

COURT OF ERRORS AND APPEALS.

F.O. Matthiessen and Wiechers Sugar
Refining Company,

vs.

Jacob Weart, administrator of Ber-
nard McMahan.

*On Writ of Er-
ror to Supreme
Court. In Tro-
ver.*

Returnable March Term, 1875.

The declaration is the ordinary declaration in an action of
trover for barrels, &c.

The plea was the general issue.

BILL OF EXCEPTIONS.

The jurors of the jury in the record hereto annexed men-
tioned, as in said record is set forth, before the Honorable Man-
ning M. Knapp, an associate justice of the Supreme Court, at
the day and place therein mentioned, came as well as the
parties therein mentioned, and the said jurors being so chosen, 10
tried and sworn as therein mentioned, thereupon the plaintiff
to prove the issue in the said record mentioned, on his part
called several witnesses, and the defence also called several

witnesses to maintain the issue in its part, and all of said witnesses being duly sworn testified as hereinafter stated, that is to say—

Michael Shanley, for plaintiff, sworn, testifies as follows—

Direct-examination by Mr. Linn.

Q. Where do you reside? *A.* Jersey City.

Q. Were you acquainted with Bernard McMahon, deceased, in his lifetime? *A.* Yes, I had known him about eight years; at the time of his death he lived in Jersey City, Essex street.

10 *Q.* Were you in his employ at any time prior to his death? *A.* Yes, from about January 1st, 1868, up to 1872, four years prior to his death; he carried on the cooperage business on a large scale, employing from one hundred to one hundred and twenty-five hands; his business was located in Morris street, Essex street, and Washington street, Jersey City; I was book-keeper, and acted as superintendent, and looked after the work; I was acquainted with what property he had, and with his business generally.

20 *Q.* Did you know what debts he owed, and to whom he owed them? *A.* Yes.

Q. Had you anything to do with the management of his finances? *A.* Yes—I collected and paid out money belonging to him.

Q. When did he die? *A.* About the 10th of January, 1872.

Q. How long had he been confined to his house, prior to his death? *A.* About three weeks.

Q. Do you recollect the day he went to his house, after which he didn't come out? *A.* Yes—December 23d, 1873.

30 *Q.* From the 25th of December, Christmas, to the time he died, did he transact any business? *A.* No, sir.

Q. Was he in a condition to transact any business? *A.* No, sir.

Q. What was the matter with him, as you understood? *A.* The doctors informed me he had softening of the brain.

Q. Did you see him during that time? *A.* I did, daily.

Q. Between that time and the time of his death, was any property taken from his premises by Mr. Matthiessen, or by his orders? *A.* Yes.

40 *Q.* Who was Matthiessen acting for? *A.* The Sugar Refining Company.

Q. What property was taken from there, generally? *A.* Barrels—cooperage stuff in general—barrels of all sorts, molasses and sugar.

Q. How many untrimmed sugar barrels were taken away?

A. I should think 15,000 or thereabouts; I am satisfied it was over 15,000.

Q. How many trimmed sugar barrels? A. About between 8 to 9,000, I should think about 8,500.

Q. What were those 15,000 untrimmed worth? A. I should say they ought to be worth forty-two cents.

Q. What were the trimmed worth? A. Forty-six cents.

Q. How many molasses barrels were taken? A. Altogether over 1,400.

Q. What were they worth? A. Part of them were worth 10 \$1.50 and part \$2.50.

Q. Can you tell what proportion were worth \$1.50, and what \$2.50? A. About 850 worth \$2.50, and the remainder worth \$1.50.

Q. How many molasses hogsheads were taken away? A. I should think over 150.

Q. What were they worth? A. \$2 each.

Q. How many ten gallon kegs were taken away? A. 420.

Q. How many half syrup barrels? A. About seven or ten.

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Q. What is the value of the ten gallon kegs? A. \$1.75 each.

Q. How many charcoaled barrels coopered? A. About thirty.

Q. What were they worth? A. We charged fifty cents for coopering; it was merely the coopering charge, 50 cents; the property belonged to the sugar refinery; we charged fifty cents for coopering.

Q. How many feet of worked lumber was taken away? A. Between 9 and 10,000 feet.

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Q. What is that worth? A. Worked, it would be worth twenty cents a foot.

Q. What was that lumber got for—what was it used for? A. It was fine lumber; it was intended to put up tanks in the sugar refinery.

Q. Do you know where that lumber was purchased? A. I do—from Mayor O'Neill.

Q. Has Mr. McMahon paid for it? A. No, sir.

Q. How many new sugar barrels? A. About 1,200.

Q. What were they worth? A. About sixty-five cents each.

Q. How many syrup hogsheads? A. About thirty, at \$2 each.

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Q. How many lining hoops? A. Over 50,000.

Q. [By defendant's counsel]—What are those hoops—flour barrel hoops? A. They are to put on top of barrels.

Q. What were they worth? A. \$1.50 a 1,000.

Q. How many copper packers? A. Five.

Q. What were they worth? A. We paid \$5 a piece ourselves for them; I didn't value them at any more than \$5 each.

Q. What are they? A. They are intended for pressing sugar into the barrel.

Q. When were these goods taken away? A. Commenced about the 27th of December; finished about the 5th or 6th of January.

10 Q. Were they taking away on the 1st of January? A. Yes.

Q. Was the sugar-house in operation at that time? A. That sugar-house was not.

Q. [By defendant's counsel]—Which sugar-house? A. The new sugar-house, where these goods were taken to; they were taken to the new sugar-house.

Q. What was done with them? The Sugar-House Co. used them up for their own purposes.

20 Q. Can you tell what proportion went each day—can you give an idea?

Q. [By defendant's counsel]—You kept an account of the articles; you made a memorandum at the time, didn't you? A. Yes.

Q. Can you tell, after looking at that memorandum, what amount were taken from day to day? A. [Witness looks at memorandum book]—Yes; by adding them up I would say 2 or 3,000 a day.

30 Q. Were or not the majority of them taken after the 1st of January? A. Yes, the largest number were taken after the 1st.

Q. [By defendant's counsel]—Do mean the largest number of pieces? A. Yes.

Q. [By defendant's counsel]—The value you don't say? A. Yes, and the value, too.

Q. Did McMahan know that these goods were taken away? A. I should not say he was competent to know it at all.

Cross-examination by Mr. Gilchrist—

40 Q. Give us your reasons for saying McMahan was not competent to know that all this thing was being done? A. From his singular actions.

Q; Tell us all of them? A. He was child-like in his actions; loss of memory.

Q. When did he lose his memory? A. About three months previous to his death.

Q. Are there any reasons for your saying he was not com-

petent to know what was going on right before his eyes? *A.* At this time he was confined to the house.

Q. What time do you mean? *A.* The time these goods were removed.

Q. 27th of December? *A.* Yes.

Q. Are you right in saying the first goods were removed on the 27th or 26th of December? *A.* 27th; I have it here.

Q. Do you think you are not mistaken? *A.* I don't think I am.

Q. And you made a memorandum of it at the time? *A.* 10 Yes.

Q. You have three books before you, were those three books kept at that time? *A.* Yes.

Q. Were you present, seeing to the removal of all these goods? *A.* Generally around.

Q. Who gave the orders to McMahan's cartmen to remove those goods? *A.* I did.

Q. How many of his horses and cartmen were used in the removal of these goods? *A.* Two double trucks and four single trucks. 20

Q. How long did that continue—that removal of the goods to the sugar house under your orders and directions by McMahan's men and horses? *A.* From the 27th of December till the 6th of January.

Q. Whereabouts with reference to the house in which McMahan lived, and where he was, as you say, after the 23d of December, when you say he took to his house and didn't come out after that—where were these goods before they were removed, where were they located? *A.* In Morris street. 30

Q. How near to his house? *A.* About one block.

Q. In Morris street, and where else? *A.* And up in Grand street.

Q. If he had been looking out of his window, could not he have seen every load that went from the Morris street shop and the other shop? *A.* I don't know that; some of them were taken in on Essex street, I think.

Q. Where they were taken in, could not he have seen most of them? *A.* Yes, he could have seen a good share of them.

Q. Whereabouts in Morris street was this shop from which 40 these goods were taken? *A.* About midway of the block, between Washington and Warren streets.

Q. Where was McMahan's house? *A.* Between Washington and Greene, on the north side of Essex street.

Q. McMahan's house was in Essex street, and not in Morris street? *A.* Yes.

Q. You say they were a block off, the shop and the house—the Morris street shop and the Essex street house? *A.* They

were two blocks, because Washington street, and Essex, and Morris streets intervenes; you had to go through Washington to get into Essex.

Q. Were there only two places from which these goods were removed? *A.* Yes, there were some removed from Essex street, below Warren, west of Warren.

Q. Where else? *A.* Grand street.

Q. The Grand street shop, and the Morris street shop, and the Essex street shop? *A.* And I should say a number of them came from Washington street.

10 *Q.* The Grand street shop was a very large shop, and a storehouse? *A.* Yes.

Q. It is there to be seen now? *A.* Yes.

Q. There is where he stored most of his barrels? *A.* Yes.

Q. Most of his stock? *A.* No, the most valuable part of his stock was kept in Morris street.

Q. The largest quantity was kept in Grand street? *A.* Yes.

20 *Q.* Do you mean to say there was more value kept in Morris street? *A.* Yes; down town there was more value kept than up there.

Q. What was kept down town? *A.* Molasses barrels, hoops, oil barrels, and other cooperage stock.

Q. What was kept in the Morris street shop—what kind of things, I mean? *A.* In one shop in Morris street—there were two shops in Morris street—molasses barrels were made in one of them shops.

Q. Was that the chief thing that was done there? *A.* Yes.

Q. What was done in the other shop? *A.* Sugar barrels were generally trimmed there.

30 *Q.* What was done in the Essex street shop? *A.* That was a molasses barrel shop, too.

Q. Like the first Morris street shop you have spoken of? *A.* Yes.

Q. You have said that McMahan was not competent to know that these goods were being removed from his shops, and you said that he had lost his memory three months before—I want you to go and tell this jury what reasons you have for saying that? *A.* I have seen him with his head full of a thing, and before he would go to the foot of the stairs he would forget all about it.

40 *Q.* That is memory; I want other things. *A.* His childish actions.

Q. Tell me how long back his loss of memory extended? *A.* It went back at least six months before his death.

Q. That would take it back to July? *A.* Yes.

Q. Wasn't his business going on from July up to the hour he was taken away—December 23d? *A.* Yes.

Q. Going on in full blast? *A.* Yes.

Q. Wasn't he receiving thousands and thousands of dollars from the Sugar Co.? A. Yes.

Q. Weren't you accepting thousands and thousands of dollars yourself and putting them in bank? A. Yes.

Q. And weren't you paying out McMahon's money? A. Yes; generally on checks.

Q. And weren't you buying things of O'Neill & Gannon, and everybody about Jersey City? A. Yes.

Q. While this man was under this loss of memory? A. Yes.

Q. Go on and tell us what more there was that convinced you that McMahon didn't know these things were being removed? A. When I would go in there when these goods were in process of removal he would ask me if the sugar houses were doing much to-day.

Q. He asked you if the sugar houses was doing much? A. Yes.

Q. How often did he ask you that? A. Almost daily.

Q. Did you see him every day during the removal of these goods? A. I should say I hardly ever missed a day; I might have missed one or two, not more.

Q. You had been his superintendent for years? A. Yes.

Q. And you know all about this thing going on? A. Yes.

Q. And you didn't object? A. No, sir.

Q. Didn't you think it was right at that time? A. Otherwise I wouldn't have done it.

Q. If you hadn't thought it was right you wouldn't have done it? A. No, sir.

Q. What was the reason it was done, as you understood it at the time? A. It was intended to compensate the sugar firm for some money that was due them.

Q. How much money was due the sugar firm from McMahon? A. Between \$9,000 and \$10,000.

Q. How long had McMahon been in debt to the sugar firm? A. He wasn't out of debt any year.

Q. Hadn't the Sugar Co. for the whole year past been advancing him money constantly? A. Yes.

Q. \$3,000 to \$5,000 at a time? A. Yes.

Q. Every two or three days? A. Yes; every week.

Q. Do you know how much McMahon was in debt to the sugar firm in the month of May, 1871? A. I don't remember.

Q. Do you recollect any applications that were made by the Sugar Co.—by the President of the Co., Matthiessen—to McMahon for the settlement of his accounts? A. Yes; Mr. Matthiessen spoke to him two or three times about it.

Q. When did he speak to him—how far back? A. I should say about July.

Q. Do you recollect how much was due in July from Mc-

Mahon to the company? *A.* At one time it went up as far as some \$14,000.

Q. Didn't it go up to 18? *A.* I never remember it going up to 18.

Q. What was done in July, August, September, and October, as to making arrangements to get the company their money; what was talked between McMahan and him, or between McMahan and you? *A.* It was intended to pay him.

10 *Q.* Did you ever hear Matthiessen speak to McMahan about it? *A.* I did.

Q. What was the nature of the conversation, and when was the conversation you recollect about the payment of that money? *A.* It was about July; McMahan promised to pay him in a couple of months; it was contemplated to raise a mortgage on the Grand street property.

Q. Are you sure that as early as July a mortgage was thought of? *A.* No, sir, I am not sure.

20 *Q.* What was the talk in July? There was some demand on the part of Matthiessen, now what was the talk? *A.* I can't tell the answer that McMahan gave him.

Q. Don't you remember anything that was said in July, or about that time, from July to October or December? *A.* Nothing beyond the general conversation.

Q. That is very indefinite—what do you mean by that? What was said by each party, as near as you can recollect? Tell us the kind of conversation? *A.* Matthiessen would make a demand for the money; McMahan would promise to pay him at the first moment.

30 *Q.* That is about July—what was done in August, September, and October? *A.* The same conversation, generally.

Q. Did Matthiessen ever talk to you upon the subject? *A.* I think he did.

Q. What did you say on the subject? *A.* I can't tell—I don't remember—I know I promised to pay him, anyhow.

Q. How did you expect to pay him, and how did McMahan expect to pay him—before the mortgage was thought of, I mean? *A.* The mortgage was thought of in October, at least.

40 *Q.* Before that how did you expect to pay him? *A.* My memory don't serve me well at this moment on that point; this thing occurred over three years ago.

Q. I know; but you have testified to facts that happened over three years ago, considerably? *A.* The time he spoke to me the mortgage was in contemplation.

Q. Did Matthiessen ever speak to you before the mortgage was in contemplation? *A.* Not that I remember; I met him daily.

Q. Have you given all you know, because I want to know every reason you have for that opinion about this man's incompetency to know even what was going on—have you given all—just bethink yourself? *A.* It was the subject of general conversation around the shops—his actions.

Q. [By the court]—He asks you if you have given all reasons, in your mind, for forming the judgment you did, that he was incompetent? *A.* From special actions, do you mean?

Q. Yes; anything that made you make up your mind to that fact, that when those things were removed, he didn't know of it? *A.* He could not keep his memory five minutes at a time. 10

Q. That you have told us all about? *A.* He was hardly able to walk up stairs—he would go like an infant up stairs.

Q. How would he go up stairs? *A.* I have seen him use his hands and feet.

Q. How long did that happen before he died? *A.* Three months.

Q. What did he explain for the reason for going up that way? *A.* He said that he got a fall once. 20

Q. Didn't he get a fall once? *A.* Not that I know of.

Q. How did he say he was injured in that fall? *A.* In his knees.

Q. How did he come down stairs during this time? *A.* He came down leaning, just like an infant would.

Q. Came down with care? *A.* Yes.

Q. How did he walk in the streets when he got on the level? *A.* I have seen him stagger many a time.

Q. Haven't you seen him in liquor? *A.* Yes.

Q. Ordinarily, how did he walk along the street? *A.* Previous to this time he was a very smart walker. 30

Q. Previous to what time? *A.* Previous to three months before the 23d of December.

Q. That would be in September; in September, October, and November, do you mean to say he didn't walk along the street as anybody would? *A.* Sometimes he would—sometimes he wouldn't.

Q. Now there is another thing—this going up and down stairs—what other things made you think he was not right?

A. Could hardly understand a word he would say. 40

Q. What did that arise from, want of brains in you, or what? *A.* He stammered in his voice.

Q. How long did that happen before? *A.* That was on him for some nine months, and he was growing worse every day.

Q. Nine months before when? *A.* Before his death.

Q. Haven't you heard persons stammer without thinking they had no sense, and didn't know what was going on; what

was there peculiar about his stammering that made you think he was a fool? *A.* I thought his brain was affected.

Q. When did you get the idea that his brain was affected?

A. I had it nearly all along.

Q. From what time to what time? *A.* About six months previous I thought he was not right in his head, previous to his death, on the 23d of December.

Q. Why didn't you think he was right in his head? *A.* From the queer way, unusual with him, that he acted and spoke.

Q. Tell us how he acted? *A.* Nonsensical conversation.

Q. Go on and give us all your reasons; I want everything from beginning to end? *A.* He got very fond of horses, and there was no need for him having those horses, he hadn't work for them.

Q. You mean to say he bought more horses than he ought to have? *A.* Yes.

Q. When did he buy those horses? *A.* He was always a talking about his horses.

Q. (By the court)—What do you mean by always? *A.* A short time previous to his death.

Q. You say this stammering extended nine months back—what other things made you think his brain was affected, or that he was incompetent to do his business? *A.* He would ask me the same question three times in half an hour, the same as if he had forgotten all about it.

Q. Go on? *A.* It was a matter of general conversation around the shop, amongst the men.

Q. Was there anything you recollect of—you know you and I have had a talk about this—do you recollect mentioning to me the discharge of men? *A.* Yes.

Q. Well, tell us what that was? *A.* He employed, if I remember, three or four men at a very slack time, and gave very large wages, and I saw there was no necessity of them, and I discharged them that night, and he hired them over again the next morning, and I told him about that, and he said he had them discharged, and when I came down again he hired them over again; I think he had them discharged three times by me, and he would hire them over again.

Q. When was this? *A.* About the first week in December or the latter part of November.

Q. Didn't you, in point of fact, have the chief charge of all the man's business? *A.* Yes; when he was not around.

Q. He was not around a great deal? *A.* He might have gone over to New York on business, or stopped out in the house, or go out into the country.

Q. You had chief charge of the business when he was not there? *A.* Yes.

Q. And he was not there much, was he? A. He was; oh, yes.

Q. You came there on the 1st of January, 1868; tell us how often he was there during the time you had charge? A. I have seen him hardly two afternoons in a week away.

Q. You mean to say all the rest of the week he was there? A. All the remainder of the time he was there.

Q. Did he have his Grand street shop as early as 1868? A. No, sir.

Q. What shops did he have when you were first there? 10
A. He had the Morris street shops and the Washington street shops, but that was used as a stable at that time.

Q. What was your compensation? A. McMahon gave me everything I wanted; there was nothing special set between us. My wages when I came to him first were \$15 a week; that continued about a year, and I got \$18 after that for another year, and after that any money I asked I always got it.

Q. Do you know how much you got? A. No, I don't; I can't tell now.

Q. Whatever you asked him for you always got? A. Yes. 20

Q. Were you a man of family then? A. Yes.

Q. Were you supporting your family out of what you got from McMahon? A. Certainly.

Q. And you had an unlimited amount of money to draw from McMahon? A. Yes; anything I ever asked from him he gave it to me.

Q. He limited you to no sum? A. No; not for a year and a half or two years before his death.

Q. After you got a working for whatever you wanted, how attentive was he to his business? A. He was around there 30 all the time, the same as before.

Q. Was he a bright, brisk, animated, pleasant business man? A. Yes; before he got crazy.

Q. Now, do you date any further back them symptoms of insanity than nine months? A. No, sir.

Q. Tell this jury to what extent business was done by you for McMahon, and by McMahon for himself, from those months till he died, after you thought his brain was affected?

A. About \$5,000 a week, I should say.

Q. That would be about \$200,000? A. It would. 40

Q. After you thought that man's brain was affected? A. Yes.

Q. Don't you suppose that every creditor that McMahon had when he died was made within those nine months? A. No, sir; there was a running account kept with the various parties.

Q. But the balance of accounts due to any man that he owed, hadn't it accrued since the nine months that you speak of? A. I should say the largest part of it.

Q. Then every debt he owed when he died was made after you thought his brain was affected? *A.* Yes.

Q. It has been opened here to this jury that Matthiessen came upon these premises and took these goods and converted them to his own use; did you so understand it? Didn't you understand that all that property was taken by agreement and understanding to pay the debt? *A.* I know the money was due Matthiessen.

10 *Q.* Wasn't there an agreement, an understanding that that property should go to pay that debt? *A.* Yes; on certain conditions.

Q. Tell us how that agreement was made and when and where? *A.* It was made between Matthiessen and me, if I remember.

Q. Don't say, if you remember; let us know whether you do remember or not? *A.* It was given to Mr. Matthiessen in McMahon's house—

20 *Q.* What was? *A.* Matthiessen promised if he was squared up by the 1st of January he would advance money as he had heretofore, to leave the business as it stood.

Q. You mean that he would advance money after the 1st of January as heretofore? *A.* After the 1st of January.

Q. Tell the jury all about that—how it came about? *A.* He acquainted a doctor about his position, and the doctor told him that he should retire from the business; told McMahon to go away for sometime.

Q. That was on the 23d of December? *A.* No, sir, a couple of days previous; then my name was mentioned in connection with a power of attorney.

30 *Q.* When you say your name was mentioned, tell us how it came to be mentioned, in what connection it was mentioned—who told you that that doctor told him so? *A.* I heard it from one of the workmen first, that McMahon had told him.

Q. Then did you have a talk with McMahon? *A.* Yes; McMahon said that the doctor advised him to go South, or to Europe, or somewhere else, so as to get the business off his mind; and he told me, "You will have to take care of this business;" "All right," said I; in the meantime I told Matthiessen, and Matthiessen got uneasy.

40 *Q.* You say this was two or three days before the 23d of December? *A.* Yes.

Q. Did you tell Matthiessen the same day you heard about it? *A.* Yes, the same day; I waited for him to come down; he got uneasy about his money; he says, "Who is going to carry on business? I suppose it is you," he says; says I, "I have got no legal authority;" "Well then," he says, "You must get a power of attorney, because I can't stop my sugar-

house for your sake or anybody else's; business must be attended to;" we went down to Vredenburg.

Q. What did you understand him to mean by he could not stop his sugar-house? What connection had the cooperage business with the sugar-houses? A. They could not get along without barrels.

Q. How many barrels a day were supplied to that company? A. This was a slack time; we put in as many as 2,000 a day.

Q. So that it was a very important matter to the sugar company, that they should be supplied with barrels? A. Yes.

Q. And therefore he was very anxious to have the business of McMahan carried on? A. Yes.

Q. Go on? A. I went to Vredenburg and got him to write out a power of attorney, and came down to Matthiessen with it, and Matthiessen, and Vredenburg, and I went over to McMahan's house, and got him to sign it on the 23d of December.

Q. What became of that power of attorney? A. It was torn up. 20

Q. State what that power of attorney was? A. It gave me legal authority.

Q. [By the court]—Do you remember what was in it? A. Yes, a large portion of it—it gave me lawful authority to collect, pay out, sign his name to any document, sign checks, to buy and sell, sue and be sued, and I forget what else; there was nothing about real estate, anyway.

Q. You had a right to do everything in his business except to sell his real estate? A. Yes. 30

Q. You say that that power of attorney was signed in the presence of Vredenburg, Matthiessen and yourself? A. Yes.

Q. What relation had Vredenburg therefore sustained to McMahan? A. His legal adviser.

Q. How long had Vredenburg been the legal adviser of McMahan? A. Three years, I should say.

Q. Then that power of attorney authorizing you to do McMahan's business was executed in your presence as his superintendent and in the presence of his counsel, on the 23d of December? A. Yes. 40

Q. Why was that power of attorney destroyed? A. Because he didn't spell his name to it—considered it worthless.

Q. What was the matter with that name to that power? A. He signed his name "Bernard McMahaney" instead of "McMahon."

Q. In other words there was a "y" to it? A. Yes.

Q. [Showing witness checks.] Look at these checks and see if he didn't sign his name that way? A. Yes; that is his

signature. [A dozen or more checks being shown witness, he says:] Those are all his signatures.

Q. If I understand you the reason that power of attorney was destroyed was that it appeared there was a "y" on the end of his name? *A.* Yes; an "ey."

Q. Did you ever say before that there was an "e" to the "y" to the end of his name on that power of attorney? *A.* Yes; I think I told you that before, it looked so like "Mahoney."

10 *Q.* Did you ever see "McMahoney" spelled with an "e" and "y"? *A.* Yes.

Q. Are not those signatures to all those checks his signature? *A.* Yes; they are all his signature.

Q. Is there not a "y" on them? *A.* Yes; that is McMahony.

Q. (By a juror.) What was the proper way of spelling that name? *A.* "McMahon."

20 *Q.* With whom or to whom did McMahon sell the materials, the work and things that were made in his shop; for whom did he work and to whom did he sell things that were done? *A.* Matthiessen & Weichers were the principal, and A. T. Briggs.

Q. By Matthiessen & Weichers you mean this Sugar Co? *A.* Yes.

Q. Who was Briggs? *A.* He was in the cooperage business in New York; and there was a flour mill in Essex street we supplied with barrels.

Q. Whose flour mill was that? *A.* Crombie owned it at one time.

30 *Q.* How extensive was his dealings with Briggs, as compared with the dealings of Matthiessen & Co.? *A.* I should say about as one is to six or eight.

Q. You think he did about one-eighth as much as he did with Matthiessen & Weichers? *A.* No; we did about six or eight times as much business with Matthiessen & Weichers as we did with Briggs.

40 *Q.* Suppose he did eight times as much business with Matthiessen & Weichers as he did with Briggs, what proportion would you say was the business he did with Briggs? *A.* About \$3,000 a month with Briggs.

Q. You say he did about eight times as much with Matthiessen as he did with Briggs; now tell us what proportion of the business under those circumstances did he do with Briggs of all his business? *A.* I should say about one-twelfth.

Q. Then how many times as much business did he do with Matthiessen & Weichers as he did with Briggs? *A.* About eight times as much.

Q. Did he do business with Briggs up to the time he died?

A. Yes.

Q. After three months before his death did you do any business with Briggs—he and you? A. Yes; I should say so.

Q. To about the same extent as before? A. Yes; I think so. There was no cessation in the business; sometimes we had no hogsheads to give him, consequently the business dropped.

Q. What was the nature of your business with Briggs? A. Mostly hogsheads. 10

Q. Selling to him? A. Yes.

Q. Where did those hogsheads come from? A. Matthiessen & Wiechers.

Q. They were hogsheads which your concern bought from Matthiessen & Wiechers and sold them to Briggs? A. Yes; we got barrels in return sometimes; sometimes money in return.

Q. The nature of the business and the extent of the business was the value of the hogsheads you took from Matthiessen? A. Yes.

Q. That was the limit of the business with Briggs? A. 2) Yes.

Q. Briggs was a collector of barrels? A. Yes; a barrel dealer; had men at work for him collecting barrels and making new barrels.

Q. You were telling us what was done to get the power of attorney so that you might deal and carry on McMahon's business; now at the time when that talk was had, before you went to Vredenburg, what was said about the satisfaction of the debt—how was it to be satisfied; I mean whether there was any arrangement between you and Matthiessen & Wiechers or the Company as to the payment of their debt, and how it was to be satisfied? A. The mortgage was expected at that time, \$12,500. 30

Q. What time were you speaking of? A. At the time of the power of attorney, December 23.

Q. Do you mean to say you had no conversation with Matthiessen at that time about his taking the barrels? A. I don't remember that I had.

Q. And about his taking staves and all those articles? A. I don't remember it. 40

Q. Before that had you had any conversation with Matthiessen as to the Companies' taking the barrels and the other things in payment of the debt? A. No, sir; I had no power to treat with Matthiessen before the 23d.

Q. That is not what I asked you. What I asked you was, whether before that you and Matthiessen hadn't had a conversation about his taking these articles in satisfaction of the debt? A. I don't remember; I had daily talks with him; I might have said so.

Q. How long before December 23d might you have had such a conversation with him? *A.* I might have had it a month before.

Q. Then wasn't it in your mind, and in McMahon's mind for a long time, the idea of Matthiessen's taking the barrels in satisfaction of his debt? *A.* No, sir; because the mortgage was expected; it was in the Insurance Companies for two months—was applied for, and that money was intended—

10 *Q.* Now, before the mortgage was thought of, wasn't there talk of Matthiessen being satisfied by the barrels and the other things? *A.* No, sir; I don't remember it.

Q. Might it not have been so and you not remember it—a conversation had with you? *A.* I don't think it could without its being in my memory in some way.

Q. When was the first talk between you and Matthiessen about taking in satisfaction of his debt these things? *A.* At the time the power of attorney was spoken of at first.

20 *Q.* Tell the jury what that conversation was? *A.* Matthiessen got uneasy, as it seemed to me, about this money that was due him, and he said that business should run right on; that he should not allow it to lapse for even half a day, on account of the necessity for this stuff in the sugar house—that is a necessity for the barrels; and it was said then that I should get a power of attorney. He spoke to me about this money before I got a power of attorney; it was for this purpose to legalize this property to Matthiessen that the power of attorney was given.

Q. You say the object of the power of attorney was to legalize the transfer of the property to Matthiessen? *A.* Yes.

30 *Q.* What I want to know is, when you made the agreement about the transfer which the power of attorney was to carry out? *A.* One or two days before I got the power.

Q. Where was it you had that understanding? *A.* I don't remember the place exactly; I think it was in the sugar house office.

Q. Tell what took place there two or three days before that power of attorney? *A.* Matthiessen made a demand on me for this property, and—

40 *Q.* Upon you for what? *A.* He made a demand on me for this property. He said he wanted to secure himself for the payment of the money. He said if I had my books squared up by the 1st of January, he would advance money as he had done heretofore and let the business run right along; and under these conditions I gave the property to Matthiessen. It was not intended exactly to compensate, for there was no price mentioned.

Q. You say that Matthiessen, on the 21st of December,

came to you as the agent of McMahan, and demanded this very property which he afterwards took? *A.* Yes.

Q. What did he say was his justification for demanding this property? *A.* To secure himself.

Q. What ground did he allege to you as his justification for that demand? *A.* For the money that he had advanced.

Q. And that was all? *A.* That was all I remember; it could not be for any other purpose that he took the property, only in return for this money.

Q. What I want to know is, he made a demand on you for \$10,000 worth of property, and when he made that demand, didn't you ask him what right he had to make that demand on you for that property? *A.* I don't remember that I did.

Q. He asked you for the property didn't he? *A.* He knew the money was not to be had; he asked for the property.

Q. Didn't he tell you at that time why he asked for that property? *A.* As a consideration for this money that was due to him.

Q. Was that the only reason he gave to you? *A.* The only reason. 20

Q. Do you recollect that he gave that? *A.* I do.

Q. You recollect that he did? *A.* I do.

Q. Hadn't McMahan before that, told you he had sold that property to Matthiessen? *A.* No, sir.

Q. Before Matthiessen demanded that property of you, hadn't you learned from McMahan that he had sold it to Matthiessen? *A.* No, sir.

Q. How then could you account for his demanding property and not money? *Q.* I knew the money was due to him. 30

Q. What took place after this power of attorney was given in carrying out this transfer—what did you do? *A.* I gave orders to the carmen to take that property down to Matthiessen.

Q. Did you do that as superintendent of McMahan? Didn't you understand that McMahan assented to that? *A.* I don't think McMahan knew anything about it.

Q. Didn't you tell him? *A.* I did.

Q. Didn't you think at the time you told him that he knew? *A.* No, sir, I don't think he did.

Q. That is not what I asked you; at the time you told him, and got his assent to transferring this property to Matthiessen, didn't you then believe and understood he knew what he was about? *A.* Yes, for the present moment, and forgot it five minutes afterward. 40

Q. You really believed he knew what he was doing? *A.* Yes, at the present time.

Q. You believed he knew what he was doing? *A.* I knew he didn't know what he was doing.

Q. Did you undertake to dispose of a large amount of his property, you knowing that he didn't know what he was about; when you told McMahan, or when you got McMahan's assent to hand over this property to Matthiessen, didn't you then believe he understood that that was to be done in satisfaction of the debt due to Matthiessen? A. Yes, sir.

Q. At that time you thought so? A. Yes; he would have done anything that Matthiessen asked him.

10 Q. In pursuance of that assent of McMahan then given, what did you do? A. I ordered material down to Matthiessen & Wiechers'.

Q. This was on the 20th, 21st, and 22d, before the power of attorney was executed; what did you do on the same day towards carrying out that arrangement? A. Nothing.

Q. What did you do on the next day? A. Nothing.

Q. Next? A. Nothing.

Q. Next? A. I began to move it then.

Q. The third or fourth day after the arrangement? A. Yes.

20 Q. Do you know why Matthiessen wanted to take possession of that property? Why he was not satisfied with the understanding he had with you? A. No, sir, I don't know the reason.

Q. Don't you know he consulted counsel about it? A. Yes.

Q. Now, don't you recollect the reason why he wanted to take possession? A. Yes, he was afraid somebody else would get hold of it before he would.

Q. He wanted to have it in his own possession before anybody else got possession of it? A. Yes.

30 Q. The third or fourth day after you had transferred this property, with the assent of McMahan, to him, you did something to deliver it—what did you do? A. I ordered the carmen to go to all the shops and take the property down to them.

Q. Where did you stay during the time it was being transferred? A. I was around the shops generally, one place and another.

Q. Didn't you keep an account of every article that was taken? A. Yes.

40 Q. Where is that account of every article that was taken? A. It is here.

Q. Why did you keep an account of every article that was taken? A. If anybody asked me what became of this property, to be able to answer them.

Q. Didn't you keep an account for the purpose of seeing how much it would amount to—how much you would be entitled to credit on the debt? A. Yes.

[This witness, by agreement of counsel, is allowed to stand aside in order to take the testimony of Dr. Varick, who desires to leave.]

Dr. Theodore R. Varick, for plaintiff, sworn, testifies as follows—

Direct-examination by Mr. Linn.

Q. You are a practising physician in this city, and have been for how long? *A.* Since 1846. 10

Q. Were you acquainted with Bernard McMahon in his lifetime? *A.* Yes.

Q. Did you attend him during his last sickness? *A.* I attended him from the 1st of January up to the time of his death.

Q. What was his condition when you saw him on the 1st of January? *A.* He was in a state of mental habitude, laboring under what is called an effusion, loss of power to adapt words to ideas.

Q. [By defendant's counsel]—Speaking the wrong words? *A.* Speaking the wrong words, and sometimes no words at all. 20

Q. What was the cause of that condition? *A.* It may be caused by a variety of circumstances; it may be due to softening of the brain, it may be due to embolus, in which the arterious supply of the brain become plugged up by a coagulation, and it may be also occasioned by an apopleptic effusion.

Q. On the 1st of January was he in any condition to transact business? *A.* No, sir. 30

Q. How often did you see him after that? *A.* Every day from that time up to his death.

Q. How did he continue from the 1st of January? *A.* Going from bad to worse.

Q. From the time you saw him till the time of his death, he was not in any condition to transact any business? *A.* No, sir.

Q. Was he in bed, or sitting up? *A.* In bed.

Q. Could you form an opinion of what his condition had been shortly prior to that time from what you saw of him on the first? 40

[Defendant's counsel.] That question ought to be qualified so as to ask him whether that opinion would be reliable. *A.* My impression was from the time, reasoning from my past experience, that it must have taken several days for him to have gotten in that condition.

Q. That he had been gradually coming to that condition for the past four or five days? *A.* That is my impression, and

also the statement of Dr. Hammond, who had him in charge previous to my seeing him.

Q. Did you visit him that day in company with Dr. Hammond? A. Yes.

Q. [By the court]—Did that state, or that condition, that you have described—inability to get words to express ideas—did that affect his mental consciousness and power of reasoning? A. In the condition in which I saw him the power of reasoning, as well as enunciation, was pretty well destroyed.

10 [Defendant's counsel]—I understood the question of the court to be general.

[The court]—My question I meant to apply to this case.

[Witness]—My answer was intended to cover this case only.

Q. Did Mr. Matthiessen ask you anything about his condition? A. No, sir.

Mr. Shanly's cross-examination continued by Mr. Gilchrist.

Q. Can you tell about what sums you received out of the assets of McMahan, during the nine months when you thought his brain was affected, for your compensation? A. I don't
20 remember; sometimes he would give me a check; whenever I wanted a \$100 he always give me a check; I should say about \$1,000, anyhow.

Q. How much did you consider you received from him during the time that you had no regular amount fixed? A. I should say \$3,000 or \$4,000.

Q. How comes it during this nine months you only got \$1,000? A. I don't say that, particularly; I got it whenever I wanted it; I don't remember the exact times I got it, nor the exact amounts.

30 Q. Where are McMahan's books? A. At Mr. Weart's office, I expect.

Q. What are those books you have? A. One is for the old sugar house, the other for the new sugar house, and the other book is an inventory of each day's work—each carman's work during the day, given in generally at night; the two little books describe where the things went.

Q. Have you got any summing up anywhere in those books, or any other place, of what the articles were that were delivered—have you at any time made up how much was transferred to Matthiessen? A. Yes.
40

Q. Where is it? A. I think Mr. Linn has an inventory of it.

Q. Did you give it to Mr. Linn? A. I think I did.

Q. You made up a statement of all the things that were transferred to Matthiessen, with their values? A. Yes.

Q. Where is that? A. I don't know.

Q. [By Mr. Linn]—You have a lead penciled memoran-

dum, haven't you? *A.* Yes; that is a copy of what you have got.

Q. Where did you get that from? *A.* From those three books here.

Q. What is on that? *A.* I haven't got the money down here—it is not carried out—but the number of articles and the price of each article.

[The witness attempts to tear off one end of the paper.]

[Defendant's counsel directs him not to tear it off, and asks witness to let him see it.] 10

[Witness declines to let him see it, but says he is willing the court should see it, and hands it to the court.]

[The court—after examining the paper—It seems to me this memorandum has some relation to the paper, but I don't think the witness is bound to produce that paper—it is a mere private memorandum.]

Q. When did you make up that paper? *A.* I don't remember; I think the original was made up a year and a-half ago—when this case was talked of first.

Q. That would be about July or August, 1872? *A.* Yes; 20 when these proceedings were contemplated first.

Q. What was it made up for? *A.* Mr. Weart and Mr. Linn asked me to make it up; they asked me to make up an estimate of the amount of property, and number of articles that had been delivered to Matthiessen & Wiechers at that time.

Q. Now, in giving these amounts, and quantities, and values that you have given here to-day, haven't you, in any degree, refreshed your memory by the fact of having made up that paper? *A.* Yes, in some degree—I think it was 30 night before last that I took it from the original.

[Defendant's counsel to the court]—Now, am I not entitled to it?

[The court]—I think the paper will have to come in.

[Defendant's counsel takes the paper.]

Q. When did you put that memorandum on there—the paper you say was made in July or August, 1873? *A.* The original was.

Q. You put that memorandum on only eighteen months ago? *A.* This was taken from the original; I rather think 40 Mr. Linn has it somewhere; I made it in Mr. Linn's office.

Q. I mean this memorandum you wanted to tear off? *A.* I think I put it down yesterday; something occurred to my memory, and I wanted to keep it in my mind; I put it down yesterday or day before.

Q. That memorandum? *A.* Yes.

Q. The memorandum previous to that which you wanted to tear off—that above it—when did you make that? *A.* I

think it was night before last; it was copied from Mr. Linn's paper, in his office.

Q. Where are the additions which you have put down here? A. I think they are on the original paper.

Mr. Gilchrist to Mr. Linn—Will you produce that original paper?

Mr. Linn—I will, if I have it; I don't think I have; it is not here; there are some papers down to the office; I will produce it by and by.

10 Q. Who handed it to you? A. Mr. Linn, in his office; Mr. Linn read it off for me, and I took the memorandum of them down; I think Mr. Gannon was there.

Q. On that paper, from which this was taken, the additions were made up? A. I think so.

Q. Who made those additions? A. I did, about a year and a-half ago—when these proceedings were first contemplated.

Q. How big a paper is that paper that Mr. Linn has? A. It is a sheet of legal cap.

20 Q. That contains the additions? A. Yes, carried out on the margin, and added up on the bottom.

Q. And was there only one sheet of foolscap? A. Yes.

Q. Where was that taken from? A. From the books.

Q. How did you take it from the books—did you add up each column in the book? A. Yes.

Q. Is this an exact copy of what Mr. Linn has? A. Yes, we read it over twice, and compared it.

Q. What did you make this copy for? A. To refresh my memory.

Q. To get at the true numbers? A. Yes.

30 Q. After these barrels were removed, and during their removal, were you receiving any barrels from customers? A. Yes, while they were in process of removal.

Q. Where was this large quantity of trimmed and untrimmed barrels in the month of December? A. In the shops.

Q. Which shop had the most? A. Oh, Grand street.

Q. Where were they in that shop? A. On the first and second floors.

Q. How many floors were there? A. Three floors.

40 Q. Were there any on the third floor? A. Very few; I think that was for manufacturing new barrels.

Q. The second floor was used for the stock? A. Yes.

Q. And the first floor was used for stock and manufacturing, too? A. Stock and trimming of old barrels.

Q. How did you keep the accounts from the time that they began to remove these barrels; how did you keep the account of McMahan, and Matthiessen and Wiechers? A. I kept it in those books.

Q. How were the bills rendered to Matthiessen from time

to time during the whole course of their dealing? *A.* At the first of the month they were rendered in aggregate; add up the number of loads of barrels and compare it with receipts that was received for each load.

Q. What was the ordinary price of the different kinds of barrels that were used for sugar? *A.* The old barrels were forty-eight cents trimmed—that is an old clean flour barrel.

Q. What did you call an old clean flour barrel? *A.* They were used for putting sugar into them.

Q. What did you call them, a trimmed barrel? *A.* A 10 trimmed barrel when it was ready to receive the sugar, hoops tightened, and heads ready to put in.

Q. How were they sent down, with one head open and the head in the barrel? *A.* Yes.

Q. When they were got down to the sugar house and filled, what was then done? *A.* They were headed up by our coopers.

Q. Then McMahan had at the refinery coopers enough to head up from a thousand to two thousand barrels a day?

A. Yes, all that was sent down had to be headed up. 20

Q. You say that Matthiessen agreed to keep advancing from time to time? *A.* Yes.

Q. What was done after these barrels had been removed, in reference to carrying on the business? *A.* There was nothing done.

Q. Were not barrels bought? *A.* Yes.

Q. Were not barrels trimmed by your men? *A.* Yes.

Q. Were not barrels sent to the refinery? *A.* Yes.

Q. And for how long did that continue? *A.* Up to about 30 the 14th or 15th of March.

Q. How did you send in your bills from the date of the first removal, the 26th and 27th of December; how did you send in your bills after that? *A.* I sent in only one bill.

Q. What did that bill include? *A.* I rather think it was up to the 1st of January; I sent in a bill for the month's work; I never see it since; I forget what it included.

Q. For the month of December, on the 1st of January you sent in a bill, and you forget what that bill included? *A.* Yes.

Q. After that, did you send in another bill? *A.* Not that 40 I remember of.

Q. Was there never any bill sent in by you after that?

A. I don't remember that there was; there was an account or statement sent in by me of the number of barrels, but I don't remember what was in it.

Q. On the 1st of February and the first of March was there no account rendered by you of barrels that were furnished?

A. I don't remember.

Q. Didn't you superintend the manufacture of barrels from Christmas till the 14th of March? *A.* Yes.

Q. And the trimming of barrels, and all the business? *A.* Yes.

Q. Who paid the men? *A.* Mr. Matthiessen did.

Q. (By the Court.) Who carried on the business after the death of McMahon? *A.* I don't know; sometimes it was Matthiessen, and sometimes myself.

10 *Q.* (By the Court.) What was the understanding between Matthiessen and the widow and you, as to who should carry on the business? *A.* Matthiessen promised me a partnership in it.

Q. It was for the benefit of the widow, wasn't it? *A.* Yes; for the benefit of the widow.

Q. You went on, and you continued there till the 14th of March—didn't you and Matthiessen have a falling out? *A.* No, sir.

Q. You and he had a falling out, hadn't you? *A.* Things haven't been very pleasant between us.

20 *Q.* Tell us how that thing occurred, and what was the falling out between you—whether there was not a feeling on your part against him, and why it was; what was done by him to you that you did not like? *A.* I considered he treated me very badly. He kept on promising this business to me and the widow, and he had it given away behind my back; I didn't know a thing about it till Mr. Weart told me the evening before the stock was sold out; that was about the 14th of March; we had no falling out previous to that.

30 *Q.* After that? *A.* I haven't had any connection with Matthiessen since—O, I didn't get any money for three months I worked there; I asked him for my wages; he told me he didn't owe me anything; to go to Mr. Weart for it. Mr. Weart told me to go Matthiessen; and there was a bill due in the coal yard, and I thought I would suit myself, and I collected the bill. The bill was due under my name; the stock was Matthiessen's; and I collected the money in order to compensate myself for the time I spent and got no wages for it; and Mr. Matthiessen sent Mr. Sunderling up for the money, threatening me that I would get into a tight place if I did not

40 refund the money; I went to my wife, she had a little money in the bank, and she drew it out, and I hadn't as much as would pay the whole amount and I gave him my gold watch out of my pocket. That made me mad.

Q. When was it you communicated to Mr. Weart, the administrator of Mr. McMahon, that McMahon was not in a condition to transfer these goods, and there ought to be a suit brought—or to Mr. Linn; when was it that you first had a communication with these gentlemen about bringing the suit?

A. I don't remember.

Q. How long ago was it? A. The first I heard about this must have been about two years ago.

Q. Don't you think you were at the bottom of the suit yourself? A. No, sir; I was not.

Q. Who was? A. At least I was not the instigator of it. I was pressed by parties for a full year or more to use my endeavors to get this suit, and it dragged for a year and a half. Finally the creditors held a meeting and almost compelled me.

Q. Was there a meeting of creditors at any time? A. There was. 10

Q. When was that? A. About a year and a half ago; I don't remember the date.

Q. Did you call a meeting of the creditors before McMahon died? A. Yes.

Q. When did you call that meeting? A. I rather think it was a day or two before he died—no, no, the same day.

Q. Who was present at that meeting? A. Mr. Gannon, Mr. Briggs, Mr. O'Neill, and many gentlemen from New York and Fall River and various other places from the country—hoop-pole men. It was in Vredenburg's office, and he was there, and Matthiessen was there. 20

Q. Did you make any showing of the assets and liabilities of McMahon at that time? A. I did.

Q. In writing? A. I think so.

Q. Where is it? A. I don't know; I think I gave it to Matthiessen at that time; I think he got the statement of the assets and liabilities.

Q. Do you recollect how the assets and liabilities came out? A. Yes. 30

Q. What was stated at that time as to the excess of the assets over the liabilities? A. Between \$35,000 and \$40,000.

Q. What was in your judgment the value of the estate and property of McMahon, here, during the year 1871 up to the time he died? [Plaintiffs' counsel objects to the question as immaterial. It is calling for the opinion of the witness and not for a statement of fact.]

[The court.]—I think it is better for the witness to state what the property was, if he knows. 40

[Defendant's counsel.]—Allusion was made in the opening that Matthiessen had taken his own way in getting at the assets of his debtor, and swept away all the property of the debtor so that the other creditors have got nothing but twenty cents on the dollar. That is an allegation that has been made here. Now, I want to show that we did it in good faith, and didn't intend to cheat anybody. It was understood by all that was there that the property was amply sufficient to pay

all the debts after Matthiessen was paid; \$40,000 was the estimate of the assets over the liabilities after Matthiessen had got all the property he had bought.

The court—I suppose the question might be asked whether he was solvent and able to pay his debts.

Q. In your judgment was that the case or not during 1871?

A. Yes.

Mr. Gilchrist—I would like to have that paper that was used to show the additions, so that we can verify them.

10 Mr. Linn—You can have all the papers I have.

Recess.

Q. In this memorandum, which is the original, I see it says, “statement of goods delivered to Sugar Refining Co., December 23, 1871, to January 10, 1872;” is that, according to your recollection, accurate as to time? A. Is that the original?

Q. [Showing it to witness.] It is your handwriting, isn't it? A. Yes; that is mine.

Q. How were untrimmed barrels divided—were they divided into classes? A. Yes; into three classes: good barrels, 20 second qualities and culls.

Q. What was the second quality? A. They were good barrels, but they required some labor and some material to trim them up, to make them good.

Q. Isn't there a class you call “potato barrel”? A. Yes; that is the third class.

Q. Potato barrels and culls are the same? A. No, sir.

Q. You said there were three qualities? A. There are good culls and potato barrels.

Q. What was the cost of a good untrimmed barrel in December, 1871? A. Thirty-five cents.

Q. That was a good barrel? A. Yes.

Q. It would cost thirty-five cents delivered at McMahon's shop? A. Yes.

Q. Without being trimmed or without anything being done with it? A. Yes.

Q. What was the cull worth ordinarily? A. Thirty cents, and the potato barrel twenty-five cents—sometimes twenty cents.

Q. In taking in the barrels didn't you classify them in that 40 wise? A. Yes.

Q. And you got from twenty to twenty-five cents for potato barrels? A. Yes.

Q. What was the range for culls? A. Uniformly thirty cents; and for a good one, thirty-five.

Q. How many barrels were there that were taken from the Grand street shop that were good, and how many culls and how many potato barrels? A. I couldn't tell that now.

Q. Don't your books show that you have there? A. No, sir; those are goods delivered on those books.

Q. Do those books show anything more than the goods delivered between December 23 and January 10? A. Yes; they go back for years.

Q. Are not the goods classified in any part of those books? A. No, sir.

Q. Before December 23, when you sent a load down to the Refinery, you sent it down trimmed? A. Yes.

Q. Had you any inventory of the number of barrels that you had at the Grand street shop? A. No, sir; I remember making a calculation once.

Q. How did you make that calculation? A. I took the foreman's book for receipt and delivery, and I made a calculation that could not be very far from the truth, I think.

Q. You took the foreman's book which showed the barrels received, and took the book which showed the barrels taken away? A. Yes.

Q. Where are those foreman's books? A. I don't know.

Q. Where are McMahan's books? A. In Mr. Wearts' office, I expect.

Q. You had them, didn't you, till the 14th of March? A. Yes.

Q. What did you do with them then? A. I had them in the house for a few days.

Q. And then? A. Sent them down to Mr. Wearts' office, and they have been there ever since.

Q. Won't those books show how many of those barrels were good, culls and potato barrels? A. No, sir; I don't think there is anything in them that would show the exact number.

Q. Would not the foreman's books show? A. I suppose it would.

Q. You have stated here that of these here are 15,000 untrimmed barrels, and you have stated them to be worth forty-two cents; now, you tell the jury that they only cost thirty-five. Can you reconcile that testimony? A. They were worth forty-two to sell and only thirty-five to buy them.

Q. How much did you put them into Matthiessen for, by the bills, when they were trimmed? A. Forty-eight. 40

Q. You considered the work on them worth only six cents? A. Yes.

Q. Those untrimmed barrels you have put in all at forty-two cents? A. Yes.

Q. And yet you say there are three classes, were not these 15,000 barrels composed of three classes? A. No, sir; there were no potato barrels amongst them at all.

Q. At any of the shops? *A.* There might have been a load in the lower shops, but there was none up there.

Q. Were there no culls? *A.* There might have been some culls.

Q. How many culls? *A.* I don't know.

Q. Can't you give an idea of what proportion there were, whether half or quarter? *A.* No, sir.

Q. How many? *A.* I should say about one-twelfth or one-fifteenth were culls.

10 *Q.* How do you arrive at that? *A.* From my experience in seeing loads, and seeing the receipts.

Q. In this statement you gave to these gentlemen you put down these barrels at forty cents each, you have sworn here were worth forty-two in the original statement? *A.* I don't remember what I put them down at there.

Q. [Showing witness paper]—The first item? *A.* Yes; forty cents.

20 *Q.* Can you reconcile that to the jury, that at one time they were worth forty cents, now you are swearing to the jury that they are worth forty-two? *A.* We got forty-two for them many times.

Q. Don't you think you are a little prejudiced in this case? *A.* No, sir; upon my honor, I am not.

Q. How many trimmed barrels did you say the defendants took away—do you recollect? *A.* About 8,500; between 8,000 or 9,000.

Q. You have given us 8,000 or 9,000 trimmed barrels, at forty-six cents? *A.* Yes.

30 *Q.* Do you know what prices you put down for them in the original statement? *A.* No, sir; I don't remember what prices in the original statement.

Q. Here is 2,610 trimmed sugar barrels at forty-five cents, are those a part of the 8,000 or 9,000 that you put down at forty-six? *A.* I suppose they are.

Q. 4,476 trimmed sugar barrels at forty-five cents, are those part of the 8,000 or 9,000? *A.* Yes.

40 *Q.* Can you explain why you made a difference, to the jury, and to the plaintiffs? *A.* I should say that the smaller number went to the new sugar house; there was a separation made in the separate houses.

Q. I am not talking about that, I mean the difference in price—why did you give the counsel one price, and give to the jury here another price? *A.* I don't know.

Q. Here are 1,200 new sugar barrels you have given us at sixty-five cents? *A.* Yes.

Q. Didn't you, in the statement to the counsel, put them down at sixty-two cents? *A.* Yes.

Q. Why did you give it to the counsel, when you were tell-

ing them the whole amount of the demand that they ought to make, why did you put it down at sixty-two? *A.* We were in the habit of giving things cheaper to the sugar house than anybody else; those first figures, I suppose, are on the basis of the business we had been transacting with the sugar house, and what I have told you this morning was on the basis of what they might be sold to other parties for.

Q. Did you ever know Matthiessen & Wiechers to pay over sixty cents for a new barrel to McMahan, headed up, ready filled with sugar, and ready, all headed up? *A.* I forget. 10

Q. You have been four years in that business, do you recollect one single instance where you charged them sixty-five or sixty-two cents for a new barrel? *A.* No, sir.

Q. Not one? *A.* Not one.

Q. Then why did you charge us sixty-five in your oath, and sixty-two in the paper, when you never sold them one for over sixty? [No answer.]

Q. You have spoken here, first, of 15,000 untrimmed barrels, then of 8,000 or 9,000 trimmed, now, you have spoken of 1,400 molasses or syrup barrels, call them off from your paper and see how you have them? *A.* I have got them separated here. [Looking at papers]—807 molasses barrels. 20

Q. You spoke of those as being worth \$1.50 to \$2.50? *A.* Yes.

Q. Can you tell us how many were worth \$1.50? *A.* Five hundred and eighty-six of those were worth \$1.50, and eight hundred and seven were \$2.50.

Q. You mean the rest of the eight hundred and seven? *A.* The remainder of the fourteen hundred; that is the way I have it here. 30

Q. Try it again; how many molasses barrels have you got down there altogether? *A.* I have got thirteen hundred and ninety-three; eight hundred and seven molasses barrels at \$2.50; one hundred and sixty-three molasses hogsheads at \$2.00; four hundred and twenty ten-gallon kegs.

Q. How do you make up fourteen hundred molasses or syrup barrels at \$1.50 or \$2.50? *A.* I have got it here, eight hundred and seven molasses barrels at \$2.50; five hundred and eighty-six molasses barrels at \$1.50. 40

Q. Is that all? *A.* That is all the molasses barrels.

Q. There are two sums you see you have given; how many of those are ten-gallon kegs? *A.* None of them.

Q. Are you sure of that? *A.* I am; a ten gallon keg is not a barrel—a barrel is forty or forty-five.

Q. What was the four hundred and twenty? *A.* Ten-gallon kegs.

Q. What, one hundred and sixty-three? *A.* Those were hogsheads.

Q. Of these two items eight hundred and seven you see were molasses barrels at \$2.50; are you sure that is right?
A. I am.

Q. [Showing witness paper.] Don't your statement rendered to the plaintiff show two hundred and twenty-one molasses barrels at \$2.50? A. Yes.

Q. Isn't there five hundred and eighty-six at \$1.50? A. Yes.

Q. Add those together; how many does that make? A. 10 Eight hundred and seven.

Q. Then don't this statement show that you have charged for five hundred and eighty-six barrels here, a dollar more apiece than you ought to have done; don't your present testimony show you have charged us a dollar more for five hundred and eighty-six than your statement to the defendant did? A. Yes; there is a discrepancy there, surely.

Q. You say that you sat down with Mr. Linn and Mr. Gannon, and made up that statement from this? A. Yes; Mr. Linn read off the items and I wrote them down with a pencil, 20 and we compared it afterwards to see if it was correct.

Q. Add the two hundred and twenty-one molasses barrels, the five hundred and eighty-six molasses barrels, the one hundred and sixty-three molasses hogsheads, the four hundred and twenty ten-gallon kegs together, and see if that don't make the number that you gave to us within ten; haven't you stated to the jury fourteen hundred molasses barrels at \$2.50 and \$1.50, when four hundred and twenty of them were ten-gallon kegs and one hundred and sixty-three of them were hogsheads? A. It foots up thirteen hundred and ninety.

Q. Isn't that exactly what you meant to say when you said 30 fourteen hundred? A. Yes.

Q. Did you ever charge Matthiessen as much as \$2.50 for molasses barrels? A. No, sir.

Q. Why did you here? A. I was told we was dealing with another party now; that there was no agreement with the creditors; and Matthiessen to deliver this stuff different to an outsider.

Q. Who told you that? A. Some of the creditors or lawyers.

Q. Which—lawyers or creditors? A. Both. 40

Q. So you have put the valuation down here as suggested to you by creditors and counsel of the administrator? A. I told them the regular price, and I was desired afterward to put down what they charged to outside parties.

Q. Did you render first to them an account with the right prices down and then this? A. No, sir.

Q. You said you gave it to them right, and then they altered it? A. According to Matthiessen & Wiechers' basis, I gave it to them right.

Q. How did you give it to them; in what shape or form did you give it to them; did you give them a list? A. Yes; in the same shape as that, I suppose.

Q. Who did you give it to? A. I think I gave it to Mr. Weart or Mr. Linn.

Mr. Gilchrist to Mr. Linn—Will you produce it?

The witness—I thought you had reference to that paper. 10

Q. This paper has the \$2.50 down. Where is the paper, if any, which you gave to them first, which you afterwards altered from what the regular prices had been? A. There was no other paper with the regular prices.

Q. You say you gave to counsel of creditors the regular prices which they had been accustomed to pay? A. I told them the prices; I don't believe it was ever on a paper; I rather think not.

Q. What was the highest that was ever paid for a molasses barrel or syrup barrel? A. \$2.25. 20

(By the court.) Paid by whom, do you mean? A. By Mr. Matthiessen.

Q. Did you make any sales of molasses barrels to anybody else but him? A. Yes; sometimes, but very seldom.

Q. In your testimony here you said you divided those 1,400 barrels, and said 850 of them were worth \$2.50? A. A mistake in the copying.

Q. And a mistake in your testimony, too? A. Yes; I swore to the contents of the paper.

Q. Molasses hogsheads you gave 163 on your paper here? 30

A. Yes.

Q. What were you accustomed to sell them for before? A. \$1.75.

Q. How much have you charged here in your evidence to the jury? A. \$2.

Q. 420 ten-gallon kegs you testified here were worth \$1.75? A. Yes.

Q. How much had you been in the habit of getting for them? A. \$1.50.

Q. Why have you told the jury here a value different from 40 what you always get? A. Outside parties we would have charged \$1.75.

Q. Did you ever sell a ten-gallon keg to anybody? A. Yes; many a time, and got as much as \$2 for them.

Q. How much did you represent those ten-gallon kegs to be worth when you gave it to the plaintiffs? A. I don't know.

Q. Look at that paper and see? A. \$1.50.

Q. You told them \$1.50 and you told the jury here \$1.75?
A. Yes.

Q. Seven half syrup barrels, you told the jury, they were worth \$2; how much did you tell the plaintiffs they were worth? A. \$1.75.

Q. Here are fourteen charcoal barrels on this memorandum, and I see there are five more; that is nineteen—in your memorandum here you have nineteen, and you gave to the jury thirty? A. I have got here fourteen besides the nineteen on this memorandum.

Q. Look at this original paper which you gave the plaintiffs, and see if you have given more than nineteen altogether there? A. No, sir.

Q. Whose barrels were those? A. The property of the sugar house.

Q. They were the property of the sugar house at the beginning? A. Yes.

Q. All that you have a right to charge them is the cooper work done on them? A. Work done on them.

Q. And when Matthiessen took them there was no dispute about that being his property, except the work? A. No, sir; except the work.

Q. When was that work done on those nineteen barrels?
A. I don't know—between the 23d of December—

Q. What means have you of verifying that to show that that is so? A. I suppose the books.

Q. Look at your books and show me any charcoal barrels that you carried away between the 23d of December and the 5th of January? A. [Looking at books.] December 27, fourteen smear barrels coopered. We charged the same for smear barrels as charcoal barrels. Sometimes we put them down smear barrels, sometimes charcoal barrels.

Q. Didn't you charge less for coopering a smear barrel?
A. No, sir; they were all fifty cents.

Q. [Showing witness a bill]—Here is a bill in your own handwriting, see if you don't charge less for a smear barrel than you do for a charcoal barrel for the cooperage; that is in your handwriting, isn't it? A. Yes.

Q. You charge less, don't you? A. That is not my handwriting where the writing is carried out.

Q. Isn't it a bill presented by you, and headed by you?
A. Yes.

Q. And paid you at this office? A. Yes.

Q. Isn't a smear barrel charged at twenty-five and a charcoal fifty? A. That is according to the work done on it, I suppose.

Q. You said they were all fifty cents; now, you spoke of

8,000 or 9,000 trimmed barrels—what is a trimmed barrel?
A. A barrel ready to put sugar into it.

Q. Now, you say that between December 27th and January 5th or 6th, that you delivered 8,000 or 9,000 perfectly trimmed barrels? *A.* Yes.

Q. One of the sugar houses was stopped at the time? *A.* Yes.

Q. In saying there were 8,000 or 9,000 trimmed barrels delivered between December 27th and January 5th or 6th—do you mean to say these 8,000 or 9,000 barrels were delivered in that time? *A.* Yes, between December 23d and January 10th. 10

Q. Didn't you render the defendant a bill up to December 31st? *A.* I suppose I did, that was the custom.

Q. Didn't you include in it a part of this 8,000 or 9,000 trimmed barrels? *A.* I don't know.

Q. Are you certain that between December 25th and January 5th, that they took from 8,000 or 9,000 trimmed barrels; now, I want to know if you didn't render a bill for these barrels, and get paid for them? *A.* I don't know that; I was asked for this statement from parties, and I took it from the book. 20

Q. You don't know whether you did between December 25th and January 5th, give the defendant 8,000 or 9,000 barrels? *A.* Certainly, I delivered them between December 23d and January 10th.

Q. And what have you to say as to your bills up to December 31; did they include any part of those 8,000 or 9,000 barrels? *A.* I don't know.

Q. [By the court]—Was that a mere statement of what you sold, or was it an account current? *A.* It was a mere statement—a monthly render. 30

Q. Look at the number of trimmed barrels you delivered in December, from the 1st of December; can you tell how many loads there were? *A.* [Looking at book]—I would say they would average five or six loads a day down to one house, about ten loads a day altogether.

Q. What days did you deliver ten loads in December?
A. There is eight on the 1st of December.

Q. Did you deliver any on the 1st of December? *A.* I did. 40

Q. Where to? *A.* To the sugar house.

Q. Which? *A.* Both—four to the old house and eight to the new house.

Q. Which house was working at that time? *A.* I don't know; I think both of them were working.

Q. When was it you said one of them was not working?
A. It was not working for a week or ten days after Christmas.

Q. Do you know when it stopped? *A.* No, I don't know the exact date.

Q. Show me another date you delivered? *A.* Twelve on the 11th; there was sixteen on the 12th.

Q. [By plaintiffs' counsel]—How many in a load? *A.* Eighty-eight or seventy-two.

Q. According to the best of your recollection you observed this going on—you observed these loads—you were having your men doing the work, and you were having men keeping
10 accounts; now, according to the best of your recollection and judgment, were there above 1,200 trimmed barrels that were sent to either of those refineries as barrels which went towards the debt? *A.* There was quite a number went in the regular order of business.

Q. Those that went in the regular order of business were not those that they are suing for, that is not what we are talking about; what I want to know is how many barrels went to the refinery under that contract you have spoken of to extinguish the debt? *A.* All the untrimmed ones went there
20 for that purpose.

Q. Were there above a thousand trimmed ones that went on that account? *A.* I don't know how many.

Q. According to your best recollection, were there above a thousand went there on that account? *A.* I think there was more.

Q. How many more—let us have your best judgment about it; we don't want you to mingle what was not paid for by the debt, and what was paid for by the debt? *A.* I can't tell.

30 *Q.* [By the court]—Can't you give a judgment as to the number that went on account of this transaction? *A.* Everything that went down after the 23d was intended to relieve Matthiessen & Wiechers' debt.

Q. The point is this, whether between the 27th and the 5th of January there were above a thousand barrels that went that were trimmed that went in discharge of the debt? *A.* I could not tell.

Q. [By the court]—Won't the books show what went after that date? *A.* Yes.

40 *Q.* Perhaps I can refresh your recollection by one of your bills—[Showing witness a bill]—Haven't you confused yourself by including that bill which was for the whole month from the 1st of December—trimmed barrels? *A.* Yes, that must include the whole month.

Q. [By the court]—That is the bill rendered December 31st? *A.* It is a bill of that date.

Q. When you speak of 9,000 barrels being taken away,

don't you think that you were in error? *A.* Yes, I see there is an error now.

Q. Do you think that above a thousand barrels went that were trimmed? *A.* I think there was more than that; the full account is in those two books.

Q. [By the court]—Does not the bill show what is on the books? *A.* That bill is for one house.

Q. Not for all the goods rendered for that month? *A.* No, sir.

Q. [Showing witness another bill, marked in ink 26th, and 10 then altered in lead pencil to 31st.] How many went to the other? *A.* I see a mark on there December 9th, 1872.

Q. Don't you understand that mark? *A.* No, sir.

Q. Didn't you never see that mark on any of your bills before? *A.* Yes.

Q. Don't it mean it is copied in a book in the refinery on that day? *A.* Yes; all the stuff mentioned in 9,735 bill went down to the old house; I am of opinion that there was no bill went into the new house at all.

Q. I ask you whether the statements of 8 or 9,000 trimmed 20 barrels is not a discrepancy from the truth? *A.* I don't think it is.

Q. Then how do you reconcile the statement you made to the jury about it? *A.* There is a discrepancy between the two statements.

Q. You were furnishing trimmed barrels to the old house, and trimmed barrels to the new house? *A.* Yes.

Q. And outside of those you were furnishing in the regular course of business barrels to them which you had agreed to deliver to pay the debt? *A.* Yes. 30

Q. Now, I want to know whether you say that this 9,000 barrels went to pay that debt, or whether they are part of those that went outside of the agreement? *A.* I am not certain upon that point.

Q. You cannot be definite? *A.* No, sir, not from memory.

Q. Can you in any other way? *A.* If I could get the proper books I could tell.

Q. What proper books do you want? *A.* I think those two small books will tell. 40

Q. Can you tell us in the morning? *A.* Probably I might—I will endeavor.

Q. There were 9 or 10,000 feet of worked lumber? *A.* Yes.

Q. What shop was that at? *A.* Washington street shop; that had to be worked into tanks.

Q. Do you know whether McMahan got any money from

Matthiessen to pay for that lumber, and for the work on the tanks outside of the agreement you made with him? *A.* Yes.

Q. How much did he get? *A.* I don't know.

Q. Wasn't it \$3,500? *A.* That money is in the general indebtedness; it was on account of the tank business, but it went into the general account.

Q. But the \$3,500 was advanced to McMahon to get this lumber with, and to pay for the labor? *A.* I don't remember how much—I expect there was something, anyhow.

10 *Q.* If I showed you a check, could you recollect it? *A.* Perhaps I could.

Q. What was done with that lumber when it was first got—wasn't it taken to the sugar-house? *A.* Yes, according as it was finished.

Q. Wasn't it taken to the sugar-house the first thing; and didn't it lay there seasoning for a good while, put up in the third story or some high place? *A.* I suppose so—I don't know—I am not certain about it.

20 *Q.* What do you mean by that answer? *A.* I have a faint, dim recollection of its being fetched down from some place before it was worked.

Q. Fetched down from the sugar-house to be worked, wasn't it? *A.* Yes, I think so; it went down there, probably, to be seasoned.

Q. Can you tell about what time it was that that payment was made to McMahon to get this lumber with, and to pay for the work? *A.* No, sir.

Q. Does this include all the lumber that was got for those tanks? *A.* No, sir.

30 *Q.* Where was the rest? *A.* Down to the sugar-house, previous; we hadn't storage room enough, and we sent it down there to have it finished.

Q. Wasn't it in the sugar-house on December 27th, and before that, already put up in tanks? *A.* No, sir, it was not.

Q. No part of it? *A.* The biggest part of it was done there.

Q. How many tanks were there? *A.* I should say about twelve or thirteen.

40 *Q.* Does that include the large and small? *A.* Yes; about six or seven of one, and five or six of the other.

Q. When this agreement was made between you and Matthiessen, weren't the six or seven largest tanks all up in the refinery? *A.* I don't know that; I know the lumber was down for the largest portion before that.

Q. I want to know after it got into McMahon's shops whether it didn't go back into the refinery in the shape of tanks there for six of the largest? *A.* Yes; I suppose the tanks were up; the material was there for them, anyhow.

Q. McMahon had no possession of the timber for those tanks that had been put up in the refinery at the time that the goods were delivered; in other words, you didn't deliver the tanks—the largest tanks? A. No, I did not—I suppose not, anyhow,

Q. How do you make out 9 or 10,000 feet of lumber that was in the Washington street shop? A. I took it from the foreman's account, John Croak.

Q. You don't know how much there was yourself? A. He knew the amount of tank stuff that went down. 10

Q. In what shape was that lumber that you put down at 9 or 10,000 feet? A. Staves and heading.

Q. It was all out ready to be put in the shape of a tank? A. Yes.

Q. It was worked lumber? A. Yes; that is the foreman's account.

Q. It was ready to be made into a round tank? A. Yes.

Q. Were the heads ready? A. I don't know.

Q. Do you recollect what price you fixed for it? A. I calculated it was worth twenty cents—the lumber and the 20 work.

Q. Don't you know it was not paid for in that way, at all? A. I know it was not.

Q. How was it to be paid for? A. Before this time it was always paid for by the gallon.

Q. You paid for a new tank according to what it contained? A. Yes.

Q. Can you give to the jury any idea of what ought to be the price of this tank, that was in the condition it was? A. There was more than one. 30

Q. Was there material for more than one? A. Yes; nine thousand feet I expect would make three.

Q. There are thirty syrup hogsheads here that you have got down? A. That was taken from memory, I suppose.

Q. What is the difference between the syrup and the molasses hogshead? A. They are the same.

Q. Do you know why they are distinguished here in this bill? A. I don't know; there is no reason for it.

Q. What did you charge us in your evidence here for these syrup hogsheads? A. \$2.00, I think. 40

Q. What were you in the habit of charging Matthiessen & Wiechers for them? A. \$1.75.

Q. What were those copper packers? A. They were to press sugar so as to make the barrel contain more.

Q. How came a cooper to have those? A. He represented one day to McMahon, and McMahon went down and had Gannon make them.

Q. What is the price to be charged? *A.* The same as charged by Gannon.

Q. The work on these tanks—you charged at twenty cents a foot for the work on the tanks and for the material? *A.* Yes.

Q. Wasn't that work done after McMahon's death, and paid for by Matthiessen? *A.* What work was done after the 1st of January was paid for by Matthiessen.

Q. Then you see you have put in that charge for that lumber—
10 *A.* I think the work was all done except the putting of them up previous to the 1st of January, when Matthiessen commenced paying the men.

Q. Then you would say that Matthiessen didn't pay for any of that labor that you have charged for? *A.* That is my memory.

[Witness is allowed to stand aside in order to give him an opportunity to make some calculations, called for by the defendants.]

20 *John Croak*, for plaintiff, sworn, testified as follows. Direct-examination by Mr. Linn.

I was employed by Bernard McMahon in his lifetime up to his death, as a cooper; I know something about the delivery of this worked lumber for tanks; it was delivered, about ten or eleven thousand feet of it, in November, or about there, and the remainder was delivered after McMahon died.

Q. Did you take an account of the delivery? *A.* I took an account after, but I have lost run of it; the account I kept in my memory was eleven thousand feet went down before he
30 died, and about eight or nine thousand after he died.

Q. Why do you think it was in November that the ten or eleven thousand was delivered? *A.* Because I hadn't room for it in the shops where I worked, and I sent it down to get some more in.

Q. Was any account kept of that delivered in any book? *A.* No, sir.

Q. Then there was no account kept of it? *A.* No, sir.

Q. Did you stay there after McMahon died? *A.* Yes, sir.

Q. And there was some of the lumber still remaining on
40 hand? *A.* Yes; some dressed and undressed.

Q. Are you quite certain that it was after McMahon died that that lumber was delivered? *A.* I am quite certain there was some delivered before he died and some after he died.

Q. How long after he died? *A.* I think the superintendent of the sugar-house, and I think Mr. Cubberly, come after McMahon was buried, and took down what remained in the shop, that might have been a day or two, probably three days

after; I told Mr. Otterhaus that the stuff wasn't worked up, then, says he, can't you work it down there.

Q. How long had you known McMahon? *A.* About fifteen years; I was personally acquainted with him eight years; I had been in his employ from June, 1866, till he died.

Q. How long was he sick before he died? *A.* I don't know as he was sick.

Q. How long was he confined to his house? *A.* I think it was after Christmas.

Q. When did you last see him? *A.* Before Christmas, I 10 think; a day or two before he was kept in the house.

Q. Did you observe anything strange in his conduct during the last times you saw him? *A.* Yes.

Q. What? *A.* I noticed he had an impediment in his speech; I noticed he used to stagger going along the street—didn't appear to have control of his limbs.

Q. Had he, before this time, been accustomed to stammering? *A.* No, sir.

Q. Was this stammering a usual or unusual thing? *A.* It 20 was unusual to him.

Q. Had you ever heard him stammer till shortly prior to his death? *A.* No, sir.

Q. Did you hear him say, or see him do, anything which excited your attention as being strange? *A.* He come up to the shop where I worked, back of the office; I said to him one day, says I, Boss, what's the matter with you? I notice something very peculiar about you lately; and he says to me, There's nothing the matter with my teeth; he took a blacking brush and went to blacking his boots, and got all flushed in his face. 30

Q. Did you speak to him about his teeth? *A.* No.

Q. How long was this before he died? *A.* This was about September; on another occasion, in November, election day, I was going down Washington street, and I met McMahon; says he, I am going to Rockaway to-day; I am going down to see them horses; Mr. Shanly was with me; and says he, come down to Mat Monk's; I want to get a hat; says I, what do we want there? come on, he says, come on; we went to Monk's, and he told Monk's to show him a hat; he put it on his head, and says to me, John, does that fit me? says I, 40 no, you had better try a stiff brimmed hat; he handed him the hat, and he says, how does this look? says I, it looks very well; now, says he, you had better take one, and, Shanly, you take one, also; says he, what kind of a one do you want? he handed me down a hat, and I says, lay that aside for me; I didn't try to fit myself at all; I didn't take the hat, for the reason I didn't think he was in his right mind, and I didn't

want to take the hat, because the bill would come in by-and-by, and he wouldn't know what it was.

Q. Did you form your opinion from his general appearance and actions, as well as from what he said, as to his condition?

A. I didn't notice anything about his appearance, no more than his general way of conducting business; I noticed another time: he was standing at the stable door, and I was on the sidewalk, and a Catholic priest of St. Peter's Church was passing by, and he asked him in to see his horses, and he turned to him, and he told him he had sixty men in the country getting out hoop poles; that I knew he didn't have; he didn't have only about twelve or fourteen.

Q. Did you hear him say anything about the value of his horses? *A.* He told me, John, they are splendid horses; they are worth \$1,800 apiece.

Q. What was his manner in talking then? *A.* Stammering; couldn't speak three words straight, as he did formerly, when I knew him—when he was in health.

Q. Do you recollect anything else? *A.* One day he discharged his brother for no cause at all.

20 *Q.* What opinion did you form of the condition of his mind during these things you saw in him? *A.* I concluded he was getting out of his mind.

Q. Were you there at the time this property was delivered to Mr. Matthiessen? *A.* Yes.

Q. When this property was delivered, what was left in the shops and upon the premises of McMahan? anything to carry on business with? *A.* I don't know; I was only around the place just where I was at work.

30 *Q.* Was there anything in your shops to do, at McMahan's business, after the things were removed to the sugar house? *A.* Not that part of the business I was at.

Q. Do you know anything about the value of these goods; barrels and hogsheads? *A.* I don't.

Q. Do you know what the lumber was worth? *A.* I understood that lumber was worth \$70 a thousand in the lumber yard. He may have got it for \$65.

Cross examined by Mr. Gilchrist.

40 *Q.* How much work was done on this lumber that was carried down, which you worked on afterwards in the refinery; how much work was done on it after it left the shop—after it got into the refinery? *A.* We had to put the whole of them up after we got them into the refinery.

Q. I am speaking of this nine or ten thousand feet that you worked out in the refinery? *A.* I think that took me a week and two more men with me—that is, to dress it, to get it into staves, fit to put up.

Q. That is three weeks' work of one man on that nine or ten thousand feet of lumber? A. Yes; then we had to put it up afterwards.

Q. Do you think that every man who abuses his brother when he don't give him any provocation is getting out of his head? A. I don't. That is only one instance. I am speaking of the general way he treated his brothers, but he should have some cause for it. I don't know what it was, but I says at the time it wasn't sufficient cause to speak to him cross at all.

Q. What position has his brother? A. He was foreman of 10 the Morris street shop.

Q. Wasn't there one in the refinery? A. Yes, sir.

Q. Didn't Barney complain of that brother for rejecting barrels? A. I heard it around.

Q. That might provoke Barney, mightn't it? A. That wasn't the same brother. The one I am speaking about is Patrick.

Q. What did Barney say was the ground of his complaint? A. I don't know what it was, but I knew at that time it was a frivolous matter. 20

Q. Did you ever hear him or Shanly lay his stammering to his false teeth? A. I never heard that.

Q. Did you ever see him under the influence of liquor? A. Once.

Q. Did you notice whether he was under the influence of liquor on this occasion you speak of? A. No, sir.

Q. (By Mr. Linn)—If you had thought he was under the influence of liquor, would you have thought it was any sign of a diseased mind? A. No, sir.

Patrick McMahan, for plaintiff, sworn; testified as follows 30

Direct examination by Mr. Linn.

Bernard McMahan was my brother. I was in his employ at the time of his death. I acted as foreman. I received barrels and delivered them. When he was well he would be around there five or six times a day; spent a great deal of his time around there. I last saw him December 25th, Christmas day, about twelve o'clock. I was to his house on that day.

Q. Was he ever out after that? A. Yes; he was out in a coach after that. Some friend might come along and take him in a coach. 40

Q. More than once? A. I haven't remembered seeing him more than once.

Q. You didn't see him after Christmas? A. I didn't see him to speak to him after that till I saw him about twenty minutes or half an hour before he died.

Q. Did you see him when he went out in a coach? A. I saw him passing in a coach.

Q. At that time did you observe anything strange in his conduct? *A.* Yes, sir.

- Q.* What? *A.* Three months before that a stoppage in his speech, and very different to what he used to be in regard to me, because he was always very kind to me, and then he found fault with my work, saying they found fault with how I had the barrels trimmed, and how I had the barrels cleaned, &c. On one occasion, about the middle of November, he come in a great rage into the shop where I was working; he says to me, Patrick, what did you do with all them nails you used this month? says I, what nails? he says there is a bill of Charlie O'Neill for \$500 worth nails for fifteen days. Says I, Barney, it is no such thing; I have the account on my book, and I went to my book, and by the time I got my book to show him I only got about fifteen kegs of nails, he run out and I followed him around to the office, and I could not find him there; he went from there to the house. On another occasion he come to me in the same month; he says to me, have you got any money? says I, yes; he says give me \$7. I went to my house, two blocks from there; it wouldn't take me more than five minutes, and I just got in when he rung the bell at the door. He says to me, is my wife here? says I, your wife? No. Well, he says, she has drowned herself; says I, the Lord save me, how is that? Well, he says, she is the damndest woman out of jail; she has cursed and damned, and went and drowned herself. I saw then there was something wrong, for they lived very peaceable. My wife says there is something wrong. The next morning I asked him, says I, did Mary come back? Oh! she was in the house, he says; she was in the house.

- Q.* At the time he was building that shop in Morris street, it was after the 1st of December, or thereabouts, he come there one morning about half-past six, and he almost killed me because I didn't light the gas in the shop, where there never was any gas. He said, why didn't I light the gas? I told him, says I, there is no gas, and he went to look to see if the gas was in it. The pipes was there, but there never had been any gas there.
- Q.* When he was sending the men to get out the hoops, I saw then from the way he talked of all the money he was going to make on polls, I knew there was something wrong; I knew a man couldn't make \$100,000 on polls with fourteen or fifteen men; he said he was going to make that much money on polls that season.

Q. What did you conclude in your own mind from these observations of his conduct? *A.* I thought he was not right in his head.

Q. Where you there at the time these goods were taken to Matthiessen's? *A.* Yes.

Q. Did you deliver any of the goods to the carman? *A.* Yes, I delivered them to our own carman about the same as I always was in the habit of delivering them. What goods I had under my charge was in Morris street, and the carman come along when I had a load already to send down to the sugar-house, and I sent them down about the same as I always did.

Q. Did any other carman besides your brother's take the goods away? *A.* Not from Morris street.

Q. Was there any other carman employed besides your brother's? *A.* I saw the cart belonging to the sugar refinery from the Grand street shop; I saw them carting from about December 27th or 28th all along after the 1st of January, till they had the last drawn from the Grand street shop.

Q. Were they working on the 1st of January? *A.* Yes, sir.

Q. Did they get the goods down as fast as they could? *A.* They had all the cribs and carts they could get barrels on to take them down.

Q. Were Matthiessen's men in the habit of carting before this time? *A.* They were in the habit of riding sugar, but not carting barrels.

Q. Did you observe anything in reference to your brother's memory? *A.* I heard plenty saying his memory wasn't good. I noticed it myself. He would come around to the shop to tell me something, and he couldn't remember what he came for, and I would have to follow him back to the office to find out.

Cross-examination by Mr. Gilchrist.

Q. What was it he said about his wife one day? *A.* He said that she must be crazy.

Q. Wasn't she crazy? *A.* Not that I seen.

Q. Hadn't she epileptic fits? *A.* Yes.

Q. What about her drowning herself? *A.* He said so.

Q. Didn't she threaten to drown herself? *A.* I don't know.

Q. Didn't you hear from other people besides Barney, that she had often threatened to drown herself? *A.* No, sir.

Q. Didn't you know she had been for years under the care of Dr. Hammond, the insane physician, of New York? *A.* I know she had been under the care of him, the Doctor, but I never knew her to be crazy.

Q. Didn't you know she used to go to Dr. Hammond for years? *A.* No, sir.

Q. Didn't you know her brain was affected? *A.* No, sir.

Q. She had fits, didn't she? *A.* Yes.

Q. You say that Barney stammered, and he was different from what he used to be? *A.* Yes.

Q. You don't take stammering to be a sign of insanity?
A. I don't know what you can make out of it.

Q. Don't you see people that stammer more or less, and cannot talk plain? *A.* Yes.

Q. Havn't you seen people with the palsy or paralysis?
A. No, sir.

Q. Didn't you never see a person with one side so bad they couldn't use it—arm sort of withered? *A.* I couldn't tell what the cause of it was.

Q. Didn't you never notice such a person couldn't talk plain? *A.* Many a person I seen couldn't talk plain.

Q. Do you know the reason why Barney couldn't talk plain? *A.* No, sir, I couldn't tell.

Q. Havn't you led this jury to think that you supposed that that was one evidence of not being right in his head?
A. It appeared so to me.

Q. Didn't he complain that he couldn't talk plain because his false teeth were new and didn't suit him? *A.* Not ever to me.

Q. Did you keep an account of the trimmed barrels that were delivered to the refineries? *A.* Yes, I kept a memorandum of them, and I gave it to Singerling; I kept a memorandum book, and I put them down in this book with the name of the carmen, and where they went to; I didn't make any distinction in regard to the old house or the new house, but I did where the barrels went through my hands elsewhere, because we sold barrels to different parties; I sent barrels
30 over to Clark & Reed, and to Lewis and different parties.

Q. Where were you when you kept this account? *A.* In Morris street.

Q. [Showing witness book]—What is that book? *A.* That is the book.

Q. Turn to the portion of that book which shows what trimmed barrels were sent to the refinery, and from what time to what time; all I care about is from Christmas up to the 6th of January? *A.* [Looking at book]—Twenty-one loads, I suppose; there is a few loads more there charged there, but I
40 know by my own mark they went to the glass house.

Q. Twenty-one loads in December? *A.* From the 25th to the 28th—that is three days.

Q. From the 25th to the 28th you say there are twenty-one loads, that went to the sugar house? *A.* Yes.

Q. You say there are more loads here, but your own mark shows you that they didn't go to the sugar house? *A.* [Looking at book]—There is twenty-three loads went down from the 26th to the 30th.

Q. The number of barrels on the loads is down on that book? A. Yes.

Q. Those barrels went from the Morris street shop? A. Yes.

Q. Do you know anything about the barrels that went from any other shop? A. No, sir.

Q. Were all those trimmed barrels? A. Yes, all of them.

Q. Where did these barrels go to? A. They went mostly down to the new house; the old house was not doing much at that time; one or two loads might go to the old house and 10 the rest went to the new house; I didn't keep an account which house they went to.

Q. What I want to know is, whether those are the barrels which were ordered to be sent there by Shanly as part to pay the debt of Matthiessen? A. I don't know anything about that. I sent those barrels down the same as I was always in the habit of sending them.

Q. Did you send any down before the 1st of January? A. Yes, all along.

Q. Was there any time in December or January when 20 everything was cleaned out of the Morris street shop—I mean of the shop? A. No, sir; there was not.

Q. Do you recollect when Matthiessen's men and Barney's men went to work carting barrels that were trimmed and untrimmed? A. Yes.

Q. Were those taken at that time as part of the same? A. Yes; they were going down the same time.

Q. And to the same place? A. No; at the same place they carted into the sugar house and the barrels that went from Grand street were stored away; they filled four places 30 with the barrels from Grand street. The barrels I had went to the sugar house to be filled.

Q. Did any untrimmed barrels go from your place? A. No, sir.

Q. The barrels you sent were to be used right off? A. They took them and put them away; if they didn't want them to-day they would want them to-morrow. I know they took more barrels them days than they were in the habit of taking from me. I know I often sent barrels down there and they hadn't room for them, but this time they made room for all I 40 could send down.

Q. You don't know anything about any trimmed barrels after the 30th of December? A. Yes.

Q. What do you know after the 30th to the 6th? A. I trimmed barrels and sent them down the same way.

Q. Have you got a list of them? A. I kept a memorandum of them.

Q. Commence at the 1st of January and give us down to

the 6th of January. *A.* January 2d was the first; I sent down four loads on that day; January 3d, four loads; January 4th, six loads; January 5th, five loads; January 6th, six loads.

Q. Do you know where those barrels came from that were sent to the refinery after the 1st of January—were they bought by Shanly or were they bought by your brother; paid for by Matthiessen or paid for by your brother? *A.* There was some of them by my brother; after that they was bought
10 by Matthiessen.

Q. Tell us when it was Matthiessen began to pay for the barrels himself, and the coopering, too? *A.* The best of my knowledge I think Matthiessen began to pay for the barrels in 1872.

Q. What day? *A.* It might be on the 2d; I haven't it here.

Q. You kept it in a separate part of your book? *A.* Yes; I made a distinction on my book. I have another book that will show; the book that I received the barrels on will show
20 the barrels that Matthiessen sent me.

Q. From what time were you paid by Matthiessen? *A.* I could not tell. Matthiessen paid me wages, I believe, the week my brother died.

Q. How far back did he pay you? *A.* He might have paid me one week at that time; I know I never got any money for Christmas week.

[It is admitted by plaintiffs that Matthiessen paid witness from the 1st of January on.]

Q. When did he begin to pay for barrels—that is, when
30 were barrels received on Matthiessen's account? Didn't you open a new account when he did it? *A.* Yes; generally two.

Q. Who brought these barrels there? *A.* The barrel collectors. I gave them receipts for them loads of barrels, and they were paid according to that book.

Q. The barrels that you trimmed and sent trimmed on the 2d, 3d, 4th, 5th and 6th of January, were they Matthiessen's barrels, or were they your brother's barrels? *A.* They were my brother's barrels.

Q. The barrels that you have spoken of in that little book
40 that you delivered on the 1st, 2d, 3d, 4th, 5th and 6th of January you say were your brother's barrels—can you swear to that? *A.* I don't know.

Q. You received barrels on the 2d of January, that were Matthiessen's; what I want to know is whether what you put down in this book on the 2d, 3d, 4th, 5th and 6th of January—
A. I never had the shop empty of barrels.

Q. Then you can't tell? *A.* I could not tell.

Re-direct-examination.

Q. What amount of stock had you on hand on the 1st of January? A. 2,500 barrels.

Q. That stock Mr. Matthiessen hadn't paid for—were they trimmed or untrimmed barrels? A. Trimmed and untrimmed.

Q. Of the 2,500 how many were trimmed, and how many were untrimmed? A. I always kept between 5 and 600 10 ahead—that is eight or nine loads of trimmed.

Re-cross-examination.

Q. How do you know that you had on the 1st of January 2,500 barrels in stock, trimmed and untrimmed—how do you get at that? A. I took a memorandum of them on a piece of paper, and I gave it in to Mr. Shanly on the 1st of January, 1872.

Q. And Mr. Shanly has that memorandum? A. I don't know what he has done with it; when I was told to count 20 this stock, I put it down with a pencil on a piece of paper, and handed it in.

Q. Who told you to count it? A. Mr. Shanly.

Q. When did he tell you to count it? A. I could not tell whether it was that day; I could count what barrels I had in the shop in ten minutes.

Q. Did he tell you what he wanted you to count them for? A. No, he didn't; always made it a habit of counting the barrels about New Year's.

Q. Did you say that you usually kept ahead? A. At this 30 time the sugar-house didn't take so many barrels, and I kept the same number of men to work, and that is the way we had so many ahead; I remember many a time we hadn't any barrels ahead—that is the week the sugar-house was not taking so many barrels, and I had as many men trimming as when the sugar-house was taking more.

Q. You believe that you had about 500 trimmed barrels in that 2,500? A. I believe I had more than that—I believe I had twice 500.

Q. You had 2,500 barrels on hand, trimmed and untrim- 40 med, on the 1st of January; and you think you had 500 of them that were trimmed barrels; and you think they were all your brother's—that he had bought them? A. I thought so then.

Q. Do you know whether you counted those barrels with the intent to send them all to the refinery or not, trimmed or untrimmed? A. I didn't know where they were going to be sent, then.

Q. Have you any information as to whether those 2,500

barrels were to be reckoned to Matthiessen's debt or not?
A. I don't know anything about that.

Q. The 2,500 barrels that you had on hand, which you counted, had they got to the refinery by the 5th of January?

A. I don't know how long it took them to go down there.

Q. Can you tell whether they did or not? *A.* I could not, exactly.

Q. What do you think about it? *A.* I know I was getting barrels in all the time.

10 *Q.* You were getting in Matthiessen's barrels after the 1st of January? *A.* I didn't keep them separated.

Q. Who told you that the barrels coming in on the 1st of January were Matthiessen's? *A.* I believe it was Mr. Rich or Mr. Sunderling told me to send Matthiessen's name after this, and the receipts I gave the carmen, Matthiessen would pay for them after that time.

Q. Do you mean to say that there was no time about Christmas or New Year's when all the barrels were sent out of that shop? *A.* I had some barrels all the time there.

20 *Q.* So far as other people knew, so far as Shanly knew, wasn't that shop empty? *A.* I don't know what Shanly knew.

Q. How near was the shop emptied at any time about Christmas or New Year's? *A.* The lowest I had between 1,000 and 1,400—at least a 1,000.

Adjourned till Monday morning.

Frederick Gaffney, for plaintiff, sworn, testified as follows on direct examination—

30 *Mr. Gilchrist*—What do you propose to prove by this witness?

Mr. Linn—We propose to prove that Charles H. O'Neill is one of the creditors of the McMahon estate; that there is a debt due him of about \$3,500 for lumber, most of which went to build these tanks. We also propose to prove the value of this lumber, dressed or undressed.

Mr. Gilchrist—We don't object to any proof of values.

The court—The point of counsel's objection is that there can be no proof admitted in this cause of the fact that there are unpaid creditors.

40 *Mr. Gilchrist*—We ask the court to overrule the offer of the plaintiff to show by this witness that there are other creditors of the McMahon estate unpaid, and I desire an exception to the admission of that.

The court—I will rule on the questions as they are presented.

Q. You are a clerk of Mayor O'Neill, in his lumber yard?
A. Yes.

Q. Did Mayor O'Neill furnish any lumber to McMahon just prior to his death? *A.* Yes. I have got a memorandum here; I can refer to it as to time—from August, 1871.

Q. What amount of lumber and for what purpose? *A.* Some four-inch clear pine and three-inch; bought for tanks to be made for the sugar house—special order.

Q. What amount? *A.* In August there was \$1,100 worth; September there was a bill of nails, about \$300; in December \$400 worth of lumber for the same purpose—three-inch pine, clear—in December, lumber and nails together \$600. I 10 didn't divide the lumber and nails.

Q. Was that lumber all for the building of tanks? *A.* All that was a special order for tanks. It is a peculiar kind of lumber and bought specially for that purpose—clear pine.

Q. Has that lumber ever been paid for? [Question objected to.]

[Mr. Gilchrist]—If the court has any doubt about it I am willing it should be admitted.

[The court]—In what point of view does counsel deem it material? 20

[Mr. Linn]—I want to show that there are creditors of McMahon who have not been paid. This action is brought by the administrator really, of course, in the interest of the creditors. If the creditors had all been paid there might be some question as to the right of the plaintiff to bring this action. The circumstances under which this lumber was obtained were peculiar, and two constructions may be given to it, and it is necessary that all the funds belonging to the estate must be collected by the administrator for the purpose of paying the debts; and we also offer the evidence with a view of over- 30 coming the suggestions thrown out by some of the testimony, or some of the questions, that this very identical lumber had been paid for by Matthiessen—that was thrown out—that this lumber had been paid for by Matthiessen. We want to show that that is not a fact.

[The Court]—There is no doubt of its competency in the last point of view.

[Mr. Gilchrist]—The question is perhaps quite important in the cause. In almost any controversy about the ownership of property where creditors are concerned, where an execution 40 creditor is following the property, the position of the party claiming the title against the creditor is very different from the position of the same party claiming title against the vendor. Now, even a fraudulent sale for the very purpose of defrauding creditors, neither the vendor nor the vendor's administrator can dispute, but a creditor can; and the aspect of the case is very much altered by the fact of the controversy

being between a creditor and a vendee, and the vendor and the vendee, or the vendor's administrator and the vendee.

Now, to start out with the idea that this suit is a suit for the benefit of the creditors, and, therefore, that we are to have applied to the case those rules which would apply to a controversy which was actually in the name of the creditor, I think we would make a very great mistake; I think the court and jury would be both doing great injustice, and it is wise to keep this case within its proper bounds, and let it be understood that this is a controversy between the administrator of the vendor and the vendee, and not between the creditors and the vendee. Now, I think so far as relates to our proof by Shanly, that that lumber for these tanks was paid for; our proof didn't go to the point that whoever McMahon bought of were paid. What Shanly admitted was that Matthiessen & Co. had given to McMahon money to buy the lumber. We don't intend to insist that there is any proof that we purchased the lumber from anybody but McMahon.

10 [Mr. Linn]—Or that you have paid anybody else for it.

20 [Mr. Gilchrist]—Or that we have paid anybody else for it; we don't intend to insist that.

[The Court]—It seems to me to be entirely immaterial in this case whether there are creditors or not. The administrator has a right to reach and marshal the assets of the deceased, or to get them where he can find them. If the object of the testimony is to set aside and annul a conveyance made by the deceased to another, because in fraud of creditors, it seems to me that the same rule applies to the administrator that would apply to the decedent himself. He cannot take
30 any steps to avoid his own act. The creditors may, but the administrator is not in the place of the creditors in a court of law. He may join with creditors to set aside conveyances fraudulently made, but it seems to me, as I now view it, that the administrator is held to this contract if a contract or sale was made in point of fact by the decedent; the administrator would be held the same as the decedent himself if he were living and in court. I don't see any way in which the question of their being creditors or not can be material in this case. It is a question of title in this case, and whether they
40 are creditors or not cannot affect that question.

[Mr. Linn]—The question is overruled then?

[The Court]—The question is admissable to contradict the idea that Matthiessen or this company paid for this property.

[Mr. Gilchrist]—We don't propose to show, we have not intended to show that we bought the lumber of O'Neill.

[The Court]—The question itself don't bring up really what the court is asked to settle here. The witness may answer this question, that it is not paid for, and yet it don't reach

the question that counsel for defence has just considered. There is some evidence in the cause that plaintiffs paid for this lumber, some part of it.

[Mr. Gilchrist]—We don't pretend that we paid anybody for it but McMahan.

[Witness]—There was a note given October 21st of \$700. The amount of the bill at that time was \$3,500. That wouldn't pay for any portion of that lumber. That note was afterwards protested.

[Mr. Gilchrist]—Do you say it was not for any portion 10 of that lumber?

[Witness]—It would not pay for any lumber, if we wished to put it to the credit of the nails, which we would have a right to do; the note has never been paid.

Q. What was that lumber worth a thousand? A. Some of it \$65; some \$72; then there was about \$5 a thousand added to some for dressing and planing; it would average about \$72 or \$73 a thousand; that was, delivered to McMahan.

Cross examination.

20

Q. In what capacity were you with O'Neill, in August, September, October, November and December, 1871? A. Bookkeeper and general clerk; I may not have had full charge at that time.

Q. Do you remember selling the identical lumber that was sold for these tanks? A. No; I know it was delivered, and it was ordered by McMahan; I remember McMahan coming in there and asking for it; it was bought specially by O'Neill for him, on his order.

Q. How do you know McMahan ordered it? A. He always 30 ordered those things himself.

Q. Have you any distinct recollection yourself, so that you can swear to it, that McMahan did order the lumber himself? A. No, I won't swear to it.

Q. You haven't knowledge enough to swear to it? A. No.

Q. I suppose you have seen it on the books, or something of that sort? A. I know more than that about it.

Q. Tell me what was the last item that McMahan bought of that concern, the date of it, and the amount of it? A. 40 January, 1872; about \$6 worth; it was a keg of nails and some spruce planks.

Q. What day in January? A. I don't know; I didn't bring the dates.

Q. Why? A. I didn't know I would require it.

Q. What is the date before that? A. December, 1871.

Q. What date in December, about? A. I can't say that; I just brought a memorandum of this thing, in a hurry.

Q. Weren't you told to omit the date? A. I had no instruc-

tions from anybody; Mr. O'Neill sent word to me to come up here; he could not come himself.

Q. How many items are there in December? A. I don't know; there is some three-inch pine and some nails.

[Mr. Gilchrist]—I shall want you to get those dates accurately, because if you are going to testify here, we want to know the dates.

[Witness is instructed to bring the dates from the books.]

10 *Michael Shanly.* Cross-examination continued by Mr. Gilchrist.

Q. All these goods which Matthiessen demanded of you, and which you let him have, if I understand you, were moved under your direction by McMahan's carmen, and by Matthiessen's carmen, from the various shops of McMahan? A. Yes; I had nothing to do with Matthiessen's carmen; I didn't direct them to remove anything.

Q. It was done under your oversight? A. Yes.

Q. Did you keep an account of all the goods that were taken? A. Yes.

20 Q. Do these three books contain it? A. Yes, with the exception of the lumber.

Q. What is this book? [Showing witness book.] A. That is the carmen's account, taken nightly.

Q. It is in your handwriting? A. Yes; all in my handwriting; there may be a little of McMahan's in some places in it, but it is substantially in my handwriting; none of it is in his handwriting after the 23d of December.

Q. You say that these goods, under this arrangement, were removed from the 27th of December to the 10th of January?

30 A. Yes; somewheres thereabouts.

Q. Could you be certain that it was not commenced as early as the 26th? A. If I could see the book; it is on the book, whatever day we commenced to remove them first.

Q. Look and see? [Handing witness book.] A. There is nothing on this book after the 26th—nothing unusual—with the exception of the regular business of the refinery; there was some barrels went down that day, but none, so far as I know, went down that day that belonged to the goods that he demanded of me; at least there is no note of it.

40 Q. Now, give me the first entry in that book, which is considered as a delivery of goods which he demanded of you, and which you assented to his taking? A. [Looking at book:] I see nothing here before the 28th.

Q. Read that entry? A. "352 untrimmed barrels taken by Lamb, carman"—that is the first entry, I think, belonging to those goods; Lamb was one of our truckman—one of McMahan's truckman; that "N. J." there signifies "New Jersey

Refinery"—that is the new house; New Jersey Refinery it used to be called.

Q. I see "Lynch"—on the 28th—"264 untrimmed barrels, N. J." A. Yes; he was McMahan's carman.

Q. "Mackin, 440 old"—what does that mean? A. Those went to the old house; they must have been trimmed—otherwise I would say they were untrimmed—he was McMahan's carman.

Q. Then there are two "88s?" A. That means two loads—88 was a load or 72 was a load. 10

Q. So that whenever we meet "88" you mean by that a load? A. Yes.

Q. If there are four "88s" following each other? A. It would mean four loads.

Q. Then there is—[pointing at book]—"88 untrimmed, N. J." A. Yes; those were untrimmed.

Q. Then there are "three 88s from Willard?" A. He belonged to Fall River; he sent his barrels in schooners, and those was taken from a schooner of his and brought down to the sugar house; those were untrimmed. 20

Q. Who was Clark? A. He was one of McMahan's truckmen.

Q. "50 hogsheads, N. J., 54 syrup, N. J.," &c.; explain those entries? A. "S. Y." signifies syrup barrels; "old" signifies "old house;" "N. J." signifies "new house."

Q. [By the court]—Is there any list of those things otherwise than in the books?

[Mr. Gilchrist]—There is a list that they have produced on our request, which the witness has had his attention called to.

[Mr. Linn]—That is a mere memorandum. 30

Q. Have you been through these books to see the quantities since last Friday? A. No, sir; not since Friday; I came down to the office to do it, and was informed that it was not necessary yet.

[Mr. Linn]—Mr. Shanly asked me if he should make out a list, and I told him I didn't think it was necessary.

Q. What does "Gautier" mean? A. It means that those went to Gautier's Crucible Works.

Q. "210 from schooner?" A. Those are Willard's barrels from the schooner, untrimmed. 40

Q. There is "70, 70, N. J." A. Two "70s;" those are trimmed, unless mentioned as being untrimmed.

Q. "By old"—what does that mean? A. That is a load that went down and we brought some back.

Q. Who was Sexton? A. He was McMahan's carman.

Q. "Two hundred Lewis"—what does that mean? A. delivered to him in New York.

Q. "72, 72, N. J." A. Those are to the new house.

Q. "216 from schooner" *A.* Those are from Willard, untrimmed barrels.

Q. You say that whenever it does not say "untrimmed barrels it means "trimmed?" *A.* Yes.

Q. Those don't say "untrimmed," and yet you say they are untrimmed? *A.* I am pretty certain that every place that "untrimmed" is not mentioned they are "trimmed?"

Q. You feel certain that every case in which it does not state "untrimmed" it means "trimmed?" *A.* Yes.

10 *Q.* I call your attention to three cases; here are three loads, 88 each, from Willard, you say they are untrimmed; 210 from schooner are untrimmed, and 316 from the schooner are untrimmed, and neither of them are so mentioned? *A.* I recollect that Willard did send us a good deal of untrimmed barrels; I have seen as many as 500 trimmed barrels come in a schooner.

Q. What is a trimmed barrel? *A.* A barrel that is ready to put sugar in.

20 *Q.* That is, it is in perfect condition as to hoops; it is ready and perfect? *A.* Yes.

Q. And it has in it the little inside hoop? *A.* Yes; in the bottom and the upper head and the inside hoop.

Q. Can you tell us whether these were trimmed or untrimmed from Willard—210 and 216 from the schooner? *A.* I can't, my memory is not right on that point.

Q. You have already said that those three cases were cases of untrimmed barrels—do you want to take that back? *A.* I do.

30 *Q.* Do you now swear that they were trimmed? *A.* No, sir, I can't tell how many of them was trimmed, but I am pretty certain that every one of these mentioned as untrimmed was untrimmed, and those where it is not mentioned were all trimmed.

Q. Lamb was one of McMahan's carmen? *A.* Yes.

Q. Here are six loads of 88's marked untrimmed; Lynch was also McMahan's carman? *A.* Yes.

Q. Mackin was also one of his carmen? *A.* Yes.

Q. "88 old"—what does that mean, trimmed or untrimmed? *A.* Trimmed, unless it says "untrimmed."

40 *Q.* "80 from schooner"—what is that? *A.* That is Willard's barrels.

Q. Trimmed or untrimmed? *A.* I can't tell.

Q. Then there are four loads of 88 each N. J.—that means to the new house? *A.* Yes.

Q. And you think they mean trimmed? *A.* Yes.

Q. "23, S. Y., N. J.?" *A.* Syrup barrels.

Q. "Clark the 29th"—that is one of McMahan's men?
A. Yes.

Q. "Hogsheads, N. J.—syrup N. J.—and here is 34;" I don't understand it, what does that mean? A. "Thirty-four sugar hogsheads taken from old house."

Q. Therefore, that was sugar hogsheads that Matthiessen sent to you? A. Yes.

Q. There are "18 syrup, old"—does that mean delivered to the old house? A. Yes.

Q. Then, "20 syrup from," and "10 oil from schooner?" A. That has nothing to do with this case, that is Willard's; that was a daily record done by the carmen, taken from their 10 accounts every night, no matter with who the dealing was.

Q. So that these twenty syrup barrels and ten oil barrels from schooner do not indicate that those were delivered to Matthiessen at all? A. No, sir.

Q. "One keg," and then there is a ten afterwards—what is that, ten gallon? A. Yes, one ten-gallon keg.

Q. "Luxton on the 29th, 199 Lewis?" A. That was delivered to Lewis.

Q. How can you distinguish by this book whether these goods were delivered to you or from you? A. I used the 20 word "from" if we received anything.

Q. And if you delivered anything you said nothing? A. Nothing.

Q. "Golden, the 29th, 420 from N. J."—that means from the new sugar house? A. I don't understand what that is at all; I can't recollect; that same is in the small book.

Q. I see in the small book there is 420 on the 29th? A. Yes, they must have gone down.

Q. What were they? A. Barrels.

Q. It says here from the new sugar house? A. That is not 30 correct, it is a clerical error.

Q. How do you know it is not correct? A. We never took any barrels from the sugar house.

Q. Do you mean to say that; didn't you often take charcoal barrels from the sugar house? A. Yes, but if those were charcoal barrels I would have mentioned it so.

Q. What did you do with the charcoal barrels when you took them? A. We sold them for potato barrels.

Q. What makes you think this is a clerical error? A. Well, because we had no necessity for taking those barrels at 40 all; we were crowded in the shops all the time; there is no reason that we should take any back from the sugar house.

Q. On the 30th I see there are seven loads, 88 N. J.? A. Them is barrels taken to the new sugar house.

Q. What is that, (pointing to item on book?) A. Twenty-eight syrup barrels taken to the sugar house.

Q. "Lynch on the 30th, 528 untrimmed N. J.?" A. 528 barrels went down.

Q. 700 staves, what does that mean; something added there—from what? A. From Leghter; that means they are molasses barrel staves—staves that were got from a firm named Robertson or Briggs, I forget which; bought by McMahan and taken to one of our shops.

Q. Which shop would they go to? A. I can't tell whether the Essex street, or one of the Morris street shops; I suppose they got share and share alike.

Q. Mackin four loads to the old house and one to the new?
10 A. Correct.

Q. Then there was 122 untrimmed N. J.? A. Yes; untrimmed.

Q. "Clark, ninety-nine sugar from old,"—that means ninety-nine taken from the sugar house to one of your shops? A. I should say they were hogsheads.

Q. "Thirty-three hogsheads N. J."—does that mean to or from? A. I think that small book will tell better.

Q. Isn't this the book of original entry? A. Yes; it was taken in a hurry every night, and there might be a clerical
20 error in it.

Q. You can't say but these thirty-three hogsheads were taken from the sugar houses? A. I think they were trimmed hogsheads that went down.

Q. Then there are two loads seventy-two—seventy-two untrimmed? A. Yes.

Q. Sexton was one of McMahan's men—here are two loads untrimmed N. J.—that means two sent down? A. Yes.

Q. Then, one seventy-two N. J.? A. Trimmed sent down.

Q. Golden, on the 30th, one of your carmen, 210 untrimmed
30 N. J.—that means untrimmed barrels sent to the sugar house?
A. Yes.

Q. "Eighteen N. J.?" A. To the sugar house.

Q. "Seventy-two old?" A. Sent to the old.

Q. Does this book, so far as I have gone over it, up to the
30th December, show what was sent from the Grand street
shops, or from all the places of McMahan? A. From all of
them.

Q. Have you any materials for showing what goods were
40 carried by McMahan's carmen? A. Yes; they are all down
on that small book.

Q. We will just continue on the next line in this book—
"Lynch 136 untrimmed F. O. M.?" A. That is all right.

Q. "Clark 144 untrimmed F. O. M.?" A. All right.

Q. "Thirty-six Sy., old?" A. Syrup barrels.

Q. "Sexton 1st"—what is that? A. That means the 1st
of January.

Q. "Seventy untrimmed F. O. M.; Golden 280 untrimmed
F. O. M.; and on the 2d, 528 untrimmed F. O. M., Lynch."

How many loads would 528 be? *A.* I suppose about six—six eighty-eights.

Q. "Mackin seven to the old house and one to the new house untrimmed F. O. M." *A.* Yes.

Q. Were not all those loads untrimmed that Mackin delivered? *A.* No, sir.

Q. Read that entry of Mackin? *A.* "Seven eighty-eights to the old house, eighty-eight N. J.;" seven loads were trimmed barrels and one load untrimmed.

Q. Notwithstanding the word "untrimmed" right under 10 it? *A.* Yes; one load was untrimmed, the others were all trimmed.

Q. "Clark, on the 2d"—that entry—where did those go to? *A.* They were taken from a lighter. I guess they went to one of McMahon's shops.

Q. All the work of Clark that day was carrying to your shops from a lighter? *A.* Yes.

Q. And they don't represent things that were carried to Matthiessen's shops? *A.* No, sir. That entry is thirty-five 20 syrups old, 480 staves—603 staves and 470.

Q. You say that the whole work of Clark on that day you believe was things carried to your shops? *A.* I think so.

Q. Look at it carefully and let us understand it?

[Witness examines the entry.]

Mr. Linn—Look at these small books at the same time and see if you have any doubt about it. [Handing witness small books.]

Witness—I should say so.

Q. What is that entry of Clark on the 2d of January? *A.* 30 It is staves that were taken off the lighter and fetched to our shops—hogsheads and syrups—thirty-one new hogsheads went down to the new house and thirty five syrup barrels to the old house.

Q. When were those small books made up? *A.* The entries in the big book were made at the night, and the copies into the small books were made the next day or day after from the big book.

Q. "Sexton on the 2d, 100 to Lewis?" *A.* Yes.

Q. And "two loads of seventy-two untrimmed, F. O. M?" *A.* Delivered to Matthiessen & Co. 40

Q. "400 staves?" *A.* They were taken to our shops, I should say.

Q. "Golden, staves from Lighter, 629, 744, 605, 722, 487, 614, 600, staves from Lighters," where did they go to? *A.* Into our shops.

Q. "Lamb on the 3d, three loads, eighty-eight each, untrimmed, F. O. M.?" *A.* They went to the new house.

Q. What does "F. O. M." mean? *A.* F. O. Matthiessen

& Wiechers; that was untrimmed stuff, went to the new house for storage.

Q. "F. O. M." means new house, as well as "N. J.?" A. "F. O. M." means where they were put in storage there.

Q. What does "N. J." mean? A. New house, the same thing.

Q. And that means put in storage or delivered to be shovelled into? A. Yes.

10 Q. [Showing witness diagram]—Look at that drawing, and see if that gives any fair representation of the situation of the old house and the new house, the ware-house and store-house, I drew that myself. [Witness points out localities of the different houses; also, points out the house that McMahon lived in; also, O'Donnell's shop—the shop on Washington street.]

Q. Had he any shop on Essex street? A. Yes, down beside the canal, where it turns—that was below Warren street.

20 Q. You spoke of these three loads, Lamb on the 3d, as untrimmed barrels—those went, you say, to one of the new houses? A. Yes.

Q. Where were those put that went to the new house? A. Most of them in the ware-house.

Q. And that ware-house is right opposite McMahon's house? A. Pretty near opposite to it, anyhow.

Q. Here are 925 staves, and 1,024 staves, where did those go to?

Mr. Linn—There is no charge in the declaration for staves, at all.

30 Mr. Gilchrist—I thought there was; then I will pass the staves; I thought they were in the declaration.

Q. There are 420 ten-gallon kegs charged in the declaration; the only thing that looks like that in your books is that entry that you said was not correct, "Golden on the 29th, 420 from N. J.?" A. No, sir, the ten gallon kegs went down after that; I think they were the last of this material that went down; I think it is on the 5th or 6th.

Q. Lynch, on the 3d, was nothing but staves, and 10,000 linings, Bush, what does that mean? A. That is lining hoops for the sugar-house.

40 Q. On the 23d Mackin delivered four loads, old? A. Old house trimmed barrels.

Q. Clark, on the 3d, delivered staves, and then thirty-four barrels, linings from Reed? A. That was things bought by us delivered to us; those were delivered to the sugar-house; they are lining hoops from a man named Reed, from the city of New York.

Q. They were thirty-four barrel linings? A. That is thirty-four barrels of hoop linings.

Q. You say those were delivered at one of the sugar-houses?

A. Yes.

Q. Where were they delivered from? A. My impression is pretty distinct on that—they were taken from the storage train at the freight depot, and fetched right down to the sugar-house.

Q. Who paid for those? A. Nobody, I expect.

Q. 3d, Sexton delivered seventy-seven syrup barrels to the old house? A. Yes.

Q. "Eighty-eight new house; seventy-two to the new or 10 old house; three loads old untrimmed and two loads new F. O. M."—were those all untrimmed or trimmed? A. Those three first loads are untrimmed and the other two— [Interrupted.]

Q. Don't you think they are all untrimmed; don't you see there is a bracket in that entry—don't that mean they are all untrimmed? A. No, sir.

Q. Mackin on the 4th, six loads—eighty-eight—two? A. Old untrimmed and eighty-eight and eighty-eight to the new.

Q. Don't you see that that last one says "eighty-eight new, 20 old?" A. New sugar barrels delivered to the old house.

Q. "440 on the 5th—Lamb to F. O. M.?" A. To the new house. They came from the Grand street shop. I believe all the new barrels we had were up there.

Q. Mackin on the 5th delivered five loads old and seventy-seven old, eight new F. O. M. What does the old mean and the new mean and "F. O. M.?" A. Seventy-seven old and eight new; those were old and the eight were new.

Q. Was the seventy-seven untrimmed if the word "untrimmed" is there? A. The word "untrimmed" is not here. 30

[Mr. Gilchrist]—Then they were trimmed.

Q. "Eighty-eight new, small old"—what is that? A. That is new barrels; small means they were smaller size than the others.

Q. What do you call a small barrel? A. Some of them vary in height three inches from others.

Q. Was there any difference in their price? A. They were not as valuable as the large ones.

Q. Clark on the 5th, fifty-four old, fifty-seven Sy. N. J., eight charcoal cooper N. J.—what is eight charcoal for coopering N. J. one ten keg? A. They were fetched up to the shop for cooperage—that would be charcoal barrels taken up to the shop for cooperage—those belonged to Matthiessen. 40

Q. Lamb on the 6th—ninety-five new, old? A. That means to the old house.

Q. "Ninety-eight ten-gallon N. J.?" A. To the new house.

Q. Lynch on the 6th, 322 ten-gallon kegs N. J. You

say the ten-gallon kegs were the last things that were moved?
A. I think they were.

Q. Look and see if that was not the last thing. You see that cross there? *A.* Yes.

Q. Who put that there? *A.* Mr. Linn put it there a few nights ago.

Q. What was the object of that? *A.* So as to have it handy for reference, I suppose.

Q. Wasn't the object of putting it there to show that that was the last thing that was delivered to Matthiessen? *A.* Yes; that was my memory of it.

Q. Then there cannot be any doubt about it that the last thing that Matthiessen got of what he demanded of you and you assented to give him was on the 6th of January. *A.* I think so.

Q. Is there any doubt about it in your mind? *A.* There is hardly any doubt.

Q. [By the court]—What date is that? *A.* January 6th. Lynch 322 ten-gallon kegs.

20 *Q.* That will end this book so far as this case is concerned. We have gone from the 28th December to the 6th of January; that ends all that is pertinent to this case in this book? *A.* I suppose so, yes.

Q. What are those two little books that you have? *A.* They are filled up from the others.

Q. Made by you afterwards? *A.* Yes.

Q. Haven't you added up those books? *A.* I have.

Q. Can't you tell us from those additions exactly what was taken by Matthiessen? *A.* No, sir; I can't.

30 *Q.* What is the first column in this little book? *A.* The dates.

Q. The second column? *A.* That is sugar barrels.

Q. Does that represent trimmed or untrimmed barrels?
A. Trimmed; nothing but trimmed barrels.

Q. The third column? *A.* That represents untrimmed barrels.

Q. In this book from the 28th of December, the third column represents untrimmed barrels? *A.* Yes.

40 *Q.* And that before in the same book, that third column represents what? *A.* Molasses or syrup barrels.

Q. In January, February and March what did that third column represent? *A.* Molasses and syrup barrels.

Q. After the 6th of January the third column would represent syrup barrels? *A.* Sometime after it seems to represent new barrels.

Q. The first column is the date, so far as we are concerned with it, that is, from December 28th to January 6th; the second is trimmed barrels; the third is untrimmed barrels,

and that third column before the 28th of December and after the 6th of January represented syrup barrels? *A.* Yes.

Q. But so far as this case is concerned it represents untrimmed barrels? *A.* Yes.

Q. What did the fourth column represent between December 28th and January 6th? *A.* Molasses or syrup barrels.

Q. What did the fourth column represent before December 28th and after January 6th? *A.* Syrup barrels.

Q. It represented syrup barrels before? *A.* Yes.

Q. It always represented syrup barrels then? *A.* Yes. 10

Q. Then you are mistaken in saying that the third column ever represented syrup barrels? *A.* Yes.

Q. These entries in the little book which applied to the new house—it will give how many barrels went to the new house from McMahon's shops between the 28th and 30th of December. See if you haven't got added up how many trimmed barrels will this book show went to the new sugar house between December 27th and 30th, from all of McMahon's shops? *A.* 852.

Q. Whose figures are those figures, 852? *A.* They are 20 mine.

Q. Did any trimmed barrels go from the 1st to the 5th from any of McMahon's shops to the new sugar house? *A.* No, sir; not one; the house was stopped.

Q. What do you mean by the "new house?" *A.* When I say "new house" I mean also the warehouse, or every place connected with the new house.

Q. You mean to say there was no trimmed barrels went to the new house or to any house connected with the new house? *A.* Yes. 30

Q. Look at the long book and tell me whether there was any trimmed barrels went to the new house on the 6th of January? *A.* [Looking at book.] There are three loads represented here to be trimmed barrels—3, 88's.

Q. Those didn't belong to the lot, did they? *A.* I think they did not.

Q. Then really and truly there was not a trimmed barrel that went from your shops to the new house after January 1st that belongs to this suit? *A.* No, sir.

Q. I think you have made a mistake in saying that the 4th column represents syrup barrels. Look at the 29th, in the long book, and see what you see there as to anything—what kind of goods went. There is 528 untrimmed barrels—read the others on the 29th. *A.* [Reading.] "528 untrimmed barrels—88 to the old house—that is trimmed; 88 from the schooner—that is the old house; four loads to the new house, and twenty-three syrup barrels." 40

Q. Are there any hogsheads on the 29th? *A.* Yes; forty.

Q. Look at January 4th, in the long book, and let us know what went to the new house on the 4th. *A.* "Three loads old, untrimmed, and two 88s, new barrels."

Q. Don't you see you have got in the fourth column, where you say syrup barrels ought to be—176 on the fourth column entered as syrup barrels, are not syrup barrels? *A.* No; they are new sugar barrels.

Q. What is the difference in value between a syrup barrel and a flour barrel? *A.* From \$1.50 to \$2.

10 *Q.* And if these were reckoned as syrup barrels you would charge the defendant \$1.50 or \$2 too much on every one of those 176? *A.* Yes.

Q. What does that "new" represent? *A.* New sugar barrels—that applies to the 176; it applies only to the barrels on the fourth column.

Q. Look on the 5th, and read all the entries that went to the new house? *A.* "440 new barrels—77 old, and 8 new and 57 syrup barrels."

20 *Q.* Will you tell us how many barrels, untrimmed, went to the new sugar house between the 28th and 30th? *A.* If that addition is correct, 6,883.

Q. Don't that include 352 on the 27th? *A.* Yes.

Q. Isn't that an error? *A.* [Looking at long book.] On the 28th in this book there are 352—it should be on the 27th.

Q. It is wrong as to date—the amount of barrels between the 28th and 30th, untrimmed, is 6,883, to the new house? *A.* Yes.

30 *Q.* Between the 1st and the 6th, how many untrimmed barrels were delivered to the new house? *A.* The balance between 6,883 and 15,074—8,191.

Q. How many syrup barrels were delivered to the new house between the 28th and 30th? *A.* 131.

Q. How many hogsheads? *A.* 163.

Q. That is, assuming your additions to be correct? *A.* Yes.

Q. The first item of fifty-four there, won't you verify that to see if it was on the 27th or 28th? *A.* It was on the 27th, that fifty-four.

40 *Q.* Does that refresh your memory, or not, as to whether the beginning to deliver these goods that were demanded of you was or was not on the 27th? *A.* I was always under the impression they commenced to be taken on the 27th, till I saw these books.

Q. Are you not, from the continued examination you have given of the books, satisfied that you were right in that impression? *A.* Yes.

Q. [By the court]—You still think the delivery began on the 27th? *A.* Yes.

Q. Who drew those three red lines there between the 26th and 27th, in the small book? A. I did.

Q. What for? A. To separate that from the other; whatever went between those dates; to separate that from what went previous.

Q. Those which were delivered between those dates was that which was demanded of you by Matthiessen? A. Yes.

Q. What is the reason you footed up that column at all—15,074? A. To get at the numbers.

Q. To get at the numbers of what was demanded of you, and what you delivered? A. Yes. 10

Q. How many new barrels were delivered to the new house between the 1st of January and the 6th? A. 62½.

Q. How many hogsheads, between the 1st of January and the 6th, were delivered to the new house? A. Thirty-one.

Q. How many syrup barrels? A. Sixty-six.

Q. Didn't you say that the last thing that went were the ten-gallon kegs? A. Yes.

Q. You say there was 133 altogether—syrup barrels that were delivered by you on demand? A. Yes.

Q. All the entries in this new house book, after your addition of 15,074, had nothing to do with this suit at all? A. I was told to put into the declaration, and add them up to the 10th, the day McMahan died. 20

[Mr. Linn]—All we claim is the goods delivered between the 27th and the 6th, inclusive.

[Mr. Gilchrist]—It is so agreed, then.

Q. About what amount in value of business was there done between Matthiessen and you, as representing McMahan, after the 6th of January? A. I can't tell.

Q. Didn't it amount to 20 or 30 or 40 or \$50,000? 30

[Mr. Linn]—Up to what time?

[Mr. Gilchrist]—Up to the 14th of March—the end of his transactions.

A. I can't get near it; they kept all the accounts themselves after I commenced there.

Q. Wasn't there more business carried on then than there had been for a month previous? A. Yes.

Q. Or two months previous? A. Yes.

Q. Wasn't there more business after the 6th of January carried on, between you and the Refinery Company, in the way of delivering and manufacturing barrels, and trimming barrels, after the 6th of January, than there had been for any month before, all the previous year? A. I should say so; that three months I was there there was more business than ever.

Q. To about how much a day did that business amount to?

A. I should say it might amount to about \$1,000 a day.

Q. And that is represented in these two little books, after the 6th of January? A. Yes.

Q. And what was the understanding between you and Matthiessen in reference to that business—as to whose benefit it was to be for? A. There was no understanding.

Q. Was not there an understanding that it was to be for the benefit of the widow? A. No, sir; not that I know of; it was intended I was to run the business for the benefit of the widow and myself; that was the understanding.

10 Q. When did the widow die? A. She died about a year or a year and a half ago,

Q. How long after McMahan? A. About a year and a half.

Q. After that arrangement was made between you and him how was the business done? Who bought the barrels, and who paid for the barrels? A. Mr. Matthiessen.

Q. Who paid the labor? A. He did.

Q. Then everything that went on after that Matthiessen paid for everything? A. Yes.

20 Q. Didn't he pay more than that; didn't he pay for every barrel that came into that shop after the 1st of January? A. No, sir; I don't think he did.

Q. Did you pay for any barrels after the 1st of January? A. No, sir.

Q. Did McMahan's estate pay for any barrels after the 1st of January? A. I think there are some claims against the estate for barrels sent there after the 1st of January.

Q. Didn't Matthiessen pay for them? A. No, sir; I think not; I am pretty certain not.

30 Q. But generally he did, didn't he? A. Yes.

Q. I want now to go over the old house bills: Now take the 27th of December and tell me how many trimmed barrels went to the old house, between the 27th and the 30th? A. [Looking at the small book] 1,460, if that addition is correct.

Q. Do you think that all those barrels that went there from the 27th to the 30th were those that were demanded of you and were delivered under that arrangement, or were they barrels that went there in the ordinary course of business as before that? A. Everything, till Matthiessen was paid up,
40 was understood to be delivered to him under this arrangement.

Q. [By the court]—Everything after the 27th till he was paid the debt? A. Yes; till he was paid a certain amount of money.

Q. Were there any untrimmed barrels delivered to the old house between the 27th and the 30th? A. No, sir.

Q. Were there any syrup barrels? A. Yes, seventy-two.

Q. Was there anything more? A. Fourteen barrels, coopered—those were Matthiessen's barrels.

Q. Between the 1st of January and the 6th, tell me how many trimmed barrels went to the old house? A. 2,185, including the 6th.

Q. How many untrimmed barrels? A. None.

Q. The untrimmed went to the new house? A. Yes, all.

Q. What does the third column in the old house book represent? A. New barrels.

Q. And in the new house book it represents untrimmed barrels? A. Yes. 10

Q. How many new barrels? A. 447.

Q. How many syrup barrels? A. 292.

Q. How many kegs? A. 420; they all went down on the 6th.

Q. How many half syrup barrels? A. Seven.

Q. These two books represent, as I understand, all the things that were delivered by you which had been demanded by Matthiessen and were all delivered between the 27th and the 6th? A. Yes; those books don't include the lumber—all except the lumber and the packers. 20

Q. I want to know from those two books how many trimmed barrels were delivered between the 27th and the 6th—the whole number of trimmed barrels? A. 3,301.

Q. 3,301 are all the trimmed barrels in this suit? A. Yes.

Q. And you swore there were 9,000? A. This arrangement you made with counsel to-day makes the alteration on that; I was told to make it up to the 10th.

Q. That would make a difference of 6,000 barrels, wouldn't it? A. Yes; my testimony included from December 23d to the 10th of January. 30

Q. You don't know how many trimmed barrels were delivered between the 1st and the 6th, do you? A. They are all in this book.

Q. You have reduced it from 9,000 to 3,000; now, cannot you limit it to less than 3,000? A. Not unless you make the time shorter again.

Q. Now, as to the untrimmed barrels; you made 15,000 and odd? A. Yes.

Q. As to the new barrels—how many more have you given in here that is chargeable to us than ought to be on the basis of charging between the 27th and the 6th? A. I don't know that there is any. 40

Q. Look at the books—[handing witness books]—haven't you charged us for forty-five new barrels on the 8th? A. No, sir.

Q. With eighteen on the 8th? A. No, sir.

Q. The fourth column in the new house book is changed from new barrels—to what? A. To molasses barrels.

Q. How many molasses or syrup barrels have you put in this controversy which are not? A. There are none that I know of.

Q. Assuming that the whole controversy is as to what was delivered between the 27th and the 6th—how many have you said you delivered to us more than ought to be? A. I haven't said any.

10 Q. Didn't you say two hundred and seventy-four? A. I forget the answer I made; I know these entries are correct, if they have been added up right.

Q. Do you recollect how many molasses or syrup barrels you stated we had carried off—didn't you say fourteen thousand? A. Yes.

Q. Just let us see from these books how many there were between the 27th and the 6th of molasses or syrup barrels? A. Six hundred and eighteen, altogether.

Q. That is against fourteen hundred that you testified? A. Yes.

20 Q. Tell me how many of those were worth the smaller sum? A. None of them.

A. How can you tell from those books whether the syrup barrels was worth \$1 or \$2? A. I know every one of those that went down to the sugar-house were worth \$2.25—or at least that was the price we charged them.

Q. Didn't you in your statement before say that there were fourteen hundred altogether, and that five hundred and fifty of them were worth the smaller price? A. I can't fetch to memory anything about the smaller priced ones, at all.

30 Q. Didn't you swear on Friday that there were five hundred and fifty of the smaller price? A. Yes.

Q. You say that six hundred and eighteen were worth \$2.25? A. Yes.

Q. And how do you state to this jury that they were all of that price—how do you know? A. I know they were all sent from the shop; they would not have been sent down in an untrimmed state—molasses barrels were never sent down in an untrimmed state.

40 Q. Were flour barrels ever sent down in an untrimmed state? A. Yes.

Q. How often? A. Very seldom.

Q. Were there not thousands of them sent down on Matthiessen's demand? A. Yes.

Q. Then why couldn't there have been syrup barrels sent down too? A. They don't go in such numbers as flour barrels.

Q. How can you swear that these syrup barrels were all

perfect and worth \$2.25? *A.* From the numbers that were sent down; and from what I know of the business; every one of those were in perfect condition; there was eighteen in each load; and I know they were all fit for use.

Q. Explain why you made this mistake before of there being five hundred and fifty that were worth the smaller price? *A.* I don't understand that small price matter, at all.

Q. How can you explain that? *A.* I took it from the inventory that was given me.

Q. What was the difference between the five hundred and fifty, as you understand it, and the eight hundred and fifty?

A. As I understand it, I thought that these were sent down in an untrimmed state for storage.

Q. Does that constitute the difference between the \$1.50 and \$2.25? *A.* Yes; that is the difference.

Q. Then, when you charge us with fourteen hundred barrels, and five hundred and fifty of them at \$1.50—you mean to say that they were untrimmed syrup barrels? *A.* Yes.

Q. And the perfect ones were worth \$2.25? *A.* Yes.

Q. How many ten-gallon kegs? *A.* Four hundred and twenty.

Q. How many of those ten-gallon kegs were delivered on the 8th, or the 7th? *A.* None.

Q. Tell me how many syrup barrels were delivered on and after the first of January to either house—between the 1st and the 6th? *A.* Four hundred and fifteen to both houses.

Q. Was that included in the six hundred and eighteen?
A. Yes, that is part of the six hundred and eighteen.

Recess.

Q. There are a considerable number of new barrels which you have spoken of; which shop of McMahan's were the new barrels made at? *A.* Grand street.

Q. And Grand street only? *A.* I don't think there were any new barrels in any other shops.

Q. Therefore, if you are correct in your statement as to the number of new barrels that came to the refinery, they should have been such as came from the Grand street shop? *A.* Yes.

Q. Are you able to say whether or not those barrels that were trimmed and sent to the old house after the 1st of January, were made out of stock which Matthiessen had bought, or out of stock which McMahan had bought? *A.* We didn't make them at all.

Q. What do you call it when they were trimmed from stock? *A.* Trimmed from stock.

Q. The barrels that were sent to the old refinery—can you tell us whether or not any of them that were sent after the 1st

of January, trimmed, were trimmed from stock that Matthiessen bought, or from stock that McMahan bought? *A.* I think they were all of McMahan's stock; I think all the trimmed barrels were.

Q. Why do you think that? *A.* Because there was stock enough there on the 1st of January belonging to McMahan to supply the amount charged.

Q. Was there not stock on the 2d, 3d, 4th, 5th, and 6th of January sent there by Matthiessen, which he had bought?

10 *A.* Yes.

Q. Then there was stock there which those trimmed barrels might have in them that Matthiessen had, and stock of McMahan's which he might have had; now, which was it—whose stock were the barrels trimmed with after the 1st of January? *A.* Matthiessen must have paid for some of them; but there was stock enough to cover the number we sent down on the 1st of January; the barrels got mixed after they were in the shop—Matthiessen's stock and McMahan's stock—that is, there was no distinction made between them.

20 *Q.* Then you are unable to say whose stock was put in these trimmed barrels after the 1st of January? *A.* I am unable to say.

Q. Then why did you charge us with all of that? *A.* Because there was stock enough there of McMahan's.

Q. There was stock there also of Matthiessen's—and why didn't you leave them all out together? *A.* Because McMahan's stock was enough to supply this number.

Q. Hadn't you, long before the 1st of January, assented to Matthiessen's having that stock transferred down to his refinery—that is, McMahan's stock? *A.* Yes.

30 *Q.* Having assented to these going away, isn't it your recollection that all that was done in that shop in Grand street was done on the barrels that Matthiessen sent there, which he bought himself? *A.* No, sir, our own barrels were trimmed as well as his, there; those barrels that came down untrimmed, men were kept a trimming all the time.

Q. Take the barrels in Morris street—were not all those Matthiessen's, which he had bought between the 1st and 6th of January? *A.* No, sir; there was a large stock of McMahan's barrels there on the 1st of January.

40 *Q.* Was there any stock of McMahan's in Morris street on the 1st of January? *A.* Yes.

Q. Of barrels? *A.* Yes.

Q. Ready to be trimmed? *A.* Ready to be trimmed.

Q. When was the last count made in the Morris street shop, before the transfer? *A.* I don't know that there was any made before the 1st of January.

Q. Was there any made on the 1st of January in the Morris street shop? A. Yes.

Q. Hadn't the Morris street shop been cleaned out by the 1st of January? A. No, sir, I don't think it had; Patrick McMahon could tell better than I could.

Q. Don't you know Patrick McMahon and Mr. Sunderling counted those barrels? A. I don't remember.

Q. Have you any account of the barrels there in the Morris street shop? A. I think I have a memorandum at home, or in Mr. Weart's office. 10

Q. What is your memorandum about? A. The stock in the shop—in the shop Patrick McMahon was foreman in.

Q. What day was that account of stock taken? A. On the 1st, or on the day before the 1st.

Q. That is the Morris street shop? A. Yes.

Q. Have you any account of the stock in any other shop? A. Yes, every shop.

Q. What date? A. On the 1st.

Q. Where are those accounts? A. I don't know.

Q. Will you produce them? A. It will take some time to look for them; Mr. Weart has got them, or I have got them. 20

Q. Do you know when the last account, before the 1st of January, was taken? A. I think it was in July.

Q. Was there an account taken in November? A. I think there was.

Q. Have you got that? A. I suppose so.

Q. Wasn't there an account taken in October? A. No, sir.

Q. There was one in November? A. I think there was.

[Mr. Gilchrist]—That account I want also. 30

Q. Wasn't there an account taken on the 26th of December, besides that one on the 1st of January, in the Morris street shop? A. Yes, there was one taken a short time previous to the 1st of January; that is the one I referred to as being in November; I think it must have been about December.

Q. Have you shown that to counsel for plaintiff? A. No, sir.

Q. Your reason for thinking, as I understand you, why the trimmed barrels were made off McMahon's stock, was that McMahon's stock was there? A. Yes. 40

Q. And yet you say there was Matthiessen's stock, too? A. Yes, the Matthiessen stock was coming in daily and going out daily.

Q. Don't you recollect that the syrup barrels that Matthiessen had on and after the 1st of January were all trimmed and put in order by himself, and made by himself? A. After the 1st January he paid the labor.

Q. Didn't he make the barrels, too? *A.* No, I rather think the stock belonged to McMahon.

Q. What kind of stock was it? *A.* Molasses barrels, second-hand, and staves.

Q. Didn't Matthiessen pay for all the labor and all the materials for all the syrup barrels that were perfected after the 1st of January? *A.* No, sir, some of McMahon's stock was there.

10 *Q.* You took an account of stock about December 26th, and you took an account of stock about January 1st—does that include everything? *A.* It was an account of everything.

Q. Was that taken at both times, December 26th and January 7th? *A.* I don't remember of it, but I think a short time before the 1st of January there was an account taken of all stock, and on the 1st of January, also.

Q. Did Matthiessen or the company demand of you or take anything but such things as could be utilized by him, or made in the shop by himself, for his use? *A.* No, sir.

20 *Q.* Nothing but what he wanted to use? *A.* Yes; he didn't want to use them at that time; he utilized them after everything.

[By the court]—Did he take anything that he didn't want right along? *A.* He used every article.

Q. Was there anything in that transfer to Matthiessen except such things as he was in daily want of? *A.* No, sir.

Q. And as was necessary to his business? *A.* No, sir.

[Mr. Gilchrist]—It may be necessary for us to use some bills, which I would like this witness to identify.

[Mr. Linn]—You can recall him.

30 [Mr. Gilchrist]—I don't offer them—I just want him to identify them, and it will save us a great deal of trouble.

Q. [Showing witness a number of bills]—Do you recognize those as the signatures of the barrel men—men who collected barrels? *A.* I recognize Mahoney's, Lee's, McGuinner's.

Mr. Gilchrist calls for power of attorney, notice of which had been given the other side to produce.

Mr. Linn produces it.

Q. You have spoken of a power of attorney that was destroyed? *A.* Yes.

40 *Q.* How many powers were there executed? *A.* Only two.

Q. The first one which was destroyed was the one that was executed in the presence of Mr. Vredenburg, and you, and Matthiessen? *A.* Yes.

Q. What is this? *A.* This is the second one.

Q. And the first was like that? *A.* Yes.

Q. Just exactly—one a copy of the other? *A.* Yes.

Q. Who destroyed that one? *A.* I rather think it was

some of the ladies of the house—his wife or his mother, I am not positive which—she destroyed it when this was executed.

Q. Was it you that testified about the time of the delivery of the tanks, or was it Mr. Croak? A. I think it was Mr. Croak.

Q. How many tanks were there in all? A. I think about twelve or thirteen.

Q. How many large ones? A. Six or seven.

Q. Which were up first, the small or the large tanks? A. I can't tell. 10

Q. How long before the demand of Matthiessen was it that these large tanks were put up in the sugar-house? A. I don't know.

Q. Were they put up some time before? I think the men were working on them at the time.

Q. The large ones or the small ones? A. I can't tell.

Q. How long before this demand of Matthiessen was it that these tanks were put in the house? A. I don't know.

Q. It was sometime, wasn't it? A. I don't know.

Q. Wasn't it at least a day before? A. I suppose so. 20

Q. [By the court]—You say they were in before? A. I suppose so—the lumber for some of them was down there before—the lumber for these tanks was bought by Mr. McMahon.

Q. And taken to the sugar-house? A. Yes.

Q. And lay there for some time, and then was taken back to the Washington street shop, and there work was done on them and the tanks that went to the lower story were put up, and after they were up the others were put up? A. I don't know which was put up first. 30

[Mr. Gilchrist]—We want the witness to produce those accounts—all the accounts of stock taken.

[Witness]—I have been looking for them now and then for two or three weeks.

Q. You say you have got them? A. I think so; they are either in Mr. Weart's office or home.

Q. [Showing witness book] This is Patrick McMahon's book? A. Yes; it was the foreman's book.

Q. Your book was made up from what? A. From the cartmen themselves; these were articles that were received at the shop. 40

Q. How do you know that? A. I see by the way he has put them down here.

Q. That is a mere entry in that book of what was received there and not what was sent out? A. So far as I have seen [still looking at book].

Q. Who kept the account of what was sent out from Mc-

Mahon's shop there? *A.* He did; he had another book, I think, that he kept.

Q. [Showing witness another small book] What is this book? *A.* That is a book of accounts of what went out of his shop.

Q. Look under the head of December 26th, of Patrick McMahon's book; is there anything there to lead you to believe that there was an account of stock taken? *A.* Yes; I see, "on hand 436."

10 *Q.* When was that? *A.* December 26th.

Q. Patrick's book shows on December 26th there was only 436 on hand? *A.* Yes.

Q. Doesn't that satisfy you that an account was taken on that day—that that was the day of the account? *A.* I can't tell what day his stock was taken.

[Mr. Gilchrist]—That power of attorney I want to offer for the purpose of showing what the former power was.

Q. What date was this power of attorney executed? *A.* Two or three days after the other.

20 *Q.* What was the date of the first power? *A.* The 23d, positively.

[Mr. Gilchrist]—I want you to produce those accounts of stock to examine you about them.

Q. How many new sugar barrels did you make out of these two accounts—the old and new sugar-house—from the 27th to the 6th? *A.* 624 in the new house, 447 in the old house.

Q. The new barrels in the old book are in the third column? *A.* Yes.

30 *Q.* And the new barrels in the other are in the fourth column? *A.* Yes.

Re-direct-examination.

Q. In these two little black books is kept an account of the goods taken by Matthiessen from the premises of McMahon? *A.* Yes.

Q. The one book contains an account taken to the old sugar house, and the other book contains an account taken to the new sugar house? *A.* Yes.

40 *Q.* In the book showing the amount of things taken to the old house, the first column shows the dates, the second column shows the number of trimmed barrels, the third column shows the new barrels, and the fourth column shows syrup barrels? *A.* Yes; that is the old house.

[Mr. Gilchrist]—These books of McMahon's have come now, and I shall want to ask a few questions about them.

Q. Now, in the new house book the first column shows dates, the second column, trimmed barrels, the third column, the untrimmed barrels, the fourth column, molasses barrels,

down to the place where it is marked new, and from that, below, are new sugar barrels? *A.* Yes.

Q. These entries were made by yourself? *A.* Yes.

Q. And were taken from this larger book the same day, or the next day, when the thing was fresh in your mind, to have it altogether? *A.* Yes.

Q. And those contain an account of all the goods delivered between the 27th and 6th, excepting lumber and the packers? *A.* Yes.

Q. Look at that power of attorney—when did you say that 10 was executed? *A.* December 26.

Q. Who is the subscribing witness to it? *A.* F. O. Matthiessen.

[*Mr. Linn*—The power of attorney is not dated.

Q. Who was present when that was executed? *A.* Mr. Matthiessen, Mrs. McMahon, and I was present, and I rather think Vredenburgh was present.

Q. Who was present when the first power of attorney was executed? *A.* The same parties.

Q. And Vredenburgh was present when they were both 20 executed? *A.* I think so; I am most positive he was present at this; I know he subscribed to the first.

Q. Why was the first one destroyed? *A.* Because I could not work on it; it was not the right man signed it.

Q. Who directed it, or requested it, to be destroyed? *A.* Matthiessen, and Vredenburgh said it was no good to be worked on; no one requested it to be destroyed at all; they said it was no use.

Q. How did this second one come to be executed? *A.* Because the right signature was not to the first. 30

Q. Who requested McMahon to make this second one? *A.* Mr. Matthiessen.

Q. Why did he request him to do it? *A.* Because the first one was not deemed valid enough to work on, to transfer these goods, or to carry on business.

Q. Where was it done? *A.* In McMahon's house.

Q. Was he sitting up at the time? *A.* Yes.

Q. Dressed? *A.* Yes.

Q. Did he understand what he was doing when he executed this? *A.* No, sir; he could not comprehend anything, not 40 for more than a minute.

Q. What did he say to you about this at the time? *A.* He said, as I was going up the steps—it was in the basement—as I was going up the steps he wanted to know if it was not too early to make contracts; he thought he was after signing a contract, it seemed to me.

Q. What did he ask you? *A.* Mr. Matthiessen explained

it to him—what it was for; afterwards, he asked me what it was, if it was not a contract.

Q. Then, in connection with that, what did he say? *A.* He said, wasn't it too early to sign contracts.

Q. What did he mean by that? *A.* The contracts for the delivery of barrels from the men.

Q. When was it customary to do that? *A.* New Year's—the 1st of January.

Q. Did he talk to you about any other business at the time this was executed? *A.* We had a general conversation about dogs and horses, and things of that sort.

Q. Did you and Matthiessen go to the house together at the time this was executed? *A.* Yes.

Q. Where did you go from? *A.* The sugar-house.

Q. Had this power been drawn before you went there? *A.* It had been drawn; I got it from Vredenburg, and took it to the sugar-house, and me and Matthiessen went to Mc-Mahon's house; I am not so positive whether Vredenburg was there at the second one, but I have a very strong impression that he was.

Q. Was Vredenburg at the sugar-house with you? *A.* Yes; or at our office; I can't tell which—he was down there somewhere, if he was down there at all.

Q. Do you recollect about anything else that you didn't state in your direct-examination which you observed in his conduct that was strange and unusual, or indicated that he didn't know what he was doing? *A.* Most everything he did; his memory was gone, lost completely.

Q. Do you recollect anything about a lot of iron? *A.* I do.

Q. In the month of December do you recollect anything about a lot of iron? *A.* Yes; I think it was in November, sometime; there was a lot of old hoop iron in the yard, and I sold it to Mr. Briggs, at so much a pound, or ton, and he asked me to make out a bill for it, as soon as it was delivered to Briggs; the bill came to between \$700 and \$800; he took a pencil and, says he, "Isn't it more than that?" and he figured it up and made \$800,000 of it; I understood he went down afterwards to Croak, and he made it the same as I did, and he called us two fools; we didn't know how to make out

anything.

Q. You said in your cross-examination that he had lost his memory six months or nine months prior to the time of his death; do you mean by that that he had entirely lost the use of his memory? *A.* No, sir, failing; his memory had failed six or nine months before.

Q. Did he improve or did he become worse? *A.* Worse, every day.

Q. During the six or nine months prior to his death was he

at times unfit to transact business, and at other times fit? A. Yes.

[Mr. Gilchrist]—I don't know that that is quite a proper question to put to an inexperienced witness.

Q. Do you mean to say that he was not fit to transact any business for nine months prior to his death? A. No, sir, only at intervals.

Q. Do you mean to say that he was fit to transact business at intervals from the 23d of December till the time of his death? A. No, sir, not at all. 10

Q. From that time to the time of his death he was not fit at all—at any time? A. No, sir, not at any time.

[Mr. Gilchrist]—That evidence is entirely improper, unless he gives us his reasons for it.

Q. Was Mr. Matthiessen aware of his condition? A. Yes.

Q. Did he talk with you about it? A. Yes.

Q. Why was this power of attorney obtained from him? A. Because Matthiessen knew that McMahan was not competent to transact business, any more—that is the reason it was given to me. 20

Q. Were you acting in concert with Mr. Matthiessen? A. Yes.

Q. By whose direction did you act when you directed the carman to deliver these goods to Mr. Matthiessen? A. Mr. Matthiessen's.

Q. Did you direct Matthiessen's carman to take any goods away? A. No, sir.

Q. Who took control of that whole business in taking charge of these goods and taking them to the sugar-house? A. Matthiessen had the principal control. 30

Q. Did you intend by letting Matthiessen have these goods that he should be paid in preference to anybody else, and other creditors suffer? A. No, sir.

Q. Did you sell to Matthiessen these goods? A. No, sir.

Q. Had you any authority from McMahan to sell him these goods? A. Under that power of attorney; Matthiessen said at the time it was no good, but he thought we could work on it a while anyhow, till McMahan would get either better or worse.

Q. Did any of the creditors object to these goods being taken away at the time it was done? A. Yes. [Objected to.] Admitted. Mr. Gannon protested against it. 40

Q. When? A. January 1st.

Q. Were these goods taken in the ordinary way of doing business, or were they hurried down to the sugar house? A. They were rushed.

Q. Had Matthiessen or the Sugar House Co. any imme-

diate demand for them? *A.* No, sir, no use for them, or a great part of them, anyhow.

Q. Why did Matthiessen want to get them into his possession so soon? *A.* I suppose he was afraid somebody else would get hold of them before; he said he wanted to secure himself for this money that was due him.

Q. Why did you consent at all to let him take the goods?

A. Because he said that he would advance money as usual when he was squared up—the same as he had with McMahan 10 to carry on the business.

Q. Did he say anything about other creditors being paid?

A. Yes, he was satisfied that the creditors could be paid if the business was allowed to go on.

Q. Was any price fixed by you and him upon these goods?

A. No, sir.

Q. After these goods were removed, who took charge of the business before McMahan's death, and after? *A.* I did; I did it till he died, then of course I dropped it; then Matthiessen took charge of it and he carried it on till about the 20 middle of March; he bought everything that came there, and paid the workmen.

Q. Whose carts were used? *A.* McMahan's.

Q. Whose shops and tools were used? *A.* McMahan's.

Q. Did Matthiessen ever pay anything for those things?

A. No, sir.

Q. Were some of those goods which were taken to the sugar house between December 27th and January 6th, goods which had been sent to McMahan, but were not delivered to him till just the day or day before the same day they were 30 taken to the sugar house? *A.* Yes.

Q. Did they ever come into the actual possession of McMahan or his shops? *A.* No, sir.

Q. Where were they taken from? *A.* Some of the trucks that usually delivered them at the shops were sent down to the sugar house, and were never left at the shops.

Q. And those were goods that McMahan needed in carrying on the business? *A.* Certainly.

Q. Were any goods received from Robertson & Co.? *A.* Yes.

40 *Q.* How did they come? *A.* I think in lighters.

Q. What goods were they that came from Robertson & Co.? *A.* Molasses barrels and staves.

Q. Did you send any one at any time to McMahan's house to take charge of him between New Year's and Christmas? *A.* I did; I don't remember exactly the date; he was a teamster there named Wynne that waited on the horses.

Q. When did you send Wynne? *A.* I think it was between Christmas and New Year's.

Q. Why? A. He was violent in the house.

Q. Do you know how he conducted in the house? A. When I came away from McMahon's house I sent Wynne back there to McMahon's.

Q. What was his conduct there that day when you were there? A. He was raving, incoherent in his talk, and stammering; his eyes were rolling, exhibited every sign of violence; he did offer violence to his wife, and his wife told me, and that is the reason I sent over Wynne.

Q. Did Matthiessen see McMahon during that time? A. 10
He did several times; I should say about three or four times.

[By the court]—During what time?

[Mr. Linn]—From Christmas to the 10th of January.

[Witness]—At least, and he told me that he had been there to see him.

Q. What did he say about his condition? A. I don't remember exactly what Matthiessen's opinion of him was, but he thought he was sinking very fast.

Q. There were several signatures shown to you upon checks—was this signature upon the first power of attorney like the signature of those checks? A. No, sir. 20

Q. The signature on this power of attorney—was that like the one on the first power of attorney? A. No, sir.

Q. Was the signature on the first power of attorney like that, or was it a plain, broad "ey," or "y?" A. It was a broad, plain, and distinct mark, "ey."

Q. Whose handwriting is the power of attorney in? A. A clerk of Vredenburgh's, I think.

Q. Who made out this statement of assets and liabilities, which was shown at a meeting of creditors, in Vredenburgh's office? A. I did. 30

Q. By whose request and direction was that done? A. By Matthiessen's direction and request

Q. Was that before or after McMahon died? A. I think it was the same day—he died that evening.

Q. Who took that statement of the assets and liabilities? [Handing witness paper.] A. That is a copy of it; I gave one to Matthiessen, also; the original was in my handwriting; this is the handwriting of Vredenburgh's clerk.

[Mr. Linn]—This shows the liabilities.

Q. [Handing witness a paper]—Is that a statement of the 40
assets—a copy as made out? A. This is a copy of the statement of the assets and liabilities, before the meeting of creditors.

Q. Was Matthiessen at that meeting? A. Yes.

[Mr. Gilchrist]—I don't see how you can produce a copy.

Q. [By Mr. Gilchrist]—When was this made? A. About the 10 of January—the day McMahon died.

Q. [By Mr. Gilchrist]—When did Mr. Weart come into the case as administrator—how long after McMahan's death? *A.* I suppose, about two or three weeks.

Q. [By Mr. Gilchrist]—Wasn't that made up for Mr. Weart? *A.* It was not.

Q. [By Mr. Gilchrist]—It was given to him, wasn't it? *A.* Yes; because I had it in my possession, and he asked me for it.

Q. [By Mr. Gilchrist]—And you say that is a copy that was made at the same time? *A.* Yes.

10 *Q.* [By Mr. Gilchrist]—How many copies? *A.* I think there were three; I intended one for myself, one for Matthiessen, and one for the creditors.

Q. Where is yours? *A.* I think I have got it home.

Q. There was a statement made out? *A.* Yes.

Q. Was that statement made out and shown the creditors? *A.* Yes.

Q. Who wished that statement made out? *A.* Mr. Matthiessen.

20 *Q.* Were the creditors complaining that McMahan had been shipped of all goods? *A.* Yes.

Q. And they didn't like it? *A.* No.

Q. Were there any new barrels purchased by McMahan, which cost McMahan seventy cents? *A.* Yes—cost him before they were headed, seventy-three or seventy-five cents.

Q. What were those barrels sold to Matthiessen for? *A.* Forty-eight cents.

Q. McMahan lost how much? *A.* Twenty-five cents apiece.

[Mr. Gilchrist]—That is entirely a new matter.

30 *Q.* [By Mr. Gilchrist]—When was that? *A.* I think it was in 1870—about a year before.

Q. Do you know what those new barrels cost McMahan, that were taken by Matthiessen? *A.* McMahan manufactured those himself.

Re-cross-examination.

Q. What was Matthiessen paying for those new barrels, for the last six months before this? *A.* I forget; I could tell by the book.

40 *Q.* Look and see? *A.* [Looking at book]—Sixty cents in 1871—that was in May.

Q. You have been asked about Mr. McMahan's condition—about this power of attorney—didn't you feel an interest in getting McMahan to sign that power of attorney—both of them? *A.* No, sir, I hadn't exactly an interest in it, I thought there was nobody more competent than I was to carry on the business; and I had my situation at stake, too.

Q. And was not that your motive in getting him to give you the power of attorney? A. Yes; not the entire motive.

Q. Your motive was to save your situation? A. I suppose so.

Q. When the first power of attorney was talked of, was not it because McMahan was going away by advice of his physicians and giving up business, so that he might be cured? A. He did endeavor to leave, but he couldn't get away.

Q. He intended to leave his business so that it should not trouble him, so he might recover his health? A. That was his idea.

Q. That is what you thought would be at that time? A. Yes.

Q. And therefore you saw that if you didn't keep that place you would lose a place that was very good; if you didn't have a power of attorney you didn't know what would become of yourself for a situation? A. I was satisfied that Matthiessen would not have changed the business in any case, even though Matthiessen himself had run it. I didn't feel the least uneasy.

Q. You didn't feel at all anxious to have a power of attorney? A. No, sir; not a bit anxious.

Q. You say you didn't think he was fit to execute either of those powers of attorney? A. Yes.

Q. Didn't you act as if you thought he was fit? A. Yes; I didn't give him to know that I knew anything about his condition at all.

Q. Give who to know? A. McMahan.

Q. Didn't you get the counsel of McMahan and who had been his counsel for three years to be present at the execution of those powers of attorney? A. Yes.

Q. Didn't he have just the same opportunity of seeing the condition of McMahan as Matthiessen? A. Yes.

Q. There were you, the superintendent, and his counsel, and Matthiessen, his best friend, all advising that thing to be done? A. Yes.

Q. Now, you say that for nine months he was from time to time incapable of doing business? A. Yes; at intervals.

Q. Tell the jury what occasions those were during that nine months that he could not do business? A. A great many cases came up from one time and another in that nine months that made me believe it—[interrupted.]

Q. What cases were they? Did he do business at any previous times when you speak of when he was not fit during the nine months? A. Yes; I saw him buy a thousand fish barrels in New York, and he paid more than he could get for them, after getting them coopered, at an expense of ten or fifteen cents each.

Q. Didn't he deal with Mr. Gannon? A. Yes.

Q. Was there any time during that time that he was not fit to do business? *A.* I think we had very little dealings with Gannon during that time.

Q. You said the balances of the debts that he owed were all incurred during that nine months? *A.* Yes.

Q. When he did business at O'Neill's, do you know whether he was capable of doing business or not? *A.* No; not latterly.

Q. Here are vouchers returned on the 2d of January; 10 thirty-eight checks returned to McMahon—didn't he sign every one of them himself? *A.* No, sir; he didn't sign after the 23d.

Q. Did you sign any checks for him? *A.* I did after the 23d.

Q. Did you sign a check? *A.* I did.

Q. Can you produce them? *A.* I guess I can produce some half a dozen.

Q. I would like to see any check you signed. You had been in the habit of giving receipts for McMahon, for a long 20 time for money? *A.* Yes; and collecting—"by M. Shanly."

Q. You had been in the habit for months or years of endorsing his name on checks for deposit? *A.* Yes.

Q. Sometimes he endorsed his own name? *A.* Yes.

Q. Many times you endorsed his name—"by M. Shanly?" *A.* Yes.

Q. Here is a receipt drawn up in your handwriting, January 6th, 1871, signed by Phillip Reilly; what was that transaction? *A.* That was to pay a feed bill of \$752.90.

Q. How was that feed bill paid? *A.* Paid by notes of 30 Goessling & Co.

Q. Who endorsed them? *A.* I did as attorney.

Q. By virtue of that power of attorney? *A.* Yes.

Q. And you were acting all the time with everybody as if that power of attorney was executed by a perfectly sane man? *A.* Yes.

Q. How much money was deposited to McMahon's credit from the 1st of December in his bank? *A.* \$13,420.

Q. Up to what time is the last entry? *A.* January 2d.

Q. Where did that money come from? *A.* I don't know.

40 *Q.* Didn't you deposit every cent of that money? *A.* I did.

Q. How many items are there? *A.* Five items.

Q. What is the first one? *A.* \$3,291; I expect \$3,000 of that came from Matthiessen & Wiechers; next item \$3,000, and that I suppose came from them; next \$400—I don't know where that came from; next \$4,000—that came from Matthiessen & Wiechers.

Q. Then \$10,000 out of that \$13,000 was paid by Matthiessen & Wiechers after the 1st of December? A. Yes.

Q. You were receiving money of McMahon's for McMahon? A. Yes.

Q. Now, you say he was incapable of doing any business? A. Yes.

Q. That money has all gone into the estate? A. Certainly.

Q. He has had the benefit of it? A. Yes.

Q. You say that you received money from time to time, 10 and here are the books of McMahon; will you show us where your account is? A. My present account?

Q. Yes. A. It is not there.

Q. Where is it? A. I don't know.

Q. Is there any entry made in McMahon's books of money you got out of his concern? A. No, sir; nor what he took himself either.

Q. You were getting \$3,000 or \$4,000 a year and not a scratch of a pen in the books against you? A. No, sir.

Q. Was that so from the beginning? A. No, sir; it was 20 not; I was generally paid with the workmen Saturday night, and my wages went in with others—that was about a year and a half.

Q. And you say there is not a scratch of the pen against you in his books? A. No, sir; nor against him.

Q. How could McMahon tell whether his misfortunes came from money which you took out of the concern or not—could he by the books? A. No, sir; he could not.

Q. You say Mr. Gannon objected? A. Yes.

Q. Did any creditor doubt at that time that McMahon's 30 estate was perfectly solid and valid—solvent? A. I don't think that Gannon thought it was perfectly valid; I think the others did.

Q. You had all of these statements of the assets and liabilities laid before the creditors? What was the object of laying that statement before the creditors? A. To appease them; they were clamorous to get some money.

Q. In your statement that you laid before the creditors, you say this is a copy of the assets and this other a copy of the liabilities? A. Yes. 40

Q. In whose handwriting is that copy? A. Vredenburg's clerk made a copy from my original.

Q. You have looked at those sufficient and satisfied yourself they are copies? A. Yes; I am satisfied they are copies of the original document.

Q. When were they made? A. About the 10th of January.

Q. Were they made the same day with the original statement? A. Yes; or a day after; but I can't tell.

Q. You have spoken of making up this statement at Matthiessen's direction; were you in Matthiessen's employ? *A.* I thought I was not at that time.

Q. Then how could you take his directions? Weren't you acting in the interest of McMahon? *A.* I was acting under Matthiessen's suggestion in everything.

Q. Were you acting under his directions—by his orders? *A.* I could not say he ordered me. I know he told me to put down \$1,000 when there was not a dollar due to him, to get
10 himself in as a creditor—that is, a thousand and six dollars and one cent.

Q. You say there was not a dollar due to him? *A.* Yes, sir.

Q. How do you make that out? *A.* He was paid about the first of January, and this was between that and McMahon's death.

Q. But now you say he was not paid; that this is all a sham. Did those goods you have spoken of amount to the amount of the debt due from McMahon to Matthiessen? *A.*
20 About \$9,250; somewhere thereabout.

Q. Did these things amount to that or anything like it? *A.* Certainly; the whole amount Matthiessen was paid, and I think he was paid \$2,000 or \$3,000 over, according to my calculation.

Q. Have you any such calculation? *A.* I have.

Q. Where is it? *A.* I guess it is in those books.

Q. Just show it to us?

[Witness turns to book.]

Q. The statement you referred to as showing that Matthiessen was not a creditor of McMahon's is the first and second
30 pages of the ledger of 1871? *A.* Yes.

Q. Don't that show that McMahon was indebted to him \$26,000? *A.* It does, but the December bills are not in there.

Q. But I asked you for a statement that showed that Matthiessen was not a creditor, and you said you had and this was it? *A.* I think I have an account, a balance sheet I took off that book, and the bills I paid Matthiessen by these barrels and this material going down there.

Q. Is there any statement in existence, or is there any which
40 shows that Matthiessen was not a creditor of McMahon? *A.* Yes; I showed it to Matthiessen.

Q. This is not it? *A.* No, sir.

Q. Where is it? *A.* I gave it to Matthiessen.

Q. Where did you get it from? *A.* I took it from that book.

Q. What did you add after this book? *A.* I added the amount of this material that this suit is brought about; there

is none of this material in this book at all, nor the December bills are not there.

Q. [Showing witness bill.] There is the December bill; how much does that amount to? A. \$6,669.

Q. That would not balance that amount in this book? A. No, sir.

Q. That would leave \$20,000 due Matthiessen yet? A. Yes.

Q. Didn't Matthiessen have a bill against McMahan at that time? A. Yes; I think it is very small—\$164.

Q. What is the balance? A. \$6,505; that is the old house bill. 10

Q. Did you render a new house bill? A. I think I did.

Q. Are you sure you ever rendered a new house bill? A. No, sir.

Q. Was not that bill made up by Mr. Matthiessen's own people for the new house? A. I know I was satisfied with the amount myself—with the new house bill. I made out a statement of it myself.

Q. [Showing witness paper.] Did you at that time make out any such bill as that of \$15,000—that bill that you gave Mr. Linn to sue on here? A. I don't remember that I did. 20

Q. Don't you remember you did not? A. No; I don't remember I did not; I may have done so and forgotten it.

Q. Was there ever a bill as much as that rendered to Matthiessen for anything, at that time, up to the 1st of January? A. I don't know.

Q. [Showing witness bill]—Is that a bill for the new house up to December 26? A. It is not my writing; I don't know whether it is or not; I don't understand that document.

Q. You don't know whether such an amount was due for things sent to the new house? A. It looks like it. 30

Q. What is it looks like it? A. The barrels; I am satisfied they didn't take any barrels from anybody else but McMahan.

Q. Look at the total amount—does it come anywhere near your recollection? A. No, sir; I have no memory of the amount at all.

Q. Then how can you say it would make a balance so that Matthiessen would be indebted to McMahan instead of McMahan to Matthiessen? A. From the statement I made at the time, and showed it to Matthiessen; he was satisfied at the time. 40

Q. What was he satisfied with? A. He was satisfied with the statement I showed him.

Q. Have you got a copy of that statement? A. I don't know.

Q. Have you got any memorandum anywhere to show the

state of accounts between McMahon and Matthiessen? *A.* I think I have.

Q. Show it to us; here are his books and your books? *A.* After the 23d there is nothing written on those books, and the remainder was written on memorandum.

Q. Where are those memoranda? *A.* Down in Mr. Weart's office, I think.

Q. You don't recognize whether these are the bills that you rendered? *A.* I think if I rendered them they would be
10 in my writing.

Q. What does that statement, to the creditors, show to be the excess of the assets over the liabilities? *A.* About \$24,000 or \$35,000.

Q. That is, he was worth \$35,000 after his debts were all paid? *A.* Yes.

Q. You say you didn't sell these things to Matthiessen? *A.* No, sir.

Q. How came you to consent to his taking away what you have put down as \$15,000 worth of property? *A.* I thought
20 I had to do it; of course I couldn't quarrel with Mr. Matthiessen; I could not refuse him when he made the demand on me, because he could have closed up the whole business in twenty-four hours—as soon as he found it convenient.

Q. That was your reason for giving him for nothing \$15,000 worth of property, as you call it? *A.* No; it was only to secure him, as he asked himself, till after New Year's; it seemed to me, from his conversation, he was willing to refund a portion of it again, so as to allow the business to go on.

Q. Are you not mistating the case when you say he was to
30 refund anything? didn't he merely agree to advance, as he had been advancing? *A.* Yes.

Q. Wasn't it understood between you and him that what he got on that demand should go upon the debt, in reduction of the debt, due from McMahon to him? *A.* Yes.

Q. Was not there a debt then due? *A.* Yes.

Q. And was not the property that went to pay it, that you agreed to let go for it, just about fairly worth, or a little less, than the debt? *A.* I did not calculate it more than paid for the property.

Q. Didn't the property pay less than the debt? *A.* I didn't
40 charge Mr. Matthiessen any more than we paid for this property ourselves.

Q. Have you charged him that? *A.* Yes.

Q. Show me where you charged it to him? *A.* Of this transaction there is no charge at all; there is no charge after the 23d.

Q. Have you given Mr. Matthiessen credit for these payments of \$10,000, made in December? *A.* Yes.

Q. Where does it appear? *A.* In that ledger.

Q. I see there is a credit of \$3,000 on the 2d of December, what became of that? *A.* It went into the bank.

Q. Can you show me that \$3,500 that was paid by him for the tanks? *A.* All the money we ever got from Matthiessen is there.

Q. Show me the \$3,500 paid for the tanks? *A.* I don't know where it is.

Q. You don't know about the time of it? *A.* No, sir.

Q. Explain what you mean by saying you didn't sell it— 10
what did you consider necessary to make a sale? *A.* To make a price; to make an agreement to sell, and the man to require the property at the time.

Q. When you send to the grocers for seven pounds of sugar, do you agree upon any price? *A.* They generally have the price posted up in the grocery store.

Q. I suppose that it is not necessary for a sale to have the price agreed upon, would you say, then, that there was no sale here? *A.* In my view, I think it is necessary to have a price agreed upon. 20

Q. But, suppose it is not, would there be a sale in this case, there being an agreement on one side to cancel the debt, and on the other side a giving of money, and it not being necessary to have the price named, would you then consider it a sale? *A.* No, not in my view.

Q. Why? *A.* Because if there was no price agreed upon—[interrupted.]

Q. But assuming that it is not necessary to have a price agreed upon, what was there wanting to make this a sale— wasn't he to be credited with the money due to him? *A.* 30
Yes.

Q. And you were to give him goods? *A.* Yes.

Q. Now, you say that Gannon protested against the goods going—who did he protest to, and what did he say, and when was it? *A.* It was on the 1st of January he protested to me.

Q. Did he protest to Matthiessen? *A.* Not that I know of.

Q. I understood you to say that Matthiessen, you supposed, was afraid that others would get hold of the goods—did anybody have a judgment against McMahan? *A.* No, sir.

Q. He was a resident of Jersey City? *A.* Yes, sir. 40

Q. No attachment could be issued against him? *A.* I don't know that.

Q. Who did you anticipate would take those things away from Matthiessen, or away from McMahan? *A.* Some of the creditors might come down, seeing the position of the man— his state of health—might come down very quick, as far as I know.

Q. Didn't you know that it would take thirty days to get a judgment against him? A. Yes; but I thought there might be something in the nature of an injunction, or some very swift process of law, that I was not aware of.

Q. You say that Matthiessen took control of the delivery? A. Yes.

Q. Was he ever in the Grand street shop any time during the delivery? A. I don't know; Sunderling was up there.

10 Q. You have said that this work that was done after the removal of those goods was done in McMahon's shops? A. Yes.

Q. Was not a portion of it done in O'Donnell's shop? Didn't Matthiessen hire O'Donnell's shop from the 1st of January for the purpose of having the work done there? A. McMahon occupied both of those.

Q. Did he ever have possession of what is called the O'Donnell shop, in Morris street? A. Oh, yes, I remember now, Matthiessen had a shop there.

20 Q. You spoke of Matthiessen being aware of McMahon's condition—what do you mean by his being aware of his condition? A. He was satisfied the man was—[interrupted.]

Q. Did he know as much about it as you? A. I kept him posted pretty well, as far as I knew myself.

Q. Did you tell Matthiessen on the 23d, when the first power of attorney was executed, when you agreed to let him have these goods, did you tell him that he was unfit to carry out such a transaction? A. No, sir.

Q. Did McMahon look as if he was fit on the 21st, 22d, and 23d? A. Yes.

30 Q. He was at Dr. Hammond's on the 23d, wasn't he? A. No, sir.

Q. On the 22d? A. I forget—either the 21st or the 22d.

Q. On the 23d of December, didn't Matthiessen pay him \$4,000? A. Yes.

Q. [Showing witness paper]—There is an order for it? A. Yes.

40 Q. Now, I want you to tell the jury what you mean by saying that Matthiessen was aware of his condition? A. Matthiessen expressed to me that he doubted the validity of that power of attorney, and I thought Matthiessen thought he was not competent to sign it at that time.

Q. You thought so because he said that he was not competent to sign it? A. Yes.

Q. Don't you know that Matthiessen had a different idea? A. Yes, sir.

Q. You thought it was invalid? A. Yes.

Q. Why? A. Because it was not signed right.

Q. Could not Matthiessen have thought so—that it was

invalid, and yet not think he was unfit to do business? *A.* I don't know what his ideas were about it, but he said that to me.

Q. All he said was that the power of attorney was not valid? *A.* Yes; he thought the man was not competent to make it.

Q. Did he say that to you? *A.* Yes; indirectly.

Q. How did he say that indirectly? *A.* He referred to it and said he would like it to have been done long before, when he had better sense—better able to do it; he was sorry it was 10 not done long before.

Q. Do you recollect when that second power was executed on the 26th of December? *A.* Yes.

Q. Do you recollect of that power being read to McMahon? *A.* Yes.

Q. Was he not asked whether he understood it or not? *A.* Yes.

Q. What did he answer? *A.* He answered, he did.

Q. Didn't he answer more than that? *A.* Not that I heard. 20

Q. Didn't he say, "Yes; it is to give Shanly the power to do my business for me?" *A.* I don't remember any of those words.

Q. Well, words very near them—didn't he say more than "I do?" *A.* I suppose he did.

Q. What did he say? *A.* I don't remember the exact words; he understood it for the moment, I suppose.

Q. Then you think he forgot it? *A.* Yes.

Q. Did you ever find any evidence from that time to the day of his death that he had forgotten? *A.* He forgot it 30 before we left the house. He thought it was a contract.

Q. Why do you say that? *A.* Because it is true.

Q. Because he asked you if it was not a little early to make contracts? *A.* Yes.

Q. And that is the reason you think he thought it was a contract? *A.* Yes.

Q. That is the only reason you have for thinking he thought it was a contract? *A.* Yes.

Q. You spoke of his being violent some day; what day was that when you sent for this man Wynn? *A.* I don't 40 remember the exact day; I should say it was before New Year's—between Christmas and New Year's.

Q. Can you give us any nearer than that? *A.* No, sir.

Q. Did you know his wife? *A.* Yes.

Q. Did she send for you? *A.* Yes; I saw the wife, and she said she was afraid of him.

Q. Did you see him violent to her that day? *A.* No, sir; I only know from what she told me.

Q. Didn't you know that that woman was under treatment of Dr. Hammond for a long time for disease of the brain?
A. Not for the disease of the brain; I know she had apoplectic fits.

Q. Don't you know that he had been in the habit of taking her from time to time to Dr. Hammond's? *A.* Yes.

Q. Don't you know that she used to threaten to drown herself? *A.* No, sir.

Q. Wasn't she melancholy? *A.* No, sir; always very cheerful.

[Deft's Counsel]—I want you to produce those accounts.

Re-examined by Mr. Linn.

Q. You said that from the 1st of January, or about that time, Matthiessen took charge of the business and paid the hands; did he pay you? *A.* No, sir.

Q. Why not? *A.* I don't know; he sent me to Mr. Weart to get paid, and Mr. Weart sent me back to Matthiessen.

Q. Up to what time did you stay there? *A.* Till about the 15th of March.

Q. And never had your pay after McMahan's death? *A.* No, sir.

Q. Did the estate of McMahan's profit anything by that business carried on by Matthiessen. It has been suggested that he took charge of that business for the benefit of McMahan's estate—did the estate profit by that business whatever? *A.* No, sir.

Q. Was McMahan brought into embarrassment by overdrafts of yours on your account or moneys paid to you—was that the reason of McMahan getting into pecuniary embarrassments? *A.* I had no money of his after December 23d.

Q. Did you ever have any money of his that he didn't know about? *A.* No, sir.

Q. This money that Matthiessen paid to McMahan in the month of December, what was it paid for? *A.* To meet the general expenses of the establishment.

Q. Were they not supplying him with goods all the time? *A.* Yes.

Q. He got all the goods that he had from McMahan all the time? *A.* Yes, and paid money in advance.

Q. And during that time was not a negotiation going on for the loan of money for a mortgage? *A.* Yes.

Q. When did that negotiation fail? *A.* On the 1st of January, I believe; McMahan was not competent to sign the mortgages according to what the Doctor said on the 1st.

Q. [By Mr. Gilchrist]—From what date is it that you wish to be understood that McMahan was so that he had no lucid interval? *A.* From a few days before New Year's, not after New Year's; certainly.

Fredrick Gaffney, recalled—
Cross-examination continued.

Q. Give us the dates of all the purchases from O'Neill by McMahon? A. August 20th, 1871, \$162.81; September 30th, \$939.46; November 18th, \$160.92; December 12th, \$457.44.

Q. What was that for? A. Three inch pine and four inch timber; tank timber; January, 1872, \$6.07.

Q. Was there any sale by him after the 12th December, between that and January, of anything? A. Nothing between December 12th and January. 10

Q. Are those the dates of the delivery or the dates the goods were ordered? A. The dates of delivery—supposed to be.

[Mr. Linn]—I show him a claim presented to me.

[Witness]—That is the total amount of the bill rendered Mr. Weart, \$3,540.23.

Q. How much is the timber? A. About \$1,800.

John Croak, recalled by plaintiff—

Q. Do you recollect having any conversation with McMahon about this lot of old hoop iron that was spoken of by Shanly? A. Yes. 20

Q. When was it? A. Some time in November or December.

Q. State what passed between you about it? A. He came out and said there was a lot of iron out there; came into the shop where I was to work, and he says, "Shanly don't know how to make it up—don't know how much it amounts to;" says I, "how many pounds of iron is there?" he told me how many pounds there was, and I reckoned it up, and it amounted to \$700 or \$800, and he turned around and said, "you are both damn fools," and he walked off. 30

Thomas F. Wynne, for plaintiff, sworn, testifies as follows—
Direct-examination by Mr. Linn.

Q. Was you acquainted with Bernard McMahon, deceased, in his lifetime? A. Yes, sir.

Q. Do you recollect being sent to stay with him one day by Shanly? A. Yes, sir.

Q. When was that? A. Between Christmas and New Year's, 1871.

Q. What was his condition that day, and what did he do? A. He was very wild; he would get up and make motions, and go around the house and get his hat to go out, and put on a big coat, and we tried to pacify him; the door was locked, 40

and as soon as we would get him pacified he would sit down and kind of go off into a sleep, and jump up, and wake up, and get his hat and big coat, and want to go out again, right or wrong, so we had to get hold of him to keep him from going out; he used to say, "there goes one of the trucks out on the street, and I wonder what he is doing," and there would be nothing passing.

Q. Did he take hold of you—use any force or violence? A. He took hold of me once by the arm, because I would not let
10 him go out; he handled me very rough—he pitched me pretty rough.

Q. How long was you with him there? A. From about eleven o'clock till four.

Q. Did he make any threats against anybody? A. No, sir.

Cross-examination.

Q. How long have you known McMahan? A. About ten
20 years, I think.

Q. He was a pretty brisk fellow, wasn't he? A. Rather a brisk kind of a lad.

Q. And he talked a little big, didn't he? A. I couldn't say that.

Q. He was doing a pretty successful business, wasn't he? A. He never said it to me.

Q. He used to drink a little? A. Not to my knowledge; I never saw it on him.

Q. What was your business; were you connected with him in any way? A. No, sir.

30 Q. How came Shanly to call for you? A. Because I was taking care of a team of horses for McMahan in his stable.

Q. Do you mean to say you never saw McMahan at all under liquor? A. Yes.

Q. You were in his employ? A. Yes, for two months.

Q. And you never saw him so that he appeared to be in liquor? A. No, sir.

Thomas Gannon, for plaintiff sworn, testifies as follows:

Direct examination by Mr. Linn.

40 Q. Were you acquainted with McMahan in his lifetime? A. Yes.

Q. Where do you reside? A. I live at 14 Grand street, about three blocks from where he lived.

Q. Were the families acquainted? A. Yes.

Q. You did business with him? A. Yes.

Q. Did you endorse his paper? A. Yes.

Q. What was his condition for three or four weeks prior to his death? A. Along in the latter part of November or 1st

of December—either the last week in November or first week in December—I first noticed McMahon; I thought he was a little flighty; he came to me one day in my shop and took me by the shoulder, and says: “Gannon, I am all right;” says I, “what’s the matter?” “Come here,” he says, “I will treat to a small bottle of wine; Matthiessen has agreed to pay me for the barrels that cost me eighty-three cents, and I have been putting them in for forty-three cents;” says he, “Matthiessen is a splendid man,” and I thought the man must be crazy; I didn’t think Matthiessen was made of that kind of 10 stuff.

Q. Did you see his property being removed? A. Yes; the 1st of January was the first I noticed it.

Q. What was being done there? A. They had trucks; my attention was first called to it; I saw Matthiessen’s carmen carting barrels and storing them away, and they had them stacked up on rounds and carts, and there was women and children watching that day to see them working there on that general holiday. I knew the new house was stopped for repairs, and I knewed that McMahon owed me money, and I 20 went to Shanly’s house to find out the cause of it; I had an intimation that McMahon was laid up, and, in fact, dead to the world, and I went to Shanly’s house and protested against this Sugar-House Company taking this stock away; and I says, “You know McMahon owes me money and it is loaned money;” says I, “you know I can’t wait a year or so for my money;” says I, “Shanly, if you don’t assure me now that these goods will be made good, then I will have to get an injunction suit out before to morrow morning to prevent the sugar-house from removing these things.” Shanly says, “I 30 know that will be all right; Matthiessen has promised me the business shall go on;” the day after New Year’s I went down again and saw Shanly, and I met Matthiessen, and I mentioned something about it to Matthiessen; I don’t recollect what he said to me; but we walked up the street to Dr. Varick’s, and Matthiessen asked him something about McMahon; says he, “McMahon is virtually dead;” this was the day after New Year’s; that confirmed me that they wanted to get all these goods and leave the rest of the creditors out in the cold; Shanly assured me that Matthiessen 40 promised him—[interrupted].

Q. Was you present at this meeting of creditors in Vredenburg’s office? A. Yes.

Q. Were you satisfied with the exhibit made? A. No, sir; I knowed it was a bogus one.

Cross-examination by Mr. Gilchrist.

Q. You feel a considerable interest in the result of this suit?

A. I don't know why I should not feel a little interest—why not?

Q. You are a creditor of McMahan? A. Yes.

Q. And you expect to get part of it if a recovery is had here? A. That is very reasonable, indeed.

Q. You have given as a reason why you thought he was a little flighty, was something he said to you about Matthiessen having agreed to pay him something for barrels? A. Yes.

Q. Wasn't he making a claim on Matthiessen for some barrels at seventy-three cents? A. I don't know.

Q. Didn't he tell you so? A. I don't recollect; I guess the only thing I recollect is this particular time.

Q. But you gave as a reason why you thought he was flighty, because Matthiessen was going to pay him seventy-three cents for barrels? A. Yes.

Q. I want to know if there had been, in point of fact, a claim by McMahan upon Matthiessen for barrels at that rate, because of a strike, or something with the men? A. That was in April previous to that; McMahan told me then.

20 Q. Wasn't that the claim that he spoke of? A. No, sir.

Q. Did you ever know of any other reason? A. Yes; in April previous to that, when the men struck, he told him to set the men to work, and he would pay the advance; this was in April, previous.

Q. Don't you recollect any such claim on the part of McMahan, against Matthiessen for more than the price that he had agreed to furnish the barrels for—a pre-existing claim previous to the time he spoke to you? A. Nothing more than I have just told you, that when his men struck in April, and when his men went to work again, he said Matthiessen agreed to pay him the advances what he had to pay the men; and this time when he came to me, at my shop, the latter part of November, or the first week in December, then he spoke about his going to give an advance on the barrels.

Q. Hadn't you heard McMahan before that saying he was entitled to some claim upon Matthiessen, because of a rise in the price of barrels? A. Not that I recollect of.

Q. You know that he had a contract with Matthiessen? A. I do not.

40 *Kenneth Dingwell*, for plaintiff, sworn, testified as follows:
Direct-examination by Mr. Linn.

Q. Were you acquainted with Bernard McMahan during his lifetime? A. Yes.

Q. Did you see him in December, prior to his death? A. Yes.

Q. Where? A. I saw him in different places on different occasions.

Q. Were you well acquainted with him? A. For six months before his death I was.

Q. Did you observe anything strange or peculiar in his conduct? A. Yes; about the latter part of November, when I was finishing up his work, I got annoyed at the way he carried on about the work. I had to hurry up to get away from him; changing his mind two or three times a day about the work. He had a stable of mine there, and his brother Patrick and he used to tell me one thing, and then he would come around and tell me another way, and when I would come and ask him about it he would deny it. He kept bothering me so, when I would do one thing the next day he would have it altered, and he would deny that he told me to do that way. I made up my mind I would get rid of him one way or another; I saw he was getting quite, as I thought, out of his mind, or something like that; he was very changeable in his ways and actions; what he said just now he would contradict it to me in the afternoon. I commenced working there on the 30th of October and finished up the latter part of November. I started on a cooper shop 20 by a 100; he only gave me a week to do it in; he said that he couldn't have his men idle, and he would only give me a short time to do it in. I put it right through for him. That was the 1st of January. I think I was about nine or ten days altogether around the job. He appeared to be very sensible then. The next thing I done I built a stable for him on Washington street, and it is then I commenced to notice he was getting so fidgety and changeable. I could not make anything, one thing or another, out of him; in fact, two of the men left on that account. I went to him three times and asked him what he was interfering with my men for; he said he didn't talk to them at all; says I, "If you have anything to say, say it to me;" then he would deny it and beg my pardon, but I saw there was no use talking to him. I didn't believe he was regular. About the 20th December I was finished up with the work, and about a week before that I went down to collect the balance of my bill, and he asked me the amount twice in one day, and he took me around twice to see his team of horses; these horses I had seen every day; he talked very much at random that day. I made up my mind he was not fit to be going round. I went into the office one day and I asked if there was any stamps, and I told Shanly I don't know what is the matter with him. Says I, "He is completely out of his mind;" that was the last time I saw him. I went down about Christmas time or a day or so after, and I wanted to see him pretty bad; I couldn't see him; they told me he was locked up in his house.

Cross-examination.

Q. How late did you work for him? *A.* I finished the principal part of the work the latter part of November; I had a man working there for four days somewheres about the 7th, 8th or 9th of December. I put a story in his cooper shop—raised it up—the shop in Morris street.

Q. Does he owe you anything? *A.* Yes, 900 and odd dollars; I took a note from him.

Q. When did you take that note? *A.* November 23d.

10 *Q.* If you thought he was out of his mind that time, what did you take a note for? *A.* It was the latter part of November, and the beginning of December I found out he was troublesome, and I didn't think he was right; I took the note November 23d.

Q. What made you do work for him after he was not right? *A.* I wanted to finish the work.

Q. Didn't you feel a little afraid you wouldn't get your money from a crazy man? *A.* I did.

20 *Q.* Have you built houses, and stables, and shops for other people? *A.* Yes.

A. Don't you find them most always changing their minds? *A.* Yes; but not like him.

Jacob Weart, for plaintiff, sworn, testifies as follows—

Direct examination—

I am the administrator of the estate of Bernard McMahon; I took out letters on the 1st of February, 1872; McMahon was a stranger to me; I never saw him in my life to know him; I made an inventory of this estate; I didn't inventory
30 any of this property, because I had understood from Matthiessen that it had been transferred to him, and also by Mr. Shanly.

Q. [By Mr. Gilchrist]—You understood it from Shanly and Matthiessen, both? *A.* Yes; some of the creditors wanted me to inventory the barrel property; I said I should not make myself liable for this barrel property by putting it into the inventory; if they wanted to pursue this property, it must be by their orders; and the thing didn't take definite
40 July, 1873; and at that time the creditors had a meeting, and ordered me to bring this suit, and the action was brought.

Q. What was the condition of the estate? *A.* The estate, I think, as it stands now, will strike a dividend—[interrupted by objection.]

[The court]—I admit it; the defendants are allowed an exception.

[Witness]—And the estate is insolvent, and would strike a dividend of about twenty per cent.; at the time I took charge of it, the estate was represented to me by Shanly and others

to be solvent, that McMahan was a rich man, and it was under those representations that I was induced to take charge of the settlement of this estate; this list of assets and liabilities was submitted to me; that showed the estate to be solvent, with a surplus of thirty odd thousand dollars; the real estate which was inventoried here to be worth over \$80,000, actually sold for about \$40,000.

Q. Did the estate receive anything from Matthiessen for the use of the property—trucks and horses—between January 1st and March 14th? [Question objected to—overruled.] 10

[Witness]—I don't think Mr. Matthiessen has ever presented any claim as a creditor—if he has, it has passed my attention, or my recollection—I think he has not.

[By the court]—Was there a rule to limit creditors? A. My impression is now, about a rule to limit creditors, that I advertised nine months—all persons to fetch in their claims; and I think I took no rule to bar creditors, because I thought there was a contingency where Matthiessen might want to put in a claim, and I didn't want to bar him, therefore, I have taken no rule to bar creditors; my understanding now is, that Matthiessen can now present his claim, if he thinks it advisable to do so; I merely took a rule for all creditors to present their claims within nine months; afterwards, at November Term, 1872, I took a rule to bar all creditors who had not presented their claims, as I find upon an examination of the minutes of the Orphans Court. 20

Cross-examination.

Q. Have you the inventory? A. No; it is on the file, down stairs. 20

Q. You said the inventory footed up \$80,000? A. That is the inventory that Shanly had.

Q. What was your inventory? A. I think some \$10,000; that was for the personal estate.

Q. Was not there a good reason for everybody thinking that estate was solvent? A. I think there was, till I looked into it a little, and I told everybody that spoke to me about it that it was insolvent; I thought myself, when I took out letters, that it was solvent.

Q. Didn't it arise from the depreciation of real estate? A. I think it arose in the first place from over valuation of real estate. 40

Q. How many lots did he have? A. He had thirty or forty meadow lots on Grand street; then he had a big cooper shop beyond that that cost some \$13,000, it was said; he had eight lots in front of the cooper shop; he had a cooper shop in Essex street, and the balance of his shops was on leased property. He was a large real estate owner, held real estate

which was largely encumbered by mortgages and taxes and assessments—matters of that kind; I think the face of the mortgages was \$25,000. I sold out all the personal property. I think I held the business for a short time and let Shanly see whether a combination could not be made to have it sold for a going concern. I had the property appraised in that way. I took George McLaughlin, who is a cooper, to make a valuation of the cooperage, and I took Sheriff Merselles, who was a horseman, to appraise the horses; and when I sold I think it

10 about came up to the appraisement.

Adjourned for the day.

[Mr. Linn.]—Before proceeding further in this matter, I would make application to the court to amend the declaration so as to include the staves which have been spoken of here, and which were taken from lighter, and which are not included in the declaration. And also, in another particular, that is, to add another count, alleging a conversion of the lumber after the death of the intestate.

20 [Mr. Gilchrist]—I have objections to the last request, but as to the staves, we were told not to investigate it, and now to go into it will keep this case hanging on two or three days longer.

[The Court]—There is no suggestion that an amendment as to the staves would be a surprise to the defendants; I will allow the amendment; the consideration that it will take more time is not a matter to be considered.

[Mr. Gilchrist]—We will consent to it.

30 *James B. Vredenburg*, sworn for plaintiff, testified as follows:

Direct examination by Mr. Linn.

Q. Were you present at the execution of a power of attorney executed by Bernard McMahon to Michael Shanly? A. I think I was, sir.

Q. Do you recollect when that was? A. I do not.

Q. Where was it? A. I think it was in Mr. McMahon's house.

40 Q. What year was it; how long prior to his death? A. From other data I think it was in December, 1871; it was in the front room of the basement.

Q. Who was present besides yourself? A. I don't know, really, that any one was present besides myself, although I have been informed since, that Mr. Matthiessen was present and Mr. Shanly, both, but I don't recollect it.

Q. Were you present at the execution of any other power of attorney but that one? A. No, sir; never.

Q. Do you know what became of that power of attorney?

A. After it was executed I delivered it to Mr. Shanly; I only know what became of it afterwards by what Mr. Shanly told me.

Q. Do you know whether there was another power of attorney executed? A. I was told so by Mr. Shanly, and, I think, also by Mr. Matthiessen.

Q. Why did Mr. Matthiessen say a second was executed? A. I don't know why he said so.

Q. He didn't tell you why he wanted a second executed?

A. I don't think he did; I don't know whether he did or not. 10

Q. Did you witness the first power of attorney? A. I feel confident I did; I didn't sign it as witness.

Q. [Showing witness paper]—Is that the power of attorney which you saw executed? A. No, sir; it is not; I didn't see that one executed.

Q. By whom was that filled up? A. That's filled up by Jacob Brinkerhoff, who was then a clerk in my office.

Q. Did you talk with McMahan much at the time of the execution of the power of attorney which you witnessed? A. I don't recollect. 20

Q. Do you recollect anything that was said at the time of the execution? A. I can't say that I do; I should say this, that I have a distinct recollection of an interview with McMahan, and I had supposed, till I heard the testimony in this suit, that the interview I had with him was the interview at which he signed the power of attorney, but since I have heard the testimony in the suit, I have made up my mind that the execution of the power of attorney was subsequent to the interview I had with McMahan.

Q. You mean the power that was executed in your presence? 30

A. Yes; was subsequent to this interview; the interview I have a distinct recollection of was, I went down to see him, to see whether it was his idea that the power of attorney should be executed, as Shanly told me should be executed; the power of attorney, if it was not executed at that time, was made that day, subsequent.

Q. Do you know that he was, at that time, endeavoring to raise some money on bond and mortgage? A. I heard so; yes.

Q. Did you have anything to do with it? A. Nothing 40 more than I saw Mr. A. K. Brown about it; he was the attorney of the parties lending the money, and I saw him about it, to urge him to expedite matters as much as possible.

Q. What was the cause of being anxious to expedite? A. The creditors of McMahan; I can't say surely that that was the reason; I don't recollect that that was the reason, except I judge that was the reason now; that the creditors of McMahan—[interrupted by defendants' counsel objecting.]

Q. Were you in correspondence with Mr. Matthiessen in reference to that loan? A. I don't know that I was.

Q. [Showing witness letter]—Look at that letter—is that a letter addressed to Mr. Matthiessen by you? A. Yes, it is; that's in my handwriting; I don't know whether I ever sent it.

Q. Do you recollect writing it? A. I don't.

Q. Do you know what was the contents—what was inclosed in this letter?

10 [Mr. Gilchrist]—We object to it as immaterial, unless it be shown that that letter got to us. We have no recollection of ever receiving it, the witness don't recollect of ever sending it, we don't produce it, they do.

[The court]—What is the object?

[Mr. Linn]—We propose to show that Mr. Matthiessen was in correspondence with Mr. Vredenburg in reference to the loan of this money which McMahan expected to obtain on bond and mortgage, with a view of paying Matthiessen's claims against him up to as late as the 4th of January, and
20 we propose to show by this witness that this letter and this bond and mortgage was in Mr. Matthiessen's possession, and was obtained from Mr. Matthiessen.

[The court]—Do you propose to show that it came from the possession of Mr. Matthiessen?

[Mr. Linn]—Yes.

[The court]—It is competent if it is followed up.

Q. Do you recollect what was inclosed in that letter? A. No, sir.

Q. You don't recollect whether you sent it to Matthiessen
30 or not? A. I do not.

Q. [By court]—Have you any impression about it? A. I have not; except from reading—I gather an impression from reading it.

Cross-examined.

Q. You were on intimate terms with McMahan? A. Yes, sir.

Q. You was his adviser? A. Yes; and had been since '67.

Q. He had quite an important law suit in your hands? A.
40 Yes, sir.

Q. And, if I understand you, Shanly applied to you to have a power of attorney drawn to that effect? [Handing witness power of attorney.] A. Yes; that's my recollection.

Q. And you say you wished to see McMahan, himself, about whether he wished such a power drawn? A. Yes, sir.

Q. And you had an interview with him on that subject? A. Yes, sir.

Q. And after that interview you drew the power of attor-

ney that you witnessed? *A.* Yes, sir; I say I thought I had executed it at this same interview, but I now conclude, from this testimony, that I drew it after that interview; I don't recollect the fact that I drew it after that interview, I only conclude so.

Q. It was either right after that interview or the same day of that interview? *A.* Yes, sir.

Q. Tell us what your idea was in consulting McMahan—you wanted to see him to know from his own lips whether he wished that thing done? *A.* I can't recollect what my idea was; I suppose my idea was the power of attorney was a pretty important one, and I wanted to see McMahan before I drew it up. 10

Q. Was your interview with him of such a character as led you to think it proper to draw that power that you did draw? *A.* It must have been so from the fact that I drew it—I don't recollect.

Q. Tell us what that interview was? *A.* I went there with Shanly; we went down in the basement door; we were let in by Mrs. Staff, his mother-in-law; McMahan was sitting by the window, dressed, with the exception of a coat, and in place of a coat he had a fur gown on; and I sat down with him, and Shanly went out; we talked there some little time about different things, and about this—about the execution of this power; I remember he told me he thought of going to Europe, he had been recommended to go to Europe, or to take a sea voyage, and he proposed going to Europe. 20

Q. He was an Irishman? *A.* Yes; he was going home to the old country on a visit; and I remember that he started this idea, whether or not if Shanly was trusted with the whole business, whether he could get it back again when he come back; we consulted about that and finally he determined to execute this power. 30

Q. Do you recollect whether you had the paper, itself, with you or not? *A.* I don't recollect.

Q. Did you state to him the fair purport of that paper? *A.* I suppose I must have done so, but I don't recollect it.

Q. Would it be in the ordinary course of your way of doing business? *A.* Yes, sir.

Q. You haven't spoken of the time of the execution of this power of attorney; can you tell how long intervened between the draft of the two powers of attorney? *A.* I think it was at least six to ten days. 40

Q. So that if this power of attorney was executed on the 26th, the former one must have been on the 20th or 16th? *A.* Yes, sir.

Q. Did you hear during this time from Shanly anything as to what had been done with relation to the goods, the barrels

of Mr. Mahon; did you hear from Shanly or McMahan whether any disposition had been made of the barrels of McMahan, and the other things? *A.* I certainly didn't hear from McMahan anything about the disposition of the barrels, that is, I have no recollection of hearing of it; I have an impression that Shanly told me that the barrels were being delivered to Matthiessen, or that Matthiessen was taking them, I don't know which.

10 *Q.* What was said as to when the arrangement was made for the taking of the barrels with reference to the time of the execution of the power of attorney? *A.* I don't recollect.

Q. What is your impression as to the time of the arrangement for the taking, as to when that arrangement was made; what impression did Shanly give you as to the time when that arrangement was made, whether before or after the execution of the power of attorney you have spoken of? *A.* I have no recollection of that now.

20 *Q.* Did you learn from Shanly whether or not he had transferred these things to Matthiessen? *A.* I certainly learned from Shanly that these things had been transferred to Matthiessen.

Q. What I want to know is, whether the time of the transfer that he spoke to you of was a time prior to the power of attorney? *A.* I don't recollect it.

Q. Was it about the time that the power of attorney was given which you witnessed? *A.* I don't recollect that.

30 *Q.* Have you no impression on your mind as to the execution of a bill of sale by Shanly, or a transfer by Shanly of these things? *A.* When I was first spoken to about this matter I was then in doubt whether it was a bill of sale or a power of attorney that I witnessed; I was in doubt about it, but I am satisfied now from the evidence that it was a power of attorney.

Q. Was the power of attorney that was executed in your presence like this? *A.* Yes, I believe this to be a copy in the essential parts.

Q. Where did you get this impression on your mind of a bill of sale being executed? *A.* I don't know where I got it.

40 *Q.* Did you have on your mind that there had been a sale of those things? *A.* I can't say.

44 *Q.* You gave that power of attorney that was executed in your presence to Shanly? *A.* Yes.

Q. And you only know what became of it by what Shanly told you? *A.* By what Shanly told me.

Q. How many powers of attorney did you charge McMahan for drawing? *A.* I didn't charge him for drawing any.

Q. Haven't you a memorandum of the draft of three; haven't you a memorandum that three were drawn in your office?

A. If I have I don't recollect it now; my recollection is there were three drawn; you were asking me about memorandum.

Q. Were they all alike? A. They were all like the first one; I will state why I think there were three; the first one was the one witnessed by me, and the one that was destroyed; the second was one which was witnessed by Mr. Matthiessen, and had no seal to it, subsequently there was a third one drawn; this here is perhaps the second one.

Q. Do you know whether that was executed or not? A. I don't know.

Q. Wasn't there one of those powers of attorney to execute a mortgage? A. I don't recollect that. 10

Q. [By Mr. Linn]—Did you have this bond and mortgage in your possession? A. Not that I recollect of.

Michael Shanly, recalled by plaintiff—

Q. [Showing witness letter]—Did you give that letter to Mr. Weart? A. Yes.

Q. Where did you get it from? A. I got it from Mr. Matthiessen.

Q. When? A. I should say the same day of the date. 20

Q. Did you have this bond and mortgage in your possession? A. I did.

Q. Did you give it to Mr. Weart? A. I did.

Q. Where did you get it from? A. I don't know whether I got it from Mr. Matthiessen or Mr. Brown; I rather think both of those documents were together, the letter, and the bond and mortgage.

Cross-examination.

Q. Where did you say you got this letter from, Mr. Matthiessen? A. Down in his office. 30

Q. Which office? A. The new sugar house office.

Q. How came you to get it? A. I don't know. I went in there on other business. He handed me that letter; he said that he had got that and spoke about the mortgage.

Q. How did you receive it from him—open? A. Open.

Q. Where were these papers? A. I rather think they were there.

Q. Did you see any envelope in which these papers had come? A. Yes.

Q. Was that handed to you at the same time? A. I don't know; I think the letter was handed openly, but whether I got the papers at that time I can't say positive. 40

Q. Who took these letters and papers to Matthiessen? A. I don't know.

Q. When was it you got them from Matthiessen? A. The same day, or it might be the next morning, but not later than

the next morning after the date that is at the head of that letter, or the same day.

Q. You saw Matthiessen in the sugar house office, and you think he handed you this letter open, and you think at the same time you got these? *A.* Yes.

Q. Did you see an envelope in which they came? *A.* No, sir; I don't remember about an envelope. I didn't mean to say that I saw the envelope.

Q. What was the date of that letter, according to your recollection? *A.* It must have been a day or two after the 1st of January; somewhere in that neighborhood, anyhow.

Q. I asked you yesterday to produce here the accounts that you said you had made out; what were those accounts I asked you to produce? *A.* You gave me a memorandum of them; the account of what was due from Matthiessen & Co., or to Matthiessen & Co.; account of the barrels on hand December 26; account of my own pay; account of barrels delivered from December 26 to January 6, on reduction of debt.

Q. These accounts you said you had? *A.* I said I thought I had.

Q. You had made them out at one time? *A.* Yes.

Q. Where do you say they are if they are in existence? *A.* I think they should be in Mr. Weart's office, or in my own house.

Q. What efforts have you made to get these accounts? *A.* I tried to get into Mr. Weart's office about six o'clock last evening.

Q. That is, just a little after he closed? *A.* I didn't know. I thought somebody might be in the office.

Q. Is that all you have done? *A.* I have searched in my own house about an hour last night, but I got sleepy and went to bed. I haven't made any exertions this morning.

Q. What time did you go to Mr. Weart's office? *A.* I should say it was between six and half-past; I didn't take the time exactly.

Q. Where did you go from here when you left here? *A.* Gannon and I and Wynne and another party walked down the whole way; we stepped in two or three places; we met a party in the street and we stood there for half an hour; then we went down to Mr. Weart's office.

Q. That's all the efforts you have made to get these accounts? *A.* That's the effort. I may get them yet. I will make further effort.

Q. [By the court]—Are those accounts that you speak of transcribed on papers or on books? *A.* They are on papers.

Q. Did you ever balance your books? *A.* Yes; at the end of every year.

Q. Could you balance your books without those accounts?
A. No, sir.

Q. Why don't the books show it then? A. The last year they were not balanced; it is the only year they were neglected. I was very busy at the time. I had no time to balance them.

Q. Did you have an account of the amount of barrels received and sent out—did you ever balance that account in 1871 or 1872? A. That was not the usage to take the barrels in that way—the number that came in and went out; it was so easy to count them, that at any time I wanted the stock, I could get it in a day in every shop. 10

Q. So that you never did make a calculation from the books of the barrels received and a calculation of the barrels delivered to verify the account? A. No, sir; it was too troublesome.

Q. You didn't do it at the time of the transfer? A. No, sir.

Re-direct examination.

20

Q. If you ever have had any such account as you speak of were they taken from these books? A. Certainly.

Q. These books contain everything? A. Yes.

Q. These books contain an account of the barrels delivered?
A. Yes.

Q. Contain everything but the lumber and the staves? A. Yes.

Q. I find in this long book, under date of January 3d, "Golden staves," a large number; were those staves taken from the lighter up to the sugar-house? A. I don't remember whether they were taken to the sugar-house or to the shop. 30

Q. Did the Sugar-House Company get these staves? A. They got them worked in barrels after.

Q. Here, under date of January 3d, "Clark's staves," a large number; what kind of staves were these? A. I am almost satisfied—at least I am entirely satisfied—they were molasses barrel staves; they came from either Briggs or Robinson, New York.

Q. Do you know whose carter Golden was? A. He was 40
McMahon's.

Q. Whose was Clark? A. McMahon's.

Q. Lynch? A. McMahon's.

Q. Lamb? A. McMahon's.

Re-cross-examination.

Q. These staves you say came from these lighters, and

Matthiessen didn't get them as staves, but they came to him in the form of barrels? *A.* Yes, I think so.

Q. And of course they came to him in the form of barrels sometime after the 3d of January? *A.* Yes.

Q. That is, they must have been made into the barrels? *A.* Yes.

Q. Who paid for making them into barrels? *A.* After the 1st of January, all the wages for labor was paid by Matthiessen.

10 *Q.* Then didn't you send bills to Matthiessen for those as barrels outside of all that was delivered prior to the 6th of January? *A.* I don't understand that question.

Q. These goods, weren't they billed—these barrels made of these staves—weren't they billed to Matthiessen by you after the 6th of January? *A.* There wasn't any bill, to my recollection, sent to Matthiessen after the 31st of December.

Q. Wasn't there an account kept of everything that he received after the 6th of January? *A.* Certainly.

20 *Q.* And credits given by him for the receipt of them? *A.* There was no money received from him for them, of course he paid for the material; he paid for the labor and he run the business himself.

Q. In the account of the barrels sent down about the 6th of January, didn't you include these very barrels made of these very staves? *A.* I suppose I did.

30 *Q.* And they were accounted for after the 6th of January by the business carried on after the 6th of January? *A.* I don't remember how that was; I had an idea at one time that those staves went to the sugar-house, but then I am satisfied that the sugar-house had no way to work them on their premises, and they had to come to the shops; of course they were all made into barrels and sent down to the sugar house.

Q. [By the court]—When did you say these staves came there?

[*Mr. Linn*]—They are on the book on the 3d.

40 [*Mr. Linn*]—These staves came from Robertson and were taken from the lighter directly, either to the sugar-house or the shops; Robertson has never been paid for them; Matthiessen has never paid for them, unless he has paid Shanly. [*Mr. Gilchrist*]—He said that all the material was paid for after the 1st of January.

[*Witness*]—I didn't mean to say that—I know these staves had not been paid for.

Q. You said everything after the 1st of January? *A.* Wages and labor were paid by him after the 1st; then I understood you to ask the question, whether it was after the 6th the material was paid for, I know I never said it, because these staves have never been paid for.

Q. How do you know? *A.* I expect that Mr. Weart would not make a preferred creditor of Robertson & Co., before he would pay anybody else.

Q. [By Mr. Linn]—What were those staves worth by the thousand? *A.* I think somewhere about \$45 or \$50 a thousand.

Q. In the statement which you gave to Mr. Linn, didn't you put in all these staves as part of the barrels here? *A.* Of course they were all worked into barrels.

Q. Didn't you charge them as barrels, here? *A.* I suppose so. 10

Re-examined by Mr. Linn.

Q. How long would it take to work 10,000 staves into barrels? *A.* It is according to the number of men employed.

Q. By the number of men employed there? *A.* I should say it would take a week, anyhow.

Q. If these staves were taken from the lighter on the 3d of January, and the barrels that Matthiessen took under this arrangement were all delivered by the 6th, could those staves have been charged in these barrels? *A.* No, sir—of course 20 not.

Q. So far as you know, Robertson has never been paid for those staves? *A.* Never.

Q. So far as you know, Matthiessen has never been paid for them? *A.* Never, so far as I know.

Q. Who bought those staves—to whom were they billed from Robertson? *A.* They were billed to McMahan.

Q. Where is the bill? *A.* Mr. Weart has it, I suppose. [Mr. Gilchrist]—There is a rule absolute in November, 1872, limiting creditors, and there is a rule subsequent to the 30 rule limiting creditors—nine months afterwards.

[By Mr. Gilchrist]—Didn't McMahan drink from time to time? *A.* Yes.

Q. And sometimes he was a little in liquor? *A.* It took very little to make him so; he was not a heavy drinker.

[Mr. Gilchrist]—Will you try to get those accounts? *A.* I will make further search for them.

[Plaintiff offers in evidence, deposition of Dr. William A. Hammond, and reads it. *Pro ut* the same.] 40

[Plaintiff offers in evidence the letter of January 4th, 1872, from Vredenburgh to Matthiessen.]

[Also offers in evidence, all the books that have been referred to here.]

[It is also understood that the letters of administration are in evidence.]

Michael Shanly, called to be asked a question, which Mr. Gilchrist says he forgot when the witness was on the stand.

Q. What did McMahon think his stammering arose from?
A. He thought, at first, that it was from something in his teeth; he had got a set of false teeth, and he thought it was from some irregularity.

[By Mr. Linn]—What did he think about it afterwards?

A. He didn't think anything about it afterwards; the dentist told him they were regularly set.

10 *William A. Hammond* testified as follows:

1 Q. Where do you reside, and what is your profession?

A. I reside in the city of New York. My profession is that of a physician.

2 Q. How long have you practiced your profession? A. Twenty-six years.

3 Q. Were you acquainted with Bernard McMahon, late of Jersey City, deceased, in his lifetime? A. I was.

4 Q. Was he at any time under your medical treatment, and if so from what time to what time? A. He was; from 20 22d of December, 1871, to the 8th of January, 1872.

5 Q. How often did you see him during that time? A. Four times. It was five times.

6 Q. What was his disease and did it affect his mind? A. He had acute softening of the brain; it impaired the integrity of his mind.

7 Q. What was his mental condition from the 22d December, 1871, to the 8th of January, 1872? A. It was in a condition of gradual dementia, advancing dementia, tending with hallucinations and delusions, paralysis and impairment 30 of the faculty of language and speech.

8 Q. Was he or not during that period, from December 22, 1871, to January 8, 1872, in your opinion in a fit condition, mentally, to make any contract or transact any business? Please give your reasons for your opinion? A. I think he could have done so on the 22d day of December, 1871, but on the 1st day of January, 1872, he could not have done so. On the 22d day of December, 1871, the disease was in its veriest incipency. He was able to come to my house in 34th street, and although his mind exhibited evidences of disorder, 40 yet he was competent then to transact ordinary business, and to converse intelligently with regard to his condition. On the 1st of January, 1872, I went to his house in Jersey City. I saw him again on the 3d and again on the 8th, and at neither of these times was he able to transact ordinary business, or to obtain a correct idea of surrounding circumstances. I did not see him after the 8th January, 1871. I omitted to state that I saw him on the 30th of December, 1872. I have

no distinct recollection of his condition then. His wife was a patient of mine previous, and brought him to me. He had always brought her over, but this time she brought him over. I always thought he was a bright, intelligent and sensible man. I was surprised to find him with brain trouble. It began with wakefulness and defective articulation.

The witness, upon being cross-examined by Hon. Robert Gilchrist, deposes and further says as follows:

1 Q. You see a great many cases of brain troubles? A. Yes, sir; I have seen seventeen cases this morning. 10

2 Q. Many men have brain trouble, and incipient softening of the brain, who are able to attend to their business? A. If you should say ordinary business, I should unqualifiedly say yes.

3 Q. The business that you do not call ordinary would not require long continued mental exertion? A. Yes; and what I mean by ordinary business I mean routine business, which a man has been accustomed to.

4 Q. How many cases have you known, speaking generally, when the softening of the brain continued a year or more without producing dementia or death? A. There are various kinds of the brain softening, simply the result of a certain morbid condition. McMahon died of what is called acute softening, which is rapid in progress, and which, when it terminates fatally, does so in less than a month, and there is another form of softening which is very slow. It occurs in very old people, and which may last for several years. 20

5 Q. Is it common for abstinence from business to arrest the incipient softness of the brain? A. Absence from business and appropriate medical aid may do it. This case of McMahon was acute and incurable. 30

Plaintiff rests.

Mr. Gilchrist opens the defence.

Martin L. Sunderling, for defendant, sworn, testifies as follows:

Direct-examination, by Mr. Gilchrist.

Q. How old are you? A. I don't know; about thirty-six or thirty-seven.

Q. What has been, for the last few years, your connection with the establishment of this company? A. I have been clerk, or, if you please, bookkeeper. 40

Q. Do you recollect the time of the delivery of the goods, that have been spoken of, by McMahon's teams and your own teams? A. I do.

Q. Tell the jury how the whole thing went on, so as to give

the jury all—how the thing commenced, and progressed? *A.* I can't say that I can tell the jury how it commenced.

Q. What was your first knowledge of it? *A.* Of the barrels being brought down to the refineries; they were being put into the different places connected with the establishment.

Q. What places were there of Matthiessen's to receive them? *A.* There is O'Donnell's shop, in Morris street; there is a warehouse connected with the melting pan of the new
10 house, on Essex street, opposite the house where McMahan lived; then there is a warehouse and storehouse, and the old glasshouse, another building on Essex street; there was, at the old house, a storehouse on the wharf, south of the refinery; then there was the warehouse connected with the old house, south of the refinery.

Q. Do you recollect the preparations that were made for the purpose of giving rooms for these things? *A.* The warehouse connected with the melting pan, in the new house, was quite empty; that was a warehouse for the storage of raw
20 sugar—the house on Essex street; I can't speak of its condition; that is, the storehouse and the other building; we had some room in the raw sugar house on the dock, where we put quite a number of them; and those that were put in the old house warehouse would be put in there for the purpose of being filled.

Q. That last would be a place for taking trimmed barrels?
A. Yes.

Q. State what accounts were kept, and by whom made up, and the result of the accounts of the things that were moved?
30 *A.* I kept all those accounts, and know just what we received from McMahan; I didn't know how long I was to keep those accounts, and didn't know exactly what books I should keep them in; therefore, I didn't buy any books for the purpose of keeping them, but kept those accounts on large slips of paper.

Q. Before you go on to that, I will ask you what was the method of your keeping accounts of barrels received at the refinery before these troubles—I mean the barrels received from McMahan? *A.* The driver of every load would bring
40 a receipt with every load, to be signed by us.

Q. When eighty-eight barrels came down to you from McMahan's, the cartmen brought a receipt for you to sign, that you had received eighty-eight barrels? *A.* Yes.

Q. That went into what account? *A.* Into a book where I kept all such accounts.

Q. Then how did you pay for those things? *A.* The bill would be rendered by Mr. Shanly at the end of each month, or as soon after the end of the month as he could get his accounts together.

Q. You had those bills that were rendered by Shanly from month to month for years before? A. Yes.

Q. Did you know the price that Matthiessen was paying for all those things? A. I did.

Q. Tell the jury how many trimmed barrels were received between the 27th of December and the 6th of January, at the refinery? A. I have got them all on a paper somewheres.

Q. [By the Court]—For all the barrels received between the times just mentioned were receipts given, in the usual way, to the carmen? A. For some—not for all. [Looking at paper.] Here is a summary of all the barrels and other stock received from McMahan; they cover the receipts for the delivery into these different places which I have mentioned; I should have mentioned at the time, that these accounts which I have made, that I made a trial balance of all the barrels which were received into that place, and those that were sent into the refinery—those that were sold on the 1st of March—and I found that I was within 411 barrels of the number; I couldn't account for 411 barrels. 10

Q. That is, you had received 411 more barrels than you could find? A. Yes; that run from the 27th of December to the 1st of March. 20

Q. How many barrels would that include—about? A. 70,000 barrels.

Q. And your accounts were so correct that they came out within 411 barrels? A. Yes; and that discrepancy would cover what barrels might be knocked down and spoiled, and, I think, some few went out without an account being given in, and it might account for mistakes in counting.

Q. Go on and tell the jury how many were received of all these things between December 27th and January 6th? A. 14,452 untrimmed sugar barrels, 494 trimmed sugar barrels; this account will not include all received between December 27th, because our books show, and for which Shanly rendered bills on the 31st of December, there were 494 outside of the bill which he rendered on the 31st of December. 30

Q. And how many in that bill of 31st of December were there of trimmed barrels, which were received after the 27th of December? A. 1,460, that was in the old house; we have a supplementary bill, made out by myself, for barrels received in the new house during the same time—I think that is 387. 40

Q. Was that 387 between the 27th and the 6th? A. Yes.

Q. [By Mr. Linn]—Are you speaking from recollection, or from the paper which you hold in your hands? A. As to those bills I refer to, I am speaking from recollection.

Q. The 1,490 are included in the bill rendered by Shanly on the 31st of December? A. Yes.

Q. How many are there in that bill? A. 9,735.

Q. And all but 1,460 of those were brought to the refinery before the 27th? *A.* Yes.

Q. State how you arrive at your statement—do you want to add that 387, and 1,460, and the 494, to show the number of trimmed barrels that were received in both houses between the 27th and 6th? *A.* No, between the 27th and the 30th of December, not after the 1st of January, at all.

Q. None in the new house? *A.* Neither house; there is nothing connected with my account after the 1st of January for untrimmed barrels.

Q. We are talking about the trimmed barrels—tell the jury how many trimmed barrels you received between the 27th of December and the 31st? *A.* From the 27th to the 6th I gave you an account from this paper, and I was endeavoring to show what we had received altogether between that time, making an exception of those received between the 26th of December and the 31st of December, that is the only way I can get at it.

Q. Now state it over again, because I don't understand it; answer the question as you understand I put it—from the 27th to the 1st of January, how many trimmed barrels were received on this account—going to the debt? *A.* I will explain—I consider that all the barrels that were in the Morris street shops were paid for by ourselves, except so much as belonged to that inventory taken at that time.

Q. Taken at what time? *A.* The 1st of January.

Q. On the 1st of January there was an inventory taken at the Morris street shops—of what? *A.* Of trimmed and untrimmed sugar barrels and molasses barrels.

Q. Who took that inventory? *A.* Patrick McMahon; I was in the shop with him at the time.

Q. How many barrels did you find there on the 1st of January? *A.* 417 trimmed barrels, 242 not trimmed, and 70 potato.

Q. You say that in the Morris street shop, on the 1st of January, there were 417 trimmed barrels, and 244 not trimmed, and 70 potato barrels, that you say was taken on the 1st of January? *A.* Yes.

Q. What became of those barrels? *A.* The 417 barrels were taken down to the old house.

Q. What for? *A.* To fill with sugar; those were taken on a separate account—that is, a separate account from those that were taken from the shop after the 1st of January.

Q. Those 417 barrels on the 1st of January that were in that shop were taken down and filled with sugar? *A.* Yes.

Q. Is that the shop that Pat. McMahon had charge of? *A.* Yes.

Q. Is that the shop that Pat. McMahon's book relates to?
A. Yes.

Q. And you say there were a certain number of untrimmed barrels there; what became of them? *A.* I have no distinct recollection of those, but presume they came down in the usual way—that is, as they were trimmed they would be sent by the carmen in the usual way.

Q. You heard Pat. McMahon testify that there were 2500 barrels on hand in that shop, didn't you? *A.* I did.

Q. And he said there were five hundred, and might be a 10 thousand trimmed ones there? *A.* Yes.

Q. Now point out anything on his book to show how that was? *A.* I see in looking over his book on the 26th of December, a mark under that date of December 26th, and a cross after the account was stopped taking that day; in reads "on hand."

Q. How many barrels there? *A.* 426.

Q. How does that agree with your recollection of December 26th? *A.* I have no recollection of that at all.

Q. Did you make any memorandum about that time of 20 that count that was taken? *A.* I was not present at that count, but at the 417 barrels I recollect I was in the shop, and and it was quite empty; that is the only recollection.

Q. Didn't you make a memorandum there about that time?
A. Yes; I have it here on a paper upon which I keep an account of syrup barrels.

Q. Now, return to the question I put to you; how many trimmed barrels were received on account of the debt of Matthiessen, from December 27th to January 6th? *A.* If you will allow me to qualify that delivery—I don't know what 30 you mean exactly.

Q. I mean delivered there which came from McMahon?
A. I should then include the 417 on hand as being received of trimmed barrels, in the Morris street shop 242 untrimmed, and 707; I shall include that in the statement.

Q. Now, I am asking you as to the trimmed barrels, from December 27th to the 6th of January all told? *A.* 2,341 trimmed barrels, between December 27th and January 6th.

Q. And you say that 2,341 included all that came from Pat. McMahon's shop? *A.* Yes, it includes those, too. 40

Q. Could there have been there any more than the 417—could there have been a few trimmed barrels? *A.* No, sir; I know there could not have been.

Q. You know it from count? *A.* I know it from count.

Q. Give us the next item you have? *A.* 655 new, large sugar barrels.

Q. That is between December 27th and January 6th? *A.* Yes,

Q. The next item you have? A. 362 new, small sugar barrels.

Q. Next? A. 345 potato barrels.

Q. Next item? A. 40 syrup barrels, old—this is untrimmed old barrels.

Q. Well? A. That covers all the barrels received.

Q. Shanly has 1400 syrup barrels that were received between those times. A. Between those dates there were some received into the two houses in the usual course of
10 business.

[The Court]—As I understand, he is going on now to complete his list.

[Mr. Gilchrist]—Yes; and he is going to distinguish between barrels which were received which do not come into the controversy—that don't belong to this matter at all.

[The Court]—The witness has been testifying of those that are received and are in controversy?

[Mr. Gilchrist]—Yes.

[The Court]—Does he now continue in regard to the things
20 that are in controversy?

[Mr. Gilchrist]—If it would be more convenient and clear, we will go right on and explain that afterwards.

[The Court]—I think it would be better.

Q. You say there were forty old untrimmed syrup barrels on that account received between those dates? A. Yes; besides what came down in the regular course of business.

Q. What is the next item you have there? A. Flat hoops for the flour barrels, 23,700, less inventory of administrator, 11,600; 12,100 was received.

30 Q. Where were those hoops? A. I am not positive where they were; I think they were in the Morris street shop.

Q. Were they removed from the Morris street shop to any place? A. Not to my knowledge.

Q. They were just left there? A. Yes; left there and used in trimming the barrels.

Q. And the administrator took in his inventory, 11,600? A. Yes.

Q. What is your next item? A. Five kegs of nails; one of three penny, and four of two penny.

40 Q. Next? A. 5,000 flour barrel staves; that was 10,000, less 5,000, which I deducted, which were taken in by the inventory of the administrator.

Q. Next? A. 20,600 hoops, marked inventoried; I think they were wooden hoops for syrup barrels.

Q. Next? A. 709 sugar hogsheads, less, sold by administrator, 382, 327 net.

Q. Go on? A. That is all.

Q. I am now speaking of the goods that were received

between the 26th and the 6th? *A.* Yes; but there is something to offset; there is to be taken off that in value, \$170.88 for setting of hoops and nails taken from the stock by Matthiessen and Wiechers, to put these barrels in repair.

Q. Explain that, you charge yourself with these articles received, and now you claim credit for some certain things—what are those things? *A.* \$170.88 for the hoops and nails.

Q. Where did they come from—whose were they? *A.* They were credited from McMahan and belong to him; they were used out of these I have credited to McMahan; he got 10 the credit of them.

Q. You have given us all the items of the account; now just give us the prices of the value of those things which you say were sent between December 27th and January 6th? *A.* 14,452 untrimmed barrels at thirty-five cents, \$5,058.20; 2,341 trimmed barrels I put down at forty-four cents, \$1,030.04.

Q. That includes all the trimmed barrels that were sent between the 27th and the 6th, on this account? *A.* Yes; received between those dates.

Q. The next item? *A.* 655 new large barrels at fifty-six 20 cents; they were not headed; we done that, \$366.80.

Q. Next item? *A.* 362 new small barrels at forty-four cents, \$159.28; 345 potato barrels at twenty cents, \$69.00; forty old syrup barrels, untrimmed, at \$1.50; \$60.00 there is an item which I discover here which was not taken off from that; that is, many of the barrels had heads out, altogether; out of all these 14,000 there was 1769 heads out, five cents a piece, which ought to be deducted.

Q. Did you include that in your \$170.00? *A.* No, sir.

Q. Well, we will come to that by and by—what was your 30 next item? *A.* Hoops; 12,100 at \$8.00 a thousand, \$96.80; five kegs of nails; three at \$6.50 per keg, \$19.50, and two at \$5.50 per keg, \$11.00, making \$30.50; 5,000 flour barrel staves, no price carried out, but I suppose it to be \$6.50, that is, put up \$32.50; 20,600 hoops, \$370.80—I presume that covered various rates for them—they were different kinds of hoops; the next item is 327 hogsheads at forty cents, \$130.76; that is all the charges; it foots up to \$7,404.68.

Q. When did you make out the state of account of those deliveries? *A.* In the early part of January, 1872. 40

Q. That was right after the thing occurred? *A.* Yes.

Q. How does this statement which you have given us differ from that? *A.* It differs from that in those 1460 barrels being added to it which had been billed by Shanly, and 387.

Q. What is the reason you didn't put in your account of January to show how much value Matthiessen had received; what is the reason you didn't put in the 1460 and 387? *A.* Because Shanly had billed the 1460 to us, and we had made

out a bill charging ourselves for the new house what Shanly omitted and failed to charge; that is the 387.

Q. Shanly had charged them as if they didn't come into this account; he had billed them as if they didn't come into the account? *A.* Yes.

Q. As if they had been old things that didn't come into the arrangement of the delivery of the goods? *A.* Yes.

Q. And you so treated them in your first account? *A.* Yes.

10 *Q.* That 1460 and 387 would be 1847 barrels? *A.* Yes.

Q. And you put those down at forty-four cents in your estimate? *A.* Yes.

Q. So what would that be, the difference between your present account and that account—that 1847 at forty-four cents? *A.* \$812.68.

Q. Why did you allow only forty-four cents for those barrels? *A.* Because I considered the way the business was being managed that it was costing four cents to head the barrels.

20 *Q.* The forty-eight cents you had always paid McMahan included the heading at the refinery? *A.* Yes.

Q. And all that work was done and paid for by Matthiessen himself? *A.* Yes, the cooperage was.

Q. What was the situation of the tanks, the tank lumber, and the timber that was delivered at or about that time; they have amended their declaration so as to include the whole of the tanks that happened to have been taken after the death of McMahan, and I want you to just give us a statement of the quantity of lumber that was delivered between the 27th
30 of December and any time afterwards—all these specific articles, tanks and lumber; in the first place, can you tell the jury what situation the tank timber was in on the 27th of December? *A.* The tank timber for the large tanks was on the kiln head of the syrup house, then in course of erection.

Q. And being put up? *A.* No, sir, not being put up.

Q. In what shape was the timber for those six tanks? *A.* It had been in McMahan's shops, and I suppose it was all ready to be set up; it was in staves and heads ready to be hooped; they were circular tanks.

40 *Q.* They were there on the top of the kiln head? *A.* Yes, waiting to be put up.

Q. Had been delivered to Matthiessen at that time? *A.* Yes.

Q. How long had they been in possession of Matthiessen? *A.* I can't state from my own knowledge.

Q. For some time? *A.* Yes.

Q. But they had been there prior to December 27th for some time? *A.* Yes.

Q. What portion of the timber bought for the tanks was that? A. I measured the tanks to ascertain that—17,058 feet in the 6 tanks; those were in possession of Matthiessen before December 27th.

Q. Where was the syrup-house—the top of the kilns? A. It was to the west of what is called the new house.

Q. How high up—what story was it in? A. The lumber was in the first story—the first floor above the ground—you enter right on the level of the ground into the top of the kilns; the kilns stand in a cellar and are lower than the ground; the top of the kilns is the first floor of the house, and there is where the stuff was. 10

Q. Where was the rest of the timber? A. There was some of it, to my knowledge, in the cooper shop of McMahon on Washington street.

Q. Who worked there? A. Croak worked there.

Q. Can you estimate the quantity there? A. I cannot, but I can say how much was furnished to complete the tanks—furnished, I find on a bill of January 31st, 1872, of Charles O'Neill to Matthiessen & Wiechers, 1,678 feet of lumber for 20 those seven tanks, the small tanks, part of which was in the shop of McMahon that I speak of.

Q. How much timber was there of McMahon's, bought by McMahon in the seven tanks? A. 7,014 feet in all in the seven tanks.

Q. Of that 7,014, how much did you buy of O'Neill yourself? A. 1,678.

Q. How much would that leave for those seven tanks that McMahon bought? A. 5,336 feet.

Q. At what price did you put that 5,336 feet of timber? A. 30 I haven't put that down.

Q. What is the bill of O'Neill's to you? A. Seven and three-quarter cents a foot; then there are some expenses of cartage and planing in addition.

Q. How much would that 5,336 feet of timber at that rate be? A. \$413.54, and some expenses of carting and planing.

Q. Can you approximate the expense in carting and planing within \$5 or \$10? A. I should say \$16.25, taking a thousand feet for a load.

Q. That with the \$413.54 makes how much? A. \$429.71. 40

Q. That would make the total of the value of all that came to Matthiessen, between the 27th and the 6th under the contract, how much? A. Counting that at prices, as I have stated, \$7,834.47.

Q. That includes the six tanks which you were already in possession of? A. Yes.

Q. Then that would leave, would it not, a balance due to Matthiessen, if he appropriated all the property received to

his debt, of about how much—\$3,000 and odd dollars? *A.* Something a little over \$2,000.

[The Court]—I don't think he has been asked anything about what was due Matthiessen.

[Witness]—No, sir.

Q. The account, as so calculated, would leave as the value of those things received by Matthiessen, between the 27th and the 6th and the timber after the 6th, \$7,834.47? *A.* Yes.

10 *Q.* Go back to your item of forty old untrimmed syrup barrels, and tell us how it is you differ so much from Shanly; he says 1,400—you say forty; he says 850 were trimmed and 550 were not. *A.* I don't know how we differ; on the 1st of January, the shop in Morris street showed that only forty.

Recess.

Q. Now, tell us from what date you have made up this account of the forty old untrimmed syrup barrels delivered between those dates? *A.* From the account of stock; they were in the Morris street shop.

20 *Q.* Does your account that you made in January, 1872, show but the forty? *A.* It does.

Q. Show us that account and let us look at it? *A.* It appears here in the fifth double column; this is the original account I made up in January, 1872.

Q. From what material did you get up this account—what did you get it up with? *A.* The account of the men that received them into the different places; they were handed in to me.

Q. This was the original entry that you made of it? *A.* Yes.

30 *Q.* What did you have—slips? *A.* I must have had slips from which to take that account after it was verified; we used slips to take the account from the different men who received them, and then, after having proved the account, entered them upon this paper.

Q. Do you know who besides Patrick McMahon kept any account of the things that was sent? *A.* Jerry O'Donnell, in the Grand street shop, kept an account of the trimmed barrels or new barrels which went from the Grand street shop.

40 *Q.* What did Patrick McMahon keep an account of? *A.* He kept an account of barrels received from the collectors and other sources, the material which would go into his shop, and also an account of barrels going out from his shop.

Q. Tell us the amounts of money which appear to be due from McMahon to Matthiessen from, say, January, February, March or April, 1871, down to the 1st of December? *A.* December 31, 1870, \$4,970.82. That was in advance to Bernard McMahon. January 31, \$6,127.22; February 28, \$5,688.93; March 31, \$11,157.25; April 31, \$17,399.98; May

31, \$13,356.56; June 30, \$12,657.44; July 31, \$17,357.87; August 31, \$14,746.28; September 31, \$17,408.43; October 31, \$13,990.32; November 30, \$11,836.89.

Q. That is the debt on the 1st of December, \$11,836.89?
A. \$11,836.89.

Q. Do you know whether or not McMahon acknowledged that indebtedness at or after that time, December 1st; do you know whether the statements were rendered to him? *A.* I don't know; I am not the book-keeper that kept these accounts. This is an abstract of the ledger that is here. 10

Q. [By the Court]—Those are net balances due at the end of the month? *A.* Yes; after the bills had come in and been deducted.

Q. Do you know of your own knowledge of Matthiessen from time to time asking for a settlement of this account of McMahon or Shanly? *A.* If I knew of it I have forgotten.

Q. Where was Matthiessen mostly; where was his place to be? *A.* He was usually in the new house office. I am mostly in the old house.

Q. The state of accounts between the company and McMahon, if you appropriated all these goods that were received between the 27th and the 6th to the payment of that debt—how would the state of the account stand; who would be the debtor? *A.* The estate of McMahon. 20

Q. In your making up that account in January, 1872, I think you did not put in the tanks, did you? *A.* No, sir.

Q. That would make the apparent balance due Matthiessen greater than it really was, would it not? *A.* Yes.

Q. And about what time, as early as January 10th, do you think you could say that you had ascertained how much had been paid on account of that \$11,000 by the property that was taken? I mean to say, had you this information as early as the 10th, the date of his death? *A.* I don't understand your question. 30

Q. You say your account was made up early in January; what I want to know is whether Matthiessen could have had from you, as early as the 10th of January, the state of that account as you made it up then? *A.* Yes; I think he could.

Q. And the state of the account at that time showed an indebtedness on that old account? *A.* Yes; I have the original paper made at that time. 40

Q. Let us see it? *A.* [Producing paper]—That paper was modified on account of the inventory of the administrator.

Q. This is the original account that you made out to show early in January the state of the accounts? *A.* Yes.

Q. As to that debt? *A.* Yes.

Q. I observe here on it, that it is started in this way—
 "Stock received of B. McMahon, December 25th to the 31st"

—it seems to include things that were delivered after that—now tell how that is? *A.* I didn't at that time consider there was any necessity to specify about exact dates, and therefore I have included this December 25th to the 31st.

Q. Does it include all the items you have given us here to day, except the tanks and the extra barrels which Shanly had billed to you? *A.* Yes, it includes all.

Q. After the 1st of January, I want you to explain to the jury what was done with the stock that you received between 10 the 27th and the 6th; and what was the means of Matthiessen getting other barrels—how he got them, and how he got them trimmed, and all about it—how the business was carried on after the 1st of January? *A.* After the 1st of January we made contracts with men who had been accustomed to bring barrels to McMahan, to continue bringing the same to ourselves; and we paid for those brought at the end of each week; that is the way we started; we made the first settlement on the 1st of January.

Q. Have you got the bills of those barrel collectors? *A.* I 20 have.

Q. You say that the first set of bills you got, was on the 6th of January? *A.* I find one on the 5th, that was for eighty-one barrels at thirty-four cents, and nine barrels at eighteen cents, to McGuinness.

Q. What was the next bill? *A.* I have two here of January the 6th—one for E. McGuinness, eighty at thirty-four cents, and thirteen barrels at eighteen cents; another one on the 7th, E. McGuinness, ninety-two at thirty-four cents, and eight at twenty-eight cents; another one on the 8th or 9th, 30 *A.* McLaughlin.

Q. All the barrels that were not McMahan's, were paid for after the 1st of January? *A.* Yes.

Q. Where did they go? *A.* They went to the Morris street shop—that is, his old shop; and, I suppose, after a while, a large number of them to the Grand street shop.

Q. You bought the barrels—now what about the hoops and the headings? *A.* At first we used the hoops and headings we found there—that is, those hoops that are in the inventory.

Q. Now, the labor? *A.* The labor we paid from the 1st 40 of January.

Q. And all barrels that were brought by the collectors after the 1st, you paid for? *A.* Yes.

Q. Does that include other barrels besides flour barrels—sugar barrels? *A.* Second and third qualities.

Q. As to other stock—stock that you received afterwards—where did Matthiessen get that stock, and where did it come from? *A.* Generally bought from the same parties who were dealing with McMahan.

Q. That is, he bought his syrup barrels and all those things from the same parties that McMahan had bought his? *A.* I don't recollect that he bought any syrup barrels; we bought from time to time, staves to make syrup barrels.

Q. What was done with them? *A.* The barrels were manufactured in Essex street and Morris street; the largest number were made out of old sugar hogsheads or molasses hogsheads—old sugar hogsheads belonging to the company.

Q. How long did you continue that account? *A.* To the 14th of March. 10

Q. And what is the state of the account at the end—the whole account of McMahan's business, and of the business that follows his? *A.* I should say, not to the 14th of March, but the 30th of November, that the balances are struck on the books.

Q. Give us the state of that account? [Question objected to, and, at the suggestion of the court, it is waived for the present.]

Cross-examination. 20

Q. You have testified that after the 1st of January Matthiessen made contracts with different persons for the purchase of barrels and materials to be used; how do you know he made any contracts? *A.* I was perfectly cognizant of them; I had the contracts that were in writing.

Q. With whom did he make them? *A.* Willard was one; that was a written contract; as to verbal contracts, I can't say.

Q. You don't know anything about the verbal contracts except what you have heard Matthiessen speak of? *A.* No, 30 sir; I know by the bills; that is all my knowledge.

Q. Your business was to keep the books in one of the offices of this company? *A.* Yes.

Q. That was your duty? *A.* Not all; I had to see to keeping things in such a way that they would go on to the books right; often to look after the things themselves which went upon the book.

Q. Where did you get the materials from which your books were made up—the facts which were entered in you books? *A.* From men who received them, and sometimes from personal count. 40

Q. What accounts did you keep in your books? *A.* Certain classes of accounts that pertained to the receiving of different articles and to the delivery of certain articles.

Q. You kept an account of the goods received at the sugar house; you mean of barrels, hogsheads, &c.? *A.* Yes.

Q. And the delivery of what? *A.* The delivery of boxes, hogsheads, barrels, &c.

Q. Barrels of sugar or empty barrels? *A.* Empty barrels.

Q. To whom were empty barrels delivered? *A.* Bernard McMahon.

Q. To anybody else? *A.* No.

Q. You have testified from a statement which you have held in your hands of the amount of goods received from McMahon, between December 27th and January 6th, and the value of them? *A.* Not from a paper—I have not.

Q. Have you testified from recollection? *A.* I have testified by their being collected from different papers.

Q. Hadn't you an account of them? *A.* Not from the 27th of January; I had it collected from different sources, from books of the barrels received, and from these papers.

Q. You have stated here that there were so many untrimmed sugar barrels delivered, and so many trimmed, and so many new large, and so many small sugar barrels, and so many potato barrels, so many old syrup, so many flat hoops; from what paper did you read that statement? *A.* Not from any one paper.

Q. If you stated those things from memory, I want your memory; if you said from the paper, I want the paper. *A.* It is on no paper at all; I got them from various sources—bills and books.

Q. When was the paper made which you were looking at? *A.* Two or three nights ago.

Q. Is this the paper of which you speak? [Referring to paper.] *A.* This paper does not include the 1460 barrels, nor the 387 barrels.

Q. Will you tell from what papers, or what books, or what other sources you derived this information which you have just given to the court and jury, in reference to the quantity of goods delivered from McMahon to Matthiessen between December 27th to January 6th? *A.* You will find them on this account, and will find an addition down here from the 9th of January, under McMahon.

Q. These loose slips of blue paper contain an account of the untrimmed barrels received from McMahon by Matthiessen from December 27th to January 6th? *A.* Yes.

Q. When were these papers made out? *A.* Sometime the first week of January, 1872.

Q. From whom did you receive your information of the amount of untrimmed barrels, and from which you made this statement? *A.* From different ones.

Q. Give the names. *A.* I don't know that I can give the names now.

Q. Did they give the amounts to you on paper, or verbally? *A.* I think on paper; but I am not positive.

Q. Can you tell the names of any of the persons from

whom you received this? *A.* Yes; Jacob Fering was one I am now positive of.

Q. In whose employ was he? *A.* In the sugar company.

Q. You received from an employee of the Sugar House Company a statement of the number of untrimmed barrels he had brought there? *A.* Yes.

Q. And that is all the information you have in regard to that part of it? *A.* No, sir; that is not the whole of it.

Q. Where did you get any other information as to the number of barrels delivered? *A.* Verified by count. 10

Q. Did you count the barrels? *A.* In some instances I did.

Q. Did you count all the barrels he bought? *A.* No.

Q. Then you don't know except as to the total amount?

A. I can know by verifying the account, to see how it corresponds; if the two accounts given in to me agree, I conclude they are right.

Q. Who else would give an account of the barrels delivered by these men? *A.* They were delivered to him.

Q. Did you receive a statement from any person of the 20 number of barrels delivered to him? *A.* From himself.

Q. He gave you the count of the barrels delivered to him?

A. Yes; if the second party would give me a second count, whoever that would be; this man, Jacob, would receive the barrels and count them, and he would give me the account, and another man would give me the account of the barrels sent out.

Q. Fering received untrimmed barrels from McMahan, and he gave you a statement of the amount he received, and the man who received them gave you a statement of the amount 30 which Fering delivered? *A.* Fering was the man that received them from McMahan, at the sugar house; then there was another man that received them at the sugar house; I don't recollect his name.

Q. Those statements which were given to you, were they given to you at night—every night that the barrels were delivered—or the next day, or the day after, or not? *A.* It is my recollection that they were given to me every day.

Q. Did they have any book where they kept the account?

A. My impression is they did, but I can't say. 40

Q. Did they show you a book, or give it to you on a slip of paper? *A.* I can't say.

Q. All you know about it is simply what these men stated to you when they came and gave you the account in? *A.* Yes; the two accounts.

Q. Where did you make that entry? *A.* I can't say.

Q. Can you say that you made any entry at all at the time?

A. I must have done so.

Q. Do you recollect of doing so? *A.* I can't call to memory.

Q. Show me on these papers where is the account of the barrels brought to the premises by Fering? *A.* He received the barrels when they came into the new house—that is, untrimmed.

Q. Who brought them to the sugar house from McMahon's place? *A.* McMahon's carts, and Campbell's carts.

Q. You didn't receive any account from the men that
10 carted them? *A.* No, sir.

Q. All you know is what he said to you? *A.* It may be very likely that he gave me a paper.

Q. Do you recollect that he did? *A.* No.

Q. And you don't recollect of making any entry at that time of the amount received? *A.* I can't state it.

Q. Were those things received in the ordinary course of business? *A.* No, sir; they were not.

Q. Hasn't it been your habit of making an entry when goods are received on some books—when goods are delivered
20 there and an account rendered to you, it is your habit to enter it in some book, is it not? *A.* Yes.

Q. These things you didn't enter on any book? *A.* No, sir.

Q. You kept them on slips of paper? *A.* Yes.

Q. So that all these goods which were delivered between the 27th and the 6th were kept in the same way, on loose slips of paper? *A.* Yes.

Q. Now, you say that 14,452 was the number of untrimmed barrels which were delivered between these dates, on account
30 of this arrangement between Matthiessen and McMahon, or Shanly, how do you know that these goods were delivered on that account, and not any other—how do you know that these were the only goods delivered on that account? *A.* I know we received the goods, as they are on these papers.

Q. Didn't you receive instructions from Matthiessen what to do, and what to keep an account of? *A.* More than likely I did.

Q. Did you know anything about any arrangement between Matthiessen and Shanly, or McMahon, in regard to this property? *A.* No, sir, nothing at all.

Q. Then how did you know not to make an entry of these
40 things upon your regular books? *A.* Because they were not in a condition to be entered there.

Q. Why not? *A.* They were not trimmed; we made an entry only on the books of barrels fit for use.

Q. These new large sugar barrels, were they fit for use when they were received? *A.* Yes.

Q. Were they entered in the books? *A.* No.

Q. Why not? *A.* Because I entered them on this paper.

Q. But why not enter them in the books—have you no reason for not entering them in the books? *A.* I can't recollect of any reason.

Q. Were those forty old syrup hogsheads ready for use? *A.* No.

Q. Were the 362 small sugar barrels ready for use? *A.* Yes.

Q. Can you tell why they were not entered upon the book? *A.* For the same reason, I suppose, that the others were not, 10 whatever it was.

Q. During this time we are speaking of now, from December 28th to the 6th of January, did you not receive more than 2341 trimmed sugar barrels at the premises where you were? *A.* No, sir.

Q. Not from any source? *A.* Not from any source—trimmed barrels.

Q. Are you sure of that? *A.* I am positive from my records made at that time.

Q. These books presented by Shanly here show that during 20 that time there were 4761 trimmed barrels delivered—can you say from your knowledge that there were not that number delivered during that time? *A.* I can, from the fact of my making a balance on the 1st of March.

Q. How could that give you any information; were not the accounts all run together right along from January the 1st right on to the 1st of March? *A.* Yes.

Q. Could you tell from that balance what number were received from the 27th of December to the 6th of January? *A.* Not from the balances, but I can tell from the account 30 from which the balance is made.

Q. Where is that account kept which shows the number of barrels? *A.* On that paper, and these two books.

Q. Explain how; by this paper and those books you can tell by striking a balance on the 1st of March what number of trimmed sugar barrels were received between December 27th and January 6th? *A.* I don't say that from the balance I can show it; I said I could show it on the account by which the balance was made.

Q. Why did you want to refer to those books; I understood 40 you to say these trimmed sugar barrels were not put upon the books at all; can you show from these papers how many trimmed sugar barrels were received during that time? *A.* I can show 1847 on these books.

Q. I understood you to say that these trimmed sugar barrels received between December 27th and January 6th, which were received by reason of this arrangement, were not put on the books—why do you refer to the books? *A.* There are

1460 put upon these books, for which Shanly has sent a bill.

Q. Where is that bill? *A.* [Producing bill]—That includes 1460 barrels which were delivered.

Q. How do you ascertain from this bill that this includes 1460? *A.* Because I see that that bill corresponds with my receipts for that month in my books; my books show 9735.

Q. How do you get 1460 out of that? *A.* There is a pencil line drawn after the 26th December in my books.

Q. When was that pencil line drawn? *A.* I suppose it was done the 26th or 27th of December.

10 *Q.* You have got entered in this book some of the trimmed sugar barrels that were received after the 27th of December? *A.* Yes.

Q. I understood you before to say that they were not in the book? *A.* I said they were in the books and the papers.

Q. The statements which you have made here in reference to the amount of trimmed and untrimmed sugar barrels, and which were received between December 27th and January 6th, have been taken from these blue papers and from those books, and other books and papers in your possession? *A.* I
20 said that there were barrels after the 1st of January which were our own, which we had paid for; those are not run in that account at all.

Q. Can you take these books, and these papers, and point out the account showing the number of trimmed sugar barrels received between those dates from McMahan. [Witness looks at books.] How long have you had this book of Patrick McMahan in your possession? *A.* I think about ten days.

Q. Did he give it to you? *A.* No, sir; I took it out of
30 the drawer, in O'Donnel's cooper shop; it was left there by Patrick McMahan, because he had no further use for it.

Q. When was your attention first called to this memoranda in Patrick McMahan's book under date of December 26th? *A.* After hearing McMahan's testimony, Mr. Gilchrist wanted me to make up the account; his testimony was so much larger than my idea—I was astonished.

Q. You had this book here in the court room? *A.* Yes.

Q. Did you discover this entry here while he was on the witness stand here in the court room? *A.* I don't recollect.

Q. When did you call the attention of Mr. Gilchrist to this?
40 *A.* It is my impression, distinctly, that I called his attention right away, immediately after seeing it; whether it was at recess or not, I am not positive.

Q. Did you make any marks in this book? *A.* No, sir; not a mark.

Q. Do you know why Patrick's attention was not called to it? *A.* No, sir.

Q. Where were these barrels trimmed, which were brought to the sugar-house in an untrimmed condition? *A.* In the place where they were left after being received from McMahon.

A. By whom were they trimmed? *A.* By the same coopers that had been in the employ of McMahon.

Q. Why were they not left in the shop to be trimmed, before they were brought? *A.* I can't say.

Q. Did you see Patrick McMahon after you discovered this in the book? *A.* No, sir; I have not. 10

Q. How did you come to discover this? *A.* I went to make an account to compare with mine from his books, taking that book of receiving barrels, and to know that I must know how many there was on hand, of course, and from that time to the date of the barrels which were received; then I took his other books and added all the barrels which were delivered together, and deducted it from it, and found the result.

Q. [By Mr. Gilchrist]—Found what result? *A.* I took the amount as I found it there, and made the result to be ninety barrels more than my account of barrels received. 20

Q. This memorandum says: "On hand 436," and a cross; do you know what that 436 means? *A.* I can't swear; but it is fair to presume it was an account taken, because the line was drawn and the number was put down—that it was the number of barrels on hand.

Q. Isn't it just as fair to presume it is the number of trimmed barrels on hand, as the whole number trimmed and untrimmed? *A.* I can't say.

Q. Isn't it as fair to presume that it is the number of syrup barrels on hand? *A.* No, sir; because there never was so many as that on hand at any time. 30

Q. Do you know whether it represents the number of trimmed or untrimmed, or both together? *A.* No, sir.

Q. You said that the amount of feet of timber in the six tanks was 17,058; did you measure those tanks? *A.* I did.

Q. And made a calculation? *A.* Yes; I helped measure the tanks; but the calculation I did not make.

Q. Who did you help to measure them? *A.* The draughtsman belonging to the house.

Q. Can you swear from your own knowledge that the number of feet of timber in those tanks was 17,058 feet? *A.* I can. 40

Q. How? *A.* By figuring them up.

Q. What figures are you going to use to do that? *A.* Figures which are put on the sketch by which I measured; those figures represent the dimensions of the tank and thickness of the lumber, and the general dimensions.

Q. Did you put the figures down at the time they were

made? *A.* No; but I recollect the height; the draughtsman put the figures down as I gave them to him.

Q. How do you know his figures are correct? *A.* I recollect by memory.

Q. You said something about an abstract from the ledger; what was that—those balances due from McMahon to Matthiessen for the several months named? *A.* Those were abstracts taken from the ledger.

10 *Q.* You have no knowledge of the state of the account except what you found upon the ledger? *A.* As the ledger shows.

Q. Haven't you got it from the checks themselves? *A.* Yes.

Q. You really don't know anything about this account except what you got from the ledger? *A.* I recognize the bills which were made out.

Q. How can you swear from those—recognize bills—that there was any such amount due to Matthiessen from McMahon—can you tell without looking at the paper what was due from month to month? *A.* No.

20 *Q.* Then you don't know anything about it except what you took from the ledger? *A.* I know there was such accounts as those.

Q. Did you keep those accounts? *A.* No, sir.

Q. They were not even in your books? *A.* No, sir.

Q. You don't know whether they are correct or not? *A.* No.

30 *Q.* You said that deducting the value of the goods received between December 27th and January 6th, on account of this arrangement between McMahon and Matthiessen, or Shanly and Matthiessen, there would still be a balance due to Matthiessen? *A.* Yes.

40 *Q.* How much? *A.* I haven't got my figures here—in the neighborhood of \$2,000, perhaps \$2,100—as I made it up, it was something like \$4,400 with the tanks not having been applied, these tanks being still left out—that is, I made up the account without the tanks, and then it stood about \$4,400—the tanks were still in an unfinished state; I can only approximate what the tanks were worth, because they were in an unfinished state; I would approximate them; I should say they were worth in the neighborhood of \$3,000.

Q. So, according to your calculation, there would still be due Matthiessen, after deducting all this property and the tanks, about \$1,000 or over? *A.* Yes.

Q. I have requested you, if you can before you leave, to point out to us where upon these books or papers we may find the account showing the number of trimmed and untrimmed barrels, and materials delivered to the sugar house

from McMahan, between December 27th and January 6th, as you have it here; Shanly has sworn to his statement and here are the books, and which, I intend to insist before the jury, contain a correct account of it, and if you have got any other account of it, I would like to see it.

Re-direct examination.

Q. How did you first get knowledge of the fact that these barrels were coming into the refinery? A. I can't say that I had any knowledge.

Q. When did you first get any information that the barrels were there—any barrels were there untrimmed? A. I don't know that I can state my knowledge.

Q. Was it anywhere near the time of their first coming? A. I should say it was very shortly after they commenced to come.

Q. Do you think an hour after? A. I should say so.

Q. Were they coming down rapidly? A. Pretty rapidly.

Q. Whose wagons and trucks was bringing them? A. McMahan's.

Q. Any of your own? A. Yes. 20

Q. Wasn't it an unusual thing for your trucks to be employed in such a thing? A. It was.

Q. Was not that likely to attract your attention? A. Yes.

Q. Did you take any charge or care to know how many barrels and other things were coming into those warehouses? A. I did, for those that came into the place where I was.

Q. Did you take any charge or care or oversight of any of the barrels that were coming into any of the other places to find out how many there were? A. After a little while—after the barrels were in the place. 30

Q. How many minutes or how many hours or how many weeks after they got into the place was it that you looked after it? A. It would have been in the first week.

Q. How did you go to work to find out? A. By having a responsible man to count the barrels; of that my recollection is not clear.

Q. Was it your duty or not to ascertain how many untrimmed barrels and trimmed barrels and syrup barrels and other things could be stored in the refinery and in the store house—was it your duty or not to do it? A. I took an interest in it. 40

Q. Did you undertake to do it or not? A. I did.

Q. In the ordinary course of business what was the way to do it? A. This was not an ordinary thing.

Q. In the ordinary course of that house and business, attending to that as a business, what would be the ordinary way

of doing it? *A.* I should take as the best way to do it to count them after they were all in.

Q. Was that done or was it not done? *A.* I don't recollect.

Q. Did you make up your blue paper out of nothing—out of your head? *A.* No, sir; I had facts at the time.

Q. Where did you get them? *A.* When I had satisfied myself of the correctness of the account I would most likely enter it. I may have taken first off the statement of the men. I can't say now.

10 *Q.* There was a warehouse opposite McMahon's own house, and there was a warehouse south of the old sugar house, and there was a storehouse in Morris street, and the building next to it, then there was a place in the new house where these barrels were put? *A.* Yes.

Q. Now, did you have any man to help the men unload those barrels as they came to any one of those places? *A.* In the old house.

Q. Who was that? *A.* I believe his name is Wilkins.

20 *Q.* What did you tell Wilkins to do? *A.* I don't know that I gave him directions to count the barrels.

Q. What did you tell him to do? *A.* I don't know that I told him to do anything except to give me an account of the barrels received by him.

Q. Didn't you see Campbell's charges for carting those things? *A.* That was for part.

Q. You had that to go by? *A.* That would not help me on the gross amount.

Q. Did you or not do your duty in ascertaining the account or number of barrels that came into those houses? *A.* I did.

30 *Q.* In the ordinary course of things, as you do business, would you have ascertained the quantities or number of barrels that came in? *A.* Yes.

Q. Have you any doubt in your own mind that you did ascertain? *A.* Not a particle of doubt.

Q. Then how would you have ascertained it satisfactorily to put down as a charge against Matthiessen any barrels delivered as you would have ascertained it? *A.* If I wanted to satisfy myself beyond a peradventure I should count them myself.

40 *Q.* Did you do any counting yourself? *A.* I did.

Q. Where did you do any counting? *A.* I was trying to think whether I counted those in the old house; I counted the Morris street shop; I don't recollect the time of my counting them.

Q. How near to the time do you suppose you counted them? *A.* I counted them in the place where they stood; those that I did count.

Q. Did you make a memorandum, do you suppose, of those you counted? A. I would in the ordinary course of business.

Q. Do you think you did? A. I should think I did.

Q. Do you suppose you made any memorandum of any count that anybody else made? A. I would.

Q. You think you did? A. Yes.

Q. In the ordinary course of business, how would that account be given to you, without paper, or on paper? A. On paper, or from a little book.

Q. Have you any doubt in your own mind that every barrel that was received there was counted? A. I have no doubt about it. 10

Q. Then how do you believe, in the ordinary course of business, that that account on that blue paper, made up within a week after, was made up? A. By collating these different counts from all the different places.

Q. When these barrels were trimmed, was not that a check on the number? A. Yes.

Q. How could that be a check on it? A. The amount we had charged gave the amount of the barrels that were sent out. 20

Q. Didn't you have another check on it, the number of barrels that were filled with sugar and sent out? A. It is my impression that there were receipts sent down with thoses for some of them, but I am not sure.

Q. With which? A. With the trimmed barrels.

Q. And with any of the untrimmed? A. Yes.

Q. What were done with those receipts? A. I think I have got some here. [Witness looks through papers.] I don't see anything here that enables me to identify positively. 30

Q. [Showing witness paper]—Look at these? A. These are seventy-seven sugar barrels, but they don't state where they are from.

Q. Don't they state they are from McMahan's shop? A. Those are receipts for barrels received at the sugar house.

Q. Do those come into this suit, or not? A. I should say not.

Q. Why not? A. Those after January 5th were counted by me on the 1st of January, in the shop at Morris street.

Q. Those received after January 1st were counted by you in the Morris street shop? A. Yes. 40

Q. Where did you receive the trimmed barrels from—which shop? A. From the Morris street shop.

Q. I should like to know whether that is a truth or a lie on that blue paper? Did you get it out of your own head? A. No, sir.

Q. Where did you get it? A. I got it from these two men, besides my own personal attention.

Q. What two men were they, Wilkins and Fering? *A.* Yes; Wilkins was in the storehouse, and Fering was in the melting pan.

Q. From those two men, what did you get? Did you get an account of all the things that was stored in those two places, or not? *A.* I did.

Q. Where did you get an account for yourself? *A.* In the old storehouse.

Q. Did you count anywhere else? *A.* I think I did, in the
10 old house warehouse.

Q. Now, you can't tell how many you counted? *A.* No.

Q. You can tell how extensively you counted? *A.* No.

Q. But from what Wilkins reported to you, either by writing or verbally, and from what Fering reported to you, by writing or verbally, and from your own count, you made up that paper? *A.* I did.

Q. Where is Wilkins? *A.* I don't know.

Q. Where is Fering? *A.* He is in our employ.

Q. Wilkins had charge in the storehouse of the old house?
20 *A.* Yes.

Q. You satisfied yourself that the figures you have got there were true, did you? *A.* I did.

Q. Do you recollect Herbert Cubberly counting any in the storehouse, and giving you an account? *A.* That is the place where he was; I know he gave me some account.

Q. Have you any doubt of the correctness of that statement? *A.* I have no doubt, but I can't recollect the details of that account.

Q. But you satisfied yourself at the time, either by counting yourself, or by the report of these three men? *A.* Yes.
30

Q. And you counted everything that was in the Morris street shop? *A.* I did.

Q. How many cartmen were there employed between the 27th and 6th for this purpose? *A.* I don't know.

Q. This account of Shanly's which commences the 28th—you don't differ from Shanly's account of the untrimmed barrels only about 500? *A.* I believe so.

Q. Shanly has testified here that there were three loads of trimmed barrels from Willard's that went to one of the houses
40 on the 28th, and that they were taken there by Mackin? *A.* I should say they were trimmed barrels.

Q. Was Willard a man who trimmed barrels, or was he a barrel collector? *A.* He was both.

Q. Did you ever deal with him? *A.* Dealt with him from Fall River.

Q. In getting trimmed barrels from him? *A.* I can tell by referring to some bills which I have—I don't recollect.

Q. On the same 28th of December, Shanly has it down

that Clark delivered fifty-four syrup barrels to the new house—what have you to say about that? *A.* It is very probable.

Q. Then why did you say that there was only forty old barrels went there—why are they not in your account? *A.* I presume they were manufacturing them.

Q. Why should not they go down in your account? *A.* Because they were received into the business of the house.

Q. Take this fifty-four syrup barrels—what is the reason if they might have come into the new house on the 31st of December—why isn't it in your account? *A.* Because it will appear in books of the two houses—[looking at book]—December 28th, fifty-four barrels. 10

Q. What was done with those fifty-four barrels? *A.* I presume, filled with syrup.

Q. What is the reason you don't calculate them as part of the goods that were brought to the refinery between the 27th and the 6th? *A.* Because that account is all made up to the 31st of December, and credited by a bill made out in McMahan's name by the book-keeper at the new house.

Q. That was doing just as you had always done with it? *A.* Yes. 20

Q. And it was not reckoned as part of this property which was got from McMahan by agreement with Matthiessen? *A.* No, sir.

Q. And the thirty-six syrup barrels on the same day? *A.* On the 27th there are thirty-six to the old house; there are seventy-one to the old house on the 28th, on my book.

Q. Have you any means of telling where those seventy-one came from? *A.* I think that these slips will show.

Q. Look at them? *A.* I see, by looking back in the column, before it is on the 28th, fifty-four—here is a figure 28, and then continued on and it shows fifty-four on the 28th; and then on the 29th there is seventy-one—that is, the 29th instead of the 28th. 30

Q. On the 28th, is fifty-four to where? *A.* To the old house.

Q. To the new house how many? *A.* Fifty-four.

Q. To the old house on that day how many? *A.* Fifty-four.

Q. Fifty-four instead of seventy-one? *A.* Seventy-one was on the 29th; I have the receipts showing the correctness of my book—receipt by Meyer, McMahan's own cooper. 40

Q. How came those receipts in your possession? *A.* They were rendered to me at the time the bill was, by Mr. Shanly—must have been that way.

Q. Why would he surrender that receipt of fifty-four syrup barrels to you? *A.* As a voucher that they had been delivered.

Q. You gave it to him as a voucher? A. Yes.

Q. Did he ever surrender a voucher for fifty-four syrup barrels delivered, unless they were settled for? A. He would surrender them with the bill he made out, to show that the bill was right.

[Mr. Gilchrist]—I will read from Mr. Shanly's book. [Counsel reads the items from December 1st to the 30th, both inclusive.]

10 Q. Now, will you say how these bills compare with that?
A. I make it to the new house 1,359; to the old house 676.

Q. Now let us see how the bills are? A. To the old house he has 781; to the new house 1,378; 1,378 barrels on the bills and charged from the shops 1,359.

Q. That is, the account I have given you is nineteen barrels less than the receipts show were received? A. Yes.

Q. You have given him credit for nineteen more barrels than he charged you for in the bill? A. Yes.

20 Q. [By Mr. Linn]—Is this a copy you are looking at, or the bill rendered by Shanly? A. No, sir; this is a copy of the bill rendered by Shanly; Shanly's bill is destroyed.

Q. [By Mr. Linn]—Who made that copy? A. I think it is a young man engaged in the office of the new house.

Q. [By Mr. Linn]—You don't know anything about that bill—you don't know that it is a copy? A. I can't swear to it.

Q. Under whose direction was that bill made out? A. I can't say; I have nothing to do in the new house.

30 Q. That, you suppose, is a copy of what Shanly rendered?
A. Yes.

Q. The bill charges nineteen more barrels than appear on the book? A. Yes.

Q. What about the original bill of Shanly for the old house?
A. The bill to the old house calls for 781 syrup barrels.

Q. How much do your books show you received? A. The same.

Q. Now, I will read from the 1st of January on. [Counsel reads the items on to the 1st of February.] Just see what that amounts to up to the 10th, and what it amounts to afterwards?

40 A. New house, 1,138; old house, 1,085.

Q. How does that agree with the credit you gave on your book? A. The syrup barrels in the new house book I don't find; I can tell by reference to the bills.

Q. Well, find the bills? A. [Looks at bills]—1,170 to the new house.

Q. How does that agree with what Shanly puts down? A. 1,138; we have given him credit for thirty-two barrels more than he charges for.

Q. As to the old house? A. The old house account is 991.

Q. How much is Shanly's account, as you got it from him? A. 1,085.

Q. What is the difference? A. Ninety-four.

Q. Ninety-four barrels that he has got down on his book that you have not on the bills delivered to the new house?

A. Yes.

Adjourned for the day.

Re-direct examination of *Mr. Sunderling* continued by *Mr. Gilchrist*.

Q. We were on the syrup barrels, you recollect—those syrup barrels outside of the forty that you have spoken of—how were they treated in the accounts between you and McMahon? A. The syrup barrels, between the 27th and the 6th, were sent in in the ordinary way, ready for filling.

Q. How were they treated in the accounts? A. Those in the old house were billed by Shanly on the 31st of December.

Q. Those in the new house? A. Those in the new house were billed by ourselves, to the name of McMahon.

Q. I understood you to say those were bills made out by Shanly, and lost? A. Those that were originally made out by Shanly.

Q. Were they treated in the same manner, or different from the syrup barrels you had received prior to the 27th in the accounts? A. Treated in the same manner.

Q. There are 655 new sugar barrels, large, and 362, small? A. There were 983 of them manufactured by McMahon; thirty-four of them came with new heading in them.

Q. 983 had been manufactured by McMahon? A. Yes.

Q. Where were those new barrels manufactured? A. In the Grand street shop.

Q. And thirty-four of them came how? A. With new heading; they were new barrels, with new heading; they were put down, thirty-four new barrels.

Q. Thirty-four barrels contained the headings of what? A. Contained headings for second-hand barrels; they were filled with headings; they were packed with headings for other barrels; they were headings for barrels where the heads had been lost out in transfer.

Q. Where did you get your account of 653, 362, 983, and 34? A. I have got them on that original paper.

Q. Where did you get the materials to make up that? A. At the time we took them in, or at the time they were transferred from the place where they went first to the place where we wanted to use them finally.

Q. Who else, besides Wilkins, and Fering, and Cubberly, kept an account of what was sent from the branch shop? A. There was a cooper by the name of Tom McDonnell; he was foreman over the coopers that were trimming these barrels stored in the melting pan warehouse and the storehouse, trimming the barrels that had been got from McMahon by these teams.

Q. He gave you an account? A. Yes.

Q. As to the other things that were sent from that Grand street shop, was there anybody else had an account? A. I can't say, positively; at the time they were sent from the shop, I believe that Pat McMahon took an account of all these barrels that were trimmed in the melting pan room, and also in the storehouse.

Q. Did he give an account to you? A. Yes, I should say he did.

A. Was there anybody at the Grand street shop that was keeping an account of what was sent? A. Not of the untrimmed barrels.

Q. Of anything? A. Yes; of the new barrels and trimmed barrels.

Q. Did you get that account—have you seen that account? A. Yes.

Q. How does that agree with your account that you got from Tom McDon-

nell and the other accounts? A. He makes it appear as 264 barrels trimmed, which I have put down as untrimmed; the reason for that is, that there was heads missing for those, and I treated them as untrimmed.

Q. Did Jerry O'Donnell have anything to do with the transportation of these goods from the Grand street shop? A. He did; he was foreman of that shop.

Q. Have you seen his account? A. I have.

Q. How does that agree with the account he made up? A. Was not your question before in reference to Jerry O'Donnell?

10 Q. No; we were talking of Tom. A. I thought you was talking of Jerry.

Q. How did your account agree with Jerry O'Donnell? A. I didn't see his account at that time.

Q. How did you make up your account at that time? A. From the men receiving them; I knew where they came from.

Q. Have you verified your accounts with Jerry O'Donnell's? A. Yes.

Q. And you never saw Jerry O'Donnell's account till within a few days? A. No, sir; I never saw his books.

Q. How did you and he agree? A. We agree.

20 Q. From the information you got at the time, you believe you were right, and from your information since, you are not corrected? A. No, sir: I am of the same opinion.

Q. Haven't you looked at Jerry O'Donnell's books since? A. Yes.

Q. Do you agree or not? A. We do.

Q. In all the things that relate to his account? A. Yes.

Q. Did you endeavor, about January, 1872, and thereafter, to get an accurate account from Shanly? A. I did.

Q. Tell us how often you asked from Shanly, an accurate account of these things that came down? A. I asked Mr. Shanly a number of times for a statement of the whole account.

30 Q. When did Shanly go away? A. About the 14th of March.

Q. How often, before the 14th of March, did you ask him for an accurate statement? A. About half a dozen times.

Q. Did he promise to give you a statement? A. Yes.

Q. Have you ever received any? A. No, sir.

Q. Have you, since the 14th of March, spoken to him more than once for it? A. Yes.

Q. Has he ever given it to you? A. No, sir.

Q. Did he admit, or not, whether he had accounts? A. He said he had accounts of these things.

40 Q. You have stated the balances that appeared on the ledger of Matthiessen, now take the checks and bills and show what the balances were? A. I will take one side of the account first.

[The court]—Is there any dispute as to the fact that there was indebtedness from McMahan to the Sugar House Company?

[Mr. Linn]—They say so; I don't know that I shall dispute it.

Q. Go on. A. December 5th, check for \$4000, checks given to McMahan; December 10th, check for \$802.75, to pay the balance of December 1st.

Q. Then the account started at this date with a balance? A. With a balance due to McMahan and this check of \$802.75.

50 [The court]—At any point where counsel can find there is a balance of account giving a starting point, it would be well to start from that.

[Mr. Gilchrist]—This is a case where the accounts may be considered to start anew.

Q. At that time, that check squared up? A. Yes; that is the balance on the ledger.

Q. Next check? A. December 10th, 1870, \$3000; December 17th, \$2500; December 24th, \$3000; December 31st, \$3000; then there is a bill rendered to McMahan; I don't find the bill here, but it appears by a reduction from his account, ordering the bill to be paid.

60 Q. [Showing witness bill]—What date is that bill? A. December 31st, 1870, \$8180.77; less our bill, \$212.75; the bill is not receipted; it went into the account.

Q. Go on; what is the next cash? A. January 7th, \$3500; January 14th, \$3000; January 21st, \$4000; January 28th, \$3500; January 31st, a bill in the same way his bill rendered, and there is also a reduction less our bill, \$208.36.

Q. As you go along with those checks, state who signed those checks and who endorsed them? A. December 5th, 1870, check to the order of B. McMahon, endorsed by B. McMahon, per Shanly; I know these to be the real signatures of those gentlemen.

Next, December 10th, \$802.75, to order of B. McMahon, endorsed by Bernard McMahon himself; I know these signatures to be the signatures of those two gentlemen; Jurgensen was the treasurer of our concern.

December 10th, to order of B. McMahon, signed by Jurgensen, treasurer, endorsed by McMahon himself; those signatures are genuine.

December 17th, to the order of B. McMahon, \$2500, signed by Wiechers, vice president, endorsed by McMahon; endorsements and signatures correct.

December 24th, 1870, \$3000 to the order of McMahon; signed by the treasurer; endorsed by McMahon himself; signatures correct.

December 31st, to the order of B. McMahon, \$3000; signed by Wiechers, vice-president, endorsed by McMahon; signatures correct.

January 7th, order by McMahon, \$3500; signed by Wiechers, vice-president; endorsed, for deposit, by the Second National Bank, Jersey City, by M. McGuigan; it is not endorsed by McMahon; that has the bank mark of being paid.

January 14th, to order of B. McMahon, \$3000; signed by Wiechers, vice-president; endorsed by McMahon; signatures correct.

January 21st, order of McMahon \$4000; signed by Wiechers, vice-president; endorsed by McMahon; signatures correct.

January 28th, to order of McMahon, \$3,500; signed by Wiechers, vice-president; endorsed by McMahon, per Shanly; signatures correct.

I gave you an account of a bill being deducted, \$208.36, January 31st; 30 another bill, with a reduction from the amount of his bill, \$41.44; that was taken from one of his bills.

February 4th, check for \$4000, to order of McMahon; signed by Wiechers, vice president; endorsed by McMahon; signatures correct.

[Mr. Linn]—We will be content with the proof of the books.

[Witness]—The ledger itself shows some cash paid on account of the next month, where the bill for the previous month shows after the cash has been paid for that month—sometimes it shows that way.

Q. [By Mr. Linn]—Those balances you have taken from those books? A. Yes.

[Mr. Linn]—Then we will take that statement, and if I want to examine him, hereafter, he will be here to be examined. 40

[Mr. Gilchrist]—Then the statement he has made will be taken as true?

[Mr. Linn]—Yes—subject to the examination, if we desire.

[The witness]—That check which I thought was signed by McGuigan, I see, is the signature of McMahon.

Q. What is the balance shown by the ledger on the 30th of November, or the 1st of December, 1861? A. \$11,836.89.

[Mr. Linn]—That is about right—somewhere in that neighborhood.

Q. Was there any interest charged on the books against McMahon, for 50 these advances? A. No, sir.

Q. What was the final balance December 1st, 1871? A. \$11,836.89.

[The Court]—It is ascertained what the balance was about the 23d or 25th of December?

[Mr. Linn]—No, sir.

[Mr. Gilchrist]—We can ascertain that.

Q. What was the next payment after the balance of November 30th.

A. December 2d, check for \$3000; the next is December 9th, \$3000; next, December 16th, \$3000; next, December 23d, \$4000.

Q. Now, take the bills for the month of December—the old house first? 60

A. The old house bill is rendered by Shanly, in the usual way, up to December 31; it covers much of these goods that have been in controversy.

Q. Can you, by a little calculation, state exactly what was delivered up to the 23d? A. I can't say, till I look at my books, whether I can do it right away.

[Mr. Gilchrist]—You may look at that and we will call you again for it.

Q. Tell us—after the first of January, who paid for the material and labor, which resulted in the production of the barrels and other things, sent by Shanly to the sugar house? A. The sugar house company themselves.

Q. That is—they paid for the lumber and materials of all things that were made after the 1st of January? A. Yes.

10 Q. [By the Court]—Do you mean to say that? A. We paid for all except these things which appear in my account as coming from Bernard McMahon.

Q. Do you mean to say that for everything outside of the matters in this suit you paid for the materials and the labor after the 1st of January? A. Yes—the company.

Q. Did you have the care of paying the labor? A. I did.

Q. And paying the materials? A. I did.

Q. And you had orders to do so after the 1st of January? A. Yes.

Q. Some of those things that were brought in on the 2d, 3d, 4th, 5th, and 6th of January, were they, or not, part of those things for which Matthiessen paid the materials and labor? A. I see, by reference to one of my papers, a matter of some staves—some syrup barrel staves; I think there is some 3000, it may be 2700; in the hurry, I didn't fix it in my mind positive; they appear on one of my statements as being taken from stock on hand belonging to Bernard McMahon.

20 Q. Did those staves enter into this account of yours as paid in discharge of the \$11,000, or not? A. Not on the later statement.

Q. Not on what later statement? A. The statement I made up, showing the condition of the account on the 5th of January; it does not appear on that paper of the 5th of January; I think it is an oversight.

30 Q. You made up an account on the first week in January of what articles that came into the refinery between the 27th and the 5th; did you, at that time, fix the prices for those articles also? A. Yes, about that time.

Q. How near to that time? A. I can't positively state at what time I made up that account, but I must have made it up quite early in the month of January.

Q. How does that, as to value, agree with the statements you have now given us as to the value of the things you have put down, as to the prices and total? A. It agrees; as to totals, there is a slight difference; my impression is, there is a difference of about \$18 in the totals.

40 Q. The account you made up in January, 1872, don't differ from the account you have now made up but about \$18? A. No, sir.

Re-cross-examination.

Q. From the 1st of January on, you were engaged in your office, at the old sugar-house? A. Yes.

Q. That was your particular place of business? A. Yes.

Q. You had no occasion to go to any of the shops of McMahon? A. I did, frequently.

50 Q. When, and for what purpose? A. I went about the 1st or 2d of January, to see the condition of the Morris street shop; I recollect of going in there, and also of taking an account of stock in the Morris street yard, and also the yard on the corner of Washington and Morris streets—that is the stable place.

Q. How often were you in those shops from the 1st to the 6th of January? A. I can't say.

Q. Every day? A. No, I should say not.

Q. It was not your business to superintend any of those shops? A. No, sir; except when I wanted to satisfy myself as to paying a bill, I would perhaps go up there.

60 Q. Do you know where the material came from which was worked up in those shops between the 1st and the 6th of January? A. All the material?

Q. Yes. A. The barrels came from collectors, and there was a considerable of stock which came and was taken account of as belonging to McMahan.

Q. You can't state, certainly, where all the goods came from which were worked up in those shops between the 1st and 6th of January? A. I can tell from my books and my papers.

Q. In the receipt of goods at the sugar-house, how did you distinguish between those goods which are in controversy in this suit and which are not in controversy, between the 1st and 6th of January? A. Those which came into the shops after the 1st or 2d of January, came from the Morris street shop, except, as I have got it down, a few barrels coming from the Grand street shop, and all those barrels in the Morris street shop had been counted on the 1st of January, and an inventory made of them, which inventory I have, and those barrels which were trimmed went down to the old house and No. 1 shed; there was 242 untrimmed barrels remaining, and seventy potato barrels; those I credited on the same account, to McMahan, as remaining in the shops, and after the 1st of January everything which came down, came down in the usual way, to be used. 10

Q. Now, do I understand you to say that after the 1st of January all the goods which came to the sugar house came from the Morris street shop and from the Grand street shop? A. No; not all the goods. 20

Q. I was asking you how you distinguished between the goods which are in controversy in the suit, and which you received between those dates, and the goods which are not in controversy in this suit? A. I am stating a matter of fact, that the barrels which came from the Morris street shop were all of our barrels after the 1st of January, except the two hundred and forty-two and seventy.

Q. Where were they brought from to the Morris street shop? A. From the collectors—men that would go out throughout the city and throughout the country, I suppose.

Q. Do you know that none of those barrels were delivered in pursuance of previous agreements made by McMahan for the delivery of the barrels? A. If they were we paid for them. 30

Q. You know you paid for them whether they were trimmed or untrimmed, and in whatever condition they were? A. Yes.

Q. It was the intention, then, to strip the premises of everything up to the 1st of January, so that Matthiessen owned everything that was there of stock on the 1st of January? A. Yes.

Q. So that really after the 1st of January McMahan didn't own anything at all? A. No, sir.

Q. Do you know where these staves came from that you have just mentioned? A. I couldn't say. 40

Q. What were they manufactured into? A. Syrup barrels.

Q. Who paid for the manufacture? A. The Sugar House Company.

Q. Who paid for the staves? A. I don't know that anybody paid for them; I credited them on his account.

Q. They were staves which belonged to McMahan? A. Yes.

Q. And you suppose Matthiessen had bought them of McMahan, and they went in with these other goods? A. Yes.

Q. What were these staves worth? A. \$35 a thousand, besides cost of lighterage, \$2.50, making \$37.50 a thousand. 50

Q. Was there not eighteen thousand delivered to McMahan on the 30th of December, which came into Matthiessen's possession from Robertson & Co.? A. I don't know.

Q. All you know is that there were three thousand came into Matthiessen's possession? A. Three thousand seven hundred.

Q. You don't know what became of the balance of the \$18,000? A. I don't know anything about that.

Q. Those were worth \$37.50 a thousand? A. Yes.

Re-direct examination.

Q. [Showing witness paper]—Whose figures are those on the back of that 60

paper which Mr. Shanly has just given to us? A. I recognize them (pointing) as Mr. Shanly's.

Q. Look at your own figures that you have given us for the 983 new barrels, would those figures correspond with your figures? A. 983 were new barrels.

Q. Does that memorandum correspond? A. Yes.

Q. And you consider them Shanly's figures? A. I do.

Q. It corresponds exactly with your accounts. [Showing witness another paper]—In whose handwriting are those figures? A. Mr. Shanly's.

10 Q. How does that agree with the statement of the trimmed barrels—494? A. Exactly; here are 70 potato barrels just as I testified; here are 1017 new; that corresponds with 983 and 34.

Q. [Showing another memorandum]—When do you think that paper was written, and what time does it relate to? A. I see some items here which I have also in my inventory, from the Morris street shop; I see other items which would seem to indicate that it was beyond that time; I also see five kegs of nails down which I have got.

20 Q. [Showing another paper]—Here is a memorandum I think in your handwriting; see if that recalls anything to you? A. I think this refers to that time when we were manufacturing ourselves; that is, this yellow paper; it has nothing to do between the 27th and the 6th.

Q. [Showing another paper]—Here is another memorandum brought by Shanly; what does that relate to? A. This I recognize as being the foreman of the shop in Essex street—Sweeney's shop—Sweeney was foreman at the time we took hold of the work, and had it the whole time while we were paying wages and buying material; judging from the items here, I should say it was after the 1st of January when we took account of stock and tools; that appears to be tools.

30 Q. I show you another paper from Shanly; isn't that Patrick McMahon's handwriting; look and see whether it agrees with what you have sworn to, as to the stock you had on hand? A. Yes, it agrees with what I have sworn to and it is in McMahon's handwriting, 417, 242 and 70; I recognize also on here, another item of 709 hogsheads which I put in my statement, less 382 sold by the administrator; that comes out exactly again.

Q. In whose figures are those on that McMahon paper? A. I should say that the three items that go to make up the gross sum, are Mr. Shanly's, and I think the addition was made by me; I see this corresponds also with an inventory taken on the 1st of January, which I have referred to as stock in Morris street yard; it agrees perfectly with what I have given.

40 Q. That 2360; can you tell what that is on this paper; is that the total of the trimmed barrels? A. Those I see, correspond with 23,700 hoops; this 8 should represent the price and that corresponds with my account of the 23,700 hoops which I have.

Q. What is that? [Showing another paper.] A. Fixtures and stock of the Grand street shop, December 30th, 1871.

Q. That paper comes from Mr. Shanly; in whose handwriting is it and who is it signed by? A. Signed by J. O'Donnell; he was foreman of the Grand street shop.

50 Q. [Showing another paper]—Can you recognize any of that handwriting of any of the figures on it? A. Yes; the handwriting of Daniel Lyon: he was foreman of the molasses barrel shop in Morris street, next to the cooper shop where Patrick McMahon was foreman.

Q. Do you recognize any figuring on there, as belonging to anybody else? A. I do; 20,600 x 18 making \$37.80, which, I think, corresponds with another entry upon my account; it seems to be for hoops; that is the sum total, I should say.

60 Q. What does that figuring upon Bellont's paper appear to be? A. I can't state what that refers to; [on being shown another paper;] this paper is in the handwriting of Daniel Lyon; the two bottom lines appear to be in the handwriting of Mr. Shanly; that figuring at the top is Mr. Shanly's, and has reference to some poles, I should say; the other side of it is horses; [on being shown another paper;] this relates to the tanks; I see on here there was

seven hundred and fifty feet that is ordered by F. O. M. ; I gave an order on the 25th of January for about that number of feet.

[Mr. Gilchrist to Mr. Shanly]—Where did you find those papers?

[Mr. Shanly]—At Mr. Weart's office; some of them at Mr. Weart's; some of them at my house, this morning.

[Mr. Gilchrist to Shanly]—How long were you at work in Mr. Weart's office?

[Mr. Shanly]—About an hour.

Q. How does that agree with the measurements you made of the tanks?

A. The item 9248 I don't understand; there is a word that I can't hardly make out; I think it is "afterwards;" there are two items which go to make out 9248, which appeared in the previous part of it. 10

Q. How much is under that after? A. 3260, which, with those two sums, make up the 9248.

Q. How does that compare with the number of feet in the tanks? A. Exclusive of those figures which appear twice, there is a difference of two thousand and twenty between the actual measurement of tanks and lumber, apparently bought for the tanks.

Q. There was more lumber bought for the tanks than was used in them, you think? A. Yes; there naturally would be some. 20

Further examined by Mr. Linn.

Q. You have been shown several pieces of papers, with memoranda and figures—do you know certainly by whom those memoranda were made? A. I do; those I stated I am sure of.

Q. You are quite certain they were made by the persons whose names you have given, from your knowledge of their handwriting and their figures? A. Yes.

Q. Do you know when those memoranda were made? A. No.

Q. Do you know for what purpose they were made? A. No.

[Mr. Gilchrist]—We will want you to give McMahon's side of the account from the 1st to the 23d of December. 30

F. O. M. *Matthiesson*, one of the defendants, sworn for the defence, testifies as follows:

Direct-examination by Mr. Gilchrist.

Q. You are president of the Refinery Company? A. I am.

Q. How many years have you been engaged in the manufacture of sugar?

A. Since 1850—twenty-three years.

Q. You learned the trade from the beginning did you? A. Yes; all parts of it.

Q. How long have you known McMahon? A. Since 1862 or 1863. 40

Q. When did you commence to manufacture sugar in Jersey City? A. In 1863; he was then furnishing us barrels; at that time the firm was O'Donnell & Co.; he was one of the firm; he had charge of the trimming of the barrels in Jersey City.

Q. When did McMahon become the sole person furnishing the cooperage for you? A. I think in 1868; I am not quite certain about it though; about that time I should think.

Q. Tell us when it was that you began to make advances to him for barrels and other things you purchased? A. May I state the reason why?

Q. Yes. A. In 1870 we had made a contract with McMahon to furnish us with all barrels and cooperage stock, and in 1870, in the summer, he didn't supply us with barrels as we needed them; we sometimes had a great deal of sugar that ought to have been in barrels and was not; I then told him he had to make provision for barrels, that it should not happen again, because it was a great loss to us— [Interrupted.] 50

Q. Tell us what was the general extent of your business during 1870 and 1871, and what inconvenience it was to you to want barrels to put your sugar in, and where the sugar lay, and what was the trouble in your business? A. I dare say at that time we required fifteen hundred to eighteen hundred barrels

a day, and if we hadn't the barrels we could not ship the goods, and the manufacture of sugar went on, and gradually we got our floors so full we didn't know what to do with our sugars; we had sold the sugars frequently in advance, and customers would ask us why you don't send us the sugar, and if prices had gone down they would have made a claim against us; in the summer time it is always difficult to get barrels, and I suppose he had to pay extra price for them; in the winter time it is a time when barrels are more freely collected and our business is not so brisk; he collected barrels and stored them away to have them for the summer time when our business is

10 brisk, and also when it is more difficult to get barrels; as he had invested a great deal of money in real estate he hadn't money to pay for the barrels as they came in, and for the purpose of aiding that we advanced him money on account of the barrels he was going to furnish us, and that, according to the books, commenced in December, 1870, and it went on during the summer and during the whole of the year 1871; in the summer time of 1871 I noticed him going very frequently to a liquor store and coming out of it pretty often, and sometimes under the influence of liquor, and I thought that would not do, so I requested him to pay me back.

Q. About how early did you commence to press him for the payment of money? A. I should think July or August.

20 Q. What was the amount due to you, according to the books, in July? A. I remember now he owed us about \$15,000 once, and I had a statement made up by the bookkeeper and showed it to him, and he took it home with him, and he acknowledged it was correct.

Q. About what time was that? A. I see here is an item of \$14,000 in August. [Looking at memorandum.]

30 Q. You say you furnished him during the summer; would you say that is the balance you furnished him? A. I remember I furnished him that balance of about \$15,000, and I then requested him to return the money or make it good in some way; he offered me his business; he told me I should take the business as it was, and he would be foreman of the cooper business; I refused to do that; that was about August.

Q. In September? A. Whenever he then afterwards came I demanded a settlement, and still I could not stop then because our business was very brisk and I had to let it go on; on the 2d of December he again came to me for more money—for \$3,000; perhaps he may have asked me for more.

Q. What was your usual way of paying him money? A. I gave him an order down to the Wall street office, where Mr. Wiechers and Mr. Jergensen were.

40 Q. This check of December 2, 1871, how was that given? A. I gave that myself.

Q. It was not usual for you to give a check on your own bank account? A. No, sir; this is the bank account of the company.

Q. But you didn't usually give checks? A. No.

Q. You usually gave an order on the treasurer and Wiechers would give a check? A. Yes.

50 Q. State to the jury what occurred before you gave that check; what was the understanding between you and him? A. I refused to advance him any more money, and he said he had to get more money, otherwise he had to stop the business; he then offered me his property again; I told him I could not take his real estate; I would accept his cooperage stock, whatever I could use as cooperage, and he agreed to that, and when I gave him the check I told him, "Now, McMahan, you understand that our agreement is, that the cooperage stock belongs to me;" he said, "Yes;" and with that I gave him the check.

Q. Who was present at that conversation? A. It was between 12 and 1 o'clock that he came, and when he came in, nobody was in there; during the conversation, the delivery clerk, Mr. Cubberly, came in.

60 Q. And he heard a part of it? A. I suppose so, because we talked very loud; we were both excited.

Q. Subsequent to that agreement, that you should have the stock, was there

any conversation between you and him as to the removal, and who should pay the expenses of it? A. After this agreement was made, I went to consult you, [Mr. Gilchrist,] and you told me the better way was to have possession of the goods; coming from the office to the refinery, I met McMahon on the sidewalk, in front of his shop; I told him where I had been, and I told him I should remove the barrels as soon as I had room for them; I told him, "How shall we remove those barrels?" he said, "I will give my teams that you require;" I told him those teams of Campbell's didn't belong to me, consequently I would have to pay for the removal of the barrels, and he said, "All right; whatever the charge is, I leave that to you; I will make that good." 10

Q. For what was it that you were to have that cooerage stock? A. For money due the concern—to the company.

Q. At that conversation, was the amount of that indebtedness due from him to you the subject of conversation? A. Not the exact figure; the figure was mentioned at about \$11,000.

Q. You haven't stated about what time it was you had this talk about the expense of removal? A. It must have been within a week, I should think; it was not the same day we had the agreement—it was three or four days or a week afterwards. 20

Q. At that time, had you the slightest suspicion that he was unfit to make a contract? A. No, sir.

Q. Had he given you any evidence of being insane or lunatic? A. No, sir; the only trouble I found with him was, that he frequented that liquor shop, three doors from his own shop, belonging to Masterson; I saw him going in and coming out of there entirely too often, for my satisfaction.

Q. What was the condition of your premises as to the practicability of receiving into them the stock? A. We had to make room in our own store-houses, and had to hire O'Donnell's shop in Morris street.

Q. What was the reason, after you had been advised by me that it would be wise to take those things into your possession—what was the reason of the delay from that time till you did take them into your possession? A. Because we had not room to store the barrels. 30

Q. State what happened in relation to the execution of the first power of attorney? A. About the middle part of December—I should say about the 10th or 12th, I passed by his house; he was in his basement, and knocked at the window for me to come in; he told me he had made up his mind to revisit Ireland, and that whether I was satisfied to leave the business in Shanly's hands; I told him I was; then the power of attorney was drawn up and signed in my presence, in McMahon's basement; Shanly and Vredenburg were there; Vredenburg read the power of attorney to McMahon, and asked him whether he was satisfied, and he said he was; then it was signed by McMahon, and witnessed, I think, by me and by Vredenburg; that power of attorney, I understand, was destroyed afterwards, and the reason that was given to me for destroying it was, because there was no seals attached to it; then another power of attorney, if I remember exactly, the same thing as the other, was signed, and Shanly was present, and I was present; I read it to McMahon the same way as Vredenburg had done, and McMahon, before he signed it, said he understood it perfectly—that it was to give the business into Shanly's hands; he signed it, and I witnessed it. 40 50

Q. Under whose directions were these goods removed—this stock? A. Mr. Shanly's.

Q. Who had charge of the receiving of the stock? A. That, I am not quite positive about; but in the new house it was Fering and Cubberly; I know that Fering received them in one house, but who received them in the store-house, I don't remember; in the old house they were received by Wilkins, who had charge of receiving the barrels before; Fering was foreman of the melting pan, and as we were not to work there, he took that part of all the barrels we received in that melting pan.

Q. There was a letter shown that Vredenburg appears to have written, and Shanly says he got from you; a letter dated January 4th, stating that Dr. 60

Varick said he was not fit to execute the mortgage; do you recollect the receiving of that letter? A. No, sir; I have no recollection of it.

Q. Have you any recollection of giving that letter to Shanly? A. No; I know that the mortgage had been talked of long before; McMahon always promised me to pay me up with money he would get from a mortgage on his property.

Q. How early did that conversation commence? A. I should think in August; he promised that he would raise money, at least told me he was going to raise it by mortgage; he was trying to get a mortgage on his property.

16 Q. Shanly has talked about your telling him to put down a \$1000, as due to you in this statement made to creditors; how did that come about? A. Shanly told me that the creditors of McMahon wanted money, and as there was no money, and there was property, I advised him to make a statement of the affairs of McMahon, so he did; and he then asked me "how shall I put you down?" as I didn't know exactly how we stood and as I was convinced that these things that had been removed, didn't cover our indebtedness, I told him to put us down as creditors for \$1000; I never charged any interest on my advances.

20 Q. From the time of the removal of this stock that was on hand, how was the business conducted; how was the material paid for from the 1st of January, and the work paid for? A. The material was paid by us, also the labor paid by us, because there was no cash to pay for the things with, and if the laborers had not been paid, of course they would have gone away; and to keep the business going for McMahon, I agreed to pay; and to some of the barrel collectors I advanced money.

Q. The material purchased after the 1st of January, which was manufactured after that date, who paid for it? A. We did.

30 Q. And the labor done on material that was bought after the 1st of January, and that was bought before the 1st of January on stock you got from McMahon, who paid for that labor? A. We did; we paid the men directly from the 1st of January, and before that we paid money to McMahon.

Q. Who paid for the work done on the stock that McMahon agreed to give you on the 2d of December; who paid for work on that stock, the stock you got on the 26th of December, which you agreed for on the 2d? A. Whatever was trimmed after the 1st or 2d of January, we paid for; and the work that was done on the stock after the 1st of January, we paid for; and stock that was got after the 1st of January, we paid for.

40 Q. What was the reason you paid for the labor after the 1st of January? A. If the men had not been paid the last week in December, and if they had not been guaranteed all their wages to be paid, they would have gone and we would have had no coopers, and consequently no barrels to put sugar in.

Q. What was the understanding between you and Shanly or McMahon, as to the material worked up after the 1st of January; for whose benefit it should be—the profit on the manufacture? A. It was for McMahon.

Q. When he died? A. After he died Mrs. Staff and Mrs. McMahon and Mr. Shanly, all three came to me and wanted to know whether I could not keep the business for them; I told them it was entirely out of my power, but all I could possibly do I would do; the business was carried on just the same.

50 Q. Did you give them any time to raise the capital to carry on the business? A. I told Shanly I would agree to carry it on for a certain time; I think the first time was four weeks; then when Mr. Weart took charge of the estate, he gave first, I think, two weeks; and afterwards, at my request, he added two more weeks, to give Mr. Shanly and Mrs. McMahon a chance to get some capital; Mr. Shanly tried to raise money, and different parties came to see me about it.

Q. When these powers of attorney were executed in your presence, did you believe or not whether McMahon understood what the purpose of the thing was? A. Perfectly and distinctly.

60 Q. He was then expecting to go abroad for his health? A. I suppose so; the first interview I had with him about the power of attorney he then mentioned that he was going to Ireland, but the second time I read the power to him he then said he understood it perfectly.

Q. Were those goods removed by force, against anybody's will who was connected with McMahan? A. No, sir.

Q. Shanly has spoken that about the 20th of December you came to him and asked him and said, "Now, I want these goods removed;" what I ask you was, whether there was any objection, to your knowledge, made to your taking those goods? A. No, sir.

Q. By McMahan or any one about his establishment? A. No, sir.

Q. What I want to get at was, whether or not there was anybody who objected to your taking that property, so far as you knew? A. No, sir.

Q. And whether you recollect your conversation with Shanly about it? A. 10
We had a conversation about it; whether it was exactly that time or not I don't know; it was prior to the removal of the goods.

Q. Did Shanly assent to it? A. Yes; he ordered McMahan carmen to do the work.

Q. And the great part of it was done by his carmen, wasn't it? A. Yes.

Cross-examination—

Q. On the 2d of December, 1871, there was due from McMahan to your company something over \$11,000? A. Yes.

Q. For advances previously made? A. Yes. 20

Q. And which had been made from time to time during the course of the past year? A. Yes.

Q. You were dissatisfied and desired pay for that? A. Yes.

Q. And then McMahan sold to you the stock he had on hand in payment of that debt? A. He agreed to give it to me in payment of that debt.

Q. Did you know how much stock he had on hand? A. He told me he had about twenty-five thousand untrimmed barrels; he gave me a statement of what he had about.

Q. Had he enough on hand to pay the debt? A. Yes; according to his statement. 30

Q. Was he delivering to you daily at that time, stock for your establishment? A. Yes.

Q. And after he made that agreement you advanced still further moneys to him in payment of these goods which was delivered from time to time? A. The barrels that he took from the collectors—he had to pay for those.

Q. You advanced money for that purpose—some \$13,000? A. Yes.

Q. This money which you advanced to him during the month of December was to pay for that stock which he was getting in from time to time, and which he was working up for you? A. Yes.

Q. But the stock he had on hand on the 2d of December he sold to you in 40
payment of this \$11,000 and odd dollars? A. Yes.

Q. When did you first learn that McMahan's mind was affected? A. I once met Dr. Varick coming from New York in Wahington street, and I asked Dr. Varick—that was after the 1st of Jannary—what was the matter with McMahan; he told me that he had softening of the brain; I asked how long it might last; he said he might die to-morrow, and might live a long time; that was the first time I knew positively.

Q. Had you heard before that that he was out of his head? A. Yes.

Q. Had you seen him frequently? A. I saw him prior to Christmas, and I think I saw him once after Christmas—between Christmas and New Year's. 50

Q. What was his condition then when you saw him? A. He was down stairs in the basement talking about different things and talking about going to Ireland.

Q. Did you observe anything then in his conduct unusual? A. No, sir.

Q. You never saw anything strange in his conduct? A. I have, when I saw him under liquor, and I thought this trouble that he had was caused by drink.

Q. You say his conduct was strange, but you attributed it to his excessive drinking? A. Yes.

Q. What did you see in him that was strange in his conduct? A. I saw 60
him act like a man that was under the influence of liquor.

- Q. Describe what you saw? A. In the summer, in August, when I saw him coming out of the liquor shop, he had the odor of liquor on his breath, and it is difficult for me to describe it.
- Q. Did you talk with him? A. Yes.
- Q. Was there anything peculiar in his manner of speaking? A. He was talking silly; talking like a drunken man would talk, I should think.
- Q. Did he stagger? A. No, I never saw him stagger.
- Q. Did he stammer in his speech? A. Not that I remember of; but it was his nonsensical conversation.
- 10 Q. When men are drunk they are very often silly? A. Yes.
- Q. What did you understand was the matter with him when you saw him at the house, between Christmas and New Year? A. I attributed it to the drinking; I thought he suffered from excessive drinking.
- Q. [By the Court]—You thought it was delirium tremens? A. Yes.
- Q. There was that same indication about his conduct that there would be about a man that was laboring under delirium tremens? A. Yes; it was natural for me to believe that because I had often seen him drunk.
- Q. When did you commence removing this property from his shops to yours? A. Between New Year and Christmas; I suppose the testimony that it was on the 27th is correct.
- 20 Q. Did your employees assist? A. Yes.
- Q. Did your carts assist? A. The carts which we employed—Campbell's.
- Q. By whose directions did Campbell's carts come? A. By my request.
- Q. Have you any knowledge of your own of what amount of goods were removed? A. Only what I know from the books.
- Q. Did you know, at the time this first power of attorney was executed, that he had been to consult Dr. Hammond? A. No, sir; because I think the power of attorney was executed before the 23d or 22d; I think the second was executed before he went to Dr. Hammond's; I don't think it was on the 23d, because the 23d is my birth-day.
- 30 Q. Why do you think the second was not executed on the 26th? A. Because, so far as my recollection serves me, it was before Christmas.
- Q. Have you a distinct recollection about the time? A. My recollection is it was not after the 23d; it was not after Christmas, consequently it must be before Christmas.
- Q. Why do you think it was before Christmas? A. That is, so far as my recollection serves me, it was before Christmas.
- Q. Was this power of attorney spoken of before McMahon had been to consult the physician? A. I don't know when McMahon consulted a physician.
- 40 Q. Didn't Shanly tell you that the physicians advised him to go away? A. The first talk I had about a power of attorney was, when I passed McMahon's house, and he was in the basement of his house, and he knocked at the window and asked me to come in; he then told me he was going to Ireland, and if Shanly would be satisfactory to me to conduct his business, if he would give him a power of attorney, and I told him yes.
- Q. Did he say what he was going to Ireland for? A. No; I told him I envied him, I would like to go to Europe myself.
- Q. Was he then complaining of his health? A. No; he was not confined to his house, if I remember right; he went out with me—left his house.
- 50 Q. He didn't say anything about a physician, then—about being advised? A. No, sir.
- Q. Do you recollect when Shanly afterwards spoke to you about a power of attorney? A. He may have done so, because I was a witness.
- Q. Why did you go there to witness it? A. At Mr. Shanly's request.
- Q. Mr. Vredenburg was there at the same time? A. Yes, sir.
- Q. And he witnessed it also? A. I think he did.
- Q. Did Mr. Shanly request you to go both times? A. Yes.
- Q. Was there anything said to you about destroying the first power of attorney? A. I understood so; otherwise I should not have witnessed the second one; I understood it was destroyed because it had not any seals to it.
- 60 Q. You didn't hear anything about the manner in which the name was written? A. No, sir; only what I heard here.

Q. When was the last time you saw McMahan out of the house? A. I don't know.

Q. Did you see him away from his house after Christmas? A. No, sir.

Q. Can you tell how long prior to that time it was you saw him out of his house? A. I heard it stated here it was on the 23d of December that he went to the house and didn't leave the house; that might have been the date; I don't know.

Q. Did you know that any negotiation was going on about that time to raise money by a mortgage for him? A. Yes.

Q. What was that money to be raised for? A. To carry on the business. 10

Q. That was not to pay you? A. If he had it any time I suppose he would have given it to me, but as I refused to advance him any more money, of course he required money to carry on the business.

Q. Was not all this money advanced to McMahan for your interest and benefit, rather than for his; wasn't it necessary that you should have a supply of barrels, and wasn't that the reason that you advanced the money? A. It was necessary that I should have a supply of barrels, but I could get them from other persons just as well as from McMahan; I have got them from other people since, a great deal cheaper.

Q. Why did you deal with him and advance him money? A. Because I 20 liked McMahan and I was under a contract with McMahan.

Q. Didn't he furnish you with those barrels at that time, a great deal less than you could get them anywhere else? A. No, sir.

Q. Didn't his men strike and didn't he say to you he could not furnish you the barrels; and didn't you say to him go on, "I will pay you?" A. I don't recollect that it is so.

Q. And didn't you promise to make it up to him? A. No, sir.

Q. Then what he told Gannon that you had promised to make up to him that loss, is not true? A. He did not get it from me.

Q. How long before the 25th of December, had you heard anything said 30 about McMahan's mental condition? A. Nothing at all.

Q. Didn't know there was anything the matter with him at all? A. No.

Q. You had observed this strange conduct which you had attributed to his excessive drinking? A. Yes.

Q. Did you think a man who was suffering from delirium tremens, was sufficiently sane to contract? A. The delirium tremens was after Christmas; and because he did drink, I wanted to have this thing settled up.

Re-direct examination.

Q. These tanks that are spoken of, do you recollect when you ordered those tanks of McMahan? A. It was during the summer time of 1871, I think. 40

Q. Did you advance him any money for the purpose of buying those tanks? A. I did.

Q. How much? A. I think \$3,500.

Q. Do you recollect the amount you advanced? A. Yes; I paid him that on account of the tanks; he told me he hadn't the money to pay for the stuff, and I told him I would advance him the money.

Q. In this arrangement between you and McMahan, I would like to understand whether it was you were to take these things for what they were worth, or whether you took his stock in lump for your debt, on the 2d of December? A. He said he had about 25,000 barrels, and I calculated it at thirty-five cents, which was the price he mentioned as having cost him, delivered in his 50 shops.

Q. What was the understanding as to the price of such articles where the price was not mentioned? A. We particularly thought about the barrels, as he considered 25,000 barrels at thirty-five cents, and the tanks and such other goods as were necessary to make the indebtedness good.

Q. You say that Shanly came to you to go and get these powers of attorney executed; what was Shanly's interest in having these powers of attorney executed? A. That he could carry on the business and keep his position there.

Q. Was that the subject of matter of conversation between you and him—his desire to keep his position? A. It was after the death of McMahan, and 60

perhaps might have been before the death of McMahon, that I told Shanly that he should get persons to advance money, that he could carry on the business for himself and the benefit of the widow.

Q. Had he any interest, that was known to you, that was talked between you and him for his getting the power of attorney? A. The power of attorney gave him control of the business, and enabled him to keep his position.

10 Q. In relation to this conversation that Gannon said he had with McMahon about you having agreed to pay him more for barrels than your contract price—now, what I want to know is, whether there had been any trouble, on McMahon's part, in getting barrels so as to make a profit on them at any one time? A. During 1871, he got short of barrels, and he had to get barrels wherever he could get them—I dare say because we demanded them from him, and he was under contract to furnish us with barrels, and I don't know what he paid for those.

Q. Didn't he inform you that he had paid more than he got for them? A. He told me he had paid more for them, and he wanted me to make it good.

Q. There was such a thing in existence as his talking about having some claim on you? A. Yes.

20 Q. If McMahon had collected the barrels the winter previous to the time when he got short, he could have bought them at the price, to make good the contract? A. Yes.

Q. It was his neglect that got him into that scrape? A. Yes.

Re-cross-examination by Mr. Linn.

Q. After the 1st of January, you took charge of the business? A. I paid for the labor and material.

Q. Did you pay Shanly? A. I did not.

Q. He was at work, wasn't he? A. He was, from the 1st of January, till the death of McMahon, in McMahon's interest.

30 Q. He was there till the 14th of March? A. Yes; and after the death of McMahon, the business was carried on in Shanly's interest; it was done for the purpose of keeping the business for the widow and Shanly.

Q. You paid for the labor and for the materials, and you had the stock brought to your premises; did you pay to the widow anything? A. No, sir.

Q. Did you pay into the estate anything out of that business? A. No, sir.

Q. Did you pay anything for the use of the carts and trucks? A. No, sir; no demands ever were made on me.

40 Q. Did you make any profit out of that business, after having paid for the materials? A. We made some profits, and we made good the balance due us against McMahon—and we didn't make up the amount.

Q. Isn't your account square with him on the books? A. No, not quite.

Q. Don't your ledger show that? A. Of course the account has been closed.

Re-examined by Mr. Gilchrist.

Q. Mr. Shanly has spoken of these powers of attorney being executed for the purpose of legalizing the transfer to you; is that true? A. No, sir.

Q. What was the purpose? A. So that Shanly could carry on the business.

Q. You say, about the 2d of December you made arrangements, as you understood it, for the purchase? A. It was on the 2d.

Examined by the court.

50 Q. What did you understand you were purchasing? A. I understood I was purchasing the barrels and tanks, and other goods that was necessary to make up my debt.

Q. What other things? A. Everything necessary for me to make my claim good—hoops, and such kinds of things; he gave me a statement of the things that he had; he told me there was 25,000 untrimmed sugar barrels, which we calculated at thirty-five cents, and the tanks and the hoops, &c.; he told me he would give me sufficient to satisfy me.

Q. I want to know what you consider you bought; or was this arrangement that you was to have it afterwards, or did you consider that you were getting

title to this property? A. After I gave him the check of \$3000, I considered I was the owner.

Q. What do you understand you got title to? A. He gave me a statement of what he had in his cooorage.

Q. [By Mr. Gilchrist]—Did it include his stock manufactured and unmanufactured? A. It included what he had; he was not quite certain of what he really had; he mentioned 25,000 barrels at thirty-five cents; then he said I have other goods, hoops, &c.; and he mentioned these other things; then he mentioned the horses and trucks, and I refused the horses and trucks; I know I didn't advance any money on the horses; I advanced money on the cooper stock. 10

Q. What was excluded of his property from what you supposed to be your purchase? A. The real estate, the horses and tools, and so on.

Q. What is the "so on;" I want something definite? A. The trucks, the horses, the real estate and the tools, were all excluded, and his personal estate was excluded—I mean his furniture, &c.—the barrels and all his cooper stock was mentioned.

Q. He had a number of men employed in his establishment at that time? A. Yes.

Q. They continued on working? A. Yes; they worked, taking in barrels from collectors and cooering them. 20

Q. Was there any price? A. Yes; the price of the barrels was thirty-five cents.

Q. Did you estimate what the aggregate of the goods was you bought there? A. 25,000 barrels he told me; I took his statement; I don't remember how many hoops he told me there was there; and there was the tanks; that there was enough of cooorage stuff to make my claim good.

Q. Between you and him at the time, was there any estimation or understanding of what the aggregate amounted to; what you were to credit him with? A. Yes, about \$11,000. 30

Q. Was that said between you that it was to be about \$11,000? A. Yes, about \$11,000.

Q. Did this list of property that you supposed was purchased at that time, include all he had there—stock, &c.? A. It included enough to make my payment good.

Q. What did it include? A. If he had 25,000 at thirty-five cents, that would make over \$8,000; that would leave only about \$3,000.

Q. Did what you was purchasing then, include all the rest of the stock he had on hand unmanufactured? A. No; it included so much as was necessary to make my claim good. 40

Q. Was it specified what particular property you were to have besides the barrels? A. The tanks, the hogsheads, the syrup barrels, the hoops.

Q. All that he had? A. So much as to make my claim good.

Q. It was not ascertained which and what part?

[Mr. Gilchrist]—If I understand the witness, he gave a statement of what he had.

Q. I asked him whether the purpose was whether all the property that he had, barrels, sugar barrels, hoops, unmanufactured stuff, or was it indefinite, as to what you were to have, except the barrels? A. It was definite as to hoops, &c.; I didn't know what he had; I didn't go to look at it.

Q. You took no possession of any part of it? A. I went to Mr. Gilchrist, a few days afterwards, and he told me I should take possession of it. 50

Q. And then your possession was taken at the time as stated? A. Yes.

Q. The money that was furnished by you—that money was all charged against McMahon in the ordinary way in which you had charged? A. Yes.

Q. \$3500 that was advanced on account of the tank—to pay for the tank—that was money advanced to him? A. It was charged to him as so much advanced, but I did understand it to be on account of the tanks.

Q. When the tanks were delivered to you was that particular account stricken off? A. It was charged on the machinery account; the tanks were not in the barrel account. 60

Q. I mean, as between you and McMahan, was there any difference made in your books from any other loan? A. No, sir.

Q. You were present at the execution of each of these powers of attorney? A. Yes, at the request of Shanly.

Q. The goods had not been delivered—these goods in question—until after the execution of the power? A. No, sir.

Q. Was there any purpose in the execution of these powers to enable Shanly to deliver these goods to you? A. Not as I know of.

10 Q. In your own mind? A. No, sir.

Q. Why were they not delivered before they were? A. Because I had not room for them.

Q. Did you make room all at once? A. We made it gradually; we made it while we were taking the barrels away.

Q. The proceeds of this mortgage, that was sought to be used for borrowing money—that, I understand you, was between the 1st of December?

[Mr. Gilchrist]—Between the 1st of October.

[Witness]—It was talked of in the summer.

20 Q. Was there any understanding as to what use there was to be made of that money if it was got? A. McMahan promised me in the summer that he would pay me with that money.

Q. [By Mr. Gilchrist]—How late were they making efforts to effect that loan—How late in the year 1871? A. I suppose nearly up to the time of his death.

Q. Did you at any time hear that, by reason of Dr. Varick's opinion, the loan was refused? A. I understood so.

Q. Was that before or after you had taken those goods? A. It was after January—either on the 3d or 4th of January.

Q. This money that was sought to be obtained—were you to have a portion of it? A. I was going to have it up to December 2d.

30 Q. If he had obtained it after December—how was that understood? A. On the 2d of December, after he had promised me over and over again that he would pay me that money back, I didn't rely on his promises any more; I then demanded a settlement, and I refused to pay him any more; then this agreement that I mentioned before took place.

Q. [By the Court]—You say Mr. Shanly didn't make any objection to your taking away any of this property; I suppose, in point of fact, Shanly was working and acting in your interest, and with you? A. He was working for McMahan.

40 Q. Didn't he take many of his suggestions and instructions from you? A. No, sir; I never gave him any orders nor directions.

Jeremiah O'Donnell, for defendant, sworn, testifies as follows:
Direct-examination by Mr. Gilchrist.

Q. Were you in McMahan's employ? A. Yes, in the Grand street shop; I went to work there in October, 1870, and I stayed till after his death.

Q. Do you recollect the removal of his stock? A. Yes.

Q. Did you keep a memorandum of the removal of the stock from the Grand street shop? A. Yes; I turned the memorandum over to Mr. Shanly when the stock was removed.

50 Q. Have you got your books yet? A. Yes.

Q. What did you turn over to Shanly as the number of barrels that were sent between the 27th of December and the 6th of January? A. I think it was about 16,096—very near that any way; that included good sugar barrels, potato barrels glass barrels, etc.; there was 983 new barrels, both sizes—one was 19½ and the other 17½ in the head.

Q. The 16,096 included the trimmed and untrimmed? A. Yes; that included trimmed and untrimmed, and potato barrels and glass barrels.

Q. What do you call glass barrels? A. They are a grade of barrels that can't be used for sugar.

60 Q. Do they call them culls? A. Yes.

Q. The 983—was that included in the 16,000? A. Yes.

Q. Can you tell us how many were of the larger size, and how many of the

small size? A. I can't, exactly; something over 400 of the large size, I think.

Q. Did you keep an account of other things that were taken from there? A. All that was taken were the barrels—that was all that was taken away from that shop; all other fixtures remained until after the administrator's sale; there were no molasses barrels there—nothing but flour barrels.

Q. Say, from the 1st of December, what was the situation of the barrels in the Grand street shop; where were the barrels that had been received in July, August, and September, and November—where were they? A. A portion of them on the first floor, a portion on the second, and a portion on the third floor; I couldn't give you any idea how many was stored on the second floor—most of them was stored on the top floor, at that time. 10

Q. When the transfer of these barrels, and cleaning out of that shop of barrels came, how long had the most of those barrels been stored in that establishment? A. A portion of those barrels remained in that shop since I took charge, on the 1st of October, 1870; those barrels were on the second floor—the first floor was made after I took charge of it.

Q. On the 27th of December, how long had the barrels on the 3d floor been in? A. A portion of them had been there only a week or two, and a portion of them had been there all summer, since May or June; that was the first time I stored any on that floor; previous to that, we manufactured new barrels there. 20

Q. Which floor was it on which the work was done? A. A portion on the top floor—a portion on the second floor.

Q. Was there any work done on the first floor? A. No, sir; nothing more than storing them away; there was no men to work there.

Q. How long had the stock been there on the first floor, that was there on the 27th of December? A. I think I first commenced to put stock in there some time in September; I put nothing there, only potato barrels, culls, &c.; no good barrels there; yes, I think I did put good barrels in there for about a month, and that was all.

Q. On the 27th of December, how long had those barrels been on that first floor? A. From some time in September, till then; there was only a very few there then; there might not have been over a hundred or two or three hundred barrels at that time, and they were mostly potato barrels, and they were sent away in October, November, and December, which is the season for shipping potato barrels, and there was not a great many of them left; I would say there was over 200 of them left. 30

Q. Was there any work done on the second floor? A. Yes; trimming sugar barrels.

Q. What work was done on the third floor? A. Trimming sugar barrels—manufacturing new barrels. 40

Q. How long had the stock which was on the second floor been there, on the day that they commenced to move? A. A portion of them had been there a year; the majority of them were stored there during that summer—I think the largest portion of them.

Q. How long had the rest of it been there? A. It had been accumulating all that summer; I was not shipping as many as I was receiving; sometimes I received 2000 and 3000 in a day; I used to get them in schooner loads from Fall River, &c.

Q. How long had most of the barrels upon that second floor been there, the day you commenced to move? A. A portion of them had been there a year—the majority of them were stored there during the summer—I think the largest portion of them. 50

Q. Had there been many that came in since the 1st of December, on that second floor? A. Yes, quite a number.

Q. Could you tell how many? A. There might have been 6,000 or 7,000—somewhere in that neighborhood, during that month.

Q. Have you got any means of telling how many came in that month? A. Yes; there was a little over twelve thousand, I think, received from the 20th of November till the 27th of December.

Q. In December alone how many had come in on the second floor? A. I 60

couldn't tell; I put them on the second or third floor as it was handiest to dispose of them, and as I had time.

Q. Had there been so many as sixteen thousand barrels in store in that shop as long as a month? A. Yes; I think there was.

Q. Was there more? A. There might have been more; it didn't vary much; during that month we received very few barrels in proportion to what we had received previous to that.

Q. You were making new barrels on the third floor? A. Yes; but not at that time; we had not made any all that fall; we ceased making new barrels mostly in May.

10 Q. How long had the barrels that were up on the third floor been there? A. Most of them had been there all summer.

Q. What kind of barrels were stored there? A. Sugar barrels; barrels to be trimmed and sent to the sugar house; they were mostly No. 1 sugar barrels; the barrels were graded No. 1, No. 2, and No. 3; No. 1 was good, No. 2 culls, No. 3 potato barrels.

Q. Refresh your memory as to the number of barrels there—as to the number of barrels that were sent out? A. I think about sixteen thousand.

20 Q. Look at your book? A. The only way I have to get at the number of barrels that I sent out is, I counted in stock on the 20th of November, and counting those barrels I received and barrels I received from the 20th of November to the 26th of December, and counting the number of barrels delivered between those dates.

Q. You did count your stock on the 20th of November? A. Yes.

Q. What did you have there then? A. I call it twenty-five thousand five hundred and sixty-seven; I will not swear to that as the number exactly, but it won't vary over two hundred—that is on the 20th of November; I can also give you the reason I can tell the exact number; when I took charge of the shop there had been barrels already stored there, and they were stored in such

30 a manner that they could not be counted without overhauling them all. Q. How did you ascertain about the number of barrels? A. We counted the rows; sometimes they were three or four high; they stood on end, three or four or five high.

Q. Look at your book and give us as near as you can how you arrived at the number of barrels? A. [Looking at book.] From November 20th to December 26th I received twelve thousand eight hundred and thirty-five; at that time I was supposed to have twenty-five thousand five hundred and sixty-seven.

40 Q. Look at your book and say what you received on the 21st of November? A. [Looking at book]—

No. 1.	95 good.	no culls.	6 potato barrels.
	83 "	2 "	6 "
	109 "	no "	28 "

Q. How did you get those? A. Received them from the men collecting them.

	23d	123 good.	4 culls.	4 potato.
	"	94 "	2 "	3 "
	24th	99 "	no "	11 "
	25th	107 "	no "	no "
50	26th	none "	none "	none "
	27th	91 "	no "	13 "
	"	130 "	2 "	14 "
	"	96 "	no "	10 "

Q. Where did those come from on the 27th? A. The greatest portion of those barrels came from New York, also those on the 24th and the 23d and 25th.

Q. On the 28th November how many did you receive? A.

	96 good.	3 culls.	2 potato.
	100 "	6 "	15 "
60	29th 95 "	3 "	2 "
	" 100 "	6 "	30 "

Dec.	1st	60 good.	none culls.	20 potato.	
"	"	133	4	11	
"	2d	92	2	5	
"	"	128	none	5	
"	4th	104	1	3	
"	"	100	2	2	
"	"	123	5	9	
"	5th	133	no	7	
"	"	79	8	12	
"	6th	118	2	18	24 heads short. 10
"	"	98	2	5	
"	7th	81	9	11	
"	"	70	2	24	
"	8th	126	7	8	
"	"	98	no	2	
"	9th	116	4	12	
"	11th	66	2	1	
"	"	132	3	15	
"	12th	119	1	23	8 heads short.
"	"	101	0	7	
"	"	92	1	7	20
"	13th	120	6	10	
"	"	80	5	8	
"	18th	85	none	32	
"	"	73	0	3	
"	19th	82	4	10	
"	"	97	8	8	
"	20th	61	5	8	
"	"	130	0	20	
"	21st	84	3	2	
"	22d	101	0	25	30
"	"	80	0	15	

Q. Havn't you made a mistake of 8,000 barrels in your addition? A. I have given you all the barrels; I have given you the items.

Q. The amount of barrels that you received, you have given us from the 2d of December to the 22d, and you gave none between the 22d and the 27th? A. I received no more barrels on the account of McMahan after the 22d of December.

Q. You say that you had on the 20th of November, 25,000? A. Yes.

Q. And you received a certain quantity that you have given us up to the 2d of December? A. Yes. 40

Q. That would increase the stock on hand from 25,800 to whatever that amounted to? A. Yes.

Q. What did you trim and send away, after the 20th of November? A. I can give you the loads:

		loads,	88's,	528 barrels.	
21st,	6	"	"	528	
"	8	"	"	704	
"	9	"	72's,	648	
23d,	10	"	88's,	880	50
"	1	"	72's,	72	
24th,	7	"	88's,	616	
25th,	5	"	88's,	440	
27th,	10	"	88's,	880	
"	1	"	72's,	72	
28th,	7	"	88's,	616	
29th,	8	"	88's,	704	
"	2	"	72's,	144	
Dec. 1st,	5	"	88's,	445	
2d,	2	"	88's,	176	
"	3	"	72's,	216	60

Q. You had on hand 25,567? A. Yes.

Q. If you deduct these that you have just called from the 25,567, it will show what you had on hand on the 2d of December, won't it? A. Yes.

Q. Are you able to tell us how many you had on hand—are you able, by any calculation you have made, to tell us what you had on hand on the 2d of December? A. I haven't made any calculation.

Q. Tell us what you sent away on the 3d of December? A. I didn't send away any; on the 4th I sent away

		5 loads, 88's,	down to the sugar-house.
	5th,	6 " "	" "
10	6th,	3 " "	" "
	"	1 " 72's	" "
	7th,	1 " 88's,	" "
	"	1 " 88's,	" "
	8th,	4 " 88's,	" "
	"	1 " 72's,	" "
	9th,	3 " 72's,	" "
	"	2 " 88's,	" "
	11th,	5 " 88's,	" "
	"	2 " 72's,	" "
20	12th,	4 " 88's,	" "
	"	1 " 72's,	" "
	13th,	6 " 88's,	" "
	14th,	4 " 88's,	" "
	15th,	5 " 88's,	" "
	"	1 " 72's,	" "
	16th,	4 " 88's,	" "
	"	1 " 72's,	" "
	18th,	3 " 88's,	" "
	19th,	6 " 88's,	" "
30	20th,	4 " 88's,	" "
	21st,	5 " 88's,	" "
	22d,	2 " 88's,	" "
	"	1 " 72's,	" "
	23d,	5 " 88's,	" "
	"	2 " 72's,	" "
	26th,	5 " 88's,	" "

Q. On the 26th, you began to move? A. I think it was the 27th.

Q. Have you any memorandum to show which it was? A. No, sir.

40 Q. If you take these from what you received and what you had on hand on the 20th of November, that will show what you had on hand on the 27th of December? A. Yes.

Q. [By the Court]—Were all these sent to the sugar house? A. Yes.

Q. From the figures we can get what you had on hand? A. Yes.

Q. And you made a mistake in addition when you said 12,000? A. Yes.

Q. It was a mistake of yours in addition? A. Yes.

Q. [By the Court]—These barrels that you sent away were trimmed and were all on and after the 2d of December? A. Yes.

50 Q. These that were trimmed after the 2d of December, and sent down to the sugar house—were they, or not, barrels brought in by the collectors? A. Yes, they were barrels brought in by the collectors—that is, the greatest portion; some might have come by the schooner from Fall River.

Q. Were what you trimmed, those taken in the regular course of business? A. Yes; as a rule the last barrels received were the first trimmed, because they were the handiest; where I have barrels for five years I would not take them down and trim them when I was receiving barrels handy.

Q. That was the way you did the business? A. Yes.

Q. How many men were there working at that shop during December? A. Eleven coopers.

60 Q. What were their wages? A. \$3.00 a day; besides, I had one laboring man and two boys.

[Mr. Gilchrist.—The summation of that is, November the 20th, 25,567,

which he swears was the stock; and Sunderling figures up the amount received from November 21st to December 2d, 2067; that would make the amount on hand, on the 2d of December, 27,634; then there was sent away 7832, making the stock on hand, December 2d, 19,802, which McMahon represented as 25,000; then there was on hand, December 2d, 19,802, and there was received, between the 2d and 26th, 3044; that, added together, makes 22,846; during that time there was sent away 7952, leaving 14,894 that were to be sent away on the 26th of December.]

Q. All that were sent away were trimmed barrels, were they not, up to that date? A. Yes, with the exception of potato barrels. 10

Q. If the barrels that were received last were trimmed first then the bulk of those barrels that were there on the 2d of December were there on the 26th?

A. Yes.
Q. The very same barrels? A. Yes.

Q. Didn't you receive seven hundred and eighty-four barrels by a schooner? A. I did; I forget the date.

Q. Was it kept in this account with the rest? A. I don't remember exactly how that was; I remember receiving them by schooner; [looking at book;] "Received from schooner Lowry, Nov. 21st, 749 good, 9 culls, 26 potato, 8 heads short." 20

Q. Have you given us those with those that you have read off to us? A. No, sir.

Q. On what day was that? A. November 21st.

Q. And that number would be added to the amount received, and added to the amount on hand on the 2d of December? A. Yes; that would make over 15,000.

Q. Tell us how many potato barrels you sent away between November 21st and December 2d?

A. On the 22d, 144 glass barrels and 72, that makes.....	216	
On the 27th,.....	72	30
On Dec. 1st.....	72	
On " 4th.....	72	
On " 5th.....	72	
On " 8th.....	144	
On " 9th.....	72	
Total.....	720	

Cross-examined.

Q. What does this little black book contain? A. The receipts of barrels I received. 40

Q. What does the other book contain? A. The number of barrels I sent away.

Q. What is the other book? A. The time book.

James Herbert Cubberly, for defendant, sworn, testifies as follows:

Direct examination by Mr. Gilchrist—

Q. You have been in the employ of the Sugar House Company for how long? A. Eleven years the 4th of next May.

Q. Do you recollect the delivery of goods between the 27th of December and 6th of January—the stock from McMahon's cooper shop? A. Yes, I do; I recollect the barrels coming in. 50

Q. What charge had you in the matter? A. Matthiessen told me to keep an eye and look around; I also kept the time of the men part of the time—that is, after we commenced to take charge of the things ourselves—that is, to pay for barrels received from the gatherers; I kept the time of the coopers after we commenced to take charge of it ourselves; that was after the 1st of January, and showed it to Mr. Sunderling every Saturday, and he paid the men.

Q. Where did you have charge of the receipts of the barrels? A. In the melting pan room, also in the store room where the refined sugar is kept; that is in the stone building in Essex street; we had some sugar stored there 60

at one time, and Mr. Matthiessen told me that as soon as I could get that out of the way he said he wanted to put in some empty barrels.

Q. As to the number of barrels you received there, did you keep an account? A. I did at the time, and he handed the account over to Sunderling.

Q. Was that account true that you handed over to Sunderling? A. Yes; I wrote it on a piece of paper and handed it to him; I counted the barrels and wrote it on a piece of paper, I think, and handed it to Sunderling.

Q. Day by day, from the 27th to the 6th? A. No; I think I didn't count the barrels till they were all in there; they were all stored in straight and nice, so I could easily count them.

10 Q. That was in the stone store house for refined sugar, in Essex street? A. Yes.

Q. The house next to that—did you have charge of that? A. Yes; that is the main building.

Q. Did you keep an account of any other barrels than those that were stored in the stone house? A. I took accounts from the foreman of the melting pan; his name is Fering.

Q. Do you recollect being present at an interview between Matthiessen and McMahon early in December? A. Yes.

20 Q. State when it was as near as you can recollect the circumstances under which it happened, and what took place and how you came there? A. I recollect that I came into the office on the 2d of December; I think it was about noon time—might have been a little after; I heard Matthiessen and McMahon talking; I heard Matthiessen demand from McMahon a settlement of some money due the firm, and heard McMahon say that he could not give him the money, but that he could give him the equivalent in property or empty barrels, and he said he could take whatever he saw fit—words to that effect.

Q. McMahon said he could take what he saw fit? A. Yes.

30 Q. What did Matthiessen say? A. Matthiessen said that he would take the empty packages.

Q. What do they call barrels in the sugar house? A. Empty packages—the syrup barrels—they are empty packages; and it struck me very forcibly at the time that these empty packages would have to be put in my warehouse, and I didn't like it very much, and I thought I needed all the room I had at that time, and I didn't think about the melting pans, and for that reason I didn't like the idea of their coming in there.

Q. Did you hear anything said about real estate? A. I don't recollect hearing anything about it.

40 Q. What you heard was that McMahon said? (Objected to as leading, by Mr. Linn.)

Q. State it again? A. I heard Matthiessen say that he didn't want the property; that he could not use that; that he would take the empty packages to cancel the debt; or barrels, I don't know which he said.

Q. That is what you recollect hearing stated at that time? A. Yes.

Cross-examination.

50 Q. How did you fix the time as being the 2d of December? A. I recollect it was in the first part of the month; and I also recollect it was in the last part of the week; and when Matthiessen spoke to me last month about it, he asked me if I recollect about it, and that is what I said to him; and he said it was at the time he gave this direct check; and when I examined the books I found it was on the 2d of the month.

Q. Have you stated all the conversation you recollect? A. Yes; I recollect Matthiessen getting up, and I think I then left the office; it was about noon hour.

Q. You don't recollect anything more that was said then? A. No, sir.

Q. Did they talk pretty loud? A. Yes.

Q. Was McMahon angry a little? A. Yes; and so was Matthiessen.

Re-direct examination.

Q. Can you tell us how long it was before the barrels were taken to be delivered? A. To the best of my recollection, I think the barrels commenced to come in somewheres around Christmas.

Q. How long was it before that, that you heard this conversation, according to your recollection? A. It is from the 2d to the 26th.

Q. Can you recollect that it was any time before Christmas that that occurred—this conversation? A. Yes; I recollect it was before Christmas.

Q. Do you recollect about how long it was before Christmas, without subtracting dates, one from another—have you a recollection about the number of weeks it was? A. Two or three weeks. 10

Q. Have you any distinct recollection how long it was before Christmas that the conversation occurred between Matthiessen and McMahon? A. No, sir; nothing particular.

Q. Was your mother ill at that time? A. Yes; she was seriously ill at that time—at least about to be so.

Q. Can you recollect whether it was about that time? A. It was a little after that time—it was the commencing of that time; I remember asking Matthiessen for leave of absence.

Considering all these papers and books referred to in evidence, (*pro ut* the same,) the defendant rests. 20

Know all men by these presents, that I, Bernard McMahon, of Jersey City, Hudson county, New Jersey, have made, constituted and appointed, and by these presents do make, constitute and appoint Michael Shanly, of the same place, my true and lawful attorney, for me and in my name, place and stead, to take charge of, conduct and carry on my business of cooper, to buy, manufacture and sell, either for cash or on credit, all such articles and property as he may deem useful and proper, as connected with said business; sign, accept, endorse, seal, deliver and execute all notes, drafts, bills and other instruments in writing whatever, which shall be necessary to the proper conducting of said business; to state accounts, to sue and prosecute, collect, compromise or settle all claims or demands due, or to become due, now existing or hereafter to arise in my favor, and to settle, adjust and pay all claims and demands which now exist against me, or may hereafter arise, as connected with the foregoing business, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do, if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, or his substitute, shall lawfully do, or cause to be done by virtue hereof. 30 40

In witness whereof I have hereunto set my hand and seal, the day of _____, in the year one thousand eight hundred and seventy.

BERNARD MCMAHON.

Sealed and delivered in the presence of F. O. Matthiessen.

Before the court charged the jury, the counsel for the defendant requested the court to charge as follows:

That the question, whether creditors were defrauded or not by what was done by the defendant with the property in question, has nothing to do with this claim by the administrator, 50 and it must be disposed of in that respect, just as if McMahon was alive and had no creditors at all.

That if the jury are satisfied that, on the 2d day of December, 1871, Mr. McMahon agreed with Mr Matthiessen that the sugar company could have the cooperage stock at prices which were named, for all, or a part, and at the real worth of

that part of the stock for which no price was named, and that there was a debt due to the sugar company, and that the value of the stock should extinguish the debt, this made a valid sale of the stock to the company; provided, the jury believe McMahan was mentally capable of making such a contract on the second day of December, 1871.

That if the jury are satisfied that, on the 2d day of December, 1871, Mr. McMahan agreed with Mr. Matthiessen that the sugar company could have the cooperage stock at prices
10 which were named, for all, or a part, and at the real worth of that part of the stock for which no price was named, and that there was a debt due to the sugar company, and that the value of the stock should extinguish the debt, this made a valid sale of the stock to the company; provided, the jury believe that McMahan was mentally capable of making such a contract on the second day of December, 1871; and provided, the jury believe any part of the stock sold was delivered prior to McMahan becoming incapable of contracting, and prior to action brought.

That an agreement by the seller to sell, and the buyer to buy
20 goods to the value of a debt, and thereby extinguish the debt is a valid sale within the statute, though there is no delivery.

That insanity of a contractor is no answer to his contract, if the other party acted bona fide, and had no reason to believe the party insane.

That nothing but imposition on an insane person is a good answer to a contract.

That the books kept by Shanly are not competent evidence in the case, to show that the sugar company, or any one else took or converted, or had in their possession the goods in dis-
30 pute, even if they might be competent of a sale, was to be proved.

And the cause being summed by counsel respectively, the court charged the jury as follows :

Gentlemen of the Jury:—The plaintiff, as the administrator of Bernard McMahan, brings this action to recover damages for the conversion of certain property, alleged to have been the property of the intestate, and alleged to have been converted by this Sugar House Company, the defendants. Now,
40 this is an action of tort, and yet it is one of the modes in the law of trying a question of title to personal property. It is one of the modes of determining differences between parties in an opposing claim of right, and it may be, and oftentimes is, where that claim of right between the parties is honestly entertained, and it would seem in this case that it is a fair, reasonable dispute between these parties as to who, in the law, was legally entitled to have this property, and it will be

no imputation upon the honesty and integrity of any of these parties whichever way your verdict may happen to fall. It is for the purpose of testing the question of right. The administrator, of course, is very properly here; he is merely the representative of this estate, with no personal interest of his own involved in it, but here simply in obedience to the requirements of his office, and in the interests of the creditors of the estate, to see that whatever belongs to that estate shall be gathered to his hands, in order that it may be distributed among those who are lawfully entitled to have the distribution—the creditors of the estate of Bernard McMahon. But the character of the suit makes some little difference in the modes and methods by which we are to handle it. It is not a suit to recover the price of goods sold and delivered. Such a suit would be subject to defences that an action of this sort does not permit. A set-off or counter claim could be pleaded to an action for the price for goods sold and delivered, and, if it was shown, would be a good defence. If this action had been brought to recover from this Sugar House Company the price or value of the goods sold and delivered, it would have been entirely competent for the Sugar House Company, by way of defence, to set-off against the claim the indebtedness which they held against McMahon. But this is not a suit for that purpose; it is not a suit that permits by way of set-off or reduction of the claim any debt that the defendants may have, or have had against McMahon, or against his estate. The evidence of such indebtedness, although it has been admitted in this case, and fully gone into, is only applicable and relevant in another view, that is, as the consideration to support an alleged sale of the goods, if such sale were, in fact and in law, made by or under valid authority. The debt, I say, is only admissible here upon the idea that it will serve the purpose of the defendant as a proper and legal consideration to support a contract of sale, if his proof, under the law, shows that such contract of sale were made. Now, in the action of trover, or for the conversion of the goods, your verdict is damages—and there are many cases where the verdict may be primitive, where a jury may assess what is called “smart money”—because of some wrong intended by the defendant; but in a case like this, in the matter of damage, if on the whole case you should find that the plaintiff is entitled to recover, your estimation of damages would only be the reasonable value of the property converted—not the lowest nor the highest price—but the reasonable value of the property converted, with lawful interest from the time of the conversion to the rendition of the judgment.

Now, there is disagreement between the parties as to the property that is alleged to have been converted; in other

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- words, there is disagreement between the parties as to the property that came into the possession of the defendant. That matter, of course, must be settled. If there is any recovery had by the plaintiff you must understand what is the property involved; and to that end, in order that you may have less difficulty about this, because it is not the intention of the court to go in detail through this very lengthened testimony; that has been sufficiently done by counsel in the cause. I have had tabulary statements prepared by counsel in the
- 10 cause, which will show you, on examination, the difference between them, and in that difference—within the limit of that difference—you must, from the evidence, get at what is the true result. Defendant shows articles and values which in the aggregate, according to the testimony of the witnesses that the defendant produces here, and which comes by way of admission before you, give the amounts footed up in the aggregate to \$8,013.32. This statement contains fewer articles, and I think from the casual examination I have given it, at
- 20 lower prices than is claimed by the plaintiff. This paper will be put into your possession and you can examine it. The footings of the statement as made by plaintiff, and, as he contends, the testimony of Shanly and of the books that are in evidence here, shows claim for goods, and at amounts which, in the aggregate, reach the sum of \$14,433.38, making a difference of \$6,000 between the parties. There is a calculation of interest in this—the difference is less than that. The aggregate amount without the interest is \$11,871.19, exclusive of the staves and the lumber. You will look at this, and the difference between these amounts, both as to property and as
- 30 to price is a matter that you are to settle from the evidence; the court does not intend to go any further into that matter, but leave it to you to ascertain what the property actually was that was actually converted, if it becomes necessary for you to reach that question in the cause.

- Now, you have heard in the cause that the defendant claims that this property, which is admitted to have been taken by him, was taken by authority of some contract, either made about the 1st of December, 1871, or about the 20th to the 25th of December, of the same year—a contract by which the
- 40 decedent, McMahon, either himself or by his agent, sold and conveyed to the Sugar House Co. this property, by which title passed to the Sugar House Co., and it became theirs, and of course they thereby were entitled to keep it and use it as their own, and therefore an answer to this action. But the plaintiff proceeds upon the theory that no sale of these goods was ever made by McMahon, or any agent of his, having at the time lawful authority to consummate such a sale, and that the title to the goods remained in the decedent at the time of his

death and passed to the plaintiff as his administrator. He denies that at the time mentioned by Mr. Matthiessen, December 2, 1871, that any valid and completed sale of the goods took place, as claimed by the defendant. Now, the plaintiff rests himself upon two points, in the denial that any contract or sale took place. First, that there was no bargaining that reached the point of a completed sale, or that manifested a complete, perfected intention to sell; and, second, that if the parties really did intend, by what transpired on the 2d, to sell, that the formalities of their proceedings were not such as to make a legal, binding contract, in view of the provisions of the statute of this state, known as the statute of frauds. Now, in order to support a sale, there must be evidence to the jury that there was a bargaining and a completed contract, in the light of an intention of the parties. The evidence of this bargaining on the 2d of December rests upon the testimony of Mr. Matthiessen and what was heard by Cubberly, one of the witnesses for defence, who was present at a talk between them. You heard that testimony; the court will make no further allusion to it than just to recall your minds to that testimony. It is upon that that whatever there is of this contract is to rest, and that in the light of the surrounding circumstances (and you are to judge whether any completed contract of sale and purchase of chattels), whether on what took place between the parties at that time—that is, between Matthiessen and McMahan—whether on what took place between them at that time the title to this property, supposing the requisites of the statute of frauds to have been complied with, the title to this property, by reason of their bargaining, was intended to pass from McMahan to Matthiessen; whether that was the intention of the parties, and whether they, as between themselves, understood and accepted that as the result of their bargaining; whether the title to the property passed from McMahan to Matthiessen, and the title to this property in question; and whether that property from that time ceased to be the property of McMahan; because if a contract of sale was made, when that contract was finished, as between these parties—I mean, when that contract was concluded, when the words of bargaining were ended, so far as they were concerned, and so far as their intentions were involved—that property must from that time have become the property of Matthiessen, and ceased to be the property of McMahan; whether that is so, and that is the test, is to be gathered from what is testified here by Matthiessen and Cubberly; and in the light of all the surrounding circumstances, the acts of the parties, their manner thereafter of dealing with the property, you are to judge.

Now, then, in order to a sale, some specifically designated property, or property capable of being specifically ascertained, through and by means of the bargaining between them, must have been the subject matter of sale. I mean by that, that the thing sold and the things bought must be definitely known and understood between the parties, or, by virtue of the contract between them, must be susceptible of being definitely ascertained and fixed—something known, specifically agreed upon, or capable of being specifically ascertained, 10 must have been agreed between them to be sold. If part of a mass of property in bulk before a sale of that part is completed, the part must be severed from the mass; if the bargain was for so much or so many of a thing, at certain prices, as would amount to so much in value or amount, the specific goods to be given and accepted must have been ascertained. Now, how was this in this transaction? What was sold? If it had been set apart, parceled out, then there would have been no question about it; but in the light of the evidence before us, we must answer the question: What was sold? How was 20 it identified? There was no bill or inventory given, and you must look to the testimony of Matthiessen for this; and you are to say whether the evidence shows what was the subject matter of sale, if a sale, because his claim is for goods in the suit; and to avail the defence on this point, you must find from the evidence that these goods have been sold by McMahan and purchased by Matthiessen. The intention of the parties is important in determining the question of whether there was a sale or not intended. The intention of McMahan to sell, and of the defendant to buy, is important in determining 30 this preliminary question of whether the parties did mean there to carry out and perfect a contract of sale and purchase. And this, as I stated, is to be gathered from the evidence, and all the circumstances surrounding it—the acts and declarations of the parties. Did the defendant take present or early possession of the property, is an inquiry that the jury has a right to make and look at in discovering this intention to sell the whole or any specific part of the decedent's property, or did the decedent continue to deal with it and treat it as his own, or manufacture it, or sell it; was any price agreed upon for 40 the property claimed to have been sold. A price agreed upon may not be necessary to a valid sale when the contract is otherwise completed. Indeed, in many causes the implied obligation to pay the value of goods sold is a sufficient consideration to support a sale. As, if a man go into the store of a merchant and buy a yard of cloth, without asking the price, the cloth is delivered, and he takes it home, it is a good purchase, the cloth becomes his, and credit is given for it, and the implied obligation to pay what the cloth is worth is a good

consideration to make it a sale. Yet on all these things the agreement, the price, the taking possession, the dealing with the property afterward, are to be taken into question to illustrate where there is doubtful intention what the parties mean.

Now, McMahan is dead, we cannot get him here to tell us, and we must look carefully at this thing—we must get at the truth of it—see whether the impressions that Matthiessen has of this matter are reliable in this lapse of time; and in order to determine that, all these surrounding circumstances—the manner in which the property was dealt with after 10 the 2d of December; who exercised acts of ownership over it; what Matthiessen did with it; whether McMahan had his men there in possession of this property, his own hired men working upon it and dealing with it, we may look at and see whether that aids us at all in determining this question of whether there had been in point of fact a sale. Usually, where men sell property they cease to meddle with it; they become indifferent as to it; it goes into the possession of other 20 parties; the storage of the property, where it is a bulky property, is important, often, to parties, and the storehouse, unless an agreement is made in regard to it, and the storing it as his own, the risks about it are changed if a sale has taken place; who insured this property, if it was insured at all, does not appear, but in the light of all the case we are to look at this thing and determine whether or not these parties actually intended—whether they so dealt with it that you, in the light of all their acts and declarations, can say you are satisfied 30 that there was a contract made on the 2d of December, by which McMahan intended to part with his property, and by which the Sugar House Company became the possessors of it. And you have a right, also, to look at what the Sugar House Company did. If they paid the price for it, that would have been a very strong circumstance in the illustration of the intention of the parties, and if, on the instant—at the time—they credited an amount of money on their claim, near to the value of the property, that would have been a circumstance in the illustration of the intention of the parties. But it does not appear that any such thing as that was done, and it is for 40 you, gentlemen, in this preliminary part of this inquiry, to say whether there was the intention on the part of these parties to make a sale. But it is insisted—and the matter is before us to be dealt with—that if there was enough in the acts of these parties, and in their declarations, showing an intention on their part to make a sale and a transfer of this property from McMahan to the Sugar House Company, that certain forms of law, required to be observed, were not observed in this matter. The statute of frauds enacts, by the 15th section, that no contract for the sale of any goods, wares, or merchandise, for the

- price of \$30 and upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or, that some note or memorandum in writing, of the said bargain, shall be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. Three things, then, are re-
- 10 quired to be done by the statute of frauds. That is an enactment by the legislature of our own state, and substantially, in every state in the Union it is the governing law, and it is a wise and beneficial law in its operation upon the subject of contracts, and is entitled to your consideration and respect, and you are bound—we are all bound by it, and well we may be willing to be bound by it; it has beneficent operations on the affairs of men. But there it is as the law, and it requires three things—or, one of three things, to make a contract for the sale of goods above the value of \$30 valid and binding—
- 20 first, that the purchaser shall accept part of the goods sold and actually receive them; or, if he don't accept part of them and receive them, that he must, as part of the bargain, give something in earnest to bind the bargain, or in part payment; or, if not, that then they must make a writing to evidence the bargain, and it must be signed by the parties or some person authorized to sign, in order that they shall be bound by such a contract. If one or other of these three things are not done, it is not a sale, and it is void and has no effect, no matter what the intention of the parties may have been—no matter
- 30 what may have been in their minds, these are provisions that must be observed and complied with. The intention of the parties, as I have said, is important in determining the question of contract of sale. The provisions of the statute of frauds are for the purpose of determining what evidence shall be required of such intent. There is no evidence, as I understand it, on which to claim for any present delivery of any portion of the goods which are claimed to have been sold by the transaction of December 2d, 1872.

40 [Defendant's Counsel]—Does your Honor mean to charge that there is no evidence?

[The Court]—I have missed it if any such claim has been made.

[Defendant's Counsel]—There was a delivery every day—the 2d, 3d, 4th,—up to the 27th of December—before the 27th—of goods and barrels, and I insisted to the jury that some of the barrels that had been sold were so delivered.

[The Court]—I remember that counsel did, in his argument, make that suggestion. It did not impress me at the time as matter that was seriously claimed in the cause. But,

gentlemen, these goods, or goods from this place, began to be delivered by McMahan to the sugar-house immediately after this alleged contract of sale, but before that contract and during the continuance of the business of McMahan, so far as the evidence appears, delivery of like kind had been made from these shops, and if I understand the evidence aright—and that, gentlemen, you are to judge of—the delivery made after the transaction of December the 2d was billed in the usual and ordinary course of trade, as district sales of property made at the time to the Sugar House Company. In other words, that the deliveries of goods, after this, continued on just the same as before. If you can find in that any evidence of a delivery and so intended by these parties under this contract, then, that is for you; but you look at it whether these deliveries sent out by the wagons were not in the ordinary course of trade, credited for at the sugar-house and charged up as sales, not on account of the contract of December 2d, but on account of the general traffic and trade between McMahan and the Sugar House Company. That is not the question of delivery that is intended when the court says there must have been a delivery of those goods; the delivery, to have been a legal binding delivery, within the statute of frauds, must have been on account of the contract of December 2d and in pursuance of it. 10 20

[Defendant's Counsel]—But not of the whole?

[The Court]—Not of the whole. Any part of it delivered by the party for the purpose of binding the bargain of December 2d, delivered with that view; if there was such a bargain and McMahan delivered a barrel with a view of binding that bargain and holding himself to it, that would be a delivery and take the case out of the operation of the statute of frauds. But, on that, gentlemen, you are to judge. There was no writing, and the question is raised and debated here, and must be settled by the court upon another point of the statute of frauds. The defendant insists that there was earnest paid—something in earnest was given to bind the bargain. 30

[Defendants' counsel]—In part payments, your Honor, not earnest.

[The Court]—Now, mere words, as I have said, are not sufficient to take the agreement for the sale of the goods out of the statute of frauds, and in the absence of a note or memorandum in writing, or in the absence of a delivery of any portion of the goods to bind the contract, or in pursuance of the contract, earnest or something in part payment must be given. Now, was there anything given in this case as earnest, to bind the bargain, or as part payment? A debt due from the seller to the purchaser may be so dealt with as to have 40

the effect of earnest given, or something paid to bind the bargain. If the debt were on a note, or other evidence of debt existing by itself, the giving up of the note, or other evidence of debt, by the purchaser to the settler would be earnest or in part payment; or a receipt given by the purchaser to the seller for the payment of or discharge from the debt, or a part of it, would, if given for the purpose of earnest or payment, bind the bargain; or if a debt on book account, then a credit made, and proper entry, so as to evidence the credit

10 and discharge the seller from the debt, or a receipt given on account of it, would be earnest given or part payment to bind the bargain. But, gentlemen, it is something to be done; it is not sufficient that the parties are simply mentally agreed that such shall be the case; it is something to be done—some act which is to evidence this intention that is required by the statute of frauds.

Not merely an act of the mind, but something done by the purchaser. A mere understanding between the parties that a credit shall be given, no matter how well understood,

20 nothing being done to completely and conclusively evidence the credit, falls short of being earnest given or part payment. Intention is the point of inquiry important where you are looking into the question whether any bargain, whether within or without the statute, is being made; but, on the question of earnest given or part payment, there must be an intention to contract, and earnest given as well, and the earnest must be evidenced by some act of the parties, either the giving or receiving earnest money, or what is equivalent; and, upon that

30 subject, for the purposes of this case, to put it beyond dispute, the court distinctly charge, that there is not evidence in this case of earnest given or part payment, sufficient to take the contract, if such existed, out of the operation of the statute of frauds. A delivery of the thing sold, or a part of it; the accepting of the thing, or a part of it, and actually receiving the same under the contract would, of itself, be sufficient to take it out of the statute. If a contract of sale was concluded between the parties December 2d, and in pursuance of that contract a delivery was actually made by the seller, and received by the buyer of the whole or any part of these goods,

40 although not made at or immediately succeeding, in point of time, the bargain, that would take the case out of the statute of frauds, if done in pursuance of the bargain, with a view of carrying it out, intended by the party delivering to be for that purpose, and by virtue and in consummation of that contract, and provided the party doing it was mentally competent to exercise, at the time of delivery, rational will upon the subject; and whatever I say of the act of McMahan is subject to that qualification; but it must have been done in pursu-

ance of the bargain—something connected with or part of the arrangement, or reasonably arising out of it.

It must be such possession acquired by the purchaser as is something more than consistent with the contract—something more than agreeable with it—consistent with it; it must be belonging to it, as part of it, as part of the bargain, and that through an understanding of the parties; it must come out of that contract, and as a part of it, as contemplated and intended by the parties; if it arose out of any new arrangement, or the possession is given or taken as a distinct, substantive act, not a part of and not in intended consummation of it, that would not be a delivery, to take the contract out of the operation of the statute of frauds. And this question, gentlemen, is left for you as one of fact, was the possession which the defendant obtained on or about the 26th of December to the 6th of January, of this property, in pursuance of, or any part of the agreement of December 2d, and intended so to be by the parties? if so, if a contract was made on December 2d, and between December 26th and January 5th, this delivery was made, intended by the parties to be in fulfillment of this contract of December, not any new contract, but the contract of December 2d, then that is a delivery that will take the case out of the statute of frauds, and if you believe that it would settle the case, that would be a legal delivery, provided McMahan, at the time of this delivery, either by himself or by his agent, was mentally competent to give legal assent to it. Now, it is not the intention of the court to go into the evidence on this point. That has been discussed ably by counsel, and their views have been given to you. I desire that you shall be possessed of the principles of law that govern the case, as understood by the court, the matters of fact are purely for you, and the court leave them to you with great satisfaction. But, gentlemen, on this point of legal delivery of a delivery in pursuance of that contract, it is proper for the court to say that you should be careful, and you must find it from the evidence; and to find that this delivery was in pursuance of this original contract, supposes that, during all this intervening time between December 2d, and the time of this delivery, that this property was in fact the property of the defendant, as understood between the parties, by a subsisting bargain; that he owned it; that the Sugar House Company were the owners of this property, and that McMahan was not. You must look at that, and you may inquire who had the custody of it, with this view, and what was being done with it, how it was being handled, and being dealt with, and by whom, whether by the decedent, McMahan, or by the Sugar House Company. And, again, as I said awhile ago on another point of the case, in illustrating the bargain, whose men were hand-

- ling it? were they McMahan's men whom he was paying? were they dealing with and handling this property, using it in the manufacture of barrels? were they dealing with any part of it, appropriating it to the making of barrels, and was it discriminated, set aside as the property of somebody else besides McMahan? These are matters that you must look at, whether the actions of the parties, both sides, were consistent with and illustrative of the ownership in the Sugar House Company, or of the ownership continuing in McMahan, or
- 10 was this delivery under some new arrangement and new plan, either between Matthiessen and Shanly, or out of some new transaction or new arrangement, or taken possession of by Matthiessen, with a view of securing himself as one of the creditors, or was it under the original bargain of December 2d? if any of these new purposes, if it arose out of any new arrangement or any new purpose on the part of Matthiessen, then it is not a delivery that effects in any way this contract, as claimed of the 2d of December; possession of this property, under any other arrangement, by any other means than in pursuance of
- 20 the original contract, is not a possession to take it out of the statute of frauds; and this is left to you.

- Now, if you find that this delivery was not in pursuance of this alleged contract of December 2, then that settles the question of this contract of December 2, unless you should find either this or the delivery of the barrels that were sent from time to time by the carts were a delivery. There is no earnest or part payment, that the court instructs you; and if you find there is no delivery between the 26th and the 6th that is referable to this contract and growing out of it and the
- 30 delivery made by the carts after December 2, were not intended by the parties or received as a delivery on account of the contract, then this contract of December 2 is out of this case. Now, there is another view in regard to this delivery. This delivery, you see, comes within the time when some of the witnesses testified McMahan was not competent to exercise a legal will. Consent, gentlemen, is the basis of all contracts—a necessary ingredient of all private obligation. Idiots and insane persons are incapable of giving consent, and therefore their contracts are invalid and not binding. If there be
- 40 such incapacity arising from idiocy, imbecility or lunacy, that the party is at the time incapable of understanding, the nature of the business in which he is engaged, and taking care of his property, contracts and obligations attempted to be made or incurred, assignments, gifts, grants or conveyances, however formal, fall as nugatory and invalid, for want of a moral power of consenting.

Persons totally destitute of reason, or so far bereft of it as not to have a will governed and directed by reason, or who

are incapable of comprehending the nature of obligations, have no power during the continuance of such infirmity to bind themselves by their acts or make valid contracts.

So that if the decedent, McMahon, at the time of the delivery of these goods, was in such a state of mind as that described, incompetent by reason of the want of mental power to consent; if during that time he was in that condition of mind, under that want of such legal power as described, he was not competent to make a delivery in pursuance of any contract, and any act done by him or any person on his behalf, at the time he was under this disability, would have been a void act, because, being part of a contract, and he unable to enter into and control and act in the contract, it would have been void and nugatory. This view of the case and the question of the mental capacity of the decedent not only affects the contract that is claimed to have been entered into about the time of the delivery of these goods—the second contract, I will call it, to distinguish it from the contract of December 2d—but you see it affects the question of delivery as well under the first alleged contract. There was but one act of possession by the defendant; these goods when they come to him came by one act, and if at the time of delivery of the goods the defendant was incompetent to act, and thus his agent incompetent, it affects both contracts, so far as the question of delivery of the goods, under the statute of frauds, is concerned.

Now, gentlemen, if the first contract should be found by you as not sufficiently proved to support, to make a defence in the case, it is still further claimed that subsequently to the 2d of December, and about the time of the giving of the power of attorney, the precise date of which is not shown, the precise date of the power of attorney is not known, but about that time another contract was entered into, and that this delivery at least was in pursuance of that contract, and therefore makes that a valid and binding contract, and thus makes a defence in this cause. That is a question you are also to deal with, and without recapitulating what I said in regard to the first contract, the same things are to be considered in regard to this second contract; first, you must find that there was a bargaining between McMahon, or some lawfully authorized agent, and the defendant; you must find from the evidence in the cause that there was some contract made at that time for a sale of these goods; should the contract of December the 2d fail, you must find in regard to the second alleged contract that there was some bargaining by which this property was sold by McMahon, and purchased by the defendant. Now, what evidence there is of that, gentlemen, you will understand. Counsel have discussed it before you, and it is not the intention of the court to intimate any opinion at all

whether there was or was not a contract made at that time, but simply to give you the rules, as understood by the court, which are to govern you in dealing with what evidence there is on that point. The statute of frauds is as much in operation in regard to the second contract as to the first. There was no memorandum there in writing, nor does it appear from the evidence in the cause that any earnest or thing in part payment was made to bind that bargain, if a bargain shall be found by you. There was a possession taken by the defendant of this property—(I assume the property in question, on that there is do dispute.) Was that possession taken in pursuance of a bargain for sale made by McMahon and the defendant, or by McMahon's agent, lawfully authorized to do it? Was there such a bargain, and was this delivery in pursuance of, in furtherance of, in completion of such contract between these parties?

Now, gentlemen, the testimony on the subject of the mental capacity of the defendant comes in here to be applied both in regard to the power to contract, the power to do the bargaining, as well as to make the delivery, and in that view this evidence must be considered by you. Upon that subject it is not the intention of the court to express any opinion, but to leave that clearly and entirely to you. You take the testimony of the physicians, you take into account the circumstances that have been mentioned by the different witnesses as to the action of McMahon; their opinions as to insanity are not worth what the physicians are; the opinions of experts are always better than opinions of ordinary men as to whether a man is insane such as to disqualify him from transacting business, but the facts that they give are good evidence, and after all it is a question to be settled by you, taking into consideration the opinions of the medical men, taking into consideration the facts that are proved before you, it is a question for you to determine, and the doctor cannot determine it for you—he may aid you in giving you his views, and you may agree with him or you may not, you must look at that as part of the testimony, because it was legally competent, and you must look at all the acts that are proved that shows whether or not he acted reasonably or strangely—take them all into account, and out of the whole of it form your judgment as faithfully, as honestly as you are enabled by the evidence, and determine the question whether at the time of the making of the contract as alleged, about the time of the execution of the power McMahon was mentally competent to make a bargain—and if so, then go a step further, as the delivery took place on the 27th and thereafter, whether his competency continued so as to enable him to complete and perfect the bargain, if he made one by a delivery. What the evidence

of that bargain is you will remember. Now, gentlemen, at this point comes in this power of attorney; why it was given does not appear, perhaps, satisfactorily in this case. We find Matthiessen and Shanly both operating in that thing; Matthiessen is there on each occasion, according to his own testimony, in the execution of each of these three powers; there was something extraordinary about that time that was happening, evidently, to call the attention of these two men to this thing, but the reason why these different powers were executed is not apparent, perhaps, in this case; yet you will 10 look at them as circumstances, and inquire whether they do not indicate that there was something extraordinary and a little unusual going on about that time. Shanly had been for sometime previous, as the testimony shows, the agent, selling and transacting the business of McMahan—that is, the ordinary business of collecting, and paying, and buying, and delivering, and selling goods; he was, perhaps, his general agent, dealing with his business as such; whether this new power was given for the reason that Shanly stated, in order that he might have power to make this arrangement of turn- 20 ing over the property to the Sugar House Co. is a question for you to decide. Matthiessen evidently was interested in this question of the power, and Shanly, if I remember his testimony distinctly, says, that that was the purpose for which the power was made, to enable him to hand over this property in payment of the debt. Gentlemen, if the debt still continued, that would settle the question of the contract of December 2d, and this power of attorney, then, would have no further significance than to enable him to make a new con- 30 tract, or to carry out the new contract if it had been made or assented to by McMahan. But this power of attorney—and it is for the court to construe it—this power of attorney gives Shanly no more power than the transacting of the ordinary usual business of that establishment; it does not give power to sell out this establishment—I mean by selling out, turning the whole thing over—it gives him power to transact the ordinary business. That is the construction the court puts upon this power, it gives power to sell in the ordinary modes of sale, as McMahan had been doing it, in the transaction of his business, but it does not give him power to assign it over 40 to the creditor, and hand it over to pay his debts.

[Defendant's Counsel]—Does your Honor mean the stock?

[The Court]—I mean the property of McMahan, whatever it was. It gives him the power that he had before the power of attorney was given him and no further, except that it gave him power to sign notes and some things that are not involved in this case, but for the purpose of breaking up this business, handing over this business to somebody else—if that was what

was in the minds of the parties at the time the power was executed, it fails to accomplish that purpose; it is not adequate to that end. There is another thing in regard to this power. If McMahan at the time of giving that power was mentally competent to execute it, and afterwards he became incompetent by reason of imbecility, insanity or any other cause, that of itself revokes the power, or revokes the agency. When a man becomes insane, or when he dies, his powers of attorney are at an end; they are no longer continued, because a man that acts by attorney is only doing through him what he may do himself; the attorney can have no higher power than the principal, and when the power of the principal ceases the power of the agent ceases, except certain powers that are not dealt with here at all—powers coupled with an interest, as for a consideration, are exceptions to this rule; but there is no claim of any such power here. If, therefore, McMahan after he had executed this power became mentally incompetent to transact his business, then whatever power passed through the letter of attorney ceased by that, and the attorney under that power could do nothing that McMahan was himself incompetent to do, and any contract made by him after that was void, any delivery made by him, under a contract previously made, would be void as part of the contract. Now, gentlemen, this is a subject to qualification. There are some cases in which a lunatic, or one claiming under him, cannot set up that as a defense; where a man deals with another in the ordinary course of business without any knowledge or intimation of the insanity of the party dealt with, and it is done in good faith, such a contract as that may be supported. If you, for instance, go into a store and purchase of the owner, the proprietor, who may be insane, yet you purchase goods without any knowledge of his insanity, and you pay for them and take them away with you the contract is good, and in this case if—and I am stating the law as strongly as it can be stated for the defence—if in this case Matthiessen, acting as the agent of the company, was dealing with McMahan, or his agent, in the ordinary course of business in good faith, without any knowledge of the insanity or mental disturbance of McMahan, and without the knowledge of such circumstances as should put a reasonable, prudent man upon inquiry, did the thing in good faith, and made the bargain in good faith, then that would be a good bargain, and neither McMahan nor his representative could set up the insanity against it. But, gentlemen, in applying that rule, you must be sure that there is nothing but good faith; you must be sure that the party is entirely innocent of all knowledge; you must be further sure that he is ignorant of all circumstances that should put a reasonable, prudent man upon inquiry to find out what the condition of things is. If this arrangement, however, was made under

circumstances by which you believe that Matthiessen understood or had reasonable ground to put him upon inquiry, and he, as a prudent man, ought to have looked into to understand the condition of McMahan, then that rule cannot apply; then he is bound by the law that governs cases of idiocy, or lunacy. It is only the man who acts in good faith, and in entire innocence of the condition of things, that can escape under the operation of that rule. And in the light of this question of good faith, you must scan all the acts of Matthiessen, because he is the agent—a very respectable gentleman, of course, and entitled to your consideration in his testimony; and so is Shanly. All that is said by way of suggestion against these men were, perhaps, as well unsaid; all these witnesses are entitled to your consideration. Shanly has been the trusted friend of McMahan, and the trusted friend of Matthiessen, as well, and it does not lie in anybody's mouth to say anything about Shanly, unless his character has changed since the time when all these parties trusted him. Shanly's position in part of this transaction was a little peculiar, and it is a fair question to put to this jury, whether or not, for the purpose of this subsequent transaction, after getting that power of attorney, Shanly, in many of his actions, was not the agent of Matthiessen, as well as McMahan, and that is a matter for you to determine; not alone from what has been said, but from what has been done, between these parties. Agency may be inferred from acts, and the acts of Shanly, in many of these matters—calling the creditors together at the instance of Matthiessen, his taking the property and delivering it at the order of Matthiessen—in all these was he the agent of Matthiessen, acting under the directions of Matthiessen? If he was his agent, as well as of McMahan, all that Shanly knew of McMahan's condition Matthiessen is chargeable with a knowledge of, and it is just the same in legal effect as if Matthiessen had known it himself.

These are all the principles that it seems to me necessary for the court to put you in possession of. As to the evidence, the court have carefully abstained from going into it—that is for you. If you are satisfied there has been a sale and delivery of these goods to the defendant in either of these transactions, your verdict will be for defendant; but if you are satisfied, under the rules stated, that the legal property still remained in the decedent at the time of his death, it goes to the plaintiff, and he is entitled to recover the value of the property that you find the Sugar House Company have converted to their use, and with interest from the time of conversion to the first day of the Supreme Court.

Whereupon, the counsel for the defendant then and there excepted to the said charge of the said judge, in that the said judge charged the said jury, that there is not evidence in this case of earnest given or part payment, sufficient to take the contract, if such existed, out of the operation of the statute of frauds. And also excepted to the said charge of the said judge, in that he charged the said jury, that the delivery, to have been a legal, binding delivery within the statute of frauds, must have been on account of the contract of December 2d, and in pursuance of it—not of the whole; any part of it delivered by the party for the purpose of binding the bargain of December 2d—delivered with that view. If there was such a bargain, and McMahan delivered a barrel with a view of binding that bargain and holding himself to it, that would be a delivery, and take the case out of the statute of frauds. It must have been done in pursuance of the bargain—something connected with or part of the arrangement, or reasonably arising out of it. It must be such possession, acquired by the purchaser, as is something more than consistent with the contract. Something more than agreeable with it—consistent with it; it must be belonging to it as part of it—as part of the bargain—and that through an understanding of the parties. It must come out of that contract as contemplated and intended by the parties.

And, also, excepted to the said charge of the said judge, in that he charged the said jury that, to find that this delivery was in pursuance of the original contract, supposes that during all this intervening time, between December 2d, and the time of this delivery, that this property was in fact the property of the defendant, as understood between the parties, by a subsisting bargain, that he owned it, that the Sugar House Company were the owners of this property, and that McMahan was not. You must look at that, and you may inquire who had the custody of it, with this view, and what was being done with it, how it was being handled, and being dealt with, and by whom, whether by the decedent, McMahan, or by the Sugar House Company. And, again, as I said awhile ago on another point of the case, in illustrating the bargain, whose men were handling it? were they McMahan's men whom he was paying? were they dealing with and handling the property, using it in the manufacture of barrels? were they dealing with any part of it, appropriating it to the making of barrels? and was discriminated, set aside as the property of somebody else besides McMahan.

And, also, excepted to the said charge in that the said judge, after charging the jury that Shanly had testified that the purpose of the power of attorney was to enable him to hand over the property in payment of debt, charged the said jury, that

if the debt still continued that would settle the question of the contract of December second.

And, also, excepted to the said charge in that the said judge, charged the jury—but this power of attorney, (and it is for the court to construe it,) this power of attorney gives Shanly no more power than the transacting of the ordinary usual business of that establishment, it does not give power to sell out this establishment, I mean by selling out, turning the whole thing over, it gives him power to transact the ordinary business, that is the construction the court puts upon this power. 10

It gives power to sell in the ordinary modes of sale, as McMahan had been doing it, in the transaction of his business, but it does not give him power to assign it over to the creditor and hand it over to pay his debt.

I mean the property of McMahan, whatever it was; it gives him the power he had before the power of attorney was given him and no further, except that it gave him power to sign notes and some things that are not involved in this case, but for the purpose of breaking up this business, hand over this business to somebody else, if that was what was in the mind of the parties at the time the power was executed, it fails to accomplish that purpose, it is not adequate to that end, including, &c. And said counsel for defendant stated, as one reason and ground of said exception, that the transfer made was only of stock, and excluded tools, horses, trucks, and real estate. 20

And, also, excepted to the said charge in that the said judge charged the said jury, that when a man becomes insane, or when he dies, his powers of attorney are at an end.

And, also, excepted to the said charge in that the said judge, refused to charge the said jury as he was requested to do, that insanity of a contractor is no answer to his contract, if the other party acted bona fide, and had no reason to believe the party insane. 30

And, also, excepted to the said charge in that the said judge, refused to charge the said jury as he was request to do, that nothing but imposition on an insane person is a good answer to a contract.

And also excepted, to the said charge of the said judge, in that he charged the said jury, there are some cases in which a lunatic, or one claiming under him, cannot set up that as a defence. When a man deals with another in the ordinary course of business, without any knowledge or intimation of the insanity of the party dealt with, and it is done in good faith, such a contract as that may be supported. If you, for instance, go into a store and purchase of the owner, the proprietor who may be insane, yet you purchase goods without any knowledge of his insanity, and you pay for them and 40

take them away with you, your contract is good; and in this case, if (and I am stating the law as strongly as it can be stated for the defence) if, in this case, Matthiessen acting as the agent of the company, was dealing with McMahon or his his agent, in the ordinary course of business in good faith, without any knowledge of the insanity or mental disturbance of McMahon, and without the knowledge of such circumstance as should put a reasonably prudent man upon inquiry; did the thing in good faith, and made the bargain in good faith, then that would be a good bargain, and neither McMahon nor his representative could set up the insanity against it. But, gentlemen, in applying that rule you must be sure that there is nothing but good faith; you must be sure that the party is entirely innocent of all knowledge; you must be further sure that he is ignorant of all circumstances that should put a reasonably prudent man upon inquiry to find out what the condition of things is.

If this arrangement, however, was made under circumstances by which you believe that Matthiessen understood, or had reasonable ground to put him upon inquiry, and he, as a prudent man ought to have looked into to understand the condition of McMahon, then that rule cannot apply.

And also excepted, to the said charge in that the said judge charged the said jury, that it is a fair question to put to this jury whether or not for the purpose of their subsequent transaction after getting that power of attorney, Shanly, in many of his actions, was not the agent of Matthiessen as well as of McMahon; and that is a matter for you to determine, not alone from what has been said, but from what has been done between these parties. Agency may be inferred from acts, and the act of Shanly in many of these matters, calling the creditors together at the instance of Matthiessen; his taking the property and delivering it at the order of Matthiessen. In all these was he the agent of Matthiessen, acting under the direction of Matthiessen.

If he was his agent as well as of McMahon, all that Shanly knew of McMahon's condition Matthiessen is chargeable with a knowledge of, and it is just the same in legal effect as if Matthiessen knew it himself.

After the court had charged the jury and they had retired, the counsel for the defendant requested the court to charge that the burden of showing mental incapacity was upon the plaintiff, and it must be strictly proved; and the court recalled the jury and charged the jury as follows:

I sent for you, gentlemen, to come into court to charge you upon one other matter which I had intended to speak of in charging you, but omitted, and am reminded of it by request of counsel. The proof that parties are obliged to make in a

case like this—first, that the plaintiff must prove a conversion and other things necessary to support his action. The defendant in this case relies upon a sale, and he must support that by proof; and the plaintiff, again, on his part, meets the question of sale by saying that the decedent was, by reason of mental incapacity, incompetent to make the contract. Now, he must prove that—the defendant must prove the sale; the plaintiff, on his part, must prove the incapacity—that is to say, it is necessary that the plaintiff should take upon himself the burthen of proof of the mental incapacity of the decedent; that is his work, and he must satisfy your minds by the proof he adduces of that fact. 10

To which charge the said counsel excepted, for that the court did not charge as requested, and especially that the incapacity must be strictly proved.

And the counsel for the defendant also excepted to the said charge of the said judge, in that he did not charge the jury as he was requested to do, that the question whether creditors were defrauded or not by what was done by the defendant's with the property in question has nothing to do with this claim by the administrator, and it must be disposed of in that respect, just as if McMahan was alive and had no creditors at all. 20

And the counsel for the defendant also excepted to the said charge of the said judge, in that he did not charged the said jury as he was requested to do, that if the jury are satisfied that on the second day of December, 1871, Mr. McMahan agreed with Mr. Matthiessen, that the Sugar Company could have the cooperage stock at prices which were named, for all or a part, and at the real worth of that part of the stock for which no price was named, and that there was a debt due to the Sugar Company, and that the value of the stock should extinguish the debt, this made a valid sale of the stock to the company, provided the jury believe that McMahan was mentally capable of making such a contract, on the second day of December, 1871. 30

And the counsel for defendant also excepted to the said charge of the said judge in that he did not charge the said jury as he was requested to do. That if the jury are satisfied that on the 2d day of December, 1871, Mr. McMahan agreed with Mr. Matthiessen that the Sugar Company could have the cooperage stock at prices which were named for all or as part, and at the real worth of that part of the stock for which no price was named, and that there was a debt due to the Sugar Company, and that the value of the stock should extinguish the debt. This made a valid sale of the stock to the company, provided the jury believe that McMahan was mentally capable of making such a contract on the 2d day of December, 40

1871, and provided jury believe any part of the stock sold was delivered prior to McMahon's becoming incapable of contracting and prior to action brought. And the counsel for the defendant also excepted to the said charge of the said judge in that he did not charge the said jury as he was requested to do. That an agreement by the seller to sell and buyer to buy goods to the value of a debt, and thereby to extinguish the debt, is a valid sale, within the statute, though there is no delivery.

10 * And the counsel for the defendant also excepted to the said charge of the said judge in that he did not charge the said jury as he was requested to do. That the books kept by Shanly are not competent evidence in the case to show that the Sugar Company, or any one else, took or converted or had in their possession the goods in dispute. Even if they might be competent if a sale was to be proved.

20 And the said judge, under the charge and directions aforesaid, left the aforesaid issue and the evidence so given on the trial thereof, as aforesaid, to the said jury, and the jury aforesaid then and there gave their verdict for the plaintiffs, as in and by said record appears. And inasmuch as the said several matters hereinbefore stated do not appear by the record aforesaid, the counsel of the said defendant prayed that the said judge would set his hand and seal to the bill of exceptions, containing the several matters aforesaid, according to the statute.

And thereupon the said Manning M. Knapp, justice as aforesaid, hath set his hand and seal hereto this eleventh day of February, in the year eighteen hundred and seventy-five.

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M. M. KNAPP. [L. s.]

[The Court]—All the exceptions are subject to the language used by the court in the charge.

M. M. KNAPP.

Assignment of Errors.

Afterwards, that is to say on the second Tuesday in March, in the year of our Lord one thousand eight hundred and seventy-five, before the judges of the said Court of Errors and Appeals, comes the said F. O. Matthiessen and Wiechers Sugar Refining Company, by Gilchrist & McGill, its attorneys, and says that in the record and proceedings aforesaid,

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and also in giving the judgment aforesaid, there is manifest error.

1st. In this, that the said judge before whom the said cause was tried below, charged the said jury that there is not evidence in this case of earnest given or part payment sufficient to take the contract, if such existed, out of the operation of the statute of frauds.

2d. And, also, there is error in this that the said judge charged the said jury that the delivery, to have been a legal binding delivery within the statute of frauds, must have been on account of the contract of December 2d, and in pursuance of it, not of the whole; any part of it delivered by the party for the purpose of binding the bargain of December 2d, delivered with that view. If there was such a bargain, and McMahon delivered a barrel with a view of binding that bargain, and holding himself to it, that would be a delivery, and take the case out of the statute of frauds. * * * * It must have been done in pursuance of the bargain, something connected with or part of the arrangement or reasonably arising out of it. It must be such possession acquired by the purchaser as is something more than agreeable with it, consistent with it; it must be belonging to it as part of it, as part of the bargain, and that through an understanding of the parties, it must come out of that contract as contemplated and intended by the parties. 10 20

3d. And, also, there is error in this that the said judge charged the said jury that to find that this delivery was in pursuance of the original contract, supposes that during all this intervening time between December 2d and the time of this delivery, that the property was in fact the property of the defendant, as understood between the parties by a subsisting bargain, that he owned it, that the Sugar House Company were the owners of this property, and that McMahon was not. You must look at who had the custody of it, with this view, and what was being done with it, how it was being handled, and being dealt with, and by whom, whether by the decedent, McMahon, or by the Sugar House Company. And again, as I said a while ago on another point of the case in illustrating the bargain, whose men were handling it; were they McMahon's men whom he was paying? Were they dealing with and handling the property, using it in the manufacture of barrels? Were they dealing with any part of it, appropriating it to the making of barrels, and was it discriminated, set aside as the property of somebody else besides McMahon's. 30 40

4th. And, also, there is error in this, that the said judge, after charging the said jury that Shanly had testified that the pur-

pose of the power of attorney was to enable him to hand over the property in payment of the debt, charged the jury that if the debt still continued, that would settle the question of the contract of December 2d.

5th. And, also, there is error in this, that the said judge charged the said jury: But this power of attorney, (and it is for the court to construe it,) this power of attorney gives Shanly no more power than the transaction of the ordinary usual business of that establishment, it does not give power to
 10 sell out this establishment—I mean by selling out, turning the whole thing over, it gives him power to transact the ordinary business. That is the construction the court puts upon this power, it gives power to sell in the ordinary modes of sale as McMahan had been doing it in the transaction of his business; but it does not give him power to assign it over to his creditors, and hand it over to pay his debts. I mean the property of McMahan, whatever it was. It gives him the power he had before the power of attorney was given him, and no further, except that it gave him power to sign notes
 20 and some things that are not involved in this case; but for the purpose of breaking up the business—handing over the business to somebody else—if that was what was in the minds of the parties at the time the power was executed, it fails to accomplish that purpose—it is not adequate to that end.

6th. And, also, there is an error in this, that the said judge charged the said jury, that when a man becomes insane, or when he dies, his powers of attorney are at an end.

7th. And, also, there is error in this, that the said judge refused to charge the said jury, as he was requested by the
 30 counsel for the defendant below, that insanity of a contractor is no answer to his contract, if the party acted *bona fide*, and had no reason to believe the party insane.

8th. And, also, there is error in this, that the said judge refused to charge the said jury, as he was requested by the counsel for the defendant below, that nothing but imposition on an insane person is a good answer to a contract.

9th. And also there is error in this, that the said judge charged the said jury, there are some cases in which a lunatic, or one claiming under him, cannot set up that as a defence where a man deals with another in the ordinary course
 40 of business, without any knowledge or intimation of the insanity of the party dealt with, and it is done in good faith, such a contract as that may be supported. If you, for instance, go into a store and purchase of the owner, the proprietor, who may be insane, yet you purchase goods without any knowledge of his insanity, and you pay for them and take them away with you the contract is good, and in this case if (and I am stating the law as strongly as it can be stated for

the defence), if in this case, Matthiessen, acting as the agent of the company, was dealing with McMahan, or his agent, in the ordinary course of business, in good faith, without any knowledge of the insanity or mental disturbance of McMahan, and without the knowledge of such circumstances as should put a reasonable, prudent man upon inquiry, did the thing in good faith and made the bargain in good faith, then that would be a good bargain, and neither McMahan nor his representative could set up the insanity against it. But, gentlemen, in applying that rule, you must be sure that there is nothing but good faith; you must be sure that the party is entirely innocent of all knowledge; you must be further sure that he is ignorant of all circumstances that should put a reasonable, prudent man upon inquiry to find out what the condition of things is. If the arrangement, however, was made under circumstances by which you believe that Matthiessen understood or had reasonable ground to put him upon inquiry, and he, as a prudent man, ought to have looked into to understand the condition of McMahan, then that rule cannot apply.

10th. And also there is error in this, that the said judge charged the said jury that it is a fair question to put to this jury whether or not for the purpose of this subsequent transaction after getting that power of attorney, Shanly, in many of his actions, was not the agent of Matthiessen as well as of McMahan, and that it is a matter for you to determine not from what has been said, but from what has been done between these parties. Agency may be inferred from acts and the acts of Shanly in many of these matters, calling the creditors together at the instance of Matthiessen, his taking the property and delivering it at the order of Matthiessen. In all these was he the agent of Matthiessen acting under the directions of Matthiessen. If he was his agent as well as of McMahan, all that Shanly knew of McMahan's condition, Matthiessen is chargeable with a knowledge of and it is just the same in legal effect as if Matthiessen had known it himself.

11th. And also there is error in this, that the said judge refused to charge the said jury as he was requested by the counsel of the defendant below; that the burden of showing mental incapacity was upon the plaintiff, and it must be strictly proved, and when so requested to charge charged the said jury of follows: I sent for you, gentlemen, to come into court to charge upon one other matter, which I had intended to speak of in charging you, omitted it, and am reminded of it by requests of counsel. The proof that parties are obliged to make in a case like this, first, that the plaintiff must prove a conversion and other things necessary to support his action. The defendant in this case relies upon a sale, and he must

support that by proof; and the plaintiff again on his part meets the question of sale by saying that the decedent was, by reason of mental incapacity, incompetent to make the contract. No, he must prove that, the defendant must prove the sale, the plaintiff on his part must prove the incapacity—that is to say, it is necessary that the plaintiff should take upon himself the burden of proof of the mental incapacity of the decedent, that is, his work, and he must satisfy your minds by the proof he adduces of that fact.

10 12th. And also there is error in this, that the said judge refused to charge the said jury as he was requested by the counsel of the defendant below. That the question whether creditors were defrauded or not by what was done by the defendants with the property in question has nothing to do with this claim by the administrator, and it must be disposed of in that respect just as if McMahan was alive and had no creditors at all.

13th. And, also, there is error in this, that the said judge refused to charge the said jury, as he was requested by the counsel for defendant below, that if the jury are satisfied that 20 on the 2d day of December, 1871, Mr. McMahan agreed with Mr. Matthiessen that the Sugar Company could have the cooperage stock at prices which were named, for all or a part, and at the real worth of that part of the stock for which no price was named, and that there was a debt due to the Sugar Company, and that the value of the stock should extinguish the debt. This made a valid sale of the stock to the company, provided the jury believe that McMahan was mentally capable of making such a contract on the 2d day of December, 1871.

30 14th. And also there is error in this, that the said judge refused to charge the said jury as he was requested by the counsel for the defendant below; that if the jury are satisfied that on the 2d day of December, 1871, Mr. McMahan agreed with Mr. Matthiessen that the sugar company could have the cooperage stock, at prices which were named, for all or a part, and at the real worth of that part of the stock for which no price was named, and that there was a debt due to the sugar company, and that the value of the stock should extinguish the debt. This made a valid sale of the stock to 40 the company, provided the jury believe that McMahan was mentally capable of making such a contract on the 2d day of December, 1871, and provided the jury believe any part of the stock sold, was delivered prior to McMahan's becoming incapable of contracting and prior to action brought.

15th. And, also, there is error in this, that the said judge refused to charge the said jury as he was requested by the counsel for the defendant below, that an agreement by the seller

to sell and buyer to buy goods to the value of a debt and thereby to extinguish the debt, is a valid sale within the statute, though there is no delivery.

16th. And, also, there is error in this, that the said judge refused to charge the said jury as he was requested by the counsel for the defendant below, that the books kept by Shanly, are not competent evidence in this case, to show that the Sugar House Company or any one else took or converted, or had in their possession, the goods in dispute, even if they might be competent if a sale was to be proved. 10

17th. And, also, there is error in this that the declaration aforesaid, and the matters therein contained are not sufficient in law for the said Jacob Weart, administrator of Bernard McMahon, deceased, to have or maintain his aforesaid action thereof against the said F. O. Matthiessen and Wiecher's Sugar Refining Company.

18th. And, also, there is error in this that the judgment, aforesaid, in form aforesaid, was given for the said Jacob Weart, administrator, as aforesaid, against the said F. O. Matthieson and Wiecher's Sugar Refining Company; whereas, by the law of the land, the said judgment ought to have been given for the said F. O. Matthiesson and Wiecher's Sugar Refining Company against the said Jacob Weart, administrator, as aforesaid. 20

And the said F. O. Matthiessen and Wicher's Sugar Refining Company prays that the judgment, aforesaid, for the errors, aforesaid and for other errors in the said proceedings being, may be reversed, annulled and altogether holden for nought, and that it may be restored to all things it hath lost by occasion of the said judgment. 30

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Attorneys of Plaintiffs.

Joinder in error in usual form.

...of the value of a year and thereby ... the debt is a valid one within the statute, though ...

... And also there is error in this that the defendant ... the matter therein contained are not sufficient ...

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... And also there is error in this that the defendant ... the matter therein contained are not sufficient ...

... And also there is error in this that the judgment ... was given for the said Jacob West ...

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... And also there is error in this that the judgment ... was given for the said Jacob West ...

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GILCHRIST & McLELLAN
Attorneys at Law

... error in said item

