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Notice and Grounds of Appeal

10

HUDSON COUNTY CIRCUIT COURT

MOREY AND COMPANY, INC., a  
Corporation,

Appellant,

vs.

JOSEPH SCHAAD, *et als.*,

Respondents.

20

To MR. G. EARL BRUGLER, Attorney of Defendants  
and Respondents.

Dear Sir:

TAKE NOTICE that the plaintiff hereby appeals to  
the Court of Errors and Appeals in the last resort  
in all causes in New Jersey from each and every  
part and the whole of the judgment entered in the  
above entitled cause on the following grounds:

30

1. That judgment should have been rendered for  
the plaintiff and against the defendants.

2. That the Trial Court should have granted  
the motion of the plaintiff for summary judgment  
as against the defendants and ordered an assess-  
ment of damages under writ of inquiry.

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3. That the Trial Court should have found that  
the Statute entitled, "An Act Concerning Condi-  
tional Sales and to make uniform the law relating  
thereto" did not require the plaintiff to have the

*Notice and Grounds for Appeal*

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10 conditional bills of sale filed within ten days after the making thereof as against the defendants for the reason that the defendants did not acquire a lien upon the goods sold until after the dates of filing of said conditional sales.

4. That the determination of the Trial Court that the conditional sales of plaintiff were void as against the defendants was erroneous.

20 5. That the Court should not have granted judgment final in favor of the defendants.

6. That the Court should not have granted judgment final in favor of the defendants because the undisputed evidence in the case showed that said defendants did not have any lien upon the goods until subsequent to the filing of the conditional sales.

30 7. That the Trial Court should have given judgment in favor of the plaintiff and against the defendants because the conditional sales filed were valid as against the defendants.

Dated, October 23, 1922.

SAMUEL KOESTLER,

Attorney of Plaintiff.

## Writ

## HUDSON COUNTY CIRCUIT COURT 10

STATE OF NEW JERSEY, to Richard Horgan, one of the Coroners of the County of Hudson, State of New Jersey.

GREETING: We command you that if Morey & Company, Inc., shall make you secure, you cause to be taken and delivered to it 20

- 1 New No. 2 Owen Milling Machine, c/s and vise.
- 1 Drop Hammer, used.
- 1 Advance 18x8 used Lathe with 4 jaw Cushman chuck.
- 1 10" Builders Grinder on Stand. with c/s.
- 4 Vises, 1-3", 2-4½", 1 Blacksmith vise.
- 1 Fosdick 3' Radial Drill, used.
- 1 Burke Bench Drill with chuck, New.
- 1 Forge and Anvil. 30
- 1 used No. 52 Bliss press.
- 1 new Smith hand screw machine with some box tools.
- 1 Miner & Peck No. 3-A Lifter,

which said Joseph Schaad, Aaron Rips, Oscar B. Spencer, Bailiff of Aaron Rips, and Thomas Madigan, Sheriff of the County of Hudson, and Improved Propeller Corporation, took and unjustly detains as is said; and that you summon the said Joseph Schaad, Aaron Rips, Oscar B. Spencer, 40  
Bailiff of Aaron Rips, and Thomas Madigan, Sheriff of the County of Hudson, and Improved Propeller Corporation to answer the annexed complaint of Morey & Company, Inc., in an action at law in the Hudson County Circuit Court, and

*Writ*

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that you notify them that unless they file their answers to said complaint with the Clerk of the said Hudson County Circuit Court at Jersey City, New Jersey, within twenty days after service upon them of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against them.

20

WITNESS, Honorable LUTHER A. CAMPBELL,  
Judge of our said Circuit Court, at Jersey City  
aforesaid, the            day of March, 1922.

JOHN J. McGOVERN,  
Clerk.

SAMUEL KOESTLER,  
Attorney.

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## Complaint

HUDSON COUNTY CIRCUIT COURT

10

MOREY AND COMPANY, INC., a  
Corporation,

Plaintiff,

vs.

JOSEPH SCHAAD, *et als.*,

Defendants.

Action at Law  
In Replevin

20

The plaintiff, Morey & Company, Inc., a corporation of New York, having its principal place of business at No. 404 Broome Street, in the City of New York, says:

1. On January 26, 1922, plaintiff was and ever since has been the owner of the following goods and chattels, to-wit: 30

1 New No. 2 Owen Milling Machine, c/s and vise.

1 Drop Hammer, used.

1 Advance 18x8 used Lathe with 7 jaw Cushman chuck.

1 10" Builders' Grinder on Stand. with c/s.

4 Vises, 1-3", 2-4 $\frac{1}{2}$ ", 1 Blacksmith vise.

1 Fosdick 3' Radial Drill, used.

1 Burke Bench Drill with chuck, New.

1 Forge and Anvil. 40

1 used No. 52 Bliss press.

1 New Smith hand screw machine with some box tools.

1 Miner & Peck No. 3-A Lifter.

*Complaint*

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

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3. On that date and divers dates since that date and before the issuance of the writ of replevin herein the said defendants have wrongfully taken the said goods and chattels from the possession of the plaintiff and refused to surrender possession of said goods to the plaintiff, and said defendants wrongfully detained and still wrongfully detains the same, although the plaintiff has made written demand upon the said several defendants for the return of the said goods and chattels to the plaintiff.

30

4. That said defendants, notwithstanding the said several demands upon them for the return of said goods and chattels to the plaintiff, have failed, neglected and refused to return said goods and chattels to the plaintiff.

Plaintiff demands possession of said goods and chattels and Twenty-five Hundred (\$2,500.00) Dollars damages for their detention.

SAMUEL KOESTLER,

Attorney of Plaintiff.

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## Answer

HUDSON COUNTY CIRCUIT COURT. 10

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MOREY & COMPANY, INC., a  
Corporation,

Plaintiff,

vs.

JOSEPH SCHAAD, *et als.*,  
Defendants.

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In Replevin. 20

The defendants, JOSEPH SCHAAD, AARON RIPS and OSCAR B. SPENCER, bailiff of Aaron Rips, all residents of the County of Hudson, in the State of New Jersey, for answer to the complaint filed herein say:

1. Defendants deny the truth of the matters contained in the complaint filed herein. 30

First Separate Defense:

1. The plaintiff was not the owner and was not entitled to the immediate possession of the goods and chattels mentioned in the complaint at the time of the alleged detention thereof by defendants.

Second Separate Defense:

1. The goods and chattels described in the complaint herein were delivered to the defendant Improved Propeller Corporation under and by virtue of conditional contracts of sale with said defendant as follows: 40

*Answer*

10 Contract dated February 16th, 1921 for the following goods and chattels:

1 New #2 Owen Milling Machine, c/s and vise.

1 Drop Hammer, used.

1 Advance 18x8 used Lathe with 4-jaw Cushman Chuck.

1 10" Builders Grinder on Stand with c/s.

4 Vises, 1-3", 2-4 $\frac{1}{2}$ ", 1 Blacksmith vise.

1 Fosdick 3' Radial Drill, used.

20 1 Burke Bench Drill with chuck, New.

1 Forge and Anvil.

Contract dated June 7th, 1921 for the following goods and chattels:

1 Used #52 Bliss press.

1 New Smith hand screw machine with some box tools.

Contract dated June 9th, 1921, for the following goods and chattels:

1 Miner & Peck #3-A Lifter.

30 2. That said contracts were not filed within 10 days after the making thereof in the office of the Register of Deeds of the County of Hudson where said goods and chattels were delivered to and first kept for use by said defendant, Improved Propeller Corporation, the buyer thereof, as required by the statute in such case made and provided; that said contract of conditional sale made on February 16th, 1921, was not filed until March 23rd, 1921; that said contract of conditional sale made on 40 June 7th, 1921, was not filed until June 22nd, 1921; that said contract of conditional sale made on June 9th, 1921, was not filed until June 22nd, 1921.

3. That at the time of the making and filing of said contracts, said defendant Improved Propeller

*Answer*

Corporation was indebted to one George J. Houtain in the sum of \$920.65; that said Houtain, a creditor of said Improved Propeller Corporation as aforesaid was without notice of the provisions of said contracts of conditional sale.

10

4. That on the 27th day of December, 1921, said Houtain sold and assigned, by his instrument in writing, his aforesaid claim for \$920.65, against said Improved Propeller Corporation, to the defendant Joseph Schaad, who now holds the same; that said defendant Joseph Schaad, on January 28th, 1922, instituted an action in attachment against said defendant Improved Propeller Corporation in the Hudson County Circuit Court, and caused to be issued out of said court, a writ of attachment directed to Thomas Madigan, Sheriff of the County of Hudson and caused said sheriff to levy upon and seize the goods and chattels aforesaid to satisfy his said claim assigned to him as aforesaid, against said Improved Propeller Corporation.

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30

5. That by reason of the failure of plaintiff to file said contracts of conditional sale as aforesaid, as required by said statute, the same were void as to said Houtain and his assignee, Joseph Schaad; that by the issuance of said attachment at the suit of said Schaad, said defendant acquired a lien against said goods and chattels and the same thereby became subject to the claim of said defendant and liable to sale in said attachment action to satisfy such judgment as should be rendered said defendant, the plaintiff in said action.

40

Third Separate Defense:

1. Plaintiff reiterates and re-alleges paragraphs one, two, three and four of the first separate defense.

*Answer*

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2. That at the time of the issuance of the writ of replevin in this action, said goods and chattels were lawfully in the possession of said Thomas Madigan, as Sheriff as aforesaid under and by virtue of said writ of attachment; that said attachment suit was then pending and undetermined and said goods and chattels were in the custody of the law in the hands of said sheriff, pending the determination of said attachment action and, therefore, not subject of replevin by the plaintiff herein.

20

Fourth Separate Defense:

1. Plaintiff reiterates and re-alleges paragraph one of the first separate defense.

2. That at the time of the issuance of the writ of replevin in this action, said goods and chattels were lawfully in the possession of said defendant, Improved Propeller Corporation, which defendant was entitled to the possession of the same under and by virtue of said contracts of conditional sale made with plaintiff as aforesaid.

30

Fifth Separate Defense:

1. That on August 19th, 1920, the defendant Aaron Rips sub-let and rented premises known as No. 1299 Paterson Plankroad, in the Borough of Secaucus, Hudson County, New Jersey, to the defendant Improved Propeller Corporation, and among other moneys reserved rent at the rate of \$75.00 a month payable in advance on the first day of each and every month; that said defendant failed to pay rent due said Rips for the months of

40 January and February, 1922, amounting to \$150; that thereafter said Rips duly authorized and empowered the defendant Oscar B. Spencer as his bailiff to distrain the goods and chattels of said Improved Propeller Corporation for said arrears

*Answer*

of rent, and thereafter, on February 3, 1922, said bailiff duly distrained the goods and chattels of said Improved Propeller Corporation, including the goods and chattels described in the complaint filed herein, to satisfy the rent due under the aforesaid sub-lease.

10

2. Defendant reiterate and re-allege paragraphs one and two of the first separate defense.

3. That at the time of the making and filing of said contracts, said defendant Improved Propeller Corporation was indebted to the defendant Aaron Rips, under said sub-lease, in the sum of \$150, for rent payable as aforesaid; and said Rips, a creditor of said Improved Propeller Corporation was without notice of the provisions of said contracts of conditional sale.

20

4. That by reason of the failure of plaintiff to file said contracts of conditional sale as aforesaid, as required by said statute, the same were void as to said Aaron Rips; that by virtue of said distress proceedings, said Aaron Rips acquired a lien against said goods and chattels and the same thereby became subject to the claim of said defendants and liable to sale in said proceedings to satisfy said claim for rent with costs.

30

Sixth Separate Defense:

1. Defendants reiterate and re-allege paragraphs one, two, three and four of the first separate defense.

2. That the defendant Thomas Madigan, Sheriff as aforesaid, in the particulars aforesaid, was in the performance of his official duties and acted in good faith, without malice, in obedience to and under process by attachment regular and valid upon its face, and levied upon said property pur-

40

*Answer*

10 suant to said writ before the return day thereof, without knowledge as to the true ownership of the same, other than the reasonable and probable cause of believing that said property was owned by said Improved Propeller Corporation, as claimed by said Joseph Schaad; said property being in fact in possession of said Improved Propeller Corporation and the apparent owner thereof.

## Seventh Separate Defense:

20 1. Defendants reiterate and re-allege paragraphs one, two, three and four of the first separate defense.

2. That the defendant Thomas Madigan, as Sheriff as aforesaid, in the particulars aforesaid, was in the performance of his official duties and acted in obedience to and under process by attachment in all respects regular and valid, sued out by said Joseph Schaad on a just claim against said Improved Propeller Corporation; by virtue of said writ, said defendant duly and lawfully seized said goods and chattels before the return day thereof.

30

## Objection In Point of Law:

Defendants will object at the trial hereof that this action should be dismissed on the ground that plaintiff seeks to replevin and recover possession of goods and chattels in the hands of the Sheriff of the County of Hudson and in the custody of the law by virtue of a certain writ of attachment issued out of this court in an action wherein the defendant Joseph Schaad was plaintiff and said defendant Improved Propeller Corporation is defendant; that said action was pending and undetermined at the time of the institution of this suit and the seizure of said goods and chattels under and by virtue of the writ of replevin herein.

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*Answer*

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Defendants demand that they be re-given possession of said goods and chattels and demand damages against said plaintiff in the sum of \$2500. by reason of the unlawful taking and detention of the same under the writ of replevin issued herein.

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G. EARL BRUGLER,

Attorney for Defendants, Joseph Schaad,  
Aaron Rips, and Oscar B. Spencer.

20

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## Reply

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## HUDSON COUNTY CIRCUIT COURT.

20

MOREY AND COMPANY, INC.,  
Plaintiff,

vs.

JOSEPH SCHAAD, *et als.*,  
Defendants.

Action at Law  
In Replevin.

The Reply of the plaintiff, Morey and Company, Inc., to the answer of the defendants, Joseph Schaad, Aaron Rips, Oscar B. Spencer, Bailiff of Aaron Rips.

To First Separate Defense:

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1. Plaintiff alleges that it was the owner of the goods and chattels and entitled to possession thereof as alleged in the complaint.

To Second Separate Defense:

1. Plaintiff admits it contracted for the conditional sale of the goods, chattels and machinery mentioned in the complaint, under three conditional contracts of sale which have been filed and recorded in the Office of the Register of Hudson County in the manner provided by Chapter 210 of the Laws of New Jersey for the year 1919.

40

2. That at the time of filing of said contracts not one of the defendants has any attachment or other lien upon said goods, chattels and machinery.

3. Plaintiff denies that the indebtedness alleged in the said third paragraph of said separate defense or the assignment thereof to the defendant,

*Reply*

Joseph Schaad, as alleged in paragraph 4 of said separate defense or gave said Schaad any right to question the validity of the conditional sales for the reason that neither the said Schaad or his assignor had any lien upon the goods upon the filing of said conditional sales.

10

## To Third Separate Defense:

1. Plaintiff denies that said goods were in the custody of law but were in fact in the hands of the Sheriff under a levy made by him under a Writ of Attachment issued out of the Hudson County Circuit Court at the suit of the defendant, Joseph Schaad, against the Improved Propeller Corporation, and that at the time of said levy and the issuance of said Writ of Attachment and levy thereunder, the conditional bills of sale were filed according to law.

20

## To Fourth Separate Defense:

1. That at the time of the issuance of said Writ of Attachment at the suit of said Joseph Schaad, that the said goods and chattels and machinery were in the possession of the Improved Propeller Corporation, none of which the said corporation was entitled to possession thereof, said Company having made default in the payments provided to be made and possession of said goods having been duly demanded by the plaintiff and surrendered to the plaintiff by the Improved Propeller Corporation and that at and before the time of the issuance of said Writ of Attachment and any levy thereunder, the conditional bills of sale were duly filed as aforesaid.

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## To Fifth Separate Defense:

1. Plaintiff has no knowledge as to the indebtedness to said Rips but alleges that at the time of the filing of the conditional bills of sale for said

*Reply*

10 goods, chattels and machinery, the said Rips did not have any lien upon said goods, chattels and machinery and, therefore, his rights, if any, are subject and subsequent to the rights and demand of the plaintiff and it is immaterial whether or not the said Rips had any notice of the statutory filing of the contracts prior to the acquiring of any lien by said Rips.

To Sixth Separate Defense:

20 1. Plaintiff alleges that the Sheriff did not make a proper levy upon said goods, chattels and machinery for the reason that said Sheriff knew of plaintiff's title thereto by reason of an order previously made by the Hudson County Circuit Court in another attachment suit then pending in said Court against the Improved Propeller Corporation at the suit of Walter M. Shaw, which order was served upon an authorized representative of the Sheriff and said goods were thereupon released from the custody of the said Sheriff under said  
30 Shaw attachment to the plaintiff herein on January 26, 1922; that thereafter said Rips and Schaad with full knowledge of the ownership of the plaintiff attempted by their respective distress proceedings and attachment proceedings to acquire a lien upon the property of this plaintiff.

To Seventh Separate Defense:

40 1. Plaintiff denies that the Sheriff of Hudson County has a valid writ of attachment and even if said Writ of Attachment against the defendant Improved Propeller Corporation, was valid it would have no effect or validity as a levy upon property belonging to the plaintiff.

Objection to Answer:

Plaintiff reserves the right to object to and move

*Reply*


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to strike out the Second, Third, Fourth, Fifth, Sixth and Seventh Separate Defenses on the ground that they do not in law constitute a defense to the plaintiff's cause of action for the reason that Chapter 210 of the P. L. of 1919 of the State of New Jersey does not render a conditional contract of sale void for failure to file within ten days of its making but merely renders such contract void as to a creditor of the buyer who without notice acquires by attachment or levy a lien upon the goods before a contract or copy shall have been filed and the answer in every defense admits that contracts were filed long before the answering defendants acquired any attachment or lien upon said goods and chattels.

Said plaintiff further reserves the right to move, notwithstanding the filing of this reply, for Summary Judgment on the ground that in truth and fact the defendants have no defense to the plaintiff's suit and unlawfully interfered with the plaintiff exercising the right of ownership of said goods.

SAMUEL KOESTLER,

Attorney for Plaintiff.

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## Rejoinder

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## HUDSON COUNTY CIRCUIT COURT

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 MOREY AND COMPANY, INC.,

Plaintiff,

vs.

 JOSEPH SCHAAD, *et als.*,

20

Defendants.

 Action at Law  
 In Replevin.
 

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The rejoinder of Joseph Schaad, Aaron Rips and Oscar B. Spencer, Bailiff of Aaron Rips, to the reply of plaintiff.

Rejoinder to Reply to Second Separate Defense:

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1. Defendants deny that said contracts of conditional sale were filed with the Register of Deeds in the County of Hudson, as required by the statute, in order to reserve title to said property in the plaintiff as against defendants.

2. Defendants deny paragraph two.

3. Defendants deny paragraph three.

Rejoined to Reply to Third Separate Defense:

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1. Defendants deny that said contracts or conditional bills of sale were filed according to law, and therefore were void and invalid as against defendants.

Rejoinder to Reply to Fourth Separate Defense:

1. Defendants deny that the Improved Propeller Corporation was not entitled to possession of said goods and chattels and deny that plaintiff duly demanded said chattels of said Improved

*Rejoinder*


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Propeller Corporation and deny that said Improved Propeller Corporation surrendered to plaintiff said goods and chattels. 10

Rejoinder to Reply to Fifth Separate Defense:

1. Defendants deny that said claim of the defendant Rips was subject and subsequent to the rights and demands of plaintiff and deny that Rips had no lien upon said goods and chattels, and further deny the alleged immateriality as to whether or not said Rips had notice of the statutory filing of said contracts of conditional sale. 20

Rejoinder to Reply to Sixth Separate Defense:

1. Defendants deny that the Sheriff of the County of Hudson did not make a proper levy upon said goods and chattels; deny that said Sheriff knew that said goods and chattels belonged to plaintiff by reason of the order mentioned; that said order was made by consent of the plaintiff in said other attachment suit, for the purpose of releasing said goods and chattels from the operation of said other attachment suit inasmuch as the levy in said other attachment was deemed by said attaching plaintiff to cover sufficient other chattels of said attached defendant, to satisfy the claim of said plaintiff; that said order was made without an adjudication or trial as to the title of said goods and chattels, under the circumstances aforesaid; that said defendants had no knowledge and at no time believed that the title to said goods and chattels was in the plaintiff herein, but verily believed and still believe said goods and chattels to belong to said Improved Propeller Corporation. 30 40

G. EARL BRUGLER,  
Attorney for Defendants,  
Schaad, Rips and Spencer.

## Answer

10 HUDSON COUNTY CIRCUIT COURT

---

MOREY AND COMPANY, INC.,

Plaintiff,

vs.

20 JOSEPH SCHAAD, *et als.*,

Defendants.

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Action at Law  
In Replevin.

The defendant, Improved Propeller Corporation, answering the complaint filed herein, says:

30 1. It admits that the plaintiff is the owner of the goods and chattels mentioned in paragraph 1, the same having been sold to this defendant on conditional sale, the provisions of which this defendant was unable to carry out and that by reason of attachment having been issued against this defendant out of the Hudson County Circuit Court at the suit of Walter M. Shaw, the provisions of said conditional sale were breached entitling the plaintiff to the immediate possession of said goods and chattels.

40 2. That this defendant on February 14, 1922, did surrender to plaintiff the key of the factory at No. 1299 Paterson Plank Road, Secaucus, New Jersey, the building in which said goods and chattels were then located, in order to enable said plaintiff to take actual possession of said goods and chattels and to remove the same from said premises pursuant to the terms of the conditional

*Answer*

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bills of sale under which said goods and chattels came into the possession of this defendant.

3. This defendant denies that it has refused to surrender possession of said goods and chattels to plaintiff or that the plaintiff is entitled to any damages against this defendant for the reasons above alleged.

PHILIP COHEN,

Attorney of Defendant,  
Improved Propeller Corp.

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Notice of Application for Summary Judgment by Default and to Strike Out Answer

10

HUDSON COUNTY CIRCUIT COURT

MOREY AND COMPANY, INC.,

Plaintiff,

vs.

20

JOSEPH SCHAAD, *et als.*,

Defendants.

Action at Law.  
In Replevin.

To: MR. G. EARL BRUGLER, Attorney of the Defendants, Joseph Schaad, Aaron Rips and Oscar B. Spencer, Bailiff of Aaron Rips, and Mr. PHILIP COHEN, Attorney of the Improved Propeller Corporation.

30

Gentlemen :

You and each of you are hereby notified that on Friday, the sixteenth day of June, 1922, at ten o'clock in the forenoon of that day (daylight time), I shall apply to his Honor Luther A. Campbell, Judge of the Hudson County Circuit Court, upon affidavits, of which true copies are herewith submitted to you, for an order for Summary Judgment upon the facts disclosed by said affidavits that the matters of defense set up in the defendants' answer do not constitute any defense to plaintiff's replevin suit and in support of said motion I shall move separately to strike out from the answer, defenses set up by Schaad, Rips and Spencer as follows:

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*Notice of Application for Summary Judgment*

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The First Separate Defense:

Because the plaintiff was entitled in fact to the immediate possession of said goods and chattels.

10

The Second Separate Defense:

Because the contract of conditional sale does not have to be filed within ten days after the making thereof except as against a creditor who obtains a lien and the answer contained in said second defense shows that the debt therein mentioned, if it existed, was not a lien on the goods and chattels mentioned in plaintiff's complaint until long after the filing of said conditional sales.

20

Third Separate Defense:

On the ground as aforesaid and upon the further ground that the goods levied upon by the Sheriff under a Writ of Attachment are not in *custodia legis* and for the further reason that there was pending an attachment suit against the Improved Propeller Corporation at the suit of one Walter M. Shaw in which suit the said Schaad should have applied to be made a party as applying creditor and not have issued a separate attachment and for the further reason that in the Shaw attachment an order was made by this Court determining that the Sheriff should deliver said goods and chattels to the plaintiff, which order and proceedings are a part of the records of this Court.

30

Fourth Separate Defense:

Because the facts produced by the affidavits show that the Improved Propeller Corporation had forfeited its rights to possession of said goods and chattels and had in fact surrendered possession of the same to the plaintiff.

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Fifth Separate Defense:

Because the defendant, Aaron Rips, did not

*Notice of Application for Summary Judgment*

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10 have any lien upon the goods and chattels mentioned in plaintiff's complaint until long after the filing of the conditional bills of sale.

Sixth Separate Defense:

Because the levy of the Sheriff was not made until long after the filing of the conditional sales as aforesaid.

Seventh Separate Defense:

20 The good faith of the Sheriff in acting on the justness of the claim in the attachment suit is immaterial. The attachment gave no lien upon the property as against the plaintiff for the reason that prior to the issuance of said Writ of Attachment and levy thereunder, the conditional sales were duly filed.

30 And you are further notified that plaintiff will move for Summary Judgment and for an order determining that the plaintiff is the owner of said goods and chattels and entitled to judgment therefor, together with damages for detention, which damages will be claimed in the sum of Four Hundred and Twenty-one Dollars and Eighty Cents (\$421.80), or in the alternative, that an Interlocutory Judgment in the nature of a Summary Judgment be awarded against the said several defendants together with a Writ of Inquiry to assess the damages of the plaintiff against the defendants by reason of the detention of said property by the defendants.

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SAMUEL KOESTLER.

Attorney of Plaintiff.

**Affidavits on Motion for Summary Judgment, Etc.**

10

HUDSON COUNTY CIRCUIT COURT

MOREY AND COMPANY, INC.,  
Plaintiff,

vs.

In Replevin.

JOSEPH SCHAAD, *et als.*,  
Defendants.

20

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

SAMUEL MOREY, of full age, being duly sworn according to law on his oath deposes and says: I am the Treasurer of Morey & Company, Inc., a corporation of the State of New York, located at No. 404 Broome Street, New York City. The said corporation is engaged in the sale of machinery and on the sixteenth day of February, 1921, Morey & Company, Inc., did receive an order from the Improved Propeller Corporation, a corporation having its place of business located at No. 1299 Paterson Plank Road, Secaucus, Hudson County, New Jersey, for

30

1 New No. 2 Owen Milling Machine, c/s and vise;

40

1 Drop Hammer, used;

1 Advance 18x8 used Lathe with 4 Jaw Cushman chuck;

1 10" Builders' Grinders on Stand with c/s;

4 Vises, 1-3", 2-4½", 1 Blacksmith vise;

*Affidavit on Motion for Summary Judgment*

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- 1 Fosdick 3' Radial Drill, used;
- 1 Burke Bench Drill with chuck, New;
- 1 Forge and Anvil;

20

the total price of which was agreed to be the sum of Thirty-two Hundred (\$3200.00) Dollars, which machinery was sold by Morey & Company, Inc., to the Improved Propeller Corporation for said sum of Thirty-two Hundred (\$3200.00) Dollars, upon a conditional bill of sale, payable Eight Hundred (\$800.00) Dollars cash with the order, three notes of Two Hundred (\$200.00) Dollars each due one, two and three months after date of delivery; four notes of One Hundred and Fifty (\$150.00) Dollars each, due four, five, six and seven months respectively, and six notes at Two Hundred (\$200.00) Dollars due eight, nine, ten, eleven, twelve and thirteen months respectively, with interest at six per cent per annum. The said agreement contained the following clauses:

30

40

"It is mutually agreed that title to the property mentioned herein and appurtenances, and all subsequent additions thereto, shall remain in the MOREY & COMPANY, INC., hereinafter designated as the "Company," until fully paid for in cash; that in case of the rejection of the property, or failure to pay as stated herein, undersigned, the purchaser, shall at once return and deliver the said property, in good order, to the "Company" at 404 Broome Street, in the Borough of Manhattan, City, County and State of New York; that a retention of the property furnished, after thirty days from date of railroad notice of arrival if shipped f.o.b

*Affidavit on Motion for Summary Judgment*

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or from date of actual delivery, whichever is hereinbefore agreed upon, shall constitute a trial and acceptance and be conclusive admission of the truth of all the representations made by or for the "Company" and void all its contracts of warranties, express or implied. It is mutually expressly agreed that this agreement is not modified or added to by any agreements not expressly stated herein, except the terms and conditions on the back hereof which are expressly made part hereof, and that this agreement is the entire contract between the said parties and contains all the terms agreed upon between the said parties. This agreement enures to the benefit of the successors and assigns of the "Company." This order is subject to acceptance or rejection by a properly authorized officer of the "Company."

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The terms and conditions made a part of said agreement and printed on the back thereof are as follows:

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"It is mutually expressly agreed that in the event of a default in the payment of any of the notes delivered by the purchaser to the "Company," or any renewal notes thereof, or in the event of a default in the payment of any installment, as herein provided, or in the event that the purchaser fails to deliver to the "Company" the notes evidencing the balance due under this contract, as hereinbefore set forth, or in the event that the purchaser removes the prop-

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*Affidavit on Motion for Summary Judgment*

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erty herein described, from the business address herein set forth without the written consent of the "Company," or in the event of the filing of a petition in bankruptcy, by or against the said purchaser, or in the event of any proceedings or action being instituted by or against the said purchaser, whereby a Receiver or custodian of the assets of the said purchaser is appointed in any court, or in case the purchaser does not act denoting his insolvency, or in the event that the said purchaser shall discontinue his business, or in the event of a breach on the part of the purchaser of any of the terms, covenants or conditions in this agreement contained, then in that event the whole unpaid balance, whether evidence by notes or otherwise, together with all collection charges, interest and protest fees, shall, without notice or demand, immediately become due and payable; at the option of the "Company," anything herein contained on the contrary notwithstanding; and the "Company," or its agents shall have the right, with or without legal process to retake possession of the said property and at its option, either retain the same, or sell it at public or private sale, at any time, without notice of any kind to the purchaser and all payments made hereunder by the purchaser may, at the option of the "Company" be retained by it as rental for the use of and as liquidated damages for depreciation in value of said property by reason of the use thereof, without prejudice, however, to any

*Affidavit on Motion for Summary Judgment*

additional rights which the said "Company" may have in the premises; that the entire expense and cost of such retaking, return or resale, as in the case may be, and a deficiency, if any there be, after the net proceeds of the sale are applied to the balance due under this agreement, shall at once be paid by the purchaser.

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It is mutually expressly agreed that any action commenced upon any or all of the notes or commercial paper shall not be considered as an election on the part of the "Company" to waive any of the terms of this agreement, and shall not preclude the "Company" from thereafter enforcing this agreement. The acceptance by the "Company" of any renewal note, by whomsoever made or endorsed, in lieu of those delivered by the purchaser to the said "Company" hereunder, shall not be considered as a waiver of this agreement, but the said renewal notes shall be subject to this agreement as though the same were delivered at the time of the execution of this agreement and duly recited herein. It is mutually agreed that the said delivery of the said property at any specified time is waived and with respect of delivery time is not of the essence of this contract. The purchaser shall at his own expense, keep the property fully insured against loss or damage by fire, or any other cause whatsoever; in the name and for the benefit of the "Company" in the amount of the unpaid purchase price, and upon failure so to do the risk or loss occa-

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*Affidavit on Motion for Summary Judgment*

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sioned thereby is assumed by the purchaser."

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That the said Improved Propeller Corporation has only paid five of the said notes, three of Two Hundred (\$200.00) Dollars each and two of One Hundred and Fifty (\$150.00) Dollars each, and the balance of said notes together with interest thereon has never been paid thereof and default has been made in the payment of the same by the Improved Propeller Corporation.

A duplicate and copy of said contract of sale was on March 23, 1921, duly filed in the Office of the Register of Deeds of Hudson County and a copy thereof is hereto annexed and made a part hereof as Exhibit "A."

On June 7, 1921, Morey and Company, Inc., did make a further sale to the Improved Propeller Corporation of

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1 used No. 52 Bliss press;

1 New Smith hand screw machine with some box tools,

at the agreed price of Seven Hundred and Thirty-five (\$735.00) Dollars, upon a conditional bill of sale. A true copy of which is hereto annexed and made a part hereof as Exhibit "B."

On June 9, 1921, the said Morey & Company,

On June 9, 1921, the said Morey & Company, Inc., did make a further sale to the said Improved Propeller Corporation of

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1 Miner & Peck No. 3-A Lifter.

for the agreed price of Four Hundred and Fifty (\$450.00) Dollars, upon conditional bill of sale, a copy of which is hereto annexed and made a part hereof as Exhibit "C." Both last named bills of

*Affidavit on Motion for Summary Judgment*

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sale are true copies thereof and were duly filed in the office of the Register of Deeds of Hudson County on June 22, 1922.

The said conditional bills of sale were duly accepted by the said Morey & Company, Inc., and the deposit paid thereunder and all of the machinery mentioned therein were by it delivered to the Improved Propeller Corporation at No. 1299 Paterson Plank Road, Secaucus, New Jersey. There is due and owing to the said Morey & Company, Inc., upon said conditional bills of sale for said machinery the sum of Twenty-three Hundred and Thirty-five (\$2335.00) Dollars besides interest thereon from the dates of said respective sales and under said conditional bills of sale, Morey & Company, Inc., is the owner of said goods and chattels.

On or about the twenty-seventh day of December, 1921, one Walter M. Shaw caused a writ of attachment to be issued out of the Hudson County Circuit Court against the Improved Propeller Corporation and did direct the Sheriff of Hudson County to make a levy upon the property of the said Improved Propeller Corporation, including the machinery of the Morey & Company, Inc., and thereupon said Morey & Company, Inc., did give notice of claim of property under the statute, claiming to be the owner of said property, and on the twenty-sixth day of January, 1922, an order was made by the Hudson County Circuit Court releasing and discharging all of the machinery above mentioned from the lien of said attachment and the levy made thereunder and the Sheriff was directed to forthwith surrender said goods and chattels to Morey & Company, Inc. The Improved

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*Affidavit on Motion for Summary Judgment*

10 Propeller Corporation became involved in financial  
difficulties and was unable to make the payments  
required to be made and shortly after the obtaining  
of the order directing the Sheriff to return the  
property to Morey & Company, Inc., our New York  
attorney, Mr. Samuel S. Winter, obtained through  
the officers of the Improved Propeller Corporation  
the two keys to their plant at No. 1299 Paterson  
Plank Road, Secaucus, New Jersey, and said Im-  
20 proved Propeller Corporation surrendered all or  
any claim which it might have to the property  
and consented to the removal of the same and there-  
upon on February 14, 1922, I sent one of our trucks  
in charge of an employee by the name of Louis  
Roskin, to the property, and he commenced load-  
ing the machinery upon the truck on that day, and  
as the loading was not completed, the truck was  
kept in New Jersey over night and the following  
day the loading was completed, and as Louis Ros-  
30 kin was about to drive off with the machinery he  
was stopped by an officer named Charles Schatz  
and compelled to remove the machinery from the  
truck under threat of arrest, and put the same  
back into the building. This took a day and a  
half time and the value thereof, including trucking,  
etc., is over the value of Seventy-five (\$75.00)  
Dollars.

Under the conditional bills of sale Morey & Com-  
pany, Inc., is the owner of all of said machinery  
40 until the same is fully paid and the same has not  
been fully paid for. There is due on the first con-  
ditional bill of sale Fifteen Hundred (\$1500.00)  
Dollars besides interest. On the second condi-  
tional bill of sale Five Hundred and Thirty-five  
(\$535.00) Dollars besides interest, and on the third

*Affidavit on Motion for Summary Judgment*

conditional bill of sale Three Hundred (\$300.00) Dollars, besides interest, so that under the terms of the conditional bills of sale and by reason of the surrender of the Improved Propeller Corporation of said property to Morey & Company, said Morey & Company, Inc., is entitled to the immediate possession of said property.

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SAMUEL MOREY.

Sworn and subscribed to before me this 20th day of May, 1922, and I certify that I am a Notary Public in and for said County and State aforesaid, duly authorized, commissioned and sworn to take oaths therein.

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NINA ROSENBERG,

Notary Public, N. Y. County,

(Seal) N. Y. Clerk's No. 160, Reg. No. 4050.

Commission expires March 30, 1924.

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

LOUIS ROSKIN, of full age, being duly sworn, according to law on his oath deposes and says: I am in the employ of Morey and Company, Inc., and on February 14, 1922, I was sent to the plant of the Improved Propeller Corporation, #1299 Paterson Plank Road, Secaucus, New Jersey, and instructed to load on our truck and bring back to New York the machinery formerly sold by Morey and Company, Inc., to the said Improved Propeller Corporation. I went to the said plant on February 14th, 1922, and started the loading but as we were unable to complete the loading of the truck on

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*Affidavit on Motion for Summary Judgment*

10 that day we left the truck, came back the following day and completed the loading and as we were about to drive off an officer, who gave his name as Charles Schatz, ordered all of the machinery removed from the truck and put back into the building and threatened to arrest me if I did not do so. In order to avoid arrest I did as he told me and did not take any of the machinery away.

LOUIS ROSKIN.

20 Sworn and subscribed to before me this 23d day of May, 1922, and I certify that I am a Notary Public in and for said County and State aforesaid, duly authorized, commissioned and sworn to take oaths therein

(Seal)

NINA ROSENBERG.

Notary Public N. Y. County.

N. Y. Co. Clk's No. 160, Reg. 4050.

Commission expires March 30, 1924.

30

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

40 SAMUEL S. WINTER, of full age, being duly sworn according to law on his oath deposes and says: I am the counsel of Morey and Company, Inc., a corporation of the State of New York, and after one Walter M. Shaw instituted attachment proceedings in the Hudson County Circuit Court against the Improved Propeller Corporation and levied upon the machinery sold to said Improved Propeller Corporation by Morey and Company, Inc., I retained Samuel Koestler, a New Jersey

*Affidavit on Motion for Summary Judgment*

attorney, to obtain possession of said property under the proceedings brought. An order was made on January 26, 1922, directing the Sheriff to surrender said property to Morey and Company, Inc., as the owner thereof. Thereafter I got in touch with the officers of the Improved Propeller Corporation and on behalf of Morey and Company, Inc., they surrendered to me said property and delivered to me the two keys of the plant at 1299 Paterson Plank Road, Secaucus, New Jersey, for the purpose of permitting Morey and Company, Inc., to remove and take back the machinery sold under three conditional bills of sale which are mentioned in the affidavit of Mr. Samuel Morey. I delivered the two keys I received on February 14, 1922, to one Louis Roskin, an employee of Morey and Company, Inc., who was directed to go to the plant of the Improved Propeller Corporation and take and bring back the aforesaid machinery.

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SAMUEL S. WINTER.

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Sworn and subscribed to before me this 20th day of May, 1922, and I certify that I am a Notary Public in and for said County and State aforesaid, duly authorized, commissioned and sworn to take oaths therein.

(Seal)

NINA ROSENBERG.

Notary Public N. Y. County.

N. Y. Co. Clerk's No. 160, Reg. No. 4050.

Commission expires March 30, 1924.

40

STATE OF NEW JERSEY }  
 COUNTY OF UNION } ss. :

SAMUEL KOESTLER, of full age, being duly sworn according to law on his oath deposes and says: I

*Affidavit on Motion for Summary Judgment*

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10 am the attorney of Morey and Company, Inc., a corporation of the State of New York, the plaintiff in the above entitled cause.

Sometime the latter part of December, 1921, Morey and Company, Inc., through its New York attorney, Mr. Samuel S. Winter, placed in my hands three conditional bills of sale, of which copies are annexed to these affidavits as Exhibits "A," "B" and "C" and also seven promissory notes given with the conditional bills of sale, Exhibit 20 "A," three promissory notes under the conditional bill of sale, Exhibit "B," and two promissory notes under the conditional bill of sale, Exhibit "C." I investigated the matter and found one Walter M. Shaw had issued an attachment out of the Hudson County Circuit Court against the Improved Propeller Corporation and thereupon on December 30, 1921, I did serve upon the Sheriff of Hudson County on behalf of Morey and Company, Inc., a demand in writing claiming said property for and 30 on behalf of Morey and Company, Inc., said property being the same machinery as mentioned in the aforesaid three conditional bills of sale. Such proceedings were had under said claim of property that on the twenty-sixth day of January, 1922, an order was made declaring that Morey and Company, Inc., was the owner of said machinery and directing the Sheriff of Hudson County to surrender possession thereof to said Morey and Company, Inc. In the attachment of Shaw against 40 Morey and Company, Inc., Mr. G. Earl Brugler was the attorney and after investigating the filing of the conditional bills of sale and other circumstances connected with said sale, he signed a consent to the order made by the Hudson County Circuit Court directing the Sheriff to forthwith sur-

*Affidavit on Motion for Summary Judgment*

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render said goods and chattels to said Morey and Company, Inc., and thereafter I made arrangements with Mr. Winter and about the sixteenth day of February, 1922, or shortly thereafter, he informed me that the truck of the Morey and Company, Inc., had gone to the plant of the Improved Propeller Corporation and some officer there refused to permit the goods to be removed, claiming that the landlord had a distress warrant and also that there was an attachment against the same. I thereupon on February 18, 1922, wrote a letter to Mr. Oscar B. Spencer, 100 Union Street, Union, New Jersey, advising him that all of the property, specifically mentioning the machinery, was owned by Morey and Company, Inc, and made demand upon him and the landlord for the return of the goods. Said letter was sent by registered mail and I have the registered receipt in my possession as well as a copy of the letter which will be produced in Court. On February 21, 1922, I received a letter from Mr. G. Earl Brugler, a copy of which is hereto annexed and made a part of my affidavit and the original will be produced at the proper time. I investigated the matter and found out that about the same time that said Brugler signed a consent to the order for the return of the goods to Morey and Company, Inc., under the Shaw attachment, he was also preparing to issue another attachment out of the Hudson County Circuit Court at the suit of one Joseph Schaad and according to the answer filed by said Schaad had by assignment obtained an alleged claim for money due and owing from the Improved Propeller Corporation, the assignment, according to the answer, having been obtained prior to the date when said Brugler signed the consent to the order aforesaid.

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*Affidavit on Motion for Summary Judgment*

10 and upon which assigned claim the said Brugler as attorney of said Schaad caused an attachment out of the Hudson County Circuit Court on January 8, 1922.

20 I wrote the Sheriff of Hudson County a letter on February 22, 1922, demanding the return of the property and informed said Sheriff unless the property was returned I would institute suit. I received the answer of said Sheriff under date of February 25, 1922, advising me that he acted under the instruction of the attorney in making his attachment in the case of Schaad vs. Improved Propeller Corporation, which letter I will produce on this application.

30 On the issuing of the Writ of Replevin I personally had charge of procuring of the bond from the National Surety Company and on behalf of the plaintiff paid a fee of Fifty (\$50.00) Dollars. I also made personal arrangements with Mr. Richard Horgan, the Coroner of Hudson County, regarding the taking of the possession of the property and service of the papers and on March 11, 1922, I paid him the sum of Forty-six Dollars and Eighty Cents (\$46.80) for his fee on service of papers and all disbursements, including watchman fees.

40 My services to the plaintiff in this Replevin Suit, including the institution thereof, procuring of bond, supervision of entire proceedings, including study of pleadings filed by the defendants and preparation of brief, affidavits for summary judgment, to and including final entry of judgment, would be reasonably worth the sum of Two Hundred and Fifty (\$250.00) Dollars, and inasmuch as said replevin suit was made necessary by the proceedings and actions of the defendants, Schaad,

*Affidavit on Motion for Summary Judgment*

Rips and Spencer, the reasonable value of my services at the sum of Two Hundred and Fifty (\$250.00) Dollars should be included in the damages which the plaintiff is entitled to recover against the last named defendants so that the damages will be the said sum of Two Hundred and Fifty (\$250.00) Dollars, the expenses of extra trucking from New York, Seventy-five (\$75.00) Dollars; fees paid to the Coroner, Forty-six Dollars and Eighty Cents (\$46.80) and premium on bond, Fifty (\$50.00) Dollars. 10

SAMUEL KOESTLER.

Sworn and subscribed to before }  
me this fifth day of June, 1922. }  
GRACE C. MULVEY.  
Notary Public of New Jersey.

COPY

Law Offices  
G. EARL BRUGLER  
Second Nat. Bank Bldg.  
Hoboken, N. J.

February 21, 1922.

Samuel Koestler, Esq.,  
207 Broad Street,  
Elizabeth, New Jersey.  
Dear Mr. Koestler:

I have been informed that Moury & Company, Inc., which you represented in the case of Shaw vs. Improved Propeller Corp., recently attempted to remove part of certain machinery alleged to have been sold by it under additional contract, from the 40

*Affidavit on Motion for Summary Judgment*

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10 premises of said Improved Propeller Corp., at Se-  
caucus.

It is true that the Shaw attachment suit no longer offered any obstruction to your client in removing said chattels, but thereafter a second attachment was levied on all of the chattels in possession of said corporation at the suit of one Joseph Schaad. This latter case was started in our Circuit Court. In addition to this, Mr. Aaron Rips, the party from whom the Improved Propeller Corporation leased said factory premises, distrained the goods and chattels in the factory to satisfy arrears of rent due him.

20 You will see from the above that the situation has changed in material respects since the afore-said order was entered in the Circuit Court with my consent. Under the circumstances, your client cannot lawfully remove the chattels alleged to belong to it until these matters are disposed of. The attachment in the Schaad case is for a debt against which you cannot make the answer you did in the Shaw case and I am satisfied that unless the claim is paid, all chattels in possession of the defendant may be sold to satisfy same.

30 I wrote you fully about the matter to assist you in formulating your clients attitude with regard to the second attachment and the distress for rent.

Please let me hear from you.

Very truly yours,

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(Signed) G. EARL BRUGLER

GEB.LRR

## Exhibit "A"

MOREY AND COMPANY, INC. 10  
Formerly known as Machinery Merchants, Inc.  
MACHINERY AND SUPPLIES

404 Broome Street New York City

Subject to strikes, accidents, manufacturing contingencies and acts of God, and subject to the terms and conditions on the back hereof which are hereby made part of this agreement as though fully set forth herein and which are hereby agreed to, please ship in good order the following machinery, etc., delivered F. O. B. cars F. O. B. Your shop 20  
to Improved Propeller Co.; about, at once; ship via truck.

1 New No. 2 Owen Milling Machine, c/s		
and vise .....	\$1,150.00	
1 Drop Hammer, used .....	350.00	
1 Advance 18x8 used Lathe with 4 jaw		
Cushman chuck .....	750.00	
1 10" Builders Grinder on stand, with c/s	55.00	
4 Vises, 1-3", 2-4 1/2", 1 Blacksmith vise..	32.00	
1 Fosdick 3' Radial Drill, used.....	750.00	30
1 Burke Bench Drill with chuck, New...	35.00	
1 Forge and Anvil .....	88.00	
	<u>\$3,200.00</u>	

for which I/we agree to pay within Thirteen (13) months, Thirty-two Hundred and 00/100 Dollars, with exchange and all collection charges.

In case payment is divided as stated below, the purchaser agrees to make settlement on date of shipment/delivery and to then evidence all payments due at a later date by promissory negotiable notes in writing, bearing date of shipment/delivery and interest as follows: 40

\$800.00 cash with order (receipt acknowledged);  
three notes of \$200.00 each due one two and three

*Exhibit "A"*

10 months after date of delivery; four notes at \$150.00 each 4, 5, 6 and 7 months respectively; six notes at \$200.00 due 8, 9, 10, 11, 12 and 13 months respectively with interest at 6% per annum.

It is mutually agreed that title to the property mentioned herein and appurtenances, and all subsequent additions thereto, shall remain in the Morrey and Company Inc., hereinafter designated as the "Company," until fully paid for in cash; that  
20 in case of the rejection of the property, or failure to pay as stated herein, undersigned, the purchaser, shall at once return and deliver the said property, in good order, to the "Company" at 404 Broome Street, in the Borough of Manhattan, City, County and State of New York; that a retention of the property furnished, after thirty days from date of railroad notice of arrival if shipped f. o. b., or from date of actual delivery, whichever is hereinbefore agreed upon, shall constitute a trial and acceptance and be conclusive admission of the truth  
30 of all the representations made by or for the "Company" and void all its contracts of warranties, express or implied. It is mutually expressly agreed that this agreement is not modified or added to by any agreements not expressly stated herein, except the terms and conditions on the back hereof which are expressly made part hereof, and that this agreement is the entire contract between the said parties and contains all the terms agreed upon between the said parties. This agreeemnt enures to the  
40 benefit of the successors and assignes of the "Company". This order is subject to acceptance or rejection by a properly authorized officer of the "Company."

*Exhibit "A"*


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Witness our hand and seal of the purchaser this  
10th day of Feb., 1921.

(L. S.)

Name: Improved Propeller Corp.

By Bruno Schmelzer, Pres.

Business Address, 1299 Paterson Plank Road  
corner Front.

Residence, Secaucus, New Jersey.

TERMS AND CONDITIONS OF WITHIN  
AGREEMENT.—It is mutually expressly agreed  
that in the event of a default in the payment of any  
of the notes delivered by the purchaser to the  
"Company", or any renewal notes thereof, or in  
the event of a default in the payment of any in-  
stallment, as herein provided, or in the event that  
the purchaser fails to deliver to the "Company",  
the notes evidencing the balance due under this  
contract, as hereinbefore set forth, or in the event  
that the purchaser removes the property herein  
described, from the business address herein set  
forth without the written consent of the "Com-  
pany", or in the event of a fire loss, or in the event  
of the filing of a petition in bankruptcy, by or  
against the said purchaser, or in the event of any  
proceedings or action being instituted by or against  
the said purchaser, whereby a Receiver or custodi-  
an of the assets of the said purchaser is appointed  
in any court, or in case the purchaser does an act  
denoting his insolvency, or in the event that the  
said purchaser shall discontinue his business, or  
in the event of a breach on the part of the pur-  
chaser of any of the terms, covenants or conditions  
in this agreement contained, then in that event  
the whole unpaid balance, whether evidenced by  
notes or otherwise, together with all collection

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*Exhibit "A"*

- 10 charges, interest and protest fees, shall, without notice or demand, immediately become due and payable, at the option of the "Company", anything herein contained on the contrary notwithstanding; and the "Company", or its agents shall have the right, with or without legal process to retake possession of the said property and at its option either retain the same, or sell it at public or private sale, at any time, without notice of any kind to the purchaser and all payments made hereunder by the
- 20 purchaser may, at the option of the "Company", be retained by it as rental for the use of and as liquidated damages for depreciation in value of said property by reason of the use thereof, without prejudice, however, to any additional rights which the said "Company" may have in the premises; that the entire expense and cost of such retaking, return or resale, as the case may be, and a deficiency, if any there be, after the net proceeds of the sale are applied to the balance due under this
- 30 agreement, shall at once be paid by the purchaser.

It is mutually expressly agreed that any action commenced upon any or all of the notes or commercial paper shall not be considered as an election on the part of the "Company" to waive any of the terms of this agreement, and shall not preclude the "Company" from thereafter enforcing this agreement. The acceptance by the "Company" of any renewal note, by whomsoever made or endorsed, in lieu of those delivered by the purchaser to the said "Company" hereunder, shall not be

40 considered as a waiver of this agreement, but the said renewal notes shall be subject to this agreement as though the same were delivered at the time of the execution of this agreement and duly

*Exhibit "A"*

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recited herein. It is mutually agreed that the said delivery of the said property at any specified time is waived and with respect of delivery time is not of the essence of this contract. The purchaser shall at his own expense, keep the property fully insured against loss or damage by fire, or any other cause whatsoever, in the name and for the benefit of the "Company," in the amount of the unpaid purchase price, and upon failure so to do the risk or loss occasioned thereby is assumed by the purchaser.

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## Exhibit "B"

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## MOREY AND COMPANY, INC.

Formerly known as Machinery Merchants, Inc.

## MACHINERY AND SUPPLIES

404 Broome Street New York City

Subject to strikes, accidents, manufacturing contingencies and acts of God, and subject to the terms and conditions on the back hereof which are hereby made part of this agreement as though fully set forth herein and which are hereby agreed to, please ship in good order the following machinery, etc., delivered F. O. B.: cars, 1299 Paterson Plank Rd., Secaucus, N. J.; to, Improved Propeller Corp.; about, at once; ship via, truck.

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1 used No. 52 Bliss press .....	\$425.00
1 New Smith hand screw machine with some box tools .....	310.00

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 \$735.00

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for which we agree to pay within twelve (12) months Seven Hundred Thirty-five and no/100 Dollars, with exchange and all collection charges.

In case payment is divided as stated below, the purchaser agrees to make settlement on date of shipment/delivery and to then evidence all payments due at a later date by promissory negotiable notes in writing, bearing date of shipment/delivery and interest as follows:

\$200.00 cash with the order, and the balance to be evidenced by three notes payable April 16, 1922, May 16, 1922 and June 16, 1922.

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It is mutually agreed that title to the property mentioned herein and appurtenances, and all subsequent additions thereto, shall remain in the Morey and Company, Inc., hereinafter designated as the "Company", until fully paid for in cash; that in case of the rejection of the property, or failure

*Exhibit "B"*

to pay as stated herein, undersigned, the purchaser, shall at once return and deliver the said property, in good order, to the "Company" at 404 Broome Street, in the Borough of Manhattan, City, County and State of New York; that a retention of the property furnished, after thirty days from date of railroad notice of arrival if shipped f. o. b., or from date of actual delivery, whichever is hereinbefore agreed upon, shall constitute a trial and acceptance and be conclusive admission of the truth of all the representations made by or for the "Company" and void all its contracts of warranties, express or implied. It is mutually expressly agreed that this agreement is not modified or added to by any agreements not expressly stated herein, except the terms and conditions on the back hereof which are expressly made part hereof, and that this agreement is the entire contract between the said parties and contains all the terms agreed upon between the said parties. This agreement enures to the benefit of the successors and assigns of the "Company". This order is subject to acceptance or rejection by a properly authorized officer of the "Company".

Witness our hand and seal of the purchaser this 7th day of June, 1921.

(L. S.)

Name, Improved Propeller Corp.

By Bruno Schmelzer, Pres.

Business Address, 1299 Paterson Plank Road.

Residence, Secaucus, N. J.

In the presence of Walter M. Shaw.

(Terms same as Exhibit A.)

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**Exhibit "C"**

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**MOREY AND COMPANY, INC.**

Formerly known as Machinery Merchants, Inc.  
Machinery and Supplies

404 Broome Street New York City

Subject to strikes, accidents, manufacturing contingencies and acts of God, and subject to the terms and conditions on the back hereof which are hereby made part of this agreement as though fully set forth herein and which are hereby agreed to, please ship in good order the following machinery, etc., delivered F. O. B.:

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cars, Derby, Conn.; to Improved Propeller Corp.; about, at once; ship via, freight.

1 Miner & Peck No. 3-A Lifter.....\$450.00  
for which we agree to pay within four (4) months, Four Hundred Fifty and no/100 Dollars, with exchange and all collection charges.

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In case payment is divided as stated below, the purchaser agrees to make settlement on date of shipment/delivery and to then evidence all payments due at a later date by promissory negotiable notes in writing, bearing date of shipment/delivery and interest as follows:

\$150.00 allowance on hammer and the balance of \$300.00 to be divided in two equal payments of \$150.00 each, due 3 and 4 months from date.

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It is mutually agreed that title to the property mentioned herein and appurtenances, and all subsequent additions thereto, shall remain in the Morey and Company, Inc. hereinafter designed as the "Company", until fully paid for in cash; that in case of the rejection of the property, or failure to pay as stated herein undersigned, the purchaser, shall at once return and deliver the said property, in good order, to the "Company" at 404 Broome Street, in the Borough of Manhattan, City, County

*Exhibit "B"*

and State of New York; that a retention of the property furnished, after thirty days from date of railroad notice of arrival if shipped f. o. b., or from date of actual delivery, whichever is hereinbefore agreed upon, shall constitute a trial and acceptance and be conclusive admission of the truth of all the representations made by or for the "Company" and void all its contracts of warranties, express or implied. It is mutually expressly agreed that this agreement is not modified or added to by any agreements not expressly stated herein, except the terms and conditions on the back hereof which are expressly made part hereof, and that this agreement is the entire contract between the said parties and contains all the terms agreed upon between the said parties. This agreement enures to the benefit of the successors and assigns of the "Company". This order is subject to acceptance or rejection by a properly authorized officer of the "Company".

Witness our hand and seal of the purchaser this 9th day of June, 1921.

(L. S.)

Name, Improved Propeller Corp.

By, Bruno Schmelzer, Pres.

Business Address, 1299 Paterson Plank Road.

Residence, Secaucus, N. J.

In the presence of Walter M. Shaw.

(Terms same as Exhibit A.)

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## Notice

10 HUDSON COUNTY CIRCUIT COURT.

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MOREY AND COMPANY, INC.,  
Plaintiff,

vs.

20 JOSEPH SCHAAD, *et als.*,  
Defendants.

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In Replevin.

To the above named plaintiff or Samuel Koestler, Esq., its attorney,

PLEASE TAKE NOTICE, that on Friday, the 30th day of June, 1922, at 10 o'clock in the forenoon of said day, (daylight saving time) or soon thereafter as counsel can be heard, at the Court House in the City of Jersey City, I shall apply to the Honorable Luther A. Campbell, Judge of the Hudson County Circuit Court, upon affidavits served upon you and affidavits heretofore served by you upon me, on your motion for summary judgment by default, etc., for an order striking out the complaint filed by you herein and the dismissal of your said action, on the following grounds, to wit:

- 30 1. The complaint filed herein discloses no facts constituting a cause of action.
- 40 2. The plaintiff was not entitled to immediate possession of the goods and chattels described in the complaint at the time the replevin herein was made.
3. The goods and chattels described in the writ of replevin were, at the time of the making of said

*Exhibit "C"*

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replevin, in *custodia legis* and not subject of replevin.

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4. The plaintiff has failed to file a bond for security for costs duly demanded before notice of trial, on March 29th, 1922.

Yours respectfully,

G. EARL BRUGLER,  
Attorney for Defendant Schaad, *et als.*

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**Answering Affidavits on Plaintiff's Motion  
for Summary Judgment, Etc.**

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HUDSON COUNTY CIRCUIT COURT.

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MOREY AND COMPANY, INC.,

Plaintiff,

vs.

JOSEPH SCHAAD, *et als.*,

Defendants.

In Replevin.

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

GEORGE JULIAN HOUTAIN, being duly sworn according to law, upon his oath deposes and says:

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1. On February 16th, 1921, I was a creditor of the defendant Improved Propeller Corporation in the sum of \$920.65, for moneys due and owing me for work, labor and services and moneys advanced and loaned to said corporation; that at said time I was without knowledge and without notice of the provisions of the three alleged contracts of the conditional sale of certain chattes as described in these proceedings, which affidavits I have read; that in fact, I had no knowledge of the existence of said contracts until about the month of December, 1921; that about the month of July or August, 1921, however, I knew said Improved Propeller Corporation owed the plaintiff herein a balance on the purchase price of certain chattels, which balance was represented by certain promissory notes, but had no further knowledge of said trans-

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*Answering Affidavits on Plaintiff's Motion for  
Summary Judgment*

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actions; that on or about the 27th day of December, 1921, by my instrument in writing, I duly sold and assigned my said claim against said corporation which still remains unpaid, unto the defendant Joseph Schaad.

GEORGE JULIAN HOUTAIN.

Sworn and subscribed to before me }  
this 16th day of June, A. D., 1922. }

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J. RAYMOND TIFFANY,

Master in Chancery of New Jersey.

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON, } ss.:

JOSEPH SCHAAD, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the defendants in the above entitled action; that I am the assignee of George Julian Houtain of a claim for \$920.65 against the defendant Improved Propeller Corporation; an assignment of said claim was made to me on or about the 27th day of December, 1921; that the amount of said claim is still due and owing to me, no part thereof ever having been paid; that after the assignment to me of said claim as aforesaid, I requested my attorney G. Earl Brugler, to bring suit for the collection of said moneys, that my said attorney informed me that suit against said corporation could only be brought by attachment in New Jersey as the same was a foreign corporation, not authorized to do business in this state and a summons could not be served on it in New Jersey.

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2. Thereafter Mr. Brugler informed me that the only property in New Jersey, to his knowledge,

*Answering Affidavits on Plaintiff's Motion for  
Summary Judgment*

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which I could attach with effect was certain chattels in possession of said corporation at Secaucus; that a prior suit by attachment had been started against said corporation by one Shaw, but that the chattels then subject to said prior attachment were probably not sufficient in value to satisfy even the claim of said Shaw; that I could attach certain other chattels of said corporation which had

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been released from said Shaw attachment.  
3. Said attorney further informed me that said chattels which were free from said Shaw attachment were sold by Morey & Company, Inc., to said Improved Propeller Corporation under contracts of conditional sale, but that inasmuch as said contracts had not been filed as required by law, the same were void as against me; that even though said contracts had been filed as required in order to reserve title to said chattels in the plaintiff herein, said Improved Propeller Corporation still had possession of same, had paid a large sum on account of the purchase price thereof and had a right of property therein which was worth something; that I thereupon instructed my said attorney to make an attachment of the right, title and interest to said Improved Propeller Corporation in said chattels which attachment was thereafter made about the 28th day of January, 1922.

30

JOSEPH SCHAAD.

40

Sworn and subscribed to before me }  
this 16th day of June, A. D., 1922 }

J. RAYMOND TIFFANY,

Master in Chancery of New Jersey.

*Answering Affidavits on Plaintiff's Motion for  
Summary Judgment*

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STATE OF NEW JERSEY, }  
COUNTY OF HUDSON, } ss.:

G. EARL BRUGLER, being duly sworn according to law, upon his oath deposes and says:

1. It is true that on or about the 27th day of December, 1921, one Walter M. Shaw caused a writ of attachment to be issued out of this court against the defendant, Improved Propeller Corporation, and that pursuant thereto, the Sheriff of the County of Hudson made a levy upon various personal property of said Improved Propeller Corporation, including the goods and chattels subject of replevin herein; that after the issuance of said attachment, the plaintiff herein served a notice on said sheriff to the effect that the property subject of replevin herein was its own and that it desired said sheriff to summon a jury to try the title thereof of said plaintiff; that before said matter came on for trial before said sheriff's jury, said Walter M. Shaw and deponent investigated the extent and value of the property levied upon by the sheriff pursuant to said writ and ascertained that said sheriff had levied upon sufficient property other than that claim by the plaintiff herein to satisfy his claim against said Improved Propeller Corporation and by reason thereof, concluded to consent to an order by this court releasing said property from the operation of said attachment; that only for the reason aforesaid was said property so released from said attachment.

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2. That before instituting suit by attachment in behalf of Joseph Schaad, or or about the 28th day of January, 1922, I examined the records in the Register's Office of the County of Hudson and

*Answering Affidavits on Plaintiff's Motion for  
Summary Judgment*

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learned that the three alleged contracts of conditional sale made by the plaintiff herein to said Improved Propeller Corporation were not filed within 10 days as required by the Uniform Conditional Sales Act and that for said reason said contracts were void as against the claim of said Joseph Schaad, whose assignor, George Julian Houtain, was a creditor of said Improved Propeller Corporation to the extent of \$920.65 at the time said chattels were delivered to said corporation at Secaucus, New Jersey, and said creditor was without notice of said conditional contracts of sale; that by reason thereof, I was requested by said Joseph Schaad to sue out a writ of attachment in his behalf against said Improved Propeller Corporation and levy upon the right, title and interest of said Improved Propeller Corporation in the goods and chattels released from the Shaw attachment as aforesaid; that said Joseph Schaad did not desire to come in as an applying creditor in said Shaw attachment suit because the goods and chattels therein levied upon were much insufficient to satisfy the combined claims of said Shaw and himself.

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3. I have no personal knowledge as to the alleged surrender of the goods and chattels subject of replevin herein to the plaintiff by said Improved Propeller Corporation and the attempt of the plaintiff herein to take possession of the same on February 14th, 1922; that said goods and chattels at the time of the issuance of the writ of attachment at the suit of said Joseph Schaad, about the 28th day of January, 1922, as will be seen, was at a time when said goods and chattels were still in

*Answering Affidavits on Plaintiff's Motion for  
Summary Judgment*

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possession of said Improved Propeller Corporation, and before the alleged surrender thereof.

4. It is not true as stated in the affidavit of Samuel S. Winter that an order was made by this court in said Shaw attachment suit directing the sheriff to surrender said property to Morey & Company, Inc., "as the owner thereof"; said order for the release of said property merely stated that said Morey & Company claimed the same, and there was no trial, recognition, finding or adjudication between any of the parties interested in said chattels as to the alleged title of said Morey & Company in the same.

20

5. It is likewise not true, as stated in the affidavit of Samuel Koestler, that the order made by this court as aforesaid on January 26th, 1922, was a declaration of the ownership of Morey & Company, Inc., of said goods and chattels, as by reference to said order will more fully appear.

30

G. EARL BRUGLER,

Sworn and subscribed to before me }  
this 16th day of June, A. D., 1922 }  
J. RAYMOND TIFFANY,  
Master in Chancery of New Jersey.

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON, } ss.:

AARON RIPS, being duly sworn according to law, upon his oath deposes and says: 40

1. That on the 1st day of February, 1922, the defendant Improved Propeller Corporation, owed me the sum of \$150. for rent accrued for the prior two months on premises No. 1299 Paterson Plankroad, Secaucus, New Jersey; that by reason of the same, I empowered one Oscar B. Spencer as my

*Answering Affidavits on Plaintiff's Motion for  
Summary Judgment*

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bailiff to distrain the goods and chattels of said corporation for the rent so due me; that said rent accrued to me by virtue of a sub-lease made by me to said corporation on August 19th, 1920; that at the time of the making of said sub-lease and thus becoming a creditor of said Improved Propeller Corporation, for rent then stipulated as owing me and to become due and payable thereafter, I had

20 no knowledge of the provisions of the three contracts of conditional sale mentioned in these proceedings; that my claim for said rent was prior to the attachment of said Shaw; that I was informed said Shaw, however, originally had an attachment covering other chattels also of said corporation; but not knowing of my prior lien, consented to release said other chattels from his attachment with the result his attachment only covered the chattels sold by me in my distraint proceedings, and owing to the act that the chattels of

30 said Improved Propeller Corporation so sold did not bring enough at a duly advertised public auction to satisfy my rent claimed and costs, said Shaw did not realize anything in his said suit; that by reason of the fact that the plaintiff herein took possession of part of the chattels of said Improved Propeller Corporation, notwithstanding my valid lien against same, I have suffered a loss of upwards of \$100.00, the same being a deficiency in the amount of rent so due me with costs in said

40 distress proceedings, besides the costs of defending this action.

AARON RIPS.

Sworn and subscribed to before me)

this 16th day of June, A. D., 1922)

J. RAYMOND TIFFANY,

Master in Chancery of New Jersey.

## Conclusions

HUDSON COUNTY CIRCUIT COURT. 10

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MOREY AND COMPANY

vs.

JOSEPH SCHAAD, *et als.*

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} On Motion, etc

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SAMUEL KOESTLER, ESQ., Attorney for plaintiff.  
 G. EARL BRUGLER, ESQ., Attorney for defendants.  
CAMPBELL, J.

This matter is before the Court upon two motions, one on the part of plaintiff to strike out the answers and for summary judgment, and the other on part of the defendants to strike out the complaint.

30

I am of the opinion that defendant's motion must prevail and my conclusion is based upon the opinion in *Brown vs. Christian, et al.*, written by Justice Bergen and reported in 117 Atlantic Reporter (Advance Sheets 4) p. 294, in which it is held that a conditional bill of sale not recorded within ten (10) days is void against an attaching creditor.

An order in consonance herewith may accordingly be taken.

Dated July 18, 1922.

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LUTHER A. CAMPBELL,  
*Judge.*

## Record of Objection

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July 25, 1922.

HON. LUTHER A. CAMPBELL, JUDGE,  
Hudson County Circuit Court,  
Jersey City, N. J.

*Dear Judge Campbell:*

I beg to thank you for sending me copy of your conclusions in the case of Morey and Company, Inc., vs. Schaad, *et al.* and as the practice laid down by the Appellate Court requires me to record an objection to your determination as basis for an appeal, I hereby make formal objection to your determination and in so doing I think I may properly call to your attention that the case of *Brown vs. Christian*, 117 Atlantic Reporter, page 294, opinion by Mr. Justice Bergen, was not decisive of the questions raised before you for the reason that the only point decided in the Brown case was that an attaching creditor's rights were paramount to a vendor whose conditional sale was not recorded at all. The rest of the opinion is dictum and I do not think that Mr. Justice Bergen intended by his remark to intimate that an attachment levied after a conditional sale was duly filed would render the sale void, although the conditional sale was not filed within ten days.

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I think Mr. Justice Bergen was merely calling attention to the language of the Statute and was not placing any judicial construction upon the same.

Very respectfully yours,

SAMUEL KOESTLER,

Attorney of Plaintiff.

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P.S.—May I ask you to kindly advise me in the enclosed stamped envelope whether the Exhibits I left with you have been filed with the Clerk or will be returned to me.

Respectfully yours,

SAMUEL KOESTLER.

## Order

HUDSON COUNTY CIRCUIT COURT.

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MOREY AND COMPANY, INC.,  
Plaintiff,

vs.

JOSEPH SCHAAD, *et als.*,  
Defendants.

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Action at Law  
In Replevin

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Application being made to the Court by plaintiff upon due notice for an Order for Summary Judgment upon the facts disclosed by the affidavits presented and filed on behalf of said plaintiff and exhibits therein mentioned and presented to the Court on the ground that the matters of defense set up in the answer of the defendants, Schaad, Rips and Spencer, do not constitute any defense to said plaintiff's action and to strike out the answer of the said defendants, and said defendants having presented and filed certain answering affidavits on their behalf and also moving for Summary Judgment in favor of the defendants, and said matters coming on to be heard by the Court and the Court having heard and considered the arguments of Samuel Koestler, Esquire, of counsel with the plaintiff and of Mr. G. Earl Brugler, of counsel with the defendants, Schaad, Rips and Spencer and having fully considered the same and the affidavits and evidence presented and the Court being of the opinion that the answer filed by the defendants sets up a good defense and that the answering defendants are entitled to have judgment final entered in their favor and the action of the plaintiff dismissed:

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*Order*

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It is thereupon on this 20th day of October, 1922, on motion of G. Earl Brugler, of counsel with the answering defendants, Schaad, Rips and Spencer, ordered that the motion of the plaintiff for Summary Judgment be and the same is hereby denied and the motion of the answering defendants for Summary Judgment be granted and that the action of said plaintiff be dismissed and that judgment final be entered in favor of the defendants and against the plaintiff with costs of suit to be

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taxed.

LUTHER A. CAMPBELL,  
*Judge.*

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## Appellant's Exhibit "A"

MOREY AND COMPANY, INC.

10

Formerly Known as Machinery Merchants, Inc.

MACHINERY AND SUPPLIES

404 Broome Street

New York City

Subject to strikes, accidents, manufacturing contingencies and acts of God, and subject to the terms and conditions on the back hereof which are hereby made part of this agreement as though fully set forth herein and which are hereby agreed to, please ship in good order the following machinery, etc., delivered F. O. B.

20

Cars F. O. B. your shop. To Improved Propeller Co. About: At once. Ship via truck.

1 New No. 2 Milling Machine, c/s and vise .....	\$1150.00	
1 Drop Hammer, used.....	350.00	
1 Advance 18x8 used Lathe with 4-jaw Cushman chuck .....	750.00	
1 10" Builders' Grinder on Stand, with c/s. ....	55.00	
4 Vises, 1-3", 2-4½", 1 Blacksmith vise..	32.00	30
1 Fosdick 3' Radial Drill, used.....	750.00	
1 Burke Bench Drill with chuck, New...	35.00	
1 Forge and Anvil.....	88.00	

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 \$3200.00

for which we agree to pay within Thirteen (13) Months Thirty-two Hundred and 00/100 Dollars, with exchange and all collection charges.

In case payment is divided as stated below, the purchaser agrees to make settlement on date of shipment/delivery and to then evidence all payments due at a later date by promissory negotiable notes in writing, bearing date of shipment/delivery and interest as follows:

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\$800.00 cash with order (receipt acknowledged);

*Appellant's Exhibit "A"*

10 three notes at \$200.00 each due one, two and three months after date of delivery; four notes at \$150.00 each, 4, 5, 6 and 7 months respectively; six notes at \$200.00 due 8, 9, 10, 11, 12 and 13 months respectively with interest at 6% per annum.

20 It is mutually agreed that title to the property mentioned herein and appurtenances, and all subsequent additions thereto, shall remain in the MOREY AND COMPANY, INC., hereinafter designated as the "Company," until fully paid for in cash; that in case of the rejection of the property, or  
30 failure to pay as stated herein, undersigned, the purchaser, shall at once return and deliver the said property, in good order, to the "Company" at 404 Broome Street, in the Borough of Manhattan, City, County and State of New York; that a retention of the property furnished, after thirty days from date of railroad notice of arrival if shipped f. o. b., or from date of actual delivery, whichever is hereinbefore agreed upon, shall constitute a trial and acceptance and be conclusive admission of the truth of all the representations made by or for the "Company" and void all its contracts of warranties, express or implied. It is mutually expressly agreed that this agreement is not modified or added to by any agreements not expressly stated herein, except the terms and conditions on the back hereof which are expressly made part hereof, and that this agreement is the entire contract between the said parties and contains all the terms agreed upon  
40 between the said parties. This agreement enures to the benefit of the successors and assigns of the "Company." This order is subject to acceptance or rejection by a properly authorized officer of the "Company."

Witness our hand and seal of the purchaser this 16th day of February, 1921.

*Appellant's Exhibit "A"*


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Name: IMPROVED PROPELLER CORP. (L. S.)

10

By Bruno Schmelzer, Pres.

Business Address: 1299 Paterson Plank Road,  
corner Front.

Residence: Secaucus, New Jersey.

In the presence of LOUIS H. WOLFF.

---

Terms and Conditions of Within Agreement—

It is mutually expressly agreed that in the event  
of a default in the payment of any of the notes  
delivered by the purchaser to the "Company," or  
any renewal notes thereof, or in the event of a  
default in the payment of any installment, as here-  
in provided, or in the event that the purchaser  
fails to deliver to the "Company," the notes evi-  
dencing the balance due under this contract, as  
hereinbefore set forth, or in the event that the pur-  
chaser removes the property herein described, from  
the business address herein set forth without the  
written consent of the "Company," or in the event  
of a fire loss, or in the event of the filing of a  
petition in bankruptcy, by or against the said pur-  
chaser, or in the event of any proceedings or action  
being instituted by or against the said purchaser,  
whereby a Receiver or custodian of the assets of  
the said purchaser is appointed in any court, or in  
case the purchaser does an act denoting his insol-  
vency, or in the event that the said purchaser shall  
discontinue his business, or in the event of a breach  
on the part of the purchaser of any of the terms,  
covenants or conditions in this agreement con-  
tained, then in that event the whole unpaid bal-  
ance, whether evidence by notes or otherwise, to-  
gether with all collection charges, interest and pro-  
test fees, shall, without notice or demand, immedi-

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*Appellant's Exhibit "A"*

10 ately become due and payable, at the option of  
the "Company," anything herein contained on the  
contrary notwithstanding; and the "Company," or  
its agents shall have the right, with or without  
legal process to retake possession of the said prop-  
erty and at its option, either retain the same, or  
sell it at public or private sale, at any time, with-  
out notice of any kind to the purchaser and all  
payments made hereunder by the purchaser may,  
20 at the option of the "Company," be retained by it  
as rental for the use of and as liquidated damages  
for depreciation in value of said property by reason  
of the use thereof, without prejudice, however, to  
any additional rights which the said "Company"  
may have in the premises; that the entire expense  
and cost of such retaking, return or resale, as the  
case may be, and a deficiency, if any there be, after  
the net proceeds of the sale are applied to the bal-  
ance due under this agreement, shall at once be  
30 paid by the purchaser.

It is mutually expressly agreed that any action  
commenced upon any or all of the notes or com-  
mercial paper shall not be considered as an elec-  
tion on the part of the "Company" to waive any  
of the terms of this agreement, and shall not pre-  
clude the "Company" from thereafter enforcing  
this agreement. The acceptance by the "Company"  
of any renewal note, by whomsoever made or en-  
dorsed, in lieu of those delivered by the purchaser  
to the said "Company" hereunder, shall not be  
40 considered as a waiver of this agreement, but the  
said renewal notes shall be subject to this agree-  
ment as though the same were delivered at the  
time of the execution of this agreement and duly  
recited herein. It is mutually agreed that the said

*Appellant's Exhibit "A"*

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delivery of the said property at any specified time is waived and with respect of delivery time is not of the essence of this contract. The purchaser shall at his own expense, keep the property fully insured against loss or damage by fire, or any other cause whatsoever, in the name and for the benefit of the "Company," in the amount of the unpaid purchase price, and upon failure so to do the risk or loss occasioned thereby is assumed by the purchaser.

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## Appellant's Exhibit "B"

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### MOREY AND COMPANY, INC.

Formerly known as Machinery Merchants, Inc.

Machinery and Supplies

404 Broome Street                      New York City

Subject to strikes, accidents, manufacturing contingencies and acts of God, and subject to the terms and conditions on the back hereof which are hereby made part of this agreement as though fully set forth herein and which are hereby agreed to, please ship in good order the following machinery, etc., delivered F. O. B.:

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cars, Derby, Conn.; to, Improved Propeller Corp.; about, at once; ship via. freight.

1 Miner & Peck No. 3-A Lifter . . . . . \$450.00  
for which we agree to pay within four (4) months, Four Hundred Fifty and no/100 Dollars, with exchange and all collection charges.

30

In case payment is divided as stated below, the purchaser agrees to make settlement on date of shipment/delivery and to then evidence all payments due at a later date by promissory negotiable notes in writing, bearing date of shipment/delivery and interest as follows:

\$150.00 allowance on hammer and the balance of \$300.00 to be divided in two equal payments of \$150.00 each, due 3 and 4 months from date.

40

It is mutually agreed that title to the property mentioned herein and appurtenances, and all subsequent additions thereto, shall remain in the Morey and Company Inc., hereinafter designated as the "Company", until fully paid for in cash; that in case of the rejection of the property, or failure to pay as stated herein, undersigned, the purchaser, shall at once return and deliver the said property, in good order, to the "Company" at 404 Broome Street, in the Borough of Manhattan, City, County

*Appellant's Exhibit "B"*

and State of New York; that a retention of the property furnished, after thirty days from date of railroad notice of arrival if shipped f. o. b., or from date of actual delivery, whichever is hereinbefore agreed upon, shall constitute a trial and acceptance and be conclusive admission of the truth of all the representations made by or for the "Company" and void all its contracts of warranties, express or implied. It is mutually expressly agreed that this agreement is not modified or added to by any agreements not expressly stated herein, except the terms and conditions on the back hereof which are expressly made part hereof, and that this agreement is the entire contract between the said parties and contains all the terms agreed upon between the said parties. This agreement enures to the benefit of the successors and assignes of the "Company". This order is subject to acceptance or rejection by a properly authorized officer of the "Company".

Witness our hand and seal of the purchaser this 9th day of June, 1921.

(L. S.)

Name, Improved Propeller Corp.

By, Bruno Schmelzer, Pres.

Business Address, 1299 Paterson Plank Road.

Residence, Secaucus, N. J.

In the presence of Walter M. Shaw.

(Same terms and conditions as Exhibit A)

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### Appellant's Exhibit "C"

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#### MOREY AND COMPANY, INC.

Formerly known as Machinery Merchants, Inc.

Machinery and Supplies

404 Broome Street New York City

Subject to strikes, accidents, manufacturing contingencies and acts of God, and subject to the terms and conditions on the back hereof which are hereby made part of this agreement as though fully set forth herein and which are hereby agreed to, please ship in good order the following machinery, etc.,

20 delivered F. O. B.:

cars, 1299 Paterson Plank Rd., Secaucus, N. J.; to, Improved Propeller Corp.; about, at once; ship via, truck.

1 used No. 52 Bliss press.....\$425.00

1 New Smith hand screw machine with some  
box tools ..... 310.00

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\$735.00

30 for which we agree to pay within twelve (12) months Seven Hundred Thirty-five and no/100 Dollars, with exchange and all collection charges.

In case payment is divided as stated below, the purchaser agrees to make settlement on date of shipment/delivery and to then evidence all payments due at a later date by promissory negotiable notes in writing, bearing date of shipment/delivery and interest as follows:

40 \$200.00 cash with the order, and the balance to be evidenced by three notes payable April 16, 1922, May 16, 1922 and June 16, 1922.

It is mutually agreed that title to the property mentioned herein and appurtenances, and all subsequent additions thereto, shall remain in the Morey and Company, Inc., hereinafter designated as the "Company", until fully paid for in cash; that

*Appellant's Exhibit "C"*

in case of the rejection of the property, or failure  
 to pay as stated herein, undersigned, the purchaser,  
 shall at once return and deliver the said property,  
 in good order, to the "Company" at 404 Broome  
 Street, in the Borough of Manhattan, City, County  
 and State of New York; that a retention of the  
 property furnished, after thirty days from date of  
 railroad notice of arrival if shipped f. o. b., or from  
 date of actual delivery, whichever is hereinbefore  
 agreed upon, shall constitute a trial and acceptance  
 and be conclusive admission of the truth of all the  
 representations made by or for the "Company" and  
 void all its contracts, of warranties, express or im-  
 plied. It is mutually expressly agreed that this  
 agreement is not modified or added to by any agree-  
 ments not expressly stated herein, except the terms  
 and conditions on the back hereof which are ex-  
 pressly made part hereof, and that this agreement  
 is the entire contract between the said parties and  
 contains all the terms agreed upon between the said  
 parties. This agreement enures to the benefit of  
 the successors and assigns of the "Company".  
 This order is subject to acceptance or rejection by  
 a properly authorized officer of the "Company".

Witness our hand and seal of the purchaser this  
 7th day of June, 1921.

(L. S.)

Name, Improved Propeller Corp.

By Bruno Schmelzer, Pres.

Business Address, 1299 Paterson Plank Road.

Residence, Secaucus, N. J.

In the presence of Walter M. Shaw.

(Same terms and conditions as Exhibit A.)

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## Appellant's Exhibit "D"

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Feb. 18, 1922.

MR. OSCAR B. SPENCER,  
100 Union St.,  
Union, N. J.

Dear Mr. Spencer:

I represent Morey and Company, Inc., of New York who are the owners of the machinery herein-after listed located in property occupied by Improved Propeller Corporation and upon which you have levied a distress on behalf of the landlord, Mr. Aaron Rips.

20

You will find in the Clerk's Office of your County an order made by Judge Campbell several weeks ago that the machinery is the property of Morey and Company, Inc., and directed the Sheriff to turn it over. Particularly the property is as follows:

30

1. New #2 Owen Milling Machine, c/s and vise.
- 1 Drop Hammer, used.
- 1 Advance 18x8 used Lathe with 4 jaw Cushman chuck.
- 1 10" Builders Grinder on Stand, with c/s.
- 4 Vises, 1-3", 2-4½", 1 Blacksmith vise.
- 1 Fosdick 3' Radial Drill, used.
- 1 Burke Bench Drill with chuck, New.
- 1 Forge and Anvil.
- 1 used #52 Bliss press.
- 1 New Smith hand screw machine with some box tools.
- 1 Miner & Peck #3-A Lifter.

40

I understand that you refused Morey's men to take this machinery away and therefore you interfered with the Court order. You have also distrained property of a person other than the tenant contrary to Section 8 of the Distress Act. Under

*Appellant's Exhibit "D"*

---

Section 11 both you and the owner will be responsible for double the value of the goods.

10

I would, therefore, suggest that you get in touch with me immediately and arrange for the surrender of these goods to Morey and Company, Inc. You may consider this letter as a demand upon you and the landlord for the return of these goods and in default of your complying with this demand I will consider that you and the landlord have converted the goods to your own use.

20

I am writing you this letter in a friendly spirit so that you may have the opportunity of correcting the error you have made without subjecting yourself and your landlord to the penalty provided under the Distress Act.

Yours truly,

SAMUEL KOESTLER.

30

40

## Appellant's Exhibit "F"

10

POST OFFICE DEPARTMENT  
 OFFICIAL BUSINESS  
 REGISTERED ARTICLE  
 No. 15555

## INSURED PARCEL

No. ....

Return to SAMUEL KOESTLER

20 (Name of Sender)

Street and Number }  
 or Post Office Box, } 207 Broad Street.

ELIZABETH,

NEW JERSEY.

## RETURN RECEIPT.

*Received from the Postmaster the Registered  
 or Insured Article, the original number of which  
 appears on the face of this Card.*

30 OSCAR B. SPENCER

(Signature or name of addressee.)

THOMAS BELL

(Signature of addressee's agent.)

Date of delivery, 2/20, 1922.

40

## Appellant's Exhibit "G"

LAW OFFICES

G. EARL BRUGLER

Second Nat. Bank Bldg.

HOBOKEN, N. J.

Telephone No. 7 Hoboken

February 21, 1922.

10

SAMUEL KOESTLER, ESQ.,

207 Broad Street,

Elizabeth, New Jersey.

Dear Mr. Koestler:

I have been informed that Moury & Company, Inc., which you represented in the case of Shaw vs. Improved Propeller Corp., recently attempted to remove part of certain machinery alleged to have been sold by it under additional contract, from the premises of said Improved Propeller Corp., at Se-caucus. 20

It is true that the Shaw attachment suit no longer offered any obstruction to your client in removing said chattels, but thereafter a second attachment was levied on all of the chattels in possession of said corporation at the suit of one Joseph Schaad. This latter case was started in our Circuit Court. In addition to this, Mr. Aaron Rips, the party from whom the Improved Propeller Corporation leased said factory premises, distrained the goods and chattels in the factory to satisfy arrears of rent due him. 30

You will see from the above that the situation has changed in material respects since the afore-said order was entered in the Circuit Court with my consent. Under the circumstances, your client cannot lawfully remove the chattels alleged to belong to it until these matters are disposed of. The attachment in the Schaad case is for a debt against which you cannot make the answer you did in the 40

*Appellant's Exhibit "G"*

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10

Shaw case and I am satisfied that unless the claim is paid, all chattels in possession of the defendant may be sold to satisfy same.

I wrote you fully about the matter to assist you in formulating your clients attitude with regard to the second attachment and the distress for rent.

Please let me hear from you.

Very truly yours,

20

G. EARL BRUGLER.

GEB.LRR.

30

10

**Appellant's Exhibit "H"**

Feb. 23, 1922. 10

Mr. G. Earl Brugler,  
Second National Bank Building,  
Hoboken, N. J.

Dear Sir:

I have your letter of February 21st and what you write me causes considerable surprise inasmuch as you examined the law thoroughly in reference to the Shaw attachment and as your present attachment comes after the Shaw attachment, it certainly must be in the same situation as the Shaw attachment and cannot entitle your attaching creditor to any greater rights. Inasmuch as you had personal knowledge of the ownership of this property and personally directed the attachment and distress against this property, it seems to me that you have laid yourself open for an action personally against you for damages and unless you direct the immediate release of this property and surrender it to my clients I regret I will have to take action not only against the claimants, Sheriff and Constable but against you personally. 20 30.

I do not want to criticize your methods but I do think they are subject to severe censure.

Unless I hear from you by return mail that you will undo this attachment and distress against the property, I shall have no cause left open to me but to institute the action which I have above suggested.

I want to notify you now that if any of the chattels owned by Morey and Company, Inc., are sold, damaged or anywise impaired you and your clients will be held responsible for any and all damages and I hereby demand on behalf of Morey and Company Inc., that you and your clients forthwith surrender these goods. 40

Yours truly,  
SAMUEL KOESTLER.

## Appellant's Exhibit "I"

10

Feb. 23, 1922.

Hon. Thomas Madigan,  
 Sheriff Hudson County,  
 Jersey City, N. J.

Dear Sir:

I understand that through the instruction of Mr. G. Earl Brugler, attorney of one Joseph Schaad, you have levied another attachment against the machinery of my client, Morey and Company, Inc., the attachment being issued  
 20 against the Improved Propeller Corporation.

May I ask you to advise me of the date of the attachment and of your levy with the name and address of the coroner of your County as I desire to take appropriate proceedings for the recovery of the property.

I hereby demand on behalf of Morey and Company, Inc., the return by you of the following machinery:

- 1 New #2 Owen Milling Machine, c/s and vise.
- 30 1 Drop Hammer, used
- 1 Advance 18x8 used Lathe with 4 jaw Cushman chuc
- 1 10" Builders Grinder on Stand., with c/s
- 4 Vises, 1-3", 2-4½", 1 Blacksmith vise
- 1 Fosdick 3' Radial Drill, used
- 1 Burke Bench Drill with chuck, New
- 1 Forge and Anvil
- 1 used #52 Bliss press
- 1 New Smith hand screw machine with some box
- 40 tool
- 1 Miner & Peck #3-a Lifter

I am making this demand in order to make the foundation of a replevin suit against you and I also ask you to advise me whether you were directly

*Appellant's Exhibit "J"*


---

instructed by Mr. Brugler to make the levy upon  
this property.

10

Thanking you in advance.

Yours truly,

SAMUEL KOESTLER.

---

**Appellant's Exhibit "J"**

20

Law Offices

G. EARL BRUGLER

Sec. Nat. Bank Bld.

HOBOKEN, N. J.

Telephone No. . . Hoboken

February 24, 1922.

Samuel Koestler, Esq.,  
207 Broad Street,  
Elizabeth, N. J.

*Schaad -vs- Improved Propeller Co.* 30

Dear Sir:—

Your letter of yesterday is before me and I am  
astonished as well as somewhat amused by what  
you have to say.

The situation of the Schaad attachment is alto-  
gether different from the Shaw case, both as to  
the law and the facts. That is perhaps where you  
have gone astray in your conclusions and in your  
threats.

If your letter had been a bit less personal, I 40  
might have taken the trouble to apprise you with  
a few more facts of the present case and thus place  
you in a position to apply your present knowledge  
of the law thereto. If it happens, however, that  
you are familiar with all the facts of the Schaad

*Appellant's Exhibit "K"*

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10

case, then I cannot help but say that your shortcomings are with respect to the law.

I would also like to say in passing that I have no personal knowledge as to the precise ownership of the so called Morey chattels. I believe that the Improved Propeller Company has a property right therein even assuming the contentions of your client to be correct as to the conditional sale.

20

I beg to say for your further information that my client expects to proceed with all reasonable dispatch and all the chattels ostensibly belonging to the defendant or in which it may have a property right, will be sold unless the defendant sees fit to make a settlement of the claim in question.

30

If you think it worth your while to make a further investigation of the grounds on which the second attachment suit is laid, I shall not be averse to assist you to the facts if you are disposed to make request therefor. I am satisfied that you will be readily convinced that your letter was untimely and without support either in fact or law.

Very truly yours,

GEB.LRR.

G. EARL BRUGLER.

40

**Appellant's Exhibit "K"**

Feb. 25, 1922. 10

Mr. G. Earl Brugler,  
 First National Bank Building,  
 Hoboken, N. J.

Dear Sir:

I have your letter of the 24th inst. in regard to demand of Morey and Company, Inc. for the return of its property and I take your letter as a refusal to comply with my demand.

Therefore, I am procuring a bond of the Surety Company and as soon as possible I will have the papers prepared in a replevin action. 20

Yours truly,

SAMUEL KOESTLER.

**Appellant's Exhibit "L"**

Office of the  
 SHERIFF 30  
 HUDSON COUNTY COURT HOUSE  
 Jersey City, N. J.

THOMAS MADIGAN

SHERIFF

JOHN M. HANNAN—JAMES T. BRADY

UNDER SHERIFFS

Feby. 25th, 1922.

MR. SAMUEL KOESTLER, 40  
 Counsellor at Law,  
 #207 Broad Street,  
 Elizabeth, N. J.

Dear Sir,

In answer to your letter dated Feby. 23/22 and received by me Feby. 25, 1922 I very respectfully

*Appellant's Exhibit "L"*

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10

advise, that on Jan. 28th, 1922 I served a duly authorized writ of Attachment wherein Joseph Scaad was Complainant and Improved Propeller Corporation was the Defendant. The writ together with levy and appraisal has since been returned to Court and I have no record of the exact articles attached but am of the opinion that some if not all the items mentioned in your letter are included.

20

Of course, as in most cases of this kind I was more or less guided as to identification of property by Plaintiffs Attorney.

The name and address of one of our Coroners is Richard Horgan #669 Palisade Ave. West New York, but might I suggest that you look up the question as to whether or not this attached property is now in the custody of the law and not in the possession of Thomas Madigan, Sheriff.

Sincerely yours,

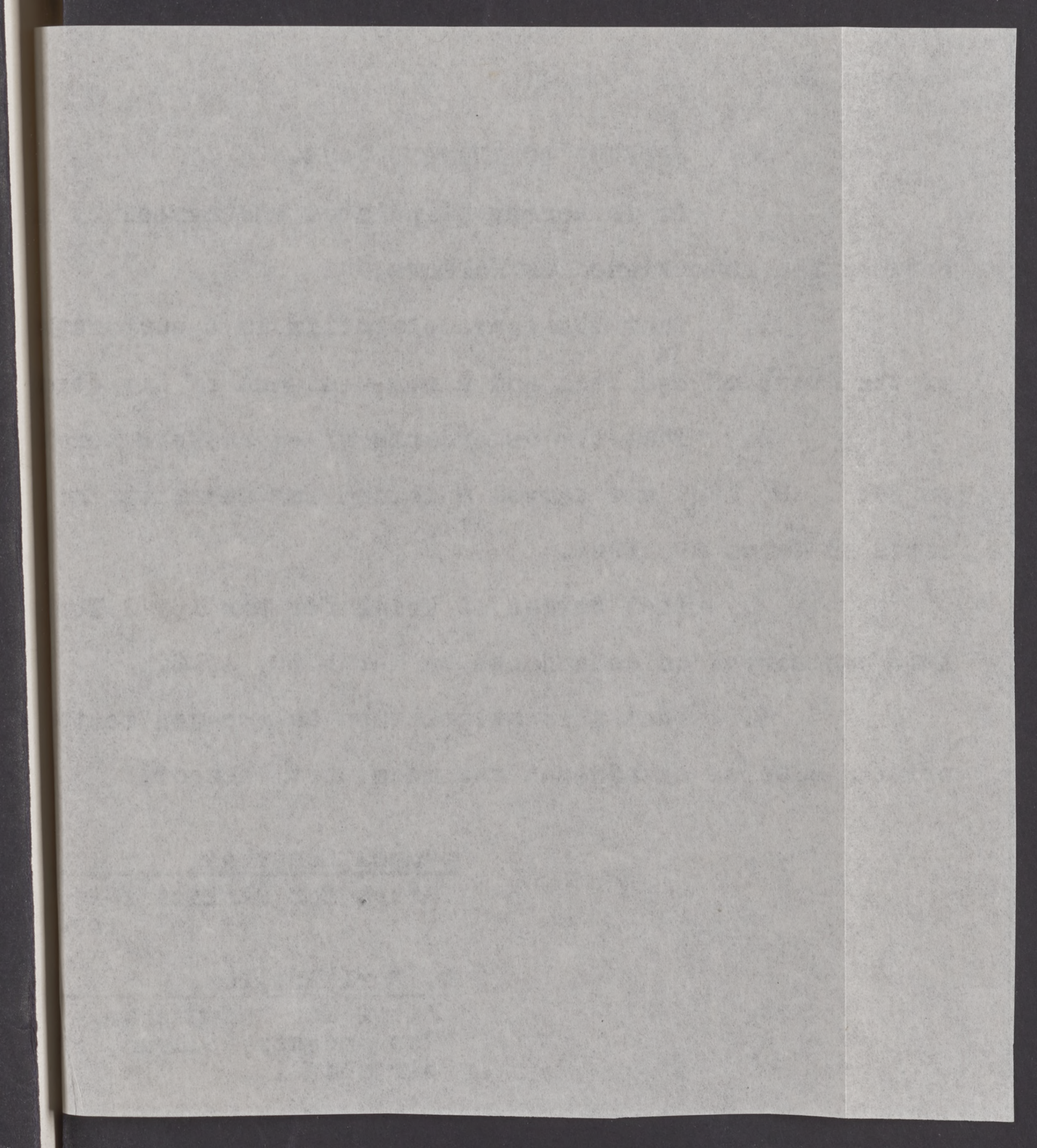
30

THOMAS MADIGAN,  
Sheriff.

TE/JM.

By Enright.

40



ADDENDA TO PRINTED CASE.

It is hereby stipulated and agreed by and between the undersigned as follows:

1. That the above plaintiff is a corporation of the State of New York and a non-resident of New Jersey.
2. That the defendants filed answers herein on March 28, 1922 and served a demand for security for costs on March 29, 1922.
3. That Notice of Trial for the April Term, 1922 was served on defendants on March 30, 1922.
4. That this stipulation be annexed to the printed case as an addenda and made part thereof.

Samuel Koestler

Atty. for Plaintiff-Appellant

G. Earl Burgler,

Atty. for Defendants, Respondents, Schaad, Spencer and Rip.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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MOREY AND COMPANY, INC.,

Plaintiff-Appellant,

and

JOSEPH SCHAAD, *et als.*,

Defendants-Respondents.

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}  
On Appeal

**BRIEF FOR APPELLANT.**

This appeal brings before the Court a final judgment of the Hudson County Circuit Court in favor of the defendant, dismissing the plaintiff's suit. (Case, page 62.)

The action is a replevin suit brought to recover a quantity of machinery sold by the plaintiff under three conditional sales to the Improved Propeller Corporation. (Case, pages 41, 46 and 48, Exhibits A, B and C.) The first of these conditional sales is dated February 10, 1921, the second is dated June 7, 1921, and the third is dated June 9, 1921. They were filed in the office of the Register of Hudson County on March 23, 1921, June 22, 1921, and June 22, 1921, respectively. (Case, page 8, line 38; Case, page 30, line 22; Case, page 31, line 3.)

The defendant, Joseph Schaad, had caused an attachment to be issued out of the Hudson County Circuit Court on January 28, 1922, against the

defendant, Improved Propeller Corporation (Case, page 9, line 20), upon a claim assigned to him by one Houtain. (Case, page 9.) The defendant, Rips, claims, under a distress warrant levied on February 3, 1922, upon the goods and chattels of the defendant, Improved Propeller Corporation, for arrears of rents due to Rips from the Improved Propeller Corporation. (Case, page 11, line 1.) The defendant, Oscar B. Spencer, as the Bailiff of Rips, actually levied the distress warrant. The Sheriff of Hudson County levied the attachment issued in the suit of Schaad and the Improved Propeller Corporation is the conditional vendee of the goods.

Default having been made in payments and an attachment having been issued out of the Hudson County Circuit Court by Walter M. Shaw, the present plaintiff filed a claim of property under the statute and obtained an order of the Hudson County Circuit Court on January 26, 1922, for the surrender of the goods to it (Case, page 16 and page 31), and thereafter receiving the key to the plant from the Improved Propeller Corporation attempted to remove the goods and was prevented from so doing (Case, page 32), and thereupon learning of the attachment of Schaad and the distress warrant of Rips, made written demands upon Schaad, through his attorney, upon the Sheriff and upon Rips, through his Bailiff, for possession of the property, and these people all refusing to deliver the goods, the plaintiff thereupon gave bond and issued his writ of replevin and complaint on the eighth day of March, 1922. On March 28, 1922, the defendants, Schaad, Rips and Spencer, filed a joint and several answer (Case, page 7) in and by which the following defenses were set up:

1. That the plaintiff was not entitled to immediate possession of the goods.

2. That the conditional sales were not filed as required by law, and

3. That the goods were in *custodia legis*, being held by the Sheriff under his Writ of Attachment.

The plaintiff upon affidavits moved for Summary Judgment and the defendants made a counter motion to like effect. See Notice and affidavits (Case, pages 22 to 58, inclusive). The matter was heard by Judge Luther A. Campbell and he decided in favor of the defendants, basing his decision upon an opinion handed down by Justice Bergen in the case of *Brown v. Christian*, reported in 117 Atlantic Reporter, page 294, and accordingly the order for Final Judgment was entered from which this appeal is taken.

The appellant contends that the determination of Mr. Justice Bergen in the case of *Brown v. Christian* is not *res adjudicata* for the reason that the only point decided in that case was that an *unrecorded conditional sale* was void as against an attachment. The fact in the Brown case was that the conditional bill of sale was *never recorded* and the language used by Mr. Justice Bergen that the conditional sale must be recorded within ten days or be void is merely a repetition of the language of the statute.

There are three points for decision:

1. The proper construction of the Conditional Sales Act of 1919.

2. Was the property in *custodia legis* so as to prevent plaintiff from issuing a writ of replevin against the same, and

3. Such subsequent deed cannot lose its priority over the earlier deed by not being put on record, but is, in its turn, if not recorded in fifteen days, subject to be postponed to a later deed taken, without notice, for valuable consideration.

Our case comes within the first rule and is clearly within the language used by Mr. Justice Van Syckel at the top of page 343 of the report in which he says:

“A deed recorded after fifteen days is notice to purchasers, mortgagees and judgment creditors, subsequent to such record.”

That determination is positively on all fours with the question of construction of the Conditional Sales Act now before the Court. The former Conditional Sales Act will be found in 2 Compiled Statute, page 1561, and provides that all conditional sales, unless recorded, should be absolutely void as against creditors not having notice thereof. That Act was before our Court in the case of *Electric Co. v. Equipment Co.*, 57 N. J. Eq. page 460, wherein it was held that the contract of sale recorded before creditors reduced their claim to judgment was valid as against them.

*Reischman v. Masker*, 69 N. J. L. 353, in which the unrecorded contract was held valid as against ordinary creditors, and to the same effect is

*Woolkey v. Wagon Co.*, 59 N. J. L. 278.

In *Smith v. Hotel Ritz Company*, 74 N. J. Eq., page 616, it was held:

“That the section protects only judgment creditors, subsequent purchasers and mortgagees without notice.”

It is, therefore, respectfully insisted that the decision of Mr. Justice Bergen in *Brown v. Christian* is not *res adjudicata* and that learned Justice did not attempt to construe the statute in relation to

rights of attaching creditors as against a recorded conditional sale and that the learned Circuit Judge in deciding the case at issue misconstrued the effect of the decision in the case of *Brown v. Christian* and misapplied the same.

The case of *Thayer Mercantile Co., Inc. v. First National Bank of Milltown*, 119 Atl. Rep., page 94, is likewise not in point for the reason that an attachment was levied within ten days and the conditional sale agreement or copy was not filed within the ten day period or on any subsequent date.

In passing it may be remarked that the language of Section 14 of the statute referring to the creditors described in Section 5 is again a limitation of the class of creditors as against whom the conditional sale may be void. In that class is included only those creditors having liens by attachment or otherwise before the contract or copy is filed.

In this case there is no such creditor as the conditional sales were filed months prior to the acquiring of any lien by any of the defendants.

It is respectfully insisted that a proper construction of the Conditional Sales Act makes valid the three conditional sales of the plaintiff-appellant as against all persons defendant in this suit.

## POINT TWO.

### **The Goods are not in *Custodia Legis*.**

Our decisions on this point are:

*Weiner v. Van Renselaer*, 43 N. J. L.  
547.

*Hawk v. Lepple*, 51 N. J. L. 208.

*Brown v. Bissett*, 21 N. J. L. 276.

And I cite from the latter case, bottom of page 276, in which Mr. Justice Carpenter held:

“But whatever difficulties may elsewhere have been felt in this country, the right of a third person, not the defendant in the process, to bring replevin, is well established.”

In the case at issue the attachment was issued by Schaad against the Improved Propeller Corporation. The third person is Morey and Company who brought the writ of replevin. The practice has always prevailed throughout this State that the owner of the goods attached by the Sheriff as the property of another person may establish ownership by an action of replevin.

### **Demand for the Return of Goods.**

The case shows that Mr. G. Earl Brugler, the attorney of the respondents in this cause, as the attorney of one *Walter M. Shaw*, caused a writ of attachment to be issued out of the Hudson County Circuit Court against the Improved Propeller Corporation on December 27, 1921, and levied upon the machinery now claimed by Morey and Company, Inc., under the writ of replevin in this cause. (Case, page 31). Morey and Company, Inc., gave notice of Claim of Property under the statute, claiming to be the owner, and such proceedings were had that on January 26, 1922, an order was made by the Hudson County Circuit Court releasing and discharging said machinery from the attachment and levy and directing the Sheriff of Hudson County to forthwith surrender the goods to Morey and Company (Case, page 31); upon this

3. Was the demand made by plaintiff sufficient?

**(a) The Conditional Sales Act of 1919.**

The facts in this case clearly disclose that goods were sold by plaintiff to the Improved Propeller Corporation upon 3 written conditional bills of sale, copies of which are printed in the case as Exhibits A, B, and C on pages 41 and 49, inclusive. These conditional sales were not recorded or filed within ten days of the making thereof. The first was filed March 23, 1921, and the other two on June 22, 1921. (Case, pages 8, 30 and 31.)

The writ of attachment of the defendant, Joseph Schaad, was issued January 28, 1922. (Case, page 9, line 20.)

The Distress of the defendant Rips was levied on February 3, 1922. (Case, page 11, line 1.)

The entire case is controlled by a proper construction of the Act of the Legislature, Chapter 210, of the Laws of 1919, entitled, "AN ACT CONCERNING CONDITIONAL SALES AND TO MAKE UNIFORM THE LAW RELATING THERETO," P. L., page 461.

Section 4 of that Act provides:

"Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons, except as hereinafter otherwise provided."

Section 5 of the Act provides:

"Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, *before*

the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale."

Section 6 provides for the filing of the conditional sale or copy with the Register of Deeds in the county in which the goods are first kept by the buyer after the sale.

The question for solution and construction is:

Does this statute hold that all conditional sales are void in the event of the vendor failing to file the same within ten days of the date of sale, or does a contract retain its validity as provided by the Fourth Section, unless a lien intervenes between the sale and the actual recording of the contract.

The pertinent language of Section is, "before a contract or a copy thereof shall be filed as hereinafter provided," so that in any event in order for the attaching or levying creditor to obtain a paramount lien he must do so before the filing of the contract. The language of the act containing the ten day clause is not for the benefit of the creditor but for the benefit of the vendor. Should the vendor file his conditional sale contract within the statutory ten days, the contract prevails although a creditor obtains a lien within those ten days.

Under a construction of Sections 4 and 5 taken together the conditional sale is valid as against all persons excepting those creditors of the buyer who obtain a lien upon the goods by attachment or levy prior to the recording of the conditional sale and as to the persons who do not acquire a lien before the recording the instrument, it makes no difference whether the instrument is recorded within ten days or after ten days. If Section 5 was intended to mean that the conditional sale

is absolutely void as against creditors unless the sale is recorded within ten days, the word "before" would have no proper place in Section 5 and it would be construing Section 5 without having proper regard for the word "before" and as it is elementary in construing the statute, the whole statute must be construed, it necessarily follows that any interpretation put upon this statute such as has been done by the Trial Judge is erroneous and not only does violence to a proper construction of Section 5 but entirely ignores the provisions of Section 4 of the Act.

A similar statute was construed by this Court in the case of *Sanborn v. Adair*, 29 N. J. Eq., page 338, in which Mr. Justice Van Syckel wrote the opinion, unanimously concurred in by all Justices of this Court. In that case the statute required the deed of conveyance to be recorded within fifteen days and in construing the Act this Court laid down the following rules:

1. A deed recorded after fifteen days is notice to purchasers, mortgagees and judgment creditors, subsequent to the time of such record.

2. A deed not recorded within fifteen days is void as to a subsequent deed for a valuable consideration, without notice, and cannot regain its priority by being placed on record before such subsequent deed is recorded.

order being entered, the Improved Propeller Corporation surrendered to Morey and Company, Inc., the key to the plant in which the machinery was located and Morey and Company, Inc., sent its truck for the goods and was stopped from taking the same. (Case, page 32.) Thereupon learning of the attachment issued by the defendant, Schaad, on January 28, 1922 (Case, page 9, line 20), and the levy of the distress by Rips on February 3, 1922 (Case, page 11, line 1), Morey and Company,

Inc., by letter dated February 18th made a demand upon the Landlord and his Bailiff for the return of the goods (Case, pages 72 and 73), and on February 21st received a letter from G. Earl Brugler, the attorney of Schaad, setting up the Schaad attachment and the Rips distress warrant, threatening to sell the goods and chattels, and in response to that letter a demand was made upon him, as the attorney of these claimants, for the return of the goods (Case, page 77). A like demand was made upon the Sheriff by letter of February 23, 1922 (Case, page 78). By letter of Mr. Brugler, dated February 24, 1922, he stated that the property would be sold (Case, pages 79 and 80). A letter was received from the Sheriff under date of February 25, 1922 (Case, page 81), which I take as a refusal to surrender the goods. The writ of replevin was not issued until March 8, 1922, and it does not make any difference that at the time of the levy of the attachment, the end of January, 1922, that the Improved Propeller Corporation may have had some right in the property, they complied with the order of January 26, 1922, made in the Shaw case, by surrendering possession and the acts committed as set forth in the letters printed on pages 72 and 82, inclusive, clearly shows that the property rights of the appellant were interfered with and that the only way those rights could have been protected was by the writ of replevin. There was a positive interference with the rights of the plaintiff to take possession of its own property. Persons authorized to act for the several claimants were given due written notice and demand made for the return of the goods and the same was not only refused but a threat was made to sell the goods to pay the claims of the defendants. (Case, page 80, line 20.)

In the case of *Shapiro v. DeLuce*, 89 N. J. L., page 161, the question in reference to an improper demand has no bearing upon this case for the reason that in the Shapiro case the wife was not the agent of the husband and had no control over the husband.

In this case, the Sheriff, the Bailiff and the Attorney were all persons actively interested for and on behalf of the attaching creditors, and the landlord and the entire atmosphere of the case, in assertion of the title is hostile to the title of the plaintiff, and in fact the landlord or attaching creditors do not claim under any title which they received from the plaintiff and which must be terminated by notice from the plaintiff, as was held in the case of *Black v. Pidgeon*, 70 N. J. L. 802.

The appellant claims that the actions of the landlord, attaching creditor and the attorney, as disclosed by their correspondence, was an exercise of dominion, as pointed out in *Schwartz v. King Realty Co.*, 93 N. J. L. 111, and that action amounted to an unlawful detention of plaintiff's property, affirmed 94 N. J. L. 134.

### **Rights To Possession.**

The plaintiff by the three conditional bills of sale retained title to all of the goods conditionally sold to the Improved Propeller Corporation, Exhibits A, B, C (Case, pages 41 to 49).

The terms and conditions of these three conditional sales as particularly set forth in Exhibit A, pages 43 and 44, gives Morey and Company, Inc., a right to retake possession of the property (Case, page 44, line 17) in the event of default in payment of any of the notes delivered to the Company (page 43, line 21), in the event that the purchaser removes the property herein described when a cus-

todian of the assets is appointed (page 43, line 36), in the event the purchaser does an act to denote his insolvency, in the event of the purchaser shall discontinue its business (Case, page 43, lines 29, 38 and 40). Each and every one of these acts of default took place. The writ of replevin calls for eleven named articles, eight of which were sold under Exhibit A, the ninth and tenth articles under Exhibit B, and the eleventh named article under Exhibit C. All of these conditional sales calls for part payment. The affidavits in the case show that under Exhibit A, the Improved Propeller Corporation paid the three Two Hundred Dollar notes and the first two of the One Hundred and Fifty Dollar notes (Case, page 30, line 12); that they did make the payment of the notes due under Exhibit A of the notes payable 1, 2, 3, 4 and 5 months after date of delivery, or in March 16th, April 16th, May 16th, June 16 and July 16th, so that there were defaults made in the notes payable August 16th, September 16th, October 16th, November 16th, December 16th, 1921, and January 16th, 1922. Under the second Bill of Sale there was no default in the payment of the note, but in the third Bill of Sale there was default in the payment of both notes which were due respectively September 9th and October 9th, 1921.

On the other hand the levy of the property under the attachment was in fact under the provision of the Attachment Act and the levy under the Distress Warrant, the placing of the property in the care of a custodian such as the Sheriff or Bailiff, was tantamount to the removal of the property from the premises, was tantamount of an act denoting the insolvency of the purchaser. All of this was followed by the order of the Court dated January 26, 1922, directing the surrender of the property to the plaintiff (Case, bottom of page 31),

and the Improved Propeller in response to said order delivered the keys of its plant to the plaintiff or its attorney (Case, page 32, line 18). All of this terminated the right of the Improved Propeller Corporation to any right of possession in and to the property sold under the three conditional sales. There was an absolute and positive default in the payments under the first and third conditional sales, the situation surrounding the case denoted a discontinue of the business and an interference with the property rights of the plaintiff which gave it the right to possession of the two articles sold under the second conditional sale. Heaped on all of this was the threat of the attaching creditor and the landlord, through their attorney, to sell the property (Case, page 40, line 30, Case, page 80, line 20), and in the answer of these defendants, Schaad claims in paragraph 5 of his third defense that the goods are liable to sale in the attachment to satisfy the judgment as may be recovered (Case, page 9, line 40). The defendant, Rips, in his answer, paragraph 4 of the Fifth Defense, says that the goods are subject to his claim and liable to sale in the proceedings to satisfy his claim for rents with costs (Case, page 11, line 33). The defendant, Improved Propeller Corporation, by its answer (Case, pages 20 and 21) admitted the breach of the contract and admitted that the plaintiff is entitled to immediate possession of the goods and chattels, that it surrendered the key to the factory and that it had never refused the demand of the plaintiff or the surrender of the goods to the plaintiff.

Thus the case discloses not only that the plaintiff has absolute title to the goods and chattels but that it had the right to possession of all of the goods and chattels at the time of the issuing of the Writ of Replevin and that at the time of the

levy of the Schaad attachment and Rips Distress Warrant plaintiff had the right to possession of all of the goods under the conditional bill of sales, Exhibit A and C, and possibly to the goods mentioned in the conditional bill of sale, Exhibit B, for the reasons above urged.

### Defendants' Other Objections.

It appears that in the stipulation annexed to and made a part of the printed case, the defendants' answer was filed on March 28, 1922, that after the filing of said answer and on March 29, 1922, the answering defendants demanded security for costs and now urge against the appeal the fact that a separate bond for security of costs was not filed by plaintiff on the ground of its non-residence.

It is contended that this matter is not before this Court for three reasons:

The first is the judgment before the Court is one in favor of the defendants and from it defendants have not and cannot take an appeal.

Secondly: The bond in the replevin suit is ample protection for any costs that should have been awarded to the defendants, and

Thirdly: Defendants have taken a step in the cause and cannot demand security for costs under the case of *Newman v. Landrine*, 14 N. J. Eq., page 291.

Furthermore the statute regarding Security for Costs does not require a dismissal of the case, it merely stays proceedings in the Court in which the action is pending. The learned Trial Judge in deciding the case and *not* in ordering a stay of the proceedings evidently agreed with the contention that the defendants were not entitled to any secu-

urity for costs other than the replevin bond filed in the sum of Five Thousand (\$5,000.00) Dollars.

### In Conclusion.

It is most respectfully insisted that a judgment final on the merits in favor of the defendants can only be sustained if the conditional sales of the plaintiff are absolutely void as against the defendants because not filed within ten days of the date of the making thereof respectively. I urge that such an interpretation of the statute is not correct and that any conditional bill of sale, irrespective of the date of its filing, is perfectly valid as against liens acquired on the property after the date of filing and if the conditional sales are valid, whether there was a proper demand or the right to immediate possession, judgment final which in effect will deprive the plaintiff of any of its rights against this property must necessarily be erroneous. If the action was prematurely brought the judgment must be to that effect and not a judgment which will forever preclude plaintiff from its rights against the property. The remarks by Mr. Justice Swayze, in the case of *Herzog's Cloak & Suit Co. v. Fedorko*, 92 N. J. L., page 34, are particularly appropriate in showing that the judgment is incorrect. However, the appeal is not merely to the form of the judgment but to the finding upon any point in favor of the respondents.

Appellants strenuously urge that under the facts in the case it is not only entitled to possession but that the defendants by their answers made an unlawful detention of the goods and that upon both grounds that the plaintiff is the owner of the goods: (a) that it gave written notice demanding their return, and (b) that there was an unlawful de-

tention of the goods, coupled with a threat to sell the same which interfered materially with the exercise of dominion over said goods by plaintiff, plaintiff must protect its rights, as it did by a writ of replevin.

The claim of the respondent Schaad is based upon an assigned claim which is alleged to have arisen at a time prior to the sale or possession of any of these goods by the Improved Propeller Corporation and, therefore, he cannot claim that upon the strength of ownership of these goods his assignor extended credit. Rips is in the same position. He rented the premises to the Improved Propeller Corporation on August 19, 1920, long before any of these goods were conditionally sold by the plaintiff to the Improved Propeller Corporation.

Respondents by their brief seem to urge that since the attempt to take actual possession of the goods did not occur until February 14th, probably two weeks after the Writ of Attachment of Schaad was issued and subsequent to the levy of the Distress Warrant of Rips, that the respondents' rights must necessarily be superior to the title and rights of possession of the appellant; that this argument entirely loses sight of the fact that under the conditional sales the title to the goods always remained in Morey and Company so that the only question really here for decision is whether at the time the right to possession arose, either on February 14th and after giving demand to the respondents, the writ of replevin was properly issued, and this can only be determined by a proper application and construction of the Conditional Sales Act. It makes no difference whether the Distress and Attachment were levied before actual possession was attempted to be taken of the goods.

It is conceded that by reason of the various de-

faults and demands for possession Morey and Company was entitled to possession at the time the Writ of Replevin was issued, provided its conditional sales were valid as against respondents. The cases of *Brown v. Christian, Thayer Mercantile Co., Inc. v. First National Bank of Milltown, supra*, give no aid in the construction of the statute for the reason that both of said cases relate to instances where the Conditional Sales *were not filed*.

In the instant case all the conditional sales were filed before the respondents acquired any lien on the goods by levy and this is the decisive feature of the case. The first citation made by counsel for respondents, on page 9 of his brief, says:

“The filing after ten days from the date of the making of the contract of course protects the seller against all subsequent purchasers who may bring levy on the goods.”

Naturally if a sale filed after ten days is good as against a subsequent purchaser, it is also good as against a subsequent lienor by levy. A proper construction of the Act, particularly with reference to Sections 4, 5 and 14, necessitates the holding that the filed conditional sale is always valid as against purchasers or lienors who acquire the goods by purchase or levy *after* the filing of the instrument.

Therefore, it is respectfully urged that the judgment below should be in all things reversed and judgment should be here entered in favor of the plaintiff with costs below and here and the cause remitted to the Hudson County Circuit Court merely for the purpose of permitting said Court to take further proceedings for the issuance of a

Writ of Inquiry under which the plaintiff's damages may be assessed for the unlawful detention by the defendants of plaintiff's property.

Respectfully submitted,

SAMUEL KOESTLER,

Of Counsel with Appellant.

## New Jersey Court of Errors and Appeals

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MOREY & COMPANY, Inc.,  
Plaintiff-Appellant,

vs.

JOSEPH SCHAAD, *et al.*,  
Defendants-Respondents.

In Replevin.

On Appeal  
from Circuit  
Court.

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### BRIEF FOR RESPONDENTS.

#### The Facts.

This was a replevin action by appellant to recover certain chattels seized by the respondent Schaad under a writ of attachment against the respondent Improved Propellor Corporation, against which chattels the respondent Rips had a distress for rent. The Sheriff of the County of Hudson was made a defendant because the chattels were in his possession as the levying officer in said Schaad attachment suit. Spencer was made a defendant because he was the bailiff of said Rips in said distraint proceedings.

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The appellant based its right to ownership and its right of possession of the chattels in question by reason of the alleged sale of said chattels to said Improved Propellor Corporation under con-

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ditional sale contracts. At the time of the Schaad attachment on January 28th, 1922, (82-11) said chattels were in possession of the Improved Propellor Corporation in Secaucus. None of said alleged conditional bills of sale, however, were filed within the 10-day period as required by the Uniform Conditional Sales Act of 1919. The first of said instruments was filed 35 days after making; the second of said instruments was filed 16 days after making, and the third of said instruments was filed 14 days after making. Appellant's brief gives the date of the first contract as February 10th, 1921, but that is wrong, it was February 16th, 1921 (25-35, 64-44).

Schaad made his said attachment on a claim for \$920.65 assigned to him by one Houtain against said Improved Propellor Corporation which existed at the time the first of said conditional sales was made. Schaad and his assignor Houtain were without notice of the provisions of said conditional sale contracts (pages 52 and 53).

Prior to the Schaad attachment, one Shaw also attached the same chattels and other property of said Improved Propellor Corporation. The appellant filed a claim of property with the Sheriff in said action. Thereafter said Shaw consented to the release of said chattels claimed by appellant as he was of the opinion at the time that his attachment covered sufficient other chattels to satisfy his claim (55-30) and thereafter, said Shaw abandoned his action altogether. An order was entered in said Shaw attachment on January 26th, 1922, by consent, whereby said chattels were directed to be surrendered by said sheriff to said appellant as the claimant thereof (57-18) and not "as the owner thereof" as stated by appellant (35-14). There was no recognition on the part of anybody as to the ownership, as by reference to said proceedings will

more fully appear. Moreover, there was no adjudication in the Shaw case and had there been one, it would not be binding on the parties here.

At the time of said Schaad attachment, the conditional vendee had paid \$2,050 on account of the purchase price of said chattels, leaving a balance due of \$2,335 (31-20), thus creating a very substantial interest on the part of the vendee in the chattels in question. At the time, however, appellant claims that its vendee was in default with some of its payments.

The affidavit of Mr. Winter, appellant's local attorney in New York, alleges that after entry of said consent order for the release of said chattels in the old Shaw attachment suit, he got in touch with the officers of the Improved Propellor Corporation and they surrendered to him the keys of the plant in Secaucus (35-12 &c.). The date of the actual alleged surrender of said keys and the consequent surrender of the chattels is very important, although, appellant did not specify the precise date. In the oral argument, however, in the court below, it was admitted by counsel for appellant, that this surrender and the attempt to recover possession, took place following the levy of the Schaad attachment by the sheriff on January 28th, 1922. The affidavit of said Winter shows that aside from the exact date of said constructive surrender, no attempt was made to obtain actual possession of the chattels until February 14th, 1922 (35-25). The court below correctly understood the sequence of events surrounding these matters as the case largely rested on the point of time when the Schaad attachment was made with respect to the time when it is claimed that appellant alleges to have become entitled to possession by reason of the alleged default by the vendee in its payments. Why appellant did not seek to make the

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chronology of said events more clear, cannot be understood.

We desire the court to particularly keep the facts in mind with respect to the order of these events as we consider them very important in passing upon the questions of law involved.

10 On March 20th, 1922, before Notice of Trial, defendants-respondents duly served appellant with notice of their demand for security for costs under the statute. Appellant never gave notice to defendants as to the filing of such security and the record shows that no security in fact was ever filed.

20 Appellant moved for summary judgment in the court below on certain affidavits shown by the record. Respondents made counter-motion for summary judgment and also filed affidavits. After considering both oral argument and briefs submitted by the respective parties on said motions, the court below decided that respondents were entitled to summary judgment against appellant.

### POINT I.

30 **Chattels replevined were in custodia legis and replevin action was properly dismissed.**

Let us summarize the important facts in the order of their happening:

1. Schaad's assignor Houtain became a creditor of the Improved Propellor Corporation (52-30).

2. On February 16th, 1921, the first conditional sale of chattels was made by appellant to said propellor corporation (25-35, 64-44).

40 3. Said chattels were seized by the Sheriff in Schaad's attachment suit on January 28th, 1922

(82-11), while in possession of said propellor corporation at Secaucus (56-45).

4. Alleged surrender of chattels after levy in Schaad suit, and attempt to obtain possession thereof on February 14th, 1922 (35-12 to 25 &c.)

5. This replevin action was begun March 9th, 1922.

10

When the alleged default in making the installment payments under the above conditional sales occurred and whether such default was under one or all of said sales we are not told. Assuming, without waiving that detail, that the alleged default occurred on all contracts and all before the levy by the Sheriff in the Schaad suit on January 28th, 1922, appellant's position is not bettered as it is fundamental that a mere default on the part of a conditional vendee does not *ipso facto* entitle a vendor to immediate possession of the subject of the sale. There must be proper demand for possession or a voluntary surrender without such demand.

20

Since judgment in this case has already passed in favor of respondents, this Court has a right to look upon the facts in the most favorable light and sustain the court below unless there is clear error. But assuming the facts in appellant's favor for the moment concerning the alleged default, at the most, appellant had no right of possession of the chattels until sometime between January 28th, 1922 and February 14th, 1922. We shall hereafter show that such possible bare right of possession as against its vendee after the Schaad attachment came too late.

30

When is property *in custodia legis*? Originally there seems to have been confusion about this doctrine. The test now seems to be whether the process rightfully issue against the property. This has been summarized as follows:

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10 “While the general rule as to the impropriety of replevin to recover goods in the custody of the law is generally conceded there is no little difference of opinion as to when property is in fact in the custody of the law within the meaning of such rule. Many courts take the view that the custody of the law must necessarily be that, and that only, which the officer had the right to assume over the specific property by virtue of the prescribed mandate contained in his writ, and that when goods are taken by an abuse of authority, they are not in the custody of the law.”

23 R. C. L., 878, citing *Bruen vs. Ogden*,  
11 N. J. L., 370.

20 “Proceedings by attachment in this state rest upon the existence of three jurisdictional facts: A debt due to the party purchasing the writ; the non-residence of the defendant, and attachable property of the defendant within the state.”

*Hawk vs. Lepple*, 51 N. J. L., 208, 215.

30 It has been shown that the Sheriff in the Schaad attachment suit seized property in which the attached defendant had substantial interest, and while said defendant still had lawful possession thereof. This being true, said process by attachment rightfully issued and a stranger thereto could not interfere so long as said chattels were in the possession of the Sheriff as an officer of the law.

40 “The distinction between goods taken on execution and by replevin is marked. In the latter case, the identical goods are in the custody of the law, and are before the court

"to be disposed of as it shall see proper and  
 "the proceeding is so far *in rem* that the goods  
 "cannot be seized upon any process until the  
 "court shall have taken action. If, therefore,  
 "a party finds his goods in the hands of an  
 "officer upon a valid writ of replevin, his rem-  
 "edy is by application to the court to be per-  
 "mitted to come in and set up his claim to 10  
 "them and not by any independent replevin.  
 "Whereas, if goods are wrongfully seized by  
 "execution, it cannot be said to confer any  
 "wrong on them or to bear any resemblance  
 "to proceeding *in rem*."

*Weiner vs. Van Rensselaer*, 43 N. J. L.,  
 547, 549.

A proceeding by attachment is a proceeding 20  
 strictly *in rem* and the case at bar, therefore, comes  
 within the rule stated above. The chattels in ques-  
 tion, having been seized under a valid attachment,  
 the remedy of the appellant herein was "to come  
 in and set up his claim to them, and not by re-  
 plevin."

## POINT II.

**Appellant had no title to or right of 30  
 possession of chattels as against re-  
 spondents because conditional bills  
 of sale were not filed within time re-  
 quired.**

Section 5 of the Uniform Conditional Sales Act  
 provides:

"Every provision in a conditional sale re-  
 "serving property in the seller, shall be void 40

“as to *any* purchaser from, or creditor of the  
 “buyer, who, without notice of such provision,  
 “purchases the goods or acquires by attach-  
 “ment or levy a lien upon them, before the  
 “contract or a copy thereof shall be filed as  
 “hereinafter provided,”

10 with a single exception—

“*unless* the contract or a copy is so filed within  
 “10 days after the making of the conditional  
 sale.”

The contracts in the case at bar is conceded by  
 appellant were not “so filed.” All attempt to re-  
 serve property in itself by appellant and make it-  
 self anything other than a general creditor was  
 “void.” Schaad or his assignor was undeniably  
 20 without notice and, therefore, acquired a valid lien.

But appellant contends, notwithstanding its fail-  
 ure to comply with the act, it nevertheless pro-  
 tected itself against *any* creditor of its vendee who  
 did not acquire a lien by attachment prior to the  
 actual filing of its conditional sales *beyond the time*  
*prescribed by the act.*

Respondents contend that such later filing is ut-  
 terly abortive except to give notice to *subsequent*  
 purchasers or lienors, but we are not concerned  
 30 here about such a class, as Schaad was a *prior*  
 creditor who acquired a lien. It might be said,  
 however, that the act expressly says “*any*” in re-  
 ference to such creditors of the buyer, which would  
 indicate creditors whether prior or subsequent.

Uniform laws have been the subject of much agi-  
 tation for many years. Commissions and commit-  
 tees have been appointed in different parts of the  
 country to harmonize important legislation in dif-  
 40 ferent states. As a result our Uniform Act was

made law in 1919. Reverting to the labors of the conferees and drafters of the act will prove illuminating and persuasive as to what was intended and is meant by its provisions.

The new work on Uniform Laws Annotated, published by Edward Thompson Company, gives the report of commissioners appointed. We quote a pertinent reference to the above Section 5:

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“Under the statute the contract is valid for  
 “10 days without filing. It was thought un-  
 “wise to require the seller to file immediately.  
 “The seller’s office may be far distant from the  
 “filing district and he should have a reasonable  
 “time to mail the papers and get them filed.  
 “The filing after 10 days from the date of the  
 “making of the contract of course, protects the  
 “seller against all *subsequent* purchasers who  
 “may bring levy on the goods.”

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Vol. 2, Uniform Laws Anno., page 9.

Since the adoption of the law by New Jersey; Justice Bergen, speaking for the Supreme Court in *Brown vs. Christian*, 117 Atl. (N. J.) 294, gave fair expression to this act when he said:

“We think that under this statute, although  
 “we do not have to go so far in this case, if a  
 “conditional bill of sale is not filed within 10  
 “days after it is made, it is absolutely void as  
 “to any attaching creditor unless he has notice  
 “of the bill of sale and of its provisions prior  
 “to the execution of the writ.”

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To the same effect see opinion by Chief Justice Gummere in—

*Thayer Mercantile Co. vs. First Nat'l  
 B'k., of Milltown*, 119 Atl., (N. J.) 94. 40

The only matter left in doubt by the above expression of our Supreme Court is with respect to the time of receiving notice by a creditor who attaches. Justice Bergen said "prior to the execution of the writ," which is correct, but could be more definite. It has been seen that such notice would not be effectual at any time against any and all creditors prior to the execution of the writ and we do not believe the learned Justice Bergen so thought. Such notice must be had by a prior creditor at or before the time he became such creditor. If it is a case of a party becoming a creditor *subsequent* to the making of the contract (not with what we are concerned with here), such notice may be given at any time prior to the execution of the writ, by the filing of the contract even though it be after 10 days.

At the close of appellant's argument under its first point, refuge is taken under Section 14 of the act as determining the class of creditors intended by Section 5. Chief Justice Gummere in the *Thayer Mercantile Co.* case, *supra*, answers that as follows:

"The language of these provisions is free from ambiguity, and our examination of the other sections of the statute satisfy us that they do not in any way restrain or limit the natural force to be given to it." (Referring to "Sect. 5.")

Appellant singles out the phrase "before the contract or a copy thereof shall be filed as hereinafter provided" and attempts to do violence to the plain language of Section 5 by contending that this indicates that a creditor's lien to be good in any event must be acquired before the filing of the contract, even though the same is filed after the 10-day period.

If the comma separating the words "them" and "before" in this section were not there, then we might agree with this construction. This comma, of course, was inserted to make a pause between said words and the two different phrases in which the words appear in order to show a break in the continuity of the thought to be expressed. The phrase beginning with "before," by reason of said comma immediately preceding said words, necessarily refers back to "creditor" or "buyer," the first words furnishing an antecedent. This comma serves only one purpose and that is to make clear that there was to be no direct relation between the word "before" and "attachment or levy."

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In other words, the attempt to reserve title would be void if "the purchaser from or creditor of the buyer" be such before "the contract or copy thereof is filed," unless such filing be within the 10 days *not* before "attachment or levy." By filing the contract within 10 days, it would be valid against everybody. By filing after ten days the contract is valid only against creditors after the making thereof who acquire a lien without notice.

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Appellant cites the case of *Sanborn vs. Adair*, 29 N. J. Eq., 338, which held that under a statute requiring that deeds "should be void and of no effect against a *subsequent bona fide* purchaser or mortgagee for a valuable consideration, not having notice thereof," unless recorded, etc., within 15 days. The court in that case did say that notwithstanding the act "a deed recorded after 15 days is notice to purchasers, mortgagees and judgment creditors, *subsequent* to such record." We have no fault to find with the construction made by the court of that statute. That statute used the word "*subsequent*" as applied to the class of parties to be affected, whereas the act under consideration uses the word "*any*" as applied to creditors, etc. Furthermore,

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10 if we should apply the same construction despite the description of the class of creditors to be affected, the Sanborn case would have no application, as the court merely decided in that case that the deed recorded after the 15 day period was merely notice to creditors *subsequent* to such record. Schaad, in the case at bar, was not a creditor subsequent to the actual filing of the conditional contracts, but a prior creditor.

20 Appellant argues also that the construction of statute *sub judice* must follow the construction made of the old conditional sales act found in 2 Comp. Stat., page 1561. It is to be noted, however, that appellant again studiously avoids mentioning the class of creditors referred to by such other statute. The old act specifically says "judgment creditors" and "*subsequent* purchasers, etc." That act was properly construed by the cases cited by appellant that a conditional contract of sale recorded before a creditor had reduced his claim to judgment was valid and valid also as against ordinary creditors. This was true because the statute by its language limited the operation thereof to the class of creditors mentioned. It requires but a short study to see that the construction of the other statutes cited by appellant have not the least application here as the same are distinguished by their dissimilarity.

30 The language of the Uniform Conditional Sales Act is plain, but if there is any need to resort to precedent for construction, the chattel mortgage act furnishes the best example, by reason of the similarity in the description of creditors.

40 "Every mortgage \* \* \* of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of

“possession \* \* \* shall be absolutely void as  
 “against creditors \* \* \* unless the mortgage  
 “\* \* \* be recorded as directed,” etc.

1 N. J. Comp. Stat., page 463, §4.

Everybody is familiar with the construction of  
 this act. It has always been held to render a chat-  
 tel mortgage void against all creditors in good  
 faith unless there was strict compliance with the  
 act (*Brown vs. Harris*, 67 N. J. L., 207).

The chattel mortgage act merely says “creditors.”  
 The old conditional sales act said “judgment credi-  
 tors” and “*subsequent* purchasers.” The present  
 Uniform Conditional Sales Act says “*any*” credi-  
 tor. There are no words of limitation of time in the  
 class of creditors in the first and last references so  
 all creditors were intended in both cases. Were it  
 not for the limitation appearing later in the same  
 section of Section 5 of the Uniform Act, specifying  
 “any purchaser from or creditor of the buyer, be-  
 fore the contract or copy thereof shall be filed as  
 hereinafter provided,” we contend that even rights  
 of creditors subsequent to the filing, if the same be  
 done out of time, who acquired a lien, would be  
 superior to the conditional vendor.

### POINT III.

**Plaintiff failed to file security for  
 costs as demanded and Court prop-  
 erly gave judgment on that ground.**

The plaintiff-appellant in this case is a non-  
 resident (see addenda to case). On March 29th,  
 1922, before notice of trial, the defendants served  
 notice on said plaintiff that they required and de-

manded that plaintiff file security for costs as required by the statute (see addenda to case).

10 The statute under which this demand for security for costs was made is found in 3 N. J. Comp. Stat., page 4115, §204. It is very positive in its terms and make it imperative on the part of a non-resident plaintiff to file such security if demand therefor be made at any time before notice of trial. The defendants duly demanded that plaintiff file such security but the same was not filed.

Appellant seeks to excuse its non-compliance with the aforesaid demand under said statute for three reasons: (1) because judgment passed in favor of the defendants; (2) because the bond in replevin was ample protection, and (3) because defendants took a step in the cause and could not properly demand security for costs.

20 As to the first ground, we beg to say that while the defendants obtained judgment in their favor, this court on appeal will sustain the ruling of the trial court upon any legal ground and will not disturb the judgment if there be any ground to support the action of the trial court. We contend that the non-compliance by appellant with the statute in itself furnished sufficient ground for the trial court to dismiss and give judgment.

30 As to the second reason urged by appellant for its failure to comply with said demand, we beg to say that the court is not concerned about the bond filed at the inception of the action as the statute imposes an absolute duty on a non-resident plaintiff to comply with the terms thereof on demand. The statute makes no exception to persons or circumstances.

40 As to the third reason given by appellant for its non-compliance as above, it cites the case of *Newman vs. Landrine*, 14 N. J. Eq., 291. It is noticeable that appellant does not quote from said case

as there is nothing in said case quotable in support of its contention. The demand for security for costs in the Newman case, the court said "does not rest upon the provisions of our statute. It is an ancient and well established rule." This being the situation the court in the Newman case merely applied the rule of practice then in effect. Here the court is guided by a statute complete and explicit in its terms. These terms having admittedly met with non-compliance on the part of appellant, it was within the prerogative of the court below to pass judgment against appellant and it did. 10

### Summary.

The court below will be sustained if there is any legal ground to support the decision made. We have given three grounds, each of which is sufficient to sustain the trial court. The burden is on appellant, however. 20

Schaad's attachment was for \$920.65. Appellant received at least \$2,050.00 and then took back the chattels conditionally sold its vendee. The right, title and interest of the vendee-debtor in said chattels was more than necessary to satisfy Schaad's claim. Appellant apparently has not suffered by its failure to exercise diligence in filing its contracts, and mistakes otherwise. 30

**The Circuit Court should be affirmed with costs.**

Respectfully submitted,

G. EARL BRUGLER,  
Of counsel with Respondents,  
Schaad, Spencer and Rips.

March Term, 1923.

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