LICHTY *v.* FAISST.

Opinion delivered November 18, 1929.

SALES—CONDITIONAL SALE—DEFAULT OF PURCHASER.—In replevin to recover machinery sold with reservation of title until paid for, where defendant admitted having executed the contract, and that he had not paid for the machinery, plaintiff was entitled to recover the property, as against a plea that the written contract had been altered in an immaterial respect.

Appeal from Perry Circuit Court; *Abner McGehee,* Judge; reversed.

STATEMENT OF FACTS

Appellant brought this suit in replevin for one Triumph Miniature Ice Plant No. 4, alleged to have been sold by him, while operating under the name of Triumph Ice Machine Company, upon a title-retention contract, to appellee, alleging that appellee made default in the payment of the purchase money as provided in the con-

tract. Upon demurrer and motion to make the complaint more specific, he amended his complaint, alleging the making of the contract of conditional sale of the plant on a certain date, and exhibited a copy of the contract with the amendment; alleged that defendant had wholly failed and refused to perform the contract by paying the purchase price of the machine, after paying thereon the sum of $1,520, and that he was entitled to the possession of the property, having retained the title thereto until paid for under the terms of the contract.

Appellee denied that Lichty, trading under the name of Triumph Ice Machine Company, was the owner and entitled to the possession of the ice plant sued for, and by amendment admitted the execution of the contract, alleged that it had been fraudulently changed or altered by striking out certain words in the first paragraph and inserting "E. C. Lichty" therefor, and that in the signature the words "Triumph Electric Company" had been struck out and "E. C. Lichty" substituted therefor; that the contract was in fact made with the Triumph Electric Company and not with E. C. Lichty, who was not a proper party plaintiff, the contract not having been assigned to him; that the change or alteration of the contract was made for the fraudulent purpose of making it appear that E. C. Lichty could sue thereon as plaintiff, and denied that Lichty was the owner of the property under the contract sued on.

Lichty testified that he had made the sale of the plant to appellee after purchasing it from the Triumph Electric Company; that the contract exhibited was the original contract made with appellee of date of April 19, 1924; that he was operating at the time under the name of the Triumph Ice Machine Company, and was the owner of the ice machine, having retained the title thereto in the contract of sale which he exhibited with his testimony; stated he sold it, using the printed form in use by the electric company from whom he bought the machine, and marking out its name as printed in the signa-

ture, leaving the signature: "The Triumph Ice Machine Co. (Owned and operated by The Triumph Electric Co.) Per E. C. Lichty."

The same words were marked out afterwards in pencil in the first line of the contract, but that the contract was signed by him and appellee at the time of the sale as stated. He explained that he had used this form of contract in making his own sales, because it was a good one; that he had already purchased the plant from the electric company; that he billed or invoiced the machine to appellee under the name of the Southern Electric Company, under which he was operating at the time. He also exhibited copies of the invoice showing the machine bought from him as the Southern Electric Company in Fort Smith.

Appellee admitted making the particular contract, admitted that he was in default under its terms, but denied that he had purchased the machine from Lichty, and stated that the contract had been changed or altered in regard to the signatures obviously after it was entered into; admitted having made the payments by check sent to Lichty; although he said they were made payable to the electric company, and that he had the paid checks in possession, he did not produce any of them when asked to do so.

The court refused to allow Lichty to state that there was no reason why he could not have had the contract assigned to him by the electric company, as it had had no interest in or right under it. Objection was made to the court's refusal to give certain instructions, and from the judgment rendered on the verdict against him the appeal is prosecuted.

I. J. Friedman and *Dean, Moore & Brazil,* for appellant.

G. B. Colvin, for appellee.

KIRBY, J. (after stating the facts). Appellant insists that the court erred in not directing a verdict in his favor, and the contention should be sustained. Appellee

admitted the execution of the conditional sales contract for the machine sold him by Lichty reserving the title to the ice-plant machine until paid for, and default made in the payment, and made no allegation of any defense to the claim for possession further than to deny that appellant was the party from whom he purchased the machine, and entitled to the possession of the property under the contract made. He alleged no defense to the suit, obviously one to collect the balance of the purchase money due under the contract of sale, by way of counterclaim or set-off, as he had the right to do (§ 8654a, C. & M. Digest; *Brunswick-Balke-Collender Co.* v. *Culberson,* 178 Ark. 957, 12 S. W. (2d) 903; *Boddy* v. *Thompson,* 179 Ark. 71, 14 S. W. (2d) 240), and admitted having made default in the payment of the purchase money under the terms of the contract he executed. In other words, he admitted making the purchase of the property, the execution of the conditional sales contract retaining the title by the seller until paid for, having made payments of the purchase money under its terms, and only claimed that it had not been executed to Lichty as it appeared to have been in the signature upon the original contract.

The undisputed testimony showed that Lichty had purchased and paid for the plant or machine sold by him to appellee, that it was invoiced and delivered to the appellee by Lichty under the name of one of his trading companies, and that no one else had any interest in or claim upon the property under the conditional sales contract with appellee at the time of the suit brought, and that appellee had made default in the payments under the contract warranting the recovery of the property in the replevin suit by the owner for the collection of the balance of the purchase money due.

The court should have granted a peremptory instruction in appellant's favor, and for his failure to do so the judgment will be reversed, and the cause remanded with directions to enter a judgment for appellant for the possession of the property or its value, the amount of

the purchase money still due under the sales contract. It is so ordered.