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NEW JERSEY

Court of Errors and Appeals.

CHARLES S. BROECK ET AL., Plaintiffs in Error, v. NEAL O'DONNELL ET AL., Defendants in Error.	BRIEF FOR PLAINTIFFS.

Statement.

The plaintiffs in error were partners and had been engaged in Jersey City in manufacturing "barrels," principally for the Matthieson & Weicher's Sugar Company of Jersey City, and were about to discontinue their business and wind up their partnership, and to that end on *January 4th, 1882*, made the following

agreement, respecting a sale of all their material on hand, with the defendants in error, and in respect to the use and occupation of premises occupied by the plaintiffs, to wit:

JERSEY CITY, N. J., January 4, 1882.

This agreement, made this day by and between Charles B. Broeck & Co., of Jersey City, of the first part, and N. & H. O'Donnell, of same city, of the second part:

Witnesseth: For and in consideration of the party of the first part letting to the party of the second part, free of rent or hire, the use of all machinery as now standing in the shop, corner of Greene and Morgan, (known as the tight-barrel shop), until the 14th day of March, 1882.

The party of the second part agrees to give to the party of the first part, upon demand, after the said 14th day of March, 1882, free and full possession of the above named machinery, without hindrance of any kind.

The party of the second part further agrees to give, free of rent, the stables on shook-yard, now occupied by party of the first part, until they can dispose of their teams; also to give reasonable time to remove what other material belonging to them on said lots.

The party of the second part agrees to pay all rent due the owners of the shop corner of Greene and Morgan, from the 1st day of January, 1882, until the 14th day of March, 1883, or any other expenses which may in any way become a lien on said machinery.

They further agree to pay all the rent which may become due on what is known as the shook-yard property, of which Mr. Force is the owner or agent, from the 1st day of January, 1882, until the 14th day of March, 1883, at which time the lease of the party of the first part expires.

The party of the first part agrees to sell to the party of the second part all the material for making barrels at the actual cost of same now in store.

The party of the second part agrees to take and use the same as fast as the sugar house requires the barrels, and to pay for the same in notes, with interest added, running two months from date of same; settlements to be made semi-monthly.

CHAS. B. BROECK & CO. [L. S.]
N. & H. O'DONNELL. [L. S.]

Witnesses present:
J. B. STANHOPE,
PATRICK TANNER.

On *January 6th, 1882*, the plaintiffs in error dissolved their partnership and discontinued their business. The defendants in error took possession of the premises mentioned in the agreement; and the said defendants also took and used a considerable part of the material therein mentioned.

Shortly after this all the residue of the materials were destroyed by fire, rendering any further taking, possession or delivery impossible.

Action was then brought in the Supreme Court by the plaintiffs against the defendants, to recover the price of the material under the agreement, and the cause was tried before the court and a jury at the Hudson Circuit. Evidence was given on behalf of plaintiffs tending to show delivery to the defendants, and also tending to show the intent of the parties to vest title in the materials in the defendants, and op-

posing evidence on both points by the defendants, and a verdict for the price of the materials was rendered by the jury in favor of the plaintiffs in error.

Upon a rule to show cause, the verdict was set aside and a new trial ordered by the court in banc, that court holding that the agreement imported an executory agreement of sale, and not a contract of sale. The cause went back to the Circuit for re-trial, and upon such trial before the court and jury, the plaintiffs again offered evidence tending to show actual delivery to the defendants and an intent to pass title to the defendants, and thereupon the court directed the plaintiffs to be non-suited.

The plaintiffs in error now submit;

1. That if there was any doubt upon the face of the agreement, whether it expressed an *actual sale* of the goods, or an executory contract for sale, then the doubt is to be solved by ascertaining *the intent of the parties;* and such question is *one of fact* and not of law, and is determined *by the jury* and not by the court.

1 Benjamin on Sales, sec. 309.

2. That as the jury, before whom both the written contract and the proof of the attendant circumstances were laid, had found for the plaintiffs, the jury had determined the question of fact, to wit: that the intent

of the parties was to make an actual sale and purchase, and not an executory contract, and as the verdict was not set aside as contrary to the evidence, the court in banc erred in setting aside their finding of the fact, and substituting their own finding of such fact as authoritative over that of the jury.

3. That as on the re-trial of the cause, there was evidence offered and permitted to be given to the jury tending to show actual delivery of the goods, and also showing the attendant circumstances of the contract, which tended to show the intent of the parties to be to make an actual purchase and sale of the goods, and to pass the title in the goods to the defendants; the Circuit Judge erred in taking the case from the jury and preventing them from finding the fact of the intent of the parties, and directing the plaintiffs to be non-suited, and the Supreme Court erred in awarding final judgment upon the postea against the plaintiffs.

4. That the said Supreme Court erred in construing the intent of the instrument evidencing the contract, without *referring to or considering* the attendant circumstances of the same, although such circumstances were before them.

Hatch v. Oil Co., 100 U. S., 124, 131;
Ferry v. Wheeler, 25 N. Y., 520, 525;
Callaghan v. Meyers, 89 Ill., 566, 570.

5. That upon the face of the agreement itself the transaction was a contract of sale, and the court erred in construing it to be an executory agreement to sell at a future day.

a. The *presumption of law is*, that a contract is an actual sale, if *the specific things* are agreed upon, and are ready for immediate delivery. In such case there is no reason for imputing to the parties any intention to suspend the transfer of *the property* inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done to the thing. And in the present case nothing remained but payment.

Benjamin on Sales, sec. 311, 322;
Hurd v. Cook, 75 N. Y., 454, 458.

b. This *presumption* is strengthened into *a certainty* in law by the *positive declaration* of the parties that the one had *actually sold* to the other, *at a price agreed* upon, *all* the material then in store. The Supreme Court admits that this clause imports an *actual sale* of *a specific thing* at an *agreed price*, and that it vested the property in the materials in the buyer. This subject of the actual sale being thus concluded between the parties, the minds of the parties proceed to the consideration of and arriving at a *consensus animi* respecting the time and mode of payment. And as the sale already agreed upon, while it settled the

sale, the specific thing sold, and the price to be paid, had not fixed the *time or method of payment*, and as the buyers evidently desired to buy upon credit, and as these matters were all that remained to be settled, and *must* be settled, the minds of the parties naturally turn to this subject. The defendants evidently desired a postponement of payment until they actually needed to use the materials, and then to make payment by *unsecured notes;* the plaintiffs naturally desired that only a portion of the whole price should be at risk at one time, and that they should retain possession of the material and their lien for the rest of the price, and that the settlements should be frequent, for the purpose of lessening their risk upon the notes for the price; evidently they were not willing to take a note at two months for the whole price and lose their vendor's lien. This is a *natural* construction of the intent of the parties upon the face of the instrument, and without violating the *presumption* of law in favor of an *actual* sale, or overturning the *distinct preceding declaration* of the parties that they had made *an actual bargain and sale.*

What business man closing up his business would *tie up his whole assets* by so senseless an agreement for future sales? It is no wonder that the common sense of the jury declared by its verdict that no such intention could be reasonably imputed to these parties.

Barker Gummere.

N. J. COURT OF ERRORS & APPEALS

CHARLES S. BROECK and WILLIAM G. PENNYPACKER, who sue, &c., *Plaintiffs in Error.* *vs.* NEAL O'DONNELL, *et al.*, partners, &c., *Defendants in Error.*	*In Covenant.* — *Defendants' Brief.*

On the fourth day of January, A. D. eighteen hundred and eighty-two, Broeck & Co., the plaintiffs, had four shops in Jersey City, in each, material for making barrels were stored, and in each work was carried on.

(McNamee printed book, pages 16, 17, 18.)

On that day agreements "P. 1," "P. 2," under seal, were made by Broeck & Co., with N. & H. O'Donnell, the defendants. The plaintiffs receiving "P. 1," and the defendants receiving "P. 2." Both agreements, "P. 1" and "P. 2" give to the defendants the use of the shop and machinery, corner of Greene and Morgan streets, Jersey City, known as the tight-barrel shop, to March 14th, 1882, and of the shop and stables at the foot of Warren street, the defendants agreeing to pay the rent to the land-owners to March 14th, 1883, and to permit the plaintiffs' horses to be kept at the latter place, and machinery to be taken away from the former place after March 14th, 1883. *No mention is made of the other two*

shops. This provision follows in "P. 1," the party of the first part (plaintiffs) agrees to sell to the party of the second part (defendants) all the material for making barrels at the actual cost of same now in store. "The party of the second part agrees to *take and use* the same as fast as the sugar house requires the barrels, and to pay for the same in notes, with interest added, running two months from date of same, settlements to be made semi-monthly." "Exhibit P. 2" contained the following provision: "The party of the first part (plaintiffs) agrees to sell the party of the second part (defendants) all the material used for making barrels at the actual cost price of same *as* now in store. The party of the second part agrees to take and use the same as fast as the sugar house requires the barrels, and to pay for the same in notes, with interest added, running two months from date of same, said settlements to be made semi-monthly."

On the sixth day of February, A. D. eighteen hundred and eighty-two, a shop on the *southwest* corner of Greene and Morgan streets, *which was not named in the agreement*, and which had continued in the possession of plaintiffs, was burned with a quantity of material. This suit was brought on the sealed agreement *for the price of that material*, and the Court granted the motion to non-suit.

What property was intended to be sold by this agreement? What meaning shall be given to the phrase material *used for making barrels* ("Exhtbit P. 2.") It may mean either material suitable to be used, or material which shall in fact be used. If it means the latter, then the fact that the material has been used must be shown before recovery can be had for it. The provision that the buyer is to take *and use* the material only as fast as the sugar house requires the barrels to be made from it, indicates this interpretation, and so does the conduct of the parties.

A further ambiquity arises. The agreement to sell applies to "all the material used for making barrels as now in store." In store where? According to the agreement it does not suggest any intention to transfer material in store elsewhere. The plaintiffs, however, seek to recover for material stored in a shop on the *southwest* corner of Greene and Morgan streets—*not one of the two shops named in the contract.*

Every contract is to be interpreted in connection with surrounding circumstances, and the acts done by the contracting parties in fulfillment of the contract may be regarded, in order to see what interpretation they have themselves put upon it, and what conditions have been waived and performed. (Addison on Cont., Sec. 324.)

2.—Plaintiffs failed to show that the material sued for was part of that contracted to be sold, and they should therefore have been non-suited.

The fair inference from the writing is, that the material contracted for was that stored in the shops mentioned in it. If it means more than that, the facts showing that it has that meaning must be proved. Plaintiffs offer no proof as to any circumstances preceding the sale. Subsequent to the contract, one of the defendants walked through the premises where the fire occurred. (Case, p. 9, l. 24; p. 11, l. 18; p. 46, l. 40.) This proves nothing. It is further proved that two loads of material were delivered to draymen on the order of defendants by the employees of the plaintiffs, from that building, but as plaintiffs charged this material to defendants on delivery (Case, p. 22, l. 9), and as new material confessedly not sold by the contract had been put in the building by plaintiffs after the contract, *of which new material these two loads may have been part* (Case, p. 24, l. 30; p. 25, l. 10; p. 32, l. 32), the transaction indicates a sale of those two loads at the time of delivery. This delivery is in no manner connected with the agreement of January 4th, 1882.

The evidence to show that the contract applies to the

goods burned is insufficient to establish that point. On the other hand, there is abundance of evidence that the parties regarded the material in the burned shop, as well as in the shop two hundred and eighty-three Warren street, as that of the plaintiffs. An attempt was made to show that the defendants stored material in the premises afterwards burned, but it failed, but it does appear that several car loads of material arrived after the sale, for plaintiffs, that some of these were sold by plaintiffs to defendants on the cars, and *were not* stored by plaintiffs in the building in question, and that other car loads not transferred to defendants were stored by plaintiffs, though manifestly no part of the property contracted for, and were stored there in such manner as not to be distinguishable from the material previously stored (Case, p. 26, l. 6; p. 31, l. 8 to l. 20, p. 34; p. 50, l. 22 to l. 23, p. 52).

It appears too *that the plaintiffs, after the execution and delivery of P.* 1 *and P.* 2, *continued to use the material, old and new, indiscriminately*, in manufacturing barrels, and *sold the barrels to various parties* without the consent of or accounting to defendants as owners of the material (Case, p. 34, l. 38 to l. 14, p. 39; p. 48, l. 15; p. 54, l. 6; p. 64, l. 8).

Plaintiffs retained possession of the premises and material up to the time of the fire, though they gave up possession of the two shops named in the agreement, and of the material therein (Case, p. 44, l. 28 to l. 28, p. 45).

In case of ambiquity the subsequent conduct of the parties is admissible to determine their intent.

2 Philips on Evidence, 675 [803].
1 Greenleaf, Sect. 293.

Barrels made for defendants by plaintiffs from "*stock on hand*," charged for at same rate as to other persons, p. 35, l. 17, thus treating the material as their own.

3. Plaintiff failed to show fulfillment of a condition precedent to recovery.

By the contract the buyer was "to take and *use* the same as fast as the sugar house requires the barrels, and

to pay for the same in notes at two months' settlements to be made semi-monthly."

Clearly this required delivery and acceptance in installments and payments at the end of each half month for the material delivered and *used* in that period.

Settlements depended upon the taking of material by defendants and the taking of materials depended upon the requirements of the sugar house, there was no obligation upon the part of the defendants to accept or pay for any material till the sugar house required barrels, and at such time as the sugar house required barrels the plaintiffs were required to have material on hand with which to make the barrels; there is no evidence to show that the sugar house required any barrels after the fire, and if such evidence did appear the demand for the material could not have been supplied, as the material had been consumed by fire while in the possession of the plaintiffs.

Had the proprietors of the sugar house discontinued business, and there being no further requirement for barrels, do the plaintiffs contend that there would remain a legal liability upon the part of the defendants to pay for the remaining material?

The obligation of the one to deliver and the other to receive were mutual and dependent.

The plaintiffs are required not only to show default in the defendants but their own readiness and offer to deliver the goods.

Dunham *vs.* Mann, 8 N. Y., 508.

The evident intention of the plaintiffs was to dispose of the "stock on hand" to some person who had or who was likely to have use for it and the intention of the defendants was not to saddle themselves with a stock of material, worth about $30,000, without being assured of its use; they therefore fortified themselves behind the requirements of the sugar house and made payments dependent upon the proceeds of the sale of the barrels.

The material was required for a particular use, at a particular place, and at a particular time, to be used by them, to be bought by them when the subject of that use

demanded or required the purchase. Upon failure of that use material not to be delivered.

The time and amount of each delivery was to be determined by "the sugar house" requirements, *which were not under control of either party.* The effect of this provision is, that the plaintiffs must show, as a condition precedent to recovery, a requirement by the "sugar house" of the amount sued for. If the sugar house had made no requirement nothing could be recovered, for defendants could not, by the contract, be called on to *take and use*, or pay for the materials.

2 Benj. on Sale, Ed. 1883, Sects. 869, 870.

The destruction of the property by fire does not relieve the plaintiffs from showing the fulfillment of this condition precedent. The effect of the destruction of the thing sold is to relieve the seller from damages for failure to deliver it, but does not give him a new remedy for the price.

Benj. on Sales, 1883, Sect. 859, note 6, and cases cited, including Smoot *vs.* United States, 15 Wall, 36–46, where *Miller, J.*, said:

"While an impossibility may release the party from liability to suit for non-performance, it does not stand for performance so as to enable the party to sue for and recover as if he had performed."

Where the parties having contracted on the basis of the continued existence of a building, its destruction by fire was held to excuse both from performance.

Taylor *vs.* Caldwell, 3 B. & S., 826.

4. "The actual cost price" was not proved.

Plaintiffs did not attempt to prove the cost of the material sold; they offered instead proof of market value and price after January 4th (Case, p, 62, l. 26; p. 74; p. 28, l. 20). But the material contracted for was that in store January 4th, and was purchased during several

months before that time. No proof of the price paid, or of the actual cost price was made, as there was a scarcity in January, 1882 (p. 62, l. 38), the prices at the time are not fair to defendants.

Plaintiffs further rely on a supposed verbal agreement, fixing prices, a memorandum of which, not signed, was posted by the book-keeper in his book. Whether the conversation, *January* 7, 1882, which is supposed to have resulted in making this memorandum related to this contract was not made to appear. (Case, p. 65, l. 29, to bottom p. 66.) If there was such an agreement as to prices, as is inferred, it will not avail plaintiffs, for the original contract is within the statute of frauds, and parol evidence to modify it is therefore not admissible.

Benj. on Sales, 1883, Sec. 214, and note 17.
Swain *vs.* Seawens, 9 Wall., 254–272.
Harvey *vs.* Grobham, 5 Ad. and E., 61.

5. The property in the goods did not pass by the contract.

Admitting that the material burned was part of that contracted for, still title had not passed at the time of the fire.

The quantity of the material was not known; not now known with any degree of certainty. The price was to be cost price, which had varied during the buying of the material, and was therefore not easy to determine, as the different purchases had not been kept distinct, *and material had been put in and drawn out indiscriminately.* (Case, p. 25, l. 18 to l. 20; p. 26, p. 33, l. 15 to p. 37; p. 41, l. 26; p. 31, l. 21; p. 56, l. 20.)

Specification of the goods was necessary. The headings, hoops and staves were of different size. Barrels of different kind and size were required by the sugar house. The contract necessarily contemplated counting to determine the price, the material having been bought by the thousand pieces. Notes were to be given from time to time, evidently contemplating payment for the amount actually delivered, at the price ascertained only by counting (Case, p. 47, l. 24).

The sale was therefore conditional.

One of Lord Blackburn's rules as to conditional sale is, that where anything remains to be done to the goods to ascertain the price, such as measuring, weighing or counting, this must be done before title will pass. This rule is adopted by Benjamin, section 365, and is fully sustained by Zagway *vs.* Farwell, 2 Camp., 240, and by other English decisions stated by Benjamin on Sales, 1883, section 369, et seq. This rule is a guide to determine the intent, and yields readily to proof of intent that the property shall pass. Yet, in the absence of such proof, the rule is abundantly sustained in this country.

Sherman *vs.* Mudge, 127 Mass., 547, is a close precedent to the present case. There a stock of goods was sold for seventy-five per cent. of the invoice prices, "delivery to be made and price paid as soon as the quantity can be verified." *Gray, C. J.*, said that these words showed an intent that the transfer and payment should both be postponed until the quantities were verified and the price ascertained. The property was held to be still in the seller.

To the same effect see Rapelye *vs.* Mackie, 6 Cow., 250; Lingham *vs.* Eggleston, 27 Mich., 324, is a well considered case often cited. *Cooley, J.*, said that when anything is to be done *by the seller* or by *both the buyer and seller* to ascertain the price, where the price depends on quantity, it must be done before title will pass.

And on principle it seems most unreasonable that one who has contracted to pay for goods by number, as actually counted, and who has relied on this arrangement, and made no effort to learn the true quantity, should be compelled to pay on a measurement made "*by the eye*" (Case, p. 11 ; p. 69, l. 21) of the employee of the seller, "and guess work." At this time, with the evidence in this case before us, it is impossible to ascertain the quantity of goods on hand at the time of the fire.

In the case before the Court every circumstance indicated that title was not to pass until the property was counted and delivered. The possession remained with the seller—no payment had been made. The material

had not been measured or counted. The quantity was unknown, and its ascertainment was a work of great time and labor. McNamee says that the material was mostly good, but that was a matter of judgment, and the buyer was entitled to use his own judgment.

"Exhibit P. 8" shows allowances for defective material. There were supposed to be more than one million staves, with headings to match, hoops by the thousands, to be handled and sorted. The right of the buyer to reject materials unfit for use in making barrels was an implied term of the contract.

Benj. on Sales, 1883, Sect. 983.

The counting and delivery involved the concurrence of both parties. (Case, p. 47, l. 24 to l. 20, p. 48.) The price per thousand was not ascertained. From the quantities and variety of material, there might well be difference of opinion as to cost price.

Finally, the taking of any goods by the buyer was made dependent upon the requirements of the sugar house, which had not made such requirement at the time of the fire, and, so far as has been shown, never required any barrels from the defendants after the fire.

This case is readily distinguishable from those where title has been held to pass by the contract, though the price remained to be determined by weighing, measuring or counting. Where actual delivery to the buyer has taken place, title may pass though the price is afterward to be ascertained.

Benj. on Sales, 1883, Sect. 378.

And where, though delivery has not taken place, yet the property has been placed at the buyer's disposal, so that he may take it *without any act of the seller*, there are cases holding that title may pass and that it should be left to the jury to determine whether such was the intent. Such a case is *Groat* vs. *Gile*, 51 *N. J.*, 431, where the buyer had only to come and take a flock of sheep, the price per head having been fixed, and the ascertainment

of the total being a mere matter of counting, which any one could do, and which involved no labor, judgment or difference of opinion.

In *Burrows* vs. *Whitaker*, 71 *N. J.*, 291, possession had been given to the buyer, who was to cull and count the goods sold, and in *Boswell* vs. *Green*, 1 *Dutch.*, 390, 398, not only had possession been given but a bill of sale had been delivered, clearly manifesting an intent to pass the property, although weighing was to take place subsequently to ascertaining the price.

In *Huff* vs. *Hires*, 11 *Vroom*, 581, 587, the property had not been measured or separated from the bulk of which it formed part, but the buyer had only to come and take it *and it had been paid for*, and that was the ground for the decision of the Court.

In all these cases Lord Blackburn's second rule is recognized, but other circumstances, such as delivery, or payment, indicated an intent that title should pass before the price was ascertained by measurement.

Other recent American cases upon this rule are collected in "Benjamin on Sales," Ed. 1883, Sects. 414 to 424.

The conduct of the parties gives evidence of their interpretation of the contract, and of their intention that the property should remain in plaintiffs.

2 Phillips Evid., 675 (803).
1 Greenleaf Ev., 293.

"Exhibit P. 8" contains the bill of particulars annexed to the plaintiffs' declaration and are the staves, &c., which were consumed by the fire.

All the goods delivered to the defendants were paid for by the defendants. This is not disputed.

Bills were delivered to the defendants from time to time, as goods were accepted by them, p. 44, l. 15, thus treating each delivery as a complete and separate sale.

1 Greenleaf on Ev., Sec. 29, 3.

The material was to be specified. Without this specification, neither the plaintiffs or the defendants could fix the price which the one was to receive and the other to pay. This is evident in the matter of rejection of imperfect material. Only such portion of the stock on hand as was used for making barrels—or, if you please, such stock as was suitable for making barrels—was, by the agreement, to be taken by the defendants—*i. e.*, imperfect goods were to be rejected, also such material as were not of proper size and shape.

The Supreme Court of this State, in Broeck and Pennypacker *vs.* Neal O'Donnell, 16 *Vr.*, 441, held *that "Exhibits P.* 1 *and P.* 2," *in this case, were executory contracts and not a bargain and sale.*

WM. BRINKERHOFF,

Att'y for Def'ts in Error.

JUNE TERM, 1886.

New Jersey Supreme Court.

CHARLES B. BROECK and WILLIAM G. PENNYPACKER, late partners, &c., vs. NEAL O'DONNELL and HUGH O'DONNELL, partners, &c.	In Covenant. On rule to show cause for new trial, on deft's motion. 10

JAMES B. VREDENBURGH,
Attorney for Plaintiffs.

WM. BRINKERHOFF,
Attorney for Defendants.
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Summons issued June 10th, 1882.
Summons returnable June 13th, 1882.

New Jersey Supreme Court, of the thirteenth day of June, in the year one thousand eight hundred and eighty-two. 30

HUDSON COUNTY, ss.:

Neal O'Donnell and Hugh O'Donnell, partners, trading as "N. & H. O'Donnell," the defendants in this suit, were summoned by service of the summons upon said Neal O'Donnell, to answer unto Charles B. Broeck and William G. Pennypacker, late partners, trading as "Charles B. Broeck & Co.," the plaintiffs therein, who sue for the use and benefit of William 40

G. Pennypacker, of a plea of breach of covenant, and thereupon the said plaintiffs, by James B. Vredenburgh, their attorney, complain: For that whereas heretofore, to wit, on the fourth day of January, in the year eighteen hundred and eighty-two, at Jersey City, in the County of Hudson aforesaid, by a certain agreement then and there made and entered into between the said plaintiffs, then being partners in trade under the name and style of "Charles B. Broeck & Co.," of the first part, and said defendants, of the second part, which agreement, under the seals of the respective parties, the said plaintiffs bring here into Court, the date whereof is the day and year aforesaid, for and in consideration of the said plaintiffs selling to the said defendants all the materials for making barrels then owned by plaintiffs, at the actual cost of same then in store, the said defendants did covenant and agree with the said plaintiffs, to take and use the same as fast as the sugar-house should require said barrels, and to pay for the same in notes, with interest added, running two months from date of same, settlements to be made semi-monthly, a copy of which agreement is hereunto annexed and hereby referred to.

And the said plaintiffs aver that although they, the said plaintiffs, have well and truly performed and fulfilled all and singular the covenants and agreements in said agreement mentioned, and to be by them done and performed, and although the said defendants have taken and used said materials for making barrels, to wit, one million thirty-inch elm staves, fifty-three thousand gross of one-half barrel staves, one hundred and ten thousand sets of eighteen-and-one-quarter-inch heading, twenty-seven thousand five hundred sets of nineteen-inch heading, and twenty thousand patent hoops of great value, to wit, of the value of forty thousand dollars, yet the said defendants have not performed the said covenants and agreements on their part to be performed, and have not paid for said materials for making barrels, in notes,

with interest added, running two months from date of same, or in cash money or otherwise, or any part thereof, according to the form and effect of the said agreement, but have hitherto wholly neglected and refused, and still do neglect and refuse so to do, contrary to the said agreement and the said covenants by them in that behalf made, as aforesaid, to wit, at Jersey City aforesaid; and so the said plaintiffs say that the said defendants have not kept with them the covenants so made between them, as aforesaid, but 10 have broken the same, and to keep the same with the said plaintiffs, the said defendants have hitherto wholly refused, and still do refuse, to the damage of the said plaintiffs of forty thousand dollars and therefore they bring their suit, &c.

JAMES B. VREDENBURGH,
Attorney of Plaintiffs.

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To the Defendants:

Take notice, that the annexed is a true copy of the agreement, under seal, on which this suit is founded.

(The agreement is hereinafter set forth as "Exhibit P. 1," upon part of plaintiffs.)

And the said defendants, by Wm. Brinkerhoff, their attorney, come and defend the wrong and injury, when, &c., and say that the said supposed agreement 30 is not their deed; and of this they put themselves upon the country, &c.

And for a further plea on this behalf by leave of the Court here for this purpose, first had and obtained by virtue of the statute in such case, made and provided, say: That the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say they have not taken and used said materials for making barrels, to wit: One million thirty-inch elm staves, fifty-three thou- 40

sand gross of one-half barrel staves, one hundred and ten thousand sets of eighteen and one-quarter-inch heading, twenty-seven thousand five hundred sets of nineteen inch heading, and twenty thousand patent hoops, of the value of forty thousand dollars. And of this they, the said defendants, put themselves upon the country, &c.

And for a further plea in this behalf, as to the said breach of covenant by the said plaintiff in the said
10 declaration above assigned, the said defendants by like leave of the Court here for this purpose, first had and obtained by virtue of the statute in such case, made and provided, say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that in and by said supposed agreement, the said plaintiffs agreed to sell to the defendants all the materials for making barrels at the actual cost of same in store. And the said defendants agreed to take and use the same as
20 fast as the sugar house required the barrels, and to pay for the same in notes, with interest added, running two months from date of same, settlements to be made semi-annually ; that they, the said defendants, continually after the making of the said agreement, were ready and willing to take and use all the material at the actual cost of same in store, as fast as the sugar house required the barrels, and to pay for the same in notes with interest added, running two months from date of same, and to make
30 settlements, semi-monthly, according to the form and effect of said agreement ; and did, from time to time, as the sugar house required the barrels, take and use, and did then buy so much of the material in store at the time of the execution of the said agreement ; and so long as the plaintiffs continued to have the same in store, as was necessary to supply, from time to time, the requirements of the sugar house in this particular ; and as the plaintiffs were ready and willing to sell the same to the defendants, and such material was then sold by the plaintiffs to the defend-

ants, in lots or quantities as so required, and the plaintiffs were ready and willing to sell the same, and as sold by the plaintiffs, were paid for at the plaintiffs' request, in notes payable at different times, with interest added, and on settlements other than as was required by said agreement; and this the defendants are ready to verify.

Wherefore, they pray judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c. 10

And for a further plea in this behalf the said defendants, by like leave of the Court here for this purpose first had and obtained by virtue of the statute in such case made and provided, say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that after the making of said agreement, and while these defendants were ready and willing to perform their part of said agreement, and said plaintiffs did sell to persons other than the defendants, 20 and did take and use in and about their business, without the knowledge, authority or consent of these defendants, and contrary to the form and effect of said agreement, large quantities of the material for making barrels, in store at the time of the execution of said agreement, and did receive pay thereof, and in nowise accounted to these defendants for such sales, with like want of knowledge, authority or consent, upon the part of these defendants. Wherefore, and by reason of which actings and doings, the said plaintiffs did fully relieve these defendants from further 30 and other performance of said agreement, and this the said defendants are ready to verify.

Wherefore, they pray judgment, if the said plaintiffs ought to have or maintain there aforesaid action thereof, against them, &c.

WM. BRINKERHOFF,
Attorney for Defendants.

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And the said plaintiffs as to the pleas of the said defendants, by them first and second above pleaded, and whereof they have put themselves upon the country doth the like.

And the said plaintiffs, as to the plea of the said defendants by them, thirdly above pleaded, say that the said plaintiffs by reason of anything, by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against them the said defendants, because they say that the defendants of their own wrong and without the causes by them in the said plea alleged broke the covenant in manner and form, as the plaintiffs have above alleged; 'and this, they, the said plaintiffs pray, may be enquired of by the country, &c.

And the said plaintiffs, as to the plea of the said defendants by them, fourthly above pleaded, say that the said plaintiffs by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof, against them, the said defendants, because they say that the defendants of their own wrong, and without the causes by them in the said plea alleged, broke the covenant in manner and form as the plaintiffs have above alleged.

And this, they the said plaintiffs, pray may be enquired of by the country, &c.

JAMES B. VREDENBURGH,
Attorney of Plaintiffs.

"Afterwards, to wit, at a Circuit Court holden at Jersey City, in and for the County of Hudson, before Manning M. Knapp, Esquire, Justice of the Supreme Court, on the thirteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two, according to the form of the statute in such case made and provided, come as well the said plaintiffs as the said defendants, by their respective attorneys within mentioned, and the jurors of the jury between the parties aforesaid being also summoned, come, who to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath:

As to the first issue joined between the said parties, that the said agreement above mentioned is the deed of the said defendants in manner and form as the said plaintiffs have above in that behalf alleged.

And as to the second issue above joined between the said parties, the jurors aforesaid, upon their oath aforesaid, say that the said defendants have taken and used said materials for making barrels, as in said declaration alleged.

And as to the third issue above joined between the parties aforesaid, the jurors aforesaid on their oath aforesaid, say that the defendants of their own wrong and without the causes by them in their plea in that behalf alleged, broke their covenants in manner and form as the plaintiffs have in their declaration alleged.

And as to the fourth issue above joined between the parties aforesaid, the jurors aforesaid on their oath aforesaid, say that the defendants, in their own wrong and without the causes by them in their plea in that behalf alleged, broke their covenants in manner and form as the plaintiffs have in their declaration alleged; and they assess the damages of the said plaintiffs by reason of the breaches of covenant above assigned to sixteen thousand one hundred and fifty-six dollars and thirty-four cents, over and above

their costs and charges by them about their suit in this behalf expended, and for those costs and charges six cents.

M. M. KNAPP, J. S. Ct.

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10 NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1883.

CHARLES B. BROECK and WILLIAM G. PENNYPACKER, late partners, trading, &c., who sues for the use of 20 William G. Pennypacker, vs. NEAL O'DONNELL and HUGH O'DONNELL, partners.	In Covenant. Rule to show cause for new trial, on defendants motion.

Application having been made to me by William Brinkerhoff, attorney of the above stated defendants, 30 within four days after the trial of the above stated cause, and on good cause shown.

I do hereby order that the plaintiff show cause before the Supreme Court at its next stated term at the State House in the City of Trenton, why a new trial should not be granted in above entitled cause.

Dated March 23d, 1883.

M. M. KNAPP, J. S. Ct.

Entered March 24th, 1883.

On motion of

40 WILLIAM BRINKERHOFF, Atty.

NEW JERSEY SUPREME COURT.

NOVEMBER TERM, 1883.

CHARLES B. BROECK et al., late partners, &c., vs. NEAL O'DONNELL et al. partners, &c.	In Covenant. On rule to show cause.

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The Court having heard the arguments of counsel on the rule to show cause, heretofore granted in this cause, and duly considered the reasons filed.

It is ordered that said rule be made absolute and that a *venire de novo* issued for trial thereof. 20

Entered November 26th, 1883.

On motion of

WILLIAM BRINKERHOFF, Atty.

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"Afterwards, to wit, at a Circuit Court holden at Jersey City in and for the County of Hudson, before Manning M. Knapp, Esquire, Justice of the Supreme Court, on the eighteenth day of October, A. D. eighteen hundred and eighty-four, according to the form of the statute in such case made and provided, come as well the said plaintiffs as the said defendants, by their respective attorneys within mentioned, and the jurors of the jury between the parties aforesaid, in the plea aforesaid, being also summoned come, who 40

to speak the truth of the matters and things within contained, being chosen, tried and sworn, evidence was given to them thereupon by the above named plaintiffs, which being insufficient to maintain the said issue on their part, and the said plaintiffs being thereupon solemnly called to produce further evidence to support and maintain the said action, the said plaintiffs come not, but make default, nor do they further prosecute their suit against the said
10 defendants.

M. M. KNAPP, J. S. Ct.

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NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT, SEPTEMBER TERM, 1884.

CHARLES B. BROECK and WILLIAM G. PENNYPACKER, who sues for the use of, &c., vs. NEAL and HUGH O'DONNELL.	In Covenant. 10

Before the Hon. M. M. KNAPP and a Jury.

Appearances—Mr. VREDENBURGH for plaintiff.
Mr. BRINKERHOFF for defendants. 20

On this eighteentn day of October, A. D. 1884, this cause was regularly called for trial, and moved by the plaintiff, whereupon a jury was empanelled, and Mr. VREDENBURGH on the part of the plaintiff opened the case, and evidence was offered as follows:

JOHN B. STANHOPE, for plaintiffs, sworn, testifies as follows: 30

Examined by Mr. VREDENBURGH:

I reside in Jersey City; I have charge of the tight barrel factory, now occupied by the Messrs. O'Donnell; I was employed in the same building on the 4th of January, 1882, corner of Greene and Morgan streets, Jersey City; this is my signature as witness to the paper you show me; it was signed in the office of the building corner of Greene and Morgan streets, on the northeast corner; there were present at that 40

time Hugh O'Donnell and William G. Pennypacker and Patrick Tanner; Hugh O'Donnell signed for N. and H. O'Donnell; that is the firm in whose employ I now am; the H. stands for Hugh, and the N. stands for Neal; the name of the firm is N. & H. O'Donnell; I think there were two papers signed at the same time.

Plaintiffs' counsel calls upon the defendant to produce the other paper. Defendants' counsel produces it, and hands it to Mr. Vredenburgh.

10

WITNESS: This is the other paper; these are the two papers I signed at that time.

Plaintiffs offer both papers in evidence. The one produced by the plaintiffs is marked "Exhibit P. 1"; the one produced by the defendants on demand, is marked "Exhibit P. 2."

20

I went into the employ of N. & H. O'Donnell, January 16th, 1882, and have been in their employ ever since; before that I was in the employ of C. B. Broeck & Co.; I was their superintendent of the tight barrel department on the northeast corner of Greene and Morgan streets; that is the place which was formerly occupied by Fields as a foundry; with the O'Donnells I have held the same position that I did with Broeck & Co.; I have charge of that department.

30

C. B. Broeck & Co., employed in the tight barrel department in the neighborhood of 75 men and boys, all told; after I went into the employ of the O'Donnell's the same number of men and boys were employed; the same men continued under the O'Donnells that worked for Broeck & Co.; there might have been some few changes, but none that I recall; the same machinery was used, and the same business was carried on as before.

40

Q. On the 16th of January, when the O'Donnells

took possession, what was there in that tight barrel factory in the way of materials for making barrels?

A. Staves, headings and hoops.

Q. Can you give us any idea of the amount in the tight barrel factory?

A. The stock consisted of syrup barrels, syrup barrel heading, syrup barrel staves, syrup barrel hoops, and there was two or three car loads of sugar barrel staves; that was the principal part of what was there. 10

Q. What are sugar barrel staves?

A. Staves used in the making of sugar barrels—slack barrels.

Q. There were materials for making tight barrels, and also two or three car loads of staves for making slack barrels?

A. Yes.

Q. What do you mean by a car load?

A. About 25,000 gross.

Q. By a thousand gross, do you mean a thousand 20 staves or 1,200?

A. 1,200; by a thousand net we mean a thousand staves.

Q. Did you and Mr. Pennypacker and Mr. O'Donnell go to the store-house on the southwest corner of Greene and Morgan streets, about the 4th of January?

A. Mr. Pennypacker and Mr. Hugh O'Donnell and myself went through the factory somewheres about that time; it was before the O'Donnells took posses- 30 sion; they walked through and looked at the stock.

Q. At that time how much material was there in that building?

A. To the best of my knowledge I think there was about a million thirty-inch elm staves.

Q. What facts were there upon which you formed your judgment as to the amount of staves that went into that building?

A. Two circumstances controlled in forming my judgment. First, I superintended the putting of the 40

stock in there, and I know its relative position; and second, but a short time before that I went through there at the request of C. B. Broeck with Mr. McNamee, with a view of giving him an idea of about what amount of material was there, and in those ways I made up my judgment.

Q. Had you given to Broeck & Co., before this date, the amount of material that was in that building?

10 A. I had, some time in the latter part of December; I reported to them that there was about one million staves there, and that there was one full car load of half-barrel staves which was represented to be 57,000 half-barrel staves; there were two kinds of headings in there also, nineteen-inch and eighteen and one-quarter-inch; I can give an idea of how many there was there of all kinds all told.

Q. How many did you find in there when you went there to make this estimate?

20 A. We reported about twenty-five car loads of 18¼ and 19-inch, altogether.

Q. From the time that you had examined with Mr. McNamee, for the purpose of giving this estimate to Broeck & Co., up to January 4th, do you know whether any had been removed or not?

A. I think there was, but I am not sure; I know there was no very large quantity removed; I cannot give you any idea of how many was taken out.

30 *Cross-examined* by Mr. Brinkerhoff:

Q. Can you state how much material was on hand January 4th, 1882, for making barrels, in any of the yards of Broeck & Co.?

A. Only that which was in the tight-barrel department, and that which was in the Apgar building.

Q. Can you tell accurately the amount of stock on hand in either of those buildings?

A. To a stave, do you mean?

Q. Yes, sir.

40 A. No, sir.

Q. Within what degree of accuracy can you make a statement of the amount of stock on hand January 4th, 1882, in any of the factories of C. B. Broeck & Co.?

A. I think I could—within four or five car loads, at least; I would not like to say much closer than that.

Q. Have you any means of ascertaning the amount of stock on hand at that time?

A. When I made that estimate I was governed by the size of the building, and about what the building would hold, and I knew about what room a carload would take up; it was an estimate simply; not an actual count; and we made the estimate as we supposed, so as to leave a margin over, that is to be on the safe side; the idea was to give what we supposed was there beyond all doubt.

Q. Did the O'Donnells, or either of them, on January 4th, 1882, know the amount of stock on hand in either of the yards of Broeck & Co?

A. I don't know.

Q. Was it possible for them to have known?

A. Not unless they went through and made a calculation; Mr. Hugh O'Donnell went through, but whether he made a calculation or not, I cannot say; I don't think it was possible for him to have made a calculation in the time that he remained there.

Q. Had you any knowledge that Mr. Pennypacker or Mr. Broeck, on January 4th, 1882, had any knowledge of the amount of stock on hand for the making of barrels?

A. I suppose they had; we had given them a statement before that time of what stock was there, and I suppose they ought to know; I had given them that statement some time in the latter part of December, within two weeks of the end of December.

Q. You cannot state the amount of material used from that stock between the day of your giving that statement and the signing of the contract?

A. No, sir.

Q. Do you know whether any price had been fixed for the materials used in making barrels between Pennypacker and Broeck and the O'Donnells?

A. I don't know.

Q. Can you make any clearer statement of the amount of stock on hand January 4th, 1882, than that you have made on your direct examination?

A. Only basing my judgment on the bulk and size of the building, and having handled staves a good
10 many years and being familiar with what a carload would hold, and having been in the business for a long time.

Q. Was it part of your department to deliver staves that were sold by Broeck & Co.

A. I did deliver them from that building only, until I entered into the employ of O'Donnell, but after that I did not deliver anything from that building.

Q, How did you ascertain the amount of material which was delivered by Broeck & Co., to the O'Don-
20 nells?

(Question objected to and withdrawn.)

Q. Why did you leave the employ of C. B. Broeck & Co.?

A. Because they had sold out their business and I was engaged by N. & H. O'Donnell.

Q. You left Broeck & Co. on the 17th of January, 1882?

30 A. No, sir; on the 14th.

Q. What time did the fire occur?

A. The morning of February the 6th, I believe.

Q. How do you form your estimate of the amount of goods that were consumed by the fire?

By Mr. Vredenburgh. That question was not asked of the witness.

Q. Then you have made no statement as to the
40 amount of stock that was contained in the southwest

corner of Morgan and Greene streets at the time of the fire?

A. No, sir, not as yet.

Q. In whose handwriting are these agreements?

A. I don't know.

Re-direct examination by Mr. Vredenburgh:

Q. You said you formed your judgment as to the amount of material in this building, among other facts, from the size of the building? 10

A. From the size of the room in which it was contained; I speak of the rooms in that building on the southwest corner of Greene and Morgan streets.

Q. Give us the size of the room, if you can?

A. In the building facing on Greene street there were two rooms, each 40 by 50 and about 12 feet high; one of them was nearly full of headings; I suppose you might possibly have got another carload of headings in there, but not more than that; and in the other room I estimated that there was 4 or 5 car- 20 loads, or probably more, or at least that.

Q. How many headings will a room 40 by 50 and 12 feet high contain?

A. It would hold at least 25 carloads; the rooms where the principle amount of staves was in was also two rooms in the back part of the building facing on Morgan street, directly west of the other room; there were two rooms there, one of them 40 by 50 was about 15 feet high, and was full of staves; it had a pitch roof, and according to my judgment would av- 30 erage about 15 feet high; that was full of staves; now, according to measurement, that would hold about 30 cars, but we did not calculate it so close as that; I calculated there was at least 25 cars in there; the other was 60 by 50, and I estimated it was about one-third full of staves—that was the front room—making altogether, as I thought, to be on the safe side, not less than 40 carloads of staves in both rooms; I did not make an estimate to get the exact amount, I estimated it so as to leave a margin on the 40 safe side, if possible.

Q. Were there two buildings on the southwest corner?

A. Well, they call it one building, I suppose; the plan calls, I think, for 50 by 100, but it is 50 by 105; I never got just the size of the lot, because there was a yard in a part of it, and it was a peculiar shaped building.

Q. How many staves will a car hold,

A. An average car holds about 25,000, that is what they load in them, but I think they will hold more than that, if they are packed in close, but they put in 25,000 staves not to get the car overcrowded.

Q. Is that net thousand or gross thousand?

A. That is gross thousand.

Q. Is a carload of heading a fixed quantity?

A. Loaded in crates about 6000 sets of headings; a set is two heads, one for each end of the barrel, and a car would contain 6000 of those sets.

Re-cross by Mr. Brinkerhoff:

Q. You mean by that, in making your estimate of carloads you estimated it as containing that quantity?

A. Yes, sir; carloads average that.

Q. In what condition were the staves and headings in the factory?

A. Headings generally come in crates or bundles, and staves come in bundles.

Q. How many staves in a bundle?

A. Some factories put up 50 and some put up 60.

Q. How many headings in a crate?

A. They vary from 12 to 20 sets.

Q. Are they not readily counted when delivered or received?

A. Yes; different manufacturers have different styles of putting up headings.

Q. You said you made up your estimate to be on the safe side—what do you mean by that?

A. I mean that I didn't want to overestimate, but I estimated so that there would be more stock there

than what I really estimated, if there was any difference at all.

Q. What was the purpose of your estimate?

A. Mr. Broeck wanted to find out how much stock was there for the purpose of putting on more insurance, and we made an estimate for that purpose, and therefore we were not particular to get the exact amount, but wanted to be on the safe side—it was simply for the purpose of insurance, and had no regard to the sale of the stock. 10

Q. When was that?

A. That was in December.

Re-direct examination by Mr. Vredenburgh:

Q. The headings and staves were in crates and bundles at that time?

A. Yes, sir.

Q. And on the 5th of Febuary, such as had not been taken away still remained in crates and bundles? 20

A. Yes, sir.

Charles L. Strohmenger, Jr., sworn on behalf of the plaintiffs, testifies:

Q. (Showing witness a paper.) Is that your signature to that paper which I show you as a witness?

A. Yes, sir; I saw Mr. Broeck and Mr. Pennypacker sign it; that is my signature and that is their signatures. 30

Paper is offered in evidence by plaintiffs and is marked "Exhibit P. 4." It is the dissolution of partnership.

40

FRANK W. MCNAMEE, sworn on the part of the plaintiffs, examined by Mr. VREDENBURGH, testified as follows :

I reside in Jersey City ; I am now employed by the Standard Mineral Water Company ; I have been in their employ since the first of May, 1882 ; before that I was in the employ of C. B. Broeck & Co. ; I had been in the employ of Broeck & Co. about seven years ; the firm consisted of Charles B. Broeck and
10 Wm. G. Pennypacker.

I know a man by the name of G. E. Barrett ; he lives in Wilmington, in Delaware ; he is a bookkeeper for Mr. Pennypacker ; I have known him 7 or 8 years ; this is Mr. Barrett's signature to this paper which you show me.

Plaintiffs offer paper in evidence, and it is marked "Exhibit P. 3." It is articles of copartnership between Broeck and Pennypacker.

20

I know the signature of Wm. G. Pennypacker, and I know the signature of Charles B. Broeck ; those are the signatures of those gentlemen on the back of this "Exhibit P. 3."

"P. 3" is an assignment of Broeck's interest to Pennypacker.

Q. Do you know Neal and Hugh O'Donnell ?
30 A. Yes ; I know them both, personally ; they compose the firm of N. & H. O'Donnell.

Q. Where does Charles B. Broeck live?

A. Jersey City ; he has lived in Jersey City four years last May, I think ; Mr. Pennypacker lives in Wilmington, Delaware ; he has lived there as long as I have known him ; his business is at 23 Washington avenue, Philedelphia; he is in the cooperage business, and is also a miller in the flour business.

Q. You have been with Mr. Broeck some seven
40 years you say ?

A. About that.

Q. Where did they first do business?

A. New York City.

Q. How long did they carry on business there?

A. Three or four years.

Q. And then?

A. 283 Warren street, Jersey City.

Q. On the first of January, 1882, what position were you in with that firm.

A. Foreman for C. B. Broeck & Co., for the slack 10 part of their work, particularly.

Q. How many men had you employed at that time?

A. Sixty to seventy, in addition to those at the tight department.

Q. That would make how many in Broeck & Co.'s employ altogether?

A. About 150, I should judge.

Q. How many horses had you?

A. 19 or 20.

Q. How many places or yards? 20

A. Four; *northeast* and *southwest*, corner of Morgan and Greene, and 283 Warren, and also at the foot of Warren street.

Q. What was done at the foot of Warren street?

A. The shooking business was done there.

Q. What are shooks?

A. The hogsheads which come from the West Indies with sugar are taken into the yard and knocked down, and put up into shook shape with two hoops around it; that consists of the staves of that hogs- 30 head; not the heads—only the staves.

Q. What else had you at the foot of Warren street?

A. The stables were at the foot of Warren street.

Q. What had you on the 1st of January in the yards or on the premises at the foot of Warren street?

A. Shooks and hogsheads, and horses and carts and harness.

Q. Where is 283 Warren street? 40

A. Corner of Railroad avenue and Warren; the property belongs, I believe, to the Malone estate.

Q. What did the firm of Broeck & Co. do at 283 Warren street?

A. Make sugar barrels to supply the sugar-house.

Q. What kind of sugar barrels?

A. $18\frac{1}{4}$ and 19-inch slack barrels; the difference between a slack barrel and a tight barrel is, one will hold water and the other will not.

10 Q. Did you make both kinds of barrels for the sugar-house?

A. One is made for syrup and molasses, and the other is made for sugar—the tight barrel for syrup and molasses, and the slack barrel for sugar.

Q. At 283 Warren street you manufactured the slack barrel?

A. Yes; that was done by machinery.

Q. What had you there on January 4th, 1882, generally speaking?

20 A. The biggest majority of the stock in that place was 19-inch heading; we had some barrels made up; very few staves; not much $18\frac{1}{4}$-inch heading at that place.

Q. What was the principal business of C. B. Broeck & Co. during 1881, and up to January 4th, 1882?

A. Making slack barrels for F. O. Matthiessen & Wiecher's Sugar Company, Jersey City.

Q. Did they have contracts with any one else that
30 you know of?

A. With Booth & Baker; they manufactured sugar barrels for them, in which I believe they put glucose sugar; they were the same kind of barrels as were made for Matthiessen & Wiechers, excepting that we put a hole in the head for them to run the hot glucose in; the hole in the head was about four inches square; they were made a little better than the other barrel, in proportion; they were a slack barrel, made a little better, so as to hold the glucose.

40

Q. How did their contract compare in size with that of Matthiessen & Wiechers?

A. It didn't amount to anything alongside of Matthiessen & Wiechers.

Q. How many barrels would you make in a week for Matthiessen & Wiechers during 1881 up to January, 1882?

A. About 15,000 a week; the biggest majority of them would be 18½, and the balance 19-inch; slack barrels, I am talking about, and I guess they would take on an average of 600 tight barrels a week; I have sent as high as 1400 tight barrels in a week, but very seldom. 10

Q. Which one of the partners conducted the business here in Jersey City?

A. C. B. Broeck; Mr. Pennypacker came here two or three times a month.

Q. Did you hear of the sale from Broeck & Co. to the O'Donnells?

A. Yes, sir; I think I heard of it on January 5th; Mr. Stanhope told me. 20

(Defendant objects to this line of examination, on the ground that there is no evidence of a sale, and also on the ground that this is hearsay testimony.)

By the Court. This does not prove the sale.

Q. What did you see occur in regard to the business, that is the things that had belonged to Mr. O'Donnell; what actually occurred after the 5th of January? 30

A. I saw Mr. Pennypacker and Mr. Hugh O'Donnell go through the premises and look all around on the 5th of January; I refer to 283 Warren street.

Q. Who took possession of the horses?

A. Some of them were sold to Mr. O'Donnell about that time, or two or three days afterwards.

Q. Did you keep on with 150 men?

A. No; we stopped them on the 14th of January.

Q. You have told us what was in the shook yard, 40

foot of Warren street, and also what was in the slack barrel factory, 283 Warren street, now tell us what was in the building on the northeast corner of Greene and Morgan streets; what part of the business was carried on there?

A. That was the tight barrel factory; Mr. Stanhope had charge of that.

Q. What was in that building on the 1st of January?

10 A. Syrup barrels, hogshead staves to make syrup barrels out of, and machinery to make syrup barrels, syrup half-barrels, and syrup flags such as coopers use, and hoops and kiln-dried staves in a kiln; there was a kiln in that building where we dried staves —that is the northeast corner of Greene and Morgan.

Q. Now the building on the southwest corner—what were you carrying on there?

A. There we made 19-inch barrels by hand.

Q. Were you doing that on the 1st of January?

20 A. Yes, sir.

Q. What had you stored in there?

A. Staves, headings and hoops; and we had some barrels there, and tress hoops that we used to make barrels.

Q. How many staves were in this building, on the southwest corner of Greene and Morgan, about the 1st of January, 1882?

A. Mr. Stanhope and I went over the building and estimated that we had a million staves; we estimated 30 about 20 carloads of headings, that is, 18¼-inch heading, and 5 carloads of 19-inch headings, about 20,000 patent hoops and at least 700 barrels on hand at that place, and there was one carload of half-barrel staves there, and I should judge there was about 28 set of tress hoops and about a thousand heading barrels there; there was also some syrup hogsheads stored there in a small yard that we had; the yard, I think, belonged to R. A. Reason & Co.; we also had 4 or 5 stoves in this building, which belonged to 40 C. B. Broeck & Co.; we had one foot-jointer there.

Q. How many men had you there?

A. 12 to 14.

Q. You say you saw Mr. O'Donnell and Mr. Pennypacker going through 283 Warren street. Did you see them in the office?

A. They were in the office.

Q. What did you see done in the office?

A. I don't think I was in the office when they were in there.

Q. What happened on the 14th of January? 10

A. We stopped all the business, and the tight work shop was turned over to Mr. O'Donnell and was taken charge of on the 16th; the 14th of January was Saturday, and that ended our business.

Q. How about the men who were employed in the building on the southwest corner of Greene and Morgan streets, making barrels by hand?

A. They stopped.

Q. Were any barrels made at the building on the southwest corner of Greene and Morgan streets, after the 14th of January? 20

A. No, sir.

Q. Did any one commence to take away the materials that belonged to Broeck & Co., about the 14th of January?

A. I think not about the 14th of January; nobody took any away.

Q. What is this book which I show you?

A. It is a book that we took the receipt of stock in; that is stock taken by the O'Donnells from the southwest corner of Greene and Morgan streets and 283 Warren street. 30

Q. Any from the northeast corner?

A. And kiln-dried staves from the northeast corner.

Q. Who kept that book—whose writing is it?

A. A good bit of it is mine, and a good bit of it is Mr. Strohmenger's; Mr. Strohmenger and I kept the book together.

Q. Does that contain all the material that was taken away by O'Donnell & Co.? 40

A. Yes; to the best of my knowledge it does.

Q. You intended to keep it accurately?

A. Yes, sir; and to the best of my knowledge and belief it was kept accurately.

The book is offered in evidence by plaintiffs and marked "Exhibit P. 5;" it is labeled on the back, "Receipt Book."

Q. I see an entry here, January 20th, N. & H. O'Donnell, 5200 kiln-dried staves—own cart—what is the meaning of own cart?

A. That the cart belonged to the Messrs. O'Donnell.

Q. State the manner of keeping that book.

A. Mr. O'Donnell would come there and take stock and we would count it on to his wagon and we would take a receipt for it; the receipt would be on the margin of the book, and would be kept by us until we put in a bill in the proper shape; that receipt would be signed by the man that hauled the stock away, and after it was signed we kept the receipt until the proper time came to make out a bill and present it to Mr. O'Donnell, and then this receipt would go to Mr. O'Donnell, so that he has got all of those receipts, or ought to have them, and we have got the stubs.

Q. From which of the buildings did the O'Donnells commence to take the materials for making barrels?

A. I think from the northeast corner of Greene and Morgan.

Q. Did they continue taking from that building until those materials that were there were exhausted?

A. Yes.

Q. Did they take from any place until the materials there were exhausted?

A. They took some staves from the cars, I think.

Q. Did they take any from any other place of business?

A. Yes; they took two loads from the southwest corner of Greene and Morgan.

Q. Was that after or before all the materials had been taken from the northeast corner?

A. I think it was after all the materials had been taken from the northeast corner.

Q. You say they took two loads from the building on the southwest corner?

A. Yes, sir.

Q. How do you know they did? 10

A. I delivered them to them; I was there at the time they took them; I took the receipt of them, and the stub is in the book.

Q. Turn to it in the book.

A. Here is one in the book, and here is the other: No. 37—2-1-1882. To N. & H. O'Donnell, storehouse corner Greene and Morgan; 66 bdls. of staves, 50 each; 41 do. do. do., 60 do.—Ent. 2-4. Bdls. means bundles.

Q. Now read the whole of that receipt, according 20 to its meaning.

A. Ticket 37, second month, first day; Entrd. means entered in the journal; the driver's name was Connell; he was in the employ of the O'Donnells.

Plaintiffs give defendants notice to produce receipt No. 37. Mr. Brinkerhoff hands it to Mr. Vredenburgh.

Q. (Handing witness.) Is that the ticket? 30

A. Yes, sir.

Plaintiffs offer ticket in evidence, marked "Exhibit P. 6."

Q. That represents one load taken from this building on the southwest corner, which was afterwards burned?

A. Yes, sir.

Q. What was the number of the receipt for the other load, which you said was taken? 40

Q. Ticket 39.

Mr. Vredenburgh calls upon Mr. Brinkerhoff to produce ticket 39, and Mr. Brinkerhoff hands it to Mr. Vredenburgh.

Q. (Handing it to witness.) Is that the ticket?
A. Yes, sir.

10 Plaintiffs offer it in evidence, and it is marked "Exhibit P. 7."

Q. Read the stub that you have?
A. (Reading.) "Ticket 39, 2–3–1882. To N. &. H. O'Donnell, 77 bdles. staves, 50 each; 35 bdles. staves, 60 each."
Q. Does the stub state where these staves were taken?
A. Yes, from the storehouse southwest corner of Greene and Morgan; I was there when they were ta-
20 ken; on both of these stubs it is written in my handwriting, "Storehouse, corner Greene and Morgan."
Q. It seems to be in different ink from the other. Do you know whether that was entered there at the same time with the other entry or not?
A. I don't think it was; It was entered there a short while after, and the reason I didn't enter it in the same ink would be that I would have the tickets in my pockets and didn't have the book with me, and after I came back I would enter it in the book.
30 Q. Were these one-horse loads or two horse loads
A. Two horse loads.
Q. Who owned the horse and truck?
A. I judged Mr. O'Donnell; I know that Broeck & Co. were not the owners.
Q. About what time in the day did the one on the 1st of February come?
A. I should judge about 4 or 5 o'clock, and I think the other one came about the same time of day; the
40 driver told me that they wanted them to take to New York.

Q. From what part of the premises did you take these staves?

A. The lower portion of the building on Morgan street toward Washington.

Q. How did he get his horses into the building?

A. Backed them in; he could back half of his truck in.

Q. After the delivery of these two loads, was there any fire in that building?

A. A fire occurred on the morning of February 6th, Sunday; I don't know what time; I was told it was three o'clock in the morning; I went there at seven o'clock in the morning, and it was burnt to the ground; it was burning at that time. 10

Q. You had been there on the 3rd and 4th of February and on the 6th you saw it was burnt?

A. Yes, sir.

Q. How many staves were there in the building at the time of the fire?

A. I should judge about a million staves. 20

Q. Had there been any staves brought to this place after the estimate you and Mr. Stanhope made in December?

A. Yes, they were brought from the Erie Railroad. Our books will show receipts from the Erie Railroad.

Q. What is this book that I show you?

A. What we call the receiving books; that book was kept by me.

Q. What cars did you receive in the first part of January, if any? 30

A. I cannot tell the amount, I think it was somewheres near 10 cars.

Q. Read off your book what you have there.

A. (Reading.) Car 28,108—36,000 net, 30-inch staves, received first month, third day, they went into the southwest corner Greene and Morgan.

Q. Who carted them?

A. Mr. Curley carted the biggest portion of them; there is seven or eight more carloads of that same amount of staves in all, received on the 4th and 5th. 40

Q. When previous to that did you receive any?

A. On the 2d, the 6th and the 5th.

Q. What did you receive on the 2d?

A. 5740 sets of $18\frac{5}{16}$.

Q. Where did they go?

A. Some of them went to the southwest corner and some were brought down below, just as we had room.

Q. Where did those that came on the Erie Road go to?

10 A. The biggest majority went to the southwest corner of Greene and Morgan.

Q. In what condition was that as to being filled up at the time of the fire?

A. It was pretty well filled.

Q. Can you say how many staves there were there at the time of the fire; how many 30-inch elm staves were in that building at the time of the fire?

A. I should judge there was a million staves there; there might have been more—there was at least that 20 many there.

A. At the time of the fire how many cars of 19-inch headings were there?

A. Five cars.

Q. How many cars of $18\frac{1}{4}$-inch headings were there in that building?

A. About 20.

Q. At the time of the fire, how many cars of half-barrel staves?

A. One car.

30 Q. Do you remember that car?

A. Yes, sir; that came from the Erie Railroad.

Q. How many staves were in that car?

A. 53,000 half-barrel staves.

Q. You have said there were 20 cars of $18\frac{1}{4}$-inch headings?

A. Yes.

Q. How many sets in a car?

A. It would average 5000 sets, taking the cars all the way through; here is one car that I have just 40 spoken of that had 5740 sets in, and here is another

car that had 5709 sets in, and another car of 5300 sets.

Q. How much do you say they would average?

A. I judge they would average 5000 sets, taking small and big cars; a great many cars we got had 6000 sets in.

Q. Then there would be at least 100,000 sets of 18¼ inch heading?

A. Yes, sir.

Q. And at least 25,000 sets of 19-inch heading? 10

A. Yes; about that.

Q. How many patent hoops were in there at the time of the fire?

A. I should judge about 20,000.

Q. Were the other materials which you spoke of—the jointer and the tress-hoops and the staves, and those other things—in there at the time of the fire also?

A. Yes, sir.

Q. All these materials so in that store at the time 20 of the fire; how many of them were destroyed by the fire?

A. All of them I guess.

Q. After the 14th of January, did Broeck have any watchman, or was there anyone in this building on the southwest corner, which was burned after the 13th of January, in your employment, or in the employ of Broeck & Co.?

A. No, sir.

Q. Was it locked? 30

A. Yes; it was locked.

Q. Who had the key, or where was the key?

A. The key was at the northeast corner of Greene and Morgan.

Q. How long after the 14th of January did the key remain in the building on the northeast corner?

A. I don't know; I should judge the key is there yet; I don't think it was burned up.

Q. How was the building opened at the time that these two loads were taken out by the O'Donnells? 40

A. We generally came up there and got the key and went across and opened it.

Q. Where did you get the key from?

A. From the tight barrel factory, the northeast corner.

Q. Was there any particular room in which it was?

A. A small office in the back part of the building.

Q. And this key was in that office?

A. Yes, sir.

10 Q. How many staves does it take to make 15,000 sugar barrels?

A. 255,000 staves to make 15,000 sugar barrels.

Q. Therefore Matthiessen & Wiechers would use up 255,000 staves in a week?

A. Yes.

Q. How about the headings?

A. He would use up about 15,000 sets each week.

Q. Do you know whether there was any scarcity of staves and such things in the market in January, 20 1882?

A. Yes, there was a scarcity.

Q. Do you know what the market value of the staves were?

A. About $10 a thousand.

Q. Do you know whether there was any scarcity of headings and other materials?

A. Yes, there was.

Q. Did you demand at any time from Hugh and Neal O'Donnell the payment for the staves sued for 30 in this suit. Did you present to them a bill of that which I show you a copy?

A. I did present them such a bill the early part of June, 1882.

Q. Did they pay it?

A. No, sir.

Q. Did you make any offer to them to take notes in accordance with this bill of sale? Tell us what you did.

A. I went and presented a bill like this to Hugh 40 O'Donnell.

Plaintiffs call upon defendants to produce the bill presented. Mr. Brinkerhoff hands it to Mr. Vredenburgh who offers it in evidence, and it is marked "Exhibit P. 8."

Q. Now state what occurred with respect to notes.

A. I told Mr. O'Donnell that I was sent down with this bill, and I offered to take two-month notes from him, and he said "I guess you will."

Q. Did he give you a note? 10

A. No, sir.

Q. You have spoken about some cars, and that some of the materials were taken by the O'Donnells from the cars. Does this or any of your books show?

A. Yes, sir.

Q. What does it show?

A. It shows three carloads of patent hoops transferred to N. & H. O'Donnell, January 11th, 1882.

Q. I see on stub No. 215, 2000 sets of 19-inch headings and 24 heading barrels by Grant. Whose writing is that? 20

A. Mine.

Q. Who took those?

A. Richard Grant; he carried on business in New York; his principal office is in New York.

Q. Where did he take them from?

A. From 283 Warren street, I saw him take them; I let him take them because he had an order from Hugh O'Donnell; I think I put that order in the office. 30

Q. And when they settled, did Mr. O'Donnell get that order?

A. I could not say.

Plaintiffs call upon the other side to produce that order. Mr. Brinkerhoff replies that they have no such order.

Q. After the fire, the remaining materials in the 40

other building were taken away by the O'Donnells, in the same way as they were taken before the fire?

A. Yes, just as I have described.

Plaintiffs give the defendants notice to produce receipt No, 215-3-7-1882, and also to produce the order just referred to by the witness.

Q. Who had charge of the barrels at the sugar-house?

10 A. I generally had charge there; we headed up the sugar, and saw that it was shipped in good order; we worked in Matthiessen & Wicher's sugar-house, on the lower floor, and on the top floor; we took empty barrels there, and they filled them with sugar, and our men headed them up.

Q. How many men had you there?

A. About seventeen.

Q. When did you stop?

20 A. January 14th.

Q. Who did it after that?

A. Hugh and Neal O'Donnell.

Q. Were the same men continued there?

A. Yes; I believe some of them.

Cross-examined by Mr. Brinkerhoff:

Q. They were thereafter employed by O'Donnell.

A. Yes; I believe they were.

Q. Do you know why Broeck & Co. ceased doing

30 business?

A. They were losing money.

Q. Don't you know that they stopped doing business because they had failed?

A. No; I never knew it that way.

Q. What were your duties as foreman of Broeck & Co.?

A. To see that everything was done properly; it was part of my duty to receive and deliver material.

Q. Have you a knowledge of all the goods received

40 and sold by them?

A. Yes, sir.

Q. What evidence have you of it here?

A. We have the shipping book and the receiving book.

Q. Do those books contain all the material that was on hand on the 1st of January, 1882?

A. I believe they do.

Q. Do they contain all the goods that were received after January 1, 1882?

A. Yes, sir. 10

Q. And the times of receiving them?

A. Yes, sir.

Q. What was the last date of receiving anything?

A. January 17th, 1882.

Q. Were there any materials purchased or received by Broeck & Co. after January 17, 1882?

A. Not to my knowledge.

Q. If anything had been received by them after that date, would you have knowledge of it?

A. Yes. 20

Q. Can you say that they received no material, such as is used in the making of barrels, after January 17, 1882?

A. Yes.

Q. State what goods they received between and including January 4th, to and including January 17th, 1882.

A. I could not tell the full amount.

Q. You say your books are here, iu which is entered all of the goods received between those dates? 30

A. Yes, sir.

Q. Tell from your books what goods were received from and including January 4th, to and including January 17th, 1882, and from whom they were received.

A. 377,000 staves received from the 4th to the 17th.

Q. From whom received, and when each lot was received?

40

By Mr. Vredenburgh. We will offer that book in evidence.

By the Witness: 36,000 staves received 1st month 4th, from Richard Grant.

Q. Received by whom?

A. By C. B. Broeck & Co.

36,000 more on the 1st–4th, from the same party.

36,000 more on the 1st–4th, from the same party.

10 36,000 more on the 1st–4th, from the same party.

36,000 more on the 1st-5th from the same party.

36,000 more on the 1st-5th from the same party.

37,000 patent hoops, 1st-5th, from the same party.

36,000 30-inch staves, 1st-6th, from the same party.

37,500 patent hoops, 1st-7th, from the same party.

14,000 30-inch staves, 1st-5th, Thomas Tyndall, and 82 barrels of 19-inch heading, 25 set in a barrel.

36,000 30-inch staves, 1st-7th, from Richard Grant.

20 38,000 patent hoops transferred to N. & H. O'Donnell.

3,500 patent hoops transferred to O'Donnell by the same party.

3,700 patent hoops, 1st-11th, transferred to O'Donnell.

3 cars, each containing 611 bundles, receive 1st-14th; I don't know whether there was 50 or 60 to each bundle, either one or the other.

Q. You have stated all the goods that were received by Broeck & Co. from and including January 4th

30 to and including January 17th?

A. Yes, sir.

Q. The goods which were received on January 4th, 1882, were they received after or before you saw Mr. O'Donnell in the office or factory of C. B. Broeck & Co. on the 4th of January?

A. I don't remember.

Q. Where were the goods stored which you received on January 4th, 1882?

A. On the southwest corner of Greene and Morgan.

40

Q. Where were the other goods stored that were received after the 4th of January?

A. Four of those cars were put into 283 Warren street.

Q. Which four?

A. The 19-inch heading on the 1st-6th, 1882; the 36,000 staves on the 1st-6th, were delivered in Warren street; the 14,000 staves and 82 barrels, 19 heading, were stored in Warren street, on the 1st-6th.

Q. Were there any stored at the southwest corner of Greene and Morgan, except those stated by you? 10

A. Those few cars that I have just now stated.

Q. And those were received when?

A. Three cars on the 1st-6th.

Q. What disposition was made of the goods received by Broeck & Co. between January 4th and January 17th, 1882?

A. Some of them were made in the barrels by C. B. Broeck & Co.

Q. What became of the others? 20

A. O'Donnell got a portion of them.

Q. Were they not mixed and confused with goods which were on hand January 4th, 1882?

A. Some was.

Q. Were not all the goods received January 4th, including that date, to and including January 17th, placed in and with the goods which were on hand and had been on hand previous to January 4th, 1882?

A. They were put into the same buildings with the other ones. 30

Q. In delivering to O'Donnell the goods, did you distinguish between those you had received from and including January 4th to and including January 17th, from those goods which were on hand prior to January 4th?

A. No, sir.

Q. They formed one common lot and stock together?

A. Yes, sir.

Q. The goods received by Broeck & Co. between 40

the dates named, to whom did they belong on receiving them?

A. To N. & H. O'Donnell.

Q. Those received between January 4th and January 17th, after having been received by Broeck & Co. who did they belong to?

A. O'Donnell.

Q. Did O'Donnell buy them for Broeck & Co.?

A. No; Broeck & Co. bought them.

10 Q. Broeck & Co. bought all of them?

A. Yes, sir.

Q. And afterwards sold them to O'Donnell?

A. Yes, sir.

Q Can you state what quantity of material was received by Broeck & Co. from and including the day when Stanhope and yourself made an estimate to and including January 4th, 1882?

A. No; I cannot state exactly what stock was received.

20 Q. Do you know when Mr. Stanhope and yourself made the estimate?

A. Somewhere around the latter part of December; either the 18th, 19th or 20th.

Q. Shall we fix it at the 20th?

A. Somewheres around there.

Q. Do your books show the amount of stock received by Broeck & Co.?

A. This book will show all the stock that was received.

30 Q. Refer to the places in the book where it is stated?

A. The only way I can tell is by referring to the books to see what went into that building, and to see what cars came from the Erie Road.

Q. Will you look at it to night, after the Court adjourns, and testify in the morning?

A. Yes, sir.

Q. Refer to the books and tell us what disposition was made of the goods that were on hand January 40 4th, 1882?

A. We made barrels out of some of them.

Q. For whom?

A. For O'Donnell, for the purpose of supplying Matthiessen's sugar house.

Q. Did you make them for O'Donnell or for Matthiessen?

A. Some for O'Donnell and some for Matthiesen.

Q. The barrels made for O'Donnell to be placed to Matthiesen & Wiechers, were charged for by Broeck to O'Donnell? 10

A. Some were charged to Matthiessen and some were charged to O'Donnell; those which were made direct for Matthiessen were charged to him, and those which were made for O'Donnell, were charged direct to O'Donnell; that was done to help O'Donnell supply the sugar-house.

Q. How much did you charge O'Donnell for the barrels made for him?

A. Somewhere near 36½ cents.

Q. Is that the price you charged other dealers? 20

A. Yes, sir.

Q. You made no deduction on account of staves; you did not charge less for making the barrels but you charged for the staves and barrels, and charged at the same rate that you charged other dealers?

A. Yes, sir.

Q. Didn't you also make barrels from the same common stock for Booth & Baker?

A. No, sir, we had those barrels on hand.

Q. Did you make barrels for anyone else, except 30 the O'Donnells and Matthiesen, from this common stock?

A. We had barrels on hand, and we supplied these people at the time.

Q. Answer my question?

A. Yes, sir; we made barrels.

Q. For whom did you make them, and when, and in what quantities?

A. We made them to help O'Donnell to supply the sugar-house. 40

Q. Will your book show when you made barrels, for whom, and what quantities?

A. Yes, sir.

Q. Refer to your books, and state what barrels were made, in addition to those which you made for O'Donnell and for Matthiessen & Wiechers.

A. I cannot tell from the book which I have here; this book will show the total amount of barrels made, but not for whom.

10 Q. From whom did you receive any information that you have, as for whom the barrels were made?

A. Mr. Pennypacker.

Q. State what Mr. Pennypacker said to you in that particular.

(Mr. Vredenburgh objects to the question, because no date is fixed.)

Q. What did Mr. Pennypacker say upon that sub-
20 ject?

A. He said that the O'Donnells were not in circumstances to supply the sugar house, and that we should go on and run the factory to help him supply it.

Q. And under his directions you went on and made the supply?

A. Yes, sir.

Q. State where the barrels were delivered to, made by Broeck and Co., from and including January 4th
30 to and including January 17th, and who paid you for them.

A. They were delivered to Matthiessen & Co.

Q. State the times?

A. I will have to refer to the books.

Q. Go to your books?

The witness refers to the books. And as it is taking too much time, the Court directs the witness to look the matter up after he leaves
40 the stand and return and testify.

Q. Will you investigate those books to-night with a view to answering this question, and be here to-morrow morning at 10 o'clock.

A. Yes, sir.

Mr. VREDENBURGH. This witness is not the book-keeper, but the book-keeper is here and will go over the books for you.

10

Mr. McNAMEE takes the stand, and Mr. BRINKERHOFF continues cross-examination:

Q. Have you investigated the books for the purpose of ascertaining for whom barrels were made by Broeck & Co., from and including January 4th to and including January 17th?

A. Yes, sir; but I understood your question to be to whom delivered; I cannot tell the amount made; 20 I can answer as to whom delivered.

Q. You made an investigation to ascertain, did you not?

A. No; the only investigation I made was as to whom the barrels were delivered between those dates.

Q. State to whom they were delivered?

A. From January 4th, to the Matthiessen Sugar Company, 21,172.

To N. & H. O'Donnell, from the 14th to 17th, 3309. 30

Butler & Renwick, from the 4th to the 17th, 160.

Booth & Baker, from 4th to 17th, 700.

L. Shepp, from 4th to 17th, 50.

Tartar Chemical Works, 4th to 17th, 26—that is all.

Q. Can you tell when any of the barrels which were so delivered by Broeck & Co. were made?

A. I cannot; I think the book-keeper can.

Q. Do you know whether any of them were made after January 4th?

A. I think there were some barrels made. 40

Q. Were there not some made for Butler & Renwick after January 4th?

A. I cannot say.

Q. Do you know whether any were made for the tobacco works, in Duane street, after January 4th?

A. I could not say.

Q. Do you know any tobacco works in Duane street?

A. No.

10 Q. J. H. Baker—Castor Oil Works—did you make any barrels for them?

A. Not to my knowledge.

Q. Were the Chemical Works, L. Shepp, Booth & Baker, Butler & Renwick, customers of H. & N. O'Donnell before the delivery of the barrels delivered after the 4th of January by Broeck & Co?

A. I could not say.

Q. Were they customers of Broeck & Co.?

A. They were at one time.

20 Q. Do you know how many barrels were on hand January 4th, which were delivered after January 4th by Broeck & Co.?

A. I should say approximately between 5000 and 6000.

Q. Where were they stored?

A. 283 Warren street, and some at the southwest corner of Greene and Morgan.

Q. Then there were between 5000 and 6000 barrels on hand January 4th?

30 A. Yes; I should judge about that many.

Q. What books of Broeck & Co. will show the amount of barrels on hand at that time?

A. I don't know of any.

Q. Didn't they keep an account of stock on hand manufactured and unmanufactured?

A. We took an account of stock once a year, or once in six months.

Q. The only estimate made by you was made in connection with Stanhope on December 20th, 1881?

40 A. Yes, sir.

Q. No estimate was at any time after that made by any person so far as you know?

A. No.

Q. The estimate made on the 20th of December was made for the purpose of effecting the insurance?

A. Yes, sir.

Q. The estimate arrived at then was how much?

A. A million staves, twenty-five car loads of heading, one car load of half-barrel staves, and twenty thousand hoops. 10

Q. The only estimate made by you was as to the goods contained December 20th, on store in the southwest corner of Greene and Morgan streets?

A. Yes, sir.

Q. State the fair and reasonable market value of the goods then in store.

A. The market value, I believe, was ten dollars a gross thousand for staves; I believe it run from eight to nine cents a set for heading, ten dollars a thousand for hoops. 20

Q. In round numbers, in value about $17,000 to $20,000 for the amount of stock in that building?

A. About; yes, sir; somewheres around there.

Q. Was there an insurance effected so far as you know, upon that stock, based upon the estimate made by you?

A. I cannot answer it; only what I heard.

Q. To whom did you make known the result of your investigation?

A. C. B. Broeck. 30

Q. And to Mr. Pennypacker?

A. I could not say positively.

Q. Did you make an estimate of the material on hand in any other place than the southwest corner of Greene and Morgan streets?

A. I don't think I did.

Q. State the mode of procedure in making that estimate by Mr. Stanhope and yourself on December 20th. How did you arrive at your estimate?

A. I knew exactly what stock was worth at that 40

time, and by placing that building full of staves so often, I could state exactly how much staves I put into it, and how much it held, and by keeping an account of it off and on at times, and I have been so familiar with the amount of stock in the building that I could tell pretty near how much was in there.

Q. What do you mean by pretty near?

A. Within two car loads.

Q. Mr. Stanhope said that he thought your estimate was correct, within four or five car loads. Is that statement correct?

A. About; yes.

Q. A car load of staves is how many?

A. The general average is 25,000 gross.

Q. A car load of headings?

A. From 5000 to 6000 set of headings.

Q. How did you estimate the hoops?

A. We never stored hoops at that place; we used to bring them from the railroad as the coopers wanted them.

Q. There were no hoops in that place when you gave your estimate. Were there any in there when the fire occurred?

A. Yes; there were.

Q. How did they get there?

A. They were hauled there from the Erie Railroad. between the 4th and the 14th of January.

Q. How did you know how many hoops there were on hand at the time of the fire?

A. By estimating a quantity that stood in a pile.

Q. When did Broeck & Co. purchase the hoops which had been taken from the Erie Railroad to the shop, which were consumed by fire?

A. He may have purchased them two weeks before they arrived there.

Q. When did they arrive there?

A. Between the 4th and the 14th.

Q. Did they arrive there before the 4th?

A. I could not say positively.

Q. Will your books show when they arrived?

A. I could not say.

Q. Mr. Stanhope says that those rooms named by you, on the southwest corner of Greene and Morgan, were not full. Is that a fact?

A. Yes, sir.

Q. How much allowance did you make for the space in the rooms that was vacant?

A. I cannot answer that question.

Q. How can you tell, with any degree of certainty, the amount of stock on hand there on the 20th of 10 December, to and including the day of the fire?

A. I have been familiar with it; I have filled the room up; I have put stock in there so often that I could tell just exactly how much it held.

Q. The rooms were not full and you made no allowance for the vacant space in those rooms?

Mr. Vredenburgh. He did not say that.

Q. If you did make any allowance, how much al- 20 lowance did you make?

A. Those rooms would hold a good many more staves than I mentioned; I don't think the rooms were ever so full that you could not get any more into them.

Q. Then you cannot now state within four or five carloads the amount of stock on hand at the time of the fire?

A. No; not positively.

Q. Nor the kind nor quantities of either of them? 30

A. No, sir.

Q. When you speak of a car averaging a certain number of staves or headings, what do you mean by average?

A. That that would be the average of the cars; that is the way the manufacturers shipped them.

Q. A car may contain 225 or 250,000?

A. Yes, sir; but they would average 25,000 a year through.

Q. Can you say with certainty that for a year the 40

goods received by C. B. Broeck & Co. would average 25,000 to the car?

A. Yes, sir; they might average more.

Q. You spoke of a bill having been presented by you to Hugh O'Donnell; what was the date of the representation of that bill?

A. About the 6th of June, I think.

Q. Who made out that bill?

A. C. B. Broeck.

10 Q. Who gave to C. B. Broeck & Co., or their agents and employees, the list of goods set forth in the bill rendered by you to the O'Donnells?

A. I think I was one.

Q. Who was the other?

A. I could not say whether the book-keeper was the other or not.

Q. How did you arrive at the list of goods set forth in that bill, "Exhibit P. 8"?

A. We took an estimate of what was in that build-
20 ing.

Q. It was the result of an estimate made by you?

A. Yes, sir.

Q. Dating back and relating to the examination made on the 20th of December?

A. Yes, sir.

Q. Did you take into consideration anything else?

A. No, sir.

Q. Can you say that that bill, as to the items, is correct?

30 A. I can; yes, sir.

Q. Was there on hand, on the southwest corner of Greene and Morgan streets, on the 5th day of February, forty cars of 30-inch elm staves, or one million staves?

A. To the best of my knowledge I think there was; yes, sir.

Q. Were there?

A. I did not count them at that time, but I am pretty near positive there were; the amount of stock
40

received, and the amount of stock made up, would show that amount of stock on hand.

Q. Judging by an estimate made, and guess-work?

A. Yes, sir.

Q. Then this bill is the result of an estimate made from guess-work?

A. It was not guess-work.

Q. But based upon the examination made on December 20th, in the manner stated by you?

A. And the amount of stock received. 10

Q. What stock did you receive after December 20, to and including February 5th?

A. I can tell you the amount received from December 20th to January 4th.

Q. Then tell us, up to January 4th.

A. 924,000 gross staves; 298,396 patent hoops; 29,430 sets of headings; all received from December 20th to January 4th.

Q. Can you tell how much was received from January 4th to and including February 6th? 20

A. I can tell from January 4th to January 17th.

Q. You stated in your testimony yesterday, I think, that it was 327,000 staves?

A. Yes; 377,000 staves received from January 4th to January 17th; and there was also 185,500 patent hoops received.

Q. From December 20th to January 17th, adding the amount of materials received to the amount approximated to be on hand on December 30th, would make about two million of staves, would it not? 30

By Mr. Vredenburgh. We object to the question, as confusing and misleading.

(Question withdrawn.)

Q. How many staves, how many headings, how many patent hoops, were used in the manufacture of barrels by Broeck & Co. from December 20th to and including January 17th?

A. I cannot answer that question. 40

Q. Then how can you state the amount of stock on hand on the day of the fire and consumed by the fire?

By the COURT. The witness has answered that he estimated it.

Q. State what the credits are that appear on "P. 8," February 1st and February 3d.

A. I did not keep the books of the concern, and I
10 could not state the credits.

Q. Do you know what material was delivered to the O'Donnells from the stock on hand January 4th and from time to time?

A. No, sir.

Q. Have you any knowledge of the bills that were rendered by Pennypacker or Broeck to O'Donnell & Ce. for goods delivered?

A. I have a knowledge that bills were delivered, but I cannot say the amount.

20 Q. Did you have any connection with those bills in any way?

A. Only by helping the bookkeeper to prove them.

Q. Did you help the bookkeeper to prove them?

A. Off and on; yes, sir.

Q. Before February 1st, had the other yards of Broeck & Co., besides that on the southwest corner of Greene and Morgan streets, been exhausted?

A. There were two places, the northeast corner of Greene and Morgan and the shook yard, that was all
30 turned over to N. & H. O'Donnell.

Q. But the building where the fire occurred had not been turned over, had it?

A. Not to my knowledge.

Q. You spoke yesterday of the key having been taken to the northeast corner of Greene and Morgan streets to the property that is occupied by the O'Donnells?

A. Yes, sir.

Q. Who took the key there?

40 A. That key was always left there before the

O'Donnells had it; it had been the custom to keep that key in the northeast corner of Greene and Morgan streets ever since we had that building.

Q. Do you know whether the O'Donnells had any knowledge that the key was kept there?

A. I don't know.

Q. Wasn't it kept there for the convenience of Broeck & Co. and Pennypacker?

A. I guess it was.

Q. You have stated there was no watchman or any person about the premises on the southwest corner of Greene and Morgan, after January 14th, in the employ of Broeck & Co.? 10

A. There was not.

Q. Was there not a watchman on those premises watching those premises on the night of the fire?

A. I believe there was a watchman went into that building an hour before the fire; it was O'Donnell's watchman; I know he watched that building anyhow. 20

Q. From what place did he watch that building?

A. From the northeast corner of Greene and Morgan.

Q. Then Broeck & Co. had no watchman there?

A. No, sir.

Q. Nor Mr. Pennypacker?

A. No, sir.

Q. You say that the goods which were delivered to Mr. Grant were delivered on an order from N. & H. O'Donnell? 30

A. Signed by Hugh O'Donnell.

Q. Did you not demand that an order should be presented before any goods were delivered?

A. Not to my knowledge; he brought the order there signed by Hugh O'Donnell.

Q. Did you not demand that an order should be presented signed by one of the O'Donnells before a delivery of the goods?

A. I could not say whether I did or not.

40

Q. You say that it takes about 255,000 staves to make 15,000 barrels?

A. Yes, sir.

Q. By that don't you mean that it takes 255,000 sound, good staves?

A. Yes, sir.

Q. What is the average of loss of staves in making up?

A. I could not tell you; it is not very large.

10 Q. In the manufacture of 15,000 barrels, how many staves would it take as they come without culling?

A. We generally bought first-class staves, and if they were broken at all, they were broken by the machine; there was no waste to them when we received them.

Q. What do you mean us to infer by your answer when you said that the O'Donnells were not in a condition to supply the sugar house with what they 20 wanted?

A. I guess it was because of the short notice that they were not in a proper condition to supply the sugar house in the way that they were running at the time.

Q. You didn't mean to say they were financially embarrassed?

A. No, sir.

Q. You saw Hugh O'Donnell and Mr. Pennypacker go through the factory on Warren street?

30 A. Yes, sir.

Q. What did you hear them say and what did you say to them at the time?

A. I didn't hear them say anything: I saw them looking around the building and looking all over the material that was in the building.

Q. Was there any material on hand January 4th, 1882, delivered to any person other than the O'Donnells by Broeck & Co. or Mr. Pennypacker?

A. Not to my knowledge.

40 Q. When you saw those parties going through the

building, do you know whether that was before or after the agreement that has been offered in evidence in this case had been executed or signed?

A. I think it was after; I think it was on the 5th, but I would not be positive.

Q. Had you, before January, 1882, been accustomed to sell the same class of materials which were on hand in January to other persons?

A. Sometimes we did, to barrel makers and coopers, but I don't know who. 10

Q. Who acted for the O'Donnells in carting away the materials delivered by Broeck & Co. or Pennypacker?

A. The O'Donnells' cartman, I guess; they had several cartmen.

Q. Do you know the names of any of them?

A. Cornell was one; Murphy was one. Mr. Curley and Reynolds and Feeley hauled staves away from there for the O'Donnells.

Q. Were you present when any of the goods which 20 were delivered to the O'Donnells were taken away by the cartmen?

A. Yes, I was there most of the times.

Q. Who counted the material which was delivered to O'Donnells' cartmen?

A. I did; and so did the carman.

Q. Did you count in full?

A. Yes.

Q. What was your purpose in counting?

A. To know how many he had on his truck, and 30 then I took a receipt for it, and this receipt would show how many he had on his truck, and the bookkeeper of Broeck & Co. kept the account of it; I gave the receipt to the bookkeeper; Mr. Pennypacker told me to see that they were properly counted on the truck.

Q. And didn't he also tell you to deliver them to the O'Donnells?

(Question objected to; admitted, and excep- 40 tion allowed.)

A. I did not deliver them to O'Donnell; Mr. O'Donnell's truck delivered them to O'Donnell.

Q. Were you not told to deliver them to O'Donnell after you had ascertained the quantity of goods that were on the truck?

A. My instructions were to see that the O'Donnells took the staves; I could not say positively whether he told me to deliver them to O'Donnell or not; he told me O'Donnell was to come here and take these
10 staves; he said that Mr. O'Donnell would come here and take them.

Q. When did Broeck & Co. or Pennypacker cease doing business?

A. On the 6th day of January.

Q. Didn't they continue manufacturing up to about the 17th day of January?

A. Somewheres around there; yes, sir.

Q. Where did they continue to manufacture?

A. 283 Warren street, southwest corner of Greene
20 and Morgan.

Q. Did the O'Donnells manufacture between the 4th and the 17th of January, 1882, at Broeck & Co.'s place of business?

A. They manufactured syrup barrels at the northeast corner of Greene and Morgan.

Q. And in the other place Broeck & Co. continued to manufacture?

A. Yes.

Q. And manufactured from the common stock that
30 was on hand, and its additions after January 4th?

A. Yes, sir.

Re-direct-examination by Mr. VREDENBURGH:

Q. You said there were 4000 and 5000 barrels on hand on the 4th of January, 1882?

A. I said between 5000 and 6000.

Q. Where were those 5000 or 6000?

A. 283 Warren street; I should judge there was
40 about 5000.

Q. How many were at the southwest corner of Greene and Morgan?

A About 500 to 700.

Q. I understood you to say that between January 4th and January 17th there were received at Jersey City about 377,000 staves?

A. Yes, sir.

Q. How many barrels would 377,000 staves make?

A. 25,259.

Q. How many barrels were manufactured by 10 Broeck & Co. between January 4th and January 17, when you say they quit business?

A. I could not answer that question; the bookkeeper will tell you.

Q. Does the book which you say is in your handwriting and which you say represents all the stock, does it represent all the materials for making barrels received in any way by Broeck & Co., or by Mr. Pennypacker for Broeck & Co.

A. It represents the stock received up to the last 20 car.

Q. State acurately how much stock was received and when received, reading each item from your book, so that we may know with accuracy just what stock was received after January 4th, from and where it went?

A. I just told you how much stock was received.

Q. Don't that book show when you received the bill of lading and when you received the car.

A. Yes, sir. 30

Q. And can't you tell what was done with the car pretty nearly?

A. Yes; pretty nearly I can.

Q. Now commence and state each car, so that we may know accurately; give it as it appears in the book?

A. From the 4th of January to the 17th?

Q. Yes; from the 4th up to the present date.

40

(By Mr. Brinkerhoff.) Hadn't you better show first that he knows that book to be correct?

Q. Is that book in your handwriting?

A. Yes, sir.

Q. Has it been tampered with in any shape or form since you wrote it?

A. No, sir; it has been in my possesion till it came here.

10

Q. Now commence with the first carload on the 4th and give each carload as it was received, and when and where it went to, and the amount of it, and when the bill of lading was received?

A. I can tell where the biggest majority of it went but I cannot tell where each and every car went; that is impossible.

Q. State to the best of your knowledge?

20

(Mr. Brinkerhoff objects to the question; the Court admits it and allows defendant an exception.)

Q. Give us the date of the first car; the number and what is in that book, that you put down at the time?

A. Car No. 3590, 5600 set 19-inch heading, from Chas. A. Sweet, received 1st, 6th; the next item is the invoice, 12th, 21st, that means December 21st; that is the date of the invoice; the car was received 1st, 6th; the freight was $42.70; received from the Pennsylvania Railroad; the freight bill was paid 12th, 28th; the stuff in that car went to 283 Warren street; the next is car 15,281; 36,000 net; 30-inch staves, received from Richard Grant, invoice dated 12th, 28th; received 1st m. 4th; freight bill $68.60; paid to the Erie Road, 12th, 31st; that went to the southwest corner of Greene and Morgan; the next is car 4015; 36,000 net; 30-inch staves received from Richard Grant 12th, 28th; received 1st month, 5th; freight $68.60 on the Erie Road; 12th

30

40

month, 31st, as I stated before, I cannot tell positively where each and every one of those cars went, I can't tell where this last one went, it went to 283 Warren street, or southwest corner of Morgan and Greene.

Q. Go on to the next one.

A. Car 5166; 36,000 net; 30-inch staves; Richard Grant; invoice 1228; received 1st m. 4th; freight $68.60; paid the Erie Road 12th, 31st; the biggest majority of these cars from the Erie Road went into 10 the southwest corner of Greene and Morgan, but I cannot tell positively which car or what car; I cannot tell positively whether that car went in there or not.

Q. Next?

A. Car 3044; 36,000 net; 30-inch stave; Richard Grant; invoice 12th, 28th; received 1st, 4th; freight $68.60; paid Erie Road 12th, 31st; I will have to say the same as to where that one went; next car, 4054, 36,000 net, 30-inch staves, Richard Grant, in- 20 voice 12th, 28th, received 1st, 4th, freight $93.60; Erie Road, freight bill paid 12th, 31st; I will have to say the same as to that; next car, 35,597, 36,000 net, 30-inch staves, Richard Grant, invoice 12th, 28th, received 1st, 5th, Grant, $76.98, paid 12th, 31st; Erie Road: I have to say the same as to that; next, 20,-941, 37,000 patent hoops, Grant, 12th, 29th, received 1st, 5th, freight $54.50; Erie Road, bill paid 12th, 31st; that came to 283 Warren street; car 1734, 36,-000 30-inch staves, Grant, invoice dated 12th, 20th, 30 received 1st, 6th, freight $80.43; Pennsylvania Road, freight bill paid 1st, 7th; that went to 283 Warren street; car 27,561, 37,500 patent hoops, Grant, invoice dated 1st, 3d, received 1st, 7th, freight $54.50; Erie Road, paid 1st, 7th; the biggest majority of those went to the southwest corner of Greene and Morgan, and part of them came down to Warren street; car 2674, 14,000 staves, 30-inch, 82 barrels of 19-inch heading, from Thos. Tyndall, date of invoice 12th, 31st, received 1st, 6th, freight $71.60, Pennsylvania 40

Road, paid 1st, 7th—that went to 283 Warren street; car 29,481, 36,000 30-inch staves, Grant, invoice dated 1st, 6th, received 1st, 7th, freight $68.60; Erie freight bill paid 1st, 6th; I am not positive whether that went to the southwest corner Greene and Morgan, or to Warren street; car 27,161, 38,000 patent hoops, Grant, invoice dated 1st, 6th—received 1st, 11th, transferred to H. & N. O'Donnell; car 2568, 35,500 patent hoops, invoice dated 1st, 6th—received 1st, 11th, transferred to O'Donnells; car 23,902, 37,500 patent hoops, Grant, invoice dated 1st, 7th—received 1st, 11th, transferred to O'Donnell; car 31,471: this book don't show how many were on this car, but we have the invoice—30-inch staves, from J. A. Ames, received 1st, 14th, Erie Road freight bill, $66.25, paid 1st, 7th—they were loaded direct from the car by Mr. Curley and taken to O'Donnells' place; car 2691, 30-inch staves, Ames, received 1st, 16th, $61.28; Erie freight bill, paid 1st, 7th; also by Curley to O'Donnells; car 3016, 611 bundles 30-inch staves, Ames, received 1st, 17th, freight $66.25; Erie freight bill paid 1st, 7th; that went from the car to O'Donnell, to their place of business in Morris street.

Q. Where was O'Donnell's place of business?

A. He has one part in Washington street, between Morris and Sussex.

Q. Was he in business there before the 1st of January, 1882?

A. I believe he was.

Q. Did he have any other place of business, or any other shop in Jersey City?

A. Not to my knowledge.

Q. In New York?

A. I believe he has No. 8 Gouvernier slip.

Q. He had it there on the 1st of January last?

A. I think so.

Q. You continued at Matthiessen's sugar-house, superintending the finishing of barrels, up to what date?

A. Saturday, January 14th.

Q. The barrels which you have mentioned as having been manufactured for Matthiessen & Wiechers, after January 4th—were they mannfactured or were they delivered to Matthiessen between the 4th or the 14th of January, while you continued at work?

A. Yes, sir.

Q. After the 14th of January, and after O'Donnell took possession, you still continued to deliver the barrels?

A. Yes; on account of N. & H. O'Donnell. 10

Q. Do the books show that?

A. Yes, sir; here is the delivery book, which will show it.

Q. In whose handwriting is that book?

A. Mine and Mr. Strohmenger's; this book will show all the barrels delivered by Broeck & Co., both up to and after the 4th of January; it will show to whom they were deliveaed, and on whose account.

Q. When you gave your figures as to barrels delivered, were they taken from this book? 20

A. Yes, sir.

Q. So that your statement depended upon the accuracy of this book?

A. Yes, sir.

Plaintiffs offer the book in evidence, and it is marked "Exhibit P. 9."

Q. I see that up to the 14th of January it is F. O. M. Who does that refer to? 30

A. F. O. Matthiessen & Wiechers.

Q. After the 14th it still continues F. O. M.

A. Then you will find there is a red stamp on it which says on account of N. & H. O'Donnell.

Q. Do Broeck & Co. or Pennypacker still occupy 283 Warren street?

A. No; not to my knowledge; Mr. Grant has it for a storehouse.

Q. Does Pennypacker or Broeck do any business in Jersey City now?

A. Not to my knowledge. 40

Q. They don't carry on any cooperage here?

A. No, sir; they went out of business January 6th.

Q. What was the name of the watchman of the O'Donnells that you spoke of?

A. Hansen, I believe.

Q. Between the 4th of January and the 14th, were any materials for making barrels removed from the southwest corner of Greene and Morgan streets?

A. I think they were.

10 Q. How much was removed?

A. I could not say positively, but I should judge from 50,000 to 75,000; they were taken to 283 Warren street, and were put into barrels.

Q. And these were the barrels that were delivered, first to Matthiessen, up to the 14th, and afterward to O'Donnells; those are the barrels that you referred to?

A. Yes, sir.

Q. When you took these 75,000 staves out of 283
20 Warren street, would they be the same goods that were arriving, or would they be the goods that were on storage?

A. I could not say positively when they arrived; during that time some arrived and were put into there; I would not say whether they were the same goods that arrived or not.

Q. Do you know whether there was any delay upon the part of the O'Donnells in taking these materials for making barrels?

30

(Mr. Brinkerhoff objects to the question.)

(By Mr. Vredenburgh.) I want to get at what the witness did to hurry up Mr. O'Donnell in taking the materials; I mean that he did not take them as fast as Matthiessen & Wiechers required them, which is as fast as the contract required him to take them.

Q. What did you do to hasten the O'Donnells?

40

A. I used to go down and report to him that he was not taking the stock as quick as he ought to take it.

A. How often did you see him about that before the fire?

A. I could not say positively, but I should say 4 to 6 times.

Q. Did he take them any faster after you spoke to him?

A. No, sir, not any faster than he did before. 10

Q. In your estimate of the amount of goods in this place that was burnt at the time of the fire, are you under or over the amount that was actually burnt up?

A. I think I am under.

Q. When you speak of being within four or five cars of the amount, what do you mean?

A. I referred to staves.

Q. Do you mean that there might be four or five cars less than your estimate in the place at the time 20 of the fire?

A. I think I said two cars.

Q. I understood you to say that Mr. Stanhope was right when he said he was within four or five cars in his estimate of the amount of stock?

A. I will say that I should judge there was four or five cars less on the 4th, or on the time he took account of stock.

Q. Do yon mean to say that there was at least a million of staves in that storehouse at the time of 30 the fire?

A. I do; yes, sir.

Q. You have been in the business how long?

A. Seventeen years.

Q. Your estimate is that there was 25 carloads of heading, how near are you to the actual amount that was in the building at the time of the fire?

A. I think that there was that many there; they were in five different compartments.

Q. Can you tell about how many barrels were 40

manufactured in the building, southwest corner, from the 4th to the 14th, in those ten days by the fifteen men you had employed there?

A. I cannot; the book-keeper can tell that better than I can.

Q. From the 14th until the fire, was there any stuff taken out of that building on the southwest corner, except what the O'Donnells took?

A. I could not say.

10 Q. Excepting those two loads, how many could there have been taken out?

A. I could not say positively.

Q. Did your answer as to about 75,000 staves intend to cover all between the 4th and the time of the fire?

A. Yes; to cover all that was taken out of that building, I should judge.

Re-cross-examined by Mr. Brinkerhoff:

20 Q. How much of the material on hand on the 4th of January, 1882, and how much of the material that Broeck & Co. received after January 4th, 1882, was consumed by that fire; and if you can, please distinguish as between the two?

A. I cannot say positively how much, but I know there was some stuff put into that building.

Q. From the 4th of January up to the time of the fire?

A. I could not say how much was put into it.

30 Q. You cannot say how many of the carloads received after January 4th, to the 17th, went into the southwest corner of Greene and Morgan?

A. I cannot tell positively.

Q. How much of the new material, brought after January 4th, was consumed by the fire; and how much of that which was on hand January 4th was consumed?

A. I cannot answer that question.

Q, Can you tell how much material which was on 40 hand January 4th, 1882, and how much of that which

was received when that was used up in manufacturing goods; state the quantity of each?

A. No, sir; I cannot.

Q. The barrels which were made by you for Matthiessen & Wiechers, the O'Donnells, and for others, the materials were all taken from the southwest corner of Greene and Morgan streets, were they not?

A. Some of them, not all of them.

Q. Can you say how much?

A. No, sir. 10

Q. Can you say who was charged for and who paid for the material which were manufactured or delivered to Matthiessen & Wiechers, to January 14th?

A. Matthiessen & Wiechers, I believe, paid for them.

Q. The barrels which were made for them and for which they paid, was from the material on hand from the 4th of January, 1882, or from the accumulated stock received after that time?

A. I could not say whether it was on hand or whether we received it afterwards; either one or the other. 20

Q. And that was the case with other goods manufactured by you for any other person than Matthiessen & Wiechers?

A. Yes, sir.

Q. When did the dissolution of partnership take place?

A. On the 6th of January, I believe.

Q. After that how long did Mr. Pennypacker continue to do business? Did he not continue until January 14th? 30

A. He represented C. B. Broeck & Co.

Q. How long did either C. B. Broeck & Co. or Mr. Pennypacker continue to do business in Jersey City?

A. The dissolution of partnership took place on the 6th of January, and I suppose that ended it.

Q. Don't you know that Mr. Pennypacker succeeded C. B. Broeck & Co.?

A. To settle the business; yes, sir. 40

Q. Didn't he continue to do business up to the 14th or the 17th of January, 1882?

A. Yes, sir.

Q. And it was he who received the new and other stock which came in, as stated by you?

A. He received it, but the stock was on the road before that.

Q. Did he continue to do business as C. B. Broeck & Co. had been doing business for some time prior
10 to that—in the same manner and with the same men?

A. Yes; about the same men.

Q. Did the O'Donnells take any of the men of Pennypacker, before the 14th of January, into their employ?

A. Not to my knowledge.

Q. You continued in the employ of Pennypacker till the 14th?

A. Yes, sir.

20 Q. And prior thereto, from the 4th, your duties were the same as they had been for a long time previous to that?

A. Yes, I believe so.

Q. The O'Donnells gave no orders or directions to you?

A. No.

Q. And so far as you saw assumed no authority about any of the places up to that time?

A. No.

30 Q. You received no orders to stop manufacturing goods from material on hand from Mr. Pennypacker or any other person?

A. I received orders to stop from Mr. Pennypacker.

Q. When?

A. I could not say what time.

Q. After the 14th?

A. I guess it was; yes, sir.

Q. Have you any doubt about that?

40 A. No doubt; no.

Q. You say there were at least one million staves on hand at the time of the fire?

A. Yes, sir.

Q. And you cannot state what made up that one million of staves, when they were received, and from whom they were received?

A. No.

Q. So far as you know, is it possible for any person to state how much was the stock on hand on the 4th of January, and how much of the accumulated stock, after that time, was destroyed by the fire? 10

A. I could not say.

Q. In your estimate of the million staves, you say there may be four or five cars, or 125,000 staves, difference. Is that the closest estimate that has been made, to your knowledge?

A. No; I have seen closer estimates than that made.

Q. In this matter, has there been any closer estimates made? 20

A. Not to my knowledge.

MARK CURLEY, a witness, sworn on the part of the plaintiffs, testifies as follows:

Direct examination by Mr. VREDENBURGH:

Q. Where do you reside?

A. Jersey City; I am a carman and truckman; I was in that business in January, 1881, and December, 1882; I carted staves from the Erie Railroad for Wm. G. Pennypacker; I have my book here which will show what I carted; I did not keep the particular date when each car was carted, but I see it was about January 3d that I carted car No. 4059; it was carted to Broeck's place—three places; it was customary to deliver the staves and hoops at the northeast corner of Morgan and Greene, and the southwest corner of Morgan and Greene, and to 283 Warren street; the most of these went to the southwest corner of 30 40

Morgan and Greene; the next car was No. 20,941, 35,597, 4015, 15,281; that was all of that lot which I carted to Broeck, and two cars of the same lot went to the O'Donnells—that is cars Nos. 34,171 and 2691.

Q. Do your books show that you carted any other staves for the O'Donnells than those two loads?

A. Yes; February 9th, 10th, 11th, 13th, headings, staves, etc., from Broeck's In Warren street, to the O'Donnell's shop in Morris and Washington; also
10 March 1st, 2d, 3d, 4th, from the same place to the same place; I believe that is all; the cars I have charged to the account of C. B. Broeck & Co. were $6 a car for carting; they came from the Erie Road and went to the O'Donnells; for the balance I was paid $7 a day by the O'Donnells.

Q. Which days were those?

A. February 9, 10, 11, 13, and March 1, 2, 3, 4.

Q. Had you been employed before that time to cart these goods?

20 A. Yes; I had seen O'Donnell shortly after carting the two cars, on January 16th and 17th.

Q. Why didn't you go to work carting right away?

A. He told me he would send for me when he wanted me to cart—when he was ready to receive the goods.

Cross-examined:

Q. Did you know whose material it was you were carting?

30 A. I knew it was C. B. Broeck & Co.

Q. And Mr. O'Donnell employed you to cart it?

A. Yes, sir; to his shops in Morris and Washington streets.

Q. Did he employ you to take any to the shops of Broeck & Co., or Pennypacker?

A. No.

Q. Did he employ you to take any to the southwest corner of Greene and Morgan?

A. No.

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Q. Didn't you state there were some taken to the southwest corner of Greene and Morgan?

A. I was not employed by O'Donnell then; I was employed by Broeck & Co.

RICHARD GRANT, a witness, sworn on the part of the plaintiffs, testifies as follows:

Examined by Mr. VREDENBURGH: 10

I reside in Jersey City; I am a dealer in cooperege materials; have been in that business twenty years; I knew the firm of C. B. Broeck & Co.; I knew the partners of that firm; I did business with them: I know the firm of N. & H. O'Donnell; I have known them for twenty years; I have also done business with them.

Q. Did you sell to N. & H. O'Donnell after January 4th, and before February 5th, between those 20 dates inclusive, any materials for the manufacture of barrels?

A. I think I did.

Q. Tell us what you sold?

A. I cannot, I have no record with me.

Q. You were subpœnaed to bring your books here?

A. I was, but I did not think I was obliged to bring my books here from New York for day before yesterday, yesterday and to-day; I have had no subpœna for to-day at all; I shall have to appeal to the 30 Court to know if I am obliged to bring my books from New York; I will give you any information I can.

Q. Can you tell how many goods you sold them?

A. Not from memory.

Q. Can you tell approximately?

A. No; I did not keep my books; I have a bookkeeper who attends to that part of my business.

Q. Can you give us some idea of how much you sold them? 40

A. No, sir.

Q. You did sell them materials for making barrels between those dates?

A. I think I did.

Q. Was it one carload or two?

A I cannot tell without reference to my books.

Q. Haven't you referred to see?

A. No, sir.

Q. The subpœna requested you to, why didn't you
10 do it?

A. I don't think it did.

Q. The subpœna requested you to bring your books, so you could testify?

A. So it did, but I didn't do that.

Q. What were you selling 30-inch staves for, such as were used by O'Donnell & Co. in the manufacture of barrels for the sugar refining company, during the month of January, or about January 4th, 1882?

20 (Question objected to as irrelevant. Admitted.)

A. That would be difficult to tell, unless you state a quantity; I deal in that kind of stock and I sell small quantities at higher rates than large quantities.

Q. Take a million staves?

A. I think staves were worth, by the million, $9.75 to $10 per gross thousand; I think the market brought that at the time.

30 Q. The $18\frac{1}{4}$-inch heading at the same time?

A. About $7\frac{3}{4}$ to 8 cents a set for 19-inch heading, and $18\frac{3}{4}$-inch heading would be about a half cent less.

Q. And patent hoops?

A. Just at that time it is pretty hard to get at the market price, but I think possibly $10.00 to $10.50 a thousand.

Q. Why do you say it is difficult, at that time, to get at a market price; was there any scarcity of
40 those things?

A. Yes; and that is what made it difficult to get at the value; there was so little in the market; there was a scarcity about that time.

Q. What did you charge the O'Donnells for the materials you supplied them?

A. I cannot tell without referring to my books.

The witness is directed to go and examine his books, so that he may be able to testify, or to bring a copy of his books. 10

Mr. Brinkerhoff reserves the right to cross-examine the witness, when he takes the stand again.

Charles L. Strohmenger, sworn on the part of the plaintiffs, testifies as follows: 20

Examined by Mr. Vredenburgh:

I am superintendent of the Cumberland House, New York City; I live in New York City; I was in the employ of Broeck & Co. for nearly three years as book-keeper; these books here were kept by me; here is the journal, the ledger, the blotter, the receipt book, the stock receipt book, the check book, the bills payable and receivable, the receipt book for barrels; these books were all kept by me. 30

Mr. Vredenburgh offers the books in evidence.

Q. By Mr. Brinkerhoff. Were they all kept by you? Are they all in your handwriting?

A. Yes; I think it is all in my handwriting up to the time I was there.

Q. Where on the premises of Broeck & Co. did you have your office?

A. 283 Warren street. 40

Q. And continued to manufacture barrels there ud to what time?

A. I think it was January 26th.

Q. Where was the tight-barrel factory of Broeck & Co.?

A. On the northeast corner of Greene and Morgan streets.

Q. How long did Broeck & Co. run that?

A. Nearly two years; they run the tight-barrel
10 factory up to the 14th of January, then the O'Donnells took possession of it.

Q. They continued to deliver barrels to Matthiessen & Wiechers up to what date?

A. Up to and including January 14th.

Q. Does your books show that?

A. Yes, sir.

Q. They continued to manufacture barrels at the southwest corner of Greene and Morgan streets up to what date?

20 A. Up to the 14th.

Q. Can you tell how many barrels they manufactured there between the 4th and the 14th?

A. No; the books will not show.

Q. From the 1st up to the 14th, when they stopped, can you say how many men were employed?

A. Yes, sir; but I cannot say how many barrels were made, for the reason that our week began on the 31st day of December. I forgot to mention the pay-roll as one of the books I have here.

30

Mr. Vredenburgh offers that book in evidence.

Witness. From the 31st of December, 1881, to and including January 6th, that is, the week ending Friday night, we manufactured, at the southwest corner of Greene and Morgan, 2141 barrels.

Q. How many men had you employed prior to January 4th, 1882?

A. I cannot give you the exact number without

40

counting; but I should judge, altogether, in the shook yard and every place, in the neighborhood of 235 to 250 men, directly and indirectly.

Q. Which one of the firm conducted the business in Jersey City?

A. Charles B. Broeck; Mr. Pennypacker lives in Wilmington, in Delaware, and came on here once or twice a month, as a rule.

Q. Give us the second week, January 6th, afterwards, at the southwest corner of Greene and Morgan streets. 10

A. As we closed down the shop at the southwest corner of Greene and Morgan streets on the 14th, we went down and took account of the barrels that were made on the 14th, including those barrels in the total amount, and that, consequently, takes the barrels on the southwest corner of Greene and Morgan streets, from the 6th to the 14th, inclusive, making seven days—that is, Saturday, and including the following Saturday, as we then closed down the business and 20 paid the men in full. We made 1935 barrels down there.

Q. From December 31st, inclusive, until you closed the business there, you made—

A. 4075 barrels.

Q. I show you a book. Is this the blotter which you kept?

A. Yes, sir; it is "Exhibit P. 10."

Q. I call your attention to a paper pasted on the cover of the book—who pasted it there? 30

A. I did.

Q. When did you paste that there?

A. I think the 7th of January last.

Q. Is there any more writing on it now than there was when you pasted it there?

A. No, sir, not that I can distinguish.

Q. From whom did you get that paper?

A. I received it from Mr. Pennypacker.

Q. Who was present at the time you received it?

A. I have no knowledge of any one being present 40

at the time I received it; Mr. Hugh O'Donnell was present just previous to my receiving it.

Q. State what occurred with regard to that paper from the first you saw of it until you pasted it in your book?

A. Mr. Hugh O'Donnell and Mr. Pennypacker came into the office and sat down at the desk within a very few feet of my desk, and were conversing in reference to the stock and the price of stock and the
10 price to be agreed upon at which the stock was to be charged, and Mr. Pennypacker and Mr. O'Donnell requested me to make out the cost price of stock and I figured upon the stock and handed them my figures; Mr. O'Donnell objected to my figures as being a little too high, more than he thought they should be; then Mr. Pennypacker and Mr. O'Donnell had some further conversation on the matter, and they finally agreed upon these figures, Mr. Pennypacker writing them down as they agreed upon them; they
20 then went out into the yard, and after going into the yard, Mr. Pennypacker came back and handed me the paper, directing me to charge all stock at those figures, and Mr. O'Donnell and Mr. Pennypacker then left the office and went away together.

(By Court.) Who directed you to do that?

A. Mr. Pennypacker.

(By Court.) Is the ink as well as the pencil in your writing?

A. No, sir, the pencil is in Mr. Pennypacker's and
30 the ink is mine; the figures and the writing are Mr. Pennypacker's in pencil, and I put it down in ink, so it would not erase; it was a reference for myself in charging; the figures in ink and the figures in pencil correspond.

Q. After that you sent bills to Mr. O'Donnell?

A. I did; and I charged as fixed by this memorandum, and they were paid by Mr. O'Donnell as fixed by this memorandum.

Q. Can you tell from your books about how many
40 barrels were made a week for Matthiessen & Wiechers during December?

A. I can give you the total amount of barrels that he received, yes, sir.

Q. Would November and December be average months; give us November and December.

A. During the month of November, we furnished Matthiessen & Weichers 12,490 19-inch barrels and 36,770 18¼-inch barrels; in the month of December we furnished them 15,736 19-inch barrels and 42,272 18¼-inch barrels, 25 14-inch barrels; in January we furnished them 6639 19-inch barrels and 17,467 18¼- 10 inch barrels that is from the 1st to the 14th inclusive.

Q. Do you remember of the fire on the morning of February 5th?

A. Yes, sir; it burnt the building on the southwest corner of Greene and Morgan streets.

Q. Tell us what materials for making barrels was in that building at the time of the fire—first, how many staves?

A. There was about a million staves in there, and I should judge about five carloads of 19-inch head- 20 ing; about 20 carloads 18¼-inch heading; and about half a carload, or in the neighborhood of 20,000 patent hoops; one full car of half-barrel staves, and there was, as appears from our books, in that car 53,000—they cost $6.40 a thousand.

Q. What book do you find that in?

A. In my journal, and it will also be found in the receiving book and in the ledger.

Q. At the time that Stanhope and McNamee made an estimate of materials in that building, did you 30 from your books, also figure up, with the aid of McNamee, how many staves there were in that building?

A. Mr. Broeck and Mr. McNamee and myself, when they came up and reported; we looked over the receiving book; the matter was then fresh in our minds, and we went over the number of cars that were being put in there, and that were in there, and, if I am not mistaken, we made a million two hundred thousand as the amount of stock that should be in 40 that place at that time.

Q. Of staves?

A. Of staves.

Q. As to the heading?

A. The heading figures up to 25 car loads of both kinds—19 and 18¼-inch heading.

Q. What is this entry on page 330 of the blotter—Richard Grant, cars 27,161, 25,068, 23,902, reconsigned to N. & H. O'Donnell?

A. Those were cars that Mr. Grant had sent us an invoice of, to pay the freight and haul them from the Erie Road to our yard, but in conversation with Mr. Hugh O'Donnell and Mr. Pennypacker, it was suggested by Mr. Grant that instead of charging us for those cars, that they be turned right over directly to Mr. O'Donnell, and that was done, with the consent of Mr. Pennypacker, and that is the credit that I have given them. Having given Mr. Grant credit for the invoice, I then charged them with the same invoices. That appears in my journal and ledger.

Q. Did Mr. Pennypacker ever pay Grant for those?

A. No, sir.

Cross-examined by Mr. Brinkerhoff:

Q. How do you know there were one million staves in the southwest corner of Greene and Morgan streets at the time of the fire?

A. I went through the building and estimated alone. I can't say whether it was the last week in December or the first week in January.

Q. For what purpose did you make the estimate?

A. For the purpose of insurance. Mr. Broeck's attention was called to the fact that he had not sufficient insurance on the building, and I went through to satisfy myself on that point.

Q. May it not have been as late as the 9th of January?

A. I could not answer that question.

Q. Did not the matter of insufficiency of insurance come up in consequence of the dissolution of the

firm, and Mr. Pennypacker succeeding Broeck & Co.?

A. No, sir.

Q. Was not the matter of insurance discussed after Broeck & Co. had dissolved.

A. Yes, sir.

Q. Don't you know that Mr. Pennypacker told you after the dissolution that he did not have sufficient insurance upon his goods in the southwest corner of Greene and Morgan? 10

A. I don't know as Mr. Pennypacker ever made any such suggestion.

Q. How long after the estimate had been made by Stanhope and McNamee was it that you made the estimate?

A. It was some little time after. They made their estimate between the middle and the latter half of December.

Q. They said it was about the 20th of December?

A. I don't stand on dates. 20

Q. In what manner did you make an estimate—how did you arrive at the quantity of material?

A. Simply from my knowledge of the amount of stock that they could get into a given place; I estimated by my eye.

Q. You did not count any bundles of staves, nor of headings, nor of hoops?

A. No, sir.

Q. Did you measure the building?

A. No, sir. 30

Q. Did you measure the height, the width or the length of the material contained in the room?

A. I measured it by my eye only.

Q. And that is the only way you got at the quantity?

A. That is the way I formed my estimate.

Q. Can you tell us how many barrels you furnished Matthiessen & Wiechers, for the three months preceding November, 1881?

A. Yes, sir; during the month of October we fur- 40

nished them with 16,877 19-inch barrels, 4999 18¼-inch barrels and 100 14-inch barrels; for September we furnished them 12,849 19-inch barrels, 49,483 18¼-inch barrels and 100 14-inch barrels.

Q. From where was the material taken which was made into barrels between December 20th and January 14th?

A. Some came in on the cars; some was taken from 283 Warren street, and some taken out of the south-
10 west corner of Greene and Morgan?

Q. State how much was taken from the southwest corner of Greene and Morgan?

A. I cannot answer.

Q. Do you know whether there was a large quantity taken from that place within that time.

A. There was not.

Q. Can you approximate the amount?

A. No; but I know there was no decided change in the appearance of the amount that was in the
20 building.

Q. Did you hear the testimony of Mr. McNamee upon that point?

A. I did.

Q. Was his statement correct?

A. I don't know, I cannot approximate.

Q. Do you mean to say you don't know how much material was used from that corner?

A. I have not said so; no, sir.

Q. Then state whether the testimony of Mr.
30 McNamee in that particular was correct or not?

A. I think he spoke the truth so faras he thinks he knows.

Q. Do you believe his statement to be a correct statement in your judgment?

A. I don't think it was far out of the way at all.

Q. Can you tell how much material was taken from the southwest corner of Greene and Morgan and manufactured into barrels between January 4th and January 17th, 1882?

40 A. No.

Q. Do you know how much of the material which was on hand in the southwest corner of Greene and Morgan on January 4th, was burned on the 5th of February.

A. No, sir.

Q. Did you purchase any goods after the 4th of January?

A. There were no goods bought after the 4th of January, to my knowledge, of any kind; there was some goods on the way and had been on the way, 10 and some of the invoices were probably dated a day or two afterwards.

Q. They were not in stock?

A. They were in transit.

Q. How much of the material which was in Jersey City, which had not reached the southwest corner of Greene and Morgan on January 4th, but which arrived there afterwards, was consumed by fire?

A. The exact quantity I could not state; there was some of that, I know, but how much I don't 20 know.

Q. You state that Mr. O'Donnell and Mr. Pennypacker agreed upon a price for a certain class of goods?

A. They agreed upon a price for all the goods.

Q. State what Mr. O'Donnell said at the time of the alleged agreement on the matter of price?

A. He stated that he considered my figures too high; that was all he said to me; the conversation was then carried on between Mr. Pennypacker and 30 myself.

Q. State what Mr. O'Donnell said to Mr. Pennypacker in your presence about agreeing to a price, in the statement that is pasted in that book?

A. I cannot give the exact words, because I do not recall them; they had quite a lengthy conversation, and it was all in reference to the price of stock; I can only give you the sense of the conversation; it was about the price, and I know those prices were afterwards used by me, and the bills were paid on 40

those prices, but the exact words of the conversation, I cannot give you.

Q. Give us the import of their conversation?

A. I can only take it from inference, that the prices were never disputed afterwards.

Q. You can only judge from what took place after that conversation, that they had agreed upon a price?

A. I did not say so.

10 Q. Upon what do you base your knowledge that they agreed upon a price?

A. For the simple reason that the paper was handed to me with the list of prices on it, and that I followed out those instructions on that paper, and that the bills were paid on those prices.

Q. Who paid for the barrels, which were manufactured from and including January 4th, to and including January 17th; and which were furnished to Matthiessen & Weichers?

20 A. We did not furnish any barrels to Matthiessen after the 14th; from the 1st to the 14th they were paid for by Mr. Matthiessen.

Q. Did any one else pay for any barrels that you manufactured between December 31st, 1881, and January 14th,1882, except Matthiessen & Wiechers?

A. I could not say; there were barrels on hand; there were barrels delivered to other parties, but whether those barrels were made previous to the 1st of January or after the 1st of January, which these 30 other parties got I could not say; my books will not show that.

Q. They may have been, or may not have been manufactured after that time?

A. They may and may not; there were barrels on hand January 1st, and those barrels may have gone to other parties, and they may have gone to Mathiessen & Wiechers.

Q. How many barrels were on hand at the time of the fire, in the southwest corner of Greene and Mor-
40 gan?

A. I don't know.

Q. Were there not 300?

A. I don't know what was in the lower shop at that time.

JAMES REYNOLDS, a witness sworn on the part of the plaintiffs, testifies as follows:

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Examined by Mr. VREDENBURGH:

Q. You are a cartman in Jersey City?

A. No, sir; but I was in January 1882, and I carted materials for the Messrs. O'Donnell, from C. B. Broeck & Company's former place, some time in January; it was before the fire; I carted them to Morris street, to O'Donnell's place of business; Mr. O'Donnell paid me; I carted materials from the Erie Road previous to that; Mr. Curley was carting at the same time, from the Erie Road, that I was; 20 I carted to the southwest corner of Greene and Morgan, the stuff was put in there; I carted two carloads, that was right after the 1st of January.

Q, (By Mr. BRINKERHOFF.) Who assisted you in counting such goods as you took from Broeck & Co.?

A. Mr. McNamee.

Plaintiffs rest.

Defendant makes a formal motion to non-suit, because the plaintiffs have failed to prove their case; 30 chiefly upon tho agreement itself. We hold that the agreement made was an executory agreement, it was not an executed agreement. It did not complete the sale between the parties. They agreed to sell the stock on hand, and the O'Donnells agreed to take the same as fast as the sugar house required the barrels. There is no proof as to whether the sugar house required the barrels faster than they were delivered; neither is there any testimony which shows that at any time the sugar house required any of the barrels. 40

At this point the witness, RICHARD GRANT, appears, and he is called to the stand and his testimony is taken now, to be considered as taken before the plaintiff rested his case.

Examined by MR. VREDENBURGH:

Q. Have you made yourself familiar enough to tell us, from January 4th, 1882, to February 5th, 1882, inclusive, the amount of materials for making barrels sold by you to the O'Donnells?

A. I made one sale of half a million staves; the exact date of the sale I cannot tell—only the deliveries; the sale was sometime between the dates you speak of; it might have been on January 20th; February 1st I delivered 42,200 gross; February 2d, 28,500 gross; February 4th, 18,350 gross. Total, 89,050 gross staves.

Q. Is that all you delivered to Mr. O'Donnell during that time?

A. Yes, sir; that is all I sold or delivered to the O'Donnells.

Q. Now, about hoops and headings?

A. I sold them none; the hoops and headings that they received from me were transfers from contracts that I already had from Broeck & Co., and which they themselves afterwards assumed.

Q. Now, as to the price?

A. The price of this half million was $9.25.

Q. Did you deliver any stuff from sales made previous to January 4th, during that month?

A. No, sir; not to Jersey City.

Q. Did you sell him any in New York?

A. No; I delivered him some to Philadelphia, but nothing here.

Q. Did you deliver him any in New York?

A. I have no recollection of any.

Cross-examined by Mr. Brinkerhoff :

Q. Do you know what use was made by Mr. O'Donnell of the goods purchased by him of you after January 4, 1882?

A. I know they were made into barrels, but I don't know what became of the barrels; I don't know who the barrels were made for.

Q. The goods that were sold by you to Mr. O'Donnell on and after January 4th, were they not the same goods which you had theretofore sold to Pennypacker? 10

A. No; I looked that matter over carefully in my ledger, and I find that the goods I had sold to Mr. Pennypacker were F. O. B. West, and Mr. O'Donnell refused to take them. This was a separate contract.

Q. This was not a contract taken by Mr. O'Donnell off the hands of Mr. Pennypacker?

A. No.

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The Court hears argument of both sides on the motion of a non-suit.

The Court grants the motion to non-suit.

Plaintiffs ask for an exception, and same is signed and sealed accordingly.

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PLAINTIFFS' EXHIBITS.

EXHIBIT P. 1.

10 JERSEY CITY, N. J., January 4, 1882.

This agreement, made this day by and between Charles B. Broeck & Co., of Jersey City, of the first part, and N. & H. O'Donnell, of same city, of the second part:

Witnesseth: For and in consideration of the party of the first part letting to the party of the second part, free of rent or hire, the use of all machinery as now standing in the shop, corner of Greene and Mor-
20 gan (known as the tight-barrel shop), until the 14th day of March, 1882.

The party of the second part agrees to give to the party of the first part, upon demand, after the said 14th day of March, 1882, free and full possession of the above named machinery, without hindrance of any kind.

The party of the second part further agrees to give, free of rent, the stables on shook-yard, now occupied by party of the first part, until they can dispose of
30 their teams; also to give reasonable time to remove what other material belonging to them on said lots.

The party of the second part agrees to pay all rent due the owners of the shop corner of Greene and Morgan, from the 1st day of January, 1882, until the 14th day of March, 1883, or any other expenses which may in any way become a lien on said machinery.

They further agree to pay all the rent which may become due on what is known as the shook-yard property, of which Mr. Force is the owner or agent,
40 from the 1st day of January, 1882, until the 14th day

of March, 1883, at which time the lease of the party of the first part expires.

The party of the first part agrees to sell to the party of the second part all the material for making barrels at the actual cost of same now in store.

The party of the second part agrees to take and use the same as fast as the sugar house requires the barrels, and to pay for the same in notes, with interest added, running two months from date of same; settlements to be made semi-monthly. 10

CHAS. B. BROECK & CO. [L. S.]
N. & H. O'DONNELL. [L. S.]

Witnesses present:
J. B. STANHOPE,
PATRICK TANNER.

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EXHIBIT P. 2.

JERSEY CITY, N. J., January 4, 1882.

This agreement made this day by and between Charles B. Broeck & Co., of Jersey City, of the first part, and N. & H. O'Donnell, of same city, of the second part;

WITNESSETH, For and in consideration of the party of the first part, letting to the party of the second part, free of rent or hire, the use of all machinery as 30 now standing in the shop, corner of Greene and Morgan, (known as the tight barrel shop), until the 14th day of March, 1882.

The party of the second part agrees to give to the party of the first part, upon demand after the 14th day of March, 1882, free and full possession of the above named machinery without hindrance of any kind.

The party of the second part further agrees to give free of rent, the stables on shook-yard now occupied 40

by the party of the first part, until they can dispose of their teams; also to give reasonable time to remove what other material belonging to them on said lots.

The party of the second part agrees to pay all rents due the owners of the shop, corner of Greene and Morgan, from the 1st day of January 1882, until the 14th day of March, 1883, or any other expense which may, in any way, become a lien on said machinery. They further agree to pay all the rent which may become due on what is known as the shook-yard property, of which Mr. Force is the owner or agent, from the 1st day of January 1882, until the 14th day of March, 1883, at which time the lease of the party of the first part expires.

The party of the first part agrees to sell to the party of the second part all the material used for making barrels, at the actual cost price of same as now in store.

The party of the second part agrees to take and use the same as fast as the sugar house requires the barrels, and to pay for the same in notes, with interest added, running two months from date of same, said settlements to be made semi-monthly.

CHAS. B. BROECK & CO. [L. S.]
N. & H. O'DONNELL. [L. S.]

Witnesses present:
J. B. STANHOPE,
PATRICK TANNER.

EXHIBIT P. 3.

Articles of agreement made and concluded on the eighth day of March, in the year of our Lord one thousand eihht hundred and seventy-five, between

William G. Pennypacker and Chas. B. Broeck of the City of Philadelphia, State of Pennsylvania.

This agreement witnesseth, that the said parties have agreed, and by these presents do agree, to associate themselves in the business of making barrels and dealing in staves, heading, hoops, and all the sundries used in the coopering business in the City of New York, State of New York, for the term of five years from the date of these papers, and that such profit, gain and increase of the said business shall be 10 equally and proportionately divided between them, share and share alike, and also all expenses and losses that may arise or happen in the said business by bad debts, bad commodities or otherwise, shall be paid and borne equally between them.

And it is further agreed by and between the parties hereto that neither of them shall, at any time during the said copartnership, endorse any note or notes, or become security for another, without the consent, in writing, being first had from the other 20 party for that purpose.

And it is further agreed between them that there shall be kept during the said term and joint business, perfect, just and true books of account, wherein shall be entered and set down all moneys received and expended in and about the said businesss, as well as all commodities and merchandise by them bought and sold, by reason and on account of the said copartnership, and all other matters and things in any wise belonging to the same, so that either of 30 them may, at any time have free access thereto, and at the end of the said term of five years or other sooner determination of these presents, (be it by the death of one of the parties or otherwise), they, the said copartners, each to the other, or in the event of the death of either of them, the surviving party to the executors or administrators of the party deceased, shall and will make a true and final settlement of all things as aforesaid, and in all things well and truly adjust the same; and also that upon making such 40

account all and every the stock, as well as the gain and increase thereto, shall be equally parted and divided between them share and share alike.

And it is further agreed that neither party shall draw from the funds of the firm, for his individual support, any sum without the written consent of the other party first being had, and the amount to be drawn stipulated therein.

And it is further agreed by the parties to these
10 presents that the co-partnership hereinbefore described, shall be known by the title of Chas. B. Broeck & Co., and that each of the partners shall well and truly exert his influence and time, so far as is consistent with other duties, for the best interests of the firm.

In witness whereof, we have hereunto set our hands and seals.

WM. G. PENNYPACKER, [L.S.]
CHAS. B. BROECK, [L.S.]

20 Witness present:
G. E. BARRETT.

EXHIBIT P. 4.

JERSEY CITY, January 6, 1882.

Notice is hereby given that the copartnership heretofore existing by and between Chas. B. Broeck, of
30 Jersey City, N. J., and Wm. G. Pennypacker, of the city of Wilmington and State of Delaware, trading as Chas. B. Broeck & Co. is this day dissolved by mutual consent. That the business of the late firm will be settled by William G. Pennypacker, to whom all bills will be paid and settlements made.

CHAS. B. BROECK,
WM. G. PENNYPACKER.

Witnesses present:
CHAS. L. STROMENGER, JR.,
40 DANIEL MANNING.

EXHIBIT P. 8.

JERSEY CITY, January 4, 1882.

Messrs. N. & H. O'Donnell, bought of Chas. B. Broeck & Co., for use of Wm. G. Pennypacker, steam cooperage, steam tight-barrel cooperage, corner Greene and Morgan streets. Office, 283 Warren street, Jersey City, N. J. 10

Jan. 4—To 40 cars, 30 elm staves—1,000,000 staves, $9.20	$9,200 00	
" " 53,000 gross ½-bbl. staves	265 00	
" " 20 cars, 18¼ hdg., 55 sets each, 110,000 sets, 6¾c.	7,425 00	
" " 5 cars, 19 heading, 27,500 sets, 7¼	1,993 75	
" " 20 patent hoops, $9.50	190 00	
	$19,073 75	
Feb. 1—By 4,500—30-staves, $9.20, $44.16		20
" 3— " 4,958 " " " 45.61	89 77	
	$18,983 98	

PAPER PASTED IN EXHIBIT P. 10.

Staves	920	9.20 Gross M.
Hoops	950	9.50 Net M.
18¼ Heading	6¾	6¾c. per set.
19 Heading	7¼	7¼c. " 30
Barrels	36½	36½c. to House
½-Barrels	31	31 c. "
Liners	40	40 c. per M.
Flat Hoops	575	5.75 "

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NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES B. BROECK et al., late partners, &c., who sue, &c., Pltff's in Error, vs. NEAL O'DONNELL and HUGH O'DONNELL, partners, &c., Deft's in Error.	In Error to Supreme Court.

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And now come the said Charles B. Broeck and William G. Pennypacker, late partners, trading as "Charles B. Brock & Co.," who sue for the use and benefit of William G. Pennypacker, plaintiffs in error, by JAMES B. VREDENBURGH, their attorney, and say that in the record and proceedings aforesaid, and in the judgment aforesaid, there is manifest error, in this, to wit:

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That the said Justice at the Circuit at the trial of said cause, granted the motion to non-suit the said plaintiffs, and non-suited the said plaintiffs; whereas he should have denied said motion to non-suit.

Therefore the said plaintiffs in error pray that the judgment aforesaid, by reason of the aforesaid error, and other errors appearing in the record and proceedings aforesaid, be reversed, annulled, and held for nothing. and that said plaintiffs may be restored to all things they have lost on occasion of said judgment, &c.

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JAMES B. VREDENBURGH,
Attorney and counsel for
Plaintiffs in Error.

40 Common Joinder in Error.

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