

Vol 410 - 1907

NEW JERSEY COURT OF ERRORS AND APPEALS

MARIE MASTERS,	}	10
Plaintiff in Error,		Error to Supreme Court.
vs.		
SCOTT CHAMPION, et. als.,		
Defendant in Error.		

J. J. CRANDALL, for Plaintiff.
 ALBERT ABBOTT Attorney and J. E. P.
 ABBOTT of Counsel for Defendants. 20

The determination of the District Court for the city of Atlantic City—and its affirmance by the Supreme Court, on the state of the case returned—is challenged by this appeal.

Summarized, the finding is:

“At the trial the allegation of the statement of
 “demand was established, together with the value
 “of the property three hundred dollars. The 30
 “defense interposed was and is that the annexed
 “notice, although served on Sunday, was and is
 “complete, because the plaintiff wholly failed to
 “cause a jury to be summoned to make inquisition
 “of the right of property pursuant to the act con-
 ‘cerning Small Cause Courts, Revis. 1903, p. 251,
 “Sec. 62.

The Judge of the District Court adjudged
“that by the service of such notice and failing to
“procure a trial of the right of property as afore-
“said provided, plaintiff is estopped from all recov-
“ery of damages for the trespass and conversion in
“the statement of demand set forth and rendered
“judgment for the defendants and against the
“plaintiff, which is the error complained of by the
10 “appellant.

The Data—The postulates of the state of the case
from which such justification is deduced are—

1st.—To Scott Champion, constable, and Sitley
& Son, incorporated: “Please take notice that the
goods hereinafter enumerated, seized by you as the
property of the Keystone Lumber Company and
Francis McCauley, by virtue of an execution at the
20 suit of Sitley & Son, incorporated, and also at the
suit of Levi B. Pierce, are not the property of said
Francis McCauley and Keystone Lumber Company,
but are my property, to wit, the following goods.”

2nd.—The goods were in the exclusive possession
of plaintiff.

3rd.—The goods were not removed from plain-
tiff’s possession till after the sale.

4th.—The allegations of the statement of demand
30 are conceded to be established.

5th. That by service of the notice, such as it
was, it was designed by the plaintiff as a protest, in
addition to or substituted for the verbal one pre-
viously given—and not as a proceeding or step ini-
tial to the summoning of a jury to try her right of
property as prescribed by statute.

6th. The notice, such as it was, was served on Sunday.

FIRST.

The legal significance of the notice independent of the effect of Sunday service.

In computing the legal value, import, and significance of this notice we must consider and contemplate it as logically conditioned by the terms of the above stated data. It is a notice containing the above limited attributes and co-relatives that we have to interpret. 10

In *Van Marter v. Lucas*, 35 Vr. 182, printed and attached to this brief Dixon J. says: "We do not say that every claim of property served on a constable who is executing a writ must be considered a claim under the statute for the *terms of the claim*, or *some other circumstance*, may negative such an inference." 20

Terms of the Claim—In *Folwell v. Fuller*, 24 Vr. 675, Reed J. says: "The result of the decision in *Baired v. Johnson*, 2 Gr. 120, is that application is to be made by filing with the Justice a claim in writing, setting out with particularity the property claimed, that an execution has issued out of a Justice Court, and that levy has been made under said execution upon the said property, and naming the Justice who issued the writ, the constable who executed it, and the names of the parties to the action." 30

In the absence of any knowledge found—that plaintiff knew whether the execution threatening her property was issued out of the Court of Common Pleas, the District Court of the City of Atlantic City, or other Court—and on the face of the

notice was the constable authorized to conclude that this notice referred to execution issued out of Justice Daniel E. Iszard's Court in a cause wherein Keystone Lumber Company and Frances McCauley were defendants? If nothing more be done than serving this notice—in addition to her verbal protest to the constable to let her property alone—do the terms of this notice conclude this plaintiff, 10 to the effect of abandoning her property to the constable? The state of the case finds that it is her's. Now can abandonment of property to the ordeal of a jury trial, be read out of the notice? In an application for a jury filed by the claimant, must it not be the same notice which is served on the constable? Suppose the constable had proceeded in the face of the notice and sold, what could plaintiff have done about it except to try her right in a suit for conversion? 20 Could she be heard to say she was damaged—by the constable's inattention to such an indefinite notice?

“Or some other circumstance,”

In *Berry v. Chamberlain*, 24 Vr. 468, Beasley C. J. says: “In these instances neither of the parties is deprived of a regular common-law trial. What the statute does is this—it offers for their acceptance a mode of trial, at once inexpressive and facile. But neither the one or the other is compelled to resort to it. The claimant has the option of presenting his claim or vindicating his rights of property by an action of replevin or in trespass *de bonis as portatis*. The plaintiff in execution may give bond and compel a sale under his execution, and thus refer the question of title for trial to the ordinary tribunals. But the parties can waive such 30

rights and at their option, accept the easier method of litigation proffered by the legislature," etc.

Again Dixon J. says, in the above case:

Van Marter v. Lucas—"Nor do we now hold that the service of a claim under the statute necessarily confines the claimant to the procedure which the statute authorizes, for perhaps, if within ten days he should institute against the officer an action of tort or replevin, the main purpose of the law would be effectuated. 10

"But we do hold that if within ten days after service of the statutory claim the claimant takes no action in vindication of his rights and the officer proceeds to sell in reliance on the implied abandonment of the claim he is exonerated from responsibility in tort to the claimant."

Now it will be seen from the above opinions, that by this statutory provision, an additional elective remedy is given the claimant. Of course by the election of one remedy either by claim of property under the statute—replevin or conversion—their is a waiver of the other two, although Dixon J. says, that the waiver by notice of claim is not complete, till ten days after service of the notice, as claimant may at the end of nine days prosecute replevin or conversion. 20

But suppose conditions do not exist which authorizes replevin, conversion or trespass, will a notice operate as an election and a waiver of tort remedies? The answer must be in the negative. Then we are relegated to consideration of the conditions, the data of the case stated. The goods were always in the plaintiff's close and in her exclusive possession. 30

The action is conceded to be trespass *quare clausum fregit* at the time of the sale. It is obvious that up to the time of asportation the claimant could not be said to be damaged, but only threatened.

Griffen v. Jackson, 11 Vr. 440.

The state of the case concedes that for claimant's purposes there was only a pen and paper levy.

10 The property could not be in the possession of the law and that of plaintiff claimant at the same time, and so long as plaintiff was only threatened, she had no remedy and hence no election. If she had procured a trial before some Justice the defendant could say, your property has not been interfered with, and prove it, and the justice would dismiss the case and claimant would have made no progress in the vindication of her rights.

20 Reed J. in Folwell v. Fuller, 24 Vr. 576, says:
"Now the claim of property filed with the Justice, having conferred jurisdiction to issue a venire, that jurisdiction continues, unless the existence of some jurisdictional fact is attacked and its non-existence exhibited. The attack should be made by way of a motion to quash the venire and dismiss the proceedings. The motion is in the nature of a plea in abatement. The substance of the objection is that
30 some fact stated in the claim, and upon the presumed existence of which the venire was issued, does not in reality have an existence."

Now it is well reasoned in Folwell v. Fuller, that in correlating the evidence on the trial of the claim before the Justice, nothing is open for consideration but the title to the goods claimed. That is,

whether there be any judgment execution, levy, etc., are eliminated.

But in the present case the trespass is bodily admitted and the only justification is the served notice, such as it is, and it is contended that this justification is not made out, and that "the terms of the claim or other circumstances negative such inferences."

SECOND

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But the Act provides: "In all cases where any constable shall by virtue of any writ of execution * * * levy on," etc.

It is laid down in *State v. Conover*, 4 Dutch, 224: "If the sheriff under execution against A levy upon the goods of B, the act is not done by virtue of his office. He derived no authority whatever from his office or from the execution in his hands to seize the goods of a third party. He had 20 precisely the same right as a private individual to seize the goods as he had when invested with office and armed with legal process. The act was done outside of his office. * * * In the action brought by the prosecutors against the sheriff for the tort, he was not sued as sheriff, nor was he complained of for any breach of official duty. He was sued simply as an individual for a tort committed by him in his private capacity. And in that 30 action the defendant could not have justified by virtue of his office nor of the process in his hands," etc. So as said before the defendants must completely justify. Justify to the extent that "the terms of the notice and circumstances do not negative—abandonment by plaintiff of her property.

But the Supreme Court says that the case is *aliter*

ego—absolutely coincident with *VanMeter v. Lucas, supra*. The opinion of the Supreme Court in this case is annexed to this brief.

The data in *VanMeter v. Lucas* is brief

The constable had possession of and was about to sell two cows, by virtue of execution out of Small cause Court against Duclas.

10 The notice was a faultless statutory notice. It was intended by plaintiff to be the initial step to trying the right of property by a Justice. It was understood by the constable to be a notice under that section.

The jury was not summoned, and the claim was considered and taken to be abandoned and the constable proceeded as if no claim had been made.

20 In other words he held his possession of the cows and proceeded as though no claim had been made. What was abandoned? Ans. The election made by the claim—which election was a waiver of an action of replevin or conversion. But suppose the constable had never had possession of the cows at all, and the claimant had never been disturbed in possession, and a statutory notice had been served and not pursued, and later the constable with a gang of harpies had invaded plaintiff's yard, and disposed of the cows in solemn form. Can any one put their finger on the time or circumstance of
30 plaintiffs right to sue in trespass replevin or trover? A time when plaintiff had conditions from which he could elect between remedies? Can he be said to abandon replevin when no right of action existed?

But the cases do not hold; that this notice constitutes an election, to waive action for trespass

quare clausam fregit. The state of the case concedes utter impossibility of justification, when it concedes that plaintiff's dominion of the property was never disturbed till the sale invasion.

THIRD.

Service on Sunday.

Justice Dixon in *VanMarter v. Lucas supra* gives to this act of notice his usual vivifying hermeneutical touch, and he never touched a subject that he did not improve on the pattern, to wit: "The matter stands as if the plaintiff had served his claim on the constable, with a request that he would delay ten days, so that the claim might be legally tried, and had thereby obtained such delay, and at the end of the ten days had notified the officer that the claim was abandoned and that he might proceed with the execution of the writ." If these facts had actually occurred, the plaintiff would certainly have been estopped from holding the constable responsible for a tort, and the statute in effect declares that what the plaintiff did and omitted to do shall be equivalent to those facts. 10 20

The question is, can the defendants justify an admitted trespass by a transaction on Sunday containing the above attributes? It takes a served notice possessing the above attributes. The date on the notice is utterly insignificant.

Taylor v. Thomas, 1 Gr. Ch. 106. 30

Arctic, etc., v. Hicks, 7 Abb. Prace, 304.

In *Reeves v. Bulcher*, 2 Vr. 224, the Chief Justice says: "The circumscriptions of the English act by the early judicial determinations, had deprived it of the greater part of its efficacy; the result of those determinations being that an indi-

vidual, so far as the secular magistrate, could with entire impunity, desecrate the Sabbath, provided he did so in a business affair, disconnected with his ordinary avocation. . . . A regulation thus mutilated does not appear to have recommended itself to the framers of our statutes, and hence the inhibition of all "*worldly employment or business.*" The terms are comprehensive, and the legislative intent manifest. In my opinion the effect of the provision

10 is to annul every transaction which, if performed on a week day would be unforceable in a court of justice."

Reed J. in *Steffins v. Earl*, 11 Vr. 137, says: "Whether the words spoken on Sunday could be resorted to in any event for the purpose of showing the character of the tenancy is very questionable." *Butcher v. Reeves supra.*

20 In *Nibert v. Baghurst*, 2 Dick 208, the germ is stated: "The 2nd of August, 1866, fell on Monday, but it abundantly appears by the proof that it was on Sunday, the preceeding day, that Baghurst and Nibert came to their understanding, and the \$25 paid. The receipt given therefor, Baghurst says, he purposely dated ahead, so that it would not appear to have been given on Sunday." Held fatal.

Cannon v. Ryan, 20 Vr, 314.

30 *Ryno v. Darby*, 5 C. E. Gr. 231.

Gennert v. Westner, 8 Dick 305.

Rhiem v. Carlisle Deposit Bk., 76 Pa. 132.

The opinion of the Supreme Court in this case construction of Sects. 1 and 5 of our Vice and Immor- seems to be the first perversion of the uniform con- ality Act, Revis. 3707.

The judgment of the Supreme Court should be reversed, the Supreme Court ordered to direct a judgment for the plaintiff for \$300 or direct judgment of the District Court to be entered for \$300 in favor of the plaintiff and against defendant with all costs.

J. J. CRANDALL for Pl't'ff.

MASTERS v. CHAMPION, et. al. 10

(Supreme Court of New Jersey, Feb. 25, 1907.)

1. CONSTABLE, LIABILITIES, WRONGFUL LEVY.

In an action for tort against a constable for removing and carrying away certain lumber, sold by him at constable's sale under execution issued out of a justice's court as the property of the defendants in execution, it appearing that the plaintiff had delivered to the constable before the day of sale a written notice, claiming the property to be hers and not the property of the defendants in execution, the constable adjourned the sale for 10 days, that plaintiff had failed to apply to have her right tried pursuant to section 62 of the small cause courts act (Act April 8, 1903; P. L. p. 270), and that thereupon the constable made sale of the property pursuant to the adjournment, it was held, following *Van Marter v. Lucas*, 64 N. J. Law, 182, 44 Atl. 865, that the plaintiff had no right of action against the constable, and the adjournment below in favor of the defendants was affirmed. 20 30

2. SAME.

Held, also, that the fact that the goods levied on were in possession of the plaintiff, and that the constable had not taken manual possession thereof at the time of the levy, did not take the case out of the rule laid down in *VanMarter v. Lucas*.

3. SAME.

Held, also, that the fact that the notice in writing was delivered to the constable by the plaintiff on Sunday did not relieve the plaintiff from the effect of the rule therein laid down; it also appearing that the notice was prepared and signed on Saturday, and was not acted upon by the constable until the Monday following.

(Syllabus by the Court.)

10 Appeal from District Court of Atlantic City.

Action by Marie Masters against Scott Champion and other. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued November term, 1906, before Swayze, Trenchard and Hendrickson, JJ.

John J. Crandall, for appellant. Albert C. Abbott and J. E. P. Abbott, for appellees.

20 Hendrickson, J. This is an appeal which brings up for review a judgment in favor of the defendants rendered in the District Court of Atlantic City. The action was tort for entering the close of the plaintiff and the seizing and carrying away a lot of cedar and other lumber of the plaintiff, valued at \$300.

30 The state of the case shows that the supposed trespass was committed by the defendant Scott Champion, who, as constable, had sold the lumber at constable's sale, and by the other defendants, who were purchasers thereat. The defense was that the constable had duly levied upon the lumber under execution issued out of a justice's court in favor of certain judgment creditors as the property of one McCauley and the Keystone Lumber Company; that the constable having advertised the lumber for sale, the plaintiff delivered to the constable a notice in writing, signed by herself, that the goods so levied on were not the property of said McCauley and the lumber company, but were her property, describing the goods as in the levy; that

thereupon the constable on the day of sale adjourned the same for ten days and posted notice thereof, and that the plaintiff wholly failed to cause a jury to be summoned to make inquisition of the right of property pursuant to Section 62 of the small cause courts act (Revision, Act April 8, 1903; P. L. p. 270), and that thereupon the constable on the adjourned day sold said lumber in parcels to the several defendants who removed the same aforesaid; that, upon these facts being established by the evidence, the judge of the district court adjudged that the plaintiff estopped from any recovery of damages and rendered the judgment complained of. 10

It would seem to us that the decision by this court in *Van Marter v. Lucas*, 64 N. J. Law, 182, 44 Atl. 865, must control our decision in this case and lead to an affirmance. But it is contended for the appellant that the present case is distinguishable. The contention is that the state of the case shows the lumber to have been in the plaintiff's possession; that she at once informed the constable that it was her property, and not the property of the defendant in execution, and, being informed that a verbal notice to the constable was not enough, and she must notify the constable in writing, she thereupon prepared the written notice and handed it to the constable, supposing she had done enough to protect her property. The contention is that the property being in the plaintiff's possession, the constable could not be deemed to be acting under the first clause of section 62 of the small cause court act. The case does show that the facts here suggested, but manifestly the operation of section 62 is not confined to cases where the constable shall have taken manual possession of the goods. The language is: "In all cases where any constable shall by virtue of any writ of execution," etc., levy on, attach or take into his possession any goods, etc. We think there is nothing in this point that can relieve the appellant. 20 30

The only other point urged is that the plaintiff's notice in writing, although prepared and signed on Saturday, was handed by her to the constable the next day, which was Sunday; that the notice and service constituted a single act, which was void and nugatory under the vice and immorality act (Gen. St. p. 3707, § 1), that no estoppel can be predicated under the plaintiff's act, and that defense must fail for that reason. Whether the appellant can now be heard to take advantage of her own act in delivering the notice on Sunday we do not deem it necessary to decide.

It should be observed that Section 62 does not require the notice to be served upon the constable. The words are: "By notice in writing delivered to said constable;" and further, that the constable did not act upon the notice on Sunday, but on the following day, when he adjourned the sale. Obviously the notice in writing, drawn and signed as it was on Saturday, was a perfectly valid one, and the mere fact that the plaintiff on Sunday handed the notice to the constable, who retained the same until Monday before acting upon it, can in no wise relieve the plaintiff from her statutory duty to pursue the requirements of section 62 and have her right tried within 10 days after the adjournment.

The result is that the judgment below must be affirmed with costs.

JOSEPH A. VAN MARTER, DEFENDANT IN CERTIORARI, V. FIELDING G. LUCAS, PROSECUTOR IN CERTIORARI:

Submitted July 14, 1899. Decided November 13, 1899.

If a person who serves upon a constable a claim of property under the fifty-ninth section of the Justice's Court act does not, within ten days after

the service, apply to a justice for the trial of his right according to that section, or institute against the officer an action of tort or replevin for the property, and thereupon the constable proceeds to sell the property in reliance on the implied abandonment of the claim, the claimant is estopped from holding the constable responsible in tort.

On certiorari to Middlesex Common Pleas.

Before Justices Dixon and Collins.

For the Prosecutor, Freeman Woodbridge.

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For the defendant, Alan H. and Theodore Strong.

The opinion of the court was delivered by Dixon, J. The defendant below, a constable of Middlesex county, had possession of and was about to sell two cows by virtue of an execution issued out of a court for the Trial of Small Causes against Joseph M. Duclos. Thereupon, on March 2d, 1898, the plaintiff below served upon him a written notice that he claimed the cows. On receiving this notice the constable delayed the sale for the space of ten days, but the plaintiff not having in that time applied to a Justice of the Peace for the trial of his right or taken any other step in the prosecution of his claim, the constable on March 19th, 1898, sold the cows under the execution. On April 6, 1898, the plaintiff sued the constable for the alleged tort, and at the trial of the case on appeal in the Middlesex Common Pleas recovered a judgment for the value of the cows. The question now presented is whether that recovery was lawful.

20

The notice served by the plaintiff was in exact accordance with the fifty-ninth section of the Justice's Court act (Gen. Stat., p. 1864,) and appears to have been intended by the plaintiff, as it was understood by the constable, to be a claim under that section. It must be deemed such. That section enacts that on such a claim the constable shall delay sale for ten days, in order that within said term the claimant may apply to a justice of the peace to have his

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right tried, and that if claimant shall not within ten days so apply "the said claim shall be considered abandoned and the constable shall proceed as if it had not been made."

10 In view of this provision, we think the plaintiff is not at liberty to treat the act of the officer as a tort for which he can be made answerable. Under the state, the matter stands as if the plaintiff had served his claim on the constable, with a request that he would delay in ten days, so that the claim might be legally tried, and had thereby obtained such delay, and at the end of the ten days had notified the officer that the claim was abandoned and he might proceed with the execution of the writ. If these facts had actually occurred, the plaintiff would certainly have been estopped from holding the constable responsible for a tort, and the statute in effect declares that what the plaintiff did and omitted to do shall be equivalent to those facts. We do not say that every claim of property served on a constable who is executing a writ must be considered a claim under the statute, for the terms of the claim, or some other circumstance, may negative such an inference.

20 Nor do we now hold that the service of a claim under the statute necessarily confines the claimant to the procedure which the statute authorizes, for perhaps, if within the ten days he should institute against the officer an action of tort or replevin the main purpose of the law would be effectuated. But we do hold that, if within ten days after service of the statutory claim, the claimant takes no action in vindication of his right and the officer proceeds to sell in reliance on the implied abandonment of the claim he is exonerated from responsibility in tort to the claimant.

30 On the agreed statement of facts filed in the Common Pleas and sent up to this court the judgment for the plaintiff should be reversed and a judgment entered for the defendant, with costs. *Smith v. Ocean Castle*, 30 Vroom 198.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

MARIE MASTERS,	}	ERROR TO SUPREME
Plaintiff in Error,		COURT.
vs.		BRIEF FOR DE-
SCOTT CHAMPION,		FENDANT IN
Defendant in Error.		ERROR.

GENERAL STATEMENT.

Scott Champion, the defendant in error, was a constable of the county of Atlantic, and as such there came to his hands two executions, issued out of a court for the trial of small causes, against Francis McCauley and the Keystone Lumber Company, by virtue of which he levied on a quantity of lumber in the possession of the plaintiff in error as property of the parties named in the writs of execution and advertised the same to be sold on the 26th day of September, 1905.

Thereafter, and before the advertised date of sale, the plaintiff in error delivered to him a written notice that she claimed the lumber, which notice bears date Septem-

ber 23, 1905, but was in fact delivered on the 24th, which happened to be Sunday.

The constable acted on the notice the following day, Monday, September 25, 1905, by adjourning the sale for the space of ten days. The plaintiff in error did not apply within the ten days to a justice of the peace for the trial of her right of property, nor did she take any other steps to establish her claim, and the constable thereafter, on October 5, 1905, sold the lumber under the executions.

The plaintiff in error sued the several purchasers at the sale for an alleged tort in removing the lumber after the sale, in the District Court of Atlantic City, and that court gave judgment for the defendants, which judgment was affirmed by the Supreme Court on appeal.

The question now is, was the case rightly decided.

POINTS.

Two reasons are assigned for the reversal of the judgment brought up the writ of error.

Under the first assignment of error an attack is made upon the validity of the constable's levy, and the claim is made that his proceedings under the writs of execution were legally inefficient to entitle the plaintiff in error to a recovery in trespass or trover, because there was no actual seizure and removal by the constable of the chattels subject to levy.

We suggest that it was not the design of the statute to supply causes of action where none existed but to avoid by a trial of the mere claim set up the goods levied on the very condition that makes trespass or trover avail-

able, and if there be error in the judgment of the Supreme Court, the fault lies in the statute which that court followed, and on which the judgment rests. The statute reads (in part), as follows: "If the claimant shall not, within ten days, apply to a justice and have his right tried as aforesaid, the said claim shall be considered abandoned, and the constable shall proceed as if it had not been made." (*P. L., 1903, p. 251, Sec. 62*)

But the plaintiff in error insists that the case is not within the statute referred to, because,

1. The goods levied on were not at the time of the levy in the possession of the defendants in execution, but were in her possession.

2. Manucaption and actual removal of the goods did not occur co-incident with the levy, hence the levy was ineffective, and upon this argument counsel for the plaintiff in error has reached the conclusion that had she pursued her statutory remedy she must have been defeated in costs. It seems to us idle to speculate upon what might have been the result of a trial that never occurred, based upon facts that never existed, and for present purposes it is sufficient that the District Court found as a fact that a levy was made, which fact was presented to the Supreme Court as part of the state of the case on appeal, and if the fact of the levy is at all in question, such question relates only to its validity as a matter of law.

The goods of an execution debtor are not protected from levy and sale because they may happen to be upon the premises or in the possession of a third person or a stranger.

In *McGee vs. Given*, 4 *Blackf. (Ind.)*, 16, it was held, "that an officer may enter upon the premises of a third person to levy upon a debtor's goods, but he does so at the risk of being liable if no property of the debtor is found there."

In *Graffenreid vs. Mitchell*, 3 *McCord, L. S. (S. Car.)*, 506, 15 *Am. Dec.*, 648, it is said "that an officer may break open the door of a third person's house in which the debtor has property." The reason that such property so situated is not protected from levy is plain, and the only remaining question under the first assignment at all worthy of consideration or notice is whether the constable is required, in making a valid levy under the statute, to take physical possession of the goods levied on and remove them from the possession or premises where they happen to be found at the time of the levy.

The levy of an execution upon personalty vests the title thereto and the right of possession in the officer making the levy, that is, he acquires a special property therein for the purpose of satisfying the execution.

11 *Am. & Eng. Enc. L. (2d Ed.)*, 668.

Hamilton vs. Hamilton, 25 *N. J. L.*, 544.

Conceding for present purposes the levy in this case to have been a mere "paper levy," such levy is good and has been so held.

P. L., 1903, p. 251, *Sec. 70*.

Dean vs. Thatcher, 32 *N. J. L.*, 470.

Caldwell vs. Fifield, 24 *N. J. L.*, 150.

In England, in order to make a valid levy upon personalty, the officer must enter upon the premises where

the goods are and take possession of them, and either actually remove them or leave a baliff in charge of them.

Rice vs. Sergeant, 7 Mod., 37.

Bradley vs. Wyndham, 1 Wils., 44.

Blades vs. Arundale, 1 M. & S., 711.

Williamson vs. Johnston, 12 N. J. L., 86.

But according to the weight of authority in the United States, it is not necessary that the officer levying an execution upon chattels capable of manual seizure, should take possession of them and actually remove them. The rule in New Jersey is discussed in the following cases.

Dean vs. Thatcher, 32 N. J. L., 470.

Brewster vs. Vail, 20 N. J. L., 56.

Caldwell vs. Fifield, 24 N. J. L., 150.

Casher vs. Peterson, 4 N. J. L., 317.

Lloyd vs. Wyckoff, 11 N. J. L., 218.

Nelson vs. Van Gazelle Valve Mfg. Co., 45 N. J. Eq., 594.

Cumberland Bank vs. Hand, 19 N. J. L., 166.

It is sufficient if the officer see the goods and have them in such a position that he can subject them to his immediate possession and control if he so wishes.

Nelson vs. Van Gazelle Valve Mfg. Co., *supra*.

ARGUMENT.

The question presented by this record was before the Supreme Court and directly recited in *Van Marter vs. Lucas*, 35 Vr., 182; *affirmed on error*, 65 N. J. L., 311.

The point is raised that the property having been in

point of fact in the possession of the plaintiff in error at the time of the levy, and the constable not taking actual physical possession thereof, his acts cannot be deemed to have been done in the lawful exercise of his authority as constable, and the case of *State vs. Conover*, 28 N. J. L. (4 Dutch.), 224, is cited as an authority supporting that proposition. The statement of the proposition in that form is, as it seems to us, equivalent to an assertion that property of a judgment debtor cannot be subjected to a valid levy upon execution issued against him on that judgment unless it be found in his possession at the time of levy and be taken by the officer into his actual physical custody and removed from the premises where found as part of the official act of making the levy. If such be the proposition, we deny that it is the law and we also deny that it derives any support from the case cited. That case deals with an entirely different set of facts and holds that the act of an officer who seizes property of a person not named in the writ is not an official act done by virtue of his office, and such officer is, therefore, liable in tort to the party injured.

The formalities to be observed by the constable in making his levy (P. L. 1903, p. 251, sec. 70) do not include the requirement that he take actual possession of the property levied on, and in the present case there was no physical change of possession. Nevertheless the act of levy placed the property in legal contemplation and effect in the custody of the law whose officer the constable was.

In *State vs. Conover*, the question of title was important. In this case that question is without influence, the real question being whether, assuming the plaintiff in error once had a right to the lumber, she should not be held to have waived it.

Van Marter vs. Lucas, supra.

Counsel for the plaintiff in error argues that the notice delivered to the constable was formally and substantially defective, the criticism being that it would not, of itself, confer jurisdiction upon a justice of the peace to issue a venire. We answer that in the statutory scheme the notice is designed to perform an entirely different function. Nothing in the statute indicates the legislative intent to be that the jurisdiction of the justice to act springs from the notice. The statute does not direct the original notice, or any copy thereof, to be filed with or even exhibited to the justice to whom application shall be made for the issuance of a venire, and we suggest that jurisdiction is not conferred upon the justice by the exhibition to him of a mere notice but by proof that satisfies him of the existence of the condition contemplated by the statutes authorizing the procedure.

Under the second assignment of error it is contended, on behalf of the plaintiff in error, that the notice, having been in fact received on Sunday, is for that reason without vitality, and reference is made to *Reeves vs. Butcher*, 2 *Vr.*, 224. That was an action to recover the amount of a promissory note made on Sunday, and the Court refused its aid to a party to the illegal transaction in its enforcement, and the case of *Nibert vs. Baghurst*, 2 *Dick. Ch.*, 208, and the other cases cited and relied upon by the plaintiff in error are of the same general character; that is, cases arising upon contracts falling within the letter or policy of the Vice and Immorality act, G. S. N. J., 3707, sec. 1-5.

The facts in *Reeves vs. Butcher*, *supra*, and the other cases referred to are wholly different from these, and the doctrine of those cases, so far as applicable here, must be

applied, it seems to us, against one who has wilfully violated the law. The Court will not aid or patiently hear a party whose only claim to its intervention rests upon his voluntary confession that with corrupt motives he has violated the positive provisions of the law and practiced deception upon its officers. We insist, however, that the notice is in no manner affected by any considerations growing out of the penal statute appealed to, and that notwithstanding that statute it had the effect intended by section 62—notice to the constable that the property he had levied on was claimed and might be proved to be property the right to which was in the claimant.

The statutory procedure rightly used is in the highest degree remedial and beneficial. The notice protects both the claimant and the constable, and the design of the enactment was to provide a tribunal and devise a machinery to which claimant of property levied on as the property belonging to another may resort and have their rights adjudicated in a simple, cheap and expeditious manner, instead of subjecting them to the formality, expense and delay of trover or replevin. The statute authorizing this procedure, like all statutes relative to the administration of justice in the Courts, and designed to render the same more simple, speedy and efficacious, is to be construed liberally for the attainment of that important object.

Haggerty vs. Cent. R. R. of N. J., 31 N. J. L., 349.

It should be remembered that the alleged infirmity of the notice has not operated to abridge any of the rights conferred by the statute upon claimants. It conferred the benefit and had the effect the statute contemplates.

Having delivered the notice and obtained the statutory immunity under that notice, the objection raised is not available to the plaintiff in error, nor did it at any time lie in her mouth to impugn the validity of her own act, but had the constable insisted upon the invalidity of the notice and refused on that account to act upon it, a different situation would have been presented.

The source of the objection renders it frivolous.

One who invokes the aid of a court of justice must have a good cause and a good conscience. It appears in the case that the plaintiff in error first notified the constable verbally of her claim, and being told that such notice was insufficient, delivered a written notice. The written notice bears date September 23, but it was not delivered it appears until the following day, which happened to be Sunday. Why it was not delivered on the day it bears date is not explained, and the reason of the delay is not known save by inference deduced from the subsequent conduct of the plaintiff in error. The written notice was received by the constable and on the day following its receipt acted upon by him in good faith.

Save by the provisions of the Justice Court act (section 62) no written notice, nor in fact is any notice required to be given under like circumstances. The officer, therefore, understood that the notice delivered to him was the statutory notice and he delayed the sale accordingly.

The plaintiff in error is presumed to have known the law and in serving the notice is presumed to have intended to comply with the statute; otherwise she intended to defeat the purpose of the statute by holding out false lights to mislead and deceive the constable. The constable, acting in good faith and in full reliance upon the implied

abandonment by the plaintiff in error of her claim upon the property, executed his writ and cannot now be held to be chargeable with or in any way affected by the secret intentions or motives or mental reservations regarding the notice she delivered.

If she intended that notice as a compliance with the statute, she is bound by that statute under the doctrine of *Van Marter vs. Lucas*; if she intended to evade the statute and by means of the notice and the service lull the officer into a sense of security the more effectually to entrap him she will not be heard to disclose her iniquity, for the disclosure of such purpose involves the admission of a deception practiced upon the constable and an intended fraud upon the creditors of the defendants in execution. The appeal by the plaintiff in error to the prohibition involved in the policy and spirit of the Vice and Immorality act reveals that her motives were and are corrupt and dishonest.

As is said by Chief Justice Beasley, in *Reeves vs. Butcher*, cited by the plaintiff in error: "Nor do I think there is any hardship in such a case, for he who knowingly infringes a positive provision of the penalties has no just ground for complaint if the law which he has contemned shall refuse to aid him to avoid the consequences of his own misconduct.

Submitted,

ALBERT C. ABBOTT,
Attorney for Defendants in Error.

J. E. P. ABBOTT,
Of Counsel.

NEW JERSEY

Court of Errors and Appeals

NEW JERSEY SUPREME COURT.

MARIE MASTERS, <i>Appellant,</i>	}	On Contract. On Appeal from
<i>vs.</i>		
SCOTT CHAMPION, ET ALS., <i>Appellees.</i>	}	District Court of Atlantic City.

The appeal in the above stated cause coming on to be heard and after argument of counsel of the respective parties, it is ordered and adjudged that the judgment of the District Court for the City of Atlantic City be 10 and the same is hereby confirmed in all respects in the above stated cause.

Done in open court.

February Term, A. D. 1907.

J. E. P. ABBOTT, for Appellees.

Entered March 15th, 1907.

I, WILLIAM RIKER, JR., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule made by said Court in the above stated cause and entered in the minutes thereof. 20

In testimony whereof I have set my hand and the seal of said Court at Trenton, this third day of April, A. D. nineteen hundred and seven.

WM. RIKER JR.,
Clerk.

[L. s.]

WRIT OF ERROR.

(Returnable April 2, 1907.)

(Filed April 5, 1907.)

STATE OF NEW JERSEY, ss.:

The State of New Jersey, To Our
[L. s.] Justices of Our Supreme Court,
Greeting.

Because in the record and proceedings, and also in
giving judgment upon a certain plaint which was in our
10 said Supreme Court, before you, between Marie Mas-
ters, plaintiff, and Scott Champion and others, defend-
ant, in a plea of Tort, manifest error hath intervened,
to the great damage of said Marie Masters as it is said.

We being willing in this behalf to correct the error in
due manner, if any there shall be, and that speedy jus-
tice be done to her, said Marie Masters, command you
that if judgment be thereon given, then that you dis-
tinctly and openly send, under your seal, the record and
proceedings aforesaid, with all things touching the
20 same, to our Court of Errors and Appeals in The Last
Resort in All Cause to be holden at State House, Tren-
ton, on the second day of April next, and this writ, that
the records and proceedings aforesaid being inspected,
we may further cause to be done thereupon, for correct-
ing that error, what of right and according to the laws
and customs of New Jersey ought to be done.

Witness, Hon. William J. Magie, Chancellor, at
Trenton, this sixteenth day of March, A. D. 1907.

S. D. DICKINSON,

Clerk.

30

J. J. CRANDALL,
Attorney.

The answer of the Justices of the Supreme Court of
the State of New Jersey within named. The record and
proceedings whereof mention is within made, with all
things touching and concerning the same, we do certify
to the Court of Errors and Appeals of said State, in a
certain schedule to this writ annexed, as within we are
commanded.

WM. S. GUMMERE,
C. J. [L. s.]

COURT OF ERRORS AND APPEALS IN THE
LAST RESORT IN ALL CAUSES.

MARIE MASTERS,
Plaintiff in Error. }
vs. } In Tort.
SCOTT CHAMPION ET ALS.,
Defendants in Error. }

ASSIGNMENTS OF ERROR.

(Filed May 14, 1907.)

Now comes plaintiff in error and assigns the follow- 10
ing reasons for reversal of the judgment of the Supreme
Court in the above entitled cause to wit:

First.

The Supreme Court committed error in adjudging
that the failure of the plaintiff to procure a trial of the
right of property under the conditions returned by the
state of the case, amounted to a renunciation of her
right of property to the constable.

Laws 1903, p. 251, Sec. 62.

(a) The return shows that there was but a paper 20
levy, and the pile of lumber on plaintiff's land had in
no wise passed into the constable's possession so as to
entitle plaintiff to any remedy by trover or trespass.
The abandonment of the statute, means that the notice
of claim should clearly appear to be an initial step in
the selection of a remedy in lieu of trespass or con-
version, and that by such election she had abandoned
her right of property to the constable.

(b) To constitute the abandonment of the statute, the
constable should have such exclusive possession of the 30
property as to be guilty of trespass or conversion if
wrongful so that on the trial of the right of property
he could affirmatively vindicate his right of possession.
But the state of the case discloses that the constable did
not have possession, but, on the contrary, the plaintiff
did, and that it was not removed from her possession
till after the sale, which was had without any significant
levy.

(c) Suppose plaintiff had procured a jury to be empaneled, and had served notice, and parties appeared, and the constable had disavowed any levy, the plaintiff could not under the state of the case show such a levy as to entitle her to costs.

Second.

The second justification of the trespass—for every invasion of the plaintiff's close is *prima facie* a trespass—that the service of the notice on Sunday affirmatively
10 justifies is wholly contrary to law.

(a) The defendants in this controversy must affirmatively infuse vigor in that notice served on Sunday, sufficient to amount to a justification of a trespass which cannot be done without subversion of established law.

Wherefore plaintiff prays that the judgment of the Supreme Court be reversed as well as that of the District Court of the city of Atlantic City, and that said District Court be adjudged to enter judgment for the plaintiff in the sum of three hundred dollars with all
20 costs including costs of printing.

J. J. CRANDALL,
For Plaintiff.

Due and legal service of the within assignments of error acknowledged.

JOINDER IN ERROR.

(Filed May 14, 1907.)

Now comes defendants in error and file their joinder in error and aver that the Supreme Court did not commit error in the affirmance of the judgment of the District Court for the City of Atlantic City, and they pray
30 that the judgment of the Supreme Court be in all things affirmed.

ALBERT ABBOTT,
Att'y and
J. E. P. ABBOTT
of Counsel.

New Jersey Supreme Court.

IN THE DISTRICT COURT FOR THE
CITY OF ATLANTIC CITY.

MARIA MASTERS,
Plaintiff, }
vs. } In Tort.
SCOTT CHAMPION AND OTHERS,
Defendants. }

NOTICE OF APPEAL TO THE SUPREME COURT.

To Albert Abbott, Esq., Attorney for Defendants.

10

DEAR SIR—Take notice that the plaintiff in the above-entitled cause hereby appeals to the New Jersey Supreme Court from the judgment of the District Court for the city of Atlantic City rendered on the twenty-sixth day of this July, A. D. 1906.

Done at Atlantic City this 30th day of July, A. D. 1906.

JOHN J. CRANDALL,
For Plaintiff.

(Endorsed.)

20

Notice of the within notice of appeal acknowledged
this 30th day of July, A. D. 1906.

ALBERT C. ABBOTT,
For Def't's.

ADJOURNED CONSTABLE'S SALE.

The sale of the goods and chattels seized as the property of Francis McCauley and the Keystone Lumber Company and taken in execution at the suit of Levi B. Pierce stands adjourned until Thursday, October the fifth, at the same hour and place.

Dated Sept. 25th, 1905.

SCOTT CHAMPION,
Constable.

10 To Scott Champion, constable, and Sitley & Son, incorporated.

Please take notice that the goods hereinafter enumerated, seized by you as the property of the Keystone Lumber Company and Francis McCauley, by virtue of an execution at the suit of Sitley & Son, incorporated, and also at the suit of Levi B. Pierce, are not the property of said Francis McCauley and Keystone Lumber Company, but are my property, to wit, the following goods: 3,400 cedar lath, 2,000 feet 1½-inch cedar
20 boards, 1,000 ½-inch gum boards, 1,500 feet ½-inch pine siding, 400 feet or more 2 x 2 x 10 feet plank, 2,000 feet 1-inch pine boards, 200 feet 2 x 3 studding, 1,500 feet 2 x 6 and 2 x 12 studding, 1,200 feet 2 x 4 studding, 1,000 feet 3 x 4 and 4 x 4 studding, 1,000 feet 4 x 4 and 4 x 6 plank, and odds and ends.

Dated September 23d, 1905.

MARIE MASTERS.

IN THE DISTRICT COURT FOR THE
CITY OF ATLANTIC CITY.

MARIE MASTERS,	}	In Tort.
<i>Plaintiff,</i>		
<i>vs.</i>		
SCOTT CHAMPION, DANIEL E. ISZARD,	}	
GEORGE KEEPETZ, JOHN SHENK, ALFRED		
WEST, JOHN SUIT,		
<i>Defendants.</i>		

STATEMENT OF DEMAND.

10

Defendants, Scott Champion, Daniel E. Iszard, George Keepetz, John Shenk, Alfred West and John Suit, in the above-entitled cause are summoned to answer Marie Masters in a plea of an action of tort to her damage three hundred dollars and for cause of action plaintiff, by her counsel, John J. Crandall, avers.

That on or about the fifth day of October, nineteen hundred and five, at the county of Atlantic, said defendants, with force and arms and unlawfully entered upon the plaintiff's land close and premises situated in said county, and then and there with force and strong hand of the property, goods and chattels of this plaintiff, took, seized, and carried away and converted to their own use 3,400 feet of cedar laths, 2,600 feet of cedar boards, 1,200 of gum or poplar boards, 2,500 feet of 1/2-inch pine siding, 500 feet 2 x 12 x 10 feet plank, 3,400 feet 1-inch pine boards, 275 feet 3 x 3 frame stock, 1,800 feet 2 x 3 and 2 x 12 joist, 2,000 feet 2 x 4 frame work, 2,780 feet of timber sills, all of the value of \$300, wherefore she demands judgment for \$300.

30

J. J. CRANDALL,
For Plaintiff.

DISTRICT COURT FOR THE CITY OF ATLANTIC CITY.

State of the case on appeal to the Supreme Court.

MARIE MASTERS,	}	In Tort.
<i>Plaintiff,</i>		
<i>vs.</i>		
SCOTT CHAMPION ET ALS.,		
<i>Defendants.</i>		

STATEMENT OF THE CASE ON APPEAL JULY
30TH, A. D. 1906.

10 ALBERT ABBOTT, *for Defendants.*
JOHN J. CRANDALL, *for Plaintiffs.*

Counsel of the respective parties to the above-entitled cause failing to agree to a statement of the case on appeal, the following is a state of the case to be considered on appeal as prepared by the Judge of the court.

The cause was tried before the Judge of the District Court for the city of Atlantic City without a jury.

The facts are that on or about the nineteenth day of September, nineteen hundred and five, judgment was
30 obtained before Daniel E. Iszard, a justice of the peace for Atlantic county, against one Francis McCauley and the Keystone Lumber Company for the sum of twenty-four and 40/100 dollars and four and 7/100 dollars costs, and execution was issued thereon and delivered to defendant Scott Champion, a constable of said county, who levied on the goods and chattels in the statement of demand hereto annexed and made a part hereof, and on the same day a judgment was entered
30 against the same defendants at the suit of Levi B. Pierro for the sum of thirty-two and 97/100 dollars and four and 7/100 dollars costs and execution delivered to same constable and a levy made upon the same goods.

The goods were in possession of the plaintiff and she at once informed the constable that the property levied.

on were her property and not the property of the defendants in execution, and she afterwards informed that a verbal notice to the constable was not enough, and that she must notify the constable in writing. The property was by the constable advertised to be sold on the twenty-sixth day of September, A. D. 1905, whereupon plaintiff prepared a written notice, of which the annexed is a true copy, and on Sunday, the twenty-fourth day of such September she handed the notice to the constable supposing she had done enough to protect her property and on the next day the constable posted the notice of adjournment of the sale, a copy of which is hereto annexed and made part of this statement, and pursuant to such adjournment, and on the fifth of October said constable sold said property in parcels to the several defendants, who removed and participated in the removal of said property against the protest of plaintiff. At the trial the allegation of the statement of demand was established, together with the value of the property three hundred dollars. The defense interposed was and is that the annexed notice, although served on Sunday, was and is complete, because the plaintiff wholly failed to cause a jury to be summoned to make inquisition of the right of property pursuant to the act concerning Small Cause Courts, Revis. 1903, sec. 62.

The Judge of the District Court adjudged that by the service of such notice and failing to procure a trial of the right of property as aforesaid provided, plaintiff is estopped from all recovery of damages for the trespass and conversion in the statement of demand set forth and rendered judgment for the defendants and against the plaintiff, which is the error complained of by the appellant.

ROBERT H. INGERSOLL,
Judge.

Done this 30 th day of July, A. D. 1906.





