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COMPLAINT.

(Filed September 17th, 1924.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY, *ss.*

ANTHONY E. IMBESI, *Plaintiff,* v. EASTERN MOTOR COMPANY, *Defendant.*	Action at Law. In Replevin. Complaint.

Plaintiff, Anthony E. Imbesi, resides in the City of Ocean City, County of Cape May, and State of New Jersey, and says that:

1. The defendant, Eastern Motor Company, is a corporation of New Jersey, located and doing business at Arkansas and Arctic Avenues, in the City of Atlantic City, County of Atlantic, and State of New Jersey.

2. About July 18, 1924, a certain written contract of that date was made by and between the said plaintiff and defendant, a true copy of which contract is hereto attached and made a part of this complaint as Exhibit A.

3. The sum of $1054 mentioned in paragraph 2 of said contract was ascertained and settled by an

account stated by and between the said plaintiff and defendant, a copy of which is hereto attached and made a part of this complaint as Exhibit B.

4. About July 18, 1924, the said defendant delivered to the said plaintiff at said City of Ocean City, a certain Dodge automobile mentioned and described in said contract.

5. On August 21, 1924, at said City of Ocean City, said defendant wrongfully, maliciously and wantonly took said Dodge automobile from the possession of the plaintiff, and ever since has wrongfully, maliciously and wantonly detained and still wrongfully, maliciously and wantonly detains the same; so taken and detained as aforesaid unlawfully.

6. On August 21, 1924, when defendant took said Dodge automobile as aforesaid, plaintiff was and ever since has been lawfully entitled to the immediate possession of the same.

7. On August 27, 1924, at said City of Atlantic City, plaintiff demanded possession of said Dodge automobile from the defendant, and said demand was refused.

Plaintiff demands possession of said Dodge Automobile and $3,000 damages for the detention of same.

CHARLES K. LANDIS, JR.,
Attorney for Plaintiff.

EXHIBIT A.

New Jersey Supreme Court.

IMBESI vs EASTERN MOTOR COMPANY—In Replevin.

AGREEMENT made this Eighteenth day of July, 1924, between EASTERN MOTOR COMPANY, a Corporation of the State of New Jersey, of the first part, and ANTHONY E. IMBESI, 933 Asbury Avenue, City of Ocean City, County of *Atlantic,* State of New Jersey, of the second part. The said parties hereby mutually agree as follows:

1. In consideration of the payment hereby reserved, and of the performance of the conditions and stipulations hereinafter contained, and on the part of the party of the second part to be performed, the said party of the first part will, on or about the 18th day of July, 1924, next, deliver to the said party of the second part one Dodge automobile, maker's number # 136587 equipped as follows: B. Sedan, motor #A 208363.

2. The party of the second part shall hold and be at liberty to use the said automobile and equipment for the term of thirty days from the date of the delivery thereof to him at the rent for the term payable as follows:

A thirty (30) day note, with interest at $6, for $1054.00, to be reduced $88.00 each and every month, when due, until note is paid off in full, such payments making in the sum of $1054.00 dollars.

3. The party of the second part shall at his own cost and expense, from time to time, replace and repair all such parts of said automobile and equipment as may be broken, worn out or damaged, and

keep the same in every respect in good running order and condition and not assign, transfer, underlet or part with possession of the same either directly or indirectly.

4. The said party of the second part will punctually pay the rents hereby reserved, and perform all the conditions and stipulations herein contained, and on his part to be performed; and will not do or suffer to be done anything whereby the said automobile and equipment or any part thereof shall or may be seized, taken in execution, attached, destroyed, or injured.

5. The said party of the second part shall keep said automobile and equipment insurance against damage or loss by fire, theft and accident, the company or companies in which said insurance is carried to be approved by the said party of the first part, for at least the sum of $1054.00 dollars, and will forthwith deliver to the said party of the first part the policies of such insurance, and the receipts for the premiums, which become payable herefor, said insurance policies to be made payable to the party of the first part.

6. It is hereby expressly declared that the property in said automobile and equipment shall remain in the said party of the first part to all intents and purposes; Provided, that the said automobile and equipment shall become the absolute property of the said party of the second part on the expiration of said terms, and payment of all rent hereby covenanted to be paid, and all costs, charges, and expenses provided for under this agreement.

7. In case of the Bankruptcy of the party of the second part, or in case the party of the second part suffers, or permits the seizure of the said automobile and equipment, or any part or parts thereof, under a landlord's warrant to distrain for rent, or

suffers or permits any attachment or other process against property to be issued against Anthony E. Imbesi, 933 Asbury Ave., Ocean City, N. J., or suffers or permits any judgment to be entered up against Anthony E. Imbesi or in case he shall assign, transfer or mortgage the said automobile and equipment or any part thereof, or in case he shall make default in performing and observing any of the covenants, conditions, or agreements herein contained, the said aggregate sum of Ten hundred fifty four dollars shall become payable to the said party of the first part, and it may at its option enter the premises of the said party of the second part, take possession of and remove the said automobile and equipment with or without any legal process, in any such case, that all payments theretofore made by the party of the second part to the party of the first part shall be considered as having been made for the use and hire of the said automobile and equipment while in the possession of the party of the second part and such payments shall be retained by the party of the first part as rental under the terms of this lease.

8. In order that no lien may attach to said automobile in favor of a third party during the existence of this agreement by reason of a debt incurred for repairs, shoes or other accessories, the lessee agrees that repairs shall be made and accessories bought at the shop and store of lessor and that in default thereof the entire remaining debt shall become payable immediately and subject to all the rights of the company as set forth in Paragraph 7 of the agreement.

IN WITNESS WHEREOF, the said Eastern Motor Company has caused its corporate seal to be hereunto affixed and these presents to be signed by its proper officers and the said party of the sec-

ond part has hereunto set his hand and seal the day and year above written.

Anthony E. Imbesi

Department of Motor Vehicles State of New Jersey

This Bill of Sale approved July 31st 1924 for which New Jersey Registration No. 69422X has been issued.

William L. Dill, Commissioner of Motor Vehicles.

By M. M. Sofroney, Agent at Sea Isle City, N. J.

Per C.M.S.

Signed, sealed and delivered in the presence of

Harry Leiby

Eastern Motor Co.

Stanley M. Pontiere

Mary E. Pileggi

State of New Jersey,
County of Cape May,

BE IT REMEMBERED that on this 18th day of July, in the year of our Lord one thousand nine hundred and 24, before me personally appeared Anthony E. Imbesi, who, I am satisfied is the person named in and who executed the foregoing agreement, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. All of which is here certified.

(Notary's Seal) Stanley M. Pontiere

My commission expires June 27, 1927.

EXHIBIT B.

New Jersey Supreme Court.
IMBESI vs EASTERN MOTOR COMPANY—In Replevin
EASTERN MOTOR COMPANY
ATLANTIC CITY, N. J.

Inv. No.
Sold to Anthony E. Imbesi — Dated 7-18-24
Address 933 Asbury Ave., — Repair
Ocean City, N. J. — Order No.
Shipped to — Your Order No.
Address — Via — Car No.

Make - 1 -	Dodge Brothers		
Type	B. Sedan		
Car No.	#A 136587 H. P. 24		
Motor No.	#A 208363 engine 3⅞ x 4½	1370.00	
	Balloon tires	125.00	
	Legal expense and interest	60.63	
		1555.63	
	Owes Motor Finance	304.00	
		1859.63	
	Credit		
Allowance on Essex		750.00	
Cash		50.00	
Delivery		5.63	805.63
			1054.00

ANSWER.

(Filed Sept. 22, 1924.)

NEW JERSEY SUPREME COURT.

ANTHONY E. IMBESI,
Plaintiff,
v.
EASTERN MOTOR COMPANY,
Defendant.

In Replevin.
Answer.

Eastern Motor Company, a corporation of New Jersey, doing business in Atlantic City, says:

1. It admits paragraph 1 of the complaint.

2. It admits paragraph 2 of the complaint.

3. It admits paragraph 3 of the complaint.

4. It admits paragraph 4 of the complaint.

5. It denies paragraph 5 of the complaint.

6. It denies paragraph 6 of the complaint.

7. It denies paragraph 7 of the complaint.

DEFENSES.

FIRST DEFENSE. After the institution of this suit plaintiff seized possession of the automobile re-

ferred to and has continued in possession of the same to this time.

Second Defense. At the time of the delivery of said car to plaintiff he gave to defendant his promissory note for $966 which was a part of the consideration for the sale of said automobile to him, and when the note matured, demand was made for payment of same at Chelsea Safe Deposit & Trust Company where the same was made payable and payment was refused, and defendant has not since paid the same and still owes the same to plaintiff with interest and protest fees. Defendant claims the right to the possession of said car and the title thereto by reason of the failure of plaintiff to pay said consideration.

Third Defense. One of the considerations for the sale and delivery of the automobile to plaintiff was the sale and delivery by plaintiff to defendant of an automobile of the Essex type for which an allowance of $750 was made at the time of the settlement, a copy of which is marked Exhibit "B" to the complaint. It was agreed by plaintiff that said Essex car was free and discharged of every lien when in truth and in fact said car was not free of lien and immediately after the delivery of the Dodge car to plaintiff the Essex car was seized and taken from defendant by virtue of legal proceedings of which plaintiff was notified and was called upon to defend said proceedings which he neglected and refused to do, notwithstanding that he covenanted and agreed to warrant and defend the said Essex car against all and every person or persons whatsoever. Said car has since been sold at public auction for non-payment of moneys due from plaintiff on account

of said car, and said sale was pursuant to the statute in such case made and provided. Plaintiff, in fact, never had the title or right to possession of said car, and if he did, same was taken from him by virtue of said proceedings and defendant took possession of said Dodge car by reason of the proceedings and facts herein stated and holds the same as it had and has a right to do.

COUNTER-CLAIM.

First Counter-Claim. On August 18, 1924, plaintiff made and delivered to defendant his promissory note for $966 payable thirty days after date at the Chelsea Safe Deposit & Trust Company, Atlantic City, New Jersey.

2. On September 17, 1924, when said note matured, it was presented to said trust company for payment and payment refused.

3. Plaintiff is still the holder and owner of said note and will ask for judgment by way of counter-claim for $966 with interest from September 17, 1924, together with protest fees of $2.50 and costs to be taxed.

Second Counter-Claim. 1. On July 18, 1924, plaintiff sold and delivered to defendant one Essex automobile No. 154007 with a used coach No. 112852 for a consideration of $750 and covenanted and agreed to warrant and defend the same against all and every person or persons whatsoever.

2. After the sale and delivery of said articles they were taken from defendant by legal proceed-

ings for money due and owing by plaintiff, and such proceedings were had thereon that said car has been sold at public vendue and defendant lost the possession thereof.

Judgment will be claimed on this counter-claim for $750 with interest from July 18, 1924.

COLE & COLE,
Attorneys of Defendant.

REPLICATION.

(Filed Sept. 29, 1924.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY, *ss.*

ANTHONY E. IMBESI, *Plaintiff,* v. EASTERN MOTOR COMPANY, *Defendant.* — Action at Law. In Replevin. Replication.

Plaintiff, replying to defendant's answer, says that:

REPLY TO FIRST DEFENSE.

1. Plaintiff denies every allegation in the first defense of defendant's answer.

REPLY TO SECOND DEFENSE.

1. Plaintiff denies that he gave his promissory note for $966 at the time of the delivery of said car to him. He says that at the time of said delivery, to wit: July 18, 1924, he gave his promissory note for $1054 to plaintiff and, according to the contract, a copy of which is attached and made a part of the complaint as Exhibit A, plaintiff paid $88 on or about August 17, 1924, and gave his promissory note for $966 which, as alleged by defendant in said second defense, was a part of the consideration for the sale of said automobile to plaintiff. He says that he gave said note for $966 in performance and as part of said contract, a copy of which is attached and made a part of the complaint as Exhibit A, and that according to said contract, there was to become due and payable upon said note at maturity, to wit: 30 days after he gave said note, only $88, and that defendant's demand for $966 was a breach by defendant of said contract.

2. About August 17, 1924, plaintiff paid to defendant said $88 then due and payable on said contract by mailing at the post office at said City of Ocean City, addressed to defendant, Arkansas and Arctic Avenues, Atlantic City, N. J., plaintiff's check payable to defendant's order at the First National Bank of Ocean City, N. J., which payment so made, the defendant accepted. About September 19, 1924, plaintiff likewise addressed and mailed to defendant another check for the $88 then due and payable on said contract, said check of September 19, 1924, being in like manner and form as said check of August 17, 1924, payable to defendant at said bank, which check defendant duly received and has refused

to cash, sufficient funds having ever since remained for the purpose in said bank.

3. On August 21, 1924, at said City of Ocean City, defendant, by its bailiff, claimed a lien upon the said automobile and attached it as the goods of the plaintiff, then and there serving upon the plaintiff a written notice of said claim and attachment, a copy of which is hereto attached and made a part of this replication as Exhibit C.

4. Plaintiff denies that defendant has any right to the possession of said car or the title thereto.

Reply to Third Defense.

1. Plaintiff admits that one of the considerations for the sale and delivery of the automobile to the plaintiff, was the sale and delivery by plaintiff to defendant of an automobile of the Essex type for which an allowance of $750 was made at the time of settlement, a copy of which is marked Exhibit B to the complaint.

2. He says that said Essex car was, at the time of its said delivery to defendant, free and discharged of every lien except such as defendant assumed and agreed to pay and for which allowance was made in settlement between plaintiff and defendant and plaintiff charged in the account stated between the parties, a copy of which is attached and made a part of the complaint, as Exhibit B, as follows:

Legal expense and interest	$60.63
Owes Motor Finance	304.00
	$364.63

3. Plaintiff says he had such title and right to possession of said Essex car as defendant knew and accepted when the same was sold and delivered by plaintiff to defendant and said allowance of $750 for same was made as aforesaid.

4. Plaintiff denies that the Essex car was seized and taken from the defendant by virtue of legal proceedings; he denies that said car has since been sold for non-payment of monies due from him pursuant to the statute in such case made and provided or that the same was taken from him by virtue of legal proceedings of which he was notified or was called upon to defend; and denies that defendant holds said car, or had and has a right to hold the same, by virtue of said proceedings.

5. He says that defendant was an innocent purchaser of said car and that the same was seized and attached after it had been sold and delivered to defendant as aforesaid, by a garage keeper claiming that plaintiff owed said garage keeper for repairs made to said car before it had been sold and delivered to defendant as aforesaid. Plaintiff says he was not served with process in said proceedings and was not called upon to defend the same; that said proceedings were unlawful and contrary to the statute in such case made and provided.

6. Plaintiff denies that he covenanted and agreed to warrant and defend the said Essex car against all and every person or persons whatsoever; he says that when he sold said Essex car to defendant he covenanted and agreed that defendant should have and enjoy quiet possession of said Essex car as against any lawful claims existing at the time of the

sale, except as mentioned in paragraph 2 and 3 of this reply to third defense.

7. Plaintiff objects to defendant's allegations that said Essex car "was not free of lien and that plaintiff never had the title or right to possession of said car."

Because defendant does not allege that he returned or offered to return said Essex car to plaintiff. Defendant cannot keep said Essex car without keeping his promise to pay plaintiff for it.

Answer to First Counter-Claim.

1. Plaintiff admits paragraphs 1 and 2 of first counter-claim.

2. Plaintiff admits that defendant is still the holder and owner of said note.

First Defense to First Counter-Claim.

1. Plaintiff says that he gave said note for $966 in performance and as part of said contract, a copy of which is attached and made a part of the complaint as Exhibit A, and that, according to said contract, there was to become due and payable upon said note at maturity only $88 and that defendant's demand for $966 was a breach by defendant of said contract.

2. Plaintiff here repeats paragraph 2 of his reply to second defense.

3. Plaintiff ever has been and is ready and willing to pay $88 each and every 30 days according to said contract.

ANSWER TO SECOND COUNTER-CLAIM.

1. Plaintiff admits all parts of paragraph 1 of the second counter-claim, except he here repeats paragraph 6 of his reply to third defense.

2. Plaintiff denies paragraph 2 of the second counter-claim.

10 FIRST DEFENSE TO SECOND COUNTER-CLAIM.

Plaintiff repeats his reply to third defense of defendant's answer.

EXHIBIT C.

New Jersey Supreme Court.

20 IMBESI vs EASTERN MOTOR COMPANY—In Replevin.

NOTICE OF LIEN.

To Anthony Imbesi, This is to notify you and all others concerned that the undersigned claims a lien on this Dodge Automobile, for repairs and supplies, payments due to the amount of $750.00, together with interest thereof, and charges of the lien, advertising and sale thereof, under and by virtue of an "Act" entitled an "act" for better protection
30 of Garage Keepers and Automobile Repairmen, passed by the Legislature of the State of New Jersey, and approved by the Governor on April 14th, 1915, and Supplement thereto approved by the Governor on March 13th, 1922.

Same being Chapter 312 F. L. 1915 and Chapter 231, E. L. 1922, and all parties using this Automo-

bile or having same in their possession are hereby notified not to remove the same at their peril until said lien is removed by the payment of the debt and charges aforesaid in full.

Dated Atlantic City, New Jersey, this 13 day of Aug. 1924.

State of New Jersey, (
Atlantic County, (ss.
Atlantic City (

Being duly sworn according to law, deposes and says that the above statement is true and correct.

Sworn to before me this day of 192

(L. S.)
Notary Public.

Commission Expires

Eastern Motor Co.
Per Harry Leiby

I, the undersigned, do hereby appoint Charles H. Luckenbilt, to act as Bailiff for me in the seizure of the above mentioned Automobile

Eastern Motor Co. L.S.
Per Harry Leiby

I, the undersigned as Bailiff have this 21 day of Aug. 1924, seized the above mentioned automobile.

Charles H. Luckenbilt, L. S.
Bailiff for Eastern Motor Co.

POSTEA AND JUDGMENT.

(Entered January 22, 1926.)

This case was tried before Honorable Theodore W. Schimpf, Circuit Court Judge, to whom the same had been referred, with a jury at the Cape May County Circuit, on December 9, 1925.

The said Judge directed the jury to return a verdict against the defendant and for the plaintiff for possession of the automobile, to wit; One Dodge Automobile, Maker's Number #A136587 equipped as follows: B Sedan, Motor #A, 208363 be returned to plaintiff, and also against the defendant and for the plaintiff for six cents damages; and the jury did accordingly return a verdict against the defendant and for the plaintiff for the possession of said automobile, that said automobile be returned to plaintiff, and for six cents damages. Theo. W. Schimpf, Judge.

Whereupon it is adjudged that the plaintiff, Anthony E. Imbesi, do recover of the said defendant Eastern Motor Company, the possession of the automobile mentioned and described in the complaint, together with the sum of six cents damages, and his costs which have been taxed at the sum of seventy-six dollars and seventy-two cents, making in the whole the sum of seventy-six dollars and seventy-eight cents.

.06	
76.72	
$76.78	

Judgment entered January 22, 1926.

AFFIDAVIT.

(Filed April 8, 1927.)

NEW JERSEY SUPREME COURT.

ANTHONY E. IMBESI, *Plaintiff,* v. EASTERN MOTOR COMPANY, *Defendant.*	Action at Law. In Replevin. On Application for Order that Automobile be Restored to Plaintiff. Affidavit.

CHARLES K. LANDIS, JR., of full age, being duly sworn according to law, on his oath says; I am the attorney of record in the above stated action at law in which it was adjudged that the plaintiff recover of the said defendant the possession of the automobile mentioned and described in the complaint, by final judgment entered January 22, 1922. Said plaintiff has not yet recovered the possession of said automobile. The following are true copies of letters received in correspondence by me with Mr. Clarence L. Cole of Cole & Cole, attorneys of record for the defendant, sent and received in the usual course of the postal mails at the dates of said letters.

March 15, 1927.

Mr. Clarence L. Cole,
Guarantee Trust Bldg.,
Atlantic City, N. J.

My dear Mr. Cole:

As you may recall, there is a final judgment that the Eastern Motor Co. return a certain Dodge car to Imbesi. I am writing you in hope that you may be able to get your client, the Eastern Motor Co., to settle this matter without further litigation. The Verdict was rendered December 9, 1925 and judgment entered January 22, 1926. As there has been no appeal, I suppose there can no longer be any question of the duty of your Client to comply with the judgment.

I am inclined to relieve you as much as I can in the matter by acceding to any reasonable offer to which I can get my client to agree.

With best regards, I am

Yours truly,

CHARLES K. LANDIS, Jr.

CKL/E

March 16, 1927.

Charles K. Landis, Jr.,
Sea Isle City, N. J.

Dear Mr. Landis:

In re: Imbesi against Eastern Motor Co.

Noting yours of yesterday. I shall confer with my client in the course of a few days and advise you what conclusion is arrived at.

Very truly yours,

C. L. Cole.

CLC/VDM

March 18, 1927.

Charles K. Landis, Jr. Esq.,
Sea Isle City, N. J.

My Dear Mr. Landis:

Further in reply to yours of the 15th instant in re Imbesi against Eastern Motor Co. My client is un-

willing to make any settlement with your client. You will recall that it appeared in the case that my client had disposed of the car so that it is not in a position to comply by returning it.

Very truly yours,
C. L. Cole.

Plaintiff therefore applies for an order that said automobile be restored to him as adjudged.

CHARLES K. LANDIS, JR.

Sworn to and subscribed before me this sixth day of April, 1927.

AMANDA WRIGHT,
(Notary's Seal) *Notary Public of N. J.*
My commission expires Feb'y. 15th, 1932.

ORDER.

(Filed April 8, 1927.)

NEW JERSEY SUPREME COURT.

ANTHONY E. IMBESI,
Plaintiff,

v.

EASTERN MOTOR COMPANY,
Defendant.

Action at Law.
In Replevin.
On Application for Order that Automobile be Restored to Plaintiff.
Order.

It having been adjudged that the plaintiff, Anthony E. Imbesi, do recover of the said defendant, Eastern Motor Company, the possession of the automobile mentioned and described in the complaint;

It is, according to the statute in such case made and provided, ordered that said defendant, Eastern Motor Company, do deliver to said plaintiff, Anthony E. Imbesi, said automobile, to wit, one Dodge automobile, maker's number #A 136587 equipped as follows: B. Sedan, Motor #A, 208363, upon service of a certified copy of this order and of said judgment.

Dated, April 7, 1927.

On motion of
LUTHER A. CAMPBELL,
Justice Supreme Court.

CHARLES K. LANDIS, JR.,
Attorney for Plaintiff.

AFFIDAVIT.

(Filed April 29, 1927.)

NEW JERSEY SUPREME COURT.

ANTHONY E. IMBESI, *Plaintiff,* v. EASTERN MOTOR COMPANY, *Defendant.*	Action at Law. In Replevin. On Application that Defendant be Attached as for Contempt. Affidavit.

CHARLES K. LANDIS, JR., of full age, being duly sworn according to law, on his oath says; I am the attorney of record in the above stated action at law in replevin, in which it was adjudged that the plaintiff recover of the said defendant the possession of the automobile mentioned and described in the complaint, by final judgment entered January 22, 1922, and in which, by order dated April 7, 1927, it was ordered that said defendant do deliver to said plaintiff said automobile upon service of a certified copy of said order and of said judgment.

On April 12, 1927, deponent served a certified copy of said order and of said judgment by handing the same to Mr. C. L. Cole, attorney for defendant, who then agreed that such service was sufficient ser-

vice according to said order. Afterwards, about April 22, 1927, deponent received from Mr. C. L. Cole a written letter of which the following is a true copy:

"COLE AND COLE
Counsellors at Law
Atlantic City, N. J.
Guarantee Trust Building

C. L. Cole
C. L. Cole, Jr.
Maurice Y. Cole

April 21, 1927.

Charles K. Landis, Jr., Esq.,
Sea Isle City New Jersey.

My Dear Mr. Landis:

I am returning the certified copy of judgment and order in Imbesi vs. Eastern Motor, which you left with me some days ago. My client informs me that it cannot comply with the order because it does not have the automobile. I do not believe it is required to tender another car. You may have a remedy by way of a suit for the value of the car, but I do not see how you can oblige the company to do something that it is not able to do.

Very truly yours,
C. L. Cole.

CLC VDM
Enc."

The certified copy of said order and of said judgmen served upon Mr. C. L. Cole as aforesaid and returned by him as stated in his said letter, are hereto attached as part of this affidavit.

Defendant has not delivered said automobile to plaintiff.

Plaintiff therefore prays that performance of said order be enforced by attaching said defendant as for

contempt, according to the statute in such case made and provided.

CHARLES K. LANDIS, JR.

Sworn to and subscribed before me this 26th day of April, A. D. 1927.

AMANDA WRIGHT,
Notary Public of N. J.

(Notary's Seal)
My commission expires Feb'y. 15th, 1932.
(Certified copy of Order and Judgment attached.)

RULE TO SHOW CAUSE.

(Filed April 29, 1927.)

NEW JERSEY SUPREME COURT.

ANTHONY E. IMBESI, *Plaintiff,* v. EASTERN MOTOR COMPANY, *Defendant.*	Action at Law. In Replevin. On Application that Defendant be Attached as for Contempt. Rule to Show Cause.

It having been adjudged that the plaintiff, Anthony E. Imbesi, do recover of the said defendant, Eastern Motor Company, the possession of the automobile mentioned and described in the complaint;

and it having been ordered that said defendant to deliver said automobile to said plaintiff upon service of a certified copy of said judgment and said order; and it appearing to the Court by affidavit of Charles K. Landis, Jr., herewith filed, that a certified copy of said order and of said judgment was served by him April 12, 1927, by handing the same to Mr. C. L. Cole, attorney for defendant, who then agreed that such service was sufficient service according to said order; and that by letter dated April 21, 1927, written to said Charles K. Landis, Jr., by said C. L. Cole, said defendant, by its said attorney, admitted that it could not comply with said order because it did not have said automobile; and it further appearing by said affidavit that defendant has not delivered said automobile to plaintiff.

It is, therefore, on this 29 day of April, A. D. 1927, ordered that the said Eastern Motor Company show cause before said New Jersey Supreme Court at Trenton on the first Tuesday of October, 1927, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon, why it, the said Eastern Motor Company, defendant, should not be attached for contempt according to the statute in such case made and provided.

And it is further ordered that the said plaintiff and defendant have leave to take affidavits to be used at the hearing of this rule. And that service of a certified copy of this rule be sufficient service.

On motion of

CHARLES K. LANDIS, JR.,

102 North Landis Avenue,

Sea Isle City, N. J.

Let the above rule be entered on the minutes.

LUTHER A. CAMPBELL,

Justice Supreme Court.

AGREED STATE OF FACTS STIPULATED BETWEEN ATTORNEYS.

(Filed July 11, 1927.)

NEW JERSEY SUPREME COURT.

10

ANTHONY E. IMBESI, *Plaintiff*, v. EASTERN MOTOR COMPANY, *Defendant.*	Action at Law. In Replevin. On Application that Defendant be Attached as for Contempt. Agreed State of Facts Stipulated Between Attorneys.

20

For use at the hearing of the rule to show cause, the said plaintiff and defendant, by their respective attorneys, hereby agree and admit, as follows:

1. The pleadings, issues, and judgment, in said action in replevin, are to be in evidence at said hearing. 30

2. In said action in replevin, the plaintiff did not require the immediate delivery to him of the property in question and the officer to whom the process issued, being so directed by the plaintiff, served the

process without taking possession of or delivering the automobile in question to the plaintiff.

3. Said process was served September 12, 1924; the defendant sold said automobile October 30, 1924, without the consent of plaintiff.

4. On October 30, 1924, defendant sold said automobile to another than plaintiff for the sum of $1250 which sum defendant has received and kept without plaintiff's consent.

5. The sum of $1250 is agreed as the value of said automobile for any purpose in which the question of value may be relevant.

6. Due and legal service is hereby acknowledged of the order dated April 7, 1927, and of said rule to show cause dated April 29, 1927.

7. Said automobile has not been delivered to said plaintiff.

8. Defendant is unable to comply with said order dated April 7, 1927, because said automobile was sold as stated in paragraph 3.

9. Defendant is able to respond in damages.

10. It was known to plaintiff at the time of the trial of the action that defendant had sold the car.

Dated, July 6, 1927. This agreement comprised within two (2) pages, each page identified by signatures of attorneys.

CHARLES K. LANDIS, JR.,
Attorney for Plaintiff.
COLE & COLE,
Attorneys for Defendant.

OPINION.

(Filed January 18, 1928.)

NEW JERSEY SUPREME COURT.

No. 409. October Term, 1927.

ANTHONY E. IMBESI,
Plaintiff,
v.
EASTERN MOTOR COMPANY,
Defendant.

Argued October 4, 1927; decided January , 1928.

In replevin, in a case wherein the plaintiff, pursuant to the Statute of 1890, C. S. 4376, P. L. 33, waives the immediate delivery to him of the property in question, and pending the action, the defendant converts such property so that it cannot be delivered at the termination of the action, the liability of the defendant is for the value of the property converted as of the time of conversion, with interest and costs; but defendant is not liable in contempt for failing to preserve the property to the end that it may be delivered in specie if so ordered.

On rule to show cause why the defendant corporation should not be adjudged in contempt of court.

Before JUSTICES PARKER, MINTURN and CAMPBELL.

For the plaintiff, CHARLES K. LANLIS, JR.

For the defendant, COLE & COLE.

The opinion of the Court was delivered by PARKER, J.:

The plaintiff contracted to buy from the defendant a motor car by contract of conditional sale. The defendant, acting upon the theory that plaintiff had broken the contract, reclaimed the car, wrongfully as claimed by the plaintiff, who then brought this action in replevin, but, in pursuance of the Statute of 1890, C. S. 4376, P. L. 33, did not give a bond and actually replevy the car through the sheriff, but left the property in the possession of the defendant. The case then went through a course of pleading and finally came on for trial, by which time the defendant had re-sold the car, plaintiff being aware of this fact at the time of trial. Notwithstanding this fact, the trial Judge directed a verdict for the plaintiff for the possession of the car and six cents damages, and judgment was entered accordingly. As the car had already been sold by the defendant, it naturally was not delivered to the plaintiff in satisfaction of the judgment; and failing to receive it the plaintiff then took out a rule of Court, apparently under Section 26 of the Replevin Act, requiring that the defendant deliver the car to the plaintiff. This rule was not obeyed for the reason above stated; whereupon the plaintiff applied to a Justice of this Court and obtained the present rule requiring the defendant to show cause why it should not be adjudged in contempt for failing to deliver up the motor car as required by the previous rule.

We are aware of no reported case in which a party has been held in contempt, even under Section 26, which contains a clause to the effect that the Court may enforce the performance of an order for restoration of the property by a writ in the nature of a writ of restitution or by an attachment as for contempt. C. S. 4375. Be this as it may, this case does

not come within the provisions of Section 26, for a careful reading of that section will demonstrate that it relates only to cases in which the property in question has been delivered by the sheriff or coroner to the party against whom the issue of property shall be found. There was no such delivery; in fact, there was no delivery at all. The car had been seized by the defendant before the suit was begun, and the defendant continued to hold it after the suit was begun for the simple reason that the plaintiff chose to proceed under the Act of 1890 and not require a caption of the car as incidental to his writ of replevin. Hence, it is clear, as already stated, that the case is not within the provisions of Section 26.

When we come to examine P. L. 33, we find it provides that the Court may direct, not the party, but the officer to take possession and deliver the property. The case shows no such direction to the officer, either by writ de retorno habendo or analogous procedure; all that it shows is some correspondence between the attorneys. If there had been such a writ in fact issued, the sheriff would necessarily return that he could not find the property in his county. In the absence of any express statutory provision (and we know of none) that the party left in possession under the Act of 1890 shall safely keep the property and be ready to render it in specie when so required, we are of opinion that under that Act such party is liable, in case of conversion, only in damages for the value of the property with interest from the time of taking, as in trover, and costs. The cases cited in the briefs do not seem to be applicable to this situation, and need not be further noticed.

The plaintiff is entitled to a rule modifying the judgment entered in this case so that it shall be a

money judgment against the defendant for the sum of $1250, being the stipulated value of the property, together with interest from the date of conversion thereof by the defendant, besides costs. So far as relates to the present proceeding in contempt, the rule to show cause will be discharged, but without costs.

RULE FOR AMENDED JUDGMENT.

NEW JERSEY SUPREME COURT.

ANTHONY E. IMBESI,
Plaintiff,
v.
EASTERN MOTOR COMPANY,
Defendant.

Action at Law.
In Replevin.
On application that Defendant be Attached as for Contempt, and Hearing on Rule to Show Cause.
Rule for Amended Judgment.

Judgment having been entered on January 22, 1926, in the above-stated action at law, whereby it was adjudged that the plaintiff, Anthony E. Imbesi, do recover of the said defendant, Eastern Motor Company, the possession of the automobile mentioned and described in the complaint, together with the sum of six cents damages, and his costs, and it

now appearing that pending said action, on October 30, 1924, said defendant sold said automobile for the sum of $1250 and converted the same to its own use; and a rule having been made directing the defendant to deliver said automobile to the plaintiff and for default of such delivery a further rule having been made that defendant show cause why it should not be adjudged in contempt, and the same having been argued at the October, 1927 Term of this Court, and the Court being of opinion that said rule to show cause should be discharged, but without costs, but that plaintiff is entitled to an award in his favor of the value of said property, which value is stipulated at the sum of $1250.

It is ordered that said rule to show cause be discharged, but without costs, and that in lieu thereof judgment be entered in favor of plaintiff and against said defendant, as in trover, for the value of said property, to wit, $1250, with interest from October 30, 1924, together with six cents damages, besides costs.

And application having been made on behalf of said defendant to postpone the entry of such judgment until such time as defendant shall have had opportunity to try the counter-claim filed in this cause to the end that the same be allowed and set off as against the value of said property: It is ordered that such application be denied, but without prejudice to the commencement of an independent suit by said defendant based on the matters set up in said counter-claim, and without any adjudication at this time as to whether such action will lie after setting up said counter-claim in this cause; such independent suit to be begun within ten days after service on said defendant of a copy of this rule. And that, in the meantime, the plaintiff may proceed herein to judgment execution and levy, but not sell

or advertise until the further order of this Court.
February 16, 1928.

Let this rule be entered.

C. W. PARKER,
J. S. C.

Entered February 29, 1928, on motion of
CHARLES K. LANDIS, JR.,
Attorney for Plaintiff.

Damages, $1250.00.
Int. from Oct. 30, 1924.
Damages, $0.06.
Costs.
$0.06 damages only stricken out of judgt.
See amendment filed March 8, 1928.
A true copy.

FRED L. BLOODGOOD,
Clerk.

JUDGMENT.

NEW JERSEY SUPREME COURT.

ANTHONY E. IMBESI,
Plaintiff,
v.
EASTERN MOTOR COMPANY,
Defendant.

Action at Law.
In Replevin.
Charles K. Landis, Jr., Attorney.

Damages $1250.00 Int. from Oct. 30, 1924.
Costs .....
$

Judgment entered this twenty-ninth day of February, A. D. nineteen hundred and twenty-eight in favor of plaintiff and against the defendant for the sum of one thousand two hundred and fifty dollars damages with interest from October 30, 1924, and costs.

WM. S. GUMMERE,
C. J.

A true copy.
FRED L. BLOODGOOD,
Clerk.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

ANTHONY E. IMBESI, *Plaintiff*, v. EASTERN MOTOR COMPANY, *Defendant.*		Action at Law. Notice of Appeal.

To Charles K. Landis, Jr., Esq., Attorney for Plaintiff:

Take notice, that the defendant appeals from the whole of the judgment entered in this cause, on the following ground:

1. The Court was without jurisdiction to order the entry of the judgment in view of the fact that the sole issue before the Court on the rule to show cause was whether the defendant should be adjudged in contempt for not complying with the order requiring the return of the automobile.

COLE & COLE,
Attorneys of Defendant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANTHONY E. IMBESI,
Plaintiff-Respondent,
v.
EASTERN MOTOR COMPANY,
Defendant-Appellant.

ON APPEAL FROM SUPREME COURT.

BRIEF FOR PLAINTIFF-RESPONDENT.

STATEMENT.

An action of replevin by *Imbesi v. Eastern Motor Company* in New Jersey Supreme Court was tried at December Term, 1924, when a non-suit was granted. On appeal and reversal, *Imbesi v. Eastern Motor Co.*, 130 Atl. Rep. 611, it was again tried December Term, 1925, when verdict was directed and judgment entered that the Motor Co. return the property taken, *i.e.*, a certain Dodge automobile, to Imbesi. The Motor Co., in the meantime having sold the car, could not return it, and on rule to show cause why the Motor Co. should not be attached for contempt, the New Jersey Supreme Court modified

the replevin judgment to be a money judgment as in trover for $1,250 with interest. *Imbesi v. Eastern Motor Co.*, 140 Atl. Rep. 31. Opinion, State of Case, pages 29 to 32, rule for amended judgment, State of Case, page 32, line 10, to page 34, line 20. Judgment, State of Case, page 35.

For use at the hearing of the rule to show cause why the Motor Co. should not be attached for contempt, the parties, by their attorneys, agreed and admitted by written stipulations filed, as follows:

> "1. The pleadings, issues, and judgment, in said action in replevin, are to be in evidence at said hearing." Agreed state of facts, State of Case, page 27, lines 29 to 31.
>
> "5. The sum of $1,250 is agreed as the value of said automobile for any purpose in which the question of value may be relevant." Agreed state of facts, State of Case, page 28, lines 14 to 16.

The appeal is upon the single ground that the Court was without jurisdiction to modify the judgment as it did because the only issue on the rule to show cause was whether the defendant should be attached for contempt. Notice of appeal, State of Case, page 36.

POINT I.

A COURT OF GENERAL JURISDICTION, MAY, OF ITS OWN MOTION, AT ANY TIME AMEND OR MODIFY ITS RECORD AND JUDGMENT. IT IS AN ACT OF DISCRETION FROM WHICH AN APPEAL CANNOT BE HAD.

Davis v. Township of Delaware, 42 N. J. Law 513;
Dolker v. Board Chosen Freeholders of Atlantic Co., 90 N. J. Law 473, citing *Hansen v. DeVita*, 76 N. J. Law 330.

Quoting from *DeLisle v. Reeves*, 96 N. J. Equity 416:

> "It is elementary that a Court of Record has sufficient control over its records to prevent them from working an injustice; it is also clear that it is the duty of the Court to correct any mistake of law or fact, both of commission and omission, and which is necessary to protect and enforce the rights of parties properly before it."

At the hearing of the rule to show cause, the Court was apprised by agreed state of facts disclosing that the judgment would be defeated by the act of the defendant in having sold the car which it was ordered to return unless the judgment were modified to be a money judgment for the agreed value.

POINT II.

APPELLANT HAS NOT STATED ANY GROUND OF APPEAL THAT ITS SUBSTANTIAL RIGHTS WERE INJURIOUSLY AFFECTED BY MODIFICATION OF THE JUDGMENT.

Ridgeley v. Walker, 86 N. J. Law, 590;
Section 27 Practice Act, 2 Cum. Supp. N. J. Com. Stts., page 2819, Section 163-303.

POINT III.

APPELLANT HAVING ACQUIESCED IN THE ENTRY OF SAID JUDGMENT, IS ESTOPPED FROM APPEALING FROM SAME.

The rule for amended judgment, see State of Case, page 33, line 22, to page 34, line 20, states that an

> "application having been made on behalf of said defendant to postpone the entry of such judgment until such time as defendant shall have had opportunity to try the counter-claim filed in this cause to the end that the same be allowed and set off as against the value of said property: It is ordered that such application be denied, but without prejudice to the commencement of an independent suit by said defendant based on the matters set up in said counter-claim, and without any adjudication at this time as to whether such action will lie after setting up said counter-claim in this cause; such independent suit to be begun within ten days

after service on said defendant of a copy of this rule. And that, in the meantime, the plaintiff may proceed herein to judgment execution and levy, but not sell or advertise until the further order of this Court."

The counter-claim being for a sum to be subtracted from the value of the car as adjudged, by applying for leave to try the counter-claim against same, the defendant-appellant assumed the right of the Court to enter the judgment for the value of the property by recognizing the value of the car as a proper factor in the legal as well as the arithmetical problem and so electing the remedy by counter-claim instead of by appeal.

Defendant-appellant asked and was given leave to proceed with the counter-claim while the judgment stood unchallenged and now complains of a status which he accepted.

Most respectfully submitted,

CHARLES K. LANDIS, JR.,
Of Counsel with Plaintiff-Respondent.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

ANTHONY E. IMBESI,
Plaintiff-Respondent,

vs.

EASTERN MOTOR COMPANY,
Defendant-Appellant.

} On Appeal from Supreme Court.

APPELLANT'S BRIEF.

Statement.

The initial action was in replevin for the possession of an automobile. Plaintiff did not give the statutory bond and defendant retained possession. After considerable period of time there was a trial at the Cape May Circuit and the judge directed a verdict for the plaintiff for possession and six cents damages. Long before the trial, defendant had disposed of the automobile and this fact was known to plaintiff and his counsel at and before the time of the trial. No attempt was made to prove the value of the car at the time of the alleged conversion and no judgment for damages to the value of the car was sought. After the entry of the judgment, plaintiff demanded possession and defendant replied that it could not return the car because it had been disposed of. Thereupon Mr. Justice Campbell allowed a rule to show cause why the defendant should not be adjudged in contempt for not returning

the car. This was the limit of the rule, there being no suggestion of a purpose to ask a money judgment. The Supreme Court decided that the defendant should not be in contempt and discharged the proceedings in contempt, but determined that plaintiff was entitled to a rule modifying the judgment entered in the initial cause and that a money judgment be entered against the defendant for the sum of $1,250. It is from the money judgment that this appeal is taken.

Argument.

The Supreme Court was without power to render the judgment from which the appeal is taken and if it possessed such power, there was a clear abuse.

The Supreme Court seems to have justified its determination because of a stipulation that the car was sold by appellant for $1,250. The stipulation was made not with an idea that a money judgment could be had, but simply because it was a fact that the appellant had sold the car before trial to the knowledge of the respondent. There was a clear way to open to respondent when he learned before trial that the car had been disposed of. He could and should have amended his pleadings and asked for money damages as was done in *Bishop* v. *Keffer,* 69 Law 47.

It will be noted that appellant filed a counter-claim in the initial action but was not pressed for two reasons; first, because respondent did not ask for a money judgment, and secondly, because it was thought that there could be no offset to an action of replevin where the sole question was the right of possession. This was so decided in the Supreme Court in the case of *McDade* v. *Reilly,* 132 Atlantic Reporter 247.

Certainly appellant was not required to anticipate when it joined in the stipulation for the purpose of avoiding the necessity of taking testimony that on rule

to show cause in contempt only it might have a money judgment against it.

Respectfully submitted that the judgment should be reversed.

COLE & COLE,
Attorneys for and of Counsel
with Appellant.

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