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 1918
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 1918
 C. Z.—Ditto
 1918

Petition.

A true copy.

PITNEY, HARDEN & SKINNER,
Solicitors for Complainant.

Petition.

Filed Dec. 23, 1918.

10

In Chancery of New Jersey

Between

PHILIP HILTON,

Complainant,

and

JOSEPH HILTON,

Defendant.

Petition.

20

*To his Honor, Edwin Robert Walker, Chancellor of the State
of New Jersey:*

The petition of Philip Hilton respectfully shows:

1. That your petitioner is the complainant in the above entitled cause, and that on November 18, 1916, he filed his bill of complaint in said cause in this court against Joseph Hilton, the defendant therein, setting forth therein certain acts of the said defendant as constituting unfair trade and competition, and praying that said defendant, his agents, employees and servants, be enjoined and restrained from using the name "Hilton's" or "Hilton" alone, or in such manner as to lead or induce the public to believe that the goods manufactured or sold by said defendant are manufactured or sold by the complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant, and from using any emblem or device resembling the trade emblem of complainant in any way in his said business, and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by defendant were manufactured or sold by complainant, and that the business conducted by defendant is the same as or a part of the business conducted by complainant.

30

40

Petition.

2. That such proceedings were had in said cause that a final decree was made therein bearing date July 18, 1918, upon a remittitur from the Court of Errors and Appeals, in and by which decree it was ordered, adjudged and decreed that the said Joseph Hilton, his agents, servants and employees should be enjoined and restrained from using the name "Hilton's" or "Hilton" alone, or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him were manufactured or sold by your petitioner, and that the business conducted by said Joseph Hilton was the same as or a part of the business conducted by your petitioner; from using any emblem or device resembling the trade emblem of your petitioner in any way in his business; and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by said Joseph Hilton, were manufactured or sold by your petitioner, and that the business conducted by Joseph Hilton was the same as or a part of the business conducted by your petitioner.

3. That, after the date and entry of said decree and notice of the same, said defendant, Joseph Hilton, his agents, employees and servants, wilfully violated the terms and injunctions thereof, and used the name "Hilton's" and "Hilton" alone and in such manner as to lead and induce the public to believe that the goods manufactured or sold by said defendant were manufactured and sold by the complainant, and that the business conducted by the defendant was the same as or a part of the business conducted by complainant and otherwise conducted his, the said defendant's business so as to deceive the public and induce it to believe that the goods manufactured or sold by the defendant were manufactured or sold by complainant, and that the business conducted by the defendant was the same as or a part of the business conducted by complainant in that he, the said defendant, continued to use in connection with his stores in the City of New York and State of New York the words "Hilton's" alone, with the words "J. Hilton, Prop." annexed thereto, or signs in front of and above said stores and in and about the windows thereof and the appurtenances thereof, and continued to use the names "Hilton's" or "Hilton" alone on labels attached to the clothing sold, offered for sale and displayed by the said defendant and in advertisements of the said stores and of the clothing offered for sale therein, and in that he, said defendant, his agents, employees and servants represented to customers that the stores

Petition.

of said defendant were a part of the same establishment as the stores of the complainant, and permitted and suffered customers, who apparently and obviously had such belief, to continue in such mistaken belief, and further represented to such customers that the stores of complainant were established subsequent to the establishment of the store of defendant.

4. That thereupon such proceedings were had in such suit upon a rule to show cause dated August 23, 1918, requiring the said defendant to show cause why he should not be adjudged guilty of contempt and why he should not be punished for his alleged misconduct in violating the said final decree on remittitur, that, on the 30th day of October, 1918, by an order of your Honor bearing date aforesaid, the said defendant, Joseph Hilton, was adjudged guilty of contempt of this Court, in that he violated the said final decree, in which order it was further provided that said defendant pay to the complainant his taxed costs on such proceedings, including a counsel fee allowed by said order, and that no other or further punishment be imposed upon him, the said defendant, and that, in view of the substantial change made by the defendant in the character of his signs since the commencement of such proceedings for contempt, he, the said defendant, be purged of the contempt therein adjudged against him upon the payment of said costs and counsel fee.

5. That said defendant has continued to use the name "Hilton's" upon signs on, above and about the stores of said defendant in the cities of Bridgeport and Waterbury, Conn, and otherwise in connection with the conduct of his business in the said cities and the advertisement of his business in said cities. That, since the date of the entry of said decree on remittitur, and since the date and entry of the said order of your Honor, dated October 30, 1918, the said defendant, Joseph Hilton, has used the words "Jos. Hilton & Co." in connection with his stores in the City of New York, on signs on, above and about said stores, and in and about the labels, tags, cards, window signs and other printed or written matter used in connection with the advertisement, display, merchandising and sale of the clothing manufactured or sold, offered for sale and displayed by him, the said defendant, and in public advertisements of his business in newspapers and other advertising media, and in other and divers ways in connection with the conduct of his business.

Your petitioner shows and charges that such use of the name "Hilton" leads and induces the public to believe that the goods

Petition.

manufactured or sold by him, the said defendant, are manufactured or sold by complainant, and that the business conducted by said defendant is the same as or a part of the business conducted by the complainant, and that the use of the words "Jos. Hilton & Co." as the name or style under which the defendant conducts his business, does not sufficiently distinguish the business of the defendant from the business of the complainant in the minds of the public.

6. That the said defendant, his agents, employees and servants, have expressly and impliedly represented to customers that the stores conducted and maintained by the said defendant were a part of, or connected, in management or otherwise, with, the business conducted by complainant, and have knowingly dealt with members of the public who have or had been led and induced to believe that the goods manufactured or sold by the defendant were manufactured or sold by complainant, and that the business conducted by defendant was the same as or a part of the business conducted by complainant, and have thereby, and otherwise, conducted his business so as to deceive the public and induce it to believe that the goods manufactured or sold by the defendant were manufactured or sold by complainant, and that the business conducted by defendant was the same as or a part of the business conducted by the complainant

7. Your petitioner shows and charges that the acts and doings of defendant, his agents, employees and servants, as above set forth in the fifth and six paragraphs constitute a wilful violation of the aforesaid decree on remittitur.

8. Your petitioner prays reference to the pleadings and exhibits and other papers filed in this cause and to the orders and decrees herein made, and to the evidence offered in this cause, including that offered upon the hearing of the aforesaid order to show cause of August 23, 1918, and prays that the same may be read and considered at the hearing upon this petition.

Your petitioner therefore prays that the said defendant, Joseph Hilton, may be adjudged guilty of contempt of Court in violating the said decree and wilfully ignoring, neglecting and refusing to comply with the same, and that your petitioner may have such further or other relief as may be equitable and just.

PITNEY, HARDIN & SKINNER,

Solicitors for Petitioner.

Affidavit of Frank J. Murray.

Affidavit of Frank J. Murray.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

FRANK J. MURRAY, of full age, being duly sworn, according to law, on his oath says:

10

1. I am a resident of the City of Orange, in the County of Essex, New Jersey, and am the general manager of the business which the complainant above named, Philip Hilton, conducts under the name of The Hilton Company. I have read the foregoing petition of Philip Hilton and believe the same to be true.

2. The above named defendant, Joseph Hilton, has since October 18, 1918, advertised his clothing business under the name "Jos. Hilton & Co." by large display advertisements in the New York Evening Journal, a newspaper having a large circulation in the City of New York and State of New York, and in adjacent territory. I am informed and believe that he has also advertised his said business under the same name in some other newspapers circulating in the vicinity of the City of New York.

20

3. On or about November 16, 1918, he caused to be placed and has since maintained a large sign over the windows of his store at the corner of Nassau and Fulton Sts., in the City of New York, on both fronts of the store, on which the name "Jos. Hilton & Co." appears in large display letters.

On or about November 20th or 21st in 1918, he caused to be placed and has since maintained a similar sign over the windows of his store at the corner of Broadway and 36th St, in the City of New York, on both fronts.

30

I am informed and believe that similar signs were erected at his stores at No. 243 Broadway, in the City of New York, and at the corner of Fifth Ave. and 33rd St., in the City of New York, between November 20, 1918, and December 1, 1918, and I know of my own knowledge that such signs are now maintained at both of said stores. The letters used on these signs appear in each case to be of equal size, that is to say, the letters forming the abbreviation "Jos." and the name "Hilton" and the suffix "& Co." are of equal size one to the other.

40

This name or style is also being used at the present time upon the labels which are attached to the clothing sold by him and are

Affidavit of Frank J. Murray.

also being used on window cards, and also on and about the windows and doorways of his stores, and also on tags used in connection with his business.

At the stores of the defendant, however, in the Cities of Bridgeport and Waterbury, Conn, I am informed and believe, that he
 10 still maintains upon and about his stores signs with the word "Hilton's" alone, and that the word "Hilton's" alone is used in the advertisement of his business in those cities.

4. I verily believe that the use of the words "Jos. Hilton & Co." as the name or style under which the said defendant conducts and advertises his business and sells and displays his merchandise leads and induces the public to believe that the goods
 20 manufactured or sold by him are manufactured or sold by complainant, and that the business conducted by the defendant is the same as or a part of the business conducted by the complainant.

In the support of my belief in this respect, I refer to the evidence which was given upon the hearing of this cause and that given upon the rule to show cause dated August 23, 1918. I especially call attention to the combination of the abbreviated name "Jos." in front of the word "Hilton," and the suffix "& Co.," and to the fact that the word "Jos." contains the same number of letters as the word "The," which precedes the name
 30 "Hilton" in the name under which complainant has conducted his business, and the fact that the word "Co." following the name "Hilton," as used by the complainant, has commonly in the conduct of his business been abbreviated to "Co."

I am informed in such manner as leads me to believe that there have been frequent instances of actual confusion in the minds of the public of the business of complainant and defendant since the adoption by the defendant of the use of the words "Jos Hilton & Co.," as the name or style under which he conducts his business.

FRANK J. MURRAY.

40 Subscribed and sworn to before me this
 23rd day of December, 1918.

ALEXANDER T. SCHENCK,
A Master in Chancery of N. J.

Rule to Show Cause.

Rule to Show Cause.

(Filed December 23, 1918.)

Upon reading and filing the petition of the complainant herein and the affidavit thereto annexed, verified December 23, 1918; 10

IT IS on this twenty-third day of December, 1918, on motion of Pitney, Hardin & Skinner, solicitors for complainant,

ORDERED, that the defendant, Joseph Hilton, show cause before this Court on Thursday, the ninth day of January, 1919, at the Chancery Chambers, Prudential Bldg., Newark, N. J., at 10 o'clock in the forenoon, why he should not be adjudged guilty of contempt in violating the final decree herein made and entered upon remittitur, and in wilfully ignoring, neglecting and refusing to comply with the same.

IT IS FURTHER ORDERED, that a true copy of said petition and affidavit, which may be uncertified, and a true copy of this order, be served upon the said defendant within five days from the date of this order; and that, in case service cannot be made personally upon the said defendant in this state, then that the same shall be served upon his solicitors, and also by mailing copies to him at his postoffice address. 20

IT IS FURTHER ORDERED that upon the return of this rule proof be taken by the parties hereto by examination of witnesses in open court.

E. R. WALKER, 30
C.

Respectfully advised,

MERRITT LANE,
V. C.

Order.

Order.

(Filed Dec. 28, 1918.)

A true copy.

10 PITNEY, HARDIN & SKINNER,
Solicitors for Complainant.

On motion of Pitney, Hardin & Skinner, solicitors for complainant, and for cause shown;

IT IS on this 28th day of December, 1918,

ORDERED, that the time for the service upon the defendant of the copies of the petition of the complainant praying that the defendant be adjudged guilty of contempt of Court herein filed on December 23, 1918, and the order to show cause made there-
20 on, bearing date December 23, 1918, be and it hereby is enlarged until five days from the date hereof.

IT IS FURTHER ORDERED, that a true copy of this order, which need not be certified, be served upon the said defendant in the manner prescribed by said order of December 23, 1918, with the said petition and order.

E. R. WALKER,
C.

Respectfully advised,

30 MERRITT LANE,
V. C.

Order of Reference.

Order of Reference.

(Filed January 3, 1919.)

It appearing to the Court that a final decree was made in this cause bearing date July 18, 1918, upon remittitur from the Court of Errors and Appeals in and by which decree it was ordered, adjudged and decreed that the defendant, Joseph Hilton, his agents, servants and employees should be enjoined and restrained from certain acts and doings therein fully set forth, and the complainant having filed his petition in this cause on December 23, 1918, alleging a wilful violation by the said defendant, his agents, employees and servants, of the aforesaid decree on remittitur, and the Court having made an order to show cause bearing date December 23, 1918, ordering the said defendant Joseph Hilton to show cause before this Court on January 9, 1919, why he should not be adjudged guilty of contempt in violating the final decree aforesaid, and in wilfully ignoring, neglecting and refusing to comply with the same, as is more fully set forth therein, and said order to show cause being still pending and undisposed of;

IT IS THEREUPON on this 3rd day of January, 1919, on the Court's own motion, ORDERED, that the said petition and the matters and things therein contained, and the answer of the said defendant to the said petition, if any he shall file, and the proceedings upon said petition and said order to show cause be and the same hereby are referred to the Hon. Merritt Lane, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,
C.

Answer.

**The Answer of Joseph Hilton to the Petition of
Philip Hilton.**

(Filed January 9, 1919.)

10 This defendant to so much of said petition as he is advised
is material for him to make answer unto, answering says:

1. That he believes it to be true, as in the petition alleged,
a bill was filed in this cause at or about the time stated, praying
for relief, but for greater certainty he begs to refer to said bill.

2. He admits that a decree upon remittitur, from the Court
of Errors and Appeals, was entered in said cause, which decree
modified the final decree entered therein, but for greater cer-
tainty he begs leave to refer to said decree on remittitur, as
20 well as the opinion of the Court of Errors and Appeals, upon
which the same purports to be based, which said decree of re-
mittitur was entered without the knowledge of, or notice to the
solicitors of this defendant.

3. After the entry of said decree on remittitur, this defend-
ant did, as soon as feasible, change the signs upon his New York
stores by adding the words "J. Hilton, Prop." being advised
and believing that the change in said signs in no way violated
but, in fact, complied with the directions of said decree on re-
mittitur. Proceedings were, as in said petition stated, com-
menced in this cause, seeking to have this defendant adjudged
30 guilty of contempt on account of the use by him of the said signs,
with the added words, and this defendant admits that he was
adjudged guilty of contempt in such use by this Honorable Court,
and that an order was duly entered therein, adjudging and direct-
ing that he pay the costs of the petitioner on such proceedings, to-
gether with a counsel fee of \$300, all of which have been paid,
and he shows that thereafter, by virtue of the terms of said
order he became and now is fully purged of such contempt. That
in the testimony adduced at the hearing on such proceedings,
it appeared that the use by this defendant of the words "J.
40 Hilton, Prop." was intended to be only temporary, and that this
defendant proposed to adopt the sign "Jos. Hilton & Co." as
indicative of a firm to be formed, and which should thereafter
conduct the business formerly conducted by this defendant alone,
but that owing to the state of the labor market it had been im-

Answer.

possible to make the permanent change in the signs, as so proposed, and hence the adoption of the temporary expedient. This defendant asserts that the judgment of contempt against this defendant was a technical judgment only, because of the view of this Court, that on account of such difficulties, whose existence no one questioned, it was the defendant's duty to have, if necessary, wholly removed the signs, or closed up the business, rather than adopt that temporary expedient.

10

4. This defendant shows that by the first of December, 1918, all of the old signs with the temporary additions, had been removed from the defendant's stores in New York City, and large maroon colored wooden signs, with gilt letters, containing the words "Jos. Hilton & Co." have been substituted. The old signs have likewise been removed from the windows, or other parts of the said stores. The labels have been changed so that in all of said stores any symbol or sign is or has been used other than the words "Jos Hilton & Co." At about and since the same time advertisements in the New York papers contained the same firm name, and likewise conspicuously featured the words—"Please note our full name and exact address, and recognize it on the signs Jos. Hilton & Co." This defendant, therefore, denies that there is anything in the signs, labels or advertisements that justifies the claim that he is thereby seeking to deceive the public or to palm off his goods as goods of the complainant. He asserts the contrary to be the fact.

20

5. He denies that the said signs or labels are likely to create confusion or to mislead the public. He likewise denies that he needs any fictitious help or assistance from the complainant. This defendant believes that his name is well known in the business, and he claims the right to use and enjoy the benefits therefrom. He shows that he located his stores in New York City in well-known clothing districts. The Nassau street store was in the very premises where a retail clothing store had previously been for over forty years, and it is in a neighborhood where there are many clothing and furnishing stores, and it was for that reason that a business of this character was started there by this defendant. The same thing is true of the lower Broadway store, near which are many other clothing and men's furnishing stores. The upper Broadway store is in a distinctly clothing

30

40

Answer.

locality, and the same is true to a large extent of the Fifth avenue store, although the complainant has no store on that avenue.

10 6. This defendant further shows that immediately after the decision in the contempt proceedings hereinabove referred to, he gave instructions to all the managers of the New York stores, to the effect that the salesmen and clerks in said stores should use every means in their power, in dealing with customers, to differentiate between the defendant's stores and those of the complainant. The complainant does no men's furnishing business, whereas the defendant does in all except two of his stores, where for lack of room he does not.

20 7. This defendant further shows that it has been expected, as heretofore shown by evidence in the cause, that a partnership would be formed between this defendant, one or more of his sons and Max Younker. Mr. Younker, however, was unable to raise the necessary capital, and so this defendant arranged with another party to join with his sons and this defendant in a partnership, and articles of co-partnership were prepared to that end, when it was discovered that the party then in mind was not satisfactory, and thereupon, and on December 26, 1918, written articles of co-partnership between this defendant, Charles Hilton, Alexander Hilton and Max Tannenbaum, were entered into, under the firm name of "Jos. Hilton & Co." That firm and these gentlemen are now and have been since that date carrying on said business. At the time of the formation of that firm this defendant had not the slightest intimation that the complainant had commenced these proceedings, as the papers therein were not served upon this defendant until the 30th of December, and that was the first knowledge he had thereof.

40 8. It is true that this defendant has continued the use of the signs "Hilton's" at the Bridgeport and Waterbury stores, in neither of which towns has the complainant any stores, nor has he any stores nearer said towns than New York City, which is about fifty miles from Bridgeport and ninety miles from Waterbury. The complainant does not advertise, and has not for years advertised in the New York papers. The result of it is that this defendant believes and avers that the complainant has no reputation in Bridgeport or Waterbury, and is not known there in any way, and that the defendant's stores there are in no sense competitive with the complainant, and this defendant is

Answer.

advised are not within the purview or terms of the orders or opinion entered in this cause. However, because of this defendant's desire to have all his stores conducted under the same and uniform name, as early as the middle of December, 1918, this defendant gave the orders for new signs for the stores in Bridgeport and Waterbury bearing the words "Jos. Hilton & Co." and owing to difficulties in the labor market these signs have not yet been completed, although they are shortly expected. Upwards of three or four weeks since new labels were sent to the Bridgeport and Waterbury stores with directions that they should be substituted for the old labels on the old stock, and, of course, all the new stock in all the stores uses the same labels.

10

9. This defendant further shows that he has always signed his name—"Jos. Hilton." The abbreviation of his name "Joseph" by the letters "Jos." in this new firm was, therefore, a simple continuance of the use of his name as it is and has been known in the trade.

20

10. The new label adopted and as now used is entirely distinct and different from that of the complainant's, as will appear from an inspection thereof.

11. This defendant denies that his agents, employees and servants have expressly and impliedly represented to customers that the stores conducted and maintained by the defendant were a part of or connected in management, or otherwise, with the business conducted by the complainant, or that the public has been led and induced to believe that the goods manufactured or sold by the defendant were manufactured or sold by the complainant, and that the business conducted by the defendant was the same as, or a part of the complainant's business, or that the public have been deceived into any such belief. On the contrary he asserts that he has done, as hereinabove stated with reference to instructions to his employees, and is doing everything in his power to produce the contrary result.

30

12. This defendant denies each and all of the other allegations of said petition not herein specifically denied.

40

Answer.

All of which matters and things this defendant is ready to aver, maintain and prove, and prays to be hence dismissed with his costs and charges.

McCARTER & ENGLISH,
Solicitors of Defendant.

10

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

JOSEPH HILTON, being duly sworn, on his oath deposes and says, that he has heard the above answer read; that he is the defendant therein named, and that the matters and things therein stated are, to the best of his knowledge and belief, true.

JOS. HILTON.

20 Sworn to and subscribed this 8th day of
January, 1919, before me:

30

40

Opening.

January 9, 1919.

IN CHANCERY OF NEW JERSEY.

Between

PHILIP HILTON,

Complainant,

and

JOSEPH HILTON,

Defendant.

10

Transcript of shorthand notes of testimony taken in the above entitled cause on January 9, 1919, at Chancery Chambers, Newark, New Jersey, before Hon. Merritt Lane, Vice-Chancellor.

20

Appearances:

Messrs. Pitney, Hardin & Skinner for complainant.

Mr. Robert H. McCarter and Mr. Selick J. Mindes for defendant.

Mr. Ward. I wish to file notice upon Mr. McCarter making an entry of the special order of reference.

Mr. McCarter. I may say to your Honor that I notice the papers that have been filed in this particular matter say among other things, they all refer to the record in the case or papers heretofore filed, or something or other. We shall object to that. We propose to fight this thing now; we think it is getting monotonous and we deem that any evidence taken in the main cause is not relevant, material or competent in this case. The issue is not the same at all and we shall expect them to prove *de novo* the alleged contempt in every step of the case.

30

The Court. I do not understand that they refer to the papers, refer to the testimony taken, but to the record so far as they refer to the record.

Mr. McCarter. Of course, the decrees or the orders say what they do say. I have got the papers right here. I found the clause I had in mind; it is the eighth paragraph of the petition upon this particular matter; "Your petitioner prays reference to the pleadings and exhibits and other papers filed in this case and to the orders and decrees made herein and to the evidence

40

Alexander T. Schenck, direct—cross.

offered in this case, including that offered on hearing of the aforesaid order to show cause of August 23, 1918, and prays that the same may be read and considered at the hearing of this petition.

The Court. You may proceed, Mr. Hardin.

10 ALEXANDER T. SCHENCK, sworn.

Direct examination by Mr. Ward.

Q You reside in Newark? A I do.

Q You are a counsellor at law of this state? A I am.

Q Employed by the solicitors for the complainant in this case? A Yes.

20 Q On December 30, 1918, did you serve certified copy of the rule to show cause and true copy of the petition and the order of December 28th upon the defendant, Mr. Joseph Hilton? A I did.

Q At South Orange, New Jersey? A South Orange.

Q That was personal service? A Personal service.

Cross examination by Mr. McCarter.

Q What was the date? A Monday, December 30.

30 Q Did you have anything to do with the procuring of the order of December 28, extending the time in which the original order to show cause should be served? A I had tried a number of times to serve Mr. Hilton and reported that fact to Mr. Ward.

Mr. McCarter. I move the answer be stricken out as not responsive.

The Court. It may be stricken out.

Mr. Hardin. I suggest it is responsive. "Did you have anything to do with the procurement of the order?" He proceeds to tell.

40 *The Court.* It may be technically responsive, but Mr. McCarter did not mean to bring out that; he meant the physical obtaining of the order, that is what he meant.

Mr. McCarter. Certainly.

Q (Question read.) A I did not.

Q Did you make any attempt to serve it on the solicitors?
A I did not.

Frank J. Murray, direct.

Q (*By Mr. Ward.*) Had you prior to December 30, made any efforts to serve the order of December 23d and the petition?

A I had.

Q On what day were those efforts initiated? A Friday and Saturday, December 27 and 28.

FRANK J. MURRAY, sworn.

10

Direct examination by Mr. Ward.

Q You reside where? A Orange, New Jersey.

Q You are a counsellor at law of this state? A Yes.

Q Are you general manager of the business conducted by the complainant, Philip Hilton? A I am.

Q How long have you been such manager? A For about two and a half years.

Q That business is today conducted under what name? A 20
The Hilton Company.

Q Under what name has it been conducted since the final hearing in this case? A The Hilton Company.

Q The word "company" is sometimes abbreviated in the use of the name? A Yes.

Q In what way? A It is generally written company in the past few months, but when it is abbreviated it is spelled "Co."

Q In what form does it appear on the signs above your stores in New York City? A Until lately it appeared as "Co." on Broadway and Thirty-seventh street, and we put up a larger 30
sign there a couple of months ago and under the new sign it reads "Company" spelled out; at Broadway and Fourteenth street, I believe, it reads "Co."; in Brooklyn it reads "Co." and at 85 Nassau street it reads "Co." and in other cities I believe it reads "Co.", that is, Pittsburg and Chicago.

Q Has the company continued the advertising in the Hudson and Manhattan tunnel trains running between Newark, Jersey City and New York? A It has.

Q That is the same character of advertising that was described on the final hearing in this cause? 40

Mr. McCarter. I object.

Mr. Hardin. I submit when we are merely showing continuation of conditions described on final hearing it is rather ridiculous to insist this is new case. This witness

Frank J. Murray, direct.

10 is now asked whether advertising in the tube cars has been continued as described in the final hearing. Your Honor remembers the detail; the contracts were produced and description of the advertising, the pictures were put in showing the exhibits in the stations of the Hudson Terminal and uptown both. Can it be possible on a proceeding of this kind we have got to take the time and expense of reproducing all that evidence in order to make it appear that the advertising and use of the name is continuing as before?

20 *Mr. McCarter.* I do not, of course, ask those contracts to be reproduced and all that, and I don't care anything about any repetition of evidence if counsel does not want to repeat, but I certainly do object to this gentleman undertaking to characterize and conclude as to what the relation between the present advertising is. If they are trying to prove *continuando* instead of producing the advertising it is very simple to say it is the same as was produced before. Now, we did not initiate these proceedings, and whether it be ridiculous or whether it be tiresome I would like to have it tried according to law. I say that not to the Court, but to my friend, Mr. Hardin, and we therefore studiously object to any conclusion of this witness or undertaking to give his judgment as to what the present advertising is. If the present advertising is of moment it should be produced.

30 *The Court.* I think that is so, Mr. Hardin. The difficulty arises not with reference to the previous testimony, but whether the advertising is the same or not the same is a matter which must be concluded by the Court, and you are asking this witness' conclusion.

40 *Mr. Hardin.* That is true enough, but there is a lot in this advertising and in this particular proceeding that is more than the mere fact of production of the advertisement; the question of continuation is as important as the character of the continuation. It is easy enough to produce the pasteboards and things of that kind. That does not in my judgment make the mere statement of the witness that the advertisement is continuing of the same

Frank J. Murray, direct.

character and type as shown in this case, but the origin of the advertising shown in this case goes back to the time when Joseph Hilton himself was a member of this business; it was initiated under his care, and in this proceeding the Court ought not to forget that, according to my motion, if we prove it at all, if we are obliged to go into this thing I think we are obliged to go clear back and let the contracts in and everything else and show the origin of it. I think we should be privileged to offer the testimony where taken so far as it relates to the advertising in the tubes to prove that feature of the matter. 10

The Court. I will permit you to do that. I will permit you to offer the evidence taken in the previous proceeding in this case as to the nature of the advertising that was then being conducted. I will permit you also to let this witness testify, if he can, that you have made no change, provided you supplement that by producing the actual advertising, copies or samples of the advertising which you are now doing. 20

Mr. Hardin. For present purposes all I want to suggest is it is perfectly right for this witness to say the advertising is continued, and if we follow the matter with particular proof.

The Court. I will permit you to do that, provided you follow it up. 30

Mr. McCarter. That last part I object to.

The Court. I will permit it, subject to being stricken out if they do not show specimens of their advertising, produce specimens of their advertising.

Q (Question read.) A It is.

Q Mr. Murray, does the company still maintain in the downtown terminal, downtown New York terminal of the Hudson and Manhattan Company, a showcase on the concourse floor? A They have several showcases in that terminal. I might mention at the final hearing— 40

Mr. McCarter. One moment. Please don't do anything but answer the question.

A What was the question?

Frank J. Murray, direct.

Q (*By the Court.*) Do you maintain showcases at the Hudson terminal? A Yes, sir.

Q Maintain showcase at the Thirty-third street, New York, terminal of the Hudson and Manhattan? A Yes.

10 Q I show you photograph of case which was admitted in evidence at the final hearing and marked Exhibit C. 89. Are you familiar with the showcase of which that was a photograph? A I was familiar with it. This case has been enlarged since that time.

Q Where was that showcase located? A Down at the Manhattan terminal; I think they call it Hudson terminal.

Q I show you photograph which was admitted at the final hearing, marked Exhibit C. 94. Are you familiar with the showcase of which that is a photograph? A Yes, I am.

Q Where was that located? A On the same terminal.

20 Q (*By the Court.*) Is it still there? A It is still there at the same place, been lately enlarged; the height of it has been raised.

Q Is the advertising the same? A Except that we have added under the frame work here on the glass, I believe, "Our only New York stores, Broadway and Thirty-seventh street; our only New York stores, Broadway and Fourteenth street," and I think we have got the words, "Style-bilt Clothes," also.

Mr. McCarter. I think that ought to be followed up with a little proof of what it is.

30 *Mr. Hardin.* We expect to.

The Court. Does that same thing apply to Exhibit C. 89 as to the added words?

A Yes. I think at the top the name "The Hilton Co." is the same as it was; I think the name is written there the same as it was before.

Q Well, have you recently seen the showcases that are in the concourse of the downtown terminal? A I have, yes.

Q And are they large glass showcases?

40 *The Court.* He says they are the same as those excepting enlarged.

A We have three new ones there, too, in addition.

Q I show you a photograph which was admitted at the final hearing and marked Exhibit C. 92. Are you familiar with the

Frank J. Murray, direct.

showcase of which that is photograph? A Yes, but that case has not been in existence, that has not been used by us for several months; at the time we give it up we took a larger case right next to it, or few feet from it, several times the size of that case.

Q When did you give that up, do you recall the date? A Oh, it was, I think, last July. 10

Q Where was this case located? A At Thirty-third street station.

Q (*By the Court.*) Of the Hudson tubes? A Of the Hudson tubes.

Q (*By the Court.*) The case that was substituted for it; how does it appear, describe it. A We used the same sign here, The Hilton Co., and it appears twice on the case, and we refer to our stores, Fourteenth street and Thirty-seventh street on all of these new cases; on all of the old ones we omitted 85 Nassau street as a store address, and also on our cards in the tube trains we have omitted 85 Nassau street for several months back; we just have two New York store addresses, Broadway and Fourteenth street and Broadway and Thirty-seventh street. 20

Q (*By the Court.*) Does that case in the Thirty-third street tubes contain the words, "Our only stores"? A It says, "Our two New York stores, Broadway and Thirty-seventh street and Broadway and Fourteenth street."

Q (*By the Court.*) What is that, Exhibit C. 82? A Exhibit C. 92. 30

Q You say you have the same sign; you mean the large sign at the top outlined by electric bulb or smaller transparency below? A I mean the large one with the electric bulb.

Q Does the new sign also have the transparency? A Yes, it has transparency, and on one side I believe "The Hilton Company" is written and on the other it says, "Style-Bilt Clothes" with some addresses.

The Court. Do you offer those?

Mr. Ward. I offer those as proof on these proceedings. 40

The Court. Any objection?

Mr. McCarter. I do not object, of course, to the absence, if they are going to follow up with present proof

Frank J. Murray, cross.

10 of what the actual signs are and your Honor deems it material; then, of course, I do not object to this. I might say I will try to save as much time as I can. I look at this thing slightly differently from my friends on the other side. We are here to answer a charge of having violated an order made in July last, and I confess I can not see how what they have done since July last in the way of modifying their signs can imply or infer or prove guilt on our part of a violation of an order of July last.

20 *The Court.* I suppose their only purpose is to show a continuance of their method of advertising would show that the way you conduct business still continues to mislead the public. Of course, if they have dropped the use of the term "Hilton's" entirely or changed the method of advertising so that by no possibility it could be misleading Mr. Hilton could not be adjudged guilty of contempt. I admit the photographs and the markings in the new exhibits in this case will start out with letters instead of numerals.

Cross examination by Mr. McCarter.

Q Mr. Murray, I understand that at your Broadway and Thirty-seventh street store your large wooden sign has the word "company" fully written out? A Yes, sir.

30 Q So I understand you to contend that that is a new practice? A The use of the word "company" in full?

Q Yes. A No; it has been used both ways for a good many years, I believe, where the store is wide and there is room to write it out, or, it can be written that way, because we use a very big letter.

Q I show you a photograph; do you recognize that? A Yes.

Q That is a photograph of what store? A Thirty-seventh street and Broadway.

40 Q And that displays the sign that you have been referring to? A Yes.

Q It has the emblems on either end? A Trademark, yes.

Q Trademark or whatever you are a mind to call it? A Yes.

Frank J. Murray, cross.

Q And it has the word "company" written fully out? A Yes.

Mr. Ward. I offer that in evidence.

Marked Exhibit D-a.

Q How long has that particular sign been in use? A Why, 10
about two or three months, I guess.

Q Can't you get nearer than that? A Well, I think—let me see, this is January; I think about two months.

Q You have had the same width up there always, haven't you? A Yes, sir.

Q What was the previous sign there? A We had a very big cornice here which was under this pier and then just room for two little narrow glass signs and each of those it was P. Hilton Co. and P. Hilton Co.

Q So the sign that was in front of the Thirty-seventh street store previous to the present sign was The Hilton Co.? A Yes. 20

Q And the change was made when? A About two months ago.

Q That would be during the month of November? A Yes, I think that would be it.

Q Now, I show you another photograph; do you recognize that? A Yes.

Q What store is that? A That is the same store.

Q The same sign? A Well, it is a continuation of the same sign, erected at the same time. 30

Q Is that the identical sign? A No; this is on the Thirty-seventh street side and that is on the Broadway side.

Q What was the sign on the Thirty-seventh street side of the Thirty-seventh street store of which this one is a substitute?

The Court. D-a is on the Broadway side and it will be D-b on the Thirty-seventh street side.

Marked Exhibit D-b.

Q What was the sign that was on the Thirty-seventh street side previous to the present sign shown on D-b? A It was 40
the same as on Broadway; we had several signs; between each of these piers was a little glass transom and on that transom was written The Hilton Co. all along here, rather small painted letters.

Frank J. Murray, cross.

Q Now, at your other stores in the City of New York then as well as now how do your signs read, The Hilton Co. or The Hilton Company? A I think they all say The Hilton Co.

Q I show you this photograph which I will have marked D-c; look at that; that is a photograph of the Newark sign, is it not? A Yes.

10 Q On Market street? A Yes, sir; I don't know whether that is the same one that is up now; no, that is not up now; that was the one that preceded this one.

Q How long was the sign of which D-c is a photograph on the Newark store, company written out? A How long was the sign up?

Q Yes. A This is the roof sign and that is a roof sign.

Q Won't you answer my question? A It was up, I think, nearly a year, or about a year; that is painted by the Newark
20 Sign Company.

Q Please answer my question?

The Court. How long was it up?

A I think about a year.

Q When was it taken down? A It was repainted about probably five months ago, six months ago.

Q And this word "company" changed? A I don't think so; I think it is written company now; I am not sure.

30 Q Well, come to the window and read so that we can get in the record what the sign on the Market street store reads at present. A Are you referring to this same sign I have been testifying about, the roof sign?

Q Yes. A It says, "Hilton's style-built clothes made by The Hilton Company."

Q Now, when was that sign put up? A I think about six or eight months ago, after this was painted off.

Q Well, you seem then to be using the two indiscriminately; sometimes company and sometimes "Co.", don't you? A I
40 believe that has been the practice, yes.

Q Has there been any change in the tube terminal or Thirty-third street station in the word "company" or "Co."? A I don't think so; I think we still have "Co." there.

Q Are you sure about that? A Well, to the best of my recollection; I am not certain, but I think it is still "Co."

Frank J. Murray, cross.

Q What is the advertisement in the concourse now on the tube, is it "Co." or "company"? A The car cards in the trains?

Q Yes. A I think it is "company."

Q Has it always been that way? A I don't think so.

Q You changed them to suit your— A At times the advertising man,—it depends on the layout of his copy. 10

Q One moment. Do you change them from time to time? A Well, I haven't noticed that.

Q They have not been made the same, have they? A No, I don't think they have.

Q They used to be and frequently were "Co."? A Yes.

Q Do you recognize this, which I will have marked D-d as being one of the current signs in the tube? A Yes.

Q There I see you have The Hilton Company, the company written out? A Yes. 20

Q How long have they been in vogue like that, has that been in vogue? A This particular sign has only been in for a few days.

Q Since these proceedings for contempt were started? A Well, the January clearance sale signs were ordered about the middle—

Q I didn't ask you when they were ordered.

The Court. When were they put in actually, to your knowledge?

A They were put in the 1st of January, January sale. 30

Q (*By the Court.*) When were they ordered? A They were ordered before the middle of December.

Q (*By the Court.*) Were they ordered before December 23d? A Yes.

Q It is a fact, is it not, that in the tube the sign during the progress of the trial, main trial, on the show-case was "The Hilton Co."? A I think it was. Do you refer to the sign on the show-case in the Hudson terminal station?

Q Yes. A Those glass cases?

Q Yes. A I think it was The Hilton Co. 40

Q Now, isn't it a fact that in the Hudson terminal at the present time there is one show-case with a sign on which the word "company" is written out in full, and another show-case with the same style of sign in which the word "company" is

Frank J. Murray, re-direct.

abbreviated into "Co."? A Well, that may be so; there are two styles of signs.

Q I don't care about two styles of signs. That is a fact, isn't it? A I think it is, but I think that that is only the case where the name appears twice on that same sign.

10 Q Are you sure about that? A I feel pretty sure that in every case the name "The Hilton Co." appears at the top of each case.

Q You still maintain a store at 85 Nassau street, don't you? A Yes.

Q And do I understand that one of the changes that you have referred to is the omission from the sign on your Hudson terminal advertisements of a reference to the Nassau street store? A Yes.

20 Q When did you make that change? A About six or seven months ago, I believe.

Q As near as you can, can you get it any nearer than that? A We had changes made and those cases enlarged and some new cases early last summer, in June and July, I believe.

Q And this omission was made at that time? A And when the change was made that omission was made.

30 Q Do you recall with any degree of accuracy what the tube terminal, the Hudson terminal signs, now say with reference to your New York stores? A I do know some of them; several of them say, "Our nearest store, Fourteenth street, corner of Broadway."

Q That is in the tube terminal at Cortlandt street? A Yes.

Q Is that accurate? A No, it is not.

Q That misleads? A It is not a true statement of fact.

Q No, it is not a true statement of fact. Do you remember anything else that it says? A I think it says our two New York stores, Fourteenth street, corner of Broadway, and Thirty-seventh street, corner of Broadway.

Q You have not done any New York newspaper advertising? A No, sir.

40 *Re-direct examination by Mr. Ward.*

Q I show you photograph admitted on the final hearing marked Exhibit C. 11; what does that show? A That shows the store at Thirty-seventh street and Broadway as it was completed; this was a new store, alteration made last year, and

Frank J. Murray, re-direct. ..

that was the way the signs were when the store was finished. I had these cornices ripped out and the board sign that has been mentioned run right across here, the full width.

Q That is the Broadway side? A Yes.

Q And this is the former condition which you described in your cross examination? A That is it. 10

The Court. It retains the same mark.

Q I show you Exhibit C. 12 on the final hearing; is that the Thirty-seventh street front of the same store? A That is it.

Q And in the former condition you have already described in the cross examination? A Yes.

The Court. It may be considered in evidence the same number, C. 12.

Q What other signs appear upon the Market street front of your Newark building in addition to the roof sign already described? A May I look at the front? 20

The Court. Yes.

A Why, there is a sign under the fourth floor windows which reads, "Manufacturing department" in small letters, "The Hilton Co." in large letters, and "Style-Bilt Clothes" in medium letters. Underneath that appears the word on another sign, "Store entrance, 791-793 Broad street, around the corner"; the words 791-793 Broad street being in large letters; and then under that right over the doorway appears a sign which reads, "The Hilton Co." with the word "Hilton" much larger than the other word, and I can not read the rest of the sign from here; in fact, I can't read the word "Co." from here. 30

Q (*By Mr. McCarter.*) Can't see anything but Hilton, can you? A I can't read it from here; I couldn't distinguish it if I didn't know what it was.

Q How long have those three signs been there? A Why, nearly two years, I believe. 40

Q Tell us just where your store in Nassau street is located with reference to the intersecting streets in that vicinity? A It is on the west side of Nassau street, about sixty or seventy feet south of Fulton street.

Frank J. Murray, re-cross.

Q Is Nassau street the first street east of Broadway? A Yes.

Q And what cross streets are between? A Between John and Fulton streets.

Q Fulton street on the north, John street to the south? A Yes.

10 Q Now, where is the store of the defendant? A At Fulton and Nassau street.

Q On what corner? A It is on the northeast corner of Fulton and Nassau.

Q John street runs to the west of Broadway? A No, John street is only east of Broadway.

Q Is it possible for a person to step out of the downtown terminal on Fulton street and walk east past Broadway to Nassau street? A It is.

20 Q (*By the Court.*) Where was the defendant's store? I didn't catch that? A On the northeast corner of Nassau and Fulton.

Q Persons going to your store at 85 Nassau street by way of Fulton street, do they pass the corner on which the defendant's store is situated?

The Court. If they walk down Fulton street they do, of course; they have to.

Mr. McCarter. Certainly.

30 *The Court.* If it is on the northeast corner of Fulton and their store is in the middle of the block, necessarily if they walk down Fulton to Nassau they must pass the defendant's store.

Re-cross examination by Mr. McCarter.

Q Are there other clothing stores in the vicinity of your Nassau street store? A Are there other clothing stores?

Q Yes. A Well, there are on Nassau street a few clothing stores; yes, I think they are merchant tailoring stores; there are probably one or two other ready-made clothing stores around there.

40 Q Only one or two? A There are some merchant tailoring stores; there is nobody of prominence, though, I don't think, that I can recall.

Q Is Mitchell's clothing store there? A I don't know where his clothing store is.

Frank J. Murray, re-cross.

Q And Piser? A I don't know.

Q Morrison? A Morrison is on Fulton, a block or two below Nassau street.

Q Now, coming back to Newark, at the main entrance around the corner, as your Market street sign reads; there is a wooden sign, is there not? A Yes.

Q And that has "The Hilton Company" written out, isn't it? A Yes. 10

Q And always has been as long as you can remember? A Well, that is a new sign; when that store was altered last spring that sign was erected last winter or last spring.

Q How was the old wooden sign, "Co." or "Company"? A I don't remember.

Q Now, as a matter of fact, the Broad street store has been completely changed and enlarged in the past year, has it not? A Yes.

Q And new window put in and new wooden sign put up? A Built for the occasion; built for the purpose, yes. 20

Q And that has "Company" written out? A Yes.

Q Now, I show you a couple of cards; do you recognize these as being cards or transparencies or advertisements that you recently used; take this one, for instances? A Yes, sir.

Q When did you use them? A We are using those now.

Q Using that now? A Yes.

Q Where? A In all our stores.

Q I observe this has "The Hilton Company" written out? A Yes, all except Philadelphia. 30

Card offered in evidence and marked Exhibit D. e.

Q You say you are using cards like D. e in all your stores everywhere except in Philadelphia? A Yes, sir.

Q Now, I will show you another one, which I will mark D. f; do you recognize that? A Yes.

Q That has got the word "Company" written out, hasn't it? A Yes.

Q And what is that? A That is sign like the other that is used inside the show window display. 40

Q In Newark and New York both? A In Newark and New York, yes.

The Court. Let it appear on the record that Mr. Joseph Hilton is present in Court personally.

Frank J. Murray, further re-direct.

Further re-direct examination by Mr. Ward.

Q I show you photograph admitted in evidence on the final hearing, Exhibit C. 8, of this store at Broadway and Fourteenth street, New York; which front of the store is that? A That is the Broadway front.

10 Q Have you changed the large sign over the show windows on that front? A No, sir.

Q (*By the Court.*) Is that front exactly the same now as it was when that photograph was taken? A I think everything that is there now was there, is the same as that; I don't think there has been any change at all.

The Court. It will be considered in evidence as C. 8.

Q Exhibit C. 9 is another photograph of the same store; which front? A Fourteenth street front.

20 Q Are the signs above the show windows the same? A Yes, just exactly the same.

The Court. Considered in evidence, C. 9.

Q I show you photograph C. 10 on the final hearing, of your Nassau street store, New York City; have the signs above the window cases been changed? A They have not.

The Court. Will be considered C. 10.

30 *Mr. Ward.* I offer in evidence certain photographs of the stores of the defendant identified by the signature, "William F. Cone, photographer," endorsed on the photograph, together with the date when the photograph was taken, and the place. I offer those in evidence with the understanding by Mr. McCarter that the photographer need not be called.

Mr. McCarter. That is right.

The Court. Let them be marked.

Photograph made December 8, 1918, by Mr. Cone of defendant's store, Fulton and Nassau streets, New York City, marked Exhibit C. a.

40 Photograph made by the same photographer, the same date, of same store, different front.

Mr. Hardin. What front is C. a?

Mr. Ward. C. a is the Nassau street front and C. b is the Fulton street front.

Frank J. Murray, further re-direct.

Photograph made on the same date by the same photographer of the defendant's store, 243 Broadway, New York City, marked Exhibit C. c.

Photograph made on December 9th by the same photographer of the defendant's store, Broadway and Thirty-sixth street, marked Exhibit C. d.

10

Photograph made December 9, 1918, by the same photographer of Thirty-sixth street front of the defendant's store, Broadway and Thirty-sixth street, marked Exhibit C. e.

Photograph made December 9, 1918, by the same photographer of the Fifth avenue front of the defendant's store, Fifth avenue and Thirty-third street, New York City, marked Exhibit C. f.

Photograph made December 9, 1918, by the same photographer of the Thirty-third street front of the same store, marked Exhibit C. g.

20

Photograph made by the same photographer on December 18th, 1918, of a portion of the lining of an overcoat displayed in the defendant's show window at his Thirty-sixth street and Broadway store, marked Exhibit C. h.

Photograph made December 17, 1918, by the same photographer of defendant's store, Grand and Bank streets, Waterbury, Connecticut—

Mr. McCarter. That we object to as immaterial.

30

Marked Exhibit C. i.

Photograph made the same date of another front of the same store marked Exhibit C. j.

Photograph made December 17, 1918, by the same photographer of defendant's store at Fair View avenue and Middle street, Bridgeport, Connecticut—

Mr. McCarter. The same objection to that as to the Waterbury.

40

Marked Exhibit C. k.

Photograph made the same day of another front of the same store offered subject to Mr. McCarter's objection and marked Exhibit C. l.

Frank J. Murray, further re-direct.

Advertisement of the defendant in the issue of October 18, 1918, of the New York Evening Journal offered in evidence and marked Exhibit C. m.

Advertisement in the issue of October 25 of the same paper offered in evidence and marked Exhibit C. n.

10 Defendant's advertisement in the issue of November 1 of the same paper offered in evidence and marked Exhibit C. o.

Defendant's advertisement in the issue of November 8, 1918, in the same paper offered in evidence and marked Exhibit C. p.

Defendant's advertisement of November 15, 1918, in the same paper offered in evidence and marked Exhibit C. q.

20 Defendant's advertisement in the issue of November 22 of the same paper offered in evidence and marked Exhibit C. r.

Defendant's full-page advertisement of the issue of November 29 in the same paper offered in evidence and marked Exhibit C. s.

Defendant's full-page advertisement in the issue of December 6, 1918, in the same paper offered in evidence and marked Exhibit C. t.

30 Defendant's advertisement in the issue of December 13 of the same paper offered in evidence and marked Exhibit C. u.

Defendant's full-page advertisement in the issue of December 20, 1918, in the same newspaper offered in evidence and marked Exhibit C. v.

Defendant's full-page advertisement in the issue of January 3, 1919, in the same paper—

40 *Mr. McCarter.* I object to that for the sake of brevity and regularity. I suppose this case is being tried from the time of the commencement of the proceedings, which was in December. Now, the proposition is to introduce a paper that was issued on January something of this year. We concede we have been doing practically the same thing. It seems to me that the proofs should cease as of the time when the petition was filed.

Jacob Mann, direct.

The Court. Mr. Ward, why isn't that so? Why burden the record?

Mr. McCarter. I object to anything after the filing of the papers, December 23.

Mr. Ward. I will withdraw the offer.

I offer in evidence defendant's advertisement in the December 15, 1918, issue of the Waterbury Republican. 10

The Court. That is admitted subject to Mr. McCarter's objection.

Mr. McCarter. Yes, the same objection to that. Marked Exhibit C. w.

Defendant's advertisement in the issue of December 13, 1918, of the Bridgeport Evening Post, offered in evidence also subject to Mr. McCarter's objection.

Marked Exhibit C. x. 20

Advertisement of the defendant in L'Aurora of Bridgeport, dated November 7, 1918, offered in evidence.

Mr. McCarter. The same objection.

The Court. Let it appear on the record; that it is an Italian paper.

Marked Exhibit C. y.

Advertisement of the defendant in the same newspaper in the issue of October 24, 1918, offered in evidence.

Mr. McCarter. The same objection.

Marked Exhibit C. z. 30

Advertisement of the defendant in the periodical called The Broadside, issued at the Naval Training Camp, Pelham Camp, New York City, December 6, 1918, offered in evidence and marked Exhibit C. aa.

Defendant's advertisement in the issue of December 20, 1918, in the same periodical offered in evidence and marked Exhibit C. bb.

JACOB MANN, sworn.

Direct examination by Mr. Ward. 40

Q You reside where? A 605 Fifty-first street, Brooklyn.

Q And you are employed where? A With The Hilton Company as manager of the Fourteenth street store in New York.

Jacob Mann, direct.

Q Have you made any change in the signs at that store recently? A No, sir.

Q Well, how recently have you made any change if you remember? A Well, I have been on that corner this May it will be five years and the same signs are above the store as the first day we opened the store.

10 Q Do you recall an instance when a man named A. E. Vogt called up your store and talked to you over the telephone? A Yes.

Q Did you make a memorandum of that at the time of what occurred? A Yes.

Q Will you refer to that memorandum? A Yes.

Q Is that memorandum in your handwriting? A Yes.

Marked 1 for identification.

20 Q Look at that, if necessary, and tell us what occurred between Mr. Vogt and yourself?

Mr. McCarter. I object to that, your Honor. It would seem I think assuming that a personal conversation between A and this witness is competent, which when offered I should object to; a telephone conversation might be a decoy, might be anything from some person with this gentleman. To undertake to hold us in contempt on evidence of that character, I object to it; it is mere hearsay; it is not from anybody; you don't know who it is except a person over the 'phone who calls himself "Vogt"; it might be Mr. Murray, might be Mr. Ward, might be Mr. Hardin, might be anybody. To undertake to make evidence against a defendant in a proceeding quasi criminal in character as contempt by reciting a conversation with such a person who does not even appear in the flesh, let alone produced here to be cross examined to find out who and what he was, and why he was doing it, it seems to me to be improper.

30 Q Let me ask another question. Did Mr. Vogt afterwards come into the store? A Yes, and made a purchase.

40 Q And was he the same man that you had talked with over the telephone?

Mr. McCarter. How does he know that? I object to it.

Jacob Mann, direct.

Q (*By the Court.*) Did you recognize the voice? A There was a telephone call at the store and a gentleman on the 'phone—

Q (*By the Court.*) Strike that out. Did you recognize his voice when he came in to see you as the same man with whom you talked on the telephone? A When he came in the store he says, "I am the gentleman"—

Q (*By the Court.*) Strike that out. Listen to my question and answer it. Did you recognize his voice as that of the same man that talked to you on the telephone? A That I couldn't say.

Q Did Mr. Vogt when he came into the store refer to a telephone conversation which he had with you previously?

Mr. McCarter. I object to it.

The Court. Yes or no; did he?

A Yes.

The Court. Now ask your next question.

Q What did Mr. Vogt say when he came to the store?

Mr. McCarter. I object to that conversation between this witness and a person whose name purports to be Vogt, in the absence of the defendant.

The Court. Mr. McCarter, wasn't that same objection raised upon the trial of the main issue and didn't I admit the testimony at that time?

Mr. Hardin. Yes, sir.

Mr. McCarter. Yes, there is no doubt about that, your Honor, but that, it seems to me, is another entirely different proposition. I thought then, with reference to your Honor's ruling, there was question as to the propriety of the ruling, but I bowed to it and never made any point in the appeal or elsewhere; but it seems to me that now on the application for contempt it is an entirely different thing. The Court of Errors have taken a distinct view of this situation. I confess it is somewhat difficult for me to apprehend what that view is, but I think after a long evening's study last night I am more or less posted upon their views; and that is one thing, how far, if at all, it was based upon evidence of that character, I don't know. The question now is

Jacob Mann, direct.

10 whether this defendant shall be adjudged guilty of contempt which may carry with it a deprivation of liberty and the proceeding is quasi criminal in character. As I understand it, and I respectfully suggest to your Honor that if this is designed, as I suppose it is, to evidence confusion, we should have the person who is said to have been confused, so that we can cross examine him. Your Honor must see that there is very great danger in a case of this kind. Mr. Vogt may have been a detective, hired for the undertaking, and I think we ought to know who is Vogt and what about him and why was he doing this. I am imputing to this gentleman, Mr. Mann, the highest credibility. I have not any suggestion in what I am now saying that he is doing anything but repeating as well as he can remember a conversation that occurred, but, of course, that conversation primarily would be irrelevant as having occurred in our absence, would be mere hearsay, unless it were designed to show a confusion by it in the mind of Mr. Vogt. Now, I think Mr. Vogt, the confused person, should be here in order that we should search his conscience and find out whether he was confused or whether he was making evidence.

20

The Court. I realize that it opens wide the door to manufacture evidence. I am going to admit the testimony, however, and deal with its competency later.

30 *Mr. Ward.* Of course, if your Honor has any doubt about the competency before striking it out of the record of rejecting it you will hear us on this point.

The Court. Oh, certainly.

Q Did Mr. Vogt say anything about having made purchases before at your stores? A He had in our different stores such as our Brooklyn store and our New York store.

Q Did you see the suit that Mr. Vogt was wearing at that time? A Yes.

40 Q Did you see a label in it? A Yes.

Q What label was it? A Hilton's label.

Q Your label? A No, sir.

Q Label of any of your stores? A No, sir.

Q Did you point out to Mr. Vogt any difference between that label and one of yours? A Yes, sir.

Jacob Mann, direct.

Mr. McCarter. I object to all the conversation.

The Court. All of the testimony is taken subject to your objection, Mr. McCarter.

Q Did he express any surprise when the difference was pointed out to him?

10

Mr. McCarter. I think the conversation should be given if it is going to be given at all.

The Court. You need not object to any of this conversation. I will consider it all taken under your objection.

Q What did he say? A After he had purchased the suit of me the suit he had on he said it was "a suit I got at your other store"; I said, "Which one do you mean"? He said, "Down at your Nassau street store"; so I recognized the suit as not one of our suits, and I looked inside and on the outside of the pocket label read, "Hilton's," so he said, "Why, isn't that one of your stores"? I said, "No." "Why, he said, "I thought it was the same concern." I said, "No, you see the labels read different." "Why," he says, "it is funny, I have been trading with you people for years and was under the impression it was the same concern," and I showed him the difference in the label.

20

Q And on what day was that? A It was on December 11, 1918.

30

Q Did Mr. Vogt give you his card? A Yes, sir.

Q And pencil his name on it himself? A Yes, that is his card right there.

Mr. Ward. That is pinned to the memorandum. May that be considered part of the exhibit for identification?

Mr. McCarter. I don't think the document has any probative force at all.

Mr. Ward. I haven't offered it yet. I understand the Court has part of the exhibit for identification.

40

The Court. The card will be considered part of the exhibit for identification.

Q Do you remember an occasion on which Mr. Joseph W. Robbins came into the store? A Yes, sir.

Jacob Mann, direct.

Q Did you know Mr. Robbins? A Only just by waiting on him that day on that occasion.

Q This gentleman that came in did he make a purchase?
A Yes.

10 Q And in making the sale he gave you his name and address? A Yes.

Q That name and address is what? A Joseph W. Robbins, 201 West 144th street; that is his own writing; that is his name right there; he signed his name.

Marked Exhibit 2 for identification.

Q What was your conversation with Mr. Robbins?

Mr. McCarter. The same objection to that.

20 Q Do you recall the conversation with Joseph W. Robbins?
A Mr. Robbins' conversation with me; he says to me that he bought, made a couple of purchases at Thirty-sixth street store and Broadway, and I told Mr. Robbins it was not the same concern. "Why," he says, "why, ain't you the same concern?" Well, I told him, I says, "This is The Hilton Company and they call themselves "Hilton's." "Well," he said, "When I went in there I thought I was buying of the same concern."

Q (*By the Court.*) He said when he made the purchase?
A After he made the purchase.

30 Q (*By the Court.*) Did he say when he had made the purchase at Hilton's? A No, sir.

Q Is this the case you know about, Manuel Buggy? A Yes, I recall that transaction.

Q What was the date? A November 23, 1918.

Q I didn't ask you the date of the Robbins' interview; do you know what it was? A No, I couldn't recall it.

Q About how long ago? A About four months ago.

Q Did you talk with Mr. Buggy? A I did, yes.

Q Had you known him before? A No, can't say I did.

40 Q He gave his full name and address as what? A Mr. Buggy.

Mr. McCarter. The same objection.

Q First name? A Manuel.

Q And his address? A 1122 West Front street, Plainfield, New Jersey.

Jacob Mann, direct.

Q What was your conversation with him?

Mr. McCarter. The same objection.

A The conversation I had with Mr. Buggy was in reference after he made the purchase he says, "I bought a suit of clothes at your Broadway store at Thirty-sixth street," and he says, "I was very much dissatisfied," and he told me that he asked the salesman at the Thirty-sixth street store—

10

Q Don't tell us what the salesman at that store said to Mr. Buggy. A Well, the customer said he asked him whether there was any connection—

Q Don't go into that; I only want the conversation between you and Mr. Buggy with reference to the transaction you had with him? A Well, he bought a suit of clothes and overcoat at our store.

Q (*By the Court.*) Did he say when he had bought the suit of clothes at Hilton's? A No, sir.

20

Marked 3 for identification.

Q Are there any other instances which you can refer to of apparent confusion that you have not made a specific record of? A I can't recall any.

Q Do you have people coming into the store sometimes looking for suits that you don't carry? A Yes, at times.

Q What do they ask for?

Mr. McCarter. The same objection.

30

The Court. Go ahead; answer the question.

A They come in and want to know whether we have any suits on sale if they read the ad in the paper. I ask them about what price suit of clothes they had an idea of buying, and they said something about \$18.50, and I would tell them we did not advertise such sale. "Why, this is The Hilton Company?" "Yes, The Hilton Company." "Well, we seen your ad and that is what brought us in."

Q (*By the Court.*) How often do those instances occur? A Well, maybe two or three a week.

40

Q (*By the Court.*) How recently? A Well, during the last two months.

Q (*By the Court.*) Any within the last month? A Yes.

Jacob Mann, cross.

Q Any within the past few weeks? A They would occur mostly on Saturdays.

Cross examination by Mr. McCarter.

10 Q You have apparently made memoranda of these interviews that you have detailed in your evidence, Mr. Mann; how did you happen to do that? A Just to refresh my memory in case they would be wanted.

Q Well, were you directed to do so? A I was.

Q By whom? A Mr. Murray.

Q When? A At all times.

Q Well, five years ago? A No, no.

Q Well, you have been in the employ five years, you say? A I mean since the session has been going on; since this confusion between Hilton's and The Hilton Company.

Q Since this lawsuit has been going on? A Yes, sir.

20 Q When were you first told to make a memorandum? A Well, after the litigation between Joseph Hilton and Phil. Hilton.

Q Do you know when that litigation commenced? A Some two years ago, I guess.

Q And you have made a note of all such conversations since that? A To my best judgment.

Q Eh? A To my best judgment, yes.

Q And you were directed to do it two years ago? A No, no; I have been here a couple of times; these are new ones that transpired.

30 Q You were directed to do this two years ago, were you? A A No, sir.

Q You said first you had done it at all times; then you said since the litigation commenced; now you say the litigation has been going on about two years, and I ask you when you were directed to make note of any such conversation? A About a year ago.

Q Now you say a year ago. Now, have you got it right? A Yes.

40 Q Where were you so directed? A I received my orders from Mr. Murray.

Q Where? A At our store, Fourteenth street and Broadway.

Q About a year ago? A Yes.

Q And you have undertaken to obey his orders? A Yes.

Jacob Mann, cross.

Q And as soon as you made these memorandums did you turn them in? A I sent them to Newark, yes.

Q What efforts they have made to get Mr. Robbins or Mr. Bruggy or Mr. Vogt you don't know? A What efforts?

Q What efforts they have made to bring these gentlemen here you don't know, of course? A No, sir.

Q (*By the Court.*) Are those instances which you have testified to the only instances of confusion that you have observed during the past year? A Oh, no, but I never made no notes of all of them. 10

Q (*By the Court.*) Why didn't you make notes if you were instructed to do it? A Well, because they were not so serious. I have had these facts where a man would come in and say he ordered a suit of clothes down to Joseph Hilton; I wouldn't go in any detail with him with reference to that.

Mr. McCarter. I object. 20

Q (*By the Court.*) These are the only instances where you considered it important enough, or rather to indicate the confusion to such an extent as that you considered you ought to make a memorandum of it? A Well, to myself personally.

Q (*By the Court.*) For the past year? A Yes.

Q Now, this Mr. Buggy, if that is his name, expressed himself as very much dissatisfied with the suit of clothes he had on? A The one he had on, yes.

Q He had already bought a new suit, hadn't he? A Yes. 30

Q And he told you where he had bought it? A Yes.

Q And the evidence you are giving is to the effect that he had come into what he believed to be the same concern and bought a new suit, although he was very much dissatisfied with the old suit? A He bought of us previous before he went to the Thirty-sixth street store, but he went in there thinking it was the same concern.

Q And being very much dissatisfied with the purchase he came back to the same concern to get another suit? A Yes, back to The Hilton Company. 40

Q Now, you recall distinctly the label that was in it that he showed you? A Mr. Buggy?

Q I haven't spoken of anybody else, have I? A If you show me I can tell you the label.

Jacob Mann, cross.

Q Answer the question, please. Do you recall distinctly the label that he showed you? A Yes.

Q What was it like? A White.

Q I show you a label in the black book that has been marked in this cause and designated Defendant's Label; is that the label that he showed you? A Yes, sir.

10 *Mr. McCarter.* It seems to be the only one of the defendant's labels in the black book and I offer the label; and I also show you the label on the very first page in white; is that the same thing?

A That is the same one.

Q It is one of those old Hilton's labels? A Yes, sir.

Q Now, what are your duties as manager of the store? A Look out for the interest of The Hilton Company, wait on the trade when all the other salesmen are busy.

20 Q Now, how many people have you heard say in your Fourteenth street store that they had seen or in any way referred to newspaper advertisements in the New York papers; how many people have you heard say that? A To my best memory, well, about thirty, or twenty-five to thirty.

Q Have you undertaken to keep any count of them? A No.

Q When? A Mostly on Saturdays.

Q What Saturday? A Different Saturdays the last two or three months.

30 Q What is the earliest? A About three months.

Q Eh? A The earliest?

Q Yes. A Only here about two weeks ago.

Q All within two weeks? A No, the last three months, but that was the last I heard of people coming in on the advertisement of the Hilton's.

Q I asked you when is the earliest time you heard any such? A About three months ago.

Q That would be when, September or August? A About August.

40 Q Are you able to say it was August? A No.

Q Might have been July? A That I couldn't say.

Q Eh? A I couldn't tell you that.

Q You have no more certainty about it than that? A I haven't made any notes.

Q Made no notes of it at all? A No.

Jacob Mann, re-direct.

Re-direct examination by Mr. Ward.

Q What did Mr. Murray tell you to record in these cases?

Mr. McCarter. I object.

The Court. What is the question?

Q What kind of a record were you instructed to make by Mr. Murray? 10

The Court. I will permit it.

A Records of the different confusions that transpired between customers that come in the store thinking they were buying, that the same concern was connected with The Hilton's, 243 Broadway or Thirty-sixth street and Broadway or Fifth avenue and Thirty-third street, New York.

Q What were you supposed to put into this record, which fact? 20

Mr. McCarter. I object to it.

Q What were you instructed to do?

Mr. McCarter. I object to that.

The Court. Why do you want to go into that?

Mr. Ward. Mr. McCarter very naturally brought out the fact that he was instructed to make a record of these cases; then he points to the comparatively few number of them. I want to show just what the instructions were and why these mere casual instances as described— 30

The Court. I will permit him to say what his instructions were.

A My instructions were in such cases where after a purchase was made by the customer where the customer himself would say, "I bought this last suit at Thirty-sixth street store," or 243 Broadway or Fifth avenue and Thirty-third street, in conversation would say to me, "Why didn't I buy that of the same concern and through the same concern, Thirty-third street and Fifth avenue or Thirty-sixth street and Broadway, 243 Broadway and Fulton and Nassau streets." I would tell them no, it was a different concern altogether, and then I would write down what the conversation consisted of. 40

Jacob Mann, re-direct.

Q (*By Mr. McCarter.*) Those were all your instructions; Mr. Murray told you all you have just said; is that right? A Yes.

Q If a person came in the store and asked for an \$18.50 suit which you did not carry in the store, did you ask him for his name and address under those circumstances? A No, sir.

Q Were you or were you not instructed to keep a specific record of instances of that sort?

Mr. McCarter. I object to it.

The Court. Admitted.

A Not in all these cases; I wasn't waiting on everybody that come in the store.

Q Everybody that spoke to you? A No, I can't recall.

Q Don't recall what? A Making any notes of \$18.50 trans-
20 actions.

Q (*By the Court.*) Being instructed to make any? A I was, yes.

Q (*By the Court.*) Were you instructed to make any notes of these \$18.50 transactions? A No.

Q Were you instructed to make notes of the name of the customer if you could obtain it? A I was, yes.

Q And address? A Yes.

Q I show you a letter and envelope; did you receive that letter and in the envelope at your store yesterday?

30 *Mr. McCarter.* Objected to as irrelevant and immaterial.

A Not yesterday; one day last week.

Q When did you receive that? A January 7.

Mr. Ward. I offer the letter and the envelope.

40 *Mr. McCarter.* We object to it. This document bears the date the 6th or 7th of January and is therefore, as I think, entirely irrelevant. We are here to answer a case that is supposed to be made by petition to which we have interposed answer. In the second place, it is objectionable because it is a mere letter written we don't know by whom, may have been written, inspired or even sent by the complainant himself or by some of his emissaries or detectives or managers or friends, and to make a case of

Jacob Mann, re-cross.

contempt without any further identification or testimony than the letter itself is, I think, improper.

The Court. I have grave doubts, but I am going to admit it at this time.

Q Do you know the writer of that letter? A No, sir.

Marked Exhibit C. b. c.

10

Re-cross examination by Mr. McCarter.

Q During the last two or three months since the fall trade started in how many customers do you have a day on the average at your Fourteenth street store? A Twenty a day; that is, including Saturdays; of course, we have more on Saturdays, but we average right through about twenty a day.

Q How many on Saturdays would you say? A About fifty.

Q And by customers I do not only mean those that buy, but I mean those that come and inquire as well? A About the same amount. Inquire with reference to what?

20

Q Clothing; sometimes might come in and expect to buy, but do not buy for some reason or another. A Sixty, we will say; we allow ten that won't buy out of the fifty; that makes sixty all together.

Q On the average, then, during the week days how much would you lose? A We lose about three out of the twenty.

Q Would twenty cover those that come to inquire as well as those that do buy? I am trying to find out how many people come in the store a day for one purpose and another, exclusive of your own help. A About twenty.

30

Q (*By the Court.*) How many salesmen have you there? A We have five that sell.

Q (*By the Court.*) And only twenty people come in your store a day? A Yes; not at one time, of course; we have extra on Saturday.

Q (*By Mr. Ward.*) How long has this difference in the number of customers as between week days and Saturdays gone on? A Well, we figure Saturday is our best day in the week, of course.

40

Q (*By Mr. Ward.*) How long have you figured it that way?

The Court. Always, haven't you?

A Yes, it is about the same run all of the time.

Larry Goldberg, direct.

LARRY GOLDBERG, sworn.

Direct examination by Mr. Ward.

Q Where do you live? A Fourteenth street and Broadway.

Q And you are employed at the same place? A The Hilton
Company.

10 Q As a salesman? A Yes.

Q Do you recall an incident, an occasion on which a man
who calls himself Nick Syres came to the store? A Will you
allow me to look at that please?

Q Did you make this memorandum which I show you?

Mr. McCarter. Can't you remember about it at all
without referring to that memorandum?

A No.

20 Q (*By Mr. McCarter.*) Not a thing? A This is my writ-
ing.

Q (*By Mr. McCarter.*) I ask you if you remembered anything
about the incident? A Yes, I remember the incident.

Mr. McCarter. I would rather you state what you re-
member about it.

Q (*By the Court.*) When did you make that memorandum?
A About November.

Q Was it the same day? A Yes, five minutes after the
transaction occurred.

30 Q (*By the Court.*) Do you need to look at that memoran-
dum to refresh your recollection as to details? Yes or no, do
you need to? A Yes.

Q (*By Mr. McCarter.*) Do you mean to tell me you have
no recollection of the incident at all? A I have at different
times waited on customers.

Q (*By the Court.*) Have you a recollection of the incident
at all? A Yes, sir.

Q (*By the Court.*) Tell us what your recollection is, un-
aided by the paper, then we will let you look at the paper.

40 *Mr. McCarter.* Of course, I object to the incident.

Larry Goldberg, direct.

A Well, your Honor, I tell you, to be truthful to you, you have got to let me look at that to give you an idea; that is an everyday occurrence in the store where I am; I only take it down when I think of it; of course, at times when I am busy I can't take it down.

Q (*By the Court.*) Have you given us all the recollection you have without looking at the paper? A There was one man I was very sure of. 10

Q It is this case we are talking about? A I can't recall that unless you show it to me.

Q (*By the Court.*) Then you can't recall anything? A I recollect this incident, but I can't tell about it unless you let me look at it.

Q (*By Mr. McCarter.*) You recollect that? A Yes, I recollect my own handwriting and I know what transpired if you let me look at it. 20

Q (*By Mr. McCarter.*) You say you can't recall a single incident? A We have a good many customers a day.

Q (*By Mr. McCarter.*) Do I understand you to say that you have no recollection at all in your mind of what occurred between Mr. Syres and yourself? A I remember waiting on the gentleman and if I have written anything down, why, I have got to look it over to refresh my memory.

Q Do you have any personal recollection of what occurred between Mr. Syres and yourself? A Yes, I have. 30

Q What is it? A A gentleman came in to buy a suit of clothes and I sold him a suit of clothes. During the course of the conversation he told me, "I bought this suit of clothes at your Thirty-sixth street and Broadway store and I ought not to come back here any more because I was not treated satisfactorily." So I looked at his suit, the suit he bought, he had on, and I immediately recognized that the suit did not belong to the company that I was working for. I looked at the label of his coat; I can't remember whether it was black or white or any particular color. I explained to the gentleman that that suit of clothes did not come from The Hilton Company; he was somewhat surprised. "Why," he says, "ain't this the same?" I said no. "Well," he says, "You ought to make me an allowance for the suit of clothes that I have bought of you." I told him, "This is a different concern altogether, one is The 40

Larry Goldberg, cross.

Hilton Company and the other is Hilton's." That is about the only recollection I have of that particular customer.

Q (*By the Court.*) Did he tell you when he had bought the suit? A No, sir.

10 Q (*By the Court.*) When did this take place? A About in the month of November.

Q The suit he referred to was the one he was wearing at the time? A Yes.

Q Do you remember an occasion upon which you conversed with Mr. Behling and his mother or his sister in your store? A Yes.

Q When was that? A My best recollection it is about from six to eight weeks.

Q (*By the Court.*) Ago? A Yes, sir.

Q (*By the Court.*) What was said?

20 *Mr. McCarter.* The same objection.

A The lady come in with her son or her brother, I am not sure; I didn't ask her; she said: "I read your ad in the paper." This was on Saturday. She said, "I see your ad for \$18.50; I would like to see that suit." I immediately told her it was two different firms, we did not advertise any suits for \$18.50, that it was a different concern altogether. She said, "I have always been buying at the Fourteenth street store and I came in today because I saw your ad and thought I could get a suit of clothes at a much better price." I told her it was a different firm altogether. That is all I remember about that particular transaction.

30 Q Do you remember other instances of such conversations where you haven't made note of the name and address of the parties? A A few other instances, but I didn't have time to bother with them.

Cross examination by Mr. McCarter.

Q Now, this Nick Syres had on a suit of clothes which he claimed he had bought at your Thirty-sixth street and Broadway store? A Yes, sir.

40 Q And you satisfied yourself it was not one of your suits? A Absolutely.

Q How did you satisfy yourself to that effect? A Because I didn't recollect seeing a garment of that kind in the place during my three years' employment.

Larry Goldberg, cross.

Q You could tell every garment that has been sold in the Thirty-sixth street store? A No, sir.

Q You never worked at the Thirty-sixth street store? A No.

Q I ask you again how you knew that the suit he had on had not been purchased at your stores? A Because I know every style of model that is built by The Hilton Company. 10

Q You think they build all their own clothes? A The finer class of clothes.

Q Did you look at the label? A Why, I might have looked at it, I am not positive.

Q Didn't you tell the Vice-Chancellor that you did? A I said I might have looked at it, I am not sure.

Q Didn't you tell the Vice-Chancellor that you did look at it? A I might have looked at it, if I said it I might have looked at it. 20

Q What was the fact about it, did you look at it or didn't you? A It is possible I did look at it.

Q Don't you remember? A I think I did.

Q Then you did look at it, didn't you? A Yes.

Q You come now and say you did look at it? A Yes.

Q What was it? A It was either a black or white label marked Hilton's.

Q It was a label either black or white marked Hilton's? A Black background with white lettering marked Hilton's. 30

Q Did this Nick Syres say if he was complaining of a suit of clothes that he had bought at your Thirty-sixth street store why he had not gone back to the Thirty-sixth street store to complain about it? A He came in the Forty-third—

Q I asked you did he say why he had not gone back to the Thirty-sixth street store where he bought the bad clothes? A No, he didn't say why he didn't go back.

Q Did that strike you funny? A No.

Q I understood you to say he wanted an allowance made for it? A Yes. 40

Q And still that did not strike you funny that he had come to a Fourteenth street store to get an allowance for a suit of clothes that he had bought at what he believed was your store Thirty-sixth street? A Well, I, as a salesman, believed that he really was entitled to an allowance.

Edward Driscoll, direct.

Q (*By the Court.*) Did it strike you as funny that he come to the Fourteenth street store instead of going back to the Thirty-sixth street store to get the allowance? A No.

Q It did not? A No.

Q Now, you took note of the Syres case and the Behling case? A Yes.

Q Pursuant to instructions? A From the manager, yes.

EDWARD DRISCOLL, sworn.

Direct examination by Mr. Ward.

Q You reside where? A My place of business is 85 Nassau street.

Q Residence? A 210 Eighty-eighth street, New York City.

Q You work at 85 Nassau street, New York? A Yes.

Q As manager of that store for Philip Hilton? A Yes.

Q How long have you been there? A Three years in April.

Q As manager? A Yes.

Q How many salesmen do you have in that store? A Just one man, one salesman.

Q Do you recall in October receiving a telephone call from someone that said they were a Westchester Shirt Company?

A Yes, had a call.

Mr. McCarter. We object to that for the same reason that we have given before, telephone call.

30

Q (Question read.)

The Court. The answer to that is yes. What is your next question?

Q Will you state that conversation?

Mr. McCarter. I object. How is that competent? There is no evidence there was an actual individual on the other end of the telephone other than your own employee. It is opening the door wide to what is commonly called a frame-up.

40

Mr. Ward. That is perfectly true of all this evidence practically.

The Court. It is a little bit different where the conversation is between individuals. I will admit the tes-

Edward Driscoll, direct.

timony upon the same condition that I admit the other. Now, what was the conversation on the telephone.

Mr. McCarter. Of course, your Honor has our objection.

Q Did you know the person speaking on the other end of the wire? A No, I did not. 10

Q State the conversation? A Why, the Westchester Shirt Company in regards to a bill, it was a ladies' bill. In regard to what she said, a bill of shirts; I told her we did not carry shirts, it must be the other Hilton's she wanted, corner of Nassau street and Fulton street; she didn't know there were two Hilton's in New York in business; I told her there was.

Q Do you remember in October a Mr. Huffstider coming into the store? A This is Huffindles.

Q Is he an old customer of yours? A No, he is not. His address is 4751 Kimball avenue, Lawrence Park, Long Island. 20

Q Had he bought from you before? A He didn't say; he was in our store and bought an overcoat.

Mr. McCarter. I object to this evidence.

The Court. Go ahead.

A He was in our store and purchased an overcoat and the suit he had on he said he had purchased in our store across from the City Hall Park, and he was told it was a different concern; he said he was under the impression it was all the same company. 30

Q (*By the Court.*) When was this conversation? A It was October 16, 1918.

Q (*By the Court.*) Did he say when he had purchased the suit? A He did not.

Q Do you remember a conversation in the latter part of October with a Mr. Reineking? A 471 Euclid avenue, Brooklyn, yes.

Q Well, what did he come into the store for? A He came in the store with a suit he had purchased at Joseph Hilton's and which had not given satisfactory wear and he thought that we had ought to make an allowance or give him another suit, and I told him it was a different concern; he had purchased a suit at Joseph Hilton's, corner of Nassau and Fulton streets and he thought our store was the same concern 40

Edward Driscoll, direct.

as the signs were down at Nassau and Fulton street at that time; a clearing sale or something there, and signs were down and he was confused and thought it was the same concern; he bought a suit on the corner.

10 Q You mean at that time the large main sign over the entrance—

Mr. McCarter. I object; you can't lead the witness that way.

Q Was that an old suit? A It was a suit he purchased recently at the corner of Nassau and Fulton streets.

Q How recently; did he say when he had purchased it? A He did not; he said it was a suit he had worn a short while.

20 Q Do you remember the case of a Mr. F. Glovers in the latter part of October? A October 26; Mr. F. Glovers' business address is 181 Hudson street, New York City. He came in our store; he had an appointment to meet his mother; going to buy a suit, and he asked me if his mother had been in. I said she had not, so he went outside.

Mr. McCarter. I object to the conversation.

30 A He stood outside the store about half an hour and come in and wanted to know if his mother 'phoned to the effect she was not coming. I said no; I suggested she might have got in the corner of Nassau and Fulton street by mistake. He said he would go over there, which he did, and his mother was there; she had an idea that was the store she was to meet him; she had been in our store before, 85 Nassau street, with another son and purchased a suit; she had an idea we had moved.

Q They came back to your store together, did they? A Yes.

Q Had you known Mr. Glovers before? A Yes.

Q Had you known the mother before? A Yes; met the mother before in our store.

40 Q Do you remember an instance in relation to a Mr. Baldwin of Church street? A Mr. Baldwin of 50 Church street, city; he had purchased a suit in our store and said the suit he had on he bought on the corner of Nassau and Fulton streets, and we told him it was a different concern. He said it was the same concern as had a store in Brooklyn, and I said no; he said he was under the impression the Nassau and Fulton street and

Edward Driscoll, direct.

Brooklyn store was the same concern; he had been a customer for some time of our store.

Q (*By the Court.*) When was this conversation? A In either November or the 1st of December, last year.

Q Do you remember Mr. J. D. McCherry of Westfield, New Jersey? A He made a purchase in the Nassau street store and he said he bought— 10

Mr. McCarter. Same objection.

A He had a suit on marked Hilton's, the label was, and he was under the impression it was the same concern.

Q Do you remember when that was? A It was in November he was in.

Q Early part of the month or latter part? A Early part.

Q Do you remember a telephone message from Philip Jones Shirt Company, or some one representing Philip Jones Shirt Company? A Yes. 20

Mr. McCarter. The same objection.

Q When was that? A That was in December.

Q What was that? A It was in regard to a bill of goods shipped to our Waterbury store, and I told her we had no store in Waterbury, and without a doubt she wanted the other Hilton's, Joseph Hilton's concern.

Q (*By Mr. McCarter.*) What was the name of that party? A Philip Jones Shirt Company. 30

Q Do you remember Mr. Houghton? A That is, Mrs. Houghton, at West Eighty-eighth street; 73 West Eighty-eighth street; 'phoned me in regard to a suit her husband had bought.

Mr. McCarter. Same objection.

A I looked in the tailor shop; he had no suit; she told me the day she bought it; we had sold no suits by that name; I asked the location of the store that it was bought; she said Nassau and Fulton streets. I said it was a different concern. She didn't know there was two concerns in the clothing business; she said it must be the same concern because it reads 85 Nassau street, and I told her the location of our store and location of Joseph Hilton's store. 40

Q When was that? A That was in December.

Edward Driscoll, direct.

Q Do you remember Mr. John Klambacher? A Yes, Guaranty Trust Company; he was in our store December 6th, and I noticed the suit he had on and asked, "Where did you buy that suit"?

Mr. McCarter. The same objection.

10 Q Did you see the label on the suit? A Yes, I saw the label.

Q Whose label was it? A Mr. Joseph Hilton's label.

Q Had he been a customer of yours before? A Yes, pretty near three years, to my knowledge, in this store.

Q (*By the Court.*) What was the conversation? A I asked him where he bought it; he told me at the store at City Hall Park. I said, "That is not our store"; he said, "I know it isn't now." I asked him how he found out; he said when he went in there he thought it was The Hilton Company store and purchased the suit, and when he got it home there was a damage in the sleeve, and when he returned the suit, why, the salesman told him there would be a cost of having this suit repaired; he said it ought to go to a weaver's; he said, "All right," seemed to remind him in a way, here was a cost for having this repairing done; he said if there is cost I am willing to pay for to have it fixed; it cost in the neighborhood of two dollars, but he says, "over in your Nassau street store anything to be done about this it would be done." I asked him if he knew Driscoll; he said yes, he knew Driscoll, but he said this is a different concern.

30 *Mr. McCarter.* Your Honor thinks this is competent.

The Court. Thought there might be something competent come out, but it didn't. I will strike it out. Did you look at the label in the man's suit of clothes?

A Yes, sir.

Q (*By the Court.*) What did it say? A Hilton's.

Q (*By the Court.*) Hilton's? A Yes, sir.

Q (*By the Court.*) Did he tell you when he had purchased the suit? A Yes, in August; last part of August.

40 Q Do you remember a telephone message from a Mr. H. Shaw? Who wrote that memorandum on that? A The cashier.

Q In your store; how did she come to write that out? A From orders.

Q Who told her what to say on the memorandum? A I did.

Edward Driscoll, direct.

Q Did you dictate it to her? A Yes.

Q When? A At the time I had interviews with the customer; why, I would take these letters to her and she would write it.

Q When was this written? A December the 18th.

Q 1918? A Yes, sir. 10

Q Did you see that after it was written out by your cashier?
A Yes.

Q What did you do then? A I read it and had it forwarded to the Newark headquarters.

Q Does that correctly state the incident that occurred on that day? A Yes.

Marked 3 for identification.

Q Read that over, Mr. Driscoll, please. Now, do you recall that incident? A Yes.

Q What was said? A The cashier called me to the 'phone and I told her in a case like that— 20

Mr. McCarter. I object.

The Court. Strike that out.

Q (*By the Court.*) What did you do? I went to the 'phone and talked to this Mr. Shaw.

Q (*By the Court.*) What was said?

Mr. McCarter. I object.

A He wanted to know why he had not received a fur-lined overcoat. I asked him where he bought it; he said, Nassau and Fulton streets; I told him he had the wrong concern on the 'phone; he said he was under the impression there was only one Hilton. I told him that the new concern were operating under the name of Hilton's at the corner of Nassau and Fulton streets and without doubt that was where he bought it. He said that is where he bought it; he insisted he was talking to the right concern, 85 Nassau street. 30

Q Do you remember a Mr. Lewis M. Willis? A Mr. Willis, I believe, bought—can I have the address on there? 40

Q Is this memorandum made by your cashier? A Yes.

Q At your dictation, when? A December 23.

Q 1918? A 1918.

Q And you saw it at the time? A I did.

Q And sent it to Newark? A Sent it to Newark.

Edward Driscoll, direct.

Q And is this card attached to it a card that this gentleman gave you? A Yes, that is his card.

Q And he wrote the address on there himself? A Yes.

Marked 4 for identification.

Q Read the memorandum, please.

10

Mr. McCarter. Can't you remember that instance without reading it through? A Yes, I can; Mr. Willis come in our store to have a coat repaired, and I looked at the coat and label, and said, "This is not our coat, but I will repair it for you just the same." He said he bought it across from the City Hall Park.

Q (*By the Court.*) Did he say when? A No, I didn't ask him when.

Q (*By the Court.*) Did you observe the label in the coat?

20 A Yes.

Q (*By the Court.*) What did it say? A Hilton's.

Q Was there another incident on December 23, 1918? A Yes; Mr. William J. Rariden; his address is 91 William street.

Q Of what city? A Of New York. He purchased a suit and overcoat in our store, and he had on a suit he said he bought over on the other corner, corner of Nassau and Fulton, Joseph Hilton, which he thought was the same concern at the time he went in there, and removing the coat at the time he purchased the suit there, he had Hilton & Company suit on, and the salesman made the remark—

30

Mr. McCarter. I object.

A He takes this suit home and compares the label with the suit which he bought of Hilton & Company and he found out it was a different concern, and he came back to 85 Nassau street and bought a suit and overcoat.

Q Do you have people come into your store who ask for goods at a certain price which you do not carry? A Yes.

Q Tell us more about that? A It is mostly on Saturdays that occurs; they come in and ask for suits and overcoats that we advertise in the papers—in the New York Journal.

40

Q And that continued up until recent time? A It is more so in the last few months in our store.

Q You get mail; is mail delivered to you that does not belong to you? A Quite often, yes.

Edward Driscoll, cross.

Q What do you do with it? A I return it to Mr. Hilton's store, Nassau and Fulton streets.

Q And sometimes receive from them mail for you? A Yes, and they return it to us.

Cross examination by Mr. McCarter.

Q How recently have you received mail that was intended for the other concern on the corner? A I think it was last week I returned a letter there from a shirt house. 10

Q Delivered by the postman? A Delivered by the postman.

Q You think the postman does not know the difference between the two stores? A He does; it is just a mistake. I told him to be careful.

Q I didn't ask you what you told him. You know very well he knows the difference, don't you? A Yes.

Q You mean to say you noticed these requests for \$18.50 suits recently? A More so, yes, in the last month or six weeks. 20

Q That has been most of the time when you noticed it? A Yes.

Q Did Rariden tell you when he bought the garment of us that he supposed he was buying of you? A No, he didn't mention the time.

Q Did he tell you what the label was on the Joseph Hilton article? A He did, after he compared it with ours; he didn't notice the label until he compared it with ours.

Q It was one of Hilton's labels? A Hilton's labels. 30

Q How many customers do you have, on the average, leaving out Saturdays? A You mean customers that are sold or people that come in the store?

Q Well, either way; I don't care. A Well, that is sold won't average over ten or twelve a day weekdays.

Q (*By the Court.*) How many people come in your store a day? A Why, I should say an average of twenty people a day.

Q Now, it is a very small store on Nassau street, isn't it? A Yes.

Q Only one salesman beside yourself? A Yes. 40

Q How does it compare in size with what I will call our store on the corner? A Why, the front no comparison at all. We have got a very small front there, 85 Nassau street, and Mr. Hilton has got a large corner front.

Max A. Werner, direct.

Q Do you know how many salesmen are employed by us in the corner store? A No, sir.

Q You say there is no comparison between the two stores? A Large size and large front he has got, and everything.

Q (*By Mr. Ward.*) Has Saturday always been your heaviest day? A Yes.

10 Q (*By Mr. Ward.*) By the way, do you have telephone calls from time to time asking for people who are not in your store?

Mr. McCarter. I object to those telephone calls.

A Yes, quite a few.

Q Do you keep gent's furnishing goods? A No.

Q Our concern does up at the corner, doesn't it? A Yes, I believe they do; I see display in the windows, so I imagine they do.

RECESS.

20

MAX A. WERNER, sworn.

Direct examination by Mr. Ward.

Q Where do you live? A 569 West End avenue, New York.

Q Where do you work? A For the Hilton Company.

Q In Brooklyn? A Yes, sir.

Q Is this memorandum in your handwriting? A Yes, I think it is. Let me see it with my glasses on. Yes, sir.

30 Q When did you make that memorandum? A The day that Mr. Thomas called in, the same evening.

Q What day was that? A November 26, 1918.

Q Do you recall that incident without reading this over? A Yes.

Q What happened? A Mr. Thomas came in that afternoon, purchased an overcoat, and after I had sold him an overcoat he says "I have a coat here"—

Mr. McCarter. I object to the conversation.

40

The Court. The same ruling.

Q Proceed. A He says "the last coat I bought of you was not very satisfactory and I would like to have you look it over," brought the coat over to me and I looked at it, looked into the pockets and found a different label than ours.

Max A. Werner, cross.

Q What label was that? A Hilton's.

Cross examination by Mr. McCarter.

Q Mr. Joseph Hilton has no store in Brooklyn, has he? A I don't know of any, sir.

Q Do you know when he bought that other suit? A It was an overcoat, sir. 10

Q When he had bought the other suit? A I didn't say he bought a suit; he bought an overcoat.

Q The coat he had previously bought was an overcoat as well? A It was an overcoat that he complained about, not a suit.

Q When had he purchased that? A Bought that in the spring.

Q Spring of 1918? A Yes.

Q Where is your Brooklyn store? A Corner of Fulton and Gallapin place. 20

Q That is quite a large store, isn't it? A Fairly sized store, good sized store.

Q How many salesmen do you have there? A Three of us and manager.

Q Three and manager? A Yes.

Q Do you do any gent's furnishing goods there? A No, sir.

Q How long has the store been there to your knowledge? A To my knowledge I think it has been there three years at this particular corner. 30

Q And the wooden sign is "The Hilton Company"? A Yes.

Q Company written out or Co.? A Word Co., abbreviation of company; I think it is Co. instead of company.

Q Are you sure about that? A That I am not positive of; I wouldn't swear to it.

Q And the label that you use in your goods there is the brown label? A It is black background with golden letters The Hilton Company. 40

Q Company written out or Co.? A Co., I guess.

Q I show you label, the lower one there; is that the type of label? A Yes.

Marked Exhibit D. g.

John H. Dayton, direct.

Q Now, the label that you found in the overcoat is one of these white ones in the black book which I before referred to?
A Yes.

(Witness points out the white label on the first page of the black book.)

10 Q Are you able to estimate with any degree of accuracy the number of customers or proposing customers that you have in a week over there? A Do you mean individually or the store itself?

Q I mean the store itself? A The store itself?

Q The store itself. A Daily or weekly?

Q I said weekly, including Saturday? A I should say probably in the neighborhood of 250.

Q A week? A Probably 300, from 250 to 300; a very hard
20 proposition to give an accurate amount.

Q I want your best estimate? A Yes.

JOHN H. DAYTON, sworn.

Direct examination by Mr. Ward.

Q Where do you live? A Lynbrook, Long Island.

Q You work at the Brooklyn store of the Hilton Company?
A Yes.

Q How long have you been there? A About eight years.

30 Q Is this name and address pasted on the face of the letter in your writing? A That is not my writing, that is customer's writing.

Q That is the writing of a customer? A Yes; he placed that there himself.

Q That was written in your presence? A Yes.

Marked 4 for identification.

Q Now, what did Mr. Laswell say at the time he was in the store?

40 Mr. McCarter. Objected to.

A P. C. Laswell. He came in to see what we did about velvet collars that did not give satisfactory wear.

Q What did he say about velvet collars that did not wear; what did he ask you to do? A I opened the coat to see the

John H. Dayton, direct.

label and found it was not our label, and I told him we could not do anything about somebody else's garments.

The Court. What was the label?

Q What label did the coat have on? A It had Hilton's label on.

Q (*By the Court.*) Did it have the word Hilton's on it? A Yes, sir. 10

Q (*By the Court.*) When was the coat bought, did he say? A He didn't say when it was bought.

Q Is this memorandum in your writing? A The signature is in my writing. That is the manager's writing.

Q The rest of the memo is in the manager's writing? A Yes.

Q Did he write it out at your dictation? A Yes.

Q And you signed it? A Yes. 20

Q Does it correctly record the incident which it purports to record? A Yes.

Marked 6 for identification.

Q And that was on what date? I show the witness the memorandum.

Mr. McCarter. What is he looking at in his hand? What are you looking at in your hand?

Q Mr. McCarter asked you for the card or memorandum you have in your hand? 30

Mr. McCarter. I ask you what you are looking at in your hand?

A A little memorandum here.

Q (*By Mr. McCarter.*) Why didn't you tell me so before? A I didn't understand you.

Q (*By Mr. McCarter.*) What is the little memorandum you have in your hand? A It is memorandum of names so I can recall the incidents.

Q (*By Mr. McCarter.*) Let me look at it? A Certainly. 40

Q (*By Mr. McCarter.*) Your counsel was talking to you about this letter marked 6 for identification, wasn't he? A Yes.

Q (*By Mr. McCarter.*) And you were holding this in your hand? A Yes.

John H. Dayton, direct.

Q (*By Mr. McCarter.*) Suppose you put that away? A All right; I guess I can remember that.

Q (*By Mr. McCarter.*) Came over here all the way to tell about this from Brooklyn, didn't you? A Yes.

10 Q When did this incident take place? A On the 11th of December.

Q 1918? A Yes, sir.

Q What was the name of the customer? A Blake.

Q Address? A 1124 Manor avenue, Ozone Park, Long Island.

Q What did he say? A He asked us if we gave ten per cent. off to naval men; I told him no, we did not.

Q Was he in a naval uniform? A Yes.

20 Q Did he refer to anything he had seen anywhere? A He said he had seen an ad in the Broadside and presumed that it was all one company; after I explained to him that it was two different companies.

Q Whose handwriting is this memorandum in? A That is in the manager's.

Q Is it signed by you? A Yes.

Q Was that dictated by you to the manager? A Yes.

Q When was it written? A On November 21.

Q November or some other month? A December 21.

Q 1918? A 1918, yes, sir.

30 Q Did it correctly set forth the incident that occurred that day? A Yes.

Marked 7 for identification.

Q I show you the memorandum; what was the name and address of the customer? A R. C. Wishpaugh, 443 Willard avenue, Wood Haven, Long Island.

Q What did he say to you?

Mr. McCarter. I object.

The Court. The same ruling.

40 A He said he come in to look over our line, but he did not come in to buy, because they had stung him on the last suit he bought.

Q He said he bought it where? A He said he bought it in one of the New York stores.

Q Did he have a suit on? A Yes.

Q Did you see the label? A Yes.

John H. Dayton, cross.

Q What label was it? A Hilton's label.

Q (*By the Court.*) Did he say when he bought it? A No, I don't think he did.

Q Now, how about a Mr. Bennett, 445 Hancock street, Brooklyn; do you recall a conversation with him? A Yes, I had some sort of conversation with him.

Q What did he say? 10

Mr. McCarter. Same objection.

The Court. The same ruling.

A I can't recall that.

Q I show you the memorandum; read the memorandum and tell us what the incident was? A Oh, he came in in answer to an ad he saw in the paper about \$18.50 suit.

Q Were you selling \$18.50 suits at the time? A No, sir.

Cross examination by Mr. McCarter.

20

Q Now, this is the only Brooklyn store of The Hilton Company, as I take it, in Brooklyn? A Yes.

Q And that is located where? A Corner of Gallatin place and Fulton street.

Q And a man by the name of Wishbone or Wishpoagh, or some such name as that, that lives at Wood Haven, had come in from Wood Haven to your store? A I don't know where he came from; he came in the store; he lives in Wood Haven.

Q Where is Wood Haven? A Long Island.

30

Q How far from Brooklyn? A Possibly about seven miles outside of Brooklyn; it is part of Brooklyn, I believe.

Q And he hadn't come in to buy; he said he didn't come in to buy, he come in to look because he had been stung before? A He wanted to look over, I presume, before he bought.

Q What did he say? A I told you what he said.

Q What was it he said? A He said he come in to look around.

Q But did not intend to buy? A No.

Q But had been stung before by you? A By The Hilton Company, not by me personally. 40

Q You wouldn't sting anybody, would you? A I will try not to.

Q Now, the young fellow that came in and wanted to know about ten per cent. off, that is not a characteristic of The

John H. Dayton, re-direct.

Hilton Company to let ten per cent. off, is it; they generally put ten per cent. on, don't they?

Mr. Hardin. I object.

A I don't think I should be compelled to answer that.

10 *Mr. Hardin.* I move it be stricken from the record.

The Court. Strike it out.

Q Did you see the Broadside advertisements? A No, sir.

Q Are you aware that the Broadside advertisement says, as offered in evidence, "Joseph Hilton and Co. at 243 Broadway only"? A I am not aware of that; I have never seen the ad.

Q Your understanding was from the way this young man said that he thought that Joseph Hilton & Co. at 243 Broadway only was your store in Brooklyn? A Presumed that was
20 one of our stores, he said.

Q Eh? A He said he thought that was one of our stores.

Q You didn't say that before, did you? Tell us what he did say? A He said he saw the ad in the Broadside and presumed Hilton's was all one; he had never noticed whether it was the Hilton Company or Joseph Hilton & Company or what; he presumed they were all one company.

Q Notwithstanding the advertisement in the Broadside says 243 Broadway only? A I didn't say that.

Q He must have been a very intelligent young man. He
30 might have been for all I know.

Q You sell goods as cheap as \$21, don't you? A Yes.

Q And that is without any advertisement or marking off price; that is the regular price of those goods? A That is the regular price, the price they are marked.

Q Marking price, yes. When was this interview with Mr. Hancock? A Hancock?

Q Yes. No, Mr. Bennett; he come from Hancock street, Brooklyn? A I can't just remember the date.

Q As near as you can? A Not exact date.

Q Three weeks ago? A Possibly about three or four weeks
40 ago, recently.

Re-direct examination by Mr. Ward.

Q I call your attention to identification No. 7. Can you tell us what the date of Mr. Bennett's visit was?

Ben J. Roth, direct.

Mr. McCarter. Is that his memorandum?

Mr. Ward. It is signed by him; he explained it fully.

A That happened at the same date as Mr. Wishpaugh, December 21.

Re-cross examination by Mr. McCarter.

Q How did you happen to dictate this memoranda? A I was instructed by the manager to take notes of all the occasions that arose similar to those. 10

Q When did you get that instruction? A Do you want the exact date or somewhere near about?

Q As near as you can recall. A Possibly about a month ago, I couldn't say exactly; within a month or two months.

Q (*By Mr. Ward.*) Sometime in the late fall or early winter? 20

Mr. McCarter. I object. He has said when it was; I don't think counsel ought to put words in his mouth.

BEN J. ROTH, sworn.

Direct examination by Mr. Ward.

Q You live where? A 165 Andorman avenue, New York.

Q Are you employed? A By The Hilton Company, 1375 Broadway.

Q That is corner of Thirty-seventh street? A Yes, sir.

Q How long have you been employed there? A Two years. 30

Q As a salesman? A Yes, sir.

Q Did you write this memorandum that I show you dated 10-25-18? A Yes.

Q When did you write it? A Directly after the conversation took place.

Q On what date? A 10-25.

Q October 25, 1918? A Yes.

Marked 7 for identification.

Q Did you write this memorandum out that I show you? A Yes. 40

Q When? A I haven't the date on that, so I can't recall.

Q Look at it and see whether it is dated or not November 1, 1918? A Yes.

Ben J. Roth, direct.

Q It relates to an incident that took place when? A At the store on that day.

Marked 8 for identification.

Q I show you another memorandum dated 11-4—is that in your handwriting? A Yes.

10 Q When did you make it out? A The day it happened, November 4, in the evening.

Marked 9 for identification.

Q You recall this incident of October 25, 1918, in which Mr. C. J. Colton figured? A Yes, I do.

Q What was it? A About 8.30 in the evening he called up and wanted to know why it was he had not as yet received his coat.

20 Q (*By Mr. McCarter.*) Telephone call? A Yes.

Mr. McCarter. I object to it.

The Court. Admitted.

A I asked the gentleman the name and he said C. J. Colton; he purchased a coat the day before; some slight alterations were to be made and it was to be delivered the following morning by 8.30 and he hadn't got the coat. I asked him to give his name and address and looked up through the shipping room and sales checks and found he had not bought the coat there. I told him so; he insisted he had bought the coat in our store. 30 I again repeated that he had evidently made a mistake; he said, "Young man, I have been buying your clothes for the past few years, don't buy them anywhere else but The Hilton Company and I know I bought that coat there." Then I explained to him possibly he had made a mistake and went to Thirty-sixth street and Broadway. He said, "If such is the case I am going back there in the morning and see about it. If it is not The Hilton Company who I have been accustomed to buying from I am going to try and get a refund."

Q Did you see him after that in your store? A No, sir.

40 Q Did you find a record of any such order? A No, sir.

Q (*By the Court.*) What store are you in? A Thirty-seventh street and Broadway.

Q Now, what happened on November 1st when Mr. Novakowitz came in? A Novakowitz, 219 West Thirty-fourth street,

Ben J. Roth, direct.

he came in to get a suit of clothes; I started to show him some suits ranging around \$40 and he didn't seem to be pleased with them, and I tried to get the range of his price; he said, "How is it you charge more for suits up here than you do on the next corner?" I said, "No, sir." He says, "How is it on the next corner you got a suit for \$21 and \$17 and here you are higher." I explained to him the difference of the two companies, and finally sold him a suit for \$35. 10

Q (*By the Court.*) What date was that? A November 1, last year.

Q Do you remember a doctor E. D. Edwric, 539 Grove street, Jersey City, coming in? A Yes.

Q Mr. Fowler, one of your other salesmen had been waiting on him? A Yes.

Q Then you went over and had a conversation? A I was called over. 20

Q And what did Dr. Edwric say to you? A Mr. Fowler introduced him to me. The gentleman had been pleased with a suit of clothes.

Mr. McCarter. I object to the conversation.

The Court. Admitted.

A Dr. Edwric had been pleased in the selection of a suit of clothes, but there was a slight alteration in the collar, shoulder, he was rather skeptical about it for the reason that he had been fooled in our Thirty-sixth street store. Mr. Fowler could not close with him; I took the man in hand and assured him he had not been in our store, but a different company. He said he knew all about that; he had bought a suit there and after going back for two try ons he forfeited his deposit and left the suit there and didn't take the suit. I then assured him if he would take that suit I would go through with the alterations and when he said it was satisfactory for him to accept it without a deposit, which I did, sent it over with the tailor to his office in Jersey City; one of the gentlemen said the suit fitted him, he was satisfied and paid for it. He came back the following week and bought an overcoat. 30 40

Q (*By the Court.*) What date? A The date is on there, November 4.

Ben J. Roth, cross.

Cross examination by Mr. McCarter.

Q This last gentleman you refer to is a doctor of medicine, doctor you called him? A Yes, sir.

Q Doctor of medicine? A No, sir.

Q What is he, a horse doctor? A He is a pharmacist;
10 runs a drug store.

Q Did he call himself a doctor? A I put down just as his card read.

Q Was he confused between a druggist and pharmacist? A I am not here to judge other fellows' minds; he said he was a doctor and I put it down.

Q Now, your store, Thirty-seventh street is on the corner? A Yes.

Q And our store is on the next corner? A Also on a corner.

20 *The Court.* The answer is yes.

Q And they are about how many feet apart, 200 feet, I believe? A They are 200 feet, yes.

Q Now, do you wish to give the Vice-Chancellor to understand that this doctor of Jersey City thought that there were two stores run by the same parties within 200 feet of one another? A I am not giving the Judge to understand anything, but my testimony as it was repeated to me.

Q What was your testimony? You changed it. Now, what did he say? A That he had bought a suit in the store
30 below that had not been satisfactory and forfeited deposit, and for that reason would not leave a deposit on the second suit.

Q Didn't you testify that he had been fooled in our Thirty-sixth street store? A Yes.

Q Have you said that just now? A Yes.

Q Tell us again what he said? A That he had been fooled in our Thirty-sixth street store by leaving a deposit and the garment was not fitted to his satisfaction and for that reason did not take it and if he made another selection he would not
40 leave any deposit on the garment until he was satisfied it fit him.

Q So you concluded he did think you had the Thirty-sixth street store as well as the Thirty-seventh street store? A Yes, he was under the impression it was the same company.

Ben J. Roth, cross.

Q He had bought some overcoats, had he, up at Thirty-sixth street? A Suit.

Q When? Did he tell you when? A He did; yes, about three weeks prior to coming our store and hadn't got the suit for that time, going back and forth trying it on.

Q He hadn't had the suit then? A What suit? 10

Q The one he bought three weeks before? A No; he had purchased it with deposit.

Q But it had not been delivered yet? A No, sir.

Q So he told you? A Yes.

Q And that he had been fooled in our Thirty-sixth street store? A Yes.

Q Sure he said "our"? A Yes.

Q Our Thirty-sixth street store? A Our Thirty-sixth street store.

Q He didn't say your Thirty-sixth street store? A That is too technical for me right now. That happened three months ago; as to whether it was your or ours, your store or our store, something on that order. 20

Q I ask you again to repeat the conversation? A I can't repeat it word for word.

Q Repeat the conversation from beginning to end that you had with this gentleman the doctor pharmacist of Jersey City. A When I asked him why after selecting the suit that Mr. Fowler had been kind enough to be courteous and wait on him for half an hour, why he didn't want it he said, "Because I was fooled in the other store; no more deposits for me until I know the garment fits, and I don't want a whole lot of alterations. I had that in your other store; and I didn't come in here only I saw a garment in the window that attracted me and if I can be fitted in that garment I will take it." That is how he come back in the store. 30

Q Now, you have got it right, have you? A Yes.

Q How did you happen to make these memoranda that you referred to? A On instruction from our manager.

Q When did you get those instructions? A I got those personally within the past ninety days whenever such incidents of confusion would arise. 40

Q (*By the Court.*) The question is when did you get these instructions? A About ninety days, I should judge three months ago.

Ben J. Roth, re-direct.

Q Have you obeyed the instructions? A To the best of my ability, yes.

Q Now, is the Thirty-seventh street store a pretty large store? A Yes.

10 Q How many clerks do you have there? A Have three salesmen.

Q And yourself? A I am one of the salesmen.

Q Have a manager? A Yes.

Q Assistant manager? A No, sir.

Q How many customers do you average in there a day? A I am not in a position to know.

Q What is your best estimate? A I can't estimate something I don't keep track of.

Q Do you have ten or twenty or thirty? A I personally or the store?

20 Q (*By the Court.*) The store? A I am pretty busy watching my own business; I can't estimate how many customers come in the store.

Q Can't give any idea at all? A No.

Q You are busy all the time yourself? A Fairly so.

Q Never stand with your hands in your pockets looking out the window? A Sometimes.

Q So you wish the Vice-Chancellor to understand it is utterly impossible for you to estimate? A I don't care to because I am under oath; I don't guess.

30 Q How about Saturdays, the same conditions prevail? A I can't guess; if I wasn't under oath I might guess.

Q How many do you get a day? A I make about forty sales a week. I know that because I keep track of it.

Re-direct examination.

Q Do you have more people in there on Saturdays than on week-days? A Yes.

Q Do you have people in there asking for suits that are priced at a figure that you do not carry? A Yes.

40 Q On any one day of the week more than another? A Mostly on Saturdays and Friday afternoon.

Q Has that been of recent occurrence? A Yes.

Q Do you make a note of all those cases? A No, sir.

Q Do you know the names and addresses of those people that come in? A No, sir.

Ben J. Roth, re-cross.

Re-cross examination.

Q You sell goods as low as \$21, don't you? A We have them priced as low as \$21 on sale now, during the sale.

Q Don't you have them lower than that? A We have one kind at \$17, I believe, during the sale.

Q What do you mean by one kind? A One little youths' suit, first long trousers suit. 10

Q Does that consist of one garment? A Just one particular style, one pattern, yes.

Q Does that consist of one garment? A One garment, one suit, no more or less.

Q Do you understand what a garment is? A A garment is a suit to my estimation.

Q It consists of garment and waist? A Yes.

Q How much is that, \$17? A Yes. 20

Q So that you do have suits for sale for less than \$18, don't you? A During the sale.

Q Do you have suits for sale less than \$18? A One suit, not suits.

Q You only have one particular suit? A Only one, one suit.

Q Haven't any duplicates of that? A No, sir.

Q So that if I come in and bought your one suit at \$17 then you would have no more of the same kind, no more of the same thing? A No more of the same thing. 30

Q Do you have one in the window? A No, sir.

Q Do you wish to be understood that you keep a particular style of youths' garments or suits that you speak of and only have one piece? A That is what I said, one suit, the only one we have to my knowledge in the store happened to be an odd thing that is left over.

Q Don't advertise \$17 suits? A No, sir, don't advertise at all.

Q Not in the tube? A I don't know. I don't go over to Jersey only when I come over on the trial; I live in New York. 40

J. Fred Galway, direct.

J. FRED GALWAY, sworn.

Direct examination by Mr. Ward.

Q Where do you live? A 345 Forest Street, Jersey City.

Q You are manager of the Broadway and Thirty-seventh street store of The Hilton Company? A Yes.

10 Q How long have you been manager there? A Oh, about four years.

Q At that store you sometimes received mail that does not belong to you? A Very often, yes.

Q Mail that properly should have been delivered where? A Why, presumably to Joseph Hilton & Company, the next corner.

Q Well, what do you do with it? A I immediately send it down.

Q Do you get mail from them sometimes that should have been delivered to you? A Yes, on several occasions.

20 Q Has that continued until recent times? A Why, yes.

Q Who made this memorandum that I show you dated 10-18? A I did.

Q When? A At the time it occurred.

Q What date was that? A 10-18.

Q Last year? A 1918.

Marked 10 for identification.

Q (*By Mr. Hardin.*) 10-18, meaning October, 1918? A Yes.

30 Q Do you want to look at this memorandum? A No, I think I recall that.

Q What happened? A A young man came in our store with a call check; I noticed the peculiar part about the check was Hilton's check stamp on it and Joseph Hilton stamped over the top of it.

Q What was stamped over the top? A Joseph Hilton & Company.

Q It was not your call check? A No, sir.

Q Who made this memorandum in ink, dated October 25, 1918? A My cashier wrote that.

40 Q In your presence? A Yes.

Q Did you dictate it? A Yes.

Q When? A On October 25, 1918.

Q Did you read it over after it was written out? A Yes.

Q And send it over to Mr. Murray? A Yes.

J. Fred Galway, direct.

Q Is that a correct memorandum of what happened? A Yes.

Marked 11 for identification.

Q Do you wish to use this memorandum? A I think I better, yes.

Q (*By Mr. McCarter.*) Can't you remember anything about it? A I can't remember details, names and addresses. 10

Mr. Hardin. How long since it was assumed as a rule of evidence if a witness had a contemporary memorandum that he was not entitled to refresh his memory by reference to it?

The Court. I suppose if you apply the technical rule counsel is entitled to his memory unassisted first.

Mr. McCarter. Memoranda are only referable when the witness cannot honestly get along without it.

The Court. I wouldn't go so far as that, but counsel are entitled to the witness's testimony unassisted first, I believe, if he has any recollection. If his recollection can be stimulated by the use of the memorandum he is entitled to use the memorandum. If he says he has no recollection whatever he is entitled to put the memorandum in evidence. 20

Mr. Hardin. He was asked whether he wished this memorandum to refresh his memory.

The Court. He has not said he cannot testify without the memorandum. If he will say that I will let him use the memorandum. 30

A It is pretty hard to connect instances and names and addresses; that is, the length of time; I can recall all the incidents, but cannot recall all the names and addresses to connect the incident.

The Court. You may refer to it.

A Mr. J. Halib, 57 East 115th street, brought an old suit in to be repaired; said he had bought it at the downtown store; it was more convenient to have it fixed up in there. 40

Q (*By the Court.*) What suit was it? A Suit made by Hilton's 243 Broadway.

Q (*By the Court.*) What was the label on it? A That was the label.

J. Fred Galway, direct.

Q (*By the Court.*) Hilton's? A Yes.

Q (*By the Court.*) When was this? A What was the date on that again? October 25.

Q (*By the Court.*) Did he say how long before that he had bought this suit? A No, he didn't say.

10 Q Do you remember an incident of a Mr. McKeeve coming into the store? A Yes, Mr. McKeeve dropped in the store one evening and asked us if we had any white flannel trousers, if we had them packed away yet; we said we had some accessible; he said he had purchased a couple of pair in our store in Fulton street and they attempted to make an alteration; he thought if he could get a pair up there to fit he thought it would be more convenient for him. After explaining it was a different store, that we had no store on that corner, he decided he would have to go down there and finish his purchase.

Q Do you remember his address? A No, I can't recall it.

20 Q I show you a memorandum; did your cashier make that under your dictation? A Yes, 55 Central Park, West, Mr. McKeeve.

Q Do you remember the date without referring to the memorandum? A No, I can't; it is October, I think October 31.

Q Last year? A Yes.

Marked 12 for identification.

Q Do you remember a telephone call from somebody to you who spoke in reference to an order given for Mr. Clues? A
30 Yes, a lady called up—

Mr. McCarter. I object.

The Court. Same ruling.

A A lady called up and said she got a 'phone message from a Mr. Clues up some place in Massachusetts asking her to get in touch with the store.

Mr. McCarter. I object. Are we to be held in contempt because somebody telephoned her from Massachusetts?
40

The Court. It is only preparatory.

A (continuing) in reference to his garment not having been delivered on time as promised, and as she was with the gentleman who made the purchase she was sure he made it in the

J. Fred Galway, direct.

store; she called up our store. After a little explanation I convinced her she made a mistake.

Q Did you investigate to find out whether the suit had been purchased? A Yes; we had no record of any such sale.

Q Do you remember what the date was? A That was along in October, I think, sometime, I can't exactly recall it.

Q Does this memorandum give you the date? A This is the 4th of November. 10

Q Last year? A Yes.

Marked 13 for identification.

Q Do you remember a man named Jack Nichols of the N. V. A. Club, New York? A The N. V. A. Club, National Vaudeville Artists. I think. Yes, he came in the store, asked for the manager.

Mr. McCarter. The same objection. 20

The Court. The same ruling.

A (continuing) and showed me an overcoat and suit which he had on, said he had just purchased in the Bridgeport store and found it was not wearing satisfactorily and wanted to know if we could not make some adjustment to him. He said he had made several purchases up there, bought Tuxedo suit and his partner had bought clothes, always bought Hilton's clothes, bought a great many of them in our store, were not satisfactory and wanted to know if I would make some adjustment. I knew we didn't have a store in Bridgeport so I immediately told him he had made a mistake in the firm. He seemed surprised. I directed him to Joseph Hilton Company headquarters and if he took the matter up with the general manager he would make proper adjustment, so he went down there with his troubles. 30

Q Did you look at the label? A I didn't look at the label.

Q Do you remember what the date was? A That was along, I think, first part of November, if I am not mistaken; the date is on the memorandum.

Q I show you the memorandum? A November 5.

Q (*By Mr. McCarter.*) What was the address? A N. V. A. Club. 40

Q (*By Mr. McCarter.*) Where is that? A It is around the Forties', some place.

Marked 14 for identification.

J. Fred Galway, direct.

Q Was there a Harry Jackson at the same address that came in with him? A Yes, they were partners, vaudeville team, they worked together, they had the same story.

Q What did he say? A He said the same thing in substance, but—

10 Q (*By Mr. McCarter.*) What? A The same thing.

Q (*By Mr. McCarter.*) The same thing? A Yes.

Q Did he refer to having purchased some clothes at some other store? A He purchased garments in Bridgeport, he said he asked at the time if they had stores in New York—

Q Don't tell what he told in Bridgeport. Did someone come from a man named Stockton in Jersey City and call for a suit? A Yes. Yes, a young lady came in our store calling for a suit her brother had purchased, saying that he told her to come over there to get his suit; she had always been with him previous at the times when he bought his clothes there; she supposed it was that store. We had no record of the transaction and I inferred he must have bought it at the corner.

20

Mr. McCarter. I move to strike out the inference.

The Court. Strike out the inference.

Q Do you remember the full name and address? A No, I do not.

Q This memorandum give it to you correctly? A Yes. N. Stockton, 76 Clark Street, Jersey City.

30 Q And the date of that incident? A The 9th of November.

Q Last year? A Last year.

Marked 15 for identification.

Q Now, Mr. G. Bolton came to your store? A Yes. He came in with his mother to purchase an overcoat and related to me an incident that occurred to him in the previous purchase of a suit, said he was out looking for a suit, had always bought our clothes, and coming up the street dropped in the corner of Thirty-sixth street and Broadway, thinking he was in our store, so much so in fact when he made the purchase he wrote them out a check to The Hilton Company and they accepted his check.

40

Q Have you got that check? A I think I mailed it to the office.

J. Fred Galway, direct.

Q Have you got the cancelled check? A Yes, that is the check.

Q Mr. George Bolton gave it to you? A Yes.

Check offered in evidence and marked Exhibit C-b-d.

Q Do you remember this man's address? A It is Flushing, Long Island, it is on the memorandum, 224 Franklin Avenue, Flushing, New York. 10

Q Do you remember Mr. W. G. Babb? A Yes.

The Court. Let the record show that this check bears date July 13, 1918, drawn to The Hilton Company, \$25.75. Is there any question as to this endorsement, Mr. McCarter?

Mr. McCarter. I don't know anything about it; I never heard of the incident before.

The Court. Purporting to be endorsed "The Hilton Company, Joseph Hilton, Thirty-sixth street, for deposit only." The endorsement may be proven if there is any question about it. 20

Q Do you remember about Mr. Babb? A If I see the memorandum I can recall it.

Q Is it necessary to refer to the memorandum? A Yes.

Q Here is the memorandum dated November 30, 1918? A Yes, this gentleman bought a suit and an overcoat in that store on the previous Saturday and brought it into us, trousers and vest, come to me to have it altered, sure he bought it in our store. 30

Q Had he been a customer of your store? A Yes.

Q His full address is what? A W. G. Babb, 456 Quincy street, Flushing, Long Island.

Q (*By the Court.*) Do you know what the date of the purchase was? A The Saturday previous to November 30.

Marked 16 for identification.

Q Do you remember receiving a letter from a man by the name of John F. Scherer, of Pine Tree Inn, Lakehurst, New Jersey? A Yes, sir. 40

Q Who is that letter addressed to? A The Hilton Company.

Q Any street address on it? A Thirty-seventh street and Broadway.

J. Fred Galway, direct.

Q You opened it and read it? A Yes.

Q Have you got the letter? A No, sir; I made a copy of the letter, however.

Q What did you do with the letter? A I sent it down to Joseph Hilton & Company, presumably it belonged to them.

10 Q It had reference to a transaction which your store had not had with Mr. Scherer? A Yes.

Q When was that, do you remember? A I can tell by memorandum, 3d of December.

Marked 17 for identification.

Q Do you remember a Mr. Henderson, 429 East Fifty-first street, New York, coming in? A I just can't recall the incident now.

20 Q Will the memorandum refresh your memory? A Yes. This gentleman brought a coat in the store for slight alterations, fixing the lining; it seemed he had bought it in there; we looked in the pocket, discovered the Joseph Hilton & Company label in it and he had not bought it from us; he had been a customer of ours for several years and didn't know the difference in the firms.

Q What date was that? A That was on the 6th of December.

Q Last year? A Yes.

30 Q Do you remember just what that label was? A Yes, Joseph Hilton & Company.

Marked 18 for identification.

Q Do you remember a visit to the store by Mr. Ernest Pacolas, of Ardsley-on-the-Hudson? A Yes; a young fellow came in the store bought a Tuxedo suit Saturday, he got it home, it seemed he was a butler and his mistress told him—

40 Q Never mind what she told him. A He brought it back to be exchanged, and I discovered it was bought of Joseph Hilton & Company, informed him of that fact; he said he was sent to The Hilton Company store, being a stranger in New York he didn't know any different.

Q (*By the Court.*) Did you look at the label? A Yes.

Q (*By the Court.*) What was the label? A Joseph Hilton & Company.

J. Fred Galway, direct.

Q (*By the Court.*) What was the date? A December 9.

Marked 19 for identification.

Q Mr. J. Markus, of 630 Park avenue, Hoboken, New Jersey, he came in the store? A Yes, he was in the store.

Q Did he have one of the suits of Joseph Hilton & Company on? A I will have to look at the memorandum. 10

Mr. McCarter. While the witness is looking at that memorandum I move to strike out the evidence with reference to that check, the incident having occurred previous to the entry of the order on remittitur, which is the basis of this action. How can we be contemned for an order that does not exist? The check is dated July 13 and the order on remittitur is dated 18th of July; I did not observe that at the time. 20

Mr. Ward. The issue is on the use of this name tends to mislead the public, and the examination of that question necessarily takes us back to the past.

The Court. July 13, 1918, they were not using the kind of sign they are using now.

Mr. McCarter. Not at all.

Mr. Ward. We have to consider among other things the kind of sign they used before in order to determine whether this one differentiates from the sign used before, which your Honor has held does not differentiate. 30

The Court. That is far fetched. I have held that the signs they were using July 19, 1918, did confuse. Why prove that they did in fact confuse? That is *res adjudicata* that they did confuse. The issue now is whether the signs they are now using confuse.

Mr. McCarter. This proceeding, as I understand it, is based upon our alleged contemptuous violation of an order of this Court, and that order is dated July 18, five days after the incident. How could we then have contemned an order that did not exist? 40

The Court. I exclude the check. Insofar as that might be evidential to corroborate the witness' testimony as to what transpired on the 27th of November it may be considered. Insofar as it may be urged to be evidence of

J. Fred Galway, cross—further direct.

confusion or evidence of fraud on the part of Joseph Hilton it is not to be considered.

Mr. Hardin. I am perfectly content with that.

Mr. McCarter. I object to its use at all.

Cross examination by Mr. McCarter.

10

Q When was this check given to you? A Why, I think the letter explains itself. May I refer to the memorandum a minute? We received the check on November 27.

Q Is that the day that he was calling in on you? A No, he mailed the check in to me a day or so later than that.

Mr. McCarter. They had a talk on November 27; in alleged corroboration of the talk he later writes them and sends them a check, evidencing some kind of action that had occurred previous to this order. Therefore, it seems to me it corroborates nothing.

20

The Court. It corroborates the story of the customer that he had in fact on the 13th of July, 1918, bought his suit at Hilton's.

Further direct examination by Mr. Ward.

Q Did Mr. Bolton, when you had your conversation on November 27, say that he knew he had bought that suit at somebody else's store? A At that time he discovered it.

30

Q When did he discover it? A That day he came in our store, he was up to buy an overcoat and coming down the street he happened to run in our store first and recollected that was the store he used to make purchases, did not discover until that day there was a difference in the store, this day, November 27th.

40

Q Now, with reference to Mr. Markus of Hoboken, I asked you, I think, whether he had on one of the defendant's suits when he came into your store? A This was a gentleman that came in our store with his wife to make purchases, and his wife told him the week previous she had been in the other store with her brother to purchase a suit and during the course of the conversation I explained to her—

Q Don't tell what she said they told. A They were under the impression they were the same stores.

J. Fred Galway, further direct.

Q (*By the Court.*) What did she say with respect to she thought it was the same store, if anything? A She said in the course of conversation with the salesman—

The Court. Strike that out.

Q (*By the Court.*) What did she say with respect to whether she understood the store at Thirty-sixth street was the same store as on Thirty-seventh street? A She said she supposed it was the same firm. 10

Q What date was that? A That was December 10th.

Marked 21 for identification.

Q Do you remember a telephone call from a Mr. Morris, in the Lafayette Hotel? A Yes.

Q Do you recall what he said?

Mr. McCarter. The same objection. 20

Q Mr. Morris called up; it seemed he had bought an overcoat the day before; either the new coat or old coat had not been delivered; I can refresh my memory from the memorandum.

Q Tell us what you remember. A He was very indignant because the overcoat had not been delivered. I looked up our records, discovered we had no transaction of that kind and name and informed him such; he hardly believed me; I asked him to look at his sales check; he referred to his sales check receipt which showed he bought of Joseph Hilton & Company, Thirty-sixth street and Broadway. 30

Q What date was that? A I can't just recall the date.

Q I refer you to the memorandum. A 11th of December, 1918.

Marked 22 for identification.

Q Do you remember a telephone call from Mr. Fraser, 184 West Forty-fourth street, New York? A Yes. Mr. Fraser had a similar experience with the previous man.

Mr. McCarter. Same objection.

The Court. Same ruling. 40

A He bought a coat in there the day before and was very indignant because it had not been delivered, and after some lengthy explanation I convinced him he did not buy it at our store. He had always been a customer there.

J. Fred Galway, further direct.

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

Q Refer to your memorandum? A December 14, 1918.

Memorandum marked 23 for identification.

10 Q Do you remember a Mr. A. H. Lockman, 371 Wadsworth avenue, New York? A Mr. Lockman was out shopping a few weeks ago for a suit and had always been a customer.

Q (*By Mr. McCarter.*) What do you know about it yourself? A Well, he told me he had dropped in the store corner Thirty-sixth street thinking he was coming in our store, and after he got in there awhile he discovered the difference and went out and come up to our store and made his purchase.

Q The date is what? A It was some time in December.

Q Refer to your memorandum? A 17th of December, 1918.

Memorandum marked 24 for identification.

20 Q Do you remember a telephone call from Mr. Wolffe? A Yes, Mr. Wolffe called up in regard to purchase he had made not having been delivered.

Mr. McCarter. The same objection.

The Court. The same ruling.

A (*Continuing.*) And after this usual conversation with him I convinced him he did not buy at our store; he had always been a customer there.

30 Q Do you remember the date? A No, I can't recall the date.

Q I show you the memorandum. A 23d of December, 1918.

Q His address? A 522 East 159th street, New York City.

Memorandum marked 25 for identification.

Q Do you remember on one occasion a truckman or somebody coming with some goods to your store? A Yes.

Q That did not belong to you? A Yes.

40 Q Have some argument with the driver about it? A Yes, the young fellow, evidently a truck driver, brought in a large package and asked me where we received our stuff; I told him in the rear room; he brought it back to the rear room; I was quite busy, I went back to sign for it and looked on the tag and discovered it was not for us, told him so; after considerable arguments—the package was rather heavy—he said he was not going to take it out, said there is where he was told to take

J. Fred Galway, cross.

it. I finally convinced him it was the next corner, J. Hilton Company.

Q What was on the label? A There was white tag on it, Joseph Hilton & Company.

Q (*By Mr. McCarter.*) Broadway and Thirty-sixth street?
A Yes, sir. 10

Q Do you have many telephone calls there asking for salesmen not in your store? A Numerous, yes.

Q Recently? A Yes, sir.

Q Do you have people come into your store looking for suits that are priced at some other figure than you carry? A Yes, sir.

Q What range of prices are these people looking for? A Well, they come in and ask for those \$18.50 suits and \$18.75 suits we advertised; some asked for those \$23.50 suits we advertised. 20

Q (*By the Court.*) Do you advertise them? A Not in the newspapers.

Q (*By the Court.*) How often has that occurred? A Oh, it has occurred almost every day this last month or six weeks, frequently more on Saturdays than during the week.

Cross examination by Mr. McCarter.

Q Do you advertise in cards in the windows or in the tubes clothes, suits at those prices? A No, I think our tube cards in the trains read \$20 to \$100. 30

Q How about your cards? A During the sale period we have sales of fifteen per cent. reduction, bring some of our suits down as low as \$21.25 that we display.

Q (*By the Court.*) You do not advertise set price \$18.50 or \$18.75? A No, sir.

Q Have you ever seen the Hilton advertisements of \$18.50, I mean, Joseph Hilton & Company? A \$18.50 or \$18.75.

Q Don't you know their advertisement prices? A I presume they are sale prices.

Q You mean by sale prices their advertisement prices? A When the advertisement reads— 40

Q Marked down? A Yes.

Q And you have marked downs, don't you, and advertise mark downs? A We don't advertise them.

J. Fred Galway, cross.

Q You have cards in your windows, don't you call that advertising? A Form of advertising, but not the same form as newspapers.

Q Don't you advertise in the tube? A Yes.

Q Your marked downs? A Yes.

10 Q You now think the tube has no effect on the New York people? A We quote no prices in the trains, tube trains.

Q I am not talking about the trains, I am talking about the booths in the terminal? A Cases?

Q Yes. Now, you have marked down prices there, don't you? A Yes.

Q Do you call that advertising? A Yes.

20 Q Now, what is your sign on the corner of Thirty-seventh street and Broadway? A Our signature sign at the top you mean? We have large sign at the top which reads, "The Hilton Company"; small sign, brass or copper, reads The Hilton Company; the big sign the name is spelled out; the small sign it is abbreviated Co.

Q What is the color of the background on your wooden sign? A Black, I think.

Q What is the color of the letters? A Gold.

Q Are you familiar with the sign on the Thirty-sixth street store? A Why, yes, I have seen it.

Q What is the color of the background? A Well, to the best of my knowledge it is reddish brown.

30 Q Sort of maroon, isn't it? A I presume so.

Q And what is the color of the letters? A Well, I won't be sure about the letters, I think they are gold, though.

Q And that says, "Jos. Hilton & Co.," does it not? A Yes.

Q You have a big crest on your sign, do you not, after the word Hilton Company? A Signature sign, yes.

Q No such thing appears on the Joseph Hilton & Co. sign? A Not to my knowledge.

Q Now, which corner is your store on, the lower corner or upper? A Uptown corner, west side.

40 Q Which corner is the store of Joseph Hilton & Co. on? A Downtown side.

Q So they are not on the same corners, are they, relatively? A No.

Q Do you ever make a mistake in using the telephone book? A Do I what?

J. Fred Galway, cross.

Q Make a mistake in using the telephone book, get the wrong person, the wrong Smith or wrong Jones or wrong Robinson or the wrong McCarter, do you ever make a mistake?

The Court. He has, Mr. McCarter.

A I don't recollect any particular time calling up a certain person; I suppose I would naturally get the right person. 10

Q I am wondering whether you ever did by mistake get the wrong Jones or wrong Smith or wrong Robinson in the telephone book? A Yes, I presume I have.

Q Yes; that is not unnatural thing to do, is it? A No.

Q The sales check receipt that was shown you by this man Morris, what did that have on it, do you remember? A It was not shown to me; I merely had him look at it himself so he could tell the address of the store he bought the suit in.

Q You didn't look at it? A No, sir.

The Court. That was telephone conversation. 20

Mr. McCarter. Beg pardon; I didn't understand that.

Q The Mr. Markus that came in with his wife who said that she had been in the other store with her brother, was that right? A Yes.

Q And she supposed that these two stores were one and the same? A Yes.

Q Did she think she was in the same store, did she think they were two stores run by the same party? A That they were two stores run by the same firm. 30

Q Do you know of a single instance in your experience where the same party has two stores as close as a block of one another? A Possibly United Cigar Stores do.

Q With that exception? A I do not pretend to recall any now.

Q Clothing store, for instance? A I don't know of any.

Q You don't know of any, do you? A No.

Q That is quite a clothing district, isn't it, up there in Fifty-seventh street and Broadway? A Why, I think that Joseph Hilton & Company and Hilton Company outside of the department stores are the only clothing stores on Broadway in that section. 40

Q Outside of what? A Outside of the department stores.

Q On the corner of Thirty-fourth street is Rogers-Peet, isn't it? A And Sixth avenue.

J. Fred Galway, cross.

Q All right at the junction? A Yes.

Q Do you remember Richie & Cornell? A They are not real clothing merchants, they are custom tailors.

Q John Davey, do you remember him? A Yes.

Q Where is he? A Way downtown, he is Thirty-second
10 street, junction of Broadway and Sixth avenue.

Q Well, that is to say, he is five blocks away? A Yes.

Q Any more? A I don't recall any. Brill Brothers is
Forty-first street.

Q Brokaw Brothers at Fortieth street? A Forty-second,
between Forty-first and Forty-second.

Q Any others, Park, tailor? A Thirty-fourth and Thirty-
sixth street.

Q They do a large business, don't they? A That I can't
say.

Q Don't you know they are active competitors of yours? A
20 No.

Q They are there, anyhow, aren't they? A Yes.

Q In other words, there is in the neighborhood of a dozen
ready-made clothing stores between Thirtieth street and Forty-
second street? A I don't think there are a dozen, no.

Q Do you know of any locality in New York City where
there are more within similar space? A Yes, I think lower
Broadway has got more stores in similar space.

Q For instance? A Well, I should judge between Warren
30 street and Park Row and that district on Broadway.

Q That is where our store 243 Broadway is? A Yes.

Q You rather think that the 243 Broadway store is in a
more decided ready-to-wear clothing district than the Thirty-
seventh street store? A Yes, I would say so.

Q As a matter of fact, it is true, is it not, that these stores
kind of get together, there seems to be a tendency in the trade
to foregather? A That, of course, I am not in a position to
say, I suppose one neighborhood is good for one concern.

Q Isn't it a fact, and don't you know that that is not only
40 true of other trades but is true of the clothing trade, that they
seem to collect together? A No, I don't think it is a fact.

Q You think not? A It is a coincidence.

Q It is a coincidence? A Yes.

J. Fred Galway, cross.

Q It is a fact all the same, whether it is coincidental, it is a fact they do do it? A I don't know; as a general rule, of course, it has been done. I don't know why it is done.

Q You think Newark is a great exception in that respect? A No.

Q They just happened to drop from the clouds and landed all together on Broad and Market streets, is that right? A That is right. 10

Q Now let us go out on Fifth avenue. We have got a store out there corner of Thirty-fourth street. Do Best & Company sell clothes? A I believe they do.

Q You have knowledge of these things? A How?

Q And Franklin Simon? A Yes, sir.

Q So that there seems to be a sort of flocking together tendency there too by dropping from heaven? A All depends what you consider flocking tendency; I don't consider the four or five or six blocks on Broadway congested neighborhood, of a dozen clothing stores to be in congested neighborhood in any way. 20

Q Mr. Pacolas, is he a foreigner? A I think so, yes.

Q Does he read English? A I presume so.

Q Do you know? A I don't know.

Q He said he had been directed by his employer to do something, he was a butler, you said? A Yes.

Q You don't know whether he could read English or not; he was a foreigner, was he? A Yes. 30

Q Now, you spoke of a lady having called up about some gentleman in Massachusetts; did this lady say who this gentleman was? A Mr. Clues.

Q I mean whether he was her husband or her lover or what he was? A No, she didn't say.

Q So why she was ringing up for him— A He had instructed her to do it, is what she 'phoned me.

Q Now, I want to take up one other subject for a moment, then I will be through with you. There were two young gentlemen partners in the vaudeville business, as I understood you; you said their address was what? A They gave me their address N. V. A. Club. 40

Q Where is that? A It is in New York, Vaudeville Actors' Club, around the 40's.

David Shapiro, direct.

Q Do you know? A No, not familiar with the exact location of it.

Q Do you know there is such a club? A Yes.

Q Ever seen it? A No, can't say that I ever have.

Q Where is it? A As I say, in the theatrical district, along
10 the 40's; I suppose it is in the telephone book.

Q They had both been in Bridgeport and both bought a suit there and both told the same story? A Practically, yes.

Q Neither suit was wearing well, is that right? A Well, they came in—

Q I want to know what the fact was; you said they both said the same thing. A They didn't both speak at once.

Q (*By the Court.*) Did they both at one time or another say their suits were not satisfactory? A Yes.

Q And that neither was wearing well? A Yes.

Q They both bought suit and overcoat? A Yes, and I
20 think they also said a Tuxedo suit.

Q Mr. Halib came in on October 25, you say he had an old suit and wanted it repaired; when did he buy that old suit? A He didn't say.

Q It was old, wasn't it? A No, it wasn't an old suit.

Q You called it such; you were not accurate? A I call any suit that has been taken out and worn and returned for alterations as an old suit.

Q An old suit he wanted repaired? A And altered at the
30 same time.

DAVID SHAPIRO, sworn.

Direct examination by Mr. Ward.

Q You live where? A I live 115 West 129 street, New York City.

Q You are employed where? A The Hilton Company.

Q What store? A Fourteenth street and Broadway.

Q Salesman there? A Yes.

Q Tell us about a man who came in yesterday.
40

Objected to.

The Court. I will permit it.

A A young man came in yesterday and said he wanted to buy a suit of clothes; in the course of conversation he told me he

Nathan Kahn, direct.

had bought a suit of clothes once before in The Hilton Company, not The Hilton Company, but he said of the Hilton people at Fulton and Nassau, and I told him it had no connection with The Hilton Company, and then we didn't go in any further conversation about the transaction; I sold him a suit of clothes and that was all.

Q (*By the Court.*) Did you get his name and address? A Yes, sir, we have his name and address. 10

The Court. What is it?

Q This slip I show you is that in your handwriting? A Yes.

Q You wrote that out yesterday? A Yes.

Q His name and address was what? A Mr. H. Forhmeister, 426a Clinton avenue, West Hoboken, New Jersey.

Q (*By the Court.*) Did he say when he had bought the suit? A No, sir. 20

Slip marked 27 for identification.

NO CROSS EXAMINATION.

NATHAN KAHN, sworn.

Direct examination by Mr. Ward.

Q Where do you live? A 55 West 110th street, New York City.

Q You are employed where? A The Hilton Company, Fourteenth street and Broadway. 30

Q Do you remember a conversation with a man who gave his name as William Buzas some time ago? A That wasn't my conversation, that was Mr. Goldberg's.

Q Do you remember a conversation with a Mr. Davis? A Yes.

Q Do you know what his initial was? A H. Davis.

Q Tell us what the conversation was? A He come in the store for a suit of clothes; I started to wait on him; he says, "I bought a suit of clothes in one of your other stores down at 243 Broadway." So when he was taking off his coat I looked at the inside label, label outside of the coat; I said "That is not our concern, it is a different concern." 40

Q (*By the Court.*) What was on the label? A On his coat was "Hilton's" black part with white letters.

Nathan Kahn, direct.

Q What was that date? A That was in the month of October.

Q What was his address? A I think the address is on there.

Q I show you memorandum? A 829 Greenwood street.

Q Is that in your handwriting? A Yes.

10 Q What is the date? A November 4. He come in to buy a suit, and the other suit of clothes he said he bought in October at the other Hilton's.

Q (*By the Court.*) Are you sure the label in that suit of clothes was "Hilton's"? A Hilton.

Marked 28 for identification.

Q Do you remember a man by the name of H. Renski? A Yes.

Q Where did he come from? A Bridgeport.

20 Q Did he give you his address? A I believe his address is on there.

Q Tell me the conversation first. A The conversation was that—

Mr. McCarter. The same objection.

The Court. The same ruling.

30 A He came in for a fur coat, he and his wife and another lady, so they wanted to buy two fur coats; he picked out two fur coats at \$100 apiece, and they wanted a discount off, so I told them we didn't give any discount off. "Well," he says, "I got it up at your other store." I says, "Where is that?" He says, "Up at Bridgeport, Connecticut." I said, "That is not our concern, that is a different concern entirely." So I called Mr. Mann, the manager, up—

The Court. Never mind.

Q Do you remember when that was? A I believe that was, the fur coat was in the month of December.

40 Q Did the man have a Bridgeport newspaper with him?
A No.

Q He wrote out his address for you, what is it? A That is it, 655 Berkshire avenue, Bridgeport, Connecticut.

Marked 30 for identification.

Nathan Kahn, cross.

Q Who was the man that had the Bridgeport newspaper with him? A That was another customer; Mr. Mann had him.

Q Didn't you talk with him? A Yes, I talked with him; he wanted to look at a fur coat; said he come from Bridgeport, he said, "I can go up to the Bridgeport store and buy cheaper up there," so I called Mr. Mann.

10

Q Do you know what his name was? A No, I don't know, I don't remember.

Q (*By the Court.*) Did he have a Bridgeport newspaper with him? A Yes, he had a Bridgeport newspaper with him and showed it to Mr. Mann, said, "They got a sale on up there," and said, "I can buy a fur coat up there cheaper."

Q (*By the Court.*) He showed the Hilton advertisement? A He showed the Hilton advertisement.

Cross examination by Mr. McCarter.

20

Q What did you say the label was in that suit of clothes that David showed you? A Black ground, white letters.

Q And what were the letters? A Hilton.

Q You are sure about that? A Positive.

Q Suppose you were told we never had such a label? A I know the difference between our label and the other label.

Q I am not talking about that at all; I am asking you if the label that you saw was not Hilton's? A Hilton I said.

Q I am asking you if you are not mistaken and it was not Hilton's? A Hilton.

30

Q (*By the Court.*) Are you sure it was not Joseph Hilton & Company? A No, sir, not at that time, not at the time he bought that suit of clothes.

Q When was the call from the fellow with the newspaper from Bridgeport? A That was right after Thanksgiving.

Q Shortly after Thanksgiving? A Yes.

Adjourned until tomorrow.

40

Frank J. Murray, direct.

Continuation of examination, pursuant to adjournment, on January 10, 1919, at the place and in the presence of the Court and counsel as before.

FRANK J. MURRAY, recalled.

10 *Direct examination by Mr. Ward.*

Q In the early part of November last did your company receive a telegram from the Meyer-Both Company of Chicago?

A I know we received some communication from them.

Q Is that the telegram? A Yes, sir.

Q That was delivered where? A I don't know, but it came to me at the Newark office.

Q From where? A I think it was forwarded from New York.

20 Q Did you have any business dealings at the time with the Meyer-Both Company? A No, sir.

Mr. Ward. I offer that in evidence.

30 *Mr. McCarter.* We have two objections to this document. In the first place, it is the same character of objection that applies to the introduction of letters or telegrams or telephones from undisclosed persons to the complainant. In the second place, this document is addressed The Hilton Company, New York, and Mr. Murray only knows that it was sent from New York, where it was received, to Newark. I should think if it has any probative effect at all its receipt in New York by The Hilton Company at one of its stores should be offered. For ought that we know somebody gets up this thing and mails it out to Mr. Murray in Newark here, and certainly it proves nothing up to date, even on the theory that there is a propriety in its introduction. If it had been sent to the Hilton Company, Newark, and received by them—

The Court. Why haven't you got to prove you received it in New York?

40 *Mr. Ward.* It certainly has come to the Hilton Company or it would not be in the hands of the Newark office.

Mr. McCarter. What is to prevent my taking a telegraph blank and writing The Hilton Company and mailing it to Mr. Murray?

Frank J. Murray, direct.

Mr. Hardin. We are going to offer a letter to which the same thing may apply; having received that telegram a letter was written, which Mr. Murray wrote, of which we have a copy, and a reply was received. We can not prove the signature of the Meyer-Both Company in the reply, but it seems to me in a case of this kind it is proper evidence. 10

Mr. Ward. Suppose we offer these all together?

The Court. You better offer them all together. It may make a change.

Q This telegram came to your office at Newark? A Yes.

Q I don't mean to say it was delivered by the telegraph company? A No; it came into my hands, it was put on my desk.

Q (*By the Court.*) You wrote a reply? A Yes.

Q Addressed reply to Meyer-Both Company at what address? A Indiana avenue, at Twenty-third street, Chicago, Illinois. 20

Q Is this a carbon copy of the letter which you sent them? A Yes.

Q Are your initials on it? A Yes.

Q (*By the Court.*) Correct copy? A Yes.

Q (*By the Court.*) Through that did you get a reply? A Yes.

Q I show you a letter and an envelope from the Meyer-Both Company on the letterhead of the Meyer-Both Company; is that the letter which you received subsequently through the mail? A Yes. 30

Q (*By the Court.*) The envelope there showing it went through the mail? A Yes.

The Court. Now, let me see them all.

Q (*By the Court.*) Do you know the Meyer-Both Company? A I only know of them by reputation.

Q (*By the Court.*) Do you know of them by reputation? A Yes, sir.

Q (*By the Court.*) As what? A They provide advertising service to merchants. I believe principally clothiers if not exclusively clothiers. 40

Mr. McCarter. In saying what I propose to say I do not mean to cast any imputation upon Mr. Murray or certainly upon counsel on the other side, but I have in

Frank J. Murray, direct.

10

mind distinctly an incident which occurred in the trial of the main issue herein with reference to a postal card, and I therefore say I haven't any faith in the genuineness of any document that is produced that is not proven. I do not think it is at all unlikely that correspondence of this kind could be all made up, inspired, and having that view, entertaining it as I do, I object most strenuously to the introduction of this correspondence because it is *res inter alia acti*, correspondence between some unknown person and Mr. Murray which we never heard of, and we have no opportunity to inquire about the origin of it or the authenticity of it; therefore we object to it.

The Court. I will admit it upon the same ground that I admitted the other testimony of similar nature.

20

Mr. Hardin. I don't know what Mr. McCarter refers to in the matter of postal card. I remember a postal card offered and was not taken because the signature was not proven. I remember nothing in the case which reflected upon the genuineness of the postal card except the absence of the proof.

Marked Exhibit C. b. e.

Q Did you receive in October, 1918, a letter through the mail on the letterhead of the Federal Advertising Agency, Inc., of New York City? A I received a letter; I don't recall the date offhand.

30

Q Is this the letter which I show you dated October 17, 1918? A Yes.

Q And is this the envelope in which that was received at your office? A Yes.

Q Do you recall replying to that letter? A Yes.

40

Q Have you got a copy of the reply there? A That first letter was not replied to, I don't believe, and there was a second letter from the same people that is here, dated November 25, and the envelope is here, too, referring to the same matter, and that was received by us. The first letter is addressed Hilton & Company, 743 Broad street, Newark, New Jersey. And to the letter of November 25 I replied on the 26th, and this is a copy of that reply.

Q (*By the Court.*) Through that did you get any reply? A Yes.

Frank J. Murray, direct.

Q (*By the Court.*) Is that there also? A That is here, too.

Q (*By the Court.*) Is that the end of the correspondence?
A Yes, sir.

The Court. Do you offer it?

Mr. Ward. I offer it. 10

Mr. McCarter. We object to this correspondence for the reasons given on the previous offer.

The Court. I will admit it.

Marked Exhibit C. b. f.

Q Mr. Murray, I show you an advertising card; is that one of your ads? A Yes, sir.

Q This ad has the word, "Style-Bilt" in red letters, has it not? A Yes, sir.

Q Do you know where that ad appears and for what period of time? A It appeared in the trains of the cars of the Hudson and Manhattan Railroad running between Newark and Jersey City and New York. 20

Q (*By the Court.*) What period of time? A Why, I believe in October and November.

Q Last year? A Or September and October of 1918.

Q (*By Mr. McCarter.*) September and October? A Yes.

Mr. Ward. I offer it in evidence.

The Court. Any objection?

Mr. McCarter. Yes, sir. This present practice which is said to be contemptuous of the Court's order was not then in vogue. We were operating under the title Hilton's at that time, for which we have been adjudged guilty of contempt. Since then we have changed to the present vogue, and I suppose that what occurred during the previous regime is not material. 30

The Court. I think the method of their advertising is material to tell what impression has been made on the public, so it may be inferred what impression has been made on the public. I will admit that in evidence. Let it be marked. 40

Marked Exhibit C. b. g.

Q Did you have something further to say about Exhibit C. b. g.? A To the best of my recollection this sign remained

Frank J. Murray, direct.

in the cars until November 1st, when we put a new card in.

Q I show you a sign, a card with picture of aristocratic young gentlemen reading a handsomely bound volume; is that one of your ads? A Yes.

Q Did that appear in the Hudson and Manhattan Railroad trains? A Yes.

10 Q During what period? A For several months and up to about November 1st.

The Court. Do you offer it?

Mr. Ward. I offer that in evidence.

Mr. McCarter. The same objection.

The Court. The same ruling.

Marked Exhibit C. b. h.

Q I show you another card with red border; is that one of
20 your cards? A Yes.

Q Did that appear in the same train? A Yes.

Q During what period? A That succeeded this card C. b. g. and went in about November 1st.

Q (*By the Court.*) How long did it stay? A Remained in until January 1st.

Mr. Ward. I offer it in evidence.

Mr. McCarter. The same objection.

The Court. The same ruling.

30 *Mr. McCarter.* May I call this to your Honor's attention? I may be entirely wrong about this, but it does not seem to me that this matter can be a floating thing, susceptible of changes on the part of the complainant to which we must momentarily, shall I say, adapt our system of advertising and conduct of the business. An order is entered in July on the remittitur which we are alleged to have contemned. Now, it must be a situation that existed at that time, if at all, that entitled the complainant to those letters. Now, if they can go on and make
40 hisory to indicate that we by what they did later than that are contemning an order made before that date, why, there will be no end to this thing.

The Court. No, Mr. McCarter, I suppose the sole object of the introduction of this testimony is to show that the complainant has continued his methods of adver-

Frank J. Murray, direct.

tising that he had in effect, was using at the time when the final decree was made. I suppose that is the sole purpose.

Mr. McCarter. Suppose that the complainant went out of business; we couldn't follow that order.

The Court. You couldn't follow, the order only enjoins you from using the name in competitive business. If they went out of business the order falls. 10

Mr. McCarter. Your Honor has my idea. I can only show my view about it.

The Court. They are endeavoring to show the competition still continues, I suppose.

Marked Exhibit C. b. i.

Q I show you another card; is that also one of your cards?

A Yes.

20

Q Did that appear in the same trains? A Yes.

Q During what period? A It went in about November 1st and remained until about January 1st.

Mr. Ward. I offer it in evidence?

Mr. McCarter. The same objection.

The Court. The same ruling.

Marked Exhibit C. b. j.

Q And this card I show you with the words "January Clearance Sale" is one of the same cards? A Yes. 30

Q And appeared in the same place? A Yes.

Q What time was that placed in the cars? A The first of this month.

Mr. McCarter. I object to that for the further reason that that is after this petition for contempt is filed. I certainly can not think that they can make evidence for themselves against us after they filed their petition for contempt.

The Court. I will admit it. 40

Marked Exhibit C. b. k.

Q Another card with the words, "January Clearance Sale," is that also one of your cards which was placed in the same train? A Yes.

Frank J. Murray, cross.

Q And on what date? A The first of this month.

Mr. McCarter. The same objection to that.

The Court. The same ruling.

Marked Exhibit C. b. 1.

10 *Cross examination by Mr. McCarter.*

Q Just look at this Exhibit C. b. g.; you are quite sure that that continued until November? A Yes, I think that was in the trains about six or seven months.

Q Are you sure about that? A Pretty sure, yes.

Q Well, are you sure? A Well, around that date; I won't be certain within a week or two.

Q I notice it says, "Clothes for spring"; you think in November you were advertising clothes for spring? A Up to nearly that time.

20 Q What? A Up to that time.

Q You said, Mr. Murray, that this was there until November 1st. I am asking you, now, if you were in November 1st advertising clothes for spring? A I think we were, having this card in there, was advertising clothes for spring. We had it close to that time.

Q When do you say Exhibit C. b. g. was put in the tubes? A I think it was put in there.

Q Do you know anything about it? A Yes.

30 Q When was it put in? A About early in the summer; possibly in May.

Q Early in the summer? A Yes.

Q Can you find out? Have you any way to find out? A Only from my own memory of it; I could check it up by finding out who printed them.

Q You think in May, or early in the summer, as you designate it, which might mean June, you advertised clothes for spring, do you? A Well, first of May we would.

Q Eh? A Might have been April.

40 Q I am not asking you to argue; I am asking an answer to my question, whether you think early in the summer, which would be June or in May, you put in an advertisement, "Clothes for spring"? A In May, we might first of May.

Q First of May? A Yes.

Q Have you said this was put in first of May? A I think it was.

Frank J. Murray, cross.

Q Is your knowledge of the others, as to when they were put there, as accurate and as definite as is the knowledge concerning Exhibit C. b. g.? A My knowledge is better on the others because the others are recent.

Q What personal attention do you give to the act of changing these particular signs in the cars? A Why, I instruct Mr. Hanser to look after it. 10

Q The matter is in the hands wholly of Mr. Hanser, isn't it? A Not wholly, no.

Q Well, practically. A I ride on the trains every day and I see the card.

Q You observe I asked you what you had to do with putting them in, not looking after them. Mr. Hanser puts them in; he attends, he gives orders for the changes? A No, I give him orders; he sometimes takes several weeks to comply with them, neglecting it or being busy, or something else that happens. In this case it remained long after the time it should have been taken out. 20

Q Did you compose these advertisements? A No, sir.

Q Who does? A Mr. Hanser.

Q Do you mean to say you specifically direct Mr. Hanser when to put out each one? A I call him up and say—

Q Won't you answer my question? A I don't know what you mean by specifically. I tell him that I want the new cards in the tubes; then he goes ahead and does it, and sometimes it takes him a month and sometimes it takes him two months or three months. He has been particularly neglectful in this particular instance. 30

Q How long has the Hilton Company used the phrase "Style-Bilt," do you know? A I think nearly two years.

Q How long? A Nearly two years.

Q (*By the Court.*) Were they using that term at the time the bill was filed in this suit in November, 1916? A I think they were.

Q Did you direct Mr. Hanser to see to it that the word company should be written out in full on as many of this last batch of exhibits as it is written out in full? A No, sir. 40

Q Eh? A No, sir.

Q Did he in his discretion use either the word Co. or the word company? A Yes.

Frank J. Murray, cross.

Q I see, for instance, that on Exhibit C. b. h. it is the Hilton Company? A Yes.

Q And on the three that I hold in my hand, I won't take time to designate them, the word company is written out, as well as on one more of their last batch, written out; that is right, isn't it? A Yes.

10 Q I observe on the one to which I directed your attention first, containing the words, "Clothes for spring," it has company written out? A Yes.

Q You say Hanser had full discretion in that matter? A Yes.

Q Sure about that? A Yes, sir.

Q You never directed anything on that? A No.

Q As far as you were concerned you didn't care which he used? A It was not a matter I gave any attention to or thought about.

20 Q Did you care which he used? A No, sir.

Q Did you give him any directions with reference to enlarging the word Hilton as opposed to the words the company on some of these? A No, sir.

Q That was his too? A Yes.

Q You took no interest in any of those things? A No particular interest in them, had no occasion to; I did instruct him to leave out the Nassau street store.

30 Q Now, coming back to this Exhibit C. b. g. which you say you remember was put in certainly not later than the 1st of May?

Mr. Hardin. He said might have been in April.

A I said it might have been in April, I am not certain about that.

Q (*By the Court.*) Not later than the 1st of May you said, didn't you? A Mr. McCarter asked me after that if it might have been April; I said possibly.

The Court. April would be not later than the 1st of May, wouldn't it?

40 Q Now, when was it put in? A I am not certain, but I do know it was in the early part of the year 1918, around the late spring.

Q You heard Mr. Hardin say something about April, didn't you? Do you see that April on the back? A No, sir.

Frank J. Murray, cross.

Q I see it is April 3, 1918, on the back? A I could tell you why I will know.

Q I see it is that. Do you see that now? A Yes.

Q What does that mean? A I don't know what it means. It came from the Tunnel Advertising Company; I suppose they put the date on it.

10

Q That means it was exhibited on the 3rd of April, 1918, to the best of your knowledge and belief? A It probably means they were inserted that day.

Q You still say they remained there until November? A I think they did, until sometime in October, up to nearly the 1st of November; I am not certain within a few weeks of this thing; I can tell you on the last two of them because they are recent.

Q I conclude then, Mr. Murray, that while you are quite active in the prosecution of this suit you really have no particular interest as to how the name of your company appears on your advertisements? A I want to say I am no more active in the prosecution of this suit than any other witness.

20

Mr. Ward. I move that the question be struck out. It imputes the conclusion of Mr. McCarter.

Q I will modify the question on the suggestion of Mr. Ward, which I think is a very proper one. I assume from the fact that you say you had nothing to do with the changes that appear on this list of exhibits that you personally take no interest or part in the use or character of the use of the name of your enterprise on your advertisement, the only advertisement it puts in the neighborhood of New York, am I correct? A I take an interest. To me the word company and Co. mean exactly the same, and I think they do to the public, and I would not be interested in the use of one or use of another particularly. I don't see any difference to my mind or to the mind of the average person; when I say Co. it stands for company.

30

Q You made an affidavit in this proceeding, didn't you? A Yes.

Q Did you read it before you made it? A Yes.

40

Q I want to call your attention to something you said there, "In the support of my belief in this respect, I refer to the evidence which was given upon the hearing of this cause and that given upon the rule to show cause dated August 23, 1918. I

Frank J. Murray, cross.

especially call attention to the combination of the abbreviated name 'Jos.' in front of the word 'Hilton', and the suffix '& Co.', and to the fact that the word 'Jos.' contains the same number of letters as the word 'The,' which precedes the name 'Hilton' in the name under which, complainant has conducted his business, and the fact that the word 'Co.' following the name
 10 'Hilton,' as used by the complainant, has commonly in the conduct of his business been abbreviated to 'Co.' "

Q Evidently that last sentence is incorrect, is it not? A No, sir.

Q The "fact that the word 'Co.' following the name 'Hilton' as used by the complainant," that is, you, "has commonly in the conduct of his business been abbreviated to 'Co.," isn't that a mistake? A No, sir; that is a mistake.

Q What significance did you mean, what did you mean
 20 by that statement? A I meant just what it says, that it is commonly used Co., which is true, now and weeks ago and months ago and years ago.

Q "And the fact that the word Co. following the name Hilton as used by the complainant has commonly in the conduct of his business been abbreviated to Co.," I want to know if that is not an error and if you did not mean to say the fact that the word company following the name Hilton as used by the complainant has commonly in the conduct of his business been abbreviated to Co. A That word should have been written
 30 out company.

Q That was an error, wasn't it? A Yes.

Q What you meant to say was you were calling the Court's attention in support of your contention that we were violating the order and were improperly using the term Jos. Hilton & Co. to the fact that in the conduct of your business the word company following the name Hilton as used by the complainant has commonly in the conduct of your business been abbreviated to Co.? A Yes. I intended—

The Court. The answer to that question is yes.

40 Q That is the answer to that question, isn't it? A Yes, that it was what, a mistake?

Q Yes, that you meant to say in your affidavit the fact that the word company following the name Hilton as used by the complainant has commonly in the conduct of the complainant's

Frank J. Murray, cross.

business been abbreviated to Co.; that is what you meant to say in that affidavit? A I meant to say, I think, the word should have had no italics about it?

The Court. The answer is obviously yes.

A Yes.

Q Now, I want to know whether you did attach any significance to the fact that the word company has sometimes been used as Co. by your concern? A I do not attach any significance to it. 10

Q Then why did you make that affidavit? A Because I think the language of that affidavit shows clearly what I did intend to say was that the word company was used as Co. commonly by this concern, which is the fact.

Q The affidavit says this: "I verily believe that the use of the word Jos. Hilton & Company as the name or style under which the said defendant conducts and advertises his business and sells and displays his merchandise leads and induces the public to believe that the goods manufactured or sold by him are manufactured or sold by the complainant, and that the business conducted by the defendant is the same as or a part of the business conducted by the complainant. In support of my belief in this respect I refer to the evidence which was given at the other hearings and to the fact that the word Jos. contains the same number of letters as the word 'The' which precedes the name Hilton in the name under which the complainant has conducted his business, and the fact that the word company following the name Hilton as used by the complainant has commonly in the conduct of his business been abbreviated to 'Co.' " Did you by that affidavit mean to give to the Court the view that your contention was that we in using the word Co. after Hilton were simulating your sign which was frequently and commonly also The Hilton Co., didn't you mean that? 20 30

Mr. Hardin. I object to this. Mr. McCarter hasn't any greater right to argue with this witness than he has any other witness. He can ask questions if he wants to, but the language of the affidavit speaks for itself. He has been all over it and has answers from the witness so far as the question of fact. Now, he is arguing with the witness. 40

Frank J. Murray, re-direct.

The Court. I will admit the question. He asks the witness practically what he meant by his affidavit.

A Mr. Ward dictated the affidavit and I read it over hurriedly and I didn't state it probably the way you have, but what I did mean by that language was that we have commonly used the
10 word Co. as well as we have used the word company, and that if the defendant has used the words and Co. he has used something which is very like what we have used and are using.

Q You still wish to be understood, in view of the language of that affidavit, as having no interest in which of the two are used by your company, as you consider that neither has any peculiar significance; they both mean the same thing? A I think they both mean the same thing.

Q And you still think, notwithstanding your affidavit, take
20 the same position regarding it as before I called your attention to the affidavit? A I take the position that my answers have made me take.

Re-direct examination.

Q Do you exercise any supervision over the advertising of the concern? A Why, in a general way, I do, yes; I leave pretty much everything up to Mr. Hanser, though.

Q Have you or not made it a custom to take care of the cards in the Manhattan trains?

30 *The Court.* Why go into that?

Q (Question withdrawn.) I show you a label, the words "The Hilton Co." and the crest over the name; is that one of your clothing labels? A Yes.

Q (*By the Court.*) In use when? A In use now and for a year or two past.

Q Continuously? A Yes.

Q Where is that label attached to the garments? A On the inside of the coat outside the pocket.

40 Q Outside of the lining of the pocket? A Yes.

Label offered in evidence and marked Exhibit C. b. m.

A We used that label mainly in overcoats at least a year and probably longer.

Frank J. Murray, re-direct.

Q This label has a crest over the name of the capital letter "H" shown in purple silk? A Yes.

Q Is that the only label you are using in your clothes? A No, sir.

Q I show you another label. Is that one of your clothing labels? A This label is now in our clothes or on hand that we manufactured before last May; since May we have adopted a new label. 10

Q Have you detached those labels from the old garments which were made in stock since last May? A We use this in suits, the coats of sack suits, not overcoats; we use larger label in the overcoats.

Q Are you sewing this label onto any of your garments you are now manufacturing? A No, sir.

Label offered in evidence and marked Exhibit C. b. n. 20

Q This label has a crest to the left of the name of the capital letter "H" sewn in gold colored silk. I show you another label; is that one of your clothing labels? A Yes.

Q Is that the one that is being now used in the suits? A Yes, since last May.

Q You have been attaching that to all your suits put on the market since last May, is that right? A Yes.

Mr. McCarter. I submit that the character of labels that the defendant has used in this business differing from the labels that were used at the time the bill was filed that we were said by the labels we had then in use to have imitated is utterly immaterial. This case divides itself into two parts. One is that we are improperly using a name, and the second part is that we are improperly imitating their labels, and when we were before your Honor the respective labels were so different that the case completely fell down with regard to the labels, and while the prayer of the bill included something with reference to the labels, if I remember correctly the decree that your Honor made has no reference whatever to it and there was no contention, although that decree was drawn by Mr. Hardin, that there was the slightest foundation for any suggestion that we were imitating their labels. In fact, they were so different that anybody that ran could see they were not 30 40

Frank J. Murray, re-direct.

10 imitated. Now, since the evidence in the case on that and
 after your Honor's decree and before the argument or
 decision of the Court of Errors, it seems now they have
 got up some other label and they are now introducing that
 for some purpose, I don't know what, but it certainly can-
 not help out in this case. The labels that were in evidence
 were in that black book. They had both our labels and
 their labels, and there they are yet, except I tore out one
 yesterday to put on this card, and they were all that were
 offered by either side with reference to the labels; and the
 principal contention that I made, your Honor will find, if
 your Honor may, by reading my brief in the Court of
 Appeals, you will see I called attention to the fact that so
 much of the case that depended on the imitation of labels
 had completely broken down, and it did, and no contention
 20 was made about it, yet the bill was filed on both ideas, the
 name and character of the label.

Mr. Hardin. As a matter of fact, the imitation of the
 label was admitted in the answer, but was out of the way
 because it had been stopped, but the significance of this
 label is in showing the use of the name had nothing to do
 with the label *per se*.

Mr. Ward. I offer the last label described by the wit-
 ness in evidence.

30 *Mr. McCarter.* We object to the label adopted since the
 commencement of the suit and not the label that was in
 use and about which the testimony was directed during
 the progress of the suit upon which the decree in which
 we are alleged to have contemned is based.

The Court. My decree was not addressed to the labels
 at all, was it? The Court of Appeals enjoined you. The
 only purpose of this testimony is to show the continuance
 of the use by that, to show the use of the Hilton Company,
 that is the only purpose.

40 *Mr. Ward.* The last label offered in evidence has a
 crest in the center underneath the name the capital letter
 "H" in white silk within a red band.

Mr. McCarter. That shows that is not the only pur-
 pose.

Frank J. Murray, re-cross.

Mr. Ward. I am only attempting to identify it in the absence of a number, that is all.

Marked Exhibit C. b. o.

Q I show you a printed sign, is that what it is? A Yes.

Q Is that appearing in the windows of one of your stores at the present time? A That was in the Newark store this morning. 10

Q When was it put in there?

Mr. McCarter. Last night.

Mr. Hardin. I would like to have the record show that.

Q It was put in the 1st of January.

Mr. Ward. I offer it in evidence.

Mr. McCarter. The same objection.

The Court. The same ruling. 20

Marked Exhibit C. b. p.

Re-cross examination by Mr. McCarter.

Q During the progress of the main trial you were present and are aware of the fact that this black book that I now place before you was produced, and on one of its pages appeared the complainant's label and the defendant's label as it now appears, are you not? A Yes.

Q The complainant's label with the so-called crest with the letter "H" in its center to the left of the printed matter corresponds to one that you now produce as being sometimes used by you? A Used by us up to May 1st and still used on clothes that were made before that time and still in stock. 30

Q On May 1st, 1918, you adopted a new style of label for clothes as distinct from overcoats? A About May 1st.

Q Well, when was it? A Well, it was about close to that, within a week or two.

Q And that is the one that you have produced and which has been marked by the stenographer which has the so-called crest in the center of the label? A Yes. 40

Q Black background with gold letters? A Yes.

Q You intended to ultimately abandon the other label that you had previously used? A We have not used it since, yes.

Q Now, in addition to that you produce another label which I understand you to say is your overcoat label? A Yes.

Frank J. Murray, re-cross.

Q And you adopted that about the same time for overcoats?
A No, I think that was adopted, in use last year; we would have—

Q Oh, no, no. How long has that one been in use? A I am not sure, but I think about a year.

10 Q About a year? In other words, it was adopted about the first of 1918, is that right? A Possibly sooner; it might have been a good deal longer than that, I am not sure.

Q As near as you can recall? A I know we have been using it for at least a year, possibly longer.

Q For a year have you had a store in Boston or Providence? Have you a store in Boston or Providence for a year? A No, I don't think we have.

Q When did you give up your Boston store and when did you give up your Providence store? A Gave one up a year ago, November 1st, and the other a year ago October 1st.

20 Q (*By Mr. Ward.*) Which was which? A October 1st, 1917, we gave up the Providence store and November 1st, 1917, we gave up the Boston store.

Q If I understand correctly, so far as you have any present intention, the two labels that you have introduced today for the first time are your present current labels for clothes and overcoats, respectively? A Yes.

Q And are designed to be indicative of your own particular business? A Naturally.

30 Q Why don't you make them alike except as to size? A Well, I was about to explain that before. The reason we are continuing the use of this label for overcoats is that we had so many on hand we did not want to destroy them, and as soon as they are exhausted we propose to use this same label in overcoats as well as suits, this new label; our manufacturing man is here; it may be we have used this label that has got Boston and Providence on it for two or three years, I don't know.

40 Q I would rather you would testify to what you know. I asked you when you adopted the overcoat label and you said a year ago; if you don't know about it say so. A I say I know we have had it that long and we might have had it two years; I am not sure about that.

Q You stood for the allegations of the bill of complaint, for the significance of your label, didn't you? A I am not a party to this suit and I don't think I stood for anything.

Frank J. Murray, re-cross.

Q Eh? A I am not a party to this suit, and not being a party to this suit I don't think I stand for any allegations.

Q Does Mr. Philip Hilton read English? A No, sir.

Q You are his general manager, aren't you? A Yes.

Q And didn't you testify in the main case that you read over the bill of complaint before it was filed? A Yes. 10

Q And collaborated with Messrs. Pitney, Hardin & Skinner in its preparation? A I didn't testify I collaborated with them; I testified I read it over.

Q And stood for it? A I didn't say I stood for it.

Q Do you stand for it? A I don't think it is material.

Q I don't ask you whether you think it is material or not; I ask you whether you stand for it? A I don't see why I should stand for it.

Q I ask you what the fact is, do you stand for it? A I don't repudiate it, if that is what you mean. 20

Q Will you answer the question, do you approve of it? A It wasn't up to me to approve or disapprove.

Q Did you approve of it? A I don't think I am obliged to answer that kind of a question.

Q I will be glad if you will answer my question. I asked you if you approved of the allegations of the bill with reference to the significance of the label?

The Court. Do you know what the allegations of the bill with respect to the significance of the label were? 30

A I do not recall the bill distinctly now. I thought the statements in the bill at the time I read it were correct and they were properly stated.

Mr. Hardin. As a matter of fact they were correct and the proofs showed it.

The Court. Never mind. I heard the case.

Q (*By Mr. Ward.*) Do you know when the so-called overcoat label was first made for you? 40

The Court. What significance has that?

Mr. Hardin. Has no significance, except in response to Mr. McCarter's cross examination.

The Court. Then it has no significance in the case.

Morris Kline—Samuel Jacobstein, direct.

10 *Mr. McCarter.* I think it has same significance as to the accuracy of this man's evidence; a man that will testify right away that it was a year from now and as soon as he finds it advertises stores that have been out of business for more than a year he falls back on his manager, I feel that the testimony must be considered a little carefully.

MORRIS KLINE, sworn.

Direct examination by Mr. Ward.

Q Where do you live? A 329 East Seventy-ninth street, New York City.

Q What is your business? A I am with the Hilton Company.

Q What are your duties there? A Manufacturer.

20 Q Do you know when the overcoat label, I think it is Exhibit C. b. m., with the purple letter "H" on it, was adopted by The Hilton Company? A To my best recollection we had this label for about three years.

Q When were the labels made? A About three years ago, or probably more.

NO CROSS EXAMINATION.

SAMUEL JACOBSTEIN, sworn.

30 *Direct examination* by Mr. Ward.

Q Where do you live? A 300 West Forty-ninth.

Q Employed by The Hilton Company? A Yes.

Q Is it part of your duties to clip the advertisements of Hilton & Company out of the newspapers as they appear? A Yes.

Q Do you do that regularly? A Yes.

Q How long have you done that? A Oh, past couple of years or more.

Q You have a scrap book that you keep them in in consecutive order? A Yes, sir.

40 Q Have you got there the advertisements of The Hilton Company appearing in the Newark Evening News from October 1, 1918, until December 23, 1918? A Yes.

Q Whose writing in blue pencil appears on the ad?

Mr. McCarter. We won't object.

Frank J. Murray, direct.

Q You identify all the ads of the company in the Newark News between the dates mentioned? A Yes.

Mr. Ward. I offer them in evidence.

Mr. McCarter. We object to them as immaterial and irrelevant, and also both as to time and as to place. I do not consider what the complainant advertises in the Newark News since October 1st has any bearing either as to time or place on the issues in this cause. 10

The Court. I will admit them.

Q You identify an advertisement in the Newark Star also?
A Yes.

Advertisement in the Newark News and Newark Star-Eagle appearing on and between the pages identified by the initials J. W. S. offered and admitted in evidence and marked Exhibit C. b. q. 20

Q Do you identify your advertisements in the Brooklyn Eagle and Brooklyn Union between the dates aforesaid? A Yes.

Q Between October 1st, 1918, and December 23, 1918? A Yes.

Mr. McCarter. The same objection as to time and place.

The Court. Admitted.

Marked Exhibit C. b. r. 30

NO CROSS EXAMINATION.

Mr. Ward. We rest.

FRANK J. MURRAY, recalled by Mr. McCarter.

Direct examination by Mr. McCarter.

Q Without holding you to the last dollar, can you estimate the cost per year of the advertisements that you make in the tube? A At the present time about \$14,000. 40

Mr. Ward. If the Court please, we have made new photographs of the show cases made in the New York terminal. They won't be ready until tomorrow. We would like to have the right to put them in.

Frank J. Murray, cross.

The Court. It may be reserved.

Mr. Hardin. Mr. Murray would like to correct a statement he made as to one of these exhibits.

Direct examination by Mr. Hardin.

10 Q Do you wish to make a correction of your testimony? A Yes.

Q In what respect? A In respect to Exhibit C. b. g. I was under the impression that Exhibit C. b. g. and Exhibit C. b. h. were mates, and as we have two of a kind each time we put cards in the cases, for instance, Exhibit C. b. i. and Exhibit C. b. j. are mates, we having two spaces in each car, and Exhibit C. b. k. and Exhibit C. b. l. are mates; but I was thinking the thing over during lunch hour and I recall that at the time Exhibit C. b. h. went in we had a long narrow card like Exhibit C. b. g. which had on it this same figure, but cut off below the waist line, and it skipped my memory; I hadn't that long card here. I sent over to the Hudson Tunnel Company yesterday to get all the cards they could furnish me, and that card they did not send, so this card Exhibit C. b. g. preceded a card which went in at the time Exhibit C. b. h. went in.

20

Q And did you tell us what time that was. I think you said this morning C. b. g. was in until about the 1st of November? A I thought it was, and instead of that it was in only until early in the summer of 1918, June or July.

30 Q In other words, when you advertised clothes for spring you mean what you say? A Yes.

Cross examination by Mr. McCarter.

Q Notwithstanding the fact you were quite certain beforehand you advertised clothes for spring in November? A Yes. I would like to explain that it does happen that through negligence probably of my own or the advertising man a card remains in many months longer than it should, and even when a season is past that particular card Mr. Mindes is holding remained in the tube train as long as five or six months, and we make an effort to change them once a month or once in two months.

40

Q I will ask you now when you say Exhibit C. b. h. was exhibited? A It was exhibited until the early part of Novem-

Max Younker, direct.

ber, sometime between the first of November and the 15th of November, up until that date.

Q From when? A From the early summer, around June or July.

Q Do you call July early summer? A I personally had charge of that particular card; Mr. Hanser didn't make the particular card. 10

Q It seems to have June 14 on it? A I know nothing about those dates; I didn't put them on; I know nothing about the writing of those dates.

COMPLAINANT RESTS.

MAX YOUNKER, sworn.

Direct examination by Mr. McCarter.

Q You are the same gentleman who under that name testified both in the main case and in the previous proceedings for contempt? A I am. 20

Q And you are still in the employ of the defendant in this matter? A Yes, sir.

Q My recollection is that on the occasion you were testifying in the contempt proceedings you expressed the hope and intention of becoming a partner of Mr. Hilton's in the business; was that expectation carried out? A No, sir.

Q Why not? A The agreement Mr. Hilton and I had was for me to raise a certain amount of money; at least, Mr. Hilton was branching out and opening a great many more stores, and while he had plenty of capital to conduct the present business he wanted more money to extend his chain; so I suggested I could raise money if he would admit me in partnership. I had in view getting some money from my father-in-law, didn't have enough myself, but my father-in-law fell down on it afterwards. 30

Q Couldn't raise the money? A Couldn't give it to me; at the time he was in the jewelry business and couldn't raise the money as quickly as he wanted to. I had some money of my own which I told Mr. Hilton about I could put in if he was satisfied to take it, I will take the profits in proportion to the amount of money I will put it. I am making more now than I would the other way, so I declined. 40

Q Now, you are still, however, occupying the same position in the business as you did before? A General manager, yes.

Max Younker, direct.

Q Now, with reference to the change that was made pursuant to the orders of the Vice-Chancellor after the last contempt proceeding, what has become of the signs that were on the New York stores previous thereto, either Hilton's or J. Hilton, Prop., what has become of those signs? A Why, they were taken
10 down.

Q And what has been substituted? A Jos. Hilton & Company.

Q What is the character of the wooden sign on the New York stores at present, and have you photographs of them? A Yes.

Q Will you produce them?

Mr. Hardin. When you say Jos. Hilton and Company you mean Jos. Hilton and Company or Co.?

20 A And Co.

Q I show you a series of photographs; look at them and tell us what they are? A Sign 243 Broadway.

Offered in evidence and marked Exhibit D. h.

Q Next one? A Broadway and Thirty-sixth street.

Marked Exhibit D. i.

A Fifth avenue and Thirty-third.

Marked Exhibit D. j.

30 A Nassau and Fulton street.

Marked Exhibit D. k.

Q Those are the New York stores? A Yes.

Q Now, what is the style of those signs that appear on those photographs; the material is wood? A Wooden sign with the maroon glazed background and gold letters.

Q What color signs has The Hilton Company on its New York stores? A They have a black background sanded to deaden the surface, gold letters.

40 Q (*By the Court.*) Are your signs gold letters? A Yes, sir.

Q Who painted, prepared and put up these signs? A Shanks Sign Company.

Q What directions did you give him with reference to them, with particular regard to the wooden signs of The Hilton Com-

Max Younker, direct.

pany? A Well, I particularly—when I gave him the order for the signs I laid particular stress to make them as different from the other signs as he possibly knew how, of course, without spoiling them.

Q Does he or do you know the size of the letters and the size of the signs? A He knows that better than I do, although I can say that our letters are smaller than theirs to a greater extent. 10

Q The letters are all the same size throughout the entire sign, there is no diminution? A The words Joseph Hilton and Company are alike.

Q All alike? A Yes.

Q Now, on the windows and doors or anything what is the phrase used? A The same as the sign above.

Q Jos. Hilton & Co.? A Yes. 20

Q All the same size? A The same size.

Q The same thing is true, then, of all the stores, is it, in New York? A Yes.

Q Is there any variation in the use of the word Co. as between Co. and company? A I do not understand what you mean.

Q (Question read.) You sometimes use company written out and sometimes Co.? A No, only Co. at all times.

Q Now, how long have you known in a business way Mr. Joseph Hilton? A About fifteen years.

Q How to your knowledge has he always signed his name? A Jos. Hilton. 30

Q Jos. Hilton? A Yes.

Q I show you a series of checks picked out at random, do they illustrate that? A They do, sir.

Q I show you the leases that were signed in the City of New York, one apparently being dated the 9th of January, 1917, between John M. Raymond and Mr. Hilton; does he sign it that way there? A Yes.

Q And another one, 23d of October, 1916, between Ralph Ward, I don't believe that is our handsome young friend here; and Mr. Hilton, is that signed the same way? A Yes. 40

Q And has that been his invariable practice, as far as you know? A As far as I know.

Q Jos. Hilton? A Yes.

Max Younker, direct.

Mr. McCarter. I don't know whether it is worth while to offer these papers in evidence.

The Court. No, I think not. The checks are about fifteen in number and range from February 16, 1917, to August 3, 1918, and all signed Jos. Hilton.

10 *Mr. McCarter.* Yes, and the leases are the same way.

Q Now, Mr. Younker, I would like to ask you to describe, if you will, generally, the characteristics of the two stores of the complainant and defendant, respectively, on Nassau street; take first our store on the corner; just describe for us the store on the corner of Nassau and Fulton? A To begin with the Nassau and Fulton street store has a fifty-foot front on Nassau street and seventy-five feet to eighty feet front on Fulton street.

Q With entrances? A Three entrances.

20 Q Where? A Two on Fulton and one on Nassau.

Q How many clerks are employed there? A Well, about ten, sometimes twelve.

Q Before you took that store who was there? A John M. Raymond.

Q How long had he been there? A Over forty years.

Q And what business did he carry on? A The same business we are carrying on at the present time.

Q Is that on the upper or lower corner? A On the northeast corner, upper corner.

30 Q Now, the complainant's store is a little below on Nassau street, and is that on the corner? A No, sir, middle of the block.

Q How large a front? A It is around twenty foot front, about twenty foot, one entrance.

Q Do they do any men's furnishing goods? A No, sir.

Q And you do, and display them, do you not? A To as great an extent as we do the clothing in that particular store.

40 Q What have you to say in view of the experience of Mr. Raymond and the time that he has been there as to the site chosen for that store being in a recognized ready-to-wear clothing territory? A Well, Nassau street has always been a very much recognized clothing center for years; you see the location caters particularly to Staten Island and Brooklyn and all around there; they made a sort of center for the buying of furnishings, men's tailoring and men's clothing for years.

Max Younker, direct.

Q Is this same thing true or not true of 243 Broadway?
A Yes, the same is true there.

Q Another clothing locality? A Another clothing locality, catering to that trade.

Q What about Broadway and Thirty-sixth and Thirty-seventh street, is that another clothing locality? A Yes. 10

Q Are there other stores in that locality besides this and The Hilton Company? A Yes, a great many.

Q And what have you to say as to your Fifth avenue location? A It holds good there as well to some extent, in a finer way.

Q (*By the Court.*) To the same extent on Fifth avenue and Thirty-third? A Yes.

Q (*By the Court.*) Is that a clothing district? A Yes.

Q What stores are there? A The Best Company do a very big business; Franklin Simon do about as big business as any in New York City; Lord & Taylor do a large clothing business, so do Altman, and Depena does a very large business; Finchley do a very large business there. 20

Q (*By the Court.*) Are there any stores between Forty-third and Forty-second street on Fifth avenue devoted wholly to the sale of men's furnishings and clothing, devoted solely, rather? A Rogers-Peet.

Q (*By the Court.*) Where is that? A Right near Forty-first, I think, and Fifth avenue.

Q And Fifth avenue? A Yes, beautiful store they have got; that is location for high priced clothing at the present time. 30

Q Advertisements have been offered in evidence of your concern in the New York Journal or American or both, and also in the Broadside; you are familiar with those advertisements? A I am, sir.

Q How much has your concern paid per annum for advertising in these papers the past year? A We started advertising only lately, about a few months ago.

Q At what rate? A At the rate of \$50,000 a year. 40

Q I pick out at random Exhibit C. m., I think it is; referring to the advertisement in the Exhibit C. m., which seems to be the New York Evening Journal, Friday, December 13, 1918, beside the name itself Jos. Hilton & Co. did you have anything put into that advertisement that was designed to dif-

Max Younker, direct.

ferentiate your concern from The Hilton Company? A Yes, that (indicating).

Q Read it out? A "Locate Jos. Hilton & Co. nearest you; make sure of its exact address"; and the same thing appears, on the same page appears another notice, "Please note our full name and exact address and recognize it on the sign of each of our four stores Jos. Hilton & Co."

Q And the address and location as well, the number and location of each store is given, is it? A Yes.

Mr. McCarter. I won't go through all.

Q Now, Mr. Younker, if you suppose or believe that those advertisements tended to create confusion and to lead your customers to go into the stores of The Hilton Co., would you have obligated yourself—

20 *Mr. Hardin.* I object.

Mr. McCarter. Let me finish it.

Q (Continuing.) Obligated the concern to spend at the rate of \$50,000 a year?

Mr. Hardin. I object to that question.

The Court. How is it competent? Isn't that argument. How can this witness say what he would have done? Of course, you may infer that he would not; that may be argued from his conduct.

30 *Mr. McCarter.* The claim is, as I understand it, we are purposely simulating their signs with the avowed purpose and undertaking to steal their trade in direct violation of your Honor's order, and I suppose I could ask him the naked question had he intended to follow the order.

The Court. You may ask him that.

Q Who has personally chosen the character of the sign and the character of the ads, you or Mr. Hilton, or have you col-
40 laborated on that? A The advertising man and myself.

Q The advertising man and yourself? A Yes.

Q Now, in any of the advertising that you have done have you simulated or copied or imitated, or endeavored to simulate, copy or imitate any advertisement or sign or other things that

Max Younker, direct.

The Hilton Company were using for the purpose of stealing their trade?

Mr. Hardin. I object to that also.

The Court. Why, Mr. Hardin?

Mr. Hardin. Because that is assuming now that there may be other advertising; if he limits the question to the advertising that has been produced I will not object, but I don't know what the question means; it covers a great wide, broad range, and I am not informed as to what the question refers to. I certainly can not intelligently cross examine the witness about something I don't know anything about, declaration on his part that he has not stimulated any advertisements he and the advertising man has produced and handled? 10

Mr. McCarter. I was not speaking of any advertisement not shown here. 20

The Court. Add to your question, confine your question.

Q Who prepared the advertisement in the New York Evening Journal or other documents that have been produced by the other side and offered in evidence, you and the advertising man? A Yes.

Q In their preparation and publication had you any design, purpose or desire to imitate or copy the thunder or name or trade or business, or procure the business of The Hilton Company? 30

Mr. Hardin. I object to that. That is a different question than the one last asked. As I understand that is practically the question your Honor has overruled.

The Court. No, not quite; he practically asks whether he intended to contemn the order of the Court, that is what the question amounts to. He has a right to say he had no intent.

Mr. Hardin. I think that is true. 40

The Court. If he had an intent to copy your sign or copy any of your advertising or imitate you in any way. I think the answer may go in.

Q Your answer is what? A No, sir.

Max Younker, direct.

Q How far is Waterbury by rail from New York City? A Approximately ninety miles, I think.

Q How far is Bridgeport by rail from New York City? A I should judge around forty-five or fifty,—perhaps.

10 Q Do you know the cost of a ticket from one place to the other? A Yes.

Q What is it? A Bridgeport is \$3.75 round trip and Waterbury, I think, is \$5.85, I think; something like that.

Q How long have you been connected in one way and another with the retail ready-to-wear clothing business? A About twenty years.

20 Q Would you say that there was any business in New York from residents of Bridgeport or Waterbury in the retail clothing business, that is to say, that citizens, persons living in Waterbury or Bridgeport of the class who would buy ready-made clothes such as are made by your concern and sold, or sold by your concern, would be apt to go all the way from Bridgeport or Waterbury to New York to procure a suit of clothes?

Mr. Hardin. Is this witness any better qualified to pass judgment on that than any other person?

The Court. Let him answer.

A No, sir.

30 Q (*By the Court.*) There is considerable commutation between Bridgeport and New York, isn't there? A I think there is, yes.

The Court. I know there is.

40 A The commutation business between Bridgeport and New York is of the character that differentiates; Mr. McCarter is trying to bring it out; they are not the people who buy clothes for \$20, \$22 or \$25; that is what I meant by that; they are not commuters to New York. A man will not spend \$3.75 for a round trip and spend a day to buy a suit of clothes. We sell our clothes from one to three dollars in Bridgeport cheaper than in New York.

Q You have no store in Newark? A No.

Q You have no store in New Jersey? A No, sir.

Q Some evidence has been offered in the way of advertisements by the defendant in Bridgeport and in Waterbury, and

Max Younker, direct.

pictures have been offered of the signs there. Did you receive any advice from counsel with respect to the effect of the decree and order on the remittitur touching the cities of Waterbury and Bridgeport? A I have.

Q And what was that advice? A At the conference at Mr. McCarter's office wherein I was instructed by Mr. McCarter to show picture of the new sign which we intended placing in New York City at that time I asked Mr. McCarter how about the Bridgeport and Waterbury signs and Mr. McCarter says, "You hurry up with these New York signs as fast as you can; the other ones you have got plenty of time, take your time about the other ones, but I would advise making them the same as New York as you don't want your stores to look different for your own reasons," and just at that time our busy season was on, our fall season was on; I asked Mr. McCarter, "Will it be time enough about a month or so?" he said, "Yes, about a month or so will be all right," whereupon around the beginning of December I had negotiated with the local sign writer in Bridgeport, the Park City Sign Company and placed an order with them to change the Waterbury and Bridgeport stores to read, "Jos. Hilton & Co."

The Court. Let the record show the witness first said Joseph Hilton & Company and the stenographer interjected "You mean Jos. Hilton & Co.", and then Mr. Younkers said "Yes."

A The Bridgeport sign I think is ready now; they are working on it a couple of days ago, three days ago; it took this man something like three weeks to get his letter from Spanjer & Company of Newark; they make all the letters for the signs all over the east here.

The Court. Mr. Hardin, are you going to contend in this case that the maintenance of the sign in Bridgeport and Waterbury stores and advertisements in Bridgeport and Waterbury is contempt?

Mr. Hardin. No, but I will argue from it there has been confusion in New York because of that, which is a reason why that sign should not be permitted in New York.

Mr. McCarter. I was going to say I took the responsibility of advising my people I didn't think that the

Max Younker, direct.

Court went to that extent and directed them to concentrate their efforts first on New York and then changed the others, and that is the whole purpose of that.

Q Now, after the direction of a change and cessation of the use of Hilton's, J. Hilton, Prop., did you get up a new label?

10 A I did, sir.

Q I show you Exhibit D. 8 and ask you if the top label on that exhibit is a specimen of the new label? A Yes.

Q And about when did you commence to use that? A Why, at the same time when we received the order from the Court to change that sign and label.

Q And has any other label been in use by you in any of your New York stores than the top label on Exhibit D. 8 since that time? A No, sir; absolutely not.

20 Q And are you gradually changing the same label at Waterbury and Bridgeport? A They have been changed.

Q They have been changed, too? A Yes.

Q The other side today introduced two labels here, one known as the overcoat label and the other known as a garment label, said to have been adopted since the 1st of May. Has either one of these labels been introduced in this litigation before today to your knowledge? A I am positive neither of these two were.

The Court. Neither of the two? You are referring now to what?

30 *Mr. McCarter.* The overcoat label and what I call garment label adopted about the 1st of May, according to Mr. Murray?

A This one I am positive was not introduced before; this one I don't think it was.

Q No, the overcoat? A No.

Q What about the time that the directions were given by Vice-Chancellor Lane with reference to the old sign of Hilton's, J. Hilton, Prop., did you give any directions to your salesmen? A I did, yes.

40 Q And what were those directions? A I have written to each store, each manager, instructing him particularly that should anyone come into the store and inquire that we have any connection with The Hilton Company to positively disabuse his mind at once and show him the location of the stores

Max Younker, direct.

that we have; in other words, show him the difference in our stores than theirs.

Q You have copies of those letters with you, haven't you?

A I think you have them, Mr. McCarter.

The Court. Are they all alike?

Mr. McCarter. I think they are. We will take one as a specimen. 10

A They are all alike.

Mr. McCarter. We will offer one as a specimen. I will pick this one out just for fun, "November 5, 1918, Jos. Hilton & Co., 243 Broadway, New York City. Attention manager. Dear Sir: In the event of any individual entering your store and inquiring whether this store has any connection with The Hilton Co. you will please instruct your salesmen to emphatically inform him that we are in no way connected with said firm; that we have four stores in New York City, and give the exact location of each store. Kindly give this your most careful attention, and oblige, Yours truly, Jos. Hilton & Co." 20

Q Some testimony was given yesterday to the effect that the complainant did not carry as cheap suits as \$18.50; do you remember that evidence? A I do, sir.

Q What observation have you had to the contrary of that, if any? A Well, I have gone to their Brooklyn store last night, as well as to their Fourteenth street and Broadway store— 30

Mr. Hardin. Before that question is answered I should like to correct Mr. McCarter's statement of the evidence or have it corrected.

The Court. I know what the evidence is.

Mr. Hardin. My recollection is, perhaps I need to be corrected, too— 40

The Court. Let the witness answer.

Mr. Hardin. I object to the statement made by Mr. McCarter as to what the evidence was.

Max Younker, cross.

A I was going over to their Brooklyn store, also their Fourteenth street store, and I have seen a suit in their window bearing a ticket \$17 in each store, in the window of each store.

Q (*By the Court.*) Have you observed their stores generally from time to time? A Yes.

10 Q (*By the Court.*) Have you observed whether they carry in their windows generally clothes marked \$18.50, or any such price as that? A Not when they have no sales.

Q (*By the Court.*) When they do have sale their sales are fifteen per cent. off, something of that kind? A They are fifteen per cent. off.

Q (*By the Court.*) Their general practice in marking down sales is to use percentage off? A I think so.

Q (*By the Court.*) And your practice in making a sale is to give the price of the article, isn't it? A Yes, sir.

20 *Cross examination by Mr. Hardin.*

Q You have been connected with Mr. Joseph Hilton while he was with his brother and since for how long all together? A Oh, I should judge around fourteen or fifteen years.

Q And your observation during that time has been that his customary way of using his name, expressing his name when he expressed it in letters was Jos.? A In letters? Why, I don't believe I ever saw any of his letters.

30 Q I understood you to say to Mr. McCarter that during all the time you have known Mr. Hilton, which now appears to have been some fourteen or fifteen years, the customary way in which his first name has been known to you is Jos.? A In signing his checks I was referring to.

Q And you don't refer to anything else? A No, because he doesn't write letters himself.

Q You never saw his signature written out in full, Joseph? A I don't think I have.

40 Q Did you participate in the conference at which it was determined to use the name of the business since the last hearing in the court of Jos. Hilton & Co., or was that determined by somebody else and you were told about it? A Why, you mean after I declined to become a partner?

Q No, the selection of names; did you participate in the selection of a name for the business after the old name was condemned? A Yes.

Max Younker, cross.

Q And who called attention in that conference to the customary habit of Mr. Hilton in pronouncing his name, in having his name Jos.? A I think Mr. Hilton did.

Q Himself? A Yes.

Q You customarily speak of the new firm or the firm of which you are connected as Joseph Hilton & Company, do you not? A Yes. 10

Q And other people do in your hearing? A I think so.

Mr. McCarter. I may say that we do not contend that people call us Jos. Hilton & Co.; if they did I think we would take another name.

The Court. Whatever distinction there is is to the eye rather than to the ear?

Mr. McCarter. Exactly.

Q (*By the Court.*) Do you refer to your place as Hilton's? A At the present time? 20

Q (*By the Court.*) Yes. A No, sir.

Q (*By the Court.*) I mean now not officially? A Joseph Hilton and Company.

Q (*By the Court.*) Do others that come in and interview you and talk about your business; have you heard them refer to your place as Hilton's? A No, sir, Joseph Hilton and Company at the present time.

Mr. McCarter. A burnt child dreads the fire; we don't say Hilton's any more if we can help it. 30

A No, we are very explicit about that.

Q This Nassau street store of yours operated by another man for so many years, Raymond was his name? A Yes.

Q Been there fifty years, I think you said? A Over forty, anyway.

Q Was the store operated under the name of Raymond down to the time when Joseph Hilton opened his store there under the name of Hilton? A Yes.

Q And the site was regarded as a valuable one because of the long accumulation of good will under Raymond? A To a very great extent. 40

Q Took that place because of the succession to the Raymond good will? A It had some bearing on our taking the store.

Max Younker, cross.

Q You think the Raymond customers are still coming back there? A Well, I don't know, I suppose they are.

Q Your view as I remember on the last trial was that a very considerable percentage of customers did come back if they were satisfied when they were waited upon in the store.

10 Q 243 Broadway that you refer to as a clothing locality is a locality in which the Hilton Company formerly had a store, isn't it? A 219 Broadway.

Q That was an old Hilton store? A Yes.

Q Has the purpose that you spoke of to Mr. McCarter to open a great many new stores under the title of Joseph Hilton & Company been abandoned or not? A It has not.

Q And it is contemplated, I suppose, to open additional stores in New York City, or some additional stores? A I can't say that; the contemplation at present is to take more stores outside of New York City.

20 Q (*By the Court.*) Is it contemplated to establish a store in Newark? A No, sir; no, sir, not for rent free.

Q You have some thought of going to Brooklyn, haven't you? A No, sir.

Q Have you abandoned the Brooklyn lease that was talked about at the first trial? A The lease was not consummated.

Q Never established Brooklyn store? A No.

Q Have no thought of Philadelphia, I suppose, either? A No, sir.

30 Q Going to stay away from the places where the other Hilton stores are established? A Not for that reason alone; we know a great many other fields we consider just as good.

Q You spoke about the advertising at the rate of \$50,000 a year in the New York Journal; when did you begin that advertising? A End of November when we put on our permanent signs Joseph Hilton & Co.

Q And when was the first week in which you put these advertisements into the Journal? A When the contract was given, the large advertisement, the full page advertisement was put in right after Thanksgiving.

40 Q I mean this \$50,000 a year proposition? A We also did advertising before then, about half the amount; we started our new contract right after Thanksgiving, full page advertising.

Q Did you make a contract for \$50,000 all at a clip? A I think we made our contract for 125,000 lines.

Max Younker, cross.

Q For how long? A When I speak of \$50,000 I don't mean the New York Journal alone; that alone amounts to that much, I guess it will amount to more than \$50,000.

Q Are you advertising in other papers? A No, we use papers like shown there, Broadside.

Q That is included in your \$50,000 rate? A Yes. 10

Q Any other papers beside the Journal and Broadside? A Yes, we use a Columbia College paper, and another paper, I just can't think of it at the time; also fraternal paper; and we do also program advertising, which we are laying out plans to use.

Q All under the name of Jos. Hilton & Co.? A Yes.

Q Do you in all your advertising put on these warnings Mr. McCarter directed your attention to, "Please note our full name and exact address and recognize it on the signs of each of our four stores, Jos. Hilton & Co."? A In all our general advertising, yes. 20

Q I mean in your newspaper advertising, or is that peculiar to these big straight advertisements? A It is peculiar because this is continuous advertising and the other contract only to one particular store.

Q You don't bother about that in the Broadside? A No, it covers only one particular store.

Q And the same way in the Columbia College paper? A Yes.

Q Do you think anybody reading this notice, "Please note our full name and exact address and recognize on the signs of our four stores Jos. Hilton & Co." would be informed thereby there was some other Hilton & Company that customers needed to be warned against? 30

Mr. McCarter. I don't think that is the issue. We put it there expressly for the purpose of bringing the men to these particular stores.

Q Is there anything about that advertisement in any way except by the use of the term Jos. Hilton & Co. that distinguishes or states the fact that you are not Hilton & Company? 40

Mr. McCarter. Don't answer the question. I object to it. The advertisement speaks for itself.

Max Younker, cross.

The Court. On that ground I will sustain the objection.

Q Do you find anything in that advertisement that in any way informs the public or any person who reads the advertisement that you are not in any way connected with the firm of Hilton & Company?
10

Mr. McCarter. The advertisement will speak for itself.

The Court. On that ground I will sustain the objection.

Mr. McCarter. I had before confined my question to the particular language I read. I was now directing it to the whole thing.

Q Have you had any personal experience of anybody coming in your store and having to be directed somewhere else in accordance with the letter of instructions to your managers?
20

A No, sir; I don't wait on customers.

Q (*By the Court.*) Any instances been reported to you?

A No, sir.

Q How did you come to write the letter then? A Why, we had these detectives come in that time, at least they said they come in and I told the men about it and I said, "Now, I am going to write you all a letter to that effect, and remember that."
30

Q (*By Mr. McCarter.*) You heard the testimony in the case, too? A Yes, I did.

Q Have you got that letter? When did the detectives come in? A That is in the former case.

Q This letter dated November 5, 1918? A Yes.

Q Do you want us to understand you wrote that letter on account of the detectives' visit which was in 1917? A The visit of the detectives was not in 1917, it was 1918, in the contempt case, a few weeks before that.

Q I was not interested in that case. You may be right. A I am right.
40

Q The letter was not written until after the Court had decided the matter? A Well, the Court decided about that time, I think.

Q You wrote this letter because of the Court's decision, didn't you? A I wrote this letter so our managers should

Max Younker, re-direct.

be on their guard against those fellows who come in and try to concoct something.

Q Did you just assume that was necessary? A No, I heard the testimony and I heard so much of that that I made up my mind that I will have something to show next time any of these detectives come here and produce testimony which I knew was not true.

10

Q You did it of your own motion? A I did, positively.

Q Nobody instructed you to do anything of the kind? A Absolutely not.

Q (*By the Court.*) Are your salesmen instructed to tell customers who indicate any confusion, if they have any confusion in their minds between The Hilton Company and your concern that your company is a new concern and The Hilton Company is the old concern? A Our salesmen are instructed to tell customers should they ask any questions about our having any connection with the other company that Mr. Joseph Hilton went out from the Hilton Company and established a new business; they have received those instructions, perhaps, fifty times, each manager, from me.

20

Q Were you shown the answer that has been filed by the defendant in this case, in this particular proceeding? A I don't think so.

Q Your statement as to Mr. Hilton signing his name Jos. Hilton is entirely confined to your knowledge of his checks?

A Yes.

30

Q And you do not undertake to extend it any further? A I wish in this connection to say that Mr. Hilton does not write any letters, I could not very well see any signature.

Q He can not write Joseph Hilton? A He doesn't write the letters and the correspondence now is all taken care of by myself entirely.

Q You mean he don't write generally; he does write his name? A Yes.

Q And he can write his name Joseph Hilton, can't he? A I suppose so.

40

Re-direct examination by Mr. McCarter.

Q I forgot to ask you two questions, Mr. Younker. Do you know what the signs, the wooden signs you put up in New York, cost you? A Approximately \$1,600. Pardon me, I

Max Younker, re-cross.

want to correct that, I mean taking them down and putting them up.

Q (*By the Court.*) Does that include the cost of the signs?

A That includes the cost of the signs, in round numbers about \$1,700.

10 Q Now, with the exception of the advertising in the tube cars and in the tube terminal in New York do you know of any advertising that The Hilton Company does or has done for years in the City of New York? A No, I don't know of any.

Q What would say, what constituency would you say that the tube advertising both in the terminals and in the cars themselves appeals to? A Entirely to New Jersey commuters.

Re-cross examination by Mr. Hardin.

20 Q That is just your judgment about it? A I live in Jersey myself and of course I base that upon my own experience.

Q You live in Jersey, therefore you read these signs in the tube trains in New York? A I naturally read them.

Q If you did not live in Jersey you wouldn't read them? A I wouldn't get a chance to travel on them.

Q You might go in tube train just the same in New York; there are large numbers of people who travel on tube trains that don't go to New Jersey? A I don't think so; I don't know why they should use that tube.

30 Q (*By the Court.*) For downtown New York, over the Pennsylvania Railroad? A The subways are so much handier, I am simply giving my opinion of it, of course.

Q That is all we intend to get, was your opinion; you do not pretend any knowledge on the subject? A I am not a transportation man.

Q If people do travel in New York that live in New York on those trains they are just as likely to read the advertisement? A If they travelled there they certainly would.

40 Q Referring again to these checks, are these checks of the business or checks of Mr. Hilton in some personal way? A Business.

Q And what observation do you have as general manager of the business of his signature to these checks? Do they go through your department in any way? A Yes, to a certain extent they do.

Max Younker, re-cross.

Q And you are accustomed to see his signature from day to day in the business on checks? A Yes, I do, sir.

Q Did it ever seem strange to you that he signed the checks Jos. Hilton and had them printed on the end J. Hilton?

A No more than he had them Hilton before and signed Jos. Hilton.

Q That does not strike you as indicating in any way the way Mr. Hilton customarily describes himself, that difference between the signature Jos. Hilton, and print across the end J. Hilton? A I don't think so.

Q The signature impresses you, the print does not? A The signature is what he always signs. You asked me whether he signed Jos. Hilton; as long as I know him he signed Jos. Hilton.

Q What name was the account in, do you know, in the bank, Jos. Hilton or J. Hilton or Joseph Hilton? A I think it was Jos. Hilton; I won't say positive.

Q You don't know, do you? A I really don't know.

Q One of these checks may be taken as a sample, I suppose. I show you check No. 510, which has J. Hilton printed on the end and is signed Jos. Hilton, signed by Mr. Hilton, is it not, you know his signature? A Yes, I know it.

Q It is made out to the order of Joseph Hilton? A Yes, that is right.

Q The bookkeeper that made it out didn't know about this habit of being known as Jos. Hilton?

Mr. McCarter. I object. How does he know.

The Court. I will overrule the question.

Q Do you know the handwriting in which the body of that check is made out? A One of the bookkeepers.

Q You don't know? A I can't positively say; it was someone in the office that makes them out; there is two of them make them out, different girl, bookkeepers.

Q The endorsement Joseph Hilton on the back is the same handwriting as in the check? A The same handwriting, that is right.

Check offered in evidence and marked Exhibit C-b-r.

A I happen to have another check here.

Q Where did you get it? A In my pocket, made out to me the same way, happened to think of that.

Joseph Hilton, direct.

Q I notice that this check that you have just referred to that you have brought from your pocket is on the Washington Trust Company of Newark, New Jersey? A Yes.

Q And signed Jos. Hilton? A Yes.

Q Up at the top of it, written across the top is Joseph Hilton written out in full? A Yes.

10 Q Do you know why that is? A I do not.

Q It does not strike you strange at all, that difference? A I really don't know.

Q Does it indicate to you that the account in the bank is carried in the name of Joseph Hilton? A It couldn't be very well because it is signed Jos.

Q I show you a check dated September 29, 1917; is that the same style of check as the one you produced a minute ago from your own pocket? A Yes.

20 Q And it has the same difference in the signature and title? A Yes.

Offered in evidence and marked Exhibit C-b-s.

JOSEPH HILTON, sworn.

Direct examination by Mr. McCarter.

Q Mr. Hilton, you are the defendant in this case? A Yes, sir.

Q How long have you been in the clothing business? A Twenty-eight years.

30 Q And without going too minutely into the history of your life, were you established in the clothing business before your brother Philip came with you? A Yes.

Q Are you married? A Yes.

Q Is your brother Philip married? A No.

Q How many children have you? A Nine.

Q You dissolved with your brother, I think it was in 1916? A Yes.

Q You think your name was pretty well known in the trade, your individual name? A Yes.

40 Q Did your brother take you in partnership with him or you take your brother in partnership with you? A I took him in.

Q Now, coming down to the last contempt proceedings, do you recall that Mr. Younker testified with reference to a proposition to become your partner? A Yes.

Joseph Hilton, direct.

Q Were you able to make a final agreement with him about that? A No, on account that Mr. Younker was not able to raise the money, sufficient money to become a partner.

Q You have long entertained the expectation of having your boys in partnership with you? A Yes.

Q How old are your boys? A One is twenty—one is twenty-two. 10

Q Their names are respectively? A Charles Hilton and Alexander Hilton.

Q Has either of them been in the war or the service? A The service, Charlie was in the service.

Q At the naval training school at Pelham? A Yes.

Q Is he still there? A Yes.

Q Hoping to get discharged shortly? A Yes.

Q Now, after you were unable to make arrangements with Mr. Younker did you arrange with anybody else for a partner? A Yes, a fellow named Breen. 20

Q Did you go so far as to have proposed articles of co-partnership drawn with Mr. Breen, your two sons and yourself? A Yes.

Q Under what firm name? A Jos. Hilton and Company.

Q Did you finally close with Mr. Breen? A No, I did not; certain things came up, I didn't want him.

Q You concluded you did not care to have him for partner? A Yes.

Q Have you, however, made a partnership agreement with any other person besides your son? A Yes. 30

Q Who? A Mr. Tannebaum.

Q Do you remember when you first took up with Mr. Tannebaum the subject of becoming associated with you and your son in business? A About December—I believe the end of November.

Q Mr. Tannebaum has a son? A Yes.

Q And is that son engaged to be married to your daughter? A Yes.

Q And with the result that an agreement was made and paper executed? A Yes. 40

Mr. McCarter. I would like to offer in evidence articles of agreement dated 26th of December, 1918, between Joseph Hilton, Max Tannebaum, Charles Hilton and Alexander Hilton.

Joseph Hilton, direct.

Mr. Hardin. I will take your word for that paper. I have more confidence in papers produced on your side than you have in papers produced by mine, but I will take your word for it.

Marked Exhibit D-i.

10 Q Is Mr. Tannebaum, who became your partner, in court?

A Yes.

Q I see by these articles on January 1, 1919, he was to put up \$5,000 and thereafter was to put up as much as \$10,000 more when needed. Has he put up the \$5,000 already? A Yes, sir.

Q At the time that you were in treaty with Mr. Tannebaum resulting in the execution of the document I have just referred to, had you the slightest knowledge, notice or suspicion of the fact that proceedings to hold you in contempt were in preparation or in progress? A No, sir.

Q Do you remember when you were first served with the papers in this contempt proceeding? A It was on Monday; I don't remember the date, but it was on Monday.

Q 30th day of December, as Mr. Ward reminds me? A Yes.

Q Had you evaded the service of any papers? A No.

Q Didn't know of any proposition? A No.

Q You are home every night, are you not? A Yes, at six o'clock.

30 Q Now, Mr. Hilton, I think it already appears that you are not a ready reader or writer of English. How do you customarily sign your name, and what has been your practice, and if you have varied from it tell us the facts about it? A The way I sign the checks right here.

Q How universally have you adhered to that, and have there been any occasions instead of signing your name Jos. you have signed it in full? A Yes.

40 Q When have they been? A Years ago, maybe about seven or eight years ago, I can't remember, but I used to sign my name, full name, Joseph Hilton, when I was with my brother in partnership, I think I used to sign the leases Joseph Hilton on account of Mr. Murray telling me.

Q On account of Mr. Murray telling you what? A Telling me to sign Joseph Hilton in full.

Joseph Hilton, cross.

Q So far as you recall do you now remember any other time in the last five or six years, unless it be the lease or leases that you signed when you were with your brother and acting under Mr. Murray's advice when you signed your name in any other way than Jos.? A Well, I used to sign J. Hilton and I think the bill of sale when I sold my business to my brother was signed J. Hilton, and the first agreement that Mr. Murray got of me that time in his office was J. Hilton, I believe, nothing else; but the only time Mr. Murray used to draw leases he made me sign full name Joseph Hilton; sometimes when he was involved in some kind of litigation, some kind of lawsuit or something else he used to make me sign Joseph Hilton.

10

Q Mr. Hilton, in the use of the signs, the advertising of the location of your stores, or the conduct of your business, have you intended to imitate or simulate the signs or the title or the name of The Hilton Company? A No, sir.

20

Q Or to get the benefit of their business? A No, sir.

Q Have you felt that there was business enough for you both? A For five like us.

Q Is your brother in the room now? A I didn't see him.

Cross examination by Mr. Hardin.

Q Did you ever do business in your life under your own name alone as Joseph Hilton? A No, I don't know, I don't remember, but I may have, no, I don't think so.

30

Q You never did? A I don't remember, maybe I did, but I don't remember.

Q You began business years ago with your brother under the title I. Hilton, didn't you? A Yes, I did business in my own name after I took the business of my brother, yes.

Q Did you not continue business under the title I. Hilton until your brother came with you? A Yes.

Q Then you don't mean for us to understand that you conducted business under any other name than I. Hilton, that is, this particular clothing business I mean? A The only time I conducted business for myself when I took it off my brother the name was I. Hilton and Sons.

40

Q When your brother came with you you called it The Hilton Company, afterwards, using it first in Philadelphia? A First in Philadelphia, yes.

Joseph Hilton, cross.

Q Have you a shop at 62 Springfield avenue, manufacturing shop? A Yes; not now.

Q Did you have for a time? A Yes.

Q You took that after you separated from your brother? A Yes.

10 Q And the sign you used up there in connection with that was J. Hilton, was it not? A Yes, sir.

Q I show the witness Exhibit C. 114? A Yes.

Offered in evidence.

The Court. It may retain the same marking.

Q Now, during the period, temporary period, as you call it, or as referred to in your answer, after the decision of this case, the original decision, you used the term, J. Hilton, Prop.? A Yes, sir.

20 Q Why didn't you say Jos. Hilton, Prop., at that time?

A The signmaker wasn't able enough to put Jos. Hilton onto the sign because it was too small space, and this was temporary proposition; that thing was only made temporary; the J. Hilton, Prop., was only made temporary for the time being until we get a new sign.

Q Do you remember being a witness in this case before the Vice-Chancellor in a former proceeding in this matter last September? A Well, I don't know, I recollect something, I don't know.

30 Q You were testifying here? A Of course, it may come to my recollection.

Q Do you remember the facts?

The Court. Do you recollect that you were on that stand testifying? A Yes, I recollect.

40 Q Do you recollect having given this testimony at that time, on September 26, page 32, "And do you remember whether you were told anything with reference to a change that the Court had expressed in its view from what the Vice-Chancellor had entertained?" "A Yes." "Q What is your recollection of the interpretation that was put upon that opinion by your lawyers as differing from the views of Vice-Chancellor Lane?" "A Well, I had a conference with Mr. Younker and myself and Mr. McCarter and Mr. Mindes in Mr. McCarter's office. Mr. McCarter told me the Court of Errors

Joseph Hilton, cross.

and Appeals sent down their decision, and you told me that I can not use the Hilton's alone, but we will wait until Vice-Chancellor Lane will give out his decree; and meantime you told me to find out what the signs would cost to change, and I went to work and found out what the signs were going to cost and I had an estimate between \$2,000 and \$2,500." "Q Changed how?" "A Changed J. Hilton & Co.; and that time I told you, Mr. McCarter, that Mr. Younker and my son was going in with me, and you told me at that time it does not make any difference who was going with you, you could go under the name J. Hilton & Co.; and when I come to you you told me, 'Now, we will wait until Vice-Chancellor Lane will give decree and we will see what the Vice-Chancellor will decide to do.'" Do you remember testifying to that effect?

10

A Yes, sir.

Q You also remember being asked by Mr. McCarter at that time, "Now, what time was mentioned as the time within which the brand new sign J. Hilton & Co. could be completed?" "A Well, they told me the best they could do they couldn't promise me, sixty or ninety days was the best he could do." Do you remember that? A Yes.

20

Q It was your purpose at that time to call this business J. Hilton & Co., was it? A At that time?

Q This partnership of Mr. Younker, your son's and yourself? A No, Jos. Hilton & Company, I made up my mind Jos. Hilton & Company.

30

Q When did you make up your mind to that? A At the same time.

Q How long ago? A At the same time when the proof was given here in court we made small sign Jos Hilton & Company.

Q What time now do you mean, you say at the same time? A The same time I was fined for contempt of Court.

Q That was after this September 26th? A No, that was the same time, wasn't it.

Q (*By the Court.*) I think I acted on that same day, didn't I? A Yes, sir.

40

Q Evidently while you were testifying it was your intention to use J. Hilton & Co.? A No, Jos. Hilton & Co.

Joseph Hilton, cross.

Q (*By the Court.*) Your first idea was to use J. Hilton & Co., wasn't it? A Yes, first idea, but I changed my mind and used Jos. Hilton & Co.

Mr. Hardin. I wasn't here and don't know what happened.

10 *The Court.* They had a sign before me at that hearing. They had Jos. Hilton & Co. on a little card, because they endeavored to get my ruling as to whether that would be approved or not.

Q Was Mr. Younker here at that time? A I don't remember.

Q Did you talk to him about this sign, Jos. Hilton & Co.? A I don't remember that day I talked to him.

20 Q You think you signed the bill of sale to your brother at the time you dissolved partnership in 1916, in the name J. Hilton, do you? A I don't remember; I guess I did.

Q That is your recollection? A That is my recollection.

Q So you would not be surprised to find that you signed it Joseph Hilton, would you? A Maybe I did.

Q Do you recognize your signature there? A Yes. The first paper I signed in Mr. Murray's office was J. Hilton.

Q That paper says, has it Joseph Hilton, Robert H. McCarter; you signed that in the presence of Mr. McCarter? A I suppose I did.

30 Bill of sale dated June 24, 1916, from Joseph Hilton to Philip Hilton was signed Joseph Hilton, all written out, and in the presence of Mr. McCarter as a witness.

Q I show you another paper dated June 24, 1916, being assignment of leases, signed the same date, also in the presence of Mr. McCarter; is that your signature, you recognize that there? A Yes.

Q And that is written out in full Joseph Hilton? A Yes.

40 Q Another paper of the same date, June 24, also signed in the presence of Mr. McCarter, also signed Joseph Hilton in full; do you recognize that? A Yes, sir.

Q Still another paper, the same date; I have four other papers here signed on the same day, all signed by Mr. Joseph Hilton in the presence of Mr. McCarter and all signed, name written out in full, Joseph Hilton, in each case, and I understand it

Joseph Hilton, cross.

is consented that that fact may appear upon the record without further reference to them. I have here a dozen or more leases—

The Court. He admits he signed the leases Joseph Hilton.

Mr. Hardin. I won't bother to go through them then.

Q Do you recall, Mr. Hilton, having testified in the former trial as to the certain contract you signed with the Tunnel Advertising Company shortly before the dissolution with your brother? A I don't remember. What was it?

Q I ask you whether you remember?

The Court. He says he does not.

Q I show you three papers marked Exhibit C. 86, C. 88 and C. 90 on the other trial, being the Tunnel Advertising contract between the Hudson and Manhattan Railroad Company and Hilton Company in evidence at the other trial. I call your attention to those; you find your signature on those papers, those three? A Yes.

Q All three written out in full, Joseph Hilton? A Yes.

Mr. Hardin. 91 is according to the copy J. Hilton, but we have the original. 93, another one of the same set, is signed by both Philip Hilton and Joseph Hilton in full.

The Court. Joseph Hilton in full?

Mr. Hardin. Yes, one of them is signed J. Hilton, apparently; I haven't the original of it; I take it for granted that is the case.

The Court. How much more of that, Mr. Hardin, are you going to show?

Mr. Hardin. I don't know as it is necessary to show any more.

Q You had read to you the answer that was filed in this case the other day by Mr. McCarter when we began this proceeding? A I don't remember.

Q Don't you remember swearing to it? A I suppose I did, yes.

Mr. Hardin. I don't know whether it is sworn to or not.

10

20

30

40

Joseph Hilton, cross.

Mr. McCarter. Yes, it was sworn to; it was read to him.

Q You can't read, as I understand? A No.

Q It was read to you? A Yes.

Q Do you recall the language in it? A Yes.

10 Q Do you remember this statement: "This defendant further says that he has always signed his name Jos. Hilton, the abbreviation of his name Joseph, and this was simply a continuance of the use of his name as known in the trade"? A Since I adopted my new business.

Q Well, you meant to say that that was since you adopted your new business— A 1916.

Q 1916? A Yes.

Q Since you separated from your brother? A Yes.

20 Q And you had no idea of going any further back with your statement than the time when you separated from your brother? A No.

Q And began the new business? A Yes.

Q And when you referred to your name being known in the trade as Jos. Hilton you were referring to the time from the fall of 1916 forward? A No, my name was Joe Hilton; I had been called Joe all over amongst the trade; every time I used to sign a check I didn't sign Joseph Hilton, I used to sign The Hilton Company; the only time Mr. Murray used to make me
30 sign the papers in the leases and other things Joseph Hilton.

Q Then you were not known in the trade as Jos. Hilton; you were known as Joe Hilton? A Joe Hilton.

Q The statement in the answer to the contrary is a mistake? A No, it is not mistake; I don't know whether it was mistake or not.

The Court. I will agree with the witness; of course, it is a mistake.

40 Q Mr. Hilton, Mr. Tannebaum expects to be your son-in-law, doesn't he? A Yes.

Q So this new firm you have gotten together would be yourself, your two sons and your son-in-law? A My intended son-in-law is in service; he is not son-in-law of mine yet; his father is the partner.

Joseph Hilton, re-direct—re-cross.

Q Where does he live? A New York.

Q Does Mr. Tannebaum intend to take an active part in the business? A No.

Mr. McCarter. The articles say he does not.

Re-direct examination by Mr. McCarter.

10

Q Do you recall that fatal hot day in June, 1916, when the separation papers were signed in my office downstairs? A Yes.

Q Do you recall the fact that Mr. Philip Hilton did not appear in our office, but that Mr. Murray appeared with the papers already signed by Mr. Philip Hilton and was to get your signature? A Yes.

Q Did Mr. Murray on that occasion give any direction as to how you should sign your name? A In full. Pardon me; I don't believe you were in the office, you were away, you were not there, were you?

20

Mr. McCarter. No; they were signed in my presence. I wish to call attention to the fact that each of these documents to which Mr. Hardin has referred, while containing the signature of Joseph Hilton written out and Philip Hilton written out, also contain the witness clause, "Signed, sealed and delivered in the presence of," as to Jos. Hilton, Robert H. McCarter, in each case as to Jos. Hilton.

The Court. In whose handwriting is the Jos. written?

30

Mr. McCarter. My handwriting "As to Jos. Hilton, Robert H. McCarter; as to Philip Hilton, Frank J. Murray.

Further cross examination by Mr. Hardin.

Q You recall when this paper was served upon you, notice of this proceeding on December 30? A I don't remember.

Q You don't remember when it was served? A Which paper do you mean?

Q I mean notice of this proceeding, the Court ordered to show cause? A On Monday, on December 30.

40

Q And where was it served? A South Orange.

Q And do you recall having denied your identity when it was served? A No, I don't remember.

Max Tannebaum, Louis A. Allen, direct.

Q And throwing the paper in the gutter? A I don't remember this.

MAX TANNEBAUM, sworn.

Direct examination by Mr. McCarter.

10 Q You live in New York? A Yes.

Q And you have been fortunate enough to have a little property that you are ready to invest from time to time? A Well, gradually, yes.

Q How long have you known Joseph Hilton? A Mr. Joseph Hilton I know about between ten and twelve years.

Q Did you learn that he was looking around for a man to supply some capital to his partnership? A Yes, I heard about it, and he was negotiating with the other gentleman, and so on, and he couldn't get through with them, and finally he proposed
20 to me; I said, "Yes, I have got some money which I could invest and would be glad to invest it with you."

Q About how long a time were you in negotiation on that matter, or, rather, how long a time elapsed, to the best of your recollection, between the first suggestion you made with reference to the matter, or he made to you, and the time you came to my office and executed the written articles that have been offered in evidence? A Well, about five or six weeks, about that.

Q Have you already contributed the \$5,000 that the articles
30 require? A I did, yes.

Q This young gentleman that sits here in uniform, I don't mean as a private sailor, but as an officer, is he your son? A He is my son.

Q He is engaged to be married, I believe, to Mr. Hilton's daughter? A Yes.

Q But your friendship and acquaintance with Mr. Hilton antedates any such relation as that; they haven't been engaged ten years, have they? A No.

40

NO CROSS EXAMINATION.

LOUIS A. ALLEN, sworn.

Direct examination by Mr. McCarter.

Q What store are you the manager of? A 361 Broadway.

Louis A. Allen, direct.

Q How long have you been manager? A 11th of August, 1917.

Q Did you get a letter from Joseph Hilton & Co., offered in evidence or read in evidence by Mr. Younker when he was on the stand with reference to treatment of customers? A Yes.

Mr. McCarter. Let me have that check that you produced yesterday. 10

Q (*By the Court.*) Have you ever had occasion to follow up the instructions given in that letter? A Not since receiving it.

Q (*By the Court.*) Prior to having received it? A On one occasion.

Q (*By the Court.*) When? A That is the occasion of this check that Mr. McCarter is speaking of.

Q (*By the Court.*) That is the only occasion that you ever noticed any confusion was ever brought to your mind? A Yes. 20

Q I am directing your attention to a check dated July 13, 1918, which has been produced and offered in evidence, Exhibit C. b. d. Please look at it, and by doing so refresh your recollection, if you need any, and tell us what you recall with reference to that incident? A I don't remember the exact amount of the check nor just exactly what it was for, but the incident I remember distinctly on account of the check being made out The Hilton Company; every check that comes into the store—

Q Don't go into every check that comes into the store? A Before it goes into the office it has to be O. K.'d by me, and this check was handed to me by the salesman, and I saw that it was made out to The Hilton Company. I turned to the customer, it was a lady, and I believe there was a young man with her, and I told her that she had made a mistake in making out that check, this was not the Hilton Company, that it was Joseph Hilton & Company, that is, that he was the proprietor, that the store at that time was under the name of Hilton's, that he was a brother of the man that owned The Hilton Company store. As a matter of fact, I explained the situation thoroughly to her and she explained to me that that check was given to her by her husband to go to The Hilton Company for a suit of clothes and that they did go to The Hilton Company, Thirty-seventh street and Broadway, but did not find anything to suit them; they were on their way I believe she said to Macy's or some other store, and they passed our 30 40

Fred M. Moran, direct.

store and being attracted by the window came in, and ended up by buying a suit of clothes, and I told her, I said "We can hardly take that check, but if she would allow me to endorse it as Hilton Company, if she would sanction it I would take it and endorse it as The Hilton Company and put our endorsement underneath it"; she agreed to everything and I instructed my cashier to do so.

10 Q Whose endorsement is that, cashier? A That is cashier, yes.

Q After that check was endorsed in that manner under those circumstances, what became of it? A Put in the bank in my deposit the following morning as usual.

Q Does Mr. Hilton or Mr. Younker know anything about that transaction? A Knows nothing about it.

Q All he knows is the result of your bank account? A That is all.

20 Q The check or money you get you use on your own responsibility deposit it and are personally responsible for it? A Yes.

Q That is that incident, you recall that distinctly? A Yes.

NO CROSS EXAMINATION.

FRED M. MORAN, sworn.

Direct examination by Mr. McCarter.

30 Q Are you a sign painter? A Yes, sir.

Q And did you have anything to do with these new signs on the several Hilton stores in New York? A Yes.

Q What did you have to do with them? A Getting the instructions from Mr. Younker regarding the change of name, the color scheme, when they were to be taken down, when they were to be put up.

Q I am speaking now of the signs that are at present up? A Yes.

40 Q What were those instructions? A They were to change the name to Joseph Hilton & Company and make the color scheme as far away as possible from the signs of The Hilton Company.

Q Were you familiar with the color scheme of the signs of The Hilton Company? A Yes, I went and looked at them; I went to the Fourteenth street store particularly.

John H. Quigg, direct.

Q That was what? A That was raised gold letter, flat band edge, black smalt ground.

Q What did you adopt? A We adopted a red background and gold letter with heavy black outline and a dark red border and gold moulding.

Q Are they similar at all? A Different.

Q Pardon me? A They are about as different as you can get them without going into a plain black and white contrast.

10

NO CROSS EXAMINATION.

JOHN H. QUIGG, sworn.

Direct examination by Mr. McCarter.

Q Did you ever buy any clothes of Joseph Hilton & Co.? A Yes, I did.

Q Where? A 243 Broadway.

20

Q When? A Just this time about a year ago.

Q Have you more recently bought a suit? A Yes, I have.

Q Where? A 243 Broadway, the same place.

Q How did you happen to go in there? A This last time or the first time?

Q Take either time. A Passing Broadway I dropped in and bought an overcoat; I was that well pleased with it I came back last winter to buy a suit.

Q The same place? A Yes.

Q Did you observe any change about the place between a year ago and the present time? A No.

30

Q When you bought the second suit did any conversation take place? A Yes, it did.

Q What was it? A The gentleman—

Mr. Hardin. I would like to know what. This is rather a different proposition.

The Court. Let us hear what the conversation is first, see whether it is relevant or not.

A After purchasing a suit I told a friend of mine, a gentleman by the name of Mr. McMahan, 27 North Ridgewood avenue.

40

Q Is this something you told in the office or outside? A No, this is a friend of mine, I was speaking to a salesman; I told him about a friend of mine having become dissatisfied with

Samuel Goldstein, direct.

a suit of clothes he had bought in Fourteenth street store, and I asked this party if the same concern was up there, and he said, "no." I said, "It is funny," I said, "I thought the two of them were alike."

NO CROSS EXAMINATION.

10

SAMUEL GOLDSTEIN, sworn.

Direct examination by Mr. McCarter.

Q What is your business? A Wholesale clothier.

Q Where? A 9 Great Jones street, New York City.

Q How long have you been in the wholesale clothing business in New York? About fifteen years.

Q Are you pretty familiar with the clothing trade in New York? A I am, sir.

20

Q Do you think there is anything in the idea that there are districts where ready-to-wear clothing stores congregate? A I do.

Q Can you name such districts? A Well, beginning with the southern part of Manhattan Island—

Q (*By the Court.*) Is Nassau street in the neighborhood of Fulton one of those districts? A There is a section called the City Hall Park section that constitute the lower part of Broadway, say from Cortlandt up to about Chambers street on the Broadway side; then on Nassau the same distance up Nassau, doesn't run up as far as Chambers street, but runs up as far as Park Row.

30

Q (*By the Court.*) Is Fulton and Nassau in that district? A Yes, quite an essential figure there.

40

Q Now, let us go up in the neighborhood of Thirty-sixth and Thirty-seventh street and Broadway? A Thirty-sixth and Thirty-seventh street and Broadway is quite, the Herald Square section, that is quite a popular clothing section; in fact, that is quite a busy market for clothiers there; there are any number of them up along Broadway east and west on Thirty-fourth street, using Broadway as a line, Seventh avenue, around that section, Thirty-fourth street.

The Court. That is enough. About Fifth avenue and Thirty-third street.

Max Younker, direct.

A The clothing center begins at Twenty-ninth street there; there is a store on Twenty-ninth or Thirtieth; it is the southwest corner of Fifth avenue, either Twenty-ninth or Thirtieth street, owned by a man, the style of the firm is Phillips and the proprietor of that place is Philip Liberman.

Q That is a district, too, is it? A Yes.

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NO CROSS EXAMINATION.

Mr. McCarter. That is our case.

MAX YOUNKER, recalled.

Direct examination by Mr. Hardin.

Q Did you ever hear of the Philip Jones Shirt Company?

A Yes.

Q Your concern have any business relations with them of any kind? A We have some relations, yes.

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Q Did you ever hear of the Westchester Shirt Company?

A No, sir.

Q Did you ever hear of Meyer-Both & Company? A Yes.

Q You have relations with them? A Yes.

Q Did you ever hear of the Federal Advertising Company?

A Yes.

Q You have relations with them, or have had? A Long time ago, yes.

Q (*By Mr. McCarter.*) How long? A Over a year at least, over a year ago. 30

Q Do you know the claim of the Federal Advertising Company for an old balance? A I don't know.

Q Haven't had any letters lately? A We have not done business with them for over a year.

Q You haven't had any letters from them lately? A I haven't had any letters.

Mr. Hardin. That is Meyer-Both Company, if that is the one you mean. 40

The Court. That is the one I mean. Do you know about that transaction referred to in that telegram?

A I really do not. I have read this telegram before, but I don't understand it.

Max Younker, direct.

Q (*By the Court.*) Did you have a transaction with the Both concern in which you cancelled an order or refused to accept, or what not? A I don't know; I wouldn't know, anyway, about it; the advertising man would take care of that; I wouldn't know anything about it anyway.

10 Q You do know you have had business relations with them?
A Oh, yes, certainly.

Q (*By the Court.*) Do you know how they came to mix you up with The Hilton Company? A I can't really tell; I don't know.

TESTIMONY CLOSED.

Adjourned until tomorrow for argument.

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Discussion.

January 11, 1919.

IN CHANCERY OF NEW JERSEY.

Between

PHILIP HILTON,

Complainant,

and

JOSEPH HILTON,

Defendant.

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Transcript of shorthand notes of testimony taken in the above entitled cause on January 11, 1919, at the Chancery Chambers, Newark, New Jersey, before the Honorable Merritt Lane, Vice-Chancellor, pursuant to adjournment. The appearances the same as on previous hearing.

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Mr. Ward. We reserved the right to offer photographs which were in the course of being taken of the present condition of the show cases in New York City and also the Brooklyn store.

Mr. McCarter. I really think I am getting softening of the brain if there was any reservation of the right to put in photographs of the complainant, the petitioner here, in my presence—then I am getting softening of the brain. I have no recollection of any such thing. I have no objection, but as I stated I don't remember any such thing.

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The Court. My recollection is that the photographs of the show cases, at least I have no recollection of the Brooklyn store—the photographs of the show cases were mentioned, but I do not recollect whether there was an express reservation. I am going to let them put them in, if you have no objection.

Mr. Hardin. I don't like to have Mr. McCarter take the attitude he does because there was an express suggestion, and these things were taken because of his challenge to Mr. Murray, and you said you would strike out the evidence at that time if we didn't follow it up.

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Mr. McCarter. I suppose they omitted to do it.

Mr. Hardin. We didn't.

Discussion.

The Court. Now, gentlemen—the photographs may now be put in.

Mr. McCarter. I don't think they included the Brooklyn store. Nothing was said about the Brooklyn store photograph. Mr. Murray—

10 *The Court.* Any objection to these photographs of the show case?

20 *Mr. McCarter.* If I am correct in my recollection of the situation it was this: Mr. Murray, when he was on the stand on his direct examination, was interrogated with reference to the present situation at the tubes, or, rather, as to a situation as of the time he was speaking, and I said I thought trying to remember what a thing looked to be from a man who was busy with other affairs was improper evidence, and your Honor said you would allow it. I don't think the subject of photographs was mentioned at all. It seems these photographs were taken yesterday. I don't understand that the condition yesterday, by yesterday I mean as of today, since these proceedings were commenced, is of particular importance at all. We have objected and continue to object to holding the defendant guilty of a contempt of an order dated in July by showing what the complainants are doing in their tube show case yesterday. While not I have no objection to the introduction, although the case has been closed, of the photographs—

Mr. Hardin. The case has not been closed.

30 *The Court.* Just a minute. They may then be marked. You make no point of the certificate of the photographer as to when they were taken and as to what they show. They may be marked and take an exhibit number as of this date.

Marked Exhibits C. 1 to C. 14 inclusive.

The Court. Anything further that you want straightened out with reference to the tube photographs?

40 *Mr. Hardin.* I have no specific recollection as to whether the reservation had to do with the Brooklyn store. If Mr. McCarter makes any point that that was overlooked, I don't care enough to force it.

Mr. Ward. Your Honor directed us to bring before the close of the case every one of the times covered by the advertisements offered by the complainant. I put in evidence advertisements

Discussion.

of the Newark and Brooklyn stores covering a period from October 1st to December 23rd, 1918. I would like to amend that offer and offer the advertisements between August 23rd, 1918, and December 23rd, 1918. In number they are not many more advertisements. The advertisements are contained in the scrap book.

The Court. Commencing August 23rd?

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Mr. Ward. The date of the first petition for contempt.

Mr. McCarter. We object to it. The new ad has no more significance than the old.

The Court. I will permit the offer and they may be marked.

Marked CBQ and CBR.

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Discussion

of the present and I should be very pleased to see the
for it is intended to be 1830. I would have been glad
other and other the same is meant between 1825, 1828,
and 1830. The year 1830 is the year in which the
of the present. The arrangements are contained in the

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The first Commission Agent Report
The second Commission Agent Report
The third Commission Agent Report
The fourth Commission Agent Report
The fifth Commission Agent Report
The sixth Commission Agent Report
The seventh Commission Agent Report
The eighth Commission Agent Report
The ninth Commission Agent Report
The tenth Commission Agent Report

James O. and O.B.

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*Conclusions of Vice-Chancellor.***Conclusions of Vice-Chancellor.**

January 11, 1919.

Messrs. Pitney, Hardin & Skinner (Mr. Hardin, Mr. Skinner and Mr. Ward) for complainant.

Mr. Selick J. Mindes and Mr. Robert H. McCarter for defendant. 10

LANE, V. C.

The application is for an order adjudging the respondent in contempt for acts alleged to constitute a violation of an injunction of this Court and to punish him therefore.

On July 18, 1918, respondent was enjoined by a decree of this Court entered on remittitur from the Court of Errors and Appeals "from using the name 'Hilton's' or 'Hilton,' alone or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him are manufactured or sold by complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant, from using any emblem or device resembling the trade emblem of complainant in any way in his business and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by defendant were manufactured or sold by complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant." 20 30

The question is one solely of fact. The legal and equitable rights of the parties have been settled by the final decree.

An extended argument was made in an attempt to show that the opinion of the Court of Errors and Appeals indicated that the law was otherwise than as considered by this Court on the determination of the main cause. An examination of the opinion of this Court in the main cause and of the opinion of the Court of Errors and Appeals will indicate that the view of this Court as to the law was not otherwise than as indicated by the Court of Errors and Appeals. This Court never assumed that it might with propriety enjoin the use by a man of his name except where he was using it in his business in such a manner as to deceive the public, palm off his goods as the goods of another or lead the public to believe that his 40

Conclusions of Vice-Chancellor.

business was that of or a part of that of another. As I indicated in *Hilton v. Hilton*, in previous contempt proceedings, 105 Atl. 65, I conceive that the difference between the Court of Errors and Appeals and this Court was one of fact. I assumed that the word "Hilton" or "Hilton's" could not be used in a competitive business, practically, without deceiving the public. It was for this reason, that I advised the final decree so wide in its scope. With this view the Court of Errors and Appeals differed. As I conceive it, the only question before me now is whether or not defendant is so using the word "Hilton" alone or in conjunction with other words and is so conducting his business as either to lead or induce the public to believe that the goods manufactured or sold by him are manufactured or sold by complainant, or that the business conducted by defendant is the same as or a part of the business conducted by complainant, and that this is a question of fact.

The final decree has the effect of an adjudication that the manner in which the business was being conducted at the time it was made was within the ban of the injunction. After the final decree was entered and served, defendant changed his signs by adding the words: "J. Hilton, Prop." Upon application to punish him for contempt I found that the additional words, "J. Hilton, Prop.," did not save the situation for the reasons which I then indicated, 105 Atl. 65. After the adjudication of contempt, defendant again changed his signs and now uses the term "Jos. Hilton & Co." to designate his business. He has altered his signs so that they are as dissimilar as they can be from the signs of complainant, and yet have thereon the words I have indicated and not have thereon words drawing attention to the fact that they are not the stores of the established Hilton Company. The store dressings, etc., are precisely the same as they were at the time the main cause was determined, so that to outward appearances the stores of The Hilton Company and Joseph Hilton look the same, as in the nature of things they must. The labels of defendants have been changed so that they are dissimilar from labels of complainant, and the remarks which I have made with respect to the signs apply to them. There is in this case the same kind of evidence as there was in the main case as to confusion. Customers have come into The Hilton Company stores believing they were in the stores of Joseph Hilton. Mail has been re-

Conclusions of Vice-Chancellor.

ceived by The Hilton Company intended for Joseph Hilton. Mistakes have been made by individuals desiring to communicate with Joseph Hilton by telephone. A witness produced by defendant himself testifies that although he was familiar with the stores of complainant and defendant he did not know, until advised by a salesman in the employ of defendant, that all of the stores were not operated by one concern. Defendant insists that he is not responsible for mistakes due to carelessness and relies upon *Rosenthal v. Blatt*, 80 N. J. E. 90. What Vice-Chancellor Leaming there said was that "concrete instances of confusion which can only be appropriately attributed to extreme carelessness or inattention on the part of customers are clearly inadequate to establish a similtude which does not in fact exist." He then said that he was unable to believe that the manner in which the name "Page of London" was being used by defendant in that case was operative to deceive or mislead any reasonable persons. The rule, of course, is that the similtude must be sufficient to confuse an ordinarily prudent man, but the test as to the care or prudence is not the precautions which a reasonably prudent man would take when investing money or what not, but the precautions, which he would take ordinarily in determining, in buying a suit of clothes, that he was in the store he thought he was in. An ordinary individual, I think, in making up his mind as to whether he is in a store operated by a certain concern, the name of which he knows, gives but a cursory glance to the sign. If the most prominent word in the name of the operator of the store he desires to enter appears prominently over the store of a competitive business he is quite likely to assume that the stores are operated by the same concern. The name "Hilton" is the same prominent feature of complainant's designation as it is of defendant's. There is no distinction, I think, in the public mind between the word "company" written out and "Co." Defendant in his designation has retained the most prominent name in complainant's designation; has substituted for the word "the" the diminutive "Jos.", has substituted for "company" written out, the designation "Co." and has put between "Hilton" and "Co." the symbol "&". Defendant is not attempting to use his own name "Joseph Hilton" alone. What he is doing is using a trade designation which contains a part of his own name in conjunction with another word also a part of com-

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Conclusions of Vice-Chancellor.

plainant's designation. Complainant himself is not using the designation "The Hilton Company" solely. He is also using and has always used to designate his business the terms "Hilton" and "Hilton's." There is more involved in the case than the mere use of one's name in one's business.

10 The case is somewhat analogous to those dealing with the right of a corporation to assume a corporate name. Under the Corporation Act, sec. 8, 2 C. S. of N. J., p. 1603, a corporation is forbidden to assume a name in use by another existing corporation or so nearly similar thereto as to lead to uncertainty and confusion. Under this statute American Glucose Sugar Refining Company has been held to be too nearly similar to Glucose Sugar Refining Company, 58 Atl. 861; L. Martin & Wilkes Company too nearly similar to The L. Martin Company, 75 N. J. E. 39, affirmed on this branch of the case, 75 N. J. E. 257; The Edison Automobile Company of Washington
20 too nearly similar to The Edison Storage Battery Company, 67 N. J. E. 44; Eureka Rubber Manufacturing Company too nearly similar to Eureka Fire Hose Company, 69 N. J. E. 159, affirmed 71 N. J. E. 300.

Defendant in his advertisements has indicated that his only stores are at the addresses mentioned in the advertisements, as also has complainant, but I do not think this saves the situation. In the first place, I do not believe it prevents confusion. I think little attention is paid by readers of advertisements to statements of this kind and that notwithstanding their presence,
30 customers are likely to go to the stores of defendant believing them to be those of complainant and *vice versa*, and moreover as I said in the previous contempt proceeding, 105 Atl. 65, I think complainant is entitled to have the public know not only that Jos. Hilton & Co. is not The Hilton Company, but also that it is not the business known as The Hilton Company prior to defendant's entering the field. What I said on page 66, 105 Atl., must be taken in connection with what I now say. I will not repeat. See *International Silver Company v. Roger*, 72 N. J. E. 933. It was insisted by counsel with defendant
40 that in the determination of this matter the rule of the criminal law must be applied and that defendant must be proven guilty beyond a reasonable doubt. This is a purely civil contempt. I acquit defendant of any actual intent to contemn the authority of the Court. The injunctive decree being in the form it is

Conclusions of Vice-Chancellor.

defendant was obliged to experiment until he should find a way of using the name, if he desired to use it, which would not be within its ban. Any imprisonment which will be ordered will be remedial in purpose, coercive in character, *Staley v. South Jersey, etc. Co.*, 83 N. J. E. 300. The proceedings are not instituted to punish for his past offenses but to compel a discontinuance of an existing practice and if defendant goes to jail he will be imprisoned only so long as he continues the obnoxious use of the name. It is analogous to an execution at law. I think, therefore, as I thought at the time of the prior contempt, that no greater proof is necessary than was necessary to secure the injunction in the first instance, and that the language of Vice-Chancellor Howell in the case of *The Rubber and Celluloid Harness Trimming Company v. The Rubber-Bound Brush Company*, 81 N. J. E. 419, affirmed 81 N. J. E. 519, to the effect that proof of actual confusion is not necessary, is applicable. But if I were bound by the rule as to reasonable doubt I have no difficulty in concluding that I have no reasonable doubt but that the manner in which he conducts his business is such as that the public is lead to believe that the goods manufactured or sold by him are manufactured or sold by complainant and that the business conducted by him is the same or part of the business conducted by complainant. Defendant, of course, labors under the handicap that originally I had the notion that the name could not be used by defendant in any such manner as he would desire to use it without creating confusion in a competitive business, but I have tried throughout this case to look upon it with an open mind. I have also observed the stores in New York myself, particularly those on 36th street and 37th street and Broadway and perhaps cannot but help being influenced by the impression made upon me by actual observation.

I will advise an order adjudging respondent in contempt. Counsel may prepare a form of order. I think perhaps the order should provide for a certain length of time within which the defendant may be permitted to discontinue the existing practise and if he does not discontinue within the time stated, then that a warrant issue upon application, upon notice, directing his commitment to the Common Jail of the County of Essex until he shall have discontinued the practise. Care should be taken in framing the order that it be conclusive so that an

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Order Adjudging Defendant Guilty of Contempt.

appeal may be taken as counsel stated in open Court at the conclusion of the hearing and the delivery of the oral conclusions that an appeal was intended. Let the order be settled on one day's notice.

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Order Adjudging Defendant Guilty of Contempt.

Filed January 28, 1919.

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Final decree in the above entitled cause having been made therein, bearing date July 18, 1918, upon remittitur from the Court of Errors and Appeals, in and by which decree it was ordered, adjudged and decreed that the defendant, Joseph Hilton, his agents, servants and employees be enjoined and restrained from using the name "Hilton's" or "Hilton," alone or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him are manufactured or sold by complainant, and that the business conducted by the defendant is the same as or a part of the business conducted by complainant, from using any emblem or device resembling the trade emblem of complainant in any way in his business, and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by defendant are manufactured or sold by complainant, and that the business conducted by defendant is the same as or a part of the business conducted by complainant; and the complainant having filed his petition in this cause on December 23, 1918, alleging a wilful violation by the said defendant, his agents, servants and employees, of the aforesaid decree on remittitur, and praying that the said defendant, Joseph Hilton, might be adjudged guilty of contempt in violating the said decree and wilfully ignoring, neglecting and refusing to comply with the same, and that the said petitioner might have such further and other relief as might be equitable and just; and the Court having made an order to show cause, bearing date December 23, 1918, ordering the said defendant, Joseph Hilton, to show cause before this Court on January 9, 1919, why he should not be adjudged guilty of contempt in violating the final decree herein made and entered upon remittitur, and in wilfully ignoring, neglecting and refusing to comply with

Order Adjudging Defendant Guilty of Contempt.

the same; and the said defendant having appeared in person and by counsel at the time and place named in said order to show cause, and the matter coming on to be heard in the presence of John R. Hardin, of counsel with the petitioner, and Robert H. McCarter, of counsel with the defendant, and due proof being made of the service of the said petition and order to show cause, in the manner required by the said order to show cause, and the further order of the Chancellor made herein on the 28th day of December, 1918; and the defendant having filed his answer herein and the proofs of the parties complainant-petitioner and defendant having been taken in open Court, and the Court having considered the said petition and answer and proofs, and the arguments of counsel having been heard, and the Court finding that the said defendant, Joseph Hilton, has individually, after October 30, 1918, and before the date of filing said petition, and thereafter until December 26, 1918, and, since the latter date, in partnership with others, used and still continues to use as the name and style under which he conducted business in the City of New York the words "Jos. Hilton & Co.," and that the use of said words as the name and style under which he conducted business in the City of New York, led and induced, and leads and induces the public to believe that the goods manufactured and sold by such business were and are manufactured and sold by the complainant, and that the said business was and is the same as or a part of the business conducted by the complainant, and that the said defendant thereby was and is guilty of a violation of the said final decree entered upon remittitur as aforesaid;

It is, on this 28th day of January, 1919, on motion of Pitney, Hardin & Skinner, of counsel with the said complainant and petitioner, ORDERED AND ADJUDGED that the said defendant, Joseph Hilton, is and he is hereby declared to be guilty of contempt of this Court; and it is FURTHER ORDERED that the said defendant do pay the costs of these proceedings to be taxed, inclusive of a counsel fee of three hundred dollars hereby allowed to counsel for complainant; and that, if the said defendant, Joseph Hilton, shall not cease to use the words "Jos. Hilton & Co." as the name and style under which he conducts business in the City of New York, either individually or in partnership with others, within thirty days from the service of this order, he, the said defendant, be committed to the common jail of the County of

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Notice of Appeal.

Essex, there to be charged upon his said contempt until he shall have ceased to use the said words as the name and style under which he conducts business in the City of New York, as aforesaid, unless the Chancellor shall see fit sooner to discharge him; and that, in default thereof, complainant have leave to apply upon two days' notice to this Court in a summary manner for the issuance of a warrant, to be directed to the proper officer, commanding him to take the body of the said Joseph Hilton and keep him in his custody in said jail until he shall have ceased to use the said words as the name and style under which he conducts business in the City of New York, as aforesaid, or this Court shall otherwise direct.

Application for further orders or relief as may be proper may be made on two days' notice.

E. R. WALKER,

C.

Respectfully advised,

MERRITT LANE,
V. C.

Notice of Appeal.

Filed January 30, 1919.

The defendant hereby appeals from an order made in this cause on the 28th day of January, nineteen hundred and nineteen, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Defendant.

Dated, January 29, 1919.

I conceive there is good cause for appeal in the above stated cause.

CONOVER ENGLISH,
Of Counsel with Defendant.

Order to Stay Proceedings.

Service of the within notice of appeal is acknowledged January 29, 1919.

PITNEY, HARDIN & SKINNER,
Solicitors of Complainant.

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Order to Stay Proceedings.

Filed January 30, 1919.

This matter being opened to the Court by Conover English, of counsel with the defendant, in the presence of John R. Hardin, Esquire, of counsel with the complainant, and it appearing that the defendant has filed an appeal from the order made in this cause on the 28th day of January, nineteen hundred and nineteen,

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It is, on this 29th day of January, nineteen hundred and nineteen, on motion of Messrs. McCarter & English, solicitors of the defendant, ORDERED, that pending said appeal, and until the further order of the Court, all further proceedings in this Court in the above cause, and under or by virtue of the said order of January 28th, 1919, be stayed pending the said appeal.

And it is further ORDERED, that the complainant have leave to apply either to this Court, or to the Court of Errors and Appeals, to dismiss the said stay, if the defendant shall unduly delay the prosecution of his appeal.

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E. R. WALKER,

C.

Respectfully advised,

MERRITT LANE,
V. C.

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Petition of Appeal.

Petition of Appeal.

Filed February 10, 1919.

New Jersey Court of Errors and Appeals

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Between

PHILIP HILTON,

Complainant-Respondent,

and

JOSEPH HILTON,

Defendant-Appellant.

On Bill, Etc.

On Appeal.

*Petition on
Appeal.*

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To the Honorable, the Judges of the Court of Errors and Appeals in the Last Resort of All Causes:

The petition of Joseph Hilton, the appellant in the above stated cause, respectfully shows:

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That the petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 28th day of January, 1919, upon a petition filed on December 23, 1918, by complainant as petitioner in a certain cause therein depending, wherein Philip Hilton is complainant and your petitioner, Joseph Hilton, is defendant, in this respect, to-wit: that said order states the finding of the Chancellor to be that the said defendant, Joseph Hilton, your petitioner, has individually, after October 30, 1918, and before the date of the filing of said petition, and thereafter until December 26, 1918, and, since the latter date, in partnership with others, used and still continues to use the name and style under which he conducted business in the City of New York, the words, "Jos. Hilton & Co.," and that the use of said words as the name and style under which he conducted business in the City of New York, led and induced, and leads and induces the public to believe that the goods manufactured and sold by such business were and are manufactured and sold by the complainant, and that the said business was and is the same as or a part of the business conducted by the complainant, and that the defendant, your petitioner, thereby was and is guilty of a violation of the final decree entered upon remittitur in this cause on July 18, 1918.

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Petition of Appeal.

Whereas said finding of the Chancellor is erroneous, in that same was not based upon the evidence as adduced from the witnesses, who testified upon the said petition of the complainant, filed on December 23, 1918, and further that the evidence adduced upon the said hearing was hearsay evidence and incompetent to predicate a finding against your petitioner of contempt of the Court.

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And your petitioner further finds himself aggrieved by the said order of January 28th, 1919, in this respect, to-wit: that the said order adjudges that the said defendant, your petitioner, is and he is hereby declared to be guilty of contempt of this Court; and it is further ordered that the said defendant, your petitioner, do pay the costs of these proceedings to be taxed, inclusive of a counsel fee of three hundred dollars hereby allowed to counsel for complainant, whereas it should not have been ordered that your petitioner be declared to be guilty of contempt, or that your petitioner pay the costs of the proceedings to be taxed, inclusive of a counsel fee of three hundred dollars;

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And your petitioner further finds himself aggrieved by the said order of January 28th, 1919, in this respect, to-wit: that the said order adjudges that if the said defendant, Joseph Hilton, your petitioner, shall not cease to use the words "Jos. Hilton & Co." as the name and style under which he conducts business in the City of New York, either individually or in partnership with others, within thirty days from the service of said order, he, the said defendant, your petitioner, be committed to the common jail of the County of Essex, there to be charged upon his said contempt until he shall have ceased to use the said words as the name and style under which he conducts business in the City of New York, as aforesaid, unless the Chancellor shall see fit sooner to discharge him; and that, in default thereof, complainant have leave to apply upon two days' notice to said Court in a summary manner for the issuance of a warrant, to be directed to the proper officer, commanding him to take the body of the said Joseph Hilton, your petitioner, and keep him in his custody in said jail until he shall have ceased to use the said words as the name and style under which he conducts business in the City of New York, as aforesaid, or said Court shall otherwise direct, whereas it should not have been ordered that said defendant, your petitioner, should cease to use the words

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Petition of Appeal.

10 “Jos. Hilton & Co.” as the name and style under which he conducts business in the City of New York, individually or in partnership with others within thirty days from service of said order, and that he be committed to the common jail of the County of Essex, there to be charge as upon contempt of the said Court of Chancery until he should have ceased to use said words “Jos. Hilton & Co.” as the name and style under which he conducts business in the City of New York, or that complainant should have leave to apply to the said Court in a summary manner for the issuance of a warrant, to be directed to the proper officer, commanding him to take the body of your petitioner and keep him in his custody in the said jail until he should cease to use said words “Jos. Hilton & Co.” as the name and style under which he conducts business in the City of New York, or until the Court should otherwise direct.

20 And your petitioner humbly appeals from the said order of the Chancellor, which finds and orders as aforesaid, upon the ground that the same is erroneous, as hereinbefore set forth.

Your petitioner therefore prays that the said order of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such other relief as to this Honorable Court shall seem meet.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Defendant-Appellant.

30 Endorsed:

“Filed Feb. 10, 1919,

THOMAS F. MARTIN,
Clerk.”

(Common Answer in Appeal.)

Exhibit D. 1.

EXHIBIT D. 1.

ARTICLES OF AGREEMENT, made this twenty-sixth day of December, nineteen hundred and eighteen, BETWEEN, Joseph Hilton, of South Orange, Essex County, New Jersey, party of the first part; Max Tannenbaum, of New York City, in the State of New York, party of the second part; Charles Hilton, of South Orange, aforesaid, party of the third part, and Alexander Hilton, of the City of Newark, aforesaid, party of the fourth part,

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WITNESSETH:

Whereas, the said Joseph Hilton, party of the first part, has heretofore been engaged in the wholesale and retail clothing business with stores located in several cities in the United States, and whereas the parties hereto have agreed to become partners in said business,

Now, THEREFORE, in consideration of the premises, and of One Dollar each to the other paid, the receipt whereof is hereby acknowledged,

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1. The said party of the first part does hereby contribute to said business so to be conducted under the firm name of "Jos. Hilton & Co.," all the merchandise stock on hand, good will, leaseholds, and other elements of the business so heretofore conducted and carried on by him as aforesaid, in return for which he is to hereafter receive eighty per cent. of the profits of the business herein provided for.

2. The second party is to contribute to said business on the first day of January, nineteen hundred and nineteen, the sum of Five Thousand (\$5,000) Dollars, and thereafter as demanded by the first party Ten Thousand (\$10,000) Dollars additional, and he shall be thereafter entitled to receive ten per cent. of the profits of said business that shall accrue during the existence of said partnership.

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3. The parties of the third and fourth part respectively shall devote their entire time to the business, in such positions as shall be assigned to them by the party of the first part, and shall each receive five per cent. of the profits of said business during the existence of said firm.

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4. Said copartnership shall commence on the first day of January, nineteen hundred and nineteen, and shall continue at will from that day, and the four several parties above

Exhibit D. 1.

named do hereby agree to be co-partners together under and by the firm name and style of "Jos. Hilton & Co."

10 5. The first, third and fourth parties respectively are to devote all their time and attention to the conduct of said business, and the second party is not to be required to devote any time thereto, and is to have no authority to purchase goods, merchandise or materials for or on behalf of said firm.

6. The said parties further agree that they shall and will at all times during the said copartnership bear, pay and discharge proportionately, as above arranged for the division of the profits, all rents and other expenses that may be required for the support and management of the said business, and all loss that shall happen to their said joint business by ill commodities, bad debts, or otherwise, shall be borne and paid between them in the same proportions.

20 7. And it is agreed by and between the said parties, that there shall be had and kept at all times during the continuance of their co-partnership, perfect, just and true books of account, wherein shall be set down all moneys paid to said co-partners, or laid out and expended by them, or any of them, in and about the said business, which said books shall be used in common between the said co-partners, so that any of them may have access thereto without any interruption or hindrance of the others.

30 8. Neither of the said parties shall subscribe any bond, sign or indorse any note of hand, accept, sign or endorse any draft or bill of exchange, or assume any other liability, verbal or written, either in his own name or in the name of the firm, for the accommodation of any other person or persons whatsoever, without the consent in writing of the other party; nor shall either party lend any of the funds of the co-partnership without such consent of the other partners; neither of the parties hereto, except the first party, shall have the power to purchase goods or merchandise for said business, or to sign any promissory note, check or incur other obligation for or on
40 behalf of said firm.

9. The third and fourth parties above named shall have a drawing account of not in excess of an amount to be hereafter designated by the first party. The second party hereto shall only be entitled to draw his profits at the expiration of

Exhibit D. 1.

each and every year during the life of this partnership, at which time a balance of profits shall be ascertained, and he shall then have the option of either drawing the same, or leaving it in the business, if the other parties consent, as he may prefer.

10. It is agreed that at the expiration of a year from the date hereof, and yearly thereafter, the affairs, accounts, profits, losses and business of the said co-partnership, shall be settled, adjusted and divided between the said parties, and that at the expiration of the partnership, the stock and profits shall be divided between the partners in the proportion above named.

10

11. This contract is executed at the City of Newark, New Jersey, and is to be construed in all matters arising thereunder in accordance with the laws of said State.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and affixed their seals, the day and year first above written.

20

JOS. HILTON,	(SEAL.)
MAX TANNENBAUM,	(SEAL.)
ALEXANDER HILTON,	(SEAL.)
CHAS. M. HILTON.	(SEAL.)

In the presence of:

SELICK J. MINDES,
ROBERT H. McCARTER.

30

40

Decree on Remittitur.

Decree on Remittitur.

Filed July 19, 1918.

IN CHANCERY OF NEW JERSEY.

10 *Between*

PHILIP HILTON,

Complainant,

On Bill, etc.

and

*Decree on
Remittitur.*

JOSEPH HILTON,

Defendant.

20

This matter being opened to the Court by Pitney, Hardin & Skinner, solicitors for and of counsel with the complainant, and it appearing that the defendant appealed from the final decree entered in this Court on September 19, 1917, in the above entitled cause, to the Court of Errors and Appeals, and that the said appeal has been determined by the said Court of Errors and Appeals and the proceedings have been remitted to this Court to proceed further thereon; and on reading the remittitur from the said Court of Errors and Appeals whereby it appears that it was ordered and decreed by said Court that the said final decree should be modified, and that the decree of this Court in lieu of the following words, to-wit:

30

“That the defendant, Joseph Hilton, his agents, servants and employees be and he and they hereby is and are perpetually enjoined from using the name “Hilton’s” or “Hilton,” either alone or in association with other word or words for any purpose whatsoever in any clothing business operated or conducted directly or indirectly by the defendant, competitive with the clothing business operated or conducted by the complainant trading under the name and style of The Hilton Company, and particularly from using the word “Hilton’s” or “Hilton” either alone or in association with other word or words to

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describe or designate any retail clothing store or stores, or the clothing therein sold, or the business therein operated, or conducted, now or hereafter operated or conducted, directly or indirectly, by the defendant in any city or cities in which the complainant, trading under the name and style of The Hil-

Decree on Remittitur.

ton Company, now operates or conducts a retail clothing business."

should be as follows:

"That the said Joseph Hilton, his agents, servants and employees, may be enjoined and restrained from using the name "Hilton's" or "Hilton," alone or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him are manufactured or sold by complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant, from using any emblem or device resembling the trade emblem of complainant in any way in his business and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by defendant were manufactured or sold by complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant."

And the said Court of Errors and Appeals having further ordered and decreed that the remaining portion of the said decree of this Court which ordered that the defendant pay the taxed costs of the complainant in this cause in this Court, inclusive of a counsel fee of \$1,000.00 thereby allowed to counsel of complainant be affirmed and that the record and proceedings be remitted to this Court to the end that the said decree of the Court of Errors and Appeals might be carried into execution and that a decree be entered in this Court according to the order of the said Court of Errors and Appeals;

It is thereupon, on this 18th day of July, 1918, on motion of Pitney, Hardin & Skinner, solicitors for and of counsel with said complainant, ORDERED, ADJUDGED AND DECREED by Edwin Robert Walker, Chancellor of the State of New Jersey, and the said Chancellor, by virtue of the power and authority of this Court, does hereby ORDER, ADJUDGE AND DECREE:

That the final decree heretofore entered herein be, and the same is hereby modified in the respects ordered by the said Court of Errors and Appeals, and that the defendant Joseph Hilton, his agents, servants and employees, be enjoined and restrained from using the name "Hilton's" or "Hilton," alone or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him are manufactured or sold by complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant,

Decree on Remittitur.

10 from using any emblem or device resembling the trade emblem of complainant in any way in his business and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by defendant were manufactured or sold by complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant.

AND IT IS FURTHER ORDERED, as heretofore, that the defendant pay the taxed costs of the complainant in this cause, inclusive of a counsel fee of \$1,000.00 as heretofore allowed to counsel for complainant.

E. R. WALKER,
C.

Respectfully advised,

20 MERRITT LANE,
V. C.

30

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4-11

THE ability to look well dressed without complaint, fussing and needless expenditure is one of the earmarks of success. You can develop this ability by coming to Jos. Hilton & Co.'s stores. Smart clothes at small cost and backed by a money back guarantee. That's our message.

Select His Xmas Gift at Jos. Hilton & Co.'s Great December Clearance Sale

OUR Haberdashery Department is contributing its share to our December clearance, and has prepared special gift packages for the Christmas trade.

The woman who seeks an appropriate gift for her husband will find our staff of clerks well trained in making her selection, and to her we extend the courtesy of exchanging anything after Christmas should it not meet with the approval of the gentleman for whom it was bought.

Suits & Overcoats at 25% Reductions

A Christmas Shirt Offering

Silk Russian Cords	Value \$7.96	Our Price	\$4.35
Heavy Tied Silk Shirts			
Evening Silk Shirts	Value \$10.00	Our Price	\$7.00
Heavy Quality			
Crape de Chine Silk Shirts	Value \$5.00	Our Price	\$3.49
Fine Madras and Silk Stripes Shirts	Value \$3.00	Our Price	\$1.89

Speaking of Xmas Neckwear!

Handsome Silk Neckties, Values 75¢ 2 in a box, \$1.00
Handsome Silk Neckties, Values \$1.50; 2 in a box, \$2.00
Italian Silk Neckties, Values \$5.00; our price, \$2.35

Men's Hose

Fine Lisle, Value 50¢ pair; our price, 39¢ pair, 3 for \$1.00

Gloves

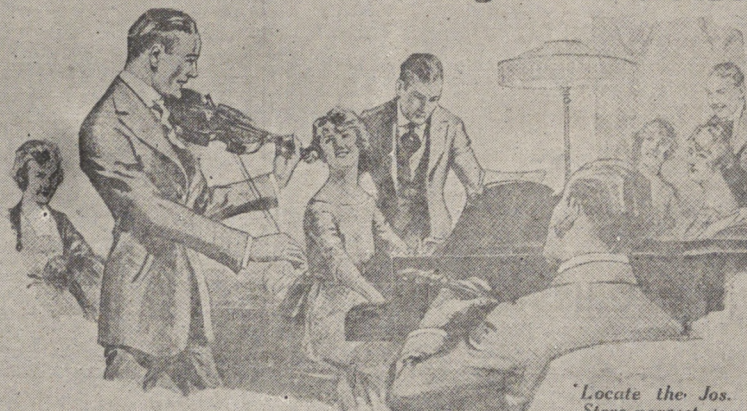
Fine Line of Suede and Tan Capeskin Gloves, Value \$1.50 pair; our price, \$2.25 pair

Bath Robes

Blanket Robes, all with Silk Cords, Value \$10.00; our price \$7.00

Ladies' Sweaters

Fine Assortment, Value \$7.50 to \$15.00; our price, \$5.00 to \$11.85



Locate the Jos. Hilton & Co. Store nearest you. Make sure of its exact address.

NO man who appreciates good values in actually worn clothes should miss this great sale. Let your gift to yourself be a Hilton Suit or Overcoat. These same clothes will cost half as much again very soon. Right now garments of no better quality are bringing inflated prices elsewhere. Come in and see these.

Hand Tailored, Hand Shaped Suits and Overcoats

Beautifully made garments in all the latest and most approved fabrics—Tweeds, serges, worsteds, cassimeres, chevots. Every suit and overcoat just full of style and backed by the Jos. Hilton Guarantee of satisfaction or your money back.

For the Returning Soldier or Sailor

This is going to be a good old-fashioned, hearty, sensible Xmas. Gifts ought to take the practical turn. What gift could be more practical or more acceptable to a man than a stylish suit or overcoat? And what could appeal more to the giver than the fact that he or she is getting the utmost in smart clothes at money-saving prices? Perhaps you have a soldier or sailor-boy, just returning home. Let your Xmas gift to him be a smart, new civilian outfit. Send him in today!

Were \$25.00; **\$18.50**
Now - -
Were \$30.00; **\$23.50**
Now - -
Were \$42.50; **\$31.50**
Now - -

PLEASE NOTE our full name and exact address and recognize it on the signs of each of our four stores—Jos. Hilton & Co.

33d St. & Fifth Ave.
334 Fifth Ave.—Opp. Waldorf-Astoria

Nassau & Fulton Sts.
Raymond's Corner—132 Fulton St.

Jos. Hilton & Co.

Makers of Men's Hand Tailored, Hand Shaped Clothes

All Stores Open Saturday Until 9:45 P. M.

243 Broadway
Opposite City Hall Park

36th St. & Broadway
1333 Broadway—Directly Opp. Herald Building

Bridgeport, Conn.
Fairfield Ave. and Middle St.

no 3 of 87 1984

IN SPITE of the excessive prices that prevail elsewhere, we are still able to offer good clothes at prices that make them the best values in town. A dollar still has 100 cents at Jos. Hilton & Co.'s stores. Merry Christmas!

PLEASE NOTE! Our full name and exact address and recognize it on the signs—Jos. Hilton & Co.



Be Your Own Santa Claus at Jos. Hilton & Co's Great December Clearance Sale

PLEASE NOTE! Our full name and exact address and recognize it on the signs—Jos. Hilton & Co.

243 Broadway
Opposite City Hall Park

Nassau & Fulton Sts.
Raymond's Corner—131 Fulton St.

33d St. & Fifth Ave.
334 Fifth Ave.—Opp. Waldorf-Astoria

36th St. & Broadway
1333 Broadway—Directly Opp. Herald Building

Bridgeport, Conn.
Fairfield Ave. and Middle St.

Here's the chance of a lifetime to join the smart dressers of New York without crippling your purse.

Hand-Tailored Suits & Overcoats

Beautiful garments, smartly cut and perfectly made from all the fashionable fabrics that well-dressed men, everywhere, are wearing. Tweeds, serges, worsteds, cassimeres, chevots—just full of style and honest values. Made for the man who appreciates good clothes and knows values.

New York cannot offer such clothes at anything like our price. When woollens were cheaper, we anticipated the future rise in prices and laid in a larger supply of the best fabrics than other merchants. That's why we are able to offer you such values now.

No sales specials! These clothes are taken right from our big stock. You cannot afford to miss this chance, if you expect to go out this Winter. Let your Xmas gift to yourself be a new suit or overcoat. Get it to-day at Jos. Hilton's. Buy your returning soldier or sailor boy a Gift Card.

Men's Suits and Overcoats
at 25% Reduction

Were \$25.00; **\$18.50**
Now - -

Were \$30.00; **\$23.50**
Now - -

Were \$42.50; **\$31.50**
Now - -

Special for Christmas! Full Dress Suits, \$30. Tuxedo Suits, \$25.

Jos. Hilton & Co.

All Stores Open Saturday Until 9:45 P. M.

Makers of Men's Hand-Tailored, Hand-Shaped Clothes



Exhibits.

EXHIBIT C. B. C.

THE ELTON	(Waterbury	Cancelled
Almon C. Judd, Proprietor	Jan. 6	3c stamp
Waterbury, Conn.	7 PM	
	1919	
	Conn.)	<u>10</u>

The Hilton Clothing Company,
 E. 14th Street & 4th Ave.,
 New York
 City

N. Y.

.....

THE ELTON		
WATERBURY, CONN.		<u>20</u>
Almon C. Judd, Proprietor.	Jan/6th, 19.	
Hilton Clothing Co.		
	New York.	

Gentlemen:—

Please let me know if the prices at present are the same in your store in New York and in your branch store here in Waterbury.

I intend to buy some suits & overcoat from you again these days, but I'm going to New York next week and if prices in your store there are lower, I would wait, till I get to New York & will buy the clothes in your store there. 30

So please let me know soon, where it would be better for me To buy from your store here or in New York.

Thanking you in advance,
I remain,

very truly yours,
 Jos. Hoffman,
 c/o O'Hara,
 77 Abbott Ave., 40
 Waterbury, Conn.

Exhibits.

EXHIBIT C. B. D.

No. 927

Flushing, N. Y. City, July 13, 1918.

BANK OF LONG ISLAND

1-427

At Flushing

Pay to the order of The Hilton Company \$25.75

10 Twenty-five 75.....Dollars

George Bolton.

Endorsed:

The Hilton Company

Joseph Hilton,

36th St.

for deposit only.

Pay Any National or State Bank

Banking or Trust Company

20

or order

JUL 15 1918

Prior Endorsements Guaranteed

The Central Mercantile Bank

of New York

Frank L. Fisher, Cashier.

Pay to the order of

Any Bank, Banker or Trust Co.

All prior endorsements guaranteed

JUL 16 1918

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1-4

1-4

Mechanics & Metals Nat'l Bank, N. Y.

(Cut "Paid")

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Exhibits.

EXHIBIT C. B. E.

WESTERN UNION
TELEGRAM

RECEIVED AT 1918 Nov 6 PM 2 22 1918 Nov 6 PM 1 24
1450 BROADWAY, N. Y.
Bryant 4423

10

J 85CH 9

Jy CHICAGO ILL 1206 P 6

THE HILTON CO

NEW YORK NY 1101

HAVE NOTIFICATION OF REFUSAL OF SHIPMENT NO
REASON ADVISE MEYER BOTH CO.

November 8th, 1918.

20

Meyer Both Co.,
Indiana Ave. at 23rd St.,
Chicago, Ill.
Gentlemen:

We have a telegram addressed to The Hilton Co., New York, which came to one of our branch stores at 1375- Broadway, New York City, and was forwarded here. You state in your telegram, that you have notification of refusal of shipment without reason and requesting us to advise. In reply would say, that we know nothing about this matter and that you evidently confused us with some other concern. We have never purchased or ordered anything from you and your business dealings have probably been with another concern in New York City who has been doing business under the name of Hilton's and recently under the name of Jos. Hilton & Co.

30

Will you please look into the matter and advise us as to just who placed the order and while we are certain you will find it is not our concern, we would appreciate this information so that we may know you have no claim against us.

Very truly yours,

THE HILTON COMPANY,

F. J. M.

Gen'l Mgr.

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FJM:HB

Exhibits.

MEYER BOTH COMPANY
Indiana Ave at 23rd Street Chicago
(Chicago, Ill. Cancelled
Nov. 12 3 c stamp
1.30 AM
1918)

10

The Hilton Co.,
Newark, N. J.

Mr. Frank J. Murray.

.....

Illustrators
Engravers
Lithographers
Publishers
MEYER BOTH COMPANY
Indiana Ave at 23rd Street Chicago

20

Nov. 11th, 1918.

The Hilton Co.,
Newark, N. J.

Attention Mr. Frank J. Murray.

Gentlemen:—

In response to yours of the 8th, the telegram was intended for Joseph Hilton & Co., 242 Broadway, New York, N. Y.

Regretting exceedingly that it should have been a bother to you, necessitating your corresponding, we are,

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Very truly yours,
MEYER BOTH COMPANY

BEB:MC

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Exhibits.

EXHIBIT C. B. F.

After 5 days return to	(New York Cancelled	
FEDERAL ADVERTISING AGENCY, Inc.	Oct. 18	2c stamp
6 East 39th St.	6:30 P.M.	
NEW YORK, N. Y.	1918	
	N. Y.)	10

Hilton & Co.
 743 Broad St.
 Newark, N. J.

.....

FEDERAL ADVERTISING AGENCY, Inc.
 Six East Thirty-Ninth Street
 New York City.

Telephone	Chicago	20
Vanderbilt-4770	30 N-Michigan Ave.	

October 17, 1918

Hilton & Co.
 743 Broad St.
 Newark, N. J.

Gentlemen:

We have carried for some time on our books several invoices totaling \$175.36, for which we are obliged to request payment.

30

It is absolutely impossible for us to carry your account beyond a reasonable number of days to permit of check by return mail. If however we do not hear from you, we shall feel obliged to press collection through other sources, in order to properly protect our interests. We hope however to have your check by return mail.

	Yours for the Fourth Liberty Loan,	40
	FEDERAL ADVERTISING AGENCY, Inc.	
GD/MF	Geo. G. Dietrich.	

Exhibits.

November 26th, 1918.

Federal Advertising Agency,
6 East Thirty-Ninth St.,
New York, N. Y.

Gentlemen:—

We have a letter from you dated the twenty-fifth instant addressed to Hilton's, 793 Broad Street, City, but the envelope in which it came is addressed Hilton Company, 793- Broad St., Newark, N. J. You referred to an account amounting to \$175.36 and request payment of same. You also refer to a letter from you to us which you wrote in October. We find in our files a letter from you dated October 17th, 1918, addressed to Hilton & Co., 743 Broad St., Newark, N. J., requesting payment for the same amount.

According to our books we have no record of any such amount and in fact, we have no account at all with you. We presume that you have made a mistake by confusing us with some other concern. It may be that the party who is indebted to you is Mr. Joseph Hilton who until lately has been doing business under the name of Hilton's and recently he has been doing business under the name of Jos. Hilton & Co. His stores are located in New York City and his main office is at 243 Broadway, New York City.

At any rate we would ask you to investigate the matter as we are anxious to know whether or not anyone has incurred any bill on our behalf as we know nothing about the matter. We would add that we have no connection with the business of Joseph Hilton.

So that we may know that there is no misunderstanding on your part we would ask you to kindly advise us whether or not this claim is against us or against somebody else so that we may know that the matter will not need our further attention.

Thanking you in advance for a reply at your early convenience, we are,

Very truly yours,
THE HILTON COMAPNY,
Gen'l Mgr.

FJM/HB

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Exhibits.

FEDERAL ADVERTISING AGENCY, Inc.
Six East Thirty-Ninth Street
NEW YORK CITY.

Telephone
Vanderbilt-4770

Chicago,
30 N-Michigan Ave.

10

November 27, 1918.

The Hilton Company,
793 Broad St.
Newark, N. J.

Gentlemen:

We have yours of the 26th inst., in
reference to our letter regarding an
open item and find upon further
investigation at this end that this
matter properly should have been taken
up with Hilton's of New York.

20

We take this opportunity to apologize
for the annoyance to you in this matter,
and beg to remain

Cordially yours,

FEDERAL ADVERTISING AGENCY, Inc.

GD/MF

Geo. G. Dietrich.

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Memorandum of Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>PHILIP HILTON,</p> <p style="text-align: center;"><i>and</i></p> <p>JOSEPH HILTON,</p>	<p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: right;"><i>Defendant.</i></p>	<p><i>On Bill, &c.</i></p> <p><i>On Proceedings to Punish for Contempt.</i></p> <p><i>On Application for Allowance of Counsel Fee.</i></p> <p><i>Memorandum.</i></p>	<p>10</p>
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Messrs. Pitney, Hardin & Skinner (Mr. Hardin and Mr. Ward), for complainant.

Mr. Selick J. Mindes and Mr. Robert H. McCarter, for defendant.

LANE, *V. C.*

In a preceding contempt proceeding, *Hilton v. Hilton*, 105 Atl., p. 65, I considered the power of this Court to allow counsel fees in cases of this nature and held that it might. My conclusions printed on page 67 of 105 Atl. are to be printed for the use of the Court of Errors and Appeals on the appeal in this case. While the facts now before me differ from the facts before me in the preceding case, yet I conclude that counsel fees ought to be allowed as a matter of discretion. The proceedings in this instance were, as in the other case, not only to vindicate the dignity of the Court, but also to secure the private rights of complainant. I have acquitted defendant of any intent to contemn the authority of the Court, and he undoubtedly acted under advice of counsel, yet it is apparent that in adopting the trade name that he did he endeavored to come as close to the line as possible. The mere fact that he acted in good faith, under the advice of counsel, dose not save him from paying costs and counsel fee. It is not the rule in this Court that the discretion of the Chancellor to award costs is only exercised when parties act *male fides*. As I said in the other case, I can see no good reason why the complainant, forced to come into this Court to assert his legal rights under a decree of this Court, should be obliged to bear the entire expense of the proceeding.

Opinion of Vice-Chancellor, October 18, 1918.

In view of the amount of work necessarily done and of the time spent in Court, the amount asked for by complainant is modest and it will be allowed without prejudice to the right of counsel for complainant to charge his client with a reasonable fee.

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October 18th, 1918.

IN CHANCERY OF NEW JERSEY.

Between

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PHILIP HILTON,

Complainant,

and

JOSEPH HILTON,

Defendant.

On Bill, &c.

*On Proceedings
for Contempt.*

Opinion.

1. In proceedings for contempt counsel fees may be allowed as part of the costs, and imposed upon a respondent found guilty by virtue of Sec. 91, 1 C. S. of N. J. 445, P. L. 1910, p. 427.

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2. *O'Rourke v. Cleveland*, 49 N. J. E. 577, distinguished.

Messrs. Pitney, Hardin & Skinner (Mr. Stanley and Mr. Skinner), for complainant.

Mr. Selick J. Mindes and Mr. Robert H. McCarter, for defendant.

LANE, V. C.

Upon proceedings instituted by complainant respondent was adjudged guilty of a contempt for his failure to obey an injunction requiring him to desist from using the name "Hilton's," etc., in such manner as to deceive the public and injure the business of complainant.

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Upon respondent making substantial changes in his method of conducting business the Court concluded not to impose any punishment other than to compel him to pay costs.

Opinion of Vice-Chancellor, October 18, 1918.

Application is now made to include in the costs an allowance for counsel fees. In *O'Rourke v. Cleveland*, 49 N. J. E. 577, the Court of Errors and Appeals held that this Court could not impose a counsel fee upon a party held in contempt as a punishment. It rested its determination upon the absence in this State of legislative authority to award counsel fees in such cases, indicating that the power to award a counsel fee is purely statutory. Subsequent to the determination of that case (1892) section 91 of an Act Concerning the Court of Chancery, 1 C. S. of N. J. 445, was amended to read as follows: "In any cause, matter or proceeding in the Court of Chancery the Chancellor may make such allowances by way of counsel fee to the party or parties obtaining the order or decree as shall seem to him to be reasonable and proper, and shall direct which of the parties shall pay such allowances," P. L. 1910, p. 427.

Considering this legislation as contrasted with the legislation as it previously existed, it seems to me to be clear that the clear intent was to vest the Chancellor with jurisdiction to allow counsel fees in every proceeding of every kind and description that might be brought in the Court of Chancery. *In the matter of Frankish*, 86 N. J. E. 280, the present Chancellor held that the act applied to proceedings in lunacy. The Court of Errors and Appeals in the *O'Rourke* case expressly determined that the award of costs at the discretion of the Court is the settled practice in courts of equity in contempt proceedings, and I can see no reason why there may not be included in the costs by virtue of section 91 a reasonable counsel fee. The statute with respect to the allowance of costs in existence at the time of the determination in the *O'Rourke* case was as indicated in the opinion of the Court of Errors and Appeals essentially different from the statute as it now exists.

In the instant case the proceedings to punish for contempt were not only to vindicate the dignity of the Court but also to secure the private rights of the complainant.

I conclude, therefore, that counsel fees may be allowed against a respondent adjudged guilty of a contempt and included in the costs.

Whether they should be allowed or not is a matter of discretion.

I conclude in this case that they ought to be.

Opinion of Vice-Chancellor, October 18, 1918.

The method in which the respondent conducted his business had been condemned by both this Court and the Court of Errors and Appeals. For some time after service upon the respondent of the decree as modified by the Court of Errors and Appeals he continued to conduct his business in the condemned manner. His excuse was that by reason of labor shortage, etc., he could not change his signs and labels. It was, of course, his duty to instantly comply with the order of the Court, even if it necessitated closing his business. His remedy was to apply to this Court for a stay of the operation of the injunctive decree. Because of the substantial change which he has now made, and the fact that he acted in a mistaken idea as to his rights or as to his duty, has induced me, without expressing an opinion as to whether the present method conforms to the decree, not to impose any punishment other than as above indicated, but I can see no good reason why the complainant, forced to come into this Court to assert his legal rights under a decree of this Court, should be obliged to bear the entire expense of the proceeding.

Counsel for complainant asks for an allowance of \$300. I think the amount asked for is modest and it will be allowed.

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New Jersey Court of Errors and Appeals.

Between

PHILIP HILTON,
Complainant-Respondent,

AND

JOSEPH HILTON,
Defendant-Appellant.

On Appeal from
order adjudg-
ing Joseph Hil-
ton guilty of
contempt.

BRIEF FOR APPELLANT.

Philip Hilton filed his original bill in the Court of Chancery against his brother Joseph seeking to enjoin the latter from using the term "Hilton" or "Hilton's" alone, or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him were manufactured by the plaintiff, and that the business conducted by Joseph is the same as or a part of the business conducted by Philip; from using any emblem or device resembling the particular emblem of the complainant, or from conducting his business so as to deceive the public and induce it to believe that the goods manufactured and sold by Joseph were those that the complainant manufactured and sold.

A very broad decree was entered in the Court of Chancery in favor of complainant, which was modified on an appeal to this court, pursuant to the directions of the opinion of Mr. Justice SWAYZE,—

104 Atl. Rep. 375. In the course of his opinion Mr. Justice SWAYZE said

“The right of a man to use his own name in his own business is part of the natural and inalienable rights guaranteed by the very first clause of our Constitution, without which the right to acquire, possess, and protect property would be of little worth.”

After pointing out three reasons that have moved the courts to hold to that rule, the learned Justice continues:

“In this present case there is a fourth reason. The parties, when they dissolved partnership, put their agreement in writing, and that writing measures their rights and obligations. At that time, under such an agreement as they made, the defendant had the right, as had been recently decided by this court in *Snyder Pasterized Milk Co. v. Burton*, 80 N. J. Eq. 185, to engage in a competing business. The complainant must be assumed to know the law and to have known that such was the effect of the agreement. He was, moreover, advised by competent counsel. In this situation we cannot do otherwise than hold that the parties contemplated that the defendant might use his own name in the clothing business. He must, of course, refrain from representing his business to be that of the complainant, and from palming off his goods as the goods of the complainant. The present injunction in its full scope cannot be sustained because of defendant's unfair trading. Apparently an injunction exactly in accord with the prayer of this bill would suffice for the complainant's protection.”

A remittitur of modification, pursuant to the opinion, was duly entered in this court and later, and on the 19th day of July, 1918, a decree on the remittitur (case, p. 164), was entered in the Court of Chancery the injunctive features of which were

in the identical language of the prayer of the bill,
—to the effect:

“That the defendant Joseph Hilton, his agents, servants and employees, be enjoined and restrained from using the name ‘Hilton’s’ or ‘Hilton’, alone or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him are manufactured or sold by complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant, from using any emblem or device resembling the trade emblem of complainant in any way in his business and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by defendant were manufactured or sold by complainant and that the business conducted by defendant is the same as or a part of the business conducted by complainant.”

Up to that time the business of the defendant had been conducted under the name of “Hilton’s”, and of course the gravamen of the complainant’s proofs in the main case was directed to an effort to show that notwithstanding the fact that when complainant and defendant were partners, they had conducted business under the firm name of The Hilton Company, nevertheless they had so frequently used the abbreviation “Hilton” or “Hilton’s” that their goods and their business, of which the complainant was the successor by purchase, had become associated with that phrase.

In attempted and immediate compliance by the defendant with this order of the court, he changed his signs as a temporary expedient, by adding below the word “Hilton’s” the additional word “J. Hilton, Prop.” This was a temporary expedient rendered necessary because of the difficulty, owing to the war, of securing new signs to carry out the contemplated intention of having a firm name. Notwithstanding the practical difficulty of getting the

new signs made, on an application for contempt, the Vice Chancellor, 105 Atl. 65, held that the use of the name "Hilton J. Hilton, Prop." was a violation of the injunction and adjudged the defendant guilty of contempt. As he record shows, page 113, it was then contemplated that a firm should be formed and signs made together with labels, that would express the name of the proposed new firm, and that the use of the words "Hilton J. Hilton, Prop." was only a temporary expedient in attempted satisfaction of the exigencies of the case.

The Vice Chancellor, owing to the difficulties of getting work done, having thus adjudged the defendant guilty of contempt, gave him a reasonable time in which to alter the signs and concluded, that upon such alteration and the payment of the costs, he should be purged of the contempt. Within the designated time all of the old signs were removed from the stores and the labels from the goods, and brand new signs containing the words "Jos. Hilton & Co." substituted. It is undisputed in the case that the defendant's instructions to the painter were to make these signs as different as possible from those of the complainant (p. 144, line 38). Indeed, the Vice Chancellor found in his opinion in this case (p. 150, line 30)

"He (the defendant) has altered his signs so that they are as dissimilar as they can be from the signs of complainant. * * * The labels of defendant have been changed so that they are dissimilar from labels of complainant, and the remarks which I have made with respect to the signs apply to them."

The exhibits, so far as the labels are concerned, enable this court to reach the same conclusion by ocular evidence, and the signs themselves are shown in the photographs. The defendant's signs have a maroon colored glazed back-ground, with gold let-

ters, while the complainant's signs—The Hilton Company—have a black back-ground, sanded to deaden the surface, with gold letters (p. 114, line 38). Moreover, in view of the fact that in the first contempt proceedings the complainant had produced evidence by detectives, whose good faith we questioned, the defendant's General Manager addressed to each of the store managers in the City of New York a letter (p. 123, line 15) :

“In the event of any individual entering your store and inquiring whether this store has any connection with The Hilton Co., you will please instruct your salesmen to emphatically inform him that we are in no way connected with said firm; that we have four stores in New York City, and give the exact location of each store.”

The reason for the adoption of the words “Jos. Hilton & Co.”, is the fact that it was anticipated, and has turned out to be the fact that, on the 26th day of December, 1918, articles of co-partnership (Exhibit D) (p. 161) were entered into between the defendant, his two sons and one Max Tannenbaum, a friend of the defendant, and the father of a young man engaged to be married to his daughter, in which Mr. Tannenbaum agreed to contribute \$15,000. to the fund, \$5,000. of which he has already contributed, and other covenants were entered into, unnecessary here to relate. Mr. Tannenbaum was a witness and testified to the existence of the partnership, and indeed no one questions its *bona fide* existence. Indeed, the order (p. 155, line 20) finds that the business was conducted as a partnership. It was arranged, after Mr. Younker, the defendant's manager, who had expected to become a partner in the business, had been unable to raise the money (pp. 133, line 1; 113, line 25), and after another proposed partner had been found unsatisfactory, and entirely without knowledge of any expectation on the part of the

complainant, to claim that the new signs of this firm were a violation of the order (p. 134, line 15). The new firm has done considerable advertising in the *New York American*, copies of which are offered in evidence by the complainant, and specimens of which are in photographic reproductions printed at pages 167 and 168 of the record. On each of these, in one or more places in conspicuous type appear the words: "Please Note, our full name and exact address and recognize it on the signs of each of our four stores—Jos. Hilton & Co."

The use of the abbreviation "Jos." is explained by the fact that Mr. Hilton has for years always signed his name on business papers, other than legal documents under the direction of his former counsel, the complainant's General Manager, Mr. Murray, "Jos. Hilton". A large package of checks was produced and offered in evidence. By error, (p. 116, line 8) they are stated to be about fifteen in number. They were, in fact, selected at random, and number over 50. The defendant went to the expense of \$1,600.00 in the alterations of his signs and the new firm has assumed obligations for a contract at the rate of \$50,000 a year for its advertising in the *New York American* (pp. 129, line 45; 117, line 40).

Notwithstanding the fact, that on the previous contempt proceedings, as appears in this case (p. 137, lines 1-20), the expectation was expressed of using as the name of the proposed firm—"J. Hilton & Co.", yet, as the Vice Chancellor states (p. 138, line 10) we had a sign before him at that hearing, in the form of a little card bearing the present name—"Jos. Hilton & Co.", and endeavored to get his ruling as to whether that would be approved or not. As shown by the opinion of the Vice Chancellor in the first contempt proceeding, 105 Atl. Rep., page 66, he deemed himself without authority to pass upon any supposititious case. The

result of it was, as the Vice Chancellor says (*id.*), the defendant was in a very "unfortunate position", and he conceived that result followed from the language of the opinion of this Court, which he says—

"Has put the burden, in the first instance, upon the defendant to experiment and make himself liable, if his experiment does not work out."

The situation, then, is, that the defendant having been disappointed in his attempt to form a partnership either with Mr. Younker or Mr. Breen, did create the present firm under the name "Jos. Hilton & Co.", and did remove every vestige of the old signs or labels, and do everything in his power to differentiate them from those of the complainant. He must have believed that his efforts would be successful, otherwise he would hardly have spent \$1,600. for the new signs, and assumed a liability of \$50,000. for a year's advertising, if he had supposed that people seeing those signs would confuse his store with the complainant's, and enter the latter rather than his.

In view of the express determination of this Court, in the main case, that the defendant has the right to use his own name in this business, and that the prohibition of the Court of Chancery against his so doing, either alone or in conjunction with other words, was erroneous, it is difficult to comprehend what more he could have done—remembering all the time the existence of the partnership—than he did, in fact, do. Indeed, the Vice Chancellor, in his conclusions (p. 152, line 43) says:

"I acquit the defendant of any actual intent to contemn the authority of the Court."

Nevertheless, he concludes that the use by this partnership of the firm name "Jos. Hilton & Co."

is of itself a violation of the order, in the absence of any proof whatever of any effort, other than the mere use of that firm name, to mislead or hoodwink the public. The situation is entirely free from fraud, or wilfulness, as the Vice Chancellor finds, and we submit that there is no basis whatever for the conclusion he reached. In his opinion (p. 153, line 28) he says—

“Defendant, of course, labors under the handicap that originally I had the notion that the name could not be used by the defendant in any such manner as he would desire to use it, without creating confusion in a competitive business, but I have tried throughout this case to look upon it with an open mind.”

It is our view, speaking respectfully, that the Vice Chancellor has not been able to shake off the old Adam of his early prejudice, or to accommodate himself to the correction in the statement of the legal principles which Mr. Justice Swayze's opinion contained. In fact, at the outset of his opinion (p. 149, line 35) the Vice Chancellor takes occasion to express the fact that his own view and that of this court in the main case did not differ. He has evidently changed his mind in this particular, because in the first contempt opinion (105 Atl. Rep., p. 66) he frankly states what is, of course, the undoubted fact that “the Court of Errors & Appeals took a different view from me”.

The gist of his opinion in the case at bar is, that owing to the peculiar views of this Court, the defendant is necessarily put in the “unfortunate position” of “experimenting” with the situation, and until he does something that will satisfy the Vice Chancellor's admittedly preconceived notion that the use by the defendant of his own name will of itself create confusion, he is liable to be repeatedly adjudged guilty of contempt, under penalty of

going to jail, and being charged with a large bill of costs and counsel fee to the complainant.

It must be remembered that the case displays no real evidence of confusion in the minds of proposing customers. In the Vice Chancellor's opinion in the contempt case (105 Atl., p. 67) he held that those proceedings—identical in form with these—“*were not only to vindicate the dignity of the Court, but also to secure the private rights of the complainant*”. In such cases this Court has held (*Staley v. South Jersey R. R. Co.*, 83 N. J. Eq. 300) that a person accused in a case of this kind has the right—

“that the facts by which his guilt is determined, and his punishment meted out, shall be established by the oaths of witnesses, subject to cross-examination and impeachment under the ordinary rules of evidence, unless the accused has either expressly or by implication waived the right thus intended for his protection.”

The opinion further adds—

“It is hardly necessary to add that among these substantial rights is that the defendant's guilt must be proved by judicial evidence, *i. e.*, by testimony to which the ordinary rules of evidence are applied.”

The proofs in this proceeding, to establish the alleged confusion, are made up—

First.

Of some alleged telephone messages from persons who are said by complainant's clerks to have inquired of the plaintiff's stores with reference to the two businesses, manifesting a failure on the part of the alleged inquirer to differentiate between them.

On the last proceeding for contempt, the plaintiff had used detectives to enter our stores to procure

evidence, which they later swore to. How can the defendant be condemned by evidence of this character; how does he know that the telephoners were not some detectives, or stool pigeons for the complainant? The persons who telephoned were not called.

Second.

Of alleged conversations between some clerks of the complainant and persons in his stores, in which these persons, who are in no instance produced, relate their suppositions as to the one or the other of the complainant's and the defendant's stores being run by the same person.

Here, again, in a case in which the defendant is to be mulcted in costs, adjudged guilty of contempt, and ultimately deprived of his liberty, is he to have no opportunity to cross-examine the persons who are alleged to have been confused; to ascertain their whereabouts and purposes; to see whether they were, or were not, in fact, confused, or were bought with a price and sent out for the purpose of being confused, just as the detectives were in the first contempt case?

The complainant, anticipating this objection, which was strenuously made below, and concerning which the Court said (p. 36, line 25)—

“I realize that it opens wide the door to manufactured evidence. I am going to admit the testimony, however, and deal with its competency later.”

produced in many instances the visiting cards of these alleged callers. The evidence in the case was given on Friday, January 9th, 1919, and finished the next morning, when the case was decided. Obviously, the defendant had no opportunity to go to the end of Long Island, or to different parts of Brooklyn and New York City to hunt up these

people, and if he had, he could not procure their evidence in this case. The amusing thing about practically all of these alleged conversations between complainant's clerks and the supposed confused individuals, is that the claim was made that they had bought a suit of clothes, as they supposed, of the complainant, in which they had been cheated, and nevertheless they came back to what they supposed was the complainant's store to buy another suit, and found themselves in the defendant's store. Surely before so absurd a story as that detailed by a paid employee of the complainant should be received, as evidence of confusion against the defendant in a proceeding of this character, he should at least have had an opportunity to see and cross-examine the individual. It is worthy of note that in most, if not all of these alleged instances of confusion, the labels in the clothes worn by the individual were inevitably the old style "Hilton's", and not the present label which is so different.

Third.

Letters from individuals, unidentified and unknown, addressed to the complainant, and indicating confusion on the part of the unknown writer. An example of this evidence is Exhibit C. b. c., page 169, where a person signing himself Joseph Hoffmann writes a letter to the complainant indicating an alleged confusion between the defendant's Waterbury store and that of the complainant in New York. Concerning this evidence (p. 45, line 5) the Court says:

"I have grave doubt, but I am going to admit it at this time."

And this, too, notwithstanding the fact that the witness who produced the letter did not pretend

to know the writer of it, or anything more than the fact that it had been received.

Among our objections to this class of evidence is that stated at the bottom of page 4—

“It is a mere letter, written we don't know by whom. It may have been written, inspired or even sent by the complainant himself, or by some of his emissaries, or detectives or managers or friends, and to make a case of contempt without any further identification or testimony than the letter itself is improper.”

It is interesting, in passing, to note that this particular letter is dated January 6, 1919, a week and more after the petition herein was filed. Objection was made upon that point, too, but similarly overruled.

Other examples of these letters, sent without any proof, except of their receipt, are found in Exhibit C. B. E., page 171; Exhibit C. B. F., page 173. Neither of the authors of those letters is produced, and we had no means (both purporting to have come from out of the State), of ascertaining whether or not they were sent in good faith, or were part of a frame-up, or who misdirected them, if they were misdirected.

Fourth.

Next, we have instances where persons are said to have come into some of complainant's stores and inquired for some clothes selling for \$18.50, as advertised in the defendant's advertisements in the *New York American*, all of which, as we have already shown, have in two or three conspicuous places the warning—

“Please note our full name and exact address, and recognize it on the signs of each of our four stores—‘Jos. Hilton & Co.’”

Here, again, we were not permitted to see any of these persons, or to cross-examine them, nor to satisfy ourselves of the extent of their confusion, or, indeed, whether they were *bona fide* or not.

Finally, there were a few instances where the postman left letters, plainly marked in the firm name of the defendant at his store on the corner of Nassau and Fulton Streets, but which he erroneously left at the complainant's Nassau Street store, a few doors below. It is not pretended that the postman was confused, or did not differentiate between the two enterprises, it was only a case of mistake on his part.

The situation in this case is precisely similar to that existing in the celebrated and leading case of *Turton v. Turton*, 42 Ch. Div. 128, where the plaintiffs have, for many years, carried on the steel manufacturing business under the name of Thomas Turton & Sons. The defendant John Turton had carried on a similar business in the same town, first as John Turton, then as John Turton & Co. He later took his two sons into partnership and carried on the same business as John Turton & Sons. It was held by the Court of Appeal, reversing the decision of NORTH, J., that so long as there was no evidence that the defendant imitated the trademarks or labels of the plaintiffs or otherwise attempted to deceive the public, although there was a probability that the public would be occasionally misled by the similarity of names, the plaintiffs were not entitled to an injunction restraining the defendants from the use of the name John Turton & Sons. In the course of the learned judgment of Lord Esher, he said, page 34,

“Now it is not alleged—certainly it is not proved against him—that he did anything in the way of his trade which tended to give any other meaning to the name in which he carried on his business, or which could give any

other meaning to it, than merely the fact that he did carry on business, and was in partnership with his sons. He had not done anything with the intent or for the purpose of making the use of his simple name look as if his name were the name of the Plaintiffs. In some cases, besides using the name, parties have, to use what I think is a happy phrase of my brother Cotton's, garnished that use—that is, they have done things besides using the name in order that the use of that name might look as if it were being used by the old firm. There is nothing of that kind here. * * *

Therefore the first question of law in the case is this: Supposing that, and that only, is done by the Defendants, but, nevertheless, some people, or, if you please, many people, in the market, do from time to time give orders intending them for the Plaintiff's firm which on account of the similarity of name go to the Defendants' firm, are the Plaintiffs entitled to an injunction? If there had been anything more than the mere use of the name by the Defendants in the way I have stated, that there might have been a necessity for an injunction, I think, cannot be denied. Here are two firms, Thomas Turton & Sons and John Turton & Sons: well, careless people may not notice the difference of Christian name, and may look more to the words "Turton & Sons" which are the same in both. That might be so. Therefore, for this purpose I assume that the names are sufficiently alike to cause those blunders in trade; but they are blunders of the people who make the blunders. Has the Defendant done anything to so far cause those blunders even though he did not intend it, which entitles the Court to stop him from doing what he is doing? He is simply stating that he is carrying on business with his two sons as partners. I say that is the accurate and exact truth of what he is doing. I will assume for the moment that it is pointed out to him, that, he doing that, blunders will occur in the business and that the results which are complained of will happen. Is there any-

thing dishonest—is there anything wrong morally, in any, even in the strictest sense, in a man using his own name, or stating that he is carrying on business exactly as he is carrying it on? Is there anything wrong in his continuing to do so, because people make blunders, and even, if you please, because they make probable blunders? What is there wrong in what he is doing?”

In *Allegretti v. Allegretti Chocolate & Cream Co.* (Ill.), 52 N. E. Rep. 487, referred to and approved by this court in 72 Eq. 938, there was, as in the case at bar, the formation of a partnership or company in which the defendants' name was used, and the court held, in the absence of fraud, it would be proper for the defendants to carry on a competing business, using the name of one of its members.

Both of these cases show that the Vice Chancellor's reasoning with reference to the firm name, as distinguished from the individual name, Joseph Hilton, is unwarranted.

Here is all the evidence in the case. No wonder that after it was all in, and had been in the argument orally analyzed to the Vice Chancellor, he was forced to the conclusion (p. 153, line 20) that proof of confusion is not necessary, and was compelled to fall back upon his own preconceived notion that so long as the word "Hilton" appears in both enterprises—notwithstanding the difference in the places; the difference in the signs; the warnings in the advertisements, and the difference in the labels, confusion will exist, and that too, beyond a reasonable doubt, and, therefore, the defendant must be sent to jail.

The importance, nay, the necessity, of producing the persons who are said to have been confused, appears from the fact that it has been universally held, in cases of this kind, that litigants are not responsible for the stupidity of customers, and the

blunders of unobservant people. In *Dunlop v. Dunlop*, Appeal Cases 1907, page 438, the Court said:

“Well, of course, there are unwary people in this world, but I think that a man who employs his own name in carrying on his business has the right to regard the people whom he may attract as being capable of exercising and being in the habit of exercising thought; and I cannot differ from the judgment of Lord Low in which he says:

‘Any one who took the trouble to think about the matter would see that the respondent’s company was a motor company and the complainant’s a tyre company. I do not think that the respondents are liable to have their business practically stopped unless they change their name simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers.’”

In this connection the opinion of Vice Chancellor Leaming, in *Rosenthal v. Blatt*, 80 N. J. Eq. 90, is significant. He says:

“These occurrences disclose some confusion which it is urged is to be attributed to a similarity of the two trade names. It is quite possible that the confusion referred to has arisen from the use of the word ‘London’ as a part of the trade name of both contending parties; but such confusion is, in my judgment, to be more appropriately attributed to extreme carelessness and inattention upon the part of the customers who have made the specific errors referred to. Complainants have no property right to the exclusive use of the word ‘London’ in connection with their business. They are only entitled to protection against unfair competition by defendant; they are entitled to be protected against defendant passing his goods or business as complainants’ goods or business, and the test is whether or not the public is likely to be deceived. Concrete instances of

confusion which can only be appropriately attributed to extreme carelessness or inattention on the part of customers are clearly inadequate to establish a similitude which does not in fact exist. I am unable to believe that the name 'Page of London' used in the manner in which it is being used by defendant, is operative to deceive or mislead any reasonable person by reason of its resemblance to the name 'London Shop', or to improperly divert complainants' trade."

See also: *Williams v. Farrand* (Mich.)
50 N. W. 446.

Illustrative of the absurdity of conclusion, we refer to the fact that some of the instances relied on, of the character above mentioned, are said to have occurred in the complainant's Nassau Street store, which is about one-half block below that of the defendant, in the middle of the block, about twenty feet wide, and is so small that they need only a Manager and one salesman. There they sell nothing but clothes. The defendant's store, on the northwest corner above, has three entrances, windows on the front and side, employs some eleven clerks, and displays in his windows as well as sells in the store, furnishing goods as well as clothes. With the difference in the signs and difference in the labels on the clothes themselves, and nothing but the alleged similarity between the name "The Hilton Co." and "Jos. Hilton & Co.", it is ridiculous to suppose that any observant or reasonably sensible person could possibly be confused between the two.

Mr. Murray, in his affidavit attached to the petition herein (p. 6, line 22), says:

"I especially call attention to the combination of the abbreviated name 'Jos.' in front of the word 'Hilton', and the suffix '& Co.', and to the fact that the word 'Jos.' contained the same number of letters as the word 'The', which pre-

cedes the name 'Hilton' in the name under which complainant has conducted his business, and the fact that the word 'Co.' following the name 'Hilton', as used by the complainant, has commonly in the conduct of his business been abbreviated to 'Co.'"

There is an obvious error in the last sentence, and, as admitted by Mr. Murray (p. 102), what he meant to say was that frequently the word "Company", following the name "Hilton's", as used by the complainant, has in the conduct of his business been abbreviated to "Co.", and the argument was that the defendant having adopted the same word "Co." as part of his partnership title, had imitated the partner's name. The fact is, however, that the complainant uses in its title "The Hilton Company", the word "company" or "Co." indifferently (see pp. 99, 101, 103 and 104), and, therefore, is in a situation to charge us with an attempt to imitate whether we called ourselves "Jos. Hilton & Co." or "Jos. Hilton & Company"—evidently a plan to catch us going or coming. So, too, with reference to the defendant's use of the abbreviation of his name "Jos." instead of "Joseph". In the first contempt proceedings, where we used the phrase "J. Hilton, Prop.", it was claimed that we were thereby accenting the word "Hilton", and had we used it in our permanent present firm title undoubtedly the same claim would have been reiterated.

To show the extent of the intelligence manifested by some of these individuals whose conversations complainant's clerks were permitted, against our objection, to repeat, reference may be made to the evidence of one Dayton, clerk of complainant, on page 62, who testified concerning the visit of a man to the complainant's Brooklyn store, who referred to an advertisement of the defendant in the newspaper known as the "Broadside", when an examination of this advertisement (p. 64, line 12) discloses that the only store advertised by the complainant

in this paper is that at 243 Broadway in New York City.

This is all there is to this case, and unless this court was wrong in the conclusion that the defendant had a right under the contract he made with the complainant to open a competitive business with the complainant, and to use his own name in the conduct thereof, so long as he refrained from doing anything to lead the public to suppose that his business, and that of the complainant, were the same,—in other words, so long as he refrained from fraudulent practices, or the use of recognized trade names, he was pursuing his legal rights, then the defendant has not been shown to have done anything contrary to the rule laid down by this court in this case.

The decision in the main case was, that his use of the name "Hilton's" was a violation of the complainant's trade name. Here, there is no suggestion of that; here everything has been done to differentiate the two; here there is an express finding of no wilfulness or no fraud, but, on the contrary, of a *bona fide* attempt on the defendant's part to avoid disobeying the order.

The Vice Chancellor seems to rely upon the *Rogers'* case, which was expressly based upon *Rogers'* fraud, as was also the fact in the other cases referred to by him on page 152 of his conclusions. The error into which the Vice Chancellor fell in his opinion in the main case, and which this Court corrected, was just that idea. He concluded that in the absence of the use of a trade name, or a fraudulent attempt to steal another's business, *i. e.*, unfair competition, an injunction would lie to prevent a competitor from using in a perfectly fair and legitimate manner his own name in the conduct of his business. This court corrected that. We point out that the Vice Chancellor has not been able to eradicate that view from his mind, and that his conclusion in this case is but another expression

of it. In the opinion adjudging the defendant guilty of contempt in the earlier case he stated (105 Atl. Rep., p. 67) :

“If, as a means of purging himself of his contempt, the respondent offers to change his practice in such a manner as will appear to me to be in accordance with the injunction, it may be that I will permit him to purge himself.”

The offer we then made was that which we carried out, namely, the adoption by the proposed firm of the name “Jos. Hilton & Co.” He was then apparently satisfied that this phrase would “appear to be in accordance with the injunction”, and so the defendant was purged of contempt. Without any legal evidence to support him, he has apparently changed his mind, and in this proceeding has concluded otherwise.

We, therefore, insist that this order is altogether erroneous; based upon a misconception of the law, and entirely lacking in evidence to support it, and that it should be reversed. In a proceeding of this character, and under these circumstances, to hold the defendant guilty of contempt, and require him, not only to incur the expense of changing all these signs, but also to pay the complainant his costs and counsel fee, with the ultimate penalty of a term in jail, is, we respectfully submit, as harsh and unjust an attempt to apply legal principles to preconceived ideas as the Courts of this State have ever undertaken to accomplish.

Respectfully submitted,

SELICK J. MINDES,

ROBERT H. McCARTER,

Of counsel with Defendant-Appellant.

March Term, 1919.

John R. Moulton & Co.

Southwestern Record