McHANEY *v.* BROWN.

Opinion delivered February 2, 1931.

1. REPLEVIN—SUFFICIENCY OF REDELIVERY BOND.—A redelivery bond in replevin is sufficient where in all essential respects it complies with the statute which authorizes its execution (Crawford & Moses' Dig., § 8649).
2. REPLEVIN—REDELIVERY BOND—SUMMARY JUDGMENT.—A redelivery bond obligating the defendant to perform the judgment of the court *held* sufficient upon which a summary judgment against defendant and his sureties was proper.

3. REPLEVIN—REDELIVERY BOND.—The requirement of Crawford & Moses' Dig., § 8649, that a redelivery bond be exacted in double the value of the property is not one of the conditions of the bond, but merely limits the amount of the sureties' liability.
4. REPLEVIN—REDELIVERY BOND.—A redelivery bond, though not executed in double the value of the property involved is sufficient to authorize a summary judgment against the sureties.
5. JUDGMENT—CONCLUSIVENESS AGAINST SURETY.—A finding in a suit against a principal that a certain tender was insufficient was binding in a subsequent action against the principal and his sureties.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellants prosecute this appeal to reverse a summary judgment against them as sureties on a redelivery bond in a replevin suit. The facts necessary to a determination of the issues raised by the appeal may be briefly stated as follows:

On June 21, 1928, C. E. Brown filed a suit in replevin in the Union Circuit Court against M. L. Simmons to recover possession of a rotary drilling rig of the alleged value of $3,000, and filed his bond under the statute in that sum. On June 23, 1928, M. L. Simmons filed his bond for redelivery of the property, signed by W. R. McHaney and the Detroit Fidelity & Surety Company, as his sureties. The bond is dated June 20, 1928, and the body of it reads as follows:

"We undertake and are bound to the plaintiff, C. E. Brown, in the sum of $3,000, that the defendant, M. L. Simmons, shall perform the judgment of the court in the above entitled cause."

On October 9, 1928, Walter E. Taylor as State Bank Commissioner, brought suit in equity to foreclose a mortgage against said drilling rig to secure the payment of a debt of C. E. Brown, payable to said Bank Commissioner in the sum of $3,833.55. The replevin suit was transferred from the circuit court to the chancery court and consolidated with the mortgage foreclosure suit. On March 21, 1929, the consolidated case was tried in the chancery

court, and a decree was entered awarding judgment in favor of said Bank Commissioner against said Brown in the sum of $3,833.55, and in favor of said Brown against said Simmons in the sum of $1,175, as damages for the rent on said drilling rig. The court further found that said sum awarded as damages should be applied under an equitable garnishment which had been issued in favor of said Bank Commissioner on the debt of said Bank Commissioner against Brown, less $587.50, being one-half of said amount of damages, which was accorded to J. S. Brooks, attorney for said Brown under the contract. The court found that Brooks had a lien on said fund for the amount of his attorney's fee. We copy in part from the decree the following:

"The court further finds that the drilling rig involved herein is of the value of $3,000; that the tender made to return said rig by defendant Simmons, through his attorney, W. R. McHaney, on July 20, 1928, was not a legal and sufficient tender; that a fair and reasonable rental value of the said property for the time it has been held by the said Simmons is the sum of $1,500, which sum should be credited with the payment of $325 made by the said Simmons, leaving a balance of $1,175, due as rental on the said rig, for which sum the said C. E. Brown should have judgment against the said Simmons."

A decree was entered in accordance with the findings of the chancellor, and it was further decreed that J. S. Brooks have and recover from M. L. Simmons one-half of said sum of $1,175, or $587.50, and that said sum be declared a lien superior to that of said Bank Commissioner on said fund.

On April 4, 1929, a summary judgment was entered in said court against W. R. McHaney and the Detroit Fidelity & Surety Company on said redelivery bond in favor of C. E. Brown for said sum of $1,175. On motion of said McHaney and Detroit Fidelity & Surety Company, said summary judgment was vacated on May 10, 1929, and subsequently re-entered of record. Said drilling rig was sold at public auction in accordance with the

provisions of the foreclosure decree on May 1, 1929, and said sum was credited on the judgment of said Bank Commissioner against said Brown. Brown was permitted to claim his exemptions in the sum of $500 against the judgment obtained by the Bank Commissioner against him in said consolidated case. Executions have been issued and returned *nulla bona* against M. L. Simmons and the sureties on his appeal bond. The record shows that he prayed an appeal from the decree in the consolidated case, but did not perfect it.

J. S. Brooks and C. E. Brown both filed motions for summary judgments in this proceeding. W. R. McHaney and Detroit Fidelity & Surety Company filed a response to their motions for summary judgment. Upon the hearing of the proceeding, W. R. McHaney testified that on or about July 20, 1928, after the redelivery bond had been signed, the sureties on this bond offered to deliver said drilling rig to said Brown and that the latter told them to leave it where it was on the lease because he was on a deal with Simmons for the sale or lease of the rig. It was decreed that J. S. Brooks have and recover from W. R. McHaney and Detroit Fidelity & Surety Company $587.50, and that C. E. Brown recover from them the sum of $225.

W. R. McHaney and Detroit Fidelity & Surety Company have duly prosecuted an appeal to this court.

Coulter & Coulter, for appellant.

J. S. Brooks and *L. H. Southmayd,* for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted that the redelivery bond was not in the form prescribed by the statute and that therefore no summary judgment could be rendered against the sureties on it. Reliance is placed upon the case of *Martin* v. *Tennison,* 56 Ark. 291, 19 S. W. 922. In that case, the defendant in an attachment suit executed a bond with T. J. Martin as surety, conditioned that the surety would satisfy the judgment of the circuit court to the extent of the value of the cotton involved in the case.

The court held that it was not conditioned to perform the judgment appealed from, as required by statute; and, because it did not conform to the requirements of the statute, it could not be enforced in the manner provided for summary judgments in such cases. We do not think the principle announced in that case applies here. In this case, the delivery bond provided that the defendant, M. L. Simmons, shall perform the judgment of the court in the case. It was executed in conformity with § 8649 of Crawford & Moses' Digest, which provides that the defendant may cause a bond to be executed to the plaintiff by one or more sureties in double the value of the property to the effect that the defendant shall perform the judgment of the court in the action. Thus, it will be seen that the bond was executed in exact conformity with the language of the statute, and it is in all essential respects a statutory bond for the redelivery of the property to the defendant in the replevin suit. The statute does not require any set form of words for the redelivery bond, and all that is necessary is that it shall in all essential respects comply with the terms of the statute which authorizes its execution. *O'Brien* v. *Alford,* 114 Ark. 257, 169 S. W. 774.

The statute requires the bond to be executed in double the value of the property, and it is insisted that this provision of the statute was not complied with, because the complaint and affidavit in the replevin suit allege the value of the drilling rig to be $3,000, the bond was only executed for that sum instead of in double the value of the property. The amount required by the statute to be named in the bond is not one of the terms or conditions to be performed by those signing the bond. It is written in the bond merely for the purpose of limiting the amount for which they are liable. If an amount greater than that provided by the statute had been written in the bond, it might be well said that different terms or conditions than those prescribed by the statute had been inserted in the bond, and that this rendered it in-

effectual as a statutory bond upon which summary judgment might be rendered. Such, however, is not the case where a smaller amount is named in the bond. As we have already seen, the statute provides that the bond shall be conditioned that the defendant shall perform the judgment of the court in the action. Thus, it will be seen that a redelivery bond in a replevin suit is not in the strict sense a substitute for the property released in pursuance thereof, nor has the surety on the redelivery bond the option to return the property. The condition of the bond is that the surety shall perform the judgment of the court in the action. It will be readily seen that in many cases the property, as in the case of automobiles, might be rendered valueless or at least materially diminished in value by the constant use of it from the time of the execution of the redelivery bond until the trial of the case. We think that the conditions of the redelivery bond in the present case in all essential respects complied with the statute, and that it was a statutory bond upon which summary judgment might be rendered against the sureties on the bond.

Again, it is insisted that the summary judgment should not have been rendered because one of the sureties testified that, soon after the redelivery bond was executed, the sureties offered to return the drilling rig to the plaintiff, and that the latter told them to let the drilling rig remain on the lease where it was because he was on a deal to sell or lease it to the defendant Simmons there. This, they contend, was a virtual acceptance of the return of the property to the plaintiff Brown. This testimony was not competent in the present suit. The original foreclosure decree in which Brown and Simmons were parties and which was rendered after the execution of the redelivery bond contains an express finding by the chancery court that the return of the rig by the defendant Simmons was not a legal and sufficient tender. A decree was entered of record in accordance with the finding of the chancellor. The most that could

be said of the decree in this respect is that it was erroneous. No appeal was perfected from this decree, and it is conclusive of the rights of the parties on the return of the drilling rig. This question could not thereafter be litigated in the motion for a summary judgment against the sureties on the redelivery bond.

Again, it is contended that the court erred in fixing the relative amounts to be allowed to the plaintiff Brown and J. S. Brooks, his attorney. We need not consider this question. Both Brown and Brooks are parties to this proceeding, and neither of them have appealed from the decree of the chancery court. Thus it will be seen that appellants are protected from any further litigation in the matter by satisfying the decree of the chancery court in this proceeding.

Therefore, the decree will be affirmed.