

NEW JERSEY COURT

OF

Supreme Court
ERRORS AND APPEALS

State of New Jersey

SAMUEL VEADER,
Plaintiff & Appellee,
vs.
FRED VEADER,
Defendant & Appellant.

On Appeal
from District
Court.

BRIEF OF DEFENDANT AND APPELLANT

Preliminary Statement

This is an appeal by Fred Veader from the District Court of the First Judicial District of the County of Morris, on the refusal of the Trial Court to nonsuit the plaintiff and direct a verdict and also on the refusal of the Trial Court to charge the jury as requested by the defendant and because of the charge by the Court.

Statement of Facts

The trial of the case from which this appeal is taken was had on June 28th, 1915, before the District Court and a jury. A motion was made for a

nonsuit upon the opening by the plaintiff (see case, p.), because the suit should have been instituted against the defendant in a representative capacity and not as an individual, he having come into possession of the horse as such representative. The motion being denied, the case proceeded. A motion was made to nonsuit and also to direct a verdict and there were various requests made to the Court to charge the jury on propositions of law, all of which were refused.

The defendant in this appeal intends only to make two points and the circumstances in connection with the case in so far as they are material to the points raised are as follows:

The horse in question was purchased in the year 1894 by John Veader, the father of the plaintiff and defendant, respectively. The horse was taken by John Veader to his home in Green Village and there used by him, cared for by him and all the rights of ownership exercised by John Veader until the year 1902. There is no evidence that the plaintiff exercised any ownership over the horse during that period of time nor did he in any way contribute to the expenses. It appears that in 1902, the plaintiff took the horse because he wanted it to use and also because his father was too old to look after it, but there does not appear to be any substantial evidence of the gift and so far as the case shows John Veader was still the owner of the horse. The plaintiff produces witnesses who heard the father, John Veader, say that he had given Sam the horse, but the defendant also produces witnesses who testify that the horse was given to the plaintiff to use only and upon the death of John Veader it was to go to the grandson, Clifford.

There was a question of fact in the case for the

jury to determine as to whether there was a gift or a loan and it is because of the refusal of the Court to nonsuit at the opening of the case and the refusal of the Court to give the jury propositions of law as requested by the defendant for their guidance in applying these facts, and because of the statement of the Court as to the *prima facie* case on the part of the plaintiff that this appeal was taken.

Points

1. The horse having been demanded and received by Fred Veader as executor, suit should have been instituted against him in a representative capacity and failure to do so is ground for a nonsuit or direction of verdict for defendant.

2. The District Court in its charge committed error in passing its opinion and commenting upon the significance of the evidence as making out a *prima facie* case for the plaintiff.

3. Where the Court refuses to charge propositions of law as requested, there is error and a new trial should be granted.

POINT I

The horse having been demanded and received by Fred Veader as executor, suit should have been instituted against him in a representative capacity and failure to do so is ground for a nonsuit or direction of verdict for defendant.

In the case of *Boyle vs. Knauss*, reported in 79 Atlantic Reporter, page 1025, there is considera-

ble discussion by the Supreme Court as to whether replevin actions should be instituted against an executor or administrator in his representative capacity or as an individual. The *Boyle* case deals with a situation where certain diamonds were left with the intestate in his lifetime but which had been sold by a bill of sale by the loaner, Austin, to one Boyle and the intestate died seized of the possession of the diamonds, although they were in fact owned by Boyle. The administrator of the intestate came into possession of the diamonds in the course of his office from the deceased, but in the case now on appeal the situation is entirely different. The defendant, Fred Veader, as executor of John Veader, did not come into possession of the horse or appropriate the same as property that his testator had in his possession at the time of his decease, but according to the opening of the plaintiff (Case p. 19), and the evidence (Case, p.), the defendant as executor of John Veader, deceased, received the horse from the plaintiff as the property of the deceased because it was a property he was entitled to as such representative to carry out the terms of the last will of the testator according to his wishes and desires, so that in this case the horse came into possession of the defendant as executor upon his demand in a representative capacity and was not handed down directly from the deceased, and that the plaintiff if he claims any ownership in the horse must maintain his action against Fred Veader as an executor, and in referring to the case of *Boyle against Knauss, supra*, it will be observed that the Supreme Court cited the *Hodge* case in which it was said:

“But upon a full consideration of the nature and of the various decisions on the

subject we are of opinion that whatever property or money is lawfully recovered or received by the executor or administrator after the death of his testator or intestate in virtue of his representative character he holds as assets of the estate; and he is liable therefor in such representative character to the party who has a good title thereto. In our judgment this upon principle must be the true doctrine."

And again at page 1026, citing the opinion in the *Hodge* case it was said:

"But that whenever an executor or administrator in his representative character lawfully received money or property, he may be compelled to respond to the party entitled in that character."

See 18 Cyc., p. 880.

The defendant claimed the horse as executor, not as individual and according to the evidence (see Case, pp. 19 and 21), it was delivered to him in this capacity. His act in demanding possession was in virtue of his office as executor and not as individual, but having received the horse as executor he can only be required to respond to the plaintiff in that capacity and failure to institute the suit against him as executor is ground for nonsuit and the Court should have so ordered.

POINT II

The District Court in its charge committed error in passing its opinion and commenting upon the significance of the evidence as making out a prima facie case for the plaintiff.

The judge erred in his charge to the jury by stating to them that (see Case, p. 26), "I under-

stand the plaintiff claims an absolute gift," and by also stating, "The plaintiff has made a *prima facie* case." Such remarks would have the tendency to induce the jury to understand that the burden of proof in this case was not on the plaintiff but on the defendant, and that by so charging he tended to mislead the jury to the prejudice of the defendant.

The dictum in the case of *Lindley v. O'Reilly*, cited in 46 N. J. L., page 352, is:

"An expression of opinion, in the charge, which might have misled the jury, to the prejudice of the defendant—HELD error, even though the general statement of the law in the charge was correct."

Again in the case of *Marsh v. Newark Heating & Machine Co.*, cited in 57 N. J. L., page 36 at page 38, Lippincott, J., in rendering the decision of the Court, stated:

"It will be seen that these were questions sharply disputed in the evidence and they are questions entirely within the province of the jury to determine and *it was not for the Judge to weigh the evidence and conclude these questions.*"

In the case of *Huebner, Adm'r vs. Erie R. R. Co.*, reported in 39 Vroom. page 468, at page 471, the Court said:

"We think that the Judge's charge in this respect was inaccurate, misleading and harmful to the defendant. After telling the jury that the real question in the case was not what was shown to Vreeland but what was on the engine when the accident happened, he tells the jury that, for the purposes of the case, the things produced to Vreeland & Huebner in the superintendent's office were the things which had been

taken from the engine and the question for the jury to decide was what was the condition of those things.”

See:

Brown vs. Fitch, 4 Vroom, 418, at 422,
New Jersey.

New Jersey Traction Co. vs. Gardner,
29 Vr., 176.

McGonigal vs. Pittsburgh Ry. Co., 89
Atl., 805.

It is further urged under this point that the Court in its charge did not leave the jury free to determine the facts and draw their own conclusions when it said, speaking of the plaintiff:

“He has produced a number of witnesses whose testimony *in my opinion* made a *prima facie* case for him.” * * *

In the charge to which exception was taken, the Court not only drew the conclusions in favor of the plaintiff and passed an opinion upon the evidence, but practically intimated that in his opinion the plaintiff was entitled to a verdict and although some slight reference was made to the evidence of the defendant, yet the jury were necessarily bound to accept the claim and contention of the plaintiff, as the judgment of their deliberations had been directed and limited to that result by the comments of the Court, and particularly because of the refusal of the Court to further charge them propositions of law as requested by the defendant, which will be taken up more fully under the next point.

The appellant, therefore, feels that the comments of the Court in this charge were not only harmful to the defendant, but limited a verdict to the plaintiff only and for that reason a new trial should be granted.

POINT III

Where the Court refuses to charge propositions of law as requested, there is error and a new trial should be granted.

By reference to the State of the Case (p. 27), it will be observed that eleven requests were made to the Court to charge the jury on propositions of law, and particularly on the point of what constituted a gift and how far the plaintiff's evidence must go in order to establish the title to the horse. These requests, in view of the limited charge made by the Court, were very essential as a matter of law for the jury to have in determining the question of fact in dispute.

In the case of *Talmage v. Davenport*, cited in 31 N. J. L., page 561 at page 562, the Chancellor, in rendering the decision of the Court stated:

“It is one of the clearest and most important duties of a Court to expound the law to the jury, for its guidance and instruction. The faithful performance of this duty is absolutely essential to the value, if not to the very existence of the trial by jury.”

In the case of *Roe v. State*, 45 N. J. L., page, 49, at page 51, etc., Justice Parker in rendering the opinion stated:

“One of the most important duties of the Court is to declare the law applicable to a case to the jury when requested so to do. This should be done in such a way as not to leave room for misapprehension or mistake.”

In the case of *Scott v. Mitchell*, 41 N. J. L., page 346, at page 347:

“These requests embody plain principles of law (*Drake v. Mount*, 4 Vroom, 441). And the application of these principles was indispensable to a correct view of the testimony, for the defendant’s negligence was the sole basis of his liability. It was therefore, the duty of the Court, being so requested, to declare these rules to the jury as the law of the case. *Broadwell v. Nixon*, 1 South, 362; *Allen v. Wanamaker*, 2 Vroom, 370.”

In the case of *Kosher Dairy Co. v. N. Y. &c. R. R. Co.*, (81 N. J. L., p. 145, at page 146), Voorhees, J., in rendering the opinion said:

“*The requests were proper and embodied a correct statement of law applicable to the issue and should have been charged. For this reason judgment must be reversed. (Scott v. Mitchell, 12 Vroom, 346; Van Vechten v. New York & New Jersey Telephone Co., 42 id., 45)*”

In the case of *State v. De Geralmo* (83 N. J. L., p. 135, at page 138), Justice Bergen in rendering opinion stated:

“One of the most important duties of the Court is to declare the law applicable to a case to the jury when requested so to do. This should be done in such a way as not to leave room for misapprehension or mistake (*Roe v. State*, 16 Vroom, 49). We are of opinion that the defendant was entitled to have the legal proposition requested distinctly charged, and that this was not complied with by the Court, unless the legal effect was substantially covered by its charge to the jury (*Aldrich v. Peckham*, 45 Vroom, 711; *Mellon v. Victor Talking Ma-*

chine Co., 48 *id.*, 670), and a careful examination of it shows that the precise point raised by the request was not adverted to by the Court in any part of its charge." Judgment reversed.

In the light of the above decisions the defendant insists that the Trial Court erred in failing to instruct the jury as requested and for that reason there was error harmful to the defendant, as a different verdict might have been reached had the Court charged as requested, at any rate, the jury were entitled to have such propositions for their guidance in considering the evidence, and for the reasons advanced a new trial should be granted.

ELMER W. ROMINE,
Attorney and Counsel for
Defendant & Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

SAMUEL VEADER,
Plaintiff and Appellee,

vs.

FRED VEADER,
Defendant and Appellant.

In Replevin.

Brief on Behalf
of Plaintiff and
Appellee.

This is an appeal from the District Court of the First Judicial District of the County of Morris. A replevin suit was brought by the plaintiff, Samuel Veader, for the recovery of a horse from the defendant, Fred Veader. The writ was dated and served September 21st, 1914 (Case, pp. 2-3), and under the writ the constable took the horse into his possession. On the same day the defendant served upon the constable a written claim of property, claiming the horse for himself, as the executor of John Veader, deceased (Case, p. 4), and the constable, upon being indemnified, delivered the horse to Fred Veader, who still has possession of the same.

The case duly came on for trial, before the court and a jury, demanded by the defendant, and a verdict in favor of the plaintiff and against the defendant was rendered and judgment for possession was entered in accordance therewith (Case, Record of First Trial, pp. 5-6-7-8).

The defendant appealed that judgment to ^{Supreme} ~~this~~ court, which set the judgment aside on the sole ground that no demand for the return of the horse had been made by the plaintiff from the defendant.

Veader vs. Veader, 94 Atl. Rep. 30. There were various other grounds urged for reversal in that case, but the court did not consider any of them worth referring to, except one of evidence, which it decided adversely to defendant.

After the decision of the Supreme Court on that appeal, the case came back to the District Court for a second trial, which was held June 28th, 1915, resulting again in a judgment for plaintiff. The defendant ~~has~~ again appealed to ^{the Supreme} ~~this~~ court, ^{which affirmed the} and it is that appeal which is now being argued (Case, pp. 8-9-10-11). An error was stated to this

The parties, or their attorneys, being unable to agree on the form of the case, the Judge of the District Court, upon application of the attorney of the appellant, settled the case, pursuant to the provisions of Sec. 207 of the District Court Act of 1898, as amended by P. L. 1902, page 566, 2 Com. St. 2016, Sec. 213 B.

The appellant specifies three objections to the determinations and directions of the District Court, and pursuant to Rule 145 of this Court (Ed. of 1913), "the appeal shall be heard and determined solely upon the points of law so specified."

Sentiffer v. Jacobs, 84 N. J. L. 128.

By Section 205 of the District Court Act (P. L. 1898, p. 630), the verdict of a jury is final and conclusive upon questions of fact, if there is any evidence to support such verdict, and the review must be on questions of law only.

McLaughlin v. Beck, 71 N. J. L. 380.

Graves v. Woodbridge, 73 N. J. L. 108.

Gore v. Herring, 72 N. J. L. 423.

Marten v. Brown, 80 N. J. L. 143.

A reading of the case as settled by the Judge, (Case, p. 18, *et seq.*) will show there was ample testimony produced before the jury to sustain the

verdict, so that we are concerned only with the questions of law raised by the specifications of objections.

Specifications of Objections.

1. The District Court found as a matter of law that the plaintiff was entitled to maintain his suit, whereas a non-suit should have been granted, because the defendant received the horse as executor and suit should have been instituted in that capacity, and no demand having been proven and there being no unlawful taking and plaintiff failing to prove title in himself.

2. The District Court erred in allowing the case to go to the jury and a direction of the verdict should have been awarded in favor of the defendant, because the suit is improperly instituted, first, because no demand was proven, no unlawful taking and no title proved in the plaintiff.

3. The court erred in refusing to charge the jury as requested by the defendant, and there was also error harmful to the defendant in the court's charge, and for these reasons there should be a new trial.

Specifications one and two are almost identical with specifications one and two set forth in the former appeal in this court, which this court said, except as to the question of a demand, did not need referring to. See *Veader vs. Veader, supra*.

Under the specifications several questions are raised, to wit:

1. Should a non-suit have been granted?
2. Should a direction of verdict have been made?
3. Was there any error in the court's charge or refusal to charge?

POINT 1.

The Court did not err in refusing to grant a non-suit, for the suit was properly brought against Fred Veader as an individual, and the plaintiff was not obliged to sue him in his representative capacity as executor; a demand was proven; plaintiff was not obliged to prove either an unlawful taking or title in himself.

POINT 2.

The Court did not err in refusing to direct a verdict, for the suit was properly instituted, there was evidence of a demand, the horse was taken unlawfully and plaintiff did not have to prove title in himself.

POINT 3.

There was no error in the Court's charge, nor did the Court err in refusing to charge as requested.

ARGUMENT.

Point One.

When the horse was taken from the possession of the plaintiff, the defendant's testator, John Veader, under whom the defendant claims, had departed this life. The testator, therefore, had neither taken nor wrongfully detained the horse from the plaintiff. The taking and detention was done wholly by the defendant. Under these circumstances, the plaintiff had the choice of suing the defendant either as an individual or in his representative capacity.

Hodge v. Coriell, 44 N. J. L. 456; aff. 46 N. J. L. 354.

Boyle v. Knauss, 81 N. J. L. 330, where the court said, "when goods are unlawfully detained by an administrator, who has come into possession of them from his intestate, in due course of administration, and claims title to them in right of his intestate, a person seeking by replevin to recover them has his choice of action either against the detainer personally, or of suing him in his representative capacity."

The case is even stronger when, as in this case, the original taking and detention has been done by the party sued and the goods did not come to him from his intestate or testator. In fact, the propriety of the present action has been expressly decided against the contention of the defendant by this court on the former appeal. *Veader v. Veader*, *supra*.

A demand for the return of the horse was made upon the defendant by the plaintiff before the writ was served and was clearly proven. The plaintiff offered in evidence the papers in the cause (Case, p. 19) which included a written demand on Fred Veader to deliver the horse to the plaintiff. The demand is printed as an exhibit on the last page

(insert) of the state of the case. The demand was filed with the Clerk of the Court by the constable who served it, and the constable was produced as a witness and testified that he served the demand first on the defendant, who first telephoned his attorney and then refused to give up the horse on the same, and then the constable served the writ (Case, p. 20). There was no denial of this testimony. The jury having found there was a demand served and there being testimony to support such finding, it cannot be considered in this court.

It is proper here to remark that the demand mentioned in the case on pages 21 and 25, is not the demand served by plaintiff, but is alleged to be a demand served by defendant, a copy of which is improperly printed on page 29 of the State of the Case, for it was not admitted in evidence by the court, because not proven by the defendant or his witnesses, and, therefore, not admissible.

Replevin being a possessory action, plaintiff does not have to prove title in himself, only a right to possession as against the defendant. The State of the Case will show, however, that the plaintiff did fully prove title to the horse in himself. He claimed title in himself and the jury found he had title.

See 34 Cyc., p. 1352, p. 1385, *et seq.*

Bierman v. Reinhorn, 71 N. J. L. 422.

It is not necessary, in order to support an action of replevin, that there be an unlawful taking. Such action may be instituted either because of an unlawful taking, P. L. 1898, page 603, or because, although the original taking may have been lawful, there is an unlawful detention, P. L. 1898, page 603, 2 Com. St., page 1992, Sec. 119, which puts a replevin suit on the same ground as an action of trover. We think the taking in the case was unlawful so as to support a suit. But even if it was not, the defendant's wrongful detention, after the

service of the demand to return the horse, was unlawful and the action would lie, by virtue of Sec. 119 of the District Court Act, P. L. 1898, page 603.

Woodside v. Adams, 40 N. J. L. 417.

Point Two.

The same argument which justified the court in refusing a non-suit, justified it in refusing to direct a verdict. It was for the jury to say whether they believed the witnesses or not and to ascertain from the evidence what the true facts were: being a jury question, the court properly let the case go to the jury.

Point Three.

The defendant excepted to the charge of the court (Case, p. 26), on three grounds: first, because the court said the plaintiff had made a *prima facie* case by a number of witnesses; second, because the court charged that he understood the plaintiff claimed an absolute gift of the horse, and third, to the whole charge. The third exception is unavailable (*Schneider v. Winkler*, 74 N. J. L. 71).

There was no error in the charge. While the court did say the plaintiff had made a *prima facie* case and, therefore, he refused to non-suit, which was the fact, he particularly charged the jury that they should not let his decision on the motion to non-suit influence them, but that they must decide on the evidence of the plaintiff's and defendant's witnesses. There was no harm in saying he understood the plaintiff claimed an absolute gift of the horse, for the plaintiff claimed to have owned the horse since 1894, when it was given to him by his father. A court can comment on evidence and say how it impresses him, if he leaves it finally to the jury to

determine for themselves, as he did in this case (Case, p. 27) (*Merklinger v. Lambert*, 76 N. J. L. 806). The charge was a fair charge, leaning, if any, towards the defendant. It set forth what plaintiff had to prove, perhaps, if anything, more strictly than required by law, and told the jury what their duties were and not to be guided by anything the court said. The whole charge must be considered (*Brown v. Spence*, 79 N. J. L. 452). There was no reversible error.

The defendant made several requests to charge.

The first one was properly refused, because expressly covered in the Court's charge (Case, p. 26, lines 19-20, also 38-40).

The second request was properly refused; there was no evidence that Samuel Veader *delivered* the horse to Fred Veader and the suit could be maintained either against him as executor or as an individual.

The third request was properly refused, for if proper in law it had been covered (Case, p. 26, line 34, *et seq.*).

The fourth request does not embody a proper legal principle, for a recovery may be had on an unlawful detention (*Woodside v. Adams*, *supra*).

The fifth request was not a proper request, for the action might be sustained on an unlawful detention (P. L. 1898, p. 603).

The sixth request was properly refused, for so much of it as is good had been covered (Case, p. 26, line 26, *et seq.*), and plaintiff did not have to prove title, only a right to possession, and did not have to prove it was unlawfully taken, but only unlawfully detained.

Dederick v. C. R. R., 74 N. J. L. 424.

The seventh request was properly refused, for it was already covered (Case, p. 26, line 26).

The eighth request was properly refused, for it was covered (Case, p. 26, line 34, *et seq.*).

The ninth request, if a proper statement of law, was covered (Case, p. 26, line 9).

The tenth request was properly refused. The court does not have to charge the jury not to draw inferences. He had already told them to weigh, determine and consider the evidence (Case, p. 27, line 2; Case, p. 26, line 18).

The eleventh request was already covered by the charge (Case, p. 26, line 24 *et seq.*).

Daggett v. N. J. S. R. Co., 75 N. J. L. 630.

Schreiner v. N. Y. & N. J. Tel. Co., 82 N. J. L. 743.

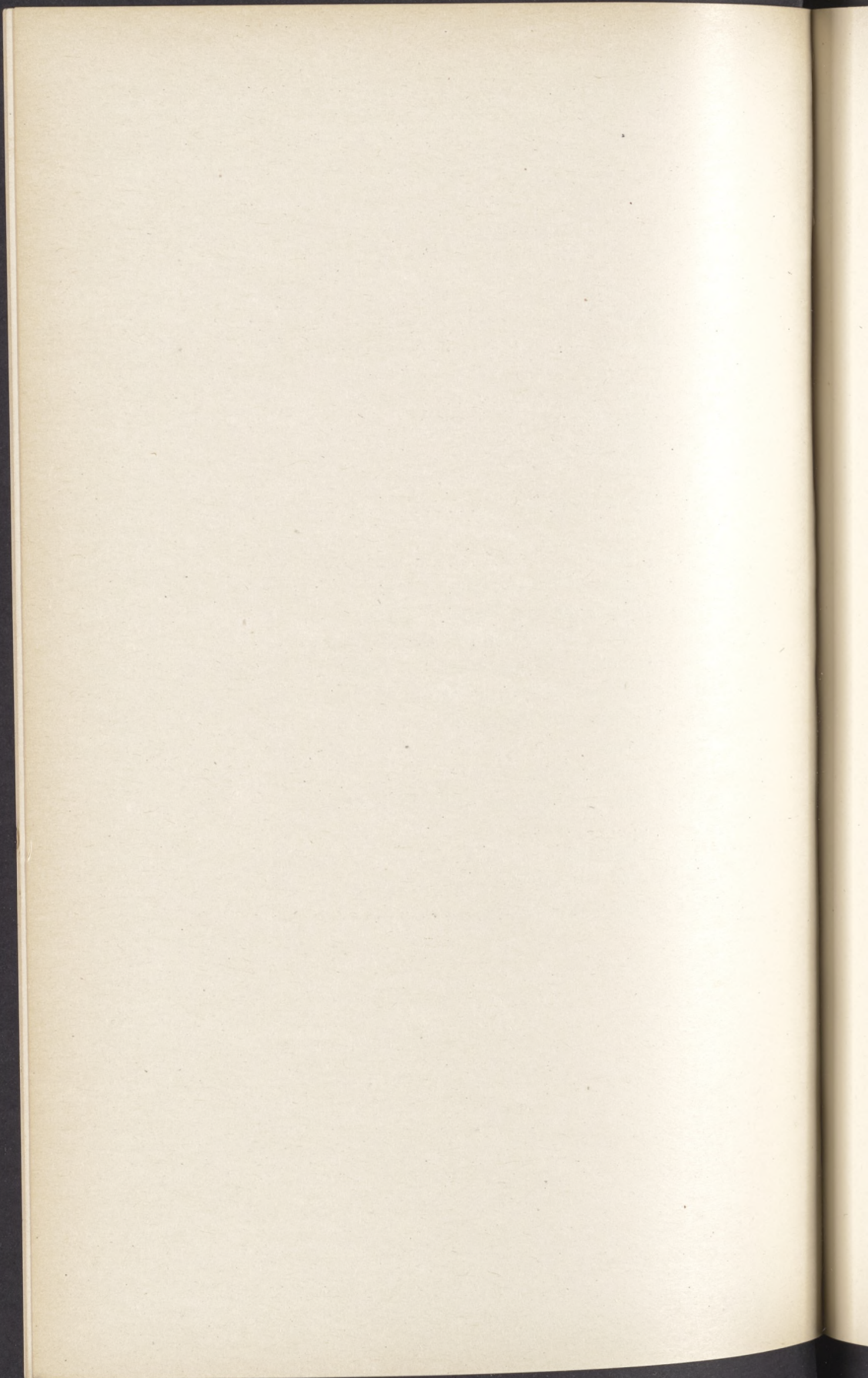
It is respectfully submitted that there was no reversible error and the judgment should be affirmed.

KING & VOGT,
Attorneys of Plaintiff and Appellee.



INDEX

	Page
Notice of Appeal	a
State of Demand	1
Writ	2
Return to Writ	3
Claim of Property	4
Record of First Trial	5
Demand for Jury	8
Record of Second Trial	8
Order	10
Notice of Appeal	11
Extension of Time Filing State of Case	12
Extension of Time Filing State of Case	13
Extension of Time for Filing State of Case	14
Extension of time for Filing State of Case ..	15
Extension of Time for Filing State of Case	16
Extension of Time for Filing State of Case	17
Clerk's Certificate	18
State of Case Settled by Court	18
Demand Offered in Evidence and Refused by the Court	29
Demand by Plaintiff	31
Specifications of Objections	33
Judgment of Supreme Court	35



New Jersey Court of Errors and Appeals

Notice of Appeal

NEW JERSEY SUPREME COURT

FRED VEADER,
Defendant & Appellant,

vs.

SAMUEL VEADER,
Plaintiff & Respondent.

In Replevin.

20

To Messrs. King & Vogt,

Attorneys for Plaintiff & Respondent.

TAKE NOTICE, that the defendant and appellant
appeals to the Court of Errors and Appeals from 30
the whole of the judgment rendered in this cause
in the Supreme Court, on the following grounds:

1. Because the District Court found as a matter
of law that the plaintiff was entitled to maintain
his suit whereas a non-suit should have been
granted on the close of the plaintiff's case, be-
cause the defendant received the horse as executor
and suit should have been instituted in that ca- 40

Notice of Appeal

capacity and no demand having been proven and there being no unlawful taking and the plaintiff failing to prove title in himself.

10 2. Because the District Court erred in allowing the case to go to the Jury and a direction of the verdict should have been awarded in favor of the defendant because the suit is improperly instituted, first, because no demand was proven, no unlawful taking and no title proved in the plaintiff.

3. Because the Court erred in refusing to charge the Jury as requested by the defendant and there was also error harmful to the defendant in the Court's charge.

20 4. The decision of the New Jersey Supreme Court in said cause was erroneous, as it confirms the judgment of the District Court of the First Judicial District of the County of Morris in this case, and in refusing to grant a new trial.

Dated May 15, 1916.

ELMER W. ROMINE,
Attorney for Defendant & Appellant.

Supreme Court of the State of New Jersey

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF COUNTY OF MORRIS

SAMUEL VEADER,

Plaintiff,

vs.

FRED VEADER,

Defendant.

In Replevin

20

State of Demand

Plaintiff of the Town of Morristown in the County of Morris and State of New Jersey, says that

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1. On September seventeenth, One Thousand Nine Hundred and fourteen plaintiff was and ever since has been the owner of one gray mare, with long mane and tail.

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

3. On the aforesaid seventeenth day of September 1914, the said horse was wrongfully and

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Writ

unlawfully taken from his possession and came wrongfully and unlawfully into defendant's possession on said day, and has ever since been and still is wrongfully detained by said defendant; that on the 19th day of September 1914, and prior to the serving of the Writ of replevin in this case, the said plaintiff demanded in writing of the said Fred Veader, possession of the aforesaid horse and notwithstanding said demand the said defendant refused to deliver possession of said horse unto said plaintiff.

4. Plaintiff demands possession of the said horse and two hundred dollars damages for its detention.

KING & VOGT,
Attorneys of Plaintiff.

20

Writ

District Court Summons:
Morris County, ss:

The State of New Jersey, To any Constable of said County, or to the Sergeant-at-arms of the District Court, of the First Judicial District of the County of Morris.

30 GREETING: We command you, that if Samuel Veader shall make you secure, you cause to be replevined and delivered to him one gray mare, with long tail and mane, which Fred Veader took and unjustly detained as is said; And, that you summon the said Fred Veader to appear before the District Court of the First Judicial District
40 of the County of Morris, to be held at the Court

Return to Writ

House, Washington Street (entrance Court Street), in the Town of Morristown on the first day of October, 1914, at ten o'clock in the forenoon, to answer the said Samuel Veader of a plea of taking and unjustly detaining said horse and chattels aforesaid; And have you then there this writ, with your proceedings thereon. 10

WITNESS, Oliver K. Day, Esquire, Judge of said Court, at Morristown, aforesaid the twenty-first day of September One Thousand Nine Hundred and fourteen.

(Seal)

HARRY G. ZWENGER,
Clerk.

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Return to Writ

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF COUNTY OF MORRIS

SAMUEL VEADER,
vs.
FRED VEADER,

In Replevin
Returnable.

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Return to the Writ.

By virtue of the within stated and hereunto annexed writ, the plaintiff having made me secure, I did at 4 o'clock in the afternoon of the twenty-first day of September A. D. Nineteen Hundred and fourteen serve a true copy of the within stated and hereunto annexed writ on Fred 40

Claim of Property

Veader, the within named defendant and at the same time did take into my possession the following named goods and chattels, to wit.

SCHEDULE

- 10 One gray mare, with long tail and mane.
 And a claim of property with a bond having been presented to me within twenty-four hours thereafter, I returned the goods and chattels taken by virtue of the within stated and hereunto annexed writ, and enumerated in the schedule made a part of this return, to the defendant claiming the same.

JAMES H. BRANT,
 Constable.

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Claim of Property

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF COUNTY OF MORRIS

30	SAMUEL VEADER, . vs. FRED VEADER, .	Plaintiff, Defendant.	} In Replevin
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To James H. Brant, one of the Constables of the District Court of the First Judicial District of the County of Morris.

40 Fred Veader, the defendant in the above stat-

Record of First Trial

ed action, hereby claims for himself, as executor of the estate of John Veader, deceased, the gray mare with long tail and mane taken by you from him (as such executor) by virtue of a writ of replevin issuing out of the District Court of the First Judicial District of the County of Morris in the above stated action, on the twenty-first day of September A. D. 1914. 10

Dated, September 21, 1914.

Yours respectfully,
FRED VEADER.

Record of First Trial

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF MORRIS 20

SAMUEL VEADER, vs. FRED VEADER,	Plaintiff, Defendant.	}	In Replevin
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King & Vogt, Plaintiff's Attorneys 30

Plaintiff Costs

Summons	\$3.00
Mileage40
Listing Fee	1.50
Attorney Fee	10.00

Total Cost	\$14.90	
To 12-man jury	5.75	40

Record of First Trial

A summons in the above stated cause was issued on the 21st day of September, 1914, returnable on the 1st day of October, 1914, wherein the plaintiff demands of the defendant the possession of one gray mare with long tail and mane.

10 The defendant filed a demand for jury on September 30, 1914.

Affidavit and Bond filed September 21, 1914.

The Plaintiff filed his State of Demand on September 25, 1914.

I served the within writ September 21, 1914 on the Defendant by reading it to him and giving him a copy thereof.

(Signed) JAMES H. BRANT,
Constable.

20

Defendant's Bond and claim of property filed September 21, 1914.

Adjournments

This cause was adjourned to October 8, 1914.

This cause was adjourned to October 15, 1914.

This cause was adjourned to October 22, 1914.

This cause was adjourned to October 29, 1914.

30 This cause was adjourned to November 16, 1914.

The plaintiff and the defendant appearing, the following jury was called and sworn to try the case.

Record of First Trial

Jury

- | | | |
|-----------------------|---------------------|----|
| 1. Ed. P. Guerin | 7. Carl T. Stirn | |
| 2. Harry Greenberger | 8. U. Stuart Reed | |
| 3. Henry C. Callahan | 9. Eugene S. Ayres | |
| 4. Geo. H. Cruess | 10. Vincent Roache | 10 |
| 5. Carlton A. Dobbins | 11. John C. Sweeney | |
| 6. James D. Ball | 12. Wm. Cramer | |

Constable GEORGE W. PIERSON,
 Attorney for Plaintiff—King & Vogt,
 Attorney for Defendant—Elmer W. Romine.

Witness's Plaintiff

Witness's Defendant

- | | | |
|--------------------|-----------------------|----|
| 1. Samuel Veader | 1. Ira Rome | |
| 2. Martha Egbert | 2. James R. Hamilton | 20 |
| 3. Edw. W. Blazure | 3. John Jackson | |
| 4. John Camusat | 4. Thomas E. Lowe | |
| 5. Abraham Ossre | 5. Fred Veader | |
| 6. Thomas Beddow | 6. Clifford Veader | |
| 7. Wm. Mitten | 7. Georgiana Veader | |
| 8. Andrew Hilbert | D-1 Certified copy of | |
| 9. Geo. Suitor | Will of John Veader. | |
| | D-2 Written Demand. | |

The evidence being closed and after argument of counsel and under a charge from the Court the jury retired, with a Constable sworn to attend them, to a private room to consider their verdict after being out about ten minutes they return into Court and by their foreman say they find a verdict in favor of the plaintiff and against the defendant and so say they all. Whereupon judgment for possession is entered in favor of the plaintiff and against the defendant.

Demand for Jury

DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

10	SAMUEL VEADER, vs. FRED VEADER,	Plaintiff, Defendant.	}	In Replevin
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To the Clerk of the District Court of the First
Judicial District of the County of Morris.

TAKE NOTICE that a new trial having been
awarded by the Supreme Court in the above stated
action, the defendant will demand a jury on the
re-trial of said cause.

20 Dated May 10, 1915.

ELMER W. ROMINE,
Attorney for Defendant.

Record of Second Trial

DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

30	SAMUEL VEADER, vs. FRED VEADER,	Plaintiff, Defendant.	}	In Replevin
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King & Vogt, Plaintiff's Attorneys.

Elmer W. Romine, Defendant's Attorney.

The judgment in the first case having been ap-
40 pealed to the Supreme Court and a new trial grant-

Record of Second Trial

ed and the defendant having filed a Demand for Jury on May 10, 1915, and the date for the trial of said cause having been set for the twenty-eighth day of June, 1915, and the plaintiff and defendant appearing, the following Jury was called and sworn to try the case.

- | | | |
|-----------------------|----------------------|----|
| 1. William F. Bark- | 7. J. Hendershot | 10 |
| man | 8. Willis B. Laird | |
| 2. James Purdy | 9. Harry D. Bell | |
| 3. Edwin S. Bean | 10. William Schweik- | |
| 4. Joseph P. Boniface | hardt, Jr. | |
| 5. Charles Bodine | 11. Robert Mack | |
| 6. Charles Brant | 12. Fred C. Reeves | |

Constable—George W. Pierson,
Attorneys for Plaintiff—King & Vogt,
Attorney for Defendant—Elmer W. Romine. 20

Witnesses, Plaintiff Witnesses, Defendant

Harry G. Zwenger	James R. Hamilton	
James H. Brant	Certified copy of Will	
Original papers in case	dated March 25, 1914.	
offered	John H. Jackson	
E. W. Romine	Levi Cole	
Samuel Veader	Clifford Veader	30
Martha Egbert	Fred Veader	
Ed. W. Blazure	Thomas E. Lowe	
Fred A. Blazure		
Andrew Hilbert		
Thomas Beddow		
William Mitten		
John Camusat		
George Suitor		

Order

The evidence being closed and after argument of counsel and under a charge from the Court, the Jury retired with a constable sworn to attend them, to a private room, to consider their verdict. After being out about fifteen minutes they returned into Court and by their foreman say they find a verdict in favor of the plaintiff and against the defendant, and so say they all. Whereupon judgment for possession is entered in favor of the plaintiff and against the defendant.

Order

20 DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

SAMUEL VEADER,

Plaintiff,

vs.

FRED VEADER,

Defendant.

In Replevin

30 It appearing to the Court that the property replevied in the above stated action has been delivered by Samuel H. Brant, one of the Constables of Morris County to Fred Veader, the defendant herein against whom the issue of property has been found and it appearing that the taking was not a distress for rent:

40 It is, on this 28th day of June, One Thousand
Nine Hundred and fifteen on application of Sam-

Notice of Appeal

uel Veader, the plaintiff herein, ORDERED that the said goods and chattels replevied and delivered as aforesaid, in the above stated action, be delivered forthwith to the said Samuel Veader.

JOSEPH HINCHMAN,
 Judge of the District Court of 10
 the First Judicial District of
 the County of Morris.

Notice of Appeal

DISTRICT COURT OF THE FIRST JUDICIAL
 DISTRICT OF THE COUNTY OF MORRIS 20

SAMUEL VEADER, vs. FRED VEADER,	Plaintiff, Defendant.	}	In Replevin
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To Samuel Veader or Messrs. King & Vogt, Attorneys for the plaintiff: 30

You will please take notice that the defendant Fred Veader, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court, rendered in the above stated action on the Twenty-eighth day of June A. D. 1915.

Dated June 28, 1915.

ELMER W. ROMINE,
 Attorney for Defendant. 40

**Extension of Time Filing State of
Case**

DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

10	SAMUEL VEADER, <div style="text-align: center;">vs.</div> FRED VEADER,	Plaintiff, Defendant.	} On Appeal
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It appearing to the Court that the attorneys of the respective parties in the above stated case have been unable to agree upon and file within the time required by law, a statement of the case on appeal.

It is therefore, on this tenth day of July A. D. 1915, ordered that an extension of time be granted until Friday, the Thirtieth day of July, for the preparing, agreeing upon and filing a State of the Case by the respective attorneys in the above stated appeal.

30

JOSEPH HINCHMAN,
Judge of the District Court of
the First Judicial District of
the County of Morris.

**Extension of Time Filing State of
Case**

DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

SAMUEL VEADER,

Plaintiff,

vs.

FRED VEADER,

Defendant.

10

On Appeal

It appearing to the Court that the attorneys of the respective parties in the above stated case, have been unable to agree upon and file within the time extended on July 30, 1915, a statement of 20 the case on appeal,

It is therefore on this twenty-eighth day of July A. D. 1915, ORDERED that extension of time be granted until Monday, August 30, 1915, for the preparing, agreeing upon and filing a state of the case, by the respective attorneys, in the above stated appeal.

JOSEPH HINCHMAN,
Judge of the District Court of 30
the First Judicial District of
the County of Morris.

**Extension of Time for Filing State of
Case**

DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

SAMUEL VEADER,

Plaintiff,

vs.

FRED VEADER,

Defendant.

10

On Appeal

It appearing to the Court that the attorneys of the respective parties in the above stated case, having been unable to agree upon and file within the time extended on August 26, 1915, a statement of the case on appeal, 20

It is, therefore, on this sixteenth day of September A. D. 1915, ORDERED that extension of time be granted until Thursday, October 14th, 1915, for the preparing, agreeing upon and filing the State of the Case by the respective attorneys in the above stated appeal

JOSEPH HINCHMAN, 30
Judge of the District Court of
the First Judicial District of
the County of Morris.

**Extension of Time for Filing State of
Case**

DISTRICT COURT OF THE FIRST JUDI-
CIAL DISTRICT OF THE COUNTY OF
MORRIS

10	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>SAMUEL VEADER,</p> <p style="text-align: center;">vs.</p> <p>FRED VEADER,</p> </td> <td style="width: 5%; text-align: center; vertical-align: middle;"> <p>Plaintiff,</p> <p>Defendant.</p> </td> <td style="width: 45%; vertical-align: middle; font-size: 4em;">}</td> </tr> </table>	<p>SAMUEL VEADER,</p> <p style="text-align: center;">vs.</p> <p>FRED VEADER,</p>	<p>Plaintiff,</p> <p>Defendant.</p>	}	On Appeal.
<p>SAMUEL VEADER,</p> <p style="text-align: center;">vs.</p> <p>FRED VEADER,</p>	<p>Plaintiff,</p> <p>Defendant.</p>	}			

It appearing to the Court that the Attorneys of the respective parties in the above stated case, having been unable to agree upon and file, within the time extended on September 16, 1915, a statement of the case on appeal,

It is, therefore, on this Fourteenth day of October A. D. 1915, ORDERED that extension of time be granted until Thursday, October 28th, 1915, for the preparing, agreeing upon and filing the State of the Case by the respective attorneys in the above stated appeal.

30

JOSEPH HINCHMAN,
Judge of the District Court,
of the First Judicial Dis-
trict of the County of Morris.

**Extension of Time for Filing State of
Case**

DISTRICT COURT OF THE FIRST JUDI-
CIAL DISTRICT OF THE COUNTY OF
MORRIS

SAMUEL VEADER, vs. FRED VEADER,	Plaintiff, Defendant.	} On Appeal.	10
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It appearing to the Court that the Attorneys of the respective parties in the above stated case, having been unable to agree upon and file, within 20 the time extended on October 14, 1915, a statement of the case on appeal.

It is, therefore, on this Twenty-eighth day of October A. D. 1915, ORDERED that extension of time be granted until Thursday, November 4th, 1915, for the preparing, agreeing upon and filing the State of the Case by the respective attorneys in the above stated appeal.

JOSEPH HINCHMAN, 30
 Judge of the District
 Court of the First Ju-
 dicial District of the
 County of Morris.

Clerk's Certificate

State of New Jersey, }
 County of Morris. } ss:

I, Harry G. Zwenger, Clerk of the District Court of the County of Morris do hereby certify that the
 10 foregoing is a true copy of the judgment and proceedings in the case wherein Samuel Veader is plaintiff and Fred Veader is defendant, recorded in Docket No. 5, page 2398.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this third day of November 1915.

(Seal.) HARRY G. ZWENGER,
Clerk.

20

State of Case Settled by Court

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF MORRIS

30	SAMUEL VEADER, Plaintiff and Appellee, vs. FRED VEADER, Defendant and Appellant.	}	In Replevin.
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40 The parties hereto, or their attorneys, having been unable to agree upon a state of the case for appeal, and having applied to me, Judge of the said Court, within the time as extended by an or-

State of Case Settled by Court

der made herein, I do hereby settle the case as follows:

The case was tried before the Court and a Jury; the action was instituted by Samuel Veader to replevy one gray mare with long tail and mane which was in the possession of Fred Veader (as Executor of John Veader, deceased), and claimed to be the property of Samuel Veader. 10

The counsel for defendant asked for a non-suit on the opening to the jury made by the attorney for the plaintiff in which he said that Deputy Sheriff Lowe of Morris County, went to plaintiff's house and told him he came for the horse. The plaintiff asked why, stating the horse was his and had been for years. The Sheriff said the horse was claimed by Fred Veader, who was the executor of John Veader, deceased. The plaintiff said that Fred Veader did not own the horse and was not entitled to it, and asked the Sheriff what he would do if he did not give the horse up. The Sheriff said he would take the horse anyway. The plaintiff then told the Sheriff if he was going to take it anyway, to take it, and the Sheriff did so, and turned it over to Fred Veader. The plaintiff then instituted this suit against Fred Veader to recover possession of the horse. 20 30

The ground urged by defendant's attorney for a non-suit was that the suit had been improperly instituted against Fred Veader as an individual and should be against him as executor and not as an individual. The Court denied the motion and an exception was allowed.

The Clerk of the District Court was sworn and produced the papers in the case, which were offered and admitted in evidence and included a 40

State of Case Settled by Court

written demand on Fred Veader to deliver the horse to the plaintiff, together with the writ of replevin in this case. The demand has been filed with the Clerk by the constable upon the return of the writ by Samuel Brant, a constable of this
10 county. The constable was then sworn and testified that he served both the demand and the writ of replevin; that he served the demand first on the defendant by reading the same and giving him a copy. The defendant then went into the house to call up his attorney. After telephoning, he would not give the horse up on the demand and the constable then served the writ in this case and took the horse.

The plaintiff testified that the horse was purchased by his father, John Veader, (now deceased)
20 in the fall of the year 1894 at an auction sale at the Mansion House in Morristown, for \$72.50, and immediately after purchasing the horse, he said to the plaintiff, "There is a horse I give you. Leave mine alone." On cross-examination the plaintiff testified that his father said, "Sam, there is a horse I give you. See if you can drive her and leave mine alone." The plaintiff further testified that he and his father took the
30 horse that night to his father's home in Green Village, where plaintiff and his father lived and that his father, John Veader, while the horse was at his father's barn and plaintiff was living there, paid for the feed of the horse and the shoeing of the horse until 1902, when plaintiff was married and had a home of his own; and he then took the horse to his house and has had it ever since exclusively, up to September 1914, when it was taken from him by the Sheriff of Morris County. The

State of Case Settled by Court

plaintiff testified that while he and his father lived together, both he and his father used the horse for work on the farm and for driving when they wanted it; that he worked out at various places before he was married, but did not take the horse with him, although he used it when he so desired, which was frequently. Plaintiff testified on cross-examination that the reason he took the horse in 1902 was because he wanted it for fun. Again he said he took it because he wanted it and it was his, and also said he took it because his father was too old to look after the horse. He said on cross-examination that he never told his father that he claimed to be the owner of the horse, because he said his father knew it, for he had given the horse to him. Plaintiff was shown a written demand signed by Fred Veader, dated September 17, 1914, in which he claimed the horse as executor of John Veader, deceased, and said that it read like a paper the Deputy Sheriff read to him, but he did not know, because the Deputy did not give him a copy. The paper was marked for identification. The plaintiff also testified that when Deputy Sheriff Lowe read the paper to him he went to telephone to his counsel, but could not get him; the Deputy Sheriff told him that if he didn't give up the horse, he would take it anyway, so the plaintiff said if he was going to take it anyway, to take it, and said that no other papers were served upon him.

Martha Egbert testified for the plaintiff and said she knew John Veader for many years, and that John Veader had told her frequently that he had given Sam the horse in question.

State of Case Settled by Court

Edward Blazier testified for the plaintiff and said he knew John Veader for many years, and that John Veader had frequently told him that he had given Sam the horse.

10 Andrew Hillbert testified that shortly after John Veader purchased the horse he heard him say in the Post Office at Green Village, where both lived, that he bought it for and had given it to Sam, and that he wanted Sam to leave his horse alone. He testified that he afterward learned that John Veader did not himself own a horse at that time, but said that Mrs. John Veader did; that there was a horse (other than the one in question) on the place and he always understood that it was John's and John always acted and talked as
20 though it was.

Thomas Beddow testified that he went to John Veader's two or three times a week on business; that he had several conversations with John Veader and John always said he had given the horse to Sam.

William Minton testified that he had several talks with John Veader at Green Village during his life time and he said "I gave him (meaning the horse) to Sam."

30 John Camisat testified for the plaintiff and said he had no special conversation with John Veader, but heard him say to another party it was Sam's horse. He also testified that up to 1902, when Sam took the horse to his own house, John Veader always paid for the shoeing of the horse.

The plaintiff then rested his case, and the defendant moved for a non-suit upon the following
40 grounds:

State of Case Settled by Court

1. Defendant received the horse as executor and the suit should have been instituted against him in that capacity and failure to do so is error.

2. There being no demand proven to have been made, suit must fail.

3. There being no unlawful taking proven there can be no recovery. 10

4. Because plaintiff has failed to prove title in himself, either general or special.

The Court overruled the motion for a non-suit and an exception was allowed to the defendant.

James R. Hamilton, being sworn for the defendant, testified that he knew John Veader in his life time and was familiar with the horse in question and that he lived very near John Veader during his life time. He said that Sam had the horse at the time he lived at Green Village and that the father, John Veader, wanted the witness to take the horse and keep it for him, as Sam was not using it right. The witness said he had other conversations with John Veader in which he said that the horse was to go to Clifford Veader after his death. He said that on one occasion Sam Veader was at the house in Green Village and John Veader, the father, attempted to take the horse away from Sam, but Sam refused to let him have it and drove off. 20 30

John H. Jackson testified for the defendant and said that John Veader always told him that the horse was to go to Clifford after his death. He said he never told him that he had given the horse to anyone.

Clifford Veader, the grandson of John Veader, 40

State of Case Settled by Court

testified that when he was a boy he used to go to his grandfather's house and his grandfather would tell him that he could have the horse when he was dead. The witness said that Sam had the horse at that time and that his grandfather said that any time Clifford wanted the horse he would
10 take it out of the shafts for him; he admitted he never asked for the horse and never said anything to Sam about his grandfather having given it to him.

Fred Veader, the defendant, testified that John Veader, his father, lived at various places in Green Village and always used the horse when he wanted to, and that Sam drove it very little, although he drove it whenever he wanted to use it.
20 He said that for a year and a half his father lived with him and had the horse at that time, and that Sam was away working somewhere, but frequently used the horse. The witness said that in 1902 Sam was Post master at Green Village, although he could not remember the years covered by his term, and the witness was Assistant Post Master, but could not tell when it was, and he told the plaintiff that he could increase the business if Sam would go to Morristown and get some mail. They
30 then talked about a means of conveyance and Fred Veader, the defendant, told Sam that he would see his father and get the horse so Sam could use it, which he did, although he admitted that he was then, and for some years before had been on bad terms with his father and they did not speak to each other. (The plaintiff denied all of this testimony, except the fact that Fred Veader and his father were not on speaking terms.) The witness
40 also testified that after that time the father used

State of Case Settled by Court

the horse repeatedly, although he could not recollect when he got out of the post office or when Sam was married, and that Sam, after he was married took the horse and kept it continuously until September 17, 1914, when the witness said it was given to him by the Deputy Sheriff. The witness also testified that his father went to the Soldiers' Home in 1910. 10

Sam testified that he was married in 1902.

Fred Veader testified that he could not identify the written demand marked for identification, saying that he had signed two, but did not know whether the one shown him was the one read or not.

Sheriff Lowe then was called, and he also said he could not identify the paper, saying further 20 that he did not remember having had any such paper in his possession to serve.

The paper was then offered in evidence and objected to by plaintiff and refused by the Court, and an exception to this taken by the defendant was allowed.

The defendant moved for a direction of a verdict on the ground that the defendant received the horse as executor and suit should have been instituted against him in that capacity. 30

2. There being no demand proven to have been made the suit must fail.

3. There being no unlawful taking proven there can be no recovery.

4. Because plaintiff has failed to prove title in himself either general or special. 40

State of Case Settled by Court

The motion was denied and the defendant was allowed an exception.

The Court charged the Jury substantially as follows:

This is a question of fact for you to determine. The burden of proof is on the plaintiff to prove that he is entitled to the horse. He has produced a number of witnesses whose testimony, in my opinion, made a *prima facie* case for him, and for that reason I refused to non-suit, as asked by the defendant. But that was before you heard the defendant's witnesses and you must not let my decision on the motion to non-suit influence you. You must decide the case from the evidence of the plaintiff's and defendant's witnesses. You must be satisfied whether a demand was made by plaintiff for the return to him of the horse. The suit is a replevin suit, wherein the plaintiff claims an absolute gift to him of the horse by his father. If this was not an absolute gift it could only be a loan. I understand that the plaintiff claims an absolute gift. If the father gave it to Samuel Veader absolutely, and you so find, he could not take it back without Sam's consent and could not give it to Clifford Veader by will. A gift without consideration may be harder to prove than one where there is a consideration, but a gift without consideration may be a valid gift. Love and affection may be a good consideration and I mention that in this case, although it is not raised. If you find that John Veader gave the horse to his son Samuel absolutely, and Fred took it away from him, and that a demand was made on Fred to return the horse, you must find for the plaintiff, but if you find there was no gift, or no demand, you

State of Case Settled by Court

must find for defendant. The evidence you are to weigh, determine and consider. You have heard the witnesses and you are to judge from their testimony.

The defendant took exception to the Court's charge in which the Court said the plaintiff has made a *prima facie* case by a number of witnesses so that the Court could not non-suit. The defendant also took exception to that part of the Court's charge in which the Court said I understand the plaintiff claims an absolute gift. 10

The defendant also took an exception to the entire charge of the Court, all of which exceptions were allowed.

The defendant requested the Court to charge the following requests: 20

1. If the Jury find that there was no demand served upon the defendant, Fred Veader, before the constable took the horse, then in law there can be no recovery in this proceeding and the case must be dismissed and the verdict should be no cause of action.

2. If the Jury find that Sam Veader delivered the horse to Fred Veader, as executor, then the suit is improperly instituted and they should render a verdict of no cause of action. 30

3. If the Jury find that the defendant came lawfully into possession of the horse and was entitled to the same, as executor of John Veader, deceased, then the verdict should be no cause of action.

4. The Jury must find that there was an unlawful taking before they can render a verdict in favor of the plaintiff. 40

State of Case Settled by Court

5. There can be no action for replevin unless there was an unlawful taking.

6. The plaintiff must prove that he was the lawful and legal owner of the horse and that it was unlawfully taken from him by the defendant before the Jury can find a verdict for the plaintiff.

7. If John Veader gave Sam the horse to use only during his life time and there was no intention on the part of John Veader that he should part with the title and that Sam Veader should be the absolute owner then the executor is entitled to the horse and there must be a verdict of no cause of action.

8. Although Sam, the plaintiff, had the horse at the time of his father's death, yet if it did not belong to him but he simply used it at the pleasure of the father and there never was any intention on the part of the father to part with the title, but that the horse was to go to the grandson upon the death of the father, then the executor, Fred Veader, was entitled to have the horse, so that he could carry out the wishes of the father, and the verdict in this case must be no cause of action.

9. It is the duty and burden on the plaintiff to prove by a preponderance of evidence that he was the absolute owner of the horse at the time it was claimed by the defendant.

10. The Jury cannot draw inference but must be controlled absolutely by the evidence as to what the intention of John Veader was.

11. In order to constitute and make a gift of the horse complete, the father, John Veader, must

Demand Offered in Evidence and Refused by the
Court

have, at the time of the alleged gift, intended that the plaintiff should have the horse against the claims of all other persons and the plaintiff must have received the horse from his father with the understanding that it was a gift and not a loan. 10

The Court refused to charge the first request to charge, stating it had already been covered. The Court refused to charge the second, third, fourth and fifth requests to charge, stating that all which were proper had been covered. The Court refused to charge the sixth, seventh, eighth, ninth, tenth and eleventh requests to charge, stating that all which were proper had already been covered.

The defendant also took exception to the refusal of the Court to charge as requested, which exception was allowed. 20

Case settled and signed by me this Fourteenth day of October One Thousand Nine Hundred and Fifteen.

JOSEPH HINCHMAN,
Judge, etc.

Demand Offered in Evidence and Re- 30
fused by the Court

To Samuel Veader or to whom it may concern:

I hereby require and demand of you to deliver up to me, as Executor of the last will and testament of John Veader, deceased, the white mare, which you now have in your possession and which was loaned to and used by you, as the property 40

Demand Offered in Evidence and Refused by the
Court

10 of John H. Veader, and which upon his death and the probating of his last will and testament was bequeathed to Clifford Veader, and the possession of which horse I am entitled to as such executor to deliver to said Clifford Veader, or his duly appointed Guardian, under the terms of the aforesaid will of John Veader.

Dated, September 17, 1914.

Yours respectfully,

FRED VEADER.

Demand Offered in Evidence by Plaintiff.

TO FRED VEADER:

I hereby demand of you one gray horse with long mane and tail, which is my property, and unless you deliver the same to me forthwith, I shall commence legal proceedings against you to recover possession of the same.

Dated September 18th, 1914.

24th in ink marked over 18th.

SAMUEL VEADER.

Specifications of Objections to Determinations

NEW JERSEY SUPREME COURT

<p style="margin: 0;">SAMUEL VEADER, Plaintiff & Appellee, vs. FRED VEADER, Defendant & Appellant.</p>	}	On Appeal from District Court.	10
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The defendant and appellant, Fred Veader, in compliance with Rule 90 of the Court, hereby specifies his objections to the determinations and directions of the District Court with respect to which he is dissatisfied in point of law, as follows, 20
to wit:

1. The District Court found as a matter of law that the plaintiff was entitled to maintain his suit, whereas a non-suit should have been granted on the close of the plaintiff's case, because the defendant received the horse as executor and suit should have been instituted in that capacity, and no demand having been proven and there being no unlawful taking and plaintiff failing to prove title in himself. 30

2. The District Court erred in allowing the case to go to the jury and a direction of the verdict should have been awarded in favor of the defendant because the suit is improperly instituted, first because no demand was proven, no unlawful taking and no title proved in the plaintiff. 40

Specifications of Objections to Determinations

3. The Court erred in refusing to charge the jury as requested by the defendant and there was also error harmful to the defendant in the Court's charge and for these reasons there should be a new trial.

10

EDWIN W. ROMINE,
Attorney for Defendant and Appellant.

We consent to the filing of these specifications as of time.

KING & VOGT,
Attys. for Plaintiff and Appellee.

Judgment in Supreme Court

The first point urged is, that the suit should have been instituted against the defendant in a representative capacity as executor, and failure to do so was the basis for the motion to non-suit and the direction of a verdict in favor of the defendant. The ruling of the Trial Court on these motions was not error. Hodge v. Coriell, 44 N. J. L. 456; 46 N. J. L., 354; Boyle v. Knauss, 81 N. J. L., 330.

It is next urged, to use the language of the brief, that the District Court in its charge committed error in passing its opinion and commenting upon the significance of the evidence, as making out a *prima facie* case for the plaintiff. The charge must be considered in its entirety. Brown v. Spence, 79 N. J. L. 452. We think, there is no error in the charge of the Trial Court.

The defendant made eleven requests to charge, some of these were in effect charged by the Court. It is unnecessary to state them in detail. The ninth request was "It is the duty and burden on the plaintiff to prove by a preponderance of evidence that he was the *absolute* owner of the horse at the time it was claimed by the defendant." In replevin the plaintiff does not have to prove an absolute ownership. This was an inaccurate legal statement; hence the Court was not bound to charge it. The Court did charge "the burden of proof is on the plaintiff to prove that he is entitled to the horse."

There is no error in the record. The judgment of the District Court is therefore affirmed with costs.

