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THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS 309

LECTURE NOTES

BY

ROBERT A. FERMI

1952

CHICAGO, ILL.

UNIVERSITY OF CHICAGO PRESS

1952

PHYSICS 309

LECTURE NOTES

BY

ROBERT A. FERMI

1952

CHICAGO, ILL.

## New Jersey Court of Errors and Appeals.

MILL FACTORS CORPORATION, a  
corporation,  
Plaintiff-Appellant,

*vs.*

THE GUARDIAN TRUST COMPANY,  
a corporation, et als,  
*Defendants-Appellees.*

**On Appeal**

**Stipulation.**

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It is hereby stipulated and agreed by and between the parties hereto that it is unnecessary to include in the State of the Case, and therefore there shall be omitted therefrom, the following pleadings:

1. Reply and answer to counterclaim of Liberty Trust Company.
2. Reply and answer to counterclaim of Conrad Deuchler, individually and as Sheriff of Essex County. 30
3. Reply and answer to counterclaim of The Guardian Trust Company.
4. Amended reply and answer to counterclaim of Conrad Deuchler, individually and as Sheriff of Essex County.
5. Amended reply and answer to counterclaim of Liberty Trust Company. 40

*Stipulation.*

6. Amended reply and answer to counterclaim of Guardian Trust Company.
7. Rejoinder (to amended reply) and reply to answer to counterclaim of Guardian Trust Company and Conrad Deuchler, etc.

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BILDER & BILDER,  
Attorneys of Plaintiff-Appellant.

STEIN, MCGLYNN & HANNOCH,  
Attorneys of Guardian Trust  
Company and Conrad Deuchler.

WOLBER & GILHOOLY,  
Attorneys of Liberty Trust Co.

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## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION, a  
corporation,  
Plaintiff.

*vs.*

THE GUARDIAN TRUST COMPANY,  
a corporation, CONRAD DEUCH-  
LER, individually and as Sheriff  
of Essex County, LIBERTY  
TRUST COMPANY, a corporation,  
Defendants.

**In Replevin**

**Notice of  
Appeal.**

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To: Stein, McGlynn & Hannoeh, attorneys of de- 20  
fendants, The Guardian Trust Company and  
Conrad Deuchler, individually and as Sheriff  
of Essex County, and  
Wolber & Gilhooly, Esqs., attorneys of de-  
fendant, Liberty Trust Company.

*Sirs:*

TAKE NOTICE, that the plaintiff appeals to the  
Court of Errors and Appeals in the Last Resort  
in all Causes in New Jersey from the whole of the  
judgment entered in this cause.

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Dated: June 12, 1930.

BILDER & BILDER,  
Attorneys of Appellant.

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ESSEX COUNTY, ss.:

The State of New Jersey to the Coroner of the County of Essex.

GREETING:

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We command you, that if Mill Factors Corporation shall give you sufficient security to prosecute its suit and to make return, if a return thereof shall be adjudged, of the following goods and chattels, to wit: 304 Gross of #30 Pulls-All Locomotives, which The Guardian Trust Company a corporation, and Conrad Deuchler, individually and as Sheriff of Essex County, and Liberty Trust Company, a corporation, and Nonpareil Toy and Novelty Company, a corporation, wrongfully and unlawfully detain, then we command you, to replevy and deliver unto the said Mill Factors Corporation the aforesaid goods and chattels without delay, and also to summon the said The Guardian Trust Company, a corporation, and Conrad Deuchler, individually and as Sheriff of Essex County, and Liberty Trust Company, a corporation, and Nonpareil Toy and Novelty Company, a corporation, so that they be and appear before the Circuit Court to be holden at Newark in and for the County of Essex aforesaid, on the 3rd day of February, 1928 instant, to answer unto the said Mill Factors Corporation for the taking and unjustly detaining the said goods and chattels, to its damage of One Thousand (\$1,000.00) Dollars, as is said, and have

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*Writ.*

you then and there this writ, with your proceedings thereon.

WITNESS, Worrall F. Mountain, Esquire, Judge of our said Circuit Court, at Newark, aforesaid, the 16th day of January, A. D. 1928.

JOHN H. SCOTT, 10  
Clerk.

BILDER & BILDER,  
Attorneys.

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## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION, a  
corporation,  
Plaintiff,

*vs.*

THE GUARDIAN TRUST COMPANY,  
a corporation, and CONRAD  
DEUHLER, individually and  
as Sheriff of Essex County,  
LIBERTY TRUST COMPANY, a cor-  
poration, and NONPAREIL TOY  
and NOVELTY COMPANY, a cor-  
poration,

Defendants.

**In Replevin  
Complaint.**

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1. On January 16, 1928, plaintiff was, and ever since has been, the owner of the following goods and chattels, to wit: 304 Gross of #30 Pulls-All Locomotives.

2. On that day plaintiff was, and ever since has been, lawfully entitled to the immediate possession of the same.

30

3. On that day, defendants wrongfully took said goods and chattels from the possession of the plaintiff and has ever since wrongfully detained, and still wrongfully detains, the same.

Plaintiff demands possession of said goods and chattels and \$1,000.00 damages for their detention.

BILDER & BILDER,  
Attorneys of Plaintiff.

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## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION, a corporation,  
 Plaintiff,  
*vs.*

GUARDIAN TRUST COMPANY, a corporation, and CONRAD DEUCHLER, individually and as Sheriff of Essex County, LIBERTY TRUST COMPANY, a corporation, and NONPAREIL TOY AND NOVELTY COMPANY, a corporation,  
 Defendants.

**In Replevin**

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**Answer and  
 Counterclaim of  
 Guardian Trust  
 Company.**

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Guardian Trust Company, a corporation of New Jersey, with its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

1. It denies the allegations set forth in the complaint filed in the above entitled cause.

As its first separate defense, and by way of counterclaim, the defendant, Guardian Trust Company says that:

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The Ferdinand Strauss Corporation, a foreign corporation, being indebted to this defendant in certain large sums of money, this defendant, on December 19th, 1927, caused to be issued out of the Essex County Circuit Court, a writ of attachment, wherein the Sheriff of Essex County was commanded to attach the rights, credits, moneys, goods, chattels etc. of The Ferdinand Strauss Corporation, and by virtue of said writ, the said

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*Answer and Counterclaim of Guardian Trust  
Company.*

10 Sheriff did attach the chattels mentioned in the plaintiff's complaint, the said chattels being the property of The Ferdinand Strauss Corporation, and did take said chattels into his custody in accordance with the statute in such case made and provided.

2. This defendant demands the return of said chattels and One Thousand Dollars (\$1,000.00) Damages.

STEIN, MCGLYNN & HANNOCH,  
Attorneys of Defendant, Guardian  
Trust Company.

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ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION, a corporation,  
 Plaintiff,  
*vs.*

GUARDIAN TRUST COMPANY, a corporation, and CONRAD DEUCHLER, individually and as Sheriff of Essex County, LIBERTY TRUST COMPANY, a corporation, and NONPAREIL TOY AND NOVELTY COMPANY, a corporation,  
 Defendants.

**In Replevin** 10  
**Answer and Counterclaim of Conrad Deuchler.**

Conrad Deuchler, answering the complaint on file herein says that:

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1. He denies the allegations set forth in the plaintiff's complaint.

FIRST SEPARATE DEFENSE.

1. On the day alleged in the complaint, defendant was and still is the Sheriff in and for the County of Essex.

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2. On said date, the defendant as such Sheriff, acting through George Friedrich, Special Deputy, levied upon the goods and chattels mentioned in the complaint as the property of The Ferdinand Strauss Corporation, upon a writ of attachment theretofore delivered to him, which had been issued out of the Essex County Circuit Court in an action in which the Guardian Trust Company was plaintiff and the said The Ferdinand Strauss Corporation was defendant, and at the time of the

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*Answer and Counterclaim of Conrad Deuchler.*

taking of said goods mentioned in the complaint, defendant was, as such officer holding said goods and chattels by virtue of said writ of attachment.

3. Said goods and chattels were at the time of said attachment the property of The Ferdinand  
10 Strauss Corporation.

By way of counterclaim, this defendant says that:

1. All the paragraphs of the answer are made part of this counterclaim.

2. This defendant demands possession of said goods and chattels, and One Thousand Dollars (\$1000.00) damages.

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STEIN, MCGLYNN & HANNOCH,  
Attorneys of Defendant,  
Conrad Deuchler.

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## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION, a corporation,

Plaintiff,

*vs.*

GUARDIAN TRUST COMPANY, a corporation, and CONRAD DEUCHLER, individually and as Sheriff of Essex County, LIBERTY TRUST COMPANY, a corporation, and NONPAREIL TOY AND NOVELTY COMPANY, a corporation, Defendants.

**In Replevin**

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**Answer and Counterclaim of Liberty Trust Company.**

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Liberty Trust Company, a corporation of New Jersey, with its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

1. It denies the allegations set forth in the complaint filed in the above entitled cause.

As its first separate defense, and by way of counterclaim, the defendant, Liberty Trust Company, says that:

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1. The Ferdinand Strauss Corporation, a corporation of the State of New York and being a foreign corporation, at the times set forth in the complaint was and still is indebted to the Liberty Trust Company in a large sum of money. Heretofore and on December 19th, 1927 Guardian Trust Company caused to be issued out of the Essex County Circuit Court, a writ of attachment, wherein the Sheriff of Essex County was com-

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*Answer and Counterclaim of Liberty Trust  
Company.*

10 manded to attach the rights, credits, moneys,  
goods, chattels etc. of The Ferdinand Strauss Cor-  
poration, and by virtue of said writ the said  
Sheriff did attach the chattels mentioned in the  
plaintiff's complaint, the said chattels being the  
property of The Ferdinand Strauss Corporation.  
The defendant, Liberty Trust Company, pursuant  
to the statute in such case made and provided be-  
came, by an order of this court, a party to said suit  
as an applying creditor in said attachment.

2. This defendant demands the return of said  
chattels and One thousand dollars (\$1,000) dam-  
ages for their detention.

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WOLBER & GILHOOLY  
Attorneys of defendant, Liberty  
Trust Company.

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## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION,  
a corporation,  
Plaintiff,

*vs.*

THE GUARDIAN TRUST COMPANY,  
a corporation, CONRAD DEUCH-  
LER, individually and as Sheriff  
of Essex County, LIBERTY  
TRUST COMPANY, a corpora-  
tion, and NONPAREIL TOY AND  
NOVELTY COMPANY, a corpora-  
tion,  
Defendants.

**In Replevin  
Re-amended  
Reply and  
Answer to  
Counterclaim  
of Guardian  
Trust  
Company.**

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Plaintiff, replying to the answer of defendant,  
The Guardian Trust Company, a corporation,  
says:

WITH REFERENCE TO FIRST SEPARATE DEFENSE.

1. Plaintiff has no information as to whether  
or not the Ferdinand Strauss Corporation was  
indebted to defendant, The Guardian Trust Com-  
pany on December 19, 1927.

30

2. Plaintiff denies that the chattels attached by  
the Sheriff of Essex County under the writ of at-  
tachment mentioned in said First Separate De-  
fense were at the time of the said attachment the  
property of the Ferdinand Strauss Corporation.

3. Plaintiff alleges that on December 19, 1927  
and at the time of the issuance and of the subse-  
quent levy of the writ of attachment mentioned  
and referred to in said First Separate Defense,

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*Re-amended Reply and Answer to Counterclaim  
of Guardian Trust Company.*

the chattels therein mentioned were in the possession of the defendant, Nonpareil Toy and Novelty Company, a corporation, and were being held by the defendant, Nonpareil Toy and Novelty Company as bailee of plaintiff.

10

4. Plaintiff alleges that the said chattels have never been in the actual possession of the Ferdinand Strauss Corporation.

5. Plaintiff alleges that on and prior to April 12, 1927, the said chattels were in the possession of said Nonpareil Toy and Novelty Company as bailee of the said Ferdinand Strauss Corporation.

20

6. That on April 12, 1927 said chattels were pledged by Ferdinand Strauss Corporation with plaintiff under and pursuant to certain agreements then existing between plaintiff and the Ferdinand Strauss Corporation as security for the repayment of loans made by plaintiff to the said Ferdinand Strauss Corporation, as well as for the payment of interest, commissions and other debit items chargeable against said Ferdinand Strauss Corporation in favor of plaintiff under and pursuant to said agreements.

30

7. That on April 12, 1927 Ferdinand Strauss Corporation executed and delivered to plaintiff a document, copy of which is attached hereto and made a part hereof marked Schedule "A".

8. That said document was executed by Ferdinand Strauss Corporation at its place of business at 108 East 16th Street, in the City of New York in the State of New York.

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9. That at the time of the execution of said document at said premises, there was displayed at the entrance of said premises and within the

*Re-amended Reply and Answer to Counterclaim  
of Guardian Trust Company.*

said premises a sign or signs of the kind and character as follows:

“MILL FACTORS CORPORATION

FACTOR FOR

10

THE FERDINAND STRAUSS CORPORATION”

10. That on said date and at the time of the pledging of said chattels by said Ferdinand Strauss Corporation with plaintiff, the defendant, Nonpareil Toy and Novelty Company agreed with the Ferdinand Strauss Corporation and with the plaintiff that said Nonpareil Toy and Novelty Company from and after said date would hold said chattels as bailee of plaintiff.

11. On said date said Nonpareil Toy and Novelty Company acknowledged to plaintiff that said Nonpareil Toy and Novelty Company held and would hold said chattels as bailee of plaintiff.

20

12. On all dates and at all times hereinabove referred to Nonpareil Toy and Novelty Company had its place of business in Newark, New Jersey, and said chattels above mentioned were on all said dates in the possession of Nonpareil Toy and Novelty Company at its place of business in Newark, New Jersey.

30

13. On all dates and at all times hereinabove mentioned, the Ferdinand Strauss Corporation had its place of business in New York City and did not have any place of business in the State of New Jersey.

14. After April 12, 1927 the said Ferdinand Strauss Corporation had no control over said chattels, said chattels being in the possession of the Nonpareil Toy and Novelty Company subject to the exclusive control of plaintiff.

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*Re-amended Reply and Answer to Counterclaim  
of Guardian Trust Company.*

10 15. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to in the First Separate Defense of defendant's answer, the said defendant, The Guardian Trust Company, knew that said chattels had theretofore been pledged by the Ferdinand Strauss Corporation with plaintiff.

20 16. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to in the First Separate Defense of defendant's answer, the said The Guardian Trust Company, knew that said chattels were then in the possession of and were being held by said Nonpareil Toy and Novelty Company as bailee of plaintiff.

20 17. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to in the First Separate Defense of defendant's answer, the said defendant, The Guardian Trust Company had notice of the facts mentioned and referred to in the preceding paragraphs numbered "15" and "16".

30 18. On December 19, 1927 and at the time of the levy of the writ of attachment mentioned and referred to in the First Separate Defense, the Ferdinand Strauss Corporation was indebted to plaintiff for money theretofore loaned by plaintiff to the Ferdinand Strauss Corporation and in connection with which loan the said chattels had been pledged by the Ferdinand Strauss Corporation with plaintiff, as aforesaid.

40 19. On December 19, 1927 and at the time of the issuance and of the levy of the writ of attachment mentioned in the First Separate Defense, defendant, The Guardian Trust Company, had

*Re-amended Reply and Answer to Counterclaim  
of Guardian Trust Company.*

knowledge of the facts set forth in the preceding paragraph numbered "18".

20. On December 19, 1927 and at the time of the issuance and of the levy of the writ of attachment mentioned in the First Separate Defense, defendant, The Guardian Trust Company, had notice of the facts set forth in the preceding paragraph numbered "18". 10

21. Plaintiff alleges that the levy of the writ of attachment mentioned in the answer of defendant, The Guardian Trust Company, was insufficient and invalid in that said Sheriff of Essex County or his deputy did not take the said chattels into his possession or custody under and by virtue of said writ. 20

Plaintiff, answering the counterclaim of defendant, The Guardian Trust Company, says:

1. Plaintiff repeats herein all of the allegations set forth in paragraphs 1 to 21 inclusive hereinabove.

At the trial of this action plaintiff will move to strike out the First Separate Defense of the answer of defendant, The Guardian Trust Company, on the ground that the said defense constitutes no good and valid defense to this action. 30

At the trial of this action plaintiff will also move to strike out the counterclaim of defendant, The Guardian Trust Company, on the ground that said counterclaim is improper, and on the ground that said counterclaim constitutes no good cause of action against plaintiff.

BILDER & BILDER,  
Attorneys of Plaintiff.

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*Re-amended Reply and Answer to Counterclaim  
of Guardian Trust Company.*

SCHEDULE "A"

Mill—Ferdinand Strauss Corp

Date—April 12th, 1927

Case No.

10 Consignment No. 185 Total . . . . . pieces

The goods described below are hereby consigned to Mill Factors Corporation to be held by them subject to their lien for advances, outlays and commissions, and are to be disposed of in accordance with our agreement with them.

DYER & FIN.

20	Description	Quality	Color	Mill No.	Stock No.	To From	To From
	30	304	Gr. Loco- motive				
	Greigh Yards	Fin Yards	Price	Stock June 30	Stock Dec. 31	Sales Record	
			22.80			6931.20	

FROM NONPAREIL TOY & NOV. CO. INC.

Receiving Number . . . . .  
30 Checked against receiving sheet . . . . .  
Recorded for advances . . . . . Total 6931.20  
(Written in ink) Stored on premises of

Nonpareil Toy & Nov. Co.  
Shipped to Shupe Whse  
for M F C

Signed THE FERDINAND STRAUSS  
CORPORATION  
By S. BERKMAN

## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION,  
a corporation,  
Plaintiff,

*vs.*

THE GUARDIAN TRUST COMPANY,  
a corporation, CONRAD DEUCH-  
LER, individually and as Sheriff  
of Essex County, LIBERTY  
TRUST COMPANY, a corporation,  
and NONPAREIL TOY AND NOV-  
ELTY COMPANY, a corporation,  
Defendants.

In Replevin

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Re-amended Reply  
and Answer to  
Counterclaim of Lib-  
erty Trust Company.

Plaintiff, replying to the answer of defendant,  
Liberty Trust Company, a corporation, says:

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WITH REFERENCE TO FIRST SEPARATE DEFENSE

1. Plaintiff has no information as to the truth  
of the first allegation contained in the First Sep-  
arate Defense.

2. Plaintiff denies that the chattels attached by  
the Sheriff of Essex County under the writ of at-  
tachment mentioned in said First Separate De-  
fense were at the time of the said attachment the  
property of the Ferdinand Strauss Corporation.

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3. Plaintiff alleges that on December 19, 1927  
and at the time of the issuance and of the subse-  
quent levy of the writ of attachment mentioned and  
referred to in said First Separate Defense, the  
chattels therein mentioned were in the possession  
of the defendant, Nonpareil Toy and Novelty Com-  
pany, a corporation, and were being held by the

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*Re-amended Reply and Answer to Counterclaim  
of Liberty Trust Company.*

defendant, Nonpareil Toy and Novelty Company as bailee of plaintiff.

10 4. Plaintiff alleges that the said chattels have never been in the actual possession of the Ferdinand Strauss Corporation.

5. Plaintiff alleges that on and prior to April 12, 1927, the said chattels were in the possession of said Nonpareil Toy and Novelty Company as bailee of the said Ferdinand Strauss Corporation.

20 6. That on April 12, 1927 said chattels were pledged by Ferdinand Strauss Corporation with plaintiff pursuant to certain agreements then existing between plaintiff and the Ferdinand Strauss Corporation as security for the repayment of loans made by plaintiff to the said Ferdinand Strauss Corporation, as well as for the payment of interest, commissions and other debit items chargeable against said Ferdinand Strauss Corporation in favor of plaintiff under and pursuant to said agreements.

7. That on April 12, 1927 Ferdinand Strauss Corporation executed and delivered to plaintiff a document, copy of which is attached hereto and made a part hereof marked Schedule "A".

30 8. That said document was executed by Ferdinand Strauss Corporation at its place of business at 108 East 16th Street, in the City of New York in the State of New York.

9. That at the time of the execution of said document at said premises, there was displayed at the entrance of said premises and within the said premises a sign or signs of the kind and character as follows:

*Re-amended Reply and Answer to Counterclaim  
of Liberty Trust Company.*

“MILL FACTORS CORPORATION

FACTOR FOR

THE FERDINAND STRAUSS CORPORATION”

10. That on said date and at the time of the 10  
pledging of said chattels by said Ferdinand  
Strauss Corporation with plaintiff, the defendant,  
Nonpareil Toy and Novelty Company agreed with  
the Ferdinand Strauss Corporation and with the  
plaintiff that said Nonpareil Toy and Novelty  
Company from and after said date would hold  
said chattels as bailee of plaintiff.

11. On said date said Nonpareil Toy and Nov- 20  
elty Company acknowledged to plaintiff that said  
Nonpareil Toy and Novelty Company held and  
would hold said chattels as bailee of plaintiff.

12. On all dates and at all times hereinabove  
referred to Nonpareil Toy and Novelty Company  
had its place of business in Newark, New Jersey,  
and said chattels above mentioned were on all said  
dates in the possession of Nonpareil Toy and Nov-  
elty Company at its place of business in Newark,  
New Jersey.

13. On all dates and at all times hereinabove 30  
mentioned, the Ferdinand Strauss Corporation  
had its place of business in New York City and  
did not have any place of business in the State of  
New Jersey.

14. After April 12, 1927 the said Ferdinand  
Strauss Corporation had no control over said  
chattels, said chattels being in the possession of  
the Nonpareil Toy and Novelty Company subject  
to the exclusive control of plaintiff.

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*Re-amended Reply and Answer to Counterclaim  
of Liberty Trust Company.*

10 15. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to in the First Separate Defense of defendant's answer, the said defendant, Liberty Trust Company, knew that said chattels had theretofore been pledged by the Ferdinand Strauss Corporation with plaintiff.

16. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to in the First Separate Defense of defendant's answer, the said Liberty Trust knew that said chattels were then in the possession of and were being held by said Nonpareil Toy and Novelty Company as bailee of plaintiff.

20 17. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to in the First Separate Defense of defendant's answer, the said defendant, Liberty Trust Company, had notice of the facts mentioned and referred to in the preceding paragraphs numbered "15" and "16".

30 18. On December 19, 1927 and at the time of the levy of the writ of attachment mentioned and referred to in the First Separate Defense, the Ferdinand Strauss Corporation was indebted to plaintiff for money theretofore loaned by plaintiff to the Ferdinand Strauss Corporation and in connection with which loan the said chattels had been pledged by the Ferdinand Strauss Corporation with plaintiff, as aforesaid.

40 19. On December 19, 1927 and at the time of the issuance and of the levy of the writ of attachment mentioned in the First Separate Defense, defendant, Liberty Trust Company, had knowledge of

*Re-amended Reply and Answer to Counterclaim  
of Liberty Trust Company.*

the facts set forth in the preceding paragraph numbered "18".

20. On December 19, 1927 and at the time of the issuance and of the levy of the writ of attachment mentioned in the First Separate Defense, defendant, Liberty Trust Company, had notice of the facts set forth in the preceding paragraph numbered "18". 10

21. Plaintiff alleges that the levy of the writ of attachment mentioned in the answer of defendant, Liberty Trust Company, was insufficient and invalid in that said Sheriff of Essex County or his deputy did not take the said chattels into his possession or custody under and by virtue of said writ. 20

Plaintiff, answering the counterclaim of defendant, Liberty Trust Company, says:

1. Plaintiff repeats herein all of the allegations set forth in paragraphs 1 to 21 inclusive hereinabove.

At the trial of this action plaintiff will move to strike out the First Separate Defense of the answer of defendant, Liberty Trust Company, on the ground that the said defense constitutes no good and valid defense to this action. 30

At the trial of this action plaintiff will also move to strike out the counterclaim of defendant, Liberty Trust Company, on the ground that said counterclaim is improper, and on the ground that said counterclaim constitutes no good cause of action against plaintiff.

BILDER & BILDER,  
Attorneys of Plaintiff.

*Re-amended Reply and Answer to Counterclaim  
of Liberty Trust Company.*

SCHEDULE "A"

Mill—Ferdinand Strauss Corp

Date—April 12th, 1927

Case No.

10 Consignment No. 183 Total . . . . pieces

The goods described below are hereby consigned to Mill Factors Corporation to be held by them subject to their lien for advances, outlays and commissions, and are to be disposed of in accordance with our agreement with them.

Description	Quality	Color	Mill No.	Stock No.	Dyer & Fin.	
					To From	To From
20 30	304	Gr. Loco- motive				
Greigh Yards	Fin Yards	Price	Stock June 30	Stock Dec. 31	Sales Record	
		22.80			6931.20	

FROM NONPAREIL TOY & NOV. CO. INC.

Receiving number . . . . .

Checked against receiving sheet . . . . .

30 Recorded for advances . . . . .  
Total 6931.20

(Written in ink) Stored on premises of  
Nonpareil Toy and Nov. Co.  
Shipped to Shupe Whse  
For M F C

Signed THE FERDINAND STRAUSS CORPORATION  
By: S. BERKMAN

## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION, a corporation,

Plaintiff,

*vs.*

THE GUARDIAN TRUST COMPANY, a corporation, CONRAD DEUCHLER, individually and as Sheriff of Essex County, LIBERTY TRUST COMPANY, a corporation, and NONPAREIL TOY AND NOVELTY COMPANY, a corporation, Defendants.

**In Replevin**

**Re-amended**

**Reply and**

**Answer to**

**Counterclaim of**

**Conrad Deuchler,**

**individually and**

**as Sheriff of**

**Essex County.**

10

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Plaintiff, replying to the answer of defendant, Conrad Deuchler, individually and as Sheriff of Essex County, says:

WITH REFERENCE TO FIRST SEPARATE DEFENSE.

1. Plaintiff denies the allegation in said First Separate Defense that at the time of the taking of said goods mentioned in the complaint, defendant was, as such officer holding said goods and chattels by virtue of said writ of attachment.

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2. Plaintiff denies Paragraph 3 of said First Separate Defense.

3. Plaintiff alleges that on December 19, 1927 and at the time of the issuance and of the subsequent levy of the writ of attachment mentioned and referred to in said First Separate Defense, the chattels therein mentioned were in the possession of the defendant, Nonpareil Toy and Novelty Company, a corporation, and were being held by

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*Re-amended Reply and Answer to Counterclaim  
of Conrad Deuchler, Individually and as  
Sheriff of Essex County.*

the defendant, Nonpareil Toy and Novelty Company as bailee of plaintiff.

10 4. Plaintiff alleges that the said chattels have never been in the actual possession of the Ferdinand Strauss Corporation.

5. Plaintiff alleges that on and prior to April 12, 1927, the said chattels were in the possession of said Nonpareil Toy and Novelty Company as bailee of the said Ferdinand Strauss Corporation.

20 6. That on April 12, 1927 said chattels were pledged by Ferdinand Strauss Corporation with plaintiff pursuant to certain agreements then existing between plaintiff and the Ferdinand Strauss Corporation as security for the repayment of loans made by plaintiff to the said Ferdinand Strauss Corporation, as well as for the payment of interest, commissions and other debit items chargeable against said Ferdinand Strauss Corporation in favor of plaintiff under and pursuant to said agreements.

30 7. That on April 12, 1927 Ferdinand Strauss Corporation executed and delivered to plaintiff a document, copy of which is attached hereto and made a part hereof marked Schedule "A".

8. That said document was executed by Ferdinand Strauss Corporation at its place of business, at 108 East 16th Street, in the City of New York in the State of New York.

40 9. That at the time of the execution of said document at said premises, there was displayed at the entrance of said premises and within the said premises a sign or signs of the kind and character as follows:

*Re-amended Reply and Answer to Counterclaim  
of Conrad Deuchler, Individually and as  
Sheriff of Essex County.*

“MILL FACTORS CORPORATION

FACTOR FOR

THE FERDINAND STRAUSS CORPORATION”

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10. That on said date and at the time of the pledging of said chattels by said Ferdinand Strauss Corporation with plaintiff, the defendant, Nonpareil Toy and Novelty Company agreed with the Ferdinand Strauss Corporation and with the plaintiff that said Nonpareil Toy and Novelty Company from and after said date would hold said chattels as bailee of plaintiff.

11. On said date said Nonpareil Toy and Novelty Company acknowledged to plaintiff that said Nonpareil Toy and Novelty Company held and would hold said chattels as bailee of plaintiff.

20

12. On all dates and at all times hereinabove referred to Nonpareil Toy and Novelty Company had its place of business in Newark, New Jersey, and said chattels above mentioned were on all said dates in the possession of Nonpareil Toy and Novelty Company at its place of business in Newark, New Jersey.

13. On all dates and at all times hereinabove mentioned, the Ferdinand Strauss Corporation had its place of business in New York City and did not have any place of business in the State of New Jersey.

30

14. After April 12, 1927 the said Ferdinand Strauss Corporation had no control over said chattels, said chattels being in the possession of the Nonpareil Toy and Novelty Company subject to the exclusive control of plaintiff.

15. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to

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*Re-amended Reply and Answer to Counterclaim  
of Conrad Deuchler, Individually and as  
Sheriff of Essex County.*

10 in the First Separate Defense of defendant's answer, the said defendant, Conrad Deuchler, individually and as Sheriff of Essex County, knew that said chattels had theretofore been pledged by the Ferdinand Strauss Corporation with plaintiff.

20 16. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to in the First Separate Defense of defendant's answer, the said Conrad Deuchler, individually and as Sheriff of Essex County, knew that said chattels were then in the possession of and were being held by said Nonpareil Toy and Novelty Company as bailee of plaintiff.

17. At the time of the levy of the writ of attachment upon said chattels mentioned and referred to in the First Separate Defense of defendant's answer, the said defendant, Conrad Deuchler, individually and as Sheriff of Essex County, had notice of the facts mentioned and referred to in the preceding paragraphs numbered "15" and "16".

30 18. On December 19, 1927 and at the time of the levy of the writ of attachment mentioned and referred to in the First Separate Defense, the Ferdinand Strauss Corporation was indebted to plaintiff for money theretofore loaned by plaintiff to the Ferdinand Strauss Corporation and in connection with which loan the said chattels had been pledged by the Ferdinand Strauss Corporation with plaintiff as aforesaid.

40 19. On December 19, 1927 and at the time of the issuance and of the levy of the writ of attachment mentioned in the First Separate Defense, defendant, Conrad Deuchler, individually and as Sheriff

*Re-amended Reply and Answer to Counterclaim  
of Conrad Deuchler, Individually and as  
Sheriff of Essex County.*

of Essex County, had knowledge of the facts set forth in the preceding paragraph numbered "18".

20. On December 19, 1927 and at the time of the issuance and of the levy of the writ of attachment mentioned in the First Separate Defense, defendant, Conrad Deuchler, individually and as Sheriff of Essex County had notice of the facts set forth in the preceding paragraph numbered "18".

10

21. Plaintiff alleges that the levy of the writ of attachment mentioned in the answer of defendant, Conrad Deuchler, individually and as Sheriff of Essex County, was insufficient and invalid in that said Sheriff of Essex County or his deputy did not take the said chattels into his possession or custody under and by virtue of said writ.

20

Plaintiff, answering the counterclaim of defendant, Conrad Deuchler, individually and as Sheriff of Essex County, says:

1. Plaintiff repeats herein all of the allegations set forth in paragraphs 1 to 21 inclusive hereinabove.

At the trial of this action plaintiff will move to strike out the First Separate Defense of the answer of defendant, Conrad Deuchler, individually and as Sheriff of Essex County, on the ground that the said defense constitutes no good and valid defense to this action.

30

At the trial of this action plaintiff will also move to strike out the counterclaim of defendant, Conrad Deuchler, individually and as Sheriff of Essex County, on the ground that said counterclaim is improper, and on the ground that said counterclaim constitutes no good cause of action against plaintiff.

40

BILDER & BILDER,  
Attorneys of Plaintiff.

*Re-amended Reply and Answer to Counterclaim  
of Conrad Deuchler, Individually and as  
Sheriff of Essex County.*

SCHEDULE "A"

10 Mill—Ferdinand Strauss Corp  
Date—April 12th, 1927  
Case No.  
Consignment No. 185 Total.....pieces

The goods described below are hereby consigned to Mill Factors Corporation to be held by them subject to their lien for advances, outlays and commissions, and are to be disposed of in accordance with our agreement with them.

20	Description	Quality	Color	Mill No.	Stock No.	Dyer & Fin.	
						To From	To From
	30	304	Gr. Loco- motive				
	Greigh Yards	Fin Yards	Price	Stock June 30	Stock Dec. 31	Sales Record	
			22.80			6931.20	

FROM NONPAREIL TOY & NOV. CO. INC.

30 Receiving Number .....  
Checked against receiving sheets.....  
Recorded for advances .....  
Total 6931.20

(Written in ink) Stored on premises of

Nonpareil Toy & Nov. Co.  
Shipped to Shupe Whse  
For M F C

Signed THE FERDINAND STRAUSS CORPORATION  
By S. BERKMAN

## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION,  
a corporation,  
Plaintiff,

*vs.*

THE GUARDIAN TRUST COMPANY, a  
corporation, CONRAD DEUCHLER,  
individually and as Sheriff of  
Essex County, LIBERTY TRUST  
COMPANY, a corporation, and  
NONPAREIL TOY AND NOVELTY  
COMPANY, a corporation,  
Defendants.

In Replevin.

10

Rejoinder to  
re-amended re-  
ply and reply to  
answer to  
counterclaim  
of Guardian  
Trust Com-  
pany.

20

The defendant, Guardian Trust Company, says that:

1. It denies all the allegations in paragraphs 3 to 21 inclusive of the plaintiff's re-amended reply.
2. It joins issue on the answer to its counterclaim.

STEIN, MCGLYNN & HANNOCH, 30  
Attorneys of Defendant,  
Guardian Trust Company.

40

ESSEX COUNTY CIRCUIT COURT.

10

MILL FACTORS CORPORATION,  
a corporation,  
Plaintiff,

*vs.*

THE GUARDIAN TRUST COMPANY, a  
corporation, CONRAD DEUCHLER,  
individually and as Sheriff of  
Essex County, LIBERTY TRUST  
COMPANY, a corporation, and  
NONPAREIL TOY AND NOVELTY  
COMPANY, a corporation,  
Defendants.

**In Replevin.**

**Rejoinder to  
re-amended re-  
ply and reply  
to answer to  
counterclaim.**

20

The defendant, Conrad Deuchler says that:

1. He denies all the allegations in paragraphs 3 to 21, inclusive, of the plaintiff's re-amended reply.
2. He joins issue on the answer to his counterclaim.

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STEIN, MCGLYNN & HANNOCH,  
Attorneys for Defendant,  
Conrad Deuchler.

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## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION,  
a corporation,  
Plaintiff,

*vs.*

THE GUARDIAN TRUST COMPANY, a  
corporation, CONRAD DEUCHLER,  
individually and as Sheriff of  
Essex County, LIBERTY TRUST  
COMPANY, a corporation, and  
NONPAREIL TOY AND NOVELTY  
COMPANY, a corporation,  
Defendants.

**In Replevin.**

**Rejoinder and  
reply to answer  
to counter-  
claim.**

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REJOINDER TO RE-AMENDED REPLY.

The defendant, Liberty Trust Company, denies each and every allegation contained in the re-amended reply of Mill Factors Corporation.

REPLY TO ANSWER TO COUNTER-CLAIM.

Liberty Trust Company denies each and every allegation contained in the answer to its counter-claim.

30

WOLBER & GILHOOLY,  
Attorneys for defendant,  
Liberty Trust Company.

40

## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION,  
a corporation,  
Plaintiff,

*vs.*

THE GUARDIAN TRUST COMPANY, a  
corporation, CONRAD DEUHLER,  
individually and as Sheriff of  
Essex County, LIBERTY TRUST  
COMPANY, a corporation, and  
NONPAREIL TOY AND NOVELTY  
COMPANY, a corporation,  
Defendants.

**In Replevin.**

**Agreed stipulation of facts.**

10

20

1. On March 25th, 1925, and on all of the dates hereinafter mentioned, Mill Factors Corporation, plaintiff in this cause, had its place of business at No. 354 Fourth Avenue, in the City of New York and State of New York, and had no place of business in the State of New Jersey.

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2. On said date, and on all of the other dates hereinafter mentioned, Ferdinand Strauss Corporation had its place of business at No. 108 East 16th Street, in the City of New York and State of New York, and had no place of business in the State of New Jersey.

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3. On and after said date, and on all of the other dates hereinafter mentioned, there was displayed upon the aforesaid premises of Ferdinand Strauss Corporation, at the entrance thereof and within the said premises, a sign or signs of the kind and character as follows:

*Agreed Stipulation of Facts.*

“FERDINAND STRAUSS CORPORATION  
MILL FACTORS CORPORATION, FACTOR.”

Said signs were displayed pursuant to and in accordance with Section 45 of the Personal Property Law of the State of New York, a copy of which section is attached hereto and made a part hereof, marked Schedule “A” 10

4. On November 14, 1927 Mill Factors Corporation, did file in the office of the Register of New York County a document, a copy of which is attached hereto and made a part hereof, marked Schedule “B”. Said document was filed pursuant to and in accordance with Section 45 of the Personal Property Law of the State of New York, above mentioned.

5. On March 28th, 1925, the Ferdinand Strauss Corporation and Mill Factors Corporation, the plaintiff herein, entered into an agreement, of which a true copy is annexed hereto and marked Schedule “C”. On October 20th, 1926, a modification of said agreement was entered into between said parties, a copy of which modification agreement is annexed hereto and marked Schedule “D” 20

6. On or about April 1st, 1927 Nonpareil Toy & Novelty Company sold to the Ferdinand Strauss Corporation three hundred four gross of toy locomotives and billed said corporation in accordance with the invoice, of which a copy is annexed hereto and marked Schedule “E”, and sent said invoice to the Ferdinand Strauss Corporation in New York City. 30

7. On April 12, 1927, Ferdinand Strauss Corporation was indebted to plaintiff in the sum of \$317,500. for advances and outlays made and com-

*Agreed Stipulation of Facts.*

missions earned pursuant to agreement referred to in paragraph "5" hereinabove.

10 8. On or about April 12, 1927, the president of the Nonpareil Toy & Novelty Company was at the place of business of the Ferdinand Strauss Corporation in New York City and there saw the invoice referred to in the paragraph numbered "6" hereinabove. In his presence such invoice was modified by an officer of the Ferdinand Strauss Corporation to be as it appears in Schedule "F" annexed hereto, and at the request of such officer of the Ferdinand Strauss Corporation the president of the Nonpareil Toy & Novelty Company then and there signed the invoice so modified on behalf of the Nonpareil Toy & Novelty Company.

20 9. On the occasion mentioned and referred to in the immediately preceding paragraph numbered "8", the said Ferdinand Strauss Corporation then and there informed the said President of the Nonpareil Toy & Novelty Company that said merchandise was being pledged by Ferdinand Strauss Corporation with the plaintiff, and that the Nonpareil Toy & Novelty Company should from and after said date hold said merchandise for the Mill Factors Corporation and subject to its instructions.

30 10. On April 12, 1927 said Ferdinand Strauss Corporation executed and delivered to plaintiff a writing, of which a copy is attached hereto and made a part hereof, marked Schedule "G". Said document was signed by Ferdinand Strauss Corporation on the premises of said Ferdinand Strauss Corporation, No. 108 East 16th Street, New York City. Said document, marked Schedule "G", and the document hereinabove referred

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*Agreed Stipulation of Facts.*

to as Schedule "F" were delivered by the said Ferdinand Strauss Corporation to plaintiff at the same time.

11. On said date, viz. on or about April 12, 1927 the merchandise mentioned and referred to in the said writings hereinabove referred to as Schedules "E", "C" and "G" respectively were in the possession of said Nonpareil Toy & Novelty Co. in the premises occupied by said company at No. 60 Union Street, in the City of Newark, County of Essex, in the State of New Jersey. This merchandise was packed in six hundred and eight cartons which cartons bore upon them no signs or labels which would indicate their ownership. The premises of the Nonpareil Toy & Novelty Company bore no signs or other indication that Mills Factors Corporation had any interest in the merchandise upon said premises.

12. The said goods and merchandise is the same goods and merchandise as is mentioned and described in the writ of replevin issued in this cause and in plaintiff's complaint filed herein.

13. The said merchandise had been manufactured by said Nonpareil Toy & Novelty Company and has been in the physical possession of the said Nonpareil Toy & Novelty Co. continuously from the time of the manufacture of such goods up to the above mentioned date, viz. on or about April 12, 1927.

14. The said merchandise had not been in the actual physical possession of Ferdinand Strauss Corporation at any time up to the above mentioned date or at any time thereafter.

15. The fire insurance policy covering said goods and merchandise was taken out on said property by Nonpareil Toy & Novelty Co. in the

*Agreed Stipulation of Facts.*

name of Mill Factors Corporation soon after April 12, 1927, and was delivered by said Nonpareil Toy & Novelty Company to plaintiff soon after said date.

10 16. From and after April 12, 1927, the said Nonpareil Toy & Novelty Company held the said goods and merchandise for and on behalf of Mill Factors Corporation and subject to its exclusive control.

17. The writing mentioned in paragraph 5 hereinabove was not recorded or filed in the office of the Register of Essex County in the State of New Jersey.

20 18. During the period from April 12, 1927 to and including December 19, 1927, the Ferdinand Strauss Corporation was at all times indebted to plaintiff in a sum in excess of \$144,000.00 for advances, outlays and commissions, pursuant to said agreement mentioned in paragraph "5" hereinabove.

30 19. On December 19, 1927, the Ferdinand Strauss Corporation was indebted to the Guardian Trust Company in the sum of \$7268.74. Said indebtedness was incurred by the said Ferdinand Strauss Corporation on various dates between August 31, 1927 and October 25, 1927.

20. On December 19, 1927, the Ferdinand Strauss Corporation was indebted to the Liberty Trust Company in the sum of \$13,545.64. Said indebtedness was incurred by the said Ferdinand Strauss Corporation between August 8, 1927 and October 27, 1927.

40 21. On December 19, 1927, the Ferdinand Strauss Corporation was indebted to the Manufacturers Trust Co. in the sum of approximately \$4,500.00. Said indebtedness was incurred by the

*Agreed Stipulation of Facts.*

said Ferdinand Strauss Corporation on or about September 2nd, 1927.

22. On December 19, 1927, a writ of attachment was issued out of the Essex County Circuit Court by the Guardian Trust Company of Newark, New Jersey, in an action against the Ferdinand Strauss Corporation. Under and by virtue of said writ a special deputy of the office of the Sheriff of Essex County on said date went to the said premises of the Nonpareil Toy & Novelty Company and asked for an officer of said company. The president, Mr. Weil, thereupon appeared and the deputy handed him a copy of the writ of attachment, showing him the original and asked for the goods which had been manufactured by said Nonpareil Toy & Novelty Company for the Ferdinand Strauss Corporation. Mr. Weil pointed out to him the three hundred four gross of toy locomotives packed in the six hundred eight cartons as aforesaid, which merchandise the deputy thereupon declared that he attached under said writ. 10  
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23. Said Sheriff did not remove the goods from said premises or put any Sheriff's deputy or other person representing the Sheriff of Essex County in custody of said goods. 30

24. At the time of the issuance of said writ of attachment, the Guardian Trust Company of Newark, New Jersey, knew that said goods and merchandise were in the possession of the said Nonpareil Toy & Novelty Company and informed the Sheriff of Essex County to that effect.

25. In the above said attachment suit, the Manufacturers Trust Company of New York City and the Washington Trust Company of Newark, New Jersey, were admitted as applying creditors. 40

*Agreed Stipulation of Facts.*

10 The defendant, the Ferdinand Strauss Corporation, did not appear or defend in the said suit, an auditor was appointed by the Essex County Circuit Court, which auditor on May 14, 1928, found that there was due to the Guardian Trust Company, a total of \$7,285.69, to the Washington Trust Company a total of \$13,442.10 and to the Manufacturers Trust Company, a total of \$4,622.85. Thereafter in said cause a rule for judgment was duly signed and entered by Judge Smith confirming the auditor's report and entering judgment by default for the plaintiff and the applying creditors in the amounts set forth in said auditor's report.

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*Agreed Stipulation of Facts.*

## SCHEDULE "A".

SECTION 45 OF THE PERSONAL PROPERTY LAW OF THE  
STATE OF NEW YORK.

"Section 45. Notice of liens upon merchandise or the proceeds thereof to secure loans or advances. Liens upon merchandise or the proceeds thereof created by agreement for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, shall not be void or presumed to be fraudulent or void as against creditors or otherwise, by reason of want of delivery to or possession on the part of the lienor, whether such merchandise shall be in existence at the time of the creation of the lien or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the person creating the lien, provided there shall be placed and maintained in a conspicuous place at the entrance of every building or place in or at which such merchandise, or any part thereof, shall be located, kept or stored, a sign on which is printed in legible English, the name of the lienor and a designation of said lienor as lienor, factor or consignee, and provided further that a notice of the lien is filed, stating:

1. The name of the lienor, and the name under which the lienor does business, if an assumed name; the principal place of business of the lienor within the state; and if the lienor is a partnership or association the names of the partners, and if a corporation the state under whose laws it was organized.

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*Agreed Stipulation of Facts.*

2. The name of the person creating the lien, and the interest of such person in the merchandise, as far as known to the lienor.

10 3. The general character of merchandise, subject to the lien, or which may become subject thereto, and the period of time during which such loans or advances may be made under the terms of the agreement creating the lien.

20 Such notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge. It must be filed with the officer designated in section two hundred and thirty-two of the lien law, in every town or city where the merchandise subject to the lien, or any part thereof, is or at any time shall be located, kept or stored, and also in the town or city where the principal office or place of business of the lienor within the state is or at any time shall be located. Such officers shall file every such notice presented to them for that purpose and shall endorse thereon its number and the time of its receipt. They shall enter in a book provided for that purpose, in separate columns, the names of the parties named in each notice so filed under the head of "owners" and  
30 "lienors", the number of such notice and the date of the filing thereof, and the general character of the merchandise as therein stated. The names of the persons creating the liens, as stated in the notice, shall be arranged in alphabetical order under the head of "owners". Such officers at the time of filing such notice shall upon request issue to the person filing the same a receipt in writing, containing the substance of the entries made or to be made as hereinabove provided. Such officers  
40 shall be entitled to receive for their services here-

*Agreed Stipulation of Facts.*

under, fees at the same rates as provided in section two hundred and thirty-four of the lien law.

Such notice may be filed at any time after the making of the agreement, and shall be effectual from the time of the filing thereof as against all rights of third parties, thereafter arising. Upon the payment or satisfaction of indebtedness secured by any lien specified in this section, the lienor or his legal representative, upon the request of any person interested in the said merchandise must sign and acknowledge a certificate setting forth such payment or satisfaction. The officer or officers with whom the notice of lien is filed must, on receipt of such certificate or a copy thereof certified as required by law, file the same in his office and write the word "discharged" in the book where the notice of lien is entered opposite the entry thereof, and the lien is thereby discharged. 10  
20

If the agreement creating such lien shall also give the lienor a right to or lien upon accounts receivable resulting from or which may result from a sale or sales of the merchandise subject to the lien, or of part of such merchandise, such right or lien shall not be void or ineffectual as against creditors or otherwise, by reason of want of possession of any such account on the part of the lienor or by reason of failure to make or deliver a further assignment of any such account, provided a bill, invoice, statement or notice shall be mailed, sent or delivered to the person owing such account receivable, stating or indicating that the account is payable to the lienor, and such mailing, sending or delivery of such bill, invoice, statement or notice shall have the same effect as a formal assignment of such account to the lienor named therein. 30  
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*Agreed Stipulation of Facts.*

## SCHEDULE "B".

10 PLEASE TAKE NOTICE, that under and by virtue of the provisions of Section 45 of the Personal Property Law of the State of New York, the undersigned has and claims a lien by agreement between the undersigned and the Ferdinand Strauss Corporation, upon merchandise and the proceeds thereof, for the purpose of securing the repayment of loans and advances made and to be made upon security of the said merchandise and the proceeds thereof, and of securing the payment of commissions and other charges provided by said agreement.

20 1. The name of the lienor is Mill Factors Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. The principal place of business of the lienor is at 354 Fourth Avenue, in the Borough of Manhattan, City, County and State of New York.

30 2. The name of the person creating the lien is the Ferdinand Strauss Corporation. The interest of such The Ferdinand Strauss Corporation in the merchandise so far as is known to the lienor, is owner.

40 3. The general character of the merchandise subject to the lien, or which may become subject thereto, is mechanical toys and kindred articles, and the period of time during which such liens or advances may be made under the terms of the agreement creating the lien commences on March 28th, 1925, and continues indefinitely thereafter, terminable, however, at any time upon four

*Agreed Stipulation of Facts.*

month's notice in writing given by either party to the other.

Dated, New York, November 12, 1927.

MILL FACTORS CORPORATION,  
By M. YANKAUER,  
First Vice-President and Treasurer. 10

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

MAX YANKAUER, being duly sworn deposes and says:

That he is the First Vice-President and Treasurer of Mill Factors Corporation, the lienor above mentioned; that he has read the foregoing Notice of Lien and knows the contents thereof; that the statements therein contained are true to his own knowledge. 20

M. YANKAUER.

Sworn to before me this }  
12th day of November, 1927. }  
JULIUS LAST,  
Notary Public.

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*Agreed Stipulation of Facts.*

## SCHEDULE "C".

10 AGREEMENT made this 28th day of March, 1925, between THE FERDINAND STRAUSS CORPORATION, a Corporation organized under the laws of the State of New York, party of the first part, hereinafter designated as the Consignor and MILL FACTORS CORPORATION, a Corporation organized under the laws of the State of Delaware, and having its principal place of business at 354 Fourth Avenue, New York City, party of the second part, hereinafter designated as the Factor,

WITNESSETH :

20 WHEREAS, the party of the first part is desirous that MILL FACTORS CORPORATION should act as its Factor

Now, THEREFORE, it is hereby mutually understood and agreed as follows :

30 *First:* The Consignor hereby constitutes and appoints Mill Factors Corporation its sole and exclusive factor, and agrees to consign and deliver to the Factor for sale on commission, free of all liens and charges at the premises of Mill Factors Corporation, 354 Fourth Avenue, or 108 East 16th Street, Borough of Manhattan, New York City, or at such other place or places as may be designated by the Factor, all goods belonging to the Consignor, or which may be thereafter acquired by it or the sale of which it may control.

40 *Second:* All sales of said goods shall be made on behalf of the Factor and in its name, and no sales shall be made without its ap-

*Agreed Stipulation of Facts.*

proval. All of the goods shall be invoiced to purchasers in the name of "Mill Factors Corporation, Factor for THE FERDINAND STRAUSS CORPORATION" and all accounts shall be owned by and be payable only to the Factor, who shall have the right to collect and receive the proceeds and who shall also have the rights of the Consignor, including the right of stoppage in transit, subject only to its obligations as such Factor to account for the proceeds of such sales. 10

*Third:* It is agreed that upon the premises upon which said goods are consigned to the Factor and sold hereunder, there shall be displayed at the entrance thereof and within the said premises, and at any other place or places where the same may be required, a sign or signs of the kind and character as follows: 20

"MILL FACTORS CORPORATION  
FACTOR FOR  
THE FERDINAND STRAUSS CORPORATION"

*Fourth:* The Consignor may designate persons to be employed in and about the sale of said goods and shall defray all selling expenses, but the Factor shall not be liable for any acts or omissions of any persons employed by the said Consignor in connection with the sale of said goods, and the Consignor agrees to hold the Factor free and harmless from any liability by reason thereof and from any merchandise risk in connection with the sale of said goods and from any loss or lia- 30  
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*Agreed Stipulation of Facts.*

bility resulting from cancellations, returns or claims by purchasers, or for loss, deterioration, damage or injury to any of the consigned goods while in transit or from any cause, and it shall also not be liable for any goods missing from inventory.

10

*Fifth:* The Factor agrees to guarantee all accounts arising from the sale of said consigned goods, provided said accounts have been approved and checked by its Credit Department, and that the merchandise so sold is finally accepted by the respective purchasers thereof without dispute, and to render account sales monthly within fifteen days after the end of each calendar month, and thereupon, provided that the Consignor carries a stock of merchandise with the Factor, sufficient to secure the Factor against any loss on account of returns, rejections or claims of any kind, the Factor agrees to discount such sales at the rate of six percent (6%) per annum upon or as of the last day of the month in which they shall have been made, adding ten days for collection to the average due date.

20

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*Sixth:* The net amount of such sales shall be credited to the Consignor as of the last day of the month, but in case after any of such sales have been so discounted, the purchaser of the merchandise represented thereby shall make a claim for breach of contract, defect in goods, imperfections, breach of warranty or right to reject merchandise or refuse to pay the full purchase price thereof for any reason whatsoever except credit risk, the amount thereof credited to the Consignor

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*Agreed Stipulation of Facts.*

upon the sale of such merchandise together with interest thereon from the date of such credit may be charged back to the Consignor by the Factor and the entire obligation of collection or adjusting such disputed claim is assumed by the consignor.

10

*Seventh:* In the event that in the judgment of the Factor the credit of any customer shall have become impaired subsequent to the acceptance of any order from such customer, and prior to the actual delivery of the merchandise hereunder, the Factor shall have the absolute right to refuse to deliver the merchandise contracted for to such customer, and in such an event it shall not assume any responsibility or be or become liable in any manner whatsoever for the failure to deliver such merchandise. In the event that the Factor should consider it necessary to recover or replevin merchandise previously shipped the Consignor agrees to accept the merchandise at the price originally billed.

20

*Eighth:* All merchandise is to be kept fully insured against fire and burglary, the premiums to be paid by the Consignor, but the policies to be in the name of the Factor and in companies approved by it. The amount of insurance carried to be at all times within the discretion of the Factor.

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*Ninth:* The Factor agrees to advance to the Consignor upon request, on goods consigned to it and in its possession, as follows:

On goods which have been previously sold and for which the signed orders are in

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*Agreed Stipulation of Facts.*

the Consignor's possession, and the merchandise finished and packed ready for shipment—an amount equal to fifty percent (50%) of the selling price, provided the selling price is not more than the lowest jobbing price.

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On goods which have not been sold—fifty percent (50%) of the cost price.

It is understood and agreed, however, that the amount to be advanced under this agreement shall at all times remain in the discretion of the Factor.

20

*Ninth A:* In the event of goods being in stock for one year or more, it is understood that such merchandise is not considered for the purpose of cash advances, although same remains in stock as equity in general account, according to the terms and provisions of this agreement.

30

*Tenth:* The Factor shall be entitled to charge and receive interest at the rate of six percent (6%) per annum upon all moneys advanced to or paid out for the account of or which may from time to time be due from the Consignor. Account current shall be rendered monthly and interest shall be charged and credited therein at the rate of six percent (6%) per annum.

40

*Eleventh:* For the purpose of ascertaining the value of the merchandise of the Consignor, consigned to the Factor, a true and correct inventory shall be taken on June 30th and December 31st of each year, and at such other times as the Factor may elect. At the taking

*Agreed Stipulation of Facts.*

of each inventory, a re-valuation of the stock on hand shall be made according to any change in market value.

*Twelfth:* For its services hereunder, and for guaranteeing the accounts approved by it as aforesaid, the Factor shall be entitled to charge and shall receive a commission of three percent (3%) on the net amount of all sales of said consigned goods. Said commission shall be charged as of the middle of the month in which goods are charged to customers. 10

*Thirteenth:* In the event that the Factor should collect any insurance moneys upon insurance placed upon said goods, it shall be entitled to the same commission upon such insurance moneys as are payable upon sales of said goods. It is also understood that in the event of loss, any expense which may be incurred by the Factor in adjusting insurance and collecting the same shall be charged to the Consignor. 20

*Fourteenth:* In the event of the transfer of this account upon the termination of this agreement or otherwise, the Factor shall be entitled to charge and shall receive a transfer commission of one percent (1%) upon the net cash market value of the consigned goods returned to the Consignor or delivered upon its order. 30

*Fifteenth:* The Factor shall at all times have the exclusive possession and control of said consigned goods, and as security for its advances now or hereafter made and whether 40

*Agreed Stipulation of Facts.*

10 or not the same shall be within or exceed the limits herein mentioned, and for its commissions, interest, expenses and other charges, excepting the expenses heretofore assumed by it, and for all indebtedness and liability of the Consignor to it, and for all liabilities which it may incur in connection with said business, except such as are herein expressly assumed by it, the Factor shall at all times have a general lien upon all of the consigned goods and upon all proceeds of sale thereof and upon any and all accounts, notes, drafts, bills receivable or evidences of indebtedness arising from any such sales.

20 *Sixteenth:* The rights of the Factor under this agreement, including the right to have, hold, and sell the goods, consigned as aforesaid, and to collect and receive the proceeds thereof, and of said accounts and to its said commissions, shall not be affected by any devolution or transfer of the rights or interests of the Consignor, whether the same shall be voluntary or by act of law. Any expense in connection with the carrying into effect of this paragraph, including all counsel fees, is to be borne by the Consignor.

30 *Seventeenth:* The Consignor shall not pledge the credit of the Factor for any purchases or upon any contracts, or for any purpose whatsoever, nor will it represent itself as the agent of the said Factor, nor do any act which might involve the Factor in any responsibility whatsoever, it being expressly understood that the sole relationship herein created between Consignor and Factor is that of Principal and Agent respectively.

40

*Agreed Stipulation of Facts.*

*Eighteenth:* It is understood and agreed that should any litigation arise and should there be any necessity of employing counsel for any reason whatever, except credit risks, any such employment of counsel, litigation or the adjustment thereof, may be handled by the Consignor acting on behalf of the Factor and at the expense of the Consignor. The Factor may make the re-assignment to the Consignor of any such accounts, for the purpose of such litigation or adjustment when requested. 10

*Nineteenth:* Upon the termination of this agreement and the payment to the Factor of all amounts due it on account of its advances, commissions, interest and other charges, and upon delivery of the customary indemnity bond, in form and amount satisfactory to the Factor, it will release the goods consigned to it by the Consignor, and hold them subject to the order of the Consignor. 20

*Twentieth:* In the event that all of the indebtedness and claims of the Factor are not paid within ten days from the termination hereof, whether at the end of the term of this agreement or otherwise, the Factor shall have the absolute right and privilege to sell any and all the merchandise held by it for advances, charges and commissions either at public or private sale with or without notice and either for cash or credit and upon such terms and for such prices as it deems proper, at which sales it may become the purchaser. The net proceeds thereof, after deducting all costs of such sales, its commissions and 30 40

*Agreed Stipulation of Facts.*

10 charges therefor and any and all expenses including legal expenses which may be incurred in connection therewith or in connection with the liquidation of this account shall be applied to the indebtedness of the Consignor under this agreement. Any surplus remaining after deduction of all such charges shall be turned over to the Consignor and in the event that there shall be a deficit, the Consignor shall remain liable therefor.

20 *Twenty-first:* This agreement shall commence on the 1st day of April, 1925, and shall continue in full force and effect until the 31st day of December, 1925, and from year to year thereafter unless either party hereto shall give four months notice in writing to the other of an intention to terminate the same on the 31st day of December in any year after 1925. Such notice shall be deemed sufficient if sent by United States registered mail to either party, directed to their last known business address.

30 IN WITNESS WHEREOF: The parties hereto have caused these presents to be executed by their duly authorized officers and their corporate seals to be hereunto affixed the day and year first above written.

THE FERDINAND STRAUSS CORPORATION  
FERDINAND STRAUSS,  
Pres.

MILL FACTORS CORPORATION  
M. YANKAUER  
Vice-President.

40 Witness:  
BERNARD PRIGOZEER

*Agreed Stipulation of Facts.*

## SCHEDULE "D".

NEW YORK, OCT. 20TH, 1926

THE FERDINAND STRAUSS CORP.,  
108 East 16th Street,  
New York City.

10

*Gentlemen:—*

Referring to our several conversations the following changes in the Factoring agreement now existing between us and dated March 28th, 1925, are agreed upon:—

Paragraph Ninth as now worded is to be eliminated, and in its place, the following Paragraph Ninth is to be substituted:—

“The Factor agrees to advances to the  
Consignor upon request, an amount equal to  
sixty six and two-thirds percent (66 $\frac{2}{3}$ %) of  
the net selling price (provided this said net  
selling price is not more than the lowest job-  
bing price) of the goods consigned to it and  
in its possession, it being understood and  
agreed, however, that the amount to be ad-  
vanced under this agreement, in excess of  
Two hundred and fifty thousand dollars  
(\$250,000.00) should at all times remain in  
the discretion of the Factor”.

20

30

Paragraph Twelfth as now worded is to be eliminated, and in its place the following Paragraph Twelfth is to be substituted.

“For its services hereunder and for guaranteeing the accounts approved by it as aforesaid, the Factor shall be entitled to charge and shall receive commission as follows:

40

*Agreed Stipulation of Facts.*

On all sales up to Three hundred thousand dollars (\$300,000.00) per annum—four percent (4%).

10 On all sales from Three hundred thousand dollars (\$300,000.00) to six hundred thousand dollars (\$600,000.00) per annum—three and one-half percent (3½%).

On all sales in excess of six hundred thousand dollars (\$600,000.00) per annum—three percent (3%).

Said commission shall be charged as of the middle of the month in which goods are charged to customers.”

20 Except for the changes herein noted, the Factoring contract mentioned above and dated March 28th, 1925, remains in every respect in full force and effect and the formal letter of termination addressed to us by you on August 30th, 1926 is hereby cancelled and made void.

Very truly yours,

MILL FACTORS CORPORATION

M. YANKAUER

Vice-President

30 THE ABOVE IS OUR UNDERSTANDING OF THE ARRANGEMENT AND IS HEREBY ACCEPTED AND AGREED TO.

THE FERDINAND STRAUSS  
CORPORATION

FERDINAND STRAUSS,

President.

*Agreed Stipulation of Facts.*

## SCHEDULE "E".

All orders are subject to strikes and contingencies beyond our control.

All claims must be made within five days after receipt of goods.

Date 4/1/27 10  
 Order No.  
 Your No.  
 Cases  
 Route  
 Terms as agreed

NONPAREIL

Trade Mark

NONPAREIL TOY &amp; NOVELTY CO. INC.

MANUFACTURERS OF

STEEL TOYS AND NOVELTIES

NEWARK, NEW JERSEY, U. S. A. 20

Sold to The Ferdinand Strauss Corp.

108 E. 16th St.,  
 New York, N. Y.

Quantity	No.	Description	Price per Gro.	Amount	Total
304	30	Locomotive	16.80	5107.20	5107.20

The above merchandise is stored in our Warehouse awaiting your shipping instructions. We have put a binder covering fire insurance for the above amount and as soon as we receive policy, we will mail same to you. 30

NONPAREIL TOY &amp; NOVELTY CO. INC.

(Signed) SAUL J. WEIL

President

DUPLICATE

Our responsibility ceases when goods are delivered to transportation companies and receipted for in good order. 40

## SCHEDULE "F".

All Orders are Subject to Strikes and Contingencies Beyond Our Control  
All Claims Must Be Made Within Five Days After Receipt Of Goods



## NONPAREIL TOY &amp; NOVELTY CO., Inc.

MANUFACTURERS OF  
STEEL TOYS AND NOVELTIES  
NEWARK, NEW JERSEY, U. S. A.

SOLD TO

The Ferdinand Strauss Corp.,  
108 E. 16th St.,  
New York, N. Y.

SCHEDULE F.

Date 4/1/27

Order No.

Your No.

Cases

Route

Terms AS agreed

QUANTITY	NO.	DESCRIPTION	PRICE PER GRO.	AMOUNT	TOTAL
304	30	Locomotive	16.80	5107 20	5107 20
<p>The above merchandise is stored in our warehouse in the name of Mill Factors Corporation awaiting their shipping instructions. We have put a binder in the name of Mill Factors Corporation, covering fire insurance for the above amount, and as soon as we receive policy, we will mail same to them.</p> <p>Sales Record</p> <p>NONPAREIL TOY &amp; NOVELTY CO.</p> <p><i>Saul J. Gril</i> President</p> <p><i>in the name of Mill Factors Corp.</i></p> <p><del>The above merchandise is stored in our Warehouse awaiting your shipping instructions. We have put a binder covering fire insurance for the above amount and as soon as we receive policy, we will mail same to you.</del></p> <p>NONPAREIL TOY &amp; NOVELTY CO., Inc.</p> <p><i>Saul J. Gril</i> President</p> <p>185 APR 12 1927</p> <p><u>DUPLICATE</u></p> <p><i>UCC</i></p>					

Our Responsibility Cesses when Goods are Delivered to Transportation Companies and Received For in Good Order.

*Agreed Stipulation of Facts.*

SCHEDULE "G".

Mill—Ferdinand Strauss Corp

Date—April 12th, 1927

Case No.

Consignment No. 185                      Total.....pieces 10

The goods described below are hereby consigned to Mill Factors Corporation to be held by them subject to their lien for advances, outlays and commissions, and are to be disposed of in accordance with our agreement with them.

DYER & FIN.

Description	Quality	Color	Mill No.	Stock No.	To From	To From
30	304	Gr. Loco-				20
		motive				
Greigh Yards	Fin Yards	Price	Stock June 30	Stock Dec. 31	Sales Record	
		22.80			6931.20	

FROM NONPAREIL TOY & NOV. CO. INC.

Receiving Number.....  
 Checked against receiving sheet....  
 Recorded for advances.....Total 6931.20 30  
 (Written in ink) Stored on premises of

Nonpareil Toy & Nov. Co.  
 Shipped to Shupe Whse  
 for M F C

Signed THE FERDINAND STRAUSS  
 CORPORATION  
 By S. BERKMAN

## ESSEX COUNTY CIRCUIT COURT.

10 MILL FACTORS CORPORATION,  
a corporation,  
Plaintiff,  
*vs.*

20 THE GUARDIAN TRUST COMPANY, a  
corporation, CONRAD DEUCH-  
LER, individually and as Sheriff  
of Essex County, LIBERTY  
TRUST COMPANY, a corporation,  
and NONPAREIL TOY AND NOV-  
ELTY COMPANY, a corporation,  
Defendants.

**In Replevin  
Interlocutory  
Judgment by  
Default.**

30 The summons and complaint in this cause hav-  
ing been duly served upon the defendant, Non-  
pareil Toy and Novelty Company, a corporation,  
and said defendant having failed to file an answer  
or take any other step in response to the com-  
plaint within the time limited by the Rules of  
Court; It is ordered that judgment interlocutory  
be entered against the defendant, Nonpareil Toy  
and Novelty Company, a corporation, and in  
favor of the plaintiff, Mill Factors Corporation,  
a corporation.

On motion of:  
BILDER & BILDER  
Attorneys.

## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION, a corporation, Plaintiff, <i>vs.</i> THE GUARDIAN TRUST COMPANY, a corporation, et als., Defendants.	}	<b>In Replevin.          Stipulation.</b>	10
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It is hereby stipulated and agreed by and between counsel for the respective parties hereto, that in the event judgment shall be entered in this cause awarding a return of the goods and chattels which are the subject matter of this suit to the defendants herein, that the damages of the defendants shall be assessed in the sum of Two Hundred Fifty (\$250.00) Dollars. 20

Dated: June 11th, A. D. 1930.

BILDER & BILDER,  
 Attorneys of Plaintiff.

STEIN, MCGLYNN & HANNOCH,  
 Attorneys of Defendants, 30  
 The Guardian Trust Company and Conrad Deuchler.

WOLBER & GILHOOLY,  
 Attorneys of Defendant,  
 Liberty Trust Company.

## ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">MILL FACTORS CORPORATION, a corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE GUARDIAN TRUST COMPANY, a corporation, et als., Defendants.</p>	<p><b>In Replevin.</b></p> <p><b>Rule for Judgment.</b></p>
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20 This case being regularly on the list for trial at the December, 1929 term of this Court; and the case having been submitted to the Court sitting without a jury, upon an agreed stipulation of facts; the Court having considered the facts and the argument of counsel thereon, does find and determine that the defendants Guardian Trust Company, Conrad Deuchler and Liberty Trust Company did not take the goods and chattels of the plaintiff in manner and form as the plaintiff has alleged; and it is thereupon on this 12th day of June, 1930,

30 ORDERED, that the plaintiff take nothing by its writ and that the defendants Guardian Trust Company, Conrad Deuchler and Liberty Trust Company have a return of the said goods and chattels to hold to them irrepleviable forever; and it is further

ORDERED, that the defendants Guardian Trust Company, Conrad Deuchler and Liberty Trust Company do recover of the plaintiff their damages

40

*Rule for Judgment.*

in the sum of Two Hundred and Fifty Dollars  
(\$250.00), together with their costs to be taxed.

NELSON Y. DUNGAN,  
Circuit Court Judge.

On Motion of

STEIN, MCGLYNN & HANNOCH,  
Attorneys of Defendants, Guardian  
Trust Company and Conrad Deuchler.

10

We consent to the entry of the foregoing rule.

WOLBER & GILHOOLY,  
Attorneys of Defendant,  
Liberty Trust Company.

20

30

40

## ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">MILL FACTORS CORPORATION, a corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE GUARDIAN TRUST COMPANY, a corporation, CONRAD DEUCHLER, individually and as Sheriff of Essex County, LIBERTY TRUST COMPANY, a corporation, Defendants.</p>	<p><b>In Replevin.</b></p> <p><b>Grounds of Ap- peal.</b></p>
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20 The following are the grounds on which plain-  
tiff appeals in the above entitled cause:

1. That the Court erred in entering judgment  
in favor of the defendants against plaintiff.
2. That the Court erred in ordering and ad-  
judging that the plaintiff take nothing by its writ  
and that the defendants, Guardian Trust Com-  
pany, Conrad Deuchler and Liberty Trust Com-  
pany have a return of the said goods and chattels  
30 to hold to them irrepleviabie forever.
3. That the Court erred in awarding damages  
to the defendants in the sum of \$250.00.

BILDER & BILDER,  
Attorneys of Plaintiff.

## ESSEX COUNTY CIRCUIT COURT.

MILL FACTORS CORPORATION, a corporation, Plaintiff, <i>vs.</i> THE GUARDIAN TRUST COMPANY, a corporation, Defendant.	}	<b>In Replevin.          Decision.</b>	10
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BILDER & BILDER, Attorneys of Plaintiff,  
 STEIN, McGLYNN & HANNOCH, Attorneys of  
 Defendants.

DUNGAN, J.

This case was argued upon an agreed state of  
 facts which are made a part of this decision, but  
 which for purposes of convenience may be shortly  
 stated as follows:—

The goods sought to be replevied consisted of  
 304 gross of toy locomotives manufactured by the  
 Nonpariel Toy and Novelty Company and there-  
 after sold by it to the Ferdinand Strauss Corpo-  
 ration, and were retained by Nonpariel Toy and  
 Novelty Company until on or about April 12th,  
 1927, on which date the Strauss Company, being  
 indebted to Mill Factors Corporation in a large  
 sum of money for advances and outlays made and  
 commissions earned, and in pursuance of an agree-  
 ment entered into between Strauss and Mill Fac-  
 tors on March 28th, 1925, Strauss "Consigned"  
 on that date to Mill Factors Corporation the said  
 toy locomotives, but no actual delivery thereof was  
 made by Nonpariel to Mill Factors, but Nonpariel  
 continued to hold the said goods which were at

*Decision.*

that time stored in its warehouse, and endorsed upon its invoice of said toy locomotives to Ferdinand Strauss Corporation dated April 1st, 1927 the following:—"The above merchandise is stored in our warehouse in the name of Mill Factors Corporation awaiting their shipping instructions".

- 10 Thereafter and while the goods were still in the possession of Nonpariel, (Having been continuously in its possession from the date of sale on April 1st, 1927) and on the 19th day of December 1927 the Ferdinand Strauss Corporation, being indebted to the Guardian Trust Company, the defendant in this suit, in the sum of \$7,268.74, a writ of attachment was issued out of the Essex County Circuit Court by the Guardian Trust Company of Newark, New Jersey, in an action against
- 20 the Ferdinand Strauss Corporation, and under and by virtue of that writ, the 304 gross of toy locomotives were attached. Thereafter, on the same day Liberty Trust Company became an applying creditor in the sum of \$13,545.64 and the Manufacturers Trust Company became an applying creditor in the sum of approximately \$4,500.00 for indebtedness incurred by the Strauss Corporation. The defendant in the attachment suit, the
- 30 Ferdinand Strauss Corporation did not appear nor defend it. An auditor was appointed by the Essex County Circuit Court, which auditor on May 14th, 1928, found that there was due to the Guardian Trust Company a total of \$7,285.69; to the Washington Trust Company a total of \$13,442.10; and to the Manufacturers Trust Company a total of \$4,622.85. Thereafter, in said cause, a rule for judgment was duly signed and entered confirming the auditor's report and entering judgment by default for the plaintiff and the applying
- 40

*Decision.*

creditors in the amounts set forth in said auditor's report. Thereafter the plaintiff herein, Mill Factors Corporation commenced this action in replevin against the Guardian Trust Company, Conrad Deichler, individually and as Sheriff of Essex County; Liberty Trust Company and Nonpareil Toy and Novelty Company, alleging that on January 16th, 1928, plaintiff was and ever since had been, the owner of the said goods and lawfully entitled to the immediate possession of the same and that the defendant wrongfully took said goods and chattels from the possession of the plaintiff and wrongfully detained them etc. 10

The facts further show that Mill Factors Corporation and Ferdinand Strauss Corporation were both corporations of the State of New York. Nonpareil Toy and Novelty Company is a corporation of the State of New Jersey, and was and is doing business in the State of New Jersey, and its factory and store house, where the goods in question were manufactured and continuously stored, are in the State of New Jersey. 20

The plaintiff claims the right to the possession of these goods under and by virtue of an agreement made between the Strauss Corporation, under date of March 28th, 1925 as modified by a further agreement dated October 20th, 1926, which constituted Mill Factors Corporation the sole and exclusive factor of Strauss Corporation, which Corporation agreed to consign and deliver to the Factor for sale on commission, free of all liens and charges at the premises of Mill Factors Corporation in New York or at such other place of places as might be designated by the Factor, all goods belonging to the consignor or which might be thereafter acquired by it or the sale of which it might control. 30 40

*Decision.*

It also provided that the Factor should "At all times have the exclusive possession and control of said consigned goods, and as security for its advances now or hereafter made" and that the Factor should at all times have a general lien upon all of the consigned goods.

10

It also appears that there was given in New York by Mill Factors Corporation the notices required under Section 45 of the Personal Property Law of the State of New York, which required notice of liens upon merchandise or the proceeds thereof to secure loans or advances to be given in accordance with that act.

20

It is further stipulated that none of the notices either by signs or filing "With the officer designated in section 232 of the Lien Law in every town or city where the merchandise subject to the lien \* \* \* is or at any time shall be located, kept or stored" were given at the warehouse of Nonpareil or in the City or County in which the goods were kept and stored. From these facts and those in addition appearing in the stipulation of facts the plaintiff claims the right to the possession of these goods under the agreement either as chattel mortgagee or pledgee.

30

Regardless of the instructions of Strauss Corporation to Nonpareil Company and the endorsement by Nonpareil on Schedule F that "The above merchandise is stored in our warehouse in the name of Mill Factors Corporation awaiting their shipping instructions", the consignment of the goods in question from Strauss to Mill Factors was in no sense a sale or a conditional sale, but was, as noted upon Schedule G, to be held subject to Mill Factors Corporation "Lien for advances, outlays and commissions."

40

*Decision.*

It is not necessary to decide what the situation would have been had the same thing occurred in New York as the New York Statutes cannot apply to the present case, as the goods in question were at all times in the State of New Jersey; but it may be interesting to note that if the goods in question had been attached in that state, under the same circumstances, the plaintiff in this case probably could not have succeeded in its replevin suit, unless possession of the goods had been delivered to it as the lienor, as Section 45 of the Personal Property Law of that State required that where there has not been delivery to or possession on the part of the lienor there shall be placed and maintained in a conspicuous place at the entrance of every building or place where such merchandise shall be located a sign on which shall be printed certain matters required by the statute, and that the notice must be filed as above indicated "In every town or city where the merchandise subject to the lien \* \* \* shall be located, kept or stored", neither of which was done in this case.

It may also be noted that paragraph 17 of the agreement between plaintiff and the Strauss Corporation distinctly states that it is "Especially understood that the sole relation herein created between consignor and factor is that of principal and agent respectively".

However this case must be decided by the laws and decisions of the state of New Jersey.

While in Plaintiff's reply brief it is indicated that there is no intention of relying upon the agreement between it and the Strauss Corporation as a chattel mortgage, on page two of the original brief it is suggested that the "Document whereby

*Decision.*

the said merchandise was pledged by the Strauss Corporation with plaintiff as security for advances" may "Be viewed as a chattel mortgage"; but the principal contention is that the plaintiff was a pledgee of these goods.

10 I am satisfied that the agreement was not a chattel mortgage in the place where it was made, but was an agreement under Section 45 of the New York Personal Property Law, and if it was not a chattel mortgage in New York, it is not a chattel mortgage in New Jersey; and even though it were possible for it to be so construed it would be invalid against an attaching creditor, as the goods and chattels involved were always in New Jersey and the agreement was not recorded here, and I  
20 am unable to find, under the stipulated facts, that there was a delivery to the plaintiff and an actual and continued change of possession of the goods. The goods were produced by the Nonpareil Toy and Novelty Company and held by it for the Strauss Corporation after their sale to that company, April 1st, 1927, and although there was a "Consignment" from the Strauss Corporation to Mill Factors Corporation, consented to by Nonpareil, the "Consignment" itself provides that the  
30 goods were consigned to Mill Factors to be held by them subject to their lien for advances, outlays and commissions, and are to be disposed of in accordance with their agreement with them, (referring of course to the agreement of March 28, 1925 as modified by that of October 20, 1926") of which no notice of any kind actual or constructive, was given by anyone concerned, to the defendant, a creditor of Strauss Corporation, or to any other creditor of the Strauss Corporation, so far as the  
40 facts show.

*Decision.*

These facts, it seems to me, dispose adversely to the plaintiff of its contention that, even though the agreement should not be held to be a chattel mortgage, yet the plaintiff is entitled to the goods as a pledgee of the Strauss corporation.

Delivery of possession is essential to the existence of a pledge. A contract to pledge, without an *actual* change of possession is ineffective as constituting a pledge. "Such change of possession should be as noticeable as the nature of the transaction will reasonably permit". 10

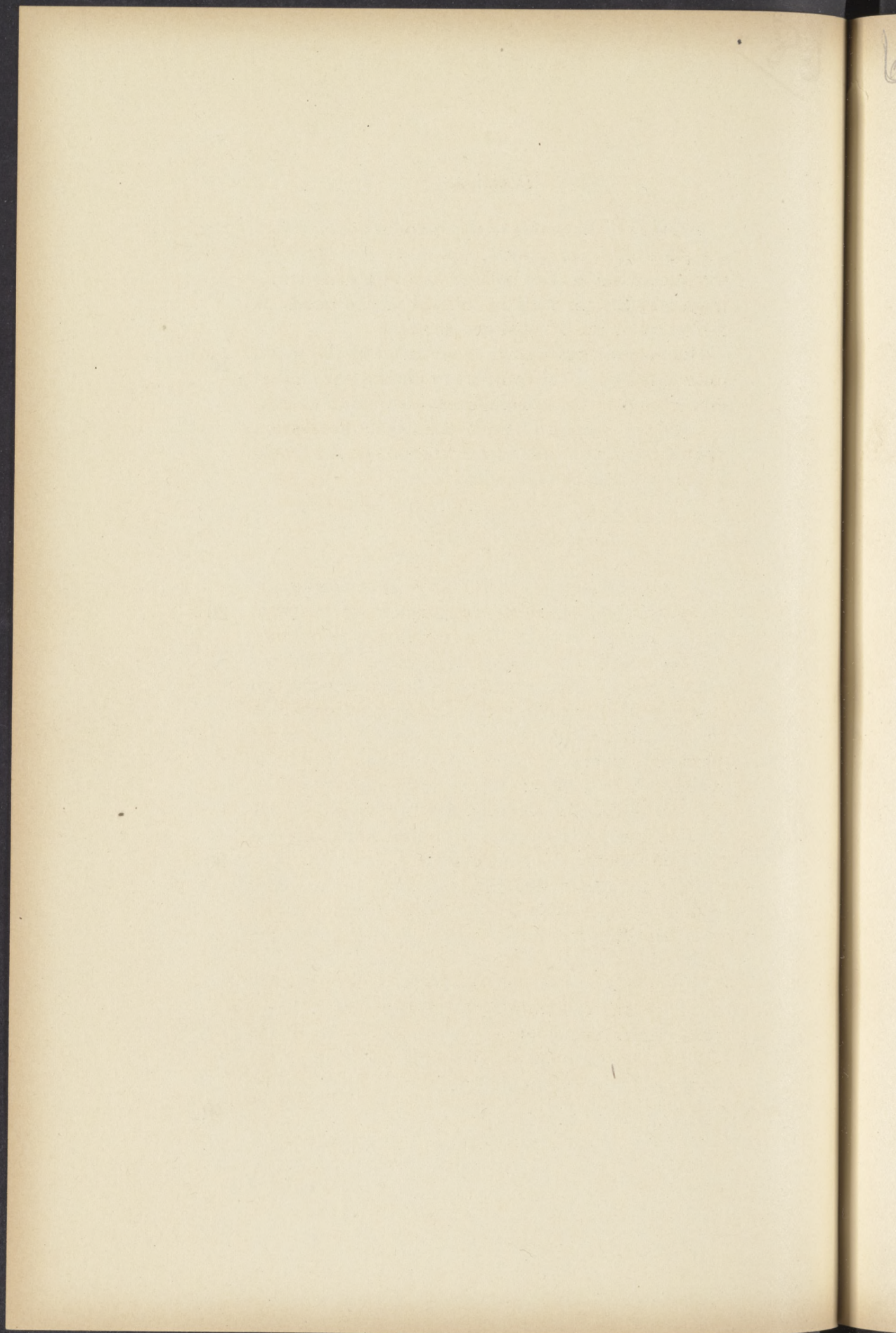
*Dirigo Tool Company vs. Woodruff*, 41  
Eq. p. 366 at p. 343.

In this case the Court said at p. 343 "Under our statute nothing short of a registration or an actual and continued change of possession will operate to create a lien by way of mortgage. While the provisions of this Statute are not applicable to pledges, still they display a clear legislative policy in opposition to the creation of secret liens upon personal property. If the transaction now claimed to be a pledge created a lien good against the world, I see no occasion for any creditor to resort to the publicity of the chattel mortgage act to obtain security for his debt." 20 30

It is not contended that the facts in this case constitute a factor's lien at common law. In fact in plaintiff's reply brief that is distinctly disclaimed.

It being my view that the facts in this case fail to show that the plaintiff legally became either a chattel mortgagee or a pledgee of the goods in question as against an attaching creditor of the Strauss Corporation, judgment will be given for the defendants. 40

NELSON Y. DUNGAN,  
Circuit Court Judge.



68

## New Jersey Court of Errors and Appeals

MILL FACTORS CORPORATION, a corporation,  
*Plaintiff-Appellant,*

10

*vs.*

THE GUARDIAN TRUST COMPANY, a corporation, CONRAD DEUCHLER, individually and as Sheriff of Essex County, LIBERTY TRUST COMPANY, a corporation, and NONPAREIL TOY & NOVELTY COMPANY, a corporation,  
*Defendants-Appellees.*

**On Appeal.**

**Brief on Behalf of Plaintiff-Appellant.**

20

### Statement of Facts and Nature of Controversy.

At the time of the institution of this replevin suit the goods in controversy were actually in the possession of the Nonpareil Toy and Novelty Company on its premises in the City of Newark. This company, although a party defendant to this suit, claims no right or interest in said goods and an interlocutory judgment by default has been entered against said defendant. See State of Case, page 60. This suit was occasioned by the levy of a writ of attachment on said goods by defendant-appellee, Conrad Deuchler, Sheriff of Essex County, in a suit instituted by defendant-appellee, The Guardian Trust Company, against Ferdinand Strauss Corporation of New York City, the goods being levied on as if the property

30

40

of said attachment debtor, Ferdinand Strauss Corporation. In truth said attachment debtor was then the owner of said goods but, as plaintiff-appellant herein claims, said owner had theretofore pledged said goods with plaintiff-appellant as security for a debt, and the goods, at the time of the attachment, were being held by said Nonpareil  
 10 Toy and Novelty Company as *plaintiff-appellant's bailee*. The defendant-appellee, Liberty Trust Company, is an applying creditor in said attachment suit.

The question to be determined in this case is whether or not when the attachment was levied on the goods such goods were in the possession of Nonpareil Toy and Novelty Company as plaintiff-appellant's bailee in consequence of a valid contract of pledge made between plaintiff-appellant  
 20 and the owner of said goods, viz. Ferdinand Strauss Corporation. If they were, then of course the goods were not liable to attachment by creditors of the said owner. In 49 Corpus Juris 925, the rule is stated that:

30 "Since the pledgee, by act of the pledgor, acquires in addition to his original right against the pledgor a right or interest in the thing itself which is the subject of pledge, he acquires a superior right to the property and its proceeds as against all persons, except those who held prior liens on the property at the time the pledge took effect."

The same authority states at page 929:

"All the cases recognize the lien of the pledgee for a preexisting debt as against subsequent attaching creditors of the pledgor."

The facts of the case have all been stipulated by the parties. Stated briefly and in chronological  
 40 order, the essential facts are as follows:

1. The goods had been manufactured for the Ferdinand Strauss Corporation prior to April 12, 1927 by the Nonpareil Toy & Novelty Company, which had kept the goods *in its possession* for said owner continuously from the time of the manufacture thereof up to said date, April 12, 1927. (See State of Case, p. 35, paragraph 6; and p. 37, paragraph 13).

10

2. On said date, April 12, 1927, the Nonpareil Toy & Novelty Company at the request of said owner of the goods, endorsed upon an invoice describing the goods, the following words:

“The above merchandise is stored in our warehouse in the name of Mill Factors Corporation awaiting their shipping instructions. We have put a binder in the name of Mill Factors Corporation, covering fire insurance for the above amount, and as soon as we receive policy, we will mail same to them.

20

NONPAREIL TOY & NOVELTY CO.  
(Signed) SAUL J. WEIL  
President”

At the same time the Nonpareil Toy & Novelty Company was informed by said owner, Ferdinand Strauss Corporation, that the latter was pledging said goods with Mill Factors Corporation (plaintiff-appellant) and that the goods should thereafter be held by Nonpareil Toy & Novelty Company for plaintiff-appellant and subject to plaintiff-appellant’s exclusive control. (State of Case, p. 36, paragraphs 8 and 9).

30

3. On the same date, viz. April 12, 1927, said owner delivered said invoice (containing the endorsement made thereon by Nonpareil Toy & Novelty Company as aforesaid) to plaintiff-appellant, together with a document describing said goods, signed by said owner and reading as follows:

40

“The goods described below are hereby consigned to Mill Factors Corporation to be held by them subject to their lien for advances, outlays and commissions, and are to be disposed of in accordance with our agreement with them.”

10 At that time said owner was actually indebted to plaintiff-appellant in the sum of \$317,500.00. (State of Case, p. 36, par. 10; and p. 35, par. 7).

4. Soon after said date, viz. April 12, 1927, Nonpareil Toy & Novelty Company delivered to plaintiff-appellant an insurance policy covering said goods and issued in the name and interest of plaintiff-appellant, pursuant to Nonpareil Toy & Novelty Company's promise contained in the endorsement made on the above mentioned invoice. (State of Case, p. 37, par. 15).

20 5. The said owner of the goods, Ferdinand Strauss Corporation, did not have any place of business in the City of Newark in this State on any of the dates above mentioned, but had its place of business in New York City. (State of Case, p. 34, par. 2).

6. Subsequent to all of the dates above mentioned and on December 19, 1927, the defendants instituted an attachment suit against said owner, Ferdinand Strauss Corporation and the writ of  
30 attachment was levied on said goods on said date. (State of Case, p. 39, par. 22).

Additional facts agreed on by the parties hereto but not considered relevant by plaintiff-appellant in this controversy, will be mentioned hereinafter.

From the foregoing facts it plainly appears, and plaintiff-appellant contends, that the goods in controversy had been effectively pledged with plaintiff-appellant by the owner as security for an existing indebtedness and hence were not subject to  
40 being subsequently levied on in an attachment suit

against the owner, Ferdinand Strauss Corporation, by defendants-appellees, as creditors of said owner.

### Discussion of Applicable Law.

The court below held that there was no valid pledge of the goods in controversy to plaintiff-appellant because there was no *actual* delivery of possession of said goods to plaintiff-appellant. This is made clear by the following portion of the court's decision:

"Delivery of possession is essential to the existence of a pledge. A contract to pledge, without an *actual* change of possession is ineffective as constituting a pledge." (State of Case, p. 71, ll. 9 to 12 inclusive).

We respectfully contend that the law is otherwise and that a *constructive* change of possession is sufficient to give validity to a contract of pledge.

The nature and essentials of a contract of pledge are set forth in Corpus Juris as follows:

"\* \* \* in order to constitute a contract one of pledge the following elements are necessary: (1) The possession of the pledged property must pass from the pledgor to the pledgee *or to some one for him*. (2) The legal title to the pledged property must remain in the pledgor. (3) The pledgee must have a lien on the property for the payment of a debt or performance of an obligation due him by the pledgor or some other person. (4) There must be a right of redemption in the pledgor." (49 Corpus Juris 900).

There can be no question but that the above mentioned document dated April 12, 1927 whereby Ferdinand Strauss Corporation (the owner of the goods in controversy) "consigned" the goods to

plaintiff-appellant as security, etc., evidenced a clear intention to *pledge* said goods. The word "consigned" means "to transfer possession". See 12 Corpus Juris 526. The delivery of the said document to plaintiff-appellant by the owner of said goods, together with the invoice describing the goods and containing an express written acknowledgment signed by the Nonpareil Toy & Novelty Company to the effect that the said Nonpareil Toy & Novelty Company was then holding said goods *for plaintiff-appellant*, was the surest and most complete evidence of a contract of pledge between the owner of said goods and plaintiff-appellant. Plaintiff-appellant contends that the *change of possession* essential to a contract of pledge was legally effected by a delivery of said documents to plaintiff-appellant by said owner.

20 An abundance of authority makes it clear that goods in the hands of a third person as bailee of an owner may be effectively pledged by the owner where such bailee is instructed to hold the goods thereafter exclusively for the pledgee, and such bailee agrees to do so, and the pledgee consents thereto. By means of such an arrangement, a former relation of bailor and bailee between the owner and the third person (his bailee) is terminated and a new and similar relationship of

30 bailee and bailor is created between said third person and the pledgee.

In the case at bar not only was this arrangement evidenced by the above mentioned documents delivered to plaintiff-appellant by the owner of the goods, but *by the subsequent conduct* of the third person (Nonpareil Toy & Novelty Company), who thereafter actually held said goods exclusively for plaintiff-appellant and subject to plaintiff-appellant's exclusive control, and

40 delivered to plaintiff-appellant an insurance

policy covering said goods and issued in plaintiff-appellant's name. (See Agreed Statement of Facts, paragraphs 15 and 16; State of Case, page 37, par. 15, and page 38, par. 16.)

The following cases involved a state of facts which was essentially similar to that in the case at bar and presented precisely the same question of law which is involved herein:

*Union Trust Co. v. Wilson*, 198 U. S. Supreme Court Reports, 530 (49 L. Ed. 1154). 10

*Pierce v. National Bank of Commerce* (Circuit Court of Appeals, 8th Circuit), 268 Fed. 487;

*Young v. Lambert*, L. R. 3 P. C. 142;

*Jones v. Baldwin*, 12 Pick. (Mass.) 316;

*Dublin City Distillery, Ltd. v. Doherty* (1914) A. C. 823; 20

*Israel v. Woodruff*, 299 Fed. 454;

*Cornelius v. C. C. Pictures* (Circuit Court of Appeals, 2d Circuit), 5 Fed. (2d) 157;

See also 49 Corpus Juris, 914 and 916.

In the case of *Union Trust Co. v. Wilson*, 198 U. S. Supreme Court Reports 530 (49 L. Ed. 1154), the Court dealt squarely with the question of the sufficiency of change of possession to satisfy the requirements of a pledge. The Court (opinion by Justice Holmes) said, at pages 1155 and 1156: 30

“it always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another, to whom the owner has sold, mortgaged, or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge.” 40

In that case the goods were actually kept in a separate portion of *the pledgor's own premises*, which portion had been leased by the pledgor to a warehouse company at a nominal rent. Nevertheless the court held that:

10           “The indorsement to a third person, as security for loans, of a receipt issued by a warehouse company for goods kept under lock and key in a place leased by it from the owner of the goods, which receipt recites that it received the property on storage, ‘to be delivered only upon surrender of this receipt, properly indorsed, and payment of all charges thereon,’ is a sufficient delivery as against attaching creditors of the owner to validate the transaction as a pledge, whether the receipt is to be deemed a public warehouse receipt under Ill. Rev. Stat. chap. 114, Sec. 2, or not.”

20           The case at bar, of course, is even stronger than that case because in the case at bar the goods, at the time of the pledge, were in the possession of the Nonpareil Toy & Novelty Company, in Newark, New Jersey, the latter company being in no wise connected with the owner of the goods, Ferdinand Strauss Corporation, whose place of business was located in New York City.

30           In the case of *Pierce v. National Bank of Commerce*, (Circuit Court of Appeals, 8th Circuit), 268 Fed. 487, the Court held that:

          “‘The rule that an article pledged must be delivered, to constitute a valid pledge, is subject to the exception that, when the article is in the possession of a third party, it may be effectually pledged without change of possession, provided notice of the pledge is given to the party in possession.’”

In discussing this matter, the court said at pages 492 and 493:

“One of the reasons, and probably the chief reason, for the alleged general rule that a deposit of the thing pledged is an indispensable attribute of a valid pledge, is that such a pledge is indispensable to prevent the possession by the pledgor of the thing pledged from giving to him a false credit, just as the failure to deliver personal property sold causes a false credit to the vendor and avoids the sale. This reason, however, ceases when at the time of the pledge the thing pledged is not in the possession of the pledgor, but is in the possession and control of a third party. On this account, probably, the authorities disclose the fact that in cases of the second class, of which the case at bar is one, an exception to the general rule of the necessity of the delivery of the thing pledged to the pledgee in order to make a valid pledge early arose, and has increased in strength and breadth, until it has now become as general as the rule itself, an exception to the effect that, when the thing pledged was in the possession or control of a third party at the time of the alleged pledge, it might be effectually pledged by the owner of it, or by the owner of an interest in it, without any change of possession or control of it, if notice of the fact of the pledge was given to the party in possession.”

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In the case at bar, of course, the third person, viz: the Nonpareil Toy & Novelty Company, was admittedly informed of the pledge and “attorned” to the pledgee (plaintiff-appellant).

In 49 Corpus Juris 914, the following rule is stated:

“\* \* \* manual delivery or manual taking possession of the property pledge is not always essential to the validity of a pledge.”

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The delivery is sufficient if there are circumstances which in contemplation of law are deemed sufficient to pass the possession of the property, \* \* \*”.

\* \* \* \* \*

10 “Delivery may be sufficiently made of the contents of a warehouse by the delivery of a key, of a warehouse receipt, or of an order which is accepted by the warehouseman. So also delivery may be made by the delivery of a bill of lading.”

The same authority, *49 Corpus Juris*, at page 916, states that:

20 “In the absence of statute, it is immaterial to the validity of a pledge whether the pledgee himself hold the property or a third person hold it for him; and therefore, where the parties all agree that the property shall be held as security for the pledgee, delivery of possession, instead of being made directly to the pledgee, may be made to an agent, or trustee, of the pledgee; or, by agreement, it may be delivered to, or left in the possession of, a third person to hold for the pledgee, provided the third person has notice of the trust and accepts the obligation it imposes, and such third person may even be an agent, clerk, or servant, of the pledgor.”

30 In the *English* case of *Young v. Lambert*, L. R. 3 P. C. 142 (cited by *Corpus Juris*), the court held that:

40 “Where the pledgor sent a note to the customs officer in charge of goods, requesting him to hold them ‘subject to the order’ of the pledgees, they paying the duty and storage charges before removal, and the note was accepted by the officer in charge who made a corresponding entry in his book, it constituted a sufficient symbolical delivery of the goods.” (See *49 Corpus Juris*, 914, note 18A).

In the case of *Jones v. Baldwin*, 12 Pick. (Mass.) 316, the court held that:

“Where the vendee of goods leaves them in the vendor’s warehouse, and gives a pledgee an order for them on the vendor, which is accepted and the goods selected, this is a sufficient delivery, and it is not affected by the removal of the goods to another warehouse by the vendor with the vendee’s consent.” (See 10 49 Corpus Juris, 914, note 22A).

In the English case of *Dublin City Distillery, Ltd. v. Doherty* (1914) A. C. 823, the Court held that:

“Where the goods are in the possession of a third party as bailee for the pledgor, possession is usually given by a direction of the pledgor to the third party requiring him to deliver them to, or hold them on account of, the pledgee, followed either by actual delivery to the pledgee or by some acknowledgment on the part of the third party that he holds the goods for the pledgee. The form in which such direction or acknowledgment is given is immaterial. (See 49 Corpus Juris, note 50A). 20

In the case of *Israel v. Woodruff*, 299 Fed. 454, the Court held that:

“Where goods loaded on lighters and in possession of a lighterage company are pledged, delivery to that company of an order from the owner to hold the goods for the pledgees and subject to their orders is a sufficient delivery.” 30

In the case of *Cornelius v. C. C. Pictures*, (Circuit Court of Appeals, 2d Circuit), 5 Fed. (2d) 157, the controversy related to the validity of a chattel mortgage. The chattel mortgage had not been recorded but it was claimed by the mort- 40

gagee that there had been a *change of possession* sufficient to comply with the statute. At the time of the execution of the mortgage, the mortgaged property was in the hands of a third person, viz. Evans Company, who was holding the same as bailee for the chattel mortgagor. Further facts as stated by the Court are that:

10        “A copy of said mortgage was filed with Evans Company, and that concern was fully advised of the transaction between Wener and defendant, and informed that thereafter no prints should be made by it from the negatives except as ordered and to the extent of order by Wener (the chattel mortgagor).

Thereupon Evans Company entered in its own records the fact that these negatives were ‘to be released on order of J. Wener only.’” (See page 158).

20        These facts were relied upon to show the requisite change of possession of the mortgaged property. The Court said:

30        “What can a mortgagee do when the chattels mortgaged to him are in the possession of a third person who is neither the agent nor tenant of the mortgagor, more than to make that third person his bailee as he had been the bailee of the mortgagor? Short of choosing another bailee, often at very material expense, no other method of effecting an actual and continued change of possession occurs to us, nor has any other method been suggested in argument.”

\*       \*       \*       \*       \*       \*

40        “The language of Holmes, J., in *Union Trust Co. v. Wilson*, 198 U. S. 530, 536, 25 S. Ct. 766, 767 (49 L. Ed. 1154), is directly applicable. That learned judge remarks: ‘It always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another to whom the

owner has sold, mortgaged or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge.' This it seems to us is the real test, viz: Was there a change in the character of the bailee's holding?

In this instance there assuredly was, for on the records of the Evans Company, which in the view most favorable to the appellants was no more than the mortgagor's bailee, absolute dominion over these cinema negatives passed to Wener, in that Wener alone was recognized by Evans Company as having authority to release the films producible from the negatives. The text-writers unanimously recognize similar doctrine, which is summed up in 11 C. J. 585, declaring in substance that the rule as enunciated by Holmes, J., supra, 'is applied by the weight of authority to cases, where the property is in the possession of a bailee of the mortgagor.' The citations for this pronouncement are extended and sufficient, and the only New York case cited—and that contra—is *Beskin v. Feigen-span*, supra, which, as above pointed out, goes entirely upon what is apparently the New York concept of tenancy and has no relation to a case of bailment where the bailee contemporaneously with the execution of the mortgage 'attorns' (as the phrase is) to the mortgagee." (See page 159).

The Court held that there was a sufficient change of possession to validate the mortgage.

The case at bar is even stronger than the cited case because in the case at bar the third person (Nonpareil Toy & Novelty Company) actually made a written acknowledgment that it was holding the said goods for the pledgee and such written acknowledgment was turned over to the pledgee. This additional significant feature was not even present in the foregoing case.

In the case of *Dirigo Tool Co. v. Woodruff*, (Court of Errors and Appeals), 41 N. J. Eq. 336, the controversy was between an alleged pledgee and a subsequent chattel mortgagee. The facts as stated in the syllabus were as follows:

10           “The Converse Manufacturing Company gave to Woodruff, a creditor, a paper acknowledging that they had pledged to him certain chattels in their factory. One Beers, the superintendent of the Converse Company was requested, and assented, to hold possession of the chattels for the pledgee. The chattels remained in the factory, and the superintendent exercised the same control over them after as he had before the alleged pledging. Subsequently, the Dirigo Tool Company, without knowledge of the transaction, and, having been informed by Beers that there were no liens upon the chattels, took a mortgage upon them to secure a debt and loan.—

20           Held, that no lien, by way of pledge, could be set up by Woodruff against the mortgage.”

In deciding the case, the Court said at pages 343 and 344:

30           “The chattels pledged, as we have seen, consisted of the machinery and tools used in the manufacture of tools, and of the manufactured goods. They were, before the alleged pledging, in the factory of the owners. After the alleged pledging, they were still in the factory of the owners.

          Before and after March 31st (the date of the alleged pledging) the owners had complete and exclusive possession of the factory and control over the contents of the factory.

40           But it is said that Beers was there, and he had promised to hold possession of the chattels for the pledgee. Beers was and had been the superintendent of the owners. In exercising control over the operations of the factory, of its machinery and of its products, he was probably the most conspicuous repre-

sentative of the company. The pledgee left the company in possession without any visible change in the position of the chattels. The pledgee left the chattels in the very position calculated to lead any person dealing with them to the belief that the Converse Company held towards them the same relation it had always held.

While this condition of things existed, Beers asserted to the agent of the complainant that there was no lien upon the chattels, and upon the faith induced by that assertion, and of what he saw, the complainants made their loan and took their mortgage. The defendant is responsible for the condition of affairs and the occurrences which misled the complainants. 10

The selection of Beers, occupying the place he did, was such as to impose upon the pledgee responsibility for his conduct. He was placed where his words were in accordance with his surroundings and his interests. 20

There were no means for a creditor or purchaser to ascertain the true posture of affairs by any visible feature, and the person selected by the pledgee to represent him, instead of asserting, repudiated his claim to possession. His well known position as superintendent for the complainants gave force to his words."

This case is of particular interest because it presents a situation which is the exact opposite of the situation in the case at bar. In the cited case the property was *in the actual possession of the pledgor* at the time of the attempted pledge and thereafter *continued* to be in the actual possession of the pledgor and *subject to the pledgor's actual control*. This was the decisive feature of the case, as is made clear by the following portion of the court's decision on pages 342 and 343: 30

"The essential feature in a pledging is a delivery of the article bailed. 40

The right of the pledgee rests not upon title, for that remains in the pledgor, but upon possession.

10 This strict requirement is designed not only as evidence of the contract of bailment, but as a monition to persons dealing with the property. Possession is *prima facie* title, and those who deal, concerning property, with a person other than he who has it in possession are put upon inquiry to ascertain by what right another holds the custody. It is true that possession may pass without actual tradition of the property. Chattels may be of a character which would render this impossible or impracticable, or the course of mercantile transaction may have adopted a symbol, the possession of which is the evidence of possession of property. The delivery of a bill of lading or a warehouse receipt is a delivery of the property. The delivery of the key of a building containing goods is a delivery of goods, as it passes from one to another the power to reach and control them. So cumbersome property as a raft may be delivered without a physical change of situs.

20 Nor can it be doubted that it is the law chattels once delivered may be returned to the pledgor for a temporary or special purpose without destroying the lien of the pledgee.

30 But that there must be first a delivery of possession to establish a pledge is elementary law. The character of this delivery must be dependent upon the circumstances which surround each transaction. In view of the purpose which the requirement of a change of possession is designed to accomplish, and in the light of the legislative policy manifested in our statute concerning chattel mortgages, it seems clear that such change of possession should be as noticeable as the nature of the transaction will reasonably permit."

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In other words, the *continued actual possession* of the goods by the pledgor after the alleged pledging thereof, defeated the pledge because that actual possession (by the pledgor) *negatived* the existence of a pledge and was *prima facie* evidence to third persons dealing with the owner (pledgor) that said goods were free from the lien of any pledge. As the Court puts it, "Possession is *prima facie* title, and (conversely) those who deal, concerning property, with a person other than he who has it in possession are put upon inquiry to ascertain by what right another holds the custody." 10

In the case of *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 13, one of the questions related to the validity of a chattel mortgage which had not been duly refiled and hence was claimed to be invalid on that account. The chattel mortgagee claimed that there was a sufficient change of possession to take the place of the requisite recording of the document. The Court states the facts in this connection as follows: 20

"The mortgagees in a chattel mortgage upon hotel furniture, which contained a provision that the mortgagors should retain the possession until default in payment, or until the chattels should be seized by execution or attachment, upon learning that a levy had been made, attended, by their attorney, at the hotel wherein the property was, and demanded possession. The mortgagors gave the attorney the keys, went with him through the hotel, opened the doors of the various rooms, and exhibited the furniture. It was then arranged that the property covered by the mortgage should be considered as stored for the mortgagees, and the attorney took away a napkin as a symbol of the delivery of the whole. Held—That this transaction could not aid the claim of the mortgagees; it was not an actual and continued change of possession." 30 40

It is obvious that the decisive feature in that case was the fact that *the mortgagors themselves* continued in the actual possession and control of the chattel mortgaged property even after the symbolical or formal taking of possession by the chattel mortgagee.

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There is no substance whatsoever to the suggestion that the state of facts in this case involves a "secret lien". A "secret lien" is one which is claimed to exist on goods which have been permitted to remain in the *actual possession* of the *owner* (pledgor) thereby enabling him to obtain credit from third persons upon the false appearance of a free and clear title to said property inferable from his possession. Such was the situation in the case of *Dirigo Tool Company v. Woodruff*, 41 N. J. Eq. 336, hereinabove discussed and distinguished from the case at bar.

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The true nature of a "secret lien" is clearly set forth in the decision in the case of *Pierce v. National Bank of Commerce* (Circuit Court of Appeals, 8th Circuit), 268 Fed. 487. In that case the court said, at pages 492 and 493:

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"One of the reasons, and probably the chief reason, for the alleged general rule that a deposit of the thing pledged is an indispensable attribute of a valid pledge, is that such a pledge is indispensable to prevent the possession by the pledgor of the thing pledged from giving to him a false credit, just as the failure to deliver personal property sold causes a false credit to the vendor and avoids the sale. This reason, however, ceases when at the time of the pledge the thing pledged is not in the possession of the pledgor, but is in the possession and control of a third party. On this account, probably, the authorities disclose the

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fact that in cases of the second class, of which the case at bar is one, an exception to the general rule of the necessity of the delivery of the thing pledged to the pledgee in order to make a valid pledge early arose, and has increased in strength and breadth, until it has now become as general as the rule itself, an exception to the effect that, when the thing pledged was in the possession or control of a third party at the time of the alleged pledge, it might be effectually pledged by the owner of it, or by the owner of an interest in it, without any change of possession or control of it, if notice of the fact of the pledge was given to the party in possession."

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In this same connection, in the case of *Lanterman v. Luby* (Court of Errors and Appeals), 96 N. J. Law, 255, the court, in discussing liens in general, said:

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"Secret liens upon chattels are an obstruction and a menace to trade and as such are against the policy of the law. They attempt to contradict and to destroy the universally accepted and natural as well as legal badge of ownership of chattels, which is possession. The law is most jealous in its protection of an innocent purchaser of a chattel for value without notice, *who has relied upon possession as the badge of ownership*. If the property has been stolen his title may be bad, but, short of that, if he has looked for liens or encumbrances where the law has told him to look, as, for instance, for chattel mortgages in the record where they are required to be recorded, and he finds none, he is entitled to rely upon what the possession tells him." (Page 259.)

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In other words, a lien comes under the condemnation of the law as "secret" where it is asserted against persons who have dealt with the *possessor of chattels* in the belief, *induced by his possession*, that *he* was the owner of such chattels. But in the

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case at bar the possessor of the goods at the date of the pledge, as well as on the date of the attachment, was Nonpareil Toy and Novelty Company, and not Ferdinand Strauss Corporation, the attachment debtor. The fact that the goods were in the possession of the Nonpareil Toy and Novelty Company, which was in no wise related to the owner of said goods, Ferdinand Strauss Corporation, and which was located in another city, viz. Newark, New Jersey, could not possibly give any false impression that the goods belonged to Ferdinand Strauss Corporation *free of liens and encumbrances*, or even imply that the goods were being held by the Nonpareil Toy and Novelty Company for Ferdinand Strauss Corporation. On the contrary, the only inference which Nonpareil Toy and Novelty Company's possession of said goods might warrant would be an inference of title in that company itself. But inquiry made of the Nonpareil Toy & Novelty Company at any time after April 12, 1927 (the date of the pledge) by third persons, would presumably have elicited information as to the fact that the Nonpareil Toy & Novelty Company was *then* holding the goods as *plaintiff-appellant's bailee*, for there is a legal presumption that the Nonpareil Toy & Novelty Company would not have made a false representation of the facts and thereby perpetrated a possible fraud upon the inquirers.

Included in the agreed state of facts are certain facts which plaintiff-appellant considers immaterial, but which defendant-appellee regards otherwise. Such is the fact that on March 28, 1925 (two years before the goods in controversy were pledged to plaintiff-appellant) plaintiff-appellant and Ferdinand Strauss Corporation, the owner of the goods in controversy, made an agreement of a

kind which is commercially known as a factoring agreement. The purpose of such agreement was to furnish the Ferdinand Strauss Corporation with loans or advances of money from plaintiff-appellant from time to time upon the security of merchandise to be pledged with plaintiff-appellant by the Ferdinand Strauss Corporation for the repayment of such loans and advances. The amount of loans to be made was to be proportioned to the cost or selling-price of the goods pledged with plaintiff-appellant. By said agreement, plaintiff-appellant also agreed to collect and guarantee collection of all bills for such merchandise aforesaid as would be sold by the Ferdinand Strauss Corporation to purchasers approved by plaintiff-appellant. An incidental reference to said agreement of March 28, 1925 is contained in the above mentioned document dated April 12, 1927, whereby the Ferdinand Strauss Corporation purported to pledge the goods in controversy with plaintiff-appellant. The language of the said document of April 12, 1927 in that connection is as follows:

“The goods described below are hereby consigned to Mill Factors Corporation to be held by them subject to their lien for advances, outlays and commissions, and are to be disposed of in accordance with our agreement with them.”

Defendant-appellee seems to entertain the view that plaintiff-appellant in this suit is relying upon said agreement of *March 28, 1925*, as a basis for plaintiff-appellant's asserted right to the goods in controversy. Indeed the court below seems to a great extent to have entertained the same view, for in its decision the court below said:

“The plaintiff claims the right to the possession of these goods under and by virtue of

an agreement made between the Strauss Corporation, under date of *March 28th, 1925* \* \* \*” (State of Case, p. 67, ll. 27 to 30 inclusive).

Such, however, is not the fact, as was made plainly evident in the brief filed by plaintiff-appellant with the court below. In that brief, plaintiff-appellant said:

“The document which actually evidenced and effected the pledge was the document designated Schedule ‘G’, which is attached to and made part of the Agreed State of Facts. That document is a so-called consignment sheet relating to and describing the merchandise in question, dated *April 12, 1927* signed by the Strauss Company. That document was delivered by the Strauss Company to the plaintiff on April 12, 1927, together with a document attached to and made part of the Agreed State of Facts which is designated as Schedule ‘F’. Schedule ‘F’ contained a description of the said goods with the following written acknowledgment with reference thereto signed by the Nonpareil Toy and Novelty Company by its president.

‘The above merchandise is stored in our warehouse in the name of Mill Factors Corporation awaiting their shipping instructions. We have put a binder in the name of Mill Factors Corporation, covering fire insurance for the above amount, and as soon as we receive policy, we will mail same to them.

NONPAREIL TOY & NOVELTY CO.  
(Signed) SAUL J. WEIL  
President’ ”

The document dated *April 12, 1927* upon which plaintiff-appellant does rely, plainly purports, in and by itself, to pledge the goods in controversy with plaintiff-appellant for “advances, outlays

and commissions". That document by its explicit language is not a prospective but a *presently operative* one. The document sets forth a description of the goods and the location thereof. It was delivered by the Ferdinand Strauss Corporation to plaintiff-appellant on April 12, 1927, together with the "invoice" of Nonpareil Toy & Novelty Company for said goods, whereon was endorsed the statement signed by the Nonpareil Toy & Novelty Company as follows: 10

"The above merchandise is stored in our warehouse in the name of Mill Factors Corporation awaiting their shipping instructions. We have put a binder in the name of Mill Factors Corporation, covering fire insurance for the above amount, and as soon as we receive policy, we will mail same to them."

The Ferdinand Strauss Corporation was on said date actually indebted to plaintiff-appellant for advances, etc. in the sum of \$317,500.00. The Nonpareil Toy & Novelty Company had previously on said date, viz. April 12, 1927, been informed of the fact that the Ferdinand Strauss Corporation had pledged said goods with plaintiff-appellant and accordingly the Nonpareil Toy & Novelty Company soon after said date sent to plaintiff-appellant an insurance policy covering said goods and issued in the name of plaintiff-appellant. 20 30

These facts, alone, constitute and furnish all the essential elements of an effective contract of pledge of said goods on that date, viz. April 12, 1927. On the other hand, the agreement of March 28, 1925 was an *agreement to pledge* the goods. It was a *prospective* and not a *presently operative* instrument as regards the creation of any lien in favor of plaintiff-appellant on any merchandise. It outlined the procedure to be followed thereafter by Ferdinand Strauss Corporation and plaintiff- 40

appellant, which procedure was in fact adopted by the acts of the parties hereinabove mentioned, which took place on April 12, 1927 resulting in a pledge of the merchandise in controversy with plaintiff-appellant. Plaintiff-appellant in no sense relies on said agreement of March 28, 1925 or purports to rely on same in this case. It follows, therefore, that none of the other facts connected with the said agreement of March 28, 1925, or the provisions thereof, and set forth in the agreed state of facts, need to be considered in determining this controversy.

One of such irrelevant facts, however, might well be briefly discussed since particular reference has been made to it *obiter dicta* in the decision of the court below, viz. the reference to Section 45 of the New York Personal Property Law and the "Third" provision of the contract of March 28, 1925, whereby it was agreed as follows:

"It is agreed that upon the premises upon which said goods are consigned to the Factor and sold hereunder, there shall be displayed at the entrance thereof and within the said premises, and at any other place or places where the same may be required, a sign or signs of the kind and character as follows: 'Mill Factors Corporation Factor for The Ferdinand Strauss Corporation'." (See State of Case, p. 47.)

The quoted provision of said contract was obviously intended *for the benefit of plaintiff-appellant* and was designed to secure compliance by the Ferdinand Strauss Corporation with the provisions of Section 45 of the New York Personal Property Law, by virtue of which a lien upon property may be preserved even though the property remains *in the actual possession of the owner*. The Act provides that:

“Liens upon merchandise or the proceeds thereof created by agreement for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, *shall not be void* or presumed to be fraudulent or void as against creditors or otherwise, *by reason of want of delivery to or possession on the part of the lienor*, whether such merchandise shall be in existence at the time of the creation of the lien or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the person creating the lien, provided there shall be placed and maintained in a conspicuous place at the entrance of every building or place in or at which such merchandise, or any part thereof, shall be located, kept or stored, a sign on which is printed in legible English, the name of the lienor and a designation of said lienor as lienor, factor or consignee, and provided further that a notice of the lien is filed, etc.

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It must be filed with the officer designated in section two hundred and thirty-two of the lien law, in every town or city where the merchandise subject to the lien, or any part thereof, is or at any time shall be located, kept or stored, and also in the town or city where the principal office or place of business of the lienor within the state is or at any time shall be located.” (See State of Case, pages 41 to 43.)

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It is to be noted that the word “*lienor*” used in the foregoing statute, refers to the person who *is given* the lien, viz. the pledgee, and not to the owner of the goods, viz. the pledgor. It is plainly evident that the above mentioned provision of the said contract of *March 28, 1925* was framed in view of said provision of the New York Personal

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Property Law and in contemplation of a situation in which the *Ferdinand Strauss Corporation* might retain *in its own possession* property which would already have been pledged by it to plaintiff-appellant and upon which it had secured loans and advances of money from plaintiff-appellant.

10 Any argument to the effect that the foregoing provision of said factoring agreement, in the event of non-compliance therewith, could create any right *in creditors of the Ferdinand Strauss Corporation* as against plaintiff-appellant, is nonsensical. Such an argument is opposed to every reasonable construction of the said provision, and moreover is in conflict with the elementary rule of law that no rights can arise under a contract in favor of third persons not parties thereto, unless the contract was intended for the benefit  
20 of such third persons. It could scarcely be contended that the contract of March 28, 1925 was entered into for the benefit of creditors of the Ferdinand Strauss Corporation.

But aside from all other considerations, it is perfectly clear that the foregoing provision of the contract of March 28, 1925, as well as Section 45 of the New York Personal Property Law, could in any event have no application (even in the New York courts) to a situation in which merchandise of the Ferdinand Strauss Corporation was actually in the possession of a *third person* holding same as bailee of a *pledgee*, as in the case  
30 at bar. In other words, it could not possibly be contended that said provision of the contract contemplated that where goods belonging to Ferdinand Strauss Corporation were actually in the possession of an *independent third person* in his own place of business, it would be necessary that a sign be put up upon the place of business of such independent third person indicating to the  
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public that there was contained on said premises goods belonging to Ferdinand Strauss Corporation. The mere statement of such a proposition demonstrates its absurdity. But as the court below appropriately says in its decision, this case must be decided in accordance with the laws of New Jersey and not the laws of New York (State of Case, page 69, lines 34 and 35). Consequently, if only for this reason, the above mentioned provision of the contract of March 28, 1925 and Section 45 of the New York Personal Property Law (to which same relates) are wholly irrelevant and immaterial to a determination of this case. 10

It is respectfully submitted that the judgment of the court below <sup>should</sup> be reversed.

Respectfully submitted,

BILDER & BILDER,  
*Attorneys of Plaintiff-Appellant.* 20

*Of Counsel:*

WALTER J. BILDER.

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[6880]

## New Jersey Court of Errors and Appeals

MILL FACTORS CORPORATION, a  
corporation,  
*Plaintiff-Appellant,*

*vs.*

THE GUARDIAN TRUST COMPANY,  
a corporation, CONRAD DEUCH-  
LER, individually and as Sher-  
iff of Essex County, LIBERTY  
TRUST COMPANY, a corpora-  
tion, and NONPAREIL TOY &  
NOVELTY COMPANY, a corpora-  
tion,

*Defendants-Appellees.*

*On Appeal.*

### BRIEF ON BEHALF OF DEFENDANTS- APPELLEES.

#### Statement of the Facts.

The facts in the instant case have been set forth in an agreed Stipulation of Facts which, with its schedules, appears on pages 34 to 60 of the State of Case.

It appears from the agreed Stipulation of Facts that on or about April 1, 1927, Nonpareil Toy & Novelty Company sold to the Ferdinand Strauss Corporation 304 gross of toy locomotives (State of Case, p. 35, ll. 29 to 36), and sent said corporation an invoice (State of Case, p. 57), from which it appears that the said Nonpareil Toy & Novelty Company held these goods on its premises awaiting shipping instructions from the owner of the merchandise, Ferdinand Strauss Corporation. Thereafter, it appears from the

facts that these goods were "consigned" to Mill Factors Corporation by the owner, Ferdinand Strauss Corporation, pursuant to a financing agreement of the parties. Any interest which Mill Factors Corporation thereby acquired in this merchandise was not disclosed to the people of New Jersey, and especially to New Jersey creditors of Ferdinand Strauss Corporation in any manner whatsoever. No document was recorded (State of Case, p. 38, l. 13); no signs of any kind were placed upon the premises of Nonpareil Toy & Novelty Company indicating that Mill Factors Corporation had any interest in any merchandise stored upon those premises (State of Case, p. 37, l. 18); the merchandise in question bore upon it no signs or labels which would in any way indicate the interest of Mill Factors Corporation (State of Case p. 37, l. 15).

The said Ferdinand Strauss Corporation was indebted to the Guardian Trust Company in a substantial sum of money and the latter company on December 19, 1927, knowing of the presence of this merchandise on the premises of Nonpareil Toy & Novelty Company (State of Case, p. 39, l. 30), caused to be issued out of the Essex County Circuit Court a writ of attachment in an action against the Ferdinand Strauss Corporation. The sheriff's deputy who was delegated to execute the writ went to the premises of Nonpareil Toy & Novelty Company and inquired for the merchandise which had been manufactured for Ferdinand Strauss Corporation (State of Case, p. 39, l. 18). The goods in question were pointed out to him by the president of the Nonpareil company and thereupon the deputy attached that merchandise under the writ.

After said attachment had been effected, Mill Factors Corporation, claiming to be the owner

of said merchandise (State of Case, p. 6, complaint, par. 1), caused said merchandise to be replevied from the possession of the sheriff. Thereafter, the attachment suit proceeded to judgment in favor of the attaching and applying creditors and that judgment awaits its satisfaction in the determination of this case.

We shall now examine the documents under which appellant claims its interest in the merchandise in question. Appellant in its brief (p. 22, l. 37) relies upon the document dated April 12, 1927, which appears as Schedule G of the agreed Stipulation of Facts (State of Case, p. 59). When we examine Schedule G to determine the effect of the instrument we are by its very terms directed to a pre-existing agreement which is incorporated in that document by reference. That document recites that the goods consigned to appellant "are to be disposed of in accordance with our agreement with them;" and that agreement is set forth in the agreed Stipulation of Facts as Schedule C (State of Case, p. 46).

Appellant in its brief (p. 24, l. 5) states that it "in no sense relies on said agreement of March 28, 1925, or purports to rely on same in this case." That agreement, nevertheless, is an integral part of this case and cannot be waived aside and excluded from the consideration of the Court. That agreement is expressly pleaded by appellant in its re-amended reply and answer to counter-claim (State of Case, p. 14, ll. 18 to 28); it is set forth in the agreed Stipulation of Facts (State of Case, p. 46); the indebtedness of Ferdinand Strauss Corporation to appellant arose and existed under that agreement (State of Case, p. 38, l. 18); and being the express contract of the parties pursuant to which they acted and dealt, it must determine their rights.

That agreement upon examination is indeed an anomalous one. At the outset the parties are referred to as factor and consignor, but as we read further it becomes apparent that the agreement is purely a financing agreement. Its material terms, when freed from the cloak of verbiage, prove to be this: The factor advances money to the consignor on goods which the said consignor "consigns" to it, the consignment of goods being merely the signing and delivery of a paper similar to Schedule G (State of Case, p. 59). The merchandise does not move (State of Case, p. 37, ll. 26 to 33). The factor receives a certain rate of interest on the money advanced and a certain percentage for its services (State of Case, p. 49, l. 38 to p. 50, l. 12; p. 50, ll. 25 to 33; p. 51, ll. 8 to 16 etc.). It is agreed that "the factor shall at all times have the exclusive possession and control of said consigned goods, and as security for its advances \* \* \* commissions, interest, expenses and other charges \* \* \* a general lien upon all of the consigned goods and upon all proceeds of sale thereof, and upon any and all accounts, notes, drafts, bills receivable or evidences of indebtedness arising from any such sales" (State of Case, p. 51, l. 37 to p. 52, l. 18). The physical handling of the goods and their sale, subject to approval by the factor of the credit risk seems to be done by the consignor (State of Case, p. 47, l. 30).

It is also important to note that it is provided in and by the terms of that agreement that "the sole relationship herein created between Consignor and Factor is that of Principal and Agent respectively" (State of Case, p. 52, l. 37).

We now turn to an examination of the law applicable to the documents hereinabove referred to and the facts of the case.

## I.

**The contract between Appellant and Ferdinand Strauss Corporation was not a contract of pledge.**

Since the consignment upon which appellant relies (Schedule G, State of Case p. 59) incorporates in it by reference the provisions of the subsisting agreement, the exact intentions of the parties must be sought in that agreement.

The State of New York, in which this contract was made, has by legislation created a statutory lien upon merchandise or the proceeds thereof by virtue of Section 45 of the Personal Property Law of that State (State of Case, pp. 41-43). That statute follows the policy of all laws creating statutory liens, and where the merchandise has not been delivered to the factor and is not in the possession of the factor, provides for the display of conspicuous signs upon the premises where the merchandise is stored, notifying the world at large of the interest of the factor therein, and for the filing of a verified notice of lien "in every town or city where the merchandise shall be located, kept or stored."

That was the lien which the parties intended to effectuate and did effectuate as to any merchandise in the State of New York. This becomes apparent when we note that the agreement in the instant case provides for the display of the required signs on "the premises upon which said goods are consigned to the factor and sold hereunder" (State of Case, p. 47, l. 16), and the appellant has pleaded compliance with that portion of the agreement and with that requirement of the statute (State of Case, p. 20, l. 34), and that compliance has also been set forth in the agreed Stipulation of Facts (State of Case, p. 34, l. 34 to p. 35, l. 11). Appellant also filed the

required notice in the office of the Register of New York County (State of Case, p. 35, l. 12), and an examination of the notice filed (State of Case, p. 44) discloses that appellant expressly claimed its lien under the statute referred to.

Unfortunately for appellant, New Jersey has no such statutory lien and, of course, the rights of the parties litigant must be determined by the laws of this State, the situs of the property (*Schmidt v. Perkins*, 74 N. J. L. 785; *Cronan v. Fox*, 50 N. J. L. 417). That being so, appellant now claims that the transaction was a pledge. That claim is retrospective, to say the least, and is hardly substantiated by the express agreement of the parties and their conduct pursuant thereto.

A similar situation was presented to the Supreme Judicial Court of New Hampshire in the case of *Janvrin v. Fogg* (49 N. H. 340). The plaintiff in that case held a mortgage and had actual physical possession of the goods as security for a debt. The validity of the mortgage being questioned, the plaintiff claimed to hold the goods as pledgee. The Court said (at p. 351):

“Where the parties made a mortgage, and relied upon that alone, and the plaintiff claimed to hold under it, as a mortgage, and took possession as mortgagee, and held in that capacity alone, never claiming to be a pledgee, and the matter of the pledge was never thought of by anybody until the trial, we do not understand how the whole character of the possession could then at once be changed without some new contract, or how one contract can thus be changed for another and an entirely different contract without at least the intention of the parties thus to change it.”

The agreement in the case at bar was drawn in New York State with the obvious intention of creating a lien pursuant to Section 45 of the New York Personal Property Law, and the legal relationship there created is determined by the law of that State (*Dougherty Co. v. Krimke*, 7 Adv. Rep. 240; 144 Atl. Rep. 617). That relationship there established determines the status of the parties to that agreement. Neither can now say that the legal relationship was otherwise in an effort to establish a lien by way of pledge under the New Jersey law, which determines the status of the chattels in question.

In this connection it may be noted that the consignment upon which appellant claims to rely, far from making any new contract, actually confirmed the existing arrangement and was made pursuant to it.

Even if we examine that instrument upon which appellant relies separate and apart from the agreement to which it refers, we find no indication of a pledge.

The goods are stated to be "consigned" to the appellant. Appellant in its brief (p. 6, l. 3) gives as the meaning of the word consign "to transfer possession." That definition is inadequate as appears from an examination of the authorities, among those the one cited by appellant (12 Corpus Juris, 526); and the common understanding of the term is quite a different one too. The authority cited by appellant, for instance, gives a more usual meaning of the term and one which conforms to the proper understanding of the term, namely, "to deposit with" or "to send to" another, such as "an agent, commission merchant, correspondent or factor, to be sold, stored, etc." In the case at bar the parties in their agreement (Schedule C,

State of Case, p. 46) have designated themselves Factor and Consignor so that the meaning of the term as used by the parties becomes apparent; and when we recall that factors have a lien (founded upon possession, of course,) that part of Schedule G which refers to appellant's "lien for advances, outlays and commissions" is entirely consistent with the expressed intent of the parties.

As to a factor's lien, it may be noted in passing that the goods in question were never physically delivered to appellant (State of Case, p. 37, ll. 27-33); and it is apparent from a reading of the agreement under which the parties operated that the appellant did not sell the goods or ever intend to sell them. The lien there agreed upon was not for appellant's services as selling agent, but by way of interest and charges for lending money to Ferdinand Strauss Corporation. For these reasons, presumably, appellant has not urged such a lien and did not urge same before the lower court (State of Case, p. 71, l. 31).

It is respectfully urged that a pledge cannot be created without an intent and agreement to pledge. Not only is such an intent absent from the case at bar, but it is in fact expressly negated by the agreement and conduct of the parties.

## II.

**The alleged pledge also fails by reason of want of possession in the pledgee.**

The cases cited by appellant (brief, p. 7) on the question of the possession necessary to a pledge, are in most cases distinguishable from the case at bar.

The instant case, for example, does not involve the transfer of a bill of lading or warehouse receipt, such a transfer as has been construed to be a real delivery. In *Union Trust Co. v. Wilson* (cited by appellant at page 7) valid warehouse receipts were endorsed over and delivered to the pledgees, and the Court expressly said (at p. 536)

“The transfer of the receipt is not a symbolical delivery; it is a real delivery to the same extent as if the goods had been transferred to another warehouse named by the pledgee.”

The case of *Pierce v. National Bank of Commerce*, (cited at page 7 of appellant's brief) was a suit in equity involving no rights of third parties. It appears that the custodian of the securities who had a prior lien, refused to recognize the lien of this pledgee. The Court said (at pp. 493, 494):

“And here are the rules and principles applicable to and decisive of the question now under consideration in the case at hand: This is a suit in equity. It is brought to enforce the equitable lien on the (securities) first pledged to the bank, evidenced by the collateral note of the construction company dated November 17, 1908. If the parties to that note intended to create such a lien, and if the intention clearly appears from the note and the facts alleged in the complaint, it is not material whether it fell under the category of a pledge, a mortgage, an assignment, or some other name.”

Manifestly, that is a different situation than the one present in the case at bar.

In the case of *Young v. Lambert*, an English case (cited by appellant at page 7), it appears that the goods were in a customs warehouse. Moreover it is significant that the Judges of the Superior Court of Lower Canada had decided

against the pledgee, and that their decision had been affirmed by the Court of Queens Bench of Lower Canada. The case was thereafter heard by the English Privy Council *ex parte* (the respondent not appearing) and reversed.

The *Dublin City Distillery case* (cited by appellant at page 7) decided that there was no valid pledge; the facts in that case showed that the goods were in a warehouse, that a delivery warrant had been delivered to the alleged pledgee together with the invoice corresponding to the number on the warrant; an entry had been made in the stock book of the warehouse opposite the number of the warrant delivered. The difficulty with the alleged pledgee's position in the mind of the Court seemed to be the fact that the pledgor had dealt with the goods. In the instant case, too, it appears from the agreement between the appellant and consignor, that the actual selling of the goods was done by the consignor (State of Case, p. 47, l. 30).

It appears from a reading of the case of *Israel v. Woodruff* (cited by appellant at page 7), that the alleged pledgee held a bill of sale for the goods. The case of *Jones v. Baldwin* (cited by appellant at page 7), was decided in Massachusetts in 1832 and it may be observed that since that date security transactions have become considerably more involved, and the interests of creditors, by progressive legislation, have been more zealously protected by recording statutes and other stringent requirements.

Appellant (at page 7 of its brief) cites the case of *Cornelius v. C. C. Pictures*. The Court's attention is respectfully directed to the fact that this case was first reported in 297 Fed. 444. In that report of the case, the "mortgagee" proved that he held a note of the "mortgagor" in the sum of

\$25,000.00 and an agreement by the mortgagor to assign all its right, title and interest in certain negatives; that notification had been given to the "bailee" to hold certain specifically designated films subject to the written order and consent of the "mortgagee." The Circuit Court of Appeals found that notwithstanding these facts, there was no valid chattel mortgage.

An order was then entered in the proceedings, permitting the alleged mortgagee to take testimony to show if he could, such additional facts as would validate his mortgage. The case was then referred back to the District Court for that purpose and then came up again on appeal to the Circuit Court. The report of that case in 5 Fed. (2d) in which the mortgage is decided to be valid, reads as follows:

"The mortgagee was permitted to take evidence and showed (what had not been proven when the case was here before) that the defendant company owned said cinema negatives which were stored with a concern doing an independent business, *i. e.*, the Evans Co. This storage was necessary because such negatives are highly inflammable and the Evans Co. had lawful conveniences for storing them which the defendant herein had not.

"Furthermore, it was the business of the Evans Co. to make prints from these negatives and it had apparently done so upon orders given by the defendant herein, and received pay for so doing. A formal instrument of mortgage was executed by the defendant and delivered to Wener (the mortgagee). A copy of said mortgage was filed with the Evans Co. and that concern was fully advised of the transaction between Wener and the defendant, and informed that thereafter no prints should be made by it from the negatives except as ordered, and to the extent of order by Wener."

It is respectfully submitted that the facts in the above case as reported first are more closely analagous to the instant case than the facts as they appear in the second report. It is apparent from a reading of the second report of the case that the Court reversed its position, and it says so in so many words, because first, the chattels (negatives) were stored with a concern whose business it was to make prints from those negatives and for that reason, had to remain in the possession of that bailee; because second, "this storage was necessary because such negatives are highly inflammable and the Evans Co. had lawful conveniences for storing them, which the defendant herein had not;" and because, third, "a formal instrument of mortgage was executed by the defendant."

These elements are all absent from the instant case. There was no formal instrument of mortgage. There was no reason for these goods remaining on the premises of the Nonpareil Toy & Novelty Company. That company had finished all its work on the goods and was merely storing them; the goods could have been stored anywhere else with equal security, and the plaintiff, in the regular course of its business, must have had many places to which it could easily have had these goods delivered and stored for it.

The cases which follow are illustrative of the attitude of our courts and the courts of our sister states in dealing with liens of the type in question in the case at bar. We shall, in some instances, refer to cases involving factor's liens and chattel mortgages, but it is submitted that the required possession in these cases (in the absence of recording) is quite similar.

"Delivery of possession is the very life of a pledge. No mere agreements respecting

possession can create it. The contract of pledge cannot exist outside of the fact of change of possession. The pledgor must dispossess himself openly, completely, unequivocally and 'without deceptive combinations which lead third persons into error as to the real possession of the thing'; and the pledgee must take and maintain an open, exclusive and unequivocal possession. (Citing cases.)" (*Security Warehousing Co. v. Hand*, 143 Fed. 32.)

In the instant case we believe that the most that can be claimed for appellant is an "agreement respecting possession." Before the alleged pledging the goods in question in the instant case were on the premises of the Nonpareil Toy & Novelty Company; after the pledging they were still on those premises. There was no delivery; there was no possession in the pledgee. There was, at most, an agreement made by the Nonpareil Toy & Novelty Company to hold the said merchandise in the name of the factor, and subject to its shipping instructions. This could not take the place of delivery and possession.

Appellant, in its brief (pp. 14-16), has quoted at length from the case of *Dirigo Tool Co. v. Woodruff*. While it is true that in that case the chattels remained in the factory of the owner, the language of the Court indicates that its attitude is not limited to that situation. It said (at p. 343):

"But that there must be a delivery of possession to establish a pledge is elementary law. The character of this delivery must be dependent upon the circumstances which surround each transaction. In view of the purpose which the requirement of a change of possession is designed to accomplish, and in the light of the legislative policy manifested in our statute concerning chattel mortgages, it seems clear that such change of possession

should be as noticeable as the nature of the transaction will reasonably permit.”

“Under our statute, nothing short of a registration or an actual and continued change of possession will operate to create a lien by way of mortgage. While the provisions of this statute are not applicable to pledges, still they display a clear legislative policy in opposition to the creation of secret liens upon personal property. If the transaction now claimed to be a pledge created a lien good against the world, I see no occasion for any creditor to resort to the publicity of the chattel mortgage act to obtain security for his debt.”

The nature of the transaction in this suit reasonably permitted a change of possession far more noticeable and clear than the facts show. No effort at all was made by the alleged pledgee to give any outward appearance of the change of possession claimed by it. Under the circumstances, we believe the lien claimed by the pledgee can properly be termed a secret one.

Two cases decided in the Federal Court arising in the State of New York are noteworthy as indicative of the attitude of the courts of that State in dealing with these financing arrangements. They are *Ommen v. Talcott*, 188 Fed. Rep. 401, and *In Re Merz*, 37 Fed. Rep. (2d) 1. Each of the claimants in those cases was a factor of the type of the appellant in this case. The Court in the *Ommen* case said:

“This is one of the innumerable schemes by which merchants have attempted to create liens on their goods which shall be unknown to their creditors and shall not affect their credit, but which shall be enforceable if bankruptcy occurs. They are all based on the idea of giving notice enough to satisfy the law and not enough to inform the creditors.”

The Court concluded by stating that:

“It is absolutely essential to the validity of a factor’s lien for advances that the property consigned shall be delivered by consignor to consignee.”

A case decided in the State of Iowa (*Hodges & Co. v. Kimball*, 49 Iowa, 577) is indicative of the attitude of the courts of that State. In that case grain was consigned to a commission merchant under agreement to sell the same and apply the proceeds towards the re-payment of advances. The grain was placed on cars consigned to the commission merchant. A creditor attached this merchandise on the cars, and in a contest between that creditor and the commission merchant, the Court decided in favor of the creditor, holding that the factor did not have the possession requisite to a factor’s lien. Assuredly, the factor did not have the possession requisite to a pledge.

Another case which discloses a great similarity in facts is that of *Moffat v. Beeler* (91 Kansas, 209). It appears from that case that one Beckwith, a merchant, executed a chattel mortgage on his stock of goods to a bank, and the bank took possession of the property mortgaged. Ten days later he executed a second chattel mortgage to Beeler, the president of that bank, and the goods being then in the possession of the bank, and the bank being notified of this second mortgage, it agreed to hold possession of the goods also for Beeler, the second mortgagee. The merchant was adjudicated a bankrupt and in a contest between the trustee in bankruptcy and the second mortgagee, the question arose as to the sufficiency of the change of possession under the second mortgage. The Court held that there was not

a sufficient change of possession to satisfy the statute, and said:

“In the present case it may be that substantial justice would have been subserved by upholding the second chattel mortgage. But the general rule that would be established by such a decision here would hamper the operation of the recording act and might open the door to frequent injustice. For illustration, a merchant might make a small chattel mortgage on his stock and give the mortgagee possession until payment should be made. A third person advised by the record that the stock was worth more than the lien might give credit to the mortgagor, only to find out later that in the meantime a second mortgage for the full value of the stock had been given, which was not of record, but which was valid because the first mortgagee had agreed to hold possession for the protection of the second mortgagee as well as for his own. The whole question is one of legislative policy, and our statutes seem to have been drawn with a purpose to make the requirement of record especially rigid in the case of chattel mortgages. \* \* \*”

A case very closely in point, decided in our own jurisdiction, is that of *Hastings v. Fithian* (71 N. J. L. 311). This case involved a contest between a trustee in bankruptcy of a silk manufacturer and a factor. The facts showed that the manufacturer had executed a bill of sale for its stock, manufactured and unmanufactured, whether in its factory or in the factories of other manufacturers in the process of finishing, and the factor had agreed in writing to turn over to the manufacturer the net proceeds after deducting its advances. The court, after examining the facts, concluded that the transaction was in fact a chattel mortgage. The court next considered the question of the sufficiency of the

delivery and change of possession. These facts appeared: On the execution of the mortgage, the mortgagees appointed the mortgagors as their agents and representatives; one of the mortgagees informed the superintendent of the plant that it had taken possession of the entire plant and thereafter the business, including the books and the bank account, which previously had been carried on in the name of "Krueger & Stohn" was conducted in the name of "Krueger & Stohn, Agents." After considering the facts, the court concluded that they did not constitute the delivery and change of possession necessary to validate the lien of the mortgage.

Courts have always looked with disfavor upon liens of the type involved in the case at bar where the facts are such that the goods were capable of actual physical possession, and the lien was susceptible of record and disclosure to creditors. Appellant could very properly have taken a mortgage to secure its advances and recorded same, or it could have taken the goods into its actual possession, or at least remove them from the possession of the Nonpareil Company which had manufactured the goods for the Ferdinand Strauss Corporation, and had been holding the goods for shipping instructions from that corporation. And contrary to the presumption indulged in by the appellant (brief, p. 20, l. 22) inquiry made of the Nonpareil Company by the deputy sheriff for the goods manufactured for Ferdinand Strauss Corporation resulted in the goods in question being pointed out by the president of the Nonpareil Company, without any reference whatsoever to the appellant's alleged claim thereto (State of Case, p. 39, ll. 10 to 25). The appellant might at least have labeled these goods as its property, or in some other way indicated

to the public at large, and especially to creditors its claim to an interest in those goods. It did nothing of that nature (State of Case, p. 37, ll. 15 to 21), and the facts in the case do not spell out the possession requisite to a pledge.

### CONCLUSION.

The Guardian Trust Company was and is a creditor of Ferdinand Strauss Corporation, a foreign corporation. It learned of certain assets of that debtor in this State and caused them to be attached to satisfy its debt. Thereafter, the suit instituted by it, in which other creditors appeared as applying creditors, was reduced to judgment. After the goods were attached, and before the entry of judgment, the appellant herein, asserting that it was the owner of the goods in question (State of Case, complaint, p. 6, l. 22) caused the same to be replevied from the sheriff, alleging a wrongful taking on January 16, 1928. Manifestly, the appellant was not the owner of those goods as there is no proof whatsoever of such ownership. Moreover, there was no wrongful taking on January 16, 1928, because the attachment had been executed on December 19, 1927.

In addition, the facts do not show a pledge. There was no delivery and possession sufficient to constitute a pledge. The documents from which the appellant must derive its rights show that there was no intent in the minds of the parties to effect a pledge. Appellant does not urge any rights as factor or chattel mortgagee, presumably because the facts would not substantiate such a claim. In its last analysis, Ferdinand Strauss Corporation and the appellant dealt with each other under a financing arrangement which

gives rise to a lien in the State of New York under Section 45 of the Personal Property Law of that State, but which in our State carries no such rights.

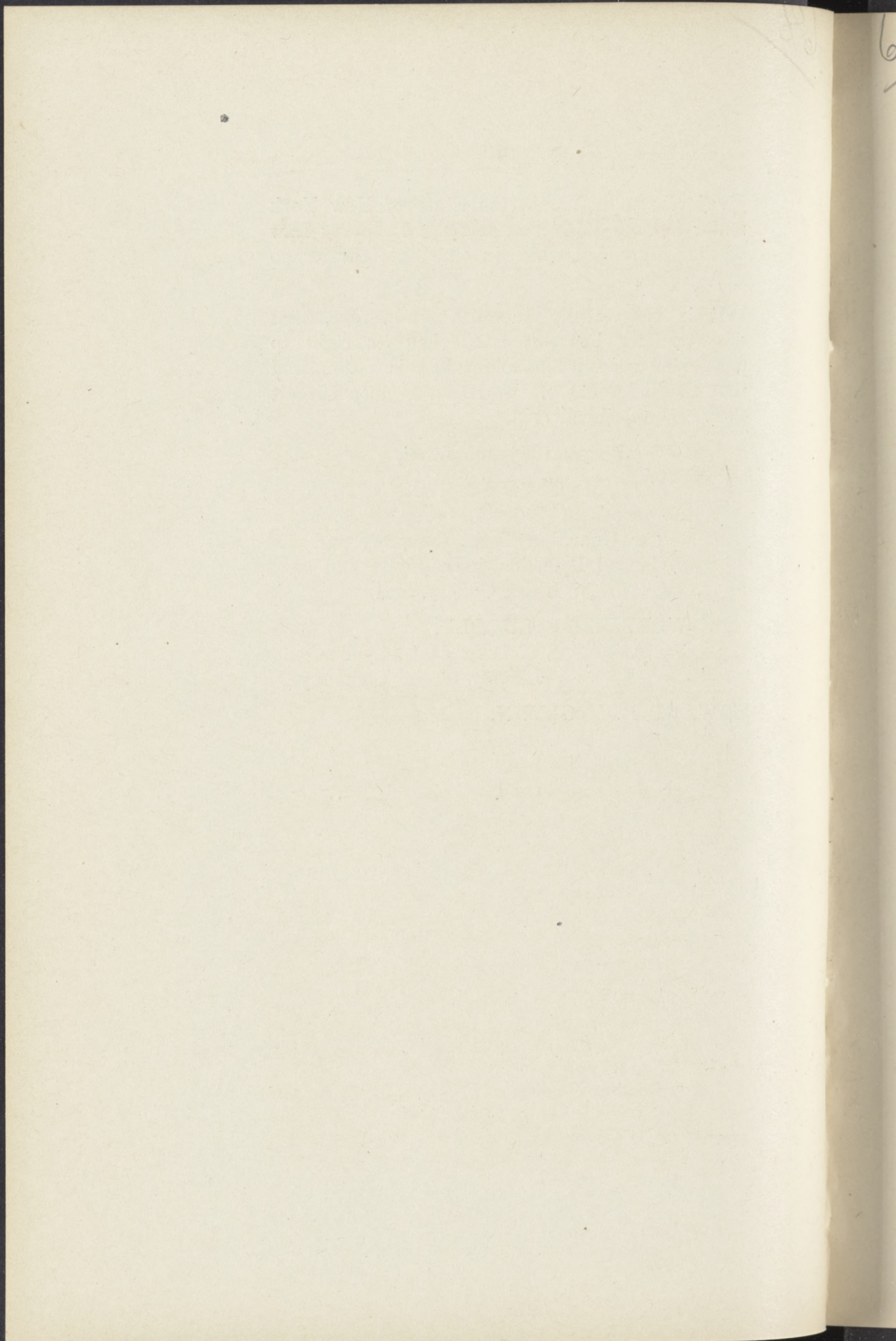
It is respectfully submitted, therefore, that the appellant has not established its right to possession necessary to maintain this action, and that the judgment of the Essex County Circuit Court should be affirmed.

Respectfully submitted,

STEIN, Mc GLYNN & HANNOCH,  
Attorneys of Defendants-Appellees,  
The Guardian Trust Company and  
Conrad Deuchler, individually and as  
Sheriff of Essex County, and

WOLBER & GILHOOLY,  
Attorneys of Defendant-Appellee,  
Liberty Trust Company.

EDWARD R. McGLYNN,  
Of Counsel.



## New Jersey Court of Errors and Appeals

MILL FACTORS CORPORATION, a  
corporation,

*Plaintiff-Appellant,*

*vs.*

THE GUARDIAN TRUST COMPANY,  
a corporation; CONRAD  
DEUCHLER, individually and  
as Sheriff of Essex County;  
LIBERTY TRUST COMPANY, a  
corporation, and NONPAREIL  
TOY & NOVELTY COMPANY, a  
corporation,

*Defendants-Appellees.*

*On Appeal.*

### REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

At the outset of their brief, under the caption "Statement of Facts," defendants-appellees represent the factual situation so *incompletely* as to call for special notice. In the second paragraph of their brief they say:

"It appears from the agreed Stipulation of Facts that on or about April 1, 1927, Nonpareil Toy & Novelty Company sold to the Ferdinand Strauss Corporation 304 gross of toy locomotives (State of Case, p. 35, lines 29 to 36), and sent said corporation an invoice (State of Case, p. 57), from which it appears that the said Nonpareil Toy & Novelty Company held these goods on its premises awaiting shipping instructions from the owner of the merchandise, Ferdinand Strauss Corporation. Thereafter, it appears from the facts that these goods

were 'consigned' to Mill Factors Corporation by the owner, Ferdinand Strauss Corporation, pursuant to a financing agreement of the parties."

At this point they *omit* to state the essential and crucial facts which we shall presently call attention to, and then proceed to say:

"Any interest which Mill Factors Corporation thereby acquired in this merchandise was not disclosed to the people of New Jersey, and especially to New Jersey creditors of Ferdinand Strauss Corporation in any manner whatsoever. No document was recorded (State of Case, p. 38, l. 13); no signs of any kind were placed upon the premises of Nonpareil Toy & Novelty Company indicating that Mill Factors Corporation had any interest in any merchandise stored upon those premises (State of Case, p. 37, l. 18); the merchandise in question bore upon it no signs or labels which would in any way indicate the interest of Mill Factors Corporation (State of Case, p. 37, l. 15)."

The facts which defendants-appellees omitted to mention at the point indicated and which we now ask this Court *to insert* are as follows: that the "consignment" was made on April 12, 1927, in the form of a document which stated that:

"The goods described below are hereby consigned to Mill Factors Corporation to be held by them subject to their lien for advances, outlays and commissions, and are to be disposed of in accordance with our agreement with them.";

that said document, after describing the goods stated that they were then located on the premises of Nonpareil Toy & Novelty Company in Newark, New Jersey; that with said document there was delivered to plaintiff-appellant a document describing the goods and containing a state-

ment *made and signed* by Nonpareil Toy & Novelty Company as follows:

“The above merchandise is stored in our warehouse in the name of Mill Factors Corporation awaiting their shipping instructions. We have put a binder in the name of Mill Factors Corporation, covering fire insurance for the above amount, and as soon as we receive policy, we will mail same to them.”

and that from and after that date Nonpareil Toy & Novelty Company did in fact hold said goods exclusively for plaintiff-appellant and subject to plaintiff-appellant's exclusive control. The insertion of these *omitted* facts in defendants-appellant's brief in the place above indicated would preclude and render legally meaningless and untenable the second above-quoted portion of paragraph 2 of their brief. For said omitted facts show (a) that the goods in controversy were effectively pledged with plaintiff-appellant, (b) that Nonpareil Toy & Novelty Company became the bailee of said goods for plaintiff-appellant, and (c) that there was *no legal need* for any notification of creditors of Ferdinand Strauss Corporation as suggested by defendants-appellees, either by recordation, or by “placing signs on the premises of Nonpareil Toy & Novelty Company, (an extravagant suggestion) or by putting plaintiff-appellant's ‘labels’ on the merchandise.” *Possession of the goods* by the plaintiff-appellant through its *acknowledged and admitted agent* or bailee, Nonpareil Toy & Novelty Company, was notice (if any were needed) of plaintiff-appellant's rights to everyone.

Defendants-appellees contend (on page 3) that since the document dated April 12, 1927 (State of Case, p. 59) on which plaintiff-appellant relies, refers to and hence incorporates the agree-

ment dated March 28, 1925 (State of Case, p. 14), plaintiff-appellant's rights must be determined by this agreement of March 28, 1925. This is obviously a self-contradictory contention. If the document dated April 12, 1927 incorporates the agreement dated March 28, 1925, the contract consists of both documents and not the one which defendants-appellees wish to select, viz. the agreement of March 28, 1925. Yet defendants-appellees proceed to treat that agreement alone as the one which governs this case. Thus defendants-appellees under the caption "The contract between appellant and Ferdinand Strauss Corporation was not a contract of pledge" proceed to say:

"Since the consignment upon which appellant relies (Schedule G, State of Case, p. 59) incorporates in it by reference the provisions of the subsisting agreement, the exact intentions of the parties must be sought in *that* agreement."

Not so. The exact intentions of the "parties" (plaintiff-appellant and Ferdinand Strauss Corporation) must be sought in the agreement of March 28, 1928 *coupled with* the agreement of April 12, 1927, the latter consisting of and evidenced by documents and conduct, viz: consignment document dated April 12, 1927, (State of Case, p. 59), the written acknowledgment and "attornment" signed by Nonpareil Toy & Novelty Company (State of Case, p. 58), the delivery of these documents by Ferdinand Strauss Corporation to plaintiff-appellant on April 12, 1927, the ensuing retention of the goods by Nonpareil Toy & Novelty Company *exclusively for plaintiff-appellant*, and the fact of Ferdinand Strauss' Corporation's indebtedness to plaintiff-appellant on April 12, 1927.

It is only by considering all of these evidential items and matters together that a court can arrive at the true intention of the Ferdinand Strauss Corporation and plaintiff-appellant in their transaction relating to the goods in controversy which occurred on April 12, 1927. In other words, the question in this case is not what did the Ferdinand Strauss Corporation and plaintiff-appellant intend on *March 28, 1924* in and by their agreement of *that* date, but what did Ferdinand Strauss Corporation and plaintiff-appellant intend on *April 12, 1927*, in and by the transaction between them on *that* date. The intention to be sought is the intention in the agreement of *April 12, 1927*, embodying every relevant matter and circumstance.

In the light of this elucidation of the full legal situation and the true legal inquiry, defendants-appellees' *isolation* and separate discussion of the agreement of March 28, 1924, is utterly irrelevant. We concede that *if* that agreement were *the only thing in the case*, and *if* the other documents had not been executed and delivered to plaintiff-appellant on April 12, 1927, plaintiff-appellant could not have claimed the goods in controversy under a pledge. We concede that if plaintiff-appellant relied on said agreement of March, 1924 (*and on nothing else*), plaintiff-appellant could not claim the goods in controversy under a pledge. It is true that that agreement *by itself* could only avail plaintiff-appellant *in the State of New York* and *under the New York Laws*. It is true that the only lien intended *by that agreement* of March 28, 1924, was a lien under *the New York lien law*. But *that agreement* is not *the agreement* involved in *this case*. Yet defendants-appellees insist on treating the agreement of March, 1924, considered by itself,

as *the agreement in this case*, as witness their statement on page 7 of their brief:

“The agreement in the case at bar was drawn in New York State with the obvious intention of creating a lien pursuant to Section 45 of the New York Personal Property Law, and the legal relationship there created is determined by the law of that State.”

That statement is perfectly true as to the agreement of March, 1924 considered by itself. It is obviously false as to the agreement in this case, made on April 12, 1927, even though the latter incorporates by reference the terms of the older agreement. For on April 12, 1927, Ferdinand Strauss Corporation and plaintiff-appellant were dealing with goods *then located in New Jersey* in the hands of an independent third person, (Nonpareil Toy & Novelty Company), and it is impossible reasonably to presume that they intended to deal with those goods “pursuant to Section 45 of the New York Personal Property Law.” Parties are presumed to know the law and hence Ferdinand Strauss Corporation and plaintiff-appellant are presumed to have known that a lien could not be created by them (contractually) on goods *located in New Jersey*, under the New York laws, but only under the New Jersey laws. Yet it is incontestable that they did intend, on *April 12, 1927* to create a *lien* in favor of *plaintiff-appellant* on the goods in controversy in this case. Since it is presumed that parties intend their transactions and contracts to be effectual, it is to be presumed (if any presumption be necessary) that they intended that the lien should be created under the New Jersey law.

In the foregoing discussion with regard to the agreement dated March 28, 1924, we have laid aside all consideration of *the extent to which* that agreement is incorporated in the document

dated April 12, 1927, by reference. The reference is contained in the words "to be disposed of in accordance with our agreement with them." These words *evidently* relate only to such provisions of the agreement referred to as are relevant, that is, such provisions as deal with the matter of the disposal of goods which have been subjected to a lien in favor of plaintiff-appellant for moneys advanced, etc. In this view, the only provisions of the agreement of March, 1924 which thus became a part of the agreement which the parties entered into on April 12, 1927 regarding the goods in controversy are paragraphs dealing with the disposal of said goods (see State of Case, pp. 46 to 54). These paragraphs in no wise affect the question raised by defendants-appellees either one way or another. Hence any consideration of the agreement of March 28, 1924 in this case is irrelevant and needless.

When defendants-appellees finally come to make some mention of the true agreement in this case, as inevitably they must, they advert only to one portion of it, viz. the "consignment" document dated April 12, 1927. (State of Case, p. 58), saying:

"In this connection it may be noted that the consignment upon which appellant claims to rely, far from making any new contract, actually confirmed the existing arrangement and was made pursuant to it.

Even if we examine that instrument upon which appellant relies separate and apart from the agreement to which it refers, we find no indication of a pledge."

If defendants-appellees went further and "examined" the additional facts evidentially and actually connected with "that instrument" they would have no discoverable basis for their statement that "we find no indication of a pledge."

They should include in their "examination" the following essential items, viz. the written acknowledgment signed by *Nonpareil Toy & Novelty Company* and delivered by *Ferdinand Strauss Corporation* to plaintiff-appellant. (See State of Case, p. 58), whereby *Nonpareil Toy and Novelty Company* became plaintiff-appellant's bailee of the goods in controversy, the fact that *Nonpareil Toy & Novelty Company* admittedly held said goods continuously thereafter exclusively for plaintiff-appellant and subject to plaintiff-appellant's exclusive order and control, and the fact that on said date (April 12, 1927) *Ferdinand Strauss Corporation* was indebted to plaintiff-appellant (and continued to owe plaintiff-appellant said indebtedness up to and after the date of the institution of this suit).

Defendants-appellees make reference to the use of the word "consign" in the document dated April 12, 1927, and argue that it should be translated "deposit with" rather than "transfer possession to," (the meaning suggested by us on cited authority). We fail to see what *legal difference* there is between the two meanings, both of which are permissible. Parties may properly and accurately say, in a written instrument, that goods have been "deposited with" one party by the other, where in fact the deposit has been made with the party's agent or bailee, as was this fact in this case, where the goods were in legal contemplation, "deposited" by *Ferdinand Strauss Corporation* with *Nonpareil Toy & Novelty Company*, as plaintiff-appellant's acknowledged bailee.

Defendants-appellees dogmatically assert that "an intent to pledge is absent from the case at bar" (page 8) but they fail to offer any suggestion as to what on earth "the parties" *did* in-

tend by the instruments executed and delivered on April 12, 1927 and the action then and thereafter taken by them.

In part 2 of their brief, defendants-appellees argue that:

“The alleged pledge also fails by reason of want of possession in the pledgee.”

Under this caption defendants-appellees seek to distinguish the cases cited by plaintiff-appellant on the subject of the sufficiency of the change of possession in the case at bar. With reference to the case of *Union Trust Co. v. Wilson* (cited by plaintiff-appellant) defendants-appellees argue that that case involved “a bill of lading or warehouse receipt.” But in the case at bar the pledgor delivered to the pledgee (plaintiff-appellant) a written acknowledgment signed by the depositary, Nonpareil Toy & Novelty Company, and reading:

“The above merchandise is stored in our Warehouse awaiting your shipping instructions. We have put a binder covering fire insurance for the above amount and as soon as we receive policy, we will mail same to you.”

There is no essential difference whatsoever between this written acknowledgment and a warehouse receipt, so far as the question of constructive change of possession and the law of pledge is concerned. The cited case did not turn on any technical or unique quality possessed by a bill of lading or warehouse receipt, but merely recognized such documents as having a symbolic character, that is, of standing for goods and obligating the signer (bailee) to deliver the goods mentioned therein. This same character was fully possessed by the Nonpareil Toy & Novelty Company's acknowledgment in this case.

Moreover the Court in the cited case stated as a universal rule that:

“It always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another, to whom the owner has sold, mortgaged, or pledged the goods, the change in the character of the bailee’s holding satisfies the requirement of a change of possession to validate the sale or pledge.”

The Court does not prescribe here that the bailee’s “assent” must be in the form of a warehouse receipt or in any particular form whatsoever.

With reference to the case of *Pierce v. National Bank of Commerce*, cited by plaintiff-appellant, defendants-appellees are in error when they say that was a case “involving no rights of third parties.” In that case the “third person” (the bank) denied that the pledgor had made the requisite delivery to Pierce (the pledgee). Defendants-appellees are correct, however, in saying that the case was in equity and actually involved the enforcement of an equitable lien in favor of the alleged pledgee. Hence the Court’s pronouncements as to the *law of pledge* are *obiter dicta*. But as a general statement of the law of pledge, made by a United States Circuit Court of Appeals, it is *obiter dicta* of great persuasiveness.

The case of *Young v. Lambert* cited by plaintiff-appellant, is not distinguishable on the ground suggested by defendants-appellees, viz. that “the goods were in a customs warehouse.” There is no essential difference between the possession of goods by a “customs warehouse” and possession by the Nonpareil Toy & Novelty Company, so far as the *law of pledge* is concerned. The comment made by us hereinabove with reference

to the case of *Union Trust Co. v. Wilson*, is wholly applicable here in the same connection. Defendants-appellees further remark that the case in question (*Young v. Lambert*) was decided contrary by the two lower courts, is certainly no point in favor of defendants-appellees. Also that the highest court may have decided the question of law in that case, in the absence of the respondent, can scarcely impeach the legal soundness or authority of the decision.

With reference to the case of *Dublin City Distillery, Ltd. v. Doherty*, cited by plaintiff-appellant, defendants-appellees say that the Court there decided that there was no pledge. That is so, but that was the result of an application of the very rule as to sufficiency of change of possession for which we cited that case. The Court found as a fact that the warehouse belonged to the pledgor itself and hence there was no change of possession. In the case at bar the Nonpareil Toy & Novelty Company actually agreed in writing to hold the goods exclusively for plaintiff-appellant and subject to plaintiff-appellant's exclusive control.

Defendants-appellees' assertion (on page 10) that "in the instant case, too, it appears from the agreement between the appellant and consignor, that the actual selling of the goods was done by the consignor" is erroneous and misleading. The agreement to which they refer, being the agreement dated March 28, 1924, obviously does not establish as a fact that "the actual selling of the goods 'here in controversy' was done by the consignor" (Ferdinand Strauss Corporation). For these goods were not even owned by the "consignor" (Ferdinand Strauss Corporation) until April, 1928, (State of Case, p. 35 par. 6).

With reference to the case of *Israel v. Woodruff* cited by plaintiff-appellant, defendants-appellees say:

“It appears from a reading of the case of *Israel v. Woodruff* (cited by appellant at page 7), that the alleged pledgee held a bill of sale for the goods.”

Their statement is *deceptive*. The *bill of sale* alluded to was one that evidenced *the sale* of the goods *to the pledgor* by the latter's vendor. This *document* of title was *turned over* to the pledgee by the pledgor as *collateral* and as part of the pledge transaction. Defendants-appellees' statement is misleading.

Defendants-appellees' comment (on page 10) on the case of *Jones v. Baldwin* scarcely requires comment from us. The common law regarding pledge has not changed since 1832.

With reference to the case of *Cornelius v. C. C. Pictures*, cited by plaintiff-appellant, defendants-appellees call attention to the fact that in an *earlier* decision of the same Court in the same case, in 297 Fed. 444, the Court had held that the chattel mortgage was invalid because the evidence failed to show a constructive delivery and change of possession. The Court there said:

“A constructive delivery and a change of possession are argued for because of the letter of November 2d to the Evans Company. But the letter does not notify the custodian that it was to hold the negatives as the property of the appellant or even that a mortgage on the negatives was given. There is no suggestion of a change of possession for the benefit of the appellant.” (See pages 445, 446).

(It is remarkable that these identical elements lacking in that case, are conspicuously present in the case at bar.) The case was then remanded

to the lower court to enable the mortgagee to give evidence to supply the missing elements. This was done by the mortgagee at the re-trial, as appears from the opinion of the Court on the second appeal (See 5 Fed. (2d) 157) as follows:

“A copy of said mortgage was filed with Evans Company (bailee), and that concern was fully advised of the transaction between Wener and defendant, and informed that thereafter no prints should be made by it from the negatives except as ordered and to the extent of order by Wener (the mortgagee).

Thereupon Evans Company (bailee) entered in its own records the fact that these negatives were ‘to be released on order of J. Wener only.’ ”

On these new facts the Court held the chattel mortgage valid. The “reasons” for *this* decision assigned by defendants-appellees (on page 12 of their brief) are at least fantastic. The true reasons are stated by the Court itself as follows:

“It always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another to whom the owner has sold, mortgaged or pledged the goods, the change in the character of the bailee’s holding satisfies the requirement of a change of possession to validate the sale or pledge. This it seems to us is the real test, viz: Was there a change in the character of the bailee’s holding?

“In this instance there assuredly was, for on the records of the Evans Company, which in the view most favorable to the appellants was no more than the mortgagor’s bailee, absolute dominion over these cinema negatives passed to Wener, in that Wener alone was recognized by Evans Company as having authority to release the films producible from the negatives.”

Defendants-appellees on page 12 of their brief suggest that plaintiff-appellant should have removed these goods from the premises of the Nonpareil Toy & Novelty Company and *stored them elsewhere*. By this significant suggestion, defendants-appellees demonstrate the insubstantial character of their legal theory. For it is obvious that there could be *no legal difference* between plaintiff-appellant's taking the goods from Nonpareil Toy & Novelty Company's premises and storing them with *another person* as its bailee, as defendants-appellees suggest, and plaintiff-appellants leaving the goods with Nonpareil Toy & Novelty Company as *plaintiff-appellant's bailee* pursuant to an explicit agreement to that effect made *with Nonpareil Toy & Novelty Company* and Ferdinand Strauss Corporation.

Defendants-appellees on page 13 of their brief offer their interpretation of the legal situation in this case. They say:

“In the instant case we believe that the most that can be claimed for appellant is an ‘agreement respecting possession.’ Before the alleged pledging the goods in question in the instant case were on the premises of the Nonpareil Toy & Novelty Company; after the pledging they were still on those premises. There was no delivery; there was no possession in the pledgee. There was, at most, an agreement made by the Nonpareil Toy & Novelty Company to hold the said merchandise in the name of the factor, and subject to its shipping instructions. This could not take the place of delivery and possession.”

Our only comment on this statement is that it discloses a full recognition of *the facts*, but an utter disregard of *the law*.

On page 15 of their brief defendants-appellees quote from the case of *Ommen v. Talcott*, 188 Fed.

401. That was a suit by a trustee in bankruptcy to recover property taken by the defendant from the bankrupt. Defendant claimed he had a *previous* lien on the goods of the bankrupt. The Court found that:

“There is nothing to show that defendant or any one in his behalf was ever in the physical possession, custody, and control of any of the property of the company at its premises until just before the bankruptcy.” (See page 404.)

Defendants-appellees omit to mention this *distinguishing fact*.

The case of *In re Merz*, 37 Fed. (2d) 1, cited by defendants-appellees on page 14 of their brief, was one in which the merchandise claimed to be pledged, remained at all times in *the actual possession of the alleged pledgor* himself. The Court said:

“The real difficulty with the claim that Auffmordt had possession is that they had no power to exclude Merz. They did not hold the lease of the premises where the goods were stored, and they had no key to the premises. The signs on the floors where the merchandise was placed were those of *Merz*. No one going there to purchase goods would have had reasonable notice that Auffmordt had any interest in the premises.” (See page 3.)

Here was a true case of a *secret lien*.

In the case of *Hodges v. Kimball*, 49 Iowa 577, cited by defendants-appellees on page 15, it is obvious that the alleged pledgee never had possession or control of the goods either personally or through any agent or bailee.

In the case of *Moffat v. Beeler*, 91 Kans. 207, cited by defendants-appellees on page 15, the goods were being held by a prior mortgagee (a

bank) under a *prior chattel mortgage* and such prior mortgagee agreed to hold said goods (subject to its own prior lien) also in behalf of the subsequent mortgagee. The Court said:

“In the present case it may be that substantial justice would have been subserved by upholding the second chattel mortgage. But the general rule that would be established by such a decision here would hamper the operation of the recording act and might open the door to frequent injustice. For illustration, a merchant might make a small chattel mortgage on his stock and give the mortgagee possession until payment should be made. A third person advised by the record that the stock was worth more than the lien might give credit to the mortgagor, only to find out later that in the meantime a second mortgage for the full value of the stock had been given, which was not of record, but which was valid because the first mortgagee had agreed to hold possession for the protection of the second mortgagee as well as for his own.”

The decision was obviously justified by the peculiar facts, which had the positive effect of deceiving creditors. In the case at bar the Nonpareil Toy & Novelty Company was not holding the goods *for its own benefit or subject to any lien of its own*.

In the case of *Hastings v. Fithian*, cited by defendants-appellees on page 16, there was manifestly no change of possession whatsoever, since the goods *remained* at all times *in the actual possession of the mortgagors* themselves.

On page 17 of their brief, defendants-appellees refer to the fact that when the sheriff (in defendants-appellees' attachment suit) inquired of the Nonpareil Toy & Novelty Company for the goods “*which had been manufactured for*” Ferd-

inand Strauss Corporation, the goods in question were pointed out to him. It is significant that the sheriff was careful not to inquire for goods *belonging to* Ferdinand Strauss Corporation but merely for goods which *had been manufactured for* Ferdinand Strauss Corporation. The goods in truth had been manufactured for Ferdinand Strauss Corporation. Undoubtedly the sheriff got his information from the Ferdinand Strauss Corporation itself.

Defendants-appellees' statement that such goods were thus pointed out to the sheriff "without any reference whatsoever to the appellant's alleged claim thereto" is wholly unsupported by anything in the agreed state of facts. In any event, however, this matter is wholly irrelevant and could have no effect on plaintiff-appellant's rights.

Respectfully submitted,

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