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Hudson County Circuit Court

GEORGE O'BRIEN, *Plaintiff-Respondent,* *vs.* MORRIS BROADMAN, *Defendant-Appellant.*	Action at Law.

To: Nathan L. Goodman, Attorney of Plaintiff-Respondent:

TAKE NOTICE that Morris Broadman, Defendant-Appellant, appeals from the whole of the judgment entered in this cause in the above entitled court to the Court of Errors and Appeals of New Jersey in the last resort in all causes.

BENJ. J. DARLING,
Attorney for Defendant-Appellant,
921 Bergen Avenue,
Jersey City, New Jersey.

Dated, Jersey City, New Jersey,
March 1, 1932.

Service of a copy of the within notice is hereby acknowledged by me this 1st day of March, 1932.

NATHAN L. GOODMAN,
Attorney of Plaintiff-Respondent.

Filed Clerk's Office
Mar. 3rd, 1932
Hudson County, N. J.
GUSTAV BACH,
Clerk.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GEORGE O'BRIEN,
Plaintiff-Respondent,

vs.

MORRIS BROADMAN,
Defendant-Appellant.

Action at Law.

To Nathan L. Goodman, Attorney of George O'Brien, plaintiff-respondent:

Take notice that the defendant appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Court, over objection of the defendant, erroneously permitted the following questions to be asked of the witness, Morris Broadman:

Q. You are engaged in the real estate business?

Q. Do you own property at the present time?

Q. Mr. Broadman, you are the owner of a number of parcels of property?

Q. Do you own any property in Jersey City in your name?

Q. How many parcels of property do you own?

Q. Do you mean by that there are so many that you don't know?

Q. Are there a number of them?

Q. What kind of properties are they?
Q. Some apartment houses?
Q. How many apartment houses are there?
Q. What is the first apartment house that you own?
Q. The second one that you own?
Q. What type of property is that?
Q. Now, besides the two apartment houses, what other property do you own in Jersey City?
Q. Where is that?
Q. The two family house?
Q. Any other piece of property?
Q. Where is the land?
Q. What does that consist of?
Q. How many lots?
Q. It takes a little less than two lots?
Q. In other words, a lot and part of a lot?
Q. Any other undeveloped property?
Q. What else?
Q. What else?
Q. Do you hold any mortgages on property at the present time?
Q. Do you hold any at the present time?
Q. How much?
Q. Is that a first mortgage or second mortgage?
Q. Do you own any stocks or bonds?
Q. Building and loan shares?
Q. It is not easy to make sales in Jersey City, regardless of what the values of property are?
Q. That Union Street property, what is the monthly rental of that?
Q. And the other apartment house brings in how much?

Q. You are not doing any work outside of collecting rent?

Q. Outside of that, you are not working?

Q. You have been living on the rents you have been getting from these various properties?

Q. You have not?

2. The Court erroneously denied defendant's motion to strike out the answers to said questions.

3. The Court, over objection of the defendant, erroneously permitted the plaintiff to amend the complaint by adding to each count a paragraph demanding punitive damages.

4. The Court erroneously permitted the jury to assess punitive damages against the defendant.

5. There was no proof whatsoever that the defendant acted maliciously or wantonly.

6. The Court, over objection of the defendant, erroneously permitted the following questions to be asked of the witness, George O'Brien:

Q. How much did you pay?

Q. For the furniture that you bought from Goodman?

Q. I mean, for the furniture that you actually bought, for the goods that you actually had from there, apart from the others?

Q. I am trying to get now what you paid for that which you paid for, that which you bought from Goodman's for getting the other furniture for the time being?

Q. Have you got a bill for it?

Q. Have you a copy of the bill?

Q. I show you what purports to be a copy. Do you recognize that?

Q. You say you think you have the bill home?

Q. Will you bring it with you tomorrow?

Q. But your recollection is that what you paid to Goodman's for what you bought there was about $1,000.00?

Q. Now are all of the goods that you bought in Goodman's mentioned in this notice which has been marked in evidence as P-1?

Q. Now besides what you bought from Goodman's are there other items in that inventory that you had not bought from Goodman's?

Q. And are those the things that you mentioned that you received as gifts?

Q. From other persons?

Q. What did you pay for that?

7. The Court erroneously denied defendant's motion to strike out the answers to said questions.

8. The Court, over objection of the defendant, erroneously permitted the following questions to be asked of the witness, Helen O'Brien:

Q. Do you recall what was paid for it?

Q. Do you know approximately what was paid?

Q. How much?

Q. Did you have other furniture besides that?

Q. Where had you gotten that?

Q. What else was there?

9. The Court erroneously denied defendant's motion to strike out the answers to said questions.

10. The Court, over objection of the defendant, erroneously permitted the following questions to be asked of the witness, Abe M. Goodman:

Q. What was that sold for?

Q. Was that the fair and reasonable and market value of the goods at that time?

Q. Now take the next item that you sold?

Q. How much was that sold for?

Q. Was that the fair and reasonable and market value at the time?

Q. Next item?

Q. What have you to say as to that price as to being reasonable?

Q. Is that the regular market price?

Q. That price is fixed by the Company?

Q. And that was a reasonable price at that time?

Q. Was there any depreciation in the value of these goods, between February 12, 1928, and June, 1929?

The Court: How much were they worth in price; what was the difference?

The Court: I don't mean new prices; I mean difference between the new price and the value of the goods as you saw them when they were being brought in?

Q. About how much would there be?

Q. Are you in a position to say what the value of the other goods which you had not sold were at that time?

Q. I mean the approximate price?

Q. What would you say was the value of the balance of the goods that were delivered to your storage?

Q. The things you can give a price on?

11. The Court erroneously denied defendant's motion to strike out the answers to said questions.

12. There was no proof whatsoever of damages sustained by the plaintiff.

13. There was no proof whatsoever that the plaintiff had levied a distraint.

14. There was no proof whatsoever that defendant had taken an unlawful distraint.

15. There was no proof whatsoever that the defendant had taken an unreasonable distraint.

16. There was no evidence whatsoever to support the verdict of the jury.

17. The Court erroneously denied the motion for a non-suit made by the defendant on the grounds that plaintiff had not alleged or proved a cause of action under the Distress Act in that, at the time the rent for which the distress was issued became due, plaintiff and defendant were strangers to each other, that plaintiff had not proved any damage, that no distress had been proved, that no unlawful distress had been proved, that no unreasonable distress had been proved, that none of plaintiff's goods had been taken, and that as to the defendant, plaintiff was a monthly tenant and was required to give one month's notice of his intention to vacate.

18. The Court erroneously denied defendant's motion for a directed verdict made on the grounds alleged in the motion for a non-suit and on the further grounds that the correspondence between the counsel for plaintiff and for defendant, all of

which correspondence was marked in evidence, showed a release from all liability, if any existed, and especially the letter of July 9, 1929, from Mr. Nathan Goodman to Mr. Benjamin J. Darling limiting the liability, if any, to the period between June 20, 1929, and July 9, 1929.

19. The Court erroneously permitted the jury to assess damages notwithstanding no damages were proved by the plaintiff.

20. The Court erroneously permitted the jury to find damages subsequent to July 9, 1929, when in fact the plaintiff had restricted his right of action to the period between June 20, 1929, and July 9, 1929.

21. The Court erroneously permitted the jury to find that the defendant had seized plaintiff's goods when in fact the plaintiff denied that a seizure had been made.

22. The Court erroneously permitted the jury to determine whether the alleged distraint was lawful or unlawful.

23. The Court, over objection of the defendant, found as a fact that the word "person" as used in sections 1 and 2 of the Distress Act means "Every man, woman, child, corporation or any other entity in the State of New Jersey within its confines".

24. The Court erroneously charged the jury as follows:

> "The Court is going to leave to you in addition to the monetary loss the value of the inconvenience, if you can assess that in dam-

ages, and the question of whether or not you are to allow anything for punitive or exemplary damages, or damages by way of smart money."

25. The Court erroneously charged the jury as follows:

"Gentlemen, before you can allow any damages by way of smart money, you must be satisfied in your minds and in your consciences, by the greater weight of the evidence, that the defendant is guilty of a wrong that has injured this plaintiff, under the pleadings and issues as framed, and you must find that by the greater weight of proof, preponderating weight. Then, if you find this plaintiff has sustained damages, you may proceed to consider the item of exemplary damages. But before you can make any allowance for exemplary damages, you must be satisfied by the greater weight of the evidence that the defendant did the thing that is alleged to be wrong, that he did it maliciously, that he did it wantonly, that he did it to injure this plaintiff; that is to say, that when he did this wrong, he knew it was a wrong, and that when he did it, he did it to injure this plaintiff. That is termed in the law malice, that he did it maliciously. The Court cannot improve upon that term. If you find first, that this defendant did something, under the pleadings, that was wrong, under the issues raised in this case, and that the plaintiff is entitled to compensation therefor, for the actual losses, then you proceed to the question of whether he did it maliciously, in order to show

whether or not he should be punished, or punitive damages found against him for the malicious act, or manner in which it was done, if you so find."

26. The Court erroneously charged the jury as follows:

"Now in this case the plaintiff says, however that he was not a monthly tenant, and he claims that he has proved that beyond dispute, but the Court is going to leave that to you under all the circumstances of this case."

27. The Court erroneously charged the jury as follows:

"So it resolves itself, as the Court sees it, although the testimony may indicate to you otherwise and it is for you to determine, around the use of these goods and the expenses that this man was put to in getting the goods, and trying to have them released from this, as he claims, unlawful restraint, and that is what you are to consider."

28. The Court erroneously charged the jury as follows:

"Can it be said, in view of this correspondence that has been had here, together with the testimony of the defendant, and the other written evidence that is in the case, that the defendant actually exhibited malice in withholding these goods? Now, if you come to the conclusion that he did not exercise any malice or the act was not a malicious act,

why, then, of course you are not justified in allowing anything by way of punitive damages, because after all, you are here to decide this case according to the law and to decide it in a just manner."

29. The Court erroneously charged the jury as follows:

"You may also find, if there was malice in this case, exercised by the defendant in this alleged unlawful act, if you come to the conclusion that the plaintiff was entitled to compensatory damages, that there may be added thereto damages by way of smart money, bearing in mind the testimony in the case and the Charge that the Court has given to you."

30. The Court erroneously charged the jury as follows:

"If you find on the other hand that this was lawful, and I am going to leave that question to you, and that this defendant was justified in taking the proceedings that he did, you may find a judgment in his favor."

"Now, in regard to compensatory damages, the testimony, as the Court sees it, is rather, I won't say meager, but it is within a narrow scope. You have heard the items that have been mentioned here. As the Court remembers it, the items directly concerned with the retention of the goods, or the goods in storage, was the amount of the storage during that period. That is, however, a question for you to determine."

Grounds of Appeal

31. The judgment is contrary to law in that plaintiff had no right of action under the Distress Act.

BENJAMIN J. DARLING,
Attorney for Defendant-Appellant.

Service of a copy of the within Grounds of Appeal is acknowledged by me this 28th day of March, 1932.

NATHAN L. GOODMAN,
Attorney for Plaintiff-Respondent.

Summons.

STATE OF NEW JERSEY.

To Morris Broadman and James J. Chauncey:

[SEAL]

You are summoned to answer the annexed complaint of George O'Brien in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Hudson County Circuit Court, at Jersey City, N. J., within twenty days after service upon you of this writ and the annexed complaint, plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, FRANK L. CLEARY, Judge of the Hudson County Circuit Court, at Jersey City, this fifth day of November, nineteen hundred and twenty-nine.

JOHN J. McGOVERN,
Clerk.

NATHAN L. GOODMAN,
Attorney.

Amended Complaint.

HUDSON COUNTY CIRCUIT COURT.

GEORGE O'BRIEN,
Plaintiff,
vs.
MORRIS BROADMAN and JAMES J. CHAUNCEY,
Defendants.
} Action at Law.

The plaintiff, residing in the City of Union, County of Hudson, and State of New Jersey, through his attorney Nathan L. Goodman, says that,

FIRST COUNT.

1. Prior to the first day of June, 1928, the plaintiff leased an apartment in the premises known as #69 Claremont Avenue, Jersey City, for a period of one year from the 1st day of June, 1928, to the first day of June, 1929.

2. The said lease was by parole and made by the plaintiff, with the owner of the building, one Mr. Leff, and it was agreed between them, that the rent was to be paid in the sum of $55.00 per month, but that the plaintiff was to have a concession of one month's rent, namely, the last month of the term.

3. Prior to the expiration of the said lease, the defendant, Morris Broadman, purchased the said premises.

4. The plaintiff paid the rent each and every month during the term of said lease, including the month of May, 1929, despite the fact that his lease provided that said month's rent was to be free, because of defendant's insistence upon payment and threat to evict.

5. The plaintiff moved from the said premises, on the 29th day of May, 1929, prior to the expiration of the term of said lease and placed his goods in the warehouse of the Goodman Warehouse Corporation, at 830 Bergen Avenue, Jersey City.

6. On or about the 20th day of June, 1929, the defendant Morris Broadman, empowered the defendant, James J. Chauncey to distrain the goods and chattels of the plaintiff, in the warehouse at 830 Bergen Ave. and on the 21st day of June, 1929, the said defendant, James J. Chauncey did thereupon serve a distress warrant upon the said goods and chattels of George O'Brien, at the warehouse above mentioned and the defendants then and there took, seized and distrained as and for a distress for rent pretended and claimed by them to be due and in arrears, namely the sum of $55.00 for the month of June, 1929, from the plaintiff to the defendant Broadman, divers goods and chattels of the plaintiff as set forth in Schedule A which is made part hereof, of the value of $2,500.

7. In truth and fact, there was no rent due and in arrears from the plaintiff to the defendant at the time of the taking and distraining of said goods and chattels as aforesaid, and the said taking and distraining was in violation of the statutes in such case made and provided.

8. By reason of the said premises the plaintiff was deprived of the use, benefit and advantage of said goods and chattels for a long period of time, and despite the fact that the plaintiff called the defendant's attention to the unlawful distress the defendant, nevertheless, refused to release the said goods and chattls and the plaintiff was obliged to retain the services of an attorney to obtain possession of the same.

9. The defendants failed and refused to proceed with the sale of the said goods according to the law in such cases made and provided but continued to maintain their unlawful distraint on the said goods and chattels for a period of three months, thereby causing the plaintiff great expense in maintaining his family and himself until said goods and chattels were released by the defendants.

The plaintiff demands as damages on this count, the sum of $2,500.

SECOND COUNT.

1. Before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff held and enjoyed said premises known as an apartment in a building located at #69 Claremont Avenue, Jersey City, with the appurtenances as tenant thereof, of the defendant Broadman at and under a rent of $55.00 per month, payable by the plaintiff to the defendant for the same.

2. On or about the 21st day of June, 1929, the defendants, not regarding the statute in such case, made and provided, whereby no person can lawfully be distrained of his goods and chattels for

any costs except by a reasonable distress, but wrongfully and maliciously contriving, and intention to injure and oppress the plaintiff, did unreasonably and excessively take and distrain and cost and procure to be taken and distrain certain goods and chattels of the plaintiff as set out in and described in Schedule A, which is attached hereto and made part hereof, of the value of $2,500.

3. The defendants distrained said goods and chattels for rent supposed to be then due and in arrears from the plaintiff to the defendant Broadman for said premises, namely the sum of $55.00.

4. The said goods and chattels so taken and distrained were of much greater value than the amount of rent said to be due and in arrears.

5. The defendant at the time of said distress knew it to be unreasonable and excessive and that a small portion of said goods and chattels would have been reasonable and sufficient for the amount of rent said to be in arrears and all the costs and charges attending the same and the appraisement and sale thereof.

6. By means of the premises, the plaintiff was deprived of the use, and benefit and advantages of said goods and chattels for a long period of time and was obliged to expend a sum of money to obtain the return and release of said goods and was further obliged to expend a sum of money to maintain himself and family until said release was effected.

Plaintiff demands as damages on this count the sum of $2500.

NATHAN L. GOODMAN,
Attorney for Plaintiff.

SCHEDULE "A."

1. 1 Settee,
2. 1 Arm Chair,
3. 1 High Back Chair,
4. 1 Cabinet,
5. 1 Night Table,
6. 1 Vanity,
7. 1 Chest of Drawers,
8. 1 Torchier,
9. 1 Bridge Lamp,
10. 1 Floor Lamp,
11. 1 Floor Lamp,
12. 1 Arm Chair,
13. 1 Bdl. Rugs,
14. 1 Boudoir Chair,
15. 1 Roll Oilcloth,
16. 1 Rug.
17. 1 Bdl. Rugs,
18. 1 Roll Oilcloth,
19. 1 B. R. Bench,
20. 1 Ice Box,
21. 1 Dresser,
22. 1 K. Chair,
23. 1 K. Chair,
24. 1 K. Chair,
25. 1 K. Chair,
26. 1 K. Table,
27. 1 Carton,

28. 1 Carton,
29. 1 Carton,
30. 1 Smoking Stand,
31. 1 Ironing Board,
32. 1 Washboard,
33. 1 Bed End,
34. 1 Mattress in carton,
35. 1 Bed End,
36. 1 Sewing Machine,
37. 1 Carpet Sweeper & Mop,
38. 1 Pair Bed Rails,
39. 1 Bdl. Slats,
40. 1 Wash Wringer,
41. 1 Spring,
42. 1 Picture,
43. 1 Mirror,
44. 1 Mirror,

Complete

I consent to the filing of the within amended complaint on or before February 10, 1930.

BENJ. J. DARLING,
Attorney of Defendant.

Service of a copy of within amended complaint is hereby acknowledged this 3rd day of Feb. 1930.

BENJ. J. DARLING,
Atty. for Defendants.

Filed Clerk's Office
Feb. 10th, 1930
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Answer.

HUDSON COUNTY CIRCUIT COURT.

GEORGE O'BRIEN,
Plaintiff,
vs.
MORRIS BROADMAN and JAMES J. CHAUNCEY,
Defendants.
Action at Law.

The defendants, Morris Broadman and James J. Chauncey, each residing in the City of Jersey City, County of Hudson and State of New Jersey, answering the complaint, say that:

FIRST DEFENSE TO FIRST COUNT.

1. They deny the truth of the matters contained in the first count.

SECOND DEFENSE TO FIRST COUNT.

1. On or about May 29, 1929, and for a long time prior thereto, plaintiff was a monthly tenant of defendant, Morris Broadman, and was in possession of an apartment house known as 69 Claremont Avenue, Jersey City.

2. On June 1, 1929, plaintiff became indebted to defendant, Broadman, in the sum of $55.00 for rent for the month of June, 1929, but plaintiff refused to pay said sum, although often requested so to do by said Broadman.

3. On or about June 20, 1929, defendant, Broadman, by his agent, the defendant, Chauncey, in accordance with the statute in such case made and

provided, distrained upon the goods and chattels of the plaintiff for the amount of rent owing by the plaintiff to the defendant, Broadman.

THIRD DEFENSE TO FIRST COUNT.

1. The distrain levied by the defendants was maintained with the consent of the plaintiff.

FOURTH DEFENSE TO FIRST COUNT.

1. Defendants released the goods so distrained from the lien of said distrain.

FIRST DEFENSE TO SECOND COUNT.

1. Paragraph one (1) of the second count is admitted.

2. Paragraphs two (2), three (3), four (4), five (5) and six (6) of the second count are denied.

SECOND DEFENSE TO SECOND COUNT.

1. The distrain executed and levied by the defendants was reasonable and not too great.

THIRD DEFENSE TO SECOND COUNT.

1. The distrain levied by the defendants was maintained with the consent of the plaintiff.

FOURTH DEFENSE TO SECOND COUNT.

1. Defendants released the goods distrained from the lien of said distrain.

BENJ. J. DARLING,
Attorney of Defendants.

Filed Clerk's Office,
February 20, 1930.
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Reply.

HUDSON COUNTY CIRCUIT COURT.

GEORGE O'BRIEN, *Plaintiff*, *vs.* MORRIS BROADMAN and JAMES J. CHAUNCEY, *Defendants.*	Action at Law.

The plaintiff, residing in the City of Union, County of Hudson, and State of New Jersey, replying to the answer of the defendants, says that:

REPLY TO SECOND DEFENSE TO FIRST COUNT.

1. He denies the allegations set forth in the second defense to the first count.

REPLY TO THIRD DEFENSE TO FIRST COUNT.

1. He denies the allegations set forth in the third defense to the first count.

REPLY TO FOURTH DEFENSE TO FIRST COUNT.

1. He denies the allegations set forth in the fourth defense to the first count.

REPLY TO SECOND DEFENSE TO SECOND COUNT.

1. He denies the allegations set forth in the second defense to the second count.

REPLY TO THIRD DEFENSE TO SECOND COUNT.

1. He denies the allegations set forth in the third defense to the second count.

Reply

REPLY TO THE FOURTH DEFENSE TO SECOND COUNT.

1. He denies the allegations set forth in fourth defense to the second count.

NATHAN L. GOODMAN,
Attorney for Plaintiff.

Filed Clerk's Office,
Mar. 10, 1930.
Hudson County, N. J.
JOHN J. McGOVERN,
Clerk.

Order to Amend.

HUDSON COUNTY CIRCUIT COURT.

GEORGE O'BRIEN,
Plaintiff,
vs.
MORRIS BROADMAN and JAMES J. CHAUNCEY,
Defendants.
} Action at Law.

Pursuant to notice served upon the attorney of the defendants, upon which service was acknowledged February 8th, 1932, and argument having been heard in open court and the Court having determined that amendment to the complaint in the above entitled cause should be allowed.

Order to Amend

It is on this 17th day of February, 1932, ordered that there be added to each of the counts of the complaint as paragraph 10 in the first count and paragraph 7 in the second count the following:

> "Defendants unlawfully, unreasonably and maliciously distrained the goods and chattels of the plaintiff and unlawfully, unreasonably and maliciously detained said goods and chattels without color or right, thereby committing a trespass against the plaintiff, entitling the said plaintiff to punitive damages."

IT IS FURTHER ORDERED that said complaint be further amended by inserting in lieu of ad damnum clause now oppearing therein the following:

The plaintiff demands by way of punitive, as well as compensatory damages the sum of Ten Thousand ($10,000.00) Dollars.

THOMAS BROWN,
Judge of Hudson County
Circuit Court.

Filed Clerk's Office
Feb. 25, 1932
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Rule for Final Judgment.

HUDSON COUNTY CIRCUIT COURT.

GEORGE O'BRIEN,
Plaintiff,

vs.

MORRIS BROADMAN,
Defendant.

Action at Law.

This case was tried on February 17th, 1932, before Honorable Thomas Brown, Judge of the aforesaid Court and a Jury.

The parties hereto through their respective counsel submitted testimony of the witnesses, and the Jury having been instructed by the Court, retired and returned with their verdict in favor of the plaintiff George O'Brien and against the defendant, and assessed the damages in the sum of $700.

Whereupon it is ordered that judgment final be and is hereby entered in favor of the plaintiff George O'Brien and against the defendant Morris Broadman in the sum of $700 and the plaintiff to have his costs taxed.

Let this rule be entered in the minutes of this Court.

THOMAS BROWN,
Judge.

On Motion of
NATHAN L. GOODMAN,
Attorney of Plaintiff.

Rule Actually entered this
25th day of February, 1932.

Filed Clerk's Office
Feb. 25, 1932
Hudson County, N. J.
GUSTAV BACH,
Clerk.

Judgment.

HUDSON COUNTY CIRCUIT COURT.

GEORGE O'BRIEN, *Plaintiff,*	Judgment entered February 25th, 1932.
v.	Damages ..... $700.00 Costs 73.24
	Total $773.24
MORRIS BROADMAN, *Defendant.*	NATHAN L. GOODMAN, Attorney for Plaintiff.

Judgment On Verdict in the above entitled cause was entered in this Court on the 25th day of February in the year of our Lord One Thousand Nine Hundred and Thirty-two in favor of the Plaintiff George O'Brien and against the Defendant Morris Broadman, in a plea of Action at Law for the sum of Seven Hundred Dollars Damages and Seventy-three Dollars Twenty-four Cents, cost of suit.

Judgment entered and signed this 25th day of February, 1932.

THOMAS BROWN,
Judge.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

GEORGE O'BRIEN *vs.* MORRIS BROADMAN and JAMES J. CHAUNCEY.	Before: Hon. THOMAS BROWN, *J.*, and a Jury.

Jersey City, N. J.
February 16, 1932.

Appearances:

ALFRED BRENNER, Esq., for the plaintiff.

JOHN H. JOBES, Esq., for the defendant.

A jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the Jury.

Mr. Brenner: The plaintiff desires to amend the pleadings by adding to the first and second counts as a part of the damage clause, that the plaintiff will seek punitive as well as compensatory damages.

The Court: Formal pleading embodying these amendments will be filed?

Mr. Brenner: Yes; I will file that in the morning.

Mrs. Elizabeth O'Brien—Direct

Mrs. ELIZABETH O'BRIEN, sworn for the plaintiff:

Direct examination by Mr. Brenner.

Q. Where do you live? A. 230 Grant Avenue.

Q. Are you the mother of George O'Brien? A. Yes, sir.

Q. Were you the first one who spoke to anyone concerning the rental of the premises to be used by your son? A. Yes; George told me he was going to get married and asked me to go look for rooms for him, and I saw a place on Claremont Avenue.

Q. What number? A. I think it was 69 Claremont Avenue, and I hired the floor.

Q. Who did you talk to at the time? A. Mr. Spear I think his name was.

Q. Spear or Leff? A. Yes, sir. Leff.

Q. Did Mr. Leff live right at the premises? A. No.

Q. Where was he at the time? A. He lives some place, I think, down Stegman Street.

Q. Did you know Mr. Leff before that time? A. Yes; he said when I went, "I know you, Mrs. O'Brien from Wilkinson Avenue."

Q. When was it you saw Mr. Leff? A. When I took the rooms.

Q. When was that? A. I think it was on Wednesday.

Q. How long before June first, 1928, was it? A. I just seen him when I gave him ten dollars and hired the rooms. I didn't see him after that.

Q. How long was that before your son went into the rooms? A. I think he went in about two weeks after.

Q. And what was the conversation that you had with Mr. Leff concerning the renting? A. He said they were $55 and a month's concession.

Q. A month's concession out of what term? A. $55 a month, and the last month of June didn't have to pay any rent.

Q. You said there was also something about cleaning? A. Yes, he said he would clean all the rooms for him.

Q. The first time that you saw Mr. Leff, were you alone or was there anyone with you? A. I was by myself.

Q. After you saw him, did you report that conversation to your son? A. Yes, I told George.

Q. As a result of that report, did your son go with you then to see Mr. Leff? A. Yes, he went to pay the balance of the rent.

Q. Did he go with you or go alone? A. No, he came with Helen, his wife and him and I went together the three of us.

Q. Who did you see the second time? A. Mr. Leff himself.

Q. Was anybody else there besides Mr. Leff? A. No, sir.

Q. Was there any arrangement made that time as to how long the apartment was to be rented to your son? A. A year.

Q. Starting when and ending when? A. June 3rd to June 3rd.

Q. This was in the year 1928? A. Yes, sir.

Q. You say you then paid the balance of the rent? A. Yes, sir.

Q. How long was the second visit after your first visit? A. Well, as soon as I think George paid the rent, right away as soon as they were cleaned.

Q. You have talked now about a first and second time you saw Mr. Leff? A. Yes, sir.

Q. What time intervened between the time you saw him the first time and the time you saw him the second time? A. About a week.

Q. Did your son then move into the place? A. He moved in, I think it was the 29th of the month he moved in, May.

Q. Did you live with him? A. No.

Q. You know nothing after he moved into the place? A. No.

Mr. Jobes: No questions.

GEORGE O'BRIEN, sworn for the plaintiff:

Direct examination by Mr. Brenner.

Q. Mr. O'Brien, where do you live at the present time? A. 252 Ottawa Avenue, Hasbrouck Heights.

Q. Did you go to see a Mr. Leff after your mother had spoken to him? A. My mother rented the house about three days before, and paid a deposit. Then we went up to speak over how it was to be cleaned. I think it was on Friday or Saturday night.

Q. When you say "we", whom do you mean? A. My wife and myself and my mother.

Q. Whom did you meet? A. Mr. Leff, the owner of the house at that time.

Q. Did you have any talk with him concerning the length of time that you were to rent the place? A. Yes, I wanted the place cleaned. He told me if I wanted it cleaned completely, I would have to have a lease for a year. I said I was willing to at the time. He told me that I would pay eleven months' rent and my twelfth month, which would be May first to 31st, would be free.

Q. Did you agree to that? A. Yes, I did.

Q. After having that conversation, did he clean the place as agreed? A. Yes, he certainly did.

Q. Did you then move in there? A. That is right.

Q. Did you continue to pay rent to him on the basis of $55 a month? A. I paid rent, I believe, for six months to the superintendent in there, and I never thought, the first time we have ever rented rooms, anything about leases, and I paid the rent the first of each month and on the seventh month, a new man came around.

Q. Who was the new man? A. He said he was the new owner.

Q. What was his name? A. Schaffe or Schacht.

Q. Did you speak to him? A. I spoke to him and told him that when we first took the place, the owner said that we were getting a month's rent free at the end of the year, and he said that he didn't know anything about that; that he bought the house and had leases, and if we had a lease, it should have been done. So I said, "Well, can't you take it up with the man that you bought the house from", and he said he would, and each month that he came around, I asked him at all times about the rent. Around the tenth month, I asked him, and he told me he didn't know where

he could get in touch with Mr. Leff. As far as he was concerned, I didn't have a lease.

Q. When was the last time you talked to Mr. Schacht? A. The last time, I believe, was around the eleventh month. The eleventh month, I believe it was. I told Mr. Schacht's son, who had collected from the time that Mr. Schacht had bought the house, that I would not pay the twelfth month, and that he should bring Leff up with him, or give me his address, and I would go to Leff and bring him with me to prove that I had a lease, and he said that I would have to see his father about it. So then the twelfth month came, and he came around for the rent, did the son, and I refused to pay it. So he said, "Well, I won't argue with you about it. I will go get my dad." So, his dad came down, and I spoke to him, and I told him that I was to live there a year, and that the twelfth month I was to get free, which I told his son for the last six months. So he said he didn't know anything about a lease. As far as keeping me there, I could move now. So I said "That is no way to talk. I am supposed to get this month's rent free, and now you are telling me I can get out." He said "I am not telling you, but here is your money back for the month's rent, if you want it." I said "I can't move now. I have no place now, but I will move at the end of the month."

Q. Did you then pay him that month's rent? A. He was paid the month's rent, yes, sir, for the twelfth month.

Q. You told him you would move at the end? A. Yes, that was my lease, was supposed to be for a year.

Q. Did you tell him you were going to move? A. Yes, I positively did.

Q. That was on what day that you told him you were going to move at the end of the month? A. I believe he called twice on the last day of the month or the first day—I don't remember which it was.

Q. It was either the last day of May or the first of June? A. Either the last day of April or the first day of May; he collected for the month of May.

Q. Now, you did stay there, then, for the month of May? A. I stayed there; yes, I stayed there the full month, I think to about the 27th.

Q. When did you start moving out? A. We looked around, that is as far as we went, looked around; my wife at the time was sick and on the advice of the doctor—

Mr. Jobes: I object to that.

Mr. Brenner: Never mind what you were advised.

Q. You say you had to look for an apartment and found none? A. I could not find one, no, sir.

Q. Then what did you do toward the end of May? A. I believe that it was around the 15th or 17th that I decided as my wife was sick, we would go down to the shore. So I went around and finally found a bungalow in the Highlands, and rented it for June, July and August, for three months.

Q. Then after you rented the bungalow, did you start in to move? A. Yes, sir.

Q. On what date? A. I think I rented the bungalow on about the 18th or 19th of May and when I had the bungalow rented, I went downstairs and rang Mrs. Schacht's bell. At that time, she lived in the building and I told her that

my lease was up for the year the end of the month, and also relative to the way her husband spoke to me about my getting out. I was agreeing to it and I would be out at the end of the month. She told me that she was sorry, that the place was sold, and that I would have to get in touch with Mr. Broadman. I told her that I had given her the rent for the month and at that time I had given her notice that my lease was up and I didn't see why I should get in touch with Mr. Broadman.

Q. Then, after you had the talk with her, did you then start to move? A. Well, I think it took us a week or so because Goodman—

Q. When was it that you started to move? A. We started to move—well, we moved all one day. I think it was around the 20th we started to get ready. We had to call up Goodman.

Q. I mean the day you actually got out? A. I believe it was the 27th.

Q. The 27th of May? A. I am not sure; I believe it was around that time. I know it was before the end of the month.

Q. You were moved into the Goodman storage warehouse? A. That is right.

Q. Down on Bergen Avenue? A. Yes, that is where I bought my stuff.

Q. While you were in the process of getting ready to move, did anyone talk to you about your moving? A. No, sir; at no time.

Q. When was the first time that you learned that there was any claim for an additional month's rent? A. The first time that I knew of any additional claim was I came home from work. I was down to the shore, and I had a letter from Goodman to the effect that if $55 was not paid in three days, my furniture would be sold at auction.

Q. Do you know when you got that notice? A. I have no record of it. I brought the letter to Mr. Goodman. Mr. Goodman had the letter; I brought it back to him.

Q. When you came up to see Mr. Goodman, did he show you any paper that had been served on him? A. Yes, sir; in fact, he sent me a copy of it, I believe.

Q. I show you a paper and ask you if that is the paper that was given to you by Mr. Goodman? (Handing witness.) A. Yes, sir.

Q. That was given to you by Mr. Nathan Goodman? A. Nathan Goodman, yes, sir.

Mr. Brenner: I offer it in evidence.

Mr. Jobes: I object to that on the ground that the proper person to prove it would be the man upon whom it was served.

The Court: It may be marked.

(Accepted and marked as Plaintiff's Exhibit P-1 of this date.)

(Exhibit P-1 read by Mr. Brenner to the jury.

The Court: What date is that dated?

Mr. Brenner: It is dated June 21st, 1929.

Q. After you saw Mr. Goodman, did you go with Mr. Goodman to see Mr. Broadman? A. Yes, sir.

Q. Was that before or after Mr. Goodman had sent a letter to Mr. Broadman? A. I could not say, sir; but I know this that I told my story. He said "Why don't you go up to see the man", so we rode up there.

Q. Whom did you see? A. Didn't see anybody at the time. I think I wasted the whole afternoon there from work, waiting for him.

Q. Then did you go back to see him after that? A. Mr. Goodman could not wait any more, so I came back again in the night time and I met him.

Q. You say you met him; whom? A. Mr. Broadman.

Q. Did you have a conversation with him? A. Yes, sir.

Q. What did you say to him? A. I asked him why he did that and he said that he was entitled to the month's rent. He said, anyway, that was no use arguing with him, that I should see his lawyer.

Q. Who was the lawyer that he referred you to? A. I don't really remember the name off hand, but it was attached to the paper that I had in my hand at the time.

Q. Did you, in response to that, go to see Mr. Broadman's lawyer? A. No, I went back and told Mr. Goodman what he said, and he said that he would write them a letter on it.

Q. Do you know whether a letter was written? A. I believe it was, yes, sir; yes, it was written.

Mr. Brenner: I call for the production of the letter of June 28th, 1929.

(Letter produced by counsel for defendant.)

Mr. Brenner: I offer this in evidence.

(Accepted and marked as Plaintiff's Exhibit P-2 of this date.)

(Exhibit P-2 read to the jury by Mr. Brenner.)

The Court: Were those goods sold?

Mr. Brenner: No, sir.

Q. Subsequent to the sending and receipt of this letter, did you see Mr. Jobes or Mr. Darling or Mr. Broadman? A. No.

Q. Were your goods released under this demand by your attorney, Mr. Goodman? A. I stepped up there in August I think it was.

Q. Let me change that question. Were they released at that time or within twenty-four hours, as demanded by Mr. Goodman? A. No, they were not.

The Court: What date was your letter?

Mr. Brenner: June 28th, 1929.

Q. Is this the first release that you got? A. It is a little complicated with the dates; they are different.

Q. I don't care about that. That is the release that you subsequently got? (Handing witness.) A. Yes, that is right.

Mr. Brenner: I offer that in evidence.

Mr. Jobes: This first release; don't you think you had better put that in evidence?

The Court: You mean a release from restraint. You say a release.

Mr. Brenner: The goods that were taken under this distress.

Mr. Jobes: I object to the phraseology, where he says the goods that were taken. There is no proof they were taken.

Mr. Brenner: The goods that were levied upon under this distress. I beg your pardon.

(Accepted and marked as Plaintiff's Exhibit P-3 of this date.)

Q. How long were these goods owned by you? A. All my furniture was bought prior to my moving into the house at 69 Claremont.

Q. When you say prior to then, how long prior to your moving in? A. A month or two months before.

Q. Where did you buy the furniture? A. I bought all my furniture at Goodmans.

Q. Goodman's Furniture Company? A. Yes, sir.

Q. That is the same company that operates the warehouse? A. Right.

Q. Did you pay for it at the time? A. Yes, everything; I paid cash.

Q. How much did you pay?

Mr. Jobes: That is objected to on the ground that this is a suit under the Distress Act, and at the time of the distraint there was no landlord and tenant relationship existing between the plaintiff and the defendant, and that the Distress Act is purely relative to the rights as between landlords and tenants.

Mr. Brenner: I think we are covered, even in that event, by the complaint, even allowing that is so, by alleging a common law action of trespass.

The Court: I will give you an opportunity to put your pleadings in proper form.

Mr. Brenner: I would be glad to overnight put the pleadings in proper form.

Mr. Jobes: Does your Honor overrule my objection?

The Court: I do.

Mr. Jobes: Exception. I wish also to object to it upon the ground that it is not the proper way to prove the measure of damages.

Mr. Brenner: I intend to connect up the actual value of the furniture by another witness.

The Court: All you are asking is what he paid for it. The Court will take that offer.

Q. (Question read as follows: How much did you pay?) A. How much did I pay?

Q. For the furniture that you bought from Goodman? A. That is a little complicated, for the reason that I had many gifts.

Q. I mean for the furniture that you actually bought, for the goods that you had from there, apart from the others? A. Well, I didn't buy all my furniture from Goodmans.

Q. I am trying to get now what you paid for that which you bought from Goodmans, forgetting the other furniture for the time being? A. I believe it runs around a thousand dollars.

Q. Have you got a bill for it? A. No, I have not.

Q. Have you a copy of the bill? A. I would have a copy home.

Q. I show you what purports to be a copy; do you recognize that? A. There is more to that. I think that my mother bought a kitchen set. That is what I bought there.

Q. You say you think you have the bill home? A. I believe I have, yes, sir.

Q. Will you bring it with you tomorrow? A. I will try to find it.

Q. But your recollection is that what you paid to Goodmans for what you bought there was about $1,000. A. That is right.

Q. Now, are all of the goods that you bought in Goodmans mentioned in this notice which has been marked in evidence as P-1? A. All of it is here.

Q. Now, besides what you bought from Goodmans, are there other items in that inventory that you had not bought from Goodmans? A. Right.

Q. And are those the things that you mentioned that you received as gifts? A. Most of them.

Q. From other persons? A. Most of them; one radio cabinet I bought in Macy's.

Q. What did you pay for that? A. I think it was $179.

Q. You said you rented a bungalow until the end of August? A. That is right.

Q. When you came back at the end of August did you have an apartment rented? A. I came up to Goodmans around August 12th or 14th, and I told them that I was going to look for rooms and told them to withhold until I had—that while they had not proceeded on to sell the furniture, it was still—

Q. The goods were not released at that time? A. No, they were not released.

Q. Goodman would not release them to you? A. He could not release on it.

Q. You didn't get your furniture until when? A. I think that it was dragged along—I had the place rented and I think it came to about September 16th or 17th I moved in; or the 19th, it might be.

George O'Brien—Cross

Cross examination by Mr. Jobes.

Q. Mr. O'Brien, you related the conversation you had with Mr. Leff and Mr. Schacht? A. Yes, sir.

Q. Did you ever have any conversation with Mr. Broadman with reference to your tenancy in the building? A. The first time I met Mr. Broadman was on June 21st or 22nd, when I received notice that he was selling my stuff in three days. I went to his house.

Q. From whom did you receive that notice? A. I received that from the Goodman warehouse.

Q. Did you ever receive notice from Broadman that he was selling your goods in three days? A. I did not.

Q. Did you ever receive notice from Broadman's lawyer? A. I received something.

Q. Did you ever receive a notice from Broadman's lawyer that they were selling the goods in three days? A. I received a copy of the memorandum placed before you.

Q. Please answer my question? A. I don't know from you or not from you.

Q. It is James J. Chauncey? A. Who is Chauncey?

Q. The other defendant in this suit? A. Who, Chauncey, Broadman?

Q. Did you ever receive any notice from Mr. Broadman's lawyer that your goods were to be sold in three days? A. I received that; that is all I received.

Q. Did you read that? A. Yes, sir.

Q. Does it say in there that your goods are to be sold in three days? A. No, the letter read that way.

Q. From whom was the letter? A. Goodman Furniture Company.

Q. Did you ever have any conversation with any agent of Mr. Broadman with reference to your tenancy in that house? A. I could not say as to when Mr. Broadman was the owner.

Q. Did you ever have any conversation with a man by the name of Ratner? A. Ratner? At no time.

Q. Did you ever have any conversation with a man who claimed to be the agent, who collected rents in the building? A. At no time; the last month's rent I paid was to Mr. Schacht.

Q. When did you move to your bungalow? A. I believe it was around May 27th.

Q. How long were you there? A. I was there until Labor Day.

Q. Did you go back there after Labor Day? A. No.

Q. Did you spend any week ends there? A. No.

Q. Did you have that bungalow with anybody else? A. I had the bungalow for my wife.

Q. Any other persons in the bungalow? A. Only when they came down to visit us.

Q. Did you pay rent entirely for the bungalow? A. Yes, I paid the rent entirely.

Q. You spoke to Mrs. Schacht you said before? A. That is right.

Q. Did you tell her that you had a lease upon the premises that you were going to vacate? A. I told her that after I had made arrangements to move down to the shore.

Q. You told her you had a lease on the property that you were going to vacate? A. Positive.

Q. How many rooms did you have in the building? A. Three.

Q. What did they consist of? A. There was a living room, bedroom and kitchen.

Q. The furniture that you claim was in the building, was that ever taken by Mr. Broadman?

Mr. Brenner: I object to that if the Court please.

The Court: Did Mr. Broadman ever take your goods or take possession of them?

The Witness: I never knew of Mr. Broadman.

Q. Now, Mr. O'Brien, there is attached to the complaint a list of 44 items which you claim to be worth well over a thousand dollars? A. That is right.

Q. With reference to item one, one settee; when did you purchase that? A. All my furniture was purchased in Goodmans. I believe that the furniture was purchased in February. They had a February sale and it was to be held until May 30th. I was married on June 3rd. I am not positive, but I believe it was purchased in February.

Q. How much do you say you paid for the settee? A. I didn't buy a settee; I bought a living room set. I believe it ran around $369.

Q. That is one settee, one arm chair, one high back chair? A. That is right.

Q. You paid $369? A. Yes, sir.

Q. Now, we have in here, one smoking stand; how much did you pay for the one smoking stand? A. The one smoking stand was a present.

Q. Now, there is item No. 29; one carton; do you know what was in the carton? A. Dishes possibly.

Q. And then item No. 28, item No. 27; one carton? A. Possibly linens.

Q. You don't know what was in it? A. No, sir; not offhand.

Q. Then we have item No. 40; one wash wringer; do you know how much you paid for that? A. That was a present.

Q. Then we have one wash-board; was that a present too? A. No.

Q. You bought that? A. I bought that small stuff myself.

Q. Do you know how much you paid for one wash-board? A. I don't know.

Q. You have one ironing board; do you know how much you paid for the one ironing board? A. No, not offhand. I didn't include that amount in what I said, around $1,500. I didn't include this item.

Q. You said all the items on here were valued at $1,500? A. Or more. In fact, I will prove to you that it runs into $2,100.

Q. This wash-board, it has a great deal of value to it? A. I didn't make that statement.

Q. We have an item, one cabinet; what is the one cabinet? A. Radio cabinet; no, that is not a radio cabinet, it is a living room cabinet.

Q. How much did you pay for that? A. I didn't pay anything for it. I went with the fellow that bought it, and it cost $179.

Q. That was a present? A. Yes, from my employer.

Q. We have one white night table, one vanity, one chest of drawers; how much were they worth? A. That is a bedroom set; that comes under the heading of bedroom set, I believe. That runs between $450 and $500.

Q. That seems to have taken care of all the bedroom and living room furniture; we have in the kitchen, five kitchen chairs? A. That is right.

Q. How much did you pay for the kitchen set? A. My mother bought that.

Q. That was a present, too? A. Yes, sir.

Q. Have we itemized everything? A. No, you haven't itemized the radio.

Q. You said the cabinet was a radio? A. I did not.

Q. I understood you to say that? A. I said it was a living room cabinet; the radio was extra. Dishes go in the bottom and there is drawers in it. You can put a radio in it if you want to, though.

Q. Where, Mr. O'Brien, is the radio in the schedule? A. The radio isn't there. I took the radio down to the shore. You didn't include all; I think there is two or three rugs that you didn't list.

(Recess to 10 A. M., February 17, 1932.)

February 17th, 1932; 10 A. M.

GEORGE O'BRIEN, recalled:

Cross examination by Mr. Jobes (Continued).

Q. When did you move to Atlantic Highlands? A. I believe it was around May 27th.

Q. What kind of house did you have down there? A. Bungalow.

Q. How many rooms in the bungalow? A. Four rooms.

Q. The bungalow was furnished? A. Yes, sir.

Q. Where do you live now? A. 252 Ottawa Avenue, Hasbrouck Heights.

Q. How long have you lived there? A. About a year.

Q. Where did you live before that? A. Bergenline Avenue; I forget the number. I think it was 316 Bergenline Avenue, Union City.

Q. When did you vacate from that house? A. Vacated from that house, I think it was around September last.

Mrs. Helen O'Brien, sworn for plaintiff.

Direct examination by Mr. Brenner.

Q. Mrs. O'Brien, you are the wife of George O'Brien, who was just on the stand? A. Yes, sir.

Q. Did you live with your husband in this apartment belonging to Mr. Broadman? A. Yes, sir.

Q. From whom did you first rent that apartment? A. Mr. Leff.

Q. When you rented the apartment, whom did you go with? A. With my mother-in-law and my husband.

Q. Where did you see Mr. Leff the day you went there? A. We went to his house.

Q. And on that day, was there any arrangement made as to the length of time that you were to stay? A. Yes, sir.

Q. And what was the arrangement on that? A. A year.

Q. Was there any agreement at that time made concerning the rental? A. Yes, it was supposed to be $55 a month with the concession at the end of the year.

Q. Concession of what? A. $55, a month's rent.

Q. For which month? A. The last month of the year.

Q. And when was the year to start and when was it to end? A. June first until June first.

Q. June first, 1928? A. 1928.

Q. And ending when? A. June first.

Q. Of the following year? A. Yes, sir.

Q. When did you then move into the apartment? A. June first.

Q. 1928? A. Yes, sir.

Q. During that year, was there any change of landlord? A. Yes, sir.

Q. Who became your second landlord? A. Mr. Schacht.

Q. Was there any talk with Mr. Schacht concerning the arrangement that you had with Mr. Leff? A. I wasn't there at the time Mr. O'Brien was there.

Q. Was there any talk with Mr. Schacht later on, toward the end of the year? A. Yes, I was there; I think it was about the 11th month when Mr. Schacht was there.

Q. Did you have a talk with Mr. Schacht at that time? A. Well, I don't know; I was there when Mr. O'Brien did.

Q. What talk did Mr. O'Brien have? A. Well, about the concession.

Q. What was said? A. I can't answer; I am too nervous.

The Court: Do you wish to leave the stand?
The Witness: No.

Q. What did your husband say and what did he say? A. He told Mr. Schacht we were not sup-

posed to pay rent for that month, and Mr. Schacht said, well, his son really it was first that was there. He said that he didn't know anything about that and he would have to pay his rent or get out. So my husband said "We have no place to go now. That is no way to talk", so then he paid the rent.

Q. Did your husband at that time say anything about his getting out? A. He said we would get out as soon as we could, but we could not get out then at that time.

Q. Then you did pay the rent for that month for which you claimed the concession; is that right? A. Yes, sir.

Q. When did you start to move out? A. Around the 28th or 29th. I don't just remember what date it was.

Q. Of what month? A. May.

Q. When you were preparing to move out, did you see Mr. Broadman or anyone else? A. The day I was moving out, he came up.

Q. Who came up? A. Mr. Broadman.

Q. Did you have a conversation with him? A. I think it was Mr. Broadman.

Q. What was the talk that you had with Mr. Broadman? A. When he came in, I told him about the concession, and I said that I had all the right to move. He told me not to get excited. I said, "Well, it is the end of the lease and we have the right to move".

Q. What did he say to that? A. I don't remember just what he said, but he said it was all right.

Q. Did he say anything at that time about holding you for another month's rent? A. No.

Q. Did you move out then? A. Yes, sir.

Q. When was it you first learned that your furniture had been restrained? A. When my hus-

band came home from work one night and he showed me the letter.

Q. Did you buy this furniture with your husband at the Goodman Furniture House? A. Yes, sir.

Q. Do you recall what was paid for it? A. Not exactly.

Mr. Jobes: I object to this question on the same grounds advanced yesterday.

The Court: I suppose what she paid for that will be connected up and you can reserve your right.

Mr. Brenner: It will be connected up.

Q. Do you know approximately what was paid? A. Yes, sir.

Q. How much? A. In Goodman's about $900. Something like that, almost $1,000.

Q. Did you have other furniture besides that? A. Yes, sir.

Q. Where had you gotten that? A. Well, the kitchen set my mother-in-law gave me, and the icebox she bought for me, too.

Q. What else was there? A. There was lamps and rugs; a lot of different things.

Cross examination by Mr. Jobes.

Q. What conversation did you have with Mr. Broadman, Mrs. O'Brien? A. Well, when I was moving he came up.

Q. What date was this, May 27th? A. Well, I can't be sure; it was the day I moved.

Q. Go ahead? A. I don't remember everything he said, because I was rather nervous at the time.

Q. Speak a little louder? A. I don't know if he asked me anything. When he came in, I started

to talk to him. He said "Don't get excited". I said, "Have you come to stop me from moving. You can't do it because it is the end of the lease, and we have all the right to move" and I told him about the concession we have, you know, with Mr. Leff, that we didn't get that and it wasn't right.

Q. Was anybody with Mr. Broadman at the time? A. No, I don't believe there was.

Q. He was alone? A. I think so; I am not sure.

Q. This furniture, you put that in storage? A. Yes, sir.

Q. When did you put that in storage? A. The day we moved.

Q. You had all the negotiations with the Goodman Storage Warehouse? A. Yes, sir.

Q. You put your furniture in there? A. Yes, sir.

Q. Was there a bill of sale given for that furniture? A. I don't know; I didn't have anything to do with the storing of it. I was there when it went.

Q. They took it from you and you signed for it? A. Yes, sir.

ABE M. GOODMAN, sworn for plaintiffs.

Direct examination by Mr. Brenner.

Q. Mr. Goodman, what business are you engaged in? A. Furniture business and warehouse business.

Q. Where is your place of business? A. 830 Bergen Avenue, Jersey City.

Q. Are you familiar with the goods that were removed from the premises of Mr. O'Brien? A. Yes, sir.

Q. Were those goods stored in your warehouse? A. Yes, sir.

Q. Besides being engaged in the warehouse business, is your Company engaged in the selling of furniture? A. Yes, retail furniture business.

Q. Does that include rugs and things of that kind? A. Yes, sir.

Q. Your Company had sold some part of the goods that were afterwards stored in your warehouse? A. Yes, sir.

Q. Do you know when that sale was made? A. Why, I guess there is a slip for it. I don't remember the exact date. The slip will show.

Q. Is this it (handing witness)? A. It is.

Q. By looking at that, can you tell us what was sold to Mr. O'Brien? A. There was a three piece living room set at $367.

Mr. Jobes: I reserve my right to strike this witness's testimony out.

The Court: He has not ventured into values yet.

Mr. Brenner: I am going to qualify him as an expert.

Q. How long have you been engaged in the furniture business? A. Seven years.

Q. And during that time, have you bought and sold furniture? A. Yes, sir.

Q. Bought and sold rugs? A. Yes, sir.

Q. Bought and sold everything pertaining to furniture?

The Court: New and second hand?

The Witness: No, sir; only new.

Q. Besides selling new goods, have you ever acted as appraiser on used merchandise? A. Yes, sir.

Q. On how many occasions? A. Four or five different occasions.

Q. Are you familiar with the prices of new and used merchandise in the furniture line? A. Yes, sir.

Q. Now, this furniture was new at the time you sold it? A. Absolutely.

Q. And it was sold on what date? A. February 12th, 1928.

Q. You have already told us about the living room set? A. Living room set, three pieces.

Q. What was that sold for? A. $367.

Q. Was that the fair and reasonable and market value of the goods at that time? A. Yes, sir.

Q. Now, take the next item that you sold? A. Seven piece bedroom set.

Q. How much was that sold for? A. $427.

Q. Was that the fair and reasonable and market value at the time? A. Yes, sir.

Q. Next item? A. One eight by ten rug, $90.

Q. What have you to say as to that price as to being reasonable? A. It is the right price there; then there was a Beautyrest mattress, $39.50.

Q. Is that the regular market price? A. Yes, that particular item had a resale value of $39.50. Ace spring, $19.75, also resale price which could not be changed.

Q. That price is fixed by the Company? A. Yes, sir.

Q. And that was a reasonable price at that time? A. Yes; that was all the items purchased on that date.

Q. Were all of these items included in the inventory that was taken at the time the distraint was levied? A. That I am not sure of; I would have to go over that.

Q. Will you glance over it and see if they are? A. All of these items are included in this list.

Q. Was there any depreciation in the value of these goods between February 12th, 1928, and June, 1929? A. Well, I didn't see them when they were coming in. They looked in very good condition.

The Court: Well, answer the question; were they in about the same condition?

The Witness: Yes, probably a mark or a few scratches on them; outside of that, ordinary wear and tear.

The Court: How much were they worth in price; what was the difference?

The Witness: There is very little difference in the new price at that time. Furniture values had not changed very much.

The Court: I don't mean new prices. I mean difference between the new price and the value of the goods as you saw them when they were being brought in.

The Witness: That is hard to say, how much they would be worth. If you had a forced sale, had to get rid of them, you probably could not get much value. If somebody needed them and knew what they were.

The Court: The test is the market value?

The Witness: There would be very little depreciation at the time.

Q. About how much would there be? A. I would say probably ten or fifteen per cent.

Q. Besides these items, were there other items which you examined at the time they came to your storage warehouse? A. I noticed that there were some gifts, that we had not sold to Mr. O'Brien.

Q. Are you in a position to say what the value of the other goods which you had not sold were at the time? A. I believe I could give a fair account of them; I could not give the exact prices paid for them.

Q. I mean the approximate price? A. Yes, sir.

Q. What would you say was the value of the balance of the goods that were delivered to your storage? A. Well, there are some items here that I cannot give prices on; cartons, I don't know what they contained.

Q. The things you can give a price on? A. There is a cabinet, chair, lamps, oilcloth, icebox, five piece kitchen set, smoking stand. Say approximately $300. for these additional items.

Q. The notice that I just handed to you, that was served on your Company? A. Yes, sir.

Q. Did you notify Mr. O'Brien of the fact that the distress levy had been made? A. Yes, Mr. O'Brien was notified by registered mail of the fact.

Q. Did you hold the goods under that levy? A. Yes, sir.

Q. Mr. Nathan Goodman is your brother? A. That is right.

Q. He is ill at the present time? A. Yes, sir.

Q. And in bed? A. Yes, sir.

The Court: You recognized the letter?

The Witness: Yes, sir.

The Court: You obeyed it?

The Witness: Absolutely.

The Court: The distress warrant?

The Witness: Yes; the goods could not be removed.

The Court: For how long?

The Witness: Until it is released by the same authority that issues it.

Cross examination by Mr. Jobes.

Q. How much were your charges for the moving and storage of these goods? A. I would have to see the papers on that; I don't know the exact figure. They are all in my file there.

Mr. Brenner: I object to the question.

The Court: How is it material?

Mr. Jobes: Because the warehouse lien is prior to our lien. They are claiming an unreasonable distress.

The Court: Do you still insist upon the unreasonable restraint?

Mr. Brenner: Yes.

The Court: Then I will admit this.

The Witness: The cartage, moving to the warehouse was $15. When the goods were packed and ready to come in, to prevent marring, there was a charge of $8. There was labor in and out, a charge of $10, and the monthly storage rate of $10.

The Court: And they were there how many months?

The Witness: They came in May 29th, 1929, and went out on September 16th, 1930.

Q. How much, Mr. Goodman, did you charge Mr. O'Brien or Mrs. O'Brien when the goods were removed from the storage warehouse? A. The full amount? The full amount was $112.15.

The Court: You have got some items not in there yet; what are the remaining items; labor how much?

The Witness: Crate $15. Wrapping $8. Labor $10, then $10 a month. Then there is a 25¢ charge for sending out the registered letter, and carting out charge to the new address $20.

The Court: Well, what does the $10 a month amount to?

The Witness: There was four months.

The Court: That would be $40?

The Witness: Yes, sir.

The Court: That does not amount to $112.50.

The Witness: Moth prevention of the three piece set; that hasn't anything to do with storage; that was $18.90.

The Court: So that you take off $18.90?

The Witness: That had nothing to do with storage.

Q. Would you have let the goods go out without paying that? A. Absolutely not.

Q. Then it was a lien you obtained upon the goods, for $18? A. Yes, it was included in the entire bill. It had nothing to do with the storage. It was prevention of moth damage to the living room set.

Q. When these gods were put in your storage house, how long were they put there for? A. We have no set time. It is put in on a monthly basis.

Q. What is the minimum? A. We have storage from $2 a month, up; it all depends on the quantity.

Q. What was the minimum rate? A. Two months the minimum time.

Q. So when the goods were put in there on May 27th, they could not be removed without payment of your charges until July 27th; is that right? A. Yes, sir.

Redirect examination by Mr. Brenner.

Q. Were all your storage charges paid? A. Yes, they were paid at the time the goods were removed or before they were removed.

Q. And this moth prevention service is a protection service? A. Yes, sir.

Q. That was paid when the goods came into the place? A. There was a payment on July 25th of $50. Then the balance when it went out; it was paid in two payments.

Mr. Brenner: I take it there is no dispute that Mr. Chauncey was acting for Mr. Broadman?

Mr. Jobes: No.

Mr. Brenner: If that is the situation, I do not desire to prosecute as against him. I will withdraw my action as against Mr. Chauncey.

The Court: Have you any objection as to that?

Mr. Jobes: No.

The Court: There will be a non-suit, then, as to him.

Mr. Brenner: A voluntary non-suit as to him.

MORRIS BROADMAN, sworn for Plaintiffs.

Direct examination by Mr. Brenner.

Q. You are engaged in the real estate business?
A. Yes, sir.
Q. Do you own property at the present time?

Mr. Jobes: That is objected to; that is not the issue; not a question in this case.

Mr. Brenner: That is in connection with punitive damages.

Mr. Jobes: But he has not proved any damage as yet.

The Court: I suppose you rest, with the exception of proving the worth of the defendant.

(The Jury was excused.)

The Court: Is there any proof of loss during the restraint?

Mr. Brenner: There would be some damage because the testimony of Mr. O'Brien is to the effect that he came back on August 15th for the purpose of getting his goods, intending to take an apartment at that time; that the return of the goods was then denied to him. So that there would be actual damage because of the restraint, and the cost of storage from August 15th, when he attempted to get the goods, and the time when the goods were actually released.

Mr. Jobes: I move to strike out any testimony that was offered as to the value of the goods on the ground that it is not the proper measure of damages.

This suit is under Sections 1 and 2 of the Distress Act, where the damage clause states:

> "shall answer the damages to the party aggrieved".

Since it is not disputed there is no physical taking of these goods, the value of the goods is not an issue. There is no proof of damage, and if there was no damage, that is not a criterion upon which the damages should be adjudged.

The Court: Well, I think it might have some evidential force to show what the property was worth that was seized. There is a charge in the complaint that the seizure was unreasonable. Isn't that the effect of the second count? How can you determine whether it was reasonable or unreasonable unless you know the value of the goods.

Mr. Jobes: The whole gist of the case is whether there was a seizure of the goods; if there was no seizure, then there are no damages.

The Court: That is begging the question that you just propounded before, that is, that the Court should strike out the testimony concerning the value of the goods, and the Court is asking you, if it is not admissible on the aspect of showing damages, isn't it admissible for the purpose of showing the unreasonable extent of the distress, or the distraint.

Mr. Jobes: I think not, because there has been no distraint proved before the Court.

(Further argument.)

Mr. Jobes: I now move for a non-suit on the ground that the plaintiff has not proved a cause of action under his complaint.

The Court (After argument):

It seems to the Court that under the statute, there was a remedy given under different paragraphs: one, where the property was actually taken and impounded and sold; and, where the distress was unreasonable and excessive.

That is one at least; and then there are penalties imposed. For example, I believe in one section of the Act, it provides for double penalty.

The situation that is presented in this case does not come within the remedies provided in these sections.

If there is any remedy at all under the statute, to support the contention of the plaintiff, it must fall within Sections 1 and 2 of the Act.

The first section provides "that all distresses made or taken, or to be made or taken for any cause whatsoever, shall be reasonable and not too great. I am not reading the wording of the Act but generally stating it. You note there the words whether the distress is made or taken. I suppose the meaning of these two words can be used interchangeably.

Under the first section, it has been held in Newell v. Clark that "no precise act of form of words is essential to a distress, and a distress may be made without actual seizure".

So that you have established under that section such a thing as constructive seizure. I think that term is sometimes used.

In the instant case, you have constructive seizure at least, if not an actual one at least a constructive seizure.

Now, what remedy has the plaintiff under Section 2, if he has any, for the constructive seizure.

Section 2 provides "that no person shall take any distress wrongfully, or cause any distress to be driven or conveyed out of the county where it shall be taken". There does not need to be any special application of the word "person". That is both conclusive and inclusive. No person means just that: no person, and no person means any person. It does not mean a person in Middlesex County, or Hudson, or Cape May County. It means every man, woman or child, corporation or any other entity in the State of New Jersey, within its confines, and he may be a hodcarrier or he may be a landlord, he may be a banker or he may be a ditch digger. It means every person that shall take any distress wrongfully, although the Act says "no person". "No person shall take any distress wrongfully, or cause any distress to be driven or conveyed out of the county where it shall be taken"; "and every person who shall do so of his or her own authority, and without judgment, shall answer the damages to the party aggrieved".

The Court is holding in this case that the testimony in the case is sufficient to hold the case thus far for the Jury, at least to put the defendant upon his defense, and that under the pleadings in the case, that a cause of action is pleaded under the second section of the Act.

Now, we are confronted with another situation before the Jury returned, and that if the question of permitting the defendant to disclose the worth of his property. Ordinarily, in common law actions, where punitive damages are sought and where they lie, that is to say, where there has been gross injury done another, wanton injury, wilful injury, a fraud has been perpetrated and the rule of punitive damages applied, it has been the common practice to interrogate or inquire into the worth of the defendant, so that the Jury may assess damages that are commensurate with the wrong that is done, and to make a commensurate sum, the worth of the defendant should be shown to the Jury.

For example, this punitive money or exemplary damages, what would be punitive damages against one man would not act as smart or punishment money against another at all.

For example, if the Jury returned a verdict against John D. Rockefeller for $500 that would not smart him as much, possibly, as it would some day laborer against whom a judgment for $500 in the way of punitive damages were found.

So that the Court and the members of the Jury have been permitted to investigate and inquire into the worth of a subject that is to be assailed, you might say, in punitive damages.

The question is whether or not in this case testimony of that character should not be allowed. I have not heard counsel on that and I think we had better dispose of it before the Jury returns.

(After argument.)

The Court: I will deny your motion, and you may have an exception.

I will permit the testimony as to the worth of the defendant to be introduced, and you may have your exception on that, too.

Mr. Jobes: I ask exceptions in each respect.

The Court: You should have the Upper Court pass upon these matters. They are very interesting and I don't know of any precedent being established, except by analogy, you might say.

If that is the only objection you are addressing to the admission of this testimony, you may proceed.

(The jury returned.)

MORRIS BROADMAN recalled:

Direct examination by Mr. Brenner.

Q. Mr. Broadman, you are the owner of a number of parcels of property? A. I don't know if I am the owner or not; there is mortgages; I don't know whether I am the owner or not.

Q. Do you own any property in Jersey City in your name? A. Yes, sir.

Q. How many parcels of property do you own? A. I don't know.

Q. Do you mean by that there are so many that you don't know? A. I don't know how many I got.

Q. Are there a number of them? A. Yes, there is a number of them, yes, sir.

Q. What kind of properties are they? A. A few apartments and some shacks, some lots.

Q. Some apartment houses? A. Yes, sir.

Q. How many apartment houses are there? A. Two.

Q. What is the first apartment house that you own? A. Twenty family house on Union Street.

Q. The second one that you own? A. On Zabriskie.

Q. What type of property is that? A. Twenty-four families.

Q. Now, besides the two apartment houses, what other property do you own in Jersey City? A. One family house, two family house.

Q. Where is that? A. Got a one family house on Harrison.

Q. The two family house? A. Where I live myself, my home.

Q. Any other piece of property? A. Got a couple of pieces of land.

Q. Where is the land? A. One on St. Paul's Avenue, that I don't know whether I own or not. There is one mortgage more than the property is worth. They are holding me on the bond.

Q. What does that consist of? A. Vacant property.

Q. How many lots? A. 42 feet.

Q. It takes a little less than two lots? A. A little bit less; there is a $6,000 mortgage.

Q. In other words, a lot and part of a lot? A. Yes, sir.

Q. Any other undeveloped property? A. I got a piece of property on Cottage Street, 35 feet, mortgage $9,000, vacant property.

Q. What else? A. I got a one family house on Cottage Street, an old shack on 25 feet.

Q. What else? A. $5,000 mortgage; I think that is all.

Q. Do you hold any mortgages on property at the present time? A. Practically all wiped out.

Q. Do you hold any at the present time? A. One.

Q. How much? A. $3500.

Q. Is that a first mortgage or second mortgage? A. Second.

Q. Do you own any stocks or bonds? A. No.

Q. Building and loan shares? A. No.

Cross examination by Mr. Jobes.

Q. This apartment house on Union Street, what is the amount of mortgages on that property? A. There was a building and loan of $60,000 and $5500.

Q. $60,000? A. First mortgage and $5500 second mortgage.

Q. Any other mortgages? A. Yes, sir.

Q. What is the value of that property? A. At the most $65,000.

Q. So that there is no equity in the property? A. I paid a couple of thousand dollars on the Building & Loan.

Q. What is the value of the Zabriski Street property? A. No value at all.

Q. How many mortgages have you on it? A. There is 46 first and $26,000 second.

Q. $70,000. Any others? A. That I just gave you.

Q. Any other mortgages on the property? A. No.

Q. Do you owe any taxes on the property? A. Yes, sir.

Q. How much taxes on the property? A. For half a year.

Q. How much is that? A. $1500.

Q. That is $71,500 on the property; what is the value? A. I offered it to the mortgagee, and

he would not take it. He is holding me on my bond.

Q. You have some vacant lots; where are the vacant lots? A. One on St. Paul's Avenue.

Q. Was that the 42 foot lot; how much mortgage on the property? A. $6,000.

Q. Is that all? A. Yes, sir.

Q. Do you owe any taxes on the property? A. Yes, it is not worth; I didn't pay for last year.

Q. How much is that? A. I don't know how much; a couple of hundred dollars.

Q. In your opinion, what is the value of these lots? A. $5,000.

Q. Have you tried to sell these lots? A. Tried, sure.

Q. What is the highest offer you got for them? A. No offer at all.

Q. What other property? A. Cottage Street.

Q. Is that vacant lots? A. Yes, sir.

Q. How much frontage have you there? A. 35 feet.

Q. Mortgage on the property? A. $9,000.

Q. Any others? A. No.

Q. What taxes? A. Taxes I owe for three years.

Q. What is the value of that property? A. About $7,000.

Q. Have you tried to sell the property? A. Yes, sir.

Q. Have you succeeded? A. No.

Q. What is the highest offer? A. No offer at all.

Q. What other property? A. Harrison Avenue.

Q. What is that? A. One family house, idle.

Q. No tenant at all? A. No.

Q. How long has the tenant been out? A. Since July.

Q. How many mortgages on it? A. Two.

Q. What is the amount of these mortgages? A. First mortgage of $11,250, second, $2900.

Q. What are your taxes? A. Taxes over $500.

Q. Due and unpaid? A. Yes, sir.

Q. What in your opinion is the value of the property? A. Most is about 13 or $14,000.

Q. Have you tried to sell the property? A. Yes, sir.

Q. Have you succeeded? A. No.

Q. What is the highest offer you have had? A. I can't get any offer at all.

Q. Any other? A. That property I sold one time and they dropped out on me, and I was on the bond and I was compelled to take the property back. The same the lots, the same Zabriskie; I was compelled to take the property back.

Q. Is that all the property you owned? A. Besides Union Street.

Q. All the property that you have testified to now, you attempted to sell, but you were compelled to take it back because you were on the bond; is that right? A. Yes, sir.

Q. You testified you had a second mortgage on some property? A. I have got it on West Side Avenue.

Q. What is the amount of the second mortgage? A. $3200.

Q. What is the amount of prior liens on the property? A. I am foreclosing it now.

Q. What is the amount of the first mortgage? A. $7500.

Q. What are the taxes? A. I owe for a couple of years taxes, and the mortgage was due a long time ago, but he didn't pay anything.

Redirect examination by Mr. Brenner.

Q. It is not easy to make sales in Jersey City, regardless of what the values of property are? A. Against this property, the mortgages, you can't sell, because it is not worth it.

Q. That Union Street property, what is the monthly rental of that? A. It brings a year about $12,000, or maybe less.

Q. And the other apartment house brings in how much? A. Zabriskie Street, around $13,000 when it is rented, but it has several floors idle.

Recross examination by Mr. Jobes.

Q. Do the mortgages on this particular property call for amortization? A. First mortgage, second mortgage; I can't pay the instalments, and it stays the way it is.

Q. Is the income upon this property sufficient to carry the property? A. No, sir.

Redirect examination by Mr. Brenner.

Q. You are not doing any work outside of collecting rent? A. I do a little repair, my own repair.

Q. Outside of that, you are not working? A. I can't build; I am a builder by trade.

Q. You have been living on the rents you have been getting from these various properties? A. No, sir.

Q. You have not? A. Can't, the way you think.

(Plaintiff rests.)

Mrs. KATHERINE SCHACK, sworn for defendant:

Direct examination by Mr. Jobes.

Q. Where do you live? A. 13 Van Nostrand Avenue.

Q. Are you the widow of Gustav Schack, about whom the plaintiff's witnesses have testified? A. Yes, I am.

Q. Are you one of the former owners of the premises at 69 Claremont Avenue, Jersey City? A. Yes, sir.

Q. Did you have any conversation with Mr. O'Brien and Mrs. O'Brien, or with Mr. O'Brien's mother with reference to the tenancy of Mr. O'Brien in the house? A. Only one with Mr. O'Brien.

Q. Where was that? A. At my home.

Q. When? A. On the 27th of May, 1929. Mr. O'Brien had called at my apartment about a quarter past eight in the morning and he said "Mrs. Schack, I am going to move" and I said to him "Well, Mr. O'Brien, this house has been recently sold and as we have furthermore nothing to do with it, you will have to give notice to the new owner." And so I said "Why are you leaving, Mr. O'Brien?" He said "I have been down to the shore with a friend of ours on Sunday and we seen a place down there which we liked very much. My friend has taken it and I am going in fifty-fifty with him. I am going to put my furniture in storage and I am going to stay until Labor Day; then I will come back in the fall and I will take an apartment and get a few weeks' concession and I will be that much in." That was our conversation between Mr. O'Brien and me.

Q. Did you object to his moving? A. Well, I had what—

Mr. Brenner: I object to that. This witness had no ownership in the property to make objection or lack of objection on her part material.

The Witness: We were joint, Mr. Schack and I.

The Court: Your client was dealing with this owner all the time; why shouldn't any conversation between them be evidential, then.

Mr. Brenner: I have no objection to her stating what the conversation was.

The Court: She can answer yes or no.

Mr. Brenner: I don't object to that.

The Court: What did you say to him?

The Witness: I said to him "See the new owner" as we had nothing now to do with it.

The Court: That is all you said?

The Witness: Yes; he wanted to know where he could get in touch with the new owner. So I gave him Mr. Broadman's house, or he could see E. O. Smith's office on Jackson Avenue. He then, it seemed to me he was going to go down. I said to him he had best probably he did go down to see him. Mr. O'Brien had passed some remark, something that "Well, if I can get away with it, I will be that much in," something to that effect. I could not say exactly, but it was something to that effect.

Q. Will you repeat that, please? A. Mr. O'Brien had said, when I told him he should go

down and see the new owner, he said something that he was not going to see, didn't care to, or something like that. I said "Well, you had better, and see what the new owner could do for him", because he told me he was going to go on the first of June and as he had not given me any notice that I know that he didn't give me a check in.

Mr. Brenner: I object and ask that it be stricken out.

Mr. Jobes: Yes.

Q. Just what he said? A. So, he said, "Well, all right. I will go see him. If I can get away with it, I will be that much in," or some words to that effect. I don't remember exactly the words; it was something to that effect, what he had said.

Q. Did Mr. O'Brien have any other conversation with you? A. No, sir.

Q. Did Mr. O'Brien reveal any of his plans? A. Only that he was going down to the shore for the summer.

Q. Did Mr. O'Brien say what he was going to do the following summer? A. I can't recall.

Q. Did Mr. O'Brien ever tell you that he had a lease upon the premises? A. Not me, no, sir.

Q. Did he, on May 27th, 1929, inform you he had a lease on the premises? A. Not to me.

Q. Did Mr. O'Brien when he vacated deliver any keys of the premises to you? A. No, sir; he didn't.

Q. Do you know what Mr. O'Brien did with the keys? A. No, sir, I do not.

Mrs. Katherine Schack—Cross

Q. Did you gain access to his apartment after he vacated? A. Not from what I understand.

Q. Did you do it? A. No, sir; I didn't.

Cross examination by Mr. Brenner.

Q. Your husband was living at the time, wasn't he? A. Yes, sir.

Q. And he had actual charge of the property during the time that he owned it? A. Yes, it was about a year.

Q. Before May 27th, when you spoke to Mr. O'Brien or when he spoke to you, you and your husband had conveyed the property to Mr. Broadman? A. Yes, sir.

Q. So that when Mr. O'Brien told you, or came down to tell you that he was going out, you then told him that you had nothing further to do with the property? A. Yes, I did.

Q. You directed him as to who the new owner was? A. Yes, I did.

Q. Did you inform Mr. Broadman that Mr. O'Brien was moving? A. I think I spoke to the superintendent.

Q. There was a superintendent in the building? A. Yes, sir.

Q. You told the superintendent that Mr. O'Brien was moving out on the first? A. Yes, sir; I did.

Q. Do you know that the superintendent then got in touch with Mr. Broadman? A. I can't say.

Q. Do you know whether Mr. Broadman was at the house seeing Mr. O'Brien before Mr. O'Brien went out? A. I didn't see him; I can't say.

DAVID RATNER, sworn for defendant:

Direct examination by Mr. Jobes.

Q. What business are you in? A. I was working for E. O. Smith at the time.

Q. What business? A. Real estate.

Q. What business were you in on May 27th, 1929? A. The same business.

Q. For whom? A. E. O. Smith.

Q. In what capacity? A. As agent to collect rent for the houses.

Q. Did you have in charge the collection of rent for 84 Claremont Avenue? A. Yes, sir.

Q. Did you have a conversation with the tenant in the building, Mr. O'Brien on or about that date? A. I had a conversation with Mrs. O'Brien.

Q. Will you relate that conversation, please?

Mr. Brenner: When?

Mr. Jobes: May 27th.

The Witness: A call came to the office of E. O. Smith saying that the tenant of the name of Mr. O'Brien was moving. So Mr. Smith sent me up to the house to see why he is moving, as we have received no notice of any moving in or out, so he sent me up to see what it is all about. So, I said to Mrs. O'Brien "Are you moving; why are you moving, aren't you satisfied." She said "No, my husband was transferred; he

was retransferred some place; I can't live here." So right away I got in touch with Mr. Broadman and I brought him up to the house. I telephoned to him and he came right up and he also said to her why is she moving. She didn't say anything. That is all I know.

Q. Did Mrs. O'Brien tell you that she had a lease upon the premises? A. No.

Q. Did Mrs. O'Brien say she was vacating because her lease had expired? A. No, she didn't say that; she said her husband was transferred.

Q. Did you know that Mrs. O'Brien had claimed a lease upon the premises? A. No, I did not.

Cross examination by Mr. Brenner.

Q. Did she say where he was transferred to? A. No.

Q. Did she say that they had paid $55 for the month of May they were not supposed to have paid? A. She didn't say anything about paying.

Q. Not a word about concession? A. No.

Q. Not a word about their time being up on June first? A. No.

Q. Not a word about having notified Mr. Schack that they were moving out on June first? A. No.

Q. Nothing like that at all? A. No.

Q. Her only excuse was that her husband was being transferred? A. That is right.

MORRIS BROADMAN, recalled for defendant:

Direct examination by Mr. Jobes.

Q. Did you have any information at all, no matter where it came from that the plaintiff, George O'Brien, claimed a lease upon premises 69 Claremont Avenue, Jersey City? A. No.

Q. When was the first time that you learned that he claimed a lease upon these premises? A. I bought the property from Mr. Schack.

Q. When was it you learned about the lease? A. When they told me when the Goodman wagon is at the door.

Q. When was the first time that you learned that the plaintiff claimed a lease upon the premises? A. About a lease? I never heard about that before they told me they were moving out.

Q. When was the first time that you learned that he claimed a lease? A. Through you.

Q. What was that? A. Just when the case that they started against me.

Q. When the plaintiff vacated the premises did he deliver the keys to you? A. No, sir.

Q. Where did you get the keys? A. I didn't get the keys.

Q. When did you gain access to the premises? A. We climbed through the window.

Q. When? A. After the first of June.

Q. How did you gain access to the apartment?

Mr. Brenner: I object to that as immaterial.

A. Through the window; we climbed in the window.

Mr. Brenner: I object; we are not trying a surrender of these premises.

Mr. Jobes: They are trying to hold the defendant for punitive damages; we claim that the plaintiff never surrendered the apartment to us.

Q. How did you gain access to that apartment? A. Through the window. Mr. Smith called me up, I think it was the 28th of May, and told me that the people are moving out without any notice, and then I came over with Mr. Ratner together. I never saw Mr. O'Brien at all, but I saw Mrs. O'Brien in the room. She said her husband is transferred to some other job somewhere else and she moved to the shore. Then I didn't feel like start to argue with a woman and I left. After I came around to go in the house. She took the letter box keys and the keys of the door; it was a Yale lock. She left all the windows open, only the window over the fire escape she left like spite, where I could not be able to get in. To tell you the truth I didn't feel like start the suit for $55 because if I collect it would cost the lawyer to start suit. She went and stuck some stick in between the window, and the windows open in the other places and the rain gets in and damages the second floor. Mr. Schack goes in the fire escape and through that window. They have what they call weather strip and they have nailed it up. Mr. Schack tried to climb over the window, which he did success and walked right in; he opened the door, and I have to take the lock and make other keys.

Cross examination by Mr. Brenner.

Q. You said the first time that you heard about any lease was the time that you were served with the summons in this proceeding? A. Yes, sir.

Q. You were served with the summons when?

Mr. Jobes: He didn't say that.

Mr. Brenner: I thought that is what he said

(Testimony read as follows:)

"Q. When was the first time that you learned that the plaintiff claimed a lease upon the premises? A. About a lease? I never heard about that before they told me they were moving out.

"Q. When was the first time that you learned that he claimed a lease? A. Through you.

"Q. When was that? A. Just when the case that they started against me."

Q. And the case was not started against you until after November 5th, 1929? A. Yes, sir.

Q. Did Mr. Jobes read to you, or did you read a letter that was sent to you under date of June 28th, 1929? A. I don't remember.

Q. Is that the letter you received? A. I don't remember this letter, but I know one thing—

Q. Is this the letter that Mr. Jobes handed to me? A. I brought him the letter; I turned over to Mr. Darling.

Q. Is that a letter you received? A. Maybe that letter; I says it may be the letter.

Q. Did you read this part of the letter?

(Reading) "Mr. O'Brien personally informed you and I personally informed Mr.

Jobes at Mr. Darling's office that O'Brien had rented these premises from Mr. Leff under an oral lease for one year and O'Brien therefore had a legal right to move before the first day of June, 1929, without giving notice, and the distress placed by you is unwarranted and illegal".

Did you read that part of the letter? A. Yes, sir. I didn't take it serious because Mr. Leff owned the property for a year, and he made me an affidavit that there is no concessions in the house.

Q. This letter was from Mr. Goodman, the lawyer, wasn't it? A. Yes, sir.

Q. In this letter, he called your attention to the fact that Mr. O'Brien said that he had a lease, didn't he? A. That is what the letter says, yes, sir.

Q. So that before the suit was started you did know that there was a claim by Mr. O'Brien that he had a lease, didn't you? A. I didn't know it.

Q. Didn't you know it by this letter? A. That didn't make anything, what he said. I had other proof.

Q. Didn't you know by this letter from the lawyer, that Mr. O'Brien was claiming a lease? A. Yes, sir.

Q. He says so? A. Yes, says in that letter.

Q. So that you did know? A. When was that sent to me?

Q. June 28th, wasn't it? A. June 28th, yes, sir.

Q. So that you did know at least five months before suit was started that there was a lease claimed? A. I don't remember that about the letter because I turned the letter right over to Mr. Darling. I didn't give it attention.

Q. You say you didn't take this letter seriously? A. No, sir; I will tell you the reason why.

Q. Don't tell me anything just now; just answer my questions. You didn't take seriously this part of the letter, did you?

> (Reading) "I am taking particular pains to inform you in this manner, after having previously informed you and Mr. Jobes in person, as we do not desire litigation or further expense, but should you proceed in your action, we warn you that you will proceed at your peril".

You didn't take that seriously, did you; is that right? A. No, I didn't take that serious, no.

Q. You didn't take seriously that part of the letter that demanded that the goods be released within twenty-four hours? A. No.

Q. As a matter of fact, you didn't release the goods within twenty-four hours, did you? A. I left everything to Mr. Darling; he called him up on the telephone, Mr. Goodman.

Q. I am not concerned with what you did in Mr. Darling's office, or what he did. You refused to obey the terms of this letter by releasing these goods in twenty-four hours after their release was demanded? A. Yes, I released.

Q. As a matter of fact, you held on to these goods, and they were not released until this release that is marked P-3? A. I released when Mr. O'Brien came to me personally and he apologized to me for taking away the goods. That is when I released, not before. Mr. O'Brien came to my house and apologized for taking away the goods, and he said he didn't have any job. Then I said "Mr. O'Brien, I will go to Mr. Dar-

ling and have Mr. Darling to charge you nothing", I would release him. I went to Darling and I said "If you release me, I will release him". He said "All right, Broadman. I don't want to be bothered with it".

Q. When did you release these goods to Mr. O'Brien? A. I don't remember the dates.

Q. How long will you say before this release was given? A. I left it to Darling, because I considered the whole thing was a joke, because he didn't have a lease and he claimed a lease.

Q. You still consider it a joke? A. Yes, sir.

Q. You don't think there is anything serious? A. No, because he came and apologized to me and then I said "I'll release you".

Q. When? A. He came to my house.

Q. When? A. When he released him.

Q. Repeat what he said? A. He said he is got out of a job, and to apologize for taking away the goods. He said he didn't know anything about it, but he had no job. I said "I will go to Darling; if Darling don't charge me anything, I will release you". He said "All right"; then I went to Darling and he said all right and that is why I released him, that everything would be off.

Q. Were you mad before? A. What would be mad?

Q. Before you released the goods, were you mad? A. I don't know; I don't remember; it is three years ago.

Q. Did you get angry because the windows were locked and the key wasn't given to you; answer my question? A. Because he didn't give me any notice, took away the keys and left the doors and windows open and moved out.

Q. I am asking whether you were angry? A. I don't remember how I felt. Maybe I felt in good humor; I don't know.

Q. When they called your attention to the fact that there was a lease and that they had a concession which had not been lived up to? A. Who?

Q. The lawyer for O'Brien? A. The lawyer for O'Brien?

Q. Why didn't you release him at that time? A. I didn't want to release him.

Q. Why? A. Because he owed me rent.

Q. Even though he had a lease, you thought he owed you rent? A. He didn't have a lease.

Q. How do you know? A. Because Mr. Schack I said to him, "Mr. Schack, have you a written lease" and Mr. Schack give a sworn affidavit that nobody had a lease on monthly, and I took Mr. Schack's word.

Q. Did you go to Mr. Leff? A. Why should I go to Mr. Leff? Mr. Leff told me—Mr. O'Brien never got no lease.

Q. Did you go to Leff when you were told that there was a lease with Leff? A. No, sir; because they didn't claim a lease. Why should I go?

Q. This letter claims? A. That didn't make, that a lawyer starts to fix you up something, I don't know.

Q. You think if a lawyer writes you a letter you should pay no attention to it? A. No.

Q. You didn't do anything to find out whether there was a lease with Mr. Leff, did you? A. No.

Q. So that you don't know whether the contents of this letter were true or not, do you? A. No.

Q. You didn't make any effort to find out, did you? A. Yes, I tried to find out.

Q. From whom? A. Mr. Schack.

Q. But this letter does not say anything concerning Mr. Schack? A. Mr. Schack told me he got the house for a year—

Q. This letter does not say anything concerning Mr. Schack, does it? A. No, this letter; I don't remember the letter either.

Q. The letter does say something concerning Mr. Leff, whom you never saw or talked to about it? A. Yes, sir.

Mr. Jobes: I offer in evidence letter from Nathan L. Goodman, dated July 9th, 1929.

(Accepted and marked as Exhibit D-1 of this date.)

Mr. Jobes: I offer in evidence letter of August 7th from Mr. Darling to Mr. Goodman.

(Accepted and marked as Exhibit D-2 of this date.)

Mr. Jobes: I offer in evidence letter of August 8th, from Mr. Goodman to Mr. Darling.

(Accepted and marked as Exhibit D-3 of this date.)

Mr. Jobes: I offer in evidence letter of September 9th from Mr. Darling to Mr. Goodman.

(Accepted and marked as Exhibit D-4 of this date.)

(The Exhibits D-1, 2, 3, and 4 read by Mr. Jobes to the jury.)

(Defendant rests.)

Mr. Brenner: I desire to offer in evidence letter of September 4th.

(Accepted and marked as P-4 of this date.)

(Exhibit P-4 read to the jury by Mr. Brenner.)

Mrs. Helen O'Brien recalled in rebuttal.

Direct examination by Mr. Brenner.

Q. On May 27th, did you have any conversation whatever with Mrs. Schack? A. Mrs. Schack, no.

Q. Did you ever tell her that you were going to try to get away with something? A. I didn't even see her.

Q. Did you ever talk to Mrs. Schack about this matter or any other matter at any time? A. No.

Q. Did you at the time of leaving, lock the windows and do these various things that Mr. Broadman testified to? A. I might have opened a window when I left, but I certainly didn't lock any windows on the fire escape.

Q. Did you lock any windows so that he could not get in? A. Not that I know of.

Q. Have you any recollection of what you did with the keys at the time? A. No, I didn't give them to anybody; I forgot to.

Q. Did you leave the place open when you left? A. I believe I left the door unlocked. I don't even remember if I closed it. That was because he had just been there, and I thought he could come back to the apartment.

Cross examination by Mr. Jobes.

Q. You don't know whether you left the door locked or not? A. I don't believe I did. I certainly didn't do it in spite.

Q. Do you know anything about where the keys went? A. No.

Q. You don't; you know you didn't turn the keys over? A. I was in such a hurry, that I forgot everything.

Q. You don't know what you did with the keys? A. No.

Redirect examination by Mr. Brenner.

Q. Did you have a talk with Mr. Ratner in which you said to him that your husband had been transferred? A. No, I certainly didn't say that. I would not make such a foolish excuse anyhow.

Q. Had he been transferred? A. No.

GEORGE O'BRIEN recalled.

Direct examination by Mr. Brenner.

Q. At the time that you went down to the shore, had you been transferred in your position? A. No, sir.

Q. Where did you work? A. De Gorgio Fruit Corporation; I worked until pretty nearly six months later. I think March or April I left there.

Q. Of the following year? A. That is right.

Q. Did you have a talk with Mrs. Schack in which you told her that you were going to try to get away with the rent, or words to that effect? A. I believe I spoke to Mrs. Schack, but it was

not on the day that she stated, the 27th. I think it was at least a week before that.

Q. When you spoke to her, did you say anything about trying to get away with the rent? A. No, I told her, just as her husband had told me, that if I wanted to leave there, I had to pay the rent in each month and I told him I had a lease and he told me I had to pay or get out. Then I told him I could not get out then, but I would get out the following month, end of the following month. I told her that and her son was there at the time in another room and knew all about it.

Q. Did you, shortly before this furniture was released by Mr. Broadman, go to him and apologize for any action upon your part? A. No.

Q. Did you go to see him at the time? A. No.

Q. When was the last time—

The Court: Why didn't you tell him if he was the owner when he came there that you were moving out your furniture?

The Witness: I can't answer that, because I wasn't there at the time. I was at work.

The Court: You had nothing to do with that?

The Witness: No, sir; I was at work.

Q. Did you bring any keys to Mr. Broadman at any time? A. No, sir.

Q. Did you at any time apologize to him for anything that he claimed that you did? A. The only thing I asked him for to let me have my furniture.

Q. And when was that? A. Well, I got the letter that they would sell my furniture; I believe it was around June 22nd and I immediately went to

Mr. Goodman, and he drove me up to where this Broadman lived, and I waited there until 5:30, I believe it was. Mr. Goodman could not wait, and at the time it was raining—

Q. When was that, the date? A. It was in June. It was right after I received the letter that my stuff would be sold if I didn't pay the month's rent.

Q. That was the time you asked him to release your furniture? A. That is the only time I have seen him until today.

Q. Was there anything said by you by way of apology? A. No, he told me I had to see his lawyer.

Q. In response to that, did you see his lawyer? A. I went back and told Mr. Goodman.

Q. And Mr. Goodman saw Mr. Jobes? A. That is right.

Cross examination by Mr. Jobes.

Q. You spoke of having received a notice that they were going to sell your goods; from whom did you receive that? A. I received a letter from the Goodman Furniture Co.

Q. You never received a letter from Broadman to that effect, did you? A. You asked me that yesterday.

Q. I am asking you again today? A. No, I didn't.

Q. Did Mr. Broadman's lawyer ever send you a letter to that effect? A. No, I only got that letter; a letter sent that was from Broadman or his lawyer, I don't know.

(Both sides rest.)

Motion for Direction of Verdict

Mr. Jobes: I now make a motion for a direction of verdict upon the same grounds that I made the motion for a non-suit.

The Court: I deny your motion.

Mr. Jobes: I ask an exception.

I now move for a direction of verdict.

On the first ground that the plaintiff has not proved the first count of the complaint, that is, an unlawful distress.

Plaintiff testified that he had an oral lease upon the property. An oral lease is good as against all those who have knowledge of it, but as against a person who has no knowledge of the lease, the bona fide purchaser of premises, it is invalid.

The Court: I think that is a question for the jury and I deny your motion.

Mr. Jobes: Exception.

Mr. Brenner: I would like to make a motion for a direction of verdict in favor of the plaintiff, and submit that there only remains to be submitted to the jury the question of the damages.

The Court: I will deny your motion and let the whole thing go to the jury.

Mr. Brenner: Exception.

Mr. Jobes: I move for a direction of verdict, upon the ground that there have been no damages proven.

On the further ground that the letter of Mr. Goodman of July 9th limited the damages, and that even under that, that no damages have been sustained or proven.

The Court: I will let the jury determine that.

Mr. Jobes: I ask an exception.

(Counsel summed up to the jury.)

Charge.

The Court then charged the Jury as follows:

Gentlemen of the Jury:

This is a case brought by George O'Brien against the defendants Morris Broadman and James J. Chauncey. Chauncey you will remember is the man whose name has been mentioned as being the officer who represented Broadman in the execution of this alleged distress warrant. Suit has been discontinued voluntarily as against Chauncey, so that you are dealing with the case of O'Brien against Broadman.

The pleadings in the case charge on behalf of the plaintiff, that the plaintiff O'Brien had a lease, a parole lease on premises known as 69 Claremont Avenue, Jersey City, for a period of one year, beginning the first day of June, 1928. That the owner at the time the lease was made was one Leff. O'Brien claims that the agreement entered into between him and Leff was that the lease was to be for the period of one year at a rental of $55 a month, and that there was what is termed as a concession, or allowance made of the last month's rent. O'Brien says that prior to the expiration of the lease that Broadman purchased the property. O'Brien claims that he paid rent each and every month as agreed to and including the month of May, 1929, although he claims that the rent was not due for the month because of the concession that was granted or because of the eviction that was threatened and consented to by O'Brien.

O'Brien charges further that he moved from the premises on the 29th day of May, prior to the expiration of the term of the alleged lease, and

that he stored his goods or placed them in the Goodman Warehouse in this city.

He charges that on or about the 20th day of June, 1929, the defendant Broadman empowered and authorized the defendant Chauncey to restrain the goods and chattels and that in pursuance of that authorization, on the 21st day of June, 1929, Chauncey did serve a distress warrant upon the goods and chattels at the warehouse and that he took the distress pretending and claiming that there was due and in arrears the sum of $55 rent for the month of June, 1929.

He claims that the rent was not due, as heretofore stated. He claims, by reason of the premises, that he was deprived of the use and benefit of the goods and that the defendant refused to release the goods and chattels from the distress that was placed thereon; that he refused to proceed with the removal and sale of the goods under the law; that the defendant thereby caused the plaintiff great expense in maintaining his family and himself unless said goods and chattels were released and delivered.

That is the first count.

The second count is much the same about the tenancy, as alleged in the first count by O'Brien, and it has this difference, that the distress was what is termed unreasonable and an excessive distress, that a small portion of the goods were sufficient to have been distrained and not the amount that was distrained and that because of this unreasonable distraint, the plaintiff was deprived of the use and benefit and advantage of said goods and chattels for a long time and was obliged to expend a sum of money to obtain the release thereof.

Charge

The defendant answers that charge and says that on May 29th, 1929, and prior thereto, the plaintiff was a monthly tenant and the defendant was in possession of an apartment house known as 69 Claremont Avenue, Jersey City. You see, there is an issue raised as to whether the tenancy is by the year or by the month. The defendant further sets up that on June first, 1929, the plaintiff became indebted to the defendant for the rent of premises for the month of June; that on or about the 20th day of June, the defendant claims, or Broadman claims, that in accordance with the statute that he caused the goods and chattels to be distrained for the amount of rent that he claimed to be due for the month of June; he claims that levy was made with the consent of the plaintiff and that the defendant released the goods so distrained from the lien of the distraint, and they claim that the distraint was reasonable, that the distraint was maintained with the consent of the plaintiff, and that the distrained goods were released from the distraint.

Those are the issues joined, Gentlemen; as the Court reads the charges of this plaintiff, he is seeking to recover moneys for the deprivation of his goods for a period of time. The Court cannot state exactly what the testimony proves in that regard as to the period of time that he has been so deprived of the use of the goods, and the testimony in the case, particularly the factual disputes, is for you to determine. You are here for that purpose.

There is a charge made on one side that the plaintiff seeks to recover for the deprivation of the use of his goods—that is what the Court

thinks it amounts to—and on the other side, there are defenses set up that the plaintiff consented to have the goods kept under the restraint, and demand was made for them and they were released, as you have heard the charge read in the answer, that there was a month's rent due and owing and that is the reason the distraint was levied.

The plaintiff claims not only what is known as compensatory damages, that is to say, to be paid for the money that he actually lost, but he wants in addition to that for you to allow him what is known as punitive damages, or exemplary. Such damages are sometimes termed smart money, money by way of punishment to the defendant.

The defendant has requested me to charge, and I do so charge you "the damage suffered must be actual damage. No damage can be allowed for mental suffering or embarrassment. The damage only allowable must be for inconvenience whereby the owner of the goods suffered monetary loss". The Court is going to leave to you in addition to the monetary loss, the value of the inconvenience, if you can assess that in damages, and the question of whether or not you are to allow anything for punitive or exemplary damages, or damages by way of smart money.

Gentlemen, before you can allow any damages by way of smart money, you must be satisfied in your minds and in your consciences, by the greater weight of the evidence, that the defendant is guilty of a wrong that has injured this plaintiff, under the pleadings and issues as framed, and you must find that by the greater weight of proof, preponderating weight. Then, if you find this

plaintiff has sustained damages, you may proceed to consider the item of exemplary damages. But before you can make any allowance for exemplary damages, you must be satisfied by the greater weight of the evidence that the defendant did the thing that is alleged to be wrong, that he did it maliciously, that he did it wantonly, that he did it to injure this plaintiff; that is to say, that when he did this wrong, he knew it was a wrong, and that when he did it, he did it to injure this plaintiff. That is termed in the law malice, that he did it maliciously. The Court cannot improve upon that term. If you find first, that this defendant did something, under the pleadings, that was wrong, under the issues raised in this case, and that the plaintiff is entitled to compensation therefor, for the actual losses, then you proceed to the question of whether he did it maliciously. In order to show whether or not he should be punished, or punitive damages found against him for the malicious act, or manner in which it was done, if you so find.

You see, therefore, that the case is not a simple one by any means. Can it be said from all the testimony that you have heard in this case that this defendant did this thing maliciously? That is for you to determine. You have heard an explanation of it.

The defendant claims that he knew nothing about any lease, that nothing was said to him about it, and that even if something was said about it, that this man was there as a monthly tenant and that he thought, whether he is right or wrong, that he had the right to insist upon payment of the rent for that month.

Charge

The law is, or was, I believe at the time, that in the absence of any special lease or in the absence of any special agreement, if a person took a place or occupied it as a tenant by the month, if he wanted to move out, he had to give a month's notice of his vacation of the premises. For example, if you were a tenant by the month and you wanted to move out, we will say on the first day of April, you would have to give notice on the first day of March to the landlord that you were going to move, and the right of notice is reciprocal in the law, that is to say, the landlord would be obliged to give you notice if you were a monthly tenant.

Now in this case the plaintiff says, however, that he was not a monthly tenant, and he claims that he has proved that beyond dispute, but the Court is going to leave that to you under all the circumstances of this case. The Court does not remember of any direct testimony, that is to say, any witness going on the stand and swearing to the contrary, that is, that this plaintiff did not rent as he claims. You can make a legal lease for a year without having it in writing. The plaintiff claims that before the year was it, the landlord who was the then owner, requested him to move, and that he did within a few days thereafter, or some time after. You will remember the testimony. He claims, you remember, that the last month under that lease was paid for, either by way of concession that was allowed under the alleged original agreement or some other way; you will remember the testimony. In any event, he claims that he did move out and that he was not indebted to anyone who was the owner of this

property for the rent of the property. He therefore claims that this defendant did him an injustice, or a wrong, when he distrained, as he claims, on the plaintiff's property which he had left in the Goodman warehouse.

The law, as the Court reads it, provides:

> "That no person shall take any distress wrongfully, or cause any distress to be driven or conveyed out of the county where it shall be taken".

It may be that you would have as much difficulty in determining the question of liability as the question of damages. Are you to allow for the value of these goods that were impounded? No, not at all, as the Court sees it. This man got his goods back. The man cannot have his cake and eat it, as the expression goes. He got his goods back; you cannot allow him for that.

So it resolves itself, as the Court sees it, although the testimony may indicate to you otherwise and it is for you to determine, around the use of these goods and the expenses that this man was put to in getting the goods, and trying to have them released from this, as he claims, unlawful restraint, and that is what you are to consider.

Now, in that connection, it may be well for you to take into consideration the written documents, in fact, the Court would ask you to do that, the papers that have been introduced in evidence. The alleged restraint is dated the 21st day of June, 1929, and Broadman, according to this document claims that he is the landlord of this particular tenant. You see, there is a dispute about that relationship. The plaintiff says no, that he

was not a tenant; the landlord says he was, and that is why the restraint was made.

However, Broadman, under this distress warrant authorizes Chauncey, one of the constables of the State of New Jersey, to distrain upon the goods and chattels of George O'Brien in the house and premises occupied by said tenant, situated and known as the Goodman Storage Warehouse. There was some dispute during the course of the trial as to whether or not the distraint was made upon the premises. As the Court sees it, for the purposes of this case, it is not material where the goods were levied upon or that the Goodman Storage Warehouse was the owner; nevertheless. O'Brien put his goods there, apparently. They claim that was his premises and that he kept his goods there, and the defendant evidently directs the constable to go to these particular premises or warehouse and make his levy, and he directs the constable to convey or carry off from the said premises, within thirty days, said goods and chattels, and to collect the rent owing of $55, and to cause said goods and chattels to be sold for the satisfaction of the said rent and the charges for such distress and to do all other things required of him under the Act concerning distresses.

Evidently the distress did not proceed to a point of sale. It appears that something else intervened between that time and the method of intervention is more or less indicated in letters that transpired or were exchanged between the attorneys. But, on June 28th, 1929, Nathan L. Goodman, an attorney at law, acting as attorney for O'Brien, wrote to Morris Broadman and advised

him that unless he received a release of the goods and chattels from the distraint within twenty-four hours, that he would be obliged to protect his legal rights.

There is stated in that letter, you will remember, a contingency, and also an insistment by O'Brien, through the attorney Goodman, that the distraint was unlawful and explaining the concession that was alleged, and that it further concluded with the remark that any further proceedings taken by Broadman would be taken at his peril. It is for you to determine what the effect of that letter is.

On September 4th, 1929, Mr. Jobes, acting as attorney, evidently for the alleged landlord, wrote to Nathan Goodman to the effect that as attorney for Broadman, that Jobes would not proceed any further, with the distraint that was made, and that the plaintiff could take possession of the goods immediately. Take a note there of the date: September 4th.

Now, on the 9th of September, a formal release was executed, releasing the goods, so that the letter dated September 4th was notice to O'Brien through his attorney, if you may consider it such, that the goods were there at O'Brien's disposal, or at least they were subject to the release and that they were released from the distraint.

An interesting part of this case is the correspondence between the attorneys concerning liability. The first letter is July 9th, 1929, you will remember, a letter from Goodman to Broadman, pointing out to him the lease and the effect thereof and claiming that they would hold Broadman for what they call illegal proceedings, and the

next letter comes from Goodman, nine or ten days later, informing Broadman that he will be away from his office for two weeks and asking him to hold any action he intends to take for that period of time, so that he may be present. Then he concludes with the statement that the delay shall not prejudice any rights his client may have.

You may consider that and as to whether it is a waiver by the plaintiff, O'Brien, through his attorney of any injury he may sustain because of the detention of the goods during that two weeks his lawyer was away, because counsel requested a stay of some kind there. Then, on August 7th Jobes, representing Broadman, writes and asks for an extension, because Mr. Darling, evidently an attorney who was interested in the matter, was away and would not return until September 3rd, 1929. That is dated August 7th.

Goodman answers that letter by saying "with reference to your letter of 7th August, please be advised that I am willing to consent to your withholding further proceedings in this matter until September 3rd. However, it is distinctly understood that this consent does not waive any rights accrued to my client by reason of your action in the matter up to and until the date of my letter to you before going on my vacation". That would be July 9th, the letter mentioned.

During that time, from July 9th, Goodman says he does not waive any of the rights his client had up to that time that he went on his vacation, and that this consent merely covers since that period and until September 3rd.

Then on September 9th, there is the letter inclosing the release.

Charge

Gentlemen, these letters may aid you in your determination of this case, and assist you in determining what amount of damages should be given in the way of compensatory damages that should be allowed this plaintiff, and whether any part thereof was waived by the action of the attorney representing the plaintiff, but more particularly on the subject of the punitive or punishment moneys. Can it be said, in view of this correspondence that has been had here, together with the testimony of the defendant, and the other written evidence that is in the case, that the defendant actually exhibited malice in withholding these goods? Now, if you come to the conclusion that he did not exercise any malice or the act was not a malicious act, why, then, of course you are not justified in allowing anything by way of punitive damages, because after all, you are here to decide this case according to the law and to decide it in a just manner. You know what justice is. Time and again the Court, possibly to some of you jurors, has pointed out what your obligation when you take your solemn oath is. It is the greatest obligation you can take, in the sight of your fellow man. Do what your consciences dictate, what is right. You must be true to yourselves, and if you are that, you cannot be false to any man. That is all the law requires; be just men.

If the plaintiff is entitled to a judgment, that he should be awarded such damages as will compensate him for the losses that he has sustained that are approximately caused by the act of the defendant.

You have first to determine, however, whether the defendant is liable and you have to determine that element in the case by the greater weight of the evidence and then you proceed to the question of damages.

You may also find, if there was malice in this case, exercised by the defendant in this alleged unlawful act, if you come to the conclusion that the plaintiff was entitled to compensatory damages, that there may be added thereto damages by way of smart money, bearing in mind the testimony in the case and the Charge that the Court has given you.

If you find on the other hand that this was lawful, and I am going to leave that question to you, and that this defendant was justified in taking the proceedings, that he did, you may find a judgment in his favor. Or, you may find that the defendant, although he was doing something that was not just right, that he is not guilty of doing it maliciously, and that therefore, if a judgment is to be found, it is only for compensatory damages.

Now, in regard to compensatory damages, the testimony, as the Court sees it, is rather, I won't say meager, but it is within a narrow scope. You have heard the items that have been mentioned here. As the Court remembers it, the items directly concerned with the retention of the goods, or the goods in storage, was the amount of the storage during that period. That is, however, a question for you to determine.

Charge

If you find in favor of the defendant, your judgment will be "no cause of action", and if for the plaintiff, you will state the amount.

Mr. Brenner: The Court said if there was a monthly tenancy, then the judgment would be in favor of the defendant. There is some proof in this case that even under a monthly tenancy, that a month's notice was given.

The Court: All right; counsel has called to my attention and I think counsel is warranted in taking that exception. The Court will so charge you, that the plaintiff contends that even if there was a monthly tenancy in this case, that he gave the notice required by law and therefore that the distress was illegal, so the plaintiff contends. In the event that you so find, your judgment will be for the plaintiff.

Mr. Brenner: Then as to the letter of September 9th, the letter concerning the release. Your Honor stated as a positive fact that the letter was sent on September 9th. Your Honor will observe that the release was not granted until September 19th.

The Court: The Court will stand corrected as to that fact, and anything that the Court may have said as to the release being transmitted on September 9th you will change to make it that the release was granted on the 19th.

Mr. Jobes: There was another letter along that line, on September 4th; I think the Court has already pointed that out to the Jury.

(The jury retired.)

Exhibit P-1.

KNOW ALL MEN BY THESE PRESENTS:

That I, Morris Broadman, Landlord, do I hereby constitute and appoint James J. Chauncey, one of the Constables of the County of Hudson in the State of New Jersey, a true and lawful Attorney and Bailiff, to Distrain, and so I hereby authorize and empower him in My name, place and stead to distrain the goods and chattels of George O'Brien.

Tenant in the house and on the premises occupied by said tenant situate and known as now in the Goodman's Storage Warehouse, 830 Bergen Ave. Jersey City, N. J. said goods and chattels belong to George O'Brien having been removed from residence he occupied at 69 Claremont Ave. Jersey City, N. J. for $55.00 being, 1 month's rent due June 1st, 1929 in the City of Jersey City, in the County of Hudson and State of New Jersey, or which may have been conveyed or carried off from said premised within thirty days next before the seizure of the same by said Bailiff: For the sum of $55.00 being rent of said premises due to said Landlord on the 1st day of June A. D., 1929.

AND I Authorize said Bailiff to collect and receive said rent, and to cause said goods and chattels to be appraised and sold for the satisfaction of said rent and the charges of such distress, appraisement and sale, and to do all other acts and things which may by the said Landlord be lawfully done for the collection of said rent by virtue of "An Act Concerning Distresses," (Revision) approved March 27th, 1874, and any and all other statutes and laws.

Exhibit P-1

WITNESS My hand and seal the 21st day June A. D., One Thousand Nine Hundred 29.

SIGNED, SEALED AND DELIVERED
in the presence of

JAMES J. CHAUNCEY

1. 1 Settee,
2. 1 Arm Chair,
3. 1 High Back Chair,
4. 1 Cabinet,
5. 1 Night Table,
6. 1 Vanity,
7. 1 Chest of Draws,
8. 1 Torchier,
9. 1 Bridge Lamp,
10. 1 Floor Lamp,
11. 1 Floor Lamp,
12. 1 Arm Chair,
13. 1 Budl. Rugs,
14. 1 Boudoir Chair,
15. 1 Roll Oilcloth,
16. 1 Rug,
17. 1 Bdl. Rugs,
18. 1 Roll Oilcloth,
19. 1 B. R. Bench,
20. 1 Ice Box,
21. 1 Dresser,
22. 1 K. Chair,
23. 1 K. Chair,
24. 1 K. Chair,
25. 1 K. Chair,
26. 1 K. Chair,
27. 1 Carton,
28. 1 Carton,
29. 1 Carton,

Exhibit P-1

30. 1 Smoking Stand,
31. 1 Ironing Board,
32. 1 Washboard,
33. 1 Bed End,
34. 1 Mattress in Carton,
35. 1 Bed End,
36. 1 Sewing Machine,
37. 1 Carpet Sweeper & Mop,
38. 1 Pair Bed Rails,
39. 1 Budl. Slats,
40. 1 Wash Wringer,
41. 1 Spring,
42. 1 Picture,
43. 1 Mirror,
44. 1 Mirror,

Complete.

Exhibit P-2.

Law Offices
NATHAN L. GOODMAN
830 Bergen Avenue
Jersey City, N. J.

June 28, 1929.

Mr. Morris Broadman,
2222Boulevard,
Jersey City, N. J.

Dear Sir:—

On behalf of my client, George O'Brien, whose furniture was distrained at the Goodman Warehouse, 830 Bergen Avenue, Jersey City, N. J., I wish to advise that unless we receive a release of

Exhibit P-2

these goods from the lien of Distress Warrant within 24 hours, we shall be obliged to protect our legal rights.

Mr. O'Brien, personally informed you and I personally informed Mr. Jobes at Mr. Darling's office that O'Brien had rented these premises from Mr. Less under an oral lease for one year and O'Brien therefore had a legal right to move before the first day of June 1929 without giving notice, and a distress placed by you is unwarranted and illegal.

As I informed Mr. Jobes, under the terms of this lease, Mr. O'Brien was to receive a concession of one month, namely the last month of the term. By reason of the sale from Less to Scheck and the later sale to you, O'Brien was unable to obtain this concession and rather than litigate the matter, he paid this last month's rent.

My client, however, will not be held up for another month's rent when the same is not due and even under your theory that he is a monthly tenant, I still insist you have no right to distrain.

I am taking particular pains to inform you in this matter, after having previously informed you and Mr. Jobes in person, as we do not desire litigation or further expense, but should you persist in your action we warn you, you will proceed at your peril.

Very truly yours,

By: NATHAN L. GOODMAN
Attorney for George O'Brien

NLG/trk

Copy to:—Mr. B. Darling, Five Corners, Jersey City, N. J.

Exhibit P-3.

I hereby release from the operation of a distrain made by me on behalf of Morris Broadman, the goods and chattels of George O'Brien, which goods and chattels were distrained at the Goodman Warehouse, 830 Bergen Avenue, Jersey City, New Jersey.

In witness whereof I have hereunto set my hand and seal this ninth day of September, one thousand, nine hundred and twenty-nine.

James J. Chauncey [seal]

Signed, sealed and delivered
in the Presence of

Grace L. Gardner

State of New Jersey }
County of Hudson } ss.:

Be it remembered, that on this 19th day of September, One Thousand Nine Hundred and Twenty-nine, before be, a Commissioner of Deeds of New Jersey personally appeared James J. Chauncey who is, I am satisfied, the person named in and who executed the above release and I, having first made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed.

Grace L. Gardner
Commissioner of Deeds
of New Jersey

Exhibit P-4.

BENJAMIN J. DARLING
Counsellor at Law
662 Newark Avenue
Jersey City, N. J.

John H. Jobes

September 4, 1929

Mr. Nathan L. Goodman
830 Bergen Avenue
Jersey City, New Jersey

Re BROADMAN vs. O'BRIEN

Dear Sir:

Please be advised that I have decided not to proceed with the distrain levied in this case. I am instructing the Constable to release the distrain. Your client is free to take possession of his goods immediately.

Very truly yours,

BENJAMIN J. DARLING
By JOHN H. JOBES

JHJ/MF

Exhibit D-1.

Law Offices
NATHAN L. GOODMAN
830 Bergen Avenue
Jersey City, N. J.

July 9th, 1929.

Mr. John H. Jobes,
c/o Benjamin Darling,
5 Corners,
Jersey City, N. J.

In Re: Distress of Geo. O'Brien

Dear Sir;

Please be advised that I am leaving on my vacation on the 11th of July and expect to be away for about two (2) weeks and would ask that you for-stall any action which you intended taking within this period of time so that I may be present when it comes up.

It is understood that any delay occasioned by this request shall not prejudice any rights that you may have in the matter.

Thanking you for your courtesy, I remain

Very truly yours,

NATHAN L. GOODMAN.

NLG/ECC

Exhibit D-2.

BENJAMIN J. DARLING
Counselor at Law
662 Newark Avenue
Jersey City, N. J.

John H. Jobes

August 7, 1929.

Mr. Nathan L. Goodman,
830 Bergen Avenue,
Jersey City, N. J.

Re.
Distress of George O'Brien

Dear Sir:—

May I have your consent to withhold further proceedings in this matter until Mr. Darling returns on September 3, 1929?

Very truly yours,

BENJAMIN J. DARLING
By JOHN H. JOBES

GLG/JHJ.

Exhibit D-3.

Law Offices
NATHAN L. GOODMAN
830 Bergen Avenue
Jersey City, N. J.

August 8th, 1929.

Mr. Benjamin I. Darling,
662 Newark Avenue,
Jersey City, N. J.

Attention; Mr. Jobes,
Re; Distress of George O'Brien

Dear Sir:

With reference to your letter of August 7th, please be advised that I am willing to consent to your with-holding further proceeding in this matter until Sept. 3rd, 1929.

However, it is definitely understood that this consent does not waive any rights accrued to my client, by reason of your action in the matter up and until the date of my letter to you before I went on my vacation and that this consent merely covers since that period and until Sept. 3rd.

As I have already told you, I believe that your action to date has been unlawful but, however, I would appreciate your taking immediate steps in September to bring this matter to a conclusion.

Very truly yours,

NATHAN L. GOODMAN,

NLG/ECC

Exhibit D-4.

BENJAMIN J. DARLING
Counselor at Law
662 Newark Avenue
Jersey City, N. J.

John H. Jobes

September 9, 1929

Mr. Nathan L. Goodman
830 Bergen Avenue
Jersey City,
New Jersey

Dear Sir:

Enclosed please find release of the distrain of the goods of George O'Brien.

Yours very truly,

BENJAMIN J. DARLING

BJD/MF
Enc/1

New Jersey Court of Errors and Appeals

GEORGE O'BRIEN,
Plaintiff-Respondent,

v.

MORRIS BROADMAN,
Defendant-Appellant.

Action at Law.

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

Without having sustained any damage, plaintiff recovered judgment for $700.00 on the following facts:

Broadman, the defendant, owned an apartment house and the plaintiff, O'Brien, occupied an apartment therein. Plaintiff vacated without notice and placed his goods in Goodman's Storage Warehouse for the summer months. Three weeks later defendant caused a distress notice to be served on the warehouseman; possession of the goods was never taken. After conferences between the parties extending over a period of a few months, the distress notice was voluntarily withdrawn. Plaintiff did not require the goods during this period for he was living at the seashore in a furnished bungalow.

Immediately upon the rendition of the verdict, defendant made application for a rule to show cause why a new trial should not be granted, but the Court refused to hear the application, stating that although the verdict was unreasonable and

purely punitive, he preferred that the defendant take an appeal.

The law in this case was fully discussed with the Trial Court on the various motions for the exclusion and expurgation of testimony (pp. 37, l. 23, etc.; 48, l. 12; 50, l. 22; 57, l. 11; 58, l. 5, etc.) on the motion for a nonsuit (p. 59, l. 9) and on the motion for direction of verdict (p. 86, l. 5) but the Trial Court erroneously permitted said testimony, ruled that plaintiff was entitled to punitive damages and so charged the jury, denied defendant's motions for a nonsuit and direction of verdict and granted defendant a general exception to all of said rulings, stating:

> "You should have the Upper Court pass upon these matters. They are very interesting and I don't know of any precedent being established, except by analogy, you might say" (p. 62, l. 9).

The grounds of appeal are numerous but because of the closeness of their connection, they can be argued under five points.

POINT I.

Under no circumstances was the plaintiff entitled to punitive damages. The judgment is erroneous because it is contrary to the statute.

A. The Trial Court erred in permitting the jury, over objection of defendant, to assess punitive damages against the defendant (pp. 22, l. 20; 26, l. 28; 57, l. 10; 62, l. 5; 90, l. 26; 90, l. 32; 97, l. 13; 98, l. 10; 98, l. 18).

The complaint sounds in case under Sections 1 and 2 of the Distress Act (pp. 13, l. 5; 37, l. 37). The

plaintiff did not amend but relied on these sections for his recovery (p. 59, l. 24). These sections provide that the defendant "shall answer the damages to the party aggrieved" (2 C. S. 1939). Punitive damages are expressly excluded by the insertion of the definite article "the," a positive direction that only the actual damages may be recovered. The Distress Act does provide for single, double and triple damages in certain sections, but none of these apply to the instant case (2 C. S. 1942 and 1943, Secs. 10, 11 and 15). Actual damages, therefore, are the sole measure of recovery.

Even if the action were in trespass, the judgment would be erroneous for exemplary damages can never constitute the basis of a cause of action (*17 C. J.*, 974, par. 270). *Plaintiff's goods were never seen, touched nor sold by defendant, but were always in the exclusive possession and control of the warehouseman and subject to his prior lien of $112.15* (p. 54, l. 36). Plaintiff suffered no inconvenience for he had put his goods in storage (p. 33, l. 28) for June, July and August (p. 32, l. 30), having rented a cottage at the seashore until Labor Day, 1929 (p. 41, l. 21). On his return the plaintiff and defendant immediately settled their differences and defendant delivered to plaintiff the release demanded (Exhibit P-4, p. 105). There was no taking of the plaintiff's goods nor was there any disturbance of his possession. The hardness of this action is comparable to that in *Cadmus* v. *Barney*, 42 N. J. L. 346, and the defendant respectfully urges that similar justice be meted out as in that case. *Executors of Lord* v. *Carbon Iron Manufacturing Co.*, 42 N. J. E. 157.

Plaintiff offered no evidence of wrongful motive on the part of the defendant but merely cross examined the defendant who justified his actions on

the grounds that plaintiff owed him rent (p. 80, l. 15). Plaintiff proved no damages, and proved no malice; the judgment therefore, is erroneous.

Neafie v. *Hoboken Printing, etc., Co.*, 72 N. J. L. 340.

B. The cost of the goods was erroneously admitted in evidence (pp. 38, l. 17, etc.; 48, l. 10, etc.; 50, l. 19, etc.).

Plaintiff's goods were never in defendant's possession (p. 42, l. 13); neither were they sold by defendant (p. 93, l. 20), but plaintiff took them from the warehouse intact. But the Court, over objection of defendant, admitted in evidence the purchase price of the furniture more than sixteen months prior to the defendant's act (pp. 37, l. 22, etc.; 48, l. 10, etc.; 51, l. 12, etc.). No evidence whatever was offered to establish the damages alleged in the complaint and the Court erred in refusing to grant the defendant's motions for a nonsuit and direction of verdict. *Dickinson* v. *Delaware, L. & W. R. R.*, 90 N. J. L. 158, *Smith* v. *Montclair, etc. Cab Co.*, 139 A. 904, not officially reported.

The Court permitted this testimony on the theory that under the count for unreasonable distraint the cost of the goods was in issue. The error arose as a result of confusing the cost with the value of the goods, as the measure of damages. Whether the goods taken were or were not a reasonable amount to satisfy the rent and expense, taking into consideration the price they might be reasonably expected to bring at a public sale for cash is the rule laid down in *Weber* v. *Vernon*, 45 A. 537 (*Delaware* case). There was no proof in the case at bar before the Court of the reasonable value of those goods but the evidence was that defend-

ant's demand was $55.00 (p. 13, l. 32), that plaintiff's statutory exemption was $200.00 (*2 C. S.*, 1946, Section 24), that the warehouseman's lien, prior to defendant's demand, was $112.50 (p. 54, l. 35), that Helen O'Brien owned a part of the goods (p. 48, l. 25) of the value of $300.00 at least (p. 53, l. 19), and was co-owner with the plaintiff in the remainder (p. 48, l. 7), a total of $667.50. Was not the defendant's demand reasonable as a matter of law when to realize his claim he would have had to sell at a forced sale for cash the interest of the plaintiff in those goods (p. 52, l. 27)?

C. The plaintiff suffered no damage.

Plaintiff vacated his apartment on May 27, 1929 (p. 33, l. 22) put his goods in storage (p. 33, l. 27) for three months (p. 32, l. 30), returned to the City on Labor Day (p. 41, l. 20) and received his goods immediately (Exhibit P-4, p. 105). Plaintiff consented to defendant's claim (Exhibits D-1, D-2 and D-3, pp. 106, 107 and 108) and restricted his rights to the period between June 21 and July 9, 1929 (Exhibit D-3, p. 108). And no one could remove those goods at that time unless all expenses and storage charges to July 27 were paid (p. 55, l. 38).

There being no dispute as to these facts, it is apparent that this suit is unusually vexatious, especially when Goodman, without any justification whatever, notified the plaintiff on June 21, 1929, that the defendant would sell plaintiff's goods in three days (pp. 33, l. 37; 34, l. 5; 40, l. 12; 40, l. 20; 84, l. 37; 85, l. 32).

POINT II.

The judgment is unlawful because the plaintiff has no right of action under the Distress Act.

A. The relationship of landlord and tenant must exist in order to support the action.

Plaintiff testified that he leased the apartment from June 1, 1928, to June 1, 1929 (pp. 30, l. 7; 46, l. 10) and vacated on May 27, 1929 (pp. 32, l. 15; 33, l. 22). If this be so, then on June 1, 1929 there was no relationship of landlord and tenant existing between plaintiff and defendant, but they were strangers to each other.

Being strangers at the time of the alleged distrain, as well as at the time when the rent was alleged to have become due, June 1, 1929 (p. 14, l. 29), no distress could have been levied by the defendant and any step taken by him to that end was a nullity and amounted, if at all, to but a naked trespass:

> "Since the right of distress exists only when the relation of tenancy exists, a distress made when such is not the case is a naked trespass, giving the person whose rights of property are thus invaded, a right to recover damages as in any other case of trespass. The common law remedy would be an action of trespass, but trover would also lie, it seems." Tiffany on Landlord and Tenant, Vol. 2, page 2076, Sec. 346-D-1.
>
> "Distress will not lie where the relation of landlord and tenant does not exist between the parties." Thompson on Real Property, Vol. 2, page 844, Sec. 1647.

And if there is no right to distrain by reason of the absence of the relationship, there can be no

distrain and hence, no action under the Distress Act:

> "A party has no right to distrain, unless there be a fixed rent agreed upon, if that be not so, the law gives him a remedy by the action for use and occupation. There can be no distress, unless there be a contract for an actual demise at a specific sum." Dunk *v.* Hunter, 5 B. & A. 322-327, 9 Eng. Rul. Cases 601.

> "Now the pleas traverse in direct terms the tenancy under those persons. Surely, therefore, such traverse cannot be immaterial. If the defendants were not the landlords, or servants of the landlords, of the premises, they must be mere strangers and trespassers, and the action should be trespass and not case, under the statutes, 1 Stat. 2 W. & M. c5 s5 and Stat. 11 G2 c19 s19. Who were the landlords was, therefore, a material question; and that is the substance of the issue.
>
> "The judgment must be for the defendants." Yates *v.* Tearle, 115 English Reports 109.

Dunk v. *Hunter, supra,* was an action of replevin —*Yates* v. *Tearle,* an action under the English Distress Act and alleged counts for unlawful and unreasonable distraint on the part of the defendants, the identical allegations in the case at bar.

The New Jersey cases are of the same import. *Hartshorne* v. *Kierman,* 7 N. J. L. 29, was an action brought under Section 11 of our Distress Act against a landlord by a person upon whose goods the landlord had distrained for rent owing from one Jones. The Court gave judgment for the defendant landlord and held:.

> "1. That the action could not be brought by a stranger.
>
> "2. That it ought to appear upon the record what the single damages were."

See:

Allen & Vail v. *Agnew,* 24 N. J. L. 443 at 445;
The Central Bank of N. J. v. *Peterson,* 24 N. J. L. 668;
Woodside v. *Adams,* 40 N. J. L. 417 at 419;
Melick v. *Benedict,* 43 N. J. L. 425;
Newell v. *Clark,* 46 N. J. L. 363 at 373;
Commercial Credit Co. v. *Vineis,* 98 N. J. L. 376;
Bryson v. *Miller Realty Co.,* 10 Adv. R. 167 at 169.

Not only do the cases say that a distress is predicated upon the relationship of landlord and tenant, but the act under which the plaintiff bases his action, with great particularity, so states. Section 8 (2 C. S. 1940) gives "every lessor or landlord, lessors or landlords, or his or their steward, bailiff, receiver or other person or persons empowered by him or them" the right to distrain the tenant's goods; Section 6 empowers the landlord to sell those goods; Section 16 authorizes the landlord to recover concealed chattels; Section 17, to distrain after term ended for rent which became due during the term; Section 24 gives the tenant an exemption of $200.00 and Section 25 provides that in case the landlord shall not proceed to have the goods appraised, the tenant may take such steps. The limitations of the act, then, being so clearly defined, it is apparent that the Legislature used the words "person" and "persons" throughout the act as comprehensive synonyms for "every lessor or landlord, lessors or landlords, or his or their steward, bailiff, receiver or other person or persons empowered by him or them" and did not intend to extend the right of distress to "every man, woman, child, corporation or any other

entity in the State of New Jersey within its confines" as stated by the Trial Court (p. 60, l. 22).

A distress levied by one without authority is but a pretention and nullity. The owner of the goods can, with absolute immunity, ignore the alleged lien and take his goods (*Newell* v. *Clark*, 46 N. J. L. 363 at 377). The right of lien is created by law; the lien by act of the party. The right, unexercised, gives the benefiting party no claim upon the goods. The act without the right makes the claimant a trespasser but does not, in any sense, give him a lien upon the chattels. And the lienee, by his demand for a release, cannot make a lien that which the law does not recognize as such. Statutory liens look for their validity to the legislation by which they are created and it is by that statute, and that statute only, that the rights are to be judged.

B. An impounding is necessary in order to impose liability.

Sections 1 and 2 require an impounding in order to impose liability for unlawful or unreasonable distress. "If there be anything wrongful in the distress, the tenant may rightfully rescue his goods before the impounding * * *" (*Newell* v. *Clark*, 46 N. J. L. 363 at 377). This clearly shows that the lien of a distress is not consummated until an impounding has been made. Then what is the purpose of Sections 1 and 2? It is to give the tenant a right of action for unlawful and unreasonable distress when he has been deprived of his goods by the landlord. But has the tenant suffered any deprivation if the goods are not impounded? Surely not. And if there has been no deprivation, how can any action arise under a statute which has as its foundation the unlawful deprivation of the tenant's goods?

Bearing in mind that the word "distress" refers to the act done as well as the thing taken, it is not difficult to see that the first two sections of the Distress Act do not give rise to a cause of action until the goods are actually taken into the possession of the landlord. The true interpretation, then, of Sections 1 and 2 is as follows:

> SECTION 1.—"That all distresses made or taken," etc., means "That all distresses (acts amounting to distress) made (consummated by an impounding) and all distresses (goods themselves) taken (into actual possession) shall be reasonable and not too great."
>
> SECTION 2.—"That no person shall take any distress wrongfully, or cause any distress to be driven or conveyed out of the county * * *" means "that no person (landlord or agent) shall take any distress (seize the goods themselves) wrongfully (for rent not yet due), or cause any distress (the goods) to be driven or conveyed out of the county."

No other construction can reasonably be made of these sections and such an interpretation finds support in the evil sought to be remedied and in the definition of the words used.

> "In its usual signification, the word 'taken' implies a transfer of possession, dominion or control. A thing is not taken unless such a change of status is effected. In trespass, trover or replevin the taking is not accomplished until the goods are within the power or control of the defendant." Jersey City *v.* Morris Canal & Banking Co., 41 N. J. L. 66 at 70.

C. The lien cannot be both valid and invalid.

A lien cannot be invalid against the owner of the goods and valid as to the owner's bailee, but that, nevertheless, is the contention advanced in this cause. The plaintiff testified that he called

for his furniture on August 12th or 14th, 1929, but that Goodman's Warehouse would not deliver it to him (pp. 36, l. 15; 39, l. 27). Abe M. Goodman testified that he would not deliver the goods to the plaintiff until the alleged distrain had been released (pp. 53, l. 27; 54, l. 5). Nathan L. Goodman informed defendant on June 28, 1929 (Exhibit P-2, p. 102), and again on August 8, 1929 (Exhibit D-3, p. 108), that the alleged distrain was unlawful. A warehouseman is entitled to withhold from the depositor the possession of the goods left in his custody only "until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead" (*4 C. S.*, 5780, par. 18). The warehouse company denied the validity of defendant's claim, and, therefore, its refusal to deliver the furniture to the plaintiff on August 12th or 14th constituted a conversion and subjected the warehouseman to a suit in accordance with the terms of the statute. *Union Trust, etc.* v. *Kyle*, 96 N. J. E. 125; *Travers* v. *Burdge*, 101 N. J. L. 237.

The present suit is but an attempt to secure from the defendant a large sum in payment of damages which were never sustained and was created out of a set of facts which imposed liability on the warehouseman but which were perverted in order to cast liability on this defendant.

POINT III.

The Court erroneously held that the defendant had seized plaintiff's goods.

From the act of the defendant the Trial Court spelled out a "constructive seizure" (p. 60, l. 5) and so instructed the jury (p. 93, l. 18) basing his de-

cision on the case of *Newell* v. *Clark, supra* (p. 59, l. 35). But that case does not support the Trial Court in that a seizure presupposes an impounding and *Newell* v. *Clark* expressly draws a distinction between the distress and the impounding (46 N. J. L. 378). The goods of the plaintiff were never sold by the defendant nor were they ever seen or touched by him or his agent. The Trial Court erred, then, in finding as a matter of law the defendant had seized plaintiff's goods under Sections 1 and 2 of the Distress Act.

POINT IV.

The Court erroneously permitted the jury to determine whether the alleged distraint was lawful or unlawful (p. 98, l. 18).

The province of the jury is to determine disputed questions of fact; whether an act is legal or illegal is not within their jurisdiction. The Trial Court had refused to decide the questions when presented to him by the defendant (p. 62, l. 9) and could not legally propound the question to the jury. Defendant respectfully contends that the Court's action in this respect was legal error.

POINT V.

The defendant's act was legal.

The plaintiff was a tenant among many in a large apartment house. He claims an oral lease with a predecessor in title of defendant, not with defendant's grantor, but with an owner before him. There was no duty upon defendant to inquire of plaintiff if he claimed any interest in the property (*Feld* v. *Kantrowitz,* 98 N. J. E. 167, affd.

99 N. J. E. 847). Defendant's grantor sold to defendant subject to monthly tenancies (p. 80, l. 18). Seven days after the distrain was delivered, plaintiff notified defendant of the alleged lease (Exhibit P-2, p. 102). Shack, defendant's grantor, is dead (p. 68, l. 10). Plaintiff's lease, if any, being invalid as against defendant, plaintiff was a monthly tenant and liable for June rent, and, upon his failure to meet his obligation, subjected his furniture to a distress in accordance with the statute.

Defendant respectfully urges that the judgment should be reversed.

Respectfully submitted,

BENJAMIN J. DARLING,
Attorney of Defendant-Appellant.

JOHN H. JOBES,
On the Brief.

New Jersey
Court of Errors and Appeals

George O'Brien, *Plaintiff-Respondent,* *v.* Morris Broadman, *Defendant-Appellant.*	Action at Law

BRIEF OF PLAINTIFF-RESPONDENT

Statement of Facts

The plaintiff, George O'Brien during the month of May, 1928, rented an apartment in the premises known as #69 Claremont Avenue, Jersey City. Arrangements for this rental were made with Mr. Leff, the owner, who agreed to rent the premises to the plaintiff under an oral lease for one year from June 1st, 1928, to May 31st, 1929, at a rental of $55 per month with the understanding that the plaintiff was to have a concession of one month's rent, or what is generally known as having the last month's rent free (Case, p. 30, ll. 1-12).

About the seventh month of the tenancy a man other than Mr. Leff came to collect the rent of the

plaintiff and the plaintiff informed the new collector of his oral lease and concession (Case, p. 30, ll. 25-40).

At the beginning of the eleventh month when the son of the new landlord, Mr. Schact came to collect the rent, the plaintiff told him that he would not pay the twelfth month's rent because of the concession arrangement under the lease with Leff. Unable to get the consent of Schact to the performance of this lease O'Brien informed him that he would pay the rent for the month of May, but would move out at the expiration of that month (Case, p. 31, ll. 1-40). This notice was given on either the last day of April or the first day of May (Case, p. 32, ll. 1-15). The plaintiff paid the rent for the month of May and on May 29th, 1929, moved from the premises and placed his goods in storage in the Goodman Warehouse Corporation in Jersey City.

On June 21st, 1929, defendant, who had in the month of May purchased the property known as 69 Claremont Avenue, appointed one, James J. Chauncey, a constable, to serve a distress warrant upon the goods of the plaintiff, then stored in the warehouse. On that date the said Chauncey did serve a distress warrant upon the warehouse company on the goods of the plaintiff O'Brien, and a list of these goods was attached to the distress so served (Ex. P-1, p. 100).

Upon receipt of the distress the Warehouse Company notified the plaintiff and gave him a copy of the distress served upon it (Case, p. 40, ll. 10-20). The plaintiff upon receiving notice came to the warehouse and interviewed Mr. Nathan L. Goodman, a member of the warehouse firm and a counselor-at-law of this State. The

plaintiff and Mr. Nathan L. Goodman went to the home of the defendant, but only the plaintiff remained to see Broadman, and requested the release of his goods.

The defendant refused to release the goods from the lien of the distress and referred the plaintiff to his attorney, Mr. Jobes, in Mr. Darling's office (Case, p. 35, ll. 1-2). This information was given to the attorney for the plaintiff, who had a conference with Mr. Jobes and requested a release of the plaintiff's goods on the ground that the distress was wrongful.

Failing to obtain a release of the plaintiff's goods as a result of the conferences the counsel for the plaintiff prepared a letter, dated June 28 and known as Exhibit P-2 (p. 102), which letter was sent to the defendant and his attorney, Mr. Darling. It is interesting to note that in this letter counsel for plaintiff advised the defendant and his counsel that their actions were illegal and that his client desired only a release of the goods and that should the defendant fail to release, he would act at his peril.

Despite this conference with Mr. Jobes and the letter of the 28th, the defendant did not release the goods nor did he proceed with inventory and notice of sale as he should have according to law, if the plaintiff did not replevin within ten days. Despite the fact that the defendant did not dare to proceed with inventory and sale, he nevertheless did fail and refuse to release the goods.

On July 9th, counsel for the plaintiff, who was about to leave on his vacation and not being desirous of having a sale held during his absence, wrote a letter bearing that date to the defendant's attorney known as Exhibit D-1 (p. 106), which letter requested that no action be taken during the

period of counsel's vacation and agreeing that the delay occasioned by this request would not prejudice the defendant's rights.

The counsel for the plaintiff returned from his vacation and still the defendant's attorney refused to release the goods, but on August 7th, by letter known as Exhibit D-2 (p. 107), requested consent of the plaintiff's counsel to withhold further action until Mr. Darling's return on September 3rd, 1929.

This letter was answered by the plaintiff's counsel by letter dated August 8, 1929 (Ex. D-3, p. 108). It is interesting to note that counsel for plaintiff still insisted that the acts of the defendant were unlawful, but consented to the delay as a matter of courtesy. By letter dated September 4th (Ex. P-4, p. 105) defendant's attorney advised counsel for plaintiff that they had decided not to proceed with the distress levied in the case and that they were instructing the constable to release the goods from the lien of the distress. In order to legally effect the release of these goods it was necessary to obtain a release either from the defendant or his constable, who had served the distress. There being no authority to accept a release from counsel for the defendant as he was not counsel of record, so that his actions might be binding upon his client, and counsel, as this letter indicates, knew that it would be necessary to obtain an official release from the constable. Despite the fact that the plaintiff was desperately anxious to get his furniture from storage, this release was not sent to counsel for plaintiff immediately.

On September 9th defendant's attorney dictated a letter bearing that date to the plaintiff,

enclosing a release (Ex. P-3, p. 104) and it is interesting to note that this release was not effected until the 19th day of September, 1929. This action is brought by the plaintiff to recover damages of the defendant because of the wrongful and unreasonable distress placed upon the goods of the plaintiff.

By reason of the fact that on July 9th, plaintiff's attorney asked that no action be taken in his absence and by further reason of the consent granted to the defendant's attorney until September 3rd, it is admitted that the period during which the plaintiff's goods were held in unlawful and unreasonable distress shall be considered only from June 21st to July 9th and from September 3rd until September 19th.

The plaintiff contends that the action of the defendant in distraining all of his goods of the value of more than $1,300 for an alleged claim of $55 was not only unlawful and wrongful by reason of the fact that there was no money due, but that it was unreasonable and excessive and was made for the sole purpose of intimidating the plaintiff into paying a sum not due, and that the distress was continued after plaintiff's attorney had warned defendant and his counsel of the gravity of their acts.

The failure of defendant to release the goods after the letter of June 28th and their continued failure after September 3rd to present a properly executed release until September 19th were acts of deliberate malice to harass the plaintiff and force him into paying a claim that he was not legally obliged to pay.

ARGUMENT

POINT I

The distress was wrongful as there was no money due from plaintiff to defendant under a demise, lease or contract.

Two different claims of tenancy were presented to the Court. The defendant claims the plaintiff was a monthly tenant and was obliged to give a 30-day notice of his intention to move, and having failed to do so, he became obligated to the defendant for $55 on June 1st, for which sum defendant placed a distress on furniture of the plaintiff at the warehouse on June 21st, 1929.

The plaintiff testified that he was a lessee under an oral lease for one year, which expired May 31st, 1929 (Case, p. 28) and this was corroborated (Case, pp. 29-30, 46).

The plaintiff also testified that on April 29th or May 1st, when the landlord's agent refused to allow the concession agreed upon in the lease, the plaintiff paid the last month's rent under protest and told the agent he would quit the premises before June 1st (Case, p. 71).

It, therefore, became a question of fact which the Court properly submitted to the jury and the jury had a right to find that plaintiff either had given notice, or was a lessee, and not obliged to give notice. Under either finding, no rent became due to defendant and the distress so placed by him was clearly wrongful.

A. The oral lease was binding on the defendant.

The defendant as a prospective purchaser of

the premises was obligated to make inquiry from the tenants in possession of the nature of their tenancy, and by reason of his failure to do so he was charged with constructive notice of the lease.

> "It is the settled law of this state that open, notorious, visible, unequivocal and exclusive and uninterrupted possession is notice, and puts a purchaser dealing with the record owner, under a duty of inquiry, and constitutes constructive notice of everything he would have learned by inquiry from the person in possession."

Wood v. *Price,* 79 N. J. E. 620.

The defendant says there was no duty of inquiry and relies on the case of *Feld* v. *Kantrowitz,* 98 N. J. E. 167. In that case the defendant attempts to charge the plaintiff with constructive knowledge that he was holder of an assignment of a one-sixth interest in the premises. The defendant contends that by reason of his tenancy in a large office building, the plaintiff was obliged to make inquiry, as to the nature of his tenancy, and had such inquiry been made the plaintiff would have been informed of defendant's claim of an assignment. The Court said:

> "Under these circumstances to charge a prospective purchaser with notice of any right, title or interest of one of the tenants, *beyond the right of tenancy,* would be absurd."

This case is clearly distinguished from the general rule as set forth in *Wood* v. *Price* (*supra*).

We submit that this defendant is chargeable with constructive notice of plaintiff's lease, and that the plaintiff having moved before the expiration of the lease, no notice was necessary and no

no money was due defendant. The distress was, therefore, wrongful.

B. Even if plaintiff were a monthly tenant and had failed to give notice, no distress can lie for money alleged to be due for failure to give notice.

The Distress Act, C. S. P. 1940, Sec. 6 provides:

> "Where any goods or chattels shall be distrained for any rent due under a demise, lease or contract whatsoever, etc."

The defendant does not allege rent due for any period while plaintiff was in possession of premises. Even if we were to concede that the defendant had legal right to sue the plaintiff for $55 as damage for failure to give notice, it is questionable whether even a suit for damages could lie until June 30th, and if a judgment was rendered it would be in the nature of a penalty for failure to give notice, and not a judgment representing rent due. Certainly no distress can lie for such claim, as the distress provides it must be for rent due under a demise, lease or contract.

Whether or not there was lease or a monthly tenancy, or whether notice was given, were disputed questions of fact and were properly submitted to the jury.

POINT II

The distress was unreasonable and too great and a violation of Section I, Distress Act, 2 C. S. 1939.

Even though a distress be proper because of

rent due, it must nevertheless be reasonable and not too great.

The defendant's total claim was for $55. The uncontradicted testimony offered by the plaintiff was that the goods so distrained were worth $1,300, less 10 or 15% depreciation at time distress was taken (Case, p. 52, l. 35).

It is clearly evident that to distrain goods of the approximate value of $1,300 for a $55 debt is unreasonable and too great.

A. The cost of goods was properly admitted in evidence.

The second count of the complaint alleges unreasonable distress. Without proof of value at time of distress, this count would fall and value was an essential element of proof.

In proving the value of goods the cost is always admissible as an element to be taken into consideration in determining the true value.

Teets v. *Hahn,* 104 N. J. L. 357.

In addition to this proof of cost, testimony was offered showing the true value at time distress was taken (Case, p. 52, l. 35).

POINT III

There was sufficient evidence of malice and wilful wrongdoing and therefore punitive damages could be assessed in this case.

> "If the Jury found the act of the defendant was a wilful trespass, it was their province to say whether or not the plaintiff should have exemplary damages." *Trainor* v. *Wolf,* 55 N. J. L. 381.

Blackmore v. *Ellis,* 70 N. J. L. 264;
Hintz v. *Roberts,* 98 N. J. L. 768;
McDevitt v. *Vial* (Pa.) 11 Atl. R. 645.

The nature of the action brought by the plaintiff is "Trespass on the case for violation of Sections 1-2 of the Distress Act" and complaint as amended was for wilful and malicious wrongdoing.

A. There was sufficient evidence of wilful and malicious wrongdoing for which the jury could assess punitive damages.

Malice and wilful wrongdoing of the defendant can be inferred from the following facts.

That defendant continued the distress and refused to release after plaintiff informed him of lease and after plaintiff's warning letter of June 28th, wherein plaintiff's attorney not only pointed out that no distress could be, because he was a lessee, but that distress was wrongful even under theory of monthly tenancy.

That defendant failed and refused to proceed with appraisal and sale in accordance with distress, although he continued to distrain the goods. Had this defendant sold the goods he would have at least shown that he believed he was right; his failure to proceed is proof that he knew the distress was wrongful. If he released the goods then he would have shown good faith, but the retention of the distress despite refusal to proceed, indicates his wilful and malicious desire to harass and injure the plaintiff.

The gross unreasonableness of the distress as could be ascertained by reading the inventory is further evidence of his wilfulness.

The defendant under cross examination (Case, pp. 78-79) testified that he released the goods when plaintiff apologized to him in June, 1929. This statement was not true as goods were never released until September 19th, 1929. He further testified that he did not take the letter of June 28th seriously and paid no attention to it. (C.P. 77 ll. 10-40)

The defendant even after he agreed to submit a proper release of the goods on September 3rd, 1929, did not do so until September 19th, 1929.

We submit that from these facts and the conduct and demeanor of the defendant on the witness stand, the jury could find evidence of wilful and malicious wrongdoing.

B. There was evidence of actual damages.

The defendant in his brief contended no evidence of actual damage having been proven, no punitive damages could be allowed.

This conclusion is based upon a mistaken premise, for the record discloses the following proof of damage.

1. That plaintiff rented premises from September 1st, but could not get his furniture for more than half a month by reason of the continued unlawful distress (Case, p. 39, ll. 35-40).

2. That plaintiff paid storage on his goods for month of September because goods were unlawfully distrained during that period (Case, p. 54, ll. 10-30).

Any proof that would support a verdict of nominal damages is sufficient to sustain an assessment of punitive damages.

Moore v. *Duke* (Vt.) 80 Atl. 194.

POINT V

The relationship of landlord and tenant need not exist to support this action.

In Point II of defendant's brief counsel gives voluminous proof that the acts of this defendant were wrongful and without color of right. To this we heartily agree. It is contended that because the lease ended on May 31st, no relationship of landlord and tenant existed on June 21st when distress was wrongfully issued and that plaintiff cannot recover for this violation of the Distress Act.

If we follow this argument to its logical conclusion we would find that a landlord who in good faith, nevertheless mistakenly, issued a distress, would be liable to a tenant, but that if a total stranger to the tenant, wrongfully and wilfully distrained his goods, the tenant would be barred from a recovery because there was no relationship of landlord and tenant.

Such argument seems entirely without merit and is a mere misinterpretation of the law in cases cited, which hold that where a landlord wrongfully distrains the goods of a tenant, then no one but the tenant and no strangner to him could sue for violation of the Distress Act.

POINT VI

The plaintiff's goods were impounded by the distress served upon the custodian warehouse.

It is uncontradicted that the defendant served upon the warehouse where plaintiff's goods were stored, the distress warrant (Ex. P-1, p. 100) and attached thereto an inventory of the goods distrained.

Despite this, defendant argues that there was no seizure and no impounding.

> "No precise form of words is essential to distress, and a distress may be made without actual seizure."
>
> *Newell* v. *Clark*, 46 N. J. L. 363.

To show just how false this position is, it is only necessary to refer to Exhibit P-4 (p. 105), wherein counsel for defendant said to plaintiff's counsel:

> "Please be advised that I have decided not to proceed with the distrain levied in this case. I am instructing the Constable to release the distrain. Your client is free to take possession of his goods immediately."

If there never was an impounding of the goods by virtue of this distress, what did counsel mean when he released the goods and authorized plaintiff to take possession immediately? Certainly if goods were not impounded there was nothing to release and no reason to order plaintiff to take possession of the goods.

POINT VII

Trial Judge's statement on application for rule immaterial to issues in this case.

Defendant's counsel in his brief injected two matters which we believe immaterial and improper.

The first pertains to alleged remarks of the trial Judge as set forth on page 1 of brief. Counsel is too long a member of the bar not to realize that such statement is not a part of record in this case and should never have been brought to the attention of this Court.

The second is an attempt to impute that the Warehouse Company, of which plaintiff's counsel is secretary, perverted certain facts to cast liability on the defendant to avoid its own responsibilities.

Counsel's advice to plaintiff as his lawyer created no duty on the Warehouse to act as judge and jury and hold the distress to be unlawful. Had the Warehouse released the goods, it would have opened the door to an action for treble damages for breach of rescous.

Such statements only becloud the real issues and should never have been made.

Plaintiff respectfully urges that the judgment be sustained.

Respectfully submitted,

NATHAN L. GOODMAN,
Attorney for Plaintiff-Respondent.

ALFRED BRENNER,
Of Counsel.