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NEW JERSEY SUPREME COURT.

PASQUALE MELLILO, trading as First Street Service
Garage,
Plaintiff-Respondent,
vs. 10a

TIFFANY OIL BURNER COMPANY, a corporation;
and SUPERIOR FINANCE CORPORATION, a cor-
poration (appellant),
Defendant-Appellant.

**Notice of Appeal and Grounds, Filed
June 6, 1927.**

*To Ernest L. Quackenbush, Esq., Attorney for
Plaintiff-Respondent:* 20a

TAKE NOTICE, that Superior Finance Corpora-
tion, defendant-appellant, appeals to the Court of
Errors and Appeals, from the whole of the judg-
ment entered in the above-stated cause, on the
ground that the Supreme Court erred in giving
judgment for the plaintiff-respondent instead of
defendant-appellant.

GREEN & GREEN, 30a
Attorneys for Defendant-Appellant.

HARRY GREEN,
Of Counsel with Appellant.

Endorsement on Backer:

Service of within notice and copy thereof, ac-
knowledged this 3rd day of June, 1927.

ERNEST L. QUACKENBUSH, 40a
Attorney of Plaintiff-Respondent.

SECOND DISTRICT COURT
OF THE CITY OF NEWARK.

PASQUALLE MELLILO, trading as First Street
Service Garage,
Plaintiff,

vs.

10

TIFFANY OIL BURNER COMPANY, a corporation,
and SUPERIOR FINANCE CORPORATION, a cor-
poration,
Defendants.

Notice of Appeal, Filed Oct. 8, 1926.

*To Pasqualle Mellilo, trading as First Street
Garage, or his Attorney, Ernest L. Quacken-
bush:* 20

TAKE NOTICE, that the defendant, Superior
Finance Corporation, hereby appeals to the New
Jersey Supreme Court, from the judgment ren-
dered by the Second District Court of the City
of Newark in the above stated action, on the 27th
day of September, 1926.

Dated, October 1st, 1926.

30

GREEN & GREEN,
Attorneys for Defendant,
Superior Finance Corporation.

Due and legal service of within Notice of
Appeal and copy thereof acknowledged this 1st
day of October, 1926.

ERNEST L. QUACKENBUSH,
Attorney for Plaintiff. 40

Specification, Filed November 30, 1926.

NEW JERSEY SUPREME COURT.

Action at Law.

On Appeal from the Second District Court
of the City of Newark.

10

—————◆—————
PASQUALLE MELLILO, trading as First Street
Service Garage,
Plaintiff-Respondent,
vs.

20

TIFFANY OIL BURNER COMPANY, a corporation,
and SUPERIOR FINANCE CORPORATION, a cor-
poration (Appellant),
Defendant-Appellant.
—————◆—————

The following is a specification of the determina-
tions or directions of the District Court, with
respect to which appellant is dissatisfied in point
of law:

1. District Court erred in proceeding with
suit when Superior Finance Corporation was not
served and not brought into Court by process.

2. District Court erred in refusing to receive
in evidence certified copies of conditional sales
contract.

3. District Court erred in ruling "that under
your writ of replevin you saw fit to claim posses-
sion of the car by virtue of the fact that the lien
claim was unreasonable and excessive, and not by

40

Specification, Filed November 30, 1926.

virtue of the fact that you are a paramount title
owner. Having elected your form of action, you
are now bound by that election".

4. District Court erred in overruling following
questions:

10

To the witness, Samuel Glass;

Q. Mr. Glass, when you purchased the contract
in this matter, the Tiffany Oil Company resided
in Paterson?

Q. Mr. Glass, when did you find out that the
Constable was removing the truck?

Q. According to your records, how much is due
on that account at the present time?

To Mr. Neibart:

20

Q. How much do you consider a reasonable
amount on that bill?

5. District Court erred in ruling "that irre-
spective of the unreasonableness of the demand by
the garage keeper, the lien is not released unless
a tender be made by the owner or he who acts
for the owner, of the amount that that owner or
he who acts for him deems reasonable".

30

6. District Court erred in entering judgment
for garage keeper instead of Superior Finance
Corporation.

Dated, November 29th, 1926.

GREEN & GREEN,
Attorneys for Defendant-Appellant.

HARRY GREEN,
Of Counsel.

40

**Writ of Replevin and Affidavit, Filed
December 17, 1925.**

Writ of Replevin, etc., Garage Keeper's Lien.

Essex County—ss.:

10 *The State of New Jersey, to any Constable of said
County, GREETING:*

YOU ARE HEREBY COMMANDED, that you cause to be replevied and delivered, WITHOUT DELAY, to Superior Finance Corporation, a corporation, or its legal representative, 1 Reo Special, Serial No. 486, Motor No. 62483, and equipment, which Pasqualle Mellilo, trading as First Street Service Garage, took and unjustly detained—as is said.

20 (L. S.)

AND that you summon the said Pasqualle Mellilo, trading as First Street Service Garage, to commence action and file state of demand or complaint with the Clerk of the Second District Court of the City of Newark, within 30 days after the issuance of this writ, showing the amount claimed by you.

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

WITNESS, Louis R. Freund, Esq., Judge of said Court, at Newark, aforesaid, the 17th day of December, 1925.

JAMES E. GARRIGAN,
Clerk.

HARRY GREEN,
Attorney.

40

Affidavit of Ben A. Neibart.

P. L. 1922, page 401.

State of New Jersey,
County of Essex—ss.:

BEN A. NEIBART, of full age, being duly sworn according to law, on his oath deposes and says, that: 10

1. Superior Finance Corporation, a corporation, is the owner, and entitled to the immediate possession of 1 Reo Special, Serial No. 486, Motor No. 62483, and equipment, now detained by Pasqualle Mellilo, trading as First Street Service Garage, under an alleged Garage Keepers' Lien of \$416.68, from whom he demanded a statement, but it was refused. He considers amount excessive, and nothing due thereon. 20

2. He was authorized by said owner to take possession of said motor vehicle, and demanded possession thereof from said Pasqualle Mellilo, trading as First St. Garage, who refused to deliver possession thereof to him. He denies the validity and correctness of said alleged lien, and herewith deposits bond for \$833.36 and \$20 costs, with the Clerk of this Court, in accordance with P. L. 1922, p. 401, and prays that foregoing Writ of Replevin shall immediately issue out of and under seal of this Court, commanding any Constable to take possession of said motor vehicle, without delay, and deliver it to the owner, or legal representative. 30

BEN A. NEIBART.

Sworn and subscribed to before me this
16th day of December, 1925.

DAVID GREEN,
Notary Public of New Jersey.
My Commission expires Nov. 27, 1928.

40

Summons.

Essex County—ss.:

THE STATE OF NEW JERSEY.

10 To any Constable in said County or to the
Sergeant-at-Arms of The Second District
Court.

SUMMON.

Tiffany Oil Burner Co., a corporation and
Superior Finance Corp., a corporation, to ap-
pear before the Second District Court of the City
of Newark, to be held in the City Hall, Broad
Street (Between Green and Franklin Streets),
20 in the said City, on the twenty-second seventh
day of January, Nineteen Hundred and Twenty,
....., at Ten o'clock in the forenoon to answer
unto Pasqualle Mellilo, trading as First St. Service
Garage in an action On Contract of each to the
damage of the plaintiff Five hundred Dollars,
hereof fail not.

30 WITNESS, Louis R. Freund, Esq., Judge of said
Court of Newark, aforesaid, the Fifteenth 20th
day of January in the year One Thousand Nine
Hundred and Twenty-six.

JAMES E. GARRIGAN,
Clerk.

(Left hand side of summons—District Court
Summons.)

(Back of Summons.)

Summons.

SECOND DISTRICT COURT
OF NEWARK, N. J.

SUMMONS ON CONTRACT.

10 PASQUALLE MELLILO, trading as First St. Service
Garage,

vs.

TIFFANY OIL BURNER Co., a corporation, and
SUPERIOR FINANCE CORP., a corporation.

Demand \$500. 20
Costs 2.10 No. 71469.
Mileage.
Returnable January 27, 1926.

ERNEST L. QUACKENBUSH,
Attorney for Plaintiff,
738 Broad Street,
Newark, N. J.

**State of Demand, Filed January 25, 1926,
Which Clerk Changed to January 15, 1926.**

10 The plaintiff demands judgment of Five hundred Dollars against the defendants on a book account for the agreed price and reasonable value due the plaintiff for the storing, maintaining, keeping and repairing of a certain Reo motor vehicle truck, Serial No. 486, Motor No. 62483, and for furnishing gasoline, accessories and other supplies therefor. All the aforementioned services were rendered and supplies and accessories were furnished by the plaintiff at the request of the defendant, Tiffany Oil Burner Company, a corporation. A true copy of the account is as follows:

	May 1925	Storage Reo Truck	\$20.00
	June 1925	“ “ “	20.00
	July 1925	“ “ “	20.00
	Aug. 1925	“ “ “	20.00
	Sept. 1925	“ “ “	20.00
	Oct. 1925	“ “ “	20.00
	Nov. 1925	“ “ “	20.00
	Dec. 1925	“ “ “	20.00
30	June 5, 1925	Recharge Battery	1.00
	July 1, 1925	Seven Gals. Gas	1.47
	Aug. 12, 1925	Eight gals. Gas	1.60
		Three Quarts Oil	.90
	Sept. 14th	“ Wash Truck and stop water leak, Labor 6 hours	7.50
	Sept. 15th	“ Change tire repair tube Put in new windshield glass	2.25 7.00

40

*Notice of Application to Fix Date for Hearing,
Filed June 16, 1926.*

Sept. 16th	“	Take off front door and refit, change tire re- pair tube, labor	10.00	
Sept. 29th	“	10 Gals Gas	2.00	
		3 Quarts Oil	.90	10
			<hr/>	
			\$194.62	

The defendant, Superior Finance Corporation, a corporation, is made a defendant herein because of the fact that the said defendant, under a claim of ownership, caused the aforesaid Reo truck, upon which the plaintiff has a Garage Keeper's Lien for storing, maintaining, keeping and repairing the same and for furnishing gasoline, accessories and other supplies therefor, to be replevined under P. L. 1922, page 401.

Judgment will be claimed for \$194.62 together with lawful interest and costs of this suit.

ERNEST L. QUACKENBUSH,
Attorney for Plaintiff.

**Notice of Application to Fix Date for Hearing,
Filed June 16, 1926.** 30

To:

Harry Green, Esq.,
Military Park Building,
Newark, N. J.

Sir:

Please take notice that on Friday, June 18th, 1926, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard at

40

Special Appearance, Filed September 27, 1926.

the Second District Court, City Hall, Newark, N. J., I shall apply to his Honor, Louis R. Freund, Judge, for an order fixing a date for the trial of the issues raised in the above entitled proceeding.

10

Yours respectfully,

ERNEST L. QUACKENBUSH,
Attorney for Pasquale Mellilo,
trading as the First Street Service Garage.

June 9, 1926.

Service acknowledged without prejudice.

20

HARRY GREEN,
Attorney for Superior Finance Corporation.

**Special Appearance, Filed September
27, 1926.**

Defendant, Superior Finance Corporation, a corporation, hereby enters a special appearance, for the following reasons:

30

1. Said defendant was never served with process in this matter.

2. Said defendant has never entered an appearance in the matter.

GREEN & GREEN,
Attorneys for Defendant,
Superior Finance Corporation.

40

State of Case, Filed October 11, 1926.

Transcript of shorthand notes of testimony taken in the above entitled matter on Monday, September 27th, 1926, at eleven o'clock in the forenoon, at the Second District Court, City Hall, Newark, N. J., before his Honor, Louis R. Freund, Judge of said Court. 10

APPEARANCES:

ERNEST L. QUACKENBUSH, ESQ., on behalf of the plaintiff.

DAVID GREEN, ESQ., of Green & Green, on behalf of the Superior Finance Corporation.

LOUIS WINARSKY, stenographer, sworn. 20

Mr. Green: We desire to enter a special appearance in this case. Our contention is that even if there are adjournments, the Court never had control of the subject-matter of the case.

In this case the garage keeper was the holder of a car sold under a conditional sales agreement. The car was in the possession of the holder, the First Street Garage. At the expiration of thirty days, as no state of demand had been filed under the garage keepers' replevin act, the action was discontinued and the bond returned. 30

The Court: What is the action here before me?

Mr. Green: This is an action on contract, on book account.

The Court: What action is being tried—a replevin suit or a contract action?

Mr. Green: Well, this contract action is evidently being tried, and we say the Court has no 40

State of Case, Filed October 11, 1926.

jurisdiction of the defendant Superior Finance Company because they were never served.

The Court: I have before me papers issued by this Court—a Court summons, a contract, a state of demand; I also have a garage keeper's lien notice. I have a garage keeper's writ of replevin; and I have further a state of demand on contract. What action am I trying?

Mr. Quackenbush: This is the situation: This is a garage keeper's suit brought under the garage keepers' lien act whereby the Superior Finance Company replevined this car under the special replevin act. I think it was promulgated in 1924.

The Court: I want to know what case is before me.

Mr. Quackenbush: This is all one case.

The Court: It can't be one case. If you have started suit on contract to recover from the oil burner company and the Superior Finance Company on book account, that is one matter. If the owner of a car is attempting to replevin it, and you appear in the replevin suit, and file your state of demand in accordance with the garage lien act, that is a different matter; or if the Superior Finance Company claim a paramount title to that of the garage keeper, and is here to establish that title, that is another matter. What is before me?

Mr. Quackenbush: The second section of this statute provides that we should file a state of demand.

The Court: When they issued the writ.

Mr. Quackenbush: When they issued the writ. That is exactly what we did.

The Court: What is this action?

State of Case, Filed October 11, 1926.

Mr. Quackenbush: The summons is not used; it is merely surplusage.

The Court: You did not issue a summons?

Mr. Quackenbush: I believe a summons was issued, yes, sir, but it was never served.

The Court: Where does this summons come from?

Mr. Quackenbush: The summons was prepared but never served.

The Court: By whom?

Mr. Quackenbush: Prepared by my office; I am not sure; but it was never served.

The Court: There is no action on contract before me.

Mr. Quackenbush: This is all that is necessary in this case. The state of demand is filed.

The Court: In the replevin action.

Mr. Quackenbush: Yes, your Honor, the defendant cannot file a state of demand, and we couldn't very well put in any kind of a paper without bringing in the owner of this particular car. The second section in that statute says we are in court.

The Court: There was never a contract action instituted.

Mr. Quackenbush: Absolutely.

The Court: What was the first process here?

Mr. Quackenbush: The first process was a replevin proceeding in this Court, and we are the answering party. The party filing a lien enters an appearance by that very proceeding. We really have to proceed as the plaintiff. By filing that they are obliged to appear in our action.

The Court: When you filed that you have merely continued what they started. Once you

State of Case, Filed October 11, 1926.

file that I have merely to determine the reasonableness of your demand. If it be an amount the Court thinks reasonable, it enters judgment accordingly.

10 Mr. Quackenbush: Do you enter judgment for the plaintiff against the bond?

The Court: I enter judgment for the garage keeper or for the owner.

Mr. Quackenbush: Absolutely. If you enter it for us it is a formal judgment. I say it is properly brought whether it is in replevin or on contract.

The Court: I say this is improper. You issue no summons in replevin.

Mr. Quackenbush: We don't have to.

20 The Court: Your state of demand is your appearance here. The writ was issued by the Superior Finance Company against Pasquale Mellilo.

Mr. Quackenbush: Yes.

The Court: Then you come in on behalf of Pasquale Mellilo and file a bill against the Superior Finance Company.

30 Mr. Quackenbush: And the second paragraph says why they are brought in. I don't see why we file a state of demand without bringing in the owner.

The Court: You claim under the statute where one holds under the owner as a chattel mortgagee that your lien attaches. You don't bring them in as a defendant. They are not a party to the process.

Mr. Quackenbush: They may be, but it isn't necessary.

40 The Court: You may bring them in to prove your case, but they are not necessarily a party.

State of Case, Filed October 11, 1926.

Mr. Quackenbush: And the second paragraph states why the Superior Finance Corporation—

The Court: Well, the Superior Finance is the moving party. I say you are perfectly justified in coming into court naming the party who brought you into court as your opponent. What is your difficulty? 10

Mr. Green: My difficulty is this: Under the '22 act a deposit or a bond is filed by the owner or his lawful representative, and the garage owner or keeper comes in within thirty days and not later. In this action on contract the defendant the Tiffany Oil Company.

The Court: There is no contract action before me.

Mr. Green: Well, this action on the state of demand which is entitled "On Contract"—that is, the state of demand filed. We say that is not the same action in which we filed our bond. 20

The Court: Yes, they have merely added an additional name. They appear here in answer to your writ of replevin and merely add an additional name to show their right to the lien. I say then, I will permit you to amend at this time to strike out the Tiffany Oil Company. You may prove your rights under them, but you had better not name them as defendants. They may be stricken out. 30

Mr. Quackenbush: That may be the effect in reading the provisions of the statute; but it seems to me to make an orderly proceeding they had to be brought in.

The Court: They don't have to be brought in. You don't have to bring in the agent.

Mr. Quackenbush: But the situation is this: It isn't exactly an agency. 40

State of Case, Filed October 11, 1926.

The Court: It is a statutory privilege.

Mr. Quackenbush: Absolutely.

The Court: How do you appear now?

Mr. Green: I am appearing on the whole
thing, your Honor. I contend that the garage
keeper's replevin action was discontinued and the
10 bond returned.

The Court: When?

Mr. Green: On or about the 16th of January.

The Court: Why was that done?

Mr. Green: Because no state of demand had
been filed within thirty days.

The Court: On January 15th, 1926. You
didn't file your state of demand until 1926.

Mr. Quackenbush: This is started on the 17th
20 of December. This is within thirty days.

The Court: Yes.

Mr. Green: The jacket in the action which we
commenced didn't show any state of demand being
filed.

The Court: I am not concerned with that. I
am not concerned with an error that the clerk
may make. That is his own fault. The defend-
ant's rights cannot be destroyed by an error of
the clerk. The state of demand was merely filed
30 in conformity with the statute where a writ of
replevin had been issued by the owner of the
car against the garage keeper. You cannot de-
stroy his rights if the clerk issued a new sum-
mons, which was never served.

Mr. Green: Well, I contend that we are never
bound; and if your Honor denies the motion I
would like to have an exception to that.

The Court: To what?

Mr. Green: I say we were never in court. We
40 were never served with a process.

Pasquale Mellilo—Plaintiff—Direct.

The Court: No, I don't think so.

Mr. Green: Well, I would like to have an
exception to that.

The Court: I will grant you an exception. I
will permit the garage keeper to amend the state
of demand by striking out as a party defendant
the name of the Tiffany Oil Burner Company and
10 permit him to proceed to prove the amount of his
lien.

Mr. Green: I would like to have an exception
to the amendment your Honor is allowing to be
made.

The Court: You may have all exceptions.

PASQUALE MELLILO, sworn in his own behalf. 20

Direct examination by Mr. Quackenbush:

Q. Mr. Mellilo, during the year 1925, what was
your business? A. Garage business.

Q. Where? A. 54 and 56 First Street, Newark.

The Court: Are any of these items ad-
mitted?

Mr. Green: I don't admit anything, your
Honor. 30

The Court: You dispute them all?

Mr. Green: We dispute them all.

The Court: You appear for the Superior
Finance Company?

Mr. Green: I appear for the Superior
Finance Company, yes, sir.

Q. And did you have any account with the
Tiffany Oil Company? A. Yes, sir. 40

Pasqualle Mellilo—Plaintiff—Direct.

Q. Where were they then located? A. They were right next door to me, 58.

Q. 58 First Street? A. Yes, sir.

Q. Who kept your books? A. I kept them.

Q. And what kind of books did you keep? A. 10 Regular, sheet form.

Q. Have you your original sheets? A. Why you have them there.

Q. Is it your original sheets I show you? A. Yes, sir.

Q. And amongst these items was there a Reo truck? A. Yes, sir.

Q. Did you have that car in storage? A. Yes, sir.

Q. For how long? A. From May, 1925, to 20 December.

Q. And what was your charge? A. Twenty dollars a month.

Q. Did you do any repairs to the car? A. Yes, sir.

Q. What were they? A. Which repairs? I have to look at the bills.

Q. Could you refer to them? A. In the particular truck—

Q. By the way, did you do other work on other 30 cars as well as on this truck? A. Yes, sir.

Q. Are they included in these items with regard to the Reo? A. No, not in regard to the Reo.

Q. What else? Tell the Court what else. A. In the Reo truck of course the repairs, they show, and different items, gas and oil and repairs.

Q. Did you make the items yourself? A. Yes, sir.

Q. How much did they amount to in total? 40 A. On the Reo truck alone, storage, gas and repairs, \$194.62.

Pasqualle Mellilo—Plaintiff—Cross.

Q. And the storage account was \$160, that is, eight months, and the rest in gas? A. Yes.

Cross examination by Mr. Green:

Q. How long was that car in your possession 10 did you say, for eight months? A. Eight months.

Q. During that time did it leave your shop at any time? A. Oh, yes.

Q. Left on and off for the period of eight months? A. Yes, in and out.

Q. Was it impounded at any time for your rent? A. At the end, around November, when I seen the Tiffany Company wasn't doing any business—Mr. Tiffany said—

Q. Not what Mr. Tiffany said; when did you 20 impound the truck?

Mr. Quackenbush: I don't think there is any difference when he did impound the truck.

The Court: Did you ever refuse to let it go out of your possession?

The Witness: Oh, no; it went out of my possession.

Mr. Quackenbush: How did it get out of 30 your possession?

The Witness: A constable came up and took it.

Q. When was the last day that you allowed the Tiffany Oil to take the truck out of your garage? A. I couldn't say.

Q. But you seem to know the business end of the garage; whether a car goes in and out. A. I don't know the days it goes in and out. 40

Pasqualle Mellilo—Plaintiff—Cross.

Q. Did you hire a constable to hold a sale on your car for the garage rent? A. No, sir.

Q. You never authorized a constable to hold a sale? A. Not a sale; to put a lien on the car.

Q. Whom did you authorize?

10

Mr. Quackenbush: I object to that.
(Argument.)

Q. You say you authorized a constable by the name of Dimeo? A. Yes, sir.

Q. And he put a tag of a certain kind as a lien on that particular truck? A. Yes.

Q. When did he put the notice of your lien on the truck?

20

Mr. Quackenbush: I object to this. I don't think this is material.

The Court: I will allow it.

A. I believe it was in the month of Decemeber—the exact date I wouldn't say, I don't know.

Q. Do you know how much of a lien you claimed at that time? A. Four hundred and some dollars, yes.

30

Q. Did you at any time hold a sale on that car? A. No, sir.

Q. No sale was held? A. No, sir.

By Mr. Quackenbush:

Q. That is the Reo truck which was taken away from you by the constable under this writ of replevin (showing witness paper)? A. Yes, sir.

40

Mr. Quackenbush: I offer this in evidence.

Samuel Glass—for Defendants—Direct.

The Court: It will be accepted.

(Paper received in evidence and marked Exhibit P-1.)

Q. Has any part of that bill been paid, \$194? A. No. 10

PLAINTIFF RESTS.

SAMUEL GLASS, sworn on behalf of the defendant.

Direct examination by Mr. Green:

Q. Mr. Glass, you are connected with the Superior Finance Corporation in what capacity? 20

A. Secretary.

Q. You are familiar with the account of the Tiffany Oil Company? A. I am.

Mr. Green: At this time, your Honor; I would like to offer in evidence a certified copy of the contract that was filed in Paterson.

The Court: What are you going to prove? 30

Mr. Green: I will prove our contract was filed in Paterson and in Newark both.

The Court: And then you want to prove paramount title?

Mr. Green: Yes.

The Court: You cannot prove it in this action. You started your action on the theory that the lien claim is excessive, and you must proceed under that election. 40

Samuel Glass—for Defendants—Direct.

10 Mr. Green: These contracts, your Honor, show that a copy was filed in the County of Passaic where the purchaser, the Tiffany Company had their place of business, and subsequently was refiled in the County of Essex where the truck was removed; and I intend to show that under our statutes that our lien was a superior lien, under the 1925 amendment.

The Court: Well, I just said to you—supposing that to be the case—

Mr. Green: Well, I would like to offer this in evidence to go ahead with that part of it.

20 Mr. Quackenbush: I shall object.

The Court: Sustain the objection and grant you an exception. I say it is immaterial in this action whether or not your title is superior.

Mr. Green: Where a conditional vendor, or the assignee of a conditional vendor—

The Court: Your instrument of sale was recorded on what date in Essex County?

30 Mr. Green: It was recorded on November 5th, 1924, in the County of Passaic, and on the 18th day of December, 1925, in the County of Essex.

The Court: After this cause of action was commenced?

Mr. Green: Yes, I think it was. You don't allow this instrument in evidence.

The Court: No, not in evidence, ruling that under your writ of replevin you saw fit to claim possession of the car by virtue of the fact that the lien claim was unrea-

40

Samuel Glass—for Defendants—Direct.

sonable and excessive, and not by virtue of the fact that you are a paramount title owner.

Having elected your form of action you are now bound by that election.

(Further argument.) 10

Mr. Green: Your Honor, shall I introduce the original contract in evidence?

The Court: That is the original conditional bill of sale? That may be accepted and marked in evidence by the stenographer.

(Received and marked in evidence Exhibit D-1.)

The matter stands that you are the assignee of the conditional vendor; and the assignment also, for the purpose of the record is admitted. 20

Mr. Quackenbush: Yes.

Q. Mr. Glass, according to the record of your company was there a default on that account?

Mr. Quackenbush: I object.

The Court: Is it admitted that the Tiffany Oil Company was the conditional vendee in possession? 30

Mr. Green: Yes. I just want to show there was a default.

The Court: It is admitted that there was a default.

Mr. Quackenbush: May I have a formal objection that this is not material to this record?

The Court: I will sustain your objection 40

Samuel Glass—for Defendants—Direct.

10 to testimony as to whether or not there was a default by the conditional vendee entitling the plaintiff to possession as against the conditional vendee. I say, so long as it is admitted that the conditional vendee was in possession, then the only question before me is whether or not the garage man's lien is reasonable, and nothing beyond that; and I therefore sustain the objection.

Mr. Green: That is, I can't show that there was a default under the contract?

The Court: I say it makes no difference, it is immaterial in this particular action.

20 Q. Mr. Glass, when you purchased the contract in this matter, the Tiffany Oil Company resided in Paterson?

Mr. Quackenbush: I object to this.

The Court: I think it is immaterial if you are going to reply on the recording act.

30 Mr. Green: I want to show your Honor, that the car was first sold in Paterson, and that is where the contract was filed, and subsequently.

The Court: Irrespective of that, irrespective of whether it was filed, irrespective of the respective rights of the conditional vendor's assignee and the garage man, that question is not before me. The only question before me in this action is whether or not the conditional vendee was in possession of the car; whether or not as such conditional vendee in pos-

40

Samuel Glass—for Defendants—Direct.

session he incurred the debt; whether or not the debt is a reasonable one. When those three questions are established that disposes of all the requirements under that particular act. Anything else is immaterial. Counsel has made his election and will be bound by his election. 10

Mr. Green: Well, I want to have an exception, if your Honor please, to your Honor's ruling that I am unable to show the contract.

The Court: I say it is immaterial in this action and will grant you an exception.

Q. Mr. Glass, when did you find out that the constable was removing the truck? 20

Mr. Quackenbush: I object.

The Court: Sustained.

Mr. Green: Exception.

Q. Did you at any time send a representative from the Superior Finance to interview the garage keeper holding the car? 30

Mr. Quackenbush: I object to that.

The Court: I will allow it.

A. I did.

Q. What was the name of the representative that you sent? A. Mr. Neibart.

Q. According to your records how much is due on that account at the present time?

Mr. Quackenbush: Object to that. 40

Ben A. Neibart—for Defendants—Direct.

The Court: What account?

Mr. Green: On the account between the Tiffany Oil Company and the Superior Finance.

Mr. Quackenbush: I object to that.

10

The Court: Sustain the objection.

Mr. Green: Exception noted.

No cross examination.

BEN A. NEIBART sworn on behalf of the defendant.

Direct examination by Mr. Green:

20

Q. You were sent by the Superior Finance Corporation to interview the Mellilo garage regarding a Reo truck that was held in their possession? A. I was.

Q. About what date did you call at the garage?

A. It was in the middle part of December, about December, 1925.

Q. You asked for a bill on the car? A. I did.

30

Mr. Quackenbush: I am going to formally object to this procedure. It is admitted that there was a dispute about it.

(Argument.)

Q. Mr. Neibart, I show you a bill of \$416.68. Was that the bill that was given to you? A. Yes, sir.

Q. I also show you a garage lien warrant signed by constable Philip Dimeo. Was that on the

40

Ben A. Neibart—for Defendants—Direct.

Reo truck? A. Yes, that was posted right on the Reo truck.

Mr. Green: I would like to offer this in evidence, your Honor.

Mr. Quackenbush: I object to that.

10

(Argument.)

Q. So you found a lien of \$416.68 on that car?

A. Yes.

Q. How much do you consider a reasonable amount on that bill?

Mr. Quackenbush: I object to that.

The Court: I will sustain the objection.

20

Q. Did you make a tender of any amount whatever? A. When I went in to ask him for a bill I asked him what the amount was, and he told me that was partly on the car and partly on Mr. Tiffany's personal work and partly on another car they had, and I said, "How can you claim all of that money on this particular car?" And he said, "That is the only thing I have in possession and that is all I got here, so I am going to hold this particular car." He said it does not make any difference; that all the money he wants is \$416; and I said, "Well, you got to let us have this, and any way, I will speak to the Finance Company; and he said, "Nothing doing." And I asked him to itemize the bill for the car.

30

Q. You asked him what was the actual lien on this car, and he said he will take \$416 and no less A. That is right. I asked him to itemize the bill.

40

Pasqualle Mellilo—Plaintiff—Recalled—Direct.

10 Mr. Green: That is the defendant's case, your Honor. At this time, your Honor I would like to ask for a direction of verdict. One ground is on the ground of excessive amount asked for. The amount asked for is \$416.68. In the state of demand as filed herein, the sum of \$194.62 is asked.

(Argument.)

Mr. Quackenbush: May I put my witness on the stand to show why he made that demand?

20 PASQUALLE MELLILO, recalled.

Direct examination by Mr. Quackenbush:

Q. Do you recall this gentleman coming to your place? A. Right there in the back seat.

The Court: Indicating Mr. Neibart.

The Witness: Yes.

30 Q. And did he make demand for this car? A. Yes, sir.

Q. And did he ask you for your bill? A. Yes, sir.

Q. And did you give him the bill? A. He asked me for the bill and that is what I gave him.

Q. And you already testified that the items were original and you did not separate them? A. Yes.

Q. And did you separate them at his request?

40 A. Yes, I separated them at his request.

Pasqualle Mellilo—Plaintiff—Recalled—Cross.

Q. What was the final bill for the Reo truck?
A. \$190,

The Court: You gave him a bill for \$190.

The Witness: He never asked me that. 10

The Court: Did you tell him at any time that the amount was \$190 before the writ of replevin was served upon him?

The Witness: Yes, sir.

The Court: To whom?

The Witness: To that gentleman there (indicating).

Cross examination by Mr. Green:

Q. Did you prepare a bill of \$195 and deliver it to the gentleman who asked you for the bill for that particular car? A. No, sir; he never came back for it. 20

Q. Did you tell him how much was due on that car? A. Yes.

Q. And you are quite sure you didn't demand the sum of \$416 for the car? A. That is the bill I gave him first.

Q. That is the bill you gave him first, and you said unless that bill is paid the car wouldn't go out? A. Oh, no. 30

Q. What did you say at the time? A. He said, "Separate the bill; that is the bill in whole. Separate the bill and we will pay it." He said, "You cannot collect the whole amount." And I said, "All right, I will separate the bill for the other cars."

Q. Is this the notice that Mr. Mellilo had on that Reo truck? A. Yes, sir. 40

Pasquale Mellilo—Plaintiff—Recalled—Cross.

Mr. Green: I would like to offer that.

The Court: Any objection to that at this time?

10 Mr. Quackenbush: I will object to it being entered in evidence for the same reason—it does not make any difference.

The Court: The question is whether or not he asserted a lien for this amount. I think at this time the evidence is material.

Mr. Quackenbush: If it is going in I would like to have an exception.

The Court: Then I will permit it, and mark it owner's Exhibit 1.

20 (Received and marked owner's Exhibit 1.)

Q. Did you see Mr. Glass there with Mr. Neibart? A. Why I believe he is the gentleman who came to drive the car out when I gave him the car.

By Mr. Quackenbush:

30 Q. Why did you claim the full amount that was due you? A. Because that was the amount of the bill in full.

Q. Did you know what the law was?

Mr. Green: I object to "what the law was".

The Court: This matter is entitled Garage Lien Warrant. Was it attached to the car?

40 The Witness: Yes, sir.

SAMUEL GLASS, recalled.

Direct examination by Mr. Green:

Q. Mr. Glass, you went to the First Street Garage with Mr. Neibart to get the car? A. I did.

10 Q. And how much did Mr. Mellilo ask for the car before it was released? A. \$416, the amount of the bill.

Q. Would he take any less? A. He would not consider less.

The Court: I will make these findings the findings which I think proper. I will find that the garage man refused to re- 20
lease the car in question unless he re-
ceived a payment of \$416.68. I will find
that the party claiming title made no
tender. I will find that the Act requires,
this being a statutory procedure, that ir-
respective of the unreasonableness of the
demand by the garage keeper, the lien is
not released unless a tender be made by
the owner or he who acts for the owner, of
the amount that that owner or he who acts
for him, deems reasonable. I will further 30
find that the demand of the garage keeper—
and I will have to find this as a fact—of
\$416.68 was an unreasonable demand, but
that no tender having been made of any
amount, the lien continues. I will find
that in this particular action, as the Su-
perior Finance Corporation instituted it,
that company chose to replevy upon the
theory that the bill claimed was an unrea- 40

Judgment.

sonable bill, and not upon the contention
that their title was paramount. I will
enter judgment for the garage man against
the owner of the car in the sum of \$194.62
—by “owner”, at this time, I mean the com-
pany claiming the right to possession—
such judgment attaching to the bond filed,
in the sum of \$194.62.

Mr. Green: Exception.

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20

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Certificate.

SECOND DISTRICT COURT OF THE
CITY OF NEWARK, NEW JERSEY.

PASQUALE MELLILLO, trading as First Street
Service Garage, 10

Plaintiff,

vs.

TIFFANY OIL BURNER Co., a corporation, and
SUPERIOR FINANCE CORPORATION,
Defendants.

I, LOUIS R. FREUND, Judge of the Second Dis- 20
trict Court of the City of Newark, New Jersey,
do hereby certify that the defendant Superior
Finance Corporation in the aforesaid action ap-
plied to me for the appointment of a stenographer
to transcribe the proceedings at the trial of the
aforesaid cause and take down the testimony
therein.

I certify that Louis Winarsky was designated
as stenographer to act as aforesaid in the said
case, and was duly sworn. I do further certify 30
that this transcript of the said proceedings and
said testimony made by the said stenographer
is a correct state of the case upon appeal.

Dated: October 8th, 1926.

LOUIS R. FREUND,
Judge.

40

Exhibit P-1.

Phone Newark, N. J.,1925

TIFFANY OIL BURNING Co. 58-60 First St. City

10

To FIRST STREET SERVICE GARAGE, DR. Paige and Jewett Specialists Automobile Repairing on All Makes of Cars Starters & Generators Rebuilt Work Guaranteed 54-56 First Street

Table with columns for date, description, and amount. Includes entries for May 25 to Sept 29, totaling \$194.62.

40

Exhibit D-1.

(Original)

NEW JERSEY

CONDITIONAL SALE AGREEMENT

10

THIS AGREEMENT, made this Thirtieth day of October, 1924, between John A. McCrane Motor Co. of Paterson, N. J., first party, his or its successors, or assigns (hereinafter called "Seller,") and The Tiffany Co. at 109 Washington St., in Paterson, N. J., second party (hereinafter called "Buyer").

WITNESSETH:—THAT the Seller in consideration of the payments, agreements and conditions contained herein which on the part of the Buyer are to be made, done and performed, has this day delivered and agreed to sell and the Buyer has this day agreed to buy from the seller, but upon the conditions hereinafter recited, to the Buyer the following Passenger or Commercial Car, or Tractor (hereinafter called the "Car").

Make, Reo; Type of Body, Special; Model Letter or Number, W; Manufacturer's Serial No. 486; Motor No. 62483; No. Cylinders, 6; Year Model, 1924; List Price F. O. B. Factory, \$2350.00; Selling Price, \$2543.00.

With extra equipment, and S. F. Corp. charges: for the sum of Twenty eight fifteen 00/100 Dollars (\$2815.00).

The Buyer has this day paid to the Seller Nine hundred thirty eight 00/100 Dollars (\$938.00); and the Buyer agrees to pay to the Seller, or order Eighteen hundred seventy seven 00/100 Dollars (\$1877.00) balance, in instalments as follows:

40

Exhibit D-1.

\$156.41 One month after date. \$156.41 Two months after date. \$156.41 Three months after date. \$156.41 Four months after date. \$156.41 Five months after date. \$156.41 Six months after date. \$156.41 Seven months after date. \$156.41 Eight months after date. \$156.41 Nine months after date. \$156.41 Ten months after date. \$156.41 Eleven months after date. \$156.49 Twelve months after date.—which instalments shall bear interest after maturity until paid at the highest legal contract rate and are to be evidenced by a promissory note (not as payment, but as evidence of the amounts to become due hereunder) made by the Buyer to the order of the Seller, bearing date hereof, and maturing on the due dates of said respective instalments. Any extensions or assignments of this Agreement or said note shall not waive any conditions herein contained.

Title to the Car and extra equipment shall not pass by delivery to the Buyer but shall remain vested in and be the property of the Seller or Assigns until the purchase price has been fully paid. Buyer agrees to operate and control said Car in conformity with all Laws and Ordinances and to indemnify and save harmless the Seller from any and all loss, or damage to persons or property caused by said Car or by the use and operation thereof to which the Seller might possibly be subjected.

Buyer agrees and acknowledges that the within contract covers all conditions and agreements between the parties, that the loss, injury or destruction of said Car shall not release said Buyer from payment as provided herein. Buyer hereby acknowledges receipt of and accepts the Car, hav-

Exhibit D-1.

ing first examined and tested the same and found same in sound and first class condition, and agrees to keep the Car insured against loss by fire and theft with insurance companies acceptable to the Seller for not less than the amount owing, and until fully paid, payable to and to protect the interest of the Seller and the Seller may place, continue and renew said insurance for the Buyer at the Buyer's expense if the Seller so elects.

Buyer agrees to pay all taxes, license fees or charges against said Car and to keep same in good condition, and that any equipment, repairs or accessories placed upon said Car shall be at Buyer's expense and become a component part thereof and included in the terms of this Agreement. Buyer further agrees not to use or permit said Car to be used for passenger hire.

Buyer further agrees that he will not use or cause or permit to be used the car, truck or tractor herein mentioned for the transportation of liquor, wines or any other beverage, for personal or commercial use, prohibited by any Federal or State statute to be transported, and it is hereby agreed that should the car, truck or tractor hereinbefore described be used for such purpose or any other unlawful purpose, it shall be considered as a default under the agreement, whether or not there shall be a default under any other terms or conditions thereof, which shall entitle the holder hereof to immediate and continued possession of the car, truck or tractor herein described.

Buyer agrees that in the event of any law or ordinance requiring the recordation of this Agreement, that it shall be recorded at the expense of

Exhibit D-1.

the Buyer and in his name, and at any time, by the Seller, or the holder of this Agreement.

Should the Buyer fail to keep and perform any or all his agreements herein contained, and to promptly pay at maturity any and all sums hereunder, or if said Car is removed or attempted to be removed from the State in which the Buyer now resides, or to be otherwise disposed of, or if Buyer shall lend, sell or encumber, or shall attempt to sell or encumber said Car or in case of misuse or abuse thereof, or whenever the Seller or his assign shall deem the debt insecure, said Seller may without any demand or notice take possession of said Car and equipments, wherever found and without process of law, and all rights of the Buyer hereunder shall cease and terminate thereupon absolutely. Buyer does hereby expressly waive any right of action against the Seller growing out of the removal, repossession or retention of said Car or otherwise, and hereby consents that upon any default (or in the event that the Buyer for any reason gives up or loses possession of the Car), all unpaid balance of said purchase price and note representing the same shall forthwith become due and payable. Buyer agrees that all payments made shall belong to and be retained by Seller as liquidated damages for the nonfulfillment of this Agreement, for loss in value of the Car, and for the rental value thereof.

Seller may, by suit or otherwise, enforce payment of said note, and no legal proceedings with respect thereto shall be deemed any waiver of said right of Seller to take possession on default or breach as aforesaid. Upon the Seller so taking possession of the Car, Seller may sell the Car

Exhibit D-1.

at public or private sale at any time thereafter without any notice to the Buyer, and said Seller may become the purchaser thereof, and if the proceeds thereof are insufficient to pay all sums remaining unpaid hereunder and the expense caused by such repossession, removal, reparation, storage, leins and sale, including a reasonable attorney's fee, incurred in taking possession of said Car, or in or about the sale thereof, or in collecting in any manner any sums which may be due and owing hereunder, Buyer agrees to pay any deficiency as damages for use of said property. The waiver or indulgence of any default shall not operate as a waiver of subsequent defaults.

Buyer agrees that said Seller, in case said Buyer fails to comply with any of the agreements aforesaid on Buyer's part to be performed, may cause judgment to be entered against said Buyer upon this agreement for the whole amount unpaid, or upon the said note, interest and costs, whether or not the same shall have become due and payable by reason of maturity or under the conditions of this agreement, and said Buyer hereby waives stay of execution, exemption laws, right of inquisition on real estate, errors and appeals, and further authorizes the prothonotary to take a commission of 5 per cent. as attorney's commission in case execution shall be issued thereon, and for that purpose the Buyer hereby appoints the prothonotary or any attorney of any Court of Record as his lawful attorney to appear for and confess judgment against said Buyer. Time is of the essence of this agreement.

This agreement shall apply to and bind the heirs, executors, administrators and assigns of

Exhibit D-1.

the Buyer, and shall inure to the benefit of the Seller, Seller's heirs, executors, administrators, successors and assigns, and contains the entire agreement between the parties hereto, their agents or employees, either verbal or written.

10

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals to this Agreement, in triplicate, the day and year first above written.

THE TIFFANY CO. (Seal)
By H. A. TIFFANY, Pres. (Seal)

Witness J. MCKENNA

20

JOHN A. McCRANE MOTORS CO. (Seal)
Paterson, N. J. Passaic, N. J.
By JAMES CRONE (Seal)

Witness LENA DEYOUNG

DEALER MUST SIGN ASSIGNMENTS ON REVERSE SIDE

30

FOR VALUE RECEIVED, the Agreement (on the reverse side) and the note herein mentioned Between The Tiffany Co. and the undersigned, and the property therein described and all the right, title, and interest therein of the undersigned are hereby sold, assigned and transferred to

SUPERIOR FINANCE CORPORATION
Paterson, N. J.

40

its successors or assigns. The undersigned jointly and severally hereby guarantees full performance

Exhibit D-1.

of said Agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses, costs and attorney's fees, and agrees to pay the attorney's fees and costs of enforcing this agreement. The undersigned jointly and severally hereby agrees that in the event of the non-compliance with any of the conditions of this Agreement, whether or not repossession has been made or undertaken, suit may be brought by the holder against any one or more or all of the parties hereto, whether or not suit has been commenced against the party or parties to the agreement and without waiving any rights to later repossess. The undersigned jointly and severally hereby waives any and all notice of non-payment, demand, presentment or protest, which may be required under said Agreement, or note mentioned in same, or in connection therewith, and agrees that any extensions which may be granted by the holder hereof to the parties to said Agreement shall not in any manner release the undersigned.

10

20

JOHN A. McCRANE MOTORS CO. (Seal)
Paterson, N. J. Passaic, N. J.

By JAMES CRONE (Seal)

30

40

Exhibit O-1.**GARAGE LIEN WARRANT**

10 State of New Jersey,
County of Essex—ss.:

PHILIP DIMEO, Constable, or Authorized Agent.

You are hereby empowered to enforce lien which we have against Tiffany Oil Burning Co., who is indebted to the undersigned, in the sum of \$416.68, which sum is due for storing, maintaining, keeping or repairing said motor vehicle or for furnishing gasoline, accessories or other supplies therefor.

20 YOU ARE FURTHER ANTHORIZED, to take said property forthwith into your possession, and detain the same in some safe place, until the said sum due and expenses are paid, and, if not paid, to hold said property until after the expiration of thirty days from the Date of such detention and then to sell the said property at Public auction upon notice of such sale being advertised according to law; and to apply the proceeds of
30 said sale to the payment of said lien and the expenses of the seizing, impounding and selling said motor vehicle according to the provision of an act of the legislature of the State of New Jersey, entitled "AN ACT FOR THE BETTER PROTECTION OF GARAGE KEEPERS AND AUTOMOBILE REPAIRMEN", (P. L. 1915 p|556 app. April 14, 1915.)

40 We agree to indemnify you against loss from all claims or claim demand or demands, damages and cost whatsoever, by reason of the seizure of said

Exhibit O-1.

property by you; to defend in your name and on your behalf, any legal proceedings brought against you to enforce same, unless we elect to effect settlement thereof; and to pay the expenses incurred in defending said proceeding, including the interest on any verdict and any cost taxed
10 against you.

We further agree to pay you \$15.00 for your services, exclusive of expenses paid by the aforesaid party.

Dated, at Newark, N. J., Nov. 27, 1925.

Lic. No. X23798—1925.

FIRST STREET SERVICE GARAGE
54-6 First Street, Newark, N. J.

20 PATSY MELLILO
Garage Keeper and Automobile Repairman.

PHILIP DIMEO, Constable.

30

40

Clerk's Transcript, Filed October 21, 1926.

In Replevin.

73997

10 SUPERIOR FINANCE CORPORATION, Plaintiff,

—and—

PASQUALLE MELILLO, trading as First Street Service Garage, Defendant.

20 Plaintiff's Costs
Summons: 3.00
Mileage:
Listing fee: 1.50
Attys fee:
Witness fee:
Total Cost:
Execution:
Statement:

30 HARRY GREEN
Plaintiff's Atty.

ERNEST L. QUACKENBUSH
Defendant's Atty.

A writ of replevin in the above stated cause was issued on the seventeenth day of December, 1925, returnable on the day of 1926, wherein the plaintiff demands of the defendant the sum of dollars.

40 The defendant filed a statement of demand on January 15, 1926.

Clerk's Transcript, Filed October 21, 1926.

The summons was served and returned as follows:

I did on the 17th day of December, 1925, replevy and deliver to Superior Fin. Corp. the motor vehicle in the said Writ mentioned, and summoned the said Pasqualle Mellilo as within, I am commanded, by reading the same on the 17th day of December, 1925, and delivering to Pasqualle Mellillo a copy thereof. 10

BEN A. NEIBART,
Constable.

Sept. 27, 1926. The plaintiff and defendant appeared and the cause was determined at this time. 20

The following witness was sworn in on behalf of the plaintiff. Benjamin A. Neibart.

The following witness was sworn for the defendant Samuel Gloss.

The evidence being closed the Court rendered judgment in favor of the defendant and against the plaintiff of damages with costs, whereupon judgment is entered in favor of the defendant and against the plaintiff. 30

Oct. 8, 1926. Notice of Appeal and Bond filed.

proceedings

This is a true copy of the order now on file in the Second District Court of the City of Newark.

JAMES E. GARRIGAN,
Clerk.

(Seal) 40

Clerk's Transcript, Filed October 21, 1926.

In Tort

71469

10

PASQUALLE MELLILO, trading as First Street Service Garage,

Plaintiff,

—and—

TIFFANY OIL BURNER COMPANY, a corporation, and SUPERIOR FINANCE CORPORATION, a corporation,

Defendant.

Quashed. see 73997.

20

58-60 First St.

Plaintiff's Costs

Summons 2.50

Mileage

Listing fee 1.50

Attorney's

Witness fee

Order

30

Total cost

Execution

Statement

ERNEST L. QUACKENBUSH

Plaintiff's Atty.

.....
Defendant's Atty.

A summons in the above state cause was issued on the day of 192 , return-

40

Clerk's Transcript, Filed October 21st, 1926.

able on the day of 192 , wherein the plaintiff demands of the defendant the sum of Five Hundred Dollars.

The plaintiff filed a state of demand January 25th, 1926. The summons was served and returned as follows:

10

73997 A writ of replevin issued in this cause 12/17/25.

proceedings

This is a true copy of the order now on file in the Second District Court of the City of Newark.

JAMES E. GARRIGAN,

Clerk.

20

(Seal)

30

40

Opinion, Filed May 21, 1927.

NEW JERSEY SUPREME COURT,

No. 404—JANUARY TERM, 1927.

PASQUALE MELLILO, trading as First Street Service 10
Garage,
Plaintiff-Respondent,
vs.

TIFFANY OIL BURNER COMPANY, a corporation;
and SUPERIOR FINANCE CORPORATION, a cor-
poration (appellant),
Defendant-Appellant.

20

Submitted January 28, 1927.

Decided, May, 1927.

On appeal from Second District Court of New-
ark.

Before Justices KALISCH, KATZENBACH and
LLOYD.

For the appellant: GREEN & GREEN; HARRY
GREEN, of counsel. 30

For the respondent: ERNEST L. QUACKENBUSH.

Per Curiam:

Pasquale Mellilo, a garage keeper, obtained a
judgment in the Second District Court of Newark,
against the Superior Finance Company for the
sum of \$194.62, due him for repairs done to a truck
claimed to be owned by the Finance Company
under a conditional sales agreement. From this 40
judgment the Finance Company appeals.

Opinion, Filed May 21, 1927.

10 The pertinent facts are that the truck being in the possession of Mellilo, was held by him for repairs made to it. The Finance Company demanded a statement of the charges and was given an amount much in excess of the sum appellant conceded to be due. It, therefore, on December 17, 1925, procured a writ of replevin to issue in the District Court in accordance with the Garage Keepers' Lien Act of 1915 (Chap. 270) as amended in 1922 (Chap. 231), entered a bond as required by the act and obtained possession of the truck. Mellilo on January 15, 1926, filed a statement of demand for the repair bill designating the Finance Company as the defendant. Appellant's counsel then filed what it terms a special appearance for the defendant assigning reasons therefor that it was not served with process and had never entered an appearance. Matters remained in this condition until October 11th following when the case was called for trial. At that time a long discussion arose between the Court and counsel for the Finance Company appearing generally as stated to the Court, "for the whole thing". The case then proceeded to trial, in which both sides called witnesses on the merits of Mellilo's claim, and judgment was finally entered as above stated.

20 30 The appellant contends first that it was not legally in court because not served with summons. The statute is somewhat vague as to the method of procedure on the claim. It directs that the lien claimant shall file his state of demand or complaint within thirty days after the issuance of the writ of replevin and that the filing of a bond or depositing of cash by the plaintiff in replevin shall be considered as the entry of a written appearance by the owner in the action which the lien claimant may bring within thirty days. The

40

Opinion, Filed May 21, 1927.

record shows that Mellilo did issue a summons in an action for his claim. but it was never served. The statement of claim was filed within thirty days (whether in the replevin or contract action does not clearly appear) and the case later proceeded to trial on its merits, both parties, as stated, calling witnesses as to the justness of the claim. 10

In this situation we think it unnecessary to pass upon the irregularity in the proceedings. The trial Court undoubtedly had jurisdiction of the subject matter, and by the appellant's appearance generally and participation in the trial acquired jurisdiction of it as a corporation. Appellant will not now be heard to object to the jurisdiction to which it voluntarily submitted. State v. Rosenblum, 130 Atl. 614; State v. Baker, 133 Atl. 785. 20

The second point argued is that the Finance Company was not permitted to show that it was the holder of a lien superior to the rights of the garageman's claim by virtue of a conditional sale contract; the Court holding that the right to so claim was waived when the replevin was issued and based on the contention that the claim was unreasonable.

The offer was to show that the Finance Company was the assignee of the conditional sale agreement between the John A. McCrane Motor Company and the Tiffany Oil Company by assignment from the McCrane Motor Company. By the agreement, the balance of the purchase price of the truck was to be paid in installments, and proof was tendered that default had occurred in the payment of such installments, whereby the right of possession and property accrued to the plaintiff in the action of replevin. Rights reserved under conditional sales or held by virtue of chattel mort-

30 40

Opinion, Filed May 21, 1927.

gages are declared by section 1 of the amendment of 1925 (Chap. 96) to be superior to the garage-man's lien when such conditional sales or chattel mortgages are properly recorded.

10 It is contended by the respondent that the sale agreement was not properly recorded, and further that the replevin prescribed by the act in the present case does not contemplate its use as an instrument for testing such alleged superior rights, and that for this latter purpose the ordinary writ of replevin is alone available.

20 Offer was made by the plaintiff to show that the sales agreement was recorded and this offer was overruled. To this ruling of the judge an exception was taken, but it is not assigned for error here nor made a ground of appeal. The contract itself was offered in evidence, but fails to show that the instrument was ever recorded. This being true, it is unnecessary to consider the view held by the Court that the priority as between the claim of the garage man and the conditional sale of the vendor could not be litigated in this action.

30 The last point urged is that in claiming a larger sum than due the claimant was guilty of fraud and thereby lost his lien. This, if raised, would present a question of fact, the determination of which this Court cannot review.

The judgment is affirmed.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

PASQUALE MELILLO, trading as
First Street Service Garage,
Plaintiff-Respondent,

vs.

TIFFANY OIL BURNER COMPANY,
a corporation; and SUPERIOR
FINANCE CORPORATION, a cor-
poration,
Defendant-Appellant.

*On Appeal
from Second
District
Court of City
of Newark.*

BRIEF IN BEHALF OF PASQUALE MELILLO, RESPONDENT.

I.

The procedure followed in this case was proper.

Whatever confusion has arisen in the procedure followed in the District Court in this case has been aggravated rather than cleared by appellant's attempted explanation, and the apparent effort to raise on appeal certain questions which were not presented to the District Court.

A writ of replevin, as authorized under Section 2 of the Garage Keepers' Lien Act (1 Supp. Comp. Stat. page 1978) issued out of the Second District Court of Newark on December 17, 1925, at the instance of appellant Superior Finance Corporation, based on the allegation that this corporation was the *owner of* and entitled to the *immediate possession* of a certain Reo truck, the subject matter of the action (Case, pp. 4 and 5). Pursuant to the requirement of the writ and the law, respondent commenced action and filed his state of demand with the Clerk of that

Court on January 15, 1926. The state of demand (Case, pp. 8 and 9) filed on that date did designate Melillo as plaintiff and joined both Tiffany Oil Company, the owner of the truck and the present appellant as defendants with an explanation why both parties were so joined (Case, pp. 8 and 9). Summonses were issued by the clerk, but never served. The clerk apparently listed the two as separate cases (Case, pp. 44-47), but subsequently merged the two in his records. According to the printed record the next step taken was the service of notice by respondent on appellant of application to fix a date for trial of the cause. This was dated June 9th and filed June 16, 1926 (Case, p. 9, l. 30 to p. 10, l. 20). Pursuant thereto the case was finally tried on September 27th, and resulted in a judgment for respondent for the full amount of his claim as set forth in the state of demand. The only intimations which the statute gives as to the procedure to be followed by the garage keeper are that (1) he "shall within thirty days thereafter, *file his state of demand or complaint* with the said clerk, showing the amount claimed by him"; (2) "if *no action is brought* or judgment should go for defendant (meaning the party suing out the writ) the Court may order return of the money or discharge of bond" deposited upon the issuance of the writ and (3) "the filing of the bond * * * shall be considered as the entry of a written appearance * * * *in the action which the garage owner or keeper may bring.*" These three provisions, it is respectfully submitted, justify the theory that the garage keeper becomes the plaintiff in the action and the claimant a defendant. The District Court, however, regarded this practice as irregular (Case, p. 12, ll. 20-33) but permitted an amendment and thereafter heard the case.

Much stress is laid in appellant's brief on the allegation that the state of demand was not filed in thirty days. The record shows otherwise (Case, p. 16, ll. 14-21; p. 44, ll. 39-40). If the docket failed to disclose the actual situation it was due to a mistake on the part of the clerk. For that the garage keeper cannot be held responsible. The Court's reasoning on this point is convincing (Case, p. 16, ll. 25-35).

Furthermore no effort was made by appellant to substantiate his contention that the state of demand was not filed within the statutory period, nor was any exception in the record based on that contention. The only argument advanced in response to the Court's statement (Case, p. 16, l. 17) that this paper was filed on January 15th (within thirty days of December 17th), was that it was not in the jacket (Case, p. 16, l. 22).

It is unfortunate that appellant has in both the record and brief made insinuations about the clerk's changing the record. Proper practice, and fair play alike, would seem to require the production of proof of such a condition before the trial court where the clerk could be produced to deny or explain.

Two other technical points are raised by appellant. First, that it was never in court, because never served with process (Case, p. 16, ll. 39-40). The statute itself covers this. The original filing of the bond was the entry of a written appearance. Second, that respondent unduly delayed prosecution of the cause. Again the statute furnished a remedy. "The Court shall thereupon *at the request of either party* fix a date for the trial."

This, we contend, disposes of Point I of appellant's brief, unless there be an obligation to

object to appellant's theory as to respondent's course of action and procedure as stated in paragraph 2, page 10 of its brief, where the record itself offers no basis whatsoever for such assumptions.

II.

The District Court properly barred appellant from its effort to establish a superior lien in this case.

1. Because appellant instituted the proceedings on the theory that it was the *owner* of the car (Case, p. 5, ll. 13-14) that the amount claimed by respondent was excessive and that nothing was due him (Case, p. 5, ll. 20-21). That in itself was inconsistent with the assertion of a superior lien.

2. The 1925 amendment to the Garage Keepers' Act (P. L. 1925, p. 96) preferred only the lien held by virtue of a prior conditional sale or of a prior chattel mortgage *properly recorded*.

Appellant cannot claim such a position. Respondent's bill covered items as far back as May, 1925 (Case, p. 8). The conditional bill of sale not only had not been filed in Essex County at that time, but was not so filed until December 18, 1925 (Case, p. 22, ll. 30-31) one day after these proceedings were instituted. There was no offer to show that this filing was in accordance with the statutory requirement.

3. The 1925 amendment operated in effect to relieve superior lienors from operation of the Garage Keepers' Lien Act. This being so, its remedy was by way of the ordinary writ of replevin. This was done in *Fox v. Cardone*, 5 Miss. 395. Under no process of reasoning could the writ here sued out be so regarded.

4. The procedure here outlined is inconsistent with any such theory. If this was intended to supplant replevin proceedings entirely as respects motor cars, the statute could and would have so provided and would not have provided a procedure adapted only to the determination of the amount due the garage keeper.

5. The demand made on the garage keeper was on the theory that he was entitled to the payment of his bill against this particular truck (Case, p. 26, ll. 28-38; p. 29, ll. 21-40; p. 31, ll. 8-14). There is no evidence of a demand for its surrender because of appellant's alleged superior lien.

III.

The garage keeper's demand was not fraudulent and hence did not operate to waive tender, or lose his lien.

No tender was made. It is true that the Court found as a matter of fact that respondent's demand of \$416.68 was unreasonable, but there is no finding that it was fraudulent. Nor is there anything in the record to indicate fraudulent purpose. While all the witnesses agree that the amount claimed in the first instance was \$416.68, it is undisputed that the garage keeper separated the items at the constable's request (Case, p. 27, ll. 39-40; p. 28, ll. 39-40; p. 29, ll. 33-38); but that the gentleman never came back for it (the revised bill) (Case, p. 29, ll. 22-23). That respondent was acting honestly is indicated by the further facts that he frankly advised the constable that the bill represented work done partly on the car, and partly on Mr. Tiffany's personal work and partly on another car they had (Case, p. 27, ll. 23-27) and that in independent

proceedings which the garage keeper had instituted under this same act, he had made claim for the same amount (Owners Exhibit O. 1, Case, pp. 42-43) apparently acting under the impression that the truck could be held as a lien for the entire indebtedness due him from its owner.

His contention that the sum of \$416.88 was owing to him from the owner of the truck remains undisputed; this fact alone removes any taint of fraud to his claim even though he could not recover that amount by way of lien against this particular car because some of the bill was on other work.

The words "unreasonable" and "fraudulent" are not synonymous. The former Webster defines as "irrational, immoderate, exorbitant," while the latter as "deceitful, using fraud" and fraud is called "deceitfulness; trickery."

Sabsevitz v. Greenville Auto Sales Co., 127 Atl. 604 and *Kiss v. Ambrose*, 97 N. J. L. 442, 117 Atl. 397 (aff. 98 N. J. L. 566, 119 Atl. 925) are controlling on this point and also on the necessity of tender or payment. In the former case the Court held "if the creditor fraudulently claimed more than was due, he lost his lien, but not if his claim was made in good faith," but if he made an excessive claim, the debtor may discharge the lien by the tender or payment of the sum actually due.

Kiss v. Ambrose holds that

"An excessive demand by a lienor for repairs made to an automobile, if made in good faith and in the belief he is entitled to the sum demanded, does not excuse the debtor from making a tender of the sum actually due for repairs."

The Supreme Court properly found against appellant on all the grounds urged. It should therefore be affirmed.

Respectfully submitted,

ERNEST L. QUACKENBUSH,
Attorney for and of Counsel
with Plaintiff-Respondent.

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45 OCT. T. 1927

New Jersey Court of Errors and Appeals.

PASQUALE MELLILO, trading as
First Street Service Garage,
Plaintiff-Respondent,
—against—

TIFFANY OIL BURNER COM-
PANY, a corporation, and
SUPERIOR FINANCE CORPORA-
TION, a corporation (appel-
lant),
Defendant-Appellant.

Action at
Law.

On Appeal from
Supreme Court.

**BRIEF OF SUPERIOR FINANCE CORPO-
RATION, DEFENDANT-APPELLANT.**

Statement.

This is an appeal by the defendant, Superior Finance Corporation, from a judgment of the Supreme Court affirming judgment of Second District Court of the City of Newark, rendered as the result of a replevin action commenced by said Superior Finance Corporation against Mellilo under and by virtue of the Garage Keepers' Lien Act, as amended, P. L. 1922, page 401, and P. L. 1925, page 96, in favor of the plaintiff and against this defendant, by the Court, sitting without a jury. Process was not served upon the defendant, Tiffany Oil Burner Co.

Facts.

The state of case will disclose an unusual situation which may be briefly stated as follows:

Defendant, Superior Finance Corporation, ap-

pellant here, was the holder of a conditional sales agreement covering a Reo automobile truck, the agreement being dated October 30th, 1924, and made between John A. McCrane Motor Co., as seller, and The Tiffany Co., as buyer, which agreement was assigned to said defendant, Superior Finance Corporation, by the said seller (Case, Exhibit D-1, pp. 35-41).

About the middle of December, 1925, appellant sent one Neibart to the garage of plaintiff, regarding said truck then in plaintiff's possession. Pursuant to a request made by Neibart for a bill on the truck, he was given a bill for \$416.68. He also found a garage lien warrant for a like amount, to wit, \$416.68, posted on the truck (pp. 26-27, Exhibit O-1, p. 42). Neibart asked the plaintiff what the amount was, the plaintiff garage keeper told him that it was partly on the Reo truck and partly on Mr. Tiffany's personal work and partly on another car they had, and Neibart said "how can you claim all of that money on this particular car?" and plaintiff replied, "that is the only thing I have in possession and that is all I got here, so I am going to hold this particular car". Neibart further testified that plaintiff also said that it did not make any difference; that all the money he wants is \$416, and that he would take \$416 and no less (Case, p. 27). Under these circumstances, appellant, by said Neibart, did not make a tender.

In this posture of affairs, appellant filed an affidavit with the Clerk of the District Court on December 17th, 1925 (Case, p. 5), and also deposited a bond for \$833.36 and \$20 costs, being twice the amount of said alleged lien and costs, with the Clerk of said Court, in accordance with P. L. 1922, page 401, and the Clerk of the District Court issued a writ of replevin, by virtue of said act, dated December 17th, 1925 (Case, p. 4), and

constable replevied the said Reo truck and delivered the same, without delay, to the appellant (Case, p. 45).

It then seems that the plaintiff issued a summons out of District Court, tested (*sic*) "The *fifteenth 20th* day of January" 1926, returnable (*sic*) "the *twenty-second seventh* day of January, Nineteen Hundred and Twenty" (Case, p. 6), the back of summons being "Returnable January 27, 1926" (Case, p. 7), against Tiffany Oil Burner Co., a corporation, and Superior Finance Corp., a corporation.

On January 25th, 1926, plaintiff filed state of demand, which filing date the Clerk of the Court changed to January 15th, 1926 (Case, pp. 8-9; Clerk's Transcript, p. 47, ll. 8-10), against the defendant, Tiffany Oil Burner Company, a corporation, and the defendant, Superior Finance Corporation.

The summons was never served (Case, p. 13).

The plaintiff then waited a period of almost six months, and, on June 9th, 1926, served a notice of application to fix date for hearing in above entitled appeal upon appellant's attorney returnable June 18th, 1926, at which time the Court fixed September 27th, 1926, as the date for said hearing.

On September 27th, 1926, plaintiff filed a special appearance on the grounds that it was never served with process and that it had never entered an appearance (Case, p. 10).

Defendant objected that it was never in court because it was not served with process, but the District Court not only held otherwise but permitted the garage keeper to amend the state of demand by striking out as a party defendant the name of the Tiffany Oil Burner Company, to which objections were made and exceptions taken (Case, pp. 16, 17).

The District Court then bunched both actions into one and permitted the plaintiff garage keeper in the above entitled appeal to prove a bill for \$194.62 (Case, pp. 17-21; p. 34, Exhibit P-1).

Appellant then offered certified copies of the conditional sales contract in evidence for the purpose of proving that copies of said contract were filed in Paterson and also in Newark, in order to assert its paramount title and superior lien, title and interest, and the District Court refused to permit the appellant to do so (Case, pp. 21-23), ruling that under writ of replevin appellant "saw fit to claim possession of the car by virtue of the fact that the lien claim was unreasonable and excessive, and not by virtue of the fact that you (appellant) are a paramount title owner. Having elected your (appellant's) form of action, you are now bound by that election." Exception was taken (Case, p. 22).

The District Court also excluded all evidence by appellant to show the filings of the contract in Passaic and Essex Counties and the amount due (Case, pp. 23-26).

At the conclusion of the case, the District Court made the following findings of fact:

The garage keeper refused to release the car in question unless he received a payment of \$416.68.

The demand of the garage keeper of \$416.68 was an unreasonable demand, but that no tender having been made of any amount, the lien continued.

By instituting the replevin proceedings under the Garage Keepers' Lien Act, appellant elected to raise an issue only as to the unreasonableness of the bill and could not contend that its title was paramount (Case, pp. 31-32).

The District Court thereupon entered a judgment in favor of the plaintiff garage keeper and

against the appellant for \$194.62, stating that such judgment attaches to the bond filed, to which appellant took an exception.

On appeal, Supreme Court affirmed judgment in a *per curiam*.

Specifications.

On said appeal, appellant filed specifications that he is dissatisfied in point of law with the following determinations of the District Court:

1. District Court erred in proceeding with suit when Superior Finance Corporation was not served and not brought into court by process.

2. District Court erred in refusing to receive in evidence certified copies of conditional sales contract (Case, pp. 21, 22, 24).

3. District Court erred in ruling

"that under your writ of replevin you saw fit to claim possession of the car by virtue of the fact that the lien claim was unreasonable and excessive, and not by virtue of the fact that you are a paramount title owner. Having elected your form of action, you are now bound by that election" (Case, pp. 22, 23).

4. District Court erred in overruling following questions:

"To the witness, Samuel Glass:

Q. Mr. Glass, when you purchased the contract in this matter, the Tiffany Oil Company resided in Paterson?" (Case, p. 24.)

"Q. Mr. Glass, when did you find out that the Constable was removing the truck?" (Case, p. 25.)

"Q. According to your records, how much is due on that account at the present time?"

To Mr. Neibart:

Q. How much do you consider a reasonable amount on that bill?" (Case, p. 27.)

5. District Court erred in ruling

"that irrespective of the unreasonableness of the demand by the garage keeper the lien is not released unless a tender be made by the owner or he who acts for the owner, of the amount that that owner or he who acts for him deems reasonable" (Case, p. 31).

6. District Court erred in entering judgment for garage keeper instead of Superior Finance Corporation.

At outset, may we say that the importance of this case—to obtain a construction of the 1922 and 1925 amendments of the Garage Keepers' Lien Act (P. L. 1922, p. 401; P. L. 1925, p. 96), which so greatly affect the automobile owners of this State and conditional vendors and chattel mortgagees (automobile finance companies)—transcends the question of the amount involved, which is reason for carrying appeal to this Court, and which construction will be helpful to the trial courts and bar of this State, so that said amendments and their *modus operandi* may be understood.

The determinations aforesaid may be treated under three points:

1. No. 1 pertains to the right of the District Court to proceed when no process was served and defendant had not entered an appearance to the action which the garage keeper commenced.

2. Nos. 2, 3 and 4 deal with the refusal of the Court to permit proof of the superior lien, title and interest of appellant, the District Court claiming that appellant cannot do so in a replevin proceeding commenced under the 1922 amendment of the Garage Keepers' Lien Act.

3. The question to Mr. Neibart (Case, p. 3, ll. 20-22), and determinations Nos. 5 and 6 present the proposition of the tender and waiver thereof.

POINT I.

To consider deposit of bond by appellant as entry of appearance, garage keeper has to commence action on alleged lien claim within 30 days and not later.

It seems to us that the District Court misunderstood and misconceived the Garage Keepers' Lien Act so far as it permitted an "owner or the person entitled to the immediate possession" (Section 2, as amended P. L. 1922, p. 401), to obtain possession of a motor vehicle by depositing the amount claimed by the garage keeper or a bond, and suing out a writ of replevin commanding officer to take possession of the motor vehicle and deliver it "without delay to the owner or his legal representative claiming the same". And also Section 2 of the Act, as amended by P. L. 1922, page 401, which provides that

"the filing of bond * * * by the owner or his lawful representative shall be considered as the entry of a written appearance on his part in the action which the garage owner or keeper may bring within thirty days and not later * * *."

Let us see what the garage keeper in this case did.

He was served with the writ of replevin on December 17th, 1925 (Case, p. 45, top), the same day on which the writ issued (Case, p. 4). This and deposit of bond operated to discharge the alleged garage-keeper's lien from the truck, and upon the delivery of the motor vehicle to the appellant, the replevin action so commenced was concluded and closed in much the same way as lands and buildings are freed and discharged from mechanic's lien claims by the filing of a surety bond with the County Clerk. The filing of said bond is then considered as an appearance by the principal and surety thereon in any action commenced or to be commenced upon said lien claim, in which event said principal and surety become party defendants to any such action, and the lien is discharged by the County Clerk. Then if such action is commenced, judgment is only entered against the surety on said bond in the event that it is finally determined in such action that the judgment would have been entered against said lands and buildings, if they had not been discharged (see P. L. 1917, Chap. 68, p. 120, I Cum. Sup. 1853, 126-6a, 6b and 6c).

Said provision of the Garage Keepers' Lien Act, which was enacted in 1922, was undoubtedly modeled after this section of the Mechanic's Lien Act, the writ of replevin being interpolated so as to enable possession of the motor vehicle to be returned to the owner or the person entitled to the immediate possession thereof pending the commencement of an action to determine the amount, if any, due on the lien, this provision being manifestly unnecessary in the case of real property because the seizure or detention by virtue of the filing of a mechanic's lien claim is a technical or

a constructive seizure and detention, the real property still remaining in the hands of the owner. This, of course, obviated the necessity of creating some kind of process to bring about the return of said property, which is essential in case of personal property where the actual physical possession of the personal property is taken.

Under said provision of the Mechanic's Lien Act, the property is freed and discharged from the mechanic's lien claim by the filing of bond and the owner is at liberty to make such disposition of the property thereafter as he may see fit, freed and discharged of said lien claim. So here, under the Garage Keepers' Lien Act, the motor vehicle is freed and discharged from the lien by the deposit of the money or bond and the delivery of the motor vehicle by means of a writ of replevin to the owner or the person entitled to the immediate possession thereof, and that is the end of the lien against the motor vehicle and the end of the replevin proceedings to bring about the return of same.

The next step, it seems to us, is a new and independent action, and has nothing whatsoever to do with the replevin action, which is concluded upon return of motor vehicle.

If the garage keeper commences such an action by the filing of a state of demand within the requisite period, to wit, within thirty days after the issuance of the writ of replevin, then the deposit of the money or bond is considered as the appearance of the owner or the person entitled to the immediate possession of the motor vehicle to said action, otherwise not.

The garage keeper did commence on action but he filed his state of demand on January 25th, 1926 (Case, p. 47, ll. 8-10), after the thirty day period had expired, and besides he did not commence the action against the appellant, who sued out the writ

of replevin as the statute contemplated, but against the Tiffany Oil Burner Company, and the appellant. At this point we would like to call your attention to an unusual state of affairs as shown by the Clerk's transcripts of the District Court docket (Case, pp. 45-47). Although the state of demand was filed on January 25th, 1926 (Case, p. 47, ll. 8-10), it was noted on the docket page of said replevin action that "The defendant filed a statement of demand on January 15th, 1926," which brought the garage keeper within the thirty-day period (see Case, p. 44, ll. 38-40, and p. 45). It is manifest that this was done afterwards because it appears before the entry of the date of service and return of the writ. Besides, the Clerk marked the docket page of the garage keeper's action (Case, p. 46) "Quashed, see 73997". And in answer to the return of summons stated: "73997. A writ of replevin issued in this cause 12/17/25" (Case, p. 47, ll. 10-12). The colloquy between the Court and counsel extending over six pages of the state of case (pp. 11-17) is enlightening, and not only shows the confusion attending the trial of this case, but that the District Court utterly disregarded the 30-day limitation within which garage keeper must bring action, and that appellant was not served with process.

The garage keeper apparently was unable to effect service upon this appellant and the other defendant, because he waited from January until June before doing anything further, and it perhaps dawned upon him for the first time that he was unable to effect service upon the appellant and the other defendant, and then he sought to bring the appellant into court by serving the notice of hearing in June by attempting to avail himself of the provisions of the Garage Keepers' Lien Act with regard to the deposit operating as an entry of appearance, to which we objected not only by

filing the special appearance but objected at opening of case, which the District Court overruled.

We therefore contend that on this point alone, the judgment of the garage keeper is a nullity, inasmuch as it was entered in the replevin proceedings after the same had terminated and in which such a judgment could not be entered, it was entered on a state of demand filed beyond the statutory period if the Court should consider that the garage keeper properly filed his action and proceeded therewith, it was not entered in an action in which an appearance was entered as contemplated by the Garage Keepers' Lien Act, and process was not served upon the appellant.

The Supreme Court, in their opinion, stated that they "think it unnecessary to pass upon the irregularity in the proceedings". They further stated that appellant appeared generally and participated in trial, and "will not now be heard to object to the jurisdiction to which it voluntarily submitted".

The appellant strenuously objected to the District Court taking jurisdiction, as reading of state of case will show (pp. 11 to 17), and also filed special appearance (Case, p. 10). When appellant's counsel stated, in response to a query from the Court "How do you appear now?" and he stated "I am appearing on the whole thing, your Honor. I contend that the garage keeper's replevin action was discontinued and the bond returned," he meant that he objected to both actions which were bunched, and not that he waived special appearance, which is manifest from further statement of appellant's counsel immediately thereafter when he said, "I say we were never in court. We were never served with a process" (Case, p. 16).

Appellant felt that it had sufficiently protected itself on the record as to its objections to jurisdiction, so as to present same to Appellate Court in case of adverse decision, and then participated in trial. It did not feel that by so doing, it waived its objections. Is not this the course of practice which was suggested by this Court in the recent case of *Salmons v. Rugyeri*, E. A., 5 N. J. Adv. Rep. 886, in which Chancellor Walker, at page 889, said:

"Here the order was simply one overruling a motion to strike out the return to a summons and to quash the writ * * *. The defendant should have filed an answer on the merits as directed by Mr. Justice Trenchard, and gone to trial. He had protected himself, upon the record, as to the question which he raised, could have raised it against on the trial, and, in the event of an adverse verdict, could have argued the invalidity of the service, as well as any other matter, or he could have stayed away and reviewed by appeal a judgment by default, which is what the defendant did in *Pizzutti v. Wuchter*."

Should counsel for a defendant against whom an objection to jurisdiction is decided by trial Court, step out of case at this point, and risk the entry of a judgment against his client which he might have been able to defeat or substantially reduce by participating in trial, if Appellate Court affirms ruling as to jurisdiction of trial Court? *State v. Rosenbaum* and *State v. Baker*, cited by Supreme Court, may be distinguished in that process acquiring jurisdiction of defendants in those cases was not attacked in courts of first instance, and was faulty, while in case at bar objection was raised *in limine* and was fundamental there being no process at all served.

Appellant therefore contends that it did not waive objections to jurisdiction, and court had no jurisdiction to enter judgment.

POINT II.

The seller under conditional sales contract (owner of title) has the right to test the superiority of his lien as against the lien of a garage keeper by commencing replevin action and depositing bond or cash as provided by Garage Keepers' Lien Act.

Under this point we will treat determinations Nos. 2, 3 and 4.

Surely, it cannot be said that the machinery provided for by the Garage Keepers' Lien Act can only be used for the purpose of testing the unreasonableness or excessiveness of a bill and not the superiority of a lien, when both propositions are embraced in the very same act under which this machinery is provided. This is the effect of the ruling of the District Court, namely,

"that under your writ of replevin you saw fit to claim possession of the car by virtue of the fact that the lien claim was unreasonable and excessive, and not by virtue of the fact that you are a paramount title holder. Having elected your form of action, you are now bound by that election."

This would restore the very evils that the 1922 amendment was intended to avert, and as expressed in the explanatory statement appended to the bill, when it was introduced:

"The object of this bill is to provide a

reasonable remedy for the automobile owner to obtain possession of his car. At present, to replevin the car, a bond for twice the amount of the value of the car would have to be put up, and in many cases it is almost impossible to do so unless at an exorbitant cost."

What reason is there for restricting these benefits of the amendment only to a case where the garage keeper renders an excessive bill, and not to a situation where a paramount or superior right is claimed by virtue of the 1925 amendment? (P. L. 1925, c. 33).

We contend both situations may be tried out in the method provided by the 1922 amendment, and that the District Court erred in the ruling refusing to receive in evidence the certified copies of conditional sales contract and in overruling the questions to the witness Glass, and for these reasons there should be a reversal.

The Supreme Court stated, "it is unnecessary to consider the view held by the Court that the priority as between the claim of the garage man and the conditional sale of the vendor could not be litigated in this action," because the ruling, to which an exception was taken, was "not assigned for error here nor made a ground of appeal." This is undoubtedly an oversight, because the rulings in question are Nos. 2, 3 and 4 of specifications of determinations filed in District Court, and they were argued under Point II of our Brief in Supreme Court, and No. 2 thereof deals with refusal of trial Court to receive in evidence the certified copies of conditional sales contract.

POINT III.

Assuming that garage keeper properly commenced his action by filing state of demand within time, and assuming that appellant elected to rely on the claim that the demand of the garage keeper was unreasonable and excessive, in these events the demand of the garage keeper was so excessive that it amounted to a fraudulent claim not made in good faith and therefore waived.

Under this point we will discuss question overruled to witness Neibart, and determinations Nos. 5 and 6.

In the first place, we contend a tender is not a prerequisite to commencing the replevin action provided for by 1922 amendment, the permissive "may" being used throughout, not the mandatory "must".

Then, the findings of the District Court certainly result not only in waiving tender but also any lien.

To properly appreciate and understand the District Court's findings regarding the demand for excessive amount and that demand was an unreasonable demand, recourse might be had to the testimony of the witness Neibart (Case, pp. 26-27). Also the testimony of the garage keeper (pp. 28-30), and the testimony of the witness Glass (p. 31).

It seems to us that we come within the exception of the requirement of a tender as laid down in

Kiss v. Ambrose, 97 N. J. L. 442, quoting from Massachusetts case.

Tender can

“be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent declaration or act.”

And in *Stephenson v. Lichtenstein*, 72 N. J. L. 113, the Court said (at p. 114):

“If we assume that he had such a lien, he would have lost it by a tender and refusal * * *. The failure to make the tender would justify him in retaining the goods *unless by his own conduct he had waived the right to a tender*. We think *his demand of a price in excess of the contract price amounted to a waiver.*” (Italics ours.)

Let us examine the findings of fact. The District Court found

“that the garage man refused to release the car in question unless he received a payment of \$416.68 * * *; that the demand of the garage keeper * * * was an unreasonable demand.”

The garage keeper demanded \$416.68, and judgment was entered for \$194.62, less than one-half thereof. The garage keeper knew or should have known that he had no right to demand any money except that which was lawfully due on the car and that by going beyond the same not only did he obviate tender but he also waived his lien.

In *Kiss v. Ambrose*, *supra*, the Court said:

“If garage keeper fraudulently claimed more than was due, he lost his lien, but if claim was in good faith, and in the belief

that he is entitled to such sum, it was still in the power of the defendant to discharge the sum actually due * * *.”

Do not the findings of the Court and the testimony alluded to show that the garage keeper fraudulently demanded more than was admittedly due him by his own testimony, and that he did not make the same in good faith?

This is not a case where there is a dispute as to reasonableness of charges, but a refusal to pay charges for more than twice the amount actually due at the time and improperly and illegally attempted to be charged against this truck and mulcted from appellant, which were not due thereon, and which garage keeper well knew.

In this connection, let us just read the testimony of witness Neibart, which testimony District Court must have relied on to justify its findings (Case, p. 27, ll. 21-23).

“When I went in to ask him for a bill I asked him what the amount was, and he told me that was partly on the car and partly on Mr. Tiffany’s personal work and partly on another car they had, and I said, ‘How can you claim all of that money on this particular car?’ And he said, ‘That is the only thing I have in possession and that is all I got here, so I am going to hold this particular car’. He said it does not make any difference; that all he wants is \$416.00 * * *.”

And we therefore contend that by making demand for sum more than twice due, knowing that demand was improper, he not only waived tender, but also lien, and District Court erred in ruling otherwise, and in entering judgment for garage keeper.

Supreme Court stated that question as to lien

being lost was question of fact, which it could not review.

It seems to us that on the undisputed facts as found by trial Judge, the question of waiver is a legal question and not a question of fact, and that the Court erred in point of law in overruling waiver.

It will be noted that for the reasons stated the Supreme Court did not pass upon the meritorious questions involved in this appeal.

CONCLUSION.

The appellant, therefore, respectfully submits that the Supreme Court erred as pointed out in the foregoing brief, and that for said reasons the judgment should be reversed and for nothing holden.

Respectfully submitted,

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