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New Jersey Court of Errors and Appeals

Notice Of Appeal And Grounds

EDWARD NAYLOR, SR., Plaintiff-Appellee, vs. GEORGE H. KNAPP and ALBERT MATHIAS, Defendants-Appellants.	Action at Law.

To James J. McGoogan, Esq., attorney for Plaintiff-Appellee:

SIR:

TAKE NOTICE, that the appellant, Albert Mathias, hereby appeals from the judgment of the Supreme Court in the above-entitled cause to the Court of Errors and Appeals in the last resort in all causes, and hereby alleges that the Supreme Court erred in the following particulars:

FIRST: Because the said Court affirmed in the District Court which determined that when the automobile for the return of which the bond was given, was returned to the plaintiff, it was encumbered by a garage keeper's lien of more than $200, and that when said automobile was taken in replevin, it was not subject to said lien, whereas there

was no evidence as to whether the said automobile was or was not subject to the said lien at the time it was taken in replevin, and because upon the undisputed facts in the case at the time the said automobile was offered and tendered to the said appellee, the same was not encumbered by any garage keeper's lien.

SECOND: Because the said Court affirmed the District Court in holding that the garage keeper's lien had been attached to said automobile after the judgment in the replevin suit.

THIRD: Because the said Court affirmed the District Court in holding that when the said automobile was returned, it was encumbered by a garage keeper's lien of more than $200, whereas there was no evidence to that effect.

FOURTH: Because the said Court affirmed the District Court holding that the said automobile had not been returned to the plaintiff in good faith, and in the same condition it was in when taken in replevin, whereas there was no evidence to that effect.

FIFTH: Because the said Court erroneously held that the judgment in favor of the plaintiff for $300 should be affirmed, whereas there was no evidence as to the value of the said automobile.

SIXTH: Because the said Court erroneously held that the District Court was right in allowing the affidavit as to the value, which had been filed in the replevin suit, to be offered in evidence to establish the value of the said automobile.

SEVENTH: Because the said Court erroneously

held, that the judgment of the District Court of the City of Trenton that the automobile when returned was subject to a garage keeper's lien, was right, whereas the same was illegal, without evidence, and contrary to the statute in such case made and provided.

The said appellant therefore prays that the judgment of the Supreme Court affirming the judgment of the District Court may be reversed and for nothing holden, and that the judgment of the District Court of the City of Trenton, in favor of the plaintiff, may be reversed, annulled and set aside.

ALBERT HUGHES,
Attorney for Appellant.

Opinion

NEW JERSEY SUPREME COURT

JUNE TERM, 1917

EDWARD NAYLOR, SR.,
Plaintiff and Appellee,
vs.
GEORGE H. KNAPP and ALBERT MATHIAS,
Defendants and Appellants.

Submitted July 5, 1917; decided November 13, 1917.

Opinion

On appeal from the District Court of the City of Trenton.

Before Justices GARRISON, TRENCHARD and MINTURN.

For the appellants, Albert Hughes.
For the appellee, James J. McGoogan.

PER CURIAM:

This was a suit brought by Edward Naylor,, Sr., against George H. Knapp and Albert Mathias in the District Court of Trenton to recover on a replevin bond given by the defendants, Mathias and Knapp.

The breach of the replevin bond alleged was that the Ford automobile replevied was not returned to Naylor, the defendant in replevin, in accordance with the order awarding its possession to him in the replevin suit brought against Naylor in the District Court by Albert Mathias.

The trial judge awarded judgment for the plaintiff and we think it cannot be disturbed.

There was evidence to support the findings that when the tender of return was made the car was not in the same condition it was when taken in replevin.

The evidence tended to show that Mathias had used the car from the time he had replevied it to the time when he attempted to return it, and during that period $200 worth of supplies and repairs were furnished on the automobile for which a lien existed. Obviously, that being the fact, the car was not in the "same condition" as when taken.

There was also evidence to support the finding that this lien was incurred after Mathias replevied the car.

The judgment below will be affirmed, with costs.

Rule For Judgment

NEW JERSEY SUPREME COURT

MERCER COUNTY

EDWARD NAYLOR, SR.,
Appellee,
v.
GEORGE H. KNAPP, *et al.*,
Appellants.
Action at Law.

This cause having been duly argued at the June term (1917) of this Court by Albert Hughes, Esquire, of counsel for the appellants, and James J. McGoogan, Esquire, of counsel for the appellee, and the Court having considered the same, and finding no error in the record or proceedings in the District Court of Trenton:

It is thereupon on this thirteenth day of November, 1917, ordered and adjudged, that the judgment of the District Court of Trenton, removed by the appeal in this cause, be affirmed with costs, and that the record be remitted to the District Court of Trenton to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of

JAMES J. McGOOGAN,
Attorney for Appellee.

Notice Of Appeal

(Filed, March 7, 1917)

DISTRICT COURT OF THE CITY OF TRENTON

EDWARD NAYLOR, SR., Plaintiff,
vs.
GEORGE H. KNAPP and ALBERT MATHIAS, Defendants.
} Action at Law.

To Edward J. McGoogan, Attorney of Edward Naylor:

SIR: Take notice that the defendants, George H. Knapp and Albert Mathias, appeal to the New Jersey Supreme Court from the judgment of the District Court of the City of Trenton rendered in the above stated action on the twenty-first day of February, 1917.

Dated, March 6th, 1917.

GEORGE H. KNAPP,
ALBERT MATHIAS,
By Albert Hughes,
Attorney.

Due and legal service of the within notice is hereby duly acknowledged this 7th day of March, 1917.

JAMES J. McGOOGAN,
Attorney of Plaintiff.

Bond

(Filed, March 7,1917)

KNOW ALL MEN BY THESE PRESENTS, that we, George H. Knapp and Isaac Fineberg, are held and firmly bound unto Edward Naylor in the sum of seven hundred dollars, for which payment of said sum we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

SEALED with our seals and dated this sixth day of March, one thousand nine hundred and seventeen.

WHEREAS, a judgment was rendered in the District Court of the City of Trenton on the twenty-first day of Februrary, one thousand nine hundred and seventeen, in a suit therein depending wherein Edward Naylor is plaintiff and George H. Knapp and Albert Mathias is defendants, for the sum of three hundred and eighteen dollars damages and twenty-nine dollars and eighty cents costs of suit, and the defendants George H. Knapp and Albert Mathias is about to appeal from said judgment of the said District Court of the City of Trenton.

Now, the condition of this obligation is such, that if the said George H. Knapp and Isaac Fineberg shall pay the costs of the said appeal, whatever be the result thereof, and shall pay to the said Edward Naylor the judgment of the District Court of the City of Trenton so as aforesaid rendered against the said George H. Knapp and Albert Mathias if the said appeal be not prosecuted by the said George H. Knapp and Albert Mathias,

or be dismissed, then his obligation to be void; otherwise, to remain in full force and virtue.

GEORGE H. KNAPP, (L. S.)
ISAAC FINEBERG, (L. S.)

Signed, sealed and delivered
in the presence of
R. M. J. Smith.

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

Isaac Fineburg, being duly sworn on his oath, deposes and says, that he is the surety in the within named bond; that he is a freeholder in the County of Mercer and had property subject to execution worth the sum of seven hundred dollars over and above all his just debts and liabilities.

ISAAC FINEBURG.

Sworn and subscribed to before me
this sixth day of March, 1917.
R. M. J. Smith,
Master in Chancery of New Jersey.

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

Be it remembered that on this sixth dav of March, one thousand nine hundred and seventeen. before me, the subscriber, a Master in Chancery of New Jersey, personally appeared George H. Knapp and Isaac Fineburg, to me known to be the parties who executed the foregoing bond, and I having first made known to them the contents thereof, they severally acknowledged that they signed, sealed and delivered the same as their vol-

untary act and deed for the uses and purposes therein expressed.

R. M. J. SMITH,
Master in Chancery of New Jersey.

(Endorsed) Approved, March 7th, 1917,
John A. Montgomery,
Judge.

Summons

(Issued, March 29, 1916)

Mercer County, ss:

The State of New Jersey to any Constable of said County or the Sergeant-at-Arms of the District Court of the City of Trenton.

Summon George H. Knapp and Albert Mathias to appeal before the District Court of the City of Trenton, to be held at the City Hall in said City, on the third day of April, nineteen hundred and sixteen, at ten o'clock in the forenoon, to answer Edward Naylor, Sr., in an action at law, for the sum of five hundred dollars.

Hereof fail not.

Witness, John A. Montgomery, Esquire, Judge of said Court, at Trenton aforesaid, the twenty-ninth day of March in the year nineteen hundred and sixteen.

HENRY M. STRATTON,
Clerk.

I served the within summons March 29, 1916, on

the defendant, George H. Knapp, by reading it to him and giving him a copy.

CHARLES A. SLACK,
Constable.

The said defendant Albert Mathias could not be found in the County of Mercer nor has he any abode therein.

CHARLES A. SLACK,
Constable.

Complaint

(Filed, April 11, 1916)

DISTRICT COURT OF THE CITY OF TRENTON

EDWARD NAYLOR, SR., Plaintiff, vs. GEORGE H. KNAPP and ALBERT MATHIAS, Defendants.	Action at Law.

Plaintiff, residing in the City of Trenton, says that:

1. Defendants by their bond, dated March 9, 1916, bound themselves under seal to one C. Fred Ruhlman, constable, to pay to him $600.00, on condition nevertheless that said obligation should be void, if defendant Albert Mathias should return

a Ford automobile, No. 651016, to plaintiff in case a return thereof should be awarded in a replevin suit brought by said Albert Mathias against plaintiff in the District Court of Trenton.

2. On March 27, 1916, the District Court of Trenton after a trial of said replevin suit, ordered defendant Albert Mathias to return said automobile to plaintiff.

3. Said automobile has not been returned to plaintiff.

4. Said bond was assigned to plaintiff by said constable on March 29, 1916, and plaintiff now holds the same.

5. Nothing has been paid on said bond, a copy whereof is hereunto annexed.

Plaintiff demands as damages $500.00 with interest from March 9, 1916.

JAMES J. McGOOGAN,
Attorney for Plaintiff.

Bond

KNOW ALL MEN BY THESE PRESENTS, that we, Albert Mathias and George H. Knapp of the City of Trenton and County of Mercer and State of New Jersey, are held and firmly bound unto C. Fred Ruhlman, constable, of the City of Trenton, County and State aforesaid, in the sum of six hundred dollars, for which payment well and 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 ninth day of March, nineteen hundred and sixteen.

Bond

THE CONDITIONS of this obligation are such, that whereas, a writ of replevin was issued out of the District Court of the City of Trenton, directed to above-named C. Fred Ruhlman commanding him to make replevin of one Ford automobile number 651016 and 22 horse power at the suit of Albert Mathias against Edward Naylor, Sr., and whereas it appears by the affidavit of William Douglas, a disinterested witness, that the value of the goods about to be replevied is three hundred dollars, and whereas the said C. Fred Ruhlman is about to replevy the said goods and return them to the said Albert Mathias by virtue of the said writ of replevin issued out of the said District Court at the suit of thesaid Albert Mathias against the said Edward Naylor, Sr.

NOW, THEREFORE, if the said Albert Mathias shall prosecute the said cause with effect and without delay, and shall return the goods and chattels in case a return shall be awarded, then this obligation to be void; otherwise to remain in full force and virtue.

ALBERT MATHIAS, (L. S.)
GEORGE H. KNAPP, (L. S.)

Signed, sealed and delivered
in the presence of
R. M. J. Smith.

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

George H. Knapp, of full age, being duly sworn according to law, on his oath, deposes and says, that he is the surety in the within bond named;

that he is a resident and freeholder of the County of Mercer, State of New Jersey; that he has property subject to execution worth the sum of six hundred dollars, over and above all his just debts and liabilities.

GEORGE H. KNAPP.

Sworn to and subscribed before me
this ninth day of March, A. D., 1916.
R. M. J. Smith,
Master in Chancery of N. J.

Affidavit of Wiliam Douglas

DISTRICT COURT OF THE CITY OF TRENTON

State of NewJersey, } ss:
County of Mercer, }

ALBERT MATHIAS,
Plaintiff,
vs.
EDWARD NAYLOR, SR.,
Defendant.

William Douglas, of full age, being duly sworn according to law, on his oath deposes and says, that he is familiar with the goods and chattels set forth in the writ of replevin issued at the instance of the plaintiff in the above-entitled action; that he has personally examined said goods and knows the value thereof; that he is

entirely disinterested in said action; and that the value of said goods to the best of his knowledge and belief is the sum of three hundred dollars.

WILLIAM DOUGLASS.

Sworn to and subscribed before me
this 9th day of March, A. D. 1916.
R. M. J. Smith,
Master in Chancery of N. J.

Agreed State of Facts

DISTRICT COURT OF TRENTON

EDWARD NAYLOR, SR.,
Plaintiff.
vs.
GEORGE H. KNAPP, *et. al.*,
Defendant.

Settled by the Court.

This was a suit brought by Edward Naylor, Sr., against George H. Knapp and Albert Matthias in the District Court of Trenton, for the recovery of $500.00, on a replevin bond given by the defendants, Matthias and Knapp to the plaintiff, a copy of which is annexed to the complaint copied in the judgment record.

The breach of the replevin bond alleged was that the Ford automobile replevied was not returned to Naylor, the defendant in replevin, in

accordance with the order awarding its possession to him in the replevin suit brought against Naylor in said District Court by said Albert Matthias.

The plaintiff, Naylor, testified that on March 28, 1916, the day following the award of the automobile to him, at 4 o'clock in the afternoon, Matthias and C. Fred Ruhlman, a constable of the District Court, came to Naylor's home in Trenton, with the automobile, and the constable, according to his testimony, said to Naylor: "Here is your car, I am returning it in accordance with the Court's order;" that Naylor then said: "Is it all mine?" and the Constable replied that it was. This conversation was denied by Naylor as to his saying "is the car mine," and the Constable replying thereto. The Constable showed plaintiff a long itemized statement purporting to be a bill of one Jacob S. Mains, a garage-keeper of Atlantic City, for more than $200.00, and the constable said to Naylor that the bill was for supplies and repairs furnished on the automobile while it was in Atlantic City, in the possession of Matthias.

The plaintiff told the constable that he did not know anything about this bill, and that he had not contracted it and would not pay it, and thereupon, the constable said: "I will have to take the car again and will be in the garage on South Warren Street, in Trenton, for thirty days, and if you want to secure the car, you can get it at the garage."

It was testified and the District Court Judge found it to be a fact, that, when Mathias replevied the automobile from Naylor in the first suit, Mathias testified on the trial that he was the

owner of the automobile and made no mention of any bill for repairs or supplies. Mathias had been in possession of the automobile during the winter of 1915-1916 and on the trial of the suit, on the bond the evidence showed that when the automobile was returned to Naylor, it was encumbered by the garage-keeper's lien of more than $200.00. The Court found from the evidence, upon which there was no dispute, that when the automobile was taken from Naylor in replevin, it was not subject to the garage-keeper's lien, but when it was returned to him, pursuant to the order of the District Court Judge, a lien for more than $200.00 under the Garage-keeper's act of 1915, encumbered the automobile, and that the lien had been attached to the car after the judgment in the replevin suit.

The plaintiff, Naylor, contended that the automobile was not delivered to him in the same condition it was in when it was taken from him under the writ of replevin, in that the car was subject to a lien of over $200.00, which was not on it when it had been taken from him, and the trial judge found that such was the fact.

Naylor testified that he had paid $550.00 for the automobile, and that it was a new Ford of the 1915 model; his son, who had operated the car, testified that it was worth $400.00, and also testified how long it had been operated, and the bond in replevin, which was offered in evidence, showed that the value of the car was fixed at $300.00 by a disinterested witness whose affidavit is annexed to the bond and which was filed in behalf of Matthias in the replevin suit.

The trial Judge found that the value of the automobile was $300.00 and gave judgment for

the plaintiff for that sum with interest amounting to $18.00. No evidence was offered by the defendant to contradict the plaintiff's evidence concerning the value of the car, and a motion for a non-suit was made. The case was tried without a jury, and on the ground that value was sufficiently proved, the defendant, Matthias, had not returned the automobile to plaintiff in good faith and in the same condition it was when taken in replevin judgment was awarded to the plaintiff for $318.00 and costs.

At the end of the plaintiff's case, the defendant moved for a non-suit on the grounds that the value of the car has not been proven, and also on the grounds that the car had been returned in the same condition as when replevied.

JOHN A. MONTGOMERY,
Judge.

Judgment Record

(*Filed May 2, 1917.*)

DISTRICT COURT OF THE CITY OF TRENTON

EDWARD NAYLOR, SR., Plaintiff,
vs.
GEORGE H. KNAPP and ALBERT MATTHIAS, Defendants.
} Action at Law.

ALBERT HUGHES, ESQ., Attorney of Defendant.

Judgment Record

State of New Jersey, }
County of Mercer, } ss:

A summons was issued in the above stated cause March 29, 1916, returnable April 3, 1916, at 10 o'clock a. m. and was returned by the constable as follows:

I served the within summons March 29, 1916, on the defendant, George H. Knapp, by reading it to him and giving him a copy.

CHARLES A. SLACK,
Constable.

The said defendant, Albert Matthias, could not be found in the County of Mercer nor has he any abode therein.

CHARLES A. SLACK,
Constable.

April 11, 1916, complaint filed.

Adjourned to day to be fixed. Placed on list for August 7, 1916.

August 7, 1916, plaintiff appeared by James J. McGoogan, the defendant by Albert Hughes, and it further appearing by the return endorsed thereon that the summons was duly served, the court proceeded to hear and determine the cause.

Edward Naylor, Sr., sworn.

Anna Mathias, sworn.

Edward Naylor, Jr., sworn.

C. Fred Ruhlman, sworn. Plaintiff rested.

Albert Mathias, sworn. Defendant rested.

Decision reserved. Briefs to be submitted.

February 21, 1917, the evidence being closed and submitted to the court, judgment was given by the court in favor of the plaintiff and against

the defendant for the sum of $316.50 debt, and costs.

February 21, 1917, upon the demand of the plaintiff, an execution was issued for the aforesaid debt and costs, to Charles A. Slack, constable, which execution was duly returned endorsed as follows: "February 23, 1917, I return this execution in court wholly unsatisfied, not having found any goods or chattels of the within named defendant whereupon to levy to make the same, or any part thereof.

CHARLES A. SLACK,
Constable.

February 23, 1917, statement for docketing issued.

March 7, 1917, Bond and Notice of Appeal filed.

April 16, 1917, order extending time to March 12, 1917, filed.

April 16, 1917, order extending time to April 2, 1917, filed.

April 16, 1917, order extending time to April 17, 1917, filed.

April 24, 1917, order extending time to May 1, 1917, filed.

May 1, 1917, order extending time to May 15, 1917.

I, Henry M. Stratton, Clerk of the District Court of the City of Trenton, do hereby certify that the foregoing is a true copy of the judgment record in the above entitled cause, that the names of the parties to said suit, the date of the issue and return of the summons and the return endorsed theron by the constable, the date of the trial and the judgment of the court in said action, together with all other proceedings had in said

court in said suit are correctly set out as the same appear upon the Docket of said Court.

Witness my hand and seal of said Court at Trenton aforesaid this eleventh day of May, one thousand nine hundred and seventeen.

(SEAL) (Signed) HENRY M. STRATTON,
Clerk.

Specifications

The following is a specification of the determination of the District Court with which the appellants are dissatisfied in point of law;

BECAUSE SAID COURT DETERMINED:

1. That the Court determined that when the automobile, for the return of which the bond was given, was returned to the plaintiff it was encumbered by a garage-keeper's lien of more than two hundred dollars, and when said automobile was taken in replevin it was not subject to said lien; whereas, there was no evidence as to whether said automobile was or was not subject to said lien at the time it was taken in replevin.

2. That said garage-keeper's lien had been attached to said automobile after the judgment in the replevin suit: whereas there was no evidence to that effect.

3. That when said automobile was returned that it was encumbered by a garage-keeper's lien of two hundred; whereas, there was no evidence to that effect.

Specifications

4. That said automobile had not been returned to plaintiff in good faith and in the same condition in which it was in when taken in replevin; whereas, there was no evidence to that effect.

5. The value of said automobile was three hundred dollars; whereas there was no evidence to establish said value.

6. That the affidavit as to value filed in the replevin suit was not competent evidence of the value of said automobile in this suit.

Dated May 16, 1917.

ALBERT HUGHES,
Attorney for Defendants Appellants.

TRENT PRESS, Printing, 14 North Warren Street, Trenton, N. J.

New Jersey Court of Errors and Appeals

EDWARD NAYLOR, SR.,
Respondent,
vs.
GEORGE H. KNAPP AND ALBERT MATTHIAS,
Appellants.
} Action at Law.

BRIEF FOR RESPONDENT.

The first point raised in the appellant's brief is: There was no lien on the automobile when returned to its owner, and hence the judgment of the District Court that there was such a lien is erroneous.

In discussing this first point, it is necessary to point out that the constable, in returning the automobile to the respondent, did not act as an officer of the District Court, but as the bailiff or agent of the lien claimant, because he had the garage bill with him and seized the automobile under the Automobile Lien Act, P. L. 1915, p. 556.

If the lien was a nullity, why did the constable, Ruhlman, seize the car under the repairman's bill, take it away and proceed to foreclose the lien under the Lien Act of

1915? For, while it appears in the State of the Case, on page 15, lines 30 to 35, that the garage keeper's agent took the automobile under the lien claim, it also appears on line 2 to line 5, page 2, of the appellants' brief in the Supreme Court that "The constable then took the car away and proceeded to enforce collection of the two bills under the garage keepers and automobile repairman's Lien Act of 1915, P. L. 1915, p. 556."

It will therefore be seen that while the appellants now ask this court to declare the lien a nullity, yet their agent, the constable, proceeded to foreclose the lien and thus to deprive the respondent of the fruits of his victory in the replevin suit. Surely this is a complete reversal of the position that has hitherto been taken by the appellants in seeking to set aside the judgment.

It is alleged in the appellants' brief that the constable was acting as an officer of the court. He was not. He was acting as the agent of the garage keeper, and was in league with Matthias. He took the automobile to Naylor, the respondent, and pretended to make a delivery of it in accordance with the order of the District Court. A farce it was surely, for he first said that he was returning the car, and then, in the same breath, he said that there was a lien on it which had first to be satisfied. It is not stretching the imagination too far to presume that he went to Naylor's home with the avowed purpose of enforcing the payment of the $200 garage bill by either attempting to enforce an invalid lien dishonestly, or honestly to hold the automobile until the bill was paid. In either event, the appellants should not profit. If Matthias and the constable were in league to cheat Naylor and set up a fictitious lien, the result should fall on them, particularly because if the constable had succeeded in bluffing Naylor out of the $200, it would have been at least a questionable transaction.

Furthermore, the lien act provides that if the supplies

are furnished for the automobile at the request or with the consent of the owner, *or his representative*, the lien may attach; while, therefore, Naylor, the owner, said to the constable that he had not contracted the garage bill and would not pay it, yet the trial court found that the car had been used by Matthias in Atlantic City during the winter of 1915-1916 (State of Case, p. 16, lines 2, 3 and 4), and also that Matthias, in driving the car from and to Naylor, used it after he seized it in replevin and before the constable attempted to return it. Matthias certainly all that time was either the owner or the owner's representative and in possession as the representative of Naylor. There was no conditional bill of sale, chattel mortgage or other public record of ownership; the possession of the car by Matthias in Atlantic City was sufficient warrant for a garage keeper to furnish repairs and supplies for the car.

The lien act is designed to protect the garage keeper. Its scope is wide enough to include not only an owner, but his representative, and goes so far as to provide that the owner may be "a conditional vendee, or a mortgagor remaining in possession, *or otherwise*." Again, supposing the garage keeper had attempted in a direct proceeding against Naylor to enforce his lien, and Naylor replevined the chattel. Could not the lien claimant have prevailed, because Naylor had consented to the use of the car by Matthias pending the determination of the replevin suit, by Naylor's failure to secure the redelivery of the automobile to him under the 126th section of the District Court Act (C. S., p. 1993)? When Naylor failed to secure the redelivery of the car within 24 hours after the constable replevied it, could not the lien claimant have successfully contended that such failure was tantamount to the express or implied consent of the owner of the automobile to the use of it by Matthias,

the plaintiff in replevin, and who contracted the repair and supply bill?

The reasoning in the case of *White* v. *Smith*, 44 *N. J. L.* 105, and of the cases there cited, applies with equal force to this case. Naylor's consent to the use of the automobile by Matthias, after failing to secure a redelivery within 24 hours after seizure of the car could have been relied on in the lien claimant's effort to foreclose the lien. It therefore appears that when Matthias used this car, and contracted the bill for repairs and supplies, the garage keeper was innocent and without notice of a question of title, and had no means of determining when employed to supply repairs and supplies to the car, that he was doing so without the consent of the owner.

Matthias ought not to be permitted to argue now that, while he expressly or impliedly represented to the garage keeper that he was the owner of the car, his representations were false and he cheated the garage keeper, who had the right to presume that possession of a chattel by Matthias meant ownership. Naylor's disclaimer of the bill would have, we insist, availed him nothing as against the attempt of the garage keeper to enforce his lien in a direct proceeding between the lien claimant and Naylor as owner.

The possession of the automobile by Matthias while the bill was contracted must be presumed to have been lawful, until the award of possession to Naylor. There is nothing in the case to lead the court to assume or suspect that the possession of the car by Matthias during the making of the repairs and furnishing of the supplies was unlawful.

The Automobile Lien Act of 1915 should be construed in favor of the lien. It does not appear that Naylor did not consent to the garage keeper's furnishing repairs and supplies. Naylor merely denied that he had contracted the bill and refused to pay it, because he

knew nothing of it. This attitude may have been based on the amount of the bill or unnecessary and exorbitant charges. Naylor has never denied the lien; on the contrary, his election to sue on the replevin bond shows that he conceded the validity of the lien, or he otherwise would have replevied the car from the constable during the thirty day period in which it was held by the constable pending the foreclosure of the lien.

The finding of the District Court in this case was based, so far as the lien was concerned, on a mixed question of law and fact, and hence is not here reviewable, because the conclusion is legally inferable from the facts proven. *Ruppert* v. *Zang*, 73 *L.* 216.

Not only did Naylor, the respondent, presume that the lien was good, but Matthias also conceded it, and so also did the constable who sold the car to satisfy the lien claim.

Matthias helped to erect the lien, and is estopped now from contending for its nullity. He accompanied the constable on the visit to Naylor's home, and heard the constable fix the lien of the garage keeper under the 1915 act. It is not necessary that the supplies or repairs be furnished for the automobile at the request or with the consent of the owner, but also at the request or with the consent of the owner's representative. For all that appears in the case, Matthias might have been a conditional vendee, or a mortgagor in possession, and if he were, then unquestionably the lien was good and valid. The appellants are therefore asking this court to find that Matthias was nothing else but a thief or a person without the shadow of title when he had the supplies and repairs furnished.

Matthias had possession of the car, legally gained by his writ of replevin. The car was put into his possession by the provisions of the District Court Act. It was not incumbent on the garage keeper to seek out the records

in all courts to ascertain the true ownership of the chattel. Possession was lawfully in Matthias until the District Court ordered the return, and while Matthias had this lawful possession the supplies and repairs were furnished (State of Case, p. 16, lines 12 to 21).

The automobile was not returned in the same condition it was in when taken in replevin. This constitutes a sufficient breach of the replevin bond. It is axiomatic that the property must be returned in the same condition it was in when replevied. An automobile returned after trial of a replevin suit and subject to a lien of $200, which was not in existence at the time of replevin, is obviously not worth as much as if it were unencumbered.

> "A judgment which is so framed as to permit a return of the property in suit is discharged by a delivery or a proper tender, within a reasonable time, to the holder of the judgment, at his place of business, of all and not merely a portion of the identical property named in the writ in substantially the same condition as when taken, without deterioration in value." 34 *Cyc.* 1551-1152.
>
> "The return of a worthless promissory note, made such by deterioration in value caused by the judgment debtor's retention of it, is not a compliance with the judgment." *Fair* v. *Citizens' Bank*, 69 *Kan.* 353.

This Kansas case fits the case at bar exactly, for when Matthias attempted to return the automobile to Naylor it had deteriorated at least one-half of its value by the imposition of the lien.

> "To avoid liability on his replevin bond, plaintiff must tender the property to defendant in the same condition in which he received it, within a reasonable time after judgment for its return." 34 *Cyc.* 1574.

In ascertaining the exact time when the lien attached, we must look to page 15 of the Case, lines 19 to 27, where the respondent testified that the constable on returning the property said that the bill was for supplies and repairs furnished on the car while it was in Atlantic City in the possession of Matthias. This referred to the time between the taking in replevin on March 9, 1916, and the alleged return on March 28, 1916.

> "The party to whom the return is ordered to be made must derive some substantial advantage therefrom; a fraudulent or pretended return is no return in law. The offer of return must be unconditional and the acceptance of it must be unconditional. * * * Plaintiff cannot say he surrenders and returns it, but in fact still holds it by a keeper; he must make a *bona fide* return and release all control over it." *Cobbey on Replevin, Sec.* 1189.

The alleged return in his case, we believe, was a mockery. The constable went to Naylor's home confessedly to deliver the automobile, but not until the garage bill was paid. That fact is clear. If that mental condition existed in the constable and Matthias, was there, despite the constable's words to Naylor, a complete delivery of the article? Was the constable returning the automobile, "In accordance with the court's order," when his principal had a lien on it, and gave Naylor no manual control over the article?

This contention is a collateral attack on the validity of the lien. The case was tried before the District Court on the theory that a lien existed on the car. The court found that there was a lien. The lien has been foreclosed, and now the appellants seek to have that lien declared a nullity which Matthias himself set in motion by handing the garage bill to the constable for collection.

The court will observe that no attack on the validity of the lien has heretofore been made.

Matthias, one of the appellants, accompanied the constable when he took the automobile from the possession of the respondent under the Lien Act of 1915, and Matthias now says that his agent, the constable, had no right to enforce the lien.

In the Supreme Court, on page 1, line 29, to page 2, line 8, of their brief, the appellants conceded that there was a valid lien on the automobile, for it is there admitted that, after the respondent refused to take the car subject to the lien, the constable, Ruhlman, "*then took the car away and proceeded to enforce collection of the two bills under the Garage Keeper and Automobile Repairman's Lien Act of* 1915, *P. L.* 1915, *p.* 556."

Now, it has never been questioned before the District Court, or the Supreme Court, that the lien existed and that the lien was not foreclosed. This point was raised in the Court of Errors for the first time, in the brief of appellants, and is inconsistent with the admissions in the appellants' brief in the Supreme Court.

It appears in the Case, page 15, lines 19 to 27, that the garage keeper furnished *repairs* for the automobile. He, therefore, irrespective of the 1915 automobile lien statute, had a common law lien on the chattel, because he had enhanced its value, and this lien was strong enough under the case of *White* v. *Smith*, 44 *L.* 105, to override the plea of the owner that he had not authorized the repairs.

We must remember that the lien claimant is not a party to this cause. He was not produced by the appellants in the trial court to rebut the presumption of the validity of the lien, raised by the respondent, and he has enforced his lien by selling the automobile.

The other point raised in appellants' brief challenges the sufficiency of the proof of value.

There was the evidence of the owner who gave the price he paid for the new Ford automobile. There was the evidence of its age, the evidence of Edward Naylor, Jr., who had operated the car, and finally the affidavit of the disinterested witness produced on the replevin bond. Furthermore, there was absolutely not the slightest contradiction of any of this testimony offered by the appellants in the trial court. There was nothing offered by them to negative any of the elements of value offered by the respondent. There was, on the respondent's closing his case in the trial court, certain and positive testimony of value, and of sufficient certainty to send the case to a jury. The appellants' remedy was to deny the valuation submitted by respondent, but there is nothing in the record to show that the damages assessed by the trial court are excessive, and if the appellants neglected at the trial to produce testimony of the value of the automobile the verdict ought not now to be disturbed.

The respondent and his son testified as to the value, and there was an affidavit of value on the bond given by appellants in the replevin suit, which fixed the value at $300, and appellants should be estopped from impeaching their own bond. However, there was not a bit of testimony offered by the appellants as to the value, and they did not contradict, until the appeal, the valuation given by respondent, and they do not say now what was the value of the property.

The affidavit of value on the replevin bond was evidence of value. It should be admitted in evidence to assist the court in determining value, with the aid of the other testimony in the case, and also the failure of the appellants to offer any evidence of value or to impeach the valuation given by the respondent and his son, was enough to convince the trial court that the property was worth $300.

When appellants gave the bond for $600 in replevin,

the value had been fixed by a witness procured by them and when they entered into that $600 bond, they must have been satisfied that the appraiser whom they had selected made a fair valuation. Matthias knew the value of the automobile, and if the appraiser valued it too low or too high, he should have produced another appraisement, before deceiving the court in procuring a writ of replevin on a false affidavit.

It will be seen, on page 12 of the Case, lines 10-14, that the appellants, over their signature, admit that "it appears by the affidavit of William Douglass, a disinterested witness, that the value of the goods about to be replevied is three hundred dollars." This written admission of the appellants they now ask this court to declare a mere scrap of paper.

The judgment of the Supreme Court affirming the judgment of the District Court should be affirmed.

Respectfully submitted,

JAMES J. McGOOGAN,

Attorney and Counsel for Respondent.

New Jersey Court of Errors and Appeals

EDWARD NAYLOR, SR., Plaintiff-Appellee, vs. GEORGE H. KNAPP and ALBERT MATTHIAS, Defendants-Appellants.	Action at Law

BRIEF FOR APPELLANTS

This case originated in the District Court of the City of Trenton, and resulted in a judgment for the plaintiff-appellee for $318. It was brought on a replevin bond given by the appellants to the appellee, conditioned for the return of a "Ford" automobile in the event of the appellee being the successful party. The state of demand alleges that the District Court ordered the appellant, Matthias, to return said automobile to plaintiff. The breach alleged was that said automobile had not been returned. The Supreme Court affirmed the judgment.

Facts Of The Case

1. The replevin suit resulted in an order that the "Ford" auto-car be returned to the appellee.

2. That the day following the order, one Ruhlman, a Constable of the District Court, went to appellee's home with the said automobile, and the Constable said to appellee:

> "Here is your car. I am returning it in accordance with the court's order."

3. When the automobile was returned to the appellee, pursuant to the order of the District Court Judge, a lien for more than $200. under the Garage Keeper's Act of 1915, encumbered the automobile. State of the Case, p. 16, l. 12, etc.

4. That the lien had been attached to the car after the judgment in replevin.

5. That the automobile when taken in the replevin suit was not subject to the Garage Keeper's lien.

6. That the value of the automobile when taken was determined to be $300.

The Law Question

The appellee contended "that the automobile was not delivered to him in the same condition it was in when it was taken from him under the writ of replevin, in that the car was subject to a lien of over $200. which was not on it when it was taken from him," and the trial judge found that such was the fact. (State of the Case, p. 16, line 22 etc). The defendant moved for a non-suit on two grounds, first, that the value of the car had not been proved, and, second, that the car had been returned in the same condition as when replevined.

Argument

The narrow question in this case is, was the car, when delivered to the appellee, subject to a *Garage Keeper's lien?* The Act (Laws of 1915, p. 556, Chap. 312) provides (Section 1) that all persons engaged in the business of keeping a garage, keeping or repairing motor vehicles, and in connection therewith maintains or repairs motor vehicles, or furnishes gasoline, accessories or other supplies, at the request or with the consent of the owner, or his representative, whether such owner be a conditional vendee or a mortgagor remaining in possession, or otherwise, have a lien upon such motor vehicle for the sum due. * * * and may, without process of law, detain such motor vehicle at any time it is lawfully in his possession until such sum is paid. And in Section 2, that such persons shall not lose such lien by reason of allowing the motor vehicle to be removed from the control of the person or corporation having such lien, and in case the motor vehicle is so removed, the person having said lien may seize the said motor vehicle wherever the same is found within the State of New Jersey. And in Section 3, that such property shall after the expiration of thirty days from the date of such detention, be sold at public auction, upon notice of sale being published in the municipality in which the said garage is located.

The elements necessary to constitute a lien are, therefore, that the repairs shall be made or accessories furnished at the request of, or with the consent, of the owner. The lien was attached after the judgment in the replevin suit, and during the period that the appellant Matthias had

the automobile under the replevin suit. The idea contained in the word "owner" is possession, control and title of the car. When Matthias' control ceased, the lien, even if there was one as to him, and incurred while he was in possession of it, ceased with his losing control. The act does not indicate that the true owner's title shall be encumbered, unless with his consent, or at his request.

Parker v Horning Co.
1916 7 L.R.A. 935
188 S.W. 54
15 Ur. 108
76 Ur 324

The facts, therefore, found by the court that Naylor had not contracted the bill, (p. 14, ll. 15, 29 etc.) and would not pay it, and that the lien was attached after the judgment, negative the idea of either request or consent of the owner Naylor. The lien, therefore, which the court found encumbered the automobile when it was delivered to Naylor, was a mere nullity.

In *Marley v. State,* 58 N. J. L. 207, and cases there cited, it is held that where the facts stated show that the thing, if done, is nugatory, when done, is a mere nullity.

Therefore, when the car was returned to Naylor, the supposed Garage Keeper's lien did not exist, was a mere nullity, and the title of Naylor could not be defeated.

Furthermore, the state of the case shows that the court made an order awarding the possession of the car to Naylor. (See pp. 10, 11, ll. 8, 9 and 10, Complaint, and p. 15, ll. 8, 9, 10, 11 and 12; also ll. 13 to 20; p. 16, ll. 11 to 15). It further shows that the Constable of the District Court went to Naylor with the automobile and said to him,

> "I am returning the car in accordance with the court's order."

The only apparent right or reason for Ruhl-

man's having the car, was that he was a Constable of the District Court of the City of Trenton, and had the car, and was making delivery of it, in obedience to the court's order. The person who had possession of the car preceding this return to Naylor, was Matthias. The reasonable inference, therefore, is that the Constable had taken the car from Matthias in obedience to the court's order. Hence, when Ruhlman took the car from Matthias' control, the appellant Matthias was not concerned with subsequent events.

In *Jardine v. Cornell,* 50 N. J. L. 485, at p. 489, it is stated that where a police officer takes a disorderly person from the scene of his disorder to the police station, *it will be presumed to have been done in his official character.*

Section 138 of the District Court Act, Comp. Stat. p. 1996, is the one under which power was given to the District Court to make an order for the return of the goods to the successful party. This remedy is given to the party succeeding at the trial, instead of pursuing his remedy for damages, or by action on the bond. And the court may enforce the performance of his order in the nature of a writ of restitution, or by an attachment for contempt. Hence, when this order was made, pursuant to this section of the statute, and Constable Ruhlman, who is styled "constable of the District Court," took the car from Matthias, the presumption is that he was exercising his functions as an officer of said court in obedience to the order of said court. By the express terms of this section, no action on the bond against the appellant Knapp could be entertained. The car was delivered, and the plaintiff-appellee had clearly elected to take the car instead of an action for damages on the bond. At the most, the only li-

ability of the parties on the bond was for the costs in the replevin suit, and as no mention is made of those costs, either in the complaint or state of the case, it is fair to presume that there is nothing due thereon.

Secondly, The Motion For Non-Suit, On The Ground That The Damages Had Not Been Proved, Should Have Been Granted

The evidence as to damages was the statement made by Naylor that he paid $550. for the automobile. Such evidence is not admissible, unless it be shown that it was a fair sale. If he bought it at a forced sale, the price made thereat could not be received in evidence. The son's testimony that the automobile was worth $400., was of no more value than any other person. The fact that he was the appellee's son does not make him an expert on the value of cars. The appraisement by a disinterested witness in the replevin action, is binding on neither party. The witness is selected by the officer who is to execute the writ to protect him in fixing the amount of the bond given by the plaintiff in replevin. The only breach, therefore, which the plaintiff was entitled to in this action, was the costs in the replevin suit.

The plaintiff relied on this evidence as the foundation for substantial damages, and he is estopped by the position which he took in the trial court from suggesting that the appellants were liable for nominal damages, and, therefore, the motion for a non-suit may have been technically improper. Such a technical answer should not at this day, when technicalities are eschewed, be allowed to maintain the award for damages.

The appellant in this case is the bondsman-surety Knapp, and he is entitled to have his obligation strictly construed. Such is the right of a surety.

I therefore confidently urge that the appellee could not be entitled to $300. The most that he could have suffered was the amount of the garage keeper's lien. That I have shown was a nullity. The costs in the replevin suit were not shown. Hence, the judgment of the Supreme Court affirming the District Court was erroneous, and judgment should now be entered reversing the judgments below, and awarding judgment final in favor of the appellants, with their costs to be taxed.

ALBERT HUGHES.

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of ~~Attorney and~~ Counsel
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