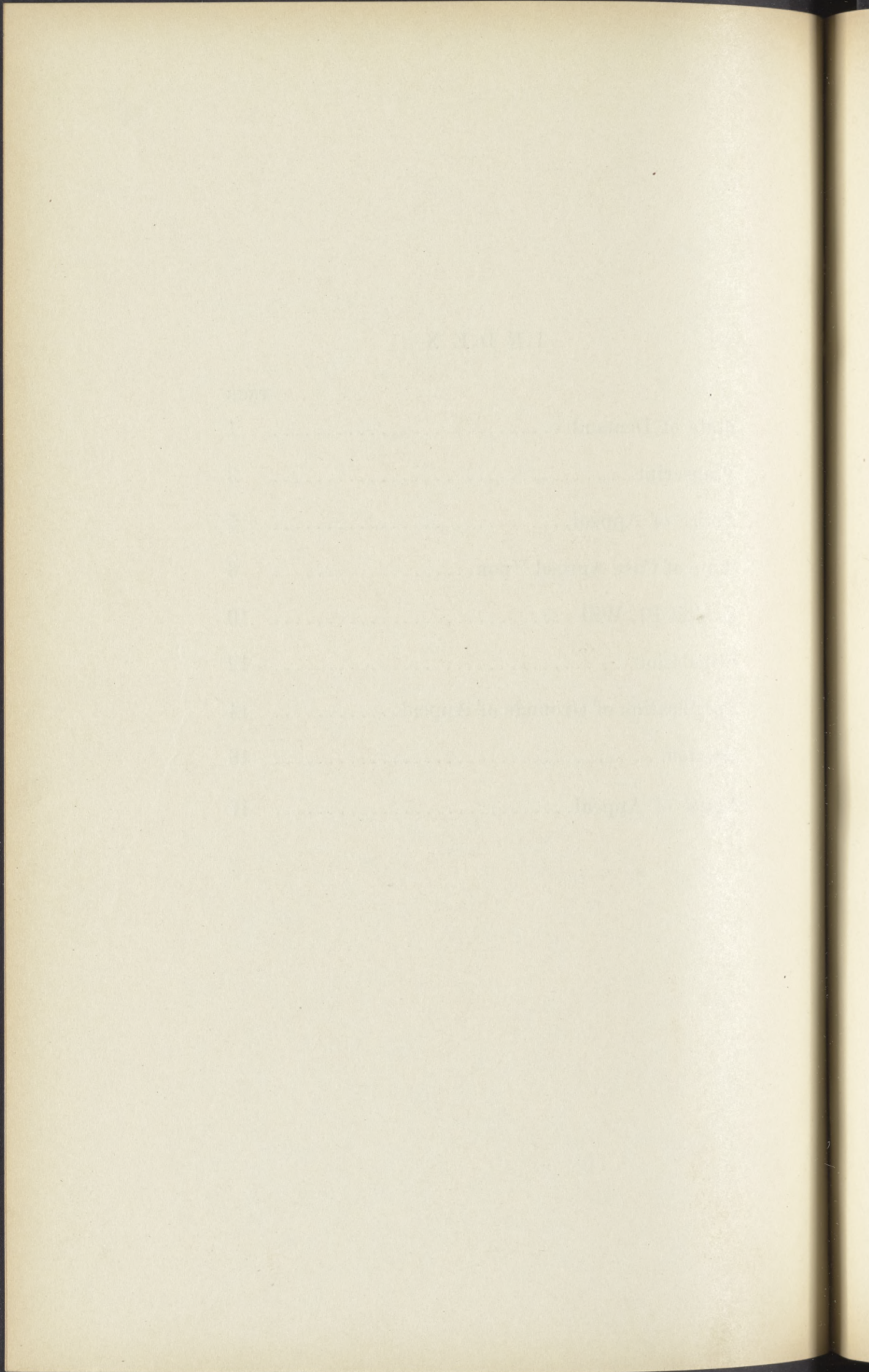


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STATE OF DEMAND.

DISTRICT COURT OF THE CITY OF
TRENTON.

ETHEL VOORHEES, execu-
trix of the Estate of
ETHEL CATHERINE
THOMAS, deceased,
Plaintiff, } 10
v.
THOMAS THOMAS,
Defendant. }
Action at Law.
State of Demand.

Plaintiff, residing in the City of Trenton, County 20
of Mercer and State of New Jersey, says that:

1. On or about the 16th day of July, 1928, Ethel Catherine Thomas died, leaving a will, which said will was duly probated in the Mercer County surrogate's office.

2. By said will, testatrix named the plaintiff, Ethel Voorhees, as the executrix, and said plaintiff qualified as executrix on the 7th day of August, 30
1928.

3. On or about the 7th day of August, 1928, plaintiff was and ever since has been the owner of the following goods and chattels, to wit:

1 dining room suite.

Breakfast set.
 Victrola (Cheney).
 Bed.
 Cedar chest.
 40 pieces of linens.
 Draperies.
 Open gold band set of dishes, two plaques.
 3 lamps.
 4 vases.

10 1 diamond ring, and all other clothes of the deceased.

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

5. On that day defendant wrongfully took said goods and chattels from the possession of the plaintiff, and has ever since wrongfully detained, and still wrongfully detains the same.

Plaintiff demands possession of said goods and chattels, and one hundred (\$100.00) dollars damages for their detention.

FRANK J. BACKES,
Attorney of Plaintiff.

TRANSCRIPT.

IN THE
DISTRICT COURT OF THE CITY OF
TRENTON.

<p>ETHEL VOORHEES, execu- trix of the Estate of ETHEL THOMAS, de- ceased, <i>Plaintiff,</i> v. THOMAS THOMAS, <i>Defendant.</i></p>	}	<p>In Replevin. Summons \$3.00 Mileage .16 Listing fee 1.50 At Law. Frank J. Backes, Plaintiff's Attorney.</p>
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A summons in the above stated cause was issued on the 22nd day of September, 1928, returnable on the 27th day of September, 1928.

By virtue of the annexed writ, the plaintiff having given sufficient security to prosecute, etc., I took the goods and chattels mentioned in said writ, and delivered to the defendant a copy of said writ on the 22nd day of September, A. D. one thousand nine hundred and twenty-eight, and within twenty-four hours thereafter the said defendant did deliver to me a claim of property in said goods and chattels which is hereto annexed and made a part of this return, and also a bond with sufficient surety to deliver the said goods and chattels in as good condition as the same were at the time of making such

30

claim, to the plaintiff or his lawful representatives, if the same shall be adjudged to the plaintiff.

CHARLES A. SLACK,
Constable.

September 27, 1928. State of demand filed.

September 27, 1928. Mr. George Gildea appeared
10 for defendant and the cause was adjourned to Oct.
4, 1928. Continued to Oct. 5, 1928.

October 5, 1928. The plaintiff appeared ready for
trial by Frank J. Backes.

Defendant also appeared by George Gildea.

Ethel May Voorhees sworn, will offered P1, Iva
Collins sworn, Mary Ella Sloyan sworn, account
books offered P2, Elsie Sloyan sworn, account with
King offered P3, account with Barlow offered P4. To
be continued on Oct. 18, 1928.

20 Betrice Holpock sworn, Florence Jewel sworn.
Receipt offered D1, Fred W. Jewel sworn, Miss
Voorhees recalled, Mrs. Sloyan recalled. Both sides
rested. Decision reserved.

January 29, 1929. The Court found as follows:

“Possession of all goods and articles (ex-
cepting bed) named in writ in plaintiff; right
of possession of bed in defendant.”

February 8, 1929. Notice of appeal and bond
filed.

30 March 6, 1929. Order extending time of appeal
filed.

March 7, 1929. Order extending time of appeal
filed.

I, FRANK MUCCIOLI, clerk of the District Court
of the City of Trenton, do hereby certify the fore-

going to be a true statement of the names of the parties in the above suit, the amount and date of judgment given in said court in the above stated case, as the same are recorded in the docket of said court in the above stated cause.

Witness, my hand and seal of said court this 30th day of April, A. D. 1929.

(Seal) (Signed) FRANK MUCCIOLI,
Clerk.

10

NOTICE OF APPEAL.

DISTRICT COURT OF THE CITY OF
TRENTON.

ETHEL VOORHEES, execu-
trix of the Estate of
ETHEL CATHERINE
THOMAS, deceased,
Plaintiff,
v.
THOMAS THOMAS,
Defendant.)

Action at Law.
In Replevin.
Notice of Appeal.

20

30

To the Above-named Plaintiff and Frank J. Backes,
Esq., Her Attorney:

Take notice that the defendant, Thomas Thomas, hereby appeals 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 29th day of January, 1929.

GEORGE GILDEA,
Attorney for Defendant.

[ENDORSED]

10 Service of the within Notice is hereby acknowledged this 8th day of February, 1929.

Frank J. Backes,
Attorney for Plaintiff.

STATE OF CASE AGREED UPON.

20 DISTRICT COURT OF THE CITY OF
TRENTON.

<p>ETHEL VOORHEES, executrix of the Estate of ETHEL CATHERINE THOMAS, deceased, <i>Plaintiff,</i></p>	}	<p>Action at Law. On Appeal. State of Case Agreed Upon.</p>
v.		
<p>30 THOMAS THOMAS, <i>Defendant.</i></p>	}	

FRANK J. BACKES, attorney for plaintiff-appellee.
GEORGE GILDEA, attorney for defendant-appellant.

The parties hereto, by their respective attorneys, submit the following as the state of the case for appeal:

This was an action in replevin in which the plaintiff claimed that the defendant wrongfully took possession of certain goods and chattels which were the property of the plaintiff's testatrix, on July 16, 1928, and thereafter wrongfully detained the same.

The defendant served upon the constable who replevied the goods and chattels in question a claim of property and gave bond and retained possession of the goods and chattels. 10

The property sued for was described in the writ and in the state of demand as follows:

One diamond ring.

One dining room suite.

One breakfast set.

Forty pieces of linens.

Draperies.

Open gold band set of dishes and two placques. 20

Three lamps.

Four vases.

All the clothes of the decedent.

One cedar chest.

One bed.

One Victrola (Cheney).

At the trial, the plaintiff testified that she personally had given to her testatrix, ten pieces of linen and two vases, linen including two buffet sets and one bureau cover. She testified that the defendant and plaintiff's testatrix had been married to each other since 1922, but that they did not go to live together until some time later. She offered in evidence a certified copy of the will of Ethel Catherine Thomas. She also testified that she had caused a letter to be written to the defendant, demanding possession of the articles named in the will. 30

The will provided that the testatrix's brother, William Sloyan, should have all her furniture in the premises known as 24 Vermont Street, and the word "furniture" was construed to mean dining room suite, breakfast set, Victrola (Cheney), bed, cedar chest, linens, draperies, dishes and lamps. The sister of the testatrix, Elsie May Sloyan, was given the diamond ring, fur coat, and all of her clothes. The plaintiff was appointed executrix.

10 Iva Collins was called as a witness by the plaintiff and testified that she was the bookkeeper of the King Furniture Company, and she produced their account with Miss Ethel Sloyan, showing a purchase of a ten-piece dining room suite, and that said account was paid in full.

Mrs. Ellen Sloyan, mother of the decedent, testified that she went with her daughter to King's Furniture Company, where her daughter purchased the dining room suite. The witness stated that her
20 daughter was employed at the Imperial Porcelain Works, and that every week her daughter gave her money out of her weekly earnings to pay King's on account. The witness also said she bought the breakfast set and gave it to her daughter, and that the set of dishes and two plaques were given to her daughter by the witness, Mr. Sloyan and Elsie Sloyan as a Christmas present, and that the defendant received a separate gift himself for Christmas. The witness also said that she presented her daughter
30 with two silk panel draperies, for which an account was offered in evidence, and that she made some of the other draperies, which she gave to decedent for her house.

Elsie Sloyan testified that she had given her sister, the decedent, linens, three porcelain lamps and a vase which she had brought with her from Bermuda. The witness also testified that she went with

the decedent to Barlow's Son Company, where the decedent purchased a Cheney talking machine and records, and that she was with the decedent when she made payment of this account.

Plaintiff also offered in evidence a copy of a contract made between G. A. Barlow's Son Company and Mrs. Ethel Thomas, for the purchase of a Cheney Talking Machine and records.

Mrs. Beatrice Hoppock, called by the defendant, testified that she heard Mrs. Sloyan say in the presence of the witness that she gave them the dining room suite, or at least half of it, and they paid for the other half. 10

Mrs. Florence Jewell testified that Mrs. Sloyan told her that she gave one-half of the dining room suite, and that they paid for the other half; that she and Mrs. Sloyan gave them a breakfast set.

Defendant testified that his mother-in-law, Mrs. Sloyan, had said that she was giving one-half of the dining room suite to him and his wife, and that they were to pay for the other half. 20

The defendant said he bought the bed in question and produced a receipt showing it was bought in his name. He said that he gave the cedar chest to his wife before they were married, and that the same was true of the diamond ring; that his wife bought the draperies and the Victrola and that they were paid for with his money. The defendant testified that he did not have the fur coat as his wife had placed it in storage and he did not know where the receipt was. 30

The Court reserved decision, and subsequently, on January 29, 1929, the Court found as follows:

"Possession of all goods and articles (except the bed) named in writ in plaintiff; right of possession of bed in defendant."

FRANK J. BACKES,

Attorney for Plaintiff.

GEORGE GILDEA,

Attorney for Defendant.

EXHIBIT P1.

LAST WILL AND TESTAMENT
of
ETHEL CATHERINE THOMAS

10 I, ETHEL CATHERINE THOMAS, a resident of the City of Trenton, County of Mercer and State of New Jersey, being of sound mind and memory, do make, publish and declare this my last will and testament, hereby revoking any and all wills by me heretofore made.

1. I give and bequeath to my brother, WILLIAM SLOYAN, all my furniture, in the premises, located at 24 Vermont Street; the word "Furniture" herein used shall be construed to mean my dining
20 room suit, breakfast set, victrola (Cheney), bed, cedar chest, linens, draperies, dishes and lamps.

2. I give and bequeath unto my sister, ELSIE MAY SLOYAN, my diamond ring, fur coat and all my other clothes.

3. I hereby make, constitute and appoint, ETHEL VOORHEES, as the executrix of this my last will and testament, and I direct that she do
30 each and every act necessary to be done for the purpose of carrying out the provisions of this will, as hereinbefore directed and provided.

In Testimony whereof, I have to this my last will and testament, set my hand and seal this 4th day of July, One Thousand Nine Hundred and Twenty-Eight.

Ethel Catherine Thomas (L.S.)

SIGNED, SEALED, PUBLISHED and DECLARED, by the said ETHEL CATHERINE THOMAS, as and for her last will and testament, in the presence of us, both being present at the same time, who at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

Ethel May Voorhees (L.S.)

Frank J Backes (L.S.)

10

[ENDORSED]

LAST WILL AND TESTAMENT
OF

ETHEL CATHERINE THOMAS,

Deceased.

20

Probated August 7, 1928.

Recorded in Book of Wills,
Fol. Surrogate's Office,
Mercer County.

30

showing the purchase on February 3, 1923, of furniture and household effects amounting to \$276.45, and the subsequent payment thereof by installments, need not be printed in the state of the case.

It is further stipulated and agreed that the plaintiff's Exhibit P III, being the ledger account of Miss Ethel Sloyan with the King Furniture Company, of Trenton, showing the purchase and payment for the furniture and household effects referred to in P (2), accompanied by an itemized bill showing the purchase by Miss Ethel Sloyan of the following articles, having a total price of \$276.45, to wit: "Walnut Buffet, Walnut Ex Table, Walnut China Closet, Walnut Server, Walnut blue Lea Arm Chair, Walnut blue Lea Chair, and Gold Band Dinner Set," need not be printed in the state of the case. 10

It is further stipulated and agreed that the plaintiff's Exhibit P IV, consisting of ledger account between Mrs. Ethel Thomas and G. A. Barlow's Son Co., of Trenton, New Jersey, showing the purchase on January 11, 1924, of one Cheney Talking Machine, \$165.00, and records, \$5.00, accompanied by a contract for the purchase of said talking machine and records signed "Ethel Thomas," dated January 11, 1924, need not be printed in the state of the case. 20

It is further stipulated and agreed that the said exhibits shall have the same force and effect as if printed in full in the state of the case.

FRANK J. BACKES,

Attorney for Plaintiff-Respondent. 30

GEORGE GILDEA,

Attorney for Defendant-Appellant.

SPECIFICATION OF GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

10	ETHEL VOORHEES, execu- trix of the Estate of ETHEL CATHERINE THOMAS, deceased, <i>Plaintiff-Respondent,</i> v. THOMAS THOMAS, <i>Defendant-Appellant.</i>	} On Appeal. Specification of Grounds of Appeal.
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20 The following is a specification of the determina-
tions of the District Court with which appellant is
dissatisfied in point of law:

1. Said District Court erred in giving judgment
in favor of the plaintiff-respondent and against the
defendant-appellant, because no evidence of the
value of the property replevined was offered, al-
though said property was retained by the defen-
dant-appellant and bond given by him pursuant to
law.

30 2. Said District Court erred in giving judgment
for the return of said property to the plaintiff-re-
spondent, because the defendant-appellant, pursu-
ant to the statute in such case made and provided,
duly served a claim of property, gave bond and re-
tained possession of the property in question.

3. The said District Court erred in giving judgment in favor of the plaintiff-respondent, because there was no evidence that the property in question was unlawfully taken by the defendant-appellant and there was no evidence that possession thereof, had been demanded of him before the institution of these proceedings.

GEORGE GILDEA,
Attorney for and of Counsel
with Defendant-Appellant. 10

[ENDORSED]

Due and legal service of the within Specification of Grounds of Appeal is hereby acknowledged this 3rd day of May, 1929. 20

Frank J. Backes
Attorney for Plaintiff-Respondent.

OPINION.

(Filed June 21, 1929.)

NEW JERSEY SUPREME COURT.

No. 457, May Term, 1929.

10

ETHEL VOORHEES, executrix
of the Estate of ETHEL
CATHERINE THOMAS, de-
ceased,
Plaintiff-Respondent,

v.

20 THOMAS THOMAS,
Defendant-Appellant.

Submitted May 8th

Decided

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

30

For plaintiff-respondent, FRANK J. BACKES.
For defendant-appellant, GEORGE GILDEA.

Before JUSTICES PARKER, BLACK and BODINE.

Per Curiam.

This was an action of replevin instituted in the District Court of the City of Trenton. The judgment is assailed on two grounds: First, that there was no proof as to the value of the goods in question and, second, that since the possession of the defendant was not unlawfully taken, that there was no proof of a demand for their return having been made. The record does show that there was evidence as to the value of the goods in question, and 10 that a written demand for their return was made before the action was commenced.

The judgment should be affirmed.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

20

ETHEL VOORHEES, executrix
of the Estate of ETHEL
CATHERINE THOMAS, de-
ceased,

Plaintiff-Respondent,

v.

THOMAS THOMAS,

Defendant-Appellant.

Action at Law.
Notice of Appeal.

30

*To the Above Named Plaintiff-Respondent, and
Frank J. Backes, Esq., her Attorney:*

Take notice that the defendant-appellant appeals to the Court of Errors and Appeals from the judg-

ment entered in the above-entitled cause upon the following ground:

The Supreme Court erred in affirming the judgment entered in said cause.

Respectfully yours,

GEORGE GILDEA,

Attorney for Defendant-Appellant.

Dated, August 22, 1929.

10

[ENDORSED]

Service of the within Notice of Appeal is hereby acknowledged this 26th day of August, 1929.

20

Frank J. Backes,
Attorney for Plaintiff-Respondent.

30

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

ETHEL VOORHEES, Executrix of the Estate of
ETHEL CATHERINE THOMAS,
deceased,
Plaintiff-Respondent,
v.
THOMAS THOMAS,
Defendant-Appellant.

ON APPEAL.

BRIEF OF DEFENDANT-APPELLANT.

This is an action in replevin, instituted in the District Court of the City of Trenton. The District Court gave judgment for the plaintiff, and the Supreme Court affirmed the judgment.

The action is to recover possession of certain personal property claimed to have belonged to the plaintiff's testatrix, who was the wife of the defendant. The defendant's wife in and by her last will and testament bequeathed certain articles of furniture, which were in the home which she and her hus-

band had occupied, to her brother, and bequeathed her diamond ring and clothing to her sister. In her will she gave nothing to her husband (p. 10).

There was no evidence that the property which the plaintiff sought to recover had been unlawfully taken by defendant. There was no evidence of any demand upon the defendant for the return of any property. The only testimony on this point was that of the plaintiff. She said that she had caused a letter to be written to the defendant demanding possession of the articles named in the will (p. 7). There was no evidence that this letter was mailed or delivered, or that it ever reached the defendant. There was no evidence of the value of the property sued for.

The plaintiff did not contend in the Supreme Court that there was any evidence of the value of the property claimed, and sought to sustain the judgment upon the authority of *Gropper v. Hoover*, 137 Atl. 837, affirmed 140 Atl. 919.

The Supreme Court disposed of the defendant's contention by saying, "The record does show that there was evidence as to the value of the goods in question, and that a written demand for their return was made before the action was commenced." What constitutes this evidence is not indicated, and the other points raised by the defendant are not mentioned by the Supreme Court.

I.

THE DISTRICT COURT ERRED IN ITS JUDGMENT IN FAVOR OF THE PLAINTIFF, BECAUSE NO EVIDENCE WAS OFFERED OF THE VALUE OF THE PROPERTY SOUGHT TO BE REPLEVINED, AND THE VALUE OF THE PROPERTY WAS NOT FOUND BY THE COURT, AND NO MOTION FOR THE RETURN OF THE GOODS WAS MADE.

The errors mentioned in the foregoing caption are set forth in paragraphs 1 and 2 of the specification of grounds of appeal.

In Section 127 of the District Court Act it is provided that where the constable or sergeant-at-arms who executes the writ of replevin delivers the property to the defendant, upon presentation of a claim of property and a bond, "*if the plaintiff recover, the Court or the jury, if there be a jury, 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 for the value of the goods and chattels as for taking and detaining them.*"

Section 138 of the District Court Act provides that in all actions of replevin, except where the taking is for a distress for rent, if the property is retained by the defendant upon serving a claim of property and giving bond, "*the party succeeding on such issue may, instead of pursuing his remedy for the damages, by execution or by action on the bond, apply to the Court in which the action is pending, for an order that the said goods and chattels 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.”

From the foregoing it appears that in an action of replevin in the District Court, where the defendant gives bond and retains the property, there can be no judgment against the defendant unless the value of the property in question is proved, and if a judgment is rendered in favor of the plaintiff it must be a money judgment. It is true that after such a judgment is rendered the plaintiff may apply to the Court for an order for the return of the goods and chattels. No proper judgment was entered in this case, and therefore no application for the return of the property was or could have been made.

The provision of Section 127 of the District Court Act that the Court or jury find the value of the goods and chattels and give judgment for such value and the plaintiff's damages, in a case where the defendant gives bond and retains the goods, is mandatory, and cannot be disregarded by the District Court.

The only judgment rendered by the District Court was as follows:

“Possession of all goods and articles (except the bed) named in writ in plaintiff; right of possession of bed in defendant.”

The plaintiff relies upon the case of *Gropper v. Hoover* (not officially reported), 137 Atl. 837, affirmed upon the opinion of the Supreme Court, 140 Atl. 919. That case merely holds that in an action in replevin in a District Court, where the defendant gives bond and retains the property, the trial Court may, in its discretion, upon application by the plaintiff, make an order for the return of the goods in

lieu of a money judgment. It must be presumed that the record in that case showed such an application, otherwise Section 138 of the District Court Act would not be invoked. No such application was made in the present case, so the judgment entered was clearly erroneous.

II.

THE DISTRICT COURT ERRED IN GIVING JUDGMENT FOR THE PLAINTIFF, BECAUSE THERE WAS NO EVIDENCE THAT THE PROPERTY IN QUESTION HAD BEEN UNLAWFULLY TAKEN BY THE DEFENDANT, AND THERE WAS NO EVIDENCE THAT THE POSSESSION THEREOF HAD BEEN DEMANDED OF HIM.

Section 118 of the District Court Act provides as follows:

“If the goods or chattels of any person be taken and wrongfully detained, writs of replevin may issue out of any District Court in any county of this State where the goods or chattels may be, in all actions where the value of the goods or chattels of which replevin is sought does not exceed the jurisdiction of the Court.”

Section 119 provides:

“Any unlawful detention of goods and chattels from their lawful owner, or the person entitled by law to the possession of the same, shall be deemed an unlawful taking for the purpose of supporting an action of replevin.”

Where there has been no unlawful taking, it is clear that a demand for the return of the property in question is necessary before an action of replevin can be maintained.

Veador v. Veador, 87 N. J. L. 140;
Crown Co. v. Reilly, 88 N. J. L. 590.

As has been said above, there is no evidence in this case of unlawful taking of possession, nor was there any evidence that possession had been demanded of the defendant. The only testimony upon this point was the testimony of the plaintiff. She said she had caused a letter to be written to the defendant demanding possession of the articles named in the letter (p. 7). There was no evidence that the letter about which the plaintiff spoke was ever mailed or delivered, or that it ever reached the defendant. There was no evidence that he had refused to deliver possession. He would not, of course, be obliged to transport the articles in question from the place where they were at the time of the testatrix's death to some place convenient for the plaintiff.

Clearly there was no evidence in the case of any demand upon the defendant for possession, and refusal by him to give possession.

It is respectfully submitted that for one or all of the reasons above urged the judgment in this case should be reversed.

GEORGE GILDEA,
*Attorney for and of Counsel
with Defendant-Appellant.*

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

ETHEL VOORHEES, Executrix of the Estate
of ETHEL CATHERINE THOMAS,
Deceased,
Plaintiff-Appellee,
v.
THOMAS THOMAS,
Defendant-Appellant.

ON APPEAL FROM THE DISTRICT COURT OF THE
CITY OF TRENTON.

BRIEF OF PLAINTIFF-APPELLEE.

FACTS.

The plaintiff-appellee brought an action in the District Court of the City of Trenton, to recover possession from the defendant-appellant, said goods and chattels mentioned in the writ of replevin and in the state of demand filed in said cause (Case, p. 1). The right to the possession of said goods and chattels inured to the plaintiff by virtue of the last will and testament of Ethel Catherine Thomas.

The goods and chattels in question were in the possession of the defendant and the same were by him unlawfully detained. The plaintiff demanded in said action the possession of said goods and chattels and damages for the unlawful detention. The Court disallowed damages for the detention of said goods and chattels, but found "possession of all goods and articles (except the bed) named in writ in plaintiff; right of possession of bed in defendant."

While there was evidence by the defendant at the trial, respecting the fur coat, the same was not claimed or mentioned in the writ of replevin, nor in the state of demand, therefore, there was no adjudication as to the right of the plaintiff of any fur coat.

ARGUMENT, POINT ONE.

THE DISTRICT COURT DID NOT ERR IN ITS JUDGMENT OF POSSESSION FOR THE PLAINTIFF, BECAUSE NO EVIDENCE WAS OFFERED OF THE VALUE OF THE PROPERTY SOUGHT TO BE REPLEVIED, AND BECAUSE THE VALUE OF PROPERTY WAS NOT FOUND BY THE COURT, AND BECAUSE NO MOTION FOR THE RETURN OF THE GOODS WAS MADE

The defendant argues that by virtue of Sections 127 and 138 of the District Court Act, the plaintiff is not "entitled to a judgment of possession without the entry of a judgment for the value of the goods and chattels in the first instant."

In the case of *Cropper v. Hoover*, 137 Atl. p. 837, 5 Misc. p. 649, affirmed by the Court of Errors and

Appeals; 140 Atl. p. 919; the action in this case was in replevin in the District Court and the judgment was in favor of the plaintiff for the possession of the automobile mentioned in said writ. The defendant in said cause retained possession of the automobile, by giving bond to the constable. One of the grounds of appeal relied upon by the defendant for reversal was: "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 giving bond to the constable." The Court in this case held that this was proper judicial action.

ARGUMENT, POINT TWO.

THE DISTRICT COURT DID NOT ERR IN GIVING JUDGMENT FOR THE PLAINTIFF, BECAUSE THERE WAS EVIDENCE THAT THE PROPERTY IN QUESTION HAD BEEN UNLAWFULLY DETAINED BY THE DEFENDANT, AND THERE WAS EVIDENCE THAT THE POSSESSION THEREOF HAD BEEN DEMANDED OF HIM.

In the State of the Case on (p. 7) counsel agreed that the plaintiff testified that she had caused a letter to be written to the defendant, demanding possession of the said goods and chattels mentioned in the said writ and state of demand. This testimony stood uncontradicted and the defendant does not deny that he ever received the letter which was written to him prior to the institution of the action. In addition to this testimony of the plaintiff in regard to the demand, the defendant went to trial upon

the merits of the case and did not rely upon the want of a demand as a technical defense, but claimed a superior right of title in himself.

34 *Cyc.* 1410 Paragraph H states:

“No demand is necessary where it appears from the facts and circumstances of the case that a demand, if made, would have been futile and unavailing, and this fact may either appear from the acts or declarations of defendant in regard to the property before the action is instituted, or from the position taken by him upon the trial, as where he does not rely upon the want of a demand as a technical defense but contests the right of the plaintiff upon the merits, claiming a superior right to title in himself.”

Coby on Replevin, page 240, paragraph 448, states:

“Where defendant pleads ownership in himself, he cannot defeat recovery under the pretense that he would have surrendered the property if demand had been made.”

Morris on Replevin, paragraph 78, states:

“Where circumstances show that a demand would have been unavailing, no demand is necessary.”

It is, therefore, respectfully submitted that a proper demand was made for the return of the property sued for.

CONCLUSION.

For the reasons hereinabove set forth, it is respectfully submitted that the judgment for possession, in favor of the plaintiff, should be affirmed.

DONALD R. BRYANT,
Of Counsel with Plaintiff-
Appellee.

FRANK J. BACKES,
Attorney of Record of
Plaintiff-Appellee.

