

INDEX

	Page
Notice of Appeal	1
Grounds of Appeal	2
Writ of Replevin	3
Complaint	4
Answer	6
Reply	9
Findings	10
Rule for Judgment	12
Testimony	13
Motion for Non-Suit	16
Plaintiff's Motion for Direction of Verdict ..	47

WITNESSES FOR PLAINTIFF.

Ralph Gitkin:	
Direct	15
Recalled—Direct	18
Recalled—Cross	21

WITNESSES FOR DEFENDANT.

Joseph Travers:	
Direct	22
Cross	34
James Eastwood:	
Direct	36
Cross	39
Frederick H. Naef:	
Direct	40
Cross	41

WITNESSES IN REBUTTAL.

	Page
Chris Edell:	
Direct	42
Cross	44

PLAINTIFF'S EXHIBITS.

	P't'd Page	Off'd Page
P-1—Bill of Sale	14	58
P-2—Demand	15	61
P-3—Notice of Sale	19	62

DEFENDANT'S EXHIBITS.

D-1—Lease	25	63
D-2—Distress Warrant	33	66
D-3—Inventory	40	68
D-4—Notice of Making Inventory Appraisement	41	70

Notice of Appeal.

Filed March 28, 1935.

Hassair County Circuit Court.

MARY BLANOS, Plaintiff, vs. EASTWOOD REALTY COMPANY, a corporation of New Jersey, Defendant. } Action at Law.	10
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TAKE NOTICE :

That the plaintiff, Mary Blanos, appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment or findings entered in this cause which adjudges that the defendant is entitled to the return of the goods taken in replevin in this action, or, in default thereof, is entitled to an assignment of the bond filed in this cause so that it may sue thereon for the breach thereof.

E. ROBERT COVEN,
Attorney of Appellant,
Mary Blanos.

Grounds of Appeal.

Filed May 14, 1935.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

10	MARY BLANOS, Plaintiff-Appellant,	}	On Appeal from Passaic County Cir- cuit Court.
	vs.		
20	EASTWOOD REALTY COMPANY, a corporation of New Jersey, Defendant-Respondent.		

20 The appellant hereby sets down the following grounds for reversing the judgment below entered in favor of the respondent:

1. The Court below erred in denying plaintiff's motion for a direction of verdict at the close of defendant's case.
2. The Court below erred in giving judgment for the defendant because the evidence adduced at the trial was insufficient to justify the findings of the Court.
- 30 3. The Court below erred in not determining and finding the amount of rent, if any, due to the defendant.
4. Judgment should have been in favor of the appellant.

E. ROBERT COVEN,
Attorney of Appellant.

Writ of Replevin.

Passaic County, ss. The State of New Jersey, to
the Sheriff of the County of Pas-
(L.S.) saic, GREETING:

We command you that if Mary Blanos shall
make you secure, you cause to be replevined and
delivered to Mary Blanos

20 Crompton Looms
2 Warpors
6 Winders
1 Measuring Machine
3 Quill Winding Machines
1 Large Scale
1 Soaking Machine

10

And all office fixtures and equipment, which the
Eastwood Realty Company took and unjustly de-
tains from her as is said; and that you summon
the said Eastwood Realty Company to answer the
annexed complaint of Mary Blanos in an action
at law in the Passaic County Circuit Court. And
that you notify that unless it files its answer to
said complaint with the Clerk of the said Passaic
County Circuit Court, at Paterson, within twenty
days after service upon it of this writ and the an-
nexed complaint, the plaintiff may proceed in the
suit and judgment will be entered against it.

20

30

WITNESS, WILLIAM B. MACKAY, Judge of the
Passaic County Circuit Court, at Paterson, this
7th day of June, nineteen hundred and thirty-
four.

LLOYD B. MARSH,
Clerk.

E. ROBERT COVEN,
Attorney.

40

Writ of Replevin.

10 BY VIRTUE of the annexed writ, the plaintiff having given sufficient security to prosecute, etc., and no claim of property therein, and no bond being delivered to me by the defendant, I did, on the 8th day of June 1934, at 10 A. M., replevy and deliver to the said plaintiff the goods and chattels in the said Writ mentioned, and summoned the said defendant as within I am commanded.

THOMAS E. MANLY,
Sheriff.

by WILLIAM A. McCANN,
Under Sheriff.

Complaint.

20

Filed July 11, 1934.

Summons Issued June 7, 1934.

PASSAIC COUNTY CIRCUIT COURT.

MARY BLANOS,
Plaintiff,

vs.

30 EASTWOOD REALTY COMPANY, a
corporation of New Jersey,
Defendant.

} Action at Law.

Plaintiff, residing in the City of Paterson, County of Passaic, and State of New Jersey, through her attorney, E. Robert Coven, says that:

40 1. On May 10, 1934, Candor Silk Company, Inc., was indebted to Samuel Rachels, in the

Complaint.

amount of \$5,775.90, being the principal and interest due on a certain bond dated May 8, 1934.

2. That on the above mentioned date, Samuel Rachels recovered a judgment in the New Jersey Supreme Court against the said Candor Silk Company, Inc., in the said amount of \$5,775.90 and \$10.00 costs of suit.

10

3. That thereafter an execution issued from the New Jersey Supreme Court to the Sheriff of Passaic County to satisfy the above entitled amount.

4. That on May 22, 1934, the Sheriff of Passaic County sold to Mary Blanos, by virtue of said execution, the following goods and chattels: 20 Crompton Looms, 2 Warpings, 6 Winders, 1 Measuring Machine, 3 Quill Winding Machines, 1 Large Scale, 1 Soaking Machine, and all office fixtures and equipment.

20

5. That since that date plaintiff was and ever since has been the owner of the above stated goods and chattels.

6. That since that date plaintiff was and ever since has been lawfully entitled to the immediate possession of the same.

30

7. That on the twenty-third day of May, nineteen hundred and thirty-four, the defendant, Eastwood Realty Company, wrongfully took the said goods and chattels from the possession of the plaintiff, and has ever since wrongfully detained and still wrongfully detains the same.

8. Plaintiff demands possession of the said

40

Answer.

goods and chattels, and Twenty-five Hundred (\$2500.00) Dollars damages for their detention.

E. ROBERT COVEN,
Attorney for Plaintiff.

10

Answer.

Filed July 5, 1934.

PASSAIC COUNTY CIRCUIT COURT.

MARY BLANOS,
Plaintiff,

vs.

20 EASTWOOD REALTY COMPANY, a
corporation of New Jersey,
Defendant.

} Action at Law.

Eastwood Realty Company, a corporation of the State of New Jersey, with its principal office at No. 300 Straight Street, Paterson, New Jersey, says in answer to the complaint:

30 1. It has no knowledge of the matters set up in paragraphs 1, 2, 3 and 4 of the complaint and leaves the plaintiff to her proof thereof.

2. That defendant does not know if plaintiff is the owner of the goods mentioned and as claimed in the fifth paragraph; but that any claim or right of plaintiff to said goods is subject to the lien of defendant as set out below.

40 3. Defendant denies plaintiff is entitled to possession of said goods as claimed in the sixth para-

Answer.

graph except upon payment of the rent due to defendant as set out below.

4. Defendant denies the sixth paragraph of the complaint.

5. Defendant shows that the Candor Silk Co., Inc., on the first day of May, 1934, and for more than a year theretofore was and had been a tenant of defendant under an agreement by which said tenant occupied premises owned by defendant and known as Mill No. 10, third floor, 18 to 26 Crosby Place, Paterson, New Jersey, and was to pay rent therefor at the rate of Two Hundred (\$200.00) Dollars per month and to pay for electrical current for light and power at rates charged by the Public Service Gas & Electric Co. 10

6. That on May 1, 1934, and on May 22, 1934, the date of the execution sale referred to in the fourth paragraph, there was due to defendant from said Candor Silk Co. Inc. for the rent of said premises above mentioned, as follows: 20

1933	Space	Power	
December	\$200.00	\$103.96	
1934			
January	200.00	174.26	
February	200.00	173.12	30
March	200.00	217.42	
April	200.00	146.74	
May	200.00	37.94	
	\$1200.00	\$ 853.44	
		1200.00	
		\$2053.44	

7. That said goods and chattels, the property 40

Answer.

of said tenant, the Candor Silk Co. Inc., which were upon the rented premises, could not be taken under any execution or other process unless the plaintiff in such execution before the removal thereof, paid to this defendant the sum of Two thousand fifty-three Dollars and forty-four cents (\$2,053.44) due for rent as above set forth.

8. The said rent nor any part of it was not paid by the plaintiff in execution nor by any other person to the defendant herein.

9. By reason thereof the plaintiff was not and is not now entitled to the possession of said goods and chattels.

FIRST SEPARATE DEFENSE.

1. The defendant here repeats paragraphs one to six of the Answer.

2. That said goods and chattels, the property of said tenant, the Candor Silk Co. Inc., which were upon the rented premises, could not be taken under any execution or other process unless the plaintiff in such execution before the removal thereof, paid to this defendant the sum of Twelve Hundred (\$1200) Dollars due for space rent as above set forth.

SECOND SEPARATE DEFENSE.

1. The defendant here repeats paragraphs one to six of the Answer.

2. The defendant, on May 23, 1934, by Frederick H. Naef, its bailiff, levied a distress on said goods and chattels mentioned in the complaint for the rent due to it by said Candor Silk Co., Inc., and the said Frederick H. Naef was in posses-

Answer.

sion of said goods under said distress and was and is entitled to remain in possession thereof until said rent is paid or made out of said goods by the sale of the same or such part thereof as might be sufficient to make said rent.

Defendant claims that the goods taken by the Sheriff under the writ of replevin in this case should be returned to it. 10

EDWARD F. MERREY,
Attorney for Defendant.

Reply.

Filed July 19, 1934.

PASSAIC COUNTY CIRCUIT COURT. 20

MARY BLANOS, Plaintiff, VS. EASTWOOD REALTY COMPANY, a corporation of New Jersey, Defendant.	}	Action at Law.	30
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Plaintiff, through her attorney, E. Robert Coven, by way of Reply to the Answer filed herein by the defendant, says that:

She denies each and every allegation contained in the said Answer and hereby joins issue on the same.

E. ROBERT COVEN,
Attorney for Plaintiff. 40

Findings.

Filed February 14, 1935.

PASSAIC COUNTY CIRCUIT COURT.

10	MARY BLANOS, Plaintiff, vs. EASTWOOD REALTY COMPANY, a corporation of New Jersey, Defendant.	} Action at Law.
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This case was tried before Judge JOHN C. LOSEY without a jury at the Passaic County Circuit Court on October 3, 1934.

20 After hearing the evidence and counsel for plaintiff and defendant, the court finds:

1. That on May 10, 1934, Candor Silk Company, Inc., was indebted to Samuel Rachels in the amount of Five thousand seven hundred seventy-five Dollars and ninety cents (\$5,775.90), being the principal and interest due on a certain bond dated May 8, 1934.

2. That on the above mentioned date, Samuel
30 Rachels recovered a judgment in the New Jersey Supreme Court against the said Candor Silk Company, Inc., in the said amount of Five thousand seven hundred seventy-five Dollars and ninety cents (\$5,775.90) and Ten Dollars (\$10.00) costs of suit.

3. That thereafter an execution issued from the New Jersey Supreme Court to the Sheriff of Passaic County to satisfy the above entitled amount.

Findings.

4. That on May 22, 1934, the Sheriff of Passaic County sold to Mary Blanos, by virtue of said execution, the right, title and interest of Candor Silk Company, Inc., in the following goods and chattels: 20 Crompton Looms, 2 Warpers, 6 Winders, 1 Measuring Machine, 3 Quill Winding Machines, 1 Large Scale, 1 Soaking Machine, and all office fixtures and equipment. 10

5. That the Candor Silk Company, Inc., on the first day of May, 1934, and for more than a year theretofore was and had been a tenant of defendant, Eastwood Realty Company, under an agreement by which said tenant occupied premises owned by defendant and known as Mill No. 10, third floor, 18 to 26 Crosby Place, Paterson, New Jersey.

6. That on May 1, 1934, and on May 22, 1934, the date of the execution sale referred to in the fourth paragraph, there was due to defendant from said Candor Silk Company, Inc., the rent for said premises above mentioned, and which accrued during and for the months of December, 1933, January, February, March, April and May, 1934. 20

7. That the defendant, Eastwood Realty Company, had a lien for the amount of said rent upon the goods of said Candor Silk Company, Inc., above mentioned, at the time they were taken and sold under execution by the Sheriff, and said lien was valid and existing at the time said goods were taken by the Sheriff in this cause and delivered to the plaintiff by virtue of the writ of replevin issued herein. 30

8. That the defendant, Eastwood Realty Company, is entitled to a judgment for the return of the goods taken in replevin in this action, or in default thereof is entitled to an assignment of 40

Rule for Judgment.

the bond filed in this cause so that it may sue thereon for the breach thereof.

JOHN C. LOSEY,
Judge.

Rule for Judgment.

10 PASSAIC COUNTY CIRCUIT COURT.

MARY BLANOS,
Plaintiff,

VS.

EASTWOOD REALTY COMPANY, a
corporation of New Jersey,
20 Defendant.

Action at Law.

This action was tried before Judge JOHN C. LOSEY without a jury at the Passaic County Circuit Court on October 3, 1934, and February 2, 1935, and said Judge having decided that the defendant, Eastwood Realty Company, was entitled to a return of the goods taken in replevin in this cause;

30 It is thereupon ORDERED that judgment be entered awarding a return of said good so taken in replevin, and that the defendant recover from plaintiff the defendant's costs to be taxed; and further, in case said goods are not so returned the Sheriff shall assign to defendant the bond given to the Sheriff in this case so that defendant may sue thereon.

Rule entered on motion of

40 EDWARD F. MERREY,
Attorney of Defendant.

Testimony.

PASSAIC COUNTY CIRCUIT COURT.

MARY BLANOS, Plaintiff, vs. EASTWOOD REALTY COMPANY, a corporation of New Jersey, Defendant.	}	Action at Law. 40
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Paterson, N. J.,

Oct. 3, 1934; 10:00 A. M.

Before—HON. JOHN C. LOSEY, Judge.

20

APPEARANCES:

E. ROBERT COVEN, Esq., Counsel for
Plaintiff.

EDW. F. MERREY, Esq., Counsel for De-
fendant.

Trial by Jury waived, by consent of
counsel.

30

Mr. Coven: Are we going to agree on the facts?

Mr. Merrey: I think there are one or two facts
that the Court may have to decide.

The Court: Both counsel are waiving trial by
Jury?

Mr. Merrey: Yes, it is to be tried without a
Jury. The facts are not much in conflict.

40

Colloquy.

PLAINTIFF'S CASE.

Mr. Coven: Now, Mr. Merrey, this is the bill of sale.

Mr. Merrey: I am not going to dispute that. The Sheriff is here, but I do not raise any questions about technical proof.

10 Mr. Coven: I offer this bill of sale in evidence, to show proof of ownership by virtue of the Sheriff's sale.

Mr. Merrey: Does that recite everything in there?

Mr. Coven: It recites the fact that the levy was made, goods were sold, on the 22nd of May, 1934~~4~~ at 2:00 o'clock, to the plaintiff, Mary Blanos.

The Court: May 22, 1934~~4~~

Mr. Coven: Yes, sir.

20 Mr. Merrey: That is, the sale was made May 22nd. That is agreed to.

Mr. Coven: Yes.

The Court: All right.

(The same was marked Plaintiff's Exhibit P-1 in evidence.)

Mr. Coven: Will you admit that demand was made for them, Mr. Merrey?

30 Mr. Merrey: Yes, I have it here, that this is what you demanded.

Mr. Coven: I will offer this demand upon the Eastwood Realty Co.

Mr. Merrey: Made before the replevin was instituted? I suppose it was made by the Sheriff at the same time, wasn't it?

Mr. Coven: No, the demand was made before the replevin was instituted.

The Court: Is that the levy, you mean?

40 Mr. Coven: Beg pardon?

Ralph Gitkin—Direct.

Mr. Merrey: When was it made?

Mr. Coven: Prior to the institution of the suit.

Mr. Merrey: I don't know when it was made.
I presume it was.

Mr. Coven: All right, take the stand, Mr. Gitkin.

10

RALPH GITKIN, sworn.

Direct-examination by Mr. Coven:

Q. Mr. Gitkin, you are associated with me, in the practice of law? A. I am.

Q. I show you this paper and ask you if you know what it is? A. This is a demand for possession that I served upon Joseph Travers, a member of the Eastwood Realty Co., demand for the property of Mary Blanos. 20

Q. Served on anyone else? A. I also served a copy upon Mr. Naef, Bailiff, for the Eastwood Realty Co.

Q. When did you serve him? A. Copy was served on Frederick Naef, on June 4, 193~~4~~, and the copy (?) was served on Mr. Travers—the exact date I don't recall—it was between May 22nd and June 4th, during that period of time.

Q. Were the goods returned to you upon your demand? A. It was not. 30

Q. Were you refused? A. It was.

Mr. Coven: That is all.

Mr. Merrey: No questions.

Mr. Coven: I offer this demand in evidence, sir.

- The Court: All right.

(The same was marked Plaintiff's Exhibit P-2 in evidence.) 40

Motion for Non-Suit.

Mr. Coven: That is our case.

(PLAINTIFF RESTS.)

MOTION FOR NON-SUIT.

10 The defendant thereupon moved for a non-suit, as follows:

Mr. Merrey: It does not appear, if the Court please, in the case, that these were the goods of Candor.

Mr. Coven: The bill of sale in evidence, your Honor.

Mr. Merrey: I mean, the bill of sale—that does not follow that they were his goods.

Mr. Coven: Here is the bill of sale.

20 Mr. Merrey: That is the bill of sale from whom, from the Sheriff?

Mr. Coven: Yes, sir.

Mr. Merrey: For the goods, it says, but that doesn't make the goods the goods of Candor, just because the Sheriff's bill of sale says so, but here is the point: If you will consent to hand over the goods to our tenant, Candor Silk Co., I will waive that.

30 Mr. Coven: I cannot do that. I have a bill of sale for certain goods, which is in your premises, made a demand for the return of them, and the return of them was refused, and I say that is a prima facie case on a replevin.

Mr. Merrey: I move for a non-suit, on the ground that it does not appear that these goods on which the Sheriff levied were the goods of Candor. Merely because the Sheriff took them and sold them does not make them his goods. He
40 may have levied on the goods of Smith, Jones or

Motion for Non-Suit.

Robinson. I suppose he gave you the bill of sale on the theory that they were the goods of Candor, but you haven't proven they were.

Mr. Coven: We will admit the goods were Candor's.

Mr. Merrey: If you will admit that—I do not admit that—if you will admit one thing—I will furnish you with proof of the other.

10

The Court: Where is the bill of sale?

Mr. Coven: (Handing paper to the Court) There are two items—one was located in this mill, the other item was located somewhere else, which is the reason for two papers. One is for silk; the other is for machinery.

Mr. Merrey: We are only concerned with the machinery.

Mr. Coven: Yes.

The Court: Where is the bill of sale? The first one?

20

Mr. Coven: Yes, sir.

The Court: What is the state of the case now?

Mr. Merrey: I move for a non-suit, on the ground that it does not appear that they have any right to this particular property. They simply come here and say, "Here is a Sheriff's bill of sale for some goods which belonged to Candor."

I say that that does not show that Candor at the time of the sale was the owner of the goods, merely because the Sheriff levied upon them, if he did. There is no proof that they were, because the Sheriff goes in and levies on a piece of machinery or goods, that does not make it belong to the defendant in the execution.

30

Mr. Coven: Well, this, if the Court please, could not be attacked in this proceeding. This is a proceeding in replevin, the right that we have by virtue of the fact that the Sheriff sold it to us, and

40

Motion for Non-Suit.

the fact that he sold us the goods at the Sheriff's sale, the bill of sale presumes that it is all right, and until proven otherwise the bill of sale should stand.

10 The Court: The trouble is that the Sheriff's bill of sale only conveys to you the right, title and interest of the Candor Silk Company, and you have got to show the Court what he conveyed, what he owned, and you have to show that they owned the property.

Mr. Coven: All right. I will do that. Take the stand, Mr. Gitkin.

PLAINTIFF'S CASE REOPENED.

20 RALPH GITKIN, recalled.

Direct-examination by Mr. Coven:

The Court: Are you waiving the motion?

Mr. Merrey: I will do that, if the Court is willing. I would like to try the case, and I do not want to try it over again, of course.

The Court: I think the motion should be granted, unless you waive it.

30 Mr. Merrey: I asked, if you would consent that Candor was our tenant, agree to that?

Mr. Coven: I really do not know who your tenant was, Mr. Merrey.

Mr. Merrey: Would you admit that the Candor Silk Company was the tenant? If you do, I will admit the sale, and withdraw my motion.

40 Mr. Coven: I cannot admit that Candor was the tenant. Now, here is the point: That on May 22, 1932, due on a bond, in the sum of \$5775.00 for the principal and interest owing on a certain bond

Ralph Gitkin—Recalled—Direct.

owed us, on which a judgment was taken, and that an execution was levied.

The Court: There isn't any dispute about that, as I understand that.

Mr. Coven: I beg pardon?

The Court: There is no dispute about that.

Mr. Coven: About the sale?

The Court: There is no question about that.

Mr. Coven: No. I cannot understand this motion for a non-suit; he is arguing for a non-suit on the ground that we have not proven that the goods that were sold were the goods of the Candor Silk Company.

The Court: I do not think that you have either. You have put in evidence a bill of sale from the Sheriff, and that bill of sale says that he sells you all of the right, title and interest of the Candor Silk Company in certain goods. Now, it does not appear that the Candor Silk Company owned the goods, and I do not suppose the Sheriff knew. He simply levied on the right, title and interest of the Candor Silk Company in those goods.

Mr. Coven: Yes, sir.

The Court: That is what he sells to you. Now, what is the thing he owned? I think it is up to you to prove what you have there.

Mr. Coven: Will you permit me to prove that?

The Court: I suppose—

Mr. Merrey: If you wish, we will consent.

The Court: All right. I will permit you to reopen your case.

Mr. Coven: Mark this.

The Court: All right.

(The same was marked Plaintiff's Exhibit P-3 in evidence.)

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20

30

40

Ralph Gitkin—Recalled—Direct.

By Mr. Coven:

Q. Mr. Gitkin, do you recall Tuesday, May 22, 1932? A. I do.

Q. What recalls that to your mind? A. I attended an execution sale at the premises of Eastwood Realty Company, located on Ramapo Avenue, at which the merchandise of the Candor Silk Company were sold.

Q. And who conducted that sale? A. Mr. Chris Edell, of the Sheriff's office.

Q. What did you do at this sale? A. I bid on behalf of Mary Blanos.

Q. I show you this notice—

Mr. Merrey: If the Court please, the Sheriff went through this formality, I suppose. I have not disputed that. But what did he get by it?

The Court: You are not disputing the formality of the sale?

Mr. Merrey: Not the formality of the sale.

The Court: That is not questioned. He admits that, as I understand it.

Mr. Merrey: Yes.

The Court: That the Sheriff went through the formality of a sale, and gave you a bill of sale to all of the right, title and interest.

By Mr. Coven:

Q. You say this was held in the premises of Candor Silk Company? A. Yes.

Q. Whose goods and chattels were sold to you?

Mr. Merrey: I object to that, unless he knows, your Honor.

Ralph Gitkin—Recalled—Cross.

A. The merchandise, that I know—

The Court: Do you know?

A. I do know. It was the merchandise of the Candor Silk Company.

Q. What did it consist of? A. May I refer to this?

Q. Yes. A. It consisted of twenty looms, two
warpers, six winders, one measuring machine,
three quilling and quilting machines, one large
scale, soaking machine, various pieces of equip-
ment, etc.—soaking machine, other equipment in
the office there.

10

Q. Did you eventually secure a bill of sale for
this merchandise? A. I did.

Mr. Coven: The bill of sale is in evidence.
That is all.

20

Cross-examination by Mr. Merrey:

Q. Mr. Gitkin, you represented Mr. Coven, the
attorney? A. I am associated with his office.

Q. You went there to have this sale take place?
A. I did.

Q. You are not an officer of the Candor Silk
Company? A. No, sir.

Q. You have no knowledge of what they owned,
except what somebody may tell you? A. I was
informed at the sale.

30

Q. Yes. Answer the question. Did you have
any knowledge? A. What was told me by the of-
ficers of the Candor.

Q. Something was told you by the officers of
the Candor Silk Company? A. That is right.

Q. That is where your knowledge came, as to
their ownership of it? A. That is true.

40

Ralph Gitkin—Recalled—Cross.

Mr. Merrey: Now, I object to that. If that is all he has, I move that his testimony be stricken out—testimony that they owned it—merely some statement of a third party, not under oath.

The Court: Well, he was a defendant in the action, he was making a levy.

10 Mr. Merrey: Defendant in that action?

The Court: Yes. The defendant says, these are the goods he owned.

Mr. Merrey: He may have said that about my goods, too.

The Court: Well, he was there, in possession of them; he was an officer of the company, and the Sheriff was trying to get the goods. He said, "This is our goods."

20 Mr. Merrey: The motion is denied then?

The Court: Yes.

Mr. Merrey: All right.

Mr. Coven: That is all.

Mr. Coven: That is our case, your Honor. The plaintiff rests.

(PLAINTIFF RESTS.)

30

DEFENDANT'S CASE.

JOSEPH TRAVERS, sworn.

Direct-examination by Mr. Merrey:

Q. Mr. Travers, you are connected with the Eastwood Realty Co. in some capacity? A. Yes, sir.

Q. What is that? A. Cashier.

Q. You keep the books of the company, do you?

40 A. I do.

Joseph Travers—Direct.

Q. What does the company do? A. Really, I have charge of two places—what is that?

Q. We are only asking about the Eastwood Realty. A. The Realty Company?

Q. Yes. A. I take care of—

Q. I mean, what is it? Is it a real estate corporation? A. It is, yes.

Q. It owns mill property on 18-26 Ramapo Avenue?

10

Mr. Coven: If it is going to be question, I think that is a rather leading question, of proof of ownership.

Mr. Merrey: All right.

Q. Do they own mill property? A. Yes, sir; they do.

Q. Where is it? A. On Crosby Place.

Q. Crosby Place? A. Yes, sir.

20

Q. Was that known by another name sometime ago? A. Sometime ago, Ramapo Avenue.

Q. What are the numbers on Ramapo Avenue? A. 18 to 26, I think.

Q. Now, what did the Realty Company do with this property? Did it occupy it itself? A. No, sir.

Q. What did it do with it? A. Only rented it.

Q. Rented it out to tenants? A. Yes, to the tenants.

30

Q. They had a tenant there by the name of Candor Silk Company? A. Yes, sir.

Q. What did they occupy? A. I believe it was—18 to 22—at any rate—18 to 22, I believe it is.

Q. What does that mean? A. The number.

Q. The number of Ramapo Avenue? A. The number of Ramapo Avenue.

Q. Or Crosby Place? A. Crosby Place, rather.

Q. What floor? A. Third floor.

40

Joseph Travers—Direct.

Q. How long did they occupy that space? A. They occupied that from, I would say, March, 1931, up to the date—I would have to refer to my books there, Mr. Merrey.

Q. Well, have you got your books? A. Yes. (Witness refers to books of account.)

10 *By Mr. Coven:*

Q. Are those books in your handwriting? A. Yes, sir.

Q. You keep them yourself? A. Yes, sir. (Continuing) Up to June, 1934.

By Mr. Merrey:

Q. When did they go in? A. I think it was March. The lease was made out in March, but their rent did not start until June 1st.

20 Q. Yes. Well, now, when the lease was made out, was it made out to the Candor Silk Company? A. It was—

Mr. Coven: (Interrupting) I object, if the Court please. If there is any lease, the lease speaks for itself.

Mr. Merrey: All right. I am asking him:

Q. Who was it made out to?

30 Mr. Coven: I object to that question, sir.

A. (Interrupting) It was not.

Mr. Coven: (Continuing) The question is: When the lease was made out, who was it made out to? If there is a lease in existence, it is a written instrument, and the instrument itself would be the best proof. I ask that that answer be stricken out.

40 Mr. Merrey: The question is whether the lease was made out to them. He said,

Joseph Travers—Direct.

“No.” I am going further now, and asking him if there was a lease on that space made.

The Witness: (Interjecting) There was.

By Mr. Merrey:

Q. Is this the lease (handing paper to witness)?

A. That is the lease.

Mr. Coven: Are you offering this in evidence? 10

Mr. Merrey: I am going to offer it. I will let you look at it first.

Mr. Coven: May I look at it? (Counsel examines paper).

Mr. Merrey: I offer it in evidence. All right? Any objection?

Mr. Coven: No, but I do not know who put these pencil marks on it.

Mr. Merrey: They should not be there—that is for some other purpose—but it doesn't have any relation to this matter. 20

Mr. Coven: All right.

(The same was marked Defendant's Exhibit D-1 in evidence.)

By Mr. Merrey:

Q. Now, this lease was made out by the Eastwood Realty Company—who is that, Mr. Cannel? 30

A. S. Cannel, silk—

Q. When the lease was made out, I notice it was made out in March and it was to commence on the 1st of June, 1931? A. Right.

Q. Mr. Cannel was there, was he? A. He was there.

Q. Trading or conducting business as S. Cannel Silk Company? A. That is right.

Q. Was there ever any change made in that?

A. Yes, sir; there was— 40

Joseph Travers—Direct.

Mr. Coven: Now—

Q. When was the change?

Mr. Coven: Just a moment. This lease speaks for itself, and if there is any change, it certainly would be in there.

10 Mr. Merrey: No, not necessarily. I am talking about, not a change in the lease but change in the occupancy.

By Mr. Merrey:

Q. Just tell us what happened? A. In October, 1931, Mr. Cannel paid me personally or brought down to me personally a check for the rent, and he asked me if I would make out the next bill—

20 Mr. Coven: (Interjecting) Now, if the Court please—

Mr. Merrey: One minute, Mr. Travers.

Mr. Coven: (Continuing) Your Honor, this is a conversation between this representative of the landlord and one Cannel, and in view of the fact that there is a lease in existence, which speaks for itself, how can that testimony of conversation between different persons be binding on this plaintiff?

30 The Court: Maybe it is not, I do not know; but we are trying to find out.

Mr. Coven: How can we know that we were going to be called upon to defend such statements as this man is going to make?

Mr. Merrey: It is evidence of what our position is.

40 Mr. Coven: I object to any testimony to vary or alter or change the terms of the lease, which is fundamental law.

Joseph Travers—Direct.

Mr. Merrey: First time I ever heard that you cannot break a lease by parol, or change its terms by parol. Is there any law of that kind, that requires that a change in a lease must be in writing?

The Court: I do not know. What are you driving at?

Mr. Merrey: We expect to show that the rights under this lease were turned over by Cannel, the tenant, to the Candor Silk Company; that thereafter they came in and conducted the operations and came in possession of the premises. He just started to tell it, he just started to say what it was—that Mr. Cannel said to make out the something, and then counsel stopped him, and from that time on, our contention is, Candor steps in, and that the Candor Silk Company was the tenant, not Cannel, and he happened to be, of course, an officer of the Silk Company—manager of the Silk Company, and I would ask that he proceed with the answer. 10 20

Mr. Coven: What is the question?

Q. (Repeated by stenographer) Just tell us what happened. 30

By Mr. Merrey:

Q. Answer that. A. To make out the November bill to the Candor Silk Company, which I said I would.

Q. Yes? A. He told me that he was taking in a partner.

Mr. Coven: I object to what he told him, sir, as not binding on the plaintiff in this action. 40

Joseph Travers—Direct.

Mr. Merrey: What have you got to do with it? You are not in this thing until years after.

By Mr. Merrey:

Q. Go on, Mr. Travers. A. Mr. Dauber—Mr. H. Dauber.

10 Q. After that, did you make out bills—to whom?

A. To the Candor Silk Company.

Q. Who paid you the rent thereafter? A. Candor Silk Company.

Q. How long did that continue? A. The last payment they made was April 18, 1934.

Q. Was there any change in the condition of things after that time, I mean, as to your tenant? A. Well, not that we knew of it.

20 Q. All of your bills for rental, then, up until May were made to Candor— A. Yes, sir.

Q. —to the Candor Silk Company, Incorporated? A. It was.

Q. Did Mr. Cannel stay there? A. He did.

Q. And he had a partner there, somebody else was in there?

Mr. Coven: I object to that, if the Court please, not binding on this plaintiff.

Mr. Merrey: It certainly is.

30 *By Mr. Merrey:*

Q. Now, then, was there any rent left unpaid? A. There was.

Q. Just tell us what rent they owed you?

Mr. Coven: If the Court please, I object to this line of examination. This is an action in replevin. We are asking for the goods back. The question is: Who is entitled to those goods, the plaintiff or the

40

Joseph Travers—Direct.

defendant? Where this comes in, I do not know.

The Court: The theory of the defendant is that there was rent due to the landlord from the tenant for the premises and that under the statute the Sheriff could not remove the property without satisfying the rent, and he is attempting to show whom he recognized as the tenant, how much rent was due, I assume— 10

Mr. Merrey: That is it.

The Court: (Continuing)—which, it would seem to me, to be proper, if the statute is to that effect, and that is my recollection.

Mr. Merrey: I have a copy of the statute. I had it written out. 20

Mr. Coven: We have the statute here.

Mr. Merrey: The 4th and 5th Section of the Landlord and Tenant Act. I think we are under the 4th section, because the sale was made by the Sheriff before the actual removal of the goods. The 5th section is where the Sheriff levies the execution, takes the goods away, and he removes the goods and chattels before he sells them, which was not done in this case. We are under the 4th section, as he sold them there. 30

The Court: Sold on the premises?

Mr. Coven: Yes, sir.

Mr. Merrey: Yes, sir; so he says.

The Court: You do not deny the statute, that that is the fact.

Mr. Coven: I do not deny that is the statute, but I have decisions that interpret the statute, in my opinion, against the defend- 40

Joseph Travers—Direct.

ant. Of course, that would be a matter for argument.

The Court: Well, you are up to this rent question now.

Mr. Coven: Yes, sir.

10 The Court: It has been stated to you, the purpose of it. I suppose you will withdraw your objection.

Mr. Coven: Yes, I think that the defendant is entitled to establish his claim for rent. I will withdraw it.

Mr. Merrey: All right.

By Mr. Merrey:

Q. How much rent was due then? A. \$2,052.74.

20 Q. For what months? A. December, January, February—

Q. December? Of what year? A. 1933.

Q. Yes? A. January, February, March, April, May.

Q. Yes. How were those items made up? A. The items were made up as follows: December down to May, \$200.00 each; that is the rent.

Q. Yes? A. And the power.

Q. That is, six months' rent at \$200.00 each?

30 A. Six months' rent at \$200.00 each, and the power through the meter was \$103.96 for December.

Mr. Coven: Of course, I object to the power, as not being part of the rent.

Mr. Merrey: All right; that is a matter for argument.

A. (Continuing) \$174.26 for January.

The Court: \$174.26?

The Witness: That is right.

40 A. (Continuing) \$173—

Joseph Travers—Direct.

Mr. Merrey: The amounts are set forth in the pleadings, if the Court please.

The Court: I haven't had a chance to look at the answer.

Mr. Merrey: It is on the second page.

By Mr. Merrey:

Q. Go ahead, we will put it on the record. 10

The Court: All right; go ahead.

A. \$174.26—February, \$173.12—

Q. That is the February power? A. That is the February power. March, \$217.42. April—

Mr. Coven: I press my objection to the question, sir, as to these figures; they are not "rent".

A. (Continuing)—April, \$146.74. May, \$37.94. 20

Mr. Merrey: You can argue afterwards, that we had no recourse for that, I presume.

Mr. Coven: The question was: How much rent was due?

Mr. Merrey: Six months' rent.

Mr. Coven: The lease calls for rent at \$200 per month. Now, I say, with respect to the power—the amount which they have 30 in their claim, which comes to \$2,053.44—includes the power bill, and I object to that going in at this time as not proper items, as to the power, in proof at this time as "rent".

The Court: I think they should show the agreement, first.

Mr. Merrey: It is in the lease.

The Court: Oh, it is in the lease? 40

Joseph Travers—Direct.

10 Mr. Merrey: Yes, the lease reads this way: (reading extensively from lease). Now, if the Court please, it is our contention that this power, while not for a certain stipulated amount each month, and while the argument has often been made, I know, that "rent" can only be something which is fixed certain, my argument is going to be that this thing of power is fixed certain by certain meters, and remains fixed, that while it is a different amount each month, it is capable of ascertainment with exactness, to the penny to the day, and I do not think there can be any dispute about that. That will all come up later to be settled, but all I am trying to do now is to prove the amounts of these various months' power bill. Whether it is part of the rent, or not, that is a question, I think, left for your Honor to decide later, whether the power charge of these six months, under the terms of the lease, is part of the rent. I suppose the best thing for them to do, ordinarily in questions of this kind, is to make objection to it, which he has done, and then we put it in, and your Honor can reserve decision. We haven't any Jury, and nobody is harmed.

20

30

Mr. Coven: I make objection to it, at this time, to its going in. The lease provides for \$200.00 per month rental, and they are now proving six months' bills for power, and the lease does not provide that this shall be paid as "rent".

The Court: I will reserve decision on the question. Is that satisfactory?

40 Mr. Coven: Yes, sir.

Joseph Travers—Direct.

Mr. Merrey: Now, I wonder if we have the entire amount in there.

(The testimony as to monthly power bills from December, 1933, to May, 1934, repeated by stenographer.)

By Mr. Merrey:

Q. The total for power is \$853.44? A. That is right. 10

Q. Now, were either of those sums—were any part of the \$1200.00 or the \$853.44—paid to you by the tenant? A. It was not.

Q. Now, did your company issue a distress warrant to have this rent collected? A. We did.

Q. To whom? A. To the Candor Silk Company.

By Mr. Coven:

Q. What is that? 20

By Mr. Merrey:

Q. To the Candor Silk Company? A. Yes.

Q. No; I mean to some bailiff? A. Oh, yes.

Q. I show you this paper. Is this the original appointment of the officer? A. It is.

Q. That is constituting Mr. Frederick H. Naef as bailiff, as I make this? A. Naef.

Mr. Merrey: I offer this in evidence, the distress warrant. 30

The Court: How much was that for?

Mr. Merrey: That is for the same amount.

Mr. Coven: That includes the power.

Mr. Merrey: Including power.

(The same was marked Defendant's Exhibit D-2 in evidence.)

By Mr. Merrey:

Q. Mr. Travers, are you in the mill building? 40
A. I am.

Joseph Travers—Cross.

Q. Daily? A. Yes, sir.

Q. How long, during the day? A. Eight hours.

Q. Did you ever see any Sheriff's sale going on there around May 22nd? A. I did not.

Q. Would you have seen it? I mean, had you passed there? A. Passed there at lease three or four times a day.

10 Q. Did you ever see any notice of a sale by a Sheriff posted on these premises? A. No, sir; I did not.

Q. If it was posted for three or four or five days previous to May 22nd, would you have seen it? A. I would.

Q. I mean, you passed the door? A. Yes.

Q. Did you see any notice—not would you—if there would have been a notice of sale posted anywhere? A. I did not.

20 Q. Did you ever learn that there was a Sheriff's sale supposed to have taken place? A. After we had Mr. Naef put up the paster.

Q. Yes. You saw Mr. Naef's notice up there? A. Yes.

Mr. Merrey: That is all.

The Court: Who was that?

Mr. Coven: That was the bailiff appointed by the Eastwood Realty Co.

30 *Cross-examination by Mr. Coven:*

Q. Mr. Travers, you are in charge of the Real Estate Department of the Eastwood Realty Company? That is the truth, isn't it? A. I am.

Q. In that capacity you had a lease executed between Eastwood Realty Company and Samuel Cannel, trading as S. Cannel Silk Manufacturing Company; that is true, isn't it? A. Yes, sir.

40

Joseph Travers—Cross.

Q. That was in March 30, 1931? A. March 3, I believe.

Q. It provided for the rental of floor space, on the third floor, north end, in the mill known as No. 10, at 18-26 Ramapo Avenue, consisting of 7436 feet of floor space, more or less; that is so, isn't it— A. Yes.

Q. (Continuing)—and the rental for that space was \$200.00 per month, wasn't it, to commence the 1st day of June, 1931, for a period of three years? A. \$200.00 a month, plus electric current— 10

Q. I was asking you about the rental. \$200.00 per month, to commence on the 1st of June, 1931, continuing for a period of three years. That is right? Isn't that so? A. Yes.

Q. This lease was never cancelled, was it? A. It was not.

Q. So that it was still in existence in June, 1934? A. With the exception that Mr. Cannel— 20

Q. I am just asking you one question; please answer my question. A. (No answer.)

Q. It was in existence in 1934? A. Right. (Witness continues, inaudibly.)

Q. The answer is "Right". Speak louder, please. A. (No answer.)

Q. You have testified that some time in October, that a Mr. Cannel spoke to you, told you from November to send the bills to the Candor Silk Company; is that so? A. That is right. 30

Q. At that time, you did not destroy this lease; you intended to keep this lease in effect, didn't you? Yes or no. A. Yes.

Q. The answer is "Yes." That is all. Just a moment. A. (No answer.)

Q. Now, you say that you passed this place every day? A. Not every day; as I said, three or four days a week. 40

Joseph Travers—Cross.

Q. At least three or four times a week? A. Yes, sir.

Q. You passed this door? A. This door.

Q. You mean, on the third floor? A. Yes, sir.

Q. You say that you did not notice any Sheriff's notice? A. I did not.

10 Q. But there might have been a notice posted; that is so, isn't it? A. I couldn't say.

Q. Do you recall where you were on May 22nd, day of the sale? Were you present there? A. I was there.

Q. You were not in the building? A. I was in the building.

Q. You didn't know the sale was going on? A. I did not.

20 Q. As a representative of Eastwood, you did not notify anybody that you had any rent coming to you, did you?

Mr. Merrey: I object to that—

Q. (Continuing) Before the sale?

Mr. Merrey: I object to that. How can he notify anybody? Ask him if he did, and whom he notified, if he did notify a certain person.

30 Mr. Coven: I will withdraw the question. That is all.

Mr. Merrey: That is all.

JAMES EASTWOOD, sworn.

Direct-examination by Mr. Merrey:

Q. Mr. Eastwood, you are an officer of the Eastwood Realty Co., are you not? A. I am.

40 Q. The company owned this building on Rama-

James Eastwood—Direct.

po Avenue and Crosby Place—around there? A. Yes, sir.

Q. Are you there—do you go to this building?

A. Every day.

Q. Do you manage the property for the Eastwood Realty? A. I am the agent in charge.

Q. Mr. Travers is your bookkeeper? A. He is the cashier. 10

Q. Is this mill located near the Erie Railroad Station—isn't it—Paterson—Market Street, Paterson? A. Right alongside of the railroad, yes.

Q. Great many tenants there, are there? A. We have about fifteen.

Q. Now, do you remember making the lease to Mr. Cannel, which was offered in evidence? A. I do. Yes, I remember it.

Q. You signed that, I think. A. I did.

Q. Well, did Cannel remain the tenant there, to the end of that lease? A. There was a change-- 20

Q. Yes? A. —a few months after it was made.

Q. When? A few months after it was made? A. Yes.

Q. Just how did that change come about? A. Why, Mr. Cannel told me that he had taken in a partner, Mr. H. Dauber.

Q. Yes? A. And that they had organized a company, known as the Candor Silk Company, who would pay the rent in future. 30

Q. Yes? A. I told him, that was satisfactory.

Q. Did you talk to his partner? A. Yes.

Q. Was there anything else said about this? A. Nothing further about that.

Q. Was there some question about what was owed by him, Cannel, himself, personally? A. Yes.

Q. What was said about that? A. Well, there was a small bill there of a little over a hundred 40

James Eastwood—Direct.

dollars for work which our operating company had done in connection with the building—

Mr. Coven: I object to that, if the Court please.

Mr. Merrey: All right.

10 *By Mr. Merrey:*

Q. That wasn't in connection with this? A. No, not at all. He simply said Cannel would have to pay that personally.

Q. Now, do you know what there is due, or is that kept by Mr. Travers? A. Mr. Travers takes care of the detail.

Q. You say that you are there every day? A. Yes.

20 Q. Do you remember, in May, last year—do you remember of the Sheriff's sale taking place there? A. I do not.

Q. Did you ever see any notice of a Sheriff's sale? A. No notices were posted.

Q. You said: No notices were posted? A. Absolutely, they weren't.

Q. Then, you made this—made out this warrant for distress to Mr. Naef? A. Yes.

30 Q. Well, before that was issued, did you know that there had been a Sheriff's sale, or been told about it? A. I didn't know anything about any Sheriff's sale.

Q. When did you first hear that there was a Sheriff's sale? A. Why, after this notice was posted—

Q. Yes? A. —some little time after—several days after.

Mr. Merrey: Yes. That is all.

40

*James Eastwood—Cross.**Cross-examination by Mr. Coven:*

Q. Were you in the building on May 22, 1934?

A. I couldn't say positively.

Q. You said "positively there was no sale"?

A. Well, I called on this party sometimes three times a day, trying to collect rent—

Q. Just a minute, Mr. Eastwood— A. (Continuing)—most of the time he wasn't there. I was there to find him. 10

Q. I am not asking you that. A. (No answer.)

Q. I am asking you whether you were in the building on that day; you say you do not recall?

A. I haven't any way of verifying—

Q. I am asking you whether you would say positive, though. A. A notice would have been up some days before May 22nd, wouldn't it? 20

Q. Is that the only reason you think— A. That is the only reason.

Q. —because the notice wasn't posted? A. Yes.

Q. This lease between the Eastwood Realty Co. and the Cannel Silk Manufacturing Company, which is in evidence, was still in existence then, wasn't it? A. Well, it is here now.

Q. You say that on the 23rd, when you issued this warrant for the bailiff that you did not know the sale had taken place? A. Positively, didn't know it. 30

Q. Didn't know it? A. Didn't know it.

Q. Did you see the bailiff that day? A. I did.

Q. Did he tell you he had spoken to me? A. He didn't say anything.

Frederick H. Naef—Direct.

FREDERICK H. NAEF, sworn.

Direct-examination by Mr. Merrey:

Q. Mr. Naef, are you the bailiff that is referred to in this distress warrant? A. I was.

Q. Did you get that from the Eastwood Realty Co.? A. I did.

10 Q. What did you do about that? A. Well, when I got it, I went upstairs, tacked one on the door there.

Q. Tacked one what? A. One of these distress warrants.

Q. Copy of the distress warrant? A. Copy of the distress.

20 Q. Yes? A. And I then made an effort to locate Mr. Cannel, who I knew was interested, and I found him the following morning at the plant, and I also served a copy of the distress warrant on him the following morning. I then proceeded to take an inventory of the stock that was in the place.

Q. You did make up such an inventory? A. I did.

Q. Is this it? A. That is it.

Mr. Merrey: I offer this in evidence.

(No audible objection.)

30 (The same was marked Defendant's Exhibit D-3 in evidence.)

Q. After that, did you give notice of making an appraisement? A. I did.

Q. Is this a copy of that notice? A. Yes, it is.

Q. Now, did you proceed further with this sale?
A. I proceeded to appraise it on the day called for in the notice.

40 Q. What became of those goods? A. Well, the last I heard, that they were replevined.

Frederick H. Naef—Direct.

Q. The Sheriff took them, did he? A. He did, yes.

Q. There was demand made upon you, which was offered in evidence, demanding that you turn over these goods? A. Correct.

Q. I show you P-2, the demand, those are the same goods. You did not turn them over on that demand, did you? A. I did not. 10

Q. Then the Sheriff took them under the replevin writ in this suit? A. He did.

Mr. Merrey: That is all.

(No cross-examination.)

Mr. Merrey: That is our case.

Mr. Coven: Just a moment, Mr. Naef.

(The witness resumes the stand for cross-examination.)

Mr. Merrey: I was to offer this notice of making an inventory. 20

(The same was marked Defendant's Exhibit D-4 in evidence.)

Cross-examination by Mr. Coven:

Q. You executed this distraint on the 24th of May—sure of that—sometime in the afternoon, wasn't it? A. Yes. If you will let me refer to the back, I can tell you the time when I executed it. 30

Q. Yes. A. 23rd of May, 1934.

Q. That was the day after the Sheriff's sale, wasn't it? A. Well, I found out later that the goods had been sold the day previous.

Q. You found that out on the 23rd? A. That they had been sold at a Sheriff's sale, I found that out when I served Mr. Cannel.

Q. Never mind the speech. Did you find out 40

Frederick H. Naef—Cross.

on the 23rd that there had been a Sheriff's sale on the 22nd? A. No, I didn't.

Q. On the 24th? A. Not that there had been a Sheriff's sale, no.

Q. Were you in my office on the 23rd? A. I don't believe so.

10 Q. Were you in my office on the morning of the 24th? A. Possibly.

Q. Don't you recall the conversation about the Sheriff's sale? A. I don't believe it was that soon after I had put the warrant on there.

Q. Anyway, soon after you heard it, did you report it to Mr. Eastwood? A. If you will allow me to explain that, I will tell you just what I did.

Q. Just answer my question. A. I never explained anything to Mr. Eastwood.

20 Q. Did you report that to Mr. Eastwood, is the question? A. As to the Sheriff's sale, no, I did not.

Mr. Coven: That is all.

Mr. Merrey: That is all.

Mr. Merrey: That is our case, if the Court please.

(Defendant Rests.)

30

PLAINTIFF'S REBUTTAL.

CHRIS EDELL, sworn.

Direct-examination by Mr. Coven:

Q. Mr. Edell, you are connected with the Sheriff's office of the County of Passaic? A. I am.

Q. How long have you been connected with this office? A. Five years.

40 Q. In that capacity, were you called upon to

Chris Edell—Rebuttal—Direct.

make a levy at the place of the Candor Silk Company on Railway Avenue, Paterson? A. I was.

Q. Did you make such levy? A. I did.

Q. Will you explain to the Court how you did it? A. I went to the premises, known as the Candor Silk Company, at the address herein stated, in the presence of the deputy, King, and I served the notice of levy. I then returned the levy back to the Chief Clerk in the Sheriff's Office. He handed me these notices, and I went to the place again on the date of the 16th—or, May 15th,—and I posted notices inside—in the office inside, one on the building bulletin board downstairs, one at Daly Avenue and Grand Street, one at Graham Avenue and Keene Street, and one at Franklin Avenue and Broad Street, Clifton, in the presence of King, the other deputy in the Sheriff's Office. 10

Q. In pursuance of that levy, did you cause the sale to be made? A. I did. 20

Q. On what date? A. On May 22nd.

Q. At what hour? A. 2:00 P. M., in the afternoon.

Q. The notices you explained about before contained that information? A. They did.

Q. Did you hold a sale? A. I did.

Q. Who was present? A. Well, the officer, King, myself, Golmer, the Chief Clerk in the Sheriff's office, and your lawyer—I don't know his name— 30

Q. Gitkin? A. (Continuing) Then we proceeded to sell the silk, first, as it stated the silk sale would be held in the Sheriff's Office. Then we proceeded to the premises over on Ramapo Avenue and sold the list of goods herein stated.

Q. And the defendants, were they present at the sale? A. Who?

Q. Were the defendants present at the sale? A. 40

Chris Edell—Rebuttal—Direct.

I think there were two gentlemen—I don't just recall whether they were officers, or not.

Q. That was besides Mr. Gitkin, who was there?

A. Yes, he was there.

Q. When you made the levy first, did you meet the officers of the Candor Silk Company? A. When I made the levy, when I went to post the
10 notices, I did.

Q. They made no objections, that the goods weren't theirs, did they? A. No; they said nothing to me. In fact, I didn't ask them.

Q. It was struck off at the sale to the highest bidder? A. What is that?

Q. The merchandise was struck off at the sale to Mary Blanos, as the highest bidder? A. That is right.

Q. That bill of sale that is in evidence, marked
20 Exhibit P-1, was executed thereafter; is that right? A. Yes. This is signed by Golmer, the Chief Clerk.

Q. Now, from the time you posted the notices and made the levy until the day of the sale, did you at any time receive notice from the landlord that there was any claim for rent due to him? A. I did not.

Q. Did you ever receive any notice after that,
30 after the sale? A. No, I did not.

Mr. Coven: That is all.

Cross-examination by Mr. Merrey:

Q. Did you say you put notices on the door? A. I posted a notice on the inside, in the office, according to my records.

Q. Oh, inside? A. Yes.

Q. Inside of the place there? A. Candor Silk
40 Company, right.

Chris Edell—Rebuttal—Cross.

Q. So that a person passing by would not see any notice? A. Well, he wouldn't in the office, but as he went in the mill, he would see it.

Q. As he went inside, he would see it in their office? A. Yes.

Q. That is, provided they didn't take it down? A. (No audible response.)

Q. You didn't put these notices out on the outside at all? A. No, we never do. 10

Q. You never do? A. We never always put them on the outside; we post them in places on the premises.

Q. Post them inside, so that people cannot see them; is that your idea? A. No, I wouldn't say it was.

Q. You know that Mr. Eastwood of the Eastwood Realty Company owned that mill, didn't you? A. No, I didn't. 20

Q. You didn't make any attempt to let the landlord know that you were conducting this sale? A. I didn't make any attempt; that wasn't any of my job.

Q. Whose job is that? A. I am just there to make the levy and post the notices.

Q. You always post notices? A. I always post them on the premises, either on the outside or the inside. 30

Q. Either on the outside or the inside? A. Yes.

Q. You are sure you always did that? A. Oh, positive.

Q. You posted these on the inside, didn't you? A. Yes.

Q. So that when they locked the door, went away, nobody could see them? A. Oh, I wouldn't say that.

Q. Now, Mr. Edell, was there any suggestion to 40

Chris Edell—Rebuttal—Cross.

keep the thing quiet? A. Any suggestion of what?

Q. Yes, from anybody to keep it a little quiet?
A. (No answer.)

10 Q. Did the Candor people tell you they didn't like this kind of notice up on the outside? A. No, they did not reply to me. In fact, I wasn't in their company long enough for anything to be asked. I know they didn't say anything to me.

Q. Now, then, this date that you called the sale, these notices, did you put them up where people could see them? A. Yes.

Q. Will you say now that they were not torn down? A. I won't say that they weren't torn down, no.

Mr. Coven: I object to that.

20 Q. Let me ask you now: Why you didn't put it on the outside door? A. Because it is not practical to put it on the outside; it is practical to put it in the building, not on the walls.

Q. Doesn't the law require you to post them in public places? A. I did.

Q. Inside? A. It wasn't necessarily inside—

30 Q. That is all. A. (Continuing) —I posted five different places. If you heard the testimony where I gave five different places where I posted them.

Mr. Coven: That is all.

Mr. Coven: That is our case.

Mr. Merrey: Do you rest?

Mr. Coven: Yes.

(Plaintiff Rests.)

The Court: We will take an adjournment now until two o'clock.

40 (Noon Recess.)

Plaintiff's Motion for Direction of Verdict.

October 3, 1934; 2:00 P. M.

Mr. Coven: Are you finished, Mr. Merrey?

Mr. Merrey: Yes. We rest.

(All Parties Rest.)

Thereupon, the Plaintiff moved for direction of verdict in her behalf, as follows: 10

Mr. Coven: I ask for a verdict in this case for possession, for the plaintiff, first, on the ground that the defendant is attempting to hold the goods of the Candor Silk Company, and the only proof before this court of the tenancy is the lease, and the tenant under that lease is the S. Cannel Silk Company. I refer to Exhibit D-1. This is the lease made between the Eastwood Realty Company and one Samuel Cannel trading as S. Cannel Silk Company. That lease was in existence, commencing June 1, 1931, and to continue for a period of three years, which would take it up until the time that this—just prior to this sale, and the time for which the defendant is asking the rent—six months' rent—rent commencing in December, 1933, carrying down for five months more. 20

The goods that we claim, under the writ, are the goods of the Candor Silk Company. The goods that we purchased were the goods of the Candor Silk Company. Therefore, the Eastwood Realty Company, the landlord under that lease, have no relief for any claim whatsoever against goods of the Candor Silk Company, because the statute provides that a landlord may only distrain goods of his own tenant and no other person. 30

Let us look at Exhibit D-2. (Reading D-2.) 40

Plaintiff's Motion for Direction of Verdict.

They cannot distrain the goods of the Candor Silk Company, if the Cannel Silk Company is their tenant, and that is the point I want to make at this time.

Furthermore, in their distress warrant, they ask for six months' rent, plus charges for power supplied to the tenant. My contention is that the
 10 lease calls for a rental of \$200.00 per month, and nothing else, and, as far as the power is concerned, that is merely a collateral agreement which is contained in the lease, but, as to that, they would have no right of lien. They would be merely a general creditor.

May I direct your Honor's attention to Corpus Juris, Book 36, Page 286. "Rent" is defined in
 20 Corpus Juris as applicable only to compensation for the use of land and tenements.

The term "rent" will not be extended to include all payments which by the terms of a lease the tenant is bound to make, such as a payment of taxes or the cost of improvement, nor will it include the obligation to perform collateral covenants.

Now, let us look at the lease. That clause which refers to the payment for power is simply a contract on the part of the party of the first part to supply power, and a contract on the part of the
 30 party of the second part to pay for it. It has nothing to do with the rent whatsoever. It is not even payable with the rent. And if the parties contended that it be paid as part of the rent, why didn't they say so. There is nothing contained in here which says that the power shall be paid as rent, and they surely haven't a right of distraint for power against goods of the Candor Silk Company when power is supplied to S. Cannel & Company, on a contract.
 40

Plaintiff's Motion for Direction of Verdict.

As to their distress, I want to call your Honor's attention to the fact that it was issued a day after the Sheriff's sale had been completed. Now, let us refer to Section 4 of the Landlord & Tenant Act.

Section 4, of the Landlord & Tenant Act, provides: "That no goods or chattels whatsoever, lying or being, or which shall lie or be in or upon any messuage, lands or tenements, which are, or shall be leased for term of life or lives, year or years, at will or otherwise, shall be liable to be taken, by virtue or any execution, attachment or other process, unless the party at whose suit the said execution or other process is sued out, shall, before the removal of such goods from off the said premises, by virtue of such process, pay to the landlord of the said premises, or his bailiff, all rent due for the said premises, at the time of the taking such goods or chattels by virtue of such process, or which shall have accrued up to the day of the removal of the goods from off the said premises, whether by the terms of lease the day of payment shall have come or not, making a rebate of interest on the sum, the time of payment of which, by the terms of the lease shall not have come; provided, the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such process is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his process, as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the money to be made by virtue of such process."

Now, looking at that coldly, it might tend to

Plaintiff's Motion for Direction of Verdict.

show that, probably, we did not live up to the statute, so I want you to look at it very closely.

10 Who does the statute require to make payment of the rent? The party at whose suit the action is brought, or the Sheriff? Neither one of them are in this case. I am suing on behalf of Mary
 20 Blanos, the purchaser at the execution sale. This requires the payment to be made to the landlord by the plaintiff in the original action before it is moved and also before it is sold by the Sheriff. That is a point I want you to consider. Further, this is the statute, but we still have cases which interpret the statute, and the first one I want to direct your Honor's attention to is the case of *Ayres v. Johnson*, in 7 N. J. Law, at page 119, a case which stands for authority that "The land-
 20 lord has no remedy against the constable who has removed, from leased premises, the goods of the tenant, from whom there is rent due, unless he gives notice to the constable" that there is rent due, "previous to the removal of the goods."

Now, in this case, in the testimony, there is no notice to the constable. Surely, if the constable is not liable under such circumstances, in this case you cannot hold this plaintiff. Do I make myself clear?

30 I say that *Ayers v. Johnson* is authority for the fact that the landlord must notify the constable, or the Sheriff's man, that there is rent due; and if he does not notify him before removal, he loses his lien, and he loses his claim.

The act says "removal". Let us see what "removal" means. I now refer you to the case of *Ryerson v. Quackenbush*, a very lengthy case, a case in which the court goes into the subject most thoroughly, a Court of Errors and Appeals de-
 40

Plaintiff's Motion for Direction of Verdict.

cision, reported in 26 Law, page 237. This is what the court says as to "removal":

"Under our statute, a levy and sale of the goods of a tenant upon the demised premises, by a Sheriff or other officer under an execution, is a removal of the goods, within the contemplation of the statute."

So that we have the sale complete and the removal complete, because, if this case is the law of our state, it says the writ of execution plus sale equals removal, and therefore their claim against us is improper. 10

Let me direct the Court's attention to the case of *Schwartz v. King Realty Co.*, 93 L. 111 at page 116 which is somewhat analogous to this case. This was an auction sale, I believe, and in this sale the auctioneer offered every item in the place for sale. There had been rent, however, due from the tenant, and the landlord never asserted that claim for rent when the sale was going on, but after the respective purchasers had bid in the goods and attempted to remove the goods, he then comes in with this case, and says: "Stop; I have rent coming, and I claim that I have a prior lien." Schwartz brings action against this Realty Company. This is what the court says: 20

"By the State of the Case it appears that (a) distress warrant was not issued against the goods and chattels of the tenant until a time after the sale was consummated, and no levy was made under the warrant until sometime afterwards. It is therefore clear that the defendant acquired no lien under the distress warrant on the goods purchased by the plaintiff." 30

Let me explain that to you. It means that at the time Mary Blanos purchased the goods, title then passed, by virtue of the sale, to Mary Blanos. 40

Plaintiff's Motion for Direction of Verdict.

Eastwood then comes in and says: "Here, I am distraining the goods and chattels," but we say, "You do not have any right to distrain the goods and chattels unless they are the goods and chattels of your tenant," and on that particular day they were the goods and chattels of Mary Blanos, not his tenant.

- 10 Then the famous case of *Woodside v. Adams* is authority for that point that I have just made, that the landlord has no lien on the goods and chattels of his tenant except such as arose by statute, and the statute simply gives him a lien against his tenant, and there is no proof that these goods belonged to Cannel, sir.

On those grounds, sir, I respectfully urge the direction of a verdict in favor of the plaintiff—verdict for possession.

- 20 Mr. Merrey: If the Court please, there are two things in this case for your consideration—the question as to whether the landlord claims under this statute or under the distress warrant. I think he claims under both—an action relating to the distress warrant and this Landlord & Tenant Act. They are two entirely separate and distinct claims.

- 30 The question that you have before you is, perhaps, singular. In other words, it may be that you cannot decide the question as to the power in this particular case.

We are in possession of these goods and chattels, and the Sheriff comes with the replevin writ in this suit and takes them away from us. The question is whether he had the right to take them or whether we had the right to maintain possession.

- 40 Now, if we had the right to maintain possession, for \$1200.00, he had no right to take them,

Plaintiff's Motion for Direction of Verdict.

and, therefore, we are entitled to possession under this lien. In other words, it might be—but you do not have to decide in this case now—the amount of our lien—interesting question—you may not feel called upon to decide that, as to whether this claim for power supplied is part of the rent or not—because if we have the right of lien for \$1200.00, then we ought to have possession, and they ought to return the goods to us, to execute our right and carry that out. 10

(Followed by extended argument of counsel on motion of plaintiff.)

Now, then, it may be that your Honor is not called upon to pass on that question as to whether we have a lien for the power, whether that is part of the rent, or not, but it seems to me that we were entitled, under all circumstances in this case, to have possession of these looms and other chattles, when they were taken away from us by this replevin writ—the plaintiff did something that she had no right to do, and must return the looms or be held on his bond. 20

Under the circumstances involved in the case, it may be that your Honor will want to take considerable time to properly consider it, and, if your Honor desires me to send you a list of cases that I contend support my position, I will be glad to do that. 30

The Court: If I read this 4th Section right, it says, “That no goods or chattels * * * shall be liable to be taken * * * by virtue of any execution, attachment, or other process, unless the party at whose suit the said execution or other process is sued out, shall, before the removal of such goods from off the said premises, by virtue of such process, pay to the landlord of the said premises, or 40

Plaintiff's Motion for Direction of Verdict.

his bailiff, all rent due for the said premises, at the time of the taking of such goods''.

10 Mr. Coven: Which leaves them with an action against either the party who brought the suit or against the Sheriff, not against us—cannot hold our goods. It does not say the purchaser at an execution sale; it says the person at whose suit the said execution or other process is sued out. They can sue either the Sheriff or the party that brought the suit, and if they do, they would lose, because they never gave notice of their rent due, and because of that fact they are too late in bringing their action.

The Court: The act does not say that they must give notice.

20 Mr. Coven: No, the act does not say that they must give notice, but the cases interpreting the act does. The Court of Errors and Appeals says so, by their decisions.

The Court: Well, how can you give notice, if you do not know of the sale?

30 Mr. Coven: It is presumed that you will know. Can we help it that Mr. Eastwood did not know about the sale? They were posted properly. The statute provides what the officer making the levy must do, and according to his testimony, he did it, and the Court must certainly uphold the genuineness of the sale and notice.

The Court: The statute says that he should pay the rent.

Mr. Coven: Before removal.

The Court: Yes, and it goes on to say that he can levy, pay the rent, as well as the amount due on the execution.

40 Mr. Coven: Yes. He could have done it, if he was notified—he would probably have done it, if he had been.

Plaintiff's Motion for Direction of Verdict.

The Court: Don't you think it is his duty to inquire?

Mr. Coven: No, the act does not require him to, and the cases so hold.

The Court: How is he going to find out whether there is any rent due?

Mr. Coven: The landlord is supposed to come in and say, "Here, Mr. Sheriff, this man owes me so much rent, and I want you to turn it over to me before you remove these goods, or sell them." 10

The Court: Well, suppose the landlord was in New York?

Mr. Coven: Well, it is our law, sir. The statute says that. The Sheriff issued the execution, makes the levy, and it requires him to post notices, and that was done. Then the day for sale came and a public sale was held. And while the landlord wasn't around, but are we to protect the landlord, or is he to protect himself. He knew that this rent was due, and he probably knew the financial condition * * * and I say that we are entitled to the goods, and that because of this execution and sale, my man is entitled to them. I think I have proven to the court that they have title under that execution. 20

Mr. Merrey: No, you did not. The tenant had possession of the goods, and you took them. 30

The Court: Well, I think that they were continuing under this lease, and I think the Candor Silk Company was the tenant. The rents, when they were paid, were collected from Candor Silk Company, and the Candor Silk Company was recognized as the tenant—that seems to have been the agreement, from the evidence before me, and I so hold. The testimony is that Cannel took in a partner in his business, that he organized a com- 40

Plaintiff's Motion for Direction of Verdict.

pany, and they were going to continue the business as Candor Silk Company, and he tells this to the landlord, asked the landlord to send future bills to the Candor Silk Company, and thereafter the Eastwood Realty Company treated the Candor Silk Company, Inc., as the tenant, and treated them as if they were in there under the same terms and conditions as Cannel was, and that seemed to be the understanding, and the rent was paid and the power was paid—rent or power, whatever you want to call it. There isn't any doubt as to what is meant by that conduct. * * * You may submit memorandum, and I will reserve decision.

The Court: The Court will now stand adjourned until tomorrow morning at ten o'clock.

20

Paterson, N. J., Feb. 2, 1935.

Before—Hon. JOHN C. LOSEY, Judge.

APPEARANCES:

For the Plaintiff: E. ROBERT COVEN, ESQ.

For the Defendant: EDWARD F. MERREY,
ESQ.

30 (This matter coming on before the Court on a motion, the following addenda was dictated for the record:)

The Court: In the case of Mary Blanos, plaintiff, vs. Eastwood Realty Company, the defendant, the motion on the part of the plaintiff for a direction of a verdict is denied.

Mr. Coven: Then I ask for an exception, sir.

The Court: I will allow you an exception.

40

Mr. Coven: Based on the same grounds that I

Plaintiff's Motion for Direction of Verdict.

made in the argument on the motion. Do I understand the Court is going to determine the case now?

The Court: Yes. I am willing to decide that there is rent due, and it is not necessary, as I see it, for me to determine the actual amount of rent due.

(Lengthy argument not reported.)

The Court: My findings will be that the goods should be returned.

10

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30

40

Exhibit P-1.**BILL OF SALE**

Know all men by these presents, that I, Thomas E. Manly, Sheriff of the County of Passaic in the State of New Jersey, by virtue of a writ of fieri facias to me lately delivered and directed, upon a certain judgment lately recovered in the New Jersey Supreme Court, wherein Samuel Rachels is plaintiff, and Candor Silk Co., Inc., is defendant, commanding me to satisfy the same, and;

Whereas, I did make a levy upon the right, title and interest in certain goods and chattels owned by said defendant, and more particularly described in Schedule "A", annexed hereto and made a part hereof, and after first having advertised the sale of the same according to law, and thereafter conducted said sale on Tuesday, the 22nd day of May, 1934, at 2:00 o'clock in the afternoon, Day-light Saving Time, at the Sheriff's Office, situate in the Court House, in the City of Paterson, at which time Mary Blanos, of the City of Paterson, County of Passaic and State of New Jersey, was the highest bidder for the said goods and chattels, I did strike off the same to her;

Now therefore, in consideration of the sum of one hundred dollars, the receipt whereof is hereby acknowledged, I do hereby bargain, sell, assign and transfer unto the said Mary Blanos all the right, title and interest of the defendant, its successors and assigns forever, in, to and of, the goods and chattels mentioned in Schedule "A".

In witness whereof, I have hereunto set my

Exhibit P-1.

hand and seal this twenty-third day of May, 1934.

THOMAS E. MANLY,
Sheriff.

Signed, sealed and delivered
in the presence of
Louis C. Gollmer,
A Notary Public
of New Jersey.

10

Know all men by these presents, that I, Thomas E. Manly, Sheriff of the County of Passaic in the State of New Jersey, by virtue of a writ of fieri facias to me lately delivered and directed, upon a certain judgment lately recovered in the New Jersey Supreme Court, wherein Samuel Rachels is plaintiff, and Candor Silk Co. Inc., is defendant, commanding me to satisfy the same, and;

20

Whereas, I did make a levy upon the right, title and interest in certain goods and chattels owned by said defendant, and more particularly described in Schedule "B", annexed hereto and made a part hereof, and after first having advertised the sale of the same according to law, and thereafter conducted said sale on Tuesday, the 22nd day of May, 1934, at 2:00 o'clock in the afternoon, Daylight Saving Time, at No. 18 Ramapo Avenue, Paterson, N. J., at which time Mary Blanos, of the City of Paterson, County of Passaic and State of New Jersey, was the highest bidder for the said goods and chattels, I did strike off the same to her;

30

Now therefore, in consideration of the sum of two hundred dollars, the receipt whereof is hereby acknowledged, I do hereby bargain, sell, assign and transfer unto the said Mary Blanos all the right, title and interest, of the defendant, its suc-

40

Exhibit P-1.

cessors and assigns forever, in, to and of, the goods and chattels mentioned in Schedule "B".

In witness whereof, I have hereunto set my hand and seal this twenty-third day of May, 1934.

THOMAS E. MANLY,
Sheriff.

- 10 Signed, sealed and delivered
in the presence of
Louis C. Gollmer,
A Notary Public
of New Jersey.

SCHEDULE "A"

73 pcs. Satins 55/80s—11900 ends—43 in. Reed space.

- | | | | | |
|----|-----------|-----------|-----------|-----------|
| 20 | 1712—72/3 | 1696—76/6 | 1571—84/1 | 1707—78 |
| | 1366—76/6 | 1382—77/7 | 1271—78 | 1334—77/2 |
| | 1276—88/3 | 1355—75/7 | 1325—79/2 | 1713—77 |
| | 1356—81/2 | 1572—74/5 | 1701—87/4 | 1512—78/3 |
| | 1306—83 | 1326—74/6 | 1389—79/3 | 1363—76/3 |
| | 1695—78/2 | 1580—70/4 | 1514—77/6 | 1351—83 |
| | 1704—79/3 | 1709—84/6 | 1314—81/7 | 1342—56/2 |
| | 1710—71/4 | 1364—77/5 | 1301—71 | 1374—77/1 |
| | 1346—77/5 | 1324—82/3 | 1578—91/3 | 1285—82/7 |
| | 1711—82/6 | 1516—76/4 | 1693—81/7 | 1515—78/4 |
| 30 | 1316—76/4 | 1694—73/6 | 1436—92/2 | 1286—76/5 |
| | 1296—77/3 | 1703—76 | 1312—97/5 | 1275—62/4 |
| | 1346—82 | 1354—85 | 1273—78/7 | 1345—64/5 |
| | 1365—78/6 | 1335—80/7 | 1344—64/5 | |
| | 1315—79 | 1702—78/2 | 1579—82/4 | |
| | 1305—90 | 1303—79/7 | 1708—78/4 | |
| | 1336—77/4 | 1398—86/4 | 1387—92/6 | |
| | 1274—81/4 | 1294—71/3 | 1705—71/6 | |
| | 1390—77/2 | 1295—96/1 | 1361—79/7 | |
| 40 | 1304—80 | 1353—65/7 | 1568—67/1 | |

Exhibit P-1.

SCHEDULE "B"

20 Crompton Looms.
 2 Warpers.
 6 Winders.
 1 Measuring machine.
 3 Quill Winding Machines.
 1 Large scale. 10
 1 Soaking Machine.
 Office fixtures and equipment.

State of New Jersey }
 County of Passaic } ss.:

Be it remembered that on this 23rd day of May,
 in the year of our Lord one thousand nine hun-
 dred and thirty-four, before me a Notary Public
 of New Jersey, personally appeared Thomas E. 20
 Manly, Sheriff, who I am satisfied is the grantor
 and seller named in the foregoing bill of sale, and
 after making known to him the contents thereof,
 he did acknowledge that he signed, sealed and de-
 livered the same as his voluntary act and deed
 for the uses and purposes therein expressed.

LOUIS C. GOLLMER.

Exhibit P-2.

30

Eastwood Realty Company and Frederick
 H. Naef:

I hereby demand of you the following goods and
 chattels which are my property, to wit:

20 Crompton Looms.
 2 Warpers.
 6 Winders.
 1 Measuring Machine.
 3 Quill Winding Machines. 40

Exhibit P-2.

1 Large Scale.

1 Soaking Machine.

and all office fixtures and equipment, and unless you deliver the same forthwith, I shall commence legal proceedings against you to recover possession of the same.

MARY BLANOS.

10

Exhibit P-3.

SHERIFF'S SALE.

NEW JERSEY SUPREME COURT.

20

SAMUEL RACHELS,
Plaintiff,

vs.

CANDOR SILK Co., INC.,
Defendant.

Fi. Fa., &c.
Judgment.

Returnable May Term, A. D. 1934

E. ROBERT COVEN, Atty.

30

By virtue of the above stated Writ of Fieri Facias to me directed and delivered, I have levied upon and shall expose for sale at Public Vendue, and sell to the highest bidder on Tuesday, May 22nd, A. D. 1934, at 2 o'clock in the afternoon, Daylight Saving Time, at No. Candor Silk Co., Inc., 18 Ramapo Ave., Paterson, N. J., County of Passaic and State of New Jersey, all the right, title and interest of the defendant Candor Silk

40

Exhibit P-3.

Co., Inc., above named, in all the following goods and chattels, to wit:

20 Crompton looms
 2 Warpers
 6 Winders
 1 Measuring machine
 3 Quill Winding Machines
 1 Large Safe
 1 Soaking Machine
 Office fixtures and equipment.

10

THOMAS E. MANLY,
 Sheriff.

Dated May 15, 1934.

By CHRIS L. E. DELL,
 Special Deputy Sheriff.

20

Exhibit D-1.

LEASE

This Agreement, Made the 30th day of March, in the year of our Lord, One Thousand Nine Hundred and thirty one,

Between Eastwood Realty Company, a corporation, of the City of Paterson, in the County of Passaic, and State of New Jersey, party of the First Part,

30

And Samuel Cannel, trading as S. Cannel Silk Co., of the City of Paterson, in the County of Passaic, and State of New Jersey, party of the Second Part.

Witnesseth, That the said party of the First Part, has hereby let, and rented to the said party of the Second Part, and the said party of the Second Part, has hereby hired and taken from the said party of the First Part

40

Exhibit D-1.

All floor space on the third floor, North end, Mill known as No. 10, situated at 18 to 26 Ramapo Avenue, in the said city of Paterson, 7436 feet of floor space, more or less. In computing floor space it is understood that outside measurements prevail.

10 A—Party of the First part agrees to keep the premises heated during the winter season.

B—Party of the First part agrees to supply the services of watchman at nights, on Sundays and legal holidays.

C—Party of the Second part shall have use of elevator.

D—Party of the second part agrees not to assign this Lease or sublet the said premises or any part thereof, without the written consent of the party of the First part.

20 E—It is agreed that party of the First part, or his agent, may have free access to the property at all times for the purpose of making inspections, repairs, etc.

F—Party of the Second part agrees to make alterations in the arrangement or disposal of his property on the premises which the owner or Fire Underwriters may deem advisable for the better protection of the property against fire.

30 G—Party of the First part agrees to furnish Electric Current for Light and Power, as supplied by the Public Service Corporation of New Jersey and at the prevailing rates as charged by that Corporation and under conditions as specified in their regular contract for the Paterson District—Power and Light being delivered from Public Service lines through our Master-Meters.

Party of the First part will not be responsible for any loss or damage due to the failure of Pub-

Exhibit D-1.

lic Service Corporation to deliver electric current through our connections.

Bill for Power and Light will be rendered as nearly the first of the following month as possible and is due on or before the 10th of each month. Party of the First part after ten days following presentation of bill for Power and Light reserves the right to refuse to furnish and also to disconnect Electric Service, for non-payment of bill for current consumed between the two previous Meter readings.

10

for the term of three years, to commence on the first day of June, 1931, A. D., 1931, at the yearly rent of Two Thousand four hundred (\$2,400.00) Dollars for floor space, payable Two Hundred (\$200.00) Dollars per month, in advance,

For Power and Light charges see item "G".

20

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the First part to re-enter the said premises, and to remove all persons therefrom.

And the said party of the Second Part covenants to pay to the said party of the First Part, the said rent as herein specified, to wit:

And at the expiration of the said term, or the termination of this lease, the said party of the Second Part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use thereof will permit, damage by the elements excepted.

30

And the said party of the First part covenant, that the said party of the Second Part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly have,

40

Exhibit D-1.

hold and enjoy the said demised premises for the term aforesaid.

In Witness Whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

10 EASTWOOD REALTY COMPANY,
Party of the First Part,
JAMES EASTWOOD, Pres.
SAMUEL CANNEL
Samuel Cannel, trading as S. Cannel
Silk Company,
Party of the Second Part.
S. CANNEL SILK CO.

Signed, Sealed and Delivered
in the presence of
20 Daniel Berliner
Aaron Puch.

Exhibit D-2.**DISTRESS WARRANT**

Know All Men By These Presents:

30 That the Eastwood Realty Company, landlord,
do hereby constitute and appoint Frederick H.
Naef one of the Constables of the County of Pas-
saic in the State of New Jersey, are true and law-
ful Attorney and Bailiff, to distrain, and do here-
by authorize and empower him in our name, place,
and stead To Distrain The Goods And Chattels
of Candor Silk Co., Inc., a body corporate of the
State of New Jersey, formerly Samuel Cannel,
trading as S. Cannel Silk Company, Tenant, in
the house and on the premises occupied by said
40 tenant situate and known as Mill No. 10, Third

Exhibit D-2.

floor, 18 to 26 Crosby Place in the City of Paterson, in the County of Passaic and State of New Jersey, or which may have been conveyed or carried off from said premises within thirty days next before the seizure of the same by said Bailiff: For the sum of Two thousand fifty-two and 74/100 Dollars, being rent of said premises due to said Landlord on the First day of May A. D., 1934, being for Rent, Light and Power as per contract, Dec. balance \$199.30, January 2/c \$303.96, February a/c \$374.26, March a/c \$373.12, April a/c \$417.42, May 2/c \$346.74, May electric \$37.94. 10

And we authorize said Bailiff to collect and receive said rent, and to cause said goods and chattels to be appraised and sold for the satisfaction of said rent and the charges of such distress, appraisal and sale, and to do all other acts and things which may by the said Landlord be lawfully done for the collection of said rent by virtue of "An Act Concerning Distresses," (Revision) approved March 27, 1874, and any and all other statutes and laws. 20

Witness my hand and my seal the twenty-third day of May, A. D. One Thousand Nine Hundred thirty-four.

EASTWOOD REALTY CO.

JAMES EASTWOOD, Pres. (L.S.) 30

Signed, Sealed and Delivered
in the presence of:

John P. Whelan,
Notary Public N. J.

Received this warrant this 23d day of May, A. D. 1934 at 2:00 o'clock P. M.

FREDERICK H. NAEF,
Bailiff. 40

Exhibit D-3.**INVENTORY**

An Inventory of the Goods and Chatels distrained by me, Frederick H. Naef, Bailiff, on the 23d day of May 1934, in the City of Paterson situate Passaic County of by the authority and in behalf of Eastwood Realty Company the Landlord of the premises for Two thousand fifty and 74/100 Dollars, being for six month's rent due them, including electric light and power.

- | | |
|----|------------------------------|
| 10 | 20 Worcester Crompton Looms. |
| | 30 Crompton Knowles Looms |
| | 6 Winders |
| | 3 Quillers |
| | 1 Sipp Warper |
| | 1 Eastwood Warper |
| 20 | 1 Twister Frame |
| | 2 Large Creels |
| | 1 Small Creel |
| | 1 Oil Tank |
| | 1/2 bbl. Oil |
| | 1 Fairbanks Scale |
| | 1 Bock Extractor |
| | 1 Bath Tub |
| | 4 Ladders |
| | 1 Lot Pick Wheels |
| 30 | 24 Sets of Harness |
| | 7 Boxes of bobbins with silk |
| | 1 Lot Reeds |
| | 1 Case of Japan Crepe |
| | 280 Orange Bobbins |
| | 280 Emerald Bobbins |
| | 1 Measuring Machine |
| | 1 Office Desk |
| | 1 Office Chair |
| | 1 Office Stool |
| 40 | 1 Adding Machine |

Exhibit D-3:

- 1 Check Writer
- 1 Steel Cabinet
- 1 Silk Safe

(And all accessories pertaining to a broad silk plant.)

TAKE NOTICE

That I have this day, by the authority and in 10
 behalf of the Eastwood Realty Company the Land-
 lord, distrained, on the premises the several
 Goods and Chattels in the Inventory, annexed, for
 the sum of Two thousand fifty-two Dollars and
 74/100 Cents being for Rent due, that the said
 Goods and Chattels are safely locked up on the
 premises,

And unless Candor Silk Co., Inc., formerly Sam-
 uel Cannel, trading as S. Cannel Silk Co., replevin 20
 the same, or pay said Rent, together with the ex-
 penses of distraining the same, within ten days
 from the date thereof, the said Goods and Chat-
 tels will be appraised and sold agreeably to law.

Given under my hand this 23d day of May, 1934.

FREDERICK H. NAEF,
 Bailiff.

30

40

Exhibit D-4.**NOTICE***Notice of Making Inventory Appraisement.*

To: Candor Silk Co., a body corporate of the State of New Jersey, formerly Samuel Cannel, trading as S. Cannel Silk Company.

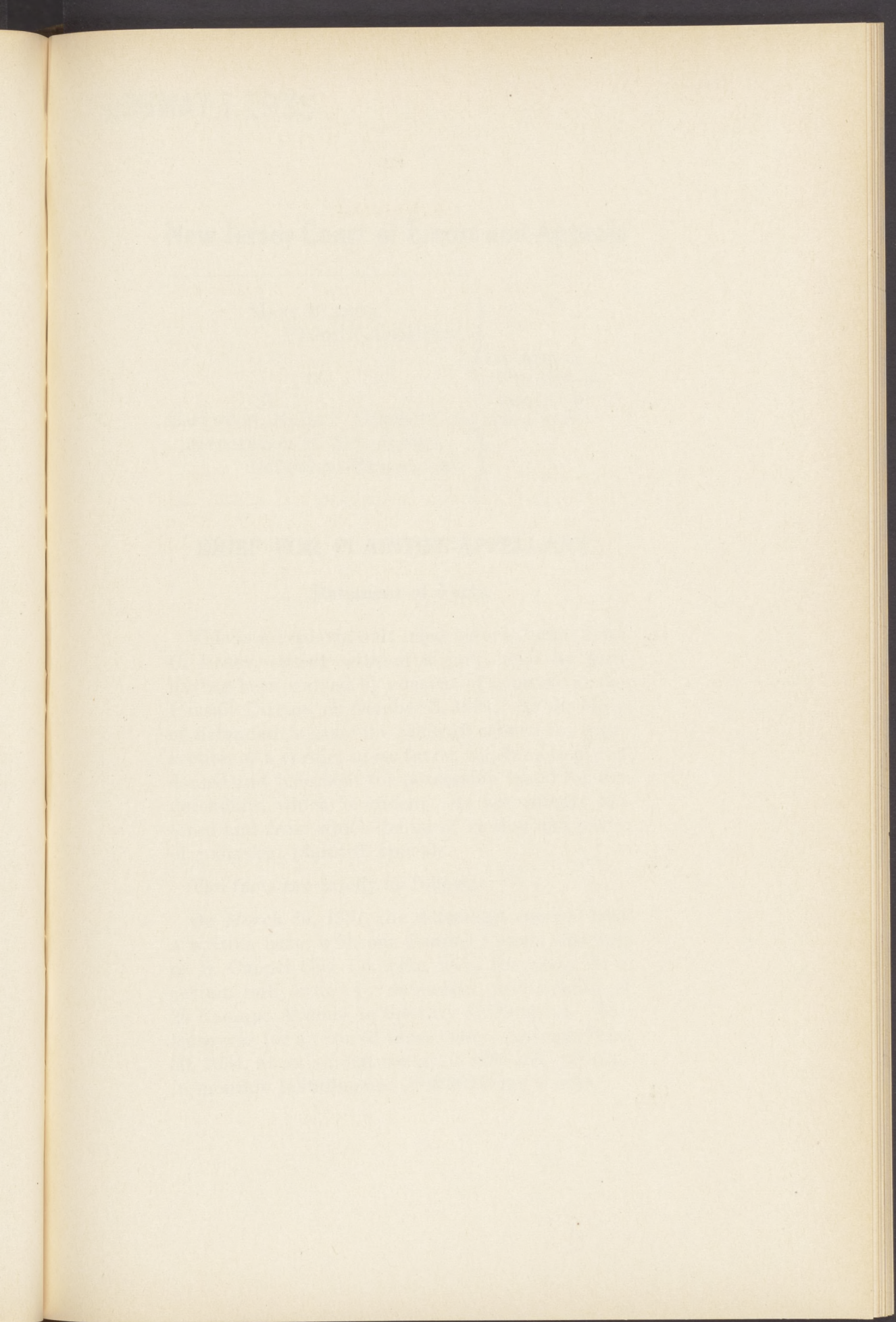
- 10 Take Notice, that on the 8th day of June, 1934, at 10:00 A. M. I shall cause your goods heretofore seized by me for arrearages of rent, due to Eastwood Realty Company, Landlord, to be inventoried and appraised according to law, at the Mill, situate and known as Mill No. 10, Third Floor, 18 to 26 Crosby Place, in the City of Paterson, County of Passaic and State of New Jersey.

Dated June 4th, 1934.

- 20 **FREDERICK H. NAEF,**
Bailiff for Eastwood Realty Co.
Landlord.

30

40



106MAY.T.1935

New Jersey Court of Errors and Appeals

MARY BLANOS, Plaintiff-Appellant, vs. EASTWOOD REALTY COMPANY, a corporation of New Jersey, Defendant-Respondent.	}	On Appeal from Passaic County Cir- cuit Court.
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BRIEF FOR PLAINTIFF-APPELLANT.

Statement of Facts.

This is a replevin suit tried before Judge John C. Losey, sitting without a jury, trial by jury having been waived by consent of counsel, at the Passaic Circuit, on October 3, 1934. At the close of defendant's case, the plaintiff moved for a direction of a verdict in its favor, which motion was denied and judgment for possession found for the defendant, which judgment was accordingly entered and from which denial of motion and entry of judgment plaintiff appeals.

The facts are briefly as follows:

On *March 30, 1931*, the defendant entered into a written lease with one Samuel Cannel, trading as S. Cannel Silk Co. (Ex. D-1) for space in a certain mill owned by defendant, and located at 26 Ramapo Avenue, in the City of Paterson. The lease was for a term of three years, expiring June 30, 1934, at an annual rental of \$2400.00, payable in monthly installments of \$200.00 per month.

On *May 22, 1934*, on the premises so hired was certain machinery owned by the Candor Silk Co., a corporation of New Jersey.

On *May 22, 1934*, by virtue of an execution against the Candor Silk Co., a corporation of New Jersey, directed to the Sheriff of Passaic County, the Sheriff sold said machinery owned by the Candor Silk Co. to Mary Blanos, the plaintiff in this action, who then became the owner of said machinery and legally entitled thereto. (Ex. P-1).

On *May 23, 1934*, defendant-respondent, landlord, did appoint a bailiff and authorized said bailiff to collect and receive certain rent due for the premises as described in the lease (Ex. D-1), to wit: six months' rent for the months of December, 1933, January, 1934, February, 1934, March, 1934, April, 1934, and May, 1934 (Note: all within the term of the lease—Ex. D-1), and if bailiff could not collect, to distrain the goods and chattels of Candor Silk Co., Inc., a body corporate. (Ex. D-2). Being unable to collect the rent, the bailiff distrained the goods and chattels on the premises among which was the machinery purchased from the Sheriff by the plaintiff-appellant. After duly demanding possession of the machinery from the defendant and the bailiff (Ex. P-2), and delivery being refused, plaintiff brought this action in replevin.

ARGUMENT.

POINT I.

Grounds 1, 2, and 4 of Appeal are substantially alike, namely, they deal with the action of the court in denying the motion for a direction of a verdict in favor of the plaintiff-appellant at the close of defendant-respondent's case and the entry of judgment in favor of the defendant-respondent, and, therefore, they may be conveniently combined and argued together.

The only testimony adduced to establish a tenancy at the trial in this matter was based upon the lease between one Samuel Cannel, trading as S. Cannel Silk Co., as tenant, and the defendant as landlord (Ex. D-1). This lease was introduced into evidence by the defendant to show the existence of the relationship of landlord and tenant, which is a necessary condition precedent to a right to distrain under our law, and the general rule of law in our state being laid down in the case of *Woodside v. Adams*, 40 L. 417, in which it was held that:

A landlord has no lien on the goods and chattels of his tenant for the payment of his rent except such as is given by the statute. The statute, which authorizes a distress for rent, expressly limits the right of distress to the goods and chattels of the tenant and no other person.

Defendant, landlord, by its agent, Joseph Travers, then testified that the tenant, Samuel Cannel, sometime during the term of this lease, notified him that thereafter the Candor Silk Co. would pay the rent. (Case, p. 27, ll. 31 to 40; p. 28, ll. 1

to 30). However, there was no proof that the Candor Silk Co. ever had any negotiations with the defendant landlord. The defendant, by its agent, Joseph Travers, on cross-examination (Case, p. 34, ll. 32 to 40; p. 35, ll. 1 to 38) admitted that the lease (Ex. D-1) remained in existence and that it was the intention of the defendant to keep the lease in effect.

(Case, p. 35, ll. 33 to 35).

“Q. At that time, you did not destroy this lease; you intended to keep this lease in effect, didn’t you, yes or no?

A. Yes.”

There does not appear in the testimony anything to show that the Candor Silk Co. either directly contracted with the defendant, or that the defendant ever had any conversation directly with the Candor Silk Co. It is, therefore, the contention of the plaintiff that the defendant looked to Cannel as its tenant and as being responsible for the rent reserved under the lease, and that S. Cannel, trading as Cannel Silk Co., was the defendant’s tenant. There does not appear anywhere in the case that the defendant released Cannel of his responsibility under the lease or that the Candor Silk Co. assumed responsibility for the rent reserved under the lease. It does appear, however, as heretofore stated, that the defendant intended that Cannel remain liable under the lease. The goods and chattels claimed under the writ in this case are the goods of the Candor Silk Co. The goods and chattels that were purchased by the plaintiff from the Sheriff were the goods of the Candor Silk Co.

The plaintiff contends:

- (1) That the goods and chattels purchased at

the Sheriff's Sale were not the goods and chattels of the defendant's tenant, and therefore, were not subject to the lien of the defendant for rent under Section 4 of the Landlord and Tenant Act.

(2) That the defendant as landlord, after the levy and sale by the Sheriff, on May 22, 1934, did not have a lien against the chattels by virtue of Section 4 of the Landlord and Tenant Act.

The Landlord and Tenant Act (3 C. S. 3066, Section 2, paragraph 4) is clear as to the rights of the landlord against his tenant, and a perusal thereof will disclose that it is required only of the plaintiff in execution, or the Sheriff, to pay the landlord his rent, but only before removal. Removal as recited in the statute has been interpreted by our courts in the case of *Ryerson v. Quackenbush*, 26 L. 236, as follows:

A levy and sale of the goods of a tenant upon the demised premises under an execution is a *removal* within the contemplation of the statute as removing them beyond the reach of a distress whether taken away or not.

The statute further does not require the purchaser at the execution sale to pay the rent to the landlord nor does it mention anything about the rights of a landlord against a purchaser at execution sale. It simply deals with the rights of a landlord insofar as the plaintiff in execution is concerned, and as to the conduct of the Sheriff with reference to the landlord's rent.

In the case *sub judice*, neither the plaintiff in execution nor the Sheriff appear, this being an action by the purchaser at the Sheriff's Sale.

In the case of *Van Horn v. Goken*, 41 N. J. L.

499, at page 504, Judge Dixon, speaking for the Court, said:

“The question whether a landlord may, in addition to his remedies against the party suing out the process and the officer executing it, prohibit the removal of the goods until his rent is paid, has not been suggested by counsel. Perhaps, in view of the decision in *Ryerson v. Quackenbush*, *ubi supra*, that a levy and sale are equivalent to a removal, such a right may not exist against a stranger to the writ.”

Thus, in the case of *Bryson v. Miller Realty Co.*, 108 L. 434, it was held that:

An adjudication of bankruptcy of a tenant before the institution of distress proceedings by a landlord against a tenant takes priority of such title as passed by sale in the distress proceeding, notwithstanding the provisions of Section 4 and 5 of the Landlord and Tenant Act.

(C. S., page 3066).

Vice-Chancellor LEWIS, in the case of *Finneran v. Fitzgerald, Inc.*, 112 Eq. 260, following the *Bryson v. Miller Realty Co.*, *supra*, at page 261, says:

“In the absence of any action by way of distrain or otherwise, to prevent the goods being removed by the Receiver, I do not consider that the landlord has brought himself within the provisions of Section 4 and 5 of the Landlord and Tenant Act. The statute does not give the landlord a preference over other creditors, but only, under certain circumstances, a lien, so that it is not entitled to a priority. I consider that the landlord, by its failure to protect its rights by appropriate action, has waived any claim it might have had under the Landlord and Tenant Act.”

It is the contention of the plaintiff, in the case *sub judice*, that the defendant did not protect its rights by appropriate action in that it should have, before the sale by the Sheriff, notified the Sheriff of its claim for rent, and it cannot come in now and say that it did not know of the sale.

In the case of *Bryson v. Miller Realty Co.* supra, Justice PARKER, speaking for the Court, on page 437, said:

“It might well be that the landlord did not know that there was to be a sale in the bankruptcy proceedings until too late to act in the premises. The proceeding itself was in Missouri and the sale was held in New Jersey under authority of the officers of the Bankruptcy Court appointed in Missouri. This may have led to confusion, but the rule seems to be settled that the pendency of a bankruptcy proceeding is noticed to all the world, and if so, the defendant was charged with notice of what was going on.”

Likewise, in the case *sub judice*, the sale having been duly and properly advertised (State of Case, page 43, ll. 3 to 30), the defendant was charged with notice of what was going on. The defendant did not take any action to perfect its lien until after the sale by the Sheriff, at which time title had passed to the plaintiff by virtue of the said sale, and thus, in *Woodside v. Adams*, 40 N. J. L. at page 419, Justice DEPUE, speaking for the Court said:

“The distinction between the right of a landlord under the Landlord and Tenant Act and his right under the Distress Act is pointed out, and it is expressly held that the Landlord’s lien under the warrant to distress will relate to the time of actual seizure under the process of distress.

Likewise, in the case of *Schwartz v. King Realty Co.*, 93 L. 111, at page 116, which is somewhat analogous to this case, the facts being that an auctioneer offered for sale and sold the goods and chattels contained in the premises, there had been rent, however, due from the tenant, and the landlord never asserted that claim for rent as the sale was going on, but after the respective purchasers had bid in the goods and attempted to remove them, the landlord contended that he had a prior lien, and attempted to stop the removal. One of the purchasers thereupon brought a writ of replevin. The Court, speaking by Justice KALISCH, said:

“By the State of the Case, it appears that a distress warrant was not issued against the goods and chattels of the tenant until a day after the sale was consummated, and no levy was made under the warrant until some time afterwards. It is, therefore, clear that the defendant acquired no lien under the distress warrant on the goods purchased by the plaintiff.”

I respectfully submit, therefore, that under the facts in this case, and cases cited, that the learned Court below erred in denying plaintiff's motion for a direction of a verdict in favor of the plaintiff, and in finding judgment for the defendant.

POINT II.

The Court below erred in not determining and finding the amount of rent, if any, due to the defendant.

The defendant claimed a lien against the goods and chattels purchased at Sheriff's Sale by the plaintiff in the amount of \$2,053.44, by virtue of six months' rent being due, at \$200.00 per month, and \$853.44 which represents a bill for power.

It is the contention of the plaintiff that if any rent at all was due to the defendant constituting a lien against the chattels in this case, there would only be due on said lien the sum of \$1200.00, and the defendant could not claim any more. The power bill can in nowise be regarded as rent because there is no provision in the lease for it to be regarded as such. A perusal of the lease (Ex. D-1) will disclose that the power covenant (page 64, l. 30) is merely a collateral covenant and constitutes an agreement between the Eastwood Realty Company and Samuel Cannel for the sale of power, and the terms of its payment. The rent is found in another clause and the only rent reserved is \$200.00 per month. The power is not reserved in the lease as rent, nor is it payable as rent. The rent was due on the first of each month. Bills for power were to be supplied between the first and the tenth of each month, and for non-payment of such bills the use of such power was to be disconnected. A different situation would prevail if, however, the lease would have provided that the power was to be paid as rent and constituted part of the rent, but such is not the case.

The general rule of law regarding a lease (Ex. D-1) such as was drawn in this case is that the rent reserved gives to the landlord a preference, but that a collateral covenant for the payment of power and fuel, etc., without being payable as rent and with rent, merely gives the landlord a right of general creditor and no greater right.

Rent is defined in Corpus Juris, in Book 36, at page 286, as applicable only to compensation for the use of land and tenements.

The term "rent" is not to be extended to include all payments which, by the terms of a lease, the tenant is bound to make, such as a payment of taxes or the cost of improvement, nor will it include the obligation to perform collateral covenants.

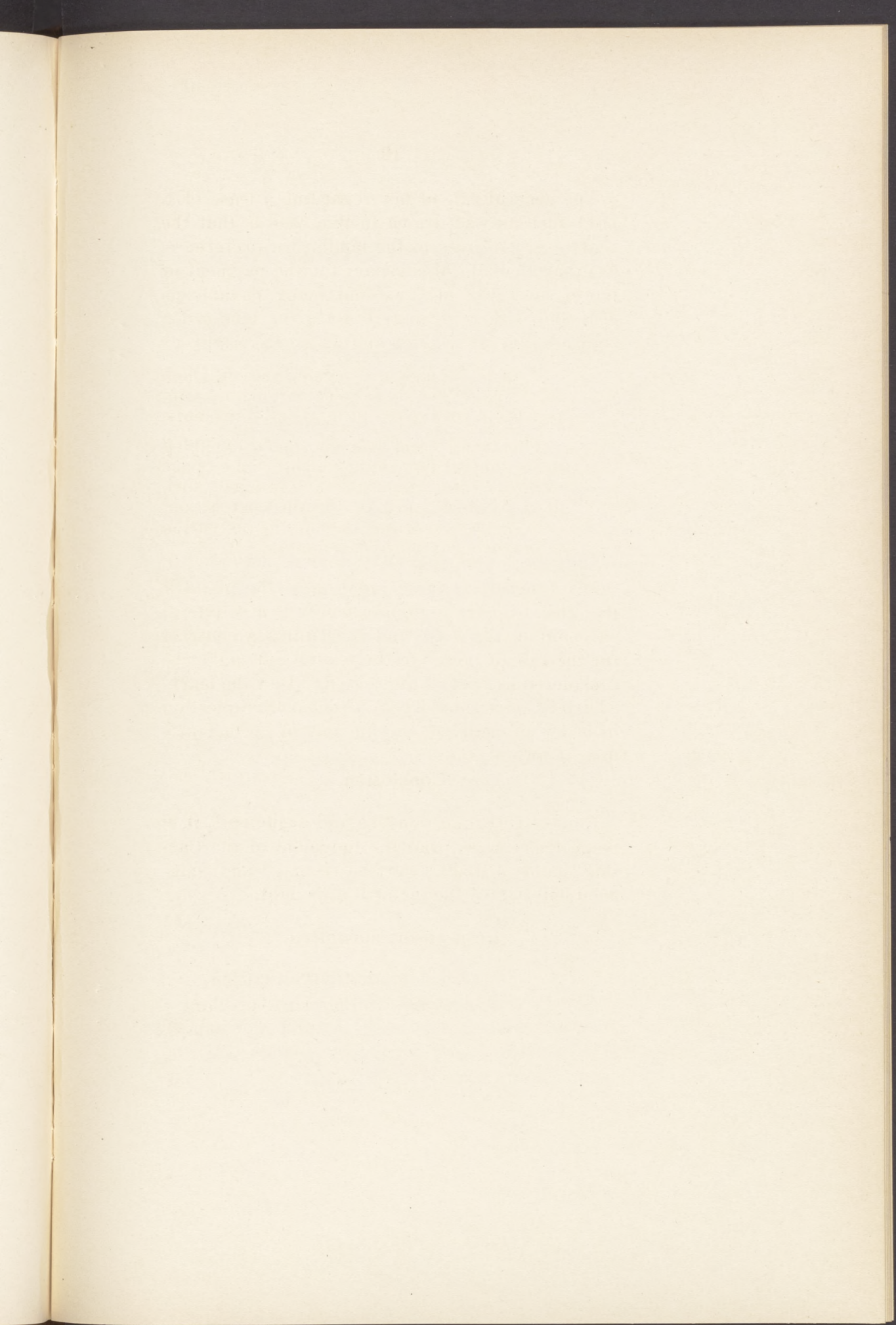
It is, therefore, the contention of the plaintiff that the covenant to supply power is a collateral covenant in the lease and constitutes a contract for the sale of power to the tenant and cannot be considered as part of the rent, and that the learned trial Court should have decided this question in order to establish the amount of defendant's lien, if any.

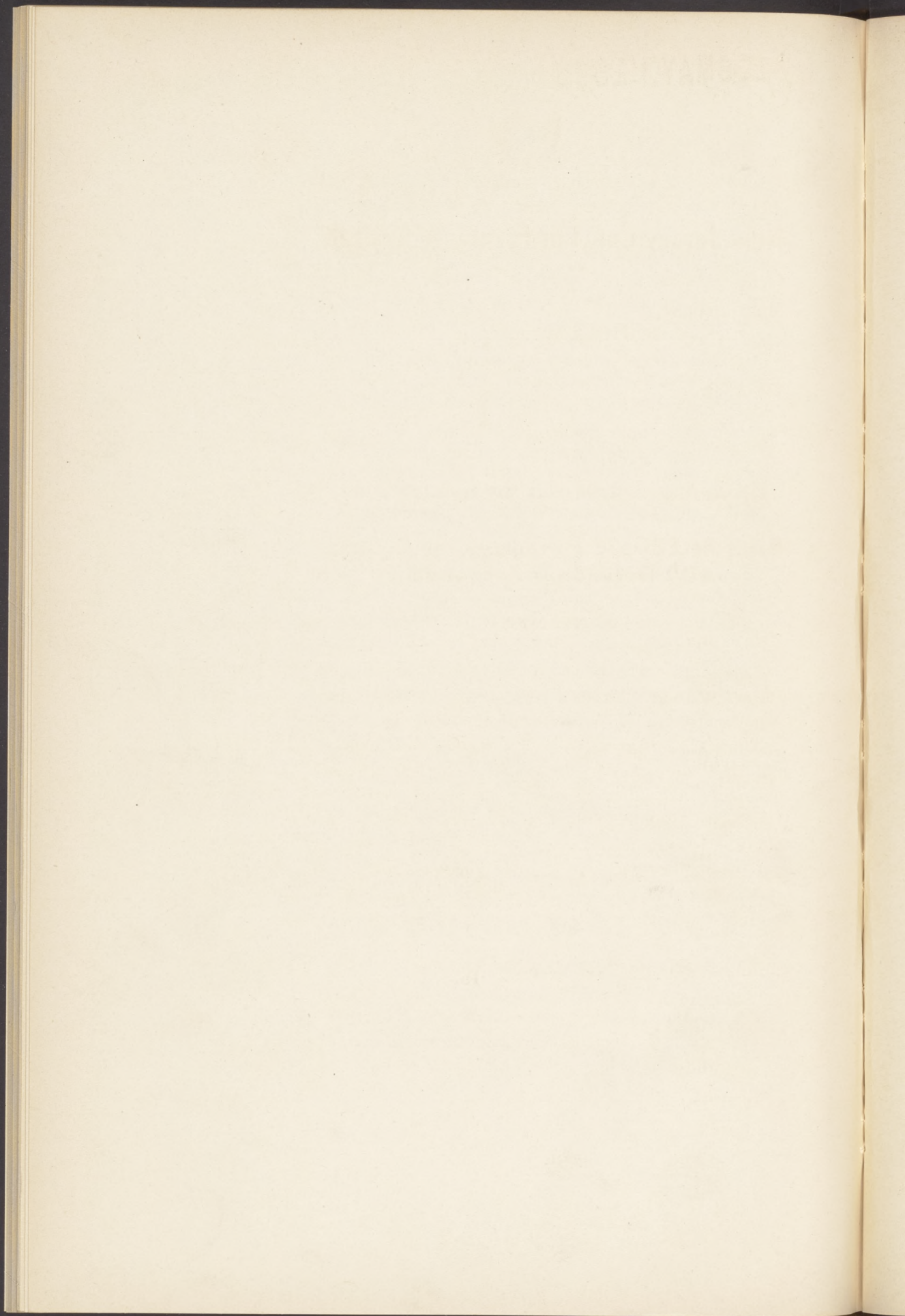
Conclusion.

For the foregoing reasons and arguments, it is respectfully urged that the judgment of the Passaic County Circuit Court be reversed and judgment entered for the plaintiff-appellant.

Respectfully submitted,

E. ROBERT COVEN,
Attorney of Plaintiff-Appellant
and of Counsel.





106 MAY. 1. 1935

New Jersey Court of Errors & Appeals

Mary Blanos,
Plaintiff-Appellant,
vs.
Eastwood Realty Company, a
corporation of New Jersey,
Defendant-Respondent.

Passaic Circuit
ON APPEAL FROM THE ~~SUPREME~~ COURT

Brief of Edward F. Merrey, of Counsel with Defendant-Respondent

STATEMENT

This matter was tried before Judge Losey in the Passaic Circuit without a jury October 3, 1934, and was decided by him on February 2, 1935.

The question at issue in this case is whether or not the defendant-respondent, Eastwood Realty Company, had a lien on certain machinery owned by its tenant, Candor Silk Company, Inc. The plaintiff was a purchaser at an execution sale in which this machinery was sold by the Sheriff of the County of Passaic. The lien is claimed under either or both of the following statutes:

Chapter 237, Laws of 1933:

"An act to give a lien to owners of mill, factory, loft and other manufacturing space upon the machinery or other chattels of those to whom space has been rented, and

providing for the enforcement of such lien.

Whereas, It is the practice of some manufacturers to rent space in a mill, factory or other building to manufacture machinery or other chattels of one kind or another and when they find they owe the landlord several months rent to place a chattel mortgage on machinery or other chattels after the rent is overdue and to the great prejudice of the landlord's interest; therefore,

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. The words and phrases used herein shall have the following definition and meaning as far as this act is concerned:

(a) The word "rentor" herein includes all persons, partnerships and corporations who may rent mills, factories or lofts or any portions thereof, to others for manufacturing or other purposes.

(b) The word "rentee" herein includes all persons, partnerships and corporations who may rent space for manufacturing or other purposes.

(c) The word "owner" herein includes all persons, partnerships or corporations having or acquiring title to property herein referred to or having or acquiring any interest in the same either in law or in equity.

2. The rentor shall be entitled to a lien on machinery and other chattels to the extent of the interest of the rentee in such machinery or other chattels for the amount of rent unpaid from date the rent is unpaid.

3. The lien created hereby shall have

priority and be paramount to any title, lien, interest, mortgage, judgment or other encumbrance created or acquired after machinery or other chattels are placed in the premises; provided, however, that such priority shall extend only to the amount of unpaid rent for not more than six months.

4. Where any rentor may have a lien upon the machinery or other chattels of any rentee by reason of unpaid rent, and the amount due shall remain due and unpaid, either in whole or in part, it shall be lawful for the rentor to expose or cause to be exposed such machinery or other chattels for sale, and sell the same free and clear of subsequent liens and encumbrances at public auction, upon notice of sale being first published for the space of two weeks, at least once in each week, preceding the day of the sale, in some newspaper published in the county in which the machinery or other chattels are located and at least five days' notice of sale being set up in five or more public places in said county, one whereof shall be the township, borough, ward or city in which said machinery or other chattels are located, and a copy of the notice be mailed to the owner or owners, if known, at least five days before the day of sale, at their last known post office addresses.

5. The proceeds of such sale shall be first applied to the payment of such unpaid rent for which the rentor has a lien and the reasonable and necessary expenses of such sale;

next to the payment of subsequent liens or encumbrances in the order of their priority; and the balance if any to the rentee; or the whole balance if any may be paid into the Court of Chancery."

3 C. S., page 3066, Section 4:

"That no goods or chattels whatsoever, lying or being, or which shall lie or be in or upon any messuage, lands or tenements, which are, or shall be leased for term of life or lives, year or years, at will or otherwise, shall be liable to be taken, by virtue of any execution, attachment or other process, unless the party at whose suit the said execution or other process is sued out, shall, before the removal of such goods from off the said premises, by virtue of such process, pay to the landlord of the said premises, or his bailiff, all rent due for the said premises, at the time of the taking such goods or chattels by virtue of such process, or which shall have accrued up to the day of the removal of the goods from off the said premises, whether by the terms of lease the day of payment shall have come or not, making a rebate of interest on the sum, the time of payment of which, by the terms of the lease shall not have come: provided, the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such process is sued out, paying the said landlord or his bailiff one year's rent may proceed to execute his process, as he might

have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the money to be made by virtue of such process. (Rev. 1877, p. 570.)"

The Candor Silk Company, Inc., was a tenant of the Eastwood Realty Company, Inc. We note that the plaintiff raises some question concerning that in her brief, but we feel that that is a matter which cannot be considered here. The Court below sat as a Judge of the facts and since there was evidence upon which it might find that the Candor Silk Company, Inc. was a tenant, its finding is not reviewable.

The Candor Silk Company, Inc., being the tenant of the Eastwood Realty Company, became in arrears for six months rent on May 1, 1934, and was so indebted on May 22, 1934, the date of the execution sale under which the plaintiff-appellant claims. There was some question as to the amount of this rent, but we believe that is not of importance here, inasmuch as it was a replevin suit and the question of issue was whether the lien claimant was entitled to retain possession of the property or not. The property owned by the defendant was a mill property such as is described in the Act of 1933 and the goods of the tenant were machinery such as is described in that statute. This being the case, one Rachels obtained a judgment against the Candor Silk Company, Inc., and the Sheriff's officer in May, 1934, levied upon the said machinery and sold the same on the 22nd day of May, 1934, to the purchaser for the sum of \$200.00. (See Bill of Sale, page 58). The amount of rent claimed is

exactly six months preceding the sale, including the month of May. The plaintiff having bought this machinery for \$200.00, made demand on the defendant for it. Defendant refused and then the present replevin suit was instituted and the goods were taken out of the defendant's possession by the Sheriff. We claim that the Sheriff had no right so to do.

In the state of the case, it appears that the defendant seized the goods under a Landlord's Warrant on the day after the execution sale. Under the circumstances, we do not intend to claim that there was anything gained whatever by the defendant under the distress warrant. It was served too late.

In passing, we wish to remark however, that the reason therefore, was that the Landlord had no information whatever of this Sheriff's sale. We will comment on this fact more at length later. The only notice posted by the Sheriff in the vicinity of this mill was posted in an inside office of the tenant and there is some question whether this notice was allowed to remain. Had the Sheriff's officer done his duty as he should have done, this notice would have been placed on an outside door and the Landlord would have taken the necessary steps to protect himself earlier. As it was at the time the distress warrant was issued, the Landlord had no knowledge or intimation of an execution sale by the Sheriff.

We note in the brief served on us by the appellant no mention was made of the 1933 statute above.

In the appellant's brief in the court below before Judge Losey, many questions were raised concerning whether or not this 1933 statute applied in this particular instance or not. Inasmuch as these points are not again raised in this court, we presume they are waived and do not answer them.

I

**RESPONDENT HAD A LIEN UNDER THE
1933 STATUTE.**

All the elements required by the 1933 statute are present. The property leased was a space in the mill or factory. The Landlord is given by this act a lien on the machinery or other chattels of the tenant for the amount of the rent unpaid from the date the rent is unpaid. The lien is for the preceding six months. The lien of the Landlord is entitled to priority and thereby paramount to any title, interest, lien, judgment, mortgage or other encumbrance created or acquired after the machinery or other chattels are placed in the premises. (Section 3.) This was the situation because the machinery was placed in the premises about two years before the execution was levied and the rent was for a period of six months. The statute gives the Landlord the right to sell the property, but does not require that he shall attempt to do so within any particular time. In this case, the goods were taken away from the landlord under the replevin writ, before he had an opportunity to enforce his lien. Our contention is that we are entitled to the possession of the property in question

and the court below so decided. We simply asked that the plaintiff now return the goods to us or that we be permitted to sue for such damages as accrue to us on our bond. In such a suit, the question as to the amount of the rent, whether it includes the charge for power or not will be decided. The court below simply gave us a judgment for possession and directed that the bond be turned over to us to be sued upon. Apparently there is no answer on the part of the plaintiff to our insistence of our rights under this statute. The argument below, which apparently has been abandoned, was to the effect that the lease in question was made before the passage of the statute. The cases are all against such a contention. The appellant contended below that the Candor Silk Company, Inc., was not our tenant and this seems to be her principal and only contention here.

II

THE CANDOR SILK COMPANY WAS OUR TENANT.

This is a question of fact and is not reviewable in this court, if there is any evidence at all below to support our position. The situation seems to be that originally the Eastwood Realty Company rented the premises to a man named Cannel. This appears by the lease which was offered in evidence on page 63. Cannel did not remain in possession but a new concern came in by the name of Candor Silk Company, Inc. (See testimony of Travers, page 23, line 31.) Also page 26. In October,

1931, Cannel paid the rent and said that the next bill was to be made out in the name of the Candor Silk Company, Inc., which Travers, representing the Eastwood Realty Company, said he would do. (Page 27.) On page 28, it appears that from that time forward, bills were made out for rent to the Candor Silk Company, Inc., and were paid by it except for the period in question for which we claim a lien. The same thing also appears from the testimony of James Eastwood, who is the agent in charge for the Eastwood Realty Company, (page 37). It seems that Mr. Cannel met Mr. Eastwood and told him that he had taken in a partner, a Mr. Dauber, and that they had organized a company known as the Candor Silk Company, Inc., and that it would pay the rent in the future. Mr. Eastwood told them that was satisfactory. This being so, the court found as a matter of fact that the Candor Silk Company, Inc., was the tenant. It said so on page 55 just below line 30. It has been well settled that when a judge sitting without a jury finds something as a matter of fact, if there is any evidence at all to support it, this finding of fact cannot be reviewed in this court.

“The question * * * * was a question of fact, and its determination by the trial judge sitting without a jury, will not be disturbed on appeal, if supported by legal evidence.” **Rice-MaCrae Truck Co. vs. Wurst,** 100 N. J. Law, page 113.

"This court will not review the decisions of the District Court upon questions of fact. It will only look to see if there is any legal evidence upon which the judgment may rest." **Aschenberg vs. Mundy**, 76 N. J. Law, page 352.

N. Y. & N. J. Telephone Co. vs. Connolly, 69 N. J. Law, page 182.

Howard vs. Moore, 79 N. J. Law, page 329.

III

SECTION 4, LANDLORD AND TENANT ACT.

While we believe the landlord had a lien in this particular case under section 4 of the Landlord and Tenant Act, we did not below base our argument before the judge who tried the case on that theory, but insisted that the lien was under the Act of 1933. We feel that due to the confusion as to whether there is a lien under section 4 caused by Bryson v. Miller Realty Co., 108 N. J. Law, page 434, and Finneran v. Fitzgerald, 112 N. J. Equity, page 260, that there is nothing to be gained in arguing that question here.

The earlier cases clearly held that the landlord had a lien under the statute. Central Bank of New Jersey, v. Peterson, 28 N. J. Law, page 668. But since the situation brings us clearly under the 1933 act, we feel that the question whether or not there was a lien under section 4 of the Landlord and Tenant Act is merely academic and that we

should not take the time of the court with such argument.

IV

GROUND FOR REVERSAL.

The appellant has listed four grounds for reversal and we think numbers 2, 3 and 4 are improper.

The first ground is:

“The Court below erred in denying plaintiff’s motion for a direction of verdict at the close of defendant’s case.”

The bulk of the argument made by the appellant is upon this ground and apparently from pages four and five of the brief, the questions raised are:

1. That the Candor Silk Company, Inc., was not a tenant of defendant.
2. That the defendant did not have a lien under the Landlord and Tenant Act.

We have answered these points first, that the court found upon evidence that the Candor Silk Company, Inc., was a tenant of the defendant, and this finding is one of fact and is not reviewable in this proceeding.

To the second point, we have said that our lien is under the 1933 statute and against which no argument has been made by the plaintiff.

As to the other grounds, No. 2 is as follows:

“The Court below erred in giving judgment for the defendant because the evidence adduced at the trial was insufficient to justify the findings of the Court.”

Plaintiff sets up a matter which is not reviewable here. In other words, the appellant seeks this court to weigh the evidence upon which the finding of the court below was made and as has been set out above in point No. II, the court will not review evidence or finding of fact in a case of this kind and upon an appeal of this character.

The third ground is:

“The Court below erred in not determining and finding the amount of rent, if any, due to the defendant.”

There is no exception taken below to the court's action in not finding the amount of rent, if any, due to the defendant. Besides, if the court should have done so, this is an error which did not prejudice the appellant. If any harm was done, it was done to the defendant. The only exception taken below appears on page 56:

“The Court—In the case of Mary Blanos, plaintiff, vs. Eastwood Realty Company, the defendant, the motion on the part of the

plaintiff for a direction of a verdict is denied.

Mr. Coven—Then I ask for an exception, sir.

The Court—I will allow you an exception.

Mr. Coven—Based on the same grounds that I made in the argument on the motion. Do I understand the Court is going to determine the case now?

The Court—Yes. I am willing to decide that there is rent due, and it is not necessary, as I see it, for me to determine the actual amount of rent due.”

The reasons that counsel gave were in a long statement being on page 47 just below line 10 in which counsel for the appellant said he asks for a verdict in this case for possession for the plaintiff. He then set forth his grounds which were chiefly as above stated.

1. That the Candor Silk Company, Inc., was not the tenant of the defendant; and
2. That there was no lien under Section 4 of the Landlord and Tenant Act;

Again on page 52, counsel said,

“On those grounds, sir, I respectfully urge the direction of a verdict in favor of the plaintiff—verdict for possession.”

No place was there any objection made to the court that the court should have given a verdict for a certain fixed sum rather than for possession. Since there was no such request, the question cannot be raised here and even if there had been a request for the court to fix the amount of the rent, I do not think the appellant could have complained if the court's action was erroneous in failing to fix the amount of the rent. The error was not prejudicial to the appellant.

The last ground of appeal is No. 4:

"Judgment should have been in favor of the appellant."

This of course is improper.

"The mere assertion that there was error in giving judgment to one party rather than to another is not sufficient. Grounds of appeal must point out error in the proceedings below where they will not be considered." **Caspert v. Empire Furniture Co., 114 N. J. Law, 546.**

Eckert v. Nazzaro, 109 N. J. Law, page 136.

Cohen v. Passaic National Bank and Trust Company, 109 N. J. Law, page 449.

Golden Realty Company v. Grant Building &c. Association, 109 N. J. Law, page 129.

See also **Valenti v. Blessington, 96 N. J. Law, page 498.**

Under these cases, the Grounds 2 and 4 are clearly bad.

In conclusion, we request that the appeal be dismissed.

Respectfully submitted,
EDWARD F. MERREY,
Of counsel with Defendant-Respondent.

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11

On the 11th inst. the following cases were called on:

The following cases were argued and the court rendered its decision:

1. *People v. [illegible]*
2. *People v. [illegible]*
3. *People v. [illegible]*

New Jersey Court of Errors and Appeals

MARY BLANOS, Plaintiff-Appellant, vs. EASTWOOD REALTY COMPANY, a corporation of New Jersey, Defendant-Respondent.	}	On Appeal from Passaic County Cir- cuit Court.
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REPLY BRIEF FOR PLAINTIFF-APPELLANT.

Statement.

The defendant-respondent's contention claiming a lien against the goods and chattels by virtue of Chapter 237 of the Laws of 1933 is foreign to this case. A perusal of the Record will disclose that not once during the trial below did the defendant contend a lien by virtue of said Act. During the entire trial of the cause, the defendant claimed a lien by virtue of Section 4 of the Landlord and Tenant Act (3 C. S. 3066, Section 4) and the right to distrain the same by virtue of Section 8 of the Distress Act (2 C. S. 1940, Section 8), and upon that theory the defendant proceeded at trial.

(Case, page 29, lines 3 to 34.)

"The Court: The theory of the defendant is that there was rent due to the landlord from the tenant for the premises and that under the statute the Sheriff could not remove the property without satisfying the

rent, and he is attempting to show whom he recognized as the tenant, how much rent was due, I assume—

Mr. Merrey: That is it.

The Court: (Continuing)—which, it would seem to me, to be proper, if the statute is to that effect, and that is my recollection.

Mr. Merrey: I have a copy of the statute. I had it written out.

Mr. Coven: We have the statute here.

Mr. Merrey: The 4th and 5th Section of the Landlord and Tenant Act. I think we are under the 4th section, because the sale was made by the Sheriff before the actual removal of the goods. The 5th section is where the Sheriff levies the execution, takes the goods away, and he removes the goods and chattels before he sells them, which was not done in this case. We are under the 4th section, as he sold them there.

The Court: Sold on the premises?

Mr. Coven: Yes, sir."

I.

Defendant cannot now avail himself of a right of lien by virtue of the 1933 statute.

A perusal of the State of Case will disclose that in the pleadings and in the trial of the cause, defendant relied upon and elected to have a lien by virtue of the 4th section of the Landlord and Tenant Act. There is nothing in the Record by way of proof to show that the said defendant claimed a lien by virtue of the 1933 Statute. Under that Statute, the defendant should not only have proven its claim for rent, but should have also perfected its lien by following the statute, which requires the rentor:

1. To expose or cause to be exposed such

machinery or other chattels for sale at public auction upon notice of sale being first published for the space of two weeks, at least once in each week preceding the day of the sale in some newspaper published in the County in which the machinery or other chattels are located.

2. Five days' notice of sale set up in five or more public places in the County.

3. Service of a copy of the notice upon the owner of the chattels.

There is nothing in the Record which indicates that the defendant followed the Statute (Chapter 237, Laws of 1933) in pursuing his remedy thereunder. The Record does disclose, however, that the defendant-respondent elected to distrain the goods and chattels. (State of Case, page 66, Exhibit D-2.)

The defendant-respondent had a right as a landlord claiming unpaid rent to pursue his remedy against the chattels by one of two methods:

First: Under the Landlord and Tenant Act (3 C. S. 3066),

Second: Under the Act of 1933, known as Chapter 237,

and his rights in the present case must stand or fall as they exist under the remedy that he pursued.

Referring to State of Case (page 29, lines 3 to 32; page 33, lines 14 to 17), it is apparent that the defendant pursued his remedy under the Landlord and Tenant Act by issuing a distress. (See also page 66, Exhibit D-2.)

The rule is well settled in this state that where a litigant has several remedies and elects to pursue one of them he is thereafter estopped from

setting forth any rights under the remedy that he might have pursued.

A comprehensive statement of the effect of an election is given in 20 Corpus Juris, 38, thus:

“An election once made between existing remedial rights which are inconsistent is not only irrevocable and cannot be withdrawn without due consent event though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that asserted by the election or to the maintenance of a defense founded upon such inconsistent rights.”

As to the subject of being estopped by having made an election, Vice-Chancellor BACKES, in the case of *Blum Building Co. v. Ingersoll*, 99 Eq. 567, at page 568, sets forth in detail the law in New Jersey, referring to a great many cases of foreign jurisdiction.

Conclusion.

For the foregoing reasons and arguments, together with the reasons and arguments set forth in the brief filed for the plaintiff-appellant, it is respectfully urged that the judgment of the Passaic County Circuit Court be reversed and judgment entered for the plaintiff-appellant.

Respectfully submitted,

E. ROBERT COVEN,
Attorney of Plaintiff-Appellant
and of Counsel.