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WRIT OF REPLEVIN

MIDDLESEX COUNTY
THE STATE OF NEW JERSEY } ss.

To any Constable of the said County of Middlesex.

Greeting:

(L. S.)

YOU ARE HEREBY COMMANDED, that if STEPHEN KISS shall make you secure, you cause to be replevied and delivered to him:

One Ford Automobile, maker's number 3660964, New Jersey license 1921, number 108421 which JOHN AMBROSE, trading as UNITED GARAGE took and unjustly detained—as is said:

AND that you summon the said JOHN AMBROSE, trading as UNITED GARAGE to appear before the District Court of the City of New Brunswick, to be held at the City Hall in the said City, on the fifteenth day of December, One Thousand Nine Hundred and twenty-one at ten o'clock in the forenoon, to answer the said STEPHEN KISS of a plea of taking and unjustly detaining his goods and chattles aforesaid:

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

Writ of Replevin

WITNESS, FREEMAN WOODBRIDGE, Esquire, Judge of said District Court, at New Brunswick aforesaid, the eighth day of December in the year One Thousand Nine Hundred and twenty-one.

RAYMOND J. STAFFORD,
Clerk.

EMIL J. HOOS,
Attorney.

BY VIRTURE of the within Writ, the Plaintiff having given sufficient security to prosecute, &c., and no claim of property therein, and no bond being delivered to me by the Defendant, I did on the ninth day of December, 1921, Replevy and deliver to the said Plaintiff the goods and chattels in the said Writ mentioned, and summoned the said Defendant as within I am commanded, by reading the same on John Ambrose and delivering to him a copy thereof.

JOHN J. HARKINS,
Sergeant-at-Arms.

Affidavit of Value

AFFIDAVIT OF VALUE

New Brunswick District Court

Between STEPHEN KISS, Plaintiff, —vs— JOHN AMBROSE, trading as the United Garage, Defendant.	IN REPLEVIN AFFIDAVIT.

Arthur Kemp being duly sworn on his oath says, that he is familiar with the goods set forth in the writ of replevin issued at the instance of the plaintiff in the above stated action; that the said goods are constituted of one Ford Automobile maker's number 3660964, New Jersey license 1921, number 108421; that he has personally examined said goods and knows the value thereof; that he is entirely disinterested in the above stated action, and that the value of said goods, to the best of his knowledge and belief, is the sum of Two Hundred Dollars.

ARTHUR A. KEMP

Sworn and subscribed to before me this 10th day of December 1921
EMIL J. HOOS,
A Notary Public for N. J.

Certified a true copy of original filed in the office of the District Court of the City of New Brunswick.

RAYMOND J. STAFFORD,
Clerk.

State of Demand

STATE OF DEMAND

New Brunswick District Court

Between STEPHEN KISS, Plaintiff, —vs— JOHN AMBROSE, trading as the United Garage Defendant.	IN REPLEVIN STATE OF DEMAND.

The plaintiff demands of the defendant the possession of one Ford Automobile Touring Car, maker's number 3660964, New Jersey 1921 license number 108421, together with damages in the sum of $13.85 for the unlawful detention of the said automobile, for that on the 22nd day of November, A. D. 1921, the plaintiff being the lawful owner and lawfully possessed of the said automobile, conveyed the same to the garage of the defendant and requested the defendant to make certain repairs thereon. The defendant proceeded to make divers repairs to plaintiff's automobile, and after having completed the same, rendered to plaintiff a bill in the sum of $65.70, which said bill is hereto annexed and made a part hereof, all of which items set forth in said bill are of greater amount than authorized by the plaintiff, and all of which being an overcharge for work directed to be done by the plaintiff.

State of Demand

Plaintiff further states that the work performed by the defendant has not been performed in a workmanlike manner, that is to say, so that the automobile of the plaintiff might be in condition to be operated without doing damage to the same.

The plaintiff thereupon refused to pay the aforementioned bill, whereupon the defendant refused to surrender the possession of the automobile aforementioned to the palintiff, and as a result of the unworkmanlike manner in which the defendant has performed his work on the said automobile, the plaintiff has been obliged to expend divers sums of money, in order to condition the aforesaid automobile so that it may be operated, and as a further result of defendant's unlawful refusal to surrender the possession of the aforesaid automobile, plaintiff has been obliged to expend divers sums of money, in order to provide conveyance for himself and his family from home to his business and other places which he would not have been obliged to spend, had defendant performed work according to agreement and in a workmanlike manner.

Plaintiff demands possession of the aforementioned automobile, together with damages in the sum of $13.85.

EMIL J. HOOS,
Attorney for Plaintiff.

Certified a true copy of original filed in the office of the District Court of the City of New Brunswick.

RAYMOND J. STAFFORD,
Clerk.

State of Demand

Nov. 22, 1921

108421 Mr. Kiss

Ford

1.	Gag. overhauling Ford motor labor	$55.00
2.	Timer	2.00
3.	New brush holder	3.00
4.	1½ gal of Oil	1.00
5.	10 gal. of Gas	2.70
6.	Gaskets for motor	1.00
~~7.~~	~~Taxicab from Dun. to Plfd.~~	~~4.00~~
8.	Lock washers for all bolts	1.00
		$65 70

DOCKET ENTRIES

In the District Court of the City of New Brunswick

STATE OF NEW JERSEY
COUNTY OF MIDDLESEX } ss.

STEPHEN KISS, Defendant. —vs— JOHN AMBROSE, trading as the United Garage Plaintiff,	IN ACTION UPON REPLEVIN Att'y of Plf. Emil J. Hoos.

A summons was issued in the above stated cause December 8th, 1921, returnable December 15th, A. D. 1921, at ten o'clock A. M. and was returned endorsed as follows:

By virture of the within writ I took possession of the within described goods and chattels and after retaining possession of the same for twenty-four hours after service of the writ, and a written claim of property not having been served upon me as provided for by section 126, District Court Act, Page 27 (P.L. 1998 Page 605) I turned same over to plaintiff in said writ named.

I served the within summons on the within named defendant John Ambrose this 9th day of

Docket Entries

December A. D., 1921 by reading the same to him and leaving him a true copy thereof.

JOHN J. HARKINS,
Sergeant-at-Arms.

December 8th Plaintiff filed Bond and Affidavit.

December 15th A. D., 1921. This cause was called at ten o'clock in the forenoon.

Plaintiff appeared with Emil J. Hoos, Attorney.

Defendant appeared with William D. Danberry, Attorney, who made a special appearance.

Defendant objected to writ and moved to dismiss the action because the writ is returnable at City Hall, New Brunswick, which is not the place where the Court is held and does not specify the place of holding Court as required by the statute. Plaintiff offered to amend the writ to read at the Court House, and the amendment is allowed and exception granted to the defendant on the ruling of the Court. Defendant then consents to go on without waiving his rights under said exception.

Stephen Kiss and Herbert E. Nelson were sworn and gave testimony on the part of the plaintiff. Plaintiff rests.

John W. Ambrose was sworn and gave testimony on the part of the defendant. Defendant Rests.

Docket Entries

Charles Tuttle was sworn and Herbert E. Nelson recalled and gave testimony in rebuttal on the part of the plaintiff. Both sides Rest.

Thereupon Judgment was given and ordered entered in favor of the defendant. (In Replevin.)

December 29th, 1921. Application being made on notice for the Court to open the judgment and award the defendant damages under the statute, and argument of counsel having been heard. The motion was denied.

December 29th, 1921. Plaintiff filed Bond on Appeal, also order extending time.

January 9th. Plaintiff filed notice of appeal.

I, Raymond J. Stafford, Clerk of the District Court of the City of New Brunswick do hereby certify that the above is a true and correct transcript of the docket in the above cause.

RAYMOND J. STAFFORD,
Clerk of the District
Court of the City of
New Brunswick.

NOTICE TO OPEN JUDGMENT

In the District Court of the City of New Brunswick

STEPHEN KISS, Plaintiff, —vs— JOHN AMBROSE, trading as the United Garage Defendant.	IN REPLEVIN NOTICE.

TAKE NOTICE: That We shall apply to the District Court of the City of New Brunswick, on Thursday, December 29th, 1921 for a writ of Restitution, directing the return of the property replevied in the above entitled cause, which has been delivered by the Sergeant-at-Arms of the District Court of the City of New Brunswick, to Stephen Kiss, plaintiff, or in lieu thereof, will apply to the Court to open the judgment entered on the above cause, and award damages to the defendant, pursuant to the Statutes in such case made and provided (to such Judge as may be holding said Court) at the Court House in tthe City of New Brunswick in the County of Middlesex and State of New Jer-

sey, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon.

Yours respectfully,

KALTEISEN & DANBERRY

40 Paterson Street,
New Brunswick, N. J.
Attorneys of Defendant.

To STEPHEN KISS,
Dunellen, N. J.

Certified a true copy of original filed in the office of the District Court of the City of New Brunswick.

RAYMOND J. STAFFORD,
Clerk.

Notice of Appeal

NOTICE OF APPEAL

New Brunswick District Court

Between STEPHEN KISS, Plaintiff, —vs— JOHN AMBROSE, trading as the United Garage Defendant.	ON CONTRACT NOTICE OF APPEAL.

TO

Messrs. Kalteissen & Danbury
40 Paterson Street,
New Brunswick, N. J.

SIRS:

TAKE NOTICE, That the plaintiff, Stephen Kiss, hereby appeals to the New Jersey Supreme Court from the judgment of the New Brunswick District Court rendered in the above stated action on the 15th day of December, 1921.

EMIL J. HOOS,
Attorney for Plaintiff.

Certified a true copy of original filed in the offices of the District Court of the City of New Brunswick.

RAYMOND J. STAFFORD,
Clerk.

APPLICATION TO STATE CASE

New Brunswick District Court

Between STEPHEN KISS, Plaintiff, —vs— JOHN AMBROSE, trading as the United Garage Defendant.	IN REPLEVIN APPLICATION.

Application is hereby made to the Honorablle Freeman Woodbridge, Judge of the New Brunswick District Court, pursuant to the statute in such case made and provided, to state case for appeal in the above entitled cause, the parties having failed to agree upon the state of the case.

EMIL J. HOOS,
Attorney for Plaintiff.

Certified a true copy of original filed in the office of the District Court of the City of New Brunswick.

RAYMOND J. STAFFORD,
Clerk.

ORDER EXTENDING TIME

New Brunswick District Court

Between

STEPHEN KISS,
Plaintiff,

—vs—

JOHN AMBROSE,
trading as the United Garage
Defendant.

ON APPEAL

ORDER.

Application having been made to the Court, within time, for an extension of time within which to file State of the Case for appeal to the Supreme Court.

It is on the 29th day of December, upon motion of Emil J. Hoos, attorney for plaintiff, ordered, that the time for filing State of the Case in the above cause be extended ten days from the date hereof.

FREEMAN WOODBRIDGE,

Judge of the New Brunswick District Court.

Certified a true copy of original filed in the office of the District Court of the City of New Brunswick.

RAYMOND J. STAFFORD,
Clerk.

JUDGE'S STATEMENT OF CASE

New Jersey Supreme Court

Between STEPHEN KISS, Plaintiff, —vs— JOHN AMBROSE, trading as the United Garage Defendant.	IN REPLEVIN STATE OF CASE.

The parties by their respective Attorneys having been unable to agree upon a State of the Case for the hearing of the appeal in this matter and application being made to me, the same is hereby settled as follows:—

This was an action of Replevin brought by the Plaintiff to recover possession of his Ford automobile mentioned in the Writ which he had left with the Defendant who was a Garage Keeper for repairs. The Defendant claimed right to possession of the property by virtue of the statute, P. L. 1915 Chap. 312, page 556. The Attorney for the Defendant at the opening of the trial moved to dismiss or quash the Writ and desired to appear especially for that purpose on the ground that the Writ was made returnable at the City Hall in the City of New Brunswick, a place where the District Court was not held, and therefore, did not comply with the statute requiring that a Writ shall specify a certain place and time.

Judge's Statement of Case

The motion was overruled and the Court permitted the plaintiff to amend the Writ so as to read at the Court House in the City of New Brunswick, the place where the District Court is held to which Ruling the Defendant's Attorney was allowed an Exception. The case then proceeded.

The Plaintiff was sworn and stated that on or about the 22nd day of November, 1921 he placed his automobile with the Defendant, who was a garage keeper in or near the Borough of Dunellen in the County of Middlesex in this State with instructions to make certain repairs, which at that time he understood would consist in the instalation of piston rings. He testified that on that evening he went to the Defendant's Garage and after a conversation with him, during which the Defendant advised him to have the motor cleaned and the valves reset he gave further instructions to that effect and understood that the automobile would be deliered to him the following day. That after six days the Defendant rendered him a bill for $65. for repairs to the automobile and stated to Plaintiff that he could have the car upon payment of that bill. Plaintiff refused to pay bill on the ground that the charge was exhorbitant, that it included work not authorized by him, and demanded the return of the car. The Defendant refused stating that he claimed the Garage Keepers' Lien under the law in New Jersey and was entitled to hold the car until the work was paid for. The Plaintiff further testified that the work done by the Defendant was not satisfactory, that since he had taken the car by virtue of this Writ he had trouble in starting the same, which trouble he had not had before taking

the car to the Defendant's Garage. He testified on cross examination that he had made no tender of any amount to the Defendant.

Hebert Nelson was sworn and qualified as an expert on the subject of automobile repairs and testified that the work which the Plaintiff testified he had authorized done, if properly done in a good, workmanship manner could be done for the sum of $18.00. Plaintiff rested and the Defendant moved for a non-suit on the ground that it appears that some amount was due for repairs to the car and that no tender having been made of any amount the Defendant was entitled to hold the car by virtue of the statute above referred to giving Garage Keepers lien for repairs and supplies.

The Court reserved decision on the Motion and said it would hear the whole case.

The defendant was thereupon sworn.

He testified that he was a garage keeper and kept a garage known as the United Garage at Dunellen, Middlesex County, New Jersey. The car was brought to him by the Plaintiff to put in piston rings. That he made an examination of the car and found that it needed a thorough overhauling. That before he did any work on the car he so advised the Plaintiff and the Plaintiff instructed him to give the car a thorough overhauling, which he did. He qualified as competent to give testimony as to the reasonable and proper value of the work done in the repairs and overhauling of automobiles, produced an itemized account of his work from his

books, copy of which is hereto annexed, and which was offered in evidence and that the value of the work done and materials and accessories furnished on that car was $65. Asked by the Court if it took him a full seven days of eight hours each to perform the work for which bill was rendered, he replied that his charge for fifty-five hours was $1.00 an hour and that the charge was reasonable and proper.

A witness was produced by the Defendant named Tuttle who testified that he was a carpenter by trade, but was also an automobile mechanic. That he had done twenty-one hours work on this car while at the Defendant's garage. That he was present when the Plaintiff came to the Defendant's garage on the evening of the day that he left the car. That he heard the conversation between Plaintiff and Defendant to give the car a thorough overhauling. Also that he had experience in automobile repairs and that in his opinion the bill for the work done on the car was reasonable and proper. Both sides rested.

Plaintiff's Attorney asked for judgment. The Court held and found as a fact that it appeared that the Defendant had done work on the car in the nature of repairs and the supplying of accessories and that he was a garage keeper within the meaning of the Garage Keeper's Law above referred to and was entitled to a lien by virtue of that law and was entitled to hold the car until his reasonable and proper bill for repairs was paid. The Court suggested that it would determine, by consent of counsel that the reasonable and proper amount for the

work and labor and repairs and accessories done on the car by the Defendant was $47., and that if the Plaintiff's Attorney would agree and consent to pay the Defendant $47., and costs that would end the case and leave possession of the car in the Plaintiff.

Defendant's Attorney agreed to accept this award of the Court if made, but Plaintiff's Attorney refused to consent to any such adjustment.

The Court thereupon denied the Plaintiff's appliaction for judgment for possession and gave judgment for the Defendant on the ground that it appears from testimony that the Defendant had a Garage Keeper's lien under the statute for work which he had done on the car and that no tender having been made to him of any amount for that work he was entitled to hold the car under the Act until his bill was paid or at least until tender of a reasonable and proper amount due was made to him.

Judgment was given for the Defendant, and on application of the Attorney for the Defendant the Court stated that the Sergeant-at-Arms would assign to the Defendant the Replevin Bond pursuant to the statute to the end that the Defendant might take such action on the Replevin Bond as he might be advised was proper.

Plaintiff's Attorney was allowed an exception to the ruling of the Court.

Transcript of the docket, copy of the writ,

Exhibit

pleadings and exhibits must be hereto annexed and returned as part of this State of the Case.
Dated—December 30, 1921

FREMAN WOODBRIDGE,
Judge

District Court of
the City of New
Brunswick.

EXHIBIT D 1

Nov. 22, 1921

108421 Mr. Kiss
Ford

1.	Gag. overhauling Ford motor labor	$55.00
2.	Timer	2.00
3.	New brush holder	3.00
4.	1½ gal of Oil	1.00
5.	10 gal. of Gas	2.70
6.	Gaskets for motor	1.00
~~7.~~	~~Taxicab from Dun. to Plfd.~~	~~4.00~~
8.	Lock washers for all bolts	1.00
		$65.70

SPECIFICATION OF OBJECTIONS

Supreme Court Of New Jersey

STEPHEN KISS Plaintiff-Appellant —vs— JOHN AMBROSE trading as the United Garage Defendant-Respondent	IN REPLEVIN On Appeal from New Brunswick District Court SPECIFICATION OF OBJECTIONS

The following is a specification of the rulings, determinations, or directions of the District Court of the City of New Brunswick with respect to which the plaintiff-appellant is dissatisfied in point of law.

1. The Court held that defendant's retention of the car was legal, although holding it for a larger sum for repairs than the Court found was due.

2. The Court held that, until defendant's bill was paid or a reasonable and proper sum was tendered him, defendant was entitled to retain the car.

3. Defendant failed to prove that the amount of the claim for which he held the car was reasonable, just and proper.

4. Defendant failed to sustain the burden of proof that his retention of the car was legal.

Specification of Objections

5. The Court denied plaintiff's motion for judgment.

6. The Court gave judgment for defendant when the Court should have given judgment for plaintiff.

EMIL J. HOOS,
Attorney for Plaintiff-Appellant.

Opinion

OPINION

(Filed June 7, 1922)

New Jersey Supreme Court

FEBRUARY TERM, 1922

STEPHEN KISS,
Plaintiff-Appellant
—vs—
JOHN AMBROSE,
trading as United Garage,
Defendant-Respondent

Submitted March, 1922. Decided June 6th, 1922.

1. A garage keeper claiming a lien under Chapter 312 of the Laws of 1915 (P. L. 1915 p. 556) for repairs made to an automobile does not waive his lien by demanding an excessive sum, if the garage keeper's demand is made in good faith, and in the belief he is entitled to the sum demannded.

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

On Appeal from the New Brunswick District Court.

Opinion

Argued before Justices Swayze, Black and Katzenbach.

Emil J. Hoos, Esq., for Appellant.

Kalteisen & Danberry, Esqs., for Respondent.

The opinion of the Court was delivered by KATZENBACH, J.

Stephen Kiss, the appellant, was the owner of a Ford automobile. He delivered it to John Ambrose, the keeper of a garage, for the purpose of making repairs to the car. There was no express agreement made between them as to the cost of the repairs. Ambrose made the repairs and rendered to Kiss a bill for $65.70 therefor. Kiss refused to pay the bill on the ground that it was exorbitant and that it included work not authorized by him and demanded a return of the car. Ambrose refused to deliver the car and claimed under Chap. 312 of the Laws of 1915 a lien on the automobile for his bill. Thereupon Kiss sued out a writ of replevin. At the trial, Kiss offered evidence to the effect that the work which he had authorized to be done could have been done properly for $18. After the introduction of this evidence, the plaintiff rested. Counsel for the defendant moved for a non-suit on the ground that the evidence offered by the plaintiff showed that there was some sum due and that as no sum had been tendered to the defendant he had the right to retain possession of the car. The court reserved decision on this motion and decided to hear the whole case. The defendant testified as well as another witness that the

plaintiff had directed the defendant to give the car a general overhauling. There was also evidence offered by the defendant that the sum of $65.70 was a reasonable and proper charge for the work done. The court held and found as a fact that the defendant had done work on the car and that he was a garage keeper within the meaning of the law and was entitled to a lien and entitled to hold the car until his reasonable and proper bill for repairs was paid. The court then suggested that it would determine by consent of counsel what the proper amount for the work done was. The record does not show whether this proposition was acceptable to the plaintiff or his attorney, but it apparently was, because the court did determine that the amount due to the defendant was $47, which the defendant agreed to accept. The plaintiff refused to accept this finding. The court thereupon gave judgment for the defendant. From this judgment the plaintiff has appealed.

The ground urged by the appellant for reversal is that Ambrose waived his lien by demanding an excessive sum for the repairs, and that this excessive demand on the part of Ambrose excused Kiss from making a tender of the amount actually due. The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender nor waive his lien for the sum really due, if his demand is made in good faith and in the belief that he is entitled to such sum, and no payment or tender is made of the sum actually due. 25 Cyc. 677. In the present case it was admitted that there was no express contract as to the cost of the repairs. Ambrose overhauled generally the car. Kiss claimed the repairs

ordered by him were new piston rings and not a general overhauling. There was no finding or evidence that Ambrose was not acting in good faith in demanding the sum which he did, or that he did not believe he was entitled to the sum he demanded. The finding of the District Court that the amount due was $47 and not $65.70 as claimed by Ambrose was in no sense a finding that the claim made by Ambrose was not made in good faith and made under the belief that he was entitled to the amount he had demanded. In the case of Folsom vs Barrett, 180 Mass. 349, the plaintiff had a lien upon a horse for his keep, which he claimed was $300.96. An auditor found the amount to be $129.17. The defendant requested the court to rule (1) that if the defendant demanded the horse and the plaintiff refused to deliver him up except upon payment of a sum larger than the sum actually due, then as a matter of law the plaintiff wrongfully held the horse, and (2) that if the defendant requested a statement of the amount due so that he could pay it, and take his horse, and the plaintiff stated that he would not give up the horse except upon payment of a sum named by him larger than the amount due, then the defendant was not bound to tender any sum to the plaintiff and the latter wrongfully held the horse. The lower court refused to rule as requested, but, in substance, ruled:

> "That if the plaintiff fraudulently claimed more than was due, for the purpose of keeping possession of the horse, he wrongfully kept the horse, but that, if he believed the sum due him to be as stated by him at the time he refused to

deliver the horse, then the fact that that sum was excessive would not work a discharge of the lien.

The Supreme Court upon review said:

"When a lienor bases his refusal to surrender property upon some right independent of or inconsistent with the lien, it is held that he has waived his lien, and he cannot afterwards set it up. Boardman vs Sill, 1 Camp. 410, note; Dirks vs Richards, 4 Man, & G. 574. But that is not this case. Here the plaintiff expressly named his lien and insisted upon it, and there was no question as to its nature. It was for the keeping of the horse a certain definite time. He based his right to hold the horse upon that lien, and upon nothing else. His demand, however, was excessive. He was right as to the existence of the lien upon which right alone he was insisting, but wrong as to the amount due. If he fraudulently claimed more than was due he lost his lien; but, if his claim was in good faith, it was still in the power of the defendant to discharge the lien by a payment of the sum actually due. If such a payment had been made at that time the lien would have been destroyed, and consequently the subsequent detention of the horse by the plaintiff would have been wrongful; and that would have been so whether or not the plaintiff honestly believed his claim to be correct. The lien was simply a right to hold the horse until a certain sum was paid, and when that sum was paid the right was gone.

The good faith of the plaintiff could not increase that sum. The same result would have followed if a tender of the sum due had been made and and refused. Co. Litt. 207a; Coggs vs Bernard, 2 Ld. Raym. 909, 917; Bac· Abr "Bailment" (B); Jarvis vs Rogers, 15 Mass; 322, 39 N. E. 1110, and cases cited. No payment or tender, however, was made; and where, as in this case, there is a lien, which is insisted upon by the creditor, and his only error is in making an excessive demand, which he honestly believes to be correct, the fact that the demand is excessive does not ordinarily relieve the debtor from the necessity of making a tender. If the debtor desires to avail himself of this honest mistake of the creditor, he must make or tender payment of the sum actually due; and neither the ability readiness, or simple offer to pay is a tender. There must be an actual production of the money, unless such production be dispensed with by the express declaration of the cerditor that he will not accept it, or by some equivalent declaration or act."

We are of the opinion that this case correctly states the law. In the case under consideration, as we have said, there was no evidence of want of good faith upon the part of Ambrose, the garage keeper, and no evidence of a tender having been made by Kiss, the owner of the automobile, of the amount due or even the amount which by his proofs he admitted he owed. For the trial court to award possession of the car to the plaintiff under such circumstances would be to render nugatory the statutory lien given to the keeper of a garage, as all an owner would have

to do would be to allege that the repairs made were in excess of those authorized by him and then recover possession of his car without paying for the work done upon it.

The judgment of the District Court is affirmed with costs.

REMITTITUR

New Jersey Supreme Court

FEBRUARY TERM, 1922

STEPHEN KISS, Plaintiff-Appellant —vs— JOHN AMBROSE, trading as United Garage, Defendant-Respondent	On Appeal From the New Brunswick District Court: REMITTITUR

This cause having been duly argued at the present term of this Court by Emil J. Hoos and W. S. Angleman, Attorney and of Counsel for the plaintiff-appellant, and Kalteissen & Danberry and Frederick Weigel, Attorney and of Counsel for the defendant-respondent, and the Court having considered the same, and finding no error in the record or proceedings in the New Brunswick District Court, it is thereupon ORDERED and ADJUDGED that the judgment of the New Brunswick District Court removed by appeal to this Court, be affirmed with costs and that the record be remitted to the New Brunswick District Court to be proceeded with in accordance with the judgment and the practice of said Court.

On Motion of KALTEISSEN & DANBERRY,
Attorneys of Defendant-Respondent.

Notice of Appeal

Filed October 3rd, 1922

NOTICE OF APPEAL

New Jersey Supreme Court

FEBRUARY TERM, 1922

STEPHEN KISS, Plaintiff-Appellant —vs— JOHN AMBROSE, trading as United Garage, Defendant-Respondent	On Appeal From New Brunswick District Court. NOTICE OF APPEAL.

TAKE NOTICE, That the plaintiff-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, affirming the judgment of the District Court.

EMIL J. HOOS,

Attorney for Plaintiff-Appellant.

To

JOHN AMBROSE, trading as United Garage,

or

Messrs, KALTEISSEN & DANBERRY

Attorneys for Defendant-Respondent

Elizabeth, New Jersey

GROUNDS OF APPEAL

Filed October 20, 1922

New Jersey
Court of Errors and Appeals

STEPHEN KISS, Plaintiff-Appellant —vs— JOHN AMBROSE, Defendant-Respondent	On Appeal from Supreme Court GROUNDS OF APPEAL

TAKE NOTICE, That the following are the grounds of appeal in the above-entitled cause:

1. Defendant's retention of the car was held to be lawful.

2. Tender to defendant of the amount demanded by defendant although the District Court held that the reasonable and proper amount for repairs was considerably less, or the tender to defendant of an unascertained reasonable and proper amount for repairs was held to be necessary to sustain plaintiff's right to recover.

3. The Supreme Court sustained the judgment

of the District Court when said judgment should have been reversed.

EMIL J. HOOS,

Attorney for Plaintiff-Appellant.

To

Messrs. KALTEISSEN & DANBERRY,
Attorneys for Defendant-Respondent
40 Paterson Street,
New Brunswick, N. J.

New Jersey
Court of Errors and Appeals

STEPHEN KISS, Plaintiff-Appellant. vs. JOHN AMBROSE, Defendant-Respondent.	In Replevin. On Appeal from Supreme Court.

Brief For Plaintiff-Appellant

This appeal is from judgment of the Supreme Court (Swayze, Black, and Katzenbach, J.J; opinion by Katzenbach, J.), affirming a judgment of the New Brunswick District Court, (Woodbridge, J.), in favor of the defendant in a replevin action brought to recover an automobile which had been left with the defendant to make certain repairs and which the defendant had refused to give up until his bill for $65.70, which bill plaintiff disputed, had been paid.

Case, State of Demand, pp. 6, 7.

Case, Docket Entries, p. 11, lines 9, 10.

Case, Judge's Statement of Case, p. 17, lines 26-32; p. 18, lines 26-32; p. 21, lines 29.

The judge found "that the reasonable and proper amount for the work and labor and repairs

and accessories done on the car by the Defendant was $47."

Case, Judge's Statement of Case, p. 20 line 40; p. 21, lines 1-2.

But he gave judgment for the defendant "on the ground that it appears from the testimony that the Defendant had a Garage Keeper's lien under the statute for work which he had done on the car and that no tender having been made to him of any amount for that work he was entitled to hold the car under the Act until his bill was paid or at least until tender of a reasonable and proper amount due was made to him."

Case, Judge's Statement of Case, p. 21, lines 17-26.

This conclusion was upheld by the Supreme Court, the opinion by Justice Katzenbach saying:

"The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender nor waive his lien for the sum really due, if his demand is made in good faith and in the belief that he is entitled to such sum, and no payment is made of the sum actually due."
Case, Supreme Court Opinion, p. 27, lines 30-36.

This ruling presents the real question in the case. Does the statute protect a garage keeper in making a demand for more than that to which he is entitled, and can he hold a car under a garage keeper's lien for such illegal charge?

SPECIFICATION OF OBJECTIONS.

There are six objections made to the Court's rulings, which are all referable, but from different angles, to the question as stated above.

1. DETENTION OF CAR NOT LEGAL.

The Court held that defendant's retention of the car was legal, although holding it for a larger sum for repairs than the Court found was due.

Case, Specification of Objections, lines 27-29.

Case, Judge's Statement of Case, p. 20, line 40; p. 21, lines 1, 2, 17-26.

The statute giving garage keepers a lien clearly contains no direct authorization for a garage keeper to hold a car for more than is reasonably due, and clearly it could not constitutionally do so. If it could not directly constitutonally do so, how could it inferentially?

The section of the statutes applicable reads:

> "1. All persons or corporations engaged in the business of keeping a garage or place for the storage, maintenance, keeping or repair of motor vehicles and in connection therewith stores, maintains, keeps or repars any motor vehicles or furnishes gasoline, accessories or other supplies therefor 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, has a lien upon such motor vehicle or any part thereof for the sum due for such storing, maintaining, keeping or repairing of such motor ve-

hicle or for furnishing gasoline, accessories or other supplies therefor, and may without process of law detain such motor vehicle at any time it is lawfully in his possession until such sum is paid.''

P. L. 1915, Chap. 312, pp. 556, etc.

II. TENDER NOT NECESSARY.

The Court held that, until defendant's bill was paid or a reasonable and proper amount was tendered him, defendant was entitled to retain the car.

Case, Specification of Objections, p. 23 lines 31-33.

Case, Judge's Statement of Case, p. 21 lines 23-26.

By ruling in the alternative, the Court clearly held that the plaintiff did not necessarily have to pay the bill. If the Plaintiff did not have to pay the bill, how was he to arrive at ''the reasonable and proper amount'' to be tendered? The Court found, after listening to the testimony pro and con, that such amount was $47.

Case, Judge's Statement of Case, p. 20, line 40; p. 21, lines 1, 2.

If the plaintiff had tendered $46.99 would the tender have been futile? If he had tendered $46, or $45, or $40, would such tender also have been futile? Can the plaintiff be penalized because he can not guess what the Court, after listening and weighing conflicting testimony, might judge to be ''a reasonable and proper amount''? Especially so when the

Court is not in replevin obliged to find what is "a reasonable and proper amount" and the plaintiff may not have been prepared, as he certainly was not obliged to do, to prove to the dot, what such reasonable and proper amount might be but only that the amount defendant claimed was clearly an overcharge. And if the Court instead of finding the "reasonable and proper amount" had contented itself by simply saying that the defendant, having a claim although less than that asserted, has a legal right to hold the car until the claimed unjust charge or the unascertained just charge is paid, where does the plantiff get off? Is not the true rule under such circumstances that the plaintiff, being given by the statute a lien for his reasonable and proper charges, charges more at his peril? And is not the defendant, having charged more than a reasonable and proper charge, remitted to his common law remedy in assumpsit to collect, in which action the points in dispute can properly be threshed out? Can it be possible that a defendant, under cover of a statutory lien for a lesser indefinite amount, may legally hold the plaintiff's property for a stated unjust amount? And if he can not legally do so, then his holding is unlawful, and the plaintiff is entitled to recover in replevin. And how can good faith on the part of the garage keeper alter the fact that he is trying to get something for nothing? Does not the fact that the Court adjudged his bill to be excessive negative, in the absence of affirmative proof to the contrary, any merely claimed good faith on the part of the garage keeper. The opinion of the Supreme Court says there was no evidence of want of good faith on the part of the garage keeper. But was such evidence necessary in view of the court's decision that the bill was excessive? An excessive bill on it's face in the absence of satisfactory explanation imports lack of

good faith. And was not such evidence to be found in the garage keeper's statement to plantiff "that he could have the car upon payment of that bill". Was not that a holdup?

Case, Judge's Statement of Case, p. 20, line 40; p. 21, lines 1-2.

Case, Supreme Court Opinion, p. 27, lines 30-34; p. 30, lines 30-32.

Case, Judge's Statement of Case, p. 18, lines 28-29.

In Stephenson vs. Lichtenstein, 72 N. J. Law 113, (Supreme Court, 1905, Swayze, J.), it was held that a demand for more than was due waived the lien, and that a demand for more than was due waived a tender. The fact that in that case there was a specific contract does not alter the principle that one can not use the special protection of the law to exact more than is due and that one doing so does it at the peril of losing that special protection.

In the case of Cruicble Steel Co. vs. Polack Tyre & Rubber Co. 92 N. J. L. 221 (Errors and Appeals, 1918, Kalisch, J.), in which the constitutionality of the garage keeper's act was being questioned, the Court said:

> "The owner is not deprived of his property, except by his own act. He has the privilege of paying the charges on the property and this discharges the lien. He may, if he sees fit, contest the validity of the lien by bringing an action of replevin or trover."

And in discussing the third secton of the Act, the Court said:

> "Evidently the 30 days required of the lienor to hold the chattel after the detention of it has actually taken place is for the purpose of affording the owner an opportunity to pay the lien charges, or if he intends to dispute the same to resort to a writ of replevin."

Evidently the Court must have had in mind that "contesting the validity of the lien" was contesting the validity of the charge on which the lien was based, and that if the charge was not valid, i. e., too much, the owner could recover his car by replevin or its value in trover. Otherwise, of what avail would be the action of replevin or trover?

Or of what avail would 30 days in which the owner has the opportunity to dispute the lien charges by resorting to a writ of replevin, if, after disputing and resorting to the writ, the defendant wins whether his charges are proper or not?

The plantiff in this case did just what this Court in the case cited told him he might do if he disputed the claim and the District Court said that the claim was too large, which in effect meant that he was right in disputing the claim. Why then should he not have had judgment?

III. FAILURE TO PROVE CHARGES PROPER.

Defendant failed to prove that the amount of the claim for which he held the car was reasonable, just, and proper.

> Case, Specification of Objections, p. 23 lines 35-37.

The Court although in effect sustaining plain-

tiff's contention that defendant's claim for $65.70 was not proper by holding that the proper charge was $47, nevertheless held that such improper charge was not sufficient to sustain the writ, and that defendant, although holding the car for a larger sum than due him, was still within the rights given him by the statute. It is rather difficult to see how the defendant can assert legal claim to hold the car based on an illegal charge. Does not the illegality of the charge which is the basis of the claim vitiate the claim? How can it be otherwise?

IV. BURDEN OF PROOF.

Defendant failed to sustain the burden of proof that his retention of the car was legal.

Case Specifications of Objections, p. 23 lines 39-40.

Defendant retaining a car not his own has the burden of proving that his retention was legal. How can he meet this burden of proof other than by showing that the charge of $65.70 for the payment of which he was holding the car, was a proper charge? And, having failed so to prove, should he not lose in the action?

V. PLAINTIFF ENTITLED TO JUDGMENT.

The fifth and sixth objections are directed to the denial by the Court of the plaintiff's motion for judgment and the giving of judgment to the defendant.

Case, Specifications of Objections, p. 24 lines 1-10.

If the plaintiff, on the Court finding as a fact that the charge made under claim for which the defendant was holding the car was excessive, was not entitled to judgment, of what use is the writ of replevin given to test the legal standing of that very claim?

SUPREME COURT OPINION.

The opinion of the Supreme Court says:

> "For the trial court to award possession of the car to the plaintiff under such circumstances would be to render nugatory the statutory lien given to the keeper of a garage, as all an owner would have to do would be to allege that the repairs made were in excess of those authorized by him and then recover possession of his car without paying for the work done upon it."

Case, Supreme Court Opinion, p. 30, lines 39-40; p. 31, lines 1-4.

This manifestly could not be so, because mere allegation without proof would avail nothing in any case, and in this case the allegation of an unjust charge is backed up by proof and the finding of the District Court in effect sustaining the allegation. Under such circumstances can this Court say that the plaintiff is without the remedy pointed out by this Court in the Crucible Steel Company case before cited? The plaintiff sincerely trusts not.

The Supreme Court opinion also calls attention to the offering of testimony by the plaintiff that the work authorized by him could have been done properly for $18, and that the plaintiff did not tender

"the amount which by his proofs he admitted he owed".

Case Supreme Court Opinion, p. 26, lines 28-31; p. 30, lines 34-37.

At no time did the plaintiff admit that he actually owed the garage keeper anything. Offering testimony that the work which was ordered could have been done properly for a certain amount is not any admission that he owed that amount, especially when he further testifies "that the work done by the Defendant was not satisfactory, that since taking the car by virtue of this Writ he had trouble in starting the same, which trouble he had not had before taking the car to the defendant's garage."

Case, Judge's Statment of Case, p. 18, lines 36-40; p. 19, line 1.

It is most respectfully submitted that the judgment of the Supreme Court affirming the judgment of the New Brunswick District Court be reversed.

EMIL J. HOOS,

Attorney for Plaintiff-Appellant.

W. S. ANGLEMAN,

Of Counsel.

November Term, 1922.