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NEW JERSEY

Court of Errors and Appeals.

CYRUS BENEDICT,
Plaintiff in Error.
vs.
PETER M. MELICK,
Defend't in Error.

In Replevin.

PHILIP W. CROSS,
Plaintiff's Att'y.

CHARLES BORCHERLING,
Defendant's Atty.

STATEMENT OF CASE.

On the first day of April, 1877, one Grace Smith, of the City of Newark, entered into an agreement with Peter M. Melick, of the same place, under their hands and seals, whereby the said Grace Smith let and rented unto Peter M. Melick certain premises, particularly described in the agreement, and are known as No. 199 Plane Street, in said City, to be used for the purpose of a coal yard for one year; the said Melick agreed to pay therefor the sum of $750, in quarterly installments, "and the further sum of one-half of the profits arising from the business and occupation of buying, selling and delivering coal from said premises," by the party of the second part. It was expressly stipulated in said

lease as follows: "Which said profits are considered and taken as part of the rental price of said premises," and were to be paid at the expiration of the lease.

And it was further agreed, that the party of the first part, the said Grace Smith, should "furnish a suitable and proper person to take charge of the selling and delivering of coal from said premises, and keep accurate books of account for the party of the second part, and to do whatsoever may be proper and necessary to be done in the carrying on of said business."

At the expiration of said lease, one quarter's rent, to wit, $187 50, remained unpaid, besides the further sum of $1,112 50, one-half of the profits arising from the carrying on said business.

The landlord distrained for the two sums above mentioned, and appointed Cyrus Benedict, a constable, as agent for that purpose. The plaintiff replevined the goods distrained. The defendant avows the taking of the distress in the right of the landlord for arrears of rent. The landlord had the books examined by an accountant before the issuing of the distress warrant. He handed his statement to the attorney upon which the distress warrant was issued.

The accountants agree substantially as to the amount due from the books of accounts. See charge of the Judge, page 71 of the printed record; also the testimony of Mr. Bestic, page , and the remarks of the Court upon the examination of Mr. Foote.

They only differ as to the amount of coal on hand after the expiration of the lease.

Upon the trial, the Court held that the distress warrant was illegal,—if the jury believed that the condition of accounts were such that the tenant could not have readily ascertained the amount due.

It held "That whenever it appears as the result of any case that the tenant cannot, with conven-

ience, ascertain the amount of rent due the landlord has no right to distrain."

The Court also said "We have also been engaged in the trial of this cause for nearly three days, and if an examination for three weeks, and a trial before a jury, for the length of time this case has occupied, be necessary for the purpose of ascertaining the amount of these profits, then this landlord's warrant was illegal."

The Court refused to charge upon the request of defendant.

1st. That if it is possible to determine the amount of the rent from the books of account, then the rent is sufficiently certain to justify the distress warrant.

2nd. That if they believe that the landlord had the books examined by a book-keeper, previous to the expiration of the lease, and knew what rent was due, then the distress warrant was legal and he distrained for a certain sum.

The plaintiff, upon the trial, insists that the landlord cannot distrain because of the uncertainty of the rent, upon the principle "that no distress can be taken for any services that are not put into certainty."

The real question is not whether you can distrain for an uncertain rent, for that is undisputed but the question is, "By the terms of the lease, have the parties made the rent sufficiently certain to enable the landlord to distrain?"

First.—It is admitted by this charge, that where a person rents a property, and pays therefor the one-half portion of the profits arising from carrying on a business on that property, that the rent is expressed sufficiently certain to permit the landlord to distrain for the profits. But it is held, that although you can distrain for profits—yet, if it

appears in any case the tenant cannot, with convenience, determine the amount of the rent due; if he cannot readily ascertain the amount of rent, then the landlord cannot distrain.

(*a*) In order to determine for what rent, and under what circumstances, the landlord can distrain for rent, we must recur to the common law.

Before the second of W. & M. the landlord could merely distrain the goods, without the power to sell; then he was compelled to take his judgment, and from the distress obtain the rent.

Therefore the rule was, that no distress can be taken for any services that are not put into certainty nor can be reduced to any certainty; for *id certum est quod certum reddi potest*—"that is certain which is capable of being reduced to a certainty." And then immediately follows a maxim which throws wonderful light on the whole subject: *oportet quod certa res deducatur in judicium*—"a thing certain must be brought to judgment."

Coke on Littleton, 96*a*, § 136.
Fry vs. Jones, 2 Rawle, 11.
Delmeter vs. Cox, 75 Pa., 200.
Wilkins vs. Tolin, 52 Ga., 208.
Rinehart vs. Olwine, 5 W. & S., 157, &c.
Daniel vs. Gracie, 6 Q. B., 145.
Smith vs. Tyler, 2 Hill, N. Y., 648.
Stewart vs. Dougherty, 9 Johnson, 108.
Gilbert on rent, page 10.
10 Johnson, 91.

The *certainty* required by the common law, was such a certainty upon which a judgment could be obtained, so that the amount thereof could be taken from the distress.

Coke on Littleton, 97*a*.

SECOND.—The *uncertain* rents for which a landlord *could not distrain* were tenancies in Frankal-

moign. The services which they were bound to render for these lands were not certainly defined. They were, in general, to pray for the souls of the donor, his ancestors and successors.

2 B. C. Cone, 101.

"The lord may not distrain them not doing this; for upon the avowry, *damages cannot be recovered* for that which neither hath certainty nor can be reduced to a certainty.

Coke on Littleton, § 136, note.

So tenants holding by military service, were considered so uncertain for which the lord could not distrain.

It appears from an examination of Coke upon Littleton, that the lord could distrain for any service for which it was possible for him to obtain a judgment.

Has the law changed? Not in the least. Has the practice changed? Only in this—that the landlord can sell the distress without obtaining a judgment. If the tenant replevins, the landlord avows, and thus takes his judgment. If, perchance, he distrains too much, nevertheless he takes his judgment for the amount actually found due upon the avowry, but is liable, in another action, for an excessive distress.

THIRD.—*Id certum est quod certum reddi potest* —"that is certain which is capable of being reduced to a certainty."

Oportet quod certa res deducatur in judicium—"a thing certain must be brought to judgment," shines like a beacon-light through all the centuries from Lord Coke till the present time.

Reddi potest are the leading words in the maxim. IS POSSIBLE TO REDUCE, not "may be," or is easily reduced; but if "IT IS POSSIBLE" to reduce it to a certainty, then it is a certainty; then it is of sufficient certainty for a distress.

FOURTH.—The rule, *Id certum est*, &c., is not confined to those cases, where to ascertain the amount, nothing but a MERE COMPUTATION is necessary.

Daniel vs. Gracie, 6 Q. B., 145.

In this case the counsel took the position that the rule *certum est*, &c., applies where, to ascertain the amount, nothing but a *mere computation is necessary; but not when a measurement must first be made of something which is to be taken.* But Lord Denman overruled him, and held the distress good.

FIFTH.—Where, by the terms of a lease, the lessor was to receive as rent a share of the grain raised, deliverable in the bushel. Held he might distrain.

Reinhart vs. Olwine, 5.
Watts & Sergent, 157–163.

SIXTH.—In the case of Fry vs. Jones, 2 Rawle, 11, the Judge holds in the following language: "We hold the principle to be that a distress is *inseparably* incident to every service that may be reduced to a certainty." "If that should be the rule, we are at loss to conceive in what inconvenience or difficulty consists." "If the tenant keeps account of the toll, which it is his duty to do, the rent may be reduced to the utmost certainty." Nor can we perceive the danger which may arise to the tenant for his rights are abundantly protected. By an offer to comply with his contract, with which he is best acquainted, he can defeat the landlord. As for an excessive distress the law, as in other cases, has provided an ample remedy. The avowry is well enough, neither can the jury have any difficulty in estimating the damages. It is to the interest of landlords and tenants that the rights of the former should be protected.

Experience, which is the best test, satisfies us

that an interference with the remedies of the common law, causes mischief rather than good.

Fry vs. Jones, 2 Rawle, 11.

So in the case at bar, they were by the terms of the lease, "to keep accurate books of account," so the rent (in the language of the above case) may be reduced to the *utmost certainty*. I fail to see any difference in principle; where a person takes one-third of the toll which passes through a grist mill, or one-half of the profit of coals which passes over a pair of scales. In one case, if accurate books of account are kept, accounts which may be verified, the person bringing the grain to the mill should be debited to the grinding and credited to the amount of toll. The cash receipts would be the receipts by toll, and the one-third of the toll would be the rent. It is no more difficult for a book-keeper, who keeps *accurate* books of account, to take the profits of a concern like the case at bar, than it would be to take the third part of the tolls of a grist mill. But suppose it should take a higher order of book-keeping in the one case than it did in the other, does that alter the principle. Would you have one rule of law to apply to an unscientific man and another and different rule to a scientific man? It is not the *ease* with which a thing may be done which is the test, for what is easy to one man may be difficult to another, and *vice versa*. But the rule is, "have the parties pointed out the way by which the rent may be ascertained—then the rent is certain."

SEVENTH.—In the case of Daniel vs. Gracie, the landlord had to measure the coal taken out of the mine. It required no ordinary skill; it might have been a very irregular surface; it might have been the fustrum of a cone. It required something far greater than a mere calculation.

EIGHTH.—The *uncertain* rent for which a land-

lord could not distrain were such which the parties, by their agreement, pointed out no possible way by which it could be reduced to a certainty; for instance, in Wells vs. Hornish, 3 Penn., 30, the defendant proved that Arthur Carr had become the purchaser of the property and premises out of which the rent was claimed at a sale made of the same, by the Sheriff of Westmoreland County, and that a deed of conveyance was duly made by Carr. without more being shown or proved on the part of defendant, he then called J. Y. B. and proposed to ask him what would be a reasonable rent for the property in 1825 and 1826, from his knowledge of the property. Held no certain rent was reserved

See also Valentine vs. Jackson, 9 Wend., 302.

I have been unable to find, after diligent search, a single case in the books, where the rent was definitely pointed out and ascertainable, where a judgment could be obtained for it, in which the rent was not distrainable. Even the tenancies in Frankalmoign, *where the kind* of religious services were pointed our, such as signing, etc., the lord could distrain.

Coke on Littleton, § 136, etc.

In the case at bar the rent and amount was specified as plainly as English language can express it. A judgment can be obtained for it; that is what we ask for in our avowry. Books of account were kept *and we know what the profits were.* If we have distrained for too much the law gives the plaintiff ample remedy, as stated in 2 Rawle, 11.

NINTH. The rule laid down by the Court was, if the tenant cannot with convenience determine the rent, the distress warrant is illegal.

The rule also laid down was, that though the landlord had the books of account examined and knew what the rent was, yet the distress warrant

was illegal if the tenant could not with convenience determine the amount due.

According to this charge, and the rule laid down therein, even if the landlord and tenant both had the books examined and knew the amount due, yet if the tenant could not with convenience determine the rent, the distress would be illegal.

This proposition is directly opposed to all the decisions of the Courts upon this subject; it is opposed to the case of Daniel vs. Gracie, 6 Q. B., 145.

In that case the landlord had to go down in a coal mine, and had to measure the surface, to determine the amount of coal that had been previously taken out. It required experts to do it. It required more than ordinary skill. It could not be done readily; it could not be done with convenience. It might have taken longer than "three weeks and three days." It required a higher order of skill than book-keeping. In that case, if the parties had kept books of account, there would have been no need of going into the mine and making a measurement. The surface of coal mines are generally so irregular that absolute exactness, in measurement, is impossible.

See how unjust this proposition is. In the case at bar the landlord had had the books examined; the book-keepers agree as to the state of the books. O'Connor, Bestic and Foote, agree as to the state of the account. We reach out our hands to the jury for a verdict. The Court brings down its gavel and says stop, the tenant could not with convenience determine the amount due, therefore your distress is illegal.

But, if your Honor please, we did determine the amount due. Yes, is the reply, but you had hard work to do it. You could not do it readily; you could not do it with convenience.

Suppose A agrees to pay B $12 per month for a house, at the beginning of each month, for a year; suppose A pays $1 at one time, fifty cents at

another, a turkey of the value of $1 75, a bushel of potatoes at another, can it be possible that the tenant can avoid a distress by saying, Oh, well I owe you rent, it is true, but I am a poor book-keeper, I didn't put down these things, I can't readily determine how much is due. It would be very inconvenient for me to do so—the fact of it is I can neither read or write; this is the way I kept the ac-account: every time I let you have an article I cut a notch on this stick—the long mark represents the dollar payment, the one-half as long fifty cents, and there are two close together—an accident happened to this stick—that one mark seems to be broken, and I can't tell exactly whether it is a three-quarter mark, a half mark, or in fact a whole mark. I can't readily determine how much is due; it isn't convenient for me to do so; in fact it is better for me not to—for the Court says, if I can't readily determine how much is due, you cannot distrain.

Such an argument is a premium upon ignorance and negligence.

But the statute conclusively decides this matter. § 17 of the distress act declares "That it shall and may be lawful to and for any person or persons *having any rent in arrear and due*, upon a lease for a term * * * of year or years, to distrain for such arrear, &c., provided that such distress may be made within six calendar months, &c., &c." Here is an *unqualified* right given to distrain for rent in arrear.

But the Court below said though there is rent in arrear yet you cannot distrain unless the tenant could readily ascertain the amount due. The statute says, unqualifiedly, you can restrain for rent in arrear. Which is right, the statute or the Court?

I think that § 27 of the Replevin Act has an important bearing, and throws some light upon this subject (if anything else is needed). In actions of replevin for distress it provides that the jury may determine whether the plaintiff, or defendant, or

whether each party shall pay his own costs. Why does the statute single out actions in replevin for distress for rent, and make that an exception? Is it not for the reason that there might cases arise in which the rent was not readily ascertainable, and that there was an honest difference between the parties as to the amount due, or whether there was any due at all, and therefore the jury could deal with the matter of costs as might be just between the parties? I can think of no other reason. If this is the correct reason, or one of the reasons, then it is a perfect answer to the position of the Courts below. If it is not one of the reasons, then the section of course has no bearing upon the subject.

The question involved in this case has been once decided by this Court.

The Court has already decided in this case that "To entitle a landlord to distrain for non-payment of money it must be due under a demise, and for a rent fixed and certain, *or capable of being reduced to a certainty by either party.*"

2. One-half the profits of a coal yard reserved as rent may be distrained for if the amount appear in the books of account kept by agreement of the parties.

The evidence shows that the amount does appear from the books of account; it shows that it was capable of ascertainment; that it was ascertained by the landlord before the distress was issued.

Yet the Court refused to charge the jury "That if it is possible to determine the amount of rent from the books of account then the rent is sufficiently certain to justify the distress warrant."

The Court refused to charge the jury "That if the jury believe that the landlord had the books examined by a book-keeper, previous to the expiration of the lease, and knew what rent was due, then the distress warrant was legal, and he distrained for a certain amount."

I respectfully submit that this refusal so to charge is in contradiction to all the decisions and principles of the law upon this subject, and is contrary to the principle laid down in the June Term of this Court.

According to the common law the landlord had a right to distrain the goods and keep them as a pledge till he could obtain a judgment, and after judgment he would take out the amount recovered. Therefore the common law held that you cannot distrain for rent that is not certain. It also held that *that is certain which is capable of being reduced to a certainty.* In other words, if the rent was sufficiently certain so that you could recover a judgment, a distress was proper. For that reason a distress for rent under Frankalmoign tenancies would not lie, for there were no known value of prayers, and no judgment could be obtained for their non-performance.

The question was not whether you could readily, and with convenience and ease, obtain a judgment, but whether it was CAPABLE of being obtained.

TENTH.—The tenant was not liable for any loss to the business.

(*a*) The landlord was only entitled to rent upon the amount of coal actually sold and delivered, (see lease.) The coal was the tenant's. The coal that remained, after the lease expired, the landlord had no interest in.

(*b*) All the rent the landlord is entitled to is the amount of the profits from selling coal, which sales appeared on the books.

(*c*) If coal went out of the yard that did not appear on the books then it was wrongfully appropriated by some one.

(*d*) If it was wrongfully appropriated by any one it was the loss of the tenant. Suppose one of the tenants horses was stolen, could it be possible

that the landlord would be responsible for it? They were not partners; the landlord was not responsible for any loss to the business; it was so specified in the lease.

(*e*) Therefore the Court erred in charging the jury "That the item of 1,021 tons of coal might be taken into consideration in ascertaining the amount of the profits." And also in charging "That in ascertaining the amount of profits the quantity of coal lost during the year was to be taken into consideration."

There was no coal lost, for it appears from the state of the case that in the declaration in the first case the plaintiff admitted and charged that the defendant took and carried away coals, &c., of the value of $3,000.

The declaration in this case only enumerates a portion of the coal which was distrained, and charges the value to be $1,400. And the constable swears that there was a great deal more coal there than he distrained upon.

Yet the plaintiff's attorney permits Mike Hart to swear that there was only some 500 tons, and that he weighed it, which was about half the amount which was charged by plaintiff to be there, in his first declaration which was drawn directly after the coal was said to have been weighed by Hart.

It is of the utmost importance to this landlord that this distress warrant should be held legal. The tenant is a bankrupt.

All of which is respectfully submitted,

PHILIP W. CROSS,

Plaintiff's Att'y.

Newark, N. J., Nov. 20, 1882.

ADDENDA.

The Court refused to charge "That if it is possible to determine the amount of the rent from the books of account, then the rent is sufficiently certain to justify the distress warrant."

It refused to charge "That if the jury believe that the landlord had the books examined by a book-keeper previous to the expiration of the lease, and knew what rent was due, then the distress warrant was legal and he distrained for a certain amount."

Nothing is more common in America than to make the rent a certain portion of the annual produce of the farm, as for instance: one-half the grain to be delivered in the bushel, and one-half the hay and straw, &c., and it has always been held that these are good reservations of rent in kind.

Smith's Landlord & Tenant, 129.
Stewart vs. Dougherty, 9 Johnson, 108.
Fry vs. Jones, 2 Rawle, 11.
Rinehart vs. Olwine, 5 W. & S., 157.

Now suppose A should rent to B his farm at the annual rent of one-half of the bushels of wheat, oats, barley and rye, to be paid on the first of January—the letting being from April to April. On the first of January the grain remains in the barn unthreshed. Can it be possible that a Court could legally charge the jury—"Gentlemen of the jury if you believe from the appearance of that barn, taking into consideration that the straw remained unthreshed, that the landlord could not readily have ascertained the number of bushels raised, then the distress warrant is illegal." "Because the right of the tenant to relieve himself from

the distress of his goods by a tender, is a right as high as the right of the landlord to collect his rent by a landlord's warrant."

It is the duty of a debtor to tender the amount of debt when due. It is the duty of the tenant to know the amount of rent; if he has to compute it, it is his duty to have it computed when due. Can it be possible that the tenant can take advantage of his own neglect? Can he, by his negligence, defeat the statutory right of distress? Can he say, I will be negligent, because if I am negligent I will deprive my landlord of a statutory right? Can he say, oh yes, I know it is possible to determine the amount of profits from the books; but if I don't do it the Court will say I can't readily do it, it is not convenient and the landlord can't distrain.

The case of Daniel vs. Gracie is directly opposed to this theory. If the principle laid down in this case had been adopted in that, the Court would undoubtedly have called a jury view, and would have reasoned in his charge somewhat in this manner—

"There is only a certain class of cases where a landlord can resort to a distress warrant for the collection of rent, and these cases are divided into two classes. First, where the rent is reserved in money the amount of which can be determined by actual calculation, by substracting from the amount of rent reserved the amount of payments made. Secondly, where the rent reserved is in one sense uncertain—that is, where it doesn't consist in so many dollars and cents, but where it consists in a variable quantity, determinable by some method of ascertainment other than by mere division and subtraction. And wherever it appears, as the result of any case, that the amount of rent that is to be paid cannot with convenience and readiness be ascertained, so that the tenant may make a tender of the rent due, there the landlord has no right to resort to a landlord's warrant for the purpose of collecting the rent."

"The first question in the cause, then, is whether going into this mine the jury can perceive, by their inspection and examination, that the tenant could have readily ascertained the amount of this rent when that distress warrant was executed, and could have tendered the amount; for only in that event was the landlord entitled to resort to the landlord's warrant for the purpose of the collection of the rent."

But how different is the language of Lord Denman in this case, he says: "In the present instance, however, the rent is reserved in money and the amount is, according to the criterion of Lord Coke, *capable* of being ascertained? "*Certum reddi potest.*" Capable is the word used. What does it mean? Webster answers—"Endued with power competent to the object." *Endued with power.* It is diametrically opposed to the idea of readiness and convenience. Capable! It is the strongest word in the language. It implies the summoning up of all one's powers, and concentrating them upon and accomplishing a particular object. The doctrine laid down by the Court below is as far removed from the principles of the common law, enforced by a long line of decisions, as power is removed from convenience; as capability is removed from readiness; as an honest intention to collect a *bona fide* indebtedness is removed from the shilly shally trickery of a dishonest tenant.

The certainty required by the law is *measured* by the *capability* of *obtaining judgment.*

"And upon the avowry, *damages cannot be recovered* for that which neither hath certainty, nor can be reduced to a certainty."

Co. Lit., 96*a*.

"It seems, therefore, there was no reservation of anything that could be recovered by action, or enforced by a distress."

3 Penrose & Watts, 55.

HOLBROOKS' STEAM PRINTERY, 11 Mechanic St., Newark, N. J.

Court of Errors and Appeals.

CYRUS BENEDICT,

Plaintiff in Error,

vs.

PETER M. MELICK,

Defendant in Error.

POINTS FOR DEFENDANT IN ERROR.

I.

Nothing appearing on the record that there has been any objections made below to the pleadings in this cause, the first error assigned by the plaintiff in error as to the insufficiency of the declaration in this cause and the matter therein contained must be stricken out, inasmuch as this court will not take notice of any matter not established by the record.

Boswell vs. Green, 1 Dutch., 391.
Williams vs. Sheppard, 1 Gr., 76.
Field vs. Gibbs, Pet. C. C., 155.

II.

No distress can be taken for any rent or service that are not put into certainty nor can be reduced to any certainty, for *id certum est quod certum reddi protest.*

Co. Litt., 96 a; 142 a.
Parke vs. Harris, 1 Salk, 262.
Melick vs. Benedict, 14 Vroom, 425.
Valentine vs. Jackson, 9 Wind., 302.
Smith vs. Oulson, 10 Johns, 91.

But the ascertainment of the amount due must be in condition to be readily ascertained.

Melick vs. Benedict, *ib.*

III.

The trial before the jury in this case disclosed the fact, that the amount of profits could not be readily ascertained.

See Foote's evidence, page 35, lines 14-15.

Two expert's investigations differ to amount of $200.

IV.

The whole charge of the Court must be taken together and construed with reference to the subject matter of controversy and the claims of the parties before the Court, and if when taken altogether, the case be correctly given, the judgment will not be reversed because a single instruction taken by itself, would be too broad in its terms.

Smith v. Car, 16 Conn., 450.
Childress v. Ford, 10 Smeder and Marshall, 25.

And unless the erroneous charge complained of prejudices the rights of the plaintiff in error, the judgment against him will not be reserved.

Graham v. Whitely, 2 Dutch, 254.
Kutzmeyer v. Ennis, 3 Dutch, 371.
Leport v. Todd, 3 Vroom, 125.
D.L. & W.R R. Co., v. Dailey, 8 ib., 526-528.

Nor is it error where the charge of the Court amounts to an expression of opinion upon the weight of the evidence.

Castner v. Sliker, 4 Vr., 96, 507.
Brush v. Carter, 3 Vr., 554.

And it is improper to ask the Court to charge in a specific way, especially if it be not purely a question of law.

Bellin v. Phillips, 4 Dutch, 125.

And it must be made clearly to appear that the charge requested was warranted by the evidence and necessarily involved in the verdict.

Davidson v. Schooley, 5 Hal., 145.

When justice has been done by a verdict, although there has been a misdirection by the judge, a *venire de novo* will not be granted.

Snyder v. Finley, Coxe, 78.
Den, Steelman v. Steelman, 1 Harr., 66.
Joslin v. N. J. Car Spring Co., 7 Vr., 141.
Princeton Turnpike Co. v. Gulich, 1 Harr, 161.
Wykoff v. Runyon, 4 Vr., 107.
Mechanics Insurance Co. ads. Nichols, 1 Harr, 410-413.
Den v. Wintermute, 1 Gr., 177.

V.

The merits of this case consist in the validity of the distress warrant under which the landlord claimed the goods.

The defendant in error therefore, under the authorities cited, and the evidence in this cause, submits that it is clearly shown—

1. That the amount of rent alleged to be due at the time of the issuing of the distress warrant, was not ascertained with any certainty, and that the sum could not be readily ascertained with such certainty as to warrant distress; and

2. That the court below in its charge to the jury, properly and impartially charged the jury as to the law governing this case, and that the question of fact was the property of the jury for their determination, and properly and explicitly left to them for their consideration.

That the rent, if any was due, could not be readily ascertained is apparent from the fact that the referee, by his report, reports that the landlord was overpaid $94.12, and the experts who examined the books, after careful examination, differ to the amount of $200.

Hence the defendent in error further submits that the writ of error should be dismissed.

CHARLES BORCHERLING,
Counsel for Defendant in Error.

Essex Circuit Court.

PETER M. MELICK, *Plff.*,
vs.
CYRUS BENEDICT, *Deft.*
In Replevin.

BILL OF EXCEPTIONS.

PHILIP W. CROSS, Defendant's Attorney.
CHARLES BORCHERLING, ESQ., Plaintiff's Attorney.

Be it remembered, that on the fifth day of January, A. D. 1882, at a Circuit holden at Newark, in and for the County of Essex, before His Honor David A. Depue, Esq., one of the Justices of the Supreme Court of Judicature, of the State of New Jersey, and Judge of said Court, the issue joined in the above stated case between the said parties (*pro ut* the pleadings) came on to be tried by a jury for that purpose duly empannelled, and thereupon the attorney of the said Cyrus Benedict being entitled to open the cause, offered in evidence the case made between Grace Smith, landlord, and Peter M. Melick, tenant (*pro ut* the same), dated the fifteenth day of May, A. D. 1877, which was received in evidence.

He called as a witness Cyrus Benedict, who testified as follows:

Cyrus Benedict, defendant, sworn in his own behalf.

DIRECT EXAMINATION.

By Defendant's Counsel:

Q. What is your occupation?

A. I am a Constable.

Q. Do you know Peter M. Melick?

A. Yes, sir.

Q. Were you in April, 1877, acquainted with Peter M. Melick?

A. Yes, sir.

Q. Do you know where he did business?

A. Yes, sir.

Q. Where?

A. On the corner of Plane and Plum, I think it is, on one side. It is a street runs up to the Hedenberg Works.

Q. Did you receive a distress warrant from Grace Smith in 1878?

A. I did.

Q. (By the Court.) Where is it?

A. I couldn't tell you where it is.

Q. Have you looked for it?

A. Well, yes, I have looked, and I haven't succeeded in finding it.

Q. When did you get it?

A. I couldn't tell the date.

Q. You certainly could tell somewhere about the time?

A. I think it was in the spring.

Q. Of what year?

A. 1878.

Q. What time in the spring?

A. I think it couldn't have been far from April; but I am not positive.

Q. Before or after the first of April?

A. I should think it wasn't far from the first of April.

Q. Was it before or after the first of April?

A. I think it was after.

Q. (By Defendant's counsel.) Was it on the third day of April?

A. I couldn't say positively. I think it was not far from the first, as near as I can recollect.

Q. From whom did you get it?

A. Mr. Cross or Mr. Smith; it came to me through Mr. Cross.

Q. Do you remember the amount for which you distrained?

A. No, sir; I do not remember the amount.

Q. When did you last see that paper?

A. The last I saw of it was a few minutes subsequent to my receiving it.

Q. Where was it then?

A. It was then in my papers. I have changed them two or three times since that time. It may possibly be with them; but I have looked, and didn't find it.

Q. Have I requested you to look for it?

A. Yes, sir.

Q. And at the other term of Court you looked for it and expected to be called as a witness?

A. Yes, sir, and couldn't find it.

Q. (By Plaintiff's Counsel.) When was the last term you speak of?

A. The September term.

Q. (By Defendant's Counsel.) You have not succeeded in finding it?

A. No, sir; it possibly may be somewhere in my papers.

Q. What did you do under that distress warrant?

A. I distrained on a portion of the coal in the yard of Mr. Melick.

Q. Whereabouts was the coal?

A. It was running along on this (Hackett) street, in the yard, but fronting on Hackett street.

Q. Where had it been removed from?

A. From the opposite side of the Canal.

Q. Of your own knowledge?

A. Well, I know they were moving; I saw them moving.

Q. On the other side of the Canal from what?

A. The yard had formerly been on the opposite side of the Canal, corner of Plane and Academy streets.

Q. Were those the premises which Melick occupied during the year 1877?

A. Yes, sir.

Q. Do you know the number of that place on Academy street which Mr. Melick occupied?

A. I do not. It is on the northeast corner of Academy and Plane, where the yard was.

Q. Well, then, what did you do after that?

A. I made the distraint on the warrant, and placed a man in charge of a portion of the coal. But before I made out a notice—I think I did not make out a notice—it was replevined—a writ of replevin served on me, and the man taken away.

Q. (By the Court.) How soon was the replevin served on you after you served the distress warrant?

A. I think it was within two or three hours; to the best of my knowledge and belief now it was soon after.

Q. (Paper shown to the witness.) Is that the writ of replevin?

A. Yes, sir.

Q. (By the Plaintiff's Counsel.) Is that the one that was left with you?

A. I handed it to Mr. Cross; I presume it is.

Q. That is the same one, is it?

A. I think it is.

Q. (By the Defendant's Counsel.) That is a copy, isn't it.

A. Well, I haven't looked at the back of it.

Paper dated April 6, 1878, and indorsed as having been served the same day, offered in evidence.

Q. (By the Court.) Under that writ, was the property that you took by distress warrant taken by the officer?

A. Yes, sir.

Q. All of it?

A. All I had distrained for, yes, sir.

Q. And you distrained on nothing except that which was covered by the writ of replevin?

A. No, Sir.

Q. Just look at the description in the writ and see whether that is the property that you had distrained?

A. (After examining paper.) Yes, sir.

Q. (By Defendant's Counsel.) Was it the same day when you distrained that the goods were replevined?

A. Yes, sir.

Q. Was it within a few hours?

A. Yes, sir.

Q. Do you remember when the writ was handed you?

Witness—At what hour, do you mean?

Defendant's Counsel—No; when the distress warrant was handed you by me.

A. No, sir, I do not.

By the Court—Can you tell how many days, it was, if any, before you served it?

A. I could not. I was under the impression it was the same day or the day after, but I am not positive.

Q. Do you mean the day before?

A. Yes, sir. It might have been the afternoon of the day before, or it might have been that morning.

Q. Your recollection is that it was the same day or the day before?

A. Yes, sir; I think so.

Q. Have you no entry on your books, charge for services, or memorandum that will enable you to fix the date when the distress warrant was given you?

A. No, sir; I have no memorandum of it.

By Defendant's Counsel—Then the Sheriff came and replevined the goods?

A. Yes, sir.

Q. And you stepped out and the Sheriff took possession?

A. Yes, sir.

CROSS-EXAMINATION.

By Plaintiff's Counsel:

Q. Do you remember anything about this transaction, positively?

Witness—About making the distraint?

Plaintiff's Counsel - About the whole transaction.

A. Yes, sir, I remember making the distraint.

Q. You remember certainly, then, that you got the warrant. You say you got it from Mr. Cross?

A. Yes, sir.

Q. Did you get it before the first of April or not?

A. I am very sure I didn't have it before the first of April.

Q. You said a while ago it was about the first week in April. Can you say that?

A. I can, because this writ was served in April.

Q. Will you say that that writ was served on you the very same day that you got the warrant?

A. No, sir; I say the day I made the distraint.

Q. What day did you get the warrant?

A. I couldn't positively say whether I got it that day or the day before.

Q. Will you say you got it the day before the writ was served?

A. No, sir.

Q. Will you say positively you got it on or after the first of April?

A. Yes, sir; because I know I didn't have the writ any amount of time.

Q. Why did you say it was some time in the spring, but you couldn't remember when it was? What did you mean by that?

A. I can't just remember what I said.

Q. How came you now to say positively it was after the first of April?

A. Why, the return of this writ; from the fact of the writ being returned served on that day. That tells me what time it was.

Q. What did you mean when you said first that it was in the spring of the year; it wasn't cold weather; and that it was some time about the first of April?

A. I couldn't tell positively, only as I looked back to judge of the time of the year, to judge what the weather was. I have seen no papers since.

Q. When did you last look for this warrant?

A. At the last September term.

Q. Did you look among your papers?

A. Yes, sir.

Q. I understood you to say that it might be there?

A. I say now that it might possibly be there. My papers are scattered round a good deal.

Q. You didn't make a diligent search ?

A. As good as I could under the circumstances.

Q. What were the circumstances that prevented you making a thorough search ?

A. Sometimes I lay papers away in different parts of the house. I have a desk now where I keep my papers; I did not then. I didn't search the house all over.

Q. Why didn't you, if you knew you had your papers in different parts of the house ?

A. I looked wherever I thought I had any.

Q. You say it may be there ?

A. It might possibly be there.

Q. Now, you made this distress, and put a man in charge. That is correct ?

A. Yes, sir.

Q. These goods were replevined away from you before you gave notice ?

A. I said I thought I had not made a notice—that I didn't think I had time to make a notice.

Q. Did you serve a notice ?

A. I don't think that I did. I might have done it.

Q. Have you any recollection about what you had been doing with that distress warrant when you got it ?

A. I remember that I made the distraint; that I put Thaddeus Burt in charge, and went away about my other business; and there was a replevin, to the best of my recollection, a very short time afterwards.

Q. Did you give any notice after that ?

A. No, sir.

Q. You gave notice after that replevin ?

A. Of course not.

Q. You testify that this was the paper that was handed to you by the Sheriff, and you handed it to Mr. Cross ?

A. When I looked at this paper I looked at this side; I didn't look at the return. I know there was a writ served on me, and I handed it to Mr. Cross.

Q. Yet you testified that this was the paper that you handed to Mr. Cross ?

A. I might have said that I——

Q. (Interrupting.) Didn't you say so ?

A. I don't know whether I said I did, or I thought I did.

Defendant called Peter M. Melick, who testified as follows:

DIRECT EXAMINATION.

By Defendant's Counsel:

Q. Do you remember this distress warrant being served on you?

A. I do.

Q. When was it?

A. It was the first week in April.

Q. Where is that distress warrant?

A. I don't know anything about it.

Q. Have you got a copy of it?

A. No, sir; I haven't got no copy of it.

Q. Did you ever see a copy of it?

A. Nothing more than what Mr. Benedict had.

By the Court:

Q. Under this distress warrant what property was taken?

A. There was about 551½ tons of coal in the yard.

Q. It was not, at the time of the distress, I understand, on the premises of Mrs. Grace Smith?

A. No, sir.

Q. Had it once been there?

A. It had been there; yes, sir.

Q. When had it been removed?

A. Removed it from the 20th of March to the 25th or 26th.

Q. What was it worth?

A. I couldn't tell exactly.

Q. As near as you can tell?

Witness—The wholesale price?

The Court—The market value to sell?

A. About $5 a ton, I think.

CROSS-EXAMINATION.

By Plaintiff's Counsel:

Q. Did I understand you right, that you saw a paper in Mr. Benedict's possession?

A. Yes, sir.
Q. Did you read it?
A. He read it to me.
Q. It was a distress warrant?
A. Yes, sir.
Q. And that was the first week in April?
A. In April.
Q. You replevined?
A. I did.
Q. Why?
A. Because——
The Court (interrupting)—That is unimportant. I suppose that was because you did not think you owed any rent?
A. Yes, sir.
Q. Was this coal that was distrained your property?
A. Yes, sir.

By the Court:

Q. You say you saw this distress warrant in the hands of Mr. Benedict?
A. Yes, sir.
Q. And you heard him read it?
A. Yes, sir.
Q. Did you see whose name was signed to it?
A. I don't think I did; I knew what it was.
Q. You knew it was a distress warrant from whom?
A. Mrs. Grace Smith.
Q. Do you remember what the warrant stated with regard to the sums for which the distress was to be made?
A. It was for the last quarter's rent and profits.
Q. Profits for the whole year?
A. Yes, sir.

Philip W. Cross, sworn on behalf of defendant, testifies:

I made out this distress warrant at the request of Mrs. Grace Smith, the defendant. It was signed and sealed by her. It was witnessed by me. It empowered Cyrus Benedict to distrain the goods and chattels of Peter M. Melick, upon the premises, No. 99 Academy street and Plane, the premises she occupied during the year 1877 as a coal-yard.

By the Court:

Q. For what?

A. For rent; for the sum of $187 rent, and 50 cents, being one-quarter's rent due the last quarter of the year, and some $1,200.

The Court—Be sure about the figures.

Witness—The only way I can be certain is to refresh my memory by a plea I drew at the time, and it says for the sum of $1,300, being the balance of rent due said Grace Smith on the 1st of April, 1878. I am not certain whether it specified the $187.50, one-quarter's rent, the last quarter's rent, and then $1,112.50, the profits. That is to say, I don't remember now distinctly whether these two items were specified separately, or whether we mentioned the sum of $1,300, including both. I am not positive as to that.

Q. The profits were $1,112.50?

A. Yes, sir; and I can state the date of this distress warrant. I am positive it was after the first day of April, 1878. As to the exact date, of course, I cannot swear, excepting as my memory is refreshed from this plea, which I drew at the time, and which I knew was correct; and it says that "on the 3d day of April, 1878, the said Grace Smith issued under her hand and seal a distress warrant, directed to defendant, one of the Constables in the County of Essex, in said State."

Plaintiff's counsel objects to reading of paper.

Witness—This paper was issued on the 3d day of April, 1878. Mr. Benedict swears that——

Objected to. Objection sustained.

Q. You delivered it to Mr. Benedict?

A. I delivered it to Mr. Benedict, and I must, from the return of this writ, have delivered it to him between the 3d day of April, 1878, and the 6th day of April, 1878. Of course, I am not positive whether it was on the 3d, the 4th, the 5th, or the 6th. It is either one of those days, and it makes no difference which.

CROSS-EXAMINATION.

By Plaintiff's Counsel:

Q. It don't make any difference what way it is?

A. No, sir.

Q. You refresh your memory by what is contained in this plea, drawn at the time; that is certain?

A. Yes, sir. What time do you mean?

Q. That is the language you used. Do you mean to say that, in anticipation of a writ of replevin and a declaration, and drawing of a plea, that you drew this plea before the action was commenced, as soon as you drew the distress warrant?

A. No, sir.

Q. You testified that you drew this at the time. How is that?

A. I meant to say that it was at or about the time that the distress warrant was issued. Of course this plea wasn't drawn upon the very day that the distress warrant was issued. But I mean to say that when I drew that plea the facts were fresh in my memory.

Q. You don't say that this was done about the time you issued the distress warrant, and therefore you testified to its correctness. This writ was attested on the 6th of April?

A. Yes, sir.

Q. Don't it appear that the declaration was filed on the 13th of May?

A. Yes.

Q. And that you filed your plea on the 5th of June?

A. Yes.

Q. And you say that was the time that you issued your distress warrant—I mean that you drew the plea from which you now refresh your memory—when you drew the plea three months before?

A. Yes, sir; the facts were then fresh in my mind.

Q. The amount was $1,112 for profits?

A. Yes, sir—$1,300. It is $187.50 for rent. The profits were the difference between the $1,300 and $187.50.

Q. Will you be kind enough to state how you arrived at that profit?

Excluded.

Peter M. Melick recalled on behalf of defendant.

DIRECT EXAMINATION.

By the Court :

Q. Do you remember what amount was stated in that distress warrant for profits ?

A. I couldn't state positively. It was about $1,300.

Q. Have you the books ?

A. They are here.

Q. (Books shown.) Are these the books that were kept in connection with the coal business from April 1, 1877, till April 1, 1878 ?

A. They are.

Q. They are all the books ?

A. Yes, sir; these are the books that were kept by Mr. Smith, and I kept the ledger.

By Defendant's Counsel:

Q. (Indicating book.) What is this ?

A. This is the order book.

Q. This was kept by whom ?

A. Samuel Smith.

Q. In your business ?

A. Yes, sir.

Q. Just as much part of your books of account as any of the rest ?

A. Yes, sir.

Q. Have you produced with you the invoices ?

A. I suppose they are all here. They should be here.

Q. What do they show ?

A. They are the manifests of the coal.

Q. The quantity of coal bought ?

A. Yes, sir.

Q. From those can you tell how much the cost price of the coal was ?

A. No, sir.

Q. Just name the books.

A. Two day-books, two cash-books, invoice book, expense

book, order book, and the bill where the manifests are posted in.

Q. How many are there in all?

A. Eight.

Q. What do these manifests show?

A. They show the quantity of coal that came in in each cargo.

Q. In other words, it shows the amount of coal that was purchased from April 1, 1877, to April 1, 1878, and went into that yard?

A. I can't be positive about that. Some of them may have been lost here, but I have the bills and everything to show.

Q. That is, if they are all complete, it will show that?

A. Yes, sir.

Q. Was there any coal received by you that didn't go in the yard, but was delivered directly without going in the yard?

A. No, sir.

Q. Not one cargo?

A. I don't think so.

Q. Are you positive?

A. I don't understand your question.

Q. Was there any coal received in this business during that year which was not taken to the yard, but was delivered to customers, either directly from the boats or in transit?

A. There may have been some boat loads sold, but passed through the yard—went in the yard. I don't remember. I think I sold Mr. Havell a boat load of pea coal, or egg coal, I don't know which, and unloaded it and carted it to the factory.

Q. It went into the yard and went upon the books?

A. Yes, sir.

Q. It was weighed there?

A. Yes, sir.

Q. Have you the weigh book?

A. I think they bought it at manifest rates, and so entered on the books.

Q. Was there any coal that was shipped by you directly to your customers without appearing upon the books of account?

A. Not as I know of.

Q. Aren't you certain that there were one or two carloads?

A. No, sir, because I didn't do business in that way. I didn't do a wholesale business.

CROSS-EXAMINATION.

By Plaintiff's Counsel:

Q. You were asked whether these books covered the year 1877 that you were in business. Do they cover any other period that you were in business on those premises?

A. Oh, yes; they were part of the way from 1875 up.

Q. To 1878?

A. Yes, sir.

Q. April 1, 1878?

A. Yes, sir.

Q. Then you were on these premises since 1875?

A. Yes, sir; I went there April 1, 1875.

Q. And the accounts of the business during those two years also appear on these books?

A. They are all together; there has been nothing different from the first day I went there, except the matter of that lease.

RE-DIRECT EXAMINATION.

By Defendant's Counsel:

Q. You were doing business there right up to the time you made this contract with Grace Smith, and on up to 1878?

A. Yes, sir.

Q. You say that a portion of these books were kept by Mr. Smith?

A. I say they were all kept by Smith, except the ledger.

Q. Was he the person that was placed in charge under this lease by Mrs. Grace Smith?

A. He was; yes, sir.

James R. Bestick, sworn on behalf of defendant.

DIRECT EXAMINATION.

By Defendant's Counsel:

Q. What is your occupation?

A. Bookkeeper.

Q. Where are you employed now?

A. New York; Warren street.

Q. How long have you been engaged in bookkeeping?

A. Since 1863.

Q. Have you examined the books of account that are before you?

A. Yes, sir.

Q. When did you examine them?

A. A year ago, I think, last spring.

Q. Did any other person examine them in connection with you, or at the same time you did?

A. There was a Mr. Kerr with me at that time.

Q. Was there any other gentleman examining the books at that time?

A. None that I know of.

Q. Or had examined them?

A. Not to my knowledge.

Q. I don't mean in connection with you, but for Mr. Melick—of your personal knowledge?

A. I understood Mr. Foote, but I don't know of any other person.

Q. You know that Mr. Foote presented statements here from the books of account?

A. Yes, sir.

Q. You have examined the books of account to ascertain what?

A. I ascertained, according to my statement given to Mr. Smith, that the gross profits were $5,247.66, and that Samuel Smith had drawn during that year $1,174.21. The total amount of the income was $27,773.88, from the cash-book and ledger, and the amount of coal on hand, and wood, at that time, 1878.

Q. You included the wood and coal on hand on April 1, 1878, and you gave the gross profits of the yard?

A. Yes, sir.

Q. I will ask you first to state what were the net profits at the end of the year, April 1, 1878, from sales actually made?

Witness—Deducting what Mr. Smith has drawn?

The Court—No; just take the net profits from the sale of coal.

Witness—I don't know what to do with Mr. Smith's accounts.

The Court - The amount Mr. Smith has received is to be charged to his wife's share of the net profits.

A. (after calculating.) $4,073.95. That is, deducting——

By the Court:

Q. Those are the net profits from sales actually made between April 1, 1877, and April 1, 1878?

A. That is, deducting what Mr. Smith had drawn.

Q. Suppose two men were in partnership, equal partners, and their net profits realized from the business were $500. You would assign to each one of those partners $250. Suppose one of them had drawn out nothing, and the other had drawn out $300. It wouldn't alter the net profits. The net profits would stilll be $500. The one would be entitled to $250, and the other to $250 less the amount he had drawn out. Whatever he had drawn more than that would belong to the other party. How have you put Mr. Smith's money?

A. In that case, $5,247.56. The way they carried on their business it is nothing but income and expenditures—the way they worked the books.

Q. What do you call gross profits?

A. Less the expenditures.

Q. What do you call net profits?

A. Net profits is what they have drawn off, each partner; the gross profits, $5,247.66, which the parties had made, and the parties had drawn out for expenses during the time. What they have on hand to start out with I call net profits.

By Defendant's Counsel:

Q. What were the profits earned in the business for the year commencing April 1, 1877, and ending April 1, 1878?

A. $5,247.66.

Q. If Mrs. Smith had one-half of that, how much would it be?

A. $2,623.83.

Q. Then, according to that statement, there would be how much due Mrs. Smith?

A. $2,623.83.

Q. You spoke about the sum of $1,174.21. What do you mean by that?

A. That is what Mr. Smith drew, according to the books, during that time.

Q. And then you mean to say that if that sum should be charged to Grace Smith, how much would be due Grace Smith?

A. $1,449.62.

Q. In your making the statements from the books in this manner, state to the jury why you left that $1,174 separate—how the items composing that $1,174 appear on the books of account?

A. I would have to look at the ledger again now. There are different items, ranging from $5 to $2.50, and so on.

Q. (By Plaintiff's Counsel.) Reading from what page?

A. 100.

Q. (By Defendant's Counsel.) To whom were they charged on the book?

A. "Samuel E. Smith, agent for Grace Smith," it is marked here.

Q. How is that "agent" written?

A. It is written in a different handwriting from the other.

Q. And that is the reason, in making up your account, you left it in that manner?

A. Yes, sir.

Q. Because it didn't appear to be drawn out by Mrs. Smith herself?

A. Yes, sir; that is the reason I didn't know whether to charge it to expense or to self.

Q. Well, admitting, for the purposes of this case, that that money was really drawn by him as the agent of Grace Smith, taking out that sum, what was the amount due Mrs. Smith on April 1, 1878?

A. $1,449.62; that is, deducting this $1,174.21.

Q. Now, I desire you to state to the jury, as plainly as you can, how you made this statement whereby you arrive at the conclusion that $1,449.62 was due from Meleck to Grace Smith, as one-half of the profits arising from the sale of coal, as appears from these books of account?

A. I took Mr. Melick's books and posted up the invoice book; went through the cash book, went through his delivery book; took the invoices of coal, and deducted the amount of coal that was received from the amount of coal sold, as per the delivery book for that month, and during that year. I went through all his books, and from that I made my statement.

Q. Read your statement as you have it there.

A. (Reading.) Income from April 1, 1877, to April, 1, 1878:— Cash as per cashbook, $22,663.28; cash net added in cashbook, $277.48; entries of cash in ledger not in cashbook, Exhibit S, $131.23. Total, $23,071.99. Less collections of previous two years, $2,649.97; leaving a balance of cash, $20,422.02. Ledger balance, Ex. No. 1, $2,968.42.

Q. What do you mean by ledger balance?

A. Parties that owed the firm.

Q. Uncollected accounts?

A. Yes, sir. There was 1,021⅞ tons of coal, Exhibit No. 2.

Q. Coal on hand?

A. Yes, sir.

Q. How much did you charge that at?

A. $4.18.

Q. How much did you charge that at?

A. $4,271.44. Sixteen cords of wood on hand at $7—$112. Total income, $27,773.88. Expenditures—Expense as per expense book, $3,179.95; lost entries in expense, Ex. No. 3, $169.66; leaving a total of expenses as per expense book, $3,010.29; sundry items of freight, $36.07; estimate bad debts and allowance for expense in collecting book account, $250; rent, not in expense account, $750; tax on business, $29; expense paid in coal, Ex. T, $62,79; cost of coal purchased, Ex. 2, $18,388.07. Total expenditures, $22,526.22. Profit, $5,247.66.

Q. One-half of that was due?

A. $2,623.83.

Q. Less the other amount?

A. $1,449.62.

Q. You say on the 1st of April, 1878, there were $1,021⅞ tons of coal in the yard?

A. Yes, sir.

Q. Please state how you arrived at the fact that there were $1,021⅞ tons of coal in the yard.

A. The amount of coal received—— Shall I give the names of the parties, or just merely the total amount?

Q. Just as you have got it.

A. (After reading list from paper) Balance on hand, 1,021⅞ tons.

Q. Have you a statement of the amount of coal sold for each month during the year?

A. Yes, sir.

Q. How did you obtain that statement?

A. From the delivery book.

Objected to. Objection sustained.

Q. There is an item of $1,980. What is that?

A. That is the $521 tons.

Q. Explain to the jury about that 521 tons. Was that the stock on hand?

A. Yes, sir.

Q. When?

A. On the commencement of the year, April 1, 1877.

Q. How was it carried over? From the other two years in the business?

A. Yes, sir; we had to go through the last two years, and Judge Johnson acknowledged that we had $1,980, commencing with that year.

Q. What did you ascertain? Not what Judge Johnson acknowledged?

A. I haven't got my two years' papers with me.

Q. (Papers shown.) Here they are. I am satisfied if you state to the jury whether you estimated it to be more than $1,980 or not?

The Court—No; 521 tons were on hand April 1, 1877. How did you find it out?

A. We went through the two years previous.

Q. How did you get the cost of those 521 tons?

A. We took that as a basis for the third year.

Q. If you will tell me the price paid for coal at the first invoice after this list commenced, we will be able to get at it in a proper manner.

A. I can tell you the average during the whole year of the amount of coal received during that year.

Q. Look at the invoices and tell me the first invoice.

A. There's only shipping receipts on these.

Q. Is there no book that will show the invoice price?

A. The invoice ought to be on here, but I don't see it. There's nothing but shipping receipts here.

Plaintiff's Counsel—That is the same book you had before?

Witness—No; I had the invoices; not this book at all. I never saw this book.

Q. (By the plaintiff's Counsel). Isn't that it?

A. No, sir.

Q. Is there anything you want that you haven't got now?

A. I want the invoices that were filed away in Judge Johnson's vault.

Defendant's counsel states that plaintiff was subpœnaed to bring all his books.

Q. (By the Court.) What is the invoice price of the first invoice of coal after the commencement of the year?

Defendant's Counsel—It will be shown in the receipts for the price paid for coal. We haven't got them.

Q. (By the Court, referring to book.) Is it there?

A. There is no price on them.

Q. (By Defendant's Counsel.) What, from the books, was the price of coal on the first of April, 1877?

A. I couldn't tell unless I saw the invoices now.

Defendant's Counsel—I have subpœnaed Mr. Melick with the invoices.

Plaintiff—I have brought everything I had—everything that was returned to me.

Witness —I can give you the average cost during the whole year.

Q. How do you give the average?

A. I take the total amount of what it cost, and the total amount received, and divide the tons into that total amount.

Q. Give the average cost during the year.

A. About $2.87, I think.

Q. Does that mean deducting the expense of getting it there?

A. That means net price. I am not charging the expense of getting it there.

Defendant's Counsel—We have witnesses to prove what it cost to put it in the yard.

Q. (By the Court.) Was that the cost at the mines?

A. That is the invoices prices.

Q. Take 531 tons and multiply it by $2.87 a ton. How much is that?

A. $1,524.97.

Q. Now add the $18,388.07, the cost of coal bought during the year.

A. $16,000. That is the total cost, including the 521 tons.

Q. At what price did you put in the 521 tons before?

A. About $3.73.

Q. I understand you that the 531 tons of coal on hand April 1, 1877, and the coal bought through the year, cost $18,388.07? 10

A. Yes, sir.

Q. There were on hand April 1, 1878, 1,021⅞ tons?

A. Yes, sir.

Q. That would amount at the same price to how much?

Witness—At $2.87?

The Court—Well, whatever you had calculated the other at?

A. $3.73. (After computation.) $3,811.59.

Q. That would make $14,576.48. Is that subtraction correct?

A $459.85 is the difference.

Q. No; deduct from $18,388.07 the $3,811.59. 20

A. $14,576.48.

Q. That would be the total cost of the coal actually sold during the year, would it not?

A. Yes, sir.

A Juror—You would want to take out some wood that was included in the statement?

Q. Yes; 16 cords of woods on hand on April 1, 1878?

A. Yes; $112.

The Court recapitulates to the jury the figures named by witness. 30

Q. Is that correct from the books?

A. That is the actual amount of the coal sold, at cost price; not what the coal was sold for.

Q. Can you give us the actual sales—the sums received on the actual sales of that amount of coal during the year?

A. I have got the amount of coal sold; not the actual selling price.

Q. What was the amount received for coal sold?

A. You have to take the amount of cash received during that year.

Q. (Reading further from witness' statement) Balance of cash received from sales during the year, $20,422.02?

A. Yes, sir.

Q. I noticed, when you gave your statement before, that you put in the 1,021⅞ tons of coal on hand at $4,271.44?

A. Yes, sir.

Q. Now you put it in at $3,811.59?

A. That was occasioned by the expert on the other trial stating that the coal was worth in the yard at that time $4.18.

Q. One other question. That $20,422.02 would represent the total income in cash received for sales during the year. Is that correct?

A. Yes, sir.

Q. Now turn to the expense as per cash book—$3,179.95?

A. Expense book.

Q. Less entries on Exhibit what?

A. No. 3.

Q. $169.66?

A. Yes, sir.

Q. Making the total expenditure during the year, $3,010.29. To that I see you have added $36.07 sundry items of freight. Is that to be included in expenses?

A. Yes, sir.

Q. The rent you estimate at $750 yearly?

A. Yes, sir.

Q. Tax, $29. Now you have expense in coal, Ex. T, $62.79. What do you call that?

A. It is coal given for expense, for hay, feed and oats.

Q. It is proper to be considered expense?

A. Yes, sir.

Q. Now, the items of expense, $3,110.29, $36.07, and $750.

Witness—You have skipped one.

Q. What is that?

A. Estimated bad debts.

The Court—I exclude that, because I think the account must be stated as it stood when the year was up.

Q. (Recapitulating estimate.) That would leave a net balance

of $2,069.39. Take one-half of that amount, equal to $1,034.69. If this account is to be stated on the basis of actual sales during the year, that would be the result. Is that correct now?

A. I should make the profits $5,038.41.

The Court—But you include in it things that are disputed.

Q. (After further recapitulating.) Explain why, in your estimate, these book accounts were carried over from 1876 to 1877.

A. That was in the cash book. These old accounts were in 1876, for goods sold in that year, and therefore they had to be deducted for the year 1877, as it was a new firm. It had nothing to do with the accounts of 1876, as I understood it.

Q. Didn't it arise also from the fact that the same set of books were kept?

A. Certainly; the same set of books were kept for the three years, as far as I saw.

Q. And is there any other reason why this should be carried over as you carried it over?

A. None that I know of, except that it didn't come in that year; it didn't belong to that year's business at all.

Q. These were accounts of coal that had been sold before this arrangement went into effect. They were on the books; the same books were used, and when the cash book came to be used, with collections that had been made on this prior business, in order to get at the amount of cash, the witness added up the whole cash book, and then, of course, went through the cash book and found out what items represented debts collected on the old business of Melick, before this business was formed, and subtracted them, showing the actual amount of cash received during 1877–8, for sales made during the year. That is the way you did it?

A. Yes, sir.

CROSS-EXAMINATION.

By Plaintiff's Counsel:

Q. You have alluded to exhibits?

A. Yes, sir.

Q. What exhibits were they?

A. In detail?

Q. Of your own making?

A. Yes, sir.

Q. And they have been used here for the first time?

A. No, sir.

Q. They were marked as exhibits, were they?

A. I don't know as they were. I believe they were.

Q. Where were they used?

A. In Judge Johnson's Court.

Q. In this same case?

A. Yes, sir.

Q. You have given us these figures exactly as you testified to before Judge Johnson?

A. Yes, sir, to the best of my knowledge.

Q. Allow me to call your attention to what I happen to have. In your testimony before Judge Johnson you have the allowance on debts $400, haven't you? Does that correspond with your present testimony?

A. It don't, for this reason, that Judge Johnson and Mr. Foote and myself went together, and he gave a little to me and a little to Mr. Foote. That fixed up that account. That's the way that must have occurred.

Q. Didn't you state that the bad debts were about $1,200?

A. Not to my knowledge; no, sir.

Q. I ask your attention to the date of Sept. 3, 1879. You made an allowance of $400, as I have it here, on that day?

A. I believe that was the allowance agreed upon first, until we got with Judge Johnson, and we came to the conclusion that $250 was sufficient.

Q. I don't understand that your abstracts and what you call exhibits were made by an understanding and agreement between yourself and Foote as to correctness?

A. No, sir.

Q. Didn't Mr. Foote dispute their correctness?

A. Yes, sir.

Q. You were first employed, when, to examine these books?

A. Well, I think it was in March.

Q. 1879?

A. 1879—I couldn't say positively now; I have no recollection.

Q. I think you said something about Mr. Kerr, who had preceded you?

A. Yes, sir.

Q. Where is he?

A. I don't know, sir.

Q. He had made the examination, and then you followed him?

A. I made a thorough examination of the books myself.

Q. In your examination of these books did you not find coal delivered as entered on the delivery book, and not entered on the cash book, or charged anywhere?

A. Not to my knowledge; no, sir.

Q. Are you sure of that?

A. I don't remember.

Q. Can you refresh your memory from your exhibits there?

A. No. I don't remember anything of the kind.

RE-DIRECT EXAMINATION.

By Defendant's Counsel:

Q. You said you made a thorough examination. Have you compared your examination with that made by Mr. Foote?

A. I have seen it in your office—a copy of it.

Q. Is there any substantial difference between the results of the two examinations, with the exception of the amount of coal on hand?

A. Very little difference between the two accounts.

Q. About how much?

A. Well, in Mr. Foote's cash account, as I saw it, he had about $200 more cash, but I had about the same amounts in ledger accounts.

Q. Which balanced?

A. Nearly balanced. I think there is very little difference. I don't suppose—I only looked at it casually—I don't suppose there's $100 difference except the amount of coal and the price at that time.

Q. Did you both adopt the same principle in ascertaining the profits on the book of account?

A. As far as I know.

Q. And you say, from your statement of the books, there was how much due the plaintiff, Grace Smith, at the end of the year?

A. $2,623.83, less $1,174.21.

Q. (By the Court.) In the $250 for bad debts, what accounts were included?

A. We didn't include any personal accounts; we lumped that amount.

Q. (By Defendant's Counsel—showing paper.) Is that the list that was first put in by Mr. Melick as bad debts?

A. No, sir; that is a list of the ledger accounts.

Q. Where did you get the information that any of the debts were bad debts?

A. Only through consultation with Mr. Foote and Mr. Johnson and myself.

Q. Is there any list of bad debts there?

A. No, sir.

Q. Isn't that it?

A. No, sir; that's the ledger accounts.

Q. Have you any list of bad debts that were admitted by Mr. Melick to be bad debts?

A. No, sir.

Q. What is that? (indicating it.)

A. Ledger balances.

Q. Explain what you mean by ledger balances. These are the balances that were due and unpaid?

A. Yes, sir.

Q. All other accounts have been paid except that list that you have in your hand?

A. Yes, sir.

Q. How much does that amount to?

A. $2,968.42.

Q. When was that?

A. March, 1879, I think, some time in the spring.

Peter M. Melick recalled for cross-examination by plaintiff's counsel.

CROSS-EXAMINATION.

By Plaintiff's Counsel:

Q. There was yesterday a statement here showing the ledger balances. You were asked to get that. Have you done so?

A. I have done so.

Q. (Paper produced.) What is this?

A. That is the correction.

Q. And that amounts in the aggregate to how much?

A. $517.11.

Q. That is the uncollected accounts?

A. Yes, sir.

Q. And the other was $487.49?

A. Yes, sir.

Q. Here is a bill against Mrs. Isaac Tucker which has been spoken of. It seems to be receipted by H. Fitzgerald?

A. I have no recollection of its being paid. I asked Mr. Fitzgerald once last summer, and he said no.

Q. Where is Mr. Fitzgerald?

A. He is on Market street; if he has collected it, of course, it is paid.

Q. You didn't get the money?

A. No, sir; I asked him if he had made any collections, and he said no; I gave him several bills?

Q. About this matter of Miss Winants?

A. I know she owes just what is on that book; she owes me a bill besides that.

Q. According to the books that is the amount she owes?

A. Yes, sir.

Q. There is, I think, one name left off, is there not?

A. Yes, sir.

Q. Who was that?

A. Henry Havell.

Q. Henry Heppe?

A. Oh, Mr. Heppe? yes, sir.

Q. What about Mr. Heppe's matter?

A. He owed me about $110 or $120—somewhere along there—according to my books, and I guess some on the other book; I attached a piano that belonged to him at the Market street depot, and got judgment against him, and after I had got judg-

ment, it seems that his wife claimed the piano ; and Mr. Van-Horne then had an attachment on the piano, and he sold the piano ; and I bought it and paid $60 for it—$20 over the claim—and got the piano ; but he has never paid me any money.

Q. Your claim for $120 has never been paid?

A. No, sir.

Q. What became of that $20?

A. I credited it on his bill, because I afterwards got judgment against the wife.

Q. $20 paid on the $110 would leave $90?

A. Yes, sir.

Q. That is still unpaid, and it don't appear in this statement?

A. Yes, sir.

By Defendant's Counsel:

Q. April 1, 1878 ; how much did Louis Heppe owe you?

A. Well, according to the statement there on this back; it is $92.50 ; but I had another account with him was in with it, that I had sold him since that, of my own account.

By the Court:

Q. The amount in this statement of the Tucker bill was how much?

A. $16.50.

Q. The Winant's bill, how much?

Defendant's Counsel, $5.97.

Q. (By Defendant's Counsel.) Will you kindly look at page 10 of the ledger, and see if there is a balance due from Mr. Heppe?

A. On the back, $692.52 ; but that included '76 and '77 ; you have got the statement right in your statement there.

Q. Then the real amount due from Heppe was $15?

A. Yes, sir ; but that didn't include the whole bill ; $15 is right.

Q. Is that in this account here?

A. No, sir ; it is not on that ; I didn't put that in, on account of that difficulty.

Q. What made you say just now that there was $110 or $120 due?

A. I said he owed that much money ; part of it was before this, and part since I have been on the other side.

By the Court:

Q. I understand $92.50 appears on this book?

A. Yes, sir.

Q. But this book includes accounts not only for 1877-8, but prior accounts, and there was a balance since that making the account $110 or $120?

A. I am not positive about that; somewhere's along there.

Q. You have charged E. R. Rose $13.25?

A. C. R. Rose.

Q. Do you know a man by the name of David Jacques?

A. I do.

Q. Was he your agent?

A. He sold some coal for me; yes, sir.

Q. Did he collect?

A. He did at times; yes, sir; he collected some money.

Q. Do you know whether or not he collected this bill?

A. It has never been turned over; I don't know anything about it.

Q. He was subpœnaed before Mr. Johnson?

A. I believe he was.

Q. Didn't he swear there that he had collected that bill?

A. Not to my knowledge.

Q. You remember his being sworn?

A. I remember Jacques being there; yes, sir; but what they made out about it I don't know; I know the money has never been turned over to me.

Q. Do you remember his swearing that it was paid?

A. No; I don't.

Q. [Paper shown to witness.] Didn't he produce that receipt before Judge Johnson for the payment of that money?

A. No, sir; I don't think he did.

Q. And didn't he say there was a balance due from you to him, and that these items which he had collected would be balanced by these collections that he had made?

A. No, sir; Mr. Jacques will never tell you so; since you bring that to my mind I will tell you what Mr. Rose said.

Q. Was Mr. Rose sworn?

A. I think he was there; he said there was a settlement between him and Jacques in reference to moving, and that they

would straighten the account up ; that's my recollection of the matter.

Q What is Mr. Rose's account ?

A. $9.25.

Q. $13.25 ; you have got it here ?

A. $13.25.

Q. J. Holzman is credited here for $18.50 ; wasn't that one of Mr. Jacques's customers ?

A. I believe it was.

Q. And didn't Mr. Jacques collect the money ?

A. No, sir.

Q. Didn't he swear so and produce the receipt ?

A. No, sir ; he didn't ; I asked him not longer than two months ago, and he said he never collected it.

Q. Does Ludlow appear upon this paper ?

A. No, sir ; Ludlow has settled.

Q. You swore below that he hadn't settled, didn't you ?

A. There was a small balance that has been settled up immediately after.

Q. (By a Juror.) This account as credited is $517 ?

A. Yes, sir ; with the exception of Mrs. Tucker's bill, which I see Mr. Fitzgerald collected, which I had no knowledge of.

Q. And $5 Winants ?

A. That I have never got. There is one thing that will make it plain to Mrs. Winants. I think she is mistaken; she bought the last ton of coal in the yard where I am up to April 30, 1878, after the sales that was made in that yard was credited to that business; and I suppose she thinks, perhaps that that is the ton of coal she is owing me for ; but it is not. The coal was bought in March 26.

By Plaintiff's Counsel :

Q. In point of fact she has paid for the ton of coal she says she owed for ?

A. No, sir; she may imagine that she owes me for it, but it was bought before the 1st of April; and of course all the coal that was bought before the 1st of April, is in my statement.

Q. What does it amount to ?

A. $5.97.

Q. She admits owing for one ton of coal ?

A. That's where her mistake is.

Samuel E. Smith called by the defendant, testifies in relation to certain accounts as to their being collectable. By consent of the counsel for the respective parties, his testimony is left out of this Bill of Exceptions, except the following:

By Mr. Borcherling.

Q. I ask you the general question: How many of those accounts that you have on this yellow paper are paid, of your personal knowledge, or by the admission of Mr. Melick that they were paid ?

A. I have no other way of arriving at it except by going to business men who are men of character and standing. Those that I have mentioned I have seen, and they have assured me that they had paid.

Q. When was this paper made out ?

A. While the case was before the referee.

Q. A year after ?

A. I don't know; it would be hard to tell.

Q. Was it made out about the time you issued this distress warrant ?

A. I couldn't say positively when it was. It was while the suit was in question.

Q. There wasn't any investigation of the books before the issuing of the distress warrant ?

A. I had the books examined—looked at a little.

Q. Who furnished Mr. Cross the statement of the amount due ?

A. I gave him a statement from Mr. O'Connor.

Q. Where did you get it from ?

A. Mr. O'Connor made it from what books he had access to. I think he made it from three years' business. He was a bookkeeper in Newark, and I think he took the books and made up the statement, and I gave the statement to Mr. Melick.

Q. Did you and Mr. Melick have any meeting before the distress warrant was issued, at which you made an effort to look over these accounts and find out how much was due ?

A. We spoke of it; we had no examination. He said he would do it.

[Defendant Rests.]

Michael Hart, sworn on behalf of plaintiff in rebuttal.

DIRECT EXAMINATION.

By Mr. Borcherling.

Q. You were in the employ of Mr. Melick in 1878, in the spring ?

A. Yes, sir.

Q. Where ?

A. On both sides of the canal, corner of Plane and Academy, and corner of Plane and Hackett street.

Q. In the month of March do you remember the removal of Mr. Melick from one place to another ?

A. Yes, sir.

Q. Was the coal that was then on the premises weighed ?

A. All except 45 tons, which was estimated at 45 tons.

Q. Who superintended the weighing ?

A. I did myself.

Q. [Paper shown to witness.] Will you look at this paper and state to the court and jury what it is ?

A. Those are the weights of the coal taken from the corner of Plane and Academy to the corner of Plane and Hackett, which were weighed by me, with the exception of 45 tons, which was carted on that day ; there was not that amount, but we estimated at 45 tons ; that was put with the weights.

Q. What was the aggregate of coal that was weighed ?

A. My weights shows 551½ tons, or 551 10-100 tons.

Q. You weighed it accurately ?

A. Yes, sir ; including what we estimated there:

Q. Including the 45 tons ?

A. Yes, sir.

Q. Was the memorandum of weights made at the time ?

A, Yes, sir.

[Paper offered in evidence.]

CROSS-EXAMINATION WAIVED.

Peter M. Melick, plaintiff, recalled in his own behalf in rebuttal.

DIRECT EXAMINATION.

By Mr. Borcherling:

Q. You heard the last witness in reference to the weighing of this coal; what do you think about it; what instructions, if any, did you give?

A. The coal was weighed in the morning, when we commenced to take it out; I supposed that the coal belonged to me; I commenced at seven o'clock with three teams, and shortly after eight we were stopped with a distress warrant; I supposed and estimated the coal in the yard then to be about 25 tons that we had carted over in the hour's time; but, in order to make it sure and safe, I put the amount at 45 tons, so that there would be no quibbling about it.

Q. So that the whole amount on hand April 1, 1878, was 551 7-100 tons.

A. Yes, sir.

Q. Do you remember what day that weighing was commenced?

A. On the day the distress warrant was issued.

Q. Which distress warrant; there were two.

A. The weighing commenced on the morning of the 22d.

Q. The 22d of what?

A. On the morning of the 21st the distress warrant was issued.

Q. That was the first distress warrant?

A. Yes, sir; the second distress warrant was issued, I should judge, about the 5th or 6th of April.

Q. How much coal was on hand on the 1st day of April?

A. I had sold $144\frac{1}{8}$ tons of stove coal; $60\frac{7}{8}$ tons; $35\frac{1}{4}$ egg; $10\frac{3}{4}$ pea.

Q. Between the 22d of March and the 1st of April?

A. Yes, sir.

Q. And that is to be deducted from the 551 tons?

A. Yes, sir.

Q. So that you had only about 250 tons on hand?

A. Something like that.

Q. This was on the 1st of April, 1878, when the lease ended?

A. Yes, sir.

Q. The coal that you moved, did you remove all of it?
A. Yes, sir.

JULIUS M. FOOTE, sworn on behalf of plaintiff in rebuttal.

DIRECT EXAMINATION.

By Mr. Borcherling:

Q. Where do you reside?
A. Easton, Pa.
Q. And your occupation and employment?
A. I am the cashier of one division of the Lehigh Valley road.
Q. And have been?
A. For some seven or eight years.
Q. Did you ever live in Newark?
A. I did.
Q. When, and up to what period?
A. I left here two and a half years ago, I should say.
Q. Have you made an abstract from the books of Mr. Melick?
A. I have made a careful examination of them.
Q. What quantity of coal was there on hand, as you found, according to the books, on the 22d day of March; of what year?
A. 1878; may I say one word with regard to these 551 tons?
Mr. Borcherling. Well, we will come to that directly.
Witness. I think there would be little need to go any further; it would take out a good many matters in respect to the expenses of the business in the statement prepared yesterday.
Q. Take your own course about how you shall make us understand this case?
A. It might lead off into a whole day's chase, where, perhaps, by taking up this little point now, I might save it; I would say, to begin with, these books are not proper books of account; to begin with. there is no cash-book in the ordinary acceptation of the term; there is only a book in which the receipts for the day were entered, added up at night, and the money put in Mr. Melick's pocket; there was only side to that book; for the other side of the cash-book, there was only a book in which expenditures were entered, when made, of the money paid from Mr. Melick's pocket; there was consequently no profit and loss

account, or can be none evolved from these books proper; I have therefore charged the business during the year with the coal which Mr. Melick furnished to it at the beginning of the year with all that he purchased for it during the year, and with the expenses he paid out; I have credited the business with the money that Mr. Melick took from it, with the accounts due that he took from it at the close of the year; also with the coal that he took from the yard at the close of the year; making, to recapitulate it briefly, a statement of what he put into the yard and took out of it; the difference is his profit; I make that profit $2,300.84.

Q. You have taken pains to get this from the books as you found them?

A. I have obtained that from nearly two month's study and work at the books.

Q. In making up this account, did you account for sundry items of coal sold in trade?

A. I have, and that is all in both ways; bills that were paid in that way I have charged to the business; I have charged the business with what Mr. Melick put in; I have credited the business with the receipts for the coal on the other hand.

Q. How did you find those books, the day-book, to correspond with the other books kept by Mr. Smith?

A. Very irregular. I never saw so bad ones. Entries carried in the day-book and carried no further. Items marked paid and not carried into the cash-book. Postings made direct in the ledger. Duplicate entries made by both parties; in others, omitted. No attempt made to balance to make one book check with another. There is no balancing. They are all a set of memoranda. The result of that, I believe, to be a loss to the party who is proprietor of the business. I believe from the appearance of the books that much of the outgo has never been set down. There is an easier way of tracing that. Much of the income has not been set down. That I have corrected, so far as I can correct it from the books. About 500 tons of coal are missing—not accounted for beyond the order book. By the delivery book the delivery of coal seems to indicate the method in which it occurred—the delivery of coal without any entry of cash or corresponding charge on the day-book for it.

Q. That is the way you account for the 500 tons of coal missing?

A. That is the way I account for that.

Q. Did you assist in ascertaining what coal was sold between the 22d of March and the 1st of April?

A. I prepared the statement from the books, taking this statement from the man who weighed the coal. I added to those figures the coal that was purchased between March 22 and April 1, making a total. I deducted from that total all that was sold between those dates, leaving the balance on hand in the yard on the 1st day of April; that is the amount which I consider Mr. Melick as having taken back from the yard at the close of his period, 468 tons.

Q. Was that amount?

A. On hand at the close of the period, the 1st of April, 1878. This 551 tons that was sworn to was on the 22d of March, and the subsequent sales belonged to the year's business.

Q. 551 tons, March 1?

A. No. March 22, at the time the coal was removed from the yard, but I consider the business entitled to the sales up to the close of the yard, and the sales reduced that balance at the close of the period, April 1, 1878, to 468 tons. That 468 tons, in this statement of the account, would take the place of the 1,021.

Q. [By a juror.] What puzzles me, on the 22d of March there were 551 tons, and then, during the month of March they sold 247 tons, which left 304 tons.

A. They bought some. The sales—200 tons during the month—are not from these statements. The sales during that period, between the 551 tons period and the 1st of April, were 14 tons of egg; 55 stove; 20 nut—89 tons. The purchases were 12 tons. I drop the fractions there. It may vary a ton or two.

Q. [By the Court.] In adjusting the account, by taking from one side and putting on the other side, the purchases would leave the 468 tons, the amount on hand the 1st of April, 1878?

A. Yes, sir.

Q. Then, by making this computation, I understand, you miss 500 tons of coal during that year?

A. Yes, sir. The delivery back shows there should have been 1,000 odd tons on hand April 1, 1878, whereas the weighing of the coal out of the yard, adding purchases and deducting sales, leaves only 468 tons there.

Q. The difference between 468 and 1,021 is coal missing and unaccounted for?

A. Yes, sir. And of course is a loss in the business, which isn't reached without taking the total import and outcome.

Q. Make that. calculation, the difference between 468 and 1,021?

A. 553 tons short.

Q. Of what went into the yard and has not been accounted for?

A. Yes, sir.

Q. Did you assist in making this table?

Witness. That's showing bad debts.

Mr. Borcherling. Yes, sir.

A. Only from Mr. Melick's statement. I have looked it over with him. I can't speak of my own knowledge of its correctness.

Q. You can only verify the amounts stated and the additions?

A. I can't verify that of that sheet. That is a corrected sheet that was made this morning. I can't speak of my own knowledge of that sheet.

Q. Is that in your handwriting?

A. No, sir. Mr. Melick's.

CROSS-EXAMINATION.

By Mr. Cross:

Q. How many tons of coal were sold in the business from April 1, 1877, to April 1, 1878?

A. I can't give that to you without figuring, because I haven't kept it by tons. I have always charged the business with all the coal put in. Have credited it with the receipts and coal taken out, keeping it in dollars and cents.

Q. If you were going to take the account of a business, or the sale of coal or anything else, wouldn't you desire first to ascertain how much coal was sold?

A. By dollars and cents, I should, and I have done so.

Q. Doesn't the delivery book show how many tons of coal were sold?

A. That don't bear on the subject. I can give it by delaying the gentlemen.

Q. How long would it take you?

A. My impression is that I can give it to you in the course of two or three minutes. My statement is not based on that. I do not believe this tonnage to be correct. I only give it as by the order book, which leaves a deficiency of 500 tons unaccounted for—5,348 14-100 tons.

Q. Is that from the delivery book?

A. That is from the delivery book.

Q. The delivery book or the order book?

A. That is all one thing.

Q. That shows the missing 500 tons?

A. This tonnage leaves a shortage to make the actual coal. This coal should be added to the 500 and odd tons that are missing.

Q. How many tons are missing?

A. 553.

Q. That is the total amount of coal that was sold, including the coal that was on hand April 1, 1877?

A. Yes, sir. I really take the difference, in this statement, you will see, between what was on hand at the beginning of the year and what was on hand at the next, because I charged the business with what was on hand at the beginning, and credited with what was on hand at the close, and charge the difference between the two amounts. If the two amounts were the same there would be nothing charged to the business.

Q. What were the receipts of the business during the year 1877, from April 1, 1877, to April 1, 1878?

Witness. Do you mean cash?

Mr. Cross. Yes, sir.

A. Cash receipts, less amount of collection on account of previous year's business, $20,554.37—less the amount collected on account of previous years.

Q. Have you that amount?

A. $2,672.79.

Q. You mean the total cash receipts of the year was what?

A. $23,247.16.

Q. What was due April 1, 1878, on back account?

A. $2,806.48.

Q. Then the receipts during the year would be the sum of $20,554.37, and $2,086.48?

A. No, sir; because I have other items to add to it.

Q. What other items?

A. I have sundry items of coal and wood sold in trade; that is, bills that were paid in coal and wood—$200.20. I also credit the business with some cash items that appear only in the ledger, with some coal delivered to Peter M. Melick's house; with two tons of coal delivered to Joseph Quinn, that don't appear anywhere, on anything.

Q. What is the amount?

A. $70.40.

Q. What is the amount of sundry items of coal and wood? 10

A. Coal and wood $200.20. That was bills paid in coal. That I credit the business with.

Q. These sums are the total receipts during the year, are they not? (Indicating.)

A. Yes, sir.

By the Court:

That doesn't represent the amount received during the year but the amount of sales during the year.

Q. Separate the cash received from sales made during the year, and tell us how much that is; and then tell us the amount 20 of book accounts. We can add them together and understand it?

A. Cash, $20,554.37.

Q. Add to that $200.20, goods sold in trade.

A. Yes, sir; and also one other.

Q. $70.40 also.

A. Yes, sir.

Q. That would make the cash sales $20,824.97. New book accounts not collected April 1, 1878, $2,806.48?

A. Yes, sir.

Q. Then, by the books, as I understand you, that would make 30 the whole amount of sales made during the year?

A. Except the book accounts left over to the close of the year; except the balance, too, of $2,806.48. I have only one additional item which represents all that Mr. Melick has received from the yard, and that is the coal and wood that he takes from the yard at the close of the year.

Q. How much?

A. $1,845.72.

Q. Give us the tons?

A. 468 tons.

Q. At how much?

A. Seven cords of wood. I have dropped the fractions there; $468\frac{7}{8}$ tons of coal, and $70\frac{5}{8}$ cords of wood.

Q. How much did that amount to?

A. $1,845.72. That represents the entire value which Mr. Melick has taken from the yard during the year—that is, the coal and wood. And I estimate the value of that coal and wood at both the beginning and close of the year, at the market price at that time. That is against Mr. Melick, because prices were considerably higher at the close of the year than at the beginning. I have given the business the benefit of that, treating that as a profit of the business.

Q. Let me see that I understand you. You have given us the amount of the cash sales?

A. Yes, sir.

Q. Book accounts outstanding?

A. Yes, sir.

Q. Those added together amount to 23,000, some odd dollars.

A. Yes, sir.

Q. The price of the coal on hand at the close of that time you deducted from those statements?

A. Yes; because it was a value which Mr. Melick took from that yard. He left coal in the beginning of that year, left it till the close of the period, and then took it out.

Q. In making your estimate did you allow Mr. Melick the quantity of coal that he put in the business on the 1st of April, 1877?

A. Yes, sir.

Q. Suppose you give me those figures now. The amount of coal on hand?

Witness. At the beginning of the period?

The Court. Yes. April 1, 1877.

A. 615 1-20 tons—$1,980.

Q. At what price?

A. $3.12. I charged it very low, because it was charged to the business.

Q. Was there any wood on hand?

A. Yes, sir. That $1,980 includes $60 worth of wood.

Q. In ascertaining the amount of business done during the

year, which, according to my view, would represent the actual sales from the yard during the year, it would be proper to include the coal that was on hand when the business was commenced, April 1, 1877, it would be proper to take out the coal on hand on April 1, 1878. By that process you would reach the quantity of coal sold during the year, and the value of it?

A. Yes, sir.

Q. When you have done that, then, in order to state the account, only one other item would go into it; that would be the expense account?

A. The expense account on one side, and the receipts on the other side.

Q. Then you subtract the expense account and the purchase of coal?

A. Yes, sir.

Q. And then that would give you the profits that were made?

A. Yes, sir.

Q. In the statement of profits the quantity of coal taken out at the end of the year, and the amount of coal put in at the beginning of the year would not enter, except for the purpose of enabling the court and jury to find out how much was sold during the year?

A. Yes, sir.

Q. Nothing more than that?

A. That is all.

Q. [By Mr. Cross.] Then you say the receipts during the year were $23,631.45.

A. If that addition is correct, I haven't got it added in that form.

The Court—That is not so; and there is where we are getting into inextricable confusion, by failing to distinguish between the cash sales and the books. Change the question to the sales during the year.

Q. The sales during the year were $23,631.45?

A. Correct.

Q. And this arose from the selling of 5,348 14-100 tons of coal, did it not?

A. I don't know about that; I don't think that total is correct. The books show that tonnage.

Q. What were the expenses?

A. The items that were entered in what was termed the Expense Book were $3,186.91.

Q. What does that represent?

A. I have some other small items which should be added to that. Rent of yard for the year, $750; expenses paid by coal in trade, $255.59. That makes my total expenses.

Q. Making in all the sum of $4,192.50?

A. Yes, sir.

Q. What was the cost of the coal purchased?

A. $17,003.83.

Q. What was the number of tons purchased during the year?

A. I haven't treated that as relevant, but I have got it here somewhere. It is usual, you know, to make up the amount of business by so many dollars. If you speak of a business, you say it has done a business of so many thousand dollars. You don't say it has sold so many bolts of cotton—6,476 6-100.

Q. Then 6,476 6-100 tons cost $17,003.83.

A. Correct. Hold on. That includes the 615 tons on hand at the beginning of the year.

Q. Then you add $1,980?

A. Yes, sir; add that, and you have the cost of the 6,476 6-100 tons.

Q. This $17,000 represents the coal actually bought, not what was in the yard?

A. Yes, sir. It will keep the thing clearer to keep the tonnage matter as a side issue, and put it in dollars and cents.

Q. I understand you to say that the 6,476 6-100 tons cost $18,983?

A. $18,923.83. There is $60 worth of wood in that. My statement is not made with reference to the tonnage at all. I only happened to have it by accident.

Q. Then the actual purchases amount to 6,476 6-100.

A. That's not quite correct, for this reason. There is 6,476 6-100 tons. The 615 2-100 is gross tons of 240 lbs. An allowance of 12 per cent. must be made before you can make any deduction between them.

Q. Did you make that allowance in your cash?

A. No, sir. I said he put so much money into the business and took so much value out of it, and the excess is his profit.

Q. If you confine this to money, how are the jury to know

how many tons were lost during the year?

A. I would propose to take that up as another issue.

Q. We must know the tons?

A. Then I have them.

Q. You say there was a certain amount represented gross tons. What amount was that?

A. 615 2-100 in gross tons.

Q. Which is the easier way to take it, in gross or net? Perhaps it would be better to take it in net?

A. Just as you please. The purchases are gross and the sales are net, on the books. The 614 tons on hand at the beginning of the year is gross tons.

Q. You say that during the year the sales were 5,348 14-100 tons. Is that net tons?

A. That is net.

Q. You say that the purchases during the year were 6,476 6-100 tons?

A. Also net tons.

By the Court:

Q. Taking the accounts as they appear on the books, I propose to get from you a statement of the account as it would stand if we go no further than that. The amount of sales during the year—of course that will include book debts and all—is $23,631.45?

A. That is correct.

Q. The total expense account is $4,192.50?

A. Yes, sir.

Q. The actual purchases and coal on hand are $18,923.33. Is that correct?

A. $18,923.83.

Q. That would make the other side of the account $23,116.33. Taking $23,116.33 from the sales during the year?

A. The amount with the $60 of wood. The $18,000 is only coal.

Q. [By a Juror.] Was there no wood purchased during the year?

A. It all went into the expenses.

By the Court:

Q. Less how much for wood?

A. $60 for wood. It would make the total expenses $23,-176.33.

Q. Subtracting the two, that would be $455.12. Now, to state an account by the books, you would add the amount of coal apparently on hand; Do you understand what I mean by that?

A. Yes, sir.

Q. How much is that? What do you make it by the books?

A. 1,127 12-100 net tons.

Q. How much would that amount to?

A. I have got the market price on that day here. I will have to make an average of the prices, because this tonnage don't specify the different mines and prices, and they all vary according to that.

Q. I want to get the amount as it appears on the books?

A. My examination of the books is 1,127 12-100. Of course we are all subject to error in any clerical work, but I spent nearly two weeks in footing that thing.

Q. How much in dollars and cents?

A. $4,226.70, at the average net price of $3.75, which is a little above the market, I believe.

Q. Well, on that estimation and on this statement, the profits would be $4,681.82. Dividing that by 2, would give $2,345.91. That, as I understand, is approximately a statement of the account of all the profits as they would appear from the books alone?

A. Yes, sir.

Q. You say that that doesn't correctly state the profits, because during the year there has been a loss in the business of the value of 553 tons of coal?

A. Yes, sir. They are only items to correct that—the loss of coal during the year and the bad debts.

Q. Less bad debts, how much were they made to be?

A. 590.61?

A Juror—$515.61.

Q. That would make $4,166.21, deducting the bad debts. Stating this account simply by the books, is there anything else that will go into it?

A. No, sir. The wood is in amount. I have $7\frac{5}{8}$ cords.

Q. I understand the $1,845.72?

A. Includes both coal and wood taken away. The statement includes more, because it includes the market rise.

Q. The $4,166.26, you say, must be corrected by a loss in the business of 553 tons of coal, which has disappeared, and cannot be accounted for because of the manner in which the books are kept?

A. Yes, sir.

Q. How much would you make that?

A. $2,156.70, at $3.90 gross price. That's an estimate at gross price, because I can't separate the different sizes that were short.

Q. [By Mr. Cross.] You only charge $3.75 per the other?

A. That was my estimate on the net tons. This 553 tons is, I believe, gross.

Q. [By the Court.] That would be $2,009.51.

Witness—Have I made an error in extension?

A Juror—I make it more that.

A. $2,156.70.

Q. Substracting that from the $4,166.21, would make the net profits $2,009.51. You gave us a statement of the profits at the commencement of your testimony?

A. $2,300.84; yes, sir. It arises from the fact that these are estimate prices that I have given now.

The Court.—So that, on this statement of the account, the only disputable question would be the loss of coal during the year. If that coal was lost in the business by reason of the manner in which the business was conducted, and it is imputable to the manner in which the books were kept, it is a factor to be considered in the case.

Mr. Cross.—Then what does he say the profits of the business are as they appear on the books?

The Court.—$4,166.21.

Plaintiff's Counsel offers in evidence notice served by constable. Also, demand made on constable for the return of the property.

PETER M. MELICK, recalled on behalf of plaintiff in rebuttal.

DIRECT EXAMINATION.

By Mr. Borcherling:

Q. This amount of money which was collected for the year previous, did you draw that out of the business ?

A. No, sir ; it went into the business. Ledger balances were collected during the year and turned in as cash.

The Court.—It is simply to be deducted from the cash collections during the year.

[Plaintiff Rests.]

Samuel E. Smith, recalled on behalf of defendant in rebuttal.

DIRECT EXAMINATION.

By Mr. Cross.

Q. Please state shortly, the way you conducted the business in the selling of coal there ?

The Court.—In the first place. what relation did you bear to the landlord in this case ?

A. I am the husband of Mrs. Smith.

Q. And you were placed there as her representative under this lease?

A. Yes, sir.

Q. And it was understood that you were to be placed there when the lease was drawn ?

A. That was the understanding. Mr. Melick wanted me there on account of my understanding the business.

Q. You have been there ?

A. Pretty near all my lifetime.

Q. State how this business was conducted in relation to the delivery and sale of coal?

A. All orders received in the office were placed on the order book. If it was a charge, it was carried in the charge account; if it was cash, it was also marked cash on this book; then it was transferred to the cash-book —the regular cash-book—that very evening. Mr. Melick went over the books with me, and we checked the books one from the other. I would sometimes call off from one book; he would sometimes check and sometimes not. We also had a ticket for the delivery of every ton of coal. Every ton of coal that ever went out of that yard had a receipt, that, when it came back, was our voucher; that was my place,

and was done, and all receipts should and did agree with the books every evening. The charges on this book were made by me upon the day-book. Mr. Melick gave me the books that he desired me to keep ; I kept them, as he asked me to keep them; and then Mr. Melick took the day-book at odd times and posted the books in the plane-house, and made out his bills in the plane-house and collected them by John Locker; and the receipts corresponded of an evening. They were printed receipts. Anybody who received a ton of coal receipted for it, and the receipts corresponded with my books. I was in the office, and that was my place to keep it. Mr. Melick came in, as I state, and if there was any error, we generally discovered it before I left. In regard to the two tons of coal mentioned by Mr. Foote that don't appear, that is true. I had made a bet of a couple of tons of coal at one time—or it was in money—and my party finally said they would take a couple tons of coal; and the day I filled it Mr. Melick had two tons of coal sent to his house ; and we agreed between ourselves that we call it an offset. He made no note of the two tons that I had, and there was none made of what he received. That was all I ever heard of, and that came out before the referee. There never has been at any time, except, perhaps, a quarter of a ton of coal that was countermanded once in a great while; ordinarily, if it was, it would be marked countermanded; but there has not been a ton of coal otherwise that has gone out of the yard but what has been accounted for on these books.

Q. When the coal was taken out of the yard, what did you give the driver ?

A. A ticket.

Q. Would he take a ton of coal out of the yard without a ticket ?

A. It was impossible. He would have the ticket, with the receipt for that ticket, and he would bring it back to me, and I would file it. At the end of the day we would take out books and tickets and check them to see if they agreed.

Q. How long have you been engaged in the coal business ?

A. I was on the corner when I was fifteen years old, with my father. I was off the place a few years, but I have spent the most of my lifetime on the old corner.

Q. About this coal being weighed, what do you know about that ?

A. The first day it was not weighed ; the second day they commenced to weigh it. There was no coal weighed when he commenced to cart it. There was seven or eight carting. Two teams will cart 70 tons a day from the factory. I have put in 70 gross tons with two teams, while I was with Mr. Melick, into Taylor's factory, which is farther than Mr. Melick's yard.

Q. How far is Mr. Melick's yard from your yard, the old yard ?

A. It's just across the bridge. There is only 50 feet between them ; the bridge divides them.

Q. How many times did they have riding coal ?

A. There were three teams of Mr. Melick's, and six or seven teams belonging to other parties.

Q. That is, the first day ?

A. The first day I don't think he had as many as that; he had his own teams, and I think, one other, or two others.

Q. How much of the day were they engaged in carting ?

A. Well, they commenced, I think, early in the morning, before I got to the office, and they were then carting; and I went and saw Mr. Cross, and asked Melick to give me a settlement, and he refused to do it.

Q. How much of the day were they working ?

A. I think the distress warrant was served about ten o'clock.

Q. Then, from early in the morning till ten o'clock on the first day, they were engaged in carting coal ?

A. Three of his own and two others, I think he had.

Q. Five teams he had ?

A. I think there were five teams.

Q. How many men were loading the wagons ?

A. As many men as could stand around the wagons, both in the yard on the corner, and the yard on the other side.

Q. They were loading up as rapidly as they could and carting it away ?

A. Yes, sir.

By the Court:

Q. Did you see the pile of coal that was carted away that day ?

A. Yes, sir.

Q. Give your judgment as to the number of tons in it? I speak of the pile of coal that was carted away the first day?

Witness—Before the distress warrant went in?

The Court—Yes.

A. There were nearly 206 tons carted away the first day—175 to 200 tons.

By Mr. Cross:

Q. You are used to judging of the amount of coal from the size of the pile? You can tell nearly, can't you?

A. I can come very close to it.

Q. In your opinion, how much coal was taken away, judging from the size of the pile?

Witness—The coal that was carted—that laid in the yard when he commenced to cart first—till the time he was done carting.

Mr. Cross—Yes; the coal that was taken away.

A. Well, there was at least a thousand tons of coal in the yard before Mr. Melick commenced to move it. I could judge better in my own yard than Melick's, because I know the property. I know what it will hold, and I could estimate it better there than in Melick's, from the fact that it was spread out a good deal.

Q. Mr. Benedict was the constable who distrained this coal, was he?

A. He was.

Q. Did you ask him to look at the quantity of coal you had in your yard on the 5th day of September, 1881?

[Objected to.]

The Court—Did you ask him?

A. I did.

Mr. Cross—Can I ask him?

The Court—No; you cannot prove anything in that line by this witness.

CROSS-EXAMINATION.

By Mr. Borcherling.

Q. You say there was always a ticket when the coal went out?

A. Yes, sir.

Q. How did you manage when you made cash sales?

A. Just the same. It's all one thing.

Q. You are certain of that?

A. Yes, sir; always sent a ticket. Where a man came in the yard and took a ton of coal, there was no ticket demanded; it was simply entered in the book.

Q. If a person came and bought a smaller quantity than a ton, and either carried it away or drew it away, did you give him a ticket?

A. No, sir.

Q. Then there were no tickets given for small cash sales?

A. No, sir; Mr. Melick didn't require it.

Q. You say you posted all the items in the cash-book from the delivery book yourself?

A. Certainly I did, unless I might have missed a case once in a great while.

Q. Turn to April 2, 1877, and find 29 Springfield avenue, a quarter of a ton. [Witness refers to book.] Do you find the transfer from the delivery book? Please to show where you transferred it from that delivery book to either the cash-book or sales-book?

A. We were busy in small quantities that day. There is two pages of it. I see that it is not carried out in this book; consequently it was not carried out in that book. It was an order that wasn't filled. That frequently happens. I would say so, undoubtedly, from the books. If it had been delivered it would have shown there; and I am confident that is how that happened.

Q. Suppose you take April 12, Mrs. Clark?

A. That's an everyday occurrence in the coal business, having a quarter or something of that kind returned because people won't receive it when we don't deliver it in time.

Q. Why did you put all these sales into the account of sales, if they were returned?

A. Well, I would like to explain myself. In the hurry of of business—I was alone—sometimes there might be an error, and me and Mr. Melick, together would discover it, and we would put in the petty cash. Where sometimes there has been

a little money over it has gone into the petty cash.

Q. That don't answer the question. Why did you foot up the total sales, when the coal was returned ?

A. I don't think I did. Those are not footed up by me.

Q. You have got April 12, Mrs. Clark ?

Witness.—What is the amount please ?

Mr. Borcherling.—A quarter of a ton $1.12, April 12 ?

A. Not delivered. If it was the books would show.

Q. What does it say ?

A. It is left blank. Let me see what the cashbook says. [Referring to book.] I have got it one place or the other. I had two of these to keep, you understand. The coal was not delivered.

Q. Does it say anything there about not being delivered ?

A. I presume not.

Q. Isn't it in the footing up ?

A. I couldn't say ; I haven't footed it up.

Q. Isn't it ?

A. I have no doubt about it.

Q. The next I was going to ask you about is June 21, J. Hayward ?

A. I don't see anything of that kind here.

Q. J. Hayward, one ton of coal, $4, June 21. 1877 ?

A. I don't see it in the delivery book either.

Q. Does it appear on your cashbook June 21 ?

A. No ; I don't see any such order. It might be a mistake in the name.

Q. J. Hayward is the one I refer to ?

A. I don't see it.

Q. July 6, Robert Gray, 1 ton coal, $4 ?

A. Oh, you'll find many such things in a book like this. Many of these things if I had time, I could straighten them up, and show it. I have found one case that I think will explain the whole matter. It was impossible for me to examine all these cases.

Q. Answer the question first, and then you may explain ?

A. I took one case where I was familiar with the name. He was an intimate friend of Mr. Melick's, and that explains the whole matter, as to how this thing is done.

Q. Which one ?

A. I can explain all of them if I have time to do it.

Q. How long would it take you to do it.

A. Here is a charge—John Campbell, King street, Nov. 30 1877. This is the order book. That order was put down Nov. 30. Then there is seven days elapse before that two ton of coal went out of the yard. When it went out it was charged on the book, and was entered in the ledger, and is now in the ledger.

Q. I am speaking of the cash and delivery books?

A. The cash wouldn't agree, from the fact that these orders were not delivered on that day, and you would have to go back to your cash to find where it was charged.

Q. Please go to your books and see where you had it on your sales-book?

A. I never received it.

Q. Received what?

A. This money. I find 2 ton of coal Nov. 30.

Q. Where does it next appear after this book?

A. It doesn't appear in the cash, because it was charged in the ledger; because I never received the cash.

Q. Who put it in the ledger?

A. Mr. Melick. It's his own handwriting.

Q. Didn't you keep these books?

A. I didn't keep the money he received.

Q. Did you keep the books?

A. I kept them in the office.

Q. And you made the entries in the other books?

A. Anything he gave me. Sometimes he would enter some things himself.

Q. You made all the entries in the other books except the ledger that in fact were made?

A. No, sir.

Q. Who else made entries?

A. Mr. Melick.

Q. In what books?

A. In the different books.

Q. Besides the ledger?

A. Yes, sir. He kept the ledger specially, though.

Q. Where does it appear on this sales-book what became of the tons of coal?

A. You are asking me to account for cash received by Peter Melick.

Q. Answer the question?

A. [Referring to cash-book.] I find that the coal was transferred to the ledger, and that it is credited on the day-book in Peter M. Melick's handwriting, and also credited in the ledger. That's Melick's handwriting.

Q. Do you find it in the cash-book?

A. I didn't receive it; Mr. Melick put it in his pocket.

Q. When was the entry made in that book?

A. By the book, on the 22d of December.

Q. And when does it appear on this book where you sold it out of your yard?

A. It was delivered at the time it was charged. The order was a week ahead.

Q. And there is Dec. 22. Don't that make three weeks?

A. Yes, sir. Sometimes they are six weeks ahead—frequently.

Q. Look for E. Roberts, Jan. 31, 1878. What do you find there?

A. There was a ton of coal ordered Jan. 31, and a ton and a half charged Feb. 8.

Q. How much a ton? Is it carried out?

A. No. It is carried into the ledger.

Q. Is it carried out in that book?

A. No. It is in the order book.

Q. Will you please look at your cash and sales-book, and find out what day that was entered on either of those books?

A. It was not a cash sale; it was a charged sale.

Q. Was it put on the sales-book?

A. Certainly not. Why should it be on the sales-book when it was a charge. It is carried out on the ledger properly. [Referring to book.] I was trying to find out where Roberts's account is charged.

Q. The testimony is that it was carried right into this ledger, this $4.75. Be good enough to state where that a charge was carried into that ledger. Where is that entry, either on that day or any other?

A. Feb. 8, there was 1½ tons charged to the gentleman, and that's part of the order.

Q. Where is the balance?

A. I was looking when the gentleman interrupted me. He evidently came back and ordered more coal.

Q. I ask for the charge of Jan. 31, and you say it is carried into this book, the ledger?

A. Isn't that Feb. 8, a week afterwards.

Q. $4.75?

A. $6.18. When the coal was delivered there was other coal, probably, delivered with it.

Q. Look on your book and see where it is entered?

A. That may have been a ton countermanded. [Examining book.] Well, there is an entry of a ton and a half in Mr. Melick's writing, Feb. 8; and it doesn't appear in the day-book. Yes; it is.

Q. What is the entry?

A. A ton and a half.

Q What date?

A. Feb. 8.

Q. Now I ask you about the one ton on the 30th of Jan'y?

A. It is included in that. When that ton was ordered, when it went to him, seven or eight days afterwards, another half ton of coal was ordered, and its all charged together. This charge here is covered entirely.

Q. Will you please to point out the two orders? Jan. 30 and Feb. 16, isn't it?

A. E. A. Roberts one ton of coal, Feb. 16. If it isn't on this book the man has been charged with more than he has got.

Q. You have got a ton there Jan. 30, haven't you? That is in your handwriting?

A. The charge is right, I presume, or I wouldn't have charged it. Jan. 31, I have got two half tons there. Now I am going to look a little further.

Q. Are these two tons charged in any other book on that day?

A. They were not delivered until some days afterwards. There is no other entry but that that covers it.

Q. Please state whether the two and a half tons are charged in this book?

A. They are covered by this charge of Feb. 6. There was a ton and a half delivered. He may have ordered another half ton. I was trying to find it when you interrupted me. I have

found two ton of it; I will find the other half ton.

Q. Please read from that first book, the order book, Jan. 31. How much have you there?

A. Jan. 31, E. A. Roberts, 2½ tons of coal.

Q. Do you find it on this book?

A. I will find it where it covers it if you will permit me. I can't do it separately.

Q. You testified that it was in this book?

A. He didn't get all the coal. He has ordered there two tons of coal, and he didn't get it all.

Q. In the ledger two tons appear?

A. A ton and a half.

Q. Where is the rest?

A. On this order book. He didn't get it all. He has had a ton and a half of it on one occasion and a ton on another—two tons and a half. He didn't get the other half ton.

Q. Where is the first item on this book? You said it was there?

A. He didn't get it till after he had ordered it some time. He has ordered three tons of coal, and he has had two ton and a half of it, and that's all that's charged.

Q. Read what it says about that?

A. I have.

Q. What does he say about the delivery there?

A. "E. A. Roberts, Bloomfield road, 2½ tons of coal;" not marked delivered.

Q. Does it say anything?

A. It's on the order book, but not marked delivered.

Q. Was it delivered?

A. I should judge not, from the other charge. Sometimes we don't deliver the same day. I judge out of the two ton that he ordered he got a ton and a half.

Q. Will you be good enough to add up the amount, and see if it is added in—that ton?

A. It is Mr. Melick's figures; it is not my fault.

Plaintiff's Counsel—We charge that many of these matters contained in this schedule are entered on the order-book and not on the cash-book.

Witness—You have sprung it onto me when I am not prepared for it. That can be done with any set of books. I can

explain every single item there, if the time is permitted.

Q. Do your books explain it?

A. Certainly; it says he ordered three tons of coal, and he got two tons and a half, and was charged with it.

Q. Do you owe Roberts anything?

A. No, sir; I never owed him a dollar in my life.

Q. Will you turn to the cash-book, page 34. What addition have you got there at the bottom—the footing up?

A. $1,408.49.

Q. Oh, for the day. We don't want that in; only the day.

A. $75.27.

Q. Isn't it, in fact, $87.36?

A. I don't know. I know there was once there a mistake, made of $10. I presume it's a mistake.

Q. How much is it?

A. [After computation.] I think that's correct—unless what they have added in.

Q. It should be $87.36 on that day, shouldn't it?

A. I don't make it so. I may be wrong. Yes; it's a mistake, but I understand what it is.

Q. How much is it?

A. $9 or $10.

Q. We make it $12.09. Please to figure it up?

A. Mr. Melick received the money, because we couldn't find it at the time, and it was expected it would come out some time; but it never did, and Mr. Melick got the $10. I make the footing of that page $111.73.

Q. I ask you now, where you arrived at this amount, of $75.27?

A. The footing up on that day is $81.24.

Q. Your figures are $75.27, are they not?

A. It is corrected evidently by Mr. Melick.

Q. Look at page 38. How does it figure up there—$53.25? Is that correctly added together—those four items?

A. This book was corrected every night by Mr. Melick.

Q. What should that be?

A. [After computation.]—$64. It is corrected afterwards by Mr. Melick's figures.

Q. Turn to page 45 of the same book?

Witness—[Interrupting]—Mr. Melick corrected all these

things if there was any mistakes. His cash had to agree with the books afterwards. Those were all fixed at that time—explained at the time he took the money.

Q. [Continued.]—$24, here on page 45. Just figure those five items and see what they amount to?

A. $34.

Q. There is $10 difference?

A. It was corrected, though, at the time, by Mr. Melick. Wherever he found any errors he made it straight. He always went over the books.

Q. Did you collect of John Thorne $9 which you never returned?

A. No, sir. I did not.

Q. Did you collect it?

A. I am not positive; I think I did, but it was handed to Mr. Melick. It was just before the time we had this trouble.

Q. How about Henry Holmes?

A. I know nothing of him.

Q. Did you collect anything of him?

A. I did not collect a dollar of him; that is, not on my own account. If I collected it I had it on the books, of course. I had nothing to do with the collections.

Q. Were the $10.90 received from Mrs. S. Smith reported on the books as having been received.

A. That's my mother; it has never been received.

Q. How about Phillip Randall?

A. I know nothing about Phillip Randall.

Q. $12.50, on page 118 of the old day-book?

A. He has been working for Mr. Melick since this time. I don't know anything about it.

Q. How about Price, $13.50?

A. I don't know. I suppose it was paid to Mr. Melick. You are asking me questions.

Plaintiff's Counsel—I charge that you have received various sums of money which I have enumerated, and insist that you have not reported the receipts.

Witness—And I say I have not; and it has never been charged against me until I came into Court here. If I have an opportunity I can explain every dollar of it. I can't do it in an hour; it is impossible for me to do so.

Q. Do you recollect collecting money from A. M. Price?

A. No, sir; never collected a dollar.

Q. How is it about Bleecker, $39.75?

A. I don't know.

Q. Uffert, $6?

A. I don't know him.

Q. Didn't collect?

A. No, sir.

Q. Joseph Morgan, $16?

A. No, sir.

Q. Do you find any entry of a collection from any of these parties on any of your books that you know of?

A. Well, if they were dealing at the place, the collector, Mr. Lockwood, had the handling of all the bills. I didn't know anything about those matters. I was not expected, nor was it my place, to collect any moneys. The first three years I was with him I did not collect any money. He had a man to do that.

Q. You didn't collect any at all?

A. No, sir; not to my knowledge. I know of none at all.

Q. If these amounts that are spoken of, where collected and not credited on the books, they were collected by somebody else, besides you?

A. Unbeknownst to me.

Q. These people had accounts at your coal-yard, hadn't they?

A. I think Mr. Price was working for Mr. Melick, and that he had an account.

Q. How about Ecke; did he have an account?

A. I think he is one of them that took advantage of the trouble, and never made any settlement.

Q. Does it appear on the books?

A. It should appear on the books.

Q. To refresh your memory, didn't you trade that bill, $39.75, or some part of it out in shoes?

A. No, sir; I have had dealings with him but I paid him on my own account.

Q. You say you never collected any moneys?

A. I don't remember collecting any moneys.

Q. [Paper shown to witness.] Is that your handwriting?

A. Why, of course; I got that. That is a bill that is settled

for. It is on the books. It is right next door to the coal-yard James Dunn is.

Q. Did you get that money ?

A. Undoubtedly I did, and it's on the books. I made out bills for coal I sold in the office.

Q. Did you receive that money ?

A. Certainly I did.

Q. Three bills that were shown to you, the moneys represented by those three bills you received ?

A. In the office.

Q. And you credited them on the books ?

A. I presume it is on the books. I know nothing to the contrary. With outside collections I had nothing to do.

Q. You did receive money in the office, and give bills and receipts ?

A. Yes, sir.

Q. The outside collections were done by some third party ?

A. Yes, sir.

Q. [Papers shown to Witness.] Those are your signatures ?

A. Yes, sir. Those are the same I had before. They are all on the books properly, if you will give me time I will find them all.

Q. Is that your signature ?

A. That man, Russell Smith, works for Melick, and has for years.

Q. Did you sign that paper ?

A. Certainly, I did.

Q. How is it with that one ? [Another Paper.]

A. Those are all coal bought in the office, and they are on the books.

Q. [By the Court.] These six bills are bills of coal that you have signed receipted for, and which you received in the office; and you say they all appear on the books ?

A. Yes, sir ; I can find them if I have time to foot the books up.

Q. [By Mr. Borcherling.] Do you know anything about that Randall account ?

A. I do not.

Q. Didn't you board with Mrs. Randall ?

A. Yes, sir. I paid her every dollar I owed though.

Q, Did you credit on any of the bills belonging to this coal business anything from Mrs. Randall on account of your board?

A. I don't think I did, sir.

Q. You are not certain?

A. I am not positive; it is so long ago.

PETER BRIENGAN, sworn on behalf of defendant in rebuttal.

DIRECT EXAMINATION.

By Defendant's Counsel:

Q. Are you carrying on a coal business at the corner of Plane and Academy streets?

A. Yes, sir.

Q. The old yard occupied by Mr. Melick in 1877 and 1878?

A. Yes, sir.

Q. Have you ascertained from your accounts how much coal was in your yard on the 5th of September last?

A. Yes, sir.

Q, How many tons were there?

A. 514 gross tons.

Q. In what shape was it?

A. In bulk in the yard.

Q. In one heap?

A. Yes, sir; and I deducted it from the invoices—the invoices of purchase—and from the book accounts.

Q. It was all in one heap?

A. Yes, sir.

By Plaintiff's Counsel:

Q. You didn't weigh it?

A. No, sir.

Q. You took it for granted that the invoices you had ought to give you a balance?

A. I beg your pardon. It is weighed when it comes in; that is the weight I took.

Q. You didn't weigh it when you found this amount?

A. It is all weighed when it goes out.

Q. I understand you get at it in this way. All the coal is weighed when it comes in, and the coal going out is weighed when it goes out?

A. Yes, sir.

Q. You take your invoice and find out what is brought in, and take your sales to find out how much has gone out.

A. Yes, sir.

Q. Are you carrying on the business there?

A. Yes, sir.

Q. With whom?

A. The firm of Smith & Briengan.

Q. Mrs. Smith and yourself?

A. Yes, sir.

Q. Could you tell, from a heap of coal of that size, anything about it? Having no invoices for the weights, could you tell by looking at it about how much coal there was there?

A. Well, I should imagine from seeing it and knowing what coal was in there, that I would form an opinion; but not probably, within a ton or two.

Q. You might as close as that?

A. Yes, sir.

Q. How long have you been in this business?

A. Six months.

Q. What business did you have before?

A. Various kinds. The last one was the hardware business.

Q. You have never been in the coal business before?

A. No, sir.

Q. Do you wish me to understand that by a six months experience in the coal business you can estimate a heap of coal of over 500 tons within a ton or two?

A. From the books, I said.

Q. No; without any books or measurements, by guessing at it?

A. Well, yes; I should imagine that by having the figures before me.

Q. Suppose you had no figures before you?

A. Then I couldn't tell.

Q. Who asked you to estimate, on the 5th of September last, a heap of coal?

A. I believe a messenger came from Mr. Cross.

Q. Through whom?

A. It came direct from Mr. Cross. It was sent from his office.

Q. Who brought it?

A. I couldn't tell you.

Q. He wanted an estimate at that time.

A. Yes, sir.

By Defendant's Counsel:

Q. He merely asked you to state from your book what amount of coal there was in that pile?

A. Yes, sir.

CYRUS BENEDICT, recalled on behalf of defendant.

DIRECT EXAMINATION.

By Defendant's Counsel:

Q. You distrained this coal that was over in the yard, and which Melick moved at the time of the distress warrant, and you saw the pile there?

A. Yes, sir.

Q. And know its size?

A. Well, I remember the ——

[Objected to.]

Q. Did you, on the 5th day of September last, go in the yard of Briengen, at the corner of Plane and Academy street, and look at that pile of coal that Mr. Briengan showed you there in the yard?

A. I did. I couldn't say it was on 5th of September; it was about that time.

Q. How did that pile of coal in the yard of Briengan compare in size with the coal that you distrained over on the other side? How much more, if any, was on the other side, than there was in Mr. Bringan's?

A. I couldn't say how much there was. The pile I looked at in September was somewhat higher than the other, I think, but a great deal shorter.

Q. Which was the larger pile?

A. The larger pile was in Melick's yard, I should think.

Q. Much larger?

A. It was a great deal longer—a very large pile of coal. There was a great deal more than I distrained on.

Q. Make a comparison to the jury. Was that pile as large again as the one in Briengan's yard?

A. I wouldn't be willing to say it was as large again. I think it was a great deal larger.

Q. This was a year and five months after I saw the other?

A. A good deal more. It was last September I was there.

CROSS-EXAMINATION.

By Plaintiff's Counsel:

Q. [Paper shown to witness.] Is that your signature?

A. I believe that to be my signature?

Q. Isn't that the notice you served on Mr. Melick?

A. That looks like my writing. I didn't know positively that I served a notice. I came to your office and told you what I had done; and, of course you knew whether I had served a notice or not. I didn't remember.

And thereupon the defendant rested his cause.

Rest for all.

The testimony in the cause having been concluded, and the parties having rested the cause, the Judge proceeded to charge the Jury, as follows:

CHARGE OF THE COURT.

DEPUE, J. Since the adjournment of this Court, gentlemen, on Friday evening last, I have had no opportunity to look at a figure in this cause, or to think of the state of accounts between these parties. I shall be compelled, therefore, in presenting that feature of this case, which relates to accounts, to rely upon the memoranda made by one of the jurors, contenting myself with simply stating in round numbers results that will be important for the jury to bear in mind if an account comes to be stated in this case.

But, before adverting at all to this account, it is proper that I should state concisely the position of these parties and the character of the issues that are involved in the case; and, in doing so, I shall call attention to one of its features of very great importance which it is possible may dispose of it before it reaches an account, and which, while it received attention from counsel during the progress of the case, received comparatively little in the course of the summing up.

This is an action of replevin. It is brought by Peter M. Melick, the plaintiff, who brings this action to recover for a certain quantity of coal which is confessedly his property, and which was taken from his possession in virtue of a landlord's warrant that was issued by Mrs. Smith and delivered to the defendant, one of the officers of this county. The merits of the case, therefore, consist in determining the validity and sufficiency of the excuse given on the part of the defendant for taking that property from the plaintiff's possession.

The evidence shows that Mrs. Smith was the owner of certain premises that were appropriated for the purposes of a coal yard, and that, sometime during the Month of May, 1877, she and Melick entered into

a lease by force of which she rented her premises to Melick for the term of one year, commencing on the 1st of April, 1877, and continuing down to the 1st of April, 1878. That lease is in evidence and it is the foundation of the authority on the part of this defendant for taking this property. By the terms of that lease Mr. Melick agreed to pay an annual rent of $750. He also agreed to give Mrs. Smith, in addition to the stated sum I have mentioned, the one-half of the profits which might be realized from the conduct of the business of buying and selling coal during the year, on the premises demised.

The admission of counsel and the evidence in the cause shows that the rent, $750, has been paid; and that, therefore, is to be excluded from your consideration, except so far as that rent entered into the profits realized from the conduct of the business.

In this situation of affairs, on or about the 3rd of April, 1878, Mr. Melick having rented another place to carry on his business, was engaged in the removal of his coal (for the coal was his) to the new yard where he proposed to continue the business in the future. While he was doing so, the property was taken by the defendant in this case, Cyrus Benedict, in virtue of a landlord's warrant issued by Mrs. Smith, for one-quarter of the rent reserved, $750, (which has been paid,) and the one-half of the profits which she claimed to have been realized out of the business during the year.

Now, the justification of the defendant for the taking of Mr. Melick's property depends, in the first place, upon the legality of that warrant, and upon the right of the landlord to resort to a landlord's warrant for the purpose of collecting the rent that is now in controversy in this cause. That is the first issue.

The law on that subject is this: A landlord has a right, without process of law, to seize on the property of his tenant for the purpose of making out of it the rent that is due for the premises demised. The tenant

also has rights which enter into and determine the propriety of resorting to a landlord's warrant in any case, and that is the right to relieve his property from seizure by tendering the amount of rent that is actually due, in order to relieve his property from seizure and sale by the landlord for the satisfaction of the rent.

There is only a certain class of cases where a landlord can resort to a distress warrant for the collection of rent, and these cases are divided into two classes. First, where the rent is reserved in money, the amount of which can be determined by actual calculation, by subtracting from the amount of rent reserved the amount of payments made; secondly, where the rent reserved is in one sense uncertain,—that is, where it doesn't consist in so many dollars and cents, but where it consists in a variable quantity, determinable by some method of ascertainment other than by mere division and subtraction. There the landlord may distrain where the situation of affairs is such that the tenant, by a calculation or inspection, may readily ascertain the amount he out to tender in order to relieve his property. Because the right of the tenant to relieve himself from the distress of his goods by a tender is a right that is as high as the right of the landlord to collect his rent by a landlord's warrant. And wherever it appears, as the result of any case, that the amount of rent that is to be paid cannot with convenience and readiness be ascertained, so that the tenant may make a tender of the rent due, there the landlord has no right to resort to a landlord's warrant for the purpose of collecting rent. I cannot place that principle in any clearer light than by reading an extract from the opinion of the Court of Errors in this case, when the case was before the Court on review.

[The Court read from opinion referred to, and continued:]

"If this result," (i. e., the amount of profits readily

appearing on the production of the books,) "was contemplated by the parties, and has actually been effected by the agency proposed and provided by them, and by a simple process of bookkeeping and calculation, where the quantities are all known and appear, then the amount payable by the tenant as one-half of the profits of the business might readily be ascertained." And it is only, gentleman, in that event that the landlord in this case had a right to resort to a landlord's warrant for the purpose of collecting his rent.

The first question in the cause, then, is whether, by taking those books, the jury can perceive, by their inspection and examination, that the tenant could have readily ascertained the amount of this rent when that distress warrant was executed, and could have tendered the amount; for only in that event was the landlord entitled to resort to this landlord's warrant for the purpose of the collection of the rent.

I have not examined these books, but it appears from the evidence of one of the experts that the amount of rent payable under this clause in this lease could not be ascertained with any degree of exactness on an examination of these books for a term of three weeks. We have also been engaged in the trial of this cause for nearly three days; and if an examination for three weeks and a trial before a jury for the length of time this case has occupied be necessary for the purpose of ascertaining the amount of these profits, then this landlord's warrant was illegal, and the plaintiff would be entitled to a verdict for the return of his property, for the reason that, under those circumstances, the landlord had no right to resort to a landlord's warrant to collect rent.

A tender of an amount for rent by the tenant, if accepted by the landlord, is final. The tenant cannot recover back any excess that he has tendered for the purpose of relieving his property. If he is not in a condition to give bond to have the property restored, and is compelled to delay the investigation and ascer-

tainment of the amount by the slow process of the law, you can readily see that there may be circumstances under which the use of a landlord's warrant for the collection of rent may be the entire destruction of a man's business; and it is only when the condition of affairs is such, that the tenant can safely exercise his right of tender, that the landlord can resort to a landlord's warrant for the collection of his rent. So that if, on the examination of these books,—in view of Mr. Melick's position in that yard, taking some part, at least, in the prosecution of that business—the books are not such as you think would enable him to have readily ascertained the amount, then the defendant will be entitled to a verdict. If, on the other hand, on your examination of these books—(I put everything else aside)—you think that Mr. Melick could without unreasonable delay have ascertained the amount due for this portion of the rent, so as to have safely made a tender of it, then this distress warrant was legal.

If you find this question in favor of the defendant, the landlord, then, and in that event only, you will proceed to state an account between these parties; for the act under which this suit was brought provides that where the landlord has executed a landlord's warrant, and the tenant has sued out a writ of replevin, and issue be joined in such a suit, if the case is one in which the landlord was justified in resorting to a distress warrant, the jury are required to find two facts: they are required to find the sum of the arrears and the value of the goods and chattels distrained; and the landlord will by that proceeding obtain a judgment for the amount of rent that is so found to be due. If the warrant was a legal one this suit is converted into a suit on the part of the landlord for the recovery of the rent that is due him, and he will be entitled to a verdict for that amount, with a proper calculation of interest.

Now, on that subject I propose to make but a very few observations, because the accounts have been

stated by the experts in such a form as will enable you, in case you are called upon to determine the amount of this rent, very readily to apply the evidence to the proper construction of the law under which this property was held.

I will take up first, and will quite briefly refer to, the statement made by Mr. Bestic, the accountant called on the part of the defendant, who makes the actual sales in cash amount to $20,422 02. He makes the expense account $3,888 15; the cost of coal, including the valuation of the coal that was on hand April 1, 1877, when Mr. Melick commenced this business $14,464 48, making the expense account and the cost of the coal $18,352 62. Deducting that from the actual sales in cash would leave a net balance of $2,069 39. According to his testimony there appears also to have been on the ledger on April 1, 1878, $2,968 42. He allows for bad debts $250, making the net balance of the ledger accounts $2,718 42. Adding that to the other statement of net profits, makes the total amount of his net profits $4,787 81. Then dividing that by two would leave the one-half of the net profits $2,393 91. It is admitted by the defendant that she has received on account of these net profits the sum of $1,174 21,—making, according to the expert's statement, $1,219 70, the amount due for the profits during that year. The distress warrant was issued for only $1,112 50; and, if you adopt the statement made by Mr. Bestic, the defendant would be entitled to a verdict for the amount of net profits claimed in the distress warrant, $1,112 50, with a calculation of interest from April 1, 1878, down to the present time. Having expressed only that amount in her distress warrant she cannot be allowed more than that on this statement of the account.

On the other hand you have the statement of Mr. Foote; and without going into the figures in detail I may say that, on a comparison of the cash sales and the book accounts, including the coal and wood, he makes the net profit $4,681, from which he de-

ducts for bad debts $515 61, making his net balance $4,166 21.

You will perceive that when you take out of these accounts the difference between the allowance made by Mr. Bestic for bad debts, and the loss claimed by Mr. Foote for bad debts, the statements of account by these two experts do not very materially differ—they differ probably about $200.

Mr. Foote, however, claims as a loss in the business 553 tons of coal, amounting to $2,156 70; deducting that, he makes the amount of net profits $2,009 51. One half of that is $1,004 75;—1,174 21 having been paid to Mrs. Smith. On that statement of the account the defendant was paid the whole of her rent, and overpaid.

Now, while there are corrections of small items, the difference between the statement made by Mr. Foote and that made by Mr. Bestic consists chiefly in the allowance of $515 61 instead of $250 for loss on the books of account, and a claim for 553 tons of coal, which is claimed, on the part of the plaintiff, to have been lost—dropped from the accounts in some way in the course of the prosecution of this business. Mr. Bestic obtains his information from the books exclusively; he makes the amount of coal on hand on April 1st, 1878, 1,021 tons; in other words, in his mode of stating the account, charging Mr. Melick with all the coal that has been sold, and giving him credit for all the coal that he bought, there should have been 1021 tons on hand at the end of the year. Mr. Foote's account is based on the testimony of Mr. Hart, who weighed the coal after the distress warrant was issued, and the testimony of witnesses with regard to the amount of coal that was actually on hand and removed before the warrant was executed.

In the statement of this account the jury are to consider the amount of bad debts that appeared upon these books; for, although the defendant stipulated that she should not become a partner and should not be liable for any indebtedness to, or indebtedness

from, the firm; yet the arrangement between these parties was an arrangement for the division of profits, and losses from bad debts, fairly and honestly incurred in the prosecution of the business, are an element which is always considered in the ascertainment of profits. The question is, if the item of bad debts is allowed, how much shall be allowed for it—$250 or $515 16? That the jury is to determine under the evidence.

The other substantial difference between these two experts is with regard to the quantity of coal on hand on April 1, 1878. This item is to be allowed. If a merchant wants to ascertain his profits he takes the value of his stock on hand at the beginning of the year and compares with it the stock that is on hand at the end of the year; and if, by the carelessness with which his business has been conducted or his books have been kept, a certain quantity of that stock has disappeared from his store without any equivalent being returned for it, he considers that in the estimation of his profits. And so, in this case, the lease requiring the landlord to furnish a competent person to superintend the conduct of this business and the keeping of the accounts, if, by reason of his management of the portion of the business intrusted to him, a certain portion of the coal which has been bought does not get into the business of the concern it is a loss; and in determining the amount of profits you are to consider the loss arising in that way. In no other way, in the ordinary conduct of business, can the amount of profit be ascertained.

If this item is to be allowed, how much shall be allowed is a question for the jury under the evidence. If the 1021 tons was the amount that appears from the evidence in the case to have been the amount that was on hand then no loss has occurred in that way. If the examination of the evidence satisfies you that a less amount of coal was on hand, and that the difference between the amount the books required to be on

hand and the amount that actually was on hand disappeared because of the manner in which this business was conducted, that fact is to be considered in the statement of account; and, without examining the figures any further, I leave this part of the case with this observation,—that if you come to state the account you are to state it on the principles I have mentioned, ascertaining what was due on the first of April, 1878, to the defendant for her rent, and give her interest from that date down to the present time— the suit being considered, in that aspect of the case, as an ordinary suit for the collection of rent. Then your verdict will be for the defendant, specifying the amount of rent that is due her.

If, on the other hand, you find after examining these books that the condition of these accounts on April 1, 1878, was such that the amount due for the profits could not be readily ascertained by the tenant, so that he could have made the tender, and therefore that this distress warrant was illegal,—or if, after examining the accouuts, you find that the rent has been paid, then and in that event your verdict will be for the plaintiff, with an assessment of damages at six cents; because in that event the property was illegally taken, and the plaintiff can only claim to have it returned to him with nominal damages.

The jury having retired,

Defendant's counsel asks the Court to charge the jury that if it is possible to determine the amount of the rent from the books of account, then the rent is sufficiently certain to justify the distress warrant.

The Court declines so to charge.

2. Also, that the landlord had the books examined by a bookkeeper previous to the expiration of the lease, and knew what rent was due, and that he distrained for a certain amount.

The Court declines so to charge.

3. Also, that there is no sufficient evidence that the debts were bad.

The Court declines so to charge.

4. Also, that in order to ascertain whether the debt was bad or not, it was the duty of the tenant to obtain judgment and issue execution.

The Court declines so to charge.

To which rulings and decisions of the Court defendant's counsel excepts, on the ground that the Court ought to have so charged the jury as requested, and prays a bill of exceptions, which is allowed and sealed accordingly.

Exception granted.

Defendant's counsel prays an exception to the following language of the Court's charge to the jury: "We have also been engaged in the trial of this cause for nearly three days; and if an examination for three weeks and a trial before a jury for the length of time this case has occupied be necessary for the purpose of ascertaining the amount of these profits, then this landlord's warrant was illegal."

Exception granted.

Defendant's counsel prays an exception to the Court's charge to the jury "That it is only where the amount of rent due can be readily ascertained by the tenant that the landlord has a right to distrain."

Exception granted.

Defendant's counsel prays an exception to the Court's charge to the jury "That if they found that the condition of the accounts was such that the amount due for profits could not readily be ascertained by the tenant, they must find a verdict for the plaintiff."

Exception granted.

Defendant's counsel prays an exception to the

Court's charge to the jury "That losses on account of bad debts should be considered and allowed by the jury in favor of the plaintiff in making up the account."

Exception granted.

Defendant's counsel prays an exception to the Court's charge to the jury "That the item of 1021 tons of coal might be taken into consideration in ascertaining the amount of the profits."

Exception granted.

Defendant's counsel prays an exception to the Court's charge to the jury "That in ascertaining the amount of profits the quantity of coal lost during the year was to be taken into consideration."

Exception granted.

Defendant's counsel prays an exception to the Court's charge to the jury "That whenever it appears as the result of any case that the tenant cannot with convenience ascertain the amount of rent due, the landlord has no right to distrain."

Whereupon the counsel for the defendant made exception to the said ruling of said Judge, as follows:

Defendant's counsel prays an exception to the following language of the Court's charge to the jury: "We have also been engaged in the trial of this cause for nearly three days, and if an examination for three weeks and a trial before a jury for the length of time this case has occupied be necessary for the purpose of ascertaining the amount of these profits then this landlord's warrant was illegal," and prayed that said Judge would set his hand and seal to this bill of exception, and it is sealed accordingly.

DAVID A. DEPUE, [L. S.]
J. S. Ct.

Defendant's counsel prays an exception to the Court's charge to the jury "That if they found that the condition of the accounts was such that the

amount due for profits could not readily be ascertained by the tenant they must find a verdict for the plaintiff," and prayed that said Judge would set his hand and seal to this bill of exception, and it is sealed accordingly.

DAVID A. DEPUE, [L. S.]
J. S. Ct.

Defendant's counsel prays an exception to the Court's charge to the jury "That losses on account of bad debts should be considered and allowed by the jury in favor of the plaintiff in making up the account," and prayed that said Judge would set his hand and seal to this bill of exception, and it is sealed accordingly.

[This exception waived.]

Defendant's counsel prays an exception to the Court's charge to the jury "That the item of 1,021 tons of coal might be taken into consideration in ascertaining the amount of the profits," and prayed that the said Judge would set his hand and seal to this bill of exception, and it is sealed accordingly.

DAVID A. DEPUE, [L. S.]
J.

Defendant's counsel prays an exception to the Court's charge to the jury "That, in ascertaining the amount of profits, the quantity of coal lost during the year was to be taken into consideration," and prayed that said judge would set his hand and seal to this bill of exception, and it was sealed accordingly.

DAVID A. DEPUE, [L. S.]
J.

Defendant's counsel prays an exception to the following language of the Court to the jury: "So that if, on the examination of these books, in view of Mr. Melick's position in that yard, taking some part at least in the prosecution of that business, the books are not such as you think would enable him to have readily ascertained the amount amount, then the de-

fendant will be entitled to a verdict; if on the other hand, on your examination of these books, (I put every thing else aside,) you think that Mr. Melick could without unreasonable delay have ascertained the amount due for this portion of the rent so as to have safely made a tender of it, then this distress warrant was legal;" and prayed that said judge would set his hand and seal to this bill of exception, and it is sealed accordingly.

[Exception not taken]

Defendant's counsel prays an exception to the Court's charge to the jury, "That whenever it appears as the result of any case that the tenant cannot, with convenience, ascertain the amount of rent due, the landlord has no right to distrain," and prayed that said judge would set his hand and seal to this bill of exception, and it is sealed according.

DAVID A. DEPUE, [L. S.]
J.

The counsel for the defendant requested his Honor, the judge, to charge and instruct the jury, as follows, viz:

1st. Defendant's counsel asks the Court to charge the jury, "That if it is possible to determine the amount of the rent from the books of account than the rent is sufficiently certain to justify the distress warrant.

The Court declines so to charge

2. That if the jury believe that the landlord had the books examined by a bookkeeper previous to the expiration of the lease and knew what rent was due, then the distress warrant was legal and he distrained for a certain amount.

The Court declines so to charge.

3. That there is not sufficient evidence to show that the debts were bad.

4th. That in order to ascertain whether the debts

were bad or not, it was the duty of the tenant to obtain judgment and issue execution. The Court declines so to charge.

Whereupon, the counsel of the defendant, conceiving that by the law of the land the Judge should have charged and instructed the jury, as above requested, prayed that his Honor, the judge, would set his hand and seal to this bill of exceptions to the said opinion of said Judge, and it is sealed accordingly.

DAVID A. DEPUE, [L. S.]
J.

The foregoing exceptions are signed subject to the instructions as given. The books and the statements and calculations of the experts are to be made exhibits in the case.

DAVID A. DEPUE,
J.

On the 19th day of October, 1882, what was suggested by defendant's counsel to be his bill of exceptions in above cause, with a notice that he would on the 21st of the same month ask the Circuit Judge to sign, was left with me; opposition being made before the Circuit Judge the exceptions were not signed, and defendant's counsel directed to redraw them according to the taking in Court, and on the ninth day of November, 1882, the above exceptions taken, and which were signed, were first presented to my notice.

CHARLES BORCHERLING,
Attorney of Plaintiff.

WRIT OF ERROR.

NEW JERSEY, *ss.:* The State of New Jersey to David A. Depue, Esquire, Judge of our Circuit Court, at Newark, in and for the County of Essex, or such Justice of the Supreme Court of the State of New Jersey as shall hold such Circuit Court, greeting:

Because in the record and proceedings, and also in the giving judgment in a plaint which was in our Circuit Court, holden at Newark, in and for the said County of Essex, between Peter M. Melick, plaintiff, and Cyrus Benedict, defendant of a plea of replevin, manifest errors have intervened to the great damage of the defendant, as by his complaint we are informed, we being willing that speedy justice should be done to the parties aforesaid, in this behalf do command you distinctly and openly to send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals, before the judges thereof, on the thirteenth day of February next, and this writ and the records and proceedings aforesaid being inspected, we may cause to be further done thereupon what of right and according to law ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twenty-fourth day of January in the year of our Lord one thousand eight hundred and eighty-two.

HENRY C. KELSEY,
Clerk.

PHILIP W. CROSS,
Attorney.

ESSEX COUNTY, *ss.*:

The Judge of the Circuit Court of the County of Essex, by virtue of the within writ to us directed, do certify that the Court of Errors and Appeals of the State of New Jersey, the plaint, judgment and proceedings, whereof mention is made in said writ, with all things touching the same, as we are herein commanded.

By order of the Court, given under the seal of the Court, this seventeenth day of February, eighteen hundred and eighty-two.

[L. S.]

Pleas before the Judge of the Circuit Court, holden at Newark, in and for the County of Essex, of the eighteenth day of April, A. D., eighteen hundred and seventy-eight.

WM. A. SMITH,
Clerk.

ESSEX COUNTY, *ss.*:

Cyrus Benedict, the defendant in this suit was summoned to answer Peter M. Melick, the plaintiff therein of a plea, wherefore he took and unjustly detained certain goods and chattels, the property of the said plaintiff, hereinafter mentioned and set forth, And thereupon the said plaintiff, by Charles Bocherling his attorney, complains: for that the said defendant heretofore, to wit, on the second day of April, in the year of our Lord one thousand eight hundred and seventy-eight, to wit, in the City of Newark, in the County of Essex, aforesaid, and within the jurisdiction of this Court, from a certain messuage and premises, known as number two hundred and fifty-one Plane Street, in the City of Newark, County of Essex, aforesaid, then and there occupied by the said plaintiff, took the following articles, coals, goods and chattels namely, lot of stove coals and nut coals, specified as about three hundred and fifty tons of coals in the aggregate, property of the said plaintiff, to wit, of the value of fourteen hundred dollars, and unjustly detained the same, until the commencement of this suit; wherefore the said plaintiff saith that he is injured and hath sustained damage to the value of fourteen hundred dollars, and therefore he brings his suit, &c.

And the said Cyrus Benedict, by Philip W. Cross his attorney, comes and defends the wrong and injury when, &c., and admits the taking of the goods and chattels in the said declaration described, and at the place mentioned therein, and justly, because he says

the said plaintiff, to wit, on the first day of April, A. D., 1877, under his hand and seal, rented, hired and leased of one Grace Smith, certain premises, situate in the City of Newark, in the County of Essex and State of New Jersey, and known and designated as No. 99 Academy Street, in said City, and more particularly mentioned and described in said lease, now in the possession of this defendant, and which he now offers to bring into this Court, the date whereof is the day and year aforesaid, and by the terms of said lease, as will more fully appear by reference thereto, the said plaintiff agreed to pay the said Grace Smith, as rent for the same, the sum of seven hundred and fifty dollars in quarterly installments, at the expiration of each quarter, from the said first of April, 1877, together with one half of the profits arising from the business of buying and selling coal from said premises, at the expiration of said lease, as will more fully appear by reference thereto; that the said plaintiff entered upon said premises and enjoyed the same, under and by virtue of said lease, from said first day of April, 1877, till April 1st, 1878; that at the time of taking the goods and chattels, as alleged in plaintiff's declaration, there was due and owing said Grace Smith, from said plaintiff, the sum of one hundred and eighty-seven dollars and fifty cents, for one quarterly installment of the seven hundred and fifty dollars, for said portion of the rent of said premises, due and payable on the first day of April, 1878, and also the further sum of eleven hundred and twelve dollars and fifty cents, due on the first day of April, 1878, for the rent of said premises, reserved by the terms of said lease as will more fully appear by reference thereto, and which said last mentioned sum is one half of the profits arising from said business of buying and selling coal from said premises, during the term of said lease, as will more fully appear by the books of account kept by the said plaintiff, and to which this defendant refers; and the reason the defendant does not bring the same into Court is, the

the said books of account are in the possession of the said plaintiff; that the said plaintiff being so indebted to the said Grace Smith for rent, as aforesaid, on the thirty-first day of March, 1878, removed said goods from said premises to the premises known as No. 251 Plane Street, in said City of Newark; that on the third day of April, 1878, the said Grace Smith issued, under her hand and seal, a distress warrant, directed to defendant, one of the constables of the County of Essx in said State, whereby she empowered this defendant to distrain the goods and chattels of the said Peter M. Melick, on the premises known as No. 99 Academy Street, in said City, or which may have been removed therefrom within thirty days, for said sum of thirteen hundred dollars, being the balance of the rent due the said Grace Smith on the first day of April, 1878, as will more fully appear by said warrant of distress, now in the possession of defendant and which he now brings into Court, the date whereof is the day and year aforesaid; that by virtue of said warrant of distress this defendant seized the goods and chattels of said plaintiff, mentioned and described in his declaration, and at the time therein set forth, as the defendant might lawfully do according to the statute in such case made and provided.

And the said defendant is ready to verify,—wherefore he prays judgment, and a return of the said goods and chattels, together with his damages and costs and charges by him about his defence in this behalf expended, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

And the said plaintiff as to the said cognizance of the said defendant, saith that the said defendant, by reason of anything by him in that cognizance above alleged, ought not, as bailiff of the said Grace Smith, to acknowledge the taking of the said goods, chattels and coals in the said place and premises, known and designated as number two hundred and fifty-one

Plane Street, in the City of Newark, in said County of Essex, in which said place and premises, known and designated as aforesaid, in which, &c., and justly, &c., because he saith that no part of the said supposed rent, in the said cognizance mentioned, was, or is, in arrear, from the said plaintiff to the said Grace Smith, in manner and form as the said defendant hath in his said cognizance in that behalf alleged. And this the said plaintiff prays may be inquired of by the country, &c.

And for a further plea in this behalf to the said cognizance of the said defendant the said plaintiff, by leave of the Court here for this purpose, first had and obtained according to the form of the statute in such case made and provided, saith that the said defendant by reason of anything in his said cognizance alleged, as bailiff of the said Grace Smith, ought not to acknowledge the taking of the said goods, chattels and coals of the said plaintiff, in the said place known and designated as number two hundred and fifty-one Plane Street, in the City of Newark, in the County of Essex aforesaid, in which, &c., and unjustly, &c., because he saith that he the said defendant at the said time, when, &c., was not the bailiff of the said Grace Smith in manner and form as the said defendant hath above in his said cognizance in that behalf alleged. And this the said plaintiff prays may also be inquired of by the country, &c.

Therefore, let a jury thereupon come before the Judge aforesaid, at Newark aforesaid, the first Tuesday of September next, who neither, &c., to recognize, &c., because, &c., and the same day is given to the parties here, &c.

At which day, before the Judge aforesaid, at Newark aforesaid, come the said parties by their said attorneys aforesaid, and the Sheriff hath not sent here the writ to him in this behalf directed, nor hath he done anything thereupon.

And afterwards, that is to say, the fifth day of January, A. D., eighteen hundred and eighty-two,

until which time the issue as aforesaid joined had been continued before the Judge aforesaid, at Newark aforesaid, come the said parties by their said attorneys, and the jurors of the jury of whom mention is before made, being summoned, also come, who, to speak the truth of the matter within contained, being chosen, tried and sworn upon their oath; the trial of this cause was commenced and continued until the tenth day of January, eighteen hundred and eighty-two, when the jurors say they find the property in the plaintiff, and assess his damages against the defendant at six cents; and so they say all.

Whereupon, it is considered that the said plaintiff do recover possession of the said goods and chattels in the declaration mentioned to him irrepleviably to hold; and it is further considered that the said plaintiff recover against the said defendant his damages by him sustained on occasion of the detention of the said goods and chattels in form aforesaid found, and also the further sum of two hundred and forty dollars and sixty-three cents for his costs and charges by him about his suit in this behalf expended by the Court, no where assessed to him of increase with his assent, which damages, costs and charges in the whole amount to two hundred and forty dollars and sixty-nine cents.

And the said defendant in mercy, &c.

Judgment signed January 10th, 1882.

DAVID A. DEPUE, *Judge.*

ASSIGNMENT OF ERRORS.

Afterwards, that is to say on the thirtieth day of February, eighteen hundred and eighty-two, in the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, came the said Cyrus Benedict, by Philip W. Cross his attorney, and says that in the record and proceedings aforesaid, and

also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Peter M. Melick to have his said action against the said Cyrus Benedict.

There is also error in this, to wit:

Because, the Judge before whom said cause was tried, charged the jury as follows: "We have also been engaged in the trial of this cause for nearly three days, and if an examination for three weeks and a trial before a jury for the length of time this case has occupied be necessary for the purpose of ascertaining the amount of these profits, then this landlord's warrant was illegal."

SECOND.—Because the said Judge charged the said jury "That if they found that the condition of the accounts was such that the amount due for profits could not readily be ascertained by the tenant they must find a verdict for the plaintiff."

THIRD.—Because also the said Judge charged the jury, "So that if, on the examination of these books, in view of Mr. Melick's position in that yard, taking some part at least in the prosecution of that business, the books are not such as you think would enable him to have readily ascertained the amount, then the defendant will be entitled to a verdict. If on the other hand, on your examination of these books, (I put every thing else aside) you think Mr. Melick could without unreasonable delay have ascertained the amount due for this portion of the rent, so as to have safely made a tender of it, then this distress warrant was illegal.

NOTE.—This Assignment of Error waived. The exception not properly taken.

FOURTH.—Because also, the said Judge charged

said jury "That in ascertaining the amount of profits the quantity of coal lost during the year was to be taken into consideration in ascertaining the profits."

FIFTH.—Because the said Judge charged said jury "That whenever it appears as the result of any case that the tenant cannot, with convenience, ascertain the amount of rent due the landlord has no right to distrain."

SIXTH.—Because also, the said Judge charged said jury "That the item of 1021 tons of coal might be taken into consideration in ascertaining the amount of the profits."

SEVENTH.—Because also the said Judge refused, upon the request of the defendant below, to charge the jury "That if it is possible to determine the amount of the rent from the books of account then the rent is sufficiently certain to justify the distress warrant."

EIGHTH.—Because also the said Judge refused, upon the request of the defendant, to charge the jury "That if the jury believe that the landlord had the books examined by a bookkeeper previous to the expiration of the lease, and knew what rent was due, then the distress warrant was legal and he distrained for a certain amount."

NINTH.—Because also the said Judge charged the jury "That it is only where the amount of rent due can be readily ascertained by the tenant that the landlord has a right to distrain."

Therefore the said Cyrus Benedict prays that the judgment aforesaid, by reason of the aforesaid errors, and of other errors appearing in the record and proceedings aforesaid, may be reversed, annulled and for nothing, and that the said Cyrus Benedict may be restored to all things he has lost on occasion of the said

judgment, and that the attorney of the defendant may rejoin to the said errors, &c.

PHILIP W. CROSS,
Attorney for and of Counsel with Plaintiff in Error.

STATEMENT OF CASE.

On the first day of April, 1877, one Grace Smith, of the City of Newark, entered into an agreement with Peter M. Melick, of the same place, under their hands and seals, whereby the said Grace Smith let and rented unto Peter M. Melick certain premises, particularly described in the agreement, and are known as No. 199 Plane Street, in said City, to be used for the purpose of a coal yard for one year; said Melick agreed to pay therefor the sum of $750, in quarterly installments, "and the further sum of one-half of the profits arising from the business of buying, selling and delivering coal from said premises," by the party of the second part, "which said profits are considered and taken as part of the rental price of said premises," and were to be paid at the expiration of the lease.

It was further agreed, that the party of the first part, the said Grace Smith, should "furnish a suitable and proper person to take charge of the selling and delivering of coal from said premises, and keep accurate books of account for the party of the second part, and to do whatsoever may be proper and necessary to be done in the carrying on of said business; the person chosen by the party of the first part was Samuel E. Smith, the husband of Grace Smith. It was by the parties understood, when the lease was signed, that Samuel E. Smith was the person to be chosen. Mr. Smith had been with Mr. Melick the two years previous. The books of account that were kept, were the order book, invoice book, cash book, day book, expense book, ledger, and bills of lading; the in-

voices and bills of lading showed the amount of coal purchased, and the order book showed the amount sold during the year.

On the 21st day of March, 1878, Grace Smith, the landlord, issued a distress warrant under her hand and seal directed to Patrick King by which he distrained the goods of the said Melick for three-quarters rent due on the first day of January, 1878, amounting to the sum of $562 50. The plaintiff replevined the goods distrained and alleged in his declaration that the said defendant "took the following named articles, namely: one iron safe, office railing, one upholstered chair, two desks, large lot of nut coals, large lot of stove coals, large lot of wood and large lot of egg coals, property of the said plaintiff, to wit, of the value of THREE THOUSAND DOLLARS, and unjustly detains the same."

That previous to said distress the plaintiff had commenced to remove the coals from 199 Plane Street to his new yard at the corner of Hackett and Plane Streets. The Morris and Essex Canal separates the two yards—a distance of about fifty feet. The plaintiff continued to move the coal till it was all removed, and had it removed before the expiration of his lease, the first of April, 1878, and before the second distress warrant was issued.

In his answer to the said declaration, in replevin, the defendant justified the taking by pleading an avowary for cognizance for rent in arrear, being the three-quarters rent above mentioned. The plaintiff filed his plea denying that there was any rent in arrear. The cause was referred to Finley A. Johnson with the case hereinafter mentioned, to ascertain the amount due; the referee reported in favor of the defendant. Each party filed his dissent. Such proceedings were had that the cause came to a trial before a jury; the jury found in favor of the plaintiff. The defendant brought his writ of Error.

On the second day of April, 1878, Grace Smith, the landlord, issued a distress warrant under her hand

and seal directed to the defendant, Cyrus Benedict, by which the said Benedict distrained an amount of coal of the said plaintiff of the value of $1400; he did not distrain upon all the coal of the plaintiff; he distrained for the sum of $187 56, one quarter's rent due on the first day of April, 1878, and for the sum of $1,112 56, being one-half of the profits of said business during said term. The plaintiff replevined the goods distrained and alleged, in his declaration, that the said defendant "took the following named articles, namely, lot of stove coal specified as about three hundred and fifty tons of coals in the aggregate, property of the said plaintiff, to wit, of the value of $1,400, and unjustly detained the same."

In his answer to the said declaration in replevin, the defendant justified the taking by alleging rent in arrear, being the one-quarter's rent due on the first day of April, 1878, amounting to $187 50, and for rent for the sum of $1,112 50, being one-half of the profits accruing from the sale and delivery of coal from said premises during said term.

The plaintiff filed his plea denying that there was any rent due. The cause was referred to Finley A. Johnson, with the case hereinbefore mentioned, to ascertain the amount due. Each party filed his dissent. The referee filed his report in the case of Melick vs. Benedict, in which he reported that there was not as much due the defendant as equalled the amount for which he distrained. Such proceedings were taken in the cause that it duly came to be tried before a jury; the jury brought in a verdict of six cents damages against the defendant for the illegal taking of the goods. The defendant brought this writ of error upon the rulings of the Court.

It is evident from the testimony that the books were not well kept, and that neither Mr. Smith nor Mr. Melick were expert accountants; Mr. Foote the plaintiff's witness testifies that they were badly kept, "mere memoranda."

Mr. Bestic, the defendant's expert witness, testifies

that there were $1,219 70 due the defendant, and said that there was not any substantial difference between his statement and that of Mr. Foote. That the only substantial difference between them is as follows: The amount of coal on hand at the end of the lease. They both agreed to the fact that from the books of account there should be 1,021⅞ tons of coal on hand at the end of the lease. Michael Hart swears that he weighed the coal and that there were but 551 tons on hand that were distrained. Mr. Foote adopts this statement. Mr. Bestic adheres to the books of account. The experts agree as to the amount of coal on hand at the beginning of the lease; they agree as to its value; they agree as to the amount of coal purchased during the continuance of the lease; they substantially agree as to the amount of coal sold; they agree as to its cost; they substantially agree as to the expense account; they disagree as to the amount actually on hand; there is no substantial disagreement as to the books of account. The cause of the disagreement is the testimony of Michael Hart.

The landlord had the books of account examined before he issued the distress warrant—by a bookkeeper. This statement of the bookkeeper was handed to his attorney.

REFEREE'S REPORT.

This cause coming on for trial at the Essex Circuit and having been referred to me, Finley A. Johnson, as referee, and I having first been duly sworn that I would faithfully and fairly hear and examine said cause in question and make a just and true report according to the best of my skill and understanding and that the said parties, by their respective attorneys, having appeared before me, and witnesses produced, having been duly sworn and examined and proofs of the respective parties offered and submitted in evi-

dence, and the matters in issue debated by counsel, and I having considered the same, do respectfully report as follows :

The facts in the above cause are as follows. On the 15th, of May, 1877, Grace Smith, by a writing under seal, leased to the plaintiff certain premises in the City of Newark as a coal yard, the letting to begin April 1st, 1877, and to continue for one year, the rent reserved being $750, payable in quarterly installments and one half of the net profits which should arise from carrying on the business of buying and selling coal, with the further stipulation on the part of Grace Smith that she should at her own cost furnish a suitable person to carry on and manage the business.

It appears that for two years previous to the making of this agreement the plaintiff and Sam'l E. Smith, the husband of Grace Smith, had been engaged in the coal business upon these premises as partners in profits, though the business was conducted in the plaintiff's name and the stock and fixtures were owned by him, and the person whose services Grace Smith covenants to furnish was understood to be and was in reality her husband, Samuel E. Smith, who conducted the business in the name of plaintiff, taking charge of the coal yard, keeping the books, selling coal &c., &c.

The plaintiff visited the yard almost daily, took charge of the cash received during the day, paid the employees and posted accounts from the books kept at the yard into the ledger. On the 2nd, of April 1878, Cyrus Benedict, as attorney in fact of Grace Smith, distrained upon the goods and chattels on the demised premises for the sum of $1300, being $187.50 for one quarter's rent, due on the 1st of April, 1878, and the further sum of $1,112 50 alleged profits arising from the conduct of the business.

The goods and chattels thus taken were replevined by the plaintiff, and the defendant pleaded the facts above set out in justification of the taking.

The plaintiff insisted in the trial that at the time of making this distraint he owed no rent and that Mrs.

Smith had been paid all that she was entitled to as her half the net profits of the business, in support of this position he produced his books of account and the testimony of one, Julius W. Foote, an expert bookkeeper, by which it appeared that nothing was due to Mrs. Smith from him, he having paid to Samuel E. Smith more than one half the net profits of the business.

Grace Smith being called as a witness by defendant denied having received any moneys from the plaintiff either as rent or profits but admitted that her husband, Samuel E. Smith, had general authority to transact business for her and that any moneys received by him on her account from the plaintiff should be credited to him. The defendant also produced James Bestic, a bookkeeper, who had made a careful examination of the books of account of the business, and who presented a statement of the result of his investigation. The account, as stated, by me (see Schedule A) is a statement of Mr. Bestic, with such alterations as it was apparent by the testimony and explanations of witnesses should be made and the corrections of which was agreed to by Samuel E. Smith and the counsel of the defendant.

I do not, as referee in this case, attempt to state an account between Grace Smith and the plaintiff, which might be taken as the basis of any action between parties other than those to this suit, but have taken the statement of the expert witness, produced by the defendant, (with the alterations already noted) as being most favorable to him, without passing upon its absolute correctness.

It will be seen from this statement, that charging Grace Smith with the sum of $1,174 21, the receipt of which is admitted by Samuel E. Smith, that the amount which would be due to her on account of profits is less than $1,112 50—the amount for which distraint was made on that account, and that the plaintiff is therefore entitled to judgment for the taking and detention, but it was insisted by Samuel

E. Smith that the moneys received by him from the plaintiff during the year were not received by him as agent of Grace Smith but on account of moneys due him from the profits of the business of the two years previous, and that he informed the plaintiff that he should credit it to that account.

This was flatly denied by the plaintiff, and in view of the fact that these moneys were charged to Samuel E. Smith, as agent of Grace Smith, in the ledger to which Samuel E. Smith had access, that the insistment rests on his unsupported testimony, and that the burden of proof is strongly upon the defendant to show that the plaintiff understood and agreed to such appropriation of the moneys so paid him it cannot in my judgment avail the defendant. I therefore find and report that the taking of the goods of the plaintiff, by the defendant, was unlawful, and that the plaintiff is entitled to judgment against the defendant, and to have his damages for such unlawful taking and detention assessed at the sum of six cents. I have also at the request of counsel for plaintiff annexed to this my report the statement of the business prepared by Mr. Foote, the witness produced by plaintiff, see Schedule "B," which shows that more money was paid to Smith than she was entitled to receive. I do not pass upon the correctness of either of those statements, because assuming that of the defendant to be true he distrained for more rent than was due, and his taking was unlawful, which is the only question which could arise under the pleadings in this cause; all of which is respectfully submitted.

F. A. JOHNSON.

June 12, 1880.

SCHEDULE A.

Statement of the receipts and expenditures of the business of Peter M. Melick for the year beginning April 1, 1877 ; ending April 1, 1878.

RECEIPTS AND ASSETS.

Cash, as per cash book, -	$22,663 28	
Less col. of previous two years,	2,649 97	
		$20,013 31
Cash from ledger, not in cash book, -		131 23
Ledger balances, - - - - -		2,968 42
971⅞ net tons of coal, at $4, - - -		3,887 50
16 cords of wood, at $7, - - -		102 00
		$27,112 46

EXPENDITURES AND LIABILITIES.

Expense, as per expense book,	$3,199 95	
Less, half value office fixtures,	169 66	
	3,010 29	
Sundry items of freight, -	36 07	
Expences paid in coal, -	255 59	
Estimated bad debts and allowance for expenses of collecting book accounts, - -	400 00	
Rent, not in expense account,	750 00	
Tax on business, - - -	29 00	
Cost of coal bought, - -	18,318 07	
		22,799 02
		$4,313 44
Grace Smith, half, - -	$2,156 72	
Paid her - - - -	1,174 21	
Due her - - - -	$982 51	

F. A. JOHNSON.

SCHEDULE B.

1877. RECEIPTS.

Cash receipts, to April 6, as per cash book, page 21, - - - - - -		$24,803 93
Less, footing from old book,	$22,541 87	
" " deduct, page 10,	697 42	
		23,239 29
		1,564 64
1878, to Jan. 1.		
Cash received, as per cash book, page 108,		14,808 56
" " " " " 153,		6,526 92
Total cash receipts for year, - - -		22,900 12
Add errors in footing daily balance, -		28 33
" cash sales not reported by Smith, -		132 97
" collection " " " -		185 74
		23,247 16
Less collections on account of the previous year's business, - - -		2,692 79
		20,554 37
Add sundries, per Schedule 2, - -		70 40
" balance due for sales, &c. - -		2,806 48
" value of coal and wood on hand, April 1, 1878, - - - - - -		1,705 06
Add sundry items of coal sold in trade,		200 20
		25,336 51

EXPENDITURES.

Expenses, as per book, - -	$3,186 91	
Coal bought during the year,	17,003 83	
Rent of yard, April 1, 1878, -	750 00	
Coal received from previous year, cash for which is in receipt above, - - -	1,920 00	
Wood ditto, - - - - -	60 00	
		22,920 74
Additional expense paid in coal, &c. - - - - - - -		255 59
		23,176 33

Net profits, from which bad debts are to be deducted, - - - - -			2,160 18
Grace Smith, half, - -		1,080 07	
Paid her, - - - -		1,174 21	
Overpaid her, - - -		94 12	

EXCEPTIONS TO REFEREE'S REPORT.

The defendant by his attorney, Philip W. Cross, excepts to the report of Finley A. Johnson, Esq., the referee appointed by the Court in said action, upon the following grounds:—

First. The referee erred in not ascertaining the exact amount due the defendant.

Second. The referee erred in this, that he did not state the account between the parties to said action.

Third. The referee erred in this, that he presumed, in his report, that if the plaintiff did not owe the said Grace Smith, mentioned in said report, the amount she distrained for, that then she could not recover any amount.

Fourth. The referee erred in not stating the amount due the said Grace Smith, and in not recommending that judgment be entered for said amount, regardless whether said amount was equal to the amount distrained for or not.

Fifth. The referee erred in this, that he did not correctly state the receipts and assets of the business of the said Peter M. Melick, and the said Grace Smith.

Sixth. The referee erred in omitting from the cash account the sum of items amounting in all to $277 48.

Seventh. The referee erred in that, that he made improper reductions for collections of business for the two years.

Eighth. The referee erred in deducting the sum of $2,968 97, whereas he ought to have deducted only the sum of $2,414 97.

Ninth. The referee erred in stating the amount of coal on hand, 971⅞ tons, net, whereas he ought to have stated it as the amount 1,021⅞ tons net.

Tenth. The referee erred in fixing the value of said coal at $4 00 per net ton, whereas he ought to have fixed it the sum of $4 18 net ton.

Eleventh. The referee erred in stating the expenses paid in coal to be the sum of $259 59, whereas he ought to have stated it at the sum of $76 28.

Twelfth. The referee erred in estimating bad debts and allowances for expenses in collecting book accounts to be the sum of $400, whereas he ought to have estimated the same at the sum of $250.

Thirteenth. The referee erred in not finding that there was three months rent due the said Grace Smith, at the rate of $750 per year, making the sum of $187 50.

Fourteenth. The referee erred in this, in not stating the amount due Grace Smith the sum of $1,747 87.

Fifteenth. The report of the referee ought to have been that there was due from said Peter M. Melick to the said Grace Smith, on account of the profits of the business and one quarter's rent, the sum of $1,747 87, with interest thereon, from the first day of April, 1880.

Sixteenth. The referee ought to have reported and recommended that judgment be entered for the said defendant for the amount distrained for, to wit, the sum of thirteen hundred dollars.

Wherefore, because of the many inaccuracies and deficiencies in said report, the said defendant, by his his attorney, excepts to the same, and hereby humbly

prays that said exceptions may be allowed, and that he may have a trial by jury of said cause, at such time as to this honorable Court may seem best.

PHILIP W. CROSS,
Defendant's Attorney.

NOTICE OF MOTION.

To Charles Borcherling, Esq., Pl'ffs Att'y,

Please take notice that on Monday the 19th day of July inst., I shall make a demand for a jury trial in the above entitled cause, before his honor David A. Depue, Judge of said Court, at the Court House in the City of Newark, N. J., at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Very respectfully,

P. W. CROSS,
Defendant's Attorney.

ORDER.

It appearing to the Court that the writ, return and record in the above stated cause has not been returned into this Court. It is thereupon on this twenty-sixth day of June, A. D., eighteen hundred and eighty-two, ordered that the said cause be brought on for hearing and argument at the next November term of this Court, and that in default thereof the writ of error be dismissed.

On motion of Charles Borcherling, Attorney of Defendant in Error.

STATE OF NEW JERSEY:

I, Henry C. Kelsey, Secretary of State of the State of New Jersey, and ex-Officio Clerk of the Court of Errors and Appeals, in the last resort in all causes, do hereby certify the foregoing to be a true copy of an order made in the above stated cause, as the same is taken from and compared with the minutes of said Court.

In witness whereof, I have hereunto set my hand and affixed my official seal this twenty-seventh day of of June, A. D., eighteen hundred and eighty-two.

HENRY C. KELSEY. [L. S.]

[COPY].

AGREEMENT OF LEASE.

Articles of agreement made and entered into this first day of April, in the year of our Lord one thousand eight hundred and seventy-seven, between Grace Smith, of the City of Newark, County of Essex, and State of New Jersey, of the first part, and Peter M. Melick, of the same place, party of the second part. Witnesseth, that the party of the first part, for and in consideration of the rents, covenants and agreements, hereinafter mentioned, reserved and contained on the part and behalf of the party of the second part, his executors, administrators and assigns, to be paid, kept and performed, has leased, demised and rented, and by these presents does lease, demise and rent unto the said party of the second part, his executors, administrators and assigns, all that certain tract or parcel of land, situate, lying and being in the City of Newark, New Jersey, and bounded and described as follows, to wit: All that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, County of Essex and State of New Jersey. Beginning at the corner formed by the intersection of the northerly line of Academy street with the westerly line of Plane street; thence running along Plane street north twenty-nine degrees and forty minutes, east one hundred and eight feet and three inches to the south side of the Morris Canal; thence along the said line of the Canal westerly one hundred and ten feet more or less to the line of the African Methodist Church lot; thence along said line south twenty-nine degrees, west one hundred and three feet four inches more or less, to the northerly side of Academy street; thence along said line south sixty-

one degrees and forty-five minutes, east one hundred and eight feet three inches more or less, to the place of beginning. Being the same premises conveyed by George Clerk to Henry Lang by deed dated October 17th, 1871, and recorded in Book No. 15 of Deeds, on pages 375, 376, 377, October 18, 1871, and afterwards conveyed by the said Henry Lang and wife to the party of the first part, to be used for the purpose of a coal-yard, to have and to hold the above described premises, with appurtenances, unto the said party of the second part, his executors, administrators and assigns, for the period of one year—that is to say, from the first day of April, 1877, till the first day of April, 1878, then to be fully completed and ended, yielding and paying therefor, unto the said party of the first part, her heirs or assigns, yearly and every year, the sum of seven hundred and fifty dollars, and further sum of one-half of the profits arising from the business and occupation of buying and selling and delivering coal from said premises by the party of the second part, provided, always, nevertheless, that if the yearly rent above received, and the profits above specified, or any part thereof, shall be behind or unpaid on any day of payment, wherein the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained on the part and behalf of the said party of the second part, his executors, administrators and assigns, to be paid, kept and performed then and from thenceforth, it shall and may be lawful for the said party of the first part, her heirs or assigns, into and upon the said demised premises and every part thereof, wholly to re-enter and the same to have again, re-possess and enjoy as in her or their first and former state, anything herein before contained to the contrary thereof in any wise notwithstanding, and the said party of the first part further agrees that she will, during the time of the continuance of said lease, at her own proper cost and expense, furnish a suitable and proper person to take charge of the selling and delivering of coal from said premises

and keep accurate books of account for the party of the second part, and to do whatsoever may be proper and necessary to be done in the carrying on of said premises. And the said party of the second part, for himself and his heirs, executors and administrators, doth covenant and agree to and with the said party of the first part, her heirs and assigns, by these presents, that the said party of the second part, his executors, administrators or assigns, shall and will, yearly and every year during the term hereby granted, well and truly pay or cause to be paid unto the said party of the first part, her heirs or assigns, the said yearly rent above reserved, on the days and in the manner as follows, to wit: The seven hundred and fifty dollars, in quarterly installments, at the expiration of each quarter, as well as one-half of the profits arising from the conducting of said business, at the expiration of this lease, which said profits are considered and taken as part of the rental price of said premises. And the said party of the second part hereby agrees not to sub-let said premises without the consent in writing of the party of the first part, and agrees to carry on the business of selling and delivering coal at said premises during said term in a businesslike manner. And the said party of the first part, for herself, her heirs and assigns, doth covenant and agree by these presents, that the said party of the second part, his executors, administrators or assigns, paying the said rent in the manner and at the times above mentioned, and performing the covenants and agreements on his and their part, the said party of the second part, his executors, administrators and assigns, shall and may at all times during the said term hereby granted, peacefully and quietly have, hold and enjoy the said demised premises, without any let, suit, trouble or hindrance, of or from the said party of the first part, her heirs or assigns, or any person or persons whomsoever, and for a more perfect understanding of this instrument, it is hereby understood and agreed by and between the parties to these presents, that the party of the first part is not to become liable for the

purchase price of the coal bought for the purpose of conducting said business, nor be liable for any loss thereto, nor be liable for any indebtedness to or for said business, nor in any manner be considered a partner with the party of the second part.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

(Signed) GRACE SMITH, [L. S.]
(Signed) PETER M. MELICK. [L. S.]
(Signed) PHILIP W. CROSS.