

INDEX.

	PAGE
Notice of Appeal.....	1
Complaint	2
Amended Complaint.....	4
Answer	5
Reply	6
Case	7
Motion for Non-Suit.....	34
Rule for Judgment of Non-Suit.....	35
Judgment	36
Grounds of Appeal.....	37

TESTIMONY.

Plaintiff's Witnesses:

Theodore L. Weed—

Direct	7
Cross	14
Redirect	23
Recross	25

George Wallheilke—

Direct	31
Cross	31

EXHIBITS.

	OFFERED	PRINTED
	PAGE	PAGE
P-1. (for identification)	11	38
P-2. (for identification)	11	39
P-3. (for identification)	11	40
P-4. (for identification)	11	41
P-5. (for identification)	11	42
P-6. (for identification)	11	43

INDEX

PAGE	
1	Notice of Appeal
2	Complaint
4	Amended Complaint
5	Answer
6	Reply
7	Case
21	Motion for New Trial
22	Rule for Judgment of New Trial
23	Judgment
27	Grounds of Appeal

TESTIMONY

Plaintiff's Witnesses:

	Theodore A. Wood
7	Direct
11	Cross
22	Re-direct
23	Re-cross
	George Wallbridge
24	Direct
25	Cross

EXHIBITS

OFFERED IN EVIDENCE

PAGE	
38	P-1 (for identification)
39	P-2 (for identification)
40	P-3 (for identification)
41	P-4 (for identification)
42	P-5 (for identification)
43	P-6 (for identification)

Notice of Appeal.

HUDSON COUNTY CIRCUIT COURT.

COMMONWEALTH FINANCE CORPO-
RATION, a corporation,
Plaintiff,

vs.

HENRY J. SCHUTT,
Defendant.

Notice of
Appeal

10

TO WILLIAM BURKE,
Attorney for Defendant,

SIR:

TAKE NOTICE that the plaintiff appeals to the
Court of Errors and Appeals from the whole of
the judgment entered in this case.

20

Arthur M. Lusley & W. C. Wheeland.
Attorneys of Appellant.

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Complaint.

HUDSON COUNTY CIRCUIT COURT.

10	COMMONWEALTH FINANCE CORPORATION, a corporation, Plaintiff, vs. HENRY J. SCHUTT, Defendant. }	Action- at-Law. Complaint
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The plaintiff, a corporation of the State of South Dakota, says:

1. On August 2, 1919 the plaintiff was and ever since has been, the owner of the following goods and chattels:

Two U. S. Motor Trucks numbered 3555 and 3556, both being Model J 1919;

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

3. On that day in the Town of West Hoboken, in the County of Hudson and State of New Jersey, defendant wrongfully took said goods and chattels from the possession of the plaintiff and has ever since wrongfully detained and still wrongfully detains the same;

4. Plaintiff demands possession of said goods and chattels and \$2500 damages for their detention.

HARTSHORNE, INSLEY & VREELAND,
Attorneys of Plaintiff.

Complaint.

TO HENRY J. SCHRUPP,
SIR:

TAKE NOTICE that the undersigned hereby demands that you forthwith deliver to it the following goods and chattels:

Two U. S. Motor Trucks numbered 3555 10
and 3556, both being Model J 1919;

Dated October 4th, 1919.

COMMONWEALTH FINANCE CORPORATION,
By Hartshorne, Insley & Vreeland,
Attorneys.

20

30

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Amended Complaint.

HUDSON COUNTY CIRCUIT COURT.

10	COMMONWEALTH FINANCE CORPORATION, a corporation, Plaintiff,	} Action-at-Law. Amended Complaint
	vs.	
	HENRY J. SCHUTT, Defendant.	

The plaintiff, a corporation of the State of South Dakota, says:

20 I. On June 18, 1919 the plaintiff was and ever since has been, the owner of the following goods and chattels:

Two U. S. Motor Trucks numbered 3555 and 3556, both being Model J 1919;

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

30 3. On that day in the Town of West Hoboken, in the County of Hudson and State of New Jersey, defendant wrongfully took said goods and chattels from the possession of the plaintiff and has ever since wrongfully detained and still wrongfully detains the same;

4. Plaintiff demands possession of said goods and chattels and \$2500 damages for their detention.

40

HARTSHORNE, INSLEY & VREELAND,
Attorneys of Plaintiff.

Answer.**HUDSON COUNTY CIRCUIT COURT.**

COMMONWEALTH FINANCE CORPORATION, a corporation,
Plaintiff,

vs.

HENRY J. SCHUTT,
Defendant.

Action-
at-Law.
Answer

10

Defendant, Henry J. Schutt, residing at the Town of West Hoboken, in the County of Hudson and State of New Jersey, says that:

First Defense.

20

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

Second Defense.

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

30

WM. F. BURKE,
Attorney of Defendant.

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Reply.

HUDSON COUNTY CIRCUIT COURT.

10	COMMONWEALTH FINANCE CORPORATION, Plaintiff, vs. HENRY J. SCHUTT, Defendant.	}	Action- at-Law. Reply
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The plaintiff, replying to the "Second Defense" set forth in the answer of the defendant, says:

It denies the allegations contained in the Second Defense and alleges that at all times mentioned therein and since then this plaintiff is the holder of the legal title to the goods and chattels described in the complaint.

HARTSHORNE, INSLEY & VREELAND,
Attorneys of Plaintiff.

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Case.

Theodore L. Weed. Called by Plaintiff. Direct.

HUDSON COUNTY CIRCUIT COURT.

COMMONWEALTH FINANCE CORPO-
RATION,

vs.

HENRY J. SCHUTT.

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INSLEY, VREELAND & DECHER, ESQS. (Mr.
Hamilton Cross), for the plaintiff.

WILLIAM F. BURKE, ESQ., for the defendant.

The above entitled case was tried February 23,
1921, before Hon. Luther A. Campbell, Judge, and
a jury. 20

Mr. Cross opened the plaintiff's case to the jury.

Mr. Burke opened the defendant's case to the
jury.

THEODORE L. WEED, sworn:

DIRECT EXAMINATION BY MR. CROSS:

30

Q. Mr. Weed, where do you live? A. Brooklyn,
New York.

Q. You are connected with the Commonwealth
Finance Corporation? A. Yes, sir; I am.

Q. In what capacity? A. Vice-President.

Q. I show you a check dated June 18th, on the
National Park Bank to the order of the National

40

Theodore L. Weed. Called by Plaintiff. Direct.

Bank of Commerce, and a voucher carrying the same number—01782-3, as that check, and ask you if you can identify those papers? A. Yes, sir.

Q. Will you just state for what that check was given to the National Bank of Commerce? A. It was given for the purchase of two U. S. Motor trucks.

10

Mr. Cross: I ask that they be marked for identification.

(Papers marked P-1 and 2 for identification.)

Q. Now I show you two invoices, U. S. Motor Truck Company, order numbers 4394 and 4395 and ask you what are those invoices? A. They are the invoices covering the purchase of the two U. S. Motor trucks for which this particular check was drawn.

20

Q. What are the numbers of those motor trucks? A. Chassis numbers are 3556 and 3555.

Mr. Cross: I ask to have those marked for identification.

(Papers marked P-3 and 4 for identification.)

30

Q. Now I show you two storage receipts dated June 18, 1919, one for U. S. truck Model J, year 1919, chassis number 3556, and the other for U. S. truck model J, year 1919, chassis number 3555, and ask you if you can identify them? A. I do identify them.

Q. Will you state under what conditions you got—

40

Theodore L. Weed. Called by Plaintiff. Direct.

Mr. Cross: Just pardon me a minute. I will ask to have those marked for identification.

(Marked P-5 and 6 for identification.)

Q. Will you state under what conditions you received those storage receipts? What were the circumstances? A. Well, we receive storage receipts in our ordinary course of business. The Commonwealth Finance Corporation has two lines of business. One retail and one wholesale. This is what is known as wholesale or stock plan, where we buy trucks from the manufacturer, and under a bailment operation place them on the floor of some dealer who has been accepted by our credit department, and the dealer gives us a storage receipt for the truck, and we in return give him an option to buy at the end of a definite period, in some circumstances thirty days, in some instances a hundred and twenty days.

Q. Now, who gave you these storage receipts? A. Jonathan Dixon, representing Cole & Dixon.

Q. Cole & Dixon. At the time that he gave you the storage receipts what was done with the check to the National Bank of Commerce? A. The check was certified.

Q. To whom was the check given? A. The check was given to the U. S. Motor Truck Company. It was first certified as all our checks covering wholesale transactions are.

Q. Just look at the check. It is drawn to the National Bank of Commerce. With that in front of you can you tell where this whole transaction took place? A. Well, the transaction took place in my own office, before me, if that is what you want.

Theodore L. Weed. Called by Plaintiff. Direct.

Q. Yes, Mr. Dixon came to you and this whole transaction took place in your office? A. It did.

Q. And you gave Mr. Dixon a check drawn to the National Bank of Commerce and in return he gave you the storage receipts; is that the fact? A. That is a fact.

10 Q. And the voucher for the check—will you please refer to that? Does the voucher recall to your recollection why the check was made to the National Bank of Commerce? A. Yes. These deals all follow one line. The factory sends its sight draft with the bill of lading and invoice attached.

20 Q. To the bank? A. To the bank. That is usually done in accordance with our instructions. These deals are usually anticipated in so far as carrying out the details are concerned; and the bank notifies the corporation that the sight draft has arrived. The dealer usually receives a similar notice and calls at our office to make out the papers and sign the storage receipt. We in turn then draw a check and have it certified. In some instances it may be delivered to the dealer, in some it may be sent direct to the factory shipping the truck. It is a matter of indifference to the corporation which method is followed.

30 Q. What method was followed in this case? A. It is difficult for me to recall exactly. I made conflicting statements, but to the best of my recollection since these transactions were between me and Dixon personally, the check was given to Dixon. Usually he called at my office and took the check away himself after it was certified.

40 Q. You paid the check to the bank and picked up the bills of lading? A. Precisely, the idea being, if I may interrupt a moment, the idea being to

Theodore L. Weed. Called by Plaintiff. Direct.

avoid demurrage. The dealers usually figure that if they can take the check themselves and go to the bank or to the railroad siding with that check they could release the trucks immediately and thus save a day or two's demurrage, which frequently happened if it were handled in a more roundabout fashion.

10

Q. The voucher says something about an option. Did you give Cole and Dixon an option on these trucks? A. We did.

Q. Was that option ever exercised? A. It was not.

Mr. Cross: I offer in evidence the invoices, check, voucher, and the two warehouse receipts.

Mr. Burke: They are all objected to because they do not prove title in the plaintiff.

20

The Court: Mr. Cross, I see that the invoices are in the name of Cole & Dixon, not in the name of the Finance Corporation.

Mr. Cross: Not in the name of the Finance Corporation. Mr. Weed has testified that the sight draft and bill of lading was sent to the National Bank of Commerce.

The Court: Yes.

30

Mr. Cross: They gave to Mr. Dixon a check to take up that sight draft.

The Court: Yes.

Mr. Cross: At the same time Mr. Dixon gave them a storage receipt for those trucks. Mr. Weed says at the time the storage receipt was given there was an option given to Cole & Dixon to purchase the truck and that the option has never been taken up by Cole & Dixon.

40

Theodore L. Weed. Called by Plaintiff. Direct.

The Court: Do you think that that indicates a sale from Cole & Dixon to the Commonwealth Company?

Mr. Cross: I do not.

The Court: What do you claim it is?

10 Mr. Cross: I say that Cole and Dixon had an executory contract with the U. S. Motor Truck Company which was to be consummated by the taking up of the bill of lading and paying the sight draft. There was no executed contract until that was done, clearly, under the law of business where sight draft and bill of lading are sent to the bank; that is a condition before the contract is executed. Before that happening took place they went to the Commonwealth; they had a right under
20 an executory contract to these trucks; they went to the Commonwealth; they didn't have the money; the Commonwealth put up the money for these trucks, completed the contract, and before the contract was completed a storage receipt from Cole & Dixon reciting that title was——

30 The Court: What I am getting at is, does that make for a sale and placing the title—absolute title in the Finance Corporation, or does it amount to anything more or less than a mere loan or advancement?

Mr. Cross: I do not think it amounts to either.

The Court: What do you say it amounts to?

40 Mr. Cross: I say it is not a sale by Cole & Dixon to the Commonwealth for the reason that Cole & Dixon did not have title to them and they could not sell something they did not own; they had a right to title; it was an

Theodore L. Weed. Called by Plaintiff. Direct.

executory contract with the U. S. Motor Truck Company; it was not their own, because it was a valid purchase by the Commonwealth Finance Corporation——

The Court: How do you reach that? When did the Commonwealth Finance Corporation purchase these?

Mr. Cross: The U. S. Motor Truck Company
by an assignment of interest to Cole & Dixon
had no title in it. 10

The Court: What is an assignment?

Mr. Cross: An assignment is a chain of circumstances. The bill of lading was sent to the National Bank of Commerce. Cole & Dixon had no title.

The Court: Let me ask you a question.
The bill of lading was in whose name, Mr.
Weed? 20

The Witness: I assume it was in Cole & Dixon, Your Honor. I may say that—

The Court: The sight draft was directed to whom?

The Witness: I can only assume the same way. I have not the facts before me.

The Court: That is, the invoice being in the name of Cole & Dixon is it fair to assume as a business proposition that the sight draft was directed to Cole & Dixon? 30

The Witness: Yes.

The Court: And that the bills of lading, or the bill of lading, whichever it may have been, were also to go in the name of Cole & Dixon?

The Witness: Yes. May I have a moment to say that same factories do follow that course and some the opposite course of bill- 40

Theodore L. Weed. Called by Plaintiff. Cross.

ing to the Commonwealth. It is a matter of almost a factory decision.

The Court: These are all marked for identification, are they not?

Mr. Cross: Yes.

10 The Court: Let them stand that way and let your offer to have them marked as evidence stand upon the record. I will let you have your cross examination first, Mr. Burke.

CROSS EXAMINATION BY MR. BURKE:

Q. Mr. Weed, what are your duties in connection with the Finance Company? A. Both Vice-president and general sales manager, and largely managerial as well as selling.

20 Q. What are your duties? What do you do? A. I am both executive in the supervision of the corporation and I am sales manager in the selling of its service.

Q. What did you do? What part of the work do you do? A. I do not follow you exactly. It is supervisory work.

30 Q. What do you do? What do you do? Can't you answer that question? A. Well, I want to answer it as fully as I can and that is why I said it was supervisory. It varies so. It might be described as a little of everything. There are some dealers whose accounts are large, as Cole & Dixons was, whom I see and do business with personally. I might even carry out or arrange the carrying out of almost all of the details of the transaction. In the Cole & Dixon case that happened to be a fact. I did. If it would interest you I might outline the Cole & Dixon trans-
40 action from the beginning.

Theodore L. Weed. Called by Plaintiff. Cross.

Q. No. Just tell me what your duties are in connection with the business firm. You have not charge of any one matter entirely yourself, have you? A. I might. It is so varied it is very difficult to answer.

Q. You didn't have charge of this Cole & Dixon matter? A. Yes, sir; I did. I did.

10

Q. You had charge of this yourself? A. I did.

Q. So you know everything in connection with it, do you? A. Practically.

Q. You know every detail in connection with it? A. Practically.

Q. There is no question about that, is there? A. I think there is no question about it.

Q. Now, as vice-president you supervise the work of all of the departments, do you? A. I do.

20

Q. Do you do the active supervision or does some one else attend to that? A. I supervise it myself.

Q. You do that yourself? A. I supervise it myself, the work of the departments, of course, each department has a head. You understand that, don't you? I don't mean to imply that I am the active head of each department. We have a collection manager, credit manager, they all operate under my supervision.

30

Q. But what you do is consult with the different heads of the different departments; that is your principal duty, isn't it? A. That is it.

Q. And your company is very large, is it not? A. It is.

Q. You have a great many departments? A. We do.

Q. Now, Cole & Dixon paid some part of the purchase price of the truck from the U. S. Motor

40

Theodore L. Weed. Called by Plaintiff. Cross.

Company, did they not? A. We don't consider it so.

Q. I will ask you whether they did or not. A. We don't consider it so. No, they did not.

Q. Didn't they pay \$1,056.10? A. They paid us that amount of money.

10 Q. Yes. A. Yes.

Q. Then you charged Cole & Dixon \$43 and something for the loan, didn't you? A. We have a carrying charge.

Q. Well, just look at that and tell me whether you did or not. A. We do not consider it a loan.

The Court: It is not a question of what you consider it. You are asked—

20 Q. (Repeated by the stenographer) Then you charged Cole & Dixon \$43 and something for the loan, didn't you? A. Why, we charged them \$43 —\$42.24—

Q. Yes. A. —for the deal.

Q. For the deal. You don't call it a loan? A. We do not.

30 Q. Now, I notice on that slip you have "accommodation"; accommodation is a loan, isn't it? A. The word might be so used but we do not construe it or use it in that sense. This is merely a printed voucher drawn up by a set of auditors.

Q. Suppose Cole & Dixon had paid to you the next day \$4,787.62 what would have happened? A. We would have cancelled the storage receipt.

Q. Yes. Now, then, the transaction was this, wasn't it: you can tell the jury from that car how much was paid by Cole & Dixon for the truck, can't you? A. Surely.

Theodore L. Weed. Called by Plaintiff. Cross.

Q. How much was it? A. The optional price of the truck was \$5,843.72.

Q. Now, of that amount how much did Cole & Dixon pay in? A. They paid us as security on this deal \$1,056.10.

Q. They paid you that amount of money? A. As security, they did.

Q. Then you deducted for the accommodation \$42 and something, did you not? A. We deducted \$42.24 for our charges. 10

Q. And of this amount that you loaned to Cole & Dixon or accommodated them with, or dealt with, whatever you may choose to call it— A. Surely.

Q. —if that amount had been returned to you by Cole & Dixon then the storage receipts would have been cancelled and you would have been paid the \$42 and something for your charges for the accommodation; is that right? A. Right. 20

Q. And you had a great many transactions with Cole & Dixon, didn't you? A. Yes.

Q. Now, in this transaction within what time was this accommodation to be returned to you? A. I haven't the record before me.

Q. Will you look at the record, please, and tell the jury? A. Yes. May I see that, please? 30

Mr. Cross: Have you any other records?

The Witness: No, I haven't any.

(Exhibit P 1-6 for identification handed to witness.)

A. This does not show, but I think it was thirty days. I will say thirty days.

Q. By that you mean that if Cole & Dixon had returned to you the amount of your loan 40

Theodore L. Weed. Called by Plaintiff. Cross.

within thirty days you would have made no further charge; is that right? A. The deal would have been cancelled.

Q. And the storage receipt would have been cancelled; is that right? A. Yes.

Q. And you even arranged with them the terms for renewals, didn't you? A. I cannot say.

10 Q. Well, just look at that and see if that refreshes your recollection? A. It would not necessarily refresh my recollection. If the matters are renewed they are renewed.

Q. Tell the jury what that means by renewing the matter? A. In the wholesale transaction the Commonwealth has a charge which I told you before covers a period of possibly thirty day transaction or it might cover one hundred and
20 twenty day transaction. That charge in addition to the interest on the deal, includes coverage for both fire and freight insurance which runs in favor of Commonwealth, to protect it in case of fire or some disaster wherever a car may be stored. When we accept the storage receipt we give the dealer the option to purchase within thirty days if he desires. Many dealers do so desire. Others run to one hundred and twenty
30 days. It is generally understood between the dealer and the corporation that if he does not sell the truck within thirty days he may have the privilege of renewing that option for an additional period. Usually at the end of one hundred and twenty days we require him to pay the option entirely, because within that time there is a certain depreciation to the truck, and it is for that purpose, to cover such depreciation, the dealer frequently asserting the privilege of using
40 that truck as a demonstrator, without our per-

Theodore L. Weed. Called by Plaintiff. Cross.

mission,—but it very frequently does happen that he runs it out and often times at the end of one hundred and twenty days the truck may be depreciated, become second hand.

Q. I mean the longer the time the greater the charge you would have made; that is right, isn't it? A. For each thirty days an additional charge; yes. 10

Q. The longer the accommodation the greater the charge? A. The greater the charge.

The Court: I do not think I followed the witness, and maybe that is the reason I do not have it in mind—you spoke of this item of \$42 something.

The Witness: \$42.24.

The Court: And what is that made up of, Mr. Weed? 20

The Witness: It includes three items, the carrying charge—

The Court: What do you mean by that?

The Witness: Well, the profit which the corporation must naturally make.

The Court: Well, what is your profit? How do you figure your profit? In other words, what I am getting at is, are you figuring on the basis of interest; that is, such and such a percentage? You may not call it interest. You say it is a carrying charge. How do you figure it, at what rate? The interest is figured on the basis of six per cent. when this transaction went through? 30

The Witness: From the date it went through until the end of the option.

The Court: Until the end of the option. So that one item is six per cent. of the amount 40

Theodore L. Weed. Called by Plaintiff. Cross.

of money that your check represents; is that right?

The Witness: Precisely.

The Court: Or is it the amount of money? Upon what do you figure the six per cent.?

The Witness: On the advance by Commonwealth.

10

The Court: \$47—

The Witness: \$4787.62.

The Court: That is right. That is one item. What is the other item?

The Witness: The cost of fire and theft insurance.

The Court: That is two items now. You say there were three items. Do you consider the theft and fire insurance different items?

20

The Witness: They would be so considered; but I think for this purpose they might be used collectively.

The Court: There was still a third item going into that sum?

The Witness: There is a third item, yes.

The Court: What is it?

The Witness: An indefinite item which might be a profit of the corporation for the expense to which it is put in drawing up of the papers.

30

Q. Mr. Weed, you have a definite charge, haven't you? A. We have a definite charge, surely.

Q. Well, how much is the charge in that case? Wasn't it three quarters of one per cent. for thirty days? A. It might figure out that way. Admit for the moment that it does figure out that way.

40

Theodore L. Weed. Called by Plaintiff. Cross.

Q. Won't you please tell us whether it does or not? A. Admit that it does. I will say yes.

Q. You will say yes. All right. So that you received three quarters of one per cent. for what you call the accommodation, is that right? A. Yes.

Q. Now, you told the jury that if Cole & Dixon didn't sell the cars within thirty days then an arrangement would be made for renewal; is that right? A. Yes, sir. 10

Q. So that if they did sell the cars within thirty days, or ten days, or five days, then you were to be paid your money for it, weren't you? A. Yes.

Q. Now, you have seen this paper before, have you not? A. Yes, sir.

Q. And that is a proof of claim which the Commonwealth Finance Corporation made in the United States District Court in the matter of Cole & Dixon, incorporated, bankrupt? A. Yes, sir. 20

Q. And it is sworn to and signed by Mr. McHarg; is that right? A. Yes.

Q. Mr. Ormsby McHarg? A. Yes, sir.

Q. Mr. Ormsby McHarg was then and is now the treasurer of the Commonwealth Finance Corporation? A. He was then; he is not now. 30

Q. This is his signature on this proof of claim? A. It is.

Q. And it is sworn to by him before a notary public in your office, is it? A. In his office.

Q. And the Commonwealth Finance Company filed this proof of claim with the United States District Court through their attorney? A. Yes.

Q. Now, Mr. Weed, these trucks were manufactured by the United States Motor Corporation of Cincinnati, Ohio, were they not? A. Yes. 40

Theodore L. Weed. Called by Plaintiff. Cross.

Q. And they were delivered to Newark, were they not? Isn't that right? A. I think so, yes. I may be wrong. I haven't any definite information on that. I think they were.

Q. But you know the details, don't you? Cole & Dixon obtained them from the station master at Newark? A. Yes.

10 Q. And took them to their place of business to sell in Jersey City; is that right? A. Yes, yes.

Mr. Burke: May I have this marked for identification.

(Paper marked D-1 for Identification.)

20 Q. The storage receipts were delivered when, do you know? A. June 18th.

Q. Both of them. June 18th, 1919. A. 1919.

Q. And you speak of trucks stored at 235 West 54th Street, New York City. These particular trucks never were in ^{New York} ~~Jersey~~ City, were they? A. No.

30 Q. And where were the trucks on June 18th, 1919, do you know? A. I have no definite knowledge, no. That is why I hesitated in answering you before. I cannot follow up the arrival of trucks. That would be out of the question. I can only assume that a truck invoiced to Cole & Dixon would be landed in Newark; that is all. If you are willing to take my answer as assuming it landed at Newark and was delivered to them, why, then I am willing to say that such was the case. But Cole & Dixon had five establishments—
40 in Albany, Brooklyn, Newark, Jersey City and New York City, and it is difficult for me to say where a truck will be delivered.

Theodore L. Weed. Called by Plaintiff. Redirect.

Q. Now, I will show you the records which you offer. Doesn't that indicate to you where they were delivered. A. It does. It says shipped to Newark, New Jersey.

Q. And from Newark, New Jersey, you know they were taken from Newark, New Jersey, by Cole & Dixon to Jersey City, don't you? You know that, don't you? A. I have no definite knowledge, no, where they were taken.

10

Mr. Burke: That is call.

REDIRECT EXAMINATION BY MR. CROSS:

Q. So far as you are concerned, your personal knowledge, you don't know whether they were even in Newark, do you? A. I do not.

20

Q. You do not know whether they were even in Jersey City? A. I have no personal knowledge whether they ever were.

Q. But on June 18th at the time these machines were signed by Mr. Dixon they signed for the storage of the trucks where? A. 235 West 54th Street, New York.

Q. And when you gave Mr. Dixon a check to the National Bank of Commerce it was on that understanding, wasn't it?

30

Mr. Burke: Well, that calls for a conclusion and I object to it for that reason, if your Honor please.

The Court: Well, the understanding is pretty far fetched, Mr. Cross, of course. You may mean by that did he have a definite agreement.

Mr. Cross: I will withdraw it.

40

Theodore L. Weed. Called by Plaintiff. Redirect.

Q. Under your agreement with Mr. Dixon when you gave him the check where were those trucks to be stored?

10 Mr. Burke: I object to that. It is leading and calls for a conclusion. I think the witness ought to be asked what was the arrangement.

Mr. Cross: I will withdraw that.

Q. When you gave the check on the National Bank of Commerce to Mr. Dixon, was there any agreement as to where the trucks were to be stored? A. At the time this transaction occurred Cole & Dixon stood in our good graces. We had no occasion to doubt them. If Mr. Dixon produced a storage receipt and stated that the trucks would be stored in New York or in Jersey City or in Newark we would take it at its face value. In this instance since he directed himself that these receipts be written as of New York there would be no question in my mind whatsoever that they were in New York. I would not question the transaction. I would have no occasion to question it.

20

Q. I see. A. May I just state further that this is only one of possibly ten to twenty such transactions a day, and where a dealer has been accepted by our credit department we do not think it necessary to send around and use a man in going to any number of outlying centers to ascertain if the trucks are at that particular center.

30

Q. You stated in reply to Mr. Burke that if this option were taken up the next day on the payment to you of this \$42 item you would give up the storage receipt. What would become of the \$4000 item?

40

Theodore L. Weed Called by Plaintiff. Recross.

The Court: I think Mr. Burke's question was different from that, Mr. Cross. I think it was if the item, something over \$4000 were paid.

Mr. Burke: \$4287.

The Court: If it were paid the next day what would be the result of that transaction?

10

Mr. Cross: That is what I meant to say.

The Witness: I understood generally for him to mean this: that if the sum of \$4287.62 were paid up the next day would the transaction be cancelled?

The Court: That is right.

The Witness: And I stated it would. Of course, I did not go into details. Usually in the cancelling of such a transaction as this we require the check to be certified; but I passed that up.

20

RECROSS EXAMINATION BY MR. BURKE:

Q. But if you received a certified check or cash for that amount of money, for the sale, why, then, of course, the transaction would be cancelled?
A. The transaction is cancelled.

Q. And these transactions you speak about with Cole & Dixon, they were all similar, were they not? A. They were.

30

Q. And a great many of them have been repaid to you, moneys returned to you? A. Yes.

Q. Leaving you what you call the profit for the company? A. Well, an adjustment is made. For instance, if Cole & Dixon cancelled this transaction it might be cancelled in several ways. Usually it was cancelled by the submission of papers covering the retailing.

40

Theodore L. Weed Called by Plaintiff. Recross.

Q. Yes, but after they sell? A. But an adjustment is made of the charge. For instance, if they owed us, as in this case, \$42.24 for a thirty days period, why, there would be an adjustment made if the deal were cancelled in fifteen days; fifty per cent. of that would be refunded to him.

10 Q. You might make a rebate, you mean? A. Yes, we might make a rebate.

Q. Do you make a rebate to him of the interest? A. We would. We always do.

Q. And after the trucks would be sold by Cole & Dixon and you would be paid, then that was the end of the transaction as far as you were concerned, unless they asked for a rebate of interest; is that right? A. The interest would be returned to them. They need not ask for the re-
20 bate of the interest.

Q. It would be rebated in their account? A. It would be rebated.

Q. Is that right? A. That is right.

Q. And you would credit them with some of the unearned interest? A. Precisely.

Mr. Burke: That is all.

30 The Court: Mr. Weed, you used the term "dealers". I understood you to apply it to Cole & Dixon. You looked upon them as dealers?

The Witness: Yes, your Honor.

The Court: In the automobile trade?

The Witness: Yes, sir.

40 The Court: And the transaction, on what you have so far detailed to us, that is, being your end of the transaction,—did it go as far as that these dealers with whom you had transaction of this character would exhibit

Theodore L. Weed Called by Plaintiff. Recross.

and offer for sale these trucks, or a truck the subject of a transaction of this character?

The Witness: No, your Honor. It didn't work out that way. The dealer would make a connection with Commonwealth and would submit his financial statement, and he approved of our credit department, and then he would telephone, write or call in person, and ascertain if we would buy a number of trucks for him from some particular factory. 10

The Court: Well, that is the part of the transaction you have so far detailed. Carry this one to a conclusion. That was done, you say, and these papers indicate, you say, what was done; and the two particular trucks in question were eventually in the possession of Cole & Dixon; were they not? 20

The Witness: Yes, sir.

The Court: Cole & Dixon, you say, were dealers, and they exhibited those trucks upon their warehouse floors, I suppose?

The Witness: Yes, sir.

The Court: You knew of that, and you knew that was the practice?

The Witness: Yes, your Honor. 30

The Court: I think you have spoken of their using them at times—I do not mean to say Cole & Dixon, but dealers generally, using them for purposes of demonstration?

The Witness: We have found it to be so. Not by our permission; in fact—

The Court: You knew that was a practice pursued by some dealers?

The Witness: Why, we knew it, yes. 40

Theodore L. Weed Called by Plaintiff. Recross.

The Court: And, of course, that demonstration was for the purpose of properly exhibiting the truck with a view to selling it, I presume; was it not?

The Witness: Yes, sir.

10 The Court: And dealers did sell their trucks—did sell trucks that were owned and held under this same class of arrangement you have just spoken about; is that true?

The Witness: Yes, sir.

The Court: That is what they have the trucks for, for the purpose of sale?

The Witness: Yes.

The Court: And you knew that was why they held them—for sale?

The Witness: Yes.

20 The Court: That is all I have.

BY MR. CROSS:

Q. With regard to this act of the dealers using the car for demonstration purposes, was that with your permission or without? A. Without our permission.

30 Q. Without your permission. And when— A. As a matter of fact, if I may answer your question further, when we found that a dealer was demonstrating our trucks we demanded immediately that he pay for the trucks, as it was expressly agreed in our contract with dealers that the truck could not be used for demonstration.

BY MR. BURKE:

40 Q. You expected them to sell them, didn't you?
A. Surely.

Theodore L. Weed Called by Plaintiff. Recross.

Q. Yes. And you didn't expect them to sell the trucks without demonstrating them, did you? A. We did. They are so sold.

Q. You had no agreement with Cole & Dixon at all with reference to demonstration? A. We did. We have with all dealers.

Q. When did you have that agreement? / 10
When we first entered into business relations with them.

Q. Yes. I see. And not at the time of this transaction? A. No. Manifestly the truck would become a second-hand truck if it were demonstrated.

Q. It was your idea if it were shown to anybody it became a second-hand truck? A. Not if they showed it to anyone, but if they demonstrated it. By demonstration I mean running it 20
around the streets.

Q. Well, you financed them to assist and sell cars; is that right? A. Precisely.

Q. And you expected them to sell cars without giving any demonstration to the buyer, even though they were four thousand or five thousand dollar cars? A. Precisely. A demonstration only means the turning of the motor. It does not mean the running into the street. 30

BY MR. CROSS:

Q. Was there any agreement between you and the dealer when the transaction would take place as to what part of the premises named in the storage receipt the cars were to be stored?

Mr. Burke: That is objected to because the agreement is here and in writing and speaks 40
for itself.

Theodore L. Weed Called by Plaintiff. Recross.

Mr. Cross: The agreement is not in evidence.

The Court: No, but you are trying to get it in evidence. It is in evidence as far as you have been able so far to get it. It is a written instrument, I presume. What was the question, Mr. Victory?

10

Q. (Repeated by the stenographer) Was there any agreement between you and the dealer when the transaction would take place as to what part of the premises named in the storage receipt the cars were to be stored?

20

The Court: I do not just see the value of that, Mr. Cross, as to whether it should be in the show room or whether it should be in the storage room; is that what you mean?

Mr. Cross: Yes, as to whether there was anything said at the time as to where it should be kept. The warehouse receipt calls for storage in certain premises. I want to know whether there was anything between the parties at the time as to what part of the premises they were to be kept in. It may be yes; it may be no.

30

The Court: Well, I will let it be answered, although it seems to me the contract speaks for itself. I will overrule the objection. Let the answer be given.

Do you understand the question?

The Witness: I understand the question. Merely a general agreement on the floor.

Q. What do you mean by on the floor? A. I don't know; I never thought of the question.

40

George Wallheilke. Called by Plaintiff. Direct.

George Wallheilke. Called by Plaintiff. Cross.

Frankly, I would assume on the show room floor, since the truck is placed there for sale.

Mr. Cross: That is all.

Mr. Burke: That is all.

(Witness excused.)

Mr. Cross: Do you want me to complete
my proof before renewing my motion? 10

The Court: Oh, yes, I do.

GEORGE WALLHEILKE, SWORN.

DIRECT EXAMINATION BY MR. CROSS:

Q. Mr. Wallheilke, on the 6th day of October
were you a deputy sheriff? A. I was. 20

Q. And did you on that day demand of the de-
fendant, Henry J. Schutt, two U. S. Motor Trucks,
Nos. 3555 and 3556? A. I did.

Q. Did he deliver the trucks in response to your
demand? A. I think he did; I am not sure; that
is quite some time ago.

Q. Did you first serve the writ of replevin? A.
Yes, sir. 30

Q. And the trucks were obtained on the writ?
A. I think they were rebonded.

CROSS EXAMINATION BY MR. BURKE:

Q. It would seem that what you did was to
serve this demand and the writ at the same time?
A. Right.

The Court: In whose possession do the trucks stand now?

Mr. Cross: They are rebonded, if your Honor please.

(Witness excused.)

Mr. Cross: Now, if your Honor please, I will read into the record interrogatories and answers to interrogatories.

*corrected by
defendant
by plaintiff*

10

The Court: All right.

Mr. Cross: First interrogatory. From whom did the defendant purchase the two motor trucks described in the complaint in this case?

Answer to first interrogatory. Cole & Dixon.

20

Second interrogatory. On what date was such purchase made?

Answer to second interrogatory. Sale agreement made April 15, 1919.

Third interrogatory. What consideration or price was paid by the defendant for said two motor trucks described in the complaint in this action? Was the said paid in cash or property?

30

Answer to third interrogatory. \$8337; by check \$4000, and property \$4337.

Fourth interrogatory. If the payment referred to in the preceding interrogatory was in cash to whom was such cash handed and on what date and where, and who was present at the time?

40

Answer to fourth interrogatory. Check to order of Cole & Dixon Company, incorporated,

handed to Robert D. Elliot, sales manager, 535 Communipaw Avenue, Jersey City, New Jersey, June 26th, 1919.

Deposited without Plaintiff
Fifth interrogatory. Was any written bill of sale or other document conveying the title to said two motor trucks described in the complaint in this action delivered to the defendant, and if so furnish a copy of it.

10

Answer to fifth interrogatory. Yes. Copy hereto attached. *Following Exhibit P6.*

Sixth interrogatory. When was actual possession of the said two motor trucks described in the complaint in this action delivered to the defendant and where?

Answer to sixth interrogatory. June 26th, 1919, at 241 Clinton Avenue, West Hoboken, New Jersey.

20

Now, I renew my motion to admit papers marked P-1, 2, 3, 4, 5 and 6 for identification.

The Court: For what purpose?

Mr. Cross: For the purpose of showing title on the 18th day of June in the Commonwealth Finance Corporation.

Mr. Burke: I object to it.

30

The Court: What is your objection?

Mr. Burke: Because they do not show title in the Commonwealth Finance Corporation at all, we submit; and it is their duty to show title.

The Court (after discussion): Well, I am inclined, Mr. Cross, not to allow the offer for the purpose for which you are suggesting it.

Mr. Cross: Your Honor will allow me to note my objection?

40

Motion for Non-Suit.

The Court: You may have it.

(Plaintiff rests.)

Mr. Burke: I move for a nonsuit, then, if your Honor please.

10 The Court: I presume for that you must be entitled to it. If I do not allow the offer here it takes the entire case away from the plaintiff.

I think it is a matter of so much importance, gentlemen, and a matter of such great doubt as to the character of the transaction, that it is but proper that I should have taken the stand that I have.

A nonsuit may be entered. You may have your exception to that also.

20 Mr. Cross: Exception.

30

40

Rule for Judgment of Non-Suit.

HUDSON COUNTY CIRCUIT COURT.

COMMONWEALTH FINANCE CORPO-
RATION, a corporation,
Plaintiff,

vs.

HENRY J. SCHUTT,
Defendant.

Action-
at-Law.

10

This cause being regularly on the calendar at the present December Term, 1920, and being called, and the respective parties appearing, and a jury being empanelled, and the evidence of the plaintiff having been submitted, and counsel for defendant moving for a non-suit, and the Court having considered the matter and being of the opinion that a non-suit should be granted;

20

It is this twenty-third day of February, 1921, ORDERED, that judgment of non-suit be entered in favor of the defendant Henry J. Schutt and against the plaintiff, Commonwealth Finance Corporation, with costs to be taxed.

30

On motion of

WILLIAM F. BURKE,
Attorney for Defendant.

Rule actually entered February 23rd, 1921.

40

Judgment.

This action was tried before Judge Luther A. Campbell, with a jury at the Hudson Circuit, on February 2nd, 1921.

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

10 They say they find for the Defendant and against the Plaintiff.

Whereupon it is adjudged that the Defendant recover of the Plaintiff its cost which are taxed at Seventy-one Dollars and forty-two cents (\$71.42).

Judgment entered February 2nd, 1921.

LUTHER A. CAMPBELL,
Judge.

20

This judgment should be changed to read non-suit by the Court. Error was made by the clerk in entering it.

30

40

Grounds of Appeal.

NEW JERSEY
COURT OF ERRORS AND APPEALS.

COMMONWEALTH FINANCE CORPO-
RATION, a corporation,
Plaintiff,

vs.

HENRY J. SCHUTT,
Defendant.

10

The above named plaintiff appellant, Common-
wealth Finance Corporation, a corporation, as-
signs the following Grounds of Appeal from the
judgment of the Hudson County Circuit Court in
the above cause: 20

1. Because the Court refused to admit in evi-
dence Exhibits marked P. 1, 2, 3, 4, 5 and 6 for
Identification.
2. Because the Court granted the defendant's
motion for a non-suit.
3. Because a judgment of non-suit was entered 30
against appellant.

Dated March 22nd, 1921.

HARTSHORNE, INSLEY & VREELAND,
Attorneys for Plaintiff-Appellant.

40

Exhibit P-1 for Identification.

COMMONWEALTH FINANCE CORPORATION
FK 100 Broadway

Check Number
1409

Voucher Number
C-1782-3

New York, June 18th, 1919.

10

Pay to the

Order of National Bank of Commerce \$5,801.48

PAY \$5801 and 48 CTS.

This check for purpose shown on
stub detached for your file

20

COMMONWEALTH FINANCE CORPORATION

Henry D. Tudor

President

N. A. Merritt

Assistant Treasurer

To the
National Park Bank
New York City

Endorsement:

30

Received Payment
Through the New York Clearing House
JUN 19 1919
3rd TELLER

Endorsement Guaranteed
Nat Bank of Commerce in New York

40

Exhibit P-2 for Identifisation.

COMMONWEALTH FINANCE CORPORATION
FK

VOUCHER

Check Number	Deal Number	
1409	0-1782-3	
	New York, June 18th, 1919	10
To National Bank of Commerce	\$5,801.48	
DISTRIBUTION		
PAY \$5801 AND 48 CTS.		

DEBITS

ACCOUNT	AMOUNT	
Notes Receivable—Trucks		
“ “ Passenger		
“ “ Miscellaneous		
Options Receivable		20
Accommodation	4787.62	
	1056.10	
Total Debits	5843.72	

CREDITS

Account	AMOUNT	
Payable to Dealer	5801.48	
Earnings—Options	42.24	
“ Retail Trucks		30
“ “ Passenger		
Accounts Payable		
Revenue Stamps		
Filing Fees		
Suspense		
Total Credits	5843.72	

N. Y.

To pay S/D at the above bank drawn by the
U. S. Motor Truck Co. Cincinnati, Ohio on Cole
& Dixon, Inc—N. Y. City for—\$5,801.48

National Park Bank, N. Y. City

Vouchered by Entered in V. R. Entered in C. B

J

J

A. M.

Entered Salesmen's Ledger Entered Ins. Reg.

Indexed By

10

Verified and Approved for Payment

J. Howard

Exhibit P-3 for Identification.

INVOICE

U S

ORIGINAL

Motor Trucks

Attach to bill of lading

20

THE UNITED STATES MOTOR TRUCK COMPANY

Incorporated

Cincinnati, Ohio Dated 5/26/19

Shipped to Same Newark, N. J. 235 W. 54th N

Order No. 4394

Mpody #522

Sold to Cole & Dixon

Customer No. 45

Shipped to Same Newark, N. J.

235 W. 54th St., New York

30

Date shipped May 24, 1919

MODEL J CHASSIS 3556

3½ Ton Worm Drive

\$3950.00

Less 32½% discount

1283.75 \$2666.25

EXTRA EQUIPMENT

Extra long wheel base

200.00

Less discount 25%

50.00

150.00

40

Plus War Tax

\$2816.25

84.49

\$2900.74

INVOICE

U S	ORIGINAL
Motor Trucks	Attached to bill of lading

THE UNITED STATES MOTOR TRUCK COMPANY
Incorporated
Cincinnati, Ohio

10

Order No. 4395 Moody #523 Date 5/25/19
Sold to Cole & Dixon. Customer No.46
Shipped to Same Newark N. J.

235 W. 54th St, New York

Dated shipped May 24, 1919

MODEL J CHASSIS 3555

3½ Ton Truck	\$3950.00
--------------	-----------

Less 32½% Discount	1283.75
--------------------	---------

20

\$2666.25

EXTRA EQUIPMENT

Extra Long Wheel Base	200.00
-----------------------	--------

Discount 25%	50.00	150.00
--------------	-------	--------

\$2816.25

Plus War Tax	84.49
--------------	-------

30

\$2900.74

Exhibit P-5 for Identification.

ORIGINAL

STORAGE RECEIPT

Date June 18th, 1919

10 The undersigned, Cole & Dixon, Inc., has received from COMMONWEALTH FINANCE CORPORATION, one new automobile described as follows:

				Chassis No.
Make	Model	Year	Motor No.	or Mfrs. No.
U.S.	J	1919		3555

20 which is stored at the expense of the undersigned for said Commonwealth Finance Corporation at 235 West 54th Street, New York, N. Y.; and the undersigned acknowledges that said automobile is the property of Commonwealth Finance Corporation, and agrees that the undersigned will deliver same only to Commonwealth Finance Corporation or its order, and only upon surrender of this receipt, duly endorsed by Commonwealth Finance Corporation.

30 Partnerships sign firm name by partner signing. Corporations sign corporate name by officer signing who must be authorized to sign checks.

Signed Cole & Dixon Inc.

By Jonathan Dixon Pres.

Endorsement:

The within Storage Receipt, with our rights thereunder is hereby assigned to..... without recourse to us in any manner.

Dated, 191

40 COMMONWEALTH FINANCE CORPORATION,

By.....

Exhibit P-6 for Identification.

ORIGINAL

STORAGE RECEIPT

Date June 18th, 1919

The undersigned, Cole & Dixon, Inc., has received from COMMONWEALTH FINANCE CORPORATION, one new automobile described as follows: 10

				Chassis No.
Make	Model	Year	Motor No.	or Mfrs. No.
U.S.	J	1919		3556

which is stored at the expense of the undersigned for said Commonwealth Finance Corporation at 235 West 54th Street, New York, N. Y.; and the undersigned acknowledges that said automobile is the property of Commonwealth Finance Corporation, and agrees that the undersigned will deliver same only to Commonwealth Finance Corporation or its order, and only upon surrender of this receipt, duly endorsed by Commonwealth Finance Corporation. 20

Partnerships sign firm name by partner signing. Corporations sign corporate name by officer signing who must be authorized to sign checks. 30

Signed Cole & Dixon Inc.

By Jonathan Dixon Pres.

Endorsement:

The within Storage Receipt, with our rights thereunder is hereby assigned to..... without recourse to us in any manner.

Dated, 191

COMMONWEALTH FINANCE CORPORATION, 40

By.....

Exhibit No. 10 - Information

Date June 1919

The undersigned, J. B. [Name], of the County of [County], State of [State], do hereby certify that the [Name] is a [Title] of the [Organization] and that he is [Status] of the [Organization].

Witness my hand and seal of office this [Date] day of [Month], 1919.

[Signature]

[Name]

[Title]

[Organization]

Subscribed and sworn to before me this [Date] day of [Month], 1919.

[Signature]

[Name]

[Title]

[Organization]

Notary Public for the State of [State]

[Signature]

[Name]

[Title]

[Organization]

COLE & DIXON, INC.

Distributors.

SMITH FORM—A—TRUCK

535 Communipaw Ave. Jersey City, N. J.

June 26th, 1919.

SOLD TO H. J. Schutt
245 Clinton Ave.,
West Hoboken, N. J.

INVOICE NO.

OUR ORDER NO.

YOUR ORDER NO.

TERMS

SHIPPED TO

VIA

Requisition No.	Quantity	Description	Amount
	2	Model J. U. S. 3½ ton 186" W. B. Trucks	7900.00
		War Tax	237.00
		Freight	200.00
		Allowance on 3½ ton Packard and 2 ton Denby and panel moving body with running gear	4337.00
		Cash on delivery	4000.00
Chassis #	Motor #		
3556	7500 E. 4		
3555	7942 E. 4		

Received 6/26/19
Check for +000.00
note for 2000.00
Cole & Dixon, Inc.
Robt. E. Elliott,
Sales Manager.

JOHN E. DIXON, INC.

MANHATTAN

SMITH STREET - 2 - FLOOR

122 1/2 West 42nd Street, New York, N. Y.

June 19th, 1918

My dear Mr. E. J. Connelley:

I have your letter of June 14th.

I am sorry that I cannot

reply to you more quickly.

I am, very truly,

Yours very truly,

John E. Dixon, Inc.

By _____

Secretary

Enclosed for you are

three copies of the

report of the

committee on

the proposed

amendment to the

constitution of the

Association of

Manufacturers of

the City of New

York, Inc.

I am, very truly,

Yours very truly,

John E. Dixon, Inc.

Enclosed for you are
three copies of the
report of the
committee on
the proposed
amendment to the
constitution of the
Association of
Manufacturers of
the City of New
York, Inc.
I am, very truly,
Yours very truly,
John E. Dixon, Inc.
By _____
Secretary

STATEMENT OF FACTS.

COMMONWEALTH FINANCE COR-
PORATION, a corporation,

Plaintiff-Appellant,

vs.

HENRY J. SCHUTT,

Defendant-Respondent.

*Brief for
Plaintiff-
Appellant.*

This cause is before the court on an appeal from a judgment of non-suit entered as a result of the ruling of the Hudson County Circuit Court, excluding evidence offered by appellant consisting of six (6) Exhibits marked P. 1, 2, 3, 4, 5, and 6 for identification. Appellant contends that the Court below erred in refusing the evidence offered and that had it been accepted, there would have been no non-suit.

Appellant is the owner of two United States Motor Trucks, Nos. 3555-3556, Model J. 1919. The two trucks were physically in the possession of Cole & Dixon, Inc., a corporation engaged in the sale of United States Motor Trucks, under bailment from the plaintiff. They subsequently passed into the possession of the defendant as a purchaser from Cole & Dixon, Inc. This suit was brought in replevin with bond and the defendant re-bonded.

The trucks were shipped to Cole & Dixon, Inc., by the United States Motor Truck Company (Exs. P. 3 and P. 4 for identification pages 40-41). Bills of lading were sent to the National Bank of Commerce in New York City with sight draft attached, page 10 line 14. Cole & Dixon, Inc., obtained from the Commonwealth Finance Corporation, plaintiff-appellant, a check, drawn to the

order of the National Bank of Commerce, for Five thousand eight hundred one dollars and forty-eight (\$5801.48) cents to pay the draft and take up the bills of lading. (See Exs. P. 1 and P. 2 for identification pages 38-39).

When appellant delivered to Cole & Dixon, Inc., its check to the order of the National Bank of Commerce for the amount of the sight draft, Cole & Dixon, Inc., executed and delivered to appellant two storage receipts, acknowledging the delivery to it by plaintiff-appellant of the United States Motor Trucks, Nos. 3555-3556, and acknowledging in such receipts that such trucks were the property of the appellant, and that they would be delivered only to the appellant or its order, and only upon surrender of such receipts. (P. 5 & P. 6 for identification pages 42-43).

The bills of lading were obtained from the National Bank of Commerce on the payment of the check of appellant, and the trucks were taken by Cole & Dixon, Inc., to its storeroom. At the time the check and storage receipts were delivered by plaintiff-appellant and Cole & Dixon, Inc., the appellant gave Cole & Dixon, Inc., an option to purchase the two trucks, which option was never exercised. (*Testimony* P. 11 1, 14).

The respondent subsequently purchased the two trucks in question from Cole & Dixon, Inc., (Answer to interrogatory Nos. 1 to 6, pp. 32-33).

Appellant's case consisted of the testimony of Theodore L. Weed, Vice-President (Book pp. 7-25), and after Mr. Weed had identified the six exhibits and testified to the manner of appellant receiving them from Cole & Dixon, Inc., they were offered in evidence as proof of the title of appellant to the two trucks.

The trial judge refused to admit the six exhibits (marked P. 1-6 for identification) in evidence. Book P. 33 L 36.

THE LAW.

It is the contention of the appellant that up to such time as Cole & Dixon, Inc., paid the sight draft of the United States Motor Truck Company at the National Bank of Commerce in New York, and obtained the bills of lading, that they only had an executory contract with the United States Motor Truck Company for two trucks, which contract was not completed until the money was paid. It was clearly a condition precedent in the contract between Cole & Dixon, Inc., and the United States Motor Truck Company that the trucks were to be paid for before delivery. Any sale that Cole & Dixon, Inc., might make before such time would be merely an assignment of their interest in such contract. That interest was sold to the appellant in the transaction wherein the appellant delivered its check drawn to the order of the National Bank of Commerce to Cole & Dixon, Inc., and received two storage receipts, acknowledging the ownership of the trucks by appellant.

If this action had been an action in replevin between the appellant, as bailor, and Cole & Dixon, Inc., as bailee, it cannot be disputed that Exhibits P. 5 and P. 6 for identification would be good proof of title in the appellant as against Cole & Dixon, Inc. It is elementary that the proof of title of the bailor against the bailee is the storage receipt delivered by the bailee to the bailor at the time the property is bailed.

There are no reported cases in this State as to

what proof is necessary in the suit of the bailor against a third party claiming title from the bailee, but there are several cases in foreign states which hold that where the bailor sues a third party to recover property obtained from the bailee, such proof that would permit a recovery against the bailee would be sufficient against the third party.

Pugh v. Calloway, 10 *Ohio State* 488.

This was a case in which a constable levied on goods in the hands of the judgment debtor, leaving the goods in the judgment debtor's possession. The Sheriff of the County at a later date levied on the same goods and took them into his possession. The constable replevined. The Court through *Gholson Judge*, at page 497, says:

"The position of the owner by becoming bailee of the officer throws light upon another question.
* * * * The plaintiff showed by his execution, levy and the undertaking a clear title as against the former owner of the property. * *

* * It would be dangerous to hold that a third person, taking the property from the mere temporary bailee of the owner, could require any further proof than would suffice against such bailee."

The Court cited the decision of *Duncan vs. Spear*, 11 *Wend* 54, which was a case involving the following facts:

Plaintiff owned several horses. He left them in the custody of one Ramson and later found them in the possession of the defendant. In that case *Sutherland, Judge*, at page 58, says as follows:

"The plaintiff showed at least a claim of property; the horses were in his possession and the

possession of his bailee, who stated them to be the property of the plaintiff only a few days before they were found in the possession of the defendant. This is sufficient to put the defendant upon showing by what right or title he holds them.

* * * * The non-suit must be set aside."

Hatowski v. Cassriel, 153 III. App. 239.

Buch v. Sutton, 2 Taunt 302.

If the proof contained in Exhibits P. 5 and P. 6 for identification would be sufficient to establish a prima facie case against the bailee, (Cole & Dixon, Inc.), it would be sufficient to establish as good a case against a third party, claiming title through the bailee. It is impossible to conceive of better evidence of title than the receipts delivered to appellant by the bailee at the time the goods were deposited by it with the bailee. If other evidence was submitted, it would be subject to the objection, which we think would be valid, that the best evidence in such a case would be the storage receipts and would be properly excluded by the trial judge.

In the case of *New York Railroad Company vs. New Jersey Railroad Company*, 60 N. J. Law, 338, affirmed in this court, in an opinion by Judge Lippencott, at page 342, it is stated as follows:

"If the bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion, and the bailor may immediately bring an action of replevin against the third party in whose possession the property is found."

The fact that the appellant gave to Cole & Dixon, Inc., an option to purchase the trucks in no way stops the appellant from asserting its ownership for it has been held that the mere giving of an option to a bailee does not in anywise author-

ize him to dispose of the property, or if he does dispose of it, to give good title.

Ryler v. Knowles Iron Works, C. C. A. 87 Fed. 976.

Cavil v. Hill, 4 Denio 327.

Harkness v. Russell, 118 U. S. 663.

The Court in the last case said: "Bailee with option to purchase cannot convey or give title unless he has previously fulfilled conditions."

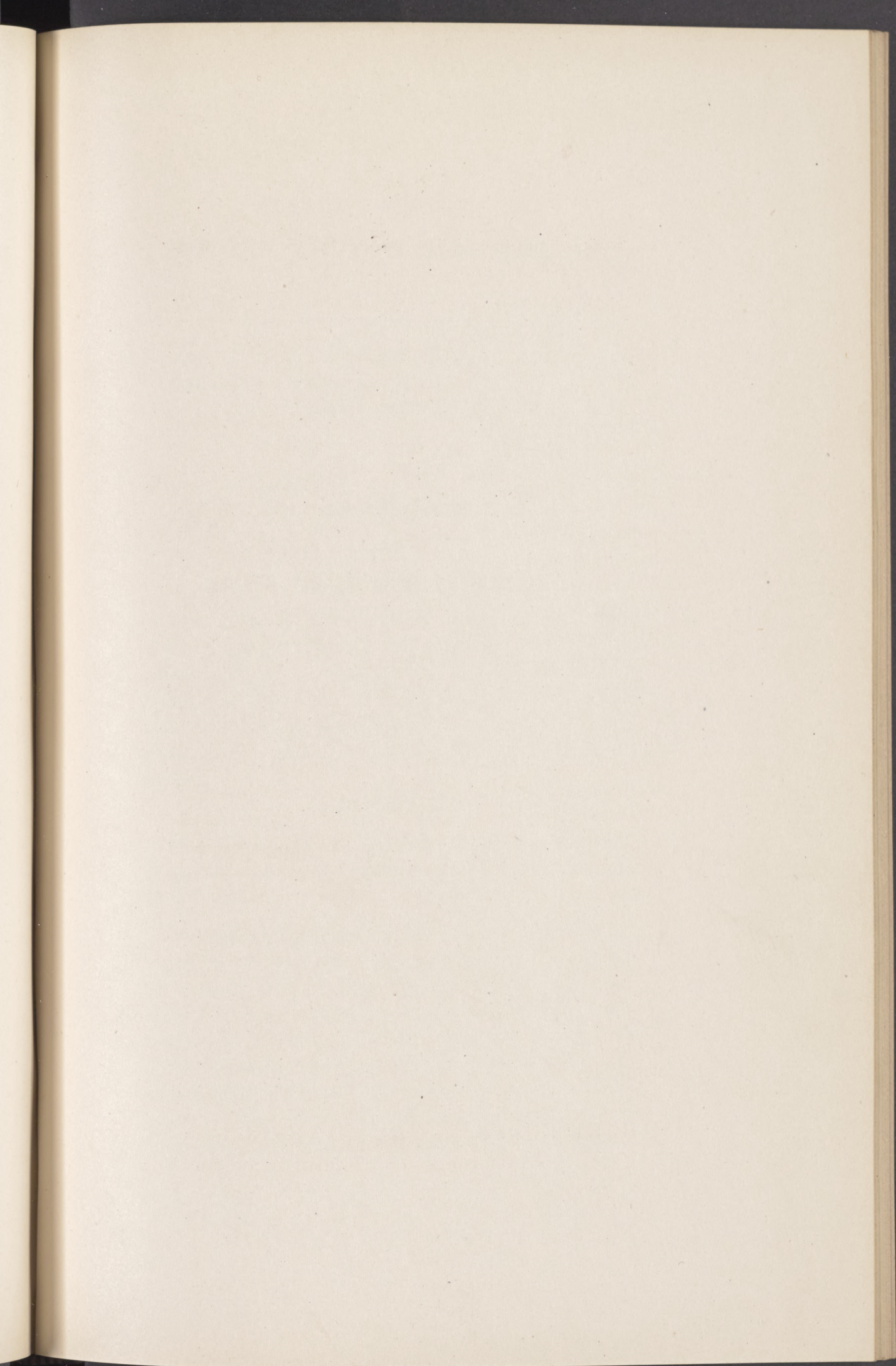
The only question before the court upon appellant's case was whether the Exhibits offered by the appellant, supported by the testimony of Mr. Weed, its Vice-President, were such as to show a title to it in the two motor trucks, which title would be good against Cole & Dixon, Inc., or against respondent, who claimed title through it.

It is respectfully submitted that if the trial judge had received the six Exhibits (P. 1 to P. 6 for identification) in evidence, such exhibits in conjunction with the testimony of Mr. Weed would have established the appellant as bailor of the two motor trucks with Cole & Dixon, Inc., and would have invested it with title and right to possession of the trucks as against Cole & Dixon, and necessarily against any assignee or purchaser of Cole & Dixon, Inc.

It is submitted therefore that the trial judge erred in excluding the six exhibits (P. 1 to P. 6 for identification) from the case and if same had been received in evidence the motion for non-suit should have been denied, and the respondent would have been put upon his proof.

Respectfully submitted,

HARTSHORNE, INSLEY and VREELAND,
and of counsel with
 Attorneys for Plaintiff-Appellant.



NEW JERSEY
Court of Errors and Appeals.

COMMONWEALTH FINANCE COR-
PORATION, a corporation,

Plaintiff-Appellant,

vs.

HENRY J. SCHUTT,

Defendant-Appellant.

*Reply Brief
for Plaintiff-
Appellant.*

REPLY BRIEF FOR APPELLANT.

The defendant-respondent in his brief, after setting out the facts, contends that the six exhibits offered in evidence were not evidence of title; and that even with the testimony taken did not show title in the plaintiff-appellant. He suggests three points which we will treat in their order:

POINT I.

Under this title the defendant-respondent states that title to the two trucks was never in the plaintiff-appellant.

The main argument on this point is that the invoices were from the U. S. Motor Truck Company to Cole & Dixon; that the draft was drawn on Cole & Dixon; that Cole & Dixon paid the draft and took the bill of lading from the bank; that Cole & Dixon went to Newark and obtained the automobile trucks and brought them to their sales-room. These facts are all admitted and from a perusal of the complete testimony it will appear

why such facts are true and why they could not be otherwise. It must be borne in mind that Cole & Dixon contracted with the U. S. Motor Truck Company for these two trucks. The only party the U. S. Motor Truck Company did business with was Cole & Dixon. When the bills of lading were sent to the National Bank of Commerce, however, Cole & Dixon were not in a position to take them up by payment of the draft and it was at that point that they went to the plaintiff-appellant and upon explaining this situation plaintiff-appellant (being in the business of financing automobile sales, etc.) took from Cole & Dixon a check for \$1,056.10 and in return gave their check to the order of the National Bank of Commerce for \$5,801.48. Cole & Dixon took this check to the bank and obtained the bills of lading.

It was as a part of this same transaction that Cole & Dixon then gave to plaintiff-appellant the storage receipts for the cars, in which receipts they acknowledged that title was in plaintiff-appellant. Plaintiff-appellant gave to Cole & Dixon an option for the purchase of these trucks, for which Cole & Dixon paid the plaintiff-appellant \$1,056.10.

Defendant-respondent contends that this transaction was such that the storage receipts were in the nature of a chattel mortgage. If this were so it would necessarily follow that the plaintiff-appellant would have a right of action against Cole & Dixon for the balance of the purchase price of the trucks and an examination of the various exhibits and of the testimony as to what happened at the time the transaction took place will show that no such right existed in the plaintiff-appellant. If this was a chattel mortgage plaintiff-

appellant would have the right to take back the trucks from Cole & Dixon, sell them, and sue Cole & Dixon for such deficiency as might arise. An examination of the exhibits and of the testimony will again show that this was impossible.

The defendant-respondent seems to have overlooked entirely the law regarding the giving of an option by a bailor to a bailee and the Court is respectfully directed to the cases cited in the brief of plaintiff-appellant on this point and which clearly state that a bailee has no right to sell objects bailed with him upon which he has an option until the terms of the option are complied with.

It is further submitted that on this point the question as to whether the exhibits offered were not what they were stated to be on their face but were in the nature of a chattel mortgage is premature and should properly have been reserved for the defense.

The question raised on this point as to the defendant-respondent being a subsequent purchaser in good faith is also premature and is not at issue on this appeal.

The defendant-respondent cites the cases of Smith vs. Lunger, 64 N. J. L., 539 and Owens vs. Owens, 23 N. J. E., 60, as the law for the point that the construction to be put on these papers was for the Court. The case of Smith vs. Lunger, Supra, is upon the construction of a contract and it is respectfully submitted that there is no analogy in the facts in that case to the facts in this case. The case of Owens vs. Owens, Supra, does not appear to be at point with the facts in this case in any way. The construction of a contract as in the Smith case is entirely different from

the construction of the papers offered in evidence in this cause and it is submitted that the Court, not having before it any other evidence than that submitted by the plaintiff-appellant, was bound to construe the papers in question on their face and until something different was shown as a part of a possible defense.

POINT II.

This point refers to the conduct of the plaintiff-appellant as precluding it from questioning defendant-respondent's right to possession of the trucks. This is unquestionably premature on this appeal and we will not consider it at length at this time.

In 24 R. C. L. at page 375, under the General Title of Sales it is stated as follows:

The mere possession of chattels by whatever means acquired, if there is no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title. As has been well said, owners of goods for commercial and other purposes must intrust others with the possession of them, and the affairs of men could not be conducted unless they could do so with safety. So long as the possession of the goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or to affect it, than a mere thief. So a carrier to whom chattels are delivered can transfer no title, as against

the owner, to one though he purchases in good faith and for value; nor can a warehouseman, with whom property is stored. At common law it is immaterial, in so far as the right of the owner is concerned, that the person intrusted with the possession of the property has the privilege or option of purchasing the same on certain conditions precedent. *So a bona fide purchaser of diamonds from one who obtained them from the owner, under the fraudulent representation that he had a customer for them, and would return them or their price in a short time, with the intention of appropriating them to his own use, acquires no title as against the bailor (Italics ours).*

See also

Ruckman vs. Decker, 8 C. E. Greene, 288;
Midland Railroad Co. vs. Hitchcock, 37 Eq.,
559.

A reading of the testimony of Mr. Weed, the Vice-President of plaintiff-appellant, will show that it was the business of plaintiff-appellant to take over contracts for the purchase of automobiles from dealers and then give options to the dealers to re-purchase the contracts from plaintiff-appellant. This is a custom of the automobile trade and there is no proof in the case that the defendant-respondent received anything from Cole & Dixon other than the bill of sale made by Cole & Dixon. He did not receive any paper indicating title in Cole & Dixon. There is no testimony that he received a bill of sale of the United States Motor Truck Company to Cole & Dixon

and it is not disputed that plaintiff-appellant had the original invoices from the United States Motor Truck Company to Cole & Dixon, and offered by them (ex. p. 3 and p. 4 for identification).

POINT III.

This point relates to the clear rule of law that the burden of proof is on the plaintiff-appellant to show title and right to possession.

On this point we quite agree with the defendant-respondent that the burden of proof is on the plaintiff-appellant to prove its right to possession and we respectfully submit that if the six exhibits offered by plaintiff-appellant had been received in evidence that we would have made a prima facie case of title and right to possession in plaintiff-appellant.

It is respectively submitted that the brief filed by the defendant-respondent in no way controverts the points made in the brief of the plaintiff-appellant and that those points made by the defendant-respondent which are premature should not influence the decision as to whether the exhibits marked P 1, 2, 3, 4, 5, and 6 for identification should or should not be admitted in evidence but are questions which should be reserved for defense and that if the six exhibits had been admitted in evidence the plaintiff-appellant would have made out a prima facie case of title and the defendant-respondent would have been put upon his proof.

HAWTHORNE, INSLEY & VREELAND,
Attorneys for and of Counsel
With Plaintiff-Appellant.

New Jersey Court of Errors and Appeals.

COMMONWEALTH FINANCE COR-
PORATION, a corporation,

Plaintiff-Appellant,

vs.

HENRY J. SCHUTT,

Defendant-Respondent.

In Re-
plevin,
On Appeal
from Hud-
son Circuit
Court.

10

BRIEF ON BEHALF OF DEFENDANT- RESPONDENT.

Statement.

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The above entitled action was tried before his Honor, Luther A. Campbell, and a Jury, on February 23, 1921; at the close of plaintiff-appellant's case, upon motion on behalf of the defendant, a non-suit was directed to be entered.

It is from this Judgment of non-suit, that the plaintiff-appellant has appealed.

The action was brought by the plaintiff against the defendant, in replevin, the plaintiff claiming to be the owner of, and entitled to the immediate possession of, two certain automobile trucks, which were purchased from Cole & Dixon, Inc., by the defendant. The plaintiff claimed to be entitled to the possession of said trucks on June 18, 1919. (See amended complaint, p. 4)

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In or about April 1919, the defendant ordered of, and agreed to purchase from Cole & Dixon, a corporation, two U. S. motor trucks, numbers 3555 and 3556, (p. 32). On June 26, 1919, said trucks were delivered to the defendant, at his

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place of business in West Hoboken, by Cole & Dixon, and paid for by him (pp. 32 & 33).

Cole & Dixon received two invoices for said trucks from the U. S. Motor Truck Company of Cincinnati, Ohio, dated May 26, 1919, (Exhibit P-3 for identification, and Exhibit P-4 for identification), showing the amount due on each truck, with its equipment, \$2900.74.

These invoices, and a draft drawn on Cole & Dixon by the U. S. Motor Truck Company, for \$5801.48, with a bill of lading attached, were sent to the National Bank of Commerce of New York. Cole & Dixon not having the full amount on hand to take up said draft and bill of lading, applied to the Commonwealth Finance Corporation, plaintiff-appellant, on June 18, 1919, for financial assistance. On that date, Cole & Dixon gave to the Commonwealth Finance Corporation, their check for \$1056.10, and the Commonwealth Finance Corporation delivered to Cole & Dixon their check, payable to the order of the National Bank of Commerce, for \$5801.48. Cole & Dixon went to the National Bank of Commerce, and paid the draft of the U. S. Motor Truck Company, and obtained the bill of lading, and took the same to the Central Railroad of New Jersey, at their Ferry Street Freight Yard in Newark, and obtained the said two motor trucks, which they took to Jersey City, where they had their automobile-truck sales rooms.

On the said June 18, 1919, Cole & Dixon delivered to the Commonwealth Finance Corporation, two documents, which are called "storage receipts", (Exhibit P-5 for identification, and P-6 for identification—pp. 42 and 43).

At the time of the making up of the check for \$5801.48 to the National Bank of Commerce by the Commonwealth Finance Corporation, said

corporation made a record of the transaction which they called a "voucher". (See Exhibit P-2 for identification, p. 39)

Plaintiff-appellant offered in evidence the exhibits which were marked for identification P-1, P-2, P-3, P-4, P-5, and P-6, for the purpose of showing title to said automobile trucks in the plaintiff on the 18th day of June, 1919; the Court refused to admit these papers in evidence, and upon defendant's motion, granted a non-suit. 10

The whole question for review is as to whether these documents offered in evidence by the plaintiff, were sufficient to show title to the said automobile trucks in the Commonwealth Finance Corporation, sufficient to maintain an action of Replevin.

The defendant-respondent contends that these documents which were offered in evidence for the purpose of showing title to the said automobile trucks in the plaintiff, were not evidence of such title, and even with the testimony taken, did not, and could not show title to the said automobile trucks in the Commonwealth Finance Corporation and that therefore, the plaintiff failed in its proof, and non-suit was properly granted. 20

The Commonwealth Finance Corporation charged Cole & Dixon \$42.24 for their charges for the "Accommodation", (P. 17, l. 18). If Cole & Dixon had returned to the Commonwealth Finance Corporation the amount of their loan within thirty days, no further charge would have been made, and "the deal would have been cancelled" (p. 17, ll. 39 &c.), and if returned before the expiration of thirty days the interest would be rebated (p. 26, ll. 1 to 24). 30

The Commonwealth Finance Corporation charged 6% on the allowance made by it, which advance in this case was \$4787.62 (p. 19. ll. 39 &c. p. 20, l. 40

12). The Commonwealth Finance Corporation received three-fourths of one per cent for the "accommodation" (p. 21, l. 5).

It clearly appears that these automobile trucks were, with plaintiff's knowledge and consent, placed on the floor of the automobile sales rooms of Cole & Dixon, for the purposes of sale by them.
 10 (p. 9, l. 16; p. 18, l. 31; p. 21, l. 10; p. 26, l. 1; p. 28, l. 1 et seq. 39; p. 29, ll. 1, 23; p. 31, l. 1).

From the papers offered in evidence by the plaintiff-appellant, being its exhibits marked for identification, it clearly appears that the whole transaction between Commonwealth Finance Corporation and Cole & Dixon was a loan by the Commonwealth Company to Cole & Dixon. Cole & Dixon sent to the Commonwealth Company and showed
 20 the Commonwealth Company that they required assistance in taking up the bill of lading for the automobiles in question. Cole & Dixon had some money and contributed towards the amount due on the draft to cover these automobile trucks, \$1056.10 (p. 16, l. 5, also see Exhibit P-2 for identification) and gave a check for that amount to the Commonwealth Finance Corporation. They needed over \$4000. more to make up the amount due on the draft, and just how that was made up, and what the charges for the same were, appears on the "Voucher" (Exhibit P-2 for
 30 identification). This Voucher clearly shows that the Commonwealth Finance Corporation advanced or loaned to Cole and Dixon \$4787.62, which was the amount of the "accommodation", (or loan to Cole & Dixon). For this loan the Commonwealth Company charged Cole & Dixon \$42.24. Mr. Weed, the Vice-President of the Commonwealth Finance Corporation, testified that if the amount of the "accommodation" or loan of \$4787.62 was repaid to the Commonwealth Company, the matter
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was then closed, and the "storage receipts" as they call them, (Exhibits P-5 and P-6 for identification), would be cancelled (p. 16, l. 32). The whole transaction was a pure and simple loan of money.

POINT I.

Title to the two trucks in question was never in plaintiff. 10

Plaintiff contends that the invoices, storage receipts, &c. make title in plaintiff, on the theory that the transaction was an assignment of the rights of Cole & Dixon, Inc. in its contract with the manufacturers. Defendant contends it was a loan merely.

The "invoices" (Exhibit P-3 and P-4 for identification) were invoices from the U. S. Motor Truck Company to Cole & Dixon. The draft for the amount due on these trucks was drawn by the U. S. Motor Truck Company on Cole and Dixon, and was payable at the National Bank of Commerce. Cole & Dixon took the check of the Commonwealth Finance Corporation for \$5801.48, (the amount of the draft, and toward which Cole & Dixon had contributed \$1056.10) to the National Bank of Commerce, and took up the draft and the bill of lading attached, and Cole & Dixon went to Newark, and obtained the automobile trucks and brought them to their sales rooms on Communipaw Avenue, Jersey City, for sale. 20 30

The "storage receipts" which the Commonwealth Finance Corporation had Cole & Dixon sign, cannot possibly be more than a security in the nature of a chattel mortgage, because Mr. Weed has testified that if Cole & Dixon paid to the Commonwealth Finance Corporation the amount of \$4787.62 which that company had advanced, these receipts would be cancelled, and a rebate made for the 40

unexpired portion of the thirty days period. It was not a question of Cole & Dixon buying these automobile trucks from the Commonwealth Finance Corporation, it was simply a matter of Cole & Dixon paying off the amount due to the Commonwealth Company for the advance that had been made on said automobile trucks; it was purely and simply a matter of a loan. The Commonwealth Finance Corporation evidently followed this course of procedure in an endeavor to evade the laws of this State in regard to the recording of instruments to secure advances made, and for which goods and chattels would be mortgaged or pledged. It makes no difference what words are used, or what titles were given to the papers transferred, if the transaction was a loan (which this transaction certainly was) and the Commonwealth Company received some paper or document to secure them for their loan, and if it claimed a lien on the goods and chattels affected the document should have been recorded immediately.

It appears clearly by the evidence offered by the plaintiff, that the defendant Schutt was a subsequent purchaser in good faith. Plaintiff read into the record (case p. 32) interrogatories and answers thereto, which the plaintiff had served upon the defendant, and from these interrogatories and answers it appears that the defendant bought the two automobile trucks from Cole & Dixon; that the defendant paid \$8337.00 for these two trucks, and that a receipt was delivered to him by Cole & Dixon which conveyed the title to the said two motor trucks to the defendant (See copy of receipt from Cole & Dixon to Schutt, the defendant, part of answer to Fifth Interrogatory); that the two automobile trucks were delivered to

the defendant Schutt on June 26, 1919, at his place of business in West Hoboken, New Jersey.

The construction to be put on these various papers, collectively or singly, was for the Court.

Smith vs. Lunger, 64 N. J. L. 539;

Owens vs. Owens, 23 N. J. E. 60.

We insist the construction, that they did not show title in the plaintiff, was a proper construction, and therefore their exclusion and the directing of a non-suit was proper. 10

As between the plaintiff and Cole & Dixon, the storage receipts might be held to be Chattel Mortgages or instruments in the nature thereof, to secure the \$4787.62 loaned by the plaintiff to Cole & Dixon, but even if so held, as they were not recorded, and as defendant had no notice thereof, they were and are void as against defendant. 20

Chattel Mortgage Act, 1. Comp. Stat. 463, Sec. 4,

POINT II.

Plaintiff by its conduct is precluded from questioning defendant's right to possession of the trucks.

Plaintiff contends that Cole & Dixon, Inc. had an executory contract with the U. S. Motor Truck Company for the purchase of the trucks, and that the transaction between plaintiff and Cole & Dixon, Inc. amounted to an assignment of the latter company's rights under this executory contract. Title to the trucks must have passed from the U. S. Motor Truck Co. upon delivery of the trucks by the railroad carrier. The draft was given to Cole & Dixon, Inc. for the express purpose of enabling them to obtain the trucks from the 30 40

carrier and it was evidently intended that Cole & Dixon, Inc. should take the trucks from the carrier into their possession. Plaintiff then, if the construction of the transaction they contend for is the true one, constituted Cole & Dixon, Inc. its agent to accept delivery of the trucks, take possession of them and take them from the
 10 carrier to its (Cole & Dixon, Inc.) show room or sales room; not for storage, not for use, but for the purpose of sale by Cole & Dixon, Inc. Cole & Dixon, Inc. were in the business of selling automobiles and trucks; it was a dealer. The whole transaction was had for the purpose of assisting Cole & Dixon, Inc. finance the purchase and sale of these two trucks and for no other purpose.

The rule is that:

20 "The owner loses the right of following and reclaiming his property where he has, by his own voluntary act or consent given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority or disposal; or, to use the language of Lord Ellenborough, when the owner 'has given the external indicia of the right of disposing of his property'. Here it is well settled that, however the possessor of such internal indicia may abuse
 30 the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent is good against him who gave it."

Elliott on New Jersey Law of Sales, p. 361, and of Lord Ellenborough in *Pickering vs. Busk*, 15 East., p. 44,

40 "If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse sent it to a repository of sale, can

it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."

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Section 23 of the Sales Act, Vol. Comp. Stat. p. provides:

"Section 23. Sale by a Person Not the Owner.

"(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, *unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.*

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"(2) Nothing in this Act, however, shall affect: (a) The provisions of any factors' acts, recording acts, or any act enabling the apparent owner of goods to dispose of them as if he were the true owner thereof. (b) The validity of any contract to sell, or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction."

Plaintiff certainly gave to Cole & Dixon, Inc. all the external indicia of the right of disposing of these trucks. The invoices were in the name of Cole & Dixon, Inc. (Exhibit P-3, and P-4 for identification, pp. 40-41; the sight draft was drawn on Cole & Dixon, Inc. (Exhibit P-2 for identification, p. 30 and case p. 13, l. 30); the bill of lading was in Cole & Dixon, Inc. (case p. 13, l. 36); Cole & Dixon, Inc. were dealers engaged in the business of selling motor trucks and had possession of the trucks for sale.

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Plaintiff's conduct has precluded it from denying the seller's authority to sell.

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POINT III.

The burden of proof to show title and right to possession was on the plaintiff, and it did not sustain same.

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"Where a defendant in replevin pleads property in himself, and specially traverses the allegation that the property belongs to plaintiff in the manner and form as alleged, and plaintiff replies by taking issue on the traverse and reaffirming property in himself, the burden of proof is on plaintiff."

Chambers vs. Hunt, 18 N. J. L. 339, (In Ct. of Errors) 21 N. J. L. 620;

See—

Chambers vs. Hunt, 22 N. J. L. 552.

20 The granting of the motion for a non-suit by the Trial Judge was perfectly proper, and not error.

We insist that the appeal should be dismissed with costs.

Respectfully submitted,

W. F. BURKE,

Attorney for Defendant-Appellant.

JOHN H. SHERIDAN,

Of Counsel.

November Term, 1921.

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INDEX

	Page
Letter of Apology	1
Journal of the	2
Journal of the	3
Journal of the	4
Journal of the	5
Journal of the	6
Journal of the	7
Journal of the	8
Journal of the	9
Journal of the	10
Journal of the	11
Journal of the	12
Journal of the	13
Journal of the	14
Journal of the	15
Journal of the	16
Journal of the	17
Journal of the	18
Journal of the	19
Journal of the	20
Journal of the	21
Journal of the	22
Journal of the	23
Journal of the	24
Journal of the	25
Journal of the	26
Journal of the	27
Journal of the	28
Journal of the	29
Journal of the	30
Journal of the	31
Journal of the	32
Journal of the	33
Journal of the	34
Journal of the	35
Journal of the	36
Journal of the	37
Journal of the	38
Journal of the	39
Journal of the	40
Journal of the	41
Journal of the	42
Journal of the	43
Journal of the	44
Journal of the	45
Journal of the	46
Journal of the	47
Journal of the	48
Journal of the	49
Journal of the	50
Journal of the	51
Journal of the	52
Journal of the	53
Journal of the	54
Journal of the	55
Journal of the	56
Journal of the	57
Journal of the	58
Journal of the	59
Journal of the	60
Journal of the	61
Journal of the	62
Journal of the	63
Journal of the	64
Journal of the	65
Journal of the	66
Journal of the	67
Journal of the	68
Journal of the	69
Journal of the	70
Journal of the	71
Journal of the	72
Journal of the	73
Journal of the	74
Journal of the	75
Journal of the	76
Journal of the	77
Journal of the	78
Journal of the	79
Journal of the	80
Journal of the	81
Journal of the	82
Journal of the	83
Journal of the	84
Journal of the	85
Journal of the	86
Journal of the	87
Journal of the	88
Journal of the	89
Journal of the	90
Journal of the	91
Journal of the	92
Journal of the	93
Journal of the	94
Journal of the	95
Journal of the	96
Journal of the	97
Journal of the	98
Journal of the	99
Journal of the	100

POINT III

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