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WITNESSES FOR DEFENDANTS.

EXHIBITS.

Notice of Appeal.

New Jersey Supreme Court

HUDSON CIRCUIT.

BERNICE J. HARRIS,
Plaintiff,

vs.

CHARLES A. WALK, JR., and
EDWARD F. WALK,
Defendants.

Action at Law.
Notice of Appeal.

To I. Ross McCOMBE, Esq.,
Attorney for Plaintiff,
591 Summit Avenue,
Jersey City, N. J.

Sir:

TAKE NOTICE that the defendant, Charles A. Walk, Jr., appeals to the Court of Errors and Appeals in the Last Resort in all Causes in New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. That the Trial Court erred in directing a verdict in favor of the plaintiff, and against the defendant Charles A. Walk, Jr.

Dated: March 11th, 1929.

RAE, KING & O'BRIEN,
Attorneys for Appellant.

Summons.

(L. S.)

The State of New Jersey to the Sheriff of the County of Hudson, Greeting:

We command you that if Bernice S. Harris shall make you secure, you cause to be taken and delivered to her, one Buick Sedan, Motor #1151701, Serial #1130007, Model 24-47, which said Charles A. Walk, Jr., and Edward F. Walk took and unjustly detains as is said; and that you summon the said Charles A. Walk, Jr., and Edward F. Walk to answer the annexed complaint of Bernice S. Harris in an action at law in the Supreme Court. And that you notify them that unless they file their answer to said complaint, with the Clerk of the Supreme Court at Trenton within twenty days after service upon them of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against them.

Witness, William S. Gummere, Esq., Chief Justice of the Supreme Court at Trenton, this 15th day of June, 1927.

Edward J. Kelleher,
Clerk.

I. Ross McCombe,
Attorney.

Complaint.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE S. HARRIS, Plaintiff, *vs.* CHARLES A. WALK, JR., and EDWARD F. WALK, Defendants.	Complaint.

Plaintiff, residing at #308 State Street, Borough of Brooklyn, City of New York, County of Kings and State of New York, says that:

1. On or about the 25th day of October, 1926, and for some time prior thereto, plaintiff was and ever since has been the owner of a certain Buick Sedan, motor #1151701, serial #1130007, Model 24-47, of the value of Eight Hundred ($800.00) dollars.

2. That on said date, plaintiff made a contract with Kasten Brothers, Inc., under terms to which said Kasten Brothers, Inc., agreed to store said automobile in its garage at #486 Tonnelle Avenue, Jersey City, New Jersey, in dead storage, at the agreed rate of Five ($5.00) dollars per month for a period of six months.

3. That on or about the 6th day of April, 1927, while said automobile, belonging to plaintiff, was located in said garage at #486 Tonnelle Avenue, Jersey City, the defendant, Charles A. Walk, Jr.,

then and there took possession of said automobile by virtue of an alleged sale, and has ever since wrongfully detained the same.

4. That said automobile is now in the possession of Charles A. Walk, Jr., and Edward F. Walk, the defendants herein.

5. The plaintiff has made demand on the said defendants for the return of said automobile, but said defendants refuse to deliver the said automobile to said plaintiff and then and now wrongfully detain the same.

Plaintiff demands judgment for the possession of said automobile, or in case it cannot be returned to said plaintiff, plaintiff then demands the sum of Eight Hundred ($800.00) dollars damages for said detention, together with costs of suit.

I. Ross McCombe,
Attorney for Plaintiff.

Notice.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE J. HARRIS, Plaintiff, *vs.* CHARLES A. WALK, JR. and EDWARD F. WALK, Defendants.	Action at Law. Notice.

To:

I. ROSS MCCOMBE, Esq.,
Attorney for the Plaintiff.

Sir:

TAKE NOTICE that we will apply to Hon. Frank L. Cleary, Judge of the Hudson County Circuit Court, on the 14th day of July, 1929, at the Court House in Jersey City, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard for an order in the above entitled cause striking out the complaint filed herein on the ground that:

1. It does not allege demand or payment of garage bill as provided by the statute in such case made and provided.

2. It does not establish the right of the plaintiff to possession of said Buick sedan mentioned in the complaint.

3. That in paragraph 3 or any other paragraph of the complaint the plaintiff does not allege that the defendant came into possession in an unlawful way.

Notice.

4. The plaintiff has not set forth that she has complied with the statutory provisions demanding the return of the said automobile.

Respectfully yours,

KING & O'BRIEN,
Attys. for Defendants.

Stipulation.

NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT.

BERNICE J. HARRIS,
Plaintiff,

vs.

CHARLES A. WALK, JR., and
EDWARD F. WALK,
Defendants.

Action at Law.
Stipulation.

It is hereby stipulated and agreed between the parties hereto that the argument of a motion originally set for the 14th day of July, 1927, and upon which day a continuance by stipulation and consent was made to the 18th day of August, 1927, it was further continued until the 8th day of September, 1927, before the Honorable Frank L. Cleary, Circuit Court Judge of the State of New Jersey.

Dated August 17th, 1927.

I. ROSS MCCOMBE,
Attorney of Plaintiff.

KING & O'BRIEN,
Attorneys of Defendants.

Stipulation.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE J. HARRIS, Plaintiff, *vs.* CHARLES A. WALK, JR., and EDWARD F. WALK, Defendants.	Action at Law. Stipulation.

It is hereby stipulated and agreed between the parties hereto that the argument of a motion originally set for the 14th day of July, 1927, and upon which day a continuance by stipulation and consent was made to the 18th day of August, 1927, it was further continued until the 30th day of September, 1927, before the Honorable Frank L. Cleary, Circuit Court Judge of the State of New Jersey.

Dated August 17th, 1927.

I. ROSS MCCOMBE,
Attorney of Plaintiff.

KING & O'BRIEN,
Attorneys of Defendants.

Order Denying Motion to Strike Out Complaint.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE J. HARRIS,
Plaintiff,

vs.

CHARLES A. WALK, JR., and
EDWARD F. WALK,
Defendants.

Order Denying Motion to Strike Out Complaint.

The Defendant having served upon the Plaintiff Notice of Motion for an Order in the above entitled cause, striking out the complaint on the ground that the complaint does not disclose a cause of action, the ground of said motion being that:

1. It does not allege demand or payment of garage bill as provided by the statute in such case made and provided.

2. It does not establish the right of the plaintiff to possession of said Buick sedan mentioned in the complaint.

3. That in paragraph 3 or any other paragraph of the complaint the plaintiff does not allege that the defendant came into possession in an unlawful way.

4. The plaintiff has not set forth that she has complied with the statutory provisions demanding the return of the said automobile.

Order Denying Motion to Strike Out Complaint.

Now, on the 21 day of November, 1927, a motion having been in conformity with the notice aforesaid by Messrs. King & O'Brien, William O'Brien of counsel for defendant, and the said motion having been opposed by I. Ross McCombe, Attorney for the plaintiff, it is ordered that the motion aforesaid be denied and that Eleven & 25/xxx ($11.25) dollars costs be allowed to plaintiff.

It is further ordered that the defendant have until the 30th day of November, 1927, instant, inclusive, to file his answer to the above entitled cause, conditioned on the payment of said costs.

On motion of I. Ross McCombe, Attorney for plaintiff. Let the above rule be entered on minutes.

Frank L. Cleary,
Judge.

Rule entered 21st day of November, 1927.

On motion of
I. Ross McCombe,
Atty. for Pltff.

A true copy
Edward J. Kelleher
Clerk

Answer and Counterclaim.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

BERNICE J. HARRIS, Plaintiff, *vs.* CHARLES A. WALK, JR. and EDWARD F. WALK, Defendants.	Action at Law. Answer and Counterclaim.

The defendants Charles A. Walk, Jr. and Edward F. Walk, of the City of Jersey City, County of Hudson and State of New Jersey, say:—

1. As to the matters alleged in paragraphs 1 and II of the complaint herein, the defendants have no knowledge sufficient to form a belief and leave plaintiff to the proof thereof.

2. The defendants deny that they or either of them ever wrongfully took possession of or wrongfully detained said automobile mentioned in paragraph 3 of the complaint.

3. Defendants admit that at the time of said suit being commenced they were in possession of the said automobile mentioned in paragraph 4 of the complaint.

4. Defendants deny paragraph 5 of the complaint.

Answer and Counterclaim.

By way of counterclaim against the plaintiff, the defendants say:

1. That they came into possession of a certain automobile as described in the complaint, to wit, 1 Buick Sedan, Motor #1151701, Serial #1130007, Model 24-47, in a lawful way, under and by virtue of the provisions of the Laws of the State of New Jersey of 1915, Chapter 312.

2. These defendants further say that by virtue of said statute, they are the lawful owners of the automobile described above and entitled to the immediate possession thereof.

3. As a result of said detention of said automobile on the part of the plaintiff under a Writ of Replevin, the said automobile has been reduced in value.

Wherefore the defendants demand the sum of Eight Hundred ($800.00) Dollars as damages.

KING & O'BRIEN,
Attorneys for Defendants.

Answer to Counterclaim.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE J. HARRIS, Plaintiff, *vs.* CHARLES A. WALK, JR. and EDWARD F. WALK, Defendants.	Action at Law. Answer to Counterclaim.

The plaintiff answering the counterclaim of the defendants interposed herein, says:

1. She denies each and every of the allegations of said counterclaim marked and designated paragraphs 1, 2 and 3.

Wherefore plaintiff demands judgment in accordance with the complaint.

I. Ross McCOMBE,
Attorney for Plaintiff.

Amended Answer and Counterclaim.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE J. HARRIS, Plaintiff, *vs.* CHARLES A. WALK, JR. and EDWARD F. WALK, Defendants.	Action at Law. Amended Answer and Counterclaim.

The defendants, Charles A. Walk, Jr. and Edward F. Walk of the City of Jersey City, County of Hudson and State of New Jersey, say:

1. They deny the allegations contained in paragraph 1 of the complaint, and say that at all times on and after the 6th day of April, 1927, they were the owners of a certain Buick Sedan mentioned in said paragraph, and now are the owners of the same.

2. They deny the allegations contained in paragraph 2 of the complaint.

3. They deny that they took possession of the said automobile in a wrongful way or wrongfully detained the same. They further deny that the autotmobile upon the 6th day of April, 1927, belonged to the plaintiff as alleged in paragraph 3 of the complaint, but upon the other hand say that the defendant, Charles A. Walk Jr. purchased the automobile from one Louis A. Schultz, Constable of the Second District Court of the City of Jersey City, under and by virtue of Chapter 312 of the

Session Laws of 1915 and amendments thereto, and rightfully took possession of the said automobile having title under a Bill of Sale given to him by the said Louis A. Schultz.

4. They admit that at the time of the said suit being commenced, they were in possession of the said automobile as mentioned in paragraph 4 of the complaint, but say that they were rightfully in possession, and that the defendant, Charles A. Walk, Jr. was the true and lawful owner of the said automobile at that time.

5. They deny paragraph 5 of the complaint, and say that they were at all times after April 6th, 1927, and when and if any demand was made upon them after that date, in lawful and rightful possession of the said automobile, and that the true and rightful owner of the automobile at any time subsequent to the above mentioned day was the defendant, Charles A. Walk, Jr.

By way of Counterclaim against the plaintiff, the defendants say:

1. That upon the 6th day of April, 1927, Charles A. Walk, Jr., one of the defendants herein, did at ten o'clock in the forenoon on that date at public auction at 408 Tonnele Avenue, Jersey City, purchase a certain Buick Sedan, Motor #1,151,701 — Serial #1,130,007 — Model Model #2427; this being the same automobile mentioned in the complaint herein.

2. Said automobile was sold upon that day by Louis A. Schultz, Constable of the Second District Court of the City of Jersey City, under the authority given him by Chapter 312, Session Laws of 1915 and amendments thereto.

3. That on or about the 25th day of October, 1926, said automobile was placed in the garage of Kasten Bros. Inc. at 486 Tonnele Avenue, Jersey City, for storage.

4. That up to and including April 6th, 1927, no storage fee or rent for said storage was paid to the said Kasten Bros., Inc., by the plaintiff, nor was any offer made to pay the sum accrued upon the said automobile, or what the plaintiff considered reasonable therefor.

5. Upon the non-payment of the storage charge on the said automobile, Kasten Bros. Inc. acquired a lien under the aforementioned Statutes, which are referred to as the "Garage Keepers' Lien Act", and proceeded to sell the said automobile according to the provisions of the Statute in such case made and provided.

6. At the aforementioned sale, the defendant Charles A. Walk, Jr., purchased the said automobile and received therefor a Bill of Sale signed by the said Louis A. Schultz, Constable and attorney-in-fact for Kasten Bros. Inc.

7. The defendant, Charles A. Walk, Jr., thereafter repaired and repainted, and otherwise improved the said automobile.

8. On or about the 15th day of June, 1927, the plaintiff took from the possession of the defendants, the said automobile then and there lawfully and rightfully in their possession, and ever since have wrongfully detained the same.

9. The automobile has as a result of said detention on the part of the plaintiff, been reduced in value.

10. The reasonable value of the said automobile at the time of the wrongful taking by the plaintiff on or about the 15th day of June, 1927, was Eight Hundred ($800.00) Dollars.

WHEREFORE, the defendants demand the sum of Eight Hundred ($800.00) Dollars as damages.

RAE, KING AND O'BRIEN,
Attorneys for Defendants.

Reply and Amended Answer to Counterclaim.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE J. HARRIS, Plaintiff, *vs.* CHARLES A. WALK, JR., and EDWARD F. WALK, Defendants.	Action at Law. Reply and Amended Answer to Counterclaim.

REPLY.

1. Plaintiff denies Paragraphs 1, 2 and 3 of defendants' Amended Answer.

2. Plaintiff admits Paragraph 4, except she denies that the defendants were rightfully in possession and that the defendant Charles A. Walk, Jr., was the true and lawful owner of said automobile at that time.

3. Plaintiff denies Paragraph 5 of defendants' Amended Answer.

ANSWER TO COUNTERCLAIM.

1. Plaintiff admits that on the 6th day of April, 1927, Charles A. Walk, Jr., made an alleged purchase at an alleged public auction at the time and place stated in Paragraph 1 of defendant's Counterclaim, but alleges that said alleged purchase was not a bona fide purchase, and that said alleged public auction was not held pursuant to Chapter 312, Session Laws of 1915 and amendments thereto.

2. Plaintiff admits that Louis A. Schultz, Constable of the Second District Court of the City of Jersey City, made an alleged sale of said automobile, but she denies that the said sale was made in accordance with Chapter 312, Session Laws of 1915 and amendments thereto.

3. Plaintiff admits that on the 25th day of October, 1926, said automobile was placed in the garage of Kasten Bros., Inc., at 486 Tonnele Avenue, Jersey City, Hudson County, New Jersey, in dead storage for a period of six months.

4. Plaintiff denies the allegations contained in Paragraph 4 of defendants' Counterclaim.

5. Plaintiff denies Paragraph 5 of defendants' Counterclaim.

6. Plaintiff denies Paragraph 6 of defendants' Counterclaim.

7. Plaintiff denies Paragraph 7 of defendants' Counterclaim.

8. Plaintiff admits that on or about the 15th day of June, 1927, she took from the possession

of defendants the said automobile, but denies the same was in defendants' possession lawfully and rightfully, and further denies that ever since she has wrongfully detained the automobile, but on the contrary alleges she is the true owner of said automobile and entitled to the possession of same.

9. Plaintiff denies Paragraph 9 of defendants' Counterclaim.

10. Plaintiff denies the paragraph marked and designated 10 of defendants' Counterclaim.

Plaintiff demands judgment for the possession of the said automobile, and in case it cannot be returned to said plaintiff, plaintiff then demands the sum of Eight Hundred ($800.00) Dollars damages for said detention, together with the costs of this suit, in accordance with the prayer in plaintiff's Complaint.

NOTICE.

The plaintiff, Bernice J. Harris, reserves the right at or before the trial of the above entitled action to move to strike out the Counterclaim filed herein, on the ground that:

(a) The Counterclaim herein interposed is improper, and not a proper pleading consistent with the nature of this action.

(b) That the right of possession is the only issue properly involved.

(c) That the defendants are not entitled to money damages.

I. ROSS MCCOMBE,
Attorney for Plaintiff.

Postea.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE S. HARRIS,
Plaintiff,

vs.

CHARLES A. WALK, JR., and
EDWARD F. WALK,
Defendants.

Postea.

This cause was tried before Honorable Henry E. Ackerson, Jr., with a jury, at the Hudson Circuit, on the Fourth and Fifth days of March, 1929, and the Judge at the trial thereof having directed a nonsuit in favor of Edward F. Walk, one of the defendants; and the jury, by direction of the Court, returned a verdict in favor of the plaintiff, Bernice S. Harris, and against the defendant, Charles A. Walk, Jr., that the plaintiff is entitled to possession of the automobile in said complaint mentioned.

HENRY E. ACKERSON, JR.,
Judge.

On Postea.

NEW JERSEY SUPREME COURT.

BERNICE S. HARRIS, Plaintiff, *vs.* CHARLES A. WALK, JR., Defendant.	Action at Law. Replevin. On Postea.

This cause having been tried before Honorable Henry E. Ackerson, Jr., with a jury, at the Hudson Circuit on the fourth and fifth days of March, 1929, and the jury by direction of the Court having returned a verdict in favor of the plaintiff, Bernice S. Harris, and against the defendant, Charles A. Walk, Jr., for the possession of the automobile as appears by the postea now here returned,

IT IS ORDERED that judgment be and hereby is entered in favor of plaintiff and against the defendant for the possession of the automobile mentioned and described in the complaint besides costs to be taxed *nisi*.

Entered March 12, 1929.

On motion of

I. ROSS MCCOMBE,
Attorney.

Costs
$74.32

Testimony.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

BERNICE J. HARRIS,
Plaintiff,

vs.

CHARLES A. WALK, JR., *et al.*,
Defendant.

Before:
Hon. Henry E. Ackerson, Jr., J.
and a Jury.

Jersey City, N. J.,
March 4, 1929.

Appearances:

I. Ross McCOMBE, Esq., for the Plaintiff.

KING & O'BRIEN, Esqs. (by Mr. O'BRIEN), for the Defendants.

(A jury was duly empanelled, found satisfactory and sworn.)

(Opening by counsel.)

BERNICE J. HARRIS, sworn on her own behalf.

Direct examination by Mr. McCombe:

Q. Mrs. Harris, did you own a Buick sedan on October 25th, 1926? A. I did.

Q. Did it have motor 1151701, serial 1130007? A. Yes.

Q. Was it model '24-47? A. Yes.

Q. Did it have a Florida license plate on it? A. Yes.

Q. Was that number 36-176-C, year 1926? A. Yes.

Q. How long had you owned the automobile prior to October 25, 1926? A. Since March, 1924.

Q. Did you buy it new? A. Yes.

Q. I show you a motor vehicle certificate of title, issued by the State of Florida, and ask you whether or not that is the bill of sale given in that State? A. It is.

Mr. McCombe: I offer it in evidence.

Mr. O'Brien: No objection.

The Court: Let it be marked.

(Admitted and marked Exhibit P-1 in evidence.)

Q. I show you license for 1926, and automobile registration card, and ask you whether that is your license for the car in question? A. Yes.

Q. That was issued by the State of Florida? A. Yes.

Mr. McCombe: I offer it in evidence.

Mr. O'Brien: No objection.

The Court: Let it be marked.

(Admitted and marked Exhibit P-2 in evidence.)

Q. Now, Mrs. Harris, did you at any time part with the title of that car—the title or ownership of that car? A. I didn't.

Q. What, if anything, did you do in October 25, 1926, with the car? A. I was just out of the hospital from an operation. Not being able to drive,

I instructed my husband to place it in storage for the winter; for six months.

Q. Now, during the time the car was in dead storage, was there at any time any request or demand for any garage rent? A. He brought a statement on the 25th day of April, 1927. The following April after the car was placed in storage.

Q. From whom did you get that request? A. My husband brought the statement.

Q. You say your husband brought the bills to you? A. Yes.

Q. From whom? Whose bill was that? A. The Kasten Garage.

Q. What was the amount? A. $27.00.

Q. What time was that? A. On or about the 25th day of April, 1927.

Q. The 25th of April, 1927. What did you do after receiving that bill? A. The next day I sat down and wrote them a letter, and wrote a check for the amount. In the meantime, I changed my address. I gave my new address, the telephone number and all in this letter.

Q. What did you enclose, if anything, in that letter you sent to Kasten Brothers? What, if anything, did you enclose in that letter? A. I enclosed a check for the storage.

Q. I show you a check drawn on the Lafayette National Bank, Brooklyn, New York, dated April 26, 1927, made to the order of Kasten's garage, for $27 and signed by Bernice J. Harris, isn't that the check? A. It is.

Q. Is that what you sent to them? A. It is.

Mr. McCombe: I offer it in evidence.

Mr. O'Brien: No objection.

The Court: Let it be marked.

(Admitted and marked Exhibit P-3 in evidence.)

The Court: Was that check paid?

A. They held the check until about a month later.

Q. You say you got it back? A. Yes.

Q. When did you get that back? A. Sometime about the middle of May.

Q. 1927? A. 1927.

Q. From whom did you receive the return of that check? A. I received it from Mr. McCombe, the lawyer, and he in turn had gotten it from the constable.

Q. Now, when did you first learn that anything had happened to your car? A. Along about the second week of May, the 10th or 12th of May. My husband sent a prospective buyer over to look at the car, and found it had been sold.

Q. Then it was the latter part of May you learned for the first time your car had been sold? A. About the middle of May.

Q. Then what did you do after you learned your car had been sold? A. Consulted a lawyer.

Q. What lawyer did you consult? A. First my husband saw George Cutley, Mr. Cutley.

Q. Through this lawyer you located Mr. Walk? A. Mr. Walk.

Q. To whom the car was sold? A. Yes.

Q. Were you refused the name of the purchaser by Kasten Brothers? A. Yes.

Q. They refused to give you the party to whom they sold the car? A. At first, yes.

Q. When you interviewed Mr. Walk, who is the defendant in this action, did you yourself interview Mr. Walk? A. I didn't.

Q. Who interviewed him? A. My husband.

Q. Do you know whether or not there was any offer to pay Mr. Walk the reasonable amount for what he paid for the car, and what work he claims he put on the car since receiving it? A. Yes.

Q. Was the amount offered refused by Mr. Walk? A. Yes.

Q. Now, did you ever, at any time, refuse to pay the lien that was placed on your car?

Mr. O'Brien: I object to that.

The Court: We have to know that.

The Witness: I didn't.

Q. I show you a notice for statement purporting to have been served upon Charles Walk and Edward Walk, and ask you if you caused that to be served on them? A. Yes.

Mr. McCombe: I offer it in evidence.

Mr. O'Brien: No objection.

The Court: Let it be marked.

(Admitted and marked Exhibit P-4 in evidence.)

(Mr. McCombe reads notice to the jury.)

Q. After you sent that statement, did you receive a statement from Walk Brothers? A. I did.

Q. And with respect to the amount, what was the demand? A. That was $701.60.

Q. Now, did you subsequently cause a demand for the return of your automobile to be made upon John Walk and Edward F. Walk? A. I did.

Q. I show you a paper and ask you whether or not that is the demand you caused to be served upon them? A. It is.

Mr. McCombe: I offer it in evidence.

Mr. O'Brien: No objection.

The Court: Let it be marked.

(Admitted and marked Exhibit P-5 in evidence.)

(Mr. McCombe reads demand to the jury.)

Q. Now, did you receive your automobile? A. I did, yes.

Q. From whom did you receive it? You didn't receive it from the Walk Brothers, did you? Did you have to replevin the car in order to get it? A. I had to put up a bond.

Mr. McCombe: Cross-examine.

Cross-examination by Mr. O'Brien:

Q. Where do you live, Mrs. Harris? A. Where do I live? 209 West 91st Street, at present, New York City.

Q. And at the time, just prior to your selling this automobile, where did you live? A. In 101 West 109th Street.

Q. You said you just came out of the hospital. Do you remember what day that was? A. I don't know, but it was sometime in September.

Q. What year? A. 1926.

Q. Sometime in September, 1926. And at that time you owned this Buick car? A. I did.

Q. When did you say you bought the car? A. March, 1924.

Q. Were you married in September, 1926? A. Oh, yes, I was married.

Q. And this car was in your name at that time? A. Yes.

Q. Where had you stored it during that month of September, 1926? A. Elliot Garage in Brooklyn.

Q. And you lived where? Did you say in 109th Street, New York City? A. Yes.

By the Court:

Q. Where did you live in April, 1927? A. 308 State Street, Brooklyn.

Q. Did you drive the car exclusively? A. My husband and I both drove.

Q. Did anyone else drive the car? A. No.

Q. When you decided you were not going to store it in Brooklyn any more, to whom did you give the car to store it? A. I was out of the State at the time. I asked my husband to locate a garage, or place, where we would not have to pay more storage than we were paying at the present, and he gave it to Mr. Freeman, of Jersey City, to place it in the garage where he was storing his.

Q. Now, this check you have produced here today. You say you sent that on April 26th, 1927? A. Yes.

Q. And now, why did you send the check on that day? A. That was the day after I received the bill for the storage.

Q. Have you got that bill? A. Yes.

Q. Have you it with you? A. Mr. McCombe has it.

(Mr. McCombe produces the bill.)

Q. This is the bill (handing witness paper)? A. Yes.

Q. Did it come in an envelope? A. No; it came through this friend that placed the car in storage for us.

Q. He handed it to you? A. He handed it to my husband.

Q. Who was that friend? A. Mr. Freeman.

Q. Did you see this bill at the time? A. I did.

Q. Did you notice what date it was made out for? A. I did.

Q. What date was this made out for? A. February 1st.

Q. What year? A. 1927.

The Court: When did you see it?

The Witness: On or about the 25th day of April. The 24th, or 25th day of April.

Q. Did you ever ask this friend where he had stored the car? A. I asked my husband a number of times if he had seen this friend; if they had asked for storage rent, and he said "Yes". He asked him several times, and he said they said no. In February of this same year this friend saw my husband and asked him if we would exchange the car for some lots, and he asked me, and I told him no.

Q. This Mr. Freeman. Do you know him very well? A. No; I don't know him so well myself.

Q. Did you know him at that time? A. Yes.

Q. Is he a friend of yours? A. Just an acquaintance of mine.

Q. You had met him before he stored your car for you? A. I hadn't; my husband had.

Q. When did you first meet him? A. I met him after I came back from recuperating from this operation; sometime in November of that year.

Q. In November? A. Yes.

Mr. O'Brien: That's all.

CHARLES C. HARRIS, sworn for the Plaintiff.

Direct examination by Mr. McCombe:

Q. You are the husband of Mrs. Harris, the plaintiff in this action? A. Yes, sir.

Q. Do you know of your own knowledge if she owned the Buick car in question? A. Yes, sir.

Q. Will you just tell us what, if anything, was done on October 25, 1926 with that car? A. On or about the 20th or the 25th of October, in 1926, my wife decided that we were paying too much storage in New York and Brooklyn and asked me to find a cheaper place to store the car; that she wouldn't need it for the winter. I did find a fellow by the name of Mr. Freeman, my foreman, I was working for him in New York City at that time. He told me he could get the car stored in Jersey City for five dollars a month, and that he kept his car at that place and knew the place well, and he would get it stored there for a period of six months at five dollars a month. So I turned the car over to Mr. Freeman and told him to put it in the garage.

Q. Now, when you turned the car over to him, did you also turn the key with it? A. Yes, sir.

Q. Was there any arrangement made regarding just when the five dollars a month would be paid? Was it to be paid each and every month, or at the expiration of the time which you intended the car to be stored for? A. There was no arrangement made as to when the money was to be paid. I asked Mr. Freeman numerous times if these people wanted the money or asked for a bill, and he told me no.

The Court: Did you go to the garage yourself with the car?

The Witness: No, sir.

The Court: Strike out anything Mr. Freeman may have told him, it would not be evidential at all. You merely gave the car to your friend Mr. Freeman, isn't that right?

The Witness: That's right.

Q. For how long? A. Six months.

Q. What was to be done with the car during these six months? A. Repeat the question, please.

(Question read.)

A. It was to be put in storage.

Q. Live or dead storage? A. Dead storage.

Q. Did you ever go to this garage where your car was stored? A. I went there after the car had been sold.

Q. When was that? A. That must have been near the middle of May or something like that, 1927.

Q. How did you happen to go there in May, 1927? A. I had a friend in Brooklyn that wanted to buy a car. I sent him over to look at the car, and he came back and told me the car was sold. I went back and saw Mr. Kasten about the car.

Q. What did you learn when you went there? A. I didn't learn very much. I asked some gentleman in the garage, I told him I wanted to see the proprietor, and he sent me to some fellow in the garage who said his name was Kasten. I asked him who bought the car, and he says the car has been sold for some time. I asked him why he sold it, and he didn't give me very much satisfaction. I asked who bought the car, he said if you want to know anything about the car see Mr. Shulz.

Q. Who did you understand Mr. Schulz to be? Did you learn later on who Mr. Schulz was? A. I learned he was the constable or officer or something.

Q. I show you a card upon which is the name of George E. Cutley, counsellor at law, 586 Newark Avenue, Jersey City, and ask you where you got that? A. I got that from lawyer Cutley, who is the man that located my car.

Q. Was it through lawyer Cutley you located the car? A. Yes.

Q. I notice marked on the back of the card the serial number and engine number of a Buick sedan. Was that the identication of the car? A. I don't remember that.

Q. Was there any request or demand made upon you for the rental of that car before you learned that it had been sold? A. None whatever.

Q. When was the first time you learned, if at all, Kasten Brothers requested or demanded rentals? A. Mr. Freeman gave me a bill about—I will say the 23rd or 24th of April, 1927.

Q. In April, 1927? A. Yes.

Q. I show you a bill, and ask you whether or not that was the bill that was given to you (handing witness paper)? A. Yes, sir; that is the bill.

Q. That is dated February 1st, 1927. Was that on there when you received it? A. Yes, sir.

Q. Was the name Harris, Buick sedan, on it when you received it? A. Yes, I think that is the same bill.

Q. Was this name B. J. Harris, State Street, Brooklyn, on it? A. No, sir.

Q. Do you know how that got on? A. No; I am not sure.

Q. But this bill I hold in my hand was what you received about the 25th of April, 1927? A. Yes, sir; that's the bill I received.

Q. That is the first intimation of anything wanted by Kasten Brothers? A. That is the first.

Q. Notwithstanding the fact you had made frequent inquiries prior to that as to whether or not Kasten Brothers wanted money or rental. A. That is the only and first notice.

The Court: Of whom did you make these inquiries?

The Witness: Mr. Freeman.

The Court: Strike it out, it would have no bearing on this case.

Q. Did you finally replevin the car? A. Yes.

Q. When did you replevin the car? A. I just don't remember the date; it must have been along in June, 1927.

Q. Prior to obtaining the car, did you have an interview with Mr. Walk? A. I didn't talk to this Mr. Walk, I talked to his brother. I think he was in the hospital at that time.

Q. To Mr. Edward Walk? A. Mr. Edward Walk was the first man I met.

Q. Just what was the conversation you had with him, and when, the first time you saw either of the Walk Brothers? A. I asked him if he had a car for sale, at first. He said he did. I asked him to let me see the car, and he drove me out to his garage—or walked out to the garage, rather—to see the car. I looked at the car and those numbers and all the other identification that I could make on the car and saw it was my wife's car. Then I told him it was my wife's car and it was sold and all about it.

Q. Did you request your car from him? A. Yes.

Q. Did you request that he give you a statement of any work he may have done on it? A. I did later.

Q. Did you offer to pay him a reasonable amount for the repairs? A. Yes. I told Mr. Walk that I didn't want him to lose any money on the car, I would pay him what he had done, a reasonable amount on the repairs that he had put on the car, and so on.

Q. Did you make a demand for the car before you finally got it? A. Yes; I think my wife did.

Q. And was it refused? A. Refused, yes.

Q. After obtaining the car, did you look in the car and find any papers? A. No, sir.

Q. You didn't find any papers? A. No, sir.

Q. Now, do you know whether or not the car had a license plate on it? A. Yes, sir; the car had a license plate on it when I turned it over.

Q. Have you got that license plate now? A. Yes, sir.

Q. From whom did you receive it? A. Mr. Walk. I didn't receive it, my wife, I think my wife says she received it from Mr. Walk, the man who bought the car.

Mr. McCombe: Cross-examine.

Cross-examination by Mr. O'Brien:

Q. You say this Mr. Freeman worked with you? A. He was my foreman; yes, sir.

Q. What is your business? A. I am blasting foreman.

Q. Where were you working at the time in question here, October, 1926? A. I was working at 8th Avenue between 18th and 20th Streets.

Q. Did you know this Mr. Freeman well? A. For a few months.

Q. And at that time did you give your car to him to have it stored? A. Yes, sir; in October.

Q. Did you at that time make any inquiries as to where he would store it? A. Yes.

Q. Did he tell you where he was going to store it? A. Yes.

Q. What did he say? A. He said he would put it in the garage he kept his car in for a year or more.

Q. Do you know where that garage was? A. I know within a few blocks only, not the address.

Q. Why do you say you know it was within a few blocks? A. Because it is close to Mr. Freeman's home. I had been to his home, and he told me it was on Tonnele Avenue.

Q. You knew at the time you gave him the car it was in a garage on Tonnele Avenue in Jersey City? A. Yes.

Q. Did he at that time mention the name of the garage? A. No, sir.

Q. Did you ever know the name? A. No, sir.

Q. At the time you gave him the car, did you give him any instructions as to what he was to do with it? A. No, sir; except put it in for six months' dead storage.

Q. Do you know exactly when this was you told him to do that? A. I couldn't give exactly, it is close within five days. I will say within the 20th or 25th of October, 1926.

Q. Now, when you say that, do you mean that was the time you turned the car over to him and gave him the car? A. Yes, sir.

Q. And after that, did you have any conversation with him concerning the storage in this garage? A. Yes; numerous times.

Q. When was the first time you knew the car had been stored in this garage on Tonnele Avenue? A. Well, next week.

Q. The next week?

The Court: The next week after what?

The Witness: I turned the car over to him on Sunday, and I knew on Monday the car was in storage.

Q. Did you know it was stored in that garage? A. I didn't know what garage it was stored in.

He told me he stored it in the garage he kept his car in on Tonnele Avenue.

Q. That is what he told you? A. Yes.

Q. Did you have any conversation about the cost of storing this car? A. Yes; he told me he had made arrangements to store it five dollars a month.

Q. And as the months of storage went by, did you make any inquiry of him? A. Yes, sir.

Q. What did you say to him? A. I asked him what was the amount and to send me the bill for the car whenever he wanted any money. He said no, if they wanted money he would give it himself or bring me the bill over.

Q. How long did Mr. Freeman work under you? A. He never worked under me. I worked for him. He was my foreman.

Q. How long did you work for him? A. I don't think I worked but a couple of weeks after that.

Q. A couple of weeks after what? A. After the car was put in storage.

Q. A couple of weeks after the car was put in storage, you left his employ? A. Yes, sir.

Q. And did you see him after that? A. Yes, sir.

Q. Did you see him between February 1st, 1927, and April 26th, 1927? A. Numerous times; yes, sir.

Q. Numerous times. Did you ever mention the car? A. Yes, sir.

Q. Did you ever say anything about the bill during that time? A. Yes, sir; numerous times.

Q. What, if anything, was your conversation concerning the bill for this car during the period from February 1st, 1927, to Aril 26th, 1927? A. There was no conversation. When he got the bill he brought it to me. When he got a bill, he

handed it to me and says, "There is the bill for the storage."

The Court: Did you expect him to get the bill for you and deliver it to you?

The Witness: Yes, sir.

The Court: He had authority from you to do all the business with the garage for you?

The Witness: Yes, sir; that's right.

The Court: He got all bills and paid it when you gave him the money to pay the bill?

The Witness: Yes, sir.

Q. Now, do you remember your relations with Mr. Freeman?

The Court: Did you tell that to your wife? Did she authorize you to give this over to Mr. Freeman and have him get the bills?

The Witness: No. My wife never authorized me to give it to any certain person. She told me to find a place to store it in.

Q. Do you remember talking with Mr. Freeman during the month of February or March in 1927? A. Yes, sir.

Q. Did you talk during those two months? A. Yes, sir.

Q. Do you remember if you had any conversations with him about the storage of this car during that time? A. Yes, sir.

Q. Did you mention the bill that was due on it? A. Yes, sir; numerous times.

Q. Did you ask him at that time if he had received any bill from this garage? A. Yes, sir.

Q. What did he say to you? A. "No".

The Court: Did you report to your wife you had given over the car to Mr. Freeman to put in this garage?

The Witness: Yes, sir.

Q. When did you do that? Right after it was done? A. Yes, sir.

The Court: So she knew through you the car was being stored in a garage on Tonnele Avenue and had been put there by Mr. Freeman, under your direction. She knew all that?

The Witness: She only knew the car was in Jersey City.

The Court: You had told her you had given it to Mr. Freeman to put it there?

The Witness: Yes, sir.

The Court: She knew Mr. Freeman took it there for you?

The Witness: Yes, sir.

Q. Did you or Mr. Freeman at any time, at your direction, pay the storage fee on this car? A. I don't know what Mr. Freeman ever did. I never paid him.

Re-direct examination by Mr. McCombe:

Q. Mr. O'Brien asked you whether you had a conversation with Mr. Freeman with respect to Kasten asking for any money some time in February. Was there anything said about lots? Do you recall? A. Yes. He told me Mr. Kasten wanted to see me. I asked him what he wanted to see me about, if he wanted money. He said no, he wanted to sell me some lots for the automobile.

The Court: When was that?

The Witness: In February; the latter part of February.

Q. What was said with respect to whether or not you wanted to sell the car for lots? A. I told him I was not interested in real estate, but, however, I would see my wife.

CHRISTOPHER C. FREEMAN, sworn for the Plaintiff.

Direct examination by Mr. McCombe:

Q. Where do you live, Mr. Freeman? A. 135 Lake Street.

Q. How long do you know Mr. Harris? A. Just about July, 1926.

Q. July 1926? A. July 1926.

Q. Now, Mr. Freeman, you knew Kasten Brothers? A. Yes, sir.

Q. How long have you known them? A. I knew them since 1925, I believe.

Q. 1925? A. Yes. Yes, it would be December, 1925, I believe, was the time I put my car in there.

Q. Did you know them quite well socially? A. I talked to them quite a bit.

Q. And they called at your house socially occasionally? A. No, not at the house.

Q. Well, they have called on business, not socially, they have called on business? A. I had them tow me in once. I had them tow me in once or twice.

Q. But you knew them very well? A. I know the three brothers there very well.

Q. When did you last see Mr. Kasten? A. I saw Mr. Kasten three weeks ago, something like that.

Q. Was that when you were down to court last? A. Yes.

Q. Was he up to your house the night before you came to court? A. Yes.

Q. You had a conversation with him, then, in your house? A. Yes.

Q. And he asked what you were going to testify to? A. He didn't ask me about what I was going to testify at all.

Mr. O'Brien: I object. The defendant wasn't present, and he should not be bound by it.

The Court: He said he wasn't asked.

Q. Now, did you take Mrs. Harris' automobile on October 25, 1926, to store it? A. I had taken it that time, within the 25th or 27th.

Q. How long prior to October 25, 1926 had you known Mrs. Harris? A. I didn't know Mrs. Harris.

Q. You didn't know the young lady here (indicating Mrs. Harris)? A. No; not before that.

Q. When did you first know Mrs. Harris? A. I don't believe I met Mrs. Harris until after the car was sold.

Q. And the car was given to you by her husband? A. Yes.

Q. And you took it and put it in Kasten Brothers for storage? A. Yes.

Q. Now, on October 25, 1926, what did you do with the car? A. On October 25?

Q. Yes. A. I think on October 25 we went up to Haverstraw in the car.

Q. And who did you see when you took the car to the Kasten Garage? Which of the Kasten Brothers? A. I saw the three brothers in the office. The three brothers were in the office.

Q. When you took the car to them, what arrangement, if any, did you make? A. I told him I put the car in for six months and if they could sell it to sell it for $750, and anything over and above that was theirs, and to take care of the battery. That was the direction.

Q. Now, did you put the car in the garage for six months' dead storage or alive storage? A. Cold storage I call it. I believe it is dead storage.

The Court: Did you make any agreement about price?

The Witness: I made an agreement before I had taken the car there.

The Court: What was it?

The Witness: Five dollars.

The Court: Per month?

The Witness: Per month.

Q. Was any agreement made with him when you took the car in there and placed it in storage on October 25, 1926, with respect to payment? A. Nothing said about payment at all.

Q. Did you tell him you were putting the car in there for a period of six months? A. Yes.

Q. Did you ask him how much he was going to charge at that time? A. I had asked, but not at that time. I had asked him before I told Mr. Harris.

Q. Have you seen anyone in connection with this case since you have been to court last? A. No.

Q. Do you remember making an affidavit in August 11th, 1927? A. I made a statement. I don't remember just the exact date.

Q. (Handing witness paper.) Is that your signature? A. (Witness examining paper.) That is my signature, yes.

Q. Now, after taking it there on October 26th, 1926, you placed it in dead storage for a period of six months. Did you see Kasten Brothers frequently? A. Quite frequently.

Q. On an average of two or three times a week? A. Say twice a week.

Q. Since putting that car in dead storage up until after it had been sold, was there any demand made by either of the Kasten Brothers from you or request made for rental of the car? A. No.

Q. Did you at any time ask them whether or not they wanted some money for the rental of that car? A. They asked me where they could get in touch with Mr. Harris. I believe the second time they asked me to get in touch with Mr. Harris, and I says I have his address at the house. I says: "Are you worried about the storage?"

Q. You asked Kasten Brothers if they were worried about the storage. What did they say? A. They said "No". They had a couple of lots that possibly would interest Mr. Harris and they would like him to see it. I says: "I will get in touch with Mr. Harris and let him know about it."

The Court: When was this?

The Witness: That must have been in January of 1927. I says possibly it would interest Mr. Harris. I heard him say he had real estate in Florida, and so I did get in touch with Mr. Harris. Mr. Harris asked me at that particular time if they were worried about their storage. I says, "No, they don't seem to be," and says, "If you want to spend any money, I will take it along to them." So, he says, "You tell them to send me a bill and I will send them a check for it." So I did, and the bill originally came in with my bill. I don't

know just exactly how long it would be for. One time I went over to his working address, he worked at 42nd Street, he was up at 157th Street at that particular time, but he was off sick at that time. I went a couple of weeks later and I delivered to him the bill.

The Court: When was this?

The Witness: That was ten days before I really knew the car was sold. Not over ten days after I delivered the bills, he came to me and told me the car was sold.

Q. When did you give the bill to Mr. Harris?

The Witness: I think it was in April sometime. I don't just remember the date.

The Court: Before or after the car was sold?

The Witness: The car had been sold before, but not to my knowledge.

Q. Did the Kasten Brothers tell you they had sold the car? A. Never. They didn't tell me they even wanted the money. I would have paid it readily myself.

Q. You asked them several times on their weekly visits back and forth for your car whether or not they wanted any money, and they said "No."

Mr. O'Brien: I object to that as leading.

The Court: Yes.

The Witness: The car was only talked about three times to my knowledge while it was in there. It was mostly about selling it when we were talking about the car.

Q. After you received a bill from Kasten Brothers, you say it was sometime in January? A. I don't just remember what time it was after I talked to them about it.

Q. Did you turn it right over to Harris when you got it? A. Not right away. The bill came and the wife said something to me about the bill coming in, and it wasn't apparently in Harris' name, and it wasn't in my name. I paid little attention to the bill, not thinking there was any way about the car being sold. I paid very little attention to it anyway. I make two attempts before I delivered the bill, anyway. The first time Mr. Harris wasn't there, and the second time I gave him the bill.

Mr. McCombe: Cross-examine.

Cross-examination by Mr. O'Brien:

Q. Now, Mr. Freeman, when Mr. Harris gave you this automobile to have stored, did he also say to you that he wanted to arrange for a sale? A. For what?

Q. For the sale of the car? A. Yes.

Q. When you brought this car, as a result of his instructions, over to the garage, did you just leave it in there, or did you see Mr. Kasten at that time? A. I saw Mr. Kasten at that time.

Q. Did you make any agreement with him at that time? A. I had made the agreement before.

Q. And what was that previous agreement? A. Five dollars a month.

Q. You were to store the car for five dollars a month, correct? A. Yes.

Q. That was in October, 1926, wasn't it? A. In October, yes.

Q. You say that sometime after that you received a bill from the Kasten Brothers, isn't that true? A. That's true.

Q. And that was this bill that I show you (handing witness paper). A. There is a bill something similar to that, yes. It seems to me there was some change on the bill I gave Mr. Harris at the time, in the name.

Q. You are not sure that that is the bill? A. I am not sure that that is the bill. It is the same thing, almost identical, except, possibly, in the name.

Q. You stated you received some bill from Mr. Kasten referring to the Harris' car, haven't you? A. Yes, I received a bill.

Q. And that it came along with your regular bill for storing this car? A. Yes, that came around the first of the month.

Q. Do you remember what month this bill came to you with your bill? A. It seemed to me it was in February.

Q. It came in February, 1927. Now, you have stated in your testimony that if you had known they wanted money you would make a check out yourself, didn't you? A. Yes.

The Court: When did you give this bill to Mr. Harris?

The Witness: I gave it to him, I would say, ten days before I knew the car was sold.

The Court: You got this in February. What did you keep it so long for?

The Witness: It was just a miscarriage of the thing. I went over once and he wasn't there. I made two stops.

The Court: Did you ever speak to Kasten about the fact that you had not been able to give this bill to Mr. Harris?

The Witness: I didn't. Mr. Kasten told me he wasn't worrying about his money.

The Court: He told you that before he gave you the bill?

The Witness: Yes. I told him to make out the bill and send it to him. I can't tell you the address today. I stored my car there two years. I couldn't tell you Mr. Harris's address today. It was partly a miscarriage on my part in not delivering the bill, but with all good intentions for both parties.

Q. Now, you say you gave this bill to Mr. Harris ten days before the car was sold, is that correct? A. Yes, ten days after I gave the bill to Mr. Harris he came to my house and told me the car was sold. I will say that much. Now, the date the check was made out, you can refer to Mr. Kasten for that and find out the date.

Q. Did you ever pay Kasten Brothers any money for the storage of this car? A. Never.

Q. You stored your own car, you say, in this garage, didn't you? A. Yes.

Q. What kind of garage is it? What is its make-up? Is it one open floor the way garages usually are? A. Yes.

Q. Are there many cars in there? A. Quite a number.

Q. You were only interested in your car and Kasten's car? A. Harris' car.

Q. Harris' car, rather. Did you ever see Harris' car in there? Did you ever see Harris' car in there during the period of this storage? A. I helped Mr. Kasten put the car back in the extreme end of the garage, where it would not be in the way of the other cars coming in and out, and I

paid very little attention to the car after it went in there. They were to pay attention to the battery. My car was by the front door. I would have to go in the back end to see the car if I wanted to.

Q. You never went back to see the car? A. No reason for that, no. I never had any occasion to go back and look at the car.

Q. Did you get your bill from Kasten at the end of every month? A. Got it the first of every month.

Q. The first of every month for storage for your car? A. Yes, the first of every month.

Q. You don't know when this automobile was sold, do you? A. I don't really know when it was sold.

Mr. O'Brien: That's all.

Re-direct examination by Mr. McCombe:

Q. But you didn't pay your bill every month, did you? A. Not every month, no. Sometimes I was behind.

Q. Sometimes you let it go for about five months. A. The bills would come just the same.

Q. Now, Mr. Freeman, was there anybody with you when you put that car in the garage on October 25, 1926? A. Mr. Mitchell was with me.

Q. Is he in court now? A. Yes.

By Mr. O'Brien:

Q. You didn't write this on this bill? That is not in your handwriting(, is it (indicating on paper)? A. No; that is not my writing.

ORVILLE E. MITCHELL, sworn.

Direct examinatoin by Mr. McCombe:

Q. Mr. Mitchell, where do you live? A. 281 Loncoln Avenue, Jersey City.

Q. Do you know Mr. and Mrs. Harris? A. I do.

Q. Have you known them very long? A. I know Mr. Harris about a year. I don't know Mrs. Harris so long. About a month, a couple of months, I will say.

Q. Do you know Mr. Freeman? A. I know Mr. Freeman.

Q. How long have you known him? A. About three or four years, I would say.

Q. You are not interested in any way in this case? A. Not at all.

Q. Did you on October 25, 1926, accompany Mr. Freeman to the Kasten Garage? A. I did.

Q. Just tell us about it in your own way? A. Well, I was boarding with Mr. Freeman at that time, see, and he asked me to come along down to the garage with him when he took the car. So I did. Something was said by one of the Kasten Brothers how long the car was supposed to be stored. I know he wanted to put the car in the garage, and he asked how long the car was supposed to be stored and he told him a period of six months. I don't know much more about it. That is about all I know.

Q. Did you hear anything with respect to payment for the car? A. No; I didn't hear anything about that.

Q. How did you happen to go down, Mr. Mitchell? A. Well, just as a passenger. Just to accompany Mr. Freeman, that is the only reason.

Q. Do you know whether or not there were any plates on the car when it was taken? A. There was a plate on the car, yes.

Q. Do you remember the license? A. I don't remember the number, but it was a Florida license.

Q. Did you see Mr. Freeman turn over the key to Kasten? A. No; I didn't. Mr. Freeman went in the office, I didn't go with him inside the office.

Mr. McCombe: That is all.

Cross-examination by Mr. O'Brien:

Q. Did you receive a subpoena to be here today? A. Yes.

Mr. O'Brien: No further questions.

Bernice J. Harris, recalled.

Direct examination by Mr. McCombe:

Q. Mrs. Harris, will you tell us again when you got the return of your car? A. I believe it was on the 17th day of June, 1926.

Q. And did you come home with it? A. Yes.

Q. And did you look in the pockets and find anything in the car? A. Yes.

Q. What did you find? A. I found some road maps we had used on our way up from the south, and also some letters addressed to my husband and different papers.

Q. I show you this certificate of title; was that in the pocket (referring to Exhibit P-1)? A. Yes, that was in it.

Q. I show you license, registration, license, exhibit P-2; was that in the pocket of the car? A. Yes, sir; that was in the letter in the pocket.

Q. I show you a letter and envelope, was that in the pocket of the car? A. Yes, sir.

Q. That was a letter found in the car?

Mr. O'Brien: I object to that, I don't see how a letter found at some subsequent time in the car after it had been returned had anything to do with the case.

The Court: No; I suppose after having gotten out of the hands of the defendant there is no telling how the letter got in there. I sustain the objection.

Q. And on this envelope is your husband's name and address? A. Yes, sir.

Q. Now, did you also obtain the license plates of that automobile? A. Yes; there was no license plate on it at the time.

Q. From whom did you get the license plates? A. Mr. Edward Walk.

Mr. McCombe: I offer the license plates in evidence.

The Court: There is no doubt about this being the license of the car.

Mr. O'Brien: There is no question about that.

The Court: Let it be marked.

(License plate received and marked in evidence Exhibit P-6.)

Cross-examination by Mr. O'Brien:

Q. You had, at no time other than the sending of this check to the garage man, paid anything for the storage on this car, did you? A. No.

By Mr. McCombe:

Q. When was the first time you were requested anything for storage? A. When I received that bill about the 25th day of April.

Q. And you immediately sent this check for it? (Indicating check.) A. Yes.

Q. Did you make inquiry from your husband as to whether there was storage due? A. I asked a number of times during that winter if he received a bill or any notice of how much storage was due, and he said no.

The Court: You knew where the car was stored, your husband had told you?

A. I asked him for the address a time or two.

The Court: You knew it was stored?

A. I knew it was stored in Jersey City.

The Court: He told you the car had been taken into storage by Mr. Freeman?

The Witness: Yes, sir.

The Court: Before this car was taken into storage your husband, as I understand it, talked with you about letting Mr. Freeman take it and put it where his car was.

The Witness: Yes.

Q. And you authorized your husband to take it and give it to Mr. Freeman to take it to the garage where Mr. Freemen kept his car? A. Yes, I thought they were reliable people.

By Mr. O'Brien:

Q. Have you had the car ever since? A. Until a few months ago.

Q. What happened to it then? A. I sold it.

Q. You haven't got the car in your possession now? A. No.

Q. You do not own it now? A. No.

Mr. O'Brien: That is all.

Mr. McCombe: The plaintiff rests.

DEFENDANT'S CASE.

CHARLES A. WALK, JR., sworn.

Direct examination by Mr. O'Brien:

Q. What is your name? A. Charles A. Walk, Jr.

Q. And where do you live? A. 139 Lake Street, Jersey City.

Q. You are the defendant in this suit? A. Yes, sir.

Q. Do you remember the 6th of April, 1927? A. Yes, sir.

Q. On that day did you purchase an automobile? A. I bought a Buick sedan.

Q. Where did you buy that car? A. Kasten Brother's garage on Tonnele Avenue, just north of Manhattan Avenue. I don't know the address.

Q. From whom did you buy it? A. Constable Shulz.

Q. Did he deliver any evidence of title with the car? A. A bill of sale.

Q. I show you this bill of sale, is that the bill of sale (handing witness paper)? A. That is the bill of sale.

Mr. O'Brien: I offer it in evidence.

Mr. McCombe: No objection.

The Court: Let it be marked.

(Admitted and marked Exhibit D-1 in evidence.)

Q. How much did you pay for the car? A. $415.

Q. Did you take possession of the car then? A. I think it was the following day I received the car and took the car out of the garage the following day. I think it was on the 8th of April I got the bill of sale, that was two days after the sale.

Q. Did you do anything to the car in the way of repairs or improvements after you received it? A. Yes, sir.

Mr. McCombe: I object to anything he may have done on the car.

The Court: It is too late now, the answer is in.

Q. What did you do or have done?

Mr. McCombe: I object to anything he may have done, on the ground that it is immaterial and irrelevant.

The Court: The objection will be sustained. The only thing you can recover is the value of the car.

Mr. O'Brien: The purpose is to establish the value of the car at the time of the replevin. Now, we intend to prove that by the evidence.

The Court: You couldn't arrive at the value unless you had what you did have done to it.

Q. What did you do or have done to your car in the way of repairs or improvements after you got it in your possession?

Mr. McCombe: I object to anything he may have done on the ground that it is not within the purview of this case. This is an action on replevin and the question of title or possession is only involved.

The Court: So far as you are concerned, you have replevined the car, I understand?

Mr. McCombe: I also object to the introduction of any evidence with reference to the counterclaim in this suit for the reason that it is not within the purview of this case, and that he has not complied with the statute.

(Argued.)

The Court: In ruling upon this objection which has been made to the question unanswered, I might say that while it may be true a counterclaim cannot be properly introduced in a replevin suit, nevertheless section 25 of the Replevin Act leaves no doubt that notice may be given by the defendant, who sues to have the value of the article passed upon by the jury. That portion of section 25 to which I have already alluded reads as follows: "and if upon the trial of an issue of property in the defendant, a verdict shall be given against the plaintiff, the jurors empanelled to try such issue, shall, at the prayer of the defendant, find the value of the property of the defendant in such goods and chattels, and his damages; and the defendant shall thereupon have judgment for the sum so found, together with his costs of suit, and shall have like execution for the same as aforesaid; provided, the defendant shall have given

the plaintiff's attorney a notice in writing, fifteen days before the trial, of his intention to require the jury to find the value of the goods and damages, in case a verdict should be found for the defendant."

In this case I find upon examining the transcript that the defendant's attorney in an amended answer filed January 22nd, 1927, sets up what he calls a counterclaim, but what is in effect a notice, as required by section 25, namely, that it is required of the jury that it is desired to find the value of the property, if any, of the goods and chattels, and I so hold. That being the case, this question now becomes relevant. There is a great deal of mystery concerning the act of replevin which is very much justified by the very ambiguous provisions contained in it, but after a reading of this section 25, what that legislature had in mind was that the defendant should have the election whether he wished to have the property returned or whether he wished to have it where it might be found and rely upon his having the verdict. Whether you call it a counterclaim, or whether it is a notice—it was in effect a notice—plaintiff's attorney set up the effect of that notice when it was filed as a pleading in this case, because he replied to it by a reply which was filed February 15th, 1929.

I will overrule the objection.

Mr. McCombe: I wish to take an exception to your Honor's ruling and also an objection to the introduction of testimony so that it will cover everything pertaining to any attempt to put in evidence damages on behalf of the defendant's counterclaim.

Q. (Question read.) A. I had a new clutch assembly put in it because it was worn. I had a new tire and tube for it. I had put on a motometer and a radiator cap. I put on a flower vase and one of those handles on the ball shift. I had it painted, renickeled, and had the dents taken out of the left rear fender and body.

Q. Anything else? A. Not that I can recall.

Q. At the time that this replevin was served upon you, did you still own the car? A. Yes, sir.

Q. You had not sold or parted with any title to it? A. No, sir; I had it in the garage.

Q. When was this car taken from you? A. Well, the exact day I don't know, but I think it was in the month of June, 1927, I think it was.

Q. Have you ever seen the car since that time? A. No, sir; not since the day it left my garage.

Q. How much did you pay for these repairs that you have spoken about? A. Would you want them itemized, or would you want what the whole car cost me?

Q. What the whole car cost you first. A. The whole car the day it was taken cost me $721.60.

Q. How much did you pay for the car? A. $415.

Q. Did you give that to the constable? A. Yes, sir; I had the cancelled check in my pocket.

Q. How much were the repairs? A. I paid $150 for the painting; $18.45 for the renickeling; the body and fender repairs was $15; for one tire 33 by 4½, $21; for the tube, $5.40; for the clutch assembly and labor was $74; the motormeter was $10; radiator cap was $6; flower vase was $2; and the ball handle was $3; seven quarts of motor oil, $1.75.

Q. Now, when were these repairs made to the car? A. Between—well, about the week after I

owned the car I had the clutch assembly put in, and then I was bickering with a concern in North Bergen in regard to painting and renickeling in the body. I didn't have enough money so I let that go until somewheres in the first week in May. When I got enough money I took it up to them and had them do that work.

Q. And it was taken from you in June? A. I believe that was the month.

Q. What caused you to go to this sale of this car? A. I had seen it advertised at the time. I am connected with the Police Department, the Hudson County motorcycle police, and I saw the advertisement on a pole, so I was nosy and I went over and read it and saw it was for some car for sale and I went into this garage and looked the car over and the day of the sale I was over there along with other people that were there.

Q. And the car you bought, was it the car described in the bill of sale (handing witness paper)? A. Yes, sir; a Buick sedan.

Mr. O'Brien: That is all.

Cross-examination by Mr. McCombe:

Q. Mr. Walk, how long have you known Kasten Brothers? A. How long have I known them?

Q. Yes. A. Well, I never met either of them up until the day of the sale.

Q. Never knew them before? A. No, sir; other than seeing their truck go by.

Q. What is your business? A. Police business.

Q. You are not an automobile repair man? A. I was, yes, but not to-day. I have not been in it since the month before I went in the Police Department.

Q. How did you obtain that car from Kasten's Garage? Did you take it away from there under

its own power? A. No, sir; I took the car away on the back of a wrecker.

Q. Took it to your own place? A. Yes, sir.

Q. Do you recall seeing Mrs. Harris after you received that car? A. I believe the first I saw of Mrs. Harris was up at your office. I won't say now whether I had seen her before that or not.

Q. Do you see Mr. Harris? A. I saw Mr. Harris the day, I think it was down at the garage, if I am not mistaken.

Q. At your garage? A. At the brother's garage; yes, sir.

Q. Did you have a conversation with him relative to the car? A. Yes.

Q. Did you tell him you thought it was a stolen car you bought? A. No.

Q. Didn't say anything about that? A. No.

Q. But at the time you thought it was a stolen car? A. No, sir.

Q. Had you heard the word stolen mentioned in this respect?

The Court: What difference does that make?

Mr. McCombe: I hope to connect it up.

The Court: All right.

The Witness: Yes.

Q. Did Mr. Harris offer to pay you a reasonable sum for what you had done on the car? A. He asked my price of the car, and I told him I was holding it for $800.

Q. Notwithstanding the fact that you paid $415 for it?

The Court: We need not go into that. The whole question is did he have title.

Q. Was there a demand made upon you for a statement?

The Court: This is not the man who was the garage keeper; this is the man who bought this at the sale. There is only one question, and that is whether or not there was agency on the part of this agent who took the car there to receive notice. If there was, you are out of it; if there was not, you are in.

Q. Was a demand made upon you for possession of the car? A. Only when the Sheriff's people came down with the writ of replevin.

Q. That is your signature, isn't it (handing witness paper)? A. Yes.

Q. Was a copy of that paper served upon you? A. Yes, sir.

Q. Then there was a demand made for production? A. Yes, sir.

Q. You refused it, and it was replevined? A. Yes, sir.

Q. Now, when did you first see this notice of sale? Is this the notice you have reference to attached to the bill of sale? A. No, sir. (Indicating on paper.) That was on there when the bill of sale was given to me. It must have been put on by the constable or one of his officers.

Q. I show you a bill and ask you whether or not that is in your handwriting? A. Yes, sir.

Q. Is that the bill you submitted to Mr. Harris? A. Yes, sir.

Q. The bill says $701.60, dated May 14th, 1927. A. That was the bill I had given to him, yes, because I hadn't at the time had all my bills together.

Q. They show the total you said was the full amount of the work and the repairs you made on the car? A. Yes, sir.

Q. Were you mistaken when you said $721? A. Unless I am mistaken in adding up what is on my bill.

Q. What date did you buy this car? A. April 6th, 1927.

The Court: When was this car taken from you by the Writ of Replevin?

The Witness: I think it was in June; yes.

The Court: When did you finish the last repairs?

A. On May 14th when it came from the paint shop.

The Court: You had been an automobile mechanic, and are familiar with the charges for labor and parts?

The Witness: Yes, sir.

The Court: When did you give up that work?

The Witness: About a month before I went on the Police Department.

The Court: When was that?

The Witness: A little over three years ago.

The Court: What do you consider—you say you put the repairs on it. What do you consider the car worth in June when it was taken from you?

The Witness: Well, it was worth easily between eight hundred and nine hundred dollars.

The Court: That is more than it cost.

The Witness: I know that, but the thing of it is what money I put into it. The car was really worth that money when I had it.

Q. Are you familiar with the values of second hand cars? A. Not so much now.

Q. Were you at that time? A. Yes.

Q. Had you bought and sold second hand cars? A. Yes, sir.

Q. You want to tell the Judge and the jury a car of that description would bring the amount you just said? A. Yes, sir.

Mr. McCombe: That is all.

Oscar H. Fox, sworn.

Direct examination by Mr. O'Brien:

Q. Where do you live, Mr. Fox? A. North Bergen.

Q. What is your business? A. Automobile repairs and general painting.

Q. In the spring of 1927, what was your business? A. In the spring of 1927?

Q. Yes. A. The same business.

Q. And do you recall at that time having any business relation with Mr. Walk? A. Yes, I did.

Q. What was it? A. Why, I painted that car for Mr. Walk, straightened out the body and fender, and also the nickel work.

Q. Are you familiar with the make of automobiles? A. I am.

Q. Will you describe the kind and model of this automobile? A. Buick sedan.

Q. Do you buy and sell second hand automobiles? A. We have bought and sold cars, yes, sir.

Q. Were you in the business at that time? A. Yes, sir.

Q. Are you familiar with the values of second hand cars? A. I am.

Q. When did you finish repairing this Buick sedan? A. I turned the car over to Mr. Walk on May 14.

Q. What, in your opinion, was the reasonable value of that car at that time? A. Between eight hundred and nine hundred dollars.

Q. How much did you charge for the repairs you did on it? A. My bill was $183.45.

Q. And is this the bill (handing witness paper)? A. Yes.

Mr. O'Brien: I offer it in evidence.

Mr. McCombe: No objection.

The Court: Let it be marked.

(Admitted and marked Exhibit D-2 in evidence.)

Cross-examination by Mr. McCombe:

Q. What business are you in now? A. The same business.

Q. How long have you known Mr. Walk? A. I have done business with Mr. Walk a number of years. I don't know how far back.

Q. Were you associated with him when he was in the automobile business? A. I did work for him on numerous cars.

Q. Was that work that you have done, done exclusively on this car? A. Yes.

Q. Or on some other car in conjunction with this car? A. No, sir.

EDWARD F. WALK, sworn.

Direct examination by Mr. O'Brien:

Q. Where do you live, Mr. Walk? A. 253 Liberty Avenue, Jersey City.

Q. What is your business? A. Automobile mechanic.

Q. What is your relationship to the other defendant in this case? A. He is my brother.

Q. Were you in the automobile repair business in the spring of 1927? A. Yes, sir.

Q. Do you remember this Buick sedan about which we have been talking today? A. Yes, sir.

Q. Did you do any work on that? A. Yes, sir.

Q. What work did you do? A. I repaired the clutch.

Q. How much did you charge for that repairing the clutch? A. $74.

Q. Is that a reasonable charge? A. Yes, sir.

Q. Are you familiar with the values of second hand automobiles? A. Well, I am not altogether. No.

Cross-examination by Mr. McCombe:

Q. Mr. Walk, were you present when Mrs. Harris called for the car? A. Yes, sir.

Q. Did you help take the car over to Brooklyn? A. Yes, sir.

Q. Was she a passenger in the car? A. Yes, sir.

Q. Do you recall her taking these papers out of the pocket of the car on the way over? (Showing witness papers.) A. No, I couldn't say.

Q. Do you remember her saying something about it when she took them out of the pocket?

A. Yes she said something, what it was I don't know.

Q. She exhibited the papers to you, but you didn't know what papers they were? A. No.

Q. Do you know when this car was bought under a garage lien? A. Yes, sir.

Q. You knew it was a lien for rent upon it, and some material and work performed on this car? You knew it was bought on a garage lien? A. Yes, sir.

Q. Did you take the license plate off the car? A. The plate wasn't on the car when Mrs. Harris came.

Q. Did you find it when Mrs. Harris came and give it to her? A. It was lying there.

Q. You didn't take it off the car? A. No.

Q. But you gave it to Mrs. Harris. Do you know where it came from? A. It was lying in the car.

Mr. McCombe: That is all.

CHARLES WALK, recalled for the Plaintiff.

Direct examination by Mr. McCombe:

Q. You knew, did you not, this car was bought under a garage lien? A. Yes.

Q. And that there was a lien on this car when you bought it? A. Yes.

Q. You bought it subject to that? A. Yes.

Mr. McCombe: I now renew my motion and ask for a direction of judgment for possession of the automobile and dismissal of the defendant's counterclaim on the pleadings.

The Court: I am at a loss to understand how you can ask that against a man by the name of Edward F. Walk. Edward F. Walk has not been brought into this case except from naming him as a defendant.

Mr. McCombe: They were in partnership.

The Court: The bill of sale says Charles A. Walk, Jr.? You haven't proven any title of possession or withholding as against Edward F. Walk. The sale was made to Charles A. Walk, Jr. If he didn't have title, he couldn't give it up. You can't hold a person in replevin unless you show that persons resists demand when he was in a position to fulfill it. Now, you say on your whole case that title was taken in the name of Charles A. Walk, Jr., and you haven't shown anything else.

Mr. McCombe: If your Honor please, I showed it was taken in possession by Charles A. Walk, who was running the business, and that they were in partnership at the time.

The Court: You can make a demand on a half a dozen people, but you have to show that they resist that demand. You have got to show they were in possession to comply with the demand.

Mr. McCombe: It was in their possession.

The Court: But where is the proof?

Mr. McCombe: I asked him if he had the car and he said yes, and he even took the car over to Brooklyn with Mrs. Harris as a passenger.

The Court: There will have to be more competent proof of it.

Mr. McCombe: I will hold it in abeyance for the moment and recall Mrs. Harris.

BERNICE J. HARRIS, recalled.

Direct examination by Mr. McCombe:

Q. Tell the court and jury where you got that plate (handing witness license plate). A. When I took the papers out of the pocket of the car there was some discussion.

Q. And the letters and contents you showed it to him on the way over? A. Mr. Edward Walk knew of the license plate at that time.

Q. He gave you this plate? A. I showed him the papers and asked him for the license plate that was on when they got the car. He said yes, it is a Florida license. Which one of the parties took it off I don't know. He said he could find the license plate for me and I asked him if he could do that. The next time I saw him he said he had found out where they had put it when they took it off the car, in a back lot.

Q. Before putting the car in the garage October 25th, 1926, did you have any repairs on it? A. Yes.

Q. In what condition was it? A. It should have been in first class condition. I had just taken it out of the Buick place for repairs a few weeks before. It had not been driven more than 100 miles since.

Q. Was it in good repair when you put it in? A. It should have been.

Q. I show you a bill and ask you whether or not that is the repairs you made prior to putting it in.

The Court: Don't let us go into this, she wasn't called back for that purpose.

Mr. McCombe: I asked her if she had repairs made prior to putting the car in the garage and she said yes.

The Court: What do you want to show?

Mr. McCombe: I want to show there was no necessity for putting repairs on it by the defendant.

The Court: That has nothing to do with this person Edward Walk.

Cross-examination by Mr. O'Brien:

Q. This trip to Brooklyn, Mrs. Harris, you were taking your car back to take possession of it, weren't you? A. Yes.

Q. You got this Mr. Edward Walk to drive it over for you, didn't you? A. Yes.

Mr. O'Brien: That is all.

Re-direct examination by Mr. McCombe:

Q. You still have possession of the car, haven't you? A. Yes.

By Mr. O'Brien:

Q. You asked Mr. Walk if he would drive the car and you home? A. Yes.

The Court: He didn't refuse to take it for you, did he?

The Witness: No, sir.

JAMES CHRISTIAN, sworn for the plaintiff.

Direct examination by Mr. McCombe:

Q. What is your business? A. Automobile salesman.

Q. How long have you been an automobile salesman? A. I beg pardon?

Q. How long have you been an automobile salesman? A. Five years.

Q. Have you had any experience in buying and selling cars? A. Yes, sir.

Q. Buying and selling second hand cars? A. Yes, sir.

Q. How long have you been engaged in buying and selling second hand cars? A. Since the last five years. Including new car sales, new cars and used cars.

Q. Now, did you have occasion to inspect the Buick sedan belonging to Mrs. Harris? A. I did.

Q. Will you tell us when? A. In the latter part of June of 1926.

Q. Now, are you cognizant with the values of second hand cars such as this would be, a 1926 model? A. Yes, sir.

Q. What model was that, do you recall? A. Five passenger, model 24-47.

Q. What was the market figure? A. Retail market?

Q. Yes. A. $650 to $700.

Q. And were you in the market to buy the car at the time? A. No, sir; I just put a value on it as a trade-in value.

Q. When you put on that value, how do you put it on? A. We take the repairs in a particular automobile from the retail price, and we put a valuation of it at $450 for a trade-in.

The Court: Did you see this car after the woman plaintiff here got it back in June, 1927?

The Witness: I don't know where she got it from.

The Court: You saw it?

The Witness: Yes.

The Court: What was its value as it stood?

The Witness: $450 was the valuation that was put on by us.

Mr. McCombe: That is all.

Cross-examination by Mr. O'Brien:

Q. This figure you have given, $450, is that for all automobiles of that year and model? A. Approximately, yes, sir, for a five-passenger model 2447.

Q. That is a general value you place on cars of that kind? A. Dependent upon the condition of it, yes, sir.

Q. What percentage do you figure on the condition of it? A. It depends. First I said we have to take the retail price and then we take the repairs plus expense of handling the merchandise.

Q. You said this was worth $700? A. $750 or $800.

Q. And it needed at the time $150 worth of repairs? A. No, sir; I didn't say that.

Q. How do you figure it was worth $750? A. We have to take a certain percentage for handling any merchandise.

Mr. O'Brien: No further questions.

Mr. McCombe: By consent of counsel it is agreed to offer this in evidence. It is an affidavit made by the Jersey Journal as

to the dates upon which the notice of sale was inserted in the paper.

The Court: Let it be marked.

(Admitted and marked Exhibit P-7 in evidence.)

Mr. McCombe: Will your Honor now please rule on my motion for a dismissal on a counterclaim on the ground that the statute has not been complied with in accordance with the laws of 1922, with the garage lien act under the laws of 1922, page 401, inasmuch as the sale as noticed in that affidavit appears to have been advertised on two respective dates; the 23rd day of March and the 5th day of April, and that the sale was made the following day, which is not in compliance with the statute which requires it must be in for two weeks, and after the completion of notice five days thereafter, whence the sale can be held. Sale was held one day after the completion of the notice. There is also evidence to the effect that no demand had been made upon the plaintiff for the rent and therefore the statutory requirement in that respect was not complied with wherein they have to wait for thirty days after the demand made upon the owner for the accrued rent.

(Argued at length.)

(Recess until March 5th, 1929, at ten A. M.)

AFTER RECESS.

March 5, 1929.
Ten A. M.

Mr. O'Brien: If your Honor please, we are here with additional witnesses to put on the stand. The constable who can prove the publication which was the subject of our discussion at the end of yesterday. I would like to ask the permission of the Court at this time to put the constable on the stand.

The Court: Do you wish to re-open your case? Is there any objection to it?

Mr. McCombe: None, if your Honor please, provided I can have the privilege of putting the plaintiffs on the stand again.

The Court: You may re-open.

LOUIS A. SHULZ, sworn.

Direct examination by Mr. O'Brien:

Q. What is your position, Mr. Shulz? A. Constable of the County of Hudson.

Q. Do you remember selling a Buick automobile in the month of April, 1927 (handing witness bill of sale)? A. Yes, sir.

Q. And there is a statement made on that bill of sale that you complied with Chapter 312 of the Session Laws of 1915? A. Yes, sir.

Q. What procedure did you take in the sale? A. In the sale?

Louis A. Shulz, for Defendants—Cross.

Q. Before the sale took place? A. We had advertised for two weeks and also posted notices as the law requires.

Q. How many places did you post notices? A. Five different places; six really.

Q. When did you publish those notices? A. In publications March 23rd and April 5th; we had to do that.

Q. And when did you post the notices of this sale? A. It would be about six days before the day of sale.

Q. Where did you publish or post them, rather? A. Different places throughout the City. The one most conspicuous on the corner of Manhattan and Tonnele Avenues.

Q. Were they private or public places? A. All public places.

By the Court:

Q. How long before April 6th did you put them up? A. April 1st. We had published it in the paper for two weeks.

Cross-examination by Mr. McCombe:

Q. How long have you been a constable? A. Five years.

Q. During those five years you sold quite a number of automobiles under the Garage Lien Act, haven't you? A Yes, sir.

Q. Undoubtedly you have sold quite a number since this particular one? A. Yes, sir.

Q. Will you tell the Judge and jury how you can remember so vividly about the date you posted these notices and the date you first began to post them, and where you posted them? A. If I remember right, Mr. McCombe, you and I went over this.

Mr. McCombe: I move to strike that out as not responsive.

The Court: Strike it out.

Q. I asked you how you remembered it. A. That would be kind of hard to answer, but it is really a matter, of course, of going through your regular legal work. You do all those things unconscious.

Q. When was the last sale you made? A. The last sale? About three weeks ago.

Q. Can you tell us now where you posted these respective notices? A. Yes, sir; one at Pryor and Grand Street, one at the corner of Grand Street, one at the corner of Pacific Avenue and Lafayette, and one was showing up in my court, and one on the corner of Brunswick and Grand.

Q. Now, can you tell us how you remember this particular instance? A. As to where they were posted?

Q. Yes. A. I won't say I know just where, I don't remember that much. I know one was posted particularly on the corner of Manhattan and Tonnele Avenue, and one which I always show is posted in the court.

Q. That's all? A. And the others throughout the City.

Q. How many throughout the City and where? A. Four others, I really posted six notices.

Q. Notwithstanding the fact you are compelled by statute to post five? A. Yes; I posted six.

Q. You always post an extra one? A. Which I keep up at the court.

Q. After the first publication when did you start in to post them? You say the first publication is March 23rd? A. The first of April.

Q. The first of April? A. The notices were posted up.

Q. How do you recall that? A. Because the notices I generally post five days before the day of sale which would bring it on the first of April. The sale was on the 5th of April.

Q. You have not known about this case before you came on the stand? A. Outside of yesterday they asked me to come up and witness.

Q. Have you been speaking to the defendants in this case? Do you know the defendant personally, Mr. Charles Walk? A. On the day of that sale was the only time I met him.

Q. Do you know Kasten Brothers? A. The first job I done with them was this one.

Q. Do you remember telling counsellor George Cutley it was a stolen car? A. It was a stolen car?

Q. Yes. A. No; it wasn't a stolen car.

Q. What did you sell the car for, Mr. Shultz? A. The bill of sale would show that.

Q. You recall this pretty vividly? A. Yes; in the main. That is impossible to say that.

Q. You knew why you were going to be here? A. Yes, I knew it.

Q. And you prepared yourself for your testimony? A. I didn't prepare anything.

Q. Mr. Shultz, do you remember having a conversation with Mrs. Harris? A. Never.

Q. Did you ever see Mrs. Harris before? A. Oh, up in the court, yes, once. I think you were with her.

Q. What court? A. Up in the Second District Court, if I remember. I am not positive now.

Q. Do you remember saying anything about telling Mrs. Harris that you thought it was a stolen car and that is why you sold it? A. No; no, sir. If it was a stolen car we would send down to find out from police headquarters.

Q. Did you tell Mrs. Harris there were no license plates on the car? A. I don't remember.

Q. Well, do you now remember whether there was any license plates on it? A. I don't.

Q. Did you inspect the car before you sold it? A. When we sell, we sell as is.

Q. Did you tell your prospective buyers what you were selling it for? A. Under the garage-keepers' lien act for storage.

Q. Did you tell him how much the garage lien was? A. It was on the car.

Q. Did you tell them how much the garage lien was? A. Yes.

Q. How much was it? A. $52 I think.

Q. You were not selling it for $52? A. I didn't sell it for $52.

Q. You were not selling it for the lien of $52, were you? A. Yes.

Q. As a matter of fact, wasn't it $27? A. According to the lien, counsellor, what he signed, that is what I sold it for.

Mr. McCombe: That is all.

Re-direct examination by Mr. O'Brien:

Q. You are not interested in this case at all? A. No; not in the least.

Q. Are you very well acquainted with Kasten Brothers? A. Just by going down there that one time. The only job I done for them.

Q. How long have you been in the city? A. How long have I been in the city?

Q. Yes. A. 33 years.

Q. You didn't know Kasten Brothers before that? A. No, sir; never done any business with them.

CHARLES WALK, recalled for the Plaintiff.

Direct examination by Mr. McCombe:

Q. Mr. Walk, on October 25th, 1926, did you and your brother Edward F. Walk operate the C. & E. Auto Repair Company at 357 St. Pauls Avenue? A. October when?

Q. October 25th, 1926. A. No, sir. My brother did, but not I. I haven't operated the C. & E. Garage since the last day, or rather the first day of October, 1926, when I went on the Police Department.

Q. Did your brother advance the money for the payment on this machine? A. Did he advance the money?

Q. Yes. A. No, sir.

Q. Isn't it a fact he was interested in this automobile? A. No, sir; it positively was mine and no one else's.

Q. It was in the garage where you formerly conducted the business of the C. & E.? A. No, sir; it was in a private garage.

The Court: It wasn't in your brother's garage?

The Witness: No, sir. It was in a private garage I had hired to put the car in. The garage is torn down now on St. Pauls Avenue, 349.

Q. I show you a card and ask you whether or not that is your business card? A. That was, yes.

Q. And it says C. & E. Auto Repair Company, doesn't it? A. Yes, sir.

Q. And Charles A. Walk and Edward F. Walk beside that, doesn't it? A. Yes, sir, it did.

Mr. McCombe: That is all.

BERNICE J. HARRIS, recalled for the plaintiff.

Direct examination by Mr. McCombe:

Q. Mrs. Harris, when you went to get the automobile from Walk Brothers, did you have a conversation with Edward Walk? A. Yes.

Q. And he was the same gentleman who took the car over to Brooklyn? A. Yes, I hired him to drive it.

Q. During that conversation, did he or did he not tell you he was interested in that car and that he had put some money in it and loaned it to Mr. Walk? A. He had said he had done some repair work of some kind, some work on the car and that his brother still owed him the money. They wanted to sell it to get their money back.

Q. Now, in order to save any possibility of any prolonged conversation, I want to ask you about the motor vehicle certificate of title. Down in Florida when you buy an automobile you get a bill of sale, don't you? A. Yes, sir.

Q. When you get your license, do you have to turn in the bill of sale, and they issue in return a motor vehicle certificate of title? A. Yes, sir.

Q. And that original bill of sale is in the secretary's office? A. Yes, sir.

Cross-examination by Mr. O'Brien:

Q. How do you know that the original bill of sale is in the secretary's office? A. I suppose they did that. They don't return it to one.

Q. But you don't know that of your own knowledge? A. No.

By Mr. McCombe:

Q. They didn't give it to you back? A. No.

Mr. McCombe: I respectfully renew my motion on the same ground.

(Argued at length.)

The Court: A motion for a non-suit by motion of the Court is granted in favor of the defendant Edward F. Walk and against the plaintiff, the reason being there is no competent proof before the Court that this man ever had possession of the automobile. Of course, there must be possession.

Now, with respect to the motion which is now before the Court as to Charles A. Walk, Jr., I am going to direct the jury to bring in a verdict in favor of the plaintiff and against Charles A. Walk, Jr., this defendant, for the possession of this car. I am doing so primarily upon the following grounds:

That there has been no competent proof before this Court of an overt act of detention brought home to the owner of this car which would entitle them under the plain provisions of the act to sell the car, and my reasons are based upon this language in the statute as found in Chapter 33, Laws of 1925, and Chapter 231. Section 1 is amended to read as follows:

"Where a person has stored a car, etc., and the bill is not paid, he may without process of law detain such motor vehicle at any time it is lawfully in his possession until such sum is paid".

Section 2 provides, "The owner or person entitled to the immediate possession of motor vehicle, or part or parts thereof, so detained as in this act provided, on learn-

ing that said motor vehicle or parts are being so detained may immediately demand from the garage owner or keeper, or the person in charge thereof, a statement showing the true amount claimed to be due for the storing, maintaining, keeping or repairing of such motor vehicle, etc." "Should possession of said vehicle or parts thereof be refused him he may obtain possession thereof by depositing the amount claimed by said statement with the clerk of the Court and deposit $50, or $10 according to the court in which it is brought."

Now, this case is brought under the general replevin act, and section 3 of this act goes on to provide:

"If no proceedings are taken for the repossession of the motor vehicle or the parts thereof by the owner or his legal representative as provided for in section two hereof, then all such property so held by any such garage keeper or automobile repairman shall, after the expiration of thirty days from the date of such detention, be sold at public auction, upon notice of said sale being first published for the space of two weeks in some newspaper circulating in the city, borough, town, township, or other municipality——" and also the posting as required by that section.

Now, that means two periods of time, thirty days from detention, and then a period of two weeks after.

In the case of Crucible Steel Company *v.* Polack Tyre and Rubber Company, 92 Law, particularly page 230, the court dealt with section 3, and had this to say:

"The section expressly provides that such property shall 'after the expiration of thirty days from the date of such detention'—" (Now, consider what that means) —"that is from the time the owner refuses to pay the lien charges, or from the time such property is seized (as the case may be), after being out of the lienor's possession, be sold at public auction. Evidently, the thirty days required of the lienor to hold the chattel after the detention of it has actually taken place is for the purpose of affording the owner an opportunity to pay the lien charges."

Now, I cannot construe that to mean anything else than that they must have notice of the intention to claim detention of the lien in order to give the right of sale, and it must be brought home to the owner by some means.

Now, in the case before me I call specific attention to the fact that it is uncontradicted that Mr. Freeman, who took this car to the garage, repeatedly asked the owners of this garage if they wanted any money, and he was told no, even after the first month's storage and says in February sometime he got a bill. What the bill is we don't know—it is not in evidence—any more than we may presume the bill was for the storage charges.

I am going to assume for the purpose of disposing of this case these defendants sent him an ordinary bill for storing the automobile, so many months at so much, and carry out the bill. Now, that certainly can't be construed as any such notice as is con-

templated by the plain reading of the statute, and especially by the case to which I last alluded to. Now, this is leaving out of the case the question which is of grave concern to me, and upon which this motion might probably be rested as to whether Mr. Freeman had any authority from the owner to receive notice of detention or bills for them. But be that as it may, the uncontradicted proof before me now is a bill was given to him sometime in February and that it was delivered to the present owner sometime in April, after the sale took place, and that she immediately, the next day, within reasonable time, sent her check.

On the face of that I can't do other than to direct a verdict in favor of the plaintiff and against the single defendant, Charles A. Walk, Jr., the verdict being that the plaintiff is entitled to the possession of the automobile.

Mr. O'Brien: May I have an exception?

The Court: Yes.

Exhibit P-1.

MOTOR VEHICLE CERTIFICATE OF TITLE
STATE OF FLORIDA

ERNEST AMOS, Comptroller.

Appn. No. 485735
Cert. No. 377863

Tallahassee, Fla., Feb. 19, 1926

Satisfactory proof having been made under chapter 9157, acts of 1923, that title to the motor vehicle hereinafter described is vested in the owner named below. This official certificate of title is issued for the motor vehicle described as follows:

Name and Make—Buick. Type—Sedan. Model —. Year of Make—1924. Engine Number—1151701. Serial or Chassis Number—Buick, 1130007, 6 cyls. Wheels—Spoke. Other descriptive features. Liens—None.

Name—Mrs. C. C. Harris.

Address—1669 N W 7th Court, Miami, Florida.

ERNEST AMOS,
Comptroller.

(SEAL)

Exhibit P-2.

1926 Registration Card.—The accompanying number plate has been registered and assigned to the addressee named hereon to be used on a motor vehicle of make and weight indicated for the year ending December 31, 1926.

Application No.—51531. Tag No.—C36176. Tax—$19.00.*

Name—Buick. Type—Sedan. Use—Private.

Weight—3800 lbs. Capacity ..... lbs. .....Pas.

Engine No.—1151701. Tires—Pneu. Date acquired—1924.

County—Date. Res. or Tour.—Res. T. C. No.

	F	Mrs. C. C. Harris	1
	L	1669 W. 7th Court	9
	A	Miami	2
		Florida	6

Ernest Amos,
Comptroller of Florida.

* (Over)

Notice

Automobile license tags can be used only on the car for which issued and must remain on that car throughout the year, regardless of any changes in ownership. Tags cannot be lawfully transferred from one car to another car. Upon sale of a car already registered, the new owner is required to apply for transfer of registration to his name immediately. The cost is $1.00. There is a regular form blank for application, and the Motor Vehicle Certificate should accompany such application. Blanks may be secured at banks, auto dealers, motor clubs or from State Comptroller.

Exhibit P-3.

To use license plate on any other car than the one for which it was issued is prohibited by law and is punishable by fine or imprisonment.

Special Note.—Motor vehicles operated for hire will, in addition to this card, be furnished for hire license certificate, and a container for the same. This for hire license certificate will be transferable from car to car, or from owner to owner.

Two tags not required by Florida law.

Exhibit P-3.

1-833

Lafayette National Bank
of Brooklyn in New York

No. 12 Brooklyn, N. Y. Apr. 26 1927

Pay to the order of Kasten Garage.....$27.00
Twenty seven and no/100.....Dollars

Bernice S. Harris.

Garage rent.

Exhibit P-4.

To:—

CHARLES A. WALK
and
EDWARD F. WALK,
357 St. Paul's Avenue,
Jersey City, New Jersey.

SIRS:

I hereby demand of you a detailed statement showing the true amount, if any, claimed to be due for the storing, maintaining, keeping or repairing of the automobile herein described or for furnishing gasoline, accessories or for supplies therefor, if any amount is due you or claimed by reason of the aforementioned items upon my Buick Sedan, motor #1151701, serial #1130007, model 24-47.

BERNICE S. HARRIS

Dated June 14, 1927.

Exhibit P-5.

To:—
CHARLES A. WALK
and
EDWARD F. WALK,
357 St. Paul's Avenue,
Jersey City, New Jersey.

I hereby demand of you the following goods and chattels, which are my property, to wit: a certain Buick Sedan, Motor #1151701, serial #1130007, Model 24-47, and unless you deliver the same forthwith, I shall commence legal proceedings against you to recover possession of the same.

BERNICE S. HARRIS

Dated, June 14, 1927.

Exhibit P-6.

A Florida automobile, license plates #36-176-C 1926.

Exhibit P-7.

State of New Jersey, } ss.
Hudson County }

Gladys V. Ward being duly sworn, according to law, upon her oath saith that she is the Bookkeeper of The Jersey Journal, a newspaper printed and published in Jersey City, County and State aforesaid, and that a notice, of which the annexed is a true copy, was published in the said newspaper for two weeks, two times, successively, at least once in each week, the first publication being on the 23rd day of March, 1927, and continued thereafter on April 5th, 1927.

Gladys V. Ward

Sworn and subscribed before me this
11th, day of January A. D. 1929.

Stella Redmond
Notary Public, N. J.
(Notarial Seal)

Notice of Sale

By virtue of Chapter 312, Sessions Laws of 1915 and amendments and by virtue of an authorization given by Kasten Bros., Inc., I will sell at Public Auction on Wednesday, April 6, 1927, at 10 o'clock in the forenoon on that date one Chevrolet Touring Car No. 2F6032; one Nash Touring Model No. 681, Serial No. 101695; one Reo Touring Car No. T-9923; one Buick Sedan, Motor No. 1151701, at 486 Tonnele Ave., Jersey City.

Louis A. Schultz,
Constable & Agent.

Mar. 23 Apr. 5

Exhibit D-1.

NOTICE OF SALE

By virtue of Chapter 312, Session Laws of 1915 and amendments and by virtue of an authorization an damendments and by virtue of an authorization given by Kasten Bros., Inc., I will sell at Public Auction on Wednesday, April 6, 1927, at 10 o'clock in the forenoon on that date one Chevrolet Touring Car. No. 2F6032; one Nash Touring Model No. 681, Serial No. 101695; one Reo Touring Car No. T-9923; one Buick Sedan, Motor No. 1151701, at 486 Tonnele Ave., Jersey City.

LOUIS A. SCHULTZ,
Constable and Agent.

mar 23 apr 5.

KNOW ALL MEN BY THESE PRESENTS That I, LOUIS A. SCHULTZ, Constable and attorney in fact for Kasten Bros. Inc., of the city of Jersey City in the County of Hudson and State of New Jersey, party of the first part, in consideration of the sum of Four hundred and fifteen ($415.00) dollars, paid by Charles A. Walk, Jr. of the city of Jersey City in the County of Hudson and State of New Jersey, party of the second part, ha bargained, sold, granted and conveyed and by these presents do , bargain, sell, grant and convey unto the said party of the second part heirs, executors, administrators and assigns, Sedan BUICK 1151701 unto the said party. The above mentioned motor car was sold at public auction Wednesday, April 6, 1927, which was in accordance with Chapter 312, Session Laws of 1915 and amendments.

Exhibit D-1.

In Witness Whereof, I have hereunto set my hand and seal this eighth day of April one thousand nine hundred and 27.

Louis A. Schultz [L. S.]
Constable and Attorney in Fact
for Kasten Bros. Inc.

Signed, Sealed and Delivered in the presence of

Marie F. Molineaux
John G. Andes

State of New Jersey, County of Hudson } ss:

Be it Remembered, That on this 8th day of April 1927 before me a Comm. of Deeds of the State of New Jersey, personally appeared Louis A. Schultz, who, I am satisfied, is the seller mentioned in the within instrument, and I having personally made known to him the contents thereof 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.

Marie F. Molineaux

(Seal)

[Endorsed.]
Bill of Sale,
for Motor Vehicle

Louis A. Schultz,
Constable
to
Charles A. Walk, Jr.

Dated April 8th, 1927.

Exhibit D-2.

Auto Glass and Windshields — Window Regulators

RELIABLE AUTO TOP CO.
Auto Tops, Trimmings, Seat Covers,
Painting, Body Work, Radiator Covers
& Glass Enclosures

Telephone Union 6948

Agent for TRIPLEX SAFETY GLASS

One block South of Columbia Park

4265 Hudson Boulevard
North Bergen, N. J. May 14 1927

Sold to CHAS. WALK

Order No. ..... Terms ..... Received by.....

Painting	150 00	
Nickelplating	18 45	
Repair left rear fender & body	15 00	
		183 45

RELIABLE AUTO TOP CO.
4265 Hudson Boulevard,
North Bergen, N. J.
PAID
May 14, 1927
Oscar H. Foe
Thank You

New Jersey Court of Errors and Appeals

BERNICE J. HARRIS, Plaintiff-Respondent, *vs.* CHARLES A. WALK, JR., and EDWARD F. WALK, Defendants-Appellants.	Action at Law. On Appeal.

BRIEF FOR DEFENDANTS-APPELLANTS.

Statement of Facts.

Bernice J. Harris, plaintiff in the action below, was the owner of a Buick motor car, and on October 25th, 1926, through a friend of her husband's, stored it in a garage on Tonnelle Avenue in Jersey City owned by Kasten Brothers. The charge of the storage was arranged at $5.00 per month. No rental was paid on the car, and on February 1st, Kasten Brothers sent a bill to the friend, Mr. Freeman, who represented Bernice J. Harris. It was received about that time by Mr. Freeman. On April 6th, the car was sold by a Constable of the Second District Court of Jersey City for the accrued garage rent, and was purchased by the defendant, Charles A. Walk, Jr.

Thereafter, on the 15th day of June, 1927, the motor car was replevied by Mrs. Harris, and upon the trial of the case, the Court directed a verdict in favor of the plaintiff and against the defendant, Charles A. Walk, Jr., upon the ground that the provisions of the Garage Keeper's Lien Act had not been complied with in that there was

no competent proof before the Court of an overt act of detention brought home to the owner of the car which would entitle the garage keepers under the plain provisions of the Act to sell the car.

POINT I.

The Court erred in directing a verdict in favor of the plaintiff and against the defendant, Charles A. Walk, Jr.

The question involved in this case is whether or not Bernice J. Harris or Charles A. Walk, Jr., is entitled to the possession of the Buick motor car involved. It is clear that if Charles A. Walk, Jr., has a valid title, which would give him possession of the car, he is entitled to it under the provisions of what is known as the "Garage Keeper's Lien Act" and Laws of 1915, Chapter 312 and its amendments.

Upon the trial of the case, Walk, we contend, established his title when he proved first, that the rent was due upon the car and a lien attached; second, that the car was sold more than thirty days after the lien attached, and third, that all the requirements under Section 3 of the above mentioned Act were present in the sale of this car.

Section 1 of the Act, Chapter 33, Laws of 1925, provides:

> "All persons or corporations engaged in the business of keeping a garage, etc., and in connection therewith stores, etc., any motor vehicle * * * therefor at the request or with the consent of the owner or his representative * * * has a lien upon such motor vehicle or any part thereof * * * and may without process of law, detain such motor vehicle at any time it is lawfully in his possession until such sum is paid."

Section 2 of this Act provides:

> "If no proceedings are taken for the repossession of the motor vehicle or the parts thereof by the owner or his legal representative as provided for in section two hereof, then all such property so held by any such garage keeper, etc., shall after the expiration of thirty days from the date of such detention, be sold at public auction subject to such prior lien of a bill of conditional sale or chattel mortgage properly recorded as aforesaid; upon notice of said sale being first published for the space of two weeks, at least once in each week, in some newspaper circulating in the city, borough, town, township or other municipality in which said garage keeper or automobile repair shop is situated, also after five days' notice of said sale set up in five of the most public places in said city or township, and the proceeds of said sale shall be applied to the payment of such lien and the expenses of such sale."

These two sections set forth all that is required in order to convey title to a car in a garage when the rent has not been paid. The first section above referred to sets forth that when rent is due upon an automobile, the garage keeper *ipso facto* has a lien upon the car for the rent, and it further contends that he may detain it as soon as the lien attaches. It further sets forth that the detention shall last for thirty days, which plainly indicates that the car shall not be sold until the lien has been upon it for at least thirty days. It does not set forth that any additional act shall be done by the garage keeper to further bring the notice of the debt to the attention of the owner of the car. It is the contention of the defendant-appellant that under this act that the reason for not requiring any additional act on the part of the garage keeper is that the owner of the car or his representative must necessarily have notice of the

debt, because they stored the car and did not pay the rental charges.

The purpose of a detention for a period of thirty days is to prevent the sale of an automobile until thirty days have elapsed from the time of the creation of the lien. Of all the persons in the world, the one who should have knowledge that the rental charges are due, the owner of the car or his representative should be that one. It surely was not the intention of the Legislature to have a garage keeper do more than is required under the plain provisions of the Act. Every express provision of the Statute was complied with in the sale of this automobile as will appear from the testimony. There is no conflict in this case as to the procedure in selling this car.

The only conflict is upon the question of whether or not the garage keeper had the right to begin the procedure set forth in Section 2 above referred to. It is the contention of the defendant-appellant that no overt act was necessary upon his part under the statute to create a detention under the provisions of the Act, but that the detention came into existence at the same time the lien attached. This adopting of the lien and existence of the debt and right of detention upon the part of the garage keeper, all were known to the representative of the owner of this car. To take any other view required a garage keeper proceeding under this Act, to do more than is set forth in the Statute to be done. We contend that the title of Walk is perfected when everything is done that the Statute requires to be done.

The Court in directing this verdict, said (page 78):

> "Now, this is leaving out of the case the question which is of grave concern to me, and upon which this motion might probably be rested as to whether Mr. Freeman had any

authority from the owner to receive notice of detention or bills for them."

This indicates that there was some doubt in the Court's mind as to whether or not the agency of Freeman was established, but an examination of the testimony shows that on page 48, Bernice J. Harris, former owner of the car, puts this beyond all doubt.

> "The Court: You knew it was stored? A. I knew it was stored in Jersey City.
>
> The Court: He told you the car had been taken into storage by Mr. Freeman?
>
> The Witness: Yes, sir.
>
> The Court: Before this car was taken into storage your husband, as I understand it, talked with you about letting Mr. Freeman take it and put it where his car was.
>
> The Witness: Yes.
>
> Q. And you authorized your husband to take it and give it to Mr. Freeman to take it to the garage where Mr. Freeman kept his car? A. Yes, I thought they were reliable people."

It is the further contention of the defendant-appellant that adopting the view that an overt act of detention was necessary thirty days before proceeding for a sale, the bill sent to the representative of the owner was sufficient to establish such detention. The uncontradicted evidence in the case was that such bill had been received by Freeman the early part of February, two months before the actual sale of the car took place. No effort was made during this period to pay for the storage of the car and the garage keeper was not approached by the owner of the car or by Freeman. The car was sold more than two months after the bill was sent. To adopt the view that in order to sell a car under this act, it is necessary

to serve some notice in addition to those required by the statute, upon the owner of the car, or to bring to her, in addition to the existence of the lien, the intention of the garage keeper to sell the car thirty days before any proceedings are held to that end, would in many cases prevent the operation of this act at all for the protection of the garage keeper. He would be required to hold all cars until he found the owner; he could not sell the car no matter how long the lien existed or how great the amount of it; he could not proceed under this act until he had somehow found the owner. It is not necessary to point out the abuses that would result from this interpretation. Rather, we contend, it is the plain meaning of the statute that when a bill is due and owing on a car, the burden of acting is placed upon the owner of the car, or thirty days after that bill is due and owing, proceedings may be taken for its sale to satisfy the lien of the garage keeper.

The case of *Crucible Steel Co.* vs. *Polack Tyre & Rubber Co.*, 92 Law. 221, contains some language on this point:

> "It is plain from a fair reading of the second section of the statute that when the owner or representative of such owner fails to pay for the repairs or supplies and demands his property and the lienor refuses to surrender it, unless the charges for the repairs thereon or supplies thereto are first paid, that a detention within the meaning of the statute takes place."

This shows that under the facts set forth a detention takes place, but it does not say that a detention may not take place under any other set of facts. If this language, which is dicta in this case, is to control, it means that no automobile may be sold until the owner of the car makes a demand which is refused. This would prevent the

sale of any car by a garage keeper until thirty days after a demand by the owner of the car for his property had been made. We most vigorously contend that this would place the control of the sale of a car in the power of the one who owed the money.

We, therefore, return to our contention that the meaning of the statute is that no car shall be placed upon the market for sale until thirty days have passed after the creation of the lien, and that then statutory notice and publication shall be given to the owner of the car.

We contend that it was not the intention of the legislature to give more protection to the owner of a car upon which there was a debt owing to a garage keeper, than is plainly set forth in the statute.

We further contend that the owner of the car in this case from the evidence, had knowledge through her representative of the existence of this lien, that the presenting of the bill was a demand for payment, and that such demand was an overt act that would, even if the contention of the Court be adopted, create such a detention as would allow the sale of this car thirty days thereafter.

Respectfully submitted,

RAE, KING & O'BRIEN,
Attorneys for Defendants-Appellants.

WM. L. RAE,
Of counsel.

New Jersey Court of Errors and Appeals

BERNICE J. HARRIS, Plaintiff-Respondent, v. CHARLES A. WALK, JR., and EDWARD F. WALK, Defendants-Appellants.	Action at Law On Appeal.

BRIEF OF THE PLAINTIFF-RESPONDENT.

Statement.

The defendant below Charles A. Walk, Jr., alone has taken this appeal herein. His co-defendant was non-suited upon the trial. No cross appeal was taken by the plaintiff-respondent.

The appeal brings up a judgment of possession, obtained in a replevin suit, in the New Jersey Supreme Court, in Hudson County, March 5th, 1929. (Judgment actually entered March 12, 1929, for possession, and for $74.32, taxed costs of court.) (See Rider, p. 18a-b, State of Case.) The trial judge, Honorable Henry E. Ackerson, Jr., instructed the jury to find a verdict for possession for the plaintiff, Bernice J. Harris, against Charles A. Walk, Jr., one of the defendants below, the learned judge non-suiting as to the other defendant.

A DIGEST OF THE TESTIMONY IN THIS CASE IS ANNEXED TO THIS BRIEF AS APPENDIX "A."

A COPY OF THE GARAGE KEEPERS' LIEN ACT AS IT READ AT THE TIME OF THE ALLEGED SALE, AND AT THE TIME OF THE TRIAL OF THE CASE, IS HERETO ANNEXED AS APPENDIX "B."

Facts.

Plaintiff-respondent, Bernice J. Harris, living in New York City, recovering from an illness (State of Case, p. 20, l. 40), requested her husband to put her Buick sedan automobile into dead storage for six months (State of Case, p. 21, l. 2) and her husband so did, through one of his friends, Christopher C. Freeman, at Kasten's Garage, in which garage Freeman kept his own car, in the City of Jersey City, N. J. (State of Case, p. 27, ll. 10-20). Mrs. Harris, said plaintiff-respondent, owned this machine, which had a Florida registration and license, and up to the day the machine was put into dead storage, said automobile was physically possessed by said plaintiff-respondent (State of Case, p. 19, l. 38; p. 27, l. 1). Mrs. Harris, never, during the times mentioned in this suit, lost constructive possession of the machine until a Constable in Jersey City essayed to sell it under an alleged sale, putatively held by him under the Garage Keepers' Lien Act.

Freeman made the bargain under which the machine went into dead storage with Kasten at Kasten's Garage; the agreement was that the machine was to go into dead storage for six months at $5 per month, storage charges (State of Case, p. 37, ll. 30-40; p. 38, l. 3). No agreement as to when the storage charges were to be paid was made (State of Case, p. 38, ll. 21-24).

Freeman was the only witness called at the trial, capable of testifying as to what the entire bargain

and arrangements were. No demand was ever made on Mrs. Harris (State of Case, p. 21, l. 5; p. 48, l. 4) or Freeman, for any storage charges, and in fact, Kasten told Freeman he did not currently wish any payment of charges (State of Case, p. 39, ll. 13 and 23; p. 40, l. 25; p. 43, l. 2). These storage charges and costs amounted, at the date of sale, to $27 (State of Case, p. 21, ll. 19 and 34). It was also shown by Freeman that Kasten's bills were statements and not demands, notwithstanding Freeman saw Kasten Bros. frequently on an average of two or three times a week (State of Case, p. 39, ll. 1-9; p. 40, l. 26). Freeman kept his own car there two years (State of Case, p. 43, l. 10). On the 5th day of April, 1927, one Schultz, a Constable, held a putative sale and sold the automobile to the defendant-appellant Charles A. Walk, Jr., a Hudson County Policeman (State of Case, p. 71, l. 5, p. 73, l. 16). No demand was ever made on the owner to pay the garage storage charges (State of Case, p. 21, l. 5; p. 35, l. 38; p. 39, ll. 13-25); no such charges had been claimed to be then as yet due, and besides this gross irregularity, the said constable violated the law in that he did not comply with the law respecting the statutory period within which said putative sale could be held, to wit, the duration of publication and the time within which to hold a sale. The first insertion of the advertisement of sale was made on Wednesday, March 23, 1927, and the other insertion Tuesday, April 5, 1927; the sale is alleged to have been held Wednesday, April 6, 1927, at ten o'clock (State of Case, p. 69, l. 10). The Constable testified the sale was held on April 5th (State of Case, p. 71, l. 4). The Bill of Sale states the sale was held April 6th, 1927; the Bill of Sale is dated April 8th, 1927. Nevertheless, at neither time had the statutory space of two weeks, in which adver-

tisement is to be made elapsed, nor had five days elapsed thereafter, within which time the sale could be made. Mrs. Harris, the plaintiff-respondent, when she first learned her automobile had been thus sold by the constable (State of Case, p. 22, l. 20), engaged lawyers (State of Case, p. 22, ll. 27-30). Kasten, the garage owner having refused to divulge any information concerning the automobile (State of Case, p. 22, l. 33), and after considerable effort, said automobile was found in the possession of Charles A. Walk, Jr., the defendant-appellant, from whom she duly demanded said automobile (State of Case, p. 23, l. 33) but said Charles A. Walk, Jr., declined to surrender the same (State of Case, p. 24, l. 15). After the demand by the plaintiff-respondent for its possession, and the refusal of Charles A. Walk, Jr., to deliver up the same, she then brought her replevin suit, at the trial of which, the jury upon the direction of the learned trial judge, returned a verdict in favor of Mrs. Harris, the plaintiff-respondent, for possession, against the defendant-appellant, Charles A. Walk, Jr., from which judgment he has taken this his appeal. (State of Case, p. 78, l. 20; see also Notice of Appeal, p. 1).

THE FACTS AS STATED IN DEFENDANT-APPELLANT'S BRIEF *ARE MISLEADING ON ACCOUNT OF THE FOLLOWING OMISSIONS:*

1st Omission: That there has been a failure to state in said brief that the dead storage was stipulated to be for six months (State of Case, p. 38, ll. 3 and 26).

2nd Omission: That there has been a failure to state in said brief that no due days were agreed upon for the storage charges (State of Case, p. 38, ll. 3 and 24; p. 40, l. 28).

3rd Omission: Defendant-appellant's brief absolutely ignores the fact that the defendant-appellant failed to put into the evidence the purported bill of Kasten, erroneously made out and carelessly thrown into the mail with Freeman's bill (State of Case, p. 41, l. 9; p. 42, l. 20).

THE LAW WAS VIOLATED AND THE CONSTABLE'S SALE WAS ILLEGAL FOR THE REASONS HEREINAFTER SET FORTH IN THIS, THE PLAINTIFF-RESPONDENT'S BRIEF.

Grounds of Appeal.

The sole ground of appeal is contained in the Notice of Appeal, viz., that the trial court erred in directing a verdict in favor of the plaintiff and against the defendant, Charles A. Walk, Jr. (State of Case, p. 1).

POINTS OF LAW.

FIRST POINT.

This suit was brought and tried in the Supreme Court. In the assignment of errors (contained in the Notice of Appeal, State of Case, p. 1), no ground of error is stated, but merely that alleged error was committed:

This appeal is pending on an irregular basis and it should be dismissed.

Trenton Banking Co., Admr. and Ex. v. Rittenhouse, 96 N. J. Law 450;
Same Case, 115 Atl. 443;
Van Horn v. Huegel, 104 N. J. Law 106;
Same Case, 139 Atl. 28;
Anderson v. Frehoffer, 104 N. J. Law 62;
Same Case, 139 Atl. 29.

SECOND POINT.

The appellant comes hither and is here without a sufficiently precise exception, on which to assign error and on which to maintain his appeal.

The grounds of error or causes for reversal must be definitely pointed out and assigned or specified with sufficient precision to apprise the court and opposing counsel of the injury complained of.

N. Y. Central R. R. Co. v. Petrozzo, 92 N. J. Law 425, see page 428;
Same Case, 105 Atl. 231;
Franklin v. Millville, 98 N. J. Law 262; 134 Atl. 750; 103 N. J. Law 159;
State v. Maurone, 146 Atl. 50; 2 N. J. Misc. Rep. 1027.

THIRD POINT.

The plaintiff-respondent has, in an uncontrovertable manner and with exact certainty, proven her right to maintain her suit and a judgment therein in replevin.

The Statutes of New Jersey, provide as follows:

"Sec. 2. That any unlawful detention of goods and chattels from their lawful owner, or the person entitled by law to the possession of the same, shall be deemed an unlawful taking for the purpose of supporting an action of replevin."

Compiled Statutes, Vol. III, page 4368.

In McDade v. Reilly, 102 N. J. Law 268; Same Case, 132 Atl. 247, the Supreme Court ruled:

> "Special function of replevin is to recover possession of a specific article, and the only issue properly involved is right of possession, whether general or special ownership is claimed."

FOURTH POINT.

The defendant-appellant as a putative buyer under a Constable's sale must sustain the burden of proof throughout. He must show that the Garage Keepers' Lien Act was complied with in its every element and as to each of its requirements: Any title which he could get was under a statute and he must show that the statute in every detail was followed and obeyed; he bought at an illegally held sale and he got no title and only a tortious possession thereby and thereunder.

In this brief the respondent states her contentions as to the facts and law of this case, as well as replying the appellant's brief.

THE EVIDENCE IN THE WHOLE CASE IS WITHOUT CONTRADICTION OR CONFLICT, THAT, THE SALE OF THIS AUTOMOBILE WAS ILLEGAL AND THAT THE SAID SALE BY THE CONSTABLE WAS ENTIRELY NUGATORY AND CONFERRED NO TITLE IN THE BUYER AT THE SALE.

There is no testimony whatsoever in the defendant's case which is relevant and competent on the issue vel non as to whether the Constable's sale was

good or not, except the testimony of the Constable; that there is no evidence in the defendant's case whatsover except that the Constable held a sale, and although the integrity of such sale was dependent upon his (the said Constable's) properly advertising in the newspapers and properly posting notices, there is nothing in the Constable's testimony that could inform the court and jury with precision as to how he posted the notices, whether they were posted in time and seasonably, and for the reason, too, that the newspaper advertisement, inserted in the Jersey Journal, itself shows it was faulty for the reason that it was not advertised for the full space of two weeks, required by the Statute.

IT IS VERY APPARENT THAT THE INTEGRITY OF THE CONSTABLE'S SALE DEPENDED UPON THE GARAGE MAN'S RIGHT TO SELL. The pre-existing rights of the garage man as to the storage of this automobile do not in any place appear in the defendant's case; *the defendant could have called as his witness, the garage man* and put him on the stand to testify; if he, Kasten, had testified, there could have been an issue of fact for the jury, *provided* this garage man, Kasten, should have testified in a manner different from Freeman and from the corroboration of the witness Freeman, by Mitchell, *but no such issue of fact was presented.* The evidence was all to the effect that the plaintiff's instructions as conveyed to Freeman and as carried out by Freeman was that the contract was for dead storage for the *entire term* of six months, at the rate of $5 per month. There is no evidence whatsoever in the defendant's, or in the plaintiff's case, as to what the due days were, when these storage charges were to be paid; when a man leases a house to a tenant, and the rent is to be payable in advance, there is in the indenture

of lease an appropriate covenant or stipulation to that effect; if interest on a bond and mortgage is to be payable, semi-annually or quarterly, there is a stipulation in the bond and mortgage appropriate to such effect; had either Kasten or Freeman made an agreement that the car was to have its storage paid from month to month, whether after every month, or each month in advance, it could have been very readily done by a little writing being taken between Kasten as the garage owner and Freeman as the man bringing the car to the garage. THE PRESUMPTION OF LAW IS THAT WHEN A TERM IS STATED, AS THE DURATION OF A CONTRACT, WHETHER A LETTING OF PREMISES OR WHAT NOT, IN THE ABSENCE OF A STIPULATION, SUCH CHARGES AND RENTS DO NOT BECOME DUE UNTIL THE EXPIRY OF THE ENTIRE TERM. If any injury has resulted to the defendant-appellant because of the lack of Kasten's testimony in the case, it is his own fault, because Kasten was in court and he could have been subpoenaed and called to the stand, and Kasten, previous to the case, knew about the case, and was down to see the witness, Freeman, the night before one day that the case was coming up (State of Case, p. 37, ll. 1-10).

BILLS AT KASTEN'S GARAGE WERE STATEMENTS, NOT DEMANDS FOR PAYMENT (Freeman, State of Case, p. 44, ll. 22-30):

Usage and custom of a trade or business can explain a silence in a contract when such custom does not contradict the contract whether the contract be in writing or by parol.

Rodgers v. Roddock Co., 98 N. J. Law 490-492;

Schenck v. Griffin, 38 N. J. Law 462;
Steward & Metler v. Scudder, 24 N. J. Law 96.

The proposition contended by the defendant-appellant throughout their brief of seven pages, can be summed up in the following proposition, viz., they contend that if the garage keeper has the automobile peacefully in his possession, the owner of the machine is entitled to no more notice than such *constructive* notice, as is given to him under the statute, by posting the notices and by publishing in the newspaper; they contend that the statute requires no direct notice to the owner of the machine, that it is the purpose of the garage keeper to sell the machine for storage charges, except in the event that the automobile has been removed from his garage with his consent, and is somewhere else than still in the possession of the garage keeper; they insist that this is a sound public policy, so far as the garage keeper and the automobile trade is concerned; *some great judge has ruled that "public policy is an unruly horse";* some great judge of 50 years ago might have contemplated that modern automobiles in trying to escape a garage keeper's lien, could break all speed records, but, where do the hundreds of thousands of owners of these expensive automobiles get off, if, without right and without real notice, and *without any effort to* inquire as to who and where the owner was, so he or she could have an opportunity to pay the garage bill, a Constable in collusion with the garage keeper can furtively sell a stored automobile?

Is it reasonable, if absolutely silently, so far as the owner or the person who put the machine into storage is concerned, the garage man hires a Constable and tells him to sell the ma-

chine, and the Constable in an absolutely carefree manner as to details, holds some sort of an auction sale, knocks down the machine to some bidder and gives that bidder a Bill of Sale for the machine? Under such a construction of the statute, as thus contended for by the defendant, an automobile has just as much negotiability as a $10 currency bill of United States money, and more negotiability than a $1,000 railroad bond; such reasoning would allow a thief to confer good title under this Statute. It is to be understood that the writ of replevin produces a suit which is a suit of right, and that said writ is not a writ of grace, but is a writ of right; and a large number of the decisions as to the method and time of notice and of sales by public officials, and the necessity of precise compliance with statutory provisions and prerequisites as to how a public sale would be noticed, advertised, held, and the sale actually made in strict compliance with the terms of the statute under which such sale is held, have been adjudicated by the courts of this State and throughout the several States of the Union, and by the Supreme Court of the United States, in certiorari proceedings and on injunctions, both certiorari and injunctions being writs of grace.

COUNSEL FOR THE PLAINTIFF-RESPONDENT, MRS. HARRIS, DOES NOT WISH TO MAKE THIS BRIEF PROLIX, AND THEREFORE EPITOMIZES BY THE ASSERTION THAT A READING OF THE CONSTABLE SCHULTZ'S TESTIMONY (State of Case, pp. 68-72) WILL SHOW THAT WHEN SAID CONSTABLE WAS ON THE WITNESS STAND, WHETHER FROM A LACK OF MEMORY, OR FROM WISHING TO COVER THE FACT THAT HE HAD NOT COMPLIED WITH THE LAW,

THE TESTIMONY WHICH HE GAVE CONCLUDED NOTHING, AND THERE WAS NOTHING IN THE SAID CONSTABLE'S TESTIMONY, FROM WHICH ANY JURY, COULD INFER ANY DEFINITE FACT WHATSOEVER THAT SCHULTZ COMPLIED WITH THE GARAGE KEEPERS' LIEN ACT IN POSTING HIS NOTICES (State of Case, p. 70, l. 25). Constable Schultz is the only witness who was produced by the defendant-appellant to sustain this Constable's sale, and unless Schultz's testimony attains enough vigor to either carry thought or competency, the defendant below, the appellant herein, has failed to sustain the burden of proof that the Garage Keepers' Lien Act was in any way complied with. The plaintiff-respondent herein earnestly and respectfully contends that there is no proof in the entire case that Constable Schultz posted the notices in the manner required by the Statute. The court is asked to read all of Constable Schultz's testimony (State of Case, pp. 68-72, inclusive), which as a whole demonstrates that he admitted having neither any records of his postings of notices or possessing any real memory as to this particular sale held by him.

The third section of the Garage Keepers' Lien Act, Cumulative Supplement to Compiled Statutes, Vol. I, p. 1978, in lines 7 and 8, commands that:

> "Notice of said sale being first published for the *space* of two weeks, at least once in each week, in some newspaper circulating in the city * * *."

On page 84 of the State of Case (Ex. P-7) it appears from the affidavit of the clerk in the newspaper office that the printed advertisement ap-

peared on the 23rd of March and on the 5th of April. *These two dates cover thirteen calendar days;* the statute commands *the space of two weeks.*

In the case of State, Alden Prosecutor v. Mayor, etc. of Newark, 36 N. J. Law 288, the Supreme Court set aside (in certiorari proceedings—a writ of grace) the sale of some dockland on the ground that the fact proven was that the statutory notice of twenty days was one day short, being only nineteen days. This case was affirmed by the Court of Errors in 44 N. J. Law 648.

Justice Van Syckel in delivering the opinion of the Supreme Court on pages 288, 289, 290 of 36 N. J. Law, spoke as follows:

> "The stringent rule which applies to titles devised under tax sales, is clearly stated by Justice Depue, in The State Baxter, prosecutor v. Jersey City, ante, p. 188.
>
> "The sale of lands for taxes or assessments, is the execution of naked power. Every requirement of the statute imposing the liability and prescribing the procedure to enforce it, which tends to the security of the owner, or is for his benefit, must be strictly conformed to. No intendment will be made in favor of the legality of the proceedings. To support the title, the burden of showing compliance with the law is on the purchaser.
>
> "The second reason assigned for reversal is, that the notice of unpaid taxes was not published as required by law.
>
> "The eighty-fourth section of the charter of Newark directs that the city treasurer, after completing the transcript of unpaid taxes, shall cause a notice to be published in two daily newspapers in said city, stating that said

transcript of unpaid taxes has been made, and that unless said taxes shall be paid at his office within twenty days after the first publication of said notice, he will proceed to collect the same by pubic sale, according to law.

"The cases hold that these publications are indispensable preliminaries to the legality of a tax sale, and if so, they must, necessarily, be made in strict accordance with statutory requirement. Thatcher v. Powell, 6 Wheat. 119; Ronkendorff v. Taylor's Lessees, 4 Peters 349; Sharp v. Speir, 4 Hill 76.

"The notice given in this case was, that unless the tax was paid within twenty days from the date of the notice, the land would be sold to pay the same.

"The notice was dated August 10, 1860, but was not published until August 11th, and consequently, but nineteen days were given the taxpayer, after the first publication, in which to pay the tax. If the treasurer could reduce the time to nineteen days, there is no reason why he might not have made it ten, or any less number. It was the right of Alden to have twenty days' notice, and in this respect the course of procedure prescribed by the statute has not been complied with.

"The object of the notice is to apprise the owner of a proceeding which, if not arrested by the payment of the tax, will divest him of his title. The manner in which notice shall be given is regulated by the positive law, and there can be no departure from it. The power of sale will attach only when every prerequisite has been complied with. Its basis is the regularity of all anterior proceedings.

"In my opinion, therefore, the sale cannot be supported, and judgment should be entered accordingly."

The Court of Appeals of the State of New York ruled that an agister's lien or liveryman's lien, being the creature of a statute and in derogation of the common law must be construed strictly:

Peter Barrett Mfg. Co. v. *Van Ronk,* 212 N. Y. 90;
Johanns v. *Ficke,* 224 N. Y. 513.

The Decisions of the Courts of New Jersey on the Question of Notice of Public Sales and the Law of Time.

State ex rel. Falwell v. Warford, 32 N. J. Law 207, the court ruled, "If the notice given by the party complaining is shown to be informal, unmeaning and different in terms and effect, from that recited in the certificate of the commissioner, the judgment will be set aside."

In the case of State, Schushard Pros. v. Drake, Collector of Taxes, 33 N. J. Law 194, the court ruled, "A service of a notice, under Section 21 of the Tax Law of 1866, upon the prosecutor's tenant, is not sufficient."

The language of the decision of the court, in part is as follows:

"* * * The objection here is, that the notice was not served on the prosecutor according to the statute.

"It was not served on the prosecutor personally, nor delivered to him, or left at his dwelling-house. It was not served, therefore, liter-

ally, according to the statute. The only service shown was by delivering the notice to his tenant at Newmarket, some miles distant from the prosecutor's dwelling-house.

"This was not the kind of service contemplated by the statute. There is no evidence that the prosecutor had ever appointed his tenant his agent for that purpose. But it is said that he appeared by attorney. But the attorney, when he appeared, protested against the legality of the service of the notice. The case, therefore, stands as if this tax had been increased thus without any notice to the prosecutor, and was, consequently, illegal, and must be set aside."

In the case of State, Jones, Prosecutor v. Landis Township, 50 N. J. Law 374, the court ruled:

"Where the return does not show that one of the five notices of sale was posted at or near the land to be sold, as required by the statute, parol proof to supply this omission is not admissible. If admissible, it should specify the place where the notice was posted.

"There must be a strict compliance with the direction of a statute requiring notices of sale of lands for taxes, and defects in such notices cannot be remedied under the act of March 23rd, 1881."

In the case of Eatontown Township v. Monmouth Electric Co., 75 N. J. Law 459, the Supreme Court, at page 462, spoke as follows:

"The county board of taxation is a special tribunal, and it is well settled that such tri-

bunals should show upon the face of their record all facts necessary to give jurisdiction. Nixon v. Ruple, supra; Wilkinson v. Trenton, supra; Folwell v. Warford, supra.

"The record brought up fails to show constructive notice to the township or its officers. On the contrary, the state of case shows want of such notice. It appears that the appeal was filed with the county board at a meeting held at Freehold, December 19th, 1906, that the township and its officers had no knowledge of the appeal; that 'the appeals in the vicinity of Red Bank' were referred to a single member, 'to be heard on Saturday, December 22nd', but at what hour and particular place does not appear; that the hearing before the single member was held at Red Bank on the last-named day, between the hours of three and four o'clock in the afternoon, without notice to the township or its assessor or other representative, and that the township was unrepresented at the hearing; that the conclusion of the single member was 'approved' by the board at a meeting held December 29th, 1906, but where the meeting was held does not appear.

"If we were to assume, which under the circumstances of this case we cannot do, that the assessor was, in legal contemplation, supposed to know of what transpired at the meeting of the county board held at Freehold, December 19th, 1906, yet it is plain that the reference for hearing of the appeal in question would not have amounted to notice because it was indefinite and meaningless as to time and place of hearing, and, therefore, insufficient for that purpose. Folwell v. Warford, supra.

"Under these circumstances, we conclude that the township had no notice, either actual or constructive, either of the appeal or of the hearing thereof."

In the case of Thorne v. Mosher, 20 N. J. Equity 257, the Chancellor defined the rule to be that where a certain number of days is required in a notice, that number of days is computed by excluding the first day and including the last day or by including the first day or excluding the last day.

In re Estate of Edward Evans, 29 N. J. Eq. 571: It was held that the probate of a will and the issuing of letters testamentary was premature because ten full days had not elapsed.

In the case of Brown v. Christian, 117 Atl. 294, 97 N. J. Law 56, Justice Bergen, in his opinion at page 296 of 117 Atl., said:

"There is another point which is fatal to this inquisition, and that is that the claimant retook the goods during business hours of the last day which must elapse before a default was possible. The lessee had the entire 19th day of July, 1920, to make the payment, and the claimants had no right to assume a default and retake his goods as early as 10 o'clock in the forenoon, because the defendant in attachment had the entire business day to make the payment, and it was his property when attached, and not that of the lessor, there being then no legal default.

The inquisition will be set aside, with costs."

The plaintiff-respondent, by way of analysis of the argument of this brief, and in reply to the argument of the defendant-appellant's brief, contends that:

1st: A *fair reading of* Sections 135-46-47-48 of Cumulative Supplement to Compiled Statutes, Vol. I, pp. 1977-1978, which is the Garage Keepers' Lien Act and which does require an express notice to someone, whether owner or the person who brings the automobile to the garage, telling him or her what money is due for storage charges or supplies or otherwise, and that if not paid within thirty days, the machine will be sold under the statute. That this express notice is required whether the automobile on which already there is a lien, *is in the garage or is out of the garage,* and that the intention of the State Legislature in specifying that express notice to the person having the automobile out of the garage, with the consent of the garage-keeper, that he is going to recapture the machine so he can subject it to a lien, and the amount of money due thereon for which the machine will be sold, was put into this statute to keep garage-keepers from authorizing constables to steal and pirate automobiles from their owners at anytime, day or night, according to the individual caprice of such garage owner or such constable. The fact that such express notice was included in the statute would *not preclude the statute of the necessity of being read in a reasonable light,* that before a man's automobile which is peacefully in the garage-keeper's possession and under the garage-keeper's control, can be sold, that man who owns the machine must be told how much is due for storage or supplies or repairs, and have the thirty days in which to pay the bill; how can there be a *detention* known to the owner or to his agent, unless there be some reasonable demand made for the payment of the bill? In this instance, Mrs. Harris never knew that she owed anything until after the machine had been sold by the Constable; in this case the garage owner

told Freeman, the man who put the machine in the garage, that he was not worrying over his money and that he did not want any, and Freeman did not even take the trouble to see that Mrs. Harris got her bill for a number of weeks, and when she did get the bill, she immediatey sent her check, but the machine had been sold and the garage-keeper never cashed the check and it was sent back uncashed to Mrs. Harris, the owner of the machine.

2nd: The plaintiff-respondent contends, that in the event this Honorable court holds that an express notice is required by the statute only in the event that the automobile is out of the garage-keeper's possession, that then (a) the testimony of Schultz has not sustained the burden of proof, by any evidence whatsoever that was competent to show that Schultz had posted his notices in the way the statute commands; (b) that the published advertisement required by the statute to give notice was short one day, it being published for only thirteen days instead of fourteen days; fourteen days being the space of two weeks; the word "space" being used in Section 3 of the Garage Keepers' Lien Act.

3rd: The contention made by counsel for the defendant-appellant on page 5 of their brief "that the bill sent to the representative of the owner was sufficient to establish such detention" (Appellant's Brief, 14 ll. from bottom of p. 5), is mere assertion of counsel, in the light of the testimony of Freeman (S. of C. p. 41, l. 10, p. 42, l. 25; p. 43, l. 2; p. 44, l. 24), that Kasten's bills were merely statements, and further the testimony of Freeman that he explicitly asked Kasten if he wanted any money for storage, and Kasten said, "No" (S. of C., p. 40, l. 30).

THE TESTIMONY SHOWS WITHOUT ANY CONFLICTING TESTIMONY THAT THE AUTOMOBILE WAS SOLD UNDER AN ALLEGED DETENTION, BEFORE THE STORAGE CHARGES WERE DUE OR HAD BECOME A DEBT.

FIFTH POINT.

The Pollack case as applied to the instant case now here on appeal.

(Crucible Steel Company v. Pollack Tire and Rubber Co., 92 N. J. Law 221;
Same Case, 104 Atl. 324;
Decided by the Court of Errors June term 1918 under the act of 1915 P. L. p. 556.)

1st. The Pollack case is in no way dispositive as to when a case under the garage lien act should go to the jury or is subject to a direction of verdict by the trial court as in the Pollack case counsel on both sides stipulated that the jury should be discharged and the case tried and decided by the court.

2nd. The Pollack case by its own terms did not decide the interpretation of the third section of the garage lien act as any comments made on the third section of the said act are *dicta;* the said third section of this act has not yet been decisively construed (1st paragraph, 2nd column, p. 325 of 104 Atl.).

3rd. On page 327, middle of the first column the decision reads as follows:

In Crucible Steel v. Pollack Tire & Rubber Co., 104 Atl. 324, and particularly on page 327, in referring to Section 3 of the Garage Keepers' Lien Act, the court says:

"* * * The section expressly provides that such property SHALL 'AFTER THE EXPIRATION OF THIRTY DAYS FROM THE DATE OF SUCH DETENTION,' THAT IS, FROM THE TIME THE OWNER REFUSES TO PAY THE LIEN CHARGES OR FROM THE TIME SUCH PROPERTY is seized (as the case may be), after being out of the lienor's possession, be sold at public auction, upon notice, etc. It does not require personal notice to be given to the owner, but provides for notice by publication, etc.

"There is no material difference in this respect from the provision of section 6 of the act concerning distress for rent, which has been on our statute books, almost in its original form, since 1795. Pat. Law, page 173; Nix Dig. page 240; Revision of 1877, page 309; 2 Comp. Stats. page 1940.

"Evidently the 30 days required of the lienor to hold the chattel after the detention of it has actually taken place is for the purpose of affording the owner an opportunity to pay the lien charges, or if he intends to dispute the same to resort to a writ of replevin. In the distress act 10 days is given to the tenant or owner of the goods to replevy the same. After the expiration of the 10 days, the landlord may take steps to sell the property distrained upon; but the statute is silent, as here, how soon after the expiration of the 10 days such steps shall be taken."

Mrs. Harris tried to pay as soon as she heard there was money claimed for storage charges. Freeman was told by the garage man, Kasten, that he, Kasten, wanted no money. This conversation took

place when Freeman asked this garage man about the bill which had been sent him, Freeman, through the mail with his own bill: Freeman said he would have paid Mrs. Harris' bill if Kasten had said he wanted his money (State of Case, p. 40, ll. 25-35).

SIXTH POINT.

If the court rules that the appellant is properly here through his general exception and his alleged assignment of error, the judgment below should be affirmed, because the case presented no question for the jury and it was the duty of the trial judge to instruct, which he so did, for the plaintiff.

The amended answer of the defendant (State of Case, p. 13, et seq.) admits the ownership in the plaintiff of the automobile and her consequent right to contest the suit as plaintiff in replevin; the appellant must justify his alleged title under the Constable's sale, if no money for storage was yet due or if no demand for it had previously been duly and seasonably made by the garage owner or if the sale was illegally made because of improper advertising in the newspaper and an improper posting of notices, then it is indisputable that the defense attempted by appellant Charles A. Walk, Jr., caused no question for the jury to arise.

This learned court by a perusal of the digest of the testimony, hereto appended as appendix "A" will conclude that the plaintiff's case was as follows:

(a) She owned and possessed the automobile.

(b) She told her husband to put it in dead storage for six months.

(c) The husband procured his friend, Freeman, to so do, which Freeman did at $5 per month storage. No explicit bargain being made as to the due days of the storage charges.

(d) That when Freeman asked Kasten, the garage man, if he wanted money, for storage, the garage man said "No."

(e) That it was customary for Kasten to let storage charges run, that his bills were merely statements.

(f) As soon as plaintiff got her bill which Freeman carried around in his pocket for a couple of months, she sent her check the next day.

(g) That the check was never cashed but was returned to her as she sent it.

(h) That the garage keeper, the Constable and the buyer at the sale were surreptitious about where the car was, that it was treated as a stolen car.

(i) That formal demand was made for the car's return as soon as its then possessor could be located and this demand refused by the Walk Brothers, defendants below.

(j) That the witness Freeman was substantiated by the witness Mitchell.

THE DEFENDANT'S TESTIMONY PRESENTS NO NARRATION OF EVENTS UP TO THE ENTRY OF THE CONSTABLE INTO THE SITUATION.

THE GARAGE MAN, KASTEN, WAS AROUND JERSEY CITY AND WAS IN THE COURT AT LEAST ONCE WHEN THE CASE WAS UP AND WAS NEVER CALLED AS A WITNESS NOR WAS ANY MOTION MADE BY THE DEFENDANT-APPELLANT TO SUBPOENA HIM.

What other evidence is in the defendant's case to make, if possible, a jury question? None.

(k) The testimony of Charles A. Walk, Jr., defendant-appellant, this he bought under the Garage Lien Act at a Constable's Sale, as he admitted in his amended answer.

(l) The testimony of the Constable Schultz which when read as a whole (State of Case, pp. 68-72) shows that *he testified to absolutely nothing except an ipse dixit that what he did he did right, failing absolutely to justify such assumptions and ipse dixit.*

When cross examined by plaintiff-appellee's counsel, he never produced any record book to refresh his memory with, although he was selling automobiles under the garage lien law and Conditional Sales Act continuously. This was his chief business as a Constable.

(m) The advertisement in the Jersey Journal (Exhibit P-7) and the alleged posted notice of sale (Exhibit D-1) are in evidence. The Bill of Sale of the Constable to Charles Walk, Jr., the appellant, recites neither the name of Mrs. Harris or of Freeman as having been the delinquent debtor sold out by Constable.

Surely the facts of this case therefore present no issue of fact in dispute, no justification for the defendant-appellant's alleged title, and the Constable who should be the Key Man to sustain his own auction sale under the garage lien act is found to have sworn to nothing, and is absolutely an impossible and self-confessed as an incompetent witness to sustain the prerequisite burden of proof as defendant's chief witness to sustain and justify his the Constable's auction sale to such defendant.

Under such circumstances the defendant-appellant had no right to go to the jury. In the case of

Much Manufacturing Co. v. *Donovan,* 86 N. J. Law 327-329; sc. 91 Atl. 310,

Mr. Justice Kalisch in delivering the opinion of the Court of Errors said:

> "* * * It is also urged that there was error in directing a verdict for the plaintiff. As has already been observed there was testimony that the defendant had repeatedly promised to pay the bill. *This evidence stood uncontradicted. There was no disputed question of fact to be submitted to the jury. The direction of a verdict, therefore, under the circumstances, was proper.*"

The situation being so, how can any reasonable complaint be made by the defendant below that he was "prejudiced" in the trial judge directing a verdict against him? He gained no comfort as to the issues of the case as contended for by him at the trial from the testimony adduced by the plaintiff in replevin, the respondent herein, and when as a defendant in replevin, he called his witnesses (the only witness he called who gave testimony relevant to the validity of the Constable's sale, was the Constable himself). The Constable knew nothing except that Kasten had told him to sell, and that he tried to sell.

It is respectfully submitted that the testimony of Constable Schultz raised no question for the jury.

This instant suit is here on a law appeal which is the successor to the Common Law writ of error; the peculium of the jury, when weighed by and as it functions on a writ of error, has been adjudicated by the Court of Errors, in Flanagan v. Guggenheim Smelting & Rfg. Co., 63 N. J. Law 647.

SEVENTH POINT.

The counterclaim of the defendant fails with the adjudication by the verdict in the plaintiff below and the appellee here.

Charles A. Walk, Jr., the appellant bought at an illegally held sale, noticed with short notices, without a demand previously made for the storage charges, which storage charges were not then yet due at the date of the Constable's Sale; the attempt to sell was a conversion of the automobile for which tort could have been brought, but which was replevined. Such conduct on the part of the garage man, Kasten and the Constable Schultz was a tort against the owner and possessor of the car, Mrs. Harris the plaintiff-appellee. *The possession of Charles A. Walk, Jr., defendant-appellant as a result was tortious.*

The man who gets a chattel and puts improvement on it, if he loses in replevin, cannot claim to be recompensed for the improvements. The Replevin Act reads as follows: The pertinent part of Sec. 21 of the Act reading as follows:

> "* * * And *if* upon the trial of an issue of property in the defendant, a verdict shall be given *against* the plaintiff, the jurors empanelled to try such issue, shall, at the prayer of the defendant, find the value of the property of the defendant in such goods and chattels, and his damages; and the defendant shall thereupon have judgment for the sum so found, together with his costs of suit, and shall have like execution for the same as aforesaid; provided, the defendant shall have given the plaintiff's attorney a notice in writing, fifteen days

before the trial, of his intention to require the jury to find the value of the goods and damages, in case a verdict should be found for the defendant."

The value of the machine was disputed by the parties to the suit.

Conclusion.

There being no jury question in the instant case now here on appeal, the plaintiff-appellee respectfully contends that her judgment of possession in this replevin suit be affirmed, and this appeal be dismissed with costs to be paid by appellant.

October Term, 1929.

Respectfully submitted,

I. ROSS McCOMBE,
Attorney of and Counsel to
Plaintiff-Respondent,
591 Summit Avenue,
Jersey City, N. J.

APPENDIX "A."

Digest of Testimony.

PLAINTIFF'S EVIDENCE.

Bernice J. Harris, Plaintiff.

She owned and possessed the automobile, as alleged in the Complaint, on October 25th, 1926, prior to its going into storage (State of Case, pp. 19-20, p. 74, ll. 20-40, p. 24, ll. 35-40). It had a Florida registration (Case, p. 20). Husband told to put it into dead storage for 6 months (Case, p. 20, ll. 37-40, p. 25, ll. 10-20). She sent check for $27 storage charges, the first day she got her bill (Bill was dated Feb. 1) (Case, p. 21, p. 25, ll. 20-42, p. 26). History of this $27 check to pay storage charges (Case, p. 22). Her demand for the amount of storage charges (Exhibit P-4) (Case, p. 23). The Walks sent her a bill for $701.60 (Case, p. 23, ll. 30-31). Her written demand (Case, p. 23, ll. 31-40) for the automobile (Exhibit P-5, Case 24, ll. 1-10). She replevied and bonded the car and got it back (Case 24, ll. 10-20).

CHARLES C. HARRIS.

Husband of plaintiff (Case 26, ll. 39-40). Wife owned and possessed car (Case, p. 27, ll. 1-20). He at her request told Freeman to put car in dead storage for six months at $5 per month (Case, p. 27, ll. 5-22). No arrangements as to due day of storage charges mentioned to him (Case, p. 27, ll. 24-41, p. 28, ll. 1-11).

Witness Freeman authorized to put car in dead

storage at Kasten's garage (Case, 27, l. 20, p. 31, ll. 20-40, p. 32, ll. 1-27).

Never went to garage or talked to it until he heard the car had been sold by Constable (Case, p. 28).

Did not get any bill or request for storage charges until car was sold (Case 29, pp. 10-40, p. 33, p. 34, p. 35, p. 36, ll. 1-10).

Demand on the Walks for the car (Case 30, ll. 20-41). Demand refused (Case 31, ll. 1-3).

Witness Freeman, a friend who kept his own car in the Kasten Garage (Case 31, ll. 20-40).

CHRISTOPHER C. FREEMAN.

His acquaintance with plaintiff's husband (Case 36, ll. 10-25). His acquaintance with Kasten the Garage Keeper (Case 36, ll. 25-40). Kasten was at Freeman's house night before the 1st day the case came up Kasten was in court that date (Case 37, l. 10, Case 36, ll. 38-40). Freeman first met plaintiff after car was sold (Case 37, ll. 25-30). Plaintiff's husband authorized him, Freeman, to put car into dead storage for 6 months with Kasten Bros. (Case 37, ll. 28-40). Arrangements with Kasten (Case 39, ll. 1-32). Arrangements with Kasten, cross-examination (Case 41, ll. 20-40).

There was no bargain with Kasten about due days of storage charges (Case 38). No demand by Kasten for payment of storage charges (Case, pp. 39, 40, 41, ll. 1-20, p. 42, ll. 1-25).

Kasten said he was not worrying about the money (Cross-exam., Case 43, ll. 1-18). Kasten's bills for storage were statements of account, not demands for payments (Case 44, ll. 12-35).

CHARLES E. MITCHELL.

Mitchell in court under a subpoena (Case 46, l. 18). Car was to go into dead storage for 6 months, was present and heard Freeman and one of Kasten brothers make the bargain (Case 42, l. 30, p. 45, l. 30).

DEFENDANT'S EVIDENCE.

Defendant Charles A. Walk, Jr., buys this car at Constable Schultz's sale, Apr. 6, 1927, at Kasten's Garage (Bill of Sale, Exhibit D-1, p. 85; Case 49, ll. 20-40). Defendant had notice he was buying under a statutory lien and right of sale (Case 61, pp. 30-33; p. 54, ll. 14-28). Defendant thought he was buying a stolen car (Case 55, ll. 20-25).

Oscar H. Fox (automobile Painter), Case 58.

Edward F. Walk, brother of defendant-appellant (Case 60), got a non-suit (Case 75, l. 10).

Louis A. Schultz, Constable who sold car under Garage Keepers' Lien Act (Case 68). As the title and right of possession is dependent on this Constable's testimony same is here referred to as entirety (Case, pp. 68 to 72).

Plaintiff had 7 Exhibits:

Exhibits

p-1 Automobile certificate of title from State of Florida (Case, 79).

p-2 Registration card for car from State of Florida (Case, 80).

p-3 Uncashed check of plaintiff for $27 (Case, 81).

p-4 Demand on Walk Bros. for charges (Case, 82).

p-5 Demand on Walk Bros. for machine (Case, 83).

p-6 Car's license plate.

p-7 Proof of advertisement and copy of it in Jersey Journal (Case, 84).

Defendant's Exhibits:

d-1 Constable Schultz' Notice and Bill of Sale (Case, 85).

d-2 Painter's bill (Case, 87).

APPENDIX "B".

GARAGE KEEPERS' PROTECTION.

(Cumulative Supp., Vol. I, pp. 1977-1978.)

An Act for the better protection of garage keepers and automobile repairmen (L. 1915, C. 312, p. 556).

1. All persons or corporations engaged in the business of keeping a garage or place for the storage, maintenance, keeping or repair of motor vehicles and in connection therewith stores, maintains, keeps or repairs any motor vehicle or furnishes gasoline, accessories or other supplies therefor at the request or with the consent of the owner or his representative, whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise, has a lien upon such motor vehicle or any part thereof for the sum due for such storing, maintaining, keeping or repairing of such motor vehicle or for furnishing gasoline, accessories or other supplies therefor, and may without process of law detain such motor vehicle at any time it is lawfully in his possession until such sum is paid.

2. Any person or corporation acquiring a lien under the provision of section one of this act shall not lose such lien by reason of allowing the motor vehicle, or part or parts of the motor vehicle, to be removed from the control of the person or corporation having such a lien, and in case a motor vehicle or part or parts, are so removed the person or corporation having the said lien may, without further process of law, but after demand of pay-

ment of claim either personally or by registered mail if owner's address is known, seize the motor vehicle or part or parts thereof, wherever the same is or are found within the State of New Jersey. The owner or the person entitled to the immediate possession of motor vehicle, or part or parts thereof, so detained as in this act provided, on learning that said motor vehicle or parts are being so detained may immediately demand from the garage owner or keeper, or the person in charge thereof, a statement showing the true amount claimed to be due for the storing, maintaining, keeping or repairing of such motor vehicle, or for furnishing gasoline, accessories or other supplies therefor, and if upon receiving such statement he considers the amount thereof excessive he may offer what he considers to be reasonably due and demand possession of said motor vehicle or parts thereof so detained. Should possession of said vehicle or parts thereof be refused him he may obtain possession thereof by depositing the amount claimed by said statement with the clerk of any court of competent jurisdiction in the county where the motor vehicle or parts may be situated, together with the sum of ten dollars to cover the costs of court in actions commenced in District or Small Cause Courts, and fifty dollars in all other courts. Whereupon a writ of replevin shall immediately issue out of and under the seal of said court commanding the sheriff, or any Constable or sergeant-at-arms, to take the possession of said motor vehicle or parts thereof and deliver the same, without delay, to the owner or his legal representative claiming the same. In lieu of depositing the amount claimed in cash, a bond in double the amount claimed, and double the amount required to be deposited as costs as hereinbefore provided, with at least one sufficient surety, and ap-

proved in the manner similar bonds are now approved in the court from which the writ of replevin is to issue, may be filed with the clerk of said court. The garage owner or keeper shall, within thirty days thereafter, file his state of demand or complaint with the said clerk, showing the amount claimed by him. The court shall thereupon, at the request of either party, fix a date for the trial of said claim and give judgment according to the facts. The judgment, if any, is to be satisfied out of deposit made, or action may be brought on bond filed. If no action is brought within thirty days, or judgment should go for defendant, the court may order the return of the money or the discharge of the bond. If a judgment is obtained and satisfied, the balance of the cash deposit, if any, shall be ordered returned to depositor. The filing of bond or depositing of cash as aforesaid by the owner or his lawful representative shall be considered as the entry of a written appearance on his part in the action which the garage owner or keeper may bring within thirty days and not later (L. 1915, c. 312, p. 557, as amended L. 1922, c. 231, p. 401).

3. If no proceedings are taken for the repossession of the motor vehicle or the parts thereof by the owner or his legal representative as provided for in section two hereof, then all such property so held by any such garage keeper or automobile repairman shall, after the expiration of thirty days from the date of such detention, be sold at public auction, upon notice of said sale being first published for the space of two weeks, at least once in each week, in some newspaper circulating in the city, borough, town, township or other municipality, in which said garage keeper or automobile repair shop is situated, also after five days' notice of

said sale set up in five of the most public places in said city or township, and the proceeds of said sale shall be applied to the payment of such lien and the expenses of such sale; and the balance, if any remaining, shall be paid to the owner of such property or his representatives; and if the said balance is not claimed by said owner within sixty days after said sale, then the balance to be paid over to the overseer of the poor of said city or township for the support of the poor. (L. 1915, C. 312, p. 557, as amended L. 1922, C. 231, p. 402, L. 1924, C. 201, p. 425.)