No. 325.

AN ACT

Concerning conditional sales: and to make uniform the law relating thereto.

CONTENTS.

Section 1. *Definition of Terms.* Be it enacted, &c., That in this act "conditional sale" means any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price or upon the performance of any other condition or the happening of any contingency. "Conditional sale."

"Buyer" means the person who buys the goods covered by the conditional sale, or any legal successor in interest of such person. "Buyer."

"Filing district" means the subdivision of the State in which conditional sale contracts or copies thereof are required by this act to be filed. "Filing district."

"Goods" means all chattels personal, other than things in action and money and machinery attached or to be attached to real estate and includes emblements, industrial growing crops, and things attached to or forming a part of land which are agreed to be severed before sale or under the conditional sale. "Goods."

"Performance of the condition."

"Performance of the condition" means the occurrence of the event upon which the property in the goods is to vest in the buyer, whether such event is the performance of an act by the buyer or the happening of a contingency.

"Person."

"Person" includes an individual, partnership, corporation, and any other association.

"Purchase."

"Purchase" includes mortgage and pledge.

"Purchaser."

"Purchaser" includes mortgagee and pledgee.

"Seller."

"Seller" means the person who sells the goods covered by the conditional sale or any legal successor in interest of such person.

Section 2. *Primary Rights of Buyer.* The buyer shall have the right when not in default to retain possession of the goods and he shall also have the right to acquire the property in the goods on the performance of the conditions of the contract. The seller shall be liable to the buyer for the breach of all promises and warranties, express or implied, made in the conditional sale contract, whether or not the property in the goods has passed to the buyer.

Section 3. *Primary Rights of Seller.* The buyer shall be liable to the seller for the purchase price or for installments thereof as the same shall become due and for breach of all promises made by him in the conditional sale contract, whether or not the property in the goods has passed to the buyer.

Section 4. *Conditional Sales Valid except as Otherwise Provided.* Every provision in a conditional sale, reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons except as hereinafter otherwise provided.

Section 5. *Conditional Sales Void as to Certain Persons.* Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale.

Section 6. *Place of Filing.* The conditional sale contract or copy shall be filed in the office of the prothonotary in the county in which the goods are first kept for use by the buyer after the sale. It shall not be necessary to the validity of such conditional sale contract, or in order to entitle it to be filed, that it may be acknowledged or attested. This section shall not apply to the contracts described in section eight.

Section 7. *Fixtures.* If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof and not to be severable

wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation. If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract or a copy thereof, together with a statement signed by the seller, briefly describing the realty and stating that the goods are or are to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty. As against the owner of realty the reservation of the property in goods by a conditional seller be void when such goods are to be so affixed to the realty as to become part thereof but to be severable without material injury to the freehold, unless the conditional sale contract or a copy thereof, together with a statement signed by the seller, briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed, before they are affixed, in the office where a deed would be recorded or registered to affect such realty.

Section 8. *Railroad Equipment or Rolling Stock.* No conditional sale of railroad or street or interurban railway equipment or rolling stock shall be valid as against the purchasers and creditors described in section five unless the contract shall be acknowledged by the buyer or attested in like manner as a deed of real property and the contract or a copy thereof shall be filed or recorded in the office of the Secretary of the Commonwealth, and unless when any engine or car so sold is delivered there shall then be plainly and conspicuously marked upon each side thereof the name of the seller followed by the word "owner."

Section 9. *Conditional Sale of Goods for Resale.* When goods are delivered under a conditional sale contract and the seller expressly or impliedly consents that the buyer may resell them prior to performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods even though the contract or a copy thereof shall be filed according to the provisions of this act.

Section 10. *Filing.* The filing officer shall mark upon the contract or copy filed with him the day and hour of filing and shall file the contract or copy in

his office for public inspection. He shall keep a separate book in which he shall enter the names of the seller and buyer, the date of the contract, the day and hour of filing, a brief description of goods, the price named in the contract, and the date of cancellation thereof, except that in entering the contract mentioned in section eight the recorder of deeds shall record either the sum remaining to be paid upon the contract or the price of the goods. Such book shall be indexed under the name of both seller and buyer. For filing and entering such contract or copy the filing officer shall be entitled to a fee of fifty cents, except that for filing and entering a contract described in section eight the recorder of deeds shall be entitled to the same fee as he is now allowed by law for similar services.

Section 11. *Refiling.* The filing of conditional sale contracts provided for in sections five, six, and seven shall be valid for a period of three years only. The filing of the contract provided for by section eight shall be valid for a period of fifteen years only. The validity of the filing may in each case be extended for successive additional periods of one year from the date of refiling by filing in the proper filing district a copy of the original contract within thirty days next preceding the expiration of each period, with a statement attached signed by the seller showing that the contract is in force and the amount remaining to be paid thereon. Such copy with statement attached shall be filed and entered in the same manner as a contract or copy filed and entered for the first time, and the filing office shall be entitled to a like fee as upon the original filing.

Section 12. *Cancellation of Contract.* After the performance of the condition, upon written demand delivered personally or by registered mail by the buyer or any other person having an interest in the goods, the seller shall execute, acknowledge, and deliver to the demandant a statement that the condition in the contract has been performed. If for ten days after such demand the seller fails to mail or deliver such a statement of satisfaction he shall forfeit to the demandant five dollars and be liable for all damages suffered. Upon presentation of such statement of satisfaction the filing officer shall file the same and note the cancellation of the contract and the date thereof on the margin of the page where the contract has been entered. For filing and entering the statement of satisfaction the filing officer shall be entitled to a fee of thirty cents, except that the recorder of deeds shall be entitled to a fee of fifty cents for filing and entering a statement of the satisfaction of a contract described in section eight.

Section 13. *Prohibition of Removal or Sale without Notice.* Unless the contract otherwise provides, the buyer may without the consent of the seller remove the goods from any filing district and sell, mortgage, or otherwise dispose of his interest in them, but prior to the performance of the condition no such buyer shall remove the goods from a filing district in which the contract or a copy thereof is filed, except for temporary uses, for a period of not more than thirty days unless the buyer not less than ten days before such removal shall give the seller personally or by registered mail written notice of the place to which the goods are to be removed and the approximate time of such intended removal, nor prior to the performance of the condition shall the buyer sell, mortgage, or otherwise dispose of his interest in the goods unless he or the person to whom he is about to sell, mortgage, or otherwise dispose of the same shall notify the seller in writing, personally, or by registered mail of the name and address of the person to whom his interest in the goods is about to be sold, mortgaged, or otherwise transferred not less than ten days before such sale, mortgage, or other disposal. If any buyer does so remove the goods or does so sell, mortgage, or otherwise dispose of his interest in them without such notice or in violation of the contract, the seller may retake possession of the goods and deal with them as in case of default, in payment of part or all of the purchase price. The provisions of this section regarding the removal of goods shall not apply, however, to the goods described in section eight.

Section 14. *Refiling on Removal.* When prior to the performance of the condition the goods are removed by the buyer from a filing district in this State to another filing district in this State in which such contract or a copy thereof is not filed, or are removed from another State into a filing district in this State where such contract or copy is not filed, the reservation of the property in the seller shall be void as to the purchasers and creditors described in section five unless the conditional sale contract or a copy thereof shall be filed in the filing district to which the goods are removed within ten days after the seller has received notice of the filing district to which the goods have been removed. The provisions of this section shall not apply, however, to the goods described in section eight. The provisions of section eleven regarding the duration of the validity of the filing, and the necessity for refiling, shall apply to contracts or copies which are filed in a filing district other than where the goods are originally kept for use by the buyer after the sale.

Section 15. *Fraudulent Injury, Concealment, Removal, or Sale.* When prior to the performance of the condition the buyer maliciously or with intent to defraud shall injure, destroy, or conceal the goods, or remove them to a filing district where the contract or a copy thereof is not filed, without having given the notice required by section thirteen, or shall sell, mortgage, or otherwise dispose of such goods under claim of full ownership, he shall be guilty of a crime and upon conviction thereof shall be imprisoned in the county jail for not more than one year, or be fined not more than five hundred dollars, or both.

Section 16. *Retaking Possession.* When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to obtain the property in the goods, or in the performance of any promise the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof. Unless the goods can be retaken without breach of the peace they shall be retaken by legal process, but nothing herein shall be construed to authorize a violation of the criminal law.

Section 17. *Notice of Intention to Retake.* Not more than forty nor less than twenty days prior to the retaking, the seller, if he so desires, may serve upon the buyer personally or by registered mail a notice of intention to retake the goods on account of the buyer's default. The notice shall state the default and the period at the end of which the goods will be retaken and shall briefly and clearly state what the buyer's rights under this act will be in case they are retaken. If the notice is so served and the buyer does not perform the obligations in which he has made default before the day set for retaking, the seller may retake the goods and hold them subject to the provisions of sections nineteen, twenty, twenty-one, twenty-two, and twenty-three regarding the sale, but without any right of redemption.

Section 18. *Redemption.* If the seller does not give the notice of intention to retake described in section seventeen, he shall retain the goods for ten days after the retaking within the State in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retak-

ing, keeping, and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred. Upon written demand delivered personally or by registered mail by the buyer, the seller shall furnish to the buyer a written statement of the sum due under the contract and the expense of retaking, keeping, and storage. For failure to furnish such statement within a reasonable time after demand the seller shall forfeit to the buyer ten dollars and also be liable to him for all damages suffered because of such failure. If the goods are perishable so that retention for ten days as herein prescribed would result in their destruction or substantial injury, the provisions of this section shall not apply and the seller may resell the goods immediately upon their retaking. The provision of this section requiring the retention of the goods within the State during the period allowed for redemption shall not apply to the goods described in section eight.

Section 19. *Compulsory Resale by Seller.* If the buyer does not redeem the goods within ten days after the seller has retaken possession, and the buyer has paid at least fifty per cent. of the purchase price at the time of the retaking, the seller shall sell them at public auction in the State where they were at the time of the retaking; such sale to be held not more than thirty days after the retaking. The seller shall give to the buyer not less than ten days' written notice of the sale either personally or by registered mail directed to the buyer at his last known place of business or residence. The seller shall also give notice of the sale by at least three notices posted in different public places within the filing district where the goods are to be sold, at least five days before the sale. If at the time of the retaking five hundred dollars or more has been paid on the purchase price the seller shall also give notice of the sale at least five days before the sale by publication in a newspaper published or having a general circulation within the filing district where the goods are to be sold. The seller may bid for the goods at the resale. If the goods are of the kind described in section eight the parties may fix in the conditional sale contract the place where the goods shall be resold.

Section 20. *Resale at Option of Parties.* If the buyer has not paid at least fifty per cent. of the purchase price at the time of the retaking, the seller shall not be under a duty to resell the goods as prescribed in section nineteen, unless the buyer serves upon the seller, within ten days after the retaking, a written notice demanding a resale, delivered personally or by registered mail. If such notice is served the resale

shall take place within thirty days after the service in the manner, at the place, and upon the notice prescribed in section nineteen. The seller may voluntarily resell the goods for account of the buyer on compliance with the same requirements.

Section 21. *Proceeds of Resale.* The proceeds of the resale shall be applied (one) to the payment of the expenses thereof; (two) to the payment of the expenses of retaking, keeping, and storing the goods; (three) to the satisfaction of the balance due under the contract. Any sum remaining after the satisfaction of such claims shall be paid to the buyer.

Section 22. *Deficiency on Resale.* If the proceeds of the resale are not sufficient to defray the expenses thereof and also the expenses of the retaking, keeping, and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer or from any one who has succeeded to the obligations of the buyer.

Section 23. *Rights of Parties where There is No Resale.* Where there is no resale the seller may retain the goods as his own property without obligation to account to the buyer, except as provided in section twenty-five, and the buyer shall be discharged of all obligation.

Section 24. *Election of Remedies.* After the retaking of possession as provided in section sixteen, the buyer shall be liable for the price only after a resale and only to the extent provided in section twenty-two. Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price shall be deemed inconsistent with a later retaking of the goods as provided in section sixteen; but such right of retaking shall not be exercised by the seller after he has collected the entire price or after he has claimed a lien upon the goods or attached them or levied upon them as the goods of the buyer.

Section 25. *Recovery of Part Payments.* If the seller fails to comply with the provisions of sections eighteen, nineteen, twenty, twenty-one, and twenty-three after retaking the goods, the buyer may recover from the seller his actual damages if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract with interest.

Section 26. *Waiver of Statutory Protection.* No act or agreement of the buyer before or at the time of the making of the contract nor any agreement or statement by the buyer in such contract shall constitute a valid waiver of the provisions of sections eighteen, nineteen, twenty, twenty-one and twenty-five, except that the contract may stipulate that, on

such default of the buyer as is provided for in section sixteen, the seller may rescind the conditional sale either as to all the goods or as to any part thereof for which a specific price was fixed in the contract. If the contract thus provides for rescission, the seller at his option may retake such goods without complying with or being bound by the provisions of sections seventeen to twenty-five, inclusive, as to the goods retaken, upon crediting the buyer with the full purchase price of those goods. So much of this credit as is necessary to cancel any indebtedness of the buyer to the seller shall be so applied and the seller shall repay to the buyer on demand any surplus not so required.

Section 27. *Loss and Increase.* After the delivery of the goods to the buyer and prior to the retaking of them by the seller, the risk of injury and loss shall rest upon the buyer. The increase of the goods shall be subject to the same conditions as the original goods.

Section 28. *Act Prospective Only.* This act shall not apply to conditional sales made prior to the time when it takes effect.

Section 29. *Rules for Cases Not Provided For.* In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular those relating to principal and agent, and to the effect of fraud, misrepresentation, duress or coercion, mistake bankruptcy, or other invalidating cause, shall continue to apply to conditional sales.

Section 30. *Uniformity of Interpretation.* This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

Section 31. *Short Title.* This act may be cited as the Uniform Conditional Sales Act.

Section 32. *Inconsistent Laws Repealed.* Except so far as they are applicable to conditional sales made prior to the time when this act takes effect the following act shall be and is hereby repealed, to wit:

Act of June 7, 1915 (P. L. 866) repealed.

The act, approved the seventh day of June, one thousand nine hundred and fifteen (Pamphlet Laws, eight hundred sixty-six), entitled "An act defining conditional sales, and regulating the recording and effect thereof, and providing penalties."

All other acts or parts of acts inconsistent with this act are repealed, but this act shall not be construed to repeal the act, approved the first day of May, one thousand nine hundred and twenty-three (Pamphlet Laws one hundred and seventeen), entitled "An act concerning conditional sales of chattels attached or to be attached to realty, and regulating the recording and effect thereof; and providing remedies, and penalties."

Section 33. *Time of Taking Effect.* This act shall take effect the first day of September, one thousand nine hundred and twenty-five.

APPROVED—The 12th day of May, A. D. 1925

GIFFORD PINCHOT.

The foregoing is a true and correct copy of the Act of the General Assembly No. 325.

Clyde L. King.

Secretary of the Commonwealth.

INDEX

SUMMONS.

THE STATE OF NEW JERSEY TO MACK INTERNATIONAL MOTOR TRUCK CORPORATION, GREETING:

You are summoned to answer the annexed complaint of Edmond E. Robins and Michael Brogan, co-partners trading as Robins & Brogan, and Frank McGuigan, plaintiffs, on appeal, in the New Jersey Supreme Court. And, take notice, that unless you file your answer to the said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

(Seal)

Witness, HONORABLE WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court, at Trenton, this 1st day of August, nineteen hundred and twenty-eight (1928).

FRED L. BLOODGOOD,
Clerk.

C. RICHARD ALLEN,
Attorney.

COMPLAINT.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

EDMOND E. ROBINS and MICHAEL BROGAN, co-partners trading as ROBINS & BROGAN, and FRANK MCGUIGAN, *Plaintiffs,* v. MACK INTERNATIONAL MOTOR TRUCK CORPORATION, *Defendant.*	C. Richard Allen, Atty. for Plaintiffs. Starr, Summerill & Lloyd, Attys. for Defendant.

(Summons issued August 1, 1928.)

Edmond E. Robins and Michael Brogan, co-partners trading as Robins & Brogan, and Frank McGuigan, say:

FIRST COUNT.

1. On August 14th, 1926, Edmond E. Robins and Michael Brogan, then co-partners, trading as Robins & Brogan, purchased on a contract of conditional

sale, of the Mack International Motor Truck Corporation, a corporation of the State of New York, being duly authorized to transact business in the State of New Jersey, two (2) Mack trucks designated and described as:

1 5-ton A. C. Mack Truck #10310227
1 Used Mack Truck #732433

together with all parts and equipment therefor, for the sum of $8955.97, of which $1992.00 was then and there paid on account and conditioned upon the payment of the balance amounting to $6963.97, which payments were due in installments falling due monthly from that time, in accordance with the schedule hereinafter attached and made a part hereof and marked Schedule A.

2. Thereafter Frank McGuigan became financially interested in said partnership firm of Robins & Brogan and took over an equal one-third interest in the rights of said Robins & Brogan in and to their equity and interest in said trucks.

3. Thereafter and until about July 1st, 1927, in accordance with the terms of said contract and in accordance with the mutual understandings and agreements thereafter entered into between the parties, plaintiffs paid on account of said purchase price the additional sum of $2697.00, making a total payment on account of the aforesaid purchase price of $4689.00 or more than 50 per cent. thereof.

4. At the date of said contract and at all times hereinafter stated, plaintiffs were engaged in the business of general contracting and hauling, and said trucks were purchased by the plaintiffs of the defendant, with the defendant's knowledge, for use in

the conduct of their said business as such contractors.

5. On or about July 21st, 1927, plaintiffs having become in default in the terms of said contract, defendant did, without demand or notice to the said plaintiffs, seize and take into its possession said trucks. Thereafter and on or about July 25th, 1927, defendant notified plaintiffs of said re-possession and in accordance with the statute in such case made and provided, directed the said plaintiffs to redeem said trucks within ten days from the date thereof by the payment of all past due installments, interest and expenses.

6. In accordance with said demand of defendant, plaintiffs did thereafter and on or about July 30th, 1927, offer to pay to the said defendant the entire unpaid balance on said contract together with interest, costs and charges for the taking thereof, as required by said notice.

7. At the time of said taking by defendant and of the offer to redeem by said plaintiffs, as aforesaid, plaintiffs were engaged in the fulfillment of a contract for the use of said trucks in and about their said business of general contracting and hauling, and said trucks were necessary for the fulfillment of said contract.

8. Defendant on said July 30th, 1927, and with knowledge that said plaintiffs required said trucks in and about their said business and were using the same for gain in connection therewith, did wrongfully refuse to accept said balance of said purchase price and did then and there wrongfully and wilfully withhold and retain possession of said trucks,

although possession thereof was then and there demanded by said plaintiffs.

9. By reason whereof the said plaintiffs lost the provisions of said contract and contracts for the use of said trucks, and in addition thereto and with the knowledge of said defendant, plaintiffs were deprived of the use of said trucks in and about their said business, and have suffered great and irreparable damage and injury, in that they have paid great sums of money for said trucks and have been deprived of their right, title, interest and use thereof, and have, in addition thereto, lost the rights and profits accruing to them by reason of said contracts, for the use of the trucks as aforesaid.

Plaintiffs demand as damages, therefore, the value of said trucks and their equity therein, the moneys paid by them therefor, and the loss of profits to them, occasioned by said wilful and wrongful taking, detention and deprivation by the plaintiffs.

Plaintiffs demand as damages on this count the sum of $20,000.00.

Second Count.

1. Prior to December 20th, 1926, one, William M. King, had, by several agreements entered into between him and the Mack International Motor Truck Corporation, become seized of certain equity in and to eight (8) Mack trucks, designated as being chassis Nos. 737397- 515975- 736231- 738315- 738316- 737396- 736700- 515974.

2. Thereafter, but prior to said December 30th, 1926, said William M. King assigned his equity in

and to said eight Mack trucks unto one, Harry C. Wagner.

3. On or about December 30th, 1926, said Harry C. Wagner and William M. King assigned all of their equity, right, title and interest in and to said eight Mack trucks unto the plaintiffs, Edmond E. Robins and Michael Brogan, which assignment was made with the knowledge and consent of defendant the Mack International Motor Truck Corporation, who did on said 30th day of December, 1926, in accordance with the assignment herein mentioned and as a result thereof, enter into a contract with the plaintiffs, Edmond E. Robins and Michael Brogan, whereby plaintiffs agreed to purchase for the balance of the purchase price then remaining unpaid on said trucks, and the defendant agreed to sell, in accordance with the terms of said contract, the eight certain Mack trucks described in paragraph 1 of this count. Said contract will be produced on the part of the plaintiffs at the trial hereof.

4. Thereafter the defendant corporation delivered unto the plaintiffs five (5) of said eight Mack trucks but were unable or unwilling to deliver unto the plaintiffs the remaining three of said trucks.

5. Thereafter, divers disputes having arisen between the plaintiffs and the defendant corporation, by a decree of the Court of Chancery of the State of New Jersey, the said contract was construed and reformed as follows:

> "That the vendor in consideration of the payments, covenants, agreements and conditions herein contained which on the part of the vendee are to be made, done and performed, has this

day sold to the parties of the second part, but upon conditions hereinafter recited, eight used Mack trucks, chassis Nos. 737397-515975-736231-738315-738316-737396-736700 and 515974, together with all added and substituted parts and equipment, for $14,954.04, of which sum $2,-403.14 has been paid to the party of the first part, leaving a balance to be paid of $12,550.90, plus any tax or taxes, Federal, State or local, now imposed upon the vendor with respect to the manufacture or sale of said property, and not included in the amount above set forth, to be paid upon the execution of this contract in cash and the residue in New York funds as follows: It being hereby agreed and understood that five of said trucks have been delivered to the said vendees and the remaining three, to wit, trucks Nos. 737397-736700 and 515974 are to be delivered to the said vendee within ten or fourteen days from the date of this agreement."

The remaining three trucks, to wit: 737397-736700 and 515974, were never delivered by the defendant corporation.

6. As a result of the said divers disputes and the decree of the Court of Chancery of the State of New Jersey aforesaid, it was agreed by and between the plaintiffs and defendant corporation, to prepare and execute a new agreement for the unpaid balance then due on the five trucks delivered to the plaintiffs, which was then and there agreed by and between the parties to be the sum of $7967.19, and which sum was payable in 19 installments of $400.00 each.

7. After the aforesaid agreement, the plaintiff, Frank McGuigan, having become financially interested in the affairs of the plaintiffs, Edmond E. Rob-

ins and Michael Brogan, the said plaintiffs, Edmond E. Robins and Michael Brogan, to secure the said Frank McGuigan for his advances and interest, with the knowledge and consent of the defendant corporation, assigned to the said Frank McGuigan all of their right, title and interest in and to the said five trucks delivered by the defendant corporation, and the new agreement referred to in the last preceding paragraph, was entered into by and between said Frank McGuigan and defendant corporation, wherein the plaintiff, Frank McGuigan, and the defendant corporation, wherein the plaintiff, Frank McGuigan, was to pay to the defendant corporation the unpaid balance of $7967.19 in 19 equal installments of $400.00 each, the first of which was payable on the 15th day of June, 1927, and the others upon the first and 15th of each month thereafter until April 1st, 1928, at which time, the balance of $367.19 was to fall due and become payable.

Said agreement will be produced in court on the part of the plaintiffs.

8. Thereafter and on or about July 21st, 1927, plaintiffs having become in arrears under the terms of said contract, the defendant corporation did seize and take into its own possession said five trucks.

9. On or about July 25th, 1927, defendant corporation notified the said plaintiffs that should said trucks be not redeemed within ten days of the date of said retaking, by the payment of all unpaid installments then due, with interest, together with expenses of retaking and storage, said defendant would immediately proceed to dispose of the same.

10. Thereafter and on or about July 30th, 1927, and within said period of ten days, said plaintiffs,

Frank McGuigan, Edmond E. Robins and Michael Brogan, offered the said defendant corporation a sum of money sufficient to cover all unpaid installments then due, with interest, together with costs of said taking and storage, and sufficient moneys to cover all remaining payments not yet due.

11. On or about said 30th day of July, 1927, and at all other times herein stated, plaintiffs were engaged, with the knowledge of defendant, in the business of general contractors and particularly in that of hauling and delivering sand, gravel and pebbles for gain, in which said business said trucks were in great demand and were necessary to the plaintiffs.

12. On or about said 30th day of July, 1927, plaintiffs and their said trucks were engaged on a contract for the hauling and delivery of sand and pebbles for profit and had posted certain moneys for the fulfillment of said contract.

13. On said 30th day of July, 1927, plaintiffs had contracted with other contractors for the use of plaintiffs' said trucks for said hauling purposes, at a profit to them, the said plaintiffs.

14. On said 30th day of July, 1927, defendant corporation, with knowledge of said plaintiffs' business and that plaintiffs were using said trucks in their business as aforesaid, wrongfully and wilfully refused to accept of said plaintiffs said moneys so offered to them for the unpaid balance due on said contract and did then and there wrongfully and wilfully withhold and retain and does now wrongfully and wilfully withhold and retain possession of said trucks, although possession thereof was then and there demanded by said plaintiffs.

15. By reason whereof, said plaintiffs lost the provisions of said contract and contracts for the use of their said trucks and in addition thereto, and with the knowledge of said defendant, plaintiffs were deprived of the use of said trucks in and about their business and were deprived of the profits which they had anticipated in and about the fulfillment of said contracts and the carrying on of their said business, and have suffered great and irreparable damage and injury.

16. By reason of said wrongful refusal of said defendant corporation to accept said moneys then offered them, and their wrongful retention of said trucks, plaintiffs have been deprived of the right, title, interest and use of said trucks, to their great and irreparable damage and injury, and have been deprived of the moneys paid by them and their assignors on account thereof.

Plaintiffs demand as damages therefore the value of said trucks and their equity therein, the moneys paid by them and their assignors therefor, and the loss of profits to them, occasioned by said wilful and wrongful taking and deprivation by the defendant.

Plaintiffs demand as damages on this count the sum of $50,000.00.

THIRD COUNT.

1. On or about July 1st, 1927, and at all times hereinafter stated, plaintiffs were engaged as general contractors and particularly in the hauling of sand, gravel, pebbles and other mineral substances, in pursuit of which business said plaintiffs used, and

rented to others the use of, certain trucks then owned or being purchased by them.

2. On or about said first day of July, 1927, and at all other times hereinafter stated, defendant corporation had full knowledge of, and was familiar with, the details of the business of the said plaintiffs and that said business was being conducted by the said plaintiffs for gain and profit.

3. On or about said first day of July, 1927, and at all other times hereinafter stated, plaintiffs were in joint possession of certain trucks by reason of divers agreements made by and between the said plaintiffs, or some of them, or their assignors, with the defendant corporation, whereby said plaintiffs were buying, and the said defendant was selling, said trucks, on what was known and designated as conditional sales agreements.

4. Said trucks, so in possession of plaintiffs by reason of said agreements, were known and designated as chassis Nos. 10310227-732433-515975-736231-738315-738316-737396.

5. By the terms of said agreements, plaintiffs were obliged to pay unto the defendant corporation certain moneys representing the unpaid balance of the purchase price of said trucks.

6. On or about said first day of July, 1927, or some time subsequent thereto, plaintiffs, being unable to meet the payments called for in said agreements, became in arrears in the payment of certain of said installments and made default therein.

7. On or about July 21st, 1927, by reason of said default, defendant corporation, in accordance with the statute in such case made and provided, repossessed said trucks and took the same into its own possession.

8. Thereafter and on or about July 25th, 1927, defendant corporation notified said plaintiffs and each of them, that it had so repossessed said trucks, and further notified said plaintiffs to redeem the same in accordance with the provisions of the statute in such case made and provided, by payment to it, the said defendant, within ten days, of all unpaid installments *then due,* together with interest and costs of retaking and storage.

9. Within said period of ten days and on or about July 30th, 1927, plaintiffs appeared before the defendant at the place then designated by it and offered to pay the said defendant a sum of money sufficient to pay all past due installments together with interest thereon and proper costs incurred by the defendant corporation in the taking and storage of said trucks, and they further offered to pay to the defendant corporation, the entire remaining unpaid balance due on said contracts.

10. Defendant corporation did then and there, with full knowledge of the plaintiffs' business as aforesaid and that plaintiffs were then actively engaged in said business, wrongfully and wilfully refuse to accept said payment of arrearages and unpaid balances, and then and there improperly and unlawfully retained in itself possession of said trucks, which the defendant has subsequently unlawfully converted unto its own use.

11. By reason of said wilful and unlawful retention of said trucks by defendant corporation, plaintiffs were deprived and have been deprived of the moneys paid by them and their assignors for said trucks, and the value of their equities therein, and have, in addition thereto, been deprived, by reason of defendant's said unlawful act, of great gain and profits accruing and to accrue to them, by reason of the loss of their said business, the contracts incident thereto, and works in which they were then engaged, and in addition thereto, were obliged to forfeit large sums of money then posted by them and conditioned upon their completion of the work on which they, the plaintiffs, were then engaged.

Plaintiffs demand as damages the sum of $70,000.00.

C. Richard Allen,
Attorney of Plaintiffs.

SCHEDULE A.

Note No. 1 Dated 8-14-26 in the amt. of $625.00 due 9-20-26.

Note No. 2 Dated 8-14-26 in the amt. of $500.00 due 10-20-26.

Note No. 3 Dated 8-14-26 in the amt. of $500.00 due 11-20-26.

Note No. 4 Dated 8-14-26 in the amt. of $300.00 due 12-20-26.

Note No. 5 Dated 8-14-26 in the amt. of $186.00 due 1-20-27.

Note No. 6 Dated 8-14-26 in the amt. of $186.00 due 2-20-27.

Note No. 7 Dated 8-14-26 in the amt. of $200.00 due 3-20-27.

Note No. 8 Dated 8-14-26 in the amt. of $370.00 due 4-20-27.

Note No. 9 Dated 8-14-26 in the amt. of $400.00 due 5-20-27.

Note No. 10 Dated 8-14-26 in the amt. of $500.00 due 6-20-27.

Note No. 11 Dated 8-14-26 in the amt. of $500.00 due 7-20-27.

Note No. 12 Dated 8-14-26 in the amt. of $500.00 due 8-20-27.

Note No. 13 Dated 8-14-26 in the amt. of $370.00 due 9-20-27.

Note No. 14 Dated 8-14-26 in the amt. of $370.00 due 10-20-27.

Note No. 15 Dated 8-14-26 in the amt. of $370.00 due 11-20-27.

Note No. 16 Dated 8-14-26 in the amt. of $370.00 due 12-20-27.

Note No. 17 Dated 8-14-26 in the amt. of $370.00 due 1-20-28.

Note No. 18 Dated 8-14-26 in the amt. of $346.97 due 2-20-28.

(Filed April 5, 1929.)

ANSWER.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

EDMOND E. ROBINS and MICHAEL BROGAN, co-partners trading as ROBINS & BROGAN, and FRANK McGUIGAN, *Plaintiffs,* v. MACK INTERNATIONAL MOTOR TRUCK CORPORATION, *Defendant.*	Action at Law. Answer.

By this answer, the defendant, Mack International Motor Truck Corporation:

1. Admits the execution of the contract of conditional sale between the plaintiffs, Edmond E. Robins and Michael Brogan, co-partners trading as Robins & Brogan, dated August 14, 1926, referred to in paragraph 1 of the first count of the complaint, but for the exact contents, terms and conditions thereof, begs leave to refer to the same when produced.

2. Avers that it has no knowledge or information sufficient to form a belief as to the allegations con-

tained in paragraph 2 of the first count of the complaint and requires proof thereof.

3. Denies each and every of the allegations set forth in paragraph 3 of the first count of the complaint.

4. Denies each and every of the allegations set forth in paragraph 4 of the first count of the complaint.

5. Admits that on or about July 21, 1927, plaintiffs, Robins & Brogan, did become and were in default in the payment of installments, in accordance with the terms of the contract made between them and the defendant, as alleged in paragraph 5 of the first count of the complaint, but denies that the defendant, without demand or notice to the plaintiffs, seized and took into its possession the trucks set forth in said paragraph, but on the contrary avers that said two trucks, together with four other trucks, hereinafter referred to, were levied upon by the Sheriff of Philadelphia County on a judgment entered in favor of Howard E. Zeigler against the said Robins & Brogan, hereinafter referred to, and that the said two trucks, together with four other trucks, hereinafter mentioned, were released by the defendant, giving bond under said levy, as hereinafter set forth; and defendant admits that on or about July 25, 1927, it gave notice to Robins & Brogan to redeem said trucks within ten days from the date thereof, upon payment of all past due installments, interest and expenses.

6. Denies that the said plaintiffs, or any of them, did on or about July 30, 1927, in accordance with any

demand, offer to pay to the defendant, the entire unpaid balance on the said contract, together with interest, costs and charges, for the taking thereof, as required by said notice, and as set forth in paragraph 6 of the first count of the complaint.

7. Denies that the plaintiffs ever offered to redeem said trucks and also denies that the said plaintiffs were, at the time alleged in paragraph 7 of the first count of the complaint, engaged in the fulfillment of any contract for which the use of said trucks in and about their said business were necessary.

8. Denies that the defendant on July 30, 1927, or at any other time, wrongfully refused to accept the balance of said contract, or wrongfully and wilfully withheld and retained possession of said trucks, mentioned in paragraph 8 of the first count of the complaint, and denies that any demand was made on the plaintiffs for the possession of said trucks, and also denies that the defendant had any knowledge whatever that the plaintiffs required said trucks in and about their business and were using the same in connection therewith.

9. Denies each and every of the allegations set forth in paragraph 9 of the first count of the complaint.

10. Denies that the plaintiffs are entitled to damages by reason of any matter or thing set forth in the first count of the complaint.

11. Avers that it has no knowledge or information sufficient to form a belief as to the allegations set forth in paragraphs 1 and 2 of the second count of the complaint and, therefore, requires proof thereof.

12. Avers it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 3, 4, 5 and 6 of the second count of the complaint, and requires proof thereof.

13. Admits that an agreement dated the 27th of May, 1927, was made between the plaintiffs and the defendant, but as to the contents, terms and conditions thereof, begs leave to refer to the same when produced.

14. Admits that on or about May 27, 1927, defendant was notified by Robins & Brogan that they had assigned their interest in the five trucks referred to in the second count of the complaint to one Frank McGuigan, and admits the execution of the contract between the defendant and McGuigan, as set forth in paragraph 7 of the second count of the complaint, except as to the terms, contents and conditions of said contract, for information as to which the defendant begs leave to refer to the same when produced, a copy of which contract is attached hereto, forms part hereof and is marked Exhibit 1.

15. Admits the allegations contained in paragraph 8 of the second count of the complaint as to the plaintiff, Frank McGuigan, being in arrears under the terms of the contract, but denies the remaining allegations of said paragraph.

16. Admits that on or about July 25, 1927, defendant gave notice to the plaintiff, Frank McGuigan, to redeem the trucks within ten days from the date hereof, upon the payment of all past due installments, interest and expenses, but denies that the defendant demanded the payment of all unpaid installments with interest and expenses.

17. Denies each and every of the allegations set forth in paragraph 10 of the second count of the complaint.

18. Avers it has no knowledge or information sufficient to form a belief as to paragraphs 11, 12 and 13 of the second count of the complaint and requires proof thereof.

19. Denies that the defendant on July 30, 1927, or at any other time, wrongfully refused to accept the balance of said contract, or wrongfully and wilfully withheld and retained possession of said trucks, as set forth in paragraph 14 of the second count of the complaint and denies that any demand was made by the plaintiffs for the possession of said trucks, and also denies that the defendant had any knowledge whatever that the plaintiffs required said trucks in and about their business and were using the same in connection therewith.

20. Denies each and every of the allegations set forth in paragraphs 15 and 16 of the second count of the complaint.

21. Denies that the plaintiffs are entitled to recover any damage whatever from the defendant by reason of any matter or thing set forth in the second count of the complaint.

22. Avers that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 of the third count of the complaint.

23. Denies each and every of the allegations set

forth in paragraph 2 of the third count of the complaint.

24. Admits that the plaintiffs, Robins & Brogan, were in possession of two trucks, referred to in paragraph 3 of the third count of the complaint, on or about the 1st day of July, 1927, under certain conditional sales contract but begs leave to refer to the contents, terms and conditions thereof, when produced, and also admits that the plaintiff, Frank McGuigan, was in possession of five trucks under certain agreements between himself and the defendant, but defendant begs leave to refer to the contents, terms and conditions thereof, when produced, but denies the remaining allegations in said paragraph.

25. Admits that the trucks were known and designated by numbers referred to in paragraph 4 of the third count of the complaint, but denies that all of said trucks were in the possession of all of the defendants.

26. Admits the allegations contained in paragraph 5 of the third count of the complaint but begs leave to refer to the said agreements as to the contents, terms and conditions thereof, when produced.

27. Admits that on or about July 1, 1927, plaintiff, McGuigan, became in arrears on payments due for the five trucks held by him under agreement of May 27, 1927, and admits that Robins & Brogan became in arrears on the two trucks, referred to in agreement dated August 14, 1926.

28. Admits that the defendant obtained possession of five of said trucks and took the same into its own

possession but avers that such repossession was not under the terms of the statute, referred to in paragraph 7 of the third count of the complaint.

29. Admits that the defendant notified the plaintiffs, or some of them, to redeem said trucks, by the payment to the defendant, within ten days, of all past due installments together with interest and costs of retaking, but denies that any demand was made for the payment of all unpaid installments under said contracts.

30. Denies each and every of the allegations contrained in paragraph 9 of the third count of the complaint.

31. Denies each and every of the allegations contained in paragraph 10 of the third count of the complaint.

32. Denies each and every of the allegations set forth in paragraph 11 of the third count of the complaint.

FIRST DEFENSE TO ENTIRE COMPLAINT.

1. On August 14, 1926, plaintiffs, Robins & Brogan, entered into an agreement in writing with the defendant for the purchase of two trucks on conditional sales contract, in accordance with the terms thereof, a copy of which agreement is hereto attached and marked Exhibit 2, to which reference is hereby made.

2. After the making of said contract, the plaintiffs, Robins & Brogan, defaulted in the payment

of the installments required to be paid by the terms thereof, to wit: an installment of $400 which fell due May 20, 1927, and another installment of $400 which fell due June 20, 1927.

3. Prior to March 19, 1927, plaintiffs, Robins & Brogan, were in possession of five trucks, chassis Nos. 515975, 736231, 738315, 738316 and 737396 under conditional sales contract made between them and the defendant, dated December 30, 1926, during which time the said trucks were taken possession of by the Sheriff of the County of Camden, under a writ of attachment issued against Robins & Brogan, and the defendant was obliged to issue a writ of replevin against the Sheriff of the County of Camden to secure possession of said trucks, and the defendant remained in possession of said trucks until the 27th of May, 1927.

4. By agreement between plaintiffs, Robins & Brogan, and the said defendant, the former released all their right, title and interest in the five trucks mentioned in the last preceding paragraph and on said day another conditional sales agreement was entered into between plaintiff, Frank McGuigan, and the defendant with reference to said five trucks, a copy of which agreement is attached hereto and marked Exhibit 1, to which reference is hereby made.

5. Plaintiff, McGuigan, made default in the terms of the agreement in that he failed and neglected to pay two installments on the purchase price, amounting to $400 due respectively July 1, 1927 and July 15, 1927, and on or about the 14th or 15th of July, 1927, the Sheriff of the County of Philadelphia took possession of four of said five trucks under a judg-

ment issued against Robins & Brogan, and the defendant obtained possession of said trucks, pursuant to the proceedings hereinafter set forth. One of the five trucks, above referred to, was in possession of one Cross and the latter, after the possession of four trucks being secured by the said defendant, surrendered the fifth truck into the possession of said defendant.

6. On the 1st day of July, 1927, one Howard E. Ziegler, caused to be entered in the Court of Common Pleas No. 5 of the City and County of Philadelphia, a judgment against Robins & Brogan for the sum of $2,478.28, and issued an execution thereon directed to the Sheriff of said County and by virtue thereof, the said Sheriff levied upon six of said trucks, to wit: chassis Nos. 732433, 10310227, 736231, 738316, 738315 and 737396, the first two of which were in possession of Robins & Brogan and the remaining four being in possession of McGuigan.

7. In order to protect the title and ownership of the defendant in said six trucks, vested in it pursuant to the terms of the conditional sales contract, above referred to, it was required to and did file in the said Court of Common Pleas No. 5, June Term, 1927, in the cause in which the said Howard E. Ziegler was plaintiff, and the said Robins & Brogan, were defendants, a statement of claim in interpleader, a copy of which is hereto attached and forms part hereof and is marked Exhibit 3.

8. The facts stated in said statement, Exhibit 3, are true and the defendant prays that the same may be considered as part of this defense, as if actually set forth in this answer.

9. At the time of the filing of the said statement of claim in interpleader, Exhibit 3, attached hereto, and in accordance with the act of Assembly of the State of Pennsylvania, made and provided, filed a bond for the purpose of securing a release of said six trucks from the lien of said execution, issued at the suit of Howard E. Ziegler against the said defendants, Robins & Brogan.

10. On July 30, 1927, and thereafter, until the filing of this answer, the issue raised by the statement of claim in interpleader was and is pending and undetermined, and during all of said period, the obligation of the said defendant pursuant to the terms of the bond given, as aforesaid, continued and remains undischarged.

11. Subsequently and about July 25, 1927, Howard E. Ziegler, the plaintiff in the said judgment, above referred to, abandoned all claim to the two trucks, chassis Nos. 732433 and 10310227, and the said two trucks remained in possession of the defendant until the same were sold, in accordance with the statute in such case made and provided.

12. On July 30, 1927, when some one or more of the plaintiffs demanded possession of the trucks, as alleged in the complaint, the defendant informed the plaintiffs that as the lien of the judgment in favor of Ziegler and levy made thereon had not been discharged from four of said trucks, and the defendant was bound by the bond which it had given, the defendant would not surrender said four trucks, until plaintiffs secured the cancellation of the said judgment against the said Robins & Brogan, or a release from any and all liability on the bond, given as

aforesaid, together with the costs and expenses incurred in connection therewith, with which reasonable request the plaintiffs refused to comply.

SECOND DEFENSE TO ENTIRE COMPLAINT.

1. On August 19, 1927, pursuant to the statute in such case made and provided and in accordance with the terms and conditions of the contract, hereinabove referred to as Exhibit 2, the defendant sold at public vendue the two trucks referred to in the first count of the complaint for less than the balance due thereon, and, therefore, Robins & Brogan cease to have any right, title or interest therein.

2. The five trucks, referred to in conditional sales contract, dated May 27, 1927, are still in possession of the defendant and have not been sold, in accordance with the statute in such case made and provided, for the reason that they have not been retaken from the said McGuigan, pursuant to said statute, or under the terms of said contract.

THIRD DEFENSE TO ENTIRE COMPLAINT.

1. On the 30th day of July, 1927, the installments payable under the conditional sales contract, above referred to, dated August 14, 1926, to wit: for $400 due May 20, 1927, $500 due June 20, 1927, and $500 due July 20, 1927, and represented by notes given by the said Robins & Brogan, matured on said dates, and were not paid, and defendant never declared any of the notes designated in said contract, maturing on or subsequently to the 30th of July, 1927, as due and payable.

2. On the 30th day of July, 1927, installments payable under the conditional sales contract, above referred to, dated May 27, 1927, to wit: for $400 due July 1, 1927, and $400 due July 15, 1927, and represented by notes given by the said Frank McGuigan, matured on said dates, and were not paid, and defendant never declared any of the notes designated in said contract, maturing on or subsequently to the 30th of July, 1927, as due and payable.

3. Plaintiffs never offered to pay to the defendant, either on the 30th day of July, 1927, or at any other time, the installments then past due on the contracts mentioned in this defense, together with the reasonable cost of retaking, keeping and storing the trucks, as provided by the terms of said contract, and prescribed by the statute in such case made and provided.

FOURTH DEFENSE TO ENTIRE COMPLAINT.

1. At the time the plaintiffs demanded possession of the said seven trucks, referred to in the complaint, to wit: on or about July 30, 1927, they insisted that bills of sale should be given, for said trucks, by the defendant, not to the conditional purchasers thereof, in accordance with the terms of said contracts, but to other parties not mentioned therein, which request the said defendant refused to comply with.

FIFTH DEFENSE TO ENTIRE COMPLAINT.

1. No one of the plaintiffs ever offered to pay to the defendant the amounts due by him on either of

the said two contracts, referred to in the complaint, for balance of installments, together with the reasonable cost of retaking, keeping and storing said trucks.

SIXTH DEFENSE TO ENTIRE COMPLAINT.

1. Objection will be made at the trial, or sooner, in accordance with the act in such case made and provided; that:

(a) There is a misjoinder of actions, in that the plaintiff, Frank McGuigan, has no right of action with respect to any matter or thing connected with the conditional sale of the two trucks, referred to in the agreement of August 14, 1926.

(b) There is a misjoinder of actions, in that the plaintiff, Robins & Brogan, have no right of action with respect to any matter or thing connected with the conditional sale of the five trucks referred to in the agreement of May 27, 1927.

(c) There is a misjoinder of parties, for the reason that the plaintiff, Frank McGuigan, has no right of action respecting the trucks referred to in the agreement dated August 14, 1926, and the plaintiffs, Robins & Brogan, have no right of action with respect to the agreement dated May 27, 1927.

SEVENTH DEFENSE TO ENTIRE COMPLAINT.

The transfer of any interest in the trucks referred to in the complaint to Frank McGuigan was without validity, for the reason that the original conditional

sale vendees had no right to sell or transfer their interest therein without the written consent of the defendant, which was never obtained.

STARR, SUMMERILL & LLOYD,
Attorneys of Defendant.

EXHIBIT 1.

MACK-INTERNATIONAL MOTOR TRUCK CORPORATION
GENERAL OFFICES
TWENTY-FIVE BROADWAY
NEW YORK CITY
CONDITIONAL SALE AGREEMENT

THIS AGREEMENT, made this 27th day of May 1927 by and between MACK-INTERNATIONAL MOTOR TRUCK CORPORATION, a corporation with general offices at Twenty-five Broadway, New York City, hereinafter called the vendor, party of the first part, and Frank McGuigan located at 5340 Glenmore Ave. City of Philadelphia County of Philadelphia State of Penna. party of the second part, hereinafter called the vendee.

WITNESSETH:

1. THAT the vendor in consideration of the payments, covenants, agreements and conditions herein contained which on the part of the vendee are to be made, done and performed, has this day sold and delivered, but upon the conditions hereinafter recited to the vendee Five (5) used Mack Chasses Nos. 515975, 736231, 738315, 738316, and 737396 AS IS together with all added and substituted parts and equipment for Seven Thousand Nine Hundred Sixty Seven and 19/100 dollars ($7967.19) plux any tax

or taxes, Federal, State or local now imposed upon the vendor with respect to the manufacture or sale of said property, and not included in the amount above set forth. dollars ($) to be paid upon the execution of this contract in cash and the residue in New York funds as follows:

The sum of Seven Thousand Nine Hundred Sixty-Seven and 19/100 dollars ($7967.19) as evidenced by the following negotiable promissory notes, bearing interest at the rate of 6% per cent, per annum, together with any and all collection or exchange charges, to wit:

Note No. 1 Dated 5-27-27 in the amount of ($400.00) Pd due 6-15-27.

Note No. 2, Dated 5-27-27 in the amount of ($400.00) Pd 200 due 7-1-27.

Note No. 3, Dated 5-27-27 in the amount of ($400.00) due 7-15-27.

Note No. 4, Dated 5-27-27 in the amount of ($400.00) due 8-1-27.

Note No. 5, Dated 5-27-27 in the amount of ($400.00) due 8-15-27.

Note No. 6, Dated 5-27-27 in the amount of ($400.00) due 9-1-27.

Note No. 7, Dated 5-27-27 in the amount of ($400.00) due 9-15-27.

Note No. 8, Dated 5-27-27 in the amount of ($400.00) due 10-1-27.

Note No. 9, Dated 5-27-27 in the amount of ($400.00) due 10-15-27.

Note No. 10, Dated 5-27-27 in the amount of ($400.00) due 11-1-27.

Note No. 11, Dated 5-27-27 in the amount of ($400.00) due 11-15-27.

Note No. 12, Dated 5-27-27 in the amount of ($400.00) due 12-1-27.

Note No. 13, Dated 5-27-27 in the amount of ($400.00) due 12-15-27.
Note No. 14, Dated 5-27-27 in the amount of ($400.00) due 1-1-28.
Note No. 15, Dated 5-27-27 in the amount of ($400.00) due 1-15-28.
Note No. 16, Dated 5-27-27 in the amount of ($400.00) due 2-1-28.
Note No. 17, Dated 5-27-27 in the amount of ($400.00) due 2-15-28.
Note No. 18, Dated 5-27-27 in the amount of ($400.00) due 3-1-28.
Note No. 19, Dated 5-27-27 in the amount of ($400.00) due 3-15-28.
Note No. 20, Dated 5-27-27 in the amount of ($367.19) due 4-1-28.

2. In case any tax or taxes, Federal, State or local shall hereafter be imposed on the vendor with respect to the sale of said property, the vendee covenants and agrees to pay such tax or taxes.

3. The conditions of this agreement are that delivery of said property by the vendor to the vendee does not pass title thereto, but neither the said property nor the title thereto shall pass by said delivery but both are and shall remain vested in and be the property of the vendor or its assigns and any extension or assignment of said notes shall not waive this or any other condition herein contained until said notes evidencing such instalments of purchase price are paid in full in money.
WARRANTY: VOID F. McG.

4. The manufacturer warrants each new motor vehicle manufactured by it, whether passenger car or

commercial vehicle to be free from defects in material and workmanship under normal use and service, their obligation under this warranty being limited to making good at their factory any part or parts thereof which shall within ninety days after delivery of such vehicle to the original purchaser be returned to them, with transportation charges prepaid and which their examination shall disclose to their satisfaction to have been thus defective, this warranty being expressly in lieu of all other warranties, express or implied, and all other obligations or liability on their part. They neither assume nor authorize any other person to assume for them any further liability in connection with the sale of their vehicles, this obligation to continue so long as the parts remain the property of the original purchaser, and such obligation and warranty, it is expressly agreed, is in lieu of all other warranties, express or implied, and of all other obligations or liability of any kind on the part of the Company. This warranty shall not apply to any vehicle which shall have been repaired or altered outside of their factory in any way so as, in their judgment, to affect its stability or reliability, or which has been subject to misuse, negligence or accident, nor to any commercial vehicle made by them which shall have been operated at a speed exceeding the factory rated speed or loaded beyond the factory rated load capacity. The seller makes no warranty whatever in respect to tires, rims, ignition apparatus, horn or other signalling devices, starting devices, generators, batteries, speedometer, or other trade accessories, inasmuch as they are usually warranted separately by their respective manufacturers.

5. IT IS FURTHER AGREED that the vendee will not remove the above mentioned property, nor

suffer the same to be removed from STATE OF PENNSYLVANIA nor sell, assign or underlet any interest in said property without the written consent of the vendor first had and obtained.

6. Upon any default in the payment of the principal or interest of any of the said notes, then the vendor may at its option declare all of said notes immediately due and payable and the same shall thereupon become due and payable. The vendee until such notes are paid in full shall not sell, let, assign, encumber, use for hire or dispose of the property (without the written consent of the vendor) and the vendee at his own expense shall keep and maintain the property in good order and condition, ordinary wear and tear excepted, during the life of this agreement and the vendor shall have the right at all times to inspect and test said property. The purchaser at his own expense shall keep the property free of all liens, taxes and charges and shall at his expense and in his name cause the property to be registered and licensed in compliance with law.

7. IT IS FURTHER AGREED that, if at any time, the vendee shall make any default in the performance of any of the undertakings herein entered into, or shall fail to make any of the payments above referred to, then the vendor or its agents may without demand first made forthwith take possession of the property wherever found. The vendee does hereby authorize and empower the vendor or its agents to enter any premises with or without force or process of law and forthwith take possession of the property and to take the same away without legal process, hereby waiving any action for trespass or damage therefor.

8. If the vendor shall so take possession of the property by reason of any default or breach thereof, the vendee agrees that all payments made by him shall belong to and be retained by the vendor as liquidated damages for the non-fulfillment or breach of performance of this agreement for loss in value with respect to the property and for the rental value thereof. The vendor may at its option by collection, suit or otherwise, enforce payment of said notes, but no suits or legal proceedings with respect thereto, shall, however, be deemed a waiver of any right of the vendor to take possession on default or breach as aforesaid.

9. IT IS FURTHER AGREED that the vendor may, during the continuance of this agreement, insure and keep the said property insured against loss or damage, by reason of fire, theft and collision in the sum of Fifteen Thousand Four Hundred Thirty and 00/000 dollars (15,430.00) in the name and for the benefit of the vendor and vendee as their interests may appear and the vendee shall pay premium for such insurance upon demand.

10. In the event of non-payment of said premium by the vendee upon demand, it shall be added to the installment of the purchase price next falling due and the terms of this agreement shall apply to it with the same force and effect as to the next installment of purchase price herein specified.

11. IT IS FURTHER AGREED that the vendee will not use, or allow to be used, said motor vehicle (s) for the illegal transportation of intoxicating liquors, and that such use will be a default with the same effect as those defaults constituting a breach hereof.

12. I have received and accepted a duplicate of this agreement and have no understanding, verbal or otherwise, different from it, and which induced to execute it.

IN WITNESS WHEREOF, this Conditional Sale Agreement has been signed and executed the day and year first above written on behalf of the Vendor, MACK-INTERNATIONAL MOTOR TRUCK CORPORATION, by its Vice-President, and by the Vendee, both signing the same, and further the Vendee hereby acknowledges receiving delivery of the said five used Mack Chasses Nos. 515975, 736231, 738315, 738316 and 737396.

MACK-INTERNATIONAL MOTOR TRUCK CORPORATION
By C. A. Warner
Vice-President.
Frank McGuigan (L. S.)
(Vendee signs here)

J. A. Jackson
(Witness as to Vendee)

This is the conditional sale agreement referred to in agreement between the Company and Robins & Brogan, dated May 27, 1927.

F. McG.

NOTE—This form is to be made in Quadruplicate properly signed and witnessed, seal attached if incorporated, and all copies, with Notes attached forwarded to Division Office (if operating under a division) or to Treasury Department after filing has been completed. Acknowledgment and affidavit form separate according to State.

EXHIBIT 2.

MACK-INTERNATIONAL MOTOR TRUCK CORPORATION
GENERAL OFFICES
TWENTY-FIVE BROADWAY
NEW YORK CITY
CONDITIONAL SALE AGREEMENT

THIS AGREEMENT, made this 14th day of August 1926 by and between MACK-INTERNATIONAL MOTOR TRUCK CORPORATION, a corporation with general offices at Twenty-five Broadway, New York City, hereinafter called the vendor, party of the first part, and Robins & Brogan located at 115 No. 3rd St. City of Camden County of Camden State of New Jersey party of the second part, hereinafter called the vendee.

WITNESSETH:

1. THAT the vendor in consideration of the payments, covenants, agreements and conditions herein contained which on the part of the vendee are to be made, done and performed, has this day sold and delivered, but upon the conditions hereinafter recited to the vendee One (1) 5-ton "AC" Mack Truck #10310227 and One (1) Used 3½-ton "AC" Mack Truck # 732433 AS IS. together with all added and substituted parts and equipment for Eighty Nine Hundred Fifty Five and 97/100 dollars ($8955.97) plus any tax or taxes, Federal, State or local now imposed upon the vendor with respect to the manufacture or sale of said property, and not included in the amount above set forth. Nineteen Hundred Ninety Two and 00/100 dollars ($1992.00) in the form of cash & Used Mack #1132176 to be paid upon

the execution of this contract in cash and the residue in New York funds as follows:

The sum of Sixty Nine Hundred Sixty Three and 97/100 dollars in the form of cash ($6963.97) as evidenced by the following negotiable promissory notes, bearing interest at the rate of six per cent, per annum, together with any and all collection or exchange charges, to wit:

Note No. 1, Dated 8-14-26 in the amount of ($625.00) √ due 9-20-26.

Note No. 2, Dated 8-14-26 in the amount of ($500.00) √ due 10-20-26.

Note No. 3, Dated 8-14-26 in the amount of ($500.00) √ due 11-20-26.

Note No. 4, Dated 8-14-26 in the amount of ($300.00) √ due 12-20-26.

Note No. 5, Dated 8-14-26 in the amount of ($186.00) √ due 1-20-27.

Note No. 6, Dated 8-14-26 in the amount of ($186.00) √ due 2-20-27.

Note No. 7, Dated 8-14-26 in the amount of ($200.00) √ due 3-20-27.

Note No. 8, Dated 8-14-26 in the amount of ($370.00) √ due 4-20-27.

Note No. 9, Dated 8-14-26 in the amount of ($400.00) due 5-20-27.

Note No. 10, Dated 8-14-26 in the amount of ($500.00) due 6-20-27.

Note No. 11, Dated 8-14-26 in the amount of ($500.00) due 7-20-27.

Note No. 12, Dated 8-14-26 in the amount of ($500.00) due 8-20-27.

Note No. 13, Dated 8-14-26 in the amount of ($370.00) due 9-20-27.

Note No. 14, Dated 8-14-26 in the amount of ($370.00) due 10-20-27.

Note No. 15, Dated 8-14-26 in the amount of ($370.00) due 11-20-27.

Note No. 16, Dated 8-14-26 in the amount of ($370.00) due 12-20-27.

Note No. 17, Dated 8-14-26 in the amount of ($370.00) due 1-20-28.

Note No. 18, Dated 8-14-26 in the amount of ($346.97) due 2-20-28.

2. In case any tax or taxes, Federal, State or local shall hereafter be imposed on the vendor with respect to the sale of said property, the vendee covenants and agrees to pay such tax or taxes.

3. The conditions of this agreement are that delivery of said property by the vendor to the vendee does not pass title thereto, but neither the said property nor the title thereto shall pass by said delivery but both are and shall remain vested in and be the property of the vendor or its assigns and any extension or assignment of said notes shall not waive this or any other condition herein contained until said notes evidencing such instalments of purchase price are paid in full in money.

WARRANTY:

4. The manufacturer warrants each new motor vehicle manufactured by it, whether passenger car or commercial vehicle to be free from defects in material and workmanship under normal use and service, their obligation under this warranty being limited to making good at their factory any part or parts thereof which shall within ninety days after delivery of such vehicle to the original purchaser be returned to them, with transportation charges prepaid and which their examination shall disclose to their satis-

faction to have been thus defective, this warranty being expressly in lieu of all other warranties, express or implied, and all other obligations or liability on their part. They neither assume nor authorize any other person to assume for them any further liability in connection with the sale of their vehicles, this obligation to continue so long as the parts remain the property of the original purchaser, and such obligation and warranty, it is expressly agreed, is in lieu of all other warranties, express or implied, and of all other obligations or liability of any kind on the part of the Company. This warranty shall not apply to any vehicle which shall have been repaired or altered outside of their factory in any way so as, in their judgment, to affect its stability or reliability, or which has been subject to misuse, negligence or accident, nor to any commercial vehicle made by them which shall have been operated at a speed exceeding the factory rated speed or loaded beyond the factory rated load capacity. The seller makes no warranty whatever in respect to tires, rims, ignition apparatus, horn or other signalling devices, starting devices, generators, batteries, speedometer, or other trade accessories, inasmuch as they are usually warranted separately by their respective manufacturers.

5. IT IS FURTHER AGREED that the vendee will not remove the above mentioned property, nor suffer the same to be removed from STATE OF NEW JERSEY nor sell, assign or underlet any interest in said property without the written consent of the vendor first had and obtained.

6. Upon any default in the payment of the principal or interest of any of the said notes, then the

vendor may at its option declare all of said notes immediately due and payable and the same shall thereupon become due and payable. The vendee until such notes are paid in full shall not sell, let, assign, encumber, use for hire or dispose of the property (without the written consent of the vendor) and the vendee at his own expense shall keep and maintain the property in good order and condition, ordinary wear and tear excepted, during the life of this agreement and the vendor shall have the right at all times to inspect and test said property. The purchaser at his own expense shall keep the property free of all liens, taxes and charges and shall at his expense and in his name cause the property to be registered and licensed in compliance with law.

7. IT IS FURTHER AGREED that, if at any time, the vendee shall make any default in the performance of any of the undertakings herein entered into, or shall fail to make any of the payments above referred to, then the vendor or its agents may without demand first made forthwith take possession of the property wherever found. The vendee does hereby authorize and empower the vendor or its agents to enter any premises with or without force or process of law and forthwith take possession of the property and to take the same away without legal process, hereby waiving any action for trespass or damage therefor.

8. If the vendor shall so take possession of the property by reason of any default or breach thereof, the vendee agrees that all payments made by him shall belong to and be retained by the vendor as liquidated damages for the non-fulfillment or breach of performance of this agreement for loss in value

with respect to the property and for the rental value thereof. The vendor may at its option by collection, suit or otherwise, enforce payment of said notes, but no suits or legal proceedings with respect thereto, shall, however, be deemed a waiver of any right of the vendor to take possession on default or breach as aforesaid.

9. IT IS FURTHER AGREED that the vendor may, during the continuance of this agreement, insure and keep the said property insured against loss or damage, by reason of fire, theft and collision in the sum of Nine Thousand and 00/000 dollars ($9000.00) in the name and for the benefit of the vendor and vendee as their interests may appear and the vendee shall pay premium for such insurance upon demand.

10. In the event of non-payment of said premium by the vendee upon demand, it shall be added to the installment of the purchase price next falling due and the terms of this agreement shall apply to it with the same force and effect as to the next installment of purchase price herein specified.

11. IT IS FURTHER AGREED that the vendee will not use, or allow to be used, said motor vehicle (s) for the illegal transportation of intoxicating liquors, and that such use will be a default with the same effect as those defaults constituting a breach hereof.

12. We have received and accepted a duplicate of this agreement and have no understanding, verbal or otherwise, different from it, and which induced
to execute it.

IN WITNESS WHEREOF, this Conditional Sale Agreement has been signed and executed the day and year first above written on behalf of the Vendor, MACK-INTERNATIONAL MOTOR TRUCK CORPORATION, by its Vice-President, and by the Vendee, both signing the same, and further the Vendee hereby acknowledges receiving delivery of the said Mack Truck No. 10310227 & Used Mack Truck No. 732433.

MACK-INTERNATIONAL MOTOR TRUCK CORPORATION

By

Vice-President.

Robins & Brogan
per Edmond E. Robins (Signed)
Frank Brogan (Signed) (L. S.)
(Vendee signs here.)

Frank Bushek
(Witness as to Vendee)

NOTE—This form is to be made in Quadruplicate properly signed and witnessed, seal attached if incorporated, and all copies, with Notes attached forwarded to Division Office (if operating under a division) or to Treasury Department after filing has been completed. Acknowledgment and affidavit form separate according to State.

EXHIBIT 3.

Mack International Motor Truck Corporation, vs. Howard E. Ziegler; Edmond E. Robins and Michael Brogan, trading as Robins & Brogan.	C. P. No. 5 June Term, 1927 No. 7958.

STATEMENT OF CLAIM IN INTERPLEADER.

The Mack International Motor Truck Corporation claims and avers as follows:

1. The Claimant is the owner of two Mack trucks, Chassis numbers respectively, 732433 and 10310227. The claimant obtained title thereto by virtue of having manufactured the same in its own shops. The said two trucks were sold to Edmond E. Robins and Michael Brogan, under the terms of a certain conditional sale agreement dated August 14, 1926, copy of which is attached hereto, marked "Exhibit A" and made part hereof. Said conditional sale agreement was made and executed in Camden, N. J., and was duly recorded in Camden, N. J., as required by law, and has also been recorded in the City and County of Philadelphia.

The Claimant still retains title to the said two trucks as the said Robins and Brogan have not per-

formed all of the terms and conditions of said conditional sale agreement, but on the contrary have defaulted in the payment of an installment of the purchase price in the amount of $400.00 due May 20, 1927, as well as another installment of $500.00 due June 20, 1927.

2. The Claimant is the Owner of four certain other Mack Trucks, Chassis numbers respectively, 736231, 738316, 738315, 737396. The Claimant obtained title thereto by virtue of having manufactured the same in its own shops. The Claimant still retains title to the said four Mack trucks, having sold the same to one Frank McGuigan on May 27, 1927, under the terms and conditions of a certain conditional sale agreement of that date, copy of which is hereto attached, marked "Exhibit B" and made a part hereof. Said conditional sale agreement has been duly recorded in the City and County of Philadelphia, as required by law. The said Frank McGuigan is not the owner of said trucks, as he has not complied with all of the conditions of said agreement, but on the contrary has defaulted in the payment of two installments of the purchase price in the amount of $400.00 each, due respectively on July 1st and July 15th, 1927.

3. The Claimant does not derive its title by, from or through either of the defendants above named.

4. The defendant, Howard E. Ziegler, disregarding the claimant's title, has caused the Sheriff of Philadelphia County to levy upon all of said six trucks as the property of Edmond E. Robins and Michael Brogan.

The Mack International Motor Truck Corporation, the Claimant, therefore tenders this issue to determine the title to said goods and chattels.

Joseph W. Henderson
Attorney for Claimant.

(Filed April 16, 1929.)

AMENDMENT TO ANSWER.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

EDMOND E. ROBINS and MICHAEL BROGAN, co-partners, trading as ROBINS & BROGAN, and FRANK McGUIGAN, *Plaintiffs,* v. MACK INTERNATIONAL MOTOR TRUCK CORPORATION, *Defendant.*	Amendment to Answer.

Sufficient cause appearing therefor:

It is, on this day of , 1929, ordered that the answer in the above cause be

amended by adding thereto a new paragraph to the first defense to the entire complaint to be known as 4A.

4A. Attached hereto and making part hereof in a copy of the agreement and release referred to in the last preceding paragraph.

Circuit Court Judge.

Whereas, the Mack International Motor Truck Corporation entered into a conditional sale agreement dated December 30, 1926, with Edmond E. Robins and Michael Brogan for the sale of eight (8) Mack trucks, Chassis Nos. 737397, 515975, 736231, 738315, 738316, 737396, 736700, 515974 respectively for the sum of twelve thousand five hundred fifty and 90/100 ($12,550.90) dollars; and

Whereas, the Mack International Motor Truck Corporation only delivered five (5) of said trucks bearing chassis Nos. 515975, 736231, 738315, 738316, 737396 and that by reason thereof the said Robins and Brogan filed a bill in equity praying for the reformation of said conditional sale agreement; and

Whereas, the said Robins and Brogan having defaulted in the payment of said installments of the purchase price due under said agreement, the Mack International Motor Truck Corporation on or about March 19, 1927, issued a writ of replevin in the Camden County Court of Common Pleas and thereby repossessed the five (5) trucks delivered to the said Robins and Brogan, as aforesaid.

Now, therefore, this agreement between Edmond D. Robins, Michael Brogan and Francis McGuigan, hereinafter called parties of the second part, and the Mack International Motor Truck Corporation,

party of the first part (hereinafter called "Mack") made this 27th day of May, 1927, Witnesseth

1. Party of the first part agreed to redeliver to the parties of the second part the five (5) Mack trucks replevied as aforesaid, under the terms and conditions of a certain conditional sale agreement dated May 27, 1927.

2. In consideration of the party of the first part executing said conditional sale agreement dated May 27, 1927, and delivering to them the said five (5) Mack trucks therein described, the parties of the second part and each of them, do hereby remise, release and forever discharge the party of the first part, its successors and assigns of and from all and all manner of action and causes of actions, suits, debts, dues, accounts, contracts, agreements, judgments, decrees, claims and demands whatsoever, in law or in equity which against the said party of the first part, the parties of the second part and each of them respectively, ever had, now has or which their respective heirs, executors, administrators or assigns or any of them hereinafter can, shall or may have, for or by reason of any cause, matter or thing whatsoever from the beginning of the world to the date of these presents.

3. The parties of the second part do hereby remise, release and forever discharge the party of the first part from all rights, accrued or to accrue by reason of their equity suit in the Chancery Court of New Jersey against the party of the first part, and agree to have the decree to be entered therein, reforming the conditional sale agreement between them dated December 30, 1926, satisfied without

costs to either party; and the said parties of the second part do hereby nominate, constitute and appoint C. Richard Allen, Esq., their true and lawful attorney to satisfy said decree and for his so doing this shall be his sufficient warrant.

4. The parties of the second part further agree that the replevin action, instituted by the party of the first part against them on March 19, 1927, be discontinued of record without cost to either party and that the liability on the bond filed in said action, by the party of the first part, be absolutely and forever discharged; and the parties of the second part do hereby constitute and appoint C. Richard Allen, Esq., their true and lawful attorney to appear for them and do all things necessary in their behalf to procure the discontinuance of said replevin action; and for so doing this shall be his sufficient warrant.

5. It is further agreed between the party of the first part and the parties of the second part that the conditional sale agreement entered into between them on December 30, 1926, as reformed by the Chancery Court of New Jersey, be and the same is hereby rescinded with the same force and effect as though the same had never been executed.

6. The parties of the second part do hereby remise, release and forever quit-claim any right or interest, if any they had, in the three (3) Mack trucks mentioned in said conditional sale agreement dated December 30, 1926, Chassis Nos. 737397, 736700, 515974 respectively, which were not delivered to the parties of the second part by the party of the first part.

In witness whereof, the party of the first part has caused these presents to be executed by its duly authorized representative and the parties of the second part have hereunto set their respective hands and seals this twenty-seventh day of May, 1927.

MACK INTERNATIONAL MOTOR TRUCK CORPORATION,
By H. L. WOEHLING,
Branch Manager.

10 MICHAEL BROGAN (Seal)
EDMOND E. ROBINS (Seal)
FRANCIS McGUIGAN (Seal)

Witness:
THOMAS F. MOUNT.

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30

REPLY.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

EDMOND E. ROBINS and MICHAEL BROGAN, co-partners trading as ROBINS & BROGAN, and FRANK MCGUIGAN, *Plaintiffs,* v. MACK INTERNATIONAL MOTOR TRUCK CORPORATION, *Defendant.*	Action at Law. Reply.

Plaintiffs, Edmond E. Robins, Michael Brogan and Frank McGuigan, replying to the answer of defendant corporation, say:

1. They deny the matters alleged in the answer of the defendant and join issue thereon.

Attorney of Plaintiffs.

TESTIMONY.

NEW JERSEY SUPREME COURT.

Camden County.

Edmond E. Robins, *et al.*,
Plaintiffs,
v.
Mack International Motor Truck Corporation,
Defendant.

Action at Law.

January 6, 1930.

Appearances:
For the plaintiff, C. Richard Allen, Esq.
For the defendant, Lewis Starr, Esq.

Before Donges, J., and a jury.

(Mr. Allen opened the case for the plaintiffs to the jury.)

(Mr. Starr opened the case for the defendant to the jury.)

THE CASE FOR THE PLAINTIFFS.

Mr. Allen: If the Court please, I will offer at this time, and consented to by Judge Starr, contract dated August 14th, 1926, between the Mack International Motor Truck Company, and Robins and Brogan, covering two trucks.

(Received and marked.)

Contract made May 27th, 1927, between Francis McGuigan and the Mack International Motor Truck Corporation, covering five trucks.

(Received and marked.)

Also letter dated July 25th, 1927, addressed to Francis McGuigan, and signed Mack International Motor Truck Corporation, by H. L. W., branch manager.

(Received and marked.)

A letter dated the same date, also on the stationery of the Mack International Motor Truck Corporation, addressed Michael Brogan and Edmund E. Robins, trading as Robins and Brogan, and notifying them that the Mack Company had repossessed seven trucks, and instructing them that the trucks should be redeemed within ten days.

Mr. Starr: I think the letter should speak for itself.

(Received and marked.)

Mr. Allen: And the registered envelope in which that communication was addressed.

(Received and marked.)

Also letter on the stationery of the same company, addressed to Robins and Brogan, dated August 9th, 1927.

(Received and marked.)

And another communication addressed in exactly the same way, also dated August 9th, 1927.

(Received and marked.)

Mr. Starr: I suppose you will admit that those letters were received by your clients, they were sent by the Mack Company, and received by your clients on or about the day of their dates?

Mr. Allen: Probably the day after the dates shown there.

EDMUND E. ROBINS, sworn.

By Mr. Allen:

Q. You are one of the plaintiffs in this case?
A. Yes, sir.
Q. Between August 14th, 1926, and July 21st, 1927, in what business were you engaged?
A. Hauling contractors.
Q. Who were associated with you in that business?

A. From August to December, Mr. Brogan was, Michael Brogan.

Q. Yes.

A. In December, somewhere around December 3rd, Mr. McGuigan became interested in a partnership, and we took him in as an equal partner.

Q. What year do you mean?

A. 1926.

Q. So from December, 1926, down to July, 1927, do I understand you, Michael Brogan and Francis McGuigan, comprised the firm of Robins and Brogan?

A. Yes, sir.

Q. Under what name did you conduct your business?

A. Robins and Brogan.

Q. On August 14th, 1926, did you enter into any agreement with the Mack International Truck Corporation relative to any trucks?

A. On August 14th.

Q. 1926?

A. Will you repeat the question?

(Question repeated.)

A. Yes, sir.

Q. I show you an agreement dated on August 14th, 1926, and marked in this case Exhibit P1, and ask you if that is the agreement which you and Mr. Brogan entered into at that time?

A. Yes, sir.

Q. That agreement calls for two trucks, does it not?

A. Yes, sir.

Q. Will you describe what those two trucks were, what kind of trucks were they, whether they were new trucks?

Mr. Starr: It seems to me that this testimony is immaterial, whether the trucks were used or whether they were new. The contract was for the trucks as they existed, and it seems to me we are going to waste a lot of time.

The Court: I understand the value of the trucks is not here involved, is it?

Mr. Allen: Yes, that is one of the reasons that this be brought out at this time. The value of the trucks would be a very material issue.

Mr. Starr: I don't understand—Mr. Allen has not yet indicated his theory with reference to the measure of damages, but certainly the value of the trucks in August would be no criterion as to the foundation, if he intends to claim damages in the following July, when this trouble was alleged to have occurred.

The Court: How is it material? Aren't we dealing with the value at the time of the alleged taking?

Mr. Allen: Yes, if the Court please, we are, but it seems to me that the type and model and character of the truck are all very material to what the value of that truck at some later time might be.

The Court: I suppose, perhaps, it would be. He may answer it.

Mr. Starr: The contract, if your Honor please, speaks for itself. It describes the truck, five-ton A. C. Mack number so and so, and one used three

and a half-ton Mack truck. I don't want to be captious. I want to shorten the case, and only have those matters offered in evidence that are material. There is a descriiption on the paper itself, and it seems to me that the paper controls.

The Court: I suppose if it describes the one as a new truck, and the other as a used truck, that is as far as the description goes.

Mr. Allen: I am just as anxious as Judge Starr not to bring in any irrelevant matters. I think, though, that it might be well if I withdraw the previous question, and ask Mr. Robins if he can tell us the model of the used truck that is mentioned in the contract?

A. One was a used truck, three-ton, three-speed truck, 1920, six years old.

Q. Does the agreement describe the size of the new truck?

A. Yes, sir.

Q. Now, had you previously had possession of one of the trucks described in that contract?

Mr. Starr: Objected to, as immaterial and irrelevant.

The Court: How is that material? You are not trying to vary the terms of this agreement.

Mr. Allen: No.

The Court: Then, how is it material?

Mr. Allen: Excepting as to the condition of the truck.

Q. What was the purchase price as covered by this agreement?

The Court: Doesn't the agreement cover that?

Mr. Allen: Yes.

Q. According to the agreement, Mr. Robins, the purchase price was $8,955.97, and recites a down payment of $1,992, and a deferred balance of $6,963.97. Can you tell me what of those notes were paid, and give the amounts of those notes that were paid by you and your partners?

A. The first note of $625 was paid. The second note of $500 was paid. The third note of $500 was paid. The fourth note of $500 was paid. The next note of $186 was paid. The next note of $186 was paid, and the next note of $200 was paid, and the next note, $370.

Q. Do you know anything about the next note of $400?

A. That was not paid. There might have been a part payment on it.

Q. Then, Mr. Robins, how much, under that contract, was still due in July of 1927?

The Court: Put it the other way. How much had he paid?

Q. Will you read the notes you paid, again?

A. $625. $500. $500. $300. $186. $186. $200. $370. The $370 note was the last one paid.

Q. According to that, $2,867 had been paid, and what was the total called for in the agreement, the unpaid balance?

A. $6,963.97.

Q. 69 what?
A. $6,963.97.
Q. According to that, in July of 1927 there still remained unpaid, $4,096.97, is that right?
A. If that is what the balance is, yes.

Mr. Starr: What is the amount, Mr. Allen?

Mr. Allen: $4,096.97.

Q. Did you later, and in December of that same year, come into possession, by reason of an agreement with the Mack Company, of other Mack trucks?
A. Yes.

Mr. Starr: I object to that, as not in this case. Any trucks, by virtue of an agreement in December, 1926, are entirely out of these allegations, for the reason as set forth in the answer, and also for the release, copy of which is attached to the answer, that there was a new contract made in May, 1927, with reference to the same trucks. I think Mr. Allen will agree that the release, copy of which is attached to the answer, was actually entered into between the parties, and that rescinded the 1926 agreement.

Mr. Allen: On that point I would agree with Judge Starr, ordinarily, the release and the execution thereof would have rescinded the prior agreement between the parties, but by reason of that release, and that is one of the very conditions that the later agreement was entered into, which has been offered in evidence, and which we acknowledge is really the agreement in dispute; but in view of

the previous release, and in view of the previous condition of this situation, the allegations between the parties, and the very terms of the release, shows that Robins and Brogan had possession of those trucks, and are, therefore, better qualified to testify as to their condition, and what the value of them was.

The Court: What has that to do with the agreement? How does the agreement figure, if the parties released each other from all obligations under that agreement?

Mr. Allen: The price agreement is recited in the release.

The Court: What difference does that make, what its terms are, as far as these allegations are concerned, if there were mutual releases? If they got your release by fraud, of course, you have got to set it up; otherwise, why aren't they released, and you are released, too?

Mr. Allen: That is true. However, the new agreement calls for a certain price, which might not be at all evidential of the value of the trucks.

The Court: What of that? How does the agreement ——

Mr. Allen: I am not asking the witness as to his agreement. I am asking him whether or not he came into possession of some of those trucks by some other deed.

The Court: If he delivered some of them, what

difference does that make? I can't see how that agreement enters into this litigation at all.

Mr. Allen: If your Honor feels that is immaterial, I will withdraw the question.

Q. Mr. Robins, did you later, and in May of 1927, enter into an agreement with the Mack Truck Company?

A. Yes, sir.

Q. In the presence of Mr. Mount, Mr. Robins, on that day did you notify the Mack Company that you had assigned your interest in these five used Mack trucks to Frank McGuigan?

A. That was after the Court of Chancery had revised the contract.

Mr. Starr: I object to that, and ask that it be stricken out.

The Court: Yes.

(Question repeated.)

A. Yes, sir.

Q. As a result of that notice to the Mack Truck Company, do you know whether or not Frank McGuigan and the Mack Truck Company entered into a new agreement covering these last five trucks?

A. Yes, sir.

Q. I show you Exhibit P2, a contract between the Mack International Motor Truck Corporation, and Francis McGuigan, dated May 27th, 1927, calling for the sale of five used Mack trucks, for a deferred balance of $7,967.19, which sum seems to have been divided into semi-monthly installments of $400 each

until the twentieth note, which was $367.19. Is that the agreement, which was entered into at that time?

A. Not at the time of that, later, it was made about two or three days later.

Q. That was dated, as I recall it, May 27th, 1927?

A. Yes, sir.

Q. When did the first note fall due?

A. On the fifth month, twenty-seventh day, 1927 year, that's the note that's on here.

Q. Mr. Robins, I think you are reading the line of the date of the notes. Are you mistaken in that?

A. Yes, the 15th of June.

Q. Was that note paid?

A. That note was paid, that first one of $400.

Q. The next note of $400 fell due on July 1st, did it not?

A. Yes, sir.

Q. Was that note paid?

A. No, sir.

Q. Was any part of it paid?

A. I don't remember whether I did or not. The last receipt I have is for the first note. I think I recall paying part of that second note, and asking him for an extension for the rest of it.

Q. Who do you mean by him?

A. I asked Mr. Woehlring for an extension of that present note.

Q. Who was Mr. Woehlring?

A. He was branch manager of the Mack Truck Company, 42nd and Woodland.

Q. About the first of July, 1926 ——

Mr. Starr: Did you offer the note in evidence?

Mr. Allen: No.

Q. About July 1st, 1926, did you have any conversation with Mr. Woehlring, the branch manager of the Mack Truck Company, relative to any of your trucks?

A. It was a little later than July 1st. I went over to—the notes was falling due, and we had been having trouble with money, and work had been scarce, and I went over to ask him for an extension of the notes, and they were granted, and I went over to Camden to see Mr. Lee.

Mr. Starr: May I have that answer read?

(Answer repeated.)

Mr. Starr: There's no suggestion in these pleadings of any agreement for the extension of these notes. That is the first knowledge we have had there would be a claim made that these notes were extended.

Mr. Allen: There isn't technically. Mr. Robins spoke about an extension, but from the technical standpoint there's no claim that there was any actual extension for any particular period, and this conversation is not introduced for that purpose.

The Court: How is it material?

Mr. Allen: It is on a different theory. I think the conversation will speak for itself, but the conversation of which I am about to speak, that will refer directly to the values of the trucks, for the purpose of showing knowledge for which these trucks were to be used, and to show a proposed sale, or assignment, of certain of these trucks, which

would, I think, satisfactorily set the value of these trucks.

Mr. Starr: That is not pleaded. There is nothing in the case to indicate he was making any claim for assignment or transfer of these trucks, and we are not prepared to meet it. The claim made by the plaintiffs is that on a certain day there was so much money due on these trucks. Tender was made. We refused to surrender the trucks, and they now claim for the value of those trucks as of that time. That is all we know about the claim from the pleadings.

The Court: There is another element of damage, and ——

Mr. Starr: That is in the case, too. When we tried the case before, your Honor ruled it out, and I think the same result would be here. Here the claim is made as to the value of the trucks, or damages, whatever the damages may be, but as to any agreement with reference to the selling of the trucks, or assignment, or something of that kind, there is nothing in the pleadings.

Mr. Allen: I feel that if the Mack Company had actual knowledge that there was an actual sale, relative to certain of these trucks, that that would be the best evidence as to the value of these trucks as of that time

The Court: Not at all. It may have been an agreed sale. It may have been for more or less than their value.

Mr. Allen: It would be evidential of it.

The Court: Not necessarily, I don't think. If you are trying to bind the defendant by that, you ought to set it up.

Mr. Allen: Exception, please.

(Exception noted for plaintiffs.)

The Court: What a person actually pays for it is some evidence, but what somebody says he can get for it is evidential of nothing, in its legal sense.

Q. About the middle of July, were these trucks, seven trucks, working?
A. Yes, sir.
Q. And in what work were these trucks engaged?

Mr. Starr: Objected to, as immaterial and irrelevant.

The Court: I think that may be answered.

(Exception noted for defendant.)

A. Hauling material from the West Jersey yards out to Bryn Mawr, for the construction of the State Road there, of Montgomery Pike.
Q. At what rate were the trucks engaged?

Mr. Starr: Objected to.

The Court: This is a question of damage?

Mr. Allen: Yes.

Mr. Starr: That question was raised at the last trial.

The Court: There never has been a second trial of this case, has there?

Mr. Starr: There's no change, as I view it.

The Court: This is really a new case.

Mr. Starr: It is new, but the cases to some extent are involved, and your Honor overruled the question upon the authority of several authorities we introduced.

Mr. Allen: I don't recall any authorities being cited.

Mr. Starr: The record shows authorities were cited, 69 Atlantic, 394.

(After further discussion):

Mr. Allen: In the first place, this is an action —possibly, we can't correctly call it trover, or can't correctly call it conversion—it is under a part of the remedy coming under the Uniform Conditional Sales Act, which provides that the parties may—I think in Section 25—shall have their actual damages; so that the question depends, not so much on the law of trover as it does upon the law of damages, as to what actual damages might mean. I have not been able to find any cases directly under Section 25 of the Uniform Conditional Sales Act, which defines what the actual damages are, but I think the general rule is that it is ——

The Court: Is there any question of the fact that the property here came into the defendant's possession lawfully?

Mr. Allen: Came into their possession lawfully, no.

The Court: In that situation, doesn't it make it an action substantially in trover and in conversion?

Mr. Allen: Substantially, I think it does, yes.

The Court: Having come into possession, lawfully of the property, they decline to turn it over as they should. That comes as near being the old common law action of trover as can be conceived, doesn't it?

Mr. Allen: I think it does, and, of course, in trover and conversion, if the Court please ——

The Court: Didn't they convert the property to their own use?

Mr. Allen: Yes.

The Court: Then you have got trover and conversion.

Mr. Allen: But if we are going back to the conversion theory, then any damages would be admissible, because punitive damages could be granted in an action of conversion.

The Court: I think our Courts have held consistently that in an action of trover and conversion the damages are the value of the property taken, at the time that taken was unlawfully converted, with interest on that sum from the time of the unlawful conversion.

(After further discussion):

The Court: I think I shall have to adhere to what I said before, that in my opinion the damages would be limited to the value of the property, plus interest from the date of detention.

Mr. Allen: Exception.

(Exception noted for plaintiffs.)

Q. On July 21st, where were those seven trucks?
A. Four of them was in Chester, and one of them was in possession of Frank Cross, and I think two of them was working at the Eastern Asphalt Company.
Q. Whereabouts at the Eastern Asphalt Company?
A. Thirtieth and Chestnut, at that time.
Q. In Philadelphia?
A. Yes.
Q. Were all of those trucks in Philadelphia?
A. One was in the garage.
Q. All in Philadelphia and Chester?
A. Yes, sir.
Q. Whose garage was one truck in?
A. South 42nd Street Garage, owned by Mr. McManus and Bechtel.
Q. Where were you on that day?
A. Down at Chester.
Q. Were you in charge of this fleet of trucks?
A. Yes, sir.
Q. Did you receive any message pertaining to any of these trucks on that day while you were in Chester?

Mr. Starr: Objected to. In the first place, he doesn't show from whom the message emanated, and in any event I don't see how it is material to this issue.

The Court: I suppose what he did, as affects the defendant, is the important thing.

Mr. Allen: I was going to show that as a result of that message, he did certain things.

The Court: You had better ask him what he did.

Q. Did you get in touch with the Mack Truck Company on that day?
A. Yes, sir.
Q. To whom did you speak?
A. Mr. Woehlring.
Q. What did you learn while talking to Mr. Woehlring?
A. I didn't talk to Mr. Woehlring that day at all.
Q. When did you talk to Mr. Woehlring?
A. Two days afterwards.
Q. Do you know whether or not the Mack Truck Company, on or about July 21st, repossessed some of those trucks?

Mr. Starr: That is a conclusion.

The Court: I suppose he can tell what they did.

Mr. Starr: I have to object to that. That is a conclusion.

The Court: Whether they repossessed them, I

suppose, is a conclusion. What they did, as a physical fact.

Q. Do you know what the Mack Truck Company did with respect to these trucks on or about July 21st?

A. Yes, one truck in the garage, and two trucks working down at the Eastern Asphalt Company, on this day those trucks were repossessed.

Mr. Starr: Objected to, and I move that the last statement be stricken out.

The Court: Strike it out.

The Witness: The weather was raining ——

Q. What did the Mack Truck Company do?

A. Come over and took one truck in the shop being repaired, and while they were taking that truck the other two trucks came in from work. It was around ten o'clock in the morning, and weather conditions didn't allow the trucks to work.

Mr. Starr: Were you there at the time?

Witness: No.

The Court: Strike it out.

Q. When did you next talk to Mr. Woehlring?

A. Two days afterwards.

Q. At that time, where were the trucks?

A. Every one of them at that time was in the possession of the Mack Truck Company.

Mr. Starr: I move that be stricken out.

The Court: Strike it out. Where were they?

Q. Where were they?
A. 23rd and Chestnut.
Q. Whose place of business is that?
A. Mack Truck Company.
Q. How did they get there, if you know?
A. I sent five of them in. They took the rest.
Q. Did you send five in as a result of some instructions from the Mack Company?
A. Yes, sir, they left word with the drivers that I was to get the trucks ——

Mr. Starr: I move that be stricken out.

The Court: Unless it was to him, he can't tell it.

Q. I think you started to say you had some conversation with Mr. Woehlring a couple of days later?
A. Yes.
Q. What did Mr. Woehlring say about these trucks that were in their possession at that time?
A. I asked him what I had to do to get the trucks back again. Mr. Woehling told me, he says, "Well, you will have to bring in the full unpaid balance, plus charges, and so forth, because it's entirely out of our hands. We dare not give you notes no more," he said. I asked him, Mr. Woehlring, I asked him, suppose we bring in the money to pay you in full, could we have the trucks? He said, "Gladly." He said, "I would even hug you and kiss you if you brought it in."
Q. How many days after the trucks were delivered to the Mack Truck Company's possession, did that conversation take place?

A. That was the date the last one came in. Two days after they grabbed the first one.

Q. Did you, on or about July 26th, receive a communication from the Mack Truck Company, signed by Mr. Woehlring, as branch manager?

A. Yes, sir.

Q. Is that the envelope in which that communication was addressed, that is Exhibit P4?

A. Yes, sir.

Q. I would like you to read that letter.

Mr. Starr: Let me see that, please?

Q. That letter was addressed to yourself and Mr. Brogan, and says: "We hereby notify you that we have repossessed the five Mack trucks bearing chassis numbers 515975, 736231, 738315, 738316 and 737396, respectively, sold under the terms of conditional sale dated May 27th, 1927, to Francis McGuigan. If these trucks are not redeemed within ten days of date of re-taking by the payment of all unpaid installments due, with interest, together with expense of re-taking and keeping in storage, we will immediately proceed to dispose of the same, in accordance with the terms of the Uniform Conditional Sales Act of the State of Pennsylvania. Also take notice that we have repossessed on July 21, 1927, two Mack trucks, chassis numbers 732433 and 10227, sold to you under conditional sales agreement dated August 14th, 1926, owing to the fact that you have defaulted in the payment of several installments. Unless all past due installments, with interest, together with expense of re-taking and keeping in storage, are paid in full within ten days from July 21st, 1927, we hereby notify you that we will immediately proceed to dispose of said trucks, in accor-

dance with the provisions of the Uniform Conditional Sales Act of the State of New Jersey." Signed "Very truly yours, Mack International Motor Truck Corporation, H. L. Woehlring, Branch Manager." Is that the notice that you received on or about July 26th?

A. Yes.

Q. Is that about the date of your phone conversation with Mr. Woehlring?

Mr. Starr: I object to that. It seems to me we ought to have his recollection as to the time, not Mr. Allen's.

The Court: Yes, I suppose that's true.

Q. Does the date of that letter, Mr. Robins, refresh your recollection as to the exact time on which you talked to Mr. Woehlring on the phone?

A. I talked to Mr. Woehlring a day or two before that letter.

Q. Did you call Mr. Woehlring after the receipt of this letter?

A. Yes, sir.

Q. Did you call on him personally, or by phone?

A. Went down personally.

Q. Who was with you when you then saw Mr. Woehlring?

A. At that particular interview I don't believe there was anybody with me.

Q. Did you, in that conversation, refer to the communication which you had received?

Mr. Starr: Objected to.

The Court: Rather suggestive, I suppose.

Q. What was your conversation with Mr. Woehlring at that time?

A. I went in to ask him the meaning of the letter, after calling him on the telephone and telling me the only thing I should do was to bring in the full unpaid balance, and getting a letter calling for just payment of the notes, to bring the notes up to date, and I went in to ask him what the amount was, and he said, "Well, Robins, I am sorry; the letter is merely a matter of form. We must have the full unpaid balance by that date. We can't give you any more notes."

Q. Did he tell you what you were obliged to do?

A. He told me that I had the limit in that letter to get the money in, or I lost the trucks.

Q. Did he tell you where, or to whom, you were to apply, or pay the money?

A. The matter was entirely out of his hands. After we got hold of the money, if we was able to raise the money to pay the full unpaid balance, we was to pay the money over to Henderson and Mount, their attorneys in Philadelphia.

Q. By the way, Mr. Robins, did you refer to Exhibit P3, which is a communication from the Mack Truck Company to Francis McGuigan, also dated July 25th. Was that letter turned over to you?

A. Yes, sir.

Q. That letter reads ——

Mr. Starr: May I see it a moment?

Mr. Allen: That letter reads: "You are hereby notified on July 21st we have repossessed five Mack trucks sold to you under conditional sales contract dated May 27th, 1926," and giving the chassis numbers. "As you are in default in the payments due

thereunder, you are hereby notified if, after the expiration of ten days from July 21st you do not tender the amount of all unpaid installments, with interest, we will proceed to dispose of said trucks in accordance with the provisions of the Uniform Conditional Sales Act of the State of Pennsylvania. Very truly yours, Mack International Motor Truck Corporation, H. L. Woehlring, Branch Manager."

The Court: To whom is that addressed?

Mr. Allen: Addressed to Frank McGuigan.

Mr. Starr: I notice on the back of this letter some marks in lead pencil. It seems to me that the letter should not be put in evidence as long as that notation is on the back.

Mr. Allen: I might suggest this—there's a memorandum on the reverse side of this letter. I think Judge Starr's attention was called to it one time previously, and it is a memorandum in the handwriting of the witness, and for that reason I am perfectly willing that the letter be marked in evidence as it has been, but that it be not delivered to the jury. As a matter of fact, the body of the letter is exactly the same as the body of the first paragraph of the previous letter, addressed to Robins and Brogan.

The Court: Why not substitute a copy?

Mr. Allen: I am perfectly willing to do that.

Mr. Starr: That is satisfactory, to substitute a copy for it.

Q. Have you had any experience, in addition to that as a member of the firm of Robins and Brogan, in buying and selling trucks of this kind and character?

A. Not in buying and selling, no, sir.

Q. To what has your experience been limited?

A. Repairing them, reconditioning trucks.

Q. Are you familiar with the market values of trucks of this kind and character?

A. I have an idea what they would bring in, what you could sell them for after they had been reconditioned. I have an idea what the value is. I have been around where they have been sold and bought.

Q. What condition were these trucks in at the time of the repossession by the Mack Company?

A. At the time they were repossessed by the Mack Truck Company, with the exception of the high speed truck, they had been reconditioned and repainted.

The Court: You are asked what condition they were in.

A. A-1 condition, with the exception of the three-speed used truck on the Camden contract.

Q. Had any recent work been done by you upon these trucks?

A. Yes, sir.

Q. What work had been done?

A. We had reconditioned the trucks, ground the valves, tightened up the bearings, re-bushed the springs, and things like that, repainted the trucks all over, and fitted batches with steel batch boards, things that was needed on the trucks to put them in condition.

Q. Of these seven trucks, will you tell us how many were of the various sizes?

A. One five-ton truck.

Q. A five-ton truck. Just what do you mean by that?

A. Five-ton.

Q. Is that the biggest truck or the smallest truck?

A. That's the biggest, the five-ton, the three-ton is a different kind of truck. They will carry that quantity of gravel, dirt, or so forth.

Q. Is there some difference in the hoist?

A. There's different type bodies and hoists. This equipment is on the truck for doing the work with. It has, for instance, a wood hoist, it is more modern, so that the work can be done faster and more efficiently.

Q. What I want to do is show the Court and jury a picture of this truck. I want you to describe the character of each.

A. The three-speed used Mack bought in Camden was a wood upright hoist and body.

Q. Was that the smallest of these trucks?

A. No, it was a used truck, three-ton chassis, three and a half-ton chassis.

Q. That was a three and a half-ton chassis?

A. Yes, sir.

Q. And a wood hoist?

A. A wood hoist, upright hoist.

Q. What year model was that?

A. 1920.

Q. Do you know the value of that truck as of July?

Mr. Starr: I object to that. Could I cross-examine the witness?

The Court: Yes.

Mr. Allen: I don't mean to inject anything rela-

tive to any previous trial, but it seems to me we might save time, in that Mr. Robins was privileged to testify to that previously.

The Court: I think counsel may examine him.

By Mr. Starr:

Q. May I ask your age?

A. 30 years old.

Q. How long have you been in the trucking business?

A. Since 1919 in the trucking business, hauling contractor, do you mean?

Q. Yes.

A. Since 1923.

Q. Before that, what did you do?

A. Worked in garages, repairing and reconditioning trucks and cars, and so forth.

Q. In a service station or in a private garage?

A. In garages.

Q. Private garages?

A. Yes, sir, garages, and, for instance, I worked for a man who would have a fleet of trucks, and take care of his equipment, and then I worked in garages.

Q. Outside of the trucks you have purchased as a member of the firm of Robins and Brogan, have you had any experience whatever with respect to the purchase and sale of trucks?

A. Yes, sir.

Q. I understood you to say a little while ago that you had not had any experience?

A. You asked me if I had done it, and I told you "Yes." I didn't do it as a business, but I have reconditioned trucks, and sold them.

Q. Have you ever bought any?

A. Yes, I have bought them. I owned the Mack trucks on the first contract.

Q. Except as a member of the firm of Robins and Brogan, have you had any experience in buying and selling trucks?

A. I told you, yes, sir.

Q. What has that experience been?

A. Five trucks we bought off the Mack Truck Company, through a man by the name of Frank Cross. I was partners with him.

Q. When was that?

A. 1925.

Q. Did you buy them?

A. Yes, sir, I was partners with Frank Cross at the time.

Q. You were using the trucks in the business you were conducting?

A. No, these five trucks happened to be owned by the man Frank Cross and myself had been working for before he turned them into the Mack Truck Company and got new trucks, and Frank Cross and myself happened to buy them.

Q. Buy them from the Mack Company?

A. Yes.

Q. You bought those trucks for use in your own trucking business?

A. Yes.

Q. What other trucks have you bought?

A. I believe that ends the experience, with the exception of my dealings with the Mack Company that's on record here.

Q. What trucks have you sold?

A. These five trucks.

Q. You bought them and sold them?

A. Yes, sir.

Q. They were bought for use in your own private business?

A. Sure.

Q. Has that been the entire amount of your activities in buying and selling trucks?

A. Two Macks, besides these five trucks, two Mack trucks.

Q. When did you buy those?

A. I bought those the same year, in the same year.

Q. You bought them from whom?

A. Bought one from a man at Torresdale Avenue and M Street, and bought one from a man at Chester.

Q. Did you buy them as a dealer, or for the purpose of use in your business?

A. I bought them because they were cheap. We went to work and repaired them, and fixed them up, and worked them as soon as we got them finished.

Q. You used these in your business?

A. We had no business. If we didn't work them we would have had them on our hands.

Q. You didn't work them at all?

A. Certainly, we worked them.

Mr. Starr: I don't think this witness is qualified.

The Court: Our Court of Appeals has held that a carpenter may testify as to the value of his automobile. It seems to me that if a carpenter may do so, certainly a man can who has ten or more years of experience in this line of endeavor.

Mr. Starr: I make the objection that the witness has not sufficient qualification to justify his testifying.

The Court: He may testify.

Mr. Starr: Exception.

(Exception noted for defendant.)

Q. In July, 1927, what was the value of this 1920 three and a half-ton chassis, with the wood hoist?
A. I had a buyer for it at that time.
Q. Don't tell us what you had a buyer for.
A. $3,000.

(At this answer audible comment was made by some of those sitting as the audience.)

The Court: I want no comment on the evidence. Anyone who is guilty of an infraction of the obvious proprieties will be dealt with according to the law.

Q. What was the smallest truck that you had?
A. $2,750.
Q. What type of car, of truck, was that?
A. Two and a half-ton truck, latest style hoist and body.
Q. Two and a half-ton chassis, what year model?
A. 1926, 1925, either one.
Q. What type of hoist did that have?
A. Heil.
Q. How's that?
A. Heil.
Q. What did you say the value of that was?
A. $2,750.
Q. What other type of trucks did you have?
A. The rest were three and a half-ton chassis.
Q. All of them?

A. With the exception of one. One was a five-ton truck, brand new.

Q. Were they all the same year model?

A. No, sir, they varied, one to two years, possibly one was three years old.

Q. Will you describe them one by one, please, and give us your estimate of the value?

A. The five-ton truck was 1926, brand new, 1926, we bought it from the Mack Company, latest style hoist and body, worth $4,500. Two of the other trucks in that contract with the five had latest style hoist and body, three and a half-ton chassis, steel wheels.

Q. What year were they?

A. I would have to look at the cards to tell you that. They are all on the registration cards there. They was worth $4,500, and the two trucks, the other two that's left had wood upright hoist and body, and they were only worth about $4,000.

Q. Did I understand you to say that Mr. Woehlring, at the time of your last conversation, that he told you that the matter was out of his hands?

A. Yes, sir.

Q. Did he say in whose hands the matter was?

A. Mr. Henderson and Mount, their attorneys.

Q. Had you had previous dealings with Henderson and Mount?

A. Yes, sir.

Q. You knew them, and knew where their office was?

A. Yes, sir.

Q. Did you subsequently call on Mr. Henderson and Mr. Mount?

A. In regard to the conversation with Mr. Woehlring?

Q. Yes.

A. Yes, sir.

Q. When?

A. On the last day of that notice in that letter.

Q. Do you know on what day of the week that was?

A. On a Saturday.

Q. Do you remember what time you got there?

A. About half-past eleven.

Q. Whom did you see?

A. Mr. Henderson and Mr. Mount.

Q. Who went with you?

A. A man by the name of McManus, Mr. Bechtel, Mr. Peckell, Mr. McGuigan, and myself.

Q. Did anyone else subsequently either come into the conference, or have any further conversation with either Mr. Mount or Mr. Henderson?

A. Yes.

Q. Who?

A. The lawyer from Philadelphia, Mr. Scott, who was working for our interest.

Q. How did he get into this conference?

A. Telephone.

Q. Were you talking to Mr. Scott on the telephone?

A. Yes, sir.

Q. How do you know Mr. Mount and Mr. Scott talked to each other?

A. I asked for permission to call Mr. Scott up first for advice what to do, and Mr. Mount give me permission, so I spoke to Mr. Scott. He asked to be put on the wire to Mr. Mount, so I turned the phone over to Mr. Mount, and when Mr. Mount was done talking to Scott, I got on the phone again.

Q. At that time did you offer to pay to the Mack Truck Company ——

Mr. Starr: I object.

The Court: It starts rather badly, I would say.

Q. What did you tell Mr. Henderson?

A. We walked in the door. He said, "Good morning," and then what he could do for us. We told him we had come to settle up for not only the back notes for the trucks, but the full amount of the unpaid balance. He said, "Sit down, I will be with you in a minute," and he went out of the room and left us sitting there, and I would say about approximately five or ten minutes afterwards he came back, and took us in his office. Mr. Mount was in there. He told Mr. Mount, "You will have to take care of these men," and the next thing we heard he walked out the door. So Mr. Mount, when everyone was seated, he says, "Well, boys, what can I do for you?" I introduced him to McManus and Bechtel. I told him, I says, "The two men here are come to take over the full unpaid balance of the amount we owe you." I said, "They ask for the title" ——

Q. And then what was done?

A. I asked, Mr. McManus had asked for the title to be put in their names. That's the way the security is made out ——

The Court: Just tell what was said.

Witness: They asked for the title to be made out in their names. Mr. Mount said, "Have you people come prepared to take care of the bond?" and Mr. McManus says to him, "We understand all about the bond. We didn't come prepared. We have been working for the last two days to find out just how much money it took to release this thing," and he says, "no one would give us any informa-

tion, no one would tell us how much to bring. We figured it out the best we could, and added quite a bit to it, and come in. We have got twelve thousand dollars with us," he says, "figuring that would cover everything. If we don't have enough, we thoroughly understand about this here bond, turn over the titles to us, and accept the money, and leave the trucks go until we can attend to it later." So Mount says, "Well, I can't do that. I don't know whether the trucks is even worth $2,500 or not. We put up the bond, and we have got to have something to take care of the bond," he says, "we put up for you people." I asked him for permission to call up Mr. Scott, so I could get his advice and ask what to do. I got in touch with Mr. Scott. Mr. Scott asked to be put on ——

Mr. Starr: I object to Scott's conversation.

Q. Subsequently, did Mr. Scott and Mr. Mount talk?

A. Mr. Scott and Mr. Mount talked then, and when Mr. Mount was done talking on the telephone, "Mr. Scott," he says, "here wants to talk to you again," so I got on the phone with Mr. Scott. Mr. Scott says ——

The Court: Don't tell what Mr. Scott said to you.

Witness: From the result of the conversation with Mr. Scott, and the things that he told me, I asked McManus and Bechtel if they were still willing to provide the money, if they were still willing to put the money there for the full unpaid balance. They said "Yes," and I asked Mr. Mount if he would accept the money and turn the title over

to McManus and Bechtel, and leave the trucks go back in the hands of the sheriff and Mr. Scott would take care of them.

Q. What did Mr. Mount say to that?

A. Refused to do it.

Q. Did you have any other conversation about titles?

A. About titles, Mr. Mount, as I recall, Mr. Mount asked me why we wanted the titles made out in McManus and Bechtel's name, and I told him that McManus and Bechtel, that was a firm in Philadelphia, and to make out the title to secure the men who had any equity in it. That was what they were asking for. That's the reason it was to be made out in McManus and Bechtel's name.

Q. Did you ask ——

Mr. Starr: Objected to.

The Court: Yes, rather leading.

Q. Was anything said by either Mr. Mount, or anyone else that was there, about putting these so-called titles into the name of anyone else?

Mr. Starr: Objected to. We are entitled to have specifically ——

The Court: Let him tell what took place.

Q. Was there any further conversation about the titles, Mr. Robins?

A. The only reference to the titles, the only reason that he refused to make out ——

The Court: What was said by whoever you talked to, and by yourself?

Witness: We asked them to make out the titles in McManus and Bechtel's name. They refused. As far as I can remember, that's all I can remember being said about the titles, although the same thing was mentioned over and over. I do recall something else now, too.

The Court: You may state it.

Witness: He refused to make the title ——

The Court: Who refused?

Witness: Mr. Mount refused to make out the title to McManus and Bechtel. We asked them if they would make out the title to Robins and Brogan, or McGuigan, either one, whoever it was would be entitled to the amount each truck would cost on the back there. There's a part on the back—I forget what you call it now—the equity they would have in each truck was to be entered on the title and held in their name, and put the title through, and accept the money, we asked them that, and they refused that.

Q. Did Mr. Henderson later come into the office?
A. Immediately after that.
Q. What was said in Mr. Henderson's presence?
A. Mr. Henderson come in and asked Mr. Mount what had been going on, what was done. Mr. Mount explained to him in full how things stood, and at that time Mr. Henderson turned 'round to McManus and Bechtel, and says to them, "I don't know

whether you thoroughly understand just the situation these trucks are in, or not. Robins and Brogan has an attachment against the trucks, and as we understand it, they owe money here and there.'' I jumped up and interrupted him, and he told me to sit down. So he went on again, he started to talk the same way. I interrupted him again, and he said, ''Robins, if you interrupt me again once more, I will throw you out of the office,'' and I let him know he could not throw me out of the office, and he kept on talking, and I decided not to interrupt him any more. He finished talking to McManus and Bechtel, and when he was through talking, he says to them, ''After all I have told you about these fellows, are you still willing to put up the money for these trucks?'' McManus laid the check down, and a twenty-dollar bill. He said, ''Yes, sir,'' and he says, ''Then I refuse.''

Q. After Mr. Henderson said he refused to accept the offer of the money, what did you do, did you leave then?

A. No, he called in a stenographer, and dictated a letter to her. I don't just recall the words as was said, or anything. He dictated some letter to her, and he asked us to sign it. We refused to sign it, and walked out.

Q. You testified something about a bond which the Mack Company had brought into this discussion in some way. At whose request was that bond filed?

The Court: If he knows.

Mr. Allen: He, apparently, has some personal knowledge of it.

A. The Mack Truck Company.

Q. Did Robins and Brogan request the Mack Trust Company to file such a bond?

A. No, sir.

Q. When did you first learn such a bond had been filed?

A. I believe it was the afternoon before it was filed. It was filed, I believe, either Friday afternoon or Saturday morning. I knew about it Friday.

Q. From whom did you learn about it?

A. From my partner, Frank McGuigan.

Q. Did you have any conversation with any of the Mack Company?

A. Not personally, myself.

Q. As to the filing of the bond?

A. Not personally, myself, no, sir.

Mr. Allen: I request the production of the original certificates of title to these trucks, issued in the name of Robins and Brogan.

Mr. Starr: We haven't them.

(At this point a recess of five mniutes was taken.)

Mr. Allen: I believe you said you did not have the certificates of title.

Mr. Starr: We don't.

Q. Do you recall being signed upon the original certificates of title a statement of encumbrance?

Mr. Starr: I object. There is something in existence, evidently, in writing, and I don't see there's any foundation being laid for any secondary evidence.

Mr. Allen: I demanded the production of the originals, if the Court please.

Mr. Starr: We haven't them, and there's a reason why we haven't them. They are not supposed to be in our possession. They can't make a demand on us for something we have not got.

Mr. Allen: I understand under the Pennsylvania Act there is a certificate of title, which is issued by the vendor to the vendee, and when there is an encumbrance, such as a sale by a conditional sale, there is a statement of encumbrance signed by the parties upon this certificate of title. I have here, and I will offer in evidence, photostatic copies of these certificates of title, as certified by the Commissioner of Highways, I believe it is, in the State of Pennsylvania, Department of Revenue, Bureau of Motor Vehicles.

Mr. Starr: Apparently these certificates of title, they are called Certificates of Title of Motor Vehicles, were the ones that were transferred at the time of the making of the May 27th agreement.

Mr. Allen: The new ones are there, too.

Mr. Starr: Some I see here—one, at least, a transfer from King, November 14th, January 27th, that has nothing to do with this litigation. I object to that. There's another one from King.

The Court: What became of the originals?

Mr. Allen: As I understand the practice over there, the originals, as I understand it—I may be

mistaken—the originals are retained by the vendor, and until the truck, or car, or motor vehicle is sold, at which time they forward these to the Department of Motor Vehicles, who, in turn, issue a new certificate of title to the new owner. Is that substantially correct?

Mr. Starr: I don't know anything about it.

The Court: Therefore, the originals would, presumably, be in the department having charge?

Mr. Allen: Either the Mack Truck Company, or, if they have subsequently disposed of these trucks, then I suppose they would have been filed so that the new owner could get possession of the new certificate. Mr. Scott, a member of the Philadelphia bar, advises me that if the trucks have been resold, the original would be on file, and these originals would be on file with the Department of Motor Vehicles, or Department of Highways.

Mr. Starr: The proof will be, when the trucks were resold under the terms of the Act, when that was done, the original certificate, as I understand it, is surrendered to the Highway Department.

The Court: They are now in public control?

Mr. Starr: Public control. What has happened to them since that time we have no knowledge whatever, because a new certificate would be issued to the purchaser. I don't believe these papers themselves are competent in this litigation. I don't see how they could be used to any purpose whatever. Certainly the three here with respect to the King

transfer had to do with the December contract, which was rescinded by the agreement of May, and that's one to King, and three from King. Apparently, the others, there's one from Robins and Brogan to McGuigan, at the time of the making of the May, 1927, agreement. There's another one at that time; and, as I understand it, these were not certificates eventually issued to McGuigan when he became owner of the trucks, pursuant to the May 27th agreement. So that all of these transfers seem to me have to do with past history, and are not at all relevant with respect to the situation as it came into existence after the making of the May 27th agreement.

Mr. Allen: I think they show on the face they are the ones assigned to Frank McGuigan, because the application ——

The Court: There's an assignment, I understand your statement to be that upon transfer of title, the certificate of the assignor is filed with the department at Harrisburg, and a new certificate issued.

(After further discussion.)

The Court: Judge Starr objects, and the originals, I suppose, are the best.

Mr. Starr: If you had the originals photographed we would not take exception to the fact they are not exemplified, but these have lost their usefulness when the certificate is assigned to McGuigan.

Mr. Allen: These are the ones that the Highway Department sent to me. I asked for the ones issued

to Frank McGuigan. I don't know whether we have any further control over that. They, at least, show the assignment to Frank McGuigan. I have demanded production of the defendant, and it seems to me if they were not in their possession, they might have notified me to that effect.

The Court: It's apparent, however, that these are not the certificates that were existing after the agreement of May 27th, 1927.

Mr. Allen: Upon failure to produce, it seems to me we are entitled, under notice we are entitled to prove them by such other evidence as may be available to us, and ——

The Court: It doesn't appear that these certificates were in possession of the defendant.

Mr. Allen: I think that I can show they were.

The Court: When you made your demand?

Mr. Allen: Possibly they were not at the time I made the demand, but, as I say, in the event of their ——

The Court: I suppose that is the only time we are interested in. If you demand production and the defendant says, "I haven't them, they are not in my possession, nor subject to my control," I suppose that's an adequate answer, isn't it?

Mr. Allen: That would be true, if the Court please, had we had any way of knowing whether or not these trucks were still in the possession of the

defendant, and we don't have. There has been no evidence to the effect that we have any knowledge—as a matter of fact, I don't have any knowledge—that these five trucks covered by these Pennsylvania certificates of title have ever been disposed of.

The Court: Isn't there something in the answer about that?

Mr. Allen: No, sir.

Mr. Starr: The answer alleges they have been sold.

Mr. Allen: There is as to the two trucks covered under the New Jersey agreement.

Mr. Starr: I guess you are right about that. At the time that answer was filed, the trucks had not been. They had been sold, but I don't think there's anything in the answer with reference to the sale of the Pennsylvania trucks, because they were not—they were sold at private sale, not public sale, because under the provisions of the Conditional Sales Act, fifty per cent of the contract price having not been paid, they were not obliged to be sold at public sale.

The Court: The second defense to the complaint says the five trucks referred to are still in the possession of the defendant, and have not been sold.

Mr. Starr: The papers produced show that it is an application of McGuigan for certificates to be issued, and the certificates that would be of any use in this litigation are the ones issued from that application, and they are not here.

The Court: It seems so to me, and I don't see the materiality of this.

Mr. Allen: The materiality lies in this fact. The Pennsylvania Act, where an encumbrance appears on the record, then the Pennsylvania Act requires certain things to be done. Whether or not these are the certificates that were actually issued in the name of Frank McGuigan, I don't know whether certificates ever would be issued to Frank McGuigan but the certificate is always held by the Mack Truck Company until they actually dispose of the actual title, according to my theory of it. I may be wrong. Now, this does show a statement of encumbrance, signed by Frank McGuigan, and that is the evidential part of these certificates.

The Court: You may mark them for identification. I think in the present situation, I am not persuaded of their materiality.

(Received and marked for identification.)

The Court: As a matter of fact, the certificate that I inspected, signed by Frank McGuigan, requested the issue of a new certificate to the Mack Company, subject to certain encumbrance.

Mr. Allen: That is true. It would, of course, indicate, as I have already said, that after these were signed, the application is made, we have nothing further to do with them. They are issued to the Mack Company.

The Court: I think you could have ascertained, if it is a material fact, I don't yet see the materiality

is established, anything on these certificates, but if they are material, it seems to me you could have ascertained whether they were in the possession of the defendant.

Mr. Allen: The answer was all I had to go by. It seems to me I can rely on their answer, and their answer sets up that the trucks are in their possession, they have title to them. I certainly ought to be able to rely on that.

The Court: They say they were in their possession?

Mr. Starr: At the time the answer was filed. This was several months ago.

The Court: It doesn't appear these certificates were in their possession.

Mr. Allen: I think I can show by Pennsylvania custom, and practice, and law, they would be.

The Court: Perhaps.

Q. I show you Exhibits P6, 7, 8 and 9 for identification, and I ask you whether the signature that is shown on what is called the assignment of certificate of title, is by you?

Mr. Starr: Objected to. These papers are not in evidence yet.

The Court: No, they are not in evidence. No testimony can be predicated upon them. They are not in evidence.

Q. You have testified you have had several transactions with trucks with the Mack Truck Company, in Philadelphia, have you not?

A. Yes.

Q. Do you know whether a certificate of title is issued in the case of a truck which is purchased on a conditional sales agreement, in Pennsylvania?

Mr. Starr: I object to that. That is not the way to prove the statute.

The Court: He can't prove what the law is.

Mr. Allen: I suppose I could call Pennsylvania counsel as ——

The Court: What is the purpose of the offer?

Mr. Allen: May I have a few moments side bar?

(Side bar.)

Mr. Allen: You will recall that at the previous trial of the same facts involved in this suit, your Honor ruled that a non-suit should be granted on the theory that by demanding a certificate of title, we had rendered conditional our tender. The Pennsylvania law undoubtedly is that where a certificate of encumbrance appears on the records of the Highway Department in Pennsylvania, or the Motor Vehicle Department, whatever it is, then the vendor, the conditional vendor, is obliged—very similar to our own Motor Vehicle Act—where our vendor is obliged to issue a bill of sale, only in Pennsylvania they are obliged to issue a certificate of title, and especially where this encumbrance appears upon the

record, they are entitled to evidence that that encumbrance has been satisfied.

The Court: Assuming that to be the law, then what?

Mr. Allen: Then this certificate will show on the record, there is an encumbrance appearing on the record of the Pennsylvania department, in the name of Frank McGuigan. Frank McGuigan signs here that there is an encumbrance of $969.08 on this particular truck, and the same thing with all of the others.

The Court: Well?

Mr. Allen: The Pennsylvania Act is, "Said certificate of title shall contain such description and other evidences of identification of said motor vehicle as the commissioner may deem reasonably necessary and proper, together with a statement of any liens, or encumbrance, or legal claim, which the application may show to be thereon, together with the name and address of holder of said lien, encumbrance, or legal claim, and said certificate of title shall be delivered to the person holding the first lien, encumbrance, or legal claim, upon said motor vehicle" ——

The Court: Assuming that to be so, what materiality has this ——

Mr. Allen: I have not quite finished as to the encumbrance: "and retaining by such person until the entire amount of such lien, encumbrance, or legal claim is fully paid by the owner of said motor ve-

hicle, when the said certificate of title shall be delivered to said owner, by the person who held the first lien, encumbrance or legal claim. Provided that a corrected certificate of title, with a statement of the lien, encumbrance or legal claim, shall be issued, upon request of the owner, when original certificate of title is returned with evidence that lien, encumbrance or legal claim, has been satisfied. The certificate of title shall not have to be renewed annually, or at any other time, except as herein otherwise provided. These certificates show that there is an encumbrance on record, and it shows that we had a right to ask that that encumbrance be removed, or a new certificate be issued to us.

The Court: This certificate doesn't show it?

Mr. Allen: Yes, over the signature of Francis McGuigan. Francis McGuigan, being duly sworn, that he has acquired possession, and so and so forth, all legal claims listed, all encumbrances, and all legal claims, and so forth, upon the application, in favor of the Mack International Motor Truck Corporation, 42nd and Woodland Avenue, and so on.

The Court: It also appears that the encumbrance is removed?

Mr. Allen: That is the old encumbrance, it just refers to that, if your Honor please, May 27th, 1927, which is the old encumbrance.

The Court: The thing to do would be to show the certificate to Francis McGuigan, and what encumbrance was upon it.

Mr. Allen: I have asked for the certificate. I have demanded production of the defendant, and they are not produced. I have nothing to show they didn't have possession of them.

(After further discussion.)

The Court: If the title has passed since, that one would be returned. I don't believe these are evidential in the present situation, Mr. Allen.

(Exception noted for plaintiff.)

Mr. Allen: I have a couple of more questions that I want to ask, but possibly your Honor's previous ruling may dispose of them, but I would like to have them on the record.

Q. Did you pay, during the year 1927, for the licenses in the State of New Jersey and Pennsylvania for these seven trucks?

Mr. Starr: Objected to as immaterial and irrelevant, if for the question of damages.

Mr. Allen: It is offered for the question of damages.

The Court: Objection sustained.

(Exception noted for plaintiff.)

Q. Did you pay garage rent in advance for these seven trucks?

Mr. Starr: Objected to, on the same ground.

The Court: Sustained.

(Exception noted for plaintiff.)

Q. Were you obliged, by reason of the detention of these trucks, to lose any work, which you had previously contracted for?

Mr. Starr: Objected to as immaterial, irrelevant and improper.

The Court: Sustained.

(Exception noted for plaintiff.)

Q. Had you, at any time, made a deposit, conditional upon the fulfillment of any work by you, and which you were obliged to forfeit by reason of the detention of these trucks?

Mr. Starr: Objected to, on the same ground.

The Court: Sustained.

(Exception noted for plaintiff.)

(At this point a luncheon recess was taken until 1:30 P. M.)

Cross-examination.

By Mr. Starr:

Q. First, speaking with respect to the trucks involved in the Camden contract, the one dated the 14th August, 1926, covering two trucks, am I cor-

rect in understanding you were in default on the payment of a note, which fell due on the 20th of May, 1927, of $400?

A. Yes, sir.

Q. And another note of $500, falling due on the 20th of June, 1927?

A. Yes, sir.

Q. And a third note which fell due on the 20th of July, 1927, for $500, is that right?

A. Yes, sir.

Q. The 20th of July?

A. Yes.

Q. That was around that time the trucks were seized, wasn't it?

A. Yes, sir.

Q. When you say you interviewed Mr. Mount and Mr. Henderson, was that on the 31st or 30th of July, 1927?

A. In regard to what?

Q. When you interviewed them, and offered, as you say, to pay the money due?

A. May I have the letter to look it up?

Q. I want the date.

A. I have to have the letter to get it.

Q. Will you look at the letter, and tell me the date you and the rest of the gentlemen went there?

A. About the 30th, the 30th of July. It was on a Saturday, and that's the best I can tell you.

Q. You don't know what day of the month it was?

A. No.

Q. At that time, you were owing all of the unpaid notes, which had matured, $1,400, on the Camden contract, is that right?

A. I don't recall just what the amount is. There was several notes fell due during the time of the possession, these ten days possession the Mack had

the truck. It might have amounted to that, I don't recall.

Q. Do you know, by the terms of your contract, when the notes were due?

A. I can tell you which is the last one that was paid, yes, sir.

Q. Won't you get your contract and tell me that?

Mr. Allen: Which contract is that?

Mr. Starr: The Camden contract.

A. The $400 note for 5/20/27, the $500 note 6/20/1927.

Q. Do you mean June or July, 1927?

A. 6/20/1927, and 7/20/1927.

Q. That amounted to $1,400 you were in arrears on notes at the time you went to Mr. Mount's office?

A. That's right.

Q. Go to the other contract, which is the Pennsylvania contract, and which is dated the 27th of May, 1927, you paid the first note, which matured on the 15th of June, 1927?

A. That's right.

Q. And you didn't pay the July 1st note of $400, or the July 15th note of $400?

A. I thought that I had paid half of it, but I have no receipt to prove it.

Q. Will you swear whether you paid any portion of that second note?

A. I can't prove it.

Q. So that, according to your best recollection, you owed $800 on that contract?

A. Yes, sir.

Q. You received by mail the letter addressed to you and Brogan, dated July 25th, 1927, which is marked P3. You got that by mail, did you?

A. Yes, sir, if that's the one that came in that envelope.

Mr. Starr: Apparently it is. It is dated the same day. Where, Mr. Allen, are the letters notifying about the sale? They don't seem to be here.

Q. Showing you Exhibit P7, that letter was handed to you, personally, was it not?

A. Yes, by a man by the name of Reddy Bell.

Q. That letter was handed to you on the 9th of August, 1927, the day it bears date?

A. I imagine it was.

Q. I show you Exhibit P4, and ask you if that letter was handed to you personally by Mr. Bell on the day it bears date?

A. No, only one of them was handed to me. I can't tell you which one it was. One of them was handed to me, and the other was handed to Mr. Brogan.

Q. Letters were sent to each of you?

A. Yes, sir.

Q. When did you know that the sheriff of Philadelphia had levied on any of these trucks?

A. On or about—it was in the evening, and the night that he levied on the trucks, the trucks was coming in from the job, and as they pulled into the garage, the sheriff was right there to meet us.

Q. Do you remember what month it was?

A. I know the day of the week, but I can't recall the date.

Q. It was in July, 1927?

A. Right.

Q. Was it the 13th of July?

A. It was on a Thursday. It was Thursday, week before the trucks was took.

Q. You don't understand my question. I am talking about the day that the sheriff made the levy. On what day was that?

A. Thursday, the week prior to when the Mack took the trucks.

Q. Do you remember the date the Mack took the trucks?

A. 21st, I believe.

Q. Are you sure about that?

A. I am not.

Q. You knew there had been a levy made by the sheriff on these trucks?

A. That's right.

Q. Did you know that the Mack had given a bond to secure possession of these trucks?

A. Not until Friday night, the next day, we had promised Mr. McManus ——

Q. Answer my question. What I want to know is, when you first knew that the Mack Company had given a bond to secure possession of the trucks when the sheriff levied on them?

A. Friday night, the next day after.

Q. The day after what?

A. After the sheriff levied on the trucks.

Q. You knew a bond had been given, the day after the sheriff had made levy?

A. Yes, sir.

Q. I want to ask you some questions about these various trucks. In the Camden contract, there were two trucks, a five ton and a three and a half ton?

A. That's right.

Q. That's right, isn't it?

A. Yes, sir.

Q. Did you not, on direct examination, tell us what, in your opinion, the market value of the three and a half ton truck was?

A. $3,000.

Q. That truck was how old?

A. At that time it was seven years old.

Q. How long had you used it?

A. From August the year previous.

Q. When you took it over, it was a used truck?

A. That's right, we reconditioned it.

Q. You took it over the 14th of August, 1926?

A. That's right.

Q. How long before that August 14th had you personally used that truck?

A. One month.

Q. The next truck was a five-ton Mack. Was that a new truck in August, 1926?

A. It was a new truck.

Q. In your testimony this morning, did you put any valuation on that?

A. Yes.

Q. How much?

A. $4,500.

Q. How much?

A. $4,500.

Q. Are these valuations you are giving us, as of July, 1927?

A. Yes, sir, I haven't saw the trucks since.

Q. Under the Pennsylvania contract with McGuigan, there were five used trucks. What was the size of these?

A. One was a two and a half-ton truck.

Q. What was the sizes of the others?

A. Three and a half-ton chassis, iron wheels, they were rated at five-ton, although they only have a three and a half-ton chassis.

Q. The other four trucks?

A. Was rated as five-ton trucks.

Q. On the two and a half-ton truck, did you put a valuation on that?

A. Yes, sir.

Q. How much?

A. $2,750.

Q. What valuation did you put on the other four?

A. The other four, there were two different style hoists and bodies with the other four trucks. I just don't recall whether two had one ——

Q. Did you put any valuation on them?

A. Yes, I did.

Q. What valuation did you put on them?

A. The one with the new steel hoist ——

Q. I am not asking you that, I am asking you what valuation to put on each truck?

A. $4,500 on two of them, and $4,000 on two of them.

Q. $4,500 on two?

A. Yes.

Q. And $4,000 on two?

A. Yes, sir.

Q. These trucks had all been used before you bought them in May, 1927, hadn't they?

A. Every one of them.

Q. How long had they been in use?

A. I don't know.

Q. Have you any idea?

A. No, I have an idea according to reports, but it's only hearsay.

Q. You testified in this case, or in a case similar to this, which was brought here some time ago, about the value of these trucks, didn't you?

A. I don't remember whether I did, or not.

Q. Let me read it: Question: "Can you fix the value?" and your answer was: "Yes, sir." Do you remember that?

A. I can't say whether I did, or not, no, sir.

Q. You were asked by Mr. Allen: "Now, what were they?" and your answer was: "$3,000 for the two and a half, $3,000 for the three and a half,

$4,500 for the others." Do you remember testifying to that effect?

A. I don't remember the conversation. I remember being asked that question.

Q. Do you remember whether you said that, or not?

A. No, I don't. That happened over a year ago.

Q. If you said it, was it true, or not?

A. With the exception of this truck with the wood hoist they are not worth $4,500.

Q. I am asking you whether you were asked this question: "Now, what are they?" and you said: "$3,000 for the two and a half, $3,000 for the three and a half, $4,500 for the others." Did you so testify or not?

A. If it's there, I must have testified to that.

Q. Mr. Allen then asked you, Question: "You mean there were two trucks at $3,000?" and you answered: "That's right; that's the two and a half-ton, and the three speed." And then this question was asked: "And five at how much?" and your answer was: "$4,500." Do you remember testifying to that effect?

A. I don't remember it, but being as you are reading it there, I must have said it.

Q. This morning, when you said that the Mack people had repossessed the trucks, did you mean they had taken possession of the trucks from the sheriff under the bond

Mr. Allen: May I have that question read?

(Question repeated.)

A. No, sir.

Q. How did they repossess the trucks except under bond they gave the sheriff?

A. They took them in, on account of the notes being in arrears.

Q. They didn't take them in until after they had given bond to the sheriff?

A. They put the bond up with the sheriff on Friday, so we could take them out to work Saturday morning, and never received the trucks until Tuesday the week following.

Q. Did they take the trucks at all until after they had given bond?

A. No.

Q. You remember being examined at the former trial with regard to what occurred at Mr. Henderson's and Mr. Mount's office on either the 30th or 31st of July, 1927?

A. Yes, sir.

Q. The money that was taken there that day belonged to McManus and Bechtel?

A. That's right.

Q. It was not your money?

A. No.

Q. You didn't furnish any portion of it?

A. No, sir.

Q. It was McManus and Bechtel, and not you, who offered to pay the money to Mr. Mount and Mr. Henderson, was it not?

A. It was myself, that money, that offered to have the money put on the desk there. It was me that took McManus and Bechtel there, to pay on my behalf.

Q. Do you remember testifying to this at the trial before: Question, by myself, "It was not your money?" answer: "No, sir." Question: "And they

made the tender?'' answer: ''Yes, sir.'' You testified that, didn't you?

A. Yes, they did.

Q. You also testified at the former trial, in answer to this question: ''And when they made the tender, they asked Mr. Mount and Mr. Henderson to give you back the trucks, and to make out bills of sales in their names as security for their money, until they were paid off, that is right, isn't it?'' and your answer was: ''That is right.'' That's the fact is it?

A. Yes.

Q. That's what occurred?

A. That's right.

Q. And the question was then put: ''Until you paid them off?'' and your answer: ''That is right, take the Mack's place.'' That's what you testified to, didn't you?

A. In regard to what?

Q. I am putting the question to you. I will add another question: ''In other words, if they advanced this money for you, the bill of sale was to be made out in their names?'' and your answer was: ''That is right.''

A. Certainly.

Q. That's exactly what happened?

A. Yes, sir.

Q. And then the question was: ''Until you paid them off?'' and your answer was: ''That is right, take the Mack's place.'' That's right, isn't it?

A. Yes, sir.

Q. And then this question was put to you: ''And that is what Mr. Mount declined to do, to give bills of sale to them?'' The answer, your answer was: ''The first time, that was the first thing he declined.'' Is that right?

A. Yes, sir.

Mr. Allen: I think Judge Starr should complete the answer. It's apparent the answer is not finished.

Mr. Starr: I gave the answer just as he gave it.

Mr. Allen: I am asking whether there is a concluding phrase.

Mr. Starr: I am putting the question as the record shows.

Q. And then the next question was: "And, of course, the McManus and Bechtel people would not make the advance, unless they got the bills of sale in their names?" and your answer was: "No, they made one other offer." Is that right?

A. Yes, sir, if it's there.

Q. The next question was: "What did Mr. McManus and Mr. Bechtel say with reference to putting up security for the bond in the interpleader proceedings?" and your answer was: "Said that they didn't have it with them, and had nothing to do with it." Is that right?

A. If it's there, it must be right.

Q. And then the question was put to you: "They would not put up any bond, or give any security with relation to that bond, would they?" Your answer was: "Did not have it with them, and was not prepared for it." Is that right?

A. Yes, sir.

Q. That's what happened that day in Mr. Mount's office?

A. That's not all that happened.

Q. That's not what I asked you. I am asking you about this question?

A. Yes, sir.

Q. And the next question was: "And you were unable, at that time, to protect the Mack Company from the bond which they had given to the sheriff, were you?" and your answer was: "I was giving them cash for the trucks." Do you remember that question and answer?

A. I don't recall it, no, sir.

Q. Will you say you didn't say it?

A. No, I won't.

Q. The next question was: "But you were not taking care of the bond in any way?" Answer: "Only in this way, I was willing to release them from their bond." Did you answer that question in that way?

A. I don't remember.

Q. What?

A. I don't recall it.

Q. I ask you whether, or not, you were asked this question: "Well, now, you were examined in advance of the trial, Mr. Robins, in this case, and do you remember this question being put to you, 'Did Mr. Henderson, or Mr. Mount, give any reason for not accepting the money when the tender was made?' And your answer was: 'Yes.' 'That is the way you testified, isn't it?' and your answer was: 'That is right.'" Do you remember that?

A. I recall part of it, yes, sir.

Q. Is the answer there that you gave correct or not?

A. I don't know what happened two years ago.

Q. You can't remember?

A. No, sir, it's the same as what happened, to the best of my knowledge.

Q. To the best of your knowledge, it did happen?

A. Yes.

Q. And then you were asked: "And then the question was put to you, 'What reason did they give

to you?' '' and did you answer: ''The first reason was, they claimed they wouldn't let the trucks go until they had put up enough cash to cover the bond to the sheriff'' and did you answer: ''That is right.'' Do you remember that testimony?

A. I don't recall that particularly, no, sir.

Q. And then the question was put: ''And the second was, they refused to turn the chattels over to McManus and Bechtel,'' and did you answer: ''That is right.'' Do you remember that?

A. Yes, sir.

Q. And then this question was put to you: ''That is what happened, isn't it?'' and you answered: ''That is right.'' Then the question was put: ''And Mr. Bechtel and Mr. McManus would not put the money up until the chattels were turned over to them, that is the fact, isn't it?'' and your answer was: ''That is the agreement'' ——

Mr. Allen: I feel that while I have no objection to any of these questions—I thought, possibly, the line of questions might tend to contradict the witness' present testimony. None of it, however, does contradict his present testimony. It confirms what he has already said. I, therefore, feel that this line of examination is not proper.

The Court: If it is for the purpose of contradiction.

Mr. Starr: It is slightly different. The story, as then given, is different from what he is now testifying to.

Mr. Allen: I haven't seen a thing that differs from the present testimony.

The Court: It may be the statements are not in exact accord, and if not, counsel is entitled to have the benefit of it. The jury will have to determine that.

Mr. Starr: What was my question?

(Question repeated.)

Mr. Starr: Do you remember that?

A. I don't recall the conversation, no. I remember being asked a question about that, but I don't recall whether that's the one or not.

Q. Have you recognized anything that I put to you that is not correct, up to date?

A. Nothing that's incorrect.

Q. Did you attend the sale of the Camden trucks, the sale of which you were notified by this letter you have identified?

A. I was down there, yes.

Q. Where did the sale occur?

Mr. Allen: I object to that. That is not part of the cross-examination.

The Court: How is that material?

Mr. Starr: I propose to show the prices which the trucks brought at public sale.

Mr. Allen: That would not fix the market value.

The Court: It may be evidential.

(Exception noted for plaintiffs.)

(Question repeated.)

A. I believe at 42nd and Woodland, in back of the garage there.

Q. Were you present?

A. Yes, sir.

Q. And the trucks were struck off, and were exposed for sale publicly, were they?

A. The two trucks was there, and myself was there, that's all, and the Mack man.

Q. Nobody else there?

A. No outsiders, no, sir.

Q. What did the trucks sell for?

A. I don't recall what they went for. One of the Mack men bid on it, but he was the only one.

Q. Can you give us any idea what they brought at public sale?

A. I could give a guess, somewhere around $2,000.

Q. Both of them?

A. I think they both went at once. I don't recall. I don't remember.

Q. Do you know whether that sale was advertised, or not, in the paper?

A. I never saw it in the paper, no.

Q. Your trouble with Mr. Henderson, Mr. Robins, the day you were at his office, was because you were swearing in the presence of the stenographer, wasn't it?

Mr. Allen: I object to it. I don't think that is proper cross-examination.

The Court: I think you developed the fact from this witness that Mr. Henderson had told him he would order him out of the office, or something, if

he didn't desist from some line of conduct which was distasteful to Henderson.

A. No, sir.
Q. You were not cursing and swearing?
A. No, sir.
Q. Not at all?
A. Not at all.
Q. Didn't Mr. Henderson tell you you would have to desist from your language, or he would see you were put out of the office?
A. No, sir, that's not what he said at all.

By Mr. Allen:

Q. After you had learned that the Mack Company put up this bond, did you again have possession of these trucks?
A. Yes, sir.
Q. Who delivered possession of the trucks to you?
A. They were not taken out of our possession at no time by the sheriff.
Q. Who told you you could use the trucks again?
A. Mr. Mount give Mr. McGuigan permission, and Mr. McGuigan give me the order to go ahead and send them to work.
Q. I didn't get that?
A. Mr. McGuigan give permission for the trucks to go to work.

Mr. Starr: You were present when Mr. Mount gave that?

Witness: No.

The Court: Strike it out.

Mr. Allen: I consent to that. I was under the impression ——

Q. When McManus and Bechtel went in the office of Mr. Henderson, were you with them?
A. Yes, sir.
Q. Did you authorize them to offer this money?
A. Yes, sir.
Q. Were they acting for you?
A. Yes, sir.
Q. In the examination as read to you by Judge Starr ——

Witness: May I change that, please, it was Mr. Scott. He was talking to him over the phone, and Mr. Scott asked him to tell them to present the check.

Mr. Starr: I move that be stricken out.

The Court: Yes, what Scott said.

Q. In the examination, as read by Judge Starr, there was some mention of another offer made by McManus and Bechtel. What was that other offer?

Mr. Starr: I don't recall any such question as that, Mr. Allen.

Q. What was that other offer McManus and Bechtel made?
A. To the Mack Truck Company?
Q. Yes, in Mr. Henderson's office?
A. When they asked for the titles, and offered the money, they was refused the titles for the sake of the bond, on account of the bond. They asked the

Mack Truck Company to take over the money, and give the titles, and leave the trucks go back in the hands of the sheriff, to hold the trucks until they could take care of it later, but Mr. Scott told us over the phone ——

Mr. Starr: I object to what Mr. Scott said.

Witness: ——to go ahead, and accept the money, and draw the titles, and leave the trucks rest in the hands of the sheriff to release the bond, and put the titles through Harrisburg.

Q. You have already testified that you received these two notices, one addressed to Robins and Brogan, and one addressed to McGuigan, which have been marked Exhibits P3 and P4. Did you receive any other notice, in addition to these two letters, from the Mack Company, requiring you to do anything at all, other than the payment of those arrearages mentioned in those two letters?

A. Did I receive any further notice of that after these letters?

Q. No, did you receive any notation any time before you went into Mr. Henderson's office?

A. Other than these letters?

Q. Yes.

A. No, sir.

Q. Was any demand ever made before you went into Mr. Henderson's office relative to this bond with the sheriff?

A. No, sir.

Q. You have mentioned the sale of these two trucks covered by this first contract, which is known as the New Jersey contract. Where did that sale take place?

A. I believe 42nd and Woodland. It was 42nd and Woodland.

Q. Is that in Philadelphia?

A. Yes, sir.

Q. They were not sold here in New Jersey?

A. No, sir.

Q. Were there any bidders at the time of that sale?

A. No, sir.

Q. Who bought the trucks in?

A. The man from the Mack Truck Company.

Q. Do you know who he was?

A. I can point him out, if he is here, but I don't remember his name.

Q. Do you see him in the room?

A. No, I don't, unless he's in back of Mr. Werner there, no, he's not here now.

Q. Had you previously seen him in the Mack Company office?

A. Yes, sir, he used to attend to the notes.

Q. You knew him, did you?

A. Yes.

Q. You knew he was employed by the Mack Truck Company?

A. Yes, sir.

Q. Did you bid?

A. No, sir.

By Mr. Starr:

Q. I didn't understand what you said, Mr. Robins, with regard to the other proposition McManus and Bechtel made. You said they suggested that the titles go through Harrisburg, and be put in their names, and that the Mack people would turn the trucks back to the sheriff?

A. Yes.

Q. What did they say about the bond?

A. Leave the trucks go back in the hands of the sheriff, and release themselves from the bond, and we would take care of it ourselves. Mr. McManus made the statement that he knew Mr. Ziegler personally.

Q. Who would release who?

A. The sheriff would release Mack.

Q. And that you people would take care of it?

A. We would take care of it, but right then they wanted to turn over the money and get the title through.

Q. That's what Mr. Mount declined to do, to make the titles to McManus and Bechtel, and turn the trucks back to the sheriff. He declined to do that?

A. He declined to do anything.

Q. He declined to do that, anyhow?

A. Yes, sir.

CHARLES H. RICHARDSON, JR., sworn.

By Mr. Allen:

Q. What is your business?

A. Right now, with a finance company.

Q. In 1927, what was your business?

A. Dealer in trucks.

Q. Did you deal in any particular kind of trucks?

A. Yes, I was made manager, branch manager, of the Philadelphia Road King Sales Company, 26th and Morris Street.

Q. In your capacity as branch manager of that company, did you have dealings with Mack trucks?

A. A few.

Q. Were you familiar with the market values of Mack trucks?

A. Somewhat.

Q. Did you, personally, examine the trucks that Mr. Robins has described here this morning?

A. Yes, sir, he came to me in person, and asked me if I knew anybody where I could place those trucks he had on hand, particular ones. I looked at the trucks.

Judge Starr: May we have the time?

Q. When was that?

A. The latter part of the spring of 1927, or early summer. I don't know what time it was, just previous to the time the repossession took place, and I had secured a purchaser for one of them ——

Mr. Starr: Wait a minute.

The Court: There is no question pending now.

Q. You say you had secured a purchaser for one of them?

A. Yes, sir.

Q. Who was that purchaser whom you had secured?

Mr. Starr: Objected to as immaterial.

The Court: I suppose, unless the sale was consumated, we are not concerned.

Mr. Allen: If the Court please, it seems to me this is in direct line with your Honor's ruling of yesterday, where the sale had been agreed upon.

The Court: Oh, no, there was no objection yesterday to the statement of the witness in that case. In that case, as I understand it, there was an actual agreement of sale, of transfer, exchanged, but I don't think it was objected to.

Mr. Allen: Possibly I should go a step further.

Q. Was, as a result of your negotiations, an agreement of sale entered into between your customer and Robins and Brogan?

Mr. Starr: If the agreement is in writing, we are entitled to have it.

The Court: First, whether there was an agreement entered into.

Witness: Only verbal.

Q. Was there such a verbal agreement made, an actual agreement of purchase on the one side, and of sale on the other?

A. Yes, sir.

Q. Not merely negotiations?

A. No, they were going through with it.

Q. Do you know whether or not, pursuant to that agreement, this truck had actually been delivered to the proposed purchaser?

Mr. Starr: Objected to. That's not evidence of any value.

The Court: It may or may not be. He may answer the question.

A. I don't know, sir.
Q. What?
A. I don't know.
Q. What was the purchase price, as made in this agreement between your customer and Robins and Brogan?

Mr. Starr: Objected to, the sale was not consummated, it seems to me.

The Court: I suppose it ought to be shown whether or not it was consummated. Whether or not that agreement was consummated has not yet appeared.

Q. Do you know whether or not there was an actual sale of this truck, about which you were describing?

Mr. Starr: That's a conclusion.

The Court: I suppose whether or not the transfer took place in accordance with the agreement is what we are interested in. Do you know that?

Witness: The transfer had not taken place, because we had not had time. When we went down to make the transfer we were told the trucks were repossessed.

Q. What truck was that?
A. Three speed, the wood hoist, I believe, was on it.
Q. Was that this oldest truck?
A. Yes, sir.

Mr. Starr: I object to Mr. Allen testifying.

The Court: I suppose it's rather leading, but it may stand.

Q. What, in your opinion, were these trucks worth in July, 1927?

Mr. Starr: Objected to. It's not shown that he made any examination whatever of any truck except this one.

The Court: He said he examined some.

Q. Do you know how many of these trucks you did examine?

A. I saw all that he had.

Q. Do you know how many that was?

A. Six or seven of them.

Q. Do you recall those particular trucks?

A. Hazy, yes. This was quite a time since I was down there, quite a length of time.

Q. What, in your opinion, was the value of these trucks at that time?

Mr. Starr: May I cross-examine?

The Court: Yes.

By Mr. Starr:

Q. In 1927, what was your occupation?

A. Me? Branch manager of the Philadelphia Road King Sales Company, a truck.

Q. This is a truck?

A. Yes.

Q. Built to sell in competition?

A. Yes, sir, it's discontinued now.

Q. Made and sold in competitioin with Mack trucks?

A. Not exactly in competition, but made and sold. It was not quite as heavy a unit as Mack.

Q. How long had you been in that business?

A. I had been with that company in particular about five years.

Q. How long were you sales manager?

A. I was made branch manager about January 1st of that year, and liquidated the company.

Q. You mean the company went out of business then?

A. Yes.

Q. When did it go out of business?

A. It didn't go out of business until the latter part of the year.

Q. Have you bought and sold trucks?

A. Yes, somewhat.

Q. What do you mean by somewhat?

A. As branch manager I have bought and sold cars.

Q. I think in answer to a question put to you by Mr. Allen, you said you had a few dealings in trucks. What did you mean by that?

A. I had experience in selling and buying trucks, yes.

Q. What type of Mack trucks did you have, if you had any Mack trucks?

A. We had taken some of them in trade-ins, and had resold them.

Q. You never sold any new trucks?

A. No new trucks for the Mack people.

Q. The only Macks you ever sold were those you took in, and resold, is that right?

A. Yes, sir.

Q. How many of those were they?

A. I don't know, offhand.

Q. Approximately how many?

A. I could not tell you that.

Q. Did you make an examination of these six or seven trucks with the idea of arriving at the value of them?

A. The idea of arriving at a value for resale, yes.

Q. For resale?

A. Yes, as he had come to me with the proposition asking me to sell these trucks for him.

Q. When did you make that examination?

A. The exact date, I don't know.

Q. Can you give us the month?

A. As I stated before, early summer or late spring.

Q. Do you know it was in 1927?

A. Yes, sir.

By Mr. Allen:

(Question repeated.)

A. The purchase for one truck was $3,000.

The Court: Strike it out. You are asked your opinion.

Mr. Allen: For resale.

Mr. Starr: I object to that.

The Court: You are asked for your opinion of the value.

Q. What, in your opinion, was the reasonable market value of that one truck at that time, taking as reasonable market value what a person, who was willing and ready, but not forced to buy, would pay to a person who was ready and willing, but not forced, to sell?

A. About $3,000 to $4,500.

Q. That is on these various types of trucks?

A. Yes, sir.

Mr. Starr: I understand Mr. Allen's question referred to one truck. Did you understand it that way?

Witness: I was referring to the lot of them.

Mr. Starr: His question was as to one truck.

Witness: He didn't say one truck.

The Court: Your question was based on one truck, that you said was the subject-matter of some negotiations for sale.

Mr. Allen: The three speed truck, which you had made some negotiations about.

Witness: About $3,000 was a fair figure.

Q. What about the other trucks which you then examined?

A. Between $3,000 and $4,500.

Cross-examination.

By Mr. Starr:

Q. How many were worth $3,000 and how many were worth $4,500 apiece?

A. I figured ——

Q. Can't you answer that question, how many at $3,000?

A. I have to stop and think how many there were, either two or three of the Heil horse, I had fixed around $4,500, the service horse it varied.

Q. You have not answered my question yet. How many did you value at $3,000 and how many at $4,500 apiece?

Mr. Allen: I think the witness answered that.

The Court: I suppose counsel is entitled to get from the witness how many there were of each kind.

A. There was only one in particular at $3,000, that I placed that —— ?

Q. I don't understand.

A. There was only one I had placed at $3,000.

By the Court:

Q. And the others at $4,500?

A. Some $4,500 and some $4,000.

By Mr. Starr:

Q. How many?

A. I don't remember just how many there were, now.

Q. You don't know how many were put at $4,500 and how many were put at $4,000?

A. I think three or four, or two or three, whichever it was.

Q. You don't know, then, is that the idea?

A. I can't recall right now.

Q. Was there a five-ton A. C. Mack truck number 10310227 there that you examined?

A. I don't recall the numbers at all.

Q. Do you remember examining a five-ton truck?

A. There was a five-ton chassis there.

Q. What value did you put on that?

A. $4,500.

Q. Do you know how long it had been used?

A. No, I can't recall now.

Q. Did you run the truck at all?

A. No, sir.

Q. You didn't examine its mechanism?

A. I looked over it, raised the hood up, and looked at it.

Q. What?

A. I raised the hood, and looked at it and listened to the motor run.

Q. Just raised the hood, and had the motor started?

A. Yes.

Q. That's all you did towards an examination of it?

A. Just to get an idea of what it would do.

Q. Three and a half Mack truck number 752433, did you see that truck there?

A. I don't remember the numbers at all, as I said before.

Q. What value did you put on that?

A. If that had the Heil horse on it, it was around $4,000.

Q. I am asking you.

A. I don't recall a thing about it, but if it had the Heil horse on it ——

Q. Do you know what value you put on the three and a half-ton truck?

A. I think around $4,000.

Q. There were five Mack chassis, various numbers, do you remember what value you put on those?

A. Not offhand, unless I could see the trucks.

Q. Did you make the same superficial examination of the five as you did of the other two?

A. Yes, sir.

Q. You simply had the motor started, and raised the hood?

A. It was with the idea of getting a sale for them, that was all.

Q. You were there for the purpose of seeing whether you could get a sale for the trucks?

A. Yes, sir.

Q. At the suggestion of Robins. He wanted to sell the trucks, did he?

A. Yes.

Q. He wanted to get rid of them?

A. Yes, sir.

Q. Your estimate of the value is based upon the desire of Robins to sell the trucks, to get rid of them?

A. With my helping him to sell.

Q. You were going to help him sell?

A. Yes, sir.

Q. Did you know anything about how old these trucks were?

A. Some of them.

Q. Which ones did you know about?

A. I know one of them was pretty old, that I went up to secure a purchaser for.

Q. Do you know how old that was?
A. Five or six years old.
Q. Did you know anything about the age of the others?
A. Some of them were new.
Q. How many were new?
A. I don't recall now.

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HUGH SCOTT, sworn.

By Mr. Allen:

Q. Where do you live?
A. Philadelphia.
Q. What is your business?
A. Attorney-at-law.
Q. When were you admitted to practice at the Pennsylvania Bar? 20
A. In Pennsylvania, 1922.
Q. Have you been practicing in Philadelphia ever since that time?
A. Yes.
Q. Are you a graduate of any law school?
A. Yes.
Q. What?
A. University of Virginia.
Q. When did you graduate from that institution? 30
A. 1922.
Q. Did you receive a degree from that school?
A. Yes.
Q. What degree?
A. Bachelor of Laws.
Q. Are you connected with any public office in

Philadelphia in connection with your practice of law?

A. Yes.

Q. What?

A. Assistant District Attorney.

Q. Are you the Mr. Scott who has been referred to in the testimony of Mr. Robins?

A. Yes.

Q. Do you recall having a telephone conversation with Mr. Mount—by the way, you know Mr. Mount, do you?

A. Yes, I have known Mr. Mount some time.

Q. Some time the latter part of July, 1927?

A. Yes, I recall the conversation.

Q. Can you tell us what took place during your conversation with Mr. Mount at that time?

A. To the best of my recollection, Mr. Mount telephoned me and said that Robins and Brogan, and certain other gentlemen, were in his office at the time, that Robins and certain others were there, and that they had with them a check, and he outlined to me what had gone on up to that time, that a tender had been made for these trucks, in payment of these trucks, and asked me what I thought about the question of a bond which had come up. The bond was one which had been put up in an action in Pennsylvania, with which I was familiar. He also discussed with me the suggestion, which had been made, that the titles to the trucks be delivered to McGuigan. As near as I recall, I said either to him, or first to Robins and then to him, that it would be satisfactory to Mr. Robins, and so advised him to have the title delivered to McGuigan, or to Robins and Brogan, and if delivered to Robins and Brogan, they be then assigned to McGuigan as security.

Q. When you say McGuigan ——

A. McManus was the name of the man I referred to. Then Mr. Mount, discussing further the question of the bond, about which we were both familiar, stated that the Mack people should have some indemnity, inasmuch as the condition of that bond was that the trucks, was that the Mack Company would perfect their title to these trucks, or, failing to do so, would pay the amount of the bond, or whatever amount should be due under the bond. At that time, I recall stating to Mr. Mount that I had no objection, provided the titles to the cars were given either to McManus or Robins and Brogan, that I had no objection, as representing them, to the return of the trucks to the sheriff, if it could not be worked out in any other way. I think I qualified it to that extent. Under those circumstances, the trucks may be returned to the sheriff, and that way would take care of the matter as far as the release of the trucks was concerned thereafter. We were satisfied at this time to secure the titles in return for the money. That's my best recollection of what took place.

Q. Did Mr. Mount advise you whether or not he would or would not accept the offer of the unpaid balance?

A. He finally advised me that he would not accept the money. I think he stated that after I had said that I was satisfied that the trucks be returned to the sheriff, although I am not certain. My recollection is he said they would not accept the money, or deliver the titles.

Q. As a member of the Pennsylvania Bar, was it, in your opinion, possible for the Mack Truck Company to surrender the trucks to the sheriff, and become released of their bond?

Mr. Starr: Objected to. It seems to me if there is any statute on the subject, we ought to have the benefit of that.

The Court: The question is, as I take it, whether, or not, under the Pennsylvania law, the defendant could return the property to the sheriff, and be released from its bond. I think that's about the only question here involved.

Mr. Starr: It seems to me that is not involved here, and as an academic proposition, it is not competent, because that proposition was coupled with another element of the tender, which would have to be taken into consideration also. I think the question itself is incompetent.

The Court: I think it may be answered.

(Exception noted for defendant.)

The Court: I think you had better reframe the question, Mr. Allen.

Q. In view of the circumstances, which were present ——

The Court: No, that starts badly, leaves too much to the question of circumstances.

Q. In your opinion, as a member of the Pennsylvania Bar, could the Mack Truck Company have returned to the sheriff, the trucks involved in these proceedings, and have thereby secured a release of any possible obligation under their bond?

Mr. Starr: That's the same question.

The Court: My suggestion was that this witness be asked whether, under the Pennsylvania law, the defendant could have returned the property to the custody of the sheriff, and been thereby released of any obligation under the bond, which, he says, was given in that case.

Mr. Allen: Can you answer, Mr. Scott, the Court's question?

Mr. Starr: Objected to as immaterial, irrelevant and improper.

(Exception noted for defendant.)

A. In my opinion, yes.

Q. Has the State of Pennsylvania adopted an Act, known as the Uniform Conditional Sales Act?

A. Yes.

Q. Can you tell us when they adopted such an Act?

A. My recollection is that the Act was adopted in 1923 or 1925.

Q. I show you a copy of the Uniform Conditional Sales Act of New Jersey, and I will ask you whether or not the provisions contained in paragraph 18, section 18, and section 25, of the New Jersey Act, have been adopted in Pennsylvania?

Mr. Starr: We have the Pennsylvania statute here.

The Court: I suppose we ought to have the Pennsylvania statute.

Witness: May I see the Pennsylvania statute?

Mr. Starr: If you want to use this one, Mr. Scott, we will give you the benefit of it. You may introduce the Pennsylvania statute if you want to, Mr. Allen.

Mr. Allen: I will then, with Judge Starr's permission, offer the Pennsylvania statute.

(Received and marked.)

A. My answer would be they are the same.

The Court: The statute of Pennsylvania as contained in this volume, is offered, and admitted into evidence, pages 609 and 611, and the relevant sections of the Acts of 1925 of the General Assembly of Pennsylvania.

Witness: Yes, of the laws of Pennsylvania. May I qualify my answer to say there are certain minor differences, and also the Uniform Conditional Sales Act in Pennsylvania has been held not to comply in some respect to bailment laws.

Q. Under the Pennsylvania law ——

The Court: When you refer to bailment laws, you mean what has been here in this case referred to as the conditional sale, where possession is given to the conditional vendee, and title retained in the vendor?

Witness: Yes, they are considered differently in New Jersey than in Pennsylvania.

The Court: That's the sort of contract you refer to?

Witness: That's the sort of contract I refer to.

Q. Do you have in Pennsylvania different forms, that is, of conditional sales agreement, and bailment liens?

A. Yes, we use different forms there, which vary somewhat in their terms.

Q. Referring to Exhibits P1 and P2, are they conditional sales agreements or bailment liens?

A. They are conditional sales agreements, and are subject to the conditions of the Pennsylvania Conditional Sales Act, as distinguished from the bailment laws, which, in some respects, are not subject to the conditions.

Q. Under the Pennsylvania law is the vendor obliged to render to the vendee any evidence of title to a motor vehicle sold, after the full payment has been paid under the conditional sales agreement?

A. Yes, under the Motor Vehicle Act in Pennsylvania the holder of the lien, or encumbrance, is entitled to retain the certificate of title to the motor vehicle, which, however, is usually in the name of the vendee, with the encumbrance noted on the face of the title in favor of the vendor, the vendor being authorized to retain the certificate of title until the encumbrance shall have been satisfied, at which time the Act states that he shall surrender the certificate of title to the vendee.

Q. Is that certificate of title then in possession of the vendor, or the seller, up to the time that the actual encumbrance has been satisfied?

A. Yes, it is in the possession of the seller up until the encumbrance shall have been satisfied.

Q. Under the Pennsylvania law, does a purchaser, having satisfied the amount of the encumbrance described in the contract, does the purchaser have a

right to ask that such certificate of title be transferred to him?

A. Yes, the Act says that he shall receive the certificate of title, and I would construe that to mean he is entitled to insist upon it, and to demand it.

Cross-examination.

By Mr. Starr:

Q. When was the Motor Vehicle Act adopted in Pennsylvania.

A. If you will permit me to refer to the Act Sections, which I have with me.

Q. I have the pamphlet law here. Look at the laws of 1925, and see whether the Motor Vehicle Act is there?

A. I haven't that with me. I can't give you the exact date of it. I think it's May something, 1925.

Q. There's a slip, and on the back of a memorandum I made, if that will be of any benefit to you?

A. The Act approved 27th of April, 1925.

Q. Page 485?

A. Page 286.

Q. That's the statute that you have been talking about, isn't it?

A. I can tell you in just one minute. May I refer to a memorandum that I have?

Q. Yes, go ahead?

A. My testimony related to the later Act, as amended, of 1927. This morning, I gave Mr. Allen a memorandum of that.

Q. Is there any change between 1925 and 1927?

A. Yes, there are some changes.

Q. With regard to the Motor Vehicle Act, about which you have testified?

A. Some changes as to that, about which I have testified.

Q. What are the changes?

Mr. Allen: If I may interrupt, I think this is the memorandum which you sent me.

A. Section 203 of the Act of 1927 provides "That a certificate of title shall contain such description, and other evidence of identification of the motor vehicle for which it is issued as the secretary may deem necessary, together with a statement of any liens, or encumbrances, or legal claims, which the applicant may show to be thereon, together with the name and address of the holder, or holders, of any such liens, encumbrances, or legal claims. Where there are no liens, encumbrances, or legal claims upon the motor vehicle, the certificate of title shall be delivered to the owner; but, otherwise, the certificate of title shall be delivered to the person holding the first lien, encumbrance, or legal claim upon said motor vehicle, and be retained by such person until the amount of such first lien, encumbrance or legal claim is fully paid by the owner of said motor vehicle, when the said certificate of title shall be delivered to said owner by the person who held the first lien, encumbrance, or legal claim, with proper evidence of satisfaction of same. A corrected certificate of title, without statement of liens, encumbrances or legal claims shall be issued upon request of the owner, when the original certificate of title is returned with proper evidence that all such liens, encumbrances or legal claims have been satisfied." There are certain other provisions which follow that.

Q. Wherein is that different from the 1925 Act?

A. The Act of May 11th, 1927, pamphlet laws, 886, Section 203.

Q. When did that Act go into effect?

A. I could not give you the effective date without having the pamphlet laws here to actually get it.

Q. Do you know whether or not it was effective the 30th of July, 1927?

A. My recollection is ——

Q. I don't want you to guess at it?

A. I can't tell you without the Act.

Q. Where is that different from the Act of 1925?

A. In this respect, the Act of 1925, page 288 of the Act of 1925, reads as follows: "That no certificate of registration of any motor vehicle, or registration number plates therefor, shall hereafter be issued by the commissioner unless the owner thereof shall make application for, and be granted, an official certificate of title to such motor vehicle, or shall present satisfactory evidence that such certificate of title has been previously issued to the owner covering such motor vehicle, except as hereinafter provided. Said application shall be made upon a blank form to be furnished by the commissioner, and shall be acknowledged before a notary public, or other officer empowered to administer oaths, and shall contain a full description of the motor vehicle, together with a statement of the owner's title, and of any liens or encumbrances upon said motor vehicle, and whether possession is held under a lease, contract of conditional sale, or other like agreement. The commissioner shall use reasonable diligence in ascertaining whether or not the facts stated in said application for a certificate of title are true, and if satisfied that the applicant is the lawful owner of such motor vehicle, or is otherwise entitled to have the same registered in his name, he shall thereupon issue an appropriate certificate of title over his signature, and sealed with the seal of his office. Said certificate

of title shall contain such description and other evidence of identification of said motor vehicle as the commissioner may deem reasonably necessary and proper, together with a statement of any liens, or encumbrance, or legal claims, which the applicant may show to be thereon, together with the name and address of holder of said lien, encumbrance, or legal claim, and said certificate of title shall be delivered to the person holding the first lien, encumbrance, or legal claim, upon said motor vehicle, and retained by such person until the entire amount of such lien, encumbrance or legal claim is fully paid by the owner of said motor vehicle, when the said certificate of title shall be delivered to said owner." And there is more to the section, which is not relevant. I would say that the effect of the two Acts is the same, but the wording somewhat varies.

Q. You represented Robins and Brogan in the judgment which was obtained by Ziegler in Philadelphia?

A. Yes, I did.

Q. In July of 1927, that judgment, while it had been opened to the extent of $400 was still in full force and effect as to the balance?

A. As to the balance of $2,000, approximately.

Q. The judgment was a valid judgment, in full force and effect at that time?

A. Yes, to the best of my knowledge, it was.

Q. The agreement, which had been given, was in the usual form, was it not, prescribed by the statute?

A. I never saw the bond, but I assume the statute had been complied with.

Q. The statute makes it obligatory on the part of the claimant to furnish a bond where an interpleader is filed?

A. No, not unless the claimant desires to have possession of the vehicle. There may be interpleader proceedings without delivery of the vehicle to the claimant, in which case the bond would not be required.

(At this point a recess of five minutes was taken.)

(Last question and answer repeated.)

Q. Do you know the time when the statute was passed with reference to interpleader?

Mr. Allen: I think there's been no direct examination on the law of interpleader, and it is not proper cross-examination.

The Court: This witness stated, as I recall his testimony, that under Pennsylvania law the defendant here might have delivered this property, and been absolved from any liability under this bond.

A. I think I had better say there that I do not know the date of the statute, and would prefer to see the statute. I would like to look the law up.

Q. I have the book here. Is that the reason you make that answer?

A. I would prefer to see it. The latest legislation on that subject is the Act of 1927.

Q. 1927, is it not?

A. Yes, I believe that to be the latest.

Q. Look at this book, the laws of 1927, page 175, and tell us whether that's the Pennsylvania law on the subject.

The Court: Perhaps counsel can't now answer

the question as to when the amendment becomes effective.

Mr. Starr: He may use it, if he wants to.

A. That, to my knowledge, is the latest Act on the subject, as amended in 1927.

Q. The amendment of 1927 provides, does it not, that if, after the rule for interpleader is made absolute, plaintiff should fail to give his bond in accordance with clause 11 of this Act, then the sheriff, after being furnished with a certified copy indicating that no bond or statement has been filed, shall proceed with the sale as if no claim had been filed?

A. That's correct, the Act reads ——

Q. If the bond had not been filed, the sheriff might have proceeded with the sale of the property?

A. Assuming that the interpleader had been instituted after the effective date of this Act.

Q. The effective date?

A. The effective date in this case is 7th of April, 1927.

The Court: Was this Act then in effect?

Witness: If the interpleader had been instituted before the 7th of April, 1927 ——

The Court: This Act would not be operative?

Witness: Not as to that portion which is an amendment of July.

Q. I have a certified copy here. Tell us when the interpleader was instituted?

A. I see on the docket in favor of the plaintiff,

April 9th, but I don't see a record of the filing of the pleadings.

Q. There seems to be another in the Ziegler judgment docket ——

A. In the other side.

Q. Then in your suit, the Ziegler suit, the other suit is the King suit, it was consolidated with the Ziegler suit?

A. In the suit, one suit begun in No. 1 Court, January 15th, 1927, and that another suit was started in No. 5 Court, Common Pleas, on July 1, 1927, and that interpleader proceedings were instituted July 16th, 1927, after the date of the Act, so that the amended Act would apply.

By the Court:

Q. Your conclusion now is that the bond was necessary?

A. The original suit had been instituted before this amended Act, but the interpleader proceeding followed the adoption of the amendment.

Q. So that a bond was necessary?

A. Yes.

By Mr. Starr:

Q. Do you want to make use of the 1927 Act to give us the date of the effective date of the amendment on Motor Vehicle Registration?

A. There's a still later addition to the Act than this. The effective date of this Act was January 1st, 1928, the Act of May 11th, 1927.

By the Court:

Q. That's when Acts become operative, unless there is some provision to the contrary?

A. The Acts become operative upon the approval of the Governor, unless the Act, in its body, states when it is to become effective.

By Mr. Starr:

Q. This amendment you speak of, of 1927, did not become operative until the first of January, 1928?

A. That is correct, but I further stated that the Act of 1925 was substantially similar to the Act of 1927, yes.

Q. Having had your attention directed to the Act of 1927 with respect to the necessity of giving a bond in interpleader proceedings, do you desire to change your opinion as to the safety on the part of the Mack Company to re-deliver the trucks to the sheriff, and be discharged from the bond?

A. No, I think not, Judge Starr.

Q. Is there any statute which provides, as you have stated what the law of Pennsylvania is in that respect?

A. No, the statute merely provides for the entering of the bond, and subsequent proceedings thereon.

Q. Is there any statute, which provides that a person, who has given a bond, is claiming in an interpleader suit, can surrender the goods levied on by the sheriff, in the possession of the sheriff, and be relieved from the bond obliged to be given under the statute?

A. There's no statute to the best of my knowledge.

Q. Is there any decision in any Court in the State of Pennsylvania to that effect?

A. That, of course, I could not say with any definiteness without first having looked up the decisions.

Q. Your opinion, as stated here, is not predicated

upon any statute, or any decision of the Courts in the State of Pennsylvania?

A. My opinion ——

Q. Can't you answer yes, or no?

A. It is not predicated upon any statute, and it is not predicated upon any decision which I can cite at this time.

Q. Merely your opinion?

A. If I may explain further, it is predicated upon the experience, which I have had in connection with finance company matters, which led me to believe then, and leads me still to believe, that approximately one week alone had elapsed from the time of the filing of the bond, and the conversation that I had with Mr. Mount. In view of the short time which had elapsed, therefore, in view of the short time in which the trucks could have depreciated, that bond might then have been withdrawn, and the trucks returned to the sheriff, with the sheriff's consent.

Q. Under the practice in Pennsylvania, how could you get the bond withdrawn?

A. The bond could have been withdrawn in Pennsylvania, certainly at a local court.

Q. It would require application to the Court?

A. It probably would have required application to the Court, yes, unless, if I may go a little bit further, unless the consent of the attorney for the plaintiff, the judgment plaintiff ——

Q. The judgment plaintiff, Ziegler?

A. Yes.

Q. If he declined to give his consent, then the application to the Court?

A. An application to Court would very likely have been necessary.

Q. Is there anything in the statute which would

justify or authorize the Court to cancel the bond, upon surrender of the goods to the sheriff?

A. There's nothing in the statute which would prohibit that.

Q. Is there anything in the statute which permits it to be done?

A. The statute does not refer to it.

By the Court:

Q. In that event, the interpleader, however, under your statute, would not have proceeded to judgment in favor of the claim, would it?

A. The interpleader would not have been proceeded with at all. The interpleader in this particular case was filed, and the affidavit—by looking at the record—the affidavit of defense was filed by the judgment creditor, raising an issue, which would have to be tried out in the Court of Common Pleas.

Q. The affidavit of defense in the interpleader was a bare denial and nothing more?

A. It forms an issue.

Q. It forms an issue?

A. Yes.

Q. That was filed in this particular case?

A. I assume so. I will tell you in a moment. Affidavit of defense of interpleader, July 25th, 1927.

Q. The effect of that, if the affidavit had not been filed, there would have been a judgment entered in favor of the creditor on the interpleader?

A. Yes. May I refer again to the dockets to clear up one point?

Q. Yes.

A. It appears July 16th, 1927, on July 16th, 1927, the rule for interpleader was filed, and on the same day the rule became absolute. I assume that was

done also by application to the Court, as, ordinarily, the rule would not have become absolute until some time later.

Q. What date?

A. On the same day, July 16th.

Q. That was before the 30th of July?

A. Yes.

By the Court:

Q. The rule absolute was by order of the Court?

A. By order of the Court, it having appeared that he did not derive title from the execution defendant. That procedure is used where the claimant desires to obtain possession of the goods earlier than he otherwise would.

By the Court: And obtains where it is alleged that the title of the claimant is not derived from the execution debtor.

By Mr. Starr:

Q. I will call your attention to another statute, 1923, page 346 of the laws of 1923 ——

By the Court: Of Pennsylvania?

Q. —— of Pennsylvania, Section 2 particularly, and that refers to the giving of the bond, and also the filing of the interpleader in making the rule absolute?

A. Yes, I believe this is the Act, which was amended by the Act of 1927.

Q. Yes?

A. This is, likewise, an amendment of an earlier Act. This is an Act which covers the circumstances

which apply in this case, as I explained in my last answer.

Q. That proceeding creates an issue that has to be tried out between the execution creditor and the claimant with regard to the ownership and right of possession to the goods claimed, and which had been levied under execution?

A. May I have that question read?

(Question repeated.)

A. It presents an issue, which, if proceeded with, is tried out, yes.

Q. And the proceeding does not reach a finality until there is a trial, and termination of the issue involved by the inter-pleader and the affidavit of defense?

A. It does not reach a finality if the parties proceed thereon, in accordance with the Act, yes.

Q. I suppose they could agree, and dismiss the proceeding, if they wanted to, but in the absence of an agreement it would proceed, as the Ziegler law suit?

A. They could, undoubtedly, agree. They could have agreed in this case.

Q. It was conditional upon his agreement, was it not?

A. I have answered that. I would say, conditional either on his agreement, or upon the matter having been taken up with the Court, and it appearing to the Court that no one was being damaged.

By the Court:

Q. They have to have an agreement with the attorney for the plaintiff or with the Court?

A. Yes.

By Mr. Starr:

Q. The interpleader proceeding in Pennsylvania is purely statutory, is it not?

A. Yes.

Q. It is not any proceeding which has any foundation in common law?

A. No.

Q. And regulated entirely by statute?

A. Regulated by statute, yes.

Q. You don't know any provision in the statute, which would permit, or which would relieve a claimant who has given a bond in interpleader proceedings, by Legislature, of that bond, by merely surrendering the goods which were levied on, in the possession of the sheriff?

A. The statute would not have any provision relating to what might happen if the bond were terminated. It does not prohibit.

By the Court:

Q. But the statute does provide that on failure to give bond, the execution creditor or the sheriff may proceed to sell?

A. No, the 1927 amendment provides that.

Mr. Starr: There's a provision in the statute.

Q. I assume, therefore, if the claimant delivered the property, and withdrew the bond, it would be, for all practical purposes a withdrawal of the claim, except by agreement?

A. Except by agreement, yes.

Mr. Starr: May I have this marked for identification?

(Received and so marked.)

By Mr. Starr:

Q. I show you, Mr. Scott, an exemplified copy of the bond which was given in this particular case, and I ask you whether or not that is the usual form of bond given in inter-pleader proceedings?

Mr. Allen: Objected to, that is not cross-examination, first of all; and second, I think that the matter of the bond, the form of bond, is purely an affirmative defense.

The Court: How is it cross-examination?

Mr. Starr: He has testified about the fact of this particular bond, or the bond given in this case, based upon the surrender back to the custody of the sheriff, and I am asking him whether this is the bond.

The Court: I think he may answer.

(Exception noted for plaintiffs.)

A. This is a form of bond which is used in interpleader proceedings.

Q. And the bond is one which was required under the Interpleader Act?

A. The bond is in the words of the statute.

Q. That is, that claimant shall at all times maintain its title to said goods and chattels, or pay the value thereof to the party thereto entitled, and so forth, that's the ordinary bond?

A. Yes, that's part of the bond.

Q. Mr. Mount, in his conversation with you, when you were discussing the matter over the telephone,

said that the matter, which was chiefly in his mind, the difficulty which was chiefly in his mind, was, there was a suit pending in Pennsylvania, and the pendence of that suit involved their putting up a bond?

A. Yes, he said that.

Q. And the Mack Truck Company put up a bond for these cars, and prevented them from surrendering the cars to Robins and Brogan, and he felt that the Mack Truck Company should have some sort of indemnity or security before releasing the cars to Robins and Brogan. That's practically what he said?

A. I think so, yes, I believe so.

Q. You told me that you had been representing Robins and Brogan in litigation, that you had the judgment stayed, the Ziegler judgment stayed, with the idea of having either the judgment set aside, or the amount thereby reduced. You told us that, did you not?

A. At that time I had the judgment stayed preliminarily. I don't recall whether the Court had finally acted upon the petition or not. They did, however, finally act upon it, as I have already answered. Whether that was before or after the conversation, I don't recall. The previous testimony probably shows.

Q. Did you express the opinion to Mr. Mount at that time, in your judgment the bond would be released by the surender of the things to the sheriff?

A. I can't say that I did. I have no recollection of having said that, in so many words.

Q. In your talk with him?

A. My recollection is said "Mr. Mount, if you will give us the titles to the cars" referring to Robins and Brogan, or McManus and Bechtel, who were there to pay the money on their behalf, "if you will give us the titles to the cars and take the money, it

will be all right with us if you return the trucks to the sheriff. We will take the responsibility," or words to that effect.

Q. You mean you would take the responsibility under the interpleader?

A. That's the inference of what I said.

Q. Not that in your opinion they would be relieved, the Mack Company would be relieved from liability on the bond, if they surrendered the goods to the sheriff. You didn't put the proposition in so many words?

A. No, I didn't say that.

Q. Your whole conversation with him was to the effect that you did not think that Ziegler would be able to sustain his claim under the judgment against Robins and Brogan. Is that not a fact?

A. I would say that was not the whole conversation. I would say that I felt the Ziegler claim against Robins and Brogan should not have been sustained, not that I believed it would be sustained if it were contested.

Q. That was what you told Mr. Mount?

A. I believe I told Mr. Mount that.

By the Court:

Q. It was contested?

A. It was contested at the time I made the statement, and it was in two separate Courts.

Q. And was subsequently sustained in part?

A. Sustained in part, and nothing has ever been done on it, as far as I am concerned.

By Mr. Starr:

Q. You don't know?

A. The taking of these trucks has had its effect on the other action.

Q. Do you know what happened to the Ziegler judgment?

Mr. Allen: I feel that's immaterial.

The Court: Isuppose that this is in line with the examination on what he said to the attorney for the defendant.

Mr. Allen: What may have occurred, what happened, actually happened, in Henderson and Mount's office, on July 30th, may have had some great influence on what happened in this Ziegler matter. I think it is immaterial to the present issue.

The Court: I think he may answer.

(Exception noted for plaintiffs.)

A. All I know about that is hearsay. Nothing happened insofar as I have knowledge, as attorney of record.

Q. In the litigation you carried on, the judgment was affirmed to the extent of $2,000?

A. The judgment previously obtained was affirmed to the extent of, approximately, $2,000, and was opened as to the remainder.

Q. Opened as to $400 and sustained as to $2,000?

A. As far as I know it is still open as to the $400, that is as far as I have any knowledge of it.

By Mr. Allen:

Q. When you speak of this judgment having been sustained for $2,000, do you mean a previous judgment, or the judgment under which this interpleader was filed?

A. The two suits were consolidated under the rules of the Philadelphia Court into one suit, and the action of the Court was taken after the consolidation of the two suits into one.

Q. The same form of interpleader had been filed in the first suit, had it not?

A. The interpleader had been filed in one suit. The docket does not show it had ever been filed in the other, but only in one suit.

By the Court:

Q. That's the Ziegler suit?

A. Yes, as I recollect now. The testimony shows.

By Mr. Starr:

Q. The record shows there are two suits, subsequently consolidated, and judgment was entered in the Ziegler suit for $2,400, and execution was issued in that suit, under which these goods were levied. Then the interpleader suit followed that. Is not that right?

A. I could not answer that without the docket. They were merged, and it runs in my mind one was in Common Pleas No. 1 and was in No. 5, and attachment issued on judgment obtained in one of those suits. In one of these suits, interpleader proceedings were begun. The docket does not show that interpleader proceedings were begun in the other suit; but in the second suit, the docket does show the decision on the interpleader, while in the second case it does not show the filing of any interpleader proceedings, but it states in the amendment having been consolidated into one.

Q. The record shows the decision in the interpleader suit long after July, 1927?

A. Yes.

Q. That was tried out and determined in favor of the plaintiff, wasn't it?

A. Yes, the docket shows.

Q. That is, in favor of the Mack Truck Company?

A. The claimant, the Mack Truck Company.

Q. For the benefit of the jury, will you tell us just what this interpleader is?

A. Interpleader proceedings arise when one, having obtained a judgment, one person, having obtained a judgment against another, and having levied upon certain goods as the goods of that other person, a third person appears and claims those goods as belonging to him, the third person. The sheriff, having levied upon the goods, finds himself in the position of not knowing to whom these goods belong. The interpleader proceedings are then instituted for the benefit of the sheriff, you might say, in order that the sheriff may know who is entitled to the possession of the goods, and interpleader proceedings can then be tried out, to determine whether the person levying on the goods, the person having a claim, or judgment, against the goods, is entitled to proceed with his levy, or whether the third person coming in and claiming the goods as his own is entitled to receive them.

Q. As I understand it ——

By the Court:

Q. Are they the only cases in which interpleader is had in Pennsylvania?

A. No, I was making it more specific as to this particular one.

By Mr. Starr:

Q. As I understand the situation, Mr. Scott, in this particular instance ——

By the Court:

Q. This particular interpleader was for the purpose of determining the right of possession of this property, as between the judgment creditor, Ziegler, and the claimant?

A. Yes, that's the story.

By Mr. Starr:

Q. When the Mack Truck Company filed this interpleader, that was in the nature of a claim that they were the owners and legally entitled to these trucks?

A. Yes, that's right.

By the Court:

Q. They said further they were entitled to possession of them as against this judgment creditor?

A. Yes.

By Mr. Starr:

Q. And this was filed on July 16th, 1927?

A. Yes.

Q. In other words, that interpleader, or claim that the Mack Truck Company was the owner of these trucks, was filed before this conversation in Henderson's office?

A. Yes, that was filed on July 16th, 1927, and the rule became absolute on the same day.

Q. Subsequently, the Court of Common Pleas, or whatever Court it was actually tried in, found the Mack Truck Company were the owners of these goods?

A. Subsequently.

Q. As of July 16th?

A. Subsequently, that was the decision of the Court.

Q. And that was the issue that the Common Pleas Court in Philadelphia had to determine, was it not, who was the owner of these trucks, the owner of the legal title, as of July 16th, 1927?

A. And who was entitled to possession. Who was the owner and entitled to possession on that date.

Q. This record shows that the execution upon which the sheriff levied on the trucks was issued in the Ziegler suit against Robins and Brogan?

A. I didn't hear the question.

(Question repeated.)

A. May I see that? I believe that to be correct.

Q. You can tell by the bond?

A. Yes, that's correct.

(At this point a recess was taken until ten o'clock A. M., January 8th, 1930.)

Camden, New Jersey, January 8, 1930.

(Hearing of the case resumed pursuant to adjournment.)

Mr. Allen: If the Court please, I have two witnesses, who are the witnesses I want to call this morning and I am just informed they are on their way over and have not arrived yet. Two or three of the witnesses I excused, because I felt their testimony was largely cumulative and I did not want to take any unnecessary time. It leaves me in that position. I have just gotten word.

The Court: You have no other testimony?

Mr. Allen: Those two witnesses are the two whom I was going to depend on this morning.

The Court: You don't know how long they have been on their way?

Mr. Allen: Mr. Robins tells me they ought to be here any moment. There are a few questions I might ask Mr. Robins on recall.

EDMUND E. ROBINS, recalled.

By Mr. Allen:

Q. Mr. Robins, had you, in July and prior to July 21st, the date of the repossession of these trucks, sold any of those trucks?

A. Yes, sir.

Q. Which one had you sold?

A. The two-ton and a half truck.

Q. Now ——

A. The small truck, the Philadelphia contract.

Q. The small one of the seven trucks, is that what I am to understand?

A. Yes, sir.

Q. And to whom had you sold that truck?

A. A man by the name of Frank Cross.

Q. Had the truck been delivered to Mr. Cross?

A. The truck had been delivered.

Q. Did the Mack Truck Company know of that transaction?

A. Yes, sir.

Mr. Starr: Wait a moment. I suppose we are entitled to know to whom, representing the Mack Truck Company, the information was disclosed, and in any event it seems to me it is immaterial.

The Court: Well, I do not know the purpose for which it is offered but I think it ought to appear to whom the disclosure was made, if anybody.

Mr. Starr: See, under the terms of this contract ——

The Court: The sale could not be made without the written consent.

Mr. Allen: If your Honor please, in accordance with your Honor's ruling yesterday, if a sale of any of the trucks had actually been consummated, your Honor ruled that that evidence would be evidential of the value, not conclusive necessarily but at least evidential of the value of the truck.

The Court: It would be some evidence.

Mr. Allen: And in view of the Conditional Sales Act, we realize we must show the consent of the Mack Truck Company.

The Court: In writing. The contract says, "The written consent."

Mr. Allen: Of course, if your Honor please, I want to be perfectly frank. There was no written consent but I think I can show why there was not written consent.

The Court: I think, Mr. Allen, so far as appears, there was no consummated sale. The sale was not consummated. There was no sale. There was merely an agreement to sell.

Mr. Allen: There were two transactions, if your Honor please. The one about which the previous conversation was had, that is the one to which Richardson attempted to testify, was not consummated but I think I can show by this witness how the sale to Cross was consummated.

The Court: All right.

Mr. Starr: Well, my objection is, if your Honor please, it is immaterial and irrelevant and there could be no sale without the written consent under the contract.

The Court: Mr. Allen says he can show the sale was consummated, so I assume he intends to show the defendant consented in writing, otherwise they could not make title.

Mr. Starr: He has already stated there was no consent in writing.

Mr. Allen: I have stated that.

The Court: I think there could not be a consummated sale, there could not be a transfer of title without the written consent of the defendant, could there?

Mr. Allen: I think so, in this way ——

The Court: The legal title was in the defendant.

Mr. Allen: Well, yes, of course, the legal title was in the defendant but what I want to show is that the defendant corporation consented to a transfer of the equitable ownership.

The Court: In writing?

Mr. Allen: Of McGuigan and told them to go ahead and they would prepare the necessary assignments.

The Court: Then the sale was not consummated.

The sale was not consummated unless the title was transferred.

Mr. Allen: Of course, the legal title would not have been transferred.

The Court: Nor could any title be transferred without the written consent. The status, in other words, could not be changed without the written consent of the defendant.

Mr. Allen: No, but if an actual agreement had been reached between the parties, all of the parties concerned, that is, the plaintiff and defendant and third party, whereby a certain price was to be paid for a certain truck and the defendant gave an oral consent to that and said that they would prepare the necessary documents ——

The Court: Yes, but, Mr. Allen, don't you see ——

Mr. Allen: Excuse me just a minute, your Honor, and, in accordance with that, the possession, that is the physical possession of this particular truck had, with an oral consent of the defendant corporation, been delivered to the third party, I feel that would be a consummation of the transaction so far as the value of the truck is concerned.

The Court: If it was not for one purpose, it would not be for another. It either was or was not a completed transaction. Now, if it was a completed transaction, with the written consent of the defendant, as required by the contract, all right, but if it was not actually completed, the mere fact that

there was a delivery of possession in advance of the actual sale, the transfer would not make it a completed transaction.

Mr. Allen: May I have an exception to your Honor's ruling?

(Exception noted for plaintiffs.)

Mr. Allen: I also feel this testimony would be perfectly material and relevant on the further ground that, in all matters of trover and conversion, the intent or the knowledge of the defendant as to the facts and circumstances surrounding each case, are material.

The Court: Well, you have not alleged that, have you?

Mr. Starr: There is no allegation of punitive damages.

The Court: I fail to see it in the pleadings, if you have.

(After further argument.)

The Court: Well, ask your questions, Mr. Allen, and I will rule on them. It is apparent we will not get anywhere by further discussion. Go ahead.

Q. Mr. Robins, about the middle of July, 1927, did you have a conversation with Mr. Woehlring, the branch manager of the Mack Truck Corporation, relative to a proposed sale of one of your trucks to a man named Cross?

Mr. Starr: That is objected to, if your Honor please, it is immaterial and irrelevant. From the opening made by Mr. Allen, it is perfectly apparent that is not in issue. If there had been any proofs of lack of good faith, so far as Mr. Cross's transaction is concerned, it is not in the pleadings.

The Court: I think that is the only issue here and there is no allegation of bad faith, so that it seems to me this is not material. The objection is sustained.

(Exception noted for plaintiffs.)

(No cross-examination.)

FRANK MCGUIGAN, sworn.

By Mr. Allen:

Q. Mr. McGuigan, what is your full name?
A. Frank McGuigan.
Q. And are you the Frank McGuigan who is a party to this second contract in this suit, dated May 27, 1927, and which contract was marked Exhibit P2?
A. Yes, sir.
Q. And in accordance with that contract, Mr. McGuigan, were the five trucks described in this contract delivered to you?
A. Yes, sir.
Q. When did you first become interested in the firm of Robins & Brogan?
A. December, 1926.

Q. And did you then become a partner in that firm?

A. Yes, sir.

Q. There has been some mention, Mr. McGuigan, of a judgment against Robins & Brogan. Were you a defendant to that judgment?

Mr. Starr: I object, if your Honor please. It seems to me that is best shown by the record. I do not know whether he is or not but I think we ought to have the best evidence.

The Court: I suppose the best evidence is the record.

Mr. Allen: The record, if your Honor please, is pleaded by the defendant.

The Court: Yes.

Mr. Starr: If you want the benefit of the record that I have, I will let you have it so you can put it in evidence.

Mr. Allen: I do not feel, if your Honor please, that the record of this judgment is a matter of our case. This has been brought out as a part of a general conversation but I do feel I am entitled to show whether or not there was a judgment against this man in whose name the equitable title to all the trucks was placed.

The Court: All of them?

Mr. Allen: The five trucks under this second contract. I feel this witness would be entitled to say whether or not ——

The Court: I think I shall permit him to answer the question.

(Exception noted for defendant.)

Q. Will you answer the question?
A. The judgment was entered against ——

The Court: No, you are asked whether you were a defendant named in the judgment.

The Witness: Robins & Brogan were the defendants.

Q. Well, were you?
A. I was a partner.
Q. Was this judgment entered against you?
A. No.

Mr. Starr: Now, if your Honor please, it seems to me we are entitled to have the record, if there is any question.

The Court: Well, I do not know that this is a matter that requires the best evidence. Isn't it a collateral matter? Do you understand the question?

The Witness: Yes, sir.

The Court: Well, then, answer it directly.

Mr. Allen: I think he did answer, your Honor.

The Court: What was the answer?

(Answer repeated.)

The Court: I did not hear it.

Q. Mr. McGuigan, you paid one of the notes described in this bill of sale, didn't you, or the conditional bill of sale?

A. Yes, sir.

Q. And on or about July 16, 1927, did you have any conversation with Mr. Mount?

A. Mr. Mount?

Q. Mr. Mount, of the firm of Rawle & Henderson?

A. Yes.

Mr. Starr: What was the date, please?

Q. On or about July 16th, about these trucks?

A. Yes.

Q. Where did you see Mr. Mount?

A. Mr. Henderson's office, 15th and Chestnut.

Q. And did anyone accompany you there?

A. A man by the name of Mr. Dailey.

Q. Did you talk to Mr. Mount there?

A. And Mr. Bechtel.

Q. Did you talk to Mr. Mount?

A. Yes, sir.

Q. About these trucks?

A. Yes, sir.

Q. What was said in that conversation?

A. Mr. Mount, I understood at that time ——

The Court: No, what was said.

Q. What was said, Mr. McGuigan?

A. Mr. Mount said that he had got a bond up in behalf of the Mack Truck Company so the trucks could go to work.

Q. What did you say?

A. Well, I said, "That's O. K. We don't have to bother any more." He said, "No, the trucks are all ready to go to work."

Q. And did Mr. Mount then authorize you ——

The Court: Well, I suppose the better form is, "What was said?"

Q. Did Mr. Mount tell you what was to become of these trucks?

Mr. Starr: I object to that, if your Honor please, the conversation.

The Court: Yes, let him tell what was said.

Mr. Allen: The witness is inclined to ramble a little bit.

The Court: Let him tell what was said.

Q. You go on with the conversation then, Mr. McGuigan, give the whole conversation as you remember it, what you said when you went in there and what Mr. Mount said in reply and what you said to that.

A. Well, Mr. Mount said, asked me what I wanted and I told him I came over, I was instructed to come over to see him with reference to a bond and he asked me who instructed me. I told him Mr. Woehlring, of the Mack Truck Company, in Philadelphia, branch office, 42nd and Woodland Avenue, and I understood, I said, to Mr. Mount, "That you are working on this bond and I want to know whether you have done anything," and he said, "Yes, I have

that almost complete," and I says, "Well, what is the next move now for me?" Well, he said, "I am not quite finished but I think you are safe to go back and get your trucks to work any time," so I did not talk very much, did not have much conversation with Mr. Mount, we didn't say any more than that, except I went back, as far as I recall, to 42nd and Woodland Avenue and got ready to get the trucks to work.

Q. As a result of that conversation, did your firm retain possession of the trucks?

A. Yes, sir.

Q. And did they continue to operate the trucks?

A. Yes, sir.

Q. And when did you learn that your firm no longer had possession of the trucks?

A. Why, I would say about a week.

Mr. Starr: Now, if your Honor please, that is a conclusion. I think we ought to have what the facts are so the jury can determine whether they were or were not in possession.

The Court: Yes.

Q. What did you next learn about where the trucks were?

A. Well, the trucks kept working for four or five or six days, I just don't remember, about nine days, it was about a week, I would say, and Mr. Robins was in charge, in full charge of the trucks, and I first learned, when I came to the garage one evening, that the trucks had been taken the previous day. I had not been there until that night after thetrucks had been taken and Robins could not get in touch with me and I did not know anything of that until after I arrived there.

Q. After you learned that, Mr. McGuigan, what did you do?

A. I went to the Mack Truck Company Corporation, 42nd and Woodland.

Q. And whom did you see?

A. Saw Mr. Woehlring, the branch manager.

Q. Is Mr. Woehlring in court?

A. Yes, sir.

Q. You knew Mr. Woehlring, did you?

A. Yes, sir.

Q. What did you say to Mr. Woehlring at that time and what did he say to you?

A. Well, I asked Mr. Woehlring what seemed to be the trouble. I said, "I understand you have taken our trucks," and he says, "Yes." I asked him why he pulled the trucks. He said he was authorized by the Mack Company to do so, he executed the orders as he got them. I said, "Well, what is the cause?" He said, "Well, you owe us some money on notes. Balance of notes up to this date is not paid. There is some balance," he said. Well, I said, "That's news to me, I did not know if we owed you any." I said, "It cannot be very much, because Robins told me that he paid you money." Well, he said, "Robins did not pay me any money since the trucks were taken out in your name." I said, "I know that isn't so." He said, "I haven't seen Robins."

Mr. Starr: Pardon me. Now, if your Honor please, I do not want to be captious but it seems to me this testimony is not material because of the fact it is alleged in the complaint these gentlemen were in default in payment of the money due and that would justify the taking of the trucks under the terms of the contract and I do not understand the materiality of this testimony.

Mr. Allen: Well, if your Honor please, it is the same old story. If I were able to pick out the parts of the conversation that I want to allege, it would be a different situation, but Judge Starr has heretofore insisted the whole conversation be given and I have to give the conversation in order to lead up to the material parts.

The Court: There isn't any doubt, is there, about the default?

Mr. Allen: No, none whatever.

The Court: The money was due?

Mr. Allen: This is just a part of the general conversation.

The Court: Well, go ahead. If possible, get down to the material part.

Q. Go ahead with your conversation from that time. Leave out about your discussion as to whether or not there was anything due.

A. All right. Well, I said then, I asked Mr. Woehlring what did he demand of us or what he wished. He said, "The balance of the notes due up to date."

Q. Now, what was your answer, again?

A. I asked ——

Mr. Allen: Repeat the answer.

(Answer repeated.)

The Witness: And I asked Mr. Woehlring if that

was all that was necessary and he said, "That's absolutely all that is necessary." Well, I said, "I will have to try and see what we can do. I will be in again and we will comply with your demand as soon as possible," and the following day I think it was, I went in again.

Q. Was that before you received a written notice from the Mack Truck Company?

A. I don't recall. I think there was a written notice to that effect.

Q. Well, I say was this conversation before or after you received this communication of July 25th?

A. I think it was before. I am not sure, positive.

Q. I show you a copy, Mr. McGuigan, Exhibit P5, and ask you whether you, sometime subsequent to July 25th, received the original of that notice?

A. Yes. Ask the question again, please.

Q. I ask you whether sometime either on or shortly after July 25th you received the original of that notice?

A. Yes.

Q. And after you received that notice from the Mack Company, did you again get in touch with Mr. Woehlring?

A. Yes, sir, yes, sir.

Q. And when was that?

A. Well, it was shortly after the first interview I had with Mr. Woehlring. That might be two days. I am not just positive of the dates. It was somewhere, anyhow, after demand was made.

Q. And what was said in that interview?

A. Well, I said, "Mr. Woehlring, I am prepared to pay the notes." He said, "I cannot accept the notes, nothing but the total balance due."

Q. Where was Mr. Woehlring when he said that?

A. In the branch office, Philadelphia, same place.

Q. Go on with the conversation.

A. I said, "That's quite a proposition and I don't see why you ask it." He said, "It is the Mack Truck Company requested me to do so and I cannot do anything different. I am acting on behalf of the Mack Truck Company and that is the orders. Take it or leave it."—something to that effect—"I cannot do any more." Do you want me to go into the conversation?

Q. Yes, go ahead.

A. Well, there was something he said about, "Robins called me on the telephone and he asked me if he got the full amount, what would I say and I told him I would hug him and kiss him if he got the full amount, and money, I told him, money talks." So, well, I said, "It is possible for us to get the full amount, and if we do, to whom shall we pay it and where and when?" He said, "You will pay it to our lawyers, Mr. Henderson and Mr. Mount. It is entirely out of our hands. It is in the hands of the attorneys."

Q. And did he say when it would be necessary to pay that money?

A. The ten days mentioned that he gave us, he said, would expire on the following Saturday, if I remember correctly, at 12 o'clock noon, and he said no later, he said they would not accept any money off us in any shape or form later than 12 o'clock Saturday.

Q. And as a result of that conversation, did you go to the office of Mr. Henderson before 12 o'clock noon on the following Saturday?

A. Yes, sir.

Q. And with whom did you go?

A. I went with Mr. Robins, Mr. Bechtel and Mr. McManus and Mr. Pickel.

Q. And whom did you see?

A. I saw Mr. Henderson and Mr. Mount.

Q. Now, give, to the best of your recollection, the conversation that took place there.

A. Well, we got there at 11.30, about, and Mr. Henderson was busy and sent word out to the lobby to tell us to wait for a few minutes, and then he received us there about twenty minutes to twelve and he said, "I am busy. Just a moment. Excuse me for a moment," and he came back, he asked Mr. Mount could he take care of the boys. Mr. Mount said he thought he would be able. Mr. Henderson left the office, left the room, rather.

Q. Then did you and these other men go in?

A. We were all in there.

Q. Did you then talk to Mr. Mount?

A. Talked to Mr. Mount. Mr. Mount asked us, "What do you want?" we said, "We came up to pay the money and get the trucks, the full amount of money which was demanded," and we said, "We brought a little more than what we thought would be the full amount, to make sure that we have enough," and we wanted him to give us an account of what he thought it would be, and Mr. Mount said, "Well, do you understand we have a bond up?" He asked Mr. McManus if he understood it and Mr. McManus said yes. He said, "There has been an attachment on these trucks and we put up a bond and we cannot give you the trucks at this present time or at any time as far as I can see." Well, we said, Mr. Robins then, I think it was, got in touch with Mr. Scott on the telephone and Mr. Mount and Mr. Scott talked and discussed the matter and we finally, Mr. Robins and Mr. Scott, held a conversation in the presence of everybody and we finally arrived at a conclusion ——

Mr. Starr: No, I object to that.

The Court: Yes, tell what was said.

The Witness: All right. Mr. Scott said ——

The Court: No, you do not know what he said.

The Witness: All right.

Q. Now, after Mr. Scott and Mr. Robins got through talking, what then happened?

A. Mr. Robins said, "Let the trucks go back into the sheriff's hands and we will take care of the trucks, we will take care of the attachment, we will take care of everything, we will eliminate the Mack Truck Company from all blame or"—I don't remember the words exactly though—"any infringements on the bond or the dealings between us and Ziegler or anybody outside of the Mack Truck Company deal, as between you and I," Robins said, "and we want the trucks and we are paying you the money and why do you want the trucks and the money? Isn't it better to you than the trucks?" Well, Mr. Mount turned and said, that he did not know how much the trucks were worth. He said, "I don't think, they may be worth so much and they might be worth twenty-seven hundred," he said, "I don't know, anyhow," he said, "we put up a bond and we are going to hold the trucks."

Q. Was anything said about bill of sale or certificate of title?

A. Yes, Mr. Mount said, asked us what way we wanted the trucks. We said we wanted the titles made out to Mr. Bechtel and McManus, and he said no, could not do that, transfer the titles, he said he

would not do it, and further discussion, then, Mr. Robins, I don't know if he was instructed by Mr. Scott or not ——

Mr. Starr: No, I move that be stricken out.

The Court: Strike it out.

The Witness: Mr. Robins said, "Make the titles out in McGuigan's name or Robins & Brogan's name, either one, and give Mr. McManus credit for the encumbrance."

Q. What did Mr. Mount say to that?
A. Mr. Mount said, "No, nothing doing."
Q. Did Mr. Mount or Mr. Henderson accept the offer of the unpaid balance?
A. No, Mr. Henderson ——

Mr. Starr: I am entitled to have the conversation, if your Honor please.

The Court: Yes, I think so. Tell what was said.

The Witness: Well, about that time, Mr. Henderson came back to the office, into the room and he transacted most of the business from that time between Robins & Brogan and myself. Mr. Henderson turned to Mr. Bechtel and McManus and asked them, "Man to man, do you understand the situation?" He said, "Those boys have got attachments here and they're in a lot of trouble in different ways," and he said, "I want to tell you the situation as it is before you pay any money." Mr. Bechtel or McManus nodded and approved, they said they understood, or something to that effect, they under-

stood the conditions. Mr. Robins interrupted Mr. Henderson. He said that was not fair, that he would not stand for it, something to that effect. Mr. Mount said, "You keep quiet, Robins." Later on, Mr. Mount—Mr. Henderson, I should say, was talking the matter over and telling, well, he said he would not give us the trucks, could not give us the trucks, or could not accept the money on account of certain different things which was complicated and he said he would not give up the trucks, and Mr. Robins then interrupted him again a second time and he said, "We will pay the money, our money is here, the trucks is yours so far and we have a part in them and we are paying you the balance and why don't you give us the trucks and forget about all the other things? We did not come here to discuss things like that. We came here as demanded by the Mack Company, to pay the money and get the trucks." He opened the door and he said, "Mr. Robins, if you interrupt again, I will throw you out." Robins said, "No, you won't you might put me out, but you won't throw me," and he turned to —Mr. Henderson turned to Mr. McManus and he said, "Are you still willing to pay the money after you have heard all?" And Mr. McManus said, "Yes."

By Mr. Starr:

Q. What is that?

A. Mr. McManus said, "Yes, I am still willing to pay the money," and that time he tendered or offered the money, which was $12,020, a certified check for twelve thousand. Mr. Henderson looked at the check and said, "I can't, I won't accept it, that is final."

By Mr. Allen:

Q. Did he say why he would not accept it?

A. He had already said why. I think I testified to that.

Q. Now, either in the letter that had been sent to you on July 25th or in either of your conversations with Mr. Woehlring, in July, just one, I think you said was before you got that letter and one afterward, was anything said then about this bond or indemnifying the Mack Company?

A. No, there was nothing said about the bond then.

Q. Did the Mack Company or anyone for them, at any time prior to your meeting in Mr. Henderson's office on the last day, say anything about demanding a bond?

A. No.

Q. Had you had previous dealings with the Mack Truck Company?

A. Previous dealings?

Q. Previous to May 25, 1927?

A. Yes, sir.

Q. Had the Mack Truck Company at any time transferred certificates of title at anyone's request?

Mr. Starr: Objected to as immaterial and irrelevant.

The Court: Well, I suppose the question refers to the certificates in this particular case.

Mr. Allen: In this particular case.

Mr. Starr: I did not understand that. I understood it had reference to other transactions. Well, if that is the purpose ——

The Court: That I understood to be the purpose.

Mr. Allen: Possibly I better reframe the questions.

The Court: All right.

Q. Had the Mack Truck Company, at your request, previously transferred certificates of title to these trucks to your name?

A. Yes, sir.

Mr. Starr: Now, if your Honor please, I object to that. Of course, if that has reference to the transaction of May 27th ——

Mr. Allen: May 25th.

Mr. Starr: May 25th, I haven't any objection to it.

The Court: I understand it does.

Mr. Starr: The question is not limited to that, if your Honor please.

Q. On May 25, 1927, at the time that you entered into this contract for these trucks, May 27, 1927, did the Mack Truck Company, at the request of either you or Robins & Brogan, transfer the certificates of title to your name?

A. Yes, sir.

Mr. Starr: If your Honor please, it seems to me it is utterly irrelevant and immaterial whether that was done or not. Mr. Allen may have some purpose

that is not disclosed but as the record now stands and the question, it seems to me whether there was a transfer on May 27th or not is irrelevant. It is not the question in issue here.

Mr. Allen: If your Honor please, the question answers a double purpose, first, we want to show how McGuigan came into this picture and secondly to show it was not unusual for the Mack Truck Company to transfer these certificates of title.

The Court: I think your second reason is bad. The first reason, I understand, is not material, for the reason McGuigan made the contract.

Mr. Allen: If the Court please, one of the reasons that the Mack Truck Company says, or Judge Starr, rather, in his opening, said they refused to do this, take this money, was something about transfer of title. Of course, our testimony is ——

The Court: No, I think ——

Mr. Allen: The alternative ——

The Court: Wait. I think the opening, that part to which you refer, was, that there were two reasons why, in the office of the attorney, the offer was refused, namely, first, because there was this outstanding obligation of a bond in the proceeding in the Court of Common Pleas of Philadelphia, one reason that the defendant would not be relieved of this liability there; secondly that the demand was made that the title be transferred to some person other than these plaintiffs and that, under the terms of the contract, the defendant felt that it should make

the transfer to the plaintiffs and not to McManus and the other person.

Mr. Allen: If the Court please, that is the very reason I feel it is material to show and proper to show that in the past the Mack Truck Company had done that without any question or any reservation.

(After further argument.)

Mr. Allen: Very well, sir. Cross-examine.

Cross-examination.

By Mr. Starr:

Q. Mr. McGuigan, you said, in answer to a question put by Mr. Allen, that Mr. Henderson said, on the occasion of the interview in his office, on the 30th of July, that the reason the money could not be accepted was because of certain complications which he then explained. Now, what complications did he state with reference to their declination to take the money?

A. He did not express them individually. He just said there was complications.

Q. Didn't he say what they were?

A. Nothing, except he referred to a bond which he seemed to talk a lot about.

Q. He referred to the bond that had been given to the sheriff?

A. He made reference to the bond.

Q. Didn't he also say there were complications by reason of the request of McManus and Bechtel that titles be put in them as security?

A. He said he understood there was complica-

tions and he asked Mr. McManus did he understand it and that is where Mr. Robins interrupted Mr. Henderson.

Q. Did Mr. Henderson say that was one of the complications?

A. Not exactly. He said—he did not mention the complications by themselves, if I understand it.

Q. Did he mention any other complication except the existence of the sheriff's bond?

A. He did not mention them, no.

Q. Did Mr. Mount mention any complications except the sheriff's bond?

A. Well, as I recall it, I don't think so, but there might have been some words used to other individuals, but I don't recall them.

Q. This money that was there was not your money, you had no interest in the money at all?

Mr. Allen: I object to that, if the Court please, that is immaterial. As long as he went there with the person, it certainly indicates a clear authorization of the offer by these other people.

The Court: Well, that may be. I think he may answer it.

The Witness: The money was going to be tendered.

Q. What?

A. The person who was offering the money was coming in with me to tender the money on our behalf.

Q. But the money belonged to McManus and Bechtel, didn't it?

A. Yes.

Q. And they insisted to have the titles with the bill of sale made in their names when they advanced the money for you, isn't that a fact?

A. They asked ——

Q. Can't you answer that question?

A. No, I wouldn't say "insist."

Q. Well, they asked that that be done?

A. They asked that that be done first.

Q. This question was put to you at the former trial, "And they (speaking of McManus and Bechtel) insisted having the bill of sale made in their names when they advanced the money for you?" and you answered, "Yes, until we would repay them." Now, isn't that a fact?

A. Well, if I did, I don't think I insisted, the right word, if it is there, yes, I did.

Q. You say they requested it, whether they insisted or not, they requested that the titles and the bill of sale be made in their names?

A. First, yes, sir, the first request.

Q. And that is one of the things Mr. Mount said could not be done, didn't he?

A. Later on, he said.

Q. Now, when you talked to Mr. Woehlring, upon the occasion just before you received the notice of July 25th, he told you, didn't he, that any settlement with reference to the matter would have to be at the office of Henderson and Mount?

A. Yes, sir.

Q. That anything that you wanted to do with respect to the notice must be done with them?

A. Yes, sir.

Q. That he had no authority whatever to make any settlement with you?

A. That's right, at that time he said he had no more authority.

Q. Yes, and if there were any adjustments to be

made in accordance with the notice, you would have to make the arrangement with Henderson and Mount?

A. No, he said the matter was entirely out of their hands, it was in the hands of the attorneys now.

Q. It was out of Woehlring's hands and was in the hands of the attorneys?

A. Yes, but he did not mention the adjustments.

Q. You understood from that, that Henderson and Mount were to take care of any receipts of money that were to be paid by you thereafter?

A. I took it for granted, yes.

Mr. Starr: That is all.

Mr. Allen: If your Honor please, I have other witnesses but all their testimony would be cumulative on this conversation in Henderson's office, and I, therefore, feel, in justice to the Court and the jury, that I should rest the plaintiff's case.

Mr. Starr: Now, if your Honor please, I have some motions to make.

The Court: Ladies and gentlemen, you can take a recess now.

MOTIONS FOR NON-SUIT.

Mr. Starr: Now, if your Honor please, my motion is to non-suit the plaintiffs upon the following general ground: The proofs do not show that the plaintiffs or any of them made such a tender to the defendant as to justify a recovery against the de-

fendant, based upon a refusal of the defendant to accept the tender, for the cause of action set forth in the complaint; that the plaintiffs have not shown such title, ownership to the property or right of possession in the trucks referred to in the complaint, at the time formal tender was made, to justify a recovery against the defendant, for the cause of action set forth in the complaint.

(After argument.)

The Court: It seems to me that upon the pleadings and the proofs, this motion must be granted. The complaint alleges that the plaintiffs were in possession of certain property, under a conditional bill of sale made by the defendant, the vendor. The plaintiffs being admittedly in default, the defendant, the vendor, demanded that the unpaid and then due installments under the bill of sale be paid, otherwise the property would be sold. The plaintiffs allege that the defendant unlawfully and without justification declined to accept payment of the sums due and deprives the plaintiffs of possession and use of the property, and sue for the damages alleged to have been sustained by reason of such improper refusal. Now, that is the issue with which we are dealing and the proofs do not sustain a refusal by the defendant of that requirement, notice of which was given by the defendant. It seems to me that the defendant was never called upon, so far as the proofs go, to deal with the situation created by its demand. What the plaintiffs demanded was the performance by the defendant of something entirely different from that required by the statute and the bill of sale, and also something entirely different from that alleged in the pleadings to have been its duty and which the defendant refused to perform.

Again, this motion probably would have to be sustained upon the ground that the defendant was entitled, before it parted with title to the property, either without reservation to the vendees named in the contracts or to the vendees, with an encumbrance provision upon the Pennsylvania certificate of title, or otherwise, to be protected against possible liens or losses in the suit in which it has intervened by interpleader, to assert its right as against a judgment creditor of two of the plaintiffs. It must be borne in mind that we are dealing here with a question which is squarely raised by the pleadings, based upon the rights of the plaintiffs under the notice and not otherwise. To demand more than they had a right to demand of the defendant and to insist upon something which they could not, under their contracts or notice from the defendant require, and which course of proceedings would disadvantage the defendant in the interpleader suit, is neither within the scope of the pleadings nor perhaps in the situation created within the rights of the plaintiffs. In that situation, I am constrained to grant the motion.

Mr. Allen: If your Honor please, as to the reason which your Honor granted this motion, that the pleadings do not comply with the proofs, I desire, therefore, to move to amend paragraph five, to insert therein, it could not change the present situation, the proofs are already in, it would not take the defendant by any surprise—I, therefore, ask that the complaint be amended to provide that thereafter the defendant demanded of the plaintiffs that they pay the entire unpaid balance. It complies with the proofs, does not take defendant by surprise.

Mr. Starr: Well, I object to that, if your Honor please. I do not think we ought to have the issue

changed right in the midst of the trial of the case, after we have gone as far as we have and after the plaintiffs have rested, and in any event the other ground is sufficient, I think, to justify it.

The Court: Yes, I think so, too. I am very much impressed with the second ground and, therefore, the motion will be denied.

Mr. Allen: May I have an exception to both grounds, if there is a ruling on both grounds?

The Court: Well, there is a ruling on both grounds and you may have your exception to both rulings. It seems to me, I might say, with respect to the motion to amend, that in a cause of this sort we ought to have a square-cut issue, and this case has been tried upon one theory, and I think that, the statute not having run, the pleadings ought to squarely raise the issue. It involves rather complicated questions of law of a foreign jurisdiction as well as our own and I can see that the defendant may not have anticipated a change in the issue, and as is suggested by counsel for the defendant, may be seriously disadvantaged by being required to proceed now upon questions not raised and upon which the law of the State of Pennsylvania may be entirely different and which counsel is not prepared to deal with. It seems to me it will be better for you to begin over, if you care to, rather than to have the whole issue changed in the middle of a trial under the circumstances of this case.

Mr. Allen: If your Honor please, may I also have entered on the record an exception to the refusal of your Honor to permit the amendment?

The Court: I intended you should have an exception, first, to my granting the non-suit, and, second, to my refusal to accede to your motion to amend the complaint, so that there may be no question about it.

(Exceptions noted for plaintiffs.)

10

EXHIBIT P1.

Contract of August 14, 1926, attached to defendant's answer, page 35.

20

EXHIBIT P2.

Contract of May 27, 1927, attached to defendant's answer, page 28.

30

EXHIBIT P3.

1-7-30.

MACK-INTERNATIONAL MOTOR TRUCK CORPORATION

MACK Trucks The MACK Bus

"A Direct Factory Branch"

42nd St. & Woodland Ave., Philadelphia, Pa.

Bell Phone Wood 9112

Keystone West 2871

July 25, 1927

Mr. Frank McGuigan,
5340 Glenmore Avenue,
Philadelphia, Pa.

Dear Sir:

You are hereby notified that on July 21st, we have repossessed five (5) Mack Trucks, sold to you under Conditional Sale Agreement dated May 27, 1927, bearing Chassis Nos. 515975, 736231, 738315, 738316 and 737396, respectively.

As you are in default in the payments due thereunder, you are hereby notified that if at the expiration of ten days from July 21st, you do not tender the amount of all unpaid installments, with interest, we will proceed to dispose of the said trucks in accordance with the provisions of the Uniform Conditional Sales Act of the State of Pennsylvania.

Very truly yours,
MACK-INTERNATIONAL MOTOR TRUCK CORP.,
(Sgd.) H. L. Woehling
H. L. WOEHLING
BRANCH MANAGER

HLW:MBM

(In Pencil on Back.)

Notes

On July 26—I called up Mr. Woehling and asked him what I had to do to get the trucks back he told me that it was in-tirely out of his hands and was up to Henderson and myself to make what terms he saw fit. He also told me that they would not even consider leaveing them out again on lease, due to the fact that there has been to much trouble collecting ects. to please them. So I asked them if it everything would be alright and if I could get my trucks if I brought the money in in full and he told me they would be only to glad to as they could wash there hands claen of the whole deal then.

EXHIBIT P4.

1-7-30.

MACK-INTERNATIONAL MOTOR TRUCK CORPORATION

MACK Trucks The MACK Bus

"A Direct Factory Branch"

42nd St. & Woodland Ave., Philadelphia, Pa.

Bell Phone Wood 9112

Keystone West 2871

July 25, 1927

Michael Brogan and
Edmond E. Robins,
trading as Robins & Brogan
5340 Glenmore Avenue
Philadelphia, Pa.

Dear Sirs:

We hereby notify you that we have repossessed the five (5) Mack trucks bearing Chassis Nos. 515975,

736231, 738315, 738316, and 737396, respectively, sold under the terms of conditional sale, dated May 27, 1927, to Frank McGuigan. If these trucks are not redeemed within ten days of date of retaking by the payment of all unpaid installments due with interest, together with expense of retaking, keeping and storage, we will immediately proceed to dispose of the same in accordance with the provisions of the Uniform Conditional Sales Act of the State of Pennsylvania.

Also take notice that we have repossessed on July 21, 1927, two Mack Trucks, Chassis Nos. 732433, and 10310227, sold to you under conditional sale agreement dated August 14, 1926. Owing to the fact that you have defaulted in the payment of several installments, unless all past due installments with interest, together with expense of retaking, keeping and storage, are paid in full within ten days from July 21, 1927, we hereby notify you that we will immediately proceed to dispose of said trucks in accordance with the provisions of the uniform Conditional Sales Act of the State of New Jersey.

Very truly yours,
MACK-INTERNATIONAL MOTOR
TRUCK CORP.,
(Sgd.) H. L. Woehling
H. L. WOEHLING
BRANCH MANAGER

HLW:MBM

EXHIBIT P5.

Registered envelope addressed to Edmund E. Robins.

EXHIBIT P6.

1-7-30.

MACK-INTERNATIONAL MOTOR TRUCK CORPORATION

MACK Trucks The MACK Bus

"A Direct Factory Branch"

42nd St. & Woodland Ave., Philadelphia, Pa.

Bell Phone Wood 9112

Keystone West 2871

August 9th, 1927.

Edmond E. Robins & Michael Brogan
5340 Glenmore Avenue
Philadelphia, Pa.

Gentlemen:

You are hereby notified that by reason of your failure to redeem the two used Mack Trucks, Chassis #732433 and #10310227, respectively, sold to you under conditional sale agreement dated August 14, 1926, within ten days after the retaking of the same, they will be exposed to public sale for cash at the place of business of Mack International Motor Truck Corporation, 42nd Street and Woodland Avenue, Phila., Penna. on August 19th, 1927, at 10 o'clock A. M. Standard Time.

Very truly yours,
MACK-INTERNATIONAL MOTOR TRUCK CORPORATION
(Sgd.) F. A. Warner
F. A. WARNER
VICE PRESIDENT

FAW/IM

(In Pencil on Back.)

Bal. still due on trucks		
200.	7200.00	12020.00
400.	357.19	11854.16
500.		
500.	7557.19	165.84
500.	4296.97	
370.		
370.	11854.16	
370.		
370.		
370.		
346.97.		
4296.97		

EXHIBIT P7.

Same as P6.

POSTEA.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

EDMOND E. ROBINS and MICHAEL BROGAN, co-partners, trading as ROBINS & BROGAN, and FRANK McGUIGAN,
Plaintiffs,
v.
MACK INTERNATIONAL MOTOR TRUCK CORPORATION,
Defendant.

Action at Law.
Postea.

This case was tried at the Camden Circuit on January 6th, 7th, and 8th, 1930, before his Honor, Ralph W. E. Donges and a jury. At the end of the plaintiffs' case, the plaintiffs were non-suited by the order of the Court.

R. W. E. DONGES,
Circuit Court Judge.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

EDMOND E. ROBINS and MICHAEL BROGAN, co-partners, trading as ROBINS & BROGAN, and FRANK MCGUIGAN, *Plaintiffs,* v. MACK INTERNATIONAL MOTOR TRUCK CORPORATION, *Defendant.*	Action at Law. Notice of Appeal.

To Starr, Summerill & Lloyd, Esqs., Attorneys for Defendant:

Take notice, that the plaintiffs, Edmond E. Robins and Michael Brogan, co-partners trading as Robins & Brogan, and Frank McGuigan, appeal to the New Jersey Court of Errors and Appeals from the decision entered in this cause, on the following grounds:

1. That the trial Court erred in granting a nonsuit against the plaintiffs.

2. That the trial Court erred in excluding testimony on behalf of the plaintiffs.

3. That the trial Court erred in excluding testimony on behalf of the plaintiffs on the question of damages.

4. That the trial Court erred in permitting certain cross-examination over the objection of plaintiffs.

5. That the trial Court erred in not submitting the questions involved to the jury.

C. Richard Allen,
Attorney of Plaintiffs.

Dated: January 18, 1930.

[Endorsed]

Service of the within notice acknowledged this 21 day of January, 1930.
Starr, Summerill & Lloyd,
Attys. for Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

EDMOND E. ROBINS and MICHAEL BROGAN, co-partners, trading as ROBINS & BROGAN, and FRANK MCGUIGAN,

Plaintiffs-Appellants,

v.

MACK INTERNATIONAL MOTOR TRUCK CORPORATION,

Defendant-Appellee.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF PLAINTIFFS-APPELLANTS.

This was an action brought in the Supreme Court and tried in the Camden Circuit under the provisions of the Uniform Conditional Sales Act (N. J. P. L. 1919, p. 461) and the same Act as adopted in the Commonwealth of Pennsylvania (Act 1925, p. 609), (State of Case, p. 134, l. 10), to recover damages as provided in Section 25 of said Act, because

of the refusal by the conditional vendor to redeliver upon a tender of performance by the conditional vendee.

At the trial, the learned Judge gave judgment by non-suit against the plaintiffs (State of Case, pp. 184-185-186), on grounds which may be summarized as follows:

(a) That the plaintiffs tendered the full unpaid balance, whereas they were limited to the right to tender only the past due installments; and

(b) That the defendant was justified in refusing to pass property in the goods without having been protected against possible liens in which it had intervened by interpleader.

From this judgment by non-suit, the plaintiffs appeal.

The facts proven were, of course, uncontroverted and are as follows:

The three plaintiffs, Edmond E. Robins, Michael Brogan and Francis McGuigan were partners (State of Case, p. 53, ll. 9-12).

On August 14th, 1926, before McGuigan became a member of the firm, two of the partners entered into a conditional sales contract, which was offered in evidence as Exhibit P1 (State of Case, pp. 35-41). This was a New Jersey contract (State of Case, p. 53, l. 20).

Later, and as a result of other negotiations, and on May 27th, 1927, the third partner, McGuigan, entered into the contract marked Exhibit P2 (State of Case, pp. 28-34), which was a Pennsylvania contract (State of Case, p. 59, l. 30).

By virtue of these two contracts, plaintiffs agreed to buy and had possession of seven (7) Mack trucks. On July 21st, 1927, plaintiffs having made default in the payment of certain of the notes, the defendant corporation, without having given notice, described in Section 17 of the Act, repossessed the entire seven trucks (State of Case, p. 70, ll. 20-37; p. 71, ll. 1-8; Exhibits P3 and P4, p. 169, ll. 12, &c.).

Four or five days later, the defendant company notified the plaintiffs by letter that unless the trucks were redeemed within ten days of the retaking "by the payment of all unpaid installments due with interest together with expense of retaking and keeping in storage" (State of Case, pp. 70-71), the defendant would proceed to dispose of them. At about the same time, Mr. Woehlring, branch manager for the defendant (State of Case, p. 60, l. 29), verbally advised plaintiffs that in order for them to redeem, it would be necessary to pay off the entire purchase price (State of Case, p. 72, ll. 3-10; p. 69, l. 24; p. 171, l. 34).

On July 30th, 1927, the plaintiffs, as and when directed (State of Case, p. 172, l. 20), appeared at the office of defendant's attorneys in Philadelphia, and offered to pay the entire unpaid balance of the purchase price together with interest and costs of retaking (State of Case, p. 81, &c., pp. 130, 131; p. 172, &c.). The defendant corporation, through its attorneys, then refused to accept the payment and refused to redeliver possession of the trucks to the plaintiffs or to issue the muniments of title required under the laws of both New Jersey and Pennsylvania (State of Case, p. 139, l. 10; p. 174, l. 30; p. 135, l. 19), giving as its reason that it had previously filed a bond in an unrelated proceeding (State of Case, pp. 173-174; pp. 82-83-84).

It appeared that previous to this, a judgment was entered against Robins & Brogan, individually, but not against McGuigan, and that on or about July 13th, 1927, the sheriff of Philadelphia had levied upon the trucks in question including those covered by the McGuigan contract (State of Case, p. 102, l. 22, etc.; p. 165, l. 19; p. 166, l. 33; p. 167, ll. 1-4). On either the same or the following day, the Mack Corporation filed its statement of claim in interpleader together with its bond as required by the Pennsylvania Statute (State of Case, p. 167, l. 29, &c.), in which it set up that it was then the owner of the trucks seized by the defendant corporation for non-payment of notes, as aforesaid.

I.

PLAINTIFFS' OFFER TO PAY FULL BALANCE OF THE PURCHASE PRICE, WAS IN ACCORD WITH THE STATUTE AND THE PLEADINGS.

In ruling on this point, the learned trial Judge indicated that plaintiffs had offered too much when they had offered to pay the full purchase price and that in some manner not made clear by the trial Court, there had been a fatal variance between the pleadings and proofs; that had the plaintiffs offer been limited to the past due notes, they would have been within their rights, but that they had exceeded their rights in tendering the full balance, thereby demanding something different from that required by the statute.

As to the suggestion of variance, it is only necessary to point out that both the complaint and the

proofs clearly recited the demand set forth in Exhibits P3 and P4 (State of Case, pp. 188-189-190. Pleadings, pp. 4, 8, 12), and both plainly showed the tender of the full unpaid purchase price (State of Case, pp. 82, ll. 18, 19, 20; p. 173, l. 20; Pleadings, pp. 4, 8, 12).

In addition to this, there was testimony, admitted *without objections* (State of Case, p. 69, ll. 24-30; p. 171, l. 34) that defendant would demand the full balance. This was not variance. In fact, it was merely in accordance with the rule that Acts be stated according to their legal effect. At most, it was evidentiary of the intent of the defendant and since plaintiffs complied with the greater demand, *a fortiori,* there was a compliance with the lesser.

In the first place, so far as the proofs show, the tender was refused on one ground and upon one ground only (State of Case, p. 173, ll. 27-30; p. 83, ll. 8-12), and that was, to use the words of Mr. Scott (State of Case, p. 131) "that the Mack people should have some indemnity."

It is fundamental that an objection to the form or manner of a tender, where it is refused upon some other ground, must be taken as waived:

38 *Cyc.* 140:

> "The objection to a demand that change be furnished, is waived if the tender is refused upon some other ground, as where a larger sum is demanded—and it seems that a mere refusal to accept the amount tendered without specific objection that change is demanded waives the objection and validates the tender."

Idem. p. 141:

> "The objection to the amount of a tender must be taken at the time the tender is made,

otherwise, it is waived; and where the sum tendered is less than the sum due and the tender is refused by the creditor on some ground other than that the amount is too small, as where it is claimed that the contract is forfeited, tenderee waives the objection to insufficiency of the amount."

Larsen v. Breene (Colo.), 21 Pac. 498:

A refusal to accept a check for the sole reason that it was insufficient an amount, is a waiver of all objection to the form of the tender.

Breed v. Herd, 6 Pick. (Mass.) 356:

"Money need not always be brought forward as well as offered, especially if a party to whom the offer is made, refuses to receive it."

Trenton Street Railway Co. v. Lawler, 74 N. J. Eq. 828:

"A tender to one who anounces in advance that he will not accept, it is unnecessary."

The tender in the present case was not objected to because it was too great, or because it exceeds the demand, or because it was the full purchase price rather than the past due installments, but was refused solely because it did not include some kind of indemnity which the defendant sought, and having rejected the tender on that specific ground and for that specific reason, the defendant waived all other objections and it is now too late to raise, for the first time, an objection based upon some new reason.

The defendant corporation having raised in the minds of the plaintiffs a question as to what would

be accepted, can not now object that the greater of the demands had been complied with:

26 *R. C. L.* (Tender Sec. 20):

> "Tendering more than the amount due without demanding change is a good tender."

The written demand contained in the letters marked in evidence was:

> "If these trucks are not redeemed within ten days of retaking by the payment of all unpaid installments due with interest," etc. (State of Case, p. 190 and 189).

After plaintiffs had advised that they were prepared to pay the unpaid installments, the manager for the defendant told them, "I cannot accept the notes, nothing but the total balance due" (State of Case, p. 171, l. 33).

It is difficult to understand how plaintiffs could, in any other way, have offered anything else but what they did subsequently offer without inviting refusal.

Plaintiffs had a right to rely upon the verbal demand of the defendant's manager, that any payment short of the full balance would be unacceptable (State of Case, p. 69, ll. 25-29). The contract contained the usual provision "That upon any default in the payment of the principal or interest of any of the said notes, then the vendor may at its option, declare all of said notes immediately due and payable and the same shall thereupon become due and payable" (Exhibits P1 and P2, Section 6). The proof that the manager for the defendant corporation made such demand, was merely evidence of de-

fendant's intent to exercise its option to declare such payments immediately due. It may be questionable whether, in view of the language of the statute, the defendant corporation would have a right to insist upon such payment or forfeiture, but where the conditional vendee, as in this case, complied with such demand, then the vendor cannot refuse to accept such an offer, on the ground that it is not yet due.

The defendant is estopped from objecting to the tender as actually made.

Assuming that as an original proposition, the tender was excessive, and that this destroyed the value of the tender, still, upon the elementary principles of justice embodied in the doctrine of estoppel, the defendant had no right to reject the tender after its manager had informed the plaintiffs that in order to redeem the trucks it would be necessary to pay the whole of the unpaid balance.

10 *R. C. L. Estoppel, Sec.* 19:

> "The cases, therefore, must be looked to and applied by way of analogy rather than rule. The following, however, may be ventured as the rule of all cases: That a person is held to a representation made or a position assumed where otherwise inequitable consequences could result to another who, having a right to do so under all the circumstances of the case has, in good faith, relied thereon."

Having represented to the defendant that a certain amount must be paid and, having induced the plaintiffs, by that representation, to comply with this requirement, the defendant is estopped from saying at the last minute "your offer is more than we want" and, by repudiating its own previously

expressed position, extinguish or even diminish plaintiffs' rights.

The argument against defendant's conduct would be strong enough if they had fixed a sum, and later, after it was offered them, claimed a larger sum; but, how much stronger is the argument for estoppel where, as here, they fix a sum and then claim that they should have been offered a smaller sum?

Plaintiffs offered to pay the whole amount which, of necessity, is an offer to pay each of its parts.

38 *Cyc.* 139:

> "Where debtor offers in payment as the sum due, a larger sum than is actually due—tender is not objectionable, for a tender of the greater sum includes the lesser sum."

Idem. p. 140:

> "A person indebted upon two or more demands held by the same creditor, may make a tender of one entire sum upon all of the demands."

This is precisely what occurred in the present case. Plaintiffs were indebted to the defendant on several notes, all of which, according to both the contract and the verbal demand of the defendant, became due on the non-payment of any one of them, and, upon demand, and in accordance with the statute, made tender of the sums thereof.

But a further reason exists that the trial Court erred in non-suiting the plaintiffs on this ground. With due deference to the learned Judge's statement (State of Case, p. 184, l. 34), the plaintiffs in offering the full unpaid balance *tendered exactly what the statute gave them the right to tender and*

demanded only what under the laws of Pennsylvania (State of Case, p. 135, ll. 15-28; p. 139, ll. 13-14), and the law of this State (P. L. 1919, p. 357, and amendments thereto) *the defendant was obliged to do.*

Section 18 of the Uniform Conditional Sales Act (P. L. 1919, p. 467), which is also the law of Pennsylvania (State of Case, p. 134, l. 10) (Pa. Acts 1925, p. 609) provides:

> "If the seller does not give the notice of intention to retake described in Section 17, he shall retain the goods for ten days after the retaking within the State in which they were located when retaken during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred."

In the present instance the trucks were repossessed by the defendant "owing to the fact that you have defaulted in the payment of several installments" (Exhibit P5, State of Case, p. 190, ll. 14-15). It is, therefore, clear that "the amount due under the contract at the time of retaking" and "the promise for the breach of which the goods were retaken" were one and the same thing.

But, the statute is in the disjunctive and gives to the conditional vendee another alternative, to wit, the "performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods."

The third clause of the contracts in question (State of Case, p. 37, ll. 14-24) provides:

> "3. The conditions of this agreement are that * * * neither the said property nor the title thereto shall pass * * * *until said notes evidencing such installments of purchase price are paid in full in money.*"

It is therefore clear that "the conditions precedent to the passage of the property in the goods" was the payment in full of the notes evidencing the installments of the purchase price. This was precisely what the plaintiffs offered to do and what the defendant refused to accept.

It is for the vendee's protection that this statute was enacted and it is for the vendee to determine of which alternative in the statute he shall avail himself. The plaintiffs therefore clearly had the option of tendering, regardless of the demand made upon them, either the past due installments or, as was actually done, the full purchase price, that being the condition precedent to the passage of property in the goods.

The very purpose of the law is to protect a conditional vendee from just such harsh and oppressive forfeitures as is attempted by the defendant in this case, to preserve for him his right of redemption in the goods. Having availed themselves of the provisions of the statute and having offered to do the utmost that they could have been and were, in fact, called upon to do both under the law and their con-

tract, it is respectfully submitted that the judgment by non-suit was error.

II.

THE DEMAND FOR SO-CALLED INDEMNITY WAS UNWARRANTED IN LAW AND IT WAS ERROR TO NON-SUIT THE PLAINTIFFS FOR THEIR ALLEGED FAILURE TO COMPLY WITH SUCH DEMAND.

The trial Court also ruled, and gave as an additional reason for non-suiting the plaintiffs that (State of Case, p. 185, ll. 2-10):

> "Defendant was entitled, before it parted with title * * * to be protected against possible liens or losses in the suit in which it has intervened by interpleader, to assert its right as against a judgment creditor of two of the plaintiffs."

The learned trial Court's ruling was, therefore, based upon an assumption, that first, there had been a refusal to comply with the defendant's demand, that, secondly, there was some liability or loss against which defendant was entitled to indemnification and, lastly, that there was a provision in the law whereby the defendant was entitled to make such a demand. In this assumption the learned trial Court erred.

1. There Was No Refusal by the Plaintiffs.

As stated above there is nowhere in the case, any evidence of a specific demand stating what was ex-

pected of the plaintiffs, so far as this bond is concerned.

> (State of Case, p. 82, l. 30): "Have you people come prepared to take care of the bond?" (p. 83, l. 10): "We put up the bond and we have got to have *something* to take care of the bond;" (p. 131, l. 5): "that the Mack people should have *some* indemnity;" (p. 173, l. 27): "There has been an attachment on these trucks and we put upon a bond and we cannot give you the trucks at this present time or at any time as far as I can see;" (p. 174, l. 30): "we put up a bond and we are going to hold the trucks."

It is clear, therefore, that, according to the proofs, there was, in fact, no clear nor specific demand but, instead, the filing of the bond was used merely as an excuse for the defendant's refusal to comply with the provisions of the statute.

In this connection, it is important that, at no time, prior to the actual date of the tender (State of Case, p. 177, ll. 4-16) was there any mention made by the defendant of this bond. The defendant had written letters to the plaintiff setting forth what would be demanded and Mr. Woehlring, the defendant's manager, had made a demand, both of which demanded specific items of cash. Neither of these demands asked for either protection or indemnity.

There being no proof of positive demand there could not, of course, have been any refusal by the plaintiffs. On the other hand, however, plaintiffs did show a complete willingness to do all within their power.

(State of Case, p. 82, bot. p. 83 top): "We didn't come prepared. We have been working for the last two days to find out just how much money it took

to release this thing, no one would give us any information, no one would tell us how much to bring," (p. 83, l. 35) "and I asked Mr. Mount if he would accept the money and turn the title over to McManus and Bechtel, and have the trucks go back in the hands of the sheriff and Mr. Scott would take care of them;" and (p. 131, l. 11): "At that time, I recall stating to Mr. Mount that I had no objection, provided the titles to the cars were given either to McManus or Robins and Brogan, that I had no objection, as representing them, to the return of the trucks to the sheriff, *if it could not be worked out in any other way.*"

It is therefore clear that there was no specific demand and no refusal to "protect" or "indemnify" the defendant.

2. There Was no Liability Against Which Defendant Was Entitled to Be Indemnified.

The second premise of the trial Court's reasoning was that there was a possible liability to the defendant by reason of its bond.

It is clear that there was no liability or possibility of loss and that there was, therefore, nothing against which it need be indemnified.

The sole question raised by the defendant's claim in interpleader was, whether or not *on the date of the levy* (or on the date of the joinder of issue), the Mack Corporation was the owner of and was entitled to possession of the trucks which had then been seized by the sheriff. What might subsequently happen to those trucks was not in issue, nor could it be in issue unless and until the sheriff had

made some subsequent levy. It was claimed by the defendant that it was the owner of the trucks on the day the levy was made, and it was admitted by the plaintiffs that on that day, the defendant corporation was the owner of the legal title to said trucks. According to the testimony (State of Case, p. 156, ll. 1-5), the Philadelphia Court subsequently found that at the time it filed its claim the Mack Corporation was the owner of the trucks at the time it filed its claim.

(State of Case, p. 156):

> "Q. Subsequently, the Court of Common Pleas, or whatever court it was actually tried in, found the Mack Truck Company were the owners of these goods?
>
> A. Subsequently.
>
> Q. As of July 16th?
>
> A. Subsequently, that was the decision of the Court.
>
> Q. And that was the issue that the Common Pleas Court in Philadelphia had to determine, was it not, who was the owner of these trucks, the owner of the legal title, as of July 16th, 1927?
>
> A. And who was entitled to possession. Who was the owner and entitled to possession on that date."

If that be the case, there could have been no liability on the part of the Mack Corporation and if there was no liability, there was nothing to indemnify, so that the demand for indemnification was a mere empty one and had no actual meaning.

The bond was not in evidence and it is submitted that the issue could not properly have been determined until the whole matter had been placed in evidence by the defendant. However, the testimony

clearly shows that the interpleader was filed on or about July 13th and that issue was joined on the question raised on the interpleader, as of that date (State of Case, p. 156, l. 13).

The situation was precisely the same as a claim of property under the practice in this State. It is submitted that the issue raised on the claim of property is a question of title at the time of the levy.

If the levy had been made in this State and a claim of property were immediately made, the sole question which could be determined on the trial of the issue on the claim of property would be, whether or not the vendor, or claimant was *at the time of the levy* the owner of the goods levied upon.

If, after the date of the levy, the claimant parted with its title either by sale to a stranger or to its conditional vendee such fact could in no wise alter the issue already joined.

Both parties agree that on both the day of the Philadelphia levy and of the joinder of issue on the interpleader, the Mack Corporation was the owner of and was entitled to possession of the trucks levied upon in the Ziegler suit. That was subsequently found to be true by the Philadelphia Courts.

This finding by the Pennsylvania Court is, of course, binding upon our own.

It is, therefore, clear that there was no "possible lien or loss against which the defendant was entitled to be protected."

3. There is no Provision in Law Whereby Defendant Was Entitled to Make a Demand for Indemnification.

Assuming, but of course, not admitting that the statute is not the controlling factor as to what the

defendant could demand, then at most, the question of whether the defendant had a right, at the last minute and without previous notice, to demand indemnification would be resolved by the determination of whether or not such demand, under all of the circumstances of the case, was a reasonable one. Whether a condition is or is not reasonable is a question for the jury and should be submitted to the jury for its determination as a matter of fact.

This is especially so, where it is not clear whether a demand was actually made and, if so, just what that demand was and whether there had not been a compliance therewith.

Those were matters of defense and it was incumbent upon the defendant to show what its demand was and whether under all of the circumstances their demand was both reasonable in fact and warranted in law and that it was not estopped from making such a demand.

The doctrine of estoppel is of especial application here. Assuming that such a demand might have been made by the defendant, still it should have been made at the time the defendant gave its notice as to what was necessary before the plaintiffs could redeem. Having given the plaintiffs notice that it could redeem by the payment of certain sums of money, it was, by the rule already considered, estopped from making some greater or additional demand at the time of their compliance with the former.

This is especially so where there are no certain terms used at the time of the refusal as to what was demanded by the defendant.

The statute, however, is the real controlling factor. The statute limits the right of the conditional vendor and, under Section 18 of the Statute as pre-

viously quoted, the conditional vendees have the right to redeem the trucks by performance or tender of *either* of the three conditions imposed by the Statute, and no others.

The Statute is in the disjunctive and not in the conjunctive. This enables the vendee to reinstate himself or to acquire title to the goods by either (1) paying the amount in default at the time of the repossession, (2) by paying the full consideration, or (3) by performing whatever condition, the breach of which was the cause of the retaking by the vendor. The breach for which the goods were retaken was not the filing of the bond. The trucks were not repossessed either because a judgment had been entered against some of the plaintiffs or because the bond had been filed. The trucks were repossessed *solely because plaintiffs had made default in the payment of certain notes.* This is made clear from the written demand made by the defendant upon the plaintiffs (Exhibit P3 and P4). This is strengthened by the fact that the defendant, after filing its bond with the sheriff, had voluntarily returned the goods to the plaintiffs.

It is questionable whether under the contract in this case the trucks could have been repossessed because of a judgment. This is especially so as to the trucks covered in the McGuigan contract, since there was no judgment against him. But assuming that they had such a right, upon payment of all the money due them there would have been no further objection on this score.

Assuming again, without admitting, that the defendant did have such a right, it is clear that the trucks were not repossessed for that reason, and it is equally clear that under Section 18 of the Statute, there could have been no demand on the plaintiffs

because of the defendant's bond *unless the trucks had been repossessed for that express reason.*

In the present case, the trucks were repossessed for one reason only—the non-payment of notes. Two demands were made—to pay the past due notes and to pay the entire unpaid balance. The vendees complied with the greater of these demands, which was, of course, a compliance with the lesser. Then, at the last minute, without previous notice, the vendor suddenly makes another demand—one which had not been previously mentioned and which the plaintiffs were not immediately prepared to meet, and which was not required under the statute.

Whether defendant was justified in refusing to redeliver the trucks to the plaintiffs was a jury question.

38 *Cyc. Pg.* 2106:

> "Whether or not the evidence admitted amounts to proof of a conversion or shows conversion by defendant, are questions to be decided by the jury under proper instructions as to what constitutes an unlawful conversion."

And as suggested in the footnote on that page, the propriety of submitting the issue of conversion to the jury is illustrated in *McCormick v. Penna. Cent. R. Co.,* 49 N. Y. 303, in which it was held as a matter of law by Church, C. J. and Rappello, J., that there was no conversion, and by Grover and Packham, J.J., that there was.

And in the same footnote:

> "A qualified refusal to deliver goods to the owner may or may not constitute a conversion, and the question should be submitted to the jury under proper instructions."

The same rule seems to have been adopted, at lease by inference, in *Mausert v. Mutual Distributing Company,* 94 N. J. L. 222:

Since the present action is similar to that of a statutory conversion and since the plaintiffs showed a literal compliance on their part with the statute, the question whether or not there was an actual conversion by the defendant, became a jury question, and it is respectfully submitted that it was error for the Court to determine this question as a matter of law.

III.

ACTUAL DAMAGES INCLUDES ALL OF THE FINANCIAL LOSS SUFFERED BY THE PLAINTIFFS AS A DIRECT RESULT OF THE DEFENDANT'S UNLAWFUL ACT.

The trial Court ruled that plaintiffs' damages were limited to the value of the trucks as of July 30th, 1927, less the unpaid balance and plus interest on the difference from that date (State of Case, p. 66, l. 2); and in conformity with this ruling, refused to admit testimony involving loss of use (State of Case, p. 63, l. 28; p. 99, l. 5); loss of license fees (State of Case, p. 98, l. 30); loss of garage rent (State of Case, p. 98, l. 33); and other incidental damages (State of Case, p. 99, l. 20).

To each of these rulings, plaintiffs excepted, and it is respectfully submitted that the Court erred in refusing to consider or to permit the testimony involving these elements of damage.

Section 25 of the Uniform Conditional Sales Act provides that:

"If the seller fails to comply, etc., the buyer may recover—his actual damages ——"

I have been unable to find any case directly involving the construction of these words as used in this Act, either in the State of New Jersey or in any of the other States in which the Act has been adopted. Generally, however, the words "actual damages" are defined as synonymous with "compensatory damages."

17 *C. J.* 710:

"'Actual damages' is a term used as synonymous with 'compensatory damages' and with 'general damages,' although 'actual damages' may be either general or special. They are substantial as distinguished from nominal damages. The term 'actual damages' is also used to indicate such losses as are actually sustained and are susceptible of measurement and as used in this sense, the phrase 'determinate pecuniary loss' has been suggested as a more appropriate designation. However, as the term is otherwise used, there may be two classes of actual damages, one of which is susceptible of definite determination, and the other incapable thereof. Actual damages have been said also to include all damages except exemplary damages."

Idem, Pg. 728:

"It may be stated as a broad general rule that a wrongdoer is liable to the person injured in compensatory damages for all the natural and direct or proximate consequences of his wrongful act or omission, and conversely, subject to some qualifications and exceptions here-

inafter stated, that he is liable only for such consequences, and this rule is applicable in cases both of contract and of tort."

Words and Phrases (1st Series) Vol. 1, Pg. 155:
Western Union Tele. Co. v. Lawson (Kans.) 72 Pac. 283.

Words and Phrases (2d Series) Vol. 1, Pg. 91:
Birmingham Water Works v. Keiley (Ala.) 56 So. 838.

"Actual damages are such as are recoverable at law from a wrongdoer by the injured party as a matter of right, as compensation for the actual loss sustained by him by reason of the wrong."

Blow v. Joyner (N. C.) 72 S. E. 319:

"The term means 'substantial' as distinguished from 'nominal' damages."

Green v. Western Union Tele. Co. (N. C.) 49 S. E. 165:

"The term is synonymous with 'compensatory' damages."

Words & Phrases (3d Series) Vol. 1:
Winans v. Chapman (Kans.) 180 Pac. 266;
Arizona Copper Co. v. Burciaga (Ariz.) 177 Pac. 29.

The State of Washington uses the expression in connection with wrongful attachments, and in: *Seattle Crockery Co. v. Healey* (Wash.) 33 Pac. 650, it was held:

" 'Actual damages' do not include the proceeds of profits from the use of the property."

This theory was apparently reversed, however, in later cases in the same State.

Levy v. Fleischner, 40 Pac. 384:

> "As used in an Act authorizing the recovery of actual damages sustained by the wrongful issue of an attachment, the term 'actual damages' does *not* mean such damages as can be definitely determined as the actual loss which the debtor would incur by reason of the attachment, and which loss could be determined or computed, *but* an undetermined loss or damage, which is no less actual by reason of its indeterminate character, such as damage to reputation, damage to pride and to feeling, and damage of that character."

Ott v. Press Co. (Wash.) 82 Pac. 403:

The learned trial Court in rejecting all testimony relative to damages other than that which related entirely to the values of the trucks, did so upon the theory that the question of damages was governed by the common law theory of trover and conversion, and followed the several decisions of this State, which limited damages in such case, to value. However, since the statute uses the word "actual damages," it carries an inference that it meant that the vendees were entitled to such damages as were actually the result of the vendor's illegal acts and which would compensate the plaintiffs for all losses directly attributable to that act, and would include such damages as loss of profits on jobs actually under contract, forfeiting moneys and other incidental losses, which were the direct result of defendant's disregard of the law. It is, therefore, so far as damages are concerned, probably nearer to the theory of

trespass *de bonis asportatis* than to the doctrine of trover and conversion.

Hughes v. McDonough, 43 N. J. L. 459, (quoting *Rigby v. Hewitt,* 5 Exch. 242):

> "* * * but of this I am quite clear, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct."

Woolley v. Carter, 7 N. J. L. 85:

> "In an action of trespass for breaking the close, and taking and carrying away the goods and chattels, if the jury find for the plaintiff, they must find the value of the goods—. They must, besides, add to the value of the goods the incidental damages, because the value is not always a compensation for the injury; as if one take from his neighbor the beasts of the plow in seed time, or the implements of husbandry in harvest, whereby he is prevented from sowing his seed or reaping his corn; it is obvious that the value of the thing taken is the smallest part of the injury."

Luce v. Jones (E. & A.) 39 N. J. L. 707:

> "The true principle is that when personal property, in the actual use of the owner, is injured or taken by a trespasser, so that the owner is deprived of the use of it, the special damage necessarily and proximately attendant upon such privation, may if alleged in the pleadings, be proven to augment the damages beyond the mere value of the thing taken, or the diminution in value of the thing injured. Such a rule is

only a specification under the general rule that the plaintiff is entitled to compensation for the wrong done him."

Graves v. B. & N. Y. R. Co., 76 N. J. L. 362:

"It is also insisted that the Court erred in admitting evidence to show loss of sales in the business of the plaintiff by reason of the injury to his wagon and in charging the jury that they might find damages for loss of profits on goods which the plaintiff had orders to deliver on the morning of the accident and was unable to procure and deliver by reason of the injury to his wagon. The pertinent rule is that when personal property in the actual use of the owner is injured by a trespasser so that the owner is deprived of its use, the special damage necessarily and proximately attendant upon such privation may be proven to augment the damages beyond the diminution in value of the thing injured."

Standard Amusement Co. v. Champion, 76 N. J. L. 771 (E. & A.); *N. J. Express Co. v. Nichols* (E. & A.) 33 N. J. L. 434:

"In an action of tort, where the quantum of damages is very much within the discretion of the jury, evidence of the nature and extent of the plaintiff's business and the general rate of profit he realized therefrom, which has been interrupted by defendant's wrongful act, is properly received not on the ground of furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury to guide them in the exercise of that discretion which, to a certain extent, is always vested in the jury."

Since the Act specifically requires the conditional vendor to return the chattels to the conditional vendee, upon the latter's compliance with Section 18, it would seem that a refusal by the conditional vendor to return the goods would place the latter in the position of a trespasser *ab initio,* and that the law of trespass, rather than that of trover, would apply to determine the damages. However, the question is not so much one of whether an action brought directly under the statute is technically an action in the nature of one in trover and conversion, or one in trespass *de bonis asportatis.* In fact, the action is one directly under the statute which gives an expres sright to "actual damages."

"Actual damages" are "compensatory damages." The above definitions of this Court are of damages which compensate for the injury received.

It is also respectfully submitted that the Court erred in excluding testimony (State of Case, pp. 63, 162, 163) tending to show that the plaintiffs had, with the knowledge and consent of the defendant, entered into agreements for the sale of two of these trucks subject to the payment of the purchase price. It would certainly be material as showing a positive knowledge by the defendant of a loss which its own actions caused the plaintiffs to suffer.

To briefly summarize the entire case, we find that defendant repossessed seven trucks conditionally sold to the plaintiffs. The plaintiffs thereupon and within ten days thereof, tendered to the defendant the "condition precedent to the passage of property in the goods" to wit: the balance of the purchase price. This was a full and literal compliance with the statute and upon defendant's refusal to redeliver the trucks they became liable to the plaintiffs for their actual damages.

It is, therefore, submitted that the trial Court erred in not submitting the facts to the jury and in excluding the testimony referred to (State of Case, pp. 63, 66, 98, 99) on the question of what constituted "actual damages."

Respectfully submitted,

C. RICHARD ALLEN,
Attorney for and of Counsel with Plaintiffs-Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

EDMOND B. ROBINS and MICHAEL BROGAN, co-partners, trading as ROBINS & BROGAN and FRANK MCGUIGAN,

Plaintiffs-Appellants,

v.

MACK INTERNATIONAL MOTOR TRUCK CORPORATION,

Defendant-Respondent.

ON APPEAL FROM SUPREME COURT.

BRIEF ON BEHALF OF RESPONDENT.

This action was tried at the Camden Circuit on the issues raised by the complaint (C., p. 2), the answer (C., p. 15), amended answer (C., p. 44), and reply (C., p. 49).

It may be stated generally that the suit was to recover damages because of the refusal, on the part of the defendant, to surrender possession of certain trucks which had been sold on conditional sales contracts, by the defendant to the plaintiffs. There were two sets of trucks involved and the cause of action with respect to the refusal to surrender is set forth in the following paragraphs in the different counts of the complaint:

First count. Paragraphs 5 and 6 are as follows:

"5. On or about July 21st, 1927, plaintiffs "having become in default in the terms of said "contract, defendant did, without demand or "notice to the said plaintiffs, seize and take into "its possession said trucks. Thereafter and on "or about July 25th, 1927, defendant notified "plaintiffs of said repossession and in accor- "dance with the statute in such case made and "provided, directed the said plaintiffs to redeem "said trucks within ten days from the date "thereof by the payment of all past due install- "ments, interest and expenses.

"6. In accordance with said demand of defen- "dant, plaintiffs did thereafter and on or about "July 30th, 1927, offer to pay to the said defen- "dant the entire unpaid balance on said contract "together with interest, costs and charges for "the taking thereof, as required by said no- "tice."

With reference to the second count:

"8. Thereafter and on or about July 21st, "1927, plaintiffs having become in arrears un- "der the terms of said contract, the defendant "corporation did seize and take into its own "possession said five trucks.

"9. On or about July 25th, 1927, defendant "corporation notified the said plaintiffs that "should said trucks be not redeemed within ten "days of the date of said retaking, by the pay- "ment of all unpaid installments then due, with "interest, together with expenses of retaking, "and storage, said defendant would imme- "diately proceed to dispose of the same.

"10. Thereafter and on or about July 30th, "1927, and within said period of ten days, said

"plaintiffs, Frank McGuigan, Edmond E. Rob-
"ins and Michael Brogan, offered the said de-
"fendant corporation a sum of money sufficient
"to cover all unpaid installments then due, with
"interest, together with costs of said taking and
"storage, and sufficient moneys to cover all re-
"maining payments not yet due."

With reference to the third count:

"6. On or about said first day of July, 1927,
"or some time subsequent thereto, plaintiffs,
"being unable to meet the payments called for
"in said agreements, became in arrears in the
"payment of certain of said installments and
"made default therein.

"7. On or about July 21, 1927, by reason of
"said default, defendant corporation, in accor-
"dance with the statute in such case made and
"provided, repossessed said trucks and took the
"same into its own possession.

"8. Thereafter and on or about July 25th,
"1927, defendant corporation notified said
"plaintiffs and each of them, that it had so re-
"possessed said trucks, and further notified
"said plaintiffs to redeem the same in accor-
"dance with the provisions of the statute, in
"such case made and provided, by payment to
"it, the said defendant, within ten days, of all
"unpaid installments then due, together with
"interest and costs of retaking and storage."

The various counts also contained averments showing a full compliance, by the plaintiffs, of the demands of the defendant, which would entitle them to the possession of the trucks.

It will also be observed that these various paragraphs were all denied in the answer, and the third

defense to the entire complaint (C., p. 25), sets up that the overdue installments were represented by notes given by the plaintiffs maturing on certain dates and that the defendant had never, under the terms of the contracts, declared the remaining notes, then unmatured, to become due in accordance with the terms of the contracts. Obviously, therefore, the material issue raised by the pleadings upon this point, was whether or not, at the time the alleged tender was made, anything was due upon the various contracts except the balance of the unpaid installments, represented by the overdue notes.

The complaint alleges that demand was made for the unpaid installments and the offer was made by the plaintiffs to pay the same. There is no suggestion, in the complaint, that the offer of payment made by the plaintiffs included the entire balance due, a sum largely in excess of the unpaid overdue installments.

Upon this issue, thus squarely raised by the pleadings, the case was tried and one of the grounds upon which the learned trial Judge allowed the non-suit was because, as he very aptly stated, the complaint was based upon a refusal to accept the unpaid installments, whereas, as a matter of fact, proof was that no offer was made to pay merely the unpaid installments, but the proffer of the plaintiffs was to pay the entire balance due on the contracts, a sum largely in excess of the installments.

Another issue raised by the answer was that set forth in the first defense, as specifically set up in paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 (C., p. 22, *et seq.*).

Exhibit 3, attached to the answer, is a statement of claim, in interpleader, presented by the defendant when the trucks were seized by the sheriff (C., p. 42).

The plaintiffs were non-suited upon two grounds:

First: The question of sufficiency of the tender of performance as proven, compared with averments in the pleadings, which is disposed by the learned trial Judge in this language (C., p. 184, l. 20):

> "The plaintiffs allege that the defendant un-
> "lawfully and without justification declined to
> "accept payment of the sums due and deprives
> "the plaintiffs of possession and use of the
> "property, and sue for the damages alleged to
> "have been sustained by reason of such im-
> "proper refusal. Now, that is the issue with
> "which we are dealing and the proofs do not
> "sustain a refusal by the defendant of that re-
> "quirement, notice of which was given by the
> "defendant. It seems to me that the defendant
> "was never called upon, so far as the proofs
> "go, to deal with the situation created by its
> "demand. What the plaintiffs demanded was
> "the performance by the defendant of some-
> "thing entirely different from that required by
> "the statute and the bill of sale and also some-
> "thing entirely different from that alleged in
> "the pleadings to have been its duty and which
> "the defendant refused to perform."

Secondly: Upon the question of the outstanding bond given in the interpleader proceedings:

> "That the defendant was entitled, before it
> "parted with title to the property, either with-
> "out reservation to the vendees named in the
> "contracts, or to the vendors, with an encum-
> "brance provision upon the Pennsylvania cer-
> "tificate of title, or otherwise, to be protected
> "against possible liens or losses in the suit in
> "which it has intervened by interpleader, to as-

"sert its right as against a judgment creditor "of two of the plaintiffs. To demand more than "they had a right to demand of the defendant "and to insist upon something which they could "not, under their contracts or notice from the "defendant require, and which course of pro- "ceedings would disadvantage the defendant in "the interpleader suit, is neither within the "scope of the pleadings nor perhaps in the sit- "uation created within the rights of the plain- "tiffs" (C., p. 185, l. 3).

Therefore, the grounds upon which the non-suit was granted, are squarely predicated upon the issues raised by the pleadings, the terms of the contracts of sales, the rights of the defendant, because it had given a bond under the Pennsylvania statute respecting interpleader suits, and the demand made by the plaintiffs respecting the non-performance by the defendant, constituted the basis for the cause of action alleged in the complaint.

The contracts of sale involved in this proceeding are identical, so far as the general provisions are concerned and only differ respecting identity of the trucks, the amounts to be paid and the maturity dates of the notes given.

The agreement of May 27, 1927, was made in Pennsylvania and is to be construed under the Uniform Conditional Sales Act of that State, while the agreement of August 14, 1926, was made in New Jersey and is to be construed in accordance with our Uniform Conditional Sales Act.

Both agreements contain the following provisions:

"6. Upon any default in the payment of the "principal or interest of any of the said notes, "then the vendor may at its option declare all "of said notes immediately due and payable and

"the same shall thereupon become due and "payable, The vendee until such notes are paid "in full shall not sell, let, assign, encumber, use "for hire or dispose of the property (without "the written consent of the vendor) and the "vendee at his own expense shall keep and "maintain the property in good order and con- "dition, ordinary wear and tear excepted, dur- "ing the life of this agreement and the vendor "shall have the right at all times to inspect "and test said property. The purchaser at his "own expense shall keep the property free of "all liens, taxes and charges and shall at his "expense and in his name cause the property "to be registered and licensed in compliance "with law."

See C., p. 32, l. 6.
See C., p. 38, l. 34.

No proof was offered in the cause, showing that the defendant had ever exercised its option to declare all of the notes, due and payable, because of the non-payment of the overdue installments. In fact, by the written demands, Exhibits P3 (C., p. 188) and P4 (C., p. 189), the plaintiffs were notified of the defaults in payments thereunder and advised that if at the expiration of ten days from July 21, 1927, tender was not made of the amount of the unpaid installments with interest, the defendant would proceed to dispose of the trucks under the provisions of the Uniform Conditional Sales Act (C., p. 188, l. 24, and also C., p. 190, ll. 3 and 13).

The allegation as to the notice to redeem, set forth in the complaint, is based upon these two exhibits and shows conclusively that it was the purpose of the defendant to demand payment of the

overdue installments only, without any intention to exercise its option to mature the entire balance due.

What occurred at the time of the alleged tender appears from the cross-examination of the plaintiff, Robins (C., p. 99, l. 32, *et seq.*).

Under the New Jersey contract $1400 was in arrears, represented by promissory notes maturing May 20th, June 20th, and July 20, 1927. On the Pennsylvania contract $800 was due on notes payable July 1st and July 15, 1927. The tender made was something over $12,000, which was alleged to represent the entire balance due on the contracts and not $2200, represented by the unpaid installments.

Respecting the discussion as to the existence of the bond in the interpleader proceedings, cross-examination of Robins (C., p. 107), discloses the following:

> "Q. You remember being examined at the "former trial with regard to what occurred at "Mr. Henderson's and Mr. Mount's office on "either the 30th or 31st of July, 1927?
>
> "A. Yes, sir.
>
> "Q. The money that was taken there that day "belonged to McManus and Bechtel?
>
> "A. That's right.
>
> "Q. It was not your money?
>
> "A. No.
>
> "Q. You didn't furnish any portion of it?
>
> "A. No, sir.
>
> "Q. It was McManus and Bechtel, and not "you, who offered to pay the money to Mr. "Mount and Mr. Henderson, was it not?
>
> "A. It was myself, that money, that offered "to have the money put on the desk there. It "was me that took McManus and Bechtel there, "to pay on my behalf.

"Q. Do you remember testifying to this at "the trial before: Question, by myself, 'It was "not your money?' answer, 'No, sir.' Ques- "tion: 'And they made the tender?' answer, " 'Yes, sir.' You testified that, didn't you?

"A. Yes, they did.

"Q. You also testified at the former trial, in "answer to this question: 'And when they made "the tender, they asked Mr. Mount and Mr. "Henderson to give you back the trucks, and "to make out bills of sales in their names as "security for their money, until they were paid "off, that is right, isn't it?' and your answer "was: 'That is right.' That's the fact, is it?

"A. Yes.

"Q. That's what occurred?

"A. That's right.

"Q. And the question was then put: 'Until "you paid them off?' and your answer: 'That "is right, take the Mack's place.' That's what "you testified to, didn't you?

"A. In regard to what?

"Q. I am putting the question to you. I will "add another question: 'In other words, if they "advanced this money for you, the bill of sale "was to be made out in their names?' and "your answer was: 'That is right.'

"A. Certainly.

"Q. That's exactly what happened?

"A. Yes, sir.

"Q. And then the question was: 'Until you "paid them off?' and your answer was: 'That "is right, take the Mack's place.' That's right, "isn't it?

"A. Yes, sir.

"Q. And then this question was put to you: " 'And that is what Mr. Mount declined to do,

"to give bills of sale to them?' The answer, "your answer was: 'The first time, that was "the first thing he declined.' Is that right?

"A. Yes, sir.

"Mr. Allen: I think Judge Starr should com- "plete the answer. It's apparent the answer is "not finished.

"Mr. Starr: I gave the answer just as he "gave it.

"Mr. Allen: I am asking whether there is a "concluding phrase.

"Mr. Starr: I am putting the question as "the record shows.

"And then the next question was: 'And, of "course, the McManus and Bechtel people "would not make the advance, unless they got "the bills of sale in their names?' and your "answer was: 'No, they made one other of- "fer.' Is that right?

"A. Yes, sir, if it's there.

"Q. The next question was: 'What did Mr. "McManus and Mr. Bechtel say with reference "to putting up security for the bond in the "interpleader proceedings?' and your answer "was: 'Said that they didn't have it with them, "and had nothing to do with it.' Is that right?

"A. If it's there, it must be right.

"Q. And then the question was put to you: " 'They would not put up any bond, or give "any security with relation to that bond, would "they?' Your answer was: 'Did not have it "with them, and was not prepared for it.' Is "that right?

"A. Yes, sir.

"Q. That's what happened that day in Mr. "Mount's office?

"A. That's not all that happened.

"Q. That's not what I asked you. I am ask-
"ing you about this question?
"A. Yes, sir.
"Q. And the next question was: 'And you
"were unable, at that time, to protect the Mack
"Company from the bond which they had given
"to the sheriff, were you?' and your answer
"was: 'I was given them cash for the trucks.'
"Do you remember that question and answer?
"A. I don't recall it, no, sir.
"Q. Will you say you didn't say it?
"A. No, I won't.
"Q. The next question was: 'But you were
"not taking care of the bond in any way?'
"Answer: 'Only in this way, I was willing to
"release them from their bond.' Did you
"answer that question in that way?
"A. I don't remember.
"Q. What?
"A. I don't recall it.
"Q. I ask you whether, or not, you were
"asked this question: 'Well, now, you were
"examined in advance of the trial, Mr. Robins,
"in this case, and do you remember this ques-
"tion being put to you, "Did Mr. Henderson,
"or Mr. Mount, give any reason for not accept-
"ing the money when the tender was made?"
"And your answer was: "Yes." That is the
"way you testified, isn't it?' and your answer
"was: 'That is right.' Do you remember
"that?
"A. I recall part of it, yes, sir.
"Q. Is the answer there that you gave cor-
"rect or not?
"A. I don't know what happened two years
"ago.
"Q. You can't remember?

"A. No, sir, it's the same as what happened,
"to the best of my knowledge.

"Q. To the best of your knowledge, it did
"happen?

"A. Yes.

"Q. And then you were asked: 'And then
"the question was put to you, "What reason
"did they give to you?' and did you answer:
" "The first reason was, they claimed they
"wouldn't let the trucks go until they had put
"up enough cash to cover the bond to the
"sheriff," and did you answer: 'That is right.'
"Do you remember that testimony?

"A. I don't recall that particularly, no, sir.

"Q. And then the question was put: 'And
"the second was, they refused to turn the chat-
"tels over to McManus and Bechtel,' and did
"you answer: 'That is right.' Do you re-
"member that?

"A. Yes, sir.

"Q. And then this question was put to you:
" 'That is what happened, isn't it?' and you
"answered: 'That is right.' Then the ques-
"tion was put: 'And Mr. Bechtel and Mr. Mc-
"Manus would not put the money up until the
"chattels were turned over to them, that is
"the fact, isn't it?' and your answer was:
" 'That is the agreement ——'

"Mr. Allen: I feel that while I have no ob-
"jection to any of these questions—I thought
"possibly, the line of questions might tend to
"contradict the witness' present testimony.
"None of it, however, does contradict his pres-
"ent testimony. It confirms what he has already
"said. I, therefore, feel that this line of exami-
"nation is not proper.

"The Court: If it is for the purpose of con-
"tradiction.
"Mr. Starr: It is slightly different. The
"story, as then given, is different from what
"he is now testifying to.
"Mr. Allen: I haven't seen a thing that dif-
"fers from the present testimony.
"The Court: It may be the statements are
"not in exact accord, and if not, counsel is en-
"titled to have the benefit of it. The jury will
"have to determine that.
"Mr. Starr: What was my question?
"(Question repeated.)
"Mr. Starr: Do you remember that?
"A. I don't recall the conversation, no. I
"remember being asked a question about that,
"but I don't recall whether that's the one or
"not.
"Q. Have you recognized anything that I put
"to you that is not correct, up to date?
"A. Nothing that's incorrect."

The provisions of the Pennsylvania Uniform Conditional Sales Act, with reference to the obligations on the part of the conditional sale vendee and vendor, in case of default, are as follows (Ex. P8):

"Section 18. Redemption. If the seller does
"not give the notice of intention to retake de-
"scribed in section seventeen, he shall retain
"the goods for ten days after the retaking
"within the State in which they were located
"when retaken, during which period the buyer,
"upon payment or tender of the amount due
"under the contract at the time of retaking
"and interest, or upon performance or tender
"of performance of such other condition as may
"be named in the contract as precedent to the

"passage of the property in the goods, or upon "performance or tender of performance of any "other promise for the breach of which the "goods were retaken, and upon payment of "the expenses of retaking, keeping and stor- "age, may redeem the goods and become en- "titled to take possession of them and to con- "tinue in the performance of the contract as if "no default had occurred. Upon written de- "mand delivered personally or by registered "mail by the buyer, the seller shall furnish to "the buyer a written statement of the sum due "under the contract and the expense of retak- "ing, keeping and storage. For failure to "furnish such statement within a reasonable "time after demand the seller shall forfeit to "the buyer ten dollars and also be liable to "him for all damages suffered because of such "failure. If the goods are perishable so that "retention for ten days as herein prescribed "would result in their destruction or substan- "tial injury, the provisions of this section shall "not apply and the seller may resell the goods "immediately upon their retaking. The pro- "vision of this section requiring the retention "of the goods within the State during the pe- "riod allowed for redemption shall not apply to "the goods described in section eight."

The wording of Section 18 of the New Jersey Act, Pamphlet Laws of 1919, Chapter 210, page 467, is identical with the wording of the above-quoted section of the Pennsylvania Act.

Manifestly, no power existed, in either the vendor or vendee, to alter the terms of the contracts above referred to, or change, in any manner, the provisions of the statute with reference to performance

of those terms and the rights of the various parties in case of breach.

Section 26 of the Pennsylvania Statute provides as follows:

> "Section 26. Waiver of Statutory Protec-
> "tion. No act or agreement of the buyer be-
> "fore or at the time of the making of the con-
> "tract nor any agreement or statement by the
> "buyer in such contract shall constitute a valid
> "waiver of the provisions of sections eighteen,
> "nineteen, twenty, twenty-one and twenty-five,
> "except that the contract may stipulate that,
> "on such default of the buyer as is provided
> "for in section sixteen, the seller may rescind
> "the conditional sale either as to all the goods
> "or as to any part thereof for which a specific
> "price was fixed in the contract. If the con-
> "tract thus provides for rescission, the seller
> "at his option may retake such goods without
> "complying with or being bound by the pro-
> "visions of sections seventeen to twenty-five,
> "inclusive, as to the goods retaken, upon cred-
> "iting the buyer with the full purchase price
> "of those goods. So much of this credit as is
> "necessary to cancel any indebtedness of the
> "buyer to the seller shall be so applied and
> "the seller shall repay to the buyer on demand
> "any surplus not so required."

The New Jersey Act, Pamphlet Laws 1919, Chapter 210, page 470, provides as follows:

> "No act or agreement of the buyer before
> "or at the time of the making of the contract,
> "nor any agreement or statement by the buyer
> "in such contract, shall constitute a valid
> "waiver of the provisions of sections eighteen,

"nineteen, twenty, twenty-one and twenty-
"five."

Manifestly, therefore, the terms of the contract and the provision of the statute, as well as the demand made by the defendant, absolutely controls the contractual relation between the parties, and it is only by the non-compliance with these terms could the defendant have been put in default so as to permit a recovery for the cause of action set forth in the complaint.

In the absence of any exercise of the option to declare all the notes due, the plaintiffs would have been entitled, upon their part, to possession of the trucks, had they made a tender of the amount of the unpaid installments and otherwise complied with the provisions of the demand. Tender not being in accordance with the notice and the rights of the parties, the defendant was not obliged to recognize the tender and the refusal to accept same did not establish a valid cause of action against it, as set up in the pleadings.

The second ground, for the non-suit, given by the learned trial Judge, can also be supported, by the pleadings and facts established on the plaintiff's case.

Under the provisions of Section 6 in each of the conditional sales contracts, the vendee agreed that:

"The purchaser, at his own expense, shall
"keep the property free of all liens, taxes and
"charges, and shall, at his expense and in his
"name, cause the property to be registered and
"licensed, according to law."

This the vendee failed to do. All of the trucks were taken in execution by the Sheriff of the County of Philadelphia under a judgment recovered in

favor of one Ziegler against Robins and Brogan, and to protect the defendant in its ownership and right of possession of the trucks, it was obliged to file an interpleader suit based upon the Pennsylvania Statute in this regard.

The condition of the bond, given by the defendant, was, in the words of the statute, "that the "complainant shall at all times maintain its title "to said goods and chattels or pay the value thereof "to the party thereto entitled."

Mr. Hugh Scott, a member of the Philadelphia Bar, was called as a witness, on behalf of the plaintiffs, and testified, in effect, that it was necessary for the bond to be given (C. P. 142, l. 23).

At first, Mr. Scott testified as follows:

"Q. Having had your attention directed to "the Act of 1927 with respect to the necessity "of giving a bond in interpleader proceedings, "do you desire to change your opinion as to "the safety on the part of the Mack Company "to re-deliver the trucks to the sheriff, and be "discharged from the bond?

"A. No, I think not, Judge Starr."

Subsequently, he testified as follows:

"Q. Under the practice in Pennsylvania, how "could you get the bond withdrawn?

"A. The bond could have been withdrawn in "Pennsylvania, certainly at a local court.

"Q. It would require application to the "court?

"A. It probably would have required appli- "cation to the court, yes, unless, if I may go "a little bit further, unless the consent of the "attorney for the plaintiff, the judgment plain- "tiff ——

"Q. The judgment plaintiff, Ziegler?

"A. Yes.

"Q. If he declined to give his consent, then "the application to the court?

"A. An application to court would very "likely have been necessary.

"Q. Is there anything in the statute which "would justify or authorize the Court to cancel "the bond, upon surrender of the goods to the "sheriff?

"A. There's nothing in the statute which "would prohibit that.

"Q. Is there anything in the statute which "permit it to be done?

"A. The statute does not refer to it" (C. P. 144).

"Q. That proceeding creates an issue that "has to be tried out between the execution "creditor and the claimant with regard to the "ownership and right of possession to the "goods claimed, and which had been levied "under execution?

"A. May I have that question read?

"(Question repeated.)

"A. It presents an issue which, if proceeded "with, is tried out, yes.

"Q. And the proceeding does not reach a "finality until there is a trial, and termination "of the issue involved by the interpleader and "the affidavit of defense?

"A. It does not reach a finality if the parties "proceed thereon, in accordance with the Act, "yes.

"Q. I suppose they could agree, and dismiss "the proceeding, if they wanted to, but in the "absence of an agreement it would proceed, "as the Ziegler law suit?

"A. They could, undoubtedly, agree. They "could have agreed in this case.

"Q. It was conditional upon his agreement, "was it not?

"A. I have answered that. I would say, con- "ditional either on his agreement, or upon the "matter having been taken up with the Court, "and it appearing to the Court that no one was "being damaged.

"By the Court:

"Q. They have to have an agreement with "the attorney for the plaintiff or with the "Court?

"A. Yes.

"By Mr. Starr:

"Q. The interpleader proceeding in Pennsyl- "vania is purely statutory, is it not?

"A. Yes.

"Q. It is not any proceeding which has any "foundation in common law?

"A. No.

"Q. And regulated entirely by statute?

"A. Regulated by statute, yes.

"Q. You don't know any provision in the "statute, which would permit, or which would "relieve a claimant who has given a bond in "interpleader proceedings, by Legislature, of "that bond, by merely surrendering the goods "which were levied on, in the possession of the "sheriff?

"A. The statute would not have any provi- "sion relating to what might happen if the bond "were terminated. It does not prohibit.

"By the Court:

"Q. But the statute does provide that on "failure to give bond, the execution creditor or "the sheriff may proceed to sell?

"A. No, the 1927 Amendment provides that.

"Mr. Starr: There's a provision in the "statute.

"Q. I assume, therefore, if the claimant de- "livered the property, and withdrew the bond, "it would be, for all practical purposes, a with- "drawal of the claim, except by agreement?

"A. Except by agreement, yes" (C. P. 147-148).

Mr. Scott also described the interpleader proceedings in Pennsylvania as follows:

"A. Interpleader proceedings arise when "one, having obtained a judgment, one person, "having obtained a judgment against another, "and having levied upon certain goods as the "goods of that other person, a third person "appears and claims those goods as belonging "to him, the third person. The sheriff, having "levied upon the goods, finds himself in the "position of not knowing to whom these goods "belong. The interpleader proceedings are "then instituted for the benefit of the sheriff, "you might say, in order that the sheriff may "know who is entitled to the possession of the "goods, and interpleader proceedings can then "be tried out, to determine whether the person "levying on the goods, the person having a "claim, or judgment, against the goods, is en- "titled to proceed with his levy, or whether the "third person coming in and claiming the goods "as his own is entitled to receive them" (C. P. 154, l. 10).

The gist of this testimony of Mr. Scott, is that if the Mack Company had not filed an interpleader

and given a bond, the trucks, which were the subject-matter of the conditional sales contracts, could have been sold by the sheriff.

The rule for interpleader, which was made absolute by the Court in Philadelphia, created an issue between the judgment creditor, Ziegler, and the claimant, Mack Truck Company, in which was to be tried the title to the personal property thus levied on. The condition of the bond, given by the defendant, was that it would at all times maintain its title to the property or pay to the judgment creditor the value of the goods taken.

The effect of this outstanding bond was to require the defendant, when the issue in the interpleader was tried, to show that it was the owner or entitled to possession of the personal property at all times, or to pay the value thereof to the judgment creditor. This bond was in full force and effect when the alleged tender was made. Concededly, Bechtel and McManus, whose money was being used to pay off the defendant, would not complete their tender unless they knew that they were getting a good title to the trucks. The defendant could not surrender the trucks either to the original vendor or to Bechtel and McManus without still remaining liable under the bond, to pay the judgment creditor the value of the trucks, if its title was not maintained. This liability under the bond could not be cancelled without an order of Court or by the consent of the judgment creditor, neither of which was offered or tendered, nor could, under the testimony, have been obtained when the tender was made.

If the defendant surrendered the trucks, even if the full amount due under the contracts was paid, it would have lost its right to protect itself from liability under the bond and still be subjected to a claim in the interpleader proceedings, on which

there might have been a full recovery against it of the value of the trucks so surrendered.

This being the situation, we insist that the defendant was justified in refusing to surrender the trucks, without being sufficiently indemnified against this outstanding bond liability, brought about exclusively by failure on the part of the plaintiffs, as conditional vendees, at all times, at their own expense, to keep and maintain the trucks free of all liens.

The principles involved with respect to the question of tender seem to be as follows:

> "It is a general rule that a tender, to be "effectual, must be unconditional, or, as some- "times expressed, it must be without conditions "to which the creditor can have a valid objec- "tion or which will be prejudicial to his rights."
>
> 26 R. C. L., p. 640, para. 21.

In 13 C. J., p. 669, the rule is stated as follows:

> "Where a person is to perform an act, the "obligation to perform which is independent "of any precedent or concurrent act to be per- "formed by the other party, the thing to be "delivered must be tendered unconditionally, "and a tender of performance may be accom- "panied by such conditions as to acceptance as "are, by the contract, conditions precedent to "be performed by the party to whom the tender "is made, and which, therefore, the tenderer "has a clear right to exact."

In the case of *Whittaker v. Belvidere Roller Mill Co.*, 55 N. J. Eq. 674, Vice-Chancellor Grey, in his opinion, makes the following statement:

> "The efficiency of the tender claimed to have

"been made is denied upon the ground that the "offer was not a tender of the payment of the "bond, but a proposition to purchase it. To "make an effectual tender, it must appear that "at the time when it was made, the party mak- "ing it had the right to tender payment of the "debt, as in the case of the debtor himself or "his representatives, or the holder of the title "to the estate on which the debt was a lien; or "that he had the right to require a transfer of "it, as in the case of subrogation of a surety, "or redemption sought by the holder of some "subsequent lien having that equity. The de- "mand should clearly disclose the right of the "party making the offer, so that the creditor "may be notified of his duty to accept."

COMMENT ON CASES CITED BY COUNSEL OF THE PLAINTIFFS.

Regardless of any conversation which occurred between the plaintiffs and the manager of the defendant, the latter had no authority to change the terms of the contract or waive the provisions of the statute. No new contract could have been made whereby the terms might be changed so that the defendant would be obliged to accept a tender of the entire amount due, particularly in view of the issues made in the pleadings, as to the notice to comply and the failure of the defendant to accept the moneys required to be paid under such notice.

There is no question of estoppel involved in the slightest degree. The entire matter was predicated upon written contracts and the provisions of a statute which could not have been changed even if

the parties so desired. Furthermore, there was no specific tender with respect to the amount due under the New Jersey or Pennsylvania contracts. The whole matter was treated as one tender and it cannot be now argued that the parties, under any circumstances, made a valid tender under either one of the two contracts in question.

The cases cited by attorney of plaintiffs are not at all in point.

The argument under the third head of the plaintiffs' brief is inapplicable, because there is not sufficient assignment of error as a basis for the same. In any event, if the judgment of non-suit be sustained, it is dispositive of the whole case, regardless of whether or not the learned trial Judge erred in admission or rejection of evidence of damage. If the trial Judge erred in granting the non-suit, the judgment must necessarily be set aside, in which event, the question as to admission or rejection of testimony would be immaterial.

It is respectfully submitted that the judgment in the Supreme Court should be affirmed.

STARR, SUMMERILL & LLOYD,
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LEWIS STARR,
Of Counsel.