

Yours very truly, Camden Lime Company." Do you remember receiving such a letter as that?

A. I don't recall receiving that letter.

Q. I don't know whether I asked you or not—I show you this letter of April 2 signed by F. B. Wills which you say was dictated in your presence. Do you remember seeing the interlineations there in lead pencil made at that time?

A. No, sir.

(Letter last referred to is marked Exhibit D1 for identification. Letter Wills to Camden Lime marked Exhibit D2 for identification. Paper in form of letter signed by F. B. Wills and M. G. Garrity, dated April 2, 1925, marked Exhibit D3 for identification.)

By Mr. LeDuc:

Q. I will ask you to examine the letter marked Exhibit D2 for identification, bearing date April 2, 1925, addressed to the Camden Lime Company and signed by Wills and Garrity, and to state whether or not that letter represents the conversation had by you, Mr. Wills and Mr. Heinlein.

Mr. Weaver: I object to that on the ground that the letter is now before the witness and if the answer tends to vary the terms—it was after this letter was written—and if it tended to vary the terms of the written instrument before ——

The Court: Yes, if it took place before this paper was written it seems to me that it is incompetent, and if afterward it may be competent but the time ought to be fixed.

Mr. LeDuc: If the Court please, in the first place these letters are not in evidence and I do not think the objection is relevant in view of that; I think they have got to be part of the case, and in the second place, is it not proper re-direct? Of course, the question Mr. Weaver asked was whether or not that represented the conversation, and I think I am entitled to carry that a step further and find out whether it represented the whole conversation.

The Court: Well, I think the fact that it is not yet in evidence may entitle him to examine.

Mr. Weaver: Now, if the Court please, the way this case is being tried is such that permits him to get all these conversations in and I am not permitted to object when it is clear that there was a written contract.

The Court: Your only remedy, I think, Mr. Weaver, is on a motion to strike out. I think after all it is a question the Court has got to deal with.

(Question repeated.)

The Court: I think I will permit him to answer that yes or no.

A. Must I answer that?
Q. Yes or no.
A. Yes.
Q. Now, did you understand the question?

The Court: I don't think you can cross-examine him.

The Witness: Well, I didn't think for sure ——

The Court: Wait; you have answered the question.

Mr. LeDuc: Can't the witness continue that? I haven't asked him another question.

The Court: No, his answer was yes or no and he said yes.

Mr. LeDuc: I do not think it will do any harm to let him continue what he was going to say. May I have an exception?

(Exception noted for the plaintiff.)

FLETCHER B. WILLS, sworn.

By Mr. LeDuc:

Q. Mr. Wills, you are Mr. Garrity's partner, a member of the Consolidated Trucking Company, aren't you?
A. Yes.
Q. And you live where?
A. 127 West End Avenue, Haddonfield.
Q. Do you recall having a conversation with either of the Mr. Heinleins in the spring of last year in regard to the contract of the City of Camden and the supplying of a bin for the purpose of measuring materials for that contract?
A. Yes, sir.
Q. Will you state as nearly as you can when that was?

A. Why, we were the low bidder with the city ——

The Court: Now, why go over that? That is all admitted, isn't it?

Mr. LeDuc: No, all we want to know is the conversation. I want to know when it was, if he can state.

Q. Was it right after you had gotten your bid?

A. Yes, I had never talked to Mr. Heinlein, Sr., but I went with Mr. Garrity and sat at his desk, young Mr. Heinlein, Jr., and we had the following conversation. Mr. Heinlein told us that as we were the low bidder on this job we are required to get a bin, as you know, I said, "Yes." He said, "What kind of bin are you going to get?" I said, "Well, we have one, but it doesn't matter—we have one we can get but we will get any kind to suit your requirements." He said, "We have a Blau-Knox that we just put down there, and I would like to see you get one like that if you could." I said, "All right, we will buy one like that; we have got to have one any way, and use the other one that we have in mind." So we immediately ——

Q. As a result of that conversation did you buy a Blau-Knox bin?

A. We did.

Q. And thereafter was that bin delivered to you?

A. Delivered to the Consolidated Trucking Company at the Camden yard.

Q. Did you then have a further conversation, you and Mr. Garrity, with Mr. Heinlein, Jr.?

A. Yes, we did.

Q. Will you state when that conversation was had.

A. I don't remember, but I believe it was April 2nd.

Q. And what was that conversation?

Mr. Weaver: Now, if the Court please, I object to that: It appears here definitely, admitted by Mr. Garrity, that there is a written agreement here. Now, notwithstanding it has not been offered in evidence, because, of course, I cannot offer it in their case, this man should not be permitted, this witness should not be permitted to go on when the Court knows by the admission of Mr. Garrity that there is such a paper—Mr. LeDuc should not be permitted to go on and examine.

The Court: Well, I suppose after all there are several exceptions to the rule laid down in Naumberg v. Young, and the effort here, I presume, will be to show that this paper is but a fragmentary part of the real contract, and that being so the plaintiff I suppose ought to have an opportunity to show that; then it is for the Court to say whether or not the paper is expressive of the contract. I think I ought not to limit this testimony.

Q. The question is, what was this conversation?

A. The second conversation?

Q. Yes.

A. I went in with Mr. Garrity to Mr. Heinlein's desk again, Jr., and we had a long talk, and it wound up that Mr. Heinlein said, "Now that your bin is here and you are ready to place it on our ground and erect it, there must be a letter like this, that when you put any machinery on our ground that it becomes the property of the Camden Lime." Mr. Garrity said to Mr. Heinlein, "Do you mean, Mr. Heinlein, that we are going to give you our new Blau-Knox loader?" Mr. Heinlein said, "No, I don't mean that you are oing to give me that loader, but

it is just customary in this way, that at the end of the year we will have some kind of settlement, when the contract is over, the payment of rental for the use of the ground or some sort," and Mr. Garrity said, "All right, we will take a chance," and we—I wrote the letter as Mr. Heinlein dictated it to me in longhand. At the same time, Mr. Heinlein said, "Will you write me—I will copy this letter—will you write me another one on your own stationery and have it signed and brought up here?" I said, "Yes." So we left, and we had another lawyer at that time; I went around myself to see the lawyer.

The Court: Never mind that.

Mr. LeDuc: That is not responsive either.

Q. The contract was concluded when—when was your contract with the city finished?

A. About the middle part of December.

Q. Did you set up this bin?

A. No, sir.

Q. Who did, do you know?

A. The Camden Lime set up the bins.

Q. Had they been instructed by you to do that?

A. No, sir, the understanding with us was that we were to erect our own bin and the letter that the Camden Lime sent us said that we were to erect it.

Q. Now, Mr. Wills, what has been your occupation for the last few years?

A. Trucking.

Q. Contractor?

A. Yes.

Q. And have you in the course of your experience as trucking contractor had occasion to use these same bins in other operations?

A. Yes.

Q. Do you know what the ordinary rental of these bins is?

Mr. Weaver: I object.

The Court: The objection is sustained. I do not think that is material. We are not dealing with the rental.

Mr. LeDuc: Well, if the Court please, I am claiming damages, of course, for the use and detention of these bins.

The Court: Yes, but the rental has nothing to do with that. You said, "What is the reasonable value of the use of the land?" and I suppose ——

Mr. LeDuc: Well, if I said "land" I meant of the bin; I will reframe the question to save time.

Q. Are you able to state what the rental value of bins of this character are in the trade?

A. Only from other contractors that I have worked with.

Q. And what is the rental value of a bin of the character in this case?

Mr. Weaver: I object to that on the ground that he says that he does not know of his own knowledge only from other contractors that he has talked to.

Mr. LeDuc: No, he didn't say "talked to" he said, "been with."

By the Court:

Q. How did you get your knowledge about what these bins rent for?
A. Your Honor, I have been ——
Q. How did you get your knowledge?
A. Through other contractors.

The Court: The objection is sustained.

Mr. LeDuc: Does he mean through what other contractors told him?

The Witness: Yes, sir.

The Court: That is what I thought. The objection is sustained.

Cross-examination.

By Mr. Weaver:

Q. Mr. Wills, you were anxious to get this contract with the city, weren't you?
A. I was.
Q. Isn't it a fact first that that is your handwriting?
A. The ink is, yes.
Q. The ink is your handwriting?
A. Not the lead pencil.
Q. No, not the lead pencil.

By the Court:

Q. Who inserted the lead pencil insertions?
A. I did not see the lead pencil; this is the first time I saw any lead pencil marks on the letter.

By Mr. Weaver:

Q. Isn't it a fact that you prepared this letter at your home, wrote it out in your own handwriting, and brought it to the Lime Company on the 2nd day of April, 1925?
A. No, sir, it is not. That letter was written on Mr. Heinlein's desk on April 2nd with his dictation and my handwriting.
Q. Which Mr. Heinlein?
A. Young Mr. Heinlein.
Q. Now, when you submitted that letter, wherever it was written, was it not objected to by Mr. Heinlein, Sr.?
A. No, sir, I have never talked to Mr. Heinlein, Sr.
Q. Was it not objected to by Mr. Heinlein, Jr., then?
A. No, sir, because he dictated it. He told me to get another letter written off of this in typewriting and send him a copy and keep a copy for myself.
Q. Then the pencil marks were inserted, that is, the words in pencil were inserted subsequent to your writing of the letter.
A. No, sir, I have never seen those pencil marks.
Q. I understand, but they were inserted, whoever put them in there, put them in after you wrote the letter?
A. I never saw the pencil marks at any time.
Q. No, but they weren't there when the letter was written, weren't they?
A. No, sir, I wrote all the ink and that is all.
Q. Isn't it a fact that on that same day the same letter with the amendments of the pencil marks was submitted to you in typewriting and you signed it?

A. No, sir, I will tell you that ——

Q. Isn't that your signature?

A. Yes, that is, but this letter is a copy of the first. Our lawyer made this copy.

Q. With the changes as in pencil?

A. I suppose him and the lawyer was down there and made those changes, I don't know.

Q. Well, you read it before you signed it?

A. I did.

Q. Now, doesn't this last paragraph express your understanding of what was to be done with the bin?

A. As per our conversation that day.

Q. Well, you can read this?

A. Yes.

Q. And you know what it means?

A. Yes.

Q. And is it not a fact that when you signed it you did it freely and willingly?

A. We did it freely and willingly as per our conversation that this bin, the matter would all be straightened out at the end of the year.

Q. Well, it doesn't say that?

A. No, it doesn't say it.

Q. And you had ample time to read it?

A. Plenty of time.

Q. Nobody forced you to sign?

A. It was really two weeks after this letter was written before I signed it.

Q. Nobody forced you to sign it?

A. Not a soul.

Q. And that is both yours and Mr. Garrity's signature?

A. Yes.

Q. And you both, the two of you, are the only ones that control the Consolidated Trucking Company?

A. Yes, sir.

Q. Now, do you recall receiving from the lime company on the same day this letter: "We hereby acknowledge receipt of your letter of even date. We will allow you to install the aggrameter on our wharf, Federal Street and Cooper Creek. It is understood that this aggrameter will be of a type acceptable to us and suitable to the city requirements for 1925, and it will be used for Camden Highway work?"

A. Yes, sir.

Q. You received that, did you?

A. Yes, sir.

Q. And you erected the bin or sent the bin to their wharf to be erected?

A. We did not erect it.

Q. Well, you sent it there to be erected?

A. Yes, we was to erect it.

Q. You used the bin for how long?

A. Well, from the middle of April until the last of the year.

Q. Ten months?

A. Eight months, whatever it was.

Q. And it was suitable for your work?

A. Yes, sir.

Q. And wasn't it difficult to get wharf property at that time?

A. It was in one way.

———

Mr. Weaver: I understand from your Honor's ruling that it is not in order for me to move to have this testimony stricken out until I offer the papers.

The Court: Yes.

Mr. LeDuc: Your Honor, I have no more questions of Mr. Wills. We had another witness we tried to get and he has not turned up.

The Court: What did you want to prove by the other witness?

Mr. LeDuc: Prove the rental value of the bin; that is the only point; with that we are prepared to rest.

The Court: Well, I suppose we might as well meet the questions then now, and if it is determined —I presume from what Mr. Weaver says he has some motions to make, and it may be that this testimony may not be necessary.

Mr. LeDuc: If I can just reserve the right to put the witness on ——

The Court: Yes, if it is determined that a jury question is presented you can put him on. Let me suggest something that has been in my mind from the very start. There is absolutely no testimony of any demand.

Mr. LeDuc: Yes, the testimony of Mr. Garrity is that after the contract was completed he went and had a certain conversation with Mr. Heinlein in which he made a demand for the return.

The Court: No, I think not; I do not think it is a demand when a man walks out and says, "I don't know whether I will let you keep it or not."

PLAINTIFFS REST.

THE CASE FOR THE DEFENDANT.

Frank J. Heinlein, Sr., sworn.

By Mr. Weaver:

Q. What office do you occupy with the Camden Lime Company?

A. President.

Q. Were you acquainted with Mr. F. B. Wills?

A. Why, I know them when I see them; they have been in our office quite a number of times.

Q. Do you recall Mr. Wills coming to your office with Mr. Garrity on the second of April, 1925?

A. I recall them coming to my office sometime in April, presumably on the second.

Q. Well, I show you a letter here which Mr. Wills has testified he signed, and ask you when you first saw that letter and at what time. (Showing witness Exhibit D1 for identification.)

A. This is a letter, a longhand letter. I was called from my office, which is a private office in the rear of our main office building, called from my private office by my son Frank, Jr., who said that Mr. Wills and Mr. Garrity were out front with a letter and they wanted me to read it before it was O. K.'d. I went out, and that was the first time I saw his letter.

Q. Did you read it?

A. I did.

Q. Did you make any suggestion in reference to the wording of the letter?

Mr. LeDuc: Just one minute before you answer that. I think we ought to know whether or not this

was in the presence of my people, otherwise I do not think it is admissible.

The Witness: It was, I will admit that; they were there.

Q. Now, what was your suggestion and how are your suggestions indicated in the letter?

Mr. LeDuc: Just a minute—what did he say?

A. Am I in order to ——

The Court: Just answer the question.

A. I want to state the position of the principals, if you will repeat the question, please. I read this letter, which young Mr. Wills had in front of him on the counter in our office, not at the desk, Mr. Garrity standing alongside of him, and I said, "That is all right in a way, but it don't sound like a good business letter;" and I then took out my pencil and made pencil memoranda on it in their presence.

Q. And are these pencil memoranda the ones you made?

A. These pencil memoranda are the ones.

Q. Did you have anything to do with the matter after those interlineations there?

A. With this letter?

Q. Yes.

A. The matter of this letter was then left to Frank, Jr.

Q. How about the matter of the subsequent letter, was that left to Frank, Jr.?

A. The subsequent letter, as you will see, is the previous letter corrected as per my notations.

Q. Do you know when that was done, when it was executed?

A. It is dated the same day.

Q. Was it executed in your presence?

A. It was not; I had returned to my private office

Q. Now, Mr. Heinlein, there has been a contract offered in evidence between your company and the city for the furnishing of certain supplies which the city required for its work, and in the contract there is a provision for a bin to be furnished by you or bins. Had you such bins in your plant at the time that contract was entered into?

Mr. LeDuc: I object to that as incompetent, irrelevant and immaterial as to whether they had bins already or not.

The Court: He may answer the question.

(Exception noted for the plaintiff.)

A. We had.

Q. Had you previous contracts with the city for the same class of material?

Mr. LeDuc: I make the same objection, if the Court please.

The Court: I do not suppose it is material.

Q. Now, was the bin erected by Mr. ——

The Court: Mr. Weaver, I am wondering how any of this is material if you are going to offer the letter and rest your case on your written contract.

Mr. Weaver: Well, of course, I do not know exactly how the Court will rule on the matter.

The Court: Well, the letter has been acknowledged, the paper has been admitted by both of the plaintiffs. I do not think you can add anything to it.

Mr. Weaver: I offer both the original letter which is marked Exhibit D1 for identification also D2 and also D3 for identification.

The Court: They will be admitted.

(Said papers are marked respectively Exhibits D1, D2 and D3.)

Mr. Weaver: I suppose it is proper right here to move that all the testimony offered by Mr. LeDuc here by his two witnesses which tends either to alter the terms of these instruments or which tends to a different construction than actually entered into in the agreement be stricken out.

The Court: Well, I do not think we need go any further; we might as well meet the thing right now. I think there are two difficulties in the way of the plaintiffs' recovery. The first is that there is no proof of notice and demand.

Mr. LeDuc: I would like to ask leave to offer evidence; I have the evidence right here.

The Court: In the second place I think this paper evidences the contract between the parties, and if it does not, I think your only remedy is in the Court of Chancery for a reformation. We are at the

time of recess now and I am making this suggestion on the score of saving time; if my present state of mind is finally my conclusion, there is no use in taking a lot of testimony. We will recess now until 1:30 o'clock P. M.

(At this point the matter was adjourned until 1:30 o'clock, P. M.)

———

Trial of the case resumed at 1:30 o'clock P. M., pursuant to adjournment.

Mr. Weaver: I make a formal motion for non-suit on the ground that there is a written agreement.

The Court: Non-suit or direction?

Mr. Weaver: Direction.

Mr. LeDuc: If you also move for a direction, you close your case?

The Court: I think I shall let the evidence stand.

Mr. Weaver: On the ground there is a written contract here which expresses the conclusion of the parties in this matter.

The Court: Do you raise any point as to no formal demand?

Mr. Weaver: Yes, and on the ground there is no formal demand for the return of the goods.

Mr. LeDuc: I made a very explicit demand in writing and met with a very explicit refusal. I overlooked that. Certainly Mr. Weaver knows there was a very clear and explicit demand made and a very clear and explicit refusal.

The Court: Mr. LeDuc, I think there is a more serious question than that.

Mr. LeDuc: Yes, there is.

(After further argument:)

The Court: It seems to me, from this whole case, that the contract is complete as to the question of the delivery of title. There is nothing not expressed. The paper was written after the parties had discussed the matter and it seems to have been the last act of the parties with respect to the delivery of the property. Following the rule laid down in Naumberg v. Young, where the contract on its face purports to be complete, and the rule as affirmed in Shinn v. Black, I am bound to conclude that there can be no testimony of parol agreements to vary the terms of this written agreement. Therefore, the motion of the defendant must prevail. It seems to me that it is a matter where the Court of Chancery might very well be employed to reform, if the plaintiffs are accurate in their statement that through mutual mistake and oversight terms that ought properly to have been incorporated in the agreement were not, but I do not know what more it could be. This was the subject-matter of the talk and it was made into an agreement, an agreement that I think is complete and is binding.

Mr. LeDuc: Your Honor will grant me an exception?

The Court: Yes.

Mr. LeDuc: Your Honor's ruling is on a motion by Mr. Weaver on the ground that this letter constituted a contract and your Honor's ruling doesn't involve the question of demand and refusal. If it does, I think the record ought to be in a little better shape than it is. We are deciding the main question this way. If the record stands this way, I am satisfied, because the real issue is being settled by his Honor. In other words, the motion to direct is not because I had not offered evidence on the demand and refusal. You know the evidence exists.

Mr. Weaver: If you want it settled on this point, I am willing to withdraw the motion for direction on the ground that no demand was made.

Mr. LeDuc: Of course, Mr. Weaver has submitted his case. It follows that when a motion to direct is made it closes the case.

The Court: Yes, he introduced the written documents and rested and says that that shows what the contract between the parties was.

Ladies and gentlemen, the Court has disposed of this matter on questions of law so it will not be necessary for you to proceed any further in this case.

(Exception noted for plaintiffs.)

EXHIBIT P1.

THIS CONTRACT AND AGREEMENT, Made and entered into this ninth day of April in the year of our Lord, one thousand nine hundred and twenty-five.

BY AND BETWEEN MICHAEL G. GARRITY, F. BEDELL WILLS and MARMADUKE WILLS, co-partners, trading as CONSOLIDATED TRUCKING COMPANY, party of the first part, and "The City of Camden," in the State of New Jersey, party of the second part,

WITNESSETH, That the said MICHAEL G. GARRITY, F. BEDELL WILLS AND MARMADUKE WILLS, trading as aforesaid, party of the first part, for the consideration hereinafter mentioned, do for themselves, their and each of their heirs covenant, promise and agree, to and with the said "The City of Camden," party of the second part, its successors and assigns, that the said party of the first part shall and will Hauling during the year of 1925, all in accordance with specifications attached hereto and made a part of this contract. all according to the specifications hereto annexed, which make a part of this contract and agreement, as fully and entirely as if the same were entered herein.

And in all respects conforming to and complying with the requirements and provisions of the said specifications, according to the terms and conditions thereof, and providing and furnishing all the material and labor necessary for such work at their own proper costs and expenses, according to the terms and conditions of said specifications.

IN CONSIDERATION WHEREOF, the said "The City of Camden," doth covenant, promise and agree, to and with the said MICHAEL G. GARRITY, F. BEDELL WILLS and MARMADUKE WILLS, co-partners, trading as CONSOLIDATED TRUCKING COMPANY, party of the first part their and each of their heirs, executors, administrators and assigns, well and truly to pay or cause to be paid unto them the sum as set forth in proposal. The payment of said price or consideration money shall be made to the said party of the first part by orders upon the Department of Revenue and Finance, founded upon estimates of the Department of Streets and Public Improvements, as to the amount of work done and articles furnished and delivered, and upon presentation by the said party of the first part of a certificate in writing of the said Department of said city (countersigned by a majority of the Committee on Purchasing Department of said city) of the amount of work done or goods furnished, and that the work done or articles furnished are according to this contract.

And it is distinctly and mutually understood and agreed by and between the parties hereto, that in case a default is made in the completion of the contract, within the time specified, or according to the terms and conditions hereof, such money as may be due to the said party of the first part, or such as would have become due had the terms and conditions of this contract and agreement been complied with, shall be and is hereby forfeited to the said party of the second part, and the said party of the second part is free to use the same in and about the completion of the said contract, and in case the said party of the second part is put to any costs and expenses over and above the contract price of the party of the first part, in and about the completion of the contract, the said party of the first part, for themselves, their and each of their heirs, executors, administrators and assigns expressly agrees

to hold liable therefor, and hereby covenants and agrees to make good the same to the said party of the second part.

And it is expressly understood and agreed, that no money shall be paid to the said party of the first part except as above provided, and for the faithful performance of all and every the articles and agreements above mentioned the said parties to this agreement are hereby bound each to the other firmly by these presents.

In Witness Whereof, the said MICHAEL G. GARRITY, F. BEDELL WILLS AND MARMADUKE WILLS, copartners, trading as CONSOLIDATED TRUCKING COMPANY, party to the first part hereto, after fully reading the foregoing contract and agreement and specifications attached, has hereunto set their hands and seals. and the said "The City of Camden" hath caused these presents to be signed by its proper officers and sealed with its common or corporate seal the day and year first aforesaid.

Michael G. Garrity
F. Bedell Wills
(Seal)
Co-partners trading as CONSOLIDATED TRUCKING COMPANY
CITY OF CAMDEN
By Victor King (Seal)
Mayor.

Signed, sealed and delivered
in the presence of
John Eggie
L. M. Engel
Attest:
A. R. White
City Clerk.
(Seal)

SPECIFICATIONS FOR HIRE OF MOTOR TRUCKS FOR THE DELIVERY OF SAND, STONE AND CEMENT TO MIXER ON STREET.

1. DESCRIPTION OF WORK: The work to be done, calls for furnishing the necessary number of 2½ and 5 Ton trucks for hauling sand, stone and cement from bins to point of operation.

2. TRUCKS: The trucks shall have three or more compartments. Each compartment capable of holding not less than 12 cubic feet of stone, 6 cubic feet of sand, and 2 cubic feet of cement. All trucks shall be equipped with pneumatic tires.

3. LOADING: The trucks shall receive from the bins, first, the necessary amount of stone for each compartment then proceed to the bins and receive the necessary amount of sand for each compartment. Then proceed to the cement car wherever the same may be placed, and receive the necessary amount of cement. This material shall then be hauled to the point of operation. The material from one compartment dumped into the skip of the mixer. The truck will then pull ahead far enough to allow the skip of the mixer to raise, this method will be followed until the three or more compartments are emptied.

4. CHAUFFEURS: Competent chauffeurs shall be furnished by the Contractor. The price bid for work shall include wages for chauffeurs. The chauffeurs shall take orders from the foreman when at point of operation.

5. BREAKDOWNS. In case of breakdown the Contractor shall immediately place a truck in good condition to take place of disabled truck.

6. CHECKING: All work will be checked both

at point of receiving material and at point of delivery. Any discrepancy between the Contractor and Department of Streets and Public Improvements shall be checked by measuring up work laid.

7. PRICES BID: The price bid will be per ton of material delivered and shall include wages of all men employed by Contractor, also, all oil and gasoline used by trucks.

8. BINS: The Contractor will be required to furnish his own bins for loading sand and stone.

9. DELAYS: The Contractor will be held responsible for all delays, and if in the opinion of the Director of Streets and Public Improvements, the cause of the delay is unwarranted, the loss of time of the workmen employed by the City will be charged to the Contractor and any expense caused by this delay shall be deducted from the amount due or to become due to the Contractor.

10. DAMAGES: The Contractor will save harmless the City of Camden, New Jersey, its officers, agents and servants, and each and every one of them, against and from all suits and costs of every name and description and from all damages to which the said City of Camden, New Jersey, or any of its officers, agents or servants may be put, by reason of injury to the person or property of others resulting from carelessness in the handling of said trucks, or through the negligence of said Contractor, or through any improper or defective machinery in said trucks, or other appliances used by the said Contractor in the aforesaid hauling, or through any act or omission on the part of the said Contractor, or his agent or agents.

EXHIBIT P2.

THIS CONTRACT AND AGREEMENT, Made and entered into this twenty-sixth day of March in the year of our Lord, one thousand nine hundred and twenty-five.

BY AND BETWEEN CAMDEN LIME COMPANY, a corporation of the State of New Jersey, party of the first part and "The City of Camden," in the State of New Jersey, party of the second part,

WITNESSETH, That the said CAMDEN LIME COMPANY, party of the first part, for the consideration hereinafter mentioned, does for itself and its successors covenant, promise and agree, to and with the said "The City of Camden," party of the second part, its successors and assigns, that the said party of the first part shall and will Furnish and deliver Special Mixture for the year of 1925, all in accordance with specifications attached hereto and made a part of this contract. all according to the specifications hereto annexed, which make a part of this contract and agreement, as fully and entirely as if the same were entered herein.

And in all respects conforming to and complying with the requirements and provisions of the said specifications, according to the terms and conditions thereof, and providing and furnishing all the material and labor necessary for such work at its own proper costs and expenses, according to the terms and conditions of said specifications.

IN CONSIDERATION WHEREOF, the said "The City of Camden," doth covenant, promise and agree, to and with the said CAMDEN LIME COMPANY party of the first part itself and its sucecssors well and truly to pay or cause to be paid unto it the sum or sums set forth in proposal.

SPECIFICATIONS FOR SUPPLYING SAND, STONE AND CEMENT AT A CENTRAL PROPORTIONING

Plant.

The object of these specifications is to have the necessary sand and stone and cement placed in compartments in trucks so same can be placed in the skip of concrete mixer and having proper proportion of materials—that is, having one part Cement, three parts Sand, and six parts Stone or Pebbles.

Sand.

The Sand shall consist of washed, sharp, well-graded river sand suitable for fine aggregate and must not contain a percentage of loam above that as specified by the American Society of Testing Materials.

Stone.

The Stone shall consist of well-graded commercial river pebbles commonly known as one and one-quarter inches commercial pebbles suitable for coarse aggregate.

Cement.

The Cement shall be Portland Cement complying with the current specifications of the American Society of Testing Materials.

The bidder must have measuring boxes of such type that same can be adjusted for a one bag, two bag, or three bag batch. That is, the boxes must be capable of being adjusted to deliver three cubic feet, six cubic feet or nine cubic feet of sand; also six cubic feet, twelve cubic feet or eighteen cubic feet of stone or pebbles. These boxes must be so made that same can be adjusted in the specified time of not over two minutes. All boxes must contain the exact amount called for.

The Cement shall be placed on a siding in close proximity to mixing plant so that the required number of bags of cement may be placed in trucks before the sand and stone is loaded.

The proportioning plant shall be so placed that same will be in easy access of a paved street.

The payment of said price or consideration money shall be made to the said party of the first part, by orders upon the Department of Revenue and Finance, founded upon estimates of the Department of Streets and Public Improvements, as to the amount of work done and articles furnished and delivered, and upon presentation by the said party of the first part of a certificate in writing of the said Department of said city (Purchasing Department) of the amount of work done or goods furnished, and that the work done or articles furnished are according to this contract.

And it is distinctly and mutually understood and agreed by and between the parties hereto, that in case a default is made in the completion of the contract, within the time specified, or according to the terms and conditions hereof, such money as may be due to the said party of the first part, or such as would have become due had the terms and conditions of this contract and agreement been complied with, shall be and is hereby forfeited to the said party of the second part, and the said party of the second part is free to use the same in and about the completion of the said contract, and in case the said party of the second part is put to any costs and expenses over and above the contract price of the party of the first part, in and about the completion of the contract, the said party of the first part, for itself and its successors expressly agrees to hold itself liable therefor, and hereby covenants and agrees to make good the same to the said party of the second part.

And it is expressly understood and agreed, that no money shall be paid to the said party of the first part except as above provided, and for the faithful performance of all and every the articles and agreements above mentioned the said parties to this agreement are hereby bound each to the other firmly by these presents.

In Witness Whereof, the said CAMDEN LIME COMPANY, party to the first part hereto, after fully reading the foregoing contract and agreement and specifications attached, has caused this indenture to be signed by its President, attested by its Secretary and its corporate seal affixed. and the said "The City of Camden" hath caused these presents to be signed by its proper officers and sealed with its common or corporate seal the day and year first aforesaid.

CAMDEN LIME COMPANY
By Frank I. Hineline,
President. (Seal)
CITY OF CAMDEN,
By Victor King,
Mayor. (Seal)

Signed, sealed and delivered
in the presence of
Frank B. Hineline,
Secretary.
Attest:
A. R. White,
City Clerk.
(Seal)

EXHIBIT D1.

Consolidated Trucking Co.
Temple Bld.
Room 107
415 Market St.,
Camden, N. J.

April 2, 1925.

Camden Lime Co.,
39 So. 6 St.,
Camden, N. J.
Mr. Hineline—
Dear Sir:

This to advise that we are ready to ~~place~~ erect a Blow on Knox Bin at your Federal St. Wharf as per our conversation with you this date. It is understood this Bin is that the ~~bins~~ are to become your property as soon as erected ~~placed~~ on the ground.

Yours truly,
Consolidated Trucking Co.
F. B. Wills,
Manager.

EXHIBIT D2.

CONSOLIDATED TRUCKING COMPANY
TEMPLE BUILDING
Room #107
415 Market St.,
Camden, N. J.

April 2nd, 1925.

Camden Lime Co.,
39 So. 6th St.,
Camden, N. J.

Mr. Hineline.

Dear Sir:—

This is to advise that we are ready to erect a Blaw-Knox Bin on your Federal St. Wharf as per our conversation with you this date.

It is understood that this Bin is to become your property as soon as erected on the ground.

Yours truly,
CONSOLIDATED TRUCKING CO.
By F. B. Wills
M. G. Garrity

EXHIBIT D3.

April 2nd, 1925.

Consolidated Trucking Company,
Room #107—Temple Bldg.,
Camden, N. J.

Gentlemen:

We hereby acknowledge receipt of your letter of even date. We will allow you to install an aggrameter on our Wharf—Federal St. and Cooper Creek. It is understood that this aggrameter will be of a type acceptable to us and suitable for City requirements for 1925, and that it will be used for Camden Highway work.

Yours very truly,
CAMDEN LIME COMPANY.

NOTICE OF APPEAL.

CAMDEN COUNTY CIRCUIT COURT.

F. Bedell Wills and Michael G. Garrity, co-partners trading as Consolidated Trucking Company,
Plaintiffs,
v.
Camden Lime Company,
Defendant.

Action of Replevin.
Notice of Appeal.

Please take notice that the plaintiffs, F. Bedell Wills and Michael G. Garrity, co-partners, trading as Consolidated Trucking Company, hereby appeal to the New Jersey Court of Errors and Appeals from the judgment of the Camden County Circuit Court rendered in the above stated action on the 20th day of May, 1926.

Dated May 12, 1927.

Louis B. LeDuc,
Attorney of Plaintiffs.

To Messrs. Wescott & Weaver,
Attorneys of Defendant.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

F. Bedell Wills and Michael G. Garrity, co-partners trading as Consolidated Trucking Company,
Plaintiffs-Appellants,
v.
Camden Lime Company,
Defendant-Respondent.

On Appeal.
Grounds of Appeal.

The appellants state the following grounds of appeal:

1. Because the trial Judge granted the motion of counsel for defendant for a directed verdict, and thereupon directed a verdict in favor of the defendant and against the plaintiffs, over the objection of the plaintiffs; whereas the said trial Judge should have submitted the case to the jury.

2. Because the trial Judge directed a verdict in favor of the defendant and against the plaintiffs, over the objection of the plaintiffs, although there was no evidence to support such a direction.

used for the double purpose of loading and measuring materials used in street construction work. It consists of a large tank or measuring box set up on four legs and standing 20′ above the ground, and so constructed that trucks can move under it and receive their load. (Record, pp. 17, 52.)

This bin—we use the word by which it has been commonly designated in this case—was delivered by the plaintiffs to defendant under the following circumstances:

Plaintiffs, a firm of truckers, bid with the City of Camden for the contract to deliver materials for street construction work in that city. They secured the contract. Their written agreement with the City, *Exhibit P*1, made on April 9, 1925, required them to "receive from the bins first the necessary amount of stone for each compartment, then proceed to the bins and receive the necessary amount of sand for each compartment; then proceed to the cement car, wherever the same may be placed, and receive the necessary amount of cement. This material shall then be hauled to the point of operation." (*Exhibit P*1*; Record, p.* 49.)

The contract for supplying the materials was secured by the defendant Camden Lime Company. Its agreement with the City, entered into under date of March 26, 1925, after specifying the materials required, provided as follows:

> "The bidder must have measuring boxes of such type that same can be adjusted for a one bag, two bag, or three bag batch. That is, the boxes must be capable of being adjusted to deliver three cubic feet, six cubic feet or nine cubic feet of sand; also six cubic feet, twelve cubic feet or eighteen cubic feet of stone or pebbles. These boxes must be so made that same can be adjusted in the specified time of not over two minutes. All boxes must contain the exact amount called for."
> (*Exhibit P*2*; Record, p.* 52.)

While the defendant's contract thus explicitly required defendant to provide bins or "measuring boxes" for the delivery of the material to the trucks, there was also incorporated in the City's contract with plaintiffs the following requirement:

> "The contractor will be required to furnish his own bin for loading sand and stone."
> (*Exhibit P*1; *Record, p.* 50.)

The "measuring box" referred to in the defendant's contract is conceded to be the same thing as the "bin" mentioned in plaintiffs' contract with the City. To quote defendant's counsel:

> "Now, Mr. Hineline, there has been a contract offered in evidence between your company and the city for the furnishing of certain supplies which the city required for its work, and in the contract there is a provision for a bin to be furnished by you or bins."
> (*Record, p.* 41.)

Why the same requirement was exacted from both contractors we do not know. That the City looked to the Camden Lime Company to supply these bins rather than the plaintiffs is indicated, at least, by the greater elaboration of conditions imposed on the former. Probably the requirement in plaintiffs' contract that they should furnish a bin was mere clerical error.

Whatever the reason, defendants took advantage of the situation and without disclosing the fact that

its contract imposed the same obligation, induced the plaintiffs, at a cost of approximately $1700 (*Record, p.* 15), to purchase a standard bin for the purpose of measuring and unloading the defendant's materials under its contract with the City.

A very extraordinary transaction followed. The plaintiffs went to the office of the defendant company where they saw one of its officers, Mr. Hineline, Jr. What ensued is described by the plaintiff, Garrity, as follows:

> "I called on Mr. Hineline, Jr.; my partner, Mr. Wills, was with me. We sat down over at Mr. Hineline's desk, the desk I noticed he always used; after that I had been in there a number of times. We sat over in the corner at his own desk, and I told him we were ready to place our Blau-Knox loader and he told me that we would have to make a written agreement that the Blau-Knox loader become the property of the Camden Lime as soon as it was set up on their premises. I says, 'What do you mean, Mr. Hineline—do you mean that we are going to give you our new Blau-Knox loader?' 'Oh, no, no,' he says, 'The Camden Lime Company require that any machinery set up on their premises—require that so that any machinery set up on their premises will be under their control; they want to have full control, and,' he says, 'later we will fix a rental, and at the expiration of your contract we will have a settlement.' I think that is word for word.
>
> Q. Well, now, what did you say to that?
>
> A. Well, then, I said, 'All right,' if he wanted it for that purpose, in order to have control, that we would agree to that, not to give him our loader, to give him control."
>
> (*Record, p.* 13.)

To the same effect is Wills' testimony (*Record, pp.* 31-32).

After the understanding thus testified to by the witness, Hineline, Jr., then dictated a letter which the plaintiff, Wills, took down in longhand. (*Garrity, p.* 14; *Wills, pp.* 31-32.) According to Mr. Hineline, Sr., who was placed on the stand by defendant's counsel, he was then called in by his son who had dictated the letter and after reading it he made a few penciled changes. These are indicated on the exhibit as reproduced in the record. (*See Exhibit D1, p.* 55.) The letter was then rewritten by plaintiffs on their letterhead and handed to the defendant company (*Wills, pp.* 32, 35; *Hineline, pp.* 40, 41). It reads as follows:

> "April 2nd, 1925.
>
> Camden Lime Co.,
> 39 So. 6th St.,
> Camden, N. J.
>
> Mr. Hineline.
>
> Dear Sir:—
>
> This is to advise that we are ready to erect a Blau-Knox Bin on your Federal St. Wharf as per our conversation with you this date.
>
> It is understood that this Bin is to become your property as soon as erected on the ground.
>
> Yours truly,
> CONSOLIDATED TRUCKING CO.
> By F. B. Wills
> M. G. Garrity"

Both parties were engaged under the City's contracts until about the middle part of December of the same year. (*Wills, p.* 32; *Garrity, p.* 16.) As soon as work thereon was completed, the plaintiff, Garrity, went to see Mr. Hineline, Jr., in regard to the removal of the bin. The witness testified:

"A. I told him I up to settle with them, final settlement about the Blau-Knox loader, about our Blau-Knox loader—that is the way I put it.

Q. Yes; what did he say?

A. Why, he says, 'That Blau-Knox loader belongs to the Camden Lime, and,' he says, 'you owe us $190.00 for erecting it.'

Q. Was anything else said?

A. Well, it kind of struck me—it struck me hard, in fact, I says, 'Well,' I says, 'that is a kind of surprise, but,' I says, 'it is all right, but I tell you, Mr. Hineline, I don't think I will let you—I am going to think it over but I don't think though I will let you keep our Blau-Knox loader.'

Q. What did he say to that?

A. He said, 'All right; don't you recall signing a letter?' I believe he called it. I said, 'I recall sitting down over there with you and you telling me that you wanted control, right over there at your desk, Mr. Hineline, you and I and Mr. Wills, that letter.' 'I will get the letter,' he says. I says, 'You don't need to get it, I recall it,' but, I says, 'You told me that that was for the Camden Lime to have complete control of any machinery erected on their property, and that you would fix a rental later and at the expiration of our contract there would be a settlement.' That was about all we said."
(*Record, pp.* 16, 17.)

There is no substantial dispute as to the facts above set forth. Plaintiffs, obviously uneducated and inexperienced, were persuaded by the defendant's officers to believe that it was necessary before

they could go to work on their contract with the City to purchase the Blau-Knox bin in question; and when this was purchased and the defendant company advised that plaintiffs were ready to set up the bin on defendant's wharf they were peremptorily told by these same officers of the defendant that they could not place the bin on defendant's land unless they agreed to transfer the title to defendant. Upon their very natural refusal to accede to this extraordinary demand they were assured that title was to be taken solely to enable defendant to exercise control over the machine while on its premises and that it would be returned when the contract work was completed.

It is impossible to put any but an unfavorable construction on the conduct of defendant's officers. If their representations to the plaintiffs in April were sincere the best that can be said for them is that they later took dishonorable advantage of plaintiffs' letter of April 2nd. On the other hand, can it be doubted that the defendant's officers had any other purpose in demanding the letter of April 2nd than to obtain an instrument which would enable them to despoil the plaintiffs of their property? The pretext advanced by the Hinelines that the letter was needed to give them control of the machine is too obviously disingenuous for acceptance, and it is difficult to resist the inference that these men in demanding the letter of April 2nd had in mind at that time the very wrong which they accomplished in the following December.

Not only did the Camden Lime Company retain the property of these two truckmen but it had the effrontery to insist upon their paying the cost of setting up the bin on its own property. (*Garrity, p.* 16, *lines* 33 *to* 35.) The bin, a substantial and en-

during fixture, was still standing on the defendant's property at the time of trial (May, 1926), and being used by them on other work. (*Garrity, p.* 17, *lines* 20 *to* 23.)

The elder Hineline, president of the defendant company (*Record, p.* 54, *line* 20), did not deny any of the circumstances narrated by the plaintiffs on the stand and defendant has rested its defense solely on a technical legal position.

Plaintiff brought its suit in replevin, proved the facts above set forth and rested. Defendant put Mr. Hineline, Sr., on the stand, had him identify the two letters and a third letter replying to the plaintiffs' letter (*Exhibit D3, Record, p.* 57), and moved for a directed verdict on the ground that the plaintiffs' letter of April 2, 1925, constituted a contract, the terms of which were binding upon the plaintiffs and could not be varied by the parol evidence which they had introduced. (*Record, p.* 43, *lines* 15 *to* 20.) The Court allowed the motion, stating:

> "It seems to me, from this whole case, that the contract is complete as to the question of the delivery of title. There is nothing not expressed. The paper was written after the parties had discussed the matter and it seems to have been the last act of the parties with respect to the delivery of the property. Following the rule laid down in Naumberg v. Young, where the contract on its face purports to be complete, and the rule as affirmed in Shinn v. Black, I am bound to conclude that there can be no testimony of parol agreements to vary the terms of this written agreement. **Therefore, the motion of the defendant must prevail.**"
> (*Record, p.* 44.)

On this ruling error has been assigned. (*Record, pp.* 59-60.)

THE LAW.

The single issue to be dealt with is whether or not the parol evidence rule precluded parol proof of the conversation with defendant's officers which immediately preceded the writing of the letter of April 2, 1924. We submit that it did not, for the following reasons:

Appellants' Points.

I. The letter of April 2, 1925, did not purport to set forth the entire understanding of the parties and was incomplete on its face.

II. It was a mere letter, lacking the characteristics of a contract or of any other legal instrument, and hence not affected by the parol evidence rule.

III. There was no consideration for the alleged agreement between the parties.

IV. If an agreement was entered into it was tainted with fraud and voidable at the instance of plaintiffs.

We will take these up in order:

I. THE LETTER OF APRIL 2, 1925, DID NOT PURPORT TO SET FORTH THE ENTIRE UNDERSTANDING OF THE PARTIES AND WAS INCOMPLETE ON ITS FACE.

The first sentence of the letter advising that plaintiffs are ready to erect the bin on defendant's wharf concludes "as per our conversation with you this date." We submit that this phrase, in itself referring to a certain conversation, necessarily made that conversation part of the agreement which the letter purported to set forth. It was not dissimilar to the case where a contract for building a bridge refers to specifications but does not set them forth, in which case the specifications become part of the contract and can be proved by parol evidence. *Sanford & Wright v. The Newark and Hudson Railroad Company* (N. J. Sup. Ct. 1874), 37 N. J. L. 1.

The parol evidence rule, authoritatively discussed by Mr. Justice Depue in *Naumberg v. Young,* 44 N. J. L. 331, recognizes a clear exception to its terms where the written contract does not set forth the whole agreement of the parties:

> "Undoubtedly this rule of evidence presupposes that the parties intended to have the terms of their agreement embraced in the written contract. If it was designed that the written contract should contain only a portion of the terms mutually agreed upon, and that the rest should remain in parol, the parties have not put themselves under the protection of the rule."
> (*p.* 339.)

In *Crane v. Elizabeth Library,* 29 N. J. L. 302, the Court said:

> "Where an entire verbal contract has been entered into, and in part execution of its terms, the parties, which on their face are fragmentary, written papers have been signed by either of them, and do not purport to be an entire and complete contract, the parol contract is not held to be merged in them, but may, notwithstanding their existence, still be proved."
> (*pp.* 305-306.)

In *Brautigam v. Dean & Company,* 85 N. J. L. 549, (affirmed 86 N. J. L. 676) the Court said:

> "But if the written contract does not purport to contain the whole agreement, and it is apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence is admissible. *Naumburg v. Young,* 15 Vroom 331. The trial Judge ruled that the contract was incomplete and admitted oral testimony as to the terms of the agreement, which we think was proper."
> (*p.* 556.)

Until the conversation referred to in the letter is known how can the trial Court claim to have before it complete evidence of the parties' agreement in this case?

We do not overlook the fact that it is the second sentence of the letter which contains an expression of the understanding that the bin is to become defendant's property; but it is so obvious that the conversation referred to in the preceding sentence covered the entire subject that we submit that reference must be had to such conversation to determine the full agreement of the parties of which the undertaking as to defendant's property in the bin was only part.

II. IT WAS A MERE LETTER, LACKING THE CHARACTERISTICS OF A CONTRACT OR OF ANY OTHER LEGAL INSTRUMENT, AND HENCE NOT AFFECTED BY THE PAROL EVIDENCE RULE.

The parol evidence rule has application only to contracts or legal instruments. It does not apply to mere letters.

> "So also, where a letter does not purport to be a complete contract, but on its face professes to be merely a recitation and confirmation of an oral agreement, such oral agreement, and not the letter, constitutes the real contract between the parties, and such contract may be shown by parol."
>
> 22 *C. J.*, pp. 1132 & 1133.

The letter of April 2nd, in its expression of an undertaking by the plaintiffs, is wholly unilateral; it suggests no consideration for that undertaking from the other party. The letter can scarcely be regarded as a muniment of title. It was not an act *in praesenti;* it referred merely to a possible status *in futuro*. It was not under seal, and if defendants claim it constituted something in the nature of a bill of sale we look in vain for an *habendum* clause or any language indicating an intent to presently part with any property or right in the bin.

III. THERE WAS NO CONSIDERATION FOR THE ALLEGED AGREEMENT BETWEEN THE PARTIES.

If a consideration moving from the defendant company could be implied from the fact, suggested by the terms of the letter, that it would deprive itself of the use of part of its wharf property, the question at once arises whether such voluntary deprivation was in any sense a legal consideration to support an agreement by plaintiffs that the bin should become the property of defendant.

Under the defendant's contract with the City of Camden it was obligated to supply this very bin, as well as others (which the evidence suggests it did supply, *Record, p.* 41, *lines* 10 *to* 22). Without the plaintiffs' bin or one like it the defendant could not have completed its contract with the City of Camden.

The act of the Camden Lime Company in furnishing ground for the erection of the plaintiffs' bin, therefore, was an advantage to that company and not a detriment, and cannot constitute a legal consideration for its alleged contract with the plaintiffs.

The rule is elementary that the promise to do what one is bound to do does not supply a legal consideration supporting a contract.

> "As a general rule the performance of, or promise to perform, an existing legal obligation is not a valid consideration. This legal obligation may arise from the law independent from contract, or it may arise from a subsisting contract."
>
> 13 *C. J.*, 351.

The rule is applied to the case of an existing contractual obligation to a third party.

> "According to the weight of authority in this country a promise to perform an existing contract with a third person or the performance of it, does not constitute a valuable consideration."
>
> 13 *C. J.*, 356.

> "Where plaintiff simultaneously contracted with a corporation to render it certain services and with an officer thereof to perform the other contract, the contract with the officer was without consideration." * * *
>
> *Petz v. Leary,* 117 App. Div. 829, 102 N. Y. S. 960.

> "A promise of a third person to pay the driver of a race horse a specified amount if he could win the race where the driver is already legally bound to drive under a contract with the master, is without consideration.
>
> "The rule stated must obtain where the promise is made by a third party to induce the promisee to carry out an existing contract which he has with another." * * *
>
> *McDevitt v. Stokes,* 174 Ky. 515, 519, 192 S. W. 681.

> "An agreement of a minority stockholder to remain in the company's employ is not a sufficient consideration for its assumption of an indebtedness due him from majority stockholders which was to be paid out of profits, where he had already agreed to remain in its employ in consideration of an agreement with a majority stockholder."
>
> *National Electric Signaling Co. v. Fessenden,* 207 Fed. 915, 125 C. C. A. 363;
> 13 *C. J.*, p. 356.

The general principle, of course, has been enforced in New Jersey. See *Conover v. Stillwell,* 34 N. J. L. 54, 57:

> "A promise to pay increased compensation for services which the party was under a prior legal obligation to render, is not valid."

A recent case, *Berlant Development Company v. McManus,* 97 N. J. Eq. 438 (Ch. 1925), involved an agreement to convey real estate sold on instalments. After the payment of the last instalment defendant demanded his deed. Complainant said he would deliver if defendant tore down a certain barn. Action was brought on this alleged contract for specific performance. The Court said:

> "There was no consideration for the agreement whatever. (After citing 13 *C. J.* 351), in other words the complainant was already bound to convey the property described and therefore had no right to exact additional consideration for the completion of the contract."

The application of the principle to a previous contract with a third party is recognized in *Gordon v. Schellhorn,* 95 N. J. Eq. 563 (Ch. 1924), the Court saying:

> "Of course, it is elementary that a consideration for one contract will not support a distinct and independent contract."

Want of consideration may, of course, be proven by parol despite the parol evidence rule.

> "It may also be shown that the actual consideration was less than that recited in the instrument, or that there was a want or failure of consideration either in whole or in part."
>
> 22 *C. J.*, 1160.

Parol Evidence to Show Conditions of a Gift.

It is obvious that if no consideration was given by the defendant, any transfer of property in the bin to it was in the nature of a mere gift. In determining whether or not a gift has been made, the question of the donor's intent is an important element and the courts will take parol evidence thereof. Thus in *Taylor v. Coriell,* 66 N. J. Eq. 262, where a deposit in bank by a parent to the joint account of the parent and the child was made, evidence was admitted to show that the deposit was solely for the convenience of the parent and was not a gift.

Similarly in *Brown v. Columbus,* 75 Atl. 917 (N. J. Ch. 1910, not officially reported), a conveyance of real estate was made for the sole purpose of enabling the grantee to go bail for the grantor's son who was expecting arrest. This special purpose was shown by parol testimony.

> "To make a gift effective the evidence should show not only a donative purpose, but also an intention on the part of the donor to divest himself of the possession of his property, and it should be inconsistent with any other intention. (Citing *Taylor v. Coriell, supra.*) That was a case that involved the question of a gift of personalty. I know of no distinction between gifts of personalty and gifts of realty, so far as this particular point is concerned." (*p.* 919.)

Similarly it is proper to show by parol testimony the limitations imposed upon a gift. This was recognized in *Beaumont v. Beaumont,* 152 Fed. 55, 61 (C. C. A. 3rd Cir. 1907—appeal from N. J. D. C.), which was a replevin suit to recover bonds. The defense was a gift of the bonds by a decedent. Evidence showed that the bonds were given but with the reservation that the coupons should be clipped and turned over to the decedent during his lifetime. The Court said:

> "A donor may attach a condition to a gift *in praesenti,* if that condition be not inconsistent with the possession or control by the donee of the thing given."

A line of decisions differing in fact but agreeing in principle with the case at bar are those where gifts have been made in contemplation of marriage but without direct reference thereto, and without fault on the man's part the engagement of the parties has been broken. In such cases it is held that the gift, made during the period of the engagement, must be held to have attached thereto the implied condition that it was to be ineffective in the event the engagement was broken.

Lansden v. Arbaugh, 227 S. W. 868 (Mo. Ap. '21);
Antaramian v. Ourakian, 194 N. Y. S. 100;
Cushing v. Hughes, 195 N. Y. S. 200;
Humble v. Gay, 168 Cal. 516, 143 P. 778 ('14).

IV. IF AN AGREEMENT WAS ENTERED INTO IT WAS TAINTED WITH FRAUD AND VOIDABLE AT THE INSTANCE OF PLAINTIFFS.

We finally come to the question of fraud, so patent on the face of the whole transaction between these parties. Can the defendant avoid the consequence of the fraudulent acts of its officers by resorting to a rule of evidence? This is its obvious purpose, since no denial was made on the stand of the plaintiffs' story and defendant's case was rested on the letter of April 2nd put in evidence by defendant's counsel.

It is fundamental, however, that the parol evidence rule does not bar proof of such facts as show that there was no real meeting of the minds or that the purported agreement was one arrived at through fraud.

Where there is involved the question of what the parties actually intended, see *Hudson County Store Fixture Company v. Guttman,* 127 A. 575 (N. J. Sup. Ct. 1925), aff. 130 A. 918, *per curiam*—(not officially reported), where a sale of store fixtures was involved. The defendant had signed a form contract but immediately after signing discovered it was a conditional sale and securing plaintiff's copy tore it up. Suit was brought on the written contract and plaintiff sought to show the conversation preceding the signing. The Court said:

> "Complaint is made of the action of the Judge allowing the defendant to relate the details of his oral negotiations with the plaintiff concerning the making of the contract prior to signing. This was objected to by the plaintiff upon the ground that the contract spoke for itself and that prior conversations were merged into the written agreement and were not admissible.
>
> We think this objection not well taken. The real question was whether or not the minds of the parties met and resulted in a contract, and upon that topic we think this evidence was admissible."
> (*p.* 576.)

The rule as to fraud is expressed thus:

> "It is well established that, as fraud vitiates everything which it touches, parol evidence is always admissible to show, for the purpose of invalidating a written instrument, that its execution was procured by fraud, or that, by reason of fraud, it does not express the true intentions of the parties. The rule in this respect is not rendered inapplicable by the fact that the writing contains a recital to the effect that all agreements between the parties are contained therein."
>
> 22 *C. J.,* 1215;
> *Sheldon Co. v. Harleigh Cemetery Assoc.,* 73 N. J. L. 115, 62 A. 189;
> *Wooden v. Shotwell,* 23 N. J. L. 465 (aff. 24 N. J. L. 789);
> *Useful Manufactures Soc. v. Haight,* 1 N. J. Eq. 393.
> *Easy Term Loan Co. v. Silberman* (N. J. Sup. Ct. 1924), 100 N. J. L. 67, 69, 70.

"The defense set up against the plaintiff's right of recover was fraud and illegality in the transaction. That fraud and illegality in a con-

tract may be established by parol testimony is too firmly established to need the citation of any authorities in support of the proposition. The cases cited on appellant's brief do not assert the contrary. Fraud or illegality in the contract is an exception to the general rule that parol testimony is inadmissible to vary or alter the terms of a written contract. *Denyse, et al., ads., John S. Crawford,* 18 N. J. L. 325; *Wooden v. Shotwell,* 23 Id. 465, 471; S. C. (Court of Errors and Appeals), 24 Id. 789; *Chaddock v. VanNess,* 35 Id. 517; *Naumberg v. Young,* 44 Id. 331, 335."

Sheldon Co. v. Harleigh Cemetery Ass'n. (N. J. Sup. Ct. 1905), 73 N. J. L. 115, 116.

"The overruling of this offer was clearly erroneous. The effect of the excluded proof was not to vary or contradict the terms of the written contract; but, on the contrary, to show that but for the false statement of a non-existent fact such contract would not have been signed, and hence that in legal contemplation no contract had been made."
(p. 116.)

Ryle v. Ryle (E. & A. 1886), 41 N. J. Eq. 582, 606.

"It is said that the testimony by which this result is reached is in conflict with the written agreement, and therefore contrary to the rule which forbids the introduction of parol evidence to contradict or vary a written agreement. As said above, I think to give the written paper in this case the full force claimed for it, would be giving countenance to a fraud. This would take

the case out of the rule contended for, and I think fairly within the exceptions in *Naumberg v. Young,* 15 Vr. 331."
(pp. 598, 599.)

Eaton v. Eaton (N. J. Sup. Ct. 1871), 35 N. J. L. 290, 295.

"A person performing services under a parol contract for compensation by the conveyance of lands, may recover the value of such services, if the other party, taking advantage of the statute of frauds, refuses to complete the contract, for the reason that, under such circumstances, it would be inequitable to retain the promised consideration and enjoy the benefit of the services without compensation. * * *

When the defendant received the money he signed a due-bill, which is a written acknowledgment of an indebtedness. The legal import of this instrument cannot be contradicted or varied by oral proof of a different understanding or agreement between the parties at the time it was signed and delivered, but it may be attacked by oral proof for want of consideration or fraud. * * *

This testimony is not obnoxious to the rule which precludes the admission of parol evidence to contradict or vary the legal import of a written instrument. It was competent evidence to show a want of consideration, and fraud or imposition in obtaining the due-bill, and was properly admitted."
(pp. 293, 294, 295.)

Den v. Moore (N. J. Sup. Ct. 1819), 5 N. J. L. 551, 557, 558.

"The counsel seemed to admit, in the argument, that fraud in the execution of a sealed instrument might be inquired into, but that fraud in the consideration could not. I do not well comprehend the grounds of this distinction. The consideration and execution of such instruments are so united as not readily to be separated. It seldom, perhaps never, happens that there is fraud in the one and not in the other. But if this were not so the law is not as was argued. Fraud reaches through every subject which it touches; it invalidates the consideration as well as the execution of all contracts, and may always be proved. Besides, the evidence in this case was expressly designed to show that the execution, both of the notes and of the bond and mortgage, was induced by imposition and fraud. I think, therefore, that the Court judged rightly in admitting the evidence."

The time has long since passed when a party pleading that fraud invalidates a written agreement is referred to a court of equity for his sole redress. The jurisdiction of law over fraud is concurrent with that of equity.

It is scarcely necessary to point out the fraud involved in the defendant's conduct. The representation that the letter of April 2nd was needed in order to give the defendant company control over the operation of the plaintiffs' bin, coming from men of the business experience and education of the Hinelines, cannot be regarded as sincere. The further representation that property in the bin was to

pass to defendant solely for the temporary purpose of control and be returned to the plaintiffs when the contract was completed, is proved to have been false by the subsequent conduct of the defendant's officers in retaining the bin and referring to the terms of the letter as justifying such retention. Knowing that that letter did not express all the terms of the parties' agreement, their attempted insistence upon it was a fraud in itself which relates back to the original transaction between the parties.

Roberts v. James, 83 N. J. L. 492, 497 (E. & A. 1912);
Gordon v. Schellhorn, 95 N. J. Eq. 563 (Ch. 1924);
Curtis-Warner Corporation v. Thirkettle, 99 N. J. Eq. 806 (Ch. 1926).

We respectfully submit on any and all of the points hereinabove set forth that plaintiffs were entitled to submit parol evidence of the real agreement between the parties and to go to the jury on such evidence. It is scarcely necessary to suggest that *Shinn v. Black,* 97 N. J. L. 219, cited by the learned trial Judge, is not in point on the facts.

Respectfully submitted,

LOUIS B. LEDUC,
Counsellor of Plaintiffs-Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between
F. Bedell Wills and Michael G. Garrity, Co-partners, Trading as Consolidated Trucking Company,
Plaintiffs-Appellants,
vs.
Camden Lime Company,
Defendant-Respondent.

Replevin-Appeal.

BRIEF FOR DEFENDANT-RESPONDENT

This appeal relates to the admission of oral testimony for the purpose of varying the terms of a written instrument. The contract, as originally prepared by the plaintiffs, was as follows:

"This is to advise that we are ready to place a Blau-Knox bin at Federal Street Wharf as per our conversation with you this date. It is understood that the bins are to become your property as soon as placed on the ground." (19, line 20; 40, line 20.) This was amended by inserting the word "erect" instead of "place," "your" instead of "at," "this bin is" instead of "the bins are" and "erected" instead of "placed," so that the contract as finally executed appeared as in Exhibit D1 and was signed by one of the co-partners. Subsequently the same contract was executed by both of the partners. (Exhibit D2.) This was accepted by the defendant. (Exhibit D3.)

The established rule is that a written contract is the only evidence of the contract as finally concluded, subject to only three exceptions, first, where the contract is on its face incomplete; secondly, where there is a collateral contract on a subject distinct from that of the written contract; and thirdly, where there is fraud and illegality in the transaction. *Naumberg vs. Young, 15 Vroom, 331; Shinn vs. Black, 12 Gummere, 219; Loan Company vs. Silverman, 15 Gummere, 67.*

Michael G. Garrity, one of the plaintiffs, testified that Exhibit D2 represented the conversation between himself, Mr. Wills and Mr. Hineline. (27, line 20; 28, line 30.) In the contracts with the City the plaintiffs were obliged to furnish a bin. (Exhibit P1, 50, line 10.) The defendant was also, under its contract with the City, required to furnish a bin. (Exhibit P2, 52, line 30.) The Lime Company already had installed in its plant bins as required by the contract. (41, lines 10 and 20.) The plaintiffs were necessarily required to erect their bin on the lands of the Lime Company in order to carry out their contract with the City. (23, line 20; 24, line 1.) The witness attempted to escape the force of this fact by stating that notwithstanding the Lime Company already had the contract for materials he would have made the City buy its sand and lime from somebody else. (24, line 20.)

The Lime Company undoubtedly refused to permit the plaintiffs to use its wharf for the purpose of erecting a bin unless it received compensation, either in the form of cash or in lieu thereof the bin. The bin was in use by the plaintiffs for eight months. (25, line 20.)

The plaintiffs attempted to evade their contract by stating a different contract than the one in writing, that is, at the end of a year there would be some kind of settlement wherein there would be payment of rental for

the use of the ground. (32, line 10.) One of the plaintiffs testified that the bin which they purchased was suitable for their work and that it was difficult to get wharf property at that time. (37, line 20.) It seems clear that Exhibit D2 is a completed contract and it certainly contains the entire agreement of the parties. It plainly says that the plaintiffs were ready to erect a bin as agreed and that it was to become the property of the Lime Company as soon as erected on their ground. If the door is to be opened for parole testimony because of the expression "as per our conversation" then, in this event, any terms with respect to which the writing is silent may be supplied and in this way the defendant will be denied the protection of the rule. There is no uncertainty in the contract with respect to the fact that the bin was to become the property of the Camden Lime Company as soon as erected on the ground. The effect of the oral testimony is to leave the title in the plaintiffs. The recapture of the bin was no doubt an afterthought on the part of the plaintiffs and this is why they wished to change the terms of the contract. One of the plaintiffs, after his contract was completed with the City, claims to have had a conversation with one of the officers of the Lime Company about the bin and testified "I am going to think it over, but I don't think though I will let you keep our Blau-Knox loader." Is this the frame of mind of a person who is perfectly certain that the bin belonged to him?

In plaintiffs' brief I find the following: "Probably the requirements in plaintiffs' contract that they should furnish a bin was a mere clerical error." There is no warrant for this assumption, as one of the plaintiffs admitted that they could not get the contract without the erection of the bin. (23, line 20.) And again, there is no warrant for the statement in the plaintiffs' brief that

the defendant took advantage of the situation and induced the plaintiffs to purchase a standard bin. (25, lines 1 to 10.) Both parties were obliged to furnish a bin and the Lime Company had one far in advance of its contract with the City for its own uses. If we must go into the realm of speculation, isn't it reasonable to assume that the City required both parties to furnish bins in order that there should be no delay in the work of construction in which the City was engaged?

Plaintiffs attempt to set up want of consideration as a reason for the reversal of the Court below. This is neither set up in the pleadings nor was there any testimony to this effect. And moreover, such a reason was not set forth in their grounds of appeal. Plaintiffs now set up in their brief that the contract is tainted with fraud. Fraud was neither pleaded nor is it set up in the grounds of appeal and there is no testimony that indicates fraud. On the contrary, the plaintiffs testified that they were not deceived in any respect. (25, lines 10 to 20; 36, lines 20 to 35.)

The last two reasons for reversing the trial Court appear to have occurred to plaintiffs' attorney during the preparation of his brief.

Respectfully submitted,

FRANCIS D. WEAVER,
Attorney for and of Council
with Defendant-Respondent.