

New Jersey Supreme Court.

PERTH AMBOY DISTRICT COURT.

SYLVESTER M. SCOTT, <i>Plaintiff,</i>	} In Replevin. On Appeal.
<i>vs.</i>	
HERMAN WUEST, <i>Defendant.</i>	} State of the case settled by the Court.

(Filed June 26, 1920.)

Silas C. Grimstead, Esq., attorney for appellant. 10

William A. Spencer, Esq., attorney for appellee.

The parties hereto by their attorneys having been unable to agree upon a state of the case for appeal and having applied to me, Judge of said Court, within the time limited by law and extended by order made herein, I do hereby state the case as follows:

The action was brought by the plaintiff against the defendant to recover a horse which was in the possession of the defendant and was claimed by the plaintiff as his property. The plaintiff was sworn and testified 20 in his behalf that in September, 1917, he was the owner of the horse in question, that he took the horse to one Charles Berg who agreed to keep it for its use, that the horse was worth \$175.00, that he was a citizen of New Jersey, resident at Oak Tree, in the County of Middlesex, that he had never sold the horse and still claimed he owned it, that the said Charles Berg instituted a suit against him before Justice Charles C. Weber in the court for the trial of small causes at Metuchen, in the County of Middlesex, and recovered a judgment against 20

him for the sum of sixty-eight dollars debt and \$4.77 costs on January 31st, 1918, upon which judgment execution was issued on said 31st day of January, 1918, returnable 30 days thereafter and delivered to one John J. R. Clark, a constable of said County of Middlesex, that the said Constable by virtue of the said execution levied on said horse and one cow as the property of the plaintiff herein and advertised the same for sale on the 21st day of February, 1918, which advertisement bears
10 date February 14th, 1918, that said execution was returned on the 4th day of February, 1918. An application was made by the plaintiff to His Honor James J. Bergen, Justice of the Supreme Court, for a certiorari to review the proceeding in the Supreme Court, that said application was finally denied. It was agreed by the parties that said sale was adjourned from week to week pending Justice Bergen's say. On March 13, 1918, the Constable made the following return on the writ of
20 execution: "I return the within execution into cash together with the amount of seventy-five dollars proceeds of sale duly advertised and sold this day, one horse to Daniel E. Baylis for Thirty no/ Dollars, he being the highest bidder therefor.

One cow sold to George Christianson for Forty-five no /Dollars, he being the highest bidder therefor.

Dated March 13th, 1918.

Signed John J. R. Clark
Constable"

The plaintiff offered the transcript of the Justice's
30 docket, a certified copy of the summons, state of demand and the execution, and the advertisement of sale, all certified by the Justice and rested. The defendant produced no witnesses.

The plaintiff moved for judgment on the ground that the levy was endorsed on the execution and not made on a separate paper and annexed to the writ. I denied his motion. He further moved for judgment for the plaintiff on the ground that the constable had returned the writ before making the sale. I denied that motion. The

plaintiff further moved that the sale did not take place on a day to which it had been adjourned. I held there was no evidence to support that contention and denied his motion for judgment on that ground. Exceptions were prayed and taken to my rulings in denying each of the above motions and granted. Judgment was granted for the defendant and plaintiff appealed.

In Witness Whereof I have hereunto set my hand this 19th day of June, 1920.

CHARLES C. HOMMANN, 10
Judge.

DISTRICT COURT OF PERTH AMBOY, N. J.

SYLVESTER M. SCOTT, *Plaintiff*,
vs. } In Replevin.
HERMAN WUEST, *Defendant*.

Silas D. Grimstead, Pl't'ffs Att'y.

Beekman & Spencer, Def'ts Att'y.

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Costs—Summons, \$1.50

Service, 1.50

Mileage, .48

Trial Fee, 1.50

Summons was issued tested April 15th, A. D. 1919.
Returnable April 29th, A. D. 1919.

The summons was returned as follows, viz.: By virtue of the within writ, I did on the seventeenth day of April, 1919, the plaintiff having given sufficient security and no bond given me by the defendant, replevin and take into my possession the goods and chattels in the writ mentioned and summoned the defendant as within I am commanded.

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WILLIAM HOFFNER, *Sergeant-at-Arms.*

Plaintiff's demand was filed April 29th, A. D. 1919.
April 29th, A. D. 1919. This cause adjourned until
May 2d; May 9th; May 16th.

May 16th, A. D. 1919. This cause was called at ten o'clock in the forenoon.

Plaintiff appeared by Silas D. Grimstead. Defendant appeared by Beekman & Spencer.

Dond of Plaintiff filed April 15th, 1919.

Bond of Defendant filed April 19th, 1919.

Sworn for plaintiff: Sylvester M. Scott.

Ex. P-1: Certified Record Justice Docket in a suit brought by Chas. Berg against Scott for \$68.75; and documents annexed to certified copy, numbering seven in all and numbering consecutively 1, 2, 3, 4, 5, 6, 7.

10 "Decision Reserved."

Order to seize horse filed May 15th, 1919.

I return the within order satisfied, having replevined the goods and chattels as within I am commanded.

WILLIAM HOFFNER, *Sergeant-at-Arms*.

June 13th, '19. Judgment was rendered for defendant "Not Guilty and a return of the horse."

	1.00	Order, extending time for 15 days, filed July 14th, 1919.
	1.00	" " " " 15 " " July 28th, 1919.
	1.00	" " " " 15 " " August 11th, 1919.
20	1.00	" " " " 15 " " August 25th, 1919.
		" " " " 15 " " September 10th, 1919.
	1.00	" " " " 15 " " September 24th, 1919.
	1.00	" " " " 15 " " October 11th, 1919.
	1.00	" " " " 15 " " October 25th, 1919.
	1.00	" " " " 15 " " November 5th, 1919.
	1.00	" " " " 15 " " November 17th, 1919.
	1.00	" " " " 15 " " December 2nd, 1919.
	1.00	" " " " 15 " " December 18th, 1919.
	1.00	" " " " 15 " " January 2nd, 1920.
	1.00	" " " " 15 " " January 16th, 1920.
	1.00	" " " " 15 " " January 30th, 1920.
30	1.00	" " " " 15 " " February 13th, 1920.
	1.00	" " " " 15 " " February 28th, 1920.
	1.00	" " " " 15 " " March 16th, 1920.
	1.00	" " " " 15 " " March 26th, 1920.
	1.00	" " " " 15 " " April 10th, 1920.
	1.00	" " " " 15 " " April 28th, 1920.
	1.00	" " " " 15 " " April 30th, 1920.
	1.00	" " " " 15 " " May 14th, 1920.
	1.00	" " " " 15 " " May 28th, 1920.
	1.00	" " " " 15 " " June 18th, 1920.

KNOW ALL MEN BY THESE PRESENTS, That we, Sylvester M. Scott, of the Township of Raritan, County

of Middlesex and State of New Jersey, and Joseph Wooster of Rahway, in the County of Union, State of New Jersey, held and firmly bound unto William H. Hoffner, Sergeant-at-Arms of the District Court of the City of Perth Amboy, in the State of New Jersey, in the sum of five hundred dollars (\$500.00) lawful money of the United States of America, to be paid to the said William H. Hoffner, Sergeant-at-Arms of the District Court aforesaid, or to his certain Attorney, representatives or assigns; to which payment well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated the ninth day of April, in the year of our Lord one thousand nine hundred and nineteen (1919). The condition of this obligation is such that whereas the said William H. Hoffner, Sergeant-at-Arms, as aforesaid, is about to replevy certain goods and chattels, that is to say, one horse, roan in color, and deliver the said horse to the said Sylvester M. Scott, by virtue of a writ of replevin issued out of the District Court of the City of Perth Amboy at the suit of the said Sylvester M. Scott against Hermen Wuest. Now therefore, if the said Sylvester M. Scott shall prosecute the said suit in the said District Court with effect and without delay, and shall return the said horse, if a return thereof be awarded, then the above obligation to be void, otherwise to remain in full force and virtue.

SYLVESTER M. SCOTT, (SEAL.)

JOSEPH WOOSTER, (SEAL.) 30

Signed, sealed and delivered in the presence of
EMMA D. URMSTON.

STATE OF NEW JERSEY, ss.

Joseph Wooster, of full age, being duly sworn on his oath says, that he is surety on the foregoing bond; that he is a freeholder and resident in the County of Union in the State of New Jersey; that he is worth one thou-

Endorsed: District Court of the City of Perth Amboy. Bond. In Replevin, \$500.

Sylvester M. Scott, Plaintiff, *vs.* Herman Wuest, Defendant.

Silas D. Grimstead, Att'y.

Approved as to force and security, April 14th, 1919.

C. C. Hommann, Judge.

Filed April 15th, 1919.

JOHN J. QUINN, *Clerk.*

To Herman Wuest, Esquire:

10

You are hereby notified, requested and required to forthwith deliver to me one horse, roan in color, my property in your possession, unlawfully taken and unjustly and wrongfully detained by you, and unless you so deliver the said horse to me I shall hold you responsible in damages and costs of suit to recover the same.

Dated April 14th, 1919.

Respectfully yours,

SYLVESTER M. SCOTT.

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I served the within demand April 17th, 1919, on defendant by reading the same to him and delivering to him a copy thereof.

WM. HOFFNER,

Sergeant-at-Arms.

MIDDLESEX COUNTY, *ss.*

The State of New Jersey to any constable of said county, or to the Sergeant-at-Arms of the District Court, Greeting: We command you, That if Sylvester M. Scott shall make you secure, you cause to be replevined and delivered to Sylvester M. Scott one horse, roan in color, which Herman Wuest took and unjustly detained—as is said and, that you summon the said Herman Wuest to appear before the District Court of the City of Perth Amboy, to be held at the City Hall, in the said city, on the twenty-ninth day of April, nineteen hundred and nineteen, at ten o'clock in the forenoon, to answer the said Sylvester M. Scott of a plea

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taking and unjustly detaining the goods and chattels aforesaid: And have you then and there this writ, with your proceedings thereon.

Witness, Charles C. Hommann, Esquire, Judge of said Court, at Perth Amboy aforesaid, the fifteenth day of April, one thousand nine hundred and nineteen.

JOHN J. QUINN,
Clerk.

(SEAL.)

SILAS D. GRIMSTEAD,
Attorney.

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By virtue of the within writ, I did on the 17th day of April, 1919, the plaintiff having given sufficient security and no bond given me by the defendant, replevin and take into my possession the goods and chattels in the writ mentioned, and summoned the defendant as within I am commanded.

WM. HOFFNER,
Sergeant-at-Arms.

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DISTRICT COURT OF THE CITY OF PERTH AMBOY.

SYLVESTER M. SCOTT, *Plaintiff*,
vs.
HERMAN WUEST, *Defendant*.
} In Replevin.
} State of Demand.

The plaintiff, resident at Oak Tree in the Township of Raritan in the County of Middlesex and State of New Jersey, complains and says that:

- 30 1. The plaintiff was a farmer at Oak Tree, and the owner of a horse, roan in color, of the value of one hundred and fifty dollars (\$150.00).
- 2. On or about September 3d, 1917, the plaintiff being about to enter the service of the United States Government at Camp Merritt in this State, placed the said horse in the care and keeping of Charles Berg on his farm at Oak Tree for pasturage.
- 3. On or about the defendant, Herman Wuest, unlawfully took the said horse from the said

Berg, who then had the horse in his possession, and since then has and the defendant still unjustly and wrongfully detains the said horse and deprives the plaintiff of the possession and use thereof to the damage of the plaintiff five hundred dollars (\$500).

4. The plaintiff demanded as damages five hundred dollars (\$500).

SILAS D. GRIMSTEAD,
Attorney of Plaintiff.

Filed, April 29th, 1919.

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JOHN J. QUINN, *Clerk.*

To William Hoffner, Sergeant-at-Arms:

You are hereby notified that the horse taken by you under a writ of replevin issued out of the District Court of Perth Amboy, at the suit of Sylvester Scott against Herman Wuest, is my property and I hereby demand the return of said property and in default thereof will hold you responsible to me for damages for such taking.

Dated, May 16th, 1919.

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HERMAN WUEST.

DISTRICT COURT OF THE CITY OF PERTH AMBOY.

SYLVESTER M. SCOTT, <i>Plaintiff,</i>	} Replevin. } Claim of Property.
<i>vs.</i>	
HERMAN WUEST, <i>Defendant.</i>	

To William H. Hoffner, one of the constables or Sergeant-at-Arms of the County of Middlesex:

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Herman Wuest, the defendant in the above stated action, hereby claims as his property the following goods and chattels: One horse, roan in color, taken by you by virtue of a writ of replevin issuing out of District Court of the City of Perth Amboy in the above stated action, on the 17th day of April, 1919.

Yours respectfully,

HERMAN WUEST.

Dated, April 19th, 1919.

KNOW ALL MEN BY THESE PRESENTS, That we, Andrew Clausen and Herman Wuest, are held and firmly bound unto William H. Hoffner, Sergeant-at-Arms of the District Court of the City of Perth Amboy, in the sum of three hundred dollars (\$300), to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

10 Sealed with our seals and dated this nineteenth day of April, nineteen hundred and nineteen.

The condition of this obligation is such, whereas the said William H. Hoffner has taken into possession certain goods and chattels, viz., one horse, roan in color, by virtue of a writ of replevin issuing out of the District Court of the City of Perth Amboy of the fifteenth day of April, nineteen hundred and nineteen, at the suit of Sylvester M. Scott against Herman Wuest; and whereas, the said Herman Wuest has served upon the said William H. Hoffner a written claim of property of certain of the goods and chattels so as aforesaid taken into custody by said William H. Hoffner;

20 Now, therefore, if the said Herman Wuest shall deliver the said goods and chattels in as good condition as the same were at the time of the making of such claim by said Herman Wuest to Sylvester M. Scott, or his lawful representatives, if the same shall be adjudged to the said Sylvester M. Scott, then this obligation to be void; otherwise to remain in full force and virtue.

HERMAN WUEST. (SEAL)

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ANDREW CLAUSEN. (SEAL.)

Signed, sealed and delivered in the presence of
WM. A. SPENCER.

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX, } ss.

Andrew Clausen being duly sworn on his oath says, that he is the surety in the within bond named; that he is a resident and freeholder in the County of Middle-

sex and State of New Jersey, and that he has property subject to execution worth the sum of three hundred dollars (\$300.00) over and above all his just debts and liabilities.

ANDREW CLAUSEN.

Subscribed and sworn to before me this 19th day of April, 1919.

BODIL SKOV,
Notary Public of N. J. 10

Filed, April 19th, 1919.

JOHN J. QUINN, *Clerk.*

KNOW ALL MEN BY THESE PRESENTS, That we, Sylvester M. Scott, of the township of Raritan in the County of Middlesex and State of New Jersey, principal, and Joseph Wooster, as surety, being a resident of the City of Rahway in the County of Union and State of New Jersey, held and firmly bound unto Herman Wuest, of said township of Raritan, County of Middlesex and State of New Jersey in the sum of fifty dollars (\$50), lawful money of the United States of America, to be paid to the said Herman Wuest or to his certain Attorney, Executors, Administrators or Assigns; To which payment well and truly to be made, we bind ourselves and our Heirs, Executors and Administrators, jointly and severally firmly by these presents. Sealed with our seals and Dated the twenty-fifth day of June, in the year of Our Lord One Thousand Nine Hundred and Nineteen (1919). Whereas a judgment was rendered in the District Court of the City of Perth Amboy in a certain cause therein depending wherein the said Sylvester M. Scott is plaintiff and Herman Wuest is defendant in replevin for the recovery of a certain horse therein mentioned by which judgment against the said plaintiff a return of the said horse was awarded with costs of suit—and whereas the said Sylvester M. Scott, plaintiff aforesaid, is about to appeal from the said judgment of the said District Court to the New Jersey Supreme

Court. Now, therefore, the condition of this obligation is such that if the said Sylvester M. Scott, plaintiff in said cause, shall pay the costs of the said appeal, whatever the result thereof may be, either if the said appeal be not prosecuted by the said Sylvester M. Scott, plaintiff, or if the said appeal be dismissed by the said Supreme Court then this obligation to be void, otherwise to and remain in full force, virtue and effect as above provided.

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SYLVESTER M. SCOTT. (SEAL.)

JOSEPH WOOSTER. (SEAL.)

Signed, sealed and delivered in the presence of
EMMA D. URMSTON.

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

20 Joseph Wooster, of said County and State, being duly sworn on his oath deposes and says that he is surety on the within appeal bond; that deponent is a freeholder in said County and owns property subject to execution worth one hundred dollars over and above all his just debts and liabilities.

JOSEPH WOOSTER.

Sworn and subscribed to before me this 25th day of June, in the year 1919.

EMMA D. URMSTON,
Notary Public of N. J.

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(SEAL.)

Term expires March 13th, 1921.

Endorsed: Bond. Sylvester M. Scott, Principal, and Joseph Wooster, Surety, to Herman Wuest. Dated, June 25th, 1919. Amount, \$50.00. Approved, C. C. Hommann, Judge.

Filed, July 5th, 1919.

JOHN J. QUINN, *Clerk.*

DISTRICT COURT OF THE CITY OF PERTH AMBOY.

Hon. Charles C. Hommann, Judge.

SYLVESTER M. SCOTT, *Plaintiff*,

vs.

HERMAN WUEST, *Defendant*.

} In Replevin.
}

NOTICE OF APPEAL.

To Herman Wuest, defendant in the above entitled 10
cause, William A. Spencer, Esq., his Attorney, or
to whom it may concern:

Notice is hereby given that Sylvester M. Scott, plain-
tiff in above entitled cause, appeals to the New Jersey
Supreme Court from the judgment of the District Court
of the City of Perth Amboy rendered against him in the
said cause on the thirteenth day of June in the year
1919.

Dated June 27th, 1919.

SILAS D. GRIMSTEAD, 20
Att'y of Sylvester M. Scott, Plaintiff.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF MIDDLESEX, }

Silas D. Grimstead, being duly sworn on his oath
says that on June 27th, in the year 1919, deponent served
a notice of which the within is true copy, upon William
A. Spencer, Attorney therein named, by leaving the same
at his office in the City of Perth Amboy, New Jersey,
with Mr. Crane, in charge; the said Spencer being ab- 30
sent.

SILAS D. GRIMSTEAD.

Sworn and subscribed to before me this 28th day of
June, in the year 1919.

WILLIAM REILLY,
M. C. C.

THE SMALL CAUSE COURT.

STATE OF NEW JERSEY, }
 COUNTY OF MIDDLESEX, } ss.

The State of New Jersey, To any Constable of said
 County: Summon Sylvester M. Scott per-
 [L. s.] sonally to be and appear before me, the sub-
 scriber, one of the Justices of the Peace of
 the County of Middlesex, at the Small

10 Cause Court, to be holden at my office, in the Borough
 of Metuchen in the county aforesaid, on Monday, the
 seventh day of January, A. D. one thousand nine hun-
 dred and eighteen, at 10 o'clock in the forenoon, to
 answer unto Charles Berg in an action contract for
 sixty-eight dollars, and this you are not to omit.

Given unto my hand and seal this 31st day of Decem-
 ber, A. D. 1917.

C. C. WEBER,
Justice of the Peace.

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Endorsed: The Small Cause Court, before C. C.
 Weber, Esq., Justice of the Peace, Metuchen, N. J.

Charles Berg vs. Sylvester M. Scott. On Contract.
 Summons—Demand, \$100.00; costs before trial,
 \$1.85; mileage,; true amount claimed, \$68.00.

A true copy.

Returnable January 7th, 1918.

Filed December 31st, 1917.

C. C. WEBER,
Justice.

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THE SMALL CAUSE COURT.

Before C. C. Weber, Esq., Justice of the Peace, New Jersey.

CHARLES BERG	} On Contract.
vs.	
SYLVESTER M. SCOTT.	

The plaintiff demands of the defendant the sum of 10 sixty-eight dollars upon a certain indebtedness of which the following is a true copy:

To board of one horse and one cow from October 3d, 1917, to December 10th, 1917, at a daily charge of fifty cents each per day.

(68 days at \$1.00 per day),

being for sixty-eight dollars and no cents, and judgment will be asked for the principal sum above mentioned and interest thereon from the tenth day of December, A. D. nineteen hundred and seventeen, until entry of judgment, with costs to be taxed.

Dated December 20th, 1917.

CHARLES BERG,
Plaintiff.

Endorsed: The Small Cause Court, before C. C. Weber, Esq., Justice of the Peace, Metuchen, N. J.
Charles Berg vs. Sylvester M. Scott. On contract.
State of Demand.

Filed Dec. 31st, 1917.

C. C. WEBER,
Justice.

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THE SMALL CAUSE COURT.

Before C. C. Weber, Esq., Justice of the Peace.

STATE OF NEW JERSEY, }
 COUNTY OF MIDDLESEX, } ss.

The State of New Jersey, To any constable of the
 County of Middlesex, Greeting: You are
 10 [l. s.] commanded by me, the subscriber, one of the
 Justices of the Peace in and for said county,
 that of the goods and chattels of Sylvester M. Scott, of
 the County of Middlesex, which may be found in said
 county, you cause to be levied sixty-eight dollars and no
 cents, due upon contract and four dollars and seventy-
 four cents of costs, also the costs hereof, which Charles
 Berg did recover against the said Sylvester M. Scott by
 my judgment given in the Small Cause Court held by
 me on the thirty-first day of January, nineteen hundred
 and eighteen, and the money so as aforesaid by you to
 20 be levied, you are commanded to pay forthwith, after
 receiving the same, unto the said Charles Berg, or, in
 his absence, unto me, the said Justice; and the overplus,
 if any there be, unto the said and make return hereto
 within thirty days from the date hereof.

Given unto my hand and seal this thirty-first day of
 January, nineteen hundred and eighteen.

C. C. WEBER,
Justice of the Peace.

30 Certified copy of Execution made out this 30th day
 of April, 1919.

C. C. WEBER, J. P.

I return the within execution into cash together with
 the amount of seventy-five dollars, proceeds of sale
 duly advertised and sold this day—One horse to Daniel
 E. Baylis for thirty dollars, he being the highest bidder

therefor; one cow sold to George Christiansen for forty-five dollars, he being the highest bidder therefor.

Dated March 13th, 1918.

Signed, JOHN J. R. CLARK,
Constable.

Endorsed: Issued January 31st, 1918. Returnable February 21st, 1918.

Levy, \$68.00; costs, \$4.74; execution costs, ; constable's fees, \$1.60—\$74.44.

10

Return—By virtue of the within execution I have levied and inventoried the following: One cow, Jersey, brown in color; one horse, bay color, about 14 hands in height, now in the stable of Charles Berg and owned by Sylvester M. Scott.

Signed, JOHN J. R. CLARK,
Constable.

Dated Feb. 4th, 1918.

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 CONSTABLE'S SALE.

Take Notice, That on Thursday, the twenty-first day of February, 1918, at two o'clock in the afternoon of that day, at the premises of Charles Berg in Grove Avenue, Raritan Township, will be sold at public vendue, to the highest bidder, sundry goods and chattels, to wit: One cow, one horse, taken in execution as the property of Sylvester M. Scott at the suit of Charles Berg and to be sold for cash by me.

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Feb. 14th, 1918.

JOHN J. R. CLARK,
Constable.

COPY.

To John R. Clark, Constable:

You are hereby notified that Sylvester M. Scott, defendant at suit of Charles Berg, plaintiff in a Small Cause Court, before Charles C. Weber, Justice of the Peace in and for the County of Middlesex, claims to be a married man with family resident in the County of Middlesex and State of New Jersey, and demands all
 10 rights and privileges as such resident-defendant debtor.

Dated March 7th, 1918.

(Signed), SYLVESTER M. SCOTT,

Per Silas D. Grimstead, Att'y.

THE SMALL CAUSE COURT.

Before Charles C. Weber, Justice.

20. CHARLES BERG
 vs.
 SYLVESTER M. SCOTT. } On Contract.

1917.

- Dec. 20. Issued a summons in above cause—returnable before me at my office—Main St., Metuchen, N. J., on Saturday, Dec. 29th, 1917, at 10 A. M. Demand filed to-day.
21. Summons returned this day with the following endorsement: "Not Found."
30. 31. New summons issued—returnable Monday, Jan. 7th, 1918.
31. Summons returned this day with the following endorsement: I served the within summons on the defendant, Sylvester M. Scott, this 31st day of January, A. D. 1917, by reading the same to him and delivering to him a copy thereof. Signed John T. Gedney, Constable.

1918.

- Jan. 7. Defendant's Attorney asked for a continuance for 1 week as he was confined to his bed. Granted.
14. Defendant's Attorney asked for a continuance for one week as the case is in course of settlement. Granted—Case to be heard Jan. 29th, 1918, at 10 A. M.
29. Defendant's Attorney asked for hearing to be postponed to 8 P. M. Plaintiff agreed to this. 10
29. Plaintiff appeared with his witness ready to go on—Defendant did not appear but his Attorney, Silas Grimstead, was present. I proceeded to hear and determine the case. Plaintiff sworn—Plaintiff's wife sworn. Decision reserved until January 31st, 1918.
31. Judgment given to Plaintiff for the sum of sixty-eight dollars principal and four dollars and seventy-four cents costs.
31. Execution issued—returnable Feb. 4th against 20
the defendant for the amount of the Judgment and Costs as above named and gave to John J. R. Clark, Constable.
- Feb. 4. John J. R. Clark, Constable, returned the execution with the following endorsement thereon: By virtue of the within execution I have levied and inventoried the following: One cow, Jersey, Brown in color; One horse, Roan, about 14 hands high; now in the stable of Charles Berg and owned by Sylvester M. 30
Scott. Signed John J. R. Clark, Constable.
Dated Feb. 4th, 1918.

I hereby certify that the foregoing is a true and correct copy taken from my docket.

Witness my hand and seal this sixth day of February, one thousand nine hundred and eighteen.

(SEAL.)

C. C. WEBER,
Justice of Peace.

COPY.

MIDDLESEX COUNTY,
BOROUGH OF METUCHEN, } ss.
STATE OF NEW JERSEY, }

*The State of New Jersey to any Constable of the
County, GREETINGS:*

You are commanded by me, the Subscriber, one of
the Justices of the Peace in and for the said County,
10 that the goods and chattels of Sylvester M. Scott, which
may be found in said County, you cause to be levied
sixty-four dollars, due on Contract, and five 93/100
dollars of Costs, also the Costs hereof, which Charles
Berg, by my judgment recovered against him on the
twentieth day of February, A. D. 1918, and the money
so as aforesaid by you to be levied, you are commanded
to pay forthwith, after receiving the same unto the said
Charles Berg or in his absence to me, the said Justice,
and to make return hereto within thirty days.

20 Given under my hand and seal this twentieth day of
February, in the year of our Lord one thousand nine
hundred and eighteen.

(SEAL.)

C. C. WEBER,
Justice of the Peace.

This is a true copy of the execution issued by me in
the above cause and of the return thereto as appears
on my docket.

C. C. WEBER, J. P.

30

Endorsed: By virtue of the within execution I have
levied and inventoried the following:

One Cow—Jersey—Brown in color.

One Horse—Roan color—about 14 hands high, now
in the stable of Charles Berg and owned by Sylvester
M. Scott.

Feb. 21st, 1918.

JOHN J. R. CLARKE,
Constable.

DISTRICT COURT OF PERTH AMBOY, N. J.

SYLVESTER M. SCOTT, *Plaintiff*,
vs.
HERMAN WUEST, *Defendant*. } In Replevin.

I, John J. Quinn, Clerk of the District Court of Perth Amboy, New Jersey, do hereby certify that the foregoing is a true and correct copy of the judgment record, and all papers appertaining thereto, as the same are on record in my office.

10

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this twentieth day of October, nineteen hundred and twenty.

(SEAL.)

JOHN J. QUINN,
*Clerk District Court of the City
of Perth Amboy, New Jersey.*



NEW JERSEY SUPREME COURT.

SYLVESTER M. SCOTT, <i>Plaintiff and Appellant,</i> <i>vs.</i> HERMAN WUEST, <i>Defendant and Appellee.</i>	}	In Replevin. On Appeal from District Court of Perth Amboy.
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RULE.

(Filed June 3, 1921.)

This appeal coming on to be heard and the same duly considered at the November Term of this Court, **10**

It is Ordered that the judgment of the District Court of the City of Perth Amboy in all things be and the same is hereby affirmed with costs, and the record remitted to the Court below to be proceeded with according to law and practice of said court.

Entered February 19, 1921, on motion of
 WILLIAM A. SPENCER,
Attorney for Defendant-Appellee.

20

NEW JERSEY SUPREME COURT.

SYLVESTER M. SCOTT, <i>Plaintiff and Appellant,</i> <i>vs.</i> HERMAN WUEST, <i>Defendant and Appellee.</i>	}	In Replevin.
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NOTICE OF APPEAL.

(Filed May 17, 1921.)

To William A. Spencer, Esquire, Attorney of Defendant and Appellee in the above-entitled cause. **30**

Take notice that the plaintiff-appellant in said above-entitled cause appeals from the judgment of the New Jersey Supreme Court rendered against him on appeal therein as entered in this cause on February 19, 1921, and from the whole of said judgment to the New Jersey Court of Errors and Appeals.

SILAS D. GRIMSTEAD,
Attorney of Plaintiff and Appellant.

Dated May 13, 1921.

I, Enoch L. Johnson, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

In testimony whereof I have set my hand
(SEAL) and the seal of said Court at Trenton, this
twenty-first day of May, A. D. nineteen hun-
dred and twenty-one.

10

ENOCH L. JOHNSON,
Clerk.

NEW JERSEY COURT OF ERRORS AND APPEALS. ON
APPEAL FROM NEW JERSEY SUPREME COURT, AF-
FIRMING JUDGMENT OF THE DISTRICT COURT OF THE
CITY OF PERTH AMBOY. HON. CHARLES C. HOM-
MANN, JUDGE.

20	SYLVESTER M. SCOTT, <i>Plaintiff-Appellant,</i>	}	In Replevin.
	<i>vs.</i>		
	HERMAN WUEST, <i>Defendant-Appellee.</i>		

GROUNDS OF APPEAL.

(Filed March 14, 1922.)

30 This cause was tried in the District Court of the
City of Perth Amboy, before the Honorable Charles
C. Hommann, Judge of said District Court, on May
16, 1919.

On this trial, Sylvester M. Scott, the plaintiff, was
sworn and testified that in September, 1917, he was the
owner of the horse in question in this suit; that the
horse was worth \$175.00; that he was a citizen of New
Jersey, resident at Oak Tree, in the county of Middle-
sex; that he had never sold the horse and still claimed
to own it; that one Charles Berg, in a Small Cause
Court, before Charles C. Weber, a justice of the peace,
recovered a judgment against him as shown by a cer-

tified transcript of the docket record and proceedings of the said justice in the said Small Cause Court offered and admitted.

The said certified transcript of the docket record and proceedings thereon was offered and admitted in evidence on behalf of the plaintiff, without objection, and marked, "*Exhibit P 1*, John J. Quinn, Clerk," by which, among other things, it appeared:

First. Judgment rendered by justice January 31, 1918.

Second. Execution issued thereon January 31, 1918, and given to John J. R. Clark, Constable.

Third. Execution returnable February 4, 1918, and was, by the constable, returned February 4, 1918, with the following endorsement, namely:

"By virtue of the within execution I have levied and inventoried the following: One cow, Jersey, brown in color; one horse, roan, about hands high, now in the stable of Charles Berg, and owned by Sylvester M. Scott.

"JOHN J. R. CLARK, *Constable.*"

Fourth. Advertisement of sale dated February 14, 1918.

Fifth. Dates of sale as advertised February 21, 1918.

Sixth. Stay of sale by Justice Bergen, February 21, 1918.

Seventh. Sale was adjourned one week to February 28, 1918.

It was admitted at the trial in the District Court that the sale was thereafter adjourned by the constable, from week to week, pending Justice Bergen's decision.

Eighth. The sale was made and reported by the constable on March 13, 1918, as follows, namely:

"I return the within execution into cash, together with the amount of seventy-five dollars, proceeds of sale duly advertised and sold this day—one horse, to Daniel E. Baylis, for thirty no dollars, he being the highest bidder therefor; one cow sold to George Christanson, for forty-five no dollars, he being the highest bidder therefor. Dated March 13th, 1918. John J. R. Clark, Constable."

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Ninth. "Exhibit P. 1—Certified Record Justice Docket in a suit brought by Chas. Berg against Scott for \$68.75 and documents annexed to certified copy, numbering seven in all and numbering consecutively 1, 2, 3, 4, 5, 6, 7."

The plaintiff thereupon rested his case.

The defendant offered no evidence.

10 "Decision reserved," without day, and afterward, namely, on June 15, 1919, without notice, judgment was rendered for the defendant—"Not guilty and a return of the horse."

Upon this case the New Jersey Supreme Court, on appeal by order entered on February 19, 1921, directed that the said above judgment of the District Court of the City of Perth Amboy in all things be affirmed, with costs, and error is now assigned upon exception to that direction of the said Supreme Court upon the following grounds, namely, because it appears by the evidence and the records of both of said above-mentioned courts—

20 1. The constable, John J. R. Clark, to whom the execution issued out of the Small Cause Court against the said Sylvester M. Scott, the plaintiff herein, did not make a lawful inventory of the goods intended to be levied upon.

2. The said constable did not make an appraisement of the goods and chattels levied upon.

3. The constable did not allow to defendant the statutory exemption given debtors having families resident in this State.

30 4. The judge of the District Court of the City of Perth Amboy, on May 16, 1919, adjourned the cause without day for continuance.

5. The said judge, on June 15, 1919, rendered judgment in said District Court against said Scott, plaintiff, without notice.

6. The sale was not on an adjourned day.

SILAS D. GRIMSTEAD,

Attorney of Plaintiff-Appellant.

Dated this February 10th, 1922.

**NEW JERSEY COURT OF ERRORS AND
APPEALS**

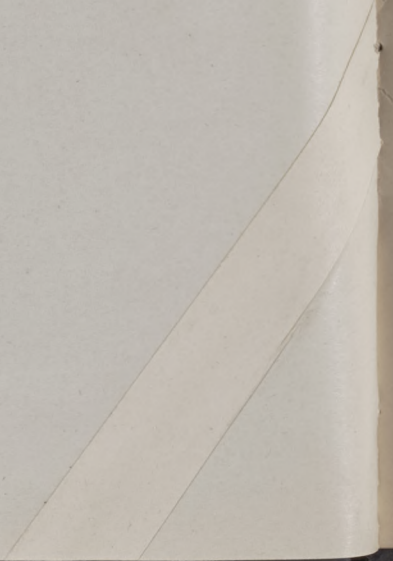
SYLVESTER M. SCOTT,
Plaintiff-Appellant,
vs.
HERMAN WUEST,
Defendant-Appellee. } In Replevin—
on Appeal.

BRIEF OF PLAINTIFF-APPELLANT

From judgment of the New Jersey Supreme
Court on the appeal from the District Court of
the City of Perth Amboy, rendered by C. C.
Hommann, Judge, without a jury.

SILAS D. GRIMSTEAD,
Attorney.

NEW JERSEY COURT OF ERRORS AND APPEALS



NEW JERSEY SUPREME COURT

SYLVESTER M. SCOTT,
Plaintiff-Appellant,

vs.

HERMAN WUEST,
Defendant-Appellee.

} In Replevin—
} on Appeal

Points on which the plaintiff-appellant relies for reversal of the judgment of the District Court of the City of Perth Amboy, from which this appeal is taken and reversal is sought.

1. The constable did not take an inventory in writing of such and so much of the property of the defendant as he meant and intended to levy upon.

2. There was no appraisal of the property advertised and intended to be sold.

3. There was no valid levy made.

4. The sale took place after the return day named in the execution and after the execution had been actually returned.

5. The sale took place on a day other than the day for which it was advertised, and to which it was adjourned.

6. There is no proof that the sale was advertised according to law.

SILAS D. GRIMSTEAD,

Attorney of Plaintiff, etc.

NEW JERSEY SUPREME COURT

BYMASTER M. SCOTT

Plaintiff-Appellant

In Reply
on Appeal

HERMAN WREST

Defendant-Appellee

Points on which the plaintiff-appellant relies for reversal of the judgment of the District Court of the City of Perth Amboy, from which this appeal is taken and reversal is sought.

1. The constable did not take an inventory in writing of such and so much of the property of the defendant as he meant and intended to levy upon.

2. There was no appraisal of the property advertised and intended to be sold.

3. There was no valid levy made.

4. The sale took place after the return day named in the execution and after the execution had been actually returned.

5. The sale took place on a day other than the day for which it was advertised and to which it was adjourned.

6. There is no proof that the sale was advertised according to law.

SILAS D. GRIMSTEAD

Attorney of Plaintiff, etc.

New Jersey Supreme Court.

SYLVESTER M. SCOTT,
 Plaintiff-Appellant,
 vs.
HERMAN WUEST,
 Defendant-Appellee. } In Replevin.

Brief of Plaintiff-Appellant.

On appeal from judgment of the District Court of the city of Perth Amboy, rendered by the Hon. Charles C. Hommann, Judge, without a jury.

SILAS D. GRIMSTEAD,
Attorney.

The evidence offered and admitted on behalf of the plaintiff on the trial of this cause in the District Court, and which by the transcript is brought to this Court for review on appeal, was as follows, viz.:

Sylvester M. Scott, the plaintiff, was sworn and testified that in September, 1917, he was the owner of the horse in question in this suit; that he took the horse to Charles Berg, who agreed to keep it for its use; that the horse was worth \$175; that he was a citizen of New Jersey, resident at Oak Tree, in the county of Middlesex; that he had never sold the horse and still claimed to own it; that the said Charles Berg, in a Small Cause Court, before Charles C. Weber, a Justice of the Peace, recovered a judgment against him, as

shown by a certified transcript of the docket and proceedings of the said Justice in said Small Cause Court.

The said certified transcript of the Justice's docket and proceedings thereon was offered and admitted without objection in evidence on behalf of the plaintiff and marked "Exhibit P1, John J. Quinn, Clerk," by which, among other things, it appears:

1st. Judgment was rendered January 31, 1918.

2d. Execution issued thereon January 31, 1918.

3d. Execution returnable February 4, 1918, and given to John J. R. Clark, Constable.

4th. The execution was returned February 4, 1918, by John J. R. Clark, Constable, with the following endorsement, viz.: "By virtue of the within execution I have levied and inventoried the following: One cow, Jersey, brown in color, one horse, roan, about 14 hands high, now in the stable of Charles Berg, and owned by Sylvester M. Scott. (Signed) John J. R. Clark, Constable. Dated February 14, 1918."

5th. Advertisement of sale dated February 14, 1918.

6th. Date of sale as advertised February 21, 1918.

7th. Stay by Justice Bergen February 21, 1918,

8th. Sale was adjourned one week, February 21, 1918. It was admitted that the sale was thereafter adjourned from week to week pending Justice Bergen's stay.

9th. Date of sale as made and reported March 13, 1918.

10th. Return and report of sale March 13, 1918, as endorsed by the constable on the execution, viz.:

"I return the within execution into cash, together with the amount of seventy-five dollars, proceeds of sale duly advertised and sold this day—one horse to Daniel E. Baylis for thirty *no* dollars, he being the highest bidder therefore: one cow sold to George Christianson for forty-five *no* dollars, he being the highest bidder therefor.

"Dated March 13th, 1918, John J. R. Clark,
Constable."

11th. The horse sold was the property of the plaintiff and the one in question in this suit, and that afterwards came to the possession of the defendant, Herman Wuest.

The plaintiff thereupon rested his case; the defendant offered no evidence.

The plaintiff claimed that the sale of the constable was illegal and void and did not pass title to the horse, and asked for judgment in his favor.

The defendant denied plaintiff's claim and moved for judgment.

The Court gave judgment in favor of the defendant and awarded a return of the horse with costs.

Judgment was rendered June 13, 1919.

THE LAW OF THE CASE.

A husband has a right to choose the place of residence for his family, and it is where he alleges it to be.

Hunt vs Hunt, 2 *Stewart* 96.

Dubaghian vs. Kaffafian, 42 *Vroom* 115.

In the case of *Wolfarth vs. Sternberg*, 41 *Vroom* 198, in the Supreme Court, it was held "That questions should not be considered in a court of review until they are first passed upon by a trial court.

But in *Gillespie vs. Ferguson*, 49 *Vroom* 470, the court there held that a judgment entered upon a non-suit directed by the trial judge will be sustained on any legal ground although the reason assigned by the court below is erroneous. The court here said: "The rule announced to the contrary in the Supreme Court in *Wolfarth vs. Sternberg*, 41 *Vroom* 198, does not meet the approval of this court. (Court of Errors.)

This decision is in accordance with the spirit of Rule No. 218 of this Court, and of Rule 5 of the Practice Act of 1912.

In support of the plaintiff's claim that the sale made by the constable in this matter was illegal and void and did not pass title to the horse to the purchaser at such sale, the plaintiff cites the following statutes and decisions of our courts thereunder.

An act concerning executions.

Pamphlet Laws 1851, page 278, sections 1 and 5.

Revision of 1877, page 391, sections 10, 11 and 12.

Compiled Statutes, Vol. 2, page 2245, section 10.

The Act constituting Courts for the Trial of Small Causes (Revision of 1903), Pamphlet Laws of 1903, Chapter 165, page 273, section 70.

For interpretation of the law see:

Wintermute vs. Hankinson, 1 *Halstead* 140.

Lloyd vs. Wyckoff, 6 *Halstead* 218-222.

Evans vs. Walsh, 12 *Vroom* 281.

Matthews vs. Warne, 6 *Halstead*, 295.

Bloom vs. Welsh, 27 *N. J. Law*, page 177.

Muir vs. Howell, 37 *N. J. Equity* 39.

An officer's return on an execution is only prima facie evidence of a levy—it must be proven. *Shinn on Replevin*, page 525, section 570.

Replevin will lie at suit of the owner against a purchaser of goods at a sale made illegally under execution. *Shinn on Replevin*, page 145, section 151.

The passing of the goods so sold from the purchaser by sale or otherwise to another does not affect the title; it remains in the original owner. *Shinn on Replevin*, page 160, section 169.

The plaintiff-appellant submits that there was error in the judgment of the District Court and the judgment rendered therein should be vacated.

SILAS P. GRIMSTEAD,
Attorney.

NEW JERSEY SUPREME COURT,
NOVEMBER TERM, 1920

Sylvester M. Scott,
Plaintiff and Appellant,

vs.

Herman Wuest,
Defendant and Appellee.

Submitted November Term, 1920: Decided
February 1921.

On appeal from the District Court of the City
of Perth Amboy.

Before Justices Trenchard, Minturn and
Kalisch.

For the appellant, Silas D. Grimstead.

For the appellee, William A. Spencer.

PER CURIAM:

This is an appeal from a judgment of the District Court of the City of Perth Amboy in favor of the defendant rendered by the judge sitting without a jury.

The appeal is probably not properly here for review, because it is asserted and not denied that there is not on file any specifications of causes for reversal as required by the rules. But we have examined the argument made by the appellant and find no merit in it and we prefer to dispose of the case upon the merits.

The action is in replevin and was brought by plaintiff against defendant to recover a horse which was in the possession of the defendant and which was claimed by the plaintiff as his prop-

erty. The plaintiff testified that in September, 1917, he was the owner of the horse; that he took it to one Berg to keep; that Berg instituted a suit against him, before a Justice of the Peace and recovered a judgment, issued execution under it and the constable levied upon the horse, advertised it for sale and sold it, and the defendant claims by virtue of that sale.

The plaintiff moved for judgment on the ground that the levy was endorsed on the execution and not made on a separate paper and annexed to the writ. This the trial judge rightly denied. We think it can make no difference that the levy was not on a separate piece of paper.

The plaintiff further moved for judgment on the ground that the constable had returned the writ before making the sale. The judge rightly denied this motion because the contention was unfounded in fact. The record indicates that the levy was made on February 4, 1918, and the execution returned on March 13, 1918, showing a sale on some prior but unnamed date.

The plaintiff further moved for judgment on the ground that the sale did not take place on the date to which it had been adjourned. The trial judge rightly denied this motion, there being no evidence to support the contention, and every presumption is in favor of the regularity of the proceeding. And moreover the state of the case indicates a regular continuance from week to week.

The judgment will be affirmed, with costs.

POINT 1. The act constituting courts for the trial of small causes (revision of 1903, Pamphlet Laws of 1903) chapter 165, page 273, section 70, Etc., requires that "the constable to whom any execution issued under the provisions of this act is delivered, shall take an inventory in writing, of such and so much of the property of the defendant as he means and intends to levy upon,

which inventory and the actual time of the making of same shall be annexed to said execution and signed by the constable and shall, at all times, be received as evidence of the levying and the time of making of same as contemplated by this act, and the property so levied upon shall be bound from the time of said levy and not before.

The constable in this cause did not do this.
(See case, page 19, lines 20 to 30 inclusive.)

POINT 2. The general act concerning executions (compiled statutes, vol. 2, page 2245) provides for the making of inventory, appraisalment and exemption of \$200.00 by sheriff or other officer in favor of any debtor having a family resident in this State, which shall not be liable to be taken or seized by virtue of any execution or civil process whatsoever, issued out of any court in this State.

The plaintiff is a citizen having a family living in this State, page 18 of case, lines 1 to 10. Section eleven of this act provides for appraisers. Section twelve provides for selection of goods to be exempted. Section 15 provides that in the defendant's absence, the appraisers must make the selection.

None of these things were done in the case before the Court. See page 16, line one to line twenty on page 17.

POINT 3. The law required that the time in making a levy must be endorsed in writing. Small Courts Act 1903, chapter 165, page 273, section 70. This was not done.

(See case pages 16 and 17, for execution and constable's proceedings therein.)

POINT 4. The return date named on execution is February 21, 1918. The sale took place March 13th, 1918.

POINT 5. The sale was advertised for Thursday, February 21, 1918, (see case page 17, lines twenty to thirty inclusive,) and was adjourned from week to week, (see page 2, lines ten to twenty inclusive), from February 21, to February 28th, to March 7th, to March 14th, and the sale took place on March 13th, according to the constable's return and the Justice's record. (See case page 16, line 30, to line 20 on page 17.) and not on the day to which it was last adjourned: namely, March 14th, 1918.

POINT 6. There is no proof anywhere that the sale was advertised according to law.

Frank D. Grinstead,
Attorney.

New Jersey Court of Errors and Appeals

SYLVESTER M. SCOTT,

Plaintiff-Appellant,

vs.

HERMAN WUEST,

Defendant-Appellee.

In Replevin.

BRIEF OF DEFENDANT-APPELLEE

Judgment in the above entitled cause was rendered for the defendant in the District Court of the City of Perth Amboy, on June 13, 1919. See State of the Case, page 4.

Notice of appeal served June 27, 1919. See State of the Case, page 13.

Order to extend time to settle State of the Case or agree upon the same filed July 14, 1919.

THIS APPEAL SHOULD BE DISMISSED ON TWO GROUNDS:

First: Because the record shows that the appellant has not complied with Rule 145 (old Rule 90) of the Supreme Court, by filing within ten days from the time limited by the statute for giving notice of appeal with the Clerk of the Supreme Court, a brief specification of the determinations or directions of the District Court with respect to which he is dissatisfied in point of law, and in fact has not filed to this day such specification. The only time the specifications appeared was in appellant's brief in the Supreme Court. See printed case—shows no such filing.

The law on this question is fully settled. In the case of *Centlifer vs. Jacobs*, 86 Atl. Rep., page 929, opinion by Parker, J.

Second: Because the record shows that the first order to extend the time to settle the state of the case or agree upon same was made after the time limited by law. Judgment was rendered June 13, 1919. Order extending time to agree upon or settle state of the case filed July 14, 1919. See State of the Case, page 4.

The law required that settlement of the state of the case must be made within fifteen days after judgment, unless further time is granted by the Judge. See District Court Act, Section 208.

Such order for further time to settle the state of the case must be secured before the expiration of fifteen days from the time of rendering judgment. This is well settled law.

Feeney vs. Rutger, 57 L., page 318.

Loftus vs. Freeholders, 43 L., 357.

REPLY TO POINT 1

Plaintiff-appellant seems to take exception to the manner in which the constable executed the writ of execution. The evidence shows on page 2 State of the Case, lines 1 to 30, that the execution was issued January 31, 1918, and made returnable February 21, 1918, and returned endorsed thereon as follows: "By virtue of the within execution I have levied and inventoried the following: One cow, Jersey, brown in color; one horse, bay color, about 14 hands in height, now in stable of Charles Berg and owned by Sylvester M. Scott. Dated February 4, 1918. John J. R. Clark, constable." There can be no other conclusion but that the levy was made on the fourth day of February, 1918, and besides the statute does not declare a levy void by reason of the fact that the same was not dated. The fact that the statute states that the time of levy should be endorsed upon the execution can answer no other purpose than that the execution would show its priority over any other execution issued against the same goods about the same time. There is no evidence in this case that any other execution on any other judgment was in existence. We contend that the constable did all that was necessary to constitute a proper levy so that

the property levied upon in the manner specified became subject to the lien of the judgment and that such levy became effective of the date of the same, to wit, February 4, 1918. See State of the Case, page 17, lines 10 to 20, inclusive.

Herman on Executions, page 385, paragraph 238, says: "In construing the return of an officer the words used by him in describing the act done by him should not be closely criticised. It should be held sufficient when it may be fairly inferred therefrom that the requirements of the law have been met. Where it is susceptible of different meanings, that should be adopted which is most conformable to his duty. If it can be fairly construed as to be sufficient in law, it is the duty of the court to so construe it.

REPLY TO POINT 2

As to the appellant's claim for exemption, his remedy is against the officer who made the sale; besides, he neglected to prove such claim on the trial of the cause. See State of the Case, page 2.

Having failed to prove his exemption in the District Court on the trial in replevin, he cannot raise the question now. Cases must be decided on law and facts and not on unproved assertions. The court did not find that the appellant was entitled to such exemption. The State of the Case is silent on the question and, such being the case, we are governed by the rule laid down in *Dordoni vs. Hughes*, 83 Law, page 355, which says: "Facts found by the District Court will be presumed to rest on competent proof when nothing appears to the contrary."

REPLY TO POINT 3

The date of the execution was January 3, 1918; levy and return dated February 4, 1918. See State of the Case page 17, lines 1 to 20.

REPLY TO POINT 4

Counsel for the plaintiff in replevin seems to rely upon the rule laid down in *Herman on Executions*, Edition of

1875, page 327, which recites: "Where the execution has been levied on personal property it may be sold after the return day without further process." * * * "The rule is by no means uniform, some courts holding that as the officer derives his authority to sell from the judgment and the writ, when that is returned the power to sell is revoked, and a sale made after the return is void. Others, that after a levy it is his duty to sell and bring the money into court, no matter what becomes of the writ." * * * "The writ must be executed and the proceedings completed if they are commenced by levy, and, therefore, may be completed after the return day. It is an entire thing."

Now let us see what the rule is in New Jersey. In the case of *Kinmouth vs. White*, 16 Dickinson, page 359, opinion by Pitney, Vice Chancellor, whose reputation as a judge is excelled by none and equalled by few, says: "It seems to be thought that a sheriff cannot execute a common law writ after he has returned it to the clerk's office as commanded by its terms. This is a mistake. It is not necessary for a sheriff in order to execute a common law writ of execution to have the writ in his hands at the time he makes sale under it. He has, in fact, no right to retain the writ after the return day mentioned in it. He must make his levy before that time, and it is his duty to return the writ with the levy annexed on the return day named and proceed to execute it as the plaintiff's attorney shall direct. The writ is a record and file of the court, and it, as well as the judgment behind it, is his authority for proceeding as much after its return as it would be had he not returned it. The non-return of such writs according to their command has led to much inconvenience. I do not see how a return of a writ with levy annexed, with a declaration by the sheriff that the same is unsatisfied, can be considered as an abandonment of the levy."

The levy under the writ binds the property for one year, vide *General Statutes*, Volume 3, Section 67, page 3000.

REPLY TO POINT 5

State of the Case, page 2, lines 10 to 20, says: "It was agreed that the sale was adjourned from week to week,"

but not a corresponding day in the week. The court found that there was no evidence that the sale took place on any other day than to which the sale was adjourned pending Justice Bergen's stay.

REPLY TO POINT 6

State of the Case is silent as to the advertising of the sale under the execution; that point was not raised and passed upon by the District Court, and there was no evidence that the sale was not properly advertised.

The defendant-appellee submits that there is no error in the judgment of the District Court and in the Supreme Court and that the judgment in the Supreme Court should be affirmed.

WM. A. SPENCER,
Attorney for Defendant-Appellee.

EMIL STREMLAU,
Of Counsel.

NEW JERSEY SUPREME COURT

NOVEMBER TERM, 1920

SYLVESTER M. SCOTT,
Plaintiff and Appellant,

vs.

HERMAN WUEST,
Defendant and Appellee.

Submitted November Term, 1920: Decided February, 1921.

On appeal from the District Court of the City of Perth Amboy.

Before Justices Trenchard, Minturn and Kalisch.

For the appellant, Silas P. Grimstead.

For the appellee, William A. Spencer.

PER CURIAM:

This is an appeal from a judgment of the District Court of the City of Perth Amboy in favor of the defendant rendered by the Judge sitting without a jury.

The appeal is probably not properly here for review, because it is asserted and not denied that there is not on file any specifications of causes for reversal as required by the rules. But we have examined the argument made by the appellant and find no merit in it, and we prefer to dispose of the case upon the merits.

The action is in replevin and was brought by plaintiff against defendant to recover a horse which was in the possession of the defendant and which was claimed by the plaintiff as his property. The plaintiff testified that in September, 1917, he was the owner of the horse; that he took it to one Berg to keep; that Berg instituted a suit against him, before a Justice of the Peace, and recovered a judgment, issued execution under it, and the constable levied upon the horse, advertised it for sale and

sold it, and the defendant claims by virtue of that sale.

The plaintiff moved for judgment on the ground that the levy was endorsed on the execution and not made on a separate paper and annexed to the writ. This the trial judge rightly denied. We think it can make no difference that the levy was not on a separate piece of paper.

The plaintiff further moved for judgment on the ground that the constable had returned the writ before making the sale. The Judge rightly denied this motion because the contention was unfounded in fact. The record indicates that the levy was made on February 4, 1918, and the execution returned on March 13, 1918, showing a sale on some prior but unnamed date.

The plaintiff further moved for judgment on the ground that the sale did not take place on the date to which it had been adjourned. The Trial Judge rightly denied this motion, there being no evidence to support the contention, and every presumption is in favor of the regularity of the proceeding. And moreover the state of the case indicates a regular continuance from week to week.

The judgment will be affirmed, with costs.

