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Notice of Appeal and Grounds, Filed July 7, 1927.

New Jersey Supreme Court,

Action at Law.

JACOB GROPPER,
Plaintiff-Respondent,

vs.

WILLIAM HOOVER,
Defendant-Appellant.

To Saul and Joseph Cohn, Esqs.,
Attorneys for Plaintiff-Respondent:

TAKE NOTICE, that the Defendant-Appellant appeals to the Court of Errors and Appeals, from the whole of the judgment entered in the above stated cause, on the 17th day of June, 1927, on the ground that the Supreme Court erred in giving judgment for the plaintiff-respondent instead of for the defendant-appellant.

Dated, June 23, 1927.

GREEN & GREEN,
Attorneys for Defendant-Appellant.

Within Notice of Appeal and copy thereof acknowledged this 23rd day of June, 1927.

SAUL & JOS. E. COHN,
Attorneys for Plaintiff-Respondent.

Notice of Appeal, Filed July 2, 1926.

FIRST DISTRICT COURT OF THE CITY OF NEWARK,

In Replevin.

JACOB GROPPER,
Plaintiff,

vs.

WILLIAM HOOVER,
Defendant.

To Jacob Gropper, Plaintiff, or Saul and Joseph E. Cohn, his attorneys:

TAKE NOTICE, that the defendant, William Hoover, hereby appeals to the New Jersey Supreme Court, from the judgment rendered by the First District Court of the City of Newark in the above stated action, on the 29th day of June, 1926.

Dated, July 31st, 1926.

GREEN & GREEN,
Attorneys for Defendant.

Service of within notice of appeal acknowledged this first day of July, 1926.

SAUL & JOSEPH E. COHN,
Attorneys of Plaintiff.

Specification, Filed September 17, 1926.

NEW JERSEY SUPREME COURT.

Action at Law.

On Appeal from the First District Court of Newark.

JACOB GROPPER,
Plaintiff-Respondent,

vs.

WILLIAM HOOVER,
Defendant-Appellant.

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

1. The District Court erred in giving judgment for possession in favor of the plaintiff and against the defendant, defendant having retained possession of the goods and given bond to the constable.

2. The District Court erred in receiving in evidence bill of sale and assignments for automobile in question.

3. The District Court erred in giving judgment in favor of the plaintiff and against the defendant, in that judgment should have been given in favor of the defendant and against the plaintiff.

Dated, September 15, 1926.

GREEN & GREEN,
Attorneys for Defendant-Appellant.

Writ of Replevin, Filed June 4, 1926.

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

To any Constable of said County, or to the Sergeant-at-Arms of the First District Court of the City of Newark, GREETINGS:

WE COMMAND YOU, That if Jacob Gropper shall make you secure, you cause to be replevined and delivered to Jacob Gropper, one four-door regular sedan, Cleveland car, model 42, motor S-42592, manufacturers number M-36595, which William Hoover took and unjustly detained—as is said: AND, that you summon the said William Hoover to appear before the First District Court of the City of Newark, to be held at the City Hall, Broad Street (ground floor, entrance on Green St.), in the said City on the tenth day of June, 1926, at ten o'clock in the forenoon, to answer the said Jacob Gropper of a plea of taking and unjustly detaining said goods and chattels aforesaid: AND have you then there this writ, with your proceedings thereon.

WITNESS Cecil H. Mac Mahon, Esquire, Judge of said Court, at Newark, aforesaid, the fourth day of June, One thousand nine hundred and twenty-six.

CHARLES R. BALDWIN,
Clerk,

SAUL & JOSEPH E. COHN,
Attorneys.

Affidavit of Service.

I served the within summons June 4th, 1926, on the defendant, William Hoover, by reading it to him and giving him a copy thereof.

THEODORE J. CONLISS,
Constable.

State of Demand, Filed June 4, 1926.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

In Replevin.

JACOB GROPPER,
Plaintiff,

vs.

WILLIAM HOOVER,
Defendant.

Plaintiff demands the sum of $100 damages and possession of the following article, and says:

1. On June 2, 1926, plaintiff became and ever since has been the owner of the following goods and chattels, to wit: one four-door regular sedan Cleveland car, model 42, motor S-42592, manufacturers number M-36595.

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

3. On the aforesaid date in a close known as 274 Lyons Avenue, Newark, N. J. did wrongfully

Order Extending Time, Filed July 6, 1926.

take said goods and chattels in his possession and has retained same although written demand has been made by the plaintiff through his agent or representative, demanding return thereof, and defendant still retains the same.

Plaintiff demands possession of said goods and chattels and damages for the unlawful retaining of same.

SAUL & JOSEPH E. COHN,
Attorneys for Plaintiff.

Order Extending Time, Filed July 6, 1926.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

In Replevin.

(On Appeal)

JACOB GROPPER,
Plaintiff,

vs.

WILLIAM HOOVER,
Defendant.

Upon application of defendant, and good cause appearing:

It is, on this 2nd day of July, 1926, ORDERED, that the time within which the case shall be agreed upon or settled, be and the same is hereby extended to September 17, 1926.

WILLIAM V. RAFFERTY,
Acting Judge of the First District Court of the City of Newark.

Clerk's Transcript.

FIRST DISTRICT COURT.

JACOB GROPPER,
Plaintiff,

vs.

WILLIAM HOOVER,
Defendant.

SAUL & JOSEPH E. COHN,
Pltf's Attorneys.

Pltf's Costs.		
Summons	$3.00	June 3
Mileage	.08	
Listing	1.50	June 10
Atty. fee	5.00	
	9.58	

WRIT OF REPLEVIN

274 Lyons Avenue

A summons in the above stated cause was issued on the fourth day of June, 1926, returnable on the tenth day of June, 1926, wherein the plaintiff demands of the defendant the sum of
Dollars.

The summons was served and returned as follows:

I served the within summons June 4th, 1926, on the defendant by reading it to him and giving him a copy thereof.

THEODORE J. CONLISS,
Constable.

June 10/26 This Cause was adjourned to June 11.

June 5/26 Defendant filed Re-Replevin Bond and the constable returned the goods to the Defendant.

June 15/26 The Plaintiff and the Defendant appearing, the cause was tried and determined at this time.

Plaintiff and Walter Goerke sworn. Defendant, Mary Ratchford and Charles F. Hummel sworn.

The evidence being closed the Court reserved decision.

The evidence being closed, the Court rendered judgment in favor of the Plaintiff and against the defendant for Possession with costs, whereupon judgment is rendered in favor of the plaintiff and against the defendant for Possession, with costs.

July 1/26 Order for the return of the goods to pltff $1.00
.75

July 6/26 Notice of appeal and appeal bond filed 1.00

July 6/26 Order filed extending time to settle case 1.00

I, CHARLES R. BALDWIN, Clerk of the First District Court of the City of Newark, do hereby certify that the foregoing is a true copy of the records and proceedings had in the above stated cause of action, as taken from Docket #214 of this Court, page #101831.

CHARLES R. BALDWIN,
Clerk of the First District Court
of the City of Newark.

State of Case, Filed September 17, 1926.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

In Replevin.

JACOB GROPPER,
Plaintiff,

vs.

WILLIAM HOOVER,
Defendant.

It is stipulated and agreed between the parties hereto, by their respective attorneys, that the state of case for appeal is as follows:

1. On June 4, 1926, plaintiff commenced an action of replevin herein, to recover possession of a Cleveland automobile from the defendant.

2. On behalf of the plaintiff, testimony was adduced that the plaintiff obtained title to the automobile by purchase for value from Bush-Goerke Motor Co., a corporation, on June 2, 1926, that on the same date said plaintiff served a written demand upon the defendant having possession of the automobile at the time of the sale to plaintiff and at the time when the demand was made, and that defendant refused to deliver the automobile to plaintiff.

3. Plaintiff offered in evidence a bill of sale for said motor vehicle, said bill of sale bearing

an assignment from said Bush-Goerke Motor Co. to plaintiff, with two witnesses and an acknowledgment.

4. Defendant objected to the offer of the bill of sale in evidence and also the assignments thereof, on the ground that said bill of sale was not in compliance with an act entitled, "An act relating to and regulating the sale and purchase of motor vehicles, requiring presence of manufacturer's number on same, requiring issuance of bill of sale and assignment of same, and providing penalties therefor", Chapter 168, Laws of 1919, page 357, as amended in that the bill of sale purported to have been acknowledged by the Bush-Goerke Motor Co., but the certificate of acknowledgment bore the personal acknowledgment of Walter Goerke, the President of said company, the first assignment to the bill of sale was dated and sworn to on April 1st, 1925, but the certificate of acknowledgment bore date of June 2nd, 1926.

5. The judge reserved his decision on receiving the bill of sale and assignments in evidence, and later received the same in evidence.

6. On behalf of defendant, testimony was adduced that the defendant purchased the automobile from Bush Goerke Motor Co. on or about April 15, 1925, and paid $750 and gave a three months' note for balance of $450, that on June 30, 1925, defendant commenced suit against the said Bush-Goerke Motor Co., in the Sssex County Circuit Court, on two counts, namely:

In the first count plaintiff alleged that automobile was represented as a 1924 year model, when

it was a 1923 model and that by reason of said misrepresentation the defendant herein rescinded the purchase and demanded the return of his $750 and the surrender of the notes for $450; and in the second count the defendant herein alleged the purchase of the automobile as aforesaid, that said Bush-Goerke Motor Co. agreed to deliver to plaintiff documents of title to said motor vehicle in conformity with the laws of this State, that said Bush-Goerke Motor Co. refused to deliver to plaintiff such title documents or any bill of sale for such motor vehicle, that as a result, the consideration for the purchase of said motor vehicle wholly failed, and that this defendant therefore rescinded the purchase and offered to return the motor vehicle to the Bush-Goerke Motor Co. upon repayment of the purchase price but the Bush-Goerke Motor Co. refused to repay the same and/or accept the return of said motor vehicle.

7. The defendant herein was non-suited on the first count but the Court directed a verdict in his favor on the second count, holding that title had not passed from Bush-Goerke Motor Co. to defendant herein under said bill of sale and assignments.

8. Said Bush-Goerke Motor Co. had also commenced an action to recover for the $450 note against the defendant herein which was tried with the above case and the Court also directed a verdict in favor of this defendant in said action.

9. On June 2, 1926, this defendant issued an execution against the Bush-Goerke Motor Co. in the action in which he recovered a judgment for $750 and costs and on June 3, 1926, the sheriff levied upon the automobile, which was still in the possession of this defendant.

Defendant's Bond, Filed June 5, 1926.

10. The judge reserved his decision, and on June 29, 1926, entered a judgment in favor of the plaintiff for possession of the automobile.

Dated, September 14, 1926.

SAUL & JOSEPH E. COHN,
Attorneys for Plaintiff,

GREEN & GREEN,
Attorneys for Defendant.

Defendant's Bond, Filed June 5, 1926.

KNOW ALL MEN BY THESE PRESENTS, that we, William Hoover, are held and firmly bound unto any constable, one of the Constables of the County of Essex, State of New Jersey, in the sum of Five Hundred ($500) Dollars, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 5th day of June, 1926.

The condition of this obligation is such, whereas the said Constable has taken into possession certain goods and chattels, to wit:

> One four door regular Sedan Cleveland car, model 42, manufacturer's number M-36595, motor S-42592.

by virtue of a write of replevin issuing out of the First District Court of the City of Newark, on the 4th day of June, 1926, at the suit of Jacob Gropper against William Hoover, and whereas, the said William Hoover has served upon the said Constable a written claim of property of certain of the goods and chattels so as aforesaid taken into custody by said Constable;

Order Transferring Posession, Filed July 1, 1926.

NOW, THEREFORE, if the said William Hoover shall deliver the said goods and chattels in as good condition as the same were at the time of the making of such claim by said William Hoover to Jacob Gropper, or his lawful representatives, if the same shall be adjudged to the said Jacob Gropper, then this obligation to be void; otherwise, to remain in full force and virtue.

WILLIAM HOOVER,
Commercial Casualty Ins. Co.
by WM. J. MARTIN,
Attorney-in-fact.

Signed, sealed and delivered
in the Presence of

HERBERT A. KUVIN.

LEO KLEIN,
as to surety.

Order Transferring Possession, Filed July 1st, 1926

In appearing to the Court that the property replevined in the above stated action, to wit: One Four Door regular sedan Cleveland Car, model 42, Motor S-42592 Manufacturers' #M-36595, has been delivered by Theodore J. Conliss, one of the constables of Essex County, to William Hoover, the defendant herein, against whom the issue of property has been found, and it further appearing that the taking was not as a distress for rent, it is on this 1st day of July, 1926, on application of Jacob Gropper, the Plaintiff herein

ORDERED, that the said goods and chattels replevined and delivered as aforesaid in the above stated action be delivered forthwith to the said Jacob Gropper.

LOUIS R. FREUND,
Acting Judge of the First District
Court of the City of Newark.

Exhibit P-1.

KNOW ALL MEN BY THESE PRESENTS, that BUSH-GOERKE MOTOR COMPANY of Newark in the county of Essex and State of New Jersey, party of the first part, in consideration of the sum of One dollar and other valuable consideration, paid by JOSEPH COHEN of Newark, in the county of Essex and State of New Jersey, party of the second part, has bargained, sold, granted and conveyed and by these presents does bargain, sell, grant and convey unto the said party of the second part his heirs, executors, administrators and assigns, Four Door Regular Sedan, Cleveland, 42 S-42592, M-36595, to have and to hold the same unto the said party of the second part, his heirs, executors, administrators and assigns forever, and Bush-Goerke Motor Company do for their heirs, executors, administrators or assigns, covenant and agree to and with the said party of the second part to warrant and defend the said described motor vehicle hereby sold unto the party of the second part his executors, administrators and assigns against all and every person or persons whomsoever.

IN WITNESS WHEREOF, we have hereunto set our hands and seal this Eighth day of December, one thousand nine hundred and twenty-three.

BUSH-GOERKE MOTOR CO.
WALTER GOERKE
Pres.
CARL W. BUSH
Secretary
(Seal)

Signed, Sealed and Delivered
in the Presence of
S. H. VAN EMBURG
JOHN AMATO

Exhibit P-1.

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

BE IT REMEMBERED, that on this Eighth day of December 1923, before me a Notary Public of the State of New Jersey, personally appeared WALTER GOERKE, Pres. Bush-Goerke Motor Co., who, I am satisfied, is the seller mentioned in the within instrument, and I having personally made known to him the contents thereof he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

ANN ARMSTRONG
Notary Public.
(Seal)

ASSIGNMENT OF BILL OF SALE

I, JOSEPH COHEN, of Newark, County of Essex, and State of New Jersey, for and in consideration of the sum of One & more dollars, to me in hand paid, do hereby sell, assign, transfer and set over unto Bush-Goerke Motor Co., Newark in the County of Essex and State of New Jersey the said motor vehicle described in the attached Bill of Sale.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of April, 1925.

JOSEPH COHEN

Witness
CHARLES SHERWOOD
CLAUDE H. BUTLER

Subscribed and sworn to before me this
1st day of April, 1925.

A. RENIGAR
Notary Public of N. J.
(Seal)

Exhibit P-1.

~~ASSIGNMENT OF BILL OF SALE~~

~~I, Bush Goerke Motor Co., of Newark, County of Essex, and State of New Jersey, for and in consideration of the sum of One & more dollars, to me in hand paid, do hereby sell, assign, transfer and set over unto William Hoover of Newark in the County of Essex and State of New Jersey the said motor vehicle described in the attached Bill of Sale.~~

~~In witness whereof, I have hereunto set my hand and seal this 15th day of April 1925.~~

~~BUSH GOERKE MOTOR CO.,~~
~~Walter Goerke~~
~~Pres.~~

~~Witness~~
~~Charles Sherwood~~
~~Edward McGlynn~~

~~Subscribed and sworn to before me this 15th day of April, 1925.~~

~~A. Renigar~~
~~Notary Public of N. J.~~
~~(Seal)~~

ASSIGNMENT OF BILL OF SALE

I, Bush-Goerke Motor Co., a corporation of the State of New Jersey, located in the City of Newark County of Essex, and State of New Jersey, for and in consideration of the sum of One dollar, to it in hand paid, hereby sells, assigns, transfers and sets over unto Jacob Gropper of Newark in the County of Essex and State of New Jersey the said motor vehicle described in the attached Bill of Sale.

Exhibit P-1.

In witness whereof, said Bush-Goerke Motor Co. has caused these presents to be signed by its President and attested by its secretary and its corporate seal to be hereto affixed the second day of June, 1926.

BUSH-GOERKE MOTOR CO.
By Walter Goerke
President
(Seal)

Witness

Sophia M. Keigel
Antoinette E. Joch

Attest

Carl W. Bush
Secretary.

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

Be it remembered, That on this 2nd day of June, in the year One Thousand Nine Hundred twenty-six before me, the subscriber, a Notary Public of New Jersey, personally appearel Carl W. Bush known to me to be the Secretary of the Bush-Goerke Motor Co. a corporation, the Grantor within named, who being by me duly sworn on his oath said and made proof to my satisfaction that he is such Secretary, and that he well knows

Exhibit P-1.

the Common Seal of said Corporation, and that the Seal affixed to the within Deed is such Common Seal and was thereto affixed by Walter Goerke the President of said Corporation, and that the said Deed was by the said President also signed and delivered as and for the voluntary act and deed of said Corporation in the presence of said Deponent, who thereupon subscribed his name thereto as attesting witness.

CARL W. BUSH
(Seal)

Sworn and subscribed before me,
at Newark, N. J. this 2d day of
June A. D. 1926.

MICHAEL SILVER
Notary Public of N. J.

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

BE IT REMEMBERED, That on this second day of June in the year of our Lord One Thousand Nine Hundred and twenty-six before me, the subscriber, a Notary Public of New Jersey personally appeared JOSEPH COHEN who, I am satisfied, is the grantor mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon he acknowledged he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

AWIEZER TINFOWITCH
Notary Public of New Jersey
(Seal)

Opinion, June 17, 1927.

NEW JERSEY SUPREME COURT.

OCTOBER TERM, 1926.

No. 421.

JACOB GROPPER,
Plaintiff-Respondent,

vs.

WILLIAM HOOVER,
Defendant-Appellant.

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

Before Justices KALISCH, KATZENBACH and LLOYD.

For the Appellant: GREEN & GREEN, Harry Green, of Counsel.

For the Respondent: SAUL and JOSEPH COHN, Michael Silver, of Counsel.

Per Curiam:

The following is an agreed state of the case brought before us for review, on appeal from the First District Court of the City of Newark:

"On June 4, 1926, plaintiff commenced an action of replevin herein, to recover possession of a Cleveland automobile from the defendant.

On behalf of plaintiff, testimony was adduced that the plaintiff obtained title to the automobile by purchase for value from Bush-Goerke Motor Co., a corporation, on June 2, 1926, that on the same date said plaintiff served a written demand

upon the defendant for possession of said automobile, said defendant having possession of the automobile at the time of the sale to plaintiff and at the time when the demand was made, and that defendant refused to deliver the automobile to plaintiff.

Plaintiff offered in evidence a bill of sale for said motor vehicle, said bill of sale bearing an assignment from said Bush-Goerke Motor Co. to plaintiff, with two witnesses and an acknowledgment.

Defendant objected to the offer of the bill of sale in evidence and also the assignments thereof, on the ground that said bill of sale was not in compliance with an act entitled, 'An Act relating to and regulating the sale and purchase of motor vehicles, requiring presence of manufacturer's number on same, requiring issuance of bill of sale and assignment of same and providing penalties therefor.' Chapter 168, Laws of 1919, p. 357, as amended, in that bill of sale purported to have been acknowledged by the Bush-Goerke Motor Co., but the certificate of acknowledgment bore the personal acknowledgment of Walter Goerke, the President of said company, the first assignment to the bill of sale was dated and sworn to on April 1st, 1925, but the certificate of acknowledgment bore date of June 2nd, 1926.

The judge reserved his decision on receiving the bill of sale and assignments in evidence, and later received the same in evidence.

On behalf of defendant, testimony was adduced that the defendant purchased the automobile from Bush-Goerke Motor Co. on or about April 15, 1925, and paid $750 and gave a three months' note for balance of $450, that on June 30, 1925, defendant commenced suit against the said Bush-Goerke

Motor Co., in the Essex County Circuit Court, on two counts, namely:—

In the first count plaintiff alleged that automobile was represented as a 1924 year model, when it was a 1923 model and that by reason of said misrepresentation the defendant herein rescinded the purchase and demanded the return of his $750, and surrender of the notes for $450; and in the second count the defendant herein alleged the purchase of the automobile as aforesaid, that said Bush-Goerke Motor Co., agreed to deliver to plaintiff documents of title to said motor vehicle in conformity with the laws of this State, that said Bush-Goerke Motor Co. refused to deliver to plaintiff such title documents or any bill of sale of such motor vehicle, that as a result, the consideration for the purchase of said motor vehicle wholly failed and that this defendant therefore rescinded the purchase and offered to return the motor vehicle to the Bush-Goerke Motor Co. upon repayment of the purchase price but the Bush-Goerke Motor Co. refused to repay the same and/or accept the return of said motor vehicle.

The defendant herein was non-suited on the first count but the Court directed a verdict in his favor on the second count, holding that title had not passed from Bush-Goerke Motor Co., to defendant herein under said bill of sale and assignment.

Said Bush-Goerke Motor Co. had also commenced an action to recover for the $450 note against the defendant herein, which was tried with the above case and the Court also directed a verdict in favor of this defendant in said action.

On June 2, 1925, this defendant issued an execution against the Bush-Goerke Motor Co., in the action in which recovered a judgment for $750

and costs and on June 3, 1925, the sheriff levied upon the automobile, which was still the possession of this defendant.

The judge reserved his decision, and on June 29, 1926, entered a judgment in favor of the plaintiff for possession of the automobile.

The grounds of appeal relied on for a reversal are:

1. "The District Court erred in giving judgment for possession in favor of the plaintiff and against the defendant, defendant having retained possession of the goods and given bond to the constable."

2. "The District Court erred in receiving in evidence bill of sale and assignments for automobile in question."

3. "The District Court erred in giving judgment in favor of the plaintiff and against the defendant in that judgment should have been given in favor of the defendant and against the plaintiff."

In support of the first ground, it is argued that judgment for possession of the automobile replevied is erroneous because only a judgment for value and damages can be entered where a defendant re-bonds property, replevied. This is clearly an erroneous conception of the law governing the subject in hand.

Section 138 of the District Court Act, 2 C. S. 1896, provides that "in all actions in replevin, except where the taking was as a distress for rent, if the property replevied shall have been delivered by the constable or sergeant-at-arms to the party against whom the issue of property shall be found,

the party succeeding on such issue of property * * * may instead of pursuing his remedy for the damages * * * apply to the Court in which the action is pending, for an order that the said goods be restored to him; and thereupon it shall be lawful for the Court in its discretion to make an order that the said goods and chattels be delivered to the party in whom the property therein has been found."

This section is like in substance to section 26 of the Replevin Act, 3 C. S. 4375. The legal effect of this section was settled in *Johnson* v. *Moson,* 64 N. J. L. 258 in which case Van Syckel, *J.* speaking for the Court of Errors and Appeals, at page 260, points out that the only judgment that can be rendered under section 10 of the Replevin Act is for the value of the goods and damages as found by the jury, but that this remedy is cumulative, since it appears from Section 26 of the Replevin Act that the plaintiff may apply to the trial court for an order upon the defendant to restore the goods to him.

In the instant case, it appears that the trial judge by virtue of Section 138 of the District Court Act, *supra,* made an order for the delivery by defendant of the replevied goods and chattels to the plaintiff. This was proper judicial action.

Next it is argued that the bill of sale and assignment received in evidence, were not in conformity with an act entitled "An Act relating to and regulating the sale and purchase of motor vehicles, requiring presence of manufacturers' number on same, requiring issuance of bill of sale and assignment for same, and providing penalties therefor." P. L. 1919, P. 357.

The alleged defect in the bill of sale and assignment, as appears from the agreed state of the

case, is, that the bill of sale purported to have been acknowledged by the Bush-Goerke Co., whereas, the certificate of acknowledgment bore the personal acknowledgment of Walter Goerke, President of said Company.

The first assignment to the bill of sale was sworn to April 1st, 1925, but the certificate of acknowledgment bore the date of June 2nd, 1926. It is conceded that the first assignment of the bill of sale to the motor company was defective in that it had not been acknowledged by Cohn. This omission, however, was supplied on June 2nd, 1926, when the acknowledgment was taken and a certificate thereof attached.

We think there is no legal obstacle in the way of curing a defective acknowledgment, where it can be done without prejudice to the rights of third parties, for such an act rather bespeaks good faith. It is further urged that the assignment from Bush-Goerke Motor Co. to Hoover is defective and cannot pass title and that the striking out of the defective assignment, without anything on the same to indicate that the alteration was made with the assent of the then holder vitiates the entire instrument. Assuming this to be true dogma, under the circumstances present in this case, the statement of the proposition reveals its puerility. The motor company assigned to Hoover, and by reason of defective assignment no title was passed to him. Furthermore it appears that Hoover had rescinded the contract. As a consequence, the title still remained in the motor company. Ergo, by consent of the holder of the title, the defective assignment was stricken out. It was the motor company which assigned the bill of sale to the plaintiff, Gropper.

Lastly, it is argued that the appellant was the

bailee of said automobile subject to secure re-payment of seven hundred and fifty dollars paid by him.

The defendant had rescinded the contract through which the automobile came into his possession. Any equitable rights he may have to the automobile cannot be successfully maintained against the right of a purchaser in good faith for value and without notice of any equity of the defendant in the property claimed.

The trial judge found as a fact that the plaintiff was a purchaser in good faith for value and without notice of any equitable right existing in the defendant to the property.

Judgment is affirmed, with costs.

New Jersey Court of Errors and Appeals.

JACOB GROPPER, *Plaintiff-Respondent,* vs. WILLIAM HOOVER, *Defendant-Appellant.*	Action at Law. On Appeal from Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This is an appeal by the defendant from a judgment of Supreme Court, affirming a judgment of the First District Court of Newark, rendered, in a replevin action for possession of an automobile, in favor of the plaintiff and against the defendant, by the Court sitting without a jury.

Facts.

The factual situation (Case, pp. 9-12) is as follows:

On April 15, 1925, appellant, hereinafter called defendant, purchased automobile from Bush-Goerke Motor Co., paid $750 and gave three months' note for balance of $450 *and received possession of said automobile.*

On June 30, 1925, defendant commenced suit against the said Bush-Goerke Motor Co., in the Essex County Circuit Court, for rescission of the purchase on the ground, *inter alia,* of failure to deliver documents of title in conformity with

the laws of this State, and the Circuit Court directed a verdict in favor of this defendant for $750 and judgment was accordingly entered for said amount and costs in favor of defendant and against said Bush-Goerke Motor Co.

On June 2nd, 1926, this defendant issued an execution against the Bush-Goerke Motor Co., on said judgment and the Sheriff levied upon the automobile, which defendant had received at time of purchase and *which was still in his possession.*

On the same date, the said Bush-Goerke Motor Co. sold the same automobile, *while it was in the possession of this defendant,* to the plaintiff, Jacob Gropper. Said plaintiff, Jacob Gropper, thereafter served a written demand upon defendant for possession of the automobile but defendant refused to deliver possession thereof to the plaintiff, claiming to be bailee thereof, with lien, as a result of which the plaintiff commenced this action of replevin to recover possession thereof.

Defendant delivered claim of property to the constable and also bond and retained possession of said automobile.

In this posture of affairs, the District Court rendered judgment in favor of the plaintiff and against the defendant for possession.

Defendant thereupon took appeal to Supreme Court, which affirmed said judgment in a *per curiam* opinion.

Specifications.

In the Supreme Court, defendant filed specifications stating that he is dissatisfied in point of law with the following determinations of the District Court:

1. The District Court erred in giving judgment for possession in favor of the plaintiff and against the defendant, defendant having retained possession of the goods and given bond to the constable.

2. The District Court erred in receiving in evidence bill of sale and assignments for automobile in question.

3. The District Court erred in giving judgment in favor of the plaintiff and against the defendant, in that judgment should have been given in favor of the defendant and against the plaintiff.

POINT I.

The judgment for possession is erroneous, because only a judgment for value and damages can be entered where a defendant rebonds property replevied.

Section 127 of the District Court Act, 2 C. S. 1994, provides that where property replevied shall be delivered to the defendant on his presenting a claim of property and giving bond, if plaintiff recovers "the Court * * * *shall* find the value of the goods and chattels as well as the damages of the plaintiff, and the plaintiff *shall* have judgment thereon in damages as well as for the value".

This statute is practically identical with Section 10 of the Replevin Act, 3 C. S. 4371.

Plaintiff must take judgment versus defendant for value of goods and damages; "he cannot in that suit take any other judgment". *Johnson* v. *Mason,* 64 N. J. L. 258, 260.

Also see *Tumulty* v. *Jordan,* 67 N. J. L. 509, 511.

POINT II.

The bill of sale and assignment received in evidence were not in conformity with the Motor Vehicle Bill of Sale Act, and were therefore erroneously received.

Bill of sale and assignments, offered in evidence in this case, were the same as the bill of sale and assignments offered in evidence in the Circuit Court but with these exceptions:

Certificate of acknowledgment was added to the first assignment (Case, p. 18, bottom of page), assignment by Bush-Goerke Company to Hoover was stricken out (Case, p. 16, top of page), and assignment of Bush-Goerke Motor Co. to Gropper was added (Case, p. 16, bottom of page, and top of p. 17).

The Circuit Court in directing its verdict in favor of defendant and against the said Bush-Goerke Motor Co., held that said bill of sale and assignment to the automobile were not in conformity with the laws of this State and that said Motor Company refused to deliver to this defendant such title documents as a result of which the consideration failed, and this defendant was therefore entitled to the return of the $750 paid by him.

After the judgment recovered by this defendant against said Bush-Goerke Motor Co., said Motor Company apparently to defeat lien of this defendant for amount paid by him, the automobile still being in defendant's possession, procured a belated certificate of acknowledgment of Joseph Cohen, the first assignee, which certificate of acknowledgment is dated June 2nd, 1926, over a

year after the date of said assignment, to wit, April 1st, 1925.

By reason of the defective acknowledgment of the first assignment (Case, p. 15, bottom of page), the documents of title were void, and could not be validated by a purported certificate of acknowledgment made over a year later, particularly so as to prejudice rights of intervening party, this defendant. *Security Credit Corporation* v. *Whiting Motor Co.,* 98 N. J. L. 45; *Arotzky* v. *Kropnitzky,* 98 N. J. L. 344, aff. 3 N. J. Adv. Rep. 419.

The statute (P. L. 1919, p. 357) was not complied with when the assignment was made and executed and therefore the title papers to the automobile were void, and not voidable.

Supreme Court, in their *per curiam,* said:

> "We think there is no legal obstacle in the way of curing a defective acknowledgment, *where it can be done without prejudice to the rights of third parties,* * * *." (Italics ours.)

It certainly prejudiced defendant. His rights accrued long before the defective acknowledgment was cured. Furthermore, curing of defective acknowledgment eliminated defect in title which prevented title from passing to him (as Circuit Court held), and title thereupon passed to him subject to his right of rescission. The situation might be compared to a defective real estate title being cured by a quit-claim or curative deed, which certainly would not give the last grantor the right to take back the title, and convey it to another grantee in utter disregard of the rights of his first grantee.

The second assignment of the bill of sale is made by said Bush-Goerke Motor Company to this

defendant and then stricken out (Case, p. 16, top of page).

It seems to us that there is a gap in the title on the face of the instrument between Hoover and Gropper which invalidates the said document, by reason of said gap created in the chain of title.

Your Honors can see the opportunities for fraud and evasion of the statute which will result if assignments attached to motor vehicle bills of sale are permitted to be altered and mutilated as in this case.

Section 5 of the said Bill of Sale Act provides:

> "All such assignments shall at all times be kept and attached to the original manufacturer's bill of sale."

This provision is mandatory and does not authorize anyone to strike an assignment from the bill of sale, the legislative intent being to preserve all the papers intact so that they will show complete history and chain of title to a purchaser, and prevent a situation as we have here, which could not have occurred if said assignment had not been stricken out.

Is not the alteration and mutilation of the assignment of Hoover contrary to this statute and therefore unlawful?

It strikes us that it is and that the said instruments are therefore vitiated and void and should not have been received in evidence.

Then again, so far as this defendant is concerned, the said documents having been once adjudicated void so far as he was concerned should certainly not affect him if subsequently the defects are cured, and the person who attempts to take advantage is the assignee or person who stands in the shoes of the Motor Company which still retains the $750 paid by this defendant, which

sum the Circuit Court found he was entitled to the return of.

POINT III.

This defendant had possession at time of purported sale to plaintiff as bailee of said automobile, with lien thereon to secure repayment of $750 paid by him.

If this defendant was justified in rescinding the contract of purchase, as the Circuit Court found he was, he certainly had the right to hold the automobile until the $750 was returned to him. Sections 69 (1) (d), 69 (4) and 69 (5), 4 C. S., pages 4663, 4664; *Auto Brokerage Co., Inc.* v. *Ullrich,* Court of Errors and Appeals, 4 N. J. Adv. Rep. 329; *Stein* v. *Scarpa,* 96 N. J. L. 86; *Van Houten* v. *Gizang,* 3 N. J. Misc. Rep. 233.

Section 69 (1) (d) of the Sales Act provides that the buyer may rescind, offer to return and recover purchase price; Section 69 (4) provides that seller is liable to repay price or part paid concurrently with return of goods, or immediately after offer to return; and Section 69 (5) provides that where seller refuses to accept, buyer is deemed to hold goods as bailee for seller, subject to lien to secure repayment of portion of purchase price paid.

What then did defendant do to lose this right which the Circuit Court and the law gave him?

It is our contention that this defendant was the bailee of the automobile and entitled to hold the same until the $750, adjudged by the Circuit Court, was repaid, that said lien could not be wiped out by assignment of bill of sale to plaintiff and that the plaintiff, the assignee of the Bush-Goerke Motor Company and who stood in its

shoes, could not maintain this replevin action successfully until he repaid $750 and that the Court in deciding otherwise was clearly in error.

POINT IV.

Besides, plaintiff had notice of defendant's rights in the automobile as a matter of law, and plaintiff was not, therefore, an innocent purchaser for value and without notice.

There is nothing in the agreed state of case which shows that the District Court Judge found as a fact that the plaintiff was a purchaser in good faith and without notice.

The automobile was in the possession of defendant and the bill of sale (Exhibit P-1, Case, p. 16) shows an assignment thereof to defendant and then stricken out.

Did this not put plaintiff on inquiry as to the rights of defendant in the automobile and would not any reasonable inquiry as to such possession by defendant and the assignment have discovered the lien of defendant (*Commercial Credit Corporation* v. *Coover,* EA, 101 N. J. L. 530)?

Was not this situation an "apparent impediment" to plaintiff taking title to the automobile free of defendant's lien and right of possession and, therefore, *not* constituting plaintiff an innocent purchaser without notice (*Halliwell* v. *Trans-States Finance Corporation,* EA, 98 N. J. L. 133)?

Surely, the doctrine of *caveat emptor* applied in all its effectiveness against plaintiff, particularly as defendant had possession of the automobile, the possession in itself being *prima facie* evidence of ownership (*Nelson* v. *Bock,* SC, 84 N. J. L. 123) and *a fortiori* at least some right or interest of defendant in said automobile by virtue of said possession.

We respectfully submit that on this factual situation, defendant was and is entitled to a judgment for possession of said automobile.

This is a far-reaching decision because the effect of same is to afford an easy means of nullifying Section 69 of the Sales Act, to the prejudice of honest and *bona fide* bailees with liens for portion of purchase price paid, as is the situation in this case.

The appellant, therefore, respectfully submits that the Supreme Court erred in affirming judgment of District Court in entering judgment for possession instead of judgment for value and damages, in receiving bill of sale and assignments in evidence, and, on the factual situation, finding a verdict in favor of the plaintiff and against the defendant, and that for the reason hereinbefore set forth the judgment should be reversed, and, there being no dispute of facts, the District Court should be directed to enter a judgment for possession of the automobile in favor of the defendant and against the plaintiff.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

JACOB GROPPER, *Plaintiff-Respondent,* *vs.* WILLIAM HOOVER, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF OF PLAINTIFF-RESPONDENT.

POINT I.

The judgment for possession is not erroneous because a successful plaintiff in replevin has an option to either take the specific goods or damages for their value, where the defendant rebonds.

Section 138 of the District Court Act, 2 C. S. 1896, provides that "in all actions of replevin, except where the taking was as a distress for rent, if the property replevied shall have been delivered by the constable or sergeant-at-arms to the party against whom the issue of property shall be found, the party succeeding on such issue of property, * * * *may instead* of pursuing his remedy for the damages, * * * apply to the Court in which the action is pending, for an order that the said goods be restored to him; and thereupon it shall be lawful for the Court in its discretion to make an order that the said goods and chattels be delivered to the party in whom the property therein has been found."

This statute is practically identical with Section 26 of the Replevin Act, 3 C. S. 4375.

Johnson v. *Mason,* 64 N. J. L. 258, 260, cited by appellant to support its contention expressly

states that the plaintiff under Section 26 of the Replevin Act may apply to the trial court for an order upon the defendant to restore the goods to him. That is precisely the situation in the instant case. Immediately upon the rendering of the decision by the Court, the plaintiff-respondent applied for and was granted an order transferring possession. (Case, p. 13, bottom of page.)

To preclude the plaintiff in replevin from the actual possession of the chattel after the issue has been found in his favor, would be overlooking the very nature of an action in replevin. Replevin is an action for the recovery of specific property. See *Pedrich* v. *Keummell,* (65 Atl. 846). The remedy given to a plaintiff in replevin under Section 127 of the District Court Act to recover the value of the goods where the defendant re-bonds is cumulative and the option to demand the return of the specific chattels rests with the successful party. *Nelson* v. *Bock,* 84 N. J. L. 123, 85 Atl. 1009; *Lembeck and Betz Brewing Co.* v. *Tarrant*, 79 N. J. L. 372, 75 Atl. 474

POINT II.

The Bill of Sale and Assignment received in evidence were in conformity with the Motor Vehicle Bill of Sale Act, and were therefore properly received.

Appellant contends that the bill of sale and assignments were defective and not in compliance with the Motor Vehicle Act (P. L. 1919, p. 357), and cites the case of *Security Credit Corporation* v. *Whiting Motor Co.*, 98 N. J. L. 45, and *Arotzky* v. *Kropnitzky,* 98 N. J. L. 344. These cases, however, do not touch upon the exact point

involved here, to wit, whether or not the act has been complied with when a defective acknowledgment has been subsequently corrected. In neither case was a bill of sale even offered and the Court correctly held that title can only pass by a bill of sale under the act.

Appellant's contention, for which no cases are cited, seems to be that a defective assignment is void absolutely and cannot be subsequently corrected. This bold proposition is incorrect. In the case of *Gaub* v. *Mosher*, (129 Atl. 253, 254) that precise question arose. The Court held that "the statute * * * does not say that a sale without compliance with its terms shall be void. On the contrary, by implication, it negatives such a contention." The Court in that case speaking of the case of *Stein* v. *Carpa,* (96 N. J. L. 86, 114 Atl. 245) in which the Court sustained the purchaser's right to rescind, said, "If the sale were void, there could be no rescission."

In the case at bar the first assignment from Cohen to Busch Goerke Motor Co. was admittedly defective in that there was no acknowledgment by Mr. Cohen. Subsequently on June 2, 1926, the proof was taken, and a certificate thereof attached. (Case , p. 18, bottom of page.)

Appellant further contends that the striking out of the defective assignment from Busch Goerke Motor Company to Hoover without anything on the same to indicate that the alteration was made with the assent of the then holder of the instrument, vitiates the entire instrument. Assuming that this proposition is correct, on the facts and the exhibits as presented, the appellant has answered his own arugment. He has said the assignment from Busch Goerke Motor Co. to Hoover is defective and cannot pass

title (Case, p. 16, top of page). Title at that point is in the Busch Goerke Motor Co. which then is the holder of the instrument. Has not the holder of the instrument assented to the striking out of the defective assignment when it assigns the bill of sale to Gropper? (Case, p. 16, bottom of page.) To rule otherwise would be to say that the holder of a bill of sale having once made a defective assignment thereof, can never again sell the car and pass good title. Section 5 of the Bill of Sale Act which appellant cites to support this proposition, however, does not have the meaning attributed to it by appellant if the section is read in its entirety. The Legislature intended that title cannot pass unless all the assignments in the chain are attached to the bill of sale. The assignment to Hoover is not in the chain of title for the evident reason that it is defective and considered a nullity, Hoover having rejected it and the Busch Goerke Motor Co. having assented thereto by the subsequent assignment to Gropper. The Legislature never intended that a defective assignment never having been corrected, should always be attached to the bill of sale or that in the event it was stricken out the entire bill of sale be vitiated.

POINTS III & IV.

Plaintiff is a purchaser in good faith, for value and without notice, and therefore takes title free from any equity of the defendant.

Section 24 of the Sale of Goods Act, 4 C. S. 4654, provides that where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

Taking this case in a light most favorable to the defendant, the best that can be said is that the Busch Goerke Motor Co. had a voidable title. The natural question which then arises is whether or not the plaintiff was a bona fide purchaser for value without notice. This is purely a question of fact. The judgment below was in favor of the plaintiff and from this it can be reasonably and correctly inferred that all questions of fact material to such decision were decided in the plaintiff's favor. A judgment presupposes a finding of facts in favor of the successful party even if such finding be not expressed in terms and also presupposes that, in the opinion of the judge, that party is entitled to the judgment by the law arising upon the facts. *Smith* v. *Cruse*, E. A., 128 Atl. 379. On appeal, questions of fact are conclusive.

But here the situation so far as this plaintiff is concerned is materially different. The automobile was sold to him and he looked to the Motor Vehicle Law for protection and made sure that all its requirements had been met. The Busch Goerke Motor Co. had a perfect legal title and plaintiff in turn received it, having paid value therefor in good faith and without any notice of the defendant's equity.

The respondent, therefore, respectfully submits that the judgment rendered by the District Court be affirmed for the reason that it made no error in rendering the judgment for possession in favor of the plaintiff and against the defendant or in receiving the bill of sale and assignments in evidence.

Respectfully submitted,

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