INDEX.

GROUNDS OF APPEAL.

Filed.

New Jersey Court of Errors and Appeals

10

ISIDORE SCHWARTZ, *Plaintiff-Respondent,* *vs.* KING REALTY & INVESTMENT CO., a corporation, *Defendant-Appellant.*	*On Appeal.* *Grounds of Appeal.*

20 Defendant-appellant states the following grounds of appeal:

First. Because the Supreme Court affirmed the judgment of the District Court of the City of Orange in favor of the plaintiff-respondent against the defendant-appellant.

Second. Because the Supreme Court affirmed the judgment rendered in the Orange District Court in favor of the plaintiff-respondent against the defendant-appellant, stating that the goods of the Schultz Co. were sold at a public and not at a private sale.

30 Third. Because the Supreme Court held that the Bulk Sales Act, Laws of 1915, page 377, did not apply to the situation presented by the facts in the within case.

Fourth. Because the Supreme Court construed the Bulk Sales Act, Laws of 1915, page 377, in such a manner as not to make the facts in the case before the court applicable to the same.

E. R. McGLYNN,
Attorney for Defendant-Appellant.

40

Notice of Appeal.

Filed September 25, 1918.

Orange District Court

10

ISIDORE SCHWARTZ,
Plaintiff,

vs.

KING REALTY & INVESTMENT CO., a corporation,
Defendant.

20

TAKE NOTICE that the defendant in the above cause does hereby appeal to the New Jersey Supreme Court from the judgment of the Orange District Court rendered in the above action on the twentieth day of September, nineteen hundred and eighteen.

E. R. McGLYNN,
Attorney of Defendant.

To Messrs. FURST & FURST,
Attorneys of Plaintiff.

30

State of Demand.

Filed August 9, 1918.

40

King Realty & Investment Company, the defendant in this suit, was summoned to answer Isidore Schwartz, the plaintiff in this suit, of a plea whereof he took the goods and chattels of the said plaintiff, and unjustly detained the same against sureties and pledges, until, etc.

And thereupon, the said plaintiff, by Furst & Furst, its attorneys, complains for that, the said defendant, on the day of , in the City of Newark, County of Essex and State of New Jersey, took the goods and chattels, to-wit:

50

John Thomson Press #2, 14x22, 14x20 Ch. & Price press, 37x52 Campbell cylinder, pulley and shafting, 2 cabinets and type, 2 h. p. motor, 200 lbs lead, paper, 1 wire stitching machine, chases of the said plaintiff, of great value, to-wit, the value of five hundred dollars, and unjustly detained the same against sureties and pledges, until, etc.

Writ of Replevin.

WHEREOF, the said plaintiff saith he is injured and hath sustained damages to the amount of five hundred dollars, and therefore brings this suit, etc.

FURST & FURST,
Attorneys for Plaintiff.

10

Writ of Replevin.

THE STATE OF NEW JERSEY, }
ESSEX COUNTY. } *ss.*

To any Constable of said County, or to the Sergeant-
20 (SEAL.) at-Arms of the District Court of Orange, GREETING:
We Command You, That if ISIDORE SCHWARTZ shall make you secure, you cause to be replevined and delivered to Isidore Schwartz, John Thomson Press #2, 14x22, 14x20 Ch. & Price press, 37x52 Campbell cylinder, pulley and shafting, 2 cabinets and type, 2 h. p. motor, 200 lbs. lead, paper, 1 wire stitching machine, chases, which King Realty & Investment Company, a corporation, of 449 Central avenue, Newark, N. J., took and unjustly detained as is said.

And, that you summon the said King Realty & Investment Company, a corporation, to appear before the Orange District Court,
30 to be held at the City Hall, No. 15 Day street, in said city, on the 7th day of August, 1918, at ten o'clock in the forenoon, to answer the said Isidore Schwartz, of a plea of taking and unjustly detaining said goods and chattels aforesaid.

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

WITNESS, DANIEL A. DUGAN, Esq., Judge of said Court of Orange aforesaid, the 31st day of July, 1918.

HAROLD J. TRABOLD,
Clerk.

40

FURST & FURST,
Plaintiff's Attorneys.

Aug. 1, 1918.

Service of a copy of the within writ is hereby acknowledged this August 11, 1918.

E. R. McGLYNN,
Attorney of Defendant.

50

Demand for Possession.

DEMAND FOR POSSESSION.

King Realty & Investment Co.,
449 Central avenue,
Newark, N. J.

Gentlemen: 10

Please take notice that you are required to deliver up forthwith, the possession of the following property:

John Thomson press #2—14x22
14x20 Ch. & Price press
37x52 Campbell Cylinder
Pulley and shafting
2 Cabinets and type
2 H. P. Motor
200 lb. lead 20
Paper
1 Wire stitching machine
Chases
which belongs to the undersigned.

Yours, &c.,

ISIDORE SCHWARTZ.

Dated at Newark, N. J.
July 31, 1918. 30

40

50

Transcript of Clerk's Docket.

ORANGE DISTRICT COURT, 15361.

10

ISIDORE SCHWARTZ, *Plaintiff,* vs. KING REALTY & INVESTMENT CO., a corporation, *Defendant.*	*In Replevin.* *On Contract.*

Summons issued July 31, 1918.
20 Demand filed August 9, 1918.
Returnable September 7, 1918.
Furst & Furst, Pltff's Attys.
E. R. McGlynn, Deft's. Atty.

Service of a copy of the within writ is hereby acknowledged August 11th, 1918.

E. R. McGLYNN,
Attorney of Defendant.

Pltff's costs:
30 Summons, $3.00
Listing, 1.50
Appeal (Deft.) 1.00
Bond and affidavit filed July 31, 1918.
Aug. 14, 1918—Trial had, Isidore Schwartz.
George F. King sworn and testified.
Distress Warrant in evidence, marked Ex. P. 1.
William E. Grimme sworn and testified.
Levy in evidence, Ex. P. 2.
Plaintiff rests, motion for non-suit continued for.
40 Briefs, Sept. 20, 1918—Motion for non-suit denied, and judgment for possession given for plaintiff and against the defendant.
Notice of Appeal to Supreme Court filed Sept. 25, 1918.
Bond of Appeal filed Oct. 9, 1918.
Stipulation extending time for filing State of Case, Oct. 9, 1918.

True copy.

HAROLD J. TRABOLD,
Clerk.

50 District Court, Orange.

State of the Case on Appeal.

New Jersey Supreme Court

10

ISIDORE SCHWARTZ, *Plaintiff-Appellee,* *vs.* KING REALTY & INVESTMENT CO., a corporation, *Defendant-Appellant.*	*On Appeal.* *State of the Case.*

20

The facts in the above entitled cause of action are as follows:

Isidore Schwartz, the plaintiff, was duly sworn and testified that the Schultz Printing Company was engaged in the general printing business, and in connection with the conduct of its business occupied three lofts in a building commonly known and designated as #239 Washington street, Newark, N. J.

He further testified that prior to June 19, 1918, the Schultz Printing Company had made and executed a chattel mortgage encumbering its assets located in the said building, and prior to that time Samuel Van Poznak, a duly licensed auctioneer of the City of Newark, was retained to sell at public sale, the assets of the said Schultz Printing Company. The said auctioneer advertised for sale the said assets and inserted notices of said sale in Newark papers and circularized the sale among the trade who might be interested in such purchases. The sale was conducted by the said auctioneer on June 19, 1918, and was largely attended and the plaintiff was also present at the said sale. The plaintiff purchased at the sale, part of the assets of said Schultz Printing Company. The plaintiff paid the auctioneer for the property which he purchased. Thereafter the mortgagee was paid and his indebtedness cancelled.

30

40

The King Realty & Investment Company was the landlord of the premises in question, and on June 20, 1918, issued a distress warrant against the Schultz Printing Company, and retained one William Grimme as its bailiff, for the purpose of proceeding with the said distress proceedings. The said William E. Grimme went to the premises on June 20, 1918, with said distress warrant, but did not make a levy upon any of the goods and chattels. The distress warrant was issued for the payment of $300 rent for the months of March, April, May and June, 1918. On July 22, 1918, the said bailiff made a levy upon the goods and chattels located in said premises and the said bailiff and the landlord refused to deliver the chattels purchased by the plaintiff, unless the claim for rent was satisfied.

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Subsequent thereto a written demand was made by the plaintiff upon the King Realty & Investment Company, to deliver up the

chattels purchased by Isidore Schwartz at the said public sale, and the said King Realty & Investment Company refused to deliver up possession, and thereafter a writ of replevin was issued out of the Orange District Court, Orange, N. J., and at the time of the issuance of the writ, the plaintiff filed a bond in accordance with the statute in such case made and provided, and under and by virtue of said writ and the filing of said bond, the Sergeant-at-Arms of the said Court, took possession of the property in question and delivered them to the plaintiff, who removed the property from the premises.

Neither the defendant company nor its bailiff prevented the plaintiff or the constable from removing the property. No claim of property was made by the defendant company or its bailiff.

William E. Grimme, the bailiff, testified as to the levy and concerning the issuance of the distress warrant. At the time of the trial, the defendant company and the bailiff appeared and both were represented by Edward R. McGlynn.

There being no further testimony, a motion for non-suit was made on the grounds, that: First, the suit was instituted against the wrong party, inasmuch as the King Realty & Investment Company did not have possession of the goods in question and the real defendant should be William Grimme, constable; and, Secondly, that inasmuch as no attempt had been made to comply with the provisions of the Bulk Sales Law, that the sale by the Schultz Printing Company to Isidore Schwartz was void as against creditors and that the King Realty & Investment Company was a creditor, and that the distress proceedings were instituted before the expiration of 90 days from the date of the sale by the Schultz Printing Company.

The motion was denied and exceptions taken by the attorney for the defendant. No testimony was offered by the defendant and thereupon a motion was made to direct a judgment in favor of the defendant on the same grounds and the motion was denied and a judgment for possession was entered. On this judgment the defendant takes its appeal.

The Court found, as a matter of fact, that William E. Grimme acted as agent for the King Realty & Investment Company when making the levy in connection with the distress and that possession by the said agent was possession by the said principal, the said King Realty & Investment Company.

The Court further found that the compliance with the Sales Bulk Law was an affirmative defense and no proof being offered by the defendant that there was no compliance with the said law, denied the motion for a non-suit and the direction of a verdict. The Court also further found that the Sales Bulk Law was inapplicable to the case at bar and for said reason also made a denial for a non-suit and a verdict as aforesaid.

FURST & FURST,
Attorneys of Plaintiff-Appellee.

E. R. McGLYNN,
Attorney of Defendant-Appellant.

Specifications on Appeal.

Sirs:

The following is a specification of the determinations of the District Court with which the appellant is dissatisfied in point of law: 10

1. Because the Court erred in denying the defendant's motion to non-suit on the ground that the defendant was not in possession of the goods described in the writ of replevin issued in the above entitled case, but that the bailiff who had seized the goods under a distress warrant, was in possession of the same and should have been the defendant.

2. Because the Court erred in denying the defendant's motion to non-suit on the ground that the sale under which the plaintiff purchased the goods described in the writ of replevin issued in this case, was void as against the credits of the seller (Schultz Printing Co.), 20 because the plaintiff who was the purchaser did not in good faith and for the purpose of giving the notice required by Chapter 208, Laws of 1915, known as "An Act to Prohibit Sales of Merchandise, Goods and Chattels in Bulk in Fraud of Creditors," make inquiry of the seller and otherwise comply with the provisions of said act.

3. Because the Court erred in denying defendant's motion to direct a judgment for the defendant on the ground that the defendant was not in possession of the goods described in the writ of replevin issued in the above entitled case, but that the bailiff who had seized the goods under a distress warrant was in possession of 30 the same and should have been the defendant.

4. Because the Court erred in denying the defendant's motion to direct a verdict for the defendant on the ground that the sale under which the plaintiff purchased the goods described in the writ of replevin issued in this case, was void as against the credits of the seller (Schultz Printing Co.), because the plaintiff who was the purchaser did not in good faith and for the purpose of giving the notice required by chapter 208, Laws of 1915, known as "An Act to Prohibit Sales of Merchandise, Goods and Chattels, in Bulk, in Fraud 40 of Creditors", make inquiry of the seller and otherwise comply with the provisions of said act.

5. Because there was no evidence, either of fact or of law for the finding of the District Court that compliance with the Bulk Sales Law is an affirmative defense.

6. Because there was no evidence, either in fact or in law in the finding of the District Court that the Bulk Sales Law was applicable to the case at bar.

Respectfully, 50

E. R. McGLYNN,
Attorney of Defendant-Appellant.

OPINION.

Filed.

NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1919. 10

ISIDORE SCHWARTZ, *Plaintiff-Respondent,* *vs.* KING REALTY & INVESTMENT CO., a corporation, *Defendant-Appellant.*	*Opinion.* *On Appeal from Orange District Court.*

20

Submitted February Term, 1919. Decided June 3rd, 1919.

FACTS.

The state of the case agreed upon between counsel of the respective litigants shows, that some time prior to June, 1918, the Schultz Printing Company made and executed a chattel mortgage on the assets of its printing business. Prior to the above date one Van Poznak, a duly licensed auctioneer, was employed by the Schultz Company to sell all its assets at public sale. The auctioneer inserted in the Newark newspapers notices of the sale of the property of the printing concern, and distributed the newspapers containing the notice among the trade who might be interested in making purchases. On the date above mentioned the sale took place, and was conducted by the auctioneer and was largely attended, and the plaintiff, who was present, purchased a part of the assets at the sale, for which he made payment to the auctioneer. 30

The King Realty and Investment Co., the defendant, was landlord of the premises occupied by the printing concern. On June 20, 1918, it issued a distress warrant for $300, being rent for the months of March, April, May and June, 1918, against the goods and chattels of the Schultz Company, and put the warrant into the hands of a constable to distrain on such goods and chattels, but no actual distraint was made until July 22, 40

1918, when the constable took possession of the goods and chattels purchased by the plaintiff at the auction sale and refused to deliver them to him unless the claim of rent was satisfied, which the plaintiff refused to do. After the auction sale the chattel mortgage was paid.

10 The plaintiff made a demand upon the defendant company to deliver up to him the possession of the goods purchased at the auction sale which demand was refused. The plaintiff thereupon brought his writ of replevin, and having filed a bond in accordance with the statute the sergeant-at-arms took possession of the property, and delivered it to the plaintiff.

At the close of the plaintiff's case a motion for non-suit was made on the grounds: First, the action was instituted against the wrong party, inasmuch as the defendant company did not have possession of the goods in question and the real defendant 20 should be the constable; and, secondly, that inasmuch as no attempt had been made to comply with the provisions of the Bulk Sales Law, that the sale by the Schultz Printing Company to Isidore Schwartz was void as against creditors, and that the defendant company was a creditor, and that the distress proceedings were instituted before the expiration of 90 days from the date of the sale by the printing company. The motion was denied to which denial an exception was taken. No testimony was offered by the defendant, and thereupon in its behalf, a motion was made on the same grounds for the direction of a 30 judgment in its favor, which motion was also denied, and a judgment for possession was entered.

The Trial Judge found, as a matter of fact, that the constable acted as agent for defendant company when making the distraint under the distress warrant, and that possession by the agent was possession by the principal.

The Trial Judge further held, that the compliance with the Sales Bulk Law was an affirmative defense and no proof being offered by the defendant that there was no compliance with the law, the defendant was not entitled to succeed on either motion 40 to non-suit or for a direction of a finding in its favor. The Trial Judge also held that the Sales Bulk Law was inapplicable to the facts of the case as they appeared before him.

Before Justices Bergen, Kalisch and Black.

For appellant, E. R. McGlynn.

For respondent, Furst and Furst.

The opinion of the Court was delivered by

KALISCH, *J.:*

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The position taken by counsel of appellant that the defendant was not a proper party to the action, and, therefore, should have been either a non-suit or judgment for defendant, is untenable.

The case agreed upon concedes, that the defendant issued the distress warrant and gave it to the constable to execute, which officer, under the authority of the warrant, took possession of the goods and chattels purchased by the plaintiff at the auction sale. It is further conceded that a demand to deliver up these goods and chattels to the plaintiff was made by him upon the defendant, which the defendant refused. There was sufficient testimony before the Trial Judge of the exercise of dominion by the defendant over the property to warrant a finding that it was in possession of the same. In law the defendant company was constructively in possession by its agent, the constable.

20

It is not necessary that a defendant should have actual possession of the goods in order to maintain an action of replevin against him. If he exercises control over them it is sufficient to uphold the action. *Allen* v. *Crary,* 10 Wend. 349.

The legal rule as stated in *Cobbey on Replevin,* page 29, is: "Replevin is essentially a possessory action, and does not lie against one who is not either actually or constructively in possession."

30

It is well to observe here that in this State replevin lies not only for the unlawful taking of the goods, but also for unlawful detention. 3 C. S., page 4368, Section 2.

Another ground advanced by appellant's counsel and relied on for a reversal of the judgment below is, that the plaintiff acquired no title to the goods purchased at the sale, because it was not made to appear that the Bulks Sales Act was complied with.

40

The state of the case discloses that the goods purchased by the plaintiff were sold to him at an auction sale which had been widely advertised, and was largely attended by prospective buyers. Whether the goods were sold by the piece or otherwise does not appear.

The Sales Bulk Act is entitled "An Act to prohibit sales of merchandise, goods and chattels in fraud of creditors" (P. L. 1915, page 377).

This act in substance provides that the sale of the whole or a large part of the stock or merchandise, etc., otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business or occupation shall be void against the seller's creditors, unless the purchaser shall in good faith and for the purpose of giving notice to each of the sellers credited at least ten days before the consummation of the sale (the purchaser having first inquired of the seller and received from him a list in writing of the names, places of business of and indebtedness to each) of the time and place when and where the transfer is to be made to him, and when and where the consideration is to be paid.

This section contains a proviso that no proceedings at law or in equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof.

The statute which we are considering is practically the same as the act of 1907, P. L. 570. It contains the same proviso.

It will be noted that in the body of both acts it is declared that the sale in bulk, etc., shall be "void." In the proviso to the section the sale is termed "such voidable sale."

In *Dickinson* v. *Harbinsen,* 78 N. J. L. 97, Mr. Justice Reed, speaking for this Court, at page 100 said: "The body of the act, as will be observed, declared that a sale should be void as to creditors unless certain things were done by the purchaser. The proviso, however, speaks of the sale as such 'voidable sale.' The word void was used in the sense of voidable. The proviso itself shows that the sale was a nullity only when attacked by creditors within a certain period."

In that case the learned justice raised a query as to the constitutionality of the act. But in the later case, *Kett* v. *Masker,* 86 N. J. L. 97, the constitutionality of the act was raised and this Court held its provisions to be constitutional. The constitutionality of the act of 1915 has not been raised in the present case and, therefore, we express no opinion upon it. At any rate we would feel bound to follow the opinion of the Supreme Court on a statute, of which the present is a copy, except for a few slight changes which do not affect the substance of it.

Because the act is drastic in its provisions and restrictive of the free alienation of property it should be strictly construed and not be extended to a transaction which does not come clearly within its terms. Guided by this universal canon of statutory construction, we are unable to perceive the applicability of the statute to the facts of the present case. The goods of the Schultz Company were sold at a public and not at a private sale. The statute is plainly aimed at private sales of property, and not at public sales. Unless we adopt this view the sale of one's goods and chattels at public auction conveys no title to the purchaser, though the sale and purchase are made in good faith. And in this connection it is difficult to comprehend how a purchaser at such sale can comply with the terms of the statute which require that a buyer shall make inquiry of the vendor and demand an inventory of him of his creditors and to send to each a ten days' notice of the buyer's intended purchase and the amount of consideration to be paid and the place where it is to be paid. It needs no further discussion to demonstrate how absurd it would be to attempt to fit these requirements of the statute to a purchase made at a public auction.

Moreover, the Legislature, by the proviso referred to, contemplated judicial action by a competent tribunal, to invalidate any such voidable sale, by an action at law or a suit in equity initiated by a creditor of the seller. This situation is not present here.

In the view expressed, it becomes unnecessary for us to consider the question argued, whether in the present proceeding the burden was upon the defendant to establish affirmatively that the provisions of the statute were not complied with by the purchaser.

For the respondent, it is argued that a landlord does not belong to the class of creditors, contemplated by the statute under consideration. Assuming, for the purpose of the present case, that the landlord is included in the class, it does not thereby clothe him with any superior right to that possessed by a general creditor. The defendant must rest its right, if it has any, on its status as landlord and of having acquired a lien upon the goods purchased by the plaintiff before the purchase was made. By the state of the case it appears that the distress warrant was not issued against the goods and chattels of the tenant until a day after the sale was consummated, and no

levy was made under the warrant until some time afterwards. It is, therefore, clear that the defendant acquired no lien under the distress warrant on the goods purchased by the plaintiff. *Woodside* v. *Adams,* 40 N. J. L. 417; *Bodell* v. *Realty Securities Investment Co.,* 88 *Id.* 155; affirmed 89 *Id.* 708.

10 The judgment of the Court below is affirmed, with costs.

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40

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ISIDORE SCHWARTZ, *Plaintiff-Appellee,* *vs.* KING REALTY & INVESTMENT COMPANY, a corporation, *Defendant-Appellant.*	*On Appeal from the Orange District Court.*

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE.

The Facts.

This is an action in replevin for the recovery of certain goods and chattels which were destrained by the King Realty & Investment Company for rent due it by its tenant, the Schultz Printing Company. The goods in question were purchased by the plaintiff at a public sale, conducted by an auctioneer on June 19, 1918. The sale was advertised in the newspapers and notices were circularized among persons who might be interested. The tenant, prior to the time fixed for the sale, made and executed a chattel mortgage encumbering all of the assets which were sold by the said auctioneer, including the property purchased by the plaintiff. From the proceeds of sale, the chattel mortgagee was paid and his indebtedness cancelled.

The day after the auction sale the defendant issued a distress warrant and the defendant retained one William Grimme as its bailiff for the purpose of proceeding with the said distress.

The trial was had before Honorable Daniel A. Dugan, and the Court directed a judgment for possession in favor of the plaintiff. From this judgment, the defendant appealed to the Supreme Court and filed six specifications. These, however, may be divided into three classes:

(1) The specification which questions the right of the proper party defendant, and contention that the proper party defendant was the bailiff in place and stead of the landlord.

(2) The specification which contends that because the plaintiff failed to comply with the provisions of an act entitled "An Act to prohibit sales of merchandise, goods and chattels in bulk in fraud of creditors," Chapter 208,

P. L. 1915, the sale was void and therefore plaintiff had no title to support an action of replevin; and that the Court erred in finding that the Sales Bulk Law was inapplicable.

(3) The specification that the Court erred in finding that a compliance with the Sales Bulk Law was an affirmative defense.

The Supreme Court affirmed the District Court.

POINT I.

A principal's constructive possession of goods in the hands of an agent or bailiff is sufficient to entitle the owner to maintain an action in replevin against the principal.

Distress for rent is regulated in New Jersey by an act entitled "An Act concerning distress." C. S., Vol. 2, pages 1939, etc.

By virtue of Section 8 of said act the landlord himself may seize for arrears of rent any of the goods and chattels of the tenant upon the premises owned by the landlord. He may do it himself or may, by power of attorney, appoint one as his bailiff to distrain. In this case, the landlord employed one William Grimme, who happened to be a constable, to proceed. The constable, when he performs this sort of a duty, does not act as an officer, but purely and solely as an ordinary agent for the landlord. He acts merely as a bailiff.

Possession by a defendant need not be actual. Constructive possession is sufficient. Replevin will lie for possession of property although not in the actual possession of the defendant, if it be under his control in the hands of another who is his agent. 34 Cyc., page 1400.

The goods in question were upon the premises owned and controlled by the defendant company and were really seized by the defendant company itself, through its duly authorized agent. The landlord would have a right to say who shall go upon the premises, in view of the fact that he was the owner thereof. In the case at bar, when a demand was made upon the defendant company for the possession of the property, it refused to give up possession. The mere fact that suit was instituted against the principal instead of the agent is immaterial. The only question in this suit is whether or not the plaintiff is entitled to the possession of the property, as against the claim of the landlord.

Replevin is a form of action which rises to regain possession of personal property which has been unlawfully taken or detained. 34 Cyc. 1352.

Where property is in *custodia legis,* it is necessary to make the officer who is in charge of the property a party defendant. For example, where an officer issues an attachment writ or has charge of an execution, a suit in replevin should be instituted against the officer. The theory of these cases is that the property is in the custody of the Court and suit must be brought against the officer in charge.

It should be borne in mind, however, that the issuance of a distress is not a judicial proceeding under the supervision of any Court. The remedy by distress is not considered an action prosecuted by one party against another, to which of necessity there must be a plaintiff and defendant, but is a proceeding *in rem* given by the common law and now regulated by the statute to the landlord whereby he seizes and holds the property found on the premises, to make good for his rent claim. Cyc., Vol. 24, page 1280.

The lower Court found, as a fact, that William Grimme acted merely as the agent or bailiff of the King Realty & Investment Company, and that the possession of the agent was possession by the principal and that the King Realty & Investment Company was a proper party defendant.

Section 23 of an act entitled "An Act to regulate the action of replevin," C. S., Vol. 3, page 4373, provides, among other things, that when goods and chattels have been taken under a distress for rent and a replevin suit is instituted by the plaintiff and in case the said plaintiff is non-suited, the defendant may, instead of having a return of the distress, a judgment for the arrearage of rent. From this section, it would necessarily follow that the proper party defendant in the replevin suit would be the landlord, by reason of the fact that he is in a position, in such a proceeding, to obtain the amount of rent due him.

Furthermore, the landlord and its bailiff have entered a general appearance in this suit and are not entitled to raise the question of proper parties.

Neither the bailiff nor the landlord in this case filed any claim of property whatsoever, and each permitted the property to be removed and gave no notice of whatsoever kind.

It certainly would be unjust to permit the landlord to state that he did not have possession of the property because his

agent under a distress for rent had exclusive possession, and that, therefore, the plaintiff was not entitled to succeed as against him. The issue is solely one between the plaintiff and the landlord.

POINT II.

The plaintiff acquired absolute title to support an action in replevin and the Sales Bulk Act does not apply to the case at bar.

The sale in question was conducted by a licensed auctioneer and was a public sale and not a private sale. The sale was advertised in the newspapers and circulars were forwarded to persons who might be interested. There was a large attendance at the sale. The sale, in effect, was one conducted solely for the benefit of the mortgagee. The Court is familiar with the terms of a chattel mortgage, which gives the mortgagee the right to conduct either a private or public sale and to retain the proceeds and give the proper credit therefor to the mortgagor. In this case the proceeds were applied to the payment of the mortgage indebtedness.

In the leading case of *Woodside* v. *Adams,* 11 Vroom, page 417, Mr. Justice Depue treats fully of the rights of landlords in cases of property encumbered by a chattel mortgage. A landlord, by virtue of Section 8, has no lien on the goods and chattels of his tenant for the payment of rent, except such as are given by the statute. The section in question expressly limits the right of distress to the goods and chattels of the tenant and no other person.

A chattel mortgage is in law a conveyance of goods and chattels mortgaged and passes the title of the mortgagor for the purposes for which it was made. The right of a mortgagee under a mortgage made by a tenant is superior to that of the landlord, subsequently seizing them under a warrant to distrain for rent. The lien of the landlord relates to the time of actual seizure under the warrant to distrain.

It is now well settled in New Jersey that the rights of a mortgagee are superior to that of a landlord subsequently seizing them under a distress warrant.

Bodel v. *Real Security & Investment Company,* 95 Atl. Rep., p. 758; 88 N. J. L., p. 155, which was subsequently affirmed by the Court of Errors and Appeals, in 99 Atl. Rep., p. 337. In this case the Court held that a landlord's lien under the statute

authorizing distress for rent relates only to the time of actual seizure under distress and a chattel mortgage on record for several months prior thereto has priority, even though some of the rent accrued before the recording of the mortgage.

The chattel mortgage in the case at bar was executed and recorded prior to the issuance of and levy under the warrant for distress for rent. The plaintiff in this case purchased at auction sale, conducted for the benefit of the mortgagee, and he stands in the position of the chattel mortgagee and, in accordance with decisions in this jurisdiction, is entitled to prevail.

In the case of *Wasserman* v. *McDonald,* 190 Mass., p. 326, the mortgagor made and executed a chattel mortgage. Thereafter the mortgagee advertised the property for sale, and an auctioneer was employed to conduct the sale. At the time of the sale there were two creditors—one, the landlord, and the other, a judgment-creditor. The plaintiff in this case was a *bona fide* purchaser for value. Thereafter the judgment-creditor seized the goods purchased by the said plaintiff. It was contended by the judgment-creditor that the Sales Bulk Law applied and the Court held that it had no application whatsoever.

The manifest purpose of the Sales Bulk Law is to protect creditors of retail dealers against a class of sales which are fraudulent. In the case at bar no fraud was shown and no question was raised as to the validity of the chattel mortgage. The sale was not a secret one.

Furthermore, a landlord does not belong to the class of creditors contemplated by the Sales Bulk Law. It was the duty of the landlord in this case to be present at the sale and give a proper notice of his rent claim and make a protest. The landlord must be vigilant and cannot permit an innocent purchaser for value, without notice, at an auction sale, to acquire goods and then seize them by virtue of the non-payment of the rent.

It is proper in this connection to mention the line of cases which hold that a landlord has no remedy against a constable who removes or take possession of the goods of a tenant from whom there is rent due unless he first gives notice to the officer of the rent due. See *Ayers* v. *Johnson,* 7 N. J. L., p. 119; *Ryerson* v. *Quackenbush,* 26 N. J. L., p. 237; *Hand* v. *Howell,* 61 N. J. Law, p. 142; 30 Atl. Rep., p. 748.

The reason assigned is that the landlord might have destrained the goods upon the demised premises in due time for the rent which had accrued. It is to be noted that in the case at bar the

tenant was in arrears for the months of March, April, May and June. The landlord should have exercised due diligence and destrained the goods prior to the public sale.

The reasoning in the said cases is clearly applicable to the case at bar. Because of the fact that the landlord omitted to give the proper notice, he is not at this time in a position to impair the rights of an innocent purchaser for value.

POINT III.

In the case at bar the plaintiff was under no obligation to show a compliance with the Sales Bulk Law—it was purely an affirmative defense.

The plaintiff established the facts which are set forth in the state of case and rested. The defendant offered no testimony showing that the sale in question was out of the ordinary course or that the debtor was disposing of his property for his own exclusive use, leaving his creditors unpaid, and that the sale was a fraudulent one.

Upon an examination of the Sales Bulk Law, we find that the body of the act declares that a sale shall be void as to creditors unless certain things are done by the purchaser. The proviso, however, speaks of the sale as "such voidable sale." The word "void" was used in the sense of "voidable." The proviso itself shows that the sale was a nullity only when attacked by creditors within a certain period. *Dickerson* v. *Harkerson,* 72 Atl. Rep., p. 941.

If the contention of the defendant is correct, that in a distress proceeding a creditor can attack the sale, it would, therefore, become his duty to show that the sale was void because of failure to comply with the Sales Bulk Law. The act provides that a proceeding may be brought within ninety days of the consummation of the sale to invalidate same. Surely in an independent suit the moving party would have to establish all of the essential facts.

It was the duty of the landlord to show that the tenant disposed of his property for his own use, leaving his creditors unpaid, because clearly from the showing made by the plaintiff, it was evident that there was no fraudulent sale, and that the mortgagee was paid from the proceeds of the sale.

Summary.

It is respectfully submitted that the judgment of the lower Court should be affirmed, because:

1. The landlord was a proper party defendant, and it was not necessary to make the bailiff a party defendant.

2. A landlord can only seize, in a distress proceeding, the goods of the tenant and not of another person. The plaintiff was an innocent purchaser for value, without notice, at a public auction sale, held in fact for the benefit of the mortgagee, whose rights are paramount to those of the landlord and whose rights accrue to a purchaser.

3. The landlord failed to prove affirmatively in this proceeding that there was no compliance with the Sales Bulk Law.

4. The Sales Bulk Law does not apply to the case at bar.

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New Jersey Court of Errors and Appeals

ISIDORE SCHWARTZ, *Plaintiff-Respondent,* *vs.* KING REALTY & INVESTMENT CO., a corporation, *Defendant-Appellant.*	*In Replevin.* *On Appeal from Supreme Court.*

BRIEF OF DEFENDANT-APPELLANT.

Facts.

This is an appeal from an opinion of the Supreme Court affirming a judgment of possession entered in the Orange District Court in an action of replevin.

The plaintiff, Isidore Schwartz, issued a writ of replevin for the recovery of certain goods and chattels located on the premises 239 Washington street, Newark, New Jersey, which premises were owned by the defendant, and which had been occupied by the Schultz Printing Company as a tenant of the defendant.

The Schultz Printing Company had sold its machinery and equipment at an auction sale, at which sale the plaintiff had purchased the goods and chattels described in the writ of replevin. The day after the sale to the plaintiff the defendant had issued a distress warrant to one William Grimme, a constable of the County of Essex, for rent due and owing from the Schultz Printing Company, its tenant, in the sum of three hundred and seventy-five dollars. The first day the constable called to make his levy he was unable to do so and finally made a levy at a later date, which levy included the goods and chattels purchased by the plaintiff and which were included in the writ of replevin.

There was no testimony introduced by the plaintiff to prove any compliance or even an attempt to comply with any of the provisions of the Bulk Sales Act contained in Chapter 208 of the Laws of 1915.

At the close of the plaintiff's case the defendant moved for a non-suit for two reasons, the first of which will not be pressed here, and the second, that there had been no proof of any com-

pliance, or an attempt to comply with any of the provisions of the Bulk Sales Act, and that, therefore, the sale by the Schultz Printing Company to the plaintiff was void, and there being no title in the plaintiff, he should be non-suited. This motion was denied and an exception taken. The defendant moved for a judgment for the defendant on the same grounds, which motion was also denied and an exception taken.

The only point which the defendant desires to urge on its appeal from the decision of the Supreme Court is the construction which was placed by that court upon the act known as the Bulk Sales Act, contained in Chapter 208 of the Laws of 1915.

ARGUMENT.

Particular exception is taken to the following paragraph contained in the opinion of the Supreme Court, (state of the case, p. 13, ll. 1 to 28):

> "Because the act is drastic in its provisions and restrictive of the free alienation of property it should be strictly construed and not be extended to a transaction which does not come clearly within its terms. Guided by this universal canon of statutory construction, we are unable to perceive the applicability of the statute to the facts of the present case. The goods of the Schultz Company were sold at a public and not at a private sale. The statute is plainly aimed at private sales of property, and not at public sales. Unless we adopt this view the sale of one's goods and chattels at public auction conveys no title to the purchaser, though the sale and purchase are made in good faith. And in this connection it is difficult to comprehend how a purchaser at such sale can comply with the terms of the statute which require that a buyer shall make inquiry of the vendor and demand an inventory of him of his creditors and to send to each a ten days' notice of the buyer's intended purchase and the amount of consideration to be paid and the place where it is to be paid. It needs no further discussion to demonstrate how absurd it would be to attempt to fit these requirements of the statute to a purchase made at a public auction.
>
> Moreover, the Legislature, by the proviso referred to, contemplated judicial action by a competent tribunal, to invalidate any such voidable sale, by an action at law or a suit in equity initiated by a creditor of the seller. This situation is not present here."

It is respectfully pointed out to the Court that the goods of the Schultz Company, although sold at an auction sale, were not, in the opinion of this appellant, sold at such a public sale as was contemplated by the Legislature in the act now under review, for the third section of the Bulk Sales Law specifically excepts from the operation of the act *only sales made under any order of a Court or made by an executor, assignee for the benefit of a creditor, administrator, receiver or any public officer in his official capacity, or by any officer of a court;* whereas the first section of the act embraces by its language *every sale in bulk of the whole or a large part of the stock or merchandise and fixtures or merchandise or fixtures, or goods and chattels otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business or occupation.*

It is also respectfully pointed out that the objection raised by the learned Justice of the Supreme Court in his opinion is not a real objection to the construction of the act now urged by this appellant. It would be very easy and practical for any person, also for the Schultz Printing Company, in the transaction now under review, to comply with every term of the Bulk Sales Act. The Schultz Printing Company could very easily have notified each and all of its creditors, ten days before the auction sale, of the time and place, when and where the sale was to be made, or after the auction sale had taken place it could have mailed a notice to all of its creditors of the fact that the auction sale had taken place, giving them the name of the purchaser or purchasers, and of the time and place, when and where the purchase price was to be paid by each of the successful bidders.

A practice quite similar to this is followed both in the Court of Chancery and in the Bankruptcy Court, where before auction sales by the receivers or trustees, a notice of the contemplated sale is mailed to each creditor notifying him of the time and place of sale, and of the fact that the confirmation of the sale will be urged before the Court or Referee having jurisdiction at a time and place named in the notice. Surely if the Schultz Printing Company had wanted to act fairly with its creditors, it could have followed the practice above outlined instead of not notifying its creditors, and it is urged that the very fact that the claim of the defendant in this case was not paid and has not been paid up to the present time, is sufficient evidence of the very fraudulent practice which this act was passed to overcome.

It is also respectfully pointed out that the proviso in the act which states that proceedings at law or equity shall be brought against the purchaser was faithfully followed in the case now under review by the defendant issuing a distress warrant and the plaintiff herein instituting its action of replevin. If these acts were not procedings at law to test the validity of the sale, then it is respectfully submitted that there is no practice known to the Bar of this State which can come within the definition of "Proceedings" contained in the above mentioned proviso.

The case of *Kett* v. *Masker,* 90 Atl. Rept. 243, clearly upholds the statement last made. As was said by the Court in that case which was an action in replevin, the plaintiff's title depended upon the validity of the vendor's title. If that was void by reason of the application of the Sales Act to the facts, the plaintiff's title necessarily falls. Also the following statement in the same case:

> "Equally unsubstantial is the contention that the defendant cannot raise the question of title in this proceeding, but must attack the sale by a direct proceeding for the purpose of invalidating it. The general policy and purpose of the act upon proof of the facts, is to render the alleged sale null and void, *ab initio* as against the creditors of the seller."

The recent cases show a general disposition on the part of the courts to afford creditors of one who has made a sale in violation of the Bulk Sales Law every reasonable remedy to protect and enforce their claims. All these statutes have one aim, to prevent a sale of goods in bulk until the creditors of the seller have been paid in full. As was said by the Massachusetts Supreme Court in the case of *Hart* v. *Brierley,* 76 Northeastern 286:

> "The statutory test is whether the sale was made in the usual way in which a merchant owing debts conducts his business, or whether he takes an unusual method of disposing of his property in order to get the money for his own use, leaving his creditors unpaid."

No case has been found in which any sale sought to be invalidated by a creditor was made by an auction as distinguished from a private sale. But it is respectfully submitted that the Bulk Sales Act should be construed so as to properly bring about its true meaning and application.

> "For this purpose resort may be had not only to the language and arrangement of the statute, but also to the intention of the Legislature, the object to be secured and

to such extrinsic matters as the circumstances attending its passage, the sense in which it was understood by contemporaries, and its relation to other laws."
36 Cyc. 1102.

It is most respectfully submitted that the Bulk Sales Act must be construed with reference to the object intended to be accomplished by it, and while it may be true that the construction of the act given it by the Supreme Court in its opinion now appealed from will not only cause inconvenience and a failure of justice is no real reason for its reversal, still it must be remembered that every purpose for which the act was passed can be easily overcome and a door opened wide for all sorts of fraudulent practices so as to comply with the Supreme Court's construction of the act, if it is not reversed by this Court.

It is respectfully submitted and strenuously urged, that bearing in mind the occasion and necessity which brought about the enactment of the Bulk Sales Law, the defects and evils in the law as it existed before its enactment, and the remedy provided for by the act itself, this Court should reverse the decision of the Supreme Court so that it will not be possible for a person owing money to merely conduct an auction sale and thus effectually and so easily remove the beneficial effects of an act which in actual practice has put a stop to the fraudulent disposition of a debtor's property without the payment of his just debts. As against the danger which the construction of the Supreme Court makes possible, surely the slight inconvenience which a compliance of the acts puts upon an honest vendor, if the construction now urged is placed upon it, so far outweighs the other construction in its beneficial possibilities, that this Court should not hesitate in finding that the Supreme Court's opinion was erroneous and that the District Court's order of possession should be reversed and a judgment of non-suit ordered entered.

Respectfully submitted,

EDW. R. McGLYNN,
Attorney of and of Counsel with Defendant-Appellant.

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New Jersey Court of Errors and Appeals

WERNER SCHWARTZENBACH, administrator *ad prosequendum* of the Estate of John Schwartzenbach, deceased, *Plaintiff-Respondent,* *vs.* ERNEST ANTOINE, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Circuit Court.*

Brief on Behalf of Defendant-Appellant.

This was an action brought by the administrator of the estate of John Schwartzenbach to recover damages from the defendant by reason of the alleged wrongful death of plaintiff's intestate, which was occasioned by his being struck by an automobile-bus driven by a servant of the said defendant on River street in the City of Paterson at about twelve o'clock on the night of May 29th, 1917.

The case was submitted to the jury which found a verdict for the plaintiff.

But two reasons are urged for the reversal of the judgment entered upon the verdict, and they are:

1. There was no proof of negligence on the part of the defendant, and

2. If there was negligence on the part of the defendant, there was evidence of contributory negligence on the part of plaintiff's intestate.

ARGUMENT.

Point I.

There was no proof of negligence on the part of the defendant.

A number of witnesses were sworn on behalf of the plaintiff, as to the manner in which the accident occurred, *everyone of whom* were in the back room of a saloon which was closed for the night, and which was, and had been darkened preparatory to being closed up. These witnesses undertook to make out a case for the plaintiff and the insistence is that no credible testimony—that is—no testimony of a believable nature, was given by any of these witnesses.

Generally the credibility of a witness's testimony is for the jury, but it is insisted that when a witness attempts to relate a story which is inherently incredible, a court is not bound to submit it for a jury's consideration.

Without repeating at length the testimony given by plaintiff's witnesses, I call the Court's attention to general statements made by all of the witnesses, with one exception which I shall later refer to.

Marcelle Parmele testified that he was in the back of his saloon when he heard a kind of thump which he described as a "crash"

(p. 15), "a sort of puncture," "a sort of rattle," "a sort of a crash like hitting something," etc. (p. 23); that after he went out to see what occurred, which he did not do right away, he saw some men about to pick up the injured form of the deceased (p. 14), which was lying about sixty feet from where the bus was then standing (p. 16). He says that it was a dark night, and had been "a little bit drizzly" (p. 12), but that there was an electric light in the neighborhood where the accident occurred (p. 13) and that he could see distinctly as he came out of the saloon (p. 17).

Michael Tooey, another witness, who was in the saloon, stated that he heard "a thump, a sudden jar as if two things came in contact, and then there was a kind of a drubbing or shoving like as if something was shoved like" (p. 37). He did not go outside and knows nothing more about the accident except that he testified that there was a mark of a wheel on the injured man's shoulder (p. 40). He also testified that it was light on River street in that neighborhood at that time and that there was no difficulty in seeing on the street (p. 42), although it was "drizzly like" and "dark" (p. 44).

Fred Gundy testified that he left a certain saloon with the deceased at the corner of Sixth and Madison avenues, and saw him go down Sixth avenue in the direction of Parmele's saloon (where all of these witnesses had congregated) and in front of which the accident occurred, and that at the time he was perfectly sober (pp. 75-76).

Henry Steiger testified that while in the saloon, he heard a noise "like an automobile, or a bus, whatever it was, coming up River street, that is, when it got near the place, then I heard a kind of a rattle and a dull jar"; that he did not get up right away but after about half a minute he went to the door and saw them carrying the injured man in (p. 101); that it had been raining that night, but was not raining at the time of the occurrence; that when the injured man was brought in, he noticed some dirt alongside of his chest (p. 102).

The above is the only evidence given indicating any negligence on the part of the defendant with the exception of that by one Luigi Camarano. This man was also in the saloon sitting at a table facing toward the street when, as he says, the bus came past "at an awful speed" and he heard a "bunk like" (p. 79); that they got up and ran to the front and saw a policeman pick up the injured man (pp. 79-80). He gave it as his opinion that the bus at the time it passed was going between "thirty and thirty-five miles per hour" (p. 82).

If this witness had any reasonable opportunity for observing the bus and estimating its speed, there is no question but what, if his story was believed, the jury had a right to find the defendant negligent. He testifies, however, that he was sitting in the back room of the saloon, which was a distance given by witnesses as about forty feet from the front door (p. 45); that the doors of the saloon were closed, and the lights out in the window (p. 87), and that the windows had four-foot panels or facings which he would have to look over the top of, in order to see the bus passing (p. 91) and that all the opportunity he had of seeing this bus and judging its speed was when it passed the front of the saloon about in the middle of River street.

If this can be called reasonable testimony then, of course, no argument can be made against the refusal of the Court to non-suit the plaintiff on the ground of lack of evidence of negligence, but can it be said that this is credible testimony? Here are a number of men sitting in the rear of a saloon which is darkened for the night and the doors of which are closed, on a dark, drizzly night, with their attention attracted indoors. While there, they hear a thump or other sort of noise, and one witness without having his attention attracted in any way, observes a bus flying by at a speed which he undertakes to estimate at thirty miles or more an hour, without giving any reason for the conclusion as to this speed, or other evidence showing that the speed was thirty or thirteen miles per hour. It was a mere statement which was founded upon nothing.

There is, of course, nothing to prevent a witness from testifying to strange, lurid and impossible situations, but the question is whether the Court in every instance, is bound to submit such testimony to the jury. I realize that it is hard to draw the line as to when testimony is to be considered credible or not as a matter of law, but sometimes circumstances speak for themselves, as in this case.

The distance of the automobile from the injured man after the accident, was not testified to by anyone as being the distance which the bus moved immediately after striking the man, but was simply a distance which separated the man from the bus when seen by the witnesses.

There was no direct evidence, or the existence of circumstances justifying the inference, that the injury was caused by the wrongful act of the defendant, and therefore the motion to non-suit should have been granted. *Suburban Electric Company* v. *Nugent,* 58 N. J. L. 658.

Point II.

Even if it can be said that there was evidence of negligence on the part of the defendant, it is clear that the deceased was guilty of negligence which contributed to the accident.

Under the proofs produced by the plaintiff, the accident occurred at a place which was fairly well lighted by electric lights, in addition to which, it is uncontradicted evidence in the case, the automobile, as it came along the street, had its lights burning. These lights had on what are known as "scatter lenses" (bot. 139-top 140) and were sufficiently bright for Julius Kyle, an officer, who boarded the car, to see them when he first looked for the bus as it came towards him about 150 feet away (p. 161). This witness also testified that the driver of the bus blew his horn before he got to Sixth avenue, which was some distance away from the point of the accident (p. 173). This was not contradicted by any of the witnesses. The witnesses for the plaintiff all testified that they heard the bus coming before it passed the saloon, in which they were.

If, therefore, this automobile could be seen as it came along River street, which was a straight street at that point under the testimony, and the deceased on a dark, drizzly night, stepped into the path of

this oncoming bus, the case is one of contributory negligence in law, and for that reason there should have been a direction of a verdict in favor of the defendant.

The plaintiff relies upon the much canvassed case of *Merkl* v. *Jersey City, etc., Ry. Co.*, 75 N. J. L. 654; but that case differs entirely from the present one. The principal point made in the Merkl case, and which moved this Court to sustain a verdict in favor of the plaintiff, was that the deceased, at the time of being run into, was seen lying in a helpless condition upon the car tracks before he was hit, and this Court indulged the inference, that the deceased in that case was *involuntarily lying* where he was, because of a fall, either while asleep, in a fit, while intoxicated or from an accidental fall, as against the idea of voluntary prostration on his own part (p. 658). And when asked to consider the case of *Vizachero* v. *R. I. Ry. Co.*, 26 R. I. 392, Judge Vredenburgh, after quoting from the opinion in the case just referred to (which indicated that the deceased was seen before the accident alive and crawling on his hands and knees between the rails and towards the car which struck him), said: "In the present case the motorman's evidence did not show nor tend to show that the intestate possessed either the faculty of will or the power of motion or the ability to escape from a place of danger. The comparison of the two cases need not be pursued further. The application of the doctrine of contributive negligence to the facts of the R. I. case affords no support, it seems to me, for its extension to the present" (p. 558).

In the case under consideration the plaintiff took great care to point out by witnesses and circumstances that the deceased *was not intoxicated* at the time he met with his accident, or that he was unconscious at the time he was struck as in the Merkl case. Fred Gundy swears that he left the deceased about five minutes of twelve, after leaving Mr. Christian's saloon, and that at the time he was *perfectly sober* (pp. 75-76). All of the witnesses for the plaintiff, as well as the witnesses for the defendant, testify that after the accident when the injured man was brought into the saloon he was conscious and spoke to them.

Dr. Armstrong testified that the deceased was a man of fairly good physique (p. 66), and Bernard Schwartzenbach testified that the deceased was a healthy man (p. 107). The testimony absolutely distinguishes the case from the Merkl case, and places it in the category of cases where one who leaves a place of safety for one of danger voluntarily, and meets with an accident or injury, is not entitled to recover. This is an old principle of law and requires no citation of cases to support it.

It is, therefore, respectfully submitted that for either or both of the above reasons the verdict in favor of the plaintiff should be reversed.

Respectfully submitted,

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