

INDEX.

	PAGE
Notice of Appeal.....	1
Grounds of Appeal.....	2
Summons	4
Complaint	5
Answer	8
Reply	10
Rejoinder	11
Postea	11
Motion for Non-suit.....	50
Defendant's Motion for Direction of Verdict.....	102
Plaintiff's Motion for Direction of Verdict.....	103
Court's Charge to Jury.....	103

TESTIMONY FOR PLAINTIFF.

John F. Bulgrien,	direct examination.....	13
	cross “	16
Frank E. Bradner,	direct examination.....	16
	cross “	17
Elizabeth Briggs,	direct examination.....	17
	cross “	19
	re-direct “	21
Catherine Cadwell,	direct examination.....	22
	cross “	23
	re-direct “	24
Anthony W. Schuler,	direct examination.....	24
Frederick W. Mausert,	direct examination.....	25, 29
	cross “	27, 37
William Mockler,	direct examination.....	47
	cross “	49

TESTIMONY FOR DEFENDANT.

Elizabeth Briggs,	direct examination.....	50
Daniel J. Lynch	direct examination.....	51
	cross “	53
	re-direct “	53
Anthony W. Schuler,	direct examination.....	54
	cross “	65
	re-direct “	71
	re-cross “	74
(recalled) direct	“	87

Mabel Gilman,	direct examination.....	75
Helen M. Freeman,	direct examination.....	77
	cross ".....	82
(recalled)	direct ".....	85
Marguerite Pearsal,	direct examination.....	84
Hugh B. Reed,	direct examination.....	87
	cross ".....	89

PLAINTIFF'S REBUTTAL.

Frederick W. Mausert,	direct examination.....	90, 92
	cross ".....	95
Alfred Hargan,	direct examination.....	91

DEFENDANT'S REBUTTAL.

Otto J. Karst,	direct examination.....	98
Helen M. Freeman,	direct examination.....	99
	cross ".....	100
Anthony W. Schuler,	direct examination.....	100
	cross ".....	100

PLAINTIFF'S SUR-REBUTTAL.

Frederick W. Mausert,	direct examination.....	101
	<i>Offered Printed</i>	
Exhibit P. 1-B—Slip	15	111
Exhibit P. 1-D—Slip	15	112
Exhibit P. 2—Answers to Interrogatories.....	69	114
Exhibit P. 3—Interrogatories	69	113
Exhibit P. 4—Answer to Second Interrogatory..	69	114
Exhibit D. 1—Letter from Frank E. Bradner....	65	116
Exhibit D. 2—Mortgage	52	117
Exhibit D. 3—Letter of April 27, 1914.....	61	121
Exhibit D. 4—Letter	55	121
Exhibit D. 5—Check	64	122
Exhibit D. 6—Notice of Chattel Mortgage Sale..	53	122
Exhibit D. 7—Letter of May 1, 1914.....	63	123
Exhibit D. 9—Ledger Sheet—Furniture Account.	80	124
Exhibit D. 10—Ledger Sheet—Bill of Sale Account	80	125
Exhibit D. 13—Dividend Check	99	126
Exhibit D. 14—Card enclosed with dividend check	99	126

Notice of Appeal.

Notice of Appeal.

Filed March 24, 1919.

Essex County Circuit Court

FREDERICK WILLIAM MAUSERT,

Plaintiff,

vs.

MUTUAL DISTRIBUTING COMPANY, a corporation,

Defendant.

Action at Law.

Notice of Appeal.

10

To Palmer Bradner, Esquire, Attorney of Plaintiff:

Dear Sir:

20

Take notice that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals in the last resort in all causes in New Jersey.

Dated, Apr. 23, 1919.

Very truly yours,

REED & REYNOLDS,

Attorneys of Defendant.

30

Service of the within notice is hereby acknowledged this 24th day of Apr., 1919.

PALMER BRADNER,

Attorney of Plaintiff.

40

*Grounds of Appeal.***Grounds of Appeal.**

Filed July 18, 1919.

New Jersey Court of Errors and Appeals

10

FREDERICK WILLIAM MAUSER, }*Plaintiff and Respondent,**vs.*MUTUAL DISTRIBUTING COMPANY, a corpora-
tion,*Defendant and Appellant.**On Appeal from
Essex County
Circuit Court.**Grounds of
Appeal.*

20

The appellant states the following grounds of appeal:

1. The Trial Court refused to grant a non-suit at the close of the case of the plaintiff, although no testimony had been presented, which, in the absence of other evidence would justify the jury in giving a verdict for the plaintiff, and such refusal was error.

2. The Trial Court at the trial refused to direct a verdict in favor of the defendant, although no evidence has been presented which would justify a verdict for plaintiff, and such refusal was error.

30

3. The Trial Court permitted the witness, Frederick William Mausert, to use, for the purpose of refreshing his memory, a memorandum which had not been made at a time and in a manner to justify its use, and to testify therefrom as to the property in his place of business at the time of the alleged trespass.

4. The Trial Court permitted the witness, Frederick William Mausert, to use, for the purpose of refreshing his memory, a memorandum which had not been made at a time and in a manner to justify its use, and to testify therefrom as to the value of property alleged to have been taken by defendant.

40

5. The following questions were admitted:

(a) To the witness, Frederick William Mausert, "Q Mr. Mausert, using that memorandum which you have to refresh

Grounds of Appeal.

your memory, will you tell what goods you had in the Arion Hall Palm Garden on June 25th, 1913, and the prices which you paid for those goods?"

(b) To the witness, Frederick William Mausert, "Q What were the profits about that time?"

And permitted those questions to be answered by the said 10
witness and such answers to be received in evidence.

6. The Trial Court permitted the witness, Frederick William Mausert, to testify as to the price of three hundred and sixty creamers when there was no evidence to show that the defendant had ever received such creamers, and such admission of testimony was error.

7. The Trial Court refused to allow the witness, Anthony W. Schuler, to testify as to the conversation with George Mausert relative to the circumstances under which the defendant received 20
the goods of the plaintiff.

8. The Trial Court, in part, charged the jury on the question of damages, as follows:

"The damages which the plaintiff would be entitled to recover would be the value of the goods at the time of the wrongful taking or the wrongful selling. You have nothing here but cost price. But many of these goods had been used for three years. A total value, as I say, has been testified to, of seven thousand five hundred and some odd dollars. In the first place, you have to find, if you can, by the evidence—of course if you cannot find 30
by the evidence the value of the goods that were taken, by the proofs here in the case, then your verdict should be for nothing more than nominal damages. Damages must be proven. But if no particular damages are proven, then cost price, less what would be a proper depreciation for age and wear, would be the measure of damages. Now, what is that? You must consider the business and use which these goods had had. The list is attached to the complaint which you will have with you. These goods consisted of things, generally, which are used on the tables. 40
They consisted of chairs, writing desk, bar glasses and fixtures, and three pages of articles here; you may look them over if you get that far in the case. The plaintiff says that glassware, dishes and things of that sort were kept renewed; that is, as they were broken they were renewed and the number kept

Summons.

intact. But the situation with reference to the glassware and crockery should not apply to chairs and furniture, which depreciate greatly with wear, and particularly with that character of wear which they would probably have in a place of that kind. All of these things you must take into consideration in determining the value, if you decide the plaintiff is entitled to your verdict; the cost price, the length of time they had been in use, and the character of use they had had, and determine from those, if you can, the amount of damage."

9. That there was no evidence for the jury upon which the verdict rendered could be justified.

10. That there was no evidence presented upon which a verdict of more than nominal damages could be rendered.

REED & REYNOLDS,
Attorneys for Defendant and Appellant.

Summons.

Filed March 7, 1917.

THE STATE OF NEW JERSEY TO MUTUAL DISTRIBUTING COMPANY,
a corporation.

You are summoned to answer the annexed complaint of Frederick William Mausert in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in this suit and judgment may be entered against you.

Witness, Frederic Adams, Judge of the Circuit Court, at Newark, this 7th day of March, nineteen hundred and seventeen.

JOSEPH McDONOUGH,
Clerk.

PALMER BRADNER,
Attorney.

*Complaint.***Complaint.**

Filed March 10, 1917.

Plaintiff, Frederick William Mausert, residing at Glens Falls, State of New York, says:

FIRST COUNT.

10

1. That on or about the 25th day of June, 1913, plaintiff was, and ever since has been, the owner of the goods and chattels set out in the schedule annexed hereto and made a part of this complaint. Said goods were of the value of \$7,556.42.

2. That on or about the day aforesaid, at Arion Hall, Washington street, City of Newark, County of Essex aforesaid, the defendant through its agents wrongfully took said goods and chattels from the possession of the plaintiff, and has ever since wrongfully detained, and still wrongfully detains the same, and has converted the same to its own use.

20

Plaintiff demands \$8,000.00 damages.

SECOND COUNT.

1. That on or about the 25th day of June, 1913, plaintiff was in possession of and carrying on business in Arion Hall, Washington street, in the City of Newark, as proprietor of a saloon and dance hall.

2. That on or about said day, the defendant through its agents and in the absence of the plaintiff, broke into said Arion Hall, and unlawfully and forceably seized said goods and chattels therein belonging to plaintiff, as set out in schedule annexed hereto, of the value of \$7,556.42, and appropriated them to its own use.

30

Plaintiff demands as damages \$8,000.00.

THIRD COUNT.

1. Paragraph 1 of the second count is repeated.

2. Paragraph 2 of the second count is repeated.

3. Prior to June 25, 1913, plaintiff had been induced by the representations of the defendant, through its agents, that plaintiff's place of business was about to be raided by the Prosecutor of the Pleas of Essex County aforesaid, and that plaintiff would be arrested, to stay away from his place of business.

40

Complaint.

4. That said representations of defendant were false to the knowledge of the said defendant.

5. The business of the plaintiff, as aforesaid, was thereby destroyed.

10 Plaintiff demands as damages \$10,000.00.

PALMER BRADNER,
Attorney for Plaintiff.

SCHEDULE OF GOODS AND CHATTELS TAKEN FROM
ARION HALL.

360 creamers,
90 vinegar cruets,
20 Removable electric sign in front of building,
Oak desk chair (revolving),
Oak writing desk,
Safe,
Large gas range,
Three large mirrors,
210 folding chairs,
Oak and glass, removable partition with swinging doors,
Lattice work with electrical wiring with 600 incandescent lights,
Complete window curtains for two floors,
One pair of stage plush curtains with fixtures,
30 360 water glasses,
500 whiskey glasses,
75 cocktail glasses,
90 large platters,
90 medium platters,
90 small platters,
75 champagne glasses,
540 goblets,
450 beer glasses,
300 wine glasses,
40 75 cordial glasses,
45 trays,
450 waiter towels,
50 dish towels,
40 rolling towels,

Complaint.

24 bottles of Mumms Extra Dry,	
Case and bulk goods,	
6 door checks (removable),	
Removable stair rods and pads,	
12 oak dining chairs,	
Removable piano platform,	
Clothing and shoes,	10
Liquor license,	
Share of stock of the Mutual Distributing Co.,	
360 cane bottom chairs (imported),	
90 quartered oak tables,	
235 folding chairs (in sections),	
Restaurant kitchen utensils,	
160 Tungsten lamps,	
205 two-watt Tungsten lamps,	
Electric sign flasher,	20
8 500-watt Tungsten lamps,	
300 tablespoons,	
100 ballroom tickets,	
Two new auto tires,	
6 new auto tubes,	
One new vulcanizing outfit,	
One box of carpenters' cabinet tools,	
15 special flower boxes, with plants,	
11 special tubs, with palms,	
360 tablecloths, linen,	
450 napkins,	30
14 large revolving electric fans,	
950 wardrobe boxes, removable,	
8 gas and electric chandeliers,	
12 small electric chandeliers,	
New oak staircase (removable),	
Artificial fireproof vine-work with palms,	
Removable stage,	
75 oyster forks,	
360 knives,	
360 forks,	40
720 spoons,	
360 soup spoons,	
90 pepper shakers,	
90 salt shakers,	

Answer.

- 10 90 toothpick holders,
 90 mustard cups,
 360 dinner plates,
 360 cups and saucers,
 360 individual dishes,
 360 pie plates,
 360 bread and butter plates,
 360 butter patties,
 25 finger bowls,
 360 soup plates,
 90 table pads, four feet square,
 360 sauce dishes,
 90 sugar bowls.

20

Answer.

Filed April 19, 1917.

Defendant, a corporation of New Jersey, having its principal office and place of business in the City of Newark, says that:

1. It denies the truth of the matters contained in the complaint.

Separate Defense to the First Count.

- 30 1. That on June 25, 1913, plaintiff claimed to be the owner of part of the goods referred to in paragraph 1 of the first count.
2. It denies the remainder of the allegations of paragraph 1.
3. It denies the allegations of paragraph 2.
4. On June 25, 1913, plaintiff executed and delivered to defendant a chattel mortgage covering or purporting to cover the following property:
- 40 90 round top tables,
 360 cane chairs,
 310 folding chairs,
 14 oak chairs,
 4 large palms,
 13 small palms,
 18 hanging baskets,

Answer.

- 1 hall partition about 100 feet long,
- 1 roll top desk,
- 1 desk chair,
- 1 combination gas range,
- all dishes, silverware, glassware,
- 1 search light,
- 1 safe,
- 85 window shades,
- 4 mirrors,
- 1 coat rack,

10

and all other goods and chattels of every nature belonging to said plaintiff then or lately in premises occupied by him in Washington street, Newark, New Jersey, to secure the payment of the sum of \$682.88 on demand.

5. That payment of the amount so stated in said chattel mortgage having been demanded being due and unpaid, defendant caused the said mortgage to be foreclosed, and the goods covered thereby or such of them as could be found were sold to raise and pay the amount so due thereon. 20

Separate Defense to the Second Count.

- 1. It denies paragraph 1.
- 2. It denies paragraph 2.
- 3. It repeats paragraphs 4 and 5 of the separate defense to the first count. 30

Separate Defense to the Third Count.

- 1. It denies paragraphs 1, 2, 3, 4 and 5.
- 2. It repeats paragraphs 4 and 5 of the separate defense to the first count.

HUGH B. REED,
Attorney of Defendant.

40

Reply.

Reply.

Filed April 24, 1917.

The plaintiff replying to the defendant's answer says that:

By Way of Reply to the Defense to the First Count.

10

1. Paragraph 4 is admitted.

2. Plaintiff has no knowledge or information sufficient to form a belief as to the allegations of paragraph 5.

3. Plaintiff further says that all of the goods mentioned in the schedule annexed to the complaint were seized and taken away by said defendant, or its agents, before the execution of said chattel mortgage.

20 4. Before this, the defendant, through its agents, told plaintiff that he had better leave town, as the prosecutor was about to raid his place of business.

5. Relying on said representations, the plaintiff went to New York City.

6. Then the defendant, through its agents, falsely and fraudulently represented to the plaintiff that his landlord was about to take all of his goods, unless he would sign certain papers for them.

30 7. Relying upon said representations, plaintiff was induced to come to Hoboken and sign said chattel mortgage.

8. Said transaction was a fraud upon the plaintiff, and the representations in paragraph 4 and paragraph 6 of this reply were false and fraudulent to the knowledge of the defendant.

By Way of Reply to the Defense to the Second Count.

1. Allegations of reply to defense to the first count are repeated.

40

By Way of Reply to the Defense to the Third Count.

1. Allegations of reply to defense to the first count are repeated.

PALMER BRADNER,
Attorney for Plaintiff.

Postea.

Rejoinder.

Filed May 21, 1917.

By way of rejoinder, defendant says that it denies every allegation in the reply.

10

HUGH B. REED,
Attorney for Defendant.

ESSEX COUNTY CIRCUIT COURT.

27682

20

FREDERICK W. MAUSERT,	Plaintiff,	Action at Law. Verdict by a Jury.
<i>vs.</i>		
MUTUAL DISTRIBUTING COMPANY,	Defendant.	Judgment for Plaintiff.
		Amount \$2595.33
		Costs 134.00
		Total \$2729.33

30

Palmer Bradner, Attorney of Plaintiff:

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit Court on April 21st, 1919. The cause having been heard and submitted to the jury, they return their verdict as follows:

They find in favor of the plaintiff, Frederick W. Mausert, and assess the damages against the defendant, Mutual Distributing Company, at the sum of two thousand and five hundred ninety-five dollars and thirty-three cents.

40

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of two thousand and five hundred ninety-five dollars and thirty-three cents and costs, which are taxed at the

Postea.

sum of one hundred thirty-four dollars, making in the whole the sum of two thousand seven hundred twenty-nine dollars and thirty-three cents.

Judgment entered and signed April 21st, 1919.

WILLIAM S. GUMMERE,
Judge.

10

Book 95, page 174.

20

30

40

John F. Bulgrien, direct.

ESSEX COUNTY CIRCUIT COURT.

FREDERICK W. MAUSERT

vs.

MUTUAL DISTRIBUTING COMPANY.

10

Transcript of shorthand notes of testimony, &c., taken in the above-stated cause, upon the trial thereof, at the Court House, Newark, N. J., April 17, 1919.

Before Hon. Nelson Y. Dungan, Judge, and a jury.

Palmer Bradner, for plaintiff.

Reed & Reynolds, for defendant.

Jury drawn and sworn.

Mr. Bradner opens for plaintiff.

20

Mr. Reed opens for defendant.

JOHN F. BULGRIEN, sworn for the plaintiff.

Direct examination by Mr. Bradner.

Q Where do you live? A 151 Elizabeth avenue.

Q Where are you employed? A Submarine plant.

Q Where were you employed in June, 1913? A Manager of Job De Camp, Incorporated.

Q What is the character of the business of that company? A 30
Moving, trucking, storage, express.

Q Do you recall receiving any order with reference to goods in Arion Hall Palm Garden? A I do.

Q What day did you receive the order? A I could not tell just what day I received the order, but it was booked for June 25th.

Q What did the order call for? A To remove all goods of the Arion Palm Garden to Arlington House, Arlington.

Q Do you know who gave the order? A I don't; it was a 40
telephone order.

Q Do you know who the order was given for?

Objected to.

Objection sustained.

John F. Bulgrien, direct.

Q Do your books show? A Yes, sir.

Q Have you your books with you? A Yes, sir.

Q What do your books contain with relation to that order?

A It was an order to remove all goods from the Arion Palm Garden to the Arlington House, Arlington, and to send the bill to the Mutual Distributing Company.

10 Q Was the bill sent to the Mutual Distributing Company? A Yes, sir.

Q What was the amount of the bill? A \$56.

Q Did the Mutual Distributing Company pay it? A Yes, sir.

Mr. Bradner. Have you any objections to this book going into evidence, Mr. Reed?

Mr. Reed. Let me see it. (Book shown to Mr. Reed.)

By Mr. Reed.

20 Q You kept these books? A Yes, sir. I didn't keep the books; I entered the orders.

Q Whose handwriting is this? A Mine.

Q When was this entered? A Well, I could not just say what day it was entered, because we would get an order to be done on a certain day, and, of course, had a certain place in the book to enter those orders under that date. That may have been given to me a week before, two weeks before, but it was ordered to be done on such and such a date.

30 *Mr. Reed.* Well, I do not think that is evidence.

The Court. If you object to it, it will be sustained.

By Mr. Bradner.

Q How many loads of goods were removed from Arion Hall Palm Garden? A Seven.

Q Have you anything with you to show— A That was eight loads.

Q Have you anything with you to show how many loads were taken? A I have a slip for each load that was delivered and signed for.

40

Q Let me see the slip? A (Witness produces slip.)

Q What do those slips purport to show? A I don't just understand.

Q What do they show, what are these slips for?

John F. Bulgrien, direct.

Mr. Reed. I suppose if they are evidential the slips themselves are the best evidence.

The Court. Do you desire to offer them in evidence.

Mr. Bradner. I do.

The Court. Any objection to that?

Mr. Reed. I probably will have none, if you will let me see them. 10

(Slip shown to Mr. Reed.)

Mr. Reed. We are willing to admit these eight slips in evidence.

Q Are you acquainted with the procedure used in obtaining there slips? What they are for? What do you use the slips for?
A We give them to the driver when he is sent out to do a job.

Q Do you see the slips at all? A Yes, sir; I am the man that gives him the slips and I am the man that receives them after the work is done. 20

Q What do these eight slips show?

Mr. Reed. They speak for themselves. I have no objection to them.

Said slips are offered in evidence, and the eight slips are marked as one exhibit, P. 1.

Q What time did your men start to take the goods out of the Arion Hall Palm Garden on that day? A They began about one o'clock in the afternoon, June 25th. 30

Q And what time were they through with their job? A Well, in the neighborhood of six o'clock; they got through work at six; we tried to get through as soon as we could.

Q Were you at the Arion Hall Palm Garden? A I was there when they commenced and I was there when they finished.

Q Did you give them their orders what to take? A Yes, sir; there wasn't any other orders except to take everything in the place.

Q And did they take everything in the place? A Yes, sir.

Q What was done with the goods when they were first taken out? A They were held in our warehouse until next morning. 40

Q And from there? A Taken to Arlington.

Q Why were they taken to the warehouse? A It was too late to deliver them.

Frank E. Bradner, direct.

Cross examination by Mr. Reed.

Q Do you know of any goods being taken to Mr. George Mausert's hotel? A No, sir.

Q Do you know whether or not any were taken? A No, sir.

10 Q (*By the Court.*) That is, you do not know? A I do not know; no.

FRANK E. BRADNER, sworn for the plaintiff.

Direct examination by Mr. Palmer Bradner.

Q Mr. Bradner, do you recall the 25th day of June, 1913? A I could not remember the dates, but I do recall what happened on that day, and by reference to my journal I can fix the date.

20 Q Did you visit the Arion Hall Palm Garden on that day? A Yes, I did. I went there to see George Mausert, and found him there, and at the time I went there there were vans in the street, and colored men were carrying tables and chairs downstairs, and the room upstairs was in great confusion; the tables and chairs all seemed to be moved in position to be taken out.

Q Who did you see there? A I saw Mr. George E. Mausert and Mrs. Briggs, and these colored men, and I have a very strong impression that Mr. Schuler was there, as I testified before, but I am not quite willing to say he was there, but that impression is on my mind, that he was there.

30 Q About what time of day did you call there? A My record shows that I was at the Orphans' Court on that day for a few hours; that would be from ten to twelve, and I spent about a quarter of an hour in the Surrogate's office, and I recall that I went from there, walking down Market street, and probably over Washington street or Halsey, and then down to the corner of Lafayette street and Broad street, where the Hotel Broad is, and inquired there for Mr. George Mausert, whom I represented in a criminal case, and was told he was at the Arion Hall, and then I walked back from there to the Arion Hall.

40 Q (*By the Court.*) Where is that? A On Washington street, near Market, north of Market; it is north of Market, that part of Washington street, on the west side of Washington street, and I think it must have been pretty close to one o'clock when I got there; about one o'clock, and they were taking the things out of the place then. I remember another person who

Elizabeth Briggs, direct.

came in there while I was there; that was Mr. George King, who was the landlord, or represented the landlord. There was some conversation between him and George Mausert.

Q (*By Mr. Bradner.*) Do you recall asking Mr. Schuler to return Mr. Mausert's goods?

Mr. Reed. I think that question is based on an assumption. 10

The Court. It is a little leading.

A I had a conversation over the telephone with Mr. Schuler before this action was brought, relating to the plaintiff's claim. The claim had been sent to me, and I did not act on it myself any further than to send somebody to see Mr. Schuler. I think Mr. Abraham Fenster went over and made some investigation, and Mr. Schuler, I think, called me up and we had a conversation on the telephone; he stated they had some goods, still had some goods which had not been sold, but if Mausert was going to act that way about it they would not give him anything, meaning, as I understood from what he said, that if he brought suit they would not give him anything. 20

Cross examination by Mr. Reed.

Q When was that conversation you had with Mr. Schuler? A Well, it was some little time before this action was brought; I cannot state to a certainty.

Q Let me see if I can aid you in stating the time? A I think I wrote a letter to Mr. Schuler, then sent somebody to see him. 30

Q You first wrote a letter, did you? A Yes.

Q I show you a letter, dated September 20, 1916? A Yes, I wrote that letter; at least, I dictated it; it was signed by me.

Q That letter was before, or after, your conversation with Mr. Schuler? A I think that was before the conversation.

Said letter marked D. 1 for identification.

Q This letter was the first you took the matter up? A I think that is the first letter I wrote to him. 40

ELIZABETH BRIGGS, sworn for the plaintiff.

Direct examination by Mr. Bradner.

Q Where do you live? A Pittsfield, Mass.

Q Were you in Newark in June, 1913? A Yes, I was.

Elizabeth Briggs, direct.

Q Do you recall the 25th of June, 1913? A I do.

Q Where were you on that day? A I was in the Arion Palm Garden.

Q What was taking place while you were there? A They were moving out the goods.

10 Q Did you know what goods were being taken out? A Yes; tables, chairs, and in fact everything in the place.

Q Was anything left? A Not to my knowledge.

Q What time of day did the moving start? A As near as I can remember it was around noontime.

Q Do you recall seeing my father there? A I do.

Q About what time did you see him? A I should think around noontime.

20 Q Who else did you see there? A I seen my brother, Mr. George E. Mausert, and also Mr. Schuler.

Q What was Mr. Schuler doing there? A Mr. Schuler was at a table, and was taking down the different items, as far as I know; marking down on the table the different articles that were being taken out.

Q Where was your brother Fred at that time, do you know? A He was at my sister's home, as far as I know, in New York City.

Q What is your sister's name? A Mrs. R. A. Cadwell, or Mrs. Catherine Cadwell.

30 Q Do you know her address? A 203 West 109th street.

Q How long did your brother stay with Mrs. Cadwell? A Well, somewhere in the neighborhood of two weeks.

Q And where did he go to after that? A Well, that I can't state; I don't know where he went to.

Q What did you next hear of him? A I can't recall that.

Q Haven't you known where your brother has been the past few years? A I did; yes.

Q Where has he been? A Been in Glens Falls.

40 Q Do you know when he went into business at Glens Falls? A No, I don't; shortly afterwards I know.

Q Has anybody from the Mutual Distributing Company, or the Mutual Distributing Company, in any way ever inquired where your brother was? A Never.

Q (*By the Court.*) Is that up near Lake George? A Yes, up in that direction.

Elizabeth Briggs, cross.

Cross examination by Mr. Reed.

Q At this time you lived in Newark, did you? A Yes.

Q For how long a time after June 25th, 1913, did you remain here? A As near as I can remember, it was either the first of July or the fourth day of July that we moved out of Newark.

Q You then went to New York? A No, I went to Boston, 10
Mass.

Q I understood you to say that Mr. Fred Mausert had left Newark prior to June 25, before the 25th of June, that Mr. Mausert had left Newark? A Well, the 25th would be on the day the goods were taken out.

Q Yes. A Yes, he left that day, as far as I can remember.

Q That same day? A I would not be positive; I cannot remember dates.

Q It was not the night before? A I could not say whether it was on the night before or on that day. 20

Q And whom did he leave in charge of his place here, the Arion Palm Garden? A Nobody, as far as I know.

Q Who had the key? A That I don't know.

Q You didn't have it? A Not as far as I know; no.

Q Where did he live when he was in Newark? A At the Hotel Broad.

Q That was a hotel kept by your brother George, was it? A Yes, it was.

Q And Fred lived down there? A Yes, sir.

Q And had been living down there for some time? A Yes. 30

Mr. Bradner. Objected to as not cross examination.

The Court. The objection will be overruled.

Q Well, you spoke of being at the Palm Garden when these goods were taken out about noon? A Yes.

Q Do you remember whether you were the first one to get there, or who was? A I remember the goods were being taken out when I went in.

Q Oh, they were being taken out? A Yes. I was told they were taking my brother's goods and I went over to see if I could not keep them from taking them. 40

Q Well, you say George Mausert was there? A Yes, sir.

Q Was he taking any part in the removal of the goods? A Yes; I think he and Mr. Schuler were superintending the work; they were ordering the goods taken out.

Elizabeth Briggs, cross.

Q How long before that, can you recall now, you brother Fred had left Newark? A Well, I can't say; I don't know whether it was that day or the day before.

Q Do you know why he left? A Yes, because he was told there was a—the place was going to be raided, and that there was an arrest out for him; a warrant out for his arrest.

10 Q Well, do you know who told him that? A Well, I told him.

Q And after hearing that he left, did he; after hearing that from you he left town? A Yes, but I was informed by my brother that there was a warrant for his arrest.

Q You were told by George? A Yes.

Q And you told your brother Fred? A Yes.

Q And your brother Fred then left? A Well, now, let me see; I am afraid I—I didn't tell him myself; he was at my house; I sent my daughter and sister to find him; they may have told him first, but I told him later.

20 Q Then he went away? A Why, my nephew called with a car; that is, Mr. Mausert's son, and took him out of the city.

Q Do you remember whether that was day or night? A No; I don't remember.

Q When did you see your brother Fred again? A That I cannot recall.

Q Well, was it within a week or— A Yes.

Q Where did you see him when you did? A At my sister's, 203 West 109th street.

30 Q Well, do you think less than a week? A Yes, I think it was.

Q Well, how soon after June 24th do you think it was? A Well, now; I couldn't give you a definite time.

Q Very well. Did you see him more than once? A That I can't recall.

Q Did you see him in Newark? A No; I saw him in New York City.

Q You did not see him in Newark at all after— A No, not that I can remember.

40 Q After he left that time? A No.

Q To come back a minute to the day June 25th, when you were there did you help take out any of these goods? A No, I did not.

Q Do you know whether George Mausert took any of them? A No, I do not.

Elizabeth Briggs, re-direct.

Q You don't know whether he did or not; you didn't see where they went to? A No, I didn't.

Q (*By the Court.*) Did you talk with anybody there about taking the goods? A I did.

Q With whom? A Mr. Schuler, and my brother, George Mausert.

10

By Mr. Reed.

Q You went to Pittsfield? A About July 1st or 4th.

Q Do you remember the linen and silver, where that was? A I do not.

Re-direct examination.

Q You said that you knew that a warrant was out for his arrest. Who told you that? A George Mausert.

Q What did he tell you? A George told me—

Mr. Reed. Do I understand this was in Mr. Schuler's presence? 20

The Court. Was Mr. Schuler present?

The Witness. No.

Mr. Reed. I object.

Mr. Bradner. Mr. Reed brought out on his cross examination about what George Mausert told Mrs. Briggs. Mrs. Briggs testified on cross examination that George Mausert had told her that a warrant was out for Fred Mausert's arrest. I believe that opens the door for further direct examination on that. 30

The Court. I think she may give the entire conversation.

Mr. Reed. Well, with respect to that point it may be competent, if confined to that.

Q What did George Mausert say to you about there being a warrant out for your brother Fred's arrest? A He told me there was a warrant out for his arrest and they were going to raid the Arion Palm Garden; that was told us by friends; this friend was with him while he was talking to me, Mr. George Mausert. This friend came in and he says, "Come on, Mausert," he says; "they will know that I told you this. I don't want to be seen with you." 40

Q Why did you send word to Fred, Mrs. Briggs? A Because my brother George told me to get him out of town for fear he would be arrested.

Catherine Cadwell, direct.

CATHERINE CADWELL, sworn for the plaintiff.

Direct examination by Mr. Bradner.

Q Where do you live? A 203 West 109th street, New York City.

10 Q Where were you living in June, 1913? A 203 West 109th street, New York City.

Q Were you in Newark on the 25th of June, 1913? A I was; yes.

Q Were you present when Mr. Mausert received warning that a warrant was out for his arrest? A Yes, I was.

Q What did Mr. Mausert do? A Well, he was frightened, and my nephew told him that he would take him away in his machine; they wanted him out of the city.

Q What is the nephew's name? A Raymond Mausert.

20 Q A son of— A George.

Q Was he taken away in the machine? A Yes, he was.

Q Where was he taken to? A To my home.

Q In New York? A Yes, sir.

Q How long did Fred Mausert stay there? A About two weeks, as near as I can remember it.

Q Where did he go from there? A To Massachusetts; I went with him.

Q And from Massachusetts? A To Albany.

30 Q Have you been acquainted with your brother's whereabouts all the time these past few years? A I certainly have; yes, sir.

Q Did Mr. George Mausert ever call on his brother while he was at your house? A He did.

Q Where did he call, do you know? A I could not tell you just when, but during those two weeks that he was there at my home.

Q Do you know what he called about? A I don't know; no.

Q Did the Mutual Distributing Company, or anyone acting for them, ever inquire of you where Fred Mausert was at any time?

A Never.

40 Q Has your brother, George Mausert, always known where you were? A That I could not say.

Q How long have you lived in New York at that address? A Nine years.

Q And he knew that address? A Yes, he did.

Catherine Cadwell, cross.

Q Were you at the Arion Hall Palm Garden when the goods were being moved? A No, I was not.

Q Do you know what time of the day Mr. Fred Mausert went to New York? A That I could not tell you; no.

Cross examination by Mr. Reed.

Q Do you remember what day that was, Mrs. Cadwell, that he went? A Yes, the 25th day of June, 1913. 10

Q Did you see Mr. George Mausert and his friend when they came to inform Mr. Fred Mausert of the fact— A No, I did not.

Q Where were you at that time; were you in Newark? A Yes; I was at my sister's home, Mrs. Briggs.

Q You didn't see Mr. George Mausert come there then and speak to his sister? A No, I did not.

Q Well, I understood her to say that a sister of her's went and hunted up Fred Mausert? A Yes, I did, but I didn't see my brother George. 20

Q You saw your brother Fred? A Yes.

Q And you told him of this— A Yes, we did.

Q You think that was in the morning of June 25th? A I could not tell you just when; I am not positive.

Q When did you next see your brother Fred? A That same evening.

Q At your home in New York? A Yes, in New York.

Q He had gone away hurriedly? A Yes.

Q As soon as he was informed of the fact that it was said that there was a warrant out for his arrest? A Yes. 30

Q And he went secretly, I suppose? A Yes.

Q He stayed at your house for two weeks? A About two weeks.

Q Did he leave there at any time, or was he there constantly? A He was there constantly.

Q Did he go out? A That I could not say.

Q You don't think he went out at all? A That I could not say, whether he went out.

Q You don't know whether he went out at all, or not? A No, I don't. 40

Q Well, you were there during the daytime, of course? A Yes.

Q Was he there the greater part of the time? A Yes.

Anthony W. Schuler, direct.

Q He was there during the daytime as well as at night? A Yes.

Q As far as you know, he did not go out at all? A As far as I know; I could not say.

Q You spoke of his going to Massachusetts with you? A Yes.

10 Q That was at the end of two weeks. Did he stay there in Massachusetts any length of time? A Yes, he stayed there the rest of the summer.

Q What was he doing there? A Just visiting around with his brother.

Q Visiting his brother where? A His brother then lived at North Adams, Massachusetts, and also he visited his father in Albany.

Re-direct examination.

20 Q You say your brother went away in an automobile? A Yes, he did.

Q What kind of an automobile, open or closed car? A That I could not say.

Q Whose automobile was it? A I think my brother George's.

ANTHONY W. SCHULER, sworn for the plaintiff.

Direct examination by Mr. Bradner.

Q What is your connection with the Mutual Distributing Company? A President and general manager.

30 Q What position did you hold in 1913? A The same, president and general manager.

Q How long have you held that position? A Since its organization, about since 1906.

Q Is Mr. Fred Mausert a stockholder in your company? A I believe he was a stockholder, yes.

Q And is Mr. George Mausert connected with your company? A He was at one time.

40 Q What was his connection with it in June, 1913? A He was a stockholder, and also treasurer, up to June 18th, I think, 1913, either the 13th or 18th, I am not sure now; some time the forepart of June, anyway.

Q Mr. Schuler, are these slips which have been offered in evidence receipted by your man? A That looks like his signature, yes.

Frederick W. Mausert, direct.

Q What was his name, do you know? A Henry Klep.

Q They are receipted for at Arlington? A Yes.

Not cross examined.

FREDERICK W. MAUSERT, sworn for the plaintiff.

Direct examination by Mr. Bradner.

10

Q Where do you live? A Glens Falls, New York.

Q Where did you live in June, 1913? A Newark, New Jersey.

Q Were you carrying on business here then? A Yes, sir.

Q Whereabouts? A Arion Palm Garden, Washington street.

Q What kind of business was that? A Well, as near as I can describe it, the same kind of place that was being run by Kreuger's Auditorium, as near as I can describe it.

Q What was that, a restaurant? A A restaurant attached.

20

Q How many floors did you have? A Two large floors.

By the Court.

Q That does not mean much to one who has not been at Kreuger's Auditorium, Mr. Mausert. I am obliged to confess my ignorance; I don't know what Kreuger's Auditorium is, or its extent? A Why, I had a restaurant. I also rented it for balls and parties and banquets, that is about all.

Q In connection with it you had a liquor license? A Yes, sir.

Q Sold liquor? A Yes, sir.

30

Q And had dances there at night? A There was times we had dances, yes, sir; not every night.

By Mr. Bradner.

Q Did you have an open bar there? A No, sir, I did not.

Q Mr. Mausert, when did you first receive warning that a warrant was out for your arrest? A Quite early in the morning; about six o'clock.

Q Of what day? A June 24th, 1913.

Q Where did you receive this warning? A In my room at the Hotel Broad.

40

Q Who gave it to you? A That, I could not mention the name of the man, but some man came to my room and told me to get out of town, the prosecutor was going to get me.

Frederick W. Mausert, direct.

By the Court.

Q You mean that you do not know the name of that man?
A Why, I did at the time, but I can't recall his name now.

By Mr. Bradner.

10 Q What did you do? A I stayed in the room; I said if the prosecutor wanted me he could get me, I had done nothing that I should leave town.

Q What influenced you to go to New York? A Beg pardon?

Q What made you go to New York? A My sisters, just about noon time, both sisters influenced me to go right to New York. My brother George was there; he told me to get out of town as quick as I could, that the prosecutor was going to get me; and they cried and went on so I went just for their sake.

20 Q Where did you go then? A My sister's home in New York City.

Q How long did you stay there? A About two weeks.

Q What happened to your business at the Arion Hall Palm Garden?

Mr. Reed. Well, if he knows, he was absent from Newark.

The Court. The question is, Do you know what became of your business?

A I did; I knew after I was there a day in New York City. I found out.

Q Did you leave anyone in charge of your place? A I did.

30 Q Who did you leave in charge? A Mr. Mockler.

Q Who was Mr. Mockler? A Why, he was the man that looked after my business.

Q General manager of the business? A Yes, sir, he was, to a certain extent.

Q Did you communicate with Mr. Mockler at all while you were in New York? A I did on the evening of the 25th, 1913.

Q About what time did you communicate with him? A I should judge between five and six.

40 Q What was the purpose of that communication?

Mr. Reed. Objected to. I think this communication with this employee would not be competent evidence, and, consequently, the purpose of it is immaterial. I object to the question.

The Court. The objection will be sustained.

Frederick W. Mausert, direct.

Q How did you communicate with Mr. Mockler? A By telephone.

Q When did you first learn that the goods were being taken out of the Arion Hall Palm Garden, or had been taken out?

A Between five and six o'clock on June 25th.

Q Mr. Mausert, do you know the goods and chattels which you had in the Arion Hall Palm Garden on June 25th? A Do I know the goods, or the price of the goods, which? 10

Q The goods themselves? A Yes, sir.

Q Did you make any list of those goods? A I did.

Q When did you make this list? A On the evening of the 25th, after I found out my goods were being taken away.

Q Mr. Mausert, have you your books of account, etc., of the books which you used in your business? A They were taken away with all my goods; I had nothing left.

Q Would you know, then, from whom you bought these various goods and chattels? A Why, I could mention some of the people; I don't know, I suppose I could mention all. 20

Q Are you familiar with the prices which you paid for the various goods? A At that time, 1913, I was.

Q Did you make a memorandum of the prices? A I did.

Q Which you paid? A I did.

Q Was the memorandum you made a memorandum of the goods? A Yes, sir.

Q Where is that memorandum, Mr. Mausert? A I left it with you at the last trial we had. 30

Q Is this the memorandum, Mr. Mausert (showing witness paper)? A Yes, sir.

Q I will ask you, Mr. Mausert, using that memorandum to refresh your recollection, what goods you had in the Arion Hall Palm Garden on June 25th, 1913, and also what prices you paid for these goods. A To read from this list?

Mr. Reed. Well, if your Honor please, may I cross examine the witness on this memorandum?

The Court. Oh, of course, yes. 40

By Mr. Reed.

Q Mr. Mausert, you said that you made this memorandum which you have in your hand now on the night of June 25th?

A I did not make this, no, sir.

Frederick W. Mausert, direct.

Q When was this memorandum which you now have, made?

A That was made one year after, about one year after.

Q And by whom? A By a party in Glens Falls, New York.

Q I think you said the last time that this memorandum was copied from memorandum that you made at that time?

10 A Yes, sir, it was copied from that memorandum.

Q Now, you fixed the time you made the original memorandum as the night of June 25th? A Well, I think, now I recall it, after talking with my sister at the time, this was made on the 25th.

Q On the former trial you said about a week after? A I did not quite know just when I did make it; it was within a week's time, I think I remember saying at the last trial.

Q At what time had you bought these goods? A These were bought in 1910; some time in 1910.

20 *The Court.* This is not a general cross examination, Mr. Reed; it is only to determine whether or not he can use this memorandum.

Mr. Reed. My objection to the memorandum will be based on the question now asked.

Q And what you put on the memorandum in 1913 was your recollection, your then recollection, of what you paid for the goods? A Yes, sir.

30 Q You have no present recollection of what you paid for the goods in 1910 aside from that memorandum?

Mr. Bradner. He did not testify he bought the goods in 1910.

The Witness. Not all the goods were bought in 1910.

Q Some of them? A Some of them, yes, sir.

Q And some of these goods you have on that list? A Some of the goods, yes, sir; and some were bought along in 1911, 1912, and also in 1913.

40 Q Well, what part of them were bought in 1913? A I will have to look over this list to come to my mind.

Mr. Reed. I object to the use of this list because it was made up after the controversy arose, and it was made up then from a memorandum of what had happened three years before, in some instances, and I think it is not such a paper as is competent for this witness to use.

Frederick W. Mausert, direct.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

RECESS.

10

By Mr. Bradner.

Q Mr. Mausert, using that memorandum which you have to refresh your memory, will you tell what goods you had in the Arion Hall Palm Garden on June 25th, 1913, and the prices which you paid for those goods?

The Court. And about when you purchased them, if you can.

Mr. Reed. I object to the question because it calls for the prices paid for the goods some three years before the time the goods were alleged to be taken. 20

The Court. That would not be the measure of their value at that time; it would be an element of their value; the use to which they had been put would go with the cost price, and the length of time they had been used would have to be taken in connection with the price which had been paid. That is the reason I have insisted that in stating the cost price he ought to state when he purchased them, and he should state the use they had had. I will overrule the objection. 30

An exception to this ruling is noted by the defendants as ground of appeal.

Q All right, Mr. Mausert. A Case goods.

Q What do you mean by case goods? A Wines and liquors, and so forth.

The Court. Well, now, in this statement here, the schedule of goods and chattels, does not that follow his memorandum?

Mr. Bradner. That follows his memorandum exactly, except as to the prices and values. 40

The Court. Then I need not follow this any further, as they appear in the schedule.

A (Continued.) 360 creamers.

Frederick W. Mausert, direct.

Mr. Reed. It does not appear that the defendant received at any time any creamers, and I object to the price of those being shown on the present state of the proof.

10 *The Court.* I have understood from the witness that what he is now about to testify to are the goods which were in that place. The testimony is that everything was cleaned out. If that is not so, you had better be sure about that.

Mr. Bradner. The testimony is that everything has been taken out.

The Court. It ought to appear very clearly that these goods about which Mr. Mausert is going to testify were positively in there when he left the day before.

20 *Mr. Reed.* In addition to that, it appears that the witnesses who testified to where the goods went did not know what goods, if any, went to the Hotel Broad to Mr. George E. Mausert, the brother of this witness, and, consequently, unless the goods which he now is to testify to are traced to the defendant, the price or cost of them is not material or relevant.

The Court. The one point had better be cleared up that the Court has suggested. The objection to this question will be sustained. I am not sure that he has gone as far as to state what the Court has suggested.

30 Q Is this memorandum a memorandum of the goods which were in the Arion Hall Palm Garden when you left there?

A Yes, sir.

Mr. Reed. Of course, that is leading.

The Court. Yes, it is leading.

Q How do you know that? A We always kept that many on hand. When one was broken we replaced it by getting new ones. It was my instructions—

40 *The Court.* Not your instructions. What you know about it.

The Witness. My instructions to my man, my overseer; anything that was broken, always to get another the next day, to keep in stock.

Q How do you know he did that? A It was my instructions to my head man, and I have done it myself.

Frederick W. Mausert, direct.

Q How often did you check your stock up? A Every night if anything was broken, because in holding banquets you have got to have so many on hand; if you did not you would be short, one thing we were very careful about; also glasses, silverware and everything.

By the Court.

10

Q How long before this time had you personally checked up? A Why, from night to night.

Q You, personally? A If I did not, my head man did.

Q That does not cover it. How soon before the 25th day of June had you personally checked up? A Just a few nights before that, I could not say whether it was three nights or four.

Q Do you mean within a week, or a month? A It was less time than that; I should judge probably three or four days.

The Court. All right, you may proceed.

20

An exception to this ruling is noted by defendant as ground of appeal.

By Mr. Bradner.

Q All right, Mr. Mausert. A 360 creamers. Do you want me to give the price of them?

Q Yes, and when you bought them, to the best of your knowledge? A In 1911, I believe; I could not vouch for that.

By the Court.

30

Q Anything further with reference to the 360 creamers? A Why, just simply that I bought them, I should judge, in 1911.

By Mr. Bradner.

Q The price? A Five cents apiece.

Q That makes how much? A \$18.

Q All right, next item. A 90 vinegar cruets, at 15 cents, \$13.50.

Q When did you purchase them? A About the same time, 1911. Removable electric sign in front of the building, \$210.

40

Q When was that put up? A Why, that gave the name of the building, the Arion Palm Garden.

Q When did you buy it? A That was bought in 1910. One oak revolving chair, \$15. Oak writing desk.

Frederick W. Mausert, direct.

Q When did you get the chair? Tell when you got each one.

A 1910, along about that time. An oak writing desk, about 1910, \$55. Safe, \$60 1910. A large gas range \$45. As near as I can remember I think it was bought in 1911. Three large mirrors \$35, bought in 1911. 210 folding chairs, at \$1.25 each, amounted to \$262.50. Oak and glass removable partition.

By the Court.

Q When did you get those chairs? Don't forget to tell us each item, when you purchased these articles. A About 1911. A removable glass partition with swinging doors, made of oak, \$332, about 1910 that was bought. Latticework with electric wiring, with 600 incandescent lights, \$480; that was about 1911. Complete window curtains for two floors for all windows, \$180; got in 1910. One stage plush curtain with fixtures, \$52; about 1910, I believe, I got that. 360 water glasses, \$18; I don't know what to say about that, in regard to when I got that; I opened the place about 1911; the glasses we kept replacing when they were broken.

Q That was purchased during the entire time? A Yes.

Q Between 1910 and 1911? A Yes. 500 whiskey glasses, at 5 cents apiece, \$25; the same thing of the glassware. 75 cocktail classes, at 15 cents apiece, \$11.25. 90 large platters, at 10 cents apiece, \$9. 90 small platters, at 10 cents each, \$9. 90 medium platters at 10 cents apiece, \$9. 75—

Q When were they bought? A Along about the same time.

Q What do you mean by that. A Between 1910 and 1913. 75 champagne glasses, at 25 cents apiece, \$18.75. 540 goblets, at 10 cents apiece, \$54. 450 beer glasses, at 10 cents apiece, \$45. 300 wine glasses, at 15 cents apiece, \$45. 75 cordial glasses, at 15 cents apiece, \$11.25. 45 trays, at 65 cents apiece, \$29.25. 450 waiter towels, at 10 cents apiece, \$45. 50 dish towels, at 10 cents apiece, \$5. 20 roller towels, at 25 cents apiece, \$10. 24 bottles of Mumm's Extra Dry, \$2.50 a bottle, \$60. 360 tablecloths, linen, 5 by 5, 35 cents apiece, \$126.05; got in 1911. 450 napkins, at 10 cents apiece, \$45. 14 large revolving electric fans \$22.50 each. I haven't got the full amount down here. 950 wardrobe boxes—

Q When did you get the fans? A The fans were got in 1910. 950 wardrobe boxes, at 20 cents apiece, amount to—I haven't got the full amount here. Eight gas and electric chandeliers.

Frederick W. Mausert, direct.

Q When did you buy those wardrobe boxes? A Those I had made.

Q When? A About 1910.

Q What were they for? A For hats and coats; to put hats and coats in. \$9.50 for the electric chandeliers. They were installed in 1910, about; \$76. 12 small electric chandeliers, \$4.10, \$49.20. A new oak staircase, removable, \$105. That was made in 1910. A removable stage, \$185. That was put in about 1911, along about that time. Artificial fire-proof vinework, with palms, \$310. That was installed in 1911. 75 oyster forks, at 15 cents each, \$11.25. 360 knives, at 20 cents each, \$72. 360 forks, at 20 cents each, \$72. 720 spoons, at 15 cents each, \$108. 360 spoons at 20 cents each, \$72. 90 pepper shakers, at 15 cents each, \$13.50. 90 salt shakers, at 15 cents each, \$13.50. 90 toothpick holders, at 10 cents each, \$9. 90 mustard cups, at 15 cents each, \$13.50. 360 dinner platters, at 10 cents each, \$36. 360 cups and saucers, at 10 cents each, \$36. 360 pie plates, at 5 cents each, \$18. 360 bread and butter plates, at 5 cents each, \$18. 360 butter platters, at 5 cents each, \$18. 25 finger bowls, at 25 cents each, \$6.25. 360 soup plates, at 10 cents each, \$36. 90 table pads, four feet square, 50 cents each, \$45. 360 sauce dishes, at 5 cents, \$18. 90 sugar bowls, at 10 cents each, \$9. Case and bulk goods kept in stock, \$300 worth. Six door checks, removable, \$5 each, \$30.

Q When were they purchased? A In 1910. Removable stair pads and rods, \$13.50. 12 oak dining-room chairs, \$1.75 each, \$21.

Q When were they purchased? A They were purchased at Schmidt Brothers, as near as I can remember.

Q When? A In about 1911. Removable piano platform, \$15. Mr. Bradner, there is some of this has been torn here; it is very hard to make it out.

The Court. Clothing and shoes; it is here.

The Witness. Yes, that is right; clothing and shoes, \$150. I kept my wardrobe.

The Court. Liquor license.

A Liquor license, \$450. Shares of stock, Mutual Distributing Company, \$100. 360 cane-bottom chairs, \$2.50 each; I haven't got the full amount here, that is torn out.

The Court. \$900.

The Witness. Those were bought at Schmidt Company.

Frederick W. Mausert, direct.

By the Court.

Q When? A 1910. 90 quartered oak tables, \$17.50 each. The full amount is torn out here. 235 folding chairs, in sections, at \$1.45 each. 160 tungsten lights, at 35 cents each, amounts to \$56.

10

By the Court.

Q Had they been used? A Yes, they had been used.

Q How long? A We would replace them just as soon as one would burn out; we had to do that. 205 two-watt tungsten lamps, at 15 cents each, \$31.75.

Q Had they been used, too? A Yes, sir. Electric sign flasher, \$37.50. Eight 500-watt tungsten lamps, at \$4 each, \$32. 300 tablespoons, 20 cents each, \$60. 100 ballroom tickets, 100 rolls, at 25 cents each, \$25. Two new auto tires, \$37.50. Six
20 new auto tubes, at \$4.25 each. One vulcanizing outfit, \$45. One box cabinet maker's tools, \$56. 15 special flower boxes and palms, \$3.50 each, \$53.50. 11 special tubs, with palms, \$6.20, \$68.20. I believe that is all.

By Mr. Bradner.

Q Are there any other things that you recall as being there at that time? A No, I don't remember just now.

Q Have you added up the values?

30 *The Court.* I might say there are two items on the schedule which he has not mentioned.

The Witness. Probably I might have skipped that.

The Court. You can see if they are on the schedule; second page, according to this, the ninth item from the bottom is 360 individual dishes, that you did not read.

The Witness. Yes, I didn't mention that. I overlooked that.

By the Court.

40 Q Have you that? A Yes, sir.

Q What about it? A Five cents each, amounts to \$18.

Q Another item is the restaurant kitchen utensils on the third page, just above the 160 tungsten lamps. A Yes, I have that. Some part of it is torn off. Restaurant kitchen utensils, \$150.

Frederick W. Mausert, direct.

Q When did you get that? A That was got in 1910 and 1911. Did I mention anything about folding chairs?

The Court. You have mentioned everything on this schedule now.

By Mr. Bradner.

Q Have you added up the values? A I did; I had it on here, but you tore it off.

Mr. Bradner. I have added it up, and I added it at the last trial also; it comes to \$7,556.42.

Q Mr. Mausert, what happened to your business after the goods were taken out?

Mr. Reed. Does he know? It appears that he went away from here and did not come back. I think the first question upon all these matters which involve the business here in Newark should be whether or not he knows from his own personal knowledge.

Q Mr. Mausert, do you know what was done in the nature of business at the Arion Palm Garden after you went away?
A Simply taken the stuff out, the goods out.

Mr. Reed. The question is, Do you know?

The Witness. What became of the goods?

Q No; do you know what business was carried on there?
A Why, no, I don't.

Q Was your business carried on there? A Yes, sir, my business was carried on there then.

Q After the goods were taken out? A Oh, no.

Q Was your business ever carried on there after June 25th, 1913? A No, sir.

Mr. Reed. Objected to. The question should be, Did he ever carry on business?

Q Did you ever carry on business there? A The same place of business?

Q Yes. A No, I did not, not after the 25th.

Q Why didn't you carry on business there after that?

Mr. Reed. I object to that. I think his reasons for it are not material.

Frederick W. Mausert, direct.

The Court. It seems the reason is so apparent it is almost unnecessary to ask such a question. He hadn't anything to carry on business there with, did he? The objection will be sustained.

Q Do you know what the profits were from your business?

10 A They varied.

Q Do you know what they were at that time? A About that time I did, yes.

Q What were the profits about that time?

Mr. Reed. I object to that as immaterial, and I do not think that can be charged to the defendant.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

20 A From \$150 to \$300 a week.

Q Mr. Mausert, when you went to New York, where did you go? A My sisters' home.

Q How long did you stay there? A About two weeks.

Q Did anyone call on you while you were there? A Raymond Mausert.

By the Court.

Q Is that your brother? A My brother's boy.

By Mr. Bradner.

30 Q When did he call on you? A June 25th, I should judge along in the afternoon about three o'clock.

Q What did he want you to do?

Mr. Reed. Objected to.

Q What did he call on you for?

Mr. Reed. Objected to.

The Court. Objection sustained.

40 Q After you left New York City, where did you go? A North Adams.

Q And how long did you stay in North Adams? A A few weeks.

Q Who did you stay with? A My folks, father and mother.

Frederick W. Mausert, cross.

Q From there where did you go? A I believe I went to Albany, and then from there to Glens Falls.

Q Did you ever hear from the Mutual Distributing Company? A No, not to my knowledge.

Q Did you ever ask the Mutual Distributing Company for your goods? A Yes, sir.

Q When did you do that? A I sent Mr. Bird to call on Mr. Schuler; also a man by the name of Henry Deyer. 10

Q When did you send Mr. Deyer? A I believe it was about four weeks after I left New York City; four weeks after the 25th.

Q What did you expect Mr. Deyer to do?

Mr. Reed. I object to that.

The Court. The objection will be sustained, unless you say you propose to prove by Mr. Deyer that he delivered the message; then, of course, it may be given. 20

Q Is Mr. Deyer in court? A I don't believe so.

Mr. Bradner. I don't believe we will have him on the stand then.

The Court. Then you may recall Mr. Mausert when that is shown.

Cross examination by Mr. Reed.

Q Let me see this memorandum of yours. (Memorandum handed to counsel.) Mr. Mausert, you have listed among the articles which were, you say, upon the premises, Palm Garden, at the time you left, 450 waiter towels. Will you tell us when those were purchased? A From time to time. 30

Q Do you remember any time when any were purchased? A Always kept so many in stock, just as soon as any was gone we replaced it.

Q So you cannot tell us when the last were bought. A No, sir.

Q And the roller towels? A The same.

Q And the dish towels? A Yes, sir. 40

Q You have no recollection of any purchase of any one of those particular articles, have you? A Well, at different times, when we bought them.

Q Can you tell me any occasion on which you purchased any particular articles on your list? A Any particular time?

Frederick W. Mausert, cross.

Q Yes. A No, I could not tell you any particular time.

Q And aside from this list of yours, have you any recollection of what you paid for anything? A Yes, sir, as near as I can remember.

Q What can you tell me that you had bought that you paid for without consulting that list? A I paid for anything that was—

10 Q Tell me any one. A Towels, glassware.

Q What did you pay for the towels? A I could not tell you that offhand now; I would have to have the slip.

Q That is what I say, independently you could not— A No; now I could not; at that time I could; that is three years ago.

Q That is more than five years ago. A After leaving the place. I did remember what the purchases were at that time.

Q I say independent of the list you do not remember anything now? A I could not say right now, no. It is five years since I have been away from there now.

20 Q Will you tell me when you purchased the artificial vine-work and palms? A I think in 1911, if I remember right.

Q You stated— A I think along about 1911.

Q Did you have that built, or buy it complete? A Had it built.

Q The value you give us—is that the cost of building it, or— A What are you speaking of?

Q I am speaking of the stage? A Yes, I had that built.

Q That is what you paid? A \$105, that is what it cost.

30 Q \$105? A I think it was \$105, if I remember right; I am not sure.

Q Well, when did you have the new oak staircase made? A That was made in 1911, if I remember right.

Q You had that made? A Yes, sir; had it made.

Q You conducted a business there of renting out your hall and cafe and restaurant? A Yes, sir.

Q Did you say it was largely attended? Did you have a large business? A Yes, sir; I done a nice business.

Q All the time? A All the time.

40 Q You had good business all the time? You had frequent calls, frequent customers? A Now and then you would have a poor day, same as in every business.

Q You generally had good business? A Fair business.

Q And these tables, chairs, crockery, and so forth, I suppose were used every day? A Used every day.

Frederick W. Mausert, cross.

Q From the time you started in in 1910, the time you got them, until the time you left? A Everything was not got in 1910. I didn't start the restaurant until later on.

Q When did you start the restaurant? A Some time in 1910 and 1911.

Q From the time you got them they were used continuously?
A I used them right along, yes, sir.

10

By the Court.

Q What would you say was the average of people who used them a day; would it be one hundred or two hundred people in your place every day? A Why, yes, more than that, I should say.

Q How much would you say on an average? A Average, that may be four hundred a day.

Q Every day? A Sometimes I had big affairs in there; we would have two thousand people at night, and then again have a small affair, probably be two hundred people; just according to who you would rent your place to.

20

By Mr. Reed.

Q I show you a paper, Mr. Mausert, and ask you if that is your signature?

Mr. Bradner. I object to it.

The Court. What is the objection?

Mr. Bradner. I do not think it is a proper cross examination, and he is trying to put in part of his case now.

30

The Court. You can always identify a signature on cross examination.

Mr. Bradner. I anticipated my move a little.

The Court. All right.

A Yes, sir.

Q That is your signature? A Yes, sir.

Q And here again, on the same paper, a little down, is that your signature? A Yes, sir.

Said paper marked D. 2 for identification.

40

Q Now, I call your attention to what preceds your signature there, some changes made in it on the margin; do you recall being present when those changes were made? A I don't remember.

Frederick W. Mausert, cross.

Q Do you know who was Charles H. Kappes? A Yes.

Q Who was he? A Mr. Schuler's lawyer, I believe, at the time.

Q I am asking you what you know about it? How did you come to go to him? A Why, Mr. Schuler sent Raymond Mausert to see me.

10 Q Excuse me, that is not an answer to my question. Did you go to see Mr. Kappes? A No; I was taken there.

Mr. Bradner. I object. I do not see how this is proper cross examination; there has been nothing said about going anywhere to see Mr. Kappes, or anybody else, in the direct examination, and nothing about any papers.

20 *The Court.* I understood him to say that with the exception of Raymond Mausert, his brother's son, who called on him on the 25th, he had not seen anybody in connection with this matter, and then he says that never, to his knowledge, did he hear from the Mutual Distributing Company. I rather imagine, from what I heard of the opening, that this may have to do with that situation.

Mr. Reed. This was a paper he executed at that time, and it contained a certain schedule of goods. I will show your Honor. (Paper shown to Court.)

The Court. Suppose you ask another question; there is no question now.

30 Q After you left Newark did you see Mr. Schuler, after you left Newark on June 25th? A No, sir.

Q You never saw him until 1916, did you? A I don't remember if it was 1916 or not.

Q When do you first recall seeing him after June 25th, 1913? A I could not say; it was 1915 or 1916.

Q It was in 1915 or 1916 you saw him? A It may have been.

Q In the meantime, I think you said you had sent Mr. George Bird to see him? A Yes, sir.

40 Q Who was Mr. George Bird? A A partner of mine.

Q You were then in business in Glens Falls? A Yes, sir.

By the Court.

Q I thought you said you sent Mr. Bird about four weeks after you left New York. A Mr. Deyer.

Frederick W. Mausert, cross.

By Mr. Reed.

Q Where is Mr. Deyer now, do you know? A Why, he is in the city here some place; I think he is on the police force now.

Q Where did you see him? A I think I had written to him, although I am not sure, to call on Mr. Schuler. 10

Q You think you wrote to him? A I am quite sure I wrote to him or talked to him over the phone, I don't remember.

Q I show you a letter dated April 27, 1914; is that your signature? A Yes, sir.

Q That is the letter you sent with Mr. Bird at the time you referred to? A Yes, sir.

Same marked D. 3 for identification.

Q I show you another letter signed G. William Mausert; is that your signature? A Yes, sir. 20

Q And did you send that with Mr. Bird to the Mutual Distributing Company? A Yes, sir.

Q Do you remember the date of that? A No, I don't.

Q Was it before or after this letter of April 27th? A I don't remember.

Q You don't remember that? A I don't remember.

Q Do you remember sending these letters? A Yes, sir.

Said letter marked D. 4 for identification.

Q Was the spotlight spoken of one of the articles you claim was taken from your premises? A I don't quite understand. 30

Q This refers to a spotlight; was that part of the goods you claim were taken from your premises? A Yes, sir.

Q Well, did you want to get the spotlight? A I did.

Q So you sent Mr. Bird down for it? A Yes, sir.

Q And with this letter, Exhibit D. 4, for identification, did you? A What is about this, now?

Q I say you wanted the spotlight and sent Mr. Bird down with that letter to Mr. Schuler? A Yes, sir.

Q Had you communicated with Mr. Schuler either on the phone or by letter between June 25th, 1913, and the time you sent this letter? A Had I received one from Mr. Schuler? 40

Q I say, had you communicated with him? A I did, a number of times.

Q By letter, or how? A By letter, I believe.

Frederick W. Mausert, cross.

Q Have you copies of any letters that you sent him? A No, sir.

Q Didn't you keep copies of letters? A No, sir, I did not.

Q Did you say that you sent other letters than this? A I believe I did, a number of times.

10 Q Well, you believe you did; do you know? A Well, I did, yes.

Q When? A While I was in Glens Falls. I never received any reply from Mr. Schuler.

Q You never received any reply at all? A No, sir.

Q Were they before or after this letter? A Well, I don't know. When was that letter dated?

Q The letter has no date. A Well, then I don't remember.

Q You don't remember when this was sent? A No, I don't.

Q So you can't tell whether it was before or afterward?

20 A No.

Q Do you remember when you got the spotlight? A I could not tell the date when I did get it.

Q Was it about the time that you sent this letter?

Mr. Bradner. Objected to as not proper cross examination.

The Court. I am inclined to permit it; he is a party, and more latitude is allowed in the cross examination of a party than a mere witness.

30 Q (Question read.) A I don't remember that.

Q Well, you wanted to get this spotlight, did you? A Yes, sir.

Q You sent your partner down for it, did you? A Yes, sir.

Q And he reported to you that Mr. Schuler would not let you have it unless you paid \$10 for it, didn't he? A Yes, sir.

Q And you sent him down the \$10, didn't you?

Mr. Bradner. Objected to.

The Court. Objection overruled.

Exception to plaintiff.

40 A No, sir, I did not.

Q Didn't you pay for it? A He paid for it.

Q Who? A Mr. Bird.

Q Mr. Bird paid for it? A I suppose he did; I didn't pay for it.

Frederick W. Mausert, cross.

Q Well, you wrote this letter, Exhibit D. 3, for identification, I think you said? A Mr. Bird, if I am right—

Q I say you wrote that, didn't you? A Yes, sir, I did.

Q Well, now, in 1916, in January you went down to the office of the Mutual Distributing Company in Newark, didn't you? A Well, if that is the date of that check, it must have been.

10

Q January 4th, 1916? A Yes, sir.

Q (Check shown to witness.) A Well, I could not say the date.

Q Well, can you say whether it was about that date? A Well, it might have been.

Q Might have been about that date? And you saw Mr. Schuler, did you? A Yes, sir.

Q And you talked to him about these goods, didn't you? A Yes, sir.

20

Q And he showed you what had been done with them? A No, sir.

Q Didn't he show you the books? A No, sir.

Q Are you sure of that? A Quite sure of that.

Q You are quite sure? A Yes, sir.

Q After talking to you about your goods, he gave you this check, didn't he? A That check was given to me, yes, sir.

Q Well, by whom was it given to you? A Mr. Schuler.

Q Who? A I think Mr. Schuler gave me the check, if I remember right.

20

Q And you endorsed it? A Yes, sir.

Q That is your signature on the back of it? A Yes, sir.

Said check marked D. 5 for identification.

Q This was the balance that remained over and above the account of the Mutual Distributing Company, and expenses? A Not that I know of, no, sir.

Mr. Bradner. I object to this line of testimony; it does not seem to be proper cross examination.

The Court. The objection will be overruled.

40

Exception to plaintiff.

Q Well, why was it given to you? A Why, I had shares in the Mutual Distributing Company; it was given to me in that way.

Frederick W. Mausert, cross.

Q What is that? A The share I owned in the Mutual Distributing Company.

Q The share that you owned? A Yes, sir; dividend on the share I owned; that is the way it was explained to me.

10 Q Who explained it to you that way? A Mr. Schuler, as near as I can understand.

Q Do you say he told you that? A He gave me that check, and it was understood it was my share of the dividend.

Q Who said that to you? A Mr. Schuler.

Q Where were you when he said that to you? A Right in the office.

Q Was anything else said about it? A Simply was given to me, that was all, and I accepted it, for I had shares in it.

20 Q Did you talk about these things that you have spoken of today? A I certainly did.

Q What? A Yes, I did.

Q What did you say about that? A Wanted to know what he was doing with my goods, and what right he had to keep my goods.

Q Was that all that was said about it? A All that I remember at that time.

Q Did he say anything about it? A He said, "You will have to fight this out with your brother George; he is the man that got me to take the goods."

30 Q You say positively that this check had nothing to do with those goods? A Not that I know of; nothing mentioned to me. It was the dividend on these shares, on my shares.

Q Did he tell you the rate of dividend? A No, sir, he did not.

Q How many shares did you have? A One share.

Q You had one? A Yes.

Q That was one of the things that you complained was taken from you, wasn't it? A Why, yes, the share was taken from me.

40 Q Yet you say they paid you a dividend in 1916? A Why, yes, that is the way it was given to me.

Q Had you ever received a dividend before? A Yes, I did.

Q When was that? A That was sent to me shortly after I was in Glens Falls; I could not tell you the date; it was sent to me by check.

Frederick W. Mausert, cross.

Q Do you remember the amount of that check? A No, I don't.

Q Was that a check from the Mutual Distributing Company? A Yes, sir.

Q Was it sent by them or by someone else? A Sent by Mr. Schuler.

Q I thought you said you never heard from him. A Well, in this way I did, by check; didn't send no word, just simply a check sent that way. 10

Q That was all? A Yes, sir.

Q Was that the only time you received a dividend? A The only time I remember it.

Q When did you go to Glens Falls? A I went there in 1913.

Q What time in 1913? A I don't remember just the time.

Q Well, you said first you went to Massachusetts after you left New York? A I did.

Q How long were you there? A I was there the biggest part of the summer; then after that I went to Glens Falls. 20

Q So you went to Glens Falls in the fall? A Yes, early in the fall, I should judge.

Q In 1913; and shortly after that you received, you say, a check for dividends? A I believe so.

Q Well, can you be positive? A If I see the check; I couldn't tell you just the date, or when it was.

Q No explanation of what it was for? A On the dividends.

Q Was there a letter with it? A I don't even remember if there was a letter. 30

Q You say you don't remember its amount? A No, I don't.

Q Now, I understand that that was the first time you saw Mr. Schuler, in 1916, at the time that check was given; that was the first time you had complained to the Mutual Distributing Company, so far as you can now remember about— A I complained about it by writing letters, but never received any answer from Mr. Schuler about my stuff.

Q But you cannot remember whether you had written Mr. Schuler before or after this letter D. 3 for identification? A No, I could not say. 40

The Court. What is the date of D. 3?

Mr. Reed. April 27th, 1914.

Q In this letter of April 27th, 1914, you say, "Will sell gas range for \$18 or \$20;" do you remember that? A Yes, sir.

Frederick W. Mausert, cross.

Q What did that refer to? A Mr. Bird was down previous to that letter and Mr. Schuler said—

Q What were you referring to, the gas range you spoke of here today? A Yes, sir.

Q And was it your intention to direct that it be sold for \$18 or \$20? A Mr. Bird was down previous to that.

Q What was your intention from what you said in this letter about selling the gas range for \$18 or \$20? A It seems Mr. Schuler wanted to know the price of it.

Q And you put that value on it—\$18 or \$20? A Yes, I put that value on it.

Q “Will you please let Mr. Bird have spotlight for \$10?” You referred also to this spotlight, I think you said? A Yes, sir.

Q You were asking Mr. Bird to let Mr. Schuler have the spotlight for \$10? A I believe Mr. Schuler asked \$10 for the spotlight.

Q The way of it was, then, you sent down to Mr. Schuler and asked for the spotlight, and he said— A Anything I wanted I would have to pay for it.

Q So you paid for this, eh? A Mr. Bird paid for it.

Q You sent him down to get it? A I didn’t send him down; he had business in Newark.

By the Court.

Q Who said anything you wanted you would have to pay for? A Mr. Schuler.

Q To whom? A To Mr. Bird.

Q Not to you? A No, sir.

By Mr. Reed.

Q Mr. Bird came back and reported that, did he? A Yes, sir, he did.

Q And you sent Mr. Bird down to get the spotlight and pay the \$10 for it? A After Mr. Schuler said he wanted \$10 for it.

Q You wrote this P. S. at the end of this letter D. 3 for identification, didn’t you? A Yes, sir.

Q You said, “Give Mr. Bird all particulars about my goods”? A Yes, sir.

Q “So I will know just how things are?” A Yes, sir.

William Mockler, direct.

Q And did you receive a letter of which this is a copy dated May 1st, 1914? A No, sir.

Q Containing a statement of your account, and a statement of what had been done with the goods? A No, sir.

Q You did not receive that; are you sure of that? A Yes, sir, I am sure. 10

Q I understand you said your sisters told you there was a warrant out for your arrest? A Yes, sir.

Q And you, consequently, left Newark, went away in an automobile, did you? A Yes.

Q That was on June 24th? A June 24th.

Q And you went to your sister's house in New York? A Yes, sir.

Q And that was to avoid what you thought was to be an arrest under a warrant that was said to have been issued for you? A Yes, sir. 20

Q And you did not come back to Newark? A No, I did not.

Q You stayed there for two weeks, and then went to Massachusetts, and from there to— A I think I stopped in Albany.

Q Albany, and then to Glens Falls. Now, I understood you to say that you went away because your sisters were so anxious about it, and cried, and persuaded you to go; is that right? A Yes, sir.

Q Well, did you stay away for the same reason? A I don't quite understand.

Q I say, was that the reason you stayed away from Newark? A Well, I was frightened some after I got over there, at the time; but if it wasn't for my sisters I think I would have stayed. 30

WILLIAM MOCKLER, sworn for the plaintiff.

Direct examination by Mr. Bradner.

Q Where do you live? A I live in Newark.

Q Were you employed by Mr. Mausert? A Yes, sir. 40

Q In June, 1913? A Yes, sir.

Q In what capacity did you work for him? A I was bar-keeper and head man.

Q Do you recall the 25th of June, 1913? A Yes, I guess I do.

William Mockler, direct.

Q How do you recall it? A Well, I know I went there around the noon hour and they were removing the stuff out, is all I remember; the 24th I was off, that was my day off, and I came there the next day and they were moving the stuff out. Mr. Schuler and Mr. Mausert was there, George Mausert.

10 Q When did you leave Arion Hall the last time before this?

A Oh, between five and six in the afternoon.

Q That is the 24th? A No, I was not working on the 24th. I was there on the 25th; that is when they were moving the stuff away.

Q What was the last day you were there before the 25th?

A I wasn't there any more after the 25th.

Q The last day before the 25th? A The 23d I was there.

Q You did not work the 24th? A I did not work; it was my day off; I was off the 24th; I came in on the 25th about
20 noon hour, when they were moving this stuff out.

Q They had already started to move? A Yes.

Q Who else was there besides Mr. Mausert and Mr. Schuler?

A I think Mr. Bradner, if I am not mistaken.

Q Anyone else? A Well, I can hardly say; I was in the back at the time, where the bar was; I was packing up all the stuff there, helping along there, I think; that is all I can remember. I know when I came in there I saw those two gentlemen there, Mr. Mausert and Mr. Schuler.

Q What was Mr. Schuler doing? A He was talking with Mr.
30 George Mausert; I don't know what he was talking about.

Q Do you know what goods went into the vans, the moving vans? A Most all the goods there outside of the liquor; that was all taken down to the Hotel Broad, to George Mausert.

Q The liquor was taken to the Hotel Broad? A Yes, the liquor, that is, the bar stuff that I had charge of.

Q Who took it down? A They hired a wagon to take it down.

Q Anything else taken down to the Hotel Broad? A That is all I can remember in my line; there might have been other stuff; I couldn't say.

40 Q Did you see anything else go out? A Well, all this other stuff went in the vans; I see all that stuff; the vans was all there; I see them taking it out, chairs and tables and all that stuff; in fact, everything was cleared out except the bar; that was all that was left.

William Mockler, cross.

Q What happened to the linen? A Well, I don't know anything about that; I didn't have charge of that.

Q What time did they finish moving? A After five o'clock, pretty near six o'clock at night.

Q Was there anything left in the place after that? A Only the bar; that was all.

Q Did you know where Mr. Fred Mausert was at this time? A No, I did not.

Q Did you hear from him at all during the day? A Yes, he telephoned at five o'clock when I was there.

Q Did you talk with him over the 'phone? A Yes, sir.

Q What did you tell him?

Mr. Reed. Objected to.

The Court. Objection sustained.

Q Who put the liquor and stuff in the wagon to take to the Hotel Broad? A The people who were hired to do it; the man who had the wagon.

Q Did you help pack up anything? A All the stuff there; took an inventory of all the stuff there and gave them a list of it; that is all; I know I put it in boxes and packages and barrels, and such like that.

Q Who gave the orders to do that? A Mr. George Mausert told me.

Q Was Mr. Schuler there then? A He was there at the time, yes.

Q Was Mr. Schuler directing any of the moving?

Mr. Reed. Objected to as leading the witness.

The Court. The objection is overruled.

A Well, they were both talking together, and Mr. Mausert told me they were going to get vans and move all the stuff; that is all I know; I don't know whether he directed Mr. Schuler or not; I don't know; I didn't hear it; I suppose he did; I don't know.

Mr. Reed. I move that that be stricken out.

The Court. It will be stricken out.

Cross examination by Mr. Reed.

Q Do you know whether or not Mrs. Briggs was there at any time during the day while you were there? A I could not say; I was working in the back; I couldn't tell you.

PLAINTIFF RESTS.

Elizabeth Briggs, direct.

10 *Mr. Reed.* I will ask for a non-suit. It seems to me
the plaintiff has not proven any of the allegations of the
complaint. Putting the worst phase of the case on it, for
the defendant, it appears that certain property, consist-
ing of eight loads of goods from the Arion Palm Garden,
were sent to Mr. Schuler and delivered to Arlington to a
storage place of his. It appears that they were sent by
the direction of Mr. George Mausert. It is true that it
does appear from the testimony that Mr. Schuler was
present part of the time when the goods were being re-
moved from the Arion Palm Garden, but that is entirely
consistent with the theory that they were taken by Mr.
George Mausert and sent to him for storage. In other
words, there is nothing in the evidence that shows a wrong-
ful taking by the defendant or any of its officers, and the
mere fact that he was present and talked with Mr. George
20 Mausert does not indicate that the defendants, the Mutual
Distributing Company, took any goods wrongfully from the
plaintiff. It does not seem to me that the Mutual Dis-
tributing Company has done anything for which they can
be mulcted in damages by the jury.

ARGUED.

The Court. The motion will be denied.

30 Exception to this ruling is noted by defendant as ground
of appeal.

ELIZABETH BRIGGS, recalled for defendant.

Direct examination by Mr. Reed.

Q Mrs. Briggs, I show you a letter dated March 17, 1918; in
whose handwriting is that? A It is in my handwriting.

Q You wrote that? A Yes.

Q To whom? A My brother George.

40 Q I want to call your particular attention to this part of it on
the second page; will you read that. Do you remember writing
that? A Yes, I do.

Q And you refer to the time when your brother Fred went
away; that was on June 25th; you saw George Mausert then? A
At what time?

Q On the 25th? A Yes, sir.

Daniel J. Lynch, direct.

Q You saw him on the 24th, did you? A The 24th, now, I can't recall it.

Q That was the day before he went away? A Yes.

Q George Mausert was trying to help his brother escape from what he supposed was a warrant out for him? A Yes.

Q And to take care of his property for him while he was gone? 10

Mr. Bradner. Objected to as leading.

The Court. The questions are leading.

(Question withdrawn.)

Q Well, you said in this letter, "I know you meant to help him instead of wrong him," did you not? A Yes.

Q Was that what he was attempting to do? A Certainly; he was trying to help my brother.

Q Well, you said this morning, I understood, that you went to the Palm Garden to persuade him not to take the goods out? 20
A I said this morning that the goods were being moved out; I went to the Arion Palm Garden trying to keep the men that were moving them; trying to dissuade them from moving them out.

Q And you had quite a discussion there with George? A Yes, I did. I seen Mr. Schuler and my brother, or Mr. Mausert was moving the goods out, and seemed to have charge; I went up and told them it wasn't good, or fair, to move the goods out, without letting the boy, Mr. Fred Mausert, know about it. I tried to plead with them not to let the goods go out; I didn't think it was fair without letting the boy know they were destroying the business. 30

Q And yet you said in this letter that George Mausert was trying to help him? A Yes, sir, at that time; at the time he came and told me there was a warrant out for his arrest I truthfully believed that my brother George was trying to help my brother Fred.

Not cross examined.

DANIEL J. LYNCH, sworn for the defendant.

Direct examination by Mr. Reed.

Mr. Reed. First, I offer in evidence a chattel mortgage made by Frederick W. Mausert to the Mutual Distributing Company, dated the 25th day of June, 1913, recorded in 40

Daniel J. Lynch, direct.

the office of the Register of Essex County, on the 26th day of June, 1913.

Same marked Exhibit D. 2.

Q Mr. Lynch, I show you a chattel mortgage, a certain copy of chattel mortgage, and a paper headed "Chattel Mortgage Sale," and ask you if you recognize those? A Yes, sir.

Q What did you do, if anything, in connection with them? A I foreclosed the mortgage. I went to the corner of Railroad avenue and Devon street, in the town of Arlington.

Q When was that done? A That was done on—the notice was put up on July 19th, 1913; the sale was July 26th, 1913, at nine o'clock in the forenoon.

Q What notice did you put up, if any? A I put up five notices.

Q Where? A Different parts of the town over there.

Q Were they public or private? A Public.

Q And what was then done? A I went to the place of the sale on the day that I advertised it for, and sold.

Q (*By the Court.*) That was what date? What date did you sell? A July 26th, 1913.

Q (*By Mr. Reed.*) Did you take any inventory of the property? A I took the inventory from the schedule of the chattel mortgage.

Q That was all? A That was all.

Q You didn't compare it? A Didn't compare it; the goods were in a barn there.

Q And what did you sell, what goods were there? A What goods were there; yes, sir.

Q And to whom? A To this gentleman over here, Mr. Schuler, is it?

Q Mr. Schuler. A Yes.

By the Court.

Q For how much? A Well, for \$600, to the—

Q Sold the goods in bulk? A Sold both the goods in bulk; yes, sir, \$600, to the Mutual Distributing Company.

Q (*By Mr. Reed.*) What is this paper I show you? A It is a notice of the chattel mortgage sale.

Mr. Reed. I offer this in evidence.

Q (*By Mr. Bradner.*) This is your signature? A Yes, sir.

Daniel J. Lynch, cross—re-direct.

Mr. Bradner. I have no objection.

The Court. It will be received.

Same marked Exhibit D. 6.

Cross examination by Mr. Bradner.

Q You say you put up notices of the sale? A Yes, sir. 10

Q Where did you publish those notices? A Over in the town there; different parts of the town.

Q How many notices did you put up? A Five.

Q Do you know the places you put them up? A I can't just recall now.

Q Have you any record? A No, sir, I haven't; I always put up five notices.

Q You say you always put up five, and you tell us you put up five— A Yes, sir; I am sure I did.

Q You don't know where you put them up? A Not exactly. 20

By the Court.

Q Do you know you put any up? A Yes, sir; I put one at the place of sale and one around the railroad there.

Q What do you mean, "around the railroad"? A Where this sale took place is right near a railroad there; the Greenwood Lake, I think it is, and then along Kearney avenue, I put up one there.

Q You mean out of doors? A Yes, sir.

Q Not in any public building? A No, sir.

Q All out of doors? A All out of doors. 30

Q Were there any bidders at that sale, Mr. Lynch? A No; only Mr. Schuler I saw.

Q No one else but Mr. Schuler? A That is the only one I can recall now.

Re-direct examination.

Q What is your official position? A Sergeant-at-arms, Second District Court.

Q How long have you been such? A About two years.

Q (*By the Court*) Second District Court of Newark? A Yes, sir. 40

Anthony W. Schuler, direct.

ANTHONY W. SCHULER, recalled for the defendant.

Direct examination by Mr. Reed.

10 Q Mr. Schuler, you testified this morning you were president and general manager of the Mutual Distributing Company and held that position in 1917? A Yes, sir.

Q Did you know Mr. Frederick W. Mausert? A Yes, sir.

Q And Mr. George Mausert? A Yes, sir.

Q And did Mr. Frederick Mausert have any dealings with the Mutual Distributing Company prior to June 25, 1913? A Yes, sir.

Q Of what nature? A Why he bought wines and liquors from them for several years, since 1909, I think.

20 Q And was there any indebtedness due to him or from him to you on June 25th, 1913? A He owed us \$682 and some odd cents, as near as I remember.

Q Did you know of his leaving Newark? A I only was told by his brother that he left Newark; the only way I knew.

Q When did you hear of it? A Why, I think June 25th.

Q And I show you Exhibit D. 2; do you recognize that? A Yes, sir.

Q When did you receive that? A Why, I think on the morning of the 26th of June.

30 Q From whom did you receive it? A From yourself, Mr. Reed.

Q Did you see Mr. Frederick Mausert after June 25th? A Not until 1916; January 4, 1916, I think was the date.

Q Well, did you have any communication with him? A After June 25th?

Q June 25th, 1913? A Yes.

Q I show you Exhibit D. 4 for identification; did you receive that? A It is not dated; my recollection is I received it a week or two before the one dated there.

40 Q You refer now to Exhibit D. 3? A Yes; I think a week or two before April 27th. On April 27th I received the second letter, and about two weeks before that we received the first letter here, which is marked D. 4.

Q April 27th, 1914, did you receive any communication from Frederick Mausert, between June 25th, 1913, and April 1st, 1914, then? A No, sir.

Anthony W. Schuler, direct.

Q Then, Exhibit D. 4 for identification, was or was not that the first communication you received? A That was the first communication.

Q How did you get that? A This was handed to me by a man by the name of Bird, Mausert's partner, as I understood.

Mr. Reed. I will offer this in evidence. 10

Same marked Exhibit D. 4 and read to the jury.

Adjourned until Monday morning, April 21st, 1919, at ten o'clock A. M.

Newark, N. J., April 21, 1919.

Continued pursuant to adjournment.

Appearances as before. 20

ANTHONY W. SCHULER, resumed the stand.

Further direct examination by Mr. Reed.

Q Mr. Schuler, did you see Mr. George Mausert on the 25th of June? A Yes, sir.

Q Where? A At the Hotel Broad.

Q Is he related to Mr. F. W.? A Brother.

Q What took place there? A Why, we talked about the chattel mortgage.

Q I think you told us the other day that Mr. Fred Mausert owed you some money? A Six hundred and eighty-two dollars and some odd cents. 30

Q Now, go ahead; what was said?

Mr. Bradner. I object to the conversation.

Q Did you see him later at the Arion Palm Garden? A Yes, sir.

Q What time of day was that? A I should think between four and five o'clock in the afternoon.

Q Who was present? A Mr. Mausert was there. 40

Q Which one? George Mausert, and Mrs. Briggs.

Q She was one of the witnesses here? A Yes, sir.

Q What was Mr. George Mausert doing? A Why, he seemed to be superintending the work there.

Anthony W. Schuler, direct.

Q What work was going on? A Tearing down partitions, moving out furniture, and so forth; packing linen and silverware. Mrs. Briggs was packing the linens and silverware there.

Q Did you see Mr. Mockler there? A Yes, sir.

Q What was he doing? A Packing glassware and other
10 things, I presume; I don't know just what he was doing exactly; I know he was packing glassware, and behind the bar.

Q Mrs. Briggs testified that she spoke to you—at least I think she spoke to you—remonstrated, anyway, about what was going on; do you recollect that? A No; she positively did not remonstrate with me. She spoke to me and I spoke to her in a very friendly tone, but no remonstrance on her part whatever.

Q What did she say, if anything? A I don't just recall; speaking about Fred Mausert, that is all, but in a friendly way; nothing was said in the way of remonstrance. She was packing
20 linen and tableware at the time I was there.

Q Well, when you were on the stand the other day you identified some slips, some delivery slips from Job De Camp. Do you know what was contained in the drays that— A No, sir.

Q What property did you receive, if any, that came from—
A The property that we had a list of here; I think you have a list of it; that is the property we have sold, and the property now remaining is all we got; you have a list of both of them.

Q What did they consist of, shortly speaking? A Why, chairs and tables mostly, and flat settees.

Q How did you come into possession of them? A It was
30 sent there by Mr. George Mausert.

Q Sent where? A To Arlington.

Q Did you have any conversation with him about that feature of the matter, delivery of the goods to you? A Yes.

Q What did he say about that?

Mr. Bradner. Objected to.

Mr. Reed. We are accused here of taking these goods without right, breaking in and entering the place of business of the plaintiff and taking these goods away; we are
40 entitled to show the circumstances under which we received them, and the conversations with the persons from whom they were received.

The Court. The objection will be sustained.

Anthony W. Schuler, direct.

An exception to this ruling is noted by the defendant as ground of appeal.

Q When did they arrive in Arlington, do you know? A Some time in the morning of the 26th of June, I think.

Q Did you take any part in moving them out of the Arion Hall Palm Garden? A No, sir; nothing whatever; no part at all.

10

Q When did you see Mr. George Mausert last? A Recently, do you mean?

Q Yes. A Yesterday.

Q And have you brought him here? A Tried to get him to come; he would not come.

Q Where is he? A In Brooklyn.

Q He was here at the last trial, was he? A Yes, sir.

Q His testimony was taken? A Yes, sir.

Q You spoke of a list of goods which you have sold and which you still have; I show you a list; will you tell me whether or not that is the list to which you refer? A That is the list of the goods, yes, sir, that we sold.

20

Q Where, and under what circumstances, was that list made?

A This list here?

Q Yes. A I presume that is a copy of our books.

Q You did not make that yourself? A No, sir.

Q Now, here is another list; what is that? A That is a copy of the list of goods on hand.

30

Q Who made up the list of goods on hand? A I made the list of the goods on hand, took the stock myself, handed it to our typist, and this is the typewritten copy.

Q Well, did you see this afterwards? A See what afterwards?

Q This list? A This list here?

Q Yes. A Why, yes.

Q And what did you do with it in regard to the list which you had made, if anything? A I compared it.

Q You compared it? A Yes, sir.

40

Q Where is the list you made? A That I don't know; that was made some time ago; about three years ago, I guess; I don't know what has become of it.

Q Have you made any search for it? A Yes.

Q Were you able to find it? A No, sir.

Anthony W. Schuler, direct.

Q Well, then refreshing your recollection from that list, will you tell me what goods you have remaining on hand? A I can read it from here; will I?

Q Yes. A 44 round top tables, 1 ticket counter, 1 wall closet, 1 gas range, 1 'phone booth, 61 soup plates, 79 dinner plates, 92 sandwich plates, 10 saucers, 2 water pitchers, 39 vegetable dishes, 6 spice dishes, 9 coffee cups, small; 6 cracker pitchers, 1 coat rack, 24 window shades, 2 curtains. That is all.

Q Now, what did you do with regard to the chattel mortgage after these goods had been taken to Arlington? A Why, it was foreclosed, about a month later, after we got the goods.

Q What was done at the foreclosure sale? A Purchased by the Mutual Distributing Company.

Q And before that foreclosure did you see Mr. F. W. Mausert at your place of business, or elsewhere? A I did not.

20 Q Did you know where he was? A I did not.

Q And when did you first learn where he was, or had been, during that time? A I did not learn where he was, or had been; I knew he was out of the State; that is all.

Q I say, when did you first learn of his whereabouts? A Why, I should judge, when he sent down; he sent an order down for the spotlight; that was sometime; I don't just recall the date; it is a letter in April of 1914, I think; I am not sure.

Q That is the one you referred to the other day? A Yes, sir; that was the first I ever heard of him.

30 Q Well, was he in Newark, do you know? A Not at that time, no. He sent his partner, a man by the name of Bird.

Q I mean at the time of the foreclosure? A He was not in Newark; I don't know where he was.

Q Did you make any inquiry? A I did.

Q Of whom? A Mr. George Mausert, his brother, and his family as well as of Mr. George Mausert.

Q (*By the Court.*) Whose family? A Mr. Mausert's.

Q Whose wife? A Mr. George Mausert's.

40 Q (*By Mr. Reed.*) Did Mr. Fred Mausert have any family? Was he married at that time? A Not that I know of.

Q I think it was testified here he had lived at the Hotel Broad? A I understand he lived at the Hotel Broad. I didn't know at the time where he lived, but I understood from him the other day that he lived at the Hotel Broad.

Anthony W. Schuler, direct.

Q And what did Mr. George Mausert have to do with the Hotel Broad? A He was the proprietor of the Hotel Broad.

Q Did you know where Mrs. Cadwell, I think it was, lived? A No, sir.

Q (*By the Court.*) Did you make any inquiry of Mrs. Briggs? A I did not know where Mrs. Briggs was; I never knew where she lived in Newark, if she did live in Newark at that time. 10

Q (*By Mr. Reed.*) Do you know where she went when she left Newark? I think she testified she left Newark the first of July that year? A I only heard that she went up in Pittsfield, somewheres; I only knew that from hearsay.

Q Did you know of anyone else of whom to inquire? A I did not.

Q The Arion Hall, was that closed, or open? A That was closed, I understand.

Q Well, after the purchase of the property at the foreclosure sale by the Mutual Distributing Company, what was done with the property? 20

Mr. Bradner. I object. I do not think we are interested in what was done with the property after the foreclosure sale.

The Court. I suppose if it was sold the sale price may have some reference to its value.

Mr. Reed. More than that; I am leading up to the fact that this property was sold, the proceeds of the sale, the books showing the sale, were shown to the plaintiff, and what amount had been received for them, and a check was given to him, and he expressed himself satisfied. 30

Mr. Bradner. I do not think any of that is relevant to the issue in any way; it is not pleaded.

The Court. If that was necessary the Court would permit an amendment showing that there was a ratification; if it should be necessary that there should be an amendment to the pleadings in order to raise the question here, it would be permitted. The objection will be overruled. 40

An exception to this ruling is noted by plaintiff as ground of appeal.

Q (Question read as follows: "Well, after the purchase of the property at the foreclosure sale by the Mutual Distributing Company, what was done with the property?") A It was ad-

Anthony W. Schuler, direct.

vertised for sale in various papers, mostly in the Evening News; possibly in the Advertiser, or the Star, whatever it was called at that time, advertising the sale, and we sold it from time to time for the best possible price we could get for it.

10 *Mr. Bradner.* I would like to have Mr. Reed's request for an amendment, if he is going to make one, put on the record.

20 *Mr. Reed.* I do not think an amendment is necessary. We set up in our pleadings that a chattel mortgage was given, and we took possession under the chattel mortgage and sold the goods. In their reply to that they say that the goods were taken before the chattel mortgage was given, and that the chattel mortgage was obtained by fraud; they do not contend that there was no proper sale, or that it was not justified under the chattel mortgage; that there was no proper foreclosure, or any of those things; so we did not raise the issue as to ratification. I think it is entirely proper, under the pleadings, that we should show that there had been a ratification, without special pleading.

The Court. Mr. Bradner, the Court did not say it was necessary. You did not so understand the Court, did you?

Mr. Bradner. I understood the Court to say that the Court would permit an amendment.

30 *The Court.* I said if it should appear it was necessary the Court would permit an amendment. The Court is not inclined to rule that an amendment should be introduced now.

Q Who really had to do with the selling of these goods? A I did, myself.

Q What experience, if any, had you had in the sale of goods of this kind? A Why, I had not had much experience in the selling of goods of this kind. We have bought a lot of chairs and tables for business purposes.

40 Q In what connection with your business? A Why, I have a saloon at Arlington, New Jersey, for the last thirty-five years.

Q Which of these books shows the sales that were made? A Why, the sales book and the ledger.

Q I show you a book; what is this? A The ledger.

Q Of what? A Of the furniture account of Fred Mausert.

Anthony W. Schuler, direct.

Q And what does that contain? A That contains the sale, and the moneys received, cash received.

Q Sales of what? A Sales of the various goods we sold; the furniture.

Q And does it contain all of them? A I don't think so.

Q What other book is there which shows? A The other ledger there; the small ledger. 10

Q (Book shown to witness.) A These are the two accounts.

Q They contain all of the accounts? A Yes, sir.

Q Now, when we closed the other day, I think that you said you received Exhibit D. 4, which was brought to you by a Mr. Bird? A Yes, sir.

Q In April, 1914? A Yes, sir.

Q And did you give Mr. Bird the spotlight at that time? A Not at the first letter; I told Mr. Bird that if Mr. Mausert wanted the spotlight he would have to send us \$10. We had not all our money out of the goods yet, and we had lots of expense besides our account, and he could not have the spotlight unless he sent us \$10. 20

Q Did you hear from Mr. Bird or Mr. Mausert later? A Yes, sir.

Q I show you D. 3 for identification? A Yes.

Q How did you receive that? A Mr. Bird brought it to us.

Q Where? A At our office in Lafayette street, in Newark.

Q On about what date? A April 27th, it was dated; I suppose he was down probably a day or so later. 30

Mr. Reed. I will offer this in evidence.

Mr. Bradner. I object to it as irrelevant; it is not part of the issues raised by the pleadings.

The Court. The objection will be overruled.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Same marked Exhibit D. 3 and read.

Q Well, what happened then with respect to the spotlight? A He came down with a letter and \$10 enclosed, and I either gave him an order for the spotlight to get it at Arlington, or had the spotlight there, I don't know which, now. He got the spotlight. 40

Q That is, you gave it to George Bird? A Yes, sir.

Q (*By the Court.*) What do you mean by \$10 enclosed? A He gave us \$10.

Anthony W. Schuler, direct.

Q What do you mean by \$10 enclosed? A I don't know whether it was \$10 enclosed, or whether he handed it to me.

The Court. Don't say so, then.

10 Q (*By Mr. Reed.*) As to the statement, he asked for a statement? A He asked for a statement, and we sent him a statement.

Mr. Reed. Mr. Bradner, have you that letter addressed to Mr. W. F. Mausert, Glens Falls, New York, signed Mutual Distributing Company, dated May 1, 1914?

Mr Bradner. No, sir; we never received such a letter.

Q I show you what purports to be a copy of a letter? A Yes.

Q Can you tell me what that is? A Why, that is a copy of a letter sent to Mr. Mausert.

20 Q When? A On May 1, 1914.

Q And what became of the original? A The original letter was sent to Mr. F. W. Mausert, Glens Falls, New York.

Mr. Reed. I will offer this copy in evidence.

By Mr. Bradner.

Q Who dictated this letter? A I did.

Q When did you dictate it? A The day it was written.

Q Did you mail it? A I did not mail it myself, no.

30 Q Do you know who did mail it? A One of our office girls.

Q Do you know which one? A Yes.

Q Which one mailed it? A Miss Gilman; she is married now; Miss Gilman at that time.

Q Do you know what time of day you dictated this letter? A I do not recall that.

Mr. Bradner. I object to this letter going in, I do not think it is part of the issue in the case.

The Court. I will look at it. (Letter handed to the Court.)

40 *Mr. Bradner.* Also it is a copy, and I do not think there is sufficient proof that the original was mailed and sent.

Mr. Reed. You admit we demanded the original?

Mr. Bradner. I admit you demanded it at the last trial.

Anthony W. Schuler, direct.

By the Court.

Q What do you know about the mailing of that letter? A Why, I don't know any more than it was there; I assume it was mailed.

Q Did you have any connection with it at all after it was dictated? A No. 10

Q Do you know anything about it after it was dictated? A Nothing more than I suppose it was mailed by our office clerk.

Q Do you personally know anything about it after you dictated it? A No, sir.

The Court. It may be marked for identification.

Same marked D. 7 for identification.

By Mr. Reed.

Q When did you next see Mr. F. W. Mausert? A On January 4, 1916. 20

Q And where did you see him? A At the office of the Mutual Distributing Company.

Q What time of day? A About noon, I should judge, between twelve and two o'clock.

Q And what occurred there? A Why, we had a friendly conversation.

Q What was said? A He asked me about his furniture, asked what we had done with it, and I told him; and then I asked the bookkeeper to bring in the books and show him just exactly what we had done; show him exactly what we had sold, who we sold it to, and what we got for it, and how much money we had above our actual account and expenses, which was \$26.53; I believe that is the right figure. 30

Q What books did you show him? A The ledger and the sales book.

Q You speak of the ledger and the sales book; are any of those books beside you? A I showed him these books here.

Q Both? A Yes, sir.

Q And the sales book. Is this the one you referred to? A Yes, sir. 40

Q After you had shown them to him what did he say, if anything, about that matter? A Why, he was pleased with what we had done—

The Court. No, no; what did he say?

Anthony W. Schuler, direct.

The Witness. What did he say? I don't remember just exactly the words he said.

Mr. Bradner. I object to this testimony also as tending to prove a defense not pleaded.

The Court. The objection is overruled.

10 *The Witness.* I can't recall just the words he said.

Q Did you give him any check at that time? A Yes, sir.

Q (Showing witness a check.) Is that it? A This is the check.

Said check offered in evidence.

Mr. Bradner. I object to the check going in evidence. No ratification has been proved, and ratification is an affirmative defense which should be specially set up; and I do not think it is part of the issue of this case.

20 *The Court.* The objection is overruled.

Exception to plaintiff.

Said check marked Exhibit D. 5 and read.

Q Well, what then happened? A Why, he accepted the check and seemed to be very pleased with what we had done.

The Court. That will be stricken out.

Q I want what he said, if you remember?

30 *The Court.* Just begin over again. Your whole answer has been stricken out. The question is what he said?

A It is hard for me to remember just what he said.

Q Can you remember what you said? A I asked him about what we would do with the balance of furniture we had on hand, and he said, "Go and sell it;" I asked him whether he wanted the furniture; he could have it, and, of course, we had our money at that time; and he said, "No, you go ahead and sell it."

Q Well, was anything said about this check of \$26.53 being a dividend? A Nothing of the kind; no, sir; he knew it was not a dividend check.

40

The Court. The latter part of that answer will be stricken out.

Q I want you to tell me was anything said? A Why, no, nothing about dividend checks.

Anthony W. Schuler, cross.

Q Was dividend mentioned? A No, sir.

Q Well, when did you next hear from Mr. Mausert, or anyone representing him, with respect to this property? A Why, some time afterwards we heard from Mr. Bradner; that is, not the gentleman here. This is the letter here; Frank E. Bradner.

Q And did you hear from him by 'phone, or letter? A By letter. 10

Q Is this the letter? A Yes, sir.

Said letter offered in evidence, being D. 1 for identification, and is marked Exhibit D. 1.

Q Did you see Mr. Bradner? A No, sir; I 'phoned him.

Q You 'phoned him? A Called him on the 'phone.

Q And what was said? A He made an appointment with me to come down and see me.

Q And did he come down? A No, sir.

Q Who came, if anyone? A Why, several weeks afterwards he sent some man down; who he was I don't recall now. 20

Q How do you know he sent him? A Well, the man told me he was sent by Mr. Bradner.

Q That is all you know about it? A That is all.

Mr. Bradner. Objected to.

Mr. Reed. I will consent that it be stricken out.

Q Several weeks afterward someone came down? A Yes, sir.

Q What did he say? A He looked over our books.

Q That was in 1916, was it? A I guess it was in 1916; I should judge it was 1916; it was after I received that letter. 30

Q The same year? A Well, it may have been, and it may have been 1917; I don't recall.

Cross examination by Mr. Bradner.

Q Mr. Schuler, was Mr. George Mausert connected with your company at one time? A He was.

Q In what capacity? A He was treasurer.

Q How long was he treasurer? A Why, for a number of years, until June 18th, 1913. 40

Q That is just about a week before the— A About a week before this happened; yes.

Q Did you live at the Hotel Broad? A Why, no, sir.

Q Take your meals there? A I did.

Anthony W. Schuler, cross.

Q You knew Mr. George Mausert very well? A Yes, sir.

Q A very close friend of his? A Yes, sir; I was at that time.

Q Did you know Mr. Briggs? A I knew him; yes.

Q Mrs. Briggs' husband; the Mrs. Briggs who has testified?
A Yes.

10 Q He was connected with the Hotel Broad, was he? A Why,
I think he was clerk there.

Q Mr. Schuler, do you recall what time of day you first went
to Arion Hall on the 25th of June? A I think it was between
four and five o'clock.

Q What did you do there? A I did not do anything there
but have a talk with Mr. Mausert, a few minutes, and left.

Q Were not you interested in looking up the goods at all? A
No.

Q Didn't care anything about it? A No.

20 Q You were interested in protecting the debt of your com-
pany? A Why, I surely was.

Q But you were not interested in looking at these goods? A
No.

Q You did not care whether they were good or bad, or what
they were? A That did not make any difference; I could not
make them any better.

Q Did you make any list of the goods while you were there?
A I did not.

30 Q Did you see my father there, Mr. Schuler? A I don't
recall him being there; there were a number of people in the
place when I was there; the carpenters were working, taking
down partitions, and men carrying down goods.

Q Who gave the—who made the request for this chattel mort-
gage? Who ordered this made? A Why, Mr. Reed and myself
went down to the Hotel Broad and—

Q Who ordered Mr. Reed to make it? A I did.

Q When did you order it? A Why, on the 25th of June.

Q What time? A Between—I think it was between some-
wheres around two o'clock, I think.

Q Did you see Mr. Reed personally? A Yes, sir.

40 Q Where? At the Hotel Broad.

Q Where? A At the Hotel Broad.
dining-room, I should think it was called.

Q Did you furnish him with any list of the goods? A I did
not.

Anthony W. Schuler, cross.

Q (*By the Court.*) Where did he get that from? A I think it was handed to him by Mr. George Mausert.

Q (*By Mr. Bradner.*) Did you see any list of the goods before you ordered the mortgage executed? A Not that I recall.

Q Did you see any list of the goods at any time? A I did not see any list except on the mortgage; no. 10

Q When did you first hear that Fred Mausert had left town? A Why, my recollection is that I was up here in this court house when I was either called on the 'phone, or possibly called up the office; I cannot recall that; but, anyway, I got in touch with Mr. Mausert; either he called me on the 'phone or I called him on the 'phone, and he then told me his brother had left the city; had left the State.

Q What day was that? A That was on the 25th of June, as I remember, 1913.

Q Was that before or after you saw George Mausert at the Hotel Broad? A That was before I saw George Mausert at the Hotel Broad. 20

Q Do you recall what time of the day you saw George Mausert at the Hotel Broad? A I told you before about two o'clock. I think it was, after court here, as near as I can remember; that is after recess.

Q Was that before or after you gave the order to Mr. Reed to prepare the mortgage? A Why, it was at the time I gave him the order to prepare the mortgage. Mr. Reed and myself were at the Hotel Broad at the time. 30

Q All three of you got together at the Hotel Broad? A Yes, sir.

Q You talked the whole matter over? A I certainly did; I consulted Mr. Reed, and the advice was to get a chattel mortgage to cover our account.

Q Mr. Schuler, at the foreclosure of this mortgage did you make any demand for the payment of the debt? A I could not find Mr. Mausert to make any demand.

Q I just asked you if you made any? A No. 40

Q Did you make any demand before you took possession of the goods? A Yes, sir, Mr. Reed did, I believe, from the attorney.

Q Before you took possession of the goods? A I did not myself, personally.

Anthony W. Schuler, cross.

Q Did you authorize any? A Mr. Reed was authorized to make the mortgage.

Q Did you have anyone make demand for the payment of the debt before the goods were taken? A I did not, no.

Q Before the mortgage was foreclosed did you attempt to make a demand? A I tried to find Mr. Fred Mausert; yes, sir.

Q How did you try to find him? A By inquiring of his relatives.

Q What relatives did you inquire of? A His brother and his brother's wife.

Q Anyone else? A Why, no one else that I knew to inquire from.

Q You knew Mr. Briggs and Mrs. Briggs? A I did not know where they were at that time.

Q What time did you make this attempt? A I don't recall the day, nor the time, either.

Q How soon before the foreclosure did you make it? A Possibly a week or so, possibly two weeks; I don't recall just now.

Q Possibly two weeks? A Possibly so.

Q Did you know where George Mausert was then? A George Mausert was at the Hotel Broad at the time I inquired.

Q Are you sure of that? A I am positive of that.

Q Are you sure he was not in New York? A He was not in New York at that time.

Q He did not have a place up near Van Courtland Park? A He did at one time; yes.

Q He did not in the months of June and July? A I don't know whether he had at that time.

Q As a matter of fact, you don't know where he was at that time? A I know where I met him.

Q Where? A At the Hotel Broad.

Q Was he still proprietor at that time? A I don't know whether he was at that time.

Q How did you come to meet him there? A I met him there.

Q Did you send for him? A No, sir.

Q Did he call you up, or did you just accidentally stumble across him? A I went to the place and met him there.

Q You don't know how you came to go there? A I went there the same as I would go to any other place; that is all I can tell you.

Anthony W. Schuler, cross.

Q What did you say to him? A I asked him if he knew where Fred was; he said he didn't know where he was; I said, "How do you suppose I can find out where he is"? And he said he couldn't tell me.

Q Mr. Schuler, do you recall testifying in the last trial before Judge Adams. Do you recall testifying as follows in answer to questions by the Court: Q "Was any demand ever made?" A "Why, he wasn't there to make a demand on; we didn't know where he was at the time." 10

Q "Then no demand was made. Was any attempt made to make a demand?" A "We did not know the man's address; we could not make a demand."

Q "You do not exactly answer my question?" A "No."

Q "Was any attempt made to make a demand? You observe the condition of the mortgage is it shall become due if the party of the first part pays on demand at the office of the Mutual Distributing Company the sum of \$682.82; having noticed this provision in the mortgage, I ask if a demand was made?" A "No, sir." 20

Q "And no effort was made to find him, you say?" A "No, sir." Did you so testify? A I might have testified to that.

Q I ask you if this is your signature, Mr. Schuler? (Showing witness paper.) A Yes, sir.

Mr. Bradner. Have you any objection to the interrogatories going in? 30

Mr. Reed. Not at all, if they all go in.

The answers to the interrogatories are marked Exhibit P. 2 and the interrogatories are marked Exhibit P. 3, and the answer marked Exhibit P. 4 and read.

Q Mr. Schuler, who attended the foreclosure sale? A Why, a man by the name of William Simons, of Long Island, and myself.

Q Is Mr. Simons a friend of yours? A Yes, sir.

Q Did anyone bid against you? A Why, if you want me to explain that I think I can explain it. 40

Q (*By the Court.*) No; did anybody bid against you? A No, I don't believe they did.

Q (*By Mr. Bradner.*) How much did you bid in the goods for? A I think it was \$600; that is what the sale shows.

Anthony W. Schuler, cross.

Q Mr. Schuler, you knew that Fred Mausert had left town?

A Yes, I think I was told so, I didn't know; no; I was told that he had left town.

Q As a matter of fact, Mr. Schuler, don't you know in whose automobile Fred Mausert left town in? A I do not.

10 Q Wasn't it your car? A No, sir; unless they took it unbeknown to me, possibly.

Q Where was your car on the 24th of June? A I don't recall that. They may have taken the car that belonged to the Mutual Distributing Company; I don't know anything about that.

Q Do you recall the testimony of my father on Thursday, in which he said that he called you on the 'phone and spoke to you in reference to the letter he sent to you, and you said that if Fred Mausert was going to act that way he would not get anything? A I recall that he made that testimony; yes.

20 Q Did you make that statement? A I think I did.

Q Mr. Schuler, what dividends were being paid? What was the amount of the dividend on your stock in 1913? A Seven per cent.

Q What was it during the ensuing year? A Seven per cent.

Q Still seven per cent? A Yes, sir.

Q Mr. Fred Mausert held a share of your stock? A I believe he did; he said so.

Q Well, don't you know? A I don't know whether he was
30 the holder of it, no; he said he lost it.

Q You knew he held it in 1913? A He was entitled to a share of stock; yes, sir.

By the Court.

Q How frequently were the dividends declared? A Every year, in the fall of the year, except last year, I think we skipped; the same thing on the following year.

Q Was a dividend declared in the fall of 1913? A Yes, sir.

Q What was the par value of your shares? A \$100.

40 Q So that the dividend in the fall of 1913 was \$7? A \$7 each hundred.

Q And the same in 1914? A Yes, sir.

Q And the same in 1915? A Yes, sir; the only dividend ever declared was seven per cent. dividend, which the secretary's book will show.

Anthony W. Schuler, re-direct.

By Mr. Bradner.

Q Mr. Schuler, did you see any of the vans containing the goods when they were taken to Arlington? A I saw some of the vans when they were loaded at the time I was at the Arion Hall.

Q You didn't see any delivered? A I don't remember when they were delivered. 10

Q You don't know what was in the vans? A I do not.

Q Did you know what goods were stored in Arlington? A I did; yes.

Q How did you know? A Took stock of them.

Q When did you take stock of them? A I don't just recall the day, a day or so afterward, or the same afternoon; I don't recall which.

By the Court.

Q You did that yourself? A Yes, sir, with assistance, of course. 20

Q Where was that done? A Done at Arlington, where the goods were stored.

By Mr. Bradner.

Q You kept them there for the Mutual Distributing Company? A Yes, sir.

Q You still have goods of Mr. Fred Mausert in your possession? A We have still goods on hand.

Re-direct examination.

Q Mr. Schuler, I think you said that on the 25th of June you had a conversation with Mr. George Mausert, in which he told you that his brother Fred had left town? A Yes, sir. 30

Q What else did he say? A Why, he spoke about owing us an account which Mr. George Mausert was responsible for, and he wanted to know whether he would not take the goods, or take a bill of sale for them. I told him I could not do anything of the sort until I had consulted counsel; I consulted you and you then went with me to the Hotel Broad and got in conversation with Mr. Mausert, and after he told you the circumstances you— 40

Q What did he say to me when you were there? A He told you that his brother had left town.

Q Did he say that? A Yes; because there was a warrant out for his arrest.

Anthony W. Schuler, re-direct.

Q What else did he say? A Well, he told us that he was responsible to us for the account, and he wanted us to take the goods, or a bill of sale, as I understood it at that time, and he then suggested a chattel mortgage would be best to secure our account.

10 Q Well, what was said about that. What else was said about the chattel mortgage, if anything? A Well, then you said, "How will we have this signed?" He said, "You can fix up the mortgage, and bring it or send it to me, and I will see that it will be signed."

Q Well, what did he say about the property in Arion Hall, about leaving it there or taking it from there? A He said it would have to be gotten out of there very soon, because there would be another month's rent due, and he wanted to get away before there would be another month's rent due.

20 Q Well, what did he say about the disposition? A I don't know what you mean by that.

Q Was anything said where it should be stores, or taken? A He asked me if I had any place to store it; I told him no, not here in Newark; I told him if he wanted to send it over to Arlington we had plenty of room over there to store it. He said, "All right, I will send it over there."

Q Well, did you see the chattel mortgage—when did you next see the chattel mortgage? A Why, the next morning, the 26th, I think.

30 Q You had not seen Mr. Fred Mausert in the meantime? A No, sir.

Q Do you know the attorney that executed the chattel mortgage? A I don't; never heard of him before that.

Q You said that George Mausert was treasurer up to the 18th of June, 1913? A Yes, sir.

Q What happened on the 18th of June? A We had our stockholders' meeting and election of officers on that date, which comes on the first Wednesday of June of each year.

40 Q The first or third? A The first or second. I am a little mixed up on that, I guess. I have it right here.

Q What are you looking at? A The by-laws; the constitution and by-laws.

Q Well, tell us when the annual meeting is held? A The third Wednesday of June.

Q That was the annual meeting? A Yes, sir.

Anthony W. Schuler, re-direct.

Q And you say that Mr. George Mausert was not re-elected?
A He was not; he sent in his resignation long before that, and it was accepted on that date, and Mr. Joseph Harginberg was elected in his place.

Q He was the treasurer? A He was the treasurer after Mr. Mausert.

Q Who is your present treasurer? A Joseph Mitchell.

Q I understood you to say that you took stock of the goods that came over to Arlington and were put in your storehouse? A Yes, sir.

Q And that you have sold all of the goods except those which you say were—the list you gave of those which you now have on hand? A Yes, sir.

Q And those you have sold appear in your book? A Yes, sir.

Q Did you receive any goods outside of those? A No, sir.

Q Did you receive any waiters' towels? A No, sir.

Q Dish towels? A No, sir.

Q Or roller towels? A No, sir.

Q Any linen whatsoever? A No, sir.

Q Any bottles of Mumm's Extra Dry? A No, sir.

Q Any liquors whatsoever? A None whatsoever; no.

Q Did you receive any door checks? A That I cannot really recall now; I don't think so, excepting they were on our list.

Q Well, did you receive Tungsten lamps? A No, sir.

Q Table spoons? A No, sir.

Q Or oyster forks? A No, sir; nothing of that sort at all. That was all, as I understood it, sent down to the Hotel Broad.

Q Did you receive gas and electric chandeliers? A No, sir.

Q Did you receive any box of carpenters' cabinet tools? A No, sir.

Q Or vulcanizing outfit? A No, sir.

Q Auto tools? A No, sir.

Q Auto tires? A No, sir.

Q (*By the Court.*) Wasn't there any silverware at all? A No, sir; that was sent to the Hotel Broad, as I understood it; I didn't see it sent there; it was packed by Mrs. Briggs, and I understood it was sent to Mr. George Mausert's place, or Mrs. Briggs may have gotten some of them; I understood she got some of them.

Mr. Bradner. I move that be stricken out.

Anthony W. Schuler, re-cross.

The Court. It will all be stricken out, except the answer "No, sir."

Re-cross examination.

10 Q When you were talking to Mr. George Mausert and Mr. Reed about the preparation of this mortgage, you left it to George Mausert to get it executed? A Why, I left it with Mr. Reed, and that is all I know about it; Mr. Reed, I presume, handed it to Mr. Mausert to have it executed; that was the understanding; my understanding.

Q The understanding was George Mausert was to get it executed? A Yes.

Q After the annual stockholders' meeting at which Mr. George Mausert was deposed as treasurer he still was a stockholder, wasn't he? A I should judge he was.

20 Q Well, you know he was. A I don't know; he might have sold his stock.

Q Would not the stock book show? A I should judge the stock book would show if it was transferred.

Q Did you know how long Mr. Fred Mausert was going to stay away from Newark? A I certainly did not.

Q Did you expect him to stay away very long? A I didn't know whether he was going to stay away long or not; I didn't know anything about it; I was told he had skipped; that was all I knew.

30 Q As far as you know he might have come back the next day? A He might have come back the next minute for all I knew.

Q And that was the reason you were in a hurry to foreclose? A I wasn't in any hurry to foreclose whatever. He understood we were going to sell the goods and get the money.

Q You did not communicate with him at all? A I did not communicate with him; I only heard from him through his brother.

40 Q Mr. Schuler, what became of that list that you made of the stock in Arlington? A I don't know; I think I have a copy of it there.

Q So you don't know what stock was there? A Yes, we have a copy of it there.

Q As a matter of fact, you don't know whether you received the linen, silver or anything else? A I know we did not receive linen.

Mabel Gilman, direct.

Q How do you know? A Because it was never sent over there.

Q How do you know it was not sent there? You made the list of it afterwards? A All right; I know it wasn't there, then.

Q It might have been there the day before? A It wasn't there the day before; it was sent to the Hotel Broad.

Q How do you know it was sent to the Hotel Broad? A Because I was told so by Mr. Mausert. 10

By the Court.

Q George, I suppose you mean? A George Mausert, yes sir.

By Mr. Bradner.

Q Mr. Mausert testified at the last trial? A Yes, sir.

Q For the defendant? A Yes, sir.

By the second juror.

Q Why was it you insisted on a chattel mortgage? Why did you take a chattel mortgage? A For the simple reason I was advised to by our counsel. 20

Q Were there other pressing creditors? A I guess there were other creditors there, yes; and we were glad to get a chattel mortgage to cover our account; that stands to reason.

Q What we principally want to know is, whether there was an urgent reason? A There were other creditors, we understood—the brewing company, and other people—and we were naturally glad to get a chattel mortgage to cover our account, which had been standing for a long while. 30

Q What did you understand this check for \$26 was for? A That was for the furniture account; after we had got our money and expenses we didn't want anything further out of it; we were glad to give him what we had there.

By the Court.

Q Regardless of the other creditors? A We had nothing to do with the other creditors.

MABEL GILMAN, sworn for the defendant. 40

Direct examination by Mr. Reed.

Q You are connected with the Mutual Distributing Company? A I am.

Mabel Gilman, direct.

Q And have been with them how long? A Eight years last November.

Q And in what capacity? A At present I am bookkeeper.

Q How long have you been in that position? A Why, I should think about three years I have had the entire charge
10 of the bookkeeping.

Q And prior to that? A I was assistant bookkeeper.

Q Do you now Mr. F. William Mausert? A Yes, I do.

Q How long have you known him? A Why, I guess almost from the time I first went with the firm.

Q Did you see him in between June 25th, 1913 and 1916? A No, I did not.

Q Did you see him in 1916? A Yes, early in January, I believe it was the 4th of January, looking at different records; I am convinced it was the 4th of January.
20

Q What time of day? A Between 12:30 and 1:30.

Q How do you fix that? A My lunch hour is between 11:30 and 12:30, and it was right after I returned from lunch.

Q Where did you see him? A He came in right after I returned. I was alone in the office at the time.

Q Did you have any conversation with him? A Yes.

Q What was it? A Mr. Mausert said that when he leased the Arion Palm Garden it was with the idea of renting out to various organizations and societies for social purposes, but after he had signed the lease—
30

Mr. Bradner. Objected to as irrelevant.

The Court. It is a conversation with the plaintiff; we haven't come to the relevant portion of it yet, perhaps.

A (Continued.) That organizations and committees would come and make reservations for this hall, but they would later find it had been constructed by non-union labor, and they would cancel the reservation; he said it was a losing game from the start, and to cover himself he had to turn it into a dance hall.

Q Was there anything further? Did you have any further conversation? A Well, just in reference to his brother.
40

Q And during the time he was there did Mr. Schuler come in? A Mr. Schuler came in later; he was there quite a while; he and I were there, well, about an hour I imagine, and Mr. Schuler came in.

Helen M. Freeman, direct.

Q What happened then, when Mr. Schuler came in? A He said he came down to see about his account.

Q Who said this? A Mr. Mausert.

Q Very well. A Mr. Schuler and he went into the general office, the private office, and after a while Mr. Schuler came out and said, "Let me see the books." I took the book from the safe to the main desk. 10

Q Where was the main desk? A In the center of the reception office.

Q Well, what after that? A Miss Freeman took the book from the desk to the inner office.

Q You did not go in? A No, I did not go in.

Q Did you do anything further while Mr. Mausert was there that day? A Well, do you want to know what Mr. Schuler did, or what I did? I did nothing else in reference to it at all.

Q (*By the Court.*) Did you hear any conversation between Mr. Schuler and Mr. Mausert? A I did not hear the conversation between them, no. 20

Q (*By Mr. Reed.*) Well, did you see any action? A I heard Mr. Schuler say, "Make out a check to cover the difference in Mr. Mausert's account."

Q This was not in Mr. Mausert's presence? A I don't remember that; I wouldn't want to say; I don't know; I don't remember whether Mr. Mausert came out or not.

Q Did you see Mr. Mausert when he went out? A I don't remember that.

Not cross examined. 30

HELEN M. FREEMAN, sworn for the defendant.

Direct examination by Mr. Reed.

Q Are you connected with the Mutual Distributing Company? A I am.

Q In what capacity? A Well, I am cashier and head of the office at present.

Q Did you have anything to do with the bookkeeping at any time? A I did. I was bookkeeper when I first went there. 40

Q Up to what date? A Well, I should judge for about five, six or seven years.

Q Up to when? When was the last date? A Well, that I can't remember; when I gave them up and Miss Goldman took them over.

Helen M. Freeman, direct.

Q How long ago was that? A Oh, perhaps three or four years.

Q Will you look at the ledgers there beside you and tell me whether you kept those books? A Yes, I did.

Q What is this book? A That is the sales book.

10 Q What does it contain? A Contains sales of the goods and chattels, F. W. Mausert, and other ones.

Q What is your method of bookkeeping with regard to this? What I mean is, are the items posted from here to the ledger? A Yes.

Q Is there any other book than these? A The cash book.

Q What does that show? A That shows cash that we received for goods that we sold.

Q Which one of these is it? A Well, there are two there.

(Books produced.)

20 *Mr. Reed.* I offer these books in evidence.

Mr. Bradner. I object if the Court please. I don't see how these books are relevant to the issue.

The Court. I am inclined to sustain the objection.

Mr. Reed. Of course, the part of the books that went before contains the account of the sale of these goods, and it was shown to the plaintiff.

The Court. I have not yet understood just what was shown to the plaintiff.

30 *Mr. Reed.* Possibly I will renew the offer after this witness has testified further on the subject.

Q Do you know Mr. F. W. Mausert? A I do.

Q And did you see him in 1916? A I did.

Q What part of the year? A The first of January; about the 4th.

Q Where was he? A At the office of the Mutual Distributing Company.

Q What time of day? A Well, when I saw him it was about half-past one.

40 Q How do you fix that time? A Because I go to lunch from half-past twelve to half-past one; when I returned he was there.

Q Who else was there? A Miss Goldman.

Q Anyone else? A Well, the young lady that went out with me at the lunch hour the same time I did.

Helen M. Freeman, direct.

Q Was Mr. Schuler there? A Not yet, no.

Q Did he come in? A He did.

Q And about what time? A I should think a quarter of two.

Q What happened then? A He and Mr. Mausert went into the private office.

Q What next happened, as far as you know? A Mr. Schuler asked for the books. 10

Q What did you do? A Took them in.

Q Took them in where? A In the inner office.

Q Who was there? A Mr. Schuler, Mr. Mausert and myself.

Q Well, what occurred then? A Mr. Schuler asked me to open the books and show Mr. Mausert his account. I did so.

Q What did you show him? A Showed him the account of the furniture we had sold.

Q Will you tell us on what page it is in this? A It is on pages 735 and 225.

Q 735 on one ledger and 225 on the other? A Yes, sir. 20

By the Court.

Q Those were the only books you showed him, the ledgers? A No, I showed him the sales book also.

Q Those are the only ones, the two ledgers and the sales book? A Yes, sir.

By Mr. Reed.

Q Did you show him the cash book? A No, he said he was satisfied with what he had already shown him; he didn't care to see it. 30

Q Well, after he had looked up this account, what was said, or did he say anything while you were looking at it? A Yes, he was satisfied with everything that had been done.

Q What did he say? A He said he was very well pleased with what Mr. Schuler had done for him and he showed him what the balance was, and Mr. Schuler said to him, "Would you like to have a check for the balance?" and he said, "Yes." He turned to me and said, "Miss Freeman, make out a check." I did so, and Mr. Mausert thanked him for what he had done for him. 40

Q What else? A He said he was very well pleased with what had been done.

Q And what happened then? A He came out and bid us good-by and went away very pleasantly.

Helen M. Freeman, direct.

Q Did he make any demand for what he said was his property at the time he was there? A No, he did not. Mr. Schuler asked him what he wanted him to do with the balance of the goods. He said, "You might as well keep them and sell them." Mr. Schuler said, "All right, whatever we get out of it we will give to you." He said, "All right," and went out.

10 Q You referred to a check; is that the one (showing witness check? A That is the one.

Q That is Exhibit P. 5. Well was anything said about dividends? A There was not.

Q Did either Mr. Schuler or Mr. Mausert mention the question of dividends? A They did not.

Q Now, turn to your book there. How does it appear that there was a balance due? A Well, because we had—

Mr. Bradner. I object to that, if the Court please.

20 *The Court.* She says this is the account that was shown to Mr. Fred Mausert, and the books now will be received. Exception to plaintiff.

Said books offered in evidence, being the sales book and two ledgers.

The Court. The ledgers should be marked on the pages referred to.

Said books are marked Exhibits D. 9, D. 10 and D. 11.

By the Court.

30 Q Do these books show the original account against Mr. Mausert? A Do you mean the merchandise he purchased from us?

Q Yes. A Yes, but not on this page; this is the furniture account.

By Mr. Reed.

Q On this page, 735, on Exhibit D. 10, what appears? A It shows the different people that we sold the goods to, and what we got for them as a total, itemized in the sales book.

40 Q Was that transferred anywhere? A Transferred to this ledger.

Q Showing balance carried forward? A Balance carried forward.

Q Balance of \$121.11? A No; the auditor told us we were running our account wrong, and we made a journal entry and transferred the account that Mr. Mausert owed us to here.

Helen M. Freeman, direct.

Q That is D. 9? A Yes, sir.

By the Court.

Q See here, Miss Freeman, the last item on the credit side of page 735 is \$121.11? A Yes, it was carried on here.

Q And your first item is \$121.11? A Yes.

Q Is not that a balance carried forward? A Yes, it was a journal entry; I don't know as you would just call it a balance. 10

By Mr. Reed.

Q It got into the other book, that is the point. How does it appear that there was a balance of \$26.53? A Because our account with F. W. Mausert was \$682.88, and there were other items that were charged against his account, such as sundry items for advertising, and the expense of Job DeCamp, Reed and Lynch account, sums which Mr. George Mausert authorized us to use and charge against the account at the time the goods were sold. 20

Q You did not talk to Mr. George Mausert, did you? A No.

Mr. Reed. We would like to withdraw that part of the answer.

Q You said they were charged against these various bills? A Yes.

Q What were they for? A Expenses.

Q Expenses in connection with what? A The moving of the goods. 30

Q What else? A I can't just tell you off-hand.

Q Where do they appear? A Well, they appear—they don't appear in these books we have here.

Q I show you some bills fastened together by a pin; what are they? A Bills that were given to us to pay in reference to the expense of this account.

Q Well, now, will you compare these items with the items of charge which you have in your account and tell us whether they are the same or not? Read them off as you compare them. A We have one here of Job DeCamp for the moving of the goods from Newark to Arlington of \$56, and he made us an allowance of \$6; we got them moved for \$50. Then we have one here from the Second District Court of the City of Newark for Mr. Lynch of \$30 for the foreclosing of the chattel mortgage. 40

Helen M. Freeman, cross.

Then we have another one of H. B. Reed for expenses and drawing up chattel mortgage; expenses and so forth. And then we also have one here of Mr. Mausert, turned in for labor of carpenters, etc.

10 Q How do those compare with the expenses that you say were charged there? A They compare with the expenses that we have charged there.

Q Were there any others? A Advertising and sundry items.

Q How much was that? A \$16.03.

Q Do you know what the advertising was? A The advertising of the goods we took under chattel, and were trying to sell them.

By the Court.

Q Where is that Mausert bill? A In with these items here.

20 Q You cannot show it to us? A I cannot show it to you because I haven't the—

Q Which items include that? A Reed, DeCamp and Lynch; they were all included together.

Q DeCamp and Reed and Lynch amount to exactly \$121.11, so how could anything else be included in that? A He had transferred from George E. Mausert \$80.53, which account was to be charged with.

Cross examination by Mr. Bradner.

30 Q Were you in the room all during the conversation between Fred Mausert and Mr. Schuler? A At the time that Mr. Schuler was showing Mr. Mausert the books I was there; I explained to Mr. F. W. Mausert.

Q Were you there all during the time Mr. Schuler and Mr. F. W. Mausert were talking? A Well, no, I wasn't; I wasn't there when they first met.

Q How long were you there? A That I can't state; long enough to do my duty.

Q How long was Mr. Fred Mausert with Mr. Schuler? A That I don't know.

40 Q Do you make out all the checks? A I do.

Q Do you make out dividend checks? A No, I do not; I make out the list that they are taken from, and oversee them.

Q Have you ever sent a dividend check to Fred Mausert? A I have.

Helen M. Freeman, cross.

By the Court.

Q Is there any book here from which you can tell the last dividend check you sent him? A I sent the last dividend check to him in 1915.

By Mr. Bradner.

10

Q What date? A I think it was in October.

Q Where did you send it to? A Glens Falls.

Q What was the amount? A Seven dollars.

Q Did you send a dividend check to him before? A I judge so.

Q Don't you know? A Well, I haven't the memory to remember, because we have a great many to send out, but if he is on the list, which he is, his check would go out.

Q Did you send him a dividend check in 1913? A I believe I did.

20

Q Have you the list of stockholders here that you sent dividend checks to? A No, I have not.

Q So you don't know whether you sent dividend checks or not in 1913 or 1914? A Well, if we did, he got one.

Q Did you send him one in 1916? A No.

Q Who instructed you to put the items of expenses, Mr. Reed's bill and Mr. Lynch's and the moving bill, in that ledger?

A Why, I judge Mr. Schuler.

Mr. Bradner. If the court please, I ask that the items of expenses that appear in these books be not admitted in evidence unless it is shown that Mr. Fred Mausert authorized them to go in. There is no proof of any authority from Mr. Fred Mausert.

30

The Court. The only ground upon which these accounts are admitted is that these accounts were shown to Mr. Mausert and that, according to the testimony of this witness, he expressed approval of the account, and, after examining the account, accepted a check for a balance, which is shown by these books. I don't think we are concerned at this time with the details. The books were admitted upon the question of ratification, to which you have already objected.

40

Marguerite Pearsal, direct.

MARGUERITE PEARSAL, sworn for the defendant.

Direct examination by Mr. Reed.

Q Where are you employed? A Mutual Distributing Company.

10 Q And how long a time? A Seven years last February.

Q What office do you hold? A Typist and billing clerk.

Q Who mails the letters? A I do that; I have charge of all the typewriting of all the letters.

Q I show you Exhibit D. 7 for identification; do you recognize that? A Yes, sir.

Q What is it? A Why, it is a letter telling Mr. Mausert—

Q Not what it is telling him; it is a letter, is it? A Yes.

Q A copy of a letter? A Yes, a copy of a letter.

Q Where is it taken from; where does the copy come from?
20 A Why, it is a copy of a letter that was given to me to write to Mr. Mausert.

By the Court.

Q Carbon copy or letter-press? A This is a carbon copy of a letter I wrote to Mr. Mausert.

By Mr. Reed.

Q I want you to tell us what you recall about that, if anything. Do you remember this particular letter? A Why, only that I write all the letters that go out.

30 Q And what do you do with them? A Why, I mail them, of course.

Q That is to say, you don't remember this particular letter, but you are speaking now of the custom? A I know that I sent this letter out.

Q How do you know that? A Only that I know I sent it, that is all I can say; I know I send out all letters; no one else has anything to do with it but myself.

Mr. Reed. Now, I will renew the offer.

40 *By the Court.*

Q Do you know where that copy came from? A Why, out of our files, I suppose; I file them.

Q Do you know? Not what you suppose. A What do you mean?

Helen M. Freeman, direct.

Q Do you know where that letter was taken from to bring to the court? A Why, out of our file, I presume.

Q Not what you presume. A Out of our file.

Q How do you know that? A Because at that time I was doing the filing also.

Q Did you take that letter out of the file yourself? A I don't know whether I took the letter out of the file myself; no. 10

By Mr. Reed.

Q I show you a list of articles; can you tell me what that is? A A list of the goods that we sold.

Q Did you copy that? A I typewrote this, yes; from a list that Miss Freeman gave me.

Q What became of it? A Little slips, I presume, that is the way they were, and I remember the making of them, and the writing of this—no, this is taken, I guess, from our ledger. 20

Mr. Bradner. I ask that this be stricken out.

The Court. It will all be stricken out. Don't "suppose" and "presume" things; you must testify only from your own recollection; if you don't know positively you should not state.

Q Did you write this? A Yes.

Q Do you remember what you wrote it from? A No, I do not.

Not cross examined.

30

HELEN M. FREEMAN, recalled for the defendant.

Direct examination by Mr. Reed.

Q Miss Freeman, I want to show you D. 7 for identification. Tell me, if you can, what you know about it? A I know that that letter was written in our office.

Q Where did it come from to bring it here? A Came out of our files.

Q Who took it out? A I did. 40

By the Court.

Q What kind of file? A We have an alphabetical file; each customer has a blank and all letters and correspondence are kept in their blanks, and this was taken from that.

Helen M. Freeman, direct.

Q How was that blank labeled? A "F. W. Mausert account."

Q And you personally took it out? A I did.

Q When? A At the time we started our trial.

By Mr. Reed.

10

Q Do you mean by that, last week or last year? A I mean in the beginning, when we started it; in the beginning of last year, when we were getting our evidence together.

Q What was done with it, so far as you know? A Why, it was taken out of the files and handed to you.

Q You did not hand it to me, did you? A No, I gave it to Mr. Schuler.

By Mr. Bradner.

20

Q Who put that in the file? A Why, Miss Pearsal.

Q Did you see her put it in? A She did all the filing at the time.

By the Court.

Q That does not answer the question. A Well, no, I didn't see her put it in.

Q You don't remember that you took it out? A I know I took it out.

By Mr. Reed.

30

Q Miss Freeman, I show you a list of goods and amounts; can you tell me anything about how that was made up? A It was made up from our ledgers.

Q By whom? A By Miss Pearsal.

Q What is it? A A copy of the account of items sold to the different people.

Q What items, of what? A Furniture, partitions, and so forth.

Q In connection with what account? A With the F. W. Mausert furniture account.

40

Said list marked D. 12 for identification.

Hugh B. Reed, direct.

ANTHONY W. SCHULER, recalled for the defendant.

Direct examination by Mr. Reed.

Q Mr. Schuler, I show you Exhibit D. 7 for identification; Miss Freeman says she gave it to you when you were in preparation for the last trial of this case; what did you do with it?
A Took it up to your office. 10

Q And what then? A Took it up to your office and handed it to you.

Mr. Reed. I would like to be sworn.

The Court. The mere fact that you had it, Mr. Reed, does not make any difference.

Mr. Reed. We offer this in evidence.

Mr. Bradner. I still object; having taken a copy from the files, she did not put it there, she did not know where that copy came from; it is very general testimony to go on. 20

The Court. I think when it has been shown that the letter has probably gone through the regular routine it is sufficient to admit it in evidence, and then whether or not it was mailed may possibly be shown by testimony that it was never received. Where the witness testifies that it was mailed because of the routine of the office, and not because of any personal recollection, I think the practice is that where it is shown that the letter probably has passed through the regular routine of the office to admit it in evidence. The letter will be admitted and an exception will be noted if you desire. 30

Said letter marked Exhibit D. 7 and read.

Exception to plaintiff.

HUGH B. REED, sworn for the defendant.

Direct examination by Mr. Harris.

Q Mr. Reed, on the 26th of June, 1913, you had a conversation with Mr. George E. Mausert? A Yes. 40

Q Where was that? A At the Hotel Broad.

Q Will you relate that conversation? A I went with Mr. Schuler to the Hotel Broad and there found Mr. George Mausert, who said that—

Hugh B. Reed, direct.

Mr. Bradner. I object to any conversation with Mr. George Mausert not had in the presence of Mr. Fred Mausert.

The Court. The objection is sustained.

10 Q What time was it, Mr. Reed, that you went to the Hotel Broad? A Between one and two.

Q How do you fix that in your mind? A I was engaged in the trial of a case here in the court house at that time.

Q Who was interested in that case? A Mr. Schuler.

Q And how did you come to go down to the Hotel Broad? A At his request.

Q And that was when? After court recess? A During court recess.

Q How long were you down at the Hotel Broad? A Ten or fifteen minutes, I should think.

20 Q Did you return to the court in the afternoon? A That is my recollection.

Q Was Mr. Schuler with you? A I think he was.

Q When did you leave the courthouse in the afternoon? A Some time during the afternoon; I cannot recall that.

Q Mr. Schuler was with you during the afternoon in court? A That is my recollection.

Q There is testimony on cross examination with regard to the chattel mortgage; what do you know with regard to this chattel mortgage, Mr. Reed? A Well, I prepared it.

30 Q Then what did you do with it? A I gave it to Mr.— I am not sure whether I sent it or not, so I can't say just what I did with it.

Q Did you have anything to do with the lawyer who executed it—before whom this chattel mortgage was executed?

A Nothing whatever.

Q Do you know the lawyer? A No.

Q When did you next see the chattel mortgage? A It was brought to my office the next morning.

Q What date? A The 26th of June.

40 Q Then what did you do with it? A Had it recorded.

Q What did you do—there is testimony on cross examination with regard to the foreclosure of this chattel mortgage—what did you have to do with that? A Well, it was brought to me to foreclose.

Hugh B. Reed, cross.

Q What did you do? A I employed a sergeant-at-arms for that purpose, after inquiring into the circumstances.

Q Did you make any demand, Mr. Reed? A No, because of the information I had received.

Q What was that? A That Mr. F. W. Mausert had left town in fear of arrest on a warrant, and they did not know where he was. Mr. George Mausert said he did not know, or could not tell, where he was; no use of notifying him, he had not been at the Mutual Distributing Company, the place where the mortgage was made payable. 10

Q Were you at the foreclosure sale? A I was not.

Cross examination by Mr. Bradner.

Q What time of day did you prepare that mortgage, Mr. Reed? A I think it was between twelve and one, or one and two; I think it was done at once, immediately.

Q Why was it drawn payable on demand? A Well, Mr. George Mausert said that his brother had gone—left town—and he suggested that we take a bill of sale for the property, and I thought it was more advisable to take a chattel mortgage, but it was expected that it would be foreclosed almost immediately, so it was drawn in that way. It was the intention of Mr. George Mausert—expected the mortgage to be foreclosed; they were taking the stock out of the place there; Mr. Fred Mausert, according to George, was not expected to return; he was gone and they were leaving this property. George Mausert was responsible to the Mutual Distributing Company, for he had guaranteed the account, said he was interested in seeing the bills paid, seeing that they got their money so that he would not be held for it; besides, he said the rent was coming due the first of the month and he wanted to get the stuff out of there. 20

Q Drawing up a mortgage payable on demand, did you not realize you had to make a demand for it? A Well, that is what the terms of the mortgage said; I did not realize it was necessary to make a demand, no; I am satisfied now that it is not necessary to make a demand if you cannot find the man to make a demand on. 30

By the Court.

Q Mr. Reed, when did you obtain the list that you put in the chattel mortgage? A Mr. George Mausert either said that he 40

Frederick W. Mausert, direct.

would give it to me, or send it to me; I don't know whether he gave it to me when I was in the Hotel Broad, or sent it up later in the afternoon.

Q And you had that put in? A I did, yes.

10 Q You received it from George Mausert? A I received it from George. I don't want your Honor to think I am saying I received it directly from him, but he spoke of sending it to me when we were down there. My recollection is, I was to go back to the trial of a case at two o'clock, so my arrangement was, if he did not give it to me he should send it to the office.

By Mr. Bradner.

Q You knew Fred Mausert was out of town at the time? A Yes, at least, that is, so his brother George said.

20 Q You knew he would not be back for some time? A That was the expectation; he was a fugitive from justice, from the information he gave me.

Q Why did you make it payable on demand if you knew those facts? A My expectation was the mortgage would be due at once.

DEFENDANT RESTS.

FREDERICK W. MAUSERT, recalled in rebuttal for the plaintiff.

Direct examination by Mr. Bradner.

30 Q Mr. Mausert, did you owe any rent at the time of this transaction? A No, sir.

Q Did you have any creditors at that time besides the Mutual Distributing Company? A Yes, quite a few.

Q Were their bills very large? A Oh, no; no, sir.

Q As much as the Mutual Distributing Company's? A No, sir.

Q Do you recall now who they were? A People I was dealing with.

40 Q Yes. Do you recall who they were? A Why, yes; Trefz Company.

Q Anybody else? A I dealt with some New York people—glasses, etc.

Q About how much did you owe these people, do you know? A I could not say that; the bill was very small. If you got

Alfred Hargan, direct.

anything from these concerns you would have to pay; they would not give you any credit.

Q You did not carry a large amount? A No, sir.

Q Mr. Mausert, do you recall when you executed that mortgage, signed it? A I don't quite understand.

Q Do you recall the execution of the mortgage? A Yes, sir. 10

Q Where did you sign it? A In Hoboken.

Q What time of the day? A I judge about five o'clock in the afternoon of June 25th.

Q Did you know at that time that your goods were being removed? A No, sir; I did not.

Q When did you first find out the goods were being removed?
A After signing—

Mr. Reed. I object to this.

The Court. The objection will be overruled. 20

Q When did you first find out your goods were being removed? A It was after five o'clock, June 25th.

Q How did you find out?

Mr. Reed. I object to that.

A Telephoning to my place of business.

Q Who did you talk to? A Mr. Mockler.

Q Did you know it was Mr. Mockler? A Yes, sir.

Mr. Bradner. If the Court, please, I would like to interrupt the witness a minute; I brought Mr. Hargan up from the prosecutor's office. 30

The Court. Very well.

(Witness withdrawn.)

ALFRED HARGAN, sworn for the plaintiff in rebuttal.

Direct examination by Mr. Bradner.

Q Are you connected with the prosecutor's office? A County detective attached to the prosecutor's office.

Q Were you holding that position in June, 1913? A I was. 40

Q Were you acquainted with Mr. Frederick William Mausert?

A I knew who he was, but I was not personally acquainted with him.

Q Were you acquainted with his place of business? A I was.

Frederick W. Mausert, direct.

Q Would you know if there were a warrant out for his arrest at that time, or not?

The Court. Could the detective know that, with all the committing magistrates throughout the county, until the papers actually came to the prosecutor's office?

10 *By the Court.*

Q You would not, would you, Mr. Hargan? A No, sir.

By Mr. Bradner.

Q Do you know whether there were any complaints made at the prosecutor's office? A I do.

Q Were there any complaints made about the way the business was run at the prosecutor's office? A No.

20 Q To your knowledge, then, there was nothing in the prosecutor's office against Mr. Mausert's business at that time? A Not to my knowledge.

Q Would you know if there were? A At that time, yes.

Not cross examined.

By the Court.

Q Would you know if the complaint came in? A Well, I would have to go further than just testify to complaints, at that time.

30 Q Were there before, or later? A No, but at that time what I was doing in the office would give me knowledge.

Q When, on June 25th? A Yes.

FREDERICK W. MAUSERT resumes the stand.

Further direct examination by Mr. Bradner.

Q Mr. Mausert, did you ever receive a letter from the Mutual Distributing Company containing a statement of any account with them?

40 *The Court.* I suppose what you ought to do is to show him that letter, isn't it?

Q Letter of May 1st, 1914, Exhibit D. 4; did you ever receive the original of that letter, Mr. Mausert? A No, sir.

Q Has the Mutual Distributing Company ever offered to return your goods? A No, sir.

Frederick W. Mausert, direct.

Q Have they offered to return the balance of the goods which they still have? A No, sir.

Q Have they offered to pay you for them? A No, sir.

Q Did you agree with them in any way to let them keep those goods and sell them? A No, sir.

Q When you went down to the Mutual Distributing Company in January, 1916, did you at that time know of this foreclosure? Did you know these goods had been foreclosed? A Yes, sir. 10

RECESS.

Q When did you first see the chattel mortgage in this case? A June 25th.

Q When on June 25th? A About five o'clock in the evening.

Q Where did you see it? A At Hoboken. 20

Q Was that the first time you saw it? A The first time.

Q Who showed it to you then? A Raymond Mausert.

Q Who is he? A A nephew of mine.

Q Whose son is he? A George Mausert's.

By the Court.

Q Where were you at that time? A In Hoboken—in New York City.

Q When he showed you the chattel mortgage? A In Hoboken. 30

By Mr. Bradner.

Q Whereabouts in Hoboken? A I could not tell you just where it was; in a lawyer's office.

Q Who brought you to Hoboken? A Raymond Mausert.

By the Court.

Q From New York? A Yes, from New York.

By Mr. Bradner.

Q Where did you first see Raymond on that day? A New York City. 40

Q Whereabouts? A My sister's home.

Q Did he come there? A Yes, sir.

Q What did he ask you to do?

Frederick W. Mausert, direct.

Mr. Reed. Objected to.

The Court. Objection sustained.

Q Did you send for Raymond to come there? A No, sir.

Q Did you know he was coming there? A No, sir.

Q Did you know anything about this mortgage until he came
10 there? A No, sir.

Q Had you talked about giving a mortgage at any time before this? A No, sir.

Q Mr. Mausert, do you recall coming to Newark in January, 1916? A Yes, sir.

Q Where did you go when you first came to Newark? Who did you go to see? A Went to Mr. Bradner's office.

Q What did you go there for? A In regard to—

Mr. Reed. Objected to as immaterial and also as incompetent.
20

The Court. The objection will be sustained.

Q Where did you go from there? A The Mutual Distributing Company.

Q What did you go there for?

Mr. Reed. I think it is immaterial what he went there for; I object to the form of the question.

The Court. I sustain the objection.

Q What did you do there? A Talked to Mr. Schuler.

30 Q What did you talk to Mr. Schuler about? A About my goods.

Q What did you say to him? A I said, "I demand my goods."

Q Anything else? A He said, "You can't have them."

Q Were you very friendly with Mr. Schuler? A No, sir; we had words.

Q Were you friendly with him when you went there? A Yes sir—Oh, you mean previous to going away?

Q When you left him after seeing him? A No.

40 Q Did you agree to any account while you were there? A No, sir.

Q Did he offer to return the goods he still had while you were there? A He did not.

Q Did he offer to pay you for them? A No, sir, he did not.

Frederick W. Mausert, cross.

Q Mr. Mausert, while you were staying at Mrs. Caldwell's, I believe—how long did you stay at Mrs. Caldwell's? A About two weeks.

Q While you were there did anyone call on you? A Yes.

Q Who called on you? A Mr. Raymond Mausert and Mr. George Mausert.

10

Q Was any demand made on you while you were there for the Mutual Distributing Company? A No, sir.

Cross examination by Mr. Reed.

Q Mr. Mausert, how old was Raymond Mausert in 1913, do you remember? A I don't know.

Q Do you know about how old he was? A About eighteen or twenty, I should judge.

Q You said that you had quite a few other creditors, but you owed no rent, as I understand? A No, sir.

20

Q You had a lease where you were? A Yes, sir.

Q Your rent came due on the first of the month? A No, on the 15th.

Q The rent came due on the 15th? A Yes, sir, as near as I can remember, the 15th of the month.

Q And what was your monthly rent? A Beg pardon?

Q How much? A Why, it varied; the first year—

By the Court.

Q In 1913? A In 1913 I think it was three hundred and fifty-four dollars and some cents a month; I would not say for sure, but I believe that is what it was.

30

By Mr. Reed.

Q How much did you owe Trefz' brewery? A I don't know.

Q Several hundred dollars? A No, sir, I am sure I did not.

Q You cannot tell us the amount? A No. I never owed a bill like that.

Q You owed the Mutual Distributing Company nearly \$700, didn't you? A Well, I don't think so; as nearly as I can remember I thought it was three hundred and something; it was quite a surprise to me when they presented this big bill I heard here in the testimony.

40

Frederick W. Mausert, cross.

Q Can you tell us any other people you owed? Did you owe any other people in New York? A No, I did not owe anybody in New York that I remember of.

Q Did you owe anybody else in Newark? A I might have owed a few little cigar bills.

10 Q Is that all? A Maybe a few little more bills; anybody that is in business owes some little bills.

Q You said you knew in January, 1916, that the mortgage had been foreclosed, did you not? A I knew that Mr. Schuler had my goods, yes.

Q You told us just before adjournment that you knew the mortgage had been foreclosed? A I don't quite understand. What do you mean, Mr. Reed?

Q (Question read.) You know what a mortgage is, do you not? A Yes, sir.

Q You know what a foreclosure is? A Yes, sir.

20 Q And you knew the mortgage had been foreclosed? A Yes, I did.

Q When did you first learn that? A Why, after the goods was taken out of the place of mine.

Q After they were taken out of your place? A Yes.

Q How soon after that was it? A After I found out the goods were removed.

Q I say, was it soon afterward you found out the mortgage had been foreclosed? A Yes.

30 Q Well, then, it was before you wrote this letter of April 27, 1914, which is marked D. 3? A This letter, do you mean, was sent before I knew—

Q No, the letter was sent after you knew, was it not? A Yes, sent after.

Q The letter was sent after you knew? A Yes, sir.

Q And you paid \$10 for the spotlight, didn't you? A Mr. Bird paid \$10; I didn't.

Q Well, he paid at your direction, didn't he? A Had to have it; why, yes.

40 Q He paid it at your direction? A Could not get it unless he paid for it? Mr. Schuler said he wanted \$10 I said, "Give him \$10." I wrote the note, "Give him the spotlight for \$10."

Q Well, prior to this letter of April 27th, you wrote this other letter, which I now show you, which is marked D. 4, did you not? A Yes.

Frederick W. Mausert, cross.

Q You knew the mortgage had been foreclosed at that time?
A Yes, I did.

Q That was the first time you had written to the Mutual Distributing Company, wasn't it? A I am not sure whether it was or not.

Q You had not communicated with them in any other way? 10
A I wrote them a number of letters, and no reply.

Q Have you any copies of letters you wrote them? A No, I have not.

Q Well, now, in January, 1916, January 4th, you said, you went to the Mutual Distributing Company? A Yes.

Q And said, "I demand my goods." A Order from my lawyer, Mr. Bradner, yes, sir.

Q And Mr. Schuler said you couldn't have them? A Couldn't have them, no, sir.

Q How long were you there? A Why, probably half an hour—about. 20

Q Was Mr. Schuler there when you went in? A I don't remember.

Q You don't know whether you waited there some time before he came? A I would not say that he was there or not, but he was there shortly after I was there.

Q Did you see Miss Goldman there? A I seen some of the ladies in the office.

Q Did you talk to them? A No, I don't remember talking to them; just asked for Mr. Schuler.

Q You did not say anything at all? A That was about all I said; I didn't know if Mr. Schuler was in the rear of the building, or where he was; but I seen him shortly after that. 30

Q Well, did you see Miss Freeman there? A Who is Miss Freeman?

Q Miss Freeman was one of the witnesses on the stand; showed you the books? A I don't remember. I remember seeing some ladies in the office when I was there.

Q Well, do you remember looking at the books? A No, sir, I do not.

Q You say that did not occur at all? A No, sir, I didn't. No books were shown to me. 40

Q You are sure none of those books were shown to you?
A Yes, sir, I am sure.

Otto J. Karst, direct.

Q Do you say Miss Freeman was not present with you in Mr. Schuler's office? A I don't remember.

PLAINTIFF RESTS.

10 OTTO J. KARST, sworn for the defendant in rebuttal.

Direct examination by Mr. Reed.

Mr. Reed. If your Honor please, I am not quite sure that this is strictly rebuttal; I want to show the payment of the dividend.

The Court. Of course, it would not be strictly in rebuttal. Any objection to it.

Mr. Bradner. I think the best way to show about the dividends would be to produce the cancelled checks.

20

Mr. Reed. We will produce the records and checks.

The Court. You may proceed.

Q Mr. Karst, are you the secretary of the company? A I am.

Q How long have you been secretary? A About nine years.

Q Which of these books is your minute book? A That one wrapped in the paper.

Q This? A Yes, sir.

Q Look in that, will you, and tell me the date of the declaration of dividends, and tell me the amount. January 1, 1913—
30 June 25th, 1913. A Do you want the date?

Q Yes. A September 9th, 1913.

Q What rate? A Seven per cent. for the year ending July 31, 1913.

Q Now, 1914? A September 8th, 1914.

Q What rate? A Seven per cent. for the year ending July 31, 1914.

Q 1915? A September 7th, 1915, seven per cent. for the year ending July 31, 1915.

Q Now, Mr. Karst, do you know anything about the payment of these dividends? A Only that the checks were mailed from the office.
40

Q Who does that? A To the stockholders. Miss Freeman.

Not cross examined.

Helen M. Freeman, direct.

HELEN M. FREEMAN, recalled in rebuttal by the defendant.

Direct examination by Mr. Reed.

Q Miss Freeman, who has charge of the payment of the dividend checks? A I do.

Q I show you a check dated September 30, 1915; what is that check? A That is a dividend check. 10

Q And what was done with that, if you know, and if you do not know, who will know? A Why, I do know.

Q What? A It was mailed out to Mr. F. W. Mausert for dividend for the year ending, with a card attached to it stating what it was for.

Said check offered in evidence and marked Exhibit D. 13.

The card attached is marked Exhibit D. 14.

Q Have you any other checks mailed to him and returned by him to the bank? A Unless there were other dividends. 20

Q It appears there were dividends in 1913 and 1914? A Well, I won't say that Mr. Mausert got his 1913 and 1914 dividend; just at that time we were having trouble over the bills, and where anybody owed a large amount to the Mutual Distributing Company the dividend checks were not mailed to them.

Q Do you know whether that was the case in this case? A I judge it was.

Q Well, do you know? A Yes, it was.

By the Court.

Q Was he credited with those dividends? A No, there was nothing done about it; they are still held there in the dividend account; if he paid his bills he would have gotten them. 30

Q You mean they still owe it to him? A Why yes; he still has it coming when his bill is settled.

By Mr. Reed.

Q I show you a check dated September 18th, 1912, for \$7. A That was the dividend he received.

Q What year? A 1912. 40

Said check offered in evidence.

Objected to as immaterial.

Objection sustained.

Anthony W. Schuler, direct—cross.

Q I notice that in Exhibit D. 13, the word "dividend" is written across the front of the check; what have you to say about checks for dividends? A All checks for dividends are printed with the word "dividend" on them in gold print.

Cross examination by Mr. Bradner.

10 Q Have you any record of the 1916 dividend check? A It was not sent to him; no.

Q That makes 1913, 1914 and 1916 that were not sent to him?

A I won't say positive that they were not sent to him, but I don't think they were.

Q You have no record of their being sent? A No.

ANTHONY W. SCHULER, recalled for defendant in rebuttal.

Direct examination by Mr. Reed.

20 Q Mr. Schuler, Mr. Mausert says that in January, 1916, when he came to your office he demanded of you the return of the goods which he claimed as his? A Positively, he did not; if he did he would have gotten them by paying the rent due on them.

Q And he says you refused to give them on his demand? A Positively not.

Cross examination by Mr. Bradner.

Q Did you give him the goods you still had? A He could have the goods by paying the rent due on them.

Q Did you offer them to him? A Yes, sir.

30 Q What did you say to him? A I told him he could have the goods that were left; we had our money.

By the Court.

Q I understand you say these goods which you still have on hand are still subject to his order? A They are, if he pays the expenses on them.

Q What is that? A I can't tell until I see the rent on them.

Q How much? A Well, I should judge \$5 a month rent.

Q For six years? A For six years.

40 *By Mr. Bradner.*

Q \$300? A About that.

Q That is all. A And for expenses for cartage and so on; the delivery of these goods after we sold them; we never charged him a cent for that.

Frederick W. Mausert, direct.

Q How is that? A As these goods were sold from time to time to various parties they were distributed by the Mutual Distributing Company; he never paid a cent for that.

Q Why did you deliver them? A We had to deliver them, didn't we?

Q And that you have charged to Mr. Mausert? A It has not been charged up yet. 10

Q But you expect to? A I think we are entitled to it.

DEFENDANT RESTS.

FREDERICK W. MAUSERT, recalled for the plaintiff in rebuttal.

Direct examination by Mr. Bradner.

Q Mr. Mausert, when did you first know that a constable's sale had been held of these goods? A I could not tell, Mr. Bradner, when I did hear that; I was informed that Mr. Schuler had taken my goods, and in order to get them I would have to get them through him. 20

Q Did you know a constable's sale had been held? A My brother George told me—

The Court. Is that just right? Constable's sale?

Mr. Bradner. I don't think he quite understands what is meant by foreclosure.

Q What is foreclosure? A Why, simply anybody that holds your goods and sells them. 30

Q When did you first know your goods had been foreclosed?

Mr. Reed. We went over that.

A I could not say that; I could not say when.

Q Had anybody told you about it— A Brother George, yes.

Q When did he tell you about it? A Why, it was the following Monday after the 25th; Sunday or Monday.

Q Did he tell you the goods had been foreclosed? A He said Mr. Schuler had the goods; they belonged to him; that I had signed papers. I said, "What papers?" He said, "The papers you signed at Hoboken gave Mr. Schuler the right to all your goods." 40

Not cross examined.

PLAINTIFF RESTS.

TESTIMONY CLOSED.

Motion for Direction of Verdict.

Mr. Reed. I move for the direction of a verdict. The complaint is breaking and entering the Arion Palm Garden and removing therefrom some property by the defendants. The second count is similar to the first.

10 *The Court.* Breaking and entering? It says the defendant wrongfully took the goods and chattels in the possession of the plaintiff and has ever since wrongfully retained them. The second count is that he broke in.

Mr. Reed. And the third count is that they made fraudulent representations.

The Court. There is no proof under the third count. You do not contend that, Mr. Bradner, do you? And you do not contend that you can recover under the second count.

20 *Mr. Bradner.* There is no evidence that they went in there with any authority. All the proof is that no order was given the Mutual Distributing Company, and they went in there and cleaned the place out. That is all the proof we can offer.

(After discussion.)

The Court. If you wish to state your reasons, you may do so.

30 *Mr. Reed.* The reasons are it appears from the testimony that there was no wrongful taking of these goods; they were sent by George Mausert to Arlington, and there received by the defendant; but there certainly was nothing wrongful in it; when they were received the chattel mortgage was executed and delivered, and the chattel mortgage was subsequently foreclosed, and subsequently, with full knowledge of the foreclosure, the plaintiff went to the office of the Mutual Distributing Company and received a check.

40 *The Court.* As a matter of fact, as I now view this case, the foreclosure proceedings are of very little consequence. The theory of the plaintiff is that you went there and took these goods. Your theory is that you did not take them at all; had nothing to do with the taking, except subsequently paid the bill for moving them; Mr. Schuler says, for George Mausert; unless it be suggested that because of the subsequent signing of the chattel mortgage by Frederick Mausert, he condoned the wrongful taking; what do you think about that?

Mr. Reed. I think if there was any wrongful taking it was on the part of George Mausert.

Charge to Jury.

The Court. My suggestion is that that is the point in the case, and that the question of the foreclosure of the chattel mortgage is of very little importance in the case.

Mr. Reed. It has, perhaps, this bearing on the case, that subsequently, after the goods had been delivered, in order to enforce their right under it, they did foreclose it, which would give them the right to retain the goods. 10

The Court. What is your view of that, Mr. Bradner?

Mr. Bradner. The foreclosure would not cut any figure in the case if we relied entirely on the wrongful taking, but it would cut a figure if the taking was right; then the foreclosure would come in, because the foreclosure itself was illegal and constituted wrongful taking at that time; the foreclosure was made before demand was made.

(Argued.) 20

The Court. The motion is denied.

An exception to this ruling is noted by the defendant as ground of appeal.

Mr. Bradner. I move for the direction of verdict in favor of the plaintiff on the ground, first, that no demand was made before the removal of the goods or before the foreclosure of the mortgage. Second, the defendant has not pleaded ratification, and he has not proved that the plaintiff had full knowledge of the whole situation and of the facts surrounding the case at the time of the alleged ratification. Third, I ask for a direction of verdict for the plaintiff for the value of the goods still in the possession of the defendant. 30

The Court. The motion will be denied.

Exception to plaintiff.

Counsel summed up.

The Court charged the jury as follows: 40

DUNGAN, J.

Gentlemen: This is a suit brought by Frederick William Mausert, the plaintiff, against the defendant, the Mutual Distributing Company, to recover the value of certain goods and

Charge to Jury.

chattels which it is alleged the defendant, through Mr. Schuler, its president, wrongfully took from the Arion Palm Garden, on Washington street, in Newark, of which the plaintiff was formerly proprietor, on the 25th day of June, 1913. The plaintiff claims the value of these goods, in his complaint, to be something over seven thousand five hundred dollars. From the argument
 10 it would appear that a considerable amount less than that is now claimed, because of certain goods which admittedly went to some other place, particularly the liquors, which, it is admitted the evidence shows, went to the Hotel Broad. The plaintiff claims, as I have already stated, that these goods were removed from the Arion Palm Garden by the defendant, the Mutual Distributing Company. The evidence on the part of the plaintiff is largely circumstantial; that is, there is no one who testifies in this case on behalf of the plaintiff who says that anyone authorized to speak for the Mutual Distributing Company authorized
 20 the removal of those goods. But the plaintiff relies upon the circumstances which surrounded the taking of these goods, and which have been mentioned in the argument, but a few of which I shall mention in the charge.

Mr. Bulgrien says he is an employee of Job De Camp, the mover, the carter, and he says that he received an order to remove the goods from the Arion Palm Garden to the Arlington House, Arlington. He says, "To clean it out." He says they sent their vans there, and that there were eight van loads. That they did load up these vans and take them to their own place,
 30 and stored them overnight. Witnesses on behalf of the plaintiff say that Mr. Schuler was there during the taking and loading of these goods. And Mr. Schuler says that in whatever was done he represented the Mutual Distributing Company. They say he was there in consultation with George Mausert, the brother of the plaintiff. But right here I want to say that, although George Mausert has been very much in evidence in this case, and though at one time he was the treasurer of the Mutual Distributing Company, but had ceased to fill that office, it does not appear that he was an officer or director or had any connection with the
 40 Mutual Distributing Company except as a stockholder of that company. And there is no evidence from which you would have a right to infer that he was authorized to speak and to bind the Mutual Distributing Company any more than you would have a right to find, if it be true, that he was responsible to the Mutual Distributing Company for this debt of his brother;

Charge to Jury.

that he was acting in his own behalf in order to secure his own debt or secure a debt for which he was responsible; even though you find that what he did was not in the interest of his brother; even though you find that what he did he did unlawfully; if you find that he had any part in it. Not only was Mr. Schuler present, according to the plaintiff's witnesses, when these goods were being removed, but it appears that the very vans which removed these goods were paid for by the Mutual Distributing Company. And not only that, but these goods were taken in these vans to property occupied by Mr. Schuler in Arlington. 10

These facts standing alone, if they did stand alone, would be facts from which you should draw inferences. It is not for the Court to draw the inferences; and if those facts stood alone, uncontradicted, it would be for you to say whether or not they did not warrant the inference that all of the goods taken out in these vans were taken out by the Mutual Distributing Company. It is an admitted fact, as has been suggested, that all the liquors which is included in the amount claimed, the proofs in this case show, was taken to the Hotel Broad. Mr. Mockler says that, and Mr. Schuler says that many of the goods for which claim is made were not taken to Arlington. For instance, he said that he made an inventory late that afternoon; that is, late in the afternoon of the 26th, I understood him to say, the goods arrived there, or perhaps later than that; I think he is not quite sure about that; and there is some suggestion that it was within a week. He says there were no waiters' towels or any linen whatever. Quite a large portion of this bill is made up of these articles. No liquors, no Tungsten lamps, no table spoons, oyster forks or any silverware of any kind; no gas or electric chandeliers; no box of tools, or vulcanizing outfit, or auto tools or tire shoes; that those goods did not come to the Arlington place at all. Of course, if these things, or any other things, were taken by George Mausert or some other person, if they were not taken by the Mutual Distributing Company, or its order, then, for those goods the Mutual Distributing Company should not be held responsible in any event, even though you should find that they are responsible in this case for the goods they did remove. 20 30 40

Unless it appears by the greater weight of the evidence that the Mutual Distributing Company wrongfully took these goods, there can be no recovery for the original taking from the Arion Palm Garden. Mr. Schuler denies that these goods were taken.

Charge to Jury.

10 He says he was around there in the afternoon, but that he had nothing whatever to do with the taking of these goods. He says he was around there between four and five o'clock; that he had, earlier in the day, between one and two o'clock, met George Mausert at the Hotel Broad, having gone there with Mr. Reed. George reminded him, he says, that he, George, was security, or responsible to the Mutual Distributing Company for the goods which his brother Frederick had purchased, and he says that he asked him to take a bill of sale for the goods, and that Mr. Reed, who was then present, suggested a chattel mortgage; that George then said to draw it up and he would have it signed. Mr. Reed did draw it up and it was sent to George to be signed, and returned to Mr. Reed the following morning. However, we will speak of that presently.

20 Mr. Schuler says that George told him he wanted the goods out of Arion Hall before another month's rent became due; and Mr. Schuler says he told him that his brother Fred had other creditors. That is admitted, but Fred said they were of small amounts and there was no rent then due. Mr. Schuler says George asked him if he had any room to store these goods, and he replied, "No, not in Newark, but I have plenty of room over in Arlington if you want to send the goods over there," and he says, "All right, we will send them over there," and he says that beyond that he had absolutely nothing to do with the taking of these goods out of the Arion Palm Garden. If that be true, that that was the only connection had with the taking of these
30 goods out of the Arion Palm Garden by Mr. Schuler, as representing the Mutual Distributing Company, then, as I have already said, there can be no recovery for the original taking from the Arion Palm Garden of these goods. So, even if you find that they were wrongfully taken, if you find that the plaintiff, with full knowledge of what had been done, gave to the defendant a chattel mortgage on these goods, that would be a circumstance from which you would have a right to infer that he had waived any right to recover for such wrongful original taking. He denies that he had this full knowledge; but even
40 under these conditions he would have a right to expect that if the chattel mortgage would be foreclosed and the goods sold under it, that that should be done with that formality which the law requires. There seems to be no question but that the foreclosure of the chattel mortgage was entirely regular, with one

Charge to Jury.

exception. The chattel mortgage given was made payable on demand. The law does not require a court proceeding to foreclose a chattel mortgage. A chattel mortgage may be foreclosed upon demand and notice to mortgagor and posting of notice of public sale in five or more public places in the municipality in which the goods are to be sold, and selling them at public sale. All these things were done, except the demand and notice, and it is admitted that no demand and notice were served. But Mr. Schuler says that they could not serve demand and notice; the plaintiff had run away and he had gone away admittedly for the purpose of concealing himself, to avoid what he had been told was a criminal process against him. Mr. Schuler says he went to George to inquire where he might serve demand, and George refused to tell him; he inquired of his wife; he says he did not know where the two sisters were; that these were the only people of whom he knew to inquire; and under those circumstances, it has been held in this very case, that is, you have heard during this case that it has once before been tried, and upon review of that trial the highest court of the State has held in this very case that, even in the case of a chattel mortgage payable on demand, a lawful notice of intention to sell the articles—and that was given in this case—for the purpose of making the debt, is equivalent to demand for payment, when, as here, the mortgagor has rendered an actual demand impossible by his flight and concealment. So, if you find in this case that the plaintiff by his flight and concealment rendered the service of demand and notice upon him impossible, then the defendant was not obliged to serve any such notice and demand; and in that case, since there is nothing else in this case irregular about the foreclosure of the chattel mortgage, the plaintiff would not be entitled to your verdict because of any irregularity in the foreclosure of the chattel mortgage. But, in addition to that, the defendant claims that the plaintiff has ratified all this. Even though the original taking was wrongful, and even though you do not find that the plaintiff by his flight and concealment had rendered demand and notice impossible; because it appears, according to this testimony, that he knew of the foreclosure, or that the defendant had taken possession of these goods shortly after the defendant had so taken possession. It is suggested that the plaintiff does not understand the force and effect of the use of the word

10

20

30

40

Charge to Jury.

10 “foreclosure”; but when he is asked to define what it means
 and he says, “the taking and selling of the goods,” he has very
 nearly correctly defined the procedure for the foreclosure of a
 chattel mortgage, which does not, as the Court has stated, require
 any judicial court procedure. Therefore, if you find that he
 understood when he stated that he knew of the foreclosure of
 this chattel mortgage shortly after it was foreclosed, it will
 be for you to say whether or not he ratified it. And for rati-
 fication the defendant relies upon a letter which was written
 with reference to a spotlight. He sent a Mr. Bird, who was
 associated with him, down to get a spotlight; and the defendant
 told Mr. Bird that he could have the spotlight for \$10. That
 thereupon another letter was written by the plaintiff, which
 was sent to the defendant, authorizing them to give Mr. Bird
 the spotlight for \$10, and authorizing Mr. Bird to pay. In
 20 addition to that, it appears that on the fourth day of January,
 1916, according to the testimony of the defendant, the plaintiff
 came down to Newark, and went to the office of the Mutual Dis-
 tributing Company, and, according to the testimony of Miss Free-
 man and Mr. Schuler, the matter of the account between the
 Mutual Distributing Company and him was discussed. Of course,
 the Mutual Distributing Company was not obliged, having pur-
 chased these goods at public sale at less than the amount of its
 claim, if the sale was entirely regular, to ever account to Mr.
 Mausert for any of these goods. They were not obliged to do
 that at all, but Mr. Schuler says that all they wanted was their
 30 money, and after they had purchased these goods, bought them
 in bulk, he says they advertised them for sale, charging the
 expense of the sale and advertising against the account, and by
 the time Mr. Mausert came down there on the 4th day of January
 they had sold a sufficient quantity of these goods to pay all
 expenses, pay their own debt and had some \$23.56 left over.
 They say that the books of account were shown to Mr. Mausert
 and that he went over these books and expressed himself as
 satisfied, thanked Mr. Schuler for what the Mutual Distributing
 Company had done for him, and received this check in settle-
 40 ment; and Mr. Schuler then told him there were some other
 goods there belonging to him, and that he could have them and
 asked what to do with them, and he told Mr. Schuler to take
 those goods and sell them for him. Mr. Mausert denies in
 detail that any such conversation took place. He says that when

Charge to Jury.

he went down there on this 4th day of January that he demanded his goods, and Mr. Schuler said, "You can't have them"; that they had words about it; that he did not agree to anything, and Mr. Schuler did not agree to return the goods that were still there, or to pay for them. He also says that the check which he accepted was to be a dividend check. It is admitted he did not receive the dividends upon the one share of stock in the years 1913, 1914, which would be \$14, but he did receive the dividend check in 1915, and that is produced; and the testimony is that the word "dividend" appears on that all-dividend check. According to the testimony of the defendant, there would not have been due him at that time more than \$14 by way of dividends, even though this check had been intended to include dividends. 10

It will be for you to say from all the circumstances of the case, even though you do not find the sales to have been entirely regular, whether or not the plaintiff, by his acts, ratified what had been done by the Mutual Distributing Company. 20

Unless you find that the original taking was wrongful, and unless you find that the sale under the chattel mortgage was wrongful by reason of failure to give the notice, then the plaintiff would not be entitled to your verdict; and not even then if he has ratified any of these irregularities by what he subsequently did.

If you find that the evidence preponderates that the original taking was wrongful, or that the sale under the chattel mortgage was irregular, and that the plaintiff has not ratified the irregularity, then you would come to the question of damages. The damages which the plaintiff would be entitled to recover would be the value of the goods at the time of the wrongful taking or the wrongful selling. You have nothing here but cost price. But many of these goods had been used for three years. A total value, as I say, has been testified to, of seven thousand five hundred and some odd dollars. In the first place you have to find, if you can, by the evidence—of course, if you cannot find by the evidence the value of the goods that were taken, by the proofs here in the case, then your verdict should be for nothing more than nominal damages. Damages must be proven. But if no particular damages are proven, then cost price, less what would be a proper depreciation for age and wear, would be the measure of damages. Now, what is that? You must consider 30 40

Charge to Jury.

the business and use which these goods had had. The list is attached to the complaint which you will have with you. These goods consisted of things, generally, which are used on the tables; they consisted of chairs, writing desk, bar glasses and fixtures, and three pages of articles here; you may look them over if you get that far in the case. The plaintiff says that glassware, dishes and things of that sort were kept renewed; that is, as they were broken they were renewed and the number kept intact. But the situation with reference to the glassware and crockery should not apply to chairs and furniture, which depreciate greatly with wear, and particularly with that character of wear which they would probably have in a place of that kind. All of these things you must take into consideration in determining the value, if you decide the plaintiff is entitled to your verdict; the cost price, the length of time they had been in use, and the character of use they had had, and determine from those, if you can, the amount of damage.

You may retire.

(Jury retires.)

Mr. Reed. I pray exception to what the Court said on the question of damages.

The exception is noted by defendant as ground of appeal.

Exhibit P. 1—B.

EXHIBIT P. 1 B.

L. D. Phone 432 Market

Local Phone 293

JOB DE CAMP, INC.

Established 1850

A M

P M

Moving Order

10

32 and 34 William Street

Newark N J June 25-13

Name Mr. A. W. Schuler

From Arion Palm Garden

Washington St.

To Arlington House

Devon St.

@ Arlington St.

Over Bowling Alleys

Vans

7.00

20

Talmage

1 load

tables & chairs

Talmage

Piano

No hoist

Hoist one way

Hoist both ways

Collect No

Paid

Performed by

30

This is to certify that the above work was done without damage

Signature A. W. Schuler

Receipt from

Henry

Job De Camp, Inc.

Per.....

Note—Exhibits P. 1 A, P. 1 C, P. 1 E, P. 1 F, P. 1 G, P. 1 H
are similar to P. 1. B.

40

Exhibit P. 1—D.

EXHIBIT P. 1 D.

L. D. Phone 432 Market

Local Phone 293

JOB DE CAMP, INC.

Established 1850

10 A M
P MMoving Order
32 and 34 William Street

Newark N J June 25-13

Name Mr. A. W. Schuler

From Arion Palm Garden

Washington St.

To Arlington House

Devon St.—Rear—

Arlington, N. J.

20 Over Bowling Alleys
Vans

1 load \$7.00

Piano No hoist
Hoist one way
Hoist both ways

Brumm

Collect No

Paid

Performed by

This is to certify that the above work was done without damage

Signature A. W. Schuler

30 Receipt from Henry

Job De Camp, Inc.

Per.....

Exhibit P. 3.

EXHIBIT P. 3.

INTERROGATORIES.

To Mutual Distributing Company, Defendant:

The following interrogatories are propounded to you by the plaintiff, and you are required to answer the same under oath and serve your answer on the attorney of the plaintiff within ten days after service hereof upon you. 10

2nd Interrogatory: Did the defendant give instructions to the attorney in relation to the preparation of the mortgage, and if so, who acted for the defendant in giving the instructions, and when were they given?

3rd Interrogatory: Did the defendant before making sale under the chattel mortgage make any demand on the plaintiff for the money claimed to be due to the defendant? 20

4th Interrogatory: Did the defendant before making sale of the chattels under the mortgage, make any effort to locate the plaintiff so as to make a demand for the money, and if so, what action did the defendant take and to whom did it apply for information?

5th Interrogatory: Did the defendant direct the constable to make a demand for the money before advertising the property for sale under the mortgage?

6th Interrogatory: Was the defendant advised by its attorney that a demand for the money was unnecessary, and did the defendant for that reason proceed to advertise and sell the chattels under the chattel mortgage without making a demand? 30

7th Interrogatory: Did the defendant pay the expense of removing the chattels from the plaintiff's place of business on Washington Street in the City of Newark to Arlington?

8th Interrogatory: Did the defendant direct any person or persons to take out the goods and chattels from the plaintiff's place of business and carry them to Arlington?

9th Interrogatory: Did the defendant know when the chattels were being taken out of the plaintiff's place of business, that George E. Mausert was having the chattels taken away, and had the defendant made any arrangement with George E. Mausert to have the same taken to Arlington? 40

Exhibits P. 4—P. 2.

10th Interrogatory: Did the defendant request George E. Mausert to have the chattels taken from plaintiff's place of business, and to get a mortgage thereon from the plaintiff to secure the payment of the plaintiff's indebtedness to the defendant.

10 Dated September 24, 1918.

Yours truly,

PALMER BRADNER,
Attorney of Plaintiff.

EXHIBIT P. 4.

Answer to Second Interrogatory.

20

Yes; Anthony W. Schuler; June 25, 1913.

REED & REYNOLDS,
Attorneys of Defendant.

Service of the within answer is hereby acknowledged this 15th day of October, 1918.

PALMER BRADNER,
Attorney of Plaintiff,
Per F. E. Bradner.

30

EXHIBIT P. 2.

Answer to Third Interrogatory.

Yes. The payment of the sum due was demanded before the execution of the chattel mortgage and the mortgage was given to enable the defendant to collect the same. No demand was made after the making of the mortgage because plaintiff had
40 left Newark before the mortgage was given, and defendant could not learn his whereabouts then or until several months after the mortgage was foreclosed.

*Exhibit P. 2.**Answer to Fourth Interrogatory.*

Yes. Inquired of George E. Mausert, brother of defendant. Learned by investigation that plaintiff was not at the place where he had been in business in Newark nor at the place that he had resided in that city. Information as to his whereabouts was refused.

40

Answer to Fifth Interrogatory.

No. Defendant was unable to find plaintiff. Could not tell constable where to look for him, in order to make the demand. Plaintiff was not at the office of defendant at any time between the delivery of the mortgage in June, 1913, and January, 1916.

Answer to Sixth Interrogatory.

No. Defendant gave the chattel mortgage to its attorney with directions to foreclose it. Defendant informed its attorney that it was informed that plaintiff had left Newark; that it had been said that there was a warrant out for plaintiff's arrest; that he had learned of it and immediately gone from Newark and had not returned; that the place where plaintiff had been in business was closed; that George E. Mausert, brother of plaintiff, would not tell where plaintiff was; that defendant knew of no way to locate plaintiff.

20

Answer to Seventh Interrogatory.

No. But at the request of George E. Mausert it paid the bill of Job De Camp, Inc. rendered to Mausert for the transportation for that part of the goods sent by him to Arlington.

30

Answer to Eighth Interrogatory.

No.

Answer to Ninth Interrogatory.

Defendant knew before all of the chattels were removed that George E. Mausert was taking out and removing certain chattels from the place of business of the plaintiff and Mr. Anthony W. Schuler, president of the defendant, consented to permit the storage of some goods in Arlington temporarily.

40

Exhibit D. 1.

Answer to Tenth Interrogatory.

No.

Dated—Oct. 2, 1918.

REED & REYNOLDS,
Attorneys of Defendant.

10

Service of the within answer to interrogatories is hereby acknowledged this Third day of October, 1918.

PALMER BRADNER,
Attorney of Plaintiff.

EXHIBIT D. 1.

20

FRANK E. BRADNER
Counsellor at Law
Essex Building
Newark, N. J.

Sept. 20, 1916.

Mutual Distributing Co.,
55 Lafayette St., City.

Gentlemen:—

30 In the latter part of June, 1913, the place of business of Frederick W. Mausert, known as Arion Hall, on Washington St., in this City, was entered by some persons and all his personal property, consisting of furniture, glassware, china, crockery, stock of liquors, movable fixtures and partitions, electric fans, table linen, silverware and numerous other things, were removed.

My information is, that these articles were taken to your place of business and were disposed of by you. This was done without the knowledge or consent of Mr. Mausert.

40 Among other things taken, was a certificate of stock in your company. Mr. Mausert has authorized me to take such action as may be necessary to recover the value of the property that was taken away, and also to recover the damage done to him by being deprived of his business.

Exhibit D. 2.

This is a very important and serious matter, and before taking any action I would like to see some representative of your Company.

Yours truly,

FRANK E. BRADNER.

10

EXHIBIT D. 2.

KNOW ALL MEN BY THESE PRESENTS:

That I, FREDERICK W. MAUSERT, of the city of Newark, in the County of Essex, and State of New Jersey, party of the First Part, for securing the payment of the money herein mentioned, and in consideration of the sum of One Dollar to me duly paid by MUTUAL DISTRIBUTING COMPANY, a corporation of New Jersey, having its principal office in the city of Newark, in the County of Essex, and State of New Jersey, party of the Second Part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell, unto the said party of the Second Part, its successors and assigns, all the goods and chattels mentioned in the schedule hereunto annexed and now in Aeron Palm Garden, No. Washington Street, Newark, New Jersey.

20

To have and to hold, all and singular the said goods and chattels above bargained and sold or intended so to be, unto the said party of the Second Part, its successors and assigns, forever. And I the said party of the First Part, for myself, my heirs, executors and administrators, all and singular the said goods and chattels above bargained and sold, unto the said party of the Second Part, its successors and assigns, against me the said party of the First Part, and against all and every person or persons whomsoever shall and will warrant and forever defend.

30

Upon Condition, that if I the said party of the First Part, shall and do well and truly pay unto the said party of the Second Part, its successors and assigns, on demand, at the office of said Mutual Distributing Company, in Newark, N. J., the sum of SIX HUNDRED AND EIGHTY-TWO Dollars and Eighty-eight cents, then these presents shall be void. And I the said party of the First Part, for myself, my heirs, executors, admin-

40

Exhibit D. 2.

istrators and assigns, do covenant and agree to and with the said party of the second part, its successors and assigns, that in case default shall be made in the payment of the said sum above mentioned, or in case the said party of the First Part shall, at any time before the day or payment herein provided for, remove the said goods and chattels, or any of them, or permit or suffer
 10 any attachment or other process against property to be issued against me or permit or suffer any judgment to be entered up against me then the said sum of money herein mentioned shall become instantly due and payable, and then it shall and may be lawful for, and I the said party of the First Part do hereby authorize and empower the said party of the second part, its successors and assigns, with the aid and assistance of any person or persons, to enter dwelling-house, store and other premises, and such other place or places whatsoever in which the said
 20 goods and chattels, or any of them, are or may be placed and take and carry away the said goods and chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto me the said party of the First Part, my heirs, executors, administrators or assigns.

In Witness Whereof, I the said party of the First Part have hereunto set my hand and seal the Twenty-fifth day of June, in the year of our Lord One Thousand Nine Hundred and Thirteen.

30

FREDRIC WM. MAUSER.

Signed, Sealed and Delivered
 in the presence of

Form changed to suit corporate mortgagee and words "in Newark, N. J.," inserted all before execution.

CHARLES WM. KAPPES.

40

Exhibit D. 2.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

ANTHONY W. SCHULER being duly sworn on his oath says he is familiar with the making of the above mortgage and the facts set forth in the following affidavit and that he is the president of the mortgagee in the foregoing mortgage named, that the true consideration of said mortgage is as follows, viz: goods, wares and merchandise sold and delivered by the mortgagee to the mortgagor at the request of the mortgagor, the total sales price of which is the amount due as herein stated, to secure the payment of which amount this mortgage is given, and deponent further says that there is due on said mortgage the sum of Six hundred and eighty-two dollars and eighty-eight cents besides lawful interest thereon from the twenty-fifth day of June, nineteen hundred and thirteen, 10

ANTHONY W. SCHULER. 20

Sworn and subscribed this 26th
 day of June A. D. 1913 before
 me, at Newark, N. J.

GERTRUDE BEAVERS,
 Notary Public
 of New Jersey.

SCHEDULE. 30

The following in the Schedule referred to in the foregoing mortgage:

	90 round top tables,	
	360 cane chairs,	
	14 oak chairs,	
	4 large palms,	
	13 small palms.	
C. W. K.	2 Francis Connor upright pianos,	40
	18 hanging baskets,	
C. W. K.	1 hall partition about 100 feet long,	
	1 roller top desk,	
	1 desk chair,	

Exhibit D. 2.

- 1 combination gas range,
 all dishes, silverware, glassware,
 1 search light,
 1 safe,
 85 window shades,
 4 mirrors,
 10 C. W. K. 22 four light gas fixtures,
 C. W. K. 14 single gas fixtures,
 1 coat rack,
 and all other goods and chattels of every nature belonging to
 said Frederick W. Mausert now or lately in said premises.

FREDRIC WM. MAUSERT.

Witness,

CHARLES WM. KAPPES,

20 STATE OF NEW JERSEY, } ss.
 COUNTY OF HUDSON. }

Be it Remembered, That on this Twenty-fifth day of June, in
 the year of our Lord One Thousand Nine Hundred and Thirteen,
 before me, the subscriber, a Master in Chancery of New Jersey
 personally appeared Frederick W. Mausert, who I am satisfied
 is the mortgagor mentioned in the within Indenture, to whom I
 first made known the contents thereof, and thereupon he acknowl-
 edged that he signed, sealed and delivered the same as his volun-
 tary act and deed, for the uses and purposes therein expressed.

30

CHARLES WM. KAPPES,
 Master in Chancery of N. J.

MORTGAGE

On Goods and Chattels.

FREDERICK W. MAUSERT

TO

MUTUAL DISTRIBUTING COMPANY

(A corporation)

Dated, June 2, 1913.

40

Received in the Register's Office of County of Essex, N. J.,
 on the 26th day of June A. D., 1913 at 11:58 o'clock in the fore-
 noon, and recorded in Book 295 of CHATTEL MORTGAGES for said
 County, on pages 249-251.

THOMAS P. ALWORTH,
 Register.

Exhibits D. 3—D. 4.

EXHIBIT D. 3.

The Home of Refined Vaudeville and Moving Pictures

PARK THEATRE

BIRD & MAUSERT

Owners and Managers

Glens Falls
Premier Playhouse

Phone, 1115 10

Glens Falls, N. Y. April 27th 1914

Mr Schuler

Please let Mr. Bird have spot lite for \$10.00, will sell gas range for 18 or 20 dollars it cost me 49 dollars.

Thanking you for your trouble

I remain as ever

F W MAUSERT

P S. Give Mr Bird all particulars about my goods so I will know just how things are. 20

P S. Mr. Schuler make out a full statement of the goods I used. I have on hand all receed bill from you.

EXHIBIT D. 4.

Mr. Schueler

Will you please let this Mr Geo Bird, have my spot light because I could used it very bad, and also let him know how my goods are getting along, he will be up to see me at Glens Falls N Y in a fews days, thank you for your trouble. 30

I remain,

F. WM. MAUSERT.

My Adress

No 17 Steward Ave

Glens Falls

N Y

c/o. W Lauer

40

Exhibits D. 5—D. 6.

EXHIBIT D. 5.

\$26.53

MUTUAL DISTRIBUTING COMPANY

Wholesalers and Importers of
Wines and Liquors

10

Newark, N. J., January 4, 1916

Pay to the order of F. W. Mausert Twenty Six Dollars
Fifty Three Cents.

A. W. SCHULER, President
JOSEPH HARBURGER, Treasurer

To the Essex County National Bank,
Newark, N. J.

55-4

No. 8989

Endorsed:

20

F W MAUSER

Pay Essex County Nat'l Bank,
Newark, N. J. or order,
Mutual Distributing Co.

EXHIBIT D. 6.

CHATTEL MORTGAGE SALE.

30

Take Notice, That by virtue of a Chattel Mortgage executed by Frederick W. Mausert, To Mutual Distributing Company, bearing date June-26th, 1913, and recorded in Book No. of Chattel Mortgage in the Register's office of the County of Essex and State of New Jersey, and upon which default in payment has been made, I shall sell the property therein mentioned described as follows:, viz.;

40

Ninety Round Top Tables—Three Hundred And Sixty Cane Chairs—Three Hundred And Ten Folding Chairs—Fourteen Oak Chairs—Four Large Palms—Thirteen Small Palms—Eighteen Hanging Baskets—One Hall Partition About One Hundred Feet Long—One Roll-Top Desk—One Desk Chair—One Combination Gas Range—All Dishes—Silverware—Glassware—One Search-Light—One Safe—Eighty-Five Window Shades—Four

Exhibit D. 7.

Mirrors—One Coat Rack—And All Other Goods And Chattels
Of Every Nature Belonging To Said Frederick W. Mausert, Now
Or Lately In Said Premises,
at Public Auction, on Saturday, July 26th, 1913, at 9 o'clock in
the forenoon of that day, on the premises known as corner of
Railroad Avenue and Devon Street in the Town of Arlington
aforesaid County and State.

10

Dated, July 19th 1913.

DANIEL J. LYNCH.

Attorney for Mortgagee

Mutual Distributing Company.

Sold for Six Hundred Dollars to the Mutual Distributing Co.

EXHIBIT D. 7.

20

May 1, 1914.

Mr. F. W. Mausert.

Glen Falls, N. Y.

Dear Sir:—

As per your request, enclosed please find statement of your
account.

We still have on hand about 65 tables, Gas Range, Safe and
twenty cane bottom chairs. Of course there will no doubt be a
little more expense which will be accounted for later.

Yours truly,

MUTUAL DISTRIBUTING CO.

30

Per.

40

Exhibit D. 9.

EXHIBIT D. 9.

(Copy)

Page 225

F. W. MAUSER FURNITURE ACCOUNT

F. Doyle Sale.....\$115.00

F. W. Mausert..... 34.50

G. E. Mausert..... 80.50

10

Written out for G. E. Mausert Furniture Account

Date	Items	Folio	Debits	Date	Items	Folio	Credits
1914				1914			
Mar. 19.	Reed-DeCamp Lynch,			Mar. 2.	A. W. Schuler, 34.....	\$	22.00
	J73	\$121.11		Mar. 2.	Henry Klepp, 34.....		3.00
Mar. 30.	Add and Sundry Items,			Mar. 2.	F. W. M., B/S acc't, J73	679.90	
	J75	16.03		April 28.	Mr. Bird, 58.....	10.00	
July 31.	Balance	785.26		April 30.	Three Palms, 58.....	9.00	
				May 6.	Check (for return of		
					seats), 62	3.00	
				May 16.	Lainhart Bldg. Co., 66..	25.00	
				May 22.	A. Del Neal, 68.....	22.50	
				June 8.	Chas. Scheid, 76	33.00	
				July 2.	F. Doyle, 88	115.00	

20

		\$922.40				\$922.40	
Oct. 1.	Transferred, G. E. M.			July 31.	Balance	\$785.26	
	Furniture, folio 224....	\$ 80.50		Oct. 22.	George Collins, 136....	5.50	
Oct. 9.	Otto Stoll, J87.....	.85					
1915							
Jany 30.	Transferred to F. W. M.						
	reg. acc't, J95.....	682.88					
Jany 30.	Balance	26.53					

30

		\$790.76				\$790.76	
1916				1915			
Jany 4.	Check, 77	\$ 26.53		Jany 30.	Balance	\$ 26.53	
		\$ 26.53				\$ 26.53	

40

Exhibit D. 10.

EXHIBIT D. 10.

(Copy)

Page 735

F. W. MAUSER—BILL OF SALE ACCOUNT

Date	Items	Folio	Debits	Date	Items	Folio	Credits	
1913				1913				
Aug. 13.	Hugh B. Reed, 235.....	\$ 41.11		Aug. 6.	Ed. M. Baldwin, 232....	\$ 31.25		10
Aug. 25.	Jos. Michel, 196.....	21.00		Aug. 27.	Jos. Michel, 240.....	19.00		
Aug. 30.	Edw. M. Baldwin, 206..	31.25		Oct. 16.	G. Headley, 264	48.00		
Sept. 8.	Job De Camp, 245.....	50.00		Oct. 24.	M. J. Owens, 268	24.00		
Sept. 9.	Daniel J. Lynch, 247...	30.00		Nov. 6.	Jos. Michel, 274.....	2.00		
Oct. 9.	Geo. V. Headley, 273...	48.00		Nov. 17.	A. W. S., 280.....	15.00		
Oct. 23.	M. J. Owens, 300.....	24.00		Nov. 29.	Cash Sale, 286	1.50		
Nov. 6.	Achtel-Stetter, 327	81.25		Dec. 2.	Y. M. C. A., 288.....	232.00		
Nov. 7.	Achtel-Stetter, 331	55.00		Dec. 17.	L. Achtel-Stetter, 294 ..	136.25		
Dec. 1.	Chris. J. Schmitt, 369...	1.50		Dec. 1.	Furniture & Fixture, M.			
Dec. 1.	M. D. Co., 370.....	57.50			D. Co., J62.....	57.50		
Dec. 1.	Young Men's Catholic			1914				
	Ass., 371	232.00		Feb. 1.	Balance	145.11		20
1914								
Jany 2.	Cash sale, 1 desk, 431..	15.00						
Jany 16.	A. Schluer, 450	24.00						
		\$711.61				\$711.61		
Feb. 1.	Balance	\$145.11		Feb. 4.	Ed. G. Cox, 22.....	\$ 59.40		
Feb. 3.	Otto Stoll, 475.....	37.00		Feb. 9.	Otto Stoll, return, 153...	.85		
Feb. 4.	Edward G. Cox, 477.....	59.40		Feb. 27.	E. G. Cox, 30.....	7.00		
Feb. 9.	Otto Stoll, 480.....	10.00		Feb. 9.	Otto Stoll, 24	46.15		
Feb. 10.	Edward G. Cox, 482.....	7.00		Mar. 19.	Mdse. Sale, J73	703.90		
Mar. 19.	Mausert Furniture Acc't			Mar. 19.	Mausert Furniture Acc't			
	J73	679.90			J73	121.11		
		\$938.41				\$938.41		30

Exhibits D. 13—D. 14.

EXHIBIT D. 13.

\$7.00

MUTUAL DISTRIBUTING COMPANY
Wholesalers and Importers of Wines and Liquors
Newark, N. J. Sept 30, 1915.

10

DIVIDEND

Pay to the order of F. W. Mausert

* * * Seven Dollars Only * * *

A. W. SCHULER, President.

JOSEPH HARBURGER, Treasurer.

To the

Essex County National Bank,
Newark, N. J.

55-4

No. 8899

Endorsed:

20

F W Mausert.

Bird & Mausert

EXHIBIT D. 14.

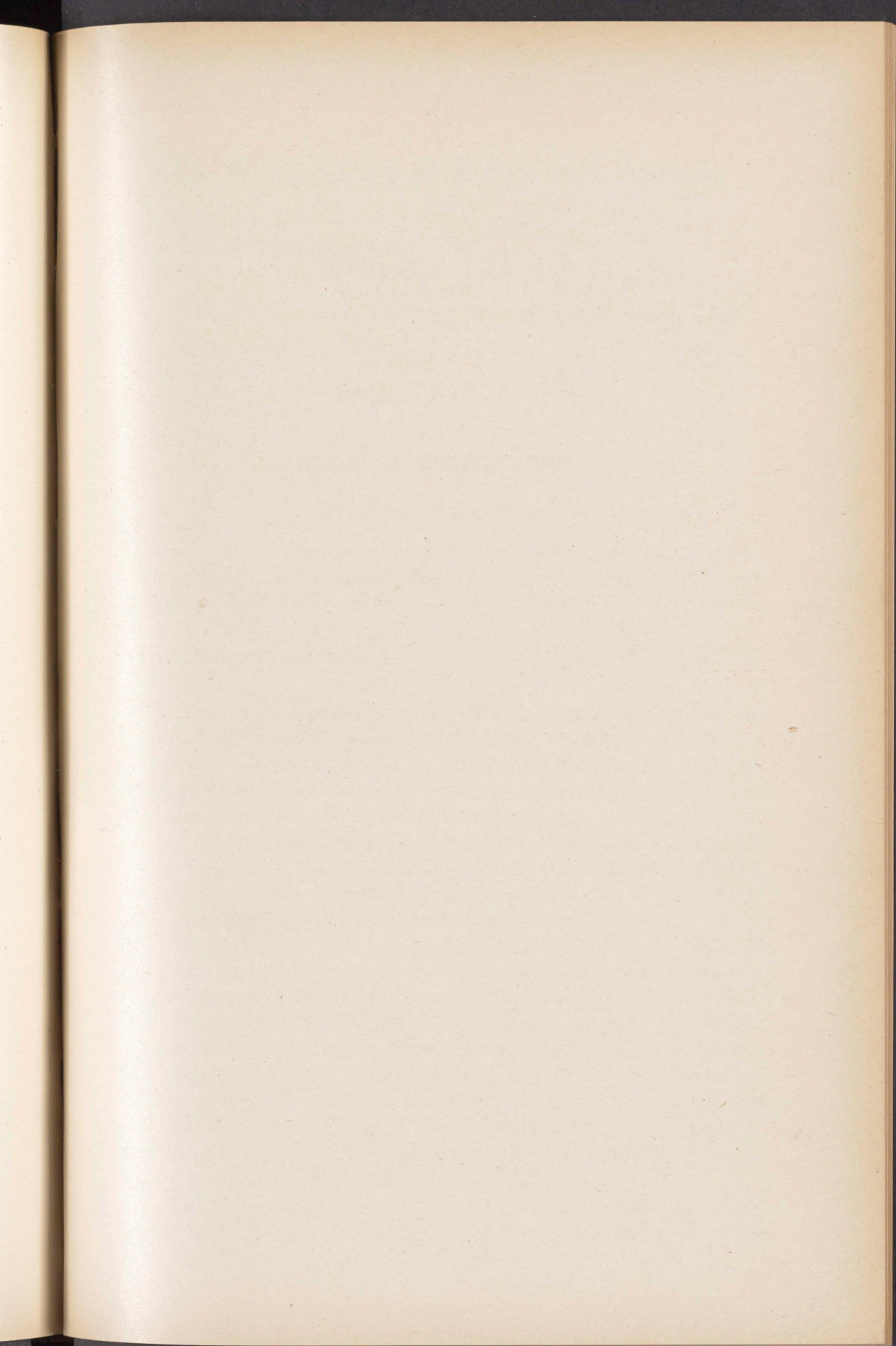
To Our Stockholders:

Herewith enclosed please find check to cover a 7 per cent, dividend as declared by the Board of Directors for the year ending

30 July 31, 1915.

Very truly yours,

Mutual Distributing Co.



New Jersey Court of Errors and Appeals

FREDERICK WILLIAM MAUSERT,

Plaintiff-Respondent,

vs.

MUTUAL DISTRIBUTING COMPANY, a corporation,

Defendant-Appellant.

Action at Law.

*On Appeal from
Essex County
Circuit Court.*

BRIEF OF RESPONDENT.

Abstract of the Facts.

This is an action for damages for the conversion of goods and chattels of the plaintiff which were in his place of business at Arion Hall Palm Garden, on Washington street, Newark, N. J.

The testimony in behalf of the plaintiff was briefly as follows:

He was the proprietor of a restaurant and bar known as "Arion Hall Palm Garden," on Washington street, in the city of Newark (Case, p. 25, l. 15). On or about June 24, 1913, he received word from some man, name unknown, that his place of business was about to be raided and that a warrant was out for his arrest (Case, p. 25, l. 40). His sisters and his brother George influenced him to go to New York (Case, p. 26, ll. 12-19), and although there was no foundation of truth in this warning, as is testified to by Detective Hargan (Case, pp. 91-92), plaintiff left town and went to New York City. On the 25th of June, late in the afternoon, one Raymond Mausert called on him and took him to Hoboken and there persuaded him to sign a chattel mortgage to the Mutual Distributing Company of all the goods and chattels in the Palm Garden (Case, p. 93, ll. 15-45). The plaintiff was not permitted to testify as to what Raymond said to induce him to sign the paper, although it was evident that Raymond was agent of the defendant for the purpose of procuring the plaintiff's signature to this chattel mortgage (Case, p. 94).

At five o'clock of the same day the plaintiff called up his bartender and discovered (p. 91, ll. 10-30) to his great surprise,

that the goods and chattels had all been moved out of his place before he executed the mortgage. He did not dare come back because of the fear of arrest at that time. The goods and chattels were moved by the Job DeCamp Company (p. 13). Eight van loads were taken to a Mr. Schuler's place in Arlington. Seven loads were labeled "tables and chairs" and the eighth load was unlabeled and contained dishes, linen (pp. 111-112), etc. Mr. Schuler and George E. Mausert were present when the goods were being removed and Mr. Schuler made an inventory of the goods in the Palm Garden (p. 18, ll. 15-25).

Mrs. Briggs (p. 18, ll. 18-25), Mr. Mausert's sister, was present at Arion Hall Palm Garden when the goods were being removed, and so were her brother George and Mr. Schuler there. She remonstrated with them (p. 51) and endeavored to dissuade them from taking her brother's goods out of the place and ruining his business. She testified (p. 20, l. 40) that she did not pack any of the goods and had nothing to do with the taking of the goods. At that time Mr. Schuler was, and he still is, President of the Mutual Distributing Company, and George E. Mausert had been treasurer until a week before the removal of the goods (p. 65, l. 38; p. 24, ll. 25-40), and was at that time still a large stockholder.

The bill for removal of the goods was paid by the defendant, the Mutual Distributing Company (p. 14, l. 15).

The night after the goods were taken the plaintiff made a written memorandum containing an inventory of the goods and of their values as he recalled them (p. 28, ll. 1-15). About one year after this he had a typewritten and compared copy made of his written one, and it was from this copy that he testified at the trial.

The defendant's story was little different. The defendant contended that the plan for the execution of a chattel mortgage was devised by George E. Mausert, who was security for Fred Mausert's credit with the defendant. George E. Mausert, Mr. Schuler and defendant's counsel planned the chattel mortgage at the Hotel Broad at noon on June 25, 1913. The mortgage was made payable on demand, so that it could be foreclosed immediately, and it was left with the defendant's counsel to obtain the plaintiff's signature thereon (pp. 88-89 and p. 74). The defendant's witnesses admitted expressly that no demand had been made for the payment of the mortgage debt either before the goods were removed from Arion Hall Palm Garden or before

the mortgage was foreclosed (p. 67, ll. 32-45, and p. 68, ll. 1-25). Also, no notice was given of the foreclosure by the defendant to the plaintiff, either by service or by mail.

The constable in charge of the foreclosure sale testified that all the goods and chattels covered by the mortgage were sold to the Mutual Distributing Company, there being no other bidders at the sale. The notices of the foreclosure sale were alleged to have been posted July 19, 1913, which is within three weeks after the goods were taken out of Arion Hall. The goods were sold on July 26, 1913, to the defendant. There were no other bidders present.

The plaintiff consulted counsel in 1913 concerning the case shortly after the goods were taken, but was advised to wait before bringing suit because of the fact that his brother was in prison and was represented by the same counsel.

The jury returned a verdict of \$2,595.33.

ARGUMENT.

Point I.

The question as to whether or not the Trial Court erred in refusing to direct a verdict for the defendant is not properly before this court.

The defendant contends that the Trial Court should have directed a verdict in favor of the defendant, and urges as its sole reason for this contention on appeal the fact that the defendant's alleged uncontroverted testimony showed that it was impossible for the defendant to make a demand upon the plaintiff before the foreclosure of the chattel mortgage because the plaintiff by his flight and concealment made such a demand impossible; consequently, the sale under the chattel mortgage was valid.

The record shows that at the trial the reason urged by the defendant in support of its motion to direct a verdict was that the evidence in the case tended to show that the original taking of the goods was not wrongful, but that the goods were taken by George E. Mausert, the brother of the plaintiff, and not by the defendant itself. The following excerpt from the record shows this (p. 102, ll. 22-45):

"The Court. If you wish to state your reasons, you may do so.

Mr. Reed. The reasons are, it appears from the testimony that there was no wrongful taking of these goods; they were sent by George Mausert to Arlington and there received by the defendant; but there certainly was nothing wrongful in it; when they were received the chattel mortgage was executed and delivered, and the chattel mortgage was subsequently foreclosed, and subsequently, with full knowledge of the foreclosure, the plaintiff went to the office of the Mutual Distributing Company and received a check.

The Court. As a matter of fact, as I now view this case, the foreclosure proceedings are of very little consequence. The theory of the plaintiff is that you went there and took these goods. Your theory is that you did not take them at all; had nothing to do with the taking, except subsequently paid the bill for moving them; Mr. Schuler says, for George Mausert; unless it be suggested that because of the subsequent signing of the chattel mortgage by Frederick Mausert, he condoned the wrongful taking; what do you think about that?

Mr. Reed. I think if there was any wrongful taking it was on the part of George Mausert."

From this it can be plainly seen that grounds offered in support of defendant's contention in this appeal are not the same as the grounds offered at the trial, consequently have not been passed upon by the Trial Court and therefore cannot be passed on by this Court.

In the case of *Van Alstyne v. Franklin Council, Jr. O. U. A. M.*, 69 N. J. L. 672, the defendant moved to non-suit the plaintiff at the trial on the ground of a breach of a condition in the contract. On appeal the defendant contended that the Trial Judge erred in refusing to non-suit the plaintiff on the grounds that the contract made out by evidence was variant from that which was set forth in the declaration. The Supreme Court held, at page 673:

"The alleged variance was not presented to the mind of the judge as a ground for the judicial action sought. It is a settled doctrine of this court that it will not review nor reverse a judgment under review because of any alleged error involving judicial action therein, unless such action was invoked upon the ground relied on which was distinctly and plainly made known in the court below."

Other cases sustaining the same view are *Thornton v. Fay*, 80 Atl. 326; *Blumenthal v. Central R. R.*, 95 Atl. 973; *McCloud v. Ill. Surety Co.*, 83 N. J. L. 572.

Point II.

Assuming defendant's contention is before this court, the direction of verdict was properly denied by the Trial Court.

In order to take a case away from the jury the testimony must be of such a conclusive character as would compel the Court in the exercise of a sound legal discretion to set aside a verdict, if one were returned in opposition to such testimony. The rule of law seems to be that the Court cannot weigh the evidence, but if there is any evidence at all which supports the view of the plaintiff the case must go to the jury. In *Hoff v. Pub. Service Ry. Co.*, 101 Atl. 404, at p. 405, Trenchard, J., says:

"In passing upon the motion for a direction of verdict for the defendant the court cannot weight the evidence, but is bound to concede to be true all evidence which supports the view of the plaintiff and to give her the benefit of all legitimate inferences which are to be drawn in her favor."

The same rule is expressed in *Andray v. Mertens*, 96 Atl. Rep. 893; also *D. L. & W. R. R. Co. v. Shelton*, 55 N. J. L. 342, where Lippincott, J., says, at page 345:

"Now, if upon the whole case there is evidence which in any way tends to establish the plaintiff's cause of action or defense, it is erroneous for the court to direct a verdict, and it is only when the facts proved clearly fail either to establish a cause of action or a sufficient defense that the court can properly direct a verdict."

Also *Meyers v. Birch*, 95 N. J. L. 238.

The weight of conflicting testimony must always be submitted to a jury. *Dickinson v. Erie R. R. Co.*, 90 Atl. 305.

Keeping these rules before us, if the testimony for the plaintiff and defendant, both, is carefully considered, it is clearly evident that there is sufficient evidence to permit the case to go to the jury. In the first place, it appears from the defendant's own testimony (pp. 67 and 68) that no demand was made for the payment of the debt by the defendant before it took possession of the plaintiff's goods, and it appears (p. 15, ll. 29-30, and p. 48, l. 20) that the defendant took the plaintiff's goods before the mortgage was executed. This fact alone would tend to make the foreclosure illegal, and at least there is a question for the jury here to decide. It should be noted that Mr. Mausert's flight took place *before* the goods were taken out and *before* the mortgage was executed; and that the defendant, in spite of his flight and concealment, *was* able to find the plaintiff to persuade him

to execute the mortgage, but claimed to be unable to find him to make a demand upon him to put him in default before the foreclosure.

Secondly, the evidence of the defendant as to its attempt to make a demand upon the plaintiff consists entirely of the testimony of Anthony W. Schuler, its president. If this testimony is contrasted with the testimony produced by the plaintiff and the legitimate and reasonable inferences drawn therefrom, it cannot fail but appear evident that the Court was justified in refusing to direct a verdict. The plaintiff's testimony shows that Mr. Fred Mausert, after he left Newark, spent two weeks at the home of his sister, Mrs. Cadwell, 203 West 109th street, New York City (p. 18, l. 30; p. 22, l. 26). From there he went to Massachusetts; from there to Albany, and then to Glens Falls. His sister, Mrs. Cadwell, knew where he was all the time (p. 22, l. 30). His sister, Mrs. Briggs, was acquainted with his whereabouts during the first two weeks of his stay at Mrs. Cadwell's (p. 18) and most of the time afterwards. His brother, George E. Mausert (p. 22, ll. 35-45), called on him during the two weeks he was at Mrs. Cadwell's; also his nephew, Raymond Mausert (p. 95, l. 9). He remained indoors most of the time.

George E. Mausert was connected with the Mutual Distributing Company and was one of the originators of the chattel mortgage scheme. Raymond Mausert was the agent to procure the plaintiff's signature in execution of the chattel mortgage. Mr. Schuler testified that George E. Mausert (p. 66, l. 4) was a close friend of his, that he testified for the defendant at the last trial (p. 57, ll. 10-20) and that he had seen George Mausert the day before the present trial and tried to get him to come to testify. Mr. Schuler (p. 66) also knew Mr. Briggs, Mrs. Briggs' husband, and knew where he was. He claimed that he made an attempt to make a demand about two weeks before the foreclosure (p. 68), which would make the time of this attempt come within the two weeks during which Fred Mausert was in New York. Two weeks before the posting of the notices of the foreclosure sale would bring the time of the alleged attempt within one week after Fred Mausert left Newark. Is it not reasonable to infer from the above facts that Mr. Schuler could have found out where Fred Mausert was if he had really tried to? He knew where George Mausert could be found. George Mausert was a close friend, and George Mausert knew where Fred could be found—in fact had called on him—and his sister knew where he was *all* the time.

Mr. Schuler's credibility as to his testimony on his attempt to find Mr. Fred Mausert is thoroughly shaken by his examination before Judge Adams in the first trial. On cross examination (p. 69) in this trial Mr. Schuler admitted that he testified in response to questions propounded by Judge Adams personally at the first trial, that he not only made no demand upon Mr. Fred Mausert, but did not even make an attempt to make a demand. How strange it is that in the second trial he claims to have inquired of all of Mr. Fred Mausert's relatives and then when pinned down says that he inquired of George Mausert and George Mausert did not tell where his brother was! How strange it is that the defendant in answer in the interrogatories of the plaintiff says that George Mausert would not tell where his brother was, and yet George Mausert was Mr. Schuler's close friend and had already testified in his behalf! How strange it was that the plaintiff's flight took place before the execution of the mortgage and that at the place where he was concealed for two weeks the defendant could find him to execute the mortgage but could not find him to make a demand upon him!

It is noteworthy in this case that the chattel mortgage was drawn payable on demand purposely so that it could be foreclosed immediately, according to defendant's story, although no one knew how long Fred Mausert was going to stay away from Newark, and he might have come back the next day. The following testimony of Mr. Hugh B. Reed is self-explanatory:

"Q What time of day did you prepare that mortgage, Mr. Reed? A I think it was between twelve and one, or one and two; I think it was done at once, immediately.

Q Why was it drawn payable on demand? A Well, Mr. George Mausert said that his brother had gone—left town—and he suggested that we take a bill of sale for the property, and I thought it was more advisable to take a chattel mortgage, but it was expected that it would be foreclosed almost immediately, so it was drawn in that way. It was the intention of Mr. George Mausert—expected the mortgage to be foreclosed; they were taking the stock out of the place there; Mr. Fred Mausert, according to George, was not expected to return; he was gone, and they were leaving this property. George Mausert was responsible to the Mutual Distributing Company, for he had guaranteed the account, said he was interested in seeing the bills paid, seeing that they got their money so that he would not be held for it; besides, he said the rent was coming due the first of the month and he wanted to get the stuff out of there.

Q Drawing up a mortgage, payable on demand, did you not realize you had to make a demand for it? A Well,

that is what the terms of the mortgage said; *I did not realize it was necessary to make a demand, no*; I am satisfied now that it is not necessary to make a demand if you cannot find the man to make a demand on" (case, p. 89, ll. 17-40).

If the counsel who drew the chattel mortgage was asked by his client to draw an instrument which could be foreclosed immediately and with that intention drew a chattel mortgage payable on demand, and then testifies at a trial that he drew the instrument with such an understanding, and did not realize the demand was necessary, is it not reasonable to infer that no demand was made and that no attempt was made to make a demand? The evidence in the case and the legitimate inferences drawn therefrom most strongly sustain the view that the defendant not only did not make a demand for payment from the plaintiff, but did not even attempt to make that demand. If this be true the Trial Judge did not err in refusing to direct a verdict, because he is bound to consider the evidence in the light most favorable to the plaintiff, and if there is any doubt in his mind at all he must permit the jury to decide the facts.

This Court held, in the case of *Mausert v. Mutual Distributing Co.*, 92 N. J. L. 190, that a lawful notice of intention to sell was equivalent to a demand for payment when the mortgagor rendered an actual demand impossible by his flight and concealment. It is respectfully submitted that in the case of *Goodrich v. Willard*, 2 Gray (Mass.) 203, which this Court cited as precedent, the lawful notice of intention was given in writing to the debtor. There is nowhere in this present case any evidence on the part of the defendant of any notice in writing, or any attempt to send a notice in writing, to the plaintiff. It certainly would have been very easy to have mailed a letter to his last known address in New York City. The plaintiff emphatically denies receiving any notice or any demand (p. 37, l. 5).

Point III.

Even if the testimony of the defendant were uncontroverted the question of credibility is one for the jury.

The evidence of the defendant as to its attempt to make a demand on the plaintiff consists entirely of the testimony of Anthony W. Schuler, its president. Mr. Schuler is an interested witness. He is not corroborated by any disinterested witness.

It is not a fact peculiarly within the plaintiff's knowledge as to whether or not Mr. Schuler really made an attempt to find him; consequently, that fact cannot be denied by the plaintiff. This being true, the defendant's contention rests entirely upon the credibility of Mr. Schuler, which was shaken on cross examination (p. 69). Therefore, this question should be one for the jury to decide, even if his testimony is uncontroverted. See 38 Cyc., p. 1570, and cases cited thereon. See also *Baumann v. Hamburg-American Packet*, 67 N. J. L. 250.

Point IV.

This being the second verdict for the plaintiff upon the same evidence, this court is justified in refusing to grant a new trial.

This is the second trial of the present case. There is no practical difference in the evidence offered by the defendant. If anything, it is weaker because it was not corroborated in the second trial.

At the first trial of this case a verdict was directed for the plaintiff, and on appeal the Court of Errors and Appeals sent the case back for a new trial because there was some evidence on the part of the defendant which tended to show that the plaintiff by his flight and concealment made a demand upon him impossible; consequently it was error to direct a verdict for the plaintiff and the case should have gone to the jury. This has been done—thus the law of the case has been carried out, for at the second trial the case went to the jury upon the same facts and the jury returned a verdict for the plaintiff.

Under the rule laid down in *Monroe v. Penna. R. R. Co.*, 87 N. J. L. 701, the Court of Errors and Appeals is bound to affirm the judgment below on the second trial. In that case there had been a former trial upon which a non-suit was directed. That judgment was removed into the Appellate Court and was reversed. On the second trial on the same facts the jury brought in a verdict for the plaintiff. The Court of Errors held that that judgment was conclusive and must be affirmed. Another case in point expressing the same rule of law is *Donnelly v. Haenichen Bros. Silk Co.*, 80 Atl. 325; also *Cassidy v. Bigelow*, 27 N. J. Eq. 505.

In *Brown v. Paterson Paper Co.*, 69 N. J. L. 474, Fort, J., held that a second concurring verdict upon the same state of

facts on slightly varying evidence should cause the Appellate Court to hesitate before granting a new trial. See also *Dickinson v. Erie R. R. Co.*, 90 Atl. 305.

Point V.

The Trial Court properly exercised its discretion in permitting plaintiff to use the memorandum.

An examined copy of a memorandum made at or near the time of the circumstances in question is properly used to refresh a witness' memory. See 40 Cyc. 2461, cases in note.

The books of the plaintiff were taken away by the defendant (p. 27, ll. 15-20). Therefore the best evidence the plaintiff could offer as to the price of the goods was his recollection of it at the time of taking.

The very purpose of the memorandum is to revive the memory of past transactions not at present clear in the mind. The witness may even be permitted to read from the memorandum. *Myers v. Weger*, 62 N. J. L. 432, at 441.

In the present case the witness was thoroughly cross examined as to the making of the memorandum and the Court correctly exercised its discretion in permitting its use. *French, Receiver v. Millville Manfs'. Co.*, 70 N. J. L. 699.

The use of such a memorandum in a case resembling this one is not unusual. In *More-Jonas Co. v. West Jersey R. R. Co.*, 76 N. J. L. 708, a memorandum was used to refresh witness' memory of values—where more than two years had elapsed between the injury and the trial.

In the case of *Howard v. McDonough*, 77 N. Y. 592, Justice Earl says:

“Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is wrongfully seized and an action is brought to recover for the conversion. There are thousand of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory while testifying by such list.”

Point VI.

The plaintiff was properly permitted to testify as to the value of 360 creamers.

The evidence for the plaintiff shows that everything in Arion Hall Palm Garden was removed by the Mutual Distributing Company. It was the custom of Mr. Mausert and his bartender to check up the stock every night and replace any pieces that were broken. Mr. Mausert personally (p. 31, ll. 10-30) checked up the stock within three or four days before his place was cleaned out, and at that time to his personal knowledge he had 360 creamers. If, therefore, he had 360 creamers the day the goods were removed, and the evidence tends to show that all the goods were removed by the defendant, then there is enough evidence to infer that the defendant received 360 creamers.

Point VII.

The testimony as to the loss of profits was admissible.

The removal of all of Mr. Mausert's property, goods and chattels entirely destroyed his business. This is self-evident. His business was a paying one and the amount of anticipated profits is a question for the jury to decide. As a general rule the loss of profits to a business which has been wrongfully interrupted by another is an element of damages for which a recovery may be had. Past profits cannot be taken as an exact measure of future profits, but all the various contingencies by which said profits would probably be affected should be taken into consideration by the jury. See 13 Cyc., pp. 57-58, and numerous cases in the notes.

Point VIII.

The Trial Court properly refused to admit the testimony of Mr. Schuler as to conversation with George E. Mausert.

Testimony as to conversations with George E. Mausert relative to circumstances under which the defendant received the goods of the plaintiff was properly excluded inasmuch as it was all hearsay. It is true that the defendant may be allowed to prove the circumstances under which it took the goods, but it cannot prove these circumstances from the conversation of third parties. It can only prove them by direct evidence in Court. In other words, the defendant is trying to prove the agreement

of Fred Mausert to mortgage the goods by the fact that George Mausert told Mr. Schuler his brother Fred wanted to give a mortgage. The defendant's theory of the case was that Fred Mausert requested his brother George to procure a mortgage and requested his brother to remove his goods and store them. This theory was brought to the attention of the Court by various other evidence. The question which was excluded was properly excluded because it was an attempt to prove Mr. Fred Mausert's request by what George Mausert told Mr. Schuler. This comes clearly within the hearsay rule as an attempt to prove a fact contained within the conversation by proving the conversation, and therefore was properly excluded.

Point IX.

The defendant's contention as to the measure of damages adopted by the Trial Court is not before this court.

The defendant took a general exception to the Court's charge as to damages. In appeal the defendant is urging a specific exception, which was not made at the trial, and which does not appear in the pleadings or in any part of the record; namely, that the measure of damages could not have been greater than the excess of value of the property taken by the defendant above the mortgage debt. Under the rule laid down in *Doran v. City of Asbury Park*, 104 Atl., p. 130, an exception to a Trial Judge's charge will not be considered unless it is specific enough to call his attention to the matter challenged. See also, *Miller v. Del. River Trans. Co.*, 85 N. J. L. 700 (90 Atl. 288).

Point X.

The charge to the jury as to measure of damages was correct.

Even if defendant's exception is properly taken, still the charge to the jury is correct. The jury, as instructed by the Court, awarded the plaintiff the value of the goods as of the time of the wrongful taking or of the wrongful selling. This is the true rule of damages in such cases.

Where a mortgage of chattels takes possession and sells *before condition broken*, the mortgagor's measure of damages is the value of the property at the time of the conversion.

11 Corpus Juris, 597.

Kohn v. Davis, 94 Fed. 288.

Davenport v. Ledges, 80 Ill. 579.

The condition was not broken in this case as no demand was made for payment and the condition rests expressly upon payment *on demand*.

The case cited by the defendant is not only not in point but the rule stated *only* applies to actions by the mortgagor against the mortgagee where the *mortgagee* has the right to possession but has sold the goods at private sales at unreasonable prices. It does not apply to a tort action where the *mortgagor* has the right to possession.

If the mortgagee has any remedy at all it would only be by way of recoupment or counterclaim, and neither was pleaded in the case, nor was the point raised at any time during the trial.

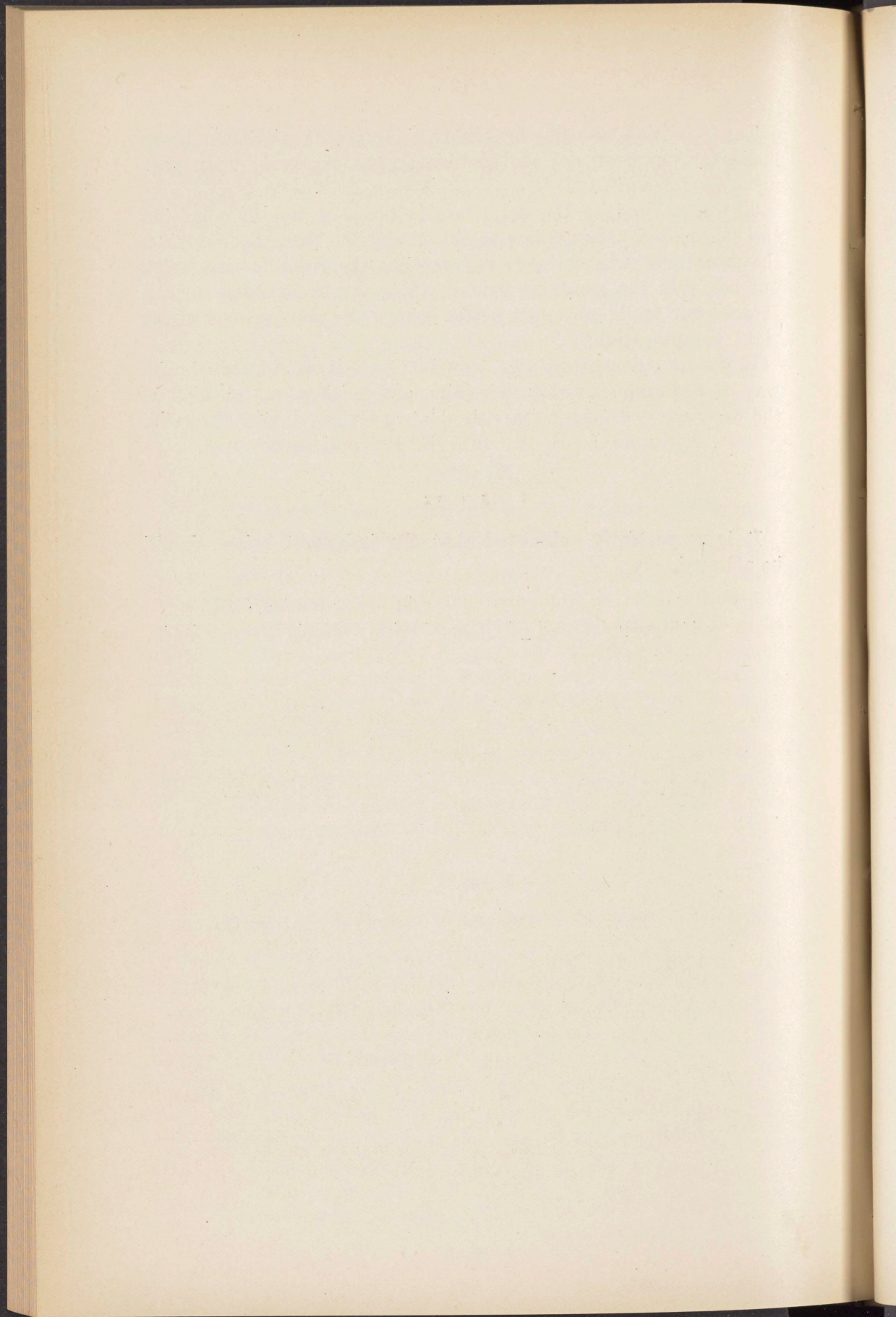
See note L. R. A., 1915 E. 199 and cases cited.

Point XI.

It is respectfully submitted that the judgment below should be affirmed.

PALMER BRADNER,

Attorney for and of Counsel with Plaintiff-Respondent.



New Jersey Court of Errors and Appeals

FREDERICK W. MAUSERT,

Plaintiff-Respondent,

vs.

MUTUAL DISTRIBUTING COMPANY,

Defendant-Appellant.

Action at Law.

BRIEF FOR APPELLANT.

Statement of Facts.

This is an action brought to recover damages for the alleged breaking and entering of plaintiff's place of business, known as Arion Palm Garden, on Washington street, Newark, on June 25, 1913, and the removal therefrom of certain personal property by the defendant.

The complaint contains three counts (state of the case, page 5).

FIRST COUNT: On June 25, 1913, plaintiff owned goods to the value of \$7,556.42; defendant, through its agents, wrongfully took said goods and chattels and has since detained and converted the same.

SECOND COUNT: On June 25, 1913, plaintiff was proprietor of a saloon and dance hall; defendant broke into said hall, seized and carried away goods and belongings of the plaintiff valued at \$7,556.42.

THIRD COUNT: Defendant by its agents, by means of false representation that plaintiff's place of business was about to be raided by prosecutor, induced plaintiff to stay away from his place of business, by reason whereof his business was destroyed.

The answer (state of case, page 8) denies truth of the allegations of the complaint and states that on June 25, 1913, plaintiff executed to defendant a chattel mortgage covering certain goods, to secure \$682.88, and the mortgage was foreclosed and the goods sold to pay amount due.

REPLY: (State of case, page 10.) The goods were taken before the execution of the chattel mortgage; the execution of the chattel mortgage was induced by fraudulent representations.

The following circumstances appear in evidence:

Prior to June 25, 1913, plaintiff had been in business in Newark at the Arion Palm Gardens, conducting a restaurant, salé of liquor and dance hall (state of case, p. 25, lines 15-30), and that he, plaintiff, owed defendant \$682.88 (page 54, line 18; page 55, line 30), and on June 25, 1913, George E. Mausert, brother of the plaintiff, told Anthony W. Schuler, president of defendant company, that plaintiff had left town (state of case, page 71, line 43); that George Mausert had guaranteed plaintiff's account and was interested in seeing the bill paid so that he (George) would not be responsible for it (state of case, page 72, line 1; case, page 89, line 29); he suggested a chattel mortgage would be best to secure defendant's account and that he, George, would get the chattel mortgage signed (state of case, page 72, line 12), and the understanding was that George Mausert was to get it executed (state of case, page 74, line 15) and that it was to be foreclosed almost immediately (state of case, page 89, line 25), and that the property in Arion Hall would have to be gotten out, because there would be another month's rent due (state of case, page 72, line 15; case, page 89, line 33). George asked Anthony W. Schuler for a place to store it, and Schuler told him he could store it in Arlington, as he had no place in Newark (state of case, page 72, line 22).

On the afternoon of June 25, 1913, the property was packed up by Mrs. Briggs, sister of plaintiff, and William Mockler, bartender for plaintiff (state of case, page 55, line 41), and George Mausert, plaintiff's brother, seemed to be superintending (state of case, page 55, line 45). These goods were packed and taken to the warehouse of Job DeCamp & Sons, where they remained overnight and were delivered to the storehouse in Arlington on the following day (state of case, page 15, line 40). The goods were sent to Arlington by George Mausert (state of case, page 56, line 30).

The chattel mortgage, Exhibit D. 2 (page 117) was drawn by Mr. Reed and taken to the plaintiff by Raymond Mausert, son of George Mausert (page 93, line 15), and that Raymond found plaintiff in New York City and went with him to Hoboken (page 93, line 30). The mortgage was executed on June 25, 1913 (page 118).

The affidavit to the mortgage was made by Anthony W. Schuler June 26, 1913, and the mortgage was recorded in the Essex County Register's Office on June 26, 1913, at 11:58 o'clock in the forenoon (page 120, line 40). The mortgage covers certain personal property of the defendant (page 119, schedule), then situated at the Arion Palm Gardens, Washington street, Newark, New Jersey (page 117, line 27).

The mortgage is upon the condition that the plaintiff shall pay to the defendant "on demand at the office of said Mutual Distributing Company, in Newark, New Jersey, the sum of \$682.88" (page 117, line 41), and provides that in case default be made in the payment of the sum mentioned it shall be lawful for the defendant to sell the property covered (page 118, lines 3-23).

On June 25, 1913, plaintiff telephoned to William Mockler, his bartender, and learned that his property had been removed from the Arion Palm Garden (page 27, line 3).

Plaintiff remained in New York City, apparently in hiding (page 23, line 34, *et seq.*), for about two weeks after the execution of the mortgage and then went to Massachusetts, then to Albany and then to Glens Falls, where he went into business (page 118, lines 25-45; page 22, lines 14-45). When the plaintiff was living in Newark prior to June 25, 1913, he lived at the Hotel Broad, kept by his brother, George Mausert (page 19, lines 26-30). Plaintiff left Newark because he was told that his business was going to be raided and that there was a warrant out for his arrest (page 20, line 8), and that when plaintiff received this warning he was frightened and went to New York City (page 22, lines 14-45) and went hurriedly and secretly pages 23-40; page 26, lines 15-21; page 36, lines 20-45; page 37, lines 1-2); plaintiff after he left Newark on June 25, 1913, did not return (page 47, line 22) and never saw Mr. Schuler, president of the defendant company, until 1915 or 1916 (page 40, lines 30-38; page 47, lines 10-35). Mr. Schuler, president of the defendant company, did not see the plaintiff after the execution of the mortgage and before the foreclosure, which was a month later, July 26, 1913, and that he did not know where plaintiff was (page 58, lines 18-20) and knew that he was out of the State (page 58, line 22), and that Schuler made inquiry of George Mausert, brother of plaintiff (page 58, line 30) and knew of no one else of whom to inquire (page 59, line 16), and that the first time he learned where plaintiff was was in April of 1914 (page 58, line 25).

On July 19, 1913, the defendant made preparations to foreclose the mortgage and gave mortgage to bailiff to foreclose. The bailiff posted the legal notices on that date (page 52, line 15). On July 26, 1913, the mortgage was foreclosed by the bailiff and so much of the property as was covered by it and came into possession of the defendant (page 52, lines 25-30) was sold at public sale and purchases by mortgagee for \$600 (page 52, line 38). On April 20, 1914, plaintiff sent his partner (page 61, line 14) to the defendant with a letter (Exhibit D. 4, page 121), asking for a spotlight which had been part of the property covered by the mortgage. The partner was told by the defendant that he could not have a spotlight unless he paid \$10 for it (page 61, line 27), and later the partner returned with a letter from plaintiff (Exhibit D. 4, page 121) and paid \$10 for the spotlight, which he took with him (page 61, line 40).

On May 1, 1914, at the request of the plaintiff, defendant sent a statement showing the amount of the goods which had been sold and the amount remaining unsold (page 62, lines 9-20; Exhibit D. 7, page 123).

On January 4, 1916, plaintiff came to defendant's office and asked for a statement (page 63, lines 19-35). He was shown the books of the defendant, a statement of his original indebtedness and a statement of the disposition which had been made of the property covered by the chattel mortgage to that date and as it appeared that the defendant had received, over and above the amount of its bill against plaintiff and the expense of foreclosure, the sum of \$26.53 (page 63, lines 25-35; Exhibit D. 9, page 124; Exhibit D. 10, page 125; page 79, lines 30-42). A check was drawn for the latter amount and delivered to plaintiff, who drew the money thereon (Exhibit D. 5, page 122; page 64, line 11), and said he was pleased with what had been done (page 79, line 35). Although in nowise obligated to do so, defendant was willing to give plaintiff this balance (page 75, lines 31-35). The plaintiff claimed that this check was a dividend on stock in defendant company (page 44, line 30), but that dividend checks were marked "dividend" (page 64, line 38; Exhibits D. 13, D. 14, page 126). During the progress of the trial the Court permitted the plaintiff to use, first, for the purpose of refreshing his memory as to what goods he had in his place of business on June 25, 1913 (page 27, line 10, and the following pages), and later for the purpose of refreshing his recollection as to prices he had paid for these goods as a basis of value (page 27, line 35, to the following pages), a copy of

a memorandum which he had made after he had learned of the removal of the property from his place of business (page 28, lines 1-15), and two and a half years after he had made the purchase (page 28, line 18) of the goods in question.

The Court also permitted the plaintiff to testify to the amount of profits about the time of June 25, 1913 (page 36, lines 10-20).

The Trial Court permitted plaintiff to testify to the value of 360 creamers where there was no evidence to show that defendant had ever received such creamers.

The Court refused to allow Mr. Schuler to testify to the conversation with George Mausert relative to the circumstances under which the defendant received the goods of the plaintiff (page 30, line 1, and following page and a half).

The Trial Court refused a motion for non-suit when there was no evidence to submit to the jury.

The Trial Court further refused to direct a verdict in favor of the defendant when the evidence on the question submitted was all in favor of the defendant.

The objection taken to the charge of the Trial Court on the question of damages (page 110, line 25).

The appellant states the following grounds of appeal:

1. The Trial Court refused to grant a non-suit at the close of the case of the plaintiff, although no testimony had been presented, which, in the absence of other evidence, would justify the jury in giving a verdict for the plaintiff, and such refusal was error.

2. The Trial Court at the trial refused to direct a verdict in favor of the defendant, although no evidence had been presented which would justify a verdict for plaintiff, and such refusal was error.

3. The Trial Court permitted the witness Frederick William Mausert to use, for the purpose of refreshing his memory, a memorandum which had not been made at a time and in a manner to justify its use, and to testify therefrom as to the property in his place of business at the time of the alleged trespass.

4. The Trial Court permitted the witness Frederick William Mausert to use, for the purpose of refreshing his memory, a memorandum which had not been made at a time and in a manner to justify its use, and to testify therefrom as to the value of property alleged to have been taken by defendant.

5. The following questions were admitted:

(a) To the witness Frederick William Mausert:

“Q Mr. Mausert, using that memorandum which you have to refresh your memory, will you tell what goods you had in the Arion Hall Palm Garden on June 25th, 1913, and the prices which you paid for those goods?”

(b) To the witness Frederick William Mausert:

“Q What were the profits about that time?”

And permitted those questions to be answered by the said witness and such answers to be received in evidence.

6. The Trial Court permitted the witness Frederick William Mausert to testify as to the price of three hundred and sixty creamers when there was no evidence to show that the defendant had ever received such creamers, and such admission of testimony was error.

7. The Trial Court refused to allow the witness Anthony W. Schuler to testify as to the conversation with George Mausert relative to the circumstances under which the defendant received the goods of the plaintiff.

8. The Trial Court, in part, charged the jury on the question of damages as follows:

“The damages which the plaintiff would be entitled to recover would be the value of the goods at the time of the wrongful taking or the wrongful selling. You have nothing here but cost price. But many of these goods had been used for three years. A total value, as I say, has been testified to, of seven thousand five hundred and some odd dollars. In the first place, you have to find, if you can, by the evidence—of course if you cannot find by the evidence the value of the goods that were taken, by the proofs here in the case, then your verdict should be for nothing more than nominal damages. Damages must be proven. But if no particular damages are proven, then cost price, less what would be a proper depreciation for age and wear, would be the measure of damages. Now, what is that? You must consider the business and use which these goods had had. The list is attached to the complaint which you will have with you. These goods consisted of things generally which are used on the tables. They consisted of chairs, writing desk, bar glasses and fixtures, and three pages of articles here; you may look them over if you get that far in the case. The plaintiff says that glassware, dishes and things of that sort were

kept renewed; that is, as they were broken they were renewed and the number kept intact. But the situation with reference to the glassware and crockery should apply to chairs and furniture, which depreciate greatly with wear, and particularly with that character of wear which they would probably have in a place of that kind. All of these things you must take into consideration in determining the value, if you decide the plaintiff is entitled to your verdict; the cost price, the length of time they have been in use, and the character of use they had had, and determine from those, if you can, the amount of damages."

9. That there was no evidence for the jury upon which the verdict rendered could be justified.

10. That there was no evidence presented upon which a verdict of more than nominal damages could be rendered.

Defendant was entitled to a non-suit and direction.

At the close of plaintiff's case no evidence had been produced which would justify a verdict of the plaintiff.

At the close of the whole case there was still no evidence to justify a verdict for plaintiff and the Court should have directed a verdict in favor of the defendant.

The Court charged the jury in this respect as follows:

"Unless you find that the original taking was wrongful, and unless you find that the sale under the chattel mortgage was wrongful by reason of failure to give the notice, then the plaintiff would not be entitled to your verdict; and not even then if he has ratified any of these irregularities by what he subsequently did.

If you find that the evidence preponderates that the original taking was wrongful, or that the sale under the chattel mortgage was irregular, and that the plaintiff has not rectified the irregularity, then you would come to the question of damages."

It is evident from the above excerpt from the charge that it was necessary for the jury in order to render a verdict in the plaintiff's favor to find three things:

1. That the original taking of the goods of the plaintiff was wrongful.

2. That the sale under the chattel mortgage was wrongful by reason of failure to give notice.

3. That the plaintiff had not ratified any of these irregularities by subsequent actions.

The lack of any one of these elements would be fatal to the plaintiff's case. As regards the second element the evidence is all one way. The defendant's testimony showed that it was impossible to make a demand upon the plaintiff before the foreclosure of the mortgage because the plaintiff by his flight and concealment made such a demand impossible, and there was a lawful notice of an intention to sell the chattel made. The testimony of the defendant in these respects is uncontradicted and uncontroverted and there was no evidence introduced by the plaintiff in this respect at all. Thus the Trial Court should have directed a verdict in favor of the defendant.

The entire testimony in the case on these points is as follows:

TESTIMONY OF ELIZABETH BRIGGS, a witness for plaintiff.

(Direct) (CASE, page 18, lines 25 to 45.)

Q Where was your brother Fred at that time, do you know? A He was at my sister's home, as far as I know, in New York City.

Q What is your sister's name? A Mrs. R. A. Cadwell, or Mrs. Catherine Cadwell.

Q Do you know her address? A 203 West 109th street.

Q How long did your brother stay with Mrs. Cadwell? A Well, somewhere in the neighborhood of two weeks.

Q And where did he go after that? A Well, that I can't state; I don't know where he went to.

Q What did you next hear of him? A I can't recall that.

Q Haven't you known where your brother has been the past few years? A I did; yes.

Q Where has he been? A Been in Glens Falls.

Q Do you know when he went into business at Glens Falls? A No, I don't; shortly afterwards I know.

Q Has anybody from the Mutual Distributing Company or the Mutual Distributing Company in any way ever inquired where your brother was? A Never.

Q (By the Court.) Is that up near Lake George? A Yes, up in that direction.

(Cross) (CASE, page 19, lines 12-30.)

Q I understood you to say that Mr. Fred Mausert had left Newark prior to June 25, before the 25th of June, that Mr. Mausert had left Newark? A Well, the 25th would be on the day the goods were taken out.

Q Yes? A Yes, he left that day, as far as I remember.

Q That same day? A I would not be positive; I cannot remember dates.

Q It was not the night before? A I could not say whether it was on the night before or on that day.

Q And whom did he leave in charge of his place here, the Arion Palm Garden? A Nobody, as far as I know.

Q Who had the key? A That I don't know.

Q You didn't have it? A Not as far as I know, no.

Q Where did he live when he was in Newark? A At the Broad Hotel.

Q That was a hotel kept by your brother George, was it? A Yes, it was.

Q And Fred lived down there? A Yes, sir.

Q And had been living down there for some time? A Yes.

(CASE, page 20, lines 1 to 40.)

Q How long before that, can you recall now, your brother Fred had left Newark? A Well, I can't say; I don't know whether it was that day or the day before.

Q Do you know why he left? A Yes, he was told there was a—the place was going to be raided, and that there was an arrest out for him; a warrant out for his arrest.

Q Well, do you know who told him that? A Well, I told him.

Q And after hearing that he left, did he, after hearing that from you he left town? A Yes, but I was informed by my brother that there was a warrant for his arrest.

Q You were told by George? A Yes.

Q And you told your brother Fred? A Yes.

Q And your brother Fred then left? A Well, now, let me see; I am afraid I—I didn't tell him myself; he was at my house; I sent my daughter and sister to find him; they may have told him first, but I told him later.

Q Then he went away? A Why, my nephew called with a car; that is, Mr. Mausert's son, and took him out of the city.

Q Do you remember whether that was day or night? A No, I don't remember.

Q When did you see your brother Fred again? A That I cannot recall.

Q Well, was it within a week or— A Yes.

Q Where did you see him when you did? A At my sister's, 203 West 109th street.

Q Well, do you think less than a week? A Yes, I think it was.

Q Well, how soon after June 24th do you think it was?

A Well, now; I couldn't give you a definite time.

Q Very well. Did you see him more than once? A That I can't recall.

Q Did you see him in Newark? A No; I saw him in New York City.

Q You did not see him in Newark at all after— A No, not that I can remember.

Q After he left that time? A No.

(*Re-direct*) (CASE, page 21, lines 35 to 45.)

Q What did George Mausert say to you about there being a warrant out for your brother Fred's arrest? A He told me there was a warrant out for his arrest and they were going to raid the Arion Palm Garden; that was told us by friends; this friend was with him while he was talking to me, Mr. George Mausert. This friend came in and he says, "Come on, Mausert," he says; "they will know that I told you this. I don't want to be seen with you."

Q Why did you send word to Fred, Mrs. Briggs? A Because my brother George told me to get him out of town for fear he would be arrested.

TESTIMONY OF CATHERINE CADWELL, a witness for plaintiff.

(*Direct*) (CASE, page 22, lines 14 to 45.)

Q Were you present when Mr. Mausert received warning that a warrant was out for his arrest? A Yes, I was.

Q What did Mr. Mausert do? A Well, he was frightened, and my nephew told him that he would take him away in his machine; they wanted him out of the city.

Q What is the nephew's name? A Raymond Mausert.

Q A son of— A George.

Q Was he taken away in the machine? A Yes, he was.

Q Where was he taken to? A To my home.

Q In New York? A Yes, sir.

Q How long did Fred Mausert stay there? A About two weeks, as near as I can remember it.

Q Where did he go from there? A To Massachusetts; I went with him.

Q And from Massachusetts? A To Albany.

Q Have you been acquainted with your brother's whereabouts all the time these past few years? A I certainly have; yes, sir.

Q Did Mr. George Mausert ever call on his brother while he was at your house? A He did.

Q Where did he call, do you know? A I could not tell you just when, but during those two weeks that he was there at my home.

Q Do you know what he called for? A I don't know; no.

Q Did the Mutual Distributing Company, or anyone acting for them, ever inquire where Fred Mausert was at any time? A Never.

Q Has your brother, George Mausert, always known where you were? A That I could not say.

Q How long have you lived in New York at that address? A Nine years.

Q And he knew that address? A Yes, he did.

Q Do you know what time of day Mr. Fred Mausert went to New York? A That I could not tell you; no.

(Cross) (CASE, page 23, lines 10 to 45.)

Q Do you remember what day that was, Mrs. Cadwell, that he went? A Yes, the 25th day of June, 1913.

Q Did you see Mr. George Mausert and his friend when they came to inform Mr. Fred Mausert of the fact— A No, I did not.

Q Where were you at that time; were you in Newark? A Yes, I was at my sister's home, Mrs. Briggs.

Q You didn't see Mr. George Mausert come there then and speak to his sister? A No, I did not.

Q Well, I understood her to say that a sister of hers went and hunted up Fred Mausert? A Yes, I did, but I didn't see my brother George.

Q You saw your brother Fred? A Yes.

Q And you told him of this— A Yes, we did.

Q You think that was in the morning of June 25th? A I could not tell you just when; I am not positive.

Q When did you next see your brother Fred? A That same evening.

Q At your home in New York? A Yes, in New York.

Q He had gone away hurriedly? A Yes.

Q As soon as he was informed of the fact that it was said that there was a warrant out for his arrest? A Yes.

Q And he went secretly, I suppose? A Yes.

Q He stayed at your house for two weeks? A About two weeks.

Q Did he leave there at any time, or was he there constantly? A He was there constantly.

Q Did he go out? A That I could not say.

Q You don't think he went out at all? A That I could not say; whether he went out.

Q You don't know whether he went out at all; or not? A No, I don't.

Q Well, you were there during the daytime, of course? A Yes.

Q Was he there the greater part of the time? A Yes.

(Cross) (Case, page 24, lines 1 to 20.)

Q He was there during the daytime as well as at night? A Yes.

Q As far as you know, he did not go out at all? A As far as I know; I could not say.

Q You spoke of his going to Massachusetts with you? A Yes.

Q That was at the end of two weeks? A Yes, he stayed there the rest of the summer.

Q What was he doing there? A Just visiting around with his brother.

Q Visiting his brother where? A His brother then lived at North Adams, Massachusetts, and also he visited his father in Albany.

FREDERICK W. MAUSER, plaintiff.

(Direct) (Case, page 25, lines 35 to 45.)

Q Mr. Mausert, when did you receive warning that a warrant was out for your arrest? A Quite early in the morning; about six o'clock.

Q Of what day? A June 24th, 1913.

Q Where did you receive this warning? A In my room at the Hotel Broad.

Q Who gave it to you? A That, I could not mention the name of the man, but some man came to my room and told me to get out of town, the prosecutor was going to get me.

(CASE, page 26, lines 1 to 21.)

Q You mean that you do not know the name of that man?
A Why, I did at the time, but I can't recall his name now.

Q What did you do? A I stayed in the room; I said if the prosecutor wanted me he could get me; I had done nothing that I should leave town.

Q What influenced you to go to New York? A Beg pardon?

Q What made you go to New York? A My sisters, just about noontime, both sisters influenced me to go right to New York. My brother George was there; he told me to get out of town as quick as I could, that the prosecutor was going to get me; and they cried and went on so I went just for their sake.

Q Where did you go then? A My sister's home in New York City.

Q How long did you stay there? A About two weeks.

(CASE, page 36, lines 21 to 35.)

Q Mr. Mausert, when you went to New York, where did you go? A My sister's home.

Q How long did you stay there? A About two weeks.

Q Did anyone call on you while you were there? A Raymond Mausert.

Q Is that your brother? A My brother's boy.

Q When did he call on you? A June 25th, I should judge, along in the afternoon about three o'clock.

Q What did he want you to do?

Mr. Reed. Objected to.

Q What did he call on you for?

Mr. Reed. Objected to.

The Court. Objection sustained.

Q After you left New York City, where did you go? A North Adams.

Q And how long did you stay in North Adams? A A few weeks.

Q Who did you stay with? A My folks; father and mother.

(CASE, page 37, lines 1 to 2.)

Q From there where did you go? A I believe I went to Albany, and then from there to Glens Falls.

(Cross) (CASE, page 40, lines 30 to 37.)

Q After you left Newark did you see Mr. Schuler after you left Newark on June 25th? A No, sir.

Q You never saw him until 1916, did you? A I don't remember if it was 1916 or not.

Q When do you recall seeing him after June 25th, 1913? A I could not say; it was 1915 or 1916.

Q It was in 1915 or 1916 you saw him? A It may have been.

Q In the meantime, I think you said you had sent Mr. George Bird to see him? A Yes, sir.

(CASE, page 47, lines 11 to 34.)

Q I understand you said your sisters told you there was a warrant out for your arrest? A Yes, sir.

Q And you, consequently, left Newark, went away in an automobile, did you? A Yes.

Q That was on June 24th? A June 24th.

Q And you went to your sister's house in New York? A Yes, sir.

Q And that was to avoid what you thought was to be an arrest under a warrant that was said to have been issued for you? A Yes, sir.

Q And you did not come back to Newark? A No, I did not.

Q You stayed there for two weeks, and then went to Massachusetts, and from there to— A I think I stopped in Albany.

Q Albany and then Glens Falls; now, I understood you to say that you went away because your sisters were so anxious about it, and cried, and persuaded you to go; is that right? A Yes, sir.

Q Well, did you stay away for the same reason? A I don't quite understand.

Q I say, was that the reason you stayed away from Newark? A Well, I was frightened some after I got over there, at the time; but if it wasn't for my sisters I think I would have stayed.

ANTHONY W. SCHULER, a witness for defendant.

(Direct) (CASE, page 58, lines 14 to 45.)

Q Now, what did you do with regard to the chattel mortgage after these goods had been taken from Arlington? A Why, it was foreclosed, about a month later, after we got the goods.

Q What was done at the foreclosure sale? A Purchased by the Mutual Distributing Company.

Q And before that foreclosure did you see Mr. F. W. Mausert at your place of business, or elsewhere? A I did not.

Q Did you know where he was? A I did not.

Q And when did you first learn where he was, or had been, during that time? A I did not learn where he was or had been. I knew he was out of the State; that is all.

Q I say, when did you first learn of his whereabouts? A Why, I should judge, when he sent down; he sent an order down for a spotlight; that was some time; I don't just recall the date; it is a letter in April of 1914, I think; I am not sure.

Q That is the one you referred to the other day? A Yes, sir; that was the first I ever heard of him.

Q Well, was he in Newark, do you know? A Not at that time, no. He sent his partner, a man by the name of Bird.

Q I mean at the time of the foreclosure? A He was not in Newark; I don't know where he was.

Q Did you make any inquiry? A I did.

Q Of whom? A Mr. George Mausert, his brother, and his family, as well as of Mr. George Mausert.

Q (*By the Court.*) Whose family? A Mr. Mausert's.

Q Whose wife? A Mr. George Mausert's.

Q (*By Mr. Reed.*) Did Mr. Fred Mausert have any family? Was he married at that time? A Not that I know of.

Q I think it was testified here he had lived at the Hotel Broad? A I understand he lived at the Hotel Broad. I didn't know at the time where he lived, but I understood from him the other day that he lived at the Hotel Broad.

(CASE, page 59, lines 1 to 19.)

Q And what did Mr. George Mausert have to do with the Hotel Broad? A He was the proprietor of the Hotel Broad.

Q Did you know where Mrs. Cadwell, I think it was, lived? A No, sir.

Q (*By the Court.*) Did you make any inquiry of Mrs. Briggs? A I did not know where Mrs. Briggs was; I never knew where she lived in Newark, if she did live in Newark at that time.

Q (*By Mr. Reed.*) Do you know where she went when she left Newark? I think she testified she left Newark the

first of July that year. A I only heard that she went up in Pittsfield somewheres; I only know that from hearsay.

Q Did you know of anyone else of whom to inquire? A I did not.

Q The Arion Hall, was that closed or open? A That was closed, I understand.

(Cross) (CASE, page 67, lines 37 to 45.)

Q Mr. Schuler, at the foreclosure of this mortgage did you make any demand for the payment of the debt? A I could not find Mr. Mausert to make any demand.

Q I just asked you if you made any? A No.

Q Did you make any demand before you took possession of the goods? A Yes, sir; Mr. Reed did, I believe, from the attorney.

Q Before you took possession of the goods? A I did not myself personally.

(CASE, page 68, lines 1 to 45.)

Q Did you authorize any? A Mr. Reed was authorized to make the mortgage.

Q Did you have anyone make a demand for the payment of the debt before the goods were taken? A I did not.

Q Before the mortgage was foreclosed did you attempt to make a demand? A I tried to find Mr. Mausert; yes, sir.

Q How did you try to find him? A By inquiring of his relatives.

Q What relatives did you inquire of? A His brother and his brother's wife.

Q Anyone else? A Why, no one else that I knew to inquire from.

Q You know Mr. and Mrs. Briggs? A I did not know where they were at that time.

Q What time did you make this attempt? A I don't recall the day, nor the time either.

Q How soon before the foreclosure did you make it? A Possibly a week or so, possibly two weeks; I don't recall just now.

Q Possibly two weeks? A Possibly so.

Q Did you know where George Mausert was then? A George Mausert was at the Hotel Broad at the time I inquired.

Q Are you sure of that? A I am positive of that.

Q Are you sure he was not in New York? A He was not in New York at that time.

Q Did he not have a place up near Van Courtlandt Park?
A He did at one time; yes.

Q He did not in the months of June and July? A I don't know whether he had at that time.

Q As a matter of fact, you don't know where he was at that time? A I know where I met him.

Q Where? A At the Hotel Broad.

Q Was he still proprietor at that time? A I don't know whether he was at that time.

Q How did you come to meet him there? A I met him there.

Q Did you send for him? A No, sir.

Q Did he call you up, or did you just accidentally stumble across him? A I went to the place and met him there.

Q You don't know how you came to go there? A I went there the same as I would go to any other place; that is all I can tell you.

(CASE, page 69, lines 1 to 25.)

Q What did you say to him? A I asked him if he knew where Fred was; he said he didn't know where he was; I said, "How do you suppose I can find out where he is?" And he said he couldn't tell me.

Q Mr. Schuler, do you recall testifying in the last trial before Judge Adams? Do you recall testifying as follows in answer to questions by the Court: Q "Was any demand ever made?" A "Why, he wasn't there to make a demand on; we didn't know where he was at the time." Q "Then no demand was made. Was any attempt made to make a demand?" A "We did not know the man's address; we could not make a demand." Q "You do not exactly answer my question?" A "No." Q "Was any attempt made to make a demand? You observe the condition of the mortgage is it shall become due if the party of the first part pays on demand at the office of the Mutual Distributing Company the sum of \$682.82; having noticed this provision in the mortgage, I ask if a demand was made?" A "No, sir." Q "And no effort was made to find him, you say?" A "No, sir." Did you testify? A I might have testified to that.

(Re-direct) (CASE, page 71, lines 31 to 45.)

Q Mr. Schuler, I think you said that on the 25th of June you had a conversation with Mr. George Mausert, in which he told you that his brother Fred had left town? A Yes, sir.

Q What else did he say? A Why, he spoke about owing us an account which George Mausert was responsible for, and he wanted to know whether he would not take the goods, or take a bill of sale for them. I told him I could not do anything of the sort until I had consulted counsel; I consulted you and you then went with me to the Hotel Broad and got in conversation with Mr. Mausert, and after he told you the circumstances you—

Q What did he say to me when you were there? A He told you that his brother had left town.

Q Did he say that? A Yes; because there was a warrant out for his arrest.

(*Re-direct*) (CASE, page 72, lines 29 to 30.)

Q You had not seen Mr. Fred Mausert in the meantime?

A No, sir.

(*Re-cross*) (CASE, page 74, lines 24 to 35.)

Q Did you know how long Mr. Fred Mausert was going to stay away from Newark? A I certainly did not.

Q Did you expect him to stay away very long? A I didn't know whether he was going to stay away long or not; I didn't know anything about it; I was told he has skipped; that was all I knew.

Q As far as you know he might have come back the next day? A He might have come back the next minute for all I knew.

Q And that was the reason you were in a hurry to foreclose? A I wasn't in any hurry to foreclose whatever. He understood we were going to see the goods and get the money.

Q You did not communicate with him at all? A I did not communicate with him; I only heard from him through his brother.

FREDERICK W. MAUSER, plaintiff, recalled.

(*Cross*) (CASE, page 95, lines 1 to 12.)

Q Mr. Mausert, while you were staying at Mrs. Cadwell's, I believe—how long did you stay at Mrs. Cadwell's?

A About two weeks.

Q While you were there did anyone call on you? A Mr. Raymond Mausert and Mr. George Mausert.

Q Was any demand made on you while you were there for the Mutual Distributing Company. A No, sir.

DANIEL J. LYNCH, sworn for the defendant.

(Direct) (CASE, page 51, lines 40 to 45.)

Mr. Reed. First I offer in evidence a chattel mortgage made by Frederick W. Mausert to the Mutual Distributing Company, dated the 25th day of June, 1913, recorded in the office of the Register of Essex County, on the 26th day of June, 1913.

Same marked Exhibit D. 2.

(CASE, page 52.)

Q Mr. Lynch, I show you a chattel mortgage, a certain copy of chattel mortgage, and a paper headed "Chattel Mortgage Sale," and ask you if you recognize those? A Yes, sir.

Q What did you do, if anything, in connection with them? A I foreclosed the mortgage. I went to the corner of Railroad avenue and Devon street, in the Town of Arlington.

Q When was that done? A That was done on—the notice was put up on July 19th, 1913; the sale was July 26th, at nine o'clock in the forenoon.

Q What notice did you put up, if any? A I put up five notices.

Q Where? A Different parts of the town over there.

Q Were they public or private? A Public.

Q And what was then done? A I went to the place of the sale on the day that I advertised it for, and sold.

Q (*By the Court.*) That was what date? What date did you sell? A July 26th, 1913.

Q (*By Mr. Reed.*) Did you take any inventory of the property? A I took the inventory from the schedule of the chattel mortgage.

Q That was all? A That was all.

Q You didn't compare it? A Didn't compare it; the goods were in a barn there.

Q And what did you sell, what goods were there? A What goods were there; yes, sir.

Q And to whom? A To this gentleman over here, Mr. Schuler, is it?

Q Mr. Schuler. A Yes.

By the Court.

Q For how much? A Well, for \$600, to the—

Q Sold the goods in bulk? A Sold both the goods in bulk; yes, sir, \$600, to the Mutual Distributing Company.

Q (*By Mr. Reed.*) What is this paper I show you? A It is a notice of the chattel mortgage sale.

Mr. Reed. I offer this in evidence.

Q (*By Mr. Bradner.*) This is your signature? A Yes, sir

(CASE, page 53.)

Mr. Bradner. I have no objections.

The Court. It will be received.

Same marked Exhibit D 6.

Cross examination by Mr. Bradner.

Q You say you put up notices of the sale? A Yes, sir.

Q Where did you publish those notices? A Over in the town there; different parts of the town.

Q How many notices did you put up? A Five.

Q Do you know the places you put them up? A I can't just recall now.

Q Have you any record? A No, sir, I haven't; I always put up five notices.

Q You say you always put up five, and you tell us you put up five— A Yes, sir; I am sure I did.

Q You don't know where you put them up? A Not exactly.

By the Court.

Q Do you know you put any up? A Yes, sir; I put one at the place of sale and one around the railroad there.

Q What do you mean "around the railroad"? A Where this sale took place is right near a railroad there; the Greenwood Lake, I think it is, and then along Kearny avenue, I put up one there.

Q You mean out of doors? A Yes, sir.

Q Not in any public building? A No, sir.

Q All out of doors? A All out of doors.

Q Were there any bidders at that sale, Mr. Lynch? A No; only Mr. Schuler I saw.

Q No one else but Mr. Schuler? A That is the only one I can recall now.

Re-direct examination.

Q What is your official position? A Sergeant-at-arms, Second District Court.

Q How long have you been such? A About two years.

Q (*By the Court.*) Second District Court of Newark?

A Yes, sir.

Mausert v. Mutual Distributing Company, 92 N. J. L. 190.

The Court of Errors and Appeals said:

"But even in the case of a chattel mortgage payable on demand, a lawful notice of intention to sell the chattels for the purpose of making the debt is equivalent to demand of payment, when, as here, the mortgagor rendered an actual demand impossible by his flight and concealment. *Goodrich v. Willard*, *supra*. In the present case the evidence tended to show that immediately after the mortgage was executed the mortgagor abandoned his place of business and residence in this state and secreted himself outside the state in such manner that plaintiff could not ascertain his whereabouts. The evidence also tended to show that lawful notice of the intention to sell was given by the mortgagee."

When there are no facts upon which reasonable and legitimately a liability can be based, it becomes the duty of the Court either to order a judgment of non-suit or direct a verdict in favor of the defendant.

Regan v. Palo, 63 N. J. L. 30.

Loper v. Somers, 71 N. J. L. 657.

Leppincott v. Royal Arcanum, 64 N. J. L. 309.

American Saw Co. v. First Nat'l Bank, 60 N. J. L. 417.

Vandergrift Const. Co. v. Camden, Etc. Ry. Co., 74 N. J. L. 669.

Belcher v. Manchester Building & Loan Association, 74 N. J. L. 833-839.

Use of Memorandum by Plaintiff.

The memorandum used by plaintiff was a typewritten copy of a memorandum which had been made by him from memory after the alleged cause of action arose. He had set down from memory the prices paid by him for the property in question, consisting of a great number of different kinds of personal property, the purchase of which had taken place two and one-half or three years before the date of the memorandum (page 28, lines 1-45), and concerning which, independent of the memorandum, he had no recollection (page 29, lines 1-40 and pages following).

It is true that in some jurisdictions a witness is permitted to give the cost price of personal property, together with evidence of deterioration from usage as an indication of the value, but I have found no case which has gone to the extent

of permitting a witness who has forgotten, at the time that the testimony is given, the prices paid, and without the memorandum would not be able to testify as to those prices, to use to refresh his memory, a memorandum made two and one-half or three years after such purchase.

He is thus testifying from a recollection of a recollection and not in any sense from an original recollection.

Value of Creamers.

The plaintiff was permitted to testify as to value of 360 creamers (page 29, line 44; page 30, lines 1-25) when there was no evidence that defendant received any creamers.

Testimony of Profits.

The answer to the question, "What were the profits about that time?" should not have been admitted. Where there has been an entire loss of the property involved in the action, then the full value of the property is the measure of damages and there can be no recovery for anticipated profits.

13 Cyc. 56-57.

Conversation with George Mausert.

The Trial Court refused to allow the witness Anthony W. Schuler to testify as to conversation with George Mausert, brother of the plaintiff, relative to circumstances under which the defendant received the goods of the plaintiff. The plaintiff complains of a wrongful taking of his goods by the defendant and the defendant should have been allowed to show under what circumstances it took the goods and to show that the taking was not wrongful.

The Measure of Damage.

The measure of damage adopted by the Trial Court was wrong. The Court charged the jury in part as follows:

"The damages which the plaintiff would be entitled to recover would be the value of the goods at the time of the wrongful taking or the wrongful selling" (Case, page 109, lines 31-34). The jury were not permitted to decide what property was received by defendant and what by others than the defendant, nor to take into consideration the amount secured by the mortgage.

The measure of damage could not have been greater than the excess of value of the property taken by defendant, above the mortgage debt.

Warwick v. Hutchinson, 45 N. J. L. 61 at 66. Affirmed 46 N. J. L. 200.

We respectfully submit, that for the above reasons the judgment should be reversed and judgment entered in favor of the defendant.

REED & REYNOLDS,
Attorneys for Defendant-Appellant.

Arthur Harris
of Counsel

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

THE UNIVERSITY OF CHICAGO
LIBRARY

1891

New Jersey Court of Errors and Appeals

FREDERICK W. MAUSERT,

Plaintiff-Respondent,

vs.

MUTUAL DISTRIBUTING COMPANY,

Defendant-Appellant.

Action at Law.

BRIEF OF APPELLANT IN REPLY.

As to respondent's abstract of facts we wish to say that in several instances we are unable to draw from the testimony the inference which had been drawn therefrom by respondent and stated in his brief, but as the members of the Court of Errors will read the testimony they will be in a position to judge to what extent those inferences are justified.

We wish to call particular attention to the following statement (on page 1 of respondent's brief), however, "although it was evident that Raymond was agent of the defendant for the purpose of procuring the plaintiff's signature to this chattel mortgage." We submit that not only is there no evidence of agency, but that it is clear from the testimony that Raymond was not the agent of the defendant for any purpose.

Respondent's Point I, II and III.

Respondent quotes a part of the discussion on the motion for direction of a verdict; the remainder appears on page 103 of the state of case and is as follows:

"*The Court.* My suggestion is that that is the point in the case, and that the question of the foreclosure of the chattel mortgage is of very little importance in the case.

"*Mr. Reed.* It has, perhaps, this bearing on the case, that subsequently, after the goods had been delivered, in order to enforce their right under it, they did foreclose it, which would give them the right to retain the goods.

"*The Court.* What is your view of that, Mr. Bradner?

"*Mr. Bradner.* The foreclosure would not cut any figure in the case if we relied entirely on the wrongful taking, but it would cut a figure if the taking was right; then the foreclosure could come in, because the foreclosure itself was illegal and constituted wrongful taking at that time; the foreclosure was made before demand was made.

(Argued.)

"*The Court.* The motion is denied.

"An exception to this ruling is noted by the defendant as ground of appeal."

(Case, page 103, lines 1 to 22.)

It will be quite apparent from this discussion that the foreclosure of the chattel mortgage given by plaintiff to defendant and covering the chattels alleged to have been wrongfully taken was a material part of the ground of the motion for the direction of verdict and that the attention of the Court was specifically called to it. At the time of making the motion the Trial Court seemed to consider the mortgage and its foreclosure of but little moment. That he later changed his attitude in this respect is apparent from his charge to the jury quoted in our main brief. There, in effect, he instructed the jury that unless it found that the foreclosure of the mortgage was irregular because of the failure to make a demand, its verdict must be for defendant, and at page 107, line 28, the Trial Court said:

"So, if you find in this case that the plaintiff by his flight and concealment rendered the service of demand and notice upon him impossible, then the defendant was not obliged to serve any such notice and demand; and in that case, since there is nothing else in this case irregular about the foreclosure of the chattel mortgage, the plaintiff *would not be entitled to your verdict because of any irregularity in the foreclosure of the chattel mortgage.*"

We have shown in our main brief that under the charge of the Court, the defendant was entitled to the verdict of the jury, unless the foreclosure was irregular.

That was the theory upon which the case was presented to the jury by the Trial Court, and it is upon that same theory that the case must be discussed here.

Fielders v. North Jersey St. Ry. Co., 68 N. J. L. 343;

Barnes v. Wallington & Co., 78 N. J. L. 490;

Hayes v. Adams Express Co., 74 N. J. L. 537.

If, therefore, there was no irregularity in the foreclosure of the chattel mortgage the defendant was entitled to the verdict.

There was no such irregularity, unless it was the failure to make demand before advertisement and sale.

A lawful notice of intention to sell the chattels for the purpose of making the debt was given (case, pages 52-53). (See quotations on pages 19 and 20 of main brief), and this Court has held in this very case (92 N. J. L. 190) that such a notice is equivalent to demand when the mortgagor has rendered demand of payment impossible by his flight and concealment.

Of the flight and concealment of plaintiff, there can be no doubt, for it is apparent from his own testimony and that of his sister. He was warned by a man whose name he has forgotten, who came to plaintiff's room, in Hotel Broad, Newark, about 6 A. M. on June 24th, 1913, that a warrant had been issued for his arrest, and about noon, on that day, urged by his sisters and brother, he went to New York to the home of his sister, Mrs. Cadwell (case, page 25, lines 35 to 45). He was frightened and Raymond Mausert took him to New York in his automobile (case, page 22, lines 16-20); he went hurriedly (case, page 23, line 29), and secretly (case, p. 23, line 32) he stayed at the house of his sister in New York for about two weeks, and, apparently, went out but little, if at all (case, page 23, line 36; case, page 24, line 1), and then went to Massachusetts, and from there to Albany, but did not return to Newark until years later.

Plaintiff admits that he stayed away because he was frightened (case, page 40, line 32), all of which appears from the testimony of plaintiff and his witnesses. There can be no question from the point of view of plaintiff that it is a true statement of fact. It, unquestionably, showed flight and concealment. It is sufficient in itself, unless some fact is made to appear which will indicate that the defendant, or one of its officers, knew of his whereabouts, to show that demand by defendant upon plaintiff for a payment of the chattel mortgage was impossible.

There is not a single word in the testimony which would make it appear that any of the defendant's officers had any inkling of his whereabouts. Even Mrs. Briggs, plaintiff's own sister, did not know where he was after the two weeks succeeding his departure from Newark (case, page 18, line 33), and Mrs. Briggs herself left Newark about July 1st, 1913 (case, page 21, line 12). Plaintiff had lived, when in Newark, at Hotel Broad, kept by his brother, George. Anthony Schuler, president of defendant company, went there and inquired of both George Mausert and George Mausert's wife as to the whereabouts of plaintiff, but was refused all information.

Respondent's Point IV.

The first verdict was set aside because the Trial Court improperly directed a verdict for plaintiff. The Court of Errors and Appeals held that the evidence of flight and concealment of plaintiff and of ratification by plaintiff was at least sufficient to submit to the jury. It did not hold that a direction of verdict for

defendant would have been improper. The evidence on the point of flight and concealment is more conclusive in the present case than at the first trial.

The cases cited by respondent under this point have not the application that respondent seeks to give them.

Respondent's Point V.

It is insisted that permitting the witness to use the memorandum made, as shown in the testimony, was not justified. It is conceded that the Trial Court has discretionary power in permitting, or refusing to permit, the use of memoranda to refresh the recollection of the witness, but there are bounds which the Court cannot transcend, and the memorandum under discussion was without those bounds.

Respondent's Point VI.

Respondent does not refer us to any testimony showing that all the goods were removed by the plaintiff. The evidence is to the contrary (state of case, page 48, line 32 to bottom, and top of page 49; case, page 73, line 12, *et seq*—and also page 56, line 26, *et seq*, and pages 57 and 58). It nowhere appears that defendant, at any time, received any creamers.

Respondent's Point VII.

In view of the fact that plaintiff left Newark hurriedly, and, in fear of arrest, hid, first in New York, and then in New England, and went from there to Albany and, to quote from respondent's brief: "He did not dare come back because of the fear of arrest at that time" (respondent's brief, page 2, line 2), and the information which caused his fear, namely, that a warrant was out for his arrest, did not come from defendant, but from a man whose name the plaintiff cannot remember, backed by plaintiff's sisters, it is insisted that the interruption of plaintiff's business cannot be properly chargeable to defendant.

Respondent's Point VIII.

The rule of *res gestae* admits declarations made under the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it.

Commonwealth v. Hackett, 2 Allen 136;
Travelers' Ins. Co. v. Mosley, 8 Wall. 397.

This is also true of conversation preceding the act, which is likewise admissible.

Ahern v. Goodspeed, 72 N. Y. 108;

Schnicker v. People, 88 N. Y. 192.

So may acts and declarations of third persons strangers to the action, as, for instance, fellow passengers in a railroad collision.

Twomley v. Central Park N. & E. River Co., 69 N. Y. 158;

Norwich Transp. Co. v. Flint, 13 Wall. 3.

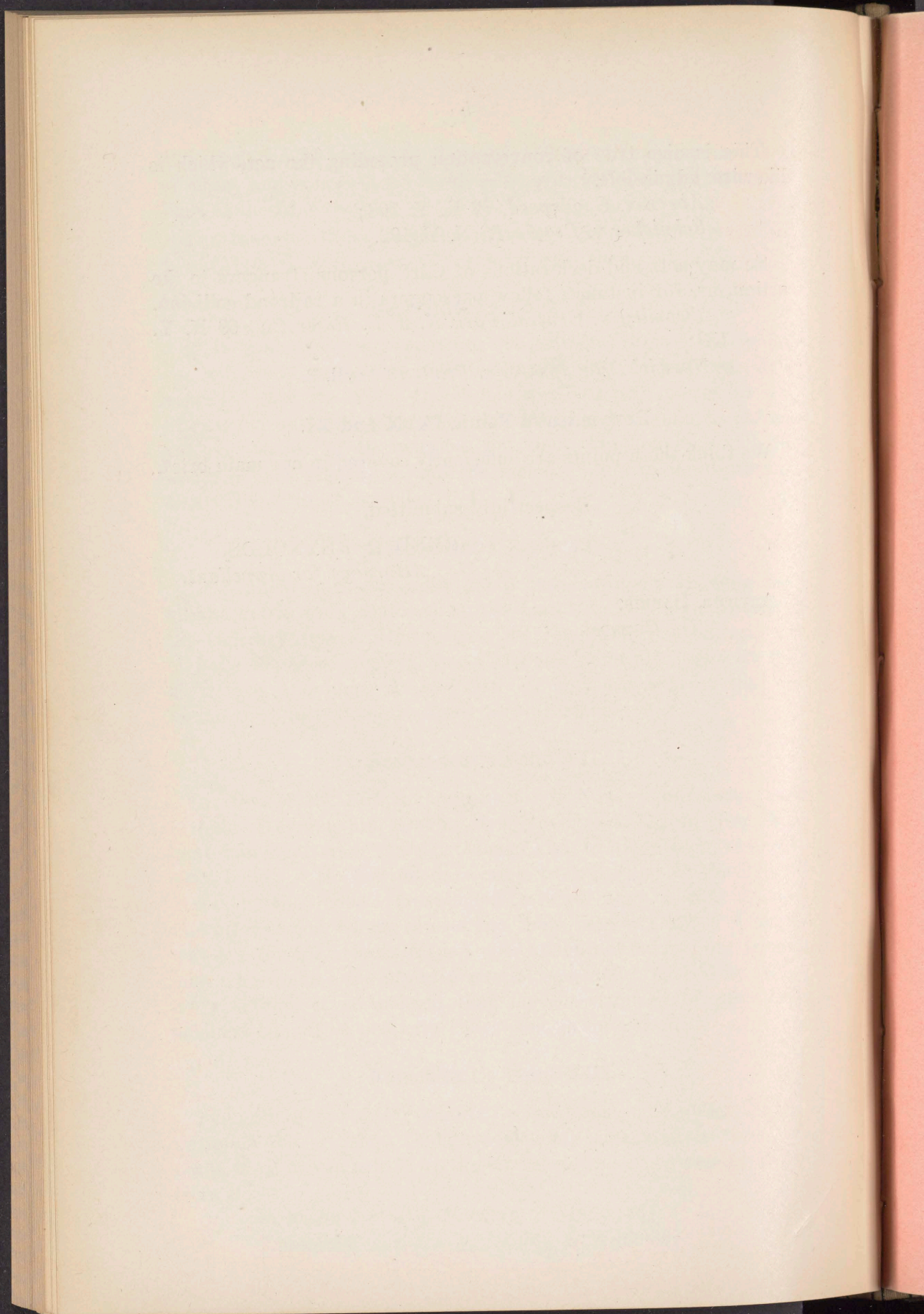
Respondent's Points IX, X and XI.

We think these points are sufficiently covered in our main brief.

Respectfully submitted,

REED & REYNOLDS,
Attorneys for Appellant.

ARTHUR HARRIS,
Of Counsel.



Introduction	1
Chapter I	2
Chapter II	3
Chapter III	4
Chapter IV	5
Chapter V	6
Chapter VI	7
Chapter VII	8
Chapter VIII	9
Chapter IX	10
Chapter X	11
Chapter XI	12
Chapter XII	13
Chapter XIII	14
Chapter XIV	15
Chapter XV	16
Chapter XVI	17
Chapter XVII	18
Chapter XVIII	19
Chapter XIX	20
Chapter XX	21
Chapter XXI	22
Chapter XXII	23
Chapter XXIII	24
Chapter XXIV	25
Chapter XXV	26
Chapter XXVI	27
Chapter XXVII	28
Chapter XXVIII	29
Chapter XXIX	30
Chapter XXX	31
Chapter XXXI	32
Chapter XXXII	33
Chapter XXXIII	34
Chapter XXXIV	35
Chapter XXXV	36
Chapter XXXVI	37
Chapter XXXVII	38
Chapter XXXVIII	39
Chapter XXXIX	40
Chapter XL	41
Chapter XLI	42
Chapter XLII	43
Chapter XLIII	44
Chapter XLIV	45
Chapter XLV	46
Chapter XLVI	47
Chapter XLVII	48
Chapter XLVIII	49
Chapter XLIX	50
Chapter L	51
Chapter LI	52
Chapter LII	53
Chapter LIII	54
Chapter LIV	55
Chapter LV	56
Chapter LVI	57
Chapter LVII	58
Chapter LVIII	59
Chapter LIX	60
Chapter LX	61
Chapter LXI	62
Chapter LXII	63
Chapter LXIII	64
Chapter LXIV	65
Chapter LXV	66
Chapter LXVI	67
Chapter LXVII	68
Chapter LXVIII	69
Chapter LXIX	70
Chapter LXX	71
Chapter LXXI	72
Chapter LXXII	73
Chapter LXXIII	74
Chapter LXXIV	75
Chapter LXXV	76
Chapter LXXVI	77
Chapter LXXVII	78
Chapter LXXVIII	79
Chapter LXXIX	80
Chapter LXXX	81
Chapter LXXXI	82
Chapter LXXXII	83
Chapter LXXXIII	84
Chapter LXXXIV	85
Chapter LXXXV	86
Chapter LXXXVI	87
Chapter LXXXVII	88
Chapter LXXXVIII	89
Chapter LXXXIX	90
Chapter LXXXX	91
Chapter LXXXXI	92
Chapter LXXXXII	93
Chapter LXXXXIII	94
Chapter LXXXXIV	95
Chapter LXXXXV	96
Chapter LXXXXVI	97
Chapter LXXXXVII	98
Chapter LXXXXVIII	99
Chapter LXXXXIX	100

Qomfou