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New Jersey
Court of Errors and Appeals

PETITION OF APPEAL.

(Filed Nov. 30, 1928)

In the Matter of The Dissolution of the New Jersey Refrigerating Company.	On appeal from Chancery On appeal from determination of the Receivers on the claim of National Cold Storage Company, Inc.

To the Honorable Court of Errors and Appeals:

The petition of the National Cold Storage Company, Inc., appellant, in the above entitled cause, respectfully shows:

(1) Petitioner finds itself aggrieved by a final decree made in the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, which decree bears date the 16th day of November, 1928, in a certain cause entitled, "In the Matter of the Dissolution of the New Jersey Refrigerating Company" for the following reasons:

The said decree finds and decrees that appellant is entitled to compensation for use and occupation

(a) for only 720 square feet of storage space, and not for 30,360 cubic feet; and

(b) for the period beginning February 6, 1925, and not the period beginning January 6, 1925; and

(c) at a rate of fifty cents per square foot per year, and not at a rate of approximately two cents per cubic foot per month; and

(d) in a total amount of $930, without interest, and not a total amount of $19,200, with interest, on monthly balances; and

(e) that said compensation as awarded in said decree is computed on the basis that appellant was entitled to be paid at the market rate for common storage, and not on the basis of the prevailing rate payable for cold storage space.

(2) Petitioner appeals from the decree of the Chancellor in so far as petitioner was not allowed for compensation for use and occupation for the entire room in which the ale was stored, for a period from January 6, 1925, to September 5, 1927, and at a rate of $600 a month, or for such other monthly rental as was warranted by the prevailing rates for cold storage space in the City of Jersey City, during the period from anuary 6, 1925, to September 5, 1927, and in so far as said decree dismisses the petition of appeal therein referred to as to the matters and things alleged in said petition of appeal which are not in said decree adjudged in favor of said appellant.

RICHARD BOARDMAN,
Solicitor for and of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

(Filed Dec. 19, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS

In the Matter of The Dissolution of the New Jersey Refrigerating Company.	On Appeal from Chancery. On Appeal from Determination of the Receivers of the Claim of National Cold Storage Company, Inc. Answer of Frank J. Bock and Edward H. Wright as Receivers of New Jersey Refrigerating Company.

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The answer of Frank J. Bock and Edward H. Wright, receivers of the New Jersey Refrigerating Company, respondents, to the petition of appeal of National Cold Storage Company, Inc., appellant.

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These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, and for answer thereto, nevertheless, say and admit, that a decree was, on the 16th day of November, 1928, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And

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these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

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J. H. HARRISON,
Solicitor of and of Counsel with Receivers of New Jersey Refrigerating Company, Respondents.

ORDER TO SHOW CAUSE.

(Filed August 9, 1927)

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IN CHANCERY OF NEW JERSEY

In the Matter of The Dissolution of the New Jersey Refrigerating Company.	On Bill, &c. On petition for permission to destroy ale.

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Upon reading and filing the petition of Frank J. Bock and Edward H. Wright, Receivers of the New Jersey Refrigerating Company, from which it appears, among other matters, that said receivers, upon their appointment, had approximately 250 barrels of alleged ale among the assets of the New Jersey Refrigerating Company in storage at the plant at 173 Ninth Street, Jersey City, New Jersey, and that said receivers have reported to

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the Court in their said petition that said ale could not be distributed among the stockholders, and that there is no market for said ale, and that the yield of alcohol would be insufficient to meet the expense involved in dealcoholizing said ale and the expense involved in preparing it for use as malt vinegar would be excessive, and said receivers having prayed in said petition for an order authorizing and directing that the said ale be destroyed, and that said receivers be directed to arrange with Bureau of Internal Revenue, Treasury Department, of the United States of America, or other appropriate agencies for the destruction of said ale, that the barrels and kegs in which said ale is contained be sold, and for such other order or direction as the nature and circumstances of the case may require, and as shall be agreeable to equity:

It is, on this ninth day of August, 1927, on motion of J. H. Harrison, Esquire, solicitor and of counsel with Frank J. Bock and Edward H. Wright, receivers, Ordered, that the National Cold Storage Company and the stockholders of the New Jersey Refrigerating Company, show cause before this Court on Monday, August 15, 1927, at the Chancery Chambers, City of Jersey City, New Jersey, at 10 o'clock in the forenoon (Daylight Saving Time), or as soon thereafter as counsel can be heard thereon, why an order should not be made authorizing and directing that approximately 250 barrels of ale now in possession of said receivers be destroyed, and that said receivers arrange with the Bureau of Internal Revenue, Treasury Department, United States of America and/or other appropriate agencies for

the destruction of said ale, and directing the sale of the barrels and kegs in which said ale is contained, and why an order should not be made for such further and/or other relief as the nature of the case may require.

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It Is Further Ordered, that a copy of this order (which need not be certified) be served upon National Cold Storage Company personally, or by mailing a true copy thereof with postage prepaid, to one of the agents, or officers of said company in the State of New Jersey, within two days from the date hereof.

It Is Further Ordered, that a copy of this order (which need not be certified) be served upon each of the stockholders of the New Jersey Refrigerating Company personally or upon their several and respective solicitors, or by mailing true copies thereof to said stockholders at their several respective post office addresses if the same can be ascertained, with postage prepaid thereon within two days from the date hereof.

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E. R. WALKER,
C.

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Alonzo Church,
V. C.

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ORDER TO DESTROY ALE UNDER SUPERVISION OF THE BUREAU OF INTERNAL REVENUE.

(Filed August 15, 1927)

IN CHANCERY OF NEW JERSEY

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In the Matter of The Dissolution of the New Jersey Refrigerating Company.	On Bill, &c.

This matter being opened to the court by J. H. Harrison, Esquire, counsel for Frank J. Bock and Edward H. Wright, receivers of the New Jersey Refrigerating Company, and it appearing from the verified petition of the receivers that they have in their possession, as receivers, approximately 250 barrels of ale which cannot be disposed of with profit to the New Jersey Refrigerating Company; that charges of approximately $18,000.00 have been made by National Cold Storage Co., Inc., against the receivers for the storage of said ale, and that it is for the best interest of the New Jersey Refrigerating Company that said ale be destroyed under the supervision of the Bureau of Internal Revenue of the Department of the Treasury of the United States of America, and that the barrels and kegs in which said ale is contained be sold by the receivers and the proceeds arising therefrom be held to await the further order of the court; and due proof being made of the service of the order to

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Order to Destroy Ale Under Supervision of the Bureau of Internal Revenue

show cause herein dated August 9, 1927, upon the persons and in the manner therein directed;

It is, on this fifteenth day of August, 1927, on motion of J. H. Harrison, Esquire, of counsel
10 with Frank J. Bock and Edward H. Wright, receivers of the New Jersey Refrigerating Company, Ordered, Adjudged and Decreed that approximately 250 barrels of ale now in possession of the receivers shall be destroyed by said receivers under the supervision and direction of the Bureau of Internal Revenue of the Department of the Treasury of the United States of America, or other appropriate department, and that the
20 said receivers be and they hereby are directed to arrange with the Bureau of Internal Revenue of the Department of the Treasury of the United States of America, or other appropriate agency or agencies, for such destruction.

It Is Further Ordered, that the barrels and kegs in which said ale is contained be sold by the receivers and the proceeds arising therefrom be held to await the further order of the court.

30 It Is Further Ordered, that said receivers retain in their hands the sum of $20,000.00 pending disposition and settlement of the claim of National Cold Storage Co., Inc., and that leave be given to said claimant to file formal proof of claim with the receivers within twenty days from the date hereof.

E. R. WALKER,
C.

40 Respectfully advised,
Alonzo Church,
V. C.

PROOF OF CLAIM OF NATIONAL COLD STORAGE COMPANY.

IN CHANCERY OF NEW JERSEY

In the Matter of The Dissolution of the New Jersey Refrigerating Company.

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State of New York, }
County of New York. } ss:

Eugene W. Lewis, being duly sworn, deposes and says:

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1. That the National Cold Storage Co., Inc., now is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that deponent is the treasurer and general manager of said company.

2. Edward H. Wright and Frank J. Bock, as receivers of the New Jersey Refrigerating Company, sold and conveyed on December 6, 1924, to the National Cold Storage Co., Inc., the premises known as 173 Ninth Street, Jersey City, New Jersey, consisting of a lot and building thereon and basement therein, and the National Cold Storage Co., Inc., now is and has been ever since December 6, 1924, the owner in fee of said premises, and now is and ever since December 6, 1924, has been engaged in the operation of a cold storage warehouse therein.

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3. At the time, to wit, December 6, 1924, said receivers sold and conveyed said premises to The National Cold Storage Co., Inc., said receivers were using the basement of said premises as a storage room and had stored therein a large quan-
10 tity of ale, and as part of the terms of sale it was agreed between said receivers and The National Cold Storage Co., Inc., that said receivers might continue in possession of said basement until The National Cold Storage Co., Inc., had given to them thirty days' notice to vacate said premises and remove the ale therefrom, and thereupon The National Cold Storage Co., Inc., on December 6, 1924, gave said receivers notice to vacate said
20 premises and remove said ale therefrom within thirty days from December 6, 1924.

4. Said receivers failed to vacate said premises and remove said ale therefrom within said thirty days and thereafter hired from The National Cold Storage Co., Inc., said basement in said premises, from January 6, 1925, at a monthly rent of $600 payable at the end of each month. Said receivers have continuously since January 6, 1925, to the present time remained in possession
30 of, used and occupied said basement and have stored therein said ale and are still in possession of, using and occupying said premises and storing said ale therein, and such use and occupation were and are reasonably worth the sum of $600 per month.

5. By reason of the premises there is now due and owing from said receivers to The National Cold Storage Co., Inc., the sum of $18,600, with
40 interest on $600 from the end of each month dur-

ing said period, and there will be due and owing from said receivers to The National Cold Storage Co., Inc., at the end of the current month on September 5, 1927, a further sum of $600, making a total amount of $19,200, with interest on $600 from the end of each month during said period. 10

EUGENE W. LEWIS.

Subscribed and sworn to before me this 1st day of September, 1927, at New York City, County and State of New York, and I hereby certify that I am a Notary Public in and for the County of New York, State of New York. 20

Witness my hand and notarial seal.
J. Rhodes O'Reilly,
Notary Public, Bronx County.
(Seal)

Bronx County 23, Register 2808.
New York County 8, Register 8018.
Kings County 29, Register 8006.
Westchester County Register. 30
Term expires March 30, 1928.

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TESTIMONY TAKEN BEFORE RECEIVERS.

IN CHANCERY OF NEW JERSEY

IN THE MATTER
of
The Dissolution of NEW JERSEY REFRIGERATING COMPANY.

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Hearing before receivers of New Jersey Refrigerating Company on claim of National Cold Storage Company for rent of basement of building K, 519 Henderson Street, Jersey City, New Jersey, held at 3 o'clock in the afternoon on Tuesday, December 6, 1927, at No. 810 Broad Street, Newark, N. J.

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Appearances:

Richard Boardman, Esq., of Jersey City, N. J., appearing for claimant.

Edwards S. Sanford, Esq., of Newark, N. J., appearing for receivers.

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Frank J. Bock and Edward H. Wright, receivers.

It is stipulated that if the decision of the receivers on the claim under investigation shall be adverse, the testimony taken today may be used before the court on appeal, and that the record may be used before the vice chancellor as part of the evidence; that questions objected to on this hearing shall be answered, but the objections shall be ruled upon and determined if and when the

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matter is presented to the court, and that copies of exhibits introduced at the hearing may be used in lieu of the originals.

JOHN A. SIEMER, sworn.

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Direct-examination by Mr. Boardman:

Q. What is your business, Mr. Siemer? A. I am a clerk at 90 West Broadway, New York City.

Q. Are you connected with the cold storage business? A. I am.

Q. With what concern? A. The Seaboard Terminal and Refrigerating Company.

Q. How long have you been in the refrigerating storage business? A. Well, I was in for three or four years, and then I was out of it, and now I am back in it. 20

Q. When was your first connection with the business? A. In 1921.

Q. With what company were you connected then? A. New Jersey Refrigerating Company.

Q. The same company which is being liquidated in this proceeding? A. Yes.

Q. How long were you with the New Jersey Refrigerating Company? A. Well, I was in continuous service with the organization for about 14 years; that is, during the time before they changed their name. 30

Q. And before it was the New Jersey Refrigerating Company, it was Lembeck & Betz? A. Yes.

Q. And how long after 1921 did you remain with that company? A. Until September, 1924.

Q. What did you do then? A. I was the presi- 40

dent of the Hudson Storage & Refrigerating Company.

Q. Did the Hudson Storage & Refrigerating Company have any business dealings in connection with the plant that was formerly New Jersey
10 Refrigerating Company? A. Yes.

Q. What were the conditions? A. They operated this plant under a lease from September, 1924, until the 5th or 6th of December, 1924.

Q. And you received possession of the property from the receivers? A. Yes.

Q. And you turned the possession over to the present claimant here? A. Yes.

Q. Describe how many buildings were there
20 used for refrigeration purposes. A. Well, there were two buildings facing 9th Street—A and B; F, H and K facing Henderson Street; and then there were several units, a small unit on 10th Street, and there was a building we designated as building O, which was part of building A.

Q. During the occupancy of the Hudson Company, to what use was the basement of building K put? A. Why, we never had the use of that basement, because it was under lock and key.

30 Q. Who did have possession of it? A. The receivers.

Q. And it was reserved at the time you took your lease? A. I don't think so. I don't think it was ever reserved.

Q. They controlled it? A. Yes.

Q. And who was in possession of the plant generally when you turned the plant over to the claimant here: in possession of this basement to
40 building K? A. I always considered that the re-

ceivers, represented by Mr. Dill, were in possession, because Mr. Dill was representing them there in the office.

Q. Who had the key of that in September, 1924? What happened? A. Just before the Hudson Storage & Refrigerating Company took possession of the plant under lease, Mr. Rogers had the key, and at that time Mr. Rogers and myself were discharged by the receivers, and the key was turned over to Mr. Dill.

Q. That was the key to which door? A. Well, there were two keys that Mr. Rogers had—one for the outer door and one for the inner door.

Q. And he turned over one or both keys? A. To my knowledge he turned over both keys.

Q. There was another door in this basement to building K, was there? A. Well, if I can recall it, I think there is a door leading from the cellar of building H to the cellar of building K.

Q. How was that door treated? Was that a door to be used at the time? A. Well, I really can't answer that, because it is beyond me: I don't really remember whether that door was in use or whether it was not in use; I can't really say. I know there is a door there; I know it from the plans.

Q. Did the Hudson Company ever take title to the property? A. No.

Q. Who did? A. The National Cold Storage Company.

Q. The complainant here? A. Yes.

Q. Were you present when the title passed from the receivers to the National Cold Storage Company? A. Yes, sir.

Q. When was that? A. Well, the final closing was on the 6th of December, 1924.

Q. At this office? A. Yes, sir.

Q. Three years ago today? A. Yes; that was three years ago to-day—on a Saturday morning.

10 Q. At the time of the passing of title on December 6, 1924, was there any conversation in your presence between the receivers and their counsel and the claimants and their counsel in connection with this basement K? A. Yes, there was.

Q. Will you tell us what took place? A. There was some question in regard to the goods that were stored in this basement, and Mr. Harrison 20 and Mr. Lewis talked this matter over, and the result of it, to me, as I recall it, was that there was a sort of an agreement made for a certain period. Now, just how long that period was I don't know.

Mr. Sanford: I object.

Q. What was said, as nearly as you can recall? A. As far as I am directly concerned, there was nothing said to me.

Q. I want to know what Mr. Lewis, what Mr. 30 Sanford said, what Mr. Harrison said, what Mr. Eagle said, in respect to basement K. This stuff in there was ale, wasn't it?

Mr. Sanford: I object. The question is leading.

Q. Tell us what was said. A. It is pretty hard to remember just exactly the conversation. Well, the controversy or conversation regarded the oc- 40 cupancy of this cellar in building K.

Mr. Bock: What was said, as near as you can recall?

A. As near as I remember, Mr. Bock personally said that he would see that this ale was removed within 30 days. That I positively remember. I took Mr. Lewis' side at the time. 10

Q. It was ale that was stored in basement K, was it?

Mr. Sanford: I object to that question.

Mr. Sanford: How did you know it was ale?

A. I had some of it at times. I know some of it was ale that I drank.

Q. What did Mr. Lewis say after he had a talk 20 with you in the presence of the receivers or of Mr. Bock? A. Mr. Lewis insisted upon having an agreement to that effect that the ale would be removed within 30 days.

Q. And what was said? A. I can't recall the words of the conversation in particular.

Q. Did Mr. Eagle say anything? A. Well, I think he did, but I could not recall it.

Q. Can you give us the words Mr. Lewis said, as nearly as you can? A. No. 30

Q. What was the effect of what they said? A. There was an agreement drawn up about the occupancy of that cellar.

Q. Was there anything said about vacating this basement of building K? A. Yes.

Q. What was said? A. Mr. Bock had made that statement that he was going to get that ale out in 30 days, or that he wanted 30 days' time or something to that effect, and Mr. Lewis said 40

at that time: "I will give you your notice now."

Q. To what? A. That he would remove it in 30 days. The effect of the conversation was that they were going to allow him 30 days.

Q. Did the Hudson Storage & Refrigerating 10 Company bill the receivers for use and occupancy of this basement during the period from September 19, 1924, to December 9, 1924?

Mr. Sanford: I object, on the ground that it is immaterial, irrelevant and incompetent. It has nothing to do with this case at all, as to what the Hudson Storage & Refrigerating Company's arrangement was with the New Jersey Refrigerating Com- 20 pany.

A. Yes; they did do it.

Q. At what rental? A. The rental was $600.00 per month for the basement.

Mr. Sanford: I make the same objection.

Q. Who made that figure—$600.00 a month? A. I made up that figure.

Q. On what basis did you charge at the rate 30 of $600.00 a month? A. Well, on the basis of what we might term a reasonable charge for the space occupied, and also on the basis of rentals which we had received for similar space in the plant during the time it was occupied by the New Jersey Refrigerating Company and the Hudson Storage & Refrigerating Company.

Q. Did you consider that the fair rental value of the property occupied by the receivers? A. 40 I did.

CROSS-EXAMINATION by Mr. Sanford:

Q. You know the size of that cellar where this ale was stored, Mr. Siemer? A. I don't recall it particularly, Mr. Sanford; there were three buildings on Henderson Street.

Q. Are you familiar with the way in which the cellar in which the ale was stored was laid out at that time? A. I was at that time. 10

Q. What was the way it was laid with respect to partitions? A. Well, if we might describe it particularly; you got out of the elevator at the basement level—I should judge there is a space there of ten feet, and then there is a door leading to this cellar. That, in itself, was the building construction. Then there was a vestibule that was made in there of about, I should judge, 20 or 25 feet—possibly a little more—and then there was a partition put up that the carpenters had put up, and behind that partition this ale was stored. 20

Q. Do you recall when the Hudson Storage & Refrigerating Company billed the receivers for this space occupied? A. Yes.

Q. When was it? A. Shortly after the closing of the contract. 30

Q. Can you fix the date more definitely than the closing of the contract? A. Some time in December, 1924.

Q. You mean after the title had passed to the National Cold Storage Company? A. Yes.

Q. Was this claim of the Hudson Storage & Refrigerating Company ever recognized or paid by the receivers of the New Jersey Refrigerating Company? A. Well, I don't know. 40

Mr. Boardman: I object to the part which says "recognized."

Q. You say you don't know whether it was paid or not? A. I said so, yes.

10 Q. What is your position with the Hudson Cold Storage? A. I am not with it.

Q. When did you cease to be with them? A. About, I guess, in April of 1925.

Q. You ceased to be with the company in 1925? A. About that time, I guess.

Q. What was your position there with the company? A. I was president at one time.

Q. Did you hold any other office but president? A. I don't know. I would have to look up the

20 book, Mr. Sanford.

Q. You weren't treasurer, were you? A. No, I don't think so; I never had any funds.

Q. You don't recall that you ever held any position as officer of the company other than president? A. Tell me what you are getting at.

Q. You answer my question. A. Well, I don't remember it; I'll tell you that right now.

Q. I show you this proof of claim of the Hudson

30 Storage & Refrigerating Company which bears the name John A. Siemer, and ask if that is your signature? A. That is my signature; yes, sir.

Q. Did you read this statement, Mr. Siemer, this proof of claim that I just showed you? A. I don't recall it.

Q. Well, will you look it over now? A. Yes, I wrote that; at least, I signed that.

Mr. Sanford: I offer in evidence this

40 proof of claim of the Hudson Storage & Refrigerating Company, signed John A. Sie-

mer, and sworn and subscribed to before a notary public under date of September 6, 1927, the notary public being Elizabeth A. Coons, reading as follows:

10

"IN CHANCERY OF NEW JERSEY

IN THE MATTER of The Dissolution of NEW JERSEY REFRIGERATING COMPANY.	Proof of Claim.

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

John A. Siemer, of full age being duly sworn according to law on *her* oath deposes and says:

I am the treasurer of the Hudson Storage & Refrigerating Company.

New Jersey Refrigerating Company, and the Receivers of New Jersey Refrigerating Company are justly indebted to the said Hudson Storage & Refrigerating Company in the sum of $1560.00, being the amount due for the occupancy by the said New Jersey Refrigerating Company and the said Receivers of Cellar on the premises situate at 523 Henderson Street, Jersey City, N. J., designated as "Cellar of Building 'K'" from September 17, 1924 to December 5, 1924, at the rate of $600.00 per month.

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No part of said sum has been paid and the whole thereof remains due and owing from the said Receivers to the said Hudson Storage & Refrigerating Company.

10 (Signed) JOHN A. SIEMER.
(L. S.)
Hudson Storage & Refrigerating Co."

Sworn and subscribed to
before me this
6th day of September, 1927.
(Signed) Elizabeth A. Coons,
Notary Public of N. J.

20

Q. You don't know whether that proof of claim was rejected or not, do you? A. No, sir; I don't.

Q. Now, regarding this charge of $600.00 a month for the space occupied, will you tell us how you arrived at that amount? What was the basis of your calculations? A. The occupancy of similar space in another building.

Q. What was the amount of the space occupied? A. The cellar of building F, part of it, at 30 one time, and talking it over with Rogers and what he thought was a reasonable charge for the space occupied.

Q. What was the cellar in which this ale was stored, Mr. Siemer? How was it designated? A. Building K.

Q. What was the space occupied in that cellar by the ale, in cubic feet? A. I couldn't tell you that offhand; I have never measured it.

40

By Mr. Wright:

Q. What was in the space that you spoke of as the vestibule? You said you got off the elevator, and then there was a ten-foot space and a door and you went through that door and into the vestibule. Now, just what was in that vestibule? A. Well, when I went there, there was nothing in there. 10

Q. There was no ale in the vestibule? A. No, sir, but the outer door was locked all the time. Nobody had access to that; we did not have keys to that.

Q. You had a key to the so-called vestibule? A. No, sir.

Q. Do you remember whether that partition went clear across the room or half-way across the room; whether it separated the ale from this so-called vestibule? A. I don't quite remember that. 20

Q. You don't remember the size of that so-called vestibule, do you? A. How could I, having not been down there in 3 years?

CROSS-EXAMINATION by Mr. Sanford:

Q. Do I understand you to say you can't recall the size of the cellar, the cubic feet? A. I can't recall at this time, but I did know it that time when I made up the bill. 30

Q. What was your rate per cubic feet? A. About 25 cents.

Q. Mr. Siemer, do you remember the lease made between the receivers of the New Jersey Refrigerating Company and the Hudson Storage Company, of which you were president? What was the rental under that lease, per month? 40

Mr. Boardman: I object. The paper speaks for itself. We were not a party to it, and the paper should be produced.

Mr. Sanford: Will you answer the question, Mr. Siemer?

10

A. Well, I don't think I will answer it, because I don't think it is a proper question for me to answer.

Q. What was the purpose of this lease, Mr. Siemer, that you speak of, that has been mentioned here? A. What was the purpose?

Q. Yes. A. Why, the plant at that time was under contract of purchase by Mr. Brown. Mr. Brown assigned his contract to the Hudson Storage & Refrigerating Company. We wanted to continue the business, hold the trade—whatever business there was to hold—and we wanted to continue the plant and operate the plant during the time that the Hudson Storage & Refrigerating Company was financing their business and taking over the contract; so an arbitrary price of $2,000.-00 a month was made for a lease, and this money that was paid was credited on the purchase price.

20

Q. Are you sure about the figure $2,000.00? It may have been $1,200.00. A. No, sir; it was $2,-000.00 a month.

30

Q. You said, that in making your charge of $600.00, that was on a basis of 25 cents per cubic foot; per cubic foot for what term? A. Per cubic foot per year.

Q. This basement to building K—I refer to the whole basement covered by the outer door—was that capable of being refrigerated? A. It was equipped for refrigeration.

40

Q. And was it a single unit, or was it capable of being subdivided? A. Well, I can't answer that; I don't know. I am not familiar with the mechanical end of it at the present time and haven't seen it for so long I could not tell you.

Q. When you spoke of the vestibule, did you refer to space inside the outer door of basement K or the space outside of that door between that and the elevator? A. I believe I described it in this way: it was a space of 10 or 12 feet from the elevator door to the door of this cellar; then there was a space inside of that cellar which was unoccupied. I might have designated that as a vestibule. 10

20

Mr. HARRY C. LEWIS, sworn.

Q. Mr. Lewis, are you related to Eugene W. Lewis, the Treasurer of the National Cold Storage Company? A. No; I am not.

Q. What is your business? A. I am the secretary and treasurer of the Merchants Refrigerating Company. 30

Q. And what does the Merchants Refrigerating Company do? A. They are a New York corporation, and have warehouses in New York and Jersey City and Newark.

Q. And how long have you been in the refrigerating business? A. 38 years.

Q. Do you hold some position in the trade? A. Yes; I am the president of the cold storage division of the American Warehousemen's Association. 40

Q. You were in the cold storage business in the period from December, 1924, to September, 1927? A. Yes.

Q. During that period, and referring to the City of Jersey City, what was the monthly value
10 of occupied space, considered as the rental of a room in a refrigerating plant? A. Our rate would have been at that time 2½ cents per cubic foot per month on a monthly contract.

Q. Do you mean on a contract that can be terminated on a month's notice? A. Contract from month to month.

Q. Would that be for refrigerated space or unrefrigerated space? A. That would be refrig-
20 erated space.

Q. Suppose you had a room in your plant, and turned off the refrigeration; say, a sizeable room. Would that seriously affect the expense of refrigerating the balance of the plant? A. No, it would not; it would have very little effect.

Q. Almost negligible? A. Almost negligible. The cost of operation would not be reduced to any extent by one room being off.

Q. You said that you would charge 2½ cents
30 per cubic foot per month. Would that be a reasonable charge in Jersey City at that time? A. I think it would.

Q. If the room were equipped with a refrigerating plant, but the refrigeration was not actually used; would that be a reasonable charge? A. I think it would. In our case, we would not have rented it in any other way except at a refrigerated price.

40 Q. In the American Warehousemen's Association, have you a standardized basis of charges,

of which that association approves? A. Well, the basis of rates is determined on about what we call a 50 to 60 per cent occupancy; that is, a warehouse is full 50 or 60 per cent of the year.

Q. Well, would these rates that you quoted be the rates as worked out by the rules of the American Warehousemen's Association? A. It would be the basis of the rates. Of course, rates would be determined in different warehouses or different cities by the cost of operation, but the basis would be used universally. 10

Q. If a small portion of one refrigerating unit were occupied by a customer, and by reason of such occupancy the balance of the unit could not be used by the storage company, what would be the reasonable charge for the storage actually used? A. Why, we would charge that rate for the entire space—the full box—used and unused in that room. 20

Q. Is that the custom? A. That is the custom.

Q. That is a reasonable custom? A. It is.

CROSS-EXAMINATION by Mr. Sanford:

Q. Mr. Lewis, when you speak of the renting of a portion of a space in a room, are we to understand that rooms are never rented in part; that they must be rented in their entirety? A. In our case, in their entirety. Usually they are small rooms. Our large storage rooms are never in demand; they are too big for any one individual. 30

Q. For any one individual? Well, then, are your rates any different on your large storage rooms that would not be in demand for an individual than for these small rooms or boxes, as 40

you call them? A. Possibly we might make a little more favorable rate for a large space.

Q. What is the usual size of these small rooms to which your rates of 2½ cents per cubic foot relate? A. About 15,000 cubic feet.

10 Q. Can you put that in terms of square feet, so that we may more readily comprehend it? A. A room 60 x 25 would be about 15,000 cubic feet.

Q. That is what you call a small box? A. That is what we call a small box.

Q. Well, would you say that a room 33 feet by 86 feet by 10 feet 8 inches would be a small box? A. Yes; I would say so.

Q. What kind of articles are you accustomed to 20 handle for storage purposes, to which these rates of 2½ cents per cubic foot would relate? A. Butter, cheese, eggs, poultry.

Q. Do they require separate boxes for storage purposes? A. Yes, sir.

Q. Due to the nature of the articles? A. Yes.

Q. Therefore, when you say that in renting a room of the size that would correspond to a small box, at 2½ cents per cubic foot, the reason that you charge for the entire room, though only a 30 small portion of it is used, is due to the fact that the commodity that would be placed there would require to be stored alone? A. Yes, sir. In other words, you cannot mingle merchandise. For one reason, their different odors. For instance; you would not want to put onions with butter.

40

RE-DIRECT-EXAMINATION by Mr. Boardman:

Q. What degree of temperature do you keep a room in which you have eggs only in storage? A. 30 to 31 degrees. 10

Q. Butter? A. About zero.

Q. Poultry? A. Zero.

Q. You have to separate commodities on the basis of temperatures, as well as odors and other considerations? A. Yes.

Mr. ALFRED B. CODET, sworn. 20

Q. Mr. Codet, what is your business? A. General manager of a cold storage warehouse.

Q. And what is your company? A. Jersey City Cold Storage Company.

Q. How long have you been in the cold storage business? A. 18 years.

Q. In the Jersey City Cold Storage Company? A. Formerly the Eastern States Refrigerating Company. 30

Q. And your plant is in Jersey City? A. Jersey City, yes.

Q. And you are familiar with conditions in the storage warehouse business in Jersey City? A. Yes, sir.

Q. What is the reasonable value of a room in a cold storage warehouse on a monthly rental per cubic foot, per month? A. I would say that 2½ cents per cubic foot per month, figured on a monthly contract. 40

Q. That would be a reasonable charge for space? A. Yes, sir.

Q. On a room in Jersey City? A. Yes, sir. It would be for my house.

Q. Well, do you know of the plant that we
10 call the Lembeck & Betz place? A. Yes.

Q. Would it be a reasonable charge for space in that plant? A. Every plant makes its own rules and regulations. If I ran the Lembeck & Betz plant, I think I would try to get the going value.

Q. And that was the reasonable value for the period from January 6, 1925, to September, 1927? A. Yes. I might add that when Mr. Lews asked
20 me to testify, I looked up eight years revenue against tonnage, and it figured on the yearly basis of twenty-three and a fraction cents per cubic foot per year for cold operation. You would charge more by the month than by the year, although we do not let space that way. We use all our space. We can make more ourselves by operation, we think. We do not like the idea of strangers in the house.

Q. The cold storage business has its busy sea-
30 sons and its slack seasons? A. Yes.

Q. And you have to allow for that? A. You have to allow for that, yes.

Q. Over the year, if a plant is doing well, what would be the average space occupied? A. 60 per cent average. A well run storage plant should be 60 per cent full, average, the year around.

Q. In a plant the size of the National Cold Storage plant, what would be the effect of turn-
40 ing refrigeration off from a room 33 x 86 x 10 ft.

8 inches upon the expense of maintenance? A. I can't see that it would be noticeable. Turning off one room among a vast number of rooms would not affect the engine room expense and the coal expense, and you would not notice the difference in the operation, I should not think. I don't think 10 you could figure it out. We have rooms turned off and put them on and our engine rooms burn just as much coal.

Q. Would coal be the element that would vary, if any? A. I don't know if you could notice it; one room would not effect it.

Q. Would any other unit affect it? A. You would have to have your corps of engineers just the same; you would not eliminate your engi- 20 neers. If you turn off one room, the difference in the cost of operation would not be noticeable. I don't see how you could figure it out.

Q. If a small portion of one refrigerating unit were occupied by a customer, and by reason of such occupancy, the balance of the unit could not be used by the storage company, what would be the reasonable cost of the storage space actually used? A. If a party is hiring a certain amount of space in a plant, we naturally held them to that 30 space unless we could use the rooms. Naturally, if we could use the rooms, we would relieve them of them. We would expect them to pay for the space they contracted for.

Q. You would charge for the whole space, whether used or occupied? A. It would be the same, naturally. We would charge the same for the used space as for the unused space, unless we could relieve them of it. 40

Q. You mean that you charge for the whole room? A. Yes, sir.

CROSS-EXAMINATION by Mr. Sanford:

10 Q. Does your experience as operator of a cold storage warehouse permit you to state whether the storage of ale in a portion of a room would prevent the use of the balance of the room for any other purpose? A. I could not answer that question. There are so many commodities stored that I can't say. I can't think of any that could be put in the same room with ale.

Q. Your experience does not permit you to answer? A. No, sir; I don't take ale.

Mr. EUGENE W. LEWIS, sworn.

Q. What is your business, Mr. Lewis? A. Cold storage.

Q. And what is your company? A. The National Cold Storage Company, Inc.

30 Q. And what office do you hold with that company? A. Treasurer and General Manager.

Q. How long have you been in the cold storage business? A. 40 years last September.

Q. Did you act for your company in the purchase of the plant of the New Jersey Refrigerating Company—the cold storage plant? A. Yes.

Q. When was that sale consummated? A. December 6, 1924.

40 Q. Who were present at the closing? A. Mr. Harrison, Mr. Sanford, Mr. Bock, Mr. Wright, Mr. Siemer, Mr. Eagle, Mr. Little and myself.

Q. Your company had taken over the contract of Mr. Brown, had you? A. Yes, sir.

Q. Now, at this conference at this office, was the presence of this ale in the plant mentioned? A. Yes, sir.

Q. Who brought the subject up? A. As I recall it, it was Mr. Sanford. 10

Q. And what did he say? A. As I recall it, he said: "You know we have some ale in the basement of one of your buildings, but we are trying to dispose of it and expect to get it out in a short time, and we will get it out on 30 days' notice." Mr. Eagle said: "I now serve on you the required 30 days' notice."

Q. Mr. Eagle was your attorney? He was 20 there in that capacity? A. He was there in that capacity, yes, sir.

Q. And he spoke in your presence and in the presence of the receivers? A. Yes, sir.

Q. Do you recall any reply that Mr. Bock made? A. That Mr. Bock made?

Q. Yes. That he would have it out or anything of that sort? A. To my recollection, Mr. Bock concurred in the notice.

Q. Did the receivers vacate the basement of K? 30 This was in the basement of K, wasn't it? A. Yes, sir.

Q. Did they vacate this space within 30 days? A. No, sir.

Q. When did they give up that basement? A. On or about September 1, 1927.

Q. At that time you didn't know what space was occupied? A. No.

Q. You did not know which building it was in? 40

A. Only that it was in the basement of one of our buildings.

Q. Did you have any conversation about the control of the ale—the responsibility for it? A. Yes; I added to what I said to Mr. Harrison on
10 the other question that I considered it contraband and I did not know just how far our company might get in by having ale in their possession, and that, as I understood it, the space under the whole of the building was occupied by the receivers, in which they had some alleged ale stored.

Q. Did you say whether or not you were going to assume any responsibility for it? A. I did that, also. I did tell them that I would accept
20 no responsibility.

Q. Did your company send a bill for the rent of this space? A. Yes.

By Mr. Boardman: Mr. Sanford, have you that bill—the bill that was sent on March 3?

Q. Mr. Lewis, did you send this bill with this letter? A. Yes, sir.

30 Subject to production of the originals, Mr. Boardman offiers in evidence the copies of the letter and bill, marked Exhibits C-I and C-II respectively.

Q. After that bill was sent, was it paid? A. No.

Q. You sent another bill, did you, under date of August 3, 1925? A. Yes, this was sent by our accounting department.

40 Statement by Mr. Sanford: Periodically the receivers received bills from the Nat-

ional Cold Storage Company for the storage of this alleged ale, at the rate of $600.-00 per month.

Q. During all this period, did you ever go down into basement K? A. No, and haven't yet. 10

Q. Were your employees permitted to go to basement K? A. No.

Q. On April 8, 1925, did you have a conference with Mr. Bock about this matter? A. Yes, sir.

Q. What occurred? A. I was over at the building as per his appointment at the warehouse office, and he spoke about the rent on this basement and offered to keep the basement on a rental of $300.00 per month, to which I objected and would not entertain it. 20

Q. And then, after that, you continued to send the bills? A. Yes, sir.

Q. Did he make any other suggestion or offer to you for the past rent? A. No.

Q. And about the furniture? A. Or about the past rent, I think you said. They were trying to dispose of the furniture, and they had had several bids, and, as I recall it, they offered it to us for $650.00 and I told him we could not use it. 30

Q. I show you a letter dated May 13, 1925, addressed to Messrs. Harrison & Roche. Did you send the original of that letter? A. Yes, sir.

Q. Does that refresh your recollection as to what the talk about the furniture was? A. Yes, sir.

Q. What was it? A. I can quote from this letter, can I?

40

Q. Yes, sir. A. (Witness, reading from letter) "Mr. Bock called and made a proposition for us to take over office furniture and fixtures on which they, the receivers, had a bid for $650.00, in lieu of the attached bill for $1,200.00; they to pay
10 for space from March 5 at $300.00 per month."

Q. And that was the offer that you refused? A. Yes, sir.

Mr. Boardman offers the copy of this letter in evidence, marked Exhibit C-III.

Q. Your recollection of the transaction is as stated in your letter, is it? A. Yes, sir.

Q. Ths basement room of building K—is it
20 one refrigerating unit? A. I haven't seen it.

Q. You are familiar with it from the plans, aren't you? A. Yes; it is one refrigerating unit.

Q. During the period from December 6, 1924, to September, 1927, the refrigeration was turned off, was it? A. It had never been on, as I understand.

Q. What is the proper temperature at which ale is kept? A. Between 50 and 60 degrees Fahrenheit.

30 Q. At what temperature are other products that you store, kept? A. From zero Fahrenheit to 33 degrees above zero Fahrenheit.

Q. What would be the effect of zero temperature upon ale? A. It would freeze it solid.

Q. Do you know if that would spoil it? A. Absolutely.

Q. Does chilling of ale spoil it? A. Yes, sir.

Q. That is, when it is stored for any length of
40 time? A. Yes, sir.

Q. Was there talk at the time you took over the plant, about whether this room should be refrigerated or not? A. No, sir.

Q. What would be the effect upon other commodities if they were stored in a room that was kept at the temperature this room was kept at? A. It would destroy any food products. 10

Q. Do you know about the door that leads out of this basement into basement G? How is the adjoining building known—as G or H? A. G.

Q. The buildings are F, G and K? A. K is the building to the north and F is the building to the south, and G is the one in between them.

Q. To return to your bill of $600.00 a month, will you tell us how you came to make up that bill? A. Without knowing the exact space of that particular room, the basis of rental was given to me by Mr. G. W. Lembeck on the same rate at which he had billed or his company—Hudson Storage & Refrigerating Company—had billed the receivers for previous occupancy. 20

Q. And Mr. G. W. Lembeck was one of the old firm of Lembeck & Betz and also connected with the Hudson Storage & Refrigerating Company and the New Jersey Refrigerating Company? A. I don't know that he was ever active with the New Jersey Refrigerating Company. 30

Q. Do you know he was one of the stockholders? A. Yes, sir.

Q. Since this question has arisen, have you gone into the fairness of that charge more carefully? A. Yes, sir.

Q. Did you have the room measured? A. Yes.

Q. What figures have you? A. 33 x 80 x 11 ft. 6 in. 40

Q. Are those the inside measurements? A. Yes, sir.

Q. When did you have those measurements taken? A. Oh, within the last two or three weeks.

10 By Mr. Wright:

Q. Does that include the entire room—the whole basement? A. Yes, sir.

By Mr. Boardman:

Q. That was the room that was occupied by the receivers? A.Yes, sir.

Q. Did the receivers ever tell you that there was an inner room in which this ale was kept? A. No.

20 Q. Did you ever hear of this inner room until this proceeding was started? A. I never knew of it until the proceedings were started.

Q. What was the reasonable value of that space in that room? A. 20 cents a cubic foot per annum.

Q. And that considers that it is in Jersey City? A. Yes, sir.

Q. The receivers could have taken it out on 30 days' notice, could they? A. Yes, sir.

30 Q. On a basis of monthly tenancy, what would you say the space was worth per month? A. Approximately 2 cents a cubic foot per month.

Q. Have you computed the interest that would have accrued on these interest installments from the time they came due until December 6, 1927? A. I have had it computed; I did not do it myself.

Q. How much does that interest amount to? 40 A. $1,866.00.

Q. Have you computed the cubic volume of this room? A. Yes, sir, but I have not got the figures. It is approximately 30,000 cubic feet.

Mr. Sanford: The receivers have computed it, I believe, at 30,650 feet. 10

Mr. Boardman: Will you admit that those figures amount to 30,650 cubic feet, subject to correction?

Mr. Sanford: We are ready to admit that there is approximately 30,000 cubic feet in the whole of basement K, in a portion of which the ale was stored.

Q. Have you computed it since the last question was asked you? A. Yes, sir. 20

Q. And what is the cubic volume of that room, according to that computation? A. 30,360 cubic feet.

Q. Did you get some earlier figures and compute it on the outside measurement? A. Yes, sir.

Q. The original report to you gave you the outside figures, did it? A. Yes.

Q. And that made it larger? A. The space was greater, of course. In round figures, it was 37,000 cubic feet. 30

Q. Mr. Lewis, what would have been the extra cost to refrigerate that room with the rest?

Mr. Sanford: I object to the question as being irrelevant. The facts have already been proven, and it is an actual situation, and not a hypothetical one, which confronts us.

A. Practically nothing. 40

By Mr. Wright:

Q. Who had charge or supervision of that vestibule in the basement of building K besides the receivers? A. No one.

Q. No one had anything to do with it? A. No,
10 sir.

CROSS-EXAMINATION by Mr. Sanford:

Q. Was there anyone in the employ of the National Cold Storage Company who had supervision of room K, where the ale was stored? A. No, sir.

Q. Where were the keys to the doors of room K? A. Mr. Dill, who represented the receivers,
20 had them.

Q. How do you know he had them? A. I was told so.

Q. Who told you so? A. Mr. Parker and Mr. Siemer.

Q. Was Mr. Siemer in the employ of the National Cold Storage Company? A. He was for a short period of, I think, 30 or 60 days.

Q. When did Mr. Siemer tell you that Mr. Dill had the keys? A. Right at this office at the time
30 of passing title.

Q. Did you ask Mr. Dill for the keys? A. No.

Q. Do you know whether anybody in the employ of the National Cold Storage Company asked Mr. Dill or the receivers of the New Jersey Refrigerating Company for the keys to room K? A. Not to my knowledge.

Q. Did the receivers turn over to you possession of the plant of the New Jersey Refrigerating
40 Company at the time of closing of title? A. Yes, sir.

Mr. Boardman: I move that this question be struck out as calling for a conclusion. We have heard what happened. Whether the receivers turned it over, or whether the Hudson Company turned it over would be something that I think none of us could answer; it calls for a conclusion of law. It is not a question of fact exactly. 10

Mr. Sanford: It is a question of fact.

Q. Mr. Lewis, don't you know that every time the receivers or their representatives went to examine the ale on storage in the space partitioned off in room K, the receivers or their representatives obtained the keys from your employees in the plant of the National Cold Storage Company? A. No. 20

Q. Who was in charge of the plant of the National Cold Storage Company in Jersey City after the National Cold Storage Company took title in December, 1924, down to December, 1927? A. Eugene W. Lewis, Jr.

Q. Is that your son, Mr. Lewis? A. Yes, sir.

Q. At the time of the closing of the title, Mr. Lewis, and the discussion which then took place with reference to the ale, did you not say, in substance and effect, that the National Cold Storage Company would assume no responsibility for the custody or care of the ale? A. Yes, sir. 30

Q. And was not the agreement made at that time between you and the receivers substantially as follows: that approximately 250 barrels of ale stored in the cellar of building K may remain there for 60 days, within which time the same is to be removed, and that the National Cold Storage 40

Company will assume no responsibility for the custody or care of the ale? A. The question of quantity is not clear in my mind, and moreover, the matter of 60 days was not discussed.

Q. However, at that time, do you recall that 10 you or someone in behalf of the Storage Company said, in effect, that the Storage Company would assume no responsibility for the custody or care of the ale? A. Yes, sir.

Q. Do you recall the dictation by Mr. Harrison at that time, that is, on December 6, 1924, at the closing of title, of a memorandum referring to four matters:

(1) As to the dispositon of the junk and machin- 20 ery;

(2) As to the title to the pipe and fittings on hand;

(3) As to the removal by the receivers of disconnected and obsolete machinery; and

(4) As to the ale?

A. I do not recall.

Q. Do you recall receiving a copy of such mem- 30 orandum, either in person or through some of your representatives at that time? A. I never received it.

Q. And was it not upon the basis of the agreement expressed in that memorandum that the disposition of the junk and the pipe and fittings and the disconnected and obsolete machinery was made?

Mr. Boardman: I object to that, because 40 he has answered that he does not recall any

such memorandum; that he never had a copy of it.

A. I do not recall such a memorandum.

Q. Upon what basis, then, was the disposition of the junk and machinery and pipe fittings and the disconnected and obsolete machinery made? A. Verbally here; and I want to say it was never carried out.

Q. Mr. Lewis, I show you a copy of a letter, dated March 9, 1925, addressed to the National Cold Storage Company, Essex & Hudson Streets, Jersey City, N. J., for the attention of Mr. E. W. Lewis, purporting to be in response to a letter of March 3 to the receivers of the New Jersey Refrigerating Company, which letter is marked in evidence as Exhibit C-1, and ask you if you remember receiving that letter? A. Yes.

Q. In that letter it was stated that the receivers would endeavor to remove the ale within 60 days, and that there was no agreement as to payment of storage charges, nor was there any intention between the parties that the ale was to be left on storage. Did you ever reply to that letter, Mr. Lewis? A. I don't remember.

The original letter is offered in evidence and marked Exhibit R-2.

Q. I show you a letter, dated September 29, 1925, addressed to National Cold Storage Company, or rather a copy of a letter, acknowledging receipt of bill of National Cold Storage Company of September 5, 1925, for one month to September 5 for storage of ale, this letter being signed by J.

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40

H. Harrison. Did you receive that letter, Mr. Lewis? A. Yes.

Letter offered in evidence and marked Exhibit R-3.

10 Q. Did you ever reply to that letter of September 29, 1925, Mr. Lewis? A. I don't think so.

Q. As I recall it, Mr. Lewis, you testified regarding measurements, by outside figures, of the room? What did you mean by "outside figures?" A. The outside of the rooms—not the inner side. We had to take the outside of the outer building, because we could not get in the room.

20 Q. When was that measurement taken? A. Shortly after the Vice Chancellor ordered the goods destroyed, or whoever ordered them destroyed.

Q. Shortly before September 1, 1927? A. That would be governed a great deal by what the Chancellor ordered. It was some time prior to September 1.

Q. What proceedings do you refer to before the Vice Chancellor? A. Where the ale was to be 30 destroyed, and he ordered the receivers to set aside the sum of $20,000.00 for the payment of the proved claim of the National Cold Storage Company.

Q. What did you do with those figures, Mr. Lewis? What did you use those figures for? A. For arriving at the basis of a charge, or to prove a charge.

Q. Well, did you intend to make any deduction 40 for the space occupied by the walls when you took the outside measurement of the building before?

A. We attempted to. I think we told them to allow a foot each way around.

Q. You afterwards made a further measurement? A. A further measurement was made; I did not make it.

Q. Do I understand the National Cold Storage Company made it? A. The company made it —somebody in the company. 10

Q. Under your direction? A. Yes, sir.

Q. You had access to the building at that time, and room K? A. When the inside measurement was taken, yes.

Q. When was that measurement taken? A. I can't recollect the date of it. It was after September 1, 1927. 20

Q. Why do you fix the date September 1, Mr. Lewis? A. Because we did not have access to the room before.

Q. How did you get access to the room then? A. After the ale was destroyed by the Government.

Q. During the time the ale was on storage, between December 6, 1924, and the date of its destruction, did you ever enter room K? A. No, sir. 30

By Mr. Boardman:

Q. Mr. Lewis, did you sign this letter dated May 25, 1925, addressed to Messrs. Harrison & Roche, in this matter? A. Yes, sir.

Letter is offered in evidence and marked Exhibit C-4.

Q. You were asked if you had made any reply to Mr. Harrison's letter of March 9 to the Na- 40

tional Cold Storage Company. As I recall it, you said you did not remember. I show you that letter, upon which you have made a notation. Does that recall to your mind that you replied to it, either orally or in writing? A. I take it that this 10 memorandum was the reply to the letter (witness reading from letter): "April 8, 1925. Mr. Bock called. Made proposition for us to take over office furniture and fixtures on which they had a bid for $650.00, in lieu of the attached bill for $1,200.00. They pay for space from March 5 at $300.00 per month."

Q. On what is that notation? A. It is on a letter of Harrison & Roche, dated March 9, 1925.

20 Q. And when did you write it? A. On April 8, 1925.

By Mr. Sanford:

Q. You permitted one month to elapse, Mr. Lewis, before making what you state was your reply to that letter? A. I allowed one month to elapse?

Q. Yes. A. Exactly.

Q. You did not seek that interview with Mr. Bock, I gather from the memorandum? A. No.

30 Q. He called upon you? A. Yes.

Hearing adjourned to Thursday, December 15, 1927, at 2:15 p. m.

40

IN CHANCERY OF NEW JERSEY

In the Matter

of

The Dissolution of NEW JERSEY REFRIGERATING COMPANY.

10

Minutes of adjourned hearing before Receivers of New Jersey Refrigerating Company in the matter of the claim of National Cold Storage Company for rent of basement of Building K, 519 Henderson Street, Jersey City, New Jersey, held at 2:15 p. m. on Thursday, December 15, 1927, at No. 810 Broad Street, Newark, New Jersey.

20

Appearances:

Richard Boardman, Esq., of Jersey City, appearing for Claimant.

Edwards S. Sanford, Esq., of Newark, N. J. appearing for Receivers.

30

Frank J. Bock, Receiver.

EUGENE W. LEWIS, sworn.

Direct-examination by Mr. Boardman:

Q. Are you the son of Mr. Eugene W. Lewis, who was on the stand on December 6? A. Yes, sir.

40

Q. What is your occupation? A. Superintendent of the National Cold Storage Company, Jersey City.

Q. How long have you been in that office? A. I have had that office since December 8, 1924.

10 Q. Before that, you were with whom? A. I have been in the cold storage business before.

Q. With the National? A. With the National in Brooklyn.

Q. You are familiar with the plant of the National Cold Storage in Jersey City? A. Yes, sir.

Q. Are you familiar with the construction of the basement of building K? A. Yes, sir.

Q. What does the basement of building K

20 consist of? A. It is a regular refrigerator cold storage room; insulated, and piped with cooling coils.

Q. This basement is one large room? A. One large room, yes.

Q. How many doors are there to that room? A. Two doors.

Q. And what are the dimensions of that room? A. 80 x 33 x 11-6.

Q. You measured it yourself? A. Yes, sir.

30 Q. And when did you measure it? A. Sometime in November, 1927.

Q. Those are the interior measurements? A. Yes, sir.

Q. Earlier in the summer, did you take any other measurements? A. Yes; I got some outside measurements for Mr. Lewis, the general manager.

Q. For him? A. Yes.

40 Q. The result of those measurements was slightly at variance with these interior measure-

ments? They were larger than the actual inside figures, if I recall? A. Yes, sir.

Q. Is this basement of building K one, or is it more than one, unit for the purposes of refrigeration? A. It is one unit.

Q. That is, you cannot chill half of it and not the whole? A. No, sir. 10

Q. In what condition was the door on the side of this room in this building K—in the basement? A. The side door was fastened on the inside, the fire door closed over and batted down.

Q. When was that condition changed? A. When they removed the contents of the room on September 2, 1927.

Q. For what purpose was it taken down? A. To dump the ale. 20

Q. Why was it done? A. So that we could get the ale dumped faster. We had two sewers in that room and two through the other door.

Q. When you went to the warehouse in December, 1924, did you have a key to this basement? A. No, sir.

Q. When, and under what circumstances, did you have a key to that? A. Why, in November or December, 1925, the carpenter reported to me that the lock on the door was in poor condition and wanted to know if he should put on another lock; I told him yes. He sent and got another lock and put it on. 30

Q. Which door was that? A. It was on the front door leading in from the elevator.

Q. Outside door? A. Yes, sir.

Q. What became of the key to that lock? A. Why, sometime along about the spring of 1926 I gave that key to Mr. Dill. 40

Q. At his request? A. Well, no; it was not at his request.

Q. What happened? A. Why, some of the receivers and one of their attorneys, Senator Harrison, was there. They wanted to go down.
10 They had a chemist they wished to examine the ale, and we had a hard time turning up the key, and when we did turn up the key, I then presented it to Mr. Dill.

Q. Had you forgotten what you had done with the key? A. Well, prior to that the key was probably up in the shipping office in a drawer, and I never gave it another thought.

Q. At that time that was the only key to that
20 lock, was it? A. Yes, sir.

Q. What kind of a lock was it? A. A Yale padlock.

Q. What number was it? A. Change 229.

Q. And where is that padlock now, and the key? A. The padlock and key are in the shipping office right now, I believe.

Q. Did you get it back some time? A. I got it back the day they opened the cellar to dump the ale.

30 Q. Well, between the time when the receivers were there with the chemist and the time when the ale was dumped, who had the key? A. Mr. Dill.

Q. Who produced it? A. Mr. Dill.

Q. Who went down and opened the door when they went in to destroy the ale? A. Mr. Dill.

Q. Who is Mr. Dill? A. Why, he works for the receivers.

Q. From the time, December 8, 1924, until the
40 carpenter put on the lock, did the National Cold

Storage Company have a key to that room? A. No, sir.

Q. What kind of products does the National Cold Storage house in the Jersey City plant? A. Food products, fruit and vegetables, poultry, eggs, meats and butter. 10

Q. At what temperature must those things be kept? A. From a range of zero to 32 degrees Fahrenheit.

Q. Was anyone in the employ of the National Cold Storage Company permitted to go down to basement K during the period from December 8, 1924 to September 2, 1927? A. No, sir.

Q. When you took charge of the plant, did your father give you any instructions in reference to the basement of building K? A. Yes, sir. 20

Q. What were they? A. He said that the basement of K was rented, and we were not to use it.

CROSS-EXAMINATION by Mr. Sanford:

Q. Do you recall when Mr. Lewis, your father, told you that the cellar of K was rented? A. Yes, sir.

Q. About what date was it? A. About December 8, 1924, when I went to work there. 30

Q. You say it was in March, 1926, or the spring of 1926, that you gave the key to cellar K to Mr. Dill? A. Yes, sir.

Q. How do you fix that date? A. I haven't any way of fixing it. It is to the best of my recollection of the time when Senator Harrison, Mr. Bock, Mr. Wright and a chemist and Mr. Dill came there to take samples.

Q. You say the lock was replaced in 1925? A. November or December; yes, sir. 40

Q. In November or December, 1925? A. Yes, sir.

Q. Did you examine the lock before you authorized the carpenter to change it? A. No; I did not.

Q. What was the carpenter doing down there?
10 A. We had him there, fixing doors around the place, changing some locks in the building, because there were some keys out on these locks and we wanted to have our own keys.

Q. Then the period of time that elapsed while you held this key was merely one of a few months? A. Yes, sir.

Q. Do you recall the circumstances in connection with the turning over of the key? How did
20 you know the receivers wanted to get into cellar K? A. Why, Mr. Dill came and asked me.

Q. Where were you? A. Probably I was around the building—on the platform somewhere.

Q. What did you do then? A. I went down with the receivers and Mr. Dill, and when we got down there I didn't have the keys, so I sent back up to the office and it took some time to turn up the key. In the meantime we had decided we
30 would have to break the lock, but when we got down there, they found the key in the office and sent it down. We opened the lock and I gave the key to Mr. Dill at that time.

Q. Did you say anything to him when you gave him the key? A. I might have.

Q. Did you give him any instructions as to keeping the key? A. No; I don't think so.

Q. Did you tell him why you gave him the key?
40 A. No; I don't think so. I might have said to him

"Better take this key, because it will be lost." I don't just remember what I did say.

Q. Isn't it a fact that in March or April of 1927 one of the receivers accompanied by Mr. Harrison, Mr. Dill and the chemist, attempted to enter the cellar K and you came downstairs and opened that door leading into the cellar? A. I have already told you how that happened; how I had to go look for the key. 10

Q. I asked you if it wasn't a fact that such a circumstance occurred in March or April, 1927? A. I don't think I can be a year out of the way. I am under the impression it was in the spring of 1926.

Q. Answer my question: Isn't it a fact they went there and tried to get into cellar K in March, 1927, and that you came downstairs and opened that door leading into cellar K? A. I can answer that question, yes. 20

Q. Answer it Yes or No. A. Yes; but not as to the date. I can't get pinned on the date. I am not positive as to that. I know that Mr. Wright, Mr. Bock, Mr. Dill, Senator Harrison and a chemist came there and I did have to look for a key to open the door. 30

Q. Well, my question was: Did this circumstance occur in March or April of 1927.

Mr. Boardman: I object. He has answered that already.

By Mr. Boardman:

Q. That cicrumstance happened only once? A. Yes.

40

Mr. Sanford (continuing):

Q. Is that the only time you saw either one of the receivers, or both, and Mr. Harrison and a chemist? A. Yes, sir.

Q. Trying to make entry to room K? A. Yes, sir.

Q. What kind of fruits and vegetables do you store in the National Cold Storage plant in Jersey City, Mr. Lewis? A. Apples, pears, onions, carrots, lettuce, celery.

Q. What temperature is required for apples? A. 31 or 32 degrees above Fahrenheit.

Q. Pears? A. The same.

Q. Celery? A. 32.

Q. Onions? A. 30½.

Q. Did you advise the receivers of Mr. Dill that you had authorized the lock to be changed on the door? A. I don't believe I did.

Q. Although your father had told you that the cellar was rented, and that no employee of the National Cold Storage Company was allowed to go down there, you had this lock changed? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Boardman:

Q. Did you tell your father that you had directed the carpenter to change the lock? A. I don't believe I did.

Q. You said something about there being other keys out, and you only wanted one key. That had reference to rooms other than this basement? A. Because I found up in the safe in the office a box of keys which would open all of the doors. It was

not a very good condition there, especially when I was losing things.

Q. And this carpenter was changing the locks all around in the plant? A. Yes, sir.

Q. If you have made a mistake of a year in respect to the time when the chemist and the other gentlemen came; was that the spring following the time that you had the change made? A. I was under the impression that it was, yes. 10

By Mr. Boardman: I offer in evidence 25 copies of bills, dating from August 3, 1925, to August 6, 1927, made out to the Receivers, and which read: "To rent of space in basement of Build 'K' ", etc, marked Exhibit C-1—Dec. 15, 1927. 20

Testimony closed.

DISPUTE OF CLAIM OF NATIONAL COLD STORAGE CO., INC.

IN CHANCERY OF NEW JERSEY

In the Matter

10

of

The Dissolution of New Jersey Refrigerating Company.

To National Cold Storage Co., Inc., Jersey City, N. J., and to Richard Boardman, Esq., Solicitor
20 *for National Cold Storage Co., Inc., 15 Exchange Place, Jersey City, N. J.:*

Please Take Notice that the undersigned, Receivers of New Jersey Refrigerating Company, dispute the whole and every part of the claim of National Cold Storage Co., Inc., amounting to the sum of $19,200.00, with interest on the sum of $600.00, as set forth in the proof of claim sworn and subscribed to by Eugene W. Lewis, as Treas-
30 urer and General Manager of said corporation, on September 1, 1927, and thereafter filed with the undersigned, and that the undersigned refuse to pay said claim or any part thereof.

FRANK J. BOCK,
EDWARD H. WRIGHT,
Receivers of New Jersey Refrigerating Company.

40 Dated: Newark, N. J.
January 4, 1928.

PETITION OF APPEAL FROM DETERMINATION OF THE RECEIVERS.

IN CHANCERY OF NEW JERSEY

In the Matter

of

The Dissolution of New Jersey Refrigerating Company.

10

The petition of National Cold Storage Co., Inc. respectfully shows that your petitioner, being a creditor of Frank J. Bock and Edward H. Wright, Receivers of the New Jersey Refrigerating Company, to a large amount, for rent and for use and occupation of premises of your petitioner, used and occupied by the Receivers, did heretofore and within the time limited by an order of this court made herein on the fifteenth day of August, nineteen hundred and twenty-seven, present its claim to the said Receivers for allowance; that the same was presented in due form, properly proved and substantiated by evidence, and submitted to the said Receivers together with further proofs, and that the said Receivers have disputed and disallowed the entire claim and have refused to pay the said claim or any part thereof.

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Your petitioner conceives that it is aggrieved by such refusal and disallowance of said Receivers, and insists that its claim is a just claim and that it should have been allowed as a just claim, and that it should have been allowed in the full

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amount of Nineteen Thousand, Two Hundred Dollars ($19,200) with interest, as set forth in the proof of claim, or in the alternative, that it should have been allowed for such other sum as was
10 legal, equitable and just.

And your petitioner respectfully appeals from such determination of said Receivers refusing the claim as aforesaid and disallowing the same, to this Honorable Court, and prays that the same may be reversed and such order made in the premises as shall be agreeable to equity and good conscience.

20 And your petitioner will ever pray, etc.

NATIONAL COLD STORAGE CO., Inc.,
by Richard Boardman,
Solicitor and Of Counsel
with Appellant.

ORDER TO ANSWER.

(Filed Jan. 7, 1928)

IN CHANCERY OF NEW JERSEY

In the Matter of The Dissolution of New Jersey Refrigerating Company.	On Petition of Appeal from Determination of the Receivers.

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The National Cold Storage Co., Inc. having filed its petition of appeal from the determination of the Receivers in this matter, and having served the same on the Receivers on the 14th day of January, 1928; 20

It is, on this 17th day of January, 1928, on motion of Richard Boardman, solicitor for and of counsel with the National Cold Storage Company, Ordered that Frank J. Bock and Edward H. Wright, Receivers of the New Jersey Refrigerating Company, answer the said petition of appeal within ten days of the said 14th day of January, 1928, and that a copy of this order, which need not be certified, be served upon said Receivers, or their solicitors, within two days of the date hereof. 30

E. R. WALKER,
C.

Respectfully advised
Jno J Fallon
V. C. 40

A true copy. Thomas Barber, Clerk.

ANSWER OF RECEIVERS TO PETITION OF APPEAL OF NATIONAL COLD STORAGE CO., INC., FROM THEIR DETERMINATION.

IN CHANCERY OF NEW JERSEY

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In the Matter

of

The Dissolution of THE NEW JERSEY REFRIGERATING COMPANY.

The answer of Frank J. Bock and Edward H. Wright, receivers in dissolution of the New Jersey Refrigerating Company to the petition of appeal of National Cold Storage Co. Inc., from the determination of the receivers rejecting the claim of National Cold Storage Co. Inc.

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Frank J. Bock and Edward H. Wright, Receivers of New Jersey Refrigerating Company, answering the petition of the petitioner, pursuant to the order of this court made January 17, 1928, say that:

30

1. The allegations contained in the first paragraph of the petition of appeal are denied, excepting insofar as they are admitted by the following statement: That within the time limited by an order of this court made herein on August 15, 1927, National Cold Storage Co., Inc., did present its claim to the receivers for allowance; said claim was presented in due form, properly proved and submitted to the receivers with further

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proofs, which proofs the receivers deemed insufficient, and that the receivers have disputed and disallowed the entire claim and have refused to pay said claim or any part thereof. 10

2. They deny each and every allegation contained in the second paragraph of the petition of appeal, excepting so much as alleges that "your petitioner conceives that it is aggrieved by such refusal and disallowance of said receivers."

3. Your receivers, further answering, say that on December 6, 1924, they conveyed to National Cold Storage Co. Inc., the cold storage plant of 20 the New Jersey Refrigerating Company on Ninth Street, Jersey City. On that date, to wit, December 6, 1924, your receivers were using a portion of the basement in building K of said cold storage plant for the storage of approximately 250 barrels of ale, and on December 6, 1924, at the time of the closing of title and the delivery of the deed for the aforesaid premises, it was agreed between the receivers and National Cold Storage Co. Inc., that said ale might remain for sixty days from 30 said date, to wit, December 6, 1924, in that portion of the cellar of building K which it at that time occupied, without charge or cost to the receivers, and that within said sixty days said ale should be removed, and it was further agreed that National Cold Storage, Co., Inc., assumed no responsibility for custody and care of said ale. Thereafter, upon the petition of the receivers, verified February 11, 1925, application was made 40

to this court for an order to destroy said ale, which order was refused. Further application having been made to this court on or about March 10 26, 1925, for the destruction of said ale, an order was granted by this court directing the stockholders of New Jersey Refrigerating Company to show cause before it on March 31, 1925, why an order should not be made directing the destruction of said ale. Before the argument on the return of said order to show cause was had, your receivers were restrained in the United States Courts from destroying said ale, which restraint 20 remained in effect until May 23, 1927. Upon the restraint being terminated, the receivers in September, 1927, under an order of this court, destroyed said ale; that the space occupied by said ale in the cellar of building K in the plant of the National Cold Storage Co., Inc., on Ninth Street, Jersey City, N. J., was approximately somewhat less than one-quarter of the cellar area, the dimensions of such space so occupied being 15 feet by 48 feet by 10 feet 8 inches in height, the meas-30 urement of the entire cellar being 33 feet by 86 feet by 10 feet 8 inches in height, and that the space occupied by said ale was partitioned off from the remaining portion of the cellar by a partition running from the floor to the ceiling; that your receivers never occupied any space in the cellar of building K in said plant other than that portion in which said ale was stored as aforesaid, and that the balance of said cellar space was 40 never used or occupied by your receivers; that

Answer of Receivers to Petition of Appeal of National Cold Storage Co., Inc., from Their Determination

National Cold Storage Co. Inc., has charged your receivers at a monthly rate of $600.00 per month for the storage of said ale from January 6, 1925, to the date of the destruction of said ale contrary to the agreement between your receivers and National Cold Storage Co. Inc. of December 6, 1924, and has charged your receivers for the entire storage space in the cellar of building K; that said monthly charge of $600.00 is exorbitant and grossly excessive. 10

Your receivers are advised and believe that their determination rejecting the claim of National Cold Storage Co. Inc., is agreeable to equity. They pray that the same may be confirmed by this court and that they be hence dismissed with their reasonable costs and charges in their behalf most wrongfully sustained. 20

FRANK J. BOCK,
EDWARD H. WRIGHT,
Receivers,
By J. H. Harrison,
Solicitor for and of counsel with receivers. 30

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TESTIMONY TAKEN BEFORE VICE CHANCELLOR CHURCH.

IN CHANCERY OF NEW JERSEY

March 1, 1928.

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In the Matter
of
The Dissolution of The New Jersey Refrigerating Company.

20 Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alonzo Church, Vice Chanrellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Richard Boardman, with whom was Mr. Eagle and Mr. Francis of the New York Bar, for National Cold Storage Company, claimant; J. Henry Harrison and E. S. Sanford for Receivers Frank Bock and Edward Wright.

30 Mr. Boardman: This is a petition of appeal and an answer from the decisions of the receivers in the New Jersey Refrigerating Company case. This proceeding really was initiated last summer when your Honor made an order for the destruction of the ale and a setting aside of the notes to meet the rent for the use and occupation on the basis of cash and you gave us time then to file our proof with the receiver.

40 We filed our proof and they called upon us to produce additional proof and we took testimony

before the receivers which it was stipulated should be used here before your Honor in case of an appeal if the decision were adverse. The decision then came down adverse and we appealed—filed a petition of appeal and the receivers have formally answered and the matter is here in order to enable us to present our testimony that we have already taken and for the receivers to present their proof in response. Shall I read the books we have taken? 10

The Court: No, I will read that myself.

Mr. Harrison: I think it can be very easily summarized, your Honor please.

Mr. Boardman: May I summarize it?

The Court: Yes. 20

Mr. Boardman: The situation was this: The title passed at Senator Harrison's office on December sixth, 1924. There were a large number of lawyers and the receivers were there and the thing was done in quite a large way—audience.

At that time there was stored in the basement of Building K some two hundred and fifty barrels of ale. The existence of this was unknown to us until it was mentioned there that day. The purchasers, the National Cold Storage Company, refused to take any responsibility. There was some talk—the testimony is that Mr. Bock said, "We will get it out within thirty days," and thereupon, Mr. Eagle, speaking for the purchaser said, "I give you then notice to get it out in the time." I think the other side may have some suggestion that it was sixty days that was mentioned, but it was either thirty or sixty, and our proof is positive that it was thirty days. Thirty 30 40

days went by and they did not get it out and more time went by. We sent them a bill in March for this two months that was then in arrears. On March 3 we sent them a bill for the arrearages for two months at six hundred dollars a month.
10 To that they replied.

Now, Mr. Lewis was the president of the company—and who, I might say, died since we took our proofs before the receiver, testified that he got that figure from Mr. Munday, who was in control, apparently, between the time of the contract under which the property was sold and the time when the title passed to us. We took title direct from the receivers. That figure was also testi-
20 fied to by Mr. Siemer, who was the president of the Hudson Storage Company, who were tenants during the intervening period between the date of the sale and the date of the perfection of the contract.

On December sixth, as I say, there were several papers signed; the deeds were delivered and we went in there following that. And on December we gave them the notice to get out at the end of the thirty days, and in March we delivered—on
30 April 8th in response to our bill, Senator Harrison wrote a letter, which is in evidence, in response to that bill, and on April eighth Mr. Bock came in to see Mr. Lewis in respect to two things: the receivers had some furniture they wanted to dispose of, and we had a bill against them for this storage for two months, and they came in and Bock made this offer that we put the furniture on which the best offer they had been able
40 to get, six hundred and fifty dollars, on settle-

ment of our twelve hundred dollar bill for rent in arrears and that we continue to carry the property in lieu—let it stay there at three hundred dollars a month. That we refused and we continued to bill them at the rate of six hundred dollars until the ale was destroyed here on September second, 1927. 10

The value of that room was testified to by the president in one case and general manager in the other, as I recall, of two of the leading storage warehouse companies in the Metropolitan District. Oh. First by Mr. Siemer, who had been with the Lembeck & Betz Company, then the New Jersey Refrigerating Company and then with the Hudson Storage Company and following that we 20 put on Mr. Harry Lewis, who was no relation to the other Mr. Lewis and who is the treasurer of the Merchants Refrigerating Company, and he testified that this space was worth two and a half cents per month and there were thirty thousand cubic—per cubic feet a month, and that would be thirty cents per year. It would be more than we planned. Mr. Lewis was also president of the Cold Storage Department of the Warehouse Men's Association. The figures he gave were in 30 harmony with the figures approved by the national organization. Mr. Cody was general manager of the Cold Storage Warehouse Company. His company was a Jersey City Cold Storage Company. He had eight years in business "And I should say two and a half cents per cubic foot per month figured on a monthly contract and it would be less if it were on a yearly contract."

Now, that is our case, your Honor. 40

Mr. Harrison: I think, your Honor please, it may be helpful if I state in a general way what the contentions of the receivers are.

This liquid, as we term it, was alleged ale, and the proof will show it was sour and of such a 10 character as to be unfit for human consumption, which we contend was well known to the purchasers of the plant.

It will also appear, at the time the alleged ale was left in the plant of the National Cold Storage Company, the purchaser of the plant assumed no responsibility for the custody or care of the ale. It will also appear that this alleged ale was stored in the corner of a basement occupying approxi- 20 mately seventy-five hundred cubic feet, or a space that made up approximately seventy-five hundred cubic feet, of a larger room which contained some thirty thousand cubic feet.

Our contention will be that we did not have control of this thirty thousand cubic feet which the claimant contends we did have control of, and all that we had was mere storage space in the corner of this larger basement, and that we had to get access to the larger room by going to the 30 officers of the National Cold Storage Company and obtaining a key from them and going in with the officers.

We do not contest the reasonableness of the charge for cold storage, or alleged to be reasonable by the petitioner, namely twenty cents a cubic foot per year. However, our contention is that, even though we may be held for storage at that rate, we only occupied approximately 40 seventy-five hundred cubic feet and that the

amount which we should be responsible for under that theory, instead of being in the neighborhood of seventy-two hundred dollars a year, should be in the neighborhood of fifteen hundred dollars a year; the whole period which it is admitted we occupied that space, whatever the space was, ex- 10 tending from March the first, 1925, until September the second, 1927, a period of approximately thirty-one months. Second, our contention will be that there was no responsibility in the petitioners to take care of this ale and that we did not have cold storage, that we merely had what is known as common storage, and that what we should be charged for should be not the cold storage rate, but the ordinary or common storage 20 rate, which our proof will be is in the neighborhood of approximately sixty to eighty cents a square foot per year, making the whole charge on this area, the dimensions of which were approximately fifteen by fifty feet or seven hundred square feet—seven hundred fifty square feet, in the neighborhood of five hundred dollars per year for the use of that space as common storage space, so it is not denied that we did occupy a portion of this space. 30

Now, the circumstances surrounding the detention or retention of this ale are somewhat peculiar. Upon the closing of the title to the plant in December, 1924, application was made to your Honor for the destruction of the ale. Pending the consideration of that matter by your Honor, the receivers were restrained by an order of the United States District Court of this district from the destruction of the ale, and, pending the liti- 40

gation in the United States District Court, the receivers were unable to do anything with the ale itself, and not until the appeal was determined against the complainant in the United States District Court, or in the Circuit Court of Appeals of
10 the Third Circuit, were the receivers able to destroy the ale under the direction of your Honor.

Mr. Boardman: May I say just a word? I think I can clarify this. Our answer replied to that, that while the ale was stored in that small room we had no agreement—everything that was talked of was of assuming control in the outer room, but, even assuming they used only the inner room, nothing was ever said about how much
20 space they were using. They were using Basement K. That was the larger room. Basement K was a single refrigerating unit and the presence of ale in there rendered the rest of the unit unusable because, had we chilled that room to use it for our other products which we store which would require something chilling, below 32, that would have ruined the ale; and, while we assumed no permanent duty to take care of the ale, we did assume the duty we could not get away from—
30 was not sabotage—not to destroy it.

Mr. Harrison: I think that is a matter of argument.

Mr. Boardman: I just wanted to point out the matter that is involved.

40

FRANK J. BOCK, sworn.

Direct-examination by Mr. Harrison:

Q. Mr. Bock, you are one of the receivers of the New Jersey Refrigerating Company? A. I am. 10

Q. Were you present at the closing of title to the so-called plant property in Jersey City on December sixth, 1924, when the receivers transferred to the National Cold Storage Company this property on North 9th Street, Jersey City? A. I was.

Q. Was any reference made at that time to some alleged ale which was then in the custody of the receivers? A. Yes, sir.

Q. Who was present? A. Mr. Lewis, Mr. 20 Eagle; I am not certain whether Mr. Boardman was or not, but some other representative, and Senator Harrison—you were present, and myself. Now, I don't recall who else—and Mr. Sanford.

Q. And Mr. Sanford? A. Mr. Sanford.

Q. What discussion was had concerning the ale referred to? A. Mr. Lewis wanted to know what about the ale that was stored there and I said, "Well, we will get the ale out just as soon as possible. Of course, you cannot move the ale 30 without the action of the United States Court—or, not the Court, but the Prohibition officials and also the Court of Chancery, but we would get it out just as soon as possible." "Well," they said, "What do you mean by that?" "Well," I said, "It will probably take us two months, anyway, to get it out." And he said, "All right. We will permit you to keep it there sixty days without any charge and—" 40

Q. What, if anything, was said about the responsibility of the cold storage company for the custody or care of the ale? A. Mr. Lewis said, "Of course, we will assume no responsibility—" I think Mr. Eagle also—"absolutely no responsi-
10 bility for the custody of the ale." And then Mr. Dill stated that he would serve notice on the receivers then and there to remove the ale within sixty days.

Q. Were there some other matters that came up in connection with the closing of title to which the receivers and purchaser gave consideration? A. There were a number of matters that were discussed, naturally, in the closing of the title,
20 but I don't recall anything in connection with the ale itself.

Q. Do you know how those other matters were put down or whether any record was made of them? A. I know that you made a record.

Q. In what way? A. Dictated a memorandum of what was agreed to at the time of this settlement.

Q. Did you ever see that memorandum which was dictated by me there and put in type? A. I
30 have.

Q. I show you a paper writing marked "Confidential memorandum for the receivers, December 6, 1924," and ask you if that is the memorandum?

Mr. Boardman: Just a minute before you—

A. (Interrupting) Yes.

40

Mr. Harrison: I ask that be marked for identification.

(Paper marked D-1 for identification.)

Q. When I dictated this memorandum were all the parties present? A. Yes.

Q. And where was this title closing had? A. In the office of the Park Commission in 810 Broad Street.

Q. And do you recall what I dictated about the ale? A. Yes, sir; that the ale was to— 10

Mr. Boardman: (Interrupting.) Just a minute. Do you offer that memorandum?

Mr. Harrison: No; just marked for identification.

Mr. Boardman: I want to know if he is going to testify as to what is in the memorandum which you produced. 20

Mr. Harrison: I don't know. I can't tell you what he is going to testify to. That is in the lap of the gods.

Mr. Boardman: Put in there: The witness examines the memorandum.

Q. The question is, I think, Mr. Bock, what did I dictate in reference to the ale? A. What I previously stated, that the ale was to be removed within sixty days and that the National Cold Storage Company would assume no responsibility 30 for its care.

Q. Now, have you ever been in Basement K where this ale is stored? A. No.

Mr. Boardman: What is the question?

Mr. Harrison: "Have you ever been in basement K?"

Q. Have you ever been in Basement K of the refrigerating company where this alleged ale was 40 stored? A. No.

Q. Did you have a talk with Mr. E. W. Lewis in April, 1925? A. I did.

Q. With reference to this ale? A. I did.

Q. What was the conversation? A. We had received a bill from the National Cold Storage Company, of which Mr. Lewis was an officer, and, recognizing that the bill was exorbitant, and which fact was admitted by Mr. Lewis, I undertook to arrive at some basis of settlement and at the same time dispose of the furniture which we had—owned, which was located in the buildings that they had bought, and I suggested to him that he take over this furniture and whatever office equipment there was in lieu of his bill and settle it on that basis, assuming at the time that we would be able to get rid of the ale in a comparatively few days.

Q. Did you ever have any conversation with Mr. Lewis, or any other representative of the National Cold Storage Company, with reference to the character of the ale and what the receivers purposed doing with it? A. Well, I told him that the ale was—

Mr. Boardman: (Interrupting.) Just a minute. Answer the question yes or no, please, Mr. Bock.

The Witness: Yes.

Q. What was that conversation and with whom was it held and when? A. I talked with Mr. Lewis. He is the only man I talked with as I recall. I told him our chief—

Mr. Boardman: (Interrupting.) You have not answered when.

The Witness: Well, he did not ask me when.

Mr. Harrison: My question was a triple question.

The Court: When, when?

The Witness: When was it asked? Oh, early in the year 1925. 10

Q. You may state the conversation.

Mr. Boardman: Now, just a moment—

The Court: Go on.

Mr. Boardman: I object. Mr. Lewis is dead and Mr. Lewis has no opportunity to answer.

The Court: You are introducing Mr. Lewis' testimony in evidence. 20

Mr. Boardman: Yes, but, of course, he has no opportunity to answer this.

The Court: I know it, but what Mr. Harrison is proceeding to do now is to controvert the testimony you have already introduced of Mr. Lewis. I think it is perfectly proper.

The Witness: I talked with Lewis. Of course, he recognized and knew, as a matter of fact, that the report we had received from— 30

Mr. Boardman: (Interrupting.) What was said, Mr. Bock?

The Witness: I told him, "I want to get rid of the ale."

Mr. Boardman: "I said," "He said."

The Witness: Well, I said that we wanted to get rid of the ale just as soon as pos- 40

sible, that we had made application or were about to make—I am not certain as to that —to the Court of Chancery to have the ale dumped in the sewers and disposed of, just as quickly as possible. We had received a report from the chemist, who had made an examination of the ale, that it was unfit for consumption. It was clearly ridiculous to undertake to keep it. That is as far as I recall talking with him about that.

The Court: Well, what did he say?

The Witness: He was not interested in what we did with the ale at all. We talked, this time I talked with him about this proposed settlement of this bill, and I was acting without having authority to do anything definite as far as my co-receiver was concerned or that the Court of Chancery was concerned; whatever propositions I made were made with a view of attempting to bring about a compromise and dispose of the two matters, the furniture which we owned and had no use for and the disposition of the ale.

Q. Did you at that time or any other time have any conversation with Mr. Lewis about keeping this alleged ale under cold storage? A. No.

Q. Did you agree with Mr. Lewis or with any other representative of the National Cold Storage Company to pay six hundred dollars a month, three hundred dollars a month or any other figure for the storage of that ale? A. No. The only conversation I had with Mr. Lewis in connection with this—and that is evidently where this

assumption evidently arose—we undertook to trade the furniture in payment for the bill which they had rendered us and there was no intent to fix any specific rate of storage.

Mr. Harrison: That is all. You may cross-examine. 10

Mr. Boardman: May I present Mr. Francis of the New York Bar?

CROSS-EXAMINATION by Mr. Boardman:

Q. Mr. Bock, this conversation where you spoke of the ale being spoiled was after the time you had been there with the chemist? A. I was not there with the chemist.

Q. Or, after the chemist— A. Had made a report. 20

Q. Yes. At the hearing before the receivers there was a time mentioned wherein a chemist came with one of the receivers or Senator Harrison. Your conversation must have been after that. A. Yes.

Q. Therefore if—what did take place on April 8th, 1925, unless that visit was prior to that? A. Which visit? 30

Mr. Harrison: If the Court please, I would like to have the question reread.

Mr. Boardman: I will reframe the question.

Q. You had several talks with Mr. Lewis, didn't you? A. Oh, yes.

Q. Well, as I understood you, that was the time when you told him about the ale having been spoiled and the chemist having said so. As I un- 40

derstood you, you spoke of that as of your conference with him on April 8th, 1925. A. That may have taken place prior to that. I am not certain as to that.

Q. Or after that? A. No; not after that.

10 Q. When did the chemist make his examination? A. Early in the year.

Q. January—what year? A. 1925, that same year.

Mr. Harrison: January, 1925.

Q. About that conference in April, 1925, what happened was substantially what was testified to and what the—in accordance with the memorandum Mr. Bock—Mr. Lewis made on the letter that 20 has been in evidence? A. If you will just let me see it, I can tell you.

Mr. Harrison: If the Court please, I object to that question, because that seems to characterize the memorandum on the back of the letter, apparently, or perhaps it will characterize the testimony of another witness. It seems to me, the proper way to do is to find out from this witness 30 himself rather than to characterize testimony of another witness.

The Court: What was the question?

(Question read as follows: "About that conference in April, 1925, what happened was substantially what was testified to and what the—in accordance with the memorandum Mr. Bock—Mr. Lewis made on the letter that has been in evidence?")

40 The Court: No. You must ask him what did happen, what did transpire.

Q. Mr. Bock, you called on Mr. Lewis on April 8th, 1925? A. Well, of course, I cannot fix the date, but I did call on Mr. Lewis about that time.

Q. And you made a proposition for them to take over the furniture and fixtures, on which you had had a bid for six hundred and fifty dollars, in lieu of their bill for twelve hundred dollars rent? A. I don't think that states the case exactly. I was not authorized of course to make any definite proposition. That is, I couldn't—

Q. (Interrupting.) But subject to that? A. I went there with the purpose of attempting to settle these two matters: that is, get this furniture out of the way, and also get this bill cleaned up, if I could.

Q. Yes. And— A. And I expressed my personal views as to what would be satisfactory to me, assuming my co-receiver would approve of such action: also subject to the approval of the court.

Q. Yes. And that discussion contemplated that the receivers should pay for space occupied—used thereafter at the rate of three hundred dollars a month. A. No.

Q. Wasn't that amount mentioned? A. No; not that I recall, because we were attempting to settle a twelve hundred dollar bill by turning over second hand furniture, on which we had no offer of six hundred and fifty, but a price placed by us on that—at that figure.

Q. Did you tell Mr. Lewis that you had a bid of six hundred and fifty dollars for it? A. I don't think so. I think I told him we had that price placed on there.

Q. Where did you say the title passed on December sixth? A. 810 Broad Street, the Park Commission office.

Q. And that is on the same floor with Senator Harrison's office? A. Yes.

10 Q. It is practically in Senator Harrison's office —wasn't it? A. Practically.

Q. Mr. Eagle and Senator Harrison and you and Mr. Wright, were you all there that day? A. I don't recall whether Mr. Wright was there on that occasion or not definitely. The day preceding I think Mr. Wright was there. I think we had more than one bite at this cherry.

Q. Yes. Now, at that time a deed was delivered 20 to the National Cold Storage Company by the receivers? A. Yes, sir.

Q. And assignment of franchise with a grant of free public—grant from the Public Utility Commission was turned over? A. As far as I recall, yes.

Q. And there was an assignment of the Erie Railroad lease? A. Yes.

Q. Dated April first, 1925, turned over—executed and turned over? A. I presume so.

30

Mr. Harrison: Your Honor please, I do not wish to interfere with the trial of this case, but I fail to see what all these details have to do in this matter. It is simply a question of ale and the responsibility of the receivers of the court of the ale by the cold storage company.

The Court: We ought to keep the testimony as nearly within the issue as possible.

40

Mr. Boardman: There is a purpose in it,

your Honor. Mr. Bock, I think all unconsciously, has testified that that memorandum was the memorandum that was dictated there that day. I want to refresh his recollection of that day. That was not the memorandum, we are confident, that was signed that day. That is entitled a "Confidential Memorandum." 10

The Court: Yes.

Mr. Boardman: And I am pretty sure that that was not the one that was dictated; certainly there was another memorandum which was part of the transaction which was signed.

The Court: All right. The other memorandum, if you think that has anything to do with the rental of Cellar K, all right. I am not interested in the Erie Railroad lease and public utility license. 20

Mr. Harrison: I am perfectly willing to have that memorandum go in, have the whole thing go in.

The Court: All right. Go on.

Q. I want to refresh the witness' memory. Then there was a bill of sale and there was an assignment of the right, title and interest of the receivers to the sinking fund to the Commercial Trust Company on its mortgage? A. As far as I know there were a number of papers in connection with the transfer that were, of course, turned over that day, but handled by our counsel. 30

Q. Now, there was another memorandum, wasn't there, made? A. I know there was a memorandum made that was signed by both parties. 40

Q. Would you look at this memorandum, dated 12-6-24, which seems to bear your signature and that of your co-receiver. Wasn't that the one that was dictated in the presence of the parties and signed? A. This was also dictated. This
10 had to do with the operation of the business and outstanding claims. Of course, that had to be settled at the same time at the closing of the title.

Mr. Boardman: I offer this memorandum in evidence.

The Court: Any objection?

Mr. Harrison: No objection.

The Court: It will be admitted.

20 (Paper marked D-1.)

Q. Wasn't it a fact that there was a good deal of discussion about the custody of this ale, and weren't both Mr. Lewis and Mr. Eagle very cautious to have no paper and no—and to assume no responsibility whatever in respect to it? A. That was definitely determined on, yes, that they would determine no responsibility for the care of the ale, but we were to be permitted to keep it there
30 for sixty days and then were expected to get it out.

Q. How clear is your recollection as to the sixty days? A. Well—

Q. Weren't you looking at this memorandum when you said you recalled the sixty or thirty days? A. If you would ask me without seeing that memorandum, my recollection is that it was a sixty day period that we were to have.

Q. That was how clear? A. Simply my recol-
40 lection. If I were asked what the period was, I should have told you sixty days.

Q. Isn't it possible, Mr. Bock, that this memorandum, which is entitled—I call your attention— A. Yes.

Q. "Confidential Memorandum for receivers," 1926— A. Yes.

Q. "December 6, 1924," was signed after the— (interrupted). A. That was not signed at all. 10

Q. I mean, was dictated and written out after the others had gone? A. I don't think so, for this reason, that, as a result of these discussions that we had in connection with the ale, the custody of it, how far the storage company was to be charged with the care of it and the time that we were to have to get rid of it, and that was the whole topic of conversation. "How soon can you get rid of it?" And we told them we would get rid of it just as soon as possible. I think Mr. Lewis said, "Well, you should get it out of there in thirty days—" And whether I said it or someone else said— "We won't have sufficient time to get court orders to get rid of it within that period; we will have to have at least sixty days," and Mr. Eagles then said, "Well, all right, but here is your notice for your sixty day period. Get it out." 20 30

Mr. Harrison: I suggest for the sake of the record that that memorandum also go in evidence.

Mr. Boardman: Yes.

The Court: Let it be marked.

(Paper formerly marked C-1 for identification now marked Exhibit C-1.)

Q. Do you recall at the hearing, this latterly hearing before the receivers in this matter when 40

Senator Harrison produced this memorandum? A. Uh huh.

Mr. Boardman: Which I assume—this was the paper, wasn't it, Senator?

10 The Witness: Yes.

Q. Mr. Sanford said "That is the memorandum that was dictated later." A. No, I don't—I don't recall him saying that. I might not have been there at that time. I had to leave during a portion of that hearing if you recall. I can't say definitely, see, that this is the particular paper, because I don't know. It was not marked for identification at that time, but it contained all 20 of the facts that were determined.

Q. You don't really know when this was actually dictated as in relation to the other memorandum? A. Well, that was dictated at the same time, practically. I mean, the same day, the same period when this settlement was being effected.

Q. Yes, and at that conference, while the parties were present, a memorandum was dictated. A. Yes.

Q. And the memorandum which has now been 30 marked Exhibit D-1, which was signed by the receivers, certainly was dictated in the presence of the other parties there? A. No question of that, and I think the other one was dictated right after it. That is my recollection of it and it is altogether logical that this must—

The Court: (Interrupting.) Well, do not argue about it.

40 The Witness: All right.

The Court: You say it was dictated right after.

The Witness: Yes.

The Court: Anything further?

Mr. Boardman: Just a moment, your Honor. That is all. 10

Mr. Harrison: For the sake of the record, may I ask Mr. Boardman if he will consent to the admission in evidence of two certificates of analyses by Dr. Edel with reference to this ale?

I have Dr. Edel here and will formally prove them at a later time. It is merely to save the recalling of Mr. Bock.

If there is any question about it, I will call the expert. I want to say these were brought to Mr. Bock's attention before he had,—this one was brought to Mr. Bock's attention before we had the talk with Mr. Eagles. 20

RE-DIRECT-EXAMINATION by Mr. Harrison:

Q. Mr. Bock, what was done with reference to finding out the condition of this ale? A. We requested a chemist to go there and make— 30

Mr. Boardman: I—

The Witness: All right.

Mr. Boardman: Go ahead.

The Witness: I say—

Q. (Interrupting.) Who was requested to make an examination? 40

Mr. Boardman: I object. This is not material to the issue at all.

The Court: I don't know whether it is or not. I will admit it. If it is not material, I will overlook it.

Q. You may answer. A. Mr. Dill, chemist, 10 was requested to get samples of the ale and make an analysis and a report to us as to the character of the ale.

Q. Yes. Was such a report made by Dr. Edel? A. It was.

Q. Do you know when that report was made? A. In January, I believe, 1925.

Q. Of what year? A. 1925.

Q. And was it prior or subsequent to January, 20 1925, that you had the talk with Mr. Lewis? A. Subsequent.

Q. Which you have previously referred to? A. Afterwards.

Q. I show you a paper writing dated January 15, 1925, and signed "Albert E. Edel" or "Edel Laboratories," and ask you if that is the report which you received from Dr. Edel? A. It was.

Mr. Boardman: I object. I think there is no materiality to it.

30 The Court: Do you offer it?

Mr. Boardman: I do not object to its being offered except as to its materiality.

Mr. Harrison: I offer it for identification and I will prove it formally.

The Court: You don't object to it being offered in evidence at this time, but you object to it as being immaterial.

Mr. Harrison: I then offer it in evidence.

40 The Court: I will admit it.

EDWIN A. DILL, sworn.

Direct-examination by Mr. Harrison:

Q. Mr. Dill, you are now employed by the receivers of the New Jersey Refrigerating Company? A. Yes.

10

Q. And have been so employed since June, 1923, the date of their appointment? A. Yes.

Q. Prior to that time, by whom were you employed? A. The New Jersey Refrigerating Company.

Q. For how long a period? A. Well, from the time they changed their name from Lembeck & Betz Eagle Brewing Company to New Jersey Refrigerating Company, I think it was in 1919.

20

Q. You have been connected with Lembeck & Betz either under the name of Lembeck & Betz Eagle Brewing Company or the New Jersey Refrigerating Company or the receivers for a period of how many years? A. Since 1900.

Q. And in what capacity have you been working for the receivers? A. As chief clerk, I suppose.

Q. "General factotum" would be, perhaps, a more comprehensive term. Were you present on December 6, 1924, when the title was being closed or was closed on the plant, the so-called plant of the refrigerating company on 9th Street, Jersey City? A. Yes, sir.

30

Q. Do you recall who were present? A. Yourself, Mr. Sanford, Mr. Bock, Mr. Eagle, Mr. Lewis, Sr. myself; and Mr. Wright was not there on the sixth.

40

Q. And Mr. Little, I believe? A. And there was another man, Mr. Woodrow, or something like that.

Mr. Harrison: Well, that is not so ma-
10 terial; we won't waste any time on that.

Q. Do you recall what, if anything, was said with reference to the alleged ale then held by the receivers in the basement of the Buiding K? A. Yes, sir; when it first started I think Mr. Lewis said—asked when we were going to get that out, and when it was then brought up, why, he said something about thirty days and then afterwards it was arranged for sixty days; we were to stay
20 there sixty days without any storage and after that we were to pay storage if we kept it there.

Q. What was said about the custody of the ale, its care and responsibility? A. Mr. Lewis said that they would not assume any responsibility and also Mr. Eagle.

Q. Was there any agreement made there as to price or terms of letting? A. No, sir; there was not anything said about it at all.

Q. Do you recall ever having seen Exhibit C-I,
30 being the so-called receivers' memorandum? A. Yes; I remember this.

Q. How did that paper come into existence, if you recall? A. Well, Mr. Lewis started to talk first, I don't know whether it was about the junk or the ale that was brought up first, but, anyhow, these things were discussed and they wanted to know when we were going to get this old junk and machinery and other stuff out that was laying
40 around there, and that is how this come up. Then

I think there was some other paper before this and Miss Downs was there, your secretary, and she took these notes down and you asked her—

Q. (Interrupting.) Who gave her the notes to take down? How did she come to take the notes down? Did I have anything to do with it? A. I think on account of the discussion between Mr. Lewis, Mr. Eagle and yourself. 10

Q. And who told her what to put down? A. Well, yourself.

Q. Did you do it, or did I tell her, or did someone else tell her? A. I didn't tell her.

Q. Didn't I dictate the memorandum? A. Yes, you did.

Q. All right. Let us answer the question. I dictated the memorandum. How often have you been in the basement of Building K since December, 1924? A. A good many times. 20

Q. Well, by "A good many times," do you mean a dozen or two dozen or a hundred times? A. Well, I have been there at least a dozen times anyhow.

Q. Now, will you tell the Court, briefly, the size of this basement? A. That we occupied? Why, the whole cellar. 30

Q. Well, first, the size of the whole cellar. Do you recall that, sir, or do you not? A. Pretty near it. 33 by about 85, in height 10 feet 8.

Q. And how much of that 33 by 85 feet space is occupied by the ale? A. 15 by 48, ten feet eight high.

Q. And how is that ale set off from the whole building? A. It was partitioned off.

Q. What kind of a partition? A. Wood. 40

Q. Who put the partition there, do you know? A. I hired our old carpenter.

Q. And is there a door on this enclosure? A. Yes, a front door.

Q. And was the door locked? A. Yes.

10 Q. Who had the key? A. I had the key to the partition where the ale was partitioned off.

Q. That is, you had the key to the inner room in which the so-called ale was stored? A. That is right.

Q. And it has been continuously in your possession since for receivers? A. That is right.

Q. Was there a door to the main cellar? A. Yes.

20 Q. And who had the key to that? A. From what time?

> Mr. Boardman: Just a minute. Will you state the time?
>
> Mr. Harrison: All right.
>
> The Court: The time is from the time the title was tranferred, I suppose.
>
> Mr. Harrison: Of course. That was what I referred to.

30 Q. Beginning in December, 1924, who had the key to the outside or main cellar, as we shall term it? A. Well, I thought I had entrance to that place, but right after the National Cold Storage took title I—shortly after they took title, I went over there and I could not get in.

Q. Why? A. Because somebody had changed the lock, so I went to Mr.—

Q. (Interrupting.) Pardon me just a minute.

40 You had a key to a lock which had theretofore

been on this outside door, but you then went over and found that the lock had been changed? A. Right.

Q. Then what did you do? A. I went to Mr.—

Q. (Continuing.) And your key which you had would not fit that lock? A. That is right. 10

Q. You may proceed—oh, fix the time, if you can, with reference to the closing of title, when you found that lock on the door had been changed. A. Shortly after the National Cold Storage Company took possession.

Q. A matter of days, hours or weeks, Mr. Dill? A. Well, I should say, approximately a month.

Q. All right. You may proceed. What did you then do? A. Then I went to Mr. Lewis, Jr., 20 and I spoke to him about it and he told me he had changed the locks because he wanted it changed. From that time afterwards I always went to—

Q. (Interrupting.) Pardon me. And Mr. Lewis, Jr. has what relation to the National Cold Storage Company and its business? A. Why, I understand he is manager over there on 9th Street, Jersey City.

Q. He is in general charge there? A. Yes. 30

Q. And, lately, when you had occasion to go into this outer cellar, how would you get in? A. Always went to Mr. Lewis first.

Q. For what purpose? A. To get the key. Sometimes he gave me a key and let me go in, and sometimes he went down with me.

Q. And how many times did that happen, do you suppose? A. Oh, offhand, maybe a half dozen times.

40

Q. Now, do you remember one occasion in the spring of 1927 when receiver Wright and Dr. Edel and I came over and went into the cellar? A. Yes, sir.

10 Q. Will you tell the Court as briefly as you can just what transpired with respect to our getting the key and going into the cellar? A. Well, we went over there and, as usual, I went to Mr. Lewis to get the key and he came down with a bunch of keys, but he did not seem to have the right one and he went back and then we were going to force the lock. In the meantime he went upstairs and when they came down again they had a key that did fit. They let us in. That was

20 the outside door to cellar K.

Q. Then we all went in and you opened the door to the inner room? A. I did.

Q. And we took our samples of the ale—that is, for testing purposes.

The Court: Only!

Mr. Harrison: We don't want the Court to misunderstand.

Q. And came out of the inner room and then

30 out of the outer cellar, and who closed the door, if you recall? A. I suppose Mr. Lewis did or one of the men. I know I did not.

Q. Not what you suppose. Do you know who closed the door? A. Offhand I—I know I did not.

Q. When was this ale destroyed, Mr. Dill? A. September the second, 1927.

Mr. Harrison: You may cross-examine.

40

CROSS-EXAMINATION by Mr. Boardman:

Q. At the time the title passed, the key to the outer door was in your possession, was it? A. Yes.

Q. Of cellar K, I mean? A. Yes.

Q. Yes. I was left with you? It was left with you? A. Yes. There was not any change. 10

Q. No change then? A. No.

Q. You continued to hold that key? A. Yes.

Q. Then the first time you discovered that your key to the outer door would not open the door was when you went with the chemist and Senator Harrison? That is right? Is that the first time you discovered it? A. No, sir.

Q. When did you first discover it? A. I went down there alone the first time I discovered it. I had instructions from the receivers to go down there every once in a while. 20

Q. What were you doing down there? A. I went down there every once in a while to look at it, to see if things were just the same as usual.

Q. What did you do when you got there? A. I just opened it and looked to see if things looked as they always were, and come out again.

Q. You said, a moment ago, I thought, that when you went with Senator Harrison you asked Lewis why he changed the keys. A. Oh, that was Mr. No. 30

The Court: No. That was not what he said.

Q. When was it that you— A. That was when I went—I went over there alone one day to go in there, as I did once in a while, and I couldn't get 40

in and I went up and saw Mr. Lewis, Jr. and he let me in. That was the time that happened. He told me he had changed the lock.

Q. Did he tell you anything more about it? A. I didn't know Mr.—

10 Q. (Interrupting.) Didn't he tell you a great many keys would open a great many locks all through the building? A. No; not at that time. I didn't know Mr. Lewis very well then.

Q. But that was a fact, wasn't it? You knew the building. A. I knew there were master keys, yes.

Q. There were a great many master keys out all over the building. A. I don't know what they
20 did. I know the way we had to do.

Q. And there were a great many master keys, weren't there?

Mr. Harrison: I object to that.

A. No; there was not a great many master keys, no, sir.

Q. Well, how many would you say? A. I think only one—

Mr. Harrison: This man was not con-
30 nected with the Cold Storage Company. What does he know about it?

The Witness: I had nothing to do with that end of it anyhow.

Q. Well, would the National—the New Jersey Refrigerating Company? A. Yes, sir.

Q. When did you next come into possession of a key to the outer door? A. The day that we went down there, when Mr. Harrison was there
40 and Mr. Edel and myself, when we couldn't get

in that day. After we got through Mr. Lewis said to me, "Ed, you better keep this key because I might lose it again," and from that time on until the ale was destroyed, I had it.

Q. Yes. After that you had it and turned it back—you went down and destroyed the ale, you were there when the ale was destroyed on September second, 1927. A. Mr. Lewis was there a good part of that time, too, and when we got through I gave him both locks and both keys back. 10

Q. Oh; did you measure these rooms accurately? A. Did I measure the rooms accurately?

Q. Yes. A. Yes. To the best of my knowledge.

Q. How did you measure them? A. I had a rule. 20

Q. Foot rule? A. I think I had one of these three-foot rules, one of these folding rules.

Q. When did you do it? A. I did it twice. I did it one time when—I did it once before the ale was destroyed and then I measured it once after the ale was destroyed, and the last time I measured it, they had just knocked the partition down, but the two by fours were on the bottom and fastened to the floor and showed the space, and Mr. Lewis was there with me when I did it. 30

Q. Young Lewis? A. Yes, sir.

Q. Now, this partition you speak of, what was it? A. Just a wooden partition.

Q. Just a lattice work or light partition? A. No, there was boards. It was built pretty strong.

Q. Returning to December sixth. Were two memorandums dictated? Do you remember two different memorandums being dictated? A. I don't remember two being dictated, but I— 40

Q. (Interrupting.) You only remember one? A. I know there was a discussion on some other papers and then Mr. Harrison dictated some matters to Miss Downs and she took them outside and had them typewritten.

10 Q. Will you look at this memorandum which is marked D-1? That was certainly dictated there that day, wasn't it? A. Mr. Siemer was the man who had these figures, because he was the head bookkeeper of the Cold Storage—for the storage department. I was the general—

Q. (Interrupting.) Was Mr. Siemer there that day? A. Yes, sir.

Q. And such a memorandum as that was made 20 up there that day, wasn't it? A. I remember something being said about this.

Q. When you broke up—when you broke up that day, when Mr. Lewis and Mr. Eagle and his party left, what happened then? Did you all go or did some of you stay? A. I think it was pretty late. I think I got out of there right after the rest of them did, as soon as I could.

Q. Have you any reason—can you explain any reason why that was a confidential memorandum 30 for the receivers, this Exhibit C-1? A. I don't know anything about that.

Mr. Harrison: Are you through, Mr. Boardman?

Q. Do you recall something being said on December sixth that Mr. Lewis said he would not assume any responsibility for the ale? A. Yes, sir.

40 Q. And they both—both he and Mr. Eagle said

they didn't know how far the Volstead Act went? A. They didn't know just when they could get rid of the ale, at that time.

Q. They were very tender about having this ale left, weren't they? A. Well, I don't know—I think they were under the impression that they could not remove it at that time. 10

Q. I understand, but Mr. Lewis and Mr. Eagle were very tender—they were very anxious about having it left—they were very fearful of what the result of leaving it there would be, weren't they? A. With the receivers?

Q. No. Mr. Lewis and Mr. Eagle.

The Court: Ask him what they said on it. 20

Mr. Harrison: The question of tenderness or harshness is hardly proper.

The Court: Ask what they said as to the rentention of the ale.

Q. Do you remember anything that was said? A. I don't remember whether it was Mr. Eagle or Mr. Lewis who brought out the part about the Federal authorities, that they did not want to get into any difficulties with them, that they would like to have the ale removed as soon as possible. 30

Q. And didn't they refuse to make any kind of a contract in reference to the—in respect to the custody of it, care of it, either in writing or otherwise? A. Yes, I remember Mr. Lewis and Mr. Eagle both said it could remain there, but they would assume no responsibilities whatsoever for it.

Mr. Boardman: I think that is all. 40

RE-DIRECT-EXAMINATION by Mr. Harrison:

Q. When, as you say, in March, 1927, you received a key from Mr. Lewis, Jr. to the outside
10 door, did you then know how many keys there were to that outside door? A. No, sir; I did not.

Q. How many keys did you receive? A. One.

Q. And that remained, I think you said, in your continuous possession from then on until the destruction of the ale? A. Correct.

Q. That is—

The Court: Is that all?

Mr. Harrison: Pardon me.
20

Q. December, 1924, how many keys were there to the outside—and prior to the change of lock, how many keys were there, to your knowledge, to the outside door, to the lock on the outside door. A. Before title was passed?

Q. Yes. A. I think Mr. Rodgers had one and I had one.

Q. And Mr. Rodgers was general superintendent of the plant? A. Yes, sir.
30

EDWARD WRIGHT, sworn.

Direct-examination by Mr. Harrison:

Q. Mr. Wright, you are one of the receivers of the New Jeresy Refrigerating Company? A. I am.

40 Q. And have been acting as such since June, 1923? A. I have.

Q. Were you present at the time of the closing of the title of the plant on 9th Street, Jersey City? A. A portion of the time, not all of it.

Q. What is your recollection as to what transpired at that closing with reference to the alleged ale then in the custody of the receivers in the basement of the plant? A. Well, I think it is similar to Mr. Bock's recollection, that the ale was to be gotten out in sixty days provided we could get it out.

10

Q. Anything said— A. And that they did not assume any responsibility for the custody of the ale.

Q. Do you remember anything about this receivers' memorandum, so-called, Exhibit C-1? A. I remember that you dictated that memoranda and it was written.

20

Q. Now, have you ever been in the cellar of Basement K where the ale is stored? A. Yes.

Q. How many occasions? A. I think twice.

Q. When? A. Both times—one time with Mr. Dill and the second time was with Dr. Edel and yourself and Mr. Dill when the tests were made.

Q. Can you fix the time when you went into the cellar with Mr. Dill? A. Well, I think it was about five or six months previous to the second visit, and that second visit was in January, 1925.

30

Q. January, 1925. A. Wasn't that the time the tests were made?

Q. Are you referring now to the visit when you and Dr. Edel and Dill and I went with you? A. Yes.

Q. Well, can you, by referring to the report that you received from Dr. Edel refresh your recol-

40

lection as to the time when this examination was made? A. (No answer.)

Mr. Harrison: I think counsel will consent that this report of Dr. Edel's can go
10 in evidence. I am going to put him on the stand.

The Court: It is consented that this report shall go in evidence.

(Report marked Exhibit C-3.)

Q. Following the examination which we made and to which you have referred, did we receive—did you receive a report from Dr. Edel as to the examination, covering the result of his examina-
20 tion? A. We did; yes.

Q. Is this the report? Is Exhibit C-3 the report to which you referred? A. Yes.

Q. Can you, by reference to that, fix the date and time when you, Dill, Dr. Edel and I went into the cellar basement K with you? A. Well, I imagine it was some time in March.

Q. Of what year? A. 1927.

Q. What, on your first visit to the cellar—how did you and Dill get in? A. Why, I think—I am
30 not sure, but my recollection is that Mr. Dill got the key from Lewis—he did.

Q. On the second visit how did you get in? A. Mr. Dill asked Lewis for the keys, young Mr. Lewis, and he brought down some keys that did not fit, and there was some argument about forcing the lock and then Mr. Lewis went upstairs again and came back with a key that did fit the outer door and we got in.

40 Q. Who opened the door? A. Lewis opened the door.

Q. And let us all in? A. Yes.

Q. Now, please describe what the situation was on the interior of the cellar where the ale was stored. A. Well, this outer door led in from a vestibule, the elevator, where we got off the elevator, and this outer door led us into this unit K, and over in one corner of the room there was a rectangular partition where the ale was stored, built of wooden planking, and that was locked in addition, and that was all the space that we had in that room. 10

Q. And who had the key to the lock on the door of the inner room? A. Mr. Dill.

Q. And on the second occasion Dill opened the door and let us all in to get a look at the ale? A. Yes. 20

Q. Did you ever make a measurement of the size of that inner room? A. No; I never did. You made it; you paced it off in a rough way. You had to do it yourself.

Q. Did you ever have any talk with Mr. Lewis relative to the payment of this rent, or did you ever make a—relative to the payment of the rent which he claimed to be due for the storage of this alleged ale? A. I don't think I did. No, I never did that, no. 30

Q. Did you ever make any agreement with him for the rental of a portion or all of the basement of the cellar in building K? A. Absolutely not.

Q. I show you Exhibits R-2 and R-3, the exhibits which were consented to be introduced in evidence at the hearing, in the former hearing and which are now before the Court—the first, R-2, being a letter from me to the National Cold Stor- 40

age Company under date of March 9, 1925, and R-3 being a letter from me to the Cold Storage Company under date of September 29, 1925—and ask you if those letters were written at the direction and with the consent—by me as counsel at
10 the direction and with the consent of you and your co-receiver? A. Yes.

Mr. Harrison: You may cross-examine.

CROSS-EXAMINATION by Mr. Boardman:

Q. Do you recall how the discussion of a period —of the time within which the ale was to be gotten out started? A. No, I don't recall.

20 Q. Who mentioned the fact there was any ale in Basement K? A. Well, I can't quite recollect. We all spoke about it. It was a subject that seemed to be uppermost in the minds of everyone.

EXAMINED by Mr. Harrison:

Q. Just a question. How long did it take to close this title, Mr. Wright? A. I think—you mean, the actual closing?

30 Q. How many days? How many days did we spend on it? A. Why, two or three days.

Mr. Harrison: Pardon the interruption.

EXAMINED by Mr. Boardman:

Q. Well, what days? A. You mean, the date?

Q. What days? Were the days prior to December sixth or days after December sixth when you had the conference in— A. (Interrupting.)
40 Well, we had—we took two or three days to close

the title there in the Park Commission rooms, as I recollect it. I was not there all the time.

Q. And who was there at the first of those several conferences? A. I have forgotten all who was there—the individuals who were there, but the same parties all the way through. 10

Q. Your recollection is it took several days? A. Yes.

Q. And do you recall this memorandum that you and Mr. Bock signed, Exhibit D-1? A. Yes.

Q. That was dictated by Senator Harrison at the closing? A. Yes.

Q. And it was signed by you and Mr. Bock? A. Yes, sir.

Q. Referring to Exhibit C-1, I call your attention to the fact that it was called a confidential memorandum for the receivers, December 6th, 1924. Do you recall why it was a confidential memorandum for the receivers? A. I don't know why it was. 20

Q. Don't you think that really was—was it really a confidential memorandum? A. I couldn't tell you. I don't know why it was a confidential memorandum.

Q. May that not have been dictated at a later time just to refresh— 30

> The Court: (Interrupting.) No, Mr. Boardman. It is not a proper question. You must ask him whether it was—whether he knows when it was dictated. Of course, it may have been dictated before—

Q. Do you know when it was?

40

The Court: —and it may have been dictated after. The question is: When was it?

Q. Do you know when this was dictated? A.
10 I couldn't tell you exactly when it was dictated.

The Court: You were not there all the time.

The Witness: No; I was not.

Q. There were two visits—Dr. Edel was at the —took two—made two examinations of the ale for you, didn't he? A. I think he did.

Q. Will you look at this one which is marked C-2 and see—on January—see what the date was
20 when he took the first ale out? A. This is dated January 15, 1925.

Q. Look at the date on which he took the ale.

The Court: The paper speaks for itself. If it is in evidence, it speaks for itself. You do not have to ask him that.

Q. Yes. I call your attention that he took some ale on January 11th, which he reported on the
30 15th of January, 1925. A. Yes.

Q. And the other report speaks of ale being taken on March 29, 1927. A. Yes.

Q. And reported on on April 5, 1927. Did you go, too, both times the samples were taken? A. Yes, sir; I think I was there both times. I am not sure whether I was there the first time or not. I know I went into that place twice, the first time with Mr. Dill, and whether that was just Mr. Dill
40 and myself I don't recall, but I know I was there the second test that Dr. Edel made, and Senator Harrison; I am positive of that.

Q. How do you remember which one it was, Mr.—how do you fix the time? A. Because it was the wrangle over the keys, that was the reason it fixed it in my mind; we could not get in.

Q. Could the wrangle over the key have occurred in 1925 as well as 1927? 10

The Court: Well, Mr. Boardman, I beg you not to ask questions of that kind.

Mr. Harrison: We will admit all possibilities.

The Court: What we want in this case are facts.

Q. Will you tell how you distinguish that it was in March, 1927, or whether it was January, 1925, 20 when this wrangle over the keys occurred? A. Well, I remember that there was much more trouble in getting hold of a key that second time. The first time I think Mr. Lewis—Mr. Dill got the key from Mr. Lewis without any trouble and we got in; that is my recollection, and the second time we could not get in. Mr. Lewis had to go back and get the key, the right key.

Mr. Harrison: Maybe the presence of a 30 mangy dog will fix the date more accurately?

The Witness: I remember him well, yes.

Q. Were you there when Dr. Edel took the ale in January, 1925? A. That is the first test that was made?

Q. Yes. A. I think I was. I am not positive. I can't say positively whether I was or not. I think I was. 40

Q. Your best recollection is that you were? A. I think I was.

The Court: Mr. Boardman, won't you please proceed as rapidly as you can?

Mr. Boardman: Yes, your Honor, I will.

10

Q. Was anything—nothing was said—or, was anything said about that partition before—where the ale was—the ale was in cellar K, was it not? A. Yes.

ALBERT E. EDEL, sworn.

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Direct-examination by Mr. Harrison:

Mr. Harrison: Are his qualifications as an analytical chemist admitted?

Mr. Boardman: Yes.

Mr. Harrison: Dr. Edel's qualifications as an analytical chemist are admitted.

Q. Doctor, you made certificates—you have made examination of certain samples of alleged ale for the receivers of the New Jersey Refrigerating Company? A. I did.

30

Q. And one of those examinations was made on January 11th, 1925, and the other on March 29th, 1927? A. I did.

Q. And did you submit these two reports, Exhibit C-2 and C-3, which incorporated your findings as to the condition of the ale? A. I did.

Q. On your first examination what did you find to be the condition of the ale?

40

Mr. Boardman: Now, I object to that. I don't think—I object. This is absolutely

immaterial as to what the condition of the ale was.

Mr. Harrison: All right; it is here in the report.

The Court: Well, the report speaks for itself.

10

Mr. Harrison: The point I am making, your Honor please, is this, that the receivers had these reports which showed that the ale was unfit for human consumption and that in their subsequent conversations with Mr. Lewis, as testified to by Mr. Bock, they told him the ale was no good and there was no necessity—how that could be involved, the fact there was no necessity of refrigerating the ale, that it was a white elephant on the hands of the receivers.

20

The Court: Ask the question. I will allow it.

(Question read as follows: "On your first examination, what did you find to be the condition of the ale?")

The Court: I will allow it.

A. It had started in to turn sour.

30

Q. Was the ale fit for human consumption? A. It was not.

Q. And did you so inform the receivers? A. I didn't get you.

Q. And did you so inform the receivers? A. I did.

Q. On the occasion of the examination of the first samples, from whom did you receive the samples? A. Workmen delivered to my office.

40

Q. So that you did not go to the cellar of Basement K and take the samples in person? A. I did not.

Q. How did you get the samples for the second examination in March, 1927? A. I got them in
10 person; was present during the sampling.

Q. Do you recall the circumstances surrounding the opening of the lock on the door, on the outside door leading into the basement? A. I do.

Q. State who was with you. A. Senator Harrison and Mr. Wright. We called at an office opposite the storage house and a gentleman with a bunch of keys—a gentleman followed us across the street and he tried to open the door and he
20 could not open it and, just as somebody tried to force the lock, the key was found. I don't know who found the key or anything like that.

Q. Well, did this same gentleman have the key? A. We took along—no, it was not the same gentleman we took along from—

Mr. Harrison: (Interrupting) Stand up Mr. Dill.

Q. Is the gentleman who stands up now, and
30 who is Mr. Edwin A. Dill, the gentleman who you took along from across the street? A. Yes, sir.

Q. Was it he who got the keys for you? A. I don't think so.

Q. Who was it? A. Some stranger.

Q. Did you learn who? A. Not a person—I couldn't say—

Q. Did you learn who that stranger, as you call him, was, later? A. I did not.

40 Q. Did you hear him called by name? A. I may have, but I can't recollect.

Q. Would you recognize the name if you heard it? A. I would not.

Mr. Harrison: That is all.
The Court: Any cross?
Mr. Boardman: No.
The Court: That is all, doctor.

10

CHARLES W. RODGERS, sworn.

Direct-examination by Mr. Harrison:

Q. Mr. Rodgers, your business? A. Superintendent of Cold Storage.

Q. How long have you been in the cold storage business? A. Thirty years.

20

Q. How long have you been employed with the New Jersey Refrigerating Company? A. Three years.

Q. Up to what time? A. 1924.

Q. In what part of the year? A. December. Latter part of—early part of December.

Q. Were you ever employed by the National Cold Storage Company? A. No, sir.

30

Q. Were you employed by the Hudson Storage Company? A. Yes, sir.

Q. The Hudson Storage Company had possession of the plant subsequently purchased by the National Cold Storage Company, did it not? A. Yes, sir.

Q. For how long a period of time? A. For about three months, three or four months, something like that, a short time.

40

New Jersey State Library

Q. Did you ever have a key to the cellar of Basement K? A. Yes, sir.

Q. And did you have a key to the inner room in Basement K where the ale was stored? A. Yes, sir.

10 Q. When you left in December—I think you said December 8th, December 10th? A. December 8th.

Q. When you left the plant December 8th, 1924, what did you do with the keys? A. Why, there was one key that I had at that time to the outer door. I think I returned it.

Q. Do you know what has become of the key? A. No, sir.

20 Q. Did you ever go into the building after that? A. No, sir.

Q. How long had that ale been in storage there? A. Three years to my knowledge, while I was with the concern, that is, not in the barrel shape. It was formerly in tanks and in another part of the room, and it was removed from the tanks and put in barrels.

Q. Do you know the prevailing rate for—oh, yes, what are the dimensions of the cellar of 30 Basement K, Mr. Rodgers? A. Oh, a room about thirty feet wide and seventy-five or eighty foot long, as I recall.

Q. And how much space within that room was occupied by the partitioned off enclosure in which the ale was stored? A. About one quarter of the room.

Q. Do you know how many cubic feet there were in it?- A. Not without figuring it out.

40 (Discussion.)

Q. Are you familiar with the prevailing prices for refrigeration and storage? A. Yes, sir.

Q. What is the prevailing price for—or, what kinds of storage are there in your business, Mr. Rodgers? A. What is known as general or common storage without refrigeration; then you have your refrigerator space, cold storage. 10

Q. You have mentioned three kinds of storage. What are those three kinds of storage from the standpoint of refrigeration or lack of refrigeration? A. Well, the common or general storage is the same thing, practically; it is without refrigeration space, not refrigerated, don't require any cold temperature and common or—or the cold storage depending on the class of goods being 20 stored would depend what temperature would be required. Cold storage, general accepted temperature is about thirty to thirty-three degrees for the general run of products that are placed in cold storage, and common or general would be outside temperature, whatever prevailed, unless you had a heated building, and some class of goods that would have to be protected from frost breakage.

Q. What were the prevailing rates from March, 30 1925, to September, 1927, for the different classes of storage to which you have referred? A. Well, that would depend on the commodities to some extent, your rate would depend a great deal on what commodities you were storing.

Q. Well, take ale, for instance, common storage. A. Well, of course, at that time there was not any ale being offered for storage, during Prohibition times and—previous to Prohibition, 40

when that class of goods was stored, and I think the rate still prevailed for that class package, that weight package, and all that, a reasonable rate of—

10 Mr. Boardman: (Interrupting) I object. I do not think it is material. It is before Prohibition.

Mr. Harrison: Well, prevailed at that time also, he said, if your Honor please.

The Court: I will allow it.

Mr. Boardman: He said no ale was being offered because there was no market at this time.

20 The Court: I will allow the question.

A. (Continuing) For cold storage, that class of pack—

Q. (Interrupting) Say for general storage. A. General storage, that package weight—I estimated without weighing it, some three hundred and fifty pounds, three hundred and fifty to four hundred pounds—and, based on general or common storage, the rate would be about twenty cents a package a month.

30 Q. On the basis of square footage, can you give us a rate on the basis of square footage for general storage? A. General storage where there is a quantity of space taken regardless of the class of goods that were stored, run around fifty cents a square foot a year. A good deal would depend on the character of the building.

Q. Are you familiar with the type of building, of the buildings in question on 9th Street, Jersey

40 City? A. Yes.

Q. And would fifty cents, in your opinion, be a prevailing rate for general storage of goods of this character? A. I think so.

Q. In a building of that kind? A. Yes, sir.

Q. How many square feet were there in this area occupied by the ale? A. Well, your room, as I said, was about thirty by eighty—twenty-four hundred square feet in the entire room, and your ale portion took up about a quarter of it, so you had about six hundred square feet, I estimate.

Q. Well, assuming that the space occupied by the ale was approximately seven hundred and fifty square feet, what then would be the yearly rate for common storage in a building of that kind for that kind of article—of goods? A. Well, that is just a matter of calculation. Seven hundred and fifty feet at fifty cents a square foot would be in the neighborhood of four hundred dollars, three hundred and seventy-five to four hundred dollars.

Q. Now, for cold storage, what is the prevailing rate—what was the prevailing rate at that time? A. The space basis, between twenty and thirty cents a cubic foot a year.

Q. Now, can you give us those cold storage rates on a square footage basis? A. Well, that is, again, a matter of calculation. Simply reduce it to take your square feet there, as I said, if you had fifteen by—that figured out and divide that many into it. That is the way we would arrive at the square foot basis, but generally cold storage is figured on the cubic foot basis, and general or common on the square foot basis.

Mr. Harrison: That is all.

CROSS-EXAMINATION by Mr. Boardman:

Q. When did you make that estimate of the square feet—when you made that estimate of the square feet, did you take into consideration the fact that this was stored in a room equipped for 10 cold storage? A. Well, that—right at the present time, or at that time, if the party had an amount of goods that did not require cold storage, and we were anxious to get the business, we would sell them space without refrigeration and make a corresponding reduction in the rate.

Q. Prior to this time you would have done it? A. At any time, yes.

Q. But a going plant would not grant the space 20 in a unit equipped for cold storage on general storage basis, would they? A. Unless they had a lot of space on their hands, no, sir; they would try to confine their business to cold storage products.

Q. That Basement K was a single unit, wasn't it? A. One room in Basement K, yes.

Q. It was a refrigeration unit? A. Yes, sir.

Q. You could not refrigerate a part of it and not refrigerate the whole of it, could you? A. No, 30 sir.

The Court: You would either have to refrigerate it all or not refrigerate any?

The Witness: That is right.

The Court: You could rent it and not refrigerate any of it?

The Witness: Yes, sir.

40

JOHN KOENIG, sworn.

Direct-examiantion by Mr. Harrison:

Q. Mr. Koenig, you were formerly bréw master at the Lembeck & Betz Eagle Brewing Company, Jersey City? A. Yes. 10

Q. For how long a period? A. Oh, about six years.

Q. And do you know about this ale, approximately two hundred and fifty barrels, having been placed in the basement of Building K? A. Well, that was possibly placed after I left, but I know all about it.

Q. Oh. Well, were you brew master when the ale was manufactured? A. I made it. 20

Q. Oh, you made it. Was it what was known as stock ale? A. Yes, sir.

Q. And, in your opinion, assuming that ale had not gone sour, had not become acid, at what temperature should it best be kept? A. Well, the very best temperature, we will say, from fifty-five to sixty, the same as wine.

Q. And at what temperature could it be kept; a temperature below fifty-five and sixty? A. Well, this particular ale at any temperature below— 30

Mr. Boardman: I object to that.

A. (Continuing)—as long as it don't freeze.

(Discussion.)

Q. When you say "kept at any temperature below fifty-five or sixty," as you put it, at how low a temperature might it be kept, in your opinion? A. Oh, at a temperature that it actually would not freeze solid, we will say down to thirty, maybe twenty-eight in the extreme. 40

CROSS-EXAMINATION by Mr. Boardman:

Q. Well, ordinarily stock ale that is kept at a temperature that will freeze is chilled and ruined, isn't it? A. No, no, but it is simply dead.

Q. Dead? A. There is no action there at all either way.

Q. But the chilling of ale is a bad thing for it? A. At times.

Q. And ale is never kept in the same temperature that vegetables are kept, is it?

Mr. Harrison: That is not a very comprehensive question. I object. The witness is not shown to be a vegetarian or familiar with vegetables. He is testifying to ale.

The Court: Yes. Confine yourself to it.

The Witness: If I can help along by perhaps explaining, if you will allow me—

The Court: All right, go ahead.

The Witness: Ordinarily when you speak about storing ale, that is, really on storing, that is, maturing ale, of course, storage is incidental to it. Now, in this particular case that ale was fully matured when it went into this storage space, so any temperature—in fact, the lower the temperature it would have been kept in this particular case, the better it would have been, that is, it would simply preserve a matured ale. It would have been really a question of keeping it as it was instead of—it would not have improved with warm storage. If anything, it would have went the other way.

Q. But at any temperature that would have frozen it, would have damaged it, would it not? A. I would not—I don't know, but I would not say materially. Of course, if it had been frozen solid, the casks would have burst open.

Q. Before December sixth, 1924, this was kept with the—in K at the natural temperature of the room, was it not? 10

Mr. Harrison: I object to it.

A. I don't know.

Mr. Harrison: This witness does not know.

The Court: He says he doesn't know, so the objection is unnecessary. 20

Q. Up until the time you did leave—

Mr. Harrison: I object. It would be entirely immaterial and irrelevant.

The Court: I will allow it.

The Witness: If it was stored properly, at a temperature from fifty-five to sixty. And before I finally left I put it in cold storage. 30

Q. At what temperature? A. Well, our cold storage, that temperature was possibly thirty, thirty-four.

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E. S. SANFORD, sworn.

Direct-examination by Mr. Boardman:

Q. You are one of the counsel of receivers? A. I am connected with Mr. Harrison's office.

10 Q. And you were present on December sixth, 1924, at the passing of title of the National Cold Storage? A. I was there part of the time.

Q. Yes. Do you recollect this confidential memorandum for receivers, which is marked C-1? What is your best recollection as to when that was dictated and where?

The Court: Is it dated?

20 A. This is C-1. This was dated December sixth, 1924. Well, according to my best—my best recollection is very poor on the subject. Mr. Harrison tells me that he dictated that at—

Q. (Interrupting) No. What is your recollection? A. I have no definite recollection of it.

Q. You remember D-1 being dictated? A. No; I do not.

The Court: Mr. Sanford says he was in and out, as I understand it.

30 The Witness: I was there part of the time, your Honor, in and out. Mr. Harrison and I were both there different times. We may have been there together and I was in and out of the room. Now, this title was closed on Friday, December 5, and Saturday, December 6th covering a period of time and as to all these various papers, I cannot be positive in my recollec-

40 tion on it. This is evidently a paper that was prepared in our office.

Q. You actively participated in the transfer of the title? A. Yes.

Q. At the hearing before the receivers, your recollection was that C-1 had been dictated later for use as it indicates as a confidential memorandum for the reecivers; is that true? 10

The Court: Is that his testimony?

Q. Is that true?

The Court: If his testimony is there, why—

Mr. Boardman: (Interrupting) He did not testify.

Mr. Harrison: Referring to a casual remark, as I understand it, your Honor please. 20

Q. Was that your recollection at that time?

Mr. Harrison: I object, if the Court please. The question now is, what are the facts: What is his best recollection now?

The Court: Yes. I think we ought to get what his recollection is now, and he doesn't seem to have any.

30

Q. What is your best recollection now? A. I answered the question a moment ago.

Q. What is that? A. Well, my answer is there, I think.

Q. Well, don't you know a memorandum was made up afterwards? A. No; I didn't know it, Mr. Boardamn.

Q. Isn't that your recollection that some memorandum of the general nature and purpose of C-1 was made up after the closing, and after Mr. 40

Lewis and Mr. Eagle had gone? A. Well, there were undoubtedly papers made up after the closing of title after Mr. Lewis had gone and Mr. Eagle. I can't say that that paper was. We had various closing statements made up.

10

(Discussion.)

Mr. Harrison: I may say this, if the Court please, that only during this trial it has occurred to me that perhaps Miss Downs, who actually took the dictation from me, is available and should, perhaps, have been brought here. It seemed to me that I had sufficient proof already. If there be any doubt as to what the facts are in connection with this particular memorandum, I would like to have the opportunity of having her brought here so that she may testify as to her recollection.

20

The Court: All right. I will allow that. Has Mr. Boardman anything else to offer, any other testimony?

Mr. Boardman: Senator Harrison, will you put on record a statement that this matter of the destruction of this ale was pending and was being fought out in the courts all the time, practically, until it was destroyed?

30

Mr. Harrison: Yes. I have no objection to it. I can, perhaps, state the facts for the benefit of counsel. See if this covers it, Mr. Boardman. Application was made by the receivers to the Court of Chancery some time in February, 1925, as I recall,

40

for an order to destroy the ale. Before the return of the order to show cause issued on that application, the receivers were restrained in the United States District Court of this district from destroying the said ale, which restraint remained in force until sometime in the summer of 1927. 10

Upon the removal of the—this suit was at the instance of Gustav W. Lembeck and others—upon the removal of the restraint, application was then again made to this court and an order obtained for the destruction of the ale, and on September second, 1927, the ale was destroyed under the direction of the Prohibition authorities. 20

Mr. Boardman: And just one thing more: The Court will, I assume, take judicial notice that Gustav Lembeck was one of the Lembeck & Betz and interested in it.

The Court: He was a large stockholder.

Mr. Boardman: Yes, a large stockholder.

The Court: Now, does this conclude the case except for the examination of Miss Downs?

Mr. Boardman: I think so, yes. I think so, yes. 30

The Court: Well, then, we will take Miss Downs' testimony. And do you want to file memorandums? What do you want to do?

Mr. Harrison: Of course, at your Honor's pleasure. I can sum up my end of the case in five or ten minutes. I think it is a very simple proposition. 40

The Court: It seems to be a simple matter.

Mr. Boardman: Your Honor has not, of course, read all the testimony as yet?

The Court: No. And I think this testi-
10 mony should be written out so I can read your testimony in connection with that, and, if you want to sum up, I will listen to that, or you can file memorandums, just as you please.

Mr. Boardman: Suppose we put in memorandums?

Mr. Harrison: All right.

The Court: Very well.

20

JULIA W. DOWNS, sworn.

Direct-examination by Mr. Harrison:

Q. Miss Downs, you are employed—now employed in the office of Harrison & Roche, at 810 Broad Street? A. Yes, sir.

Q. And were so employed on December the
30 sixth, 1924? A. Yes.

Q. Do you recall the closing of the title of the premises on 9th Street, Jersey City, being the cold storage plant of the New Jersey Refrigerating Company? A. Yes.

Q. Do you recall how long that title was in closing? A. Why, it took considerable time. I couldn't say definitely just how long; I know it was quite some time.

40 Q. Do you know how many days the parties

met? A. No, I couldn't say exactly; I know they were several days negotiating and the actual closing took quite some time.

Q. Well, were you called—To what extent did you participate in the closing? A. Well, I was there when they closed the title. There were several men there; I should say there were about a dozen men in the room at the time. 10

Q. Well, did you have occasion to take any dictation from any of the parties present there? A. Yes.

Q. From whom? A. Why, I think you dictated.

Q. Can you, by an examination of Exhibit C-1 and Exhibit D-1 tell me whether either or both of those exhibits were typewritten by you and whether you took the stenographic notes upon which those typewritten sheets are based? A. Yes. I remember them very well. 20

Q. What are the facts, Miss Downs, as you recall them, the circumstances surrounding the dictation and transcription of Exhibit C-1? A. Well, I couldn't say whether it was before the title had actually closed or after, but there was some conference—some conversation between the attorneys of the cold storage company with you, and after talking to them you returned and dictated the things to be incorporated in this memorandum and I went out after you had dictated it and wrote it and brought it back and gave it to you that day. 30

The Court: That seems to be very explicit and to the point.

Mr. Harrison: You may cross-examine. 40

CROSS-EXAMINATION by Mr. Boardman:

Q. Which of those exhibits did—or both of them—did you give to them, as you recall? A. Well, I know the shorter one of the two I did. I couldn't say positively as to the second one, 10 because, as I recall, whether it was at noon hour or late in the afternoon, I am not sure as to that, but I know everyone was dispersing and the one paper, I wouldn't even say it was one of these —this I know I wrote, because the shorter memorandums I did write all on that day.

Mr. Harrison: Referring to Exhibit C-1.

The Witness: Exhibit C-1. And there 20 were one or two other papers which they said, "You can write up forward to us."

Q. Now, just let me ask you this: Do you keep a book? Of course, you take this all down in books? A. Oh, yes.

Q. Have you kept—do you keep your old books? A. No.

Q. Will you look at the first part of C-1 where it says "Confidential memorandum for receivers"? Do you recall whether that made any 30 impression on you at the time you wrote it? Was there anything said about that when it was written? A. No; I don't think anything special was said to me about it, except that I was asked to write it up and bring it in, which I did.

Q. Does that refresh your memory, that "Confidential memorandum for receivers"—does that refresh your memory as to whether that was written—dictated in the presence of all, or whether it 40 was dictated afterwards or elsewhere? A. No.

I had no dictation on it after the closing. Everything was given to me right there while everyone was in the room.

Q. Do you remember this little memorandum? A. Yes.

Q. Is that your handiwork? A. Yes. 10

The Court: Is that in evidence?

Mr. Boardman: No.

The Witness: That was just a memorandum to take care of the papers, to see that everything was properly taken care of.

Mr. Harrison: No objection to its introduction in evidence.

Mr. Boardman: I don't know whether I want to cumber up the record. 20

The Court: It is up to you.

Mr. Boardman: I will have it marked.

(Memorandum marked Exhibit D-2.)

The Court: Is there anything further?

Q. At 8:10 the general conferences were held in the room of—

Mr. Harrison: Park commission.

Q. —Park Commission, were they? A. Yes. 30

Q. And were some of the smaller conferences held in the front offices of Harrison & Roche? A. The actual closing itself was in the Park Commission board room.

Q. Yes. A. But various negotiations were held in Mr. Harrison's office.

Q. Yes. Would you recall where C-1 was dictated, whether it was in the Park room or— A. (Interrupting) Oh, these were dictated in the 40

Park Commission Room at the time of closing, on the actual day of the closing.

Q. Do you know, referring to this paper, memorandum enclosing D-2—do you know why this confidential memorandum was not included in the
10 list of papers that were to be executed?

The Court: I won't allow that, Mr. Boardman. We are merely after facts, not reasons. Anything further; anything else?

Mr. Boardman: I don't think so.

The Court: That is all, Miss Downs.

20

EXHIBIT C-I BEFORE RECEIVERS.

March 3rd, 1925.

Edw. H. Wright & Frank J. Bock, Receivers,
Messrs. Harrison & Roche,
810 Broad Street,
Newark, N. J.

Dear Sirs:
30

Through an oversight our billing department neglected to send you an invoice for two months rental for certain space in the basement of building "K" of this Company's Plant in Jersey City, which space you still occupy.

On December 6th, 1924, your attorney, Mr. Harrison, agreed to remove the product stored in
40 said space on 30 days notice, and this notice was given in the presence of Messrs. Bock, Harrison

and the writer by our counsel Mr. J. Frederick Eagle.

Very truly yours,

THE NATIONAL COLD STORAGE CO. INC.,
General Manager. 10

EWL:MCK
(Tab.)

EXHIBIT C-II BEFORE RECEIVERS.

New York City, Mar. 3, 1925.

20

Edw. H. Wright and Frank J. Bock, Receivers
New Jersey Refrigerating Company
810 Broad Street, Newark, N. J.

To THE NATIONAL COLD STORAGE CO., INC., *Dr.*
Offices: 19 Hudson Street, Cor. Reade St.

Date No.

Lot————— Months Articles Weight Rate Amount
In Out 30

To rent of space in basement of Building K:
From Jan. 6 to Mar. 5 2 @ $600.00 per
month $1,200.00

40

EXHIBIT C-III BEFORE RECEIVERS.

May 13, 1925.

Messrs. Harrison & Roche,
810 Broad Street,
Newark, N. J.

10 Dear Sirs:

We have your letter of May 5th and note that you have been advised by Mr. Bock of a verbal arrangement that he had with us regarding the office furniture in our office building at 173 Ninth Street, Jersey City.

Mr. Bock called to see the writer on April 8th in connection with your letter of March 9th
20 regarding our invoice to the Receivers of the New Jersey Refrigerating Company, amounting to $1,200.00. I find a notation that I made on the letter above referred to which reads:

"Mr. Bock called and made a proposition for us to take over office furniture and fixtures on which they (the Receivers) had a bid for $650.00 in lieu of the attached bill for $1,200.00 they to pay for space from March 5th at $300.00 per
30 month."

In accordance with this tentative agreement, you can see that it would not be in order for us to comply with the last paragraph of your letter of May 5th, in which you ask us to send a deposit, a check to the order of the Receivers for $50.00.

Very truly yours,

The National Cold Storage Co. Inc.,
40 General Manager.

EWL:MCK

EXHIBIT C-IV BEFORE RECEIVERS.

May 25, 1925.

Messrs. Harrison & Roche,
810 Broad Street,
Newark, N. J.

10

Attention Mr. J. H. Harrison

Dear Sirs:

We have your letter of May 20th in which you say that you gather from our letter (May 13th) that we are no longer interested in the purchase of the office furniture, and that Mr. Wright, one of the Receivers of the New Jersey Refrigerating Company, will get in touch with us in regard to this matter within a short time.

20

We are interested in this furniture to the extent of using it in part payment of bills of this company rendered to the Receivers of the New Jersey Refrigerating Company.

Very truly yours,

30

The National Cold Storage Co. Inc.,
General Manager.

EWL:MCK

40

EXHIBIT C-1, DEC. 15, 1927, BEFORE RECEIVERS.

New York City Aug. 3, 1925

Edw. H. Wright & Frank J. Bock, Receivers
New Jersey Refg. Co.,
810 Broad St., Newark, N. J.

10

To The National Cold Storage Co., Inc., *Dr.*
Offices: 19 Hudson Street, Cor. Reade St.

Lot	Date In	Date Out	No. Months	Articles	Weight	Rate	Amount

To rent of space in basement of Bldg. "K":
20 From Mar. 6 to Aug. 5—5 mo. @ $600.00
per month $3,000.00

(Note: Attached to this exhibit and offered with it were twenty-five other bills of the same series from Sept. 5, 1925, to Aug. 6, 1927, both inclusive, each for monthly rent of space in basement of building K at $600 per month.)

At hearing before Vice Chancellor.

EXHIBIT C-1, ~~DEC. 15, 1927.~~

(Copy)

Confidential Memorandum for Receivers.
December 6, 1924.

1. Junk, machinery, etc., in rear of office building on south side of Ninth Street to be removed by receivers and disposed of within 30 days. 10

2. Pipe and/or fittings on hand, used in connection with the refrigerating plant, in plant, by way of replenishment or addition, belongs to National Cold Storage &c Co.

3. Disconnected and obsolete machinery and junk, now in the storage warehouse plant, and formerly used in connection with the brewery business, is the property of the receivers and shall be removed by them within 30 days. 20

4. Approximately 250 barrels of ale, stored in cellar of Building K may remain for 60 days, within which time same is to be removed. National Cold Storage &c Co. will assume no responsibility for custody or care of ale.
(Tab.)

EXHIBIT C-2 BEFORE VICE CHANCELLOR.

EDEL LABORATORIES

837 Broad Street

Newark, N. J.

10 Messrs. Edw. H. Wright &
Frank J. Bock, Receivers
N. J. Refrigerating Co.
Newark, N. J.

January 15, 1925

CERTIFICATE OF ANALYSIS

Received from The Receivers of the N. J. Refrigerating Co. on
20 January 11, 1925.

Our No.	Markings	Spec. Gravity of Distillate	Absolute Alcohol by weight	Absolute Alcohol by volume	Acidity (Calculated as Lactic Acid)
16755	1-A 1-12-24	0.98787	7.16%	8.92%	0.54%
16758	5-A 1-12-25	0.98833	6.86%	8.53%	0.42%
16760	3-A 1-12-25	0.98766	7.30%	9.09%	0.49%
16757	P-2 1-12-25	0.98880	6.53%	8.14%	0.70%
16756	P-6 1-12-25	0.98816	6.97%	8.67%	0.87%
16759	P-4 1-12-25	0.98880	6.53%	8.14%	0.73%

30

The Acid Content is high.

EDEL LABORATORIES
By (Signed) Albert E. Edel
Analytical Chemist.
(L. S.) Albert E. Edel, Chemist
Newark, N. J.

Analyzed by S
Checked by T
40

At hearing before Vice Chancellor.

EXHIBIT C-3 ~~BEFORE RECEIVERS~~

(Copy)

Edel Laboratories 837 Broad St., Newark, N. J.
Dr. Albert E. Edel
Analytical Chemist
Messrs. Frank J. Bock & Edward H. Wright,
Receivers' of New Jersey Refrigerator Company,
810 Broad Street,
Newark, N. J.

Re: Analysis of Ale #3256.

Gentlemen:

This is to certify that I have made an analysis of seven samples of ale taken from The New Jersey Refrigerator Company, formerly The Lembeck and Betts Brewery, on March 29th, 1927.

Sample marked #1.

Specific Gravity of Distillate	0.98783
Absolute Alcohol by Weight	7.19%
Absolute Alcohol by Volume	8.95%
Acidity (as Lactic Acid)	0.26%
Odor and Taste	Sour

Sample marked #2.

Specific Gravity of Distillate	0.99901
Absolute Alcohol by Weight	0.51%
Absolute Alcohol by Volume	0.64%
Acidity (as Lactic Acid)	0.14%
Odor and Taste	Putrid and Sour

Sample marked #3.

Specific Gravity of Distillate	0.98737
Absolute Alcohol by Weight	7.51%

Absolute Alcohol by Volume	9.34%
Acidity (as Lactic Acid)	0.34%
Odor and Taste	Souring

Sample marked #4.

Specific Gravity of Distillate	0.98923
Absolute Alcohol by Weight	6.25%
Absolute Alcohol by Volume	7.79%
Acidity (as Lactic Acid)	1.04%
Odor	Souring

Sample marked #5.

Specific Gravity of Distillate	0.98770
Absolute Alcohol by Weight	7.28%
Absolute Alcohol by Volume	9.06%
Acidity (as Lactic Acid)	0.22%
Odor and Taste	Sour

Sample marked #6.

Specific Gravity of Distillate	0.99853
Absolute Alcohol by Weight	0.76%
Absolute Alcohol by Volume	0.97%
Acidity (as Lactic Acid)	0.18%
Odor and Taste	Sour—watery

Sample marked #7.

Specific Gravity of Distillate	0.99394
Absolute Alcohol by Weight	3.34%
Absolute Alcohol by Volume	4.17%
Acidity (as Lactic Acid)	0.23%
Odor and Taste	Putrid—watery

Conclusion

The chemical and physical examinations of the above Ales proved that they are all unfit for

human consumption, being all sour to a varying degree and two of them actually putrid.

Respectfully submitted,

(Signed) ALBERT E. EDEL, 10
Analytical Chemist.

April 5, 1927. (L. S. Albert E. Edel,
Chemist, Newark, N. J.

EXHIBIT D-1 BEFORE VICE CHANCELLOR.

Memorandum on Closing of title to plant of the New Jersey Refrigerating Company and other properties more particularly described in contract with Charles T. Brown dated September 17, 1924. 20

In making adjustments on the closing of title it appeared that the accounts payable to the New Jersey Refrigerating Company, as of October 31, 1924, for storage of goods in plant at that time, was the sum of $532.36; that there was paid on these accounts, as appears by sheet hereto annexed, the sum of $250.29, leaving a balance due of $282.07, which amount the Hudson Storage & Refrigerating Company, or its successors, will endeavor, as agent of the receivers, to collect from time to time upon release of goods now in storage on behalf of the customers shown on the annexed list, and make monthly returns to the receivers. 30

40

It also appeared that subsequent to November 17, 1924, deliveries were made by the Hudson Storage & Refrigerating Company for the account of the New Jersey Refrigerating Company, and cartage charges are due for such deliveries. The
10 amount of these charges is to be submitted and adjusted in connection with the credit item of $282.07 above referred to.

The receivers agree, within 48 hours, to notify the customers whose names are shown on the annexed list as now having goods in storage at the plant for the account of the New Jersey Refrigerating Company, forthwith to remove the goods in storage or to enter into new contracts
20 with the purchaser; and the receivers assume any damages that may have been occasioned to goods now in storage which may have already been occasioned, or which may be occasioned prior to the removal of said goods or the entering into of new contracts with the National Cold Storage Company.

FRANK J. BOCK,
EDWARD H. WRIGHT.

30 (Tab.)

40

EXHIBIT D-4 BEFORE VICE CHANCELLOR.

NEW JERSEY REFRIGERATOR CO.

Located	Warehouses
On Erie Railroad	Ninth Street
Connecting	Tenth Street
with all	Grove Street
Freight Lines.	Henderson Street

10

OFFICE 173 NINTH ST.
Jersey City, N. J.

Accounts Receivable as at Oct. 31, 1924, for customers who have storage in plant at this time.

	Oct. 31/24	Paid in Nov. & to date
Castles Ice Cream Co.	$ 9.60	$ 9.60
Eckerson Co.	8.02	8.02
I. Moeschen	10.50	9.00
Pacific Extract Co.	58.60	0.
Phenix Cheese Co.	118.73	0.
J. Reviello	23.13	0.
Bloom & Doner	11.95	11.95
Jacob Dold Packing Co.	.65	0.
F. D. Follansbee	.48	0.
Ben Grunstein	1.75	0.
S. W. Kagan Co.	4.32	0.
S. J. Levine	4.15	0.
Malone & Clementi	10.08	0.
J. Minder & Son	6.26	6.26
N. Y. & Chicago Beef Co.	5.90	5.90
J. Odenheimer	2.68	2.68
Peterson Bros.	1.50	0.
Rosedale Dairy	173.63	173.63
N. Schweitzer & Co., Inc.	17.49	0.

20

30

40

Silberman Bros.	59.00	23.25
J. Schmitzberger	.99	0.
J. Stanley	.70	0.00
C. Vrola	2.25	0.
	$532.36	$250.29
Balance due from above customers on Oct. balances		282.07
	$532.36	$532.36

10

Exhibit D. 2.

Memorandum on Closing.

December 6, 1924—

20 Mr. Wright to sign memorandum on closing.

Delivered check for $299 for revenue stamps on deed to Mr. Enright, of N J Title Guaranty & Trust Co.

Send—Mr. J. Frederick Eagle, 120 Broadway, New York City, complete copy of deed.

Send—Mr. Eagle, duplicate original of lease from National &c Co. to Receivers.

30 Papers delivered on closing.

1. Deed O. K. and delivered to National Cold Storage &c Co.

2. Assignment of franchise, with copy of grant from Public Utilities Commission. Duplicate original held by receivers.

3. Assignment of Erie Railroad lease, dated April 1, 1920, to Lembeck & Betz Eagle Brewing Co.; original lease and blue print thereto annexed. Duplicate originals delivered to receivers.

40

Exhibit D-2 Before Vice Chancellor

4. Bill of sale of personal property under contract. Carbon copy held by receivers.

5. Bill of sale for 7 automobiles. Carbon copy held by receivers.

6. Assignment of right, title and interest of receivers to sinking fund under Commercial Trust Co. mortgage. Carbon copy retained by receivers. 10

7. Copy of memorandum on closing dated Dec. 6, 1924, delivered to National Cold Storage, &c. Co.

Note: Original left with receivers to be executed by both receivers and to be mailed Mr. Eagle upon completion. 20

EXHIBIT R-II BEFORE RECEIVERS.

HARRISON & ROCHE
Law Offices
810 Broad Street

10 Newark, N. J.

(Seal)
March 9, 1925.

J. H. Harrison
Auguste Rocke, Jr.

E. S. Sanford
C. Wallace Vail

20

The National Cold Storage Company,
19 Hudson Street,
Jersey City, N. J. Att. Mr. E. W. Lewis.

Gentlemen:

Your letter of the 3rd instant to the receivers of the New Jersey Refrigerating Company, with
30 enclosure of invoice for two months rental of space in cellar in Plant of Ninth Street, Jersey City, occupied by approximately 250 barrels, which barrels are said to contain ale, has been turned over to me.

My memorandum on closing of the plant title, shows that the National Cold Storage Company representatives would assume no responsibility for the custody or care of the ale at any time,
40 and that the entire risk would have to be taken

by the receivers. It is true, that in behalf of the receivers, I stated that we would endeavor to remove the ale within sixty days, but there was no agreement that we should pay any storage charges, nor was there any intention on the part of the parties so far as I recall, that the ale was left on storage. 10

The receivers purpose presenting a petition to the court within a few days for permission to remove the ale, and probably destroy it, so that I am hopeful that you will be agreeable to arrangements for its prompt removal. I have asked the receivers to get in touch with you within the next few days with that end in view. You will probably hear from them very shortly. 20

Yours very truly,

J. H. HARRISON.

JHH/JWD

Memo. at Foot of Letter Made by E. W. Lewis 30

4/8 Mr. Bock called; made proposition for us to take over office furniture & fixtures, on which they had bid for $650, in lieu of the attached bill for $1200.00; they pay for space from Mar. 5 at 300.00 per mo.

40

EXHIBIT R-III BEFORE RECEIVERS.

HARRISON & ROCHE
Law Offices
810 Broad Street
Newark, N. J.

10

J. H. Harrison
Auguste Roche, Jr.

E. S. Sanford
C. Wallace Vail

September 29, 1925.

20 National Cold Storage Company, Inc.,
19 Hudson Street, New York City.

Gentlemen: *In re New Jersey Refrigerating Co.*

I acknowledge receipt of your bill of September 5, 1925, covering rent of space in basement of Building K of your storage warehouse on Ninth Street, Jersey City, N. J., for one month, to September 5, $600.00. I assume this is for the 30 space in which some two hundred and fifty odd barrels of ale are stored.

This bill cannot be honored by the receivers. As I wrote you under date of March 9, 1925, your company would assume no responsibility for the custody of the ale, and, at the closing of the title to the plant, took the position that the entire risk for the care of the ale would have to be taken by the receivers, and I believe at that time you left 40 with the receivers, or their agents, the key to

the room in which the ale was stored. We did endeavor, in accordance with our agreement, to remove the ale within sixty days after the closing of the title, but due to legal proceedings and other difficulties, we could not remove the ale, and at the present time the receivers are under an injunction, issued by the United States District Court for the District of New Jersey, not to remove the ale from storage. The receivers do not recognize any liability for storage charges, and cannot recommend for payment any bill for such charges unless and until the Court of Chancery of New Jersey shall approve. 10

Yours very truly, 20

JHH/NLF

J. H. HARRISON,
Counsel for Receivers N. J. Refrigerating Co.

OPINION.

(Filed Nov. 5, 1928)

IN CHANCERY OF NEW JERSEY

10 In the Matter

of

The Dissolution of the New Jersey Refrigerating Company.

Richard Boardman for the National Cold Stor-
20 age Company.

J. H. Harrison, counsel for receivers.

Church, V. C.

This is an appeal from the rejection by the receivers in the above entitled matter of a claim for storage charges on about 250 barrels of ale stored in a portion of the cellar of a building sold
30 by the receivers to the National Cold Storage Company. The claim is for $19,200 with interest on $600 from the end of each month beginning with the month terminating February 5, 1925, and ending September 5, 1927. The proof of claim alleges, first, that the receivers hired the basement, all of it, at a rental of $600 per month, and, second, that said basement, all of it, was used and occupied by receivers during the said period and that the use is reasonably worth $600 per month.
40

The facts are in dispute, but, after a careful consideration of the testimony and briefs of counsel, I find them to be as outlined hereafter in this opinion. When title was closed between the receivers and the National Cold Storage Company on December 6, 1924, a memorandum was dictated by Mr. Harrison, counsel for the receivers, in the presence of all parties concerned. It contains the following paragraph: "Approximately 250 barrels of ale, stored in cellar of building K may remain for sixty days within which time same is to be removed, National Cold Storage, etc. Co. will assume no responsibility for custody or care of ale."

I therefore find that the receivers are not responsible for storage or rent during those sixty days. The receivers were unable to dispose of the ale because of a decree of the U. S. District Court for the District of New Jersey which directed them "to safely keep said ale in their possession subject to the further orders of this court."

This necessitated the keeping of the ale for nearly three years before it could be destroyed. There is nothing in the testimony to lead me to the conclusion that the relation of landlord and tenant existed between the receivers and the storage company. In the memorandum above quoted the company expressly repudiated any responsibility, which is certainly an incident of that relationship. The whole testimony shows that the receivers did not recognize an obligation for any fixed rent for any certain period.

10

20

30

40

However, the fact remains that the ale remained in the cellar of the storage company for a considerable time, through no fault of the storage company. I think it is entitled to reasonable compensation for the space actually occupied by
10 the ale after the expiration of the sixty days mentioned above. I do not think it is entitled to remuneration for the whole cellar. The testimony shows that the storage company had at least as much access to the cellar, except the room partitioned off for the ale, as the receivers.

I shall find that the storage company is entitled to remuneration at the prevailing rate for common storage for the room actually occupied by the
20 ale. It occupied 720 square feet. The common rate is fifty cents per square foot per year. This, as I understand the testimony, would make the charge $930. If my mathematical calculations are correct, I will advise a decree accordingly. If not, I will advise a decree according to this opinion, the figures to be corrected to conform thereto. No interest will be allowed.

DECREE.

IN CHANCERY OF NEW JERSEY

In the Matter of The Dissolution of New Jersey Refrigerating Company.	On Petition of Appeal from Determination of the Receivers Rejecting Claim of National Cold Storage Co., Inc.

10

National Cold Storage Co., Inc., having appealed to this court from the rejection in whole by Frank J. Bock and Edward H. Wright, Receivers of New Jersey Refrigerating Company, a corporation in dissolution, of the claim of appellant for storage charges on approximately 250 barrels of ale alleged to have been stored in the basement of building K on premises on Ninth Street, in the City of Jersey City, New Jersey, sold by said receivers to appellant, said claim having been filed with said receivers under order of this court dated August 15, 1927 and being for $19,200 with the interest on $600 from the end of each month beginning with the month terminating February 5, 1925 and ending September 5, 1927, and alleging, first, that said receivers hired the basement, all of it, at a rental of $600 per month, and, second, that said basement, all of it, was used and occupied by said receivers during the said period and that its use was reasonably worth $600 a month; and the appeal having come on to be heard

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30

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in the presence of Richard Boardman, Esquire, solicitor for and of counsel with National Cold Storage Co., Inc., the petitioner and appellant herein, and of J. H. Harrison, Esquire, solicitor for and of counsel with Frank J. Bock and
10 Edward H. Wright, Receivers of New Jersey Refrigerating Company, and the court having examined the petition of appeal herein and the answer of said receivers to said petition, and having taken proofs and having considered, pursuant to stipulation in the cause, the evidence offered before the receivers by the appellant and having heard and considered the arguments of counsel; and it appearing to the court that, in
20 full satisfaction of the said claim, the National Cold Storage Co., Inc. is entitled to reasonable compensation for the space actually occupied by said ale, to wit, 720 square feet, from February 6, 1925 to September 5, 1927 at the annual rate of fifty cents per square foot, and that such reasonable compensation for said period is the sum of $930, without interest:

It is, thereupon, on this 16th day of November,
30 1928, Ordered, Adjudged and Decreed that out of the moneys of New Jersey Refrigerating Company now or hereafter in their possession as such receivers, Frank J. Bock and Edward H. Wright, Receivers of New Jersey Refrigerating Company, are hereby authorized and directed to pay to National Cold Storage Co., Inc. the sum of $930, without interest, in full satisfaction of the claim of National Cold Storage Co., Inc. against said receivers for rent and use and occupation of the
40 basement of building K on premises on Ninth

Street, in the City of Jersey City, New Jersey, for the storage of ale, which said claim was filed with said receivers under an order of this court made herein on August 15, 1927.

And it is further ORDERED, ADJUDGED and DECREED that the petition of appeal herein be, and the same is, hereby dismissed as to all and singular the matters and things alleged therein, and which are not herein adjudged in favor of the appellant. 10

E. R. WALKER,
C.

Respectfully advised.
Alonzo Church,
V. C. 20

The above decree conforms to the findings of the Vice Chancellor.

RICHARD BOARDMAN,
Solicitor for and of Counsel with
National Cold Storage Co., Inc.

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NOTICE OF APPEAL.

(Filed Nov. 30, 1928)

IN CHANCERY OF NEW JERSEY

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In the Matter of The Dissolution of the New Jersey Refrigerating Company.	On Bill etc. On Claim of National Cold Storage Company, Inc.

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National Cold Storage Company, Inc., claimant, appeals from so much of the decree (advised by Hon. Alonzo Church, Vice Chancellor), in this Court, made in this cause, in this matter, on the 16th day of November, 1928, as

(1) recites and decrees that appellant is entitled to compensation for use and occupation for only 720 square feet, and not for 30,360 cubic feet, and for the period beginning February 6, 1925, and
30 not for the period beginning January 6, 1925, and at a rate of fifty cents per square foot per year, and not at a rate of approximately two cents per cubic foot per month, and in the total amount of $930 without interest, and not the total sum of $19,200 with interest on unpaid balances; and

(2) dismisses its petition of appeal as to the matters and things alleged therein, which are not

40

in said decree adjudged in favor of said appellant.
November 27, 1928.

RICHARD BOARDMAN,
Solicitor for and Of Counsel with National Cold Storage Company, Inc., 10
Appellant.

I conceive that there is good cause for appeal in the above cause.

RICHARD BOARDMAN,
Of Counsel.

Service of the within Notice is admitted this 28th day of November, 1928. 20

J. H. HARRISON,
Sol'r & of Counsel with Frank J. Bock and Edward H. Wright,
Receivers.

New Jersey
Court of Errors and Appeals

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY.

On Appeal of NATIONAL COLD STORAGE COMPANY.

NATIONAL COLD STORAGE COMPANY,
Appellant,

FRANK J. BOCK and EDWARD H. WRIGHT as Receivers,
Respondents.

APPEAL FROM DECREE OF COURT OF CHANCERY REJECTING, EXCEPT IN SMALL PART, THE CLAIM OF NATIONAL COLD STORAGE COMPANY AGAINST THE RECEIVERS.

BRIEF FOR APPELLANT.

Statement of the Case.

The question here involved is the amount the appellant is entitled to recover from the Receivers for cold storage space occupied by the Receivers.

The manner in which the question comes to this court is as follows:

By an order of August 15, 1927, the Court below ordered its Receivers to destroy certain ale then in their possession, and gave to the appellant twenty days within which to file formal proof of its claim for storage (pp. 7, 8).*

Appellant then filed its claim for $19,200 with interest on $600 from the end of each month from January 6, 1925, to September 5, 1927 (pp. 9-11). The claim is based both upon a hiring and upon use and occupation (p. 10).

Testimony in support of the claim was taken before the Receivers on December 6 and 15, 1927 (pp. 12-55). The Receivers rejected the claim *in toto* January 4, 1928 (p. 56). The appellant appealed from the Receivers' determination (p. 57). The Receivers answered the appeal (pp. 60-63), and a hearing was then had before Vice-Chancellor Church on March 1, 1928 (pp. 64-126).

Vice-Chancellor Church held that the appellant was entitled to remuneration at the prevailing rate for *common* storage for the space actually occupied by the ale, *i. e.*, 720 square feet at the rate of 50 cents per square foot per year, making a total of $930 without interest (pp. 144-146).

A decree in accordance with the Vice-Chancellors' opinion was entered on November 16, 1928 (pp. 147-149).

This appeal was then taken on November 30, 1928 (pp. 1, 2; 150, 151).

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*Page references, unless otherwise noted, are to the Record, or State of Case.

Grounds of Appeal.

Appellant contends that the decree appealed from is erroneous in that it awards compensation

(a) For 720 square feet of storage space instead of 30,360 cubic feet;

(b) At the rate of 50 cents per square foot per year instead of 2 cents per cubic foot per month;

(c) Without interest instead of with interest on monthly balances.

The question as to *quantity of space* arises from a controversy as to whether the Receivers are chargeable with the use of an entire room, constituting one refrigerating unit of appellant's plant, or only with use of such part of the space in that room as was actually occupied by the ale.

The question as to *rate* arises from a controversy as to whether the Receivers are chargeable with the reasonable value of *cold* storage or only with the reasonable value of *common* storage.

The petition of appeal herein assigns as a further ground of appeal that the Court below awarded compensation for the period beginning February 6, 1925, instead of the period beginning January 6, 1925 (pp. 1, 2). In order, however, to eliminate discussion of a controverted question of fact as to which the testimony was conflicting, that ground of appeal is not here insisted upon.

The Facts.

For the most part the facts are undisputed.

The Parties and the Plant.

The New Jersey Refrigerating Company formerly was Lemback & Betz Eagle Brewing Company, its name having been changed about 1919 (p. 87). Receivers in liquidation were appointed in June, 1923 (p. 98). Among the assets which came into their possession was the old Lembeck & Betz Brewery at Ninth and Henderson Streets in Jersey City, New Jersey, which consisted of several buildings, one of which was known as Building K (pp. 13, 14). In the basement of that building was a quantity of ale, which had been manufactured at a time when the plant was being operated as a brewery (p. 115).

From September to December, 1924, the plant was operated by Hudson Storage and Refrigerating Company under a lease from the Receivers (p. 14). The Receivers, however, retained possession of the basement of Building K during that time. Upon this point Mr. Siemer, of the Hudson Storage and Refrigerating Company, testified (pp. 14, 15):

> "Q. During the occupancy of the Hudson Company, to what use was the basement of Building K put? A. Why, we never had the use of that basement, because it was under lock and key.
>
> "Q. *Who did have possession of it?* A. *The Receivers.*
>
> "Q. And it was reserved at the time you took your lease? A. I don't think so. I don't think it was ever reserved.

"Q. *They controlled it?* A. *Yes.*

"Q. And who was in possession of the plant generally when you turned the plant over to the claimant here: in possession of this basement to Building K? A. I always considered that the Receivers, represented by Mr. Dill, were in possession, because Mr. Dill was presenting them there in the office.

"Q. Who had the key of that in September, 1924? What happened? A. Just before the Hudson Storage & Refrigerating Company took possession of the plant under lease Mr. Rogers had the key, and at that time Mr. Rogers and myself were discharged by the Receivers and the key was turned over to Mr. Dill.

"Q. That was the key to which door? A. Well, there were two keys that Mr. Rogers had—one for the outer door and one for the inner door.

"Q. And he turned over one or both keys? A. To my knowledge he turned over both keys."

Mr. Siemer and Mr. Rodgers had been employees of New Jersey Refrigerating Company, and after the appointment of the Receivers they both became employees of Hudson Storage and Refrigerating Company (pp. 13, 14; 109).

G. W. Lembeck was one of the large stockholders of New Jersey Refrigerating Company (pp. 37, 121); and so far as the record shows he still is. He was also connected with the Hudson Storage & Refrigerating Company (p. 37), which, as above stated, operated the plant for a few months under a lease from the Receivers.

Hudson Storage & Refrigerating Company presented a claim against the Receivers for the oc-

New Jersey State Library

cupancy of the cellar or basement of Building K for the period from September 17 to December 5, 1924, *at the rate of $600 per month,* making a total of $1,560 (pp. 21, 22). What action the Receivers took upon that claim does not appear in the record.

Arrangement with Appellant as to Receivers' Occupancy.

In December, 1924, the Receivers sold this plant to National Cold Storage Company, the appellant herein, the title having been closed and the premises conveyed on December 6, 1924 (pp. 61, 71).

At the time of closing title reference was made to the fact that the Receivers had this ale in their custody in the premises which were being conveyed, and what was said upon that subject at that time is testified to by several of the persons who were present at the closing.

Among the persons present were the Receivers, Mr. Bock and Mr. Wright; their counsel, Mr. Harrison and Mr. Sanford; Eugene W. Lewis, Treasurer and General Manager of the appellant, and Mr. Eagle, his counsel; Mr. John A. Siemer, and Mr. Edward A. Dill, who is described as chief clerk or "general factotum" of the Receivers (p. 87).

Mr. Siemer testified that the conversation "regarded the occupancy of this cellar in Building K" (p. 16); that Mr. Bock said that he would see that the ale was removed within thirty days; that Mr. Lewis insisted upon an agreement to the effect that the ale would be removed within thirty

days (p. 17); that Mr. Bock stated that he wanted thirty days' time "or something to that effect"; and that Mr. Lewis said, "I will give you your notice now" (pp. 17, 18).

Mr. Lewis testified that Mr. Sanford stated, "You know we have some ale in the basement of one of your buildings, but we are trying to dispose of it and expect to get it out in a short time, and we will get it out on thirty days' notice"; and that Mr. Eagle said, "I now serve on you the required thirty days' notice" (p. 33).

He further testified (p. 34):

> "Q. Did you have any conversation about the control of the ale—the responsibility for it? A. Yes; I added to what I said to Mr. Harrison on the other question that I *considered it contraband* and I *did not know just how far our company might get in by having ale in their possession,* and that, as I understood it, the space under the whole of the building was occupied by the Receivers, in which they had some alleged ale stored.
>
> "Q. Did you say whether or not you were going to assume any responsibility for it? A. I did that, also. I did tell them that I would accept no responsibility."

Also, on cross examination (pp. 41, 42):

> "Q. At the time of the closing of the title, Mr. Lewis, and the discussion which then took place with reference to the ale, did you not say, in substance and effect, that the National Cold Storage Company would assume no responsibility for the custody or care of the ale? A. Yes, sir.
>
> "Q. And was not the agreement made at that time between you and the receivers sub-

stantially as follows: that approximately 250 barrels of ale stored in the cellar of Building K may remain there for 60 days, within which time the same is to be removed, and that the National Cold Storage Company will assume no responsibility for the custody or care of the ale? A. The question of quantity is not clear in my mind, and moreover, the matter of 60 days was not discussed.

"Q. However, at that time, do you recall that you or someone in behalf of the Storage Company said, in effect, that the Storage Company would assume no responsibility for the custody or care of the ale? A. Yes, sir."

Mr. Bock, one of the Receivers, testified (pp. 71, 72):

"Q. What discussion was had concerning the ale referred to? A. Mr. Lewis wanted to know what about the ale that was stored there and I said, 'Well, we will get the ale out just as soon as possible. Of course, you cannot move the ale without the action of the United States Court—or, not the Court, but the Prohibition officials and also the Court of Chancery, but *we would get it out just as soon as possible.*' 'Well,' they said, 'What do you mean by that?' 'Well,' I said, 'it will probably take us two months, anyway, to get it out.' And he said, 'All right. *We will permit you to keep it there sixty days without any charge* and'—

"Q. What, if anything, was said about the responsibility of the cold storage company for the custody or care of the ale? A. Mr. Lewis said, 'Of course, we will assume no responsibility'—I think Mr. Eagle also—'absolutely no responsibility for the custody of the ale.' And then Mr. Dill (Eagle?) stated that he would serve notice on the receivers

then and there to remove the ale within sixty days."

On cross examination he further testified (pp. 82, 83):

"Q. Wasn't it a fact that there was a good deal of discussion about the custody of this ale, and weren't both Mr. Lewis and Mr. Eagle very cautious to have no paper and no —and to assume no responsibility whatever in respect to it? A. That was definitely determined on, yes, that they would determine no responsibility for the care of the ale, but we were to be permitted to keep it there for sixty days *and then were expected to get it out.*"

* * * * * *

"A. I don't think so, for this reason, that, as a result of these discussions that we had in connection with the ale, the custody of it, how far the storage company was to be charged with the care of it and the time that we were to have to get rid of it, and that was the whole topic of conversation. 'How soon can you get rid of it?' *And we told them we would get rid of it just as soon as possible.* I think Mr. Lewis said, 'Well, you should get it out of there in thirty days'— And whether I said it or someone else said— 'We won't have sufficient time to get court orders to get rid of it within that period; we will have to have at least sixty days,' and Mr. Eagles then said, 'Well, all right, but here is your notice for your sixty-day period. Get it out.' "

Mr. Wright, the other Receiver, testified that his recollection was similar to Mr. Bock's—that the ale was to be gotten out in sixty days pro-

vided they could get it out, and that appellant did not assume any responsibility for the custody of the ale (p. 99).

Mr. Dill, the Receivers' "general factotum" (p. 87), testified (p. 88):

> "Q. Do you recall what, if anything, was said with reference to the alleged ale then held by the Receivers in the basement of the Building K? A. Yes, sir; when it first started I think Mr. Lewis said—asked when we were going to get that out, and when it was then brought up, why, he said something about thirty days and then afterwards it was arranged for sixty days; *we were to stay there sixty days without any storage and after that we were to pay storage if we kept it there.*
>
> "Q. What was said about the custody of the ale, its care and responsibility? A. Mr. Lewis said that they would not assume any responsibility and also Mr. Eagle.
>
> "Q. Was there any agreement made there as to price or terms of letting? A. No, sir; there was not anything said about it at all."

On cross examination, Mr. Dill further testified (pp. 96, 97):

> "Q. Do you recall something being said on December sixth that Mr. Lewis said he would not assume any responsibility for the ale? A. Yes, sir.
>
> "Q. And they both—both he and Mr. Eagle said they didn't know how far the Volstead Act went? A. They didn't know just when they could get rid of the ale, at that time.
>
> "Q. They were very tender about having this ale left, weren't they? A. Well, I don't know—I think they were under the impression that they could not remove it at that time.

"Q. I understand, but Mr. Lewis and Mr. Eagle were very tender—they were very anxious about having it left—they were very fearful of what the result of leaving it there would be, weren't they? A. With the Receivers?

"Q. No. Mr. Lewis and Mr. Eagle.

The Court: Ask him what they said on it.

Mr. Harrison: The question of harshness or tenderness is hardly proper.

The Court: Ask what they said as to the retention of the ale.

"Q. Do you remember anything that was said? A. I don't remember whether it was Mr. Eagle or Mr. Lewis who brought out the part about the Federal authorities, that they did not want to get into any difficulties with them, that they would like to have the ale removed as soon as possible.

"Q. And didn't they refuse to make any kind of a contract in reference to the—in respect to the custody of it, care of it, either in writing or otherwise? A. Yes, I remember Mr. Lewis and Mr. Eagle both said it could remain there, but they would assume no responsibilities whatsoever for it."

Mr. Dill further testified (p. 93):

"Q. At the time the title passed, the key to the outer door was in your possession, was it? A. Yes.

"Q. Of cellar K, I mean? A. Yes.

"Q. Yes. It was left with you? It was left with you? A. Yes. There was not any change.

"Q. No change then? A. No.

"Q. You continued to hold that key? A. Yes."

It will thus be observed that the Receivers retained possession of the room in which the ale was stored and agreed to get the ale out within a short time. According to appellant's witnesses they were to remove it within *thirty* days, while according to the Receivers' witnesses they were to have *sixty* days within which to remove it. The lower Court found that the free time agreed upon was *sixty* days (p. 145). For the purpose of this appeal we here accept that finding—the effect being to reduce appellant's claim from $19,200 to $18,600, with interest.

Occupancy Continued Until September, 1927.

The Receivers did not remove the ale at the expiration of 30 days, nor at the expiration of 60 days, *i. e.,* they did not remove it by January 6 nor by February 6, 1925.

By petition verified February 11, 1925, the Receivers applied to the court below for an order to destroy the ale, but such order was *refused* (Answer of Receivers, pp. 61, 62). About March 26, 1925, the court below made an order, upon application of the Receivers, directing the *stockholders* of New Jersey Refrigerating Company to show cause why an order should not be made directing the destruction of the ale (id. p. 62). Before argument was had on that order to show cause, *the Receivers were restrained by the United States Court from destroying the ale and that restraint remained in effect until May 23, 1927* (id. p. 62). The United States Court further directed the Receivers "to safely keep said ale *in their possession* subject to the further orders of this (the Federal) Court" (p. 145).

That restraint was obtained at the instance of G. W. Lembeck, one of the large stockholders of the Refrigerating Company (Statement of Mr. Harrison, p. 121); and in this connection we call the court's attention to the opinion of the United States Circuit Court of Appeals for the Third Circuit in *Chamberlain* v. *Lembeck,* 18 Fed. 2d, 408, in which that court said:

> "Gustav W. Lembeck is a stockholder of the Refrigerating Company, which before the Eighteenth Amendment was adopted was operated as the Betz Eagle Brewing Company. Thereafter the brewery plant was turned into a storage and warehouse. At that time there were 253 barrels of ale stored at the plant. On the dissolution of the Refrigeration Company, the stockholders, to whom the ale belonged, wanted to remove each his proportionate share to his home. Lembeck owned 254 shares of the stock, and made application to the prohibition director for a permit to transport his share of the ale to his private dwelling. The application was refused and he filed this bill of complaint. In due time answers were filed and the cause came on for hearing. The defendants did not offer any evidence, but at the conclusion of complainant's evidence moved to dismiss the bill because, among other things, the proper parties were not before the court. *The learned trial judge refused, and entered a decree directing the prohibition director of New Jersey to issue a permit authorizing the transportation by Mr. Lembeck and his associates of their pro rata shares of the ale from the warehouse to their private residences.* An appeal was taken to this court."

Upon that appeal the decree of the District Court was reversed and the bill dismissed because of the absence of the Commissioner of Internal Revenue as a party to the suit.

It thus will be seen that by reason of a court order *obtained by one of the owners of the ale* the Receivers were required to keep the ale in their possession, and that, of course, made its continued storage necessary.

It should be noted, too, that the final decree of the District Court in Mr. Lembeck's suit gave *all* the stockholders of New Jersey Refrigerating Company the same relief it gave Mr. Lembeck, *i. e.,* the right to take the ale in proportion to their stockholdings.

About three months after the injunction of the District Court was vacated as a result of the above-mentioned decision of the Circuit Court of Appeals, the Receivers obtained from the court below an order directing the stockholders of New Jersey Refrigerating Company, *and the appellant herein,* to show cause why the ale should not be destroyed (pp. 4-6). An order for its destruction was then made, as above stated, on August 15, 1927 (pp. 7, 8).

The ale was then actually removed from appellant's plant on September 2, 1927, when it was destroyed under direction of the prohibition authorities (p. 121) and pursuant to the order of the court below (pp. 7, 8).

Nature of Receivers' Occupancy.

Not only did the ale remain on storage until September 2, 1927, but, in addition, the Receivers actually retained possession and control of the entire refrigerating unit, known as Basement K, until that date.

As already stated, the Receivers retained possession of Basement K when they leased the plant to the Hudson Storage & Refrigerating Co. in September, 1924 (Siemer, pp. 14, 15, quoted at pp. 4, 5, *supra*). When the Receivers conveyed the plant to the appellant in December, 1924, they still retained that possession. Mr. Dill, their representative, had the key to Basement K during the term of the lease to the Hudson Storage & Refrigerating Co. (pp. 14, 15) *and he retained the key when the plant was conveyed to the appellant* (Dill, p. 93). No key to Basement K was delivered to the appellant, nor did the appellant ask for the key (Lewis, p. 40; Lewis, Jr., pp. 49, 50, 51).

In November or December, 1925, appellant's carpenter reported to its Superintendent, E. W. Lewis, Jr., that the lock on the door was in poor condition and asked if he should put on another lock (Lewis, Jr., p. 49). Appellant's Superintendent told the carpenter to do so, and the carpenter sent and got another lock and put it on (*id.*). The key to the new lock was then given by appellant's Superintendent to Mr. Dill, representative of the Receivers, some time along about the spring of 1926 (*id.*), *and Mr. Dill retained that key until the time when the ale was destroyed in September, 1927* (Lewis, Jr., p. 50).

Appellant's Superintendent, who was the son of its Treasurer and General Manager, testified (p. 51):

> "Q. Was anyone in the employ of the National Cold Storage Company permitted to go down to basement K during the period from December 8, 1924, to September 2, 1927? A. No, sir.
>
> Q. When you took charge of the plant, did your father give you any instructions in ref-

erence to the basement of building K? A. Yes, sir.

Q. What were they? A. He said that the basement of K was rented, and we were not to use it."

Appellant's Treasurer and General Manager testified (p. 35):

> "Q. During all this period, did you ever go down into basement K? A. No, and haven't yet.
>
> "Q. Were your employees permitted to go to basement K? A. No."

During that period the Receivers' representative, Mr. Dill, went to Basement K "a good many times"—"at least a dozen times anyhow" (p. 89). He did that pursuant to instructions from the Receivers to go there every once in a while to "see if things were just the same as usual" (p. 93).

Mr. Dill fixes the time of the change of the lock as being approximately a month after the appellant took title to the plant (pp. 90, 91); but regardless of the exact time when the new lock was put on, the fact remains that Mr. Dill had no difficulty in getting into Basement K whenever he wanted to by asking appellant's Superintendent for the key. Whenever he wanted to get into the basement he went to appellant's Superintendent at the plant, and he says that "sometimes he (the Superintendent) gave me a key and let me go in, and sometimes he went down with me" (p. 91). Mr. Dill further testified that in the spring of 1927 he and some other representatives of the Receivers went to Basement K for the purpose of getting samples of the ale for testing purposes

(p. 92) and that after the samples were taken appellant's Superintendent said to him, "Ed, you better keep this key because I might lose it again" (p. 95), and "from that time on until the ale was destroyed, I had it," *i. e.,* Mr. Dill had the key (p. 95).

Extent of Receivers' Occupancy.

The room known as Basement K, or as the basement or cellar of Building K, is *one refrigerating unit,* and it is so shown upon plans of the building (Lewis, p. 36; Lewis, Jr., p. 49; Rodgers, Receivers' Witness, p. 114). A part cannot be refrigerated unless the whole is refrigerated (Rodgers, p. 114). And, as already shown, the key of that room was held by the Receivers.

At the time of closing title, when the arrangement as to the Receivers' occupancy was made between the Receivers and the appellant, neither Mr. Lewis nor the Receivers ever had been in Basement K (Lewis, pp. 35, 36; Bock, p. 73; Wright, p. 99).* What knowledge they had of Basement

---

*The testimony of Mr. Lewis and Mr. Bock is positive and specific to the effect that neither of them ever had been in Basement K, even down to the time of testifying (Lewis, pp. 35, 36; Bock, p. 73). Mr. Wright testified that he had been in Basement K on two occasions, the first of which was "about five or six months previous to the second visit" and that the second visit was when he went there with Dr. Edel and Mr. Harrison and Mr. Dill for the purpose of making some tests (p. 99). He further stated that the second visit was in January, 1925, but he immediately inquired of examining counsel, Mr. Harrison: "Wasn't that the time the tests were made?" (p. 99)—thus showing that he was not sure of his dates. The testimony of Dr. Edel shows conclusively that the only time that he went to Basement K was in March, 1927 (pp. 107, 108). Mr. Dill also fixed the "testing visit" of Mr. Wright, Dr. Edel, and Mr. Harrison as being in the spring of 1927 (p. 92). It is plain, therefore, that Mr. Wright was mistaken in fixing January 1925 as the date of his second visit to Basement K. His second visit was in March, 1927; and as his first visit was "about five or six months previous to the second visit" (p. 99), it is plain that he never had been in Basement K at the time of closing title in December, 1924.

K was thus derived from the plans of the building (p. 36), which showed Basement K to be a single refrigerating unit; and it is obvious that, when the talk was had as to the Receivers' being permitted to continue to store the ale where it then was, all parties must have had in mind that the Receivers were to continue to occupy the whole of that single refrigerating unit.

Upon the hearing before the Vice-Chancellor it developed that Mr. Dill had "hired our old carpenter" to put a wooden partition in Basement K (pp. 89, 90). Mr. Dill had been in the employ of New Jersey Refrigerating Company for many years prior to the receivership and had continued in the employ of the Receivers from the time of their appointment (p. 87). Whether by "our old carpenter" he meant the carpenter of the Receivers or the carpenter of the New Jersey Refrigerating Company does not appear. Neither does it appear *when* Mr. Dill had this partition put in. But the existence of the partition certainly was not known to the appellant.

Upon the basis of the existence of that partition, the Receivers make the claim that they actually occupied and are liable only for the part of Basement K which was partitioned off as actually occupied by the ale.

Upon this point, however, Mr. Dill himself, upon direct examination by the Receivers' own counsel, testified (pp. 89, 90):

> "Q. Now, will you tell the Court, briefly, the size of this basement? A. THAT WE OCCUPIED? WHY, THE WHOLE CELLAR.

"Q. Well, first the size of the whole cellar. Do you recall that, sir, or do you not? A. Pretty near it. 33 by about 85, in height 10 feet 8.

"Q. And how much of that 33 by 85 feet space is occupied by the ale? A. 15 by 48, ten feet eight high.

"Q. And how is that ale set off from the whole building? A. It was partitioned off.

"Q. What kind of a partition A. Wood.

"Q. Who put the partition there, do you know? A. I hired our old carpenter.

"Q. And is there a door on this enclosure? A. Yes, a front door.

"Q. And was the door locked? A. Yes.

"Q. Who had the key? A. I had the key to the partition where the ale was partitioned off.

"Q. That is, you had the key to the inner room in which the so-called ale was stored? A. That is right.

"Q. And it has been continuously in your possession since for receivers? A. That is right."

On cross examination he further testified, as already quoted (p. 93):

"Q. At the time the title passed, the key to the outer door was in your possession, was it? A. Yes.

"Q. Of cellar K, I mean? A. Yes.

"Q. Yes. I was left with you? It was left with you? A. Yes. There was not any change.

"Q. No change then? A. No.

"Q. You continued to hold that key? A. Yes."

The Receivers thus clearly in fact had possession of and "occupied" the entire room, or re-

frigerating unit, even though the ale was not bulky enough to fill that unit.

Further evidence that the Receivers retained the possession, use, and enjoyment of the entire unit, and that no possession or use or enjoyment of any part of it ever passed to appellant until the ale was destroyed in September, 1927, is found in the following:

The proper temperature at which to store ale is between 50 and 60 degrees Fahrenheit (pp. 36, 115), whereas the temperature at which other products stored by the appellant are kept is from zero to 33 degrees Fahrenheit (pp. 36, 54). To refrigerate Basement K to the point where other products could be kept therein would freeze the ale solid and destroy it (p. 36) and cause the casks to burst open (p. 117), whereas to refrigerate Basement K at the proper temperature for ale would destroy any other food products that might be stored therein (p. 37).

Notification to Receivers of Appellant's Charges.

On March 3, 1925, appellant sent to the Receivers a bill for storage or rental for the period from January 6 to March 5, 1925, at the rate of *$600 per month,* making a total of $1200 (Lewis, p. 34; Exhibits C-I and C-II, pp. 126, 127).

The rate of $600 per month was suggested to the appellant by Mr. G. W. Lembeck, one of the stockholders of the New Jersey Refrigerating Company, and that was also the same rate at which Mr. Lembeck's other company, the Hudson Storage & Refrigerating Co., billed the Re-

ceivers for previous occupancy (Lewis, p. 37; Siemer, p. 18).

On March 9, 1925, Mr. Harrison, counsel for the Receivers, wrote the appellant with reference to its bill of March 3 as follows (pp. 140, 141):

> "My memorandum on closing of the plant title, shows that the National Cold Storage Company representatives would assume no responsibility for the custody or care of the ale at any time, and that the entire risk would have to be taken by the receivers. It is true, that in behalf of the receivers, I stated that we would endeavor to remove the ale within sixty days, but there was no agreement that we should pay any storage charges, nor was there any intention on the part of the parties so far as I recall, that the ale was left on storage.
>
> "The receivers purpose presenting a petition to the court within a few days for permission to remove the ale, and probably destroy it, so that *I am hopeful that you will be agreeable to arrangements for its prompt removal. I have asked the receivers to get in touch with you within the next few days with that end in view. You will probably hear from them very shortly.*"

On April 8, 1925, Mr. Bock, one of the Receivers, had a conversation with Mr. Lewis, appellant's Treasurer and General Manager, in which he proposed that appellant take over certain office furniture and fixtures, on which the Receivers had received a bid of $650, in lieu of the storage bill for $1200, *and that they pay for the space from March 5 at $300 per month* (pp. 35, 36, 141). Mr. Lewis testified that he objected to that proposition and would not entertain it (p. 35).

On August 3, 1925, appellant sent the Receivers another bill for the period from March 6 to August 5, 1925, at the rate of *$600 per month,* making a total of $3,000 (Lewis, p. 34; Exhibit C-I of December 15, 1927, p. 130).

A further bill for another month was sent on September 5, 1925 (p. 130); and with reference to that bill Mr. Harrison, counsel for the Receivers, wrote the appellant as follows (pp. 142, 143):

> "This bill cannot be honored by the receivers. As I wrote you under date of March 9, 1925, your company would assume no responsibility for the custody of the ale, and, at the closing of the title to the plant, took the position that the entire risk for the care of the ale would have to be taken by the receivers, and I believe at that time you left with the receivers, or their agents, the key to the room in which the ale was stored. We did endeavor, in accordance with our agreement, to remove the ale within sixty days after the closing of the title, but due to legal proceedings and other difficulties, we could not remove the ale, and at the present time the receivers are under an injunction, issued by the United States District Court for the District of New Jersey, not to remove the ale from storage. The receivers do not recognize any liability for storage charges, and cannot recommend for payment any bill for such charges unless and until the Court of Chancery of New Jersey shall approve."

Each month thereafter the appellant sent, and the Receivers received, further bills *at the rate of $600 per month* (pp. 34, 35, 130).

Nothing in the way of a dispute of those bills ever occurred.

The ale remained where it was with knowledge on the part of the Receivers that appellant was charging them at the rate of $600 per month.

In this connection, moreover, it seems appropriate to call the Court's attention to the answer of the Receivers to the bill of complaint in the above mentioned suit of *Chamberlain* v. *Lembeck*, 18 Fed. (2d) 408. In that answer, which was verified and filed on *May 11, 1925,* the Receivers set up what they designated as a counterclaim against the plaintiff, and they there said:

> "2. Said ale is stored in the plant formerly of the New Jersey Refrigerating Company on Ninth Street, Jersey City, New Jersey; that said plant is now owned by National Cold Storage Co., Inc., a New York corporation, which corporation has demanded from these defendants that they pay to it as and for the *storage charges on said ale the sum of $600.00 per month from February 5, 1925, until said ale shall have been removed from said place of storage.*
>
> "3. The complainant brings this suit in behalf of himself alone, and the litigation arising therefrom may extend over a protracted period, *during which time the storage charges on said ale and the costs of this litigation will accumulate and be a charge against these defendants* to the injury of all the stockholders.
>
> "These defendants therefore pray that complainant, as a condition for leave to continue the prosecution of this suit, may be ordered to enter into an agreement with sufficient sureties to indemnify and save harmless

> these defendants for all charges for the storage of said ale, together with the costs of this litigation, and that these defendants may have such other and further relief as may be proper."

While that answer does not appear in the record in this case, it is a part of the printed record on appeal in *Chamberlain* v. *Lembeck, supra,* and hence we assume it to be a matter of which the Court will take judicial notice, or, if permitted so to do, we will make proof of it under the new practice.

POINT I.

As the receivers continued to occupy the space after notice that appellant's charges therefor were $600 per month, they impliedly assented to and are legally liable for charges at that rate.

> "If a tavern keeper, *warehouseman* or wharfinger *specifies his rates of charge, and gives notice to a customer in advance,* and the latter afterwards puts up at his tavern, or *makes use of his warehouse* or wharf, he *thereby assents to the proposed charges,* and cannot refuse to pay them, upon the ground that they are more than is usual or customary. *By the use of the wharf, after notice of plaintiff's rates of charges, the defendants impliedly contracted to pay them, and they cannot now disaffirm their contract.*"
>
> *Blakeslee's Storage Warehouse* v. *Turgrimson,* 176 Ill. App. 83, 85, 86;
>
> *Steamship Co.* v. *Sparks,* 22 Texas 657, 659.

> "Where the depositor knows the charges of the warehouseman, he cannot refuse to pay on the ground that they are unreasonable."
>
> 40 *Cyc.* 451.

In *Montgomery* v. *Berry,* 31 Ga. App. 701, 121 S. E. 853, that statement of the law was quoted with approval, and in that case the Court further said:

> "Under the plaintiff's evidence, he had the right to make the increase as claimed, which he testified was proper and customary, after notice to the defendant, regardless of whether or not the subsequent conversation between the plaintiff and defendant could or could not be taken as showing an implied consent by the defendant to such increase; and, under this view of the evidence, *the defendant, having permitted his cotton to remain in the warehouse after the plaintiff had requested him to remove the same if the increase was not satisfactory, would be liable for the amount claimed.*"

In *Seeligson* v. *Taylor Compress Co.,* 56 Texas 219, the rule already quoted from *Steamship Co.* v. *Sparks, supra,* was reiterated and followed in a case where the owner of cotton had *protested* the warehouseman's charge at the time he stored his cotton and had placed it in storage there because there was no other place to store it. The Court said (p. 227):

> "The circumstances under which Seeligson sent his cotton to appellee's warehouse do not justify the inference that he sent it there otherwise than voluntarily. The neces-

> sity under which he labored amounted to no more than this: that he found it to his interest to store his cotton in a warehouse provided for that purpose; and no such storage was to be had on better terms than those offered by appellee.
>
> "His general protest against such charges for cotton delivered uncompressed did not weaken the inference that he sent this cotton to be stored on the usual and well-known terms on which alone appellee was willing to receive it. *It does not appear that those terms were unreasonable; but even if they were, having assented to them by his acts, he could not afterwards repudiate his contract.* 22 Tex., *supra.*"

The same principle was applied in *Despard* v. *Walbridge,* 15 N. Y. 374. In that case the plaintiff, assignee of a lessee, gave notice to a sub-tenant, whose term was then expiring, that if the sub-tenant should hold over, the plaintiff would consider the premises as taken by the sub-tenant for a term of one year at a rent of $1500 per annum payable quarterly. The defendant made no reply but held over and continued to occupy the premises. The Court held that this was *an assent to the terms of the notice*, that the defendant was liable for rent at that rate, and that evidence tending to show that the premises were worth less than $1500 per annum was immaterial and properly excluded. The Court said (p. 376):

> "The plaintiff, being the owner of the residue of the term created by that lease (as for the purposes of this question we must assume), gives notice of his rights to the defendant, and states the terms on which the

> expired lease of the latter may be renewed. Here is something more than a mere privity of estate, viz.: a direct proposition from the owner of the reversion to the tenant in possession for a renewal of his lease, and this proposition is met by a continued occupation without other reply. This, I think, laid the foundation for an implied contract. It was in law, a virtual assent to the terms prescribed in the notice.''

In *Coit* v. *Planer,* 51 N. Y. 647, the defendants were in possession of one story of certain premises under an agreement to pay a rent of $150 per annum, and the plaintiff notified them that if they continued to occupy after May 1, 1866, the rent would be $400. It was held that the plaintiff was entitled to the rent demanded because, ''as to the rent accruing after May 1, 1866, the law would imply, from the fact of occupancy (alleged and admitted), that the defendants submitted to the terms imposed.''

In *United Merchants Realty & Improvement Co.* v. *Roth,* 193 N. Y. 570, 579, 580, the defendant had requested the plaintiff to allow him to continue to use and occupy certain premises after his right thereto had ended, and the plaintiff told the defendant that if he remained over his term the plaintiff would elect to hold him as a tenant for another year *on the terms of the lease between the plaintiff and the owner of the reversion.* The defendant had knowledge of the terms of that lease, and with such knowledge he remained in possession. The Court said (p. 580):

> ''These facts constitute a cause of action, because *the law implies from the fact of occu-*

pancy under the circumstances alleged that the defendant assented to the terms stated. This has been held in several cases which we regard as controlling in principle. (*Despard* v. *Walbridge,* 15 N. Y. 374; *Coit* v. *Planer,* 51 N. Y. 647; *Preston* v. *Hawley,* 139 N. Y. 296.)"

In the case at bar, the Receivers made use of appellant's warehouse by retaining the key to one room and permitting the ale to remain therein with full knowledge that appellant was charging them for such use at the rate of $600 per month. *For two years they remained silent in the face of monthly bills duly rendered to them at that rate.* They had suggested $300 per month and that suggestion had been expressly declined by appellant (pp. 35, 36). They had also counterclaimed in Mr. Lembeck's suit upon the ground that appellant was charging $600 per month and that during the pendency of that suit "the storage charges on said ale * * * will accumulate and be a charge against these defendants" (*supra,* pp. 23, 24).

The Receivers thus, under the authorities cited, impliedly contracted to pay *$600 per month,* and they cannot now disaffirm that contract.

POINT II.

Even if the Receivers be not bound by an implied assent to the appellant's bills, they are bound by an implied agreement to pay the reasonable value of the space; and such reasonable value is proved in this case to be at least $600 per month.

1. FROM THE FACT OF OCCUPANCY THE LAW IMPLIES AN AGREEMENT TO PAY THE REASONABLE VALUE.

With respect to the arrangement made at the time of closing title, Mr. Dill, the Receivers' representative, testified upon his direct examination as a witness for the Receivers (p. 88):

> "We were to stay there sixty days without storage and *after that we were to pay storage if we kept it there.*"

But even if no express agreement were made, the law implies an agreement, regardless of whether the relationship be deemed to be that of bailor and bailee or that of landlord and tenant.

The settled rule is stated in 40 *Cyc.* 450, as follows:

> "In the absence of a special contract, where goods are received by a warehouseman for storage in the usual course of business, there is an implied contract on the part of the bailor to pay *the customary charges for storage and expenses, or such reasonable charges as warehousemen of like capacity and facility are entitled to.*"

Also, at page 453 of the same work, it is stated:

> "If, after terminating the contract of storage, the warehouseman does not remove the goods, upon the failure of the depositor to do so in a reasonable time, he is entitled to *the market rate of storage after such default,* and the rule applies where the goods were held gratuitously under no contract for storage."

In *Rea* v. *Trotter,* 26 Grattan (67 Va.) 585, 592, the Court approved the following instruction:

> "When one receives from another goods in store, and nothing is said between the parties as to pay for such storage, the law implies a contract that the party who receives the goods in store shall be paid *a reasonable compensation therefor.*"

The Court referred to the "undeniable principle of law" that where services are performed by one party at the request of another the law raises an implied contract to pay therefor, and it then said (p. 593):

> "Now the case before us is precisely such a case. To receive and keep goods in storage for another, at the latter's special instance and request, is certainly to render him a service."

An exceptionally pertinent case, because of its similarity of facts, is *Grove* v. *Barclay,* 106 Pa. St. 155. Certain machinery was located in a building in Philadelphia when plaintiff's ancestor purchased the building from one of two co-owners of the machinery. About six months after acquiring

title the purchaser of the building notified the owners of the machinery that he claimed storage during the time it had remained upon his premises and gave them notice to remove the machinery. He further stated that if they did not remove it he would sell it. Counsel for one of the owners of the machinery replied that the premises had been purchased with knowledge of certain "complications" and asserted a right to have the machinery remain, and gave notice that if the owner of the building removed the machinery he would be held responsible for damages. The machinery then remained on the premises for a period of ten years. Suit was then brought for use and occupation of the premises, or, in the alternative, for storage charges. The Trial Court ruled that the plaintiff had a right to present his claim in that alternative aspect; but it further ruled that to recover for use and occupation there must be the relationship of landlord and tenant and the existence of such relationship was disproved because the owner of the building had elected to treat the owners of the machinery as trespassers rather than as tenants. The Trial Court further ruled that there could be no claim for storage charges for the period after the owner of the building had given the notice above mentioned because, by such notice, he had elected to treat the owners of the machinery as trespassers. The plaintiff then moved to amend his declaration so as to assert a claim in tort, and the Trial Court refused leave to amend. Upon writ of error those rulings were reversed, the Supreme Court of Pennsylvania holding that the plaintiff was entitled to recover

compensation for the use of his property and that it made no difference upon what theory the recovery was had. The Court said (pp. 163, 164):

> "The defendant, John K. Barclay, for some ten years before the bringing of the present action, occupied in whole or in part, the premises of the plaintiffs for his own use and purposes, and *the question now is whether he can be made to pay for them. The court below thought not; we are of a different opinion.* In the outstart we may observe, that the case of Barclay's Appeal, 12 Norris, 50, has no application to the matter in hand; nothing was there determined but that Grove's remedy, whatever it might be, was not in equity. As to the case in hand, if the facts as stated in the charge of the learned Judge, who directed the trial below, are to be taken as proved, *the plaintiffs ought to have had a verdict* had those facts been properly submitted, nor would it matter whether such verdict was rendered upon a count in assumpsit or in case, and in order to provide for an alternative of this kind the amendment proposed by the plaintiffs ought to have been allowed: *McClosky* v. *Miller,* 22 P. F. S. 151. The facts were for the jury, and they might have found for the plaintiffs on either of the three following grounds; for the use and occupation of the premises; on an implied contract for storage, or for an obstruction of the plaintiffs' use of the property by an unwarrantable persistence by the defendant in the possession of it without right. An implied contract for use and occupation may arise from the use of the premises by the tenant and the sufferance of the landlord, nor does the fact that the tenant holds over after notice to quit tend to destroy this implication, unless

the landlord has followed up the notice by some act indicative of an intent to treat him as a trespasser; *National Oil Refining Co.* v. *Bush,* 7 Norris 335; and see also opinion of Judge Brewster, affirmed in Stockton's Appeal, 14 P. F. S. 58. On the question of an implied contract for storage, the court below admitted that such contract might fairly be implied as to the occupancy prior to the correspondence of December, 1873, but not after that time. But we cannot see how the actual status of the parties was altered by that correspondence. It is true, Grove required the vacation of the premises by the removal of the machinery, but Barclay refused to comply with that request, hence, the occupancy continued precisely as it was before. So Grove might, in relief of his property, have removed the machinery, *but he elected, as he had a right to do, to let it remain where it was,* and thus the original condition of affairs continued as it had been before the correspondence. Having thus a continuation of precisely the same circumstances after the notice as those which had previously raised the implication of a contract, it is impossible to see why that implication should not also be continued. *Nor does the defendant's claim of right to the occupancy of the premises help him in his attempted avoidance of his implied contract to pay for their use unless he can prove that the claim thus made is substantial, for if the contrary were held, then might every such contract be defeated by the interposition of a fictitious claim of right in or to the subject matter of it.*"

The cases in New Jersey are in accord with the foregoing.

In *Conover* v. *Conover,* 1 N. J. Eq. 403, 407, the Court said:

> "The occupation of the premises is proved beyond doubt: that the property at the time belonged to the testators, is equally true; and it *follows as a matter of course, that the party in possession is bound to pay for the use and occupation,* unless he can show an agreement to the contrary, or some satisfactory reason why he should not be charged. The burthen of the proof rests upon the defendant, who would resist the claim."

In *Chambers* v. *Ross,* 25 N. J. Law 293, an owner of premises contracted to sell them to one who refused to complete the purchase upon the ground of a defect of title, and during the pendency of a bill to compel specific performance of the contract the owner refused to accept rent from the defendant, who was then in possession as tenant, and also refused to make repairs. After being defeated in his suit for specific performance, the owner sued for rent, and it was held that he was entitled to recover. The Court said:

> "There was no express contract between the parties, and none was necessary. *The law will imply a contract to pay rent from the mere fact of occupation,* unless the character of the occupancy be such as to negative the existence of a tenancy. *The action for use and occupation does not necessarily suppose any demise. The Dean and Chapter of Rochester* v. *Pierce,* 1 Camp. 467; *Hull* v. *Vaughan,* 6 Price 157; 2 *Saund. Pl. & Ev.* 890; *Chitty on Con.* 332.

> "Nor will the fact, that Chambers disclaimed being landlord, alleging that the property was Tulane's, defeat his right of recovery. Had that representation been acted upon by the tenant, and the rent been paid to Tulane, or settled with him, Chambers would have been estopped from setting up his claim.
>
> "But he is not deprived of his right to recover by a disclaimer of his relation as landlord, made under a misapprehension of his rights, where the misrepresentation has not been acted upon by the tenant, nor operated in anywise to his prejudice (pp. 295-296).
>
> * * * * * * *
>
> "That the landlord refused to make repairs, and left the premises in a ruinous condition, may be very material upon the question of damages, *but cannot affect the plaintiff's right to recover, so long as the premises were habitable and were actually occupied by the defendant*" (p. 297).

It is quite true that in *Stewart* v. *Fitch,* 31 N. J. Law, 17, 19, which was cited by the Receivers below, the Court said that an action for use and occupation can only be maintained upon a contract, express or implied; but it is also true that the opinion in that case clearly indicates that, if the evidence had shown that the defendants had used and occupied the plaintiff's land after notice that the plaintiff would charge for such use and occupation, a contract would have been proved.

It is likewise true that in *Mason* v. *Haurand,* 79 N. J. Law 375, which likewise was cited by the Receivers below, the Court again said that an action for use and occupation will not lie except on

contract, express or implied; but it is also true that in that case the Court further said (p. 377):

> "It is true that from the fact of occupancy a contract to pay rent will ordinarly be implied (*Chambers* v. *Ross,* 1 Dutcher 293)."

In his opinion in the case at bar the Vice-Chancellor said (p. 145):

> "There is nothing in the testimony to lead me to the conclusion that the relation of landlord and tenant existed between the receivers and the storage company. In the memorandum above quoted (Ex. C-1, p. 131) the company expressly repudiated any responsibility, which is certainly an incident of that relationship."

It really make no difference whether the relationship between the appellant and the Receivers was that of landlord and tenant or that of bailor and bailee. Appellant is entitled to compensation for the use of its property whichever relationship existed. (See *Grove* v. *Barclay,* 106 Pa. St. 155, at pp. 30-33, *supra.*) But it is quite apparent, we submit, that in making the above-quoted statement the learned Vice-Chancellor got very twisted on his law.

A landlord, in the absence of express contract, certainly assumes no responsibility for the goods which the tenant brings upon the landlord's premises. Such responsibility is *not* "an incident of that relationship." On the contrary, the fact that the appellant refused to assume responsibility for the ale is the very best possible evidence that the relationship was that of landlord and tenant rather than that of bailor and bailee.

The testimony makes it very plain that what was meant by the statement that the appellant assumed "no responsibility for the ale" was that the appellant, and the Receivers as well, were meticulously avoiding any violation of the 18th Amendment or of the Volstead Act. Mr. Lewis regarded the ale as "contraband" (p. 34) and did not want to get into any difficulties with the Federal authorities (Dill, p. 97). In other words, the parties—counsel on both sides being present—were avoiding even a technical or apparent "transportation" by transferring the custody of the ale from the Receivers to the appellant; and to avoid a "transportation" the transaction was closed by an agreement that the Receivers should *reserve and retain possession of the room in which the ale was stored.*

It was contemplated, of course, that the Receivers would remove the ale in a short time, but stockholders of the New Jersey Refrigerating Company—*the beneficiaries in whose behalf the Receivers are opposing this claim*—intervened and obtained in the Federal Court an injunction by which the Receivers were restrained from destroying the ale and directed "to safely keep said ale *in their possession* subject to the further orders of this court" (p. 145). All parties regarded the ale as being "*in the possession*" of the Receivers. They had it in their possession, however, *upon the property of the appellant;* and having used and occupied the appellant's property for the purpose of keeping the ale in their possession, the law implies an agreement on their part to pay the reasonable value of such use and occupation.

Appellant cannot, in law or in justice, be made to suffer from, or to bear the expense of, the litigation in which the Receivers and their beneficiaries indulged over the question whether the ale should be kept or destroyed.

2. $600 PER MONTH IS CONCLUSIVELY SHOWN TO BE THE REASONABLE VALUE OF THE USE AND OCCUPATION.

As already pointed out at pp. 20, 21, *supra*, appellant, in fixing the charge at $600 per month, merely adopted the basis of rental suggested to it by Mr. Lembeck, one of the Receivers' beneficiaries.

MR. SIEMER, who has had long experience in the cold storage business and formerly was connected with New Jersey Refrigerating Company and also with Hudson Storage & Refrigerating Company (pp. 13, 14), testified that $600 a month was *a fair rental value of the property occupied by the Receivers* (p. 18). He arrived at that charge on the basis of 25 cents per cubic foot per year (p. 24).

HARRY C. LEWIS (not related to appellant's Mr. Lewis), who has been in the refrigerating business 38 years, is Secretary and Treasurer of Merchants' Refrigerating Company, which has warehouses in New York, Jersey City, and Newark, and is also President of the Cold Storage Division of the American Warehousemen's Association (p. 25), testified that 2½ cents per cubic foot per month was a reasonable charge in Jersey City during the period here in question (p. 26).

Alfred B. Codet, General Manager of Jersey City Cold Storage Company, with 18 years' experience in the cold storage business and familiar with conditions in the storage warehouse business in Jersey City (p. 29), testified that 2½ cents per cubic foot per month was a reasonable charge in Jersey City during the period in question (pp. 29, 30).

Eugene W. Lewis, appellant's Treasurer and General Manager, testified that the reasonable value of the space was 20 cents per cubic foot per annum, or approximately 2 cents per cubic foot per month on a monthly tenancy (p. 38).

Charles W. Rodgers, a witness called by the Receivers (p. 109), testified that the *prevailing rate for cold storage space was "between 20 and 30 cents a cubic foot a year"* (p. 113).

There is no testimony in the case in any way contradicting or impugning the foregoing.

The cubic content of the room in question is 30,360 feet (p. 39).

On the basis of 2½ cents per cubic foot per month, as testified by Harry C. Lewis and Alfred B. Codet, the charge would be $759 per month.

On the basis of 25 cents per cubic foot per year, as testified by Mr. Siemer, the charge would be $7,590 per year, or $632.50 per month.

Appellant's charge of $600 per month is thus less than the reasonable value fixed by all the experts.

POINT III.

Appellant is entitled to compensation for *cold storage* space, and not merely for *common storage* space.

We find it impossible to conceive upon what theory the learned Vice-Chancellor reached the conclusion that appellant is entitled to remuneration "at the prevailing rate for *common* storage" (p. 146), instead of at the prevailing rate for cold storage. Certainly no theory is indicated in his opinion.

Appellant is engaged in the *cold* storage business. What it purchased from the Receivers was a *cold* storage plant. The part of that plant of which the Receivers retained possession and control was *one refrigerating unit* of that plant.

Whether or not that unit was in fact actually refrigerated during the period of the Receivers' occupancy made no difference in the cost of operation of the plant (H. C. Lewis, p. 26; Codet, p. 31; E. W. Lewis, p. 39).

Having thus occupied *cold* storage space in a *cold* storage plant, the Receivers cannot avoid paying the reasonable value of cold storage space, even though it be assumed (what certainly is not proved) that under other circumstances the ale might have been kept just as well in common storage.

If a man should choose to store hay in an office building on Wall Street, he could not avoid paying the reasonable rental value of the office build-

ing merely because the hay could just as well have been stored in a barn in some other location where the reasonable rental value was considerably less.

If a man take a room at the *Ritz* he impliedly agrees to pay, and the Ritz is entitled to receive, the usual rates prevailing at the Ritz, and not those prevailing at a lodging-house on First Avenue.

If a man walk into a store and pick up a can of caviar, he impliedly agrees to pay the prevailing price of caviar, and not the prevailing price of cheese, even though the cheese might better satisfy his hunger.

With great respect, we submit that the idea that appellant should be confined to the reasonable value of common storage is so entirely contrary to settled law, and to all ideas of justice and equity, that it is not deserving even of serious consideration.

POINT IV.

Appellant is entitled to compensation measured by the cubic content of the entire refrigerating unit, and not by the square foot of floor space actually occupied by the ale.

As to Cubic Content.

All the witnesses state the reasonable value of cold storage space in terms of *cubic feet.* That is true even of the Receivers' own witness, Mr. Rodgers, who testified that the prevailing rate for cold storage space was "between 20 and 30 cents a *cubic foot* a year" (p. 113).

Why the learned Vice-Chancellor awarded compensation on the basis of square feet, instead of on the basis of cubic feet, is as much a mystery as why he awarded it at the prevailing rate for common storage instead of at the prevailing rate for cold storage.

No one, at least so far as this record shows, ever computed the value of cold storage on the basis of square feet; and there is no sensible reason why that should be done. The space above the cask of ale that is placed on the floor is just as valuable as the space occupied by the cask on the floor. If one cask occupy four square feet of space on the floor, and the casks are piled three high, it is plain that by adopting the square foot basis the Court is giving the Receivers storage of three casks at the same price they would have had to pay for one. In fact, it is giving them even more than that, for even one cask occupies some space above the floor. It is not the same as a sheet of paper laid flat on the floor.

Here again, therefore, the action of the lower Court in adopting square feet instead of cubic feet as the basis of the measure of compensation is so utterly contrary to known business practice, and at such variance with settled principles of law, that the error in the ruling is apparent from the mere statement of what has been held.

As to Entire Cellar.

As to the lower Court's ruling that appellant is not entitled to remuneration "for the whole cellar" but only for "the room (space) actually oc-

cupied by the ale'' (p. 146), its error, we submit, may be made conspicuously apparent by calling attention to the fact that what the lower Court has done is to award compensation for the space occupied by the *ale,* whereas what it should have done is to award compensation for the space occupied by the *Receivers.*

It would be about as sensible to hold that no tenant should pay the reasonable rental value of a room hired by him where his furniture occupied only a small part of the room.

As is shown in our statement of the facts, the discussion at the time of closing title related to the occupancy of the cellar or basement of Building K which constituted a single refrigerating unit (pp. 6-12, *supra*). Nothing was then said about the wood partition inside that unit, which apparently marked off the part of that unit which was actually occupied by the ale. The existence of that partition was not even known to appellant, and apparently was not known to the Receivers; or, if it were known to the Receivers, the fact of its existence was concealed from the appellant. The Receivers retained possession of the key to the door of the cellar. ''There was not any change'' (p. 93), *i. e.,* the Receivers retained possession of the cellar; and their own representative, Mr. Dill, testified that the Receivers *occupied the whole cellar.*

> ''Q. Now, will you tell the Court, briefly, the size of this basement? A. *That we occupied? Why, the whole cellar''* (Dill, p. 89).

The Vice-Chancellor has stated in his opinion (p. 146):

> "The testimony shows that the Storage Company had at least as much access to the cellar, except the room partitioned off for the ale, as the Receivers."

The testimony, we submit, shows precisely the contrary. The Receivers retained possession of the key to the cellar when title was transferred and appellant had no key. It is true that when appellant's superintendent, upon the recommendation of the carpenter, had a new lock put upon the door because of the poor condition of the existing lock (Lewis, Jr., p. 49), the appellant kept the new key at its office at the plant for a short time; but that apparently was a mere matter of convenience to the Receivers, and even that key was later turned over to the exclusive possession of the Receivers' representative, Mr. Dill (Lewis, Jr., pp. 52, 53; Dill, pp. 94, 95).

The installation of the new lock was an act for the benefit and advantage of the Receivers in that its object was the better security of their property. It was neither an eviction of the Receivers, actual or constructive, nor an assumption of possession by the appellant.

It is of course a fact of common knowledge that storage warehouses usually and ordinarily have access to the rooms which they rent; and even if the Vice-Chancellor were correct in saying that appellant "had at least as much access to the cellar" as did the Receivers, that fact would not militate against its claim in the least. Here, however, the fact is that appellant had no key by

means of which access to the cellar could be obtained (except its temporary possession of the new key as above stated), and its instructions to its superintendent were that basement K was rented and that he was not to use it (Lewis, Jr., p. 51; Lewis, Sr., p. 35).

Furthermore, there is the additional fact in this case that even if appellant had "access" to the cellar *it certainly had no beneficial use of it.* As already pointed out at page 20, *supra,* the presence of the ale in the cellar prevented any use of the unoccupied space in the cellar for the purpose of storing other articles. And this is an additional reason why appellant is entitled to charge for the entire cubic content of the basement despite the fact that the ale did not occupy the entire cubic content. Upon this point Mr. Harry C. Lewis, an entirely disinterested witness, of indisputable experience and standing, testified as follows (p. 27):

> "Q. If a small portion of one refrigerating unit were occupied by a customer, and by reason of such occupancy the balance of the unit could not be used by the storage company, what would be the reasonable charge for the storage actually used? A. Why, we would charge that rate for the entire space—the full box—used and unused in that room.
>
> "Q. Is that the custom? A. That is the custom.
>
> "Q. That is a reasonable custom? A. It is."

That testimony is wholly uncontradicted and there is no evidence to the contrary.

The Vice-Chancellor's ruling that appellant is not entitled to remuneration for the whole cellar is thus *contrary to the established usage and custom of the business as indisputably proved by uncontradicted testimony in this case.*

POINT V.

Appellant Is Entitled to Interest.

By continuing to occupy appellant's property with notice that appellant's charges therefor were $600 per month, the Receivers impliedly agreed to pay charges at that rate (Point I, p. 24, *supra*). The claim being thus liquidated, the right to interest from the end of each month is so clear and obvious as not to require discussion.

> "A liquidated claim, whether oral or written, carries with it as a matter of law interest from the time it was due, in the absence of any agreement to the contrary. And a claim may be said to be liquidated so as to bear interest when the amount due or to become due is fixed by law or by agreement between the parties."
>
> 33 *Corpus Juris,* p. 210, § 70.

And even if the Court should hold that the Receivers are not bound by the appellant's bills, but are merely bound to an implied agreement to pay *reasonable* charges (Point II, p. 29, *supra*), the right to interest in this case is equally clear.

The general rule that interest is not recoverable upon unliquidated demands is subject to excep-

tions; and interest is now recoverable upon all claims based upon *quantum meruit* where the amount to be paid can be ascertained by computation or by computation in connection with readily ascertainable values.

In 33 *Corpus Juris* 212, the law is stated thus:

> "*Demands Readily Ascertainable by Computation.* As elsewhere stated in this work, an exception to the rule denying the right to interest in the case of unliquidated demands arises where, although a demand is unliquidated, the amount thereof can be readily ascertained by mere computation. In these circumstances interest thereon will be allowed.
>
> "*Market Values.* Even though a demand is not specifically pecuniary, so as to be accurately ascertainable by mere computation, yet if, by reference to established market values, the amount due may be approximately ascertained, interest will be allowed as upon a liquidated demand."

In *Faber* v. *City of New York,* 222 N. Y. 255, which has been so widely cited that it may be said to have become a classic upon the subject, the Court said (p. 262):

> "The question of the allowance of interest on unliquidated damages has been a difficult one. The rule on this subject has been in evolution. Today, however, it may be said that if a claim for damages represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day. The test is not whether the demand is liquated. Was the plaintiff entitled to a certain sum? Should the defendant have paid it? Could the latter

> have determined what was due, either by computation alone or by computation in connection with established market values, or other generally recognized standards?"

In *Blackwell* v. *Finlay,* 233 N. Y. 361, interest was allowed in an action to recover the *reasonable value* of legal services; and in that case the Court said (p. 363):

> "Without seeking to bring order out of the chaos in which the present state of the law on the subject exists, we may safely repeat the familiar rule that a claim for legal services resting on a *quantum meruit* draws interest from the time when a demand is made after the close of the services and the debtor is thus put in default. (Citing cases.) It would indeed work great injustice if one who *renders ordinary services, whether professional or otherwise, or sells ordinary commodities,* could not by presenting his bill and demanding payment, put the debtor in default and start interest running. The rule is a sound one, and commendable in its application here, where the plaintiff has recovered the exact amount demanded by him from defendant."

In *Prager* v. *New Jersey Fidelity & Plate Glass Ins. Co.,* 245 N. Y. 1, the subject of interest was again discussed with considerable elaboration by Cardozo, *Ch. J.* Speaking of a case where the demand was greatly in excess of the amount determined to be due, the Court said (p. 5):

> "We think that even there, interest is to be added to the amount of the award. This was the ruling in *de Carricarti* v. *Blanco* (121 N. Y. 230), where the plaintiff, suing for

> $12,000 as the value of his services, obtained an award of $3,568, to which interest was added from the date of the demand. So in *Sweeny* v. *City of New York* (173 N. Y. 414), the claim was in excess of $100,000 (p. 416), and the award was $79,229.13, yet again interest was added."

The Court pointed out that while the dispute as to value was going on the defendant had the benefit of the money, that interest must be added if the plaintiff is to be made whole, that the defendant could have limited its liability for interest by a common law tender or by a payment on account, and that if it chose to keep the money it should pay for what it kept. The Court then continued (p. 6):

> "There would be obvious injustice if interest were to be lost as the result of a slight discrepancy between the claim and the award. The whole subject is beclouded if the right is made dependent upon considerations of more or less. The test is rendered too uncertain to be in truth a test at all. *More and more the courts are coming over to the view that in actions on implied contracts to recover for services or property, interest is a concomitant very nearly automatic, and this though the value has been honestly disputed.* Interest is now held to be an incident to 'just compensation' where property has been taken in the exercise of the power of the government. (*U. S.* v. *Rogers,* 255 U. S. 163; *Seaboard Air Line Ry. Co.* v. *U. S.,* 261 U. S. 299.) It is no less such an incident where liability has its origin in the obligation of a contract.
>
> "Our ruling is limited to the necessities of the case before us. In an action upon an

implied contract to recover compensation measured by the value of the services where the recovery is not subject to counterclaim or setoff (*Excelsior Terra Cotta Co.* v. *Harde,* 181 N. Y. 11), we hold that interest must be added from the date of the demand. We do not go into the question of the liability for interest where the cause of action is to recover damages for the violation of a duty."

In *Van Cleave* v. *Reeder,* 204 N. Y. App. Div. 826, 827, the Court said:

"In the present case the amount of damages to which plaintiff was entitled was a sum determinable by defendants *by computation in connection with established market values,* accessible to them, as well as to the general public in published reports of sales, and, therefore, interest is properly allowable to plaintiff upon his recovery."

In *Great Northern Ry. Co.* v. *Philadelphia & Reading Coal & Iron Co.,* 242 Fed. 799 (C. C. A., 8th Circuit), the Court said (p. 803):

"The general rule is that no interest can be recovered for the breach of a contract, where the damages are in their nature unliquidated and there is no reasonably certain standard by which the amount can be determined until the amount has been ascertained. (Citing cases.)

"The general rule is not open to controversy, but there is an exception to it in cases where the unliquidated claim is subject to an exact computation by reference to available data, or where the amount is subject to *rea-*

sonably certain calculation by reference to existing market values."

In *DeMotte* v. *Whybrow,* 263 Fed. 366 (C. C. A., 2nd Circuit), the Court cited and quoted from *Faber* v. *City of New York, supra,* and then said (p. 368):

"Interest is allowable on an unliquidated demand in cases where it can be determined what amount is due, either by mere computation, or by computation in connection with established market values, or other generally recognized standards."

In *P. N. Gray & Co.* v. *Caballiotis,* 276 Fed. 565 (D. C. E. D. N. Y.) the court said (p. 571):

"In any aspect of the case, the plaintiff's damage is the difference between the contract price for the sugar and the market value. The reasonable market price deducible from the evidence is 14¾ cents per pound, this being the lowest market price testified to by any disinterested witness. Damages should be awarded upon that basis. And as sugar is a commodity, the price of which on any market day is readily ascertainable, the plaintiff should be allowed interest from the date of the breach of contract, viz. January 29, 1920. Faber v. City of New York, 222 N. Y. 255, 262, 118 N. E. 609."

In *Milliken-Tomlinson Co.* v. *American Sugar Refining Co.,* 9 Fed. (2d) 809 (C. C. A., 1st Circuit), the Court said (p. 819):

"As to interest on the amount of damages awarded, we think this case is not controlled

> by the recent decision in this circuit in International Paper Co. v. Beacon Oil Co. (C. C. A.) 290 F. 45, for the reason that at the time of defendant's breach of its contract fine granulated sugar had a market value easily ascertainable and it would have been feasible for the defendant to compute plaintiff's damages if it had admitted liability and chosen to tender the amount thereof. This fact would seem to bring this case within the doctrine of those cases which have held that interest may be recovered in suits for unliquidated damages, 'where it can be determined what amount is due either by mere computation or by computation in connection with established market values or other generally recognized standards.' "

In *Druckman* v. *Forsyth Furniture Lines*, 22 Fed. (2d) 59 (C. C. A., 4th Circuit), interest was allowed in an action for damages for breach of a contract for the sale of property where the damages claimed were the difference between the agreed price and the market price. The Court there stated that the great weight of authority in the State courts and in the Circuit Courts of Appeal was in favor of the allowance of interest in such cases. It distinguished several cases in which interest had been disallowed upon the ground that in those cases there was no market value or other means by which the loss might be ascertained with reasonable certainty, whereas, in the case before it "there was a market value by which the pecuniary loss might be ascertained with reasonable certainty on a fixed date." The Court also stated in that case (p. 60):

"It is perfectly obvious that if a party can breach his contract which requires him to accept and pay for certain property and can escape by the payment simply of the difference between the market price and the agreed price, without any allowance of interest for the months or years that may have elapsed during which he has failed to pay this difference, the aggrieved party has not been adequately compensated for the wrong done. It hardly needs the citation of authorities to show that such a theory is consonant neither with reason nor justice. We are, however, not left without high controlling authority. The Supreme Court of the United States has recently passed upon this very question in the case of Miller v. Robertson, 266 U. S. 243."

In the case at bar appellant's claim is based upon an implied contract. The amount due, if not actually agreed to by continuing to occupy the space with notice of the amount claimed, was readily determinable by mere computation from ascertainable market values. Under the foregoing authorities interest from the time of demand is to be allowed.

The accrued interest down to December 6, 1927, is $1866 (Lewis, p. 38).

Conclusion.

We submit, therefore, that the decree appealed from should be reversed and that appellant's claim should be allowed at the sum of $21,066 ($19,200 plus $1866) with interest on $19,200, part thereof, from December 6, 1927, *less* $600 with in-

terest thereon from February 6, 1925, which is to be deducted because of the finding that the Receivers were to have *sixty* days free time instead of *thirty* days.

Respectfully submitted,

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Solicitor for and of Counsel with Appellant.

J. FREDERICK EAGLE,
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Of the New York Bar,
Of Counsel.

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New Jersey Court of Errors and Appeals.

In the Matter
of
The Dissolution of the NEW JERSEY REFRIGERATING COMPANY,
On Appeal of NATIONAL COLD STORAGE COMPANY.

NATIONAL COLD STORAGE COMPANY,,
Appellant,

FRANK J. BOCK and EDWARD H. WRIGHT as Receivers,
Respondents.

APPELLANT'S REPLY BRIEF.

I.

As to the facts.

Respondents' brief contains several misstatements as to the facts, some of which are of great importance and cannot be allowed to go uncorrected.

1. With reference to the partition in Basement K respondents state at page 1:

> "This partition was erected by appellant's workmen, about the date of transfer, to provide storage room for 250 barrels of ale."

That is wholly incorrect; and it is a misstatement of such far-reaching importance that is not too much to say that counsel's apparent belief in that statement may be the explanation of their action in resisting this claim.

Mr. Dill, respondents' own employee, testified, explicitly and positively and without contradiction that *he* put the partition there *himself* (State of Case, p. 90; and see pp. 18, 19, of our first brief where his testimony is quoted). Appellant had nothing to do with putting the partition there and was not even aware of its existence.

2. Respondents state, at pages 1, 2, of their brief that the ale was destroyed September 5, 1927, "by an order of this court upon an application by the Receivers filed for that purpose *in March, 1925.*"

That is incorrect. Respondents petitioned the court below for an order to destroy the ale in February, 1925, and their application was *refused* (pp. 61, 62). In March, 1925, they obtained an order directing the stockholders to show cause why the ale should not be destroyed (p. 62) and the stockholders thereupon obtained an order of the Federal Court enjoining respondents from destroying it (p. 62) and directing respondents to safely keep the ale in their possession (p. 145). The order directing the destruction of the ale was not applied for by respondents until *August 9, 1927* (pp. 4-6), which was nearly three months after the injunction of the Federal Court had been vacated (p. 62).

3. At page 4 respondents state:

> "The first time that any specific sum (for storage) was mentioned was on April 8, 1925, in a conversation with Mr. Bock about the furniture."

That is incorrect. The specific sum of $600 per month was mentioned in the bill which appellant sent to respondents on March 3, 1925 (p. 34 and Exhibits at pp. 126, 127).

4. At page 6 respondents state:

> "Counsel for the Receivers immediately repudiated the bill in their letter of March 9, 1925."

The letter of March 9, 1925, appears at pages 140, 141, and we submit that the characterization of it as a repudiation of the bill is unjustifiable.

5. At page 10 respondents state that they knew on January 11, 1925, that the ale had gone "sour" and "was worthless."

To support that statement they quote an extract from the testimony of the chemist, Dr. Edel, at pages 106, 107. But when that testimony is read in its entirety, and in connection with Dr. Edel's reports, it is quite apparent, we submit, that Dr. Edel in reality was testifying as to his second examination on March 29, 1927, instead of his first examination on January 11, 1925. Dr. Edel's report of January, 1925, merely states that "The acid content is high" (p. 132). It is only in his second report, of April, 1927, that he states that the ale was "unfit for human consumption" and "sour" (pp. 133-135).

It is quite absurd to suppose that if the ale had been sour and unfit for human consumption in January, 1925, the Chancery Court would have *refused* respondents' application for leave to destroy it in February, 1925, or that the stockholders would have obtained their injunction and spent two years in endeavoring to get permission to remove the ale to their homes. Furthermore, if Dr. Edel had found the ale sour and unfit for

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human consumption at the time of his *first* examination, there would have been no reason whatsoever for ever having him make a *second* examination.

7. At page 11 respondents quote the testimony of Mr. Lewis as to his conversation with Mr. Bock in April, 1925, and then state that "Mr. Bock denied any such conversation."

Mr. Bock did not do anything of the kind. He admitted that he had a conversation with Mr. Lewis in April, 1925, and testified that in that conversation he "undertook to arrive at some basis of settlement" and "suggested to him (Lewis) that he take over this furniture and whatever office equipment there was in lieu of his bill and settle it on that basis (p. 74). And Mr. Bock did not deny that Mr. Lewis rejected his proposition.

II.

As to the existence of an agreement to hire.

Respondents' argument upon this point is that there is no proof of any agreement "*with the exception of the evidence of Mr. Dill.*" Assuming that it be true, what better or more conclusive evidence could be desired than the testimony of the respondents' own employee, general factotum, and witness, who was present at the time of closing title and expressly testified that the arrangement was that

> "We were to stay there 60 days without any storage and after that we were to pay storage if we kept it there" (p. 88).

New Jersey State Library

In the face of such testimony, the assumed finding that there was no agreement of hiring is contrary to the evidence and without any evidence to sustain it.

III.

As to the existence of an implied contract for storage at a specific rate.

Respondents set up three matters as refuting "any inference of an implied agreement" (Their Brief, pp. 9-11):

> (*a*) The Receivers had exclusive control of only that part of the cellar in which the ale was stored.
>
> (*b*) The Receivers knew January 11, 1925, that the ale had gone sour and was worthless.
>
> (*c*) Mr. Lewis, appellant's General Manager, had never entered Basement K, but nevertheless had a conference with Mr. Bock at which Mr. Bock offered to keep the basement on a rental of $300 per month and Mr. Lewis objected to his proposition and would not entertain it.

Reason "(*c*)" tends to sustain rather than to refute, the implication of an agreement to pay, because respondents kept the ale where it was with knowledge of appellant's charges.

Reason "(*b*)" already has been shown to be false in fact (see *ante*, pp. 3, 4).

Reason "(*a*)" is likewise false in fact. Mr. Dill, respondents' employee, general factotum, and witness, expressly testified that the respondents *occupied the whole cellar* (p. 89); and the

presence of the ale in the cellar prevented appellant from using any part of the cellar for the storage of other articles (see pp. 17-20, and 42-45 of our first brief).

Furthermore, this is not a case where the existence of an implied agreement depends upon a finding of fact as to the intention of the parties. The obligation to pay follows *as a matter of law* from the conceded fact of occupancy. Even if the Receivers actually intended *not* to pay, the law nevertheless says they must pay.

The numerous authorities cited in Points I and II of our first brief assert this principle; and special attention may be called to *Grove* v. *Barclay,* 106 Pa. St. 155, which is cited and quoted at pages 30-33 of our first brief. In that case the owner of the machinery which had been left upon the plaintiff's property claimed the right to leave it there without paying storage. Yet, despite his intention not to pay, the court held that he was liable.

The principle is elementary and universally recognized.

> "A distinction exists between contracts implied in fact and those which are *implied in law.* The former are implied contracts, and the latter are *quasi* contracts. In a *quasi* contract the contract is a mere fiction; the intention being disregarded. In an implied contract the intention is ascertained and enforced. 'In one, the intention is disregarded; in the other, it is ascertained and enforced.' *Hertzog* v. *Hertzog,* 29 Pa. 465, 468. A *quasi* contractual obligation is imposed by law for the purpose of bringing about justice, *without regard to the intention of the parties.*"
>
> *City of New York* v. *Davis,* 7 Fed. 2d, 566, 573, 574 (C. C. A. Second Circuit).

The principle was applied by this court in *Waldron* v. *Davis,* 70 N. J. Law 788, in which it sustained a recovery for boarding and nursing a lunatic. There had been an express contract between the parties and it was contended that the existence of such express contract precluded any recovery for the period after the defendant's intestate became *non compos mentis;* but this court said (pp. 790, 791):

> "After that event deprived the parties, not only of their power to keep in force the prior mutual agreement, but also of their legal ability to enter into any new one, *the law implied a liability on the part of the lunatic* (which became binding, after her death, also upon her estate) to pay, upon *quantum meruit,* what such 'necessaries' were reasonably worth. This principle, also, is so well sustained by authority of both text-book and reported cases, that I shall only cite a few of the most pointed, viz: *Van Horn* v. *Hann,* 10 Vroom 207; *Hallett* v. *Oakes,* 1 Cush. 296; *Kendall* v. *May,* 10 Allen 59; *Richardson* v. *Strong,* 13 Ired. 106; *Pearl* v. *McDowell,* 3 J. J. Marsh, 659; 1 Ad. Cont. (2d Am. ed.) 236."

So, here, respondents having occupied appellant's property the law itself implies an obligation to pay for such use and occupancy, irrespective of whether respondents actually "intended" to pay or not.

We add, however, that the facts also show that respondents *did* intend to pay.

IV.

As to respondents' liability for cubic content of entire cellar at prevailing rates for cold storage.

Respondents assert, at page 13 of their brief, that this involves a question of fact. We submit that that view is untenable. The facts are known and undisputed, and the conclusion to be drawn therefrom is one of law.

Respondents concede that when they conveyed the plant to appellant possession of the entire building was delivered "*except the cellar described as Basement K*" (Their Brief, p. 1). They also concede that the building conveyed had been used as a *cold* storage warehouse and that "*this business* was continued by the appellant" (id., p. 1). There is no contradiction of the fact that Basement K constituted *one refrigerating unit,* a part of which could not be refrigerated unless the whole was refrigerated. Respondents' own witness expressly so testified (p. 114). The presence of the ale in that unit prevented appellant from using it for other products (See p. 20 of our first brief and page references there given).

In view of these conceded facts, *viz.,* that respondents retained possession of one unit of a *cold* storage plant owned by a company engaged in the *cold* storage business, and used that unit for the storage of their property with knowledge that appellant was charging them therefor at the rate of $600 per month, and thereby prevented appellant from using any part of that unit for cold storage purposes, it follows irresistibly *as a conclusion of law* that respondents must pay for that unit at cold storage rates.

It may be that, as argued at page 14 of respondents' brief, it was not the "*fault*" of the

Receivers that the ale was not removed or destroyed before September, 1927; but there certainly appears to have been no reason why the Receivers, during this long period of over two years, could not have obtained an order for the removal of the ale to some other place of storage if they thought that *cold* storage was unnecessary or that Basement K was larger than was needed. If the Receivers were not at fault, certainly appellant was not.

The real gist of the matter is whether the Receivers' beneficiaries, the stockholders, shall be made to pay for the storage of the ale during the time they were carrying on their litigation in an attempt to get the ale for themselves. Law and justice alike dictate that they must pay.

V.

As to appellant's right to interest.

We find nothing in the cases cited in respondents' brief upon this point which runs counter to the authorities cited at pages 46-53 of our first brief. Those authorities show the present attitude of the courts toward the allowance of interest, and we submit that this court should adopt the rules there laid down.

Respectfully submitted,

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February, 1929.

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

New Jersey Court of Errors and Appeals

NATIONAL COLD STORAGE COMPANY,
Appellant,

vs.

FRANK J. BOCK and EDWARD H. WRIGHT, as Receivers,
Respondents.

Appeal from Court of Chancery.

BRIEF FOR RESPONDENTS.

Facts.

On December 6, 1924, the receivers conveyed premises known as 173 Ninth street, Jersey City, New Jersey. Possession of the entire building was delivered at the same time, except the cellar described as basement "K," which space, in effect, is the subject of this litigation. Prior to December 6, 1924, the building had been used as a cold storage warehouse. This business was continued by the appellant. Basement "K" in round figures is 33 feet in width by about 85 feet in length and is 10 feet 8 inches high (p. 19, l. 4). A partition was erected at one end of basement "K" which enclosed a space 15 by 48 feet and 10 feet 8 inches high. This partition was erected by appellant's workmen, about the date of transfer, to provide storage room for 250 barrels of ale. The key to the door of this enclosure was entrusted to Mr. Dill, who was in the employ of the receivers. No other person had a key to this room. There was also a door to basement "K." Mr. Dill also had a key of this door. The ale remained in the small room from December 6, 1924, to September 5, 1927, when it was destroyed

by an order of this Court upon an application by the receivers filed for that purpose in March, 1925. Upon the filing of this application, proceedings were instituted in the Federal Court by one of the stockholders of the New Jersey Refrigerating Company, and the *receivers were restrained from destroying the ale.* This restraint was subsequently vacated by the United States Circuit Court of Appeals and immediately thereafter the ale was destroyed by order of this Court. Bills were sent to the receivers by the appellant at the rate of $600 per month. The first bill, dated March 3, 1925, read as follows:

> "To rent of space in basement of building 'K' from January 6th to March 5th (2) at $600.00 per month, $1,200.00."

All subsequent bills were similar in form.

Upon receipt of this bill, counsel for the receivers, on March 9, 1925, wrote appellants in part (p. 141):

> "It is true that in behalf of the receivers I stated that we would endeavor to remove the ale within sixty days but there was no agreement that we should pay any storage charges, nor was there any intention on the part of the parties, so far as I recall, that the ale was left on storage."

On September 29, 1925, counsel for the receivers again wrote in reference to the same matter (p. 143):

> "The receivers do not recognize any liability for storage charges and cannot recommend for payment any bill for such charges unless and until the Court of Chancery of New Jersey shall approve."

In the interim, the receivers, or one of them, verbally disclaimed responsibility for storage charges, and asserts there was no such agreement.

On September 1, 1927, the appellant filed with the receivers a claim for $19,200 with interest on $600 from the end of each month during said period, for rent from January 6, 1925, to September 5, 1927. In that claim, the appellant avers that respondents "hired" from the National Cold Storage Company "said basement in said premises from January 6, 1925, at a monthly rental of $600, payable at the end of each month." * * * The receivers denied any agreement for storage and, after a hearing, rejected this claim. Appellants appealed from the rejection to the Court of Chancery. There the matter was heard practically *de novo* and decided *inter alia* as follows:

> "I shall find that the storage company is entitled to remuneration at the prevailing rate for common storage for the room actually occupied by the ale. It occupied 720 square feet. The common rate is fifty cents per square foot per year. This, as I understand the testimony, would make the charge $930.00. If my mathematical calculations are correct, I will advise a decree accordingly. If not, I will advise a decree according to this opinion, the figures to be corrected to conform thereto. No interest will be allowed."

The questions involved in the case will now be considered.

I.

Was there an agreement to hire.

The Court of Chancery decided that there was no express agreement. Assuming, but not admitting, that this conclusion involved the determination of controverted facts, there is evidence to support the decision. It was the desire of both parties to be rid, as soon as possible, of the

responsibility for the custody of the ale. Mr. Lewis, president of the National Cold Storage Company, said:

> "Q At the time of the closing of the title, Mr. Lewis, and at the discussion which then took place, with reference to the ale, did you not say in substance and effect that the National Cold Storage Company would assume no responsibility for the custody of the ale? A Yes" (p. 41, ll. 28-35).

That this was also the receivers' understanding is evident from a notation in the closing memorandum.

> "National Cold Storage Company will assume no responsibility for custody or care of the ale."

Mr. Lewis testified that at that time his representative, Mr. Eagle, said, "I now serve on you the required thirty days' notice" (p. 33, l. 28), referring to the limit of time to dispose of the ale.

The receivers insist that this agreement was for sixty days. Mr. Bock testified, "It will probably take us two months, anyway, to get it out," to which Mr. Lewis replied, according to Mr. Bock, "All right, we will permit you to keep it there without any charge" (p. 71, l. 40). Whether the period was thirty days or sixty days is immaterial because appellant now waives any charge to February 6th. The fact is that the bill for the two months of 1925 was not based upon any agreement. The first time that any specific sum was mentioned was on April 8, 1925, in a conversation with Mr. Bock about the furniture (p. 35, ll. 10-20). Mr. Lewis admits (p. 37) that at the time of the passing of title, he did not know the dimensions of basement "K." Mr. Bock denies (p. 76, l. 35) any agreement with Mr. Lewis as to storage. With the exception of

the evidence of Mr. Dill, to which I will now refer, there is absolutely no proof in the case relating to any agreement for storage until April 8, 1925, which was more than a month subsequent to March 3rd, on which date the respondents received a bill for storage at the rate of $600 per month, for the months of January and February, 1925. Now, as to Mr. Dill,

> "Q Do you recall, what if anything, was said with reference to the alleged ale then held by the receivers in the basement of the building 'K'? A Yes, when it first started I think Mr. Lewis said—asked when we were going to get that out, and when it was brought up, why, he said something about thirty days and then afterwards, it was arranged for sixty days. We were to let it stay there for sixty days without any storage and after that we were to pay storage if we kept it there" (p. 88, ll. 12-20) * * *
>
> Q Was there any agreement made then as to price or terms of letting? A No, sir, there was nothing said about it at all" (p. 88, ll. 25-28).

It, therefore, appears that the only agreement between the parties to April 8, 1925, was to the effect that there was to be no charge for the storage of the ale for a period of sixty days. We have insisted that the case is absolutely void of any proof as to an agreement for storage to April 8, 1925. The first intimation of a charge for storage subsequent to that date was in a letter sent with the bill of March 3, 1925. That notice is ingenious (p. 126):

> "Through an oversight, our billing department neglected to send you an invoice for two months rental for certain space in the basement of building 'K' of this Company's plant in Jersey City, which space you still occupy."

Counsel for the receivers immediately repudiated the bill in their letter of March 9, 1925. Nothing further occurred between the parties until April 8, 1925, when Mr. Lewis had a conference with Mr. Bock:

> "Q On April 8, 1925, did you have a conference with Mr. Bock about this matter? A Yes, sir.
>
> Q What occurred? A I was over at the building as per his appointment at the warehouse office, and he spoke about the rent on this basement and offered to keep the basement on a rental of $300 per month, to which I objected and would not entertain it.
>
> Q And then after that you continued to send bills? A Yes, sir.
>
> Q Did he make any other suggestion or offer to you for the past rent? A No" (p. 35, ll. 20-30).

Mr. Lewis further testifying stated:

> Q To return to your bill of $600 a month, will you tell us how you came to make up that bill? A Without knowing the exact space of that particular room, the basis of rental was given to me by Mr. G. W. Lembeck on the same rate at which he had bill or his company—had billed the receivers for previous occupancy" (p. 37, ll. 29-30).

Mr. Bock, one of the receivers, denied making any such statement. What actually took place at the conference of April 8th appears in Mr. Bock's testimony (p. 74):

> "Q What was the conversation? A We had received a bill from the National Cold Storage Company, of which Mr. Lewis was an officer, and, recognizing that the bill was exorbitant, and which fact was admitted by Mr. Lewis, I undertook to arrive at some basis of settlement and at the same time dispose of the furniture which we had—owned, which was located in the building that they had bought, and I suggested to him that he take over this furniture and what-

> ever office equipment there was in lieu of his bill and settle it on that basis, assuming at the time that we would be able to get rid of the ale in a comparatively few days" (ll. 10-20).

Again, on cross examination, Mr. Bock testified to the same effect (p. 79).

Upon these and other facts, the Court determined the relation of landlord and tenant did not exist between the receivers and the National Cold Storage Company, and decided:

> "The whole testimony shows that the receivers did not recognize the obligation for any fixed rent for any certain period."

Consequently, there was no express contract. Indeed, the appellant did not seriously assert such a contention.

II.

Was there an implied contract for storage at a specific rate?

There was no implied contract to pay $600 per month. The fundamental principle of implied contracts has never changed from that laid down by Blackstone.

> "Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes and every man undertakes to perform."

This rule applies to the law of hiring and in the absence of an expressed or implied contract, the receivers are responsible only for the reasonable use and occupation.

The evidence is clear that the subject of rental was not discussed until April 8, 1925. The only reference to the matter is in the correspondence between the parties and their own acts.

The first notice to the receivers that a charge would be made for storage after February 6, 1925, is contained in the bill dated March 3, 1925, for two months' rent. This implication of an agreement to charge $600 a month for basement "K" was immediately rebutted in Mr. Harrison's letter on March 9, 1925.

> "Your letter of the 3rd instant to the receivers of the New Jersey Refrigerating Company, with enclosure to invoice for two months' rental of space in cellar in Plant of Ninth Street, Jersey City, occupied by approximately 250 barrels, which barrels are said to contain ale, has been turned over to me.
>
> My memorandum on closing of the plant title, shows that the National Cold Storage Company representatives would assume no responsibility for the custody or care of the ale at any time, and that the entire risk would have to be taken by the receivers. It is true, that in behalf of the receivers, I stated that we would endeavor to remove the ale within sixty days, but there was no agreement that we should pay any storage charges, nor was there any intention on the part of the parties so far as I recall, that the ale was left on storage.
>
> The receivers purpose presenting a petition to the court within a few days for permission to remove the ale, and probably destroy it, so that I am hopeful that you will be agreeable to arrangements for its prompt removal. I have asked the receivers to get in touch with you within the next few days with that end in view. You will probably hear from them very shortly."

About this same time Mr. Bock, in an effort to dispose of some furniture, suggested to Mr. Lewis that "he take over this furniture and whatever other office equipment there was, in lieu of his bill and settle it on that basis"—(p. 75, l. 20) * * * not, however, before stating

to Mr. Lewis "the bill was exorbitant, and which fact was admitted by Mr. Lewis" (p. 74, ll. 10-12).

Mr. Bock further testified (p. 76, ll. 30-40):

> "Q Did you agree with Mr. Lewis or with any other representative of the National Cold Storage Company to pay six hundred dollars a month, three hundred dollars a month or any other figure for the storage of that ale? A No, the only conversation I had with Mr. Lewis in connection with this—and that is evidently where this assumption evidently arose—we undertook to trade the furniture in payment for the bill which they had rendered us and there was no intent to fix any specific rate of storage."

The Court of Chancery found as a fact, upon this and other evidence, that there was no implied storage agreement. The situation which confronted the receivers at that time refutes any inference of an implied agreement and the character of the occupancy was such as to negative any agreement, viz:

a. The receivers had exclusive control of only that part of the cellar in which the ale was stored. About a month after the National Cold Storage Company took possession according to the testimony of Mr. Dill (pp. 90-91), the lock on the door to the main cellar was changed by the appellant and the key was entrusted to Mr. Eugene W. Lewis, Jr., son of the president of the company and the person in charge of the plant (appellant's brief, p. 16).

Dill, the agent of the receivers, visited the premises frequently. Before he could gain admission, he had to procure the key from the superintendent or the superintendent unlocked the door for him (p. 91). This control of the key to the main cellar continued from January,

1925, to September, 1927. In March, 1927, Mr. Edell testifies that (with Messrs. Harrison, Wright and Dill) he called at the office of the storage company,

> "and a gentleman with a bunch of keys—a gentleman followed us across the street and he tried to open the door and he could not open it, and just as somebody tried to force the lock, the key was found. I don't know who found the key, or anything like that" (p. 108).

Mr. Dill solves the finding of the key.

> "Q Will you tell the court just as briefly as you can just what transpired with respect to our getting the key and going into that cellar? A Well, we went over there, and, as usual, I went to Mr. Lewis to get the key and he came down with a bunch of keys, but he did not seem to have the right one and he went back and then, we were going to force the lock. In the meantime, he went upstairs and when they came down again, they had a key that did fit. They let us in. That was the outside door to cellar 'K.' "

It, therefore, appears that the respondent did not have exclusive control and possession of basement "K."

b. The receivers knew January 11, 1925, that the ale had gone "sour."

> "Q On the first examination, what did you find to be the condition of the ale? A It had started to turn sour.
>
> Q Was the ale fit for human consumption? A It was not.
>
> Q Did you so inform the receivers? A I did."

It is to be noted that on January 11, 1925, which was before the expiration of the sixty-day period, the receivers had full knowledge that the product in the enclosure was worthless. It is likewise to be noticed that Mr. Bock, one of

the receivers, had full knowledge of the same fact at the time of his conversation with Mr. Lewis, Sr., in March, 1925, with reference to the liquidation of appellant's bill for storage charges for the months of February and March, 1925, by the acceptance of some office equipment.

c. Mr. Lewis, president of the National Cold Storage Company, had never entered basement "K."

> "Q During all this period, did you ever go down in the basement 'K'? A No, and haven't yet."

Notwithstanding that fact, in April, 1925, Mr. Lewis asserts that he had a conversation with Mr. Bock about the matter, as follows:

> "Q On April 8, 1925, did you have a conference with Mr. Bock about this matter? A Yes.
>
> Q What occurred? A I was over at the building as per his appointment at the warehouse building and he spoke about the rent on this basement and offered to keep the basement on a rental of $300 per month, to which I objected and would not entertain it.
>
> Q And then after that, you continued to send the bills? A Yes, sir.
>
> Q Did he make any other suggestion or offer to pay for the past rent? A No" (p. 35, ll. 10-25).

Mr. Lewis then explained the suggestion as to the furniture. Mr. Bock denied any such conversation.

Upon these controverted facts, the Court below decided that there was no implied agreement to pay either $600 or $300 per month. It is true, of course, that a bargain is a bargain, and that where the facts are undisputed and unambiguous, the Court will not interpret the terms, regardless of how unfavorable they may be to one of

the parties. On the other hand, when the parties differ, the Court (or jury) will determine the facts.

The respondents knew that the ale was worthless; and Mr. Bock had informed the President of the appellant corporation that "we had received report from the chemist who had made examination of the ale, that it was unfit for consumption. * * * " (p. 76, l. 10). The receivers tried to dispose of it by an order of this Court. They were restrained by an order of the Federal Court. From this fact, alone, and upon the denial of Mr. Bock, that he had made any agreement for storage or for rent, the Court below was justified in finding that there was no agreement with appellant. It is inconceivable that the receivers agreed to pay rent at the rate of $600 per month for four times the space they actually occupied with contraband ale. Nor could they transport or dispose of the ale in the face of the restraining order. There is not a scintilla of evidence that the receivers impliedly assented to pay $600 per month, or any other sum, for storage simply because monthly bills were sent to them.

It is a well-stated principle of law that the only reliable evidence (in the absence of an express agreement) bearing upon the existence or creation of the relation of landlord and tenant is that of the payment of rent. Not only by their refusal to pay, but by their repudiation of the monthly bills, the receivers indicated clearly their disavowal of any fixed agreement.

> "The law will not imply a promise to pay rent for the premises from the fact that goods have been kept on them with the consent of the owner of the premises where it appears that the owner of the premises understood that the person leaving the goods

expressly refused to pay rent, though the owner did not agree that he should not pay rent.'' *Cook* v. *Medbury,* 150 Mass. 499 (23 N. E. 225).

III.

The respondent is responsible only for the use and occupation of the space where the ale was actually stored at a reasonable rate for common storage.

This, too, involves a question of fact. The respondents claim rent for all of the basement "K," at *cold storage* rates, which amounts to $18,000. In other words, the National Cold Storage Company seeks to impose an obligation of $18,000 for the storage of stale ale.

The enclosure occupied about one-quarter of the cellar, or approximately 720 square feet. According to the testimony of Mr. Rodgers (pp. 112-113), which is the only testimony in the case, the fair rental for general storage is at the rate of fifty cents per square foot per year.

> "Q On the basis of square footage, can you give us a rate on the basis of square footage for general storage? A General storage where there is a quantity of space taken regardless of the class of goods that were stored, run around fifty cents a square foot a year. A good deal would depend upon the character of the building.
>
> Q Are you familiar with the type of building, of the building in question on 9th street, Jersey City? A Yes.
>
> Q And would fifty cents, in your opinion, be a prevailing rate for general storage of goods of this character? A I think so."

This testimony was admitted without objection. The Court accepted this evidence and multiplied the number of square feet by fifty cents per year

for the entire period from February 1, 1924, to September 1, 1927, and advised a decree for $930.

Appellants contend that this decree is erroneous for two reasons:

a. That the Court should have found that the defendant occupied 30,360 cubic feet, and

b. That the reasonable charge should have been at the rate of two cents per cubic foot per month instead of fifty cents per square foot per year.

Therefore, two problems are presented:

a. The quantity of space.

b. Was the ale on cold storage or common storage.

Upon these two points the Court found that the storage company was entitled

> "to compensation for the space actually occupied by the ale after the expiration of the sixty days mentioned" and "to remuneration at the prevailing rate of common storage for the room actually occupied by the ale."

There is evidence to support this conclusion. However, before indicating such evidence, it is important to call attention to the fact that the receivers were *under injunction from the early part of 1925 until 1927 to refrain from destroying the ale.* It was not the fault of the receivers that the ale was not removed or destroyed before September, 1927. As we have stated, the use and occupation by the receivers was confined only to the enclosure in basement "K" and the evidence as to such occupation is set out in full under point two. This leaves only the question of the reasonable charge for such occupation. The appellant claims compensation at cold storage charges, at the rate of

between twenty to thirty cents per cubic foot per year (p. 113). Respondents contend that there was no agreement either as to storage or as to payment. Appellant insists that because basement "K" was equipped for cold storage as a part of the equipment of the entire building, that in law and in equity receivers became responsible for the storage at cold storage rates. The Court determined, however, that as there was no agreement, and "the only obligation upon the receivers was to pay for common storage for the space actually occupied," and upon the testimony of Mr. Rodgers, *supra,* determined that the reasonable prevailing rate for common storage was 50 cents per square foot per year. As the Court below decided that there was no expressed or implied agreement for storage except to pay a reasonable rate for the use and occupation, and as there is evidence to support that finding, the appeal should be dismissed.

IV.

Is appellant entitled to interest on $930.00?

The opinion of the Court below classes the claim as one for unliquidated damages. It is a well-known principle of law that a claim may be said to be liquidated so as to bear interest only when the amount due or to become due is fixed by law or by agreement between the parties (33 C. J., p. 210, Sec. 70).

Appellant's claim has now been fixed by law at $930, or at the rate of $30 per month, as the reasonable charge for common storage. It does not necessarily follow, however, that appellant is entitled to interest on the monthly basis of $30 per month, remaining unpaid, because no demand was made by appellant upon respondent

for the rental found to be due by the Court, and for the further reason that the claim did not become liquidated until fixed by the Court.

Munn & Co. v. *Americana Corps.*, 82 Eq. 443, p. 449;

Hoist Co. v. *Breidt City Brewery,* 94 L. 230, p. 235.

Conclusion.

This case involves only well-known principles of law, but the cases cited in appellant's brief are not applicable to the facts in this litigation. In all of the cases cited by appellant, the decisions turned on the question of assent, either expressed or implied, to fixed rates, or disclosed facts from which ratification of such rates was inferred. Here, however, the receivers did not assent either by word or deed. On the contrary, they repelled any inference of assent or ratification by immediate and direct repudiation of the charges attempted to be made for the storage of the ale; and, in addition, the receivers were restrained by injunction from destroying the ale.

The appeal should be dismissed.

Respectfully submitted,

J. H. HARRISON,
Counsel for Receivers.

February, 1929, Term.