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NEW JERSEY  
Court of Errors and Appeals.

HOWARD EWART,  
*Plaintiff,*

vs.

V. W. WILLEY MOTOR COMPANY,  
*Defendant.*

Action at Law.  
~~On Postea~~ In Replevin  
Replevin.

10

COMPLAINT.

20

(Filed May 18, 1926.)

V. W. Willey Motor Company, the defendant in this cause, was summoned to answer unto Howard Ewart, the plaintiff therein, in an action at law upon the following complaint.

(Writ Issued May 10, 1926.)

Plaintiff, residing in the Village of Toms River, in the County of Ocean and State of New Jersey, says that:

30

1. On May 6, 1926, he was and ever since has been the owner of the following goods and chattels, to wit:  
1 certain 2-ton White automobile truck, 1920 model, Engine No. 42202, Serial No. 75349.
2. On that day, he was and ever since has been lawfully entitled to the immediate possession of the same.
3. On that day, on Brunswick Avenue, in the City of Trenton, defendant wrongfully took said automobile

and has ever since wrongfully detained and still wrongfully detains same, notwithstanding demand for the return of the same made upon defendant by the plaintiff herein.

Plaintiff demands possession of said automobile and \$1,000.00 damages for its detention.

HOWARD EWART,  
Attorney per se.

ANSWER.

(Filed May 21, 1926.)

Defendant, V. W. Willey, trading as V. W. Willey Motor Co., with its place of business in Trenton, N. J., says:

That under Chapter 312, of the Laws of 1915, Chapter 231, of the Laws of 1922, and Chapter 33 of the Laws of 1925, of the State of New Jersey, it, a regularly conducted garage, is entitled to a garageman's lien in the sum of \$375 and interest, on the car which is the subject of this suit, because repairs, accessories and supplies were furnished on said car at the request of the herein plaintiff's brother, the then owner, and that repeated demands have been made by the defendant for the payment of its account, and that plaintiff and his brother have neglected and refused to pay said account, not at any time having denied or questioned it; that a detailed statement of said account was served on said plaintiff's brother previous to the taking.

That on or about the 10th day of May, A. D. 1926, said truck was taken under a garage lien and is now in the possession of the defendant and subject to sale under said acts for the collection of said lien.

Defendant denies that plaintiff is lawfully entitled to the possession of said truck.

Defendant denies that it wrongfully took said truck and that it wrongfully detains same.

Defendant asks judgment of possession together with counsel fee and costs of this suit to be taxed.

HERVEY S. MOORE,  
Attorney for Defendant.

PLAINTIFF'S REPLY.

(Filed June 7, 1926.)

Plaintiff replying to the answer filed herein says that:

1. He denies that defendant is entitled, as against the plaintiff, to any lien whatsoever upon the automobile mentioned in the complaint.

2. He denies that any demands or detailed statement of defendant's alleged claim has ever been served upon him.

3. He denies said automobile was taken by defendant on or about the tenth day of May, 1926, under a garage lien and denies that said automobile is now in possession of defendant subject to sale for the collection of the alleged lien.

4. He says said automobile, then the property of Elmer E. Ewart, was levied upon by the Sheriff of Mercer County by virtue of a writ of execution issued out of the New Jersey Supreme Court in a suit wherein Lizzie E. Brown was plaintiff and the said Elmer E. Ewart was defendant, and that, under and by virtue of said writ and said levy, the said Sheriff did sell said automobile at duly advertised sheriff's sale, on December 30, 1924, to the plaintiff herein.

5. He says the alleged lien of defendant as mentioned in the Answer herein grew out of a transaction between defendant and said Elmer E. Ewart prior to said levy and sale by the Sheriff of Mercer County.

6. He says any lien or claim defendant may have heretofore had upon said automobile was lost and cut off by virtue of said levy and sale above mentioned.

HOWARD EWART,  
*Attorney per se.*

NOTICE.

10 Take notice that at or before the trial of this issue I shall move to strike from the answer the statement:

“Because repairs, accessories and supplies were furnished on said car at the request of the herein plaintiff’s brother, the then owner.”

and the statement:

“that a detailed statement of said account was served on said plaintiff’s brother previous to the taking.”

20 for the reasons that:

*First*—Both of said statements are irrelevant and impertinent.

*Second*—Neither of said statements, if true, set up any defense to this action.

Very truly yours,

HOWARD EWART,  
*Attorney per se.*

To HERVEY S. MOORE, ESQ.,  
*Attorney for Defendant.*

NEW JERSEY SUPREME COURT.  
No. 57, Mercer Circuit.  
January Term, 1927.

HOWARD EWART,

*Plaintiff,*

*vs.*

V. W. WILLEY MOTOR COMPANY,

*Defendant.*

Action at Law.

TESTIMONY.

Transcript of shorthand notes of testimony, etc., taken in the above-entitled matter on the trial thereof before Hon. Frank B. Jess, Circuit Court Judge, and a jury, at the Court House, Trenton, New Jersey, on Tuesday March 29, 1927.

Appearances: Howard Ewart and Aaron V. Dawes, for the plaintiff;

Hervey S. Moore, for the defendant.

(Jury empaneled and sworn.)

(Mr. Dawes opened for the plaintiff.)

(Mr. Moore opened for the defendant.)

The Court—What is the question of fact to be determined here?

Mr. Moore—I guess Mr. Dawes had better open that up, if the Court please. He is the moving party.

Mr. Dawes—I desire to offer the pleadings. There is no fact in this case, as I take it, that stands upon the pleadings denied. I mean no material fact. We claim the ownership of this car. The pleadings admit the ownership in us. The pleadings admit that no demand was ever made upon the plaintiff for the payment of any supposed lien which this defendant may have claimed to have upon the car. Upon that question the plaintiff is certainly entitled to a judgment, because the Lien Act distinctly says that the party having or claiming such lien after demand of the owner for the payment of the claim, either personally or by registered mail, if the owner’s address is known, may seize the car. No such claim or demand, on the pleadings here, has ever been

made of this plaintiff and, therefore, so far as having any lien, he has not complied with the statute.

Mr. Moore—If the Court please, the pleadings admit no such thing. The second paragraph of the answer says, "On or about the tenth day of May, 1926, the said truck was taken under a garage lien." That presupposes everything was done requisite with it.

(After discussion.)

The Court—You better go ahead, Mr. Dawes, and  
10 prove your right to possession.

Mr. Dawes—If your Honor please, the law under which we claim is a later law than Mr. Moore is claiming under. The present question is who is entitled to the possession of this car, and the Law of 1922 says that anyone having such lien may without further process of law and after demand of payment of claim—

The Court—They say they made demand.

Mr. Dawes—They do not say they made it of the  
20 owner. The law requires them to make it of one particular person, and that is the owner. That is the law of 1922.

Mr. Moore—We will prove we did.

Mr. Dawes—Our reply says we deny that any demand or detailed statement of defendant's alleged claim has ever been served upon him. That reply was in reply to their so-called claim of lien and has never been denied and stands confessed in this Court on these pleadings. There is the reply. The rule says—

The Court—You do not mean to say that when they  
30 make an affirmation of a fact, and there is a reply denying that, that they must come back again? They set that up in the original answer. They say they made a demand.

Mr. Dawes—The law sets out how they shall make it. The law does not permit them, because they happen to see a man with a truck or with an automobile, to pick it up unless they make demand for the payment of the lien before they do it.

The Court—I think that is right.

(After discussion.)

Mr. Dawes—The pleadings do not show he made a demand of this plaintiff.

The Court—If he does not prove that he made demand he is out of court under that Act.

Mr. Moore—Yes, but our answer states that on or about the tenth of May, 1926, the said truck was taken under a garage lien.

(After discussion.)

The Court—Regardless of what the intention of the  
10 act was, what have you to say to the apparently express language of the Act that the demand must be made of the owner.

Mr. Moore—We have made that demand and that is covered in the answer.

The Court—Of the owner?

Mr. Moore—Yes, sir. Howard Ewart says he is the owner.

Mr. Dawes—They say in their pleadings they made  
20 it of the plaintiff's brother.

Mr. Moore—I am talking about the second paragraph now.

Mr. Dawes—"A detailed statement of the said account was served upon the plaintiff's brother." That was previous to the taking. Now we did not move to strike this plea out and we put in our reply that he never made any demand upon this plaintiff; and if he intended to contest that and show that he did he should have filed a rejoinder to that reply and said that was not so.

Mr. Moore—Paragraph 2 of our answer covers it.  
30 I conceive that to be a matter of defendant's proof anyway. We have the man here who made the demand upon the present plaintiff, the man who now says he is the owner of the truck.

(After discussion.)

(Adjourned until Wednesday, March 30, 1927, at fifteen o'clock in the forenoon.)

TRENTON, N. J., MARCH 30, 1927.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court—What is the situation now?

Mr. Moore—Mr. Dawes has moved, practically, for a judgment on the pleadings; and I have maintained that our pleadings were sufficient under the garage lien act.

The Court—Was there a formal motion? I think  
10 there was just a discussion.

Mr. Dawes—I will at this time offer the pleadings in evidence and rest.

Mr. Moore—If the Court is not satisfied that my answer contains sufficient to comply with the Garage Lien Act, and more particularly the amendment of 1922, then under Section 124 of the Practice Act I ask leave at this time to amend my answer, providing the Court does not think it is sufficient. I think it is sufficient, because it says that on or about the tenth of May,  
20 1926, said truck was taken under a garage lien. If it was taken under a bona fide garage lien all the proper preliminaries would have to be done. If the Court does not agree with me on my proposition, then I move that the first paragraph in the answer be amended, after the word "Taking," to be the following, "And demand made of plaintiff for payment of lien."

Mr. Dawes—When, if your Honor please?

Mr. Moore—It is not necessary to state that, under the statute, but any time before the taking.

Mr. Dawes—He should name the time.

30 Mr. Moore—The act says, "Or after demand of payment of the claim, either personally or by registered mail, if the owner's address is known." As a matter of fact we will show that three demands were made.

The Court—Is there objection to the amendment?

Mr. Dawes—Yes, sir. Because the reply specifically states that no demand whatever was made upon the plaintiff. His pleadings stand as admitting that fact.

The Court—No, Mr. Dawes. In reading the pleadings I find this: "And that repeated demands have been made by the defendant for the payment of this account." That does not say the demands were made of the plaintiff. But then it goes on to say, "And that the plaintiff and his brother have neglected and refused to pay said account."

Mr. Dawes—The brother has nothing to do with this matter.

The Court—I imagine that would be true. The Act  
10 itself would seem to contemplate that when demand is made it must be made upon the owner of the car.

(After discussion.)

The Court—I understand the theory of the law to be, in the first place, that one who makes repairs or furnishes supplies to a car may, if the car is in his possession, detain it; he has a lien if it is in his possession at the time he made the demand, without any process of law; he can hold it until the lien is satisfied.  
20 If it is out of his possession, if he permits it to be removed from his possession, then another thing is essential, and that is that, having a lien, the Act gives him the right to take it wherever he may find it, but he must make demand upon the owner of the car.

Mr. Moore—Yes, sir; either personally or by registered mail.

The Court—Of whoever happens to own the car at that time. Now, according to the pleadings, the car was sold under a levy by the Sheriff in December, 1924. Apparently nothing was done to enforce any lien which the plaintiff may have had until the car was seized in  
30 1926, May 6, 1926. In the meantime there had been a Sheriff's sale on an execution against the owner of the—

Mr. Moore—If the Court please, it was 1926 when the present plaintiff got possession of this car. We took it off the plaintiff as soon as we found out about this Sheriff's sale.

The Court—You say the Sheriff's sale was in 1926?

Mr. Moore—Yes, sir.

The Court—Then the pleadings are wrong. They say 1924.

Mr. Dawes—We stand on the pleadings. The pleadings are proper.

Mr. Moore—Here is a note here dated February, 1926, covering seven hundred dollars due us on the original consideration and \$425 due us on the garage  
10 lien.

The Court—Notes, you say?

Mr. Moore—Yes, sir.

The Court—How do they fix the time of the Sheriff's sale?

Mr. Moore—They fix the time of the Sheriff's sale as being after February 25, 1926, and not in 1924.

(After discussion.)

The Court—Well, Mr. Dawes, I understand, says that they offer the pleadings in evidence and rest. It  
20 is your next move.

Mr. Moore—Then is it admitted that Mr. Ewart had knowledge that there was a garage lien on this car at the time he purchased the car?

Mr. Dawes—May your Honor please, the pleadings speak for themselves on that. He has raised no such question.

Mr. Moore—If that is the effect of it your Honor, I am going to move for a judgment for the defendant.

The Court—The position of the plaintiff seems to be that he is relying on the pleadings without putting in  
30 any evidence. If he is resting on that I will have to deal with that situation when it exists.

Mr. Moore—I will call Mr. Ewart.

*Howard Ewart*, sworn for the defendant.

Direct examination, by Mr. Moore.

Q. Are you a brother of Elmer E. Ewart?

Mr. Dawes—I object to any question concerning the conduct of the sale as outside of the

pleadings as they stand and irrelevant and immaterial. I also insist that the question raised at this time before the Court is one of the right of this defendant to have taken this car, upon the ground that no demand was made of the owner for the payment of this bill before the car was taken. I stand, first, therefore, upon the statute that has not been complied with, and the question of the lien is therefore premature and not before the Court. They are not in any  
10 position to try the lien until the defendant shows compliance with the Act. I move, therefore, to overrule any testimony until that primary question is settled.

The Court—I will deny the motion.

Mr. Dawes—I ask an exception.

The Court—Yes.

Q. You are a brother of Elmer E. Ewart?

A. I am.

Q. Were you his attorney when he went through  
20 bankruptcy?

A. I was.

Q. Upon what did he go through bankruptcy, what judgments?

Mr. Dawes—I object to that.

The Court—How is that material, Mr. Moore?

Mr. Moore—I am leading up to the question of how this plaintiff came to get possession of this truck. This jury is entitled to know the whole story.

The Court—You wish to prove your case, do you, and you are calling this witness for that purpose—that is, your case raised by the pleadings?  
30

Mr. Moore—Yes, sir.

The Court—Then the objection is overruled.

Mr. Dawes—Exception.

(Last question read.)

A. The bankruptcy petition, which I do not have before me or here in court, disclosed liabilities totaling, as I remember, approximately \$15,000, a small part of which was in the form of judgments.

Q. Did he owe you any money?

A. He did.

Q. How much?

A. I recovered a judgment against my brother in the New Jersey Supreme Court in November, 1924, for an amount approximating six hundred dollars.

10 Q. Was it contested?

Q. Was it contested?

Mr. Dawes—Objected to as immaterial.

The Court—Objection sustained.

Q. Who else recovered judgments against him in your immediate family?

Mr. Dawes—Objected to as immaterial.

The Court—Objection sustained.

Q. Of course you knew all about his financial condition, having been his attorney in this case, did you not?

20 Mr. Dawes—Objected to as immaterial.

The Court—Objection sustained.

Q. Did you know your brother owed seven hundred dollars on this White truck in question?

A. When?

Q. At the time you recovered your judgment against him, and also at the time he went into bankruptcy.

A. I knew—

Mr. Dawes—I object to the bankruptcy. The question is at the time he recovered the judgment and the sale. That is the only material feature in this case. I object to the question on that ground.

30

The Court—Do you object to all the question?

Mr. Dawes—I object to the question as framed on the ground it embraces matters which are impertinent and immaterial to this issue.

(Last question read.)

The Court—The latter part of the question, "Also at the time he went into bankruptcy," may be stricken out, on the objection of counsel.

A. I knew that he owed the Willey Motor Company a certain amount. I do not believe I knew the exact amount.

Q. And you also knew he owed the Willey Company \$375 for repairs to this truck, didn't you?

A. I knew at that time, that is, at the time of the judgment—

Q. And at the time of the sale?

A. I have not finished the answer. —that he owed the Willey Company a sum of money for repairs on the truck; just what sum I do not believe I did know.

Q. At the time of the sale you knew it, didn't you?

A. I personally did, yes.

Q. How much did you pay for this truck at the sale?

Mr. Dawes—Objected to as immaterial.

The Court—Objection sustained.

Q. Did you purchase the truck at the sale? 20

A. I did.

Q. Are you using the truck?

Mr. Dawes—Objected to as immaterial.

The Court—Objection sustained.

Q. Who is using the truck?

Mr. Dawes—I object to that for the same reason.

The Court—Objection sustained.

Q. Where is the truck?

A. I believe the truck is in Mercer County. I can not answer that positively. 30

Q. In whose possession is it?

A. In the possession of my brother.

Q. Is he a farmer in Mercer County?

A. He was a farmer and lives on a farm.

Q. Is he a farmer now?

A. I think not.

Q. Don't you know?

A. That is a question that calls for a conclusion that you and I might differ upon. In my judgment he is not a farmer now.

Q. Everything connected with the farm was sold at the sheriff's sale, was it?

Mr. Dawes—Objected to as having no relevancy to this issue.

The Court—Objection sustained.

Q. Were any of the chattels sold at the Sheriff's  
10 sale removed from the farm?

Mr. Dawes—Objected to as not within the issues.

The Court—Objection sustained.

Mr. Moore—That is all. Cross-examine.

Cross-examination, by Mr. Dawes.

Q. This sale you speak about took place when?

A. December 30, 1924.

Q. Who were the plaintiffs in execution in that case?

20 A. Elizabeth Brown, of Hightstown, New Jersey; myself as administrator; myself individually, and Carrie B. Ewart.

Q. Did Mrs. Brown have any notice or knowledge at the time this judgment was obtained?

A. She did not, nor did she attend the sale.

Q. This truck was taken into possession by the defendant?

A. Yes.

Q. Was the car re-replevined?

A. No.

Q. Does the defendant still have possession of the car?

A. The car was seized by the defendant on May 6, 1926. I instituted replevin proceedings after a demand for possession and furnished a bond and took the car under the replevin suit. The defendant did not put up a bond or re-replevin it.

Mr. Dawes—That is all.

Re-direct examination, by Mr. Moore.

Q. What did you pay for that truck at the sale?

Mr. Dawes—Objected to as already asked and overruled.

The Court—Objection sustained.

Mr. Moore—That is all.

Virgil W. Willey, sworn for the defendant.

Direct examination, by Mr. Moore.

Q. Mr. Willey, do you know the defendant company,  
10 the V. W. Willey Company?

A. I do.

Q. Do you know Howard Ewart, the plaintiff?

A. I do.

Q. Did your company take into its possession under the Garage Lien Act a motor truck, 1920 model, White, engine number 42202 and serial number 75349, which plaintiff had in his possession?

A. We did.

Q. Before taking this into your possession under the  
20 Act what if anything did you do?

Mr. Dawes—I object to that. The only question, as I understand, is whether he made demand of this plaintiff.

The Court—Objection overruled.

Mr. Dawes—Exception.

The Court—Yes.

A. I went to Toms River to Mr. Howard Ewart's office.

Q. This gentleman here (indicating)?

A. Yes, sir.

30

Q. Did you see him?

A. Yes, sir, on two occasions to talk with him about the truck and find out why he had bought it and what he intended to do with it.

Mr. Dawes—That is not material, what he intended to do.

Mr. Moore—You can cross-examine when your time comes, Mr. Dawes.

The Witness—I understand the purchase price at the sale—

Mr. Dawes—I object.

The Court—Yes; it is just a question of what he did.

The Witness—I asked Mr. Ewart who was going to pay me the bill for the truck, whether he or his brother was. He said he was not in a position at that time to tell me just who was going to pay it. I told him that his brother was still renewing the notes and that I was willing to trust his brother for it; that I wanted to know what he was going to do as he had the bill of sale for the truck and it was licensed in his name.

Q. Did you tell him how much was due on it?

A. We talked that over and I told him both amounts and what both amounts were for.

Q. Just what if anything did you say to him as to the amounts?

A. I think that I realized that on the seven-hundred-dollar account I was out as I had neglected to refile it.

Mr. Dawes—I object to that.

The Witness—I realized I was out on that as I had neglected to refile my contract and that had to be filed in three years, but that I could collect, or would collect, on the \$375 as that came under the garagemen's lien act.

Q. When again did you see the plaintiff, Howard Ewart?

A. I can not just recall whether I saw him again in his office before I saw him up in the office of Mr. Oliphant the Referee in Bankruptcy.

Q. What if anything did you say to him with reference to this \$375 claim?

A. I asked him if he was going to pay it or who was going to pay it.

Q. What was his reply?

A. He said he was not in a position to talk about it.

Q. And shortly thereafter what did you do?

A. I told him I would replevin the truck.

Q. What did you do then?

A. I got a constable and had him replevin the truck on the street, right in front of my garage.

Q. When you took the truck in your possession what if anything did the plaintiff do?

A. He had some one from the Sheriff's office come there and re-replevin it, and put up a bond, I believe.

Q. What was the value of the bond?

A. I think a thousand dollars.

Q. So that your testimony is that you demanded payment of this claim personally of the plaintiff on two occasions?

A. Yes, sir.

Mr. Moore—Cross-examine.

Cross-examination, by Mr. Dawes.

Q. Mr. Willey, the first occasion was at Toms River, you say?

A. Yes, sir.

Q. Can you fix the date?

A. No. It would be rather hard for me to fix that date. It was right after the sale. I could fix it positive within a week or two. It was within a week or two after the sale, as I recall.

Q. And that would be in January of 1925?

A. Well, whenever the sale was; it was right shortly after that.

Q. It was in the winter time right after the sale, 1925?

A. 1925 or 1926. It has been about a year ago.

Q. You say it was right after the sale?

A. Yes; I would say it was at the outside within a month after the sale.

Q. You have spoken about certain promissory notes?

A. Yes.

Q. You had a promissory note made by Elmer Ewart for this bill for repairs?

A. I did.

Q. And that note continued on down until what time?

A. It continued up until a few days before the bankruptcy proceeding. You see the sale was quite some time before the bankruptcy proceeding, and even though the truck was sold Mr. Ewart continued on the note.

Q. And during that time the note you held was in the hands of a certain bank, wasn't it?

A. It was.

Q. All the notes you held were discounted at the bank?

A. That is correct.

Q. And these particular notes I am speaking about in question.

A. Yes, sir.

Q. What bank held them?

A. The Mercer Trust Company I think held them.

Q. Was it the Mercer Trust or the Colonial Trust?

A. I won't be sure. We deal with several banks.

The protest will show on the notes.

Mr. Dawes—That is all.

Re-direct examination, by Mr. Moore.

Q. I show you what purports to be a note and ask you if that is the note that was given you on February 25, 1926, previous to this sale, for \$375.

A. Not previous to it. This was a continuation of a note that was given previous to the sale. This is a renewal of that note.

By Mr. Dawes.

Q. That note was given after the sale?

A. Yes, sir.

Q. A year and a half afterward, wasn't it?

A. No. The truck was sold, I think— The sale was in the Fall of 1925— This is in February 1925, and that sale was in 1925.

Q. (Producing paper.) Look at that.

A. Yes; I stand corrected. It was December thirtieth.

Q. What year?

A. 1924. I stand corrected on that. I missed it by a day.

Q. You missed it by a year, didn't you?

A. December thirtieth? I guess I did.

Mr. Moore—We rest.

Howard Ewart, the plaintiff, recalled in rebuttal.

Direct examination, by Mr. Dawes.

Q. Mr. Ewart, will you state what conversation you had with Mr. Willey at your office in Toms River, and when it took place?

A. Mr. Willey stopped at my office in Toms River within, I should say, approximately one month after December 30, 1924. He told me he was on the way down the bay to go duck gunning. We had a conversation about an automobile truck which I had purchased at the Sheriff's sale on December thirtieth previous. He told me that he held a note of Elmer Ewart, or one or more notes, for the balance he said was due him under a conditional bill of sale, and also a note or notes for the balance he claimed to be due him for repairs and accessories furnished on the truck, and he asked me what my brother was going to do about paying them, and I told him I presumed he was going to pay them. He told me his position was that his claim was superior to my title under the Sheriff's sale. I told him that my position was that my title under the Sheriff's sale was superior to his claim. We had a very friendly conversation about it and that was the extent of the conversation. But no request or demand of any kind was made upon me for the payment of the amount he claimed

to be due upon the truck, or any part thereof. In fact he told me at that time that he held the notes for the amount he claimed to be due, the notes of my brother.

Q. Was there any other conversation held by you at any time with Mr. Willey wherein he made any demands respecting the payment of the amount claimed on this lien?

A. After Mr. Willey's visit to my office in Toms River in either January or February of 1925, I heard  
10 nothing more from him and did not see him again until March or April, I believe it was, of 1926, when I saw him in Mr. Oliphant's office in Trenton. I had no conversation with Mr. Willey at that time. We exchanged greetings, spoke to one another, and that was all.

Q. Did he in that conversation demand of you payment for any amount due from your brother?

A. He did not.

Mr. Dawes—Cross-examine.

20 Cross-examination, by Mr. Moore.

Q. You heard him testify that he demanded payment of this claim from you twice. Was he mistaken?

A. You will have to draw your own conclusion, Mr. Moore. I heard him testify, yes. I did not, however, hear him testify that he demanded payment of me.

Q. He testified that he demanded payment of this garage bill from you twice.

A. Your recollection differs from mine.

Q. And if he did say that, do you say that he was mistaken?

30 A. I have testified that he never did either request or demand payment from me.

Q. During this first conversation did you lead him to believe that possibly you might pay him the bill?

A. I did not.

Q. Didn't you lead him to believe right on up to the time your brother went into bankruptcy that you and your brother would take care of this bill?

A. I did not. The only thing that was said along the lines you apparently have in mind was upon the first visit to Toms River, he asked me what my brother was going to do about these notes and I told him I presumed my brother was going to pay them; and I told him at that time a petition in bankruptcy would be filed later; and the discussion continued about the notes, and I told him that I had never told my brother not to pay the notes and certainly never should advise him not to pay them.

Q. Did you pay as much for the motor vehicle as the  
10 garage lien amounted to?

Mr. Dawes—Objected to.

The Court—Objection sustained.

Q. You do recollect some of the conversation that Mr. Willey had with you at Toms River, don't you?

A. I recollect it all, Mr. Moore.

Q. And you recollect some of the conversation he had with you in Mr. Oliphant's office?

A. I had no conversation with Mr. Willey in Mr.  
20 Oliphant's office.

Q. He said he made a demand upon you there for this money.

A. I heard the statement, but he did not say he made a demand upon me.

Mr. Moore—That is all.

Mr. Dawes—We rest.

Mr. Moore—We rest.

Mr. Dawes—Now, if your Honor please, I move for a directed verdict upon two grounds.

One ground is that under the testimony in this case  
30 the judgment creditor, having no notice at the time the levy was made upon this automobile, that he stands in the shoes of the judgment creditor.

Secondly, that no demand has been made upon Mr. Ewart, the plaintiff in this case, for the payment of this bill, under the testimony.

Thirdly, that if any such demand was made, promissory notes were outstanding by the debtor in the hands

of the bank and that no demand at such a time could have been effectuated.

I call your Honor's particular attention to a case in tenth Vroom, on a mechanic's lien claim, which holds that during the outstanding of promissory notes a lien is dormant.

Therefore there was nothing that he had a right to demand from Mr. Ewart by way of this lien at the time he alleges he made these demands, either one or  
10 the other.

Therefore, even on his own testimony, no demand such as is contemplated by the statute has been made.

On those grounds I ask for a direction of verdict for the plaintiff.

I do not understand that any amendment has been allowed on the pleadings and I therefore move that on the pleadings the plaintiff is entitled to a direction also.

Mr. Moore—If the Court please, I made my motion for an amendment to the pleadings and stated that if the  
20 Court did not think my pleading were satisfactory that then I would move or ask leave to amend; and I believe the stenographer took down the part I desire to have amended and the words in connection therewith.

(After argument.)

The Court—There is no evidence on which I could direct a verdict for the plaintiff in this case, as the plaintiff has rested upon the pleadings and the evidence of Mr. Ewart dealing with the question of demand, and I deny the motion for direction of a verdict for the plaintiff.

30 Mr. Dawes—I pray an exception.

The Court—Yes.

Mr. Moore—I will ask the Court to direct a verdict for the defendant.

The Court—I suppose you are basing that upon your answer and the evidence in support of the answer, that you have a lien and that demand was made upon Mr. Ewart.

Mr. Moore—And that he knew it before the demand was made. He did not take this truck as a bona fide purchaser for value without notice of any lien on it—and he admitted it on the stand. Further, we say that we made two demands on him.

The Court—Mr. Moore, I cannot grant your motion, because I cannot hold under the evidence as it stands that a demand such as the statute contemplates was made upon Mr. Ewart. Mr. Willey was very specific in his testimony that he asked Mr. Ewart if he was going to  
10 pay the bill, and he did say, in response to your question whether he had on these two occasions made a demand, "Yes." But of course you were in asking that question assuming that that was the conclusion to be drawn from his testimony, and I can not agree with you on that, because I feel that under this lien act, it being a statutory lien, and a sort of extrajudicial proceeding, that every essential of the statute must be complied with. Therefore I can not grant the motion to direct a verdict for  
20 the defendant.

(Mr. Moore began summing up for the defendant.)

The Court—Mr. Moore, what is there to go to the jury on in this case?

Mr. Moore—I can not see that there is anything to go to the jury, for the reason I asked the Court to direct a verdict for the defendant. Your Honor seemed to think that because of the issue of fact between Mr. Willey and Mr. Ewart as to whether or not Mr. Ewart received a demand from Mr. Willey to pay this bill before he took it back in his possession under the garage  
30 lien law, that that raised a jury question.

I say my motion for direction in favor of the defendant must be granted, because Mr. Ewart admitted, not only on this stand but in the Referee's Court, that he had knowledge of this lien before the sale. If he did, then be bought this subject to that lien.

The Court—Where is the plaintiff's case to go to the jury?

Mr. Moore—The plaintiff has no case; therefore, we ought to have a direction.

The Court—I can not agree with you on that.

Mr. Moore—I move, your Honor, that the Court find title in this motor vehicle in the defendant company, the V. W. Willey Company.

Mr. Dawes—I move for a direction in favor of the plaintiff upon the ground that the defendant has failed to prove a condition precedent; that is, that he made a demand upon this plaintiff for the payment of this lien.

(After argument.)

The Court—I think that the question before us now is this: that you are here as the plaintiff in this case in an action in replevin, and my view is that you have not established your claim to possession of this property.

If a motion for a non-suit were made I would entertain it.

(After argument.)

Mr. Moore—If the Court does not care to render a verdict in favor of the defendant, and I understand you do not, then I will move for a non-suit.

The Court—All right.

Mr. Dawes—I say it is too late now to move for a non-suit. I have asked for a direction of verdict.

The Court—I think, in view of the fact that counsel for the plaintiff rested upon the pleadings, that the motion for a non-suit does not come too late.

Mr. Dawes—May I offer the bill of sale?

Mr. Moore—I object to that. He has closed his case on the pleadings.

The Court—I think the motion for a non-suit should prevail, and I think that is the only disposition to be made of this case, as the proof stands.

Mr. Dawes—I pray an exception.

JUDGMENT.

This case was tried before Judge Frank B. Jess, with a jury at the New Jersey Supreme Court, Mercer County.

The Judge allowed a non-suit against the plaintiff.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant V. W. Willey Motor Company do recover of the said plaintiff, Howard Ewart, its costs which have been taxed at the sum of forty-one dollars.

Costs \$41.00.

Judgment entered April 13, 1927.

WM. J. GUMMERE,

A true copy.

C. J.

EDWARD J. KELLEHER,

Clerk.

NEW JERSEY SUPREME COURT.

20

HOWARD EWART,

Plaintiff,

vs.

V. W. WILLEY MOTOR COMPANY,

Defendant.

Action at Law.  
In Replevin.

NOTICE OF APPEAL.

30

(Filed April 16, 1927.)

The plaintiff in the above-entitled cause hereby appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

AARON V. DAWES,  
Attorney of Plaintiff.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, }  
COUNTY OF MERCER, } ss.

10 Aaron V. Dawes, being duly sworn according to law on his oath deposes and says: I served notice of appeal, a copy of which is hereto annexed, on Hervey S. Moore, the attorney of the defendant, on the 15th day of April, 1927, by leaving the same at his office with person in charge.

A. V. DAWES.

Sworn and subscribed before me this 18th day of April, 1927.

WILLIAM A. MOORE,  
M. C. C. of N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HOWARD EWART, }  
Plaintiff-Appellant, }  
vs. }  
V. W. WILLEY MOTOR COMPANY, }  
Defendant-Respondent. }

GROUNDS OF APPEAL.

(Filed May 13, 1927.)

The plaintiff hereby assigns the following grounds for reversing the judgment entered in the above cause:

1. The Court erroneously refused on motion of the plaintiff at the close of the case to direct a verdict in favor of the plaintiff.

2. The Court erred in non-suiting the plaintiff after both sides had rested.

3. The Court erred in denying the motion of the plaintiff on the pleadings to direct a verdict for the plaintiff.

4. That on the pleadings the defendant is not entitled to the judgment entered in this case.

5. That the defendant is not entitled to the judgment entered in this case because the Court non-suited the plaintiff and did not determine any issue in favor of the 10 defendant.

6. That the defendant's answer is insufficient in law to justify the judgment entered in the above cause.

AARON V. DAWES,  
Attorney of Plaintiff-Appellant.

**NEW JERSEY**  
**Court of Errors and Appeals**

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HOWARD EWART,  
*Plaintiff-Appellant,*

*vs.*

V. W. WILLEY, TRADING AS V. W.  
WILLEY MOTOR Co.,  
*Defendant-Appellee.*

Action at Law.  
In Replevin.  
On Appeal.

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**BRIEF FOR PLAINTIFF-APPELLANT.**

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**PREPARATORY STATEMENT.**

This is a suit in replevin instituted in the Supreme Court; was tried before Judge Jess and a jury at the Mercer Circuit on March 29 and 30, 1927, and resulted in a judgment of non-suit entered in the Supreme Court April 13, 1927. From this judgment the plaintiff appeals.

The suit involves the right to the possession of a "White" automobile truck claimed by the defendant under the provisions of the Garagekeepers' Lien Act, being Chapter 312, P. L. 1915, as amended by Chapter 231, P. L. 1922, and Chapter 33, P. L. 1925.

## I.

## THE PLEADINGS.

The complaint alleges (p. 1) that on May 6, 1926, and subsequent thereto, the plaintiff was the owner of the truck in question. That statement is not denied in the Answer and is therefore admitted.

The defendant in his Answer (p. 2) says that he seized the truck under the Garagekeepers' Lien Act for a claim of \$375.00 for repairs, accessories and supplies furnished upon the truck

"at the request of the herein plaintiff's brother, the then owner, and that repeated demands have been made by the defendant for the payment of its account, \* \* \* that a detailed statement of said account was served on said plaintiff's brother previous to the taking."

At no place in his Answer does the defendant allege that he demanded payment of the owner of the truck (the plaintiff) previous to the taking.

Plaintiff's Reply (p. 3) specifically alleges that no demand was ever made upon him (the owner) for payment of defendant's claim previous to the taking. The defendant filed no rejoinder and does not in his pleadings controvert that allegation, and, by the established rules of pleading, not having denied it, admits it.

## II.

## THE PROOFS.

It appeared by the evidence that the plaintiff had purchased the truck in question (p. 13) at a Sheriff's sale on December 30, 1924, held by virtue of certain executions issued against the then owner of the truck under judgments secured against the then owner in suits in which Elizabeth Brown et al. were plaintiffs (p. 14, p. 19).

On May 6, 1926, defendant took the truck from the possession of plaintiff (pp. 14 and 15) under claim of a garagekeeper's lien for \$375.00 for repairs, etc., furnished the truck at the request of the then owner, brother of the plaintiff (Answer p. 2). (That would be prior to December 30, 1924.)

On May 10, 1926, plaintiff took the truck from the defendant on a writ of replevin (pp. 1 & 14).

The defendant testified to two conversations with plaintiff concerning the defendant's claim, one shortly after the Sheriff's sale on December 30, 1924, and the second in the office of Mr. Oliphant (pp. 15-19). The latter conversation was in March or April of 1926 (p. 20). At these times the defendant had accepted the promissory note of Elmer Ewart (the former owner of the truck) for the claim of \$375.00 (and renewals of the note) and had discounted these notes at the bank (pp. 18 & 20). Defendant testifies to having asked plaintiff whether he was going to pay the claim or who was going to pay it (p. 17) but carefully avoids stating that he demanded payment from plaintiff (the owner).

The plaintiff, on the other hand, clearly testified that no request or demand was ever made upon him for payment of defendant's claim (pp. 19 & 20).

The Court found as a fact that no demand such as the statute contemplates was made by the defendant prior to the seizure of the truck (p. 23).

Defendant knew that plaintiff had purchased the truck at the Sheriff's sale (p. 15) on December 30, 1924 (pp. 14, 17 & 19).

## III.

## THE LAW.

1. The so-called Garagekeepers' Lien Act, being Chapter 312, P. L. 1915, as amended by Chapter 231, P. L. 1922 (Vol. 1, Cum. Suppl. to Comp. Stats. 1911-1924, p. 1977), by Section 2 thereof, provides that where a person having a lien upon a motor vehicle

allows the machine to be removed from his possession, the lien shall not be lost but he may—

“without further process of law, but after demand of payment of claim either personally or by registered mail if owner’s address is known, seize the motor vehicle, or part or parts thereof, wherever the same is or are found within the State of New Jersey.”

Chapter 33, P. L. 1925, further amends Sections 1 and 3 of the Act, but not in matters pertinent to the present controversy.

2. “In the absence of possessory right shown to exist in another, the general property in chattels draws to it the right of possession, and, in such a case, plaintiff establishes his right to possession by showing a clear legal title.”

34 Cyc. 1389, and cases cited.

3. The acceptance by the defendant of a promissory note, and renewals thereof up until February, 1926, suspended his right of lien until the note fell due and was not paid.

*Dey et al. v. Anderson et al.*, 39 N. J. L. 199.

4. “The common law establishes liens in the order of priority of their acquisition.”

*Voorhis v. Westervelt*, 43 N. J. Eq. 642.

There is nothing in the Garagekeepers’ Lien Act (Chapter 312, P. L. 1915, as amended) that changes this common law rule.

#### IV.

#### ARGUMENT.

1. We respectfully urge that the trial court should have directed a verdict in favor of plaintiff at the close of the case and that its refusal so to do constituted error for the reasons following:

Section 2 of Chapter 312, P. L. 1915, as amended, under which defendant claims the right to take posses-

sion of the truck in question, requires as a condition precedent that, where the one claiming the lien is not in possession, he must first make demand for payment upon the owner of the truck before exercising the right given him by the statute. Performance of this condition precedent was neither pleaded nor proven by defendant. The Court found that no such demand had been made (p. 23). The undisputed proofs showed that the defendant took possession of the truck from the plaintiff (p. 15) on May 6, 1926 (p. 14). The pleadings admitted ownership in the plaintiff and the uncontradicted proof was that plaintiff had acquired title December 30, 1924.

Furthermore, it appeared by the defendant’s own testimony that he had accepted a promissory note in payment of his claim and that this note was renewed from time to time up to February, 1926. This we say suspended his right of lien so long as the note continued (*Dey et al. v. Anderson et al.*, *supra*). The judgment creditors, however, under whose judgments the truck was sold by the Sheriff and purchased by plaintiff on December 30, 1924, acquired a lien upon the truck by virtue of the Sheriff’s levy prior to the sale on December 30, 1924, and, there being no lien upon the truck in favor of defendant at that time, plaintiff purchased the truck freed of any lien claimed later by the defendant. The lien of the judgment creditors attached under the levy prior to December 30, 1924. The defendant’s lien did not arise until nonpayment of the promissory note given in February, 1926. The liens take priority in the order of their acquisition (*Voorhis v. Westervelt*, *supra*) and the lien of the judgment creditors having attached first, a purchaser at a judgment creditors’ sale acquires title free of the claim of one holding a lien subsequent to that of the judgment creditors. To hold otherwise would destroy the priority of the liens and any advantage to be had by holding a prior lien.

Not only did it affirmatively appear at the trial that defendant was not entitled to possession (and so the Trial Court held) but it was admitted by the pleadings that plaintiff was the owner of the truck and the defendant testified (p. 15) that he took the truck from plaintiff's possession. The pleadings established the plaintiff's title and there being no proof or even intimation that anyone else (excepting defendant) claimed any right of possession, title in plaintiff established his right to possession (34 *Cyc.* 1389). And, in addition, the defendant testified that he took the truck from plaintiff's possession. The undisputed proofs, we respectfully contend, clearly entitled plaintiff to a directed verdict at the close of the case because:

(a) It affirmatively appeared that the defendant was not entitled to possession of the truck.

(b) It affirmatively appeared that plaintiff was the owner of the truck at the time it was seized by the defendant; that the defendant took the truck from the possession of the plaintiff and therefore the plaintiff was not only the owner of the truck in question but was also entitled to the immediate possession of the same.

2. We further respectfully contend that the Court erred in denying the motion of the plaintiff for a directed verdict on the pleadings for the reasons that the pleadings affirmatively showed ownership of the truck in the plaintiff; the pleadings failed to allege the condition precedent, namely, demand for payment from the owner of the truck, that would have entitled defendant to seize the truck; and there being no claim of any possessory right shown to exist in any other person, title in the plaintiff drew to it the right of possession. And by showing title, plaintiff established his right to the possession (34 *Cyc.* 1389 and cases cited). The pleadings themselves establish all the facts necessary and proper to support a judgment in favor of plaintiff and defendant should not have been permitted to try to prove a demand not alleged in his pleadings.

3. The Court also erred in non-suiting the plaintiff after both sides had rested and in no event do the pleadings support the judgment entered in this case. As has been stated in Paragraphs 1 and 2 respectively, the pleadings themselves establish the plaintiff's case and established his right to the immediate possession of the truck and, that being so, it cannot be said that the plaintiff failed to make out a case and should therefore suffer a judgment of non-suit against him.

4. If we err as to the pleaded facts of the case and consider the evidence in the cause the defense is no stronger than the answer.

First. The evidence discloses that the defendant could not have made any effectual demand to justify its taking, for the defendant had received a promissory note for the claim, had negotiated and endorsed it and it was outstanding in the hands of the endorsee. The lien was dormant or extinguished and in neither case was the defendant in a position to accept payment.

We cite the cases *Horcastler v. Farran*, 3 *B and Ad*, 497 (5 *E. C. C.* 288), and *Morton, Assignee, v. Austin*, 66 *Mass.* (12 *Cush*) 389 at 392 to the effect that the lien is extinguished by receiving and negotiating a promissory note for the lien claim. The *Dey* case *supra* does not disclose any negotiation of the note making a stronger case for the plaintiff than the *Dey* case.

Second. The plaintiff is a bona fide holder for value. Plaintiff testifies that one of the judgment creditors had no knowledge of the garage keeper's alleged lien. He, the plaintiff, stands in the shoes of the judgment creditor.

*Capital Circle v. Schmitt*, 84 *N. J. Eq.* 95, it is held thus:

"In order that a judgment creditor may have the full benefit of the statute the protection afforded to him is to be extended to the purchaser at the execution sale and even though the

latter had notice he takes the land free of the complainant's mortgage."

"When a garage keeper permits an automobile to be taken away upon which he claims a lien and the owner subsequently sells or delivers it to an innocent purchaser for value without notice the lien is lost."

*Lanterman v. Luby*, 96 N. J. L. 255.

For the reasons aforesaid, we respectfully urge the Court to reverse the judgment of non-suit entered below and to direct that a judgment be entered in favor of the plaintiff.

Respectfully submitted,

AARON V. DAWES,  
*Of Counsel with Plaintiff-Appellant.*

NEW JERSEY  
**Court of Errors and Appeals**

HOWARD EWART,  
*Plaintiff-Appellant,*

*vs.*

V. W. WILLEY, TRADING AS V. W.  
WILLEY MOTOR COMPANY,  
*Defendant-Appellee.*

Action at Law.  
In Replevin.  
On Appeal.

**BRIEF FOR DEFENDANT-APPELLEE.**

It is admitted that defendant is a garage man. It is admitted that the brother of plaintiff-appellant was indebted to defendant-appellee in the sum of \$375 for work performed on the motor truck which is the subject of this proceeding.

The plaintiff-appellant admitted (page 13 of the State of the Case) that he knew his brother owed defendant-appellee the sum of \$375 for repairs to this truck. It is admitted that the truck in question never left the possession of the brother of plaintiff-appellant (page 13).

The pleadings and the proof clearly show that a demand was made upon plaintiff-appellant as well as his brother for the payment of the garage claim (pages 9, 16 and 17 of the State of the Case).

It is admitted that the brother of plaintiff-appellant took advantage of the bankrupt act (page 11, State of the Case).

Under the above circumstances all of the provisions of the garage lien act were complied with by defendant-appellee. First the work was done and the accessories furnished on the truck; the plaintiff-appellant when he purchased the truck at the Sheriff's sale knew of the garage lien and therefore the case of *Lanterman v. Luby*, 96 *New Jersey Law* 255, does not apply to the advantage of plaintiff-appellant; demand was made not only upon the brother of plaintiff-appellant but upon plaintiff-appellant himself for the payment of the claim; the answer states "said truck was taken under a garage lien" which presupposes that all previous necessary steps were taken under the act.

The Court below properly granted a non-suit on the case as it stood and we submit that the judgment of said Court should be affirmed.

HERVEY S. MOORE,  
*Attorney for Defendant-Appellee.*