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Notice of Appeal.

Notice of Appeal.

Filed November 1, 1917.

Essex County Circuit Court.

10

FREDERICK WILLIAM MAUSERT, <i>Plaintiff,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		
MUTUAL DISTRIBUTING COMPANY, a corporation, <i>Defendant.</i>	}	<i>Notice of Appeal.</i>

To Palmer Bradner, Esquire, Attorney of Plaintiff. 20

Dear Sir:

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

Dated November 1st, 1917.

Very truly yours,

30

REED & REYNOLDS,
Attorneys of Defendant.

Service of the within notice is hereby acknowledged this first day of Nov. 1917.

PALMER BRADNER,
Attorney for Plaintiff.

40

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

Filed November 30, 1917.

New Jersey Court of Errors and Appeals

10

 FREDERICK WILLIAM MAUSERT,
Plaintiff and Respondent,
vs.
 MUTUAL DISTRIBUTING COMPANY,
 a corporation,
Defendant and Appellant.

*Grounds of Appeal.**On Appeal from Essex County Circuit Court.*

20

The appellant states the following grounds of appeal:

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

30

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

40

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

Grounds of Appeal.

4. The trial court permitted the witness, Frederick William Mausert, to use for the purpose of refreshing his memory, a memorandum (P. 3 for identification) which had not been made at a time and in a manner to justify its use, and to testify therefrom as to the value of property alleged to have been taken by defendant. 10

5. The following questions were admitted:

(a) To the witness, Frederick William Mausert.

Q How much did you pay for them? (Referring to the goods alleged to have been taken by the defendant).

(b) To the witness, William Mockler.

Q What did you tell him? (Referring to plaintiff).

20

(c) To the witness, William Mockler.

Q What did you say to Mr. Mausert? (Referring to plaintiff).

(d) To the witness, William Mockler.

Q Did you tell him (referring to plaintiff) who was moving the stuff out?

(e) To the witness, William Mockler.

Q Whom did you tell him (referring to plaintiff) was moving it? (Referring to the property alleged to belong to plaintiff). 30

(f) To the witness, Frederick William Mausert.

Q How was it that you came to go to Hoboken?

and permitted those questions to be answered by the respective witnesses, and such answers to be received in evidence.

Grounds of Appeal.

6. The trial court refused to admit the following competent evidence:

(a) Defendant's books of account.

(b) The by-laws of the defendant company.

10 7. The Court directed a verdict in favor of the plaintiff, although it was error so to do.

8. The Court charged the jury as follows:

(a) It appears to me that the only question I can submit to you is the question of damages.

20 (b) The language of the mortgage is "On the demand at the office of the Mutual Distributing Company." My construction of that, is, that he (plaintiff) was entitled to have a demand made upon him to pay the sum that he owed to the Mutual Distributing Company.

30 (c) But before his right could be terminated, he was entitled to an opportunity to pay the debt, and that opportunity was to be afforded to him by a demand to pay the debt, and until that demand was made, the Mutual Distributing Company had no power or right to foreclose the mortgage. No demand was ever made nor was any attempt ever made to make a demand, and by the strict language of the instrument, I, therefore, consider that the foreclosure which was subsequently instituted, was instituted prematurely, and that the foreclosure proceedings conferred no right to the possession of this property upon the Mutual Distributing Company, and deprived Mr. Mausert of no right of possession.

40

Grounds of Appeal.

(d) Therefore, in my opinion, the only question for the jury to consider, the foreclosure having been legally inefficacious, is to determine what is the value of the goods that were taken from Mr. Mausert at the time when they were taken, and to give a verdict for that amount. 10

(e) "You will have to determine from the evidence just what goods were taken and what their value was, and for that amount, I think, under the facts as they are presented to the jury in this case, the plaintiff is entitled to a verdict."

(f) If you find that the defendant made no demand for payment after the execution of the chattel mortgage, then you must find for the plaintiff, and as there is no evidence of any demand, but clear evidence that no demand was made, the result is that the only question of fact for the jury is the question as to what was the reasonable value of the articles taken at the time when they were taken, for which amount with interest at 6% to this date, the plaintiff is entitled to your verdict. 20

9. The Court directed the jury to find a verdict for the plaintiff and assess the damages in his favor. 30

REED & REYNOLDS,

Attorneys for defendant and appellant.

HUGH B. REED,

Of Counsel.

Service of within grounds of appeal acknowledged this November 28, 1917.

PALMER BRADNER,

Attorney for Plaintiff. 40

Summons.

Summons.

Filed March 7, 1917.

THE STATE OF NEW JERSEY TO MUTUAL DIS-
TRIBUTING COMPANY, a corporation.

10

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

20

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

JOSEPH McDONOUGH,
Clerk.

PALMER BRADNER,
Attorney.

30

40

Complaint.

Complaint.

Filed March 10, 1917.

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

10

FIRST COUNT.

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

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

20

Plaintiff demands \$8,000.00 damages.

SECOND COUNT.

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

30

2. That on or about said day, the defendant through its agents and in the absence of the plaintiff, broke into said Arion Hall, and unlawfully and forceably seized said goods and chattels therein belonging to plaintiff, as set out in

40

Complaint.

schedule annexed hereto, of the value of \$7,556.42, and appropriated them to its own use.

Plaintiff demands as damages \$8,000.00.

THIRD COUNT.

10 1. Paragraph 1 of the second count is repeated.

2. Paragraph 2 of the second count is repeated.

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

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

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

Plaintiff demands as damages \$10,000.00.

PALMER BRADNER,
Attorney for Plaintiff.

30

40

Complaint.

SCHEDULE OF GOODS AND CHATTELS
TAKEN FROM ARION HALL.

360 creamers,	
90 vinegar cruets,	
Removable electric sign in front of building,	
Oak desk chair (revolving),	10
Oak writing desk,	
Safe,	
Large gas range,	
Three large mirrors,	
210 folding chairs,	
Oak and glass, removable partition with swinging doors,	
Lattice work with electrical wiring with 600 incandescent lights,	
Complete window curtains for two floors,	20
One pair of stage plush curtains with fixtures,	
360 water glasses,	
500 whiskey glasses,	
75 cocktail glasses,	
90 large platters,	
90 medium platters,	
90 small platters,	
75 champagne glasses,	
540 goblets,	30
450 beer glasses,	
300 wine glasses,	
75 cordial glasses,	
45 trays,	
450 waiter towels,	
50 dish towels,	
40 rolling towels,	
24 bottles of Mumms Extra Dry,	
Case and bulk goods,	
6 door checks (removable),	
Removable stair rods and pads,	40

Complaint.

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

Answer.

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

20

Answer.

Filed April 19, 1917.

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

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

30

Separate Defense to the First Count.

1. That on June 25, 1913, plaintiff claimed to be the owner of part of the goods referred to in paragraph 1 of the first count.

2. It denies the remainder of the allegations of paragraph 1.

3. It denies the allegations of paragraph 2.

4. On June 25, 1913, plaintiff executed and delivered to defendant a chattel mortgage cov- 40

Answer.

ering or purporting to cover the following property:

- 10 90 round top tables,
 360 cane chairs,
 310 folding chairs,
 14 oak chairs,
 4 large palms,
 13 small palms,
 18 hanging baskets,
 1 hall partition about 100 feet long,
 1 roll top desk,
 1 desk chair,
 1 combination gas range,
 all dishes, silverware, glassware,
 1 search light,
 1 safe,
 20 85 window shades,
 4 mirrors,
 1 coat rack,

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

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

Separate Defense to the Second Count.

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

Reply.

Separate Defense to the Third Count.

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

HUGH B. REED,
Attorney of Defendant. 10

Reply.

Filed April 24, 1917.

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

By Way of Reply to the Defence to the First 20
Count.

1. Paragraph 4 is admitted.
2. Plaintiff has no knowledge or information sufficient to form a belief as to the allegations of paragraph 5.
3. Plaintiff further says that all of the goods mentioned in the schedule annexed to the complaint were seized and taken away by said defendant, or its agents before the execution of said chattel mortgage. 30
4. Before this, the defendant, through its agents, told plaintiff that he had better leave town, as the Prosecutor was about to raid his place of business.
5. Relying on said representations, the plaintiff went to New York City.
6. Then the defendant, through its agents, falsely and fraudulently represented to the plaintiff that his landlord was about to take all 40

Rejoinder.

of his goods, unless he would sign certain papers for them.

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

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

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

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

20 By Way of Reply to the Defence to the Third Count.

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

PALMER BRADNER,
Attorney for Plaintiff.

Rejoinder.

30

Filed May 21, 1917.

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

HUGH B. REED,
Attorney for Defendant.

40

Judgment.

ESSEX COUNTY CIRCUIT COURT.

FREDERICK WILLIAM MAUSERT, <i>Plaintiff,</i> vs. MUTUAL DISTRIBUTING COMPANY, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Verdict by a Jury.</i> <i>Judgment for Plaintiff.</i> Amount\$5,004.88 Costs 69.45 <hr style="width: 100px; margin-left: auto; margin-right: 0;"/> Total\$5,074.33	10
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Palmer Bradner, Attorney of Plaintiff.

This action was tried before Judge Frederic Adams, with a jury at the Essex County Circuit Court on October 30th A. D., 1917. The cause having been heard and submitted to the jury they return their verdict as follows: 20

They find in favor of the plaintiff, Frederick William Mausert, and assess the damage against the defendant Mutual Distributing Company at the sum of Five thousand four dollars and eighty-eight cents.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Five thousand four dollars and eighty-eight cents and costs, which are taxed at the sum of sixty-nine dollars and forty-five cents, making in the whole sum of Five thousand seventy-four dollars and thirty-three cents. 30

Judgment entered and signed October 30th, 1917.

Book No. 94 Judgments, Page 364.

John F. Bulgrien, direct.

Q Have you your books with you? A I have the papers to show that the work was done.

Q Would your books show anything at all, or any time that you received that order? A It wouldn't show the exact date the order was given; it would show that the work was to be done.

10

Q Would it show who gave the order? A No.

By the Court.

Q Do I understand you to say that on June 25, 1913, which you get from the book, does not show the date when the order was given? A No, sir.

Q But the date when it was done or when it was to be done? A We don't put down the date the order is given; we put down as the work is ordered—we put it in the book, and then there is a slip made from that for the day that the work is to be done.

20

Q To be done? A Yes, sir.

Q June 25th is the date— A The work was to be done.

Q —when the work was to be done? A Yes, sir.

30

Q Not when it was done, but when it was to be done? A Yes, sir.

By Mr. Bradner.

Q What was done on the 25th, Mr. Bulgrien? A The goods were loaded.

Q What time did you begin to load the goods? A In the afternoon.

Q From where? A From the Arion Palm Garden.

40

John F. Bulgrien, direct.

Q About what time in the afternoon did you begin to load? A Around one or two o'clock.

Q Where did you take the goods? A Took them to the warehouse and took them to Arlington the next morning.

Q Whereabouts? A Arlington.

10 Q To whom did you deliver them over there?
A Well, they were delivered to some hotel on the corner of Devon street and Midland avenue, Arlington.

By the Court.

Q You took them to a warehouse, you say?
A They were taken to the warehouse on June 25th and kept there until next morning.

Q What date? A June 25, 1913.

20 Q Then you took them to a warehouse? A To our own warehouse; yes, sir; as it was too late to deliver them.

Q And when was it that you took them to this hotel? A June 26th.

Q Did you mention the name of the hotel?
A I don't know the name of the hotel.

Q To a hotel on the corner of some streets?
A Devon street and Midland avenue, Arling-
30 ton.

Q In what place? A Arlington, New Jersey.

By Mr. Bradner.

Q How many van loads were taken? A Eight.

Q Do you know what was taken? A Why, no, nothing more than the slip showed: chairs and tables, and so forth. It was the contents
40 of the place, I suppose.

John F. Bulgrien, direct.

Mr. Reed. I move that that be stricken out, if your Honor please.

The Court. Strike it out.

Witness. In fact, there was nothing left in the place after we left there.

Q Have you the slips with you, Mr. Bulgrien? A Yes, sir. 10

Q Let us see the slips. A (Witness produces papers.)

Q Are the slips in your handwriting? A Yes, sir.

Q What is this load (indicating)? A Load of chairs and tables.

Q Who receipted this slip? A Why, it is signed for in the name of Schiler, or Schuler, with some other name under it; I can't say what it is. In fact, all the slips are signed with that name. 20

Q What is the date on it? A June 25th.

Q And what does this slip show (indicating)? A Loads of tables and chairs.

Q And receipted the same way? A The same way.

By the Court.

Q Are these pages numbered? A No, sir. These are not pages; they are work slips. 30

Q This is a loose-leaf book, is it? A Why, it is just the slip that we give each one of the drivers that does the work, and he has it signed. There must be eight of them here.

Q Eight slips? A Yes, sir.

Q Because there were eight van loads? A Yes, sir; a slip for each load.

John F. Bulgrien, direct.

By Mr. Bradner.

Q How about this slip (indicating)? A That is a load of tables and chairs, too.

Q It is one load? A Yes, sir.

Q What about this slip (indicating)? A That shows a load; it doesn't say what it was.

Q Do you know what was in that load? A No, sir; I can't say myself, because I wasn't there when they loaded it; I wasn't there when they put the goods on; I couldn't say what was in the load.

Q (*By the Court.*) Are you speaking of any particular load now? A One slip here calls for just a load.

The Court. There is nothing else to enable the Court and jury to apply this testimony to any particular writings. "This slip" and "that slip," of course, mean nothing whatever.

Mr. Bradner. I should like to offer these slips in evidence, if the Court please.

(The papers referred to are shown to defendant's counsel).

Mr. Reed. I think these are all right, Mr. Bradner.

The Court. Can these be detached, or should they remain in the book?

Mr. Reed. These can be taken out.

The Court. I do not doubt that they can be taken off, but should they be taken off?

Q (*By Mr. Bradner.*) Each slip is given to the man that has charge of the load, as I understand it? A Yes, sir; the driver gets the slip.

John F. Bulgrien, direct.

Mr. Bradner. It is not a book of entry at all; they are just loose slips.

The Court. Have the other slips on this string any connection with this case?

Mr. Bradner. No, not at all; I think those are the only ones.

Mr. Reed. Only those eight. 10

The Court. Then do counsel see any objection to those being detached, or had they better be left as they are?

Mr. Reed. There is no objection to their being detached at all.

Witness. That batch of slips there is the work that was done in the whole month, the whole of the month of June.

The Court. These all bear the date of June 25th, these eight slips. There are also other slips that bear the same date, no doubt. These, then, can be detached and marked separately. 20

(The papers referred to are marked respectively Ex. Pl. A, Ex. Pl. B, Ex. Pl. C, Ex. Pl. D, Ex. Pl. E, Ex. Pl. F, Ex. Pl. G, and Ex. Pl. H.)

Q Mr. Bulgrien, you said that these goods were taken to a warehouse from Arion Hall? 30

A Yes, sir; they were taken to our own warehouse.

Q To your own warehouse? A Yes, sir.

Q Whereabouts? A Oliver street, 18 to 24 Oliver street.

Q When were those slips signed? A They were signed June 26th, when the goods were delivered in Arlington.

Q Where were they delivered in Arlington?

A The Arlington House. 40

John F. Bulgrien, cross.

Q Whose house was that? A Why, I really don't know whose that was.

Q Who paid the bill for this? A The Mutual Distributing Company.

10 *Mr. Bradner.* That is, the defendant in this case.

By the Court.

Q What was this building in Arlington where you delivered them? A I don't know; I was never there.

Q Oh, you did not go there? A No, sir.

Q (*By Mr. Bradner.*) What was the amount of the bill, Mr. Bulgrien? A \$56.

20 Q (*By the Court.*) When was it paid? A That I don't remember, when it was paid. There was a bill sent to them.

Cross examination by Mr. Reed.

Q Mr. Bulgrien, you are no longer connected with the Job De Camp Company, I understand? A Am I now?

Q Yes. A No, sir.

Q Did you see any of these goods loaded? A Did I see any loaded?

30 Q Yes. A No, sir; I saw them after they were on the wagon, part of them.

Q You saw each load after it was on the wagon? A No, not each load; I saw part of them.

Q Do you know which loads? A No, sir.

Q How many? A There were some came by the office and others didn't come by. That is how I could see some of them and not the rest.

40 Q You mean that you saw the wagons driving by with these things on? A Yes.

John F. Bulgrien, cross.

Q What were they, closed or open vans? A Well, some closed and some were open.

Q And I understand that you were not over at Arlington? A No, sir.

Q The only way that you know where these goods were delivered is from the slips? A Yes, sir. 10

Q And what testimony you gave with regard to that was taken from these slips which have been introduced in evidence, is it not? A Well, and my best recollection from the order that was given.

Q I mean about the delivery. A I don't just understand you there.

Q You said that these goods were delivered to Arlington, to some hotel, did you not? A Yes, sir. 20

Q And I say your testimony with regard to the place where they were delivered was taken from these slips altogether, was it? A Yes, and from the man that gave me the order, where it was to be taken to; he gave me the place they were to be taken, to the Arlington House, on Midland avenue and Devon street.

Q I say you do not know the contents of the vans, except that it appears from the slips that they were tables and chairs? A Yes. Some of them were closed and you couldn't see what was there, of course. 30

Q (*By the Court.*) Who was your employer? A Job De Camp, Incorporated.

Anthony W. Schuler, direct.

ANTHONY W. SCHULER sworn in behalf of plaintiff.

Direct examination by Mr. Bradner.

10 Q Mr. Schuler, are you the president of the Mutual Distributing Company? A Yes, sir.

Q Were you the president in June, 1913? A Yes, sir.

Q Was George E. Mausert connected with the company in 1913? A No, sir; not in June, at this time.

Q Was he ever connected with the Mutual Distributing Company? A He was at one time, yes.

20 Q When was that? A Well, he was treasurer up to June 18, 1913.

Q Mr. Schuler, can you identify the handwriting on the receipts attached to those slips (papers shown to witness)? A I think that is my man's handwriting; yes, sir.

Q On all of the slips? A Yes, sir.

The Court. You are showing the witness what?

30 *Mr. Bradner.* Showing the witness Exhibits Pl. A to Pl. H, the eight slips.

Q (*By the Court.*) When you say you think it is your man's handwriting, what man do you mean? A Well, it is a man that I employed at that time, named Henry Klepp, I think.

Q (*By Mr. Bradner.*) Who employed Mr. Klepp? A I did.

Q Do you mean yourself or the company? A Myself, personally.

Anthony W. Schuler, cross.

Cross examination by Mr. Reed.

Q Mr. Schuler, I understood you to say that up until June 18, 1913, Mr. George Mausert had been the treasurer? A Yes.

Q What happened on that day with respect to him? A Why, we had our stockholders' meeting, and Mr. Joseph Harburger was elected instead of George E. Mausert. 10

Q You said "a stockholders' meeting." What meeting was it, was it an annual or a special meeting? A Annual meeting of the stockholders.

Q An election of officers? A Yes, sir; officers and directors.

Q Was Mr. Mausert elected a director at that meeting? A No, sir.

Q And he was not a director after the 18th of June? A No, sir. 20

Q (*By Mr. Bradner.*) Was he still a stockholder? A I believe he held some stock.

Q (*By Mr. Reed.*) Have you the stockholders' book showing the record of stockholders, here? A We have the stock-book, if that is what you mean.

Q Yes. Have you that here? A Yes.

Mr. Reed. I understand it is downstairs. 30

By the Court.

Q I am not sure whether you say that Mr. George E. Mausert ceased to be a stockholder on that day? A Yes, sir; he sent in his resignation, and Mr. Joseph Harburger was elected in his stead.

Q I am not speaking of the office of treasurer. Did he cease to be a stockholder on that day? A I don't think so; he might have dis- 40

Frank E. Bradner, direct.

posed of his stock. I think our books show that he was a stockholder of record; I don't know. He might have disposed of his stock.

The Court. You have answered the question. I wanted to be sure whether I understood you correctly.

10

FRANK E. BRADNER sworn in behalf of plaintiff.

Direct examination by Mr. Bradner.

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

Q How do you recall it? A I could not recall the date except by looking at my record on that date.

20 Q What did you do on that day? A I keep a record of the work done every day, and I have kept it for many years in the same way. (Witness refers to book). On June 25th I was at the court house—

Q (*By the Court.*) You mean 1913? A 1913. I was in the court house here, in the Orphans' Court, all the morning—

30 Q (*By Mr. Reed.*) All morning, you say? A All the morning. And I was in the Surrogate's office for a short time, and I went then, after twelve o'clock, to the Hotel Broad, on Broad street, to see Mr. George E. Mausert, and learned that he was at the Arion Hall, or Palm Garden, conducted by his brother, on Washington street, and I went there. I do not remember the time of day; I only judge that it was between twelve and one from the fact that I left the court house about quarter-past twelve, and then down to the Hotel Broad, and then
40 went back to Washington street. I saw Mr.

Frank E. Bradner, direct.

Mausert there. When I got there there were some vans in the front of the building, to which I paid no particular attention that I recall now, since hearing what happened. I went upstairs, and Mr. George E. Mausert was there—

Q (*By the Court.*) He was the man that you were looking for? A He was the man that I was looking for. —and Mrs. Briggs, his sister, and I am strongly inclined to think that Mr. Schuler was there, but I do not want to swear positively about that. 10

Mr. Reed. Well, I think that should be stricken out.

Witness. That is a very strong impression that I have, that Mr. Schuler was there. 20

By the Court.

Q You do not want to testify to that? A I cannot feel sure about it, because I was interested only in seeing Mr. Mausert. I did observe that chairs and tables were being carried downstairs at that time by colored men and put in the van.

Q You saw some chairs and tables being carried downstairs? A Yes. The room was in great disorder; it had every appearance of being dismantled and everything being taken out of it. While I was there talking to Mr. Mausert, Mr. George King came in. I am able to fix the time with certainty because I went there for a specific purpose, which was carried out; I went there to get some money from Mr. Mausert, and I received the money from him at that time, which Mrs. Briggs paid to me. 30

Q (*By Mr. Reed.*) Who paid? A Mrs. Briggs counted the money out; she had the money in her possession and paid it to me. 40

Frederick W. Mausert, direct.

Q (*By the Court.*) Did she give it to you or give it to him? A Well, I do not recall whether she handed it to him or handed it to me. I gave Mr. Mausert a receipt.

Q You got the money? A I got the money.

10 *Cross examination by Mr. Reed.*

Q You heard the testimony, Mr. Bradner, to the effect that these vans did not go there until afternoon? At least, I understood Mr. Bulgrien to say that it was in the afternoon, at one or two o'clock. You say they were there in the morning, between twelve and one? A I should judge, Mr. Reed, it must have been very close to one o'clock when I got there, because I had to go from the court house to the Hotel Broad and then go back to Washington street.

20 Q Well, you say that the moving was well under way when you— A I did not say that; I said they were carrying tables and chairs downstairs when I got there.

Q I think you said it was in great confusion? A I don't remember what they were doing, Mr. Reed, as I hadn't the remotest idea what they were doing, and I did not ask them. I do recall that Mr. King had something to say.

30 Q You represented Mr. George E. Mausert at that time? A I represented Mr. Mausert in the indictment against him, and he was taking a writ of error from the judgment.

FREDERICK W. MAUSERT, plaintiff, sworn
in his own behalf.

Direct examination by Mr. Bradner.

40 Q Mr. Mausert, were you carrying on business in Newark in June, 1913? A Yes, sir.

Frederick W. Mausert, direct.

Q Whereabouts? A The Arion Palm Garden, Washington street.

Q What kind of a business was it? A I used to rent this hall for balls, and so forth, and dinner parties, and also I ran a dancing place upstairs, and I also served people in a restaurant.

10

Q How many floors did you have? A Well, I had two floors.

Q Was there a bar there? A Well, there was away in the back; it wasn't where you would walk in from the street.

Q (*By the Court.*) It was in back, you say? A It wasn't a bar that you could walk in from the street and take a drink; it was simply to serve the waiters for the dining room.

20

By Mr. Bradner.

Q What did you have in the place as furnishings? A I had tables and chairs and silverware, linen, partitions, cane bottom chairs, imported chairs, and also folding chairs, mirrors; practically everything that would go with a dining room.

Mr. Reed. I think that the last is a conclusion, if your Honor please. I ask that it be stricken out—"everything that would go in a dining room."

30

The Court. I think it is a general characterization; it is not harmful; it is merely descriptive. I shall let it stand.

Q Do you know exactly the number of articles? A I did at the time—not the exact number of everything, but as near as I could remember. I believe you have a list of the different stuff.

40

Frederick W. Mausert, direct.

Q When did you make that list? A Why, that list was made shortly after I got out of there, after I found out that the goods were taken out.

Q (*By the Court.*) That is the time when you made the list? A Yes, after this stuff was
10 taken out, after I found that it had been taken out.

Q (*By Mr. Bradner.*) Was the business that you carried on strictly legal in every way? A Yes, sir.

Objected to.

The Court. That seems to involve a conclusion of law. I sustain the objection.

(Question withdrawn).

20 Q Had you ever received any warnings from any source, such as the Prosecutor's office, or any one else?

Objected to.

A No, sir; I never did.

Mr. Reed. I think that is immaterial, whether or not he received any warning from the Prosecutor's office. It would be hearsay. It would not bind this defendant.
30 It does not seem to me at all important.

The Court. I sustain the objection.

Q Mr. Mausert, had you ever received any intimation at all that the business you carried on was not proper and legal in any way? A Why, I did, but—

Mr. Reed. I think that is objectionable for the same reason, unless the attempt is to show that the warning came from the defendant. It does not seem to me that it is
40

Frederick W. Mausert, direct.

at all important in this case, whether he received warning from anyone else but the defendant.

Mr. Bradner. If your Honor please, we propose to show that he did receive warnings from the defendant. This question is merely preliminary to showing that. We wish to show that the business he carried on was absolutely legal in every way, and that he received no intimation from anybody that it was not so. I intend to connect this up later and show that the only intimation that he received that his business was not proper was from the defendant. 10

The Court. That would seem to connect it with the defendant, and would escape the force of Mr. Reed's objection; but, as it now stands, that is not your question. Objection is made on the ground that, if there was a warning not connected with the defendant, it would not bind the defendant. I sustain that objection. 20

Q Mr. Mausert, did you ever receive any intimation that your business was not proper or legal? A Yes. 30

Mr. Reed. I object to that, your Honor. I think that is the same question in another form that your Honor ruled upon before.

The Court. I think it is the same question. I sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Bradner. Mr. Reed, have you the chattel mortgage here? 40

Frederick W. Mausert, direct.

Mr. Reed. Yes (handing paper to plaintiff's counsel).

Q Mr. Mausert, is this your signature (paper shown to witness)? A Yes, sir.

Q Is that also (indicating)? A Yes, sir.

10 Q (*By the Court.*) Did you say it was your signature? A Yes, sir.

Q (*By Mr. Bradner.*) When did you sign this paper, Mr. Mausert? A Why, that was signed in Hoboken, I believe, on the day of the 25th of June, 1913.

Q What time of the day did you sign this? A Why, I should judge about—very late in the afternoon; I couldn't state just what hour it was, but I remember it was very late, five o'clock, along about five o'clock.

20 *By the Court.*

Q What month did you say? A June 25th, 1913.

Q Do you say the 25th or 26th? A 25th.

Q About what hour? A I should judge along about five o'clock in the afternoon.

By Mr. Bradner.

30 Q How did you come to go to Hoboken that afternoon? A Why, a nephew of mine called over—

Mr. Reed. I think this is immaterial. I wish your Honor would warn the witness that conversation between him and a third party not connected with the defendant is not admissible.

40 *The Court.* The question is only partly answered; the objection that was interposed was to an unfinished question. He be-

Frederick W. Mausert, direct.

gan by saying that a nephew of his said something. The thing is so unformed that I hardly know what the testimony is or what the objection is.

Mr. Reed. I thought from the opening words of the answer that it was evident that he was about to tell us what the nephew said. I thought that would be objectionable, and I wish to object to his testifying to what his nephew said or did. 10

The Court. It depends on whom the nephew was. For all we know, he may have been an agent of the defendant. If what he said is not connected with the defendant, it would be evidently hearsay, and if what he did is not connected with the defendant, it would be irrelevant. I do not know what the plaintiff expects to prove, and so, of course, I cannot rule now on this unfinished sentence any more definitely than to say that, unless the nephew was the agent of the defendant company, his statements are inadmissible, and unless his acts in some way bind the company, his acts would be irrelevant. 20

Mr. Reed. Yes, sir. I thought that that should appear first; that, if this nephew was connected with the defendant company, it should be first made to appear that such was the case before we are told what he said or did. 30

The Court. Yes, I think so.

(Question withdrawn).

Mr. Bradner. I should like to offer the chattel mortgage in evidence.

Frederick W. Mausert, direct.

The Court. It does not yet appear what this paper is. The witness has identified his signature.

Mr. Bradner. It is a bill of sale.

The Court. It speaks for itself, I suppose. Is there any objection?

10

Mr. Reed. None at all.

The Court. What is this?

Mr. Bradner. It is a chattel mortgage from Frederick W. Mausert to Mutual Distributing Company, dated June 25, 1913, and recorded June 26th, at 11:58, in this county. The affidavit is signed by Anthony W. Schuler, as president of the mortgagee.

20

The Court. This is not objected to. Let it be marked.

(Paper referred to is marked Ex. P. 2.)

Mr. Bradner. The goods covered in this chattel mortgage are as follows: "90 round tables, 360 cane chairs, 310 folding chairs, 14 oak chairs, 4 large palms, 13 small palms, 18 hanging-baskets, 1 hall partition about 100 feet long, 1 roller-top desk, 1 desk chair, 1 combination gas range, all dishes, silverware and glassware, one searchlight, 1 safe, 85 windowshades, 4 mirrors, 1 coat rack, and all other goods and chattels of every nature belonging to the said Frederick W. Mausert now or lately in said premises."

30

The Court. Does it say where they are?

Mr. Bradner. "Arion Palm Garden, Washington street, Newark, N. J." The consideration of the mortgage is \$682.88, "due and owing the mortgagee for goods,

40

Frederick W. Mausert, direct.

materials and merchandise sold and delivered by the mortgagee to the mortgagor.”

The Court. What does it secure, a note?

Mr. Bradner. No.

Mr. Reed. The condition is, if your Honor please, to pay the sum of \$682.88 on demand at the office of the Mutual Distributing Company. 10

The Court. What is the date of the affidavit?

Mr. Bradner. The 26th day of June, 1913. The affidavit was taken at Newark.

The Court. Unless I misunderstood the witness, he said he thought this was signed at Hoboken on June 25th, at about five o'clock P. M. 20

Mr. Bradner. Yes, sir.

The Court. The mortgage is dated on the 25th and the affidavit is dated on the 26th?

Mr. Bradner. Yes, sir.

Mr. Reed. The acknowledgment is on the 25th, your Honor.

The Court. It is acknowledged on the 25th? 30

Mr. Reed. Yes, sir.

Q Mr. Mausert, did you have any other goods in Arion Hall besides those goods mentioned in the schedule to the chattel mortgage or according to the slip that you have there?

A I don't recall; I couldn't say just what I did have; I couldn't say just now. At the time when I made out this slip it was correct.

Frederick W. Mausert, direct.

Q Have you a memorandum with you that you made at the time? A Yes.

By the Court.

10 Q Did I understand you to say that you made out the slip? A I say I made out a memorandum after I left there, as near as I could remember, just how much stuff I did have.

Q Then when you said "slip," you were not speaking of these slips that we have referred to? A No, sir; this is simply this paper (producing paper).

Q After you left Arion Hall you made up a list? A Yes, sir.

20 Q That is what you mean by "slip"? A Yes, sir; I mean the goods; I could remember what I had.

The Court. Yes. I just wanted to understand you. I understand now.

By Mr. Bradner.

Q Refreshing your memory from that slip, can you tell us what you had in Arion Hall at that time, at the time the goods were removed, and what the value of those goods was?

30 *Mr. Reed.* I object to that, if your Honor please. That slip was made from recollection after these events had taken place. I think that it is not a memorandum made at the time that will justify its use to refresh the witness's recollection, nor as to the value. He has not shown any familiarity with the value such as would justify him—

40 *The Court.* No, that is another proposition. But let us consider just what is

Frederick W. Mausert, direct.

meant by a memorandum made at the time. How near the time must it be? It need not be contemporaneous.

(Counsel argue.)

The Court. Mr. Reed suggests that the question is premature, on the ground that sufficient foundation has not been laid for the use of the memorandum as a paper made at or about the time. I shall sustain his objection, as the case now stands. Find out something more about this statement which the witness made. 10

Q Mr. Mausert, when did you make this memorandum of the goods that were taken?

A Why, I should judge about a week after, along about that time, after my goods were taken; that is, after the 25th of June. 20

Q Did you know very well what goods and chattels were in your place at Arion Hall? A I don't quite understand.

Q Did you know at that time what goods and chattels were in Arion Hall, at the time you made the memorandum? A I don't quite understand you now.

By the Court.

Q What means had you at the time when you made that statement of making a statement? What knowledge had you? A Just from memory, that was all. 30

Q What reason did you have for remembering anything about it? A After I found out that my goods were taken away, then I made this statement. Of course, my books and everything was taken; I inquired about them; they were taken out of the place at the time; and I had no books or anything else to 40

Frederick W. Mausert, cross.

show, so I made a memorandum, as near as I could remember, what I had in the place.

Q I think what Mr. Bradner wants to know is how much acquaintance at the time you made this memorandum did you have with the subject that you undertook to put down? How
10 much did you know about it, how familiar were you with it? A With the case?

Q With these goods that you had. A I bought all of them myself.

Q You knew them all? You bought everything? A Yes, I did; I bought everything myself.

By Mr. Bradner.

Q Now, Mr. Mausert, can you tell us what
20 goods were in Arion Hall at the time the goods mentioned were taken?

Objected to.

The Court. If you wish to cross examine on the memorandum, as a memorandum, I shall allow you to do so now.

By Mr. Reed.

Q Mr. Mausert, how do you fix the time
30 when you made this memorandum? A How do I fix the time?

Q Yes. A Why, as I said, about a week after.

Q How do you fix it as a week after? A Why, along about a week after, as near as I can remember.

Q It may have been longer or shorter? A I don't think it was any longer.

Q And where were you? A I was in New
40 York City.

Frederick W. Mausert, cross.

Q Why were you making the memorandum at that time? A Because I found out that Mr. Schuler had taken all my goods.

Q That was the reason for making this memorandum, was it? A Yes, sir (handing paper to defendant's counsel).

Q And did you make that memorandum yourself? A I did, yes. 10

Q Did you typewrite it yourself? A That one there I didn't.

Q You did not make this? A It was copied from there.

Q This is a copy of the one that you made? A Yes, sir.

Q Where is the memorandum that you made?

The Court. I do not understand whether the witness said he did typewrite the memorandum that he made. 20

Q Did you typewrite the one you made? A No, sir.

Q That was written? A Yes, sir.

Q Was it written by you? A Yes, sir.

Q Yourself? A Yes, sir.

Q Where is it, do you know? A I don't remember where it is now.

Q When did you see it last? A I don't know; I couldn't remember. 30

Q Well, how was this one made (indicating)? A It was copied from the one that I made.

Q By whom? A Why, by—I don't remember his name.

Q And when was the copy made?

The Court. We are talking about a paper that we have before us. Let it be marked for identification. 40

Frederick W. Mausert, cross.

(The paper referred to is marked P. 3 for identification.)

(Question read.)

By the Court.

10 Q You may say, if you know, when the copy was made. A Why, I believe that copy was copied from my copy, I should judge, probably a year afterwards.

Q You did not know by whom? A Well, I couldn't tell you the party's name, but I know him by sight.

By Mr. Reed.

Q Where was it copied? A Glens Falls, New York.

20 Q This original memorandum, which you made, you think, about a week after you had learned of the removal of your goods, did that contain these prices? A Why, as near as I could remember, yes.

Q Do you know whether it did or not? A Why, I did at that time, but I don't remember now.

30 Q You cannot say whether that contained those prices or not? A Why, I did at the time, yes, as near as I can demember. Of course, I did not have my books to show for it.

Mr. Bradner. I do not think the witness understands you.

Mr. Reed. No.

40 Q I say, did this memorandum that you made one week after you learned that your goods had been removed contain these prices which appear on this memorandum? A Yes, sir.

Frederick W. Mausert, cross.

Q Well, after this copy had been made— which you say happened about June, 1914, did it? A This copy?

Q Yes. A Why, about a year after, I should judge; I am not sure; it must have been within about a year.

Q Why do you think it was a year? A 10
As near as I can remember.

Q And what did you do to it after this copy had been made from the other? A I just kept the copy.

Q Just kept this copy? A Yes.

Q Did you do anything else about it? A Why, not that I remember, no.

Q This was given you by the man who made the copy? A Yes.

Q Was the original returned to you, or did he keep that? A Just the same as the copy that I gave him. 20

Q No. Was the original returned to you, or did he keep it? A No, I kept the copy.

By the Court.

Q You were asked whether this paper marked P. 3 for identification was given to you by the man who made the copy. Can you answer that question? A Yes, sir. 30

Q Was it? A This was given to me after the man made the copy from my own copy in my handwriting.

Q That is the question that you are asked: You say he did? A Yes, sir; the man gave me the old copy back, which I really destroyed, the old copy, or did something with it; I haven't got it.

Mr. Reed. I renew the objection. I do not think that has been shown to be 40

Frederick W. Mausert, cross.

such a memorandum as to justify its use to refresh the witness's memory.

The Court. Let me ask a question.

By the Court.

10 Q Mr. Mausert, did this paper we have been talking about, which, I suppose, is typewritten— A I have not seen it.

Mr. Bradner. Yes, sir (handing paper to the Court).

Q You say that this paper marked P. 3 for identification was copied from your written memorandum? A Yes, sir.

20 Q How do you know that it was copied from your written memorandum? A Because I stayed there and I seen this man write it on the typewriter, copy it from my own copy.

Q Did you compare the two? A Yes, sir.

Q In what way? A Why, I checked them all off; as soon as he got done I went over it with my old slip and checked it all, and it all corresponded to my old copy.

Q In what way did you check them off? A I held them and checked them over as I went along.

30 Q You checked them over yourself? A Yes, sir.

Q And compared them? A Yes, sir.

Q And you found the typewritten paper to be a copy of the other? A Just the same; yes, sir.

40 *The Court.* This is therefore an examined copy of a copy of a paper which is claimed to have been made sufficiently near to the transaction to be a memorandum which the witness may use in court for

Frederick W. Mausert, direct.

the purpose of refreshing his recollection. I do not recall any case on this precise point. There are two questions. One question is whether this written paper was a memorandum. I think that it may be regarded as a memorandum, the value of which is to be estimated by the jury, in view of the time when it was made, the extent of it and the witness's familiarity with the facts, and if it is usable as a memorandum, subject to those considerations, I think it is. I do not see why an examined copy of it may not be used. Therefore I think the witness may proceed with his testimony. 10

Defendant's counsel pray an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

By Mr. Bradner.

Q Now, Mr. Mausert, will you tell us, refreshing your memory from that memorandum, exactly what goods you had in Arion Hall on June 25, 1913, and what the value of those goods was? A Yes, sir.

Mr. Reed. I object to the question because it contains a request to give the value of the goods, and it is not shown that this witness is competent to testify as to the value of the goods. 30

The Court. No, the case has not been developed on that point.

Q Just tell us what goods you had there.

The Court. Aside from the question of value?

Mr. Bradner. Yes, sir. 40

Frederick W. Mausert, direct.

A 6 door checks, 12 oak dining room chairs, removable platform, clothing, shoes.

Q How much clothing and shoes, do you recall? A Why, about \$150 worth.

Mr. Reed. I move to strike that out.

10 Q What clothes? A I used to keep a lot of my good suits over there in my place.

The Court. All that you are now asked to do is to enumerate, as far as you can, what they were, not what their value was.

Witness. I don't recall everything just now, but I kept a whole lot of goods of my own in my dresser over there. As near as I could remember at the time—I made a mistake; I said \$150, but it is \$450.

20 *The Court.* Never mind that.

Mr. Bradner. We do not want the value.

The Court. You cannot help us on that item now, as to the specific items, except to say what in general they were.

Witness. There were a number of dress suits, and, as I say, a number of business suits; I had all my belongings, automobile supplies, suits, shoes, and, naturally, everything that anybody would have.

30 Q Have you any recollection of the number of suits? A I don't recall, no; I couldn't say.

Q Go on to another item. A 360 cane-bottom chairs, 90 quartered-oak tables, 235 folding chairs, 160 tungsten lamps—

Q That is, electric lights? A Yes. —205 two-watt tungsten lamps, electric sign flasher, eight 500-watt tungsten lamps, 300 tablespoons, 100 ball-room tickets; that is, 100 rolls—

40

Frederick W. Mausert, direct.

Q (*By Mr. Reed.*) 100 rolls of what? A Ball-room tickets. —2 new automobile tires, 6 new automobile tubes, 1 new vulcanizing outfit, 1 box of carpenter's tools, 15 special flower-boxes with palms, 11 special tubs with palms, 360 tablecloths, 450 napkins, 15 large revolving electric fans, 950 wardrobe boxes, 8 gas and electric chandeliers, 12 small electric chandeliers, new oak staircase, removable; removable stage, artificial fireproof wirework with palms, 75 oyster forks, 360 knives, 360 forks, 720 spoons, 360 soup-spoons, 90 pepper-shakers, 90 salt-shakers, 90 toothpick holders, 90 mustard cups, 360 dinner plates, 360 cups and saucers, 360 individual dishes, 360 pie plates, 360 bread and butter plates, 360 butter patties, 25 finger bowls, 360 soup plates, 90 double pads, 360 sauce dishes, 90 sugar bowls, 360 creamers, 90 vinegar cruets, removable electric sign in front of building, oak desk chair, revolving; oak writing-desk, safe, large gas range, 3 large mirrors, 210 folding chairs, oak and glass removable partitions with swinging doors; lattice work, with electrical wiring, with 600 incandescent lights; complete curtains to both floors—

By Mr. Bradner.

Q That is, window curtains? A Window curtains, yes. —1 pair of stage plush curtains, with fixtures; 360 water glasses, 500 whiskey glasses, 75 cocktail glasses, 90 large platters, 90 medium platters, 90 small platters, 75 champagne glasses, 540 goblets, 450 beer glasses, 300 wine glasses, 75 cordial glasses, 45 trays, 450 waiter towels, 50 dish towels, 40 roller towels, 24 bottles of Mumm's Extra Dry, case goods.

Frederick W. Mausert, direct.

Q Mr. Mausert, you said a safe was taken out? A Yes.

Q What was in that safe? Was there anything in it? A Why, I kept some of my books in the safe, also money, and so forth.

10 Q Any stocks or bonds, or anything like that? A Why, yes, I had one share of stock in there of the Mutual Distributing Company.

Q Mr. Mausert, when you signed this mortgage in Hoboken who was present with you? A Ray Mausert.

Q Who else was there? A Why, I don't remember. The lawyer from Hoboken was there. What is his name? Mr. Capps, is it? That is all I remember was there.

20 Q Was Mr. Schuler there? A No, I didn't see Mr. Schuler.

Q Who is Raymond Mausert? A Why, that is a nephew of mine; he is George Mausert's boy.

Q Mr. Mausert, who bought all the goods that you have mentioned? A Who bought them?

Q Who bought all these goods?

30 *The Court.* In the first instance? A I don't quite understand you.

The Court. How did you get them?

Q Where did you get these goods that were in Arion Hall? A Why, I bought some in New York and some in Newark.

Q You bought them yourself? A Yes, sir; all the stuff I bought myself.

Q How much did you pay for them?

40 *Mr. Reed.* I object to that. I do not think that is material. It is not a true indication of value.

Frederick W. Mausert, direct.

The Court. (After argument.) Certainly it is very common, when we are dealing for instance, with the sale of real estate, to prove what it cost some time before—not too long before, but some time before. Of course, it may have either appreciated or depreciated in value in the interval, but I think it is quite common to show what it brought at the time of the last prior transaction, and, while there is a certain immobility and fixity about real estate that does not apply to personal property, I think the same general rule applies. I shall overrule the objection and allow the witness to state what he gave for these articles, subject to further evidence as to the time and further evidence as to their depreciation in value. 10
20

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Why, each one separate; is that the way you would like to have me call these out? I haven't got these all added up here.

Mr. Reed. Now, I object again to the use of this paper to show the value and refresh the witness's recollection of value. It does not appear that the memorandum was made within a reasonable time after the purchase of the goods. Your Honor will remember that this is a copy of a copy, or a copy of a statement made a week after the witness learned that the goods had been removed, and it does not now appear that it was made within any rea- 30
40

Frederick W. Mausert, direct.

sonable time after the goods were purchased.

10 *The Court.* No, there is no evidence on that subject. Before we have been dealing with a fixed date, the day of the taking. There is no knowing how long the witness may have owned these goods. You had better take up each item, Mr. Bradner. The considerations that apply to different items might differ.

Mr. Bradner. I shall endeavor to qualify the witness and see if he is acquainted with the value of these goods.

The Court. Proceed.

Q Mr. Mausert, you bought these goods yourself, did you not? A Yes, sir.

20 Q And are you acquainted with the value of goods and chattels used in your kind of business? A Yes, sir.

Q Are you acquainted with the market price of goods and chattels of this character about this year, 1913, or that year? A Yes, I was at that time.

Q Well, are you acquainted now? A No, I am not acquainted now, not at the present time.

30 Q When you made this memorandum of the value did you make it from your knowledge? A Yes, sir; from my knowledge.

Q Of what the market price of the goods was? A Yes, sir.

The Court. Your questions are somewhat leading.

By the Court.

40 Q From what did you make it up? A Just from memory.

Frederick W. Mausert, direct.

Q Memory of what? A Why, of what I paid for the goods; I remembered that much at the time.

Mr. Bradner. I think the witness shows that he was acquainted with the purchase price of the goods that he bought at that time.

10

The Court. Your question limits the witness to 1913. He may have bought these goods years after that.

Q When did you buy these goods, Mr. Mausert? A I bought these goods when I opened that place, just previous, a few years before.

Q How many years before? A I think I was in there about three years, if I remember. Mr. King is here, and he can tell you just how long it was.

20

By the Court.

Q Do you mean that it was 1910? A I don't think it was three years; I think it was about two and a half years.

Q Somewhere about two and a half years before? A Yes, sir.

Q Before this date in 1913? A Yes, sir. I should judge these goods were bought two and a half or three years before; they were about two and a half or three years old. There were other goods I kept buying while I was in there, even to the date just before I got out of there.

30

Q (*By Mr. Reed.*) What is that? A There were a number of these goods that I bought at the time, just a little previous to my goods being taken away from me.

40

Frederick W. Mausert, cross.

By Mr. Bradner.

Q Do you remember what goods those were? A No, sir; I don't remember. If I looked over the slip it would come back to my memory, I think.

10 Q Can you tell by looking over the slip just what they were? A No, I don't think I can.

Q Did you know in June, 1913, what the purchase price was of the goods that you bought when you moved there? A Yes, sir; I did.

Q From what did you get your knowledge? A From memory, that is all.

Q Do you know what the purchase price was of the goods you purchased when you moved in? A Do I know now?

20 Q Yes. A Just from this slip here.

Q If you knew the goods, would you know the purchase price? A In 1913?

Q Yes. Now, if I showed you a list of the goods would you know the purchase price when you bought them? A Why, if I looked the slip over, I could. It is hard to remember back over four years. If I had my books I wouldn't have to go through all this, but my books were taken away with the stock.

30 *The Court.* The question now seems to be whether you can testify as to the price. If you wish to cross-examine on his capacity in that respect, you may do so.

By Mr. Reed.

Q Mr. Mausert, your knowledge of prices was obtained entirely from the purchase of these goods which you say you purchased yourself, was it not? A Is that the whole list, Mr.
40 Bradner?

Frederick W. Mausert, cross.

The Court. Mr. Reed is asking you a general question.

Q I say your knowledge of the value of these goods was entirely derived from your purchase of them, was it not? A Yes, sir.

Q What? A As near as I can remember, 10
yes.

Q As near as you can recall? A Yes.

Q And the bulk of the goods was purchased two and a half to three years prior to June, 1913? A I wouldn't vouch for that, but I think so. Along about two and a half or three years.

Q And the prices that you have put down on this slip were your recollection of what you had paid for the goods? A What I paid for them; yes, sir. 20

Mr. Reed. I renew my objection. I think it is perfectly apparent now that this testimony is taken from a memorandum made two and a half to three years after the purchase and from his recollection of what the purchase price was. I should judge that that does not come within the rule which permits the refreshment of memory 30
from a memorandum.

Mr. Bradner. If the Court please, the best evidence would be from his books themselves, and the books were taken away when the goods were taken away, and the only evidence he could have would be his recollection at the time the goods were taken away. He was carrying on that business then, and his recollection of prices at that time would be fresh in his memory. 40

Frederick W. Mausert, cross.

10 *The Court.* That would be the only way, except to go to the men from whom he bought and find out from them, from their books. I think there is a presumption that the price which is paid in a buying and selling transaction represents the then value of the article sold, unless some special circumstances are shown that overthrow that presumption. Now, here is a memorandum made soon after the books were taken away by the defendant, or goods that were delivered to the defendant were taken away, in which the witness put down what he remembered of the articles, and so made a list of the articles, and also put down what he remembered of what they cost him, which may have been two or three years before in some cases. I do not think it is an unusual experience for a man who buys articles in a considerable amount to remember for a good many years what he gave for them. His books are gone, and he has nothing to rely on but his memory, unless he can hunt for the vendors whom he may not be able to find. It is a question of degree, as to what the weight and value of the testimony, under all the circumstances, may be thought to be, but I think it is not incompetent. Therefore I shall allow the witness to testify upon this subject of value.

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30

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Frederick W. Mausert, direct.

By Mr. Bradner.

Q Now, will you tell us the value of the goods and chattels which you had in Arion Hall?

The Court. At what time?

Mr. Bradner. June 25, 1913.

10

A What I have had there at that time?

Q Yes. A (Referring to paper.) Case and bulk goods—

By the Court.

Q Not what you would give for them now, or two or three years before, but what they were worth then. A Well, now, I don't remember that, but I had so much goods in the place at the time; that is the only case goods that I am speaking of now.

20

Q You have spoken about some figures that you put down in your memorandum. A Yes, sir.

Q What figures are they? A There is \$30 for door checks.

Q No. What is that \$30 item? A Why, it is \$5 apiece for a door check.

Q What does the \$30 show? A That I gave \$30 for them door checks.

30

Q How many years before? A I couldn't say just how long it was, but I had them put on the doors, and I remember very well we gave that much for them, \$5 apiece. I should judge that was two years—

Q I do not know that I understand what you mean. Door sash? A No, door checks. They close the doors; they are up over the top of the door.

40

Frederick W. Mausert, direct.

Q You do not know how long you used them? A I might have used them a year and a half or about a year.

Q What condition were they in? A All in good condition. They were all on the doors when I left.

10 Q They were second-hand? A Yes, sir. This is the price I gave for them, I remember very well, \$5 apiece.

Q You do not undertake to say how much they had lost in value at that time? A I think they were just as good as a new check.

The Court. I wanted to find out what your figures meant in your own mind. Then all you can prove by the witness is what he gave for them.

20 *By Mr. Bradner.*

Q Case and bulk goods. A I had at the time about \$300 worth.

Q That is, bottled goods and— A Wine, and so forth.

By the Court.

Q What were they? A Why, whiskey and wine, and so forth, all bottled goods.

30 Q Was that improved or deteriorated by age? A As near as I can remember, it was about \$300 that I had at the time. I always kept that much.

By Mr. Bradner.

Q Does not wine and whiskey improve by age? A Yes, it does; it is supposed to. I never drank any, so I don't know.

40 Q You had \$300 worth there, you say? A Yes, sir; I always kept that much in stock, about that much.

Frederick W. Mausert, direct.

Q The value of six door checks? A \$30.

Q Removable stair rods and pads? A \$13.50.

Q 12 oak dining chairs? A \$21. \$1.75
apiece I gave for them.

Q Removable piano platform? A \$15.

Q Clothing and shoes? A \$150.

Q Liquor license? A \$450. 10

By the Court.

Q That is what you gave for the license?

A Yes, sir.

Q When? A I don't remember just when. It was a month previous to that, probably—Oh, I couldn't just say how long I had used that license, but I could look that up.

By Mr. Bradner.

Q When did you get it, about a month previous? A It might have been a month or it might have been two months before that; I couldn't say; I don't remember just when I got the license. 20

Q 360 cane bottom chairs? A Yes, they cost me \$2.50 apiece; that amounts to \$900.

By the Court.

Q Where did you get them? A I got them up at Schmidt's furniture store, on Springfield avenue. 30

Q When did you buy them? A I bought them when I opened up the place; that was two and a half or three years before, as near as I can remember.

Q Have you got a receipt? A I had a receipt at the time; I haven't got the receipt, but I think it was \$2.50 apiece, as near as I can remember. 40

Frederick W. Mausert, direct.

By Mr. Bradner.

Q The receipts were taken away? A Yes, sir; everything.

Q 90 quartered oak tables? A Yes, sir. \$7.50 apiece, as near as I can remember.

10 *By the Court.*

Q Where did you buy them? A The same place.

Q Schmidt's? A Schmidt's.

Q How much stuff came from Schmidt's? A Why, I got some chairs and tables; I believe that was all. \$340.75 is the full amount.

Mr. Bradner. No, that is wrong. \$675.

Witness. Yes, \$675. I made a mistake.

20 Q What is that for? A Quartered oak tables.

Q How many were there? A 90 of them.

Q (*By Mr. Bradner.*) 235 folding chairs in sections? A \$1.45 apiece, \$340.75.

Q What enables you to fix the price on these chairs? A That is the price I gave for them; I remember it.

30 Q Where did you get them, at Schmidt's? A I got most of them at Schmidt's, yes. I charged for the ones that I got from Mr. Schmidt, and the others were just about the same price.

Q (*By Mr. Bradner.*) Restaurant kitchen utensils? A About \$150 worth.

40 Q (*By the Court.*) What were they? A Kettles and anything that would be used in a kitchen or used for a restaurant. I haven't got it down here, but, as I remember it, I marked that down—

Frederick W. Mausert, direct.

Q You cannot enumerate them all? You cannot say how many pots and pans and kettles there were? A No, I can't just now. At the time I remembered what there was, and I figured that it amounted to that much. I didn't write everything down; it would be too much of a list.

10

By Mr. Bradner.

Q 160 tungsten lamps? A 35 cents apiece; that is \$56.

Q 205 two watt tungsten lamps? A \$31.75.

Q Electric sign flasher. A \$37.50.

Q Eight 500 watt tungsten lamps? A \$32.

Q 300 tablespoons? A \$60.

Q 100 ballroom tickets? A \$25.

Q That is 100 rolls, I understood you to say before? A Yes, sir.

20

Q 2 new auto tires? A \$75.

Q 6 new auto tubes? A \$25.50.

Q 1 new vulcanizing outfit? A \$45.

Q 1 box of carpenter's tools? A \$56.

Q 15 flower boxes with plants? A \$52.50.

Q 11 special tubs with palms? A \$68.20.

Q 360 tablecloths, linen. A \$126.05.

Q 450 napkins? A \$45.

30

Q 15 large revolving electric fans. A \$15.

Q 450 wardrobe boxes? A \$190.

Q 8 gas and electric chandeliers. A \$76.

Q 12 small electric chandeliers? A \$49.20.

By the Court.

Q Where did you get your wardrobes? A I bought them and had them made up; I got the lumber in the lumber yard, pine, and had it made up, and they averaged just about 20

40

Frederick W. Mausert, direct.

cents apiece to finish up, including the lumber, which requires about 5 feet to make a box.

Q And how much are you charging? A 20 cents apiece. Really, that should be more than that, because you couldn't make a box—the pine alone would almost cost you that.

10 Q Just what were these? A Coat rooms, where you put your coat and hat on.

Q (*By Mr. Bradner.*) New oak staircase, removable? A \$105.

Q (*By the Court.*) Where did you get your staircase? A Why, in figuring up just what it did cost.

Q Who made it? A Why, I had a carpenter to help me, and I also done work. I am a carpenter by trade myself.

20 Q How do you get at the \$105? A Well, as near as I can remember, that was on the books. I remember very well what that did cost at the time. I have spent \$105. I had another man figure on it; he wanted \$200 and something for that, and I built that for \$105.

By Mr. Bradner.

Q Removable stage in ballroom? A \$105.

30 Q Artificial fireproof vinework with palms.
A \$310.

Q 75 oyster forks? A \$11.25.

Q 360 oyster knives? A \$72.

Q 360 forks? A \$72.

Q 720 spoons? A \$108.

Q 360 soup spoons? A \$72.

Q 90 pepper shakers? A \$13.50.

Q 90 salt shakers? A \$13.50.

Q 90 toothpick holders? A \$9.

40 Q 90 mustard cups? A \$13.50.

Frederick W. Mausert, direct.

- Q 360 dinner plates? A \$36.
- Q 360 cups and saucers? A \$36.
- Q 360 individual dishes? A \$18.
- Q 360 pie plates? A \$18.
- Q 360 bread and butter plates? A \$18.
- Q 360 butter patties? A \$18. 10
- Q 25 finger bowls? A \$6.25.
- Q 360 soup plates? A \$36.
- Q 90 table pads? A \$45.
- Q 360 sauce dishes? A \$18.
- Q 90 sugar bowls? A \$9.
- Q 360 creamers? A \$18.
- Q 90 vinegar cruets? A \$13.50.
- Q Removable electric sign? A \$210.
- Q Oak desk chair, revolving? A \$15. 20
- Q Oak writing-desk? A \$35.
- Q Safe? A \$60.
- Q Large gas range? A \$45.
- Q 3 large mirrors? A \$35.
- Q 210 folding chairs? A \$262.50.
- Q Oak and glass removable partition with swinging doors? A \$322.
- Q Lattice work with electric wiring? A \$480.
- Q Complete window curtains for two floors? 30
A \$180.
- Q 1 pair of stage plush curtains with fixtures. A \$52.
- Q 360 water glasses? A \$18.
- Q 500 whiskey glasses? A \$25.
- Q 75 cocktail glasses? A \$11.25.
- Q 90 large platters? A \$9.
- Q 90 medium platters? A \$9.
- Q 90 small platters? A \$9.
- Q 75 champagne glasses? A \$18.75. 40

Frederick W. Mausert, direct.

Q 540 goblets? A \$54.

Q 450 beer glasses? A \$45.

Q 300 wine glasses? A \$45.

Q 75 cordial glasses? A \$15.25.

Q 45 trays? A \$29.25.

Q 450 waiter towels? A \$45.

10 Q 50 dish towels? A \$5.

Q 40 rolling towels? A \$10.

Q 24 bottles of Mumm's Extra Dry? A \$60.

Q What was the par value of that share of stock you said that was taken? A \$100.

Q Do you know what the total of this is added up? A No, I do not know.

Q You have not added it up? A No.

20 *Mr. Bradner.* I have added it up, if the Court please. May I give the figures which I find?

The Court. You have added it up, you say?

Mr. Bradner. I have added it up. It amounts to \$7756.45.

30 Q Mr. Mausert, do you know what the amount of business was that you carried on in Arion Hall? A I did at the time; I couldn't remember from day to day just now.

Q Can you recollect about what your receipts a year amounted to? A Well, some weeks—

Mr. Reed. The answer is yes or no to that. I think the witness is confined to the answer of yes or no.

The Court. Do you know what your receipts on an average amounted to from

Frederick W. Mausert, direct.

year to year? You may answer that either yes or no.

Witness. Why, yes, I think I could.

Q You have not got your books, have you, Mr. Mausert? A Why, no, I haven't.

Q And the only way you can tell is from your memory? A My memory, that is all. If I had the books I could show that. 10

Q Tell us, to the best of your recollection, what it would be?

Mr. Reed. I object to that. I think it is immaterial. The witness says he cannot tell us definitely enough to be material or to be informative as to what it was, and I think the question is immaterial. At this stage of the case it does not appear that it is at all material. 20

The Court. My own question is whether it is included in the issue.

Mr. Bradner. It certainly is included in the issue.

The Court. The complaint contains three counts, of which the first and second are a good deal alike. The third count, as to which no evidence has been given yet, raises the question of fraud. Section 5 of the third count says that "The business of the plaintiff, as aforesaid, was thereby destroyed." To what does that refer, to the third count? It is numbered under the third count. 30

Mr. Bradner. That refers to the third count.

The Court. Does it mean that it was the fraud that destroyed the business? Gram- 40

William Mockler, direct.

matically, I should think so. There is no evidence yet that the mere taking away of the goods had any effect on the business.

At one o'clock, P. M., the court takes a recess of one hour.

10

AFTER RECESS.

Mr. Bradner. There is one witness whom I have here who is anxious to get away to attend to business this afternoon, and his testimony will only take a few minutes. I should like to withdraw Mr. Mausert and put this witness on.

The Court. The Court has no objection to your calling another witness.

20

(The witness stands aside for the present.)

WILLIAM MOCKLER, sworn in behalf of plaintiff.

Direct examination by Mr. Bradner.

Mr. Mockler, were you employed by Mr. Mausert? A Yes, sir.

30 Q At Arion Hall? A Yes, sir.

Q In what capacity were you employed? A Barkeeper.

Q Do you recall June 25, 1913? A Yes, sir.

Q Where were you on that day? A At Arion Hall.

40 Q Will you tell us what happened while you were there? A Yes. They moved everything out of there; they took everything away there; the men came up and carried everything out and took it down to the vans and carted it away.

William Mockler, direct.

Q What time did they start to move the goods out? A Oh, it was in the afternoon, after dinner-time, around one or two o'clock.

Q What time did they finish moving out? A Well, it was late in the evening, around five or six o'clock, around that time, when they finished up. 10

Q Were you there all the time? A Yes, sir.

Q Who was there? A Mr. Mausert was there, Mr. Schuler was there, myself, and there was other people there working around, taking stuff down and taking it out; I don't know who they were.

Q Which Mr. Mausert was there? A George Mausert.

Q And Mr. Schuler? A Yes, sir.

Q How long were they there, do you recall? A Well, the most part of the afternoon they were there. 20

Q When was Arion Hall closed up? A Well, it was closed up the night I was off, which was on a Tuesday, which I always had off; I always had a party working for me and was always off that night. It was on a Tuesday, I know.

By the Court.

Q. On the Tuesday before these things were taken away? A Yes, sir; the day before. 30

Q Well, that was on a Wednesday, was it? A Wednesday was the day they took the stuff away, that was the next day.

By Mr. Bradner.

Q It was closed the night before the goods were taken away? A Yes, sir.

Q Why was it closed? A What is that?

Q Do you know why it was closed up? 40

William Mockler, direct.

Mr. Reed. I object to that.

The Court. That may be an inference, why. If you can frame your question so as to direct the mind of the witness to facts from which an inference can be drawn, you may do that.

10

(Question withdrawn.)

Q While the goods were taken out, or the afternoon that the goods were taken out, did you receive any communication from Mr. Frederick Mausert? A No, sir; I did not.

Q Did you receive any communication from him in the evening? A Well, he 'phoned late in the afternoon, asking me in regard to how business was, and I told him everything was—

20

Objected to.

Q (Question read.) A Yes, sir.

The Court. Answer that yes or no.

Witness. Yes.

Q He 'phoned you? A Yes, sir.

Q About what time was it? A Oh, it was around pretty near six o'clock, after the stuff went away.

30

Q What did you tell him? A I told him—

Objected to.

The Court. The witness said that he received a communication. He has not said what it was, and he has not been asked what it was. This action is brought by Mr. Frederick W. Mausert. Consequently, what Mr. Mausert said would be a proper subject for direct inquiry. Now, the question is what the witness said to him, as I understand it.

40

William Mockler, direct.

Mr. Bradner. Yes, sir.

The Court. I shall hear counsel.

Mr. Reed. This is an employee of Mr. Frederick W. Mausert, and a communication between him and his employer would be, as far as the defendant is concerned, hearsay, and it would not bind us. It would have no bearing on the matter. 10

The Court. (After argument.) I do not think you would be entitled to what Mr. Mausert said to him, as that might be a self-serving declaration. Mr. Mausert himself can testify to what he did on that day, but Mr. Mausert's declarations to the witness I do not think are competent.

Mr. Bradner. I have not asked for Mr. Mausert's declarations to the witness; I have asked for the witness's declarations to Mr. Mausert. 20

The Court. There was something that you said that made me think that the two were connected in your mind. What would be your objection to what this witness said to Mr. Mausert, Mr. Reed?

Mr. Reed. This witness, of course, was not the agent of the defendant, and what he might have said to Mr. Mausert would not be binding upon us. He can testify to the conditions as he found them, but, I think, he cannot testify to what he said to Mr. Mausert about those conditions, Mr. Mausert being the plaintiff. 30

The Court. I shall allow the question. Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

William Mockler, direct.

Q What did you say to Mr. Mausert? A Well, I told him, I said, "Why, they moved the stuff out." He said, "Is that so?" I said, "Yes, sir."

By the Court.

10 Q What is that? A "They moved the stuff out."

Q You told him that they had moved the stuff out? A Yes, sir.

Q When was that, Mr. Mockler? A That was the next day, the 26th, I think it was, or the 25th; I don't know which.

Q It was on the next day after the moving of the stuff? A Yes, sir; the next day.

20 *By Mr. Bradner.*

Q Did you tell him who was moving the stuff out? A No, I told him the van was there.

Objected to.

The Court. I shall receive it.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

By the Court.

Q Yes or no. Did you tell him who? A They moved it out.

Q Can you answer the question yes or no? The question is: Did you tell him who moved it out? A Yes, I told him — that moved it there.

Q You are not asked to do anything but say yes or no to that question. A Yes, sir.

40 Q Whom did you tell him was moving it?

William Mockler, direct.

Mr. Reed. Will you allow me an exception to this also, your Honor?

The Court. Certainly.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

10

A I told him the moving men was moving it out.

Q The moving men? A They were moving it. I didn't know who the parties were.

Q You did not know who they were? A No, sir.

Q Is that it? A Yes, sir; I didn't know who they were.

Q Did you tell him you did not know who they were? A Yes, sir.

20

Q (*By Mr. Bradner.*) Who was directing the removal of the goods, Mr. Mockler?

Mr. Reed. I think that that calls for a conclusion. I object to that.

Q (*By the Court.*) Tell us what was being done. What was being done there at the time of the moving? A Everything was carried out, packed up and carried out.

30

Q Who was doing it? A The men—well, I was helping myself, packing the stuff up.

By Mr. Bradner.

Q Did anyone tell you to remove the goods?

A Yes, sir.

Q Who told you to remove them?

Mr. Reed. I object to that. It does not appear that it was any one who had authority from the defendant.

40

William Mockler, direct.

By the Court.

Q Tell us how it was done. How many men were there there? A What do you mean, packing up?

10 Q Yes; moving? A I couldn't tell; quite a lot of them, I know, colored people and white people; I figure about a dozen of them, anyhow.

Q Where did they get their orders from? A I got my orders from Mr. George Mausert.

Q Where did the men get their orders from? A That I couldn't say, where they got their orders from.

By Mr. Bradner.

20 Q Did you see what was put in the vans? A Well, I seen what was carried downstairs. I didn't see what was put in. I would have to look out of the window.

Q Were the tables and chairs carried downstairs? A Yes, sir.

Q The partition? A Yes, sir.

Q The safe? A Yes, sir.

Mr. Reed. I think this is leading, and I object to it.

30 *The Court.* Do not ask leading questions. Ask the witness to enumerate the articles that were carried out, so far as he can.

Q Will you tell us, so far as you remember, what was carried out? A Well, in fact, everything in the place was carried out; partition, chairs, tables, safe; everything that was in the place was carried out.

40 Q Was there anything left? A All that was left was the bar and the ice-box.

William Mockler, cross.

Cross examination by Mr. Reed.

Q You said that you took some things out yourself, at Mr. Mausert's direction? A I took some things out myself?

Q Yes. A No, sir; I did not.

Mr. Bradner. I do not think he did 10
make that statement.

Q Well, you packed them up yourself? A Packed them up; yes, sir.

Q Did you remove any of the goods? A No, sir; I didn't move nothing; just packed them up, and the moving men moved them themselves.

Q Did you not have a horse and wagon there that you took to the Hotel Broad? A Yes, sir; I had my orders. 20

Q Those things that you took, they were taken by you— A Yes, sir.

Q —to the Hotel Broad? A Taken to the Hotel Broad; yes, sir.

Q Do you remember what they were? A Yes, sir.

Q What? A Whiskey, all kinds of liquor, and different things in the line of bar stuff.

Q Well, were there some knives and forks? A No, sir. 30

Q You did not take those? A No, sir; not down there.

Q Well, did you pack those up? A Yes, sir.

Q (*By the Court.*) I understand you that the knives and forks did not come from the Hotel Broad; is that right? A No, sir; they did not; they came from Arion Hall.

Q (*By Mr. Reed.*) What did you put in the wagon that you drove besides whiskey and 40

William Mockler, cross.

liquor, anything? A No, sir; that was all. What I mean, stuff that went with the bar, whiskey and—

Q Case goods? A All case goods and all stuff like that.

10 Q Did you not take some table linen down there? A No, sir; I did not.

Q You are sure of that? A Yes, sir; positive.

Q Well, did you remove the knives and forks anywhere? Did you take those at all? A No, sir; I did not.

Q Or the table linen? A No, sir.

Q Or any clothing? A No, sir.

Q Any automobile supplies? A No, sir.

20 Q Did you see those? A I saw them, but I didn't move them.

Q So that all that you took was the liquor and case goods? A Yes, sir; the liquors; I looked after that.

Q You said Mr. Schuler was there on that day. What time of day was that, do you remember? A Oh, that was before noon.

Q In the forenoon? A Yes, sir.

30 Q The forenoon? A Yes, sir.

Q Can you fix the time? A Well, it must have been around about eleven o'clock, something like that, ten or eleven o'clock.

Q Who was there besides Mr. Schuler and yourself? A George Mausert was with him.

Q Do you remember whether Mrs. Briggs was there? A Mrs. Briggs?

Q Yes. A Well, there was some woman there; I couldn't say who it was.

40 Q Do you know whether or not she was a sister of Mr. Mausert? A What is that?

William Mockler, cross.

Q One of Mr. Mausert's sisters? A It might have been.

Q You did not know it? A No, sir.

Q When you were there in the morning who let you in? Was it not Mrs. Briggs who let you in? A The place was open when I got there.

10

By the Court.

Q That was on what day? A That was the next day, the day after the place was closed up.

Q The next day after what? A Well, the 25th. The place was closed up on the 25th, and the next day is when they moved all the stuff.

Q The place was open when you got there, you say? A Yes, sir.

Q That is, in the morning? A In the morning; yes, sir.

20

Q What day was that? A Well, that was on a Wednesday. Tuesday it was closed, and Wednesday it was open; that is, when I went there.

Q And when were the goods removed? A That day, Wednesday.

By Mr. Reed.

Q Whom did you find there when you went there in the morning, Mr. Mockler? A Oh, four or five people.

Q Who were they? A I don't know who they were.

Q Do you know any of them? A No.

30

40

Frederick W. Mausert, direct.

FREDERICK W. MAUSERT, plaintiff, resumes the stand in his own behalf.

Direct examination (continued) by Mr. Bradner.

10 Q Mr. Mausert, I think you testified this morning that you went to Hoboken and signed a chattel mortgage there? A Yes, sir.

Q About what time in the afternoon was it that you went to Hoboken? A Late in the afternoon, I should judge along about five o'clock.

Q How was it that you came to go to Hoboken?

Mr. Reed. I object to the form of the question.

20 *The Court.* I shall allow it.
Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Well, Ray Mausert called to see me at New York City—I was stopping at my sister's house over there—to come right to Hoboken.

30 Q (*By the Court.*) What is the name? A Raymond Mausert. He told me to come right to Hoboken—

Mr. Reed. If your Honor please, it does not appear that Ray Mausert was in any way connected with the defendant, and therefore what he said to this man, it seems to me, would be immaterial in the present state of the proof.

40 *The Court.* I shall let this statement stand, but Raymond Mausert is no party to the case, and his statements are not evidential, except that they are matters within his own knowledge.

Frederick W. Mausert, direct.

Q What did he want you to go to Hoboken for, Mr. Mausert? A He told me—

Mr. Reed. I object to that.

The Court. No, that would be obviously hearsay—Mr. Raymond Mausert not being a party to the case.

10

(Counsel argue.)

The Court. Does not your proof fall short of proving that Raymond Mausert was an agent of the defendant company so as to bind the defendant by his statements? I sustain the objection.

(Question withdrawn.)

Q Mr. Mausert, who produced this paper that you signed?

20

The Court. The mortgage, do you mean?

Mr. Bradner. The mortgage.

A The first was Raymond Mausert.

Q Did he have it in his possession? A Why, he did. I thought he was going to get it from the lawyer in Hoboken; so when I got over there I found out that he had it in his pocket.

Q He took it out of his pocket? A Yes, sir. After I got over to the lawyer's office I found that he had it in his pocket.

20

Q That is the first that you saw it? A Yes, sir.

Q What did Mr. Raymond Mausert say to you in New York City?

Mr. Reed. I object to that. That is a conversation between third parties.

(Question read.)

40

Frederick W. Mausert, direct.

The Court. The mere fact that he had the mortgage in his possession would not prove anything else, would it?

10 *Mr. Bradner.* It might perhaps prove that he was authorized to get a signature. Certainly we are entitled to show the representations that he made for the purchase of inducing him to sign the mortgage.

The Court. That seems clearer to you than it does to me. I sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20 Q Mr. Mausert, when was the first time that you heard of this chattel mortgage? A When Mr. Mockler told me.

Q You do not understand the question. When was the first time you heard of this paper that you signed? A When I signed it over in the lawyer's office, in Hoboken; that must have been.

By the Court.

30 Q You first heard of it then, did you? A Yes, sir; that was the first I heard of it—no, I am a little wrong. When Raymond Mausert called on me in New York City, telling me to come over with him—

Q Never mind what he told you. You first heard of it when Mr. Raymond Mausert called on you? A Yes, sir.

40 Q With reference to signing it? A Yes, sir; to come to Hoboken to sign papers. I didn't see the paper until I got over there. In taking it out of his pocket I seen it there.

Frederick W. Mausert, direct.

By Mr. Bradner.

Q Did you know what it was? A Why, I didn't at the time, no.

Q Did you intend to sign a chattel mortgage?

Objected to.

10

The Court. That, I think, is objectionable, because a person of average intelligence who does sign a document is presumed by the law to understand what it was that he was signing. There is no question about that, I suppose. I sustain the objection.

(Question withdrawn.)

Q What did you sign it for, Mr. Mausert?

Mr. Reed. I object to that. I think the paper speaks for itself. That is a written instrument.

20

The Court. The question is pretty well settled in New Jersey that an instrument of this kind speaks for itself; that the person who signs it is presumed to know what was in it and to sign it for the purpose of giving it legal validity, giving it effect. If the witness were to undertake to say that he signed it for some other purpose, the testimony would probably be stricken out on the ground that it was contradictory of his own acts. I sustain the objection.

30

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q What did you do after you signed this paper, Mr. Mausert? A Went back to New York City.

40

Frederick W. Mausert, direct.

Q Did you communicate with your place of business at any time that evening? A Right after I walked out of the lawyer's office, in Hoboken, that is when I called up my man, that worked for me, Mr. Mockler, over the telephone.

10

By the Court.

Q Where was he? A He was in my place of business, the Arion Palm Garden.

Q In New York? A No, in Newark.

Q You have described him as a man who worked for you? A Yes, sir.

Q At what? A Bartender.

By Mr. Bradner.

20

Q What did you say to him?

Objected to.

The Court. I sustain the objection. I think we are going around and around in a circle here. I do not see how this defendant can be affected by conversations between this witness and his employee.

Plaintiff's counsel prays an exception to this ruling of the Court.

30

Exception noted as ground of appeal.

Mr. Bradner. I am offering this because I want to show that this was the first intimation that Mr. Mausert had of the removal of the goods from his place of business—

The Court. The question is as to a statement made by Mr. Mockler to the witness. That is the only thing that you want to prove?

40

Mr. Bradner. Yes, sir.

Frederick W. Mausert, cross.

The Court. You want to prove that that was the first time that the witness knew of the removal of the goods?

Mr. Bradner. The first time that he knew of the removal of the goods.

The Court. I do not see any objection to your asking a plain question. When did you first hear that the goods were removed and how did you hear it? That is all you want to get. 10

Q When did you first hear that the goods were removed, Mr. Mausert? A When I asked Mr. Mockler how business was.

Q (*By the Court.*) No. When? A It was on Wednesday, I think, on the 25th of June, 1913. 20

Q (*By Mr. Bradner.*) What time of the day? A Well, I should judge it was five, or after five, o'clock in the afternoon. I says, "How is the business?" He says—

The Court. No, the conversation is not asked for.

By the Court.

Q You say you first heard of it on Wednesday, June 25th? A Yes, sir. 30

Q That answers that question. About what time of day? A Why, I should judge, along about five o'clock in the afternoon.

Cross examination by Mr. Reed.

Q Mr. Mausert, what did you do this day with respect to these goods when you learned that? A What?

Q What did you do after that? 40

Frederick W. Mausert, cross.

The Court. After you heard that what did you do?

A I went back to New York City.

Q Anything further? A I stayed at my sister's home there.

10 Q How long a time? A I stayed there for a few weeks.

Q How many weeks? A Probably two weeks or so; I am not sure.

Q Where did you then go? A Well, I went to North Adams or to Albany; I am not sure.

Q Did you engage in business there? A No, sir; not then.

Q Where are you in business now? A Glens Falls.

20 Q How long have you been in business there?

Objected to as not proper cross examination.

30 *The Court.* The witness says that he went back to New York City. Unless it is following that up, I do not see how it is relevant. This is on cross examination. He said he went back to New York City and stayed there two weeks. I think the door is open to inquire where else the witness went.

Mr. Reed. I just wanted to show what happened after that, what steps he took and what he did, and it seems to me that would be material.

Q How long have you been in business there, Mr. Mausert? A A little over three years, I believe.

40 Q Over three years? A Yes, sir.

Frederick W. Mausert, cross.

Q Well, what did you do with respect to your property, anything? A It was taken away from me.

Q Well, what did you do?

The Court. What did you do after it was taken away from you?

A I consulted with my lawyer, Mr. Bradner, to take up the case. 10

Q When did you do that? A I did that while I was in New York City.

Q That was in 1913? A Yes, sir.

Q Well, did you take any steps regarding it? A Yes.

Q Except that? A I did with Mr. Bradner, yes, at the time.

Q Through him? A Through Mr. Bradner, yes. 20

Q That was all you did at the time, was it? A All?

Q Did you do anything else? Did you see anybody regarding it? A No, I didn't see anybody. People came to see me.

Q Did you go to the Mutual Distributing Company? A Yes, I did, when I got in Newark.

Q When? A I couldn't tell you the date, but I should judge it was about seven months ago; I may be wrong. 30

Q Seven months back? A It might be seven months ago.

Q Did you see them between June, 1913, and this time that you mention, seven months ago?

A Did I see who?

Q The Mutual Distributing Company. A I called on Mr. Schuler, yes.

Q When? A I couldn't state; I say about seven months ago. 40

Frederick W. Mausert, cross.

Q Did you see him or anyone representing the Mutual Distributing Company? A Yes, I seen him; I seen Mr. Schuler myself.

Q When was that? A It might be seven months ago or ten months ago; I can't say.

10 Q No. I say did you see anyone between June 25, 1913, and this time that you mention, which is seven or ten months ago? A Which was connected with the Mutual Distributing Company?

Q Yes. A A brother of mine, Mr. George Mausert, called on me.

Q No. Did you go to see Mr. Schuler or anyone connected with the company? A Mr. Schuler was the only man that I called on, that I remember.

20 Q Who is Mr. Bird, a partner of yours Mr. Mausert? A Yes, sir.

Q What is his first name? A George Bird.

Mrs. Bradner. If your Honor please, I do not think that that is proper cross examination. It does not seem to have any connection with the direct examination.

The Court. (After argument.) I sustain the objection. I think it is part of your own case.

30

Mr. Reed. All right, sir.

Q Mr. Mausert, you have listed among the goods you say were taken from you 540 goblets. When did you purchase those 540 goblets? A Well, I kept them in stock, kept adding them ahead all the time.

Q You kept them ahead? A Oh, yes, we had to have them in stock.

40 Q Are you able to tell me when you got them? A I bought them different places.

Frederick W. Mausert, cross.

Q When? A I couldn't tell just when. I always kept them in stock; I had to do it; there were so many tables.

Q Well, when did you take an inventory of the property that you had there? A Why, if I had my books I could tell you.

Q Do you remember when that was? A I don't know; I don't remember right offhand now. 10

Q I suppose that this crockery and glassware was broken from time to time, was it not?

A Well, we would replace them just as soon as one was broken.

Q You mean to say that whenever a goblet was broken you would immediately replace it?

A Yes, sir; my man was supposed to notify me any time any was broken, and we would send and get more. 20

Q That is the way you knew whether they were broken or not—it was his information to you? A I would find out just how many were broken and replace them with new.

Q How often did he report to you on the question of how much was broken? A Every day or two.

Q Do you recall the average number that were broken every day or two? A Not off-hand, no. 30

Q You can't tell? A You could never tell how many was going to be broken each day.

Q The chairs you had used for two and a half years in your place? A Yes, every day.

Motion for Non-suit.

ANTHONY W. SCHULER recalled in behalf of the plaintiff.

Direct examination by Mr. Bradner.

Q Mr. Schuler, did you send anyone to New York to see Mr. Frederick W. Mausert? A
10 No, sir.

Q At any time? A No, sir.

Q Did anyone in the company? A No, sir.

Q (*By the Court.*) So far as you know?

A As far as I know.

CROSS EXAMINATION WAIVED.

PLAINTIFF RESTS.

20 *Mr. Reed.* May it please the Court, I ask for a non-suit, as it does not appear that the defendant either took the goods from the plaintiff's possession or that he made any representations which justified the claims made in the declaration. The cases very definitely hold that it must be shown that the agent of the defendant was the one who was guilty of the acts which are complained of, and that any representations or anything that was said was authorized
30 by him.

Now here we have the fact that the goods were taken out of the place of business of the plaintiff. It does not appear that they ever went into the possession of the defendant. The papers that are offered in evidence show that they are signed for by Mr. Schuler. He says that he signed by a man that he employed at the place in Arlington. It does not appear that that
40 place was the place of the defendant. At

George E. Mausert, direct.

all events, they were not delivered there until the 26th of June. They were taken from the place of the business of the plaintiff evidently by his brother George, who superintended the taking of the goods from there. George Mausert at that time was not the agent of the defendant; he had no connection with them, and it does not appear that it was through their instrumentality or at their direction that they were taken. If they were taken by the Mutual Distributing Company, it was entirely proper that they should have possession of them, since they had a chattel mortgage on them. If the acts of Mr. Schuler are chargeable against the Mutual Distributing Company, it was entirely proper that they should take them, because they had a chattel mortgage which gave them the right to take them. So that there appears to be absolutely nothing that has connected them with wrongdoing in this matter at all, and I think that we are entitled to have a nonsuit. 10

The Court. I deny the motion.

Defendant's counsel prays an exception to this ruling of the Court. 20 30

Exception noted as ground of appeal.

GEORGE E. MAUSERT, sworn in behalf of defendant.

Direct examination by Mr. Reed.

Q Mr. Mausert, you were in business in Newark in 1913, were you not? A Yes, sir.

Q At the Hotel Broad? A Yes, sir.

George E. Mausert, direct.

Q And, of course, you know your brother, the plaintiff in this case? A Yes, sir.

Q And he was then in business in Newark, too, was he not? A Yes, sir.

Q Where was his place of business? A On Washington street, the Arion Hall.

10 Q (*By the Court.*) What is your brother's name? A Frederick Mausert.

Q (*By Mr. Reed.*) Did you see him about the 25th of June, 1913? A No, sir; I did not.

Q When did you see him before that? A I didn't see him until about three years after that.

Q Did you have any conversation with him? A Yes, sir; I did.

20 Q When? A Why, on the night of the 25th, I think.

Q (*By the Court.*) The 25th of what? A Of June, 1913.

Q (*By Mr. Reed.*) What was the conversation that you had with him at that time? A He called me up on the phone.

30 Q What did he say to you? A He simply wanted to know what the trouble was, and I told him what I had heard, which I had already heard from a sister of mine, that there was a warrant out for his arrest.

Q And what did he say? A Well, he said he didn't know anything about it and he was surprised to hear it.

40 Q Well, what was said about his place of business, if anything? A I told him that he owed the Mutual Distributing Company \$600, and I knew he owed other people, and I thought he should protect the Mutual Distributing Company, for two reasons. The first reason: I went on his account. He was entitled to credit

George E. Mausert, direct.

of \$100 from the Mutual Distributing Company, which was the amount of stock that he had—

By the Court.

Q You told him that he owed the Mutual Distributing Company \$600 and you thought that he ought to protect them? A Yes, sir. 10

Mr. Bradner. I ask that all this evidence be stricken out on the ground that it is hearsay, if your Honor please.

The Court. The plaintiff is Mr. Frederick W. Mausert. This is a conversation with him, is it not?

Mr. Bradner. Yes, sir.

The Court. Well, is not anything that was said to the plaintiff, or any notice given to him, or any statements by him, if they are relevant to the issue, competent? It is something that he said to the plaintiff. 20

Mr. Bradner. It is not binding as proving any debt to the defendant company.

The Court. Oh, no, it does not prove anything, except that this is a statement made to the plaintiff. The witness states it as a reason why he urged him to secure the Mutual Distributing Company. He might be in error; he might not owe them \$600. He said that was what he said to Mr. Frederick W. Mausert, the plaintiff, and that was the reason why he ought to protect the company. Proceed. 30

By Mr. Reed.

Q What else was said, Mr. Mausert? A I simply mentioned the fact that I thought it was his place to protect that account, if not for the 40

George E. Mausert, direct.

benefit of the Mutual Distributing Company, but for my own benefit, if no one else's; that he knew that his account wasn't good for that amount. The system of the Mutual Distributing Company, or the rules of the company, was that no man should have credit beyond the
 10 amount of stock that they held at the time, which he knew at the time he bought this stock from the company—\$100. That was the extent of his credit. Mr. Schuler called on me one day at my place of business. "Mr. Mausert," he says—

The Court. One moment. No question has been asked about this. You are wandering.

20 Q Go back to the conversation which took place between you and your brother. You told him your reasons for thinking that he should secure that account, and what did he say? A He said, "All right," he was willing to do so. So I told him what was necessary to be done; a mortgage would have to be drawn.

Q And what else? A And then I spoke to Mr. Schuler about it; I notified him to have a mortgage drawn, and you and he came to my
 30 place of business and we talked it over, and you had the mortgage drawn and sent it down to me, and I gave it to my son. My brother told me where he was going to be and where he could find him.

Q (*By the Court.*) That is, Mr. Raymond Mausert? A Yes, sir; my son, eighteen years old at that time, Raymond Mausert.

Q Well, did you talk to your brother after
 40 that? A No, sir; I did not.

George E. Mausert, direct.

Q Now, you said the conversation that you had with him took place the night before that mortgage was signed? A Yes, sir; the night before; I think that was on the 24th.

By the Court.

Q Which conversation, the conversation with your brother? A Yes, sir. 10

Q About protecting the company? A Yes, sir.

By Mr. Reed.

Q Well, what was said about the property at the place of business? A Why, nothing was said, simply that I told him that I thought it would be best to take the stuff out and put it in storage; that there would be another month's rent due, and the landlord would hold it if it wasn't taken out; and, of course, that was agreed upon, to take it out. 20

Q What did you do then? A Then I notified the DeCamp people to send vans over the next day and take the furniture and remove it to Arlington, where there was a storeroom that I got from Mr. Schuler to put it in. That was his property.

Q Were all of the goods taken over there? A Yes, sir; all that I can think of, except the liquors. There was some silverware, linens and chinaware that was sent down to my place, which I was surprised when I came down there. I never had no use for it; I never used it; I couldn't sell it and I presume it is there yet. It was something that I couldn't use; it was entirely different from what I was using. 30

Q You said "silverware". Was it silverware? A No, sir; I should call it tinware. 40

George E. Mausert, direct.

It was something that I wouldn't use in my place.

Q Well, what about the liquors? Did you receive the liquors? A Well, yes, sir; the liquors went there, and I gave him credit for it; and Mr. Mockler charged everything up; 10 he furnished me a list; I checked it off, and I gave him credit for it. He received a bill since that time showing that I gave him credit for it.

Objected to as a conclusion.

Q You said you gave him a statement of it? A Yes, sir.

Mr. Bradner. I object. He does not know whether the plaintiff received the bill or not.

Q (*By the Court.*) Is it within your own 20 knowledge that the plaintiff received a bill? A No, sir; only I mailed it to him with one of my own envelopes with my name on it, and if he did not receive it, I should think it would be returned to me.

Q (*By Mr. Reed.*) You mailed it to him? A Yes, sir.

Q Did your brother ever make any objection to you after that about it? A No, sir; never.

Q What did he say afterwards respecting 30 this property? A Nothing; nothing was ever said to me after that.

Q (*By the Court.*) What was your business at that time? A Hotel business in Newark.

By Mr. Reed.

Q Hotel business at the Hotel Broad? A Yes, sir.

Q Did you notice the furniture and stuff that you say was taken out of there and stored? A 40 Yes, sir; I did.

George E. Mausert, cross.

Q What was the condition of that? A Why, the condition was very good, I should think; I don't think it was bad. The furniture had been used for two or three years.

Q For two or three years? A Yes, sir.

Juror No. 12. Your Honor, was there any bad feeling between these brothers at this particular time? Were they friends? 10

The Court. You may answer the question.

Witness. Yes, sir; we were the best of friends.

Cross examination by Mr. Bradner.

Q Mr. Mausert, you said that you talked with your brother on the 'phone? A Yes, sir.

Q On what night was that? A I think on night of the 24th, the day that he left Newark. 20

Q Whereabouts was he when you talked to him on the 'phone? A I don't know where he was; he called me up; I didn't call him up, because I didn't know where he was.

Q When did he leave Newark? A I think on the 24th of June.

Q Did you see him before he left Newark? A No, sir; I did not. I tried to find him, but I didn't see him. 30

Q Did you know that he was going to leave Newark? A Yes, sir; and I knew that he had left Newark.

Q How did you know that he was going to leave Newark? A Because my sister informed me that she told him to leave Newark, and she said he had left Newark.

Q Do you know why he left Newark? A Yes, sir. 40

George E. Mausert, cross.

Q Why did he leave Newark? A Because I warned him to get out of the city, that there was a warrant out for his arrest.

Q Did you know that there was a warrant out for his arrest? A No, sir; I do not know it, or I did not know it, but I was informed that
10 there was one out.

Q Did you not know that there was not any? A No, sir; I did not.

Q Did you not know that your brother's place was conducted in an absolutely proper manner? A I knew it was not.

Q Mr. Mausert, you were the treasurer of the Mutual Distributing Company, were you not? A Yes, sir; I was for several years.

Q Up until June 18th? A Yes, sir.

Q Did you have charge of the books of the
20 company? A I did not.

Q Did you pay the bills of the company? A I did; I signed the checks, yes.

Q Did you send out the bills? A No, sir; I did not.

Q You said before that you and your brother were very good friends? A Yes, sir; the best of friends.

Q Are you good friends now? A I was up
30 until I was notified to appear against him; I don't believe that I am just at the moment. We were good friends.

Q Have you been in constant communication with him all these three years? A No, sir; I have not.

Q Have you seen him at any time during these three years? A No, sir; I have not until some time in June, this year. I think that was the first time I met him from the
40 time this trouble started.

George E. Mausert, cross.

Q And still you were good friends with your brother up until you were notified about this case? A Until I was notified about this warrant; we were good friends up to that time; yes, sir.

Q What time? A Up to the time that I notified him, through a sister of mine, that there was a warrant out for his arrest. 10

Q That was back on the 24th of June? A Yes, sir.

Q For three years you have not had anything to do with him? A No, sir; I haven't had anything to do with him.

Q Have you communicated with him at any time during those three years? A No, sir.

Q Did you telephone to your brother? A Yes, sir— Have I ever telephoned to him? 20

Q In the past three years? A I telephoned to him several times within the last three months, four months.

Q Did you call him up from Schenectady? Did you call him up at Glen Falls from Schenectady a week or so ago? A Yes, sir.

Q Did you tell him that he had better drop this case? A I certainly did.

Q Did you tell him you were going to fight it through to the finish? A I told him I was going to fight anything; I told him that if I got on the stand that I would do him a good deal of harm; that he couldn't gain anything by my being here; and he said he didn't want me here. 30

Q What day was that mortgage drawn up? A I presume on the 25th—the 25th, as I understand it. I haven't seen the mortgage since it was drawn, but, from what I heard here today, it was the 25th. 40

George E. Mausert, cross.

Q What time of the day? A Why, I should say about one o'clock or two o'clock in the afternoon.

Q You gave it to Raymond Mausert? A Gave it to my son, Raymond; yes, sir.

10 Q You say the mortgage was drawn about one or two o'clock? A I think so.

Q And you gave it to Raymond Mausert? A Yes, sir.

Q And he took it to New York? A Yes, sir.

Q And how did he go to New York? A By train.

Q By train? A I think so.

20 Q What time did he leave? A I couldn't tell you just the time; some time in the afternoon.

Q Did you give the order for the removal of these goods, Mr. Mausert? A Yes, sir.

Q When did you give that order? A I gave that order on the 25th.

Q What time of the day on the 25th? A Why, in the afternoon, I should think; I think about one o'clock or two o'clock, along in there.

Q Were you there all the time the goods were being removed? A No, sir; I was not.

30 Q What time were you there? A I was there perhaps an hour during the afternoon, I should say, or perhaps two hours.

Q Where did you direct the goods to be taken to? A To Arlington.

Q Did you tell Mr. Raymond Mausert that the landlord would hold the goods unless he secured the Mutual Distributing Company? A I don't know whether I did or not.

40 Q Did you not testify to that on your direct examination? A No, sir.

George E. Mausert, cross.

Q Did you not testify that the landlord might take the goods? A Yes, sir; I did; I mentioned that to my own brother, but not to my son Raymond.

Q That is what I asked you. A You asked me if I didn't mention it to Raymond. I beg your pardon! I understood that you did. 10

Q You told him that the landlord would hold the good? A I told him he would, which I knew he would.

Q (*By the Court.*) Who was the landlord? A Mr. King.

Q (*By Mr. Bradner.*) Do you know how much he owed to the Mutual Distributing Company? A Yes, sir.

Q How much was it? A Very near \$700.

Q Do you know what kind of business your brother was doing? A Well, I don't know a great deal about his business. I used to go up there occasionally. 20

Q Was he doing a good business? A He wasn't making any money; he told me so, anyway.

Q Had he paid the Mutual Distributing Company right along? A No, sir.

Q He carried an account with them? A He had a big balance there all the time. 30

Q In whose name did you order the De-Camp people to move the goods? A In my name.

Q Who paid the bill? A Mr. Schuler paid the bill; I requested him to do so.

Q For the Mutual Distributing Company? A Yes, sir.

Q Mr. Mausert, why aren't you and your brother friends now? A Why, I presume we 40

George E. Mausert, re-direct.

are, so far as I know. What I am saying here shouldn't offend him at all.

Q Well, did you not testify just a minute ago that you and your brother were on the outs after you had warned him that the prosecutor was after him? A I considered that we
10 were on the outs; yes, sir.

Q What was the reason for that? A Because he wouldn't recognize me or my family after that.

Q Why would he not recognize you? A That is up to him to answer that question.

Q You were convicted, were you not, Mr. Mausert, for keeping a disorderly house? A Yes, sir; I certainly was.

Q Did you hand that chattel mortgage to
20 Raymond personally? A Yes, sir.

Q What instructions did you give him at the time? A I told him to go over and let my brother sign it.

Q Did you tell him to tell Fred that the landlord would hold the goods unless he signed the mortgage? A No, sir.

Re-direct examination by Mr. Reed.

30 Q Mr. Mausert, I understood you to say that up until June 18, 1913, you had been treasurer of the Mutual Distributing Company? A Yes, sir.

Q What happened on June 18th? A There was an election of officers, and my name was being used as a candidate for the office, for re-election, and I sent in a letter asking them to withdraw my name. On account of the trouble I was in at that time, I didn't think
40 I would be any credit to the organization.

Anthony W. Schuler, direct.

Q You spoke of your brother's being one of the stockholders; you said he had a share of stock in that company? A Yes, sir.

Q That was at that time? A Yes, sir.

Q Now, do you know whether or not there were any other bills against your brother at that time? A No, I don't know much about that, but I have heard since then, or after that, that there was. 10

Mr. Bradner. I object to that.

The Court. Never mind that.

ANTHONY W. SCHULER recalled in behalf of defendant.

Direct examination by Mr. Reed.

Q Mr. Schuler, what position do you hold in the Mutual Distributing Company? A President and general manager. 20

Q How long have you been such? A Since its organization; about eleven years, I guess.

Q And what part do you take in the transaction of the business of the company? A Why, I manage the business for the concern.

Q You manage it? A Yes, sir.

Q Do you know Mr. Frederick W. Mausert? A I do. 30

Q And how long have you known him? A Why, I think since about 1909.

Q Which one of these books is the stock ledger? A I think there are two of them there, Mr. Reed.

Q (Book shown to witness.) Just look at that and tell me when Mr. Frederick W. Mausert became a stockholder of the company. A December 22, 1909, was the first installment paid, \$25, and the balance was paid on February 40

Anthony W. Schuler, direct.

19th—I can't just make this out here—1910, I guess.

Q 1910? A February 19, 1910, yes.

Q How many shares of stock? A One share.

10 Q Does he still hold it? A I should judge so. He said he lost it.

Q I mean so far as the company is concerned? A So far as the company is concerned, yes.

Q Well, was he indebted to the company in any sum of money in June, 1913? A Yes, sir.

Q What amount? A I think it was \$680 and some odd dollars.

By the Court.

20 Q What was that for? A Why, for merchandise, liquors.

Q What is the Mutual Distributing Company, what is their business? A Wholesale liquor dealers.

30 *Mr. Bradner.* If the Court please, I think the best way to prove that debt would be to produce the books. We have one of the officers of the company and the books here.

Mr. Reed. Well, I can prove it by the books. I thought I would ask him.

By Mr. Reed.

Q Did you make any effort to collect the amount due from him, Mr. Schuler? A Yes, sir; from time to time.

40 Q Well, on what basis was he trading with you at the time, in June, 1913? A Why, at that time we stopped his credit, any more than

Anthony W. Schuler, direct.

he would have to pay a bill before we would give him another bill. That went on for several months, and I think the books will show that, that he would have to pay so much on account before he could get any more. That went on for some time.

Q Well, do you remember when this chattel mortgage was given? A Why, I think it was on the 25th of June, 1913. 10

Q I am now referring to Exhibit P. 2. Do you remember the circumstances connected with that? A Yes, sir.

Q What occurred? A Why, it was dated on the 25th, and it was signed by me on the 26th of June.

Q What was done about that time, do you recall the circumstances? A With reference to what, Mr. Reed? 20

Q To the execution of the chattel mortgage. Did you see Mr. Frederick W. Mausert about it? A No, sir.

Q And did you say anything to him about it at that time? A No, sir; I didn't see him; I didn't see him until some time in January 1916, when he came to the office.

Q January, 1916? A Yes, sir.

Q Well, did you know where Mr. Frederick W. Mausert was at the time of the execution of this chattel mortgage? A No, sir. 30

Q Did you hear from him in any way? A Not until—well, we got two letters from him there during that time, up until—

Q No, I mean about June 25, 1913. A No, I didn't hear from him at all at that time; I didn't see or hear from him until we got his first letter there, which you have got there.

Anthony W. Schuler, direct.

Q You refer to this letter that I now show you (paper shown to witness)? A That is the first letter that I remember receiving from him.

Q Do you know when you received that? A I can't recall it; it isn't dated; I should judge about a week before he sent No. 2 there, which is dated.

Q By "No. 2" you refer to this letter (paper shown to witness)? A Yes, sir.

Q Dated April 27, 1914? A Yes, sir; I should judge a week; possibly it was longer.

Q (*By the Court.*) What is the date of the second letter? A April 27, 1914.

Q How did the first letter reach you? A Handed to me by a man by the name of George Bird.

20 *Mr. Reed.* I shall offer this in evidence.

By the Court.

Q Do you mean that the letter was delivered by hand? A Yes, sir. He was Mr. Mausert's partner, I understand.

Q That was the first letter? A The first letter. The second one was also brought by him; it was an order for some of the goods.

30 *Mr. Reed.* I shall offer the earlier letter, without date, address to Mr. Schuler, signed "F. William Mausert."

(The paper referred to is marked Ex. D. 1.)

(Mr. Reed reads Ex. D. 1.)

Q Do you know whether this first letter was received before or after the goods were removed? A This letter?

40 Q Yes. A Long after the goods had been removed.

Anthony W. Schuler, direct.

Q How long? A Well, I don't know; I should judge—let us see. June to April, 1914. That is about—

Q You cannot tell exactly? A About five or six months, isn't it?

By Mr. Reed.

10

Q June 25, 1913, to April, 1914. That is about ten months, I should say. A About ten months, yes, about that, I should say.

Q What took place with regard to this request that Mr. Mausert made to you in his letter, Exhibit D. 1? A Why, I told him that I couldn't deliver that spotlight, as the Mutual Distributing Company hadn't gotten their money out of the goods yet.

Q (*By the Court.*) You told whom? A Mr. Bird, Mr. Mausert's partner. 20

Q (*By Mr. Reed.*) Is that all you said to him? A No, I said we hadn't gotten all our money, and we had additional money besides our account of \$300 at that time.

Q (*By the Court.*) You said you hadn't gotten the spotlight? A No, I told him I couldn't give him the spotlight because we hadn't got our money out at that time; I told him if he wanted that spotlight to have Mr. Mausert send down \$10 for it. That is what we had it inventoried for, about. 30

Q (*By Mr. Reed.*) What next happened? A Well, the next thing, we got this letter here (indicating).

Mr. Reed. The letter of April 27, 1914, addressed to Mr. Schuler and signed "F. W. Mausert." I offer this (handing paper to plaintiff's counsel).

40

Anthony W. Schuler, direct.

Mr. Bradner. No objection.

(The paper referred to is marked Ex. D. 2.)

(Mr. Reed reads Ex. D. 2.)

10 Q What was done then, Mr. Schuler? A Well, we gave him the spotlight and received his \$10.

Q (*By the Court.*) You gave him the spotlight? A Yes; that is, we may have given him an order for it; I don't know which now. It is some time ago.

Q (*By Mr. Reed.*) You gave him the spotlight? A Yes, sir.

20 Q What was the question about the gas range? A Well, when Mr. Mausert's partner was down I told him I had a customer for the gas range, but I really didn't know what price we ought to put on it, and I asked him to ask Mr. Mausert what he thought it was worth, and that is the answer there.

30 Q Mr. Schuler, you spoke of seeing Mr. Mausert some time ago. When was that, do you remember? A As near as I can recall, about January 4, 1916, he came to the office, I believe, to see me. I was out to lunch at that time, and he waited for me until I returned, and at that time he inquired about what we done with his goods. I told him that we had sold them, showed him the books, showed him the account, and showed him that there was a balance, over and above our account, as well as our expenses, of about \$26.

40 Q (*By the Court.*) When was that? A About January 4, 1916, I think it was. I showed him the books, showed him just exactly how we had sold the goods and how much we had over and above our account, and he being

Anthony W. Schuler, direct.

a stockholder, I thought it no more than right to give him what we had over, and he asked me to make out a check, and we gave him a check right there.

Q (*By Mr. Reed.*) Is this the check to which you refer (paper shown to witness)? A Yes, sir. 10

Q (*By the Court.*) He took the check? A Yes, sir. Here is the check, for \$26.53.

Mr. Reed. I shall ask that this be marked in evidence.

(The paper referred to is marked Ex. D. 3.)

(*Mr. Reed reads Ex. D. 3.*)

Q (*By Mr. Reed.*) Is that Mr. Mausert's signature? A Well, as near as I can tell; it looks like it a great deal, anyway. 20

Q Well, you say at this time that you showed him your books and showed him how much his account was? A Yes, sir.

Q What you had received from the sale of the property? A Yes, sir.

Q And what did he say? A Why, he was very agreeable; he was pleased with what we had done, I guess. I told him we had some goods left; I told him what we had left, as near as I can tell, and we have got some yet, I think. 30

By the Court.

Q Do you remember what he said? A He was pleased and took his check and bid us good-bye, I guess.

Q Do you remember what he said? A No, I don't remember just what he said. 40

Anthony W. Schuler, direct.

By Mr. Reed.

Q Do you remember whether he made any objection? A No objection whatever.

Q Did he criticize the account? A No, sir; not in the least.

10 Q What was done with this mortgage after it was given to you, Mr. Schuler? A It was held for some time, and the goods afterwards were sold under constable's sale.

Q Foreclosed? A Foreclosed.

Q You sold the property? A Yes, sir.

Q When did that take place, do you know?

A I can't recall now offhand.

20 *Mr. Bradner.* I object to this line of testimony, if your Honor please. I think the best proof of the foreclosure of the mortgage would be the constable himself or the records themselves.

The Court. If it is necessary that this feature of the case should be proven strictly, that would be the proper course.

30 *Mr. Reed.* I thought that the witness could testify that that was done—not to the particulars of the foreclosure, but that the property was foreclosed. He would know that of his own knowledge if he attended—

The Court. I am not expressing any opinion; I say, if it is necessary that that be strictly proved, the way indicated by Mr. Bradner is the way to do it.

40 Q Then after that sale, or after the foreclosure that you speak of, what was done with respect to the property? A Why, after we had bought it in we advertised in various papers here in Newark, the News mostly, I guess,

Anthony W. Schuler, direct.

perhaps the Star occasionally, and we sold it from time to time to the best of our ability.

By the Court.

Q You sold it from time to time? A Yes.

Q You did not have one sale? A No, sir; we sold it at private sale; we advertised it and tried to get as much for it as we possibly could. 10

Q What happened at the time of the sale you have spoken of, at the foreclosure. Were you there? A Yes, sir.

Q What happened? Was the property sold there? A It was sold there, purchased by myself.

Q You bought it? A Yes, sir.

Q (*By Mr. Bradner.*) As agent of the Mutual Distributing Company? A Yes, sir. 20

Q (*By Mr. Reed.*) That was a public sale, was it? A Yes, sir; a constable's sale. I guess they call it a public sale.

By the Court.

Q Mr. Schuler, did this mortgage ever become due? A Why, it is on demand.

Q Was there any demand ever made? A Why, he wasn't there to make the demand on; we didn't know where he was at the time. 30

Q Then no demand was made. Was any attempt made to make a demand? A We didn't know the man's address; we couldn't make a demand.

Q You do not exactly answer my question. A No.

Q Was any attempt made to make a demand? You observe that the condition of the mortgage is that it shall become due if the party of the first part, Mr. Mausert, pays on 40

Anthony W. Schuler, direct.

demand at the office of the Mutual Distributing Company the sum of \$682.88. Having noticed this provision in the mortgage, I ask if any such demand was made? A No, sir.

Q And no effort was made to find him, I understand you to say? A No, sir.

10 ADJOURNED until tomorrow, Tuesday, October 30, 1917, at ten o'clock, A. M.

SECOND DAY.

Tuesday, October 30, 1917.

Met pursuant to adjournment.

Present, counsel as before stated.

20 *Mr. Bradner.* If your Honor please, I should like to ask that you grant me an exception which I neglected to ask for yesterday. Your Honor sustained Mr. Reed's objection to testimony which I offered, or endeavored to offer, to show representations of an agent of the Mutual Distributing Company, and I neglected, I think, to take an exception at that time.

30 *The Court.* I do not remember the exception, but anything you inadvertently omitted yesterday you may take now. Make it clear to the stenographer what you refer to.

Mr. Bradner. Yes, sir.

ANTHONY W. SCHULER resumes the stand in behalf of defendant.

40 *Mr. Reed.* Mr. Bradner, I asked you for a letter which was sent to Mr. Mausert,

Anthony W. Schuler, direct.

of which that is a copy. Can you let us have that letter (handing paper to plaintiff's counsel)?

Mr. Bradner. I have not got it.

Mr. Reed. You have not such a letter?

Mr. Bradner. No.

10

Direct examination (continued) by Mr. Reed.

Q Mr. Schuler, I show you a copy of a letter dated May 1, 1914, addressed to F. W. Mausert by the Mutual Distributing Company (paper shown to witness). What have you to say about that?

The Court. You assume it to be a copy. Is it a carbon copy?

Witness. A carbon copy; yes, sir.

20

The Court. You have demanded the original?

Mr. Reed. We demanded the original; yes, sir.

The Court. You may answer the question.

A Why, this was a letter we sent him, as he requested us to let him know what we still had on hand, and this is what we sent him in answer to that.

30

By the Court.

Q In answer to what letter was that written? A To a letter—yes, the letter that he sent by Mr. Bird.

Mr. Reed. I have it here.

The Court. How is it marked?

Mr. Reed. It is marked Ex. D. 2.

40

Anthony W. Schuler, direct.

By Mr. Reed.

Q Is that the letter to which you refer (paper shown to witness)? A Yes, sir.

Mr. Reed. I shall offer this.

10 *The Court.* That is the letter of April 27th.

By Mr. Bradner.

Q What day was this letter written, Mr. Schuler? A The day that it is marked there.

Q What day is that? A I should judge May 1st, isn't it? Or whatever date is marked there.

Q Did you dictate this letter? A Yes, sir.

Q Yourself? A Yes, sir.

20 Q To a stenographer? A Yes, sir.

Q Who mailed the letter? A Why, it was mailed from the office.

Q Did you see it mailed? A I don't recall seeing it mailed, no.

Q How do you know that it was mailed? A I don't know any other way excepting that it took the usual course.

30 Q Did you put the stamp on the letter? A I did not, that I know of.

Q Did you see anybody put the stamp on the letter? A I don't know as I did.

Mr. Bradner. I object to the copy going in evidence. There is no proof that the letter ever left the office.

The Court. I think there is enough of a presumption to warrant the reception of the letter.

40 Plaintiff's counsel prays an exception to this ruling of the Court.

Anthony W. Schuler, direct.

Exception noted as ground of appeal.
(The paper referred to is marked Ex.
D. 4.)

(Mr. Reed reads Ex. D. 4, dated May 1,
1914, addressed to Mr. F. W. Mausert,
Glens Falls, New York, and signed "Mu-
tual Distributing Company.")

10

By Mr. Reed.

Q Now, Mr. Schuler, what books show the
goods sold on the account of Mr. F. W. Maus-
ert? A Why, the ledger, I should judge.

Q This book, this big ledger (book shown
to witness)? A Yes, sir.

Q Will you turn to it. A (Witness turns to
page in book.)

Q You are referring now to page 462 of this
ledger? A Yes, sir.

20

Q And what does that show? A Why, that
shows Mr. F. W. Mausert's account.

Q And the balance due from him? A
Yes, sir.

Q At that time? A Yes, sir.

The Court. At what time?

Q What date was that? A Why, this bal-
ance shows here August 1st balance.

30

Q What year? A 1913.

By the Court.

Q When had that balance been carried
from? A What is the question?

Q What were the last goods purchased by
him? A Why, on June 13th, I guess; June
13th, these goods here (indicating).

Q June 13, 1913? A Yes, sir.

40

Anthony W. Schuler, direct.

Q And the balance was how much? A Here, \$682.88.

Q Now, you spoke yesterday of having had a conference with Mr. Mausert in January, 1916, showing him an account. What account did you show him? A I showed him his account
10 here.

Q And you spoke also of an account of the prices received for goods which you had disposed of? A Yes, sir.

Q Where is that, in that book? A Why, I don't know if it is here or not; I am not sure of that. You mean for the furniture, and so forth, sold?

Q Yes. You said you showed him an account and gave him a check for \$26. A I showed him this account here, as well as his
20 account for his goods. I don't recall what book that is in. Where is that, Miss Freeman?

(The woman addressed says: "Part of it is in that ledger and part of it is in that locked ledger (indicating).")

Mr. Reed. I shall ask Miss Freeman that later.

Witness. I do not keep the books, you
30 know.

Q Now, I show you a book marked "Ledger, M. D. Co.," page 255, showing an account headed "F. W. Mausert, furniture account" (book shown to witness). A Yes, sir.

Q Is that the one you refer to? A Yes, sir. That shows the balance over, \$26.53.

Q Also in this ledger, marked "No. 3," on page 735—

The Court. Is that the one first referred
40 to?

Anthony W. Schuler, direct.

Mr. Reed. The first ledger referred to, yes.

Q On page 735 there appears an account of furniture sold. Was that shown to him at that time? A Yes, sir.

Q By you? A Yes, sir.

10

Mr. Reed. I should like to offer this.

The Court. What is the connection between these three accounts, the account on page 462 of ledger No. 3, the account on page 735 of ledger No. 3, and the account on this other book, the smaller ledger, page 255?

Mr. Reed. Well, the last one spoken of, the one in ledger No. 3, precedes the one in ledger—

20

The Court. Let the witness explain the relation of these three accounts.

Witness. That shows his merchandise account; the first one shows his merchandise account; the next is the—

By the Court.

Q You are now referring to page 462 of ledger 3? A This on page 735 is the starting of his furniture account; that is page 735 in this book.

30

Q That is the starting of the furniture account? A Yes, sir.

Q At what date? A This was started here, I guess, about August, 1913, the first bill entered here; the first goods were sold on August 25th, according to this.

Q What year? A 1913.

40

Anthony W. Schuler, direct.

Q Now, what are these two other accounts? You say the ledger shows the starting of the furniture account? A Yes.

Q That is, the large ledger? A The large ledger.

Q Now, we have two other accounts.

10 *Mr. Reed.* The small ledger is the continuation of the furniture account.

The Court. Just let me ask my question.

Q We have another page now in the large ledger, page 462. What is the nature of that account? A That is the merchandise account.

Q Now, that small ledger, page 255, what is that account? That is called "Furniture account," too? A 255? I do not see it here.

20 Q 255, as I understand. A No, that is wrong, I think.

Q F. W. Mausert's furniture account. A That is 225, according to this book here.

Q That is probably a mistake of mine. Now, what is the relation of that furniture account to the furniture account at page 735 of ledger No. 3? They are both furniture accounts? A Yes, sir. Why, I believe it was started in this ledger here, and when our expert accountant went over our books he said it would have to
30 be carried over to this smaller ledger.

Q Then your best information about it is that the account in the smaller ledger, the furniture account, page 225, is a continuation of the furniture account in the large ledger, page 735? A Yes, sir.

The Court. Did I understand you to offer these books?

Mr. Reed. Yes, sir.

40 *The Court.* You may cross-examine.

Anthony W. Schuler, direct.

By Mr. Bradner.

Q Mr. Schuler, do you keep these books yourself? A No, sir.

Q Did you make the entries in them? A No, sir.

Q Who did make the entries in them? A Our bookkeeper. 10

Q Under your supervision? A Yes, sir.

Q Under your direction? A Yes, sir.

Mr. Bradner. I have no objection to the account of Mr. Mausert with the Mutual Distributing Company for merchandise going into evidence, but I do object to the furniture account going in. I do not see where that is relevant to the issue in this case. The defendant has not pleaded any furniture account of Mr. Mausert's; they have pleaded a chattel mortgage and a sale under it, and that is all. They have not set up that Mr. Mausert carried a furniture account with the Mutual Distributing Company after that, and I do not see how that account is relevant. I do not see why it should go in. 20

The Court. Let me see page 735 of ledger 3. 30

(Witness hands book to the Court.)

The Court. This is called a bill of sale account; it is not called a furniture account; it is called a bill of sale account.

Witness. It refers to the furniture, though, I think.

The Court. And it is carried forward from what book, the journal?

Witness. What is this carried forward from, Miss Freeman? 40

Anthony W. Schuler, direct.

Mr. Reed. No, you must answer the Judge's question, Mr. Schuler, if you know.

The Court. I do not think it is sufficiently explained to be receivable.

10 *Mr. Reed.* Your Honor, I was offering this from the point of view that this had been shown to the plaintiff in this meeting of January 4, 1916, and as a result of that he was given a check for \$26. I thought for that reason they were admissible. I have here the bookkeeper who can explain that account.

The Court. Do you claim an accord and satisfaction?

20 *Mr. Reed.* Well, I claim that this evidence is admissible from various standpoints. One is that it is evidence that there was no claim of misrepresentation at the time of the making of the mortgage, and that there was no claim at the time that the payment of \$26 was made, but it would be ratification and estoppel also.

30 *The Court.* As the case now stands, I do not think that the claim of misrepresentation is sustained—that is, the third count—because it does not yet appear that, if there was a misrepresentation, it was made by the authority of the defendant; that is, it does not appear to have been made by an agent of the defendant. It is to be gathered from some expressions that witnesses have let fall that something that Mr. George E. Mausert said was relied on as a misrepresentation; but Mr. George E. Mausert at the time of this transaction was not an officer or stockholder of the

40

Anthony W. Schuler, direct.

defendant company, nor does it appear up to this point that he was the agent of the defendant company. I therefore see nothing in the case yet to sustain the allegation of the complaint that there was a misrepresentation. The case, I think, stands on the other two counts of the complaint; it stands on the chattel mortgage, pure and simple. 10

Mr. Reed. The only other thing that then remains in the complaint is the charge of trespass.

Mr. Bradner. And trover.

Mr. Reed. And trover, trespass and trover. Now, if the plaintiff complains that these goods were taken by the defendant, and your Honor thinks that it appears that the defendant knowingly took the goods, the fact that— 20

The Court. At this point there is evidence tending to show that the goods were taken and that the defendant took them.

Mr. Reed. If in January, 1916, after the alleged taking, the plaintiff acquiesced in the possession by the defendant of these goods and of the disposition made by the defendant of them, it seems to me that would be pertinent on the question whether there had been a wrongful taking. 30

The Court. I shall hear counsel, but it has seemed to me that, if you rely on an offer on that date of an alleged balance of \$26 and some cents as the balance of the account as shown on the books, which was tendered by the defendant and accepted by the plaintiff, that would amount to an accord and satisfaction; but you have not pleaded accord and satisfaction. 40

Anthony W. Schuler, direct.

Mr. Reed. No.

The Court. Is that an available defense?

10 *Mr. Reed.* Well, it would be available to show the acquiescence in what had been done by the defendant up to that time, notwithstanding the failure to plead accord and satisfaction.

The Court. It would be available, certainly, if your pleadings support it.

Mr. Reed. (After further argument.) I shall withdraw the offer for the time being and prove the books more fully by the bookkeeper, and prove the foreclosure of the chattel mortgage, and ask your Honor to permit me to offer the books again.

20 *The Court.* Take your own course.

By Mr. Reed.

Q Mr. Schuler, what disposition was made of these goods which you have been discussing and which you discussed with Mr. Mausert at this meeting of January 4, 1916? A What disposition was made of them?

Q Yes.

30 *Mr. Bradner.* I object to this question, if your Honor please. I think this is going into something that is not a part of the defense. All the defense is that there was a chattel mortgage and a sale under it, and this witness has already testified that he bought the goods in at that sale. What happened after that I do not think we are concerned with.

40 *The Court.* The question is probably introductory to proof of the foreclosure. I do not think the foreclosure can be proved

Daniel T. Lynch, direct.

except in more detail than by mere reference to it. The witness may answer the question, I think.

(Question read as follows: "Mr. Schuler, what disposition was made of these goods which you have been discussing and which you discussed with Mr. Mausert at this meeting of January 4, 1916.") 10

A Why, they were sold.

Q At what time and at what prices? A Why, at various times.

Q Who sold them? A Why, I did most of it myself.

Q Can you tell what goods you sold and for what prices?

Mr. Bradner. I object to this line of examination. I do not think this has anything to do with the foreclosure. 20

The Court. If there is a book record of it, the book had better be produced.

Mr. Reed. Well, the proof of these books I have been obliged to postpone until after calling Mr. Lynch to prove the foreclosure. Will your Honor permit me to withdraw this witness and call Mr. Lynch? 30

The Court. Yes.

DANIEL J. LYNCH sworn in behalf of defendant.

Direct examination by Mr. Reed.

Q Mr. Lynch, what official position do you hold? A Sergeant-at-arms of the Second District Court.

Q In the City of Newark? A In the City of Newark. 40

Daniel T. Lynch, direct.

Q For how long a time? A Twenty-four or twenty-five years.

Q I show you a paper purporting to be a certified copy of a chattel mortgage between Frederick W. Mausert and the Mutual Distributing Company (paper shown to witness).
10 Did you do anything in connection with that paper? A Yes, sir; I foreclosed and sold some goods and chattels.

Q You foreclosed? A Yes, sir.

Q When? A Saturday, July 26th.

Q (*By the Court.*) What year? A 1913.

Q (*By Mr. Reed.*) Well, just tell us what you did in your process of foreclosure? A I put up five notices, advertised the goods and chattels for sale on Saturday, July 26, 1913,
20 at nine o'clock in the forenoon, on the premises known as corner of Railroad avenue and Devon street, in the Town of Arlington.

Q And where did you post the notices? A That I can't recall; different parts of the town.

Q What sort of places were they, public or private? A Public places; yes, sir.

Q How many? A Five.

Q How long? A Five days before the
30 sale.

Q And what did you then do? A Went to the place and sold.

Q At what time and at what place? A At nine o'clock in the forenoon, at the corner of Railroad avenue and Devon street.

Q Was the sale public or private? A Public.

Q And what was the result? A I sold, I think, in bulk to this gentleman over here (indicating).
40

Daniel T. Lynch, direct.

Q That is, pointing to Mr. Schuler. For what amount? A Sold for \$600 to Mr.—Mr. Mausert, is it?

Q Well, whose handwriting is that (paper shown to witness)? A My handwriting. Mutual Distributing Company.

10

By the Court.

Q To whom? A Mutual Distributing Company.

Q You said something about Mr. Schuler. You mean he was the person that did the bidding? A He was the person that bid it in.

Q And you sold to the Mutual Distributing Company? A Yes, sir.

Q Did you give a bill of sale? A I can't recall now whether I did or not. Counsel usually draws the bill of sale and I execute it. I can't recall whether that was done or not.

20

Q Have you a memorandum of what the goods were which were sold? A Only in the chattel mortgage. The schedule in the chattel mortgage is what I go by.

Q This is a copy of your notice, is it Mr. Lynch (paper shown to witness)? A That is a copy of that there, yes.

30

Q The advertisement? A Yes, sir.

Q I observe you say, "and all other goods and chattels of every nature belonging to Frederick W. Mausert now or lately in said premises." Have you any present recollection as to what these other goods and chattels were? A No, I have not.

Q Or whether there were any of them? A No, I have not.

40

Daniel T. Lynch, direct.

By Mr. Reed.

Q Did you examine the goods or inventory then yourself? A No, I didn't check them off my list.

10 Q You just advertised what was in the chattel mortgage? A Advertised what was in the chattel mortgage.

Q You do not know whether all of the goods mentioned here were there or not, do you? A No.

Mr. Reed. I offer these in evidence. One is the certified copy of the chattel mortgage upon which he foreclosed.

Mr. Bradner. I object to it.

20 *By Mr. Bradner.*

Q Did you have the chattel mortgage, Mr. Lynch? A Yes, sir; I foreclosed the chattel mortgage.

Q This is the chattel mortgage, is it (paper shown to witness)? A That is a copy of the chattel mortgage.

Q Did you ever see the original chattel mortgage? A I can't say that I did.

30 *Mr. Bradner.* I object to those going in evidence. It is not a proper foreclosure. He did not see the original chattel mortgage.

The Court. Is not a certified copy of the chattel mortgage just as good?

Mr. Bradner. I do not think so.

40 *The Court.* I overrule the objection and shall receive the certified copy of the chattel mortgage.

Helen Marian Freeman, direct.

(The paper referred to is marked Ex. D. 5.)

Mr. Reed. I also offer in evidence a copy of the advertisement of sale.

(The paper referred to is marked Ex. D. 6.)

10

By the Court.

Q Mr. Lynch, did you see these goods? A Yes, sir.

Q Where were they? A They were in a barn or shed right in back of a saloon.

Q In Arlington? Yes, sir.

Q Do you know whose saloon, or don't you remember? A That I don't know, whose saloon it was.

20

Cross examination by Mr. Bradner.

Q Did you see Mr. Frederick Mausert at any time? A Not at that time, but I have met the gentleman.

Q Not at that time, though? A No.

Q Did you give him notice of any sort of this sale? A No.

Re-direct examination by Mr. Reed.

Q You gave public notice, I understand? A Public notice, yes sir.

30

HELEN MARIAN FREEMAN sworn in behalf of defendant.

Direct examination by Mr. Reed.

Q Miss Freeman, are you connected with the Mutual Distributing Company? A Yes.

Q For how long a time? A Why, about between ten and eleven years.

40

Helen Marian Freeman, direct.

Q What are your duties? A I am book-keeper and general head of the office.

Q I show you a ledger marked with a large figure on the back, "No. 3" (book shown to witness). At page 735 what does that contain?

10 A Why, that contains the goods that were sold that the Mutual Distributing Company took in chattel from F. W. Mausert, the sales that we made.

Q What period does that cover? A Where it began?

Q Yes, that account in ledger No. 3. A Why, it started in August, 1913.

By the Court.

Q What page is that? A Page 735.

20 Q August? A August.

Q What is the first date? A August 6th, the first sale that we made.

By Mr. Reed.

Q And when does that end? A In this ledger?

Q Yes. A March 19, 1914.

By the Court.

30 Q Is that the next date? A That is when it ended in this ledger, March 19, 1914. This ledger covers from August—

Q That is the extent of the account? A Yes, sir.

By Mr. Reed.

40 Q Where were the entries made after that date? A They were carried into what our certified accountant calls our locked ledger, or private ledger, of the Mutual Distributing Company.

Helen Marian Freeman, direct.

Q (*By the Court.*) Is that the small book that we have here? A That is the small book, page 225.

Q (*By Mr. Reed.*) And what are the items on page 225 of the small book? A Sales that we made on that same account, furniture that was sold. 10

Q What period does that cover? A From March, 1914, to August, 1914.

Q (*By the Court.*) Any particular date in August? A August 22d.

Q (*By Mr. Reed.*) Is that the last item? A That is the last sale.

Q The last sale that was made? A Yes, sir.

Q What book is that ledger transferred from? A Why, the sales-book. 20

By the Court.

Q They are both of them from the sales-book? A Well, the small ledger is not from the sales-book. When we first started our account we ran it in our sales-book as a regular sale. When our accountant came out he forbid us doing that; he said we were doing it incorrectly, and he made us enter our items as we got them as cash items for the goods sold. 30

Q Then the large ledger is based on the sales-book? A Yes, sir.

Q And the small ledger— A Is based on the cash-book.

Q It is a book of first entry, it is not? A Yes.

Q You say it is based on the cash-book? A It is based on the cash-book; we get the items in it in cash and we credit to the account.

Q Were the items that went into the sales-book and the large ledger also cash sales? A 40

Helen Marian Freeman, direct.

Yes, but we run it as a sales account, just as we run a merchandise sales account.

By Mr. Reed.

Q I show you a book that has a gray cover (book shown to witness). What is this? A
10 That is a sales-book.

Q And the items from this book were transferred to the— A To this book (indicating).

Q Book No. 3, page 735? A Yes.

Q Where is this cash-book that you refer to? A It is over there on the desk (indicating). There are two.

Q The items in the small ledger on page 225 are transferred from these two books, the cash-
20 books? A Yes.

Mr. Reed. I offer these in evidence.

Mr. Bradner. I object. I still do not see where the matter contained in these books is relevant to the issue that is raised by the defendant in this case. The evidence is that the defendant bought the goods at foreclosure sale for \$600, and what happened to the goods after that we are not interested in. That is all that he has pleaded.
30

The Court. These sales I understand to be sales made of the goods—

Mr. Bradner. To private persons.

The Court. —possession of which had been acquired by the defendant, the Mutual Distributing Company, by foreclosure of this mortgage.

40 *Mr. Reed.* Yes, sir.

Helen Marian Freeman, direct.

The Court. And this is an account of the subsequent sales. Mr. Bradner suggests that we have nothing to do in this case with the subsequent transactions, with what the company did with the goods after they had acquired them by foreclosure. What is your view about it, Mr. Reed. 10

Mr. Reed. My view is that it showed a ratification upon his part of the chattel mortgage and all that was done under it. Although it might not amount to an accord and satisfaction, it showed his acquiescence in what was done up to that date. These books were shown to him on January 4, 1916, and he acquiesced in whatever was done and the prices at which the goods were sold. It would bear on the question of damages, if there were any damages. 20

The Court. He not only assented, but took a check tendered to him as the balance up to that date.

Mr. Reed. Yes, sir.

The Court. The question in my mind is whether this is not an accord and satisfaction, which you ought to have pleaded, if you intended to rely on it. 30

(Counsel argue.)

The Court. This amounts to an accord and satisfaction, I think, and I do not think you have pleaded it. I do not think that is an available defense. So that, I think, we come back to the mortgage itself, whether it was due and properly foreclosed. If that is a complete bar to the plaintiff's suit, why, that ends the case in 40

Helen Marian Freeman, direct.

10 favor of the defendant. If, on the other hand, the proceedings under the foreclosure were irregular, then the foreclosure was inoperative to transfer the title, and that points towards a verdict for the plaintiff. I do not know that the particular question now under consideration is one that will raise the question that you have a right to put on the record. This discussion arose on the question of the offer of the books; this is a broad offer of the books for the purpose of showing all the sales from first to last. I do not think that those facts, if made to appear, would be relevant to this issue. Therefore I sustain the objection to the offer.

20 *Mr. Reed.* May I urge one other ground, so as to have the advantage of all the points of view from which I think it might be evidential?

The Court. Certainly.

30 *Mr. Reed.* The plaintiff claims that we took his goods and wrongfully detained them. That is one of the counts of this declaration. Now, as far as the goods which had then been sold, at the time, on January 4, 1916, in which he acquiesced, there would no longer be a wrongful detention. That would not be a question of accord and satisfaction, but acquiescence on his part in what had been done with those goods up to that time. In that point of view I think these books might be evidential, and I would like to suggest that ground also to your Honor.

40 *The Court.* That is, sales up to that time and not subsequent?

Anthony W. Schuler, direct.

Mr. Reed. Yes, sir.

The Court. What proportion of the sales was before that time?

Mr. Reed. I shall ask the witness.

Q What proportion of the sales were made up to that time? A Why, all of them; we sold nothing after that. 10

Mr. Reed. It appears from Mr. Schuler's testimony that not all of the goods had yet been disposed of.

By the Court.

Q Your books show nothing but sales? A No, sales and cash items.

Q Your books do not show what was on hand unsold? A No, it wouldn't show that. 20

The Court. I sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

CROSS EXAMINATION WAIVED.

ANTHONY W. SCHULER resumes the stand in behalf of the defendant. 30

Direct examination (continued) by Mr. Reed.

Q Mr. Schuler, I show you this schedule, Exhibit P. 2—

The Court. That is the chattel mortgage?

Mr. Reed. Yes, sir.

Q Which of those, if any, did you receive— which of those goods, if any (paper shown to witness)? A Why, those that we sold and 40

Anthony W. Schuler, direct.

those that we have received, according to our list; that is all we received.

Q (*By the Court.*) Did you receive all of these in the schedule? A Why, I don't think so.

10 *Mr. Reed.* Read it over.

Witness. We received the round top tables, the cane chairs, the oak chairs, folding chairs, large palms and small palms, hanging baskets, partition, roll-top desk, desk chair, combination gas range. Silverware, glassware and dishes. We received the dishes. We didn't receive any silverware or glassware. We received a searchlight.

20 *The Court.* Just mention what you did receive. Perhaps that would be the easiest way.

By Mr. Reed.

Q You say you did not receive any silver?
A No, sir.

Q And you did not receive any glassware?
A No, sir.

30 Q What else did you receive that you find on that schedule? A Why, there isn't anything on here that we didn't receive; we received mirrors and window shades and a coat rack, that is all.

Q (*By the Court.*) You received everything except the silver and glassware, so far as you now remember? A Yes, sir.

Q (*By Mr. Reed.*) Did you receive any liquor? A No, sir.

40 Q Is that on the schedule? A No, sir; there isn't any on there, anyway.

Anthony W. Schuler, direct.

Q That is not mentioned. Now, when you say you received them all, are you referring to those specifically mentioned or to those referred in the general clause? A I don't recall receiving 360 cane chairs. We received cane chairs. According to our list of what we sold and what we have got left, that shows exactly what we did receive. 10

The Court. The question refers to whether you received these goods that are mentioned or whether you had in mind this omnibus clause at the end. You had in mind specific items, I suppose, when you testified.

Mr. Reed. Yes.

Witness. No, we didn't receive all the goods and chattels belonging to Frederick Mausert. 20

Q (*By the Court.*) Are you able to say whether you received anything in addition to the items specifically mentioned? A No, sir; we didn't receive anything in addition to those mentioned.

Q (*By Mr. Reed.*) And of those items you did not receive the glassware— A The glassware and the silverware, no silverware nor glassware. 30

Q Now, this mortgage is made payable on demand at the office of the Mutual Distributing Company, in Newark. Did you make any demand? A No, I did not. I didn't know the address of Mr. Mausert; I didn't know where he was at that time.

Q When was he at the office of the Mutual Distributing Company, in Newark? A I didn't see him there until January 4, 1916. 40

Anthony W. Schuler, cross.

Cross examination by Mr. Bradner.

Q Mr. Schuler, did you give Mr. Mausert any notice of the foreclosure? A I didn't know where to find him to give him any notice.

The Court. Answer the question.

10 *Witness.* No, sir.

Q Did you make any attempt to find him? A I believe I inquired, and I couldn't find anybody who knew where he was.

Q Whom did you inquire of? A I think I inquired of Mr. Mausert's family.

Q When did you inquire of them? A Well, I think some time after he went away.

Q How long after he went away? A I can't just recall the time; a month or so after he
20 went away.

Q A month or so after he went away? A I think so; I don't know.

Q Do you know that the foreclosure took place a month after he went away? A I think it did, somewhere along a month or so afterwards.

Q Mr. Schuler, I show you this chattel mortgage, Exhibit P. 2; I show you that affidavit, "Anthony W. Schuler"—"Anthony W. Schuler,
30 being duly sworn, on his oath says that he is familiar with the making of the above mortgage." Were you present when the above mortgage was signed, Mr. Schuler (paper shown to witness)? A When Mr. Mausert signed it?

Q Yes. A No, sir.

Q Did you know when he was going to sign it? A I don't know as I did. That was left to our counsel, to draw the mortgage and—

Q Did you know where he was going to
40 sign it? A I did not.

Anthony W. Schuler, cross.

Q Did you know he was going to sign it?

A Well, I understood he was going to sign the mortgage, yes, sir.

Q How did you understand that he was going to sign it? A Because I was told that he wanted to give us a chattel mortgage.

Q Who told you that he wanted to give you a chattel mortgage? A Mr. George Mausert.

10

Q When did he tell you that? A I should judge on the 25th.

Q What time on the 25th? A I can't just recall the time.

Q Was it in the morning? A I don't think it was in the morning.

Q Was it in the afternoon? A It was some time after noon, I should judge.

20

Q That is the first that you knew? A That is the first I knew about Mr. Mausert getting out or anything else.

Q And yet you took this affidavit, that you were familiar with the making of this mortgage, and you did not know it was going to be made until after noon on the 25th of June, 1913? A I was as familiar as I could be with it, the same as I would be with any mortgage, I should judge. I knew he intended to give us the mortgage, because his brother told me so.

30

Q Did you know that Mr. Mausert had left town? A I understood that he had left town.

Q What do you mean by that? Didn't you know that he had left? A No, sir; I was told by Mr. Mausert that he had left town.

Q When did he tell you that? A On June 25th.

Q (*By the Court.*) You mean that you were told so by Mr. George Mausert? A Yes, sir.

40

Anthony W. Schuler, cross.

Q (*By Mr. Bradner.*) At the same time that he told you that Mr. Fred Mausert was going to make a mortgage? A He called me up and asked me—he told me that Fred had got out, and he wanted to know whether we would—Fred Mausert wanted to give us a bill of sale, or something, to secure our account, and I told
10 Mr. Mausert that I couldn't take it until I consulted with counsel, and I consulted with Mr. Reed, and Mr. Reed advised me to get a chattel mortgage to secure our account.

Q Was Mr. George Mausert a member of the Mutual Distributing Company at that time? A He was not a— What do you mean by "member"?

Q Was he a stockholder? A I guess he was
20 a stockholder.

Q Was he a director? A No, sir.

Q Did he have authority to make any agreements with Mr. Fred Mausert, or make a chattel mortgage? A No, sir; not for the Mutual Distributing Company, he did not.

Q Who gave the authority to Mr. George Mausert to get this mortgage? A I know nothing about that.

Q You do not know whether he had any
30 authority? A No, I don't know. Mr. George Mausert didn't give us that mortgage; Mr. Fred Mausert gave it.

Q Who got the mortgage signed? A I don't know. It was left in Mr. Reed's hands to get the mortgage, and what he done with it isn't up to me.

Q When did you first see the mortgage, Mr. Schuler? A Why, I should judge on the morning of the 26th, I think.
40

Anthony W. Schuler, cross.

Q When did you go to Arion Hall on the 25th? A When did I go there?

Q Yes. A I think some time in the afternoon.

Q Do you remember what time in the afternoon? A I couldn't quite tell you; no, sir.

Q Did you see my father there? A I don't remember seeing him there. 10

Q Were they taking the goods out when you were there? A Yes, they were taking the goods; they were taking partitions down and removing the goods when I was there; yes, sir.

Q Were you directing them to take the goods out? A No, sir; I had nothing to do with it.

Q (*By the Court.*) This was on what day? A The 25th day of June.

Q (*By Mr. Bradner.*) You were there when they were taking them out, though? A I was there for just a few minutes. 20

Q Do you know who gave the order to Job DeCamp to take them out? A I think Mr. George Mausert; yes, sir.

Q Do you know what time he gave that order? A I can't recall that, no.

Q When did you first know that the goods were going to be taken out? A About noon on the 25th day of June, I think. 30

Q Was the mortgage signed at that time? A Not that I recall. I don't know what time the mortgage was signed.

Q Had you seen Mr. Mausert at that time? A What Mausert?

Q Mr. George Mausert. A I believe I saw him on June 25th, at noon, about, at his place of business.

Q Is that the time he told you he was going to get a mortgage from his brother? A As I 40

Anthony W. Schuler, cross.

told you before, he said he could give us either a bill of sale or—

Q That was the time he first told you that?

A That was the time, about that time, yes. We got Mr. Reed, and Mr. Reed was down in Mr. Mausert's place, and he advised to get a
10 chattel mortgage to cover our account.

Q And at that time you knew that the goods were going to be taken out? A I knew they were going to be taken out, yes.

Q Did you know that the mortgage was not signed yet? A At that time, twelve o'clock, the mortgage hadn't been signed yet. We had nothing to do with taking out the goods; that was up to Mausert's brother.

Q Were not the goods ordered to be taken
20 to your place, in Arlington? A I guess they were.

Q Why were they taken there? A What was the question, why?

Q Why were they taken there? A To be stored there.

Q Why did you want to store them there? Wasn't there any room at the Mutual Distributing Company's place? A No, sir; we had no room to store any furniture there.

30 Q When you went to Arion Hall whom did you see there besides Mr. George Mausert? A Why, I saw a number of men that I didn't know; I saw Mrs. Briggs there; that is Mr. Fred Mausert's sister, or the sister of both Mauserts, of course. She was there; she seemed to have charge, packing up silverware, I guess, and table linen, and so forth. She was the one, as I understood, that had the keys to the place, by the order of Mr. Fred Mausert. He under-
40 stands that very well.

Anthony W. Schuler, cross.

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

Q Did you ask him to take any goods? A No, sir.

Q Pack up any goods? A No, sir.

Q Did Mr. George Mausert ask him to pack up any goods while you were there? A I don't know anything about that; I was only there just a few minutes. 10

Q When was the first time that you heard from Mr. Fred Mausert after the goods were taken out? A Why, I think the first time I heard from him, when he sent for the spot-light.

Q Mr. Bird came down? A Mr. Bird came down and wanted the spot-light. I think that was the first time; I don't recall him any time before that. 20

Q Had you sent him any notices or made any demands upon him before that time? A No, I didn't know where he was up until that time.

Q You say that Mr. George Mausert gave the order to DeCamp to remove the goods for the Mutual Distributing Company? A No, sir; he didn't give any orders for the Mutual Distributing Company; he had nothing to do with the Mutual Distributing Company. 30

Q Who paid the bill for the carting of these goods? A Why, we paid the bill, on the advice of Mr. Mausert. He said, "You have got enough goods there to pay that bill; it is up to you to pay it;" and we paid it. We thought we had goods enough to cover our account; that is why we paid it.

Q Do you know what became of the glass-ware? A I don't know; I think it went down to the Hotel Broad. 40

Anthony W. Schuler, cross.

Q Did you see it taken out of the place?

A No, sir; I only understood so.

Q There is one load here marked "One load," with no explanation. Do you know what was in that load? A I couldn't tell you.

Q There might have been glassware in it?

10 A Yes, there might have been glassware or silverware.

Q There might have been silverware? A Yes. You mean that went down to the Hotel Broad; is that what you mean?

Q It is receipted for by your agent. A No, sir; we got no silverware nor glassware.

Q You do not know what was in that load, do you? A I don't know what load you have reference to.

20 Q There is one load that has no indication of what was in it; all the others have marked on them what was in the load. A No, I don't know anything about it.

Q You do not know? A No.

Q It might have gone over there, and you not know anything about it? A I know it didn't go there, because I took stock of all the goods and it wasn't there.

30 Q When did you take stock? A Several occasions.

Q When was the first time? A Right after they got over there.

Q Where? A Where they were stored.

Q In Arlington? A Yes, sir.

Q In your place? A Yes, sir.

Q Was it the day after the goods were taken?

A No.

40 Q How many days after? A I can't tell you; I don't remember that.

Anthony W. Schuler, cross.

Q Did you receive any letters with reference to this case from my father? A We received one letter; I think it is dated—I don't just recall the time. I called him up and asked him to come down and look at our books, and he promised to do that and made an appointment, but didn't keep it.

10

Mr. Bradner. (To defendant's counsel.) Have you got that letter?

Mr. Reed. There it is (handing paper to plaintiff's counsel).

Q Is this the letter (paper shown to witness)? A Yes, sir; this is the letter.

Q What is the date of that letter? A September 20, 1916.

Q You did not answer except by phone? A I called him up on the phone, and he made an appointment what time to call and look over our books. I waited for him, I think, for a couple of hours, and he never came.

20

Q You never sent him any letter in reply to that, though? A No. I called him up, and he said he would come down, but he didn't come down, and after that you came down—I think it was you that came down and looked over the books, and you thought they were all right, I thought.

30

(By agreement of counsel, the paper referred to is offered in evidence and marked Ex. D. 6.)

Mr. Reed. This is a letter to the Mutual Distributing Company, from Frank E. Bradner, dated September 20, 1916.

Q Mr. Schuler, did you know why Mr. Mauser went to New York? A Why, I don't

40

Anthony W. Schuler, cross.

know any more that what George Mausert told me, that he understood there was a warrant out for his arrest, and he went around to his sister's house, a sister of Mrs. Briggs, and I told him—

10 Q Do you know anything about his business?

A In what way?

Q How it was conducted? A I understood that he ran a dance hall there.

Q Did you have any reason to believe that there was a warrant out for his arrest? A Yes, sir; that is, I believed what Mr. Mausert, his own brother, told me.

Q That is all? A Yes, that is all.

Q You did not make any other investigation?

20 A No, sir.

Q You did not know whether it was true or not? A Well, I believed Mr. Mausert; I thought that he was a man that—

Q Did you know how long Mr. Fred Mausert was going to stay away? A No.

Q He might have been back the next day, for all you knew? A He might have.

30 Q What did you want to get a chattel mortgage for? A To cover our account; we were glad to get it.

Q Was he not paying right along? A He had to pay in order to get more goods.

Q He paid every time that he got more goods? A He had to pay so that he could get more goods.

40 Q So that you had no other reason for getting a chattel mortgage? A I think that was a sufficient reason; that is, we were glad to get it to cover that account.

Anthony W. Schuler, re-direct.

Q If you did not know that he was not coming back, why did you take out the goods?

A We didn't take out the goods.

Q You took them into your possession, did you not? A They were received over at my place in Arlington; they were sent there by Mr. George Mausert.

10

Q Whom did you receive them for, for the Mutual Distributing Company? A I suppose so. We had a mortgage at that time, when they were sent over there.

Q You received them for the Mutual Distributing Company? A Yes.

Q Did you know you were going to get them? A Did I know we were going to get them?

Q You knew they were going to be sent there, did you not? A Yes, sir.

20

Q And you knew they were going to be sent there at noon on June 25th, did you not? A I knew about it some time in the afternoon; I don't know just what time it was.

Q But you knew it? A Mr. Mausert asked me whether I wouldn't store the goods over there, and I told him yes. I knew they were going to be sent there.

Q And you knew you were going to keep them for the Mutual Distributing Company, then, did you not? A Why, yes.

30

Re-direct examination by Mr. Reed.

Q Mr. Schuler, referring to this letter of September 20, 1916, Exhibit D. 6. What communication did you have before that time, if any, with respect to any claim by Mr. F. W. Mausert? A I had no communication whatever until I received this letter of Mr. Bradner's.

40

Charles Rosin, direct.

Q That is the first time? A That is the first time that we heard that there was any dissatisfaction in it, as these two letters that we have in evidence here from Mr. Fred Mausert will show.

10 Q This property that you received over there, these tables and chairs, and so on, did you show them to any one recently? A Yes, sir.

Q To whom? A To Mr. Rosin, of Reed & Company's auction house.

Q Was what you showed him any part of the property that had been covered by this chattel mortgage? A Yes, sir.

20 Q What was it you showed him? A Why, some tables that were still left, the window shades and dishes, gas range. I guess it was about all that was left.

CHARLES ROSIN, sworn in behalf of defendant.

Direct examination by Mr. Reed.

Q Mr. Rosin, in what business are you engaged? A Buying and selling new and second-hand furniture.

30 Q Where? A Corner of Arlington and Branford place, Newark.

Q For how long a time? A In that business?

Q Yes. A The past fifteen years.

Q And during that time have you made sales of any second-hand furniture? A During that time?

Q Yes. A We sell twice a week.

Q Second-hand? A Both new and second-hand.

40 Q Do you know Mr. Schuler? A Yes, sir.

Charles Rosin, direct.

Q Did you inspect any furniture with him recently? A Yes, sir.

Q Where? A At Arlington.

Q Of what did it consist? A Some chairs, round tables, a gas range and some white dishes.

Q And have you bought or sold any property of that kind? A Yes, sir. 10

Q Did you in the year 1913 buy or sell any property of that kind? A Well, I couldn't just state in the year 1913. We buy similar property right along.

Q What was the value of that property?

The Court. Please state again the date when you saw it, Mr. Rosin.

Witness. Last Monday.

Q What was the value of similar property in 1913? 20

Mr. Bradner. I object to that question, if your Honor please. There is nothing to show that he saw this particular property in 1913, and there is no connection between similar property and this property now and as it would have been in 1913. This property may have altered a good deal between now and 1913.

The Court. I think the question is too vague, Mr. Reed. 30

Mr. Reed. I shall try to make it more pointed.

Q What was in 1913 the value of second-hand furniture in good condition which had been in use from two and a half to three years, in ordinary usage?

Mr. Bradner. I object to the question.

The Court. Cannot you be more specific? What kind of furniture? 40

Charles Rosin, direct.

Mr. Reed. Well, we will say chairs, such chairs as you saw there.

The Court. What kind of chairs?

Q What sort of chairs were those that you saw there? A They were Vienna chairs.

10 Q What kind are they? A Well, they are an ordinary chair used in a barroom, or saloon.

By the Court.

Q Made of wood? A Yes, sir; they are made of cane, cane seats.

Q Cane seats? A Cane seats.

By Mr. Reed.

20 Q What was the value of those chairs at second-hand in 1913, in good condition?

Mr. Bradner. I object to that. I think that is too vague. That does not connect it with the chairs taken from the plaintiff's place in 1913. He has not shown how old they are. They might have been brand new at that time.

30 *The Court.* I think the question is objectionable. It does not sufficiently connect the witness's knowledge with the articles which it is desired to have him value. I sustain the objection.

(Counsel argue.)

The Court. If he has any knowledge derived from the opportunity of seeing them, which is available to you, you are at liberty to ask for it, of course.

Mr. Reed. Very well, I shall ask that.

40 Q What was the value of the goods that you saw, Mr. Rosin, taking them up particularly, the

Charles Rosin, direct.

chairs, tables and whatever other property there was?

Mr. Bradner. I object to that question unless he qualifies it as to the time.

The Court. That is all he can answer, the value of the things that he saw at the time he saw them. 10

Mr. Bradner. That would be in the year 1917, and these goods were taken in 1913.

The Court. That is all he can answer as to that. When Mr. Reed asks another question I shall have an opportunity to hear what it is. This is only a step. I think the witness may take the step.

By the Court.

Q What do you say as to the value of those things that you saw? Take, for instance, the tables. A As I saw them at that place? 20

Q Yes. A Why, they are worth \$2.50 apiece. The chairs that I saw were worth from fifty cents to a dollar apiece. The shades were of no value.

Q Window shades? A Window shades, old window shades. The dishes were worth about four cents apiece.

By Mr. Reed.

30

Q How about the gas range? A The gas range was worth \$2, in the condition it is in.

Q Were there any folding chairs? A The folding chairs I saw at the Catholic Institute, on New street. Mr. Schuler pointed them out to me.

By the Court.

Q What were they worth? A The single chairs are worth about fifty cents apiece. He 40

Charles Rosin, direct.

showed me chairs that were together, three or four in a seat, and they are worth about seventy-five cents apiece.

Q Three and four together? A Three and four together.

10 Q Connected, you mean? A Yes, sir. They are a folding chair, but they are in sections, three and four chairs in sections.

Q And they are worth how much? A Seventy-five cents apiece.

Q What did you see besides tables and chairs? A I was also pointed out some partition at the plant on Lafayette street, oak partition.

20 Q Oak partition? A Oak partition, what I have seen there. They are from—well, it would be worth anywheres from \$30 to \$40. It all depends on how bad some one wants a second-hand partition.

By Mr. Reed.

Q Is that a thing that is easy to dispose of?

A No, sir.

Q Did you see the safe?

The Court. The safe is not enumerated. Is the safe enumerated in the chattel mortgage?

30 *Mr. Reed.* Yes, "1 safe."

Mr. Bradner. Yes, sir.

Q (*By the Court.*) Did you see a safe? A I don't remember seeing a safe.

Q (*By Mr. Reed.*) Do you remember seeing hanging baskets? A No, sir.

Q Roller top desk? A I don't recall that.

Q Mirrors? A No.

40 Q Now, what is the difference in the value of property of the kind that you have described between now and the year 1913?

Charles Rosin, direct.

Mr. Bradner. I object. The property has probably deteriorated in the past four years, and the question that Mr. Reed asks has not covered any deterioration at all. Consequently, it would not be relevant.

The Court. Perhaps I do not get the same idea of the question. I thought the question was this: What was the comparative price of such property in 1913 and in 1917? Is that your idea? 10

Mr. Reed. That is my idea; yes, sir. Your Honor has expressed it better than the question that I asked, and I shall put it in that form, if you will permit me.

The Court. What kind of property, new property or second-hand property? 20

Mr. Reed. No, second-hand property, such as Mr. Rosin has been describing.

The Court. That is, you want to ask the witness to compare the market value of second-hand articles such as he saw, such as he was shown by Mr. Schuler lately, and the value of such articles in 1913?

Mr. Reed. Yes, sir.

The Court. That assumes that in both years they were second-hand. 30

Mr. Bradner. It also assumes that the articles such as he saw were articles second-hand plus four years lying in storage, or in usage, we do not know what, and if you say articles such as he saw now, the price of those articles in 1913, you are also assuming that the articles which he is trying to give the price of in 1913 have had four years usage. You must assume that. 40

Charles Rosin, direct.

The Court. Perhaps the expression "such as you saw," is not happy. My idea was the same kind of chairs and the same kind of tables, assuming them to be second-hand in 1913 and second-hand now, what would their comparative value be? I think that

10

Q Will you please answer that question? A They would be worth a little more now than they were in 1913.

Q What percentage of increase? A From twenty to twenty-five per cent.

Q What would the chairs such as those that you saw, second-hand, be worth in 1913? A Well, that I testified before, from fifty cents to one dollar.

20

Q Well, what would the difference in price depend on? A Today?

Q That change from fifty cents to one dollar. A The difference is, a chair with a cane out or that is burned or broken is less than a chair in first rate condition.

Q That is, a chair in first rate condition— A It would be worth one dollar, and so on down. It depends on the condition it is in.

30

Q What about the tables? A The tables the same thing. If the top is all scratched and nicked, it is worth less than a perfectly good table.

Q What would be the price of those chairs new? A Are you speaking of today or in 1913?

Q In 1913. A They were worth from \$21 to \$24 a dozen.

Q New? A New; yes, sir.

Q Is that cash or installments? A Well, not necessarily cash.

40

Charles Rosin, direct.

Q What about the tables? A The tables would cost \$4.50 apiece.

By the Court.

Q New? A New; yes, sir.

Q At that time? A Yes, sir.

By Mr. Reed.

10 01

Q You did not put any value on the window shades. Why not? A Well, they would be worth about seventy-five cents apiece when they were bought.

Q What? A Seventy-five cents apiece when they were bought; those that I have seen.

Q New? A New.

By the Court.

Q The question was what value you put on them now? A Second-hand window shades have no value; they don't fit, and the condition they were in, nobody would use them. 20 08

The Court. What is your idea about the window shades?

By Mr. Reed.

Q These shades that go up and down, is that your idea? A Yes, sir. There were about twenty-four or twenty-six shades, those that I have seen. 30 08

Q These dishes, you say, were worth five cents apiece? A Four cents apiece, the dishes that I saw over there; they cost about six cents apiece.

Q And they are worth four cents? A Yes.

Q What is the difference in value between now and 1913? A They would be a little better now; they would be about fifty per cent. higher now than they were then. 40 01

Charles Rosin, direct.

Q Is that the same as to second-hand? A Yes, sir.

10 *Juror No. 10.* I would like this gentleman to tell me what kind of shades they were, whether they were Holland shades, linen shades or cotton shades.

Witness. They were a Holland shade. I didn't examine it close. They were a second-hand shade; they were small ones.

Juror No. 10. Couldn't you tell by looking at them whether they were a Holland shade or a cotton shade or linen shade?

Witness. No, they weren't a linen shade, I am sure of that.

Juror No. 10. Were they a striped shade?

20 *Witness.* No, a plain color.

By Mr. Bradner.

Q Were they painted? A They were green, a plain color; I didn't see any paint; I just seen them in a window. There might have been some painting on them or printing on them.

Q You do not know whether they were water-proof or not, then? A No, I do not.

30 *By Mr. Reed.*

Q The gas range, you said, was worth \$2. Why do you place that value on it? A Why, that particular gas range, the condition it is in, it isn't worth any more than \$2.

Q (*By the Court.*) What would it have been worth new? A Why, in 1913, they cost \$16; they cost about \$20 today.

Q (*By Mr. Reed.*) What is the trouble now?
40 A Well, a gas range that has been used is of

Charles Rosin, cross.

very little value. I am testifying from what I know we get for similar ranges. We sell them mostly every week for what we can get for them.

Q Has there been an increase or decrease in folding chairs since 1913? A There is an increase in all merchandise.

Q What increase? A About twenty-five per cent. 10

Cross examination by Mr. Bradner.

Q You say you saw some dishes there? A Yes, sir.

Q Do you know how many dishes there were there? A There weren't very many.

Q Were they in a barrel? A No, they were setting on the floor. They were pointed out to me. 20

Q What kind of dishes? A Why, there were some vegetable dishes, some individual plates—an assorted lot of dishes.

Q Cups and saucers? A I haven't seen any cups and saucers.

Q These cane chairs—what do they call them, Vienna chairs? A Vienna chairs; yes, sir.

Q Are they imported? A Some of those over there were imported; yes, sir.

Q They are pretty valuable, are they not? A No, not any more valuable than a domestic chair. 30

Q Do they not cost more than a domestic chair? A No.

Q Are you positive of that? A Yes, sir. There is a domestic chair that costs more money than the Vienna chair.

Q Are you testifying to what you would pay for the goods? A That is what I sell them for. 40

Otto J. Karst, direct.

Q Are all these prices what you pay for the goods, these prices that you have given us? A No, that is what we sell them for.

OTTO J. KARST, sworn in behalf of defendant.

10 *Direct examination by Mr. Reed.*

Q Mr. Karst, are you connected with the Mutual Distributing Company? A Yes, sir.

Q As secretary? A Yes, sir.

Q For about how long a time? A About nine years.

Q I show you a pamphlet, or book (shown to witness). What is this? A The constitution and by-laws.

20 *Mr. Reed.* I want to offer that (handing book to defendant's counsel).

Mr. Bradner. What is this for?

Mr. Reed. It shows when the annual meeting is held.

30 *Mr. Bradner.* I object to this. I do not think there is anything here that has anything to do with this case, and I do not think this is a proper way to introduce the constitution and by-laws of a corporation. This printed book was probably printed within the last year. If he wants to introduce the constitution and by-laws, he can produce the original copy or a certified copy of it.

The Court. Do you wish to prove what the constitution and by-laws were at the time of the taking?

40 *Mr. Reed.* I wish to prove what they were in June, 1913; yes, sir.

Otto J. Karst, direct.

By the Court.

Q You have an official book containing a copy of the by-laws and constitution, I suppose? A I never saw it.

Q You never had occasion to refer to anything but this printed book? A That is all. 10

The Court. It would seem to me that there ought to be better proof than this little pamphlet, which is not accounted for in any way.

Mr. Reed. That I understand to be the one that they rely on; I think the witness said that it was. There are no constitution and by-laws which appear in the minutes, and the reference, they tell me, is to this pamphlet which they produce. 20

Q Have you examined the minutes to see whether there is any constitution or by-laws to be found there? A No, sir; the man that was secretary previous to me hadn't written it in the minutes.

Q He had not written it? A Not to my knowledge.

Q Have you ever seen the original minutes? A Some of them. 30

By Mr. Reed.

Q What is this book that I show you, Mr. Karst (shown to witness)? A Minutes of the meetings of the stockholders of the Mutual Distributing Company of Newark, New Jersey.

Q And when does it begin? A This begins June 19, 1907. 40

Otto J. Karst, direct.

By the Court.

Q 1907? A 1907. That is not the origin of the company.

Q That is not the origin of the company? A No, sir.

10 Q Have you any prior book? A There are some minutes. You will find it in the directors' minute-book.

Q (*By Mr. Reed.*) Is this the book that I show you (shown to witness)? A Yes, sir. There are some extracts from the minutes here, kept by the previous secretary. I have attached it to this book here.

20 Q (*By the Court.*) In this book that you have do you find any reference to the constitution and by-laws? A Do you want me to look it over?

The Court. Yes. What do you want to show, Mr. Reed?

Mr. Reed. I want to show the time set for the holding of the annual meeting.

Mr. Bradner. I do not see what that has got to do with the case.

30 *The Court.* Perhaps we can get at it another way.

Q How long have you been secretary? A Since June, 1907.

Q Do you know when during the last ten years the annual meeting has been held? A Every third Wednesday in June.

Q That has been the practice? A Yes, sir.

Q For the last ten years? A Yes, since I am secretary.

40 *The Court.* That is some evidence of what the requirement was.

Mabel Irene Gilman, direct.

By Mr. Reed.

Q During those ten years what have been recognized as the by-laws of the company? A The contents of this pamphlet (indicating).

Q Has there been any other used or recognized? A There was an original constitution and by-laws drawn, but I don't remember ever seeing it. 10

Q During that ten years was there any other set of by-laws used than those? A No, sir.

Witness. I don't find it in there, your Honor.

Q You say your examination of the minutes of the directors and stockholders does not disclose any other? A No, sir.

Mr. Reed. I renew the offer of that. 20

Mr. Bradner. I still object.

The Court. I think it is objectionable. I sustain the objection.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

CROSS EXAMINATION WAIVED.

30

MABEL IRENE GILMAN, sworn in behalf of defendant.

Direct examination by Mr. Reed.

Q Miss Gilman, are you connected with the Mutual Distributing Company? A I am.

Q For how long a time? A For seven years the coming November.

Q And in what capacity? A Why, at present I am bookkeeper. 40

Mabel Irene Gilman, direct.

Q What were you in 1913? A I was assistant bookkeeper.

Q Do you know Mr. Frederick W. Mausert, the plaintiff? A I do.

Q When did you see him? A Early in January, 1916.

10 Q Where? A At the office of the Mutual Distributing Company.

Q Tell me what occurred there.

Mr. Bradner. I object to this testimony. I do not see that this has anything to do with the defense as alleged by the defendant in the pleadings. What Mr. Mausert did in January, 1916, has nothing to do with the chattel mortgage or its foreclosure.

20 *The Court.* It is impossible for the Court to say that Mr. Mausert might not have said something at that time that would be competent. I shall overrule the objection as at present made.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court. You may state what he said.

30 A Well, he came into the office, I should judge, between 12:30 and 1:30—

By the Court.

Q On what day was that? A I wouldn't say what day it was; I know it was early in January; I wouldn't care to state the date.

40 Q 1916? A 1916. Mr. Schuler had gone to lunch; I was the only one in the office at the time, and in the course of conversation Mr. Mausert said to me when he leased the Arion Hall, on Washington street, it was with the intention of renting it out to various organizations and so-

Mabel Irene Gilman, direct.

cieties for, I imagine, as near as I can remember, social purposes, and that after—I don't know whether it was after the lease had been drawn, but that is what I understand—after the people would make these engagements for this hall they would find out that it had been constructed by non-union labor, and they would come and cancel the engagement, and to cover himself he had to turn it into a dance hall, and it was a losing game from the start. 10

Mr. Bradner. I move that that be struck out, all of it, your Honor. I do not see that it has any connection with the case at all.

The Court. Only as to the value of the business done there. I shall let it stand for the purpose of showing what the value of the business was. 20

By Mr. Reed.

Q Anything else? A I asked him if he had seen—no, I don't know whether I said, "Have you seen your brother, Mr. George Mausert?" or, "When did you see him?" I don't know just which way I stated that question; but he said, "No, I haven't seen him," and I think he said, "I don't intend to see him," but I wouldn't want it as a matter of record here that he used the word "intend," as far as that word goes, but that was the thought that was conveyed to my mind. 30

Q What else was said at the time? A Well, I don't know anything else that was said. I thought it was rather a heartless way to speak.

Mr. Reed. No, never mind.

The Court. Never mind that.

CROSS EXAMINATION WAIVED. 40

DEFENDANT RESTS.

Motion to Overrule Defense.

10 *Mr. Bradner.* I think this is the proper time to make this motion, if your Honor please. I desire to move now to overrule the defense, on the ground that, on their own case, they have shown that they made no demand for the payment of this debt, as called for by the chattel mortgage. The direct condition of the mortgage—

The Court. I am familiar with the provision of the mortgage.

20 *Mr. Bradner.* It shows that Mr. Mausert was to pay upon demand the sum of \$682. Mr. Schuler testified yesterday and today that he made no demand for this money, and made no attempt to make a demand, and the proof shows that the goods were being taken out even before the mortgage was made.

The Court. Mr. Schuler testified a little differently today. Perhaps I had something else in mind. What he said was about notice. He said he made some attempt to give notice by inquiry of the relatives and family of Mr. Mausert. But that was evidently after the foreclosure proceeding had been instituted.

30 *Mr. Bradner.* It was a month after the goods were taken.

The Court. Yes, I think so.

(Counsel argue.)

40 *The Court.* I should like to have an opportunity of examining these cases, and if you have something in rebuttal, so that the case, so far as the testimony goes, is not concluded, I shall take any testimony that you desire to adduce, and consider this question afterwards.

Alfred J. Hargan, direct.

ALFRED J. HARGAN, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Bradner.

Q Mr. Hargan, are you connected with the prosecutor's office? A I am a county detective attached to the prosecutor's office.

10

Q Were you holding that position in June, 1913? A I was.

Q Are you acquainted with Mr. Frederick William Mausert, the plaintiff? A I have known him by sight for several years.

Q Were you acquainted with his place of business in 1913? A Personally?

Q Did you know of it? A I knew where his place was.

Q Was there any warrant in your possession for his arrest at that time? A No.

20

Q In June, 1913? A No.

Q Did you know of any? A I did not.

Q Did you know of any complaints against his business or against him at that time?

Mr. Reed. I suppose, if this witness did not, it would not be material to show simply that this witness did not know it.

The Court. I shall take Mr. Hargan's testimony.

30

(Question read.)

A I did not.

Q To your knowledge, was the prosecutor's office after him for anything at that time? A Not to my knowledge.

CROSS EXAMINATION WAIVED.

40

Frederick W. Mausert, direct.

CHARLES O'GARA, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Bradner.

Q Mr. O'Gara, what is your business? A Lieutenant of police.

10 Q Are you acquainted with Mr. Frederick W. Mausert? A I am.

Q Were you acquainted with the business which he did at Arion Hall in 1913? A Yes, sir.

Q Have you ever been in that place? A Yes, sir.

Q Often? A Mostly every night in the week.

Q How was it run? A All right.

20 Q Anything illegal or improper about it? A No, sir.

Q You did not have any complaint of any sort against the way that Mr. Mausert ran his business? A No, sir; I did not.

CROSS EXAMINATION WAIVED.

FREDERICK W. MAUSERT, plaintiff, recalled in his own behalf in rebuttal.

30 *Direct examination by Mr. Bradner.*

Q Mr. Mausert, do you recall calling up Mr. George Mausert on the 24th of June? A No, sir.

Q Where were you on the 24th of June? A In New York City.

Q Did you communicate in any way with your brother? A No, sir; I did not.

40 Q When was the next time that you saw your brother? A He came to New York on Monday

Frederick W. Mausert, direct.

night following after the 24th; he came to my sister's home.

Q Is that the first time that you— A That I saw him to speak to him since that time.

Q Since the goods were taken out? A Yes, sir.

Q What did he tell you then? 10

Mr. Reed. I object to that, if your Honor please. I think that Mr. George Mausert does not appear to be the agent of the defendant, and what he told him on this occasion is not material.

The Court. Mr. George Mausert is not a party to the suit, and if you wanted to contradict anything that George Mausert said, the proper course was to lay a foundation by inquiring whether at a certain time and place he made a certain statement. 20

Mr. Bradner. That is what I wish to do, your Honor.

The Court. That is all you can do. All you can do now is to follow up the foundation by asking the witness, "Did Mr. George Mausert, at a certain time and place, say so and so?" specifying the words which you put to Mr. George Mausert and which he said that he had not used. 30

Mr. Bradner. I also wish to show the cause for the enmity between Mr. Fred Mausert and Mr. George Mausert, which Mr. George Mausert could not give any reason for.

The Court. It does not occur to me that we have any concern with that. If you wish to follow up the foundation by putting a specific question as to whether Mr. George 40

Frederick W. Mausert, direct.

Mausert made a certain statement, you may do that.

Q Did Mr. George Mausert tell you that the goods had been taken out? A Yes, sir.

10 Q When was the first time that you heard of this chattel mortgage?

Objected to as repetition.

The Court. You may ask the question.

(Question read.)

A When Raymond, his son, called on me, in New York, telling me to come to—

Mr. Reed. I object to what was said.

The Court. Never mind what he said when he called on you.

20 *Witness.* He called on me—

The Court. No, you have answered the question.

Q You first heard of it when Raymond called on you? A Yes. It was on Wednesday, the 24th of June, 1913.

Q The 25th? A The 25th, I should say, yes. He told me to come to Hoboken—

30 *The Court.* Never mind what he told you. I think you have already testified on that subject.

Mr. Bradner. Now, I should like to go into what Raymond Mausert told Frederick Mausert. Mr. George Mausert testified on the stand that he sent Raymond over there to get this mortgage executed for the Mutual Distributing Company. Raymond was an agent to get Fred's signature; he was the agent of the defendant. Now, I should like

40

Argument.

to go into the representations that Raymond made to Frederick Mausert.

Objected to on the ground that Raymond Mausert was not the agent of the defendant, and therefore the evidence would be hearsay.

At one o'clock, P. M., the court takes a recess of one hour. 10

AFTER RECESS.

(Counsel argue.)

The Court. I understand your offer is objected to on the ground that the agency is not shown.

Mr. Reed. Yes, sir.

The Court. I sustain the objection. 20

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court. The other matter relates to the question of demand.

The mortgage is peculiar in this: that the party of the first part, Frederick W. Mausert, agrees to pay to the party of the second part, the Mutual Distributing Company, on demand, at the office of the Mutual Distributing Company, in Newark, a certain sum. On whom is the demand to be made? On him, of course. But he was not in any way connected with the Mutual Distributing Company, except that he had a share of stock in it. Consequently, he was not in the way of being there. If it had read, "on demand at a certain bank," then the demand would have been made on the bank by the Mutual 30 40

Argument.

10 Distributing Company, and the bank would be the appointee of Mausert, to have money there ready to meet the demand. But here the Mutual Distributing Company is the person who makes the demand. How could it make it of itself? How could it address it to a person who was not bound to be there and who naturally would not be there? It seems to me that, in the effort to give a rational meaning to this condition, we should seek for a construction of the contract which is fair to both parties, which would give Mr. Mauser notice that a demand was made upon him and which would fix a place for payment. It does fix a place for payment—at the office of the Mutual Distributing Company. It fixes no time of payment. The demand is very important in a case of this kind.

20 In the case of *Ely v. Carnley*, 19 New York 496, Mr. Justice Grover, reading the opinion, said this: "The mortgage was payable on demand. No demand of payment had been made. In such a case the mortgagor does not lose his right to redeem without demand, or something equivalent thereto. In no case does the law dispense with a demand when a forfeiture will be incurred or a right lost upon an agreement like the one in question. Until a demand made, Bradley had the right to discharge the mortgage by payment." The lacking feature, the thing needed to make the demand a fair one, is something to make the time definite.

30 It seems to me that Mr. Mausert was entitled to a demand made upon him personally, specifying the time at which pay-
40

Frederick W. Mausert, direct.

ment was required to be made at the office of the Mutual Distributing Company. That would be fair to him. If he did not comply with that demand, he could not complain if he suffered a forfeiture; but until he knew not only where, but when, the demand was to be effective, I hardly see how he could meet it, unless, as Mr. Bradner suggested, by staying at the Mutual Distributing Company all through the business of every day and waiting for a demand to be made upon him, which, of course, is unreasonable. No demand was made, and no demand was attempted to be made. I think the demand was a necessary prerequisite to the foreclosure of this mortgage. 10

I shall make a ruling in conformity with that decision when the question presents itself in a concrete form, so that both sides may have an opportunity to consider it and the defendant may have an opportunity to except to it. 20

FREDERICK W. MAUSERT, plaintiff, resumes the stand in his own behalf in rebuttal.

Direct examination (continued) by Mr. Bradner.

Q Mr. Mausert, why was not this suit started sooner? 30

Mr. Reed. That, I think, calls for a conclusion, what the witness thinks is the reason. I object to it.

Mr. Bradner. The witness knows the reason.

Q Why did you not start this suit sooner?

The Court. (After argument.) It seems to me to be immaterial. 40

George E. Mausert, direct.

Cross examination by Mr. Reed.

Q Mr. Mausert, with whom did you leave the keys to your place in Newark?

Objected to as not proper cross examination.

10 (Question read.)

A Nobody.

(Question withdrawn.)

PLAINTIFF RESTS.

GEORGE E. MAUSERT recalled in behalf of defendant in sur-rebuttal.

Direct examination by Mr. Reed.

20 Q Mr. Mausert, you have testified yesterday as to what you told the plaintiff regarding the fact that there was a warrant out for his arrest. Upon what was that information based?

A A gentleman telling me about it. He came to my place and told me that there was a warrant out for his arrest.

Q What were the circumstances at that time?

30 A Why, there was a case going on against me at that time, and in that case his place was mentioned, which gave me a reason to believe that such was the case, that there was a warrant out for his arrest, from what I knew was mentioned in my own case.

Q Any further information? A Outside of that? No, there was not.

40 Q What was your belief with regard to the truth of the rumor that you heard? A I really believed that there was a warrant out for his arrest, and I immediately went to his house, or to my sister's house, where I thought I could

George E. Mausert, direct.

find him, to let him know about it, and took this gentleman with me that gave me that information, to have him tell it to him himself, so that there would be no question about me deceiving him, if he thought that I was trying to deceive him; I wanted this man to mention it to him himself.

10

Q Did you find him there? A I did not.

Q How did you obtain entrance to his place of business on the 25th? A The keys were in my sister's possession and she opened the door and let me in.

Q What had she to do with it? A Why, she saw my brother and gave him the information that there was a warrant out for his arrest.

CROSS EXAMINATION WAIVED.

20

Mr. Reed. If your Honor please, I should like to recall Mr. Schuler for a minute, with respect to the sale of the property by the Mutual Distributnig Company. I asked some questions with respect to that before, but your Honor ruled them out, I think. Now, in view of your Honor's present ruling, it may be important as to the prices that he received and the information he gave respecting them to Mr. Fred Mausert, the plaintiff. So that I shall ask him to take the stand again and ask him the question, and see what your Honor thinks about it.

30

Mr. Bradner. I shall object to those questions.

The Court. Let the witness take the stand, and we shall see what the questions are.

40

Anthony W. Schuler, direct.

ANTHONY W. SCHULER recalled in behalf of the defendant in sur-rebuttal.

Direct examination by Mr. Reed.

Q Mr. Schuler, you testified that you sold some of the property that came from Fred F. Mausert's place from time to time? A Yes, sir.

Q After the foreclosure sale? A Yes, sir.

Q What effort did you make to obtain the best prices for them?

Mr. Bradner. I object to this.

The Court. I suppose the question now is directed to the question merely of value. I think that it is proper to get all we can on the subject of value.

Q *Mr. Reed.* It bears on the question of value; yes, sir.

Q Can you give me a record of what you received for the property and what effort you made to obtain the best prices for them? A We advertised them in various papers from time to time.

Q Just what did you sell? A I have a list of them here, if that is what you want.

Q When did he make that list? A Why, at the same time that I made a copy of the list that you have got there.

Q And from where did you get the list? A It was taken from my books.

Q Which book? A The ledger, I should judge.

(Book shown to witness.)

Q *Witness.* This ledger No. 3, part of it was taken from this, and I guess there is something in the other ledger as well.

Anthony W. Schuler, direct.

Q Well, take up the ones that are there first. Those are the earliest items, are they not? A Yes, sir; there are some items here.

Q What sales were made and of what property?

The Court. And when?

Mr. Reed. Yes, and when? 10

The Court. And to whom?

A The first sale appears here on August 25th, to Joseph Michel.

Q (*By the Court.*) 1913? A 1913.

Q (*By Mr. Reed.*) What was it? A Twelve chairs— No, that is not the one. There was a sale of \$21 here, it says here. It is in the other book there—the items. This does not show the items here. 20

Q (*By the Court.*) The small ledger? A The small ledger. 20

Witness. (To the former witness, Miss Helen Marian Freeman.) What book is that in, Miss Freeman?

(The former witness, Helen Marian Freeman, says: "There are two parts to that. I believe there is a sale for \$19 and one for \$2.") 30

The Court. Take up one thing at a time. We are on the \$21 item. Can you explain that?

Witness. Here it is (referring to book). Here is one of \$21.

Mr. Reed. Page 196.

The Court. Page 196?

Witness. Yes, sir.

The Court. What book does that refer to, page 196 of what? 40

Anthony W. Schuler, direct.

Witness. Of the sales ledger there.

(Book handed to witness.)

Witness. 12 chairs and 2 tables, chairs at \$1.25 each, \$15, and 2 tables at \$3 each, \$6; total amount \$21.

10 Q Turn to the next item and tell us what that was.

The Court. When was that, August 25th?

Witness. That was August 25th.

Q Now, the next item. A August 30th, to Edward M. Baldwin, a sale of \$31.25; 25 chairs, at \$1.25 each; total, \$31.25. George V. Hoadley, 93 Chestnut street, Kearny, New Jersey, 24 chairs, \$1.25 each.

20 *By the Court.*

Q The date, please? A This was on October 9, 1913.

Q And the item? A 24 chairs, at \$1.25 each; 6 tables, at \$3 each; total, \$48. M. J. Owens, 552 South Orange avenue, city, 12 chairs at \$1.25 each; 3 tables, at \$3 each; total, \$24.

Q What is the date again? A On October 23d.

30 Q Still 1913? A Yes, sir. Achtel-Stetter, Broad street—

Q Give me the date first, please. A November 6, 1913. —65 chairs, \$1.25 each, \$81.25. November 7th, Achtel-Stetter, Broad street, Newark, again, page 331, 55 chairs, \$1 each, \$55.

Q These were private sales? A Yes, sir. December 1, 1913, Chris J. Schmidt, 3 chairs, 50 cents each; \$1.50 total. Mutual Distributing Company, December 1, 1913, partition, \$50; 6
40 chairs, \$1.25; total, \$57.50. The Young Men's

Anthony W. Schuler, direct.

Catholic Association, 76 New street, city, 162 sectional folding chairs, \$1 each, \$162; 20 single folding chairs, heavy, \$1 each, \$20; 100 single folding chairs, light, 50 cents each, \$50; a total of \$232. January 2, 1914, cash sale, 1 desk, \$15. That was a sale made to a party—I didn't know the party's name. I sold it myself for \$15 to a conductor on the Erie Railroad, the Greenwood Lake line. January 16th, to A. Schleer, 619 Bloomfield avenue, Montclair, New Jersey, 3 tables, \$3 each, \$9; 12 chairs, at \$1.25, \$15; a total of \$24. February 3d, Otto Stahl, 362 South Orange avenue, city, 20 chairs, \$1 each, \$20; 20 chairs at 85 cents each, \$17; a total of \$37. February 4th, Edward G. Cox, 257 Parker street, city, sent to the First Precinct station, 66 chairs at 90 cents each; it says here, "2 tables on memorandum;" total amount, \$59.40. That is the chairs. The tables were sent on memorandum. The next sale was made on February 9, 1914, Otto Stahl again, South Orange avenue, city, 5 tables, at \$2 each, \$10. On February 10th, Edward G. Cox, 257 Parker street, city, 2 tables, sent to First Precinct station, \$3.50 each, \$7. I think that is as far as we got in this book here. I think there is some more sales in that other book.

10

20

30

(Book handed to witness.)

Witness. March 2, 1914— (To the former witness Helen Marian Freeman:)
Would that be in this?

(The former witness Helen Marian Freeman says, "No, there are no more in that book.")

Witness. What book are they in?

40

Anthony W. Schuler, direct.

(The former witness Helen Marian Freeman says, "They are cash items; they are in the cash book.")

Mr. Reed. Have you any objection to Miss Freeman helping Mr. Schuler find the items?

10 *Mr. Bradner.* No, not a bit. I object to the items, though.

Mr. Reed. Go ahead and help him find them.

(The former witness Helen Marian Freeman indicates in book.)

Witness. A. W. Schuler, chairs—that is cash received for the chairs—\$22, March 2d; and March 2d again, Henry Klepp, a sale here of \$3.

20 Q (*By the Court.*) Can you tell us what the articles are? A Yes, I can tell from the order slips here.

(Papers handed to witness.)

Witness. These were 14 folding chairs, at 25 cents each. They were damaged chairs.

30 Q Which are you speaking of now, the \$22 or the \$3 item? A The \$22 item I am speaking of.

Q Folding chairs? A Yes. This says, "14 folding chairs, 25 cents each; 22 bent wood chairs, broken, 75 cents each." That is, the seats were all broken out; there were no seats in them at all; they were not salable; and I took them and had seats put in. 75 cents each, \$16.50.

40 Q How much were the folding chairs apiece? A 14 folding chairs, 25 cents each, \$3.50; 22 bent wood chairs, at 75 cents each, \$16.50,

Anthony W. Schuler, direct.

broken, and 1 round top table, damaged, \$2, making a total of \$22. Klepp, \$3 for oilcloth.

Q The same date? A Yes, sir. April 28th, Mr. Bird—that was Mr. Mausert's partner—spotlight, \$10. That is the \$10 that Mr. Mausert sent down his partner to get the spotlight. Then it says on April 30th, "Palms"—cash sale for palms, \$9. Here is a check. A check was received from Bamberger's for returned seats. We bought some seats there to repair the chairs, the broken seats, and we had to return them; they didn't fit. We got a balance of \$3 returned from Bamberger's. That was on May 6th. On May 16th, Lanehart Building Company, sale of safe, \$25. On May 22d, Mrs. A. Delancy Neill chairs, \$22.50. They were 20 chairs, at \$1.12½ each. The amount of the sale is \$22.50. That was Mrs. Delancy Neill, Asbury Park, New Jersey. That was on May 22d. June 8th, Charles Schied, sale, \$33; 12 tables, at \$2.75 each; the total amount is \$33. July 2d, F. Doyle, 14 kitchen chairs, 50 cents each, \$7; 10 iron bottom tables, \$2.75 each, \$27.50. The total here is \$34.50. George Collins, October 22d, 2 round top tables, \$2.75 each; total, \$5.50.

Q (*By Mr. Reed.*) What is the total?

Mr. Bradner. I do not think that is of any materiality in this case.

Q (*By the Court.*) Is this all, did you say?

A This is all the goods I have here in the book, yes.

The Court. I see no harm in getting the total. The witness can add it up or you can add it up yourself.

Mr. Reed. I thought it would be convenient if the testimony showed what the total was.

Anthony W. Schuler, direct.

Q (*By Mr. Reed.*) Have you the total? A Why, I have the total amount of the transactions here; that is \$868.40. That is, of course, expense and—

Q (*By the Court.*) No, the aggregate of these particular items. A I haven't that
10 added. Wait a moment. No, it is not added.

The Court. We will take your figures, Mr. Reed.

Mr. Reed. \$847.

The Court. Of these items?

Witness. Not of these items, is it? Yes, it is \$847.40. That is, for these items.

By Mr. Reed.

Q Can you tell what goods remain in your
20 possession? A Yes. You have the list there, I think, yourself.

Q Well, is this the paper that you refer to (paper shown to witness)? A Yes, sir.

Q I do not mean that. A That was made by one of our typewriters.

Q From what? A From a copy of mine.

Q Where did you make it? A I counted
30 the goods over there left on hand.

Q What did you do with your copy after that copy was made? A Why, I should judge it is at the office, or destroyed. This copy was made from that.

Q What did you do in connection with it? Did you compare it or— A Oh, yes.

Q Or did you do anything to assure yourself of it? A Yes, sir.

Q Will you tell me what remains there? A
40 There are 44 round top tables, 1 ticket counter, 1 closet, 1 gas range, 1 'phone booth—telephone

Anthony W. Schuler, direct.

booth—61 soup plates, 79 dinner plates, 92 sandwich plates, 10 saucers, 2 water pitchers, 39 vegetable dishes, 6 spice dishes, 9 coffee cups, small; 6 cream pitchers, 1 coat-rack, 24 window shades, 2 curtains.

Q Is that all? A That is all.

10

Q What goods did you receive other than those that you have testified you sold and those you have just testified remained? A None.

Q That is all you received? A Yes, sir.

Q Now, in giving the prices for which these articles were sold, in some instances the prices vary, I notice; I notice chairs in some instances you sold for 50 cents and less, and in other instances \$1.25. What caused the difference in the prices? A There was a difference in the prices owing to the defect in the goods. Some had the bottom entirely taken out, and some had holes burnt in with cigars, and some were damaged otherwise, and they were sold according to what we could get for them. In every case I have tried to get as much as I possibly could.

20

Q What is the value of those goods remaining?

30

Mr. Bradner. I object to that, your Honor. I do not think it is material as to the value in 1913, when they were taken.

The Court. As to what time was your inquiry?

Mr. Reed. I shall say in June, 1913.

Mr. Bradner. Mr. Schuler is not qualified as an expert on furniture in 1913.

40

Anthony W. Schuler, direct.

By the Court.

Q Do you know about furniture values? A Well, I have bought considerable chairs of that class; I have had considerable dealings with tables of that kind and know the value of them from time to time.

10 Q Do you feel competent to express an opinion? A Yes, sir; I do.

Q Well, you may do it. A Well, from a second-hand standpoint, my man told me that he had two second-hand dealers over there and they offered him \$1 apiece—

The Court. No, just in your opinion.

Witness. Well, from a second-hand standpoint, the second-hand dealers would allow us a dollar apiece for them.

20 Q (*By Mr. Reed.*) For the chairs? A For the tables. The ticket counter—I don't believe there was any value to that at all. It was just a round box that was built, I guess, by Mr. Mausert himself.

Q (*By the Court.*) 44 round tables, at \$1 apiece. A That is the value that was put on by a second-hand dealer.

30 Q Never mind what he told you, but, from your experience and knowledge, if you can tell us, you may do so. A I think probably we would be able to get \$1.50 for it.

Q Now you are going back to the ticket counter. A Probably 50 cents. The wall closet was a closet that was built to be up against a wall. Probably that was worth \$1 or \$1.50. The gas range, I should judge, was worth \$5. This second-hand dealer said that it was

40 worth only \$2.

Anthony W. Schuler, direct.

By Mr. Reed.

Q You say about \$5? A I should think it would be worth about \$5. The 'phone booth—I don't know whether there was any value on that; I don't know whether I have had any right to ship that over there or not.

10

Q Can you put a value on that. A No, I don't think there is any value to that, to speak of.

By the Court.

Q What do you know about crockery? A I don't know much about crockery, sir.

Q Tell us all you do know. A Only what I heard here this morning.

Q You need not tell us that. A Well, I don't know much about that, Judge; I can't put any value on that.

20

Q Well, is there any other article there that you know of? A No, these are all dishes now. Coat-rack. That is merely a board with some hooks screwed into it. The value, I should think, would be 25 or 50 cents. Window shades. I don't believe there is any value for them; they don't fit any windows. Two curtains. That is merely some red material; that doesn't amount to much.

30

By Mr. Reed.

Q Well, what value? A I should judge 50 cents, probably.

Q Where have these goods been since June, 1913? A Why, they were stored over there in this place.

Q (*By the Court.*) In Arlington? A In Arlington.

40

Anthony W. Schuler, direct.

Q (*By Mr. Reed.*) You spoke in your testimony this morning about an investigation that you made to learn Mr. Mausert's whereabouts, and I understand you to say it was about a month after the receipt of the chattel mortgage. I wish you would tell me, if you recall, whether that investigation was made before or after the proceedings to foreclose the chattel mortgage?
 10 A Why, I really can't tell you that, Mr. Reed. I know that I inquired about him, but I can't tell you just exactly the time.

Juror No. 12. Your Honor, I would like to know what was the object of attaching these goods in the County of Essex and moving them out of the county?

20 *Witness.* Why, just for the reason that we had storage room over there; we had a vacant place over there. When Mr. Mausert asked me whether we had a place to store them, I said, "We haven't got any place in Newark, but I have lots of room over in Arlington;" and he says, "All right, take them over there."

30 *Juror No. 12.* I also ask your Honor whether that was not an unusual proceeding, to remove the goods out of the county under those proceedings?

The Court. You mean after foreclosure?

Juror No. 12. At this time the mortgage had not been registered. They were moved over night. The mortgage wasn't registered until the following day, and the goods were delivered prior to that.

40 *Mr. Reed.* I think the juror is mistaken about that. They did not go over to Arlington until the 26th. The man from the

Anthony W. Schuler, direct.

Job DeCamp Company said that they stored them in their warehouse on the night of the 25th and took them over on the 26th. That is my recollection of the testimony.

Juror No. 12. Weren't they delivered on the morning of the 26th? The mortgage wasn't filed until pretty near noon. Isn't that the evidence? That is the way I understand it. 10

The Court. Counsel might state what their recollection is.

Mr. Bradner. That is right.

Mr. Reed. The testimony is that they were not taken over until the morning of the 26th.

The Court. From DeCamp's warehouse; is that it? 20

Mr. Reed. Yes, sir.

Mr. Bradner. The testimony is that they were left in the wagons over night and went over in the morning, and the mortgage was not recorded until two or three minutes to twelve on the morning of the 26th.

The Court. I understand the law to be that the mortgagor retains possession, except as to moving the goods out of the county. That is the decision in the case of *Finkel v. Lepkin*, 62 New Jersey Law 580, as I recall it. "A first mortgagee of chattels has no right until his mortgage debt is due to take from the mortgagor the possession of the chattels mortgaged, unless an attempt is made to remove the goods from the county." What the Court says is this: 30 40

George E. Mausert, direct

10 “After the due day of the Lepkin mortgage, if it was not paid, Finkel had the right to retain possession, so long as he did not attempt to remove the wagon out of the county.” In other words, the mortgagor, the man who is given the mortgage, which is unpaid, if there is a sale, nevertheless retains possession of the chattels, although he has apparently sold them, unless he attempts to remove the goods from the county, in which case the mortgagee can prevent him, because it gets them out of the jurisdiction.

Juror No. 5. I would like to ask who gave the order to Job DeCamp for the removal of the goods?

20 *Witness.* Mr. George Mausert.

Jurors No. 5. Was the order given orally or in writing?

Witness. I don't know; I don't know anything about that; I didn't give any order.

GEORGE E. MAUSERT recalled in behalf of defendant in sur-rebuttal.

30 *Mr. Reed.* Now you can ask your question.

By Juror No. 5.

Q Did you give the order to the Job DeCamp Company for the removal of these goods?

A Yes, sir.

Q Orally or in writing? A I gave it over the 'phone.

DEFENDANT RESTS.

Motion to Direct Verdict.

Mr. Reed. I ask your Honor to direct a verdict for the defendant.

The complaint contains three counts. The first count says: "That on or about the 25th of June, 1913, at Arion Hall, Washington street, Newark, the defendant through its agents wrongfully took said goods and chattels from the possession of the plaintiff, and has ever since wrongfully detained and still wrongfully detains the same, and has converted the same to his own use." 10

Now, it appears, to the contrary, that the defendant did not take the goods from the possession of the plaintiff. These goods were sent to the defendant by George Mausert, the brother of the plaintiff, who apparently gave authority to him to turn them over to the defendant. The defendant accepted them at his request, and stored them at his request until the foreclosure of the chattel mortgage. Consequently, I think it cannot be maintained that there was any wrongful taking or detention of the goods. It does not appear that there was any demand for the return of the goods, so that they could base a cause of action of detention on it. Therefore I think that the first count of the complaint has not been sustained. 20 30

Your Honor has ruled on the question of agency, so that I need not discuss that question.

The goods were received in Arlington on the 26th. In the meantime the chattel mortgage had been executed. Of course, the affidavit and the recording of the 40

Motion to Direct Verdict.

mortgage made no difference between the parties as to its validity. That would be simply to make the mortgage valid as against creditors. So that the time of the making of the affidavit and the time of the recording are immaterial.

10 The second count states that the plaintiff was in possession and carrying on business on the 25th day of June, and that on that day the defendant broke into Arion Hall and unlawfully and forcibly seized the goods and chattels. There is no proof that they broke into the hall and seized the goods and chattels, and consequently that count also fails.

20 I think your Honor has already dealt with the third count. The count alleges that the plaintiff was induced by the representations of the defendant to leave his place of business and stay away from there, and that the representations were false, and the plaintiff's business was thereby destroyed. There has been no evidence that there were any representations made by any agent of the defendant that would support that count.

30 Therefore, I think, the plaintiff has failed on each count, and I ask that the Court direct a verdict for the defendant.

The Court. The motion is denied.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Reed sums up for defendant.

Mr. Bradner sums up for plaintiff.

*Charge to Jury.***Charge to Jury.**

The Court charges the jury as follows:

Adams, *J.*:

Gentlemen of the Jury. It appears to me that the only question I can submit to you is the question of damages. 10

The difficulty that I have felt in this case from the first arises from the form of the chattel mortgage itself, which says that if Mr. Mausert "shall well and truly pay to the Mutual Distributing Company, on demand at the office of the Mutual Distributing Company, the sum of \$682.88, these presents shall be void." Otherwise, of course, the presents are not to be void. The mortgage left the possession of the property in Mr. Mausert. It left the right of enforcing the mortgage in the Mutual Distributing Company. The condition of the mortgage was that Mr. Mausert was entitled to have an opportunity to pay the debt of \$682.88, and so make void the mortgage, and what he was entitled to was a demand upon him for the payment of that money. The language of the mortgage is, "on demand at the office of the Mutual Distributing Company." My construction of that is that he was entitled to have a demand made upon him to pay the sum that he owed to the Mutual Distributing Company. By the terms of the mortgage it was to be paid at the office of the Mutual Distributing Company. But before his right could be terminated he was entitled to an opportunity to pay the debt, and that opportunity was to be afforded him by a demand to pay the debt, and until that demand was made 20 30 40

Charge to Jury.

the Mutual Distributing Company had no power or right to foreclose the mortgage. No demand was ever made, nor was any attempt ever made to make a demand, and, by the strict language of the instrument, I therefore consider that the foreclosure which was subsequently instituted was instituted prematurely, and that the foreclosure proceedings conferred no right to the possession of this property upon the Mutual Distributing Company and deprived Mr. Mausert of no right of possession.

Therefore, in my opinion, the only question for the jury to consider, the foreclosure having been legally inefficacious, is to determine what is the value of the goods that were taken from Mr. Mausert at the time when they were taken and to give a verdict for that amount.

I shall not go over the details of the case. You have attached to the complaint a list of the articles said to have been taken. You have, what is still better, attached to the mortgage a list of the articles covered by the mortgage. There is one general provision: "and all other goods and chattels of every nature belonging to the said Frederick Mausert." You will have to determine from the evidence just what goods were taken and what their value was, and for that amount, I think, under the facts as they are presented to the jury in this case, the plaintiff is entitled to a verdict.

So I find, as I am requested by the counsel for the plaintiff, that "If you find that the defendant made no demand for payment after the execution of the chattel mortgage, then you must find for the plaintiff." And as there is no evidence of any demand, but clear evidence that no demand was made, the result is

Exceptions to Charge.

that the only question of fact for the jury is the question as to what was the reasonable value of the articles taken at the time when they were taken, for which amount, with interest at six per cent. to this date, the plaintiff is entitled to your verdict.

(THE JURY RETIRES.)

10

Mr. Reed. Will your Honor note my objection for the purpose of appeal to what your Honor said in your charge respecting your direction of a verdict for the defendant, and that the only question was one of damages?

Exception noted as ground of appeal.

Mr. Reed. Also to what you said in your charge respecting the construction of the chattel mortgage, with particular reference to the clause requiring a demand?

20

Exception noted as ground of appeal.

Mr. Reed. And to what you said in your charge respecting the construction of the chattel mortgage, with particular reference to the clause requiring a demand?

Exception noted as ground of appeal.

30

Mr. Reed. And to what you said in your charge respecting the foreclosure of the mortgage, that it was premature?

Exception noted as ground of appeal.

Mr. Reed. And your direction of a verdict for the value of the goods taken?

Exception noted as ground of appeal.

Mr. Reed. And to your direction that the verdict be for the value of the goods taken at the time they were taken, with interest?

40

Exception noted as ground of appeal.

Exhibit P. 2.

EXHIBITS.

EXHIBIT P. 2.

KNOW ALL MEN BY THESE PRESENTS:

10 That I, FREDERICK W. MAUSERT, of the city of Newark, in the County of Essex, and State of New Jersey, party of the First Part, for securing the payment of the money herein mentioned, and in consideration of the sum of One Dollar to me duly paid by MUTUAL DISTRIBUTING COMPANY, a corporation of New Jersey, having its principal office in the city of Newark, in the County of Essex, and State of New Jersey, party of the Second Part, at or before the ensealing and delivery of
20 these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell, unto the said party of the Second Part, its successors and assigns, all the goods and chattels mentioned in the schedule hereunto annexed and now in Aeron Palm Garden, No. Washington Street, Newark, New Jersey.

30 To have and to hold, all and singular the said goods and chattels above bargained and sold or intended so to be, unto the said party of the Second Part its successors and assigns, forever. And I the said party of the First Part, for myself, my heirs, executors and administrators, all and singular the said goods and chattels above bargained and sold, unto the said party of the Second Part, its successors and assigns, against me the said party of the First Part, and against all and every person or persons whomsoever shall and will warrant and
40 forever defend,

Exhibit P. 2.

Upon Condition, that if I the said party of
 the First Part, shall and do well and truly
 pay unto the said party of the Second Part, its
 successors and assigns, on demand, at the office
 of said Mutual Distributing Company, in New-
 ark, N. J., the sum of SIX HUNDRED AND
 EIGHTY-TWO Dollars and Eighty-eight cents, 10
 then these presents shall be void. And I the
 said party of the First Part, for myself, my
 heirs, executors, administrators and assigns,
 do covenant and agree to and with the said
 party of the second part, its successors and
 assigns, that in case default shall be made
 in the payment of the said sum above men-
 tioned, or in case the said party of the First
 Part shall, at any time before the day of
 payment herein provided for, remove the said
 goods and chattels, or any of them, or permit 20
 or suffer any attachment or other process
 against property to be issued against me or
 permit or suffer any judgment to be entered
 up against me then the said sum of money
 herein mentioned shall become instantly due
 and payable, and then it shall and may be
 lawful for, and I the said party of the First
 Part do hereby authorize and empower the said
 party of the second part, its successors and 30
 assigns, with the aid and assistance of any per-
 son or persons, to enter dwelling-house, store
 and other premises, and such other place or
 places whatsoever in which the said goods
 and chattels, or any of them, are or may be
 placed and take and carry away the said goods
 and chattels, and to sell and dispose of the
 same for the best price they can obtain; and
 out of the money arising therefrom, to retain
 and pay the said sum above mentioned, and 40

Exhibit P. 2.

all charges touching the same, rendering the overplus (if any) unto me the said party of the First Part, my heirs, executors, administrators or assigns.

In Witness Whereof, I the said party of the First Part have hereunto set my hand and seal the Twenty-fifth day of June, in the year of our Lord One Thousand Nine Hundred and Thirteen.

FREDRIC WM. MAUSERT.

Signed, Sealed and Delivered
in the presence of

Form changed to suit corporate mortgagee and words "in Newark, N. J.," inserted all before execution.

CHARLES WM. KAPPES.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. }*ss.*

ANTHONY W. SCHULER being duly sworn on his oath says he is familiar with the making of the above mortgage and the facts set forth in the following affidavit and that he is the president of the mortgagee in the foregoing mortgage named, that the true consideration of said mortgage is as follows, viz: goods, wares and merchandise sold and delivered by the mortgagee to the mortgagor at the request of the mortgagor, the total sales price of which is the amount due as herein stated, to secure the payment of which amount this mortgage is given, and deponent further says that there is due on said mortgage the sum of Six hundred and eighty-two dollars and eighty-eight cents besides law-

Exhibit P. 2.

ful interest thereon from the twenty-fifth day
of June, nineteen hundred and thirteen,

ANTHONY W. SCHULER.

Sworn and subscribed this 26th
day of June A. D. 1913 before
me, at Newark, N. J.

10

GERTRUDE BEAVERS,
Notary Public
of New Jersey.

SCHEDULE.

The following in the Schedule referred to in
the foregoing mortgage:

	90 round top tables,	20
	360 cane chairs,	
	14 oak chairs,	
	4 large palms,	
	13 small palms.	
C. W. K.	2 Francis Connor upright pianos,	
	18 hanging baskets,	
C. W. K.	1 hall partition about 100 feet long,	
	1 roller top desk,	
	1 desk chair,	30
	1 combination gas range,	
	all dishes, silverware, glass- ware,	
	1 search light,	
	1 safe,	
	85 window shades,	
	4 mirrors,	
C. W. K.	22 four light gas fixtures,	
C. W. K.	14 single gas fixtures,	
	1 coat rack,	40

Exhibit P. 2.

and all other goods and chattels of every nature belonging to said Frederick W. Mausert now or lately in said premises.

FREDRIC WM. MAUSERT.

Witness,

10 CHARLES WM. KAPPES.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.

20 Be it Remembered, That on this Twenty-fifth day of June, in the year of our Lord One Thousand Nine Hundred and Thirteen, before me, the subscriber, a Master in Chancery of New Jersey personally appeared Frederick W. Mausert, who I am satisfied is the morgagor mentioned in the within Indenture, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

30 CHARLES WM. KAPPES,
Master in Chancery of N. J.

Exhibit D. 1.

MORTGAGE

On Goods and Chattels.

FREDERICK W. MAUSERT

TO

MUTUAL DISTRIBUTING COMPANY 10
(A corporation)

Dated, June 2, 1913.

Received in the Register's Office of the County of Essex, N. J., on the 26th day of June A. D., 1913 at 11:58 o'clock in the forenoon, and recorded in Book 295 of CHATTEL MORTGAGES for said County, on pages 249-251.

THOMAS P. ALWORTH,
Register. 20

EXHIBIT D. 1.

Mr. Schueler

Will you please let this Mr Geo Bird, have my spot light because I could used it very bad, and also let him know how my goods are getting along, he will be up to see me at Glens Falls N Y in a fews days, thank you for your trouble. 30

I remain,

F. WM. MAUSERT.

My Adress

No 17 Steward Ave
Glens Falls
N Y

c/o. W Lauer

40

Exhibit D. 2.

EXHIBIT D. 2.

The Home of Refined Vaudeville and Moving
Pictures

PARK THEATRE

BIRD AND MAUSERT

10 Owners and Managers

Glens Falls

Phone, 1115

Premier Playhouse

Glens Falls, N. Y. April 27th 1914

Mr Schuler

Please let Mr. Bird have spot lite for \$10.00,
will sell gas range for 18 or 20 dollars it cost
me 49 dollars.

20 Thanking you for your trouble

I remain as ever

F W MAUSERT

P S. Give Mr Bird all particulars about my
goods so I will know just how things are.

P S. Mr. Schuler make out a full statement
of the goods I used. I have on hand all receed
bill from you.

30

40

Exhibits D. 3, D. 4 and D. 5.

EXHIBIT D. 3.

\$26.53

MUTUAL DISTRIBUTING COMPANY

Wholesalers and Importers of
Wines and Liquors

Newark, N. J., January 4, 1916

10

Pay to the order of F. W. Mausert

Twenty Six Dollars Fifty Three Cents.

A. W. SCHULER, President

JOSEPH HARBURGER, Treasurer

To The Essex County National Bank,

Newark, N. J.

55-4

No. 8989

Endorsed:

F W MAUSERT

Pay Essex County Nat'l Bank,

20

Newark, N. J. or order,

Mutual Distributing Co.

EXHIBIT D. 4.

May 1, 1914.

Mr. F. W. Mausert.

Glen Falls, N. Y.

Dear Sir:—

As per your request enclosed please find statement of your account. 30

We still have on hand about 65 tables, Gas Range, Safe and twenty cane bottom chairs. Of course there will no doubt be a little more expense which will be accounted for later.

Yours truly,

MUTUAL DISTRIBUTING CO.

Per.

Exhibit D. 5. is a certified copy of chattel mortgage already printed as Exhibit P. 2 on pages 182 to 127. 40

Exhibit D. 6.

EXHIBIT D. 6.

FRANK E. BRADNER
Counsellor at Law
Essex Building
Newark, N. J.

10

Sept. 20, 1916.

Mutual Distributing Co.,
55 Lafayette St., City.

Gentlemen:—

In the latter part of June 1913, the place of
business of Frederick W. Mausert, known as
Arion Hall, on Washington St., in this City, was
entered by some persons and all his personal
property, consisting of furniture, glassware,
china, crockery, stock of liquors, movable fix-
tures and partitions, electric fans, table linen,
silverware and numerous other things, were re-
moved.

20

My information is, that these articles were
taken to your place of business and were dis-
posed of by you. This was done without the
knowledge or consent of Mr. Mausert.

Among other things taken, was a certificate
of stock in your company. Mr. Mausert has
authorized me to take such action as may be
necessary to recover the value of the property
that was taken away, and also to recover the
damage done to him by being deprived of his
business.

30

This is a very important and serious mat-
ter, and before taking any action I would like
to see some representative of your Company.

Yours truly,

FRANK E. BRADNER.

40

Exhibit D. 6.

EXHIBIT D. 6.

CHATTEL MORTGAGE SALE.

Take Notice, That by virtue of a Chattel Mortgage executed by Frederick W. Mausert, To Mutual Distributing Company, bearing date June-26th, 1913, and recorded in Book No. 10 of Chattel Mortgage in the Register's office of the County of Essex and State of New Jersey, and upon which default in payment has been made, I shall sell the property therein mentioned described as follows:, viz.;

Ninety Round Top Tables—Three Hundred And Sixty Cane Chairs—Three Hundred And Ten Folding Chairs—Fourteen Oak Chairs—Four Large Palms—Thirteen Small Palms—Eighteen Hanging Baskets—One Hall Partition About 20 One Hundred Feet Long—One Roll-Top Desk—One Desk Chair—One Combination Gas Range—All Dishes—Silverware—Glassware—One Search-Light—One Safe—Eighty-Five Window Shades—Four Mirrors—One Coat Rack—And All Other Goods And Chattels Of Every Nature Belonging To Said Frederick W. Mausert, Now Or Lately In Said Premises,

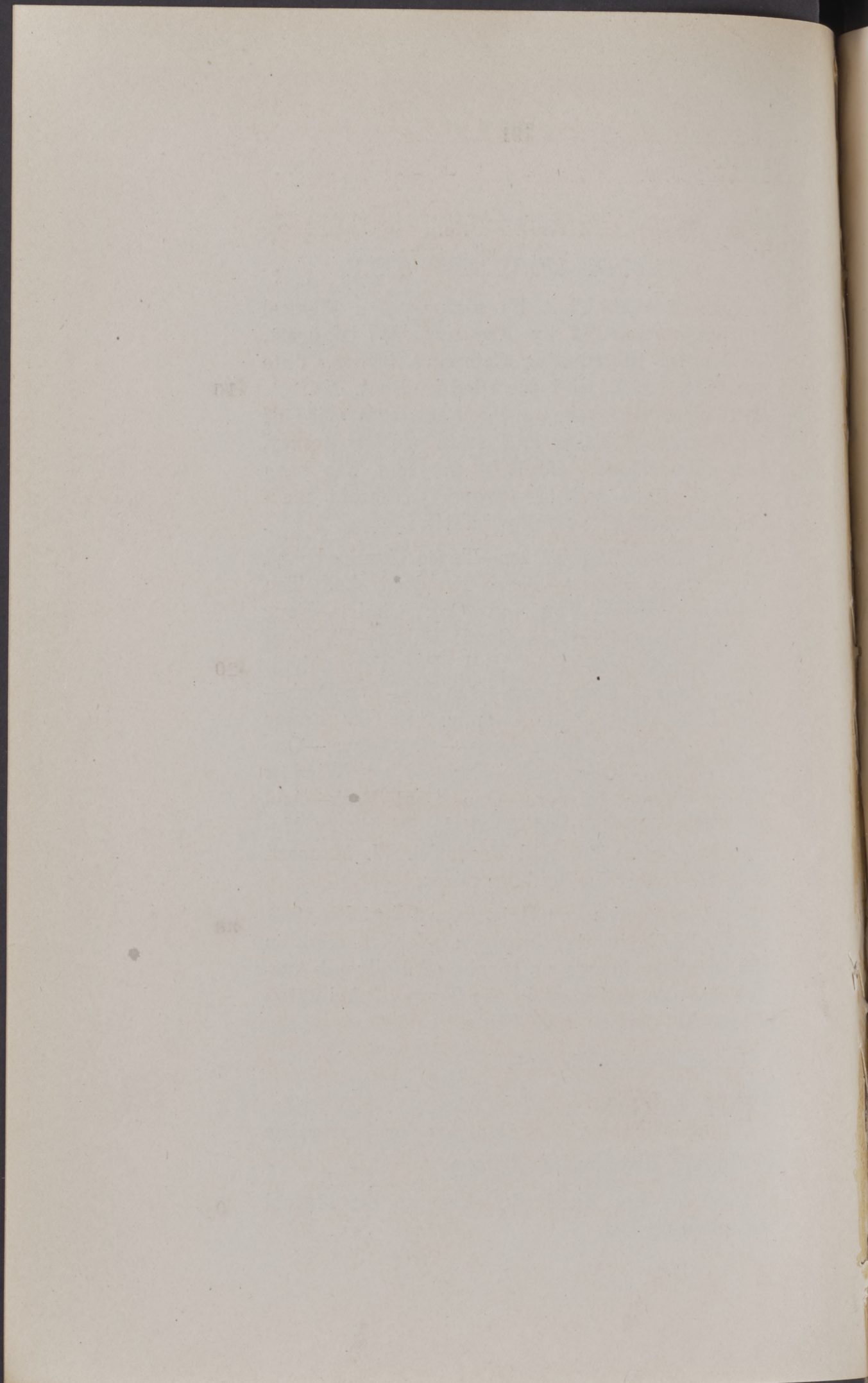
at Public Auction, on Saturday, July 26th 1913, at 9 o'clock in the forenoon of that day, on the premises known as corner of Railroad Avenue and Devon Street in the Town of Arlington aforesaid County and State. 30

Dated, July 19th 1913.

DANIEL J. LYNCH.

Attorney for Mortgagee
Mutual Distributing Company.

Sold for Six Hundred Dollars to the Mutual 40
Distributing Co.



New Jersey Court of Errors and Appeals

FREDERICK W. MAUSERT, <i>Plaintiff-Respondent,</i>	} <i>Action at Law.</i>
<i>vs.</i>	
MUTUAL DISTRIBUTING COM- PANY, <i>Defendant-Appellant.</i>	

Brief for Appellant.

Statement of Case.

This is an action brought to recover damages for the alleged breaking and entering of plaintiff's place of business, known as Arion Palm Garden, on Washington street, Newark, on June 25, 1913, and the removal therefrom of certain personal property by the defendant.

The complaint contains three counts. (State of the case, page 7.)

FIRST COUNT: On June 25, 1913, plaintiff owned goods to the value of \$7,556.42; defendant, through its agents, wrongfully took said goods and chattels and has since detained and converted the same.

SECOND COUNT: On June 25, 1913, plaintiff was proprietor of a saloon and dance hall; defendant broke into said hall, seized and carried away goods and belongings of the plaintiff valued at \$7,556.42.

THIRD COUNT: Defendant by its agents, by means of false representations that plaintiff's place of business was about to be raided by prosecutor, induced plaintiff to stay away from

his place of business, by reason whereof his business was destroyed.

The answer (state of the case, p. 11) denies truth of the allegations of the complaint and states that on June 25, 1913, plaintiff executed to defendant a chattel mortgage covering certain goods, to secure \$682.88, and the mortgage was foreclosed and the goods sold to pay amount due.

REPLY: (State of the case, p. 13) the goods were taken before the execution of the chattel mortgage; the execution of the chattel mortgage was induced by fraudulent representations.

The following circumstances appear in evidence:

Prior to June 25, 1913, plaintiff had been in business in Newark at the Arion Palm Gardens, conducting a saloon and dance hall (state of the case, p. 28, line 40, p. 29, line 1). He had certain furnishings in said place (p. 44, line 1, etc.). He was informed that a warrant was out for his arrest and left Newark. Plaintiff was indebted to defendant in the sum of \$682.22, for liquors purchased (page 96, line 17); and on June 24, 1913, George E. Mausert, a brother of plaintiff, suggested to plaintiff that he secure the payment of the amount so due by executing to defendant a chattel mortgage. Plaintiff consented to do so (page 86, line 20). George E. Mausert further advised plaintiff to have the property belonging to him then in the Arion Palm Gardens taken out of that place and stored so that the landlord could not secure a lien thereon for rent (page 87, line 16). On the afternoon of June 25, 1913, George E. Mausert packed up the property belonging to plaintiff, sent a part of it to a storeroom in

Arlington, belonging to Anthony W. Schuler, and part consisting of liquors, chinaware, silverware and linens, to his, George E. Mausert's, own place (page 87, line 25). George E. Mausert employed Job DeCamp & Sons (page 92, line 21) to move the goods taken to Arlington. These goods were packed and loaded on June 25, 1913 (page 18, lines 1 to 25), taken to the warehouse of Job DeCamp & Sons, where they remained over night and were delivered to the storehouse in Arlington on June 26, 1913. That part of the property taken by George E. Mausert was packed up and moved to his place of business by William Mockler, bartender for plaintiff (page 67, line 31, page 69, lines 12 to 20).

The chattel mortgage, Exhibit P. 2 (page 182), was drawn, sent to George E. Mausert at his suggestion, and he sent his son, Raymond Mausert, to plaintiff in order that it might be executed (page 86, line 28, etc.). Raymond Mausert found plaintiff in New York City (page 72, line 25) and went with him to Hoboken to the office of a lawyer on June 25, 1913, where at about five o'clock in the afternoon on that date the paper was executed (page 32, lines 3 to 25). The affidavit to the mortgage was made by Anthony W. Schuler, June 26, 1913, and the mortgage was recorded in the Essex Register's office on June 26, 1913, at 11:58 o'clock in the forenoon (page 187, line 17). The mortgage covers certain personal property of the defendant (page 185, schedule) then situated at the Arion Palm Gardens, Washington street, Newark, N. J. (page 182, line 26).

The mortgage is upon the condition that the plaintiff shall pay to the defendant "on demand, at the office of said Mutual Distributing Company, in Newark, N. J., the sum of \$682.88"

(page 183, line 1) and provides that in case default be made in the payment of the sum mentioned it shall be lawful for the defendant to sell the property covered (page 183, lines 16 and 36).

On June 25, 1913, plaintiff telephoned to William Mockler, his bartender, and was informed by him that his property had been removed from the Arion Palm Gardens (page 66, line 1, page 76, line 1).

Plaintiff remained in New York City for about two weeks after the execution of the mortgage and then went to Albany and from there to Glens Falls, N. Y., where he went into business (page 78, line 10, etc.). Defendant did not know the whereabouts of plaintiff (page 27, line 35), who had left town in fear of arrest (page 90, line 1), and who did not come to the office of the Mutual Distributing Company until January 4, 1916 (page 97, line 26) and was not heard from by the Mutual Distributing Company until April 20, 1914 (page 97, line 36, page 98, line 1). On July 26, 1913, the mortgage was foreclosed by a bailiff and so much of the property covered by it as had come into the possession of the defendant (pages 166, 167, 168, 169 and 170, line 38, page 171, lines 1 to 15) was sold at public sale (page 116, line 10, etc.), and purchased by mortgagee for \$600.00 (page 117, line 1). On April 20, 1914, plaintiff sent his partner (page 98, line 23) to defendant with a letter (Exhibit D. 1, page 87), asking for a spotlight which had been part of the property covered by the mortgage. The partner was told by the defendant that he could not have the spotlight unless he paid \$10.00 for it (page 99, line 26) and later the partner returned with a letter from plaintiff (Exhibit D,

2, page 188) and paid \$10.00 for the spotlight, which he took with him (page 100, line 9).

On May 1, 1914, at the request of the plaintiff, defendant sent a statement showing the amount of the goods which had been sold and the amount remaining unsold (page 106, line 1 and page 189, Exhibit D. 4). On January 4, 1916, plaintiff came to defendant's office and asked for a statement (page 100, line 26). He was shown the books of the defendant, a statement of his original indebtedness and a statement of the disposition which had been made of the property covered by the chattel mortgage to that date (page 101, line 22) and as it appeared that the defendant had received, over and above the amount of its bill against plaintiff and the expenses of foreclosure, the sum of \$26.83 (page 100, line 37, etc.), a check was drawn for the latter amount and delivered to plaintiff, who drew the money thereon (Exhibit D. 3, page 189). Although in nowise obligated to do so, defendant was willing to give plaintiff this balance because he was a stockholder in defendant company (page 100, line 37, page 101, line 1).

During the progress of the trial the court permitted the plaintiff to use first for the purpose of refreshing his memory as to what goods he had in his place of business on June 25, 1913 (page 35, line 33 and the following pages) and later for the purpose of refreshing his recollection as to the prices he had paid for these goods as a basis of value (page 47, line 25 to the following pages), a copy of a memorandum which he had made after he had learned of the removal of the property from his place of business (page 38, line 35), and two and a half years after he had made the purchase (page 49, line 30) of the goods in question.

The court also permitted the witness, Mockler, who had been plaintiff's barkeeper, and was in nowise connected with defendant, to relate a conversation between plaintiff and the witness (page 66, line 1) in the absence of defendant.

The trial court refused to admit plaintiff's books of account, which had been shown to plaintiff, and the items there shown form the basis for the check given by the defendant to plaintiff on January 4, 1916 (page 122, line 18). The court further refused a motion for non-suit, a motion to direct a verdict for the defendant, and directed a verdict in favor of the plaintiff, leaving to the jury only the question of the amount of damages.

The objections taken to the charge of the court trial on (page 4, line 12).

Defendant Was Entitled to a Non-Suit and Direction.

At the close of plaintiff's case no evidence had been produced which would justify a verdict of the plaintiff.

At the close of the whole case there was still no evidence to justify a verdict for plaintiff.

(See remarks of the Court, page 23, line 30.)

Use of Memorandum by Plaintiff.

The memorandum used by plaintiff was a typewritten copy of a memorandum which had been made by him from memory after the alleged cause of action arose. He had set down from memory the prices paid by him for the property in question, consisting of a great number of different kinds of personal property, the purchase of which had taken place

two and one-half or three years before the date of the memorandum (page 51, lines 3 to 20), and concerning which, independent of the memorandum, he had no recollection (page 50, line 20).

It is true that in some jurisdictions a witness is permitted to give the cost price of personal property, together with evidence of deterioration from usage, as an indication of the value, but I have found no case which has gone to the extent of permitting a witness who has forgotten, at the time that the testimony is given the prices paid, and without the memorandum would not be able to testify as to those prices, to use to refresh his memory, a memorandum made two and one-half or three years after such purchase.

He is thus testifying from a recollection of a recollection and not in any sense from an original recollection.

The Value of the Articles.

We insist that the evidence given by plaintiff in this case did not give any true indication of the value of the goods alleged to have been taken, which had been in use in the saloon and dance hall for a period of from two and one-half to three years at the time of the alleged taking.

The property the cost of which was the subject of the testimony by the plaintiff had not been shown to have been taken by the defendant or any one representing it, and in fact a great part of it never came into the hands of the defendant. The property which came into defendant's possession is detailed on pages 166, 167, 168, 169, 170 and 171. This is the only definite testimony on that subject and is not contradicted. It is apparent from this testi-

mony that the property in question was worn. In some cases, the seats were broken out of the chairs (page 168, line 33, and page 171, line 20). Furniture which had been used in a saloon and dance hall for two and one-half to three years is very apt to be damaged, yet the amount of the verdict shows that the jury must have awarded to plaintiff the full cost price of these articles or more, to arrive at the amount for which the verdict was rendered.

This will be evident from the statement marked "Schedule A" attached to this brief, in which is given a list of all the property covered by the mortgage which came unto the possession of defendant (see pages 166 to 171 of the state of the case), with the price paid for same as testified to by plaintiff (see pages 53-60 of the state of the case), so far as we have been able to identify the same, except the spotlight which was delivered to defendant on payment of \$10.00 (page 100, line 10). The total there shown as the cost price thereof is but \$2,968.95, the verdict \$5,004.88.

Defendant's Books of Accounts, Etc.

Defendant's books of account show the sum for which plaintiff was indebted to defendant for liquor purchased, at the time when the chattel mortgage was given, and also an account showing the amount received by defendant after the foreclosure from the sale of the various articles of property. These books are material for various reasons, but especially because they had been shown to plaintiff and discussed with him and form the basis for the delivery to an acceptance by him of the check, Exhibit D. 3.

(See state of the case, page 100, line 35, and page 101.)

At that time the mortgage had been foreclosed and the property purchased by the defendant which had been disposed of to the best advantage. Defendant had received an amount sufficient to reimburse it and a surplus of \$26.83. Plaintiff called and inquired how things stood, was shown the complete account in the books and accepted the check, Exhibit D. 3, without objection.

Exhibits D. 1, D. 2 and D. 3, together with the books of the defendant taken in connection with the fact that plaintiff examined these books and accepted the balance shown by them, make it seem incomprehensible that plaintiff could be awarded a verdict for the wrongful taking of these goods.

The Direction of Verdict for Plaintiff.

The trial court disregarded all questions of fact at issue and directed a verdict solely on the ground that the defendant had made no actual demand upon plaintiff before foreclosing the mortgage.

(See charge of the Court, state of the case, pages 179 and 180.)

The Court charged the jury that the only question for the jury to consider was the determination of the value of the goods taken from plaintiff at the time when they were taken and to give a verdict for that amount. No distinction was made between that part of the property which came into the possession of the defendant and that part of the property which was taken by George E. Mausert (page 87, line 30).

The chattel mortgage, Exhibit P. 2, was upon "the condition that if Frederick W. Mausert, the plaintiff, shall do well and truly pay unto

the said party of the second part, its successors, assigns, on demand, at the office of said Mutual Distributing Company, in Newark, New Jersey, the sum of \$682.88, then these presents shall be void."

The trial court construed this condition to mean that the plaintiff was entitled to have an actual demand made upon him to pay the debt, notwithstanding the fact that he did not come to the place appointed, and that in the absence of such a demand, the mortgage did not become due, and the foreclosure and sale of the property covered thereby was therefore inefficacious, and that the plaintiff was entitled to a verdict based on the value of the goods alleged to have been taken to be determined by the jury. The Court did not even distinguish between the goods included in the foreclosure and those which were taken by George E. Mausert.

The Measure of Damage.

Had the plaintiff been entitled to a direction of verdict the measure of damage adopted by the trial court was wrong. The Court charged the jury that "the only question of fact for the jury is the question as to what was the reasonable value of the articles taken at the time when they were taken, for which amount, with interest at six per cent. to this date, the plaintiff is entitled to your verdict" (page 181, lines 1-9). The jury were not permitted to decide what property was received by defendant and what by others than defendant, nor to take into consideration the amount secured by the mortgage.

The measure of damage could not have been greater than the excess of value of the prop-

erty taken by defendant, above the mortgage debt.

Warwick v. Hutchinson, 45 N. J. L., 61 at 66.

Not Within the Issue.

The issue as to the invalidity or validity of the foreclosure and sale under the chattel mortgage was not raised by the pleadings.

Excelsior Electric Company v. Sweet, 59 N. J. Law, 441.

Partridge v. Woodland Steamboat Co., 66 N. J. Law, 290.

Duel v. Mansfield Plumbing Co., 86 N. J. Law, 582.

The complaint (page 7, first count) is based upon the wrongful taking by the defendant of the goods of the plaintiff from Arion Hall, and the wrongful detention and conversion of the same. The second count upon the breaking into Arion Hall and forcible seizure of the goods of the plaintiff and appropriation thereof by the defendant. The third count upon the allegation that by fraudulent representation that the plaintiff's place was to be raided by the prosecutor of Essex County, the plaintiff was induced to leave Newark and thus the business of plaintiff was destroyed. The answer in denying the allegations of the complaint sets up that the plaintiff executed to defendant the mortgage in question (Exhibit P. 2, page 182) and the foreclosure thereof. The reply admits the execution of the chattel mortgage, but alleges that the goods the seizure whereof is complained of, were taken by the defendant before the execution of the chattel mortgage; that the execution of that mortgage was obtained by fraudulent representations. No claim is made

that the mortgage was not due or that it was not properly foreclosed, but the damage alleged is that arising from the wrongful seizure of the property in the first instance and before the execution of the mortgage, coupled with the claim that the execution was obtained through fraud. The theory upon which the trial judge directed a verdict was, therefore, entirely outside of the issue raised by the pleadings.

No Demand Could Be Made.

Plaintiff was not at the place appointed for the payment until two and one-half years after the foreclosure (state of the case, pages 78-79 and 80) and did not return to Newark after the execution of the chattel mortgage, but stayed in New York City for about two weeks, and then went to North Adams or Albany and finally to Glens Falls, New York. The next time the plaintiff went to the office of the Mutual Distributing Company was in January, 1916 (state of the case, page 100). Had any demand been necessary to make the mortgage due, the absence of the mortgagor would excuse it.

Leonard v. Olson, 99 Iowa 162; 35 L. R. A., 381.

9 *Corpus Juris*, 81.

No Demand Was Necessary

An obligation to pay money on demand is due without actual demand.

Larason v. Lambert, 12 N. J. L., 247.

Agens v. Agens, 50 N. J. Equity, 566-568.

DeRaimes v. DeRaimes, 70 N. J. L., 15.

Wheeler v. Warner, 47 N. Y., 519.

Farmers' National Bank v. Venner (Mass.), 48 N. E., 540.

The fact that the obligation, payable on demand, is payable at the particular place does not change the rule.

Haxton v. Bishop, 3 Wend., 15 at 20.

As between the obligor and the obligee no presentment at the place mentioned in the instrument is necessary, since it is due generally.

Weed v. Van Houten, 9 N. J. L., 189.

Adams v. Hackensack Improvement Co.,
44 N. J. L., 638.

Farmers' National Bank v. Venner, 75
N. E., 540.

Payson v. Whitcomb, 32 Mass., 212.

Even to charge an endorser, it is only necessary that the obligation be at the place designated on the day it falls due and some person representing the holder thereof authorized to accept payment.

Hoffman's v. Hollingsworth, 37 N. E., 960.

Berkshire Bank v. Jones, 6 Mass., 523.

Folger v. Chase, 35 Mass., 63.

Malden Bank v. Baldwin, 79 Mass., 155.

The statute of limitations begins to run against the holder of an obligation payable on demand from its date.

Larason v. Lambert, 12 N. J. L., 247.

Wright v. Payne, 62 Alabama, 340; 34 Atl.
Reporter, 24.

Clay v. McKeen, 69 N. H., 86; 36 Atlantic,
877.

That a bond conditioned for the payment of money only, on demand, is due immediately; that no actual demand is necessary, and that the statute of limitations runs from the date thereof will appear from the following cases:

Ervin v. Brooks, 111 N. C., 358; 16 S. E.,
240; 25 Cyc., 1102; 9 C. J., 81; 5 Cyc., 815.

Scudder v. Morris, 3 N. J., 1-419.

A mortgage, payable on demand, is due at once and may be foreclosed without actual demand.

Martin v. Stoddard, 127 N. Y., 61; 27 N. E., 285.

Ferris v. Spooner (N. Y.) 5 N. E., 773.

Kelabian v. Shinkle (Rhode Island) 59 Atl. Reporter, 743.

Southwick v. Hapgood, 64 Mass., 119.

Jones on Chattel Mortgages (fourth edition), Section 77, etc.

In *Security Trust and Safe Deposit Company v. The New Jersey Paper Board and Wall Paper Mfg. Company*, 57 Equity, 603, at 606, this Court said:

“it is settled in this State that an obligation for the payment of money at the specified place creates not a conditional liability dependent upon presentment and demand at that place, but an absolute liability to pay generally. In an action at law upon such an obligation, presentment for payment at the place named therein need neither be pleaded nor proved. The bonds in question would therefore have become due on June 5, 1905, without presentment at the banking house at which they were payable and thereafter an action at law could be maintained thereon, in like manner coupons attached to the bonds become due at the respective dates at which they were payable without presentation at the banking house at which they were also payable and thereafter an action could have been maintained thereof.

“In any such action the fact that the money had been provided at the designated place could be interposed, not as a complete, but as a partial defense.

“If the obligation of these coupons could have been enforced in an action at law it is obvious that their non-payment was a default in the payment of the interest such as was contemplated by, and contained within, the covenant in question. Had it appeared that money for the payment of these coupons had been provided at the banking house named so that upon presentation they would have been paid, another question would have been presented.”

It thus appears to have been settled in this State that a mortgage payable on demand is due at once, without demand, and that if payable at a particular place all that is necessary to constitute a presentment is to have the mortgage at that place with some one there authorized to accept payment; that no actual presentment is necessary; but that the fact that the mortgagor had deposited money at the place designated to meet the payment may be shown as constituting a tender, which in order to be a good defense must be pleaded and the money paid into court.

In *Ely v. Carnley*, 19 N. Y., 496, cited by the trial judge on page 160, line 22, of the state of the case, the facts were these:

In September, 1850, one Bradley had given to Mason a mortgage on chattels to secure the payment on demand of \$546.19 and interest. The mortgage was duly filed. In March, 1851, plaintiff recovered a judgment against Bradley. In August, 1851, the mortgage was refiled in the office of the register of New York, correct in all respects except a clerical error whereby the sum secured was stated to be \$646.19 instead of \$546.19. Held, that such error rendered the

mortgage void as against creditors of the mortgagor after the lapse of a year from the filing of a true copy in September, 1850.

“There having been no change in possession of the property, it is immaterial that by the terms of the mortgage the title to the property had become absolute in the mortgage when such incorrect copy was filed.”

The decision in that case with regard to necessity for demand is entirely at variance with the decision of the same court in

Martin v. Stoddard, 127 N. Y., 61-27; N. E., 285.

Payne v. Gardner, 29 N. Y., 146.

Gillett v. Balcom, 6 Barb., 371.

Wheeler v. Warner, 47 N. Y., 519.

Ferris v. Spooner, 5 N. E., 773.

and the cases in other States cited in this brief.

In *Wheeler v. Warner*, 47 N. Y., 519, the Court said:

“There is no divided opinion here or in England that, upon such a note (demand) with or without interest, an action may be maintained against the maker because it is due. No demand can be sued before it is due. No action will lie on any claim of any description arising upon a contract before it is due. To say that the suit is the demand is to repeat an unmeaning phrase as thus used which no number of repetitions can make sensible. A demand note is due forthwith and hence may be sued without demand.”

In *Ely v. Carnley*, *supra*, the exact wording of the condition of the mortgage there in ques-

tion is not given, and it is probable that some circumstance made it appear that it was intended that actual demand should be made.

In order to sustain the direction of the verdict in the case now under consideration it must be held that under the condition of the mortgage given by the plaintiff to defendant, before it could be foreclosed, it was necessary that the plaintiff go to the place where the defendant was (notwithstanding the fact that the mortgage provided that the payment to be made at the office of the defendant) and to make a demand upon him.

The fact that the plaintiff was not in the city of Newark, nor even in the State of New Jersey, and that defendant did not know where he was, was disregarded by the trial court.

The trial court evidently considered that the designation of the place was for the convenience of the mortgagor not of the mortgagee. If such were the law it is apparent that the mortgagor might avoid the consequence of a default indefinitely, by concealing himself or by moving from place to place.

The Court laid stress upon the fact that the defendant made no attempt to find the plaintiff in order to make the payment. I have found no case which would justify the conclusion that such effort is necessary. The cases sustain the opposite doctrine.

If a note is payable at a particular place, a presentment at that place is not absolutely necessary to sustain an action against the maker; it is for him to show in defense that he was there ready to pay.

Payson v. Whitcomb, 32 Mass., 212.

We insist that the foreclosure of chattel mortgage was in all respects legal and that defendant acquired title to the property sold thereunder.

The Plaintiff Gave Up Possession to Defendant.

Even assuming the contrary, the Court was not justified in directing a verdict for plaintiff, for while ordinarily mortgagor is entitled to possession of mortgaged property until default, there was evidence from which the jury might determine that plaintiff, through his brother and agent, voluntarily placed the property in the possession of plaintiff (page 87, lines 15 to 36). Such a procedure is entirely proper. It is only where the mortgage is not "accompanied by immediate delivery and followed by an actual and continued change of possession of the thing mortgaged" that recording is necessary.

Under these circumstances before he is entitled to recover the property or damages for its detention he must tender the amount secured by the mortgage. (*Jones on Pledges*, Sec. 571.)

Plaintiff Was Estopped.

There is still another circumstance which shows the direction of a verdict in favor of the plaintiff to have been error.

On January 4, 1916, plaintiff went to defendant and after inspecting the account showing what part of the property had been sold and the prices received therefore, he asked for and received from defendant the balance of receipts over the amount due on mortgage and expenses of foreclosure (page 100, line 30, page 101). While this did not amount to accord and satisfaction, he was then estopped from claiming damages for any irregularity in foreclosure

or for the taking of the property sold, for he acquiesced in the sale and shared in the proceeds without protest.

See case of *Albertson v. Sullivan*, which is apparently not reported, but is cited in New Jersey Digest (gg.) column 4884, under Estoppel-acquiescence.

It was then the duty of the Court to direct a verdict for defendant.

Martinez v. Runkle, 57 N. J. L., 111.

In any event there could be no justification for a direction of verdict for plaintiff.

Dickerson v. Erie, 85 N. J. L., 588.

Uvalde Asphalt Paving Co. v. Central Union Stock Yards Co., 84 N. J. L., 297.

It is respectfully submitted that the verdict and judgment thereon should be set aside and a new trial ordered or judgment given for defendant.

REED & REYNOLDS,
Of Counsel with Defendant-Appellant.

SCHEDULE A.

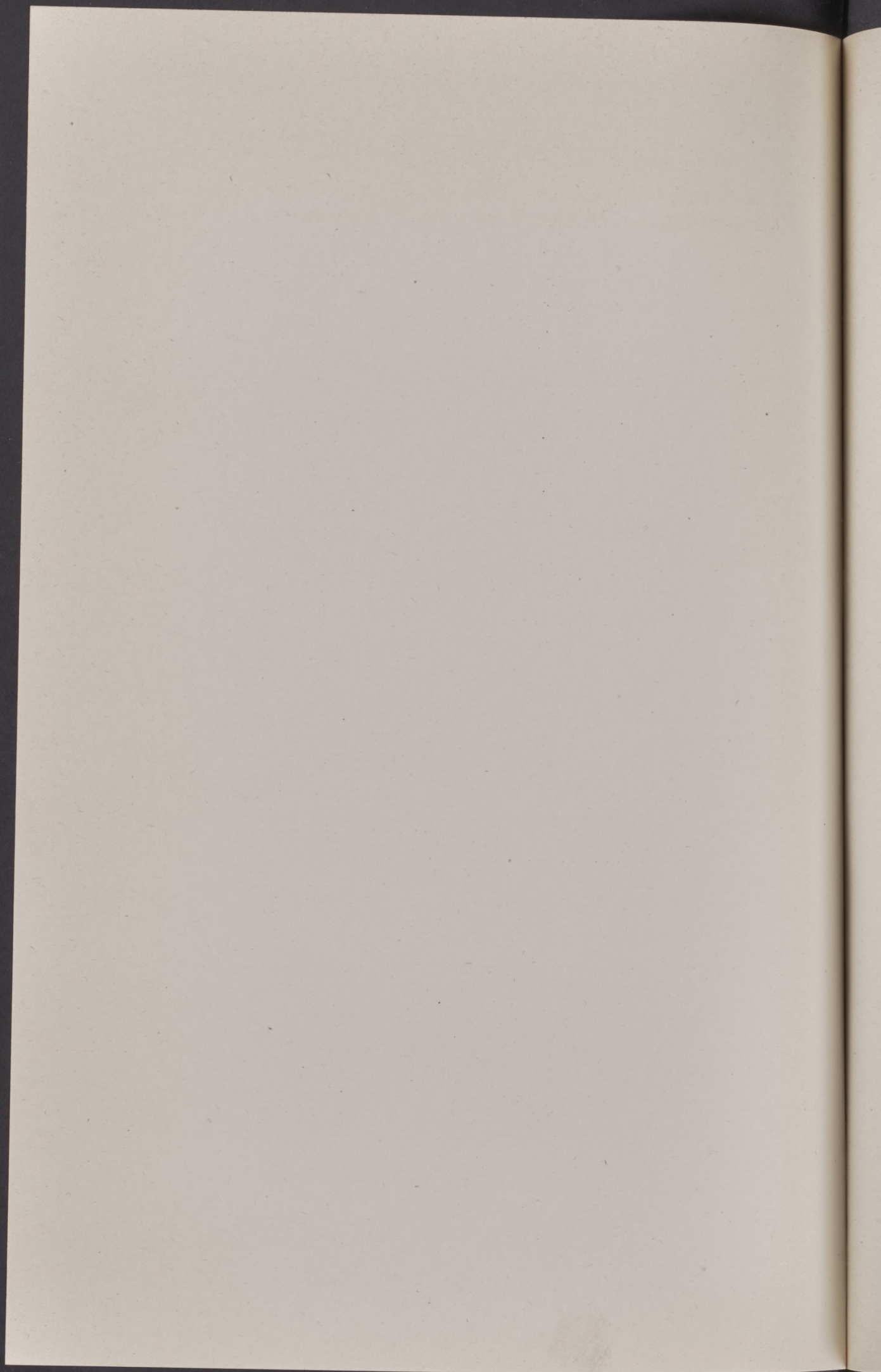
LIST OF GOODS RECEIVED BY DEFENDANT AND SOLD UNDER CHATTEL MORTGAGE.

	Price for which sold by Defendant.	Purchase price as testified to by Plaintiff.	
12 chairs @ 1.25....	15.00	1.75	21.00
2 tables @ 3.00....	6.00	7.50	15.00
25 chairs @ 1.25....	31.25	2.50	62.50
24 chairs @ 1.25....	30.00	2.50	60.00
6 tables @ 3.00....	18.00	7.50	45.00
12 chairs @ 1.25....	15.00	2.50	30.00
3 tables @ 3.00....	9.00	7.50	22.50
65 chairs @ 1.25....	81.25	2.50	162.50
55 chairs @ 1.00....	55.00	2.50	132.00
3 chairs @ .50....	1.50	2.50	7.50
partition	50.00	....	322.00
6 chairs @ 1.25....	7.50	2.50	15.00
162 chairs @ 1.00....	162.00	1.45	234.90
(folding)			
20 chairs @ 1.00....	20.00	2.50	50.00
(folding)			
100 chairs @ .50....	50.00	2.50	250.00
(folding)			
desk	15.00	....	35.00
3 tables @ 3.00....	9.00	7.50	22.50
12 chairs @ 1.25....	15.00	2.50	30.00
20 chairs @ 1.00....	20.00	2.50	50.00
20 chairs @ .85....	17.00	2.50	50.00
66 chairs @ .90....	59.40	2.50	165.00
5 tables @ 2.00....	10.00	7.50	37.50
2 tables @ 3.50....	7.00	7.50	15.00
14 folding			
chairs @ .25....	3.50	1.45	20.30
22 bent wood			
chairs @ .75....	16.50	2.50	55.00

1 round table	2.00	.....	7.50
oilcloth	3.00		3.00
spotlight	10.00	del'd to ptff.	10.00
safe	25.00		60.00
20 chairs @ 1.12½..	22.50	2.50	50.00
12 tables @ 2.75....	33.00	7.50	90.00
14 kitchen			
chairs @ .50....	7.00	2.50	35.00
10 iron bottom			
tables @ 2.75....	27.50	7.50	75.00
2 round top			
tables @ 2.75....	5.50	7.50	15.00
			<hr/>
			\$2,324.20

REMAINING UNSOLD.

44 round top tables	7.50	330.00
1 ticket counter, not included in demand.		
1 closet, not included.		
gas range		45.00
telephone booth, not included.		
61 soup plates .....	.10	6.10
79 dinner plates .....	.10	7.90
92 sandwich plates .....	.05	4.60
10 saucers .....	.10	1.00
2 water pitchers, not listed.		
39 vegetable dishes .....	.05	1.95
6 spice dishes .....	.05	.30
9 coffee cups .....	.10	.90
6 cream pitchers, not listed.		
1 cream pitcher, not listed.		
24 window shades		180.00
2 curtains		52.00
		<hr/>
		\$2,953.95



Specification of the Grounds of Appeal Relied Upon.

1. Refusal to grant a non-suit (State of the Case, page 83, line 28).

2. Refusal to direct a verdict for defendant (State of the Case, page 178, line 33).

3. The trial court improperly permitted the use of a memorandum made about three years after the purchase of the property specified therein to refresh the recollection of the plaintiff.

FIRST: As to what property was contained in his place of business (State of the Case, page 42, line 36).

SECOND: As to the prices paid for that property (State of the Case, page 53).

4. The trial court permitted the plaintiff to testify as to the prices he had paid for the property in question from a memorandum made by him about three years after the purchase thereof, notwithstanding the fact that aside from such memorandum the witness had no personal recollection of such prices (State of the Case, page 53 to page 60, page 48, line 28; page 51, line 3).

5. The following evidence was admitted (page 66, line 1):

Q What did you say to Mr. Mockler?

A Well, I told him I said, "Why they moved the stuff out"; he said, "Is that so?" I said, "Yes, sir."

Q What is that? A They moved the stuff out.

Q You told him that they had moved the stuff out? A Yes, sir.

Q When was that, Mr. Mockler? A That was the next day, 26th, I think it was, or the 25th, I don't know which.

Q It was on the next day after moving the stuff? A Yes, sir; the next day. (State of the Case, page 66, line 40.)

Q Whom did you tell him was moving it? A I told him the moving men was moving the stuff out.

6. The trial court refused to admit in evidence the books of account of defendant.

7. The trial court directed a verdict in favor of plaintiff in the following words: "It appears to me that the only question that I can submit to you is the question of damages." (State of the Case, page 179, line 9.)

8. The court charged the jury as follows:

(b) The language of the mortgage is: "On demand at the office of the Mutual Distributing Company." My construction of that is that he (plaintiff) was entitled to have a demand made upon him to pay the sum that he owed to the Mutual Distributing Company. (State of the Case, page 179, line 29.)

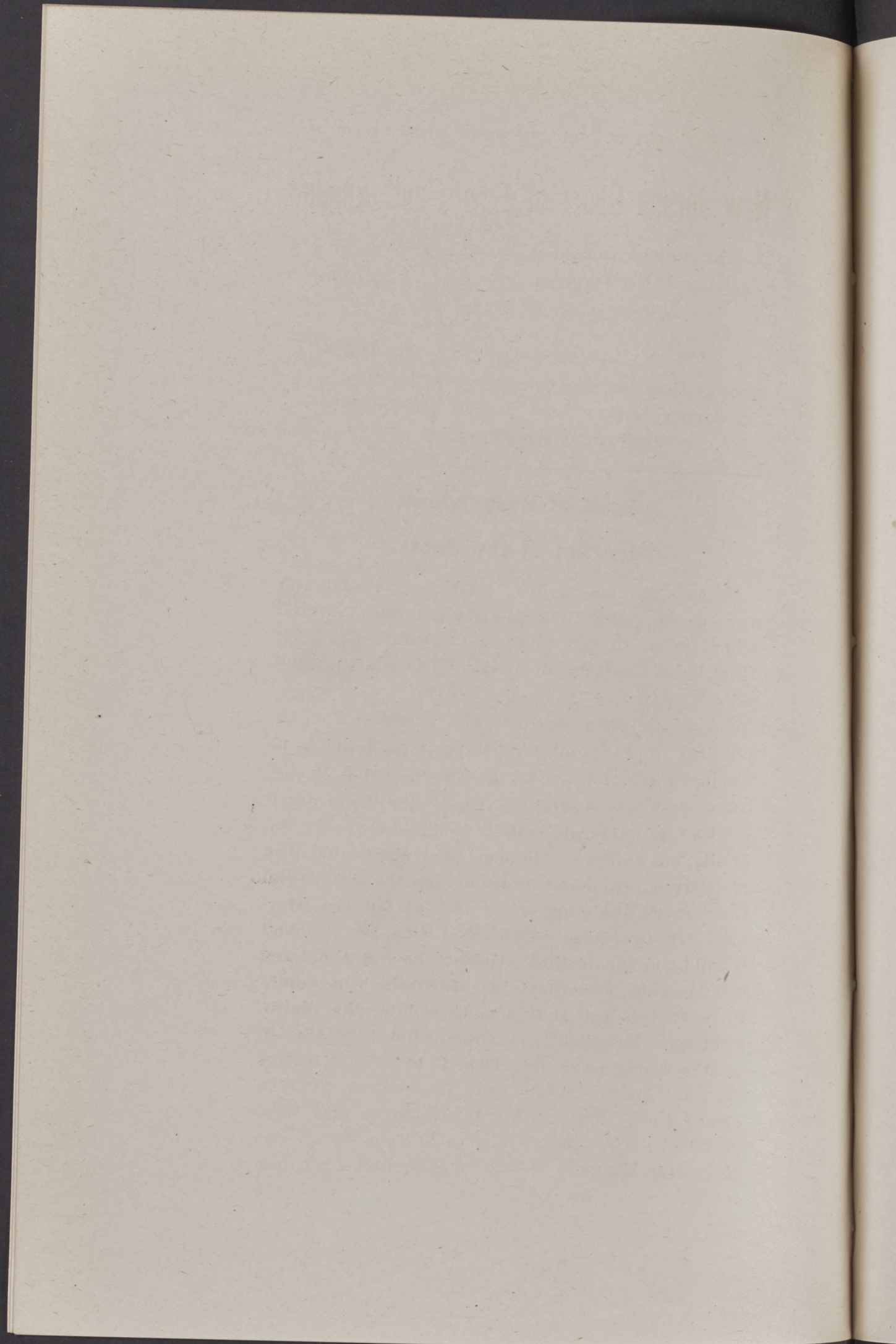
(c) But before his right could be terminated he was entitled to an opportunity to pay the debt, and that opportunity was to be afforded him by a demand to pay the debt, and until that demand was made the Mutual Distributing Company had no power or right to foreclose the mortgage. No demand was ever made, nor was any attempt ever made to make a demand, and, by the strict language of the instrument, I therefore consider that the foreclosure which was subsequently instituted was in-

stituted prematurely, and that the foreclosure proceedings conferred no right to the possession of this property upon the Mutual Distributing Company and deprived Mr. Mausert of no right of possession. (State of the Case, page 179, line 36.)

(d) Therefore, in my opinion, the only question for the jury to consider, the foreclosure having been legally inefficacious, is to determine what is the value of the goods that were taken from Mr. Mausert at the time when they were taken and to give a verdict for that amount. (State of the Case, page 180, line 15.)

(e) You will have to determine from the evidence just what goods were taken and what their value was, and for that amount, I think, under the facts as they are presented to the jury in this case, the plaintiff is entitled to a verdict. (State of the Case, page 180, line 28.)

(f) If you find that the defendant made no demand for payment after the execution of the chattel mortgage, then you must find for the plaintiff. And as there is no evidence of any demand, but clear evidence that no demand was made, the result is that the only question of fact for the jury is the question as to what was the reasonable value of the articles taken at the time when they were taken for which amount, with interest at 6% to this date, the plaintiff is entitled to your verdict. (State of the Case, page 180, line 35.)



New Jersey Court of Errors and Appeals

FREDERICK WM. MAUSERT,
Plaintiff-Respondent,

vs.

MUTUAL DISTRIBUTING COMPANY,
a corporation,
Defendant-Appellant.

*Action at
Law.*

*On Appeal
from
Supreme
Court.*

Brief of Respondent.

Abstract of the Facts.

This is an action for damages for the conversion of goods and chattels of the plaintiff, which were in his place of business at Arion Hall Palm Garden, on Washington Street, Newark, N. J.

Inasmuch as a verdict was directed for the plaintiff it is very proper that the facts, as disclosed by the whole of the evidence in the case, should be presented to this court.

The testimony in behalf of the plaintiff was, briefly, as follows: He was the proprietor of a restaurant and bar, known as Arion Hall Palm Garden, on Washington St., in the City of Newark. On or about June 24th, 1913, he received word from his brother, George E. Mausert, and others, that his place of business was about to be raided and that he had better leave town, although there was no foundation of truth in this warning, as is testified to by Detective Hargan (page 155) and Lieutenant O'Gara (page 156). The plaintiff left town and went to New York City. On the 25th of June, one Raymond Mausert called on him and took him

to Hoboken, late in the afternoon and there persuaded him to sign a chattel mortgage of all the goods and chattels in the Palm Garden. The plaintiff was not permitted to testify as to what Raymond said to induce him to sign the paper, although it was evident that Raymond was the agent of the defendant. At five o'clock of the same day the plaintiff called up his bartender and discovered, to his great surprise, that the goods and chattels had all been moved out of his place. He did not dare come back because of the fear of arrest at that time. The goods were moved by the Job De Camp Company. Eight van loads were taken to a Mr. Schuler's place in Arlington. Seven loads were labeled "tables and chairs" (p. 20) and the eighth load was unlabeled and included dishes, linen, etc. A small amount of whiskey and case goods were taken to the Hotel Broad under the direction of George E. Mausert (p. 69). Mr. Schuler and George E. Mausert were present when the goods were being removed. Mr. Schuler was at that time president of the Mutual Distributing Company and George E. Mausert had been treasurer until a week before—and was still a large stockholder. *The bill for removing all the goods was paid by the defendant, the Mutual Distributing Company.* What was done with the goods after this the plaintiff did not know.

Shortly after the goods were taken the plaintiff made a written memorandum of the goods and of their values at that time. About one year after this he had a typewritten and compared copy made of his written one, and from this copy he testified at the trial.

The defendant's story was little different. George E. Mausert testified that he warned his

brother to leave town and had an agreement with him to store his goods. George Mausert also testified that he persuaded Fred to agree to execute a mortgage to the defendant for the debt he owed to it. George also testified that he had received some of the linen and silverware taken from Arion Hall, though this fact is expressly denied by the man who packed and moved the stuff to the Hotel Broad (p. 69).

The defendant's witnesses expressly admitted that no demand (p. 128, ll. 1 to 28) (p. 119, l. 26) (pp. 103 and 104) had been made for the payment of the mortgage debt, and that no attempt had been made to make a demand. Also no notice was given of the foreclosure by the defendant to the plaintiff. The constable (p. 118, l. 10) in charge of the foreclosure sale testified that all the goods and chattels covered by the mortgage were sold to the Mutual Distributing Company, who later resold them at private sales to various people.

The plan for the execution of a chattel mortgage was devised by George E. Mausert, Mr. Schuler and defendant's counsel (p. 13).

The plaintiff consulted counsel in 1913 concerning the case immediately after the goods were taken, but was advised to wait because of the fact that his brother was in prison and was represented by the same counsel (p. 79, ll. 1 to 20).

The trial court directed a verdict for the plaintiff and instructed the jury to find as damages, the value of the goods at the time they were taken, with 6 per cent. interest to date. The jury returned a verdict of \$5,004.88.

The points in the appellant's brief will be considered in their order.

POINT I.

MOTIONS FOR NON-SUIT AND DIRECTION OF VERDICT FOR DEFENDANT WERE PROPERLY DENIED.

At the close of the plaintiff's case, the evidence and the logical inferences therefrom clearly showed that the defendant had unlawfully removed and converted the goods and chattels of the plaintiff before the execution of the chattel mortgage.

At the close of the whole case, the fact that the defendant had unlawfully foreclosed the mortgage *without a demand for payment, and without giving notice thereof*, was sufficient evidence to justify the refusal of a directed verdict in the defendant's favor.

POINT II.

THE TRIAL COURT PROPERLY PERMITTED PLAINTIFF TO USE MEMORANDUM.

An examined copy of a memorandum made at or near the time of the circumstances in question, is properly used to refresh a witness' memory. See 40 Cyc. 2461, and cases in note.

The books of the plaintiff were taken away by the defendant (p. 50, lines 25 to 30), therefore the best evidence the plaintiff could offer as to the price of the goods was his recollection of it at the time of the taking.

The very purpose of the memorandum is to revive the memory of past transactions not at present clear in the mind. The witness may even be permitted to read from the memorandum.

Myers v. Weger, 62 N. J. L. 432 at 441.

In the present case the witness was thoroughly cross-examined as to the making of the memorandum and the court correctly exercised its discretion in permitting its use.

French, receiver, v. Millville Manfs'. Co.,
70 N. J. L. 699.

The use of such a memorandum in a case resembling this one is not unusual. In *More-Jonas Co. v. West Jersey R. R. Co.*, 76 N. J. L. 708, a memorandum was used to refresh witness' memory of values—where more than two years had elapsed between the injury and the trial.

In the case of *Howard v. McDonough*, 77 N. Y. 592, Justice Earl says:

“Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is wrongfully seized and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory while testifying, by such list.”

POINT III.

THE VALUE OF THE ARTICLES.

The question of value was left to the jury, in this case. The evidence of the cost price of the goods was the best evidence the plaintiff could furnish. Property was constantly being replaced so that little of it could be said to be two and one-half years old (pp. 80 and 81). The defendant offered the evidence of Charles

Rosin, a second-hand furniture dealer, and of Anthony W. Schuler, to show the value of the goods at the time of the taking, and as the question was left to the jury—this evidence being before them—it does not seem that the defendant was prejudiced in any way by the plaintiff's testimony as to their value.

All the evidence in the case tends to show that *all* the goods and chattels of the plaintiff were taken by the defendant, except some whiskey and liquor which went to the Hotel Broad. Everything in fact except the "bar and the ice box" (p. 68, line 40). The chattel mortgage covered *all*, the foreclosure was of *all*. George Mausert's testimony is not substantiated by any other, but in fact, is expressly contradicted by the man he directed to move the stuff (p. 69).

The verdict of the jury shows most conclusively that they did *not* award the full cost price of these articles. *Firstly*, the cost price testified to was over \$7,556, the verdict was for \$5,004.88. *Secondly*, the verdict included 6 per cent. interest for three and one-half years—which if subtracted would leave \$3,900, or about one-half of the cost price of the goods.

POINT IV.

DEFENDANT'S BOOKS OF ACCOUNT WERE PROPERLY EXCLUDED.

Defendant's books of account were offered for the purpose of showing an accord and satisfaction which had not been pleaded, *nor* was any part of the issue; therefore the books were properly kept out. See remarks of court, pages 123 and 124.

POINT V.

THE VERDICT WAS PROPERLY DIRECTED FOR THE PLAINTIFF.

The direction of the verdict for the plaintiff depends upon two factors. *One*—whether the plaintiff had possession of the property at the time of the conversion. *Two*—whether it was necessary for the defendant to make a demand on the plaintiff for payment, or do something to put plaintiff in default.

The chattel mortgage was in the usual form of bill of sale with condition subsequent which reads as follows: "Upon condition, that if I the said party of the First Part, shall and do well and truly pay unto the said party of the Second Part, its successors and assigns, *on demand*, at the office of said Mutual Distributing Company in Newark, N. J., the sum of Six Hundred and Eighty-Two Dollars and Eighty-eight cents, *then these presents shall be void*," and further provided that in case default should be made in the payment of said sum above mentioned the defendant was authorized to enter and take the goods and sell them, etc.

It is evident from the construction of the instrument that the parties intended the plaintiff to retain possession of the goods. However, the mortgagor of chattels in New Jersey is entitled to possession of the mortgaged chattels *until a default*. Chattel mortgages are regarded as a mere security for the payment of the debt.

Doughten v. Gray, 10 N. J. Eq. 328;

Woodside v. Adams, 40 N. J. L. 417, 11 *Corpus Juris*, 597.

This is also the decision in the more recent case of *Finkel v. Lepkin*, 62 N. J. L. 580, where

the Court held—a first mortgage of chattels has no right until his mortgage debt is due to take from the mortgagor the possession of the chattels mortgaged unless an attempt is made to remove the goods from the county. The Court says, “*After* the due day of the Lepkin mortgage, if it was not paid, Finkel had the right to retain possession, so long as he did not attempt to remove the wagon out of the county.”

Therefore it must be taken that the plaintiff was entitled to possession under the mortgage. Now, no matter whether the plaintiff's case be considered as true, or whether the defendant's story through the testimony of George E. Mausert, is accepted, still the goods must have been taken from the possession of the plaintiff. The plaintiff claimed that the chattels were taken directly by the defendant from plaintiff's place of business. The defendant claimed that George E. Mausert, or Anthony W. Schuler, or some other person took them, by agreement with plaintiff to act as his bailees—in either case the defendant took the goods from the *possession* of the plaintiff at the foreclosure sale, if not before.

If the goods were taken from the possession of the plaintiff, the only other question that could arise is—was the plaintiff put in default? This will be considered later under the point concerning the necessity of a demand.

Furthermore, the Court had the right to assume that the defendant received all of the goods claimed by the plaintiff as the testimony in the case shows that the only possible goods the defendant *might not* have received were a few cases of liquor which went to the Hotel Broad.

POINT VI.

THE MEASURE OF DAMAGES WAS CORRECT.

The jury, as instructed by the Court, properly awarded as plaintiff's damages the reasonable value of the articles taken at the time when they were taken, with interest at 6 per cent. to date. This is the true rule of damages in such cases.

Where a mortgagee of chattels takes possessions and sells *before condition broken*, the mortgagor's measure of damages is the value of the property at the time of the conversion.

11 *Corpus Juris* 597.

Kohn v. Davis, 94 Fed. 288.

Davenport v. Ledges, 80 Ill. 579.

The condition was not broken in this case as no demand was made for payment and the condition rests expressly upon payment *on demand*.

The case cited by the defendant is not only not in point but the rule stated *only* applies to actions by the mortgagor against the mortgagee where the *mortgagee* has the right to possession but has sold the goods at private sales at unreasonable prices. It does not apply to a tort action where the mortgagor has the right to possession.

If the mortgagee has any remedy at all it would only be by way of recoupment or counterclaim, and neither was pleaded in the case, nor was the point raised at any time during the trial.

See note L. R. A. 1915 E. 199 and cases cited.

POINT VII.

THE VALIDITY OF THE MORTGAGE,
AND FORECLOSURE WAS WITHIN THE
ISSUE.

The defendant's brief has not quoted the pleadings carefully.

The fifth paragraph of the Separate Defense to the First Count of the Complaint, which is repeated as the defense to the other counts of the complaint, reads as follows, p. 12, l. 29 (State of Case):

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

The reply to the above paragraph of the answer is (p. 13, l. 23):

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

Section 20, Practice Act 1912, reads as follows:

"Every material allegation of fact in a pleading which is not denied by the adverse party is deemed to be admitted *unless* the latter avers that he has no knowledge or information thereof sufficient to form a belief."

It is submitted that under the above section of the Practice Act, the demand upon the plaintiff and the validity of the foreclosure are issues in the case as raised by the pleadings.

POINT VIII.

A DEMAND COULD HAVE BEEN MADE.

The suggestion of the defendant that the plaintiff was never at the defendant's office and consequently no demand could have been made upon him, is without force. *The defendant's office is the place of payment, not of demand.* It certainly could not have been expected that the plaintiff should spend all his time at the office of the defendant, waiting for a demand to be made upon him. If the defendant's story is true—namely, that George E. Mausert or Schuler was bailee for the plaintiff—there is very good reason to believe that they could have found the plaintiff.

POINT IX.

A DEMAND WAS NECESSARY TO CREATE A DEFAULT.

That a promissory note, or a bond, payable on demand is due immediately and may be sued on immediately, is admitted. There is a distinction in the case of a chattel mortgage in this State. The words "payable on demand" in a note or bond—merely refer to the date of maturity of the obligation—which is, of course, immediately. However, in a chattel mortgage, in which default is conditioned upon the payment of a sum *on demand*, more than the mere maturity of the obligation is connoted by the words. They create an express condition precedent which the mortgagee must perform before the mortgagor is put in default. The law of New Jersey provides that a mortgagor is entitled to possession until default. *Finkel v. Lepkin, supra.* The evidence conclusively shows

that the mortgagor had possession of the chattels in question. *When, therefore is the mortgagee entitled to possession?* Not until he has put the mortgagor in default. *When is the mortgagor in default?* The only possible answer is—*when the mortgagee has made a demand on him according to the condition in the mortgage.* To reduce the argument of the defendant to a further absurdity, it should be noted that if the mortgagee can seize the goods and sell them without a demand, he can do so immediately upon the execution of the mortgage. Consequently the condition in the mortgage and the provisions for default, etc., are mere excess verbiage, meaningless. There would be no difference between a chattel mortgage conditioned on payment on demand and an absolute bill of sale—when both the law of the State and the facts in the case provide that the mortgagor is entitled to possession until a default. What a possibility for fraud where the mortgage debt is \$680 and the chattels are worth \$7,550!

The law has always endeavored to avoid a forfeiture and the very few cases which are in point expressly affirm the proposition that a demand is necessary.

The case of *Ely v. Carnley*, 19 N. Y. 496, the facts of which have been misquoted by the defendant's counsel in his brief, raises the question of demand squarely. The facts very briefly are as follows: It was an action to recover damages for a false return on an execution. The plaintiff had recovered a judgment against B, and execution was issued and placed in the hands of the defendant, who returned it unsatisfied. B had before this, executed a chattel mortgage payable on demand to one M. A copy was filed by M—with an error in it. The

property was in B's possession at the time the mortgage was given. M foreclosed after the plaintiff had issued execution. The Court gave judgment for the plaintiff on the ground that an erroneous copy had been filed, therefore a refiling was necessary to give title to M. The defendant appealed, claiming that no refiling was necessary as the mortgage was payable on demand and therefore foreclosable immediately and the title was in M.

The learned Justice Grover, in deciding for the plaintiff, says:

“The defendant claims that the title to the property had become absolute in the mortgage and that no refiling was necessary. The mortgage was payable on demand. *No demand of payment had been made.* In such a case the mortgagor does not lose his right to redeem without demand, or something equivalent thereto. *In no case* does the law dispense with a demand when a forfeiture will be incurred or a right lost upon an agreement like the one in question. Until a demand made, Bradley had the right to discharge the mortgage by payment.”

The same point is raised by the issue in the case of *Ashmead v. Kellogg*, 23 Conn. 70. This was an action for trover and conversion by a mortgagee against a mortgagor, for selling a vessel mortgaged to the plaintiff. The mortgage specified no time of payment and provided that until default the defendant should remain in possession. The defendant claimed that he had a right to possession until payment demanded. No payment had been demanded. Plaintiff claimed that the mortgage was payable immediately and therefore title was in him.

and defendant was guilty of conversion. The Court held most emphatically that a demand for payment was necessary to put the defendant in default, consequently the defendant was held not liable.

See also 7 *Cyc.*, 82;

11 *Corpus Juris*, 705.

Another case, directly in point, in which the Court found that a demand was necessary is the case of *Slingo v. Steele-Wedeles Co.*, 82 Ill. App. 139. This is also a very strong case. A demand is necessary to create a forfeiture for interest on a note. *Adams v. Adams*, 55 Eq., 42.

A careful perusal of the cases offered by the defendant-appellant in support of his contention, shows that either they are not in point, or else other considerations moved the Court. The following cases were offered to support the proposition that a demand was not necessary.

Martin v. Stoddard, 127 N. Y. 61, the only question relating to mortgages in the case was that where a mortgage was omitted from the printed state of the case on appeal, and the time of payment was not mentioned, it would be presumed to be payable on demand.

Ferris v. Spooner, 5 N. E. 773. The question of necessity of demand was not raised in this case at all.

Kelabian v. Shinkle, 59 Atl. 743. This was a bill to annul a mortgagee's sale. The mortgage secured a demand note. Defendant demurred to the bill. The court held that the question as to necessity of demand was not raised in the case, but intimated that if it had been raised a demand would be necessary.

Southwick v. Hapgood, 64 Mass. 119. Court held a demand not necessary because of the

service of a notice under statute which allowed 60 days in which to redeem.

Payne v. Gardner, 29 N. Y. 146. Action on a certificate of deposit. No mortgage connected with the case.

Wheeler v. Warner, 47 N. Y. 519. Action on a demand note questions raised as to Statute of Limitations. No mortgage connected with the case.

Gillett v. Balcom, 6 Barb. 371. Court held a demand not necessary. But in this case the mortgagor turned the goods over to the mortgagee two weeks before foreclosure was started. Moreover, this is an earlier case than *Ely v. Carnley*, *supra*, and is only a Supreme Court decision, therefore not the law in New York.

Security Trust, etc. v. New Jersey Paper Bond, etc. 57 Equity, 603. This is the case the defendant relies upon as settling the law in New Jersey. The question of demand was not raised. The mortgage provided that after default in payment of interest and after demand, the whole principal was to become due. A demand in writing was actually made. The Court held that this was sufficient and that no presentation of interestcoupons for payment was necessary.

It should further be called to the attention of this court, that if the transaction in this case were to be considered a pledge, there would be no question about the necessity of a demand and notice before title passed.

See 43 L. R. H. 750, and cases cited in note.

POINT X.

A DEMAND IS NECESSARY, OTHERWISE THE MORTGAGOR WOULD HAVE NO EQUITY OF REDEMPTION.

The right to redeem is the very essence of a mortgage and is what distinguishes it from a sale.

Wilmerding v. Mitchell, 42 N. J. L. 479.

This right would be lost to the mortgagor if the mortgagee could seize the chattels and foreclose without a demand. The mortgagor's right to an equity of redemption under a chattel mortgage is settled law in this State.

Chapman v. Hunt, 15 N. J. Eq. 373;

Freeman v. Freeman, 17 N. J. Eq. 47.

POINT XI.

TO PERMIT THE MORTGAGEE TO FORECLOSE WITHOUT A DEMAND, OR NOTICE, IS A DENIAL OF "DUE PROCESS" UNDER THE 14th AMENDMENT OF THE U. S. CONSTITUTION.

The facts of this case show that not only was there no demand made, or any attempt at a demand for payment by the defendant, but also no notice of the foreclosure was given—nor was any effort made to give notice to the plaintiff by the defendant. To permit the defendant to recover under such circumstances would be in effect a denial to the plaintiff of his fundamental rights under the protection of the "law of the land", the "due process" clause of the 14th Amendment to the United States Constitution. It would be permitting the defendant not only to seize the plaintiff's goods without putting him in default, but also allowing the defendant

to dispose of them without giving the plaintiff any notice, or opportunity to be heard. This aspect of the case is too important, and fundamental to be passed upon by this Court without due consideration.

POINT XII.

THE PLAINTIFF DID NOT GIVE UP POSSESSION TO THE DEFENDANT.

The evidence for the plaintiff shows that the goods were taken by the defendant from the plaintiff's possession, wrongfully, before the execution of any mortgage, at plaintiff's place of business. The only evidence to the contrary is the unsubstantiated evidence of George E. Mausert, who claimed that he took the goods as bailee for the plaintiff and not for the defendant, consequently the plaintiff did not give up possession to the defendant even if this evidence is assumed to be true.

POINT XIII.

PLAINTIFF WAS NOT ESTOPPED NOR DID HE WAIVE ANY RIGHTS.

Accord and satisfaction, estoppel, and waiver were not pleaded as defenses by the defendant and therefore it should not be allowed to prove them.

However, on the facts as they stand, no estoppel of the plaintiff is shown. No fact, no bit of testimony can be found in the evidence offered by the defendant which shows that the defendant relied upon the plaintiff's acceptance of the check as an acceptance of the foreclosure and ensuing sales. In fact, the contrary is shown. There is no proof that the defendant

ever offered to return the unsold goods, or account for them in any way. Surely a court must look beyond the mere acceptance of a small check when \$7,550 worth of goods and chattels have been taken to cover a \$680 debt.

The plaintiff did not waive any rights by accepting the check. A waiver can only take place when the party has full knowledge of all the facts. The plaintiff knew nothing about the foreclosure or the sales until the trial, so could not possibly have waived any rights.

POINT XIV.

IT IS RESPECTFULLY SUBMITTED
THAT THE JUDGMENT BELOW SHOULD
BE AFFIRMED.

PALMER BRADNER,
Attorney for Plaintiff-Respondent.

FRANK E. BRADNER,
Of Counsel.

New Jersey Court of Errors and Appeals

FREDERICK WILLIAM MAUSERT, <i>Plaintiff-Respondent,</i>	} <i>Action at Law.</i>
<i>vs.</i>	
MUTUAL DISTRIBUTING COM- PANY, a corporation, <i>Defendant-Appellant.</i>	} <i>On Appeal from Supreme Court.</i>

Brief of Appellant in Reply.

In the abstract of facts submitted by respondent in his brief (page 1), it is stated that plaintiff, having received warning from his brother and others, left Newark and went to New York City. At the trial plaintiff tried unsuccessfully to show that the warning was the malicious act of the defendant. Since his attempt was unsuccessful, it would seem to be immaterial whether or not the warning was founded on fact. If it were material, it must be apparent that the testimony of Detective Hargan and Lieutenant O'Gara does not conclusively show that the warning was without basis, while on the other hand, the fact that the plaintiff fled the city without stopping to investigate, and as stated on page 2 of respondent's brief, did not dare to come back because of fear of arrest, and in fact, did not return for more than two years, gives evidence that the plaintiff either had a guilty conscience, or his nerves were sadly out of order.

On page 2 respondent complains that he was not permitted to testify to what Raymond Mausert said to induce him to sign the chattel

mortgage, "although it was evident that Raymond was the agent of the defendant." We submit that there is no evidence of such agency, in fact, the trial Court expressly held that there was no such evidence.

(State of the case, page 73, line 11.)

Nor is there any evidence that plaintiff was surprised to learn that the goods and chattels had been moved out of his place. He did not express any surprise to his bartender, who was permitted to testify as to the conversation had with him.

The goods taken to the Hotel Broad by George E. Mausert are detailed by him on page 87, line 31; page 88, lines 1 to 12. The liquors alone were valued by the plaintiff for \$300 (page 54).

Mr. Schuler was present for a few minutes while the goods were being removed, but had nothing to do with the taking out of the goods. (Page 131, lines 16 to 23.)

The bill for removing the goods taken to Arlington was paid by defendant "on the advice of Mr. Mausert." The defendant thought that the goods covered by the mortgage were of sufficient value to secure the amount of bill as well as the cost of cartage. (Page 133, line 32.)

On page 3 of respondent's brief, second paragraph, it is asserted that no attempt was made to make a demand for the payment of the money secured by the chattel mortgage and that no notice was given to the foreclosure.

The defendant did not know the whereabouts of plaintiff, inquiry was made of his relatives and apparently they did not know (state of the case, page 97, lines 36 to 39; page 103, lines 29 to 35; page 128, lines 2 to 20).

By respondent's own admission he was a fugitive in fear of arrest and dare not return. (See respondent's brief, page 2, line 11.)

Although he knew of the removal of the goods and consulted counsel, neither plaintiff nor his counsel communicated with the defendant until more than three years later, in September 20, 1916. (Page 137, lines 33 to 40.)

Point One.

If we should assume, however, that the evidence supported the matters set up by respondent in his abstract of facts and that none of these matters were disputed, we submit that there is nothing therein to justify a verdict for the plaintiff, and therefore on plaintiff's own statement it is apparent that a non-suit should have been granted and that a verdict should have been directed for the defendant.

Point Two.

Respondent states that the books of the plaintiff were taken away by defendant. We insist that it nowhere appears that such was the fact.

It is true that the question of the use of a memorandum is very much in the discretion of the trial Judge, but it must be the exercise of a discretion of which this Court will approve. It cannot be arbitrarily used, nor to an unjustifiable extent, and in none of the cases cited by the plaintiff, nor in any case that we have been able to find, has the Court gone as far as the trial Court did in this case.

Point Three.

In contending that the evidence tends to show that all of the goods were taken by the defendant, respondent says the testimony of

George Mausert to the effect that he received a considerable portion of the goods himself, is not substantiated. He forgets that the Court directed a verdict for the plaintiff, to justify which all questions must have been uncontroverted. To admit that the evidence raised any question of fact is to admit that the verdict cannot be sustained.

Attention is again directed to the schedule attached to the appellant's main brief, showing a list of the articles which it appears from the evidence, were all that were received by the defendant.

Point Four.

The action of defendant in paying, and of plaintiff in receiving, the surplus received from the sale of the goods acquired by defendant under the foreclosure of the chattel mortgage, over and above the amount of the debt and expenses, did not amount to an accord and satisfaction, because the matter was not yet completed, there were still some property from which the defendant hoped to derive some further sum, which after deducting the expenses of storage, it was willing to turn over to the plaintiff (Exhibit D. 4), who hoped to receive it. This could not be pleaded in bar, for to be effective such an accord must be wholly executed.

Cook v. McAdoo, 85 N. J. Law, 692-694.

It, nevertheless, showed that plaintiff acquiesced in all that had been done by defendant.

Point Five.

It could not have been the intention of plaintiff to retain possession of the goods covered by the chattel mortgage, for his agent under his instructions immediately turned them over to the defendant, evidently for the purpose of fore-

closure. This is borne out by all of the subsequent behavior on the part of plaintiff; his purchase of the spotlight from defendant (Exhibits D. 1 and D. 2); his acceptance of part of the proceeds of sale. (Exhibit D. 3.)

The respondent is attempting to make a technical distinction, but he seems to overlook the fact that if the plaintiff, by George E. Mausert, his brother and agent, took the property in question out of Essex County and into Hudson County, defendant would have had a right to take them whether or not they were voluntarily surrendered to it. Section one of "an act concerning mortgages on chattels" (Compiled Statutes, page 463), provides: (1) "Every chattel mortgage shall vest in the mortgagee or owner thereof the right to the possession of the chattels therein described, so far as may be necessary for the purpose of preventing the removal thereof out of the county wherein they were at the time of the execution or delivery of such mortgage, and of recovering such chattels in case the same shall have been removed out of such county."

Respondent says that the Court had a right to assume that defendant received all the goods claimed by plaintiff, yet George Mausert, who had no connection with plaintiff except as stockholder, testified on page 87, lines 30 to 40, and page 88, lines 1 to 12 that he received and accounted to plaintiff for property valued by plaintiff as follows:

Whiskey, case goods (page 54, l. 21) ..	\$300.00
Champagne (page 60, l. 12)	60.00
Table Spoons (page 57, l. 17)	60.00
Knives & Forks (page 58, ll. 32-36) ...	335.25
Linens (page 57, ll. 29-30)	171.05
	<hr/>
	\$926.30

As stated in the main brief, Mr. Schuler detailed the specific items which the defendant received. Schedule A, in main brief.

Point Six.

Is fully covered by discussion under Point Five and under the heading, "Measure of Damage" in our main brief.

Point Seven.

It would seem that whether or not the payment of the amount secured by the mortgage had been demanded would be within the knowledge or information of the plaintiff so that his reply quoted in respondent's brief is inappropriate.

In this connection, Rule 40 under the Practice Act of 1912, which is Rule 58 of the Supreme Court is as follows:

Rule 58. "The answer must specially deny such allegations of fact in the complaint as defendant intends to controvert, unless he intends in good faith to controvert all the allegations; in that case he may deny them generally. It must specially state any defense which is consistent with the truth of of the material allegations of the complaint, and any defense which, if not stated, would be likely to cause surprise, or would raise issues not arising out of the complaint. For instance, the statute of frauds, or of limitations, release, payment, performance, or facts, showing fraud illegality, or contributory negligence."

Supreme Court Rule 70 * * * "and the rules respecting the form and manner of pleading in the answer apply to the reply."

Point Eight.

The contention that the defendant's office is the place of payment, not of demand, is contrary to all of the decisions. Whether or not plaintiff could be expected to spend his time at the office of the defendant waiting for a demand, is immaterial, since that was the contract he made.

He agreed to pay on demand at the office of the Mutual Distributing Company, and had demand been actually necessary it would have been his duty to remain there during the business hours of every day, or take the consequence of his absence.

As to defendant being able to find plaintiff it will be remembered that Mr. Schuler testified that he was unable to find him, although he made inquiry.

Point Nine.

The condition of the chattel mortgage is similar to the condition of a bond secured by a mortgage, the difference is that one is incorporated in a single instrument and in the other there are two. The case of a chattel mortgage cannot be distinguished. The doctrine is based on the rule that any obligation for the payment of money only, on demand, is due immediately and without actual demand. The condition of the chattel mortgage in question is just as much an obligation for the payment of money only as is a bond or promissory note secured by a chattel mortgage.

Assume that the chattel mortgage had secured a note payable on demand, respondent admits the note would be due immediately, there must therefore be a default in the condition of a mortgage, which can thus be foreclosed immediately.

Would a different rule be applied to a chattel mortgage conditioned for the payment of a \$1,000 on demand, from that applied to a similar mortgage securing the promissory note payable on demand?

We will ask the Court to judge whether or not we have misquoted the facts of the case of *Ely v. Camley*, 19 N. Y. 496.

In the case of *Ashmeade v. Kellogg*, 23 Conn., page 70, cited by respondent, no time was fixed for payment, but interest was payable yearly, and the mortgage provided that the chattel, a vessel, should remain in possession of defendant till default. The Court held that on the whole instrument it was evident that it was intended the mortgage should not be due until a request for payment had been made.

In *Slingo v. Steele-Wells Co.*, 82 Ill. App. 139, also cited by respondent, there was a note payable on demand and one payable in a year, secured by mortgage on chattels. The Court evidently considered that the purpose of the instrument was to extend some term of credit and held that there was no default until demand, thus establishing a rule different from that in almost every other jurisdiction.

Respondent challenges the applicability of the cases cited in the brief for appellant. A short quotation from each will show the reason for these citations.

Martin v. Stoddard, 127 N. Y., page 61. Raised a question of whether a mortgage had been barred by statute of limitations. The Court held that the thing promised being a payment of money on demand the statute begins to run from the date of the instrument.

Ferris v. Spooner, 5 N. E. 773. (New York.) This was an action for foreclosure. The bond

was conditioned for the payment of \$27,000 and interest, on demand. The Court held that the previous demand was not essential to the cause of action.

Kelabian v. Shinkle, 59 Atl. 743. This was a bill to annul a mortgagee's sale of two lots of land. It is apparent that in Rhode Island a sale may be had without judicial action. The Court held that where a mortgage note is payable on demand, the mortgagee has a right to foreclose at any time.

In *Southwick v. Hapgood*, 64 Mass., 119, the syllabus is as follows: A mortgage of personal property to secure a note payable on demand may be foreclosed according to S. T. 1843, C. 72, section one, before any demand of payment.

The Court said the note described in the mortgage being payable on demand was due presently and the condition of the mortgage was broken immediately. No demand was necessary upon the promisor to constitute such breach.

The other cases are sufficiently quoted in appellant's brief.

Point Ten.

Unquestionably a man can give a mortgage and at the same time convey or bar his equity of redemption, and that was, no doubt, intended to be the effect of the chattel mortgage given in this case. Plaintiff being afraid to return to New Jersey did not expect to redeem it.

Point Eleven.

Does not respondent overlook the fact that the effect of the paper he executed was to grant to the mortgagee a right to foreclose without demand. He was presumed to know the law,

and undoubtedly did so. In effect he said to the mortgagee, I give you a mortgage payable on demand, due immediately, hence I am in default and you may foreclose as soon as you please. There is nothing unconstitutional in that.

Respondent complains that he received no notice. The usual notice by advertisement was given him (state of the case, page 116, lines 17 to 37).

Point Twelve.

Respondent admits that there is evidence that George E. Mausert took the property under an arrangement with the plaintiff, but contends that the evidence of this was unsubstantiated. Nevertheless it must have raised a question for the jury which the Court should have submitted to them.

Point Thirteen.

Respondent did not raise any question of lack of demand or illegality, or informality in the foreclosure of the chattel mortgage in his pleadings, so that there was no necessity or opportunity to plead estoppel or waiver.

We insist that the letters written by plaintiff to defendant (Exhibits D. 1 and D. 2) are inconsistent with his claim that the defendant wrongfully took his goods, and that those two exhibits with (Exhibit D. 4), which was written in answer to his request for particulars about the property which he knew to be in the hands of the defendant and (Exhibit D. 3), whereby after being furnished with the full detail of the disposition of the property in question he accepted the surplus arising from the sale thereof, have estopped him from claiming

any irregularity in the mortgage, its foreclosure or in the disposition of the property.

Plaintiff was shown the books of the defendant wherein the disposition of the property, and the prices received therefore, were detailed, the entire matter was explained to him and he then accepted the check.

(See state of the case, page 99, lines 20 to bottom, and pages 100, 101, 108, 109 and 110.)

Respectfully submitted,

REED & REYNOLDS.

Of Counsel with Oest. Appellan

