Dickinson Law Review - Volume 19, Issue 7

Dickinson Law Review

VOL. XIX APRIL No. 7

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Subscription $1.25 per annum, payable in advance

THE REPLEVIN ACT OF 1901

CHAPTER 1.

PREAMBLE AND PURPOSES OF THE ACT

Section 1. The Act of April 19, 1901, P. L. 88 was enacted for the purpose of "Regulating the Practice in Cases where the writ of Replevin is Issued," without interfering with the substantive law of replevin,[1] save in so far as such principle of law is expressly inconsistent with the provisions of this act.[2] It thus became a complete code of the practice "Relating to Replevin,"[3] in every instance where the writ is issued,[4] whether it be for the establishment of title to or right of possession of personal property,[5] or for documents that my be evidence of such ownership,[6] but not for documents as evidence of the title to real estate,[7] though it embraces replevin in disrtess pro-

[1]Clark v. McLanahan, 39 Sup. 30 (1909); Comm. to use v. Schroeder, 18 Dist, 929 (1909).

[2]Section XIII. of the Act of 1901.

[3]Ott v. Miller, 16 Dist 140 (1907), 33 Pa. C. C. 304.

[4]Games v. Gilder, 10 Lack. Jurist 234 (1909).

[5]Rosenfeld v. Goldberg, 14 Dist. 381 (1905).

[6]Reber v. Schroeder, 221 Pa. 152 (1908).

[7]Smithson v. Johnson, 23 Dist. 68 (1914), S. C. 71 Leg. Int. 40.

ceedings;[8] the evident intent o fthe legislature being to speed the cause generally.[9]

Section 2. Prior to the Act of 1901, the practice of replevin was governed solely by the Act of 1705 when title to personal property was involved, or by the Act of 1772 in proceedings between landlord and tenant;[10] but in many details the procedure was unsettled. It was even doubted whether under the Act of 1705, a bond was necessary with the issuance of the writ of replevin.[12] Neither was the counterbond or old claim property bond prescribed by statute.[13] But the main deficiencies which the Legislature intended to remedy were:

1. There was no fixed time within which a forthcoming bond should be filed.

2. There was no certainty as to the condition of such bond; and

3. There was no provision made for the release of the sheriff and his sureties for taking a replevin bond which proved insufficient at the time of the rendition of judgment, through contingencies which he could not foresee.[14]

And as a remedial statute, the Act of 1901 "is to be interpreted in such manner as to most effectually accomplish its purpose,"[15] in which "the previous law, the supopsed evil, the remedy desired, the language of the statute and the fair and reasonable import thereof must be considered."[16]

[8]Drumgoole v. Lyle, 30 Sup. 463 (1906); Pickering v. Yeates, 51 Sup. 436 (1912).

[9]Greismer v. Hill, 13 Luz. Leg. Reg. 231 (1907). Affirmed in: 225 Pa. 545 (1909).

[10]Williams v. Rutherford, 14 Dist. 282 (1905).

[11]Comm. v. Schroeder, Supra Note 1.

[12]Balsley v. Hoffman, 13 Pa. 606 (1850).

[13]Chaffee v. Sangston, 10 Watts 265 (1840).

[14]Hill v. Mervine (No. 1) 13 Dist. 580 (1904); 29 Pa. C. C. 260.

[15]Comm. v. Schroeder, Supra Note 1.

[16]Hill v. Mervine (No. 1) Supra Note 14.

CHAPTER II.

PRAECIPE AND BOND IN REPLEVIN

Section 3. Proceedings in replevin, as all other actions, originate by paintiff's attorney issuing a praecipe or order, upon the prothonotary of the Common Pleas to issuet this writ, in which a description of the specific chattels to be replevied is set forth.[17] But such description need not be detailed, it is enough if it permits of a clear identification of the property involved in the suit.[18] And if the description be so meagre in its details that the identity of the specific property cannot be established, any act on the part of the defendant affirming the replevin proceedings differentiates such property.[19]

Section 4. With this praecipe the plaintiff, or his agent, "shall make an affidavit of value of the goods and chattels,"[21] and the filing of record of such affidavit of value is not a statutory requisite,[22] as it is made by plaintiff merely to determine the amount of bail,[23] and an approximate value is sufficient.[24] So where the jury awarded more damages than the plaintiff stipulated in the affidavit of value, the court allowed him to recover the same because the affidavit of value is not a matter of record but merely information for the prothonotary.[25] Therefore, such

[17]Weaver v. Lawrence, 1 Dallas 156 (1790); English v. Dalborw, 1 Miles 160 (1836).

[18]Selig Polyscope Co. v. Swaab, 20 Dist. 194 (1911).

[19]Ruch v. Morris, 28 Pa. 245 (1857).

[20]Nicholl, Atty. v. Abram 7 D. R. 250 (1898), 20 Pa. C. C. 605.

[21]Section 8th of the Act of 1901.

[2]Hill v. Mervine (No. 2) 13 Dist. 582 (1904), 29 Pa. C. C. 262;

[22]Hill v. Mervine (No. 2) 13 Dist. 582 (1904), 29 Pa. C. C. 262; S. C., 5 Lack. Jur. 182.

[23]Hill v. Mervine (No. 2) Supra Note 22; Smith v. Stakulsky, 15 Luz. Leg. Reg. 317 (1910).

[24]Selig Polyscope Co. v. Swaab, Supra Note 18.

[25]Di Clemente v. Lustig, 12 Lack. Jur. 231 (1911). And this is true even where the damages are more than that stipulated in the declaration. Fisher v. Whoolery, 25 Pa. 197 (1855).

affidavit need not contain the stipulation as provided by Section VIII. of the Act of 1901, "which value shall be the cost to the defendant of replacing them should the issue be decided in his favor.[26] But the plaintiff is held to the value in the writ where he sues the sheriff on the latter's bond for neglect of duty.[27]

Section 5. The prothonotary, under Section 1 of the act, then prepares the bond instead of the sheriff as under the old practice,[28] relieving the latter from the "very harsh rule that the sheriff should be held responsible for what he could not possibly foresee, and what may happen afterwards, notwithstanding the greatest foresight,"[29] and the hardship of the old rule was one of the reasons for the enactment of this statute of 1901.[30]

Section 6. This bond is signed by the person applying for the writ of replevin with the surety. "The surety's name need not appear in the body of the bond. Its execution by him is sufficient because the act merely provides that he shall execute and file 'such bond' . . . . .with security in double the value."[31] And if there be any irregularities in the body or caption of such bond, this is cured by the proper indorsement by the prothonotary.[32]

Section 7. This bond, under the first section of the act, is always a condition precedent before any writ of replevin shall issue,[33] as was the custom under the prior practice,[34] and must be renewed with every alias or pluries writ.[35]

[26]Sprague Electric Co. v. Perely, 54 Pitts. L. J. 230 (1906).

[27]Gibbs v. Bartlett, 2 W. & S. 27 (1841).

[28]Oxley v. Cowperthwaite, 1 Dall. 349 (1788); Pearce v. Humphreys, 14 S. & R. 23 (1825); Watterson v. Fuelhart, 169 Pa. 612 (1895).

[29]Watterson v. Fuelhart, Supra Note 28.

[30]Hill v. Mervine (No. 1), Supra Chapt. 1—Note 14.

[31]Smith v. Stakulsky, Supra Note 23.

[32]Smith v. Stakulsky, Supra Note 23.

[33]Pickering v. Yeates, Supra Chap. 1, Note 8.

[34]Baird v. Porter, 67 Pa. 105 (1870); Watterson v. Fuelhart, Supra Note 28; Taylor v. Adams Express Co., 9 Phila. 272 (1873).

[35]National Cash Reg. Co. v. Wilmore, 11 Dist. 65 (1902); S. C., 27 County 464; S. C., 4 Lanc. Jur. 60; 8 Northampton 400.

Section 8. The filing of the bond does not vest the title in the plaintiff[36] as under the old practice.[37]

Section 9. Prior to the Act of 1901 a foreign plaintiff, in addition to the bond, had to give security for costs.[38] But it is doubtful whether this additional security is necessary under the Act of 1901 as the bond is particularly conditioned upon the payment of "all legal costs." Perhaps this additional security was required because of the uncertainty of the fact as to whether a replevin bond was necessary under the Act of 1705.[39] But since this uncertainty is now set at rest, it is reasonable to suppose that the original replevin bond is all that is necessary from a foreign plaintiff. It would seem absurd to require two separate bonds to secure a single incident.

Section 10. The bond is "in double the value of the goods sought to be replevied" whether it be to determine the right to or title to possession of personal property, or, in distress for rent under the Act of 1772; for a landlord cannot distrain upon household effects more in value than the actual amount of the rent due.[40]

Section 11. The condition of the bond is that the plaintiff maintain his "title" to such goods and chattels. And "title" in this act has been construed to mean title —absolute or qualified. That is:

"In order to make the act consistent throughout, it would appear that wherever the word 'title' occurs, in the act, the terms includes within its meaning, a qualified property in or right of possession, if that is the real question at issue."[41]

And by the same authority:

" 'Title' must be construed in the broad sense of the word wherein the question of title is the moving cause, giv-

[36]Schuckers v. Schuckers, 21 Dist. 608, (1912).

[37]Frey v. Leeper, 2 Dallas 13 (1791).

[38]Jackson & Gross, "Landlord and Tenant", par. 777, sec. 2.

[39]Balseley v. Hoffman, Supra Chapt. 1, Note 12.

[40]Weaver v. Lawrence, Supra Note 17.

[41]Von Moschzskir, J. in Houghton Mifflin Co. v. Du Bell, 15 Dist. 833 (1906).

ing rise to the controversy and the main issue to be tried and determined on the pleadings provided for in this act."[42]

And in a similar vein, McConnell, J. said:

" 'Title' as used in this act comprehends title to possession of the chattels as to any qualified property therein as well as unqualified ownership thereof."[43]

Section 12. "Title to such goods and chattels" has been construed to include documents evidentiary of such title,[44] and this only to personal property and not when such documents involve the title to real estate,[45] though it does apply for the recovery of a lease.[46]

Section 13. This sustaining of title appears to be the sole condition of the bond. This thought is strengthened by Section VII of the act where the Legislature, after enumerating the alternate remedies accorded to the successful party, treated the suit on the bond as an added and distinct remedy, separate and apart from the other,[47] by saying:

"Or he may sue in the first instance upon the bond given and recover thereon the value of the goods and chattels, damages and costs, in the same manner that recovery is had upon other official bonds."

As an added proof that the bond given is limited to the sole condition "to maintain title," we have the Act of April 14, 1905, P. L. 163 which compels the plaintiff to give an additional bond for the cost and maintainance of impounding the property. Especially is this true, when we note that under the old practice, the requirement of such a bond was doubted,[48] wherefore its conditions were un-

[42]Rosenfeld v. Goldberg, Supra Chapt. 1, Note 5.
[43]Davis v. Nipple, 22 Dist. 1043 (1913).
[44]Reber v. Schroeder, 221 Pa. 152 (1908).
[45]Smithson v. Johnson, 27 Dist. (1914).
[46]Clark v. Nevell, 1 Phila. 19 (1850).
[47]Similar to the prior practice—Shell v. Hummell, 1 Pears. 19 (1853).
[48]Balseley v. Hoffman, Supra Chapt. 1, Note 12.

settled,[49] and we would assume that the Legislature in framing this remedial statute, would have been particular to have specifically remedied such uncertainties in the bond, by definitely prescribing the condition or conditions to be therein stipulated.

Section 14. It is questionable whether a mere "lienor" can maintain replevin, as he cannot enter a bond under this act to "maintain his title," because he has no property of any kind in the goods or chattels to be replevied.[50] Prior to the Act of 1901 a "lienor" could have maintained replevin but not by virtue of an inherent right—qualified or absolute—in the goods themselves, but by reason of the peculiar contractual relationship between the parties.[51] Again, since the replevin bond was not a definite requirement prior to the Act of 1901,[52] a plaintiff was not necessarily restricted to maintain his "title" to such goods and chattels; it was sufficient that he maintain his lien. Therefore, the earlier cases permitting a lienor to maintain replevin are not authorities under the Act of 1901. For it will be asked, how can a lienor maintain replevin when he cannot qualify as to the bond, a condition precedent "before any writ of replevin shall issue?" The case of FOX v. MAGAW,[53] though it arose subsequent to the enactment of 1901, was decided in reliance upon the earlier cases of YOUNG v. KIMBALL,[54] and CORBETT v. LEWIS,[55] and is, therefore, not an authority for the principle that a "lienor" can institute replevin under the Act of 1901. In Young v. Kimball,[56] Lowrie, J. specifically said:

[49]Weaver v. Lawrence, Supra Note 17; Chaffee v. Sangston, Supra, Chapt. 1, Note 13; Gibbs v. Bartlett, Supra, Note 27.

[50]Young v. Kimball, 23 Pa. 193 (1854); Shoreley v. Hub Machine Co., 23 Dist. 364 (1914).

[51]Young v. Kimball, Supra, Note 50.

[52]Balseley v. Hoffman, Supra, Chapt. 1, Note 12.

[53]12 Dist. 53 (1903).

[54]Young v. Kimball, Supra, Note 50.

[55]Corbett v. Lewis, Supra. Note 53.

[56]Williams v. Williams, 18 Dist. 988; S. C., 11 Del. Co. 1; S. C., 22 York Leg. Rec. 146.

"The right of a lien for the keeping of several horses of the same person at the same time is a charge, not against the horses and therefore several and divided but against the owner, secured by a lien upon all the horses and therefore joint and several and one horse may be detained for the keeping of all."

Thus the lienor's right is primarily against the owner and not inherent or qualified in the goods or chattels themselves.

Section 15. Aside from the stipulation in the replevin bond, the parties to a replevin proceeding are not restricted. It may include proceedings between husband and wife,[57] and is apparently the proper procedure between them,[58] though the unity of persons between them is not destroyed.[59] A foreign corporation, even though it be unregistered, may maintain replevin.[60]

Section 16. It is further provided in the bond that upon failure to maintain such title, the plaintiff "shall pay to the parties thereunto entitled, the value of such goods and chattels." And such value is not necessarily controlled by the amount stipulated in the affidavit of value,[61] or in the declaration.[62]

Section 17. And in the same contingency, the bond provides for the payment in addition to "all legal costs, fees," sustained "by reason of the issuance of such writ of replevin," apparently attorney's fees, as fees have been defined to be "compensation to an officer for services rendered in the progress of the cause;"[63] but such fees could

[57]McDonald v. McDonald, 38 County 268 (1911).

[58]North v. Storage Co., 56 Sup. 267 (1914). But Compare Act of March 27, 1913, P. L. 14.

[59]Duroth Mfg. Co. v. Cauffield, 243 Pa. 24 (1914).

[60]De Clemente v. Lustig, Supra, Note 25; Selig Polyscope Co. v. Swaab, Supra Note 18.

[61]Fisher v. Whoolery, Supra, Note 25; Schofield v. Ferrers, 46 Pa. 438 (1884); Krumbhaar v. Stetler, 20 Phila. 341 (1891).

[62]Gibson, J., in Musser v. Good, 11 S. & R., 247 (1824).

[63]Shoemaker v. Nesbitt, 2 Rawle 201 (1828).

not have been recovered prior to the Act of 1901.[64] It would be advisable, therefore, to insert a clause in the instrument of bailment, providing for a certain per centum for counsel fees in case it is necessary to institute replevin proceedings for such goods or chattels.

Section 18. The bond also provides for damages, which includes everything the defendant may have lost through the wrongful detention,[65] so as to allow him to be compensated in full for his loss.[66] Thus in replevin for the recovery of shares of stock, the court permitted the plaintiff to recover the dividends that accrued pending the disposition of legal proceedings.[67] But it must be an actual loss suffered and not mere conjecture.[68] In many instances exemplary damages are permitted in replevin,[69] in which the jury may assess the damages beyond the value of the property,[70] especially where there is an element of "outrage" or "oppression;"[71] and such "outrage" or "oppression" need not be specifically averred in the declaration.[72] But consequential damages not necessarily or naturally resulting from the tortious act, must be specially alleged.[73]

Section. 19. The replevin bond may also contain a clause confessing judgment as it does not enlarge the obligation but merely facilitates its enforcement,[74] though the replevin bond in distress proceedings was exrpessly pro-

[64]Comm. v. Schroeder, Supra, Note 1, Chapt. 1.
[65]Pure Oil Co. v. Terry, 209 Pa. 403 (1904).
[66]Comm. v. Schroeder, Supra, Chapt. 1, Note 1.
[67]Pure Oil Co. v. Terry, Supra, Note 65; Armstrong v. City, 23 Dist. 62 (1914).
[68]Cummings v. Gann, 52 Pa. 484 (1866); Cox v. Burdett, 23 Sup. 346 (1903).
[69]Warner v. Augenbaugh. 15 S. & R. 1.
[70]Cox v. Burdett, Supra, Note 68.
[71]Schofield v. Ferrers, Supra, Note 61.
[72]Id.
[73]Clark v. Morss, 142 Pa. 311 (1891).
[74]Id.

hibited from containing such confession of judgment by the Act of 1772.[75]

Section 20. Under the eighth section of the Act of 1901, "the prothonotary shall, in the first instance, file the amount of bail and approve or reject the security offered." So if he accepts a married woman's bond and this is unquestioned by the opposing party, such bond will not be stricken off after judgment is entered for want of an affidavit of defense.[76] But this decision must be confined within its own narrow limits for the court intimated that the question could only have been raised upon a rule to open judgment and not on a rule to strike off when everything appeared perfectly regular upon the face of the record.[77]

Section 21. The filing of the bond "in the first instance," has been construed to mean that the prothonotary's authority is limited to the replevin bond as that is the bond filed in the first instance. Section one of the Act of 1901 does not, in express terms, limit the prothonotary's duty to the replevin bond, and the eighth section of the same act does not metion and particular case wherein the prothonotary's authority may be exercised, "in the first instance." Therefore, it would follow that the eighth section of the act is an explanation of the prothonotary's duties generally, and that he shall "in the first instance"[78] in every case, where bail is presented, file and approve or reject the security offered.

Section 22. "A proper practice under the provision of the act would be for any party dissatisfied with the amount of the bond or the sureties thereon, to file his exception in the first instance with the prothonotary and have him accord the party complaining a hear-

[75]Rehm v. Askew, 13 Dist. 353 (1904); 20 Lanc. 395; 5 Lack. Jur. 142.

[76]Compared Aikey v. Aikey, 23 D. R. 1023 (1914), 71 Leg. 714.

[77]See Section 36 seq. under "Counter-Bond."

[78]McIlvaine, P. J. in Hogg v. Oil Co., 17 Dist. 118 (1908); 54 Pitts. I. J. 448; 10 Del. County 293. For the substitution or revision of bail bonds see Act of March 19, 1803, P. L. 40.

ing. If he dispose of the matter satisfactorily to both parties and his decision is complied with, that is the end of the matter; if either party is dissatisfied he can take an appeal to the court to have the order of the prothonotary revised."[19]

CHAPTER 3

THE WRIT OF REPLEVIN

Section 23. After the bond is properly executed and filed, the prothonotary issues the writ of replevin.[1] This writ also contains a summons to defendant,[2] or party in possession of the goods and chattels in controversy,[3] to appear personally, "the summons to the defendant being necessary and subordinate, so far as respects the frame of the writ,"[4] without it thereby assuming the usual attributes of a summons.[5]

Section 24. This writ of replevin is handed to the sheriff, who proceeds to execute it, always accompanied by a representative of the plaintiff to identify the property named in the writ and about to be replevied.[6] The sheriff can enter defendant's premises, if necessary, within reasonable limits, to execute the writ without being considered a trespasser.[7]

Section 25. The writ of replevin may be served by the sheriff in the county in which it is issued:

(a) By taking possession of the goods and chattels described therein and by serving the defendant, if found, as in the case of a summons, and by adding to the record and serving as in the case of a summons, any

[1]Pickering v. Yeates, Supra, Chapt. 1, Note 8.
[2]Weaver v. Lawrence, Supra, Chapt. 2, Note 17.
[3]English v. Dalbrow, Supra, Chapt. 2, Note 17; Lawall v. Lawall, 150 Pa. 626 (1892).
[4]Baldwin v. Cash, 7 W. & S. 425 (1844).
[5]Ogilbie v. Bennett, 1 County 575 (1886).
[6]Kneas v. Fitler, 2 S. & R. 263 (1816).
[7]Id.

other person than the defendant who may be found in possession of such goods and chattels, or any of them, or

(b) If the goods and chattels cannot be found, then by serving the writ as in the case of a summons, in which event the cause shall proceed with the same effect as if a summons in trespass has been duly served; and alias and pluries wirts may issue in the same suit at any time prior to the verdict and said goods and chattels may be taken by virtue thereof, with the same effect as if taken on the original writ.[8]

Section 26. These methods of serving the writ of replevin are repeated in the second and ninth sections of the Act of 1901, and is an adoption of the prior practice.[9]

Section 27. The sheriff has seventy two hours from the time when the writ is served within which to remove the goods, either physically or symbolically, such period of time being allowed for his possession under section III of the Act of 1901.[10]

Section 28. The service of the writ may be accepted on behalf of the defendant or party in possession,[11] as under the old practice,[12] or a general appearance may waive the service of the writ.[13]

Section 29. "If the defendant has been duly summoned and does not appear at the return day of the writ, the plaintiff, after having filed his declaration, may enter a common appearance for the defendant and proceed in the cause as in other cases." This is a reiteration of the old Philadelphia County rule of court as set down in the old

[8]Service Act of July 9, 1901 P. L. 614 (Section 9.)

[9]Weaver v. Lawrence, Supra, Chapt. 2, Note 17; Baldwin v. Cash, Supra, Note 4; English v. Dalbrow, Supra, Chapt. 2, Note 17.

[10]Caulk v. White, 5 Lack. Jur. 1 (1904).

[11]Id.

[12]English v. Dalbrow, Supra, Chapt. 2, Note 17.

[13]Miller v. Warden, 111 Pa. 300 (1886).

[14]2 Miles 172 (1837).

[15]Crofut v. Chichester, 3 Phila. 457 (1859).

[16]Ogilbie v. Bennett, Supra, Note 5.

[17]Schreck v. Brittles, 19 Dist. 734 (1910); S. S. 37 County 227.

[18]Anthony v. Rife, 6 Dauphin 203 (1903).

case of Lynd v. Benjamin.[14] It seems that no judgment could be entered for want of an appearance in replevin,[15] as it is not within the purview of the Act of June 13, 1836.[16]

Section 29a. By the second section of the act, the sheriff can add to the writ, the name of the party actually in possession of the chattels, though not originally named in said writ. There is a clause in the writ commanding the sheriff to serve the party in possession as well as the defendant originally named in the writ.

Section 30. The adding of the name of the party in possession as party defendant to the record, by the sheriff, does not make such a party a joint defendant in these proceedings;[17] thus he acquires a wider privilege than that accorded to a joint defendant at common law.[18] But if a party is impleaded as a party defendant to the record by any methods other than those prescribed in the Act of 1910, particularly by an act on the part of the plaintiff himself, such defendant, however, becomes a joint defendant, and a release of one is a release of all.[19]

Section 31. If there is any other person that claims the goods in controversy who is neither an original defendant on the writ, nor in possession of the goods and chattels, he may file a petition to intervene as under the earlier practice.[20] But only upon condition that he first file an affidavit "that the goods and chattels so replevied belong to him."[21]

CHAPTER IV.

COUNTER BOND

Section 32. After the writ is properly served and the property is restored to the plaintiff, the defendant or intervenor, may file a counter bond so as to retain posses-

[19]Schreck v. Brittles, Supra, Note 17.

[20]Lawall v. Lawall, Supra, Note 3.

[21]Pickering v. Yeates, Supra, Chapt. 1, Note 8; Anthony v. Rife, Supra, Note 18.

sion of the property so replevied. It has been decided that the original defendant in the writ must also file an affidavit of ownership, as a condition precedent to the filing of the bond,[1] but, as possession is always considered prima facie evidence of ownership,[2] it follows, then, that the affidavit of ownership in such case is superfluous.

Section 33. This counter bond is the old property bond,[3] considerably enlarged in its scope,[4] not having been definitely prescribed by statute prior to this enactment.[5] In its legal import it is equivalent to the replevin bond,[6] as it is given "in the same amount as the original bond and with like conditions," and must contain surety.[7]

Section 34. Since the conditions of the counter bond are similar to the replevin bond, namely, to maintain title, it follows that neither a defendant landlord,[8] nor a mere lienor can file such claim property bond,[9] for the reason that "the landlord's claim is inconsistent with ownership. He acquires a lien upon the tenant's goods and a right to sell them, but not a property right—general or special;"[10] and a lienor, "because he has no property of any kind in the thing replevied, his lien for repairs is perfectly protected by the replevin bond, which by section 8 of the act is placed under the full direction of the court and may easily be guarded against present or future insufficiency."[11]

Section 35. Where the lower court refused to strike off a landlord's counter bond, this was affirmed by the

[1]Anthony v. Rife, Supra, Chapt. 3, Note 18.

[2]Lehman v. Gill, 12 Dist. 89; S. C. 19 Lanc. 279.

[3]Pickering v. Yeates, Supra, Chapt. 1, Note 8; Comm. v. King, 13 Dist. 404 (1905).

[4]Comm. v. Schroeder, Supra, Chapt. 1, Note 1.

[5]Chafee v. Sangston, Supra, Chapt. 1, Note 13; Hill v. Mervine (No. 1), Supra, Chapt. 1, Note 14.

[6]Comm. v. Schroeder, Supra, Chapt. 1, Note 1; Shorley v. Hub Machine Co., Supra, Chapt. 2, Note 51.

[7]Hill v. Mervine (No. 1), Supra, Chapt. 1, Note 14.

[8]Pickering v. Yeates, Supra, Chapt. 2, Note 33.

[9]Shorley v. Hub Machine Co., Supra, Chapt. 2, Note 51.

[10]Anthony v. Rife, Supra, Chapt. 3, Note 18.

[11]Shorley v. Hub Machine Co., Supra, Chapt. 2, Note 51.

Superior Court on the ground that such order was merely interlocutory, and, therefore, premature for an appeal.[12] This decision was apparently influenced by the Amendment to this section by the Act of April 14, 1905.[13]

Section 36. Section 3 of the Act of 1901 says that the counter bond should be filed without specifically naming the depository, and this has been construed to mean that such counter bond cannot be filed with the prothonotary, the court emphasizing the requirement of the 8th section which allows the prothonotary to pass upon the bail only "in the first instance," namely the replevin bond. The counter bond, therefore, could only be filed with the sheriff[14] as in the prevailing practice. The question immediately arises how can the older practice apply when there was no such definite practice,[15] and it was this vagueness as one of the reasons that led to the passage of the Act of 1901.[16] As an authority for the proposition that the counter bond is filed with the sheriff,[17] the court cites the case of Watterson v. Fuelhart.[18] This is error, as a careful reading of the opinion in that case will show that the rule of law that applied to the replevin bond had never been sanctioned as applying to the counter bond, for there the court expressly says: "The cases cited in suits on replevin bonds are not necessarily applicable to the claim property bond."

Therefore, it would be more reasonable to suppose that since the legislature intended the right of the defendant to be equalized with that of the plaintiff—"the claim property bond is virtually a counter writ of replevin"[19] and the law of replevin to be uniform throughout, the practice relating to this counter bond should be similar to

[12]Singer v. Pintzuk, 53 Sup. 43 (1913).
[13]P. L. 163.
[14]Hill v. Mervine (No. 1), Supra, Chapt. 1, Note 14.
[15]Chaffee v. Sangston, Supra, Chapt. 1, Note 13.
[16]Hill v. Mervine (No. 1) Supra, Chapt. 1, Note 14.
[17]Id.
[18]Supra, Chapt. 2, Note 28.
[19]Shorley v. Hub Machine Co., Supra, Chapt. 2, Note 34.

the original replevin bond, and, accordingly, it should be filed with the prothonotary.[20]

Section 37. The filing of a counter bond does not vest the title to the goods and chattels in the defendant,[21] as it did under the old practice,[22] but holds such title in abeyance during the pendency of the action.[23]

Section 38. If there be any doubt as to the identification of the property, the filing of a counter bond individuates such property.[24]

Section 39. The counter bond must be filed within seventy-two hours from the service of the writ of replevin,[25] thus definitely limiting the time of the prior practice in which the defendant was allowed a reasonable time to find security;[26] and, during the seventy-two hour period, the goods and chattels are in the possession of the sheriff.[27] But if the goods or chattels have not been removed, either physically or symbolically, by the sheriff before the expiration of the said seventy-two hours, then the defendant will be regarded as in peaceful possession of the same and no counter bond is necessary.[28]

Section 40. The act further provides that the seventy-two hour limit within which the counter bond must be filed, may be extended by the court "upon cause shown," and, this has been construed to mean that the cause can only be shown during the said seventy-two hour period,[29] thereby placing a restriction upon the defendant that did not exist prior to the Act of 1901,[30] and not expressly pro-

[20]See Sec. 21, Supra.

[21]Schuckers v. Schuckers, 21 Dist. 608 (1912).

[22]Stewart v. Wolf, 7 Atl. 165 (1886).

[23]Schuckers v. Schuckers, Supra, Note 20.

[24]Rauch v. Morris, Supra, Chapt. 2, Note 19.

[25]Lunneman v. Lunneman, 11 Dist. 759 (1902); S. C., 27 County 657; S. C., 19 Montg. L. R. 148.

[26]Hocker v. Sticker, 1 Dall. 225 (1787); Pearce v. Humphreys, Supra, Chapt. 2, Note 28.

[27]Caulk v. White, Supra, Chapt. 3, Note 10.

[28]Id.

[29]Sickel v. Gamble, 21 Mont. 171 (1905).

[30]Pearce v. Humphrey, Supra, Chapt. 2, Note 28.

vided for in this act. And this, notwithstanding the fact that the defendant's rights are enlarged under the counter bond,[31] for he now occupies the same position as the plaintiff himself under the original replevin bond.[32] If the defendant under section 7, is entitled to a return of the property upon a successful conclusion of the case, why may he not have possession of the property during the pendency of the proceedings, especially since the title during the entire time is held in abeyance?[33] To deny this privilege of possessing himself with this property after seventy-two hours, is to deny defendant an equal right with the plaintiff contrary to the letter and spirit of the act.[34] Therefore, in view of the fact that the older practice allowed a wider range of time, and that the defendant's rights were still further augmented by the Act of 1901, in the absence of any express provision in this section of the act inconsistent with older practice, the only reasonable inference as to the intent of the legislature to be assumed by the seventy-two hour limit provided for in this section of the act, would be, that the Legislature intended to state a definite time within which the counter bond should be filed—no such definite time being provided for in the earlier practice[35]—save, where peculiar circumstances of the case would equitably entitle such a defendant a still longer time. And it is difficult to understand why such exigency should be limited to seventy-two hour period merely. If time should be extended "upon cause shown," such may be shown whenever it may arise as an equitable exigency. That the Legislature intended this proviso to be administered in accordance with equitable principles is further evidenced by the Amendment of this section by the Act of April 14, 1905, P.

[31]Comm. v. Schroeder, Supra, Chapt. 1, Note 1.

[32]Shorley v. Hub Machine Co., Supra, Chapt. 2, Note 51.

[33]Schuckers v. Schuckers, Supra, Note 20.

[34]Comm. v. Schroeder, Supra, Chapt. 1, Note 1; Shoreley v. Hub Machine Co., Supra, Chapt. 2, Note 51.

[35]Chaffee v. Sangston, Supra, Chapt. 1, Note 13.

L. 183 which "clearly usurped all equity powers where the return of the specific chattels is involved."[36]

Section 41. The Amendment of April 14, 1905, P. L. 183 provides for the impounding of the property in the custody of the sheriff, where the property has peculiar extrinsic value, a clear usurpation of all equity powers, where the return of the specific chattel is involved, so that now a bill in equity is no longer permissible for the return of the specific property.[37] The plaintiff, however, is compelled to give a bond for the cost of maintainance during the time the goods or chattels are impounded.

[36]Shorley v. Hub Machine Co., Supra, Chapt. 2, Note 51.

[37]French v. Carson et al. 23 Dist. 774 (1914); Shorley v. Hub Machine Co., Supra, Chapt. 2, Note 51.

MOOT COURT

HILLARY v. BANK

Banking—Certificate of Deposit a Mere Receipt for Money—Payment of Interest

STATEMENT OF FACTS

A, buying land of Hillary, the price of which was $4000, and there being a lien apparently on the land, it was agreed that A should pay the $4000 into the bank until the removal of the lien, and then the bank should pay it to Hillary. A year elapsed, when a decree of the court adjudging the supposed lien invalid was obtained. The bank on demand paid Hillary the $4000, but refused to pay any interest, although it had issued to him an ordinary certificate of deposit, which however, said nothing about interest.

This is an action of assumpsit in which the plaintiff seeks to recover interest at 3 per cent., the ordinary rate paid by the bank on deposits at interest.

Fineberg for plaintiff.

Howard for defendant.

OPINION OF COURT

ROYAL, J. In 6 Cyc. 728, we find this definition of a certificate of deposit: "A written acknowledgment by a bank or banker of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the depositor, to the order of the depositor, or to some other person or his order." As to whether such a certificate is a mere receipt for money or in effect a promissory note, the different jurisdictions are not in accord.

That it is the latter, and not a receipt for money, has been held in a long line of decisions in many states, among which we note: Citizens Bank v. Brown, 40 Ohio 39 (1887), and the cases reported in 35 Cal. (1868); 47 Wis. 555 (1879); 87 Ind. 238 (1862); representing the latest holding on this question in the respective jurisdictions. In the first case cited, the court states: "The certificate is in effect a promissory note. It possessed all the requisites of a negotiable promisory note." The certificate was exactly similar to the one the bank gave to the plaintiff in the case at bar. There was nothing said about interest, and the court awarded interest only from the date of the demand for the principal and the refusal to pay it over. No interest was allowed for the time the money was in the bank before it was demanded, and the interest given was in the

nature of damages for the refusal to hand over the sum deposited when demanded.

It is to be observed that in all the citations noted above, the definition of a certificate of deposit as a promissory note, was in litigation where the question of negotiability of the paper was the chief point at issue. And this has been the case practically in every instance that this statement has been made. We are unable to find any cases which hold that such a certificate of deposit as we are considering is only another form of a promissory note. What has been held, is that it simply resembles a note as to its negotiability. Under this consideration we are unable to agree with either of the learned counsels in this case, when they appear to treat the certificate as a promissory note in all respects and use the terms interchangeably.

Regardless of what other jurisdictions have held on this point, this state has steadfastly maintained that a certificate of deposit is merely a receipt for money. Patterson v. Poindexter, 6 W. & S. 227; Charnley v. Dulles, 8 W. & S. 353; Gillespie v. Mather, 10 Pa. 28; Lebanon Bank v. Mangan, 28 Pa. 452 (No interest stated); Loudon Savings Fund Society v. Hagerstown Sav. Bank, 36 Pa. 498. And as the learned court remarks very wisely in 28 Pa. 452, "When a principle of Pennsylvania law has been settled by the Supreme Court of the state, it is not to be changed in order to conform to the laws of other states." The case at bar must be decided in conformity with the principles of law as laid down in this state. In Shute v. Pac. Nat. Bank, 136 Mass. 487, this view of a certificate of deposit is also taken, and a distinction between it and a promissory note is advanced. "Such a certificate," we read, "is not merely a promise to pay a certain sum, but it declares that a certain sum has been deposited which is payable to the depositor, or his order, on the return of the certificate properly indorsed."

All that Hillary held by the transaction in this present instance, was a receipt for $4000, which the "bank had issued to him on an ordinary certificate of "deposit." The relation which existed between him and the bank was that which exists under any ordinary deposit, i. e., debtor and creditor. "An ordinary deposit of money in a bank creates the relation of debtor and creditor." Hale on "Bailments and Carriers, pg. 40, and Sistare v. Best, 92 N. Y. 7, 9: Phoenix v. Risley, 111 U. S. 125.

This being so, and there being no stipulation as to interest, we are unable to see how the plaintiff can recover. All he was entitled to was the principal which the bank paid over to him upon demand as they were required to do. "Interest is not recoverable upon a debt except upon the presumption that the debt should have been paid sooner or upon AN EXPRESS CONTRACT TO PAY INTEREST". See Brainerd v. Champlain Transp. Co. 29 Vt. 154. There

certainly was no express contract to pay interest, and there was no presumption that the 'debt' should have been paid sooner. It was presumed, as indeed it was actually stipulated, that the money should be paid over to Hillary upon the removal of the lien on the land in question. It is true that interest is often given as damages, but the plaintiff does not ask for nor can he receive it as such. "Interest is a compensation to the creditor for a wrongful delay by the debtor." Fleming's Estate, 184 Pa. 80. But the plaintiff might still recover the interest he seeks on an implied contract to pay the same. "An implied contract to pay interest arises where the circumstances of a transaction justify the inference that the parties contracted with reference to interest." 22 Cyc. 1491. And in this connection: "A party as a general rule is not chargeable with interest unless on his part there is a promise, express or implied, to pay it." In re Fallon 110 Minn. 213 (1910).

We can see no circumstances in this transaction which give any evidence of such an 'implied contract.' The money was to remain in the bank for an indefinite time. It might be a week, a month, six months, or a year, entirely problematical and entirely dependent upon the uncertain length of time it would take to remove the lien which existed on the land. As a matter of fact it took a year for this purpose, but the plaintiff has shown nothing that would lead us to conclude that it was certain that that was the length of time the money should remain in the bank. It was beyond a doubt the very uncertainty of this feature of the transaction that was responsible for the bank's giving the plaintiff 'an ordinary certificate of deposit which said nothing about interest.' Had interest been contemplated it undoubtedly would have been stated so. It is customary for banks to issue these certificates of deposit for interest, but then there is a distinct provision that it shall be payable only if the principal is left on deposit for a specified time. Under the features of the transaction under consideration, the principal was liable to be demanded at any time, and would have to be paid over. In this respect it had a striking characteristic of an ordinary checking account in a bank, and we know of no authority which holds that interest is due on such accounts in the absence of an express contract to that effect. It is not the custom, and even under an express contract would be a rarity. Banks as an almost universal rule only give interest where the principal is left with them for some stated or certain time, or longer, and in the majority of instances also require previous notice before demand for the sum, when the amount subject to interest is demanded by the depositor.

The bank in this case was really doing the plaintiff a favor, with a very uncertain possibility that the $4000 would be left on deposit long enough to compensate them for the trouble of taking it. It was their duty to be always ready to hand the money over

to Hillary, whenever he should be entitled to receive it, in other words, when the lien should be removed. In Mathewson v. Davis, 191 Ill. 391 (1901), where the only duty was one of this sort, it was held that the party was "not generally chargeable with interest." In an early case in this state, reported in 2 Dallas (Pa.) 182, there was no liability for interest unless there was a "neglect to pay it (the principal) on demand."

We have gone at some length into this question which the case at bar presents, and given it our careful consideration, with the conclusion that the plaintiff is not entitled to recover the interest he seeks, in the absence of any stipulation as to interest on the certificate of deposit which he held from the defendant. We believe this to be in conformity with the principles of law as laid down in this state, although we are unable to cite a specific case which presents facts exactly identical to those of the case at bar.

Judgment for the defendant.

OPINION OF SUPERIOR COURT

"It is a well understood principle of law that interest does not run on a contract, unless especially provided for therein, until the time fixed for payment. In other words, interest will not be allowed until the time of payment has arrived, unless especially contracted for." Booth v. Pittsburg, 154 Pa. 482.

Applying this rule it has been held that "a general bank deposit draws no interest, unless by agreement, unless upon demand for payment it is refused or unreasonably delayed." Staibs Est. 11 super. 454. And the fact that the deposit was made under the circumstances present in this case has been held not to exempt the deposit from the application of the general rule. Dewitt v. Keystone Nat. Bank, 243 Pa. 534; Haswell v. Farmers Bank, 26 Vt. 100; Citizens Bank v. Arkansas Co., 80 Ark. 601. Nor does the operation of the general rule depend upon the negotiability or non-negotiability of the certificate of deposit. Bolles on Negotiable Instruments 424; Breyfogle v. Beckley, 16 S. & R. 264; Norton on Bills and Notes, 61, 76.

Judgment affirmed.

STACK v. SMITH

Landlord and Tenant—Waiver of Breach of Covenants—Liability for Rent Upon Removal Without Consent of Landlord

STATEMENT OF FACTS

A lease of a house for three years from April 1, 1912, stipulated that should the lessee do certain things on the premises the lease

should be void. These things were done prior to April 1, 1914, and the tenant Smith moved out without the consent of the landlord Stack. This is an action for the rent for the year April 1, 1914—April 1, 1915, the rent being payable in advance. The defense is that the lease becoming void, Smith on moving, was not liable for any further rent.

Savige, for plaintiff.
Setzer, for defendant.

OPINION OF THE COURT

BRENNEMAN, J. The first question is whether the acts of the tenant Smith rendered the lease void, or merely voidable. Are we to construe the terms of the lease strictly and literally or are we to construe them in the same manner in which the courts of this state have been construing similar leases? The law on this point is now well settled and defined. There has been an evolution, a complete change in the law with respect to the interpretation of the word void.

Originally in Pennsylvania the construction placed upon the word void was that it immediately made the lease of no effect and the breach of express covenants by the lessee could not be waived by the lessor. There was no way by which the tenant could be reinstated except by a new lease. Shaeffer v. Shaeffer, 37 Pa. 525; Davis v. Moss, 38 Pa. 346.

"The doctrine of Wills v. Gas Co., 130 Pa. 122, is an innovation or change in the law; that the parties must have presumed to have contracted in view of the general law as it was expounded when their engagements were formed, and to determine the legal effect of the contract otherwise, is to impair its obligation in contravention of the 10th section of the first article of the Federal Constitution. In Kendrick v. Smich, 7 W. & S. 41, and in Shaeffer v. Shaeffer, 37 Pa. 525, although a condition in each case was in the interest of the lsesor it was held that upon breach of the condition by the lessee the lease was ipso facto absolutely void, and could not afterwards be affirmed or continued by a subsequent recognition of tenancy on the part of the lessor or by any act of his, otherwise than by making a new lease. But as said in Wills v. Gas Co., supra, the vigor of the rule has been relaxed. In Davis v. Moss, supra, where the forfeiture was said to depend upon the terms of the instrument 'unless there be evidence to affect the landlord, with a waiver of the breach, like receipt of rent, or other equally unequivocal act,' in which case the lease may be continued at the instance of the lessee. The ruling in Davis v. Moss, supra, is the first step in the transition from the doctrine of Kendrick v. Smich, to the now well settled rule laid down in Galey v. Kellerman, 123 Pa. 491, and Wills

v. Gas Co. The principle is well established that where the condition appears to have been inserted solely in the interest of the lessor, the lease is void upon the breach if the lessor by some positive act elects to take advantage of it." Ray v. Gas Co., 138 Pa. 588.

The same doctrine is followed in the case of Murray's Estate, 216 Pa. 274. The latest Pennsylvania case in which this new doctrine has been followed is the case of Cape May Real Est. Co. v. Henderson, 231 Pa. 84, in which we find the following discussion: "The general rule is that a party cannot take advantage of his own wrong or set up his own default to work a forfeiture of his own contract unless the contract expressly gives him the right to do so. While the parties may contract that on default the contract shall become void at the option of either party yet such intent in the agreement must be so plain as to be unavoidable in order to sustain such construction. Covenants that the contract shall become void, or that the estate shall cease or terminate on failure by grantee or lessee to pay at the time specified are not self-operating and do not make the contract void except at the option of the grantor or lessor," and that legal effect, no matter what form or cumulation of words or phrases be used, can only be changed by express stipulalation that the contract shall be voidable at the option of either party, is well settled. Cochran v. Pew, 159 Pa. 184.

Was there a waiver of the breach in the case at bar? Undoubtedly there was. The rent was payable in advance and therefor due when this action was brought. This suit was brought by Stack to recover the rent from April 1, 1914, to April 1, 1915. The fact that he is suing for the rent is positive evidence of waiver.

Since we have found that this lease was voidable at the option of the lessor it follows from this that Smith the tenant was not allowed to say whether or not these acts constituted a breach of covenants. Stack had the right of election, Smith had not. "The landlord need not insist in the forfeiture although the causes of it exist. He may, e. g., waive his right to dispossess the tenant for the non-payment of rent at the appointed time." Trickett, "Landlord and Tenant," p. 403.

Considering the lease effective it is important to ascertain whether the rent can be collected for the year in question. There sems to be very little doubt on this point and the cases are almost all unanimous that it can be collected. "The lease having been made and no obstacle existing to the lessee's taking possession according to its terms, his refraining from taking possession according to its terms, is no defense to a suit for the rent. A lessee for a certain period cannot by abandoning the possession within the period and tendering an apportioned part of the rent, escape from paying

the rent for the entire period, the lessor not accepting a surrender. Nor is it a defense that after the lessee has quit the premises within the term, the lessor has neglected to procure another tenant." Trickett, supra, p. 142. Applying this doctrine to the case at bar Smith cannot escape the payment of the rent. The rent was due and the action was not prematurely brought. His not occupying and the surrender of the lease, unaccepted by Stack, are no excuse for nonpayment of the rent.

"In order that the surrender shall release the tenant from further liability for rent the surrender must be accepted by the lessor." 24 Cyc. 116 (b).

A tenant who removes during the term cannot defend against payment of rent subsequently accruing on the ground that the house was untenantable. Moore v. Gardiner, 161 Pa. 175.

In view of the fact that the lease was voidable at the option of the lessor and that his suit for the rent was a waiver of the breach, we therefore hold that the plaintiff must recover the rent for the year April 1, 1914—April 1, 1915.

Judgment for plaintiff.

OPINION OF SUPERIOR COURT

On the doing of certain things, the lease was to be "void." But, this means it shall be voidable by the lessor, not by the lessee. The condition was for the benefit of the former, not of the latter.

The lessor has not chosen to avoid the lease. On the contrary he affirms its validity by suing for the rent for the third year due in advance. 2 Tiffany, Landlord & Tenant, p. 1386.

Affirmed.