INDEX.

PAGE

PLEADINGS.

Notice of Appeal 1
Grounds of Appeal 2
Writ of Replevin 13
Return of Writ 14
Complaint 15
Answer and Counterclaim of Defendant, La Brecque Co. . 16
Reply to Answer and Counterclaim 20
Order 21
Supplemental Counterclaim 22
Answer to Supplemental Counterclaim 25
Reply to Answer to Supplemental Counterclaim 26
Supplemental Answer to Supplemental Counterclaim 27
Reply to Same 27
Rule for Judgment 28
Judgment 30
Rule for Judgment on Supplemental Counterclaim 31
First Rule to Show Cause 32
Reasons on First Rule to Show Cause 33
Second Rule to Show Cause 33
Decision of Judge Dungan on First Rule to Show Cause . . 34
Order Discharging First Rule to Show Cause 36
Decision of Judge Dungan on Second Rule to Show Cause. 37
Order Discharging Second Rule to Show Cause 39
Motion to Strike Out Supplemental Counterclaim 40
Motion Denied 45
Motion to Non-suit on Plaintiff's Opening 46
Stipulation *re* Warehouse Receipts 79
Motion for Direction of Verdict in Favor of the McGann Company 153
Charge to Jury 161
Exceptions to Charge 171
Requests to Charge 173

PAGE

TESTIMONY.

For Counterclaimant La Brecque Company.

Joseph F. McGann,	direct examination.....	47
	cross "	61
	re-direct "	61
Milton M. Unger,	direct examination.....	63
	cross "	66
Edmund J. La Brecque,	direct examination.....	67
	cross "	69
	re-direct "	74
	re-cross "	75
Milton I. Voorhees,	direct examination.....	81
Norbury C. Murray,	direct examination.....	81
	cross "	94
	re-direct "	112
	re-cross "	114
David Bobker,	direct examination.....	107
	cross "	108
	re-direct "	111
Aaron Lane Cricher,	direct examination.....	116
	cross "	119
	re-direct "	123
Francis B. Broughton,	direct examination.....	124
	cross "	125
David H. Lowy,	direct examination.....	125
	cross "	130

For The McGann Company.

Milton M. Unger,	direct examination.....	134
	cross "	136
	re-direct "	145
Joseph F. McGann,	direct examination.....	146
	cross "	147
Charles J. Kraemer,	direct examination.....	149
	cross "	149

EXHIBITS.

		Off'd	P't'd
P. 1.	Warehouse Receipts of McGann Co.....	48	177
P. 2.	Letter McGann Co.....	48	179
P. 3.	Letter McGann Co.....	51	180
P. 4.	Invoices McGann Co.....	52	181
P. 5.	Statement McGann Co.....	55	183
P. 6.	Letter La Brecque Co.....	62	185
P. 7.	Letter La Brecque Co.....	62	186
P. 8.	Letter La Brecque Co.....	62	187
P. 9.	Letter La Brecque Co.....	62	188
P. 10.	Letter La Brecque Co.....	68	189
P. 11.	Letter N. J. Novelty Footwear Co.....	68	190
P. 12. P. 13.	Warehouse Receipts La Brecque Co....68-69		191
P. 14.	Record Chancery Proceedings in Suit of La Brecque *v.* McGann, *et al*.....	84	192
P. 15.	Letter to Max Kalter Co.....	91	196
D. 1.	Order Given by N. J. Novelty Footwear Co.	150	197
D. 2.	Newspaper Advertisement of La Brecque Co.	152	198

NOTICE OF APPEAL.

Filed June 30, 1920.

Essex County Circuit Court

THE MCGANN COMPANY, *Plaintiff,* *vs.* THE NEW JERSEY NOVELTY FOOTWEAR COMPANY, and LA BRECQUE COMPANY, INC., *Defendants.*	*Action at Law.* *Notice of Appeal.*

To Burnett, Sorg, Murray & Duncan, Esqrs., Attorneys for La Brecque Company, Inc.

SIRS:

The plaintiff hereby appeals to the Court of Errors and Appeals of New Jersey from the judgment of $6,174.22, entered upon the verdict of the jury on June 25, 1920, as of March 23, 1920, and heretofore entered in the above cause.

Yours respectfully,

MILTON M. UNGER,
Attorney of Plaintiff.

New Jersey State Library

GROUNDS OF APPEAL OF THE McGANN COMPANY.

Filed.

New Jersey Court of Errors and Appeals

THE MCGANN COMPANY, a corporation, *Plaintiff-Appellant,*	*Action at Law.*
vs.	*In Replevin.*
NEW JERSEY NOVELTY FOOTWEAR CO., *Defendant,*	*On Appeal to Court of Errors and Appeals.*
and	
LA BRECQUE COMPANY, INC., *Defendant-Appellee.*	

The McGann Company, plaintiff-appellant, as and for the grounds of its appeal from the judgment rendered against it in the above cause, hereby specifies and assigns the following:

1. The Court declined to strike out the supplemental counterclaim filed by the La Brecque Company, although the said supplemental counterclaim did not contain an allegation of facts sufficient to constitute a cause of action.

2. The Court declined to strike out the supplemental counterclaim, although it appeared said counterclaim set up merely that The McGann Company, a warehouse company, having actual physical custody of goods, with knowledge that the La Brecque Company, another warehouse company, had issued warehouse receipts upon the goods, had delivered the goods to a person other than the La Brecque Company, without allegations either that the La Brecque Company had lawfully issued its receipts or that the La Brecque Company had a special property in the goods, or that the person to whom The McGann Company delivered the goods had not a higher title than the La Brecque Company, the warehouse company, the said The McGann Company insisting that the counterclaim as framed did not contain sufficient facts to constitute a cause of action.

Grounds of Appeal.

3. The Court erroneously permitted the following question to be admitted and answered by the witness, Joseph F. McGann.

"Q Do you know whether or not the East Newark Bank acquired any of these receipts?"

4. The Court erroneously permitted in evidence the fact that the warehouse receipts issued by The McGann Company, to the New Jersey Novelty Footwear Company, had been negotiated by the New Jersey Novelty Footwear Company with certain banking institutions and individuals.

5. The Court erroneously permitted the following question to be asked of the defendant, Joseph F. McGann:

"Q Prior to their return on July 31st, 1919, did you know that these receipts had been negotiated by the New Jersey Novelty Footwear Company to various parties, including banks and individuals?"

6. The Court erroneously permitted the La Brecque Company to offer in evidence McGann invoices numbered 1232, 2086, 1385 and 2087, marked Exhibit P. 4.

7. The Court erroneously permitted the following question to be asked of the witness, Joseph F. McGann:

"Q Did you make or cause to be made any demand upon the La Brecque Company for the payment of these charges between July 28th and August 2nd?"

8. The Court erroneously permitted to be offered in evidence and marked Exhibit P. 5 a storage statement of The McGann Company, amounting to $1,021.44.

9. The Court erroneously permitted the La Brecque Company to offer in evidence a contract made between the La Brecque Company and the New Jersey Novelty Footwear Company, contained in letters marked Exhibits P. 10 and P. 11.

10. The Court erroneously permitted to be offered in evidence twelve warehouse receipts marked Exhibit P. 13.

11. The Court erroneously permitted the witness, Norbury C. Murray, to testify as to the terms of an agreement between The McGann Company and the La Brecque Company and others, where it appeared that the agreement was in writing.

12. The Court declined to permit The McGann Company to offer in evidence the record of the proceedings in bankruptcy in

the matter of the New Jersey Novelty Footwear Company, including the petition of the trustee in bankruptcy, with reference to 778 cartons of goods, part of the merchandise in dispute, the said record being evidential to show that there had been a change of the goods into money; that the New Jersey Novelty Footwear Company had become insolvent and had been adjudicated a bankrupt and that the trustee in bankruptcy had succeeded to its rights and that the Bankruptcy Court had obtained and had taken exclusive jurisdiction to determine the rights of the various parties, including The McGann Company and the La Brecque Company, in the goods and in the proceeds of the goods, and that the Bankruptcy Court had, in fact, taken over the jurisdiction for the purpose of determining that thing, and in such proceedings both The McGann Company and the La Brecque Company and the holders of warehouse certificates were parties.

13. The Court erroneously declined to direct a verdict in favor of the McGann Company.

14. The Court declined to direct a verdict in favor of The McCann Company upon the grounds:

(a) It appeared at the conclusion of the case that The McGann Company had delivered the goods to the depositor upon demand, the demand being accompanied with an offer to satisfy the warehousemen's lien, and that The McGann Company was obliged to make such delivery under the provisions of section 8 of an act entitled "An Act concerning warehouse receipts and to make uniform the law relating thereto."

(b) Because it appeared at the conclusion of the case that The McGann Company, the warehouseman, had, in fact, delivered the goods to a person lawfully entitled to the possession of them within the meaning of section 10 of the act aforesaid.

(c) Because there was no evidence sufficient to go to a jury from which the jury could find that The McGann Company had information before delivery of the goods that the delivery about to be made was to one not lawfully entitled to the possession of the goods, and it was not contended in the case that The McGann Company had been requested by or on behalf of the La Brecque Company not to make delivery.

Grounds of Appeal.

(d) Because the issuance of the warehouse receipts by the La Brecque Company under the circumstances under which they were issued by that company did not give to the La Brecque Company a property in the goods which vested it with right to receive the said goods from The McGann Company upon a satisfaction of the lien of The McGann Company.

(e) Because there was no evidence in the case from which the jury could find that the La Brecque Company had any higher right to the goods than the Kalter Company to whom it appeared that The McGann Company had delivered possession of the goods, there being no evidence from which the jury could find that the Kalter Company was not a bona fide purchaser for value without notice of the rights of the La Brecque Company, if any rights that company had.

(f) Because it affirmatively appeared in the case, without contradiction, and there was no evidence to the contrary, that the Kalter Company was a bona fide purchaser for value, without notice of the rights of the La Brecque Company, if any rights it had, and as such was entitled to the delivery of the goods as against the La Brecque Company.

(g) Because it appeared in the case without contradiction and there was no question for the jury, that the La Brecque Company was not entitled to the delivery of the goods after the satisfaction of The McGann Company's lien, because the La Brecque Company had not, in fact, complied with its contract with the New Jersey Novelty Footwear Company which required it, before becoming a warehouseman, to pay the charges of The McGann Company, which, at the time of the delivery of the goods it had not paid, and which at the time of the trial it had not paid.

(h) Because at the time of the issuing of the receipts by the La Brecque Company the La Brecque Company was not a warehouseman within the meaning of the act, and had no right to issue the receipts, and the issuance of the receipts did not give it a right to possession of the goods after the satisfaction of the lien of The McGann Company.

(i) Because it affirmatively appeared in the case, and there was no question for the jury, that the La Brecque Company by omitting to take advantage of the statute and rebond the goods and by omitting to make a demand upon The McGann Com-

pany placed The McGann Company in such a position as that the La Brecque Company could not complain if it, The McGann Company, delivered the goods upon the order of the depositor.

(j) Because it appeared in the case, without contradiction, and there was no question for the jury, that subsequent to the delivery by The McGann Company of the goods to Kalter there was an agreement between the parties whereby the sale to Kalter was ratified, and the moneys dealt with in such a way as that the La Brecque Company lost its right to proceed against the goods and was relegated to proceed against the proceeds.

(k) Because it affirmatively appeared in the case and there was no evidence to the contrary, and no question for the jury, that the La Brecque Company had not been damnified.

(l) Because it affirmatively appeared in the case and there was no evidence to the contrary, and no question for the jury, that if there was any right of action for the delivery of the goods by The McGann Company that right of action was in the holders of the receipts and not in the La Brecque Company.

(m) Because the warehouse receipts issued by the La Brecque Company were not issued in accordance with the provisions of the act, and the issuance of such receipts did not confer any rights on the La Brecque Company.

15. The Court declined to charge the second request, which reads as follows:

> "Before you can find that the delivery to Kalter was an unlawful delivery you must be satisfied that Kalter had knowledge of the issuance of the warehouse receipts by La Brecque, or information which would put a reasonably prudent man on inquiry as to the rights of La Brecque."

16. The Court declined to charge the third request, which reads as follows:

> "You must be satisfied before you can find a verdict for La Brecque by the preponderance of the proof that La Brecque was entitled after the satisfaction of the McGann lien, to the possession of the goods."

Grounds of Appeal.

17. The Court declined to charge the fourth request, which reads as follows:

"The mere issuance of the La Brecque receipts gave the La Brecque Company no rights as to the possession of the goods."

18. The Court declined to charge the fifth request, which reads as follows:

"Before you can find that the La Brecque Company had the right to the possession of the goods, after the satisfaction of the McGann lien, you must be satisfied that the La Brecque Company had the right to issue the La Brecque receipts."

19. The Court declined to charge the sixth request, which reads as follows:

"You cannot find that the La Brecque Company had the right to issue La Brecque receipts because it did not carry out its contract with the New Jersey Novelty Footwear Company which required it to pay the McGann lien."

20. The Court declined to charge the seventh request, which reads as follows:

"If you find that Kalter was a bona fide purchaser for value without notice of La Brecque that claimed rights, you must find a verdict for McGann."

21. The Court declined to charge the eighth request, which reads as follows:

"Under the warehouse act a warehouseman is bound to deliver to the depositor if depositor makes demand accompanied by an offer to satisfy lien—if you are satisfied that this is what McGann did, and that it did not in anywise collude with the New Jersey Novelty Company, or with Kalter, your verdict must be for McGann."

22. The Court declined to charge the ninth request, which reads as follows:

"There is no evidence from which you may find that McGann Company or its agents colluded in anywise with New Jersey Novelty Company or Kalter, or the agents of either."

23. The Court declined to charge the tenth request, which reads as follows:

"The surrender by La Brecque to McGann of the McGann warehouse receipts was not notice to McGann of the rights of La Brecque."

Grounds of Appeal.

24. The Court declined to charge the eleventh request, which reads as follows:

"The surrender by La Brecque to McGann of the McGann warehouse receipts was not information to McGann that the delivery made to New Jersey Novelty Company or Kalter was to one not lawfully entitled to the possession of the goods."

25. The Court declined to charge the twelfth request, which reads as follows:

"There was no obligation on McGann before making delivery to Kalter or New Jersey Novelty Company to notify La Brecque of proposed delivery."

26. The Court declined to charge the fourteenth request, which reads as follows:

"The notice given by Murray to Kramer, if you find it was given, was not notice to McGann of the rights of La Brecque."

27. The Court declined to charge the fifteenth request, which reads as follows:

"The notice given by Murray to Kramer, if you find it was given, was not information to McGann that the delivery made to Kalter or New Jersey Novelty Company was to one not lawfully entitled to the possession of the goods."

28. The Court declined to charge the eighteenth request, which reads as follows:

"If you find that the La Brecque Company ratified the sale to Kalter you must find a verdict for McGann."

29. The Court declined to charge the nineteenth request, which reads as follows:

"If you find that La Brecque consented that the proceeds of the sale to Kalter should stand in place of the goods you must find a verdict for McGann."

30. The Court declined to charge the twentieth request, which reads as follows:

"If you find that La Brecque consented to the payment out of the proceeds of sale of $1,500 to New Jersey Novelty Company, McGann cannot be held for so much of the value of the goods."

Grounds of Appeal.

31. The Court declined to charge the twenty-first request, which reads as follows:

"In considering whether La Brecque ratified the sale you may take into consideration the probabilities of the situation and may consider whether it is reasonable to suppose that McGann would consent to an arrangement by which Kalter should pay the proceeds of the sale, and a part of such proceeds immediately be paid to New Jersey Novelty Company, and subsequently all of such proceeds, and McGann still be liable to La Brecque for the value of the identical goods for which Kalter paid."

32. The Court declined to charge the twenty-second request, which reads as follows:

"If you find that the La Brecque Company is entitled to a judgment the amount of that judgment should be the reasonable value of the goods less the amount paid for them by Kalter, to wit, * * *"

33. The Court declined to charge the twenty-fourth request, which reads as follows:

"From what you find to be the reasonable value of the goods you must deduct the amount of the McGann lien, to wit, * * * "

34. The Court declined to charge the twenty-fifth request, which reads as follows:

"From what you find to be the reasonable value of the goods you must deduct the $1,500 paid to New Jersey Novelty Company by consent of the La Brecque."

35. The Court declined to charge the twenty-sixth request, which reads as follows:

"There is no evidence from which you can find that the reasonable value of the goods was greater than the amount Kalter paid for them."

36. The Court declined to charge the twenty-seventh request, which reads as follows:

"If you find that the La Brecque Company is entitled to a verdict and that the reasonable value of the goods was not greater than the amount Kalter paid for them, your verdict should be 6¢."

37. The Court declined to charge the thirty-second request, which reads as follows:

"You may take into consideration in determining the bona fides of McGann the fact that under the warehouse

act if it had refused to deliver on the order of New Jersey Novelty Company it might have lost its lien."

38. The Court declined to charge the thirty-third request, which reads as follows:

"You must consider that the McGann Company had the right to the poissession of these goods on August 2, 1919—That matter has been determined in another suit in favor of McGann."

39. The Court declined to charge the thirty-fourth request, which reads as follows:

"There is no proper evidence from which you can find a value of these goods greater than the price paid by Kalter."

40. The Court declined to charge the thirty-sixth request, which reads as follows:

"If you find that in making delivery McGann acted in good faith, there can be no verdict against McGann."

41. The Court erroneously charged the jury as follows:

"The effect of the issuing of those certificates by La Brecque was to give to La Brecque, after the lien of McGann had been extinguished, the right to the possession of those goods, and to make La Brecque the one lawfully entitled to the possession of the goods, and therefore the goods should have been delivered, after McGann had realized upon them, had extinguished his lien, to La Brecque if—and there you come right to the question in this case—McGann had knowledge, if McGann had information that La Brecque was the party entitled to the goods, because as between La Brecque and the Novelty Company there was no question but that the Novelty Company had not the right to the possession of the goods when it had turned them over to La Brecque and La Brecque had issued against them its warehouse certificates. Therefore, had McGann information when the goods were sold to Kalter that La Brecque and not the Novelty Company was the person lawfully entitled to the goods?"

42. The Court erroneously charged the jury as follows:

"You will see that even though McGann had the right to possession under his lien the goods were at that time in the physical possession of La Brecque and La Brecque issued its receipts."

43. The Court erroneously charged the jury as follows:

"That is the only proof in the case of actual notice being given to McGann; but it may be that actual notice is not necessary, and it would not be necessary if the information which McGann had if the occurrences surrounding the transaction was such that an ordinarily intelligent person would have known that La Brecque had issued its receipts against the goods."

44. The Court erroneously charged the jury as follows:

"It is disclaimed on the part of the La Brecque Company that they claim any right to the possession of the goods because of storage charges, because at that time they were at least constructively if not actually in possession of McGann, so that their rights depended upon the issuing of these negotiable certificates."

"So the very narrow question for you to decide in this case is whether or not the evidence preponderates that at the time McGann released the goods to Kalter by order of the Novelty Company McGann had knowledge of the issuing of the La Brecque warehouse receipts. If it had then La Brecque is entitled to recover in this case. If the evidence does not so show by its preponderance then McGann is entitled to your verdict."

45. The Court erroneously found the following holdings of fact and findings of law:

"For the purposes of this case I shall hold that those warehouse certificates created in the La Brecque Company a lien and the right to possession of these goods after the lien and the right to possession of the McGann Company had become extinguished. The right of The McGann Company was extinguished, when it had received all of its warehouse certificates and when it had been paid the amount of its storage, which was sometime in August, 1919. Therefore, that the New Jersey Novelty Footwear Company, under its agreement with the La Brecque Company, by virtue of its agreement with the La Brecque Company, was not the person who was in fact at that time lawfully entitled to the possession of these goods. This would make the warehouseman liable as for a conversion of these goods if the warehouseman had information that the delivery about to be made to the New Jersey Novelty Footwear Company or its assignee, the Kalter Company, was not lawfully entitled to the possession of these goods. That, I think, is the sole question in this case and the only question that ought to be argued to the jury.

I shall instruct the jury along the lines already suggested in the statement I have made in my declination to direct a verdict; whether or not The McGann Company had information that the delivery about to be made to the New Jersey Novelty Footwear Company or to its assignee, the Kalter Company, was a delivery to one not lawfully entitled to possession of the goods, and an exception to that ruling on behalf of The McGann Company will be noted as ground of appeal."

MILTON M. UNGER,

Attorney for The McGann Company, Plaintiff-Appellant.

Writ of Replevin.

WRIT OF REPLEVIN.

Filed August 2, 1919.

ESSEX COUNTY, *ss.*

STATE OF NEW JERSEY, to JOHN R. FLAVELL, Sheriff of the County of Essex, GREETING:

We command you that if The McGann Company, a corporation of the State of New Jersey, shall make you secure, you cause to be taken and delivered to it sixteen hundred and eighty-three cartons of footwear which the New Jersey Novelty Footwear Company, a corporation, and the La Brecque Company, a corporation, took and unjustly detain from it as is said; and that you summon the said New Jersey Novelty Footwear Company and the La Brecque Company to answer the annexed complaint of the McGann Company in an action at law in the Essex County Circuit Court and that you notify them that unless they file their answers to said complaint with the Clerk of the said Essex County Circuit Court at Newark, within twenty (20) days after service upon them of this writ and the annexed complaint the plaintiff may proceed in the suit and judgment may be entered against them.

Witness, Nelson Y. Dungan, Judge of the Essex County Circuit Court, at Newark, this Second day of August, One Thousand Nine Hundred and Nineteen.

JOHN H. SCOTT, *Clerk.*

MILTON M. UNGER,
Attorney,
763 Broad St., Newark, N. J.

Return to Writ.

ESSEX COUNTY CIRCUIT COURT.

Between THE MCGANN COMPANY, a corporation, *Plaintiff,* *and* NEW JERSEY NOVELTY FOOTWEAR COMPANY and LA BRECQUE COMPANY, *Defendants.*	*In Replevin.* *Returnable August 22nd, 1919, Milton M. Unger, Att'y.*

By virtue of the above stated and hereto annexed Writ to me directed, the plaintiff having made me secure, I did on the Second day of August A. D., 1919, serve the hereto annexed Writ personally upon Alley Prell, President of New Jersey Novelty Footwear Company, and personally upon Mr. Cricher, acting Secretary and Agent in Charge of La Brecque Company, the within named defendants; and did at the same time take into my possession the goods and chattels herein named, and no claim of property in the said goods named therein being presented to me within 24 hours thereafter, I did deliver the same to the plaintiff claiming the same.

JOHN R. FLAVELL, *Sheriff.*

By: CHAS. F. HUMMEL,
Special Deputy.

COMPLAINT.

Filed August 2, 1919.

Plaintiff, The McGann Company, a corporation of the State of New Jersey, says that:

1. Between March 27, 1919, and July 1st, 1919, there came into the possession of the plaintiff sixteen hundred and eighty-three (1,683) cartons of footwear, the property of the defendant, New Jersey Novelty Footwear Company, which plaintiff received as a warehouseman pursuant to law and for which it issued warehouse receipts.

2. While in the possession of the plaintiff certain charges, amounting to $1,021.44, for the storage, warehousing, labor and other lawful charges thereon lawfully accrued to plaintiff, and not being paid, plaintiff had and claimed a lien on said personal property and the right to its possession until the satisfaction of said sum.

3. On July 28, 1919, at No. 100 Front street, in the City of Newark, New Jersey, defendants wrongfully held and took said merchandise from and out of plaintiff's possession and without its consent, and ever since have wrongfully detained and still wrongfully detain same from plaintiff.

4. The said charges have not been paid and plaintiff claims a lien thereon and a special property therein.

5. The plaintiff demands possession of said goods and Five Hundred Dollars, damages.

MILTON M. UNGER,
Attorney for Plaintiff.

I hereby appoint and depute Charles F. Hummel to serve the within writ.

Witness my hand and seal this 2nd day of August, 1919.

JOHN R. FLAVELL, *Sheriff.*

By: HARVEY W. KEOUGH,
Under Sheriff.

Sheriff Fees,	5.46	(SEAL)
Bond Fee	1.00	
	6.46	

ANSWER AND COUNTERCLAIM OF DEFENDANT, LA BRECQUE COMPANY.

Filed August 21, 1919.

Defendant, La Brecque Company, as and for its answer and defense to the above-entitled cause, says:

1. That it denies the matters and things set forth in paragraph 1 of said complaint.

2. That it denies the matters and things set forth in paragraph 2 of said complaint.

3. That it denies the matters and things set forth in paragraph 3 of said complaint and says that on the 28th day of July, 1919, at its warehouse 100-110 Front street, Newark, New Jersey, this defendant had in its possession about 1,665 cases said to contain footwear deposited in said warehouse by New Jersey Novelty Footwear Company, but this defendant says that its possession thereof was rightful and lawful.

4. That it denies the matters and things set forth in paragraph 4, but says that it has no knowledge as to whether or not plaintiff was entitled to any of the charges claimed by it, but this defendant denies that the plaintiff had any lien on or any special or other property in said cases, and this defendant on the contrary says that this defendant rightfully and lawfully came into possession of said property on or about the 14th day of June, 1919, since which date it has continued in the rightful and lawful possession thereof, and that this defendant since said 14th day of June, has had at all times a lien thereon and a special property therein by reason of the fact that it has, during the period aforesaid, and for a long time prior thereto, been engaged in the business of general and common warehouseman; that on the date aforesaid, as such it lawfully obtained possession of said goods, and while in possession thereof, issued against or in respect to said goods, its negotiable warehouse receipts to New Jersey Novelty Co. or its order, in accordance with the statute in such case made and provided, none of which receipts have been surrendered to this defendant, and which are all outstanding and existing obligations of this defendant and impose upon this defendant the duty to deliver on demand to the holders of said receipts, the goods named therein, and further, that this defendant by reason of its storage of said goods

for the period aforesaid, has a lien on said goods to the amount of $141.86, no part of which has been paid.

5. That plaintiff is not entitled to the possession of said cases or any part thereof, and that the plaintiff is not entitled to any damages whatever from this defendant.

FIRST DEFENSE.

1. This defendant says that if the plaintiff ever had a lien upon the 1,665 cases of footwear which came into the possession of this defendant, the plaintiff lost such lien by reason of being ousted from the possession of the premises where said cases were stored, by a judgment of dispossess rendered by the Second District Court of the City of Newark, by virtue of which this defendant was placed in the possession thereof, by plaintiff's failure to remove therefrom said cases in accordance with the terms and conditions of the lease dated August 1, 1917, made by P. Ballantine & Sons, under which the plaintiff claimed to have had possession of said premises; by its failure to remove said cases from said warehouse, in accordance with the warrant of dispossess issued by the Second District Court of the City of Newark, whereby possession of said warehouse was given to this defendant and by acceptance by the plaintiff of the surrender of the warehouse receipts issued by the plaintiff or by Joseph F. McGann against said cases.

SECOND DEFENSE.

That this defendant was rightfully and lawfully in possession of said cases, and that previous to the institution of this action, no demand for the possession of said cases was made by the plaintiff of this defendant.

THIRD DEFENSE.

1. That continuously for the 18 months last past this defendant has been and still is lawfully engaged in the business of general and common warehousemen in the City of Newark and elsewhere.

2. That at the time of the institution of this action there were, and still are, outstanding negotiable warehouse receipts for said goods issued by this defendant long prior to the in-

stitution of this action, in conformity with the statutes in such case made and provided, to New Jersey Novelty Footwear Company or its order, which receipts are existing obligations of this defendant, and which call for delivery, by this defendant of said goods, on demand and on payment of this defendant's storage charges, to the holder or holders of said negotiable warehouse receipts, which receipts were issued upon its receipt of the physical possession of said goods.

FOURTH DEFENSE.

That the plaintiff although often requested so to do by this defendant, failed and refused to present correct or itemized bills of the charges claimed by it in respect to said cases and this defendant was ready, willing and able to pay any liens which the plaintiff had on said goods when proper bills therefore were submitted by the plaintiff.

FIFTH DEFENSE.

1. This defendant here repeats paragraphs 1 and 2 of the Third Defense as fully and to the same effect as if the same were here repeated at length.

2. This defendant at the time of the issuance by it to New Jersey Novelty Footwear Company of said negotiable warehouse receipts against said cases as a common or general warehouseman, contracted with New Jersey Novelty Footwear Company to store for it said cases at the rate of 6 cents per case per month, which said storage charges computed to the date of the institution of this action amount to the sum of $141.86 for the payment of which this defendant claims and is entitled to a lien upon and possession of the aforesaid cases.

3. That plaintiff well knowing of the existence of these charges and this lien made no tender or offer to pay the same or any part thereof, and made no request of this defendant for a statement of its charges and lien and gave to this defendant no intimation of its intention to institute this action.

COUNTERCLAIM.

1. This defendant, by way of counterclaim against the plaintiff, here repeats all of the foregoing answer and defenses as

fully and to the same effect as if the same were here repeated at length.

2. This defendant demands that plaintiff's suit be dismissed; that said goods be returned to this defendant and that it be awarded a judgment against the plaintiff in the sum of $10,000.00 for the damages sustained by this defendant by reason of its having been deprived of the possession thereof, by the plaintiff under its writ, besides the costs of this defendant to be taxed, and that in lieu of the return of said goods, a judgment be rendered in favor of this defendant and against the plaintiff for the value of said goods, to wit: the sum of $45,000.00, besides this defendant's costs to be taxed.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of Defendant, La Brecque Co.

Filed August 21, 1919.

JOHN H. SCOTT,
Clerk.

REPLY TO ANSWER OF DEFENDANT, LA BRECQUE COMPANY.

Filed September 3, 1919.

Plaintiff denies that part of paragraph 4 of the answer which alleges that the defendant, La Brecque Company, came rightfully and lawfully into possession of the property on June 14, 1919, and that since that date had a lien thereon, and a special property therein by reason of the matters and things set forth in said paragraph 4.

Plaintiff denies the matters and things set forth in the first and second defenses.

Plaintiff denies paragraph 1 of the third defense.

Plaintiff has no knowledge as to the matter and things set forth in paragraph 2 of the third defense.

Plaintiff denies the fourth defense.

Plaintiff denies that part of paragraph 1 of the fifth defense, which is made up of paragraph 1 of the third defense, and has no knowledge as to that part of paragraph 1 of the fifth defense, which is made up of paragraph 2 of the third defense.

Plaintiff has no knowledge as to paragraph 2 of the fifth defense, except in so far as it is averred that defendant had a lien upon and possession of the goods, which allegation plaintiff denies.

Plaintiff denies paragraph 3 of the fifth defense.

Answer to Counterclaim.

Plaintiff answers paragraph 1 of the counterclaim by repeating such portions of this reply as have been hereinbefore interposed.

Plaintiff denies the right of the defendant to the relief demanded in paragraph 2 of the counterclaim.

Special notice.

The plaintiff avers that the matters and things set forth in the answer and counterclaim and in any one or more of the paragraphs thereof, do not constitute a legal defense to the claim of the plaintiff or present a cause of action against the plaintiff and the plaintiff hereby reserves the right to move to strike out said answer and counterclaim or any of the para-

Order.

graphs thereof, either at or before the trial of the above-entitled cause.

MILTON M. UNGER,
Attorney for Plaintiff.

Filed September 3, 1919.

JOHN H. SCOTT,
Clerk.

ORDER.

Filed December 9, 1919.

It appearing that since the institution of the above-entitled cause, matters have arisen out of the same which are part of the same transaction; and that in order that a complete determination of the controversies arising out of said transaction may be had, it is necessary that Joseph F. McGann be made a party to said suit in the manner and form set forth, in the defendant's supplemental counterclaim hereto annexed.

It is therefore, on this 9th day of December, 1919,

Ordered that permission be and hereby is granted to La Brecque Co., Inc., to file the supplemental counterclaim hereunto annexed; and it is further

Ordered that the plaintiff, the McGann Company, a corporation, and Joseph F. McGann file their answers or take such other steps in response to said supplemental counterclaim as they may be advised are proper within ten days after the service upon them of a true but uncertified copy of this order and said supplemental counterclaim.

NELSON Y. DUNGAN,
Judge, Essex County Circuit Court.

I hereby consent to the entry of the above order and the filing of said counterclaim.

MILTON M. UNGER,
Attorney of Plaintiff and Jos. F. McGann.

Supplemental Counterclaim.

SUPPLEMENTAL COUNTERCLAIM.

Filed December 9, 1919.

First Count.

1. This defendant, La Brecque Co., Inc., prior to and at the times hereinafter mentioned, was and still is engaged in the business of a general, common and public warehouseman, in the City of Newark, and elsewhere.

2. That prior to August 2, 1919, this defendant was engaged by its co-defendant herein, to wit, New Jersey Novelty Footwear Co., to store and to act as its warehouseman in respect to 1,665 cartons of its merchandise, said to contain shoes or footwear, for which this defendant was to receive compensation at the rate of 6 cents per month or fraction thereof, per carton, to be paid to this defendant by New Jersey Novelty Footwear Company, as and when said cartons were removed from this defendant's warehouse, no part of which has ever been paid.

3. That pursuant to this arrangement this defendant received from the New Jersey Novelty Footwear Company on or about the 14th day of June, 1919, the physical possession of said 1,665 cases, which were then and there stored by this defendant as warehouseman, in its warehouse, 100-110 Front street, Newark, N. J., and that thereupon this defendant issued to New Jersey Novelty Footwear Company or its order, for all of said cartons, this defendant's negotiable warehouse receipts, in the manner and for by statute in such case made and provided, and which require of this defendant the delivery of said cartons on demand by the holders of said receipts.

4. That New Jersey Novelty Footwear Company then endowed and delivered said negotiable warehouse receipts to various parties, to secure debts which it then owed to them or to secure advances then made by such parties on the faith and credit of such receipts, or both, and that such receipts, have not been surrendered but are still outstanding and existing obligations of this defendant as aforesaid.

5. That said cartons, remained in the possession of this defendant in accordance with said arrangement, until the plaintiff herein, acting in conjunction with Joseph F. McGann, under color claim of a special property therein by way of a lien there-

on, took on or about the 2nd day of August, all of the same from the possession of this defendant by means of the Writ of Replevin which is the basis of this suit.

6. That subsequent to such taking of such goods, and prior to the 19th day of August, the New Jersey Novelty Footwear Co. without the knowledge or consent of this defendant, made a settlement satisfactory to the plaintiff, of the lien on said cartons, claimed by the plaintiff.

7. That on the satisfaction of its lien, it became the duty of the plaintiff and said Joseph F. McGann, to return said cartons, to this defendant or to notify this defendant of the fact that its lien had been satisfied in order that this defendant might regain possession of said carton.

8. That the plaintiff and said Joseph F. McGann, who jointly has possession of said cartons, notwithstanding their duty in that behalf, unlawfully and without the knowledge or consent of this defendant converted the same to their use and delivered the same to or allowed and permitted some other person or firm to take possession of said cartons, which were then removed from this state and permanently lost to the plaintiff, to Joseph F. McGann and this defendant, and the holders of said receipts.

9. That this defendant has demanded of the plaintiff and said Joseph F. McGann, that they surrender said cartons to and permit this defendant to restore the same to the warehouse of this defendant, but that the plaintiff and said Joseph F. McGann, have refused and still refuse so to do.

10. That the value of said goods, at all times since the taking thereof by the plaintiff from the possession of this defendant has been and still is the sum of $35,000.00 wherefor this defendant demands damages for the plaintiff and said Joseph F. McGann, in the sum of $25,000.00 together with interest thereon from the 19th day of August, 1919, and its costs of this suit.

Second Count.

This defendant here repeats as fully and to the same effect as if the same were here repeated at length, paragraphs 1 to 8, both inclusive, and paragraph 10 of the first count of this supplemental counterclaim.

Supplemental Counterclaim.

THIRD COUNT.

1. This defendant here repeats as fully and to the same effect as if the same were here repeated at length, paragraphs 1 to 8, both inclusive, of the first count, of this supplemental counterclaim.

2. That when the plaintiff and said Joseph F. McGann converted and parted with the possession of said cartons as aforesaid, they well knew, or had reasonable cause to believe that negotiable warehouse receipts had been issued by this defendant; that they were laid by various parties as security for debts and advances made to New Jersey Novelty Footwear Company and that said receipts had not been surrendered to this defendant and that said debts and advances and this defendant's storage charges had not been paid.

3. This defendant here repeats paragraphs 9 and 10 of the first count of this supplemental counterclaim, as fully and to the same effect as if the same were here repeated at length.

FOURTH COUNT.

1. This defendant here repeats as fully and to the same effect as if the same were here repeated at length, paragraphs 1 to 8, both inclusive, of the first count of this supplemental counterclaim.

2. This defendant here repeats as fully and to the same effect as if the same were here repeated at length, paragraph 2 of the third count of this supplemental counterclaim.

3. This defendant here repeats as fully and to the same effect as if the same were here repeated at length, paragraph 10 of the first count of this supplemental counterclaim.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of Defendant, La Brecque Co., Inc.

Filed December 9, 1919.

ANSWER OF THE McGANN COMPANY AND JOSEPH F. McGANN, TO THE SUPPLEMENTAL COUNTERCLAIM OF DEFENDANT, LA BRECQUE CO.

Filed December 19, 1919.

1. Paragraph 1 of the first count is admitted.

2. Plaintiff and Joseph F. McGann have no knowledge as to the truth of the allegations contained in paragraph 2 of the first count.

3. Paragraph 3 of the first count is denied.

4. Paragraph 4 of the first count is denied.

5. Paragraph 5 of the first count is denied.

6. Paragraph 6 is admitted, except the allegation that the settlement therein referred to occurred without the knowledge or consent of La Brecque Company, which is denied.

7. Paragraph 7 of the first count is denied.

8. Paragraph 8 of the first count is denied.

9. Paragraph 9 of the first count is denied.

10. Paragraph 10 of the first count is denied.

11. The same answer is hereby interposed to the second count as is hereinbefore set up by way of answers to paragraphs 1 to 8, inclusive, and paragraph 10 of the first count of this supplemental counterclaim.

12. The same answer is hereby interposed to the third count as is hereinbefore set up by way of answers to paragraphs 1 to 8 inclusive, of the first count of this supplemental counterclaim.

13. Paragraph 2 of the third count is denied.

14. The same answer is hereby interposed to paragraph 3 of the third count as has been hereinbefore set forth in answer to paragraphs 1 to 8 of the first count.

16. The same answer is hereby interposed to paragraph 2 of the third count as has been hereinbefore set forth to paragraph 2 of the third count.

17. The same answer is hereby interposed to paragraph 10 of the fourth count as has been hereinbefore set forth to paragraph 10 of the first count.

Reply to Answer to Supplemental Counterclaim.

SPECIAL NOTICE.

The plaintiff avers that the matters and things set forth in the said counterclaim and in any one or more of the paragraphs thereof, do not constitute a legal defense to the claim of the plaintiff or present a cause of action against the plaintiff and the plaintiff hereby reserves the right to move to strike out said counterclaim or any of the paragraphs thereof, either at or before the trial of the above-entitled cause.

MILTON M. UNGER,
Attorney for Plaintiff and Joseph F. McGann.

Filed December 19, 1919.

REPLY TO ANSWER OF THE PLAINTIFF AND JOSEPH F. McGANN TO SUPPLEMENTAL COUNTERCLAIM OF DEFENDANT, LA BRECQUE CO., INC.

Filed December 22, 1920.

The defendant, La Brecque Co., Inc., joins issue on the answer of the plaintiff and Joseph F. McGann to the counterclaim filed by this defendant.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of Defendant, La Brecque Co., Inc.

Filed December 22, 1920.

Supplemental Answer to Supplemental Counterclaim.

SUPPLEMENTAL ANSWER TO SUPPLEMENTAL COUNTERCLAIM.

Filed.

Plaintiff answering all of the counts contained in the supplemental counterclaim says:

1. That the delivery of the goods referred to in the complaint and in defendants' supplemental counterclaim, was made by the McGann Company in strict compliance with the provisions of the statute in such case made and provided.

2. That the New Jersey Novelty Footwear Company sold the goods while in the possession of the McGann Company to the Max Kalter Mercantile Company for a consideration; that after the delivery of said goods to the said Max Kalter Mercantile Company the said defendant, La Brecque Company, ratified said sale and delivery and consented to the payment of the purchase price of said goods by means of a check to the order of Milton Unger and David Bobker, attorneys, that upon such ratification and consent said check for the unpaid balance of the purchase price of said goods, to wit, the sum of $3,122.50 was delivered to the said Milton Unger and David Bobker who hold the same or the proceeds thereof for the use and benefit of whoever may be entitled thereto.

MILTON M. UNGER,
Attorney for Plaintiff.

We hereby consent that the above may be filed as within time.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of Defendant, La Brecque Co.

January 13, 1920.

Note—Reply of Defendant, La Brecque Co., to supplemental answer of plaintiff to supplemental counterclaim was stipulated at the commencement of the trial and appears in the transcript thereof.

Rule for Judgment.

RULE FOR JUDGMENT.

Filed February 16, 1920.

It appearing to the Court that a writ of replevin and the complaint annexed thereto has been issued in the above cause and duly served on the defendants, New Jersey Novelty Footwear Company and La Brecque Company, Inc., and it further appearing that the time limited by law for the defendant, New Jersey Novelty Footwear Company, to file an appearance, answer or counterclaim has expired and that the defendant, New Jersey Novelty Footwear Company, failed to enter an appearance, file an answer or counterclaim within the time required by law according to the form of the statute in such case made and provided, and it appearing that said cause came on for trial and that the defendant, New Jersey Novelty Footwear Company, did not appear, but made default and that the plaintiff is entitled to judgment by default against the defendant, New Jersey Novelty Footwear Company, by reason of the premises in its complaint above mentioned.

It is, therefore, Ordered and Adjudged that the defendant, New Jersey Novelty Footwear Company, did take the before mentioned goods and chattels in manner and form as the plaintiff has complained against the defendant, New Jersey Novelty Footwear Company, and that the plaintiff is entitled to judgment for possession as against said defendant, New Jersey Novelty Footwear Company, together with the damages of the plaintiff about its suit in this behalf in the sum of six cents, besides costs of suit to be taxed.

And it further appearing to the Court that the counterclaim exhibited herein by the defendant, La Brecque Company, Inc., against the plaintiff, the McGann Company, and Joseph F. McGann impleaded, could not be conveniently disposed of in the foregoing action, and that a separate trial thereof was ordered and that the foregoing cause proceeded to trial upon the complaint of the plaintiff and the answer and supplemental answer of the defendant, La Brecque Company, Inc., and the replies of the plaintiff, and Joseph F. McGann, impleaded, thereto and that said cause was duly tried by the Court in the presence of the parties by their respective counsel and the said issues having been so submitted and tried and the Court having afterwards heard argument by counsel of the respective parties

Rule for Judgment.

upon a motion made by each of them for the direction of a verdict for possession, and the Court being of the opinion that upon the question and issues so tried the plaintiff was entitled to a verdict for possession as against the defendant, La Brecque Company, Inc., did direct the jury to return a verdict for possession in favor of the plaintiff, and against the defendant, La Brecque Company, Inc., and the jury having accordingly returned said verdicts.

It is thereupon Ordered and Adjudged that judgment for possession of the goods set forth in the writ of replevin be entered in favor of the plaintiff, the McGann Company, and against the defendant, La Brecque Company, Inc., together with six cents damages, besides costs of suit to be taxed.

And it is further Ordered that the issues raised by said counterclaim and amended counterclaim exhibited by the defendant, La Brecque Company, Inc., be made the subject matter of another suit or cause of action between the parties hereto and that said defendant, La Brecque Company, Inc., have leave to move and bring on the trial of said cause of action at any time hereafter.

NELSON Y. DUNGAN,
Circuit Court Judge.

Dated February 16, 1920.

On motion of

MILTON M. UNGER,
Attorney of Plaintiff.

Judgment.

JUDGMENT.

Entered February 4th, A. D. 1920.

ESSEX COUNTY CIRCUIT COURT.

29419

THE MCGANN CO., INC.,
Plaintiff,

vs.

NEW JERSEY NOVELTY FOOTWEAR COMPANY and LA BRECQUE COMPANY,
Defendant.

Action at Law.

In Replevin.

Judgment entered February 4th, A. D. 1920.

Costs, $91.53.

Milton M. Unger, Attorney of Plaintiff.

Judgment after Verdict by order of the Court was rendered on the Fourth day of February, A. D. Nineteen Hundred and Twenty in favor of the Plaintiff The McGann Co., Inc., and against the Defendant New Jersey Novelty Footwear Company and La Brecque Company for possession of the goods mentioned in the writ of replevin and the sum of Ninety-one Dollars and Fifty-three Cents, cost of suit.

Judgment entered and signed February 4, 1920.

WILLIAM S. GUMMERE,
Judge.

Book 95, page 375.

Rule for Judgment on Supplemental Counterclaim.

RULE FOR JUDGMENT ON SUPPLEMENTAL COUNTERCLAIM.

Filed June 25, 1920.

It having appeared to the Court that the counterclaim and supplemental counterclaim exhibited herein by the defendant, La Brecque Company, Inc., against the plaintiff, the McGann Company, and Joseph F. McGann, impleaded, could not be conveniently disposed of in the foregoing action, and a separate trial thereof having been ordered accordingly, and the cause having first proceeded to trial upon the complaint of the plaintiff and the answer and the supplemental answer thereto of the defendant, La Brecque Company, Inc., resulting in a judgment in favor of the plaintiff with the express reservation that the issues raised by the counterclaim and supplemental counterclaim exhibited by the defendant, La Brecque Company, Inc., be made the subject matter of another trial between the parties thereto, and the case having proceeded to trial upon the counterclaim and supplemental counterclaim of the defendant, La Brecque Company, Inc., against the plaintiff, the McGann Company, and Joseph F. McGann, impleaded, before Judge Nelson Y. Dungan, with a jury, in the presence of the counsel of the respective parties, on March 23, 1920, and the cause having been heard, and a verdict having been directed and rendered in favor of the said Joseph F. McGann, impleaded, with his costs to be taxed, and the issues as between the defendant, La Brecque Company, Inc., and the plaintiff, the McGann Company, having been submitted to the jury, they having returned their verdict thereon, as follows:

Whereupon it is adjudged that the defendant, La Brecque Company, Inc., recover of the plaintiff, the McGann Company (a corporation), the sum of $6,174.22 and its costs.

Wherefore, it is ORDERED and ADJUDGED, that the plaintiff, Joseph F. McGann, impleaded, do recover of the defendant, La Brecque Company, Inc., his costs, which are to be taxed at the sum of $63.85.

And it is further ordered that the defendant, La Brecque Company, Inc., do recover against the plaintiff, The McGann Company (a corporation), the sum of $6,174.22, with its costs which are taxed at the sum of $63.85, making in the whole sum of $

First Rule to Show Cause.

Let the foregoing rule be entered now, as of March 23, 1920.

Dated, June 25, 1920.

NELSON Y. DUNGAN,
Judge, Essex County Circuit Court.

On motion of

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of Defendant,
La Brecque Company, Inc.

FIRST RULE TO SHOW CAUSE.

Filed March 30, 1920.

Application having been made within six days after the rendering of the verdict herein,

It is, on this 26th day of March, 1920, on motion of Milton M. Unger, attorney for the plaintiff, ORDERED, that the La Brecque Company, Inc., show cause before me at the Court House, in the City of Newark, New Jersey, on Tuesday, the sixth day of April, 1920, at 2 o'clock in the afternoon, why the verdict in the above cause should not be set aside and a new trial granted to The McGann Company.

And it is further ORDERED that in the meantime and until the determination of said rule, execution be stayed on the said judgment.

And it is further ORDERED that the said The McGann Company be permitted to reserve all the exceptions taken at the trial as to the admissibility of evidence, as to rulings by the Trial Court and as to all other matters in which exceptions were reserved as a ground for appeal, and that this rule shall not preclude the taking of an appeal on the matters so reserved.

NELSON Y. DUNGAN,
Circuit Court Judge.

Second Rule to Show Cause.

REASONS ON FIRST RULE TO SHOW CAUSE.

Filed April 15, 1920.

The following are the reasons upon which the plaintiff rests its motion for a new trial:

1. The verdict is without evidence to support it.
2. The verdict is against the weight of the evidence.
3. The verdict is contrary to the charge of the Court.
4. The verdict is excessive.
5. The verdict is illegal.

MILTON M. UNGER,
Attorney for Plaintiff.

SECOND RULE TO SHOW CAUSE.

Filed April 15, 1920.

Upon reading and filing the annexed affidavits,

It is, on this twelfth day of April, 1920, ORDERED, that the defendant, La Brecque Company, Inc., show cause before this Court, at the Court House, in the City of Newark, New Jersey, on Friday, the sixteenth day of April, 1920, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, why a new trial should not be granted to The McGann Company, upon the ground of newly discovered evidence.

And it is further ORDERED that a true but uncertified copy of this order and the accompanying affidavits be served upon said La Brecque Company or their attorneys, Burnett, Sorg, Murray & Duncan, within one day from the date hereof.

NELSON Y. DUNGAN,
Circuit Court Judge.

Decision on First Rule to Show Cause.

DECISION OF JUDGE DUNGAN ON FIRST RULE FOR NEW TRIAL.

DUNGAN, *J.*

The facts in this case are very clear in the mind of the Court, the case having been so recently tried.

Of course, the Court ought not to set aside the verdict merely because the Court, if he had been the judge of the facts, might have found otherwise than the jury did.

I believe, if there had been no jury, and if the Court had been called upon to decide the facts in this case, the Court would have decided upon those facts differently than the way in which they were decided by the jury. The impression the facts made upon my mind was that The McGann Company did not have the knowledge of the issuing of the warehouse receipts by the La Brecque Company, or, at any rate, that that was not clearly shown by the evidence; but, as we are constantly saying to juries, they are the judge of the facts. They must have made upon their minds the opposite impression, otherwise they would not have found as they did.

The question then is whether the verdict is so clearly against the weight of the evidence as to indicate passion, prejudice or misconduct on the part of the jury. Of course, if there had been no question of knowledge, that is, if it had been proven beyond question that The McGann Company had knowledge, then, under the decisions, it would have been the duty of the Court to have directed a verdict against the defendant, and have left to the jury only the question of damages. But that was not my view of the case at all—not my view of the facts in the case. I thought that the Decker letter was one thing the jury might consider. Then I thought another thing which they might consider, and which I think was especially mentioned in the charge, was the fact that there was a proposition known to Mr. McGann to substitute for the McGann warehouse receipts the La Brecque warehouse receipts; that subsequently the McGann receipts were taken up and returned to The McGann Company. The only proposition of which Mr. McGann knew, by which these receipts should be taken up, was the proposition to substitute for them the La Brecque receipts. I felt at the time that this might be a question for the jury. I think that the final disposition of the case depends upon whether the Court is right on the point

of law that the delivery was to a person not lawfully entitled thereto; and upon this rule to show cause, having reserved exceptions, I am not inclined to pass upon that ruling of law in the case. As suggested by Mr. Lane, Courts frequently do that and frequently reverse themselves. If this rule to show cause did not reserve exceptions I might be entirely willing to pass upon that question of law, and reverse myself, if I thought I was wrong; but it may be somewhat embarrassing to pass upon my holding of law in the case, and decide I was right, and then have the Supreme Court say that I was wrong upon it. So it has never been my practice, where exceptions are reserved, to pass upon my own alleged errors, but to do that only when no exceptions were reserved, and when I have the whole case upon a rule to show cause. My thought is that if I was right in charging the jury that delivery to the New Jersey Novelty Footwear Company, or to Kalter & Company upon their direction, was a delivery to a person not lawfully entitled thereto, that the question of knowledge was one which, under the evidence, was properly left to the jury, and that the inferences to be drawn from the evidence were of such a character that the jury might have found as they did, without being accused of having been controlled or influenced by passion, prejudice or misconduct, even though it may be that the Court, upon those same facts, would have found otherwise.

The result of the view of the Court will be to discharge the rule to show cause.

The one point only having been made as to the weight of the evidence, nothing being said about the amount of damages, I assume that counsel feel that, if the verdict is not against the weight of the evidence, the damages are not excessive; therefore, I do not pass upon that point. And that is my own view; that there is evidence upon which the jury might have found the amount of verdict they did find.

The rule to show cause will be discharged, and upon the other phase of the case, whether or not the Court ought to reopen the case upon the ground of newly discovered evidence, that matter can be taken up later.

ORDER DISCHARGING FIRST RULE TO SHOW CAUSE.

Filed June 25, 1920.

A rule to show cause having been issued by this Court on the 26th day of March, 1920, on motion of plaintiff, The McGann Company, why the verdict in favor of the defendant, La Brecque Company, Inc., on its counterclaims in the above case should not be set aside, and a new trial granted to The McGann Company, in which said rule to show cause, the plaintiff, The McGann Company, reserved all the exceptions taken at the trial as to the admissibility of evidence, as to the ruling of the Trial Court and as to all other matters in which exceptions were reserved, as a ground for appeal, with the further reservation that said rule should not preclude the taking of an appeal on the matters so reserved, and pursuant to the demand made by La Brecque Company, Inc., the plaintiff, The McGann Company, filed as its reasons for the making of said rule to show cause absolute, the following:

1. The verdict is without evidence to support it.
2. The verdict is against the weight of the evidence.
3. The verdict is contrary to the charge of the Court.
4. The verdict is excessive.
5. The verdict is illegal.

The first, third and fifth of which said reasons were stricken out on motion of the defendant, La Brecque Company, Inc., on the ground that the questions and points of law raised thereby were included in the reservations contained in said rule to show cause.

And the matter having been duly brought to hearing and having been argued on the basis of the second of said reasons, the fourth reason having been abandoned, and no reason appearing to the Court why the verdict of the jury should be set aside or a new trial granted,

It is, on this 23rd day of April, 1920,

ORDERED, that the said rule to show cause be and the same hereby is discharge with costs to be taxed in favor of La Brecque Company, Inc., and against the plaintiff, the McGann Company, all without prejudice to the right of The McGann Company to proceed with a second rule to show cause granted to it by this

Decision on Second Rule to Show Cause.

Court, on the 12th day of April, 1920, on the ground of newly discovered evidence.

Let the foregoing rule be entered now, as of April 23, 1920.

Dated June 24, 1920.

NELSON Y. DUNGAN,
Circuit Court Judge.

DECISION OF JUDGE DUNGAN ON SECOND RULE TO SHOW CAUSE.

ESSEX COUNTY CIRCUIT COURT.

Newark, N. J., June 18, 1920.

McGann

vs.

New Jersey Novelty Footwear Company.

On rule to show cause why new trial should not be granted on the ground of newly discovered evidence.

Mr. Unger for the rule.

Mr. Murray, contra.

Dungan, *J.*

I had hoped I would be able definitely to decide this case at the close of the argument, for fear that an examination of the testimony might delay the decision for some weeks. If I should decide this case upon the impressions made upon me by the argument, I would dismiss the rule. There are two things I have grave doubt about; one is I cannot quite understand why counsel after having received that letter from Mr. Prall on the 10th, the trial taking place on the 22nd, should not in the meantime have consulted Mr. Prall himself. It is true that a portion of that time was consumed by illness of the attorney, but from the 18th to the 22nd was at his disposal. Instead of consulting Prall he consulted Mr. Leff, and relied upon what Leff told him

rather than consulting the man who had the information, and who could have denied or affirmed what counsel already had an intimation of, namely, that there had been a conversation between Luscomb and Prall, in which the consent of the La Brecque Company was given to the sale of these goods; and that, as appears from the testimony, was the information that came to counsel. After getting such information as that, it seems to me that the person to see was not Leff, but Prall. He did not see Mr. Prall, and, as I say, I have grave doubt whether reasonable diligence was used by counsel. It looks very much to me, knowing counsel as well as I do, and his usual care in the preparation of cases, and especially the care with which this case was prepared by him, like speculating on the result. I do not mean by that to reflect upon the testimony which counsel himself has given, because I have the highest regard for counsel, and his testimony, but I see no reason why I should have a higher regard for that, than the testimony of all alike. I think I ought not to give undue credit to the testimony of counsel.

Then I have very grave doubt, in view of the denials in the testimony on the trial, to which my attention has been called, whether or not it complies with this statement in Tovey *v.* Public Service Railway Co., that "Newly discovered evidence, to be entitled to consideration on a motion for a new trial, must not only be probable on its face, but worthy of belief, and comes from sources making the same credible." I have very grave doubts whether or not, in view of these denials in Prall's testimony, to which attention has been called, I can say that Prall's testimony is such credible testimony that the Court ought to upset this whole trial for the purpose of receiving that testimony.

I say that is the impression made upon me by the argument, but I feel I ought not to decide such an important question without going over this entire testimony, and permitting counsel to submit briefs, if they so desire. I may say, however, that unless a reading of the testimony shows that the facts have been incorrectly represented to me on one side or the other I am not inclined to change the impression I have announced, I mean, if I have received a right impression from the argument, that my decision is likely to be against making the rule absolute. I am going to do this: I am going to consider any briefs that are in my hands by next Wednesday, and my impressions are not so fixed that they cannot be changed by a reading of the testimony,

or by briefs. And what I have said is with a realization of the impressions made upon me at the trial which were, as I have already stated, if I had had to decide the case I would not have decided it as the jury did. But there were facts upon which the jury might decide it that way, and there is nothing to indicate that there was any misconduct, prejudice or passion which would deprive the jury of their right to decide the question upon the facts. As already indicated, my impressions from the argument lead me to the view that the rule must be discharged, subject to change by careful reading of the testimony and consideration of the briefs. If the briefs, and a reading of the testimony, do not result in changing that view, no further opinion will be rendered, but just a decision.

ORDER DISCHARGING SECOND RULE TO SHOW CAUSE.

Filed June 25, 1920.

A rule to show cause having been issued by this Court on the 12th day of April, 1920, why a verdict rendered in favor of the defendant, La Brecque Company, Inc., and against the plaintiff, The McGann Company, should not be set aside and a new trial granted on the ground of newly discovered evidence;

And testimony having been taken pursuant to and under said rule to show cause and arguments of counsel thereon having been heard, and no reason appearing to the Court why the aforesaid verdict should be set aside, or a new trial granted,

It is, on this 18th day of June, 1920,

ORDERED, that the said rule to show cause be and the same hereby is discharged, with costs to be taxed in favor of the defendant, La Brecque Company, Inc., and against the plaintiff, The McGann Company, in which costs is to be included the sum of $107.66, representing the balance due the Commissioner as and for fees in connection with the hearings and testimony had and taken under said rule to show cause.

Let the foregoing rule be entered now, as of June 18, 1920.

Dated June 25, 1920.

NELSON Y. DUNGAN,
Circuit Court Judge.

ESSEX COUNTY CIRCUIT COURT.

No. 454.

DECEMBER TERM, 1919.

THE McGANN COMPANY,
Plaintiff,

vs.

NEW JERSEY NOVELTY FOOTWEAR COMPANY and LA BRECQUE COMPANY, INC.,
Defendants.

Action at Law.

Transcript of shorthand notes of testimony, etc., taken in the above stated matter before Honorable Nelson Y. Dungan, Circuit Court Judge, and a jury, at the Court House, Newark, New Jersey, on Monday, March 22, 1920.

Appearances:

Milton M. Unger, Esq., and Merritt Lane, Esq., for the plaintiff.

H. Theodore Sorg, Esq., and Norbury C. Murray, Esq., (Burnett, Sorg, Murray & Duncan) for the defendants.

Mr. Lane. If your Honor please, before the jury is called I move to strike out the complaint, which is called the supplemental counter claim in the original action, for the reasons stated in the answer which was filed to that supplemental counter claim, which reserved—

The Court. (Handing papers to the clerk.) This was to be filed.

Mr. Lane. —which reserved, in accordance with the Practice Act, the right to strike out the pleading on the ground that it did not constitute a cause of action.

The Court. We have disposed of the complaint in the other suit?

Mr. Lane. Yes, sir. This comes up under what is called the supplemental counter claim.

Now, that counter claim alleges substantially that before August second, 1919—

The Court. Will you not just bring back to my mind what the case was about originally? There have been several in between.

Mr. Lane. I was going to state what the supplemental counter claim consists of, and I think that does tell the story.

The Court. All right.

Mr. Lane. That prior to August second, 1919, the New Jersey Novelty Footwear Company arranged with the La Brecque Company that the La Brecque Company should store for it certain goods at a certain price; that the La Brecque Company thereupon issued to the New Jersey Novelty Footwear Company warehouse receipts, which warehouse receipts, it is alleged, are still outstanding; that on August second the McGann Company, by virtue of a writ of replevin, removed the goods from the storage warehouse of the La Brecque Company; that subsequently thereto (the counter claim does not say when) the McGann Company delivered the same to or allowed and permitted some other person or firm to take possession of said cartons which were then removed from this State and permanently lost to the La Brecque Company.

The first count of the counter claim alleges that the La Brecque Company had demanded of the McGann Company that they surrender the cartons prior to this delivery— No; I beg your Honor's pardon. The first count alleges that the La Brecque Company has demanded at some time or another that the McGann Company deliver to the La Brecque Company and that that demand has been refused.

The second count is precisely the same as the first count except for the motives of demand.

The third count is the same as the first count, except that it alleges that the McGann Company well knew or had reasonable cause to believe that the negotiable warehouse receipts had been issued and that they were held by various parties as security for debt.

The fourth count is a combination, as I read it, of the second and third counts.

Your Honor will see that there is an allegation of an agreement between the New Jersey Novelty Footwear Company and the La

Brecque Company by which the La Brecque Company was to store these goods; that in pursuance of that agreement the La Brecque Company issued warehouse receipts; that subsequently the McGann Company removed these goods by writ of replevin and recovered possession. There is no allegation that the McGann Company did not rightfully remove the goods, so that so far as the counter claim is concerned the McGann Company was entitled to the possession of the goods.

Then the complaint goes on and alleges that subsequently to the McGann Company becoming possessed of the physical possession of the goods they delivered to some person or persons—it does not allege that the person or persons to whom the delivery was made was not entitled to the possession. There is no allegation to whom they delivered it or the circumstances under which there was a delivery.

So that, if your Honor please, considering the language of this counterclaim most favorably toward the pleader—a reversal of the rule—it amounts to this, that when a person lawfully succeeds, or lawfully takes the physical possession of property, with knowledge (because, I think, one of the counts alleges knowledge) with knowledge that a warehouse company through some arrangement between the owner and the warehouse company has issued warehouse receipts upon the goods, without any allegation that those warehouse receipts were lawfully issued, without any allegation of any special property in the warehouseman, the person taking physical possession of the property must not deliver those goods to any other person, other than the warehouseman who has issued his receipts, whether that person have a higher title than the warehouseman or whether the person is a bona fide purchaser for value, without notice of the warehouseman's rights or not—the mere fact that the McGann Company after lawfully receiving possession of those goods delivered them to somebody injures the La Brecque Company which has issued these warehouse receipts—now, that cannot be the law, because it does not follow that the warehouse receipts issued by the La Brecque Company were not illegally issued, were not issued to a thief. It does not follow that the McGann Company when it made delivery did not deliver to a person who had a higher right than the La Brecque Company, and that is assuming, of course, that the La Brecque Company had any right at all.

For that reason I insist that the counter claim does not set forth a cause of action.

There is another objection. It is not a motion addressed to the counter claim but it is a motion addressed to the entire case, for judgment on the pleadings.

The McGann Company filed a supplemental answer to the supplemental counter claim, and that contains the following allegation: "That the New Jersey Novelty Footwear Company, which was the owner of these goods, sold the goods while in the possession of the McGann Company to the Max Kalter Mercantile Company for a consideration; that after the delivery of the goods to the Max Kalter Mercantile Company the said defendant, the La Brecque Company ratified said sale—" (reads.)

That allegation, of course, is that after delivery of the goods referred to in the counter claim the La Brecque Company ratified that sale and consented to the payment of the proceeds to two lawyers to hold the proceeds for the use and benefit of the defendant or whomsoever may be entitled thereto.

There is no answer to that except this: There was a reply filed which merely states that the La Brecque Company joins issue upon the supplemental answer. In other words, it is an attempt to use that which is, as I understand it, forbidden by the Practice Act, a general denial of the general issues, and there is no specific denial of the facts.

The Court. Is that what you attempt to cover this morning by the papers you just filed?

Mr. Murray. It was, if your Honor please.

Mr. Lane. I have no knowledge of that.

The Court. I did not read it. Let me see it, please. That just joins issue; that is all.

Mr. Lane. I do not know what that means.

There is another ground, of course. I do not know whether this goes to the counterclaim or not, but I am mentioning it at this time. There is no allegation in the counter claim that the La Brecque Company is in any way damnified; the only allegation is that these warehouse receipts are out, not anything about there being any injury by their being out.

The Court. This supplemental counter claim is intended to take the place of any other counter claim?

Mr. Murray. Yes. There was originally a counter claim filed to the replevin complaint and then subsequently to that, under an order of this court, we filed a supplemental counter claim to take the place of the original.

The Court. So I need not consider the other at all.

Mr. Murray. It is supplemental, not amended. It is added and in addition to the original counterclaim.

The Court. Then I will have to look at the original counter clam. I do not find any counterclaim here among the papers.

Mr. Murray. I think that is included in the answer in the replevin suit, of Your Honor please, answer and counter claim.

Mr. Lane. If Your Honor please, the original counter claim only amounts to this: that the defendant McGann wrongfully took, and asks damages for the taking. That was disposed of in the other case.

The Court. Yes. I find it here. Now, I want to read this. (Examines papers.) I will hear you.

(Mr. Murray proceeds with argument.)

The Court. Do you allege in the counter claim knowledge on the part of the plaintiff, or the defendant in this counter claim, of the issuing of these warehouse receipts?

Mr. Murray. Yes.

The Court. That is alleged?

Mr. Murray. Yes; that is alleged.

(After argument.)

Mr. Murray. Now, with regard to this question of the reply, possibly I was wrong about my understanding of the Practice Act, but I understood the Practice Act did not require in a reply the detailed statement that it does in an answer. If that is wrong I would ask Your Honor's permission to amend the formal reply to the supplemental answer to the supplemental counter claim.

The Court. Making it a denial?

Mr. Murray. Yes, sir.

The Court. That may be done.

Mr. Murray. I can possibly admit some part of it, with a qualification.

Mr. Lane. It is somewhat important, if Your Honor please, because as I understand the situation the La Brecque Company

cannot deny the facts stated in that answer, that is, cannot with any degree of fairness deny it; and I would like to know just what is admitted in that and what is denied.

The Court. You better look over the answer and put it upon the record. You better do it right away if you want to amend, so counsel may know what they will be obliged to prove. I have the answer here, I think, "Answer of Joseph F. McGann to the supplemental counter claim." That is the one, is it?

Mr. Lane. That is the one.

The Court. Is there a supplemental answer there? "Supplemental answer to supplemental counter claim."

Mr. Lane. That is it.

The Court. (Referring to papers.) The first paragraph is that the delivery of the goods referred to in the complaint and in the defendant's supplemental counter claim was made by the McGann Company in strict compliance with the provisions of the statute in such case made and provided.

Mr. Murray. That is denied.

The Court. Second, that the New Jersey Novelty Footwear Company sold the goods while in the possession of McGann to the Max Kalter Mercantile Company for a consideration, and after delivery of the said goods to the said Max Kalter Company the said defendant ratified said sale and delivery by means of a check to the order of Milton Unger and David Bobker, attorneys; that upon said ratification and consent said check with the unpaid balance of the purchase price of said goods was delivered to said Milton Unger and David Bobker, who hold the same for whoever may be entitled thereto. Is that admitted or denied?

Mr. Murray. That is denied.

The Court. Well, that denies the whole thing. Then it does amount just to a denial.

(After argument.)

The Court. The motion for striking out of the supplemental counter claim will be denied, and an exception to that ruling may be noted.

Mr. Lane. Now, I desire to file a plea setting up the proceedings in the suit commenced by the McGann Company against La Brecque Company, and the determination of that case and the

judgment therein as *res adjudicata,* or whatever may be considered *res adjudicata,* as having been determined in that case.

Mr. Murray. That is the replevin?

The Court. Yes. That will be permitted. Of course, that will proceed to dispose of a great deal set up in the supplemental answer, and the question in this case will be the bona fides of the transaction relating to the disposal of these goods. Is not that the issue now.

Mr. Lane. That is the issue which Your Honor has allowed in the case by denying the motion to strike out. I insist that it is improperly in but that is another matter.

(Jury empaneled and sworn.)

(Mr. Murray opened.)

Mr. Murray. Now, the situation at the present time is just this: There are 459 cases short. That is, we have got outstanding our La Brecque warehouse receipts calling for 459 cases of goods and there aren't any goods. 459 cases are gone and we are now asking, I might say that these 459 cases which are short which are owned by the holders of these receipts, the Jamesburg Bank and Mr. Murso and one or two others—we are now asking you to give us a judgment for the value of the 459 cases containing 1,244 dozen of slippers, so that we can use the money which that judgment against the McGann Company will give us to settle our obligations to the receipt holders for these goods which are gone.

Mr. Lane. I move to non-suit on the plaintiff's opening on the last statement made by the cross-plaintiff that the goods for which the plaintiff sues are now owned by the receipt holders, who are not parties to this litigation. If it is the theory of the plaintiff that the goods are owned by some third party not a party to this litigation I cannot see how a party who is not a party to this litigation can bring a suit for the recovery of the goods.

The Court. I think I will take into consideration all the rest he said and possibly disregard his last statement.

(Mr. Lane opened for the McGann Company.)

JOSEPH F. McGANN, sworn as a witness on behalf of the plaintiff, La Brecque Company.

Direct examination by Mr. Murray.

Q Mr. McGann, you are connected with the McGann Company? A Yes.

Q In what capacity? A President and treasurer.

Q How long have you been such? A Since the incorporation.

Q When was that? A About a year and a half ago.

Q Do you do business also trading as the McGann Company? A I formerly traded as the McGann Company. I organized and started the business as J. F. McGann, trading as the McGann Company, about five years ago.

Q What is the nature of the business conducted by The McGann Company, a corporation? A General warehousing, trucking and so on.

Q And it has been since its incorporation? A Yes.

Q Do you personally as the McGann Company also engage in that same business, in the general warehousing business? A I do not quite understand that question.

Q Who did conduct the warehousing business at Number 4 Warehouse up to last June? A J. F. McGann trading as the McGann Company, and later the McGann Company, incorporated.

Q The McGann Company, a corporation, always conducted this Number 4 Warehouse since its incorporation? A No.

Q When did it begin? A I cannot just recall when our business was incorporated, but when we first took over Number 4 Building, as I recall it, we were then trading or doing business as J. F. McGann, trading as the McGann Company, which later was changed to "The McGann Company, Incorporated."

Q After The McGann Company was incorporated was all the business done at Number 4 Warehouse done by The McGann Company, Incorporated, or by you personally? A The McGann Company, Incorporated.

Q Between February and April, Mr. McGann, did you receive from the New Jersey Novelty Footwear Company certain cases said to contain footwear? A Cartons; yes.

Q And they were stored in Number 4 Warehouse? A Yes.

The Court. What date was that?

Mr. Murray. Between February and May of 1919.

Joseph F. McGann, direct.

Q At that time was it The McGann Company or was it Joseph F. McGann, individually, trading as The McGann Company, which acted as warehouseman for those goods? A I cannot just recall the date of the incorporation of our company and, therefore, I cannot answer that question definitely, whether we were doing business as individuals or as a corporation.

Q And in June of 1919? A The same answer.

Q When these goods were received by you did you issue receipts for them? A We did.

Q Have you the receipts here?

(Mr. Lane produces papers.)

Q I show you a number of receipts, Mr. McGann. Will you see whether or not those are the receipts? A They are.

Q Now, they seem to be signed, "The McGann Company." Does that mean The McGann Company, Incorporated, or does it mean you individually? A I still cannot answer your question definitely, for the reason that these receipts may have been forms that we were formerly using, with the incorporation omitted. I may have been doing business then, or we may have been doing business then, as an individual or as a corporation. These receipts do not clarify in my mind whether it was a corporation or an individual.

Mr. Lane. Are you going to have that marked in evidence?

Mr. Murray. Yes.

The Court. Do you offer them in evidence?

Mr. Murray. I do.

(Package of papers referred to as receipts marked Exhibit P. 1, on behalf of La Brecque Company.)

Q Now, Mr. McGann, you entered into a contract, did you not, with the New Jersey Novelty Footwear Company when you took these goods on storage for them? A Yes, sir.

Q (Showing witness paper.) Is this the letter which forms that contract? A Yes, sir.

Mr. Murray. I offer that.

(Paper last referred to marked Exhibit P. 2, on behalf of counter claimant.)

Joseph F. McGann, direct.

Q Do you know what the New Jersey Novelty Footwear Company did with these receipts after it had received them from you—the warehouse receipts, I am speaking about.

Mr. Lane. I object to that on the ground it is immaterial and irrelevant.

Mr. Murray. I will withdraw the question and change the form.

Q Do you know whether or not the East Newark Bank acquired any of these receipts?

Mr. Lane. I object to that on the ground it is immaterial and irrelevant.

Q After they were issued by you?

The Court. I do not see the materiality of that.

Mr. Murray. It is all going to show the notice that our receipts were outstanding at the time that the disposition was made of the Kalter & Company goods. Then we will show our receipts were exchanged for these receipts of Mr. McGann's and Mr. McGann knew that his own receipts were held by these various banks, and that he knew of the substitution.

The Court. Is there any objection to it appearing in this case that these receipts were negotiated with the various banks and subsequently returned to the McGann Company?

Mr. Lane. Subject to my objection as to the relevancy and materiality I will admit it. I do not think it makes a particle of difference.

The Court. I have grave doubts about it and yet if counsel expects to connect it it may become a part of the case.

It is admitted, then, that these receipts were negotiated by the New Jersey Novelty Footwear Company with certain banking institutions and individuals and that they were subsequently returned to the McGann Company.

Mr. Murray. There is one more question I want to ask on that—maybe that will be admitted—if Mr. McGann knew sometime before they were returned that they had been negotiated.

The Court. The question may be answered subject to the objection as to the materiality.

Q Prior to their return on July 31, 1919, did you know that these receipts had been negotiated by the New Jersey Novelty Footwear Company to various parties, including banks and individuals? A I had been advised by the First National Bank of East Newark that certain receipts issued by the McGann Company had been given to them and held by them as collateral. I had received no information of any kind that any receipts had been given to individuals.

Q What about the Jamesburg Bank? Did you know prior to July thirty-first that some of your receipts had been negotiated through the Jamesburg Bank? A I was to continue.

Q Pardon me. A Including, I believe it is, the First National Bank of Jamesburg. Mr. Voorhees told me that they held certain receipts issued by the McGann Company to the New Jersey Novelty Footwear Company.

Q They are the same receipts which had been issued to the New Jersey Novelty Footwear Company? A They were receipts we had issued to the New Jersey Novelty Footwear Company. I have so testified.

Q Who is Mr. Decker? A He was a former employee of the McGann Company.

Q He was employed to solicit business for you, was he? A His duties were to do as I directed him. They were diversified.

Q What did he do, as a matter of fact, in connection with the business? A He carried out my instructions. You could say solicitation of business; you could say taking care of matters pertaining to insurance, and various things, including the adjustment of claims, and so forth. In other words, his business, or rather his duties were of a general rather than of a specific nature.

Q Mr. Decker was the one who signed your contract with the New Jersey Novelty Footwear Company, was he not? (Showing witness paper.) A Yes.

Q I show you a letter headed "The McGann Company," directed to New Jersey Novelty Footwear Company, dated June 27, 1919, signed, "Yours very truly, The McGann Company, Inc.," followed by the signature, "William Decker." Is that Mr. Decker's signature? A It is.

Joseph F. McGann, direct.

By the Court.

Q Did Mr. Decker hold any office in The McGann Company? A He did not. Your Honor, he was an employee, and that letter was written by my direction.

Mr. Murray. This letter of June 27th is offered.

Mr. Lane. Let me see it.

(Letter last referred to and offered in evidence is marked Exhibit P. 3, on behalf of counter claimant.)

By Mr. Murray.

Q I noticed that is signed, "The McGann Company, Inc." Does that refresh your recollection as to the time The McGann Company took over the business? A No, sir. That would indicate we were operating as a corporation at the time but it does not refresh my memory as to the time our business was incorporated.

By the Court.

Q Except that it would be before that time? A Yes, your Honor. It is a simple question but I do not recall. It is needless to say that there is no evasion, but I do not recall the date of the incorporation of our business.

Q It would be very easy to get. A Mr. Unger has it. The change in our business was—

Mr. Unger. January first, 1919.

Q Are you able, with your recollection now refreshed by Mr. Unger, to state when it was incorporated? A January first, 1919.

Mr. Unger. It was incorporated two or three days before that time and it started January first, 1919.

The Witness. It represented to us a bookkeeping matter and nothing else. There was no change in the management of any kind.

By Mr. Murray.

Q I show you two invoices bearing the heading of The McGann Company and bearing the numbers 2086 and 1385. I will ask you whether those were given with reference to the New Jer-

sey Novelty Footwear Company goods which have been mentioned. A (After examining papers.) Yes; they are made out on our form.

Q I call your attention to the fact that they appear to be addressed to Hyman Rabinow. Can you say how those bills came to be addressed to Hyman Rabinow? A Not of my personal knowledge.

Q Do you know from any source? A No.

Q Does that refresh your recollection as to who these various warehouse receipts that you had issued were negotiated to? A No; it does not.

The Court. Do you offer them.

Mr. Murray. Yes.

Mr. Lane. What are they?

Mr. Murray. They are two invoices—

Mr. Lane. I object to them on the ground they are immaterial and irrelevant and have no bearing in the case at all.

Mr. Murray. It is all going to the question of notice. I will connect it all up.

The Court. It will be admitted.

Mr. Lane. Your Honor will note the objection?

The Court. Yes.

Q I mentioned two invoices. There are also two others attached, numbered 1232 and 2087. Will you look at the last two invoices and tell me whether those cover the same goods or not, or part of the New Jersey Novelty Footwear Company goods? A Yes; apparently.

Mr. Murray. I offer those four invoices, fastened together.

(Marked Exhibit P. 4, on behalf of counter claimant.)

Q Who is Mr. Smith? A Mr. Smith is the secretary. Mr. James L. Smith is the secretary of the McGann Company.

Q And was he last summer? A Yes.

Q And during 1919? A Yes.

Q Was Mr. Kramer employed by you during the months of June, July and August, 1919, by you or your company? A Yes.

Joseph F. McGann, direct.

Q Do you remember when the goods were taken out on replevin from Number 4 Warehouse, on August 2, 1919? A Yes, I remember it being reported to me. I was not present.

Q Did you send Mr. Kramer there? A I did.

Q For what purpose? A To represent the McGann Company.

Q Before August second did you know that there was a judgment against the New Jersey Novelty Footwear Company—had been recovered against the New Jersey Novelty Footwear Company?

Mr. Lane. Objected to as immaterial and irrelevant.

Mr. Murray. If Your Honor please, I am going to prove this first by actual notice and afterward by circumstantial evidence, and I will have to prove my circumstances one at a time. If it is not connected up it can be stricken out.

The Court. I do not see how the fact, even if it is proven, that there was a judgment against the New Jersey Novelty Footwear Company could be relevant. There is no such thing suggested by the pleadings.

(After argument.)

The Court. The objection will be sustained.

Mr. Murray. May I have an exception to the ruling?

The Court. You are entitled to it without a request.

Q Mr. McGann, did you receive any part of your warehousing charges which accumulated against these goods prior to August second? Did you receive any money prior to August second from the New Jersey Novelty Footwear Company? A We received no money until after the goods were taken out by replevin, and as I recall it we received—

Q You have answered the question Mr. McGann.

The Court. I suppose Mr. McGann may not remember it consecutively. Is that the trouble?

The Witness. Yes; your Honor.

The Court. He has answered the question, I think.

The Witness. My recollection is that we received the money from Mr. Unger either August second or later.

Joseph F. McGann, direct.

By the Court.

Q Had you received anything at all before that date? A We had not, your Honor, from February up to that time.

Q And February is the date when the first goods were stored? A Yes, sir, your Honor.

By Mr. Murray.

Q Had you made any attempt to in any way collect for these storage charges which were accumulating between February and August second? A We issued in that time a great many invoices and a number of statements. We made a number of personal efforts to get some money for the reason that we were not only entitled to it, but the work that we performed was paid by us in cash and at the time that work was performed.

Q These invoices which you speak of were bills, were they not? A Bills and also statements.

Q How often were they sent out? A Primarily when the merchandise was received and then on each thirty days after; and in addition, as I recall it, a great many duplicate invoices were sent out and no response in the way of payments.

Q You received back your warehouse receipts on July 31st, did you not, all of them by July 31st? A To my recollection; yes.

Q Where did your company get them from; from whom? A I cannot testify to that as to my personal knowledge, except by report that they were handed in our office either by United States mail or by messenger from La Brecque. That, however, is a conclusion.

Q Did you make or cause to be made any demand upon the La Brecque Company for the payment of these charges between July 28th and August 2nd?

Mr. Lane. I object to that as immaterial and irrelevant. I do not know what the theory is.

Mr. Murray. If your Honor please, it is the same proposition, it is another one of these circumstances. The McGann Company received these receipts or its receipts from the La Brecque Company—

The Court. The question may be answered.

(Last question read.)

A I did not.

Q Are you speaking now personally or for your company? A I am speaking now of the McGann Company.

Q Did you render any statements to the La Brecque Company for the amount of the storage charges which you claimed during that interval? A By advice of my attorney, or our attorney, Mr. Unger, we did.

Q Do you remember what the amount of the storage charges which you claimed were? A I do not recall.

Q About? A Approximately a thousand dollars.

Q (Showing witness paper). I show you a statement. Can you say whether that is the statement you just referred to or not? A That is one of them.

Q Can you say now what the exact amount of your storage charges were? A $1,021.44.

Mr. Murray. Have you any objection to that going in evidence?

Mr. Lane. Yes; I object to it on the ground it is immaterial and irrelevant. I do not see that we are concerned with respect to the charges of Mr. McGann in this particular case.

The Court. It may be received and an exception noted.

(Statement referred to marked Exhibit P. 5 on behalf of the counter claimant.)

Q Mr. McGann, when had the delivery of the New Jersey Novelty Footwear Company goods to the Max Kalter Company commenced? A My recollection is that it was three or four days after the goods had been taken over by the McGann Company by replevin.

Q They were taken on August 2nd, were they not?

Mr. Lane. That is conceded.

Q Then three or four days would be what, Tuesday or Wednesday? A That is my recollection.

The Court. August 2nd was Saturday?

Mr. Murray. Yes. That would be August 5th or 6th.

Q By what means were they transported to New York? A By The McGann Company's trucks.

Joseph F. McGann, direct.

Q At whose direction did the McGann Company's trucks carry those goods to New York? A The New Jersey Novelty Footwear Company.

Q Who in the McGann Company arranged the details of the transportation to New York? A No one.

Q Who designated the truckman or the driver or chauffeur who was to take the trucks to New York? A I don't recall who, either Mr. Smith of Mr. Kramer. Your first question there had to do with the arrangement and that was made in Mr. Unger's office.

Q By whose direction? A I cannot testify to that. I was not present.

Q How did Mr. Unger come to be handling the matter? A Mr. Unger is an attorney. Mr. Unger represented the McGann Company and the matter was in litigation and he was handling it for the McGann Company.

Q He had been authorized to handle the matter by you, had he not? A Certainly.

Q Who fixed the price for the cost of the transportation or transporting these goods in your trucks? A I believe I did. There was no question of price mentioned at the time we received instructions from Mr. Unger to transport these goods, but the matter of the price was submitted subsequently to me.

Q Now, prior to July 31, 1919, did you attempt to get possession of the New Jersey Novelty Footwear Company's goods from the possession of the La Brecque Company? A Yes; we did.

Q Why did you want possession of the goods? A When we were ordered by the courts to vacate Building Number 4 there was a great deal of merchandise in that building on which we had warehouseman's liens, and in addition to that we had issued negotiable warehouse receipts as well as not negotiable. We were therefore obligated and responsible for this merchandise. When we were ordered to vacate the building we immediately started to move our goods, moving in truck loads, approximately five thousand truck loads. On some of the merchandise we were offered resistance by the La Brecque Company. When we attempted to take out in the usual course and we came to it the New Jersey Novelty Footwear Company's merchandise, the La Brecque Company refused to permit us to take it out. We wanted this merchandise as well as all other first and most im-

portant, because we had issued negotiable warehouse receipts and we were, therefore, responsible for the value; and, secondly, because in practically every instance there were sums of money due us for warehousing service on this merchandise, and we therefore had a warehouseman's lien. That is the reason we wanted to get possession of the New Jersey Novelty Footwear Company's goods.

Q Two reasons, then: First, to protect your outstanding negotiable receipts which you had issued, and, second, to enable you to collect the storage charges or warehouseman's charges which had accumulated on it? A Yes; to both.

Q When you took the goods out on August 2nd, your receipts had all been surrendered to you? A They had.

Q So your only interest in the goods at that time was the payment of your charges? A It was a very important thing to us, the warehousemen's lien.

Q In July did you go down to the Jamesburg Bank? A Yes.

Q What date in July? A I cannot recall the date. There is a letter in evidence that would refresh my memory, or a letter filed.

Q Have you the letter here? A Mr. Unger may have it.

Q Who did you see down there? A Mr. Voorhees.

Q Why did you go down to Jamesburg? A The day before I made my trip we received a telephone call and I was connected on the wire. The party said it was the Jamesburg Bank, Mr. Voorhees speaking. He said that he had been informed that the La Brecque Company had taken over the McGann Company's business; that they held two or three warehouse receipts issued by the McGann Company, and his purpose in calling up he stated was to ask, under the new condition of affairs, whether those receipts would be affected in any way or whether he could retain them.

Q Did you go down to Jamesburg the following day? A I replied to him then telling him what is already before the court, that the building was taken over by the La Brecque Company, but they did not under any circumstances take over the McGann Company; and I further said to him that I was living at the shore and I would use the following day as an excuse to stay home and go over to see him in my machine, which I did, and explain to him further.

Q Did you go over the next day to see him? A I did.

Q What took place at that meeting? A Mr. Voorhees reiterated his telephone talk to me. He said he had been approached by the La Brecque people who had asked him to give over his receipts issued by the McGann Company, which he had in his hand at the time he spoke with me. I told Mr. Voorhees that we were still in business and hoped to continue for a great many years; that in this particular matter the New Jersey Novelty Footwear Company had placed merchandise in storage for which we had performed the trucking and the storage and the labor from February up to the present time, and that we had not received any money from them; that we had made a number of efforts without result, and that more recently, since we had been ordered to vacate this particular building, which was one of a number that we operate, that we had tried to get in touch with them but without result. I told him further that we had a warehousemen's lien against this particular merchandise and that we, apparently not being able to locate these people either in Jamesburg or in Newark, that it was our purpose since we had not been able to get the goods from the warehouse, being obstructed by La Brecque, that we proposed to take them out because of our lien and because of our outstanding receipts, by replevin. I further suggested to Mr. Voorhees that under the circumstances—and I did this in good faith—that his interest would be best served by retaining the McGann Company's receipts, which have never been repudiated since we have been in business. He promised to do that.

Q At any time during your conversation with Mr. Voorhees did Mr. Voorhees express any intention, or say anything with regard to his intention regarding the release or surrender of your receipts? A He said in the presence of an associate of his (I do not recall his name) that he not only would not let go of our receipts but he would retain them; that he would not accept La Brecque's receipts. This was said in the presence of a short stout man—

Q Perrine? A Mr. Perrine by name.

Q During the conversation you had with him by telephone on the previous day was there anything said by Mr. Voorhees with regard to an intention regarding the surrender of your receipts? A There was not. His conversation was in substance

asking for further information and when we concluded our telephone talk the matter was to be held in abeyance until I came there the following day. There was no expressed thought of Mr. Voorhees that he would do anything with the receipts. I am speaking now of the telephone conversation.

Q If he had made the La Brecque Company the warehousemen of these goods in place of yourselves that necessitated changing the receipts?

Mr. Lane. I object.

Mr. Murray. I will withdraw the question.

Q I show you a copy of a letter dated July 23rd, 1919, directed to the McGann Company by someone, cashier. Can you, by using that, refresh your recollection of the date of your call on the Jamesburg Bank? A Yes.

Q What was the date? A What was what date?

Q The date of the telephone conversation with Mr. Voorhees. A That letter as I read it is July 23rd.

Q July 23rd? A It was the day previous.

By the Court.

Q That is that you went to Jamesburg or had the telephone conversation? A The conversation, your Honor, was the day previous to July 23rd; that would be July 22nd.

By Mr. Murray.

Q And the date of the trip was the date of that letter, July 23rd? A That is my recollection.

Q Did you have any communication with the East Newark Bank regarding your receipts which you had issued against the New Jersey Novelty Footwear Company's goods and which the bank held as collateral? A Yes.

Q When? A I do not recall when but we received, as I recall it, one or two, or perhaps three letters at different dates, advising us that the New Jersey Novelty Footwear Company had lodged with them as collateral receipts issued by the McGann Company. I do not recall the dates of the various—the two or three letters.

Q That was all prior to July 31st? A Yes.

Joseph F. McGann, direct.

Q Did you talk to anyone from the East Newark Bank within a week or two prior to July 31st regarding these receipts which the bank held? A My recollection is that I did.

Q When? A I cannot recall the date, Mr. Murray.

Q About how long prior to July 31st? A Well, you fixed the date within a week or ten days.

Q What was the substance of that communication? A As I recall it a messenger from the East Newark Bank came to our office with some receipts. He was referred to me personally.

By the Court.

Q Some of your receipts? A Yes, your Honor. He said he was looking for the La Brecque Company's office, and after telling him that he was in the wrong place; that their office was located at 100 Front street, I got in touch with the First National Bank of East Newark and spoke with Mr. Newshafer, the cashier.

Q Why did you get in touch with him? A For the same reason that I went to Jamesburg.

Q And that was what? A To say that the merchandise covered by our receipts—we had a warehousemen's lien, the charges had not been paid and that it was our purpose, in view of the fact that we could not get them by peaceful means from the La Brecque Company, to take them out by replevin. I reiterated in substance what I told Mr. Voorhees. Mr. Newshafer requested me then to tell his messenger to bring back our receipts to his bank.

Q Were all of the cases of goods which were to be delivered to the Max Kalter Merchantile Company in New York actually delivered? A My recollection is that they were not.

Q Why were they not all delivered? A My recollection is that we were restrained from further delivery by you.

Q By what means? A A restraining order.

Q From where? A I cannot testify to that.

Q From the Court of Chancery? A I cannot testify. I received the information through my lawyer not to make any further deliveries.

Q By July 31st had all of the goods in which you were interested been removed from the La Brecque Company warehouse except the New Jersey Novelty Footwear Company's goods?

Joseph F. McGann, cross—re-direct.

Mr. Lane. Objected to as immaterial and irrelevant.

The Court. Objection sustained.

Q When did the sheriff, who took these goods under replevin on August 2nd actually turn them over to you? A I cannot testify to that as my personal knowledge, but by report from my representative, Mr. Kramer, the work of taking these goods out was commenced between two and four o'clock in the afternoon and continued up to ten o'clock that night.

Q When the sheriff first took them did you store them for the sheriff? A The sheriff turned them over to us immediately.

Q For what purpose? A I cannot testify to that.

Mr. Murray. Cross examine.

Cross examination by Mr. Lane.

Q Was the authority that you got from the New Jersey Novelty Footwear Company to deliver to Max Kalter in writing? A It was.

Q I show you a paper dated August 5, 1919, and ask you whether that is the writing? A (After examining paper) It is.

Mr. Lane. I will have that marked for identification.

(Paper referred to marked D. 1 for identification, on behalf of the McGann Company.)

Q At the time the delivery of the warehouse receipts was made to you was there any demand made upon you by the La Brecque Company for delivery of those goods to them or release of the goods to them? A There was not.

Q Did the La Brecque Company ever tender to you the amount of your storage warehouse charges? A They did not.

Q Prior to August 5, 1919, was there ever any demand made upon you for the delivery of the goods to them, by the La Brecque Company? A There was not.

Mr. Lane. I think that is all.

Re-direct examination by Mr. Murray.

Q On July 31st, when you made the demand for your charges who had the physical possession of the goods? A They were in the possession of the La Brecque Company.

Joseph F. McGann, re-direct.

Q I show you a letter from La Brecque Company to the McGann Company, Inc., dated July 31, 1919. Did your company receive that letter?

Mr. Lane. We admit we received all those letters you hold in your hand and have no objection to putting them in evidence.

Mr. Murray. All right

The Court. Do you want them offered?

Mr. Murray. I will offer them all.

The Court. Make a statement as to each one, the date and from whom and to whom.

Mr. Murray. July 31, 1919, from La Brecque Company to—they are all from La Brecque to McGann Company.

(Letter last referred to and offered in evidence marked Exhibit P. 6 on behalf of counter claimant.)

Mr. Murray. Another dated July 31st.

(Marked Exhibit P. 7 on behalf of counter claimant.)

Mr. Murray. Another one July 31st.

(Marked Exhibit P. 8 on behalf of counter claimant.)

Mr. Murray. And one July 28th.

(Marked Exhibit P. 9 on behalf of counter claimant.)

Q Did you say on what date the first load of the Kalter & Company goods went to New York? A I did not say.

Q Can you say? A No.

Q Can you look it up during the lunch hour and be able to say this afternoon, if I am not asking too much of you? A Yes, sir.

Mr. Lane. August 6th was the date.

Mr. Murray. Counsel tells me the date was August 6th.

The Court. The date of what?

Mr. Murray. Of the delivery of the first load of goods to Max Kalter & Company.

Milton M. Unger, direct.

MILTON M. UNGER, sworn as a witness on behalf of the counter claimant.

Direct examination by Mr. Murray.

Q You were last July and August the attorney of Mr. McGann, of the McGann Company? A I was.

Q And still are? A Yes.

Q On or about July 31st did you make a demand upon the La Brecque Company for either the Novelty Company goods or the storage charges that were claimed by— A Personally not.

Q Did you ask any of the La Brecque Company or its representatives to pay the bills? A On what dates?

Q About July 31st. A During the month of July, throughout the month, I had numerous telephone conversations with the attorneys for the La Brecque Company and with representatives of the La Brecque Company.

Q You remember that the McCann Company receipts were all surrendered by July 31st? A I am so informed.

Q Up to that time what were you as the attorney of the McGann Company trying to get from the La Brecque Company, money or goods? A What is that?

Q Up to July 31st what was your position with respect to these goods and the storage charges? A My position?

Q Yes, as attorney? A I was advising the McGann Company what to do.

Q Was it your purpose or intention to obtain possession of the goods from the La Breque Company, physical possession of the goods, or the storage charges, up to July 31st? A It was my intention to obtain both if I could.

Q And why was that? What was your purpose or reason for that? A My purpose in endeavoring to obtain possession of the goods to the McGann Company was in order to insure the enforcement of the lien of the McGann Company against the goods for the payment of its charges, and in order to safeguard the McGann Company upon its outstanding warehouse receipts.

Q After the receipts of the McGann Company were surrendered to it, and its liability with respect to them terminated, then what was your attitude after that, up to August 2nd? A I did not consider that its liability with respect to the warehouse receipts had terminated.

Q When you had received the surrender of these receipts? A No, sir; it still had a duty, under the warehouse law.

Q To whom? A To either the holder of the receipts or the depositor.

Q I am speaking now after the McGann Company receipts had all been surrendered to the McGann Company. A Yes; that is what I mean.

Q Did you demand the goods, or advise the demand of the goods, subsequent to July 31st? A Subsequent to it?

Q Yes. A I drew the demand for the goods and I believe it was July 30th or July 31st. I am not sure which date.

Q Mr. Unger, did you receive payment of The McGann Company storage charges, in behalf of McGann or McGann Company? A I did.

Q On what date? A I believe it was Tuesday, August third.

Q Monday was August fourth. A Tuesday, August fifth. Saturday was August second. Monday was the fourth. It would be Tuesday, August fifth. It was on a Tuesday.

Q In what form was that purchase price paid?

The Court. You have not spoken about the purchase price yet.

Mr. Murray. The bill, I mean.

Q How was it paid? A It was in the form of a check.

Q Whose check? A I believe it was the check of the Max Kalter Mercantile Company.

Q For how much? A It was $1,500, the particular check.

Q Why was the check more than $1,021.44, which the McGann statement called for? A Because the goods had been taken out at that time under a writ of replevin and there were other expenses and charges in connection with the replevin and they had been added to the ten hundred and some odd dollars and had been itemized, and, as I recall them—I have the paper in my file there—they totaled a little over fourteen hundred dollars, and Kalter made out the check for the fifteen hundred with the request that I total the charges and refund him the difference, which I did.

Q Was there any arrangement between you and Mr. Kalter or the Kalter Company, or its representatives regarding the time when that check could be used by you or your client? A Yes.

Q What was that arrangement? A I was not to use the check until delivery of the merchandise had commenced.

Q Why was that arrangement made? A Those were the terms imposed by Mr. Kalter.

Q Did he say why he imposed those terms? A I had told him that we had replevined the goods and that under the law the defendant had a certain time within which to re-replevin, and I told him that time should be given, and that if he waited—I told him the replevin had taken place on Saturday, August second, and that I did not believe in computing Saturday afternoon and Sunday as a part of the time within which to re-replevin, and that I considered that the defendant would have Monday and possibly Tuesday within which to re-replevin and that no delivery would be made to him until Wednesday morning, and I so instructed the McGann Company. Upon doing that, he said, "Well, if you don't want to make delivery until Wednesday morning, I don't want you to use the check until then." And I agreed to that.

Q When was the check to be used, with reference to delivery, when delivery commenced or when it was completed? A As soon as the first merchandise was loaded on the truck and delivery commenced I was to use the check.

Q Do you remember procuring certain La Brecque Company warehouse receipts and surrendering them to me? A Yes.

Q Do you remember when that was? A I should say it was September second or third. I have a receipt signed by you for the goods among my papers, which bears the date—I will get the papers. (Examines papers.) September 3, 1919.

Q Did you surrender to me on or about that date La Brecque Company warehouse receipts, numbers 1066, 1067, 1068 and 1069? A I did.

Q Where did you get those receipts? A From the First National Bank at East Newark.

Q Did you issue, or did the McGann Company issue its receipts to the East Newark Bank in substitution of these La Brecque Company receipts which you obtained from the bank?

Mr. Lane. Objected to as immaterial.

A This is September, 1919, after this—

The Court. I do not see the relevancy of it.

Milton M. Unger, cross.

Mr. Murray. If your Honor please, I understand the defense is we consented or ratified this sale by having something to do with taking some money.

The Court. If that becomes a defense that may be again offered. The objection will be sustained.

Mr. Murray. Now, if your Honor please, I would like to get on the record at this point the same question I asked a moment ago, as to the judgment, whether Mr. Unger knew at the time of this sale whether there was a judgment against them—

The Court. Well, if you think two good exceptions on the same point are better than one—

Mr. Murray. There has been additional testimony gone in since the last question.

The Court. All right.

Mr. Murray. Cross examine.

Cross examination by Mr. Lane.

Q This check for $1,500 that was paid to you or Mr. McGann by Max Kalter, was that a part of the single transaction with respect to the sale of these goods? A Yes.

Q What was the entire purchase price paid by Max Kalter? A I did not take any part in arranging the purchase price, but I understood that it was in excess of $3,000.

The Court. Eight thousand?

The Witness. In excess of $3,000.

Q You had nothing to do with the actual negotiations for the sale? A No. The parties were agreed when they came in my office.

Q What time of the day was that? A They came in about quarter to two in the afternoon.

By the Court.

Q What day was that? Was it Monday or Tuesday? A There were two days. The representatives of the New Jersey Novelty Footwear Company had been in on Monday getting figures and then nothing definite had developed and then the meeting between the parties took place on Tuesday, the following day, and it was at that time that the money was paid.

Edmund J. La Brecque, direct.

By Mr. Lane.

Q And all that McGann got were his warehouse charges? A That is all. I drew the check to him for the payment of the bare warehouse charges.

Mr. Lane. That is all.

EDMUND J. LA BRECQUE, sworn as a witness on behalf of the plaintiff, the counter claimant.

Direct examination by Mr. Murray.

Q Mr. La Brecque, you are connected with the La Brecque Company? A I am.

Q In what capacity? A I am vice-president and secretary.

Q Is the La Brecque Company in the general warehousing business? A They are.

Q And has been for how long? A Well, as a corporation, since 1917.

Q I show you certain warehouse receipts, La Brecque Company warehouse receipts, number 1637. I ask if that is your signature? A Yes.

Q I show you another one, number 1645, and ask if that is your signature? A Yes.

Q And number 1646. A It is.

Q And number 2037? A Yes.

Q Those are all your signatures? A Yes.

Q Do they cover the New Jersey Novelty Footwear Company's goods? A Yes.

(At one o'clock in the afternoon a recess was taken until two o'clock in the afternoon.)

(Last question and answer read.)

Q Do you mean they cover all of the entire number of cases? A No. All these receipts are on the New Jersey Novelty Footwear Company's goods.

Q They do not cover all of the goods? A No.

Q I show you receipts numbers 1640, 1641, 1642, 1643, 1066, 1067 and 1069, and ask you if those cover part of the New Jersey Novelty Footwear Company's goods? A All of those cover part of the Novelty Company's goods.

Edmund J. La Brecque, direct.

Q Did you make a contract with the New Jersey Novelty Footwear Company regarding the storage of these goods? A The La Brecque Company did; yes.

Q The receipts which I just mentioned a moment ago, these receipts were issued, were they? A Yes.

Q To whom? A The New Jersey Novelty Footwear Company.

Q You say that you made a contract with the New Jersey Novelty Footwear Company for the storage of these goods. I show you a letter from the La Brecque Company to the New Jersey Novelty Footwear Company, dated June 20, 1919, and a letter from New Jersey Novelty Footwear Company to La Brecque Company dated June 23, 1919. Is that the contract? A Yes; that is the contract.

Mr. Murray. I offer that in evidence.

The Court. It will be received.

Mr. Lane. I object to that on the ground it is immaterial and irrelevant, and your Honor will note an exception?

The Court. Yes.

(Two letters referred to and offered in evidence are marked, respectively, Exhibit P. 10 and Exhibit P. 11 on behalf of counter claimant.)

Mr. Murray. I offer these receipts.

The Court. Do you want to put them all together?

Mr. Murray. Yes.

The Court. There are eleven of them, are there?

Mr. Murray. Twelve, I make it.

The Court. 1637, 1645, 1646, 2037, 1640, 1641, 1642, 1643, 1066, 1067, 1069.

Mr. Murray. And 1068.

The Court. All right.

(Papers last referred to, fastened together, marked Exhibit P. 12 on behalf of counter claimant.)

Q Mr. La Brecque, when did you first learn that the McGann Company storage warehouse charges had been paid? A On Friday, August eighth.

Edmund J. La Brecque, cross.

Q And when did you first learn that the goods had been sold to Kalter & Company? A On that same day.

Q I show you three additional warehouse receipts, Mr. La Brecque, numbered 1063, 1064 and 1065. Were those receipts issued by you in connection with the New Jersey Novelty Footwear Company's goods, or some of them? A They were.

Mr. Murray. I offer those. Have you any objection?

Mr. Lane. The same objection, as to materiality and relevancy.

The Court. They will be received.

Mr. Lane. And I ask an exception.

The Court. They will be marked P. 13.

(Papers last referred to and offered in evidence marked Exhibit P. 13 on behalf of counter claimant.)

Mr. Murray. Cross examine.

Cross examination by Mr. Lane.

Q Mr. La Brecque, what time was it on August eighth that you ascertained that the goods had been disposed of by the New Jersey Novelty Footwear Company? A I cannot remember just what time of the day it was. Mr. Murray called me up and informed me about it. I never heard of it up to that time.

Q When did Mr. Murray tell you?

Mr. Murray. If your Honor please, that is objectionable, I think. I have really no objection to it if he wants to ask it.

The Court. Proceed.

A Why, Mr. Murray told me that he had started—

The Court. When did Mr. Murray tell you?

Mr. Lane. No. "What."

The Court. Oh. "What." All right.

The Witness. Mr. Murray told me the injunction proceedings had been instituted and also asked me did I know that the McGann Company had released these goods to the New Jersey Novelty Footwear Company. I told him that I did not.

Edmund J. La Brecque, cross.

Q You cannot remember what time of the day that was? A It was sometime during the working day. It was between nine o'clock in the morning and five o'clock in the afternoon, because I was at the office when he called me up.

Q You know Mr. Prell, of course? A Well, I met him twice.

Q You know that he was the president or an officer of the New Jersey Novelty Footwear Company? A I was informed of that; yes.

Q Did you meet him on Monday, August fourth? A No.

Q Are you sure of that? A Absolutely, because the first time I ever met Mr. Prell was on Wednesday, the 13th of August, I believe.

Q You had not met him before that at all? A Absolutely not. I never met any member of the New Jersey Novelty Footwear Company before that.

Q Your negotiations had been entirely— A The negotiation between the New Jersey Novelty Footwear Company and the La Brecque Company had been instituted by Mr. Luskum and Mr. Creicher.

Q You personally had nothing to do with it? A Absolutely not.

Q Do you remember being present at your office on either Monday, August fourth, or Tuesday, August fifth, when Mr. Prell came in to see Mr. Luskum? A No. I was at my office, but my office was at the Woolworth Building, New York, and Mr. Prell was not over there.

Q Were you at the warehouse in Newark on that day? A No; I was not.

Q And do you remember Prell telling Luskum— A Well, I could not remember if I was not there.

Q Wait until I get through with the question. Do you remember hearing Prell tell Luskum, either at your office in the Woolworth Building or your office at Newark or somewhere else, on August fourth or fifth, that he had sold the goods to Kalter & Company and wanted to know whether it was all right? A No, I do not.

Q And do you remember Luskum telling him he could go as far as he liked; that La Brecque Company had no interest in it? A No.

Q No such conversation ever took place? A Not to my knowledge.

Edmund J. La Brecque, cross.

Q At which you were present or which you overheard? A Absolutely not.

Q Do you remember having a conversation with Prell over in New York, in the evening at a restaurant in New York?

Mr. Murray. If your Honor please, this is not cross examination. What date is this?

Mr. Lane. About August seventh or eighth.

Mr. Murray. This witness' testimony related up to the time of the sale. The only question that was asked this witness was whether he had heard of the sale. That is the only thing that he has been asked, and I say this is not proper cross examination.

The Court. The objection will be overruled.

Mr. Murray. And an exception?

The Court. Yes.

A I do not.

Q Did you ever meet Prell or Lowy in New York? A No. I was with them in New York at one time. I never met them there.

Q Are you drawing a distinction between meeting them and being with them? A No. The place you are trying to mention is at Newark. I did meet them at a restaurant in Newark.

Q At The Washington Restaurant? A At The Washington Restaurant in Newark.

Q When was that? A On the thirteenth of August, on Wednesday, I imagine.

Q Hadn't you met them the night before in New York? A No; I had not.

Q Did you ever meet them in New York or were you ever with them in New York? A I was, the day following, that is the fourteenth, the day following the Wednesday I met them in Newark.

Q What was the subject-matter of your conversations at these two places? A Do you want me to relate—

The Court. What was the subject-matter, he says.

Mr. Murray. I object to this. Here we are up to August thirteenth.

(After discussion.)

(Objection overruled.)

Mr. Murray. May I have an exception?

The Court. Yes.

The Witness. Well, the subject of discussion was getting back our warehouse receipts.

Q Was the subject of the conversation also the payment of the moneys that Kalter owed? A Yes; that was mentioned. It was mentioned by Mr. Prell if we got that money we would be able to get our receipts back.

Q And as a result of that conversation you said you would release the money? A I did not, and we did not release any money at that time on account of him not—

Q What? A On account of not doing what he wanted him to do.

Q Didn't you tell him at that time, either August thirteenth or August fourteenth, that you would direct your attorney to release the money in the hands of Kalter? A Well, I told him—

The Court. No. Just that.

The Witness. No.

Q What did you tell him? A Can I explain the circumstances?

The Court. That is what he is asking, what you told him.

The Witness. Mr. Prell explained to me that he wanted to get my warehouse receipts back. He said that as a result of the controversy between the McGann Company and the La Brecque Company and the notices and so forth that he was up against the wall; that all his creditors were down on him, and he said that some of the creditors would be satisfied with blocks of his stock in exchange for some of our warehouse receipts. Then he explained that he had sold the goods to another concern in New York and that the McGann Company had released those goods on the payment of a check, and then he said that some of these creditors were getting down on him and the only way that he could get these warehouse receipts back was to pay these creditors, and that we were holding up certain moneys they owed him in New York,

and if he could get that money released he could get me my warehouse receipts back, and I told him that was the thing we were interested in, in getting the warehouse receipts back.

Q You also told him you would release the money, didn't you. Continue and tell the conversation. A He said, "Will you come over and explain the situation to the Max Kalter firm in New York?" And I said, "Why, yes." And so we went over the following day and we called up to this place and I believe either Mr. Prell or Mr. Lowy talked to Mr. Rosenwasser there and Mr. Rosenwasser came and asked me what it was all about and what we were going to do, and I said, "I have explained to Mr. Prell the only thing I am interested in is the warehouse receipts. I don't care what happens to the money. It is not a matter of storage charges the La Brecque Company wants." All their negotiable warehouse receipts were out and we wanted them back, and he said Mr. Prell had not advised him warehouse receipts entered into it at all, and he would have to take it up with his attorney, and I said I had to go back to my New York office and any time he wanted to come with his attorney to my New York office he was at liberty to do so, and that afternoon about 5:30 Mr. Rosenwasser, Mr. Prell, Mr. Lowy and Mr. Rosenwasser's attorney came in the New York office and they had a certain paper and said if I would sign that they could release the money so Mr. Prell could get my warehouse receipts back, and I would not sign anything, and I said I could not enter into anything, and I would have to call up my attorney, and I called up Mr. Murray and Mr. Murray told me to have nothing to do with them, and I said I was sorry for Mr. Prell, but we could absolutely do nothing, and that was the end, and that was the last I ever saw of Mr. Prell.

Q Didn't you tell him at that time that you would release the money? A I merely stated—

The Court. No.

The Witness. No, sir.

Q Well, what did you say? A I wanted my warehouse receipts back. That was the thing I was interested in, and if he could absolutely prove to me that I would get my warehouse receipts back that that money would be easily released.

Edmund J. La Brecque, re-direct.

Q You knew at that time, did you not, that you had filled a bill in the Court of Chancery for an injunction? A Yes.

Q Now, these warehouse receipts which have been introduced in evidence were not issued by you on the dates that they bear date, were they? A No; they were not.

Q At the time the warehouse receipts bear date your concern had nothing whatever to do with the goods, had it? A No.

Q (Showing witness paper.) I show you—

Mr. Murray. I object. This is not cross examination.

The Court. Yes; I think we have gone beyond the limit of cross examination of this man.

Mr. Lane. I think that is all.

The Court. You are anticipating, perhaps.

Re-direct examination by Mr. Murray.

Q Why did you date the warehouse receipts which have been offered in evidence back of the time when you actually obtained physical possession of them? A Well, the contract with the New Jersey Novelty Footwear Company and ourselves stated that when we got itemized bills, found out just the amount of money the New Jersey Novelty Footwear Company owed to the McGann Company, we were to pay that money, but the New Jersey Novelty Footwear Company could not afford to pay the storage until the goods were released, and they told us at the time that was the same arrangement they had made with McGann. I did not know anything about that, but if we were to pay all the charges of the McGann Company the New Jersey Novelty Footwear Company would owe us from the original storage date; and when a warehouse receipt is given to a bank, a negotiable warehouse receipt, I believe the law requires that it show the date it went in storage, so that anyone negotiating that will know just how much the storage charges are on the goods, and so we always date our warehouse receipts as the law provides, from the date the material goes in storage, showing the amount of storage charges and the labor due on the goods.

Q How did the dates on these receipts which you issued correspond with the dates on the McGann Company receipts which were taken up? A They were identical, because the

Edmund J. La Brecque, re-cross.

New Jersey Novelty Footwear Company assured us the McGann dates were right, when the merchandise entered the warehouse.

Re-cross examination by Mr. Lane.

Q Is it not a fact that you dated those receipts the same day as the McGann receipts in order to indicate that your concern had taken over the business of the McGann Company? A No, sir; absolutely not.

Q You had endeavored to get the people who stored goods in the McGann Company to store goods with you, hadn't you? A Yes, we are—

The Court. Did you?

The Witness. Will you repeat that question?

(Question read.)

The Witness. Not personally. My solicitors might have.

Q Well, under your direction? A No.

Q Did you know that your solicitors were trying to get the people who had goods stored with the McGann Company to store with you? A Well, I had knowledge of it; yes.

Q And still you say you did not direct it? A I did not.

Q Well, why didn't you stop it? A In the first place, if a certain company wants to store—if we give a better proposition to a company and they want to store their goods with us instead of McGann—we are in the storage business for profit and it is not for us to stop it.

Q In other words, because the McGann Company was forced by circumstances to leave this building which you went into you thought it fair competition to get the customers of the McGann Company who had goods stored in that place; is that right? A Yes—

Mr. Murray. I want to object for the reason it is immaterial. It is going to bring in all the past history, which I understand your Honor wants eliminated. Now, if Mr. Lane proceeds with this cross examination—

The Court. It seems to be getting in without objection, and I am inclined now, since it is opened, to let it in, and I am inclined to overrule the objection.

Mr. Murray. I ask an exception.

Edmund J. La Brecque, re-cross.

The Court. Yes.

The Witness. Well, the La Brecque Company felt they owned the building and had been deprived of it so long, Mr. McGann should have thought of his customers months before and have asked them months before, when he should have gotten out.

Q I show you a part of a newspaper account. A Yes.

Q Do you recognize that? A Yes.

Q Was that inserted under your direction? A Under the direction of our attorney, Mr. Burnett.

Q And the telephone number there is the telephone number of the McGann Company? A I could not say that.

Q 1620 Market and 1621 Market. Didn't you know that was the telephone number that had been there when the McGann Company had the place? A No. I was not familiar with Mr. McGann's telephone number.

Q Did you have any authority to use Mr. McGann's telephone number? A There was a discussion in the office when Mr. McGann wanted certain concessions from us, and there was an agreement that was not lived up to, and seeing we could not get a telephone for three or four weeks we would use the old telephone.

Q You would use McGann's number? A Yes.

Q Because you could not get a telephone for three or four weeks you used McGann's number. Is that right? A Not necessarily the number. I said the phone. We did not, though. Mr. McGann took it out.

Q Did you communicate with your counsel on the morning of August fifth with respect to the meeting that was to be held at Mr. Unger's office with respect to these goods? A No, I did not.

Q Have you any knowledge how your counsel obtained information that a conference was to be had in Mr. Unger's office that afternoon? A No, I have not.

By Mr. Murray.

Q How long had you been trying to get possession of the building which you had purchased, Mr. La Brecque? A Well, the six months—Mr. McGann had six months more to run and that time was up on May first.

Q When did you get actual possession? A June 16th, I believe.

Q Did you have any difficulty getting possession? A Yes.

Q What was the nature of the difficulty?

The Court. What do you think the relevancy of this is?

Mr. Lane. I object to it.

Mr. Murray. I object to one half the story going in without the other, and that is what I anticipated when I made the objection.

The Court. All right. Go ahead.

Mr. Lane. I object on the ground it is irrelevant and immaterial, and on the ground it is a litigation of which there is better proof than this witness' testimony. The records will show.

The Court. I think you will admit that from May first until possession was given the matter was in litigation.

Mr. Murray. Yes.

Q How many courts did you litigate it in, Mr. La Brecque? A Every court it could be litigated in I believe.

Mr. Murray. I will call Mr. Rabinow.

The Court. Is this about the warehouse receipts?

Mr. Murray. Yes.

The Court. In view of the other case can that not be admitted without calling these other witnesses?

Mr. Murray. My idea is that at the other trial the amount to be given by Mr. Rabinow was not stated. through an oversight.

Mr. Lane. I have no objection to stipulating in the case that the testimony given by this gentleman in the other case—

The Court. Well, perhaps he better be called. I thought maybe it would be possible to stipulate that these gentlemen were the holders of these certificates, Mr. Murray giving the names and the amounts which they had advanced against them. Have you it in detail?

Mr. Murray. I have all of that information in detail except the amounts due Mr. Marsa and Mr. Rabinow.

The Court. Submit it to the other side and get those details right away and perhaps we can save time.

Mr. Lane. If your Honor please, I am perfectly willing to stipulate that the men who have been named and who were produced at the last hearing hold receipts of the La Brecque Company which were substituted for the McGann receipts, and that they advanced moneys on the McGann receipts and that the moneys are still due, providing it is also stipulated, as they have testified, that the reason they made the substitution was because of the request made upon them by the La Brecque Company. It was so testified in the other case.

Mr. Murray. Yes, the La Brecque Company did request the holders of the receipts to exchange.

The Court. Why can that not be eliminated entirely, except to use the testimony?

Mr. Murray. I think so; yes. The amount due to Mr. Rabinow as the amount due on his note is $3,790.77.

The Court. Put it on the notes and maybe the other side will agree to the whole thing. Is there anybody else?

Mr. Murray. Is Mr. Marsa in court?

(No response.)

Mr. Murray. He was subpoenaed and he was here this morning. I have his receipts, but I do not know how much is due him.

The Court. If he comes in it can be added.

Mr. Murray. Then I understand a part of the stipulation is these were negotiated by endorsement of the New Jersey Novelty Footwear Company.

Mr. Lane. Yes, by the La Brecque Company.

Mr. Murray. Endorsed by the New Jersey Novelty Footwear Company.

Mr. Lane. I think so; yes.

The Court. Now, just submit your statement to the other side and they may be willing that shall go right in.

Mr. Lane. In that stipulation I ask counsel on the other side to stipulate these men who have been men-

tioned are parties to the bankruptcy proceedings against the New Jersey Novelty Footwear Company. I do not know whether they have in fact filed claims in the bankruptcy proceedings or not. If they have filed claims I want them admitted.

Mr. Murray. Some are parties and some are not. Mr. Rabinow I know is a party to the bankruptcy proceedings. The La Brecque Company and the McGann Company are parties to that proceeding.

The Court. Are these holders of the La Brecque warehouse certificates which were issued on account of the New Jersey Novelty Company's negotible or non-negotiable certificates also parties to the bankruptcy proceedings as creditors?

Mr. Murray. I can only speak positively as to Mr. La Brecque and Mr. Rabinow and the Jamesburg Bank.

Mr. Unger. The rule to show cause in the bankruptcy case shows who is a party.

The Court. Now, with that admission are you willing to let it in?

Mr. Unger. Yes, sir.

The Court. Now, you may submit your statement to the other side and see if they are willing that should go in in lieu of this testimony.

Mr. Lane. We will stipulate that, subject to correction. I do not think there is any correction.

Mr. Murray. Then I better put that in the form of a dictated statement.

The Court. Well, if you want to do that.

Mr. Murray. And I can be corrected if I get it wrong.

It is agreed that prior to August second the La Brecque Company issued the following negotiable warehouse receipts against the following goods of the New Jersey Novelty Footwear Company—

The Court. Against the goods of the New Jersey Novelty Footwear Company which are in question.

Mr. Murray. Which are in question.

The receipts and the holders thereof referred to are I. M. Leff, number 1637, 48 cases, to secure loan of $500.

Stipulation re Warehouse Receipts.

The Court. Give the number of the certificate, will you?

Mr. Murray. 1645 and 1646, Hyman Marsa, 126 cases and 100 cases, respectively. The amount of the lien this was to secure I do not know.

Number 1063, 1064 and 1065, Jamesburg Bank, covering 94 cases, 116 cases and 115 cases, respectively, to secure loan of $5,500.

Non-negotiable receipt number 2037, A. Rabinow, 100 cases, to secure loan of $3,790.60.

That these warehouse receipts were issued to the New Jersey Novelty Footwear Company by the La Brecque Company, and by the New Jersey Novelty Footwear Company endorsed over by endorsements in blank to these respective holders or creditors in exchange for the McGann Company negotiable warehouse receipts for like numbers, and at the request of the La Brecque Company; and that these holders have not been repaid and that the several holders of these receipts still hold them.

Mr. Lane. And are parties to the bankruptcy proceedings?

Mr. Murray. And that they are parties to the bankruptcy proceedings now pending in connection with the New Jersey Novelty Footwear Company in bankruptcy.

Mr. Sorg. Marsa is $3,300.

The Court. Marsa is $3,300?

Mr. Sorg. Yes, sir.

Mr. Murray. It has been agreed that the cases of footwear now actually in dispute and involved in this trial for which La Brecque Company claims judgment are 459 cases containing 1244 dozen of slippers.

The Court. There is no agreement as to the value?

Mr. Lane. No.

Norbury C. Murray, direct.

MILTON I. VOORHEES, sworn as a witness on behalf of the counter claimant.

Direct examination by Mr. Murray.

Q Mr. Voorhees, you were connected or are connected with the Jamesburg Bank? A I am.

Q Do you remember when Mr. McGann came down to your bank on July twenty-third last? A I do.

Q Who else was there? A He was alone that day. He came alone with his—I think it was his father with him. They came up from Bradley Beach.

Q Was that the only time he came down there to see you? A He telephoned the day before he would be up to see me and he would talk to me about the New Jersey Novelty Footwear Company.

Q Was there anyone else there beside Mr. McGann and his father? A No; he just same along, I guess, as a matter of company.

Q No one else was there? A Not with him at that time.

Q Did he come down there at an earlier or later time in regard to these receipts? A He had never been there but twice.

Q When was the second occasion? A At the time they had the sale of the Novelty Company affairs. He just came in to pass the time of day.

Mr. Murray. That is all.

Mr. Lane. I have no cross examination.

NORBURY C. MURRAY, sworn as a witness on behalf of the counter claimant.

Direct examination by Mr. Sorg.

Q You are a member of the law firm of Burnett, Sorg, Murray & Duncan? A I am.

Q In July 1919 and thereafter you were handling the business between the McGann Company and La Brecque Company? A Yes, particularly with regard to the New Jersey Novelty Footwear Company's matters.

Q You actively took that up when? A July thirty-first.

Q Were you present on the day when the goods were replevined by the McGann Company from the La Brecque Com-

pany? A Yes. I got there apparently after the work of removal had started.

Q Who did you find there? A I found Mr. Hummell, the deputy sheriff, Mr. Kraemer of the McGann Company, and there were several workmen outside; I do not know who they were working for.

Q Who was with you? A Mr. Frank B. Broughton.

Q Did you have any conversation with Mr. Kraemer or anyone else respecting the replevin suit? A Yes, I did. I first asked the deputy sheriff what it was all about and he showed me a writ of replevin and I looked it over and it appeared to be regular, and I then turned to Mr. Kraemer and I said, "Mr. Kraemer, I protest against this. You haven't any right to take these goods out. We have outstanding negotiable receipts against these goods. You have got back your receipts." And he said, "Yes; I know it." And I said, "And our receipts are still outstanding. You haven't any right to take these goods." I do not think he made any reply to that, and then I turned to the sheriff and I protested to him about taking the goods and I suggested that it probably would not do me any good to resist forcibly and he smiled and said it probably would not.

The Court. And you concluded not to do so?

The Witness. I concluded not to do so. And I left there. I suppose I was there about three-quarters of an hour all together.

Q When you arrived the goods were in course of being removed? A They were being lowered out of the window. There was one more party there, Mr. Cricher.

The Court. Was he with you?

The Witness. No; he was an employee of the La Brecque Company.

Q What did you do after that with respect to the matter? A I started immediately to get these goods back.

Q How? A I started to draw the papers for an injunction, to be presented to the Court of Chancery to procure an order from that Court compelling the McGann Company to return those goods, and in these papers, in the Chancery bill we tendered into court the sum of eleven hundred dollars to cover the amount

of the McGann storage charges, as claimed, and in the bill asked the Court to determine how much was in fact due McGann for his storage charges, take out whatever amount it found to be due to McGann out of the check which we would deposit in court, and in the meantime give us back our goods so that we could meet the demands which had been made upon us by the holders of our receipts.

Q When did you complete the papers, the complaint or petition or whatever it was, in that injunction proceeding? A I completed them on Thursday noon, August seventh.

Q What caused the delay between August second and that date? A I had to draw them all over once. There were more facts came up which I was not familiar with and I did not learn until I got the papers pretty near finished and they were quite bulky and I had to draw them all over again.

Q Did you get a rule to show cause on them? A I went to Trenton before Vice-Chancellor Backes on Friday morning. I could not get a Vice-Chancellor on Thursday afternoon, they were away on vacation, and I found Vice-Chancellor Backes would be in Trenton on Friday morning and I went down there and presented the papers to him and stated the situation and he made the order.

Mr. Sorg. It is agreed that we use copies instead of subpoenaing the clerk or one of his representatives to appear.

Q Are these true copies of the papers in that suit? A Yes; they are. There is the bill of complaint, the answering affidavits by Mr. McGann and several of his witnesses, an order dated August eighth, another one dated August twenty-sixth, and another one dated September second, and one dated September ninth.

Mr. Sorg. I offer the whole batch in evidence.

Mr. Lane. We have no objection to their being received in evidence, if your Honor please, provided it is definitely understood that the statements of fact contained in these pleadings are not binding on us.

The Court. Oh, yes. The only purpose can be to show what was done, that is all. That should be distinctly understood.

Mr. Sorg. Oh, that is understood.

Norbury C. Murray, direct.

(Papers referred to, fastened together, marked Exhibit P. 14 on behalf of counter claimant.)

Q That order for restraint was made when? A On August eighth.

Q What did you do in pursuance of that? A I got back from Trenton somewhere in the neighborhood of half-past one or two o'clock and I immediately had a copy made of the order and of the other papers and had them sent over to Mr. Unger, copies of them, who represented the McGann Company. I sent them over by a young man in the office. He had been gone probably half an hour when I received a telephone call from Mr. Unger and he said, "I just received a copy of an injunction bill and a restraining order and injunction." He said, "These goods have been sold," and "They are being delivered—" either had been delivered or were being delivered, and I was surprised. That was the first time that I had heard of the sale of these goods and I had not heard anything before this of the payment of the McGann charges. He told me then that the McGann charges had been paid; that the goods had been sold to a concern in New York and that he was not sure whether they had all been delivered or not, and I asked who the concern was and he told me the Max Kalter Mercantile Company. I protested to Mr. Unger against that proceeding, and I immediately called up the Max Kalter Company in New York. I did not know who they were or anything about them, but I found them in the telephone book. I got in touch with someone who said he was Mr. Rosenwasser of the Max Kalter concern and I said I understood he had bought some New Jersey Novelty Footwear Company goods, and he said he had, and I said "Have they all been paid for?" and he said, "I don't think they have all been delivered," and I said, "There are warehouse receipts against those goods and there is an injunction by the Court of Chancery in New Jersey here against them." And I said not to give up any money or pay over any of the purchase price to anybody and he said he would do that—or, rather, not do that, not pay over any purchase price.

Q Had you had any conversation with Mr. Unger or anyone else regarding the matter between Saturday, August second and August eighth? A I heard from Mr. Bobker, who was the attorney of the New Jersey Novelty Footwear Company, on

Monday morning, sometime during Monday morning or in the forenoon—

Q August fourth? A August fourth, and he told me there was going to be a conference about these Novelty Company goods that afternoon in Mr. Unger's office. I then called up Mr. Unger and I said, "I understand there is going to be a conference about these goods this afternoon," and he said, "Yes," and I said, "Is there any objection to me being present?" and he said, "No. Come along." And I asked when it was and I think he said three o'clock or half-past three.

Q Did you attend the conference? A No; I did not get there. I was busy at that time, and I think I was at one time actually drawing these very injunction papers; but anyway about three o'clock he called me up and said the conference was on and asked if I was coming over and I told him I would be over there in about ten minutes and ten minutes got by and I did not get there. I was so busy; my partner had just gone away and I was loaded up with work, and I did not get there at all that afternoon.

Q Was anything said that day or any other time before you found out on August eighth as to the fact that the goods were to be sold or had been sold? A I never had any intimation of such a thing until I got this injunction served. I might say my injunction papers were all drawn with a view of getting the goods back.

The Court. I suppose you would have had if you had gone to that conference.

The Witness. I do not know exactly what happened at that conference yet.

The Court. I understood that was the conference at which the thing was discussed.

The Witness. Yes.

Q Subsequent to August eighth did you have any conversation with Mr. Unger or Mr. McGann or the McGann people with regard to the matter? A Yes.

Q When? A We had two. The first one we had on Monday, August eleventh. I might say there that when Vice-Chancellor Backes granted this restraining order on August eighth he fixed a day to hear the parties in Trenton on August twelfth. The

day before that hearing was to come up we had a conference in my office and that conference was called at the request of Mr. Prell or Mr. Lowy.

Q Who were present? A The conference was held in the afternoon and lasted all the afternoon, from along about two until half-past five or six o'clock.

Q Who were present? A There were present Mr. Unger, Mr. Bobker, Mr. Prell, Mr. Lowy, Mr. Cricher and myself.

Q What occurred? A I opened the conference by saying that the only thing we were interested in in this thing was either to get goods to replace our receipts, to make good our receipts or get our receipts back; that was the only thing that interested me and the discussion revolved around that proposition. I said I considered Mr. McGann liable to us for his action in selling these goods the way he had, and Mr. Unger disagreed with me on the question of whether Mr. McGann was liable or not. We had considerable debate and various propositions were offered, most of them, if I remember rightly now, by Mr. Prell and Mr. Lowy, to devise some means—

The Court. Who was Lowy?

The Witness. He had been connected with the New Jersey Novelty Footwear Company.

The Court. Prell was president, I think.

The Witness. Yes, sir.

Q Did anything concrete result? A Nothing resulted, excepting we did agree that the hearing which the Court had set for the following day in Trenton was adjourned until the nineteenth.

Q Did you have a hearing on the nineteenth? A Yes; we went down and had the hearing on the nineteenth.

Q Who was there? A Mr. Unger, Mr. McGann and Mr. La Brecque was there, and I think Mr. Bobker was there; yes, I know he was.

Q All right. What occurred? A I stated to the Court the situation as presented, as set forth in the papers which I had filed. Then to that I added a verbal statement to the Court of what I had learned. Mr. Unger then stated to the Court what his papers contained and agreed with me substantially on what had occurred, and disagreed with me as to the liability of McGann

with respect to it. The difficulty there with the Court doing anything was because the goods were gone and there wasn't anything to do anything with. We had asked the Court to make an order to return the goods and the difficulty there was that the goods were wholly gone and this Kalter Company was out of the State and was not subject to the Chancery Court's orders, and neither was the money that was supposed to be—that was held by them at that time. The Court, in the course of its talk—

Mr. Lane. If your Honor please, I object to what the Court said.

The Court. Oh, yes.

Q As a result of that hearing was there any further order made in the matter? A There was an order made—that is, there was a formal order made, but whether it was a written or verbal order—the Court put the hearing over, I think, for a week or ten days, or possibly two weeks, and we all came home.

Q Did you have another conference after that? A Yes. The hearing was on the nineteenth and we had one on the twenty-first.

Q Where was that? A That was in my office.

Q Who was there? A The same parties. Did I name before in that other conference Mr. Bobker? I should if I did not.

Q Mr. Lowy, Mr. Prell, Mr. Unger, Mr. Cricher, Mr. Bobker and yourself? A Yes sir.

Q Now what happened at that conference? A I again opened up the conference and I stated what I had already stated at the previous conference about our position wanting the goods or receipts, and I said to Mr. Unger in the hearing of all of them, "Mr. Unger, you and I cannot apparently agree as to what the liability of McGann is for the disposal of those goods. I think he is responsible for it and is liable to us for it, and you argue or maintain that he is not, and we never will agree until it is tried out in court, and in the meantime this money is over here in New York; Prell is trying to get it and we have no control over it. This Kalter concern any time they see fit can pay over the money to anybody they please, and we cannot stop them, and rather than to see Prell get it I think we had better make some arrangements to get the money in the State, and in the meantime we will go ahead and fight out our liabilities in court."

Mr. Unger had somewhat modified his attitude at that conference from what it had been before, in that he was not quite so insistent upon his idea that McGann was not interested in this controversy. The upshot of the matter was we had a great deal of discussion and the discussion revolved around this: I was informed, and in fact we all at that conference considered, the value of these goods to be twenty dollars a case. We had no other information at that time. There were some thousand cases taken out, for which we had— We had outstanding receipts for some thousand cases for which we had no cases in our possession, and that made a possible liability on our part to our receipt holders of twenty thousand dollars. The bond which the McGann Company had put up when it took the goods was ten thousand, and I was very much afraid of something going wrong with Mr. McGann—

Mr. Lane. I object to this.

The Court. Whatever was said.

The Witness. I stated this.

Q Was this brought out at the conference? A It was all brought out at the conference and it is part of the attitude I took.

Mr. Lane. I don't want your attitude, except as expressed in words.

The Witness. As expressed.

The Court. All right.

The Witness. We figured it out and we did all this openly. Everyone had a pad of paper and as I remember it was trying to figure a way out of this thing. We finally arrived at the conclusion that there were 229 cases of goods in the McGann warehouse which the injunction had stopped the delivery of to Kalter. They were in this State and available.

Q Those were part of the goods sold but which had not yet been delivered? A Yes. There were 229 cases there. There was some $3,000 in the hands of Kalter's.

Q For goods which had been delivered but for which he had not paid? A For which the Novelty Company had not yet received the money, because I had stopped it.

Norbury C. Murray, direct.

Q That action in the stopping of the payment of that money by Kalter & Company was voluntary on their part and was not subject to any injunction served on them? A No; it was voluntary. When I told them what the situation was they said they would do nothing further.

Q All right. A The 229 cases, together with the money which was over there, together with some two or three hundred cases (I have forgotten the exact number) which Prell said was down in the factory at Jamesburg and could be shipped at once and used to replace the goods which had been sold—we figured our liability would then be reduced to this ten thousand dollars, which was the amount of the bond which McGann had put up. So then the question arose as to how this money was to be gotten over here from the Kalter Company, and who was to hold on to it. Mr. Lowy, I believe it was—yes; I know it was Mr. Lowy—said if we could come to an agreement as to what should be done with it and fix it so Kalter & Company would not be obliged to pay it the second time or run any chance on it Mr. Lowy could probably arrange to have the money paid to whomsoever we saw fit, and I think Mr. Unger and Mr. Bobker suggested I be made the trustee of that money. I refused; I would not have anything to do with it, and I told them I did not consider it my money or La Brecque's money and I would not have anything to do with it; but I would withdraw my objection to Kalter & Company paying it over. It was at my telephone order that they had held up the money, and I said I would withdraw that and consent to let Mr. Unger and Mr. Bobker, as trustees, hold it.

Q Pending what? A Pending the outcome of the litigation which is now before the Court.

Q Was there anything said between yourself and anyone else as to what the effect of this agreement should be? A The effect was to be that it was to be held—

Mr. Lane. I object to that unless the exact conversation is given.

The Court. Yes.

Mr. Lane. And I further object on the ground the agrecment is in writing and speaks for itself.

Mr. Sorg. It is not an agreement between the parties.

The Court. It may be stated what the agreement was.

Mr. Lane. I will note an objection.

The Court. The objection will be noted.

The Witness. The agreement was that money was to be held by the trustees until this suit now before the Court, which we are trying today, was fought out, and that if the McGann Company got a judgment against it for the taking or selling of these goods, in our favor, it could use the money as far as it would go to satisfy that judgment. On the other hand, if it were determined that the McGann Company was not liable, then if the receipt holders, our receipt holders, got a judgment against us, I mean the La Brecque Company, then the La Brecque Company could use the money so far as it would go, to liquidate its debt. Then Mr. Prell, after we had got that tentatively agreed on, said that if he could get some money to meet his payroll, that if he could go down there to Jamesburg at the factory and make some more goods just like those which had been sold and replace those—

Q Was anything said or agreed upon between yourself and Mr. Unger as to the effect the transfer of this money should have on the suits which were pending? A Well, it was not to have any effect.

Q All right. Go ahead. A —and as fast as those goods were sent down from the factory they would be sent to McGann's warehouse, McGann would issue his receipts against them, go to the holders of those receipts, give them his receipts and take up our receipts.

Q The New Jersey Novelty Footwear Company was to manufacture some more goods in substitution of those which had been sold? A That is right.

Q Against which the McGann Company was to issue their receipts? A I will say this: I refused at that meeting to store any more of these goods. They talked about bringing more goods down to replace them and I refused to have any in the La Brecque Company warehouse or have anything more to do with them, and McGann then said they would store the goods, and they were to take the goods as they were sent down from Jamesburg, issue their receipts against them, take those receipts, deliver them to the people who held our receipts, and those people would then surrender our receipts, give us back our receipts and then we

would be out of the whole matter and we would be under no further liability and then this issue would never have to be tried out, because our liability would have been eliminated by the surrender of our receipts.

Q Who was to get back the La Brecque Company receipts then? A Mr. Unger.

Q I show you a letter addressed to Max Kalter Mercantile Company, dated August 21, 1919. Is that the direction to which you referred to as to Max Kalter & Company turning over the money? A Yes; that is it.

Mr. Sorg. I will offer that in evidence.

Mr. Lane. No objection.

(Letter referred to marked Exhibit P. 15 on behalf of counter claimant.)

Q I notice that the first part of this direction in which Max Kalter & Company are instructed to to turn over the balance of the purchase price to the order of Milton M. Unger and David Bobker, attorneys for the McGann Company and the New Jersey Nevelty Footwear Company, respectively, that that is not signed by the attorney of the La Brecque Company, but that a separate notice is appended on the bottom of that letter, signed by the attorneys of the La Brecque Company. Why was that? A I refused to sign that first part.

Q Why? A I was not agreeing to anything except withdrawing the notice which I had given to the Max Kalter concern to hold up that money, withdrawing it and consenting to them paying it over to these attorneys, and I did not want to have it appear in this agreement that this was a settlement of the transaction. That was the reason I insisted on putting it in that form.

Q Now pursuant to that arrangement you say was made at the time, that the New Jersey Novelty Footwear Company should manufacture goods or deposit them in the storehouse of the McGann Company, for which they were to issue their receipts and get back ours, was there any part of that arrangement carried out? A Well, now, at the latter end of the conference, when that agreement or consent there was signed, there was this feature added to it; that Prell—

The Court. Suppose you answer the question first.

(Last question read.)

Q If I am anticipating I will withdraw that question temporarily and let you conclude as to what arrangement was made at that conference. A It was agreed that Prell of the Novelty Company should get $1,500 of this money; that it was to be used by him to pay his payroll in Jamesburg, make slippers, additional goods to replace those which had been sold. It was also at that time agreed that when he had turned in, or when Mr. Unger had turned in and surrendered to the La Brecque Company 390 of its outstanding receipts that the Novelty Company should get the balance of the money, the balance after the $1,500 had been paid.

Q How did you arrive at the figure of 390? A There were 778 cases sold and delivered to Max Kalter. We figured that at $20 a case— Just take that out, please— We figured that there were 1,007 La Brecque Company receipts at that time.

Q For 1,007 cases? A That were in controversy.

Q You mean for a thousand and seven cases? A Yes. There were 229 undelivered cases; they were taken care of.

Q Which were still in the warehouse of The McGann Company? A In the warehouse of The McGann Company.

Q All right. That left the difference between 1,007 and 229; I think it made 778, and we figured that the 778—that if we got the number of two hundred cases, which were already manufactured in the McGann warehouse, and got our receipts back for that number, and had got an additional 390 besides, that our outside liability to our receipt holders could not be more than the McGann replevin bond and that then we would be protected, and that if Mr. Prell did succeed in his scheme of replacing these goods and taking up all our receipts then there would not even be a suit over it.

Q In other words, the assumption by the parties at the time was that the ten thousand dollar bond would take care up to that amount of liability, and that over and above that amount we would get back receipts? A That was the idea exactly. The whole thing swung around or revolved around getting our liability reduced to this ten thousand dollars.

Q Now, is there anything else? A These figures—I know the 390 is right, but I am not quite positive about the exact figures.

Q Was there anything else agreed on at that conference on the twenty-first? A I think I said Mr. Unger was to get back our receipts as fast as he—

Q Yes. Now, pursuant to that arrangement did the La Brecque Company get back any of their receipts? A Yes. About September third, I think it was—in fact I know it was September third—Mr. Unger—

Mr. Lane. This is all admitted, if your Honor please.

The Court. Yes.

Mr. Sorg. I did not know this was admitted.

The Court. I understood that was so. There were nine or ten of them, were there not?

The Witness. I do not think—

Mr. Sorg. Not growing out of this case, I don't believe.

The Witness. On September third Mr. Unger surrendered to us the La Brecque receipts which up to that time had been held by the East Newark Bank.

The Court. Eight of them?

The Witness. No; it was three of them belonged—Three or four belonged to the Jamesburg Bank and the balance to the K. M. Stone Company, which is not in controversy here at all.

Q When you speak of the Jamesburg Bank here do you mean East Newark? A The East Newark Bank.

Q And here is what purports to be a receipt for those receipts? A That is a copy of the receipt.

Q Can you identify from that receipt what certificates were turned back? A Yes. Numbers 1066, 1067, 1068 and 1069. I think that made a total of 308 cases. These were the East Newark Bank receipts surrendered to Mr. Unger on September third, amounting to 308 cases.

Q Why was not the arrangement consumated by which all the receipts would be ultimately returned by means of having goods manufactured by the Novelty Company turned over to Mc-

Gann and McGann's receipts issued for ours? A Prell drew out the money and disappeared and the concern went bankrupt.

Q He disappeared? A Yes.

Q Where is he now, as far as you know? A The county jail.

Q After that, then, of course the arrangement fell through, with his disappearance? A Yes.

Q And the Novelty Company was put in bankruptcy? A That is it.

Mr. Sorg. Cross examine.

Cross examination by Mr. Lane.

Q And proceedings are now pending in bankruptcy, in which you are a party? A Yes.

Q The McGann Company is a party? A Yes.

Q And these various receipt holders are parties, looking toward the disposition of the moneys which are in the hands of Mr. Bobker and Mr. Unger, and also toward the disposition of the 229 cases of goods which are now in the possession of The McGann Company. Is not that so? A That is correct. When you say "Looking toward it," there are proceedings instituted and pending to get possession of it.

Q And also to determine the rights of the respective parties to the funds? A Not as I understand the proceedings, Mr. Lane.

Q Let me understand exactly what your idea was at this conference on August twenty-first. As near as I can get it is this: that the purchase price of these goods which had been bought by Kalter was to be paid to the New Jersey Novelty Company provided receipts covering 390 cartons were surrendered to you. That is correct, is it not? A That is correct.

Q Now, $1,500 of that purchase price was to be immediately paid to Prell, representing the New Jersey Novelty Footwear Company. That is correct, is it not? A Yes.

Q So that $1,500 immediately went out of the control of both the La Brecque Company and The McGann Company. That is correct, is it not? A I do not know just the date it was paid, but the $1,500 certainly went out of the control of either of them when Prell got it.

Q But it was so understood and agreed? A Yes.

Q The balance of the $3,500, or something like that at any rate, was to be paid to Unger and Bobker to hold as trustees for whomsoever might be entitled to it, pending the delivery to you of the receipts covering the 390 cartons? A Pending the termination of this litigation or—and—pending the surrender of 390 cases.

Q Now, "or" or "and"? A Repeat that question again, please?

(Previous question read, as follows: "The balance of the $3,500, or something like that at any rate, was to be paid to Unger and Bobker to hold as trustees for whomsoever might be entitled to it, pending the delivery to you of the receipts covering the 390 cartons?")

The Witness. Yes, that is correct. If they surrendered 390 cartons they could have the money.

Q In which event the moneys would be lost to the La Brecque Company and the McGann Company? A We expected them to be used— It was agreed that the money was to be used to make new goods until our receipts were all surrendered.

Q That was the benefit that you were getting from it. Is that right? A Why, yes.

Q The net result of the transaction was that any claim to these goods, as goods, was lost to anybody concerned? A The goods were gone; yes.

Q The goods were gone and had been paid for? A That is right.

Q The net result was that the man who got the goods got the goods and paid the price? A I understood the goods were sold by Kalter immediately to some of their customers.

Q As a matter of fact, in this agreement any claim that might be made afterward with respect to these particular goods was lost, wasn't it, given up? A Was lost to whom?

Q To anyone except Kalter & Company. A Well, I think that would be a question of law rather than fact, Mr. Lane.

Q I am trying to get your mental attitude. You have testified at great length as to your attitude and your idea with respect to the law. A Well, I did not intend to do so.

Q I want to know what your mental attitude was as to the effect of this agreement. A My understanding was that the goods were gone beyond hope of recall; that the only thing that

Norbury C. Murray, by the Court.

was there was some money and they better get that money in control in this state in the hands of trustees where it would protect which of the two of us were liable with respect to the sale of these goods. That was the proposition.

Q Yes, and not only was the money brought over here to protect which of the two of you were liable, but you agreed that $1,500 of it should immediately go to the New Jersey Novelty Footwear Company, didn't you? A That is correct.

Q That was gone and you agreed— A They were what?

Q That was gone to both of you? A Yes.

Q And you agreed that when certificates for 390 cartons were surrendered to you the rest of it might go the same way? A Exactly.

Q Now, do you mean to say your idea was that in this suit or in any other suit you were going to hold McGann on his bond of ten thousand dollars for the full value of those cartons? A Absolutely.

Q Oh, you were? A Absolutely. That was the reason I would not sign the upper part of that arrangement there. I considered it was up to Mr. Unger and Mr. Prell to make good that loss.

Q The loss to whom? A The loss of these goods.

Q To whom? A To us or our receipt holders.

Q So you considered this sale was to be in effect or at least confirmed, the purchase price was to be paid, the moneys representing the purchase price were to go to somebody other than McGann, to wit, the New Jersey Novelty Footwear Company, and, nevertheless, McGann was to stand responsible for the full value of those goods; is that right? A No, that is not correct.

Q Why is it not correct? A In the first place we did not confirm the sale. What we did was take the proceeds when we could not get the goods.

By the Court.

Q Mr. Murray, do I understand you to say the agreement then was that $1,500 was to go to Prell to manufacture other goods to take the place of those that had been sold? A Yes; that is right.

Q Is that correct? A Yes, sir.

Q That when 390 cases, or rather when receipts for 390 cases were turned over to you then the balance of the money

which had been collected from Kalter & Company was also to be turned over to Prell to manufacture other goods. Is that right? A That is right.

Q So that by the agreement which you there made it was arranged, upon certain conditions, that all of this money which came from Kalter & Company was to go to Prell to manufacture goods. Is that right? A Yes.

Q Now, what was to be done with those goods? A Those goods were to be taken down to the McGann warehouse.

Q And McGann was to use those goods which came to his warehouse, issue his own warehouse certificates for them and go out and exchange them for warehouse certificates which the La Brecque Company had issued? A That is correct.

Q And that was to be done to the extent of goods which should be delivered by Prell to the McGann warehouse. Is that right? A I do not know as I quite understand that question.

Q Was there anything in the agreement which obligated McGann to endeavor to get back the La Brecque warehouse receipts for a greater number of cases than the number which Prell would manufacture or turn in to the McGann Company? A It was the agreement that Unger was to get these goods, was to use these goods and to get back all of our receipts, and it was to his interest to do so—

Q Whether or not Prell manufactured those goods or turned them in to the McGann Company? A Why, he was to manufacture the new goods.

Q Was it the agreement that regardless of whether or not Prell manufactured and turned in to the McGann Company those goods against which the McGann warehouse certificates were to be issued—I say, whether or not he did that, was it agreed that Mr. Unger was to go out and get your warehouse certificates? A No, but it was stated, and I stated, that if he did not he would have to make good in this suit. He took the risk, in other words.

Q Did he agree to it? A That is my understanding of it.

Q What did he say that gave you such an understanding as that? What did Mr. Unger say that would create that understanding in your mind? A It was agreed this whole thing was to be without any prejudice. In fact, I stated in the beginning of the conversation that this was merely a means to stop Prell

from getting the money without any chance whatever of it doing either of us any good, and that this determination of this question and this litigation as to the liability of McGann to us was to go right along.

Q I understood you to say a while ago that for all above these 390 cases and the amount of money on hand, including the cases in the McGann Company, you relied on the McGann bond. A We did, because the 390 cases would protect our outside liability to our receipt holders, with the ten thousand dollar bond.

Q Then why did you agree, if that was the purpose of your agreement, that after you were paid in that amount, that the money that was then left in the hands of Mr. Unger and Mr. Bobker, with the 390 cases that were to be delivered, and the 229 cases left in Mr. Unger's hands, that Prell was to go on with the balance of the money manufacturing the other goods, if you relied on the ten thousand dollar bond? A The reason for that was that gave the McGann Company an opportunity to relieve itself from the liability under its bond by getting the goods replaced, by getting these new goods into its warehouse.

Q In other words, you were helping Mr. Unger out? A We were protecting ourselves first of all, and a feature of paying the money to Prell gave Mr. McGann an opportunity, by getting in these new goods and financing the concern out of this money, by which he could relieve himself from all liability under the bond by surrendering our receipts.

Q By doing that you were giving up fifteen hundred or two thousand dollars of your security and running the risk of losing that— A I was not running it. I was not running the risk to the extent of $1,500. We were relying on the McGann bond.

Q Yes, but you relied on that $1,500 or $2,000 as making up the first $10,000 of the McGann bond? A Not the first part, no.

Q I do not mean that. I mean the balance. What was the amount turned over to Mr. Unger? I understand it was somewhere in the neighborhood of $3,500? A Thirty-two something.

Mr. Sorg. About $3,280.

Q Well, then, there is seventeen hundred and some dollars. A Seventeen hundred and some dollars?

Norbury C. Murray, cross.

Q Yes; there was that seventeen hundred and some dollars you relied upon in addition to the cases in the McGann warehouse and the certificates Mr. Unger was to get for 390 cases, as making up that $10,000? A No. As I recall he was not to get the $1,700 until we got 390 cases.

Q Yes. So I say if you gave up the $1,700 after the 390 cases came in all you would have then would be the 229 cases and the receipts for the 390 cases? A And the McGann bond.

Q But the McGann bond then would not have made up the $20,000, because it took that $1,700, in addition to those cases to make up the first $10,000, didn't it? A There were 229 cases on hand; there were some in the factory at that time to be sent down, which were already manufactured; then the 390 would have reduced our liability to about—488 cases—390 from 778 would be four hundred and some cases. There were about 1,007 receipts outstanding. There were 229 cases in the warehouse which had not been delivered to Kalter, which left 778; 390 from that, that is 388.

Q At $20 a case, that is how much? A Somewhere between six and seven thousand dollars, and that is the way it was figured out.

Q In turning over the $1,500 to Prell you felt that was being done for the benefit of the La Brecque Company, didn't you? A To a certain extent, in that it offered a chance of avoiding this litigation.

Q And for which you thought the La Brecque Company would get the benefit? A To that extent.

By Mr. Lane.

Q Now, getting back again to my first question: it is a fact, then, is it not, that you expected the McGann Company, notwithstanding the disposition which was to be made of the proceeds of this sale, to still remain liable for the full value of the goods sold? A Absolutely.

Q Why did you say a few moments ago when I put it in a little different way that that was not your understanding? A I do not know that I did. I did not intend to.

Q You put it just the reverse a few moments ago? A It was because I did not understand your question, then.

Norbury C. Murray, cross.

Q In other words, notwithstanding the fact that this sale of these particular cartons was to be permitted to be consummated, the purchase price paid, a part of the purchase price immediately put out of the control of the McGann Company, the balance of the purchase price, that is the $1,500, going to the New Jersey Novelty Footwear Company, your depositor, according to your theory, and the balance of the purchase price to go to the control of the McGann Company when you got receipts covering 390 cartons, notwithstanding all that nevertheless the McGann Company was to pay you on this bond the value of these identical cartons? A They were to pay us the value or to make good to us the liability which we are under to our receipt holders.

Q That was your theory? A That was the theory; that was my understanding.

Q You realize, don't you, that that results in this pending suit in compelling the McGann Company to pay the value of these cartons, the value of which has already been paid or disbursed? A Not at all, because that question in that form assumes that the price for which they were sold to Kalter & Company is the actual value.

Q You are not suing for any difference in value? A We are suing for the real value of the goods.

Q Irrespective of the fact that the sale has been consummated and the purchase price paid? A Irrespective of that fact.

Q You realized on the second day of August that the situation with the La Brecque Company was rather serious, didn't you? A Well, yes.

Q And you informally notified Kraemer, according to your testimony, that you had warehouse receipts out and the goods must not be disturbed? A Yes, sir.

Q And they were disturbed? A They were taken away. They were taken away on Saturday.

Q And you realized at once that something might happen to those goods? A No; not when they were taken under a replevin bond, I did not expect anything to happen to them.

Q You knew that after the expiration of twenty-four hours the person who took the goods could do as he pleased with them, didn't you? A Not at all.

Norbury C. Murray, cross.

Q Why not? A I knew that he had taken them. His writ of replevin or his complaint showed that the only thing he claimed was the right to his charges. That did not give him the right, as I understood it or as I now understand it, to do anything but hold the goods until they are paid.

Q When they are paid, then what? A Return them.

Q To whom? A Where he got them from.

Q To the person from whom he got them? A Or else notify the person from whom he got them to come and get them; one of the two.

Q Then what theory did you have in your mind at that time—

Mr. Sorg. I do not know whether the discussion of what the law is is for the edification of the jury or anyone else—

The Court. We will try not to be unduly influenced by it.

Q Why then did you file that bill of complaint on August eighth? A Because we wanted the goods back. The receipt holders had a right to come to the La Brecque Company warehouse and demand that we give them the goods. If they were in the possession of the McGann Company we could not comply with the demand, and we did not want to be in that position.

Q You knew you could re-replevin them? A Yes.

Q Why didn't you? A If we were wrong in our view regarding the right of Mr. McGann to retain his lien for storage charges then it would result in a judgment being given against us on the replevin suit.

Q Your idea is that if you retained these goods and Mr. McGann recovered in the suit he could recover a judgment against you for $10,000, notwithstanding his real claim? A He could recover, as I understand it, the value of the goods.

Q And collect it? A I do not say that.

Q Well, the main thing is the collection, is it not? A Not all together, no.

Q You knew as a lawyer on August second and August third that there was a clear way by which you could adequately protect your rights? A I did not understand anything of the kind, because that replevin suit would not determine how much was due McGann and even if we had retained those the question

would still be how much if anything was due McGann for storage charges. What I proposed to do was to go into the Court of Chancery where it would be determined unquestionably.

Q Either you were entitled to them or McGann was? A Yes, sir.

Q If McGann was entitled to possession you could not have any lien? A We could not have a prior lien as against him if he was entitled to possession.

Q If someone has a right of possession as against you you cannot have a lien, can you? A If I am in possession and someone has a first lien on those goods, of course, they have—if it is a warehouseman's lien—of course they have first right, provided they have not waived it, to take the lien away from me until their lien is satisfied. Now, I might have an underlying or second lien which would be perfectly valid. That is my view of it, even if they were taken away by the first lien, to protect his first lien. If the first lien was satisfied the second lien would come into force and I would be entitled to protection on my second lien.

Q And that is on the view, I suppose, that they are lawfully taken, if someone lawfully deprives you of possession you still retain your lien? A If the La Brecque Company, for instance, had the goods in their possession and they had a lien for warehousemen's charges secondary or subject to the lien of the McGann Company, and the McGann Company took those goods lawfully, if you will, out of the La Brecque Company warehouse to satisfy its lien, and it was satisfied, then I say the La Brecque Company could in its turn re-replevin or replevin those goods and take possession from the McGann Company to satisfy the La Brecque Company.

Q Re-replevin? A No, it would not be re-replevin; it would be an original replevin.

Q Well, that you did not do, did you? A No.

Q When did you notify the McGann Company, or anyone connected with the McGann Company, of your rights, except this man Kraemer—of your assumed rights? A I did not. No.

Q Nor anybody else, to your knowledge? A Except what has been testified to so far.

Q That is the Kraemer incident; that is the only notice you gave? A The only notice I gave; yes, I think that is right.

Q Didn't you think this was of sufficient importance, if you claimed a right to those goods, to formally notify the McGann Company of your claim? A No. This thing had been going on. I assumed after I told them on Saturday they knew it, and I did not think of such a thing as them disposing of the goods. I was not worrying about that at all, only I wanted to get the goods back as quickly as possible so we would not get in trouble with the receipt holders.

Q You knew there was the possibility that the New Jersey Novelty Footwear Company or someone else would satisfy the McGann Company lien? A I never dreamed of such a thing after they had made the contract with us to advance it for them.

Q Is that the reason why you refrained from taking any action? A I was preparing to take it into another court.

Q Your knowledge of the fact that the La Brecque Company had issued these additional receipts, upon which they were liable, according to your view, in thousands of dollars every single day the La Brecque Company was out of the possession of those goods—that was a danger, wasn't it? A Not if they were properly taken care of. I did not consider they were in any danger. I did not consider the goods were in any danger at all.

Q What did you think would ultimately happen to those goods if you did not do anything? Did you think they would remain with McGann indefinitely? A I did not consider that question, because I was at the time filing a bill in Chancery which was going to determine that question. If you want that statement answered I would say I would suppose the McGann Company would hold them and sell them in the way provided by law, by public auction.

Q Were you waiting for that? A No, not at all. I was not waiting for anything but the time to get my bill filed; that is all.

Q Did it take you from the second day of August to the eighth day of August to draw this bill? A No; I think I started to draft it Monday afternoon, August fourth.

Q Well, the bill is a bill that could be drawn in an hour, couldn't it? A Possibly by some people. I could not get it drawn in an hour. I got it drawn just as fast as I possibly could, and all these affidavits, just as fast as I could get it done.

Norbury C. Murray, cross

Q What was your idea at the time you started proceedings in Chancery as to the inadequacy of a remedy at law? A Mr. Lane, if we had gone into the replevin suit it would not have been determined then, no matter who was successful, how much the McGann Company was actually entitled to for storage charges. If I replevin from a man who claims a lien on an article I must, as I understand it, tender him the exact amount or tender him more than is due him. If I tender him less than the amount, for instance, if he claims a thousand dollars and I tender him $950, thinking that is what I owe, then if the Court determines that I owe $975 I lose my replevin suit and we are just where we started. That is my understanding of the situation. In fact, I have been through it in district court proceedings, which is the same proposition, and the result is you get nothing determined in such a situation by means of a replevin suit unless you go and pay more to the party claiming under the lien, pay everything he claims whether it is due or not, and then you have to go to work and sue him to get back what you claim was the excessive payment. That is the situation which results from a replevin suit.

Q You knew that the New Jersey Novelty Footwear Company was the depositor, didn't you, so far as McGann was concerned? A Yes, sir; I knew that the goods originally belonged to the New Jersey Novelty Footwear Company.

Q And you were familiar with the warehouse act, weren't you? A Fairly.

Q You knew this warehouse act required the McGann Company, or rather the warehouse company to surrender to the depositor upon payment of the warehouseman's charges, did you not? A Provided the rights of no other parties had been acquired to the goods in the meantime, yes.

Q What? A Yes, provided he was the only party interested in the goods. Let me see if I understand the question again. Repeat it.

(Previous question read, as follows: "You knew this warehouse act required the McGann Company, or rather the warehouse company to surrender to the depositer upon payment of the warehouseman's charges, did you not?")

The Witness. Not when the McGann Company knew that the La Brecque Company had outstanding charges. Section 33, I think, covers that. I am not sure of that.

Q You knew then at least that the action of McGann with respect to the delivery would be governed by the question of notice, didn't you? A Why, yes; I supposed it would be.

Q And knowing that and realizing the position your client was in you did not give them any formal notice? A I had already given them notice on Saturday.

Q You did not give any notice except this incidental notice to a man named Kraemer when the Sheriff was removing the goods? A I object to the words "incidental notice." I gave them notice Saturday afternoon but I personally did not give them any other notice.

Q Why didn't you? A I did not think it was necessary.

Q You depended upon an oral notice? A Yes.

Q In an important thing like this? A Plenty of people heard it. There is no question about proving it.

Q Did you know who Kraemer was? A He was there in charge of the McGann warehouse.

Q Did you know who he was at the time? A I asked Mr. Hummell who was in charge and he turned and said, "Mr. Kraemer here of the McGann Company." And I said, "Is this Mr. Kraemer?" He said, "This gentleman here." I said, "Who is this?" and he said. "Mr. Kraemer."

Q Did you know whether he was superintendent or treasurer or office boy? A No, sir; I did not know him.

Q And you depended upon an oral notice to a man like that? A Yes, as far as any further notice by me was concerned.

Q On August fifth—when did you meet Mr. Bobker—the day of the conference, whatever date it was—I may be mistaken about that. A That was the eleventh.

Q The day of the conference you were to attend and did not? A That was the fourth.

The Witness. (After discussion) Mr. Bobker is a witness in this case and I understand he will be obliged to be in Trenton tomorrow, and if possible I would like to have his testimony taken.

The Court. We cannot do it now. We have reached the adjournment hour. He might have been put on the

stand before. How long will it take? I have a very important engagement at quarter-past four.

(After discussion.)

The Court. You better take his testimony before a Supreme Court Commissioner tonight.

Mr. Lane. May the testimony of Mr. Bobker, by consent of counsel, be taken before the jury without your Honor's presence?

The Court. I am perfectly willing.

Mr. Lane. There will be no objections to any extent. I know about what he is going to testify to, but I would rather have the jury hear it.

The Court. If you gentlemen will agree on any exceptions.

Mr. Murray. We will do that.

The Court. How long will it take?

Mr. Murray. I do not think it ought to take over half an hour at the outside.

The Court. I am not going to keep the jury here a half hour.

Mr. Murray. Mr. Bobker would be called with reference to this same meeting that I have been talking about. I will say that we will let Mr. Bobker tell his story with as little interruption or objection as possible.

The Court. I will put it to the jurors to say if any of you have made any engagements for the evening that will make it inconvenient for you to remain. I have and I cannot remain. If you have not made any arrangements and you do not object to it, we will try to make it up in some way on your half term of service.

(No response.)

The Court. All right. The jurors do not object. Mr. Murray's cross examination may be finished tomorrow?

Mr. Sorg. Yes.

DAVID BOBKER, sworn as a witness on behalf of the counter claimant.

Direct examination by Mr. Murray.

Q Mr. Bobker, do you remember this conference on August twenty-first at my office between yourself and Mr. Unger and Mr. Prell— A Was that the conference relating to the disposition of the Kalter moneys?

Q Yes. A Why, I believe I recall the details of that conference.

Q Go ahead and state them, and if there is any objection we will object as we go along. A Mr. Unger was present, Mr. Murray was present, I believe Mr. Prell was there and I was present. The object of the meeting at that time was to make some amicable disposition of the matter if we possibly could and dispose of the funds that were in the possession of the Kalter Company for the merchandise which had already been delivered, and which moneys were held up, as I understand it, by reason of a telephone communication from you. It was agreed that the balance due from Kalter in connection with the sale of the merchandise, and which amounted to about $3,280, was to be paid over to Mr. Unger and myself, as trustees, for the benefit of whatever person or persons would ultimately be interested in those funds. I do not recall whether there was anything reduced to writing at that particular time or not, and I do not believe there was— Yes, I think there was something reduced to writing and it was signed by Mr. Unger, and Mr. Prell happened to be there and he signed it, and I signed it, and then I think you signed a portion of that agreement.

Q I will show you this Exhibit P. 15. A Yes, that is the agreement. This is the agreement we prepared.

Q What was the rest of the agreement, anything? Was there anything outside of that? Was there any arrangement made regarding the payment of any part of this fund to Prell? A Why, yes. I think Prell at that time stated he needed funds for the purpose of continuing the manufacture of slippers and, if possible, replacing the slippers which had been sold to the Kalter Company, and I think it was agreed that when the McGann Company was to return to the La Brecque Company receipts covering 390 cases, so that the La Brecque Company would in turn receive its receipts for the 390 cases that the

moneys paid to Mr. Unger and myself as trustees would be paid over to the New Jersey Novelty Footwear Company.

Q Why was the number 390 fixed upon? A I never paid any close attention to the number of cases outstanding or the number of receipts outstanding, but I know that you and Mr. Unger figured the number of receipts outstanding by the La Brecque Company, the number of cases that had already been sold to the Kalter concern, the number of cases that were still on hand, and, if I recall correctly, you made a statement to the effect that you would possibly have recourse on this $10,000 replevin bond and you thought it safe to consent to the payment over of these funds upon the return of 390 of the outstanding warehouse receipts.

Q You say that the money was to be held for the benefit of those ultimately interested. How were the parties interested to be determined? A Why, I presume as a result of the litigation which was pending or as the result of a subsequent amicable adjustment of all differences.

Q What was said about the effect of that statement upon the replevin suit, which is this suit now that is pending, at that time?

Mr. Lane. That is objected to upon the ground that this suit at that time was not pending at all. The suit that was pending at that time was a clear replevin suit.

Q Upon the rights and liabilities, then, of the McGann and La Brecque companies, as against each other? A I believe you made a statement, either at the outset or at some other part of the conference, that anything that was done was without prejudice to the rights of La Brecque Company, or something to that effect.

Q You do not remember how the 390 cases was arrived at? A No, I do not. I never made a memorandum of the figures and I relied upon Mr. Unger and yourself, because you had all the figures there. I never had the figures before me or in any of my records.

Cross examination by Mr. Lane.

Q Was it not with respect to Mr. Murray's taking the money in his own name that the term "without prejudice" was used? Did he not object to taking it in his own name because if he

did that it would prejudice his own case? A There was a suggestion made, I think, by Mr. Unger, that the funds be held by Mr. Murray and he refused to hold those funds either in his own individual name or in conjunction with Mr. Unger, and I think it was because of the fact that he thought it might prejudice La Brecque's rights.

Q Was it not with respect to that that the term "without prejudice" was used? A He used that term when we made that suggestion that the funds be held by him, and he may have used that term at the start of the conference.

Q At the start of the conference? A I am not exactly certain whether he used the term at the start of the conference or not, but he did make that statement when we made the suggestion that he take the funds in his own name. He said he better not because he thought it might prejudice the rights of the La Brecque Company.

Q You did not consider that statement, from what he said, that whatever was done would be without prejudice, as giving any of the parties to anything that was done the right to withdraw from what they actually did? A No; I did not.

Q Did you see Mr. Murray about the time the writ of replevin was sued out?

Mr. Murray. That is not proper cross examination.

Mr. Lane. We will make him our witness on this point.

A No, I did not see him. I talked with him over the telephone.

Q Did you advise him to re-replevin the goods? A I did.

Q What was his reply to that? A He told me that from a legal standpoint he thought the rights of the La Brecque Company would be best protected by not re-replevining, and he told me to re-replevin in behalf of the New Jersey Novelty Footwear Company. I told him the New Jersey Novelty Footwear Company was not in a position to re-replevin because they probably could not get a bond, and I suggested to him that La Brecque Company re-replevin. That was over the telephone, that conversation.

Q As I understand it, he thought the rights of the La Brecque Company would be best protected by not re-replevining? A He did not use exactly those terms, but he told me that if La Brecque re-replevined that the final results might prove more detrimental to La Brecque than if they did not re-replevin, not

using exactly those terms, but that is the impression it made upon my mind at the time.

Q He suggested, as I understand you, that the New Jersey Novelty Footwear Company re-replevin? A Yes; he said, "Why don't you folks re-replevin?" I said, "We cannot re-replevin because I don't believe the New Jersey Novelty Footwear Company can obtain a bond."

Q Did he suggest upon what legal theory the New Jersey Novelty Footwear Company might re-replevin? A No; we did not go into that discussion.

Q Did he suggest that the New Jersey Novelty Footwear Company was the owner of the goods and that it ought to re-replevin? A No— Yes; I think he did suggest that the New Jersey Novelty Footwear Company ought to re-replevin because the goods belonged to them and, I think, they were made a party to the replevin proceedings.

Q You were present on August fifth at Mr. Ugner's office at the time this sale was made, were you not—or consummated? A I was.

Q Did you see Mr. Murray that morning? A I do not believe I saw him. I believe I called him on the telephone and told him that there was a conference to be held at Mr. Unger's office in the afternoon in connection with a disposition of the matter.

Q What else did you tell him? A I do not recall whether I told him anything beside that or not.

Q What led you to call him up? A Prell either called me up or came into the office and stated that he believed he could dispose of the matter on that day by obtaining sufficient funds to pay the storage charges and thereby enabling him to obtain a release of the merchandise.

Q That was the day before? A Either the day before or that morning.

Q Upon that statement being made by Prell what led you to call up Murray? A I called him up believing that we could possibly straighten out the tangle that afternoon, and I suggested to him that he be present at this conference.

Q What did he say? A I think he said he would try and be present.

Q Had the sale of these goods to Kalter been arranged before Mr. Prell came to your office? A I understand that a sale had been arranged before they came to the office.

David Bobker, re-direct.

Q What time did the conference in Mr. Unger's office begin? A I think about two or two-thirty.

Q How long did it last? A An hour or an hour and a half.

Q Do you remember the telephoning between Unger's office and Mr. Murray during the course of that conference? A I think I recall Unger telephoning to Murray and telling him that all the parties were there. I do not know who he was talking to. He called up Murray's office, but who he talked to I do not know.

Q Was there any attempt whatever to conceal anything during this transaction of the sale of these goods, from Murray or anyone else? A By whom?

Q By anyone that you know of. A No one that I know of, excepting possibly by Prell.

By Mr. Murray.

Q So far as you know there wasn't any notice given to La Brecque of this sale, was there? A No notice was given to the La Brecque Company of the sale; no.

Q Or of any intention to sell it either, was there? A Not that I know of. I did not, because I did not know about the sale until either the morning or the afternoon that we met over at Unger's office after Prell had called me up either that day or that very morning.

Q What day of the week was that on, if you remember? A I do not recall the day of the week.

Q Well, Saturday was August second. A I think it was on August fifth. I do not recall what day it was on, though.

(Adjourned until Tuesday, March 23, 1920, at nine-thirty o'clock in the forenoon.)

Norbury C. Murray, re-direct.

Newark, N. J., Tuesday, March 23, 1920.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

NORBURY C. MURRAY resumes the stand.

Mr. Sorg. Does your Honor want the testimony of Mr. Bobker read?

The Court. Oh, no. I understood it was to be along the lines of Mr. Murray's testimony.

The Witness. Yes.

Mr. Lane. I have no further questions.

Re-direct examination by Mr. Sorg.

Q Mr. Murray, there was some testimony given yesterday afternoon by Mr. Bobker, or some questions were asked with respect to what was said if anything at that conference on August twenty-first with regard to some part of the arrangement or all of the arrangement being without prejudice. Will you tell me just what was said, if anything, in that respect?

Mr. Lane. I object to that as not being re-direct examination. The witness has already testified to that.

The Court. I think he has stated that. He has two or three times stated that the conversation was that it was to be without prejudice. I did not hear Mr. Bobker and I do not know what he testified to, but Mr. Murray said that yesterday.

Mr. Sorg. I was not clear whether it had come out or not. I am satisfied, then.

Q On cross examination you were asked with respect to what this present suit covers, whether it was intended to cover the entire amount of the goods that were sold to Kalter & Company on August fourth or fifth. Tell me what the fact is with regard to that. A This suit covers only the cases for which we have receipts still outstanding, which we have agreed upon with counsel as 459.

Q Does it include, for example, the receipts which were returned to La Brecque by The McGann Company after August twenty-first, and which receipts which were returned represented

goods which were subsequently manufactured by Prell, for which McGann issued his receipts and then got back our receipts? Does this present suit cover any part of that? A It does not.

Q Do you know what the original number of cases were that were in the LaBrecque place? A 1683.

Q And some of those had been delivered before the replevin suit was instituted by The McGann Company? A Thirty-six belonging to the K. M. Stone Company had been delivered before the replevin.

Q And then in addition some others had been delivered? A Yes; one hundred and seventy-five.

Q That made 211, which reduced the number in the warehouse at the time of the replevin to 1,472 cases. Is that right? A That is right.

Q Now, by actual count, according to what the Sheriff showed on his return, how many cases were taken out? A 1,469, I think they told me.

Q There is apparently a discrepancy of three cases somewhere.

Mr. Lane. I do not know the purport of this examination.

The Court. The number of cases involved seems to be admitted. I do not know what difference it would make.

Mr. Sorg. I simply want to identify the fact, which I thought might have been beclouded on the cross examination, just what this present suit is for; that we are not trying to recover 1,007 cases.

The Court. That was agreed to at the very opening of the case, 459 cases.

Mr. Sorg. The only point is the cross examination was of a tendency to bring out the fact that we were sueing for the whole amount, which was ten hundred and some cases.

The Court. I think I may have stated that in the questions I asked.

Mr. Sorg. We are not suing for those but for the remaining cases, 459.

Norbury C. Murray, re-cross.

The Court. The questions of the Court did not have to do with the number of cases, but with the theory that was being expressed by Mr. Murray at that time.

Mr. Sorg. On the August twenty-first conference?

The Court. Yes.

Q In regard to this $3,200 fund that was in the hands of Kalter & Company, about which you were examined yesterday, as to the arrangements made at the time of the conference on August twenty-first, how many cases of goods was Prell to manufacture and turn over to McGann for which he was to issue his receipts and get back ours?

The Court. Has he not already gone over that? He said yesterday he was to manufacture and turn over to McGann a sufficient number of cases to enable McGann to issue his certificates and get back all of the La Brecque certificates. That is what you said yesterday?

The Witness. Yes, eventually.

Q And the $3,200 which was in the hands of Kalter & Company, that was to be used for what purpose by Prell?

The Court. He has already answered that. The fifteen hundred was to be used at once for manufacture of a certain number and when that number had been manufactured and turned in to McGann he was to have the balance of it.

Q For what purpose was he to have that balance? A To make some more goods to replace the balance of the receipts.

Re-cross examination by Mr. Lane.

Q The 459 cases which are being sued for in this case are a part of the goods that were sold to Kalter, are they not? A They are.

Q And a part of the goods for which the three thousand and some odd dollars represents payment, are they not? A They are.

Mr. Lane. That is all.

By the Court.

Q And both parties, the McGann Company and the La Brecque Company, relied upon Prell to carry out his agreement

so far as the use of the $1,500 was concerned, did they not? A Why, yes.

Q And both parties relied upon Prell, if he used that $1,500 advantageously to both parties, to use the balance of the $3,200 for the manufacture of other goods, did they not? A That is correct.

By Mr. Sorg.

Q How many cases did Prell actually turn over subsequent to getting that payment? A 308 cases.

Q And what tentative value, so far as you were concerned, had you fixed on August twenty-first as the possible value of those cases? A We assumed for the purpose of that computation—everyone did—took as the value $20 a case.

The Court. He stated that yesterday.

The Witness. Your Honor, when you asked me—

The Court. I asked if both parties did not rely upon Prell first to carry out the arrangement which was the basis of the payment to him of $1,500, and then if he carried that out advantageously to both parties if you did not rely upon him further to carry out similar arrangement with reference to the $1,700.

The Witness. That is correct, with this correction: if he failed to carry out his arrangement I was still looking to McGann to make good any loss which we might suffer.

The Court. Was that agreed?

The Witness. Yes, that was the arrangement, as I understood, agreed to by everyone.

By Mr. Lane.

Q What was said which led you to understand that? A I could not give you the exact words. There was a three-hour conference there. That was the substance of the agreement which was made by everyone, as I understood it.

Q In other words, getting back to what I asked you yesterday, McGann was to let this money go and still remain liable? A Well, he would not remain liable—

Q Yes, he would.

The Court. Let him answer.

A If Mr. Prell used the entire $3,200 to manufacture the goods and he made 778 cases and delivered them to McGann and McGann got our receipts back, McGann's liability to us would be eliminated entirely and our liability to our receipt holders would be eliminated entirely.

Q In other words McGann was running all the risk? A If Mr. Prell did not do as he agreed to do McGann would be liable to us. We offered Mr. McGann the chance, in other words, all possible means of eliminating his liability to us.

Q What words were used which indicated any such intent on the part of McGann or anyone else? A I would not attempt to give the exact words of that conference. I could not begin to do it at this late date, of a three-hour conference.

By the Court.

Q What you have told us of that conference is the impression that the conference made on your mind? A That is correct.

AARON LANE CRICHER, sworn as a witness on behalf of the counter claimant.

Direct examination by Mr. Murray.

Q Mr. Cricher, what is your business? A I am a student at Columbia University, sir.

Q Were you employed by the La Brecque Company last July and last August? A I was.

Q Do you remember when these goods were taken out of the warehouse, the Novelty Company goods were taken out of the warehouse, on August second? A I think, if I state it correctly, I was the only representative of the La Brecque Company from the New York office there at that time.

Q You were there? A I was there.

Q Will you tell us what happened there? A I was pust preparing to leave the warehouse, about one o'clock that afternoon, and Mr. Kraemer and another gentleman whom afterward I found out to be the sheriff came up. I was on the outside of the building and he told me he had a writ of replevin and, knowing, what that was naturally I had to acquiesce and let him go ahead. We went into the warehouse and started to remove the goods, I told him at the time he came in that he had no right to remove the goods, and of course that did not do any good for

me, and then I phoned to you, and I do not remember just the exact time, but in a short time you came down with another gentleman and I remember distinctly speaking with you and the gentleman with you, Mr. Kraemer and the sheriff, and you telling him that the receipts of the La Brecque Company were out for these goods he was taking out of the warehouse; that we had receipts outstanding. I told him the same thing. I stayed at the warehouse until everything was finished up, which was late, about ten o'clock that night.

Q Were you present at this conference in my office on August twenty-first? A I was.

Q Do you remember the agreement or arrangement that was made there at that time? A I have got a copy of the arrangement that was made there at that time, that I kept in my possession. That is signed by all of the parties present that all signed at that time. At the time of the conference I had some figures that I made on the back of this piece of paper to which the signatures are signed, so I can tell you everything that happened pretty closely.

Q Now go ahead and tell what happened.

The Court. I understand he says there was an arrangement there that was signed by all parties. That would be the best evidence, would it not?

Mr. Murray. That is a copy of the consent that was already admitted in evidence.

The Court. Oh, yes.

Q What was the arrangement entered into by the parties?

Mr. Lane. I object to that upon the ground that it was reduced to writing.

The Court. If the only thing is what has been introduced in evidence here I am inclined to permit the statement, as I did in the case of Mr. Murray and as I assume he went into it with Mr. Bobker last night.

Mr. Lane. Your Honor will allow an exception?

The Court. An exception will be noted.

A This conference was after we had been to Trenton.

Q What did you go to Trenton for?

Aaron Lane Cricher, direct.

The Court. There was a hearing in the Court of Chancery there?

A There was a hearing in the Court of Chancery at Trenton. The Vice-Chancellor said something—

Q No. State what happened at the conversation on the twenty-first. A I was trying to lead up to show what happened to me, because that was why I was there. Mr. Unger and Mr. Prell wanted to try to clear up this matter as much as possible because of what the Vice-Chancellor at Trenton said. He said it looked to him as if there was a conspiracy of some sort—

Mr. Lane. I move to strike that out.

The Court. It will be stricken out. You were told distinctly not to state what was said in Trenton, but you go ahead and do it.

The Witness. I beg your pardon, sir. I made a mistake.

The Court. Proceed.

The Witness. Well, at the conference, then, we tried to straighten out this matter as much as possible so the whole thing could be cleared up as much as possible, and Mr. Prell was very anxious to straighten it out—

The Court. You are asked to tell what took place there.

The Witness. An agreement was reached, a copy of which I believe has been given to the Court, whereby Mr. Prell of the New Jersey Novelty Footwear Company—

Mr. Murray. Now, you need not repeat that. That we have in evidence already.

The Witness. —was going to get the money from the Max Kalter Company and use it to replace the goods—

The Court. Can you give the conversation?

The Witness. I cannot remember those conversations, sir. This was last August and it was a three-hour conference there.

Q What disposition was to be made of the money that came from the Max Kalter Company? A Mr. Prell was to have $1,500 with which he was going to manufacture goods to give to the McGann Company so they could get back our receipts.

Aaron Lane Cricher, cross.

Q What about the balance? A The balance of the money was turned over in trust with Mr. Bobker and Mr. Unger.

Q What was to be done with it? A With which?

Q The balance of the money that was to be given in trust? A As I remember, that was to be held to see that Mr. Prell completed his arrangement with Mr. Unger and Mr. Bobker. I don't remember distinctly just what else was to be one with it.

Q That he completed it in what way? A Uutil he had manufactured the goods and sent them to their warehouse.

Q What goods? A Goods enough so that receipts might be issued to replace ours.

Q Was there anything said about what was to be done with the replevin suit then pending? A Yes. In order that they might do this—

By the Court.

Q Was there anything said? A Yes, there was.

Q Well, what was said and who said it? A I believe Mr. Murray said that pending this, so that the matter might be straightened out, he would put off the replevin suit for a week so that they might go ahead with this arrangement.

By Mr. Murray.

Q Are you speaking of the replevin suit or the Chancery suit? A The Chancery suit. As to the replevin suit, this had nothing to do with what we were doing in the replevin suit.

By the Court.

Q What was said, Mr. Cricher? A Mr. Murray simply said at the opening of the conference that this did not prejudice his rights in any way.

Mr. Murray. Cross examine.

Cross examination by Mr. Lane.

Q You are engaged in phychological work? A I am a student at Columbia University. I am working my way through by doing that present.

Q Just what is the phychological work? A My work is this, sir: there is a young gentleman in New York City who has to have someone to be with him most of the time—

Aaron Lane Cricher, cross.

Q I asked you what phychological work is.

Mr. Murray. I object.

A Work of a phychological nature.

Q Well, "phycho" refers to the brain, does it not, the mind?

Mr. Murray. What has this to do with the present case?

The Court. I think the witness said that was the work on which he was engaged.

Mr. Murray. He did not state it on direct examination.

The Court. I am inclined to permit it.

Q Just what do you understand phychological work to be? A Work wherein you help another mentally.

Q You were sworn in this case before, weren't you? A Yes, sir.

Q And you did not say one word, did you, with respect to being present at the time the goods were taken out on replevin? A I don't remember if I was asked the question regarding that or not, sir.

Q I did not ask you that. Did you say anything with respect to it? A Not that I know of, sir; not that I remember.

Q Don't you know that you did not? A I don't remember that I did.

Q Don't you know that you did not? A No, I did not.

Q Is your recollection with respect to what transpired three weeks ago at this trial as vivid as your recollection of what transpired on August 21st? A Why, it is better, sir.

Q Do you remember with respect to what transpired at the trial? A Yes.

Q And I suppose it is also better than as to what transpired at the time these goods were taken on August 2nd? A It is as good.

Q Well, is it as good or better? A It is just about as good.

Q And you do not know now whether at this trial you testified with respect to the taking out of the goods on August 2nd or not? A I have answered that question, sir.

Q Well, answer it again. Do you know or don't you? A I said that I did not say anything regarding the taking out of the merchandise from the warehouse at that time, because I was not asked about it, I could not say a thing about it at the time.

Q Is that what you said not five minutes ago? A Yes, sir.

Q Are you sure of that? A I am positive.

Q And your recollection as to what you said five minutes ago I suppose is at least as vivid as to what took place on August 4th or August 21st; is that so? A Yes, sir.

Q Didn't you say five minutes ago that you did not know whether at this trial before you testified with respect to the taking out of these goods or not? A No; I answered that question, sir, before.

Q Answer it again.

Mr. Murray. What is the question?

Mr. Lane. Read it.

Mr. Sorg. He has answered it twice now.

The Court. The question may be answered.

(Previous question read as follows: "Didn't you say five minutes ago that you did not know whether at this trial before you testified with respect to the taking out of these goods or not?")

The Witness. No; I did not say that.

Q You did not? A Yes.

Q You are now positive that you did not say ten minutes ago, or five minutes ago, that you did not know whether you testified at the other trial as to the taking out of these goods or not, and you are sure now that what you said in response to my question five minutes ago was that you did not say that because you were not asked? A That is right.

Q When did you first tell Mr. Murray that you were present at the time these goods were taken out on August 2nd? A Mr. Murray was there. I phoned him that day to come there.

Q When did you tell Mr. Murray that you had overheard this conversation in which Mr. Murray protested against the taking out of the goods? A I was there with Mr. Murray when that occurred and overheard that conversation.

Q So Murray knew that you were present during that time? A Yes, sir.

Q And you did not draw that to Mr. Murray's attention within the past twenty-four hours? A I did not draw that to his attention, no.

Q Did you have a conference last night at his office with respect to this case? A No, sir.

Q Have you had any conference since yesterday afternoon with respect to this case? A No, sir.

Q And no talk has been had between you and Mr. Murray since yesterday afternoon with respect to the case? A Why, I went directly—

Q Yes or no. A No.

Q At this conference, Mr. Cricher, on the 21st of August, there were some hot words passed between you and Mr. Prell, were there not? A Some hot words?

Q Yes. A I would not say so.

Q Well, perhaps not hot words, but you accused him of various things, didn't you? A I don't remember that I did, sir.

Q Didn't you say that he had tried to defraud the La Brecque Company, or words to that effect? A I did not say that to him that I remember. I might have brought to his attention what was said down in the Court of Chancery, though, sir.

Q With respect to Prell? A Yes, sir.

Q And what he had done? A With respect to Mr. Prell or his actions in the matter at the time.

Q Haven't you a distinct recollection, now that your memory is refreshed, that you did use some language that he resented? A Not that I remember, sir.

Q You do know now whether you did or did not? A Not that I remember.

Q Well, do you remember his turning around to you and saying, "You shut up or I will tell what went on in New York yesterday"? A I don't remember him saying anything like that to me, sir.

Q Did he say it to anybody? A No, sir; not that I remember.

Q Well, did he say anything that sounded like it? A Not that I remember, sir.

Q He might have said it? A Without my knowing a thing about it he might have said it.

Q You were there during all the conference? A I was in Mr. Murray's office.

Q You would have heard it, wouldn't you? A Unless he went out some other place and said it.

Aaron Lane Cricher, re-direct.

Q Well, at that conference? A Not in that room, sir; not where I was.

Q Did he make any reference to something which had occurred in New York? A He might have made a reference to something which occurred in New York, because Mr. Prell had been in New York before and I had been there, too.

Q All right. Now, what reference did he make? A I don't remember him making a reference, at present, sir.

Q But he might have? A Yes.

Q You would have heard it? A Yes, but I might not remember it.

Q Now, haven't you a distinct recollection that you said something to him, or something was said to him by somebody, with respect to the remarks of Vice-Chancellor Backes? A Something might have been said, but I do not remember.

Q How did he reply to that? Did he stand still, or sit still, and take it? A I don't remember that, sir.

Q You haven't the least idea what reply he made? A I don't remember what was said in that respect.

Q About all you remember about this conference is that it was "without prejudice"; that is about right, isn't it? A No, sir.

Mr. Lane. That is all.

Re-direct examination by Mr. Murray.

Q Do you know Mr. Kraemer? A I had seen Mr. Kraemer before; yes, sir.

Mr. Lane. If your Honor please, there is someone here from the Bankruptcy Court with the original files of the Bankruptcy Court, and they want these files back.

I offer that in evidence, if your Honor please, with the consent of the other side at this time, so these original files may go back to the Bankruptcy Court—have you any objection?

Mr. Murray. I object to that as being irrelevant and immaterial. I do not see how they pertain to this issue at all. As far as agreeing upon the contents, subject to that objection I haven't any objection, but I think they should be ruled on before they go in.

Francis B. Broughton, direct.

The Court. They may be marked for identification. You cannot very well agree now. If you have copies of them let the originals be marked for identification and then use the copies.

Mr. Unger. Unless the young lady wants to leave the papers in the custody of the Court. They are the files of the United States District Court. I do not know what her instructions are in that respect. She will remain.

FRANCIS B. BROUGHTON, sworn as a witness on behalf of the counter claimant.

Direct examination by Mr. Murray.

Q Mr. Broughton, what is your business? A I am with Benjamin & Johnes Company, 42 Warren street.

Q In August of last year with what concern were you connected? A Secretary of the Newark Association of Credit Men and manager of their adjustment bureau.

Q Do you remember going to the La Brecque Company warehouse on August 2nd? A I do.

Q Who did you go with? A Mr. Murray.

Q Who else was there at the time? A There were a number of men. There were only three I remember the names of: the young man who was a witness before me, I do not remember his name, Mr. Kraemer who was introduced to me there, and Mr. Hummell, whom I knew by sight. There were a number of laborers there whom I did not know.

Q What happened there A They were removing certain goods from the third or fourth floor window, if I remember rightly, and I overheard you ask Sheriff Hummell if it would do any good to protest, or something to that effect, and he said "No", in a kind of facetious tone on both sides; apparently it was evident. If I remember right you went into another part of the building where I did not accompany you and upon your returning just before we left you called the attention of Mr. Kraemer and Mr. Hummell to the fact there were negotiable warehouse receipts out against this merchandise and that they had no right to deliver this merchandise, or remove it rather, and offered a formal protest against their so doing.

David H. Lowy, direct.

Cross examination by Mr. Lane.

Q Now, were the words "Formal protest against the removal" used? A No, I merely used that to classify or describe what I mean. I do not remember the exact wording, but it was something to the effect, "I wish to warn you or inform you that these receipts are out", or something of that kind.

Q Was that said in a facetious way? A No, it was not. That was only when he was suggesting stopping the Under Sheriff doing something he had started to do. The warning was given in all seriousness just gefore we left.

Q You are a client of Mr. Murray's office? A Yes, sir.

Q The Credit Men's Association is, is it not? A It is.

DAVID H. LOWY, sworn as a witness on behalf of the counter claimant.

Direct examination by Mr. Murray.

Q Mr. Lowy, what is your business? A Shoe man.

Q Were you connected with the New Jersey Novelty Footwear Company? A Yes, sir.

Q In what capacity? When did your connection with them begin, if you remember? A It began in July, 1918. I went on the road as salesman and came back in November, and about the middle of January or the early part of January I assisted around the factory helping the production and helping him a little in his financial matters, a sort of a general man around the factory up until the latter part of July, 1919.

Q Were you familiar with the nature and character of this footwear contained in the cartons in the McGann Company warehouse? A Yes, sir; very familiar.

Q How did you get your familiarity with it? A I believe I personally checked off or shipped sixty or seventy per cent. of it. I had seen all of it manufactured and I sold all of it.

Q Were you familiar with the nature and character of the goods which were sold to Kalter & Company? A Yes, sir.

Q How were you familiar with them? A I saw his goods in the course of manufacturing. Most of it was manufactured according to orders I had received the previous year on the road. I helped to calculate the cost on the different slippers.

David H. Lowy, direct.

Q When did you last see the goods? A When it was put into storage; and then I saw it again when it was unpacked by Kalter & Company for checking up purposes.

Q How long have you been in the shoe business, Mr. Lowy? A Oh, I started to work in the shoe business when I was fifteen years old. About nineteen or twenty years.

Q What branch of the shoe business have you been in? A I have been a retail salesman; I have been a buyer; I have been a road salesman.

Q What is your opinion of the value of the goods which were sold to Kalter & Company? A Well, the goods that were sold to Kalter & Company were under what I would call peculiar conditions. Mr. Kalter advanced two thousand dollars cash—

The Court. Just answer the question.

Q What was the value of the goods sold to Kalter & Company, per case? A Well, that question is not very clear to me. The value to Kalter & Company per case was $9.75.

By the Court.

Q That was the sale price, do you mean? A That was the sale price. I should value the order, to make up—

Q $9.75? A $9.75 a case of three dozen. The value to us to make it—

Q No. What was the value in the market?

By Mr. Murray.

Q What was the market value? A Those goods were sold in the market ranging in price from $6.75 a dozen to $10.50 a dozen. They generally ran three dozen in the case.

Q What caused the variance in price? A The different materials that we used.

Q The different grades, do you mean? A The different materials, the different kinds of slippers.

Q How many different kinds of slippers were there in that lot sold to Kalter & Company? A I should say about five or six different kinds.

Q What would be, in your opinion, the average value of those goods per case? A That is a very hard question to answer.

The Court. If you do not know you will have to say so.

The Witness. I know, but the average value would have to be taken according to the amounts of the different grades that were there.

The Court. Do you mean to say that you are unable to answer the question?

Q Do you know what percentage of each grade was in that lot? A About what percentage there is, yes, a pretty fair idea of it.

Q Now, can you tell us what the percentage of the lowest grade was? A I should say about forty per cent.

By the Court.

Q What do you mean? A Forty per cent. of the amount of goods in storage ranging around $6.75 to $7.25, and I should say about forty per cent. was $8.50 to $9.50, and about twenty per cent. of the better grade.

Q That would be what price? A That would be $10.50.

Q Do you know for how much per case these goods were sold by Kalter & Company? A They averaged around six dollars a dozen, or $18.00 a case.

Q When was that sale by Kalter & Company made? A I believe it was made the same week that we shipped the goods in to them.

Q That was in August, 1919? A August, 1919.

Q Had there been any depreciation that you know of in the price? A Yes, sir. Between the time when I took orders and when they were sold to Kalter there was a depreciation of about twenty-five to thirty per cent.

Q Now, these figures which you gave, these values which you gave, were they the figures as to the time when you took the orders or manufactured the goods, or were they the figures as of the time when they were sold to Kalter & Company last August? A Which figures do you mean, the $6.75 to $10.50?

Q Yes. A These were the figures taken at the time that I sold the goods.

Q Then in August the value would be about twenty-five per cent. less? A In August, 1919, the value would be about twenty-five or thirty per cent. less.

David H. Lowy, direct.

By Mr. Murray.

Q Were you present at the conference on August 21st in my office? A I was at your office—

Mr. Murray. I withdraw that question.

Q Were you present at the conference on August 21st? A I was present at two conferences in your office. I believe around the 21st there was a conference held.

Q Who was there? A Mr. Unger, Mr. Bobker, Mr. Cricher, Mr. Murray, Mr. Prell and myself.

Q Do you remember what happened there and what was said there? A Might I ask you, Mr. Murray, is August 21st the first conference in your office or the second?

Q That is the second. A Yes, I do remember it.

Q Will you tell what took place there, Mr. Lowy? A We had come over to see you to make an arrangement—

By the Court.

Q What took place in the office? A We were in the office and—

Q What took place in the office? A We held a conference in the office.

Q Now, what took place? A We tried to make an arrangement to substitute other goods and cash and to return to La Brecque Company their warehouse receipts and to stop any impending suits or actions that Mr. Murray might take against either Prell or the New Jersey Novelty Footwear Company. We were there in Mr. Prell's interests. We had been notified that Mr. Murray had taken action against Mr. Prell, and I believe he mentioned against Mr. McGann, because these goods were sold.

By Mr. Murray.

Q Was there any other arrangement made regarding the money held by Max Kalter? A Yes, sir.

Q What was that arrangement? A The arrangement was made that I was to be given a letter to Max Kalter releasing the money that was being held by him and that he was to make the check out in favor of Milton Unger and David Bobker.

Q Do you remember the amount of it? A Thirty-two hundred and some odd dollars, Mr. Murray.

David H. Lowy, direct.

Q What was to be done with that money when Mr. Unger and Mr. Bobker got it? A Mr. Prell was to receive $1,500 of that money, which he wanted to use to pay his payroll down at Jamesburg, and buy some material to continue to manufacture of some unfinished slippers that he had down there at Jamesburg, and they were to be sent to the McGann Company, who in turn were to issue warehouse receipts to people holding La Brecque Company receipts, and they in turn were to surrender the La Brecque Company receipts and take the McGann receipts instead.

Q When was the $1,500 to be paid? A The $1,500 was to be paid to Mr. Prell immediately.

Q When were the goods to be brought down from the Jamesburg factory, the substituted goods? A Mr. Prell said he had in the neighborhood of three hundred cases at the Jamesburg factory that he could bring up right away, and that if he was given a week's time he could probably manufacture three hundred cases more.

Q You say the three hundred cases that were already manufactured were to be brought up right away. Was there any definite time set for that, do you know? A Well, that was to be done right away.

Q What was to be done with the balance of the fund? A I understand from the conference that $1,700 was to be held in trust by Mr. Unger and Mr. Bobker. You at that time claimed that your interest lay in the fact that the McGann people had filed a bond of $10,000 when they replevined the goods, which you considered and which I agreed with you at the time, was a sufficient amount for the amount of goods; and you stated that your interest in the case was that you had an action pending at Trenton, I believe it was, and that if through the efforts of Mr. Prell, the cases which he would ship up to Newark to get back the La Brecque warehouse receipts—if he reduced that liability by the time you went down to that case—

Q Which case? A The case you said you had in Trenton, pending against the—

Q The Chancery case? A I suppose so; I don't know—that if he would reduce that liability to within the amount of the $10,000 bond, you would agree to a postponement of the case to give them a chance to go ahead and take up those outstanding warehouse receipts.

David H. Lowy, cross.

Q Do you know what outstanding receipts were to be taken up? A I do not know just how many receipts there were, but I believe the amount of money that had been borrowed on those receipts was in the neighborhood of $16,000 or $18,000, and we figured there—I do not know whether you got the memorandum Mr. Unger has, but I believe there were 379 cases to be brought up—three hundred and some odd cases, I believe it was seventy-nine, that would have to be brought up with the money that would be left out of the Kalter check to bring Mr. Prell's liabilities to within the $10,000 bond put up by McGann.

Q Was the $1,700 to be paid over to Prell? A Not that I understand, not until the receipts were—the La Brecque Company receipts were returned.

Q How many different ones were outstanding? A I believe there were three held by the Jamesburg bank.

Q For how many cases of goods each? Do you remember? A Not accurately, Mr. Murray; in the neighborhood of $250 or $300 cases. There was a like amount held by the East Newark bank. There was one warehouse receipt for a hundred cases held by H. Rabinow. There were two or three receipts held by Hyman Marsa. There was one receipt held by I. M. Leff for fifty cases.

Cross examination by Mr. Lane.

Q When were these goods manufactured? A Why these goods started in the course of manufacture in the middle of January.

Q For what class of trade? A Department store, mail order houses and jobbing trade.

Q How do you fix the original value of six, eight and ten dollars? A Why, we calculate that. We have what they call a calculation sheet. We take in how many slippers we get to a yard of cloth, how many pairs of soles, what our selling expenses are, the salesman's commission and our estimated profit and we arrive at our selling price.

Q Then that selling price is the cost of production plus profit and overhead? A Yes, sir.

Q A short time after the manufacture of these goods there was a considerable drop in the market, was there not? A After the armistice; yes, sir.

Q What caused that drop? A I explained that the last time. Do you want me to go through it again?

Q You will have to. A Why, before the armistice and all during the armistice there was a strong demand for felt slippers; the whole industry was for felt slippers. These were substitution for felt, and it was impossible to get any felt at all that year because the Government had taken over all the felt. There was a scarcity of felt slippers and the jobbers naturally took to a substitute; they had to have slippers. When the armistice was signed the jobbers felt there would be a release of felt by the Government and there would be felt slippers on the market by 1919. Consequently substitutes took a drop.

Q You negotiated this sale to Kalter yourself? A Yes, sir.

Q At the price of $3.25? A The price of $3.25.

The Court. A dozen?

The Witness. Yes, sir.

Q Did you know as a matter of fact what the market price was at that time? A I know what our market price would have been if I had gone out to sell them.

Q I did not ask what your asking price would have been. Did you know what the market price was, that is, the price at which slippers were selling at that time? A I had not been out to sell a slipper in two months or two and a half months.

Q Then you did not know what the market price was? A I don't think there would be any change in the last two or two and a half months, as to the market price.

Q Well, with reference to these kinds of slippers it was changing all the time, wasn't it? A No; they took their drop right after the armistice was signed. That is about the only drop they would take.

Q Do you know of any sales made in the market about the time of the sales to Kalter? A Yes. There was a salesman had taken out a couple of samples and Macy & Company in New York offered to buy what there was, regardless of sizes and colors, for five dollars a dozen.

Q When was that? A That was the latter part of June or July.

Q Was that sale actually consummated? A No.

Q Is that the only sale or offered sale that you know of about that time? A Yes, sir.

Q You do not know about how many or what percentage of the different priced slippers were in these particular 479 cases, do you? A That were shipped to Kalter?

Q These particular 479 cases? A No; I do not.

Q As a matter of fact you do not know whether these particular 479 cases contained two dozen or three dozen, do you? A Yes, sir.

Q There were two sizes, weren't there? A There were three sizes; 18 pair cases, 36 pair cases and 72 pair cases.

Q Do you know whether these particular 479 cases—what sizes they were? A They were thirty-six pair cases.

Q Were there any of the other sizes sold to Kalter? A No, sir.

Q Then all that were sold to Kalter were thirty-six pair cases? A Thirty-six pair cases.

Q You are a manufacturer and Kalter is a jobber? A Kalter is an auctioneer.

Q Well, he is a jobber, isn't he? A A jobber; yes.

Q And you do not know what his overhead is, do you? A No, sir.

Q And you do not know what he figures in for his profit, do you? A No, sir.

Q That is not a matter that concerns you at all, does it? A No, sir.

Q You do know, however, that in selling shoes there is a considerable advance by the jobber and then by the retailer before the price to the public is fixed, over the manufacturer's price? A Yes, sir.

Q The selling cost has got to be taken in, of the jobber? A The selling cost of the jobber and the retailer.

Q And you haven't any idea as to those amounts? A Well, you can figure that out. I can tell you what the slippers sold for at retail.

Q You haven't any idea as to what they figure the amount at. All you would do would be to take the retail figure and figure back, wouldn't you? A Well, the jobber would generally work on a percentage of ten per cent. over his overhead.

Q How do you know that? A From different talks that I have had with jobbers in the course of selling them goods.

Q Do you know what percentage is overhead? A What one jobber would figure another would not figure. The overhead

would have to be determined. One jobber's overhead expenses might be considerably larger or considerably smaller than the next jobber's.

Q It is not very unusual to double, is it? A It is very unusual to double.

Q It is not unusual to take fifty per cent., is it? A For overhead? 10

Q Yes. A It is very unusual.

Q How do you know that? A No concern could exist that took fifty per cent. for overhead, if it was purely a jobber.

Q At this conference that took place on August 21st you say this young man Cricher was present? A Yes, sir.

Q During that conference was anything said by Cricher or by anyone else with respect to statements made as to Prell? A Mr. Cricher and Mr. Prell had a little argument.

Q Was it a warm argument? A No; not very warm. Mr. 20 Cricher insisted on running the proceedings all the way through and Prell turned around to him and said, "You were at the New York conference and you keep quiet." And Mr. Murray admonished Mr. Cricher, that he would take care of all that was to be taken care of there.

Q Did he say, "You keep quiet or I will tell what happened in the conference in New York," or words to that effect? A No; he said just what I stated there.

Q Did he refer to the conference in New York? A Yes; he referred to the conference in New York.

Q Who got Mr. Unger to go to this conference at Mr. Mur- 30 ray's office? A I did.

Q How long before the conference? A I believe I saw Mr. Unger in the morning.

Q Before you went to Mr. Unger— A I went to Mr. Unger and then I went to Mr. Murray's office. I believe I came back to Mr. Unger's office and told him I had arranged a conference in Mr. Murray's office for the afternoon.

Mr. Murray. That is our case.

40

MILTON M. UNGER, recalled on behalf of the McGann Company.

Direct examination by Mr. Lane.

Q Mr. Unger, on August 4th or August 5th—which was it, the date of the conference in your office which resulted in the delivery by Mr. McGann to Kalter? A August 5th; the last conference.

Q When did you have a conversation with respect to that conference with Mr. Murray? A In the morning of that day. Mr. Murray telephoned me and told me that he understood that a disposition of that matter was to be made at my office in the afternoon, and asked me if there was any objection to his being present. I told him there was none and I would be glad to have him come over and he said he would be there.

Q When did this conference convene? A Two P. M.

Q Who were there? A Mr. Bobker was there; Mr. Lowy, Mr. Prell and I was there.

Q Was there anything said at that conference—

Mr. Murray. Objected to.

Mr. Lane. Wait a minute.

Q Was there anything said at that conference with respect to any outstanding receipts of the La Brecque Company?

Mr. Murray. I object to that.

The Court. The question may be answered yes or no.

Mr. Murray. May I have an exception?

The Court. Yes.

A No.

Q When was the delivery by McGann to Kalter to commence? A The following Wednesday; the next day.

Q Did you at that time or at any time prior to the delivery have any information that the delivery about to be made was to one not lawfully entitled to possession?

Mr. Murray. I object to the question, to the form of the question. That is asking for a conclusion of law.

Mr. Lane. I submit we are entitled to that conclusion of law.

The Court. Objection overruled.

Mr. Murray. I ask an exception.

The Court. An exception will be noted.

A No, sir.

Q Did you advise Mr. McGann to make the delivery? A I did.

Q Did you know at the time, or any time prior to the delivery, that there were any La Brecque receipts out? A No, sir.

Q Or that La Brecque had any interest in the goods? A No, sir.

Q What was your opinion at that time with respect to the obligation of McGann?

Mr. Murray. I object to that, if your Honor please.

The Court. I am inclined to sustain that objection, Mr. Lane.

(After argument.)

The Court. Objection sustained.

Mr. Lane. Your Honor will allow an exception?

The Court. Yes.

Q At the conference on August 21st, Mr. Unger, what was said, if anything, with respect to prejudice? A Let me have that receipt or order for the goods, please.

Q (Handing paper to witness.) And the order also? No; you don't want that. A No. I do not recall that anything was said specifically about prejudice, except in this respect; that when we came to consider the question as to whom the money of Mr. Kalter was to be paid to, or to whom it was to be paid, Mr. Murray stated that he did not want to be the recipient of the money. Mr. Bobker and I had asked him to receive it, and he stated that he did not want to become trustee for it because it might prejudice his client in a possible suit on the bond if it subsequently developed that his client or he had received some money, and it was thereupon agreed that the money was to be paid to Mr. Bobker and I as trustees.

Q Did you get any impression from that conference that this money was to be paid over in the manner contemplated and that McGann would remain liable for the value of the identical goods represented by the money? A I got no such impression. I went there in Mr. McGann's behalf.

Milton M. Unger, cross.

Q How did you come to go there? A Mr. Lowy of the New Jersey Novelty Footwear Company came into my office in the morning and asked me if I could not do something to straighten out this difficulty, and I asked him there—I said, "Did you ever tell McGann that La Brecque had issued receipts, or did you ever tell me—"

Mr. Murray. I object to the conversation with Lowy, if your Honor please.

The Court. The conversation with Lowy will be stricken out.

The Witness. He asked me to do him a favor and come over to Murray's office and help straighten out the difficulty, and I went over.

Q Do you remember at that conference anything being said between Cricher and Prell? A Very much was said.

Q Well, just what was said? A Cricher was after Prell. He was telling him what he was going to do to him and accusing him of fraud and different things, and Prell turned on him and said, "You shut up or I will tell what happened in New York a couple of days ago," or "a couple or nights ago."

Q Was anything more said? A No; Cricher kept quiet after that and let his lawyer do the talking.

Q How long did this conference in your office on August 5th last? A From about quarter of two until twenty minutes after four. I left the office at that time.

Q How many times did you telephone Murray? A I telephoned him once, I should say about three o'clock, and asked him if he was coming over and he said he would be over in about ten minutes.

Q Did you have any further telephones from him? A I think I telephoned him once. I believe he telephoned me once and said he would be over shortly.

Q Did he appear? A No; not up to twenty minutes after four when I left.

Cross examination by Mr. Murray.

Q I understood you to say that this call which you just mentioned, to me, took place on August 5th, on Tuesday? A It was the day when the settlement was made, and I believe it was a Tuesday.

Milton M. Unger, cross.

Q The settlement was made on Tuesday? Do you remember making an affidavit, Mr. Unger, in the Chancery proceedings? (Showing witness paper.) Will you tell us whether that is the affidavit? A That is a copy of it.

Q Can you tell us when that affidavit was made by you? A August 19th.

Q The fourth paragraph reads, "On August 4th the representatives of the New Jersey Novelty Footwear Company called at my office—" etc. (reads). Is this affidavit you made at the time right, or is the testimony you have just given correct, as to the date. You have just said it was on Tuesday, August 5th, and in the affidavit you say Monday, August 4th? A Does it say Monday there?

Q It says August 4th. A It says on August 4th the representatives of the New Jersey Novelty Footwear Company— It was on that day, whether it was August 4th or 5th I do not know, but it was that day, and the affidavit is in all other respects correct.

Q You do not say now, Mr. Unger, that you told him that it was contemplated selling these goods or delivering them to anybody, do you? A No; because I did not know at the time that there would be any sale or delivery.

Q You did not know it yourself? A No, sir; I told you a disposition of the matter would take place. You telephoned me.

Q You knew that the goods of the Novelty Company had been left by the McGann Company in the La Brecque Company warehouse when the La Brecque Company took the warehouse over, did you not? A I know they had been compelled to leave them there.

Q They had been physically there in the warehouse and in the physical possession of La Brecque Company? A Yes.

Q And they had been there from June until the second day of August? A That is right.

Q You knew that the La Brecque Company had refused to give them up to your client, didn't you? A Yes, sir.

Q You had demanded from the La Brecque Company that they pay your storage charges, had you not? A Personally, no.

Q I mean your concern or—you knew on August 5th, or 4th, that your concern had demanded possession of those goods from La Brecque? A I knew that possession of the goods had been demanded.

Milton M. Unger, cross.

Q You knew that storage charges your client claimed had been demanded? A I knew a bill had been submitted in response to the request of the La Brecque Company for a bill.

Q You knew that there had been some correspondence in which the La Brecque Company told your client that it would pay or pass for payment your storage charges when they could find out whether they were correct? A I had seen such correspondence.

Q You knew at that time that your client's negotiable warehouse receipts had been outstanding and had been returned to your client? A At what time?

Q You knew it on August 4th or 5th, when you made this sale? A Yes.

Q You knew those receipts had been outstanding? A Yes.

Q Now, Mr. Unger, why did you think that the La Brecque Company offered to pay the storage charges claimed by your concern? The bills were made to the New Jersey Novelty Footwear Company, weren't they? A Yes.

Q Why did you think that the La Brecque Company would pay the storage charges on the goods of someone else? A They did not pay them.

Q I asked why did you think they would pay them? A I did not think they would pay them.

Q Why did you submit a bill to them then? A Because they had requested it.

Q Why did you think they were requesting it? A I am not a mind reader.

Q You knew these McGann receipts had been turned in to your client by the La Brecque Company? A I did.

Q You knew they were endorsed in blank, were they not? A They bore the New Jersey Novelty Footwear Company's endorsements.

Q Didn't you know that the possession of a negotiable warehouse receipt, endorsed in blank by the payee, so-called, entitles the possessor of it to the goods? A I did not know and do not know any such thing.

Q Were not the McGann Company receipts negotiable receipts? A Yes.

Q Under the warehouse act and the negotiable instrument act is not possession of warehouse receipts, if they are negotiable

and properly endorsed, *prima facie* evidence of the ownership of the goods? A It depends upon how the possession and endorsement were acquired, and for what purpose.

Q That you do not know, how it was acquired, and all you did know is the La Brecque Company did have possession of the McGann receipts so endorsed? A When?

Q When they turned them in to that company on July 31st. Don't you consider that the La Brecque Company was the *prima facie* owner of those goods? A No, sir; I consider that they were not the owners of those goods.

Q When you took the goods out on August 2nd you took them from the possession of the La Brecque Company? A Yes.

Q And you took them for the sole purpose of securing payment of your charges? A We did not take them for that sole purpose. As I explained yesterday, we had two duties in mind.

Q On August 2nd your receipts had all been returned to you, had they not? A Yes.

Q If in fact the La Brecque Company had been hired by the Novelty Company to become the warehouseman of those goods in your place, and if your company knew of that fact, your only claim to these goods on August 2nd was a claim for storage charges? A It was our only claim, but we had an interest in the goods, to see they were distributed according to law and returned to the holder of the receipt or the depositor. That was our contract.

Q At that time the holder of the McGann receipts was the La Brecque Company, wasn't it? A Never in my opinion. It had possession of them for a purpose, but it was never the holder.

Q When a negotiable receipt is endorsed on the back to the payee it passes by delivery to someone? A When it is endorsed to someone.

Q When a negotiable warehouse receipt is endorsed in blank by the payee the title to the warehouse receipt and the goods it represents passes by delivery of that warehouse receipt by any other endorsement, does it not? A It depends upon the agreement.

Q If there is no other agreement and it is simply turned over title passes? A It depends upon to whom it is turned over and for what purpose.

Milton M. Unger, cross.

Q Then you knew when you got these warehouse receipts from the La Brecque Company that there might be some agreement under which the La Brecque Company held these receipts of the McGann Company. Is that correct? You knew there might possibly be some agreement? A Anything was possible.

Q For all you knew the La Brecque Company might have purchased these receipts from the Novelty Company or from the banks or former holders of the receipts. You did not know anything to the contrary, did you? A I did know.

Q How did you know? A I asked Mr. Lowy and Mr. Prell when they were in my office if they were the owners of these goods, when they wanted delivery made to Kalter, and they signed written instructions.

Q Then your sole knowledge was based upon what they told you? A They were there present at the conference and they told me that.

(Last question read.)

The Witness. Sole knowledge as to what?

Q As to whether or not the La Brecque Company might have purchased these goods? A I relied upon what they told me. I would say this: That in none of the correspondence of the La Brecque Company to the McGann Company which I had seen at that time had there been any such intimation.

Mr. Murray. I move to strike that out as not responsive, if your Honor please.

The Court. That will be stricken out.

Q Do you remember testifying in the Bankruptcy Court sometime in December? A Yes.

Q With regard to this Kalter fund transaction? A About the money?

Q Yes, about the money. A Yes.

Q Do you recall whether you said in your testimony in part—page 7—"It was then agreed that Mr. Bobker and I out of the moneys which we were to receive, the exact amount of which I do not recall just now, should advance to the New Jersey Novelty Footwear Company $1,500 to acquire some receipts, and give up the balance to them when they had acquired warehouse receipts covering 390 cases"? A That is right.

Q Do you remember so testifying? A Yes.

Milton M. Unger, cross.

Q How was that figure of 390 cases arrived at? A Specifically I cannot pretend to go into the conversation that we went into there, but after this direction to the Max Kalter Mercantile Company was signed and Mr. Bobker and I were made the trustees of the fund I took care to write down at that time in pencil the exact terms under which we were to hold this money, and I wrote it in pencil on the corner of my receipt.

Mr. Murray. Objected to.

The Witness. And it is still there.

Q Go ahead. A And, refreshing my recollection from that memorandum, I will state that the understanding was that this money, all of it, was to be paid to the New Jersey Novelty Footwear Company when receipts for 390 cases had been returned to La Brecque Company; and that Bobker and I were to advance $1,500 to Prell or to the New Jersey Novelty Footwear Company immediately upon receipt of the money to go out and acquire receipts; and we discussed ways and means, how that was to be done.

Q Now, we fixed a value, did we not, for the purpose of the computation or discussion there, of $20.00 per case. Is that right? A Well, I have a memorandum made at the time. I do not find that on it. We may have; I would not say we did not. I have a memorandum of the number of cases.

Q So that with a value of $20.00 a case, 390 cases would represent a value of in the neighborhood of $7,000. Is that right? A If your multiplication is correct, I guess that is right.

Q And that was to be the result of using this $3,200, of Prell using the $3,200? A No; the $3,200 was to be the result of obtaining the cases. When Prell brought in receipts, or when they would deliver up receipts covering 390 cases, then the New Jersey Novelty Footwear Company was to get all of the money. Until it did that, or in advance of it rather, we were to give him $1,500 outright to make up his payroll and to pay other expenses. The $1,500 payment was conditional except as he represented what he would be able to do with it.

Q When was that payment of $1,500 made, with reference to August 21st? A On August 21st we signed the authorization and the money did not come through until a few days later and then a check came, drawn, I believe, to Mr. Bobker's order and myself and we deposited it.

Milton M. Unger, cross.

By the Court.

Q Do you remember now the exact amount? A It was over $3,000.

Q Do you remember the exact amount? A I do not. Mr. Bobker has the bank book. It was over $3,000.

By Mr. Murray.

Q Do you remember how long after August 21st it was that you paid over this $1,500? A It was not over three or four days I don't believe.

Q Do you remember, with regard to that $1,500 payment, coming down and finding me in the Second District Court where I was about to start the trial of a case? A Yes.

Q And asking me whether I would consent to the $1,500 payment? A Yes.

Q Why did you ask me to consent to that? A Mr. Bobker and I received the money and Mr. Kalter took off from the check when he delivered it to us some five or six hundred dollars for shortages which he claimed existed and which we were informed by the New Jersey Novelty Footwear Company did exist, so that the check was a good deal less than we thought we would get, and under those circumstances I was unwilling to make this $1,500 payment to Prell unless you were informed of it, and I said that until you got back from the District Court I was not going to make any payment, and Prell suggested that he had a taxi there and he would take us all down to the District Court, which he did, and we went in the court room and explained to you that Kalter had taken something off the check and we asked you O. K. on the $1,500 payment and you gave consent and we went back to the bank and cashed the check and gave him the money.

Q Now, in December you testified in this other proceeding which I mentioned a while ago, in the Bankruptcy Court, "We were all of us discussing ways and means, as I recall it, whereby this money could be paid over and none of us prejudiced thereby. The La Brecque Company, represented by Mr. Murray's firm, was averse to the New Jersey Novelty Footwear Company getting this money until the warehouse receipts which the La Brecque Company had issued and which you claimed were still outstanding were returned or surrendered to the La Brecque

Company." Is that statement true? A If I so testified there that is true.

The Court. Is that the testimony in the Bankruptcy Court?

Mr. Murray. Yes; on December 5th.

Q At what time during the conference was this paper which resulted in getting possession of the money drawn up and signed? A Well, I should say about the end of the conference. I think we had agreed on everything—

Q About the end of the conference? A I think it was about the last thing that was done.

Q When we opened the conference do you remember me saying to you in the hearing of all present that I considered the McGann Company liable for this sale of these—the McGann Company liable for the sale of these goods to Kalter? Do you remember me saying that? A I remember that you did but that I disputed it.

Q You disputed me? A Yes.

Q And do you remember that I said, "While we are fighting this out among ourselves there is no use letting Prell get the money without some control, or letting him leave it in New York where Kalter could get away with it"? A I would not say those were your exact words, and I would not say they were not. We were all interested in getting the money over here.

Q Was something said to the effect that while we were fighting it out among ourselves we would try to get some arrangement so the money would not be lost to everyone? A I guess we were all agreed that we wanted the money over here.

Q Wasn't there something of that kind said? A There was a great deal said about that. I accused you of tying up the money in New York.

Q I admitted it, didn't I? A Yes; and then we agreed that it ought to come back here.

Q If it had not been tied up, as far as anything you did, it would have gone to Prell, wouldn't it? A I did not have the disposition of the money.

Q In other words, it was through my efforts in tying it up that any of it was saved. Is that right? A I do not know whether that was the reason but I assume you had instructed Kalter not to pay it and that he had not paid it.

Q You have not answered the question yet. Did I say to you when we began the conference that while we were fighting this thing out among ourselves as to whether McGann, or the McGann Company, was liable to us for this loss that we had better get hold of the money so it would not be lost to all of us? A Words to that effect, I should say.

Q You did not understand that the replevin suit which was then pending was going to be stopped, did you? A We were plaintiffs in it and I was going ahead.

Q What did you mean a while ago when you said that I refused to act as trustee because it might prejudice my suit on the bond? What was your conversation with regard to that? A When it came to a question as to who should handle this money I think Mr. Bobker and I were willing that you should become custodian of it and you said you did not want to handle or did not want it in your name for fear that if subsequently you had to bring an action on the bond against McGann and the Surety Company this might be construed to be a payment to you, or something like that. Anyway, you did not want to take it in your name.

Q I told you, did I not, that I intended to sue McGann of the McGann Company for this damage, did I not? A I do not recall that you intended to sue him. The proceedings were already pending at the time.

Q Well, I told you I intended to hold him liable, didn't I? A I suppose we were all threatening to hold each other liable. I would not say you did not.

Q Will you say I did not say that, or words to that effect? A I guess we were all threatening each other.

Q We could not agree on where the liability was and we were going to fight it out? A You and I held different opinions.

Q And that was the idea we had when we left the conference, that we were going to fight it out as to the liability of the La Brecque Company and McGann Company with respect to these goods? A Not altogether. My idea, and I believe it was yours, was that we were considerably impressed by what Lowy and Prell said they were going to be able to do. They made us promises of how they were going to get goods into the McGann warehouse, have new receipts issued and those receipts were to suspend the old, and I really believe you and I thought

they would keep their promises and this litigation would never have come about.

Q Well, if the money had been used it might have resulted in the substitution of all the lost goods, might it not? A I considered it likely. They said they would.

Q In that case the liability of the La Brecque Company to its receipt holders would be terminated, wouldn't it? A If it got its receipts back. I do not know what its liability is.

Q Then there would not be any liability of the McGann Company to the La Brecque Company, would there? A I never considered there was any liability of McGann.

Q There would not be in that case, anyway, would there? A There was not and I did not consider there would be any. I never considered there was any.

Q Now, at that time, and in all our discussion, we assumed, did we not that if the McGann Company was liable as I claimed, that the bond would be collected upon in case McGann did not make good on the amount recovered against him. Is that correct? A I think you assumed the existence of the bond for that purpose.

Q I think you did too, didn't you? A I did not dispute with you that the bond was given to insure his liability in the replevin suit.

Q I expressed my idea and you did not dispute it? A I would not say I did.

Q Now, Mr. Unger, I could not collect on the bond until I had first gotten a judgment against McGann, or the McGann Company, could I?

The Court. Oh, now, Mr. Murray.

Mr. Murray. I am coming to something now—

The Court. I think that is just a step too far. I doubt if I would be willing to let this case go as it has gone if it was not the last case of the term and we had a whole week to try it!

Mr. Murray. That is all.

Re-direct examination by Mr. Lane.

Q Now, Mr. Unger, may I ask again the question that his Honor has overruled, and for which I think the door has been opened; what your idea was on the 4th or 5th of August, at the

time of this delivery, with respect to the legal rights of the McGann Company and the legal duties of the McGann Company, and the basis of the opinion?

Mr. Murray. Same objection.

The Court. I think the other side has as much right to his opinion as you have, Mr. Murray, and you have been asking his opinion and views right along. Objection overruled.

(Last question read.)

A My opinion at that time was—

The Court. And still is?

The Witness. And still is—and I think that it has been somewhat vindicated by the determination of the Court in the replevin suit, that the La Brecque Company never had the right to the possession of these goods; that it was never warehouseman for these goods; that the McGann Company at all times had the right to possession until the satisfaction of its warehouse charges, and that when those warehouse charges had been satisfied it owed a duty to the depositor of the goods, namely to deliver them to the depositor, and having received instructions from the depositor to do that I advised the McGann Company that it must abide by its instructions and make delivery in accordance therewith.

JOSEPH F. McGANN, recalled as a witness on behalf of the McGann Company.

Direct examination by Mr. Lane.

Q Did you at the time of the delivery of the goods to Kalter have any knowledge of any outstanding La Brecque receipts?
A I did not.

Q From who did you, prior to the delivery to the Kalter Company, have instructions or advice from counsel with respect to the delivery?

Mr. Murray. I object to that, if your Honor please.

The Court. Objection overruled.

Joseph F. McGann, cross.

A I received instructions from Mr. Unger, the counsel for the McGann Company, to make delivery of the cartons to the Max Kalter Mercantile Agency.

Q Did you at the time of the delivery, or prior thereto, have any information that the delivery contemplated to Kalter was a delivery to one not lawfully entitled to the possession of the goods? A I did not.

Mr. Murray. I object to that on the same ground.

The Court. The objection will be considered as timely, and will be overruled.

Cross examination by Mr. Murray.

Q When you say you had no knowledge you are speaking of yourself personally? A No knowledge of what?

Q Outstanding warehouse receipts. A I am speaking of my knowledge both personally and officially.

By the Court.

Q You mean as president and treasurer? A Yes, your Honor.

Q Who were the officers of your company? A Myself as president and treasurer. It is sort of a close corporation. My sister is vice-president and Mr. Smith, unfortunately a brother-in-law, secretary.

Q Who are the directors? A We three.

By Mr. Murray.

Q You caused statements to be sent, or bills to be sent, to the La Brecque Company for the charges you claimed against these goods, didn't you? A By request.

Q You received your negotiable receipts endorsed in blank, did you not, from the—

The Court. You asked that when he was on the stand before.

Mr. Murray. Not "endorsed in blank."

The Court. They are here. They are in evidence.

Q As far as you knew when you turned over the goods to the Kalter Company, La Brecque Company might have made advances on those goods or might have bought the goods? A Might.

Joseph F. McGann, cross.

Q Is that true, as far as you knew? A I could not answer that question, only as a suggestion.

Q As far as you knew it was possible that they had?

The Witness. If your Honor please the question is very foolish.

The Court. Your counsel does not seem to object to it, Mr. McGann.

(Previous question read, as follows: "As far as you knew when you turned over the goods to the Kalter Company, La Brecque Company might have made advances on those goods or might have bought the goods?")

A They might have, and then again they might not have.

Q You did not inquire from the La Brecque Company to ascertain whether they had any interest in these goods or not, did you? A No. There was no especial reason for my doing so.

Mr. Murray. I ask that last statement be stricken out, if your Honor please.

The Court. It will be.

Q Didn't you know, Mr. McGann, that when you had been down to Jamesburg and saw Mr. Voorhees and they expressed the intention of surrendering your receipts and taking La Brecque receipts in their place, on July twenty-third; and when you had been down to the East Newark Bank within ten days of the same time and they had expressed the same intention, and when you within ten days or a week thereafter received those very receipts from the La Brecque Company, what did you think brought about the surrender of your receipts to you? A Mr. Murray, you are trying to put certain thoughts in my mind.

Q Exactly. A In the matter of the Jamesburg Bank, the last word Mr. Voorhees said to me was that they would continue to hold the McGann Company receipts and not under any circumstances accept the La Brecque Company's. And the First National Bank of East Newark, the last spoken word that I had with them (and I rave testified to it) was over the telephone, and that was with Mr. Newshafer, who requested me to direct his runner, or messenger, who had receipts in his possession at the time, and who called at our office, thinking he was in La

Brecque Company's office, to not go to the La Brecque Company, but to go back to the bank with the receipts.

Q Yet after that, Mr. McCann, those very same receipts did come through the La Brecque Company, didn't they? A Yes.

Q And the other receipts you had been talking with Mr. Voorhees about, of the Jamesburg Bank, did come through the La Brecque Company? A I so testified.

Q Now, didn't you think it strange that when you received your receipts back, which had been held by the Jamesburg Bank and the bank said they would not surrender them, didn't you think that was at all strange? A There was no reason why I should even give it any consideration. The matter was subject to litigation; the matter was being handled by the attorneys on both sides. I was being guided in every way by the advice of my attorney, and so far La Brecque or their organization was concerned, I did not care to have anything to do with them. I did not care to deal directly with them, for reasons that need not be gone into, but they are sufficient.

CHARLES J. KRAEMER, sworn as a witness on behalf of The McGann Company.

Direct examination by Mr. Lane.

Q Mr. Kraemer, you live where? A Rahway, New Jersey.

Q You are connected with The McGann Company, or were on August fourth? A Yes, sir.

Q August second, rather? A Yes, sir.

Q Do you remember being present at the time the goods were delivered or taken out on a writ of replevin? A I do.

Q Did you see Mr. Murray there? A Later in the day; yes, sir.

Q Did Mr. Murray state to you that there had been negotiable warehouse receipts issued by the La Brecque Company upon the goods, these goods? A I never heard him say it.

Cross examination by Mr. Murray.

Q You remember testifying in the trial of the first half of this case, Mr. Kraemer? A Yes, sir.

Q Did you say you did not recall any conference concerning the warehouse receipts on August second when the goods were taken out on replevin? A I did not know who you were.

Q "Will you swear there was not such a conversation? A I will not swear." A I remember that distinctly.

Q And that was the fact? A That was the fact. I did not hear you say it.

Q You will not swear to it, that there was not such a conversation? A Why no. You might have said anything outside of my hearing.

Q To you? A I will swear you did not say it to me.

Q To you? A I did not hear you say it.

Q Do you want to swear I did not say it to you? A Well, I will swear I did not hear you say it; yes, sir.

Mr. Murray. That is all.

Mr. Lane. That is all. I offer in evidence, if your Honor please the paper which has been marked Exhibit D. 1 for identification. It is the order given by the Novelty Footwear Company for the delivery of these goods.

The Court. It will be received.

(Paper heretofore marked D. 1 for identification marked Exhibit D. 1 on behalf of McGann Company.)

The Court. I would like to see exhibits P. 10 and P. 11.

(Papers referred to handed to the Court.)

Mr. Lane. I offer in evidence, if your Honor please, the record of the proceedings in bankruptcy in the matter of the New Jersey Novelty Footwear Company, including the petition of the trustee in bankruptcy reciting the fact that there was in the possession of The McGann Company these goods which were removed by replevin; the fact that certain of those goods, 778 cases, part of which is now in discussion, had been transferred to the Kalter Company, and the remaining cartons still in the possession of The McGann Company; and that the First National Bank of Jamesburg and the First National Bank of East Newark, Isadore M. Leff and Hyman Marsa claimed interest in the goods by virtue of receipts, and that La Brecque Company claims an interest in the goods and that The McGann Company claims an interest in the goods; and the allegation of the trustee in bankruptcy that the goods are the rightful property of the trustee in bankruptcy by reason of the fact that there are no valid receipts issued and outstanding for the same to any person, firm or corporation, and that the purported warehouse receipts issued by the La Brecque Company are in-

valid; and praying for an order adjudging and determining that the goods now in the possession of The McGann Company be declared to be the property of the bankrupt estate, free, clear and discharged of the respective claims of the persons whom I have mentioned, and for further and other relief; and the order issued upon that petition on the sixth day of November, 1919, ordering the persons whom I have named to show cause before the Bankruptcy Court why an order should not be made granting the prayer of the petition, and to file their claims to the property; and then to further show cause why the Court should not adjudicate and determine the claims; and restraining in the meantime the persons named from removing, disposing, encumbering or transferring the property referred to and already described in the petition; and a further petition of the trustee in bankruptcy, filed on the twenty-sixth day of November, 1919, setting up that a check of three thousand dollars and upwards was made for the bankrupt to David Bobker and Milton Unger, the funds were deposited in the Federal Trust Company of Newark, and that Unger and Bobker had no interest in the fund; and praying for an order directing Bobker and Unger to turn over to the trustee in bankruptcy the fund; and an order made on them requiring Bobker and Unger to show cause why an order should not be made.

I desire it stipulated that all the parties named have appeared in the Bankruptcy Court and the Bankruptcy Court has now under consideration the determination of the subject matter of these petitions.

The Court. Have you objection to that?

Mr. Murray. I have objection to them going in evidence on the ground they are incompetent, irrelevant and immaterial. I do not think they have anything to do with the issue whatever. As far as stipulating the contents, I am willing to sit down and go over the papers and stipulate it.

The Court. What is your thought about it, Mr. Lane?

Mr. Lane. My theory is there has been a change from the goods into money; that in the meantime the New Jersey Novelty Footwear Company has become insolvent and that the trustee in bankruptcy has succeeded to its rights and that the Bankruptcy Court has obtained exclusive jurisdiction to determine the rights of the parties in the goods and in the proceeds of the goods, and

that the Bankruptcy Court has in fact taken over the jurisdiction of determining that thing, and in that proceeding all the parties who are here are parties there. That is my theory.

The Court. The objection will be sustained.

Mr. Lane. Your Honor will allow me an exception?

The Court. Yes.

Mr. Lane. I offer in evidence, if your Honor please, the proceedings in the case entitled McGann Company vs. La Brecque, in replevin.

The Court. I suppose for the purpose of showing—

Mr. Lane. For the purpose of sustaining the plea of *res adjudicata* to the extent that that judgment is *res adjudicata* in this suit.

The Court. I suppose there is no objection to that?

Mr. Murray. No, sir.

The Court. It will be admitted.

It is stipulated and agreed that the replevin proceedings referred to, consist of the pleadings set forth at the beginning of this state of the case and of a judgment on such replevin issue in favor of The McGann Company without prejudice, however, to the trial of the issues involved in the counterclaim of defendant La Brecque Company, Inc., which is the subject matter of this appeal, the replevin issue and the issue raised by the counterclaim having been by the Trial Court separated into two trials.

The judgment on the replevin issue is the subject of a separate appeal now pending in the Court of Errors and Appeals.

MILTON M. UNGER,
Attorney of Plaintiff, The McGann Co.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of La Brecque Company, Inc.

Mr. Lane. Now, I offer in evidence the advertisement of the La Brecque Company that was identified by Mr. La Brecque as Exhibit P. 1.

Mr. Murray. No objection.

The Court. It will be admitted.

(Marked Exhibit D. 2 on behalf of McGann Company.)

Motion for Direction of Verdict in Favor of the McGann Co.

Mr. Lane. I offer, if your Honor please, the proceedings pending in the Court of Chancery.

The Court. They have been offered and received on the part of the plaintiff.

Mr. Lane. We rest.

The Court. Is there any rebuttal?

Mr. Murray. No.

(Testimony closed.)

Mr. Lane. If your Honor please, I ask for a direction of verdict in this case. I think I will use the names of the parties, rather than "Plaintiff" and "Defendant," because of the confusion.

The Court. In my consideration of the case I have all the time spoken of the La Brecque Company as the plaintiff in this proceeding, although it is the defendant in the old proceeding, and the McGann Company as the defendant in this proceeding, although you may treat it as you like. The reverse is the fact.

Mr. Lane. I move for a direction of verdict in favor of The McGann Company, upon the following grounds:

The testimony discloses that McGann was operating a storage warehouse; that the New Jersey Novelty Footwear Company deposited with the McGann Company the goods in question; that The McGann Company continued to be the warehouseman for those goods for the New Jersey Novelty Footwear Company up to the fifth of August, 1919. The McGann Company had physical possession of the property on the fifth of August, 1919, as the warehouseman, under its original contract with the New Jersey Novelty Footwear Company for deposit. That it was obliged to resort to the use of a writ of replevin to obtain the physical possession of the property on August second does not alter the legal situation, in my opinion, at all. In legal contemplation there was no break in its possession as a warehouseman, so far as its duties to the New Jersey Novelty Footwear Company went. On the 5th of August, 1919, it was the warehouseman and charged with the duties of a warehouseman under the provisions of the statute, Section 86, providing that the warehouseman is bound to deliver the goods upon a demand made either by the holder of the receipt for the goods or by the depositor, if such

demand is accompanied with an offer to satisfy the warehouseman's lien. It is bound to deliver upon satisfaction of the warehouseman's lien, upon the demand being made by the depositor.

Now, the provisions of Section 9 are as follows:

(Reads.)

Now, the provisions of Section 10 do not apply to the provisions of Section 8 at all. They apply to the provisions of Section 9. Section 8 provides for the obligation of the warehouseman, the condition in which he is bound to deliver. Section 9 provides for the condition in which he is justified in delivering, subject, as the section says, to the provisions of the three following sections, to which Section 10 applies.

Your Honor will realize that if Section 10 is to be construed as applied to Section 8 it would result in a person who was a holder of a warehouse receipt making demand for the goods, and if some demand had been made by someone else that the goods should not be delivered, the warehouseman would not be permitted to deliver, which would destroy the negotiability of these receipts.

Section 8 provides, as Section 9 provides, for the persons to whom the warehouseman is justified in delivering. Section 8 provides that the warehouseman is bound to deliver either to the holder of the receipt for the goods, that is the holder of the negotiable receipt, or by the demand of the depositor, if such demand is accompanied by (A). (B) and (C).

So that I say, in the first place, that this delivery that was made by the McGann Company to Kalter was a delivery which McGann was bound to make, under the provisions of the act. If he had not made the delivery, under the provisions of the act, and it should subsequently transpire that he should have made the delivery, or if he did not make the delivery at all and it should subsequently transpire that he was right in refusing to make the delivery, two things would happen to him. In the first place the burden is immediately cast upon McGann to show a lawful excuse. In other words, in any suit brought by Kalter or by the depositor against McGann, which suit might be against McGann individually, not mentioning La Brecque, by reason of the fact that he had refused to deliver, the burden would have been put upon McGann to show that he refused to deliver because of a lawful excuse. Now, that burden the La Brecque or no one else has a right to cast upon McGann, under

the provisions of this act. And another thing might happen to him. Under the provisions of this act a warehouseman loses his lien if he refuses to deliver when the proper demand is made, under the provisions of Section 29—and there again the distinction is drawn between being bound to deliver and justified in delivering. The warehouseman loses his lien upon goods (a) by surrendering possession thereof, or (b) by refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of the act.

So we have this situation. We have a demand made by the depositor, accompanied by an offer to satisfy the lien, and under the provisions of Section 8 that is a demand that the warehouseman is bound to comply with. He may, I suppose, refuse to comply with it for a lawful excuse, if he desires. If he refuses to comply with it for what he alleges to be a lawful excuse, the burden is forthwith cast upon him to prove that it is a lawful excuse. In the first place he has got to fight the battles of somebody else in this case; and in the second place, if he should be mistaken he would lose his lien.

Now, I say that demonstrates that there never was any legislative intent to read into Section 8 the provisions of Section 10.

The Court. I suppose we might add to what you have said there never was any such legislative intent or such a situation as this would never arise.

Mr. Lane. That might possibly be. I can only go by the act.

(Mr. Lane proceeds with argument.)

Mr. Lane. So that I say, in the first place, that the delivery made to Kalter by the McGann Company was in strict compliance with the act and there can be no recovery upon that phase of the case.

Secondly, what is there in this case to show that the La Brecque Company had a higher right to these goods than Kalter? What is there to show in this case that the delivery to Kalter was not a delivery to a person lawfully entitled to the goods?

These goods were in the possession of McGann, the warehouseman and the New Jersey Novelty Footwear Company was the owner of the goods. If Kalter was a bona fide purchaser for value, without notice of the rights of the La Brecque Com-

pany, then even as against the La Brecque Company, if their rights were being interpleaded, he would be entitled to the possession of those goods. Where goods are in the physical possession of a warehouseman a person dealing with those goods knows, is bound to know, that there may be negotiable warehouse receipts out against those goods. But Kalter was dealing with goods that were in the possession of the McGann Company, not the La Brecque Company, and there is not a scintilla of evidence in this case that Kalter did know that the La Brecque receipts were out or that anyone had any interest in this property except McGann and the New Jersey Novelty Footwear Company. So that when the New Jersey Novelty Footwear Company directed delivery to Kalter in pursuance of a sale bona fide made Kalter was the person lawfully entitled to the possession of those goods?

Before you can place liability upon a warehouseman for an improper delivery you must show that he knew at the time of the delivery that the person to whom the delivery was to be made was one not lawfully entitled to the delivery. There is absolutely no evidence in this case that Mr. McGann knew that the person to whom the delivery was to be made was not lawfully entitled to delivery.

Now, of course, the La Brecque Company cannot recover upon the weakness of the title of someone else. They have to recover upon the strength of their own title. Were they entitled to possession, as a matter of fact, after the satisfaction of the McGann lien? The contract between the New Jersey Novelty Footwear Company and the La Brecque Company was to the effect that the La Brecque Company would store these goods for the Novelty Company, and that was contingent upon the payment by the La Brecque Company of the bill of the McGann Company, and, as your Honor stated in the other case, that payment was not made. The contract between the La Brecque Company and the Novelty Company never was carried out. Now, under the contract between the Novelty Company and the La Brecque Company, when did the La Brecque Company get a right to hold these goods? I do not know. It has not paid the bill yet. I do not know whether it is entitled to those goods if the goods were in our possession at the present time. I do not know that it is entitled to the possession of those goods. It did not get possession of them by virtue of the contract. Did

it get possession by virtue of the issuance of these warehouse receipts? Does the fact that a warehouseman issues receipts for goods give him the right to possession whether he had the right to issue receipts or not? I cannot conceive how the issuance of the receipts by the La Brecque Company at a time when the La Brecque Company had no right to issue those receipts, because it was decided in the preceding case that the McGann Company always remained the warehouseman—the La Brecque Company never became the warehouseman and it had, therefore, no right to issue those receipts; and by what right, therefore, does it claim the possession of these goods after the satisfaction of the McGann lien?

All this trouble might have been saved if the remedy provided by law had been pursued. There were innumerable ways open for the La Brecque Company to protect itself. They must be presumed to know the law. Not only did they fail to rebond the goods, but with that statute staring them in the face, that statute that provides for a request on behalf of the person lawfully entitled, to the warehouseman, they never made any such request and never made any such demand.

I respectfully submit that on the whole case there is nothing to go to the jury.

(After argument.)

Mr. Lane. I also ask for a direction of verdict on a ground which I omitted to state at the beginning of the argument, and that is that the proof shows that subsequent to this sale to Kalter there was an agreement between the parties whereby the sale to Kalter was ratified and the moneys dealt with in such a way as that the La Brecque Company lost its right to proceed against the goods, whatever its rights may have been, to proceed against the proceeds.

And I also move for a direction of verdict specifically with respect to the defendant in this suit, McGann, on the ground there is not a bit of evidence to show specifically that McGann is bound and there is not a scintilla of evidence in this case that McGann or anybody connected with him had anything to do with this sale to Kalter at all; not a suspicion of it. There is not a scintilla of evidence that McGann did any concealing. He went there and met the people after the sale had been consumated and took his directions and acted under advice of counsel. There

is no evidence from which any conspiracy conclusion can be inferred by anybody.

(At 12:55 P. M. a recess was taken until 2 o'clock P. M.)

Mr. Unger. If your Honor please, I notice Mr. Lane is not here and in his absence I want to add to the motion to direct a verdict two additional grounds, and ask your Honor to consider them.

The first is that in any event the plaintiff has not shown that it has been indemnified.

Secondly, that if any right of action existed in respect to the merchandise in controversy, the right of action is in the holders of the warehouse receipts and not in the plaintiff.

The Court. The warehouseman act seems to be very comprehensive and explicit, but as suggested during the argument, I doubt whether the situation which has arisen in this case was ever contemplated by those who drafted the act or by those who have construed the act, because counsel on both sides, who are very careful counsel in the examination of cases, have not referred the Court to a single case where the circumstances are similar. And I must confess that after hearing the argument pro and con I have considerable doubt as to the duty of the Court if the Court should adopt a strict construction of the act. However, I believe the Court ought not to do that. I think that the Court should construe the act with considerable liberality in view, as I say, of the situation in this case, which could hardly have been contemplated when this act was drawn.

Being in doubt, as I have said, I think the duty of the Court is to deny the motion for a direction of verdict, but in doing that I feel that I ought to indicate to counsel, for convenience in argument, my view as to the single question which there is in this case for argument.

The goods in question having been in the actual possession of the La Brecque Company at the time these warehouse certificates were issued, I am not prepared for the purposes of this case to hold that those warehouse certificates were null and void; and for the purposes of this case I shall hold that those warehouse certificates created in the La Brecque Company a lien and the right to possession of these goods after the lien and right to possession of the McGann Company had become ex-

tinguished. The right of the McGann Company was extinguished when it had received all its warehouse certificates and when it had been paid the amount of its storage, which was sometime in August, 1919. Therefore, that the New Jersey Novelty Footwear Company, under its agreement with the La Brecque Company, by virtue of its agreement with the La Brecque Company, was not the person who was in fact at that time lawfully entitled to the possession of these goods. This would make the warehouseman liable as for a conversion of these goods if the warehouseman had information that the delivery about to be made to the New Jersey Novelty Footwear Company or its assignee, the Kalter Company, was not lawfully entitled to the possession of these goods. That, I think, is the sole question in this case and the only question that ought to be argued to the jury.

I shall instruct the jury along the lines already suggested in the statement I have made in my declination to direct a verdict; whether or not the McGann Company had information that the delivery about to be made to the New Jersey Novelty Footwear Company or to its assignee, the Kalter Company, was a delivery to one not lawfully entitled to possession of the goods, and an exception to that ruling on behalf of the McGann Company will be noted as ground of appeal.

(By request of Mr. Lane, Mr. Sorg opened summing up on behalf of counter claimant.)

The Court. Mr. Lane, I want to call your attention to the fact that requests numbers 22 and 24 are incomplete.

Mr. Lane. I will fill them out, your Honor.

The Court. I want to hear counsel on the question of the measure of damages in this case. I am requested by counsel for the McGann Company to charge, "If you find that the La Brecpue Company is entitled to a judgment the amount of that judgment should be the reasonable value of the goods less the amount paid for them by Kalter." Do you agree to that?

Mr. Sorg. No; I do not agree to that.

The Court. I would like to have your thought about that.

Mr. Lane. My thought is that by the conference of August 21st the parties agreed that the amount actually paid by Kalter should be received on account of these goods that were used, and both parties are estopped, or rather the plaintiff here is

estopped from saying that we should be responsible for so much of the value of these goods, the benefit of which the plaintiff actually has had.

The Court. As a matter of fact is not that money held under your agreement?

Mr. Murray. It is held, as I understand it, on these terms: That if we get a judgment against McGann for the value of these cases, McGann is entitled to take that money and use it toward the payment of the judgment which we get against him. If we should not get a judgment against McGann and our receipt holders get a judgment against us, then we are entitled to take the money and use it to liquidate our liability, so far as it will suffice, to the receipt holders.

The Court. Now you say $1,500 has been deducted from that. Do you think that no consideration should be taken of that?

Mr. Murray. I do not.

The Court. Why?

Mr. Murray. That was supposed to be used to get back the 308 cases which he did in fact get back. As I stated on the stand, if I remember correctly, my understanding was and my contention now is, that if that money, the $1,500 was lost to all concerned, it was simply the loss of the one who was ultimately held responsible, as between ourselves or the La Brecque Company or between ourselves and the receipt holders. In other words, if we got a judgment against the McGann Company, if the $1,500 had not been paid out, they would have had $3,200 with which to liquidate their indebtedness, and now they have $1,700.

The Court. I suppose by reason of the payment of that $1,500 to the New Jersey Novelty Footwear Company, the result was to turn over to the McGann Company 308 cases which otherwise they would not have received, or in the liquidation of your certificates for that number of cases.

Mr. Murray. That was the effect.

The Court. All right.

Mr. Unger. Does your Honor want the amount?

The Court. Yes.

Mr. Unger. $3,122.50.

Colloquy.

The Court. Now, you see there is no proof of that in the case. Is that admittedly the amount?

Mr. Lane. There is no proof of that in the case?

The Court. Nothing that has been called to my attention. If it is in some of the documents—

Mr. Unger. That is the amount ascertained from the bank book.

Mr. Murray. Whatever Mr. Unger says is in the bank book, that is admitted.

The Court. Now, how about the twenty-fourth request?

Mr. Unger. That is the sum in controversy here. The amount actually paid to McGann was—

The Court. Fourteen hundred and some dollars was given, but I do not know whether the exact figures were given or not. That was in your testimony.

Mr. Unger. I have the exact figures.

The Court. Now, the twenty-fourth request is, "From what you find to be the reasonable value of the goods you must deduct the amount of the McGann lien, to wit:—" Do you object to that?

Mr. Unger. I have those figures now. $1,408.76.

The Court. Yes; I think that is what you testified to.

Mr. Murray. No; if your Honor please, because the purchase price of $3,200 was in addition to the $1,500. The purchase price was $3,200, plus $1,500.

Mr. Lane. If your Honor please, that does not disturb, however, the twenty-fourth request. The twenty-fourth request is, "From what you find to be the reasonable value of the goods." We are not talking about the purchase price to Kalter, but "From the reasonable value of the goods you must deduct—" and so forth.

The Court. McGann has received payment of his lien. Now the amount of goods in controversy admittedly is 459 cases, but if you deduct that from the present amount McGann would have that twice.

Mr. Lane. Well, that may be so.

The Court. Yes. Now, the twenty-seventh request, "If you find the La Brecque Company is entitled to a verdict and that the reasonable value of the goods was not greater than the

amount Kalter paid for them, your verdict should be six cents." Do you agree to that?

Mr. Murray. No; I do not.

The Court. All right.

Mr. Sorg. May I continue, then, on that one point?

The Court. Yes.

(Mr. Sorg continues with opening.)

(Mr. Lane summed up on behalf of McGann Company.)

(Mr. Sorg summed up on behalf of La Brecque Company.)

CHARGE.

The Court (DUNGAN, *J.*). Gentlemen of the jury. I think it well to state something about this suit, a phase of which has already been passed by. This suit, as originally brought, was what is known as a replevin suit. The McGann Company, which I shall call "McGann" for brevity, had formerly occupied a building on Front street in this city, known as "McGann Warehouse Number 4." That warehouse had been sold to the La Brecque Company by the owner (it was leased by the McGann Company) and there was certain legal controversy in two or three courts over the vacation of that property by McGann, with which you have absolutely nothing to do in this case. That is all passed by and settled, so far as you and the Court are concerned.

The result of those suits was to place the La Brecque Company, which I shall call "La Brecque" for brevity, in the possession of that building. In that building were the goods of the New Jersey Novelty Footwear Company, which I shall call the "Novelty Company."

The Warehouseman's Act gives a warehouseman a lien upon goods on storage with it for the storage charges, for labor, weighing, coopering and many other items specified in the twenty-seventh section of the Warehousemen's Act. McGann demanded of La Brecque the possession of those goods, which was denied. Thereupon McGann brought, as it had a right to do, a suit in replevin, issued a writ to the sheriff, entered into a

bond and directed the sheriff to go there and take into his possession the goods of the New Jersey Novelty Footwear Company.

The Replevin Act provides that when a sheriff or an officer takes possession of goods by virtue of a writ of replevin he shall retain those goods in his possession for twenty-four hours to give the party from whom they have been taken, or any other party claiming ownership of those goods, an opportunity to re-replevin, which may be done by their giving a bond and taking the goods back.

The goods were taken to McGann's warehouse and no disposition was made of those goods until several days after the writ of replevin was executed by the sheriff; the writ being executed on Saturday and there was no physical disturbance of those goods until Wednesday, the sixth, four days later.

The mere bringing of the suit is not all. A person who brings a replevin suit must also prosecute it and prosecute it to a conclusion. That is what McGann did. He filed his pleadings, what is known as a complaint, and to that complaint La Brecque filed an answer and counterclaim. The answer denied the right of McGann to take the goods into its possession, and said that if McGann did rightfully take the goods into its possession it had not dealt with them as it ought to have dealt with them after it did have them in its possession, and that was the subject of the counterclaim which is the subject of this suit.

For reasons satisfactory to the Court, when the case originally came up for trial, the Court concluded to separate the issues. The Court concluded that the issues in the case were so involved that they could better be handled by first trying out before the Court and jury the right of McGann to take the goods from the La Brecque warehouse, or what had formerly been the McGann warehouse, and then submitting to another jury the question whether or not the goods had been properly handled by McGann after it had taken them into its possession, if in the former trial it should be decided that McGann had properly taken possession of the goods under his writ of replevin.

It was decided in the first suit that McGann did what he had a right to do, and that he rightfully took possession of the goods of the Novelty Company under his writ of replevin, and the result of that suit was to award the possession of the goods to McGann. That suit was terminated favorably to McGann,

and with that you have nothing to do. That has already been decided.

This suit is upon the defendant's counterclaim. La Brecque, being the defendant in the suit we are trying, has the affirmative on the counterclaim. The question involved in this suit is not whether McGann rightfully took the goods into his possession, because that has already been decided in his favor, but whether or not, after he had taken those goods into his possession, he dealt with them as the law required him to deal with them.

The decision of the motion for a direction of verdict does not indicate the views of the Court upon the merits of this case at all. The decision of that motion is simply an indication that it is the view of the Court that this case involves a question of fact to be decided by the jury, because it is the peculiar province of the jury to decide questions of fact. The functions of the Court and jury are entirely separate and distinct. The Court decides the law, and you are to take the law from the Court whether you agree with it or not. Sometimes the jury does not agree with the Court, very often counsel do not, but in the final analysis in the trial of a case all are obliged to take the views of the Court, and if counsel are aggrieved they have their remedy. Where there are questions of fact involved the province of the jury is to decide those questions of fact. The Court cannot deprive it of that function, and the Court is bound by your finding of fact.

The Warehousemen's Act is comprehensive, and yet it does not seem to be sufficiently comprehensive to anticipate a case where two parties at the same time claim to be warehousemen of the same goods in the same warehouse. As suggested by the attorney for McGann the questions involved in this case are not complicated. The act provides that where a warehouseman delivers goods to one who is not in fact lawfully entitled to the possession of them the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods, if he delivered the goods otherwise than as authorized in sub-divisions B and C of the preceding sections, that is to persons other than the person lawfully entitled to the possession of the goods; and those two paragraphs, B and C, it is not necessary to read.

It appears that when La Brecque came into possession of this warehouse, after these various litigations had come to an end,

and they had eventually been put into possession of the building, the Novelty Company's goods were in that building and an arrangement was made between the Novelty Company and La Brecque by which La Brecque should become the warehouseman, at a price therein stipulated, and assume the indebtedness due to McGann. Thereupon La Brecque issued its own warehouse certificates, and either it or the Novelty Company proceeded to gather up the McGann receipts, and on the twenty-ninth or thirty-first day of July, 1919, they had succeeded in getting together all of the McGann receipts, and on the thirty-first of July delivered to McGann the last of their receipts; but they did not then pay to McGann the storage charges which were due to McGann, and it was for that reason it was decided in the former suit that McGann had the right of possession to the goods under his warehouseman's lien.

The Warehouseman's Act provides that no warehouse receipts may be issued for goods which are not in the possession of the warehouseman. You will see that even though McGann had the right to possession under his lien, the goods were at that time in the physical possession of La Brecque, and La Brecque issued its receipts, and that created a situation where McGann was entitled to the possession of the goods, which he was awarded in the previous trial, for the purpose of realizing upon his lien out of the goods of the Novelty Company, and for the purpose, I may add, as suggested by Mr. Unger, of delivering them to the rightful owner or proper person to whom they should have been delivered.

The effect of the issuing of those certificates by La Brecque was to give to La Brecque, after the lien of McGann had been extinguished, the right to the possession of those goods, and to make La Brecque the one lawfully entitled to the possession of the goods, and, therefore the goods should have been delivered, after McGann had realized upon them, had extinguished his lien to La Brecque if—and there you come right to the question in this case—McGann had knowledge, if McGann had information that La Brecque was the party entitled to the goods, because, as between La Brecque and the Novelty Company, there was no question but that the Novelty Company had not the right to the possession of the goods when it had turned them over to La Brecque and La Brecque had issued against them its warehouse certificates.

Therefore, had McGann information when the goods were sold to Kalter that La Brecque and not the Novelty Company was the person lawfully entitled to the goods? The burden of showing that McGann had knowledge is upon La Brecque, and that must appear by the greater weight of the evidence in the case before La Brecque is entitled to your verdict. There is no question but that if McGann had no knowledge of the rights of La Brecque under its warehouse receipts it had no alternative, under the eighth section of the Warehousemen's Act, but to deliver the goods to the Novelty Company.

The Novelty Company sold the goods to Kalter and directed McGann to deliver the goods to Kalter, and the eighth section provides that the warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of the receipt for the goods or by the depositor. McGann had all of its receipts, and upon the demand of the depositor the goods were delivered to Kalter; and McGann had no alternative but to deliver the goods to the Novelty Company or upon its order, under that section, unless McGann had knowledge that La Brecque was the one lawfully entitled to the goods.

Does it appear by the greater weight of the evidence in this case that McGann had that knowledge? The burden is upon La Brecque to prove by the greater weight of the evidence in the case that McGann had that knowledge. The only proof there is in this case of the giving of direct information upon the subject that La Brecque had issued its warehouse receipts against the goods it appears was that given on the day the writ of replevin was executed. It appears by the testimony of Mr. Murray, and perhaps another, that a Mr. Kraemer, who was then present, and who was there as the representative of McGann, was told that La Brecque had issued its receipts against the goods. Although Mr. McGann says that Kraemer was the representative of The McGann Company there, if he was simply there as the representative of McGann for the purpose of seeing that the goods were properly loaded and removed, and it appears that he was not an officer or director of the company, and unless he was there for the purpose of receiving notice, such as it was claimed was then given to him (there is no proof that he was there for that purpose), then the notice of Kraemer of the fact that these receipts were issued would not be notice to McGann,

if Kraemer was a mere employee and not an officer or director of the company, unless Kraemer conveyed that notice or that information to the proper officer or director of McGann, and there is no proof in this case that he did.

That is the only proof in the case of actual notice being given to McGann; but it may be that actual notice is not necessary, and it would not be necessary if the information which McGann had of the occurrences surrounding the transaction was such that an ordinarily intelligent person would have known that La Brecque had issued its receipts against the goods.

Those circumstances, or some of them, were these: McGann received word from two banks, the First National Bank of East Newark and the Jamesburg Bank, that there had been offered at those banks a suggestion that the McGann receipts should be taken up, and that there should be substituted in place thereof the receipts of La Brecque. Mr. McGann went down to Jamesburg and had a talk with Mr. Voorhees, the officer in charge of that bank, and after discussing the matter with him Mr. Voorhees told him that they had decided to keep the McGann receipts, and that they would not receive in exchange for them receipts issued by La Brecque. As to the First National Bank of East Newark, a messenger brought to the office of McGann their receipts, looking for the La Brecque Company, and Mr. McGann called up that bank, and after having a conversation with the cashier of that bank, he was told to send the messenger back with the McGann receipts, and he did send him back. Subsequently all of the McGann receipts were turned over to Mr. McGann, and he says that he never knew at any time until after the goods had been sold to Kalter that La Brecque had issued its negotiable receipts against the Novelty Company's goods; and Mr. Unger, who was McGann's attorney, and in charge of affairs, says that he never knew until after the sale to Kalter that La Brecque had issued its receipts against the goods, and he advised Mr. McGann as representing the McGann Company that the Novelty Company was the one lawfully entitled to the possession of the goods.

It is disclaimed on the part of the La Brecque Company that they claim any right to the possession of the goods because of storage charges, because at that time they were at least constructively, if not actually, in possession of McGann, so that

their rights depended upon the issuing of these negotiable certificates.

So the very narrow question for you to decide in this case is whether or not the evidence preponderates that at the time McGann released the goods to Kalter by order of the Novelty Company, McGann had knowledge of the issuing of the La Brecque warehouse receipts. If it had, then La Brecque is entitled to recover in this case. If the evidence does not so show by its preponderance then McGann is entitled to your verdict.

You are not at all concerned in this case about the innocent holders of certificates. They are not parties to this suit at all. The parties to this suit, and the only parties you have to consider in this case, are La Brecque and McGann.

If you decide McGann is entitled to your verdict, the question of damages need not enter into your consideration. If you conclude that La Brecque is entitled to your verdict, then at the outset of this case it was admitted that the goods involved in this suit were 459 cases, containing 1,244 dozen slippers, and La Brecque, if entitled to your verdict, would be entitled to receive at your hands the reasonable value of those slippers. Something was said about there being an agreement at the time of the meeting on the twenty-first day of August that these were worth twenty dollars a case. A mere tacit agreement between the parties present, if they did not know anything about the value of the goods, would not fix the value, and it is for you to decide from the evidence in the case what a reasonable value of the goods would be. Mr. Lowy is the only person who testified as to that. He says that these goods (there were originally, it appears, over 1,600 cases), that forty per cent. of the goods were worth in the early part of 1919 $6.75 to $7.25 a case; forty per cent. were worth $8.50 to $9.50 a case, and twenty per cent. $10.50 a case; but he admits that there was a great depreciation in those goods between that time and the time they were sold to Kalter. He fixed twenty-five or thirty per cent. depreciation, and it appears these goods were actually sold to Kalter at $9.75 per case, or $3.25 a dozen. Now, $3.25 a dozen for 1,244 dozen would be $4,043. It appears that Kalter sold the goods at an average of $18 a case, or $6 a dozen, and Mr. Lowy says that to the price which Kalter paid for them he added his overhead and his profit. So if you decide La Brecque is entitled to your verdict it will be for you gentlemen to say what is a reasonable

value for these 1,244 dozens of slippers, and then to multiply the price per dozen by the number of dozens, and that should be your verdict, together with interest from the first day of September, we will say, 1919, to this date at six per cent.

I have here several requests to charge on behalf of The McGann Company.

"1. You cannot find a verdict in favor of La Brecque Company unless you are satisfied by a prepondenance of the proof that McGann Company had information that the delivery to the Kalter Company was to one not lawfully entitled to the goods."

That I charge you.

There are several requests which I decline to charge, except as I have charged, and those that I omit will come under that designation.

The next request which I will charge will be 10.

"10. The surrender by La Brecque to McGann of the McGann warehouse receipts was not notice to McGann of the rights of La Brecque."

I say that was not notice of itself. It was a circumstance which you may consider in determining whether or not McGann had notice.

"11. The surrender by La Brecque to McGann of the McGann warehouse receipts was not information to McGann that the delivery made to New Jersey Novelty Footwear Company or Kalter was to one not lawfully entitled to the possession of the goods."

I charge you that with the same qualification.

"12. There was no obligation on McGann before making delivery to Kalter or New Jersey Novelty Company to notify La Brecque of proposed delivery."

I charge you that, provided the delivery to New Jersey Novelty Footwear Company or Kalter was without knowledge of any rights of La Brecque.

"14. The notice given by Murray to Kraemer, if you find it was given, was not notice to McGann of the rights of La Brecque."

I have already covered that.

"15. The notice given by Murray to Kraemer, if you find it was given, was not information to McGann that the delivery made to Kalter or New Jersey Novelty Company was to one not lawfully entitled to the possession of the goods."

I have already charged you substantially that.

"16. The burden of proving to your satisfaction that Murray gave the notice to Kraemer, is on the La Brecque Company, and plaintiff must establish it by the preponderance of the proof."

I charge you that.

"17. That the greater number of witnesses are on one side does not necessarily mean that that side is to believed."

I charge you that.

"21. In considering whether La Brecque ratified the sale you may take into consideration the probabilities of the situation, and may consider whether it is reasonable to suppose that McGann would consent to an arrangement by which Kalter should pay the proceeds of the sale, and a part of such proceeds immediately be paid to La Brecque, and subsequently all of such proceeds, and McGann still be liable to La Brecque for the value of the identical goods for which Kalter paid."

I think I will decline to charge that.

"28. In determining the reasonable value of the goods you may take into consideration the price paid by Kalter for them."

I charge you that.

"29. The burden is on the La Brecque Company to establish the value of the goods."

I charge that.

"30. Unless you are satisfied by a preponderance of the proof that the amount paid by Kalter did not represent the fair value of the goods at the time, it is your duty to take that price as the fair value."

If that represented the fair value it would be your duty to take that as the fair value.

"31. The fair value of the goods is to be taken as of the time they were sold to Kalter."

I charge you that.

"33. You must consider that The McGann Company had the right to the possession of those goods on August 2, 1919. That matter has been determined in another suit in favor of McGann."

I have already charged that.

"35. Unless you find that La Brecque issued its receipts in good faith no rights can be based upon the issuance of such receipts."

I charge you that.

(The jury retired.)

Mr. Lane. I desire to except—

The Court. First we will have noted an exception to the refusal of the Court to charge each and every one of the defendants requests specifically as requested.

Mr. Lane. Then I except to that portion of your Honor's charge wherein your Honor stated that the question was whether McGann after taking possession dealt with the goods as the law required them to be dealt with.

The Court. Exception allowed.

Mr. Lane. Also to that portion of your Honor's charge in which your Honor stated that the goods at the time of the issuance of the La Brecque receipts were in the physical possession of La Brecque.

The Court. Exception allowed.

Mr. Lane. Also to that portion of your Honor's charge in which your Honor stated that the effect of the issuance of the La Brecque receipts was to give to La Brecque the right to possession of the goods after the extinguishing of the McGann lien.

The Court. Exception allowed.

Mr. Lane. Also to that portion of your Honor's charge in which your Honor said that if McGann had information that La Brecque was entitled to the goods the verdict must be for La Brecque.

The Court. Exception allowed.

Mr. Lane. Also to that portion of your Honor's charge in which your Honor stated that actual notice was not necessary;

that McGann would be bound if an ordinary prudent man would know that the receipts had been issued.

The Court. An ordinarily intelligent man.

Mr. Lane. An ordinarily intelligent man; yes, sir.

The Court. Perhaps "Prudent" would have been better, but I used the word, "Intelligent."

Mr. Lane. "Intelligent" is better, because it is a question of intelligence rather than prudence.

The Court. I think that is so.

Mr. Lane. I except also to that portion of the charge in which your Honor said the question is did McGann have knowledge of the issuance of the La Brecque receipts; if he did then La Brecque is entitled to recover.

The Court. Yes.

Mr. Sorg. I ask an exception to the charging of the requests to charge that were put in by the attorney for McGann.

The Court. Yes; I meant to say that.

Mr. Sorg. And to the form in which they were charged, we take exception to that.

And then we take exception to that part of your Honor's charge in which you stated that the failure of the La Brecque Company to pay the warehouse charges of McGann under the circumstances created a situation where McGann was entitled to the possession of the goods for the purpose of realizing upon its lien out of the goods of the Novelty Company or for the purpose of turning them over to the owner.

And also to that portion of your Honor's charge that the Court's construction as to the eighth section made it obligatory on McGann to make delivery of the goods to the Novelty Company under the circumstances stated in connection therewith.

And also to that portion of your Honor's charge that the only direct information was that given on the day that the writ of replevin was executed, which Mr. Murray gave Kraemer, because there was that other notice which they had, from that letter which Mr. McGann wrote, or which was written under his direction, to the Novelty Company, and which we claim shows they knew of the fact there was an arrangement made between the Novelty Company and La Brecque for the storage of these goods.

The Court. Yes.

Mr. Sorg. Also to that portion of your Honor's charge that if Kraemer was simply there as the representative of McGann for the purpose of seeing that these goods were properly loaded or moved, and it appears he was not an officer or director of the company, and unless he was there for the purpose of receiving notice such as was given, that in that case it would not be binding upon the company.

Also an exception to that portion of your Honor's charge which stated that the rights of La Brecque depended upon the issuance of these negotiable certificates.

Also to the failure of the Court to charge that the mere fact of the possession of the goods by La Brecque and the fact that the warehouse receipts came to McGann from La Brecque for those goods was notice to them of the fact of our interest.

The Court. Well, if you are entitled to an exception for a failure to charge, it may be noted.

Mr. Sorg. I probably misstated that—to the charge which the Court made eliminating the possibility of that being considered as notice.

The Court. Exceptions allowed.

Counsel for the McGann Company requested the Court to charge as follows:

1. You cannot find a verdict in favor of La Brecque Company unless you are satisfied by a preponderance of the proof that McGann Company had information that the delivery to the Kalter Company was to one not lawfully entitled to the goods.

2. Before you can find that the delivery to Kalter was an unlawful delivery, you must be satisfied that Kalter had knowledge of the issuance of the warehouse receipts by La Brecque, or information which would put a reasonably prudent man on inquiry as to the rights of La Brecque.

3. You must be satisfied before you can find a verdict for La Brecque by the preponderance of the proof that La Brecque was entitled after the satisfaction of the McGann lien, to the possession of the goods.

4. The mere issuance of the La Brecque receipts gave the La Brecque Company no rights as to the possession of the goods.

Requests to Charge.

5. Before you can find that the La Brecque Company had the right to the possession of the goods, after the satisfaction of the McGann lien, you must be satisfied that the La Brecque Company had the right to issue the La Brecque receipts.

6. You cannot find that the La Brecque Company had the right to issue La Brecque receipts because it did not carry out its contract with the New Jersey Novelty Company which required it to pay the McGann lien.

7. If you find that Kalter was the bona fide purchaser for value without notice of La Brecque that claimed rights, you must find a verdict for McGann.

8. Under the warehouse act a warehouseman is bound to deliver to the depositor if depositor makes demand accompanied by an offer to satisfy lien—if you are satisfied that this is what McGann did and that it did not in anywise collude with the New Jersey Novelty Company, or with Kalter, your verdict must lie for McGann.

9. There is no evidence from which you may find that McGann Company or its agents colluded in anywise with New Jersey Novelty Company or Kalter, or the agents of either.

10. The surrender by La Brecque to McGann of the McGann warehouse receipts was not notice to McGann, of the rights of La Brecque.

11. The surrender by La Brecque to McGann of the McGann warehouse receipts was not information to McGann that the delivery made to New Jersey Novelty Company or Kalter was to one not lawfully entitled to the possession of the goods.

12. There was no obligation on McGann before making delivery to Kalter or New Jersey Novelty Company to notify La Brecque of proposed delivery.

14. The notice given by Murray to Kraemer, if you find it was given, was not notice to McGann of the rights of La Brecque.

15. The notice given by Murray to Kraemer, if you find it was given, was not information to McGann, that the delivery made to Kalter or New Jersey Novelty Company was to one not lawfully entitled to the possession of the goods.

16. The burden of proving to your satisfaction that Murray gave the notice to Kraemer, is on the La Brecque Company and plaintiff must establish it by the preponderance of the proof.

Requests to Charge.

17. That the greater number of witnesses are on one side does not necessarily mean that that side is to be believed.

18. If you find that the La Brecque Company ratified the sale to Kalter you must find a verdict for McGann.

19. If you find that La Brecque consented that the proceeds of the sale to Kalter should stand in place of the goods you must find a verdict for McGann.

20. If you find that La Brecque consented to the payment out of the proceeds of sale of $1,500 to New Jersey Novelty Company, McGann cannot be held for so much of the value of the goods.

21. In considering whether La Brecque ratified the sale you may take into consideration the probabilities of the situation and may consider whether it is reasonable to suppose that McGann would consent to an arrangement by which Kalter should pay the proceeds of the sale, and a part of such proceeds immediately be paid to La Brecque, and subsequently all of such proceeds, and McGann still be liable to La Brecque for the value of the identical goods for which Kalter paid.

22. If you find that the La Brecque Company is entitled to a judgment the amount of that judgment should be the reasonable value of the goods less the amount paid for them by Kalter—to wit: $3,122.50.

24. From what you find to be the reasonable value of the goods you must deduct the amount of the McGann lien, to wit: $1,408.76.

25. From what you find to be the reasonable value of the goods, you must deduct the $1,500 paid to New Jersey Novelty Company by consent of the La Brecque.

26. There is no evidence from which you can find that the reasonable value of the goods was greater than the amount Kalter paid for them.

27. If you find that the La Brecque Company is entitled to a verdict and that the reasonable value of the goods was not greater than the amount Kalter paid for them, your verdict should be six cents.

28. In determining the reasonable value of the goods, you may take into consideration the price paid by Kalter for them.

29. The burden is on the La Brecque Company to establish the value of the goods.

Requests to Charge.

30. Unless you are satisfied by a preponderance of the proof that the amount paid by Kalter did not represent the fair value of the goods at the time, it is your duty to take that price as the fair value.

31. The fair value of the goods is to be taken as of the time they were sold to Kalter.

32. You may take into consideration in determining the bona fides of McGann the fact that the warehouse act if it had refused to deliver on the order of New Jersey Novelty Company it might have lost its lien.

33. You must consider that the McGann Company had the right to the possession of these goods on August 2, 1919—that matter has been determined in another suit in favor of McGann.

34. There is no proper evidence from which you can find a value of these goods greater than the price paid by Kalter.

35. Unless you find that La Brecque issued its receipts in good faith no rights can be based upon the issuance of such receipts.

36. If you find that in making delivery McGann acted in good faith, there can be no verdict against McGann.

Exhibit P. 1.

EXHIBIT P. 1.

In lieu of setting forth at length Exhibit D. 15, it is hereby stipulated and agreed that the same consists of seventeen receipts in form following:

Form 20

Warehousemen Transfer Agents

THE McGANN COMPANY

Front Street,

Newark, N. J.

McGann Terminal Warehouse

P. R. R. Siding Private Dock

Capacity 2,000 Car.

Date Stored

Warehouse No.

Stock No.

Receiving Record

Location

Articles

Herewith transcript of merchandise received by this company this day, and stored for your account.

THE McGANN COMPANY.

This negotiable receipt is not valid unless countersigned by J. F. McGann, and delivery of merchandise will only be made upon surrender of this receipt, properly endorsed.

THE McGANN COMPANY,

Countersigned.....

Warehouse Receipt Negotiable

Authorized Transfer Agents and Warehousemen for D. L. & W. R. R.—E. R. R.—Greenwood Lake R. R.—L. V. R. R.—P. R. R.—Wright & Cobb Transportation Co.

That each of such receipts is signed by "The McGann Company by James L. Smith" and countersigned by "Joseph F. McGann."

That each of such receipts is numbered, and the numbers thereof are as follows:

5033, 5039, 5042, 5046, 5049, 5051, 5059, 5066, 5069, 5073, 5074, 5079, 5084, 5085, 5100, 5101, 5126, 5132.

That one of such receipts bore two numbers, namely, 5100 and 5101.

That each of said receipts is drawn in favor of New Jersey Novelty Footwear Co. and that all of same were by it endorsed in blank by its president, Alley J. Prell, except #5033, which was by it endorsed specially to K. M. Stone Importing Co. and #5069, which was by it endorsed specially to Rabinow & Weinstein.

Exhibit P. 1.

That receipt #5085 bears additional endorsement as follows: "7/8/19—(10) ten cartons footwear released.

THE McGANN CO. J. L. S."

That receipt #5084 bears additional endorsement as follows: "7/8/19—(8) eight cartons footwear released.

THE McGANN CO. J. L. S."

That said receipts are dated and call for cartons of footwear and were surrendered to the McGann Company by La Brecque Company, Inc., as follow:

Receipt No.	Date of Receipt	No. of cartons called for	Date of surrender of receipt by La Brecque Company, Inc., to McGann Co.
5033	2/18/19	165	Jul. 29, 1919
5039	2/26/19	125	Jul. 31, 1919
5042	3/ 1/19	83	Jul. 31, 1919
5046	3/10/19	48	Jul. 31, 1919
5049	3/13/19	50	Jul. 31, 1919
5051	3/15/19	50	Jul. 31, 1919
5059	3/22/19	100	Jul. 29, 1919
5066	3/31/19	115	Jul. 31, 1919
5069	4/ 7/19	100	Jul. 31, 1919
5073	4/14/19	126	Jul. 31, 1919
5074	4/14/19	50	Jul. 31, 1919
5079	4/21/19	125	Jul. 31, 1919
5084	4/28/19	126	Jul. 29, 1919
5085	4/28/19	110	Jul. 29, 1919
(5100	5/ 5/19	82	Jul. 31, 1919)
(5101	5/ 5/19	34	Jul. 31, 1919)
5126	5/13/19	94	Jul. 31, 1919
5132	5/19/19	100	Jul. 31, 1919

MILTON M. UNGER,
Attorney for Plaintiff, The McGann Co., (a Corp.)

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of Defendant, La Brecque Co., Inc.

Exhibit P. 2.

EXHIBIT P. 2.

Warehousemen Telephone 1620-21 Market Transfer Agents

THE McGANN COMPANY

140-146 Front Street
37 Rector Street

58-78 Front Street
25-37 Lombardy Place

General Offices
100-120 Front Street

Newark, N. J., Feb. 14-19.

N. J. Novelty Footwear, Inc.,
144 Orange St.,
Newark, N. J.

Official Transfer Agents—Warehousemen for Erie, Lackawanna, Lehigh Valley, Pennsylvania and Greenwood Lake Railroads.

Gentlemen:

We hereby confirm estimate given you by the writer as follows:

STORAGE—We propose to store the smaller size cartons at the rate of 7½c each per month. The larger size at 11c each per month.

LABOR—Labor charge on smaller cartons 7½c each. Larger size 11c each.

TRUCKING—We propose to truck the smaller size cartons at the rate of 6c each. The larger size at 11c each.

It is understood that after handling a few loads at the above mentioned rate, that we will talk the matter over and see if the above rate is mutually satisfactory.

We thank you for the order and can assure you that we will give you prompt and efficient service at all times.

Yours very truly,

THE McGANN COMPANY, INC.

WD/EF

Wm. Decker.

References: Essex County National Bank—Newark Board of Trade.

Exhibit P. 3.

EXHIBIT P. 3.

Warehousemen Transfer Agents

THE McGANN COMPANY
Newark, N. J.

June 27, 1919.

New Jersey Novelty Footwear Company,
Jamesburg,
New Jersey.

Attention Mr. Lowy.

Dear Mr. Lowy:

A few days ago the writer sent you a letter explaining that we were beginning to vacate our Warehouse #4 and would place the goods in one of our other warehouses adjacent thereto at no expense whatever to you, at the same time giving your goods the same careful attention as in the past and looking after your interests with the same consideration as if the goods belonged to ourselves.

Was quite surprised when we were advised by the Company who have taken over Warehouse #4 that you had given them a promise to hold the goods on storage for your account.

The writer has tried to reach you by phone, but was unable to do so, so that we could have a personal talk so that you would more fully undersatnd the situation.

We ask you as a personal favor to please phone us at once and make an appointment and the writer will be very glad to meet you here in Newark or even go to Jamesburg to meet you.

We appreciate your business and do not intend to allow a competitor to steal it as they certainly must of mispresented the situation to you, otherwise you surely would have not consented transferring the business to them.

Thanking you in advance, we remain

Yours very truly,

THE McGANN COMPANY, INC.

Wm. Decker.

WD/HH

Official Transfer Agents—Warehousemen for Erie, Lackawanna, Lehigh Valley and Pennsylvania Railroads.

Exhibit P. 4.

EXHIBIT P. 4.

In lieu of setting forth herein at length Exhibit P. 4, it is hereby stipulated that:

1. Such exhibit consists of 20 bills or invoices, directed to New Jersey Novelty Footwear Co., Jamesburg, N. J., as follows:

Receiving Record No.	Invoice No.	Amount of Invoice
5039 (corrected invoice)	2609	$41.25
5039	2610	68.75
5100-5101	2611 (Corrected Inv.)	38.18
5100-5101	2612 (Corrected Inv.)	25.52
5068	2613 (Corrected Inv.)	33.00
5069	2614 (Corrected Inv.)	33.00
5051	2615 (Corrected Inv.)	16.50
5051	2616 (Corrected Inv.)	22.00
5049	2617 (Corrected Inv.)	16.50
5049	2618 (Corrected Inv.)	22.00
5046	2619 (Corrected Inv.)	15.84
5046	2620 (Corrected Inv.)	20.12
5042	2621 (Corrected Inv.)	27.39
5042	2622 (Corrected Inv.)	36.52
5033	2623 (Corrected Inv.)	54.45
5033	2624 (Corrected Inv.)	90.75
5059	2625 (Corrected Inv.)	33.00
5059	2626 (Corrected Inv.)	44.00
5085	2627	9.45
5084	2628	9.45

That of said invoices, those bearing the following invoice numbers, read as follows:

#2610—Corrected Invoice. Storage on 125 cartons footwear from March 26, 1919 to August 26, 1919 at 11c per carton, etc.

#2612—Corrected invoice. Storage on 116 cartons footwear from June 5, 1919 to August 5, 1919 at 11c per carton, etc.

#2614—Corrected invoice. Storage on 100 cartons footwear from May 7, 1919, to August 7, 1919, at 11c per carton, etc.

Exhibit P. 4.

#2616—Corrected invoice. Storage on 50 cartons footwear from 4/15/19 to 8/15/19 at 11c per carton, etc.
#3618—Corrected invoice. Storage on 50 cartons footwear from 4/13/19 to 8/13/19 at 11c per carton, etc.
#2620—Corrected invoice. Storage on 48 cartons footwear from 4/10/19 to 8/10/19 at 11c per carton, etc.
#2622—Corrected invoice. Storage on 83 cartons footwear from 4/13/19 to 8/13/19 at 11c per carton, etc.
#2624—Corrected invoice. Storage on 165 cartons footwear from 3/18/19 to 8/18/19 at 11c per carton, etc.
#2626—Corrected invoice. Storage on 100 cartons footwear from 4/22/19 to 8/22/19 at 11c per carton, etc.
#2627—Corrected Invoice. Storage on 110 cartons footwear from 7/28/19 to 8/28/19 at 7½c per carton, etc.
#2628—Corrected invoice. Storage on 126 cartons footwear from 7/28/19 to 8/28/19 at 7½c per carton, etc.

It is stipulated that in addition to the above, there were included in Exhibit P. 4, the following invoices:

Invoice #2086—To H. Rabinow for 50 cartons said to contain novelty footwear, storage from 5/14/19 to 6/14/19.
1 mo. 7½c Amount $3.75

Invoice #1385—(duplicate) To Hyman Rabinow for 50 cartons. Storage from 4/14/19 to 5/14/19.

1 mo. 7½c	$3.75	
Labor in and out 7½c	3.75	
Cartage 6c	3.00	Total $10.50

Invoice #1232—To Rabinow & Weinstein for 100 cartons. Storage from 4/7/19 to 5/7/19.

1 mo. 7½c	$7.50	
Labor in and out	7.50	
Cartage 6c from N. J. Nov. Co.	6.00	Total $21.00

Invoice #2087—To Rabinow & Weinstein for 100 cartons said to contain novelty footwear, storage from 5/7/19 to 6/7/19.
1 mo. 7½c Total $7.50

MILTON M. UNGER,
Attorney of Plaintiff, The McGann Co.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of La Brecque Company, Inc.

Exhibit P. 5.

EXHIBIT P. 5.

Telephone 1620 Market Statement Service Day or Night

NEW JERSEY NOVELTY FOOTWEAR CO.
Jamesburg, New Jersey.

In Account With
THE McGANN COMPANY

General Offices:—100-110 Front Street, Newark, N. J.

Date	Number	Amount
3/27/19	1136	8.25
	1137	4.13
4/1/	1194	24.16
15	1384	26.46
21	1436	26.26
28	1509	26.46
	1510	23.10
29	1515	8.25
	1516	4.13
5/3/	1570	8.63
15	1739	19.74
	1725	9.45
22	1873	21.00
	1885	9.38
7/22	2446	10.50
	2447	3.75
	2448	3.75
	2449	3.75
	2453	9.45
	2454	9.45
	2458	8.63
	2459	8.63
	2466	9.45
	2467	9.45
	2468	7.50
	2469	7.50
	2479	9.38
	2480	9.38
	2481	7.45
	2482	7.45

Auditor.

Exhibit P. 5.

Telephone 1620 Market Statement Service Day or Night

NEW JERSEY NOVELTY FOOTWEAR CO.
Jamesburg, New Jersey.

8/1/19

In Account With
THE McGANN COMPANY

General Offices:—100-110 Front Street, Newark, N. J.

Date	Number	Amount
7/22/19	2483	9 45
	2484	9 45
8/1	2609	41 25
	2610	68 75
	11	38 18
	12	25 52
	13	33 00
	14	33 00
	15	16 50
	16	22 00
	17	16 50
	18	22 00
	19	15 84
	20	20 12
	21	27 39
	22	36 52
	23	54 45
	24	90 75
	25	33 00
	26	44 00
	27	9 45
	28	9 45
		1021 44

Auditor.

Exhibit P. 6.

EXHIBIT P. 6.

7-31-19

The McGann Co. Inc.
146 Front St.
Newark, N. J.

Dear Sirs:—

Enclosed please find New Jersey Novelty Footwear Co. receipts for the following merchandise:—

115	Cartons	3-13-19
82	"	5-5-19
34	"	5-6-19
94	"	5-13-19
50	"	4-14-19
100	"	4-7-19
125	"	2-26-19
50	"	3-13-19
83	"	3-1-19
50	"	3-15-19
125	"	4-21-19
126	"	4-16-19
100	"	5-19-19
48	"	3-10-19

The above receipts with the following which have been already sent to you:—

100	"	4-28-19
118	"	4-28-19
165	"	2-18-19
100	"	3-22-19

represent the total amount in store. 1665 Cartons. Eighteen having been previously withdrawn, and endorsed on the back of the original receipts.

A correct bill for the amount of Storage due your Co. will be immediately audited and passed for payment.

Yours truly,

LA BRECQUE CO. INC.

Exhibit P. 7.

EXHIBIT P. 7.

LA BRECQUE COMPANY, INC.

Lighterage
Storage
Trucking
Insurance

Exporters.

Woolworth Building

New York.

New York Office
Telephones
Barclay (9236
(9237
(9238

July 31st, 1919.

McGann Co., Inc.
146 Front St.
Newark, N. J.

Gentlemen:

The New Jersey Novelty Footwear Co. intend to withdraw from our warehouses the following lots of merchandise.

50 cartons recd. under date 4/14/19.
125 cartons " " " 4/21/19.

To avoid any misunderstanding, will you render us a bill for storage on the above lots immediately, in order that same may be paid before the delivery of the goods.

Kindly send bill to 100 Fulton St. Newark.

Very truly yours,

LA BRECQUE CO. INC.
Luscomb.

(Stamp of The McGann Company, showing receipt of above letter on Jul. 31, 1919)

Exhibit P. 8.

EXHIBIT P. 8.

LA BRECQUE COMPANY, INC.

Lighterage
Storage
Trucking
Insurance

Exporters.

Woolworth Building

New York.

New York Office
Telephones
(9236
Barclay (9237
(9238

July 31, 1919.

The McGann Company, Inc.,
146 Front St.,
Newark, N. J.

Gentlemen:—

Acknowledging receipt of your letter of the 29th inst., in which you state:

> "Replying to your letter of the 28th inst. regarding merchandise of the New Jersey Novelty Footwear Company, we are enclosing herewith a statement of our charges,"

would advise that said statement *was not* enclosed with the above-mentioned letter, evidently thru oversight. As all warehouse receipts issued by you to the New Jersey Novelty Footwear Company have been returned to you by us, and we are desirous of having this account straightened out immediately, demand is made upon you to deliver immediately to our office at 100-110 Front St., Newark, *complete and itemized invoices* of charges you have against the above mentioned concern.

Yours very truly,

LA BRECQUE COMPANY, INC.
Per L. J. Wassel.

LJW:w

Exhibit P. 9.

EXHIBIT P. 9.

LA BRECQUE COMPANY, INC.

Lighterage
Storage
Trucking
Insurance

Exporters.

Woolworth Building

New York.

New York Office
Telephones
(9236
Barclay (9237
(9238

July 28th, 1919.

McGann Company,
146 Front Street,
Newark, N. J.

Gentlemen:—

In reference to our letter of July 24th regarding storage charges due on the N. J. Novelty Footwear Co., material wish to say that we have not as yet received same from you, nor have we received any reply and request that you send same immediately.

We also want you to mail us the amount of charges you claim are due on all material which is now in our warehouse.

Hoping that you will take care of this immediately, we are.

Yours truly,

LA BRECQUE CO., INC.,
Per. L. J. Wassel.

LJW:DL

Exhibit P. 10.

EXHIBIT P. 10.

LA BRECQUE COMPANY, INC.

Lighterage
Storage
Trucking
Insurance

Exporters.

Woolworth Building

New York.

New York Office
Telephones
Barclay (9236
(9237
(9238

June 20th, 1919.

The N. J. Novelty Footwear Co.,
Continental Hotel,
Newark, N. J.

Gentlemen:—

ATTENTION OF MR. LOWY.

As per our conversation with Mr. Lowy, we will give you a rate of 6¢ per carton on material now in our Terminal Warehouse, at Newark, N. J. In order that we may hold this material for your account, kindly send us a letter authorizing us to keep same and we will see that everything is taken care of as it should be.

We trust that we may receive your authorization by return mail and beg to remain.

Respectfully yours,

LA BRECQUE CO., INC.,
Per E. J. La Brecque.

ALC:DL

Exhibit P. 11.

EXHIBIT P. 11.

Alley J. Prell Originators of Styles Phone 8941 Branch Brook

NEW JERSEY NOVELTY FOOT-WEAR
Manufacturers of
Mi-Lady Queen Slippers
Picture Felts-Com-Foot-Eez-Moccasins

Office and Factory
154 Orange Street

Originators of
"The Pollyanna
Boot"
Pat. Apld. For

Newark, N. J., June 23, 1919.

La Brecque Co.,
Woolworth Building,
New York.

Mr. A. Lane Cricher,

Dear Sir:

Your letter received and contents noted, would say in reply that is satisfactory to us to change our goods from McGanns Warehouse to your account under the following conditions. A flat rate to be charged of 6¢ a month. Our outstanding indebtedness to Mc Ganns to be taken over by the La Brecque Co. Inc., and we to pay all indebtedness on each individual receipt upon taking of same out of storage.

I remain,

Respectfully yours,

NEW JERSEY NOVELTY FOOTWEAR CO.
A. J. Prell,
D. H. L.

Exhibits P. 12 and P. 13.

EXHIBITS P. 12 AND P. 13.

In lieu of setting forth at length, it is hereby stipulated that the Exhibits P. 12 and P. 13 consist of fifteen warehouse receipts, fourteen of which are in the following form:

No. New York 19
Marks

Received in Terminal Warehouse
100-110 Front St.
Newark, N. J.

For account of New Jersey Novelty Footwear Company.....
(Description and quantity of goods)
To be delivered on their order on payment of the charges due thereon.

La Brecque Company, Inc.
Edmund J. La Brecque.

Storage, $.06 per mo. per case
Labor .....
Charges from.....

That the particular data contained in each of said receipts is as follows:

Receipt No.	Date	Name of Owner	No. of cases of footwear.	Marks	Date of receipt and date from which charges commence.
1637	Mar. 10/19	N. J. Nov. Foot. Co.	48		Mar. 10, 1919
1066	Feb. 26/19	N. J. Nov. Foot. Co.	125		Feb. 26, 1919
1067	Mar. 31/19	N. J. Nov. Foot. Co.	83		Mar. 31, 1919
1068	Mar. 15/19	N. J. Nov. Foot. Co.	50		Mar. 15, 1919
1069	Mar. 13/19	N. J. Nov. Foot. Co.	50		Mar. 13, 1919
1640	Apr. 28/19	K. M. Stone Import Co.	110	C-H-2	Apr. 28, 1919
1641	Apr. 28/19	K. M. Stone Import Co.	126	A-10 & 11	Apr. 28, 1919
1642	Feb. 18/19	K. M. Stone Import Co.	165	A-11-12	Feb. 18, 1919
1643	Mar. 28/19	K. M. Stone Import Co.	100	C. 11.	Mar. 28, 1919
1645	Apr. 16/19	N. J. Nov. Foot. Co.	126	A-14	Apr. 16, 1919
1646	May 19/19	N. J. Nov. Foot. Co.	100	B-1	May 19, 1919
1063	May 13/19	N. J. Nov. Foot. Co.	94		May 13, 1919
1064	May 5/19	N. J. Nov. Foot. Co.	116		May 5, 1919
1065	Mar. 31/19	N. J. Nov. Foot. Co.	115		Mar. 31, 1919

That of said receipts, those bearing Numbers as above, 1637, 1066, 1067, 1068, 1069, 1063, 1064, 1065, 1645, and 1646, were

Exhibit P. 14.

endorsed in blank by New Jersey Novelty Footwear Co., by its President, Alley J. Prell.

That of said receipts, those bearing Numbers 1638 and 1647 were endorsed to Max Kalter Mercantile Co. by New Jersey Novelty Footwear Co by its President, Alley J. Prell.

That of said receipts those bearing Numbers 1640, 1641, 1642 and 1643 were not endorsed at all.

That the remaining receipts (No. 2037) of Exhibit P. 12 was in the same form as the other 16 receipts, except that it was issued to A. Rabinow, is marked on its face "Not negotiable" and was not endorsed at all.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of Defendant, La Brecque Company, Inc.

MILTON M. UNGER,
Attorney of Plaintiff, The McGann Co.

EXHIBIT P. 14.

In lieu of setting forth herein at length a copy of the record marked Exhibit P. 14, it is hereby stipulated that such record shows:

That on August 8, 1919, La Brecque Company, Inc., filed a bill in the Court of Chancery of New Jersey, alleging that the complainant was engaged in the warehouse business in Newark, N. J. That Joseph F. McGann and the McGann Company, a corporation, were also so engaged.

That McGann occupied premises known as No. 100 Front street, Newark, N. J., under a lease made by P. Ballantine & Sons, the owner, dated August 1, 1917, terminable on a six months notice in writing in case of sale. That the premises were sold on October 15, 1918, by the owner to complainant, who on October 30, 1918, gave notice in accordance with the lease to vacate the premises on May 1, 1919. That when the notice to quit was given, McGann had on storage in the building property worth $1,000,000, according to statements of McGann; that McGann made no attempt to remove the merchandise from the premises, and refused to vacate. That dispossess proceedings were commenced in the Second District Court of Newark after

Exhibit P. 14.

May 1, 1919, and judgment for dispossession given on May 23, 1919; that McGann sought to have the proceedings reviewed by certiorari; that the application was dismissed; that McGann filed a bill in the Court of Chancery seeking to enjoin complainant from taking possession or interfering with the property of his clients and customers stored in the premises, which bill was dismissed on the merits of the case; that an appeal was taken to the Court of Errors and Appeals, which appeal is pending. That notwithstanding the proceedings the goods and merchandise of customers and clients of said McGann were on the premises on June 14, 1919, when an official of the Second District Court took possession pursuant to the warrant to dispossess. That many customers of McGann expressed a desire to have complainant act as warehouseman instead of McGann and that complainant allow their goods to remain on storage with complainant. That as to those who did not make such arrangements, complainant directed McGann to remove their goods from the premises. That the removal was finally completed on July 24th, 1919.

That among customers of McGann, New Jersey Novelty Footwear Company had on storage 1665 cases of footwear valued at $30,000. That complainant agreed with N. J. Novelty Footwear Company to pay McGann the indebtedness of New Jersey Novelty Footwear Company on said goods for storage on June 23, 1919, when bills therefor had been itemized and verified by the Footwear Company, for which the latter agreed to reimburse complainant as and when goods were removed from the warehouse. That when McGann received the goods from the Footwear Company he issued his negotiable warehouse receipts, but when complainant effected its contract with the Footwear Company, it procured and surrendered all of the receipts issued by McGann who accepted them and who has them in his possession, and complainant issued in their place and stead its own negotiable receipts, alleged to be held by various persons.

That on July 31, 1919, complainant received word from the Footwear Company which held complainant's receipts for 175 cases of goods that it would on August 1 call for delivery of the merchandise; that complainant requested McGann to forward to complainant a properly itemized bill for the charge claimed by latter against said goods, informing him that the goods were to be taken out by the holder of the receipt; that the holder of the receipt called for the goods and demanded possession there-

Exhibit P. 14.

of; that McGann had not forwarded the bills; that complainant communicated with him by telephone, demanding proper bills; that McGann promised the same within 15 minutes; that after waiting for one hour for the bills, the goods were delivered to the holder of the receipt. That later McGann sent in bills for the entire 1665 cases stored. That the Footwear Company claimed they were incorrect and unintelligible; that complainant returned the bills to be corrected and itemized so that they could be verified by the Footwear Company; that on August 2 McGann communicated with complainant and refused to render itemized and corrected bills and McGann demanded immediate payment of the bills as presented. That complainant refused to pay them.

That without demand for possession McGann replevined all of cases of footwear in possession of complainant through a writ of replevin sued out of the Essex Circuit Court. That the goods were taken from complainant's possession although McGann knew that complainant had issued its negotiable receipts for all of such goods, which were and are still outstanding.

That McGann caused the merchandise replevined to be insufficiently appraised at $5,000, giving a bond for $10,000. That the goods are worth $30,000. That there is due to complainant for storage $141.84. That complainant's outstanding receipts impose on it the obligation to deliver immediately to the holders thereof the goods called for thereby. That because McGann has possession thereof under the replevin complainant cannot do so.

That complainant by reason of its outstanding receipts is entitled to immediate possession of the goods. That it will suffer irreparable damage if unable to deliver the goods; that the replevin action in the Circuit Court, owing to congestion on the calendar, cannot be brought to trial for months.

That McGann's only interest is by way of an alleged lien for storage amounting, as he claims, to $1,021.

That complainant is and always has been ready to pay McGann amount actually due to him, but cannot do so, because the Footwear Company claims the bills to be incorrect; that if complainant had re-replevined the said goods it would have been compelled to file a bond for $10,000 as a condition precedent thereto, and if on the trial of said action, it was established that the bills as rendered were correct then the McGann Company might have recovered a judgment against complainant for the value of said goods, of at least $5,000. Complainant prays for an answer from

Exhibit P. 14.

McGann, individually, McGann Company, and the Footwear Company. That defendants be enjoined from removing or disposing of the goods. That the Court determine the amount of the lien, if any, of McGann; that pending the determination, the goods be returned to complainant's warehouse. That complainant tenders itself willing and ready to pay the Clerk of the Court of Chancery $1,100, or whatever sum the Court may determine to be due, to be paid to the McGann Company when the goods are returned to complainant or other adequate security furnished for the reimbursement of La Brecque Company by New Jersey Novelty Footwear Company.

On August 8, 1919, the Court made a rule to show cause, returnable August 12, 1919, why the merchandise should not be returned, and enjoining further disposition in the meantime.

The matter was continued from time to time by consent of the parties, and on August 26, 1919, upon such consent the Court made an order permitting McGann to deliver to K. M. Stone Importing Company 465 cases of goods belonging to it upon surrender to complainant of the warehouse receipts issued against said goods. It was stipulated that this order should not operate as an admission that the goods involved in the cause were taken from complainant wrongfully.

On September 2, 1919, the Court modified the restraining order so as to permit McGann, with the consent of the Footwear Company to surrender to complainant such warehouse receipts issued by latter as either of defendants have in their possession or control, and upon such surrender the defendants were to be relieved of the force and effect of the restraining order with respect to the goods represented by the receipts so surrendered.

The matter was continued from time to time and finally no formal continuance was made. No other or further proceedings have been taken in said cause by any party thereto.

MILTON M. UNGER,
Attorney for Plaintiff, the McGann Co.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys for Defendant, La Brecque Co.

Exhibit P. 15.

EXHIBIT P. 15.

BURNETT, SORG, MURRAY & DUNCAN

Counsellors at Law

National State Bank Building,
810 Broad Street,
Newark, N. J.

D. Frederick Burnett
H. Theodore Sorg
Norbury C. Murray
Leonard A. Duncan
H. D. Sorg

L. D. Phone
Market 8100
Cable Address
"Burcorn"
Western Union Code

August 21, 1919.

Max Kalter Merchantile Co.,
591 Broadway,
New York City.

Gentlemen:

The undersigned, having come to an amicable arrangement regarding the disposition of the moneys due from you as part of the purchase price of the goods recently purchased by you from the New Jersey Novelty Footwear Company, they have agreed and hereby authorize and direct you to pay the unpaid balance of the purchase price of said goods, by means of a check to the order of Milton M. Unger and David Bobker, attorneys for the McGann Company and the New Jersey Novelty Footwear Company respectively.

NEW JERSEY NOVELTY FOOTWEAR CO.,
Alley Prell, Pres.

DAVID BOBKER,
Attorney for N. J. Novelty Co.

THE McGANN COMPANY,
By Milton M. Unger.

Exhibit D. 1.

On behalf of La Brecque Company, whom we represent, we hereby withdraw the direction which we recently gave you to withhold payment of the purchase money mentioned in the foregoing letter, and on behalf of La Brecque Company and ourselves, hereby consent to the payment of the money as above directed.

BURNETT, SORG, MURRAY & DUNCAN,
Attorneys of La Brecque Co.

EXHIBIT D. 1.

NEWARK, NEW JERSEY.

FILE

DATE
August 5, 1919.

The McGann Company,
Newark, N. J.

Gentlemen:

This is your authority to deliver to Max Kalter Mercantile Company, 591 Broadway, New York City, the merchandise covered by the warehouse receipts surrendered to you as follows:

Warehouse No.	Description.
	Cartings.
5039	125 cartings Foot Novelties.
5132	100 cartings
5046	48 cases Cartings Footwear.
5049	50 cartings slippers #780
5051	50 cartings #713 Footwear.
5051	100 cartings said to con. footwear.
5069	115 cases footwear.
5066	126 cartings said to con. N. footwear.
5073	50 cartings said to con. N. footwear.
5074	125 cases said to con. N. footwear.
5079	82 cases said to con. N. footwear.
5100-5101	34 cases said to con. N. footwear.
5126	94 cases said to con. slippers.
5042	83 cartings of footwear.

Yours very truly,
THE NOVELTY FOOTWEAR CO.,
Per Alley Prell, Pres.

Exhibit D. 2.

EXHIBIT D. 2.

PUBLIC NOTICE.
TO ALL PERSONS INTERESTED IN GOODS
NOW STORED IN
McGANN TERMINAL STORAGE WAREHOUSE
AT 100-110 FRONT ST., NEWARK, N. J.

Take notice that the Courts have awarded judgment to undersigned, La Brecque Co., Inc., for immediate possession of above warehouse. The Sergeant-At-Arms has taken possession in our behalf and is about to remove all persons and property therefrom.

La Brecque Co., Inc.

Owners of the premises, rather than subject you to possible loss incident to the summary, forcible removal of your goods, incurs the expense of this advertisement (your names being unknown to us) as the only means of communicating the facts to you as

Innocent Third Persons

to the end that you may at once protect your goods either by removing them or by making new arrangements with us.

We have no desire to inconvenience those who have goods stored in the warehouse, but necessarily being without records and having no means of identification or inventory, we cannot accept responsibility unless new arrangements are made with us at once in which event we will be pleased to exempt such goods from the operation of the judgment, and we pledge the best warehousing Service and Safety.

We shall conduct a general warehousing and storage business, affording the best facilities at the lowest price commensurate with service.

Telephone or telegraph communications from responsible parties will be honored if mutually satisfactory arrangements are made. State full particulars so that we may identify your goods.

LA BRECQUE CO., INC.

Woolworth Building, New York City.
New York Office Telephone, Barclay 9236 and 7 and 8.
Newark Warehouse Telephone Market 1620 and 1

BURNETT, SORG, MURRAY & DUNCAN, *Attorneys,*
810 Broad Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE MCGANN COMPANY, *Plaintiff-Appellant,* *vs.* NEW JERSEY NOVELTY FOOTWEAR CO., *Defendant,* *and* LA BRECQUE COMPANY, *Defendant-Respondent.*	*Case No. 2.* *Action at Law.* *In Replevin.* *(Conversion.)* *On Appeal from Essex County Circuit Court.* *Dungan, J., and a Jury.*
THE MCGANN COMPANY, *Plaintiff-Appellee,* *and* NEW JERSEY NOVELTY FOOTWEAR CO., *Defendant,* *and* LA BRECQUE COMPANY, INC., *Defendant-Appellant.*	*Case No. 1.* *Replevin.* *On Appeal from Essex County Circuit Court.* *Dungan, J., and a Jury.*

BRIEF OF THE McGANN COMPANY.

THE CASE.

The case was this:

No. 1. The McGann Company was a storage warehouse concern and occupied a warehouse at 100-110 Front street, in Newark, under a lease from the then owner expiring April 30, 1926, subject to prior termination in case of the sale of the premises, upon six months' notice to the tenant. More than six months prior to May 1, 1919, the property was sold to the La Brecque Company, another storage warehouse concern. Notice was given to McGann to vacate on May 1, 1919. McGann disputed the sufficiency of the notice and refused to vacate. Suit was brought for possession by La Brecque against McGann in the District Court for possession. This action was resisted by McGann. Judgment went for La Brecque. Application was made to review the proceedings on certiorari, which was denied. Application was made by McGann to the Court of Chancery to enjoin the

ousting, which application was denied. An appeal was taken to the Court of Appeals, resulting unfavorably to McGann. The proceedings are reported in 109 Atl., page 501. Exhibit P. 1, page 162, case No. 1.

A dispossess warrant was issued out of the District Court on June 14, 1919 (73). There was a large amount of stored goods. Arrangements were made between McGann and La Brecque for McGann to remove the goods (pp. 73, 99). It was agreed that the removal should begin on the following Wednesday (p. 74). The moving commenced on June 17. On the 18th day of June La Brecque caused a notice to be served (Exhibit P. 6, pp. 74, 168, 99). There followed a conference between the parties before the District Court. The District Court directed the constable to withdraw and McGann was permitted to continue to remove the goods (pp. 75, 101, 102).

In the meantime La Brecque caused to be published in the public press, Exhibit P. 7 (pp. 104, 105, 169). That exhibit reads as follows:

PUBLIC NOTICE.
TO ALL PERSONS INTERESTED IN GOODS
NOW STORED IN
McGANN TERMINAL STORAGE WAREHOUSE
AT 100-110 FRONT ST., NEWARK, N. J.

Take notice that the Courts have awarded judgment to undersigned, La Brecque Co., Inc., for immediate possession of above warehouse. The Sergeant-at-Arms has taken possession in our behalf and is about to remove all persons and property therefrom.

La Brecque Co., Inc.

Owners of the premises, rather than subject you to possible loss incident to the summary, forcible removal of your goods, incurs the expense of this advertisement (your names being unknown to us) as the only means of communicating the facts to you as

Innocent Third Persons

to the end that you may at once protect your goods either by removing them or making new arrangements with us.

We have no desire to inconvenience those who have goods stored in the warehouse, but necessarily being without records and having no means of identification or inventory, we cannot accept responsibility unless new arrangements are made with us at once in which event we will be pleased to exempt such goods from the operation of the judgment, and we pledge the best warehousing Service and Safety.

We shall conduct a general warehousing and storage business, affording the best facilities at the lowest price commensurate with service.

Telephone or telegraph communications from responsible parties will be honored if mutually satisfactory arrangements are made. State full particulars so that we may identify your goods.

LA BRECQUE CO., INC.,
Woolworth Building, New York City.
New York Office Telephone Barclay 9236 and 7 and 8.
Newark Warehouse Telephone Market 1620 and 1. (This was the telephone number of The McGann Company.)
Burnett, Sorg, Murray & Duncan, Attorneys,
810 Broad Street, Newark, N. J.

Mr. Burnett, who represented La Brecque, said, with respect to Exhibit P. 6 (p. 101):

> Q Why didn't you after the conference in Judge Johnson's office carry out the threat you made in your notice? A Because Mr. McGann and Mr. Unger then came back to my office, and I had no feeling against Mr. McGann at all, it was purely a friendly matter; I was fighting it from a professional standpoint, and he came over and asked me if we would not rescind that; I said, "No, we cannot rescind it, but if he would take the goods promptly we would afford him every courtesy; we did not want them to soldier on the job." I simply held this in abeyance; held it over his head, so if he did not do it this notice would immediately go into effect.

Among the goods in the warehouse at the time La Brecque took possession were goods which had been stored with McGann by the New Jersey Novelty Footwear Company (p. 29). These goods were stored at various times and at the time La Brecque took possession there was due to McGann for advances and for storage approximately the sum of $1,000. When McGann, in the course of removing its goods, came to remove the goods of the Novelty Company, La Brecque refused to permit the removal (pp. 88, 89, 90, 75, 76, 29, 39, 132, 133). La Brecque commenced interfering immediately after removal commenced on June 17 (p. 89). The removal of other goods was not completed until late in July (p. 90).

McGann at the time of the storage of the goods of the Novelty Company with it had issued to the Novelty Company warehouse receipts which had been negotiated. McGann demanded that La Brecque permit it, McGann, to remove the goods of the Novelty Company upon many different occasions in June and July (pp. 72, 75-76 77).

On July 28, 1919 (p. 61, Exhibit D. 11, p. 185), a formal demand was served by McGann on La Brecque. On July 31st, or August 1st, Milton M. Unger, counsel for McGann, had a conversation with Mr. Murray, counsel for La Brecque, in which conversation Mr. Unger told Mr. Murray that he was going "to move," and Mr. Murray advised him to go ahead (p. 77).

The following day McGann issued a writ of replevin, upon which writ the goods were taken into the custody of the Sheriff of Essex County. After the statutory period had expired without La Brecque rebonding the goods, the Sheriff delivered the goods to McGann.

La Brecque put in evidence two letters (Exhibit D. 12, p. 186, and Exhibit D. 13, p. 187). The first is from La Brecque to the Novelty Company, dated June 20, 1919, in which letter La Brecque gives to the Novelty Company a rate upon the goods and states: "In order that we may hold this material for your account, kindly send us a letter authorizing us to keep same and we will see that everything is taken care of as it should be. We trust that we may receive your authorization by return mail." The letter, Exhibit D. 13, is dated June 23, 1919, written by the Novelty Company to La Brecque and reads in full as follows:

> "Your letter received and contents noted, would say in reply that is satisfactory to us to change our goods from McGann's Warehouse to your account under the following conditions. A flat rate to be charged of 6c. a month, our outstanding indebtedness to McGanns to be taken over by the La Brecque Co., Inc., and we to pay all indebtedness on each individual receipt upon taking of same out of storage."

No word of this agreement was communicated by La Brecque to McGann at any time.

On July 31st, 1919, La Brecque wrote McGann a letter (Exhibit D. 1, p. 176), enclosing the warehouse receipts which had been issued upon the goods by McGann. In this letter there is the following statement: "A correct bill for the amount of storage due your Co. will be immediately audited and passed for payment."

On the 24th day of July, 1919, La Brecque had written McGann (Exhibit D. 2, p. 177):

> "Having all the warehouse receipts issued by you to the New Jersey Novelty Co. in our possession, request is made that you forward us immediately all storage due

> you by the said New Jersey Novelty Co., so that payment can be made and those warehouse receipts returned to you."

To the same effect is a letter (Exhibit D. 3, p. 177), dated July 28, 1919.

McGann had from month to month sent to the Novelty Company, the depositor, bills for storage and for advances (pp. 41, 42).

Mr. Unger first attempted to get the goods June 27 (p. 75). Prior to the issuance of the writ of replevin Mr. Murray, counsel for La Brecque, had the bill and said it would not be paid (p. 77).

Upon the 29th day of July, 1919, McGann sent to La Brecque a letter enclosing a bill which contained the following statement (Exhibit D. 6, p. 180):

> "We are ready to deliver up this merchandise on surrender of the warehouse receipts and the satisfaction of our lien for charges, provided, when the goods are delivered acknowledgment of such delivery is signed for us. This offer is, however, without prejudice to our right to take immediate possession of the goods in case our demand is not complied with."

The warehouse receipts which were delivered by La Brecque to McGann on July 31, 1919, were endorsed in blank; there was nothing upon them to show that La Brecque had any interest in the goods, nor did La Brecque notify McGann of any interest.

Upon the 29th day of July, 1919, La Brecque delivered 175 cartons of these goods without paying the bill of McGann, and this, notwithstanding the fact that an agent of McGann endeavored to prevent the removal (pp. 88, 90). This precipitated the action of McGann. It was obliged to act to protect itself.

No. 2. On August 5, 1919, the goods were delivered by McGann, on the order of the Novelty Company to the Max Kalter Company, which latter concern had purchased the goods from the Novelty Company and there was paid to McGann its storage charge of $1,021.44 (Case No. 2, p. 64).

It is of this delivery by McGann to Kalter on the order of the Novelty Company that La Brecque complained and for which it received damages notwithstanding the fact that it (La Brecque) refused to rebond (pp. 101, 102, 103) and on the contrary endeavored to get the Novelty Company to rebond as the owner of the goods (pp. 109, 110). Recognizing the Novelty

Company as the owner of the goods when it suits its purposes so to do, La Brecque repudiates the recognition when it suits its purposes so to do.

Neither McGann nor its counsel, Mr. Unger, had anything to do with the sale by the Novelty Company to the Max Kalter Company, nor is there any evidence that the Max Kalter Company was not a bona fide purchaser of the goods without notice of any rights of La Brecque, if any rights that company had. Mr. Unger represented McGann at the time the goods were delivered to Kalter. He testified that he directed McGann to deliver the goods; that he did not know at the time that there were warehouse receipts issued by La Brecque outstanding; that he did not know that the delivery about to be made was to one not lawfully entitled to possession; that he did not know that La Brecque had any interest in the goods (p. 135). How La Brecque in the face of its attempt to get the Novelty Company to rebond as owner can justify its contention now that a delivery on the order of the Novelty Company was improper, there being no change of conditions, it is hard to conceive. It is harder to conceive how La Brecque can contend that McGann KNEW that the delivery on the order of the Novelty Company would be improper when apparently La Brecque did not know it, assuming its attempt to get the Novelty Company to rebond was made in good faith.

McGann testified (p. 146) that he had no knowledge of any outstanding La Brecque receipts; that he made the delivery because of the instructions of his counsel, Mr. Unger, and that he did not know at the time of the delivery that the delivery contemplated to Kalter was a delivery to one not lawfully entitled to the possession of the goods (p. 147). Prior to the conference at Mr. Unger's office on August 5th, which resulted in Mr. Unger's directions to McGann to deliver the goods to Kalter, Unger had communicated with Mr. Murray (representing La Brecque), as well as had Mr. Bobker, counsel for the Novelty Company (pp. 110, 111, 134, 85), and Mr. Murray had agreed to come to Mr. Unger's office. They waited for him until four o'clock and he did not appear. The testimony with respect to this, and it is not denied, is important to indicate that the transaction in Mr. Unger's office was not held in secret. There was no attempt to conceal (p. 137).

Mr. Murray ascertained, according to his testimony, that the goods had been delivered to Kalter, almost immediately after

the delivery (p. 84). There was still due from the Kalter Company at the time on account of the purchase price of the goods approximately $3,000. Mr. Murray directed the Kalter Company not to make payment of this $3,000. There were conferences held between the parties then as to what should be done with the $3,000 (pp. 87, 140, 141, 142, 143, 96, 97, 98, 99). These conferences finally resulted in an agreement being made between the parties approved by the attorneys for La Brecque (Exhibit P. 15, pp. 196-197), under which the $3,000 was paid to Milton M. Unger and David Bobker. The attorneys of La Brecque signed a statement (p. 197) on behalf of La Brecque withdrawing the direction which they had previously given to the Kalter Company to withhold payment of the purchase price and on behalf of La Brecque consented to the payment of the money to Messrs. Unger and Bobker. Of this $3,000, with the consent of La Brecque, $1,500 was paid to Prell, who was the president of the Novelty Company (pp. 142, 92).

McGann attempted to show, that the Novelty Company was afterwards placed in the hands of the Bankruptcy Court; that a petition had been filed by the Trustee in Bankruptcy making parties McGann and La Brecque and the holders of the warehouse receipts issued by La Brecque, in which petition it was claimed that the goods undisposed of and the proceeds of the sale (that is, the moneys in the hands of Messrs. Unger and Bobker) belonged to the Trustee in Bankruptcy, free from any claim of La Brecque or of the holders of the warehouse receipts, upon the ground that the warehouse receipts issued by La Brecque were invalid, and an order was prayed adjudging and determining that said moneys and the goods which had not been delivered by McGann to the Kalter Company to be the property of the Trustee, free from the claim of La Brecque and the holders of its warehouse receipts; that an order to show cause was issued upon such petition and restraining in the meantime the persons named from removing, disposing, encumbering or transferring the property referred to and described in the petition; that the parties, including La Brecque, appeared and the Bankruptcy Court had under consideration the determination of the subject matters of the petition (p. 80).

This offer was overruled (pp. 151-152) and is made the subject of a ground of appeal in Case No. 2 by McGann (12th ground, p. 3).

The Pleadings and Procedings Below.

McGann instituted its suit for replevin, based upon its right as a warehouseman, to the possession of the goods and upon the refusal of La Brecque to permit removal. To the complaint La Brecque filed an answer (Case No. 1, p. 8), and a counterclaim and a supplemental counterclaim (Case No. 1, p. 14; Case No. 2, p. 22). This supplemental counterclaim alleged that prior to August 2nd the Novelty Company had arranged with La Brecque that La Brecque should store certain goods at a certain price and that La Brecque thereupon issued to the Novelty Company its warehouse receipts, which warehouse receipts were still outstanding; that on August 2nd McGann, by virtue of a writ of replevin, removed the goods from the storage warehouse of La Brecque; that subsequently thereto McGann delivered the same and allowed some other person or firm to take possession of said goods, which were removed from the State and permanently lost to La Brecque.

There is no allegation in the supplemental counterclaim of any right of property in La Brecque; there is no allegation with respect to whom McGann delivered the goods, whether the person to whom the goods were delivered had a higher right, if La Brecque had any right at all.

The charge is that it was the duty of McGann, after the satisfaction of its lien, to deliver the goods back to La Brecque, and this *apparently irrespective of who paid the storage charges.* In other words, conceding that McGann was entitled to the possession of the goods until its lien was paid, immediately upon the payment of its lien, whether this payment was made by the Novelty Company or by a third person, it became the duty of McGann to return the goods to La Brecque. This, of course, could not be true because, if it were, McGann would never be able to satisfy its lien because the person who paid the storage charges would undoubtedly require delivery to him. Counsel for La Brecque in his testimony unconsciously concedes the fallacy of this position. He says (p. 103) that he was waiting and that he supposed "The McGann Company would hold them (the goods) and sell them in the way provided by law, by public auction." I do not suppose it will be contended that if such a sale were made McGann could deliver the goods back to La Brecque.

While there is an allegation in the supplemental counterclaim that La Brecque had issued warehouse receipts upon these goods, there is no allegation that La Brecque had been called upon to respond to any of the holders of the warehouse receipts.

A motion was made to dismiss the counterclaim, which was denied (p. 45), and is made the subject of grounds of appeal by McGann (Nos. 1 and 2, p. 2, Case No. 2).

When the case was moved for trial there was a severance (Case No. 1, p. 26). The Case No. 1 was confined to a determination as to whether McGann was entitled to, by virtue of the writ of replevin, remove the goods from the possession of La Brecque on August 2, 1919. This case resulted in a direction of a verdict for McGann (p. 159). Both sides moved for a direction (pp. 152, 157, 158).

Case No. 2 was confined to a trial upon the issue as to whether McGann was liable to La Brecque for the value of the goods, because of the delivery to the Kalter Company on August 5th. The Court left to the jury to determine the narrow question as to whether at the time of the delivery McGann had knowledge that La Brecque had issued its warehouse receipts (pp. 166, 167, 168).

While the Court in the forepart of its charge indicated that what the jury was to determine was whether The McGann Company at the time of delivery had knowledge that the delivery about to be made was to one not lawfully entitled (p. 166), it distinctly charged (p. 168) that if McGann knew at the time of delivery that La Brecque had issued its receipts the verdict must be for La Brecque. This was excepted to (p. 169) and is made a ground of appeal (44th ground, p. 11). Moreover, the Court held that proof of actual knowledge was not necessary, that it was sufficient if the information McGann had of the occurrances surrounding the transaction was such than an ordinarily intelligent person *would have known that La Brecque had issued its receipts upon the goods* (p. 167), *not that an ordinarily intelligent person would have known that the delivery about to be made was to one not lawfully entitled thereto,* an entirely different proposition. This was excepted to (p. 171), and is made the subject of a ground of appeal (43rd, p. 11).

La Brecque, as stated by the Court, disclaimed any right to the possession of the goods because of storage charges (p. 167).

It rested its right to compel McGann to, after the satisfaction of its lien, return the goods to La Brecque upon the issuance by the La Brecque Company of negotiable receipts (p. 168).

> The Court said: "So the very narrow question for you to decide in this case is whether or not the evidence preponderates that at the time McGann released the goods to Kalter by order of the Novelty Company, McGann had knowledge of the issuing of the La Brecque warehouse receipts."

The Court declined to submit to the jury the question as to whether the consent of La Brecque, through its attorneys (the authority of the attorneys being conceded), to the payment of the balance of the purchase price by Kalter, was not such acquiescence or ratification of the sale as to limit La Brecque to its recourse against the fund, or at least limit the damages to the value fixed by the sale to Kalter. (See requests to charge 18-19-20-21 and the action of the Court thereon, p. 170, grounds of appeal Nos. 28, 29, 30, 31, p. 18.)

The Court also declined to charge that from the reasonable value of the goods there should be deducted the amount paid by Kalter by the check to Messrs. Unger and Bobker, which amount now stands for the goods and to which La Brecque has recourse. (Request to charge, p. 175; ground of appeal No. 32, p. 9.)

It declined to charge that from the value of the goods the amount of the McGann lien should be taken. (Request to charge 24, p. 175; ground of appeal, No. 33, p. 9.)

The result of this is that while it is conceded that McGann is entitled to the payment of its lien, it is now forced to pay to La Brecque as a part of the value of these goods, the moneys which it was entitled to retain in satisfaction of its storage charges.

The Court also declined to charge that there must be deducted from the value of the goods the $1,500 paid to Prell, which moneys concededly was paid to Prell as a part of the consideration of the goods paid by Kalter, with the consent of La Brecque. (Request 25, p. 175, ground of appeal No. 34, p. 9.)

The result of the trial in Case No. 2 was a judgment against McGann for $6,174.22 (p. 31), which represents the value of the goods as of the time of the sale to Kalter, based upon the testimony of value of David H. Lowy (p. 125). This amount is about double the amount paid by Kalter and no consideration was given to McGann, either for the $3,122, which was paid by Kalter

to Messrs. Unger and Bobker, with the consent of La Brecque, or the $1,500 which was paid by Messrs. Unger and Bobker out of this fund to Prell, with the consent of La Brecque, or of the amount due to McGann for its storage warehouse charges. In other words, although it has been determined that McGann was entitled to the possession of the goods for the satisfaction of its storage warehouse charges, it is now required to repay to La Brecque the amount which it received for the storage warehouse charges.

From the judgment in favor of McGann in Case No. 1 (the replevin suit), La Brecque appeals.

From the judgment in favor of La Brecque in Case No. 2 (the conversion suit), McGann appeals.

ARGUMENT.

In Case No. 1 (the Replevin Suit) the Court properly granted a direction of a verdict in favor of The McGann Company, and in Case No. 2 (the Conversion Suit), the Court improperly refused to grant a direction of a verdict in favor of The McGann Company.

While the cases were tried separately, nevertheless they are so interwoven as that we think that before considering the grounds of appeal in each one in detail, it is advisable that we indicate the position of McGann.

At the time McGann was dispossessed by La Brecque it had on storage goods belonging to the Novelty Company, upon which it had issued its negotiable warehouse receipts, which were outstanding. There was also due to it for storage charges accrued a sum of upwards of $1,000.

While it was the duty of the District Court Constable to put La Brecque in possession of the warehouse, McGann might be permitted to remove its own property and so in fact it was permitted.

After the Court of Chancery and the Supreme Court had declined to interfere with the judgment of dispossession, it was agreed that McGann might remove its goods and it proceeded to remove them. When McGann attempted to remove the goods of the Novelty Company, La Brecque refused to permit the removal, notwithstanding the fact that McGann had outstanding negotiable warehouse receipts and also had a lien for its storage charges.

No notice was given by La Brecque or the Novelty Company to McGann of any arrangement between the Novelty Company and La Brecque, under the terms of which La Brecque was to act as warehouseman.

Previous to July 31st, 1919, some of the goods were removed by the Novelty Company from the warehouse, with the consent of La Brecque and against the protest of McGann and without the payment of McGann's charges.

On August 2, 1919, McGann sued out its wirt of replevin.

McGann had never relinquished its right to the possession of the goods and it was entitled to possession not only because of its right to a lien for storage charges, but also because, although its negotiable warehouse receipts had been surrendered, of its obligation to the Novelty Company, the depositor of the goods.

The Trial Court properly held that McGann had not waived or lost its right to a lien.

The Warehousemen Act provides, Section 29, 4 Compiled Statutes of New Jersey, page 5782, that a warehouseman loses his lien in two events: (a) By surrendering possession of the goods or (b) by refusing to deliver the goods when a demand is made, with which he is bound to comply under the provisions of the act.

As to (a) McGann never surrendered possession of the goods. It was forcibly dispossessed of the premises, but it was permitted to remove the goods. Constructively it remained in possession of the premises to the extent necessary to continue in possession of and to remove the goods. So far as the physical possession of La Brecque of the goods is concerned, it was in possession as the agent of McGann.

When McGann came to remove the goods, La Brecque forcibly prevented the removal.

This was not *a surrender of possession* by McGann.

The lien is lost only by voluntarily parting with possession and this is upon the ground that "The conduct of the bailee in parting with his possession in inconsistent with the preservation of his lien, and where that is proved, the presumption is that he has waived or abandoned it, *unless his conduct is satisfactorily explained.*"

Robinson v. *Lanabel,* 63 Me. 116;
Morse v. *Andrascoggin R. Co.,* 39 Me. 285;
Stickney v. *Allen,* 10 Gray, 352;
Kelbridge v. *Freeman,* 48 Vt. 62.

Where a bailor wrongfully takes possession, the lien is not lost. Even where taking possession was by consent for a special purpose, if evidence shows an intent to depart from the special purpose, the lien is not lost.

Breeley v. *Ross,* 57 Iowa 651.

If possession of goods obtained by bailor without knowledge of the bailee, the lien is not lost nor does it defeat the right of action to recover damages for injury.

Wallcock v. *Keith,* 22 New Hampshire 196.

Possession is not always necessary in order to create a lien.

In *Fitzhugh* v. *Winan,* 9 N. Y. 559, it appeared that the plaintiffs were warehousemen. Goods were shipped by a consignor to plaintiffs. Plaintiffs had advanced all charges. The carrier delivered to another. Plaintiffs brought suit against that other for the property, but did not get it as the defendant gave security and actually delivered the property to the rightful owner.

The Court held that plaintiffs had a special property in the goods and were entitled to a judgment for possession, and if that were impossible, then for the value of their special interest.

It was held that both the master of the boat who delivered to defendant and defendant were guilty of conversion and subjected them to an action by plaintiffs for the whole value.

It was said, "That both the original taking of the property by the defendant and his refusal upon demand to deliver to plaintiffs were wrongful, is entirely clear. He could earn no freight by the carriage of the goods nor be entitled to reimbursement for expenditures on account of them. (*Lempiere* v. *Pasley,* 2 T. R. 486, 490.) The subsequent receipt of the goods from the defendant by the person to whom they were destined is no bar in an action against him. * * * It could only go in mitigation of damages."

It was further held that although the plaintiffs never were in possession of the goods, they had such a special property as would support replevin. Citing *Sweet* v. *Pynn,* 1 East. 4; *McCombie* v. *Davies,* 7 East.; *Urquhart* v. *McInver,* 4 Johns. 116; *Allen* v. *Williams,* 12 Pick. 297.

And see to same effect *Heard* v. *Brewer,* 4 Daly 137, in which it was held that mere constructive possession may in some cases give a lien, although actual possession in another. In that case after advances, but before the goods were delivered to plaintiffs,

they were attached as the property of the shipper. Held that the plaintiff had such a special property as to be entitled to maintain replevin.

In *McFarland* v. *Wheeler,* Court of Errors, New York, 26 Wendell, 467, it was said:

> "It is undoubtedly true that a party having a legal subsisting lien upon property, accompanied by possession, may have his action of replevin whenever he is so disturbed in that possession as to threaten the defeat of his lien."
>
> "It is true that the possession thus essential to a lien need not always be the direct and actual possession of the party; that of his agent, servant or the keeper of a warehouse acting under his authority is also his own, for this as for many other legal purposes. If then the boards had been placed under the control or upon the land of some third person for the convenience of both parties, but under the authority of the owners of the saw-mill claiming the lien, or if the place of deposit had been some public wharve where the lumber was placed under the control of those claimants and in their name, there might be a continuance of legal possession."

It was said in the McFarland case that, page 481, lien was lost in case of change of possession only as against bona fide purchasers for value and without notice.

"*Intent to waive the lien must be proven.*" 40 Cyc. 459.

> "Where the bailee has been dispossessed of the property by a stranger, he may obtain trespass, trover, detinue or replevin." 6 Corpus Juris, Sec. 177, page 1167, title "Bailments."
>
> *Warren* v. *Finn,* 84 N. J. L. 206.
>
> "A warehouseman is entitled to possession until the lien is satisfied." *Reidenback* v. *Tuck,* 85 N. Y. S. 352, 57 L. R. A. 271. Dec. Digest, Sec. 33, Warehousemen; 48 Cent. Digest, Sec. 65, 66.
>
> Although the presumption of law is against a waiver by a warehouseman of his lien, yet where the warehouseman permits the depositor to remove goods, it will be presumed that the lien has been waived or abandoned, unless the warehouseman's conduct is satisfactorily explained. *Robinson* v. *Larrabee,* 63 Me. 116.

There was not in the case any evidence that McGann ever voluntarily surrendered the goods. On the contrary, it appeared without dispute that La Brecque forcibly prevented McGann from removing the goods and forcibly took possession of them from McGann.

There was no evidence of any direction on the part of the Novelty Company to McGann to permit La Brecque to retain possession of the goods.

Even if McGann knew that there was some arrangement between La Brecque and the Novelty Company; it did not know the details. No release was tendered to McGann from the Novelty Company. Under its contract McGann was responsible to the Novelty Company, *the depositor,* of the goods.

The warehouseman loses his lien under sub-division (b) of Section 29 by refusing to deliver the goods when a demand is made, with which he is bound to comply under the provisions of the act.

Under Section 8, 4 Compiled Statutes of New Jersey, page 5778, a warehouseman, in the absence of some lawful excuse, "is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

(a) An offer to satisfy the warehouseman's lien;

(b) An offer to surrender the receipt, if negotiable, with such endorsements as would be necessary for the negotiation of the receipt, and (c) a readiness and willingness to sign * * * an acknowledgment that they have been delivered, if such signature is requested by the warehouseman."

This sub-division (b) did not apply in any respect to the conditions existing in the case at bar.

The negotiable warehouse receipts issued by McGann had been surrendered on July 31st. The surrender of the negotiable warehouse receipts was not accompanied by any intimation that La Brecque claimed to be the holder or entitled to any rights thereunder. There were no endorsements on the receipts indicating that La Brecque had any interest in the goods. No demand was made in accordance with Section 8 upon McGann by La Brecque as the holder of a receipt. No demand was made by the Novelty Company, the depositor. No offer was made either by La Brecque or by the Novelty Company to satisfy the warehouseman's lien.

It was urged that the issuance of the warehouse receipts by La Brecque in some way deprived McGann of its right to a lien and of its right to replevin these goods.

The section of the Statute which was said to apply is Section 25. That section reads:

> "If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the Court."

It will be at once observed that this section applies only to cases in which "goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them."

In the case at bar, these goods were not delivered to La Brecque, either "by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner."

The right of possession in the goods, to the knowledge of La Brecque, was in McGann. La Brecque forcibly took possession from McGann. It then illegally issued its warehouse receipts. It now says: "Although I had no right to retain possession of these goods as against McGann, yet because I issued my negotiable receipts on them McGann cannot assert its right as against me."

The mere statement of this proposition indicates that it cannot be correct.

In considering the points made by La Brecque, the appellant in Case No. 1 in detail, more will be said upon this subject.

It is, therefore, insisted that the Court properly held that McGann was entitled to the possession of the goods at the time it sued out its writ of replevin.

The goods were taken by the Sheriff on August 2nd. August 3rd was Sunday. La Brecque, although it might have, did not re-bond. This because it was advised by counsel that if it were wrong in its contention that it was entitled to the possession of the goods, it would make itself responsible for the full value (Case No. 2, p. 101, *et sequi*). It urged the Novelty Company

to re-bond. And observe this—it was not denied that La Brecque urged the Novelty Company to re-bond, which act would put the goods without the control of La Brecque. La Brecque now complains that McGann actually delivered the goods to the Novelty Company or its assignee. In other words, it complains because in another way precisely the same thing was accomplished as if the Novelty Company had done what the La Brecque Company desired it to do, *i. e.*, re-bond the goods.

Between August 2nd and August 6th, without the knowledge of McGann, the Novelty Company engaged to sell the goods to the Kalter Company for valuable consideration.

On August 6th, the representatives of the Kalter Company and the Novelty Company met in Mr. Unger's office, he being counsel for McGann, and then and there the Kalter Company paid to the Novelty Company a part of the consideration for the goods and the amount due to McGann for storage charges was liquidated.

McGann then, upon the instructions of Mr. Unger, its counsel, delivered the goods, or some of them, to the Kalter Company.

This meeting in Mr. Unger's office was not held in secret. Mr. Murray, counsel for La Brecque, was notified to attend. When he did not appear, he was telephoned to. The transaction was not put through until after he was notified.

Under the provisions of Section 8 of the Warehousemen Act a warehouseman is bound to deliver the goods upon a demand made * * * by the depositor, if such a demand is accompanied with—

(a) An offer to satisfy the warehousemen's lien;

The demand for the delivery was made by the depositor, that is the Novelty Company. It was accompanied with an offer to satisfy the warehouseman's lien. McGann could not under the provisions of the act decline to make the delivery.

Under Section 10 it is provided that:

> "Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by sub-divisions (b) and (c) of the preceding section (that is Section 9) and though he delivered the goods as authorized by said sub-divisions he shall be so liable, if prior to such delivery he had either

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery; or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods."

The Court in Case No. 2 conceived that after the satisfaction of McGann's lien, La Brecque, by reason of the issuance of its warehouse receipts, was entitled to the possession of the goods, and that it was for the jury to determine whether McGann at the time it made delivery to Kalter "had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods." Or as the Court put it, had information that La Brecque had issued its warehouse receipts (p. 168), the Court holding that knowledge by McGann of the issuance of the La Brecque warehouse receipts was information that La Brecque and not the Novelty Company was entitled to the possession of the goods, and this, notwithstanding the widely divergent views of counsel, and the great uncertainty of Mr. Murray, counsel for La Brecque.

But this Section 10 can have no application whatever to a delivery made under Section 8. It can only have application to a delivery made under Section 9.

Sections 8, 9, 10, 11 and 12 must be read together.

Section 8 provides in what instances a warehouseman *is bound* to deliver.

Section 9 provides for such instances in which a warehouseman *is justified* in delivering.

There is *no reference in Section 8 to the provisions of Sections 10, 11 and 12.*

There *is a reference in Section 9 to the provisions of Sections 10, 11 and 12.*

Section 9 commences: "A warehouseman is justified in delivering the goods, *subject to the provisions of the three following sections,* to one who is," and then follows (a), (b) and (c). You do not find similar language in Section 8.

Now immediately following Section 9 is Section 10, and that section provides that if a warehouseman delivers the goods to one who is not lawfully entitled to the possession, the warehouseman shall be liable as for a conversion if he delivered otherwise

than as authorized by sub-divisions (b) and (c) of the preceding section, that is 9, and even if he delivered the goods as authorized by such, if prior to such delivery he had, etc.

If Section 10 applies to Section 8, this results: If under Sec- 8 the warehouseman delivers to a holder of a receipt or to the depositor upon a demand accompanied by an offer to satisfy the warehouseman's lien, and if as a matter of fact the holder of the receipt or the depositor is not in fact lawfully entitled to the possession of the goods, the warehouseman is absolutely liable as for conversion to the person having a right of property or possession in the goods, whether he has been requested by the person lawfully entitled not to make delivery or whether he had information that the delivery about to be made was to one not lawfully entitled to the possession or not. *If he delivers under Section 8, he certainly does not deliver under sub-divisions (b) and (c) of Section 9, and it is only when he delivers under subdivisions (b) and (c) of Section 9 that he is saved,* if he has not been requested by or on behalf of a person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or has not information that the delivery about to be made is to one not lawfully entitled to the possession of the goods.

It is suggested that when the demand was made, as it was made, by the Novelty Company, the depositor of the goods, for the delivery of the goods to the Kalter Company, accompanied as it was by an offer to satisfy the lien, McGann was under the obligation of declining to comply. The most that McGann could say to the Novelty Company would be that it would accept the money of the Novelty Company in satisfaction of its lien, but would deliver the goods to La Brecque irrespective of the demand of the Novelty Company, the depositor.

This position would result, under the provisions of Section 29, in the loss of the lien of McGann, because under the provisions of that section it would lose its lien by refusing to deliver the goods when a demand was made with which it was bound to comply under the provisions of the act, and under the provisions of Section 8, it was bound to comply with a demand made by the depositor, if the demand was accompanied with an offer to satisfy the warehouseman's lien.

If Section 10 of the act applies to delivery under Section 8, the negotiability of warehouse receipts is absolutely destroyed, for all that a person need do to prevent delivery to the holder of a

warehouse receipt or to the depositor, would be to serve a notice upon the warehouseman, requesting the warehouseman not to make the delivery.

The purpose of the act was to increase the negotiability of receipts.

Even under the old act this Court held in *Wheeler* v. *Brookfield,* 70 N. J. L., page 703, that a warehouseman properly delivered to the depositor property stored by the depositor, notwithstanding the fact that there had been, prior to the delivery, served upon the warehouseman a notice by the person lawfully entitled to the possession of the goods not to deliver.

It appeared in the case that the Kalter Company was a bona fide purchaser for value, without notice. That it was a purchaser for value is conceded. There is no evidence that it had notice of any assumed rights of La Brecque. As between La Brecque and the Kalter Company, Kalter was lawfully entitled to the possession of these goods.

There was no evidence that McGann knew or had information, that it was delivering to a person not lawfully entitled to the possession of the goods.

Mr. McGann and Mr. Unger both testified that McGann made the delivery upon the advice of Mr. Unger. They both denied knowledge of any contract between La Brecque and the Novelty Company, which would give La Brecque the right to possession of the goods and denied knowledge of the issuance of La Brecque receipts. But irrespective of this, Mr. Unger advised McGann that it was bound to comply with the demand of the Novelty Company.

The Statute provides that the warehouseman must have information that the delivery about to be made is to one not lawfully entitled to the possession of the goods. It requires that the warehouseman must know at the time he delivers that he has no right to deliver. Even if McGann knew that the warehouse receipts had been issued, this was not sufficient, *although the Court charged the jury that it was.* It must be shown that it in fact knew that the person to whom the delivery was about to be made, was not lawfully entitled and there was no evidence to this effect.

There was no proof in the case that La Brecque Company had in fact been injured.

While its warehouse receipts were outstanding, no evidence was offered that any demand had been made upon it by the receipt holders. The receipt holders are, if any, the ones actually injured, and it may well be that they took the receipts under such circumstances as that if the action be brought by them directly against McGann, McGann would have a perfect defense.

The Court erred in Case No. 2 in declining to direct a verdict for The McGann Company.

CASE NO. 1. THE REPLEVIN SUIT IN DETAIL.

La Brecque Statement of Facts.

In its statement of facts La Brecque says that La Brecque, with the knowledge of McGann, contracted with the Novelty Company for the latter to act as warehouseman under an agreement that La Brecque would pay the proper amount of storage charges due McGann as soon as the same could be ascertained and verified, and would issue and substitute La Brecque receipts for McGann receipts and that La Brecque should have a lien on the goods not only for such charges as might accrue to it for future warehousing, but also for the accumulated charges advanced for the Novelty Company to McGann (paragraph 10, p. 3).

It is denied that there was any evidence that McGann knew of the issuance by La Brecque of its warehouse receipts or of the contract between La Brecque and the Novelty Company. The agreement between La Brecque and the Novelty Company consists of Exhibits D. 12 and D. 13 (pp. 186, 187). We have already referred to D. 13 (p. of this brief).

The engagement by the Novelty Company that La Brecque should act as its warehouseman was under the following conditions: "A flat rate to be charged of 6c. a month, our outstanding indebtedness to McGann to be taken over by the La Brecque Co., Inc., and we to pay all indebtedness on each individual receipt upon taking of same out of storage." That was the nearest the contract came to creating a lien.

While it is true, as stated in paragraph 13 of the La Brecque statement of facts, that La Brecque sent to McGann Exhibits D. 2, dated July 24, 1919; D. 3, dated July 28, 1919; D. 4, dated

July 31, 1919; D. 5, dated July 31, 1919 (Exhibit D. 6 referred to by La Brecque is a letter by McGann to La Brecque), it is equally true that monthly statements had been sent by McGann to the Novelty Company and there was no statement in any of these letters that La Brecque would make payment of the storage charges due from the Novelty Company to McGann.

It is significant that notwithstanding that the letter from the Novelty Company to La Brecque which completed the contract between La Brecque and the Novelty Company was dated June 23, 1919, no pretence is made that any suggestion came from La Brecque to McGann that La Brecque might have something to do with payment of the McGann charges until the letter, D. 2, dated July 24, 1919, one month after the making of the contract and this, notwithstanding that McGann had been demanding the goods and La Brecque had been refusing delivery (pp. 39, 29, 72, 75, 132). It is further significant that the goods the charges for which La Brecque asked for in the letter, D. 4 (p. 178), dated July 31st, stating that the Novelty Company "intend to withdraw from our warehouse," were in fact taken away July 29, 1919, two days before the sending of the letter (pp. 88, 90, 76). These goods, 175 cartons, the La Brecque Company permitted the Novelty Company to take against the protest of The McGann Company without the surrender of the McGann receipts or the payment of the McGann charges.

The oral testimony shows that both Mr. McGann and Mr. Unger had been attempting to collect the amount due for storage charges for over a month without succeeding either in obtaining payment or obtaining an agreement on the part of La Brecque to pay.

In paragraph 15 La Brecque says that after the service of the demand for possession, Exhibit D. 11 of July 28th (p. 185), and the letter, D. 6, July 29th (p. 180), there was a further demand as late as August 2nd for charges without any demand for the possession of the goods. This further demand so-called was merely the sending by McGann of a statement of the amount due it for storage charges (Exhibit D. 9). And this bill is made out to the Novelty Company (pp. 83, 84).

La Brecque repeats in paragraphs 16 and 17 that McGann had knowledge at the time of the suing out of the writ of replevin that the warehouse receipts issued by La Brecque were outstanding. This is denied.

The Grounds of Appeal.

The grounds of appeal are printed on page 2. The third and fourth must be disregarded. Each involves a question of the preponderance of proof which this Court will not consider.

The fifth must be disregarded so far as it rests upon the causes set forth in the fourth for the same reason. The fifth relies upon two additional reasons: (a) Because the Trial Court held that The McGann Company had a lien on and was entitled to the possession of the goods in question. (b) Because the Trial Court held that although the negotiable warehouse receipts of this defendant, previously issued against the goods in question, were at the institution of this writ outstanding and held by third parties holders for value in due course, the said goods were not exempt from legal process and were the proper subject matter of the writ of replevin issued in this suit.

La Brecque has argued (b) of the fifth ground first.

POINT I.

Because the negotiable warehouse receipts previously issued by the defendant for the goods were then outstanding and in the hands of third parties, the goods, by virtue of the "Warehouse Act, Section 25, were exempt from seizure by replevin."

We have already considered the provisions of Section 25 (p. of this brief). As pointed out, it only applies where the goods have been delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued.

In the case at bar the property was not delivered to La Brecque by the owner. La Brecque obtained possession by forcibly preventing McGann from taking the goods as by right it was entitled.

If the contention of La Brecque be sound, then a warehouseman may steal goods, issue warehouse receipts for the stolen goods and the owner of the goods is powerless.

But if a thief should steal the goods and store the goods in a warehouse, inasmuch as his act would not be the act of a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, the goods might be replevined by the lawful owner.

In the case of *Kershaw* v. *Booth Fisheries,* etc., 170 So. Ill. App. 117 (1913), it appears from the excerpt quoted in counsel's brief that the plaintiff made it possible for the third party to obtain from the warehouseman a negotiable receipt.

No such situation exists in the case at bar. McGann did not make it possible for the Novelty Company to obtain the receipts from the warehouseman, nor did it make it possible for La Brecque to issue the receipts. McGann did everything in its power to prevent such a situation. La Brecque by wrongfully refusing to permit McGann to take the goods created the difficulty.

In *Wheeler & Wilson* v. *Brookfield,* 70 N. J. L., page 703, this Court said:

> "It is consistent with public policy to require one out of possession and asserting a claim in property to proceed by due process of law to establish his right while it is still in the hands of the warehouseman, or otherwise to relieve the warehouseman from liability if he shall, in the meantime, deliver it to the receipt holder. Such a statute does not deprive the owner of a complete remedy. The remedy to such a claimant is to proceed against the warehouseman, by due process, to take into possession the property claimed, and to recover it by operation of law."

Warehouse receipts negotiable "do not confer upon the transferee any right or title as against one having title to the goods superior to that of the original bailor." 40 Cyc. 418.

The New York Court in the suit of Collins *v.* Ralle, 20 Hun. 246, affirmed 85 N. Y. 63, said: "Any other construction would enable any one, fraudulently depositing the goods of another to pass title, as against the true owner, by obtaining a warehouse receipt in his own name."

The issue of a warehouse receipt to a bailor for goods to which he has no title conveys no title to the goods as against the true owner, either to the bailor or to his assignee. 40 Cyc. 414.

Statutes with respect to warehouse receipts being in derogation of the common law are to be strictly construed. 40 Cyc. 417.

And see the remarks made by the Trial Judge on this subject in granting the motion of McGann to direct (p. 161).

The suggestion of counsel for La Brecque that McGann enjoin negotiation of the receipts thus improperly issued by La Brecque so far as least as McGann was concerned has the advantage of boldness.

POINT II.

Before the plaintiff (The McGann Company) could properly bring replevin, it was bound to present an itemized statement of the charges which it claimed, and this it failed to do.

The premise upon which La Brecque bases the argument under this heading, *i. e.,* that the original possession of the goods by the defendant (La Brecque) was lawful, such goods having been left in defendant's possession by the plaintiff when the latter was ousted by legal process from the possession of the warehouse, is false.

La Brecque had no possession of the goods until it forcibly prevented McGann from removing them. While the goods were left in the warehouse at the time McGann went out, they were not surrendered to the possession of La Brecque. The goods still remained in the possession of McGann until La Brecque by force prevented McGann from removing them *and thereby took possession of them.*

The goods having been stored with McGann by the Novelty Company and McGann warehouse receipts being out, and McGann having a lien for storage charges, McGann was entitled to the continued possession.

When La Brecque interfered with McGann taking the goods out, it unlawfully possessed itself of the goods. It subsequently obtained possession of the McGann warehouse receipts, but the obtaining possession of these warehouse receipts did not convert its unlawful taking into a lawful detainer. It never paid the amount due McGann for storage charges.

If it had paid the amount due McGann for storage charges, it would still not have converted its unlawful taking into a lawful detainer, although McGann would not have any right perhaps in equity to complain.

McGann was under no obligation to furnish La Brecque, either an itemized or an unitemized statement of its charges. It furnished to the Novelty Company, the depositor, a statement of

charges from month to month. It received no word from the Novelty Company, the depositor, to submit its bills to La Brecque. It received no promise on the part of La Brecque to pay the bills, if submitted. The statement of counsel on page 14 of his brief that La Brecque stated that it would pay the proper amount of plaintiff's claim as soon as it was furnished with data sufficient to enable it to ascertain its proper amount is disingenuous. (Counsel refers to the letters, D. 2, D. 3, D. 4, D. 5, pp. 176-179.) Nothing approaching such a statement is contained in any one of the letters.

McGann was entitled to the continued possession of these goods until, under the provisions of Section 8 of the Statute, demand was made upon it, either by the holder of a receipt or by the depositor accompanied, "(a) With an offer to satisfy the warehouseman's lien."

If McGann was in the physical possession of the goods, it was not obliged to surrender them until such an offer was made.

McGann was under no obligation to furnish La Brecque with an itemized bill, or make any demand upon La Brecque for payment.

And see the remarks of the Trial Judge (pp. 160-161).

POINT III.

The amount for which the plaintiff claimed a lien on the goods, was excessive, and defendant's failure to pay the same, did not give rise to a right in the plaintiff to maintain replevin for the goods.

In the first place, there was no obligation upon McGann to make any demand upon La Brecque.

In the second place, the question of the amount of storage was a matter between McGann and the Novelty Company. The bill presented by McGann was subsequently paid by the Novelty Company, without protest.

Counsel states that in all reason what the warehouseman must do in order to retain the goods when in his possession, he must also do when he seeks to recover them from the possession of another; that is, he must make his demand for the correct amount.

Not so. La Brecque had wrongfully deprived McGann of the goods. McGann had no knowledge of any arrangement between

La Brecque and the Novelty Company, under the terms of which La Brecque was to pay the bill (p. 84). As against La Brecque as the situation existed on August 2nd, at the time the writ was issued, McGann was entitled to possession irrespective as to whether the bill for storage was paid or not. It still remained liable to its depositor, the Novelty Company, for the goods.

It is said the charges are excessive because there is included items for storage during the time that McGann was out of possession of the warehouse. But the goods were still constructively at least in the possession of McGann. La Brecque was its agent. It may be responsible for rent for the premises or what not. In any event it was entitled to charge for storage. It was always constructively in possession and it was always liable for the goods to the depositor.

POINT IV.

While the plaintiff made a formal demand upon the defendant for the goods, the effect of such demand was nullified, when it subsequently made demand for the amount of its lien, unaccompanied by an alternative demand for the goods.

As appears from the testimony of Messrs, McGann, Unger, Kaemer and Seaton, and as admitted by La Brecque (p. 132), La Brecque interferred with McGann when it came to remove these goods. Several attempts were made to remove them, each time La Brecque interferred.

Finally the notice, Exhibit D. 11, was served by McGann on July 28, 1919 (p. 185).

It is now said that because on July 31st McGann, in response to the request of La Brecque, forwarded to La Brecque the statement, Exhibit D. 9 (p. 183), it nullified the effect of this demand. It is said that there was a change in attitude on the part of McGann. There was no change in attitude.

The testimony of Mr. Unger, who had charge of the transaction for McGann, is to the effect that he continuously insisted (p. 77), upon the possession of the goods, and finally he advised Mr. Murray on July 31st, or August 1st, that he intended "to move" and was advised by Mr. Murray that he go ahead. Thereupon the writ of replevin was issued.

Counsel is mistaken when he asserts that McGann was not entitled to both the *money* and the *goods*. McGann was entitled to the money for its storage charges and it was entitled to the

goods until it had a formal release from its depositor, the Novelty Company.

La Brecque was in reality holding the goods as custodian *de son tort* for Mr. McGann, and what Mr. McGann by the writ of replevin was doing was taking the physical position of the goods from the custodian *de son tort* and not from one holding or having any interest in its own right. When this is kept in mind a great many of the matters discussed by counsel appear to be of no importance, as, for instance, whether the bill of McGann was excessive or not.

POINT V.

It was error for the Court to permit the plaintiff, over the timely objection of defendant, to offer evidence to the fact that subsequent to the institution of suit, the depositor of the goods (New Jersey Novelty Footwear Company), paid the full amount of charges claimed by the plaintiff, when such payment was without the knowledge or consent of the defendant.

This evidence was properly admitted. The contract of storage was between McGann and the Novelty Company. The proof was that McGann had no part in the sale to the Kalter Company. There was no proof of any conspiracy on the part of McGann and the Novelty Company to defraud La Brecque. There was no proof that McGann had any knowledge of any contract between La Brecque and the Novelty Company.

Moreover, upon the view of the case taken by the Court it was immaterial whether the bill for $1,021.44 was or was not excessive, because McGann was under no obligations to make any demand whatever upon La Brecque except a demand for possession of the goods if that were necessary.

POINT VI.

The plaintiff lost its lien, by failing to remove the goods when it vacated the warehouse.

McGann insisted throughout that the notice given to it to vacate was illegal. It resisted removal proceedings to the extent that it could. So soon as it was finally determined that La Brecque was entitled to possession, McGann commenced to remove its goods.

There was no evidence before the Court that it did not proceed diligently. The statement of counsel that there was no reason why the plaintiff could not remove the goods in question when it was ousted under the writ of replevin, is disingenuous. In the first place, there were many more goods in the warehouse to be removed than the goods of this particular customer. In the second place, McGann was forcibly prevented from removing the goods by La Brecque.

Surrender of possession is only evidence of a waiver of lien. (See discussion, page of this brief.)

In the case at bar, the surrender of possession under the circumstances could not be considered a surrender of the lien.

Conclusion.

Both sides having moved for a direction of a verdict, both sides conceded that the testimony was in such shape as that a verdict should be directed.

The view of the testimony most favorable to the side in whose favor the verdict was in fact directed must therefore be taken.

It is respectfully submitted that judgment in Case No. 1 should be affirmed.

CASE NO. 2. THE CONVERSION SUIT.

POINT I.

The Trial Court erred in declining to direct a verdict in favor of McGann. Grounds of Appeal Nos. 13 and 14. Motion to direct (p. 153).

In the general statement of the case (p. of this brief) we have argued that the Trial Court should have directed a verdict in favor of McGann. We do not desire to reiterate what we have already said.

At the close of the case it appeared that McGann had delivered the goods to the depositor in strict accordance with the provisions of Section 8 of the Warehousemen Act, 4 Compiled Statutes of New Jersey, page 5778.

As we have attempted to point out, the provisions of Section 10 relied upon by the Court cannot apply to a delivery under Section 8 (p. of this brief).

If the provisions of Section 10 apply, then it was conceded in the case that no request had been made by or on behalf of La Brecque to McGann not to make the delivery, and there was no evidence in the case from which the jury had the right to find that McGann had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. Knowledge on the part of McGann, which was denied, that La Brecque had issued warehouse receipts, was not proof that McGann had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

There was in the case without contradiction proof that the delivery had been made by McGann upon the order of the depositor. Counsel for McGann had advised it that under the Warehousemen Act it was obliged to make the delivery (pp. 135, 145).

The issuance of the warehouse receipts by La Brecque under the circumstances under which they were issued did not give to La Brecque such a property right in the goods as would give it the right to receive the goods from McGann upon a satisfaction of the lien of McGann.

McGann was entitled to retain the goods until its lien was satisfied. **It was entitled to a satisfaction of its lien. The depositor satisfied the lien and demanded the goods. La Brecque could not insist that McGann should take the money from the depositor and then deliver the goods to La Brecque.**

Under the provisions of Section 29 had McGann declined to deliver possession upon the order of the depositor accompanied with an offer to satisfy the lien, McGann would have lost its lien.

At the time La Brecque issued the warehouse receipts (so far as McGann was concerned) La Brecque was unlawfully in possession of the goods, and the mere issuance of the warehouse receipts could not give it a right as against McGann.

It was disclaimed in the case (see the charge to the jury, page 167) on the part of La Brecque that it had any right to the possession of the goods because of the storage charges, so that its rights depended entirely upon the issuance of the receipts.

The Kalter Company was a bona fide purchaser for value without notice of any rights of La Brecque. As between La Brecque and the Max Kalter Company therefore the Max Kalter Company was the person lawfully entitled to possession.

The only right, if any, that La Brecque had to the possession of the goods was based upon the contract between La Brecque and the Novelty Company, evidenced by the letters, Exhibits P. 10, P. 11 (pp. 189, 190).

Exhibit P. 11, the letter from the Novelty Company to La Brecque, states "It is satisfactory to the New Jersey Novelty Footwear Company to change the goods from McGann to La Brecque under the following conditions: Our outstanding indebtedness to McGanns to be taken over by the La Brecque Company, Inc., and we to pay all indebtedness upon taking of same out of storage."

La Brecque never complied with this contract. It did not take over the outstanding indebtednessss "to McGanns." It did not, therefore, become entitled to the possession of the goods by virtue of this contract.

Subsequent to the delivery of the goods, the arrangement was made evidenced by the letter, Exhibit P. 15, page 196, under the terms of which La Brecque consented to the payment by Kalter of the purchase price to Messrs Unger and Bobker.

This was a ratification of the sale and La Brecque was thereafter relegated to the purchase money.

Any right of action, if any, based upon the receipt, rested in the receipt holders and not in La Brecque.

The Court erred in refusing to direct a verdict in favor of The McGann Company.

POINT II.

The Court erroneously declined to charge the second request of The McGann Company, which reads as follows:

> **"Before you can find that the delivery to Kalter was an unlawful delivery, you must be satisfied that Kalter had knowledge of the issuance of the warehouse receipts by La Brecque, or information which would put a reasonably prudent man on inquiry as to the rights of La Brecque" (pp. 173, 169. Ground of Appeal 15, p. 6).**

These goods were rightfully in the possession of McGann. At the time of the trial the replevin suit, Case No. 1, had been decided, in which case it had been held that McGann rightfully took the goods and rightfully retained them. Kalter Company purchased the goods from the Novelty Company.

If Kalter Company had no knowledge of the receipts issued by La Brecque (assuming now that these receipts gave La Brecque some interest in the goods), it is insisted that the Kalter Company having paid value for the goods was, as against La Brecque, the person lawfully entitled thereto.

La Brecque had put it in the power of the Novelty Company to sell the goods to Kalter Company. It had in the first place wrongfully interferred with the removal of the goods by McGann. It had not carried out its contract with the Novelty Company to pay the charges of McGann. It had failed to rebond the goods in the replevin action to protect itself.

It cannot, therefore, complain if, by reason of the sale to Kalter Company, it is injured.

POINT III.

The Court erroneously declined to charge the seventh request, which reads as follows:

> **"If you find that Kalter was the bona fide purchaser for value without notice of La Brecque's claimed rights, you must find a verdict for McGann" (p. 174, Ground of Appeal No. 20, p. 7).**

This was upon the theory that if Kalter Company was a bona fide purchaser for value without notice of La Brecque's claim, then Kalter Company was the person lawfully entitled to the goods, and the delivery by McGann to the Kalter Company was not to a person not lawfully entitled to the possession.

POINT IV.

The Court erroneously declined to charge the eighth request, which reads as follows:

> **"Under the warehouse act a warehouseman is bound to deliver to the depositor if depositor makes demand accompanied by an offer to satisfy lien—if you are satisfied that this is what McGann did and that it did not in anywise collude with the New Jersey Novelty Footwear Company, or with Kalter, your verdict must be for McGann" (p. 174, Ground of Appeal No. 21, p. 7).**

We have already referred to the Warehousemen Act, Section 8, which requires that a warehouseman must deliver goods upon demand made by a depositor accompanied with an offer to satisfy the warehouseman's lien.

If, as had been testified by McGann's witnesses, McGann delivered the goods to the depositor upon a demand accompanied with an offer to satisfy the lien, and it did not in anywise collude with the Novelty Company or with Kalter Company, then it would seem that it could not be said that the delivery by McGann was to a person whom McGann had information was not lawfully entitled thereto. This is what the Court was asked to charge the jury.

POINT V.

The Court erroneously declined to charge the eighth request, which reads as follows (21st Ground of Appeal, p. 7, 8th Request to Charge, p. 174):

> **"Under the warehouse act a warehouseman is bound to deliver to the depositor if depositor makes demand accompanied by an offer to satisfy lien—if you are satisfied that this is what McGann did and that it did not in anywise collude with the New Jersey Novelty Company, or with Kalter, your verdict must be for McGann."**

The Warehousemen Act, as we have previously pointed out, Section 8, page 5778, provides that "A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with: (a) An offer to satisfy the warehouseman's lien."

McGann held the goods as warehouseman for the Novelty Company. It had a lien for charges. If the Novelty Company, the depositor, made demand for the goods accompanied by an offer to satisfy the lien, and if McGann delivered upon the understanding that the Novelty Company was the depositor and was demanding the goods and if it did not collude with the Novelty Company or with Kalter, who was the purchaser of the goods, then it would appear that the verdict should be for the defendant and this is what the Court was asked to charge.

POINT VI.

The Court erred in declining to charge the ninth request to charge which reads as follows (22nd Ground of Appeal, p. 7; 9th Request to Charge, p. 174):

> **"There is no evidence from which you may find that McGann Company or its agents colluded in anywise with New Jersey Novelty Company or Kalter, or the agents of either."**

McGann was entitled to have excluded from the consideration of the jury any theory that it might be liable because of collusion between it and the Novelty Company and Kalter, which resulted in the removal of the goods. There was no evidence whatever in the case of any such collusion. If McGann had in fact colluded with the Novelty Company and Kalter to remove the goods for the purpose of depriving La Brecque of any assumed rights, it might be argued that McGann was liable.

POINT VII.

The Court erroneously declined to charge the tenth request, which reads as follows:

> **"The surrender by La Brecque to McGann of the McGann warehouse receipts was not notice to McGann, of the rights of La Brecque" (23rd Ground of Appeal, page 7, 10th Request to Charge, page 174).**

It was in evidence that on July 31 La Brecque had surrendered to McGann the warehouse receipts which had theretofore been issued by McGann. These receipts were enclosed with a letter, Exhibit P. 6, page 185. It is conceded that La Brecque did not at any time notify McGann of its rights (except the claimed notice to Kraemer). It was argued that the surrender by La Brecque to McGann of the McGann receipts was notice to McGann of some right of La Brecque. In view of the contents of the letter, Exhibit P. 6, it is urged that this is not so and the jury should have been so instructed upon request.

POINT VIII.

The Court erred in declining to charge the eleventh request, which reads as follows:

> **"The surrender by La Brecque to McGann of the McGann warehouse receipts was not information to McGann that the delivery made to New Jersey Novelty Company or Kalter was to one not lawfully entitled to the possession of the goods." (24th Ground of Appeal, p. 8, 11th Request to Charge, 174.)**

Before McGann could be made liable under the provisions of Section 10 of the Warehousemen Act, it must have "Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods." It was argued that the surrender of the McGann receipts by La Brecque Company accompanied with the letter, Exhibit P. 6, gave such information. This is obviously not so and the jury should have been so instructed.

POINT IX.

The Court erred in declining to charge the fourteenth request, which reads as follows:

> **"The notice given by Murray to Kraemer, if you find it was given, was not notice to McGann of the rights of La Brecque."**

And likewise erred in declining to charge the fifteenth request, which reads as follows:

> **"The notice given by Murray to Kraemer, if you find it was given, was not information to McGann, that the delivery made to Kalter or New Jersey Novelty Company was to one not lawfully entitled to the possession of the goods." (26th and 27th Grounds of Appeal, page 8, 14th and 15th Requests to Charge, page 174.)**

Mr. Murray, the attorney for La Brecque testified that when the sheriff was removing the goods under the writ of replevin, he, Murray, appeared and stated to a man named Kraemer (p. 82), "Mr. Kraemer, I protest against this, you haven't any right to take these goods out. We have outstanding warehouse receipts against these goods. You have got back your receipts." And he said, "Yes, I know it." And I said, "And our receipts are still outstanding. You haven't any right to take these goods."

This episode was denied by Kraemer, page 149.

What the Court charged with respect to this matter was (p. 166). "The only proof there is in this case of the giving of direct information upon the subject that La Brecque had issued its warehouse receipts against the goods it appears was that given on the day the writ of replevin was executed. It appears by the testimony of Mr. Murray, and perhaps another, that a Mr. Kraemer, who was then present, and who was there as the representative of McGann was told that La Brecque had issued its receipts against the goods. Although Mr. McGann says that Kraemer was the representative of The McGann Company there, if he was simply there as the representative of McGann for the purpose of seeing that the goods were properly loaded and removed, and it appears that he was not an officer or director of the company, and unless he was there for the purpose of receiving notice, such as it was claimed was then given to him (there is no proof that he was there for that purpose), then the notice to Kraemer of the fact that these receipts were issued would not be notice to McGann, if Kraemer was a mere employee and not an officer or director of the company, unless Kraemer conveyed that notice or that information to the proper officer or director of McGann, and there is no proof in this case that he did."

There was as the Court stated no proof whatever in the case that Kraemer was an officer or director of The McGann Company or that he was sent, at the time the goods were taken out under the writ of replevin, for any purpose other than to see that the goods were properly loaded, etc. It is clear that notice to him would not be notice to McGann unless, as the Court says, Kraemer conveyed that notice to the proper officer or director of McGann. But there was absolutely no evidence from which an inference could be drawn that Kraemer conveyed such notice to any officer or director of McGann. McGann was therefore entitled to a charge that the notice to Kraemer was not notice to McGann and what was said by the Court on page 166, was not a proper compliance with that request.

But assuming for the instance that notice to Kraemer that warehouse receipts had been issued by La Brecque was notice to McGann, such notice was certainly *not information to McGann that the delivery made to Kalter or the Novelty Company was to one not lawfully entitled to the possession of the goods.* It did not impart any information to McGann that by reason of

the issuance of the La Brecque receipts, La Brecque was entitled to the possession of the goods after the lien of McGann had been satisfied.

POINT X.

The Court erroneously declined to charge the eighteenth request, which reads as follows:

> **"If you find that the La Brecque Company ratified the sale to Kalter you must find a verdict for McGann."**

The Court erroneously declined to charge the nineteenth request, which reads as follows:

> **"If you find that La Brecque consented that the proceeds of the sale to Kalter should stand in place of the goods you must find a verdict for McGann."**

The Court erroneously declined to charge the twentieth request which reads as follows:

> **"If you find that La Brecque consented to the payment out of the proceeds of sale of $1,500 to New Jersey Novelty Company, McGann cannot be held for so much of the value of the goods."**

The Court erroneously declined to charge the twenty-first request, which reads as follows:

> **"In considering whether La Brecque ratified the sale you may take into consideration the probabilities of the situation and may consider whether it is reasonable to suppose that McGann would consent to an arrangement by which Kalter should pay the proceeds of the sale, and a part of such proceeds immediately be paid to La Brecque, and subsequently all of such proceeds, and McGann still be liable to La Brecque for the value of the identical goods for which Kalter paid."**

The Court erroneously declined to charge the twenty-fifth request, which reads as follows:

> **"From what you find to be the reasonable value of the goods, you must deduct the $1,500 paid to New Jersey Novelty Company by consent of the La Brecque Company." (28th, 29th, 30th, 31st and 34th Grounds of Appeal, pages 8 and 9; Requests to Charge, page 175.)**

These grounds of appeal, although separate and distinct and separately relied upon, will be argued together, because they are co-related and depend upon the same facts.

After part of the goods had been delivered to Kalter and after La Brecque, through Mr. Murray, had obtained an injunction out of the Court of Chancery restraining the delivery of any further goods and after La Brecque had notified Kalter, who at that time had not paid for the goods to the extent of approximately $3,000, an agreement was made between the parties under which the moneys in the hands of Kalter were paid over to Messrs. Bobker and Unger, as Trustees. Exhibit P. 15, page 196.

Mr. Murray's statement with respect to the manner in which this agreement happened to be entered into, commences on page 86, and see page 89. He testified (p. 89), "So then the question arose as to how this money was to be gotten over here from the Kalter Company, and who was to hold on to it. Mr. Lowy, I believe it was—yes; I know it was Mr. Lowy—said if we could come to an agreement as to what should be done with it and fix it so Kalter & Company would not be obliged to pay it the second time or run any chance on it Mr. Lowy could probably arrange to have the money paid to whomsoever we saw fit, and I think Mr. Unger and Mr. Bobker suggested I be made the Trustee of that money. I refused; I would not have anything to do with it, and I told them I did not consider it my money or La Brecque's money, and I would not have anything to do with it; but I would withdraw my objection to Kalter & Company paying it over. It was at my telephone order that they had held up the money, and I said I would withdraw that and consent to let Mr. Unger and Mr. Bobker, as Trustees, hold it."

After this money, the proceeds of the goods purchased by Kalter, was, in pursuance of this agreement, turned over to Messrs. Bobker & Unger, Mr. Murray, representing La Brecque, consented to the payment out of it of $1,500 to Prell, President of the Novelty Company (page 92), see his testimony as follows: "A It was agreed that Prell of the Novelty Company should get $1,500 of this money; that it was to be used by him to pay his payroll in Jamesburg, make slippers, additional goods to replace those which had been sold." See his cross examination, page 96. "Q So you considered this sale was to be in effect or at least confirmed, the purchase price was to be paid, the moneys representing the purchase price were to go to somebody other than McGann, to wit, the New Jersey Novelty Footwear Company, and, nevertheless, McGann was to stand respon-

sible for the full value of those goods; is that right? A No, that is not correct. Q Why is it not correct? A In the first place we did not confirm the sale. What we did was to take the proceeds when we could not get the goods."

Under cross examination by the Court (pp. 96-97), Mr. Murray testified that the $1,500 was to go to Prell to manufacture other goods to take the place of those that had been sold. And see (p. 98 and p. 99), "Q In turning over the $1,500 to Prell you felt that was being done for the benefit of the La Brecque Company, didn't you? A To a certain extent, in that it offered a chance of avoiding this litigation. Q And for which you thought the La Brecque Company would get the benefit? A To that extent." And see cross examination (p. 100), "Q You realize, don't you, that that results in this pending suit in compelling The McGann Company to pay the value of these cartons, the value of which has already been paid or disbursed? A Not at all, because that question in that form assumes that the price for which they were sold to Kalter & Company is the actual value. Q You are not suing for any difference in value? A We are suing for the real value of the goods. Q Irrespective of the fact that the sale has been consummated and the purchase price paid? A Irrespective of that fact." And see Mr. Bobker's testimony (p. 107), and Mr. Unger's with respect to the agreement is found on page 135. "Q Did you get any impression from that conference that this money was to be paid over in the manner contemplated and that McGann would remain liable for the value of the identical goods represented by the money? A I got no such impression. I went there in Mr. McGann's behalf." And see his testimony (pp. 140, 141 and 142).

Subsequently upon a petition being filed in Bankruptcy against the Novelty Company an order was made by the United States Bankruptcy Court restraining Messrs. Bobker and Unger from paying out any part of these moneys. The petition upon which the order was based made parties La Brecque and McGann the receipt holders and prayed for an adjudication of the Bankruptcy Court that the receipt holders were entitled to no rights because the receipts were improperly issued and that the fund be paid to the Trustee in Bankruptcy. See page 94, and the offer by McGann of the record of the proceedings in Bankruptcy, page 150, which offer was excluded by the Court and which action of the Court is specifically made a ground of appeal, page 152. (12th Ground of Appeal, page 3.)

The Court did not consider that the proceedings subsequent to the sale had any effect whatever upon the case and practically held that the evidence with respect to the subsequent proceedings, that is the payment of the moneys to Messrs. Bobker and Unger and the payment of the $1,500 to Prell, was immaterial. Notwithstanding the request of McGann it did not refer to these proceedings in its charge and refused to charge as requested.

From the testimony which had been offered, the jury might have concluded that La Brecque ratified the sale to Kalter. The Kalter Company held the proceeds of the sale and refused to pay them over without the consent of La Brecque. La Brecque consented to the payment of the moneys to Messrs. Bobker and Unger. These moneys were in fact paid over. Subsequent thereto La Brecque consented that out of the moneys, $1,500 should be paid to Prell of the Novelty Company. Subsequent to this, the United States District Court in Bankruptcy took control of the situation and treated the proceeds of the sale turned over to Messrs. Bobker and Unger with the consent of the La Brecque Company, as standing in the place of the goods and took over the administration of the fund in the place of the goods in a proceeding to which all of the parties to this proceeding as well as others are parties.

From the testimony the jury might have found, first, that La Brecque ratified the sale to Kalter and McGann was therefore entitled to have the 18th Request charged; second, that La Brecque consented that the proceeds of the sale to Kalter should stand in place of the goods and McGann was therefore entitled to have the 19th Request charged; third, that La Brecque consented to the payment out of the proceeds of sale of $1,500 to the New Jersey Novelty Company in which event McGann could not be held for so much of the value of the goods, that is to say, the $1,500 which, by the consent of La Brecque, had been paid over to Prell and lost to all of the parties could not be charged to McGann, and McGann was therefore entitled to have the 20th Request charged. If this testimony was material and the jury were entitled to consider the question of waiver or ratification, then in determining whether the La Brecque Company ratified the sale or not it might take into consideration the probabilities of the situation and might determine whether it was reasonable that McGann would consent to an arrangement that Kalter should pay the proceeds of the sale, and a

part of such proceeds immediately be paid to Prell, and subsequently all of such proceeds, and McGann should still remain liable to La Brecque for the value of the identical goods for which Kalter paid, and McGann was therefore entitled to have the 21st Request charged.

It is urged that in any event, the $1,500 paid to the Novelty Company with the consent of La Brecque cannot be charged against McGann, and McGann was therefore entitled to have the 25th Request charged.

POINT XI.

The Court declined to permit the McGann Company to offer in evidence the record of the proceedings in bankruptcy in the matter of the New Jersey Novelty Footwear Company, including the petition of the trustee in bankruptcy, with reference to 778 cartons of goods, part of the merchandise in dispute, the said record being evidential to show that there had been a change of the goods into money; that the New Jersey Novelty Footwear Company had become insolvent and had been adjudicated a bankrupt and that the trustee in bankruptcy had succeeded to its rights and that the bankruptcy court had obtained and had taken exclusive jurisdiction to determine the rights of the various parties, including the McGann Company and the La Brecque Company, in the goods and in the proceeds of the goods, and that the Bankruptcy Court had, in fact, taken over the jurisdiction for the purpose of determining that thing, and in such proceedings both The McGann Company and the La Brecque Company and the holders of warehouse certificates were parties (twelfth Ground of Appeal, p. 3; Offer and Objection, p. 150).

The contention of La Brecque was that the issuance of the warehouse receipts by it during the time when the goods were in the warehouse and while La Brecque was in physical possession of the warehouse and the negotiation of those certificates to the First National Bank of Jamesburg, The First National Bank of East Newark, Isadore M. Leff and Hyman Marsa, gave the latter such an interest in the goods as would give them the right to hold La Brecque and that because of this liability of La Brecque to the holders of the warehouse receipts, La Brecque had such an interest in the goods as required McGann after the satisfaction of its lien for storage charges, to surrender the goods to La Brecque rather than to the Novelty Company, or upon the order of the Novelty Company.

After some of the goods sold to Kalter were in fact delivered, but prior to the delivery of same, an injunction had been obtained by the La Brecque Company and certain of the goods were tied up in the McGann warehouse.

As has been heretofore stated by virtue of the agreement evidenced by the letter, P. 15, page 196, Kalter & Company paid to Messrs. Bobker and Unger the balance due from it for the purchase price of the goods delivered to it and as has heretofore been stated out of this fund, by consent of La Brecque $1,500 was paid to Prell, President of the Novelty Company.

The Novelty Company was subsequently declared a bankrupt and a trustee appointed. The trustee filed a petition in the bankruptcy proceedings making parties La Brecque, The First national Bank of Jamesburg, The First National Bank of East Newark, Isadore M. Leff and Hyman Marsa, all of the holders of La Brecque receipts, The McGann Company, charging that the goods remaining in the possession of McGann were the rightful property of the trustee in bankruptcy by reason of the fact that there were no valid receipts issued and outstanding and alleging that the purported warehouse receipts issued by La Brecque were invalid, and praying for an order adjudging and determining that the goods now in the possession of The McGann Company be declared to be the property of the bankrupt estate, free, clear and discharged of the respective claims of the persons referred to in the petition.

A further petition was filed by the trustee making the same persons parties and setting up that a check for $3,000 and upwards had been made to Messrs. Bobker & Unger. (This is the same $3,000, the proceeds of the Kalter sale), that Messrs. Bobker and Unger had no interest in the fund and praying for an order directing Messrs. Bobker and Unger to turn the fund over to the trustees. All of the parties referred to, including La Brecque, appeared in the proceedings and at the time of the trial, these proceedings were pending and undetermined. (Page 94.)

Neither the receipt holders nor the trustee in bankruptcy are parties to the pending litigation, so that a judgment in the pending litigation is not *res adjudicata* as to them.

Taking the statement of Mr. Murray as to the effect of the agreement between La Brecque and McGann with respect to the $3,000 paid by Kalter, as correct, McGann or La Brecque, as the case might be, would have the right to resort to the

$3,000 in satisfaction of any liability under which they might be liable. (Pages 95, 96, 98.)

Mr. Murray testified (p. 90):

> "The agreement was that the money was to be held by the trustees until this suit now before the Court, which we are trying today, was fought out, and that if The McGann Company got a judgment against it for the taking or selling of these goods, in our favor, it could use the money as far as it would go to satisfy that judgment."

The Bankruptcy Court upon the petition of the trustee in bankruptcy has taken full and complete jurisdiction to determine first whether the receipts issued by La Brecque are valid or not, second, whether the receipt holders or La Brecque or McGann have any interest in the goods now in the possession of McGann or in the moneys in the possession of Messrs. Bobker and Unger.

Whatever may be the judgment in this suit, the Court of Bankruptcy may determine that McGann has no interest in these goods or in this money because the receipts issued by La Brecque are invalid and neither the receipt holders nor La Brecque have any interest or right or had any interest or right in the goods or in the proceeds thereof and the moneys may be directed to be paid and the goods may be directed to be turned over to the trustee in bankruptcy. In that event, McGann will be compelled to pay the judgment in this suit and at the same time will not get the benefit of the agreement made between the parties, under which the money was paid over to Messrs. Bobker and Unger, as that agreement is construed by La Brecque.

It is submitted therefore that the Court erred in declining to admit the offer of the proceedings in the Bankruptcy Court. (Offer and objection, pages 150 and 152.)

POINT XII.

The Court erroneously permitted the witness, Norbury C. Murray, to testify as to the terms of an agreement between The McGann Company and the La Brecque Company and others, where it appeared that the agreement was in writing (11th Ground of Appeal, p. 3; Question and Objection, p. 89-90).

It appeared that after considerable negotiations the agreement between the parties was reduced to writing. Exhibit P. 15, pages 196, 197. Notwithstanding this, Mr. Murray was permitted to testify (p. 89, etc), not only as to the conversation between the parties which lead up to this agreement, but also as to what he considered to be the effect of the agreement.

POINT XIII.

The Court erroneously permitted the La Brecque Company to offer in evidence the contract made between the La Brecque Company and the New Jersey Novelty Footwear Company contained in letters marked Exhibits P. 10 and P. 11 pp. 189-190.

(9th Ground of Appeal, Evidence and Objection, pp. 68-69.)

By means of these letters, La Brecque sought to prove that after McGann had been ousted from possession of the warehouse the Novelty Company had contracted with La Brecque that La Brecque should hold the goods for it.

Under the terms of the contract, as evidenced by the letters, La Brecque was to hold the goods, provided, "Our outstanding indebtedness to McGann to be taken over by the La Brecque Company, Inc., and we to pay all indebtedness on each individual receipt upon taking of same out of storage."

There was no evidence that McGann had any knowledge of the making of this contract by La Brecque and the Novelty Company nor was there any evidence that La Brecque had complied with the conditions of the contract, and certainly in the absence of this evidence, the arrangement between La Brecque and the Novelty Company, whatever it was, was immaterial. The arrangement did not give La Brecque the right as against McGann to the possession of the goods or to issue warehouse receipts which would create rights in the goods to the prejudice of McGann.

POINT XIV.

The Court erred in permitting La Brecque to offer in evidence the papers showing the storage charges of McGann. Exhibit P. 5. (8th Ground of Appeal, p. 3, Evidence and Objection, p. 55. Printed page 183.)

This testimony and offer was objected to upon the ground that it was immaterial and irrelevant. At the time of the trial of this action, the replevin suit had already been determined and it had been decided that McGann was entitled to take possession of the goods to hold for the satisfaction of his storage charges. The amount of these storage charges were wholly immaterial in the pending suit and injected a false issue.

POINT XV.

The Court erroneously permitted the following question to be asked of the witness, Joseph F. McGann:

> **"Q Did you make or cause to be made any demand upon the La Brecque Company for the payment of these charges between July 28th and August 2nd?"**

7th Ground of Appeal, p. 3, Testimony and Objection, p. 54.

The same objection as to the sending of the statement of the storage charges applied to this question. It had already been determined that McGann was entitled to possession of the goods and whether McGann had or had not made demand upon La Brecque for the payment of the charges prior to taking the goods into its possession by virtue of the writ of replevin, was wholly immaterial and injected a false issue.

POINT XVI.

The Court erroneously permitted to be offered in evidence McGann invoices Numbered 1232, 2006, 1385 and 2087, marked Exhibit P. 4 (6th Ground of Appeal, Offer and Objection, p. 52, printed page 181).

These were statements rendered by McGann from time to time to the Novelty Company prior to August 2 when McGann took the goods by virtue of the writ of replevin.

As before stated, it had been determined that on that date McGann was entitled to possession of the goods. The in-

voices which had been sent to the Novelty Company prior to August 2 were, so far as the issues in this case were concerned, wholly immaterial and injected a false issue in the case.

While the admission of some of this immaterial evidence may not have improperly influenced the jury, the admission of the entire line which was immaterial must be presumed to have had some influence. The purpose must have been to show that prior to August 2, McGann made improper charges to the Novelty Company and did not properly request La Brecque to pay the charges and so conducted itself as not to be entitled to the possession of the goods on August 2, but that point had been determined in McGann's favor in the replevin suit.

We can conceive of no view in which this testimony could have been material upon the issue which was to be determined in the pending suit which was, as put by the Court to the jury in its charge, whether McGann on or about the 6th day of August, 1919, delivered the goods to a person not lawfully entitled thereto having information that he was so doing.

POINT XVII.

The Court erroneously permitted the following question to be admitted and answered by Joseph F. McGann:

> **"Do you know whether or not the East Newark Bank acquired any of these receipts?"**

3rd Ground of Appeal, p. 3, Question and Objection, p. 49.

The Court erroneously permitted in evidence the fact that the warehouse receipts issued by the McGann Company to the New Jersey Novelty Footwear Company had been negotiated by the New Jersey Novelty Footwear Company with certain banking institutions and individuals.

4th Ground of Appeal, Testimony and Objection, p. 49.

The Court erroneously permitted the following question to be asked of the defendant, Joseph F. McGann:

> **"Q Prior to their return on July 31st, 1919, did you know that these receipts had been negotiated by the New Jersey Novelty Footwear Company to various parties, including banks and individuals?"**

5th Ground of Appeal, p. 3, Testimony and Objection, pp. 49-50.

The Court erroneously charged the jury as follows:

"The effect of the issuing of those certificates by La Brecque was to give to La Brecque, after the lien of McGann had been extinguished, the right to the possession of those goods, and to make La Brecque the one lawfully entitled to the possession of the goods, and therefore, the goods should be delivered, after McGann had realized upon them, had extinguished his lien, to La Brecque if—and there you come right to the question in this case—McGann had knowledge, if McGann had information that La Brecque was the party entitled to the goods, because as between La Brecque and the Novelty Company there was no question but that the Novelty Company had not the right to the possession of the goods when it had turned them over to La Brecque and La Brecque had issued against them its warehouse certificates. Therefore, had McGann information when the goods were sold to Kalter that La Brecque and not the Novelty Company was the person lawfully entitled to the goods?"

41st Ground of Appeal, Charge to the Jury, 165, Exception and Objection, p. 171.

The Court erroneously charged the jury as follows:

"It is disclaimed on the part of the La Brecque Company that they claim any right to the possession of the goods because of storage charges, because at that time they were at least constructively if not actually in possession of McGann, so that their rights depended upon the issuing of these negotiable certificates."

"So the very narrow question for you to decide in this case is whether or not the evidence preponderates that at the time McGann released the goods to Kalter by order of the Novelty Company McGann had knowledge of the issuing of the La Brecque warehouse receipts. If it had then La Breque is entitled to recover in this case. If the evidence does not so show by its preponderance then McGann is entitled to your verdict."

44th Ground of Appeal, Charge to the Jury, p. 167. Exception and Objection, p. 174.

The Court erroneously found the following holdings of fact and findings of law:

"For the purposes of this case I shall hold that those warehouse certificates created in the La Brecque Company a lien and the right to possession of these goods after the lien and the right to possession of the McGann Company had become extinguished. The right of The McGann Company was extinguished, when it had received all of its warehouse certificates and when it had been paid the amount of its storage, which was some time in August, 1919. Therefore, that the New

Jersey Novelty Footwear Company, under its agreement with the La Brecque Company, by virtue of its agreement with the La Brecque Company, was not the person who was in fact at that time lawfully entitled to the possession of these goods. This would make the warehouseman liable as for a conversion of these goods if the warehouseman had information that the delivery about to be made to the New Jersey Novelty Footwear Company or its assignee, the Kalter Company, was not lawfully entitled to the possession of these goods. That, I think, is the sole question in this case and the only question that ought to be argued to the jury."

45th Ground of Appeal, and Finding of the Court and Objection, pp. 158-159.

The foregoing points will be argued together although separately urged, because they are co-related. If the position of McGann with respect to them be correct, the Court likewise erred in refusing to direct a verdict for McGann. (13th and 14th grounds of appeal, p. 4, motion, p. 158.)

The matter has already been argued (p. of this brief) but we will here re-state it.

At the time this suit was tried it had been determined that McGann was entitled to take these goods into its physical possession upon the 2nd day of August, and that it was entitled to hold the goods as against all persons, including La Brecque, until its storage charges had been satisfied.

The depositor of the goods with McGann was the Novelty Company.

Under the provisions of section 8 of the Warehouseman's Act, McGann was bound to deliver the goods upon a demand made "by the depositor," if such demand was accompanied with "an offer to satisfy the warehouseman's lien."

There is no question but that on August 5th or 6th, a demand was made by the Novelty Company upon McGann to turn over the goods to the Kalter Company, whom the evidence did not disclose was not a bona fide purchaser for value without notice from the Novelty Company and this demand was accompanied by an offer to satisfy the warehouseman's lien. With that demand, on advice of counsel, McGann complied.

The demand for the delivery was made by the depositor, that is the Novelty Company. It was accompanied with an offer to satisfy the warehouseman's lien. McGann could not under the provisions of the act decline to make the delivery.

Under section 10 it is provided that

> "Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section. (That is Section 9) and though he delivered the goods as authorized by said subdivisions he shall be so libale, if prior to such delivery he had either
>
> (a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery; or
>
> (b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods."

The Court conceived that after the satisfaction of McGann's lien, La Brecque, by reason of the issuance of its warehouse receipts was entitled to possession of the goods and that it was for the jury to determine whether McGann at the time it made the delivery to Kalter had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods, and held that if McGann had information that La Brecque had issued its warehouse receipts, it had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

See that portion of the charge stated in the 44th ground of appeal, p. 11.

The Court stated, on p. 166, that if McGann had no knowledge of the rights of La Brecque under its warehouse receipts it had no alternative, under the eighth section of the Warehousemen's Act, but to deliver the goods to the Novelty Company (p. 166, l. 15).

The Court, therefore, held that the delivery made by McGann was under section 8 but that the provisions of section 10 applied. (See the Court's charge, p. 164, l. 35.)

It held that paragraphs (b) and (c) referred to in subdivision 10 did not apply.

But this section 10 can have no application whatever to a delivery made under section 8. It can only have application to a delivery made under section 9.

Sections 8, 9, 10, 11 and 12 must be read together.

Section 8 provides in what instances a warehouseman *is bound* to deliver.

Section 9 provides for such instances in which a warehouseman *is justified* in delivering.

There *is no reference in section 8 to the provisions of sections 10, 11 and 12.*

There *is a reference in section 9 to the provisions of sections 10, 11 and 12.*

Section 9 commences "A warehouseman is justified in delivering the goods, *subject to the provisions of the three following sections,* to one who is," and then follows (a), (b) and (c). You do not find similar language in section 8.

Now, immediately following section 9 is section 10 and that section provides that if a warehouseman delivers the goods to one who is not lawfully entitled to the possession, the warehouseman shall be liable as for a conversion if he delivered otherwise than as authorized by subdivisions (b) and (c) of the preceding section, that is 9, and even if he delivered the goods as authorized by such if prior to such delivery he had, etc.

If section 10 applies to section 8, this results—if under section 8 the warehouseman delivers to a holder of a receipt or to the depositor upon a demand accompanied by an order to satisfy the warehouseman's lien and if as a matter of fact the holder of the receipt or the depositor is not in fact lawfully entitled to the possession of the goods, the warehouseman is absolutely liable as for conversion to the person having a right of property or possession in the goods, whether he has been requested by the persn lawfully entitled not to make delivery or whether he had information that the delivery about to be made was to one not lawfully entitled to the possession or not. *If he delivers under section 8, he certainly does not deliver under subdivisions (b) and (c) of section 9 and it is only when he delivers under subdivisions (b) and (c) of section 9 that he is saved,* if he has not been requested by or on behalf of a person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or has not information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

It is suggested that when the demand was made, as it was made, by the Novelty Company, the depositor of the goods, for the delivery of the goods to the Kalter Company accompanied

as it was by an offer to satisfy the lien, McGann was under the obligation of declining to comply. The most that McGann could say to the Novelty Company would be that it would accept the money of the Novelty Company in satisfaction of its lien, but would deliver the goods to La Brecque irrespective of the demand of the Novelty Company, the depositor.

This position would result, under the provisions of section 29, in the loss of the lien of McGann, because under the provisions of section 29 it would lose its lien by refusing to deliver the goods when a demand was made with which it was bound to comply under the provisions of the act, and under the provisions of section 8, it was bound to comply with a demand made by the depositor, if the demand was accompanied with an offer to satisfy the warehouseman's lien.

If section 10 of the act applies to delivery under section 8, the negotiability of warehouse receipts is absolutely destroyed, for all that a person need do to prevent delivery to the holder of a warehouse receipt or to the depositor, would be to serve a notice upon the warehouseman, requesting the warehouseman not to make the delivery.

The purpose of the act was to increase the negotiability of receipts.

Even under the old act this Court held in *Wheeler* v. *Brookfield,* 70 N. J. L., p. 703, that a warehouseman properly delivered to the depositor property stored by the depositor, notwithstanding the fact that there had been, prior to the delivery, served upon the warehouseman a notice by the person lawfully entitled to the possession of the goods not to deliver.

The Court erred in holding that the issuance of these receipts by La Brecque gave it any right to the possession of the goods after the satisfaction of the lien of McGann.

The Warehouseman's Act provides, section 2, that a receipt must contain (b) the date of issue of the receipt.

Section 50, 4 Compiled Statutes of N. J., p. 5785, provides:

> "A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime."

In the case at bar La Brecque had forcibly prevented McGann from removing these goods.

At the time of the issuance of La Brecque receipts the goods were not in the actual custody of La Brecque. They were in the custody of McGann. La Brecque was only the agent of McGann through its own wrong.

It issued these receipts and dated them, contrary to the provisions of the act, at a time when neither the goods nor the warehouse was under its control.

The reason given by LaBrecque for the dating back of these receipts (p. 74) does not alter the situation.

La Brecque then took these receipts and endeavored to induce bona fide holders of McGann receipts to exchange the McGann receipts for the La Brecque receipts (p. 75).

La Brecque was doing everything within its power to obtain the business of McGann (p. 76). See the newspaper advertisement, p. 198, Exhibit D. 2, referred to on page 76.

The confusion and loss has been occasioned, first, by the active intervention of La Brecque in endeavoring to appropriate to itself the business of McGann, second, by the failure of La Brecque to give any formal notice to McGann of its claimed rights, third, by the deliberate standing by of La Brecque under advice of its counsel, after McGann had obtained possession of the goods upon a writ of replevin, taking its chance of anything happening to the goods, although there was a clear remedy, to wit, rebonding (pp. 101-103).

POINT XVIII.

The Court erroneously charged the jury as follows:

> **"That is the only proof in the case of actual notice being given to McGann; but it may be that actual notice is not necessary, and it would not be necessary if the information which McGann had if the occurrences surrounding the transaction was such that an ordinarily intelligent person would have known that La Brecque had issued its receipts against the goods." (43rd Ground of Appeal, Charge 167, Objection 171-172.)**

The Court also erred in charging as follows:

> **"So the very narrow question for you to decide in this case is whether or not the evidence preponderates that at the time McGann released the goods to Kalter by order of the Novelty Company McGann had knowledge of the issuing of the La Brecque warehouse receipts. If it had then La Brecque is entitled to recover in this case. If the evidence does not so show by its preponderance then McGann is entitled to your verdict." (44th Ground of Appeal, p. 11, Charge 168, Objection 172.)**

The only evidence which it was claimed to be in the case to show knowledge of McGann that the delivery "about to be made was to one not lawfully entitled to the possession of the goods," was evidence which it was claimed tended to show that McGann had knowledge of the issuance of the La Brecque receipts.

As the Court held there was no direct proof of this.

The Court instructed the jury that if they found that McGann had knowledge of the issuance of the La Brecque receipts, then McGann was in the position of having "information that the delivery about to be made was to one not lawfully entitled to the possession of the goods."

This, it was contended, was error.

The mere fact that McGann may have had information that La Brecque had issued its warehouse receipts plus the fact that the Court held under the law that the issuance of the La Brecque receipts gave La Brecque the right to possession of the goods, was not proof that McGann had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods, because it conclusively imputes to McGann knowledge that the issuance of the La Brecque receipts gave La Brecque right to the possession of the goods.

Subdivision (b) of this section of the statute contemplates knowledge on the part of the warehouseman not only of a fact which would give another than the one to whom delivery is about to be made, the right to delivery but of the concrete fact that the person to whom delivery is about to be made is one not lawfully entitled to the possession of the goods.

In other words, subdivision (b) requires bad faith on the part of the warehouseman.

Subdivision (a) protects a person lawfully entitled to the possession of the goods if he gives notice.

Subdivision (b) is designed to cover those cases where, although no notice has been given, the warehouseman acts in bad faith.

It is, therefore, necessary under subdivision (b) to prove more than the mere fact that another than the one to whom delivery was made was entitled to delivery and that the warehouseman had knowledge of the facts which made the other entitled to delivery. There must be sufficient in the case for the jury to find that the warehouseman knew that these facts made the other entitled to delivery.

The word "Information" is defined as "Knowledge acquired, derived, or inculcated, as by observation, by reading or study, or in conversation. Timely or specific knowledge respecting some matter of interest or inquiry." Century Dictionary.

Metcalf v. *Mutual Fire Ins. Co.,* 112 N. W. 22, 132 Wis. 67.

In order that McGann have information that the delivery about to be made was to one not lawfully entitled he must *have knowledge that La Brecque was entitled to the goods.*

Where knowledge or intent is required the maxim that ignorance of the law excuses no one does not apply.

Cutter ads *The State,* 36 N. J. L. 125.

16 Corpus Juris 85.

As the Chief Justice said in the *Cutter* case:

> "But it is further argued on the part of the prosecution, that as the fees to which the justice was entitled are fixed by law, and as he cannot set up, as an excuse for his conduct his ignorance of the law, his guilty knowledge is undeniable. The argument goes upon the legal maxim, *ignorantia legis neminem excusat.* But this rule, in its application to the law of crimes, is subject, as it is sometimes in respect to civil rights, to certain important exceptions. Where the act done is *malum in se,* or where the law which has been infringed was settled and plain, the maxim, in its rigor, will be applied; but where the law is not settled, or is obscure, and where the guilty intention, being a necessary constituent of the particular offence, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied. To give it any force in such instances would be to turn it aside from its rational and original purpose, and to convert it into an instrument of injustice.

It is significant that the statute requires information, not notice. It has been said that notice is equivalent to information, intelligence or knowledge. "This may be true for purpose of a general definition, but it is not strictly accurate, for 'notice' is not always synonymous with 'knowledge,' and facts which do not show actual knowledge may suffice to satisfy a requirement of 'notice.' However closely actual notice may in many instances approximate knowledge, there may be actual notice without knowledge."

20 Ruling Case Law, title "Notice," sec. 1.

Moore v. *Kenockee Tp.,* 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555.

What the Court in the case at bar has done has been to apply the equitable rule that where notice is required, if there be present facts which would put a reasonable man on inquiry, notice may be presumed.

But this rule is based upon the hypothesis as stated by Pomeroy, 594:

> "It should be carefully observed that the notice thus defined is not knowledge nor does it assume that knowledge necessarily results."

But the Warehousemen's Act does not require notice, it requires information which is equivalent to knowledge.

It does not require information of facts which make a party not the proper party to whom to deliver goods but of the fact that the party to whom delivery is about to be made is not the person lawfully entitled thereto, it requires a knowledge of the law, it does not presume that knowledge.

But the Court in the case at bar has held not only that it may be inferred that McGann had knowledge of the issuance of La Brecque receipts but from that inferred knowledge it must be conclusively inferred or presumed that it had knowledge that the issuance of these receipts made the Novelty Company a party not lawfully entitled to delivery.

There was no such evidence in the case at bar.

It was held by the Court that knowledge on the part of McGann, or as the Court said, if the occurrences surrounding the transaction were such that an ordinarily intelligent person would have known that La Brecque had issued its receipts against the goods, that standing alone was sufficient to satisfy the requirements of subdivision (b) of section 10.

If this be the law, it is certainly harsh.

There was no dispute but that McGann was acting throughout by advice of counsel.

Mr. Unger testified, p. 134:

> "Q Did you at that time or at any time prior to the delivery have any information that the delivery about to be made was to one not lawfully entitled to possession? A No, sir.
>
> Q Did you advise McGann to make the delivery? A I did.
>
> Q Did you know at the time, or any time prior to the delivery, that there were any La Brecque receipts out? A No, sir.

Q Or that La Brecque had any interest in the goods? A No, sir.

Q What was your opinion at that time with respect to the obligation of McGann?''

This question was overruled but the door having been opened, it was repeated and answered (p. 146).

''A My opinion at that time was—and still is—and I think that it has been somewhat vindicated by the determination of the Court in the replevin suit, that the La Brecque Company never had the right to the possession of these goods; that it was never a warehouseman for these good; that the McGann Company at all times had the right to possession until the satisfaction of its warehouse charges, and that when those warehouse charges had been satisfied it owed a duty to the depositor of the goods, namely to deliver them to the depositor, and having received instructions from the depositor to do that I advised The McGann Company that it must abide by its instructions and make delivery in accordance therewith.''

McGann testified on page 146:

''Q Did you at the time of the delivery of the goods to Kalter have any knowledge of any outstanding La Brecque receipts? A I did not.

Q From who did you, prior to the delivery to the Kalter Company, have instructions or advice from counsel with respect to the delivery? A I received instructions from Mr. Unger, the counsel for The McGann Company, to make delivery of the cartons to the Max Kalter Mercantile Agency.

Q Did you at the time of the delivery, or prior thereto, have any information that the delivery contemplated to Kalter was a delivery to one not lawfully entitled to the possession of the goods? A I did not.'' (P. 147.)

As we have previously stated, the conference which took place which resulted in the delivery of the goods to Kalter was not held in secret. Both Messrs. Unger and Bobker attempted to get Murray, representing La Brecque, there. Unger's testimony, pp. 136 and 65; Bobker's testimony, p. 110, and see Murray's testimony, p. 85, l. 10.

Murray, counsel for the La Brecque Company, seemed to be in doubt as to the rights of the parties.

(P. 101.)

''A I knew that he had taken them. His writ of replevin or his complaint showed that the only thing he claimed was the right to his charges. That did not give him the

right, as I understood it *or as I now understand it,* to do anything but hold the goods until they are paid.

Q When they are paid, then what? A Return them.

Q To whom? A Where he got them from.

Q To the person from whom he got them? A Or else notify the person from whom he got them to come and get them; one of the two. * * *

Q Why then did you file that bill of complaint on August eighth? A Because we wanted the goods back. The receipt holders had a right to come to the La Brecque Company warehouse and demand that we give them the goods. If they were in the possession of the McGann Company we could not comply with the demand, and we did not want to be in that position.

Q You knew you could re-replevin them? A Yes.

Q Why didn't you? A If we were wrong in our view regarding the right of Mr. McGann to retain his lien for storage charges then it would result in a judgment being given against us on the replevin suit.

Q Your idea is that if you retained these goods and Mr. McGann recovered in the suit he could recover a judgment against you for $10,000, notwithstanding his real claim? A He could recover, as I understand it, the value of the goods.

Q And collect it? A I do not say that."

(P. 102.)

"Q When did you notify The McGann Company, or anyone connected with The McGann Company, of your rights, except this man Kraemer—of your assumed rights? A I did not. No.

Q Nor anybody else, to your knowledge? A Except what has been testified to so far.

Q That is the Kraemer incident; that is the only notice you gave? A The only notice I gave; yes, I think that is right.

Q Didn't you think this was of sufficient importance, if you claimed a right to those goods, to formally notify The McGann Company of your claim? A No. This thing has been going on. I assumed after I told them on Saturday they knew it, and I did not think of such a thing as them disposing of the goods. I was not worrying about that at all, only I wanted to get the goods back as quickly as possible so we would not get in trouble with the receipt holders.

Q You knew there was the possibility that the New Jersey Novelty Footwear Company or someone else would satisfy The McGann Company lien? A I never dreamed of such a thing after they had made the contract with us to advance it for them.

Q Is that the reason why you refrained from taking any action? A I was preparing to take it into another court.

Q Your knowledge of the fact that the La Brecque Company had issued these additional receipts, upon which they were liable, according to your view, in thousands of dollars every single day the La Brecque Company was out of the possession of these goods — that was a danger, wasn't it? A Not if they were properly taken care of. I did not consider they were in any danger. I did not consider the goods were in any danger at all.

Q What did you think would ultimately happen to those goods if you did not d oanything? Did you think they would remain with McGann indefinitely? A I did not consider that question, because I was at the time filing a bill in Chancery which was going to determine that question. If you want that statement answered I would say I would suppose The McGann Company would hold them and sell them in the way provided by law, by public auction."

(P. 104.)

"Q You knew that the New Jersey Novelty Footwear Company was the depositor, didn't you, so far as McGann was concerned? A Yes, sir; I knew that the goods originally belonged to the New Jersey Novelty Footwear Company.

Q And you were familiar with the warehouse act, weren't you? A Fairly.

Q You knew this warehouse act required The McGann Company, or rather the warehouse company, to surrender to the depositor upon payment of the warehouseman's charges, did you not? A Provided the rights of no other parties had been acquired to the goods in the meantime, yes.

Q What? A Yes, provided he was the only party interested in the goods. Let me see if I understand the question again. Repeat it.

(It was repeated.)

A Not when The McGann Company knew that the La Brecque Company had outstanding charges, section 33, I think, covers that. I am not sure of that."

As a matter of fact, section 33 has nothing to do with the case and as the Court stated, La Brecque waived any right under any assumed lien. The reason for this was that it could have no right because it could not have its warehouseman's lien after the goods were lawfully taken from its possession, if any lien it ever did have, and see his testimony, p. 105.

According to the view taken by the Court, although counsel now sharply differ as to the legal rights created by the facts and although Mr. Murray, counsel for La Brecque, was not certain as to what the rights of the respective parties were, McGann was

absolutely bound to know, at his peril, the legal rights of La Brecque.

It is submitted that there was no proof from which the jury could have found that McGann had information that the delivery about to be made was to one "not lawfully entitled" to it and that for this reason the Court erred in charging as aforesaid and the Court also erred for the same reason in refusing a direction of a verdict for McGann as has been previously argued.

Conclusion.

It is submitted that the judgment in case No. 1 should be affirmed and the judgment in case No. 2 be reversed and a *venire de novo* issue.

MILTON M. UNGER,
MERRITT LANE,
Of Counsel for McGann.

March Term, 1921.

New Jersey Court of Errors and Appeals

THE MCGANN COMPANY, *Plaintiff-Appellee,* *vs.* NEW JERSEY NOVELTY FOOTWEAR COMPANY and LA BRECQUE COMPANY, INC., *Defendant-Appellant.*	*Action at Law.* *In Replevin.* **On Appeal No. 1.**

Appeal by defendant, La Brecque Company, Inc., from judgment in Essex County Circuit Court in favor of plaintiff, in an action of replevin based on a claim by the plaintiff, of a lien for warehousing charges on the replevied goods, which were in the possession of the defendant, La Brecque Company, Inc.

STATEMENT OF FACTS.

1. On October 30th, 1918, Joseph F. McGann occupied the storage warehouse at 100-110 Front street, Newark, N. J., under a lease from the then owner, P. Ballantine & Sons, expiring April 30th, 1926, subject to the prior termination in case of sale of the premises upon six months' notice thereof to the tenant, during which six months the tenant was to occupy the premises rent free.

2. Prior to that date the premises were sold to the defendant, La Brecque Company, Inc., and notice of the termination of the lease on May 1st, 1919 was given to the tenant jointly by P. Ballantine & Sons and La Brecque Company, Inc. The tenant disputed the efficacy of the notice and refused to vacate the premises on May 1st, 1919.

3. Dispossess proceedings were then brought in the Second District Court of the City of Newark, which resulted in a judgment for possession against the tenant and in favor of this defendant, La Brecque Company, Inc. Numerous, but unsuccessful attempts were made by the tenant to procure a stay in the execution of this judgment, which are recited at length in the opinion of this Court in the case of McGann *vs.* La Brecque Company, Inc., reported 109 Atl. 501, March 1st, 1920 (Law Report not yet published).

4. When the plaintiff, the McGann Company and the tenant was ousted from the possession of the premises on or about

June 19th, 1918, under the judgment of dispossess, he or the sub-tenant left in the premises, the goods in question with other goods, which had been stored with them, so that La Brecque Company, Inc., acquired physical possession of the goods in question.

5. The plaintiff, the McGann Company, is a corporation owned by the tenant, Joseph F. McGann, and occupied the premises as his sub-tenant.

6. The plaintiff, the McGann Company, the defendant, La Brecque Company, Inc., and the tenant, Joseph F. McGann, were all engaged in the business of general or common warehousemen, and this defendant had purchased the premises for use in connection with its business.

7. After receiving the notice aforesaid, the plaintiff herein, the McGann Company, or the tenant, accepted from New Jersey Novelty Footwear Company (hereinafter called the "Novelty Company"), the goods in question in the months of February, March, April and May, 1919, for storage in the warehouse (the notice to vacate May 1st, 1919, had been given the preceding October). These goods were received at various times during such months and for each lot thereof, the plaintiff or the tenant issued its or his negotiable warehouse receipts to the order of New Jersey Novelty Footwear Company.

8. These receipts were then endorsed in blank by the Novelty Company and negotiated by way of sale or pledge as security for loans, to various third parties.

9. At the time of the deposit of the goods by the Novelty Company with the plaintiff or Joseph F. McGann, storage rates were agreed upon by them at the rate of 11¢ per month for the large size cartons and 7½¢ per month for the small size (subject to future adjustment if not satisfactory), (State of Case, page 165, Exhibit P. 3).

10. After the defendant, La Brecque Company, Inc., acquired physical possession of the goods in question, the depositor, the Novelty Company with the knowledge of the plaintiff and the tenant, contracted with defendant, La Brecque Company, Inc., for the latter to act as warehouseman of said goods in place of the plaintiff or the tenant, and it was agreed between the Novelty Company and the defendant, that the latter would pay the proper amount of storage charges due the plaintiff or the tenant as soon as the same could be ascertained and verified, and would issue and substitute the La Brecque Com-

pany, Inc., negotiable warehouse receipts for the McGann Company receipts then outstanding against the goods, which McGann Company receipts were to be surrendered to La Brecque Company, Inc., and by it to the McGann Company, and that La Brecque Company, Inc., should have a lien on the goods not only for such charges as might accrue to it for future warehousing, but also for the accumulated charges advanced for the Novelty Company to the McGann Company.

11. Pursuant to this contract, the La Brecque Company, Inc., at once commenced to issue a series of its negotiable warehouse receipts, bearing the same date and calling for the same number of cases of goods, as the McGann receipts called for, made in favor of the Novelty Company, which receipts were endorsed in blank by the Novelty Company for the purpose and delivered to the several holders of the McGann Company receipts which were then delivered by the holders to La Brecque Company, Inc. This series of exchanges was completed before July 31st, 1919, and by that date all of the McGann warehouse receipts had been delivered to McGann by La Brecque Company, Inc.

12. From the date of the original deposit of the goods, the plaintiff or Joseph F. McGann rendered monthly bills for the warehousing charges to the Novelty Company, first at its Newark address and later, when it had moved its factory to Jamesburg, New Jersey, to it at that address. In some or in all of these bills, there were errors of different kinds, and on August 1st the McGann Company sent to the Novelty Company at Jamesburg, a complete set of bills or invoices for warehousing charges it claimed had accumulated, those which were in correction of previous bills, being designated as "corrected."

13. On, prior and subsequent to July 31st, La Brecque Company, Inc., repeatedly requested the McGann Company for an itemized statement of the charges which it claimed against the goods (Exhibits D. 2, D. 3, D. 4, D. 5, D. 6, State of Case, pages 177-180), in order that it might verify and pay the same.

14. The only information as to such charges which the La Brecque Company, Inc., received was an unitemized statement (Exhibit D. 9, State of Case, page 181), containing a list of figures which were supposed to represent the sum totals of the bills or invoices (State of Case, page 45). This statement afforded no information as to the size of the cartons nor the rate charged nor the quantity charged for, nor the length of time

for which such charges were made. La Brecque Company, Inc., declined to pay the amount demanded until it was furnished with an itemized statement thereof.

15. While endeavoring to obtain such itemized statement, La Brecque Company, Inc., was served by the McGann Company with a demand for the possession of the goods, with which, because of its contract with the Novelty Company, it did not comply. This demand was later, and up to as late as August 2nd (the date of the issuance of the writ of replevin herein), followed by a demand on the part of the McGann Company for the amount of its charges as set forth in statement (Exhibit D. 9), unaccompanied with any further demand for the possession of the goods.

16. On August 2nd, 1919, the plaintiff, the McGann Company, knowing that La Brecque Company, Inc., negotiable warehouse receipts for these goods were outstanding and in the hands of third parties, removed from the warehouse, under the writ of replevin herein, the goods in question.

17. On August 4th, or 5th, the Novelty Company (without the knowledge or consent of La Brecque Company, Inc.), paid the McGann Company the amount of its charges as claimed, whereupon, without the knowledge or consent of La Brecque Company, and knowing that the warehouse receipts of the latter were still outstanding and held by third parties, the McGann Company surrendered the goods to the Novelty Company which sold them and departed with the proceeds.

18. The La Brecque Company, Inc., denied the right of the plaintiff under the circumstances, to replevin the goods, and filed the usual formal counterclaim in addition to its answer, which raised the issue as to the right of the plaintiff to replevin (State of Case, page 8).

19. The La Brecque Company, Inc., in addition, filed a counterclaim for damages, based on an unlawful delivery of the goods by the plaintiff to the Novelty Company while in possession thereof under the writ of replevin (State of Case, page 14).

20. The Trial Court separated the two issues and tried them separately (State of Case, page 26). The trial of the replevin issue was first held and resulted in the direction of a verdict for the plaintiff (State of Case, page 162). This judgment is the subject matter of this appeal by the defendant, La Brecque Company, Inc.

POINT I.

Because the negotiable warehouse receipts previously issued by the defendant for the goods, were then outstanding and in the hands of third parties, the goods, by virtue of the "Warehouse Act" (Section 25), were exempt from seizure by replevin.

This was made the basis of an unsuccessful motion for the direction of a verdict. (State of Case, page 158.)

POINT II.

Before the plaintiff could properly bring replevin, it was bound to present an itemized statement of the charges which it claimed, and this it failed to do.

This was made the basis of an unsuccessful motion for the direction of a verdict. (State of Case, page 158.)

POINT III.

The amount for which the plaintiff claimed a lien on the goods, was excessive, and defendant's failure to pay the same, did not give rise to a right in the plaintiff to maintain replevin for the goods.

This was made the basis of an unsuccessful motion for the direction of a verdict. (State of Case, page 158.)

POINT IV.

While the plaintiff made a formal demand upon the defendant for the goods, the effect of such demand was nullified when it subsequently made demand for the amount of its lien, unaccompanied by any alternative demand for the goods.

This was made the basis of an unsuccessful motion for the direction of a verdict. (State of Case, page 158.)

POINT V.

It was error for the Court to permit the plaintiff, over the timely objection of defendant, to offer evidence to the fact that subsequent to the institution of suit, the depositor of the goods (New Jersey Novelty Footwear Company), paid the full amount of charges claimed by the plaintiff, when such payment was without the knowledge or consent of the defendant.

POINT VI.

The plaintiff lost its lien, by failing to remove the goods when it vacated the warehouse. This was made the basis of an unsuccessful motion for the direction of a verdict. (State of Case, page 158.)

POINT I.

Because the negotiable warehouse receipts previously issued by the defendant for the goods, were then outstanding and in the hands of third parties, the goods, by virtue of the "Warehouse Act" (Section 25) were exempt from seizure by replevin.

ARGUMENT.

Section 25 of the Uniform Warehouse Act (Compiled Statutes, page 5781), provides:

> "Goods free from garnishment or execution.—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman or its negotiation enjoined. *The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the Court.*"

When the goods were replevied there were outstanding, and held by third parties (State of Case, pages 96, 17, 103, 117, 119, 123, 135, 136), negotiable warehouse receipts (Exhibit P. 8, State of Case, page 171), which had been previously issued for the goods by this defendant (State of Case, page), in its capacity as warehouseman (State of Case, page 92).

These receipts were in the form prescribed by Sections 1, 2 and 5 of the Warehouse Act Compiled Statutes 5777). They had been issued when the defendant was in the physical possession of the goods (State of Case, pages 47, 95), as required by Section 50 of the Warehouse Act Compiled Statutes, page 5785).

Part of these receipts were drawn in favor of K. M. Stone Importing Company for such part of the goods as it had purchased from the Novelty Company (State of Case, pages 57, 96),

and part were drawn in favor of the New Jersey Novelty Footwear Company (Exhibit P. 8, State of Case, page 171), which was the original owner and depositor of all of the goods.

Those drawn in favor of the Novelty Company had been by it endorsed in blank and delivered to third parties, as permitted by Section 38 of the Warehouse Act, which provides as follows:

> "Endorsement of Receipts.—A negotiable receipt may be negotiated by the endorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such endorsement may be in blank to bearer or to a specified person. If endorsed to a specified person, it may be again negotiated by the endorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner."

By the negotiation of these receipts, the transferees, by virtue of Section 41 of the Warehouse Act, acquired the legal title of the goods called for thereby and acquired also the direct obligation of the defendant to retain for them possession thereof.

In construing and applying Section 25 above quoted, regard must be had to the underlying purpose and intent of the act as a whole.

As was pertinently stated by the Court of Errors and Appeals, in the case of *Wheeler & Wilson Mfg. Co.* v. *Brookfield* (70 N. J. L. 703), in commenting upon the Warehouse Act, which was in force prior to the passage, in 1907, of the Uniform Warehouse Act now under consideration.

> "This provision of the statute makes warehouse receipts a convenient method of pledging personal property stored in warehouses as collateral for loans and the like, and is of great importance and security in mercantile transactions of very large concern. The sale and delivery of millions of bushels of grain stored in the great warehouses of the common carriers of this country, by the delivery of warehouse receipts, is of almost daily occurrence.
>
> "That no discretion to deliver to others than the holder of the warehouseman's receipt should exist in the warehouseman is essential to the proper conduct of these vast bussiness interests. These receipts should import verity."

The Uniform Warehouse Act in question, which has been adopted by many states, is a recognition of the extent to which warehouse receipts are used in commercial transactions of large magnitude. As is shown by the many safeguards therein provided for the protection of warehousemen and holders of ware-

house receipts, the primary purpose of the act is to assure to the holder of a negotiable receipt, that possession of his goods will be available to him on demand.

Section 2, I. (Compiled Statutes, page 5777), provides that the receipt must contain a statement of the warehousing charges (the purpose of which is to inform the holder of the precise amount of the warehouseman's lien, and the amount which he must tender in order to obtain possession of the goods).

Section 7 provides that non-negotiable receipts must be plainly so marked.

Section 11 prohibits a warehouseman from parting with the possession of the goods unless any negotiable receipts issued therefore are first surrendered.

Section 54 (Compiled Statutes, page 5786), makes it a criminal offense for him to do so.

Section 20 makes the warehouseman liable if the goods do not correspond with the description thereof as contained in the receipt.

Section 49 (Compiled Statutes, page 5786) makes unpaid seller's rights in respect to goods subservient to those of the holder of such receipt. The act makes it a criminal offense for a warehouseman to issue a receipt unless he has actual possession of the goods named therein, or to issue duplicate receipts unless they are so marked, or to issue receipts for goods in which he has a personal interest, unless such fact be stated on the receipt.

All of these protective measures are rendered nugatory if the goods are subject to attachment, garnishment or other possessory actions. And it was in recognition of this fact that Section 25 was adopted.

At the trial, counsel argued and the Court held (State of Case, pages 158-161), that Section 25 was not intended to apply to a case such as the one at bar. The history of the legislation on this subject demonstrates that such contention is unfounded.

Section 8 (Compiled Statutes 5789), o fthe Original Warehouse Act, which was superseded by the Uniform Warehouse Act, adopted in 1907, provided (Section 8):

> "Act not to apply to property removed by operation of law.—That so much of this act as forbids the delivery of property, except in surrender and cancellation of the original receipt, or the indorsement of such delivery thereon, in case of partial delivery, *shall not apply to property removed by operation of law.*"

That section was under consideration in the case of *Wheeler* v. *Brookfield* (70 N. J. L. 703, 1904). Referring to that section, the Court said:

> "He (meaning the warehouseman) must deliver, therefore, on presentation of the receipt or violate the criminal law of the state, except he excused himself in the manner pointed out in Section 8 of the statute, which reads as follows: (Quotes Section 8)."

The same section was commented upon in the case of *Stephenson* v. *Lichtenstein* (72 N. J. L. 113, 1905).

When, in 1907, the legislature enacted Section 25 of the Uniform Warehouse Act, it must have had in mind Section 8 of the previous act, and the decision of this Court in the Wheeler *vs.* Brookfield and the Stephenson *vs.* Lichtenstein cases.

That the legislature intended to nullify completely that portion of Section 8, which provided that goods might be removed by legal process, is conclusively shown by the fact that the legislature not only omitted such a provision, but affirmatively prohibited such removal, and then extended the prohibition even further and stated:

> "* * * the warehouseman *shall in no case* be compelled, etc. * * *"

East Orange vs. Suburban Electric Light and Power Company (Court of Errors Ej 5 L 3 cl 4.

As was said by Chief Justice Gummere, in *Cook* v. *Bennett Gravel Co.* (New Jersey Supreme Court, 1917), (100 Atlantic Reporter 331, N. J. L.), referring to another statute:

> "The first section of the Act of 1783 having been embodied in the enactment of 1820, the legislature which passed the later act is to be presumed to have adopted the earlier one with the meaning which had already been ascribed to it by judicial construction." (Cites authorities.)

It would be difficult to frame a more positive prohibition than is contained in Section 25.

It is significant that the legislature saw fit to protect bills of lading, which, from a commercial standpoint, partake of the same nature and serve the same purpose as warehouse receipts, by inserting identically the same provision in the Bill of Lading Section of the Uniform Sale of Goods Act, enacted in the same year (1907). (See Section 39, Compiled Statutes 4656.)

The Uniform Warehouse Act has been in force in several large and commercially important states since 1907, and likewise with the Uniform Bill of Lading Act. An exhaustive examination of the authorities throughout this country, discloses only two decisions in which Section 25 of the Warehouse Act, or Section

39 of the Bill of Lading Act was under consideration. *Kershaw v. Booth Fisheries, etc.,* 170 So. Ill. App. 117 (1913); *Manufacturers Mercantile Co.* v. *Monarch Refrig. Co.,* 107 N. E. 185 Ill. (Supreme Court, 1915), in the first mentioned case it being stated by the Court in part as follows:

> "In our opinion the plaintiff having rendered it possible for Newhall (the third party), to obtain from the warehouseman a negotiable receipt, should not under Section 25 of the act, be allowed to recover the goods taken in replevin, and in trover the goods not taken, without having previously obtained a decree enjoining Newhall from transferring the receipt."

The Court held further, that Section 25 prohibited replevin as well as garnishment and execution.

In the Manufacturers Mercantile Co. case, it was stated in part:

> "Under Section 25, goods for which a negotiable receipt has been issued, cannot, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution unless the receipt be first surrendered to the warehouseman or its negotiation enjoined and the warehouseman cannot be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the Court."

The mere fact that the question has been raised in Appellate Courts only twice in thirteen years, in view of the immense volume of business constantly transacted by means of bills of lading and warehouse receipts, is, in and of itself proof of the unambiguous nature and general application of the prohibition contained in Section 25.

This provision is designed to prevent the occurrence of exactly what has occurred in this case, i e., the obtaining by legal process from a warehouseman, the possession of goods, and the disposing of them without making provision for the negotiable warehouse receipts outstanding against them.

It may be contended that such prohibition operates against only those who have knowledge of the fact that there are negotiable receipts outstanding.

Whether or not knowledge is a necessary requisite to the operation of the prohibition, the plaintiff had knowledge of all the facts in this case.

The plaintiff was expressly so notified when its representative with the assistance of the Sheriff, was actually seizing the goods (State of Case, pages 141, 146).

It also had reason to believe that negotiable receipts were outstanding by reason of the following facts:

(a) It knew that the defendant was a warehouseman, and as such, in accordance with the custom in and requirements of that business, issued receipts for all goods in storage.

(b) The plaintiff knew that *its* receipts originally issued for the goods in question, were negotiable and were held by third parties. (State of Case, pages 48, 68.)

(c) The plaintiff knew a week or ten days before July 31st (replevin suit was instituted August 2nd), that the holders of its negotiable receipts intended to surrender them and accept in place thereof, the negotiable receipts of this defendant (State of Case, pages 48, 53, 55, 56, 57).

(d) It received from this defendant for surrender, between July 29th and July 31st, the plaintiff's negotiable receipts endorsed in blank. (Possession of these negotiable instruments so endorsed, was in and of itself, unaccompanied by any other circumstances, *prima facie* evidence of ownership thereof. (State of Case, page 37, Exhibit P. 4, page 166).

In view of all of the circumstances, and particularly its prior knowledge of the intention on the part of the holders of its (plaintiff's) receipts, to surrender plaintiff's receipts and take in exchange defendant's receipts, was notice to the plaintiff as a reasonable person, that the surrender by the defendant of plaintiff's negotiable receipts, was in part performance of such exchange.

(e) The plaintiff knew that the third parties who held its receipts, particularly Jamesburg Bank and the East Newark Bank, had loaned large sums of money to the depositor, New Jersey Novelty Footwear Co., and had taken the receipts as collateral security. It knew that the Novelty Co. was in financial straits. (The plaintiff had been unable to collect from the Novelty Company its storage charges (State of Case, page 44), and it knew that a judgment had been rendered against the Novelty Company (State of Case, page 77).

Under such circumstances it was the duty of the plaintiff to ascertain whether the Novelty Company had repaid the third parties their loans (which in view of its financial condition was wholly improbable), or whether the third parties had surrendered their McGann receipts in exchange for La Brecque receipts.

These facts, all of which were within the knowledge of the plaintiff, in addition to the information expressly given at the time of the seizure of the goods, afforded ample notice, if notice was required, to the plaintiff that the negotiable receipts of the defendant were outstanding against the goods which the plaintiff sought to replevy.

Section 25 did not render it impossible for plaintiff to collect any warehousing liens it might have against the goods. It knew who held the receipts and their addresses, and its proper course was to have first enjoined negotiation of the receipts and the surrender by the defendant of the goods as prescribed by section 25. Had the course of action thus prescribed by the statute been adopted by the plaintiff, the present controversy would never have arisen.

We contend that under section 25, the goods in question were exempt from seizure by replevin and that the plaintiff's suit for that reason cannot be maintained.

POINT II.

Before the plaintiff could properly bring replevin, it was bound to present an itemized statement of the charges which it claimed, and this it failed to do.

ARGUMENT.

In the case at bar, the original possession of the goods by the defendant was lawful, such goods having been left in defendant's possession by the plaintiff when the latter was ousted by legal process, from the possession of the warehouse.

To maintain the present statutory action of replevin, when the original possession of the defendant was lawful, *an unlawful detention* by the defendant of the goods must be established, *Woodside* v. *Adams,* 40 N. J. L. 417.

The lawful possession or detention of the goods must be converted into an unlawful possession or detention. Under some circumstances this may be effected by making a demand upon and obtaining the refusal of the defendant to deliver possession of the goods. *Crown Co.* v. *Riley,* 96 Atl. 481.

There is no unlawful detention by the defendant, unless its refusal, on demand made for the purpose, to surrender pos-

session of the goods, *was unjustified.* The refusal to surrender possession does not in every case constitute an unlawful detention. *Frome* v. *Dennis,* 45 N. J. L. 515.

Where plaintiff's right to the possession of the property demanded is doubtful, a refusal by defendant, qualified by a request for a reasonable time in which to consult counsel as to his duty, is not such a refusal as will afford a basis for replevin, until after this lapse of a reasonable time. *Page* v. *Crosby,* 24 Pick. 211.

The refusal by the defendant to surrender possession of the goods to the plaintiff, was under the circumstances, justified.

The only interest in the goods, which the plaintiff had or claimed, was the right to their possession as security for an alleged unpaid warehousing lien (State of Case, pages 7, 84, 85). If and when such lien was satisfied, it had no further interest in or claim to the possession of the goods.

The defendant was authorized to retain possession of the goods by the owners thereof, New Jersey Novelty Footwear Company (State of Case, pages 186, 187), and the holders of the several warehouse receipts (the latter as is shown by their surrender of the McGann and the acceptance of the La Brecque receipts).

The defendant therefore, had (assuming for the purpose of argument, that the plaintiff had a lien), one of two courses of action open to it:

1. To deliver possession of the goods to the plaintiff.

This it did not do because of its authorization by the owners of the goods to retain possession of them.

2. To pay the plaintiff the amount of the lien and retain the goods.

This right was recognized by the plaintiff, when after making demand for the goods, it demanded instead, payment of its lien (State of Case, pages 84, 85).

The defendant could not pay the plaintiff's lien until it knew the amount thereof, and consequently since the knowledge of the details of this lien, so far as the defendant was concerned, was wholly in the plaintiff, it was its duty to furnish the defendant therewith.

The plaintiff recognized, but did not fulfill its duty when it submitted an unitemized statement (Exhibit D. 9, State of Case, pages 182, 183).

Was it the duty of the defendant, ignorant as it was of the proper amount of the plaintiff's lien, to pay whatever amount the plaintiff chose to ask, under penalty of losing possession of the goods, or was it the duty of the plaintiff under the circumstances, to furnish detailed information from which the correctness of the amount of its lien could be ascertained?

The duty of a warehouseman in respect to its bills, is defined by section 33 of the Warehouse Act (Compiled Statutes 5782), which provides that before goods can be sold all parties interested in the goods must be served with a notice which must contain *"An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due."*

The goods consisted of 1683 cartons of different sizes. Plaintiff's charges for labor and storage, depended upon the size of the cartons (Exhibit P. 3, State of Case, page 165), and upon how long the goods had been stored (the various cartons had been placed in storage at different times so that different amounts of storage had accumulated upon different cartons). The plaintiff itself had become confused as to the proper amount, as is evidenced by the fact that it had made errors in its invoices rendered previous to August 1st, 1919 (State of Case, pages 44, 46, 60), and had been obliged to make out corrected invoices (Exhibit D. 10, State of Case, pages 184, 185).

None of these invoices or itemized bills were ever sent to or received by the defendant. The only information received by the defendant was the statement (State of Case, page 132, Exhibit D. 9; State of Case, page 182), consisting of a series of forty-two amounts. A mere inspection of this statement demonstrates the impossibility of verifying its correctness.

The defendant, before receiving the statement (Exhibit D. 9, State of Case, page 182), made demand on the plaintiff for a statement of its charges (State of Case, pages 177-178), and after receiving the unitemized statement (Exhibit D. 9), stated that it would pay the proper amount of plaintiff's claim as soon as it was furnished with data sufficient to enable it to ascertain its proper amount. (State of Case, pages 176-179.)

Instead of complying with this wholly reasonable request, the plaintiff refused to comply and seized the goods by replevin.

As the defendant was to look to the Novelty Company for reinbursement, it was entitled to receive an itemized statement of the charges, because if it paid an excessive amount, it could

not compel reimbursement by the Novelty Company. The defendant, having demanded such a statement, its failure to surrender possession of the goods while waiting therefor, does not constitute an *unlawful detention.*

The defendant was exercising no right inconsistent with the rights of the plaintiff in respect to the goods.

The position of the defendant was analagous to that of one who has pledged his personal property to secure future advances to be made to a third party. Before the pledgor can redeem his property he must make a tender of the amount advanced. The knowledge of the details of the account is in the possession of the pledgee, and consequently the pledgor is entitled to an account from the pledgee.

Where securities are pledged to secure debt of a third party to the pledgee, the pledgor may compel pledgee to disclose the debt due it in order that the pledgor may redeem its securities by paying the debt.

Rennie v. *Deshon,* 31 N. J. Eq. 378 (Chancery 1879).

Speaking in regard to the duty of a pledgee to the pledgor, who desires to redeem the unused collateral, it was said by the Court of Chancery of this state:

> * * * "The knowledge of the precise sum of this deficiency lies peculiarly within the defendant's (meaning the pledgee) breast. *It was his duty as pledgee to have stated an account of his receipts and disbursements in the disposal of the pledge,* and the application of the collateral to the satisfaction of the deficiency. Had he stated such an account, the defendant would have been informed as to the exact balance due, and could then have tendered the precise sum due. But the defendant, through not disclosing the facts to the pledgor's representative, yet objects to the insufficiency of the tender, because not the proper amount."
>
> (*Chambers* v. *Kunzman,* 59 N. J. Equity 443.)

To demonstrate the necessity of the rule for which we contend; assume that unknown to the defendant, plaintiff's correct claim was $500; that it demanded $1,000. Under any other rule, under peril of losing possession of the goods it would be obliged to pay the $1,000 demanded. It would not be reimbursed by the Novelty Company and it would have no means of obtaining sufficient information to enable it to recover from the plaintiff, the overcharge.

Plaintiff claims possession by virtue of a warehouseman's lien. Section 33 of the Warehouse Act (Compiled Statutes 5782), provides that before a warehouseman may sell goods for unpaid

charges, he must serve a notice which among other things contains *"an itemized statement of the warehousemen's claim, showing the sum due at the time of the notice and the date or dates that it became due."*

What the legislature requires, i. e., an itemized statement, before the sale of goods, should be held to be a condition precedent to their seizure by replevin.

It is a rule that when there is a dispute as to the amount due a carrier in possession of goods, the bailee is given a reasonable opportunity to ascertain the correct amount before surrendering the goods.

(*Beasley* v. *Baltimore, etc., Co.*, 27 App. D. C. 595, 6 L. R. A. N. S. 1048; *Brown* v. *Philadelphia, etc., Co.*, 32 L. R. A. N. S. 189, Dictum in both cases.)

The same reason which gave rise to this rule, is present in the case at bar. Section 18 of the Warehouse Act (Compiled Statutes 5780), expressly extends to the warehouseman, in the case of adverse claims, a reasonable time in which to ascertain the validity of the conflicting claims, before surrendering the goods to any claimant.

Under the circumstances existing in this case, we contend that the defendant exercised no "unlawful dominion" over the goods, was exercising no right inconsistent with the rights of the plaintiff, and was not guilty of an "unlawful detention" of the goods, and that consequently there existed in the plaintiff no right to institute the replevin action.

POINT III.

The amount for which the plaintiff claimed a lien on the goods, was excessive, and defendant's failure to pay the same, did not give rise to a right in the plaintiff to maintain replevin for the goods.

ARGUMENT.

The plaintiff insisted upon receiving the precise sum of $1,021.44 (shown upon statement, Exhibit D. 9, State of Case, page 182).

This statement was a summary of a large number of itemized bills or invoices (Exhibit D. 10, State of Case, pages 194, 43), (sent to Novelty Company not to La Brecque Company, Inc.), (State of Case, page 46). An inspection of some of these in-

voices. (Exhibit D. 10, State of Case, page 184), i. e., those numbered 2610, 2612, 2614, 2616, 3618, 2620, 2622, 2624, 2626, 2627, 2628, shows that in the sum of $1,021.44 insisted upon by the plaintiff, was *included storage up to various dates in August, 1919; one (No. 2628), as late as August 28, 1919.*

Plaintiff had no right to charge for further storage after it lost possession of the warehouse and the goods on June 19, 1919.

The contract between the McGann Company and Novelty Company (Exhibit P. 3, State of Case, page 165), was terminable by either party at any time.

On June 20th, 1919, Novelty Company made a contract with La Brecque Company, Inc., for the storage of these goods (Exhibits D. 12 and D. 13, State of Case, pages 186, 187). This, together with the fact that McGann Company lost possession of the goods, had the effect of terminating its contract with the McGann Company, especially as the latter had knowledge of it (see La Brecque Company, Inc., newspaper advertisement, Exhibit P. 7, State of Case, pages 169, 170), and its reply thereto (Exhibit P. 9, State of Case, page 173), and the letter of McGann Company, dated June 27th (Exhibit D. 8, State of Case, page 181), remonstrating with Novelty Company about the change of warehousemen.

Notwithstanding the fact that on June 19th the plaintiff lost possession of the goods; that on June 20, Novelty Company authorized La Brecque Company to act as warehouseman for the goods; that plaintiff had actual knowledge of such change as early as June 27th; that plaintiff by July 31st had received back all of its warehouse receipts (State of Case, pages 37, 64, 78). *The plaintiff nevertheless insisted upon payment for storage up to August 28th.* (State of Case, page 46.)

Plaintiff was insisting upon being paid for services which it did not render, i. e., storing the goods after June 20th *that service was rendered by La Brecque Company, Inc., and not by the McGann Company.*

The inclusion therefore, of claims for charges to August 28th, in the statement (Exhibit D. 9, State of Case, page 182), for $1,021.44 rendered that demand excessive.

The insistence by the plaintiff upon the payment of such excessive demand, deprived the plaintiff of whatever right to maintain replevin it might otherwise have had.

The rule was well stated in *Stephenson* v. *Lichtenstein,* (72 N. J. L. 112 at page 114).

> "If we assume that he had such a lien, he would have lost it, by a tender and refusal of the $5.50 agreed upon. The failure to make the tender would justify him in retaining the goods unless by his own conduct he had waived the right to a tender. *We think his demand of a price in excess of the contract price, amounted to a waiver.*"
>
> (See also 25 Cys., page 677, and authorities there cited.)

The rule above enunciated applies here with even greater force than it did in the Stephenson case, because in that case the lienor was in possession and the burden was upon the owner to place the lienor in default, before obtaining possession, *whereas in the case at bar the "owner" (La Brecque Company, Inc.), was in possession and the burden was therefor upon the lienor (the McGann Company), to place the "owner" in default.*

Section 29 of the Warehouse Act Compiled Statutes 5782) provides that a warehouseman loses his lien:

> "By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of the act."

In all reason what the warehouseman must do in order to retain the goods when in his possession, he must also do when he seeks to recover them from the possession of another. That is, he must make his demand for the correct amount.

This the McGann Company failed to do when it demanded an amount in excess of that legally due it.

POINT IV.

While the plaintiff made a formal demand upon the defendant for the goods, the effect of such demand was nullified, when it subsequently made demand for the amount of its lien, unaccompanied by any alternative demand for the goods.

ARGUMENT.

Prior to July 31st, the date on which the last of its receipts were delivered to it, the claim to the goods by the McGann Company was based upon two grounds:

1. Its alleged lien.
2. Its outstanding negotiable warehouse receipts.

(State of case, pages 64-78.)

That was the situation when the written demand for the goods (not the amount of the lien), was made on July 29th (Exhibit D. 11, dated July 28th, State of Case, page 185).

By the return of the McGann receipts on July 31st, the second ground above mentioned was eliminated and the right of the plaintiff to possession of the goods was then limited to an alternative demand, i. e., for money or possession.

This was recognized by the plaintiff when it ceased making demand for the goods and instead made demand for the $1,021.44 claimed to be due.

Mr. McGann testified (State of Case, page 64):

> "Q On July 29th the only claim which you—the only interest in the cases which you claimed to have was for your storage charges? A No, it was not, up to the surrender of the receipts we were responsible.
>
> "Q Then on July 31st when all the receipts had been surrendered to you, your only interest in the goods was the right to have your storage charges paid? A Our warehouseman's lien."

And Mr. Unger (plaintiff's attorney), testified (State of Case, page 78):

> "Q Up to July 31st, that is the day on which the last of the McGann receipts were surrendered, what were you on behalf of your company demanding; were you demanding goods or were you demanding money? A Both.
>
> "Q After July 31st, after you had received the warehouse receipts back, what were you demanding? A Payment of the warehouse charges."

Since plaintiff was not entitled to *both* the money *and* the goods, the demand for the money made after July 31st necessarily nullified the demand for the goods made July 29th, when its receipts were outstanding.

The plaintiff should have made a demand for the money and if that proved unavailing, it should have followed it up by a demand for the goods, or at least should have made a demand in the alternative.

What we said under Point II (*supra*), applies with equal force here. A demand for money is not a demand for goods, and a refusal to pay money is not a refusal to deliver goods.

In view of the change in attitude by the plaintiff before and after July 31st, there was, under the circumstances, no "unlawful detention" of the goods by the defendant, and hence replevin can not be maintained.

POINT V.

It was error for the Court to permit the plaintiff, over the timely objection of defendant, to offer evidence to the fact that subsequent to the institution of suit, the depositor of the goods, (New Jersey Novelty Footwear Company) paid the full amount of charges claimed by the plaintiff, when such payment was without the knowledge or consent of the defendant.

ARGUMENT.

Mr. McGann was permitted to testify as follows (State of Case, page 67):

"Q The bill of $1,021.44, was that subsequently paid by the New Jersey Novelty Footwear Company in full and without objection?

"*Mr. Murray* (for defendant, La Brecque Company, Inc.). I object to that unless it is shown that that was paid by the La Brecque Company. Payment by somebody else would not affect the case of the La Brecque Company, particularly after August 2nd, when the goods were taken out under the replevin suit.

"*The Court.* The objection will be overruled.

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

A It was paid in Mr. Unger's office. I was not present; therefore I cannot testify.

"Q Well did your concern get the full amount of it? A We did."

The obvious, and in fact the only possible purpose of this question, was to show that plaintiff's claim of $1,021.44 for warehousing charges was not excessive, as claimed by the defendant, by showing that it was paid without objection by the Novelty Company, which was to be ultimately chargeable therewith.

The Novelty Company was not the agent of La Brecque Company, Inc., and moreover, this very payment was a part of the fraud which the Novelty Company was then perpetrating.

The act of the Novelty Company in making this payment was in no sense chargeable to La Brecque Company, Inc. The latter had not authorized it and had no knowledge of it until several days later.

That the testimony objected to materially influenced the mind of the Trial Court, is demonstrated by the fact that notwithstanding that the plaintiff's own undisputed records showed

the claim of $1,021.44 to be excessive, and the defendant made the question of excessive demand a special ground for the direction of a verdict (State of Case, pages 157, 158), the Trial Court passed by the entire question with the remark (State of Case, page 161):

> "I do not think it necessary to comment upon the three points made by the defendant in its motion for the direction of a verdict on the question of payment."

Without the testimony objected to, the evidence before the Court would have been wholly undisputed and it could not have done otherwise than to have found the plaintiff's demand excessive, which in turn, would, as we contend under Point III (*supra*), have necessarily resulted in the direction of a verdict for the defendant.

POINT VI.

The plaintiff lost its lien, by failing to remove the goods when it vacated the warehouse.

ARGUMENT.

The Warehouse Act (Compiled Statutes 5782), Section 29, provides:

> "A warehouseman loses his lien upon goods (a) by surrendering possession thereof."

By the notice given in October, 1918, by La Brecque Company, Inc., to vacate on May 1st, 1919, the plaintiff was given a proper opportunity in which to remove its goods. Instead of availing itself thereof, it placed the goods in question therein, at various times beginning in February, 1919, *and continued until as late as May, 19, 1919.* (State of Case, page 33, also Exhibit P. 4, Receipt Nos. 5132, 5126, 5101, 5100, etc. State of Case, page 167.)

Plaintiff placed in the warehouse some of the goods in question after proceedings had actually been instituted to dispossess it. (Exhibits P. 1 and P. 2, State of Case, pages 162-164, also page 33), *and only two days before the trial of that proceeding* (Exhibit P. 2, State of Case, page 164).

There was no reason why plaintiff could not remove the goods in question when it was ousted from possession. The sheriff was able to remove them in one afternoon (August 2nd, State of Case, page 6), under the writ of replevin, and there was no

reason why the plaintiff could not have done so between May 23 when the judgment of dispossess was entered against him and June 14, when the warrant thereunder was issued (Exhibits P. 1 and P. 2, State of Case, pages 162, 164).

The only reasonable construction which can be placed upon the plaintiff's attitude, is that rather than remove the goods, and vacate the premises, he would contest all the ouster proceedings, and if his contest proved unsuccessful, would abandon the goods and his lien thereon.

We contend that his abandonment of the goods under such circumstances amounted to a "surrender" of his lien thereon, within the meaning of the above quoted sections of the Warehouse Act.

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OF
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Attorneys for and of Counsel with
Defendant-Appellant, La Brecque Co., Inc.

New Jersey Court of Errors and Appeals

THE MCGANN COMPANY, Plaintiff-Appellant, vs. NEW JERSEY NOVELTY FOOTWEAR CO., Defendant, and LA BRECQUE COMPANY, Defendants-Respondents.	CASE NO. 2 ACTION AT LAW. (CONVERSION) ON APPEAL FROM ESSEX COUNTY CIRCUIT COURT, DUNGAN, J., and a Jury.

BRIEF OF LA BRECQUE COMPANY, INC.

This brief contains:

1. Comments by way of reply to the McGann Brief filed in answer to the La Brecque Brief on Case No. 1, referred to as the "Replevin Case."

2. Answer to the McGann Brief in Case No. 2, referred to as the "Conversion Case."

Comments on and corrections of "The Case" as to the first case (the Replevin Suit) set forth in the McGann Brief (pages 1-5).

The amount due McGann (stated by counsel, page 3, to be $1,000) is disputed. (See our Brief No. 1, page 16.)

New Jersey State Library

Counsel for La Brecque (Mr. Murray) did not tell counsel for McGann (Mr. Unger) "To go ahead" as counsel claims (page 4) Case No. 1, page 140.

Counsel says (page 4) "No word of this agreement was communicated by La Brecque to McGann at any time."

There was evidence that McGann did know of the contract between La Brecque and the Novelty Co. (Exhibit D-8, Case No. 1, p. page 181) in which McGann says:

> "* * * Was quite surprised when we were advised by the company who have taken over warehouse No. 4 (meaning La Brecque) that you had given them a promise to hold the goods on storage for your account."

Murray (counsel for La Brecque) did not say, as counsel claims (page 5) that the McGann bill "would not be paid." What he said was (Case No. 1, page 140) "it would not be paid *as presented.*" (The bill was not itemized and La Brecque was endeavoring to procure an itemized statement.)

Comments on and corrections of "The Case" in respect to the Replevin suit (Counsel's Brief, pages 5-11).

The storage of McGann was paid by Novelty Co. without the knowledge or consent of La Brecque.

La Brecque's suggestion of rebonding by Novelty Co. *contemplated the goods, when rebonded, being returned to La Brecque Co.,* and to no one else.

The testimony, facts, arguments and conclusions contained on pages 6 and 7 of counsel's brief, are all disputed, and are discussed fully hereafter, under the appropriate Points. The subject matter of pages 6 and 7 is reiterated and dwelt upon at length by counsel under such points.

The Pleadings and Proceedings Below.

(Conversion Suit Case No. 2)

Counsel argues (page 8):

1. There is no allegation in the supplemental counterclaim of any right of property in La Brecque.

The answer to this is that the allegation in paragraphs 3 and 4 of the counterclaim (Case No. 2, page 22) that while in possession of the goods, La Brecque, as a general warehouseman, issued the statutory negotiable warehouse receipts, which are still outstanding, shows a property right by way of bailment in the La Brecque Co. as Bailee.

The Warehouse Act (Sections 12, 13, 18, 25, 50, 54 Comp. Statutes, page 5779, etc., summarized at length herein under Point 18, Conversion Case) show that the warehouseman has the exclusive right to the possession of goods while its negotiable receipts are outstanding.

2. "That there is no allegation with respect to whom McGann delivered the goods, whether the person to whom the goods were delivered, had a higher right or if La Brecque had any right at all."

The answer to that is this: that since as we have shown above, La Brecque had the exclusive right to the possession of the goods, it is immaterial to whom McGann delivered the goods, so long as it was someone other than La Brecque.

Paragraphs 7 and 8 of the counterclaim (Case No. 2, page 15), allege that it was the duty of McGann, upon the satisfaction of its lien, to either

to return the goods to La Brecque, or to notify La Brecque to come and take them, that instead of this, McGann, without the knowledge or consent of La Brecque, converted the goods by delivering them to someone other than La Brecque, whereby the goods were "permanently lost to the plaintiff, to **Joseph F. McGann,** and this defendant, and the holders of said receipts."

Counsel contends (page 8), that it is not true that whether the McGann lien was paid by the Novelty Co., or by some third person, McGann was in duty bound to return the goods to La Brecque, and argues that if this were true, McGann's lien would never be paid, because the person who paid the lien, would undoubtedly require delivery of the goods to him.

Counsel's argument amounts to this: that anyone, whether he has any interest in the goods or not (Novelty Co. at the time of the conversation, had stripped itself of its interest in the goods, by negotiating to third persons, the receipts), could obtain possession of them merely by paying McGann's lien.

The Statute (Sections 28, etc., Compiled Statutes, page 5781), expressly provides how the warehouseman's unpaid lien is to be satisfied, i. e., by a duly advertised auction sale.

That this course was not adopted, is alleged by paragraph 6 of the counterclaim (Case No. 2, page 23), which alleges that a *settlement* of the lien was made by Novelty Co., without La Brecque's knowledge or consent, and paragraph 7, that McGann failed to notify La Brecque thereof, in order that he might regain possession of the goods.

If the goods had been advertised and sold by auction, in accordance with the Statute, McGann would have been obliged, under Section 33 of the

Statute (Compiled Statutes, page 5783), to give notice thereof to La Brecque, as a party known to have an interest in the goods, in which case La Brecque would have had knowledge, which paragraph 6 alleged La Brecque did not have.

The supplemental counterclaim, and especially the 3rd and 4th counts thereof, which allege knowledge on the part of McGann, sufficiently alleged a cause of action and the trial court properly refused to strike out the same.

The other matters mentioned on pages 9, 10 and 11, of Counsel's Brief, are fully discussed in his brief and in our brief, under the appropriate points, and we will therefore not mention them under this Point.

Reply to Argument (Counsel's Brief, page 13).

So much of pages 11 to 29 of Counsel's Brief as relates to the issues of Case No. 1, the replevin suit, we have covered in our Brief No. 1.

So much of such pages as relates to Case No. 2 (the Conversion Suit), is a mere repetition of the matters discussed by counsel in his brief, under the appropriate points on pages 29 to 59, and answered in our brief under the same points.

To avoid repetition, we will therefore not discuss under this heading, the matters mentioned by counsel on pages 11 to 29.

CASE NO. 2. THE CONVERSION SUIT.

Reply to Point 1 of The McGann Co.

The McGann Co. in delivering the goods to the Kalter Co. on the order of The Novelty Co. (the original depositor), did *not* deliver them as counsel

says (page 29) "in strict accordance with the provisions of Section 8 of the Warehousemen's Act, 4 Comp. St., 5778."

That section says (not mentioned by counsel), *"In the absence of some lawful excuse provided by this Act"* delivery shall be made to the receipt holder or depositor, etc., and provides: "In case the warehouseman refuses or fails to deliver in compliance with a demand by the holder or depositor so accompanied, *the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.*"

Section 10 (Compiled St., 5778), enumerates as some of the "lawful excuses" referred to in Section 8,

a. A request by the person lawfully entitled, etc., not to make such delivery.

b. Information that the one to whom the delivery was about to be made, was not lawfully entitled to them.

Counsel erroneously says, page 18 "There is no reference in Section 8 to the provisions of Sections 10, 11 and 12."

The words:—*"In the absence of some lawful excuse,"* constitute a clear reference to Section 10. He contends (page 18) that Section 8 refers to cases in which the warehouseman is *bound* to deliver the goods while Section 9 refers to cases in which he is *justified* in delivering the goods.

If this were true, the warehouseman would be *"bound"* under Section 8, to deliver to one who he knew had stolen the warehouse receipt, if such wrong doer offered to satisfy the storage lien and surrender such stolen receipt, but under Section 9 he would not be "justified" in so doing. In short, under counsel's theory, the wrong doer himself

could force the warehouseman to do what the warehouseman could not do voluntarily.

The true construction of Sections 8 and 10 is that the warehouseman is bound to deliver the goods unless he has either been requested by the rightful owner not to make the proposed delivery or has reason to believe that the person to whom the proposed delivery is to be made, is not the proper person, but his refusal casts upon the warehouseman the burden of proving the "lawful excuse."

Section 18 (Compiled St. 5780) exempts the warehouseman from liability in such case until he has had a reasonable opportunity to ascertain the facts, and Section 17 affords him an opportunity to interplead if he cannot ascertain the rights of con flicting claimants.

Counsel contends (page 19, paragraphs 2 and 3, page 30, paragraph 4) that if McGann had accepted the storage charges from the Novelty Co., but had insisted on returning the goods to La Brecque Co. (from which McGann had taken them by replevin) McGann would have lost his lien, under Section 29.

This contention is without merit for three reasons:

1. The depositor Novelty Co. had contracted the personal obligation to pay the charges and was primarily liable therefor and McGann could rightfully insist upon payment of the charges, regardless of the delivery of the goods. McGann could have instituted suit and collected them as they accrued from month to month.

2. Acceptance of the money would *satisfy* the lien, not cause its loss.

3. In order to effect a forfeiture of lien the demand must be one with which the warehouseman is bound to comply (Section 29, Comp. St. 5782).

The warehouseman is not bound to and must not comply with the demand for possession made by the depositor after he has negotiated the negotiable warehouse receipts to third parties. Negotiation of the receipts passes title from the depositor to the transferee (Sections 37-43, Comp. St. 5783) and after transfer, the transferee and not the depositor is the owner and the party entitled to possession (against the depositor), and any demand by the depositor would be wholly ineffective.

Counsel's contention (Paragraph 1, page 19) is based on the wholly false premise that the Court would compel (he concedes that Section 8 is confined to *compulsory* deliveries) the warehouseman to deliver goods to one not lawfully entitled thereto.

The Court will not compel (under Section 8) nor the law permit (under Section 9) the warehouseman to deliver goods to one known to be not entitled thereto.

Counsel contends (page 20) that because Kalter Co. bought the goods for value without notice of La Brecque's interest therein, that Kalter Co. was the person "lawfully entitled" under Sections 9 and 10.

While the Kalter Co. as an innocent third party might be protected in its purchaser, it was not "lawfully entitled" to the goods as between the parties to this litigation. The Kalter Co. is not a party to this litigation, and its possible rights are of no concern in this case.

The question is, Before the delivery to Kalter & Co., who was the person "lawfully entitled."

NOT the McGann Co., because when the depositor Novelty Co. paid the storage charges (one of its personal contractual obligations which it was bound to pay) McGann's interest in the goods terminated (its receipts had already been surrendered).

NOT the Novelty Co. because it had negotiated to third parties the negotiable receipts issued by La Brecque.

NOT Kalter Co., because Novelty Co. had already transferred its title to the third parties by negotiating to them the warehouse receipts. Delivery to Kalter Co. at the direction of Novelty Co. was in legal effect, merely a delivery to the Novelty Co. Clearly the only person lawfully entitled to the goods was La Brecque, as the bailee for the holders of its outstanding warehouse receipts.

Counsel contends (page 30) that the issuance by La Brecque of its receipts did not give it the right to the possession of the goods upon the satisfaction of McGann's lien.

We flatly disagree with counsel on this proposition.

The only requisites to the issuance of the statutory warehouse receipts are:

1. That they be issued by a warehouseman (Section 1, Comp. St. 5777). La Brecque is conceded to have been a warehouseman. (Brief, page 1.)

2. That at the time of the issuance of the receipts, the warehouseman be in the physical possession of the goods. (Section 50, Comp. St. 5785.)

The fact of possession is conceded. (Case No. 2, pages 67, 68, 69, 78, 79, 80.)

The issuance of the La Brecque receipts to the holders of the McGann receipts, in exchange therefor, was entirely legal, and if as counsel contends, McGann had not lost his lien such receipts were subject only to the payment of such lien.

This did not in any wise prejudice either McGann or the receipt holders. When McGann's lien was terminated the right to the possession automatically followed the La Brecque receipts. In other words, La Brecque (accepting as correct for the purpose of argument, counsel's view that McGann had not lost his lien) became second lienor and as such was entitled to the possession of the goods upon the satisfaction of the first lien.

La Brecque was lawfully (and not unlawfully as counsel says, page 30) in possession of the goods. Possession of the goods was acquired when it acquired possession of the building. Possession was retained at the direction of the depositor, Novelty Co., with the consent of the receipt holders, all of whom accepted La Brecque in exchange for McGann receipts.

Such retention of possession was accompanied by a surrender of the McGann receipts and an offer to satisfy his charges when he presented a proper bill therefor.

La Brecque in issuing its receipts under such circumstances, was acting not only within its legal rights but in a manner well calculated to protect the rights of all concerned.

There was in effect, a demand for the goods by La Brecque. La Brecque already had physical possession of the goods. To demand a possession which it already has, would be superfluous. It only remained for it to deliver the McGann receipts

to McGann, which it did (Case No. 1, page 54) and to ascertain the amount of charges properly due McGann, which it made every effort to do (Exhibits P-6, 7, 8, and 9, Case No. 2, pages 185-188) and to pay them when ascertained. It did not pay them because it could not ascertain the correct amount thereof.

Counsel contends (page 20, paragraph 4) "that there was no evidence that McGann knew or had information that it was delivering to a person not lawfully entitled to the possession of the goods."

Since this point has already been made the ground of an application for a new trial and decided adversely to The McGann Co., it should not be considered by this Court. Findley vs. Handley, 50 N. J. L., 503, affirmed 51 N. J. L., 172.

A rule to show cause why the verdict should not be set aside on the ground that the verdict was against the weight of evidence, was granted (Case No. 2, pages 32, 33) argued and decided adversely to the McGann Co. (Case No. 2, page 34) on this very point (Case No. 2, page 35, Opinion of Dungan, J., paragraph 2) (Order discharging rule, Case No. 2, page 36).

This question of knowledge on the part of the McGann Co., was expressly submitted to the jury and dwelt on at length by the trial court in its charge. (Case No. 2, pages 165-168.)

The consideration by the Court on the rule to show cause of the question as to whether or not the verdict was contrary to the weight of evidence, necessarily included the question now sought to be raised. Ashurst vs. Atl. Coast, etc., Co.—66 N. J. L., 16.

THERE WAS AMPLE EVIDENCE TO WARRANT THE JURY IN FINDING THAT THE McGANN CO. HAD INFORMATION THAT NOVELTY CO. AND KALTER WERE NOT THE PERSONS LAWFULLY ENTITLED TO THE GOODS.

The facts upon which such information was based and from which it could properly be inferred, were:

1. The McGann Co. knew that its receipts had been negotiated by Novelty Co. to various banks and others (Case No. 2, pages 49 and 50).

2. In spite of diligent efforts on the part of the McGann Co., it was unable to collect from Novelty Co. any of its storage charges from February to August, although such charges were payable monthly (Case No. 2, pages 53-54).

3. Decker at McGann's direction (Case No. 2, page 51) wrote a letter dated June 27 to Novelty Co. (Exhibit P-3, Case No. 2, page 180) in which he evinced a knowledge that La Brecque had been substituted for McGann as warehouseman of the goods. In that letter he said:

"Was quite surprised when we were advised by the company who have taken over our Warehouse #4 that you had given them a promise to hold the goods on storage for your account."

"We appreciate your business and do not intend to allow a competitor to steal it as they certainly must of misrepresented the situation to you, *otherwise you surely would not have consented transferring the business to them."*

4. A week or ten days prior to August 2 (the conversion took place August 5th or 6th), McGann

knew that there was an intention on the part of La Brecque and the Novelty Co., to surrender the McGann receipts and issue in their place La Brecque receipts (Case No. 2, page 57) McGann testified (Case No. 2, page 58):

> "He (referring to a receipt holder) said * * * that he would not only not let go of our receipts, but he would retain them; that he would not accept La Brecque's receipts." * * * (which shows that an exchange of receipts had been discussed.)

The East Newark Bank (another receipt holder) a week or ten days prior to July 31st, to the knowledge of McGann, actually sent its receipts for exchange, but the messenger took them to McGann instead of La Brecque and McGann sent them back (Case No. 2, page 60).

5. The McGann receipts were all surrendered to McGann by July 31 (Case No. 2, pages 49-50) *by La Brecque Co.* (Case No. 2, pages 54, 149).

6. The McGann receipts so returned by La Brecque were endorsed in blank. These receipts are negotiable instruments and when endorsed in blank are transferable by delivery (Sec. 37, Comp. St. 5783) La Brecque the possessor of the McGann receipts was the prima facie owner thereof. This fact alone was sufficient to put McGann upon inquiry as to the interest of La Brecque.

McGann admitted (Case No. 2, page 147) that La Brecque "might have made advances on or bought the goods" but did not consider that there was any reason why he should make inquiry (Case No. 2, page 148).

McGann made demand upon La Brecque for payment of his charges (Case No. 2, page

55). Why did he do this unless he knew that La Brecque had some interest in the goods which would prompt it to pay the comparatively large sum of $1,000? Why did McGann think La Brecque offered to pay such charges if not because he had an interest in the goods?

7. Within a week or ten days after the exchange of McGann for La Brecque receipts had been discussed, the McGann receipts were in fact surrendered to McGann by La Brecque. This surrender in view of the fact that McGann knew his receipts were in part at least held by banks, coupled with the fact that he knew the Novelty Co. was short of funds (evidenced by McGann's inability to collect his storage charges), rendered it most improbable that the Novelty Co. had liquidated its obligations, to its receipt holders, and made it certain to any reasonable man that the contemplated substitution of receipts had been affected. If the Novelty Co. had redeemed the McGann receipts, it and not La Brecque would have had possession of and surrendered the McGann receipts.

8. *The McGann Co. was expressly notified that there were outstanding La Brecque receipts against the goods.*

9. When the goods were being removed from the possession of La Brecque on August 2nd (conversion took place August 5th or 6th), counsel for La Brecque warned Kraemer, an employee of McGann, who was sent there by McGann, "To represent the McGann Company" (Case No. 2, page 53) as follows (Case No. 2, page 82):

> "Mr. Kraemer, I protest against this. You haven't any right to take these goods out. We

have outstanding negotiable receipts against these goods. You have got back your receipts."

And he (Kraemer) said,

"'Yes, I know it' and I said, 'And our receipts are still outstanding. You haven't any right to take these goods.'"

This warning was corroborated by Aaron L. Cricher, an employee of La Brecque (Case No. 2, page 117), and by F. B. Broughton, a client of La Brecque's counsel (Case No. 2, pages 124-125).

10. La Brecque had physical possession of the goods, which was prima facie evidence thereof.

The trial Court both in its charge to jury (Case No. 2, pages 166-168) and in its opinion rendered in discharging the rule to show cause (Case No. 2, page 34) commented correctly and at length on the evidential force of these facts and circumstances, and correctly held that they were sufficient to warrant the jury in finding as it did, on the question of knowledge on the part of McGann.

It is contended (page 20) that even if McGann knew that La Brecque receipts were outstanding against the goods at the time of the conversion, this was insufficient because, as counsel claims, he must have information that the person to whom delivery is to be made is not the one lawfully entitled thereto.

The holders of the receipts (which are negotiable instruments) are the holders of the legal title to the goods. The warehouseman is obliged by law (Section 54, Comp. Statutes 5786) to retain possession of the goods until the receipts have been surrendered.

Consequently, so long as La Brecque receipts were outstanding, La Brecque and no one else could be lawfully entitled to the possession of the goods.

It is also contended (page 20) that there is no proof that La Brecque has been injured and that the receipt holders are the proper parties to bring the action. It is well settled that a bailee may recover in conversion the full value of the goods bailed.

Central R. R. Co. vs. Bayway Refining Co., 81 N. J. L., 456 (E. & A., 1910).

Even if formal proof of demand upon La Brecque by the receipt holders for the goods was necessary, it was waived when at the instance of the trial court (Case No. 2, page 77), for the purpose of saving time, a stipulation was entered into regarding the receipts (Case No. 2, pages 77-80). The question of "ratification" touched upon by counsel (page 31) we will discuss fully under our reply to Point 10.

Reply to Points No. 2 and No. 3—Conversion Suit.

The refusal to charge the jury as requested, was correct.

The goods were in the possession of McGann *for a limited and special purpose only,* i. e., to secure to his satisfaction of his lien.

When this limited purpose was served, it was McGann's duty to return or hold them to the order of La Brecque from whom he had taken them.

Delivery to anyone other than La Brecque, constituted a conversion.

Whether Kalter knew or did not know of La Brecque's interest in the goods, was immaterial.

Neither the rights of La Brecque nor the duties of McGann are to be measured by the knowledge or want of knowledge of Kalter Co. They are to be measured and determined by the knowledge of McGann.

Delivery to Kalter Co. by McGann on the order of Novelty Co. was in legal effect, delivery to the Novelty Co.

The charges requested were incorrect and misleading in that:

1. They made knowledge on the part of Kalter & Co. of La Brecque's rights, the criterion, which is contrary to the Statute (Section 10, Comp. St., 5778) which makes knowledge on the part of McGann, the criterion and determining factor.

2. They assumed that if Kalter Co. had no knowledge of the interest of La Brecque in the goods, Kalter Co. was lawfully entitled to the goods, whereas so long as the La Brecque receipts were outstanding no one except La Brecque was entitled to their possession (Sections 10, 25, 50, Compiled Statutes, pages 5778, 5781, 5785).

If it be held in spite of the prohibition contained in Section 25 against subjecting goods against which there are outstanding warehouse receipts, to legal process, McGann might, nevertheless, seize them by replevin, to protect his lien, it must be held that when that purpose has been served, Section 25 comes into full operation and requires their return to La Brecque.

Kalter & Co. could under no circumstances have been the party lawfully entitled to the possession, and the requested charges were therefore erroneous and were properly refused.

Reply to Points Nos. 4 and 5—Conversion Suit.

The charges requested were properly refused because they incorrectly quote the Statute.

They say: * * * "the warehouseman is bound to deliver to the *depositor*, if the *depositor* makes demand, etc. * * *."

The Statute (Section 8, page 5778) says: The "warehouseman * * * is bound to deliver the goods, upon a demand made either by *the holder of a receipt for the goods* or by the depositor."

The charges as requested, in effect state that:

1. The warehouseman is bound to deliver the goods to the depositor even if the depositor has already sold and negotiated the receipts to some third party and has thereby stripped himself of all interest in the goods, as did the Novelty Co. in this case.

The Statute avoids this situation by providing that the warehouseman must deliver to the holder of the receipt, or to the depositor, if the depositor surrenders the receipt, etc.

The charges as requested also omit to mention that *the Statute requires such delivery only on surrender of the outstanding receipts.* There never was any offer and none was ever proved or claimed to have been made, to surrender the La Brecque receipts.

The charges are wholly in conflict with the Statute (Section 8) on the question of surrender of the warehouse receipts.

The requested charges also omit the qualification contained in Section 8 of the Statute, to the effect that the warehouseman is bound to deliver only "in the absence of some lawful excuse provided by this act."

The charges as framed, admit of no such "lawful excuse" for non-delivery.

The charges as framed, omit entirely the qualification contained in Section 10, which as we have shown, under our discussion of Point 1 (Conversion Case) prevents the delivery to the depositor or receipt holder if the warehouseman has information that he is not the person lawfully entitled to the goods.

For these reasons, the court properly refused to charge as requested.

Reply to Point No. 6 (Conversion Case).

The requested charge, unaccompanied as it is, with any statement of the meaning of the term "collude" or of the effect, or lack of effect, to be given to the presence or absence of collusion, would mislead and confuse the jury, and the court in its discretion properly refused it.

While McGann was entitled to it, the trial court charged the substance of the ninth request, when it charged (Case No. 2, page 165):

> "* * * if—and there you come right to the question in this case—McGann had knowledge; if McGann had information that La Brecque was the party entitled to the goods * * * (page 166). Therefore had McGann information when the goods were sold to Kalter that La Brecque and not the Novelty Company was the person lawfully entitled to the goods?"

and again (at page 168):

> "So the very narrow question for you to decide in this case, is whether or not the evidence

preponderates that at the time McGann released the goods to Kalter, by order of the Novelty Company, McGann had knowledge of the issuing of the La Brecque warehouse receipts. If it had, then La Brecque is entitled to recover in this case. If the evidence does not so show by its preponderance, then McGann is entitled to your verdict."

This charge effectively excluded from consideration, the idea of "collusion," which the ninth request sought to charge.

McGann was not entitled to have excluded the idea of collusion.

McGann knew that La Brecque's receipts were outstanding (the jury so found).

The sale and delivery of the goods by McGann to Kalter at the order of Novelty Co. took place in Mr. Unger's (McGann's counsel, and the one who was acting throughout [Case No. 2, page 56] as general attorney for McGann) (Case No. 2, page 64) presence.

Mr. Unger took a check from Kalter Co. in part payment of the McGann charges, plus costs, and agreed to hold it until part of the goods were in the course of delivery to Kalter in New York, by means of McGann's trucks (Case No. 2, page 56). The fact that McGann, in spite of vigorous efforts to do so, had been unable to collect any of his charges from the Novelty Co. which had been accruing month by month, from February to August (Case No. 2, page 54) must have raised some doubts in their minds as to the financial condition of the Novelty Co.

No notice of the intended delivery to Kalter was given to La Brecque. These facts warranted the jury (we personally do not charge that there was collusion) in finding collusion.

Counsel (pages 6, 17, 56) tries to convey the impression that La Brecque's counsel (Murray) was given such a notice, and refers to the fact that Mr. Unger invited Murray to a conference on August 5th, at which he said (Mr. Unger's testimony, page 134) there "might be a disposition of the matter," Murray says (Case No. 2, page 85) that what was said was "There is going to be a conference about the matter this afternoon."

This is the only "notice" claimed to have been given and while no point of it is made in the Brief, it being only casually referred to, we desire to call attention to the real facts.

Mr. Unger testified (Case No. 2, page 137):

> "Q. You do not say now, Mr. Unger, that you told him (referring to Murray) that it was contemplated selling these goods or delivering them to anybody, do you?
>
> "A. *No, because I did not know at that time that there would be any sale or delivery.*"

Neither La Brecque nor Murray can be charged with notice of a sale or delivery which was not mentioned, and which was not yet known of by McGann or Mr. Unger.

Reply to Points Nos. 7 and 8—Conversion Case.

The trial court (Case No. 2, page 169) charged the tenth request (Point 7) in modified form when it said, referring to this request:

> "I say that was not notice of itself. It was a circumstance which you may consider in determining whether or not McGann had notice."

The Court (Case No. 2, page 169) charged the eleventh request with the same qualification.

This was the most favorable aspect, from McGann's standpoint, of the effect of the surrender by La Brecque of the McGann receipts, endorsed in blank as they were.

The fact formed one link in the chain of circumstantial evidence which proved knowledge on the part of McGann, as fully discussed under Point 1 (Conversion Case).

The only effect which these requested charges could have had on the mind of the jury, would have been to exclude wholly from its consideration, that fact. McGann was not entitled to such entire exclusion.

McGann was not entitled to have the surrender of the receipts isolated from all of the surrounding circumstances with which it was so closely connected. To adopt such a rule would be to prevent the proof of facts by circumstantial evidence.

The Court, in its general charge (Case No. 2, pages 166-167), dwelt upon correctly and in considerable detail upon this chain of evidence, and the part the surrender by La Brecque of the McGann receipts, played therein, and this coupled as it was with the requested charges in modified form properly instructed the jury as to this evidence.

Counsel in his argument (page 34) says:

> "It is conceded that La Brecque did not at any time notify McGann of its rights (except the claimed notice of Kraemer)."

That is not correct, as we contend that the facts and circumstances themselves afforded McGann ample notice.

Neither is it true, as counsel says (page 34) that all of the McGann receipts were sent to McGann

with the letter (Exhibit P-6, page 185). That letter shows that some of these receipts had been previously forwarded. Moreover, that letter was followed up by the letter of July 31, (Exhibit P-8, page 187), which reads in part:

> "As all warehouse receipts issued by you to the New Jersey Novelty Footwear Company have been returned to you by us, and we are desirous of having this account straightened out immediately demand is made upon you to deliver immediately to our office at 100-110 Front St., Newark, *complete and itemized invoices* of charges you have against the above mentioned concern."

The expressed readiness of La Brecque to pay McGann's charges, coupled with the surrender by La Brecque of McGann's receipts, and the fact that La Brecque was then in physical possession of the goods, gave McGann ample notice that La Brecque had some interest in the goods, and constituted evidence from which the jury could properly find as it did find, that McGann had knowledge of La Brecque's rights.

Reply to Point 9 (Conversion Case).

The trial court properly refused to charge the fourteenth and fifteenth requests. McGann testified (Case No. 2, page 53).

> "Q. Do you remember when the goods were taken out or Replevin from No. 4 warehouse on August 2, 1919?
>
> A. Yes I remember it being reported to me. I was not present.
>
> Q. *Did you send Mr. Kraemer there?*
>
> A. *I did.*

Q. *For what purpose?*
A. *To represent the McGann Company."*

There was no attempt by counsel to have McGann show that Kraemer's "representation" was only a limited one, as counsel now claims it was. It must be borne in mind that there had already been one trial in which McGann (Case No. 1, page 33) testified in response to the same question:— "To represent the McGann Company." It is inconceivable that being forwarned as he was, McGann would not have stated that Kraemer's "representation" was limited, if such were the fact. In view of McGann's testimony, the burden of proving that there was a limitation on such representation, is on McGann not on La Brecque, as counsel contends (Case No. 2, page 36).

As the proofs stand, Kramer was McGann's "representative."

To represent is defined as:

Webster's Dictionary:—"To stand in the place of; to be the equivalent of; to supply the place, perform the duties, exercise the rights or receive the share of; *to speak and; act with authority in behalf of;* to act the part of (another).

Standard Dictionary:—"To appear in the character of; personate; *to act* vicariously or *as the authorized agent for;* stand in place of; hold legal rights conferred by or descended from (another); replace; also to appear as an instance or illustration."

The well settled rule is thus stated:

> "The knowledge of the agent is chargeable upon his principal, whenever the principal, if acting for himself, would have received notice of the matter known to the agent."

Vulcan De Tinning Co. vs. American Can Co., 72 N. J. Eq., 387, Errors & Appeals, at page 400.

Meacham on Agency, 2nd Edition, page 1387, etc., Section 1803:

"* * * Where an agent acts for his principal in the loaning of money, the principal will be effected by the knowledge of an agent as to who the real borrower is. The same rule applies where an agent authorized to purchase notes had notice that they were tainted with usury; where an agent authorized to receive money had notice that it was being taken from a trust fund; where * * * where an agent charged with the control of a team of horses had notice that they were in the habit of running away; where a coachman having charge of a dog had notice that the dog was vicious. * * *"

The subject of Kraemer's "representation" was the possession of the goods in question. The notice was given to Kraemer while he was actually "representing" McGann in obtaining possession of these identical goods.

The notice given Kraemer comes squarely within the rule above quoted.

The fifteenth request was therefore in direct conflict with the law on the subject and was properly refused.

Counsel claims (page 36) that there was no proof that Kraemer was sent to the warehouse "for any purpose other than to see that the goods were properly loaded."

The testimony of McGann, that he sent Kraemer "to represent the McGann Co." fully refutes counsel's claim.

If there was any limitation on Kraemer's authority, it was wholly within the knowledge of McGann and not of La Brecque, and it was therefore McGann's duty to state it at the trial, which he had ample opportunity to do.

There was ample evidence, if any was necessary, to warrant the jury in finding that Kraemer was acting as the *general* representative of McGann.

La Brecque had consistently refused to give the goods to McGann. That fact gave McGann reason to believe that the forcible removal might and probably would be resisted and that matters of importance would probably develop when the removal was attempted, and that, coupled with the failure on the part of McGann to state the limitation in the authority of Kraemer (if there was any limitation, of which there is no evidence), was sufficient to warrant the jury in inferring that Kraemer was authorized to receive the notice in question on behalf of McGann.

The Court gave the jury the most favorable (from McGann's standpoint) possible charge on this point (quoted in counsel's brief, page 36), and properly left it to the jury to determine as a question of fact, the extent of Kraemer's authority.

The fifteenth request is erroneous for the additional reason that if McGann had knowledge of La Brecque's outstanding receipts (and the request is predicated upon that assumption), then, as we have shown in our discussion of Points 1 and 17, La Brecque and not Kalter Co. was the one entitled to the goods.

The request leaves wholly out of consideration all of the surrounding circumstances, which the jury was entitled to consider.

The Court (Case No. 2, page 170), referring to the fifteenth request, stated:

"I have already charged you substantially that."

Reading the original charge and the modified request together, the jury was fully and correctly apprised of the law controlling that aspect of the situation.

Reply to Point No. 10 (Conversion Case).

The trial court properly refused to charge the eighteenth, nineteenth, twentieth, twenty-first and twenty-fifth requests.

The sale of the goods by the McGann Co. to Kalter & Co. and the delivery of the same by McGann to Kalter & Co. was not pretended to have been as the agents for or on behalf of La Brecque Company.

Consequently there could be no "ratification" of such transaction by La Brecque Co.

Inasmuch as the eighteenth and twenty-first requests relate wholly to a technical "ratification" of which there is not the slightest evidence, they are erroneous and were properly refused.

The eighteenth and twenty-first requests are also both erroneous, because they are unaccompanied by any explanation of the meaning of the term "ratified" as applied to the facts in this case.

The Court in *its discretion properly refused these requests as tending to confuse and mislead the jury.*

The facts were that all but 229 cases of the goods had been delivered by McGann to Kalter & Co. without the knowledge or consent of La Brecque Co., and by Kalter & Co. already disposed of, although only partly paid for. La Brecque then dis-

covered what had been done and through its counsel telephoned Kalter & Co., which was located in New York City and out of the jurisdiction of the courts of this state, not to pay the purchase price to anyone until further notice. The conference between the representatives of McGann, La Brecque and the Novelty Co. was held August 11th. Concerning this conference, counsel for La Brecque testified (Case No. 2, page 86):

> "I opened the conference by saying that the only thing we were interested in in this thing was either to get goods to replace our receipts, to make good our receipts, or get our receipts back; that was the only thing that interested me and the discussion revolved around that proposition. I said I considered Mr. McGann liable to us for his action in selling these goods the way he had, and Mr. Unger disagreed with me on the question of whether Mr. McGann was liable or not. * * *"

And also:

> "Nothing resulted, excepting we did agree that the hearing which the Court had set for the following day in Trenton was adjourned until the nineteenth."

Another conference was held August 21st. This conference is the conference to which the requests mentioned under Point 10 relate. Concerning this conference, counsel for La Brecque testified (Case No. 2, pages 87-88):

> "I again opened up the conference, and I stated what I had already stated at the previous conference about our position, wanting

the goods or receipts, and I said to Mr. Unger in the hearing of all of them: 'Mr. Unger, you and I cannot apparently agree as to what the liability of McGann is for the disposal of those goods. I think he is responsible for it, and is liable to us for it, and you argue or maintain that he is not, and we never will agree until it is tried out in court, and in the meantime this money is over here in New York; Prell is trying to get it, and we have no control over it. This Kalter concern, any time they see fit, can pay over the money to anybody they please, and we cannot stop them; and rather than to see Prell get it, I think we had better make some arrangements to get the money in the state, and in the meantime we will go ahead and fight our liabilities in court.' Mr. Unger had somewhat modified his attitude at that conference from what it had been before, in that he was not quite so insistent upon his idea that McGann was not interested in this controversy. The upshot of the matter was we had a great deal of discussion, and the discussion revolved around this: I was informed, and in fact we all at that conference considered, the value of these goods to be $20.00 a case. We had no other information at that time. There were some thousand cases taken out, for which we had—we had outstanding receipts for some thousand cases, for which we had no cases in our possession, and that made a possible liability on our part to our receipt holders of $20,000.00. The bond which the McGann Co. had put up when it took the goods was $10,000.00, and I was very much afraid of something going wrong with Mr. McGann—"

At page 89:

"Q. That action in the stopping of the payment of that money by Kalter & Company was voluntary on their part and was not subject to any injunction served on them? A. No; it was voluntary. When I told them what the situation was, they said they would do nothing further.

Q. All right. A. The 229 cases, together with the money which was over there, together with some two or three hundred cases (I have forgotten the exact number) which Prell said was down in the factory at Jamesburg and could be shipped at once and used to replace the goods which had been sold—we figured our liability would then be reduced to this ten thousand dollars, which was the amount of the bond which McGann had put up. So then the question arose as to how this money was to be gotten over here from the Kalter Company, and who was to hold on to it. Mr. Lowry, I believe it was—yes, I know it was Mr. Lowry—said if we could come to an agreement as to what should be done with it, and fix it so Kalter & Company would not be obliged to pay it the second time or run any chance on it, Mr. Lowry could probably arrange to have the money paid to whomsoever we saw fit; and I think Mr. Unger and Mr. Bobker suggested I be made the trustee of that money. I refused; I would not have anything to do with it, and I told them I did not consider it my money or La Brecque's money, and I would not have anything to do with it; but I would withdraw my objection to Kalter & Company paying it over. It was at my telephone order that they had held up the money, and I said I

would withdraw that and consent to let Mr. Unger and Mr. Bobker, as trustees, hold it.

Q. Pending what? A. Pending the outcome of the litigation which is now before the Court."

At page 90:

"The agreement was that money was to be held by the trustees until this suit now before the Court, which we are trying to-day, was fought out; and that if the McGann Company got a judgment against it for the taking or selling of these goods, in our favor, it could use the money as far as it would go to satisfy that judgment. On the other hand, if it was determined that the McGann Company was not liable, then if the receipt holders, our receipt holders, got a judgment against us—I mean the La Brecque Company, then the La Brecque Company could use the money so far as it would go to liquidate its debt. Then Mr. Prell, after we had got that tentatively agreed on, said that if he could get some money to meet his payroll, that if he could go down there to Jamesburg at the factory and make some more goods, just like those which had been sold, and replace those—

Q. Was anything said or agreed upon between yourself and Mr. Unger as to the effect the transfer of this money should have on the suits which were pending? A. Well, it was not to have any effect."

Counsel for Novelty Co., testified (Case No. 2, pages 108-109):

"What was said about the effect of that statement upon the replevin suit which is this suit now that is pending at that time?

(Objection.)

Q. Upon the rights and liabilities thereof. The McGann and La Brecque Companies as against each other? A. I believe you (meaning Murray, counsel for La Brecque) made a statement, either at the outset or at some other part of the conference, that anyhing that was done was without prejudice to the rights of La Brecque Company or something to that effect."

Also:

"Q. Was it not with respect to Mr. Murray's taking the money in his own name that the term 'without prejudice' was used? Did he not object to taking it in his own name because if he did that it would prejudice his own case? A. There was a suggestion made, I think by Mr. Unger, that the funds be held by Mr. Murray and he refused to hold those funds, either in his own individual name or in conjunction with Mr. Unger, and I think it was because of the fact that he thought it might prejudice La Brecque's rights.

Q. Was it not with respect to that that the term 'without prejudice' was used? A. He used that term when we made that suggestion that the funds be held by him and he may have used that term at the start of the conference.

Q. At the start of the conference? A. I am not exactly certain whether he used the term at the start of the conference or not, but he did make that statement when we made the suggestion that he take the funds in his own name. He said he better not because he thought

it might prejudice the rights of the La Brecque Company."

Mr. Cricher (a former employee of La Brecque) testified (Case No. 2, page 119) concerning the conference:

"Mr. Murray (counsel for La Brecque) simply said at the opening of the conference, that this did not prejudice his rights in any way."

Counsel for McGann testified (Case No. 2, page 144):

"Q. Did I (counsel for La Brecque) say to you when we began the conference that while we were fighting this thing out among ourselves as to whether McGann or the McGann Company was liable to us for this loss that we had better get hold of the money so that it would not be lost to all of us? A. Words to that effect I should say * * *.

Q. What did you mean a while ago when you said that I refused to act as trustee because it might prejudice my suit on the bond? What was your conversation with regard to that? A. When it came to a question as to who should handle this money I think Mr. Bobker and I were willing that you should become custodian of it and *you said you did not want to handle or did not want it in your name for fear that if subsequently you had to bring an action on the bond against McGann and the Surety Company this might be construed to be a payment to you, or something like that.* Anyway, you did not want to take it in your name.

Q. I told you, did I not, that I intended to sue McGann of the McGann Company for this

damage, did I not? A. I do not recall that you intended to sue him. The proceedings were already pending at the time.

Q. *Well, I told you I intended to hold him liable, didn't I?* A. I suppose we were all threatening to hold each other liable. *I would not say you did not.*

Q. Will you say I did not say that, or words to that effect? A. I guess we were all threatening each other.

Q. We could not agree on where the liability was and we were going to fight it out? A. You and I held different opinions."

McGann desired to reduce as much as possible, his possible liability to La Brecque.

La Brecque and McGann could not agree upon their respective rights and liabilities.

What was more natural then, than that pending the determination of its rights against McGann, La Brecque should consent to McGann obtaining possession of the money from Kalter, since the goods could not be returned? Placing it in the hands of trustees insured La Brecque that McGann could not use it for any purpose but the liquidation of McGann's liability to La Brecque when it had been determined. By this transaction there was afforded La Brecque, as security in addition to the $10,000.00 replevin bond of McGann the fund so placed in the hands of trustees.

In short, so far from there being a waiver of its rights against McGann, the whole transaction was predicated, so far as La Brecque was concerned, upon the idea of eventually obtaining judgment against McGann and insuring its payment in part by means of the bond and the fund.

It is to be noted that the written "consent" (Exhibit P-15, Case No. 2, page 196) was in the form of a withdrawal of the notice previously given to

Kalter, *appended to the agreement which was between McGann and Novelty Co., whom La Brecque Co. considered throughout as the wrong doers.*

As we have already shown there could not possibly have been a technical "ratification." The question was, was there a waiver of its rights against McGann? The above and the following testimony shows that La Brecque never gave up the idea of holding McGann responsible.

The situation briefly was this. The goods were gone beyond recall. The replevin bond furnished by McGann was in the sum of $10,000. The value of the goods was considered by all parties to be $20,000. La Brecque therefore desired to have some security for its liability to its receipt holders for the $10,000 deficiency, other than the mere general financial responsibility of McGann, pending the determination of its rights against McGann.

Prell, of the Novelty Company, was trying to get possession of the money held by Kalter Co. in New York.

The nineteenth request is therefore erroneous because *it omits from consideration the "expressed" intention with which La Brecque "consented" to the payment of the fund to the trustees.*

Although the evidence is ample to justify the jury in finding that La Brecque openly expressed the intention to maintain unprejudiced, his rights against McGann, *the request totally ignores the question of intent,* and proceeds upon the assumption that the "consent" regardlesss of the intent, necessitates a verdict for McGann.

The nineteenth request is erroneous for the additional reason that it assumes as a fact the agreement to have been that the *proceeds* ($3,000 *plus*) should stand in the place of the *entire amount of goods* (determined by the jury to have been of a value of about $6,000).

To have charged as requested, would have been equivalent to instructing the jury to the effect that it could not find that the agreement was that the proceeds should stand in place of the goods *pro tanto,* in which case the verdict would be *against* McGann (but for a lesser amount) *and not for him as requested.*

The twentieth request is erroneous because it ignores the circumstances, intent, and the qualification of La Brecque which accompanied the consent to the payment of the $1500.

This request assumes as undisputed, facts which were seriously disputed, i. e., under what circumstances, for whose benefit, and for what purpose the payment was made. If, as La Brecque claims (Case No. 2, page 116), when counsel for La Brecque testified:

> "If Mr. Prell (of the Novelty Co.) used the entire $3200 (of which the $1500 payment was a part) to manufacture the goods and he made 778 cases and delivered them to McGann and McGann got our receipts back, McGann's liability to us would be eliminated entirely and our liability to our receipt holders would be eliminated entirely.
>
> Q. In other words, McGann was running all the risk? A. If Mr. Prell did not do as he agreed to do McGann would be liable to us. We offered Mr. McGann the chance, in other words, all possible means of eliminating his liability to us" (see also pages 98 and 100).

And consented to allow McGann and Prell to use it on their own responsibility, McGann still to remain liable for the full value of the goods, then the payment would have no effect on the outcome of this suit, or the amount of damages recoverable.

And if such was the agreement, then the requested charge would have been erroneous. If the question of the effect of the $1500 payment was to be submitted to the jury at all, then it was necessary to have the jury determine the substance of the agreement under which the payment was made. This, the requested charge failed to do, and hence the request was properly refused.

The twenty-first request (in addition to the reasons above set forth) was properly refused.

The request mentions a payment or arrangement for a payment, *to La Brecque.*

There was no claim of any payment or agreement for any payment, *to La Brecque.* The only payments ever made were the payment of $3200 to counsel for McGann and Novelty Co. as trustees, and the payment by them of $1500 to Novelty Co. (The circumstances of which are set forth above under our discussion of the twentieth request.)

La Brecque expressly refused to receive or have anything to do with this fund (Case No. 2, pages 89, 109, admitted by counsel for McGann, page 144).

To have thus mis-stated so material a fact in its charge to the jury would have been error and the Court, both as a matter of strict law and in the exercise of its discretion, was justified on this ground alone, in refusing the request.

The twenty-fifth request was properly refused.

This is subject to the same criticism as the twentieth request, i. e., it utterly ignores the circumstances, qualification and expressed intent which accompanied the consent to the payment of the $1500 concerning all of which there was considerable dispute.

The twentieth, twenty-first and twenty-fifth requests were erroneous for an additional reason:

They amount to a claim of payment to La Brecque of $1500. *Payment was not pleaded.*

"Ratification" but not "payment" was pleaded. (Case No. 2, page 27.) The payment to the trustees of $3200 is mentioned as one of the particulars of the alleged "ratification" but no mention directly or indirectly, is made of the $1500 payment to Novelty Co.

Not only was it not pleaded, but the case was not tried on the theory that it constituted a payment, looking to the reduction of damages. The evidence as to the $1500 was offered and admitted solely as part of the so-called "ratification," which if it could have existed, would have resulted in a verdict for McGann, and not been by way of reduction of damages against him.

To seek at the conclusion of a trial, by means of a request to charge to inject into the case an entirely new issue, i. e., payment, in reduction of damages, is wholly improper and unfair, and the requests were properly refused.

Reply to Point No. 11 (Conversion Case).

The offer of the Bankruptcy proceedings was properly rejected for the reasons that:

1. The proceedings in question were not pleaded (Case No. 2, pages 20, 25, 27), and were therefore immaterial and irrelevant to the issues presented by the pleadings.

2. The proceedings offered, were had in November, 1919, and consequently took place long after the occurrences which are the subject of this suit, had taken place. They were therefore wholly irrelevant and immaterial.

3. The record herein fails to show what such proceedings would reveal. The hasty summary of their contents, by counsel, without verification by opposing counsel, and without copies being annexed to the State of the Case herein, does not afford this Court sufficient information to justify it in overruling their rejection by the trial court, which presumably did inspect such proceedings in detail.

This Court cannot be expected either to guess at their contents or to overrule the trial court without definite knowledge of the facts on which its ruling was based.

As a matter of fact, both La Brecque and McGann appeared specially and objected to the jurisdiction of the Bankruptcy Court in these proceedings and at the time of the trial of this case the question of jurisdiction was still undetermined and the merits had not then been considered.

The proceedings in Bankruptcy did not relate to any part of the goods in question. *They related to the 229 cases of goods which were never delivered and are still in McGann's possession and which are wholly excluded from this case.* This case involved only the 778 cases sold and delivered to Kalter Co.

4. The proceedings were only offered by counsel (Case No. 2, page 151) to show that the Bankruptcy Court had taken or attempted to take jurisdiction.

If counsel thought that he would be prejudiced by any action the Bankruptcy Court might take, he should have applied to that Court to restrain La Brecque from prosecuting this suit. Such a course would have enabled La Brecque to have had the question of jurisdiction decided on its merits in a direct proceeding.

He might have applied for an adjournment of the trial of this case, and awaited the outcome of the Bankruptcy proceedings. This too he failed to do, although he had ample opportunity so to do. (This case was tried in February, 1920. The Bankruptcy Proceedings were commenced in November, 1919.)

This is merely an attempt to have the question of the jurisdiction of this Court and Bankruptcy Court determined collaterally or as an incident to the trial of this issue herein.

The impropriety of such a proceeding is apparent, and the offer was properly rejected.

Reply to Point No. 12 (Conversion Case).

La Brecque did not sign the so-called "agreement" (Exhibit P-15, Case No. 2, pages 196, 197).

La Brecque merely attached to it (page 197), a notice to Kalter Co., withdrawing its previous notice to withhold the money. Mr. Murray's testimony (Counsel for La Brecque Co.), was in explanation of the circumstances surrounding the signing of such notice.

There was no written agreement signed by La Brecque or his counsel and his testimony was therefore properly admitted.

Reply to Point No. 13 (Conversion Case).

The letters (Exhibits P-10 and P-11, pages 189-190) were relevant and material in showing La Brecque's authority to retain possession of the goods.

They constituted in part, the agreement by which La Brecque was substituted for McGann as warehouseman of the goods.

Whether McGann knew or did not know of this agreement, had no bearing on the admissability of such letters and testimony regarding them.

As a matter of fact, there was evidence (Exhibit P-3, Case No. 2, page 180) to show that McGann did know of such a contract.

McGann's contract (Exhibit P-2, State of Case No. 2, page 179) was properly admitted to establish his alleged right to the goods, and La Brecque's contract was properly admitted to establish its right.

Reply to Point 14 (Conversion Case).

The substance of the papers (Exhibit P-5, Case No. 2, page 183) had already been testified to by McGann and stated without objection (page 55) that the storage charges amounted to $1,021.44.

The admission of the papers themselves was therefore not injurious.

Mr. Unger also, without objection, testified to the same effect (Case No. 2, page 64).

Counsel complains (Brief, page 45) that the replevin issue had already been determined and that these papers in question "injected a 'false issue.'"

If such "false issue" was thereby injected, it was wholly removed by the Court when, in its charge (Case No. 2, pages 163-164) referring to the Replevin issue said:

> "That suit was determined favorably to McGann, *and with that you have nothing to do.*
>
> "The question involved in this suit is not whether McGann rightfully took the goods

into his possession, because that has already been decided in his favor, *but whether or not, after he had taken those goods into his possession, he dealt with them as the law required him to deal with them.*"

Even if the admission of P 5 was originally erroneous, such error was cured by later testimony and by the Court's charge rendered harmless.

Reply to Point No. 15 (Conversion Case).

The question complained of was relevant, because it sought to bring out the fact that demand for the goods had been made and refused, which would constitute another link in the chain of circumstantial evidence (discussed under Point 1) of McGann's knowledge of La Brecque's interest when he delivered the goods to Kalter Co.

Counsel for McGann was asked and answered substantially the same question, without objection (Case No. 2, pages 63 and 64).

Counsel's complaint of this evidence is that it injected into the case, the already decided replevin issue.

If so, such false issue was effectively removed by the Court's charge (noted under our discussion of Point No. 14).

Reply to Point No. 16 (Conversion Case).

Inspection of invoices (Case No. 2, page 182, last four invoices) the admission of which is complained of, shows that they were directed to parties other than the depositor, The Novelty Co. That indi-

cated that McGann knew that parties other than the Novelty Co., i. e., receipt holders, were interested in the goods, and that in the face of such knowledge, his delivery of the goods to Kalter Co. was an unlawful delivery.

They constituted another link in the chain of circumstantial evidence discussed under Point 1 , and were properly received for that stated purpose (page 52).

Reply to Point No. 17 (Conversion Case).

With reference to McGann's testimony: "Do you know whether or not the East Newark Bank acquired any of these receipts?"

> "Q. Prior to their return on July 31st, 1919, did you know that these receipts had been negotiated by the New Jersey Novelty Footwear Co. with certain banks and individuals?"

If the permitting of this question was erroneous (which we do not admit) such error was wholly cured when McGann, without objection, testified (Case No. 2, page 59):

> "Q. Did you have any communication with the East Newark Bank regarding your receipts, which you had issued against the New Jersey Novelty Footwear Company's goods, and which the bank held as collateral? A. Yes.
>
> Q. When? A. I do not recall when, but we received as I recall it, one or two or perhaps three letters at different dates, advising us that New Jersey Novelty Footwear Company had lodged with them as collateral receipts is-

sued by the McGann Company. I do not recall the dates of the various—the two or three letters.

Q. That was all prior to July 31st? A. Yes." (See further testimony along same line, page 60.)

McGann's counsel opened the door to further testimony on this subject when he asked McGann on direct examination (Case No. 2, page 146):

"Q. Did you at the time of the delivery of the goods to Kalter, have any knowledge of any outstanding La Brecque receipts?

A. I did not."

La Brecque's counsel, after the door had thus been opened, asked McGann, without objection (Case No. 2, page 148), substantially the same question as that complained of and McGann explained at length (pages 148-149).

Even if the question was improper when originally asked, it was thus made a proper question by McGann's counsel's own questions.

The question when originally asked, was proper as a link in the chain of circumstantial evidence, discussed under Point 1, as it tended to show knowledge on the part of McGann, of La Brecque's interest in the goods.

The points of law involved in those portions of the charge quoted under Point No. 17, we have already discussed fully under Point 2, and we will therefore only briefly discuss them here, in reply to counsel's brief on this point.

Section 8 of the Warehouse Act, Compiled Statutes, page 5778 reads:

"Delivery of goods upon demand of holder of receipt; proof of excuse for non-delivery:— A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor if such demand is accompanied with:

(a) An offer to satisfy the warehouseman's lien;

(b) An offer to surrender the receipt if negotiable, with such endorsements as would be necessary for the negotiation of the receipt; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgement that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal (P. L. 1907, page 343)."

Section 9 reads:

"Persons to whom delivery may be made:

A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

(a) The person lawfully entitled to the possession of the goods, or his agent;

(b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either endorsed upon the receipt or written upon another paper; or

(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been endorsed to him or in blank by the person to whom delivery was promised by the terms of the reecipt or by his mediate or immediate endorsee (P. L. 1907, page 344)."

Section 10 reads:

"Conversion or unlawful delivery: Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section, and though he delivered the goods as authorized by said subdivisions, he shall be so liable, if prior to such delivery he had either,

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery; or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods (P. L. 1907, page 344)."

Section 11 reads:

"Cancellation of receipt on delivery of goods; liability for failure: Except as provided in section thirty-six, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to anyone who purchases for value in good faith such receipt for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman (P. L. 1907, page 344).

Section 12 reads:

"Partial delivery; liability for all goods unless indicated on receipt: Except as provided in section thirty-six, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to anyone who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman (P. L. 1907, page 345)."

Under Section 9 the warehouseman is justified in making delivery to:

a. The person lawfully entitled thereto.

b. The holder of a non-negotiable receipt, or of order from the person who is entitled to possession.

c. The holder of a properly endorsed negotiable receipt.

Unless as provided in Section 10, he has been requested by the proper party not to make such delivery or has information that the proposed delivery is to one not lawfully entitled to the goods.

Since McGann knew, when he delivered the goods to Kalter Co., that La Brecque's negotiable warehouse receipts were outstanding, and knew that by reason of that fact that La Brecque and La Brecque only, was entitled to the possession of the goods, McGann was prohibited by Sections 8, 9 and 10, from delivering them to anyone other than La Brecque.

Under Section 8, the warehouseman is bound to deliver the goods upon payment of the charges and the surrender of the receipt, *unless the warehouseman has a "lawful excuse" for not delivering.*

Such "lawful excuses" are in part at least, enumerated in Sections 10, 17 and 18. Such lawful excuses are:

a. Request by a person lawfully entited to a right of property or possession of the goods, not to make such delivery (Section 10 A).

b. Receipt of "information that the delivery about to be made was to one not lawfully entitled to the possession of the goods" (Section 10 B).

c. Interpleader, where there are conflicting claims (Section 17).

d. Inability to determine immediately, who is the person lawfully entitled.

Counsel apparently contends (pages 51-52) that the La Brecque receipts were void because they were issued while as counsel claims, McGann still had a lien thereon.

He says

> "At the time of the issuance of La Brecque receipts, *the goods were not in the actual custody of La Brecque.*"

The undisputed evidence is that La Brecque was in the physical possession of the goods when its receipts were issued and replevin was resorted to by McGann to remove them from La Brecque's possession.

The fact that, if as counsel claims, McGann still had a lien on the goods, such lien might be paramount to the rights of La Brecque or the holders of its receipts, but such fact would not render *the La Brecque receipts void.* They would remain valid and effectual in every respect with the single possible exception that any rights under them might be subject to McGann's lien and when such lien was satisfied, even this exception would be removed.

Even if it were true as counsel claims (page 52) that La Brecque as a competitor, was seeking to obtain some of McGann's business, or to have his receipts substituted for McGann's, the result of this case would not be affected in any degree. La Brecque if he saw fit, had a perfect right to do just those things.

Counsel seems also to claim (page 52) that La Brecque in some manner, lost his rights against McGann when it did not re-replevin the goods. Re-replevin is a *privilege* given to a defendant, *not a duty* imposed upon him.

A privilege which he may or may not exercise as he sees fit. He loses nothing if he does not avail himself of it.

Reply to Point No. 18 (Conversion Case).

Counsel says (page 55):

> "It (the statute) does not require information of facts which make a party not the proper party to whom to deliver goods, but of the fact that the party to whom delivery is about to be made is not the person lawfully entitled thereto, *it requires a knowledge of the law, it does not presume that knowledge.*"

By the Warehouse Act (Sections 12, 13, 18, 25, 49, 50, 54, pages 5779-5780, 5781-5785-5786, Compiled Statutes) it is effectually *provided that the warehouseman shall not be deprived of possession of the goods so long as its receipts are outstanding.*

Section 12 provides that where a partial delivery is made, the receipt must be taken up or such partial delivery plainly indicated thereon.

Section 14 excuses warehouseman from delivering goods, the receipt for which has been lost, until security has been furnished.

Section 18 excuses warehouseman from delivery where there are conflicting claims, until he has had an opportunity to investigate.

Section 25 provides that goods shall not be removed from possession of warehouseman until all negotiable receipts have either been surrendered or impounded.

Section 49 provides that seller's lien or right of stoppage in transit is cut off by issuance of warehouse receipts.

Section 50 makes it a crime to issue receipts unless the goods are then in his possession.

Section 54 make it a crime to deliver goods without taking up the receipts.

To argue that McGann, a general warehouseman, acting at all times as counsel, admits (page 55) under advice of counsel, did not know or did not have information that negotiable receipts outstanding, as a matter of law, give to the warehouseman the exclusive right to the possession of the goods is inconceivable.

The evidence shows that McGann did know the law. In response to the question (Case No. 2, page 56):

> "Q. Why did you want possession of the goods?"

McGann said:

> A. (Line 35) * * * "And in addition to that we had issued negotiable warehouse receipts as well as not negotiable. *We were, therefore, obligated and responsible for this merchandise.*" * * *

(Line 44, page 56):

> "We wanted this merchandise as well as all other, first and most important, because we had issued negotiable warehouse receipts, and we were therefore responsible for the value." * * *

(Page 57):

> "Q. Two reasons then: First to protect your outstanding negotiable receipts which you had issued, and second, to enable you to collect the storage or warehouseman's charges which had accumulated on it? A. Yes, to both."

(Page 58, line 26):

> " * * * We proposed to take them out because of our lien *and because of our outstanding receipts by replevin.*"

This shows conclusively that McGann knew the law to be that a warehouseman, whose negotiable receipts are outstanding, is entitled to the possession of the goods, and may recover them by replevin.

Mr. Unger (McGann's counsel), under whose advice counsel, says (page 55 of Brief) McGann "was acting throughout," testified (Case No. 2, page 63, line 34):

> "A. My purpose in endeavoring to obtain possession of the goods to the McGann Company was in order to insure the enforcement of the lien of the McGann Company against the goods for the payment of its charges, and in order to safeguard the McGann Company upon its outstanding warehouse receipts.
>
> Q. After the receipts of the McGann Company were surrendered to it, and its liability with respect to them terminated, then what was your attitude after that, up to August 2nd? A. I did not consider that its liability with respect to the warehouse receipts had terminated.
>
> Q. When you had received the surrender of these receipts? A. No, sir; it still had a duty, under the warehouse law.
>
> Q. To whom? A. To either the holder of the receipts or the depositor.
>
> Q. I am speaking now after the McGann Company receipts had all been surrendered to the McGann Company. A. Yes; that is what I mean."

Mr. Unger was McGann's general agent throughout this matter. McGann testified (Case No. 2, page 149):

> "The matter was being handled by the attorneys on both sides."

Mr. Unger's knowledge was therefore McGann's knowledge, so far as this matter was concerned.

Not only was McGann and his counsel presumed to know the law, but they actually did know it.

That knowledge, coupled with their knowledge of the outstanding La Brecque receipts, constituted "information" within the meaning of the Statute, that La Brecque, and not Kalter Co. or Novelty Co. was entitled to the goods.

Counsel contends (page 54):

> "In order that McGann have information that the delivery about to be made was to one not lawfully entitled, he must have knowledge that La Brecque was entitled to the goods."

McGann, knowing the law as he shows he did, knew that La Brecque had the *exclusive* right to the possession of the goods, *and therefore that delivery to anyone other than La Brecque would be to one not lawfully entitled.*

McGann knew the law to be that, outstanding La Brecque receipts gave La Brecque the exclusive right to the goods (see testimony above). McGann knew both from the circumstances and actual notice given his representative Kraemer, that La Brecque receipts were outstanding.

Counsel contends (page 54) that "notice" is not equivalent to the "information" required by the Statute, and that "notice" is not sufficient, and that actual "knowledge" must be shown.

The sense in which the term "information" is employed in the Statute, is made clear when we consider the provisions of Section 18 (Comp. St. 5780), which reads:

> "Delivery of goods excused until adverse claims can be determined. If some one other that the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has *information* of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to *ascertain* the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead."

If "information" means actual knowledge, then why did the Legislature provide that the warehouseman should be given a reasonable time in which *TO ASCERTAIN* the facts?

If "information" means "knowledge" then *"to ascertain"* would be to learn something which the warehouseman already knew.

"Information" as employed in the Statute, includes any information which would cause a reasonably prudent or intelligent man to believe that someone other than the person to whom the delivery was to be made, was entitled to the goods.

The maxim that "ignorance of the law excuses no one" is entirely applicable to this case.

Cutter ads. The State, 36 N. J. L., 125, cited by counsel (page 54) merely stands for the proposition that where the law is obscure, one ignorant of the law cannot be prosecuted *criminally for an offense in which "guilty intention, being a neces-*

sary constituent of the particular offense, is dependent, on a knowledge of the law."

That counsel's argument, that McGann was not bound and could not be presumed to know the law, is unsound and is demonstrated by the fact that everyone transacting business, is constantly required at his peril, to exercise his knowledge of the law. The person who buys real estate, or gives or takes a mortgage upon real estate, must exercise his knowledge of the law governing his rights. If he in fact does not know the law, or knowing it, fails to apply it, the loss is his, and he will not be heard to say, as counsel intimates he should be,

> "I did not know the law and therefore it does not apply to me."

To discuss the proposition further, is unnecessary.

The Court's charge to the jury, was correct.

Conclusion.

For the reasons above, it is respectfully submitted, that:

The judgment in Case No. 2 should be affirmed and for the reasons set forth in our Brief No. 1, that the judgment in Case No. 1, should be reversed.

Respectfully submitted,

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of counsel for
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32619