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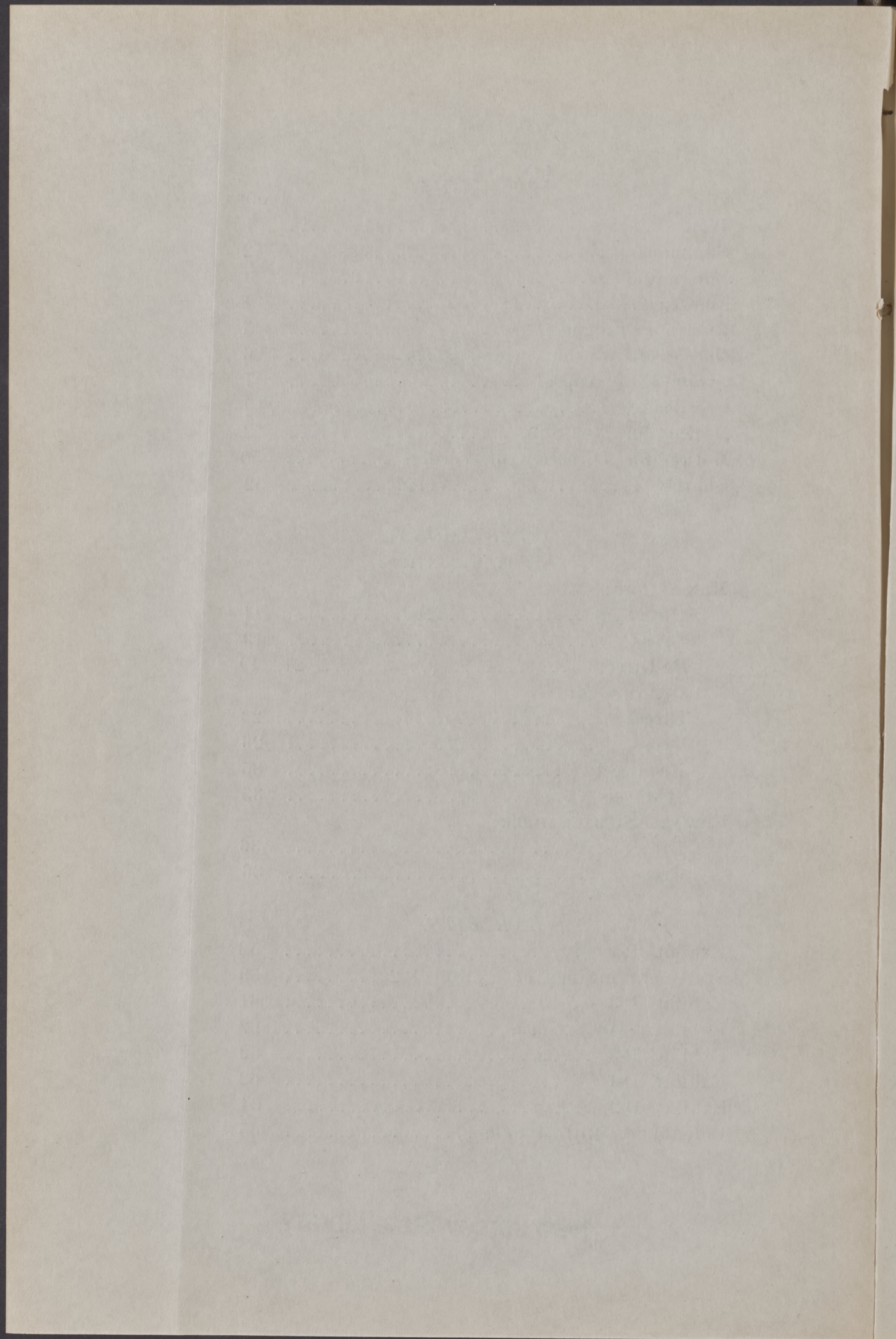
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Writ.

10

By Virtue of the annexed Writ, the plaintiff having given sufficient security to prosecute, &c., I took the goods and chattels mentioned in said Writ, and delivered to the defendant a copy of the said Writ on the Fourth day of August, 1922, and within twenty-four hours thereafter the defendant did deliver to me a claim of property in said goods and chattels, which is hereto annexed, and also a bond with sufficient surety to deliver the said goods and chattels in as good condition as the same were at the time of making such claim, to the plaintiff, or his lawful representatives, if the same shall be adjudged to the plaintiff.

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THOMAS MADIGAN,
By John Convery, S. D. S.
Sheriff.

30

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Summons.

(Filed August 11, 1922)

HUDSON COUNTY: ss.:

THE STATE OF NEW JERSEY, to Thomas
(Seal.) Madigan, Sheriff of the County of
Hudson. *Greeting:*

10 We command you, that if Max Thoss shall give
you sufficient security to prosecute his suit and
to make return, if a return thereof shall be
adjudged, of the following goods and chattels, to
wit, 1 Winton-Six Touring car, Model 40, Manu-
20 facturer's No. 3338, which Valentine Olb wrong-
fully and unlawfully detains, then we command
you, to replevy and deliver to the said Max Thoss
the aforesaid goods and chattels without delay,
and also to summon the said Valentine Olb, so
that he be and appear before the Circuit Court
to be holden at Jersey City, in and for the County
of Hudson, aforesaid, on the 23 day of August
instant, to answer unto the said Max Thoss for
the taking and unjustly detaining the said goods
and chattels, to his damage of Twenty-five hun-
dred (\$2500.00) Dollars, as is said. And have
you then and there this writ, with your proceed-
ings thereon.

30 WITNESS, Luther A. Campbell, Esq., Judge of
our said Circuit at Jersey City, aforesaid, the
29th day of July, 1922.

JOHN J. MCGOVERN,
Clerk.

KAPPES & HILLE,
Attorneys.
Filed Clerk's Office
Aug. 11th, 1922.
Hudson County, N. J.

Complaint.

(Filed October 21, 1922.)

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">MAX THOSS, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">VALENTINE OLB, <i>Defendant.</i></p>	}	Complaint.	10
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Plaintiff, residing at the Town of Guttenberg, in the County of Hudson, says:

1. On June 13th, 1922, plaintiff was and ever since has been the owner of the following goods and chattels, to wit:—one certain Winton-Six Touring car, Model 40, Manufacturer's No. 3338, together with tools, appliances and accessories therein and thereon, of the value of \$3500.00. 20

2. On that day, plaintiff was and ever since has been lawfully entitled to the immediate possession of the same.

3. On that day at the garage at Hudson Boulevard, at or near the corner of Walnut Street, West Hoboken, Hudson County, defendant wrongfully took said goods and chattels from the possession of the plaintiff and has ever since wrongfully detained and still wrongfully detains the same. 30

Plaintiff demands possession of the said goods and chattels and \$1500. damages for their detention.

KAPPES & HILLE,
Attorneys of Plaintiff.

Filed, Clerk's Office
Oct. 21, 1922.
Hudson County, N. J.

40

Clerk.

Answer.

(Filed October 28, 1922.)

HUDSON COUNTY CIRCUIT COURT.

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<p style="text-align: center;">MAX THOSS, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">VALENTINE OLB, <i>Defendant.</i></p>	}	<p>Answer. In Replevin.</p>
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Defendant, Valentine Olb, residing at the Township of Weehawken, Hudson County, New Jersey, says that:

20 **FIRST DEFENSE.**

1. Defendant denies the truth of the matters contained in the complaint.

SECOND DEFENSE.

30 1. At the time mentioned in the complaint, defendant was, since has been, and now is, the owner of the goods and chattels set forth in the complaint.

WM. F. BURKE,
Attorney of Defendant.

Filed Clerk's Office,
Oct. 28th, 1922,
Hudson County, N. J.

Clerk.

Rule for Judgment.

(Filed December 1, 1922.)

This action was tried before Judge Willard W. Cutler, with a jury, at the Hudson Circuit, November 29th, 1922.

The cause having been heard and submitted to the jury they returned their verdict as follows: 10

They say they find for the plaintiff and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of Three Thousand Two Hundred Dollars (\$3,200.00).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Three Thousand Two Hundred Dollars and his costs amounting to Fifty-three Dollars thirty-four Cents, making the whole sum of Three Thousand Two Hundred fifty-three Dollars and thirty-four Cents (\$3,253.34). 20

Judgment entered this Dec. 1, 1922.

WILLARD W. CUTLER,
Judge.

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Notice of Appeal.

(Filed .)

HUDSON COUNTY CIRCUIT COURT.

10

MAX THOSS,

Plaintiff,

vs.

VALENTINE OLB,

Defendant.

Action at Law.
In Replevin.
Notice of Ap-
peal.

To KAPPES & HILLE, ESQS.,
Attorneys of Plaintiff.

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TAKE NOTICE, that the defendant appeals to the
Court of Errors and Appeals from the whole
of the judgment entered in this cause.

WM. F. BURKE,
Attorney of Defendant-Appellant.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

<p style="text-align: center;">MAX THOSS, <i>Plaintiff,</i> vs. VALENTINE OLB,</p>	}	<p>Action at Law. Grounds of Ap- peal.</p>
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The appellant states the following grounds of appeal. 10

1. The following questions were admitted:
To the witness Max Thoss "Have you the policy?"

2. The bill of sale from Edward Siebachmeier to Max Thoss dated June 13, 1922 was admitted in evidence.

3. The insurance policy insuring the automobile, described in the writ of replevin, obtained by plaintiff was admitted in evidence. 20

4. The registration card the license issued by the Commissioner of Motor Vehicles of the State of New Jersey for the year 1922 to plaintiff for the automobile described in the writ of replevin was admitted in evidence.

5. The defendant's motion for a non-suit was denied.

6. The defendant's motion for a direction of a verdict was denied.

7. The Court charged the jury: Now, so far as the bill of sale is concerned, the bill of sale held by Thoss is a prior bill of sale to that held by Olb, and if it is a bona fide bill of sale and was not held as security for a debt, then Mr. Thoss would be entitled to a verdict for the value of that car, but if you find that that was not a bona fide bill of sale, but was a bill of sale as security, a conditional bill of sale, or that it was the intention of the parties that Mr. Thoss should 30 40

Grounds of Appeal

void that car as security, in the nature of a chattel mortgage, then Mr. Thoss has no claim which he can enforce for possession of this car, or the statute concerning chattel mortgages declares that "every mortgage or conveyance intended to operate as such, which shall not be accompanied by the delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the mortgage, having annexed thereto prescribed affidavit", and so on.

10

If you find from the evidence that it was the intention of the parties at the time, for Siebachmeier to give the bill of sale to Thoss to secure him for that \$4750, then he has no claim because he did not record his bill of sale, or did not record it as a chattel mortgage, and unless you find that Mr. Olb knew of the fact when he bought it, why, Mr. Olb's title is the better title. That, members of the jury, is a question you have to decide in this case. So, if you find from all this evidence that you have heard, that this bill of sale which the plaintiff has, was in reality security for his \$4700, or that Olb has notice that the plaintiff had this claim on this automobile, then, of course, there can be no recovery because unless this bill of sale is a bona fide bill of sale, he cannot recover in this action against this defendant, or, if you find it was not a bona fide bill of sale, but was a conditional bill of sale, or was held as collateral security for the note of \$4750, then if Mr. Olb knew of it, why, of course, he cannot take advantage, claiming he is the bona fide purchaser without notice, and if you find that Mr. Olb was a bona fide purchaser without notice, that is, without knowing anything

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Grounds of Appeal

about it, without knowing Mr. Thoss had any interest in it, and he bought the car and delivered the \$3500 in notes and took the car and that Mr. Siebachmeier had the right to sell it at that time, then, of course, your verdict should be a verdict for the defendant.

If you find for the plaintiff, the verdict should be a verdict for the amount of the car because the statute provides that where there has been a real delivery, that is, the party still keeps the property, the plaintiff can recover the value, whatever you find the value of the car is from the evidence. He would also be entitled to the question of damages, if you find for the plaintiff, but there have been no damages presented in this case, so the whole question for you to determine is, whether or not this original bill of sale was a bona fide bill of sale, or whether it was simply a security given by Mr. Siebachmeier to Thoss to secure him for the money which he owed him. 10

8. The jury assessed the damages at the sum of \$3200. whereas such damages should have been six cents. 20

9. There was no evidence as to the value of the car from which the jury could find and assess the sum of \$3200. as the value of the automobile. 30

10. The evidence on behalf of the plaintiff did not warrant the finding of a verdict by the jury, against the defendant, for the sum of \$3200.

11. All of the evidence in the case did not warrant the finding by the jury of a verdict against the defendant for the sum of \$3200.

12. There was no proper or sufficient proof of damages which warranted the jury in finding a verdict against the defendant for the sum of \$3200. 40

13. There was no proper or sufficient proof of the value of the automobile described in the writ of replevin which warranted the Jury in finding a verdict against the defendant for the sum of \$3200.

14. The verdict of the jury was against the weight of evidence.

10 15. The verdict of the jury was against the whole evidence.

WM. F. BURKE,
Attorney for Appellant.

Certificate.

STATE OF NEW JERSEY, }
Hudson County, } ss.:

20 I, JOHN J. MCGOVERN, Clerk of the County of Hudson, aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein,

Do HEREBY CERTIFY, That the foregoing is a true and correct copy of Summons, Complaint, Answer, Rule for Judgment and Notice of Appeal in the case of Max Thoss, Plaintiff, vs. Valentine Olb, as the same is taken from and compared with the original on file in my office.

30 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the (Seal.) seal of said Courts and County, at Jersey City, this twelfth day of January, 1923.

JOHN J. MCGOVERN,
Clerk.

Testimony.**HUDSON COUNTY CIRCUIT COURT.**

MAX THOSS,

vs.

VALENTINE OLB.

10

Before :

CUTLER, J.,

and a Jury.

November 29, 1922.

APPEARANCES :

MESSRS. KAPPES & HILLE, for the Plaintiff.

20

WILLIAM F. BURKE, for the defendant.

MAX THOSS, sworn.

DIRECT EXAMINATION BY MR. KAPPES :

Q. I show you a bill of sale from Edward Siebachmeier, to yourself, dated June 13, 1922, and ask you if that is yours? A. Yes, sir.

Q. And when did you get it? A. On the day it was made out. 30

Q. What day was that? A. That date.

Q. On the date which it bears? A. Yes, sir.

MR. KAPPES: I offer it in evidence.

MR. BURKE: Objected to, if your Honor please; the bill of sale does not comply nor pretend to comply with Sections 4 and 5

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Max Thoss,—Direct.

of the Act regulating the sale of motor vehicles.

THE COURT: What is your objection to this bill of sale?

10 MR. BURKE: My objection, if your Honor please, is that it is not a bill of sale from the manufacturer, and if it is not a bill of sale from the manufacturer, it is not an assignment of the manufacturer's bill of sale. It does not comply with Sections 4 and 5.

THE COURT: What have you to say to that?

20 MR. KAPPES: If the Court please, that statute is a penal statute, the purpose of the statute is well known to prevent the fraudulent transfer of motor vehicles and to aid the criminal authorities and the public generally in giving some legal protection against the loose methods theretofore existing in the transfer of automobiles. It does not affect the ownership in the particular machine. It is a statute, penal in its nature, and embodies just like the analogous statute, that of the Tenament House Law, a statute passed for the public good by providing penalties in 30 case a landlord, for instance, does not provide fire escapes and ladders, his failure to do so subjects him to a penalty. But the failure to comply with those provisions does not make it a basis of a civil suit; in other words, the issue here is between two men, each of them claiming, as the evidence will disclose by the time we get through, the defendant Olb, I am satisfied, has no bill of sale different 40 from the one you hold. He has a bill of sale from the same party without any as-

Max Thoss,—Direct.

signment, no better in form than this particular one is, but on a later date.

THE COURT: You may mark it Exhibit P-1 for identification at the present time. This Act of 1919 was amended in 1920, if I recall.

MR. KAPPES: It has been amended. 10

Q. Who is this Siebachmeier who signed this bill of sale? A. Automobile—

MR. BURKE: I object.

THE COURT: He may tell us who he is.

THE WITNESS: An automobile dealer.

Q. Where is he located? A. Well, he used to be at 4334 Boulevard.

Q. Hudson Boulevard? A. Yes, sir. 20

Q. Right opposite Columbia Park? A. Yes, sir.

Q. Did you know that he was the dealer in Winton cars? A. Yes, sir.

Q. And how long had you known Siebachmeier? A. About two years.

Q. At the time he gave you this bill of sale, had you had any business transactions with him?

A. No, sir. 30

Q. Had you had any relations with him at all; was he indebted to you for money loaned? A. Well, he was; yes.

Q. When had you loaned him money?

(No answer.)

Q. I withdraw the question. How much did he owe you at the time you got this bill of sale?

A. 4750.

Q. What, cents? A. Dollars.

Q. How long had he owed you the money, about? A. About one year. 40

Max Thoss,—Direct.

Q. And on the day you got this bill of sale, and before that time, were you familiar with the Winton Six automobile described in the bill of sale? A. Yes, sir.

Q. And had you see it at Siebachmeier's place, the show-room? A. Yes, sir.

10 Q. What kind of a car was it, the color? A. Maroon.

Q. Was it a new or a used car? A. New.

Q. Had it been driven at all? A. No, sir.

Q. After receiving this bill of sale, did you have it insured? A. Yes, sir.

Q. Have you the policy?

MR. BURKE: I object to that, if your Honor please.

20 THE COURT: He may show what he did with it.

MR. BURKE: Will your Honor allow me an exception?

THE COURT: Yes.

Q. Is this the policy? A. Yes, sir.

Q. Winton, 3278—I offer it in evidence.

MR. BURKE: I object to it.

30 THE COURT: You may mark it for identification.

Marked Exhibit P-2 for identification.

Q. What else did you do besides getting the car insured; have you your license card, your registration card with you? A. Yes, sir.

Q. What else did you do after having it insured, what did you do? A. I got the registration out.

40 Q. Where did you get it? A. Up at the Hudson Dispatch Building, the registering department.

Max Thoss,—Direct.

Q. The Commission of Motor Vehicles? A. Yes, sir.

Q. Registered this car as your property?

MR. BURKE: I object to that for the same reason.

MR. KAPPES: I offer the registration certificate. 10

MR. BURKE: I object to it for the same reason. It is incompetent, irrelevant and immaterial.

THE COURT: You may mark it for identification.

Marked Exhibit P-3 for identification.

THE COURT: Does that correspond with your number?

MR. KAPPES: Yes, if the Court please, Winton Six, 3338. 20

Q. Did you get license plates?

MR. BURKE: That is objected to for the same reason.

THE COURT: Yes. Where was this car all the time?

THE WITNESS: At the Hudson Boulevard place. 30

Q. In your possession? A. No, in Siebachmeier's possession; in the dealer's possession.

THE COURT: And you got the bill of sale?

THE WITNESS: Yes.

THE COURT: And you did not get the car?

THE WITNESS: No, sir.

THE COURT: What did you do with the plates when you got them? 40

Max Thoss,—Direct.

THE WITNESS: Well, I left them home.

THE COURT: And you did not have then actual possession of the car when you got the car license?

THE WITNESS: No, I didn't have it yet.

THE COURT: We only want to get at the facts.

10

Q. At the time you got this bill of sale, this car described in these papers was in Mr. Seibachmeier's place? A. Yes, sir.

Q. And the car was new and had not been driven? A. Yes.

Q. Did you have some understanding with Siebachmeier before you left there about having the bill of sale? A. Yes, sir.

20

Q. Then you proceeded to where? A. To Emil Bach's place.

Q. Who is Emil Bach? A. The Town Clerk of Union Hill.

Q. The Town Clerk of Union Hill? A. Yes, sir.

Q. And he prepared the bill of sale? A. Yes, sir.

Q. And executed it and witnessed it? A. Yes, sir.

30

Q. Now, at the time did you have any understanding with Siebachmeier about what was to be done with the car? A. Yes, sir.

MR. BURKE: I object to that, if your Honor please, because an understanding would not be taking possession; he said he did not take possession.

THE COURT: What conversation they had.

40

MR. KAPPES: I want to show, if the Court please, that although he did not have actual possession in his fingers, he had constructive

Max Thoss,—Direct.

possession of the car; the car was held for him.

THE COURT: You may show what was said and what their understanding was.

Q. You had no garage of your own, had you?

A. No.

10

Q. You had not owned any automobile before that? A. No.

Q. Did you have any place where you could keep this car, of your own? A. No, sir.

Q. Did you have some talk with Siebachmeier as to what was to be done with the car, where it was to be kept and how? A. Well, the thing was this, they were——

Q. No, what was said? A. What was said? That if he sold the car, he only is to transfer from my bill of sale.

20

MR. BURKE: What is that?

THE WITNESS: If he should sell the car, he can only transfer it from my bill of sale.

Q. Do you remember exactly the words he used? A. Well, I could not tell you the exact words.

Q. Well, was this car your car or was it his?

30

A. It was my car.

MR. BURKE: That is a conclusion, if your Honor please.

THE COURT: Yes, I think he ought to tell us what was said. That is the whole question in this case, as to the ownership of the car.

Q. When you got this bill of sale, was there anything said between you and Mr. Siebachmeier as to whose car it was? A. Yes, sure.

40

Max Thoss,—Direct.

MR. BURKE: Whose car?

THE WITNESS: It was mine.

Q. Now, who was going to take care of it, or keep it? A. Well, it was to stay in Siebachmeier's place because I didn't have any room.

10 Q. It was to be left there and kept there for you? A. Yes, sir.

Q. For Siebachmeier, or for you? A. For me.

Q. Did you ever drive the car? A. No, sir.

Q. And how long did you leave the car in his place? A. Well, it must have been about two weeks.

Q. Did you give permission to Siebachmeier or anybody to take your car away? A. No, sir.

Q. Is the car there now? A. No.

20 Q. Do you know who took the car away? A. Yes, sir.

Q. Who? A. Mr. Olb.

Q. And how did you learn about that? A. Why, I passed by and I seen the car gone and I went inside and asked where the car was.

Q. Who did you see? A. The salesman, Mr. Bergman.

30 Q. One of the men who was a witness to the bill of sale? A. Yes, sir.

Q. Was Mr. Olb there at that time? A. No.

Q. Had you given permission to anybody to move that car? A. No, sir.

Q. What did you do then, come to your lawyer? A. Yes, sir.

Q. And do you remember the 31st day of July of this year? A. Yes, sir.

Q. Is that the date you came to my office? A. Yes, sir.

40 Q. Do you know if this notice was prepared there, is that your signature? A. Yes, sir.

Max Thoss,—Cross

Q. What did you do? A. Paid the man for the car.

Q. Where? A. At Mr. Olb's place.

Q. You went with your lawyer to Mr. Olb's place of business? A. Yes, sir.

Q. Where was that? A. Paterson Plank Road.

Q. And what happened then? A. Well, he refused to talk with us. 10

Q. Was this notice served on him? A. Yes, sir.

Q. Who served it on him? A. He did.

Q. And was a copy signed by you with Mr. Olb? A. Yes, sir.

Q. And thereafter you left the negotiations to your counsel? A. Yes, sir.

Q. Do you know where the car is now? A. No, sir. 20

MR. BURKE: Then it was in Mr. Olb's possession?

MR. KAPPES: He does not know.

Q. Do you know where the car is now? A. I do not know where the car is located.

CROSS EXAMINATION BY MR. BURKE:

Q. At the time you got this bill of sale, did Mr. Siebachmeier owe money? A. He did, yes, sir. 30

Q. And this was security for the money? A. Yes, it is.

Q. And afterwards he paid you something on account, didn't he; he gave you a car, another car, didn't he? (No answer.)

Q. Didn't you get something later on on account of the debt? (No answer.)

THE COURT: Well, answer. Don't shake your head. The stenographer cannot hear you. 40

Max Thoss,—Cross

A. Well, that was something—he paid me \$500 about, on the 6th or 7th of June.

Q. Did he pay you anything after he made the bill of sale? A. Yes.

Q. What did he pay you after that? A. 500 he paid over.

10 Q. Didn't he also transfer you another car?
A. This was in my possession.

Q. But he gave you title to that other car?
A. I had the title on it.

Q. Did Mr. Siebachmeier give you anything besides the \$500 after the bill of sale was made?
A. He gave me a note.

Q. He gave you a note? A. Yes, sir.

20 Q. For how much, and when did he give you a note, and how much money? A. Not after the bill of sale was made, that was before. The bill of sale was some sort of security.

Q. How much interest were you to charge him?
A. Six per cent.

Q. And did he pay you the interest? A. No, sir.

Q. After the bill of sale, some interest? A. No, sir.

30 Q. He did not make any payment of interest after the bill of sale? A. No, sir.

Q. Now, state the circumstances, or, what the understanding was when Siebachmeier sold the car; he was to sell it on your account, is that right? A. Oh, yes.

Q. And you left it in his place of business?
A. Yes, sir.

Q. And he was a dealer in automobiles? A. Yes, sir.

40 Q. Did Siebachmeier say how much he was to sell the car for? A. He advised \$3600.

Q. And he would sell it for the regular sales price, is that right? A. Yes, sir.

Max Thoss,—Re-Direct

Q. And the regular sales price was \$3600? A. Yes, sir.

Q. And after he sold it, the money was to be paid by him to you, is that right? A. Yes, sir.

MR. BURKE: That is all.

10

RE-DIRECT EXAMINATION BY MR. KAPPES:

Q. Mr. Burke has asked you about a note. I show you a note and ask you if that is the note you referred to? A. Yes, sir.

MR. KAPPES: I offer it in evidence.

No objection.

Marked Exhibit P-4.

Q. The note is still in your possession, owned by you? A. Yes, sir.

20

MR. KAPPES: I again offer in evidence bill of sale, the insurance policy and the registration card.

MR. BURKE: I object to it, if your Honor please. The provisions of those sections distinctly say that it is unlawful to sell—

THE COURT: I think the papers may go in evidence.

30

MR. BURKE: Your Honor will allow me an exception?

THE COURT: Yes. I do not say it does pass title. I think it goes in evidence to show the relations of the parties.

MR. BURKE: It could not pass title, because the Act distinctly says you cannot pass title in that way.

THE COURT: All right. They may be marked in evidence.

40

Marked Exhibits 1, 2 and 3.

MR. KAPPES: That is our case.

Motion for Non-Suit

10 MR. BURKE: I move for a non-suit, if your Honor please, because no title has been proved, no legal title, and the case is exactly within the provisions of The Commonwealth Finance Company against Shook, which went up to the Court of Errors in this State. This case is just the same as the Shook case. This man, on his own testimony, took this paper security for a debt.

THE COURT: Yes.

20 MR. BURKE: And, under the Shook case, it was nothing more or less than a mortgage, and it was not recorded, and the possession of the car was permitted to remain with the dealer and the understanding was, according to the testimony, that the dealer was to sell the car, and if he sold it, he was to apply the purchase price, \$3,600, and pay it to the plaintiff, so that, if your Honor please, it seems to me, that the evidence is exactly on all fours with the Shook case, and the burden, of course, is on the plaintiff to prove—

THE COURT: What have you to say?

30 MR. KAPPES: I think, if your Honor please, the situation is much different. The Court and jury would be perfectly justified, from the testimony of this witness, to find that there was a consideration existing far in excess of the value of this car at the time of this transaction; that although the plaintiff did not have actual physical possession of the car, it was not in his possession, because it was left to Siebachmeier for him. The testimony as to a possible sale
40 of the car, the jury may infer from the evidence, was this: Siebachmeier was to go

Valentine Olb—Direct

out and attempt to find a purchaser for a car, now Thoss' car; and if he got a purchaser, he was to come to Thoss and Thoss, if a transfer was to be made, would execute the bill of sale, provided he was satisfied with the price obtained, which would apply on the existing indebtedness. True, the situation may be questionable if we were in an equity court, whether this situation is a legal transfer of title, or whether it was merely security, but whichever way it was, we are not here trying our title, if the Court please. This suit is a question of possession as between Thoss and some other claimant. 10

THE COURT: I will refuse your application as it stands now. 20

MR. BURKE: Your Honor will allow me an exception?

THE COURT: Yes.

MR. KAPPES: The plaintiff is offering the notice, the demand for possession.

Marked Exhibit P-5.

VALENTINE OLB, SWORN. 30

DIRECT EXAMINATION BY MR. BURKE:

Q. Where is your place of business? A. My place of business is 663 Patterson Plank Road.

Q. Is that in North Bergen? A. North Bergen.

Q. And do you know Mr. Siebachmeier, the man who has been spoken of in this case? A. Yes. 40

Q. Did you, on July 8th, 1922, have some deal-

Valentine Olb—Direct

ings with him? A. Yes. Please, may I explain the whole thing, as far as it is to my knowledge? On April 8th—

MR. KAPPES: I think the witness should answer the question.

10 Q. And what transaction did you and he have on that day? A. On April 8th, I loaned Mr. Siebachmeier \$1000, and this is proven by a certified check of the Commonwealth. On May 9th, he came to me and said, "would you be kind and lend me money, I cannot collect," and I gave him another certified check for \$2,500, and he gave me notes as security. Then Mr. Siebachmeier, he could not—I was out myself driving with him
20 to Bayonne, up to Guttenberg, when the notes nearly came due and he could not collect, so he said to me, "I got a car here in the show window, and I sell you the car." That is how I came to the car, and I told Mr. Siebachmeier I rather have the money instead of the car. Then he says, "you can set your own price," he says, "you helped me out and when I get my money, some way or another—" I said, "well, I ought to have something," and I bought the car for \$3200
30 and besides his promissory note, in addition to that.

Q. Let's see. At the time he owed you how much, \$3,500? A. \$3,500.

Q. And you had two notes? A. Yes, sir.

Q. One for \$1,000 and one for \$2,500? A. Yes, sir.

Q. And what did you do with those notes? A. When he gave me the car what is there on that
40 paper and I gave him the notes and everything, I thought I owned the car.

Valentine Olb—Direct

Q. He gave you this contract? A. Yes, and I thought I owned the car.

Q. Contract for car No. 3338, Model 40? A. Yes.

Q. Is this Mr. Siebachmeier's signature? A. Yes, sir; that is his signature.

10

MR. BURKE: I offer that.
Marked Exhibit D-1.

A. Further, after three weeks——

Q. Wait. He gave you that contract for the car? A. Yes, sir.

Q. And what did he do about this, the \$300?

A. Well, he gave me this promissory note.

Q. Is this the note? A. Yes.

20

MR. BURKE: I offer that.
Marked Exhibit D-2.

Q. What did you do with the old notes? A. I gave them to Mr. Siebachmeier.

Q. What did he do with them? A. I don't know.

Q. You gave them back to him? A. I gave back to him everything what belonged to him, and I thought I owned the car because I paid for it.

30

Q. And you have possession of the car now? A. Yes. After three weeks, this party, Mr. Thoss, and a man named Kappes, came down to my place of business and said, "are you Mr. Olb?" I said, "yes." He handed me a paper in my place and he said, "we want to settle with you," and I had never done any business with these two gentlemen.

Q. Where was the car when you gave back the note to Mr. Siebachmeier and got the contract? A. This car was for sale in Siebachmeier's show room.

40

Valentine Olb—Cross

MR. KAPPES: I ask that that be stricken out.

Q. And where was the show room? A. On the Boulevard, 4334 Boulevard. I bought the car there and he owed me the money, and I gave
10 him the notes, and I thought it was done.

Q. And did you get a bill of sale? A. What you got there, that is all.

Q. Mr. Siebachmeier is the agent for the manufacturer, isn't he? A. Yes.

THE COURT: He is the manufacturer's agent for the Winton car?

MR. BURKE: Yes.

MR. KAPPES: This is not even acknowl-
20 edged.

MR. BURKE: That is all.

CROSS EXAMINATION BY MR. KAPPES:

Q. What business are you in? A. I am in the dyeing business.

Q. And you have the notice here that Mr. Thoss and I served on you? A. No, I didn't accept your notice, you took that notice with
30 you, if you recollect.

Q. Didn't I leave a notice exactly like this with you? A. I have not got it.

Q. Didn't I leave it with you? A. No, not to my knowledge.

Q. Was it July 21st, 1922, that Thoss and I came to your place? A. It was about that time.

Q. And we were in your office and you were down in the yard, were you not? A. What?

Q. You were down in the yard when we arrived in your office? A. Yes.
40

Q. And the girl in charge of your office called you upstairs? A. Right.

Valentine Olb—Cross

Q. And how long were we in your place at that time? A. Well, not so very long, because I was busy and I could not—I never would know you either—I didn't talk to you, but I think you said how we could come to a settlement, you demanded a settlement.

Q. I only asked you how long we were there? 10

MR. BURKE: Do you want to prove the notice?

MR. KAPPES: Yes, we won't deny anything.

Q. Didn't Thoss and I first talk to you about what the situation was, told you and showed you—I withdraw that. Didn't we at that time show you the bill of sale, Exhibit P-1? A. I beg your pardon, you did not show me anything. 20

Q. Didn't we tell you— A. No, sir.

Q. Didn't we tell you that Mr. Siebachmeier— A. You said, "I am here to come to a settlement, and we want the money or the car," that is what you said.

Q. Mr. Olb, didn't I say to you, "Siebachmeier had owed Thoss \$5,000, and he has had a sale from Thoss since the 13th"? A. You said that— 30

Q. Didn't I tell you that? A. You said that—

Q. Didn't I tell you that? A. You said that you wanted me—

Q. Didn't I tell you that, did I or didn't I? A. As a matter of fact, you only told me that, that Siebachmeier owed you \$4,700, you did not tell me \$5,000, you told me \$4,700.

Q. Did you see this note at that time? A. 40
You did not show me any note.

Valentine Olb—Cross

Q. Didn't I show you this note for \$4,755?

A. No, sir.

MR. BURKE: What difference does it make, we do not deny—

10 Q. Didn't you say that Siebachmeier was a crook? A. Nothing of the kind, nothing of the kind.

Q. Didn't you say— A. I didn't say anything, I said to you—

Q. Just a minute, please. Answer the question. After I had been talking to you for a few minutes about the situation, didn't you say, "I am in the same boat like you, I lent him money, too"? A. No, sir

20 Q. "And the only way I can get it back is to get a bill of sale," didn't you say that? A. I didn't tell you anything.

Q. Did you say that, or didn't you? A. No, sir.

Q. You deny that you said that? A. I do not deny that, I am telling the truth. I didn't tell you anything like that, I told you I am busy and go to Mr. Burke.

30 Q. Now, you have testified here in answer—
A. Right—

Q. Wait a minute, please. Don't get so excited. You said in answer to Mr. Burke's question that you had loaned Siebachmeier \$1,000 on April 8th? A. What.

Q. You said in answer to Mr. Burke's question that you had loaned Siebachmeier \$1,000 on April 8th? A. Yes, sir.

40 Q. And May 19th he told you he was hard up for money, and could not collect and he would like \$2,500 more, and you gave it to him?

Valentine Olb—Cross

A. Yes, and the certified check can be proven by the bank.

Q. Did he give you some notes as security? A. Yes, sir.

Q. Then, after a while you tried to collect your money and could not get it? A. Right.

Q. And then you said you wanted something for your money— A. Mr. Siebachmeier offered me the car after I could not collect the money, and I got from him the car. 10

Q. What you wanted from him at that time was the money, wasn't it? A. Well, the money—

Q. Yes or no, either you did or you didn't? A. What?

Q. At that time before you got this yellow contract, you wanted your money back, didn't you? A. Yes sir. 20

Q. And Mr. Siebachmeier told you he could not give you your money back? A. Siebachmeier was honest—

Q. Just answer the question—he told you he could not give you your money back, didn't he, yes or no? A. Could not collect, that was the trouble, he was willing to pay me.

Q. He wanted to pay you but he could not, because he did not have the money? A. Yes, sir. 30

Q. Then he suggested to you that you take back the Winton car, that was not his Winton? A. Right.

Q. And that was on July 8th, was it? A. Yes, sir.

Q. Now, you did not know Thoss at that time, did you? A. No sir.

Q. And you did not know whether or not the car had been sold before, did you? A. No, sir, that car was in the showroom. 40

Valentine Olb—Cross

Q. All right, you have answered "no sir." Now, you said in answer to Mr. Burke's question that when you got this bill of sale from him and the note for \$300, then he said to you he would try to pay you back the money as soon as he could?

A. No, sir.

10 Q. Mr. Olb, did you take the car out of the place on July 8th when you got the bill of sale, yes or no? A. Why——

Q. Yes or no, did you take the car out of the showroom on the 8th of July, when you got the bill of sale; yes or no? A. Mr. Siebachmeier told me——

Q. Yes, or no, please, answer the question? A. Why, I was——

20 THE COURT: When did you take the car out?

THE WITNESS: I think on the 11th.

Q. Did you try to take the car away on the day that you got the bill of sale and the \$300 note, yes or no? A. The car, I tried to take the car out, but the car he could not run out, we tried to run her and I had to leave the car there until he repaired it to take it out.

30 THE COURT: What was the matter with it, wouldn't it run? What was the trouble?

THE WITNESS: There was something disconnected.

THE COURT: Had not been connected up?

THE WITNESS: The sparkplugs and the wires fixed up and put on.

40 THE COURT: When you bought it, it was not then running, and you had to have it fixed to run?

Valentine Olb—Cross

THE WITNESS: Yes, that is why I could not move it out on the 8th.

Q. Wasn't it the distributor that was out of the car, a little device which distributes the spark to the various spark plugs? A. It was a spark-plug or something, we could not run it, not on the 8th. 10

Q. Do you know whether or not the spark-plugs were in the car? A. Yes, but when the sparkplugs—

Q. Just answer the question, do you know that the sparkplugs were in the car? A. Yes, and I found the wire was loose, was disconnected, and I could not run her on the 8th.

Q. Exactly; what was the matter with it was merely to put in something that would connect up the electric system, isn't that so? A. Well, and some other defect. 20

Q. Was Mr. Siebachmeier there with you on that day? A. Yes, he was there when I bought the car.

Q. Was he there when you tried to run the car? A. He was there when I bought the car.

Q. Who was it tried to run the car? A. I did. 30

Q. Do you drive a car? A. Well, I built—

Q. Yes or no? A. I can run a car.

Q. That is what I am asking you? A. Yes.

Q. On July 8th, had you ever driven an automobile? A. Well I could not run this car because it was not in running order.

Q. Well, on the 8th of July, had you ever driven an automobile? A. Before, ten years before already. 40

Q. You had been running cars for the last ten years? A. Yes, sir, I can run them.

Valentine Olb—Cross

Q. And on the day you got this bill of sale, how many other automobiles, pleasure cars, did you own? A. None.

MR. BURKE: I object to that.

10 THE COURT: He has a right to ask the question.

Q. Did you ever drive this particular Winton Six, Mr. Olb? A. No, because——

Q. Never mind the because, I do not ask you that. Did you ever drive this particular car? A. I had my chauffeur to drive it.

Q. When? A. From Siebachmeier's place down to where the car is now in Glick's Garage on the Boulevard.

20 Q. And the car has been in Glick's garage since when? A. Since we got it from Siebachmeier.

Q. Well, now, you did not get it from Siebachmeier at all, did you, Mr. Olb? A. I got it from the sheriff.

Q. Yes. On what day was that? A. That was on the 11th.

30 Q. Isn't it a fact that Siebachmeier was afraid to let you take the car out, and you started a suit in replevin, and had the shiriff take the car on July 11th, isn't that true? A. Because the car I paid for and ——

MR. KAPPES: I ask that that be struck out as not responsive.

40 A. The car I paid for and Mr. Siebachmeier told me that he wanted to keep the car in a showroom. As I had my contract and everything, and I am not buying a car to have it in a showroom, if I buy a car, I want it——

Valentine Olb—Cross

Q. And he did not give it to you did he? A. He did give it to me, and he would not complain if I had the sheriff take the car.

Q. Now, Mr. Olb, won't you please just try to answer the question and we will save a lot of time. Isn't it a fact that after you got this bill of sale, and after you had a yellow contract and after you had the \$300 note, Siebachmeier would not give you the car and you went to your lawyer who issued a writ of replevin and had the sheriff take the car? A. Yes. 10

Q. And isn't that the only way you got it? A. (No answer).

Q. And isn't it because Mr. Seibachmeier was afraid to let you have the car, and told you he had already given a bill of sale to Thoss that he could not give it to you, isn't it true? A. I do not know anything about that. 20

Q. Well, the only way you got it was to go to the sheriff? A. Yes.

Q. And didn't I come to you with Mr. Thoss, and didn't I say to you, "Mr. Olb, I think we are both stuck, it might be better for us both to cooperate and either put Siebachmeier in jail or make him cough up the money"? 30

MR. BURKE: I object to that. That is not proper cross-examination.

THE COURT: I think it is proper, whether he said this to him. He may ask him.

MR. BURKE: Exception.

Q. (Question repeated by stenographer, as follows: "And didn't I come to you with Thoss, and didn't I say to you, Mr. Olb, I think we are both stuck, it might be better for us to cooperate and either put Siebachmeier in jail or make 40

Valentine Olb—Cross

him cough up the money?"") A. Well, I do not remember.

THE COURT: That answers the question, he does not remember.

10 Q. Now, if after you had the sheriff take the car, Mr. Siebachmeier would have gotten \$3500 for you, and would have given him the car back and taken your money, would you not? A. Why

Q. Yes or no?

MR. BURKE: I object to that.

THE COURT: I cannot see that it is material; it is a question of what might have happened.

20

Q. Well, after you had made this arrangement, signed this contract and gotten the \$300 note from Siebachmeier, and before you replevined the car, didn't Siebachmeier say to you that when he would get the money, the \$3500, he would pay it to you back? A. No, sir.

Q. Has this car been driven by you since the sheriff delivered it to this garage where it is now? A. We—

30

Q. Yes or no? A. No.

Q. You have not used the car, have you? A. No, I am waiting for a decision of the court.

Q. And all you know that that car has ever been driven was under the custody of the sheriff from Siebachmeier's showroom to Glick's garage, four blocks away, isn't that true? A. Yes, sir.

MR. KAPPES: That is all.

40

Valentine Olb—Re-Direct—Re-Cross

RE-DIRECT EXAMINATION BY MR. BURKE:

Q. You recovered a judgment for possession of the car against Siebachmeier, did you not?

MR. KAPPES: I object; the record will be the best evidence.

THE COURT: It is a matter of record.

MR. BURKE: I have it here, but Mr. Kappes has asked him whether he did bring a suit. Now, I am asking him whether he did not secure a judgment.

MR. KAPPES: Well, I do not object.

Q. You recovered a judgment for possession of the car against Siebachmeier in the Hudson County Circuit Court? A. Yes.

RE-CROSS BY MR. KAPPES:

Q. In that suit you did not make Thoss a party-defendant, did you? A. (No answer.)

Q. In the suit of replevin that you brought, you did not make Thoss a party to it, did you? A. I didn't know Thoss, I never done any business with Mr. Thoss, or Mr. Kappes.

Q. When I was down at your place with Thoss and served this demand on you, didn't I tell you if we could not, the three of us, get together with Siebachmeier and arrange this case under our bill of sale which was of an earlier date than yours, we would be compelled to replevin this car back from you? Did I, or did I not tell you that? A. I did not even know you before; you were a stranger to me, and I don't transact any business with strangers.

MR. KAPPES: That is all.

(Witness excused.)

Edward Siebachmeier—Direct—Cross

EDWARD SIEBACHMEIER, SWORN.

DIRECT EXAMINATION BY MR. BURKE:

Q. You have been subpoenaed, have you not, to come here this morning? A. Yes, sir.

10 Q. I show you a paper purporting to be a bill of sale to Max Thoss, which is marked in evidence, exhibit P-I; this calls for car No. 3338? A. Correct.

Q. Model 40? A. Right.

Q. When did you get possession of that car, Mr. Siebachmeier? A. I got possession of the car on the 16th.

Q. The 16th of what? A. Of June.

Q. 1922? A. 1922.

20 Q. So that when this bill of sale was given to Thoss, you did not have possession of the car? A. No, the car was—I went out to the factory and brought the car in; it was paid for by me.

Q. But you did not have possession of it? A. No.

Q. Where was the car on June 13th, 1922? A. At the factory.

Q. Where is the factory? A. Cleveland, Ohio.

30 BR. BURKE: That is all.

CROSS EXAMINATION BY MR. KAPPES:

Q. Where? A. Cleveland, Ohio.

Q. How did it come that you were out there on that day? A. I was not out there that day, but they assembled the car, as far as I understand; the car was out at the factory.

40 Q. You say you did not get the car until when? A. June 16th.

Edward Siebachmeier—Cross

Q. How do you remember the day? A. Because I went out this Thursday night to the factory, and was there Friday morning.

Q. Well, what day was Thursday? A. June 15th.

Q. Did you drive this car in? A. I drove the car in, yes, sir. 10

Q. And when did you get it to West Hoboken? A. It was the following Monday morning.

Q. What day of the month? A. Well, it was the 21st, there is four days between.

Q. What is that? A. Four days from Thursday.

Q. The 21st? A. I do not know exactly, maybe one or two days difference on the date.

MR. BURKE: Have you any records? 20

THE WITNESS: I have the bill of sale what I paid for it.

Q. At the time you signed this bill of sale to Thoss, you owed him between \$4500 and \$5000, didn't you? A. Around that, yes sir.

Q. Both of these bills of sale, the one to Thoss and the one to Olb, called for identically the same car, do they not? A. Yes, sir.

Q. Did you owe money to Olb at the time you gave him this bill of sale? A. Well, the way— 30

Q. You know whether you did or not? A. I owed Olb and I owed some other people.

Q. How much did you owe Olb? A. Altogether \$3500.

Q. And how much did you owe to Olb? A. Around \$4700.

Q. Is this your note to Thoss? A. Yes, sir.

Q. This note is dated June 8th, isn't it? A. Right. 40

Q. Didn't you use the money on this note to buy this car from the factory?

Edward Siebachmeier—Cross

MR. BURKE: I object to that if your Honor please.

MR. KAPPES: I will withdraw it. If Mr. Burke objects to it I will withdraw it.

10 Q. How can you explain to his Honor and the jury that you gave those two different people a bill of sale for identically the same car, one June 13th and the other on July 8th? A. Well, for the first, I was after Mr. Olb to sell the car quite some time. Mr. Olb loaned me some money. I needed some money, and I asked him and he said, "Sure, you can have it"; and at the same time I always tried to sell him a car because he wanted to buy a car; he wanted to buy a car
20 last year and he said he would buy one this year, so at that time he says, "Well, I might as well take the car." I said, "You got \$3500, I sell you the car for so and so much money". He said, "All right". I told him the car is not free and clear. He said, "Well, can I have receipt for my money on the car?"

THE COURT: He said what?

30 THE WITNESS: I said, I give him a bill of sale, but the bill of sale is made out. "delivery on the 14th," which is marked on the bottom.

Q. Let's see what you refer to. This one is acknowledged, Thoss' bill of sale? A. Yes, sir.

Q. Now, what was the notation on the Olb car that you are talking about, that it was not free and clear; you said there was something on there that it was not free and clear when you gave it to Olb, that is what we would like to
40 have you explain? A. July 14th, I got some

Edward Siebachmeier—Cross

money coming in, I expect some money coming in.

Q. We are not talking about your expectations; I am asking you what you said about some notation on Olb's bill of sale that it was not free and clear? A. The notation was, "delivery July 14th." 10

Q. Where did you find that? "Delivery July 14th?" A. Right.

Q. Who wrote it on there? A. I did.

Q. Why did you put that on there? A. In the first place, I didn't have the car in there—it was for show purposes, and it was the only car I had in at present, and at that time, I got two other cars coming through from the factory, and I got some money from somebody else on them; two more cars I expected to get. 20

Q. You did not intend to get this car on the day you made this bill of sale to him, did you? A. No, on the 14th—make delivery on the 14th.

Q. Why don't you just answer the question. And Mr. Olb understood that from you, that he would not get it on July 8th, didn't he? A. Well, yes; this was an agreement signed.

Q. Yes, and on July 13th, the day before the date when you marked on your bill of sale, he replevined the car, did he not? A. Yes. 30

Q. And the next day Thoss called up from your showroom to my office, and after talking to me, put you on the wire, didn't he? A. Right.

Q. And didn't I say to you then, "Siebachmeier, what is this thing? We have a bill of sale here dated June 13th, you have been keeping this car for us, what has happened?" And you said, "Oh, there is a misunderstanding, they got a contract from me for delivery July 14th, the time is not up yet, they got no right to do 40

Edward Siebachmeier—Cross

this". Didn't you say that? A. Well, I sold the car on that condition, delivery July 14th.

Q. Didn't you refer me to your lawyer? A. Yes.

10 Q. And didn't you tell me about your contract for delivery on the 14th, and that Thoss' contract was all right? A. I didn't say——

Q. Didn't you tell me it was Thoss' car and his bill of sale was all right, didn't you? A. I didn't say there was anything wrong, I said the contract called for delivery on the 14th.

Q. Answer the question, didn't you tell me that Thoss' bill of sale was all right? A. I cannot remember anything——

20 Q. Will you say you did not say it? A. I didn't tell—I cannot remember I said it.

Q. Will you deny you said it to me? A. I said I cannot say for sure, I said anything like that.

Q. You knew Thoss had a bill of sale for June 13th, didn't you? A. Yes.

30 Q. And wasn't the understanding you and Thoss had at that time that he would have the car insured, and take out a registration and get his license, and on my advice to take the car out of your place? A. He was supposed not to take——

Q. Just answer the question. Didn't you know that, answer the question? A. I know I cannot answer it because——

Q. Just a moment. Hadn't I been in conference with you and Thoss before June 13th? A. No.

40 Q. Didn't I have you and Thoss up at Gillen's office, the insurance agent, before Thoss got a bill of sale? A. Not on this car——

MR. BURKE: This is not cross-examination; I only ask him one thing.

Edward Siebachmeier—Cross

THE WITNESS: This was about four weeks before.

Q. And didn't I say to you that Thoss must have something for security? A. I gave him that car and a note.

Q. Yes or no? A. Yes. 10

Q. Well, didn't I tell you the only way to secure him was to at least give him a bill of sale, and I would have him go and have the car registered? A. At that time—

Q. Didn't I tell you that? A. You said, but you also were not sure yourself about registering at the present time.

Q. And didn't you suggest we go together up to Cadralla, the agent of the Motor Vehicle Commissioner, and get the thing straightened out because you did not like to have it registered on Thoss' name, because if you did, after that it would be a used car, even if it had not been driven; didn't you say that? A. Yes. 20

Q. And wasn't it then after that, that without coming to me, you took Thoss over to the Town Clerk, Emil Bach, and gave him this bill of sale? A. Yes, sir.

Q. And didn't you and Mr. Thoss go to Cadralla and get the car insured, didn't you, yes or no? A. About that particular car— 30

Q. Yes or no, didn't you know Thoss got this insurance policy on the car?

MR. BURKE: I object, this is not proper cross-examination.

A. I don't know.

MR. BURKE: Just a minute— 40

THE WITNESS: He had the bill of sale on that name.

Edward Siebachmeier—Cross

THE COURT: I think it goes into the *res gestae*. There is an entirely different situation presented here when it appears that you got this car under a replevin. There is no delivery.

10

MR. BURKE: If your Honor please——

THE COURT: There is no delivery under this bill of sale, that is where the trouble comes in now.

MR. BURKE: But this is a case where the plaintiff is to prove he is entitled to possession of this car.

THE COURT: I am not so sure of that.

MR. BURKE: That is my idea of it.

THE COURT: Proceed.

20

Q. You knew he got the car registered, didn't you? A. I didn't know that.

Q. Didn't he go down to your garage with the registration plates, 211071? A. This was when we made the contract out.

30

Q. After you made the contract, the one the court is looking at, and before you gave Olb the bill of sale, wasn't it? A. After we made the contract out, Thoss went over and got the registration out; he said he likes to take a license out.

Q. Just a minute; he wanted to go over and take this license out and you had some talk about it, didn't you? A. He did go over after.

Q. When did you know first that Thoss went over to the Motor Vehicle Commissioner and got this registration for the car; when did you first know it? A. It was a Monday.

40

Q. What month was it in? A. In June; this was the following Monday; I believe it was Thurs-

Edward Siebachmeier—Cross

day when they signed the agreement—Friday—and Monday he went over there.

Q. Did you go with him to get this registration? A. No, I did not.

Q. Did he go down to your place with the plates?

10

MR. BURKE: Question objected to for the same reason, it is incompetent, irrelevant and immaterial.

THE COURT: I don't think it will throw any light on the subject. How will it throw any light on your rights? This man is not party to this suit.

MR. KAPPES: If the Court please, I think for this very cogent reason, that this man acted upon some bill dated July 8th, and apparently before a notary, with this peculiar language, "delivery July 14th, 1922."

20

THE COURT: That does not help it as far as your license or your insurance is concerned. That does not answer the question.

MR. KAPPES: It would go to this, if the court please: The defendant says that he attempted to move this car on July 8th, the day of the bill of sale. I think this goes directly to that point, and if we can show that Thoss, holding a prior bill of sale, having constructive possession, having permitted possession to remain with the privileged party over whom this whole dispute is, the witness now on the stand, and that Thoss went and insured the car, got a registration, if we can show he came down there with the plates and Siebachmeier's reason for not letting him put the plates on and taking the car out, then, I think we are getting down to the meat of this thing.

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40

Edward Siebachmeier—Cross

THE COURT: Oh, no, it does not affect it at all. If this man were a party to the suit it might be. The question is, what did the defendant know about this thing?

MR. BURKE: He did not know anything about it.

10 MR. KAPPES: I will withdraw the question.

THE COURT: The situation is now he had an agreement to get a car on the 14th, goes there on the 8th, or shortly after that, and does not get it, then instead of waiting for the 14th, he gets out a writ of replevin; there does not appear to be any delivery of that car.

20 Q. On July 8th, the date of this bill of sale to Olb, did Olb attempt to move that car? A. Well, he asked me to——

Q. Now, now——

MR. BURKE: Let him answer.

MR. KAPPES: I ask that the answer be stricken out, I am entitled to an answer. Did Olb attempt to move the car on July 8th?

30 A. Well, I got to give you the answer just the way it is. He asked me to get the car out to give him a trial; he says he wants to get a trial and probably show it to his wife. I tried to get the car out and the distributor here, it slipped. It was out of timing.

Q. Hadn't you yourself removed the distributor, in other words, didn't you take the distributor out? A. The pin on the bottom slipped. We had to remove it to work on it.

40 Q. Had you removed the distributor yourself with the idea that nobody could move the car?

Edward Siebachmeier—Cross

A. I didn't want any body to move the car without me.

Q. I am asking you, had you removed the distributor with the idea that nobody could move the car? A. On this car——

Q. Answer the question yes or no? Hadn't you taken out the distributor only with the idea that nobody could move the car? A. I always do that in any car; I don't say the distributor, I remove the key, so that nobody can fool with it.

10

Q. But in this particular car, you had taken out the distributor? A. We had to take it out to work on it.

Q. Did you intend to put it back again? A. We did put it back again.

20

Q. When? A. The same day.

Q. I ask you, did Mr. Olb, outside of his request for a demonstration or trial, ever attempt to take the car out, to keep it out? A. That I do not know. He wanted to take the car out, this demonstration, and take lessons.

Q. Outside of any desire for a demonstration, did Mr. Olb ever attempt to take the car out of your place and permanently keep it away? A. I cannot say that.

30

Q. Not that you know of?

MR. BURKE: He said he cannot say that.

Q. You cannot say that because you do not know? A. I do not know what he had in his mind.

Q. I will make it more plain for you. So far as you know, Mr. Olb at no time attempted, before the replevin suit, to take the car out and away from your place and permanently keep it

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Edward Siebachmeier—Cross

away, did he, so far as you know? A. I do not know what was in his mind, to take the car out, only the way——

10 Q. Did he ever tell you that he wanted a demonstration? A. He wanted to take a demonstration and show his wife. I told him I have several parties coming to see the car and he said, "I will bring the car back again."

Q. That is what I want to find out; so far as you know, at no time did Mr. Olb want to take the car out for a demonstration and would bring it back because you had other prospective purchasers? A. Yes.

Q. You were still attempting to get buyers for the car? A. Not for that car.

20 Q. Didn't you tell Thoss when you gave him his bill of sale that you wanted to give him the money you owed him? A. Yes, sir.

30 Q. And if you could find a buyer for this car at a reasonable price, you would let Thoss know, and Thoss would permit you to make the sale provided he got the purchase price; was that the understanding? A. No, the understanding was this: At the time he says he needs the money I said "all right, as some comes in you have it." Well, we made that understanding, I gave him a note, June 8th for the money; the note was made out for two months. He said. "can't you give security for your note? I don't want the car." I said, "I give you a good endorser." First, he said all right, then after—first he said, well, he wants to have better security, he wants to have a mortgage from the party that will endorse the note. I said, "I don't know if the party will give a mortgage for security." Then 40 he said, "I want to have a mortgage in addition to that note."

Edward Siebachmeier—Cross

Q. He asked you for a chattel mortgage, hadn't he?

THE COURT: Who is that, Thoss?

THE WITNESS: Thoss, in addition to the endorsement; he was satisfied afterward.

THE COURT: Then, why didn't you give him a chattel mortgage instead of the bill of sale? 10

THE WITNESS: I could not give him a chattel mortgage on the car, the car was supposed to be sold.

Q. Didn't Thoss ask you as early as April last for a chattel mortgage? A. Well, not on the car.

Q. Yes. You got money from Thoss in two checks in 1921— 20

MR. BURKE: This is not cross-examination.

MR. KAPPES: I withdraw it.

THE COURT: It is beyond your cross-examination.

Q. Your purpose was in giving this bill of sale to Thoss, to secure him at least in part, for some of the money you owed him, wasn't it? 30

A. Yes, sir.

Q. That was your idea? A. Yes.

Q. And despite the fact that he might have had it registered and got his license plates, you still had the idea that if you could find a buyer for the car, you would have to come to Thoss for a bill of sale, wasn't that right? You had to get Thoss' consent, didn't you? A. I didn't, no.

Q. You didn't have to get his consent? A. 40
No, because I answered that before, that this

Edward Siebachmeier—Cross

was the first car, and I gave him the bill of sale, but at that time the car was not registered.

10 Q. Did these two different bills of sale to two different people for the same identical car, mean anything in your mind, Siebachmeier? A. Well, it seems that this bill of sale is supposed to be good July 14th, providing they leave the car in the place and I get the other two new cars in.

Q. So far as you were concerned, neither Thoss' bill of sale nor Olb's bill of sale was to be any good until some later day, is that right? A. This is an acknowledgment of the money from Mr. Olb.

Q. What was this to Thoss? A. Mr. Thoss got a note.

20 Q. Did Olb have notes?

MR. BURKE: I object, not proper cross-examination.

THE WITNESS: Olb?

Q. He had had notes, hadn't he? A. Yes, sir.

Q. Your understanding with Olb was, that his bill of sale would not become complete until the 14th of July?

30 MR. BURKE: He did not say that; he said it was not to be delivered until July 14th.

Q. Didn't you say a minute ago that this bill of sale to Olb was not to be effective until the 14th of July; did you say that, or didn't you? A. Yes.

Q. Did you mean that? A. Yes.

40 Q. And Olb returned the car through the sheriff the day before the 14th, didn't he? A. I think it was the 12th, two days before.

Max Thoss—Re-Direct

MR. KAPPES: That is all.

MR. BURKE: That is all.

(Witness excused.)

MR. KAPPES: That is our case.

MR. BURKE: I have the judgment between Olb and Siebachmeier. I don't think it is disputed. The record shows that on August 7th, 1922, judgment was entered in favor of Valentine Olb, against Edward C. Siebachmeier for possession of this car. 10

REBUTTAL.

MAX THOSS, recalled.

RE-DIRECT EXAMINATION BY MR. KAPPES: 20

Q. You attend with me as your counsel at Mr. Olb's place of business on the day of this demand? A. Yes.

Q. And the demand was served on Mr. Olb, was it? A. Yes.

Q. At that time was there some conversation? A. Yes.

Q. Was the word "replevin" used? A. Yes.

MR. BURKE: I object to the question. It is not rebuttal. 30

THE COURT: I think it is competent.

MR. KAPPES: Olb has denied it, he says he did not remember.

Q. What was said to Mr. Olb at that time?

A. Well, we told him that the car belongs to us.

THE COURT: When was this?

THE WITNESS: That was on the date we served the notice on Mr. Olb. 40

Max Thoss—Re-Direct

MR. BURKE: Long after Olb's bill of sale.

THE WITNESS: I think on the 21st of June.

Q. Go ahead, what else was said? A. We told him that we would like to co-operate with
10 him, but he said, "nothing doing, nothing doing."

MR. BURKE: He said he bought the car, didn't he?

THE WITNESS: He said he bought the car and if we had anything to say, we should go to the lawyer and then I told him we would have to replevin the car.

(Witness excused.)

MR. BURKE: I ask a direction of a ver-
20 dict because there is no proof in this case that the plaintiff is entitled to possession of this car against this defendant.

THE COURT: I will hear what you have to say.

MR. KAPPES: It seems to me to be a simple issue; the only question to be tried out is a right of possession. Now, on the testimony, after all the testimony has been
30 heard, it is quite within the purview of the jury to find these facts: That Siebachmeier is indebted to both these parties, to both Thoss and Olb; to Thoss in more money than to Olb; that on June 13th, this bill of sale was made and delivered by Siebachmeier to Thoss, and Thoss thereafter registered, got it insured, got plates, and permitted the car to remain in Siebachmeier's place. That will be the constructive possession
40 in Thoss. Now, when Olb came along, Olb's

Max Thoss—Re-Direct

claim, so far as the right to possess the car is concerned, is based on another bill of sale for the identical car, dated July 8th, coupled with this unique language, "delivery July 14th, 1922". There never was a delivery under that bill of sale, but what happened was that two days before the 14th, Olb brought a replevin against whom? Siebachmeier only. Surely this would not affect the right of possession of Thoss; Thoss was not made a party to the suit. I think, if your Honor please, the evidence in the case shows clearly that the right of possession was in Thoss long before Olb had any dealing with Siebachmeier, the then holder, or custodian of the car.

THE COURT: But isn't it the testimony that this claim is in the nature of security; that this man had a right to sell the car?

MR. KAPPES: I think not, if the Court please. The plaintiff testified that this car could not have been moved or sold without his knowledge or consent.

THE COURT: I am going to leave it to the jury.

MR. BURKE: Exception.

THE COURT: Take your exception.

Both sides sum up.

Judge's Charge.

MEMBERS OF THE JURY:

It appears from the evidence in this case that one Edward Siebachmeier was the agent of the manufacturers of the Winton Automobile. He was indebted to Max Thoss, the plaintiff in this present action, who had loaned him some \$4,750, and for which indebtedness Thoss held the note of Siebachmeier. On June 13th, of the present year, Siebachmeier executed a bill of sale for a Winton Six touring car, model 40, manufacturer's number 3338 and delivered that bill of sale to Thoss. At the time he delivered that bill of sale, Thoss already held his note for \$4,700. If the bill of sale was an absolute bill of sale and there was no agreement between these parties that that bill of sale was a conditional bill of sale, or was to be held in the nature of a chattel mortgage as security for the money which he owed, then Thoss would have been entitled to recover at that time the possession of that car. But he did not do that; he never had possession of the car. He left it in the possession of Siebachmeier. He claims that Siebachmeier was authorized to sell the car and to pay him the proceeds of the car but that he had to pass title. After the car was sold, Siebachmeier paid him \$500 on account of the indebtedness and so Thoss still held a note of \$4,750 on which he is entitled to make a deduction of \$500 for the sum of money which has been paid him. Now, about that time, or shortly after, Siebachmeier became indebted to the present defendant, Olb. He first borrowed

Charge

\$1,000, then borrowed \$2,500, making an indebtedness of Siebachmeier to Olb of \$3,500. Somewheres in July when the notes were about to become due, Mr. Olb wanted his money, and Siebachmeier agreed to sell him this identical car for which he had already given a bill of sale to Thoss, at a price to be agreed upon, and they agreed upon the price of \$3,200, and thereupon Mr. Siebachmeier executed another bill of sale to Olb for this identical car, and he received back his two notes, amounting to \$3,500, and gave Olb his note for the difference in the amount, that is, the difference between \$3,200, the price of this car, and the \$3,500, which he owed him; in other words, he gave him a note for \$300. The car was not delivered to Olb. The agreement which was made on July 8th, which you will have before you, calls for delivery on or about July 14th, and the bill of sale has, underneath the signature of Siebachmeier, "delivery July 14th, 1922." When Mr. Olb did not get delivery of the car, he issued a writ of replevin. The car was taken from the possession of Siebachmeier and delivered over to Olb, but you see, Mr. Thoss was not a party to that suit, so the fact that Mr. Siebachmeier did not defend that suit and allowed a judgment to be entered against him, does not in any way affect the title or claim Mr. Thoss has to this car.

Now, you see, both these parties have a bill of sale for this identical car, and they both cannot own it. When Mr. Thoss could not get his car, he brought suit against Mr. Olb in replevin; that is, he issued a writ out of this court directing the sheriff to take that car and deliver

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Charge

it to him, claiming it was his property and not Mr. Olb's. Mr. Olb denies that and says, "it is my car" and he replevined it, that is, he gave bond and kept the car, so that the car now is in Mr. Olb's possession and the plaintiff, before he can recover, must satisfy you by the
10 preponderance of the evidence that he is the owner of that car. If he has failed to do that, then a verdict must go necessarily for the defendant. Now, so far as the bill of sale is concerned, the bill of sale held by Thoss is a prior bill of sale to that held by Olb, and if it is a bona fide bill of sale and was not held as security for a debt, then Mr. Thoss would be
20 entitled to a verdict for the value of that car, but if you find that that was not a bona fide bill of sale, but was a bill of sale as security, a conditional bill of sale, or that it was the intention of the parties that Mr. Thoss should hold that car as security, in the nature of a chattel mortgage, then Mr. Thoss has no claim which he can enforce for possession of this car, for the statute concerning chattel mortgages declares that "every chattel mortgage or conveyance
30 intended to operate as such, which shall not be accompanied by the delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the mortgage, having annexed there-
to prescribed affidavit," and so on.

Now, you see unless it was a bona fide bill of sale, then Mr. Thoss cannot recover in this action. If you find from the evidence that it
40 was the intention of the parties at the time,

Charge

for Siebachmeier to give the bill of sale to Thoss to secure him for that \$4,750, then he has no claim because he did not record his bill of sale, or did not record it as a chattel mortgage, and unless you find that Mr. Olb knew of the fact when he bought it, why, Mr. Olb's title is the better title. That, Members of the Jury, is a question you have to decide in this case. So if you find from all this evidence that you have heard, that this bill of sale which the plaintiff has was in reality security for his \$4,750, or that Olb had notice that the plaintiff had this claim on this automobile, then, of course, there can be no recovery because unless his bill of sale is a bona fide bill of sale, he cannot recover in this action against this defendant, or, if you find it was not a bona fide bill of sale, but was a conditional bill of sale, or was held as collateral security for the note of \$4,750, then if Mr. Olb knew of it, why, of course, he cannot take advantage, claiming he is the bona fide purchaser without notice, and if you find that Mr. Olb was a bona fide purchaser without notice, that is, without knowing anything about it, without knowing Mr. Thoss had any interest in it and he bought the car and delivered the \$3,500 in notes and took the car and that Mr. Siebachmeier had the right to sell it at that time, then, of course, your verdict should be a verdict for the defendant.

If you find for the plaintiff, the verdict should be a verdict for the amount of the car because the statute provides that where there has been a real delivery, that is, the party still keeps the property, the plaintiff can recover the value, whatever you find the value of the car is from the

Charge

evidence. He would also be entitled to the question of damages, if you find for the plaintiff, but there have been no damages presented in this case, so the whole question for you to determine is, whether or not this original bill of sale was a bona fide bill of sale, or whether
 10 it was simply a security given by Mr. Siebachmeier to Thoss to secure him for the money which he owed him.

Now, I have been requested to make a charge on certain portions of the law. I will dispose of them now. There can be no such thing as constructive possession as against the person who buys a thing in good faith and gets it. If you buy a piece of property, a piece of personal
 20 property from a person who has it in his possession, there is no constructive possession, so far as you are concerned. The buyer is supposed to get the property that he buys.

Getting a car insured and getting a license and the license tag, cannot affect this case in any way unless you find that Mr. Olb knew about it. If he knew that Thoss had the car insured, if he knew that the license was in his name, or
 30 if he knew that Mr. Thoss had obtained the license tags for the car, why that would put him on notice, and he could not claim that he was a bona fide purchaser without notice. The fact that Siebachmeier may or may not have known that, cannot affect the notice that Mr. Olb had of that. Of course, it is the duty of the holder of a chattel mortgage or conditional bill of sale who has not possession of the property, to put
 40 it on record, and if he fails to do what he should do, the fact of his having a chattel mortgage

Charge

unrecorded or a conditional bill of sale is no defense as against the bona fide purchaser in good faith.

That, Members of the Jury, is the case that you will have to decide from all the evidence you have heard.

10

MR. KAPPES: Exception to that part of the Court's charge where the Court charged the jury that Thoss never had possession of the car, and also insofar as it was charged that after the car was sold, Siebachmeier gave Thoss \$500 on account of the indebtedness.

MR. BURKE: Exception to that part of the charge in which your Honor said it is for the jury to say whether or not the bill of sale Thoss has is a bona fide bill of sale, or whether it was security for a debt, on the ground that there was no testimony in the case other than it was only security for a debt.

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Exhibit P-1.

Know all men by these presents, that Ed. Siebachmeier of Town of West Hoboken in the County of Hudson and State of New Jersey, party of the first part, in consideration of the sum of Twenty-five Hundred 00/100 dollars, paid by Max Thoss of Town of Guttenberg, in the County of Hudson and State of New Jersey, party of the second part, has bargained, sold granted and conveyed and by these presents bargain, sell, grant and convey unto the said party of the second part his heirs, executors, administrators and assigns, Touring, Winton-six, model 40, Manufacturer's No. 3338. To have and to hold the same unto the said party of the second part, heirs, executors, administrators and assigns forever, and Ed. Siebachmeier does for his heirs, executors, administrators or assigns, covenant and agree to and with the said party of the second part to warrant and defend the said described motor vehicle thereby sold unto the party of the second part his executors, administrators and assigns against all and every person or persons whomsoever.

ED. SEIBACHMEIER.

IN WITNESS WHEREOF I have hereunto set my hand and seal this ^{thirteenth} ~~thirtieth~~ day of June, one thousand nine hundred and twenty-two.

Signed, sealed and delivered)

in the presence of)

EDWARD L. BERGMANN. JR.,

EMIL BAUTZ.

STATE OF NEW JERSEY, }
 County of Hudson. } ss. :

BE it remembered that on this thirteenth day of June 1922, before me a Notary Public of the State of New Jersey personally appeared Ed. Siebachmeier, who, I am satisfied, is the seller mentioned in the within instrument, and I having personally made known to him the contents there- 10
 or he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

EMIL BAUTZ,
 Notary Public, N. J.

**Statement in Lieu of
 Exhibit P-2.**

Automobile Policy. 20

No. A1828983

UNITED STATES FIRE INSURANCE COMPANY OF
 NEW YORK.

Fire policy with Theft endorsement
 Amount \$3400. Rate .55 Premium \$18.70
 Name of Assured Max Thoss
 Address of Assured 216-24th Street, Guttenberg,
 N. J. 30

The term of this policy begins at noon on the 25th day of May, 1922 and ends at noon on the 25th day of May, 1923. Amount of insurance Thirty-four Hundred Dollars (\$3400.)

Warranties.

1. Assured's occupation is embroidies.
2. The following is the description of the automobile: Year 1922, Model 40, Trade Name Win-

Exhibit P-2

ton, type of body 7 pass. Touring, Factory or Serial No. 38257, Motor No. 3338, Advertised Horse Power 70, No. of Cylinders 6, List Price \$3400.

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3. The facts with respect to the purchase of automobile described are as follows: Purchase by the Assured the fifth month, year of twenty-two, new, actual cost to assured including equipment \$3400. the automobile described is fully paid for by the assured and is not mortgaged or otherwise encumbered, except as follows: No exceptions.

4. The uses to which the automobile described is and will be put are: private and pleasure and business uses excluding commercial delivery.

20

5. The automobile described is usually kept in public garage, located, West Hoboken, N. J. Countersigned at Jersey City, N. J. this 30th day of June, 1922,

ARNOLD RIPPE,
Attorney.
HOWARD LONG,
Agent.

30

40

Exhibit P-3.

This Registration Expires December 31st, 1922.

STATE OF NEW JERSEY

OFFICE OF SECRETARY OF STATE

211071

Department of Motor Vehicle Registration and
Regulation Passenger Vehicle Registration No.
204971

10

Issued to Max Thoss
of Guttenberg

In pursuance of "An Act defining motor vehicles and providing for the registration of the same and the licensing of the drivers hereof; fixing rules regulating the use and speed of motor vehicles; fixing the amount of license and registration fees; prescribing and regulating process and the service thereof and proceedings for the violation of the provisions of the act and penalties for said violations" Approved April 8, 1921.

20

This Certificate must be carried when vehicle is operated.

Description of Vehicle.

Made by Winton 6

Year 1922 Model 40 Body Tour.

Serial No. 3338 Horse Power 34

30

Engine No. 3338

In testimony whereof I have set my hand and my seal of office the 8th day of June, A. D. 1922.

WM. L. DILL

Commissioner of Motor Vehicles

Fee \$17.00

W. J. CADWALLADER

Agent

40

Union Hill, N. J.

Exhibit P-4.

\$4,755.

West Hoboken, N. J.

June 8th, 1922.

Two months after date I promise to pay
to the order of Max Thoss
Four Thousand Seven Hundred and fifty-five
10 00/100 Dollars, at 4334 Hudson Boulevard West
Hoboken, New JerseyValue received.
No. Due August 8/1922 Ed. Siebachmeier

Exhibit P-5.

To:

MR. VALENTINE OLB:—

I hereby demand of you the following goods
and chattels, which are my property, to wit: 1
20 Winton-Six Touring Car, Model 40, Manufact-
urer's No. 3338, and unless you deliver the same
forthwith, I shall commence legal proceedings
against you to recover possession of the same.
Dated: July 21st, 1922.

MAX THOSS

Exhibit D-1.

30 ED. SIEBACHMEIER
4334 Hudson Boulevard.

DUPLICATE

CONTRACT

West Hoboken, N. J.

July 7, 1922.

You are hereby authorized to deliver one
Winton-Six Automobile Model 40 Body Style Tour-
ing, Color Morraum with regular equipment for
40 which I agree to pay spec. price Thirty-two hun-

Exhibit D-1

dred Dollars (\$3,200.) plus the cost of extras, transportation, charges and taxes of whatever kind which have been or may be levied at the time of delivery.

Herewith please find check for Thirty-two hundred Dollars (\$3,200.) as initial payment that this order may take effect immediately. 10

Delivery on or about July 14, 1922, I agree to pay the balance together with freight and charges for extras, when notified that car is ready for delivery. Notice may be sent by mail to the address given below.

All payments on account and any car given in exchange, shall be forfeited as liquidated damages if subsequent payment is not made within five days of notice that the car is ready for delivery, or if I in any way fail or refuse to perform this agreement. 20

It is expressly agreed that in the event this order is cancelled because of your inability to deliver, any second-hand car which may have been taken in exchange in part payment of purchase price and sold by you previous to such cancellation, shall be accounted for by you at the price sold, less all expenses for repairing, painting and selling the same, and not at the price which may have been allowed for the same in exchange. 30

I hereby agree that your liability for failure to deliver within a reasonable time, or the time specified herein, is hereby limited to the return of any payments made hereunder and the return of any automobile taken in exchange, if same has not been sold, or if sold, the proceeds of the sale of the same less all expenses for repairing, painting and selling the same. 40

I agree that neither this contract nor any of my rights under it shall be assignable and that in case of my transferring or assigning this contract or any of my rights under it, you are to have the privilege of cancelling this order.

10 It is mutually agreed that there are no promises verbal understandings or agreements of any kind pertaining to this order not clearly specified in it, and that this contract is in no way binding upon you until it is signed or otherwise approved by your signature.

Price of Car \$3,200.
Total 3,200.

No. 3338 Model 40

Signature of Purchaser Valentine Olb

Address of Purchaser 17 King Ave., Weehawken,

20 Approved and Accepted

ED. SIEBACHMEIER

(Signature of Proprietor)

EDWARD W. BERGMANN

(Signature of Salesman)

Car No. 3338

Exhibit D-2.

30 \$300.00 July 8th, 1922

Payable on demand after date I promise to pay to the order of Valentine Olb

Three Hundred and 00/100Dollars.

at 4334 Hudson Boulevard, West Hoboken, N. J. with interest Value received.

No. Due ED. SIEBACHMEIER.

40

Defendant's Bill of Sale

KNOW ALL MEN BY THESE PRESENTS, that Ed. Siebachmeier of West Hoboken in the County of Hudson and State of New Jersey, party of the first part, in consideration of the sum of Two Thousand dollars, paid by Valentine Olb of Weehawken, in the county of Hudson and State of New Jersey, party of the second part, have bargained, sold granted and conveyed and by these presents bargain, sell, grant and convey unto the said party of the second part heirs, executors, administrators and assigns, Touring, Winton-Six, model 40, manufacturer's no. 3338. To have and to Hold the same unto the said party of the second part, heirs, executors, administrators and assigns forever, and Ed. Siebachmeier, do for heirs, executors, administrators or assigns, covenant and agree to and with the said party of the second part to warrant and defend the said described motor vehicle hereby sold unto the party of the second part executors, administrators and assigns against all and every person, or persons whomsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this eight day of July one thousand nine hundred and Signed, sealed and delivered

in the presence of
JULIUS KLUMPP
 Notary Public
 County of Hudson,
 New Jersey.

ED. SIEBACHMEIER
 Delivery July 14, 1922.

Delehant's Bill of Sale

Know all men by these presents that I, the undersigned, of the County of Hudson and State of New Jersey, party of the first part, in consideration of the sum of Two Thousand dollars, paid by Valentine Olden Woodman in the County of Hudson and State of New Jersey, party of the second part, have granted, sold, transferred and conveyed and by these presents bargain, sell, grant and convey unto the said party of the second part, his executors, administrators and assigns, Thomas Wilson, six model 40 manufacturer's no. 212's To have and to hold the same unto the said party of the second part, heirs, executors, administrators and assigns forever, and his heirs, executors, administrators and assigns, do hereby covenant and agree to and with the said party of the second part to warrant and defend the said described motor vehicle hereby sold unto the party of the second part, executors, administrators and assigns against all and every person or persons whatsoever.

In Witness Whereof, I have hereunto set my hand and seal this eight day of July one thousand nine hundred and

thirty-six, signed and delivered in the presence of us, the undersigned, as witnesses, to the said party of the second part, his executors, administrators and assigns, to wit: Valentine Olden Woodman, of the County of Hudson, State of New Jersey, and

Ed. SIEKACHMIR
 Dated July 11, 1932

New Jersey Court of Errors and Appeals

Between

MAX THOSS,
Plaintiff-Respondent,

vs.

VALENTINE OLB,
Defendant-Appellant.

Memorandum
for Plaintiff-
Respondent.

STATEMENT OF FACTS

This is a suit in replevin for the recovery of possession of an automobile and its accessories (a Winton-Six, Model 40, Manufacturers No. 3338). Plaintiff claims title and right of possession on June 13th, 1922 (exhibit P-1) under a Bill of Sale therefor from Edward Siebachmeier, a dealer in automobiles (case p. 13 l. 15; p. 15 l. 32; p. 26 l. 14).

Thoss having no garage or place to keep the car, delivered it to Siebachmeier for the purpose of safe keeping (case pp. 18 l. 1-11), and with the understanding that Siebachmeier might seek a purchaser for the regular sales price, and if one

were found, sale would be consummated and title passed through Thoss (case pp. 17 l. 22).

Subsequently on July 8th, 1922, while Siebachmeier was indebted to Olb, defendant, in the sum of \$3,500, Siebachmeier entered into an agreement with Olb for the sale of the same car for \$3,200 (see agreement, exhibit D-1), under which, if at all, delivery was to be made to defendant on July 14th, 1922. This instrument was dated July 7th, 1922. Defendant's alleged Bill of Sale bears date July 8th, "one thousand nine hundred and"— (case p. 65) and under the signature of Siebachmeier, "delivery July 14, 1922."

Siebachmeier never made delivery of this car to defendant Olb either under the instrument (exhibit D-1) nor the alleged Bill of Sale (case p. 65) but on July 11th, 1922 (case p. 32 l. 25 l. 27) (three days before time fixed for delivery) Olb instituted replevin in the Hudson Circuit against Siebachmeier, and so took possession of the car (case p. 48 last line) and later obtained judgment therein (case p. 49 l. 10) in which suit this plaintiff was not a party.

Defendant had knowledge of lack of title or defect therein of Siebachmeier before he, Olb, obtained possession of the car (case p. 38 l. 23) (case p. 39 l. 23).

The value of the car was \$3,600 (case p. 20 l. 40) (exhibit P-2), value \$3,400.

August 4th, 1922 (writ P-1) plaintiff Thoss replevied car from Olb, the defendant, and Olb filed claim of property and bond with the Sheriff and retained possession of the car.

The Jury rendered a verdict for the plaintiff against the defendant for the sum of \$3,200.

POINT I**Plaintiff when he brought replevin had title and right of possession of the car against defendant.**

Siebachmeier on June 8th, 1922, was indebted to Thoss, plaintiff, for \$4,755 (Exhibit P-4), in part repayment of which he conveyed and delivered this car to plaintiff by Bill of Sale (Exhibit P-1) on June 13, 1922.

Plaintiff's claim that this was an absolute sale is clearly evidenced by the intention of the parties.

Q. At the time you got this bill of sale, this car described in these papers was in Mr. Seibachmeier's place.

A. Yes, sir.

Q. And the car was new and had not been driven?

A. Yes.

Q. Did you have some understanding with Siebachmeier before you left there about having the bill of sale?

A. Yes, sir.

Q. Then you proceeded to where?

A. To Emil Bach's place.

Q. Who is Emil Bach?

A. The Town Clerk of Union Hill.

Q. The Town Clerk of Union Hill?

A. Yes, sir.

Q. And he prepared the bill of sale?

A. Yes, sir.

Q. And executed it and witnessed it?

A. Yes, sir.

Q. Now, at the time did you have any understanding with Siebachmeier about what was to be done with the car?

A. Yes, sir (case p. 16).

Q. You had no garage of your own, had you?

A. No.

Q. You had not owned any automobile before that?

A. No.

Q. Did you have any place where you could keep this car, of your own?

A. No, sir.

Q. Did you have some talk with Siebachmeier as to what was to be done with the car, where it was to be kept and how?

A. Well, the thing was this, they were—

Q. Now what was said?

A. What was said? That if he sold the car, *he only is to transfer from my bill of sale.*

Mr. Burke: What is that?

The Witness: *If he should sell the car, he can only transfer it from my bill of sale.*

Q. When you got this bill of sale was there anything said between you and Mr. Siebachmeier as to whose car it was?

A. Yes, sure (case p. 17).

Q. Now, who was going to take care of it, or keep it?

A. Well, it was to stay in Siebachmeier's place because I didn't have any room (case p. 18).

Q. *It was to be left there and kept there for you?*

A. Yes, sir (case p. 18).

Q. For Siebachmeier or for you?

A. For me (p. 18).

Q. Did you give permission to Siebachmeier or anybody to take your car away?

A. No, sir (case p. 18).

Thoss then had the car insured (case p. 14),

had the same registered with the Commissioner of Motor Vehicles (case p. 15) (Exhibits P-2 and P-3).

In thus registering the car Thoss did that which is required of an owner:

The Motor Vehicle Act, P. L. 1921, Chap. 208, Sec. 9.

“Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.”

“For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.” (*The Sales Act* P. L. 1907, Chap. 132, Sec. 18).

“The intention of the parties is a question of fact for the jury upon disputed facts and circumstances.” (*Smalley vs. Hendrickson*, 29 N. J. L. 371.)

POINT II

The Bill of Sale to plaintiff, Thoss (Exhibit P-1) complies with the act P. L. 1919, Chap. 168.

The Bill of Sale completely complies with the act and required no assignments, as title came from the automobile dealer.

POINT III

Defendant obtained no title to the car in question and had none, nor any right of possession at the time of the commencement of this suit.

The defendant called as his witness the automo-

bile dealer, Siebachmeier (case p. 36). He testifies:

Q. At the time you signed this bill of sale to Thoss you owed him between \$4,500 and \$5,000, didn't you?

A. Around that, yes sir.

Q. Both of these bills of sale, the one to Thoss and the one to Olb, called for identically the same car, do they not?

A. Yes, sir.

Q. How much did you owe Olb?

A. Altogether \$3,500.

Q. And how much did you owe to Olb? (Misprint: Olb should read *Thoss*).

A. Around \$4,700.

Q. Is this your note to Thoss?

A. Yes, sir.

Q. This note is dated June 8th, isn't it?

A. Right. (case p. 37.)

Q. How can you explain to his Honor and the jury that you gave those two different people a bill of sale for identically the same car, one June 13th and the other on July 8th?

A. Well, for the first, I was after Mr. Olb to sell the car quite some time. Mr. Olb loaned me some money. I needed some money, and I asked him and he said, "Sure, you can have it"; and at the same time I always tried to sell him a car because he wanted to buy a car; he wanted to buy a car last year and he said he would buy one this year, so at that time he says, "Well, I might as well take the car." I said, "You got \$3,500, I sell you the car for so and so much money." He said, "All right." *I told him the car is not free and clear.* He said, "Well, can I have a receipt for my money on the car?" (case p. 38).

Q. You did not intend to get this car on the day you made this bill of sale to him, did you?

A. No, on the 14th—*make delivery on the 14th* (case p. 39).

Q. After you made the contract, the one the court is looking at, and before you gave Olb the bill of sale, wasn't it?

A. After we made the contract out Thoss went over and got the registration out; he said he likes to take a license out.

Q. Just a minute; he wanted to go over and take this license out and you had some talk about it, didn't you?

A. He did go over after.

Q. When did you know first that Thoss went over to the Motor Vehicle Commissioner and got this registration for the car; when did you first know it?

A. It was a Monday.

Q. What month was it in?

A. In June (c. p. 42, l. 40).

The agreement under which defendant claims to have purchased the car has very peculiar language (Exhibit D-1) "the price is \$3200. *plus the cost of extras, transportation, charges and taxes of whatever kind, which have been or may be levied at the time of delivery,*" (p. 63).

"Delivery on or about July 14, 1922, I agree to pay the balance together with freight and charges for extras, when notified that car is ready for delivery. Notice may be sent by mail to the address given below" (p. 63).

"I hereby agree that your liability for failure to deliver within a reasonable time, or the time specified herein, is hereby limited to the return of any payments made hereunder and the return of any

automobile taken in exchange, if same has not been sold, or if sold, the proceeds of the sale of the same less all expenses for repairing, painting and selling the same" (p. 63).

The foregoing in conjunction with the notation of Siebachmeier "delivery July 14, 1922" on defendant's alleged bill of sale (p. 65) in which the consideration is given as "Two Thousand dollars" (p. 65, l. 4) with the added fact that defendant obtained possession of the car not by delivery from Siebachmeier but from the Sheriff under replevin in conjunction with the testimony of Siebachmeier (defendant's witness).

"The Court: The situation is now he had an agreement to get a car on the 14th, goes there on the 8th, or shortly after that, and does not get it, then instead of waiting for the 14th, he gets out a writ of replevin; there does not appear to be any delivery of that car (p. 44).

A. I didn't want anybody to move the car without me (p. 45).

Q. Outside of any desire for a demonstration, did Mr. Olb ever attempt to take the car out of your place *and permanently keep it away?*

A. I cannot say that.

"I told him the car is not free and clear" (p. 38 l. 25).

Q. Did he ever tell you that he wanted a demonstration?

A. He wanted to take a demonstration and show his wife. I told him I have several parties coming to see the car and he said, "I will bring *the car back again*" (p. 46).

Q. Did these two different bills of sale to two different people for the same identical car, mean anything in your mind, Siebachmeier?

A. Well, it seems that this bill of sale is sup-

posed to be good July 14th, providing they leave the car in the place and I get the other two new cars in.

Q. Didn't you say a minute ago that this bill of sale to Olb was not to be effective until the 14th of July; did you say that, or didn't you? A. Yes (p. 48) "clearly indicates that Olb was not a purchaser in good faith, that he had knowledge of some outstanding claim against the car, to wit, the plaintiff's and that he took subject thereto.

There is not one iota of testimony that Olb ever did an act of any kind to evidence ownership on his part. He never drove or operated the car; he never insured it, he never registered it with the Commissioner of Motor Vehicles.

Such failure on his part justified the jury to draw the inference that he did not act in good faith in procuring a bill of sale or that he had knowledge of the well-founded claim of Thoss as to ownership and possession by the latter.

POINT IV

The case at bar does not fall within the decision of Commonwealth Fin. Corp. vs. Schutt, 116 Atl. 722.

The case cited and relied upon by defendant is one where there was absolutely no dispute in the facts or of the intention of the parties; the transaction was solely and only for the purpose of securing an advance of moneys by the Financial Corporation, whereas, in the case at bar, the testimony already referred to *made a jury question* as to the intention of the parties.

POINT V

The registration card issued by the Commissioner of Motor Vehicles to plaintiff and the Insurance Policy (Exhibit P-2) were properly admitted in evidence.

Since the intention of Siebachmeier and Thoss as to plaintiff's bill of sale being a relevant question, this testimony was both material and relevant.

POINT VI

The charge of the Court to the jury was entirely in accord with the facts adduced in the testimony as already averted to.

POINT VII

The amount \$3200 for which the jury found a verdict for the plaintiff was within their province.

Q. Did Siebachmeier say how much he was to sell the car for?

A. He advised \$3,600 (p. 20).

Q. And the regular sales price was \$3,600?

A. Yes, sir (p. 21).

POINT VIII

Defendant's motion for a non-suit was properly denied.

POINT IX

Defendant's motion for a direction of a verdict was properly denied.

POINT X

The judgment should be affirmed.

Respectfully submitted,

KAPPES & HILLE,
Attorneys of Respondent.

CHARLES WM. KAPPES,
Of Counsel.

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New Jersey Court of Errors and Appeals.

MAX THOSS,
Plaintiff-Respondent,

vs.

VALENTINE OLB,
Defendant.

10

Action
At Law.

Statement of Facts.

This is a suit in replevin for the recovery of a Winton Six Automobile Model 40 Manufacturers No. 3338 and tools, appliances and equipment. Plaintiff claiming ownership on June 13, 1922. 20

Edward Siebachmeier, a dealer in automobiles, (case pp. 13-20) was indebted to plaintiff in the sum of \$4755. for which sum plaintiff held Siebachmeier's note for \$4755. dated June 8, 1922 on August 8, 1922 (Exhibit P-5). On June 13, 1922, Siebachmeier executed and delivered to plaintiff the bill of sale under which the latter claims title (Exhibit P-1) as security for the money due from Siebachmeier to plaintiff (case pp. 16, 18, 20, 25) and was to be sold (case pp. 17-20) for the regular sales price and after the sale the money was to be paid by him to plaintiff (case p. 21). Plaintiff never had possession of the car (case p. 16). 30

Afterwards on July 8, 1922, defendant to whom Siebachmeier was indebted for the sum of \$3500. for which sum defendant held Siebach- 40

meier's notes, entered into an agreement with Siebachmeier for the purchase of the car for \$3200. (Exhibit D-1). This sum of \$3200. was paid by defendant cancelling \$3200. of Siebachmeier's debt to him and surrendering up to the latter the notes for \$2500. (case pp. 24, 25, 26). The car was then in Siebachmeier's place of business in his show room for sale (case pp. 25, 26).

10 Afterwards Siebachmeier executed and delivered to defendant a bill of sale (see Exhibit Defendant's bill of sale).

On July 12, 1922, defendant replevied the car from Siebachmeier and it was in his possession at the time of the issuance of the writ of replevin.

Defendant had no knowledge of the transaction between Thoss and Seibachmeier at the time he purchased the car.

20 The jury rendered a verdict for the plaintiff and against the defendant in the sum of \$3200.

POINT I.

Plaintiff did not have title or right to possession of the automobile against defendant.

30 Plaintiff's bill of sale was executed and delivered by Siebachmeier to plaintiff to secure a debt owing to plaintiff, evidenced by a promissory note due August 8, 1922.

40 There is no dispute that Siebachmeier owed plaintiff \$4755. at the time of the execution of the bill of sale (Exhibit P-1) and that the bill of sale was executed and delivered by Siebachmeier and accepted by plaintiff to secure the payment of this debt (case pp. 13-19-20). And the automobile was permitted by plaintiff to remain in Siebachmeier's possession in his place of business as a dealer in such automobiles for sale (case pp. 16-18-20-25).

This is plaintiff's claim and the only claim he makes. It further appears (case pp. 17-20-21) that Siebachmeier was to repay these moneys from the sale of the car and with interest (case p. 20).

Under these circumstances the bill of sale was a chattel mortgage.

Commonwealth Fin. Corp. vs. Schutt, 116 Atl. 722. 10

And not having been recorded was void as against a purchaser in good faith.

Defendant was a purchaser in good faith. Siebachmeier was indebted to him in the sum of \$3500. for which sum defendant held the latter's notes. Defendant cancelled this indebtedness and surrendered the notes, as the consideration for the sale to him of the automobile. 20

This is a good consideration.

Baker vs. D. L. & W. R. R. Co., 64 N. J. L. 53;

Lodge vs. Hulings 63 N. J. Eg. 159.

POINT II.

Defendant had absolute title to the car at the time of the commencement of this suit. 30

Defendant and Siebachmeier on July 7, 1922 entered into a contract (Exhibit D-1) for the purchase of this automobile at the price of \$3200. in which contract it was agreed that delivery should be made on or about July 14, 1922. At that time defendant paid to Siebachmeier the purchase price of the car by the surrender of the notes and the cancellation of the debt. The next day Siebachmeier executed and delivered to defendant a bill of sale dated July 8, 1922, (see Defendant's bill of sale) absolute in form with the words written under the signature "Delivery July 40

14, 1922", Siebachmeier's attempts at explanation of these words, on cross-examination, amount to no more than that defendant was not entitled under the bill of sale to possession before July 14, 1922. But the title did pass by the bill of sale notwithstanding delivery was postponed to July 14.

10 Section 19 of Sales Act.

Brock vs. O'Donnell, 45 N. J. L. 441-443;
Frazier vs. Fredericks, 24 N. J. L. 162-169.

It has not been shown that defendant, at the time of the making of the contract or the surrender of the notes and the cancellation of the debt or the delivery of the bill of sale, knew or had any notice that plaintiff held a bill of sale or had
20 any claim against the car and the burden of proof that defendant was not a purchaser in good faith was on plaintiff.

Commonwealth Fin. Corp., vs. Schutt,
(supra).

POINT III.

30 Plaintiff has not established that he was at the time of the commencement of this suit entitled to the immediate possession of the car.

The real test, then, as to whether an action (replevin) can be maintained turns upon the question whether the plaintiff is, *at the time of the commencement of the suit*, entitled to the immediate possession of the property claimed.

Commonwealth. Fin. Corp. vs Schutt,
(supra);

40 *Chambers vs. Hunt*, 18, N. J. L. 339;

Chambers vs. Hunt, 18 N. J. L. 339;

620;

Same case, 22 N. J. L. 552.

And the strength or weakness of defendant's title or right of possession cannot be considered.

Commonwealth Fin. Corp. vs. Schutt,
(supra).

It is contended that plaintiff's bill of sale must be construed to be a mortgage to secure the debt due to him from Siebachmeier which debt was due on August 8, 1922. And plaintiff having failed to show that defendant was not a purchaser in good faith was not entitled to possession at the time of the commencement of this action. 10

Even if defendant were not a purchaser in good faith and even if he had taken title with knowledge or notice of plaintiff's bill of sale, plaintiff was not entitled to prevail in this suit.

The test is "*entitled to immediate possession at the time of the commencement of the action.*" 20

Plaintiff as a mortgagee, was not entitled to possession until default to make payment on the due day.

Finkel vs. Lepkin, 62 N. J. L. 580.

Plaintiff's debt was not due until August 8, 1922, the demand was made on July 21, 1922, the writ issued on July 29, 1922 and executed August 4, 1922. The mortgagor was then not yet in default, in fact, there is no evidence in the case that he ever did make default, it would appear that at the time of the issuance and execution of the writ plaintiff was not entitled to possession even as against Siebachmeier, and certainly not as against defendant. 30

In passing it might be noted that the automobile has always remained in the County of Hudson where it was located at the time of the making of the chattel mortgage. 40

Even if plaintiff's bill of sale should be construed as an absolute bill of sale rather than a mortgage he cannot recover inasmuch as he permitted the automobile to remain in the vendor's possession in his show room for the purpose of sale by him (case pp. 17-20-21).

10 *Commonwealth Fin. Corp. vs. Schutt*,
(supra);
Bridgeham vs Hinds, (Me.) 115 Atl. 197.

Furthermore plaintiff's bill of sale was not in accordance with the act P. L. 1919 Chap. 168 page 357 and therefore void and passed no title.

Stein vs. Scarpa, 114 Atl. 245;
McGlymn Ellis, 1 N. J. advance Rep.
25.

20

POINT IV.

The registration card the license issued by the Commissioner of Motor Vehicles of the State of New Jersey to plaintiff for the automobile described in the writ should not have been submitted in evidence.

30 This license was simply evidence of certain declarations made by the plaintiff as to the ownership of the car in question, which were self serving. The issuance of this license of itself does not give the plaintiff any right of possession in the car described therein and is only issued to him upon his declaration that he is the owner. This evidence may have had an improper influence on the jury by reason of the inference to be drawn therefrom.

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POINT V.

The insurance policy insuring the automobile described in the writ of replevin, obtained by the plaintiff should not have been admitted in evidence.

This policy which the plaintiff has obtained was improper evidence because it was self serving and did not show title or any right of possession in the plaintiff, it was simply evidence of a declaration by the plaintiff that he owned the car in question. The inferences to be drawn from this evidence may have had some effect on the jury. 10

POINT VI.

The court should not have charged the jury on the construction to be placed on the plaintiff's bill of sale. 20

There is no dispute as to the facts, the plaintiff says "I took the bill of sale as security for money due to me" (case pp. 13-19-20). This testimony is undisputed and the court should have found as a matter of law that the plaintiff's bill of sale was in effect a chattel mortgage and not being recorded was therefor void as against this defendant. 30

POINT VII.

The court should not have left to the jury the construction to be placed upon the plaintiff's bill of sale.

There is no dispute as to the facts, the plaintiff says, "I took the bill of sale as security for money due me" (case pp. 13-19-20). The court should have found as a matter of law that the bill of sale was void as against this defendant and directed a verdict in his favor. 40

POINT VIII.

The verdict of the jury for \$3200. cannot be sustained by the evidence.

The defendant having filed a claim of property with the sheriff, plaintiff, if he succeeds is entitled to a money judgment for the value of the automobile and for the taking and detaining.

10 Section 10 Replevin Act Vol. 3, Com Stats. p. 4371.

There was not a scintilla of evidence as to the value of the automobile or of any damages of the plaintiff, and the amount returned by the jury is without justification or foundation and must be set aside.

POINT IX.

20 Defendant's motion for a non-suit should have been granted.

POINT X.

Defendant's motion for a direction of a verdict should have been granted.

Respectfully submitted,

30 WM. F. BURKE,
Attorney of Appellant.

JOHN H. SHERIDAN,
G. FRANK SHANLEY,
Of Counsel.

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