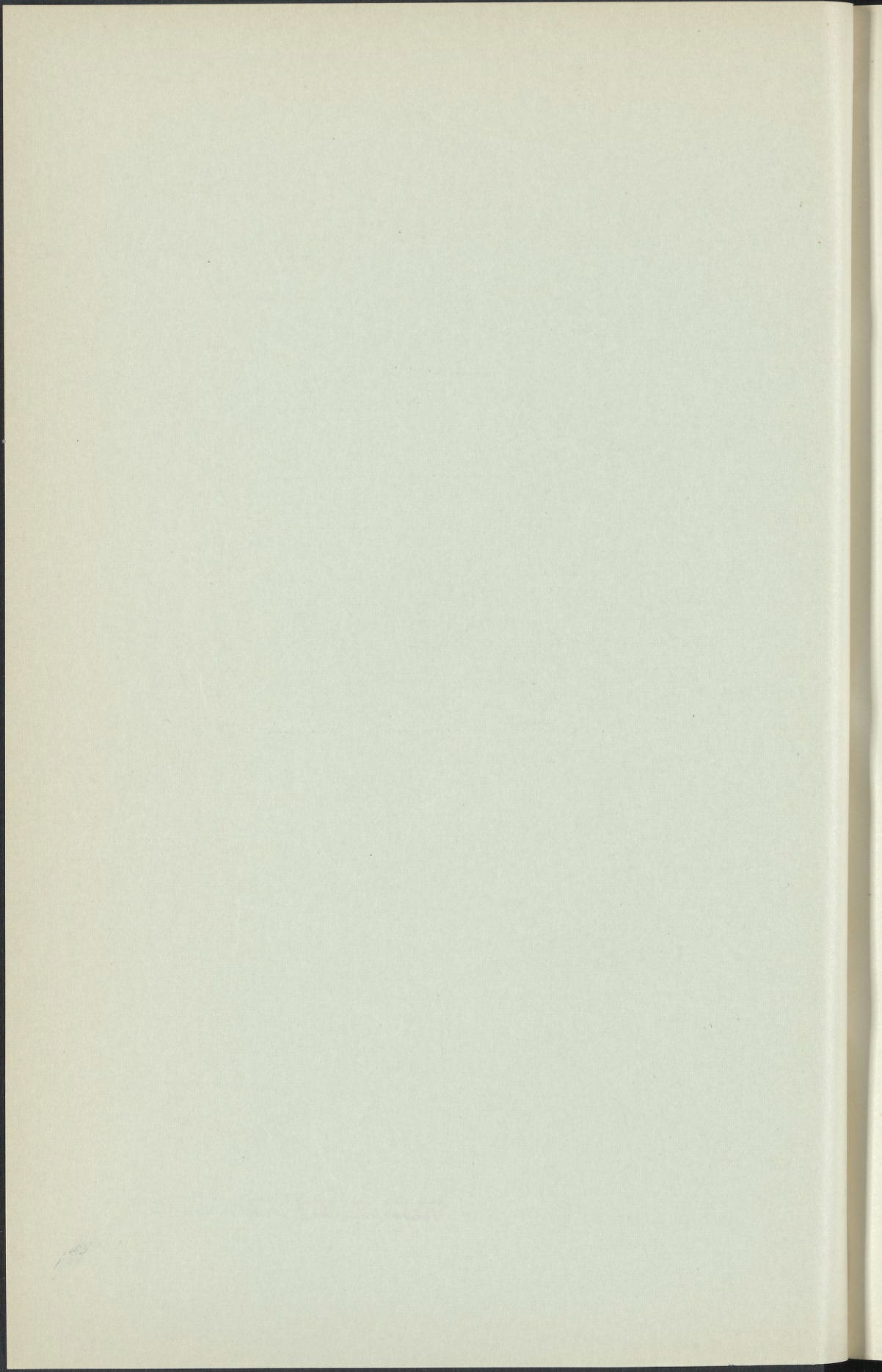


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Notice of Appeal.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

ETHEL M. ROGERS,
Plaintiff-Appellee,

vs.

HYMAN KRAMER,
Defendant-Appellant.

Action-at-
Law.

20

To:

Koehler & Augenblick, Esqs.,
Attorneys of Plaintiff-Appellee.

Sirs:

Take Notice that the defendant-appellant, Hyman Kramer, appeals to the New Jersey Court of Errors and Appeals from the order striking out the answer and entering judgment in this 30 cause.

Dated, March 9th, 1931.

MINTURN & WEINBERGER,
Attorneys of Defendant-Appellant.

40

Summons.

THE STATE OF NEW JERSEY

TO HYMAN KRAMER

(L. S.)

10 You are summoned to answer the annexed complaint of Ethel M. Rogers, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20 WITNESS, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 14th day of January, nineteen hundred and thirty-one.
 FRED L. BLOODGOOD,
 Clerk.

Koehler & Augenblick,
 Attorneys.

To the within named Defendant:

30 Take Notice that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within ten days, of such service, and an answer within twenty days thereof, and that in default thereof judgment will be entered against you.

Lawful service on a corporation is deemed personal service.

40 KOEHLER & AUGENBLICK,
 Attorneys of Plaintiff.

Complaint

before maturity and in due course for a valuable consideration.

4. When said note became due it was not paid. The sum of \$1,500.00 was paid after the maturity of said note by the defendant on the principal thereof and there remains due and unpaid on said note from the defendant the balance of \$5,000.00 with interest thereon from November 25th, 1929.

5. Thereafter the said Union National Bank in Newark, N. J., transferred said note to the plaintiff who is now the holder thereof.

20 Plaintiff demands damages in the sum of Five Thousand Dollars (\$5,000.00) besides lawful interest since November 25th, 1929, and costs of suit.

KOEHLER & AUGENBLICK,
Attorneys of Plaintiff.

\$6,500.00 Clifton, N. J., Nov. 25, 1929

30 Three Months After date I promise to pay to the order of Thomas Parsonnet & Nat Fruchtman Six thousand five hundred and 00/100 Dollars at Labor National Bank of Newark, N. J.

Value received with Interest
No. F. B. D. C. Due Feb. 25/30

HYMAN KRAMER

Complaint

(Endorsement)

Thomas Parsonnet

Nat Fruchtman

Augusta B. Parsonnet

March 4, 1930

Received payment on a/c Three hundred forty
 nine 67/100 Dollars 34967

UNION NATIONAL BANK

In Newark, N. J.

Dec. 29/30

Received payment on a/c Twelve hundred
 fifty 00/100 Dollars (\$1250.00) leaving balance 20
 unpaid of Five thousand 00/100 Dollars \$5,000
 —as of Nov. 25, 1929

UNION NATIONAL BANK

In Newark, N. J.

30

40

Answer

FIRST SEPARATE DEFENSE.

The said defendant is discharged of and from any liability on account of said note.

10

SECOND SEPARATE DEFENSE.

1: After the date of maturity of said note, said defendant, in accordance with an agreement made by and between the Labor National Bank, of Newark, Thomas Parsonett and Nat Fruchtman, did agree to pay the sum of \$6,500.00 account of said indebtedness. That there was, at that time, with the said Labor
20 National Bank, certificate of deposit or cash, in the sum of \$5,000.00.

2: That it was expressly understood and agreed that said note of \$6,500.00 would be cancelled upon the payment of said sum of \$1,500.00, and the proceeds in the possession of the said bank in the sum of \$5,000.00.

3: That it was the agreement that the said
30 defendant should be relieved of any liability on account of said obligation.

4: That the said defendant did in fact pay the said sum of \$1,500.00. Said note was to have been cancelled insofar as any liability was concerned, by the said defendant.

5: That there was due and owing from the said Nat Fruchtman and Thomas Parsonett, at the time of the said agreement, the sum of
40 \$8,939.34, jointly and severally unto the said defendant.

Answer

6: That there is nothing due and owing on said note of \$5,000.00 from the said defendant to the said plaintiff or to any other person, but on the contrary the said defendant claims that there is due and owing unto him the sum of \$3,939.34, representing the difference between said sum of \$8,939.34 and the said note of \$5,000.00 upon which the said plaintiff brings the said action. That the defendant herein is about to institute an action against the said Thomas Parsonett for the said sum of \$3,939.34 the excess due after crediting the said sum of \$5,000.00 upon which the plaintiff brings this action.

MINTURN & WEINBERGER, 20
Attorneys of Defendant.

30

40

Notice of Motion.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

ETHEL M. ROGERS,

Plaintiff,

vs.

HYMAN KRAMER,

Defendant.

}

Action
at Law.
Notice.

To the above-named Defendant or Messrs.
Minturn & Weinberger, his Attorneys:

20

Take Notice that on Saturday, the 28th day
of February, 1931, at ten o'clock in the fore-
noon or as soon thereafter as counsel can be
heard, we shall move before the Honorable
William S. Gummere, Chief Justice of the New
Jersey Supreme Court, to strike out the an-
swer filed in this cause by the defendant, Hy-
man Kramer as sham and/or frivolous and at
the same time and place we will likewise move
to strike out the first and second separate de-
fenses in said answer and each and every part
thereof as frivolous for the reason that the
same do not disclose any defense to the com-
plaint.

30

Further take notice, that at the time and
place aforesaid, we will move for the entry of
summary judgment in favor of the plaintiff
and against the defendant.

40

Hereto appended are affidavits which will be
used in support of said motion.

Yours respectfully,

KOEHLER & AUGENBLICK,

Attorneys of Plaintiff.

Affidavit of William Dunkel

course. This note was given to renew one which we had previously discounted.

When the note became due it was not paid and it was duly protested.

At the time this note fell due we had a certificate of deposit in our possession which belonged to Augusta B. Parsonnet, one of the endorsers of this note in the sum of \$5,000.00. This certificate of deposit we were holding as additional security for the \$6,500.00 note. 10

After the maturity of the note, we received on March 4th, 1930, \$349.67 on account of the note and there remained therefor of the note and interest, the interest amounting to \$99.67 up to November 25th, 1929, being the date of maturity of the note and \$250.00 being on the principal, a balance due of \$6,250.00. The defendant, Hyman Kramer, said that he would pay \$1,250.00 to us and wanted Thomas Parsonnet and Nat Fruchtman to pay the remaining \$5,000.00; although we made no agreement of any kind with any of these parties we accepted payments totalling \$1,250.00 which we credited against the principal due on this note. Inasmuch as we held the certificate of deposit belonging to Augusta B. Parsonnet for \$5,000.00, we were not particularly concerned about the remaining \$5,000.00, however at no time did we make any agreement that upon the payment by Kramer of \$1,250.00 would he be released from the remaining portion of the \$6,500.00 note. We merely accepted payments from time to time until the note was reduced to \$5,000.00. 20 30 40

Affidavit of William Dunkel

10 On or about December 29th, 1930, at the request of Augusta B. Parsonnet, who was the owner of the \$5,000.00 certificate of deposit, we transferred the note in question to the plaintiff, Ethel M. Rogers, and we were paid the \$5,000.00 which then remained due on the note by Augusta B. Parsonnet releasing to us the \$5,000.00 certificate of deposit belonging to her. On December 29th, 1930, when we transferred said note to the plaintiff there remained due on said note the said sum of \$5,000.00 with interest on the sum of \$5,000.00 from November 25th, 1929, at six per cent per annum.

WILLIAM DUNKEL.

20 Sworn and subscribed to before me
this 19th day of February, 1931.
Constance H. Bendix,
An Attorney at Law of N. J.

30

40

Affidavit of William Dunkel

\$6500.00 Clifton, N. J. Nov. 25, 1929

Three months after date I promise to pay to
the order of Thomas Parsonnet & Nat Fruchtman
Six thousand five hundred and 00/100 Dollars
at Labor National Bank of Newark, N. J. 10

Value received with Interest
No. Due Feb 25/30 HYMAN KRAMER

(Endorsement):

Thomas Parsonnet
Nat Fruchtman
Augusta B. Parsonnet

March 4, 1930 20

Received payment on a/c Three hundred forty-
nine 67/100 Dollars 349.67

UNION NATIONAL BANK

In Newark, N. J.

D.

Dec. 29/30

Received payment on a/c Twelve hundred
fifty 00/100 Dollars (\$1250.00) leaving balance 30
unpaid of Five thousand 00/100 Dollars \$5,000.—
as of Nov. 25, 1929.

UNION NATIONAL BANK

In Newark, N. J.

D.

Affidavit of Augusta B. Parsonnet.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

ETHEL M. ROGERS,
Plaintiff,
vs.

HYMAN KRAMER,
Defendant.

Action at Law.
Affidavit.

State of New Jersey,
County of Essex, ss:

20

Augusta B. Parsonnet, of full age, being duly sworn upon her oath according to law deposes and says:

I am one of the endorsers on the note upon which this suit is brought, the note being endorsed in the following order: Thomas Parsonnet, Nat Fruchtman and myself.

30

The note in suit was given to the Union National Bank in Newark, N. J., to renew a larger note which they had previously discounted, likewise made by the defendant.

On February 25th, 1930, this note fell due and was not paid. At that time I had the Union National Bank hold as security for my endorsement a certificate of deposit of the value of \$5,000.00 which belonged to me.

40

After the maturity of the note there was a payment of \$250.00 principal and \$99.67 interest made on March 4th, 1930, leaving a balance due on the note of \$6,250.00. There-

Affidavit of Augusta B. Parsonnet

after, from time to time, payments were made aggregating \$1,250.00 and there remains due the sum of \$5,000.00. I at no time agreed to use my certificate of deposit to pay off this note, nor did I ever agree that Mr. Kramer, the defendant, would upon the payment of \$1,250.00 on the principal of the note be released from it. 10

I was indebted to the plaintiff in the sum of \$5,000.00 and I had always expected to use the money represented by my certificate of deposit to pay her when the note would have been paid in full. Accordingly, when I found that Mr. Kramer was not paying off the note I arranged with the Union National Bank in Newark, N. J., to use my \$5,000.00 certificate of deposit to reimburse her for the balance due on the note and to transfer the note to the plaintiff which was done and I transferred the note to the plaintiff so that she might be repaid for the \$5,000.00 which I owed her. 20

AUGUSTA B. PARSONNET.

Sworn and subscribed to before me this

21st day of February, 1931. 30

Constance H. Bendix,

An attorney at Law of N. J.

Affidavit of Hyman Kramer.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

10

ETHEL M. ROGERS,
Plaintiff,
vs.

HYMAN KRAMER,
Defendant.

}

Action at Law.
Affidavit.

State of New Jersey,
County of Essex, ss:

20

Hyman Kramer, of full age, being duly sworn on his oath according to law, deposes and says:

1. I am the defendant named in the above entitled action.

30

2. I have read the affidavits of William Dunkel, Augusta B. Parsonnet and Ethel M. Rogers. Replying to so much of the affidavits as requires answer, I desire to state that I am not indebted in any amount on said note of \$6,500.00, the same having been fully paid and satisfied. This note was a renewal note of a note which originally was in the sum of \$17,500.00, which was reduced by payments thereon. There was given as security a certificate of deposit in the sum of \$7,500.00. Thereafter, this certificate of deposit was reduced to a certificate of deposit in the sum of \$5,000.00, with the understanding that when this note of \$17,500.00 was reduced to

40

\$5,000.00, the said certificate of deposit would

Affidavit of Hyman Kramer

be applied and used in payment thereof, the note cancelled and returned to the said defendant, the consideration therefor having been the following: That the said Hyman Kramer, the defendant herein, caused to have extended credit to Nat Fruchtman and Thomas Parsonnet, through the Kramer Lumber Corporation for lumber and materials necessary in a certain building development in Nutley, New Jersey, in which the said Nat Fruchtman, Thomas Parsonnet and Hyman Kramer were interested. That the said Nat Fruchtman and Thomas Parsonnet jointly and severally agreed to repay two-thirds of such sums as may have been guaranteed and paid by the said Hyman Kramer to the said Kramer Lumber Corporation and others from whom materials were purchased. That the following indebtedness was contracted and eventually paid by the said Hyman Kramer:

Pabor Realty Co.	\$1,728.74	
Max Rosenberg	285.00	
Kaufman & Windheim	1,320.00	
Zitrin	400.00	
Kramer Lumber Corporation	16,110.09	30
Capitol Electric Co.	400.00	

That the said Nat Fruchtman and Thomas Parsonnet thereupon became jointly and severally obligated to the said Hyman Kramer in the sum of \$13,495.90. That there was applied on account of said indebtedness, in accordance with the agreement made between Nat Fruchtman, Thomas Parsonnet and Augusta B. Parsonnet, the sum of \$5,000.00, evidenced by certificate of

Affidavit of Hyman Kramer

10 deposit which was given as security for the
note made by the said Hyman Kramer and
discounted at the Union National Bank of New-
ark, leaving a balance due from the said Thomas
Parsonnet and Nat Fruchtman of \$8,495.90. That
the said Ethel M. Rogers, if in fact the owner
of the said note, acquired the same after matur-
ity, and took subject therefor to the rights
existing between the parties thereto. That at
the time of the acquisition of the said note by
the said plaintiff, there was nothing due thereon,
said obligation having been in fact paid in ac-
20 cordance with the terms of the agreement made
between the said Hyman Kramer, Nat Frucht-
man, Thomas Parsonnet and Augusta B. Par-
sonnet.

Wherefore the said defendant respectfully
prays that the application of the plaintiff may
be denied.

HYMAN KRAMER.

Subscribed and sworn to before me this

5th day of March, 1931.

Joseph Warren,

30 Notary Public of N. J.

Summary Judgment

10 said note for valuable consideration to the said Union National Bank in Newark, N. J., and the said Union National Bank in Newark, N. J., thereupon became the holder of said note before maturity and in due course for a valuable consideration.

4. When said note became due it was not paid. The sum of \$1,500.00 was paid after the maturity of said note by the defendant on the principal thereof and there remains due and unpaid on said note from the defendant the balance of \$500.00 with interest thereon from November 25th, 1929.

20 5. Thereafter the said Union National Bank in Newark, N. J., transferred said note to the plaintiff who is now the holder thereof.

Plaintiff demands damages in the sum of Five Thousand Dollars (\$5,000.00) besides lawful interest since November 25th, 1929, and costs of suit.

KOEHLER & AUGENBLICK,
Attorneys of Plaintiff.

30

\$6500.00 Clifton, N. J. Nov. 25, 1929

Three Months After date I promise to pay to the order of Thomas Parsonnet & Nat Fruchtman Six Thousand five hundred and 00/100 Dollars at Labor National Bank of Newark, N. J.

40 Value received with Interest
No. F. B. D. C. Due Feb. 25/30

HYMAN KRAMER

Summary Judgment

(Endorsement):

Thomas Parsonnet
 Nat Fruchtman
 Augusta B. Parsonnet
 March 4, 1930 10
 Received payment on a/c Three hundred forty
 nine 67/100 Dollars 34967
 UNION NATIONAL BANK
 In Newark, N. J.

Dec. 29/30
 Received payment on a/c Twelve hundred
 fifty 00/100 Dollars (\$1250.00) leaving balance
 unpaid of Five thousand 00/100 Dollars \$5000.— 20
 as of Nov. 25, 1929.
 UNION NATIONAL BANK
 In Newark, N. J.

(Filed Jan. 19, 1931.)

The defendant, Hyman Kramer, residing in
 the City of Passaic, County of Passaic and 30
 State of New Jersey, answering the complaint,
 says that:

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. The allegations alleged in paragraph 4 are
 denied, except that defendant admits having 40
 paid \$1,500.00 on account of said note, after

Summary Judgment

the maturity thereof, under circumstances hereinafter more particularly referred to.

5. As to paragraph 5, defendant has no knowledge or information sufficient to form a
10 belief, and leaves plaintiff to make proof in accordance with law, except that said defendant denies that said plaintiff is the owner and holder of said note, and denies further, that there is anything due on account of said note from the defendant.

FIRST SEPARATE DEFENSE:

20 The said defendant is discharged of and from any liability on account of said note.

SECOND SEPARATE DEFENSE:

1. After the date of maturity of said note, said defendant, in accordance with an agreement made by and between the Labor National Bank, of Newark, Thomas Parsonett and Nat Fruchtman, did agree to pay the sum of
30 \$6,500.00 on account of said indebtedness. That there was, at that time, with the said Labor National Bank, certificate of deposit or cash, in the sum of \$5,000.00.

2. That it was expressly understood and agreed that said note of \$6,500.00 would be cancelled upon the payment of said sum of \$1,500.00, and the proceeds in the possession of the said bank in the sum of \$5,000.00.

40 3. That it was the agreement that the said

Summary Judgment

defendant should be relieved of any liability on account of said obligation.

4. That the said defendant did in fact pay the said sum of \$1,500.00. Said note was to have been cancelled in so far as any liability was concerned, by the said defendant. 10

5. That there was due and owing from the said Nat Fruchtman and Thomas Parsonett, at the time of the said agreement, the sum of \$8,939.34, jointly and severally unto the said defendant.

6. That there is nothing due and owing on said note of \$5,000.00 from the said defendant to the said plaintiff or to any other person, but on the contrary the said defendant claims that there is due and owing unto him the sum of \$3,939.34, representing the difference between said sum of \$8,939.34 and the said note of \$5,000.00 upon which the said plaintiff brings the said action. That the defendant herein is about to institute an action against the said Thomas Parsonett for the said sum of \$3,939.34 the excess due after crediting the said sum of \$5,000.00 upon which the plaintiff brings this action. 20 30

MINTURN & WEINBERGER,
Attorneys of Defendant.

(Filed Feb. 2, 1931.)

Afterwards upon proceedings duly had according to the Statute the Court ordered said answer stricken out as sham and failing to show such facts as entitle him to defend. 40

Summary Judgment

Whereupon it is adjudged that the plaintiff Ethel M. Rogers do recover of the said defendant Hyman Kramer the sum of Five thousand three hundred eighty-three dollars and thirty-three cents damages together with her costs which have been taxed at the sum of Fifty-four dollars and twelve cents making in the whole the sum of Five thousand four hundred thirty-seven dollars and forty-five cents.

10

\$5,383.33
 54.12
 —————
 \$5,437.45

Judgment signed and entered March 10, 1931.
 WM. S. GUMMERE,

20

C. J.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

30

In testimony whereof I have set my hand and the seal of said Court at
 (Seal) Trenton, this twentieth day of
 April, A. D. nineteen hundred and
 thirty-one.

FRED L. BLOODGOOD,
 Clerk.

40

Rule for Summary Judgment.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

<p style="text-align: center;">ETHEL M. ROGERS, Plaintiff, vs. HYMAN KRAMER, Defendant.</p>	}	Action at Law.	10
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It appearing by affidavits filed in this cause that the defense made by defendant's answer is sham, and the defendant, after due notice, having failed to show such facts as entitle him to defend; 20

It is, on this 9th day of March, 1931, Ordered that the defense be struck out and that final judgment be entered for plaintiff for the sum of \$5,383.33 and costs.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
Chief Justice.

On motion of
Koehler & Augenblick,
Attorneys of Plaintiff. 30

Grounds of Appeal.NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	ETHEL M. ROGERS, Plaintiff-Appellee, vs. HYMAN KRAMER, Defendant-Appellant.	}	On Appeal.
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To Koehler & Augenblick, Esqs.,
 Attorneys of Plaintiff-Appellee.

20 Sirs:

Take Notice that the defendant-appellant, Hyman Kramer, appeals to the New Jersey Court of Errors and Appeals from the order striking out the answer and entering judgment in this cause on the following grounds:

1: The Court erred in holding the defendant's answer to be sham.

30 2: The Court erred in striking out the answer.

3: The Court erred in ordering final judgment to be entered for the plaintiff.

MINTURN & WEINBERGER,
 Attorneys of Defendant-Appellant.

**NEW JERSEY COURT OF ERRORS AND
APPEALS**

ETHEL M. ROGERS,
Plaintiff-Appellee,

vs.

HYMAN KRAMER,
Defendant-Appellant.

} On Appeal.

**BRIEF ON BEHALF OF DEFENDANT-APPEL-
LANT.**

Facts.

This is an appeal from a final judgment of the Supreme Court of New Jersey, Essex County Circuit thereof, rendered by Chief Justice Gum- mere, striking out a complaint on the ground that it was sham and that the defendant failed to show such facts as would entitle the defend- ant to defend. The judgment was entered in favor of the plaintiff and against the defendant in the sum of \$5,437.45 (Case, p. 26).

The Pleadings.

The plaintiff-appellee in the case at bar brought suit in the New Jersey Supreme Court, on a note in the amount of \$6,500, dated No- vember 25th, 1929, and payable with interest at the Labor National Bank in Newark, New Jersey. Said note was a three-month note made

by Hyman Kramer, defendant-appellant, to the order of Thomas Parsonnet and Nat Fruchtman. The note bore the following endorsements, namely: Thomas Parsonnet, Nat Fruchtman and Augusta B. Parsonnet. These allegations comprise the first count of the complaint. Paragraph 3 of the complaint sets forth that prior to the maturity of said note, the said Thomas Parsonnet and Nat Fruchtman endorsed said note for valuable consideration to the said Union National Bank which said bank became the holder of said note and in due course for a valuable consideration.

Paragraph 4 alleges that said note was not paid upon its becoming due. The sum of \$1,500, however, was paid after maturity toward reducing the principal of said note, leaving a balance of \$5,000 plus interest.

Paragraph 5 alleges that thereafter the Union National Bank transferred said note to the plaintiff, who is now the holder thereof.

The above makes up the sum and substance of the complaint (Case, pp. 3-4).

Thereafter, the defendant filed his answer to the action. Defendant admitted the first three paragraphs of the complaint. As to Paragraph 4, defendant denied all the allegations excepting that he admitted paying \$1,500 on account of the note after its maturity. As to Paragraph 5 of the complaint, the defendant answered that he had no knowledge or information sufficient to form a belief, and leaves plaintiff to make proof in accordance with law, *except that said defendant denied that the plaintiff was the owner and holder of said note, and denied fur-*

ther that there was anything due on account of said note from the defendant. So much for the answers to the allegations in the bill of complaint (Case, p. 7).

To make clear his position as to the merits of the plaintiff's action, the defendant set forth two separate defenses. The first separate defense in very clear language stated that the defendant was discharged of and from any liability on account of said note. The second separate defense set forth in detail the facts going towards the destruction of the defendant's liability on said note (Case, pp. 8 and 9).

The pleadings up to this point clearly raise a question of fact, as to the defendant's liability on the note, in view of his answer and separate defenses. Upon the defendant filing his answer and separate defenses, plaintiff made a motion to strike the answer of the defendant on the ground that it was sham and/or frivolous and to strike out the first and second separate defenses as frivolous in that they did not disclose any defense to the complaint (Case, p. 10). Supporting affidavits on consideration of the motion were submitted by both sides.

Argument.

The pleadings clearly present a question of fact for the jury, and a consideration of the affidavits submitted, unquestionably sustains this contention. There was submitted the plaintiff's affidavit (Case, p. 11). In effect, she states that she is the holder of the note in the suit. That prior to the transfer of the note, Augusta B. Parsonnet owed her \$5,000 on a bond and

mortgage. On December 30, 1930 (after the maturity of the note), the Union National Bank transferred the note to her. That it contained an endorsement that there is due on said note \$5,000 (although on its face the note was for \$6,500). At the time, Mrs. Parsonnet, who was an endorser on the note of \$6,500, told her that the note was transferred to reimburse the plaintiff for \$5,000 which was due to the plaintiff from Augusta B. Parsonnet.

We next consider the affidavit of William Dunkel, cashier of the Union National Bank in Newark, N. J. (Case, pp. 12-14). These facts clearly appear therein: That the note was made by Kramer for \$6,500 and was endorsed by Thomas Parsonnet, Nat Fruchtman and Augusta B. Parsonnet; that the bank was a holder in due course; the note was given to renew one which the bank had previously discounted. The affidavit, then proceeds as follows:

“At the time this note fell due we had a certificate of deposit in our possession which belonged to Augusta B. Parsonnet, one of the endorsers of this note in the sum of \$5,000.00. *This certificate of deposit we were holding as additional security for the \$6,500.00 note.*”

At case, page 14, the following appears:

“On or about December 29th, 1931, at the request of Augusta B. Parsonnet, who was the owner of the \$5,000.00 certificate of deposit, we transferred the note in question to the plaintiff, Ethel M. Rogers, *and we were paid the \$5,000.00 which then remained due on the note by Augusta B. Parsonnet releasing to us*

the \$5,000.00 certificate of deposit belonging to her.”

The conclusion from the foregoing is inevitable, that the bank held as collateral security for this note of \$6,500, this certificate of deposit for \$5,000, and that the bank was paid the said \$5,000 by the application of this \$5,000 certificate. We mention this, because we think that the Supreme Court obviously overlooked this portion of the affidavit. Every fact stated therein, clearly jibes with the appellant's contention. We shall advert to this at a later point in this brief.

Finally, we have the affidavit of Augusta B. Parsonnet (Case, p. 16). We quote certain important parts thereof:

“The note in suit was given to the Union National Bank in Newark, N. J., to renew a larger note which they had previously discounted, likewise made by the defendant.

“On February 25th, 1930, this note fell due and was not paid. At that time I had the Union National Bank hold as security for my endorsement a certificate of deposit of the value of \$5,000.00 which belonged to me.”

At page 17, we find the following statement:

“I at no time agreed to use my certificate of deposit to pay off this note, nor did I ever agree that Mr. Kramer, the defendant, would upon the payment of \$1,250.00 on the principal of the note be released from it.”

The three affidavits were submitted by counsel for appellant in support of the motion to strike. Kramer, the appellant, merely sub-

mitted one affidavit. It will be observed that in his answer, the defendant denied:

(1) That the plaintiff is the owner and holder of the note;

(2) That there was anything due thereon either to the plaintiff or to any other person.

And further alleged that there was an express agreement that the note of \$6,500 would be cancelled upon the payment of the sum of \$1,500 *and the proceeds in the possession of the bank in the sum of \$5,000.00.*

In the supporting affidavit, Kramer swears to the following:

(1) That he is not indebted in any amount on the note, the same having been fully paid and satisfied;

(2) That the note was a renewal note of one originally for \$17,500, reduced by payments;

(3) That there was given as security a certificate of deposit in the sum of \$7,500;

(4) This certificate of deposit was ^{reduced} ~~refused~~ to a certificate of deposit in the sum of \$5,000;

(5) There was an understanding that when the note of \$17,500 was reduced to \$5,000, the certificate of deposit would be applied and used in payment thereof;

(6) And the said note cancelled and returned to Kramer;

(7) The consideration for the same being the extension of credit to Nat Fruchtman and Thomas Parsonnet, through the Kramer Lum-

ber Corporation, the details of which appear on case, page 19;

(8) That an agreement existed between Nat Fruchtman, Thomas Parsonnet and Augusta B. Parsonnet, concerning the application of the said \$5,000 certificate;

(9) That the said Ethel M. Rogers, the plaintiff, took subject to the rights existing between the parties thereto;

(11) That at the time Ethel M. Rogers acquired the note:

(a) There was nothing due thereon;

(b) The obligation had been in fact paid in accordance with the terms of the agreement made between all of the parties to the note.

It is inconceivable to us, how, in the face of the answer filed and the supporting affidavit, that the Supreme Court was justified in assuming that no question of fact existed for a jury. These facts are admitted in all of the affidavits:

(1) That the certificate of deposit of \$5,000 was given as collateral security for this note made by Kramer;

(2) That it was in fact paid by Augusta B. Parsonnet to the bank.

With these facts conceded, we are not at all concerned with the reason which prompted the payment of this certificate of deposit for \$5,000 to the bank. Kramer on one hand, states in his answer, and swears in his affidavit that the payment was in fact made in pursuance of an agreement that when the note reached \$5,000, the certificate of deposit was to be applied in payment

of this obligation. He swears that this arrangement was made between Mrs. Parsonnet and the other parties to the note. It is our view and our claim, that when this collateral was put up to support this note, that any arrangement between the parties would legally govern the situation, and that for all intents and purposes, such collateral would not be properly released without the consent and approval of each of the parties to the note. Kramer had the right to assume, in the face of the agreement which he says existed, in his answer and in his affidavit, that the note would be paid by the application of this certificate. Mrs. Parsonnet was legally precluded from exercising dominion and control over said certificate of deposit once it was given as security, pursuant to the arrangement. The mere fact that this bank did apply said certificate of deposit in payment of this obligation, would of legal necessity create the presumption that it was paid in pursuance of the agreement. Collateral security, it is respectfully submitted, must always be applied in payment of the obligation which it supports.

Augusta Parsonnet gave a certificate of deposit in the amount of \$5,000 to the bank as collateral security for the note on which her name appeared as endorser. Her sole purpose and object in doing this was to conform to the agreement entered into between herself and the other parties and Hyman Kramer, and she was to apply this certificate of deposit towards cancelling the note of \$6,500 signed by Hyman Kramer as maker when it reached the balance of \$5,000. Hyman Kramer in his affidavit swears that such was the agreement and she

was one of the parties to it. How could she therefore, apply it for some other purpose? There is no question that the one and only thing to be done with the certificate was to apply it to wipe out the obligation on the note of Hyman Kramer. When Augusta Parsonnet therefore, used it to pay off an obligation of Ethel M. Rogers, she completely departed from the terms of the agreement.

In the answer and affidavit submitted on behalf of Hyman Kramer, we find a clear and positive denial of liability on the note. An agreement is plainly set forth whereby all the parties were agreed as to the arrangements for settling the liability on this note. The affidavit of Kramer speaks for itself and in every detail answers the opposing affidavits. As far as the motion was concerned, it raised a pure question of fact for the determination of a jury, thereby totally destroying the conclusion that the answer was sham and therefore subject to a motion to strike the complaint.

We now concern ourselves with the legal angle of this case. The grounds of appeal (Case, p. 28) will be discussed as a unit inasmuch as they involve related questions of law.

Law.

It is admitted on behalf of the plaintiff, that the plaintiff took the note after the maturity date thereof. The question therefore for our consideration is, what legal status does the plaintiff occupy?

In the case of *Baxter v. Little* (Mass.), 6 Misc.

9, we find the following opinion which concerns itself with the rights of a holder after maturity.

“The endorsee of a note overdue takes a legal title; but he takes it with notice on its face that it is discredited, and therefore subject to all payments and offsets in the nature of payment. The ground is that by this fact he is put upon inquiry, and therefore he shall be bound by all existing facts of which inquiry and true information would apprise him.”

Assuming but not admitting (because the defense denies it) that Ethel M. Rogers became the holder of said note, she did so after the date of maturity, and therefore, according to the rule of law enunciated in the above case, took it subject to any and all defenses existing against such note. Unlike a holder in due course as defined in Section 55 of the Negotiable Instruments Law (Compiled Statutes of New Jersey, p. 3471) the plaintiff did not take an instrument free from existing defenses.

In the case of *McCormack v. Williams*, 88 N. J. L. 170, we find a situation very much resembling that in the case at bar. At page 173, Chancellor Walker, speaking for the Court of Errors and Appeals, said:

“At maturity promissory notes become subject to certain defenses which previously did not exist, and in section 28 of our Negotiable Instrument Act, it is expressly provided that the absence or failure of consideration shall be a matter of defense as against any person not a holder in due course, that is, not a holder before maturity without notice of any invalidity in the instruments. This defense does not speak for itself, it has to be

interposed and proved. In our opinion the trial judge should have submitted the issue in this case to the jury for their determination and, because he directed a verdict for the defendant he erred."

In our opinion the case of *Beneficial Loan Association v. Hellery*, 95 N. J. L. 271, decided by the Supreme Court, is of considerable weight in the determination of this case because it so closely resembles the case at bar. At page 275, Chief Justice Gummere said:

"The holder of a promissory note which comes into his hands after maturity takes it subject to all legal defenses which the maker may have against its enforcement."

To counsel for the appellant the above case seems to be a complete answer to the case at bar.

We call the Court's attention to a few other cases decided in this State. The case of *Cumberland Bank v. Hann*, 18 N. J. L. 222, decided that where a note, check or bill is transferred after maturity, the transferee takes it subject to all the defenses that are available as between the original parties. The case of *Little v. Cooper*, 11 N. J. Eq. 224, decided that a transferee of a promissory note after maturity takes it subject to all the equities existing between the drawer or endorser and the holder at the date of maturity. And in the case of *Tillow v. Britton*, 9 N. J. L. 126, it was held that one taking a note after maturity and dishonor, is chargeable with knowledge of equities existing in favor of the maker.

The plaintiff came into possession of the

note in question after the date of its maturity. By so doing she clearly subjected whatever rights she might have acquired to all the defenses existing against the note. The defense to this note being the agreement to which we have referred in detail and whereby the obligation of the defendant on the note was cancelled, the plaintiff therefore took subject to said agreement. At least, and that is our main contention, the defendant has the right to prove to a jury the agreement he sets forth which goes towards the cancellation of his original obligation on said note. The question of fact to be determined is thereby very apparent, from the pleadings, and the defendant was denied his right to prove his meritorious defense.

In concluding this brief, we wish to say a few words on what constitutes a sham answer. In the case of *Milberg v. Keuthe*, 98 N. J. L. 779, Trenchard, J., speaking for the Court of Errors and Appeals said:

“A sham answer is one good on its face, but false in fact; a frivolous answer is one which on its face sets up no defense, although it may be true in fact. A frivolous answer is always assumed to be true, while a sham answer must be admittedly false or conclusively proved to be so; the character of the former is determined by mere inspection; while that of the latter is usually determined by proof *aliunde*.”

According to the above definition of a sham answer we are forced to the conclusion that on the pleadings, as supplemented by the affidavits, the answer of the defendant could not in the least be deemed sham.

We refer also to the case of *Birkenfeld v. Ginsburg*, 7 Adv. Rep. 745. That case, too, was a motion to strike out the answer on the ground that it was sham and also for summary judgment. Justice Trenchard, speaking for the Court of Errors and Appeals, said:

“This is an appeal by the defendant below from a summary judgment entered in the Essex County Circuit Court in favor of the plaintiff.” * * *

“The answer denied each paragraph of both counts of the complaint in such a manner as to amount to a denial of all the allegations set out in it.” * * *

“Upon further affidavits filed by both plaintiff and defendant, the answer was stricken out and summary judgment entered.

“Now Supreme Court Rules 80 and 81 (Revision of 1926), upon which the application for striking out the answer and for summary judgment was based, reads thus:

“80. When an answer is filed in an action brought to recover a debt or liquidated demand arising—

“(a) Upon contract express or implied, sealed or not sealed; or

“(b) Upon a judgment for a stated sum; or,

“(c) Upon a statute;

the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.”

“81. The motion to strike out shall be

made upon affidavit of the plaintiff or that of any other person cognizant of the facts, verifying the cause of action, and stating the amount claimed and his belief that there is no defense in the action."

"Under these rules plaintiff is entitled to a summary judgment upon presenting an affidavit complying with Rule 81, *unless the defendant by affidavit or other proofs shows such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend; but if upon review of such a final judgment, as permitted by Section 15 of the Practice Act of 1912 (Pamph. L., p. 380), it be found by the appellate court that the facts set out in the defendant's affidavit, presented in support of his answer, fully and completely deny and controvert essential allegations of the plaintiff's complaint and affidavit upon which his cause of action depends, the judgment will be reversed.*" * * *

"We find that the facts set out in the defendant's affidavit fully and completely deny and controvert essential allegations of the plaintiff's complaint and affidavits upon which his cause of action depends.

"Thus defendant's affidavit contains a full and complete denial of essential allegations contained in the first count of the complaint and in the plaintiff's affidavits in support thereof. It denies that the lease between the defendant and the Mileage Gas Corporation was approved in substitution of the one of the Warner-Quinlan Company, and accepted by the defendant as a full performance by the plaintiff of his employment. It further denies the allegation in plaintiff's affidavit of admission of liability. It sets forth defendant's version of the facts relating to the transaction in such manner

as to require the submission of the defendant's liability on the first count to a jury.

"Likewise defendant's affidavit contains a full and complete denial of essential allegations contained in the second count of the complaint and in plaintiff's affidavits in support thereof. It denies the employment of Messrs. Kessler & Kessler by the defendant, and avers that such services as they performed were performed for some other person. It denies the admissions of liability charged in plaintiff's affidavit. These denials likewise require the submission to a jury the question of the defendant's liability on the second count.

"In order that the case may be submitted to a jury the order striking out the answer will be vacated, the summary judgment reversed, and the cause remitted to the Court below to be proceeded with according to law."

The above case in every way bears out the contention of counsel for the defendant that the answer of the defendant is not sham. To our view the above case is decisive of the question in the case at bar.

In conclusion, counsel for the appellant respectfully urges to this Honorable Court that the answer filed by the defendant was not sham and legally necessitated the submission of the questions of fact presented to the jury.

Wherefore, it is respectfully submitted that the judgment of the Supreme Court may be reversed, the answer which was struck out reinstated, and the matter proceeded with in the Court below in accordance with law.

MINTURN & WEINBERGER,
of counsel with
 Attorneys, of Defendant-Appellant.

The first part of the report is devoted to a general survey of the situation in the country. It is followed by a detailed account of the work done during the year. The report concludes with a summary of the results and a list of the names of the members of the committee.

The committee has the honor to acknowledge the assistance rendered by the various departments of the Government and the private institutions. It is also indebted to the members of the committee for their valuable suggestions and criticisms.

The committee is composed of the following members:

Chairman: _____
 Members: _____
 Secretary: _____

The committee is pleased to have the honor to present this report to the public. It is confident that the results of its work will be found to be of great value to the country.

 Secretary

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ETHEL M. ROGERS, <i>Plaintiff-Appellee,</i> <i>vs.</i> HYMAN KRAMER, <i>Defendant-Appellant.</i>	}	<i>On Appeal from Supreme Court.</i>
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BRIEF ON BEHALF OF PLAINTIFF-APPELLEE.

This is an appeal from a summary judgment entered in the Supreme Court upon an order made by Chief Justice Gummere. A copy of the Order appears in the State of Case on page 27.

Facts.

The suit is based upon a promissory note made by the defendant on November 25, 1929 and payable to the order of Thomas Parsonnet and Nat Fruchtman for Sixty Five Hundred (\$6500.00) Dollars with interest and payable three months after its date.

The complaint alleged the making of the note, and further, that prior to the maturity of the note the payees endorsed it for valuable consideration to the Union National Bank in Newark, New Jersey (the name of which bank had been changed from Labor National Bank).

The complaint also alleged that thereupon the said Bank became the holder of said note before maturity in due course for valuable consideration and that when the note became due it was not paid; but after maturity Fifteen Hundred (\$1500.00) Dollars was paid on account of the

principal of said note by the defendant; and that after maturity of said note said Union National Bank in Newark transferred the note to the plaintiff who alleged herself to be the holder thereof.

To this complaint an answer was filed. A copy of the answer appears on pages 7 to 9 in the State of Case.

Upon the filing of the answer the plaintiff moved, under Rules 80 and 81 of the Supreme Court, to strike out the answer as sham and/or frivolous and for the entry of summary judgment. This motion was supported by the affidavits of Ethel M. Rogers, the plaintiff, as well as by affidavits of Mr. William Dunkel, the cashier of the Union National Bank in Newark, and of Augusta Parsonnet who was an endorser on the note. These affidavits appear on pages 11-17 of the State of Case.

Defendant presented on the argument of the motion an affidavit made by himself, which appears on pages 18-20 of the said State of Case.

After hearing the attorneys for the parties and considering the affidavits submitted, his Honor, the Chief Justice, made the Order upon which this appeal rests, striking the answer as sham and directing summary judgment to be entered in favor of the plaintiff for the amount of the note with interest.

The following undisputed facts appear from the affidavits and pleading:

The defendant made the note in suit.

The note in suit was given to renew a note in a larger amount which had previously been made by the defendant and had been discounted at the Union National Bank.

The said bank was a holder in due course of said note having acquired the same for full value before maturity (this is also admitted by the answer).

At the time the note in suit matured the said bank held a \$5,000.00 certificate of deposit belonging to Augusta Parsonnet which certificate was held to secure the bank for the endorsement of Augusta Parsonnet.

The defense raised by the answer as well as by the affidavit of the defendant, briefly stated, is that after the maturity of this note there was an agreement made, by the terms of which it was agreed that when the note in suit would be reduced to \$5,000.00, that then the proceeds of the certificate of deposit would be applied to pay off the note. This defense is set up in the answer as the second separate defense.

The answer alleges that this agreement was made between the Labor National Bank of Newark, Thomas Parsonnet and Nat Fruchtman. The affidavit of the defendant says this agreement was made between the defendant, Thomas Parsonnet, Nat Fruchtman and Augusta Parsonnet, the owner of the collateral, ~~could not be binding~~. In his affidavit, however, the defendant changes the story as to who were the parties to this agreement and says that Thomas Parsonnet, Nat Fruchtman and Augusta Parsonnet and the defendant were parties to the agreement but he does not verify, under oath, that part of his answer which alleges that the Labor National Bank of Newark was a party to this agreement.

While it may be true that if the Bank (which at the time the agreement is alleged to have been made was the holder of the note) was a party to the agreement which the defendant alleges that would be a good defense, which point it is not necessary to decide in this case; yet the proofs

which were submitted to the Supreme Court failed to show that this Bank was a party to that agreement. So that the case resolves itself, upon the defendant's affidavit to this, unquestionably, the Bank was at the time this agreement was alleged to have been made, the holder of the note; and at that time, while this Bank was the holder of the note, the defendant made an agreement with the payees of the note and the accommodation endorser that collateral deposited by the accommodation endorser with the Bank should be used to discharge the note.

This agreement was not made, according to the proofs of the defendant, with the holder of the note who likewise held the collateral. In fact, no proof was offered, or suggestion made that either the Bank, or the plaintiff, had any knowledge of the agreement which the defendant relies on, except that the answer alleged that the Bank was a party to the agreement. The affidavit of the officer of the Bank denied this, and the defendant's affidavit did not show that the Bank was a party to the agreement or even knew it was made; and therefore, that part of the answer was clearly sham.

The affidavits on behalf of the complainant show without any contradiction in the proofs that after the note fell due and on December 29, 1930, the Bank transferred the note in suit to the plaintiff and that there was at that time due on the note \$5,000.00 with interest from November 25, 1929; and that the Bank received in consideration for this transfer the release of the \$5,000.00 certificate of deposit which had belonged to Augusta Parsonnet. It also appears from the proofs in this suit and is uncontradicted by any proof in the case that Augusta Parsonnet had been indebted to the plaintiff in the sum of \$5,-

000.00 and had intended using the money represented by this certificate of deposit to pay the plaintiff and that when the defendant failed to pay the note and thereby it became impossible for Augusta Parsonnet to obtain the money represented by the certificate of deposit with which to pay the plaintiff, the certificate was released to the Bank and in consideration of that release the Bank transferred the note to the plaintiff; the note was never paid, the Bank received consideration for the transfer of the note to Mrs. Rogers. See affidavit of William Dunkel, State of Case, page 14.

It therefore clearly appears from the proven facts in this case that the plaintiff was the owner and holder of the note in suit; that she acquired said note after maturity from a holder who was a holder in due course for full value prior to maturity; and that neither the plaintiff nor the Union National Bank had any knowledge or reason to know of the existence of the alleged agreement nor was either of them a party to this alleged agreement.

LAW.

The law which should govern the rights of the plaintiff under the facts developed in the case are found in the decisions and statutes.

The statute law applicable are Sections 57, 58 and 59 of the Negotiable Instruments Act of 1902, 3 Comp. Stat., pages 3741-3742 and are as follows:

“57. HOLDER IN DUE COURSE MAY ENFORCE PAYMENT—A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce pay-

ment of the instrument for the full amount thereof against all parties liable thereon (P. L. 1902, p. 593).

58. DEFENSES AGAINST HOLDER NOT IN DUE COURSE—TITLE THROUGH HOLDER IN DUE COURSE—

In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable; *but a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter* (P. L. 1902, p. 593).

59. HOLDER IN DUE COURSE; PRESUMPTIONS AND BURDEN OF PROOF.

Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims, acquired the title as a holder in due course; but the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title (P. L. 1902, p. 594)."

In 8 Corpus Juris, page 466, it is laid down as follows:

"D. PURCHASERS FROM BONA FIDE HOLDERS. The rule as to who is a bona fide holder is subject to an exception where the holder takes from a bona fide holder, in which case he occupies the same position as his transferor, notwithstanding the subsequent holder has actual notice of defenses, was a purchaser after maturity, or is not a purchaser for value. * * * THE NEGOTIABLE INSTRUMENTS LAW expressly provides that a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality

affecting the instrument, has all the rights of such former holder in respect of all parties prior to the later. * * *”

This text is supported by a wealth of authority.

In 3 R. C. L. under the title of Bills and Notes, page 1036, this same rule is laid down.

In the case of *Marion County v. Clark*, 94 U. S. 278, the U. S. Court held:

“If an intermediate holder between the plaintiff and defendant took the note under such circumstances as will entitle him to recover against the defendant, the plaintiff will have the same right even though he may have purchased when the note was overdue or with knowledge of its infirmity as between the original parties.”

Montclair v. Ramsdell, 107 U. S. p. 147, opinion by Mr. Justice Harlan.

This was a suit upon certain negotiable bonds and coupons issued by the Township of Montclair, in Essex County, New Jersey.

At the trial the court was asked to give, and refused, the following charge: “If the evidence satisfies the jury that there were circumstances of fraud or illegality in the inception of the bonds, or in the circumstances under which they were issued and disposed of by the commissioners, then the plaintiff cannot recover on the bonds without some proof that he purchased them for value or gave some consideration for them.”

In disposing of the refusal of the trial court to charge as requested, the court said (on p. 159):

“Without entering upon a critical examination of the authorities upon this important subject of commercial law and assuming for the purposes of this case merely that the proof, of the exclusion of which the Township complains, was competent evidence for some

purposes under the plea of *non est factum*, we are of the opinion that the instruction in question ought to have been refused, its rejection was proper, for the reason if for no other, that it required the jury, if they believed either fraud or illegality in the inception of the bonds to have been established, to find for the Township, unless the plaintiff proved that he purchased for value or gave some consideration for them. Such is not the law; for, if any previous holder of the bonds in suit was a bona fide holder for value, the plaintiff, without showing that he had himself paid value, could avail himself of the position of such previous holder. In Byles on Bills, 119, 124, it is correctly said that: 'If any intermediate holder between the defendant and the plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title.' In *Hunter v. Wilson*, 19 L. J. N. S. Ex. 8, the plea was that the bill of exchange was drawn by a named person, at the request and for the accommodation of the defendant, without any consideration or value whatever, and that it was endorsed by that person without any consideration or value given by the plaintiff for such endorsement either to the defendant or to said person, or to any other person whatsoever. It was held that the plea ought to have contained a statement equivalent to an allegation that none of the previous parties to the bill had given value for the endorsement. One of the Judges remarked that 'some party to the bill may have given value for it, so as to vest a valid title in the plaintiff. We cannot tell through how many hands it may have passed.' It is not necessary in this case to hold that the plea in such a case should aver that no previous holder of a negotiable security paid value. But the case last cited is authority for the proposition that the plaintiff may be protected by showing that some previous holder paid value."

The court also quoted the following language of Mr. Justice Strong in the case of *Commissioner v. Bolles*, 94 U. S. p. 104:

“But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any illegality or fraud in their issue.” The court proceeded: “And still more: the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, as the work had been completed. There is no pretence that he had notice of anything that should have made him doubt their validity. Why was he not a bona fide purchaser for value? The law is undoubtedly, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.”

And in the case of *Montclair v. Ramsdell*, *supra*, the court held that if there were illegality in the inception of the bonds a defense upon that ground would not have been good against the plaintiff because the plaintiff in virtue of a new and independent title derived from or traced to a prior bona fide holder for value, could stand upon the rights of such holder.

In the case of *Northampton National Bank v. Kidder*, 106 N. Y. 221 the court held that after maturity a purchaser for value is not a bona fide purchaser *unless* he succeeds to the rights of such a holder who became such before maturity.

In *Roberts v. Lane*, 64 Maine at page 111 the court says:

“But it is equally well settled that if any intermediate holder between the plaintiff and defendant took the note under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right even though he may have purchased when the note was overdue or with a knowledge of its infirmity as between the original parties.”

In the case of *Symonds v. Riley*, 188 Mass. 470, checks given under an arrangement for the exchange of certain checks and notes and one Gorman deposited the checks with the National Bank of Salem and drew against them. When the checks became due they were protested for non-payment. The checks came into the hands of the plaintiff who was the cashier of that bank. The defendant claimed that he was not liable because of equities existing between the defendant and the real payee (there was a nominal payee). The court held that these checks were negotiable instruments and that while it might be that the defense could have been pleaded against the payee, yet the bank had taken these checks in good faith before they were overdue and had paid full value for them and that the checks, being unaffected in the hands of the bank by the equities if any, alleged by the defendant, were unaffected by such equities in the hands of the plaintiff and that the plaintiff had taken such title as the bank had, saying:

“If the bank had a perfect title, as it did, he took the same title and became invested with all the rights of the bank. *Thompson v. Shepherd*, 12 Met. 311. *Bank of Sonoma County v. Gove*, 63 Cal. 355. *Howell v. Crane*, 12 La. An. 126. *Wilson v. Mechanics Savings Bank*, 45 Penn. St. 488, 494. There is

nothing to show that he had notice when the checks were transferred to him of any alleged equities or defenses on the part of the defendant. But even if he had had such notice it would not have availed the defendant. *Thompson v. Shepherd, supra, Peabody v. Rees, 18 Iowa, 571.*”

In Bigelow on the Law of Bills and Notes and Cheques (Second Edition), page 256, it is laid down:

“Generally an endorsee may recover in the face of equities known to him when he took the paper, and further though he took it without valuable consideration, if between him and the defendant there is some one who was a bona fide holder for value, and the endorsee was not himself a party to any fraud or illegality affecting the instrument. The defendant would be liable to such prior holder, and the plaintiff only stands in his place.”

DeJonge Co. v. Woodport Hotel & Land Co., 77 N. J. Law, page 233. In this case Mr. Chief Justice Gummere, speaking for the Supreme Court discusses section 59 of the Negotiable Instruments Act and he said at page 235:

“By force of Section 59 of the Negotiable Instruments Act (Pamph. L. 1902, p. 594) every holder of a promissory note is deemed prima facie to be a holder in due course, i. e., among other things that he took the note in good faith, and for value, without notice of any infirmity in the instrument or defect in the title of the person negotiating it, but that section further provides that when it is shown that the title of the person who has negotiated the instrument was defective the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course.”

In the case of *Rosinoff v. Altshul*, 99 N. J. Law, page 519, this court held that the holder of a promissory note which had been assigned to him after maturity had no better title than that of his assignor. The inference clearly being, and the case having been decided upon the theory that the assignee who took the note after maturity had the same rights as his assignor.

The case at bar is in many respects similar to the case of *Irvington Trust Company v. Maurer*, 8 N. J. Misc. 565. In that case the maker of the note was sued by the holder to whom it had been negotiated. The maker claimed that he has signed this note personally when, in fact, he intended to execute it as an officer of a corporation and that not only the payee knew this but that the holder of the note should have known it. These contentions were dismissed by the court and in the opinion it was said:

“The most that is urged is that Helene Weiss, the payee, in the note, took it with knowledge that the appellant had made an error in signing it personally when, in fact, as he asserts, he should have executed it as an officer of the Newark Lamp Works, Inc. If this be so and constitutes such bad faith on the part of Helene Weiss as to amount to fraud, a question we pass by, it is entirely impossible to spell out of any of the proofs in the case, actual knowledge or knowledge of such facts as make for bad faith of the appellee.”

Another ground of appeal in that case was that Helene Weiss discharged the note and paid the note and therefore there was no liability as between the appellant and trust company appellee. This ground of appeal was based on the assumption and assertion of the appellant that Helene Weiss had a certain line of credit with the Trust Company, secured, collaterally, by said security

which she had deposited with it and that therefore the Trust Company either did or should have charged against her accounts or collected from her through such collateral security the note in suit when it fell due and therefore the bank should not look to appellant for payment of the note. The court stated the proposition and said "to state the proposition is to dismiss it for lack of legal support."

A great deal of space is devoted in the appellant's brief to a discussion of what constitutes a sham plea. It is in this connection, important, we think, to quote the language of Mr. Justice Campbell speaking for this court in the case of *Wittemann v. Giele*, 99 N. J. L. page 478, where he said:

"The defendants' appeal and their contention is that the Supreme Court erred in ordering that the answer be stricken out and summary judgment entered because the questions involved, being questions of fact, the defendants were entitled to have them submitted to and passed upon by the jury. The complete answer, making defendants' contention untenable, is to be found in the opinion of this court in *Eisele & King v. Raphaele*, 90 N. J. L. 219.

"The finding of the Judge making the order to strike out must be assumed to be true until the contrary appears.

"The contrary does not appear in this case and findings must therefore be taken as correct."

In this connection the case shows that on the motion to strike out the answer and enter summary judgment the only part of the answer that the defendant attempted to substantiate was the second separate defense and that set up an agreement in very hazy form both in the answer and in the affidavit. However, the answer stated that

this agreement had been made between the defendant, the holder of the note and the payees. The affidavit however, did not attempt to show that the Labor National Bank the holder, was a party to this agreement and therefore that defense was sham because the important element of the agreement, if the agreement could be considered as a bar, would be that this bank was a party to it. There was, therefore, no question of fact before the Chief Justice and that answer was sham and under the well settled rules as laid down in the cases typified by *Eisele & King v. Raphaelle, supra*, and *Wittmann v. Giele, supra*, the court was faced with the duty of striking the answer and entering summary judgment.

ARGUMENT.

On page 8 of the appellant's brief the assertion is made that collateral security must always be applied in payment of the obligation which it supports. No authority is cited for this statement and we know of no such rule; especially is this not so in the case where an endorser of a note deposits collateral with the holder to secure his endorsement.

In the last paragraph on page 8 of appellant's brief, it is said that the sole purpose of Augusta Parsonnet in giving the certificate of deposit of \$5,000.00 to the bank was to conform to the agreement alleged to have been entered into between herself, the payees of the note and Kramer and it is said that there is no question that the only thing to be done with the certificate was to apply it to wipe out the obligation on the defendant's note and that when Augusta Parsonnet used it to pay off an obligation of Ethel M. Rogers, she completely departed from the terms of the agreement.

In the first place, we desire to point out that the affidavit of Augusta Parsonnet is very clear and explicit; that she never made any such agreement and while the fact of the making of such agreement is in dispute yet it is not disputed that the collateral was never used to pay off the note, in fact the concluding sentence of the paragraph referred to on page 9 of appellant's brief shows this for they say:

“When Augusta Parsonnet therefore used it to pay off an obligation of Ethel M. Rogers, she clearly departed from the terms of the agreement.”

And while it may be that the appellant, if this agreement was in fact made, has a good claim against Augusta Parsonnet, that is no defense to the plaintiff's suit and in this connection we think the language of the Supreme Court in the case of *Tillon v. Britton*, 9 N. J. L. 125 at page 134 is very apt.

“I place my opinion on another ground, that if a man promised to pay a note without defalcation or discount and there happened to be any failure of consideration between the maker of the note and the person to whom it is made, or any subsequent equities arise between them they must adjust those matters in a separate action between themselves without involving the endorsee in their disputes even if he knew that disputes existed at the time he received the endorsement.”

Again referring to this paragraph in appellant's brief, it is said that the sole purpose and object of giving the \$5,000.00 certificate of deposit by Augusta Parsonnet was to conform to the agreement alleged. The defendant's affidavit contradicts this statement because in the defendant's affidavit he says, page 18: “There was given as security a certificate of deposit in the sum of

\$7,500.00. Thereafter this certificate of deposit was reduced to a certificate of deposit in the sum of \$5,000.00 with the understanding that when this note of \$17,500.00 was reduced to \$5,000.00, the said certificate of deposit would be applied and used in payment thereof, the note cancelled and returned to the said defendant, the consideration therefor. * * *'' So that it appears from the defendant's affidavit that this certificate of deposit was deposited with the bank before the alleged agreement is supposed to have been made and the statement in the brief therefore finds no support in the proofs.

On page 9 of the brief it is said:

“An agreement is plainly set forth whereby all the parties were agreed as to the arrangements for settling the liability on this note. The affidavit of Kramer speaks for itself and in every detail answers the opposing affidavit.”

We submit that the affidavit of Kramer alleges an agreement made without the concurrence or knowledge of *the essential* parties, namely, the holder of the note; and this agreement could not in any way be binding upon or effect the bank which held the note at the time the agreement was made nor does this affidavit as to the agreement support the answer because the answer says that the bank was a party to the alleged agreement, the affidavit does not. The answer does not say that Augusta Parsonnet was a party to the agreement although the affidavit does.

On page 11 of appellant's brief it is asserted that the Supreme Court held in the case of *Tillon v. Britton*, 9 N. J. L. 126, that on taking a note after maturity and dishonor, is chargeable with knowledge of equities in favor of the maker. In this connection we draw attention to the fact

that in that case there was not present the question of a holder who acquired title after maturity but through a holder in due course. Moreover, the decision in that case was that even though there was a defense to the note, as between the parties, it would not be available against the endorsee, even if the endorsee took title after maturity. On page 130 the court said:

“Accordingly, in the case of *Coryell v. Croxall*, 2 South. 764, this court decided that no discount could be set up against the endorsee of a note so drawn; though he took it after it was overdue, and had become dishonored. In that case the court ordered the plea and notice of set-off to be stricken out; and the same must therefore be done here as far as respects the set-off.”

Further on in the opinion the court again referred to the case of *Coryell v. Croxall*, *supra*, on page 133, and said that Croxall made a note to LeGrand and afterwards furnished him with goods, and that he had a just and righteous set-off, but endorsed away the note *after it was overdue* to Coryell, and in that dishonored state it came to Coryell, “yet he recovered of Croxall, the maker, according to the face of the note.”

In this connection, it is likewise of interest to note, that the Negotiable Instrument Act of 1902 was not in force at the time that case was decided. To hold that anyone who acquires a negotiable instrument after maturity, even though it be through a holder in due course, is, by the very fact that the paper is overdue, charged with knowledge of equities which may exist between all the prior parties thereto, would be to nullify the language of the Negotiable Instrument Act, contained in sections 58 and 59, which give a holder through a holder in due course, the rights such holder in due course had, unless the holder

was himself a *party* to fraud or illegality affecting the instrument.

And with the Negotiable Instrument Act in mind, it is said by this court, in *Aldrich v. Peckham*, 74 Law page 711, at page 715:

“The correct rule, as tersely stated by Mr. Justice Dixon, in *Read v. Abbott*, 16 *Id.* (Vr.) 303, is: ‘Bad faith, not merely notice of suspicious circumstances, is necessary to defeat recovery.’”

See also *Rice v. Barrington*, 75 N. J. L. 806.

In the case at bar, there is no suggestion that there was any bad faith, or even notice of the agreement alleged on the part of the plaintiff or of its predecessor in title to the note, the Union National Bank.

Counsel for the appellant in their brief cite a number of cases in this State in the attempt to show that the plaintiff is not a holder in due course because she took the instrument after maturity and therefore took it subject to any and all defenses existing against the note. None of these cases have any application whatever to the case at bar because they all deal with instances where the holder who acquired the instrument after maturity did not acquire it through a holder in due course. We have quoted at considerable length in this brief from texts and cases to show the distinction between one who acquires a note after maturity and cannot trace his title through a holder in due course, and the case, on the other hand, of one who acquires a note after maturity but succeeds to the rights of a holder in due course.

Conclusion.

In conclusion, we respectfully submit and it clearly appears in this case and is undisputed that the Union National Bank, the plaintiff's predecessor in title, was a holder in due course; that the note in suit was transferred by the bank to the plaintiff without any knowledge by the plaintiff or by the bank of the alleged agreement to discharge the note; that the note was not paid but that the bank received payment for transferring the note; that the rights of the plaintiff being the holder through a holder in due course as laid down by the authorities and as defined by the Negotiable Instrument Act rise to whatever rights any holder to or through whom the plaintiff can trace her title, enjoyed.

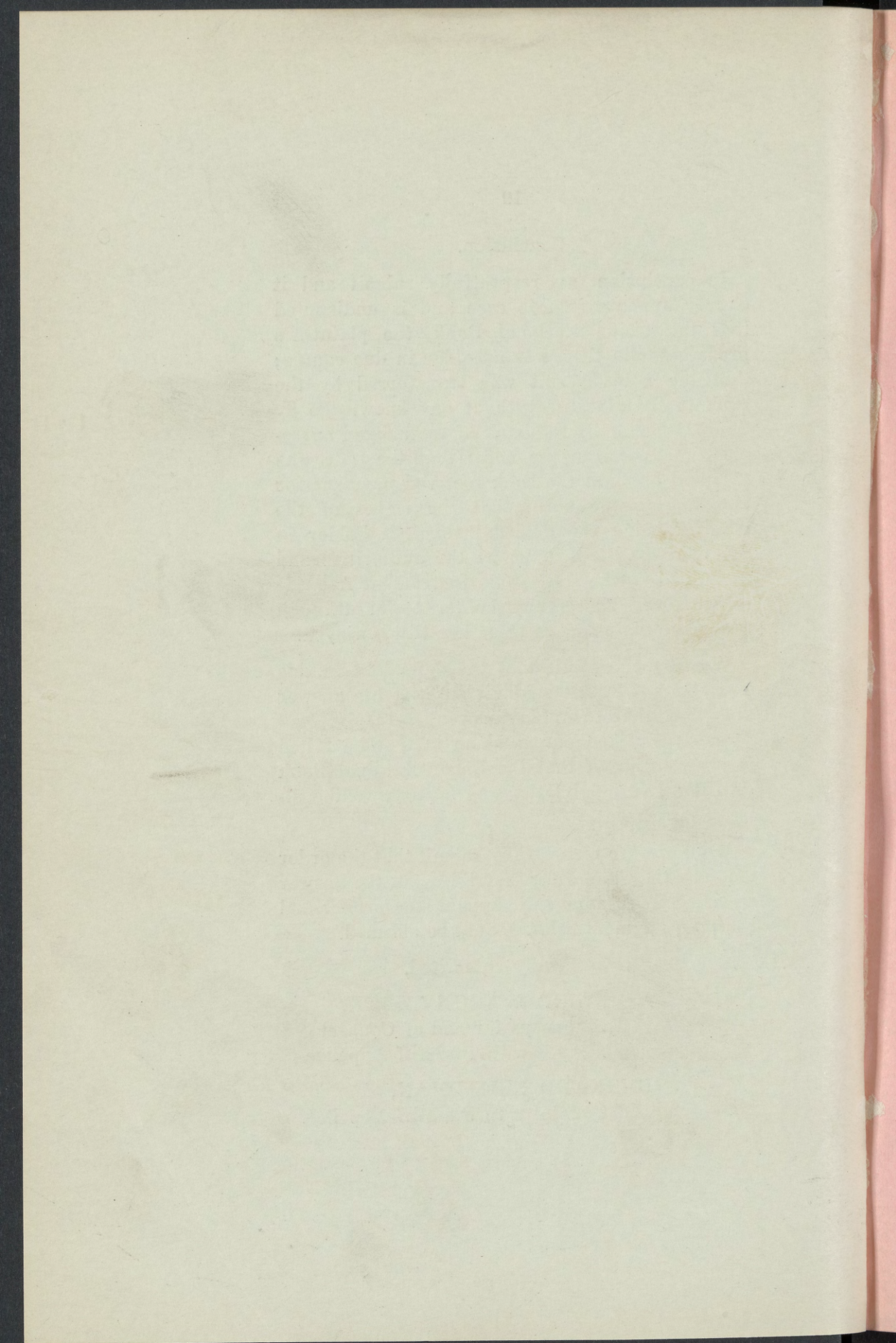
We further submit that the defendant in this case did not by his affidavit support his answer and that therefore his answer was false and properly stricken out as sham in that he failed to show by proof that the Labor National Bank or Union National Bank was a party to the alleged agreement.

We therefore respectfully submit that the order made by the Chief Justice striking out the answer and directing summary judgment was proper and that the judgment below should be affirmed.

Respectfully submitted,

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