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**Notice of Appeal.**

(Filed January 7, 1929.)

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**New Jersey Supreme Court**

LEBENSFELD BROS., INC.,  
*Plaintiff-Appellant,*

*v.*

PHILIP BUDNE,  
*Defendant-Appellee.*

Action at Law.

20

To:

KEALEY, GILFERT & NEBLO, Esqs.,  
Attorneys of Defendant-Appellee.

SIRS:

PLEASE TAKE NOTICE that the plaintiff does hereby appeal from the whole of the judgment of reversal entered in the New Jersey Supreme Court in this cause, to the Court of Errors & Appeals, in the last resort in all causes.

30

Dated January 4th, 1929.

Yours, &c.,

GROSS & GROSS,  
Attorneys and Counsel of  
Plaintiff-Appellant.

40

**Grounds of Appeal.**

(Filed January 7, 1929.)

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10

LEBENSFELD BROS., INC.,  
*Plaintiff-Appellant,**v.*PHILIP BUDNE,  
*Defendant-Appellee.*

Action at Law.

On Appeal from  
the Supreme  
Court.

The plaintiff-appellant states the following grounds of appeal herein:

20

1. That the New Jersey Supreme Court erred in reversing the judgment recovered by the plaintiff herein against the defendant in the First District Court of Jersey City.

2. That the New Jersey Supreme Court erred in not affirming the judgment recovered by the plaintiff herein against the defendant in the First District Court of Jersey City.

30

GROSS & GROSS,  
Attorneys and Counsel of  
Plaintiff-Appellant.

40

**Opinion of Supreme Court.**

(Filed October 2, 1928.)

NEW JERSEY SUPREME COURT,

No. 416, JANUARY TERM, 1928.

LEBENSFELD BROS., INC.,  
*Plaintiff-Appellee,*

*v.*

PHILIP BUDNE,  
*Defendant-Appellant.*

10

Submitted January Term 1928; decided October 2, 1928.

Appeal from First District Court of Jersey City.  
Before Justices PARKER, MINTURN and CAMPBELL.

20

For Appellant, EMILE NEBLO.

For Appellee, GROSS and GROSS.

*Per Curiam:*

This is an action in replevin to recover certain show cases and store fixtures sold by appellee to appellant under a conditional bill of sale. Default in payments thereunder having taken place a demand for the return of the goods was made and return being refused the action in question was brought.

30

The jury, by direction of the trial judge, returned a verdict for \$450, for the value of the goods, in favor of the appellee.

There are seven grounds of appeal, viz.:

1. Error in admitting conditional bill of sale because not properly proved.

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*Opinion of Supreme Court.*

2. Error in overruling certain questions put to the appellant.

3. Error in overruling certain questions put to the witness Isaac Baclar.

10 4. Refusal to submit cause to jury.

5. Judgment is irregular.

6. Proceedings irregular.

7. Error in refusing to accept in evidence proof of certain attachment proceedings.

We conclude that grounds 1, 5, 6, and 7, present no reason for reversal.

Grounds 2, 3, and 4 may be considered together.

20 The plaintiff below claimed the right to recover possession of the goods, because the defendant, the conditional vendee had failed to make payments in accordance with the terms of the conditional bill of sale. The defendant contended that plaintiff as a part of its undertaking had agreed to install the fixtures and had, in part, at least, failed so to do.

30 The testimony referred to under grounds 3 and 4 as having been erroneously excluded was for the purpose of showing this breach of contract and failure of performance upon the part of the plaintiff.

This we think the defendant was entitled to show, if he could, because performance by the defendant by payments, other than the payment of \$400, already made, was not required until and unless the plaintiff had performed by delivery and installation.

40 The question was not one of title but of the right of possession.

*Rule for Reversal of Judgment and Remittitur.*

It was error therefore to exclude this proof and if made, a jury question would have been presented because there was already in the case proof on the part of the plaintiff that the fixtures had been properly set up and installed in accordance with the terms of the contract.

10

The judgment below is reversed, with costs.

**Rule for Reversal of Judgment and Remittitur.**

(Filed Oct. 8, 1928.)

NEW JERSEY SUPREME COURT,

No. 416, JANUARY TERM, 1928.

LEBENSFELD BROS., INC.,  
*Plaintiff-Appellee,*

*v.*

PHILIP BUDNE,  
*Defendant-Appellant.*

On Appeal from  
District Court.

20

This case having been duly argued at the January term 1928 of this Court by Emil Neblo of counsel for the defendant-appellant, and Gross & Gross, counsel for the plaintiff-appellee, and the Court having inspected the record and judgment below, and considered the arguments of counsel.

30

It is thereupon ORDERED that the judgment of the First District Court of Jersey City be in all things reversed, set aside and for nothing holden, with costs of this Court to be taxed; and that the record of proceedings be remitted to the said First District Court of Jersey City to be proceeded with in

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*State of Demand.*

accordance with this judgment and the practice of  
said Court.

On motion of

KEALEY, GILFERT & NEBLO,  
Attorneys of Defendant-Appellant.

10

**State of Demand.**

(Filed August 22, 1927.)

FIRST DISTRICT COURT OF JERSEY CITY.

LEBENSFELD BROTHERS, INC.,  
*Plaintiff,*

*v.*

PHILIP BUDNE,  
*Defendant.*

20

In Replevin.

Plaintiff demands of the defendant the possession of the chattels hereinafter described:

- 2—9ft. Wallcases (s. h.)
- 1—10 ft. Cigar Wallcases (s. h.)
- 1—Slant Wallcase
- 1—Stationery Wallcase
- 1—Cigar Show Case
- 1—Candy Show Case
- 1—Novelty Show Case

30

The plaintiff is the owner of the aforementioned goods and chattels, and is entitled to possession of the same and the defendant herein is unjustly and unlawfully detaining said possession in violation of plaintiff's rights in the premises.

40

*Writ of Replevin.*

Judgment will be demanded for possession of the goods aforesaid, or for their value, together with damages for their detention and costs of suit.

GROSS & GROSS,  
Attorneys of Plaintiff.

10

**Writ of Replevin.**

(Issued August 23, 1927.)

Hudson County, ss.:

THE STATE OF NEW JERSEY, To the Ser-  
geant-at-Arms of the First District  
L. S. Court of Jersey City or to any  
Constable of said County:

20

GREETING:

YOU ARE HEREBY COMMANDED, That if Lebensfeld Brothers, Inc., shall make you secure, you cause to be replevied and delivered to LEBENSFELD BROTHERS, INC.:

- 2—9 ft. Wallcases (s. h.)
- 1—10 ft. Cigar Wallcase (s. h.)
- 1—Slant Wallcase
- 1—Stationery Wallcase
- 1—Cigar Show Case
- 1—Candy Show Case
- 1—Novelty Show Case

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which Philip Budne took and unjustly detained—as is said: AND that you summon the said Philip Budne to appear before the First District Court of Jersey City, to be held at the Court Room, First National Bank Building, 20 York Street, in said City, on the thirtieth day of August, one thousand nine hundred and twenty-seven

40

*Writ of Replevin.*

at ten o'clock in the forenoon, to answer the said Lebensfeld Brothers, Inc., of a plea of taking and unjustly detaining said goods and chattels aforesaid. AND have you then there this writ, with your proceedings thereon,

10

WITNESS, CHARLES L. CARRICK, Esquire, Judge of said First District Court at Jersey City aforesaid, the twenty-third day of August in the year One Thousand Nine Hundred and Twenty-seven.

B. FRANCES MARRON,  
Clerk.

GROSS & GROSS,  
Attorneys.

20

30

40

### Transcript of Record.

State of New Jersey, }  
 Hudson County, } ss.:  
 City of Jersey City, }

FIRST DISTRICT COURT OF JERSEY CITY,

Before—CHARLES L. CARRICK, Esquire, Judge.

10

No. 166106

	LEBENSFELD BROTHERS, INC., <i>Plaintiff,</i>		
	<i>v.</i>		
6	PHILIP BUDNE, <i>Defendant.</i>		
<i>Costs</i>	<i>City</i>	<i>Al</i>	In Replevin.
Bond	1.00		Gross & Gross, 20
Summons	1.50		Pif.'s Atty.
Service		1.50	Kealey, Gilfert &
Mileage		.20	Neblo,
Venire	2.50		Dft.'s Atty.
Summoning Jury		3.00	
Jury fees		12.00	
Subpoena		.50	
Trial Fee	1.50		
			30

August 23, A. D. 1927, Bond presented, approved by the Court and filed.

A summons was issued tested August 23, A. D. 1927, returnable August 30, A. D. 1927, at 10 o'clock in the forenoon of the said Court in the City of Jersey City.

The Sergeant-at-Arms returned the writ as follows, viz.: The plaintiff having given sufficient

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*Transcript of Record.*

10 security to prosecute, &c., and no claim of property therein and no bond being delivered to me by the defendant. I did on the 23rd day of August, 1927, replevy and deliver to the said plaintiff the goods and chattels in the said writ and received \$500 cash. The defendant Philip Budne, could not be found and I served the within writ on him the 23rd day of August, A. D. 1927, by leaving a copy thereof at his usual place of abode in presence of a person of his family over the age of fourteen years, whom I informed of the contents thereof, wife.

WILLIAM TURNER,  
Constable.

20 August 25, A. D. 1927, Demand for trial by jury filed by defendant.

Plaintiff's demand filed August 22, 1927.

November 10, A. D. 1927, Jury drawn but cause adjourned to December 8, 1927.

December 8, 1927, the plaintiff appearing and the defendant appearing the trial of the cause was proceeded with as follows:

30 The Constable returned the Venire with the following named persons summoned:—Alexander Miller, William Moody, Patrick Frodet, William M. Bell, Richard Dodd, Joseph Krams, Donald Freese, Charles W. White, John P. Barrett, George Bell, William P. Fox and Samuel Epstein, who were jointly and severally sworn as jurors.

Upon application of defendant, James S. Slavin, was appointed and sworn as stenographer.

40 On the part of the plaintiff—William Filon, Harry Liebensfeld, David Falb, Anthony Roberts, William Liebensfeld were sworn and testified. One delivery receipt and one lot of notes were offered and received in evidence.

*Transcript of Record.*

On the part of the defendant—Philip Budne, Isaac Baclar, Sarah Budne and John Scanlon were sworn and testified.

WHEREUPON by direction of the Court, the jury bring in a verdict in favor of Liebensfeld Brothers, Inc., plaintiff, in this sum of Four hundred and fifty dollars, and twenty-eight dollars and seventy cents, costs.

10

December 24, 1927, Notice of Appeal and Appeal Bond filed.

I, B. FRANCES MARRON, Clerk of the First District Court of Jersey City, Charles L. Carrick, Esquire, Judge, do hereby certify that the foregoing is a true copy of the Writ of Replevin, State of Demand and Transcript of a Judgment of the said Court.

20

IN WITNESS WHEREOF, I do hereby set my hand as Clerk of the said Court and affix the seal of the said Court this twenty-seventh day of December, nineteen hundred and twenty-seven.

B. FRANCES MARRON,  
Clerk.

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**Notice of Appeal.**

(Filed December 24, 1927.)

FIRST DISTRICT COURT OF JERSEY CITY.

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LEBENSFELD BROTHERS, INC.,  
*Plaintiff,*

*v.*

PHILIP BUDNE,  
*Defendant.*

} Notice of Appeal.

To Lebensfeld Brothers, Inc. or Gross & Gross,  
Attorneys:

20

TAKE NOTICE that the defendant Philip Budne hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of Jersey City rendered in the above stated action on the 8th day of December, 1927.

KEALEY, GILFERT & NEBLO,  
Attorneys of Defendant.

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**Testimony.**

FIRST DISTRICT COURT,  
JERSEY CITY, NEW JERSEY.

LEBENSFELD BROTHERS, INC.,  
*Plaintiff,*

*v.*

PHILIP BUDNE,  
*Defendant.*

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December 8, 1927.

Before—Hon. CHARLES L. GARRICK, J., and a jury.

APPEARANCES:

20

GROSS & GROSS, Esqs. (by LEO BLUMBERG,  
Esq.) for the Plaintiff.

KEALEY, GILFERT & NEBLO, Esqs. (by  
CHARLES C. COLGAN, Esq.) for the De-  
fendant.

JAMES S. SLAVIN,  
Official Stenographer.

(Mr. Blumberg made an opening state- 30  
ment to the Jury on behalf of the Plaintiff.)

(Mr. Colgan made an opening statement  
to the Jury on behalf of the Defendant.)

WILLIAM FILON, called as a witness on behalf  
of the plaintiff, being duly sworn, testified as fol-  
lows:

*Direct examination by Mr. Blumberg:*

Q. You are employed by the Registrar's Office, 40  
Mr. Filon? A. Yes.

Q. You are subpoenaed to come here today? A.  
Yes.

*William Filon, direct.*

Q. You brought with you a conditional sales agreement? A. Yes, sir.

Q. Is it on file in your office? A. Yes.

Q. What is the file number? A. November 3, 1926.

10

*By the Court:*

Q. The number of it. A. Six nine four three.

Q. The date is what? The filing date? A. The filing date is June 23rd, 9:08 A. M. 1927.

Mr. Blumberg: I offer this agreement in evidence.

The Court: Have you seen it, Mr. Colgan?

20

Mr. Colgan: Well, I object to this if the Court please. It is not signed—

Mr. Blumberg: I have another one—

Mr. Colgan: Just a minute. My objection to this, if your Honor please is that it is not signed by the defendant and it is not signed by the plaintiff in this action.

The Court: It will be received in evidence and marked Exhibit P-1.

30

(The paper referred to was received in evidence and marked Exhibit P-1.)

Mr. Blumberg: That is all.

The Court: You have a copy of that?

Mr. Blumberg: Yes.

The Court: Mr. Colgan, this a copy, so the original may go back with Mr. Filon.

Mr. Filon: I will leave it here.

The Court: You will leave it here?

Mr. Filon: Yes.

40

The Court: We will see that it gets back.

*Harry Lebensfeld, direct.*

HARRY LEBENSFELD, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

*Direct examination by Mr. Blumberg:*

Q. Was this signed in your presence by Mr. Budne? A. Yes. 10

Q. What business are you in? A. Store fixtures.

Q. In New York? A. In New York.

Q. Are you a member of the firm of Lebensfeld Brothers, Inc.? A. Yes.

Q. What are you? President? A. Yes.

Q. Where is your place of business? A. 219 Bowery.

*By the Court:*

20

Q. 219 Barclay Street? A. Bowery.

*By Mr. Blumberg:*

Q. Are you the party that sold these goods to Mr. Budne? A. Yes, sir.

Q. Did he go over to your store? A. Yes, sir.

Q. What did he do? A. He came over to my store and looked at some fixtures. I showed him some fixtures. He says "come over to my place and measure it out and see what I need." 30

Q. Did you do that? A. I did.

Q. Did he sign this agreement then? A. Then I went to his store and measured them up and give him an estimate. I says to him "come down to the store and look at the old fixtures and you can say what kind of new stuff you need." He came down and he signed the agreement.

Q. This agreement says: "all above fixtures to be set up in store at 1204 Washington Street, Hoboken, N. J." Was that done? A. Yes. 40

*Harry Lebensfeld, direct.*

Q. Who set them up? A. The carpenter and the painter painted them.

Q. Are they all here today? A. Yes, sir.

Q. Did you get four hundred dollars cash according to the agreement? A. Yes.

10 Q. Did you get notes? A. I got notes.

Q. Have you got them with you? A. Yes.

Q. This first note which is due September 15th—is it? A. Yes—no, July.

The Court: How many notes are there, Mr. Blumberg?

The Witness: Twelve of them.

Mr. Blumberg: Twelve notes.

The Court: How much each?

20 Mr. Blumberg: \$36.50.

The Witness: Forty dollars each.

The Court: Find out how much the notes are. He says they are forty dollars. That is something different. Let us get that right. What was the whole amount of the contract?

Mr. Blumberg: Four hundred forty-five dollars—eight hundred and forty-five dollars. Four hundred dollars was paid on account.

30 *By the Court:*

Q. How much are the notes for? A. Four hundred forty-five dollars.

Q. The individual notes? How much are they? A. Some are for forty dollars; some are for thirty-six dollars and fifty cents.

Q. Did you give the amount of them? A. Yes; four hundred and forty-five dollars.

40 *By Mr. Blumberg:*

Q. I show you this note, due July 15th, 1927, and

*Harry Lebensfeld, direct.*

ask you whether that was paid or not? A. That was not paid.

Q. Were any of the other notes paid? A. No, sir. He called me up on this note and says "leave it alone for a few days. I am a little short," which I did.

10

Q. When these notes weren't paid, what did you do? A. I came down and made demand for the goods,—for the money or the goods.

Q. What did he say to you?

The Court: Of course we don't know what the contract is. Read that part of it to him.

*By Mr. Blumberg:*

Q. Several clauses are in this contract. I will read a few of them to you. The contract between Leberfeld Brothers and Philip Budne mentions these fixtures: cigar show case, stationary wall cases and shelves. One clause says: "it is agreed that the foregoing shall constitute a conditional sale of said chattels to the undersigned, and that there are no precedent or contemporaneous conditions not stated herein, and that there are no oral agreements, representations or warranties." It also states: "It is agreed that all the terms, conditions and stipulations printed on or written on the back thereof, shall be and be deemed part hereof, and are hereby made part hereof, to the same force and effect, as though they were contained on this page." I will read the fifth condition: "It is specifically agreed that the title to the property herein described shall remain in the seller, until the full purchase price shall have been actually paid in cash, and the acceptance of any

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*Harry Lebensfeld, direct.*

note or other paper, or the obtaining of a judgment for any amount owing under this contract shall be in no wise taken or considered as a waiver of this—

10

Mr. Colgan: May I enter an objection at this time? That part of this which should have been signed is not signed.

The Court: I have admitted the paper in evidence. Proceed.

20

Mr. Blumberg: “—as a waiver of this condition. That in default of full payment for said property, or any part of installment thereof, when due as agreed, or in the event of any attachment, execution, distraint, or other process being sued out against the conditional purchaser, for foreclosure proceedings, or actions, or Bankruptcy proceedings, voluntary or involuntary, instituted against the conditional purchaser, or assignment for the benefit of creditors, or in the event of a receivership of the conditional purchaser, or assignment for the benefit of creditors, or in the event of a receivership of the conditional purchaser’s business or property being ordered or directed by any Court or Judge, then the seller shall have the right to forthwith take possession of the said property or any such portion thereof, as in their judgment may be sufficient to enable them to realize the herein mentioned full payment, to remove the said property or portion thereof, and shall have the right to enter upon the premises where the said property is located, to remove all or any such selected portion

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40

*Harry Lebensfeld, direct.*

without hindrance or legal process. In such event the seller is to retain all money paid on account as rental for the use of said articles during the period they were withheld by the purchaser. That on failure to pay any note or installment, when due, all the remaining notes or installments, shall immediately become due and payable." 10

The Court: Proceed.

*By Mr. Blumberg:*

Q. You say you went over to collect the money?

A. Yes, sir.

Q. When was this? A. After two notes were due.

Q. Whom did you see? A. Mr. Budne. 20

Q. Did you speak to him? A. Yes, sir.

Q. What did you say to him? A. "Either pay me the money or give me back my merchandise."

Q. What did he say? A. He says, "don't bother me; I have nothing to do with you."

Q. He made no complaint about the goods? A. Made no complaint to me.

Q. You instituted a suit? A. I instituted a suit; I came over to see you and got out a summons. 30

Mr. Blumberg: In Mr. Colgan's opening address, he said the goods were rebonded. That is not a fact.

The Court: Who has the goods now?

*By Mr. Blumberg:*

Q. Who has the goods now? You haven't the goods? A. I haven't the goods; no.

The Court: There was a bond taken?

Mr. Blumberg: There was a bond taken. 40

*Harry Lebensfeld, direct.*

Mr. Colgan: There was five hundred dollars put up. We have a receipt.

(Argument by counsel and court in regard to the point raised by Mr. Blumberg that Mr. Colgan said in his opening address that the goods were rebonded.)

10

*By Mr. Blumberg:*

Q. How long have you been in the fixture business? A. About ten years.

Q. Your parents were in the fixture business? A. What?

Q. You were born in the business? A. Yes.

Q. What do you say the goods were worth at that time?

20

Mr. Colgan: I object if the Court please.  
The Court: At what time?

*By Mr. Blumberg:*

Q. At the time you went to the store in August?

The Court: What is the objection?

Mr. Colgan: The objection if the Court please is that no time is fixed, first.

The Court: Yes, he has fixed the time.

30

Mr. Colgan: The second ground is that the value of these goods is fixed according to the security that they have accepted—five hundred dollars; according to the rebond in this case; they made an affidavit that the value of the goods was five hundred dollars.

Mr. Blumberg: It is stipulated that they were worth five hundred dollars.

40

The Court: The question is withdrawn, on the stipulation that they were worth five hundred dollars?

*Harry Lebensfeld, cross.*

Mr. Colgan: That is, two hundred and fifty dollars; double the amount. It has to be double the amount of the value of the goods.

The Court: I can't pass on that. You make objection or agree that the value is five hundred dollars. 10

Mr. Colgan: I won't agree to that.

The Court: I will allow the witness to testify. You may have your exception. Proceed.

*By Mr. Blumberg:*

Q. You went down with the constable, did you not? A. Yes.

Q. Constable Turner? A. Yes. 20

Q. You saw the goods at that time? A. Yes.

Q. Can you testify now from your experience of ten years? What would you say was the market value or reasonable value of the merchandise in that store, covered by the conditional bill of sale? A. About five hundred dollars—four hundred and fifty dollars.

Q. Four hundred and fifty dollars? A. Yes.

*Cross examination by Mr. Colgan:* 30

Q. You made an affidavit of this matter, didn't you, Mr. Lebensfeld? A. Let's see the affidavit.

Q. Did you make an affidavit? A. For what?

Q. As to the value of these goods before this replevin action was instituted.

The Court: You had better get all of the papers and let him see them.

Mr. Colgan: I will go into another part of it. 40

*Harry Lebensfeld, cross.*

*By Mr. Colgan:*

Q. You are Mr. Harry Lebensfeld? A. Yes, sir.

Q. Is there another Lebensfeld over in your place? A. My place? My brother.

10 Q. What is his name? A. Aahron.

Q. E-r-a-n? A. A-a-h-r-o-n.

Q. Aahron? A. Yes.

Q. You say that Mr. Budne came to your store?  
A. Yes.

Q. And picked out the goods on that day? A.  
What day?

Q. On the day he came over? A. He came over  
to my store?

20 Q. Yes. A. First he picked out some second-  
hand goods. Yes, he told my brother to send  
somebody over.

Q. He told your brother that? Were you there  
when he told your brother that? A. I wasn't there.

Q. Then you are testifying to something your  
brother told you in reference to that? A. This  
was before the sale was made.

Q. Were you there? A. When he came in for  
the estimate, I wasn't there.

30 Q. Were you there when he signed this? A.  
The agreement?

Q. The agreement? A. Sure.

Q. Will you sign your name, Mr. Lebensfeld?

(The witness signed his name on the pa-  
per.)

The Court: This affidavit is made by  
somebody entirely different.

*By Mr. Colgan:*

40 Q. Did you sign this agreement? A. Let me  
see it? Yes.

*Harry Lebensfeld, cross.*

- Q. Is this your signature? A. Yes, sir.
- Q. Do you know Mr. Budne? A. Sure.
- Q. Where is he? A. Sitting there (indicating).  
The man with the bald head.
- Q. How many times did you see him? A. Seen him? 10
- Q. Yes. A. About three or four times.
- Q. Did you go over and measure the fixtures?  
A. Yes, sir.
- Q. You, yourself? A. Yes, sir.
- Q. With someone else? A. Myself.
- Q. Alone? A. Yes.
- Q. Were you there when the fixtures were brought over? A. Brought over with the truck?  
No, sir. 20
- Q. After the fixtures were brought over, were they set up? A. Sure.
- Q. Did you receive any word from Mr. Budne about the fixtures? A. No word at all.
- Q. Now, you didn't send over all the goods specified in this agreement, did you? A. Yes, sir.
- Q. You did? A. Yes, sir.
- Q. Was there one candy show case sent over?  
A. Yes, sir.
- Q. This one here (indicating on the agreement)?  
A. Yes, sir. 30
- Q. Did you see that being put into the wagon?  
A. Yes, sir.
- Q. Did Mr. Budne call you up and tell you—  
A. No, sir.
- Q. Was this order changed on a novelty case?  
A. There was an addition. That was an extra novelty case.
- Q. How about this 1-3 foot show case? A. That is a novelty case. 40

*Harry Lebensfeld, cross.*

Q. That was changed? A. That wasn't changed; that was an addition to the order.

Q. An addition? A. Forty-five dollars.

10 Q. Your agreement called for four hundred dollars in cash and a balance of four hundred dollars in eleven monthly payments? A. Yes.

Q. At thirty-six dollars and fifty cents each month, beginning June 15th. You didn't accept that proposition, did you? A. Sure I did.

Q. When did you get the first hundred dollars? A. The first hundred or two hundred?

Q. The first two hundred. A. When we signed the agreement.

20 Q. Had he had the fixtures at the time? A. When he signed the agreement he gave me two hundred.

Q. How much more did you get? A. Two hundred when the goods were delivered.

Q. Two hundred when the goods were delivered? A. Yes.

Q. When these goods were delivered, didn't you receive a telephone call from your man? A. About what?

Q. About accepting a check? A. A check?

30 Q. Yes. A. I didn't receive no call.

Q. No calls at all? A. No.

Q. You say the value of these goods was four hundred dollars or four hundred and fifty dollars, is that right? A. Yes.

Q. Who is Mr. Cohen? A. Mr. Cohen?

Q. Yes. Herman Cohen? A. He is in the store fixture business.

Q. Where? A. On the Bowery.

Q. What number? A. 89 Bowery.

40 Q. 89 Bowery? A. Yes.

*Harry Lebensfeld, cross.*

Q. How long has he been in the business? Do you know? A. I don't know.

Q. You say the goods are valued at four hundred and fifty dollars or five hundred dollars? A. Yes, sir.

Q. At the time you went over when the first note was due— A. The goods were worth back to my place? 10

Q. Never mind that. What was the value of the goods at the time you saw them? A. Four hundred and fifty dollars.

Q. Four hundred and fifty dollars? A. Yes.

Q. How long had they been used? A. They had been used a few months.

Q. A few months? A. Yes.

Q. Were they in good condition? A. Were they in good condition? 20

Q. Yes. A. Yes, sir.

Q. You sold them for eight hundred? A. Yes.

Q. They were used three months? A. Yes.

Q. They depreciated 50% in value, did they? A. Yes, sir.

Q. Why? You say you made demand on Budne for the payment? A. Yes.

Q. Of this first note? A. Yes.

Q. How did you make that demand? A. Personally. First through the bank; then I went down personally and made demand for the money. 30

Q. And Budne told you "don't bother me"? A. "Don't bother me now. I have no time to talk to you."

Q. Was he busy at the time? A. He wasn't busy.

Q. You don't know what the reason was why the note was not paid? A. I don't know why. I don't know of any reason. 40

Q. What did you say to him then? A. The man

*Harry Lebensfeld, cross.*

says he had no time to talk to me. That is all he said. I walked out. I said, "What is the trouble?" He says, "No trouble." He says, "Don't bother me."

Q. What did you do then? A. Went to see a lawyer.

10 Q. Gross & Gross? A. Yes.

Q. What happened then? A. I got out a summons for the man.

Q. Replevin? A. Yes.

Q. You put up a bond? A. Yes.

Q. You didn't make any other demands on him. That time he told you not to bother him. A. I made demands for the second and third notes. First, I made demands on him for the first note. He says, "Leave me alone for a few days. I am a little short."

20 Q. He did say that the first time? A. Yes. The second time—

Q. Let us stick to the first time. What did you say the first time? Did he say he was too busy? A. The first note, he says, "I am short."

Q. All right, you testified that you went in— A. Yes.

Q. And he said, "Don't bother me; I am too busy?" A. That was the second time.

30 Q. The second time? A. Yes.

Q. And what did he say the first time? A. The first time he says: "I am short. I have no money now; come around when the second note will be due."

Q. What day was that? A. The first time, I believe it was July 20th—the 18th—I can't remember exactly.

40 Q. The second note was due when? In August? A. I believe in August. It was due in August.

*Harry Lebensfeld, cross.*

Q. You went back the second time and saw Budne? A. Yes.

Q. What did he say then? A. He says: "Don't bother me. I have no time to talk to you."

Q. What did you say to him? A. Nothing.

Q. You just walked out? A. I said, "What is the trouble?" He says, "Don't bother me." 10

Q. Did you ask him the reason why? A. He says, "Don't bother me." What am I going to do? I wasn't asking him when he didn't tell me.

Q. Is that the way you do business? When a man says, "Don't bother me," you don't inquire the reason why? A. The first time I went in, the man was satisfied.

Q. What do you mean, he was "satisfied"? A. He says, "I am a little short." He didn't tell me anything about the fixtures. 20

Q. The first time? A. Yes.

Q. You were willing to wait? A. Of course, I was willing to wait.

Q. The second time, he says, "Don't bother me"? A. The second time, he says, "Don't bother me; I have nothing to do with you."

Q. You didn't take the trouble to find out why? A. He said he was a little short. 30

Q. Did you ask him why? A. He said, "Don't bother me"; that is all.

Q. You walked out? A. Of course I did.

Q. It only took you about a minute? A. No, it took more than a minute.

Q. About how long did it take? A. About two or three minutes.

Q. It took two or three minutes for you to ask him. What did you say to him when you were there? A. I said, "Good evening." It was night time. He said, "How is business?" 40

*Harry Lebensfeld, cross.*

Q. What did you say? A. I said, "Business is all right."

Q. You said, "Business is all right"? A. I said, "Business is pretty busy. There are two notes due. One is overdue."

10 Q. You said that? A. Yes.

Q. What did he say? A. He said, "Don't bother me on the notes."

Q. Did he say it in an angry tone? A. He seemed to be a little mad.

Q. He seemed to be a little mad? A. Yes.

Q. Did you ask him what the trouble was? A. I didn't ask him what the trouble was. He said, "Don't bother me. I have nothing to do with you." All of a sudden, he got in a rage. He says, "I have  
20 nothing to do with you any more."

Q. Do you know the reason? A. I don't know any reason for the man to give me an answer like that, "I have nothing to do with you." I walked out. That is all.

Q. Had you received a complaint prior to that time? That your fixtures were not set up according to your agreement? A. No, sir.

Q. Didn't you call your man from the job over there when he telephoned you? A. No, sir.

30 Q. Did you receive any letters from Mr. Budne? A. No, sir.

Q. Did you turn over all your correspondence to your lawyer? A. What do you mean? Correspondence?

Q. You turned over all the papers, didn't you? A. All my papers? Sure.

Q. Did you receive a letter from a firm in Hoboken by the name of Kealey, Gilfert & Neblo? Look this over and let me know whether you re-  
40

*Harry Lebensfeld, cross.*

ceived the original of that? A. I never received any letter.

Q. Never received it? Your place of business is 219 Bowery? A. Right.

Q. Now, you never received any word from Mr. Budne that the cigar wall case—

10

Mr. Blumberg: I object. The letter is not in evidence.

The Court: He said he received no letter. If that is so there is no use of getting before the jury what he said he did not receive. Prove it on your case.

*By Mr. Colgan:*

Q. Did you receive a telephone communication from— A. No, sir.

20

Q. Is your brother in court? A. No, sir.

Q. You are a corporation, aren't you? A. Yes, sir.

Q. You do business over in Jersey here? A. Whenever we have customers we do business.

Q. You come over here quite often, don't you, Mr. Lebensfeld? A. No, sir.

Q. You do business over here? A. Whenever we have a customer we deliver goods.

30

Q. You have quite a number of customers over here?

Mr. Blumberg: I object to this line of questioning.

The Court: How was it material?

Mr. Colgan: I withdraw it.

*By Mr. Colgan:*

Q. Now, didn't you tell Mr. Budne that you were not Harry Lebensfeld? A. Never denied it.

40

*Harry Lebensfeld, cross.*

Q. So, you had charge of all the transactions with Budne, is that right? A. Yes, sir.

10 Q. With the exception of the time he came in and told you to send a man over? A. He told my brother to send a man to measure it. And see what he needs. I went out and measured it up and told him what he needed. He came over and looked at some second-hand stuff and signed the agreement, and gave me a deposit on the goods. We delivered the goods. After the goods were set up, he signed the notes. I have the notes here.

Q. You didn't go over and take the measurements yourself? You sent a man over. A. I went out first and measured it myself, and told him what he needed.

20 Q. What did you measure? A. To see what the man needed.

Q. What did he need? A. He needed a cigar wall case in the front of the store; two stationary wall cases in the back of the store on the same side; he needed a cigar show case; needed a candy show case; he needed one length of slant wall case on the other side of the store; a magazine rack in the front; and then after the job was put up and set up, he came down and he ordered a novelty case. After he saw the stuff being put in condition in the store, he said, "it looks to be all right. Make me a novelty case in addition to the order."

30 Q. Your man set these goods up? A. Yes, sir. My carpenter.

Q. Did your carpenter ever go back there again? A. Never went back there again for any reason. He set them up; accepted the man's word.

40 Q. Did he ever go back there again? A. No, sir.

*Harry Lebensfeld, redirect.*

Q. How about the cigar wall case? Was that set up? A. Yes, sir.

Q. Was there a glass in it? A. Everything was in it.

Q. Did you see it? A. I seen it when I loaded it on the truck, and I seen it when the stuff was in the man's store. When I go to make demand on the note. 10

Q. Was the stationery wall case painted when you sent them over? A. No, they weren't painted.

Q. Were they painted afterwards? A. Yes.

Q. Who painted them? A. My painter.

Q. Your painter? A. Yes.

Q. After they were set up? A. Yes. After the carpenter got finished with the carpenter work the painter painted them. 20

Q. The magazine rack? A. That was all set up. Everything was set up.

Q. Do you know where the fixtures were put in the store? A. Yes, sir.

Q. Where? A. 1204 Washington Street.

Q. Do you know where each fixture was to be put? A. Yes, sir.

Q. Where was the cigar wall case to be put? A. Put on the right side of the store.

Q. Is that where it was when you saw it? A. Yes. 30

*Redirect examination by Mr. Blumberg:*

Q. This delivery receipt was signed by Budne?  
A. Yes, sir.

Mr. Blumberg: Any objection to this, Mr. Colgan?

Mr. Colgan: Yes, I object to that unless it is proved. Our defense is the goods weren't delivered. 40

*Harry Lebensfeld, redirect.*

*By Mr. Blumberg:*

Q. Were you there when they were delivered?

A. I wasn't there. The truckman delivered them.

Q. Are the truckmen here? A. Yes, sir.

10 Mr. Blumberg: I offer these notes in evidence.

The Court: Is there any question about the notes?

Mr. Colgan: I object to all the notes, outside of the note for \$36.50. The contract calls for eleven monthly payments at \$36.50.

The Court: You say those notes are not signed by your man; signed by the—

Mr. Colgan: No objection.

20 The Court: They will be received in evidence.

(The twelve notes were received in evidence and marked P-2 to 13, inclusive.)

*By Mr. Colgan:*

Q. Will you write your name once again, Mr. Lebensfeld?

(The witness wrote his name.)

30 The Court: That is all.

Mr. Colgan: I want to offer this for identification. He identified that as his signature.

The Court: Let me have it.

Mr. Colgan: Also this signature he made on this yellow sheet of paper.

(The papers referred to were marked D-1 and D-2 for Identification.)

40

*David Fald, direct-cross.*

DAVID FALD, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

*Direct examination by Mr. Blumberg:*

Q. Do you live in New York? A. Yes, sir.

Q. You are a truckman? A. Yes, sir. 10

Q. Work for Lebensfeld Brothers? A. Yes.

Q. Did you go to the store at 1204 Washington Street, Hoboken, N. J.? A. Yes.

Q. The store of Philip Budne? A. I don't recall the name exactly.

Q. Do you know the man? A. Yes.

Q. Is he in court? A. Yes.

Q. Where is he? A. There he is, sitting there (indicating).

Q. The bald-headed man? A. Yes, sir. 20

Q. Did you deliver these goods to Mr. Budne's store (showing witness a paper)? A. Yes, sir.

Q. The goods that are in that delivery receipt? A. Sir?

Q. The goods that are mentioned in that delivery receipt? A. Well, I can't exactly recollect, but I remember the man signing the receipt. That is all I know, and everything was "O. K.," otherwise, I suppose he wouldn't have signed it. It was checked over—the stuff. 30

Q. He checked all the stuff over? A. Yes.

Mr. Blumberg: I offer this in evidence.

Mr. Colgan: All right.

(The delivery receipt was received in evidence and marked P-14.)

*Cross examination by Mr. Colgan:*

Q. Where did you put these goods? Where did you say you put these goods? A. 1204 Washington Street. 40

*Philip Budne, direct.*

Q. Was that an empty store? A. I don't recollect.

Q. Did you go over there again? A. No, sir.

Q. It was an empty store. There was nothing in the store, was there? A. I don't remember, whether goods were in the store or not.

10 Q. Well, when you brought the goods in there, there was nothing else in the store, was there? A. I don't recollect, outside of my goods that I brought in. I didn't stand around. Then I pulled away with the truck.

Mr. Blumberg: That is all. Plaintiff rests.

---

20 PHILIP BUDNE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

*Direct examination by Mr. Colgan:*

Q. Mr. Budne, where do you do business? A. 1204 Washington Street, Hoboken.

Q. What kind of business are you in? A. Stationery, cigars, candy.

30 Q. Where did you buy your fixtures? A. I bought the fixtures at Lebensfeld Brothers, at 219 Bowery.

Q. When did you go over there? A. Well, I can't recollect exactly the date, but I went down there to this place, and there was a man by the name of Harry Lebensfeld, but this is not Harry (indicating).

40 Q. How do you know? Did you ask for Harry Lebensfeld? A. The man that dealt with me told me that he was Harry Lebensfeld.

*Philip Budne, direct.*

Q. What sort of man was he? A. Taller than him; dark and taller than him.

Q. What order did you give? A. I went down because I wanted fixtures for the store. I told him he should go and measure out the store and see what was needed. That same Harry came out and measured out the store; not this fellow, but Harry came. 10

Q. Did this man measure your store (indicating)? A. No, sir.

Q. All right; go ahead. A. This man—he always said that he is not the boss. Harry Lebensfeld came over and he took the measurements, and he gave me a price of eight hundred dollars (\$800.00) which I was supposed to get fixtures for all around. Well, next— 20

The Court: Why go into that? That is in the contract.

*By Mr. Colgan:*

Q. Were all of the fixtures under your contract turned over to you? A. No.

Q. What was missing? A. The candy case; as near as I remember the candy case was missing.

Q. Anything else? A. No. 30

Q. Was there any other change made in the contract that you signed? A. Yes, sir.

Q. What other change was made? A. There was a three-foot show case there that I wanted changed to a two and a half foot glass case. So he told me that that would be \$45.00 extra; and they didn't give me the three-foot case but gave me that glass case.

Q. Did that add to the contract or decrease the contract? Did you have to pay more for that? A. I had to pay more for that. 40

*Philip Budne, direct.*

Q. Where were the goods delivered? A. To an empty store at 1200 Washington Street.

Q. Why were they delivered to an empty store?

A. Why were they delivered to an empty store? He asked me.

10 Q. Who asked you? A. Harry Lebensfeld told me he would take that place to work in. They had an empty store for which we paid \$20.00. Lebensfeld was to pay—return to me—

The Court: We don't want all that. Let us get right down to the issue.

*By Mr. Colgan:*

20 Q. After these goods were set up, did you ever speak to Harry about the goods?

Mr. Blumberg: I object. The question here is title.

The Court: Yes.

*By Mr. Colgan:*

Q. Did you buy these goods? A. Yes, sir.

Q. From whom? A. From Harry Lebensfeld.

30 Mr. Blumberg: I object to that if the Court please.

*By Mr. Colgan:*

Q. Who owns the goods now?

Mr. Blumberg: I object to that.

The Court: That is asking for conclusion.

*By Mr. Colgan:*

40 Q. Did you purchase these goods at any time after they were delivered at your store? A. No.

*Philip Budne, direct.*

Q. I show you this paper. Just look at it. I ask you whether the name mentioned in there is yours. Just answer yes or no. A. Yes.

Q. Now were these goods set up in your store by Lebensfeld? A. Partly.

Q. All right. A. Some of them were in the cellar. 10

Q. What went in the cellar? A. All the show cases.

Mr. Blumberg: I object.

The Court: When there is an objection, do not answer.

Mr. Blumberg: I object to the question as immaterial.

The Court: Whether they were set up or not? Proceed. 20

*By Mr. Colgan:*

Q. What fixtures were in the cellar? A. In the cellar were all the glass show cases taken apart and not painted white—the woodwork.

Q. Were they goods you bought from Lebensfeld? A. Yes, sir.

Q. Were they supposed to be set up under your agreement? A. Yes, sir. 30

Q. Now, what did you do when you found they were not set up?

Mr. Blumberg: I object, if your Honor please.

The Court: It will be excluded.

*By Mr. Colgan:*

Q. Did you set them up? A. I had to pay somebody to set them up. 40

*Philip Budne, direct.*

Q. Who set them up for you?

Mr. Blumberg: I object.

A. I have a carpenter—

*By Mr. Colgan:*

10

Q. Who is he? A. A carpenter I had give an estimate for—

The Court: Never mind that.

*By Mr. Colgan:*

Q. Then this man set the show cases up for you? A. Yes.

Q. You paid him for that? A. Yes, sir.

20

Q. Did you, before you had them set up, have any conversation with Lebensfeld Bros. with reference to that? A. Yes.

Q. Whom did you have the conversation with?

Mr. Blumberg: I object to this question. As I understand it, the question here is whether we are entitled to these goods. They are not setting up the defense that the goods were defective.

30

The Court: I don't understand that they are claiming the goods were defective. I will allow it.

Mr. Blumberg: Allow me an exception?

*By Mr. Colgan:*

Q. Whom did you have a conversation with? A. I had once with this gentleman here who was on the stand before. He says, "I am not the boss. I don't know anything about that. You will have to see Harry." When I was in the store—

40

Q. Did you see Harry? A. Yes, sometime after.

*Philip Budne, direct.*

Q. What did you tell Harry? A. I told Harry, "You know everything is messed in the store. It has got to be fixed up. I am losing business. It can't go on this way." Harry answered me. He had a note in his hand: "I got a receipt for the goods I will sue you and will collect"—

10

Q. It wasn't this man (indicating)? A. No, sir.

Q. What did you do then? A. Then I give it over to my attorney.

Q. Was that before or after you got the carpenter to put them up? A. Way before. We gave him a lot of time on it.

Q. Did you see him any time after that? A. No, sir. Never did they come around after the fixtures were put in the store. They had one carpenter working, and Lebensfeld—neither one of them showed up since.

20

Q. Did this man come over to your store at any time? A. No, sir.

Q. When was the first time you saw this man? A. When they brought the fixtures in.

Q. All right. I show you this agreement that is signed. Did you see this paper being signed? A. I seen it, yes, sir.

Q. When it was signed? A. Yes.

Q. Who signed that paper? A. Not this gentleman. A tall fellow which he said he is Harry Lebensfeld.

30

Q. You are sure it wasn't this man? A. Positively.

Q. When these notes became due, did this man come over to your store twice for the notes? A. No, sir. Only from the bank. It was from the State Bank,—the note. They sent it from the City National Bank, there was no man in to collect the note.

40

*Philip Budne, cross.*

Q. What did you do when these two notes were due? A. I just protested these notes.

Q. Refused to pay them? A. Yes.

Q. Did you notify Lebensfeld before that time that you were not going to pay the note? A. Yes, sir.

10

Q. Did you institute a suit against Lebensfeld?

Mr. Blumberg: I object to it.

The Court: When?

Mr. Colgan: In August.

The Court: You mean after this?

Mr. Colgan: Yes.

The Court: Overruled.

Mr. Colgan: Allow me an exception.

20

*Cross examination by Mr. Blumberg:*

Q. You don't deny that you went over to New York and picked out these fixtures, do you? A. Well, he had nothing there.

Q. You went over to New York and picked out these fixtures, didn't you? A. No, I didn't pick out—

30

Q. What did you do? A. It was just said what was to be done. There was no fixtures there to be picked out.

Q. Did you pick out a cigar wall case? A. That was the only one. That was the second hand case. That was the only one there; yes.

Q. Did you see other wall cases there? A. No, sir.

Q. That was to be put up for you? A. No, he said he had some there not painted, but I didn't see them.

40

Q. Did you see a stationary wall case? A. No.

*Philip Budne, cross.*

Q. Did you see a cigar show case? A. No; that was supposed to be built, too.

Q. A novelty show case? A. No.

Q. Have you got in your store two nine foot wall cases? A. Yes.

Q. Were they built by Lebensfeld? A. Yes. 10

Q. Have you a ten foot cigar wall case? A. Yes.

Q. Was that built by Lebensfeld? A. No.

Q. It wasn't? A. No, it wasn't; that was there. That is an old case.

Q. That was delivered by Lebensfeld? A. Yes.

Q. Slant wall case? That was put up by Lebensfeld? A. Yes.

Q. Novelty show case was put up by Lebensfeld? A. It wasn't put up. 20

Q. Wasn't the novelty show case put up by Lebensfeld? A. He had it set in the cellar.

Q. That would be \$45.00? A. That would be \$45.00 extra. In exchange—there was a three foot show case. I wanted a novelty case. He made me pay that.

Q. The cigar show case? A. No, sir. They put it down in the cellar. My man had to put it up.

Q. What is it you say you did not get? A. A six foot slant—candy case. 30

Q. This is the conditional sales agreement you signed? A. Yes. I was told this was an order and not a conditional bill of sale. He never showed me anything on the other side.

Q. Did you sign this? A. Yes, sir.

Q. Did this call for a candy show case six foot long? A. This called for a candy show case six foot long, yes, sir.

Q. You say you never got that? A. Never got that. 40

*Philip Budne, redirect.*

Q. Sure about that? A. Absolutely.

Q. Do you remember when the truckmen came over with the goods? A. Yes.

Q. Did you look it over before you signed it?  
A. They made me sign it, before they put the merchandise down. It was eight o'clock at night. They wouldn't lay the merchandise down until I signed it.

Q. Did you read it? A. No, sir.

Q. Did you read it? A. Before I signed it, yes, but it was on the truck; I didn't see the merchandise.

Q. Did you know this called for a candy show case, the second hand? A. These cases were not included in this load at all.

20 Q. You signed for it? A. They made me sign it. They had my note for \$400.00. I had to.

Q. You gave them \$200.00 more for it? A. He demanded that. In cash.

Q. You gave \$200.00 in cash? A. Yes.

Q. You signed this? A. Yes.

Q. You saw the goods? A. The goods were on the truck. Then I signed it and got everything.

Mr. Blumberg: That is all.

30 *Redirect examination by Mr. Colgan:*

Q. At the time these goods were delivered, did you have any conversation with Lebensfeld? A. Yes, sir.

Q. What conversation did you have?

Mr. Blumberg: I object unless it is shown with whom he had the conversation.

The Court: Show whom he talked with.

40 *By Mr. Colgan:*

Q. What conversation did you have with the

*Philip Budne, redirect.*

driver of the truck at the time he delivered them in reference to the goods about payment?

Mr. Blumberg: I object.

A. Nothing.

The Court: It will be excluded.

10

*By Mr. Colgan:*

Q. What Lebensfeld did you have the conversation with? A. With Harry Lebensfeld.

Q. Was this Lebensfeld there (indicating)? A. Yes. He was there but not Harry.

Q. But you had a conversation with this man? A. Oh, yes.

Q. What conversation was that? A. He said, "I am not the boss; I don't know anything about it."

20

Q. What did you do? A. I called up Harry Lebensfeld.

Q. Was it in the empty store that you called up? A. No, I called up from my store.

Q. You called up from your store? A. Yes.

Q. Did you get Harry Lebensfeld? A. Yes, sir.

Q. Do you know his voice? A. Yes, sir.

Q. Did you talk with him before? A. Yes, a few times.

30

Q. What conversation did you have with him? A. The understanding was that \$200—

Q. Never mind that. What conversation did you have? A. I told him that I don't know—I signed, but I don't want to pay \$200 until the fixtures are installed. He said, "No, that is the way we do business. You have to pay as you have the notes signed."

Q. Anything else? A. No.

40

Q. What did you do then? A. I paid the \$200.

*Philip Budne, recross.*

Q. How? Check or cash? A. Cash.

Q. When they had these fixtures all completed, they took the fixtures from the empty store? A. They put it into my store.

10 Q. How did the fixtures happen to be down in the cellar? A. Because the show cases didn't come in this load. They came after.

Q. Who put them in the cellar? A. The driver.

Q. Did you tell him to put them in the cellar? A. There was no other place to put them.

Q. Did anybody come over from Lebensfeld to install the show cases after that? A. No, sir.

Q. Did anybody come over to fix the other show cases after they were put up? A. Never.

20 Q. There was only one man over that fixed up the show cases? A. The wall cases only; not the show cases.

Mr. Colgan: That is all.

*By Mr. Blumberg:*

Q. How many men of Lebensfeld were working in your place? A. One man, and another man after. One man came in one day to put the cases together. One man started one day, and he called  
30 him back.

Q. Was there a painter there? A. There was no painter there, no. He didn't work on that store at all; he worked in the empty store.

Q. He worked in the empty store? A. Yes. He asked me for some money to buy paint. He didn't have any paint.

Q. Is this fellow here Harry Lebensfeld? A. No, sir.

Q. He wasn't there? A. No, sir.

40 Q. Didn't he come and measure that store for you? A. No.

*Philip Budne, recross.*

Q. Who came and measured that store for you?

A. A taller fellow than him, and slimmer. I know Harry Lebensfeld.

Q. How much taller was he? A. A couple of inches.

Q. How much slimmer? A. I didn't weigh him. 10

Q. When did you give these notes Mr. Budne?

A. When I give the notes?

Q. Yes. A. They made me sign the notes when they brought the fixtures to the empty store. They didn't want to put anything in the store until I signed the notes.

Q. At their insistence you sat down and signed the notes? A. Yes.

Q. And gave all cash? A. No. They demanded the cash after. I wouldn't sign the notes. 20

Q. When did you pay the cash? A. About a half hour after.

Q. After the goods were delivered? A. Yes—no, the goods were on the truck yet.

Q. When did you sign the notes? A. Before that.

Q. You signed the notes first? A. Yes.

Q. Then you gave the cash? A. Then he told me they wouldn't put the fixtures down until I give him \$200 cash. 30

*By Mr. Colgan:*

Q. Did you look at the back of this agreement?

A. He never showed me the back.

Q. Did you look at it? A. No, sir.

*Isaac Baclar, direct.*

ISAAC BACLAR, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

*Direct examination by Mr. Colgan:*

10 Q. Mr. Baclar, what business are you in? A. Painter, decorator, and carpenter.

Q. How long have you been a carpenter? A. Fourteen years.

Q. Are you in business for yourself? A. Yes, sir.

Q. How long have you been in business for yourself? A. Five and a half years.

Q. Prior to that time you worked for someone? A. Worked for somebody?

20 Q. Worked for somebody? A. Yes, I work every day.

Q. I mean you were not in business for yourself? A. No.

Q. You worked both as a painter and carpenter? A. Yes.

Q. Did you do any work for Mr. Budne? A. Yes.

30 Mr. Blumberg: I object to this as immaterial.

The Court: How is it material?

Mr. Colgan: He was supposed to erect these fixtures. I have shown so far the showcases were not erected in accordance with the contract.

The Court: If this was a suit on a note, it would be all right, but how does it concern us now?

40 Mr. Colgan: The part of the consideration for signing the conditional sales agreement was that they were to be installed.

*Isaac Baclar, direct.*

It is admissible for this reason also: Suppose the goods are not in existence now; the court will have to give a money judgment.

The Court: I presume the goods are in existence they were in existence. I don't see, Mr. Colgan, how we are concerned at all that they weren't put up. They own the goods and that is what they are suing for. I will overrule it. 10

Mr. Colgan: Allow me an exception. The Court's ruling is that I can't get in the value of this work at all?

The Court: Yes.

Mr. Colgan: I want to offer in evidence for the purpose of the record the attachment suit issued— 20

Mr. Blumberg: Just a minute. I strongly object to that.

The Court: I understand what it is. I don't see how it can possibly be admitted. You may make your offer on the record. I will overrule it and give you an exception.

Mr. Blumberg: We had no notice of the suit anyway.

Mr. Colgan: An attachment suit issued by Philip Budne against— 30

The Court: Out of what court?

Mr. Colgan: Out of the Hoboken District Court, against Lebensfeld Brothers, on the 15th day of October, 1927. Also a record of the said judgment. It was issued on the 25th day of August, 1927. Judgment was obtained—judgment entered September 15th, 1927, as shown by attachment book of the Hoboken District Court number four. 40

The Court: Page what?

*Harry Lebensfeld, direct.*

10 Mr. Colgan: Page 367. Judgment was for \$300 and \$20 costs; which execution issued October 15th, 1927, and a levy made on October 15, 1927, on the following goods: Two 9 foot wall cases, one 10 foot cigar wall case, one slant wall case, one cigar show case, one novelty show case; and that the attachment book number 4 shows that the execution was returned on October 15th by John Solferino, Sergeant-at-Arms, having collected. On October the goods were sold for the sum of 100 to the plaintiff Philip Budne. Also a bill of sale from John Solferino, Sergeant-at-Arms to Philip Budne, dated October 20th, 1927, making sale to Philip Budne of the goods mentioned in the writ of execution.

20

The Court: Do you object to that?

Mr. Blumberg: I object to the offer of the bill of sale and the entire proceeding of the attachment.

The Court: The offer is overruled.

Mr. Colgan: The court will allow me an exception?

30

HARRY LEBENSFELD, recalled as a witness on behalf of the defendant, testified as follows:

*Direct examination by Mr. Colgan:*

Q. Have you, Mr. Lebensfeld any identification about you? A. Identification?

Q. Yes. A. This ring (indicating).

Q. Have you any card? A. Yes, I have agreements signed by me.

40

Q. Have you any letters? A. No letters. I have this ring (indicating).

*Harry Lebensfeld, cross.*

Q. Have you got any cards with you? A. The concern's cards; business cards, Lebensfeld Brothers. There is my ring, H. L. That is all I have.

Q. May I look at these? A. The cards? Go ahead. 10

Q. What does your brother look like? A. My brother?

Q. Yes. A. Smaller than me.

Q. Is he taller or thinner than you? A. He is smaller than me.

Mr. Colgan: I also want to offer in evidence if the Court please this signature written by Harry Lebensfeld and the agreement. 20

The Court: It may be received.

(The papers referred to are received in evidence and marked D-1 and D-2.)

*By Mr. Blumberg:*

Q. Is this your signature on this agreement? A. Yes.

Q. This agreement here (indicating)? A. Yes.

Q. There is no question that you are Harry Lebensfeld? A. No. 30

Q. The truck drivers all know you? A. Yes.

Q. As Harry Lebensfeld? A. Yes.

Q. Is there any other Harry in your place? A. No, sir.

Q. None at all? A. None at all.

*By the Court:*

Q. What is the name of the man who went over to take the measurements? A. I went over to give him the measurements. 40

*Sarah Budne, direct.*

Q. Somebody else went over? A. A carpenter went over to get the correct measurements.

Q. What is the carpenter's name? A. Tony Roberti.

10 *By Mr. Blumberg:*

Q. Is he here? A. Yes, sir.

---

SARAH BUDNE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

*Direct examination by Mr. Colgan:*

20 Q. Mrs. Budne, you are the wife of the defendant, Philip Budne? A. Yes, sir.

Q. Did you ever see this man before (indicating)? A. Only when he brought over the fixtures.

Q. Only when he brought over the fixtures? A. Yes.

Q. Do you know the man who took the measurements in your store? A. Yes.

Q. What was his name? A. Harry Lebensfeld.

Q. Harry Lebensfeld? A. Harry Lebensfeld.

30 Q. What kind of a looking man was he? A. He was taller than him. I only saw him once. He was in the store once.

Q. But you are sure it is not this man here (indicating)? A. Yes.

Q. Were you there when the show cases were delivered? A. Yes, sir.

Q. Do you know where the show cases were put? A. In the cellar.

Q. Were those show cases put up? A. No, sir.

40 Q. Did you have any conversation with Harry Lebensfeld? A. My husband—

*Anthony Roberti, direct.*

Q. Did you? A. No. Of course, I didn't see him any more.

Q. Were you present at any conversation held between your husband and Mr. Harry Lebensfeld?

A. No.

Q. When he was over to the store? A. That time when he took the measurements I told him what I want he should make me. 10

Q. You told him? A. My husband was there, too.

Q. Do you know whom the show cases were put up by? A. By the carpenter man sitting over there.

Q. Who got the carpenter to put them up? Who told the carpenter to put them up? A. Mr. Budne. 20

Mr. Colgan: That is all.

---

ANTHONY ROBERTI, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

*Direct examination by Mr. Blumberg:*

Q. Where do you live, Mr. Roberti? A. 164 Wilson Avenue, Brooklyn. 30

Q. Mr. Roberti, you work for Lebensfeld Brothers? A. Yes.

Q. You work for Harry Lebensfeld? A. Yes.

Q. Who is Harry Lebensfeld? A. Right here (indicating).

Q. Is there any other Harry Lebensfeld in your place? A. No, sir.

Q. What is the other brother's name? A. Morris Lebensfeld. 40

Q. Morris Lebensfeld? A. Yes.

*Anthony Roberti, cross.*

Q. Is there an Aahron Lebensfeld? A. No, sir.

Q. How long have you been working for Lebensfeld Brothers? A. About two and a half years.

Q. Did you work in the store at 1204 Washington Street? A. Yes.

10 Q. What work did you do? A. Carpenter work.

Q. How many days were you there? A. I worked there four days.

Q. Did anybody else work with you? A. Yes.

Q. Who? A. A painter.

Q. Is he in court? A. Yes.

Q. Are these the fixtures— A. I can mention them to you.

20 Q. What are they? A. One 10-foot cigar wall case, second-handed; two 9-foot stationery wall cases; one novelty wall case, about 11 feet; one novelty wall case—

Q. Go ahead. A. One cigar case, about 6 feet; one 3-foot case was changed to a novelty case; one magazine rack; one 6-foot slant case.

*Cross examination by Mr. Colgan:*

30 Q. You are the man who builds the fixtures, aren't you? A. Yes, I put the measurements on it.

Q. You installed these over in Budne's store? A. Yes, sir.

Q. All of them? A. Yes, sir.

Q. Did you go down in the cellar? A. No, sir.

Q. Did he tell you there was some stuff in the cellar to install? A. No.

Q. When you left his store then— A. The job was complete.

40 Q. The job was complete? A. For me.

Q. Did you have a conversation with Budne

*Anthony Roberti, cross.*

when you left that day, that there would be another man over to fix them? A. There was a magazine rack he wanted me to change.

Q. What is that? A. There was a magazine rack he wanted me to change. I says, "He will make it just the way you want it. He will send a man to set it up." 10

Q. Was that man over there? A. Yes.

Q. Who is he? A. A fellow by the name of Morris Breck.

Q. Do you know whether he went over there? A. Sure.

Q. Do you know whether he went? A. Sure; I seen him over there myself. I should know.

Q. Is that the only thing that was to be set up? A. Yes, sir. 20

Q. Who did you say was in Lebensfeld Brothers, Incorporated? A. Who was it?

Q. Yes. Who are the members of the firm? A. Harry, Morris and Ed.

Q. No Aahron? A. Harry. Maybe; I know him as Morris.

Q. You call him Morris? A. Yes. I call him Morris. We generally call him "Hook," on account of the hook, you know. 30

Q. You say that because you heard this man say it? A. No, I know him.

Q. The day you left, did you have a conversation with Budne about Lebensfeld Brothers? A. No, not with him. I had no business with him.

Q. You had no conversation with him? A. No, sir.

Q. You didn't tell him he was stuck? A. He was stuck?

Q. Did you tell him he was stuck? A. No. Why should I tell him that? 40

*John Stanley, direct-cross.*

Q. You never told him that? A. No, sir. I can swear to God about that. I raise my right hand again.

Q. Never mind.

10

The Court: That is all.

---

JOHN STANLEY, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

*Direct examination by Mr. Blumberg:*

Q. You live in New York, Stanley? A. Yes, sir.

Q. You work for Lebensfeld Brothers? A. Yes.

20

Q. How long have you been working for Lebensfeld Brothers? A. About a year and a half.

Q. What is your business? A. Varnisher.

Q. Painter? A. Painter.

Q. Did you work at 1204 Washington Street, Hoboken, New Jersey? A. Yes.

Q. Mr. Budne's store? A. Yes.

Q. Do you know Budne sitting over there (indicating)? A. Yes. That is the bald-headed gentleman.

30

Q. How many times were you in his store? A. I worked there two days and finished up.

Q. Was Roberti there, the carpenter? A. Roberti?

Q. Yes. A. Yes, sir.

Q. He was working there, too? A. Yes.

*Cross examination by Mr. Colgan:*

40

Q. What store were you in? A. 1204 Washington Avenue—Washington Street. It is a small store with one window; very crowded, full of goods.

*William Turner, direct-cross.*

Q. Who else besides Budne was in there? A. Budne, his wife was in the store.

Q. What kind of goods were crowded in there?

A. Toys and candy, cigarettes and cigars. Mr. Budne gave me money to get some enamel and he gave me a job. When the job was finished he said he was satisfied. 10

Q. Was that in the empty store? A. No, sir, I didn't go to the empty store.

Q. Were you down in the cellar? A. No, sir.

Q. You weren't down there? A. No, sir.

Mr. Colgan: That is all.

WILLIAM TURNER, called as a witness on behalf of the plaintiff in rebuttal, being duly sworn, testified as follows: 20

*Direct examination by Mr. Blumberg:*

Q. You are a constable, Mr. Turner? A. I am.

Q. You had the writ of replevin in this case? A. I did.

Q. Did you make demand on them? A. I did. Before I served it.

Q. Have you the return of the writ here? A. I have. 30

Mr. Blumberg: That is all.

*Cross examination by Mr. Colgan:*

Q. Mr. Turner, you made your demand while you had your writ in your hand? A. I only had a demand in my hand at the time I made the demand.

Q. You had the writ in your pocket? A. Yes.

Q. Mr. Turner, you weren't there when this 40

*William Turner, redirect.*

gentleman was there (indicating)? A. Yes, I think that gentleman was with me at the time.

Mr. Colgan: That is all.

*Redirect examination by Mr. Blumberg:*

10 Q. You made a demand first, is that it? A. Yes.

Q. It was refused? A. Yes, sir.

The Court: Case closed?

Mr. Colgan: Yes, that is the case.

Mr. Blumberg: I think we are entitled to a direction of a verdict.

The Court: What question is there for the jury?

20 Mr. Colgan: The question is that demand was made before the writ was served. That is what Mr. Turner testified. I don't think that is proper.

(Argument between counsel and court.)

The Court: Gentlemen, under the view I take of the law in this case there is no question of fact to be submitted to you, and you are therefore by direction of the court to return a verdict in this case in favor of the plaintiff.

30 Mr. Blumberg: Before the jury is discharged, may I have the judgment for possession of \$450?

Mr. Neblo: Under the statute the only judgment that can be entered here is for the value of the goods and damages for their detention. I ask that the judgment be for the value of the goods and no damages for detention.

40 Mr. Blumberg: I waive all damages for detention.

The Court: Do you think there should be a verdict for \$450?

*Certifications.*

Mr. Neblo: No.

The Court: In any event, it must be for damages.

Mr. Neblo: Yes.

The Court: Under the objection which has been raised by the defendant, I will instruct you in place of finding a verdict for the plaintiff, to find a verdict for \$450 for the plaintiff. 10

Mr. Colgan: Your Honor will grant me an exception?

The Court: Certainly.

I, CHARLES L. CARRICK, Judge of the First District Court, Jersey City, N. J., do hereby certify that the foregoing is a transcript of the evidence given on the trial of the case of Lebensfeld Bros., Inc. v. Philip Budne on December 8, 1927, as certified by James S. Slavin, the stenographer appointed to report such evidence stenographically. 20

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 22nd day of December, 1927.

CHARLES L. CARRICK,  
Judge.

I, JAMES S. SLAVIN, the stenographer duly appointed to report stenographically the evidence given before the First District Court, Jersey City, N. J., in the case of Lebensfeld Bros., Inc. v. Philip Budne, do hereby certify that the foregoing is a true and correct transcript of the evidence given on December 8, 1927, before Hon. CHARLES L. CARRICK, Judge of the First District Court, Jersey City, N. J., in said Matter. 30

IN WITNESS WHEREOF I have hereunto set my hand and seal this 22nd day of December, 1927. 40

JAMES S. SLAVIN.

**Specification of Determinations.**

(Filed December 31, 1927.)

NEW JERSEY SUPREME COURT.

10

LEBENSFELD BROTHERS, INC.,  
*Plaintiff-Appellee,**v.*PHILIP BUDNE,  
*Defendant-Appellant.*On Appeal from  
District Court.Specification of  
Determinations.

The following is a specification of the determinations of the District Court with which appellant is dissatisfied in point of law:

20

1. The Court erred in receiving in evidence Exhibit P-1.

2. The Court erred in permitting the attorney for the plaintiff to read from Exhibit P-1.

3. The Court erred in sustaining the objection to the question put to the defendant: "After these goods were set up, did you ever speak to Harry about the goods?"

30

4. The Court erred in excluding the question to the defendant: "Now what did you do when you found they were not set up?"

5. The Court erred in overruling a question put to the defendant: "Did you institute a suit against Lebensfeld?"

6. The Court erred in refusing to receive testimony offered on behalf of the defendant as to the value of the goods.

40

*Specification of Determinations.*

7. The Court erred in refusing to receive in evidence the record and proceedings of an attachment suit instituted in the Hoboken District Court by Philip Budne against Lebensfeld Bros., Inc.

8. The Court erred in refusing to receive in evidence the bill of sale to Philip Budne under said attachment.

10

9. The Court erred in taking the case from the jury.

10. The Court erred in directing a verdict for the plaintiff.

11. The Court erred in directing the jury to render a verdict for the plaintiff in the sum of \$450.

20

12. The Court erred in not submitting the case to the jury.

13. The proceedings, verdict and judgment are in divers respects irregular and illegal.

14. The Court should have non-suited the plaintiff because the alleged agreement between the parties was such as to permit an action in debt thereon and not an action in replevin.

30

15. Exhibit P-1 is not a conditional sale entitling plaintiff to maintain an action in replevin.

KEALEY, GILFERT & NEBLO,  
Attorneys of Defendant-Appellant.

40

**Exhibit P-1.**

## AGREEMENT

<p>10</p>	<p>Name PHILIP BUDNE          (Hereinafter called the          Purchaser)          St. and No. 1204 Washing-          ton St.          City Hoboken          County N. J.          State N. J.</p>	<p>Have this 23 Day of May 1927          PURCHASED OF          LEBENSFELD BROS., Inc.          STORE FIXTURES          (Hereinafter called the          Seller)          219 BOWERY          NEW YORK CITY          Through their Salesman the          following mentioned goods</p>
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## A PAYMENT IS REQUIRED ON ALL AGREEMENTS

1—10½ Cigar Wall Case Zinc lined second hand  
 2—9 ft. Stationery Wallcases plain shelves  
 1 Stationary Rack  
 20 1—14 Slant Wallcase mirror back bottom plate  
 shelves  
 about 14 ft. Stationery Wallcase adjustable  
 shelves one door in back  
 1 Candy Show Case. 6 ft. long (returned)  
 1 Cigar Show Case. 6 ft. long over lapped Top  
 1—3 ft. Show Case over lapped top

All above fixtures to be set up and cover all  
 walls of store at 1204 Washington St. Hoboken,  
 N. J.

30 As compensation for the foregoing the pur-  
 chaser agrees to pay to the seller the aforemen-  
 tioned sum of \$800. Eight Hundred 00/10—  
 Dollars, as follows: Four Hundred Dollars in  
 cash balance in eleven monthly instalments at  
 \$36.50 every month beginning June 15, 1927.

It is agreed that the chattels herein are to be  
 placed in the premises . . . and are not to be

*Exhibits.*

removed therefrom without the written consent of the seller and that all the said chattels shall be so arranged as in no wise to be attached or affixed to the freehold.

The purchaser agree to keep said chattels insured from loss by fire for not less than . . . . . 10  
Dollars from the delivery thereof until the principal sum herein is paid, the benefit to be payable to the seller, and in default thereof the seller may insure same at the cost of the purchaser.

It is agreed that the foregoing shall constitute a conditional sale of said chattels to the undersigned, and that there are no precedent or contemporaneous conditions not stated herein, and that there are no oral agreements, representations or warranties. 20

It is agreed that all the terms, conditions and stipulations printed on or written on the back thereof, shall be or be deemed part hereof, and are hereby made part hereof; to the same force and effect, as though they were contained on this page.

The purchaser hereby agrees and certifies that he has fully and carefully read and is familiar with all the terms, stipulations and conditions of this contract. 30

PHILIP BUDNE L. S.

..... L. S.

(The following is printed on the back of the foregoing):

CONDITIONS

1. This agreement not to be countermanded, and is given subject to the approval of the seller. The seller not to be responsible for delays, in case of strikes, accidents and other unavoidable causes. 40

*Exhibits.*

2. If goods are not shipped on or before shipping date specified, the sellers agree, in fulfillment of their contract for delivery, to extend the time of payment for a period equal to such a delay.

10

3. If any portion of this order is short in shipment, or any delivery or installation be made in filling any portion thereof, the purchaser shall pay in accordance with the terms specified, for all goods received by him, withholding any such part of the purchase price as is represented by such shortage or error.

20

4. The seller is not to consider any claim for damage in transportation, unless made within five days from date of shipment of goods, and accompanied by Transportation Company's freight bill, bearing agent's "Bad Order" endorsement.

30

5. It is specifically agreed that the title to the property herein described shall remain in the seller, until the full purchase price shall have been actually paid in cash, and the acceptance of any note or other paper, or the obtaining of a judgment for any amount owing under this contract shall be in no wise taken or considered as a waiver of this condition. That in default of full payment for said property, or any part of installment thereof when due as agreed, or in the event of any attachment, execution, distraint, or other process being sued out against the conditional purchaser, or foreclosure proceedings, or actions, or Bankruptcy proceedings, voluntary or involuntary, instituted against the conditional purchaser, or assignment for the benefit of creditors, or in the event of a receivership of the conditional purchaser, or assignment for the benefit of creditors,

40

*Exhibits.*

or in the event of a receivership of the conditional purchaser's business or property being ordered or directed by any Court or Judge, then the seller shall have the right to forthwith take possession of the said property, or any such portion thereof, as in their judgment may be sufficient to enable them to realize the herein mentioned full payment, to remove the said property or portion thereof, and shall have the right to enter upon the premises where the said property is located to remove all or any such selected portion without hindrance or legal process. In such event the Seller is to retain all money paid on account as rental for the use of said articles during the period they were withheld by the purchaser. That on failure to pay any note or installment, when due, all the remaining notes or installments shall immediately become due and payable.

10

20

6. This contract shall be construed in accordance with, and be governed by the laws of the State of New York.

7. The use of any of the work or articles or chattels before mentioned or received under this contract by the purchaser, shall be deemed an acceptance of all labor and material hereunder, and a waiver and release of any and all claims in reference to labor and materials supplied hereunder.

30

8. Should the purchaser order any additional labor or materials, same shall be purchased under the same conditions, as stated herein.

It is agreed, that no waiver of any of the terms of this agreement shall be claimed to be made by the seller, unless such waiver or alleged waiver is in writing, duly subscribed by the seller.

40

*Exhibits.*

9. The breach by the purchaser of any of the terms, stipulations and conditions of this contract shall entitle the seller to receive the entire sum remaining unpaid at once without further notice and demand.

10 ACCEPTED, agreed to, and executed at NEW YORK, N. Y., by the Purchaser on the .... day of ..... 192.....

.....  
Residence .....  
Business Address .....

Witness:

20 .....  
Received on Account of  
this Agreement, \$. .....

30

40

## Exhibit P-14.

New York May 23, 1927.

Phone Dry Dock 5846

Drug	Fixtures
Jewelry	"
Confectionery	"
Bakery	"
Restaurant	"
Millinery	"
Coffee Pots	"
Cafeterias	"
Office & Showrooms	

LEBENSFELD BROS., INC.  
 Manufacturers & Dealers of  
 STORE FIXTURES  
 Complete Interiors For Any Business  
 No Connection with any other Establishment  
 Office and Factory 219 Bowery

Please ship the following articles subject to the conditions specified below, which conditions are hereby agreed to,

Sold to BUDNE

At 1204 Washington Ave., Hoboken, N. J.

TERMS, NET CASH  
 No CHECKS ACCEPTED

No goods taken off wagon unless paid for in advance to driver.

Deposit forfeited if goods are not accepted upon first delivery.

This order is taken subject to the approval of LEBENSFELD BROS., INC. Subject to strikes, accidents and other delays beyond our control. It is expressly agreed that this order shall not be countermanded. All goods sold as ARE.

This order is not modified by or added to by any agreement, expressed or implied, not stated herein.

Our responsibility ceases after delivery of goods in good condition to the transportation company. FREE DELIVERY WITHIN 2 MILES.

1 Cigar Wall case	(s h)	
2 Stationery Wall case	(s h)	
1 slant Wall case	(s h)	
1 straight Wall case	(s h)	
small wall case	(s h)	
1 Candy Show Case	(s h)	
1 Cigar Case	(s h)	
1 Novelty Show Case		
Total		845 —
on account		200 x

additional cash payment down 645 —  
 200 —

balance in twelve monthly notes 445 —

DELIVERY RECEIPT

**Stipulation.**

## NEW JERSEY SUPREME COURT.

10

LEBENSFELD BROS., INC.,  
*Plaintiff-Appellee,*

*v.*

PHILIP BUDNE,  
*Defendant-Appellant.*

On Appeal from  
 the District  
 Court.

Stipulation.

20

It is stipulated, consented and agreed with Exhibits P-2 to 13, inclusive, being promissory notes made by the defendant to the plaintiff, and Exhibit D-2, being a specimen of the signature of Harry Lebensfeld, need not be printed as part of the state of case.

KEALEY, GILFERT & NEBLO,  
 Attorneys of Plaintiff-Appellee.

GROSS & GROSS,  
 Attorneys of Defendant-Appellant.

30

40

## Exhibit D-1.

## AGREEMENT

Name Philip Budne	Have this 23 day of May 1927	
(Hereinafter called the	PURCHASED OF	
Purchaser)	LEBENSFELD BROS., Inc.	
St. and No. 1204 Washing-	STORE FIXTURES	10
ton St.	(Hereinafter called the	
City Hoboken	Seller)	
County N. J.	219 BOWERY	
State N. J.	NEW YORK CITY	
	Through their Salesman	
	.....the following men-	
	tioned goods.	

A PAYMENT IS REQUIRED ON ALL AGREEMENTS.

1—10½ Cigar Show Case Zinc lined second Hand	20
2—9 ft. Stationery Wallcases second Hand	
1 Magazine Rack	
1—14 ft. Slant Wallcase mirror bottom plate shelves about 14 ft. Stationery Wallcase adjustable shelves	
1 Candy Show Case 6 ft. long	
1 Cigar Show Case 6 ft. long over lapped Top	
1—3 ft. Show Case s ft. long	
1—door in back	30

All above fixtures to be set up and all walls of store at 1204 Washington St. Hoboken, N. J.

As compensation for the foregoing the purchaser agrees to pay to the seller the aforementioned

sum of \$800 Eight Hundred                       
xx

Dollars, as follows:

\$400. in cash and balance of \$400. in eleven 40

*Exhibits.*

monthly payments at \$36.50 every month beginning June 15, 1927.

10 It is agreed that the chattels herein are to be placed on premises ..... and are not to be removed therefrom without the written consent of the seller and that all the said chattels shall be so arranged as in no wise to be attached or affixed to the freehold.

The purchaser agrees to keep said chattels insured from loss by fire for not less than ..... Dollars from the delivery thereof until the principal sum herein is paid, the benefit to be payable to the seller, and in default thereof the seller may insure same at the cost of the purchaser.

20 It is agreed that the foregoing shall constitute a conditional sale of said chattels to the undersigned, and there are no precedent or contemporaneous conditions not stated herein, and that there are no oral agreements, representations or warranties.

30 It is agreed that all the terms, conditions and stipulations printed on or written on the back thereof, shall be and be deemed part hereof, and are hereby made part hereof; to the same force and effect, as though they were contained on this page.

The purchaser hereby agrees and certifies that he has fully and carefully read and is familiar with all the terms, stipulations and conditions of this contract.

HARRY LEBENSFELD L. S.

.....L. S.

40 (The following is printed on the back of the foregoing) :

*Exhibits.*

## CONDITIONS

1. This agreement not to be countermanded, and is given subject to the approval of the seller. The seller not to be responsible for delays, in cases of strikes, accidents and other unavoidable causes. 10
2. If goods are not shipped on or before shipping date specified, the sellers agree, in fulfillment of their contract for delivery, to extend the time of payment for a period equal to such a delay.
3. If any portion of this order is short in shipment, or any delivery or installation be made in filling any portion thereof, the purchaser shall pay in accordance with the terms specified, for all goods received by him, withholding any such part of the purchase price as is represented by such shortage or error. 20
4. The seller is not to consider any claim for damage in transportation, unless made within five days from date of shipment of goods, and accompanied by Transportation Company's freight bill, bearing agent's "Bad order" endorsement.
5. It is specifically agreed that the title to the property herein described shall remain in the seller, until the full purchase price shall have been actually paid in cash, and the acceptance of any note or other paper, or the obtaining of a judgment for any amount owing under this contract shall be in no wise taken or considered as a waiver of this condition. That in default of full payment for said property, or any part of installment thereof when due as agreed, or in the event of any attachment, execution, distraint, or other process being sued out against the conditional purchaser, 30 40

*Exhibits.*

10 or foreclosure proceedings, or actions, or Bankruptcy proceedings, voluntary or involuntary, instituted against the conditional purchaser, or assignment for the benefit of creditors, or in the event of a receivership of the conditional purchaser, or assignment for the benefit of creditors, or in the event of a receivership of the conditional purchaser's business or property being ordered or directed by any Court or Judge, then the seller shall have the right to forthwith take possession of the said property, or any such portion thereof, as in their judgment may be sufficient to enable them to realize the herein mentioned full payment, to remove the said property or portion thereof, and shall have the right to enter upon the premises where the said property is located, to remove 20 all or any such selected portion without hindrance or legal process. In such event the Seller is to retain all money paid on account as rental for the use of said articles during the period they were withheld by the purchaser. That on failure to pay any note or installment, when due, all the remaining notes or installments shall immediately become due and payable.

30 6. This contract shall be construed in accordance with, and be governed by the laws of the State of New York.

7. The use of any of the work or articles or chattels before mentioned or received under this contract by the purchaser, shall be deemed an acceptance of all labor and materials hereunder, and a waiver and release of any and all claims in reference to labor and materials supplied hereunder.

40 8. Should the purchaser order any additional

*Exhibits.*

labor or materials, same shall be purchased under the same conditions, as stated herein.

It is agreed, that no waiver of any of the terms of this agreement shall be claimed to be made by the seller, unless such waiver or alleged waiver is in writing, duly subscribed by the seller.

10

9. The breach by the purchaser of any of the terms, stipulations and conditions of this contract shall entitle the seller to receive the entire sum remaining unpaid at once without further notice and demand.

ACCEPTED, agreed to, and executed at NEW YORK, N. Y., by the Purchaser on the ..... day of ....., 192....

20

.....

Residence .....

Business Address .....

Witness:

.....  
Received on account of this

Agreement, \$.....

30

40

**Record of Attachment Suit.**

DISTRICT COURT OF THE CITY OF HOBOKEN.

Before—WILLIAM J. HANLEY, Esq., Judge.

HARRY BENNETT, Clerk.

\$400.00

10

KEALEY, GILFERT & NEBLO, Plaintiff's Attorneys.

State of New Jersey, }  
County of Hudson, } ss.:

20

PHILIP BUDNE,  
*Plaintiff,*

*v.*

LEBENSFELD BROTHERS,  
*Defendant.*

} In Attachment.

30

August 25, A. D. 1927, an affidavit was filed by the plaintiff alleging that Philip Budne maketh oath that Lebensfeld Brothers, Inc., is indebted to Philip Budne in the sum of Four Hundred Dollars \$400.00 and that he verily believes that the said Lebensfeld Bros., Inc., absconds himself from his creditors, and that he is not, to the knowledge and belief of the said Philip Budne, resident in this State at this time August 25, A. D. 1927, a writ of attachment was issued to John Solferino Sergeant-at-Arms, August 25, A.D. 1927, said Sergeant-at-Arms returned said writ as follows, viz.: I return the within writ of attachment this 25th day of August, A. D. 1927, having attached in the presence of John Dulheill a credible witness, the goods and

40

*Record of Attachment Suit.*

chattels of the within named defendant as per inventory and appraisement hereto annexed.

JOHN SOLFERINO, Serg.-at-Arms.

September 1, A. D. 1927, this cause was placed on the list of causes for trial for September 15th, A. D. 1927. 10

September 15, 1927, plaintiff filed State of Demands and affidavit and proceeded to trial by proof of affidavit.

On the part of the plaintiff the following witnesses were sworn and delivered their evidence.

JOHN SOLFERINO.

Whereupon it is on this fifteenth day of September, A. D. 1927, by this Court considered and adjudged that said Philip Budne, plaintiff, recover against said Lebensfeld Bros., Inc., defendant, the sum of Three hundred Dollars debt and Twenty Dollars and ten cents cost of suit. 20

Oct. 15, A. D. 1927, execution was issued to John Solferino, Sergeant-at-Arms, who returned the said execution as follows, viz.: I return the within writ this 20th day of October, A. D. 1927, partly satisfied having sold Goods and Chattels for \$100.00 to plaintiff—as I am within commanded. 30

JOHN SOLFERINO,  
Sergeant-at-Arms.

## INVENTORY.

2—nine foot wall cases.  
1—ten foot cigar wall cases.  
1—stand wall case.  
1—cigar wall case. 40  
1—novelty show case.

*Record of Attachment Suit.*

## WRIT OF EXECUTION.

10 To John Solferino, sergeant-at-arms of Hoboken District Court: You are hereby commanded to levy and make of the goods and chattels, rights and credits of Lebensfeld Bros., Inc., in the sum of Three hundred dollars debt and twenty dollars costs which Philip Budne by the judgment of the District Court of the City of Hoboken rendered on the 15th day of September, one thousand nine hundred and twenty-seven, recovered against it and also the costs hereof, and forthwith pay the same to the said Philip Budne, or in his absence, into said court, and within thirty days from the time you shall receive this execution, make return of the proceedings had thereon. Witness, William J. Hanley, Esq., Judge of said court at Hoboken aforesaid the 15th day of October, 1927, Harry Bennett, Clerk.

20

I return the within writ this 20th day of October, 1927, partly satisfied having sold the within goods and chattels for the sum of \$100 to plaintiff, as I am within commanded.

JOHN SOLFERINO.

30

40

**New Jersey Court of Errors and Appeals**

LEBENSFELD BROS., INC.,  
*Plaintiff-Appellant,*

*v.*

PHILIP BUDNE,  
*Defendant-Appellee.*

**BRIEF OF PLAINTIFF-APPELLANT.**

Plaintiff herein obtained a judgment for \$450 in the First District Court of Jersey City, by direction of Judge CARRICK sitting with a jury. This judgment was reversed with costs by the Supreme Court. Plaintiff is now taking an appeal from the judgment of reversal of the Supreme Court.

**Statement of Facts.**

The plaintiff-appellant is engaged in the store fixture business in the City of New York and as such sold a set of store fixtures to the defendant-appellee Philip Budne, of No. 1204 Washington St., Hoboken, N. J., under a conditional bill of sale (Exhibit P-1). The defendant paid in cash upon the receipt of the merchandise the sum of \$400 leaving a balance due and owing of \$445, the indebtedness of which is evidenced by a series of promissory notes. Not a single one of the notes was paid, and after demand duly made upon the defendant for the return of the goods this action of replevin was instituted.

The defendant, instead of rebonding the goods and chattels, deposited with the constable the sum of \$500 in cash, and thereupon the constable left the goods with the defendant.

The defendant having asked for a trial by jury, the case came on to be heard on the 8th day of December, 1927. At the conclusion of the case the Court directed a verdict in favor of the plaintiff for \$450. The facts as adduced at the trial, and our comments upon the evidence, will be set forth more fully under our argument herein.

The defendant herein took an appeal from the judgment of the First District Court of Jersey City (Case, p. 12), filing fifteen specifications of determinations of error (Case, pp. 58-59). The Supreme Court in an opinion handed down on the 2nd day of October, 1928, reversed the judgment of the lower court, with costs (Case, pp. 3 to 6).

### **Argument.**

The initial difficulty with which the plaintiff-appellant is faced results from the necessity of directing its attention to the opinion of the Supreme Court, and for the moment disregarding the additional arguments advanced by the defendant in the Supreme Court. This is so because the Supreme Court dismisses summarily grounds 1, 5, 6 and 7 for reversal argued before it, which conclusion we, of course, contend was absolutely correct. As this Court may not advert to these additional grounds, it is necessary for us in this brief to submit an argument on the aforesaid grounds, which argument we shall advance hereinafter.

The Supreme Court specifically considers grounds 2, 3 and 4 urged before it and decides that the Trial Court was wrong in taking the case away from the jury and in directing a verdict.

It is our contention that the District Court Judge was correct and that the Supreme Court was in error in reversing the judgment.

The situation is a simple one. The plaintiff, relying upon a conditional bill of sale, the terms of which are most explicit, seeks a recovery of its chattels because of the failure of the defendant vendee to pay the sums of money contracted to be paid. Can the defendant, as a defense to such an action of replevin, set up defects in the chattels and an alleged failure of the plaintiff to properly install the chattels? We contend not.

It is submitted that the sole question at issue in the case was the title of the plaintiff and its right to possession at the time of the issuance of the writ. The state of facts, which the defendant sought to elicit, viz.: that the fixtures were not properly constructed, in no wise militated against the title of the plaintiff. It is the well established law of this State that the sole issue in a replevin suit is the title of the plaintiff and its right to possession.

See

*McDade v. Reilly*, 102 N. J. Law 268; 132 Atl. 247.

Mr. Justice KALISCH, speaking for the Supreme Court in *McDade v. Reilly*, says:

“The only issue properly involved (in a replevin case) is the right of possession of the article claimed, whether by reason of general or special ownership.”

*McDade v. Reilly* was followed in the case of

*Auto Security Co. v. Stewart*, 4 Adv. Rep. 1972; 135 Atl. Rep. 92 (not yet officially reported).

The Supreme Court in its opinion states that the defendant was entitled to show, at the trial, failure of performance upon the part of the plaintiff "because performance by the defendant, by payments other than the payment of \$400 already made, was not required until and unless the plaintiff had performed, by delivery, an installation."

The Supreme Court did not advert to *McDade v. Reilly* or to *Auto Security Co. v. Stewart*, cases which we cited in our brief in the Supreme Court on this proposition.

Nor did the Supreme Court give full efficacy to the agreement relative to payment which formed the basis of the plaintiff's right to possession. This agreement will be found on page 62 of the state of the case, it being condition 5 of the conditional bill of sale, which reads as follows:

"5. It is specifically agreed that the title to the property herein described shall remain in the seller until the full purchase price shall have been actually paid in cash, and the acceptance of any note or other paper, or the obtaining of a judgment for any amount owing under this contract shall be in no wise taken or considered as a waiver of this condition. That in default of full payment for said property, or any part of installment thereof when due as agreed, or in the event of any attachment, execution, distraint, or other process being sued out against the conditional purchaser, or foreclosure proceedings, or actions, or bankruptcy proceedings, voluntary or involuntary, instituted against the conditional purchaser, or assignment for the benefit of creditors, or in the event of a receivership of the conditional purchaser, or assignment for the benefit of creditors, or in the event of a receivership of the conditional purchaser's business or property being ordered or directed by any court or judge, then the seller

shall have the right to forthwith take possession of the said property, or any such portion thereof, as in their judgment may be sufficient to enable them to realize the herein mentioned full payment, to remove the said property or portion thereof, and shall have the right to enter upon the premises where the said property is located to remove all or any such selected portion without hindrance or legal process. In such event the Seller is to retain all money paid on account as rental for the use of said article during the period they were withheld by the purchaser. That on failure to pay any note or installment, when due, all the remaining notes or installments shall immediately become due and payable."

It is apparent that the foregoing condition constitutes an entirely distinct and independent covenant. See

*Stewart v. Childs Restaurant Co.*, 86 N. J. Law 648, 92 Atl. 392.

Upon analysis it would seem that the defense sought to be raised by the defendant herein, to wit: the failure of the plaintiff to install the store fixtures properly, was not a bar to this replevin action. Does it in any way alter the title or right to possession of the plaintiff that the goods are defective or that the goods are improperly installed? The title or the right to possession is the same and if the agreement states that upon non-payment of certain notes, plaintiff is entitled to the return of the goods, we submit that the failure to properly install the goods is entirely beside the point and immaterial. The question is an important one and of interest to the bar of this State. Many lawyers of this community have asked us about this case and have also asked wherein the case was distinguishable from *McDade v. Reilly* and *Auto Security Co. v. Stewart*.

The defendant's claim for damages was entirely independent. Otherwise a trifling breach by plaintiff would result in absolute failure on the plaintiff's part to recover its chattels; and defendant would be relieved of the obligation to pay for the chattels.

We contend that the Supreme Court was in error, and that the matters of defense sought to be raised by the defendant were not proper matters of defense and were not relevant in a replevin case where title and the right to possession was the issue. The Trial Court was therefore correct in overruling the questions asked of the defendant Isaac Baclar, relative to the installation of the goods; was correct in overruling certain questions put to the defendant; and was correct in refusing to submit the case to the jury upon the question of the proper installation of the store fixtures.

There were other points raised by the defendant before the Supreme Court, but the Supreme Court, in its opinion, correctly decided that those points presented no reason for a reversal. As to those points, we stated in our brief before the Supreme Court, that it should be observed that a number of the points raised and argued by the defendant could not be considered in view of the fact that said propositions were in no wise raised in the District Court. See

*Oliphant v. Brearley*, 54 N. J. Law 521.

On page 523 of the foregoing case Mr. Justice MAGIE, speaking for this Court, says:

"Nothing is better settled than that an objection to the admission of evidence which does not specify the ground of objection will not sustain an exception. *Mooney v. Peck*, 20 Vroom 232.

"The reason underlying the rule respecting exceptions is equally applicable to those cases where formal exceptions are not required. It must appear to the court of review called on to review a ruling of an inferior court, not only that the ruling complained of was objected to, but that the ground of objection relied on for reversal was presented to the court below. *Cole v. Cliver*, 15 Vroom 212. The mere noting of an objection to testimony will not afford ground for contending that the testimony was not admissible. *Nestal v. Schmid*, 10 *id.* 686. And this rule was applied by this court in a cause arising in a District Court to an objection made in that court on grounds different from those relied on here for contesting the ruling thereon. *Dale v. See*, 22 *id.* 378.

"The conclusion upon this contention of defendant then is, that while no exception of a formal nature was required to be made in the District Court in this case, yet that the state of the case should show that an objection substantially presenting to that court the grounds now urged against the admission of the evidence complained of, should appear in the state of the case in order to obtain a review of the ruling on the evidence."

Defendant contended that the bill of sale was erroneously introduced into evidence. An examination of the state of the case will disclose that while the defendant objected to the introduction of the conditional sales agreement in evidence, which objection was overruled by the Court, no exception was taken to this ruling (Case, p. 14). Furthermore the only ground of the objection as stated by counsel for the defendant, was to the effect that the agreement was not signed by the defendant or by the plaintiff. The fact is that the agreement was signed by the defendant (Exhibit P-1) and the defendant's copy which was offered

in evidence later, it will be noted, was signed by the plaintiff (Exhibit D-1). It must be apparent, therefore, that this argument of the defendant is of no efficacy, firstly, because no exception was taken by the defendant to the ruling of the Trial Court, and, secondly, because the argument advanced on appeal was in no wise advanced at the trial of the cause.

The defendant in its argument before the Supreme Court contended that the judgment was irregular and illegally rendered, citing *Tumulty v. Jordan*, 67 N. J. Law 509. That case is clearly distinguishable. The point stressed by the Court in that case is that the judgment was entered for *debt*. This can easily be gathered by the quotation from *Tumulty v. Jordan*, cited by the defendant in its brief in the Supreme Court. The Court says:

“The action of replevin sounds in tort and is similar in character to actions of trespass and trover so that the verdict would naturally be damages and not debt.”

See also

*Johnson v. Mason*, 64 N. J. Law 258.

In the above case Mr. Justice VAN SYCKEL, speaking for this Court, approves of a verdict and judgment for money damages, saying:

“In this case the finding of the verdict for the value of the goods for the plaintiffs necessarily carried with it a finding that the goods belonged to the plaintiffs, otherwise they could not have the verdict. Such finding must precede the verdict.

“If there must be an express judgment that the goods belong to plaintiff, the bond would be nugatory, for no such express judgment is authorized by the statute or can be rendered.”

Furthermore, we do not see how this point can be raised by the defendant. An examination of the colloquy at the end of the case, discloses that the judgment was moulded in exactly the manner suggested by the defendant (Case, pp. 56-57). The Court was about to direct a verdict for possession in favor of the plaintiff, whereupon Mr. Neblo, who was associated with Mr. Colgan in the trial of the case for the defendant, stated to the Court, as follows:

“Under the statute the only judgment that can be entered herein is for the value of the goods and damages for their detention. I ask that the judgment be for the value of the goods and no damages for detention.”

Judge CARRICK thereupon did exactly what Mr. Neblo said and directed a verdict for the value of the goods and no damages for their detention. Nowhere did the defendant suggest a finding as to the title of the goods. The defendant suggested a monetary verdict and a monetary verdict was awarded. It certainly does not lie in the defendant's mouth at this stage of the proceedings to object to the form of the verdict.

We submit that it was the duty of the defendant's counsel at the end of the case, when the Court was directing the verdict, to apprise the Court of his contention in this regard. Counsel could easily have stated to the Court that the judgment, in his opinion, should have been a judgment that the title of the goods was in the plaintiff. No such suggestion being made to the Trial Court, the defendant cannot now raise this point on appeal.

Another objection by the defendant to the proceedings, was the depositing of \$500 in cash as security by the defendant. It would seem that any difficulties in the situation, if indeed there were

any, were caused not by the plaintiff, but by the defendant, and we cannot see how the defendant can now avail himself of such difficulties so created by him.

Defendant, in his brief in the Supreme Court, stated that "the action of the Constable put the case in a position which made it impossible to frame a proper issue for the Court and jury to hear and determine." There is no merit whatsoever in this contention.

*Gropper v. Hoover*, 137 Atl. Rep. 837 (not yet officially reported).

Furthermore, the attention of this Court is called to the fact that the case was proceeded with, by consent, upon the theory that the goods were re-bonded, and the defendant can, therefore, not withdraw from the position taken by him at the trial.

On pages 19 and 20 of the state of the case, it will be noted that a discussion ensued between counsel and the Court in regard to the point as to how the case should be proceeded with. If the defendant had any objection to the proceedings, same should have been raised at that time, but it will be noted that no objection whatsoever was raised, and that no exceptions were taken.

And, indeed, at the conclusion of the case, the defendant's counsel suggested that the verdict be one for money damages, the colloquy in this regard being as follows:

"Mr. Blumberg: Before the jury is discharged, may I have the judgment for possession or \$450?"

"Mr. Neblo: Under the statute the only judgment that can be entered here is for the value of the goods and damages for their detention. I ask that the judgment be for the

value of the goods and no damages for detention.

"Mr. Blumberg: I waive all damages for detention.

"The Court: Do you think there should be a verdict for \$450?

"Mr. Neblo: No.

"The Court: In any event it must be for damages.

"Mr. Neblo: Yes.

"The Court: Under the objection which has been raised by the defendant, I will instruct you in place of finding a verdict for the plaintiff, to find a verdict for \$450 for the plaintiff."

Another argument advanced by the defendant in his brief in the Supreme Court was directed to the Court's refusal to admit in evidence the attachment proceedings in the Hoboken District Court.

At this state of the argument it is advisable to present to the Court a picture of the curious events which transpired after the issuance of the replevin.

The suit was instituted on the 23rd of August, 1927, and the writ served the same day, the goods replevined being left in the store of the defendant Philip Budne at 1204 Washington St., Hoboken, N. J. The defendant, by himself or by his attorneys, thereupon conceived the novel idea of thwarting the action of replevin by instituting a suit in attachment in the Hoboken District Court, the case being that the sum of \$300 was due and owing from the non-resident Lebensfeld Bros., Inc., the plaintiff in the replevin suit. The goods attached by Philip Budne in this suit in the Hoboken District Court were the very goods which he had in his store, and which he must have conceded were the property of the said Lebensfeld Bros., Inc., as otherwise no attachment could be made thereon.

We shall not discuss the ethics of the situation, although the same was duly presented to the Trial Court.

The defendant Philip Budne knew the address of the plaintiff and knew that the plaintiff was represented by counsel, and knew that the goods being in his possession, the plaintiff Lebensfeld Bros., Inc., would not know of any attachment; still no notice whatever was given to the plaintiff Lebensfeld Bros., Inc., of the attachment being made. Stealthily the defendant Budne proceeded with his work and obtained a judgment and execution, and a sale thereon.

It is submitted that such procedure, taking place after the writ of replevin was issued, could in no wise affect the plaintiff's title or right to possession at the time of the issuance of the writ. Such was the conclusion of the Trial Court, and we do not note any authorities cited by the defendant-appellant in his brief in the Supreme Court to indicate that the Trial Court was wrong in its ruling.

An examination of the authorities indicates that the determinative point in a replevin suit is the time of the commencement of the action.

“Not only must the plaintiff have the right to possession generally, but he must have the right to immediate and exclusive possession at the time of the commencement of the action, or as is sometimes stated, at the time of the taking and detention.”

34 Cyc. 1386.

See also:

*Chambers v. Hunt*, 18 N. J. Law 339.

In *Chambers v. Hunt*, Chief Justice HORNBLOWER (speaking for the Court) says, on page 343:

"I have already explained myself to mean by property in the plaintiff, not an absolute ownership. A right to the possession and dominion of the goods at the time of commencing the action is no doubt sufficient \* \* \* . But the plaintiff must have such ownership or exclusive right to the possession at the time of commencing his suit."

Furthermore, if the defendant seeks to establish his title by the record of the attachment proceedings, said proceedings are defective. The record does not contain any affidavit of proof, and is therefore barren of any proof of the indebtedness upon which the attachment proceedings were based. Any judgment rendered therein would certainly be of no efficacy to effect a change in title prejudicial to the plaintiff.

It will be noted that the Supreme Court reversed the judgment, with costs. We submit that this was error. If the judgment was reversed, the Supreme Court should have had the costs abide the event. If perchance this Court should affirm the judgment of the Supreme Court, we would respectfully request that that part of the order awarding costs to the defendant, be reversed and corrected so as to read "costs to abide the event of a new trial."

### **Conclusion.**

We believe that we have fully presented our argument to the effect that the defense of failure properly to install fixtures was not material in an action of replevin to recover the possession of the fixtures. We believe also that we have, as best we could, answered points which will undoubtedly be raised by the defendant in his brief.

We respectfully submit therefore that the judgment of the Supreme Court should be reversed.

GROSS AND GROSS,  
Attorneys of Plaintiff-Appellant.

LEO BLUMBERG,  
Of Counsel.

## New Jersey Court of Errors and Appeals

LEBENSFELD BROS., INC.,  
Plaintiff-Appellant,

*v.*

PHILIP BUDNE,  
Defendant-Appellee.

### BRIEF OF DEFENDANT-APPELLEE.

#### Statement of Facts.

This is an appeal from a judgment of the Supreme Court reversing a judgment of the First District Court of Jersey City. The case was tried before Judge Carrick, sitting with a jury. The action was brought to replevy certain store fixtures sold by appellant—who hereafter will be called the plaintiff—to the appellee—who hereafter will be called the defendant—under a conditional bill of sale. The plaintiff claimed that the defendant had breached said conditional sales contract by making default in certain installment payments due thereunder, and by reason of such breach had forfeited his right to the possession of said fixtures, and that he, the plaintiff, was entitled to regain possession of said fixtures or the value of the same if said fixtures could not be had.

The conditional sales agreement under which the defendant purchased the goods contained the following provision: "All above fixtures to be set

up in store at 1204 Washington Street, Hoboken, N. J." (See Exhibit P-1, Case, p. 60, ll. 27-30 incl.)

In defense of the action the defendant claimed and offered evidence tending to show that he was not in default with the payments due from him under said sale contract, and that the plaintiff was not entitled to declare a forfeiture of his right of possession to said fixtures and regain the possession of the same because under the terms of said sale agreement the plaintiff had agreed to install the fixtures and had in part at least failed to do so. This evidence was rejected by the Trial Judge and the jury was directed to find a verdict for the plaintiff for the value of said goods.

On appeal to the Supreme Court, that Court reversed the judgment of the District Court, holding that it was error for the District Court to exclude the proof offered by the defendant tending to show that the plaintiff had not performed his part of the sale contract by installing the fixtures as required by the same; that it should have been left to the jury to determine whether the plaintiff had set up the fixtures as required by said contract; that a disputed question of fact would have been created by the defendant's evidence that the plaintiff had not installed said fixtures as required by said contract, there being already in the case proof on the part of the plaintiff that the fixtures had been properly set up and installed in accordance with the said conditional sales contract.

The plaintiff, feeling himself aggrieved by this finding of the Supreme Court, appeals to this Court and the only question presented for decision in this Court is whether the Supreme Court was right in holding that it was error for the District Court to reject the offer of evidence by the defendant tending to prove that the plaintiff him-

self was in default by not having performed his part of the conditional sale contract, and whether the Supreme Court rightly decided that the Trial Judge was in error in directing a verdict for the plaintiff and in withholding the case from consideration by the jury. This brief will therefore be confined to this single point.

### POINT I.

#### **The Supreme Court committed no error in reversing the judgment of the District Court.**

The question before the District Court was whether the defendant had breached the conditional sale contract by unjustifiably defaulting in making payments as required by said conditional sale contract, and whether the plaintiff was entitled to declare a forfeiture under said contract of the right of the defendant to the possession of said fixtures. The contract (see Exhibit P-1, Case, p. 60, ll. 27-30 incl.) provided that all fixtures sold under the same would be set up by the plaintiff in the store of the defendant. The plaintiff testified that this had been done. The defendant offered to show that the plaintiff himself was in default under said sale contract in that said fixtures had not—at least in part—been installed as said contract provided, and that by reason thereof the plaintiff was not entitled to demand performance by him insofar as future installment payments were concerned until he, the plaintiff, had performed his part of said sale contract, and was not entitled to declare a forfeiture of his right to the possession to said fixtures when he, the plaintiff, was himself in default.

The Trial Judge evidently lost sight of the provision in the contract requiring the plaintiff to

install these fixtures in the defendant's store, and erroneously rejected the defendant's offer to show that such fixtures had not been installed as required by said contract, and that the plaintiff himself was in default. The Supreme Court held that this was error, and among other things said:

“The testimony referred to under grounds three and four as having been erroneously excluded was for the purpose of showing this breach of contract and failure of performance upon the part of the plaintiff.

This we think the defendant was entitled to show, if he could, because performance by the defendant by payments, other than the payment of \$400. already made, was not required until and unless the plaintiff had performed by delivery and installation.

The question was not one of title but of the right of possession.

It was error therefore to exclude this proof and, if made, a jury question would have been presented because there was already in the case proof on the part of the plaintiff that the fixtures had been properly set up and installed in accordance with the terms of the contract.”

We think it is too plain to require the citation of legal authorities that a party insisting on a forfeiture must not himself be in default. Forfeitures are not favored in the law. The forfeiture in this case was predicated upon the defendant's alleged breach of the conditional sale agreement in failing to make the installment payments as required thereby. The Supreme Court in effect holds that the covenant respecting these installment payments and the covenant respecting the obligation of the plaintiff to install said fixtures in defendant's store were dependent covenants, and that the defendant was entitled to show that the plaintiff himself was in default and not entitled to insist upon a forfeiture of the defendant's right of

possession to said fixtures under said conditional sale agreement. As we understand the law, forfeiture provisions in contracts are most strictly construed against the person insisting upon such forfeiture, and that such provisions, if possible, will so be construed by the Court as not to work a forfeiture.

We think the Supreme Court rightfully held that the District Court committed error in excluding the defendant's offer to show that the plaintiff, who was insisting upon a forfeiture, was himself in default, and that in view of the evidence of the plaintiff that he had fully performed his part of the contract, contradicted as it was by the defendant that he had not performed his part of said contract, a disputed question of fact was created which necessitated the submission of the case to the jury.

**It is respectfully submitted that the judgment of the Supreme Court should be confirmed.**

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Attorneys for Defendant-  
Appellant.

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