INDEX

WITNESSES FOR PLAINTIFF.

WITNESSES FOR DEFENDANTS.

PLAINTIFF'S EXHIBITS.

DEFENDANTS' EXHIBITS

Summons.

Filed February 20, 1942.

The State of New Jersey: To Automobile Finance Co., a corporation of the State of Pennsylvania, Credit Corporation, a corporation of the State of New Jersey, and Wilber D. Janes:

You Are Summoned to answer the annexed complaint of Joseph A. Natale, in an action at law in the New Jersey Supreme Court.

And Take Notice, that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Thomas J. Brogan, Esq., Chief Justice of the Supreme Court, at Trenton, this 6th day of February, One Thousand Nine Hundred and Forty-two.

Fred L. Bloodgood,
Clerk.

Charles D. Merz,
Attorney.

Complaint.

Filed February 20, 1942.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE Co., a corporation of the State of Pennsylvania, CREDIT CORPORATION, a corporation of the State of New Jersey, and WILBER D. JANES,

Defendants.

Plaintiff, Joseph A. Natale, residing at 57 Washington Avenue in the Borough of North Plainfield, County of Somerset, and State of New Jersey, says that:

1. On December 23, 1941, the plaintiff was, and ever since, has been the owner of the following chattel: one 1940 LaSalle four door sedan, engine number 4328171, manufacturer's number 4328171, model number 40-52 of the value of Twelve Hundred ($1200.00) Dollars.

2. Said chattel was purchased by the plaintiff from J. A. McIlrath, trading as Jack's Garage in the City of Pittsburgh, State of Pennsylvania on September 18, 1941.

3. On said last date above mentioned, plaintiff, Joseph A. Natale, financed the purchase of said automobile through the defendant corporation herein, Automobile Finance Co., a corpora-

tion of the State of Pennsylvania located in Pittsburgh, Pennsylvania, at which time the plaintiff herein was given a "customer's copy" of such finance agreement, a true copy of which is hereto annexed and made a part hereof.

4. On said last date above mentioned, plaintiff, Joseph A. Natale, acquired possession of said automobile and had same duly licensed in the State of Pennsylvania.

5. Subsequently, on or about the first of October, 1941, with the consent and permission of the defendant corporation, Automobile Finance Co., plaintiff did remove from the State of Pennsylvania to the State of New Jersey, and did bring with him the aforementioned automobile.

6. Prior to November 10, 1941, plaintiff, Joseph A. Natale did on divers occasions communicate with the Automobile Finance Co. one of the defendants herein as to the payment in full for the balance due on said finance contract, and on said date, to wit, November 10, 1941, plaintiff received from said defendant Automobile Finance Co. a letter which mentioned among other matters the following:

> "On the 1940 LaSalle Sedan, Account No. 28597 the balance is $736.02 plus 80¢ delinquent charge of 5¢ a day, or $736.82. The interest refund amounts to $46.00 which will make the net pay off $690.82 and if you wish to cancel the insurance there will be an additional refund of $23.40, making the net pay off $667.42."

7. As a result of the receipt of said letter, plaintiff did arrange to pay off the entire balance as mentioned hereinabove and did have the West-

field Trust Co. of Westfield, New Jersey, forward its cashier's check in the amount above mentioned, to wit, Six Hundred Sixty-seven Dollars and Forty-two ($667.42) Cents, which check was delivered to the Mellon National Bank of Pittsburgh with specific instructions by the said Westfield Trust Co. to the said Mellon National Bank of Pittsburgh to the effect that said cashier's draft was to be delivered to the Automobile Finance Co. of Pittsburgh, one of the defendants herein, in return for which the said Mellon National Bank of Pittsburgh was to receive the contract and the bill of sale of the said automobile.

8. The aforesaid letter was dated November 29, 1941, and accompanying the check was the insurance certificate to the Automobile Finance Co. which was also to be returned to the said Automobile Finance Co., one of the defendants herein.

9. The said Mellon National Bank of Pittsburgh, Pennsylvania did upon receipt of same make tender to the defendant, the Automobile Finance Co. of Pittsburgh who refused same.

10. On December 23, 1941, at about 12:30 P.M. the defendant company Automobile Finance Co. of Pittsburgh, Pennsylvania, together with defendant Wilber D. Janes, who was then and there an employee of the defendant, Credit Corporation, a corporation of the State of New Jersey, who was agent for the Automobile Finance Co., the other defendant herein, did unlawfully and illegally remove the plaintiff's automobile from the corner of Washington and Warren Streets in the City of Newark, County of Essex, and State of New Jersey.

11. Plaintiff, before parking said automobile,

did lock the ignition switch as well as all doors and did not deliver the keys of same to anyone of the defendants herein.

12. The seizure of the automobile was made by the defendants herein after breaking into said automobile without the knowledge, consent, or permission of the plaintiff.

13. No notice was given to the plaintiff as to the proposed seizure, and the automobile in question was concealed by the defendants herein without the plaintiff's knowledge as to the place of storage.

14. After the seizure plaintiff received no notice from anyone as to the seizure, or as to the place of storage of said car or automobile.

15. On Saturday, December 27, 1941, the defendant, Wilber D. Janes, did deliver to a representative of the defendant corporation, Automobile Finance Co. the plaintiff's automobile, which representative did thereupon drive said automobile back to Pittsburgh, arriving there Sunday morning, December 28, 1941.

16. Plaintiff, after considerable investigation, between December 23, 1941, and December 27, 1941, learned who seized the said automobile and after the defendants herein knew of plaintiff's knowledge of seizure, caused the removal of said automobile from the State of New Jersey to the State of Pennsylvania, as above stated.

17. By reason of the defendant company, Automobile Finance Co. failure to accept the full amount due as was tendered in November 1941, the plaintiff herein has been and is now lawfully entitled to the immediate possession of said automobile.

18. The plaintiff herein has made repeated demands on the defendants, the Automobile Finance Co. of Pittsburgh, Credit Corporation, and Wilber D. Janes for the return of said automobile, but said defendants refused to deliver the said automobile to the plaintiff and then and now wrongfully detained the same.

Plaintiff demands judgment for the possession of said automobile, one 1940 LaSalle four door sedan, engine number 4328171, manufacturer's number 4328171, model number 40-52, or in case it cannot be returned to said plaintiff, then Twelve Hundred ($1200.00) Dollars, together with damages for said unlawful detention together with costs.

CHARLES D. MERZ,
Attorney for Plaintiff.

Customer's Copy of Finance Agreement Annexed to Complaint.

Form 801-B

AUTOMOBILE FINANCE COMPANY
PITTSBURGH, PA.

Customer's Copy

Make of car: LaSalle; Serial number: 4328171; Motor number: Same; Year: 40; Type of body: Sedan; N-U: U; Model: ; Pgh-1; Account number: 28597-25.

Purchaser—Street No.—City—State:
Natale, Joseph A.
615 Island Ave.
McKees Rocks, Pa.

Payments: 18 @ 40.89; Insured from noon 9-18-40; Ins. expires noon: 3-18-43;

Selling price: 950.00; Cash payment: 350.00; Trade-in

Due date: 25; Ins. coverage: Peril Peril 1; Prem.: $ Inc; Perils 3 and 4; Limit Liab.: ACV; Rate: A 9.00; B 3.50; Peril 2 Actual value in excess of $100 deductible; A 30.00, B 6.50; Total: $39.00; Car used only for G.

Occupation - Employer

Salesman

U. S. Realty Co.

Amount of Note: 736.02; Garage Location: Public Private; A=1st yr.; B=over yr.; Ins. Ctf. No. 48077.

NOTICE TO CUSTOMER

1. It is indeed a pleasure to welcome you among our many customers.

2. Please accept this as notice that we have purchased contract and note signed and given by you as part payment on the within described automobile.

3. The coupon book enclosed provides a coupon for each installment due. It is necessary for you to attach coupon to each remittance made to insure proper credit to your account.

4. Only remittances made direct to us constitue payment. We will not be responsible for installments paid to dealer or others.

5. Forward each installment sufficiently in advance to reach us before the close of banking hours on the maturity date, thereby avoiding delinquency charge of 5¢ per day.

6. Insurance has been provided as per memorandum of insurance enclosed.

7. It is unlawful to remove the within described automobile from the state or to sell, transfer, take, conceal, drive away, trade or in any

manner dispose of the above mentioned property until the note which you signed is paid in full.

8. When all installments have been paid our interest in the car will be fully released.

9. Be sure to notify us of any change in your occupation or address.

How	*Mo. Due*	*Date Paid*	*Payments*		*Balance*
	Oct.		40.89	1	736.02
	Nov.		40.89	2	695.13
	Dec.		40.89	3	654.24
	Jan.		40.89	4	613.35
	Feb.		40.89	5	572.46
	Mar.		40.89	6	531.57
	Apr.		40.89	7	490.68
	May		40.89	8	449.79
	Jun.		40.89	9	408.90
	Jul.		40.89	10	368.01
	Aug.		40.89	11	327.12
	Sept.		40.89	12	286.23
	Oct.		40.89	13	245.34
	Nov.		40.89	14	204.45
	Dec.		40.89	15	163.56
	Jan.		40.89	16	122.67
	Feb.		40.89	17	81.78
	Mar.		40.89	18	40.89
				19	.00*

CONT'D.

Account Number: 28597-25; Purchaser: Natale, Joseph A.; Due: 25; N.I.: 18; New-used: Used; Plan: NR.

To the Customer:

This is a copy of your account as it appears on our records. Please fill in information requested, detach and return to us promptly.

Answer and Counterclaim.

Filed March 10, 1942.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES,

Defendants.

The defendants, Automobile Finance Co., a corporation of the State of Pennsylvania, and Wilber D. Janes, in the above entitled cause, as and for their Answer to the Complaint, respectfully show that:

1. They deny each and every allegation contained in the Complaint.

FIRST SEPARATE DEFENSE

1. The defendant, Automobile Finance Co., is the holder and owner of a certain Lease Agreement executed by the plaintiff under date of September 18, 1941, by the terms of which the plaintiff did lease from J. W. McIliath, trading as Jack's Garage, one 1940 La Salle Sedan, Serial No. 4328171, for a period of eighteen months, at a monthly rental of $40.89, beginning on the 25th day of October, 1941, which Lease Agreement was purchased by the said defendant and duly

assigned to it by the said J. W. McIliath, trading as Jack's Garage.

2. The said plaintiff defaulted under the terms of said Lease in that he failed to make the payments which were due on the 25th day of October, 1941, and on the 25th day of November, 1941. He further defaulted under the terms of said Lease in that he removed the motor vehicle from the State of Pennsylvania without the knowledge or consent of said defendant, and he did encumber said motor vehicle contrary to the terms of said Lease, in that he placed thereon a Chattel Mortgage which he executed in favor of Leon Carrar, in the principal sum of $400.00, which Mortgage was dated December 11, 1941, covering the aforesaid motor vehicle.

3. Because of default existing under the terms of the aforesaid Lease Agreement, the said defendant, through its duly authorized agent, the defendant, Wilber D. Janes, caused to be repossessed the aforesaid motor vehicle to which it was lawfully entitled, and to which it had legal title.

SECOND SEPARATE DEFENSE

1. Any tender which the plaintiff claims to have made was insufficient in that the total amount due for rental on said automobile was $736.02, for the period of eighteen months, and the alleged tender by the plaintiff of the sum of $667.42 was insufficient.

THIRD SEPARATE DEFENSE

1. The alleged tender by the plaintiff by check in the sum of $667.42 was conditioned upon the

defendant Automobile Finance Co. delivering up a Bill of Sale and cancelled Contract to the plaintiff, which conditions the plaintiff was not legally entitled to impose upon the said defendant.

FOURTH SEPARATE DEFENSE

1. The sum of $667.42 alleged by the plaintiff to be the balance due on the Lease Agreement, was not tendered to the defendant Automobile Finance Co. promptly in accordance with the offer it made to the plaintiff, but an alleged tender by way of a check was supposed to have been made more than three weeks after said offer was submitted to the plaintiff.

FIFTH SEPARATE DEFENSE

1. The plaintiff never made a legal tender to the said defendant of the balance which the plaintiff alleges was due on the said Lease Agreement for rental for the entire period of eighteen months.

SIXTH SEPARATE DEFENSE

1. At the time the alleged tender by check in the sum of $667.42 was made on behalf of the plaintiff as alleged by the plaintiff to be the balance due under the Lease Agreement dated September 17, 1941, covering the La Salle automobile, the plaintiff was in default under the terms of said Lease Agreement, for the payments which were due on October 25, 1941, and November 25, 1941, each payment being in the sum of $40.89, therefore the defendant, Automobile Finance Co. was not obligated to accept the sum of $667.42 as the balance due under the Lease Agreement.

SEVENTH SEPARATE DEFENSE

1. On or about the 10th day of November, 1941, plaintiff represented to the defendant that he would pay to the said defendant the balance due on the 1941 De Soto, and the balance due on the 1940 La Salle, if the said defendant would advise him the necessary amount to pay off both of these accounts, less rebate, said payment to be made immediately upon receipt of the figures from this defendant. Under date of November 10, 1941, the defendant, in reliance upon the representations made by the plaintiff as being true, did quote the said plaintiff the net figure less rebate on the 1941 DeSoto Sedan of $999.67, and the net figure on the 1940 La Salle Sedan of $667.42. The plaintiff did not accept the net figure on both of these motor vehicles, in that he failed to pay to the said defendant a total sum of $1667.09. The said net figure was conditioned upon payment by the said plaintiff to this defendant of the total sum of $1667.09.

The defendants, Automobile Finance Co., a corporation of the State of Pennsylvania and Wilber D. Janes, by way of Counter-claim respectfully show that:

FIRST COUNT.

1. They are the holders and owners of a certain Lease Agreement executed by the plaintiff as the lessee and J. W. McIliath trading as Jack's Garage as the lessor, by the terms of which Agreement the plaintiff leased one 1940 La Salle Sedan, Serial No. 4328171, from the said lessor for a period of eighteen months at a monthly rental of $40.89, beginning on the 25th day of

October 1941, and on the 25th day of each month thereafter.

2. The plaintiff defaulted under the terms of said Lease in that he failed to make payments which were due October 25, 1941, in the sum of $40.89, and November 25, 1941, in the sum of $40.89, and there became due and payable under the terms of said Lease the sum of $736.02, being the rental for the entire eighteen months.

3. The plaintiff failed to pay to the defendants the sum of $736.02.

4. By the terms of said Lease the plaintiff agreed to pay an attorney fee of $50.00.

Damages will be claimed in the sum of $786.02, besides lawful interest from the date of maturity of each instalment, and costs of suit to be taxed on the First Count.

SECOND COUNT

1. The defendants are the holders and owners of a certain promissory note executed by the plaintiff to J. W. McIliath, trading as Jack's Garage, dated September 18, 1941, in the principal sum of $736.02, which was payable in eighteen equal and successive monthly instalments of $40.89 each, the first payment being due and payable one month from the said date. A true copy of said note is hereto annexed and made a part hereof.

2. The plaintiff defaulted under the terms of the aforesaid promissory note, and there became due and payable to the defendants by the plaintiff the sum of $736.02.

3. The plaintiff has failed to pay to the defendants or either of them the sum of $736.02.

4. By the terms of the aforesaid promissory note, the plaintiff agreed to pay an attorney fee of 15%, which is $110.40.

Damages will be claimed in the sum of $846.42, besides lawful interest from the date of maturity of each instalment, and costs of suit to be taxed on the Second Count.

CHARLES BLUME,
Attorney for Defendants, Automobile
Finance Co., and Wilber D. Janes.

Note Annexed to Answer and Counterclaim.

(Total of Note) $736.02; (City) Pittsburgh; (State) Penna.; (Date) Sept. 18, 1941.

After date, I or we or either of us, promise to pay to Jack's Garage (Lessor) or order, on the like date of each month in 18 equal and consecutive monthly installments of $40.89 each, the first payable one month after date Seven Hundred Thirty Six and 02/100 dollars with interest from maturity at the highest lawful rate.

If any installment of this note is not paid at the time and place specified herein, the entire amount unpaid shall be due and payable forthwith.

And (I,) (we,) do hereby authorize, irrevocably, any attorney to appear for (me,) (us,) after maturity of the whole or any part hereof, in any court of record in the United States, in term time or vacation, and to waive the issue and service of process and to confess a judgment against (me,) (us,) in favor of the payee or any

subsequent holder hereof, for such amount as may appear to be unpaid hereon together with costs, collection expense and attorney's fees of 15%, which we agree to pay and to release all errors and waive all rights of appeal.

And (I,) (we,) do hereby release all errors, and without stay of execution, inquisition and extension upon any levy on personal property or real estate is hereby waived, and condemnation is agreed to and the exemption of personal property from levy and sale of any execution hereon, is also hereby expressly waived, and no benefit of exemption shall be claimed under and by virtue of any exemption law now in force or which may be hereafter passed.

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

Signed Joseph A. Natale (Copy) (Seal)

Negotiable and Payable at the office of
Automobile Finance Company with
Exchange.

Answer to Counterclaim.

Filed May 15, 1942.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES,

Defendants.

The plaintiff, Joseph A. Natale, in the above entitled cause, by way of answer to the Counter-claim respectfully says that:

1. He denies each and every allegation contained in the Counter-claim.

FIRST SEPARATE DEFENSE.

1. The instrument executed by the plaintiff as stated in paragraph one of the first count of the counter-claim is not in effect a lease agreement, but is in effect a conditional agreement for the sale of the automobile, the subject matter of this action.

2. Under the terms and conditions of said agreement, it provides among other things that in the event of a default of any installment, the seller may demand the entire unpaid balance, which the defendant company, Automobile Finance Co. did and the plaintiff thereafter, ten-

dered or caused to be tendered the entire balance due as demanded by the defendant company, Automobile Finance Co.

3. The said defendant Company, Automobile Finance Co. did upon the tender of same, refuse to accept a bank cashier's check, for said agreed sum.

SECOND SEPARATE DEFENSE.

1. The promissory note referred to in the second count of the Counter-claim is a part of the agreement mentioned in the first count of the Counter-claim and said note was in default at which time the entire balance became due and payable and which note the plaintiff offered to pay in full in accordance with the sum agreed to be due thereunder by the defendant company.

CHARLES D. MERZ,
Attorney for Plaintiff.

Reply to Answer to Counterclaim.

Filed October 21, 1942.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES,

Defendants.

The defendants in the above entitled cause by way of reply to the answer to counterclaim respectfully says that:

1. The defendants join issue with the plaintiff on the separate defenses contained in the answer to the counterclaim.

CHARLES BLUME,
Attorney for Defendants.

Notice.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE Co., a corporation of the State of Pennsylvania, CREDIT CORPORATION, a corporation of the State of New Jersey, and WILBER D. JANES,

Defendants.

To: CHARLES D. MERZ, ESQ.,
Attorney for Plaintiff,
2375 Mountain Avenue,
Scotch Plains, New Jersey.

SIR:

PLEASE TAKE NOTICE that on the 27th day of March, 1942, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, prevailing time, I will apply to the Honorable Joseph L. Smith, Circuit Court Judge sitting as a Supreme Court Commissioner, at the Court House in Newark, New Jersey, for an order to strike out the Complaint in the above entitled cause as to the defendants, The Credit Corporation, a corporation of the State of New Jersey, and Wilber D. Janes, on the following grounds:

Notice.

As to the Defendant, The Credit Corporation:

1. Said Complaint is sham;

2. This defendant was in no wise connected with the transaction as set forth in the Complaint.

3. The Complaint does not set forth a cause of action as against this defendant.

4. That said Complaint was filed merely for the purpose of harrassing and embarrassing this defendant.

As to the Defendant, Wilber D. Janes:

1. Said Complaint is sham.

2. The Complaint does not set forth a Cause of action as against this defendant.

3. That said Complaint was filed merely for the purpose of harrassing and embarrassing this defendant.

The Affidavits annexed hereto, and the Exhibits will be used at the argument of this motion, and the original Lease Agreement and Certificate of Title to the motor vehicle will also be produced.
Dated: March 18, 1942.

Yours respectfully,

Charles Blume,
Attorney for defendants, The Credit Corporation, and Wilber D. Janes.

Affidavit of A. M. Pivirotto.

Filed March ,1942.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, CREDIT CORPORATION, a corporation of the State of New Jersey, and WILBER D. JANES,

Defendants.

State of Pennsylvania, }
County of Allegheny. } ss.:

A. M. PIVIROTTO, of full age, being duly sworn according to law, upon his oath, deposes and says: that he is Exec. Vice President of Automobile Finance Co., a corporation of the State of Pennsylvania, and is duly authorized to execute this Affidavit. That he is familiar with the facts contained herein of his own knowledge and information.

1. That on September 18, 1941, Automobile Finance Co., a corporation of the State of Pennsylvania, which I will hereinafter refer to as "Corporation" purchased a Lease Agreement which was executed by Joseph A. Natale as the lessee and J. A. McIliath, trading as Jack's Garage as the lessor, by the terms of which Agreement the lessor leased to the lessee one 1940 La

Salle Sedan automobile, Serial No. 4328171, and as rental for said automobile the lessee agreed to pay $40.89 per month beginning on the 25th day of October, 1941, and on the same day of every month thereafter, for a period of eighteen (18) months. The said Lease provides that the plaintiff, in the event of any default in instalments of rental or upon breach of any condition or covenants in the Lease, will deliver forthwith, the motor vehicle in good condition to the Corporation, and the said Lease also provides that if said motor vehicle is removed from the State of Pennsylvania, in which state the plaintiff resided at the time of the execution of the Lease, there shall be a default under the terms of said Lease. The Lease also prohibits the plaintiff from encumbering the motor vehicle. A copy of said Lease is hereto annexed and made a part hereof and marked Schedule "A," as well as the Certificate of Title to a Motor Vehicle issued by the State of Pennsylvania, showing the ownership of said motor vehicle in the Corporation, marked Schedule "B."

2. The plaintiff failed to pay the instalments which were due on the 25th day of October 1941 and the 25th day of November, 1941, and the Corporation, by virtue of its Lease and Title, caused said automobile to be repossessed from the plaintiff on the 23rd day of December, 1941.

3. At no time did Joseph A. Natale, the plaintiff in this cause, offer to me or Automobile Finance Co. the two instalments which were past due, or the sum of $736.02, which would have been the rental for the entire term of eighteen (18) months. At no time does the Lease provide that title to the motor vehicle should pass to Mr. Na-

tale. I have read the Complaint in the above entitled cause, and also examined the exhibits annexed hereto, and I state that on December 23, 1941, Mr. Natale was not the owner of the motor vehicle nor entitled to possession thereof. No permission was given to Joseph A. Natale to remove this motor vehicle from the State of Pennsylvania, in which State he lived at the time he entered into the Lease Agreement.

4. Automobile Finance Co., through me, requested Wilbur D. Janes, who is one of the defendants in this cause, to repossess this automobile on behalf of Automobile Finance Co. The Credit Corporation, which is also a defendant in the above entitled cause, was never employed or engaged by Automobile Finance Co. in connection with the repossession of the automobile, nor was The Credit Corporation ever the agent, servant or employee, or in any other wise connected with Automobile Finance Co. for any purpose whatsoever.

5. After the automobile was repossessed, and particularly after December 28, 1941, Wilbur D. Janes was not an agent, officer, employee or in any way connected with Automobile Finance Co., nor was he authorized, nor did he have authority, to accept service of a Summons and Complaint on the 16th day of February, 1942, on behalf of Automobile Finance Co.

6. Copy of a letter written by the plaintiff to me dated November 3, 1941, is hereto annexed and made a part hereof, and marked Schedule "C." In accordance with the request contained in this letter in the last paragraph, a letter was forwarded to Mr. Natale by Automobile Finance Co. under date of November 10, 1941. A copy

of said letter is hereto annexed and made a part hereof and marked Schedule "D." Mr. Natale had another account with Automobile Finance Co. covering a 1941 De Soto Sedan automobile, which he had left with a dealer in Pittsburgh, Pennsylvania. The letter of November 10, 1941, was written in contemplation of Mr. Natale paying on both the La Salle and De Soto accounts, and for that reason rebates as shown in the letter were given as of November 10, 1941, and were made in contemplation of receiving payment in full of the net rebates on both accounts by return mail. At no time was the sum of $667.42 tendered to Automobile Finance Co. or to me on behalf of Automobile Finance Co. by Joseph A. Natale, Westfield Trust Company, or Mellon National Bank. At no time was the sum of $999.67 tendered to Automobile Finance Co. or to me in connection with the 1941 De Soto Sedan, by Joseph A. Natale or anyone on his behalf. Mr. Natale sent a letter to Mr. F. D. O'Brien, who is connected with the Automobile Finance Co., under date of November 18, 1941, a copy of which letter is hereto annexed and made a part hereof, and marked Schedule "E." This letter also refers to paying off both the automobiles.

7. There is no other instrument executed by Joseph A. Natale in connection with the leasing of the La Salle motor vehicle.

A. M. Pivirotto.

Subscribed and sworn to before
me this 16 day of March, 1942.
P. W. Lancaster,
(Seal) Notary Public.
My commission expires March 6th, 1945.

Affidavit of A. M. Pivirotto.

Schedule B, Annexed to Affidavit.

CERTIFICATE OF TITLE TO A MOTOR VEHICLE

Penalty For alteration or forgery of this Certificate, maximum fine of $1,000.00, or 2 years imprisonment, or both

Gross Wt.-Date Orig. titled Engine No. Mfr's No. H.P.-Seat. Cap-Ch. Wt.
Make-Type Body Annual Fee Title No.
3-25-40 4328171 Same 37
LaSalle Sdn 14.80 D5479136

Automobile Finance Co
5526 Penn Ave. Dx
Pittsburgh Pa 1330658

Important

Date shown is that on which vehicle was originally titled.

Make certain that engine and manufacturer's numbers on car agree with numbers shown on this title.

COMMONWEALTH OF PENNSYLVANIA
Department of Revenue

The Motor Vehicle described hereon is subject to the following encumbrances. Favor of
Amount $

I, the undersigned, Secretary of Revenue of the Commonwealth of Pennsylvania, do hereby certify, pursuant to the provisions of the Act of May 1, 1929, P. L. 905, as amended, that an application has been made to me as prescribed by said act for a Certificate of Title to a motor vehicle described hereon.

I do further certify that I have used reasonable diligence in ascertaining whether or not the facts

stated in said application for a Certificate of Title are true, and that I am satisfied that the applicant is the lawful owner of the above described motor vehicle, or is otherwise entitled to have the same registered in his name.

Wherefore, I do hereby certify that the above named applicant has been duly registered in the office of the Pennsylvania Department of Revenue, as the lawful owner of the above described motor vehicle, and that it appears upon the official records of said office that at the time of the issuance of this Certificate, said motor vehicle is subject to the encumbrances hereinbefore enumerated, if any.

Witness my Hand and Seal of Office.

WALTER J. KRESS,
(Seal) Acting Secretary of Revenue.

Schedule C, Annexed to Affidavit.

Nov. 3, '41

Mr. Arthur Pivorotti
Automobile Finance Co.
Pittsburgh, Pa.

Dear Mr. Pivorotti:

You, no doubt, have not been made aware of the unpleasant complication that has come up over the financing of my two cars, a condition that I had hoped would have been averted by the resale of the De Soto. My record will show that I tried very hard to dispose of this car, but due to the urgency of the trip I had to leave same with Mr. Merola for sale. As related to Mr. O'Brien in a previous letter, I could not affect the loan to redeem the apt. building, a few details

of which I had previously disclosed to you. This left me no alternative but to return to Pittsburgh, and on my return I stopped off in Philadelphia to see an official of the Albert M. Greenfield Co. This official was responsible in my appointment to the industrial staff of their Newark, N. J. office, so I returned here to assume my duties as of Nov. 1st.

Last week, I wrote Mr. O'Brien that I would be back in Pgh, but due to change in plans, I have returned to Plainfield. I'm writing you all this so you will know the facts.

As to the cars, I can assure you that I will clear the whole situation very shortly, as I have prevailed upon a business associate of Mr. Carrar to buy the De Soto, and he said he would if I can secure from you the exact amount necessary to pay off the amount less rebate for the La Salle, and I will try to refinance it in Newark. This will net you cash for both cars, so that you sustain no loss due to courtesies shown me.

Please advise the two separate amounts and you will hear from me immediately so that we can clear this up.

Very sorry, if this has caused you any displeasure. Best regards.

Very truly yours,

Jos. A. Natale,
c/o Carrar Trucking Co.
Watchung, N. J.

Schedule D, Annexed to Affidavit.

November 10, 1941

Joseph A. Natale
c/o Carrar Trucking Co.
Watchung Road
Watchung, N. J.

Dear Sir:

In the absence of Mr. Arthur Pivirotto I am answering your letter of November 3rd in which you desire to know the net pay off on each of your accounts.

On the 1940 LaSalle Sedan, Account #28597 the balance is $736.02 plus 80¢ delinquent charge of 5¢ a day, or $736.82. The interest refund amounts to $46.00 which will make the net pay off $690.82 and if you wish to cancel the insurance there will be an additional refund of $23.40, making the net pay off $667.42.

On the 1941 DeSota Sedan, Account #24833 the balance is $1,081.92 plus $3.00 delinquent charge of 5¢ a day, or $1,084.92. The interest refund amounts to $34.45 which will make the net pay off $1,050.47 and if you wish to cancel the insurance there will be an additional refund of $50.80, making the net pay off $999.67.

If you decide to cancel the insurance it will be necessary that we have your insurance policies on these accounts.

Your prompt reply will be appreciated.

Yours very truly,

AUTOMOBILE FINANCE COMPANY

FDO:sh

Affidavit of A. M. Pivirotto.

Schedule E, Annexed to Affidavit.

(Letterhead of Albert M. Greenfield & Co.)

November 18, 1941

Mr. F. D. O'Brien
Automobile Finance Company
5526 Penn Avenue
Pittsburgh, Pennsylvania

Dear Mr. O'Brien:

Thank you very much for your letter of November 10, 1941, addressed to me in care of Carrar Trucking Company, giving me the actual net pay-offs on my two cars.

In reply will say that I am awaiting definite word from a local individual as to the purchase of the DeSota and, in addition, I am also waiting to hear from Mr. Merola as to the condition and latest status on the car.

You will hear from me again within the next few days.

Very truly yours,
(Signed) Jos. A. Natale.

JAN:MC

Opinion on Motion to Strike Complaint.

Filed May 4, 1942.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW—ON BRIEFS.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE Co., a corporation of the State of Pennsylvania, CREDIT CORPORATION, a corporation of the State of New Jersey, and WILBER D. JANES,

Defendants.

CHARLES D. MERZ, ESQ., Attorney of the Plaintiff;

CHARLES BLUME, ESQ., Attorney for the Defendants.

SMITH, JOSEPH L., *C. C. J.*

This comes on a motion to strike out the service of the summons and complaint as against the defendant, Automobile Finance Co., a foreign corporation, upon the ground that the service was not made upon an officer, director, agent, clerk or engineer of the corporation, as required by statute; and on motion to strike the complaint as against the defendant, Credit Corporation, a New Jersey Corporation, and Wilber D. Janes, upon the ground that the complaint is sham and further that it does not set forth a cause of action against these defendants.

The complaint, in substance, alleges that the defendant, Automobile Finance Co., a corpora-

tion engaged in business in Pittsburgh, Pennsylvania, through its agent, Wilber D. Janes, caused the unlawful seizure of the automobile of the plaintiff and sues for the value of the said automobile.

Service on the defendant, Automobile Finance Co., a foreign corporation, was accomplished by service upon this same agent, Wilber D. Janes. He was the agent who made the allegedly unlawful seizure. It is not disputed that he made the seizure and whether that was lawful or unlawful is the subject matter of the litigation. It appears therefore, that he had "such connection with the business out of which the alleged cause of action arose, as to make him a representative of the corporation, with respect to that particular business." Service upon him, therefore, was properly made.

Carroll v. *N. Y. N. H. & H. R. R. Co.*, 65 N. J. L. 124, 46 Atl. 708, 709.

Brainard v. *New York, O. & W. Ry. Co.*, 150 Atl. 681.

Deighan v. *Beverage Weekly & Trade Newspaper Corp.*, 16 A. 2d 612, 18 N. J. Misc. 705.

As to the defendant corporation, Credit Corporation, the contention is that this corporation was in no wise connected with the transaction or with the seizure, and that the defendant, Wilber D. Janes, when making the seizure of the car was doing so for and on behalf of the defendant, Automobile Finance Co., and not on behalf of the defendant, Credit Corporation. This contention of the defendant is well substantiated, and in fact remains unrefuted by anything shown by the plaintiff. The most the plaintiff relies on, is the

fact that Wilber D. Janes was an employee of the Credit Corporation, but there is nothing to show that, in this particular transaction, he was acting as such employee.

The plaintiff contends that Wilber D. Janes had admitted that there had been some correspondence between Automobile Finance Co. and the Credit Corporation, in reference to this transaction. However, it is not shown what this correspondence consisted of, nor is it shown that Wilber D. Janes receives his instructions from the Credit Corporation. It appears therefore, that on the undisputed and uncontradicted statement of facts, no cause of action is shown as against the Credit Corporation.

As to the action against Wilber D. Janes, the sole contention of the defendant is that they had the right to repossess the car as they did, and that therefore they are not liable. This, of course, raises a question to be tried, and if the facts as alleged were possible of only one interpretation, it would have been the duty of the court to pass upon such facts as a matter of law. That, however, is not the case. The plaintiff contends that he offered, through his banking facilities, payment of the entire balance due upon the car, but that the defendant refused acceptance of such balance. The defendant does not deny such refusal to accept payment, but contends that under the particular form of the so-called lease, executed by the plaintiff, the defendants were not under any obligation to deliver the cancelled contract or bill of sale upon receipt of the balance due on the contract. The instrument in question is called a "lease agreement," under the terms of which one J. W. McIliath, trading as Jack's Garage, executed a lease to the plaintiff for the

car in question, a La Salle Sedan. The defendant points out that this was not a conditional sales agreement; that it was exactly as designated, a lease, for the use of an automobile to be returned to the lessor upon termination of the lease. The contention of the defendant is that under this lease, the plaintiff would never acquire ownership of the car.

According to *Stern & Co.* v. *Paul, et al.,* 96 Pa. Super. 112, cited by the defendant:

> "The distinction between a bailment and a conditional sale is difficult to define in general terms and the mere use of technical words will not prevent a court from looking at the real nature of the transaction and declaring that an agreement purporting to be a bailment is really a conditional sale."

It appears therefore, that a Pennsylvania court would not be prevented from looking at the real nature of the transaction and declaring that an agreement is a conditional bill of sale even though it is designated as a lease. It is conceivable that a person may loan his automobile to another on a particular rental basis for a specified term, for a definite rent reserved, payable in installments. It should be noted, however, that the defendant, Automobile Finance Co., was not engaged in the business of lending cars, but on the contrary was engaged in the business of financing the purchase of cars; its business being the obtaining of interest or profit on its financial investment. It will also be noted that the so-called "lease agreement" signed by J. W. McIliath, was on a form prepared by the defendant, Automobile Finance Co., and in this form Mr. McIliath is designated as a dealer, and in detailing the transaction, space

is provided for giving the list price and not for rent reserved. Space is provided for finance charge in the sum of $136.02, and space is provided for "allowance on car traded in." To say the least, it would be most unusual for the renter of an automobile to trade in a car to have the privilege of renting an automobile, if that were the intention of the parties.

The court makes these observations, not for the purpose of passing final judgment upon the nature of this document used in this case, but merely to indicate that there are questions of fact to be determined by a trial before a jury.

For these reasons, it is the opinion of the court that the matters in issue are contradicted, and are capable of different interpretations as the final evidence may indicate. Therefore, they are not such matters as the court may dispose of on a motion.

Accordingly, the defendant's motion to set aside the service of summons as to the defendant, Automobile Finance Co., will be denied, and the motion to strike the complaint as to the defendant, Credit Corporation, will be granted, and the motion to strike the complaint as to the defendant, Wilber D. Janes, will be denied. An order will be entered accordingly.

May 4th, 1942.

Commission for Examination of a Witness Out of the State.

Issued June 29, 1943.

The State of New Jersey to Charles Lysle Seif, Esq., of the City of Pittsburgh, in the State of Pennsylvania,
(L. S.) GREETING:

Know ye that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give unto you, full power and authority diligently to examine Thomas L. Orr and W. E. Berryhill, both of the City of Pittsburgh and State of Pennsylvania, upon certain interrogatories to be exhibited to you, as well upon the part of the plaintiff, as upon the part of the defendants, in a certain action at Law now depending in our said New Jersey Supreme Court, wherein Joseph A. Natale is plaintiff and Automobile Finance Co., a corporation of the State of Pennsylvania and Wilber D. Janes are defendants: And therefore we command you that, at certain days and places to be appointed by you for that purpose, you do cause the said witnesses to come before you and then and there examine said witnesses upon oath or affirmation first having been taken before you, and that you do cause the same to be reduced to writing and signed by said witnesses and yourself; and when you have so taken such depositions you are to send them to us in our said New Jersey Supreme Court without delay, closed up under your seal, distinctly and plainly set together with the interrogatories and this writ. And we further command you, before you act in or be present at the swearing or examination of any witnesses, you do take the oath, or, if conscientiously scrupulous of taking an oath, then an affirmation, faithfully,

fairly and impartially to execute this commission, and that you take such oath or affirmation before any person lawfully authorized to administer an oath or affirmation in the State of Pennsylvania, where you reside.

Witness, THOMAS J. BROGAN, ESQ., Chief Justice of our said Supreme Court, at Trenton, this 29th day of June, 1943.

JAMES J. GAVIN,
Clerk.

CHARLES D. MERZ, ESQ.,
Attorney of Plaintiff.

Interrogatories and Answers.

Filed July 22, 1943.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,
Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES,
Defendants.

INTERROGATORIES AND ANSWERS.

Charles Lysle Seif, member of the Bar of Allegheny County, Pennsylvania, having been authorized as Commissioner and having been duly sworn, met with Messrs. Orr and Berryhill in the

Mellon National Bank, at 11 A.M. July 16, 1943, and the commission having been examined by the Messrs. Orr and Berryhill, and the former having been duly sworn by Mr. Seif, orally and verbally answered interrogatories submitted as follows:

INTERROGATORIES

By Mr. Seif:

1. What is your full name and address? Answer: Thomas L. Orr, Woodland Road, East End, Pittsburgh, Pennsylvania.

2. By whom are you employed and in what capacity? Answer: By Mellon National Bank of Pittsburgh as Vice President and Cashier.

3. On or about November 29, 1941, did you receive from the Westfield Trust Co., of Westfield, N. J., a check in the sum of $667.42, payable to the order of Automobile Finance Co., of Pittsburgh, Pa.? Answer: I did.

4. What kind of a check was it? Answer: I have no record of that as the check was not described in the inclosing letter. My recollection is that it was a treasurer's check of the Westfield Trust Company.

5. What did you do with said check? Answer: I handed it with the accompanying letter to Mr. Berryhill of our collection department.

6. If this check was tendered to any one, state name of person, date, place and time of such tender. Answer. I do not know to whom or where the check was tendered as this was handled by Mr. Berryhill.

7. What final disposition was made of said check? Answer: The check was disposed of by Mr. Berryhill.

CROSS INTERROGATORIES

1. Did you in person present the check of Westfield Trust Company in the sum of $667.42 to Automobile Finance Co.? Answer: No.

2. At what address did you present said check? Answer: I did not present it.

3. Give the full name of the person to whom said check was tendered by you at the address stated in the preceding interrogatory. Answer: No one.

THOMAS L. ORR,
Witness.

W. E. BERRYHILL, having been duly sworn by Mr. Seif, orally and verbally answered interrogatories submitted as follows:

INTERROGATORIES

By Mr. Seif:

1. What is your full name and address? Answer: William E. Berryhill, 40 Walnut Street, Crafton, Pennsylvania.

2. By whom are you employed and in what capacity? Answer: Mellon National Bank, Pittsburgh, Managing Head of Collection Department.

3. On or about November 29, 1941, did you receive from the Westfield Trust Co., of Westfield, N. J., a check in the sum of $667.42, payable to the order of Automobile Finance Co., of Pittsburgh, Pa.? Answer: We did.

4. What kind of a check was it? Answer: Our records show it to be a bank check. A bank check could be a treasurer's check or the bank's draft on a New York bank or other bank.

5. What did you do with said check? Answer: Upon receipt of the check, we communicated with

the office of the payee by telephone, and our records show that we talked with a Mr. Lancaster and notified him of receipt of this check for delivery to the payee upon their surrender of a certain contract signed by Joseph A. Natale. Mr. Lancaster answered, stating that he could not accept this check for the reason that Mr. Joseph A. Natale had two cars with them, and they therefore would not surrender the contract on the one car until both were satisfied.

6. If this check was tendered to any one, state name of person, date, place and time of such tender. Answer: We tendered the payment by 'phone to Mr. Lancaster, our records show, on December 1st, 1941, at the office of the payee, Pittsburgh, Pennsylvania.

7. What final disposition was made of said check? Answer: The check was returned by mail December 1, 1941, to the Westfield Trust Company, Westfield, New Jersey, with the statement that its acceptance was refused.

CROSS INTERROGATORIES

1. Did you in person present the check of Westfield Trust Company in the sum of $667.42 to Automobile Finance Co.? Answer: No, not in person, because they had refused acceptance by telephone.

2. At what address did you present said check? Answer: At the office of the payee, Pittsburgh, by telephone as hereinbefore stated.

3. Give the full name of the person to whom said check was tendered by you at the address stated in the preceding interrogatory. Answer: I don't know his full name but his last name was Mr. Lancaster.

WILLIAM E. BERRYHILL,
Witness.

Commission for Examination.

I, Mary W. Tuttle, having been first duly sworn by Commissioner Charles Lysle Seif, hereby certify that I made stenographic notes of the interrogatories and answers heretofore set forth, and that the foregoing is a true and correct transcript of the same.

MARY W. TUTTLE,
Stenographer.

I hereby certify the foregoing to be a true and correct transcript of the questions asked and answers made.

CHARLES LYSLE SEIF,
Commissioner.

Commission for Examination of a Witness Out of the State.

The State of New Jersey to Charles Lysle Seif, Esq., of the City of Pittsburgh, in the State of Pennsylvania, GREETING:

Know ye that we, in confidence of your prudence and fidelity, have appointed you and by these presents do give unto you, full power and authority diligently to examine W. E. Berryhill, of the City of Pittsburgh and State of Pennsylvania, upon certain interrogatories to be exhibited to you, as well upon the part of the plaintiff, as upon the part of the defendant, in a certain action at law now depending in our said New Jersey Supreme Court, wherein Joseph A. Natale is plaintiff and Automobile Finance Co., a corporation of the State of Pennsylvania and Wilber D. James are defendants, And therefore we command you that, at certain days and places to be appointed by you for that purpose, you do cause

the said witness to come before you and then and there examine said witness upon oath or affirmation first having been taken before you, and that you do cause the same to be reduced to writing and signed by said witness and yourself; and when you have so taken such depositions you are to send them to us in our said New Jersey Supreme Court without delay, closed up under your seal, distinctly and plainly set together with the interrogatories and this writ. And we further command you, before you act in or be present at the swearing or examination of any witness, you do take the oath, or, if conscientiously scrupulous of taking an oath, then an affirmation, faithfully, fairly and impartially to execute this commission, and that you take such oath or affirmation before any person lawfully authorized to administer an oath or affirmation in the State of Pennsylvania, where you reside.

WITNESS, THOMAS J. BROGAN, ESQ., Chief Justice of our said Supreme Court, at Trenton, this day of October, 1943.

JAMES J. GAVIN,
Clerk.

CHARLES D. MERZ,
Attorney of Plaintiff.

Interrogatories and Answers.

Filed November 1, 1943.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES,

Defendants.

INTERROGATORIES AND ANSWERS

Interrogatories administered at 2:30 P.M., October 26, 1943, at the Mellon National Bank, Pittsburgh, Pennsylvania, to, and answers given by, Mr. William S. Berryhill, of the City of Pittsburgh, State of Pennsylvania, a witness produced, sworn and examined, upon the part of Charles D. Merz, Attorney for and on behalf of Joseph A. Natale, the Plaintiff, in a certain cause now pending in the New Jersey Supreme Court of the State of New Jersey between the said Joseph A. Natale, plaintiff, and the said Automobile Finance Co., a corporation of the State of Pennsylvania, and Wilber D. James, defendants, before Charles Lysle Seif, Esq., of the City of Pittsburgh, appointed in that behalf pursuant to a rule of said New Jersey Supreme Court.

INTERROGATORIES

By Mr. Seif:

1. What is your full name and address? Answer: William E. Berryhill, 40 Walnut Street, Crafton, Pennsylvania.

2. By whom are you employed and in what capacity? Answer: Mellon National Bank, Pittsburgh. Manager, City Collection Department.

3. On or about November 29, 1941, did you receive from the Westfield Trust Company of Westfield, N. J., a check in the sum of $667.42, payable to the order of the Automobile Finance Co., of Pittsburgh, Pa., together with a certain letter of instructions? Answer: Yes, I received the check accompanied by a letter of instructions from the Westfield Trust Company, dated November 29, 1941, requesting the Mellon Bank to present a check in the amount of $667.42 and an insurance certificate to Automobile Finance Company, and to release both of them upon delivery of the cancelled contract on Joseph A. Natale Account No. 28597-25, and the bill of sale on his 1940 LaSalle, which bears the serial number 4328171.

4. Was the nature of said check either a personal or bank check? Answer: A bank check.

5. Did you personally contact the Automobile Finance Co. by telephone, with reference to the tender of this check to the said payee company? Answer: Yes, I did, by telephone.

6. If so, please state the date of this telephone call, exact number you called, street address of telephone number as listed in the Pittsburgh telephone directory and the name of the person or persons with whom you talked. Answer: December 1st, 1941, I phoned the office of the drawee,

obtaining their telephone number from the Pittsburgh telephone directory, and I talked to a Mr. Lancaster.

(a) Whom did you ask for upon being connected with this number? Answer: I told them I wanted to talk to someone regarding a payment, and Mr. Lancaster was put on the line.

CROSS INTERROGATORIES

1. On or about November 29, 1941, did the Mellon National Bank of Pittsburgh, Pennsylvania, by whom you were then employed have a telephone switchboard through which all outgoing calls were made? Answer: No. We had a switchboard but it was used only for long distance calls. City or local calls were made through the deal telephone direct.

2. When you want to be connected with a number outside of the Mellon National Bank, do you request the telephone operator to obtain the number for you, and to call that number? Answer: No. Only on long distance calls. All local calls are handled through the dialing system direct.

3. If your answer is yes, was such a procedure followed on or about November 29, 1941, by you, and did you personally request your telephone operator to call the number of Automobile Finance Company? Answer: No, I used the dial phone.

4. In giving your answer to interrogatory number 3 propounded by the plaintiff, state whether or not you personally received the check mentioned therein? Answer: Yes.

5. Are the answers given to the interrogatories propounded by the plaintiff, and the cross-interrogatories propounded by the defendant, based upon your own personal knowledge, or were your answers given as a result of referring to

records and papers not made by you? Answer: Yes, partly from my own personal knowledge and partly from reference to records. The records to which I referred were made by me personally, and I referred also to a copy of the letter of instructions from the Westfield Trust Company of Westfield, N. J., dated November 29, 1941, inclosing the check covering this payment.

6. Was the answer given by you to interrogatory number 6 propounded by the plaintiff based upon your own personal knowledge at the time you gave your answer, or were you obliged to consult records or other papers to obtain the answers? Answer: Yes, from my own personal knowledge, after my memory was refreshed, after consulting the records.

WILLIAM E. BERRYHILL,
Witness.

I, Mary W. Tuttle, having been first duly sworn by Commissioner Charles Lysle Seif, hereby certify that I made stenographic notes of the interrogatories and answers heretofore set forth, and that the foregoing is a true and correct transcript of the same.

MARY W. TUTTLE,
Stenographer.

I hereby certify the foregoing to be a true and correct transcript of the questions asked and answers made.

CHARLES LYSLE SEIF,
Commissioner.

Rule to Show Cause why a New Trial Should Not be Granted.

Filed May 19, 1944.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES,

Defendants.

This matter being opened to the Court on the motion of Charles D. Merz, attorney for Plaintiff, above named, made within six days after trial of the said cause at circuit,

IT IS, on this 16th day of May, 1944, ORDERED that the defendants show cause before the Court, at the Court House, in the City of Somerville, N. J., on the 19th day of June, 1944, at 10 o'clock in the morning, or as soon thereafter as counsel can be heard, why the verdict entered should not be set aside, and a new trial granted; and it is further

ORDERED that the Plaintiff's exceptions to the refusal of the Trial Judge at the Trial of said cause to direct a verdict for the Plaintiff at the close of the whole case, when moved so to do by the counsel of Plaintiff be, and they hereby are reserved.

J. WALLACE LEYDEN,
C. C. J.

Reasons.

Filed May 19, 1944.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES,

Defendants.

Application for a new Trial in the above stated cause having been made and a Rule to Show Cause having been issued by the Court, the Plaintiff does hereby state Reasons for such application:

1. Injustice has been done by the course of the Trial and the Verdict and that the Plaintiff has been deprived of clear and important principles of law.

2. Extrinsic circumstances may and should have been introduced with reference to the construction of the lease agreement, conditional sales agreement or contract, whichever would be its proper identification.

3. Trial Judge erred in refusing Plaintiff the privilege to amend complaint at the outset of the Trial to include Punitive Damages.

4. Trial Judge erred in refusing to submit the controversy to the Jury with proper instructions.

Reasons.

5. Trial Judge erred in directing verdict in favor of defendants since the issue involved was one of fact and for a Jury to decide whether the contract or agreement was in fact a lease agreement or a conditional sales contract.

6. Trial Judge erred in refusing to allow the Jury to arrive at verdict resting on inferences such as a Jury is authorized to draw.

7. Witness for Defendants committed Perjury in swearing against his own previous personal attestation, thereby furnishing a peculiar case requiring special investigation and a new trial should be granted. This perjury affected vital testimony in the Trial.

8. Trial Judge erred in refusing to admit in evidence letter of November 10, 1941, which establishes a supplemental agreement or Novation.

9. Insufficiency of evidence due to the result of mistake, which the Court can see caused the exclusion of vital evidence,

(a) Lack of oath on depositions from Pittsburgh

(b) Vital papers necessary for trial not in Court Room but in Trenton, N. J. at time of trial

(c) Arbitrary agreement as to value of automobile of $700.00 due to lack of witness and expert testimony which would have been secured by a postponement.

10. Trial Judge erred in admission of agreement in evidence inasmuch as said agreement is purely fictitious, defective and a nullity, wherein leasor Jack's Garage warrants that he has good and valid title to said automobile and can make valid transfer of same, whereas by the record he

Reasons.

never held title to the automobile either before the time of signing, or at the time of signing or at any time subsequent thereafter. As proven by the record, title for the said automobile was vested in the name of the plaintiff on September 16, 1941, three days before the signing of the agreement and conveyed to the Plaintiff by the Metropolitan Buick Co., of Pittsburgh, a third and disinterested party, free and clear of all debt.

11. Trial Judge erred in the admission of the promissory note which was a part of said agreement and attached thereto and was given on account of the signing of the said lease agreement, being non-effective inasmuch as no consideration passed from leasor to leasee.

12. Assuming that agreement was valid, plaintiff under bailment lease still has rights under lease even after one or more instalments are in default and after repossession has taken place.

13. Trial Judge erred in refusing to direct verdict in favor of Plaintiff.

14. Trial Judge erred in admitting in evidence agreement offered by defendants since leasor did not have title or ownership of car which he conveyed.

15. Trial Judge erred in not striking out the testimony of witness for defendants, one Rich.

16. Trial Judge erred in refusing to direct verdict against defendant Wilber D. Janes, since he offered no defense at all.

17. Trial Judge erred in refusing to admit depositions taken in Pittsburgh, Pa.

18. Verdict was against the weight of evidence.

CHARLES D. MERZ,
Attorney for Plaintiff.

Opinion on Rule to Show Cause for New Trial.

NEW JERSEY CIRCUIT COURT

SIXTH JUDICIAL DISTRICT

J. Wallace Leyden
Circuit Court Judge

Chambers, 210 Main Street
Hackensack, N. J.

June 27th, 1944

William D. Merz, Esq.
186 William Street
Scotch Plains, N. J.

Charles Blume, Esq.
1180 Raymond Boulevard
Newark 2, N. J.

re: Natale v. Automobile Finance Company

I have again reviewed this case in the light of the arguments advanced and the memoranda submitted on the rule.

In the final analysis the plaintiff's argument amounts to the statement that if he is permitted to again try the case, he will do much better the next time; that certain difficulties of proof will be overcome and that the matter will be presented in a more plausible way. Such an argument could, of course, be made after the trial of every case as hindsight is better than foresight, but it presents no legal basis for upsetting the judgment in favor of the defendant. The arguments that the plaintiff will be in a position to prove a novation at a new trial and that the witnesses for the defendant, called by the plaintiff, committed perjury, are without merit. The plaintiff here seeks to do the impossible. He is bound by the contract he entered into and estopped by his conduct from asserting otherwise. If the matter were re-litigated, there is a grave probability that the plaintiff would find himself saddled with a

verdict against him on the counterclaim in a sum greater than the loss which he insists he suffered by reason of the re-possession of the vehicle by the defendant finance company.

The rule will be discharged, but without costs.

Very truly yours,

J. WALLACE LEYDEN.

L:H

Judgment.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES,

Defendants.

This action was tried before the Honorable J. Wallace Leyden, Circuit Court Judge, designated to try said cause, at the Somerset Circuit on the 20th day of March, 1944.

Said Judge directed the jury to return a verdict against the plaintiff on the complaint and the jury did accordingly return a verdict against the plaintiff and in favor of the defendants.

The defendants voluntarily and without prejudice withdrew their counterclaim.

Subsequent to the rendition of said verdict a Rule to Show Cause why the verdict should not

be set aside and a new trial granted was allowed the said plaintiff which said Rule was argued before J. Wallace Leyden, Circuit Court Judge before whom the case was tried and the Court having heard the argument of counsel and having duly considered the reasons filed ordered said Rule to Show Cause discharged by order filed during the May Term 1944 of the Supreme Court.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the said defendants, Automobile Finance Co., a corporation of the State of Pennsylvania and Wilber D. Janes do recover of the said plaintiff, Joseph A. Natale their costs which have been taxed at the sum of fifty seven dollars and fifty cents.

Costs 57.50

Judgment entered and signed July 12, 1944, as of March 28, 1944.

THOMAS J. BROGAN,
Chief Justice.

Notice of Appeal.

Filed March 21, 1945.

NEW JERSEY SUPREME COURT

COUNTY OF SOMERSET

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO., a Pennsylvania corporation, and WILBER D. JANES,

Defendants.

To: Automobile Finance Co., or
Charles Blume, Esq.
Estelle Ave.
Plainfield, N. J.

SIR:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause, Joseph A. Natale, hereby appeals to the Court of Errors and Appeals, the last resort in all causes, from the whole of the judgment entered in the New Jersey Supreme Court of the County of Somerset, rendered in the above entitled cause on the 21st day of March, 1944.

JOSEPH A. NATALE,
Attorney *Pro Se.*

Service of the within Notice of Appeal is hereby acknowledged this 14th day of March, 1945.

CHARLES BLUME,
Attorney for Defendants.

Grounds of Appeal.

Filed April 21, 1945.

NEW JERSEY COURT OF ERRORS AND APPEALS

ACTION AT LAW.

JOSEPH A. NATALE,
Plaintiff-Appellant,

vs.

AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania and WILBER D. JANES, individual,
Defendant-Respondents.

To: CHARLES BLUME, ESQ.
Attorney for Defendant-Respondents.

SIR:

The above named plaintiff-appellant Joseph A. Natale, assigns the following grounds on appeal from the whole of the judgment of the Somerset County Supreme Court, in the above entitled cause.

I. The refusal of the Trial Judge to direct a verdict in favor of the plaintiff-appellant after conclusion of the trial was a reversal error, upon which exceptions were taken and reserved.

1. Court erred in its adjudication of the case in arriving at the conclusion that the plaintiff-appellant had no cause for action and had not proven a case.

2. Court erred in directing the verdict in favor of the defendant-respondents at trial and in taking the case away from the jury. Factual questions were presented for a jury to decide.

Grounds of Appeal.

3. Court erred in the admittance to evidence of the lease agreement or contract as presented by the defendant-respondents, over the objection of plaintiff-appellant's counsel.

4. Court erred in its weighing of the evidence to find that the contract was in default and that it was thereby breached by plaintiff-appellant.

5. Court erred in the admittance to evidence of the promissory note and counterclaim over the objection of plaintiff-appellant's counsel.

6. Court erred in its refusal to give consideration and to admit to evidence the letter of November 10, 1941 which was presented by the plaintiff-appellant, said letter being issued by the defendant-respondent corporation and sent to plaintiff-appellant outlining the exact manner of payment acceptable to the defendant respondent corporation.

7. Court erred and thereby abused discretion in refusal to delay the verdict as requested by plaintiff-appellant to await delivery of vital papers which were being transferred from the Supreme Court Clerk's office at Trenton, N. J. to the Court House on the morning of the second day of the trial and before verdict was rendered.

8. Court erred in the refusal to admit to evidence the answers to interrogatories as administered to the Mellon National Bank of Pittsburgh, Pa., and directed to Mr. William S. Berryhill which were presented by the plaintiff-appellant at trial.

9. Court erred in the weighing of the evidence and testimony, the result of which was a verdict based on fraudulent evidence and testimony.

10. Court erred in the refusal to amend the

complaint to include exemplary and punitive damages.

11. Court erred in the refusal to grant a verdict against Wilbur D. Janes co-defendant-respondent, when moved so to do by counsel on the grounds that said co-defendant had not entered a defense. Reacting to the contrary the Court did render a verdict in favor of the co-defendant-respondent whereas he had entered no defense which is in direct contradiction to the law.

12. Injustice was done due to the course of the trial and the Court deprived the plaintiff-appellant of the protection of clear and important principles of law.

II. The disclosure at trial of newly discovered evidence affecting the contract in question constitutes grounds for the granting of a new trial. It could not have been previously ascertained by the plaintiff-appellant and is of such material nature that it could sway the entire verdict on a re-trial of the case.

III. Court abused discretion in the refusal to grant a new trial at the conclusion of arguments by counsel on the subsequent Rule to Show Cause.

1. Trial Judge erred and abused discretion in the refusal to give merit to the elements of perjury as indicated on the Rule to Show Cause.

2. Trial Judge erred and abused discretion in permitting verdict to stand when elements of fraud were clearly indicated to him on the Rule to Show Cause.

3. Trial Judge erred and abused discretion on the ruling that plaintiff-appellant was bound by the contract entered into and was estopped from asserting otherwise.

Grounds of Appeal.

4. Trial Judge erred and abused discretion on the ruling that Novation in the case was without merit after arguments by counsel on the Rule to Show Cause.

The above Grounds on Appeal may be entered in the manner as enumerated above or each sub-annotated ground may be considered as a distinct prime ground on appeal and subject to whichever manner the Reviewing Court may desire.

JOS. A. NATALE,
Plaintiff-in *Propria Persona.*

Service of the within Grounds of Appeal is hereby acknowledged on the 18 day of April, 1945.

CHARLES BLUME,
Attorney for Defendant-Respondents.

Testimony.

NEW JERSEY SUPREME COURT

SOMERSET COUNTY

ACTION AT LAW.

JOSEPH A. NATALE,

Plaintiff,

vs.

AUTOMOBILE FINANCE CO. OF PITTSBURGH, PA., and WILBER D. JONES,

Defendants.

Somerville, N. J.,
March 20, 1944.

Before—HON. J. WALLACE LEYDEN, Judge,
and a Jury.

APPEARANCES:

For the Plaintiff, CHARLES B. MERZ, ESQ.,
by HENRY HANDELMAN, ESQ.

For the Defendants, CHARLES BLUME,
ESQ.

(A Jury was accepted and sworn.)

(Mr. Handelman opened the case to the Jury.)

(Mr. Blume opened the case to the Jury.)

JOSEPH A. NATALE, the plaintiff, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct-examination by Mr. Handelman:

Q. Mr. Natale, where do you live? A. 58 Grove Street, North Plainfield.

Q. How long have you lived there, Mr. Natale? A. I would say now about a year and a half.

Q. You are the plaintiff in this action? A. No, I lived at 57 Washington then. Of course, I do not hear well. You will have to talk up.

Q. I say, are you the plaintiff in this action? A. Yes, I am.

Q. Where did you live in September, 1941? A. At 57 Washington Avenue, North Plainfield.

Q. In September, 1941? A. In 1941.

Q. And in September of that year where did you live? A. You just asked me September?

Q. Yes. A. All right. I lived there in September.

Q. Where did you live prior to that time? A. In Pittsburgh.

Q. Pennsylvania? A. Pennsylvania, yes.

Q. And what was your street address? A. 615 Island Avenue, McKees Rocks, Pennsylvania, which is a suburb of Pittsburgh.

Q. While you were in Pittsburgh did you purchase an automobile? A. I purchased many automobiles, but I had the DeSoto first. I bought a DeSoto.

Q. Never mind the DeSoto. The particular automobile in question in this suit, when did you buy that? A. Oh. Well, the exact date, as I can recall, a delivery was made to me on September 16, 1941.

Q. Whom did you buy the automobile from? A. From Jack McIliath, an individual that had a garage, known as Jack's Garage, but I found out later that he didn't have title to the car.

Mr. Blume: I object to what he found out later.

The Court: Yes. Strike it out.

Q. You bought the car through him; is that right? A. That is right. I bought it through him.

Q. Did you make any arrangements with him as to how much you were going to pay for the car, and how it was going to be paid for? A. That is right. I did.

Q. How much was the car to cost? A. $950.

Mr. Blume: I object to that.

Mr. Handelman: All right.

The Court: I will allow it.

Q. As the result of your negotiations with him did you finally obtain title to the car? A. Yes, I did.

Q. I show you these documents and ask you what they are, if you know? A. These are Pennsylvania titles, showing ownership of an automobile, in the State of Pennsylvania. The front side of the title—

Mr. Blume: I object. May I cross-examine first, please?

The Court: Objection sustained.

Mr. Handelman: If your Honor please, I would like to offer these in evidence, and I am willing to let—

The Court: Show them to counsel.

Mr. Blume: No objection to one. No objection to both of them.

(Papers marked Exhibits P-1 and P-2.)

Q. Now, Mr. Natale, will you please tell the Court and jury what those documents show?

Mr. Blume: I object to it.

The Court: Objection sustained.

Mr. Handelman: I withdraw the question.

A. This is a photostatic copy—

Q. Just a minute.

Mr. Blume: Just a minute.

Mr. Handelman: He does not hear well.

Q. Mr. Natale, as a result of your negotiations with Mr. McIliath did you finally obtain title to this car? A. Yes, I did.

Q. What did you do next? A. After arranging with McIliath to obtain the car, made all arrangements, we go to the Finance Company next for the balance of the money. I was not paying Jack McIliath in full; that is, I did not have all the money to pay for the car.

Q. Was this before or after you had obtained title? A. I gave him a deposit, gave him some more money, and then I got title. So then we go to the Finance Company and get the other $600., but I got title before we got the $600., if that is what you mean.

Q. Yes. A. Made arrangements with Jack McIliath to buy this car. I gave him $150., deposit, and I gave him some more and satisfied him, so I say to him, "If you have not the title"—

Q. Not what you said to him. After that did you go to the Finance Company? A. No; we went to get the title, because he didn't have it in his possession. The car was not in his name.

Q. Then you did obtain title? A. So then we went to another agency.

Q. Yes. A. The Metropolitan Buick Company.

Q. So that you obtained title? A. Surely. I got title direct from the Metropolitan Buick Company to myself, which is evidenced right here on the back of the title, of the Pennsylvania bill of sale. Then we go from there—oh, no; then I don't see Mr. McIliath for another two days. There was some trouble about getting it to the Finance Com-

pany, to get the rest of the money which was due him. In the meantime he had already said that the car was mine, and he had made changes to the striping of the car. So we go to the Finance Company on the 19th of September.

Q. What Finance Company was it? A. The Automobile Finance Company.

Q. And that is the defendant in this action? A. The defendant, yes, sir.

Q. What took place there? A. I had already talked to the vice president, Mr. Arthur Pivirotto, making arrangements for the financing of this car when we came. There was very little to be done.

Q. Did you know Mr. Pivirotto? A. Yes, I did, personally.

Q. Did you know what his position with the company was? A. Vice-president, and I think Assistant Secretary or Treasurer.

Q. Go on. A. McIliath was furnished with the other $600., so we had made arrangements to make the deal. So we go to the Finance Company, and we hand the Finance Company the bill of sale as received from Metropolitan Buick Company to me.

Q. Yes. A. That is, turned over to the Finance Company in order to get the other $600. Now, this is also designated on the back here, on this form here, showing the transfer of the title from the Metropolitan Buick to me.

Then on the 19th, whenever I encumbered the car, I signed here on the back of that same title, encumbering the item for—let me see—for $736., total to the Automobile Finance Company of Pittsburgh. Now, that is done in order to get another re-application of title. In other words, the title to the automobile has to be reassigned to

me, as another individual, but the application goes to Harrisburg, and from Harrisburg then they mail out a new title to the owner; so in signing here it authorized Harrisburg to issue a new title to me.

In doing that—the amount I assigned here, as to the encumbrance on the car. Well, now, they actually gave Jack McIliath $600., but including finance charges and the costs of the insurance and all, it came to $736.02. So they incorporated the full amount in the amount of encumbrance. I signed it. Down below here there is another place where you sign for the transfer of license plates from one car to another, as an owner. You must do that. So I filled this form and handed it to Mr. Hartwell, in the Automobile Finance Company's office.

Q. What was his position with the Finance Company? A. He was handling all details with registering and financing, although I had already received the O. K. from Mr. Pivirotto. Mr. Pivirotto had told him to go ahead with my finance, so he arranged the detail. At that time, after receiving the title, he goes back in the office and comes out with a check for $600. and hands it to Jack McIliath, and the check was made payable to Jack McIliath.

Q. Now, after this transaction, and the sending of these papers to Harrisburg, as you say, did you receive anything back from Harrisburg? A. Yes, I received a card, denoting ownership of the car, but that is not it. That just is an affidavit there from a Notary Public working in the Automobile Finance Company office, showing I had made transfer of plates, that I had to carry around with me in order for the police to be satisfied.

Q. You did not get a notice back from the Motor Vehicle Department, that the title had been transferred back to you; is that right? A. No. The only thing we got, the owner's card, and it is in the file somewhere. I had it there.

Q. Never mind. You got an owner's card? A. I got an owner's card.

Q. Showing title in whom? A. In my name, J. A. Natale, 9—or 615 Island Avenue, McKees Rocks.

Mr. Handelman: May I ask that that be produced?

Mr. Blume: I never got notice to produce it, counsel.

The Court: Is there any dispute about it?

Mr. Blume: I do not know what he is talking about. He said he got a notice from Harrisburg—we had nothing to do with that—that he is the owner of the car.

The Court: What difference does it make? Go ahead.

Q. Mr. Natale, after this deal was transacted what did you do with the car? A. Well, after the completion of the deal, I had told Mr. Pivirotto previously that I had to come down to New Jersey.

Q. What was the purpose of your coming to New Jersey? A. I had—primarily it was on account of my mother, that is, her physical condition.

Mr. Blume: I object to his bringing his mother in here.

Q. All right, Mr. Natale. At any rate, as a result of your conversation with Mr. Pivirotto, what did you do? A. I arranged to come down East here.

Q. Why did you talk to Mr. Pivirotto about coming down here?

Mr. Blume: I object to why he talked.

The Court: I will allow it. Go ahead.

A. Why did I talk with Mr. Pivirotto?

Q. Yes. A. Because I know it is illegal to take a car out of the state without written permission, or without some kind of permission from the Finance Companies; so at the time I made this transaction I explained to Mr. Pivirotto himself, personally, he and I standing in front of the counter, in his office, that I was coming down to North Plainfield, the office where I was coming to. I gave him the name of the company and address, the Carrar Trucking Company, in Watchung. I also told him that I had some financing to take care of on an apartment building I owned in Pittsburgh, that I was coming down here to try and refinance, or to try to get some money, to redeem this property.

Q. Mr. Natale, after you got here what did you do about notice, if anything? A. After I got here, for me to go to get my job with Alfred M. Greenfield—

The Court: Let us confine ourselves to this car, this bill of sale, and this promissory note, and this conditional sale or lease, or whatever it is. That is all I am interested in. That is all I will listen to. I do not care about jobs or mothers, or what not. Is that clear?

Mr. Handelman: Yes, sir.

The Court: All right.

Q. After you got here did you send the Finance Company a notice? A. Absolutely.

Mr. Blume: I object to it.

A. (Continuing) As soon as I was located in my new position.

The Court: Will you wait—

The Witness: Excuse me.

The Court: —until counsel has finished making an objection?

I will allow it. You may have an exception.

Mr. Blume: Allow me an exception.

The Court: Now you can go ahead.

Q. What was it? What was it that you sent to the Finance Company? A. What did I send to the Finance?

Q. Yes. A. A letter.

Mr. Blume: I object to what he sent.

The Court: I will allow it.

A. (Continuing) I wrote to the Finance Company.

Q. What was the purpose of your writing?

Mr. Blume: I object to the purpose of writing the letter. Under the cases it is improper to state the purpose of writing a letter?

Q. At any rate you wrote a letter, did you not? A. That is right.

Q. And you addressed it to the Finance Company? A. That is right.

Q. What was in the letter?

Mr. Blume: I object to it; no notice to produce the letter.

The Court: Objection sustained.

Mr. Handelman: I withdraw the question.

Q. While you were away, Mr. Natale, were you employed in New Jersey?

Mr. Blume: I object to the question.

A. Yes.

The Court: I will allow the answer to stand.

Mr. Handelman: I think, if your Honor please, that his employment is important because—

The Court: I am allowing the answer to stand. Do you want me to change my mind?

Mr. Handelman: No, sir, I do not.

Q. What was your position, Mr. Natale?

Mr. Blume: I object to what his position is; not binding on us.

The Court: I do not care what it was, but it may be interesting. I will allow it. Go ahead.

Mr. Blume: I take an exception.

The Witness: That is all he does, just objecting.

A. What was my position?

Q. Yes. A. I was in the industrial leasing department of Alfred M. Greenfield Company, in the Academy Building, in Newark.

Q. In connection with that position was it necessary for you to have a car?

Mr. Blume: I object to it.

The Court: How is that material?

Mr. Handelman: On the question of damage.

The Court: The damage is the value of the automobile.

Mr. Handelman: I think, plus the wrongful detention. Plus wrongful detention.

The Court: The wrongful detention, in my opinion, would be measured by the rental of a similar automobile at that time.

Mr. Blume: In other words, your Honor, damages for detention of cars are merely interest on the value of cars from the date of detention. There are New Jersey cases on that.

Mr. Handelman: It is my understanding, if your Honor please, he would be entitled to punitive damages.

The Court: Do you object to the question?

Mr. Blume: I do.

The Court: I will sustain your objection.

Q. Now, while you had the car here in New Jersey did you make payments in accordance with the terms of this contract?

The Witness: What do you say? Can I answer that?

Mr. Blume: I wish your Honor would stop the witness.

The Court: I will let him go so far, and then he won't have any case any more, if he interrupts like that again, Mr. Blume, so you need not worry. I will control the situation promptly and very expeditiously. Go ahead.

Q. While you had the car here in Jersey did you make payments on it? A. No.

Q. Why not?

Mr. Blume: I object to why not.

The Court: Objection sustained.

Q. In December of 1941 where was the car? A. In December, 1941?

Q. Yes. A. What date?

Q. December 23rd. A. Last time I saw the car I had parked it on the street, in Washington Avenue, in Newark, while going in to my office.

Q. Yes. And when you came out what happened? A. I came out to fill a one o'clock appointment. I go to where I had parked the car, and it was not there.

Q. What did you do? A. I became very excited, went to the police. It seems that there was a policeman on the second block.

Mr. Blume: Just a moment.

The Court: When you got to the police what did you do?

The Witness: I wanted to advise them that my car was missing.

Q. Did you so advise them? A. Yes. They told me—

Mr. Blume: I object to that.

Q. Not what they told you. A. I see. All right. Yes, I advised them.

Q. Now, was anyone there able to tell you what happened to your car? A. Yes.

Mr. Blume: I object to it.

The Court: I will allow it. I will allow it.

Q. Did you later find out what happened to it? A. Yes.

Q. Tell the Court and jury what happened to the car, if you know. A. Well, in arriving at the Auto Squad office in the Newark Police Department—

Mr. Blume: That is not responsive, your

Honor. He was merely asked, "What happened to the car, if you know?".

The Court: Do you know what happened to it? Do you know what happened to it?

The Witness: Well, now, I will hesitate on that answer.

The Court: Yes or no. Do you know what happened to it?

The Witness: I think the Automobile Finance Company have the car, took the car, yes.

Q. Do you know who took it? A. Yes.

Q. Who? A. Wilber D. Jones of Newark.

Q. Do you know what he did with it? A. He sent it back to Pittsburgh, made two different statements.

Q. After the car was sent back to Pittsburgh did you attempt to contact the defendant Finance Company? A. Did I do what?

Q. Did you contact the Finance Company? A. Oh, yes, numerous occasions.

Q. When was that? On what day? A. When?

Q. Yes. A. The very day they took the car I called long distance from my office.

Q. Whom did you talk to? A. First to Mr. Hartwell, the man whom I had done business with before.

Q. Did you recognize his voice? A. Yes, definitely.

Q. What was said? A. He transferred me to another man by the name of—I think his name was Michaels, an attorney for their company.

Q. Did you speak to Michaels? A. Yes. I wanted to know where the car was.

Mr. Blume: I object to any conversation with Michaels, unless he lays the founda-

tion, identifying Michaels, and identifying the voice.

The Court: No; I will allow it. I will allow it.

Q. What did you tell Michaels? A. I said to Michaels—I asked him if he had taken the car. He said he didn't know. Now, he told me something else. Shall I say that?

Q. Yes. What else did he tell you? A. He said, "But if we do have the car, you can be assured that it will stay and remain in the State of New Jersey for ten days."

Q. Did it remain in New Jersey for ten days? A. No.

Q. Now, did you offer to pay them the balance due on the car at that time? A. Before and afterwards. They always knew I had—

Q. When was the first time you offered to pay the full balance due on this car? A. When was the first time? Back in November, November 12, 1941; and the 29th day of the same month I made arrangements with the bank to send them the money, and the check was sent to Pittsburgh, to pay off this account.

Mr. Blume: I ask that the statement be stricken out.

The Court: Yes, strike it out. Strike it out.

Mr. Handelman: If your Honor please, I would like to ask the defendants if they have a letter here from Charles D. Merz, Attorney, addressed to the Automobile Finance Company, at Stratford Avenue, Pittsburgh, Pennsylvania, dated February 2, 1942, concerning a 1940 LaSalle sedan, serial No. 4328171.

Mr. Blume: In connection with that demand or notice to produce, that was served upon me about 2:45 or 3:00 o'clock Friday afternoon. My man comes from Pittsburgh—after he had left Pittsburgh, and I had no way of getting in touch with him and finding out if we had such a letter. We do not know whether we have it or not.

Mr. Handelman: In the absence of the letter, may I introduce secondary evidence to show what the letter contained?

The Court: I think so.

Q. Mr. Natale, were you familiar with a letter which was sent by Mr. Merz, to the Automobile—

Mr. Blume: I object. There is no proof of sending any letter yet.

The Court: Let him finish the question.

Q. —which was sent to the Automobile Finance Company on February 2, 1942, concerning your car?

Mr. Blume: I object to that.

A. Yes, I am.

Mr. Blume: I object to the question on the ground that there is no proof that any such letter was sent.

The Court: I will allow it.

Mr. Blume: Is Mr. Merz here in court, if your Honor please?

The Court: Go ahead.

Q. I show you a copy of a letter dated February 2nd, addressed to the Finance Company, and ask you if that is the letter.

Mr. Blume: I object to it. There is no proof that we received any such letter.

The Court: I will allow it.

Mr. Blume: Or no mailing of any such letter.

The Court: You may have an exception. Go ahead.

A. Yes, that is a copy of the letter that Mr. Merz wrote to the Automobile Finance Company on February 2nd.

Mr. Handelman: May I have it marked in evidence?

Mr. Blume: I object to it going into evidence.

The Court: Objection sustained.

Mr. Handelman: May I have it marked for identification?

The Court: It may be marked for identification.

(Letter marked Exhibit P-3, for identification.)

Q. Now, subsequent to the sending of this letter, Mr. Natale, did you receive any communication from the Finance Company? A. Yes. I think I got a letter from the Finance Company, and I turned it over to Mr. Merz. So then he answered my letter.

Q. And what was the nature of the letter which you received from the Finance Company?

Mr. Blume: Let us have the letter. That will tell us what it says.

The Witness: If you have it there, I might identify it.

Q. Is this the letter, Mr. Natale? A. This is in answer to Merz's letter.

Q. Yes. A. I previously got another letter

from the Automobile Finance Company. Then we answered it, and this letter is an answer to the letter I just identified before.

Q. Now, what was in the letter that you received— A. As I remember, in that letter—

Q. Just a minute, now. In the letter you received did the Finance Company make any mention to you about payment for this car?

Mr. Blume: I object to it.

The Court: Objection sustained.

Q. At any rate, Mr. Natale, as a result of these letters, both to yourself and to Mr. Merz, what did you do about payment of the moneys due the Finance Company, if anything? A. I went to the Westfield Trust Company, in Westfield, New Jersey, and arranged to refinance the balance. I had a letter that was sent to me from the Automobile Finance Company, giving me the exact amount—

Mr. Blume: I object.

The Witness: All right.

A. (Continuing) I went to the Westfield Trust Company, and arranged to refinance the car. The amount of the refinancing, naturally, I had to have before me, and I couldn't give them the amount, to the bank, unless I knew what to ask for, so I produced a letter showing the balance that was due on this car, from the Automobile Finance Company. I showed this letter to Mr. Walsh of the bank, and also Mr. McCormack. I filled out an application, gave references, told them where I worked and where I lived, told them I had the car with me. After a day or so an appraiser comes to my house to appraise the car.

Mr. Blume: I object to any transaction with the bank.

The Witness: All right. I guess I am ahead of the story. O. K.

Q. Did you borrow the money from the bank? A. Yes. The bank O. K.'d it.

Q. What did you tell them to do with it? A. Notify Pittsburgh that they had the money ready.

Q. Do you know whether or not this was done? A. Yes.

Q. Do you know by whom it was done? A. By whom?

Q. Yes. A. Yes. Mr. Walsh of the Westfield Trust.

Q. I show you a telegram addressed to Mr. Merz, at Scotch Plains, and ask you if you know who sent the telegram? A. Yes. F. Michaels, the man that we had been conversing with. But this is after they took the car.

Mr. Handleman: Is there any objection to this?

Mr. Blume: I surely do object to it. I object to the telegram on the ground that there is no identification of Michaels. There is no signature on here. It is merely a lot of printed matter.

The Court: I sustain your objection.

Q. At any rate, Mr. Natale, did you ever receive your car back? A. No.

Q. Did you ever personally offer to pay the money due the Finance Company? A. I did.

Q. When? A. By telephone. I talked to Arthur Pivirotto, personally, at the Pittsburgh Athletic Club, in Pittsburgh. I got him on the telephone, and the day after the bank had sent him a wire telling him that they had the money.

Mr. Blume: I object to the bank—

The Court: Yes. Strike it out. Strike it out.

Q. Never mind what the bank did. What you did. A. All right. I talked to Arthur Pivirotto at the Pittsburgh Athletic Club, in Pittsburgh, asking him to please accept the money that I had ready for him on this pay off of this LaSalle car.

Q. What did he tell you? A. He refused it.

Q. Did he tell you why? A. He said that he thought I was sticking him with another car, another previous transaction that I had.

Q. Did he say anything about there being any more moneys due on this car? A. No.

Q. Did the Finance Company, after they had given you the amount due, and which amount you borrowed from the Westfield Bank, later give you any figure as to the amount due? A. I don't understand what you mean, Mr. Handelman.

Q. What is that? A. I don't understand that question now.

Q. In other words, at the time you first got the notice from the Finance Company as to how much was due, you went to the bank and arranged to borrow that amount of money, did you not? A. That is right.

Q. After you had borrowed it, did the Finance Company later again tell you about any other amount due? A. No.

Q. Did they still continue to insist that that was the correct amount? A. Presumably, yes.

Q. Did they ever ask you for any more money than the amount you borrowed? A. No.

Q. Now, I show you this shipment card and ask if you know what it is (handing card to witness). A. Pardon me?

Q. I show you that shipment card and ask if you know what it is? A. Yes.

Q. What is it? A. My personal belongings that were in the car were shipped back to me.

Mr. Blume: I object to the answer; not responsive.

A. (Continuing) It had this tag on there. That is all I know about it.

Mr. Blume: He is merely asking what that was. I do not see how it is binding on anybody, or what materiality it has in the case.

The Court: Then do not worry about it, Mr. Blume. I will allow it. Go ahead.

A. (Continuing) This tag was what he asked about, including my personal belongings as they were shipped back to me.

Q. Do you know who it was from? A. From that description on there, no. I never heard of the American Finance Company.

Q. The only dealings you had in this case were with whom? A. Automobile Finance Company of Pittsburgh.

Mr. Handelman: Is there any objection to the admission of this card in evidence?

Mr. Blume: If the Court will look at it. Of course, I object.

The Court: Objection sustained.

Q. Mr. Natale, have you ever refused to pay the amount due the Finance Company on this car?

Mr. Blume: I object to the question.

A. Never.

The Court: I will allow it to stand.

Mr. Blume: May I have an exception?

A. (Continuing) No.

Mr. Handelman: That is all.

Cross-examination by Mr. Blume:

Q. Mr. Natale, at the time you got possession of the automobile you resided in McKees Rocks, Pennsylvania? A. You will have to talk louder. I want to hear you over there.

Q. I am sorry. At the time you got possession of this automobile you resided in McKees Rocks, Pennsylvania? A. That is right.

Q. Is that near Pittsburgh? A. About four miles, yes.

Q. And did you sign this paper? A. Yes, I signed this paper.

Mr. Blume: Mark it for identification.

(Paper marked Exhibit D-1, for identification.)

Q. Did you sign a promissory note in connection with that paper? A. I signed papers in blank. I don't know what was in them. I just—they shoved three or four papers in front of me, and I signed them.

Q. How many cars did you buy in your lifetime? A. I bought 35 cars in my lifetime.

Mr. Handelman: I object to that.

The Court: I will allow it. I will allow it.

Q. How many cars did you buy on time?

Mr. Handelman: I object to that, if your Honor please.

The Court: I will allow it.

Mr. Handelman: I do not see what difference it makes.

The Court: He said he signed papers in blank, and I suppose counsel is going to demonstrate that he is quite familiar with the papers that he signed. Go ahead.

Q. How many cars did you buy on time? A. Three or four, maybe.

Q. More than three or four? A. I don't have an exact count. I never kept a record of them.

Q. Is there anything in this paper that you signed that isn't true? A. No. As to the amounts filled in, Jack's Garage, Liberty Avenue.

Q. Is the car described in there correct? Please look at the front, Mr. Natale. That is what you said you signed. A. Well, I want to look at the back. If there is any objection to that, I guess you might just tell me what I signed, and I will answer it. Yes, I signed that, and that is about the way it should be, although I did not fill in the amount.

Q. Is there anything any place in that contract that is not true, that is written in ink? A. Include fine print, too. I will ask you a question.

Q. You please answer a question. Is there anything in the contract that is not true? Did you write the fine print? As to what was filled in afterwards, or what?

Q. Everything that is in there. A. This whole contract is a fake, I will say this much. You got trick paragraphs in there. Now, why would I say it was true? You are asking me a direct question, "Is it true?" I say it is not true.

Q. Mr. Natale, I asked you one question. I asked you whether the writing in there, in ink, was in there when you signed it. A. Why don't

you distinguish that? I asked you if you meant the writing, and you would not answer me. The writing was not filled in all the way it should be, yes.

Q. Nothing wrong with it, is there? A. Not that I can see at the moment.

Q. Well, take a look at it, and take two moments, and tell us if there is anything wrong with it. A. All right. Yes, the writing that was put in after I signed it is O. K.

Q. So that, after making the June payment, the balance was $736.02, wasn't it? A. No.

Q. Didn't you sign a note for that amount? A. The balance—

Q. Didn't you sign a note for— A. —to be advanced was $600.

Q. Didn't you sign a note for $736.02? A. Including refinance charges and interest, yes.

Q. That is correct That is true, too, isn't it? A. Yes.

Q. I show you the note and ask you whether that is the note you signed? A. Yes. That was attached right to the bottom of it.

Q. Is there anything wrong with that note? A. No. I don't see anything wrong with it.

Mr. Blume: I offer it for identification.

(Paper marked Exhibit D-2, for identification.)

Q. You had another car at this time, didn't you? A. Yes.

Q. What kind was that? A. 1941 DeSoto.

Q. And you had plates on that car? A. I had what?

Q. Plates, license plates for it? A. Yes, I did.

Q. And you said that you owned this car on September 16, 1941; is that correct? A. Which car do you mean now?

Q. The LaSalle. A. Well, then, say LaSalle. Yes. I got title to it September 16th.

Q. What do you base your title on? A. The fact that the Metropolitan Buick Company there transferred the title over to me free and clear, right in the rear there. It is all plain, in writing.

Q. Are you referring to Exhibit P-1? A. Yes, this part of the exhibit right here.

Q. That is what you rely upon for title to the automobile; is that correct? A. That is all that is necessary, once—

Q. What? A. What was that question again?

Q. Is that what you rely upon as giving you title to the automobile? A. That is right.

Q. And you said you took possession of this LaSalle on September 16, 1941? A. That is right.

Q. Did you drive it that day? A. Yes, I drove it.

Q. Did you drive it the next day? A. Not the next day.

Q. Why didn't you drive it the next day? A. Because there had to be some painting done on the car, and Jack McIliath agreed to do that.

Q. You had plates on the car when you drove it, didn't you? A. I had Jack McIliath's plates on it.

Q. You didn't have your plates on it, did you? A. Not at that time, no.

Q. No. When did you put your plates on this car? A. What?

Q. When did you put your plates on this La Salle car? A. The day that the license plates were transferred, which is shown by the other date, right on the same certificate.

Q. What date was that? A. September 19th.

Q. September 19th? A. That is right.

Q. And that is the day you got your certificate

of title, isn't it, September 19th? A. No, I didn't get a certificate of title September 19th.

Q. When did you get it? A. I never got it.

Q. Right. A. It went to the Finance Company, which is the State law, with the encumbering.

Q. You did not have a certificate of title, did you? A. What?

Q. You never had the certificate of title, did you? A. I had an owner's card, which was sufficient in the State of Pennsylvania.

Q. You never had the certificate of title to this LaSalle, did you? A. In my name. It was made out in my name.

Mr. Handelman: I object to it. I do not see that it makes any difference as to who had actual possession of the certificate.

The Court: You brought that out. Go ahead.

Q. You never had possession of the certificate of title to this LaSalle, did you? A. Let me ask a question before I answer that.

The Court: You won't ask any questions. You are answering questions now.

The Witness: But he is mixed in his statement, your Honor. I don't know what he means. I want to make it clear and concise, as to how that certificate of title had—my name appeared on that title, but I did not hold it long after it was issued to me.

Q. You never had possession of this title, did you? A. No.

Q. You knew that the Automobile Finance Company always had possession of the title,

didn't you? A. The title was in my name. They just held it in escrow.

Q. They held it in escrow. You had a written agreement with them to hold it in escrow? A. No written agreement.

Q. So that the first time your plates went on this car was on September 19, 1941? A. That is right.

Q. And that was after the Automobile Finance Company purchased the lease agreement which you signed? A. It was all done simultaneously.

Q. Now, at this time you had a DeSoto automobile, too, didn't you? A. Yes.

Q. Is that correct? And that was being financed by the Automobile Finance Company? A. That is right.

Mr. Handelman: I object to that, your Honor. What difference does it make whether he had another car or not?

Mr. Blume: He brought it out in this case.

Mr. Handelman: No, I did not. The only question involved here is the question of this particular car, if your Honor please.

The Court: That is right. What is your purpose?

Mr. Blume: It was brought out. I want to show—all right. I will withdraw the question.

Q. Mr. Natale, now, you said on November 10th—I believe that is the date—that you offered to pay to the Automobile Finance Company the balance due on the car; is that correct? A. Which car?

Q. Which car were you talking about? A. Which car? You are asking the question. Which car are you talking about?

Q. When you made that statement what car were you referring to?

The Witness: Your Honor, I don't know what he means.

The Court: Well, tell us you don't know, then.

Q. You don't know. All right. Did you go to Pittsburgh personally, and offer $736.02 to the Automobile Finance Company? A. Not personally, no.

Q. On December 23, 1941 you were in arrears for the payment which was due October 25th and November 25th, weren't you? A. Yes.

Q. That is correct, isn't it? A. Sure; two months.

Q. You said you knew Mr. Pivirotto personally; is that correct? A. Yes. We had a speaking acquaintance. He knew me, and we shook hands quite cordial at times.

Q. How many times had you met up until today? A. How many times had I met him?

Q. Yes. A. Well, I don't know. It is just being around Pittsburgh, having seen him around the office, and different gatherings.

Q. How many times had you spoken to him up until Tuesday, from the first time you knew him? A. I would say half a dozen times, sure, if you just want a scheduled amount.

Q. You know him when you see him, don't you? A. Yes, I do.

Q. Do you see him here today? A. Yes, he is here.

Q. He is here, all right? A. Yes.

Q. Point him out, will you? A. What?

Q. Point him out. A. The second row from the

back, the first man sitting there, with his hand up to his mouth.

Q. That is correct. And you saw him this morning when he came into court, didn't you? A. Yes; I recognized him.

Q. How many times did you speak to him over the telephone? A. Once, that I know of, definitely. If you want the date, that is when I talked to him. Verbal telephone, you mean, in Pittsburgh?

Q. Yes. A. Numerous times.

Q. That is before you came to New Jersey? A. That is right.

Q. You said you had in writing the consent to take the automobile out of the State of Pennsylvania? A. I didn't say I had it in writing. Never said that.

Q. You have not got a written consent to take the car out? A. No; I never said that.

Q. But you have not got a written consent, have you? A. No.

Q. Now, when you spoke to Mr. Pivirotto about taking the car out to New Jersey, did you intend to move out of Pennsylvania? A. I didn't know at that time.

Q. You did not know at that time whether it would be permanently or not? A. No.

Q. But after you came to New Jersey you knew it was going to be permanent, didn't you? A. After my job arrangements were complete I figured I would stay here, yes.

Q. You did not return the car to Pittsburgh then, did you? A. Not necessary when I sent the money to pay for it.

Q. You sent the money? A. Yes.

Q. You personally sent the money? A. The Westfield Trust Company sent him the money. I

had to keep the car here and I had to get license plates for my car.

Q. When you say Westfield Trust Company sent the money— A. For my account.

Q. Did they send $736.02? A. That exact amount he asked for.

Q. No. A. No. We did not send $736.

Q. That is the amount due on your note, isn't it? $736.02 is the amount due on your note, isn't it? A. What about the letter? They say how much.

Q. Isn't that correct, sir? A. Yes, that is the amount of the note. They changed that figure.

Q. Now, you do not have a letter here or anything to show that they changed that figure, have you? A. Yes; right there. I think my attorney will show it to you.

Mr. Blume: Do you have the letter?

Mr. Handelman: I have that letter, and intend to offer it as soon as you are through.

Mr. Blume: All right. That is all I want to know.

Q. You had signed other leases like that which is marked for identification, D-1, hadn't you?

Mr. Handelman: I object to this, if your Honor please. What difference does it make whether he signed others or not?

The Court: How is this material?

Mr. Blume: I want to show his familiarity with these instruments.

The Court: All right. I will allow it.

Q. Didn't you sign other instruments before this, like this lease? A. With the same company, you mean?

Q. Same company and other companies. A. Yes, I have signed bailment lease agreements, yes, for the financing of cars, if that is what you want to try to bring out.

Q. That is correct.

Redirect-examination by Mr. Handelman:

Q. Now, Mr. Natale, did you receive a letter from the Automobile Finance Company concerning the amount due from you to them?

Mr. Blume: I object.

A. Yes.

Mr. Blume: I object; improper redirect.

The Court: Oh, I will allow him to say that he received such a letter.

Q. I show you a letter dated November 10, 1941, and ask you if that is the letter? A. Yes, it is.

Q. And do you know the gentleman who wrote it? A. No, sir. O'Brien was another name foreign to me. I don't know him.

Mr. Handelman: I would like to offer this letter in evidence.

Mr. Blume: If the Court thinks it is proper redirect, I have no objection. I objected to it as not being proper redirect.

The Court: Do you object to this letter?

Mr. Blume: Yes, sir.

The Court: You had better. I mean you cannot make one objection, you know, to one question, and then think it is going to last you all day.

Mr. Blume: I make an objection to the introduction of the letter. It is improper, at this time.

The Court: I think it is, too. I will sustain your objection.

Joseph A. Natale—Redirect.

Q. Mr. Natale, in the communications which you received from the Finance Company, and as a result of your calls, were you told the amount due on this car?

Mr. Blume: By whom? Where and when, may I ask?

By the Court:

Q. As a matter of fact, you did not have to be told how much was due on the car at all, did you? A. Yes.

Q. You did? A. Yes. That is customary in a car financing. There is always a pay off amount.

Q. All right. Let you and me have a little talk here. You borrowed $736.02 from this finance company, putting up your car as security, did you not? A. Yes.

Mr. Handelman: I think, if your Honor please—may I interrupt for a minute? But he did not get that much money, your Honor. I think it is important.

The Witness: I only borrowed $600. of it.

The Court: Are you making a point about that?

Mr. Handelman: Yes. That is the reason I intended to interrupt.

Q. Well, you know, don't you, Mr. Natale, that when you borrow money and put up a car as security, that they insure the car, so they won't lose anything? A. That is right.

Q. And you know you pay that? A. Yes.

Q. And you also know that they are in business to make money? A. That is right.

Q. And they charge you finance charges? A. Yes.

Q. So that you knew when you borrowed this $600. that you would have to pay more than $600. back? A. That is right.

Q. Wouldn't you? A. That is right.

Q. You knew you would have to pay $736.02 back; that is true? A. If I lived out the contract.

Mr. Handelman: That is right.

Q. All right, if you lived out the contract. And you also agreed to pay them back at the rate of $40.89 a month? A. That is right.

Q. And you did not pay them back one cent? A. No.

Q. So that in November, when you are talking about how much is due, you knew that there was at least $736.02 due them, plus the penalty, five cents a day, for not making the two payments, I mean if you were going to wipe out your obligation and to pay the whole sum at once? A. Well, it was customary, your Honor, if I might go into that a little bit there, in paying for a car, from all experience I have had, in paying for a balance on a car, there is always a refund of amount, as—or a rebate, I might say, in insurance and also in interest rate, so that you get a new rate from the finance company. You always call up and ask what the payoff is on that particular financing contract, and they will tell you, which will be a lower rate than what you signed for originally.

Q. Did they give you an adjustment for paying it all off at once? A. In my case, paying it off at once, they gave me $666.42.

By Mr. Handelman:

Q. Mr. Natale, as you have just brought out, the reason why you wanted to pay them $667.64

was because of reductions; is that right? A. That is right.

Q. That was actually the amount due, then, was it not, at that time? A. That is right.

Mr. Blume: I object again to that question.

The Court: Yes. Objection sustained.

Q. Mr. Natale, do you know what the actual amount due them was at the time that you offered to pay them in November, 10th? Do you know? A. Did I know the exact amount?

Q. Yes. A. At that time? No.

Q. As a result of your communication with the company did you find out? A. Oh, after I received their letter, yes.

Q. And what was the exact amount necessary to pay the car off at that time?

Mr. Blume: I object to the question.

The Court: Yes. Objection sustained.

Mr. Handelman: If your Honor please, I think it is proper to show that the amount necessary to pay off at the time he asked for it, November 10th, was given to him by the company, and that he knew the amount at that time.

The Court: I sustain the objection. You may have an exception.

Mr. Handelman: Thank you. I will ask for an exception.

Q. Now, after you received this letter did you send the company any money? A. After I received the letter?

Q. The letter. A. The letter?

Q. Yes. A. I took that over to the Westfield at once.

Mr. Blume: He said that he did not send any money.

The Witness: No, I did not send them any money.

Q. Did you arrange to have that amount sent to them? A. That is right. I did.

Mr. Handelman: That is all.

JAMES E. WALSH, called as a witness on behalf of the Plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Handelman:

Q. Mr. Walsh, where do you live? A. Westfield, New Jersey, 627 Summit Avenue.

Q. Mr. Walsh, in 1941 what was your employment? A. Secretary of the Westfield Trust Company.

Q. Do you recall Mr. Natale, the plaintiff in this action, making application for a loan by the Westfield Company? A. Yes, I do.

Q. Can you tell the Court and jury when that was? A. November 22, 1941.

Q. Do you recall what the loan was for? A. It was to refinance an automobile that he had pledged with the Automobile Finance Company in Pittsburgh.

Q. What were you to do?

Mr. Blume: I object to what he was to do. I do not see how it is binding upon these defendants.

The Court: I will allow it.

Q. What were you to do with the money borrowed by Mr. Natale? A. We were to remit to

the Automobile Finance Company, obtain the bill of sale, security for our loan.

Q. What was the amount of the loan? A. Our loan?

Q. Yes. A. The proceeds was $667.42. That would be the amount we would advance.

Q. What was done with that amount? A. We issued a check.

Q. To whom? A. Payable to the Automobile Finance Company.

Q. In Pittsburgh, Mr. Walsh? A. Yes, in Pittsburgh.

Q. Was that check forwarded to the Automobile Finance Company? A. It was forwarded to the Mellon National Bank, in Pittsburgh.

Q. Were there any instructions? A. With instructions to deliver it to the Automobile Finance Company, against receipt of the bill of sale, which the Mellon National Bank in turn was to return to us.

Q. Which bill of sale? A. To a 1940 LaSalle automobole.

Q. And whose property was the automobile, if you know?

Mr. Blume: I object to that.

The Court: What is the question.

(Question read.)

Mr. Blume: It calls for a conclusion.

The Court: If he knows, I will allow it.

A. Well, it was not a matter of knowledge. We were informed it was Mr. Natale's automobile.

Q. What happened to the check, do you know? A. It was returned to us by the Mellon National Bank.

Q. Do you know why it was returned?

Mr. Blume: I object.

The Court: Objection sustained.

Mr. Handelman: That is all, Mr. Walsh.

(No cross-examination.)

(Recess.)

After Recess.

Mr. Handelman: Now, if your Honor please, unless Mr. Blume wants to recross Mr. Natale—

Mr. Blume: I want to examine Mr. Natale.

Mr. Handelman: All right.

JOSEPH A. NATALE, the plaintiff, resumes the stand and testifies further as follows:

Recross-examination by Mr. Blume:

Q. Mr. Natale, do you know the Central Discount Company? A. Do I know a Central Discount Company?

Q. Yes.

Mr. Handelman: I object, if your Honor please, unless it be shown it is going to be connected with this case in any way. What difference does it make whether he knows?

Mr. Blume: Very much; very much.

The Court: I will allow it.

Q. Do you know the Central Discount Company? A. Never heard of them.

Q. Do you know a man named Jacob Rich? A. I didn't hear that question.

Q. Did you know a man named Jacob Rich? A. Rich?

Q. Yes. A. Where at? Where is he from?

Q. Newark. A. Yes. I talked to a finance company in Newark. It seems I talked to a man by the name of Rich.

Q. What is the name of the finance company? A. I don't know the name.

Q. What address? A. Broad Street, some where.

Q. You went there for a loan? A. Yes, I did.

Q. And you told him you had this 1940 LaSalle automobile? A. That is right.

Mr. Handelman: I object, if your Honor please. I do not see what difference it makes with this case, whether or not he went to the Central Discount Company or any other company.

The Court: I will allow it.

Mr. Handelman: May I have an exception?

The Court: Certainly.

Q. You applied to them for a loan on the car, didn't you? A. Yes, I did.

Q. In what amount? A. I don't remember.

Q. Did you get your loan? A. I was not ready to accept it. Oh, yes, he said I had to have title from Pittsburgh, I had to have the title, so it was then that I wrote to Pittsburgh and tried to find out how much they would accept if they would send the title to me and arrange the detail.

Q. You told Mr. Rich that you owed money to the Automobile Finance Company in connection with this car? A. That is right.

Q. And at that time when you went to Mr. Rich you owed $736.02? A. I owed the same amount.

Mr. Handelman: I object.

The Court: I will allow it. I will allow it.

Q. Isn't that correct, sir? You owed $736.02 when you went to Mr. Rich for a loan? A. I don't know that I gave him a specified amount.

Q. But you did owe that amount? A. The same as it was from the beginning, yes.

Q. That is right. And you did not get your loan, did you? A. I didn't go ahead with it.

Q. You did not go ahead with it? A. No. I was not ready to accept the loan, even if he would have offered it. I just inquired as to whether or not it could be financed.

Q. You gave him all the details about writing to the company, didn't you? A. I gave him some information on it. Naturally, I would.

Q. And you never came back for the loan? A. No, because I could not get the title from Pittsburgh, yes.

Q. In other words, you wanted the title first; then you wanted to pay it? A. Sure; he wanted to see the title of ownership to the car.

Q. And you did not have it, did you? A. I didn't have it. It was in Pittsburgh, with the Automobile Finance.

Mr. Blume: That is all.

Redirect-examination by Mr. Handelman:

Q. Mr. Natale, in order to pay off this loan, did you owe the defendant Finance Company $736.?

Mr. Blume: I object to the question. He has answered he owed $736.02 four times, in my questioning.

The Court: I will allow it. Go ahead. You can answer it.

The Witness: Can I answer?

A. Did I owe $736.?

Q. Yes. A. There are two ways of answering that. At that precise moment, no.

Q. When you made your offer to pay, did you owe it at that time? A. Not that exact amount.

Q. Do you know what the amount was that you did owe?

Mr. Blume: I object to it.

A. I assume it would be the amount less the rebate.

Mr. Handelman: That is all.

Recross-examination by Mr. Blume:

Q. You said you personally made an offer to pay to the Automobile Finance Company? A. Personally?

Q. Yes. A. Yes, sir.

Q. Did you go to Pittsburgh and offer them the money? A. Over the telephone, Arthur Pivirotto.

Q. On what day was that? A. I can tell you exactly what day it was.

Q. Yes. A. Because at that time—

Q. On what day was it? Tell us. A. I will have to think and concentrate as to the date. I am going to give you the reason why I know the exact date, because it was Thanksgiving holiday here, and it was not Thanksgiving holiday in Pittsburgh. And when I made the phone call it was because our office was closed, and I called Pivirotto in Pittsburgh on Thanksgiving Day of 1941, and as it was in effect here, but not in Pittsburgh, so it must have been the 21st or the

22nd, the last Thursday in November, rather than the last Thursday—

The Court: You called on the New Deal Thanksgiving Day?

The Witness: That is right. You see, there was two Thanksgiving Days.

Q. You still had your car, didn't you? A. Yes.

Q. And you called Mr. Pivirotto and asked him what? A. To answer the wire that had been sent to him by the Westfield Trust Company, agree to accept the money that was ready for him.

Q. To accept— A. A telegram that was sent to him, had been sent a few days previous to that day.

Q. Did you see the telegram, sir, received by the Automobile Finance Company? A. Yes, the Westfield Trust Company—

Q. Did you see the telegram? A. Yes, I saw it being prepared, ready to go out. It was still in the bank.

Q. You do not know whether it was delivered, though, do you? A. I couldn't very well know if it was delivered. I was in Jersey.

Q. Did not see it go to the Western Union or Postal Telegraph, whichever one it was, did you? A. Through information received from the Westfield Trust Company, that is all I know.

Q. Someone told you that? A. I saw the telegram being prepared. I did not deliver it to the telegraph office.

Q. You just saw a blank with some writing on it? A. I think Mr. Walsh can testify to that.

The Court: Well, let us not worry about that.

Mr. Blume: That is all.

Mr. Handelman: That is all, Mr. Natale.

At this time, if your Honor please, I would like to read into the record the answers to these interrogatories, the interrogatories and the answers to them, concerning the transaction in Pittsburgh with this money.

Mr. Blume: I would like to see the interrogatories, and see whether they comply with the statute. Are these the originals? I object to them.

Mr. Handelman: I think I have the originals here. Here is one of them. Do you want to look at this one?

Mr. Blume: I object to those interrogatories, first, on the ground that there is no proof of a commission. Secondly, on the ground that there is no proof that the commissioner was sworn in accordance with the statute, under R. S. 2:100-20, which provides: the Commissioners appointed under this article shall, before they enter upon their duties, take an oath faithfully, fairly and impartially to execute the commission, which oath may be taken before any person lawfully authorized to administer an oath in the state or country, where such commissioner resides or may be at the time. There is nothing in here to show that such oath was taken by the commissioner.

Mr. Handelman: If your Honor please, in answer to that I may say that Mr. Blume had his opportunity to object to that on his motion, which he did not do, and, therefore, impliedly agreed that this should become part of the record.

The Court: I do not think there is any such implication as that, do you?

Mr. Handelman: There is a motion addressed to them, merely to strike out certain ones, the answers to certain interrogatories, which he claims were not proper.

Colloquy.

The Court: Then the next step, I suppose, is that the deposition of this witness—was it by deposition?

Mr. Handelman: Yes, it was.

The Court: —becomes evidential, and you must first offer it. Now, he objects to that offer, saying that you have not the original papers here, and apparently the commission was not executed properly, from what he says.

Mr. Handelman: Well, I have the original paper here, as a matter of fact, which recites—

Mr. Blume: I object to what it recites.

The Court: Of course the deposition should have been returned to the Clerk. Did you get it?

The Clerk: Not that I know of.

Mr. Handelman: Yes, it was filed.

Mr. Blume: Perhaps counsel has it. I don't know.

Mr. Handelman: The original was filed. That is a copy.

The Court: Have you the original there? Let me see it.

Mr. Blume: The statute requires that it be sent to the Clerk of the Supreme Court or Clerk of this court, and there to be held until the trial.

Mr. Handelman: I think that the originals are filed with the Clerk of the court. Under those circumstances I see no reason why we can't use these. They are exact copies.

The Court: How do I know that?

Mr. Handelman: Well, Mr. Merz is here. He drew them.

The Court: I mean I am not doubting your word at all, but how do I know it from a legal standpoint?

Mr. Handelman: Mr. Merz is the attorney who

drew them, and he is here, and I may be able to prove that through him.

As a matter of fact, your Honor, the originals stand without any alterations, and are filed with the Clerk without any answers being stricken from them.

The Court: Now, what is your point, Mr. Blume?

Mr. Blume: First, I object to the introduction on the ground that there is no proof that the commissioner, who is supposed to have been appointed, before he entered on his duties, as provided for in the Revised Statutes, 2:100-20, took an oath, faithfully and fairly and impartially to execute the commission. Furthermore, the paper which is offered shows no proof of ever being filed with the proper Clerk. In fact, everything is irregular in connection with it.

Mr. Handelman: Well, your Honor, he waived that, anything that might have been irregular, when he served the notice to strike out the answers to some of them.

The Court: Oh, I do not think so. I do not think that follows at all. That is a preliminary matter. Now you are at a point where they are either going to be evidential or not, and he says you have not complied with the statute. Taking the testimony of a witness out of the State is such an extraordinary thing that you ought to follow the statute.

Mr. Handelman: I think Mr. Merz is here and can testify that the statue was followed in this particular case.

The Court: How can he say that?

Mr. Handelman: Well, he is the man who prepared them.

The Court: The document itself, the deposi-

tions themselves, the questions and answers, as a document, returned by this foreign commissioner, has to speak for itself, hasn't it?

Mr. Handelman: Well, the original has been filed. It is on record in this court.

The Court: Have you it?

The Clerk: I do not think so, no.

Mr. Blume: In fact, there is no proof that they were ever filed with the Clerk. There is no stamp on it at all.

The Court: What do you mean, filed in Trenton?

Mr. Handelman: Yes.

The Court: It should be here.

Mr. Handelman: As a matter of fact, if your Honor please, the first ones were mailed direct to Trenton.

The Court: Have you the Revised Statutes there?

Mr. Blume: No, I have not. I will get them for you. I have what I just read.

The Court: Now you are offering this, what apparently is a copy of the papers?

Mr. Handelman: Yes, sir.

The Court: And you object?

Mr. Blume: I do.

The Court: I will sustain the objection.

Mr. Handelman: If your Honor please, I think it is important that we have these interrogatories and their answers, and since they are a matter of record of this court at Trenton, of course, I would like to have an opportunity to get them. It will only mean delay, but I think it is an important part of my client's case.

The Court: Well, they should be here.

Mr. Handelman: Well, I didn't think that there was going to be any objection, because Mr. Blume

had never mentioned in his notice of motion to strike out some of these answers, and I assumed that everything was all right.

The Court: A violent assumption.

Mr. Handelman: Perhaps so. But, nevertheless, that was my—

The Court: What do you want me to do?

Mr. Handelman: Well, I would like an opportunity to produce them.

The Court: And how is that going to work out as a practical matter?

Mr. Handelman: Well, that is where the trouble arises.

The Court: They should be here now. Well, what do you want me to do?

Mr. Handelman: Well, I think perhaps I can continue without them now, at this time, and I think I can get along without them.

The Court: All right.

Mr. Handelman: Thank you. Mr. Merz.

CHARLES D. MERZ, called as a witness on behalf of the Plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Handelman:

Q. Mr. Merz, what is your occupation? A. Attorney at law.

Q. And Where do you live? A. Scotch Plains, 186 William Street.

Q. Do you also practice in Scotch Plains? A. That is right.

Q. In November, 1941, did you represent Mr. Natale? A. I did not.

Q. And did you subsequently represent him? A. I did.

Q. Was it in connection with this particular case? A. That is right. Christmas Day, 1941.

Q. Did you with Mr. Natale go to Newark? A. Several times, for several days.

Q. And did you ever talk with Mr. Jones, the defendant in this action? A. I did, sir.

Q. And in those conversations when was the first time you talked with him? A. Oh, I would say between Christmas and New Year's.

Q. Of what year? A. 1941.

Q. 1941. And what was the purpose of your talking to him, Mr. Merz?

Mr. Blume: I object to the purpose.

The Court: Yes. Objection sustained.

Q. Did you ask him anything about the automobile involved in this case? A. I did.

Q. Particularly what did you ask him? A. I asked him where it was.

Q. What did he tell you? A. It had gone back to Pittsburgh, to the Automobile Finance Company.

Q. Did he tell you who had taken the car? A. A driver sent out from the home office in Pittsburgh, who came to Newark to drive it out to Pittsburgh.

Q. Did he tell you on whose behalf he seized the car? A. The Automobile Finance Company of Pittsburgh.

Q. Is that one of the defendants in this action? A. That is right, sir.

Q. Did you later, Mr. Merz, communicate with the Automobile Finance Company of Pittsburgh? A. I did, sir. You mean by telephone or—

Q. In what way did you communicate? A. Communicate by telephone and also by mail.

Q. Whom did you talk to, or to whom did you

write? A. The only person I spoke to there, that I know of, was a Mr. Michaels, the attorney for the Finance Company.

Q. What was the first time that you spoke to Mr. Michaels? A. The first and only time I spoke to him was the Saturday following Christmas of 1941, in the morning, around ten o'clock. I called him from Scotch Plains, at his office in Pittsburgh, and at the office of the Automobile Finance Company.

Q. Yes. And you talked to a man represented to be Mr. Michaels, you say? A. That is what the gentleman told me, yes, sir.

Q. Now, did you ask him about this car? A. I did.

Mr. Blume: I object to any conversation with this man Michaels. There is no foundation laid as to this witness knowing Michael's voice, ever having spoken to him before. He said he only spoke to him the one and only time, Saturday, at ten A.M., after Christmas.

The Court: All right, all right.

Mr. Handelman: All right.

Mr. Blume: Is your Honor ruling on my motion, or on my objection?

The Court: I am just telling you that I comprehend your objection.

Mr. Handelman: I have not asked him about any conversation.

The Court: Go ahead.

Q. As a result of your conversation what did you do, Mr. Merz? A. I waited for a phone call back from Mr. Michaels, that did not come in.

Q. And did you expect a phone call from him?

Mr. Blume: I object to what he expected, out of his own mind.

The Court: If he waited, I suppose he expected something. Go ahead.

A. Yes, I expected a phone call back from the man. The man promised to call me back at eleven o'clock.

Q. Did you receive the call? A. I did not.

Q. What did you then do? A. I endeavored to locate him on the telephone.

Q. Did you locate him? A. I did not.

Q. Having failed to locate him by phone, what did you then do? A. I subsequently—I believe the following month,—wrote him a letter, because that was the end of December, and I think it was early in January, as I recall it, that I wrote him.

Q. In the meantime had your client received any word from the company? A. No. I think he had a letter previous to that.

Q. I show you a letter dated February 2, 1942, marked P-3 in evidence, and ask you if this is a letter which you wrote to the defendant Finance Company? A. That is a copy of a letter that I had written by my office, addressed to the Automobile Finance Company, February 2, 1942.

Q. Did you yourself post this letter in the mail? A. I always post my mail in Plainfield, in the evening.

Mr. Handelman: I would like to offer this letter in evidence.

Mr. Blume: I object to the letter, as self-serving, under the cases, as his letter is after the controversy arose. It is dated February 2nd. The controversy arose on December 23rd, two months previous. Under the case of Rich v. Tanenbaum, 198 Atlantic, 240, according to this case, you cannot write a letter after the happening of

the acts complained of by us, and then use it himself as evidence of the existence of the facts therein stated in his own behalf. A party cannot make evidence in his own behalf. A vice which this rule seeks to prevent is the manufacturing of evidence by a party in his own behalf, after a controversy has arisen between him and the other party, of the matter or matters contained in the letter, writing, and that is certainly self-serving.

The Court: Let me see it. Is this a copy of the letter which you demanded produced?

Mr. Hendelman: Yes, it is.

The Court: I will allow it.

Mr. Bume: I take an exception.

The Court: You may have an exception.

(Paper marked Exhibit P-3.)

Q. Now, Mr. Merz, during the course of your dealing with the Finanec Company and with Mr. Michaels, the attorney, did you receive a telegram from him? A. Telegram and also a letter.

Q. Yes. Do you recall the telegram that you received? A. I will if I see it, sir. I have not seen it for some time. Yes, that is the telegram I got.

Q. Do you recall what was in the telegram? A. Yes, I can—you mean the contents of this telegram here?

Q. Yes.

Mr. Blume: I object to his reading it.

A. Yes. Do you want me to read it?

Q. If you will.

Mr. Blume: I object to reading it.

The Court: Objection sustained.

Mr. Handelman: I offer the telegram in evidence.

Mr. Blume: I object to the offer of the telegram. There is no proof—

The Court: Objection sustained.

Q. Mr. Merz, did you arrange, as a result of these conversations that you had, with whoever it was in the office of the defendant Finance Company,—did you arrange with Mr. Natale to forward the money there in payment for the moneys due on this LaSalle automobile?

Mr. Blume: I object to the question as leading. It is very much so.

The Court: I will allow it.

Mr. Blume: Exception.

A. I endeavored to make such arrangements.

Q. Do you know what happened to the money that was sent?

Mr. Blume: I do not see how he would be in a position to know. He had nothing to do with it.

A. No. That was before I got into the case.

Mr. Handelman: That is all.

Mr. Blume: That is all, Mr. Merz.

Mr. Handelman: Mr. Pivirotto.

Arthur M. Pivirotto—Direct.

ARTHUR M. PIVIROTTO, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct-examination by Mr. Handelman:

Q. Mr. Pivirotto, you are employed by the Automobile Finance Company of Pittsburgh? A. I am.

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

Q. And in November, 1941, were you the vice-president at that time? A. I was.

Q. Did you have employed by you a Mr. F. D. O'Brien? A. Yes.

Q. What was his capacity in the company? A. Clerk.

Q. And did he have authority to sign letters for the company? A. Yes.

Q. I show you this letter and ask you if that is Mr. O'Brien's signature? A. That I don't know.

Q. Is that a letterhead of your company? A. It is.

Q. Is that concerning the account of Mr. Natale in this action?

Mr. Blume: I object to that. It is not binding on us. He said he does not know his signature. He is reading from a paper there. There is no proof from the witness to bind the defendants.

The Court: I will allow it.

Mr. Blume: I take an exception.

Q. Will you answer the question? A. What was the question again?

Mr. Handelman: Will you please read the question?

(Question read.)

A. Yes, it is.

Q. Was that letter sent out from your office?

Mr. Blume: I object.

A. It is on our letterhead. I don't know whether it has been sent from our office or not.

Q. That is Mr. O'Brien's signature there? A. That is a signature.

Mr. Blume: I object to the question. He said he does not know the signature of Mr. O'Brien.

The Court: Go ahead.

Q. Do you or do you not know the signature? A. I do not.

Q. How long has he worked for you? A. He worked at the time just several months.

Q. But he was in your office at that time? A. In our employ.

Q. And he had authority, as you say, to send the letter out like this? A. That is right.

Q. And this letter concerned the account of Mr. Natale? A. That is right.

Q. Now, I ask you if you know about the account of Mr. Natale? A. In what respect?

Q. Well, were you familiar with his account? A. I had some knowledge of it.

Q. You know Mr. Natale, too, don't you? A. Only having seen him in the office.

Q. Yes. You recall talking to him about this car? A. Yes.

Q. Do you know on November 10th how much was due on this car if paid in full at that time, in 1941? A. I do not.

Q. Mr. Pivirotto, if the total amount of the note was $736.02 wouldn't there be an allowance off of that amount at that time if payment was made in full of the account? A. There would not.

Q. There would be no allowance for cash? A. There owuld be no allowance.

Q. No allowance for the finance charges? A. There would be no allowance.

Q. So that if Mr. O'Brien wrote that letter to Mr. Natale, he was wrong?

Mr. Blume: I object to it. It is argumentative.

The Court: Objection sustained.

Mr. Blume: He is making Mr. Pivirotto his witness.

Mr. Handelman: That is right.

Q. Now, were you in the company or in the offices at the time a check was tendered? A. I have no knowledge of any check ever being tendered.

Q. You have no knowledge about that? A. No.

Q. Did you authorize Mr. Jones or anyone in your company to pick up the car of this plaintiff, Mr. Natale? A. I did not.

Q. You did not. Did anyone else in the company authorize him to do it? A. I presume that our branch manager would.

Q. Who would that be? A. A Mr. Holmes.

Q. Do you know whether or not your company received the car? A. Yes. We did.

Q. Do you still have the car? A. We do not.

Q. Did you sell it? A. We did.

Q. Did you notify Mr. Natale that you were going to sell it?

Mr. Blume: I object. Nothing in the law says he has to.

The Court: Oh, I will allow it.

A. The question, please?

(Question read.)

A. That I don't know.

Q. Did you also have an attorney employed by your firm named Walter F. Michaels? A. We did.

Q. Are you familiar with his signature? A. I could not identify it, no.

Q. On February 5th, particularly, 1942, was he authorized to act for the company at that time? A. He was counsel.

Q. He was. I show you this letter and ask you if you know whether or not that is Mr. Michael's signature? A. I don't know.

Q. Now, Mr. Pivirotto, when a customer signs this so-called lease agreement with your company, he also gets a customer's copy, does he not, that is attached and separate—it is a separate agreement than this lease agreement, but is attached to it? A. He does not.

Q. I show you this form and ask you if this is a form used by your company. A. It is.

Q. And that is given to each customer, is it not? A. It is not given to the customer.

Q. What is done with it? A. Probably within a week's time it is sent through the mail.

Q. It is sent to the customer, isn't it? A. That is right. It is not given to him.

Q. That is part of his arrangement with your company? A. It is not part of the arrangement.

Q. Why is it sent to him, Mr. Pivirotto?

Mr. Blume: I object to the question.

The Court: I will allow it.

A. It is in accordance with the regulations W that the customer must have a copy of the transaction.

Q. That is a copy of the transaction? A. No. This up here (indicating).

Q. What is regulation W? A. It is a regulation passed by the Federal Reserve Board to con-

trol the amount of moneys lent—the amount of—the length of time that a note may be in existence.

Q. Yes. And this form contains certain notices to the customer, does it not, which are printed right on it; isn't that so? A. That is right.

Q. Is this the large one? A. Yes.

Q. Is this the one that was sent to Mr. Natale, as a matter of fact? A. I believe it was.

Mr. Handelman: I would like to offer that in evidence.

Mr. Blume: I object to it; not binding on the defendant. No signature on it. Merely a printed paper. Not a part of any contract.

The Court: I will allow it.

Mr. Blume: Exception.

(Paper marked Exhibit P-4.)

Q. It is part of this notice, is it not, Mr. Pivirotto, that "When all instalments have been paid our interest in the car will be fully released," isn't it? A. No, sir; that is not part of the lease agreement.

Q. No, but that is, as a matter of fact, your procedure, is it not? A. No, it is not.

Q. Do you mean to say that after a person pays for the car or pays the amount of moneys that you have in the car that is being financed, that you take the car back in every case? A. The lessee will present the car to us. In some instances we waive it.

Q. As a matter of fact, Mr. Pivirotto, in all instances where the full amount is paid, you transfer the title over to the purchaser, do you not? A. We do not.

Q. Did you or did you not tell Mr. Natale that you would turn this title over to him? A. I never

had any conversation with Mr. Natale about the title, with Mr. Natale.

Q. Wasn't the title of this car, Mr. Pivirotto, in Mr. Natale's name prior to the time he came to your company? A. It was not.

Q. You say that the title to this car was not in Mr. Natale's name? A. That is right.

Q. Whose name was it in, do you know? A. I don't recall, no.

Mr. Handelman: That is all.

Mr. Blume: That is all.

Mr. Handelman: If your Honor please, I understand now that a witness who has been subpoenaed here to testify as to the value of the car is not present in the court. I called him twice now and expected him here all the time, but he has not shown up.

The Court: Was he under subpoena?

Mr. Handelman: He is under subpoena.

The Court: Call him again. Maybe he is here now.

Mr. Handelman: Is there a Mr. Rosenblatt in court?

(No response.)

Mr. Handelman: He is under subpoena.

The Court: Did you pay him?

Mr. Handelman: I gave Mr. Natale the money to pay him, and I think he did.

Did you pay Mr. Rosenblatt?

Mr. Natale: Yes.

The Court: When was he served?

Mr. Handelman: I think on Friday.

The Court: Well, that is ample time. If he does not show up you can start a process of contempt on a motion, and I will take care of Mr.

Rosenblatt, if he has been subpoenaed and he did not show up. Nothing would please me more.

Mr. Handelman: That would be our case, with the exception of the testimony as to the value of the car.

The Court: It is quite an important element in your case, Mr. Handelman.

Mr. Handelman: Certainly, it is. Under the circumstances, all I can ask for is that we have some continuance. I am not in a position, unless there be someone here in court who knows the values of these cars. Mr. Walsh, do you know the value?

Mr. Walsh: I can't qualify.

The Court: Well, what do you say?

Mr. Blume: I ask for a nonsuit.

The Court: Now, don't go so fast.

How about the situation that they now find themselves in? Have we time?

Mr. Blume: Well, is it practical?

The Court: Are you asking me?

Mr. Blume: Of course, we have no objection to some time, but, as a practical matter, I don't know how it can work out.

The Court: Well, he is faced with this, that you apparently have a witness under subpoena, in good faith, and the witness does not show up. Now, shall I penalize him because Rosenblatt does not show up? They have done everything they can possibly do to get him here, apparently.

Mr. Blume: No, I think they are entitled to some time.

The Court: Why don't you get some local automobile man in Somerset, Somerville?

Mr. Handelman: Even that requires some time.

The Court: Why pick out Rosenblatt? Where is he from?

Mr. Handelman: I don't know, but he was familiar with this particular car, and Mr. Natale had known him. I do not even know the gentleman.

The Court: What is it, a 1941 LaSalle automobile?

Mr. Handelman: 1940 LaSalle.

The Court: 1940 LaSalle automobile. There should be a lot of Cadillac-LaSalle dealers in Somerville.

Mr. Handelman: I think there are.

The Court: It is a rich place, isn't it?

Mr. Handelman: But even that requires some time. I think I can locate someone here to testify as to the value of the car.

I do not see why we cannot agree upon it.

The Court: Maybe you can. Can you?

Mr. Handleman: If that is the only question involved.

Mr. Blume: Our value placed on it is about $700.00. Reasonable?

Mr. Handelman: Well, I think it is low, but under the circumstances what am I to do about it? I will agree with you.

The Court: Do not keep asking questions. I am not here to answer questions.

Mr. Handelman: I will have to agree as to the value of the car being $700.

What about the loss of the use of the car, the rental value of another?

Mr. Blume: You have no such element of damage in your complaint.

Mr. Handelman: Oh, I have pleaded damages for the unlawful detention.

Mr. Blume: That is interest on the value.

Mr. Handelman: I don't think so.

Mr. Blume: I have a case on it.

The Court: Well, now, have you another problem?

Mr. Handelman: Another problem.

The Court: I say, have you another problem?

Mr. Handelman: Apparently we have several. But I think this, to begin with, Mr. Blume ought to know, or he knows, that for that $736.—

Mr. Blume: We are not going to argue the point. We have agreed on the value.

Mr. Handelman: That it would be more.

Mr. Blume: If he does not want to agree, that is up to him.

The Court: Now, the next point is, you claim loss of use of this vehicle?

Mr. Handelman: That is right.

The Court: You will never get Mr. Blume to stipulate to that. You can see that now.

Mr. Handelman: I can see that now, yes, sir. I can see it.

The Court: Well, I do not know what to do with you.

Mr. Handelman: Well, unfortunately, I am sorry about this, but I cannot help it. But we did everything that we could, or we are supposed to do, under the circumstances.

The Court: I will give you an opportunity to get your proof as to damages, that you were disappointed in getting, because of this fellow.

Mr. Blume: The question, I thought, before the Court now, was the question of the loss of use; and I say under the pleadings that there is no provision for loss of use.

The Court: Yes, he is pleading it, unlawful detention of the car.

Mr. Blume: And under the cases unlawful detention is the interest on the value from the date of its detention.

Colloquy.

The Court: You mean, assuming that they converted the car to their own use.

Mr. Blume: That is right, sir.

The Court: It would be the value of the car as of that day.

Mr. Blume: That is right.

The Court: In money; and that the loss of the use of the money would be represented by interest.

Mr. Blume: Yes, sir. And in a similar case the Court held that the measure of damages should not exceed simple interest in addition to the value. There is a New Jersey case on it and a Pennsylvania case.

The Court: I suppose that is substantially correct, isn't it, Counselor?

Mr. Handelman: I think the Judge would know more about that.

The Court: You cannot have both, can you?

Mr. Handelman: No. But it seems to me that you can't always replace a car immediately, either, and for that reason you are entitled to the loss of use of it, if you can show that you did lose it, which there is no question about in this case.

The Court: Well, the theory of your complaint is introver and conversion, isn't it; that they wrongfully—

Mr. Handelman: Took the car, that is it.

The Court: And illegally seized your automobile and converted it to their own use?

Mr. Handelman: Yes, sir.

The Court: And you allege they did that on Demember 10th, I think it is.

Mr. Handelman: December 23rd, your Honor.

The Court: December 23, 1941.

Mr. Handelman: They seized the car that day, and drove it right to Pittsburgh. This man had no opportunity to repossess it.

The Court: So what they did would be measured by that day, wouldn't it?

Mr. Handelman: No; plus the unlawful—

The Court: So you would get your $700., plus interest from—

Mr. Handelman: December 23rd.

The Court: —December 23, 1941, would you not? You then would be made whole, legally?

Mr. Handelman: Well, it was my opinion that we should have punitive damages because the taking was malicious and wanton and unlawful, and that is why I attempted to amend the complaint.

The Court: Now, you are not answering me. I say, assuming everything that you say and contend and argue for is correct, and these defendants converted your car to their use, the conversion took place on the 23rd of December, 1941, and you have stipulated that the value of the article which they took from you, as of that day, is $700., (it is almost like a forced sale) so if you get your $700., plus interest on the $700. from that day, you should be whole.

Mr. Handelman: Well, if that is the law, I would say yes, but I am not satisfied that that is the law. That is the only question.

The Court: Well, if you were ever prepared on this case, you should be now.

Mr. Handelman: Yes. Well, it is my opinion.

The Court: I do not know all the law. As a matter of fact, I know little, and I am here, willing, ready and able to listen.

Mr. Handelman: It is my understanding of the law—

The Court: But it strikes me that Mr. Blume's contention is correct. Otherwise you could have alleged one count for the value of the car as of

December 23rd, 1941, and the loss of the use of the car, for how long? Up until today?

Mr. Handelman: Until it could be replaced.

The Court: I think you are confusing another theory. If you had a replevin action, I suppose—

Mr. Handelman: This is a replevin action.

The Court: This is?

Mr. Blume: Conversion action, not replevin.

Mr. Handelman: That is what it is, replevin.

Mr. Blume: It is not.

The Court: You start by a summons, apparently. It is not a writ of replevin.

Mr. Blume: It is not a replevin. There is no writ here.

The Court: I suppose you would be entitled to possession of the article, plus damages for its unlawful detention.

Mr. Handelman: That is right.

The Court: But you are suing really in trover and conversion, apparently. You state they took the car and converted it to their own use. I think your measure of damages is the value of the article, with interest on your money, that is, loss of the use of the money, from the day they converted it. I will so rule, anyway, in the absence of any authority to the contrary.

Mr. Handelman: I have a note here that Mr. Rosenblatt left at 12:30 to come to court, but I see no reason why we should hold this thing up any longer, and I am willing to go along on the strength of what we agreed to.

The Court: All right.

Mr. Handelman: The plaintiff therefore rests his case.

Mr. Blume: I ask for a nonsuit.

The Court: Go ahead. Why?

Mr. Blume: The plaintiff here has not proven

a tender. One, the account was in default at the time any proposed tender was supposed to have been made; that we were not legally obligated to accept any moneys at that time. The plaintiff admitted that the amount due under the contract, the note, was $736.02, and he admitted that no such sum was ever tendered. He admitted that he was in default in two payments when the car was taken. He has not shown any legal tender in cash to the office of the Automobile Finance Company. He has not shown anything under his contract, under his case, which would entitle him to recover.

On the other hand, our counterclaim alleges that there is due, with attorneys's fee and interest, over $800., and since the amount due us is more than due him, we are entitled to a judgment for the defendants.

The Court: Well, what are you doing now? What are you bringing in this counterclaim for?

Mr. Blume: I am asking for a—

The Court: What has that to do with it?

Mr. Blume: I ask for a nonsuit on the ground first stated, that there was no proof of any tender being made to us of an amount due under the contract, as admitted by the plaintiff, nor is there any proof of any legal tender ever being made to us of the amount due.

The Court: What do you say, Counselor?

Mr. Handelman: I say only this, if your Honor please, that there is not any proof that there was any default. That is No. 1. Mr. Natale did not admit that there was any default.

The Court: Oh, yes, he did. He said he was.

Mr. Handelman: I don't think he did. He said they claimed—

The Court: He said he was.

Mr. Handelman: They claimed a payment due, and they claimed $736. He didn't say they were due it. As a matter of fact, it was quite to the contrary. Furthermore, the testimony—

The Court: Wait. Don't go so fast. Do you mean to say that Natale did not testify that he defaulted on this contract?

Mr. Handelman: No; he said that he tried to pay them, and that they refused the money.

The Court: I am talking about the instalments due October and November.

Mr. Handelman: Even October and November, if your Honor please.

The Court: He said he did not pay them.

Mr. Handelman: That is right. He said he tried to pay them and he contacted them for that purpose, but they did not accept the money, would not accept that money. And, furthermore,

---

The Court: I do not recall anything like that.

Mr. Handelman: Well, I think that it is clear in the record that he did.

Mr. Blume: The record will show I asked him specifically if he was in default October and November. He admitted $736.02 was due.

Mr. Handelman: He did not say he was in default.

Mr. Blume: I will ask the stenographer to read it back.

Mr. Handelman: He said they claimed those payments.

Mr. Blume: The cross-examination of Natale will show.

The Court: Well, go ahead.

Mr. Handelman: The cases, both in Pennsylvania and in New Jersey are well settled, that

where it is shown circumstances which would render a tender useless, that no tender must be made. But here, not only was that shown, but in addition, the fact that a tender was, in fact, made, that it was refused, that this company had asked for more money than was due, and, therefore, it was useless to make such a tender. And I cite to your Honor—

The Court: You do not have to argue that. I am merely concerned now with what you have demonstrated, giving you the full benefit of all legitimate inferences that may be drawn therefrom. Apparently you have shown that you borrowed $736.02 from this auto finance company on September 19, 1941, and you made quite a point about it being $600. that you actually got, and the rest of it was finance charges and insurance. But the answer is that you signed a contract that has been marked in evidence, hasn't it?

Mr. Handelman: No, it is not. It was marked for identification.

The Court: That is right.

Mr. Handelman: And it is up to the defendant to prove that.

The Court: Well, anyway, you did something. You borrowed $736.02, and by your own pleadings you say that you agreed to pay it back in accordance with a schedule starting in October, at the rate of $40.89 a month, for what appears to be eighteen months. Now, my recollection of the testimony is that Natale said he was in default on the October and November instalments.

And then there is a dispute as to whether he moved the car from Pittsburgh to New Jersey without permission. In any event, he decided he was going to refinance the car, and to that end

he made application to the Westfield Trust Company, wasn't it?

Mr. Handelman: That is right.

The Court: For a loan, obviously, to buy off this auto finance company, and to finance it through the Westfield Trust Company. And that is all we have. What else have you shown?

Mr. Handelman: We have this, if your Honor please, that December 23rd Mr. Natale had an automobile, as shown by the Pennsylvania title here in evidence, in this case; that on that day, according to the testimony of Mr. Merz, and an admission by the defendant Jones, the car was taken by him, for the Automobile Finance Company, from the spot in which it stood in Newark, and they took the car. Now, that in itself is enough. It is up to the defendants to go on and explain why they took it, if they can do it, and to justify their taking. We show that we owned an automobile, that they took it. What right had they to take the car? Now, if they had such a right, let them show why they had the right. It is part of their defense.

The Court: What do you say to that?

Mr. Blume: They used Mr. Pivirotto as their witness. The question asked him was whether they had the car in Pittsburgh. He said yes. They asked him whether or not they had it until today. He said no. I refer to his testimony. And, in fact, the plaintiff says we took it under our lease. He does not deny it. His pleadings say so. His own pleadings say we did it.

Mr. Handelman: The plaintiff says in his pleadings, if your Honor please, that they took the car unlawfully, and converted it to their own use.

Mr. Blume: We took it because—

Mr. Handelman: And the plaintiff has testified

that the car was his, and that is the record of the Pennsylvania document.

Mr. Blume: May I refer to Mr. Pivirotto's testimony? Mr. Pivirotto said the car was sold, and the question asked was, "Was notice sent to Mr. Natale of the sale?", and I objected, and I think the Court allowed it. And Mr. Natale was shown the contract on cross-examination. He read it. He testified from it. The whole case was tried on that theory. But, if your Honor please,—

The Court: No. Your justification for seizing the car would be your contract.

Mr. Blume: That is correct.

The Court: I will deny your motion.

Mr. Blume: I take an exception.

The Court: You may have an exception.

DEFENDANTS' CASE.

JACOB L. RICH, called as a witness on behalf of the Defendants, being duly sworn, testifies as follows:

Direct-examination by Mr. Blume:

Q. Mr. Rich, in October, 1941, were you connected with the Central Discount Company? A. I was.

Q. In what capacity? A. President.

Q. Do you remember Joseph A. Natale coming to you? A. Yes, I do.

Mr. Handelman: Now, if your Honor please, I am going to object to this whole line of testimony, or examination and testimony, because this is, as a matter of fact, before the conversion took place. What relation can it have to the present situation?

The Court: I don't know, Counselor. I have not the slightest idea.

Mr. Handelman: Your Honor, certainly, then, I object to it.

The Court: I do not know what counsel has in his mind. I will listen. Go ahead.

Q. What did he come to you for? A. To make a loan on his automobile.

Q. Did he tell you who held the lease on it? A. He did.

Q. Do you remember who it was? A. The Automobile Finance Company of Pittsburgh.

Q. Did he tell you the amount? A. He was not quite sure as to the amount.

Q. And did you get details from him in connection with this car? A. Pardon me?

Q. Did you get the details from him in connection with this car? A. Oh, yes. I took an application and all the details.

Q. As a result of your conference with him did you write a letter? A. I did.

Q. To the Automobile Finance Company?

Mr. Handelman: Now, if your Honor please, I would like Mr. Blume to allow the witness to testify, and these questions are very leading, to say the least. I think he ought to ask the questions and let the witness answer.

The Court: Well, all leading questions are not inherently objectionable.

Mr. Handelman: He is his witness.

The Court: They are still not inherently objectionable; and I do not know what the purpose of this is, anyway. Probably it won't amount to anything when we get through with it all. Go ahead.

Q. As a result of your conversation, Mr. Natale, did you write a letter to the Automobile Finance Company? A. I authorized my secretary to write a letter.

Q. Did you see the letter? A. Yes, I did.

Q. I show you a letter dated October 20, 1941, and ask you if that is the letter you sent? A. That is the letter.

Mr. Blume: I offer the letter in evidence.

Mr. Handelman: I object to it. What is the purpose of it?

The Court: What is the materiality of such a letter, Mr. Blume?

Mr. Blume: I want to connect up that this, as admitted by Mr. Natale, went to the Central Discount, with which Mr. Rich is connected, and that as a result of that transaction or conference Mr. Rich sent a letter to the Automobile Finance Company, inquiring as to the balance, and that he got a letter back, that the balance was $736.02.

Mr. Handelman: How is that binding on—

The Court: I will sustain your objection.

Q. Where was your company located October 20, 1941? A. 1096 Broad Street, Newark.

Q. Did you give Mr. Natale a loan on the car? A. No, I did not.

Q. Did you discuss with him why a loan was not given?

Mr. Handelman: I object to it.

The Court: Objection sustained.

Mr. Blume: I take an exception. That is all.

Mr. Handelman: That is all. I have no questions.

If your Honor please, I move that all of this witness' testimony be stricken from the record, as being immaterial, incompetent and irrelevant.

The Court: No, I will allow it to stand.

Mr. Handelman: Exception.

ARTHUR M. PIVIROTTO, called as a witness on behalf of the defendants, having been previously duly sworn, testifies as follows:

Direct-examination by Mr. Blume:

Q. I show you a lease agreement dated September 18, 1941, signed by Joseph A. Natale, and ask you if your company is the holder of that lease. A. It is.

Q. And when did you purchase it? A. On or about September 18, 1941.

Q. From whom was it purchased? A. From Jack's Garage.

Q. And was there an assignment of that lease from Jack's Garage to your company? A. There is.

Mr. Handelman: I object to his testifying, if your Honor please. The instrument will speak for itself.

Mr. Blume: I offer the instrument in evidence.

Mr. Handelman: I object to it. I object to it. I object to it because the execution has not been proven, if your Honor please.

The Court: Isn't that the document that was marked for identification?

Mr. Blume: Yes, sir.

Mr. Handelman: Yes.

The Court: That Mr. Natale said he signed?

Mr. Blume: Yes, sir.

The Court: It may be marked in evidence.

Mr. Handelman: May I see it?

Now, if your Honor please, Mr. Natale tells me now that the instrument was not filled in at the time it was signed, and he testified to that before, so I object to it.

The Court: Well, anyone who is fool enough to sign a blank piece of paper will have to suffer the consequences. It may be marked. You may have an exception.

Mr. Handelman: Thank you.

(Paper marked Exhibit D-1.)

The Court: By signing a blanket instrument you inferentially give authority to the one to whom you give it, to fill it out. Cannot escape by that method.

Q. I show you a promissory note dated September 18, 1941, in the sum of $736.02. Did you also receive that note at the time you got the bailment lease? A. Yes, sir.

Q. Was that in connection with the same purchase? A. It is.

Mr. Blume: I offer the note in evidence.

Mr. Handelman: I would like an opportunity, if the Court please, to examine Mr. Pivirotto about this before consenting to allow it to go in evidence. He stated before, if you will recall, on direct-examination, as my witness, that he knew very little about this account. And now apparently he knows a little more than he did at that time.

The Court: Is this the note that you

showed to Mr. Natale, and he said he signed?

Mr. Blume: Yes, sir.

The Court: Mark it for identification.

Mr. Blume: Yes, sir.

The Court: I will give you an opportunity to examine him, if you want to, about this paper.

By Mr. Handelman:

Q. Mr. Pivirotto, were you present when this paper was executed? A. I was not.

Q. Do you know what was on the paper at the time it was executed? A. I know that it is a law form lease that we have, prepared by counsel.

Mr. Blume: There is no claim of forgery here. I do not know what the purpose is.

The Court: Go ahead; go ahead.

Q. Well, do you know whether or not at the time that this note was signed by Mr. Natale, whether he had agreed to pay the amount that was inserted in here? A. That I don't know. I believe if a man signs a note—

Q. Never mind what you believe.

Mr. Handelman: I think, if your Honor please, that this is not admissible because it was all executed after Natale signed it.

The Court: It may be marked in evidence, and you may have an exception.

Mr. Handelman: Thank you.

(Paper marked Exhibit D-2.)

By Mr. Blume:

Q. Were any payments received by your company in connection with this note or bailment lease? A. There were none.

Q. How much is due on that bailment lease? A. The full face amount of the note.

Q. What is that? A. $736.02.

Q. Did you figure the interest on that note from the date of its maturity until the present time?

Mr. Handelman: I object to it. I do not see that it is material at all.

The Court: I will allow it.

A. Do you want me to figure it?

Q. Did you figure it before? A. I had figured it.

Q. What is the amount of the interest? A. $44.16.

Q. And does the note provide for an attorney fee of 15 per cent? A. Yes, it does.

Q. And what is that? A. The amount of that is $117.02.

Mr. Handelman: I object to that, too, if your Honor please.

The Court: Why?

Mr. Handelman: Because if Mr. Blume has in mind his counterclaim, I say that he abandoned it, for two reasons. In the first place, he failed to mention it when he made his opening address, or any reference to it. In the second place, he abandoned it actually when he told you a few moments ago that he did abandon it and forget about the counterclaim, so that he therefore abandons it; and this testimony is therefore not proper.

The Court: I do not understand it to be such. I will allow it.

Q. What is the total amount due? A. $897.20.

Q. Now, your company took possession of this automobile? A. Yes.

Q. Why? A. Because of a default in the payment of the rental on the automobile, under the lease agreement.

Q. And on December 23, 1941, how many payments were in default? A. There were two payments in default.

Q. How much was each payment? A. $40.89, apiece.

Q. Now, did you tell Mr. Natale that he could remove that automobile from the State of Pennsylvania? A. I never did, at any time.

Q. Did you have a conversation with him at the time this transaction took place? A. He informed me that the purpose of his buying this automobile was that he had some relatives or friends coming in from New Jersey, on whom he wanted to make an impression with a La Salle automobile.

Q. Did you lend Mr. Natale any money? A. We never made a loan of any money in our company.

Q. To whom was payment made under that lease when you bought it? A. To Jack's Garage.

Q. Did you receive the title from the very first day the transaction took place? A. At the time that the moneys were paid to Jack's Garage.

Mr. Handelman: Just a minute. I object to that. The best evidence of the title would be the record, to show the title.

The Court: No, I will allow it.

The Witness: May I have the question?

Mr. Handelman: May I have an exception, your Honor?

(Question read.)

Q. Referring to McIliath. A. We received the title from the owner of Jack's Garage, Jack— J. M. McIliath.

Q. From the day you received that title did it ever go out of your possession? A. Never did.

Q. After you received possession of the automobile what did you do with it? A. Will you state that question again, please?

Q. After you received possession of the automobile did you do anything with it? A. We sold it.

Q. How much did you receive for it? A. $625.

Q. To whom was it sold? A. McKitten Motors, Butler, Pennsylvania.

Cross-examination by Mr. Handelman:

Q. Mr. Pivirotto, you are quite familiar with this Natale account, are you not? A. I know of the details of handling a regular transaction in our business.

Q. So that your testimony, then, is based on the regular details in your business; is that right? A. That is correct.

Q. And not what you know about this particular case? A. I do know of the case, in so far as it having been presented to me from time to time.

Q. And Mr. Natale talked to you about it from time to time, didn't he? A. No, he didn't talk to me from time to time. He had another transaction with us which was in default, which he talked to me about.

Q. Is that the only time he talked to you about it? A. Principally, yes.

Q. Isn't it a fact that he asked you whether or not it was all right to take this car to New Jersey? A. He never did.

Q. Did he tell you that he wanted the car— A. He never did.

Q. Just a minute.

Mr. Blume: I object to that.

Mr. Handelman: What was the technical objection before the Court?

The Court: Go ahead.

Q. Didn't he tell you, according to your own testimony just now, that he wanted this car to make a showing with some relatives in New Jersey? A. He told me that there were some relatives coming from New Jersey. That is what he said.

Q. You are sure that he did not tell you that he was going to New Jersey? A. I am positive.

Q. As a matter of fact, your company wrote him several letters while he had the car here in New Jersey, did you not? A. That was after he took the car out of Pennsylvania.

Q. Yes, after he took the car out. A. Without our permission.

Q. Yes. And in any of those letters did you ever ask him to return the car to Pennsylvania? A. That I don't know.

Q. Did you do it? A. No, I didn't.

Q. You knew he had the car in New Jersey, didn't you? A. That is right.

Q. As vice-president of the company didn't you think it was your duty to get the car back? A. Not necessarily.

Mr. Blume: It is argumentative.

Q. But did you do anything to get it back to them? A. Yes.

Q. Did you? I mean before the time you took the car off of Washington Street in Newark, did you do anything? Did you tell Mr. Natale that you wanted the car? A. He knew that.

Q. Didn't he notify you where the car was? A. That I don't know.

Q. Didn't he write and tell your company that he was in New Jersey? A. That he was in New Jersey, but not where the car was.

Q. Didn't he give you his address? A. I believe he did. I do not recall it.

Q. Are you familiar with the Pennsylvania laws regarding bills of sales of automobiles? A. I am familiar with the title law.

Q. Yes, the title law. A. Yes.

Q. I show you this instrument and ask you if you know what it is.

Mr. Blume: I object. It is improper cross-examination.

Q. P-1.

The Court: I will allow it.

Mr. Handelman: He said the title was in them.

A. This is not a certificate of title.

Q. What is it? A. It is an application for a certificate of title.

Q. What is this instrument, Mr. Pivirotto? A. That is a certificate of title.

Q. Will you look at it, please? Will you tell me whose name it shows the certificate to be in? A. J. A. Natale.

Q. What date? What is the date of the certificate? A. September 23, 1941.

Q. And what date did your company make the loan? A. I believe I said September 18th or 19th.

Q. Of the same year? A. Of the same year.

Mr. Handelman: That is all.

Redirect-examination by Mr. Blume:

Q. Now, Mr. Pivirotto, did your company make a loan to Mr. Natale? A. We did not make a loan; we purchased this lease agreement from Jack's Garage.

Q. What was the procedure in connection with obtaining a certificate of title in Pennsylvania? A. The owner makes application, in the case of a new automobile,—confining ourselves to a used automobile, as it is in this instance, the former owner assigns the automobile to a prospective lessee, in this case, and makes application from the Highway Department at Harrisburg, requesting that the title be issued on the automobile, with an encumbrance subject to liens, leases, or other chattels contained in the certificate of title.

Q. All right. Now, you received that in your possession afterward? A. It is sent to us directly from the Highway Department.

Mr. Blume: No further questions.

Recross-examination by Mr. Handelman:

Q. Where is it, Mr. Pivirotto? A. Where is what?

Q. Where is the certificate of title, in you? A. I think we have one.

Q. You think you have one. Do you have one or not? A. We do.

Q. Now, you said that this car was transferred from Jack's Garage to Natale; is that right? A. No, I didn't say that.

Q. What did you say? A. I said we purchased —we gave our check to Jack's Garage in purchase of this lease agreement.

Q. Now, you are sure about that? A. Yes.

Q. And you are as sure about everything else as you are about that, Mr. Pivirotto? A. I am quite positive that we made our check payable to Jack's Garage.

Q. As a matter of fact, Mr. Pivirotto, this assignment came to Mr. Natale, not from Jack's Garage, did it? A. This was made by Metropolitan Buick Company.

Q. And that— A. Mr.—

Q. That fact you are certain about, are you? A. As stated here, yes.

Q. Thank you very much.

Mr. Handelman: That is all.

Redirect-examination by Mr. Blume:

Q. Now, Mr. Pivirotto, when you sold this automobile was the sale approved by the Motor Vehicle Department of Pennsylvania?

Mr. Handelman: I object to it, if your Honor please.

The Court: Oh, I will allow it.

A. May I have the question again?

Mr. Handelman: I do not see what it has to do in this case, and it is after this thing, this transaction, took place.

The Court: I will allow it. Go ahead.

The Witness: May I have the question again?

(Question read.)

A. It was.

Q. I show you a bill of sale showing your company to be the owner of this car, with assignments to Sam Green. Is that the certificate you

got from the Motor Vehicle Department? A. Yes, it is.

Mr. Handelman: I object to the use of this instrument, if your Honor please, or any testimony about it, because it is something which took place at an entirely later date. It has nothing to do with the transaction, and I think it should not be admissible in evidence.

The Court: What is this, Mr. Blume?

Mr. Blume: This connects up the sale of our car, showing the Motor Vehicle Department recognizes us as being the owner and having the right to sell, because they are questioning that indirectly, while they have not come out with it directly, and I want to show the Motor Vehicle Department approved everything that was done.

Mr. Handelman: That would not make any difference, if your Honor please, whether they approved it or not, the Motor Vehicle Department.

The Court: I don't think so.

Mr. Blume: They pass upon the certificates.

The Court: What does this contemplate, a sale after you sold?

Mr. Blume: No. This contemplates the title into us after we repossessed the car, and then the subsequent sale to us from this same woman for, I think, $650.

Mr. Handelman: If your Honor please, that is entirely different from what we have been alleging all through the entire action here. They have maintained that they were the owners of it, that this car was leased to Mr. Natale.

Mr. Blume: That is right.

Mr. Handelman: Now, are they going to put the shoe on the other foot and argue the other way?

I object to it and say it is not proper at this time.

The Court: I do not know how you could make it more complicated, if you tried. I do not see how this is going to do any good. I will sustain the objection.

Mr. Blume: All right. That is all.

Mr. Handelman: That is all.

Mr. Blume: Just one question. Pardon me.

By Mr. Blume:

Q. Do you know the purpose of the title law with reference to automobiles in the State of Pennsylvania?

Mr. Handelman: I object to it.

Mr. Blume: He was asked about that, and asked about the automobile law, by counsel, on direct.

Mr. Handelman: He is not qualified to tell us the purpose of it, if your Honor please. I asked him whether he was familiar with it. But for him to attempt to tell the purpose of it is something that even a good lawyer may not be able to do.

The Court: I will take it. It may be interesting.

A. It was simply introduced in Pennsylvania as a police measure.

Q. Police measure? A. That is right.

Mr. Blume: All right. That is all.

Plaintiff's Motion for Direction of Verdict.
Defendants' Motion for Direction of Verdict.

Mr. Blume: That is the defendants' case.

Mr. Handelman: If that be true, your Honor, at this time I would like to move for a direction of a verdict in favor of the plaintiff, for the reason that we have shown that the plaintiff owned an automobile on December 23, 1941, which was unlawfully taken by the defendants. They have not justified their taking of that car in one way whatsoever. They have not proven title in that. They have not been able to prove that they owned the car and leased it. As a matter of fact, it is quite to the contrary.

The testimony and the records which have been submitted in evidence show that the title was in this plaintiff, and that it remained there, and that they took the car against his will, and unlawfully.

The Court: I will deny your motion.

Mr. Blume: I ask for a direction of a verdict on the plaintiff's case, and for a direction of a verdict on the counterclaim. It has been definitely established that the plaintiff signed this bailment lease, and that it was purchased by the defendants, and that the amount due under the bailment lease at the time of the purchase was $736.02; that at the time the car was repossessed the account was in default, I should say, for the instalments due October and November; and under the terms of the contract the automobile was to be returned to the defendant, irrespective of whether all the instalment payments of rent were met; that when default was made under the contract, the defendant had a right to retake or repossess the automobile where it was found.

There is definite testimony that the sum of

$736.02, or that the instalments in default were never met or tendered, that the value of the automobile, on the plaintiff's case, was $700. The car was sold by us for $650., so that under the terms of the contract there has been a loss to us of the difference; so that even if the plaintiff is entitled to recover, the amount due the defendant is greatly in excess, and there should be a verdict in favor of the defendants for the difference.

Furthermore, that there never had been a legal tender to the defendants, as provided by the lease, and that under the terms of the contract, when default occurred, the entire balance became really due and payable. So the balance became actually due and payable on October 25, 1942, of $736.02.

There is no consideration for any offer to take a lesser sum than actually due.

Therefore I request a direction in favor of the defendants on both the complaint and the counterclaim.

Mr. Handelman: May I have a word, your Honor, about Mr. Jones? Where is he, and why hasn't he answered?

Mr. Blume: I have.

Mr. Handelman: I mean as to Mr. Jones. He has not even appeared here today to contest this action, to put in a word in defense of himself. Are we not entitled to a judgment against Mr. Jones? I submit, your Honor, that we are. There is not any proof of agency, or anything regarding it at all.

Mr. Blume: Shall I answer that, sir?

The Court: No, I do not think it is necessary for you to do so. Let us do one thing at a time.

We are faced with a motion for a direction of a verdict in favor of these defendants and against you, on the ground that you have not shown a

cause of action, but that the proof is to the contrary. Now, what do you say about that?

Mr. Handelman: I say that the answer to that, if your Honor please, is very simple. We have proved that we owned an automobile; that the car was parked lawfully in the City of Newark on December 23rd; that somebody took it; that later Mr. Jones admitted that he took it. He says that he took it on behalf of the Finance Company. That is his statement to Mr. Merz, who testified here. There is no proof of agency between the Finance Company and Mr. Jones. They do not say that he was their agent. They have not said a word about it, that he took that car. There is no question that he had no right to take the car at the time that he did take it. The title has been proven in Mr. Natale. The company says, as a matter of defense, that they had the title, but, your Honor, they have not been able to prove that they had the title, because the record clearly indicates that title was in Natale. They say they had a lease agreement, and you can call the agreement anything you want to call it, but your Honor well knows that regardless of the words that you use to describe it, the fact remains that the lease, or whatever it is, the paper is what it is, and not what they call it. This amounted to a conditional sales agreement, as I see it, in New Jersey, and I believe the law—

The Court: This contract was made in Pennsylvania, was it not?

Mr. Handelman: That is right, and the law is similar in Pennsylvania.

The Court: I do not know anything about the law in Pennsylvania.

Mr. Handelman: Well, they have not proven anything about the law in Pennsylvania, and have

not shown that they are entitled to the possession of this car in any manner whatsoever. The fact is that the title was and remained in Natale. Now, they bring in some bill of sale three or four months later to justify the fact that they had the right to take possession of the car, saying, by inference, that if it were not right the Motor Vehicle Department would not permit it to be done. But your Honor well knows, as well as I, that many times things are done that are not right, whether the Motor Vehicle Department O.K.'s them or not; and it is up to them to prove those things, and which they failed to do. So I think that we are entitled to a verdict.

The Court: I enjoy the way you gloss over the points.

Let me have that lease agreement.

Mr. Handelman: I might say, if your Honor please, this, about the law in New Jersey. The Motor Vehicle Department provides, and the Motor Vehicle laws provide, that a car taken in New Jersey, where this car was taken,—there must be some notice given to the Motor Vehicle Department of the taking, and they have failed to do that.

The Court: So what happened?

Mr. Handelman: So they have had an unlawful taking, which is our allegation of the complaint.

The Court: That may subject them to a penalty prescribed in the Motor Vehicle law, for not notifying the Commissioner. Admitting what you say is true. But that certainly would not affect their rights under their contract, would it?

Mr. Handelman: Well, what rights do they have under a contract where they never had title?

The Court: That is just what I am going to find out now. But I notice that you could not

print this with finer print, even if you tried hard to do so.

I am not going to keep you suffering, Members of the Jury, here, while I debate this with these lawyers. You will have to be back here tomorrow anyway.

You may be excused until ten o'clock tomorrow morning. Maybe this will be over by then. If it is not, you will be on hand to listen further.

(The Jury left the courtroom at 3:38 P.M.)

(The Court conferred with the respective attorneys in Chambers.)

Adjourned to tomorrow, March 21, 1944, at ten o'clock A.M.

Somerville, N. J.,
March 21, 1944.

TRIAL RESUMED.

The Court: Members of the Jury, during these recesses, both yesterday afternoon and this morning, counsel have argued the legal side of this situation, and I have decided as a matter of judicial decision to grant the motion made by the defendant for a direction of a verdict.

While it is not necessary, I think perhaps in this situation it might be well if I told you why. It appears from the proof now before us that Mr. Natale entered into a contract by virtue of which he borrowed some $736.02 on the security of an automobile, which he agreed to repay at the rate of $40. and some cents a month. He did not make any payments, or, at best, he skipped the October 25th payment of $40.89. Now, the contract provides that if there is a default in any of

the payments the company may repossess the car wherever it may be, either by the use of force or not, and with or without notice; and apparently that is just exactly what these defendants did.

I see no reason why Mr. Natale should now complain of the situation in which he finds himself, because it is the result of his own breach of his own contract. If he did not like that contract he was not compelled to sign it in the beginning. So, with that explanation, I direct you to bring in a verdict in favor of the defendants and against the plaintiff, Natale.

You can take it, Mr. Clerk.

The Clerk: Ladies and Gentlemen of the Jury, hearken to your verdict as the Court has ordered it recorded. You say you find a verdict in favor of the defendant, the Automobile Finance Company of Pittsburgh, Pennsylvania, and Wilber D. Jones, and so say you all.

The Court: All right. Thank you very much.

Now, counsel tells me that in view of this disposition of it, they have no desire to go ahead with their counterclaim. Is that correct?

Mr. Blume: We desire to withdraw our counterclaim voluntarily, and without prejudice.

The Court: All right. That may be done. So that will dispose of it.

Exhibit P-1.

Commonwealth of Pennsylvania, ss:

I Hereby Certify, That the foregoing and annexed is a Photostatic copy of original application for re-assignment of certificate of title No. B5479136 covering LaSalle Sedan, serial and engine No. 4328171 from Metropolitan Buick Company to J. A. Natale, 615 Island Avenue, McKees Rocks, Pennsylvania, 1941 registration No. 2ED-25: now on file in the offices of the Bureau of Motor Vehicles, Department of Revenue, Harrisburg, Pennsylvania.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of this department the day and year aforesaid.

DAVID W. HARRIS,
(Seal) Secretary of Revenue.

REASSIGNMENT OF CERTIFICATE OF TITLE

Commonwealth of Pennsylvania
Department of Revenue
Bureau of Motor Vehicles

This form will not be accepted unless attached to the Assigned Certificate of Title and must be accompanied by required title fee for person selling the motor vehicle as well as the title fee for the person to whom it is resold, and purchaser's registration fee (if desired with title).

Reassignment of Title No. A-5479136

For value received I/we hereby lease, sell, assign, transfer or set over to J. A. Natale, Address 615 Island Ave., McKees Rocks, Alleg (County) Pa. the following described motor vehicle (Make of Vehicle) LaSalle Sdn; (Engine No.): 4328171;

Exhibit P-1.

(Manufacturer's No.): 4328171 which is covered by the attached Certificate of Title and state that at the time of delivery said motor vehicle is subject to the following liens, encumbrances, or other legal claims and none other: Encumbrance none

Are you a manufacturer, jobber, or dealer in motor vehicles? yes If so, give one of dealer's registration numbers X 5660.

METROPOLITAN BUICK COMPANY
(Sgd) Harry E. Brown,
Partner.

Subscribed and sworn to before me
this 16th day of September 1941.
H. L. Steinberg,
(Seal) Notary Public (Stamp)

Application for Certificate of Title by Purchaser or Lessee

J. A. Natale being duly sworn states that he has acquired Possession of the motor vehicle described above and covered by the attached Certificate of Title by purchase or lease subject to the liens, encumbrances, leases, contracts of conditional sale and other legal claims set forth in this application. Is this motor vehicle subject to any encumbrance other than as set forth above? yes If so, give: Amount $736.02 Favor of Automobile Finance Co. 5526 Penn Ave. Pittsburgh Allegh County Penna. Are you a manufacturer, jobber or dealer in motor vehicles no

(Sgd) J. A. NATALE.
J. A. Natale.

Subscribed and sworn to before me
this 19th day of September 1941.
(Seal) W. McCarthy, Notary
My Commission Expires March 6, 1945.

Exhibit P-1.

Application for Transfer of Registration Plates

I hereby make application for the transfer of Pass. registration plates No. 2ED25 issued for the year 1941, for DeSoto motor vehicle No. 5723300 covered by Certificate of Title No. B590 8666 to the motor vehicle described on the attached Certificate of Title which I aver is equipped according to law.

J. A. NATALE.

Fee for Seller's or Lessor's Certificate of Title, $2.00; Fee for Purchaser's or Lessee's Certificate of Title $5.60; Total 7.60.

Assignment Record No. 943687—Transfer Record No. 943688—Reissue Record No. C5479136

(Stamped): Approved for issue Sep 22 1941 O.D. No. 23—Clyde E. Fisher—A.F.C. Pitts. Branch

COMMONWEALTH OF PENNSYLVANIA
Department of State

I-A No. 2396

Harrisburg, January 25, 1944

Pennsylvania, ss:

I, C. M. Morrison, Secretary of the Commonwealth of Pennsylvania, having the custody of the Great Seal of Pennsylvania

Do Hereby Certify, That David W. Harris now is, and was at the time of subscribing his name to the foregoing certificate, Secretary of Revenue for the Commonwealth of Pennsylvania, U. S. A., duly appointed, commissioned and qualified:

That the records of the Department of Revenue of Pennsylvania are in the legal custody of and are kept pursuant to the laws of this State by said Secretary of Revenue, who is also the cus-

todian of its official seal, hence, full faith and credit are due and ought to be given to his official acts accordingly.

And Do Further Certify, That I verily believe the seal impressed upon the foregoing certificate, and the signature attesting the same, are genuine.

In Testimony Whereof, I have hereunto set my hand and caused the Great Seal of Pennsylvania to be affixed, the day and year above written.

C. M. Morrison,
Secretary of the Commonwealth.

(Seal)

Exhibit P-2.

Commonwealth of Pennsylvania, ss:

I Hereby Certify, That the foregoing and annexed is a Photostatic copy of original certificate of title No. C5479136 covering LaSalle Sedan, serial and engine No. 4328171 in name of J. A. Natale, 615 Island Avenue, McKees Rocks, Pennsylvania: now on file in the offices of the Bureau of Motor Vehicles, Department of Revenue, Harrisburg, Pennsylvania.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of this department the day and year aforesaid.

David W. Harris,
Secretary of Revenue.

(Seal)

Certificate of Title to a Motor Vehicle

Penalty For alteration or forgery of this Certificate, maximum fine of $1,000.00 or 2 years imprisonment or both

Exhibit P-2.

Gross Wt. Date Orig. Titled Engine No. Mfr's No. H.P.-Seat. Cap.-Ch. Wt. Make-Type Body Annual Fee Title No.

3-25-40 4328171 Same 37
LaSalle Sdn 14.80 C5479136
J. A. Natale
615 Island Ave 943688
McKees Rocks Alleg Co Pa

Important—Date shown is that on which vehicle was originally titled.

Make certain that engine and manufacturer's numbers on car agree with numbers shown on this title.

COMMONWEALTH OF PENNSYLVANIA
Department of Revenue

The Motor Vehicle described herein is subject to the following encumbrances, Favor of Automobile Finance Co. 5526 Penn Ave. Pittsburgh, Pa. Amount $736.02.

I, the undersigned, Secretary of Revenue of the Commonwealth of Pennsylvania, do hereby certify pursuant to the provisions of the Act of May 1, 1929, P. L. 905, as amended that an application has been made to me as prescribed by said act for a Certificate of Title to a motor vehicle described hereon.

I do further certify that I have used reasonable diligence in ascertaining whether or not the facts stated in said application for a Certificate of Title are true and that I am satisfied that the applicant is the lawful owner of the above described motor vehicle, or is otherwise entitled to have the same registered in his name.

Wherefore, I do hereby certify that the above named applicant has been duly registered in the office of the Pennsylvania Department of Revenue

Exhibit P-2.

as the lawful owner of the above described motor vehicle, and that it appears upon the official records of said office that at the time of the issuance of this Certificate, said motor vehicle is subject to the encumbrances hereinbefore enumerated, if any.

Witness my hand and seal of office

WALTER J. KRESS,
Acting Secretary of Revenue

(Seal)

COMMONWEALTH OF PENNSYLVANIA
Department of State

1-A No. 2395

Harrisburg, January 25, 1944

Pennsylvania, ss:

I, C. M. Morrison, Secretary of the Commonwealth of Pennsylvania, having the custody of the Great Seal of Pennsylvania

Do Hereby Certify, That David W. Harris now is, and was at the time of subscribing his name to the foregoing certificate, Secretary of Revenue for the Commonwealth of Pennsylvania, U. S. A., duly appointed, commissioned and qualified:

That the records of the Department of Revenue of Pennsylvania are in the legal custody of and are kept pursuant to the laws of this State by said Secretary of Revenue, who is also the custodian of its official seal, hence, full faith and credit are due and ought to be given to his official acts accordingly.

And Do Further Certify, That I verily believe the seal impressed upon the foregoing certificate, and the signature attesting the same, are genuine.

In Testimony Whereof, I have hereunto set my

Exhibit D-1.

hand and caused the Great Seal of Pennsylvania to be affixed, the day and year above written.

C. M. Morrison,
(Seal) Secretary of the Commonwealth.

Exhibit D-1.

Lease Agreement

28597

Made this 18 day of Sept. 1941 between Jack's Garage of 4063 Liberty Ave Pgh, Pa. (hereinafter called the Lessor), and the undersigned (hereinafter called the lessee.)

Witnesseth: That the Lessor has this day delivered in good condition and hereby leases upon the terms, rental and for the time below specified, to the Lessee the following Passenger or Commercial Car, or Tractor (hereinafter called "Machine"), delivery and acceptance of which is hereby acknowledged by Lessor and Lessee.

Make: LaSalle; Type of Body: Sdn; Model Letter: ; Manufacturer's Serial No. 4328171; Motor No.: Same; No. of Cylinders: 8; New or Used: Used; Year: 1940.

Total	$950.00
Finance Charge	$136.02
Total Rental	$1086.02
Cash on or Before Delivery	$350.00
Allowance on Car Traded In	——
Total Down Payment	$350.00

A note payable in 18 equal monthly installments of $40.89 each, commencing one month

from date hereof, given by Lessee to Lessor as evidence but not as payment of a balance owing. The aggregate amount of monthly instalments plus the down payment is the total rental price of the Car.

First payment shall be made on the 25 day of Oct. 1941 and monthly thereafter on the 25th day of the month.

Said installments of rental shall bear interest after maturity until paid at 6% per annum. Any extension or assignments of this Agreement or said note shall not waive any condition herein contained. The term of this lease is from date hereof until the due date of said final installment, unless sooner determined, subject to the provisions and terms hereof.

At the expiration of the term of this Lease, Lessee agrees to surrender to the Lessor, or assigns, the above described Machine and extra equipment in good condition.

It is expressly understood and agreed by and between the parties hereto that no title to the said Machine and extra equipment, either legal or equitable, shall vest in the Lessee except as Lessee hereunder.

Lessee agrees that the loss, injury or destruction of said Machine shall not release said Lessee from payment as provided herein. Lessee shall keep the Machine insured against loss by fire and theft with insurance acceptable to the Lessor for not less than the amount owing under the terms of this Lease and until fully paid, payable to and protecting the interest of the Lessor, and the Lessor may place and renew said insurance for the Lessee at the Lessee's expense if the Lessor elects. Said Lessee hereby authorizes said Lessor or assigns to make application for such insur-

ance, and said Lessee hereby appoints said Lessor or assigns his, its or their agent to effect such insurance.

It is further agreed that the Lessee shall not underlet or dispose of the Machine or assign this Lease. Lessee agrees to operate and control said Machine in conformity with all laws and ordinances, will not transport liquor therein and will indemnify and save harmless the Lessor from any and all loss or damage to persons or property caused by said Machine or by the use and operation thereof to which the Lessor might possibly be subjected.

In the event of any default by the Lessee with respect to any rental payments, principal or interest after maturity, or if said Machine is removed or attempted to be removed from the State in which Lessee now resides, or to be otherwise disposed of, or if Lessee shall sell or encumber or shall attempt to sell or encumber said Machine, or upon the issuance of any judgment, execution, distress for rent, or like process against the Lessee, or upon the insolvency of the Lessee, or in case of misuse or abuse thereof, then the Lessor or his or its assigns may, at its option, declare all unpaid rental installments immediately due and payable. The Lessee shall not sell, assign, let, encumber, use for hire or dispose of the Machine and the Lessee shall, at his expense, keep and maintain the Machine in good order, repair, and running condition, and will replace any and all worn, broken and defective parts in the Machine and will pay for the same promptly, and reimburse the Lessor with respect to any damage to the Machine. Lessee shall keep the Machine free of all taxes, liens and charges, and shall, at his expense and in his name cause the

Exhibit D-1.

Machine to be registered and licensed in compliance with the law; and should the Lessee fail to pay for any labor, materials or accessories that may be placed upon the Machine, or fail to pay any taxes, liens or other charges that may be imposed upon the Machine, then the Lessor may, at his option, pay such items in behalf of the Lessee —and any sum so paid by the Lessor shall be deemed to be part of the original rental due hereunder as though originally included herein, provided, however, that nothing herein shall be construed to authorize or empower the Lessee to enter into any agreements whereby any claims or liens whatsoever may or can be filed against the said leased property; on the contrary, it being agreed that the Lessee shall be individually, personally and solely liable for any such charges.

Upon any default in payment of any installments of rental or upon breach of any condition or covenant herein made by the Lessee, the Lessee shall, forthwith deliver the Machine in as good condition as when received by the Lessee (ordinary wear and tear excepted) to Lessor, and should Lessee fail or refuse to deliver the Machine as aforesaid, the Lessor shall have the right, without notice or demand, to terminate this Lease and to take possession of the Machine wherever found, and Lessee hereby authorizes Lessor to enter the premises of the Lessee, with or without force or process of law, and forthwith take possession of Machine. If Lessor shall so take possession of the Machine, all payments made by the Lessee shall belong to and be retained by Lessor as partial payment for the nonfulfillment or breach of performance of this Agreement, for loss in value of the Machine, and for the use thereof Lessor may take possession

Exhibit D-1.

of any other property in the above described motor vehicle at the time of the repossession and hold the same temporarily for Lessee without any responsibility or liability on the part of Lessor or its agents and employees. In addition thereto, the Lessor shall be entitled to demand and collect from the Lessee any and all installments of rental that may be due or payable under the terms of this Lease, and the Lessor shall have the right to proceed for the collection of the same as herein set forth. Lessor may, at his option, by collection, suit or otherwise, enforce payment of any note or notes that may be given by Lessee and no suits or legal proceedings shall be deemed a waiver of said right of Lessor or assigns to so take possession, nor shall the exercise by the Lessor or his or its assignee of any particular right or remedy against the Lessee of the Machine be construed in any manner as a waiver of any other right or remedy of the Lessor or his or its assigns whatsoever. It is the intent and agreement of the parties hereto that the Lessor's remedies herein provided for are cumulative rights and not alternative, and that the respossession of the Machine as herein provided shall not bar an action for the recovery of the rental due, or to become due for the use of said Machine, nor bar any action or proceeding on any note or notes that are or shall be given, and, conversely, an action for the recovery of the rental for the use of said Machine or on any note or notes that are or shall be given, shall not bar the Lessor's right to the repossession of the Machine as herein provided.

Lessee agrees to pay all costs, charges, expenses and disbursements, including an Attorney's fee of $50.00 incurred in taking possession

of said Machine, or in collecting any sums owing hereunder and not paid at the maturity thereof, and that the waiver of any default shall not operate as a waiver of successive defaults, but all rights hereunder shall continue notwithstanding any one or more waivers, Lessee acknowledges receipt of a true copy of this Agreement, and acknowledges that he, or they, have read the same before affixing his or their signatures.

In case said Lessee fails to comply with any of the agreements aforesaid, on Lessee's part to be performed, Lessee hereby empowers any attorney of any court of record within the United States or elsewhere to appear for said Lessee as of any term, and after one or more declarations filed, confess judgment against said Lessee for the whole amount of the rental installments at that time due and unpaid, together with interest after maturity and costs of suit and attorney's commission of 15% for collection; and said Lessee hereby releases all errors and waives stay of execution, inquisition, and extension, upon any levy on real estate; and condemnation is agreed to; the exemption of personal property from levy and sale on any execution is also hereby expressly waived and no benefit of exemption will be claimed by the Lessee under and by virtue of any exemption law now in force.

It is understood and agreed by and between the parties hereto that any and all oral representations, warranties, agreements and promises, whatsoever, have been merged in this written agreement, and that there is no understanding or agreement between the parties hereto other than those set forth herein and that no oral representation or promise has been given by either the

Lessor or Lessee to the other as an inducement to enter into this Agreement.

The Lessee does hereby make, constitute, and appoint the Lessor, its Attorneys or Agents, as Lessee's true and lawful Attorney for him and in his name to collect any insurance due either to the Lessor or Lessee and to apply the proceeds for any such insurance to the Lessee's accounts, with power also to sign or endorse the Lessee's name on any insurance checks, drafts, receipts, claims and proofs of loss or any other papers which may be necessary. And with power also to sign the Lessee's name to the Certificate of Title for any purpose whatsoever.

It is further understood and agreed by and between the parties hereto that in the event the Lessor or its assigns is compelled to and does retake possession of the Machine, that the Lessor or its assigns may, at his, their, or its option, sell, assign or transfer the title to said Machine, either by private or public sale, without notice to the Lessee; and the Lessor may, at its option, credit on the amount of rental and other moneys that may be due to the Lessor under the terms of this Agreement, the net amount realized from such resale or transfer of title, and proceed against the Lessee as herein provided for the collection of the balance due from the Lessee. It is further understood and agreed by and between the parties that the amount so credited by the Lessor shall be conclusive evidence of the value of the Machine as of the date of repossessing the same.

The terms hereof are and shall be binding upon the heirs, executors and administrators of the Lessee, and shall inure to the benefit of the Lessor, his or its heirs, successors and assigns.

In Witness Whereof, Lessor and Lessee, par-

ties hereto, have hereunto subscribed their signatures and set their seals hereto on the day and year first above written.

Do not sign here unless you have actually received Motor Vehicle, and owe the full amount shown above.

Jos. A. Natale (Seal)
(Lessee Sign Here)

The within contract is hereby accepted and for valuable consideration, the receipt whereof is hereby acknowledged, the undersigned hereby sells, assigns, transfers and sets over to Automobile Finance Company the within contract, and all right, title and interest in and to the property therein described, and all rights and remedies under said contract, including the right either in assignee's own behalf or in undersigned's name to take all such proceedings or otherwise, as undersigned might have taken, save for this assignment. The undersigned warrants that the within instrument is genuine and in all respects what it purports to be; that all statements of fact therein contained are true; that at the time of execution of the agreement, the undersigned had a good title to said automobile and a good right to transfer title thereto; that all parties to the foregoing instrument have capacity to contract; that the undersigned has no knowledge of any facts which impair the validity of said instrument or render it less valuable; and that Certificate of Title showing encumbrance in favor of Automobile Finance Company has been applied for.

Jack's Garage
J. W. McIliath
(Signature of Dealer)

Exhibit D-1.

(*Reverse side*)

LESSEE'S STATEMENT.

Name of Lessee, Jos. A. Natale. Street Address 615 Island Ave. City, McKees Rocks, Pa. Phone Fe 4940. Age (Date if under 24) 38. White. Married or single, single. Number of Dependents, 1. Monthly Income, 25.00. Real Estate recorded in name of? Jos. Natale. Location, same. Present Employer, U. S. Realty Co. Position, Salesman. Business Address, Union Trust Bldg. How long employed, 5 mos. Former Employer, London Guarantee. How long employed, 2 yrs. Previous Finance Company, 1st Cons Disc. First Trade Reference, Ernest Groihead. Address, Superior Fire Insur. Second Trade Reference, Potter Title & Trust. Third Trade Reference, Dr. P. J. Henney.

I hereby agree and certify that I am confident that I can pay the installments of rental on said lease promptly as they become due and that said motor vehicle will not be used for taxicab purposes, or in violation of the National or State liquor laws or any other unlawful purposes.

JOS. A. NATALE (Seal)

Exhibit D-2.

(Total of Note) $736.02 (City) Pgh. (State) Pa. (Date) 9-18-41

After date, I or we or either of us, promise to pay to Jack's Garage or order, on the like date of each month in 18 equal and consecutive monthly installments of $40.89 each, the first payable one month after date Seven Hundred thirty Six & 02/100 dollars with interest from maturity at the highest lawful rate.

If any installment of this note is not paid at the time and place specified herein, the entire amount unpaid shall be due and payable forthwith.

And (I,) (we,) do hereby authorize, irrevocably, any attorney to appear for (me,) (us,) after maturity of the whole or any part hereof, in any court of record in the United States, in term time or vacation, and to waive the issue and service of process and to confess a judgment against (me,) (us,) in favor of the payee or any subsequent holder hereof, for such amount as may appear to be unpaid hereon together with costs, collection expense and attorney's fees of 15%, which we agree to pay and to release all errors and waive all rights of appeal.

And (I,) (we,) do hereby release all errors, and without stay of execution, inquisition and extension upon any levy on personal property or real estate is hereby waived, and condemnation is agreed to and the exemption of personal property from levy and sale on any execution hereon, is also expressly waived, and no benefit of exemption shall be claimed under and by virtue of any exemption law now in force or which may be hereafter passed.

Partnerships sign firm name by partner sign-

Exhibit D-2.

ing. Corporation sign corporate name by officer who must be authorized to sign checks.

Signed Jos. A. Natale (Seal)

Negotiable and Payable at the office of
Automobile Finance Company
with Exchange.

28597

(*Reverse side*)

Without recourse for value received pay to the order of Automobile Finance Company Pittsburgh, Pa.

Signed Jack's Garage (Seal)
(Lessor)
Signed J. W. McIliath (Seal)
(Officer, Firm Member or Owner)

On Guarantee Transactions
Dealers Sign Below

For value received I/we hereby sell, assign and transfer the within note to—Automobile Finance Company Pittsburgh, Pa.

We, and each and all of the endorsers hereon, jointly and severally guarantee payment of principal and interest, exchange, collection expense, costs, and attorney's fees, as and when the same shall become due, and of any extension or renewal of this note in whole or in part, accepting all its provisions authorizing the maker, without notice to us, or either of us to obtain, and the holder hereof to grant extensions or renewals in whole or in part, waiving demand protest and notice of protest and non-payment also agreeing that in case of non-payment of principal or inter-

est when due, suit may be brought by the holder of this note against any one or more or all of us at the option of said holder, whether or not such suit has been commenced against the maker, and whether or not repossession has been made or undertaken, and that in any such suit, the maker may be joined with one or more or all of us at the option of the holder. It is hereby agreed that this note becomes immediately due and payable (less any payment made on the within note) in event of non-payment at maturity of any payment scheduled on the within note.

The undersigned further empowers any attorney of any court of record within the United States, or elsewhere, to appear for them or any of them, after the maturity of the whole or any part hereof, in term time or vacation, and to waive the issue of services of process, and to confess a judgment or judgments against the undersigned, in favor of the holder, for such amount as may appear to be unpaid hereon, together with collection expense, cost and attorney's fees of 15%, and to release all error and waive all right of appeal. The undersigned hereby waives all benefit of valuation, appraisement and exemption laws now in force, or which may be hereafter passed, and the undersigned does hereby waive stay of execution, inquisition, and extension upon any levy of real estate, and condemnation is agreed to.

Signed (Seal)

(Dealer)

New Jersey Court of Errors and Appeals

JOSEPH A. NATALE, Plaintiff-Appellant, vs. AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES, Defendant-Respondents.	Action at Law On Appeal.

BRIEF OF PLAINTIFF-APPELLANT.

Introduction.

This appeal brings before the Appellate Court for review a directed verdict in favor of the defendant-respondents at trial and/or together with a review of the decision on the subsequent Rule to Show Cause, as rendered by the Honorable J. WALLACE LEYDEN, New Jersey Supreme Court, Somerset County.

The presentation of this appeal is undertaken by the plaintiff-appellant in *propria persona* and it is with the humble apologies and due respect to the learned Court and the Honorable Trial Judge that the said plaintiff-appellant is exercising his privilege as a layman citizen of the State of New Jersey to impune the Court on its adjudication of the case. For this privilege plaintiff-appellant is deeply grateful. The Court may be assured that every effort has been made by plaintiff-appellant to secure proper legal representation but due to reasons beyond his control,

endeavors were of no avail, therefore in a case of last resort this appeal is so advanced.

Plaintiff-Appellant prays that the Court will give consideration to this appeal and review of the case on its merits as presented in the State of the Case and that the indulgence of the Court will be granted on irregularities of form on the Brief which will be evident to the learned Court and that same will be done in interests of Justice to the Cause at issue.

Summary of Facts.

On December 23, 1941, at about 12:45 in the afternoon, defendant-respondents repossessed or caused to be taken a 1940 LaSalle automobile which was duly titled and owned by plaintiff-appellant, by breaking into and entering same while it was parked on Washington Street, in the City of Newark, N. J. without notice, demand or knowledge of plaintiff-appellant, alleging in defense of their act a default in the lease agreement or finance contract.

Defendants-respondents caused said automobile in question to be removed from the State of New Jersey while driven under its own power to the State of Pennsylvania and to the defendant-respondent's place of business in Pittsburgh, arriving there on December 27, 1941.

Defendant-respondents' contention is that they had the right to take the automobile as they did and that therefore they are not liable, which is the point at issue in this cause and contested by plaintiff-appellant on various grounds among which it is maintained that the entire balance due and payable under the disputed contract was tendered to the defendant-respondents and its acceptance refused, therefore suit has been instituted

for the taking of the said automobile and demand is made for its restitution thereof, together with damages arising from the unlawful seizure both exemplary and punitive with payment of court costs.

ARGUMENTS.

POINT I.

The refusal of the trial Judge to direct a verdict in favor of the plaintiff-appellant was a reversal error.

State of Case, page 139 will reveal that counsel for plaintiff-appellant did move the Court for a directed verdict in favor of plaintiff-appellant at the conclusion of defendants' case and same was immediately denied by the trial judge without any deliberation whatsoever. It could be inferred by the Court's prompt denial of the motion that the trial judge had arrived at his conclusion before arguments of counsel were fully debated thereby leaving many of the points of argument as presented by plaintiff-appellant's counsel unanswered.

In direct contradiction to plaintiff-appellant's counsel's motion the trial judge did direct a verdict in favor of the defendant-respondents and it is therefore maintained by plaintiff-appellant that the said direction of verdict was a reversal error on the grounds and arguments as hereinafter set forth.

POINT I - 1.

Court erred in its adjudication of the case in arriving at the conclusion that plaintiff-appellant had no cause for action.

The language of the Court in its direction of the verdict in favor of the defendant-respondents sets forth and clearly indicates that in the opinion of the Court plaintiff-appellant's counsel had not presented a cause of action which may so be interpreted by the remark of the trial judge during arguments of counsel (State of Case, page 140, line 38).

> "We are faced with a motion for the direction of a verdict in favor of these defendants and against you on the grounds that you have not shown a cause of action, but that proof is to the contrary.
> Now what do you say about that?"

It will be conceded by the plaintiff-appellant at the outset of these arguments that plaintiff-appellant's counsel perhaps did show certain dereliction of duties which were noted on his presentation of evidence and in its foundation thereof; however notwithstanding and in spite of the admitted derelictions, it is maintained by plaintiff-appellant that the actual case as presented in its condensed form was of sufficient magnitude to encompass every single point as enumerated on the Bill of Complaint, and that therefore plaintiff-appellant did show a legal cause of action and would have shown a much stronger cause had the inadvertancies not existed.

POINT I - 2.

Court erred in taking the case away from the jury since there were factual questions presented for a jury to decide.

Plaintiff-appellant will refer to the opinion of the Court as rendered by the Honorable JOSEPH L. SMITH on the motion to strike the complaint in Essex County (State of Case, p. 32, l. 20).

> "The sole contention of the defendants is that they had the right to repossess the car as they did and that therefore they are not liable. This of course raises a question to be tried and if the facts as alleged were possible of only one interpretation it would have been the duty of the Court to pass on such facts as matter of law. That however is not the case."

Another excerpt of Judge SMITH's opinion (State of Case, p. 34, l. 12):

> "The court makes these observations, not for the purpose of passing final judgment upon the nature of the document used in this case but merely to indicate that there are questions of facts to be determined by a trial before a jury."

Judge SMITH's opinion is further quoted (State of Case, p. 34, l. 17):

> "For these reasons it is the opinion of the Court that the matters in issue are contradicted and are capable of different interpretations as the final evidence may indicate. Therefore they are not such matters that the Court may dispose of on a motion."

The arguments as presented on the motion to strike the complaint were very much in accord and the same as presented at the trial and in all justice to the litigant parties it should have been presented to the jury for the weighing of the evidence and the questions of fact so noticeably at the surface.

The question as to whether or not the contract was a lease agreement as purported by the defendant-respondents whereby plaintiff-appellant was never to acquire ownership of the car after payment in full or whether it was a conditional sale or a simple contract in support of a loan of money on the car, was disputed as to identity and performance thereof, which should have been the province of the jury to pass on as a matter of fact and law.

> *John Somers Faucet Co.* v. *Commercial Casualty Co.*, 99 Atl. 342, 89 N. J. L. 693 (1916);
> *Downs* v. *New Jersey Fidelity Ins. Co.*, 103 Atl. 205, 91 N. J. L. 523 L. R. A.
>
> The construction and effect of a written instrument is a matter of law for the Court to determine and not for a jury, but when the construction of a written instrument depends on extrinsic facts as to which there is a dispute, its construction is a mixed question of law and fact and presents a jury question under proper instructions from the Court.

It was admitted at the trial by plaintiff-appellant that he signed the contract in good faith while it was in its blank and incomplete form depending on the trustworthiness of the defendant-respondents to comply with agreement and insert the proper data to complete the contract. The data as inserted after execution of the contract

was not in accordance with agreement and the name Jacks Garage was erroneously used instead of the Metropolitan Buick Co. The fact that a fictitious name was inserted as lessor, that the contract was executed in blank, that it contained trick clauses to the effect that the lessee was never to become its owner after completion of all payments were all facts that are extrinsic and of an unusual nature and it would have been proper for the jury to pass on this evidence which is subject to inferences such as the jury may draw;

> *Faulkner* v. *Paterson R. Co.*, 46 Atl. 765, 65 N. J. L. 181.
>
> When the evidence of witnesses in a cause at trial is in conflict it is the province of the jury to determine the credibility of witness and in which direction the weight of evidence exists.

It is rather doubtful that a jury would have believed the testimony of Mr. A. Pivirotto, only witness for the defense, on his identification of the letter of November 10, 1941 as presented to him by counsel for plaintiff-appellant (State of Case, p. 108, l. 20). He admitted that Mr. O'Brien was a clerk in his office and that Mr. O'Brien had the authority to sign letters but when confronted with the actual letter that he had authorized Mr. O'Brien to send to the plaintiff-appellant he said he could not identify the signature. It is a definite fact that the testimony as given by this defendant-respondents' witness was false as his affidavit will show (State of Case, p. 28) which contradicts his testimony. The credibility of this witness should have been for the jury to determine its true value.

The trial judge opinionated on the direction of the verdict that plaintiff-appellant, Mr. Natale,

had defaulted in the contract and had breached it by his own acts (State of Case, p. 144, l. 10).

The case of *Spattuzzi* v. *Star Auto Truck Ex.* (E. & A.) 1938, 119 L. 377, 196 A 723, clearly sets forth:

> The question as to whether or not a party had defaulted in payment on a contract of conditional sale as buyer held a question for the jury.

Testimony was presented in behalf of plaintiff-appellant in the presence of Mr. James E. Walsh, secretary of the Westfield Trust Co. (State of Case, p. 91) to the effect that plaintiff-appellant had caused him to issue a Treasurer's Check in the amount of $667.42 as requested by defendant-respondents in their letter of November 10, 1941 as payment in full of the contract and that he had caused same to be sent to the Mellon National Bank in Pittsburgh, Pa. for tender to the defendant-respondents' finance company, was given no consideration by the trial judge in his direction of the verdict. There was a clear question of performance which should have been left to the jury to decide.

> *Harrison* v. *Dickerson,* 93 Atl. 718, 87 N. J. L. 92.
>
> Where the issue whether a contract was fully performed was under the evidence a disputed question, the question was for a jury to decide.

It must be clear to the Court that questions of fact were abundantly interspersed in this law action which were disregarded by the trial judge and certainly in direct contradiction to the opinion as rendered by Honorable Joseph L. Smith at Essex County:

Betts v. *Francis*, 30 N. J. L. 152.

A verdict will be set aside and a new trial granted where a question that should have been left to the jury with proper instructions was not submitted to them.

POINT I - 3.

Court erred in the admission to evidence of the Lease Agreement as presented by the defendant-respondents.

The argument on this point intends to bring up for review the legality of the contract in question. The Court's observation and remarks on the admission of this instrument is recited as follows (State of Case, p. 128, l. 12):

> "The Court: Well, anyone who is fool enough to sign a blank piece of paper will have to suffer the consequences. It may be marked. You may have an exception.
> Mr. Handelman: Thank you."
> (Paper marked Exhibit D-1.)

With particular reference to the Court's remark on the signing of the blank piece of paper, could it then be inferred as a matter of law, that regardless of the substance of the inscriptions as made to a blank piece of paper after it was signed by a party that it would become of legal competence to stand in a court of law and be allowed to be introduced to the record without any consideration given to its construction or identity or whether or not the completed after execution piece of paper was in conformity to legal statute or process of law or defective, or whether or not it held legal consideration or whether it was secured in bad faith or on elements bordering fraud. The

question is raised by the layman, plaintiff-appellant, does the mere signing of a blank piece of paper make it a legal instrument. The answer to this question should be very clear even to one entirely unfamiliar with the law.

A Supreme Court ruling on this subject sets forth the point quite clearly in the case of *Joseph Heimberg* v. *Lincoln National Bank* (Sup. Ct. 1934) 113 L. 76, 172 A. 528:

> Incomplete instruments undelivered—it will not if completed and negotiated without authority be valid contract in the hands of the holder as against any person whose signature was placed thereon before delivery.

A copy of the contract in question was never delivered to the plaintiff-appellant after execution, therefore it is maintained that the contract was never completed and should not have been allowed to bind the plaintiff-appellant.

New Jersey Law—When title defective 20 N. J. L. 7-2-55 (Seltzers) page 70:

> The title of a person who negotiates an instrument is defective within the meaning of this subtitle when he obtains the instrument or any signature thereto, by fraud; duress or force or fear or other unlawful means or for illegal consideration (no consideration) or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. (Parenthesis ours.)

New Jersey Law (Seltzers 20 page 188) recites further:

> Mistake of fact may void a contract. To offset the validity or legal effect of an agreement a mistake of fact must be one that is material.

The mistake of fact on the instrument in question referred to by the plaintiff-appellant is the undeniable mistake that Jack's Garage was shown thereon as lessor and executed by Jack McIliath who warrants in the contract that he has legal title to the automobile in question (Exhibit D-1, State of Case, p. 158, l. 26) whereas on the record he did not have title before the time of signing, during the time of signing or at any time subsequently thereafter. That surely must be a mistake of fact that is material.

Kirk v. *Dempsey,* 88 A 1029-85 N. J. L. 304 supports the contention that it is essential to the validity of the grant (lease) that the grantor must be owner (lessor).

See also

Blanchard v *Trustees, etc., Pgh.* 100 A 804, 256 Pa. 242.

Plaintiff-appellant will further maintain that the lease agreement should not have been admitted to evidence inasmuch as it held no legal consideration. Upon examination of the contract in question (Exhibit D-1) it is shown that Jack's Garage as lessor undertakes to lease or convey an automobile to the plaintiff-appellant, Joseph A. Natale, at $40.39 per month for an eighteen month period.

New Jersey Law on consideration will show the following:

> To give consideration value for the support of a promise it must be such as deprived the person to whom the promise was made of something which he previously possessed or else conferred upon the other party a benefit which he would not have otherwise have had.
>
> *Conover* v. *Stillwell,* 34 N. J. L. 54.

Referring to Jack McIliath as lessor he had nothing before the contract was signed of which he was deprived inasmuch as he did not own or have title to the car for which the promise was made and Joseph A. Natale already had title which he received three days before the contract was executed, namely, November 16, 1941 (Exhibit P-1) from the Metropolitan Buick Co. under separate consideration, therefore Joseph A. Natale was not benefitted by something which he would not have had since he already owned the car.

Pennsylvania Law is recited on this point which will serve to show how a Pennsylvania Court would look at this same point at issue:

> The remedy for inserting offers of evidence which should have been excluded and the elimination of evidence which should not have been excluded is a new trial.
>
> *Dixon* v. *Metropolitan Ins. Co.*, 7 A 20 L. 549, 136 Pa. Super. 573.

POINT I - 4.

Court erred in its finding that contract was in default.

The reviewing Court will be referred to the trial judge's opinion addressed to the jury on the rendering of the verdict in favor of defendants, (State of Case, p. 144).

The trial judge clearly stated that plaintiff-appellant Natale borrowed $736.02 on the security of the automobile and that due to the skipping of the October 25th payment the contract became in default and that the defendants had the right to

act as they did. The Court's decision on this question of fact was concluded without any consideration or mention made of the testimony as given by Mr. James E. Walsh of the Westfield Trust Co. (State of Case, p. 91) whereby it was definitely established by this testimony that plaintiff-appellant did remit all the money due under the contract and that its acceptance was arbitrarily refused and therefore in the light of the evidence as introduced to the record, the question of default was not to be attributed to the plaintiff-appellant but as the facts were presented it was the defendant-respondents that had defaulted or at its best they had prohibited the plaintiff from performing his part of the contract. It is generally established by the record that plaintiff-appellant was ready to perform and that tender was ready.

To cite New Jersey law on this point:

> *Becker* v. *Kelsy,* 157 Atl. 177, 9 N. J. L. Misc. R. 1265—#346:
>
> > General rule is in pleading performance of conditions precedent and readiness to perform and tender of performance plaintiff need not state facts showing such performance or tender.

The plaintiff-appellant will maintain that the fact he had skipped the October 25th payment does not deny him any rights under the contract which he inherently had and that the offer of payment in full as evidenced by the record made it mandatory on the defendant-respondents to accept the payment as offered.

Pennsylvania Law will go even further and allow that inherent right under the contract to the point that the car may be already repossessed and in the hands of repossessor, viz; *Weigand* v. *Standard Motor Car,* 167 A 493, 109 Pa. Sup. 256,

Buyer under Bailment lease, still has rights under lease even after car is repossessed after default of payments.

All of the above readiness to perform and tender of payment was made before the car was actually repossessed on December 23, 1941.

The observation of the trial judge in his statement to the jury that the contract was in default was not within his province to decide, as it was not for the Court to weigh the evidence on a question of fact. The credibility of the witness for defendants, Mr. A. Pivirotto who testified that the contract was in default the extrinsic circumstances surrounding the performance of the contract were all questions of fact for the jury to decide and especially when it was a disputed question where the jury may have drawn inferences which is permitted to them. The Court cannot weigh evidence, but is bound to concede to be true all evidence which supports the view of the plaintiff and to give the benefit of all legitimate inferences which are to be drawn in its favor. *Hoff* v. *Public Ry. Co.,* 90 N. J. Law, 106; *Barry* v. *Borden Farms,* 100 N. J. Law 106.

The record will show by examination of the interrogatories (State of Case, p. 38) that the money to pay off this contract in the amount of $667.42 was offered to the defendant-respondents by Mr. Berryhill of the Mellon National Bank and its acceptance was refused.

New Jersey law will recite that it is useless to make the actual personal tender of money when it has been definitely ascertained in advance that the tender will not be accepted, such as cited in the case of *Becker* v. *Kelsy,* 157, Atl. 177 9 N. J. L. Misc. R 1265—#346.

POINT I - 5.

Court erred in the admittance to evidence the promissory note on counterclaim.

The promissory note as presented by the defendant-respondents and admitted to evidence and marked Exhibit D-2 (State of Case, p. 129, l. 32) over the objection of appellant's counsel was one and the same obligation as signified by the lease agreement in the cause at issue. The Court will be referred to the printed matter on the lease agreement which in its first paragraph of stipulations sets forth (State of Case, p. 152, line 1) viz:

> "A note payable in 18 monthly installments of $40.89 each, commencing one month from date hereof, given by lessee to lessor as evidence but not as payment of balance owing."

The above excerpt from the lease agreement itself clearly demonstrates that the note was not an additional consideration and should not have been imposed upon the plaintiff-appellant as a penalty. Since the automobile was repossessed as their alleged restitution for default in lease agreement as payment in full how can it be maintained by the defendants that they should be paid for the note in addition to having taken possession of the automobile.

Testimony of the defendants' witness Mr. A. Pivirotto while under direct-examination, admitted that the payment of the contract was also payment for the note (State of Case, p. 130, l. 1).

Plaintiff-appellant in addition to the above will also bring to the Court's attention that the note as admitted to evidence by the Court was void of any consideration, for the same reason as argued

under the admittance of the lease agreement. Maker of the note was not benefitted by anything which he did not already possess and the payee of the note, Jack's Garage, was deprived of nothing since he had no automobile to lease or convey which he had contracted to do, therefore, it is respectfully maintained that the admittance of this note to evidence by the Court was erroneous or was not fully understood by the Court.

The fact that the defendant-respondents withdrew their counter-claim which was based on this note does not condone the error of the Court in having admitted it to evidence inasmuch as the withdrawal of this note was done voluntarily by the respondents and not by order of the Court. It is therefore respectfully maintained that the Court erred in the admission of this note to evidence and allowing the counter-claim.

POINT I - 6.

Court erred in its refusal to admit to evidence the letter of November 10, 1941.

State of the Case, p. 74, l. 9 will reveal that the plaintiff-appellant while on the witness stand endeavored to bring out the fact he had received a letter from the defendant-respondent finance company in advance of and prior to the letter as marked for identification P-3 between Mr. Michaels and Mr. Merz. The letter referred to in plaintiff-appellant's testimony was the letter of November 10, 1941 as sent to plaintiff-appellant by defendant-respondents (State of Case, p. 28) clearly setting forth the exact amount of $667.42 as the net pay-off acceptable to them as payment in full for the contract on the automobile in ques-

tion specifically stating the original amount of the contract with the certain allowances made for rebate on interest and for cancellation of insurance policy.

It is not clear to the plaintiff-appellant why this testimony was not permitted to be introduced as to this letter of November 10th. Counsel for defendant's repeated objections were sustained by the Court after witness was specifically asked to answer questions propounded to him by plaintiff-appellant's counsel. The Court however by sustaining the objections of defendant's counsel did eliminate material evidence that was vital to the cause at trial.

The same letter was subsequently shown to witness for defendants Mr. A. Pivirotto on direct-examination by plaintiff-appellant's counsel (State of Case, p. 108, l. 20) who refused to identify the said letter. It then remained due to the surprise of this witness for plaintiff-appellant's counsel to secure from the Clerk at Trenton the original affidavit as filed on the motion to strike the complaint and to exhibit to him the previous attestation in order to secure the admission of this letter in evidence. To this end it was decided that plaintiff-appellant drive to Trenton the following morning of the second day of the trial to secure this additional evidence and the Court was requested by plaintiff-appellant in the presence of Mr. Robert Falcey, deputy clerk of the Clerk's Office of the Supreme Court, by telephone after arrangements were completed for the transfer of the evidence; to delay the verdict until the arrival of the Clerk with the papers. This delay was not granted by the Court therefore it was not possible to have same introduced to the record.

The elimination of this letter from the evidence at trial prohibited the plaintiff-appellant from claiming NOVATION of the lease agreement in question; said letter having changed the terms of the contract with respect to the amount due. The case in New Jersey Law; *New Jersey Terre Cotta* v. *Goodman Warehousing Co.,* 134 Atl. 759, 103 N. J. L. 113 cites:

> Sellers letter proposing allowance for defective material and for certain payment by buyer and that previous agreement be cancelled and buyer's acceptance and providing for manner in making payment HELD constitutes NOVATION.
>
> NOVATION implies extinguishment of existing debt or obligation by the parties thereto and the transition into a new existence between same or different parties, consideration being the discharge of the old debt.
>
> *New Miami Shores Co.* v. *Duggan,* 160 Atl. 262, 9 N. J. Misc. 620 (Aff. E & A)
> *New Miami Shores Co.* v. *Duggan,* 160 Atl. 515, 109 N. J. L. 220.

Another citation on Novation is as follows:

> A contract is discharged when new terms are agreed upon and a new contract results consisting of the new contract and the terms of the old contract which are consistent with them.
>
> *McDougal* v. *Henning Mfg. Co.,* (E. & A.) 1917, 91 L. 209, 102 Atl. 680.

This letter of November 10, 1941 was the cause of the plaintiff-appellant's transmittal of payment as requested in the amount of $667.42 which was testified to by Mr. James E. Walsh of the Westfield Trust Co. (State of Case, p. 91) and further corroborated by the answers to interrog-

atories as administered to Mr. William Berryhill of the Mellon National Bank at Pittsburgh (State of Case, pp. 38 and 43). It is logical to presume that if this letter had not been received by plaintiff-appellant specifying the amount requested then plaintiff-appellant would have also been able to remit the full amount of the contract namely $736.02 instead of $667.42. The difference involved would not have precluded the full payment.

As a note of explanation reference to the names of two automobiles appearing on the said letter, namely the De Soto and the La Salle showing two respective pay-off amounts of $667.42 and $999.67, referring to two separate accounts. It will be noted that the two accounts involving the two cars were each separate and distinct one from each other and neither contract had any connection with the other. This is a matter of record that there was no evidence introduced by either side to refute this statement. It cannot be maintained therefore by the defendant-respondents that both accounts had to be paid off simultaneously inasmuch as there was nothing in either contract to that effect and there were no oral agreements to infer any such agreement. The statement in Mr. Pivirotto's affidavit sets forth as shown (State of Case, p. 24, l. 36) viz:

> "7. There is no other instrument executed by Joseph A. Natale in connection with the leasing of the LaSalle motor vehicle.
>
> A. M. Pivirotto"

POINT I - 7.

Court erred and abused discretion in not permitting delay in order to secure vital records from Trenton, N. J.

Arguments as set forth on POINT I-6 page 17, line 19 starting from sentence "It then remained due to surprise of witness for plaintiff-appellant's counsel to secure from the Clerk at Trenton" will be repeated and made a part hereof * *

POINT I - 8.

Court erred in its refusal to allow the answers to interrogatories to be read into the record.

This point in argument reference to the refusal of the trial Judge to permit the reading into the record of the Answers to the certain interrogatories which were administered to Mr. William Berryhill of the Mellon National Bank of Pittsburgh may prove to be an interesting one and worthy of the reviewing Court's consideration.

State of Case, p. 101, l. 30 will reveal after considerable debate between counsel of both sides that the trial Judge did sustain the objection of defendant-appellant's counsel over the objection of counsel for plaintiff-appellant and thereby eliminated the introduction of this evidence on the grounds that the statute was not being followed and that there was no proof of a commission or oath.

A delay was asked for by plaintiff-appellant's counsel until the actual record could be transmitted from the Clerk's Office of the Supreme Court

at Trenton to prove that the said interrogatories were according to statute and that they were filed at the office of the Clerk but due to the course of the arguments by counsel said delay was not permitted and an attempt was made by plaintiff-appellant's counsel to use the exact copies of the record but same was refused by the Court (State of Case, p. 99, l. 30).

The record as transmitted from the Supreme Court to the Appellate Court will reveal by examination that the interrogatories were in accordance to statute inasmuch as the original set was filed July 22, 1943 with a commission having been previously issued on June 19, 1943. As to the oath which was objected to by defendant-respondent's counsel, the answers to the interrogatories will reveal by the opening statement of the commissioner Charles L. Seif on the said papers (State of Case, p. 36, l. 38) which is as follows:

> "Charles Lysle Seif, member of the Bar of Allegheny County, Pennsylvania having been authorized as Commissioner and having been duly sworn * * *"

The above would denote that he had complied with the statute with reference to taking the oath and that it would also be in compliance with the directive as set forth on the said commission as issued, which reads as follows: State of Case, pp. 35-36:

> "And we further command you, before you act in or be present at the swearing or examination of any witness, you do take the oath, or, if conscientiously scrupulous of taking an oath, then an affirmation, faithfully, fairly and impartially to execute this commission * * *"

There is nothing recited in the commission requesting that the commission must show evidence

of having taken the oath. Mr. Sief being a Pennsylvania attorney would be required to act in accordance with the commission as directed to him only, as he could not be expected to know what the New Jersey Statute was in regard to oaths.

It is maintained by the plaintiff-appellant that since the originals of answers to interrogatories were not in Court at the time of trial and admitting that it was a mistake of counsel for not seeing to it that the papers were on hand it can be assumed that since the issuance of the commission and its performance thereof was under the jurisdiction of the Court, the Court should have permitted the delay to secure the originals or to have allowed the use of the copies until the originals could have been presented at a later time for verification, as this was a material part of the plaintiff-appellants case and question at issue.

At its best the Court should have waived the technicalities as objected to by the defendant-respondents in order that the questions at issue could have been presented more fully before the Court and for its adjudication of the issue.

> New Jersey Law 2:27-157 provides to prevent failure of justice by reasons of mistakes and objections to form, the Court or Judge may at all times amend all defects and errors in any proceeding in an action pending in the Court, whether or not there is anything in writing to amend by or the defect or error is that of the party applying to amend. Amendments made with or without costs and upon terms. All amendments necessary to determine real question in controversy between parties to an existing action shall be so made. Seltzer's page 580.

POINT I - 9.

Court erred in weighing of the evidence and basing verdict on incredible evidence.

The testimony of Mr. A. Pivirotto, witness for defendant-respondents will be revealed by the record as having no credibility. His testimony was deliberately false clearly showing elements of fraud and in direct attempt to deceive the Court. Excerpts of his testimony are cited; (State of Case, p. 108, l. 9) direct-examination by Mr. Handelman which is as follows:

> Q. Mr. Pivirotto you are employed by the Automobile Finance Co.? A. Yes.
> Q. In what capacity? A. Vice-president.
> Q. And in November, 1941 were you vice-president at that time? A. I was.
> Q. Did you have employed by you a Mr. D. F. O'Brien? A. Yes.
> Q. What was his capacity? A. Clerk.
> Q. And did he have authority to sign letters for the Company? A. Yes.
> Q. I show you this letter and ask of you if that is Mr. O'Brien's signature? (Exhibiting letter of November 10) A. *That I don't know.*
> Q. Is that a letter of your Company? A. It is.
> Q. Is that concerning the account of Mr. Natale in this action?
>
> Mr. Blume: Objection.
> The Court: I will allow it.
> Mr. Blume: I take an exception.
>
> Q. Will you answer the question? A. What was the question?
> (Question read) A. Yes, it is.
> Q. Was that letter sent our from your office?
>
> Mr. Blume: Objection.

A. It is our letterhead. *I don't know whether it has been sent from our office or not.*

Q. That is Mr. O'Brien's signature?

Mr. Blume: Objection.

The Court: Go ahead.

Q. Do you or do you not know the signature? A. *I do not.*

Q. Do you know on November 10, how much was due on the car if paid in full at that time? A. *I do not.*

Q. Mr. Pivirotto, wouldn't there be an allowance off that amount if payment were made in full? A. *There would not.*

Plaintiff-appellant would refer the Court to Mr. Pivirotto's affidavit upon which he relied at the motion to strike the complaint (State of Case, p. 28, Schedule "D") and upon examination of this affidavit and schedule "D" it will be revealed that he recited the very same letter word for word as it was sent to the plaintiff-appellant and furthermore gives detail as to why the letter was sent. This affidavit is offered as evidence to the Court that the witness testified falsely while on the witness stand; and he refuted his own previous attestation and this alone would be grounds for a new trial.

In the case of *Young* v. *McPherson,* 3 N. J. Law 895 it was adjudged:

> Where witnesses swear against their own previous attestation, it presents a peculiar case requiring special investigation. In this case a new trial was granted.

The case of *State* v. *Dayton* (Sup. Ct. 1850) 23 L. 49, further establishes this point:

> An affidavit falsely sworn to was held Perjury by force of the Act of Oaths.

Additional testimony of this witness is recited as taken from the State of Case, p. 131, l. 24 while under direct-examination of defendant's counsel:

> Q. To whom was payment made under that lease when you bought it? A. To Jack's Garage.
>
> Q. Did you receive the Title from the very first day the transaction took place? A. *At the time that the moneys were paid to Jack's Garage.*
>
> Mr. Handelman: Just a minute. I object to that. The best evidence of the title would be the record, to show the title.
>
> The Court: No, I will allow it.
>
> The Witness: May I have the question?
>
> Mr. Handelman: May I have an exception?
>
> Q. Referring to McIliath. A. *We received the title from the owner of Jack's Garage—J. M. McIliath.*
>
> Q. From the day you received that title did it ever go out of your possession? A. *Never did.*

The foregoing testimony was permitted to remain on the record by the trial Judge after it was previously proven by the record and Exhibits P-1 and P-2 (State of Case, p. 141, l. 36 and p. 148, l. 20) that the title of said car was transferred from the Metropolitan Buick Co. to Joseph A. Natale on September 16, 1941 three days before the time of the making of the lease agreement as introduced by the defendants and Exhibit P-2 will show that title was issued by the Department of Motor Vehicles of Pennsylvania to Joseph A. Natale as requested by the application of title Exhibit P-1 (State of Case, p. 146, l. 20) on September 23, 1941, and it remained in the name of Natale until February 2, 1942 at which time defendant finance company by virtue

of an application to Motor Vehicles Department stating that the car was repossessed, was issued a new title showing the said corporation as owner. This new title was issued six (6) weeks after the car was taken.

The new title as issued on February 2, 1942 to the defendant finance corporation is also exhibited in Mr. Pivirotto's affidavit and shown as Schedule "B" (State of Case, p. 25) which shows a Title Number *D*5479136. The Court will be referred to the title number on the Certificate of Title as issued to Joseph A. Natale (State of Case, p. 149, l. 8) which is shown as *C*5479136. These numbers are identical with the exception of the letter prefix "D" and "C." The titles as transferred to new owners in the State of Pennsylvania will be originally shown as "A" titles and subsequent transfers of the same title retain the same numbers but are prefixed with the letters in alphabetical order denoting prior ownership. Therefore the Natale certificate which is prefixed with the letter "C" is the prior title and that the "D" title as issued to Automobile Finance Co. was subsequent to and followed the Natale title by virtue of repossession and not as testified to and as pleaded by the defendants, that they had title at the time of repossession.

The exhibiting of the Certificate of Title as Schedule "B" in the affidavit of Mr. Pivirotto was false which the record will prove and therefore his testimony while on the witness stand as denoted above was also false.

The Book of Rules of the Supreme Court of New Jersey page 21 Rule 33 on Pleadings under Untrue Statements reads viz:

> Allegations or denials, made without reasonable cause, and found untrue, shall subject the party pleading the same to the pay-

> ment of such reasonable expense, to be taxed by the Court, as may have been necessarily incurred by the other party, by reason of such untrue pleading (Rule, Pr. Act 1912).

The above citation of Supreme Court Law will show that in addition to false testimony given by the defendant-respondent at trial, he is also subject to false pleadings and subject to additional penalty.

More excerpts of this witness' testimony is recited while under cross-examination by plaintiff's counsel (State of Case, p. 135, l. 30) which is as follows:

> Q. Where is it, Mr. Pivirotto? A. Where is what?
>
> Q. Where is the certificate of title, in you? A. *I think we have one.*
>
> Q. You think you have one. Do you have one or not? A. *We do.*
>
> Q. Now you said that this car was transferred from Jack's Garage to Natale; is that right? A. No, I didn't say that.
>
> Q. What did you say? A. I said that we purchased—we gave our check to Jack's Garage in purchase of this lease agreement.
>
> Q. Now you are sure about that? A. Yes.
>
> Q. And you are as sure about everything else as you are about that, Mr. Pivirotto? A. I am quite positive that we made our check payable to Jack's Garage.
>
> Q. As a matter of fact, Mr. Pivirotto, this assignment came to Mr. Natale not from Jack's Garage, did it? (Extending Exhibit P-1) A. This was made by Metropolitan Buick Co.
>
> Q. That fact you are certain about, are you? A. As stated there, yes.
>
> Q. Thank you very much.

In view of the foregoing it is maintained that the testimony and evidence as presented by the

defendant-respondents at trial was incredible and that the trial Judge in awarding the verdict to the defendants must have weighed the evidence which resulted in rendering a verdict based on incredible evidence.

The following citation of authorities seem to confirm the contention of the plaintiff-appellant viz:

> *Vangar* v. *Fisher Baking Co.,* 154 A. 203, 9 N. J. L. Misc. R. 399 N. J.
>
> Verdict for defendants unsupported by credible evidence. New trial was necessary.

The case of *McCabe* v. *Penna. R. R. Co.,* 166 A. 843, 311 Pa. 229 will also confirm viz:

> False statements necessitates a new trial.

Also cited is the case of *Faulkner* v. *Paterson R. Co.,* 46 A. 765; 65 N. J. Law 181:

> When the evidence of witnesses in a cause on trial is in conflict, it is the province of the jury to determine which of it is to be taken as true to determine the credibility of witnesses and in which direction the weight of evidence exists.

POINT I - 10.

Court erred in its refusal to amend the complaint to include exemplary and punitive damages.

On the motion to amend the complaint which was served by Mr. Henry Handelman counsel for plaintiff-appellant and filed on March 18, 1944 which said motion was heard in trial Judge's Chambers before the start of the trial the trial

Judge did refuse to amend the said complaint to include exemplary and punitive damages, therefore it is maintained by plaintiff-appellant that said refusal was a reversal error.

> New Jersey Law 2:58-47 Seltzer's page 655.
>
> If a distress and sale shall be made by virtue of this statute for rent pretended to be in arrears and due when in fact it is not due, the person distraining or to him in whose name or right the distress is taken the owner of the property distrained, his executors or administrators may by action at law recover double the value of the property so distrained and sold, together with full costs of action against the person so distraining.

The ruling of the Pennsylvania Court in the following case will show how that court would look at a situation such as this, viz:

> *Minnich* v. *Kaufman,* 108 A. 597, 26 5 Pa. 321 #134.
>
> Judge erred in refusal to amend the complaint to include punitive and exemplary damages.

POINT I - 11.

Court erred in its refusal to grant a verdict against Wilbur D. Janes co-defendant since he had entered no defense.

The Court was moved by plaintiff-appellant's counsel to render a verdict against the co-defendant Wilbur D. Janes on the grounds that he had not entered a defense and that he had not even

made his presence in the Court. Reference is made to the Court's remark in answer to said motion (State of Case, p. 140, l. 24)

> Mr. Handelman: May I have a word, your Honor about Mr. Janes? Where is he and why hasn't he answered?
>
> Mr. Blume: I have.
>
> Mr. Handelman: I mean as to Mr. Janes. He has not even appeared here today to contest this action, to put in a defense of himself. Are we not entitled to a judgment against Mr. Janes? I submit your Honor, that we are. There is not any proof of agency or anything regarding it all.
>
> Mr. Blume: Shall I answer that, sir?
>
> The Court: No, I do not think it is necessary for you to do so. Let us do one thing at a time.

There is no further record in the State of Case which will show that the trial Judge disposed of this motion as made by plaintiff-appellant's counsel either in his further remarks to counsel or in his direction of the verdict to the jury.

It is the further contention of the plaintiff-appellant that he was entitled to a judgment against Wilbur D. Janes inasmuch as he was the person who had actually taken the car and he has claims in all of his pleadings that he was not an agent of the defendant finance corporation and that he did so take the car as an individual. The agency was also denied by the pleadings of the defendant finance company. The judgment record will clearly show that judgment was rendered in his favor whereas he was not even in Court to defend himself. This surely must be an error of the Court.

The following citation of authority would tend to support the contention of plaintiff-appellant which is as follows:

New Jersey Supreme Court (1929)

Failure to find verdict as to one defendant contrary to charge to find against both or neither warrants setting aside verdict against co-defendant.

Rubel v. *Weiss,* 146 A. 427 N. J. Misc. R. 447.

The above recitation of law is not similar to the issue involved in this point but it does however bring out the fact that the verdict must be inclusive and complete to encompass the entire issue and that the testimony and evidence as presented for one of the defendants cannot be used in favor of and in support of the other co-defendant. And it becomes a material question of law inasmuch as the rendering of a verdict in favor of this co-defendant prohibits the plaintiff appellant from any recourse of action which he might have had against said co-defendant due to his taking of the car.

It will be maintained that the Judge in directing the verdict as he did should have given some reason for disposing of the plaintiff-appellant's complaint against this co-defendant.

Pennsylvania law on this point is cited which is as follows:

Statler v. *Pennsylvania R. R. Co.,* A. 494, 299 Pa. 321.

Where none of issues necessary to be decided had been specifically decided by either Court or jury due to the course of the trial remedy, new trial.

POINT I - 12.

Injustice was done due to the course of the trial and plaintiff-appellant was deprived of clear and important principles of law.

New Jersey Law laid down in Supreme Court 1860 cites as follows:

> Where it appears that injustice has been done by the course of the trial and the verdict and that the party has been deprived of the protection of clear and important principles of law, the Court will set aside the verdict and order a new trial.
>
> *Meeker* v. *Boylan,* 28 N. J. Law 274.

To dwell upon this point briefly it would be the plaintiff-appellant's interpretation of the above law reference that the term "injustice" would be definable under the language of the Court and that it could be the basis for the reversal of a verdict.

As a matter of argument it would be maintained by plaintiff-appellant that the trial Judge in the rendering of the verdict did not take into consideration the phases of the trial and injustice was therefore done to the cause; viz:

1. Plaintiff-appellant was deprived of the privilege to amend the complaint

2. Plaintiff-appellant was deprived of the use of the answers to the interrogatories as administered to Mr. Berryhill of the Mellon National Bank

3. Plaintiff-appellant was deprived of the use of the letter of November 10, 1941 which would have been the basis of Novation

4. Plaintiff-appellant was deprived of the remedy as offered by the law; in the refusal of a new trial on the Rule to Show Cause

5. Plaintiff-appellant was deprived of a judgment against Wilbur D. Janes co-defendant respondent who had not even put in a defense for his actions and had remained away from the Court and that the trial Judge remarked that it was not necessary to reply to the plaintiff-appellant's counsel when a judgment was requested against this co-defendant.

6. Construction of the lease agreement was denied the plaintiff-appellant by the trial Judge upon arriving at the conclusion that plaintiff was estopped from demanding construction

7. Plaintiff-appellant was deprived of pleading performance to the contract in question.

POINT II.

The disclosure at trial of newly discovered evidence.

It was disclosed by the trial of the case and by virtue of the introduction of the so-called lease agreement that the lessor as named in the said instrument was Jack's Garage instead of Metropolitan Buick Co. This fact was unbeknown to the plaintiff-appellant before the trial. It was disclosed by parties before the contract was executed that Jack's Garage was not the owner of the automobile in question as also maintained in the testimony of the plaintiff-appellant but it was not to be assumed that the misrepresentation of Jack's Garage was to be continued and made a part of the instrument as executed by plaintiff-

appellant. The agreement was then that the name of Metropolitan Buick was to be used as lessor and not Jack's Garage. The fact that the contract was signed in blank by plaintiff-appellant and that thereby it precluded the opportunity of ascertaining the real inscriptions that were afterward made to the contract. The contention of the plaintiff-appellant that the contract was executed in blank was not disputed by defendant-respondents at trial and no copy of the completed contract was ever given to the plaintiff-appellant therefore its exact wording was not known until same was examined at trial in the Court.

This disclosure then becomes newly discovered evidence and it is of such a material nature that it would vitally effect the rendering of a verdict on a retrial of the case. The plaintiff-appellant will at a new trial be able to show undeniable evidence and proof that the contract which was the sole defense of the defendant-respondents is null and void and therefore same would be stricken from the record.

POINT III.

The trial Judge abused discretion in the refusal to grant a new trial at the conclusion of arguments on the Rule to Show Cause.

On the subsequent Rule to Show Cause arguments were presented on the various grounds in reworded form as presented on this appeal, all adjudged to have no merit. The language of the trial Judge on the discharge of the Rule is quoted as follows, S. C., p. 50:

> "If permitted a new trial certain difficulties of proof would be overcome by plaintiff

and the matter would be presented in a more plausible way."

It would be indicated by the Court's remarks as above that the certain derelictions or mistakes at the trial were evident to the trial Judge and if same be true then it was within the province of the Court to see that the remedy for those mistakes was carried out in the granting of a new trial by the Rule to Show Cause. It is assumed by plaintiff-appellant that the purpose of a Rule to Show Cause is to offer remedy for errors in order that justice may be accorded to the cause at issue.

The case of *Floersch* v. *Donnell,* 82 A. 733, 82 N. J. Law 357 recites

> A motion for a new trial after verdict because of insufficiency of evidence can only be granted where the *Court can see* that the verdict must have been the result of passion, prejudice, *mistakes,* ignorance or corruption. (Italics ours.)

POINT III - 1.

Trial Judge erred in refusal to give merit to perjury charge.

The testimony of the witness for defendants Mr. A. Pivirotto which has been demonstrated in this brief and the State of Case as being incredible and showing elements of fraud and deliberate falsification is such that he would be subject to personal incrimination on the basis of perjury and same was given no cognizance on the Rule to Show Cause. New Jersey Law will be cited on this point and shown as follows:

Definition of Perjury:

> A crime committed when lawful oath is administered in some judicial proceeding to a person, who swears willfully, absolutely and falsely in a matter material to the issue of point in question.

To constitute Perjury:

> First: Testimony must be material to issue
> Second: There must be lawful administered oath
> Third: Swearing must be corrupt, positive and false
> Fourth: There must be corroborating evidence.

Examination of the State of the Case and this witness' affidavit on record will clearly show that his testimony was maliciously false, positive, was under administered oath both at the trial and his affidavit under notorial seal and the testimony clearly affected points of the issue that were material, such as the letter of November 10, 1941, title to the automobile and the refusal to admit the tender of payment in full as made by the Mellon National Bank for the Westfield Trust Co.

The above was all very definitely brought to the attention of the trial Judge in fact so much so that it caused displeasure and a display of temper by the trial Judge at Chambers.

Refusal of a new trial would be considered as being abuse of discretion by the trial Judge.

POINT III - 2.

Trial Judge erred and abused discretion in allowing verdict to stand after elements of fraud were clearly indicated to him on the Rule to Show Cause.

Plaintiff-appellant will repeat one and all of the arguments as presented on POINT III-(1) and will make same a part hereof.

POINT III - 3.

Trial Judge erred on the ruling that plaintiff was bound by contract entered into and was estopped from asserting otherwise.

New Jersey Supreme Court 1874 holds in the case of *Stewart* v. *Lehigh Valley R. R. Co.,* 37 N. J. Law 53.

> The fact that the parties to a written contract have adopted and acted upon an erroneous construction thereof, it will not prevent them from insisting upon a proper and legal construction as to transactions which are not clear, if the terms of the contract are of themselves susceptible of a definite legal construction.

It would appear by the above citation that the plaintiff was within his rights in asserting otherwise, therefor it is held by the plaintiff-appellant that the trial Judge abused discretion in not granting the new trial.

POINT III - 4.

Trial Judge erred in refusing to give merit to Novation.

It was brought to the attention of the trial Judge on the Rule to Show Cause that the letter of November 10, 1941 clearly constituted NOVATION, said letter being sent to the plaintiff-appellant by the defendant-respondent finance company as shown by Mr. Pivirotto's affidavit (State of Case, p. 28).

This letter was not fully before the Court at trial due to objections sustained and refusal to admit but the original of the letter itself was exhibited to the trial Judge and its relevance to the cause at issue and he was fully informed as to its introduction to the record by virtue of the said Pivirotto affidavit. As previously argued on POINT I - (6) the same will be considered as a part hereof.

POINT III - 5.

Verdict of case would affect administration of justice in future law actions.

Dispensing of justice in future law actions would be affected by the verdict of this case if it were allowed to remain and against public policy.

The case of *Collins* v. *Will,* A. 2nd 98, 18 N. J. Misc. 492, is cited:

> Power to vitiate verdict by Court is remedial in character and also with view to the prevention of injustice in ultimate effect of the decision upon the administration of justice in general.

Conclusion.

This humble appeal as presented by plaintiff-appellant Joseph A. Natale, in *propria persona,* respectfully shows that the appellant finds himself aggrieved by the verdict as rendered in the Supreme Court of New Jersey by Honorable J. Wallace Leyden and therefore prays that the verdict as rendered aforesaid be reversed and set aside and that your appellant may have such relief in the premises as to this Honorable Court shall deem proper on the basis of the merits of the case.

Respectfully submitted,

Joseph A. Natale,
Plaintiff-Appellant,
in *Propria Persona.*

Dated May 4, 1945.

New Jersey Court of Errors and Appeals

JOSEPH A. NATALE, Plaintiff-Appellant, *vs.* AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES, individual, Defendants-Respondents.	Action at Law. On Appeal from New Jersey Supreme Court, Somerset County. Sat below: J. Wallace Leyden, C. C. J.

BRIEF OF DEFENDANTS-RESPONDENTS.

The defendants-respondents object to the exhibits as being made a part of the State of Case as are found on pages 19 to 46 inclusive. None of these exhibits were offered in evidence. These consist of notice of motion of the defendants to strike the complaint; affidavit of A. M. Pivirotto used by the defendants on the motion with exhibits annexed; opinion of Judge Joseph L. Smith; commissions for examination of a witness out of the state; interrogatories and answers.

Statement of the Case.

On September 18, 1941, Joseph A. Natale, the plaintiff-appellant, executed a contract called a "Lease Agreement", at Pittsburgh, Pennsylvania, by virtue of which he obtained possession from J. W. McIliath, trading as Jack's Garage, of one 1940 LaSalle Sedan. The total rental was $950.00 but because he wanted to finance the transaction

there was added finance charges of $136.02, which Natale agreed to pay in 18 equal monthly installments of $40.89 beginning on October 25th, 1941, and monthly thereafter until the full sum of $1096.02 was paid. This contract was purchased by the respondent, Automobile Finance Co. on the same day, from Mr. McIliath.

Natale did not make the payment which was due on October 25th, 1941, in the sum of $40.89 and removed the motor vehicle from the State of Pennsylvania. The motor vehicle was repossessed on December 23, 1941, at which time two installments were in default.

On February 6, 1942, Natale instituted suit against the Automobile Finance Co., the holder of the contract and its agent, Wilbur D. Janes, who repossessed the motor vehicle as agent, claiming unlawful repossession in that he offered to pay, after default, the sum of $667.42 in full payment of the balance of $736.02, and that it was refused, and claimed the value of the car.

A counterclaim was filed on behalf of the defendants alleging default under the contract and the sum of $736.02 being due together with interest and attorney fee as provided therein. Natale also executed a note in connection with the transaction in the principal sum of $736.02, and this was made the second count under the counterclaim.

The case came up for trial before Judge J. Wallace Leyden, Circuit Court Judge, and a jury. Plaintiff's proof as to the value of the car was $700.00 whereas the defendants proved that Natale owed on the note with interest and attorney's fees a total of $897.20.

At the close of the case the court directed a verdict in favor of the defendants on the complaint, whereupon the defendants withdrew their counterclaim without prejudice.

On May 16, 1944, Natale obtained a rule to show cause why the verdict entered should not be set aside and a new trial granted. He reserved his exceptions to the refusal of the trial judge at the trial of said cause to direct a verdict for the plaintiff at the close of the whole case. However, in his reasons for a new trial Natale set forth this ground. The rule to show cause was discharged after the court heard argument of counsel and considered the reasons filed by Natale for a new trial.

The Issues.

Whether the obtaining of a rule to show cause for a new trial, even with a reservation as to exception of the trial court to direct a verdict for the plaintiff which reservation was argued as a reason for a new trial, and the discharge of the same is *res judicata* and bars the appellant from bringing this appeal. Whether the Court erred in directing a verdict for the defendants at the close of the whole case.

LAW.

POINT I.

The appellant is barred on this appeal to urge the same grounds of appeal as were urged in his reasons on the rule to show cause for a new trial.

The appellant urged 18 reasons on his application for a new trial in the lower court (Case, pp. 47-49). The rule to show cause reserved unto the appellant "exceptions to the refusal of the trial judge to direct a verdict for the plaintiff at the close of the whole case, when so moved

to do by the counsel for the plaintiff be, and they hereby are reserved" (Case, p. 46). Under paragraph 13 of the reasons advanced for a new trial (Case, p. 49, ll. 24-26) the appellant states:

> Trial judge erred in refusing to direct verdict in favor of plaintiff.

The opinion of Judge Leyden in denying a new trial on the reasons advanced, states (Case, pp. 50-51):

> "I have again reviewed this case in the light of the arguments advanced and the memoranda submitted on the rule."

It must be assumed, and the foregoing statement of the court definitely shows, that all of the reasons urged by the appellant were either argued or abandoned. This is also true with reference to the reservation of the exception taken by the appellant to the failure of the court to direct a verdict in favor of the appellant at the close of the case.

Rule 129 of the Supreme Court provides as follows:

> Granting to a party a rule to show cause why a new trial shall not be granted shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule.

Litigants are not permitted to gamble on the outcome of their application for a new trial. Either they make an election to apply for a new trial or take an appeal. They cannot have both. Even a reservation in the rule to show cause of exceptions will be of no avail if such exception was argued or abandoned.

In the case of *Jones* v. *U-Drive-It Co., et al,* 8 N. J. Misc. 356, affirmed in 107 N. J. L. 523, there

was a verdict in favor of the plaintiff, and the defendant appealed. The defendant had obtained a rule to show cause why the verdict should not be set aside, and urged and argued as grounds therefor that the verdict was against the weight of the evidence and excessive. Upon a hearing under such rule the trial court discharged it. In affirming the lower court, the appellate court laid down the following rule:

> Where it is urged under such rule the verdict is against the weight of the evidence, such insistence is tantamount to an admission that there was some evidence, although insufficient, to support the verdict. Under such circumstances *a reservation of exceptions to* refusal to non-suit or *direct a verdict is unavailing as a ground of appeal. Catterall* v. *Otis Elevator Co.,* 103 N. J. Law 381, 135 A. 862.

To the same effect is the case of *Koczan* v. *Hamilton Laundry Service, Inc.,* 124 N. J. L. 52, 11 A. 2d 238.

The case of *Phillips* v. *Klein,* 127 N. J. L. 517, was an appeal to the Supreme Court by the defendant. In the trial court the defendant obtained a rule to show cause why the verdict should not be set aside and a new trial granted for the reason—(2) that the verdict was against the weight of the evidence. The court discharged the rule. Justice Case, for the Supreme Court, in affirming the lower court said:

> "It is well settled that where the verdict has been attacked on a rule to show cause as being against the weight of the evidence, the consideration and disposition of the rule covers the ground of a motion to nonsuit and a motion to direct and operates as a bar to any argument or consideration of such grounds of appeal. *Simons* v. *Lee,* 117 N. J. L. 370, 189 A. 360. The rule to show cause

> contains a provision that defendant's exceptions to the refusal of the trial judge to order a nonsuit or to direct a verdict was reserved. But the discharge of a rule makes *res judicata* every reason argued in support of it and no language inserted in the rule can save to the prosecutor the benefit, for appeal, of an exception that goes to a point assigned and argued under the rule. *Dombroski* v. *Metropolitan Life Insurance Company,* 126 N. J. L. 545, 19 A. 2d 678.
>
> "As the papers show no matter for review the appeal will be dismissed with costs."

The appellant in the case at bar inserted a reservation in the rule to show cause, as follows (Case, p. 46):

> Ordered that the plaintiff's exceptions to the refusal of the Trial Judge at the Trial of said cause to direct a verdict for the Plaintiff at the close of the whole case, when moved so to do by the counsel of Plaintiff be, and they hereby are reserved.

The appellant in his reasons for a new trial set forth as follows (Case, p. 49, ll. 24-25):

> 13. Trial Judge erred in refusing to direct verdict in favor of Plaintiff.

This same reason was urged as a ground on this appeal, and it is set forth as follows (Case, p. 54, ll. 29-34):

> I. The refusal of the Trial Judge to direct a verdict in favor of the plaintiff-appellant after conclusion of the trial was a reversal error, upon which exceptions were taken and reserved.

This appellant having urged on this appeal a ground which was a reason on his application for a new trial, altho he reserved his exception, is now precluded from again raising that point on

this appeal, and the decision of the trial court is a bar and *res judicata.*

Again this Court in the case of *Simons* v. *Lee,* 117 N. J. L. 370, dismissed an appeal because:

> "These grounds of appeal are not available to the appellant because of the fact a rule to show cause was allowed and discharged—, and one of the reasons assigned for making the rules absolute was that the verdict was against the weight of evidence. It is well settled that where a verdict has been attacked on a rule to show cause as being against the weight of evidence, the consideration and disposition of the rule covers the ground of a motion to direct, and operates as a bar to any argument or consideration of such grounds on an appeal."

A comparison of the reasons advanced on the rule to show cause and the grounds on this appeal will reveal that they are the same, except as to those grounds with relation to the abuse of discretion. This comparison is as follows:

> REASON: 1. Injustice has been done by the course of the trial and the Verdict and that the Plaintiff has been deprived of clear and important principles of law (Case, p. 47).

> GROUND: I. 12. Injustice was done due to the course of the trial and the court deprived the plaintiff-appellant of the protection of clear and important principles of law (Case, p. 56).

The appellant is barred from asserting the above ground on this appeal because it was set forth as a reason in the rule to show cause. Further, this ground does not set forth anything on which court can pass. It is a mere statement of the author without any legal principles being involved.

REASON: 2. Extrinsic circumstances may and should have been introduced with reference to the construction of the lease agreement, conditional sales agreement or contract, whichever would be its proper identification (Case, p. 47).

GROUND: I. The refusal of the Trial Judge to direct a verdict in favor of the plaintiff-appellant after conclusion of the trial was a reversal error, upon which exceptions were taken and reserved (Case, p. 54).

I. 1. Court erred in directing the verdict in favor of the defendant-respondents at trial and in taking the case away from the jury. Factual questions were presented for a jury to decide (Case, p. 54).

I. 3. Court erred in the admittance in evidence of the lease agreement or contract as presented by the defendant-respondents, over the objection of plaintiff-appellant's counsel (Case, p. 55).

I. 4. Court erred in its weighing of the evidence to find that the contract was in default and that it was thereby breached by plaintiff-appellant (Case, p. 55).

It is again pointed out that the appellant is barred from alleging the foregoing grounds on this appeal for the reason that they were advanced on the rule to show cause. Whether or not the court gave the instrument in question a particular name is of no consequence. The court found that there was undisputed testimony that when the automobile in question was repossessed by the defendants the instrument executed by the appellant and owned by the defendant, Automobile Finance Company, was in default, and by its terms

the defendants had the legal right to repossess the motor vehicle. The testimony in this respect is as follows:

> "Q. On December 23, 1941 you were in arrears for the payment which was due October 25th and November 25th, weren't you? A. Yes" (Case, p. 84, ll. 15-20).

The instrument, whether it be called a lease, conditional sales contract, chattel mortgage or otherwise, gives to the defendant the right to repossess, and this provision is as follows (Case, p. 154, ll. 21-35):

> "Upon any default in payment of any installment of rental or upon breach of any condition or covenant herein made by the Lessee, the Lessee shall, forthwith deliver the Machine in as good condition as when received by the Lessee (ordinary wear and tear excepted) to Lessor, and should Lessee fail or refuse to deliver the Machine as aforesaid, the Lessor shall have the right, without notice or demand, to terminate this Lease and to take Possession of the Machine wherever found, and Lessee hereby authorizes Lessor to enter the premises of the Lessee, with or without force or process of law, and forthwith take possession of Machine."

The appellant admitted to the execution of the instrument, and his testimony is as follows:

> "Q. Did you sign this paper? A. Yes, I signed this paper.
>
> Mr. Blume: Mark it for identification.
>
> (Paper marked Exhibit D-1, for identification.)" (Case, p. 78, ll. 19-25.)

This instrument was offered in evidence during the testimony of an officer of the defendant corporation. This was as follows:

"Q. I show you a lease agreement dated September 18, 1941, signed by Joseph A. Natale, and ask you if your company is the holder of that lease. A. It is. (Case, p. 127, ll. 15-19.)

Mr. Blume: I offer the instrument in evidence.

(Paper marked Exhibit D-1.)" (Case, pp. 127-8, l. 18.)

This instrument is fully set forth on page 151 of State of Case.

REASON: 3. Trial Judge erred in refusing Plaintiff the privilege to amend complaint at the outset of the Trial to include Punitive Damages (Case, p. 47).

GROUND: 10. Court erred in the refusal to amend the complaint to include exemplary and punitive damages (Case, pp. 55-56).

Since the reason and the ground of appeal are the same appellant is again estopped from asserting it on this appeal. There is no allegation as to abuse of discretion, and the appellant fails to point out where in the state of case an application to amend was made and refused by the trial court. This is fatal. The rule of law regarding abuse of discretion of the trial court in refusing to allow an amendment to the complaint will be taken up under another point in this brief.

REASON: 4. Trial Judge erred in refusing to submit the controversy to the Jury with proper instructions (Case, p. 47).

GROUND: I. 1. Court erred in its adjudication of the case in arriving at the conclusion that the plaintiff-appellant had no cause for action and had not proven a case (Case, p. 54).

I. 2. Court erred in directing the verdict in favor of the defendant-respondents at trial and in taking the case away from the jury. Factual questions were presented for a jury to decide (Case, p. 54).

I. 4. Court erred in its weighing of the evidence to find that the contract was in default and that it was thereby breached by plaintiff-appellant (Case, p. 55).

The foregoing reason and ground are in effect that the trial court erred in directing a verdict in favor of the defendants instead of submitting the case to the jury. On the rule this reason was argued and the appellant is again barred from urging these grounds on this appeal.

REASON: 5. Trial Judge erred in directing verdict in favor of defendants since the issue involved was one of fact and for a jury to decide whether the contract or agreement was in fact a lease agreement or a conditional sales contract (Case, p. 48).

GROUND: I. The refusal of the Trial Judge to direct a verdict in favor of the plaintiff-appellant after conclusion of the trial was a reversal error, upon which exceptions were taken (Case, p. 54).

I. 1. Court erred in its adjudication of the case in arriving at the conclusion that the plaintiff-appellant had no cause for action and had not proved a case (Case, p. 54).

I. 2. Court erred in directing the verdict in favor of the defendant-respondents at trial and in taking the case away from the jury. Factual questions were presented for a jury to decide.

The reasons advanced by the respondent on this appeal on objection to the grounds of appeal of the appellant are practically the same as to each ground of appeal. The appellant is barred on the foregoing grounds from raising them on this appeal because of the fact they were made a reason on the rule to show cause.

> Reason: 6. Trial Judge erred in refusing to allow the Jury to arrive at verdict resting on inferences such as a jury is authorized to draw (Case, p. 48).
>
> Ground: I, I 1. 2, 4, 5 and 6 (Case, pp. 54-55).
>
> I. 1. Court erred in its adjudication of the case in arriving at the conclusion that the plaintiff-appellant had no cause for action and had not proven a case.

The ground and the reason being virtually the same, this court cannot consider this ground on appeal as the appellant is barred from raising it again.

> Reason: 7. Witness for Defendants committed perjury in swearing against his own previous personal attestation, thereby furnishing a peculiar case requiring special investigation and a new trial should be granted. This perjury affected vital testimony in the Trial (Case, p. 48).
>
> Ground: I. 9. Court erred in the weighing of the evidence and testimony, the result of which was a verdict based on fraudulent evidence and testimony (Case, p. 55).

The appellant is precluded from making the ground of appeal effective on this appeal because

he is again barred by virtue of the fact that it was urged on the rule to show cause.

The appellant in his brief on this point (Brief, pp. 23-28) attempts to confuse the real issue in the case. The issue is whether or not the appellant was in default under the instrument he executed and owned by the respondent and if so, whether the respondents had a right to repossess the motor vehicle. The appellant admitted that he was in default on his October and November instalments of $40.89 each (Case, p. 84, ll. 15-20). The instrument which he signed gave the respondent the right to repossess because of default (Case, p. 154, ll. 21-35). It appears to be the claim of the appellant that when he signed the lease and note they were in blank, but he does not claim that when the instruments were received by the respondent they were not completed or that they were not filled in according to his agreement with the respondent's assignor, Jack McIliath trading as Jack's Garage. His testimony regarding these instruments is as follows (Case, p. 79):

> "Q. Is there anything in this paper that you signed that isn't true? A. No. As to the amounts filled in, Jack's Garage, Liberty Avenue.
>
> Q. Is the car described in there correct? Please look at the front, Mr. Natale. This is what you said you signed. A. Well, I want to look at the back. If there is any objection to that, I guess you might just tell me what I signed, and I will answer it. Yes, I signed that, and that is about the way it should be, although I did not fill in the amount."

Case, page 80:

> "Q. Nothing wrong with it, is there? A. Not that I can see at the moment.
>
> Q. Well, take a look at it, and take two moments, and tell us if there is anything wrong

with it. A. All right. Yes, the writing that was put in after I signed it is O. K.

Q. Is there anything wrong with that note? A. No. I don't see anything wrong with it."

If the instruments were in blank when signed, then the signer gave implied authority to the holder to fill in the blanks in accordance with their agreement. The appellant makes no claim that the instruments were not filled in according to this agreement.

According to the complaint of the appellant, he claims that while the amount due under the instruments was $736.02 (Case, p. 3, ll. 30-37) yet he attempted to tender the sum of $667.42 in full payment. He claims if the witness Pivirotto had identified the signature to a letter he would be able to prove that the respondent agreed to accept $667.42 in full payment of the obligation instead of $736.02 (Appellant's Brief, pp. 23-28). This letter was not offered in evidence by the appellant, and the court did not rule as to its admissibility in evidence as it was not called upon to do. The ground of appeal fails to set forth the testimony which the appellant claims was incredible. This must be done in order for the appellate court to consider the evidence. Such was the holding in the case of *Terminal Cab Co.* v. *Mikolasky,* 128 N. J. L. 275, where the grounds of appeal were designed to review alleged rulings of the trial judge on evidence, but they failed to raise properly any point for the consideration of the appellate court. In dismissing the appeal, the court laid down the following rule:

> "The rule is thoroughly settled that grounds of appeal, whether in civil or criminal cases at law, should specifically point out the judicial action complained of, and, in the case of rulings on evidence, should state the name of the witness, the questions or answers

objected to and ruled upon by the trial judge; * * *

In none of the specifications relating to rulings on evidence is this rule complied with."

This court is not supposed to search the record to find what errors the trial court committed. It is the duty of the appellant to set forth with particularity his ground of appeal. Failing to do so is fatal on appeal.

Objection is made by the respondents to the reference by the appellant in his brief to an affidavit of Mr. Pivirotto because such affidavit was not introduced in evidence and is not part of the record of the trial (Appellant's Brief, p. 24).

There is no contradiction in the testimony of Mr. Pivirotto. The appellant's suit was instituted on February 6, 1942 (Case, p. 1). The trial took place on March 20, 1944, more than two years later. The appellant used Mr. Pivirotto as his witness, and is thereby bound by this witness's answers. Testimony of this witness regarding a letter is found on page 108 of the State of Case, which is as follows:

"Q. Did you have employed by you a Mr. F. D. O'Brien? A. Yes.

Q. What was his capacity in the company? A. Clerk.

Q. And did he have authority to sign letters for the company? A. Yes.

Q. I show you this letter and ask you if that is Mr. O'Brien's signature? A. That I don't know.

Q. Is that a letterhead of your company? A. It is.

Q. Is that concerning the account of Mr. Natale in this action? A. It is."

Nowhere in the testimony of this witness is there an identification of a letter, nor anything to

enlighten this court as to its contents which would be material to the case, nor is there anything shown that if this letter were permitted into evidence the court would have arrived at a different result.

The letter referred to by appellant as Schedule D, on page 28 of the State of Case, was never offered in evidence, and neither was the affidavit of Mr. Pivirotto. Respondents object to these papers being made a part of the State of Case and to any reference to them by the appellant. The testimony of this witness was not in conflict with any other testimony in the entire case which took place at the trial.

By the terms of the lease agreement the appellant has agreed:

> "That the Lessor has this day delivered in good condition and hereby leases upon the terms, rental and for the time below specified, to the Lessee (Natale) the following Passenger—car,—delivery and acceptance of which is hereby acknowledged by Lessor and Lessee" (Case, p. 151).
>
> "At the expiration of the term of this lease, Lessee agrees to surrender to the Lessor, or assigns, the above described Machine and extra equipment in good condition.
>
> It is expressly understood and agreed by and between the parties hereto that no title to the said machine and extra equipment, either legal or equitable, shall vest in the Lessee except as Lessee hereunder" (Case, p. 152, ll. 20-28).

Under his own signature the appellant admitted that he did not have legal title to the motor vehicle, and he is thereby estopped to deny that to which he assented to and on which the parties, and the assignee, relied upon. Regardless of whether the respondent, Automobile Finance Co., had legal title or not, the result—the direction of the verdict

in favor of the respondents would not have been different. The issue was whether the respondent had the right to repossess the automobile when it did because of default in payment of the October and November installments. Under another point in this brief respondents will elaborate on this theory of the case.

The law is clear that the holder of an instrument has the implied power to fill in blanks after the execution of the instrument. This was the holding in the case of *West Side Trust Company* v. *Krug*, 117 N. J. L. 102, 187 A. 154 (Errors and Appeals). In that case the defendant claimed all the papers he signed were in blank. These were the note, contract and completion certificate. There was a judgment in favor of the plaintiff appealed, which judgment was affirmed. Justice Bodine, speaking for this court, said:

> "Even if the instrument was not complete at the time of delivery, the person in possession thereof has prima facie authority to complete it by filling in the blanks, and after completion, if negotiated to a holder in due course, it is valid and effectual for all purposes."

And in case of a contract where blanks were left to be filled, the Supreme Court held, in the case of *Kohler* v. *Codes*, 6 N. J. Misc., stated that the party "is considered as consenting that the blanks may be thus filled after he has executed the contract."

> "REASON: 8. Trial Judge erred in refusing to admit in evidence letter of November 10, 1941, which establishes a supplemental agreement or Novation" (Case, p. 48).

> "GROUND: III. 4. Trial Judge erred and abused discretion on the ruling that Nova-

tion in the case was without merit after arguments by counsel on the Rule to Show Cause'' (Case, p. 57).

This is another instance where the appellant is estopped from raising the same ground on appeal as the reason advanced on the rule to show cause for a new trial. This ground is argued in appellant's brief (at p. 38) but he fails to make reference to any page in the State of Case where such letter was offered in evidence or a ruling made on it by the trial court. He fails to show any consideration for the so-called novation or supplemental agreement. The appellant admitted that he owed $736.02, and in his Exhibit P-1 (Case, p. 146) set forth this amount as an encumbrance in favor of Automobile Finance Co. (ll. 31-35).

''Reason: 9. Insufficiency of evidence due to the result of mistake, which the court can see caused the exclusion of vital evidence,

(a) Lack of oath on depositions from Pittsburgh.

(b) Vital papers necessary for trial not in Court room but in Trenton, N. J. at the time of trial.

(c) Arbitrary agreement as to value of automobile of $700.00 due to lack of witness and expert testimony which would have been secured by a postponement.

Ground: 8. Court erred in the refusal to admit to evidence the answers to interrogatories as administered to the Mellon National Bank of Pittsburgh, Pa., and directed to Mr. William S. Berryhill which were presented by the plaintiff-appellant at trial'' (Case, p. 55).

The same reason was urged on the rule to show cause as is now urged as ground for appeal. The appellant is estopped and barred from again raising this ground on appeal. It is to be noted that the appellant does not claim he offered in evidence the answers to the interrogatories, nor is there anything in the State of Case to show that the interrogatories were even offered for identification so that this court could ascertain with certainty whether they should have gone into evidence. The record discloses that no original papers were offered, and it was admitted by appellant's counsel that the original papers were in Trenton. This is borne out by the following (Case, p. 101, ll. 31-37):

> "Mr. Handelman: If your Honor please, I think it is important that we have these interrogatories and their answers, and since they are a matter of record at Trenton, of course, I would like to have an opportunity to get them. It will mean delay, but I think it is an important part of my client's case."

At page 102:

> "The Court: And how is that going to work out as a practical matter?
>
> Mr. Handelman: Well, that is where the trouble arises.
>
> The Court: They should be here now. Well, what do you want me to do?
>
> Mr. Handelman: Well, I think perhaps I can continue without them now, at this time, and I think I can get along without them."

Mr. Handelman did not ask the court for permission to introduce these papers at the close of the entire case. The trial continued until the following day (Case, p. 143, ll. 22-24), and yet the appellant made no effort to obtain these papers before the case came to a close. Re-

spondent objects to the papers made part of the State of Case as set forth on pages 35-45 because they were neither identified nor offered in evidence at the trial. They are entitled "Commission for Examination of a Witness Out of the State; Interrogatories and Answers; and Commission for Examination of a Witness Out of the State; and Interrogatories and Answers." Appellant's counsel did not take an exception to the court's ruling in refusing to permit the papers to go into evidence and failure to take an exception bars the refusal as a ground of appeal.

As a precautionary measure Respondents feel it necessary to answer the brief of the appellant on the other matters he raised under this point. Respondents objected to the introduction in evidence of the paper, and stated the following (Case, p. 100):

> "Mr. Blume: First, I object to the introduction on the ground that there is no proof that the commissioner, who is supposed to have been appointed, before he entered on his duties, as provided for in the Revised Statutes, 2:100-20, took an oath, faithfully and fairly and impartially to execute the commission. Furthermore, the paper which is offered shows no proof of ever being filed with the proper Clerk. In fact, everything is irregular in connection with it."

There were two commissions (Case, p. 35 and p. 40). The return of the commissioner fails to show that he was sworn to "faithfully and fairly and impartially to execute the commission," as provided by R. S. 2:100-20.

Further, in his brief, the appellant states that it "was a mistake of counsel for not seeing to it that the papers were on hand * * *". The law is quite definite that if plaintiff's counsel lacked dili-

gence in the trial of the case, the defendant certainly should not be penalized therefor, and a new trial will never be granted because of such lack of diligence. *Rooney* v. *Herrmann,* 20 N. J. Misc., 27 A. 2d 650, at page 652, under Point I.

The cases touching on the point relating to the record as being conclusive as to determine trial errors are the following. In the case of *Schnoll* v. *Dutt,* 128 N. J. L. 475, the defendant endeavored on appeal to allege as error the failure of the trial court to permit into evidence a bill of particulars which were not offered as shown by the record. Justice Perskie, speaking for the Supreme Court, stated:

> "This, of course, constitutes the only record properly before us. We are limited to the facts therein contained and cannot, as defendants would have us, consider the bill of particulars which was not offered in evidence. Hanley *v.* P. Ballentine & Sons, 121 N. J. L. 620, 3 A. 2d 582.

> REASON: 10. Trial Judge erred in admission of agreement in evidence inasmuch as said agreement is purely fictitious, defective and a nullity, wherein lessor Jack's Garage warrants that he has good and valid title to said automobile and can make valid transfer of same, whereas by the record he never held title to the automobile either before the time of signing, or at any time subsequent thereafter. As proven by the record, title for the said automobile was vested in the name of the plaintiff on September 16, 1941, three days before the signing of the agreement and conveyed to the Plaintiff by the Metropolitan Buick Co., of Pittsburgh, a third and disinterested party, free and clear of all debt" (Case, pp. 48-49).

> "GROUND: 3. Court erred in the admittance to evidence of the lease agreement or contract as presented by the defendant-respondents, over the objection of the plaintiff-appellant's counsel" (Case, p. 55).

An examination of the appellant's brief on this ground fails to show where in the State of Case an exception was taken to the introduction into evidence of this agreement (Appellant's Brief, pp. 9-12). This ground cannot be urged on this appeal because it was urged on the reason for a new trial.

The testimony of the appellant in which he admitted the execution of the agreement is as follows:

> "Q. Did you sign this paper. A. Yes, I signed this paper.
>
> Mr. Blume: Mark it for identification.
>
> (Paper marked Exhibit D-1, for identification.)" (Case, p. 78, ll. 19-25.)

This instrument was offered in evidence during the testimony of an officer of the defendant corporation. This was as follows:

> "Q. I show you a lease agreement dated September 18, 1941, signed by Joseph A. Natale, and ask you if your company is the holder of that lease. A. It is (Case, p. 127, ll. 15-19).
>
> Mr. Blume: I offer the instrument in evidence.
>
> (Paper marked Exhibit D-1)" (Case, pp. 127-8, l. 18).

The trial court cannot commit error where the person who signed the instrument admits his signature. Proof of the signature makes the instrument evidential.

> "Reason: 11. Trial judge erred in the admission of the promissory note which was a part of said agreement and attached thereto and was given on account of the signing of the said lease agreement, being non-effective inasmuch as no consideration passed from lessor to leasee" (Case, p. 49).

"GROUND: 5. Court erred in the admittance to evidence of the promissory note and counterclaim over the objection of plaintiff-appellant's counsel" (Case, p. 55).

The appellant is barred from setting up as a ground of appeal this ground for the reason that it was raised under the rule to show cause.

Under the second count of the counterclaim, respondent alleged the ownership of the promissory note executed by the appellant dated September 18, 1941, in the principal sum of $736.02, which was in default (Case, p. 13). In the appellant's answer to the counterclaim, under his second separate defense he admitted the note was in default "at which time the entire balance became due and payable * * *" (Case, p. 17).

Under cross-examination the appellant admitted the execution of the note. This is set forth in the State of Case on page 80, as follows:

"Q. I show you the note and ask you whether that is the note you signed? A. Yes. That was attached right to the bottom of it.
Q. Is there anything wrong with that note? A. No. I don't see anything wrong with it.

Mr. Blume: I offer it for identification.

(Paper marked Exhibit D-2, for identification.)"

The testimony relating to the admittance of the note in evidence is found on page 128 of the State of Case, which is as follows:

"Q. I show you a promissory note dated September 18, 1941, in the sum of $736.02. Did you also receive that note at the time you got the bailment lease? A. Yes, sir" (ll. 24-28).

Mr. Blume: I offer the note in evidence (l. 30).

At page 129, line 36, the note was marked Exhibit D-2. The ground of objection by appellant's counsel was as follows (Case, p. 129, ll. 29-34):

> "Mr. Handelman: I think, if your Honor please, that this is not admissible because it was all executed after Natale signed it."

This reason for objecting to the admissibility of the note does not set forth any legal ground to which an objection can be made and an exception taken thereunder. Counsel admits that the note was executed by Natale, therefore there can be no valid objection to its going into evidence.

The lease instrument and the note were purchased by Automobile Finance Co. from Jack's Garage. There was no loan to the appellant. The testimony regarding this is as follows (Case, p. 131):

> "Q. Did you lend Mr. Natale any money? A. We never made a loan of any money in our company.
>
> Q. To whom was payment under that lease when you bought it? A. To Jack's Garage.
>
> Q. Did you receive the title from the very first day the transaction took place? A. At the time that the moneys were paid to Jack's Garage" (ll. 22-30).

and at page 132:

> "Q. From the day you received that title did it ever go out of your possession? A. Never did."

The lease agreement and the note were purchased by the respondent on September 18, 1941 (Case, p. 127, ll. 16-19; and Case, p. 128, ll. 24-28):

> "Reason: 12. Assuming that agreement was valid, plaintiff under bailment lease still has rights under lease even after one or more

instalments are in default and after repossession has taken place" (Case, p. 49).

No ground of appeal could be found which would correspond with the above reason.

"REASON: 13. Trial Judge erred in refusing to direct verdict in favor of Plaintiff" (Case, p. 49).

"GROUND: I. 1. The refusal of the Trial Judge to direct a verdict in favor of the plaintiff-appellant after conclusion of the trial was a reversal error, upon which exceptions were taken and reserved."

Since the appellant raises this same ground as a reason on the rule to show cause, he is barred from setting it up on this appeal. The record fails to reveal an exception being taken by appellant's counsel to the court's failure to direct a verdict in favor of the appellant. Appellant in his brief fails to indicate such an exception (Appellant's Brief, p. 3). Failure to take an exception is fatal to the appellant.

"REASON: 14. Trial Judge erred in admitting in evidence agreement offered by defendants since lessor did not have title or ownership of car which he conveyed.

GROUND: I. 3. Court erred in the admittance in evidence of the lease agreement or contract as presented by the defendant-respondents, over the objection of the plaintiff-appellant's counsel."

Having set up as a ground on this appeal the same reason as was advanced under the rule to show cause the appellant is barred from setting it up on this appeal.

The admittance into evidence of this instrument was for the purpose of showing that the re-

spondent had an instrument by the terms of which repossession of the motor vehicle could be taken because of default existing thereunder. The testimony of Mr. Pivirotto, vice-president of Automobile Finance Co., one of the respondents is as follows (Case, p. 130, ll. 39-40; p. 131, ll. 4-10):

> "Q. Now, your company took possession of this automobile? A. Yes.
> Q. Why? A. Because of a default in the payment of the rental on the automobile, under the lease agreement."

The appellant admitted he signed the instrument, and it was admitted in evidence. The testimony regarding this is as follows (Case, p. 78, ll. 19-25):

> "Q. Did you sign this paper. A. Yes, I signed this paper.
>
> Mr. Blume: Mark it for identification.
>
> (Paper marked Exhibit D-1, for identification.)"

This instrument was offered in evidence during the testimony of an officer of the defendant corporation. This was as follows:

> "Q. I show you a lease agreement dated September 18, 1941, signed by Joseph A. Natale, and ask you if your company is the holder of that lease? A. It is" (Case, p. 127, ll. 15-19).
>
> Mr. Blume: I offer the instrument in evidence.
>
> (Paper marked Exhibit D-1)" (Case, pp. 127-8, l. 18).

In his first separate defense in answer to the counterclaim, the appellant states (Case, p. 16, ll. 28-34):

"1. The instrument executed by the plaintiff as stated in paragraph one of the first count of the counterclaim is not in effect a lease agreement, but is in effect a conditional agreement for the sale of the automobile, the subject matter of this action."

It is the respondent's contention, that regardless what the instrument might be called, that under the terms and conditions thereof the respondent had the right to repossess the motor vehicle upon default being made by the appellant (Case, p. 154, ll. 21-34). None of the pleadings indicate that the appellant claimed fraud, or that he executed the instruments under duress. The respondent, Automobile Finance Co., was a holder in due course when it purchased the lease agreement and the note, and there is no proof that this respondent had any knowledge of any defect in the instruments. Even if it was not a holder in due course, there is no proof of any defense to the instruments even if they were in the hands of the original Lessor or payee. It was through this transaction that Natale was able to get possession of the motor vehicle. The details regarding this transaction are set forth in the testimony of Natale at page 59 of the State of Case, as follows:

"Q. Whom did you buy the automobile from? A. From Jack McIliath, an individual that had a garage, known as Jack's Garage, but I found out later that he didn't have title to the car. (The latter part of the answer was stricken out by the court).

Q. You bought the car through him; is that right? A. That is right. I bought it through him."

And at page 61:

"Q. What did you do next? A. After arranging with McIliath to obtain the car, made all arrangements, we go to the Finance Com-

pany next for the balance of the money. I was not paying Jack McIliath in full; that is, I did not have all the money to pay for the car."

At page 63, lines 10-13:

"A. * * * Well, now, they actually gave Jack McIliath $600, but including finance charges and the costs of the insurance and all, it came to $736.02. * * *"

How the appellant can claim from the foregoing testimony there was fraud is beyond all comprehension.

"REASON: 15. Trial Judge erred in not striking out the testimony of witness for defendants, one Rich."

There is no ground of appeal urged regarding this reason.

REASON: 16. Trial Judge erred in refusing to direct verdict against defendant Wilbur D. Janes, since he offered no defense at all" (Case, p. 49).

GROUND: 11. Court erred in the refusal to grant a verdict against Wilbur D. Janes co-defendant-respondent, when moved so to do by counsel on the grounds that said co-defendant had not entered a defense. Reacting to the contrary the Court did render a verdict in favor of the co-defendant-respondent whereas he had entered no defense which is in direct contradiction to the law" (Case, p. 56).

Because of the fact that the appellant obtained a rule to show cause and argued the same with the reasons urged at its argument, he is now barred from alleging this as a ground of appeal.

The defendant, Wilbur D. Janes, filed an answer together with his co-defendant, in which he stated (Case, p. 9).

The defendants, Automobile Finance Co., a corporation of the State of Pennsylvania, and Wilber D. Janes, in the above entitled cause, as and for their Answer to the Complaint, respectfully show that:

> "1. They deny each and every allegation contained in the complaint."

And at page 10, lines 20-26:

> "3. Because of default existing under the terms of the aforesaid lease agreement, the said defendant, through its duly authorized agent, the defendant, Wilber D. Janes, caused to be repossessed the aforesaid motor vehicle to which it was lawfully entitled, and to which it had legal title."

Throughout his brief the appellant has misstated facts. Attention is called to his brief at page 30 where he states:

> "* * *. The agency was also denied by the pleadings of the defendant finance company."

The answer is to the contrary. Janes was in court and represented by counsel—his answer puts him in court.

> "REASON: 17. The Judge erred in refusing to admit depositions taken in Pittsburgh, Pa." (Case, p. 49).

> "GROUND: 8. Court erred in the refusal to admit to evidence the answers to interrogatories as administered to the Mellon National Bank of Pittsburgh, Pa., and directed to Mr. William S. Berryhill which were presented by the plaintiff-appellant at trial" (Case,).

As can also be seen, appellant has again set forth as a ground the same reason which was urged on the rule to show cause. He is estopped from again setting up this ground on appeal.

There is nothing in the record to disclose that the answers to the interrogatories were offered in evidence. The reasons advanced by respondents under appellant's reason No. 9 is made part of its argument against appellants urging ground No. 8 as ground for appeal. To set forth these arguments at length would clog this memorandum (Respondents' Brief, pp.).

The Commission for examination of a witness out of the state, as set forth at page 35 of the State of Case, fails to show that it was filed. There is a statement at the top of the page that it was "Issued June 29, 1943". The commission as set forth on page 40 of the State of Case fails to show a filing date, and the attestation fails to show the date the commission issued. The interrogatories and answers fail to show that the commissioner was sworn as provided by statute (Case, p. 42). This statute is found in R. S. 2:100-20, and provides as follows:

> "The commissioner—appointed under this article,—shall—before they enter upon their duties, take an oath faithfully, fairly and impartially to execute the commission, which oath may be taken before any person lawfully authorized to administer an oath in the state or country, where such commissioner—reside or may be at the time."

Even if the answers to the interrogatories were admitted into evidence they would be of no effect without the interrogatories also being in evidence. Answers without the questions would be like a cart without a horse, or a house without a foundation. The result of the trial would not have been changed.

"REASON: 18. Verdict was against the weight of evidence" (Case, p. 49).

"GROUND: 2. Court erred in directing the verdict in favor of the defendant-respondents at trial and in taking the case away from the jury. Factual questions were presented for a jury to decide" (Case, p. 54).

Respondents have previously objected to this ground on appeal, and again urge its rejection because it was argued on the rule to show cause. In the case of *Simons* v. *Lee,* 117 N. J. L. 370, 189 A. 360 (Errors and Appeals) a rule to show cause was obtained by the appellant in the lower court which was discharged. On appeal, this court held:

> "It is argued that the trial court erroneously refused to nonsuit the plaintiff and direct a verdict for the defendant, as the plaintiff failed to present sufficient evidence to support a finding of negligence on the part of the defendant. These grounds of appeal are not available to the appellant because of the fact a rule to show cause was allowed and discharged in each of the three cases, and one of the reasons assigned for making the rules absolute was that the verdict was against the weight of evidence. It is well settled that where a verdict has been attacked on a rule to show cause as being against the weight of evidence, the consideration and disposition of the rule covers the ground of a motion to direct, and operates as a bar to any argument or consideration of such grounds on an appeal."

In his brief the appellant refers to an opinion by Judge Joseph L. Smith on a motion by the defendants to strike out the complaint (Case, p. 32). It is urged by respondents that this opinion is not part of the State of Case on appeal, and therefore should not be considered on this appeal, nor is it binding on the respondents. Judge Smith, stated however, as follows (Case, p. 34):

> "The court makes these observations, not for the purpose of passing final judgment upon the nature of this document used in this case, but merely to indicate that there are questions of fact to be determined by a trial before a jury."

It must be assumed that the appellant submitted an affidavit on this motion to strike in opposition to that of the respondents. This affidavit is not in the State of Case. Without having the affidavits of both parties even this court cannot determine whether a factual question was raised on the motion. There is no opportunity for cross examination where affidavits are used which are *ex parte,* and a decision of the judge on a motion is not controlling at the trial. What transpires at the trial is what comprises the record on appeal and such record shows cross examination of witnesses on both sides.

In conclusion, the respondents respectfully submit that inasmuch as the appellant has presented as his grounds on this appeal the same reasons as were urged on his rule to show cause, he is barred from taking an appeal, and the discharge of the rule is *res judicata.* He has waived his reservation because as one of the reasons he urged was argued on the rule.

POINT II.

The trial court did not abuse its discretion in discharging the rule to show cause:

The appellant urges as grounds for appeal that the trial court abused his discretion for the following reasons (Case, pp. 56-57):

> "III. Court abused discretion in the refusal to grant a new trial at the conclusion

of arguments by counsel on the subsequent Rule to Show Cause.

1. Trial Judge erred and abused discretion in the refusal to give merit to the elements of perjury as indicated on the Rule to Show Cause.

2. Trial Judge erred and abused discretion in permitting verdict to stand when elements of fraud were clearly indicated to him on the Rule to Show Cause.

3. Trial Judge erred and abused discretion on the ruling that plaintiff-appellant was bound by the contract entered into and was estopped from asserting otherwise.

4. Trial Judge erred and abused discretion on the ruling that Novation in the case was without merit after arguments by counsel on the Rule to Show Cause."

Appellant under his Point III fails to show with facts or reference to the State of Case in what way or manner, or in what respect the trial court abused discretion in refusing to grant a new trial. The Judge is a reasonable man. He was present at the trial where he observed the witnesses. He knew well that if the appellant was granted a new trial he would find himself with a judgment against himself on the counterclaim. Regarding this, the court said (Case, pp. 50-51):

"* * * If the matter were re-litigated, there is a grave probability that the plaintiff would find himself saddled with a verdict against him on the counterclaim in a sum greater than the loss which he insists he suffered by reason of the re-possession of the vehicle by the defendant finance company."

In Exhibit P-2 there is inserted the amount of $736.02 as an encumbrance in favor of the respondent, Automobile Finance Co., and this is described as follows (Case, p. 149, ll. 20-23):

> "The Motor Vehicle described herein is subject to the following encumbrances, Favor of Automobile Finance Co. 5526 Penn Ave. Pittsburgh, Pa. Amount $736.02."

This is the appellant's exhibit and he is bound by it. He is bound by the balance of $736.02 as being due under the lease agreement or contract, whichever it may be called. Under the terms of his agreement he obligated himself to pay $40.89 per month beginning with October 25, 1941, and monthly thereafter, for 18 months (Case, pp. 151-152). Appellant admitted that he did not pay the instalment which was due on October 25, 1941 (Case, p. 84, ll. 16-19). Therefore, under the terms of his agreement it stated (Case, p. 154):

> "Upon any default in payment of any installment of rental or upon breach of any condition or covenant herein made by the lessee, the Lessee shall, forthwith deliver the machine * * * to Lessor, and should Lessee fail or refuse to deliver the Machine as aforesaid, the Lessor shall have the right, without notice or demand, to terminate this lease and to take possession of the machine wherever found, and Lessee hereby authorizes Lessor to enter the premises of the Lessee, with or without force or process of law, and forthwith take possession of Machine."

This agreement was assigned by the Lessor, J. W. McIliath, to the respondent, Automobile Finance Co., with "all rights and remedies under said contract, including the right either in assignee's own behalf or in undersigned's name to take all such proceedings or otherwise, as undersigned might have taken, save for this assignment" (Case, p. 158).

The motor vehicle was repossessed because of default of the appellant. Taking the appellant's theory on this appeal that the instrument is a

conditional sales contract, then the time price of the motor vehicle was $1086.02. It is common knowledge that when a person buys a chattel on time that the price is more than if he had paid cash for it. The cash price of the automobile would be $950.00 (Case, p. 151, l. 30). Assuming that the appellant was entitled to a judgment for the value of the car he could not recover no more than $1086.02. He owed, without the attorney fee as provided in the note and contract, $736.02, so that the most he could recover would be $350.00. However, at the trial the proof was that the car was worth but $700.00, so that if the case went to the jury, the jury would have to find a verdict in favor of the respondents for at least $36.02. The value of the car of $700.00 as adduced at the trial is as follows (Case, p. 115):

> "Mr. Blume: Our value placed on it is about $700.00. Reasonable?
> Mr. Handelman: Well, I think it is low, but under the circumstances what am I to do about it? I will agree with you.
> Mr. Handelman: I will have to agree as to the value of the car being $700.00."

Taking the view most favorable to the appellant, by sending the case back for retrial the most the appellant could recover would be $350.00, allowing the value of the car as $1086.02.

There is no proof of perjury at the trial of any of the respondents' witnesses. The ground of appeal fails to set forth the name of the witness who was supposed to have committed perjury, nor the testimony which constituted the perjury. We must assume that the appellant refers to Mr. A. Pivirotto because this witness' name is mentioned in appellant's brief (Brief, p. 35). Regarding the letter of November 10, 1941, there is nothing in the State of Case to show such a letter was offered in evidence. Appellant is apparently

trying to make part of the record a letter dated November 10, 1941, which was an exhibit attached to the affidavit of Mr. A. M. Pivirotto on the motion to strike the complaint. If this affidavit and letter were so material to the appellant's case at the trial it was his duty to procure it before trial. He is in effect attempting to claim this affidavit and letter as newly discovered evidence. A similar situation was created in the case of *Christie* v. *Petrullo,* 128 A. 853, 101 N. J. L. 492.

At the trial of the foregoing case there was a judgment for the plaintiff. Defendant obtained a rule to show cause for a new trial claiming newly discovered evidence which consisted of a witness who had not testified at the trial but of whom the defendant knew, he thinking he had sufficient witnesses at the trial to win the case. In denying a new trial the court said, at page 854:

> "What the defendant did was to go to trial with the testimony which he had gathered and which he thought would be sufficient to win the case. Now that he has lost his case, he seeks a new trial upon the testimony of one whom he had every reason to believe before the trial would prove a valuable and material witness. If he could locate Lauther within 6 days after the trial he certainly should have been able, with due diligence, to have located him during the three weeks prior to the trial. The evidence which Mr. Lauther could give cannot therefore be classed as newly discovered evidence, because it could have been obtained by due diligence on the part of the defendant for use at the trial. * * * These rules of law must be strictly enforced. If not strictly enforced it would open the door for litigants to withhold available testimony, and then, if the result of the trial was adverse, resort could be had under the guise of newly discovered testimony to obtain another trial in which the litigant could correct the mistakes made

> in the former trial and perhaps secure a different result. The aim of the law should be to force litigants to the fullest preparation of their cases before trial. This can best be accomplished by strictly enforcing the principles of law governing new trials."

In the case of *Fish* v. *Stoll*, 4 N. J. Misc., 134 A. 123, there was a verdict for the plaintiff and the defendant obtained a rule to show cause for a new trial alleging newly discovered evidence. In denying a new trial, the court said:

> "This evidence now presented is open to another criticism, in that it only tends to discredit plaintiff's witness, and a new trial will not be granted for such."

Other cases expounding the foregoing rules of law are *Hoban* v. *Sandford & Stillman Co.*, 64 N. J. L. 426, 45 A. 819; *Nightengale* v. *Public Service Coordinated Transport*, 8 N. J. Misc., 149 A. 526; *Rooney* v. *Herrman, et al.*, 20 N. J. Misc. 335, 27 A. 2d 650; *Paradise* v. *Great Eastern Stages*, 114 N. J. L. 365, 176 A. 711.

As to abuse of discretion on the part of the trial court, the appellant is fortunate that there was no judgment on the counterclaim. This court can very well infer that the trial court saved the day for the appellant, and that the withdrawal of the counterclaim was by agreement of counsel. In his charge to the jury, the court said (Case, p. 144):

> "I see no reason why Mr. Natale should now complain of the situation in which he finds himself, because it is the result of his own breach of his own contract. If he did not like that contract he was not compelled to sign it in the beginning. So, with that explanation, I direct you to bring in a verdict in favor of the defendants and against the plaintiff, Natale."

The court properly charged the jury, and this is confirmed by the case of *Zuker* v. *Dehm,* 128 N. J. L. 435, 26 A. 2d, 564, wherein Justice Bodine speaking for the Supreme Court, said:

> "A written agreement is enforced according to its terms, and courts of law cannot create new bargains however hard the old ones seem."

Justice Perskie, speaking for this court in the case of *Chiesa* v. *Public Service Coordinated Transport,* 128 N. J. L. 69, 24 A. 2d 369, in considering the question of whether the dismissal by the trial judge of the rule to show cause why the verdict in favor of the defendant should not be set aside and a new trial granted, constituted an abuse of discretion, said:

> "In determining the posed question requiring decision, this court has heretofore held that it 'cannot concern itself with the weight of evidence'; that it may not 'substitute its judgment for that of the trial court,' *Heuser* v. *Rotherberg,* 123 N. J. L. 319, 320, 8 A. 2d 391; that it is only for the 'plainest abuse of discretion' that it reviews in error the action of the trial judge in granting or refusing to grant a new trial, *Trovato* v. *Capozzi,* 119 N. J. L. 147, 194 A. 611; * * *; and lastly this court in *Nelson* v. *Eastern Air Lines, Inc.,* N. J. Err. & App. 24 A. 2d 371, decided this day, has held that it is only when the attributes of 'shock to reason and to justice' mark the disposition of a rule to show cause that the reason, abuse of discretion, is entertained as a ground of appeal. The case at bar does not fall within this category."

To the same effect is *Hoffman* v. *Maloratsky,* 112 N. J. Eq. 333, 164 A. 260 (Errors and Appeals).

As to the appellant's claim of Novation, there is nothing in the record to sustain this point; nor

is there any consideration on the part of this appellant shown for the substitution of a new contract for the old one. His brief fails to support this contention.

POINT III.

The trial court did not err in directing a verdict for the defendants.

The theory of the appellant's case as shown by his complaint is that the respondent, Automobile Finance Co., held a conditional sales contract on the automobile of the appellant (Case, p. 2, ll. 33-36; p. 16, ll. 29-33). The answer and counterclaim of the defendants allege that the appellant, Automobile Finance Co., was the holder of a lease agreement executed by Natale, and that because of his default under the terms under the instrument it was entitled to possession of the motor vehicle and caused it to be repossessed (Case, pp. 9-10). Whether this instrument is called a bailment lease, conditional sales contract or otherwise is immaterial to the issue. As long as Natale defaulted thereunder, the respondent finance company was entitled to possession of the motor vehicle according to the terms of said instrument (Case, p. 154, ll. 21-35). The balance due on the instrument at the time of repossession was $736.02, there having been defaults in the payments due on October 25th and November 25th, 1941, each in the sum of $40.89 (Case, p. 131, ll. 10-11). And as the appellant himself testified (Case, p. 84, ll. 15-19):

> "Q. On December 23, 1941 were you in arrears for the payment which was due October 25th and November 25th, weren't you? A. Yes.
>
> Q. That is correct, isn't it? A. Sure; two months."

The answer of the respondents alleges that because of default of the appellant, the motor vehicle was repossessed because the respondent, Automobile Finance Co., was lawfully entitled to it (Case, p. 10, ll. 21-27).

The witness for the respondents, Arthur M. Pivirotto, an officer of the finance company, testified that because of default under the instrument signed and executed by the appellant his company took possession of the motor vehicle (Case, p. 130, ll. 39-41; p. 131, ll. 4-11).

The appellant's cause of action is predicated on an alleged tender after the instalment of October 25th, 1941, was in default. There is nothing in the record of the trial which indicates that the appellant tendered the instalments in arrears, or the entire balance due under the contract of $736.02. His testimony in this regard is as follows (Case, p. 84, ll. 11-14):

> "Q. * * * Did you go to Pittsburgh personally, and offer $736.02 to the Automobile Finance Company? A. Not personally, no."

And there is nothing in the record that Natale made a tender of any amount either before or after the default.

Taking the view most favorable to the appellant, he proved the value of the motor vehicle to be $700.00 (Case, p. 115). The amount due on the note executed by the appellant was $736.02, and together with attorney fees of 15% as provided therein and interest, the total amount he owed to the finance company was $897.20 (Case, p. 130, ll. 38-40). At the close of the case the court would have been obliged to direct a verdict in favor of the respondents for the sum of $161.18. Fortunately for the appellant, after the verdict was directed in favor of the respondents, the counter-

claim was withdrawn without prejudice (Case, p. 144).

There was no error committed by the trial court in directing a verdict for the respondents.

Conclusion.

This appeal should be dismissed and the judgment of the lower court affirmed with costs. By obtaining a rule to show cause and arguing his reasons as well as his reservation, the appellant is now estopped from bringing this appeal. Furthermore, appellant failed to take exceptions to the court's rulings excepting as to the introduction in evidence of the contract and note. And as to these exceptions, they are lost because of the rule to show cause. The trial court attempted to save the day for the appellant, and so did counsel for the respondents, by seeing to it that there was no judgment entered against the appellant for the difference of the value of the car and the amount due on the note which was the basis of the counterclaim. Appellant has had two tries at the case already, and lost. If the appellant proceeded with the trial when he knew he did not have in court a witness or papers, *he took a needless risk* for which he cannot now complain. *Rooney* v. *Herrman,* 20 N. J. Misc. 335, 27 A. 2d 650.

Respectfully submitted,

Charles Blume,
Attorney for Defendants-Respondents.

New Jersey Court of Errors and Appeals

JOSEPH A. NATALE, Plaintiff-Appellant, vs. AUTOMOBILE FINANCE CO., a corporation of the State of Pennsylvania, and WILBER D. JANES, individual, Defendant-Respondents.	Action at Law On Appeal from New Jersey Supreme Court. Sat Below: J. WALLACE LEYDEN, *C.C.J.*

REPLY BRIEF OF PLAINTIFF-APPELLANT.

Point is made by respondents on objections raised as to the introduction of certain exhibits as part of the State of Case, pages 19 to 46 inclusive, and in so doing the objections are cited in respondent's temporary typed points of argument which were served upon appellant on May 23, 1945, the expectation being implied that the printed points on brief were to be ready for formal service at a later date. Formal service of the printed State of Case was made upon the respondents on May 4, 1945 and since the objections to the State of Case was not made until May 23, 1945, it is more than ten (10) days after receipt of the State of Case. This lapse of time will show the respondents as being dilatory in the raising of the objections and it will therefore preclude and prohibit the filing of these objections as the State of Case is now complete. Rule 22 of the Court of Errors and Appeals clearly prescribes as follows:

> "Three copies of the State of Case shall be furnished to each adverse party at least twenty days before the time noticed for argument, and unless the adverse party gives notice *within ten days* after service of his objections thereto, it shall be deemed complete * * *" (Italics ours.)

In view of the above it appears that it is not necessary to reply to the argument on objections as made by responents, however as a precautionary measure plaintiff-appellant in response thereto will maintain that the exhibits as shown in the State of Case are reviewable by the Court and in support will cite Rule 21 of Court of Errors and Appeals as follows:

> "The appellant or plaintiff in error shall provide a State of Case, which shall contain, in appeal in equity the pleadings, proofs and order, decree or judgment with petition of appeal, or in error or in appeals in civil cases at law, the record and so much of the transcript of the proceedings at the trial as will adequately exhibit the exceptions relied on for reversal, with the assignment of errors and joinder in error, or grounds of appeal the reasons given in the Court below for the judicial action complained of, and any other document proper to be considered in this court."

It is to be interpreted by the examination of this rule that all of the record of the case together with the transcript of the trial is to be exhibited to the Court which will adequately portray and describe the points of the issue at bar and since the judicial action complained of on the appeal encompasses each and every one of the exhibits notwithstanding objections by the respondents, it can be assumed that the exhibits are in order and must remain a part of the State of Case. Said exhibits being objected to are shown as follows:

Affidavit of A. M. Pivirotto (State of Case, page 28)

Opinion of Judge Joseph L. Smith (State of Case, page 30)

Commission for examination of witness (State of Case, page 35)

Interrogatories and answers (State of Case, pages 36 and 42).

The affidavit of A. M. Pivirotto was introduced to the record by the respondents and it was relied upon by them on the motion to strike the complaint and subsequently filed by them and it must be conceded that the affidavit was made in good faith for presentation to the Court, the filing of which makes the paper subject for review at any future time. It therefore seems rather peculiar that the respondents would now object to its introduction in the State of Case.

The Court of Errors and Appeals, in the case of *Cohen* v. *Camden Refrigerating & Terminals Co.*, 30 A. 2d 428, 129 N. J. L. 519, clearly sets out treatment given to a point of similar nature when it was adjudged, as follows:

> "Trial Judge's opinion disposing of motion to strike reply, demand for bill of particulars and affidavits, one supporting motion to strike, and answering affidavit in justification of reply, were essential parts of 'state of case' and should not have been printed as an appendix to respondents brief * * *"

In view of the foregoing citations of authority it would be maintained by plaintiff-appellant that the State of Case was complete due to lack of objections at proper time and in addition thereto the exhibits in question are essential to the Court for a comprehensive review of the issues of the cause.

Plaintiff-Appellant will call to the Court's attention and object to the service of points of argument as made by the defendant-respondents. Formal service of the appellant's printed three copies of points was made on May 10, 1945. Respondents submitted two typed sets of points on May 23, 1945, which was followed by the formal service of the printed points on May 27, 1945. Allowing the respondents full benefit of the temporary service of the typed brief as made on May 23, 1945, this would be more than the ten days as stipulated and prescribed in Rule 23 of the Court of Errors and Appeals which is cited as follows:

> "At least fifteen days before a cause is moved the attorney or solicitor of the moving party shall serve upon the attorney or solicitor of the adverse party three copies of the points on which he means to rely * *. Within ten days thereafter the attorney or solicitor of the adverse party shall serve upon the attorney or solicitor of the moving party, three copies of his points in reply, in like form as required by the moving parties points."

As to the point made by respondents on brief that the grounds of appeal are the same as the reasons on the rule to show cause it will be brought to the Court's attention that the grounds of appeal as set forth in this cause are as follows (State of Case, pages 54, 55 and 56):

> "I. The refusal of the trial judge to direct a verdict in favor of the plaintiff-appellant after the conclusion of the trial was a reversal error, upon which exceptions were taken and reserved.
>
> II. The disclosure at trial of newly discovered evidence affecting the contract in question constitutes grounds for the grant-

ing of a new trial. It could not have been previously ascertained by the plaintiff-appellant and is of such material nature that it could sway the entire verdict on a re-trial of the case.

III. Court abused discretion in the refusal to grant a new trial at the conclusion of arguments by counsel on the Rule to Show Cause.

A comparison of the above recited grounds on appeal with the reasons as assigned on the rule to show cause (State of Case, page 47) will reveal that they are not the same as contended by the respondents on his brief. Ground I on appeal was stipulated on the rule to show cause but it was not argued inasmuch as it was reserved on the application for the said rule and the memorandum of counsel on the rule to show cause will show no mention of any argument made on this reason other that its assignment to the application of the rule. The argument on this reason was removed due to its reservation on the Order granting the Rule which followed the application and it therefore becomes a reviewable ground by virtue of the exceptions reserved.

The markings and enumeration of the descriptive sub-annotated grounds are exactly as they are shown to be, in support of the three primary grounds. The subgrounds are essential to the Court for a complete review of the point at issue and it cannot be manifested by the respondents that grounds of appeal could possibly be argued without referring to the particular exceptions as to when, where and how the Trial Judge erred in refusing to direct a verdict in favor of the plaintiff.

Counsel for the respondents makes a point to the effect that the record failed to show an ex-

ception taken to the Court's failing to direct a verdict in favor of plaintiff. In reply thereto respondents will be referred to State of Case, page 140, line 24, wherein it will be revealed that appellant's counsel did take exception by continuous colloquy with the Court through all of page 141 and ending his remarks on page 142, line 17 with the following:

> "So I think that we are entitled to a verdict"

The mere phraseology "I take an exception" would be interpreted by the appellant as being a summarized version of the counsel's disagreement with the Court on its ruling on a point of evidence without going into detail as to why he disagrees. The above cited pages of colloquy by appellant's counsel with the Court would surely show that appellant's counsel disagreed with the Trial Judge in refusing to direct the verdict in favor of the plaintiff.

Respondents' brief page 8 will cite Reason 2 on the Rule and compare it with Ground I-1-3-4 on the appeal and there is no apparent similarity between the two. Reason 2 on the rule refers to the construction of the lease agreement while Ground I-3 refers to the admissibility of the lease agreement to evidence. Respondent continues on this point of argument and states that court found that the lease agreement was in default and that the defendant-respondents had legal right to repossess the car. Citation is made of plaintiff-appellant's testimony at the trial that he admitted the contract to be in default. This was a known fact that the contract was in default on October 25th and November 25th but the rest of the testimony that respondents failed to cite brings out the fact that although in default on

the dates aforementioned it was taken out of default by the tender of the entire balance due which was sent to respondents on November 29th. This question of default was clearly one of performance which the jury should have been permitted to decide and not the Court as argued on plaintiff-appellant's brief, page 12, POINT I.4.

Respondents' argument on the point that grounds of appeal are the same as the reasons on the Rule are unfounded and repetitious.

Respondents claim in their brief that the letter of November 10 was not offered in evidence (respondent's brief, page 19, line 20). The Court will be referred to State of Case, page 87, line 25 which is recited as follows; Joseph A. Natale redirect-examination by Mr. Handleman:

> Q. I show you a letter dated November 10, 1941, and ask you if that is the letter. A. Yes, it is.
>
> Q. And do you know the gentleman who wrote it? A. No, sir. O'Brien was another name foreign to me. I don't know him.
>
> Mr. Handleman: I would like to offer this letter in evidence.
>
> Mr. Blume: If the Court thinks it is proper redirect I have no objection. I objected to it as not being proper redirect.
>
> The Court: Do you object to this letter?
>
> Mr. Blume: Yes, sir.
>
> The Court: You had better. I mean you cannot make one objection, you know, to one question and then think it is going to last you all day.
>
> Mr. Blume: I make an objection to the introduction of the letter. It is improper at this time.
>
> The Court: I think it is too. I will sustain your objection.

The above excerpt of testimony and colloquy will show that not only did the Trial Judge instruct Mr. Blume how and when to object after he had practically agreed to its admission but it will be revealed that the said letter of November 10th was offered to the Court and its admittance refused, which is in direct contradiction to the statement in respondent's brief. The admittance of this letter was material to the cause at issue as argued by plaintiff-appellant in his brief, page 16, POINT I-6. This was a clear case of NOVATION and it would have established that the amount of tender was in the exact net sum of $667.42 as agreed upon by the respondents in the said letter of November 10th.

As to the admission by appellant in the execution of the lease agreement which held the trick stipulation printed therein that legal title was not in appellant's name, it does not convey the privilege to the respondents to claim the title when the actual proof of title is the record of the title itself, which was demonstrated by the exemplified copy of the certificate of title under seal of the State of Pennsylvania and shown as Exhibit D-2, State of Case, page 148, line 20. The issue as to whether or not the Automobile Finance Co. had title is referred to in the respondent's brief as being unimportant. Plaintiff-appellant will maintain that the question of title is important inasmuch as the respondents have claimed ownership of the car and that it was only leased to appellant and that they had the right to take the car even *without* default, which is evidenced by the stipulation as contained in the lease agreement, cited as follows (Case, page 152, line 20):

> "At the expiration of the term of this lease, Lessee agrees to surrender to the les-

sor, or assigns, the above described Machine and extra equipment in good condition."

Whereas it is maintained that the respondents could not have leased the automobile in question to the appellant inasmuch as they never had title. This would be material to the issue as argued by appellant to the effect that the lease agreement was defective and should not have been admitted to evidence.

It is agreed that the law is clear as to the holder of an instrument having the implied power to fill in the blanks after execution, but upon examination of the instrument after it is filled in it must reveal that the inscriptions as made after execution must be according to agreement and to matters of fact and not misrepresentations in the use of fictitious names which had no relation to the instrument. The law will certainly not permit the insertion of the name of a person as owner of a chattel or property when it is definitely established that he is not the owner, and it would certainly not be expected to hold up as a legal instrument in a Court of Law. The argument is not whether it is permissible to fill in an uncompleted instrument but one as to the legality of the instrument after it is completed.

Point is also made on the brief of defendant-respondents page 22 wherein it is stated that appellant's brief failed to show where in the State of Case exceptions were taken to the introduction of the lease agreement to evidence. For respondents information he will be referred to appellant's brief, page 9, under POINT I-3 which specifically sets forth the page number in the State of Case as being 128, line 12, and the citation will again be made as follows:

"The Court: Well, anyone who is fool enough to sign a blank piece of paper will have to suffer the consequences. It may be marked. You may have an exception.
Mr. Handleman: Thank you."

(Paper marked Exhibit D-1.)

The above citation of the Court's observation and the Trial Judge's remark "You may have an exception" and Mr. Handleman's reply "Thank you" would surely show that exception was taken to the introduction of the lease agreement to evidence and that it therefore becomes reviewable by virtue of such exception under Ground I of appellant's petition of appeal.

Respondent's brief page 23 makes point as to the counter-claim that the appellant had admitted signing the note and that it therefore became evidential because he had signed it. Again it is recalled to the respondents that the point of issue on the appeal is not the execution of the said note, but that the point of argument is whether or not the note is valid as a legal instrument, inasmuch as it was only given as evidence of payment to the lease agreement and it being so stipulated in the lease agreement that it was all and one the same obligation and also as to the legality being dependant on the fact that the said note was void of any consideration. This is a matter for the Reviewing Court to decide as a point of equity. The signing of a piece of paper does not give it validity as a legal instrument if everything else about it is not in accordance to law.

In Point II of respondent's brief (page 32) appellant's ground III is recited and the statement is made by respondent that appellant failed to show with facts or reference to the State of

Case in what manner the trial judge had abused discretion in refusing to grant a new trial.

Sub-points, 1, 2, 3, and 4 to ground III in appellant's brief clearly sets out the facts and references as to abuse of discretion by the Trial Judge. The fact that mistakes at the trial were evident to him (Case, page 50, line 20), the fact that perjury was committed by A. M. Pivirotto, that the sanctity of the Court was violated by this witness was clearly demonstrated to the Trial Judge on the Rule to Show Cause (Case, page 48, line 12) therefore it is clear abuse of discretion to shock reason and justice, in not granting the remedy in a new trial.

The question of NOVATION, by virtue of the letter of November 10, 1941 as demonstrated to the trial Judge and his refusal to give merit to this reason on the Rule, which was opinionated thereon (Case p. 50, l. 30) together with his ruling that the plaintiff was estopped by his actions from asserting otherwise on the admittance and construction of the lease agreement (Case page 50, line 35) is considered abuse of discretion in not permitting the remedy at law on points which he had adjudged that were not within his jurisdiction at the trial.

The statement of respondent's counsel on brief that appellant failed to show in what way or manner, or in what respect the Trial Court abused discretion in refusing to grant a new trial (brief, page 33, line 19), has coerced from the appellant an observation that has been gleaned from a complete reading of the testimony of the State of Case which he has been reluctant to state all during the course of these arguments and that is that if the trial judge has not abused discretion against the appellant, then he must have been

rather favorable towards the defendants on the sustaining of objections and the allowance of testimony to the record. The following colloquy while the appellant was on the witness stand under direct-examination by Mr. Handleman (State of Case, page 68, line 20)

> "Q. Now, while you had the car here in New Jersey did you make payments in accordance with the terms of this contract?
>
> The Witness: What do you say? Can I answer that?
>
> Mr. Blume: I wish your Honor would stop the witness.
>
> The Court: I will let him go so far, and then he won't have any case anymore, if he interrupts like that again Mr. Blume so you need not worry. I will control the situation promptly and very expeditiously. Go ahead.
>
> Q. While you had the car here in Jersey did you make payments on it? A. No.
>
> Q. Why not?
>
> Mr. Blume: I object to why not.
>
> The Court: Objection sustained.

It will be admitted that the appellant was entirely out of order in his remarks to respondent's counsel and it perhaps called for some disciplinary measure however appropriate but it would not have called for his having the case taken away from him or his refusal to permit the question "Why not" to be answered. The answer to the question "Why not" as propounded by appellant's counsel would have been a true explanation as to why the payments were not made but it was within the discretion of the Court to disallow the answer and therefore it remained on the record that no payments were made. It is not clear to the layman appellant as to why the objection was sustained. This was a material part of the

testimony that was refused to the appellant's case. Other excerpts abundantly interspersed throughout the State of Case will bear out the appellant's contention that perhaps the cause of action would have been more completely before the Court if the Trial Judge had been more flexible towards the appellant.

The trial Judge's remark to appellant's counsel "Now what to you say about that" which will be found in State of Case, page 141, line 5, will be brought to the Court's attention for whatever it may be worth and the Trial Judge's refusal to reply to Appellant's counsel's motion for a verdict against Wilbur Janes when he remarked "No, I do not think it is necessary for you to do so" (Case, page 140, line 36) would tend to confirm appellant's belief that the Trial Judge had abused discretion.

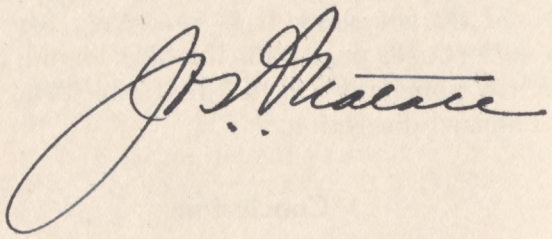
Conclusion.

The argument of counsel for respondents that the same reasons as urged on the Rule to Show Cause are urged as grounds on the appeal is not confirmed by an examination of the specifically enumerated grounds on appeal as shown in the State of Case. It has been proven by arguments that exceptions were taken on the introduction of the contract and note and that they therefore are reviewable. Respondent's statement that the trial Court and respondent's counsel attempted to save the day for the appellant (brief page 41) seems to be unfounded inasmuch as the counsel for respondents did save the day for respondents by maneuvering the issues so that a verdict was awarded in respondent's favor.

It will be respectfully submitted to the Honored Court and the appellant prays that consideration will be given to this cause not only as a reviewable point of law but inasmuch as the case was taken away from the jury, that the Court will adjudge this case as a jury would have done in an effort to prevent the ultimate injustice that would accrue to this case and to the administration of justice in general.

Respectfully submitted,

JOSEPH A. NATALE,
Plaintiff-Appellant in
Propria Persona.



25 MAY T 1945

COURT OF ERRORS AND APPEALS

STATE OF NEW JERSEY

JOSEPH A. NATALE

Plaintiff-Appellant

vs

AUTOMOBILE FINANCE CO., a corporation of the State of Penna., and WILBUR D. JANES, individual

Defendant-Respondents

ON APPEAL FROM NEW JERSEY

SUPREME COURT

ADDENDUM

SAT BELOW:

J.WALLACE LEYDEN, C.C.J.

JOSEPH A. NATALE
Plaintiff-Appellant in
propria persona

58 Grove Street
North Plainfield, N.J.

COURT OF ERRORS AND APPEALS

STATE OF NEW JERSEY

JOSEPH A. NATALE Plaintiff-Appellant vs AUTOMOBILE FINANCE CO., a corporation of the State of Penna., and WILBUR D. JANES, individual Defendant-Respondents	ON APPEAL FROM NEW JERSEY SUPREME COURT ADDENDUM SAT BELOW: J.WALLACE LEYDEN, C.C.J.

ADDENDUM TO REPLY BRIEF OF PLAINTIFF-APPELLANT

In the event of the Reviewing Court's contemplated affirmation of the argument as presented in defendant-respondent's brief, which is recited as follows;

"POINT I. The appellant is barred on this appeal to urge the same grounds on appeal as were urged in his reasons on the rule to show cause for a new trial."

Plaintiff-Appellant will respectfully submit and prays that consideration of the Court will be given to this petition of appeal, before an ultimate decision is rendered, on the supplemental point that the discretion of the Court may be allowed as prescribed by the New Jersey Supreme Court on appeals in Rule 130, which is recited as follows;

" A rule to show cause why a new trial should not be granted may, in the discretion of the Court, be special and then the question shall be heard and decided on the grounds upon which the rule was allowed."

Respectfully submitted,

Joseph A. Natale
Plaintiff-appellant in
propria persona

Service of the within addendum is hereby acknowledged this 6th day of June, 1945,

(Signed) Charles Blume

Charles Blume
Attorney for Respondents