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TESTIMONY.

For Plaintiff.

For Defendant.

NOTICE AND GROUNDS OF APPEAL.

New Jersey Supreme Court

ESSEX COUNTY.

CHARLES T. DOUGHERTY CO., INC., a corporation, *Plaintiff,* *vs.* PHILIP KRIMKE, *Defendant.*	*Action at Law.* *Notice and Grounds of Appeal.*

To Walter A. Beers, Esq., 60 Park Place, Newark, N. J., attorney for plaintiff:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Court admitted in evidence the following statements stipulated to be the testimony of Chester Scull, although the same were immaterial and irrelevant:

> "Chester Scull received the stone from Charles T. Dougherty Co., Inc., on representation that he had a customer interested in the purchase thereof."
>
> "He, Chester Scull, took the stone from Charles T. Dougherty, having no customer in view."
>
> "That Chester Scull subsequent to November 3, 1926, informed Charles T. Dougherty Co., Inc., the stone had been sold. That this statement was made to induce Charles

T. Dougherty Co., Inc., to charge its value to him."

The following questions were admitted in evidence:

2. To the witness, Alfred Manning. "What was the conversation" (referring to the conversation between the witness and Chester Scull subsequent to November 3, 1926)?

3. To the witness, Charles T. Dougherty. "What conversation did you have with Chester Scull at the time you delivered the diamond to him?"

4. To the same witness. "When you gave that stone to Chester Scull under this agreement, did you sell it to him?"

5. To the same witness. "That writing, 'charged November 3, 1926' on that card, what does that mean?"

6. The Court excluded from the evidence the Conditional Sales Act of the State of New York.

7. The Court denied the defendant's motion for a non-suit.

8. The Court denied the defendant's motion for a directed verdict in favor of the defendant.

The Court charged the jury as follows:

9. "At the time that Scull took this diamond from the Charles T. Dougherty Company, he was what we know in law as a factor. A factor is an agent who as a business sells merchandise assigned or delivered to him, by or for his principal. He is usually entrusted with the possession, control and disposal of the merchandise. He may even sell it in his own name or he may sell it in the name of his principal, but he cannot pawn it or pledge it for his own account; this

is true even if the man with whom he pledges it has no notice of his character as the factor, as in this case with Scull."

10. "The defendant insists that by a conversation held between Mr. Manning the office manager of the plaintiff company and Scull, that the status of factor and principal existing between Dougherty & Company and Scull was changed, and that Dougherty & Company sold the diamond to Scull, and Scull then became a debtor to Dougherty & Company.

What evidence is there to prove that? Well, in the first place the evidence is contradictory. Mr. Dougherty, the head of this company, who said he owned it, testified that he did not sell the stone to Scull and even Mr. Manning's testimony, you may find upon reflection, in your opinion, may indicate rather meagre proof of a sale. They said that they wanted the diamond back and the reason was given to us by Mr. Dougherty. Mr. Manning said he had a conversation with Scull in which Scull told Manning that he had sold the diamond; that is what he was supposed to do as a factor and Mr. Manning testified that within ten days Scull was to bring in $2,585. On this card was written the words 'Charged 11-8-26,' and then Mr. Manning said he did not make any inquiries. He sat back and waited for ten days, as I understood him. Maybe you will find that constituted a sale and maybe you will not. If the plaintiff, of course, sold this diamond to Scull, when I say sold it I mean passed the title of the diamond to Scull and did that in the face of this agreement which he had with Scull who was to sell the diamond and give them this money, if you find, as I say, they passed this title to Scull then it was a sale to him and the debt

was due from him. In that instance the defendant should prevail."

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendant-Appellant.

Due service of a true copy of the within notice and grounds of appeal is hereby acknowledged, this 5th day of June, 1928.

WALTER A. BEERS,
Attorney of Plaintiff.

Complaint.

NEW JERSEY SUPREME COURT.

CHARLES T. DOUGHERTY CO., INC., a corporation, *Plaintiff,* *vs.* PHILIP KRIMKE, *Defendant.*	*Action at Law.* *In Replevin.*

PHILIP KRIMKE, the defendant in this cause, was summoned to answer unto Charles T. Dougherty Co., Inc., a corporation, the plaintiff therein, in an action at law upon the following complaint:

Complaint.

(Writ issued May 12, 1927.)

Plaintiff, Charles T. Dougherty Co., Inc., a corporation of the State of New York, having its principal office in the City of New York, County of New York, and State of New York, says:

FIRST COUNT.

1. On or about November 3, 1926, the plaintiff was and ever since has been the owner of an emerald-cut diamond weighing 5.17 carats.

2. On the aforesaid date, the plaintiff was and ever since has been entitled to the possession of the goods mentioned.

3. During the month of November, 1926, the defendant acquired possession of the diamond mentioned, issuing his pawn ticket No. 26811 therefor.

Complaint.

4. During the month of November, 1926, the defendant wrongfully acquired possession of the diamond mentioned.

5. On or about May 3, 1926, the plaintiff demanded possession of his goods aforementioned, which demand was refused.

Plaintiff demands possession of the said goods and $2,000 damages for their unlawful detention.

SECOND COUNT.

1. On or about November 3, 1926, the plaintiff was and ever since has been the owner of an emerald-cut diamond weighing 5.17 carats.

2. On November 3, 1926, the plaintiff delivered said diamond to Chester Scull, at New York City, New York, as agent for the firm of Scull & Thompson.

3. The said diamond was delivered upon a memorandum agreement signed by said Scull, as follows:

"This following goods for examination: It is understood and agreed that said goods shall remain the property of Charles T. Dougherty Co., Inc., and that no title is to pass, are subject to their order, and shall be returned on demand."

4. During the month of November, the said Scull, at Newark, N. J., pledged the said diamond owned by this plaintiff with the defendant for a loan of $700.

5. On or about May 3, 1926, the plaintiff demanded possession of the said diamond from the defendant, which demand was refused.

Plaintiff demands possession of the said goods and $2,000 damages for their unlawful detention.

Complaint.

THIRD COUNT.

1. On or about November 3, 1926, the plaintiff was and ever since has been the owner of an emerald-cut diamond, weighing 5.17 carats.

2. On the aforesaid date, the plaintiff was and ever since has been entitled to the possession of the goods mentioned.

3. On November 3, 1926, the plaintiff delivered said diamond to Chester Scull, at New York City, New York, as agent for the firm of Scull & Thompson.

4. The said diamond was delivered upon a memorandum agreement signed by said Scull, as follows:

"The following goods for examination: It is understood and agreed that said goods shall remain the property of Charles T. Dougherty Co., Inc., and that no title is to pass, are subject to their order, and shall be returned on demand."

5. Said Scull fraudulently obtained possession of the said diamond, in that he induced the plaintiff to deliver possession of his goods, relying upon the statement of said Scull that he had a customer to whom he wished to show the said diamond, to procure a purchaser therefor.

6. Said Scull fraudulently obtained possession of the said diamond as aforesaid, intending to pledge the same for a personal loan.

7. Said Scull thereby fraudulently obtained possession of the plaintiff's diamond, title to which was not divested from the plaintiff.

8. During the month of November, 1926, the said diamond was pledged with defendant for a loan of $700.

9. On or about May 3, 1926, the plaintiff demanded possession of the said diamond from the defendant, which demand was refused.

Plaintiff demands possession of the said goods and $2,000 damages for their unlawful detention.

FOURTH COUNT.

1. Plaintiff repeats the allegations contained in paragraph one of the third count.

2. Plaintiff repeats the allegations contained in paragraph two of the third count.

3. Plaintiff repeats the allegations contained in paragraph three of the third count.

4. Plaintiff repeats the allegations contained in paragraph four of the third count.

5. Plaintiff repeats the allegations contained in paragraph five of the third count.

6. Plaintiff repeats the allegations contained in paragraph six of the third count.

7. Plaintiff repeats the allegations contained in paragraph seven of the third count.

8. Plaintiff repeats the allegations contained in paragraph eight of the third count.

9. During the month of November, 1926, said Scull pledged the said diamond with the defendant for a loan of $700 who issued his pawn ticket No. 26811 therefor.

10. The defendant thereby wrongfully and fraudulently obtained possession of the said diamond, in that he knew the said Scull did not own the said diamond.

11. The defendant did not act in good faith in accepting the said goods for a pledge, in that he did not make a reasonable or sufficient inquiry, as to the ownership of the said diamond.

Complaint.

12. The defendant wrongfully, fraudulently and in bad faith accepted the said diamond for pledge, in that he had accepted goods from said Scull of the approximate value of $30,000.00 for pledge and should have known said Scull was not the owner thereof.

13. The defendant accepted wrongfully, fraudulently and in bad faith goods in the possession of said Scull, which the defendant knew or should have known were held by memorandum agreement, title to which was in others.

14. Defendant, on numerous occasions prior to the pledging of the plaintiff's diamond, accepted from Scull large and small lots of made-up jewelry and loose stones and goods, knowing that said Scull was not a dealer in the class of goods pledged except as a small side line to his business of dealing in colored stones.

15. Defendant, accepted for pledge, wrongfully, fraudulently and in bad faith, the diamond owned by plaintiff referred to in paragraph one, which defendant knew or should have known said Scull obtained fraudulently from plaintiff for the purpose of pledging with the defendant, in that defendant had accepted approximately seventy-five articles for pledge which said Scull did not own.

16. On or about May 3, 1927, the plaintiff demanded possession of the diamond so held by the defendant, which demand was refused.

17. Plaintiff demands possession of the said goods and $2,000.00 damages for their unlawful detention.

WALTER A. BEERS,
Attorney of Plaintiff.

(Filed May 16, 1927.)

Demand for Bill of Particulars.

Demand for Bill of Particulars.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CHARLES T. DOUGHERTY CO., INC., a corporation, *Plaintiff,* *vs.* PHILIP KRIMKE, *Defendant.*	*Action at Law.* *Demand for Bill of Particulars.*

PLEASE TAKE NOTICE that the defendant requires you to furnish him within ten days of the date of service hereof upon you of a true and complete copy of the agreement entered into between the plaintiff and Chester Scull, referred to in paragraph 3 of the second count.

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendants.

To
WALTER A. BEERS, Esq.,
60 Park Place,
Newark, N. J.

Due service of a true copy of the within bill of particulars is hereby acknowledged this 17th day of May.

WALTER A. BEERS.

Filed July 19, 1927.

EDWARD J. KELLEHER,
Clerk.

Bill of Particulars.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CHARLES T. DOUGHERTY CO., INC., a corporation, *Plaintiff,* vs. PHILIP KRIMKE, *Defendant.*	*Action at Law.* *Bill of Particulars.*

To Stein, McGlynn & Hannoch.

PLEASE TAKE NOTICE that the following is a true copy of the memorandum agreement entered into by the plaintiff and Chester Scull, as referred to in paragraph three of the second count of the complaint:

MEMORANDUM.

New York 11/3/26

Scull & Thompson
To Charles T. Dougherty Co. Inc., Dr.
Manufacturing Jewelers
7-11 West 45th Street No. 13090.

THE FOLLOWING GOODS FOR EXAMINATION: It is understood and agreed that said goods shall remain the property of CHARLES T. DOUGHERTY CO. INC., and that no title is to pass, are subject to their order, and shall be returned on demand.

Answer.

Emer. Cut. Dia.	2.22	888 —
" " "	5.17	500 ct.
	CHGD. 11/8/26	2585.
	Net cash	

C. A. Scull

WALTER A. BEERS,
Attorney of Plaintiff.

May 27, 1927.

Service of a copy of the within bill of particulars is hereby acknowledged.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

Filed June 4, 1927.

EDWARD J. KELLEHER,
Clerk.

Answer.

The defendant, answering the complaint filed herein, respectfully shows and alleges:

ANSWER TO FIRST COUNT.

1. The defendant has no knowledge as to the allegations of paragraph 1 of the first count, and leaves the plaintiff to make such proof thereof as it may be advised is proper.

2. He denies the allegations of paragraph 2.

3. He admits that in the month of November, 1926, he acquired possession of a diamond and issued his pawn ticket No. 26811 therefor, but does not know whether the diamond in question is that referred to in the complaint, and there-

fore leaves plaintiff to make such proof thereof as it may be advised is proper.

4. He denies the allegations of paragraph 4.

5. He admits the allegations of paragraph 5.

ANSWER TO SECOND COUNT.

6. The defendant has no knowledge as to the allegations of paragraph 1 of the second count, and leaves the plaintiff to make such proof thereof as it may be advised is proper.

7. He admits the allegations of paragraph 2.

8. He denies the allegations of paragraph 3 and alleges that the schedule "A" attached hereto, made part hereof, is a correct copy of said agreement.

9. He admits that during the month of November, 1926, Scull pledged a diamond for a loan of $700, but has no knowledge of whether said diamond is the property of plaintiff.

10. He admits the allegations of paragraph 5.

ANSWER TO THIRD COUNT.

11. The defendant has no knowledge as to the allegations of paragraph 1 of the third count, and leaves the plaintiff to make such proof thereof as it may be advised is proper.

12. He denies the allegations of paragraph 2.

13. He admits the allegations of paragraph 3.

14. He denies the allegations of paragraph 4 and alleges that the schedule "A" attached hereto and made part hereof is a correct copy of said agreement.

Answer.

15. He denies the allegations of paragraph 5.

16. He denies the allegations of paragraph 6.

17. He denies the allegations of paragraph 7.

18. He admits that said diamond was pledged but does not know whether it is the diamond in question.

19. He admits the allegations of paragraph 9.

ANSWER TO FOURTH COUNT.

20. The defendant has no knowledge as to the allegations of paragraph 1 of the fourth count, and leaves the plaintiff to make such proof thereof as it may be advised is proper.

21. He denies the allegations of paragraph 2.

22. He admits the allegations of paragraph 3.

23. He denies the allegations of paragraph 4 and alleges that the schedule "A" attached hereto and made part hereof is a correct copy of said agreement.

24. He denies the allegations of paragraph 5.

25. He denies the allegations of paragraph 6.

26. He denies the allegations of paragraph 7.

27. He admits that a diamond was pledged with him, but does not know whether such diamond is the property of plaintiff.

28. He admits that he issued his pawn ticket No. 26811 in connection with the loan referred to in paragraph 27 hereof.

29. He denies the allegation of paragraph 10.

30. He denies the allegation of paragraph 11.

31. He denies the allegation of paragraph 12.

Answer.

32. He denies the allegations of paragraph 13.

33. Defendant admits that from time to time miscellaneous jewelry and stones were pledged by said Scull with him.

34. He denies the allegations of paragraph 15.

35. He admits the allegations of paragraph 16.

36. He denies the allegations of paragraph 17.

FIRST SPECIAL DEFENSE TO ALL COUNTS.

37. If the diamond in defendant's possession is the same diamond referred to in plaintiff's complaint, defendant alleges that he acquired same in good faith, for value, and without notice of any interest of the plaintiff or any other person therein, and therefore, alleges that his right of possession is prior and paramount to that of plaintiff.

SECOND SPECIAL DEFENSE TO ALL COUNTS.

38. If the diamond in defendant's possession is the same diamond referred to in plaintiff's complaint, then this defendant alleges that the plaintiff delivered said diamond to said Scull knowing that said Scull would sell or otherwise dispose thereof, and permit said Scull to exercise all the rights of apparent owenrship thereof.

39. Defendant dealt with said Scull believing him to be the owner thereof, and without any knowledge of any interest which the plaintiff

might have therein, and advanced to said Scull, upon the security of said diamond, a large sum of money, accepting said diamond as security for the repayment thereof. Plaintiff failed and neglected for a long space of time to either demand from said Scull the return of said diamond, or the payment of the purchase price thereof. By reason thereof the plaintiff is estopped from alleging any title or interest in itself therein as against this defendant.

THIRD SPECIAL DEFENSE TO ALL COUNTS.

40. If the diamond in defendant's possession is the same diamond referred to in plaintiff's complaint, then this defendant alleges that the plaintiff on November 3, 1926, delivered possession thereof to Scull & Thompson under an agreement for the sale thereof by said plaintiff to said Scull & Thompson under the terms of which agreement the property in said diamond was to pass to the buyer at a subsequent time upon the conditions set forth in said agreement, a copy of which is annexed hereto, made a part hereof, and marked Schedule "A."

41. Said agreement constitutes a conditional sale as defined by the Statutes of the State of New Jersey.

42. Said agreement was not recorded in accordance with the terms of said statute.

43. The defendant was a pledgee of said diamond from said buyer, without notice of the provisions of said agreement, having accepted said diamond as security for the repayment of a loan made by him to said buyer.

Answer.

44. Under the terms and provisions of said statute, said agreement is void as against this defendant, and this defendant is entitled to possession thereof as against the plaintiff.

FOURTH SPECIAL DEFENSE TO ALL COUNTS.

45. If the diamond in defendant's possession is the same diamond referred to in plaintiff's complaint, then this defendant alleges that on November 3, 1926, plaintiff delivered said diamond to said Scull and Thompson and thereupon under the terms of a written memorandum, a copy of which is annexed hereto, made part hereof, and marked Schedule "A."

46. Said memorandum constitutes a conditional sale as defined by the Statutes of the State of New York, in such case made and provided.

47. Said agreement was not recorded in accordance with such statute.

48. The defendant was a pledgee of said diamond from said buyer, without notice of the provisions of said agreement, having accepted said diamond as security for the repayment of a loan made by him to said buyer.

49. Under the terms and provisions of said statute, said agreement is void as against this defendant, and this defendant is entitled to possession thereof as against the plaintiff.

FIFTH SPECIAL DEFENSE AS TO ALL COUNTS.

50. If the diamond in defendant's possession is the same diamond referred to in plaintiff's complaint, then this defendant alleges that said

Answer.

Scull was the factor and agent of the plaintiff, who in the State of New York, entrusted said Scull with the possession of said property for the purpose of sale.

51. This defendant advanced money to said Scull upon the faith of such possession, and without knowledge of any interest of the plaintiff therein.

52. By reason of the Statute of the State of New York commonly known as the Factor's Act, Section 43 of the Personal Property Law of said State, Consolidated Laws, Chapter 41, Subdivision 1, the said Scull must be deemed to be the true owner of said property so as to give valid title to this defendant to secure the advances made by him.

53. By reason of the foregoing, plaintiff is not entitled to possession of said property unless and until the advances made by this defendant to said Scull have been paid and satisfied.

SIXTH SPECIAL DEFENSE TO ALL COUNTS.

54. If the diamond in defendant's possession is the same diamond referred to in plaintiff's complaint, then this defendant alleges that on November 3, 1926, the plaintiff delivered said diamond to Scull and Thompson, as partners, under the terms of an agreement more particularly set forth in Schedule "A" attached hereto, and made part hereof.

55. In and by the terms of said agreement, it was provided by the phrase "chg. 11/8/26 net cash $2,585" that in the event that said diamond was not returned to the plaintiff, on or before

November 8, 1926, the transaction between the parties were to be regarded as a sale by the plaintiff to said Scull and Thompson of said diamond for the sum of $2,585 net cash.

56. Said diamond was not returned to the plaintiff on or before November 8, 1926, and the plaintiff thereupon elected to declare said transaction a sale by it to said Scull and Thompson.

57. By reason thereof, said Scull and Thompson became the owners of the legal title thereto.

58. Thereafter said Scull and Thompson by said Scull pledged said diamond with the defendant as security for a loan in the sum of $700, which loan has not been repaid.

59. By reason thereof said defendant is entitled to possession thereof as against the plaintiff.

Wherefore this defendant demands judgment be entered in his favor against the plaintiff, together with its costs in this behalf most wrongfully sustained.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

Answer.

"SCHEDULE A."

(5192
Telephone Bryant (5193

Memorandum

New York 11/3/26

SCULL & THOMPSON
To CHARLES T. DOUGHERTY CO., INC., DR.
Manufacturing Jewelers
7-11 West 45th Street,

No. 13090

THE FOLLOWING GOODS FOR EXAMINATION: It is understood and agreed that said goods shall remain the property of CHARLES T. DOUGHERTY CO., INC., and that no title is to pass, are subject to their order, and shall be returned on demand.

EMER CUT DIA	222	888
" " "	5.17 500 ct.	
	Chg. 11/8/26 2585	
	Net Cash	

C. A. SCULL
PLEASE CHECK WEIGHT OR COUNT UPON RECEIPT OF GOODS.

(Filed June 22, 1927.)

Reply.

Reply.

1. Plaintiff denies, as set forth in paragraph thirty-nine of the defendants answer, that he failed to demand possession of the diamond referred to and asserts that on November 3rd and each day thereof, to November 8th, he demanded the return of the diamond from Chester Scull.

2. The plaintiff denies, as set forth in paragraph forty-five, that schedule A is a copy of the memorandum agreement signed by Chester Scull for Scull & Thompson on November 3, 1926, and asserts that the bill of particulars sets forth the agreement in full with the exception of the notation "chgd 11826"; which was placed thereon on November 8, 1926.

3. Plaintiff denies the allegations in paragraph fifty-six of the answer.

WALTER A. BEERS,
Attorney for Plaintiff.

(Filed July 25, 1927.)

Judgment.

Judgment.

This case was tried before Judge Worrall F. Mountain with a jury to whom it was referred for trial at the Essex Circuit on May 7, 1928.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for possession of the goods described in the writ of replevin annexed to the complaint, and in the complaint.

Whereupon it is adjudged that the plaintiff Charles T. Dougherty Co., Inc., a corporation, do recover of the said defendant Philip Krimke the possession of the goods mentioned and described in the complaint together with its costs which have been taxed at the sum of Sixty-eight dollars and fifty-six cents.

Costs $68.56

Judgment entered May 12, 1928.

WM. S. GUMMERE,
C. J.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at Trenton, this ninth day of June, A. D. nineteen hundred and twenty-eight.

FRED L. BLOODGOOD,
Clerk.

(SEAL)

TESTIMONY.

NEW JERSEY SUPREME COURT.

Monday, May 7, 1928.

CHARLES T. DOUGHERTY CO., INC., *Plaintiff,* vs. PHILIP KRIMKE, *Defendant.*	*Action at Law.*

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appears Walter A. Beers.

For the defendant appears Stein, McGlynn & Hannoch (by Edward R. McGlynn).

(A jury is called and sworn.)

Mr. Beers: There is an error in the copy of the transcript marked Schedule "A." Where it says "C H G," that should read, "C H G D."

The Court: Is there any objection to the correction on page 12?

Mr. McGlynn: No, your Honor.

Mr. Beers opens for the plaintiff.

Mr. McGlynn opens for the defendant.

CHARLES T. DOUGHERTY, sworn in behalf of the plaintiff.

Direct examination by Mr. Beers.

Q Are you a member of the firm of Charles T. Dougherty, Inc.? A Yes, I am the sole owner.

Q Did you have a transaction with Chester Scull on November 3, 1926? A I did.

Q What was that transaction?

Mr. McGlynn: I object. If it is in writing the writing is the best evidence. There is a bill of particulars furnished with my demand and I understand that it was in writing.

(Argument.)

The Court: Whether there was fraud or not between Mr. Dougherty and Mr. Scull is collateral to this issue. If there was fraud between them in the making of this contract, the defendant who had not yet received the diamond, but probably knew of its existence, was not bound by any fraud between them, if there was the grossest kind. If between this gentleman and the man named Scull, there was an agreement in writing, whether there was fraud or not in that agreement does not seem to me is an issue, but he can tell us what happened when this diamond was given to Scull and what Scull gave back when he received the diamond.

Q Did you give to Mr. Scull a diamond on that date? A I did, sir.

Q When you gave him the diamond, is this the writing which you received? A Yes; that is his signature on it.

Q This ink writing, was that on the card at the time Mr. Scull signed? A No indeed, not until he came back.

Q Is that ink writing your writing? A No, that was made by the office manager.

Mr. Beers: I offer this card in evidence.

Mr. McGlynn: No objection.

(Same is marked Exhibit P. 1.)

(Exhibit P. 1 appears as Schedule A in the defendant's answer.)

Q What conversation did you have with Mr. Scull at the time he signed that card?

Mr. McGlynn: I object on the ground that the delivery of the stone was probably in writing, and under our cases an agreement cannot be changed by oral testimony.

The Court: Sustain the objection.

Mr. Beers: I suggest that the question is asked for the purpose of showing a fraudulent transaction between Chester Scull and Charles T. Dougherty, Inc. That where a question of fact is raised, declarations at the time of the transaction are admissible and where possession or ownership of the property is under inquiry, such declarations are received as explanatory of the possession.

The Court: That is true when the matter at issue rests directly on the fraud, but that is not the situation here. The defendant in this case was not a party to this

transaction that you are speaking of. It was a man named Scull and Charles T. Dougherty Company, Inc. Any transaction between them is collateral to this issue. This issue is between this plaintiff and the defendant. The plaintiff claiming, as I understand it, that the defendant took this diamond without notice that the diamond was not Mr. Scull's diamond, but was the diamond of the plaintiff or someone else. I do not see how fraud makes any difference.

Mr. Beers: I think I am a little ahead of my story on that question. I will withdraw the question.

Q Did you have any conversation with Mr. Scull after that card was signed? A I did. I—

Mr. McGlynn: Just a moment. That is the answer.

Q On what date, if you can recall? A On the same date. I tried to get him and I couldn't reach him; I got him the next morning.

Q Was the wording on that agreement, "Charged November 8, 1926," written on that card with your permission?

Mr. McGlynn: I object. I do not see what difference it makes if the man already says the handwriting was in the handwriting of his manager of the business, he being the sole owner. I do not see how the condition can be changed regarding a third person.

The Court: Sustain the objection.

Alfred Manning, direct.

ALFRED MANNING, sworn in behalf of plaintiff.

Direct examination by Mr. Beers.

Q Are you connected with Charles T. Dougherty Company, Inc.? A I am.

Q Is this your handwriting, "Charged November 8th"? A That is my writing.

Q What conversation did you have with Chester Scull, if any, with reference to what is written on that card?

Mr. McGlynn: I object. First, on the ground that I do not think we are bound by any conversation—

The Court: Sustain the objection.

Mr. Beers: At this time I would like to read a stipulation into the record made between myself and Mr. McGlynn. This is a stipulation of fact and in the stipulation Mr. McGlynn has reserved his right to object if your Honor should rule that the evidence is not material to the issue or that it is not binding on the defendant.

Our first stipulation is as follows, and this is the testimony of Chester Scull, as though such evidence had been given by Scull if he were personally present.

1. "The emerald cut diamond, Wt. 5.17 carats, which Chester Scull received from Charles T. Dougherty Company, November 3d, 1926, under memorandum agreement described in the bill of particulars, is the diamond which was pawned with Philip Krimke on the same day, for which he received ticket No. 26811, the stone not having

left Scull's possession from the time he received it from the Charles T. Dougherty Company until he delivered it to Krimke at Newark."

Mr. McGlynn: I have no objection to anything there.

Mr. Beers: That is for the purpose of establishing the identity of the stone. The second is this:

2. "Chester Scull received the stone from Charles T. Dougherty Company on representation that he had a customer interested in the purchase thereof."

Mr. McGlynn: My objection to that is it is absolutely immaterial, any reference that he received it from Charles T. Dougherty Company. The memoranda agreement in evidence contains the full contract between them.

Mr. Beers: Under that memoranda agreement, if that speaks for itself, title to that stone before it was given to Scull remained in the Charles T. Dougherty Company, because of the fact that the writing on that card, "Charged November 8, 1926," I wish to say that the title in that stone is not now in Chester Scull, but that it is a void transaction and the title still remains in the Charles T. Dougherty Company.

Mr. McGlynn: By reason of what? What made it void?

Mr. Beers: I do not have to have you admit that Chester Scull, through fraudulent statements induced Charles T. Dougherty Company to mark "Charge" on that card. That is, they did not have to take his word for it that he had sold it.

Mr. McGlynn: I say those representations between Charles T. Dougherty Company and Chester Scull are not binding and have no materiality here. The motive or reason has nothing to do with it. Mr. Dougherty handed him this stone and they made out this Exhibit P. 1.

Mr. Beers: The object of this stipulation is to show the fraudulent statements which induced the Charles T. Dougherty Company to mark "Charged" on that card. What the statements were is not material. The point is that whatever they were Mr. McGlynn admits they did induce the Dougherty Company to write "Charged" on that agreement. Mr. McGlynn as I understand it is only objecting to the fact that it is not binding and not material. The objection is that whatever they were Mr. McGlynn admits they did induce the Dougherty Company to write "Charged" on that agreement. The objection is that it is immaterial or irrelevant.

The Court: I do not see how it is material. This is the view I have of the case as I have listened to it: There was a transaction between Mr. Scull and Charles T. Dougherty Company. Dougherty & Company having a diamond which it owned, and which it had not yet given to anyone else that is, it had dominion over it. Now, if it chose to part with possession of the diamond to anyone else, if it gave it to some other person to do something with, if it gave it to Chester Scull, then Chester Scull was the agent for Dougherty & Company. If it gave it to that person without retaining any

control or without that person being in the employ of Dougherty & Company, why then it still and does retain the title to the diamond and there is no proof that the defendant in this case here knew anything about the arrangement so far as he is concerned at this time, even if Scull defrauded the plaintiff. So far as we know the negotiations between Scull and the plaintiff were a matter of perfect secrecy to the defendant; he did not know anything about these things at all.

Is it your contention that Scull was the agent of the plaintiff and if he was not, then under what theory are you going to replevin the diamond?

(Argument.)

The Court: I do not care so much about your cases as much as your logic. Dougherty Company owned the diamond. They picked out a man named Scull evidencing confidence in that man and they say to Scull, "Now, we are going to give you this diamond. The title is in us, but we will hand it to you." Now, Scull does not steal it, they pick him out because they had confidence enough in him to let him have it, and there is an agreement made between Dougherty Company and Scull that the diamond is to remain the property of Charles T. Dougherty and no title is to pass to him; he could have it. Of all that the world knows nothing, but Scull goes out and pledges this diamond and puts the money in his pocket and apparently keeps it.

Krimke, the defendant, did not put confidence in Scull, everyone else did not trust

Scull with this diamond. Dougherty Company picked Scull out and said, "I have confidence in you. Do as you want with it, but between us the title is in me." Mr. Scull goes out and under the common law there is a presumption that the one who has in his possession personal property owns it. Mr. Scull goes out with this diamond to Mr. X, who knows nothing about this arrangement and says, "Here is a diamond. I want to pledge it." If you can show that Mr. X had knowledge of some of this, then, I think you can make a case out of it, but it seems to me when an owner of a diamond, or the owner of any chattel, picks out a certain person to act as his agent and has a personal agreement with that person that the property shall remain in him, that is between the agent and the principal, and then turns the property over to the agent, and the agent goes out and sells the property and someone else goes off with the money, the right of action of the principal is against the agent. I may be wrong, and if you have any cases that can show otherwise, I would be very glad to see them. I would feel differently if Mr. Scull had stolen this diamond where he did not get any title. Then, manifestly, Krimke would not be joined in this case.

(Argument.)

The Court: If you can prove to me that Scull was not the agent of Dougherty & Company, I will agree with you. If he was their agent, however, I do not think I can. If he was not their agent, he was what you might call an independent contractor.

(Argument.)

The Court: The difficulty in this case was the action by the Court. My notion of the relation between Dougherty Company and Scull as that of principal and agent is what sent me off on a false scent. As I look at it now the relation between those two was that of bailor and bailee. Unaffected by any statute, if that is the case, that is, the Dougherty Company by this memoranda gave this diamond to Scull and that relationship existed then the law is clear as evidenced by a number of cases. First of all in the Cyclopedia of Law and Procedure, page 123, section 8 holds by the common law rule which still widely obtains that, "a factor has no power to pledge goods of his principal for his own debt and this is true although the pledgee has no notice of his character as a factor." To go back further than that we find that Kent's Commentaries, volume No. 2, page 626 holds, "Though a factor may sell and bind his principal, he cannot pledge the goods as security for his own debt, not even though there be the formality of a bill of parcels, and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of factor is no excuse." Then, we come to the United States Supreme Court and find in the case cited to me of Warner, *et al. v.* Martin, it is held on page 208 that, "A factor or agent who has power to sell the produce of his principal, has no power to effect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that

the pledgee is ignorant of the factors not being the owner. But if the factor has a lien upon the goods he may pledge them to the amount of his lien."

I think that is the situation in this case. I think I was mislead by my own notion of the relation between Charles T. Dougherty Company, Inc., and Scull as principal and agent. I think these cases cover the plaintiff's case. The Conditional Sales Act provides in 1919, page 461, it states in the first paragraph what an act is. The first section of the paragraph is not applicable.

I will allow that stipulation.

Mr. McGlynn: I object to that statement as immaterial and irrelevant.

The Court: Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: For the reason that in the first place it is collateral, but the plaintiff in this case, as I understand it, has the burden of proving its legal status. That is, the status between it and Scull and its status was that of bailor and bailee and it can establish that as part of its case.

Mr. McGlynn: I object. The relationship, if any, created between these people, was created by a written instrument, and an oral conversation should not be produced to change it.

The Court: It seems to me that if he was the bailee in this case that settles it.

Mr. Beers: I expect to show that the bailor and bailee continue to this date and

this mark on the card "charged" is erroneous.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Beers: The next stipulation No. 3 is, "That he, Chester Scull, took the stone from Charles T. Dougherty Company having no customer in view."

Mr. McGlynn: I object to that on the ground that whether Mr. Scull had a customer in view, or the motive that actuated him in getting the stone is immaterial and irrelevant and cannot vary the terms of the written agreement.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Beers: No. 4, "That Chester Scull, subsequent to November 3, 1926, informed Charles T. Dougherty Company the stone had been sold. That this statement was made to induce Charles T. Dougherty Company to charge its value to him."

Mr. McGlynn: It seems to me that to change the legal force and effect of that statute by charging that on November 3, 1926, and subsequent thereto, Chester Scull informed Charles T. Dougherty that the stone had been sold to induce the Dougherty Company to charge the value to him has no logic at all. The agreement speaks for itself and Mr. Dougherty testified that those words were put on there by his manager and it

does not make any difference whether Mr. Scull by artifice or trick, did anything else to make it of a different character. They cannot subsequently by his evidence make it so.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Beers: The last stipulation is "As between Chester Scull and Charles T. Dougherty Company there has been no sale of the stone to Scull."

Mr. McGlynn: I object on the ground it is absolutely immaterial.

The Court: It is very material to the plaintiff in this case.

I do not think I understand this situation. You said you agreed to stipulate something but apparently did not.

Mr. McGlynn: In order to avoid going up to Sing Sing Prison and taking Chester Scull's testimony, we stipulate that he would say these things and I would object to it.

Q Did you speak to Chester Scull on November 3rd, the day he received these goods from your firm? A Mr. Dougherty had a conversation with him in which he obtained—

Mr. McGlynn: I object. You were asked if you spoke to him.

The Court: You can answer that yes or no.

Q Did you speak to Mr. Scull? A I did not. I handed him the merchandise.

Q Did you speak to Chester Scull subsequent to November 3, 1926, regarding this transaction? A Prior to it?

Q After. A After November 3rd I had several—

Mr. McGlynn: I object. Can't that be answered yes or no?

A I spoke to him several times after he obtained the merchandise.

Q What was the conversation?

Mr. McGlynn: I object.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A I demanded the goods be returned and that was the conversation every time.

Q What did he say? A He had them sold.

Mr. McGlynn: I object.

The Court: I will admit it. You mean demanded the diamond?

The Witness: Yes; I had another customer for it.

Q His representation to you was that he had it sold? A He had it sold.

Q (By Mr. Beers.) What is the value of that stone?

Mr. McGlynn: The question is, "What was the value," not "What is."

Alfred Manning, cross.

Q What was the value of that stone on November 3, 1926?

The Court: Should you not prove what the value was as of the time you demanded it from the defendant? What was the value at that time?

A The memoranda stipulates $2,585 for the stone or $500 per carat.

Q Was that the value on November 3, 1926? A Yes, sir.

Q What was the value in May, 1927? A I think they sell at the same value.

Q The value today? A About the same.

Cross examination by Mr. McGlynn.

Q This was not the only transaction you had with Mr. Scull, was it? A The only one on November 3rd.

Q This was not the only business transaction your firm had with Mr. Scull? A On memorandum, yes.

Q How long had you known him? A How long have I known Chester Scull?

Q Not you personally; your firm. A I was with the firm eight years and we did business with Mr. Scull, buying from him.

Q During the entire eight years? A Yes, sir.

Q This was the first time you ever sold him anything in eight years? A To my knowledge, yes.

Q What did you say a few minutes ago that this was the first time you had anything on memorandum with him? Did you sell him otherwise? A We never sold him otherwise.

Q Why did you say this was the first thing you had on memorandum with him? A I said we purchased from him.

Q Before that you said this was the only memorandum transaction you had with him. A I don't believe I did.

Q Did you ever sell to him at all? A No.

Q This was the first time? A Yes, sir.

Q The same form of memorandum you use daily in your business? A Yes, sir.

Q When did you make the first demand of Mr. Scull? A One hour after he got it.

Q When did you make the next one? A I couldn't give you the exact date.

Q How long was it after the first one? A To my knowledge the first time I asked him was an hour after.

Q I asked you when was the second demand? A To my knowledge I cannot remember, but I phoned him consecutively every day for almost a week.

Q When did you make the third demand? A I don't remember.

Q It was before the one on November 8th? A Yes, sir.

Q How many did you make before November 8th? A I don't remember.

Q Did you make more than one? A Yes, sir.

Q You personally? A Yes, sir.

Q Did you make them personally of him or over the phone? A By the phone.

Q Did you ever see him after November 3rd? A Yes, sir.

Q When was the first you saw him after November 3rd? A As far as I remember, about three days after November 3rd I finally got in touch with him.

Q You mean personally, not by telephone? A Yes, sir.

Q Face to face? A Yes, sir.

Q The third time after November 3rd? A Yes, sir.

Q Did you make a demand then for the stone? A Yes, sir.

Q Did you see him again on November 8th? A Did I see him again on November 8th? I don't remember.

Q Did you see him the day you made this notation on this original memorandum? A Yes, sir.

Q Personally or by telephone? A Personally, I didn't give him a bill.

Q I didn't ask you anything about that. You are anxious to tell me something I do not want to know. Just answer the question. Now, have you the books of Charles T. Dougherty here? A No, sir.

Q After making this notation, "Charged November 8, 1926, $2,585," on here, was there any entry made in some book? A I don't remember. I wasn't the bookkeeper at that time.

Q Were you the manager? A Yes, sir.

Q You do not mean when you made a notation on here you do not know whether an entry was made? A I would have to look it up.

Q What was the practice of making entries from the memorandum to charge transactions? A Where a man promises to bring in a check within two or three days we do not make—

Mr. McGlynn: Will you read the question to the witness?

(Question read.)

A Must I answer it again?

Q Yes. You did not answer it before. A I thought I did. When we sell a ring to a customer with whom we always did business on memorandum we wait a day or so until he reports the sale and the terms are agreed upon and we make the charges in the book.

Q In what book? A In the sales book.

Q From the sales book it was posted to what book? A The ledger.

Q From the ledger the statement was sent out to him? A Yes, sir.

Q If the terms are agreed upon? A Yes, sir.

Q Do they vary in certain transactions? A Yes, sir.

Q Some being cash and some being time? A Yes, sir.

Q Do you ever take any notes? A We always take notes. Pardon me. I will take that back; we take cash many times, but on regular customers where the terms are agreed on we take notes.

Q Is there anything on this memorandum Exhibit P. 1 which indicates the nature of the terms? A Net cash.

Q That is in your handwriting? A In my handwriting.

Q So, when you said "CHGD" on here it means "charged," doesn't it? A Yes.

Q So, if it was being charged and the terms were net cash, what book would it go in? A When Mr. Scull brought in the cash we would enter it in the salesbook as a cash transaction.

Q In the meantime between the time when you charged it to your account and the time you brought in the cash what book would it be entered in? A None but that. That is the stock record.

Alfred Manning, cross.

Q This is the only record in your office it is in on a cash transaction? A Except on our inventory, that stone would appear on the sheet.

Q On your inventory sheet there would be a notation that the stone was out on memorandum, wouldn't there? A What?

Q I say, on the inventory sheet you would have a notation that the stone was out on memorandum? A No, sir.

Q How could you take an inventory when you have stock in and out? A We check up the cards.

Q Did you take a physical inventory of the stones not in your place? A Before we take the inventory we take our memorandum file and check it up on the inventory.

Q And the inventory shows that the stone was out on memorandum and not in your store? A No.

Q It couldn't be in both places? A No; that was the only record I had and I as manager of the firm knew the deal had not been completed yet, so I put it on the record, that someone took that out.

Q And that you had sold it yourself, as it says on here? A I had not sold it to him yet.

Q What does it say? A "Charged."

Q Whom did you charge it to? A In ten days Mr. Scull would have been charged for it, because he guaranteed to bring me a check for $2,585.

Q When and on what date? A Ten days from the 8th.

Q There is nothing on there? A The bill I would render him would be dated the 8th.

Q The deal, then, between Scull and your firm on November 8th was a net cash transaction? A Yes, sir.

Q For $2,585? A Yes, sir.

Q To be paid in ten days? A Yes, sir.

Q No discounts? A Nothing.

Q No interest? A No; he had sold it.

Q If he did not pay within ten days he would be charged for it? A No, sir. We went after him hammer and tongs for what we could find out about him.

Q That arrangement and deal was made between Scull and you on November 8th? A Yes, sir.

Q Net cash, $2,585? A Yes, sir.

Q To be paid within ten days? A Yes, sir.

Q Was that conversation in your office? A Yes, sir.

Q That conversation was had after you had again demanded that he return the stone? A Yes, sir.

Q You did not get the cash in ten days, did you? A No, sir.

Q Did you make any other entries? A Entries or inquiries?

Q Entries. A We made no entries at all; we made many inquiries.

Q You made inquiries? A Trying to get a hold of Mr. Scull, and I could not find him, and finally I found out that his office was locked up.

Q When did you find that out? A I can't remember the date; it was two years ago.

Q How long after November 8th did you find out that something was wrong with Scull? A I can't remember.

Q Two or three weeks? A I couldn't say, because I can't commit myself to something that I am not positive of.

Q It was sometime, wasn't it? A I couldn't say.

Charles T. Dougherty, direct.

Q Was it to be paid at the end of ten days? A Yes, sir.

Q In other words, you made no inquiries within that ten days? A No.

Q You were waiting for— A A check.

Q The time when he was to pay you for the stone which had been sold him for cash? A Yes, sir.

CHARLES T. DOUGHERTY, recalled in behalf of plaintiff.

Direct examination by Mr. Beers.

Q Was Chester Scull, on November 3, 1926, employed by you? A No, sir.

Q Who was he? A He was a dealer in precious stones with an office at 170 Broadway.

Q Prior to this transaction of November 3rd, had you ever before sold goods to him? A Never.

Q Had he sold goods to you? A Yes, sir.

Q What conversation did you have with Chester Scull at the time you delivered the diamond to him?

Mr. McGlynn: I object on the ground the agreement is in writing and it speaks for itself.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A I told him how I came into possession of this stone and was very anxious to get rid of it and

I would give it to him for what it actually cost to get the cash out of it. I had had it on another occasion out on memorandum with an importer for a customer in Washington and he put the stone in pawn in Washington and I got it back from Washington and when I gave it to Scull I told him I was very anxious to sell it and I did not want anything like that to happen again and would sell it to him for what I actually paid in cash for it.

Q Did you ask Scull to sell it for you or did he ask you if you had that type of stone?

Mr. McGlynn: I object.

The Court: Sustain the objection.

Q Did you have any conversation later that day, November 3, 1926, with Chester Scull? A Only over the telephone. I tried to get him, but I could not get him, but—

Mr. McGlynn: That answers the question.

Q When was the first time you heard from Scull after November 3rd, not Mr. Manning, yourself? A I couldn't tell you that. I tried to get him on the phone and I could not get him and I left word at his office to have him bring it right back.

Q When you gave that stone to Scull, under this agreement, did you sell it to him? A No, sir.

Mr. McGlynn: I ask that the answer be stricken out as a conclusion.

The Court: I will not strike it out.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: A man who owns a horse, a cow, a shotgun or a diamond ought to know whether he sold it or not.

Mr. McGlynn: The man who employs an agent is bound by an agent's actions.

The Court: This man was not an agent, he was a bailee.

Q That writing, "Charged, November 3, 1926," on that card, what does that mean?

Mr. McGlynn: I object. The writing speaks for itself.

The Court: I do not see that that makes a bit of difference.

Mr. McGlynn: I think it is very material, your Honor.

(Argument.)

The Court: I will admit the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q (Question read.) A That means he has reported he had sold the stone.

Q First of all, why was it marked on the card? A He came into the office and said that he had sold the stone and promised to bring in the cash for it.

Q Had he sold it? A I don't know.

Mr. McGlynn: I object.

The Court: Sustain the objection.

Mr. McGlynn: Withdraw the objection.

Q That is as far as the record has gone for that transaction? A As far as I know, yes.

Q If any entries would have been made on that transaction they would have been done by Mr. Manning or at his request? A Yes, sir.

Cross examination by Mr. McGlynn.

Q Mr. Manning was your general manager? A Yes, sir.

Q He, just a few minutes ago, as I understood it, stated that he had a conversation with Mr. Scull and had agreed to change this transaction involving this 5.17 carat diamond so that you would receive $2,585 in cash within ten days? A Yes, sir.

Q Is that what that entry was made for, to evidence that transaction? A That is the way I understand it.

Q Net cash means ten days? A Thirty days in our trade.

Q If Manning made a different arrangement with Scull for ten days net cash that would be satisfactory? A Thirty days is considered net cash.

Q If it come to any difference, if any note had been taken or any longer terms made that would be on the same card? A Yes, sir, marked "Settled by note."

Q So then, whatever your arrangement was with Scull between November 3rd and November 8th, up to the time Mr. Manning had this conversation with him, after that the situation changed and took a different form? A The situation changed an hour after when the man who had had it previous to that wanted it back.

Q I mean between you and Scull. The situation which was created when you delivered that

stone to him and took his receipt—this is his receipt (indicating)? A Yes, sir.

Q Remained the same up to November 8th when your man Manning had a talk with him and agreed to take $2,585 ten days cash? A No, my agreement was not changed, because I tried to get him on the phone that day and get it back.

Q Mr. Manning saw him on the 8th? A Yes, sir.

Q Mr. Manning and he had a conversation? A Yes, sir.

Q As the result of that conversation Mr. Manning agreed to take $2,585 in ten days from Mr. Scull for the diamond? A Yes, sir.

Q Scull was the principal member of a firm, wasn't he? A Scull and Thompson.

Q It was a partnership? A Yes, he was the head of the firm.

Re-direct examination by Mr. Beers.

Q Was "Net cash" written on there the day Scull received the diamond or was it written on there November 8th? A The day he got it.

Re-cross examination by Mr. McGlynn.

Q You mean by that if Mr. Scull had come into your place of business on November 3, 1926, and handed you $2,585 in cash that would have closed the transaction? A Yes, sir.

Q It was not necessary for him to bring the stone back with him if he gave you the cash? A No, sir.

Q If the sale was to someone else for $2,585 or more, all he had to do was to come back and hand you the cash? A Yes, sir.

Philip Krimke, direct.

Q If he sold it to anyone else for cash and paid you the $2,585, the transaction would have ended? A Yes, sir.

PHILIP KRIMKE, sworn in behalf of plaintiff.

Direct examination by Mr. Beers.

Q You are the defendant in this action, are you not? A Yes, sir.

Q You have been subpoenaed to bring the records of the transaction which you had with Chester Scull between January 1, 1926, and January 1, 1928. Have you that record with you? A I have. Here are the cards and here is the record.

Q How many are there?

Mr. McGlynn: I object. I do not see that it makes any difference.

The Court: Sustain the objection.

Q This list which you handed me is a complete list of all the transactions you had with relation to pawns with Chester Scull between January 1, 1926, and January 1, 1927?

Mr. McGlynn: I object.

Q Is that so?

Mr. McGlynn: I object.

The Court: Sustain the objection. Pick out the particular transaction, can't you, from that list.

Philip Krimke, direct.

Q Did you, on March 25, 1926, receive from Chester Scull for pawn, a diamond platinum ring?

Mr. McGlynn: I object.

Q Upon which you loaned him the sum of $500?

Mr. McGlynn: I object.

The Court: Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Beers: The object of this question is under the third count of my complaint.

The Witness: I did, if it is recorded there.

The Court: Is that the stone in question?

Mr. McGlynn: No.

The Court: What is the idea of asking about other stones. I thought this was the one you had in mind.

(Argument.)

The Court: I will read that count. You refer to the third count?

Mr. Beers: Yes, the third count just alleges the pawn by Scull and the fourth count brings in Mr. Krimke.

The Court: I will admit it.

(The list is marked Exhibit P. 2.)

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Philip Krimke, cross.

Q Between January 1, 1926, and January 1, 1928, this is a list of your transactions with him? A Correct.

Q What was Chester Scull's business to your knowledge? A Jeweler, broker.

Q What branch of the jewelry trade? A Well, there is so many of them in New York in the same line they go from house to house and obtain goods on memorandum and they take them out and try to sell them but they do not sell them, they return them, and as they do they pay for them, principally by paper over there, as I understand; I never had any transactions with them.

Cross examination by Mr. McGlynn.

Q Was there anything unusual to you in your business to have manufacturers or wholesalers of jewelery come to your place and pawn merchandise? A Very usual.

Q Very usual? A Oh, yes.

Q Is there anything unusual for a man in business in New York City to have twenty-five transactions with you? A No.

Q Did Scull himself redeem some of these purchases? A Oh, yes, mostly all.

Q He would come back and redeem them himself? A He would.

Q Did you make any inquiry with regard to Scull after your first one or two transactions? A I did.

Q Whom did you make inquiry of for him? A After the second article had been pledged I called up the police department.

Q Here in Newark? A Yes, sir.

Q Who took charge of the inquiries for you? A First, the record bureau and then Lieutenant

Philip Krimke, re-direct.

McMahon, who is the man who attends to the business in New York for the Newark department.

Q Did you get his report before you had any further transactions? A Yes, sir.

Q Did you get that report before you had this transaction which involved this particular stone? A Yes, sir.

Re-direct examination by Mr. Beers.

Q When you say there was nothing unusual about the dealer pawning these goods, do you mean an owner or do you mean merchants in the trade who receive others goods on memorandum? A We assume they are the owners.

Q You know that merchants will take the manufacturers goods and represent themselves as the owner and pawn them, don't you?

Mr. McGlynn: I object.

The Court: Sustain the objection.

Q Have you, in your time in business, had goods pawned by a merchant in the trade who held the goods on memorandum?

Mr. McGlynn: I object.

The Court: Sustain the objection.

William J. McCabe, direct.

WILLIAM J. McCABE, sworn in behalf of the plaintiff.

Direct examination by Mr. Beers.

Q You are connected with the record bureau of the Police Department of the City of Newark? A Yes, sir.

Q You have the record of the pawns of Chester Scull with Philip Krimke between January 1, 1926, and January 1, 1928? A Yes, sir.

Q Are these cards the records you have charge of showing the report by Mr. Krimke of goods which he received? A Yes, sir.

Mr. Beers: I offer these cards in evidence.

Mr. McGlynn: I object. I cannot see the relevancy of cluttering this record up with police cards made down at the City Hall.

Mr. Beers: I want to show the number of pledges Mr. Krimke had taken from Chester Scull between those dates.

Mr. McGlynn: How has that any relevancy to the fraud?

The Court: Those simply show the goods that were pledged?

Mr. Beers: Yes, your Honor.

The Court: What proof is that that Scull is or is not the owner of the goods? That merely proves that he pledged them.

(Argument.)

Mr. Beers: I think it is evidence if I can show that Mr. Krimke received goods to the value of $100,000 on which he loaned $40,000 over a period of nine months—I can not get any evidence of a direct admission by Mr.

Krimke or Mr. Scull of any fraudulent act, but it is evidence from which a jury might infer that Mr. Krimke knew or should have known that this particular diamond was not owned by Chester Scull when he accepted it for pledge.

The Court: How would he have obtained that information?

(Argument.)

Mr. Beers: I say it is up to the jury to determine that.

The Court: I thought you were going to prove this was some knowledge Mr. Krimke had. I do not think it is evidential.

I will sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Beers: I offer the records of the bureau to contradict and test the credibility of Mr. Krimke whose statement is that the record which he has given me is a complete record of the transactions between himself and Chester Scull from January 3, 1926 to January 3, 1928.

Mr. McGlynn: I object. Nothing has been shown that they do not agree and they speak for themselves.

The Court: I will sustain the objection but not on the grounds you give.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Have you charge of these records?

Mr. McGlynn: He said so twice.

Mr. Beers: Is it your Honor's idea that the question of fraud cannot go to the jury?

The Court: I do not think you have proved any fraud as yet.

Mr. Beers: On the naked fact of the amount of goods that were pledged over those months.

The Court: I do not think that is fraudulent.

Mr. Beers: I will withdraw Mr. McCabe for the time being and recall Mr. Krimke.

PHILIP KRIMKE, recalled in behalf of the plaintiff.

Direct examination by Mr. Beers.

Q Is that your handwriting (indicating)? A No, sir.

Q These cards are stamped from Philip Krimke? A My clerks do that.

Q Did you submit them to the record bureau or office of the City of Newark? A We usually do that.

Q Look at them. Are they records of transactions which you had with Chester Scull?

Mr. McGlynn: Your Honor has already ruled this out. I do not see why we should waste time on this at this time.

The Court: You may answer that question.

A I believe they are.

Philip Krimke, direct.

Q I show you a record of a pledge on December 22, 1926, $350. Is that on the list which you gave me?

Mr. McGlynn: I object for two reasons. First, because the record of the City of Newark is not the best record because he has the original witness here and second he cannot impeach his own witness.

The Court: It is not impeaching him, it is perhaps sustaining his testimony.

I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A These records my manager takes from the cards. There may be more cards on record.

Q Does this report show it there? A No, that is the fault of the bookkeeper. I can send for it if you want it.

Q Does the pawn you made on that date show on that record? A Yes.

Mr. Beers: I offer these cards in evidence.

Mr. McGlynn: I object to them as immaterial and irrelevant.

The Court: I do not see how they are.

Mr. Beers: I will withdraw the offer, the answer to the question is sufficient. My offer is to show the difference between the records of the City of Newark containing a list of the pawns and the list submitted by Mr. Krimke. I am put to the trouble of sifting through these cards to check them out inasmuch as they are not admitted in evidence.

Q I show you a record of a pledge for $750 on October 4, 1926, and I ask you if you have given me a record of that? A I believe that card is in the lawyer's office.

Q It is not on the list you gave me? A No, it is in dispute.

Q I show you a record of a pledge made August 10, 1926, for $625, and I ask you if you submitted that as a record? A These were taken from the duplicates.

Q Is that one I show you in the reports? A It is not on that list.

Q There are two pledges on August 10, 1926. A We hurriedly went through that on Friday and the duplicates are made by the police.

Q I show you the record of a pledge July 28, 1926, for $700 and I ask you if that was recorded on your list? A That would be in the same position as the others.

Q It is missing from the list? A Yes, sir.

Q I show you the record of a pledge dated July 27, 1926, for $800 and I ask you if that is recorded on your list? A That is the same thing; the duplicates are all there.

Q I show you the record of a pledge made on July 21, 1926, for $700 by check to Scull and I ask you if that is on the list? A No.

Q It is not reported? A No.

Q I show one of May 27, 1926, pledge of Chester Scull for $500, and I ask you if that is recorded on the list? A No, sir.

Q I show you a pledge dated November 3, 1926, by Mr. Scull, of $1,100, and I ask you if that was shown on the list? A Yes. These are duplicates from my card.

The Court: When you have proven all this, or proved exactly what he did have,

what do you expect to profit by it? Suppose this man had dealt with Scull for five years, I do not still see how, unless you are going to prove something else, that the mere proof of that means anything. If you cannot prove anything but that I do not see how it is material.

(Argument.)

Mr. Beers: It seems to me that this question should arise, if as a matter of law Scull had a right under the Conditional Sales Act of the Factor's Act of New York, which Mr. McGlynn contends applies, if under those acts a pawnbroker is in the position of a bona fide purchaser in good faith, that is one who was led to believe or had reasonable cause to believe that Scull had title to these goods, then, I say that the evidence is admissible, not necessarily to show fraud, but to show bad faith, or to show if he does not come within that rule of being a pawnbroker, that anyone who buys in good faith, being led to believe that Scull was the owner and there are those number of pledges—

The Court: This is based on a theory that the defense is going to try to interpose the statutes of New York?

Mr. Beers: Yes.

The Court: Then, it should be by way of rebuttal, because suppose they did not, then, this is left hanging in the air. You are anticipating the defense, it seems to me.

Mr. Beers: In other words, until proof of such statute is in evidence either from New York or New Jersey, I should not attempt to prove this?

The Court: Do you not think you should not?

Mr. Beers: Yes.

The Court: If they come in and attempt to prove this agreement was made in New York, first they have to prove it; secondly, it shall be determined by the statute of the State, but you are not meeting anything now.

Mr. Beers: I will withdraw Mr. Krimke at this time.

At one o'clock P. M. the Court takes a recess of one hour.

AFTER RECESS.

PLAINTIFF RESTS.

Mr. McGlynn: May I make a motion with reference to Count No. 4?

The Court: Yes.

Mr. McGlynn: It seems to me that Count No. 4 has not been proven and should be dismissed.

The Court: I will grant the motion.

Mr. McGlynn: I respectfully move for a non-suit on the other counts, on the ground that as the record now stands by virtue of the Conditional Sales Act of the State of New Jersey, the plaintiff is not entitled to a verdict.

The Court: I will deny that motion for the reason I gave when I decided the point of law that arose at that time with the cases I recited.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

JOHN J. McMAHON, sworn in behalf of defendant.

Direct examination by Mr. McGlynn.

Q You are connected with the Newark Police Department? A I am, yes.

Q In what capacity? A Lieutenant of police.

Q Have you any particular line of work you have been assigned to for some time? A Yes, in the pawnshops of New York.

Q At the request of Mr. Philip Krimke of this city, did you make an investigation for him concerning one Chester Scull?

Mr. Beers: I object to the question as immaterial and irrelevant.

Mr. McGlynn: I think it is in view of the fact the fourth count is out.

Mr. McGlynn: With the consent of my opponent, instead of having some one here to prove the New York statute, he has permitted me to read into the record the two acts which I wish to make part of my case.

Mr. Beers: I admit the statute, but not unless it applies to the law in this case; that is, I do not want him to prove the statute if it is admissible, but if the law does not apply to this case, and I say it does not under our Marvin Safe case, I do not want it read into the evidence.

Mr. McGlynn: My offer is at this time to prove Section 43 of Personal Property

Law, Consolidated Laws, Chapter 41, Subdivision 41 of the New York statute known as the Factor' Act.

Mr. Beers: I object to this being offered in evidence on the ground the New Jersey law applies.

The Court: How does that apply? That may be the law of New York City or New York State, but the conversion of this replevin took place in the State of New Jersey?

Mr. McGlynn: Your Honor has already in the plaintiff's case indicated that you have construed the contract between Chester Scull and Charles T. Dougherty Company as a bailment, if it was true the contract was made in New York.

The Court: Yes.

Mr. McGlynn: The law of New York with reference to the contract is admissible.

The Court: It would seem so as far as the pleadings and proof are concerned, so far as that contract is concerned.

(Argument.)

The Court: This law reads, among other things, "Every factor or other agent entrusted with the possession of any merchandise for the purpose of sale shall be deemed to be the true owner, so far as to give validity to any contract made by such agent with any other person for the sale or other disposition of such merchandise." But, Mr. McGlynn, the State of New York cannot pass a law operative on the State of New Jersey, or any of the citizens of this State, but that is what you are trying to read into this contract. You are trying to have me say be-

cause the Legislature of New York State has passed a statute it shall give validity to a contract which you want to enforce in this State.

(Argument.)

The Court: I think the contract between Charles T. Dougherty Company and Chester Scull absolutely rests on this. I think you are right, as far as you go, but when Chester Scull came out of the State of New York and came over here he lost the benefit of that statute. That is my theory so far as the relation between Dougherty Company and Scull is concerned. I think you are quite right that act is effective between them.

Mr. McGlynn: I understand you are ruling on my offer to prove this act as what, your Honor?

The Court: I am inclined to admit the act, but I am going to construe it, as I say. I will admit the act for the purpose of construing the contract which existed between the Dougherty Company and Chester Scull.

Mr. McGlynn: I will read it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. McGlynn: "Every factor or other agent entrusted with the possession of any bill of lading, custom house permit or warehouseman's receipt for the delivery of any merchandise, and every such factor or agent not having the documentary evidence of title, who shall be entrusted with the possession of any merchandise for the purpose of sale, or has the security for any advances to be

made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of this merchandise and any account receivable or other chose in action created by sale or other disposition of such merchandise, or any money advanced for negotiable instruments or other obligation in writing given by such other person upon the face thereof.''

I now offer to prove the Conditional Sales Act of the State of New York found in the Laws of 1920, Chapter 635.

The Court: What has that to do with this case?

Mr. McGlynn: The two acts are uniform and it is my contention he did not comply with the provisions of the New York Act by recording his agreement in New York and judicial notice was taken that he did not record the agreement here.

The Court: Where was the conditional sale?

Mr. McGlynn: The original was in New York between Dougherty Company and Scull. That is my instruction.

The Court: I will not permit that to be put in evidence.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. McGlynn: Then, there is an admission that this agreement was not recorded either in New York or New Jersey?

Mr. Beers: Yes.

Motion for Direction of a Verdict.

Mr. McGlynn: It is admitted that the contract was not recorded either in New York or in New Jersey?

Mr. Beers: Yes.

DEFENDANT RESTS.

Mr. McGlynn: There being no rebuttal, I desire to make a motion for the direction of a verdict in favor of the defendant, first, on the ground that this contract, the one in New Jersey, resulted in the defendant getting good title, because the original contract between Dougherty Company and Scull was not a bailment. To the defense of bailment, looking at "Words and Phrases, Second Series," it is found that a contract of bailment seems to have in it the idea of the return to the bailor of the specific article bailed, and that its distinguishing feature between the bailment and the sale is the fact that there is this obligation to return the specific article. In that connection I call the Court's special attention to Mr. Dougherty's testimony in which he said this man did not have to return the specific article; all he had to do was to report the sale of the article and give him a check for $2,585.

The Court: Yes, but suppose he did not give him the check?

Mr. McGlynn: Then, it is simply a debtor and creditor, the same as any other merchant. The fact that this is not a bailment but seems to be a conditional bill of sale has been passed on by the Court where a contract almost identically similar to the one before your Honor was concerned, the case of Kupchick *v.* Levy, 187 New York Supplement 192.

(Argument.)

The second ground of my motion is this. There are facts before your Honor now which are not disputed and for the purposes of this motion I admit are absolutely so. Mr. Manning, the manager of the plaintiff company has testified, that he, five or six days after the original transaction, which your Honor can construe for the purpose of this motion as a bailment or conditional sales or anything else, he made a demand for the return of this stone, and at that time made a new contract with Mr. Scull under the terms of which Mr. Scull was to pay the plaintiff $2,585 in cash or within ten days from date. Mr. Manning was the manager of the plaintiff's business and had absolute authority according to Mr. Dougherty to make such a contract. In fact he put on the original entry in this transaction between Chester Scull and the Charles T. Dougherty Company, "Charged, November 8, 1926. Net cash," which he said meant the payment of the amount within ten days. Irrespective of what the contract was before that, at that moment there came into being a new legal situation which put the title to this diamond in Mr. Scull; fraudulent, crooked, at present a convict, makes no difference. That is the legal situation that was created by that agreement and it seems to me it is a matter to be passed upon by this court and not by the jury and I respectfully urge a verdict be directed in favor of the defendant.

The Court: I will deny the motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: I am going to leave this fact to the jury, that if the original status was changed and a sale was made by Dougherty & Company

to Scull, changing their relation from bailor and bailee to debtor and creditor, that then the judgment should be for the defendant.

That is denied by Mr. Dougherty and was denied by Mr. Manning in one breath and there is some evidence of it in another. Whether it was an explanation of what took place is for the jury to determine and not for me to determine.

I will deny your motion and you may have an exception.

Mr. Beers: May I first make a motion for the direction of a verdict before we sum up in favor of the plaintiff on the ground that the identity of the goods has been established or admitted; the title has been proven by Charles T. Dougherty Company and the defendant admitted that there has been no sale between Scull and Dougherty and that therefore there is nothing for the jury to determine and there should be a direction of a verdict in favor of the plaintiff.

The Court: I will deny the motion.

Mr. McGlynn sums up for the defendant.

Mr. Beers sums up for the plaintiff.

CHARGE.

The Court charges the jury as follows:

MOUNTAIN, *J:*

The plaintiff in this case is a corporation, Charles T. Dougherty Company, Inc., and the defendant is Philip Krimke. It would appear from the testimony that the plaintiff bought and sold precious stones which was carried on in addition to the business of manufacturing jeweler.

On the third day of November, 1926, it owned, or assigned by this memorandum which I hold in my hand and which is marked Exhibit P. 3, to Scull and Thompson, but particularly to the former a 5.17 carat diamond valued at $2,585 and the memorandum which they kept and was signed, as I understand it by Chester A. Scull, had these words upon it, "It is understood and agreed that the goods shall remain the property of Charles T. Dougherty Company, Inc., and no title shall pass, subject to their order and shall be returned on demand." This is the familiar consignment on memorandum. They are not always worded the same way, but it is the sort of consignment I think particularly used in the jewelry trade, to agents or factors or individuals who think they can sell what someone else owns on the market.

After this man Scull had obtained this stone he brought it over to New Jersey and pledged it with the defendant and the defendant allowed him, at the time it was pawned, a certain amount of money for it. It now appears that Scull, I presume from what counsel has said, is sequestered in Sing Sing Prison and the plaintiff has brought this action against the defendant which is for replevin. It wants this diamond back.

Charge to Jury.

The issue that I am going to leave to you is this: At the time that Scull took this diamond from the Charles T. Dougherty Company, he was what we know in law as a factor. A factor is an agent who as a business sells merchandise assigned or delivered to him, by or for his principal. He is usually entrusted with the possession, control and disposal of the merchandise. He may even sell it in his own name or he may sell it in the name of his principal, but he cannot pawn it or pledge it for his own account; this is true even if the man with whom he pledges it has no notice of his character as the factor, as in this case with Scull. Now, when Scull left the Dougherty Company office with this diamond he was a factor and whether he remained one or not I am going to leave to you. If he did, your verdict must be for the plaintiff.

The defendant insists that by a conversation held between Mr. Manning the office manager of the plaintiff company and Scull, that the statuts of factor and principal existing between Dougherty & Company and Scull was changed, and that Dougherty & Company sold the diamond to Scull, and Scull then became a debtor to Dougherty & Company.

What evidence is there to prove that? Well, in the first place the evidence is contradictory. Mr. Dougherty, the head of this company, who said he owned it, testified that he did not sell the stone to Scull and even Mr. Manning's testimony, you may find upon reflection, in your opinion, may indicate rather meagre proof of a sale. They said that they wanted the diamond back and the reason was given to us by Mr. Dougherty. Mr. Manning said he had a conversation with Scull in which Scull told Manning that he had sold the

diamond; that is what he was supposed to do as a factor and Mr. Manning testified that within ten days Scull was to bring in $2,585. On this card was written the words "Charged 11-8-26," and then Mr. Manning said he did not make any inquiries. He sat back and waited for ten days, as I understood him. Maybe you will find that constituted a sale and maybe you will not. If the plaintiff, of course, sold this diamond to Scull, when I say sold it I mean passed the title of the diamond to Scull and did that in the face of this agreement which he had with Scull who was to sell the diamond and give them this money, if you find, as I say, they passed this title to Scull then it was a sale to him and the debt was due from him. In that instance the defendant should prevail.

In conclusion, I will say this, that so far as the defendant is concerned, if Scull was the factor, as I have defined it, then, the defendant had the right to the possession of this diamond against all the world except this plaintiff, except the owner of the diamond and, the plaintiff, if that was the case, can successfully recover its possession, if you find that to be the case.

If you find a verdict for the defendant it would be reflected by a judgment rendered on contrary facts. If you find the plaintiff is entitled to your verdict, then your judgment should be for the possession of this diamond in favor of the plaintiff.

(The jury retires.)

Mr. McGlynn: I respectfully pray an exception to that part of your Honor's charge which began, "At the time Scull took this diamond from Dougherty Company as the factor or

agent," and reading down and finishing up, "That he cannot pawn or pledge it."

Exception noted as ground of appeal.

Mr. McGlynn: I also pray an exception to that part of your charge where your Honor said that the evidence is complicated, even in Mr. Manning's testimony you may find that on reflection it contained only meager testimony.

Exception noted as ground of appeal.

Mr. Beers: I respectfully pray an exception to that part of your Honor's charge which charges that the jury might find that after the ten days had elapsed from November 8th that a sale might have been consummated by Scull and Dougherty.

Exception noted as ground of appeal.

Mr. Beers: I respectfully pray an exception to that part of the charge which charges that the jury may find that the Dougherty Company had sold the diamond to be replevined to Chester Scull.

Exception noted as ground of appeal.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

CHARLES T. DOUGHERTY CO., INC., a corporation, *Plaintiff-Respondent,* *vs.* PHILIP KRIMKE, *Defendant-Appellant.*	*Action at Law.* *In Replevin.* *On Appeal from New Jersey Supreme Court, Essex County.*

BRIEF FOR DEFENDANT-APPELLANT.

Facts.

This is an appeal from a verdict in favor of the plaintiff-respondent in an action of replevin tried in the Supreme Court (Essex Circuit) before Honorable Worrall F. Mountain and a jury.

Plaintiff, who was a dealer in precious stones in New York City, instituted this action to recover an emerald-cut diamond, weighing 5.17 carats, valued at $2,585.00. The record discloses that the plaintiff, being the owner of the diamond just described, delivered it in New York City on November 3, 1926, to one Chester Scull, a member of a partnership known as Scull & Thompson, apparently engaged in the business of selling diamonds, etc. (State of Case, p 24, ll. 1 to 40.)

At the time and place of delivery, to wit, in in New York City, the following contract was entered into between the plaintiff and Scull (State of Case, pp. 11-12):

MEMORANDUM.

New York, 11/3/26.

Scull & Thompson,
To Charles T. Dougherty Co., Inc., Dr.
Manufacturing Jewelers
7-11 West 45th Street. No. 13090

The Following Goods for Examination: It is understood and agreed that said goods shall remain the property of CHARLES T. DOUGHERTY CO., INC., and that no title is to pass, are subject to their order, and shall be returned on demand.

Emer. Cut Dia. 2.22 888—
" " " 5.17 500 ct.
CHGD. Net Cash 11/8/26 $2585.
C. A. Scull

At the time the above contract was signed, the words "Net Cash" were written on it. (State of Case, p. 47, l. 20.) Later on, November 8, 1926, the notation "*CHGD.* 11/8/26 $2585" was placed on the agreement by the manager of the plaintiff's business. (State of Case, p. 27, l. 11.)

On November 3, 1926, Scull came to Newark and pledged with the defendant Krimke, the diamond in question and received on said pledge from the defendant, the sum of $700. (State of Case, p. 27, ll. 33 to 40.) On November 8, 1926, the plaintiff having demanded from Scull the return of the diamond and having been informed by Scull that he had sold it, made the notation indicated above, to wit: "*CHGD.* 11/8/26 $2585" and therefore, according to the argument made by the defendant, changed whatever relationship legally existed into an absolute sale, and plaintiff thereupon became a creditor of Scull for the sum of $2585.00.

The learned judge who presided at the trial created considerable confusion in the minds of the jury by the different viewpoints he took of

the legal aspects of the case, as will be shown by the following statements:

(1) On pages 29 and 30—The Relationship of Principal and Agent:

> "Now, if it chose to part with possession of the diamond to anyone else, if it gave it to some other person to do something with, if it gave it to Chester Scull, then Chester Scull was the agent for Dougherty & Company." (State of Case, p. 29, ll. 35 to 39.)

(2) On page 31—The Relationship of Independent Contractor:

> "If you can prove to me that Scull was not the agent of Dougherty & Company, I will agree with you. If he was their agent, however, I do not think I can. If he was not their agent, he was what you might call an independent contractor." (State of Case, p. 31, ll. 35 to 40.)

(3) On page 32—The Relationship of Bailor and Bailee:

> "The difficulty in this case was the action by the Court. My notion of the relation between Dougherty Company and Scull as that of principal and agent is what sent me off on a false scent. As I look at it now the relation between those two was that of bailor and bailee." (State of Case, p. 32, ll. 6 to 12.)

(4) On page 66—The Relationship of a Consignment on Memorandum:

> "This is the familiar consignment on memorandum." (State of Case, p. 66, ll. 25 and 26.)

(5) On page 67—The Relationship of Principal and Factor:

> "The issue that I am going to leave to you is this: At the time that Scull took this diamond from the Charles T. Dougherty Company, he was what we know in law as a factor. A factor is an agent who as a business sells merchandise assigned or delivered to

him, by or for his principal.'' (State of Case, p. 67, ll. 4 to 10.)

(6) Also on page 67—The Relationship of Principal and Debtor:

''The defendant insists that by a conversation held between Mr. Manning the office manager of the plaintiff company, and Scull, that the statutes of factor and principal existing between Dougherty & Company and Scull was changed, and that Dougherty & Company sold the diamond to Scull, and Scull then became a debtor to Dougherty & Company.'' (State of Case, p. 67, ll. 22 to 30.)

(7) On page 68—The Relationship of a Sale:

''Maybe you will find that constituted a sale and maybe you will not. If the plaintiff, of course, sold this diamond to Scull, when I say sold it I mean passed the title of the diamond to Scull and did that in the face of this agreement which he had with Scull who was to sell the diamond and give them this money, if you find, as I say, they passed this title to Scull then it was a sale to him and the debt was due from him.'' (State of Case, p. 68, ll. 10 to 20.)

The defendant contended that the question of whether there was or was not a sale under the facts, there being no dispute, should have been determined by the trial court, but the question was left to the jury.

Defendant strenuously insisted at the trial that the delivery of the stone under the contract between plaintiff and Scull in the State of New York was most important in view of two New York statutes, both of which were offered in evidence by the defendant, to wit: First, Factor's Act, Section 43, Personal Property Law, Consolidated Laws, Chapter 41, Subdivision 41. This act was admitted in evidence. Secondly, the Conditional Sale Act of New York, Laws of 1920,

Chapter 635. This was not permitted to be read into the record. Under either one of the New York statutes just quoted, it was respectfully urged that a person dealing with Scull, whether it was in connection with a purchase of the diamond in question or a pledge of it, received a title and a possession which was superior and paramount to that of the plaintiff.

Defendant's motion for a non-suit and a verdict were both denied by the trial court.

The entire case was left by the learned trial judge to the jury with this extremely narrow issue:

> "Now, when Scull left the Dougherty Company office with this diamond he was a factor and whether he remained one or not I am going to leave to you. If he did, your verdict must be for the plaintiff" (State of Case, p. 67, ll. 17-21).

Defendant not only believes that he is entitled to a reversal of the judgment now under appeal, but also that the determination of this court will once and for all establish the fact that he is entitled to retain possession of the diamond as against the plaintiff.

This was a most interesting case to prepare for trial, to actually try, and also to prepare for argument on appeal. The trial judge's rulings with regard to the various legal aspects of the relationship existing between the parties and Scull during the trial of the case, are not detailed as an unfounded criticism, but merely as an indication of the extremely interesting problems which the case itself affords. Legal reasons for a reversal of the verdict in the court below will be presented in the following order:

1. Errors in the admission of testimony;

2. Error in charge to the jury;

3. Error in refusal to permit Conditional Sales Act of New York to be placed in evidence, and refusal to non-suit or direct verdict in favor of the defendant.

ARGUMENT.

POINT 1.

The Trial Court erred in rulings on evidence, which errors were substantial and had a material effect in the verdict of the jury.

The errors in admission to testimony which are complained of and which will be presented under this point are enumerated in the Grounds of Appeal as Nos. 1 to 5 inclusive.

It will be observed that a written stipulation had been entered into between the attorneys for the respective parties so as to avoid the necessity of taking the testimony of Chester Scull who was at the time of the trial an inmate of Sing Sing prison in New York.

Counsel for the defendant had reserved in the stipulation the right to object to the materiality of the testimony (State of Case, p. 27, ll. 21 to 28).

The first statement in the stipulation to which objection was made, was as follows:

> "Chester Scull received the stone from Charles T. Dougherty Company on representation that he had a customer interested in the purchase thereof."

The Court will notice that there are between five and six pages of the record consumed in the argument as to the admissibility of this testimony before the trial judge ruled it admissible

(State of Case, pp. 28 to 33). Apparently plaintiff's contention at the trial as to the admissibility of this testimony was based on the argument that Scull, having represented to the plaintiff that he had a possible customer for the diamond in question and the plaintiff was going to prove that Scull had no customer in view and that consequently that made the original transaction void and therefore title to the diamond at all times remained in the plaintiff.

Defendant strenuously urged at the trial and again contends that any representation made by Scull to the plaintiff to induce it to surrender possession was absolutely immaterial and not binding on the defendant, because, no matter what happened or what was said between Scull and the plaintiff or plaintiff's representative before the stone was actually delivered, there was at the time of delivery a written contract between Scull and the plaintiff which was complete as to all details and that it was the duty of the trial court to construe that contract without the aid of any parol testimony.

The next statement and stipulation to which objection was made, is as follows:

> "That he, Chester Scull, took the stone from Charles T. Dougherty Company having no customer in view."

It is contended that the reasoning just given with reference to the first objection is equally applicable to this testimony.

The next statement is as follows:

> "That Chester Scull, subsequent to November 3, 1926, informed Charles T. Dougherty Company the stone had been sold. That this statement was made to induce Charles T. Dougherty Company to charge its value to him."

The phrase "CHGD. 11-8-26" was written upon the original contract by the duly authorized manager of plaintiff's business and without any explanation or other testimony, had a clear and defined meaning, and it can be easily seen that this testimony was serious and extremely harmful to the defendant's case. It is fundamental law that motive or testimony indicating a mental operation at the time of the execution of a contract on the part of either contracting party cannot be admissible. The secret thoughts that sway the judgment of the contracting parties not expressed either orally at the time or written into the agreement if admissible, would open the door for the grossest kind of fraud.

The next two questions which were permitted to be answered will be argued together:

> "Q What was the conversation?" (referring to the conversation between the witness and Chester Scull subsequent to November 3, 1926) (State of Case, p. 36, l. 18).
>
> "Q What conversation did you have with Chester Scull at the time you delivered the diamond to him?" (State of Case, p. 43, ll. 28 to 30).

It is respectfully contended that the leading case of *Naumberg* v. *Young, et al.*, 44 N. J. L. 331, is authority for the proposition of evidence as to what was said or done at the time the contract was made is not admissible in evidence, and the facts in this case do not come within the exceptions established by the case just quoted.

The exceptions were:

1. Where the contract is incomplete and on its face doesn't purport to contain the whole agreement;

2. Where the parties also enter into another agreement by parol which is collateral

and is on a subject distinct from that to which the written contract relates.

It is immaterial in the determination of the case now before the Court that the defendant is a stranger to the written document which evidenced the transaction between the plaintiff and Scull. As was said in 22 *Corpus Juris*, page 1294, Section 1726,

> "The rule which forbids the terms of a written contract to be varied by parol evidence does not preclude one not a party to the contract from showing that he has rights under it, because it was entered into for his benefit. But where a third person not a party to an instrument claims rights or benefits thereunder and seeks to take advantage thereof, the parol evidence rule applies to him as much as to a party, and he is not entitled to introduce evidence to vary or contradict the writing, for the general rule against varying a writing by parol or extrinsic evidence applies to all rights which originate in the writing or in the relation established thereby."

The next question designated under Point 4 in the Grounds of Appeal was as follows:

> "When you gave that stone to Chester Scull under this agreement did you sell it to him?"

The rule of evidence excluding questions, the answers to which state a conclusion, is too well established to require a lengthy list of citations.

In *re William McCraven*, 87 N. J. Eq. 28,

Wigmore on Evidence, Vol. 4, Sec. 1924.

It will be observed that this question was an extremely damaging question. In the first place, the question clearly did not call for an answer containing facts, but the witness' own conclusion as to the legal result of certain conversations;

secondly, it was the duty of the trial court to determine whether there had been a sale of the diamond from the plaintiff to Scull, or even assuming without admitting that it was not the duty of the trial court to so determine, it was then the duty of the jury to make such determination from the facts in the case and not for the witness to make such a determination in his answer to the objected question.

The next question to which objection was made is as follows:

> "That writing, CHGD 11-8-26 on that card, what does that mean?"

Some of the argument made to the previous questions has some applicability to this question also; first, because the phrase itself is clear and complete; secondly, it calls for a conclusion. In this connection the Court's attention is especially directed to the facts brought out upon the cross examination of the witness Manning (State of Case, pp. 37 to 43). It is extremely difficult to read this testimony without quickly coming to the conclusion that no matter what construction is placed on the earlier relationship existing between the plaintiff and Scull, there surely was an absolute sale between them the moment plaintiff's authorized manager placed on the original agreement the phrase "*CHGD 11-8-26.*" There was no necessity for any explanation as to the meaning of this phrase for there was no ambiguity, no uncertainty, no indefiniteness, no doubt as to the meaning of the words. It was simply a desire on the part of the plaintiff to again reiterate its theory, that because it charged Scull with $2,585.00 and allowed him ten days within which to pay it, and because he did not pay his debt, and because apparently Scull had lied to the plaintiff, the latter should be put back

legally in the same status it was before the diamond left its possession, irrespective of the fact that since that time the defendant had dealt with Scull with no notice or knowledge of plaintiff's interest in the diamond, and that as between the plaintiff and the defendant, the defendant should suffer because the plaintiff had entrusted Scull with a diamond worth $2,585.00 relying on his (Scull's) statement as the inducing feature of a written contract and a subsequent change therein.

POINT 2.

The Trial Court erred in its charge to the jury.

Under this heading Point designated 10 in the Grounds of Appeal will be presented.

The following is a portion of the charge to which exception was taken (State of Case, p. 67, l. 21 to l. 20 on p. 68):

> "The defendant insists that by a conversation held between Mr. Manning the office manager of the plaintiff company and Scull, that the statute of factor and principal existing between Dougherty & Company and Scull was changed, and that Dougherty & Company sold the diamond to Scull, and Scull, then became a debtor to Dougherty & Company.
>
> "What evidence is there to prove that? Well, in the first place the evidence is contradictory. Mr. Dougherty, the head of this company, who said he owned it, testified that he did not sell the stone to Scull and even Mr. Manning's testimony, you may find upon reflection, in your opinion, may indicate rather meagre proof of a sale. They said that they wanted the diamond back and the reason was given to us by Mr. Dougherty. Mr. Manning said he had a conversation with Scull in which Scull told Manning

> that he had sold the diamond; that is what he was supposed to do as a factor and Mr. Manning testified that within ten days Scull was to bring in $2,585.00. On this card was written the words 'Charged 11-8-26,' and then Mr. Manning said he did not make any inquiries. He sat back and waited for ten days, as I understood him. Maybe you will find that constituted a sale and maybe you will not. If the plaintiff, of course, sold this diamond to Scull, when I say sold it I mean passed the title of the diamond to Scull and did that in the face of this agreement which he had with Scull who was to sell the diamond and give them this money, if you find, as I say, they passed this title to Scull then it was a sale to him and the debt was due from him. In that instance the defendant should prevail.''

It is respectfully contended that the trial court in its statements in the portion of the charge just set forth was in error, when it said that the evidence which proved the change of relationship was contradictory.

The evidence on this point is very brief and was given by Alfred Manning, Manager of the plaintiff's business, and by Mr. Charles T. Dougherty who was sole owner of the plaintiff corporation.

Mr. Manning's testimony on this point will be found in the State of Case, beginning on page 39, line 25 and continuing to line 10, page 43.

Mr. Dougherty's testimony on this point will be found in the State of Case, beginning on page 44, line 32, with the question to which objection was made and continuing to the top of page 48 including his cross examination.

There was no attempt on the part of any other witness to contradict the testimony given by the

two gentlemen last named, nor was any testimony introduced by the defendant in his case which in any way varied or contradicted the testimony.

It is respectfully contended and most strenuously urged that a reading of the testimony just pointed out can lead to but one conclusion and that is, that irrespective of what the legal status was or the legal relationship was between Scull and the plaintiff Dougherty, on November 8, 1926, by the actions of plaintiff's manager, Mr. Manning, there was an actual sale of the diamond in question by Dougherty to Scull.

It is most respectfully contended that this construction should have been made by the trial court and not left by him for determination to the jury. Of course, if there was an actual sale of the diamond in question from the plaintiff to Scull, then defendant was entitled to retain possession of the diamond as against the plaintiff.

POINT 3.

The Court erred in refusing to permit Conditional Sales Act of New York to be placed in evidence and in refusing to non-suit or direct a verdict in favor of the defendant.

As outlined in the statement of facts in this brief, the original contract or agreement between the plaintiff and Scull which resulted in the plaintiff delivering the diamond which was the subject matter of this suit, was made in New York City where both the plaintiff and Scull were in business, and the delivery of the diamond was in New York City, and it was repeatedly urged by the defendant at the trial of this case that the determination of the legal relationship or status

between the plaintiff and Scull was to be determined by the law of the State of New York.

Defendant at the trial insisted that the original memorandum or agreement created between the parties to that contract either the relationship of a conditional sale or that of principal and factor. It will be remembered that the trial court admitted into evidence the New York statute dealing with factors. (See State of Case, p. 61, ll. 30 to 40 and p. 62, ll. 1 to 15.)

Defendant then offered to prove the Conditional Sales Act of New York found in Laws of 1920, Chapter 635.

This offer was refused by the trial court without any objection being made by the plaintiff, and to the ruling defendant took an exception.

Where a contract is made and completed in one state it is the contention of the defendant that the law of the state where that contract was made and where the property was delivered determines the rights flowing from that contract.

Cooper et al. v. *Philadelphia Worsted Company,* 68 N. J. Eq. 622.

This is a case where a contract with reference to the title of tangible chattels situated in another state is made in that state between a resident thereof and a New Jersey corporation, and it was to be performed there. The court held that the law of that state determined the effect of the contract.

Cockrell v. *McKenna,* 6 N. J. Adv. Rep. 850, is also authority for this contention on the part of the defendant.

In that case a promissory note made and delivered in New York was held to be governed by

the Laws of New York. The note was to be enforced in New Jersey. Court said,

> "The note was dated, made and delivered in the State of New York. The law of that state, *i. e.*, the *lex loci contractus,* governs and controls the rights of the parties to the action. That law was applied to the facts of the case by the trial judge. That was the proper course for the trial judge to pursue."

In *Receiver of State Bank of New Brunswick* v. *First National Bank of Plainfield,* 34 N. J. Eq. 450, it was held where a transfer of property is valid by the *lex loci,* whether it be effected by the act of the defendant or by operation of law, no just rule of comity requires the courts where the property happens to be located, to judge such transfer to be invalid at the instance of citizens of other states, simply on the ground that it is incompatible with its laws.

In the case of *Cooper* v. *Philadelphia Worsted Co.,* cited *supra,* the ownership of machinery was involved. An agreement was made for the leasing of machinery to defendant with a clause for purchase at the end of the lease. The machinery was delivered in Pennsylvania. The Court said,

> "The contract now in question was made in Pennsylvania, and was intended by the parties to be performed there; the chattels were at the time in Pennsylvania, and were removed to this state without the consent of the vendor; in Pennsylvania there was no transfer of title, but a mere contract of bailment. We think, in such a case, the law of Pennsylvania must control."

It must be remembered in this connection that Section 14 of the Uniform Conditional Sales Act, Laws of 1919, reads,

> "When prior to the performance of the condition the goods are removed from an-

> other state into a filing district where such contract is not filed, the reservation of property in the seller shall be void as to purchasers and creditors described in paragraph 5 (includes pledges) unless conditional sales contract is filed within ten days after such removal.''

The defendant is aware of the case of *Marvin Safe Co.* v. *Norton,* 48 N. J. L. 410, in which case one Schwartz purchased of plaintiff a safe under a contract that the safe was to be the property of the company until payment of the price. The contract was made in Pennsylvania, delivery was to be made in New Jersey. The chattels were delivered to Schwartz in New Jersey and then Schwartz sold to the defendant who was a bona fide purchaser for value. The Court in that case held that the transaction if consummated in New Jersey, the laws of this state and not Pennsylvania governed; although Norton, when he purchased goods in New Jersey acquired only such rights as his vendor had.

It is the contention of the defendant that the above case can be distinguished from the case now before the court for determination. It is important to note that in the Marvin Safe Co. case the transaction between the original vendor and vendee was not complete until delivery was made in New Jersey, but in the present suit the diamond was delivered to Scull in New York and it clearly was the intention of the parties that the law of that state should govern.

This court in *Cooper* v. *Philadelphia Worsted Co.,* cited *supra,* at page 628, says as to the Marvin Safe Co. case,

> ''Title was determined according to the law of the situs. The title reserved by the safe company was valid in Pennsylvania as long as the goods were in that state; the

> title acquired by Norton in New Jersey, under New Jersey law, was only such title as his vendor, Schwartz, then had, which was only a conditional title, and it was held that this title could not be made absolute as to tangible goods in New Jersey by a provision of the Pennsylvania law. There was no conflict between the title to the goods in Pennsylvania and the title to the goods in New Jersey; on the contrary, it was the very title acquired in Pennsylvania which subsequently passed by the transfer in New Jersey.''

By the same token it can be said that according to New York law title to this diamond insofar as persons standing in the same circumstances as the defendant herein, was in Scull, and the subsequent transportation of the diamond to New Jersey and the pledge of it to this defendant placed him in a position where his possession was superior to that of the plaintiff. The result is in agreement with the view of the Court when it decided the Marvin Safe Co. case, for it said on page 415:

> ''The validity, construction and legal effect of a contract may depend either upon the law of the place where it is made or of the place where it is to be performed, or, if it relate to movable property, upon the law of the situs of the property, according to circumstances; but when the place where the contract is made is also the place of performance and of the situs of the property, the law of that place enters into and becomes part of the contract, and determines the rights of the parties to it.''

It is therefore respectfully contended that it was the duty of the trial court to admit into evidence the Conditional Sales Act of New York and then to construe under the circumstances of this case which of the two New York statutes applied to the transaction between Scull and Dougherty.

This it is contended was absolutely necessary before a determination could be made in the present case as whether or not the plaintiff or defendant was entitled to possession of the diamond in question.

The next two points under this heading will be argued together, namely, the question of whether or not the trial court erred in its refusal to non-suit the plaintiff and in its refusal to direct a verdict for the defendant.

It will be noticed that quite a considerable portion of the State of the Case is taken up with testimony introduced by the plaintiff in an attempt to prove fraud on the part of the defendant under the Fourth Count of the complaint. This count was dismissed by the Court, (State of Case, p. 58, ll. 23 to 30).

Appellant is not so much concerned with the refusal of the trial court to grant the motion of non-suit as it is with the Court's refusal to direct a verdict in favor of the defendant and therefore the balance of this brief will be taken up in a discussion of the latter point.

As has been suggested in another part of this brief, it was the contention of the defendant that it was the duty of the trial court to define the legal relationship that existed between Scull and the plaintiff Dougherty, and that this was an absolute condition precedent before a determination could be made as between the plaintiff and the defendant as to which one of the two was entitled to possession of the diamond in question, and as was pointed out in the statements of fact at the beginning of this brief, the trial court had considerable difficulty during the progress of this case in coming to a definite conclusion as to just

what relationship was created by the agreement marked Exhibit P. 1, which appears in full in the State of Case, pages 11 and 12.

As was also suggested in another part of this brief, the defendant contended that the original contract just referred to between the plaintiff and Scull resulted in either a conditional sale or the creation of a relationship of principal and factor as defined in the New York Factors Act which appears in the State of Case on pages 61-62.

Construing the contract in question as creating a conditional sale, and it having been admitted that the contract was not recorded either in New York or in New Jersey, (See State of Case, p. 62, ll. 38 to 40) then the possession of the defendant is superior to that of the plaintiff and there should have been a direction of a verdict in favor of the defendant.

In an examination of the Factors Act referred to herein, found in Chapter 635, Laws of 1920, State of New York, it will be seen that Scull having been entrusted with the possession of the diamond by Dougherty for the purpose of sale, was deemed to be the true owner thereof so far as to give validity to any contract made by Scull with any person for the sale or disposition of the diamond, and therefore, construing the original agreement as creating such a relationship, the trial court should have directed a verdict in favor of the defendant.

Then disregarding entirely the question of the original contract between Scull and Dougherty and taking up for consideration what transpired after the delivery of the diamond, when the notation "Chgd 11-8-26" was written upon the contract, and construing this as a sale from Dougherty to Scull, then possession of the defendant was

superior to that of the plaintiff and a verdict should have been directed in favor of the defendant.

The case of *Kupchick* v. *Levy*, 187 N. Y. Supp. 192, was an action for conversion of a watch against the defendant who was a pawn-broker. The plaintiffs, as jewelers, delivered the watch to one Bonner on the following memorandum:

> "These goods are sent for your inspection and remain the property of Ed. Krupchick, and are to be returned on demand. Sale takes effect only from date of approval of your selection and bill of sale rendered."

The Court held in favor of the pawn-broker, and in the course of its opinion it said:

> "Bonner was entrusted with the possession of merchandise for the purpose of sale and must be deemed the true owner thereof in accordance with the Factors Act."

Thompson v. *Goldstone*, 187 N. Y. Supp. 621.

The plaintiff jewelers entrusted X with jewels merely to show to particular customers. X pledged them with defendant pawn-brokers. The understanding of the parties was that title was in plaintiff. The lower court charged that if X was merely entrusted with possession, plaintiff could recover from defendant. On appeal there was a reversal and it was held that the defendant was protected by the Factors Act and mere possession was sufficient to estop plaintiff by force of Factors Act.

Also see the case of *Warner* v. *Martin*, 52 U. S. Supreme Court Reports, 667, which will probably be used in opposition to defendant's contention. It is true that that case held a factor or agent who has power to sell the produce of his principal has no power to affect the property

by tortiously pledging it as a security or satisfaction for a debt of his own. But the decision cannot be used as authority for the proposition now before this court. At page 672, it is said,

> "Warner says in his answer that at the time he made his purchase, the 'insolvency of Essenwein was believed.' Those are his words and according to all that class of cases asserting the principle under which his answer puts him, such knowledge was sufficient to entitle the plaintiff to avoid the sale."

So the question of knowledge on the part of the purchaser from the factor was an item which the Court considered in its opinion. In the case now under review, it was not disputed that the defendant Krimke acted in good faith and without any knowledge of the transaction between plaintiff and Scull.

It is therefore respectfully submitted that the substantial errors made by the trial court entitle the defendant not only to a reversal of the judgment entered against him, but that for the reasons herein stated, the trial court should have directed a verdict in favor of the defendant, and that the opinion of this court should settle the question of who is entitled to possession of the diamond.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant-Appellant.

E. R. McGLYNN,
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

CHARLES T. DOUGHERTY CO., INC., a corporation, *Plaintiff-Respondent,* *vs.* PHILIP KRIMKE, *Defendant-Appellant.*	*Action at Law.* *In Replevin. On Appeal from New Jersey Supreme Court, Essex County.*

BRIEF FOR PLAINTIFF-RESPONDENT.

Facts.

Some further discussion of the facts is necessary from the respondent's viewpoint. Chester Scull, a merchant in the jewelry trade, procured a diamond stone from the plaintiff-respondent, Charles T. Dougherty Co., and signed a memorandum receipt (p. 11), also set up at length in the appellant's brief. That merchant, Scull, was what is known as a factor and under the receipt he signed became a bailee. He had the right to sell the property but no right to pawn or pledge it. He did pledge the diamond with the defendant-appellant. Thus an action in replevin by the owner of the stone. It is important to note that Scull pawned the stone the very day he received it from Charles T. Dougherty Co. (Stipulation, p. 27). Our first stipulation is as follows:

> "The emerald cut diamond, wt. 5.17 carats, which Chester Scull received from Charles T. Dougherty Company, November 3d, 1926, under memorandum agreement described in the bill of particulars, is the diamond which was pawned with Philip Krimke on the same day, for which he received ticket No. 26811,

> the stone not having left Scull's possession from the time he received it from the Charles T. Dougherty Company until he delivered it to Krimke at Newark."

Scull having no title when he pawned the stone, most certainly the pawnbroker acquired no right on that date, November 3, 1926. The appellant contends that subsequent to the pawn Scull acquired title insofar as the pawnbroker was concerned, though he admits that as between Scull and the owner, Dougherty Co., title never passed (Stipulation, p. 35).

> "As between Chester Scull and Charles T. Dougherty Company there has been no sale of the stone to Scull."

It is true the appellant reserved a right of objection to the stipulation (p. 27, l. 21), but he reserved only one ground of exception, which was the reason why the stipulations of the evidence were not lengthy by making a proposed question to the witness and an answer. The only ground of objection reserved by the appellant was the ground of the question's materiality (p. 35). "Mr. McGlynn: I object on the ground it is absolutely immaterial."—* * * but, as the court said, "It is very material to the plaintiff in this case." Having admitted that Scull, insofar as Dougherty Company is concerned, never received title, the appellant in his argument overlooks the fact that he never acquired any intervening right, having made his loan when no title was in Scull, ever so far as the pawnbroker was concerned.

After reading this stipulation that Scull never acquired title as far as the defendant is concerned, it is amusing to read from the appellant's brief (p. 5), "Defendant not only believes that he is entitled to a reversal of the judgment now

under appeal, but also that the determination of this court will once and for all establish the fact that he is entitled to retain possession of the diamond as against the plaintiff.'' Thus the appellant would own a diamond of the value of $2,585 belonging to this respondent for a pawn of $700.

But there never was any kind of a sale of the diamond. The appellant contended in the lower court and does here contend that the words, ''Chgd 11-8-26'' on the memorandum card is conclusive of a sale. In his brief (p. 2) the notation is referred to incorrectly as ''Chgd 11-8-26 $2,585,'' but the $2,585 was part of the memorandum receipt signed November 3, 1926 (State of Case, p. 27, l. 11). The appellant so understood it (his brief, p. 10). The difference in meaning is this: The appellant argues the sum of $2,585 was charged November 8, 1926, while the plaintiff contended the words without the amount did not indicate a sale (p. 40), cross examination.

> ''Q So, when you said 'CHGD' on here it means charged, doesn't it? A Yes.
>
> Q So, if it was being charged and the terms were net cash, what book would it go in? A When Mr. Scull brought in the cash we would enter it in the salesbook as a cash transaction.
>
> Q In the meantime between the time when you charged it to your account and the time you brought in the cash what book would it be entered in? A None but that. That is the *stock record.*''

and (on p. 41),

> ''Q And that you had sold it yourself, as it says on here? A I had not sold it to him yet.
>
> Q What does it say? A 'Charged.'
>
> Q Whom did you charge it to? A In ten days Mr. Scull would have been charged

for it, because he guaranteed to bring me a check for $2,585.''

And the testimony of Mr. Dougherty, the owner of the company (p. 45),

''Q That writing, 'Charged, November 3, 1926,' on that card, what does that mean? A That means he has reported that he sold the stone.''

The record, of course, was only a card record showing where the merchandise of the company was from time to time. There was no book account charging any sum to Scull. As the testimony indicates, they were waiting for the cash and did not enter up any charge on the books and they refused to bill Scull for the goods (p. 42).

''Q Did you make any other entries? A Entries or inquiries?

Q Entries. A We made no entries at all; we made many inquiries.''

Page 39, under cross examination:

''Q Did you see him the day you made this notation on this original memorandum? A Yes, sir.

Q Personally or by telephone? A Personally, I didn't give him a bill.''

Just why no sale was consummated is clear from the stipulations and the evidence generally. The reason is that Scull had not effected a sale. He did not produce any cash. Dougherty Company did not open a charge account with Scull. The records got no further than marking the card record (p. 46).

''Q That is as far as the record has gone for that transaction? A As far as I know, yes.''

It is important to note that the memorandum receipt was marked ''net cash'' and, as Mr. Manning testified, Dougherty Co. was waiting for the cash which would consummate a sale to Scull's prospective purchaser (who did not exist).

Wigmore on Evidence, Vol. 3, paragraph 1770:

> "The making of a contract necessarily involves utterances by conversation, telegrams and the like and these are admissible under the issue."

There were, therefore, two questions for determination. First, for the court to construe the memorandum receipt which the court properly decided was a bailment. Second, for the jury to decide the single question of whether or not there was a sale made later on. No other fact was in dispute. The jury, from proper evidence, found that there had been no sale. The appellant's contention that the court confused the jury with his change in viewpoint as to the construction of the memorandum agreement has no foundation, first, because it was never left to the jury to decide what the relation was, it being a legal construction, and, second, if the court confused itself there was more harm to the plaintiff, in that the court at the time it first had an erroneous impression of the relationship between Scull and the plaintiff said (p. 30), "I do not care so much about your cases as much as your logic." There the discussion which followed probably put this respondent in an unfavorable light before the jury. Moreover, the court changed its viewpoint of the relationship but once (p. 32). The court made clear the erroneous impression it had in its discussion set forth at length at page 32. The seven excerpts from the court's remarks in the appellant's brief (p. 3 of brief) indicate that there only was one change of viewpoint, which was that the court first was impressed that Scull was employed by Dougherty Company and after an examination of the agreement offered in evidence decided the relation was of bailor and bailee. No other excerpt printed is inconsistent with this view. The seventh excerpt, for example,

refers not to a construction of the memorandum receipt but was the court's statement in dealing with the testimony as to whether or not there subsequently was a sale.

POINT I.

The Court's ruling on the admissions of evidence were proper.

The stipulations entered on the record over objection were made by counsel as the agreed testimony of Scull, as though such evidence had been put to him on question and answer, were he personally present (p. 27). The appellant's attorney reserved the right to object on the ground that the evidence produced by such a stipulation was immaterial to the case. The objections to the evidence were so taken on the record. Dealing with these stipulations collectively only with respect to their being material, it is clear that they are material in that they show, that if the diamond left the plaintiff's possession under a memorandum receipt, that the status bailor and bailee did not change. They explained the words written on the receipt November 8, 1926, which of themselves do not effect a contract of sale, though probably are evidence of it. The meaning of these words upon that receipt are made clear in my quotations from the evidence in the discussion of the facts heretofore. The plaintiff had a right to submit evidence that the diamond never was sold to the defendant. As the court said (p. 33):

> "The Court: For the reason that in the first place it is collateral, but the plaintiff in this case, as I understand it, has the burden of proving its legal status. That is, the status between it and Scull and its status was that of bailor and bailee and it can establish that as part of its case."

The court might have added—not only such was the status on November 3, 1926, but that the status has so continued until the time suit was instituted.

That the wording of itself did not constitute a sale in the appellant's mind is evidenced by the last stipulation (p. 35). "As between Chester Scull and Charles T. Dougherty Company there has been no sale of the stone to Scull." This is an admission there was no sale ever consummated between them. No statement could be more material (which is the appellant's ground of objection). The court, after objection, remarked, "It is very material to the plaintiff in this case" (p 35).

Even though a fraudulent sale were consummated, if the testimony on behalf of the plaintiff could be believed, the voiding of it between Scull and Dougherty (I refer to the stipulation as evidence of the fact that between them the sale was void from the beginning) took place before the right of any innocent party intervened. The pawnbroker had loaned his money to Scull the very date the goods were received by Scull.

The appellant's contention that the contract between Scull and Dougherty Co. should be construed without the aid of parol evidence is correct. Such construction leads to no other conclusion but that the contract was between a principal and factor and was one of bailment, as is argued hereafter. The argument on the objection to the stipulation for this reason, however, overlooks the fact that the purpose of the stipulation was not to aid the construction of the memorandum agreement, which needs no aid for this respondent's contention, but was material to show the arrangement of bailor and bailee continued. This is also true of the appellant's

contention that parol evidence was objectionable (p. 36).

> "Q What was the conversation? A (Over objection) I demanded the goods be returned and that was the conversation every time.
>
> Q What did he say? A He had them sold."

The evidence was not of something said or done at the time the memorandum receipt was signed on November 3, 1926, but as the appellant points out in his brief is a conversation subsequent thereto. Certainly, parol evidence was proper to show the same arrangement continued. The answer itself makes clear the necessity of such testimony and its propriety. The other question argued with this objection by the appellant needs no argument to sustain its propriety, for if it were not proper there was nothing harmful in the answer.

> 10 R. C. L. 946. "The rule is well settled and supported by the weight of authority that wherever the motive, belief or intent of any person is a material fact to be proved under the issue at trial it is competent to prove it by the direct testimony of such person whether he is a party to the suit or not."
>
> At page 983, "Declarations of the parties made with regard to matters of business, if contemporaneous with the acts they tend to explain and qualify, are admissible as part of the *res gestae*."

Moreover, there is no objection on the record that any question or stipulation violated the parol evidence rule.

Respecting the question, "When you gave that stone to Chester Scull under this agreement did you sell it to him?" which objection is only on the ground that it called for a conclusion, the propriety of that is answered best in the court's words (p. 45), "A man who owns a horse, a cow,

a shotgun or a diamond ought to know whether he sold it or not.'' Whether the question was proper or not, the appellant fails to state how it was harmful. The court did construe the memorandum receipt constituted a bailment which was the court's duty as hereafter pointed out. Whether or not there subsequently was a sale the court properly left to the jury.

The last point of evidence discussed by the appellant bears upon the question, '' 'Chgd 11-8-26,' what does that mean?'' I refer to the discussion of facts heretofore. Of course, as the appellant argues from his viewpoint, there is no necessity for any explanation, but not from the respondent's. Here was their diamond with a pawnbroker, and all the while the plaintiff was trying to induce Scull to return it, he having no title to it, and after fraudulent statements (appellant admitted by stipulation) he induced the plaintiff to mark the memorandum receipt as was done. That statement was placed on the card, the testimony bears out, only upon the condition Scull made a sale which he had not done. The marking was not a book entry. It was simply to indicate Scull's report. The sale would have been made if he brought in the cash (p. 45) within ten days. This was not done, so no sale was made. The transaction was never marked a sale on the books, as the testimony indicated would have been done had a sale been made. At best, it was for the jury to determine and the court so instructed the jury. (See also discussion of facts heretofore.) This leaves out of consideration the principle that the rights of an innocent party did not intervene. The appellant, having acquired his rights the day the receipt for the goods was signed and having stipulated there was no sale between Scull and Dougherty,

he is estopped from asserting the title was in Scull even as to himself in view of the time at which his loan was made.

POINT II.

The memorandum receipt made Scull a bailee.

Under this head the remaining points presented by the appellant can be argued— The refusal to permit the Conditional Sales Act to be introduced as evidence and the motions for non-suit and direction of a verdict. As stated before, the one fact for the court was: Did the first memorandum agreement constitute anything other than the relation of bailment? The fact that the jury found there was no sale subsequently, has been discussed at length, so these points are treated only in connection with the court's proper construction of the law. The inapplicability of the two statutes (Factor's Act and Conditional Sales Act) can more readily be seen after discussion of the general principle of the law under which the trial court made its interpretations.

> 11 R. C. L., page 753. "A factor may be defined as one specially employed to receive goods from a principal and to sell them for a compensation called factorage or commission and in a general way it may be said that the factor must carry on the business as a trade; that the goods must be received into his possession whether in bulk or sample; that he must have full power to sell in his own name and without disclosing his principal; that the business must be undertaken for a commission, although in some cases there may be some other method of remuneration * * *. One of the fundamental rights of a person who has put goods in the possession of a factor for sale is the right to have the goods returned to him if demanded before sale, etc. * * *."

The appellant does not contend there is any other construction except possibly the Conditional Sales Act, which is discussed hereafter.

There can be no pledge by a factor. In *Towne* v. *Goldman,* 26 N. J. L., page 47, a salesman was entrusted with watches, he to sell for cash or on terms. He pawned them. Question raised is whether a general power of sale with the possession of goods does not give the right to pawn or pledge. The court there said it did not, adding:

> "This principle was affirmed in Ludwig *v.* Baruch, 69 N. Y. S., page 933, which case distinguishes between possession with general power of sale and possession with power of sale to a specific third party. But there is no reason for distinction. That case was based on the construction of a Factor's Act of New York which attempted to abolish the harsh common law rule which makes pledges by a factor authorized to sell void, but to break down all distinction between the authority to sell absolutely and one to transfer conditionally by pledge."

This principle appears in 2 Kent's Commentaries, page 625,

> "Though a factor may sell and bind his principal, he cannot pledge the goods as security for his own debt, not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of factor is excuse."

In *Warner* v. *Martin,* 52 United States Court, page 667, 11 How. 209, which case the appellant holds inapplicable because of certain knowledge on the part of the person receiving the goods, but which case the court went further than the question stated by the appellant when it said there is another reason for the view it took of the case.

> "A factor or agent who has power to sell the produce of his principal, has not power to

> effect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and *it is of no consequence that the pledgee is ignorant of the factors not being the owner.*''

Construing again the form of memorandum receipt or contract between the parties who made it, there was no passing of title under New Jersey law or New York law. I emphasize—between the parties who made it. There are any number of New York cases dealing with these forms of receipts all of which refer to the taker of the goods as a factor—*Ludwig* v. *Baruch*, 69 N. Y. S., page 933; *Thomas* v. *Goldstone*, 157 N. Y. S. 621; *Shuyster* v. *Koplik*, 168 N. Y. S., page 1016. In all of those cases the Factor's Act (printed in the State of Case, p. 60) was used to advantage by pawn-brokers for their protection. I cite them only to make clear the relationship between the parties to the agreement and the proper construction of the contract—that it was no condition sale or any other kind of a contract, which the appellant called it in his answer. Because it was such a contract is why the Factor's Act was passed in New York.

The effect of that contract readily disposes of the appellant's alleged error of the trial court in refusing to deal with the Conditional Sales Act. That was no more relevant than a chattel mortgage act or an act respecting conveyances of realty. It is not printed, nor was the act read into the record for the purpose of showing the alleged error in the trial court's ruling. A reading of it found at Chapter 635 of the Laws of 1920 indicates its irrelevancy. A Conditional Sales Act is not proper to construe a relationship of a principal and factor which is in the nature of a bailment.

This also holds true of the Factor's Act which the trial court admitted in evidence over this respondent's objection. No harm was done however in view of the court's proper instruction to the jury interpreting it (or in fact ignoring it after it was permitted in evidence). That act of course does not break down the relationship between the parties (which is a necessary one in the jewelry trade) but does confer benefits upon innocent purchasers or those who loan in good faith on the strength of title inferred from possession.

But the pawn-broker defendant in this case under appeal is a New Jersey resident. He dealt with the property here and cannot obtain any benefit from that statute. The law where the situs of the property is, governs, and he is bound by the law of the jurisdiction in which he acquired his rights. This is well-established by the much cited Marvin Safe case. That case applies without any possible distinction from the case under consideration. In that case (*Marvin Safe Co.* v. *Norton*, 48 N. J. L. 410) a contract was made in Penn. for delivery of a safe to one Schwartz. Sale on condition. Title to pass upon payment in full. Terms cash delivered on board at Philadelphia or New York. Schwartz had the safe delivered to New Jersey and here sold it to Norton. Penn. had a Conditional Sales Act making such contracts void as to bona fide purchasers, unless the contract was recorded which was not done. New Jersey had no such statute. The court said (at p. 415):

> "The contract of sale between Marvin Safe Co., and Schwartz was made at the company's office in Phila. The contract contemplated performance *by delivery of the safe in Phila.* to the carrier, for transportation to Highlow, New Jersey. When the terms of

> sale are agreed upon and the vendor has done everything that he has to do with the goods the contract of sale becomes absolute. Delivery of the safe to the carrier in pursuance to the contract was delivery to Schwartz and was the execution of the contract of sale."

It is well to bear in mind reading this quotation that the appellant's only distinction from the case under consideration was that there was delivery of the property in New Jersey, which is contrary to that statement by the court. Further on the court states:

> "The contract between Schwartz and the Company having been made and also executed in Penn, by delivery of the safe to him, as between him and the company, Schwartz' title will be determined by the law of Penn."

The contract of Norton, the defendant, with Schwartz for the purchase of the safe was made in New Jersey and Norton's rights were construed under N. J. Law.

It is clear that the appellant must make out his case by virtue of the law of the State in which he acquired his rights. Under the Factor's Act the public policy of this state was not violated. The principal's title was lawful here as against the appellant. As the court said in the Marvin Safe case (I refer to Krimke's possession as the parallel)

> "His possession under the contract has been exclusively in this state. That possession violated no public policy—not the public policy of Pennsylvania for the possession was not in that state; not the public policy of this state, for in this state possession under a conditional sale is regarded as lawful and does not invalidate the vendor's title unless impeached for actual fraud."
>
> *Coopers* v. *Philadelphia Worsted Co.*, 68 Equity 628.

Reasoning from a quotation in the Marvin Safe case, the appellant contends (his brief, p. 17) "title to the diamond, insofar as persons standing in the same circumstances as the defendant herein, was in Scull and the subsequent transportation of the diamond to New Jersey, and the pledge of it to this defendant placed him in a position where his possession was superior to that of the plaintiff." But that overlooks the appellant's own quotation that inasmuch as Scull had no title, he being a factor the appellant received none here. What the Factor's Act said with respect to purchasers, etc., in good faith is immaterial. The question is what was the title between the parties Dougherty and Scull?

Another difficulty with the appellant's argument is an assumption that the Conditional Sales Act construed the memorandum receipt. No provision of the act was pointed out in the trial court or here which made the agreement under consideration a conditional sale rather than that of factor and principal. As the trial court said when the act was offered in evidence (p. 62):

> "The Court: What has that to do with this case?"

POINT III.

The larceny of Scull could confer no title upon him which will protect the loan by the appellant.

The stipulations in evidence (the second on p. 28, the third and fourth on p. 34 and the fifth on p. 35) are set forth together:

> "Chester Scull received the stone from Charles T. Dougherty Company on representation that he had a customer interested in the purchase thereof."
>
> "That he, Chester Scull, took the stone from Charles T. Dougherty Company having no customer in view."

> "That Chester Scull, subsequent to November 3, 1926, informed Charles T. Dougherty Company the stone had been sold. That this statement was made to induce Charles T. Dougherty Company to charge its value to him."
>
> "As between Chester Scull and Charles T. Dougherty Company there has been no sale of the stone to Scull."

The total substance of those stipulations is that Scull committed a larceny. If the admissions were not made by stipulation the court must assume they could have been proven. As the appellant's counsel stated (p. 35) "The stipulations were entered into to avoid going up to Sing Sing and taking Chester's Scull's testimony." That being the situation Scull could confer no property right by his tortious pledge.

Schmidt v. *Simpson*, 94 N. E. 966, N. Y. A woman delivered jewelry articles to one Weber with a right to sell which he pawned the following day. The counsel in that case stipulated all the facts as stipulated in the case under appeal with the exception of the fact of intent at the time the goods were taken, which the plaintiff attempted to give evidence of and which the lower court would not permit.

> "Thereupon oral testimony was offered on behalf of the plaintiff, in which he attempted to show that Charles A. Weber in taking the jewelry into his possession and subsequently pawning the same was guilty of a larceny, and that consequently the defendant got no title to the jewelry or a lien thereon. At the conclusion of the case the court refused to submit the question to the jury, holding it was entirely immaterial * * *"
>
> "Upon the trial, plaintiff, as we have seen, sought to establish that Weber was guilty of a larceny in taking the jewelry into his possession, that in doing so he intended to

> cheat and defraud the owner of the value of the property * * *. It appears that the issue remains open, undetermined and the fact that the court refused to submit it to the jury on the application of the plaintiff did not render it necessary for the defendant to ask to go to the jury upon that question."

In the case under review that question did not have to go to the jury. The stipulations admitted those facts. There was no title conferred upon Scull at any time because of his crime and fraudulent intent. So the appellant never acquired any right.

If this court will not adopt that view, the case can at least be taken as an indication of the materiality of the stipulations and evidence objected to by the appellant.

In *Freidenheim* v. *Gutter*, 94 N. E. 640; 201 N. Y. 94, the court decided a situation somewhat similar to the Schmidt Simpson case and to the case under review adverse to the plaintiff because of the protection which the pawnbroker had in New York for reasons not apparent in the Schmidt case. But the court did state:

> "At common law there would be no defense to this action."

That is the law prevailing in the case at bar.

Warner v. *Martin*, 52 Supreme Court 667. The principle that a factor could not deprive his principal of his title by a fraud was also recognized.

> "But it was said though a factor may not pledge the merchandize of his principal as a security for his debt, he may sell to his creditor in payment of an anteceded debt. No case can be found affirming such a doctrine. It is a misconception arising from the misapplication of correct principals to a case not belonging to any one of them * * *.

> When a contract is proposed between factors or between a factor and any other creditor to pass property for an anteceded debt, it is not a sale in the legal sense of the word or in any sense in which it is used in reference to the commission which a factor has to sell. See Berry *v.* Williams, 8 How. 495. It is in accordance to the usage of the trade. It is a naked transfer of the property in payment of a debt * * *. When such a transfer of property is made by a factor for his debt it is a departure from the usage of the trade known as well by the creditor as it is by the factor. It is more; it is a violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash or he may do so upon credit as may be the usage of the trade. A transfer for the anteceded debt is not doing one thing or the other.''

It is to be remembered in reading this decision that the appellant pawnbroker made his loan before there was what he claimed a title transfer insofar as the appellant's rights were concerned. Again, there is a stipulation no title passed to Scull.

Conclusion.

It is respectfully submitted that the construction of the memorandum agreement between Scull and Dougherty was a bailment under the relation of principal and factor; that there was no subsequent sale as the jury determined; that the Factor's Act of New York is not a construction of the agreement conferring any rights upon the pawnbroker in this state; that even though it might be said Scull had subsequently induced a sale it was of such a nature that it conferred no rights upon himself, and therefore none upon the

pawnbroker by such a tortious pledge. The jury's verdict should be sustained.

Respectfully submitted,

WALTER A. BEERS,
Counsel for the Plaintiff-Respondent.