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WITNESSES.

Plaintiff's:

EXHIBITS.

Plaintiff's:

New Jersey
Court of Errors and Appeals

Summons.

THE STATE OF NEW JERSEY, To WIGDOR KLEIN:
You are summoned to answer the annexed complaint of BENJAMIN POTOKER, Assignee of Harry Landskroner, in an action at law in the Essex County Circuit Court.

And Take Notice, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in his suit and judgment may be entered against you.

Witness, NELSON Y. DUNGAN, Judge of the Essex County Circuit Court, at Newark, this 18th day of November, Nineteen Hundred and Twenty-six.

JOHN H. SCOTT,
Clerk.

BENJAMIN M. WEINBERG,
Attorney.

Answer.

ESSEX COUNTY CIRCUIT COURT

BENJAMIN POTOKER, Assignee of Harry Landskroner, Plaintiff, vs. WIGDOR KLEIN, Defendant.	Action at Law.

ANSWER OF THE DEFENDANT, WIGDOR KLEIN.

The defendant answering the complaint filed by the plaintiff in the above entitled cause, says:

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 is denied.
5. Paragraph 5 is admitted.

JOHN W. McGEEHAN, JR.,
Attorney of Defendant.

Judgment.

ESSEX COUNTY CIRCUIT COURT

State of New Jersey, County of Essex. } ss:

41712

BENJAMIN POTOKER, Assignee of Harry Landskroner, Plaintiff, vs. WIGDOR KLEIN, Defendant.	Judgment against Plaintiff Benjamin Potoker, Assignee of Harry Landskroner. Damages Costs $76.60 Amount $76.60 Date when entered January 18, 1928. Plaintiff's Attorney Benjamin M. Weinberg.

State of New Jersey, County of Essex, Clerk's Office. } ss:

I certify that the foregoing is a correct abstract from the Circuit Judgment Record Book 1004, page 072, kept in Clerk's Office of a judgment rendered in the Circuit Court of Essex County.

In Witness Whereof, I have hereunto set my hand and Official seal this 12th day of March, A. D. 1928.

(Seal)

JOHN H. SCOTT.

Notice of Appeal.

ESSEX COUNTY CIRCUIT COURT

BENJAMIN POTOKER, Assignee of Harry Landskroner, Plaintiff, vs. WIGDOR KLEIN, Defendant.	Action at Law

To John W. McGeehan, Attorney of Defendant:

Take Notice, that the above plaintiff, Benjamin Potoker, Assignee of Harry Landskroner, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in the above entitled cause in the Essex County Circuit Court.

Dated, February 4th, 1928.

BENJAMIN M. WEINBERG,
Attorney for Plaintiff.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS

BENJAMIN POTOKER, Assignee of Harry Landskroner, Plaintiff-Appellant, vs. WIGDOR KLEIN, Defendant-Appellee.	Action at Law

The plaintiff-appellant, as and for his grounds of appeal from the judgment entered against him in the above cause, hereby specifies and assigns the following:

1. The Court erroneously directed the jury to bring in a verdict in the above said cause, in favor of the defendant, Wigdor Klein, and against the plaintiff, Benjamin Potoker, assignee of Harry Landskroner, when, as a matter of law, the said cause should have been submitted to the jury for its determination.

2. The judgment entered upon said verdict was erroneously entered as a result of the direction of a verdict as hereinabove stated.

Dated: February 4th, 1928.

BENJAMIN M. WEINBERG,
Attorney for Plaintiff-Appellant.

Testimony.

ESSEX COUNTY CIRCUIT COURT

BENJAMIN POTOKER, Assignee, etc., Plaintiff, vs. WIGDOR KLEIN and ELSIE LANDSKRONER, Defendants.	Action at Law.

January 17, 1928.

Before: HON. WORRALL F. MOUNTAIN, J., and a Jury.

For the plaintiff appears Benjamin M. Weinberg.

For the defendants appear John W. McGeehan, Jr.

(A jury is called and sworn.)

Mr. Weinberg opens for the plaintiff.

Mr. McGeehan opens for the defendants.

(Mr. McGeehan, in his opening to the jury, stated: "At the conclusion of that hearing, Judge Porter—")

Mr. Weinberg: I object to anything that happened in the Court of Common Pleas, other than the mere appointment of the assignee. The answer in this case admits the appointment of the

assignee and the giving of the money and sets up not a solitary defense. I cannot see where there is any relevancy or materiality or propriety in getting before a jury something that will probably not get before the jury in this case.

Mr. McGeehan: I think it goes to the jurisdiction of this court. We have admitted in the answer that an assignment was made, but that is made pursuant to a statute in this state which limits the parties and powers of that assignment and which was made pursuant to a decree on which there is a determination by this court in which it urged that this claim in this court was not true and if an affirmative defense is required I shall move to amend the answer, if that is required to be raised by an affirmative defense. I do not think it is. I think the plaintiff must show his right to recover pursuant to that assignment and show the proceedings in which it was obtained, and, therefore, it enters into the case.

The Court: Certainly, in one case I think that will be necessary, but I am wondering how a husband can sue his wife.

Mr. Weinberg: An officer of the court is suing on behalf of the creditors. Mr. McGeehan is now outlining what occurs to me immediately as a defense of *res adjudicata,* which is a matter of fact and law and must be pleaded. It cannot be set up in a general issue. I am not prepared to go into a defense of *res adjudicata.* If it is raised, I shall give notice of motion to strike it out.

The Court: It sounds to me as though you better not say what Judge Porter said.

Mr. McGeehan: May I say this without stating the decision? This appointment is made pursuant

to an order of the Court of Common Pleas and that power is a part of the direct appointment of the assignee and the signature of the defendant to that is a certain adjudication of it and as part of the order itself so that this assignee would be permitted to proceed to something the court did not empower it by its decision to proceed with.

The Court: I think you can tell them about that.

Mr. McGeehan: That is all I intend to tell them.

The Court: There is no question, of course, but that the assignee has to show how he happens to bring the action and I have to know that under the law, who has a right to bring it.

Mr. Weinberg: That may be all right.

The Court: You may go ahead and I will let you say that.

(Mr. McGeehan continues with his opening.)

Mr. Weinberg: For the sake of the record I desire to take an objection to any opening on the part of defendants' counsel with respect to what might have constituted a defense along the line he stated, *i. e.,* a previous adjudication. I need not again repeat what I said, that the answer is limited to a denial of repayment. There is an admission of obtaining the money without consideration and under the law the burden of proving payment is cast upon the defendant. The defense of *res adjudicata* as outlined before the jury and has not been pleaded, and it is the plaintiff's contention, it being an officer of the court, empowered to bring an action for any money it may discover, whether testified to or not, that it cannot be barred by any such defense at this

time. If the defense wants to raise that question, first he ought to have an opportunity of formally determining that. I am not prepared to go into that. I know as a general thing that an action before it can be held *res adjudicata,* must be between the same parties and in the same capacity; this case is not *res adjudicata.*

The Court: You go ahead and prove the case.

Mr. Weinberg: I offer in evidence interrogatories and answers admitted by the plaintiff to be the defendants.

(Interrogatories and answers are marked Ex. P-1, 2, 3 and 4.)

(Ex. P-1, 2, 3 and 4 read to jury.)

Plaintiff rests.

Mr. McGeehan: I desire to move for a nonsuit, on the ground, first, the plaintiff has not sustained the burden of proving there existed at the time of the assignment a right of action possessed by the assignor. The proof particularly fails in respect to the indebtedness at that time as to the repayment or non-repayment of the money in question. This is not an action in equity or fraud; it is a suit at law to recover an alleged debt owing to Harry Landskroner. The best that can be said of the assignee's position is that he is in the same position Harry Landskroner would be in if he were suing on an allegation that money had been loaned to Wigdor Klein and Elsie Landskroner, and that that money had not been repaid. The payment of the money in any suit brought before your Honor, the payment of money is not

sufficient proof of the indebtedness existing in a direct suit by a party. You would have to prove, "Has that money been repaid?" It has not. You would have to prove that the loan, or an advancement took place, and also that it was not repaid or returned to the plaintiff in the case because that is the very basis of an indebtedness or right of action. In the case of a proceeding in Chancery, in equity, by a person to recover property alleged to have been fraudulently conveyed or where an equitable proposition applies, there may be a presumption of fraud as against the creditor where there is a conveyance of property without consideration; that would put upon the defendant the burden, but this is a suit at best by Harry Landskroner and his assignee being in no better position under the statute or under the law as he himself would be. In this case they prove that someone seven years before by the appointment of the assignee, that certain money was paid to the two defendants and that there was no consideration for that. They do not ask, "Was it ever repaid?" They do not prove it was never repaid, they do not prove it was an existing claim or paid at the time of the appointment of the assignee or at any time whatever, that being the case, I think the entire case of the plaintiff fails in that the burden of proof is upon the plaintiff to prove an existing right of action possessed by the assignor at the time the assignment was made to the assignee.

The second ground is that the assignee with respect to the suit of Elsie Landskroner—that the case presented shows that this court has no jurisdiction in it, on the face of it, it being a suit

by the husband through an assignee alleging a claim against a husband by his wife which can only be proceeded on in the Court of Chancery for an accounting.

(Argument.)

I think that is additional grounds for a nonsuit in the case of Elsie Landskroner. That is the suit of the assignee against Elsie Landskroner. In addition, the plaintiff has failed to prove an assignment that has vested in the plaintiff a right of action which is asserted in this suit. It is true that there is an allegation of the assignee of goods, chattels, rights and credits, and so forth by the Court of Common Pleas. That is an allegation, apparently, by court appointment, and both the plaintiff and defendants apparently misconceive how the appointment of an assignee is made. The plaintiff said that the assignee was appointed by the court and I admit it, but I think we both misconceive the manner.

(Argument.)

But in order for the plaintiff to show his standing and his right to come into this court and to recover for this particular claim I submit to your Honor that he must prove that he has a right to recover where there is a denial of that and he has not done so. That assignment, or the appointment might cover certain assignments and certain rights and credits not such as are involved in this case. The plaintiff does not say that he was appointed assignee of all the goods and chattels, rights and credits, moneys and so forth, including and specifying that which is sued upon

here. The plaintiff merely makes a general allegation that there was an assignment made of the goods and chattels, rights and moneys and effects of Harry Landskroner, the insolvent debtor. Now, specifying that he was an insolvent debtor and that he was an appointment by the court I think it is for him to show his right to recover for this by putting in evidence the assignment itself and the order of the court in which it was made in order to afford this court an opportunity to inspect them on their right to proceed, so that a motion for nonsuit would be based on the fact under which he proceeds. He has not done that and when the time comes if it be necessary, of course, the question of defense is a matter of *res adjudicata*.

The burden is upon the plaintiff to show that there is a subsisting debt at the time of the appointment of the assignee. That there was money due and owing at that time. Merely getting an admission that several years before there had been loaned to the defendant in this case some money without a question of whether it was repaid and without any proof that it was not repaid, I submit does not sustain the burden on the plaintiff of proving their case against these defendants. Even on a promissory note where there is a presumption of remuneration the plaintiff must prove there is the full amount still owing to him and in this case the assignee has failed to do that, and on that ground in the case against Elsie Landskroner, I submit that the assignee cannot sue in place of the husband.

(Argument.)

Mr. Weinberg: Then I will ask to reopen my case and put the defendants on now.

The Court: You want to open your case?

Mr. Weinberg: If there is any doubt, I will ask leave to reopen it and put on these defendants.

The Court: Is there any objection?

Mr. McGeehan: I do object, your Honor.

The Court: I do not know but that the situation somehow appeals to me as though the court was sitting here listening to a case in supplementary proceedings. If I rule the way you want me to it would appear as though I were not only putting bait on your hook, but catching the fish with the hook in addition. You come into court and are not quite sure whether you have a right to recover or not. You have not proven you can recover and you say the other man has to prove you cannot. That kind of a rule makes me sit here the way a master would be in supplementary proceedings.

Mr. Weinberg: I say, if there was any doubt I would ask to reopen my case and put in the proof on the part of a man who will probably have to be cross-examined to the extent of his being adverse. That is the only reason I confine myself to my legal rights on my case and if you come in and make him a defendant to be cross-examined by me without having to appeal to the court for some latitude on cross-examination, I thought perhaps it would be a more orderly way and I felt it would be perfectly right after having proved the debt to rest and that he could come in and deny it and give me a right of orderly cross-examination. That is the only thing. It is true that we may have experimented to an ex-

tent with the court in endeavoring to establish our right. It is not a thing that was so terribly clear that I could say, "This is absolute," but I say that has been my belief, and that is about the only case I can think of to bear out my contention. I have not heard any cases cited which are opposed to that motion.

The Court: The debtor in this case was the plaintiff?

Mr. Weinberg: Was the plaintiff in the court below.

(Argument.)

The Court: I will let you open your case and call your witnesses and Mr. McGeehan may have an exception.

(Exception noted as ground of appeal.)

WIGDOR KLEIN, sworn in behalf of the plaintiff.

Direct-examination by Mr. Weinberg:

Q. Where do you live? A. I live in 37 Avon Avenue. I want to have an interpreter. I can't talk much in English.

Q. You have a cold? A. No, I cannot talk in good English.

Mr. McGeehan: Does he need an interpreter?

Mr. Weinberg: He did not need one the last time.

Q. Is Harry Landskroner your son-in-law? A. Yes, sir.

Q. What is your business? A. In the chicken business.

Q. How long have you been in the chicken business? A. About sixteen years.

Q. Where is your place of business? A. 283 Prince Street.

Q. How long have you been in the chicken business on Prince Street? A. I think about fourteen or fifteen years.

Q. How long have you lived in Newark altogether? A. Twenty-two years.

Q. Do you sell to the trade at retail or do you sell to butchers? A. Mostly retail.

Q. Did you, some time prior to the latter part of August, 1923, receive $4,700 from Harry Landskroner? Right? A. Yes.

Q. How did you receive it, that is, what was it? A. A check.

Q. Whose check was it? A. I don't know.

Q. Did you look at it? A. No.

Q. Do you know to whom that check was made payable? A. No.

Q. You did not look to see whether it was payable to Harry?

Mr. McGeehan: I object. He says he does not know to whom it was made payable.

Q. You do not know? A. No.

Q. What did you do with it? A. I deposited it.

Q. Where? A. In the Broad and Market Bank.

Q. Who asked you to deposit it in the Broad and Market Bank? A. Harry gave me the check, I should deposit it.

Q. You did deposit it? A. Yes, sir.

By the Court:

Q. In your own account? A. Yes.

By Mr. Weinberg:

Q. You did not look at the signature on the check? A. No.

Q. Can you read English? A. No.

Q. Do you write English? A. Only my name.

Q. You signed the interrogatories. That is your signature on that paper, isn't it (indicating)? A. Yes.

Mr. Weinberg: Showing the witness Exhibit P-2.

Q. Did you do anything with that $4,700 after you put it in your account? A. I gave it to Harry. Harry comes, he wants a couple of hundred dollars cash; I gave him.

Q. Harry would come to you and ask you for a couple of hundred dollars cash and you would give it to him? A. Yes.

Q. When was the first time after you put the money in the bank that you gave Harry, your son-in-law, any money? A. I don't know.

Q. Do you know how much money the first payment was to him? A. No.

Q. Did you ever keep any account of the money you gave back to Harry? A. I never kept account. He gave me $4,700, and when I gave him $300 I kept $4,400 and when I gave him money, he is my son-in-law, he would not take my money.

Q. Did you put down on any place at any time any figures as to whether you gave Harry any money or not?

Mr. McGeehan: I object. He answered he did not.

The Court: I will admit it.

Q. Did you ever put it down anywheres how much money you gave to Harry? A. I don't remember, to tell you the truth.

Q. Do you know whether you put it down in Yiddish, Hebrew, English or any other language? A. Yes.

Q. Did you write it down? A. Yes, on a piece of paper.

Q. Where is that piece of paper? A. When I—

Q. Wait a minute.

Mr. McGeehan: I think he should be allowed to make his answer.

Q. Where is this paper? A. I did not keep the paper. When I gave him the money I threw away the paper and I did not keep the paper. He took out all the money in six months.

By the Court:

Q. He took back all the money in six months? A. Yes.

By Mr. Weinberg:

Q. When did you say you got that check? A. Which day I don't remember.

Q. What month? A. That I don't remember.

Q. Do you remember the year? A. I don't remember the year, because he is satisfied that I put the money in the bank.

Q. Where is your bank book? A. My bank book?

Q. Your bank book in the Broad and Market

Bank? A. In the Broad and Market Bank is the book.

Q. Where is your pass book they gave you? A. I don't know anything.

Q. You have a bank book, haven't you? A. Sure.

Q. Where is it? A. I haven't here the bank book.

Q. You did not keep the bank book? A. Here in my pocket, no.

Q. You did not bring it to court? A. Why should I bring the bank book to court?

Q. Have you the bank book here? A. Sure, I got a bank book at home.

Q. Have you the bank book showing that you put $4,700 in the Broad and Market Bank? A. No.

Q. What did you do with that book? A. That book I lost and they gave me another book, I think so.

Q. How long did you have the account in the Broad and Market Bank? A. About eight or nine years.

Q. Have you still one there? A. Yes, sir.

Q. You still have a bank account with the Broad and Market National Bank? A. Yes, sir.

Q. Do you draw checks on that account at different times? A. Sure, all the time when I pay bills.

Q. Did you give Harry, your son-in-law, a check for any of the money you gave him? A. No.

Q. You never gave him a check? A. Never a check.

Q. Did Harry ever give you a receipt for any money you ever gave him? A. No.

Q. You knew that Harry gave you that money when Harry was in some kind of trouble with Mr. Weissenger, didn't you? A. No.

Q. You did not know that? A. No.

Q. How did you give him the money, this $4,700 back? A. Who, Harry?

Q. Yes. A. $300, $200, $100, because all the time I have cash because I have a cash business, I gave him cash, no checks.

Q. Harry and his wife, who is your daughter, worked for you during that time, didn't they? A. They used to come by the business; she works by me.

Q. During the time that you were giving Harry this money, as you say, wasn't Harry working for you? A. No.

Q. Didn't you pay both of them wages? A. After, when he give up the business.

Q. He was in what business? A. He had an automobile fixing, I don't know what it is.

Q. Was that the Newark Ignition Company? A. I don't know what the name is.

Q. He was out of the business at the time when he gave you that $4,700 check? A. No, sir.

Mr. McGeehan: I object. He already has testified to the contrary, and that makes it leading.

By the Court:

Q. Have you any idea how many months elapsed before all this was paid back, that is, after he paid it to you how many months did it take you to pay it back? A. I don't remember, I think seven or eight months.

Q. Did he tell you anything when he gave you that $4,700 check? A. No.

By Mr. Weinberg:

Q. Do you or don't you know that Harry had drawn all that from some bank at that same time when he gave you the check? A. No, I didn't know it.

Mr. McGeehan: I object as immaterial.

The Court: I will consider your objection as made of time, but I will allow it to stand.

Q. What do you mean when you say that Harry gave you the $4,700 check, but didn't say anything to you about it? A. I don't understand that.

Q. Did he say he was just giving you a present? A. He didn't give me no present. He gave me a check that I shall deposit the check.

Q. Did you ask him why he gave it to you? A. He gave it to me because he says he needs the cash.

Q. He didn't ask you to cash a check for him right away? A. No.

Q. So you just took the check and put it in the account? A. Yes, my account.

Q. You do not know why he gave it to you?

Mr. McGeehan: I object as calling for a conclusion.

The Court: Sustain the objection.

Q. Did he tell you when he wanted the money back you would give him your check? A. No.

Q. You say you gave it back to him by giving

him $200 at a time, $300 at a time? A. Yes, two or three or four hundred, something, I gave him $1,000 because the day before I had cash.

Q. $1,000? A. Sometimes two or three hundred dollars a week.

Q. How much did you ever give him at a time? A. I don't remember.

Q. What was the most you ever gave him at one time? A. $200, $300, maybe sometimes $350, I don't remember how I gave it.

Q. Do you remember at the hearing in the court on the same floor before Judge Porter you were asked by him, "How did you give him the money?" And you said, "$50, $100, $25," isn't that so?

Mr. McGeehan: I object.

Q. Isn't that so?

Mr. McGeehan: I object on the ground this is the plaintiff's own witness and he cannot read a prepared statement to him on cross-examination.

The Court: I will admit the question.

Q. Isn't that so, that the most you say you gave him was $100? A. $25, $50, or $10.

Q. Was anybody around at any time when you ever gave Harry any of this money? A. Maybe, but I didn't see.

Q. That you know of? A. No, I don't remember that, because all the time, of course, I have cash.

Q. Whereabouts did you pay Harry this money? A. In the market.

Q. Always in the market? A. Always in the market? Sometimes in the house.

Q. Sometimes in the house? A. Yes, sir.

Q. Whose house? A. My house.

Q. Was anybody around when you gave it to him? A. My wife, maybe.

Q. You don't know who was? A. I should remember that?

Q. At the time of the hearing in the other court you did not have any paper either, on which you wrote down anything that you paid Harry? A. No.

Q. Do you know how many payments you made to Harry? A. No.

Q. You have no idea? A. No.

Mr. McGeehan: I think you misconstrued that testimony on page 84.

Mr. Weinberg: I will straighten it out.

Q. I asked you before as to payments of $50, $25, and $100 that I understood you had stated in the other court were the amounts in which you repaid Harry. My attention is called to the fact that those figures—are they the moneys you say Harry owed you? A. Yes.

Q. So that you not only claim you repaid the $4,700 but you gave him more besides? A. Yes.

Q. That was all within a period of how long a time? A. I don't remember how long it is.

Q. How long was it from the time Harry gave you the $4,700 that Harry was owing you money for loans that you made him? A. I don't remember.

Q. Was that all in this six months, too? A. No, that took more than six months. I couldn't tell you how long that takes, so long as I gave him all the money and he took more from me; he is short and I gave him some cash.

Q. You think you were giving him as much as $300 a week? A. Yes.

Q. And you do not know why he wanted it? A. It is my children. When he gets it he will give me back.

Q. Tell me why you did not give Harry this money back by check?

Mr. McGeehan: I object as being a cross-examination of his own witness.

The Court: I will admit it.

Q. Why didn't you give this money back to Harry by check? A. Because he told me I should give him the cash. I had the cash and I gave him cash.

Q. He speaks English very well, Harry? A. I don't know if he speaks good English.

Q. Did you ever speak to him? A. I speak Yiddish.

Q. You don't know whether I speak English or not?

CROSS-EXAMINATION by Mr. McGeehan:

Q. You were asked by Mr. Weinberg at the time of the hearing before Judge Porter whether you did not know exactly how many payments you made? Do you remember being a witness before Judge Porter? Do you remember being in court? A. Yes.

Q. Before Judge Porter in the Common Pleas Court? A. I don't remember the name of the judge but I remember that.

Q. Did you testify there in December, 1925, and the early part of 1926? A. That I don't remember.

Q. When Harry was arrested, do you remember on a judgment Mr. Weissinger got against him? Do you remember that? A. Yes.

Q. Did you owe Harry any money then? A. No.

Q. Did you pay it all back? A. Yes.

Q. How long before that was it you paid it back? A. I think a couple of years.

Adjourned to Wednesday, January 18, 1927, at ten o'clock, A. M.

Second day.

Wednesday, January 18, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

ELSIE LANDSKRONER, sworn in behalf of the plaintiff.

Direct-examination by Mr. Weinberg:

Q. You are the wife of Harry Landskroner? A. Yes, sir.

Q. And the daughter of Wigdor Klein, one of the defendants in this case? A. Yes, sir.

Q. You are the wife of Harry Landskroner, who is the son-in-law of Wigdor Klein? A. Yes, sir.

Q. You did, somewhere around 1924, receive $1,000 from your husband, Harry? A. Yes, sir.

Q. Did you ever repay it to him? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. When? A. A few months later.

Q. How? A. Various payments.

Q. What is that? A. Various times.

Q. Can you tell us any of the times when you repaid it? A. I just don't recall.

Q. Can you remember when you made the first repayment to him? A. Probably a week or two later.

Q. I am asking for your recollection; do you know? A. I don't know.

Q. You cannot remember when you made your first payment? A. No.

Q. Do you remember how many repayments it took to pay back the money? A. No.

Q. How much did you receive? A. A little over $1,000.

Q. How much over $1,000? A. I just can't recall the check.

Q. You don't remember that? A. No.

Q. What did you do with the money? A. Returned it to Harry Landskroner.

Q. What did you do with the money when you first received it? A. Deposited it in my account.

Q. In where, the Broad and Market? A. Yes, sir.

Q. So, you had an account there? A. Yes, sir.

Q. You had an account there at the same time your father had an account in the Broad and Market National Bank? A. Yes, sir.

Q. When Harry gave you this money did he tell you the purpose of it, why he gave it to you? A. No, sir.

Q. He did not tell you why? A. No, sir.

Q. I suppose you did not ask him why he gave you the money? A. No, sir.

Q. Did he ask it back from you? A. He did.

Q. Did you ask him why he wanted it back? A. No, sir.

Q. And he did not tell you? A. No, sir.

Q. How did you make the repayments to him, by cash or check? A. By cash.

Q. Was there any reason for that? A. No, sir.

Q. Why didn't you repay him by check? A. I happened to have cash.

Q. You happened to have it? A. Yes, sir.

Q. In your home? A. Yes, sir.

Q. Why didn't you put it in your bank account? A. He asked me before I had it in the bank.

Q. How long was it from the time when he gave you the money until you had returned all of it to him?

Mr. McGeehan: I object. She testified to that; she said a few months.

The Court: I will admit it.

A. A few months.

Q. What do you mean by a few months, how many? A. Probably three or four months, I just can't recall.

Q. Probably six months? A. Probably six months; I don't know how long.

Q. And probably only two months? A. Probably.

Q. Now, as to the amount that you gave him, what is your best recollection as to that? A. Different times, I don't know just how much cash I happened to have.

Q. That is not giving us much information. A.

Fifty dollars or seventy-five dollars, as much as I happened to have.

Q. You say fifty or seventy-five dollars? A. At different times it was different amounts, as much as I happened to have.

Q. Was it $100? A. Not quite that.

Q. Never as much as $100? A. Maybe it was.

Q. How frequently did you make payments to him? A. I can't recall.

Q. You do not know whether it was once a week or twice a week? A. No, it wasn't as often as that.

Q. It was not as often as once a week? A. It was not even once a week.

Q. Once every two weeks? A. Probably.

Q. Well, what was it? A. I said I can't recall.

Q. Do you know exactly when it was that you received the money from your husband? A. Not exactly, no; it was the latter part of 1924.

Q. You have a bank account still? A. No, not in the Broad and Market.

Q. When did you close it there? A. Last year.

Q. You have your pass book, I suppose? A. I have it home.

Q. Why didn't you bring it? A. I didn't think it was necessary.

Mr. McGeehan: I object. That is not proper on direct.

Q. You knew you were to be in this case? A. Yes, sir.

Q. Notwithstanding that you did not bring your bank book? A. It was not called for.

Q. Have you any memoranda of any kind anywhere in any form? A. No, sir.

Q. That will—what is it? A. I said I haven't.

Q. Regarding your transaction with your husband? A. No.

Q. Nothing of any sort? A. At the time I did.

Q. I am asking you as to now? A. No, sir.

Q. What time did you have it? A. At the time, in 1924.

Q. You did not have it at the time you appeared in the insolvency proceedings before Judge Porter, did you? A. No, sir.

Q. Then, when was it you had it? A. At the time I was giving the money back.

Q. Do you remember whether the money that you received from your husband, Harry, was about the time that your husband gave the money to your father? A. I don't know when he gave the money to my father.

Q. You never knew when he gave money to your father? A. No.

Q. You never knew he gave your father as much as $4,700? A. No.

Q. Did you hear that your father paid it back to him? A. I knew it after I came to court that my father gave it to him.

Q. How did you know it? A. I heard it here.

Q. You did not hear anything in the home about that? A. No.

Q. Harry never told you that he gave your father $4,700? A. No.

Q. And Harry did not tell you that your father gave it back to him? A. No.

Q. Nor did your father tell you anything about that?

Mr. McGeehan: I object.

The Court: I will admit it.

A. No.

Q. Were you working for your father at any time? A. At a time, yes; not at that time, no. About a year later we started to work for my father, Harry and I.

Q. A year later than what? A. A year later than you claim Harry got the money.

Q. Was Harry engaged in any business with you about the time when you received the money from Harry? A. I can't recall.

Q. You do not recall whether he was? A. No.

Q. Do you know whether he was in business shortly before that? A. Yes, he had an ignition store down on William Street.

Q. He was in business under the name of the Newark Ignition Company? A. Yes, sir.

Q. Do you know he had a bank account in the Broad and Market Bank, don't you? A. Yes.

Q. That was about the time when he gave you the money? A. I don't recall.

Q. You don't remember that? A. No.

Cross-examination waived.

Plaintiff rests.

Defendant rests.

Mr. McGeehan: I respectfully move for the direction of a verdict for the defendants on the ground that the evidence adduced by the plaintiff shows affirmatively at this time that there was no indebtedness due to the assignor and the plaintiff at the time of the appointment of the assignee says that there is not only affirmatively proven

that fact regardless of the question of where the burden of proof is now, but there is in the Elsie Landskroner case evidence before the court at this time that she is the wife of the plaintiff's assignor.

(Argument.)

There is no evidence that the plaintiff has sustained the specific claim or the kind of claim included in the plaintiff's case and upon that ground I ask for a nonsuit. I do not think he can stand on that without proof of the document upon which he acts.

But I think the important point in the case is that what the plaintiff alleges in his complaint, paragraph 4 is the gist of the action and the thing upon which the suit was joined. That is part of the plaintiff's allegation and part of his case, it is something he has to prove as a fact to sustain his case which he alleges against this defendant. I think the burden of proof is upon him to prove that fact that the money which was years before loaned or advanced has not been paid back and that there was the existing obligation which existed as a right of action in the hands of Landskroner at the time of the appointment of him as assignee. If that be the case, then the plaintiff has certainly not sustained that burden, even if that be not the case, the plaintiff has put upon the stand witnesses whose testimony by all the rules of evidence he is bound by and those witnesses as part of his case have testified definitely and absolutely that the money they received from Harry Landskroner in 1923 and 1924 respectively was paid back in full several months thereafter, so that the appointment of the assignee on the 31st of March, 1926, some three years after the time the money was alleged to have been paid in the one case and two years in the other, could not have been due and owing at the time of the appointment of the assignee. That testimony binds the plaintiff, even if the burden of proof were otherwise, and I do not think that it is. They have put witnesses on the stand and they have proved as part of their case definitely and positively that the money, if any, was advanced and there is no question about this $4,700 and $1,000 being advanced; we admit in the pleadings and join issue on the return of the money, and they put evidence in on the plaintiff's case proving it was returned back, and under the circumstances no right of action existed on the part of Harry Landskroner at the time the assignment was made, none exists today and I ask that a verdict be directed for the defendant.

(Argument.)

The Court: There are two kinds of cases, depending on the character of the testimony. One case, for instance, where a witness is asked, for instance, if he paid a debt, says, "I did," and is asked no other questions and leaves the witness stand. The jury cannot say he did not, because the testimony is that he did. There is another kind of case where the witness goes on the witness stand and says, "I did make a payment" and then on cross-examination doubt creeps into the man's mind as to whether he did make it. Now, you claim that this defendant now comes in the

second class. I do not mean that I apply this to him at all, I have exaggerated the two cases for the purpose of argument.

(Argument.)

The Court: I want you to get this slant on this thing. This action is brought by the assignee, a man named Potoker, and appointed by the Court of Common Pleas against a person whom he alleges wants money that belonged to Harry Landskroner. Now, the original contention and effort to get at these assets was between Potoker and Harry Landskroner: "You are an outsider in saying to me that you want that money that Landskroner gave him and I want $4,700 of it back." That is a lot of money and this is, as I said yesterday, in my opinion, it is in the nature of a fishing excursion. If you were deprived absolutely by lack of statutes to get certain information I might possibly rule different, but it seems to me that some of the information which you claim this man did not give you could have been obtained prior to the trial of the case from him. In any event, as far as Wigdor Klein is concerned, I will grant the motion and direct a verdict for the defendant. So far as the other defendant is concerned, I will transfer the case to the Court of Chancery and defendants' counsel may have an exception to my doing that.

(Exception noted as ground of appeal.)

Direction of a Verdict.

The Court: Gentlemen of the jury, I will supplement what I said to counsel in this case to you by these remarks that some time, a few years ago, it appeared that this man, Harry Landskroner, got into some kind of financial difficulty and Benjamin Potoker was appointed his assignee under a statute of this state, where the assignee is selected by the Court of Common Pleas and an assignment is drawn in accordance with the statute to him and he properly tries to find not only the assets that are not declared, but those that are not disclosed. I understand from what I heard in this case that this is an effort to find assets which were not disclosed and testimony has been introduced showing that several years before this assignment took place his father-in-law received $4,700 by a check and was told to put it in his bank, the Broad and Market National Bank, and did so, and he says he paid it all back. This is an action against the father-in-law, this is an attempt by the assignee to hold Wigdor Klein liable for the $4,700; quite a lot of money. Wigdor Klein has the appearance of being rather illiterate, and he says he paid this back. The courts, of course, are not enthusiastic about some methods that are adopted by people who like to avoid their debts, which this may have suggested, this method of paying back by cash when one has a bank account. But his testimony stood unshaken except that he said he had paid it back by cash when his son-in-law wanted it and if I had left this case to you and you had brought in a verdict of $4,700 against Wigdor Klein I would have set it aside on the ground that it was against the weight of the evidence; that there was no

evidence that he had paid it back, that he had not been shaken on any examination made of him to indicate what was deposited and, moreover, this is no reflection on counsel, but I had an idea of my own, if it had been found desirable to prove that this was taken from Landskroner and not paid back or paid back in such a way as to suggest subterfuge and an effort to evade the rights of creditors, that there should have been a discovery of that before the trial and we could have the benefit of the discovery. I think if I had been asked to sign an order to examine him I would have done so, and counsel would have had the benefit of that.

I make this explanation because I do not wish the jury to think that the court sanctions anything that savors in anywise the concealment of assets, but we have to follow the law and I must direct this verdict. As I stated, if you found that you would hold Wigdor Klein for $4,700 I would have to set the verdict aside because it is a lot of money to take from this man.

Therefore, I direct that you bring in a verdict in favor of Wigdor Klein and against the plaintiffs, Benjamin Potoker and Harry Landskroner.

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

(Exception noted as ground of appeal.)

Exhibit P-1.

ESSEX COUNTY CIRCUIT COURT

BENJAMIN POTOKER, Assignee of Harry Landskroner, Plaintiff, vs. WIGDOR KLEIN, Defendant.	Action at Law. Interrogatories.

To the above-named Defendants, or John W. McGeehan, Jr., his attorney:

TAKE NOTICE, that the plaintiff demands answers under oath, to the within interrogatories, within fifteen days from the date of service upon you.

1. Did Harry Landskroner, on or about August 4th, 1923, give to the defendant, Wigdor Klein, without any consideration, the sum of $4,700.00, then being the money of him, the said Harry Landskroner?

2. Was said sum of $4,700.00, had and received by the said Wigdor Klein, for the use and benefit of the said Harry Landskroner?

Dated: September 22nd, 1927.

BENJAMIN M. WEINBERG
Attorney of Plaintiff.

Exhibit P-2.

ESSEX COUNTY CIRCUIT COURT

BENJAMIN POTOKER, Assignee of Harry Landskroner, Plaintiff, vs. WIGDOR KLEIN, Defendant.	Action at Law. Answer to Interrogatories.

To: Benjamin M. Weinberg, Esq., Attorney of Plaintiff.

Sir:

TAKE NOTICE that the following are the Answers of the defendant Wigdor Klein, to the Interrogatories proposed by the plaintiff, Benjamin Potoker, in the above entitled cause.

ANSWER TO FIRST INTERROGATORY.

Yes, I received such sum but I do not remember exactly when I received it.

ANSWER TO SECOND INTERROGATORY.

Yes.

WIGDOR KLEIN.

State of New Jersey, }
County of Essex. } ss:

Wigdor Klein, being duly sworn on his oath according to law says that he is the defendant in

Exhibit P-2

the suit in which certain interrogatories were served upon him, and to which interrogatories the foregoing answers thereto are made; and that the facts set out in said answers and the statements therein are true to the best of his knowledge as he verily believes.

WIGDOR KLEIN.

Sworn and subscribed to before me
this sixth day of January, 1928.
Ralph E. Cooper,
Attorney at Law of
New Jersey.

Service of three copies of the within Brief is hereby acknowledged this 24th day of May, 1928.
Benjamin M Weisberg
Attorney for and of counsel with Plaintiff-Appellant.

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15 MAY.T.1928

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

New Jersey Court of Errors and Appeals

BENJAMIN POTOKER, Assignee of Harry Landskroner, *Plaintiff-Appellant,* *vs.* WIGDOR KLEIN, *Defendant-Appellee.*	*Action at Law.* *On Appeal from Essex Circuit Court.*

BRIEF ON BEHALF OF DEFENDANT-APPELLEE.

The plaintiff brought his suit as assignee of the goods and chattels, etc., of Harry Landskroner, an insolvent debtor, against the defendant, Wigdor Klein, alleging that over three years before the institution of suit, and almost three years before the appointment of the assignee, the alleged insolvent debtor had given to the defendant the sum of four thousand seven hundred dollars ($4,700), and that (Complaint, p. 2),

> "said Wigdor Klein has not returned any part of said sum of four thousand seven hundred dollars ($4,700), or any interest which has accrued thereon, to the said Harry Landskroner, etc.,"

and the assignee sought to obtain a judgment for said amount by reason of said alleged receipt and alleged failure to repay the same by the defendant. The defendant admitted the receipt several years before of said sum from the said Harry Landskroner but denied the allegation of the complaint that said money had not been returned, or that there was due to the plaintiff as assignee of the said Harry Landskroner the sum mentioned. It will thus be seen that the entire basis and theory of the suit of the as-

signee was that he was appointed as assignee of the rights, credits, etc., of Harry Landskroner, a then existing chose in action was possessed by the said Harry Landskroner by reason of the payment of said money to and failure to return same by the defendant. Therefore the case of the plaintiff rested on his contention that the money which had admittedly been paid to the defendant in 1923 by Landskroner had not been repaid to Landskroner. This was the sole basis of plaintiff's suit, and the non-payment being denied by the defendant, this became a fact in issue at the trial. Whether the burden rested upon the plaintiff to prove the non-payment or upon the defendant to prove the payment, may be a matter susceptible of different opinions, but regardless thereof the plaintiff, as part of his case and by witnesses called by him, affirmatively proved by direct testimony that the money advanced by the insolvent debtor to the defendant in 1923, *had been repaid in full* long before the assignee was appointed or brought his suit. No evidence whatever was adduced in the case proving or even tending to prove otherwise. Thus when the plaintiff rested the only evidence before the Court was the uncontradicted testimony of plaintiff's own witness (the defendant) that the sum in question had been loaned or advanced to the defendant by the insolvent debtor in 1923 and repaid a couple of years before the suit was instituted, that resulted in the judgment under which the debtor applied for his discharge. Of course, the plaintiff having proven his own case out of court and the defendant having rested upon the plaintiff's proofs, there was no alternative for the Trial Court except to direct a verdict for the defendant. It was proven in the plaintiff's case without contradiction and unequivocally that the defendant had repaid all

the money he received long before the assignee was appointed, and that he owed no money whatever to the insolvent debtor or the assignee. As the plaintiff's suit was based upon the allegation that the defendant had received the money in 1923 from the insolvent debtor, and that he had failed to repay the same, so that an obligation existed to the insolvent debtor from him, and then the plaintiff affirmatively proved on the contrary that the borrowed money had been repaid in full, no basis for a claim or suit appeared in the evidence, and not only was no jury question presented, but upon the evidence the jury could only be instructed by the Court to return a verdict for the defendant. This the Trial Court did and, it is respectfully urged, ruled correctly.

The brief of the plaintiff-appellant seems to urge that in spite of the foregoing facts the Court should have submitted the case to the jury on the theory that even though the plaintiff's witness called by him specifically and without deviation, testified that the money had been repaid, the jury for some reason or other might have disbelieved the truth of the witness' statement, and have found as a fact based on no evidence, and contrary to the specific evidence of plaintiff's witness, that the money had not been repaid. That a party calling a witness is bound by his testimony is elementary. As was stated by Supreme Court in *Den, Ex. Dem. Boyd* v. *Banta* (1 N. J. L. 308):

> "It was also said, and assented to by the whole Court, that if a party called a witness and examines him as to a fact which regularly would not operate against him if proved by the other party, unless proved by written testimony, yet as against the party who thus establishes it himself, from his own witness, it shall be conclusive."

The defendant-appellee in his brief does not deny the definite and direct nature of the testimony of the defendant when called as a witness for the plaintiff, that the money was repaid. The brief does not point out any respect in which it was shaken or in which contradictory or other weakening elements appear in the testimony, but contents itself with characterizing the testimony as "incredible," "unbelievable," "unsatisfactory," and "unconvincing." It is respectfully submitted that a reading of the evidence of the defendant when called as a witness for the plaintiff reveals no basis for such characterization, but that on the contrary the witness gave a reasonable and convincing statement, frankly stating when and how the money was given to him by his son-in-law to keep for him, and when and how he paid it back. For a plaintiff to be allowed to call a witness and examine upon matters of fact pertaining to the case, and then when the testimony is unfavorable to seek to avoid being bound thereby, would lead, if approved, to situations preposterous on the face of them. For instance, in an accident case, if the plaintiff produced one witness and no other evidence whatever, and that witness testified that he was struck by an automobile which he deliberately and purposely stepped in front of, intending to be hurt, the plaintiff could object to a direction of verdict for the defendant on the ground of contributory negligence, because the jury might not believe all that the plaintiff said regarding his actions, in spite of the fact that there was no other evidence before the Court. The courts have constantly directed verdicts when the case was rested on the plaintiff's proofs where the uncontradicted evidence proved facts debarring the plaintiff from recovery, even where such facts related to

matters of affirmative defense, such as contributory negligence in tort cases.

The brief of the plaintiff-appellant calls attention to the statement by the Trial Court in directing a verdict,

> "that the testimony of the defendant as to payment 'stood unshaken,' and that if the matter was left to the jury and it brought in a verdict against the defendant, Klein, he would set the verdict aside on the ground that it was against the weight of the evidence."

These were merely part of the remarks of the Court to the jury in the course of his granting the motion, but the motion was made and granted by the Court upon the ground that the plaintiff's own case proved the repayment of the money and that no debt existed at the time of the appointment of the assignee.

The cases cited in the plaintiff-appellee's brief are none of them in point. They all refer to tort cases, or contract cases involving the determination of matters by a jury's judgment founded upon facts, and recite the well-known rule that in such cases whether the evidence be disputed or undisputed as to what occurred but the facts admit of two inferences, one favorable and the other unfavorable to the plaintiff, the decision of the case is for the jury, where fair-minded men may honestly differ in arriving at conclusions to be drawn from such facts. But where the sole evidence in a contract case definitely shows facts which have but one meaning and one legal effect and which, as a matter of law, debar the plaintiff from recovery, and the evidence can admit of no inferences beyond what it specifically states, and is not controverted in any respect, the Court naturally is confronted with no question or dispute for the jury to decide.

When the defendant Klein was called by the plaintiff and testified that he paid back the money that he had received, this testimony could admit of no inference except that the money was paid back, and if the money were paid back, a situation was not presented where the jury had to reach any conclusion involving the application of judgment of fair-minded men, such as whether certain facts constituted negligence or certain facts showed authority given to an agent, or other matters within the realm of debatable conclusions to be reached from facts susceptible of various views by a jury as matters of judgment.

That the cases quoted from by the plaintiff-appellant are inapplicable, and that they are all tort or contract cases involving the judgment of juries as to the *effect* of testimony on the question of negligence or non-negligence or the breach of a contract may be seen by a reference to them. Thus, *Cetofonte* v. *Camden Coke Co.*, 78 N. J. L. 662, was a negligence case in which error was assigned on the refusal of the Trial Court to nonsuit the plaintiff, on the question of negligence and contributory negligence, and the Court said:

> "But we think that fair-minded men might honestly have drawn *the conclusion* from the uncontroverted facts, both that the decedent was ignorant of the danger and that he was not warned of it. Both questions were, therefore, properly submitted to the jury."

So in the cited case of *Furniture Co.* v. *Board of Education* (58 N. J. L. 646), the question in issue was which of the parties to the suit were guilty of a breach of contract under the evidence in the case. The Court stated (p. 652):

> "The conduct of the defendants in renewing their order for the desks originally ordered, and continuing to urge their delivery, so far from being notice of a purpose to abandon the contract, was consistent alone with the notion that the agreement was still in force. Under such circumstances, the delivery of the desks within a reasonable time after receipt of an answer to the pertinent inquiries of the plaintiff would have been a legal fulfillment of the contract. The question of reasonable time is generally one of fact for the jury, and is always so when it rests upon conflicting inferences as to the mutual effect of the conduct of the parties to the transaction.
>
> "In the present case that was undoubted delay, but the question whether a reasonable time had elapsed or even begun to run, in view of all the circumstances, would seem to be susceptible of two answers, one of which would not be unfavorable to plaintiff's contention."

The Court then goes on to give additional instances of *conclusions* that the jury might reach from the proven facts, and then went on to say,

> "There are other circumstances of more or less significance, but enough has been said to indicate the test according to which, as we think, the whole case should have gone to the jury, viz., that the conclusion of fact to which the learned justice came, was not one about which reasonable men might not honestly differ. There must be a *venire de novo.*"

The foregoing gives explanation to what the Court had said previously in the decision,

> "The facts of the case are not in dispute, being for the most part the written communications between the parties, or the entries in the minutes of the defendant. This circumstance does not, however, of itself create a question of law for the Court, since if indisputable facts admit of two inferences, one favorable and the other unfavorable to the plaintiff, a question is presented that calls for the opinion of the jury.

> "In other words, to warrant a non-suit it is not enough that the facts are without dispute; the inference that is drawn from such facts must likewise be, in a legal sense, indubious, *i. e.*, one about which reasonable men may not honestly differ."

The foregoing quotations show clearly that the statement of the Court applied to a situation where the jury was called upon to reach a decision of fact based upon evidence which, while undisputed, was susceptible of several determinations by the jury as to its effect on the relations of the parties, and the language of the Court cannot be construed to permit a jury to reach a finding diametrically opposite to the only interpretation that could be given to evidence such as was given in the present case, to wit, that the money had been repaid. The single short excerpt from the opinion in the above case of *Furniture Co.* v. *Board of Education* contained in the brief of the plaintiff-appellant, is misleading, unless considered in connection with the context as contained hereinabove.

So also the quotation from the case of *Bower* v. *Bower* (78 N. J. L. 387), contained in the brief of the plaintiff-appellant, is as follows:

> "It is not enough to constitute a court question that the facts of a case are not in dispute. If the inference to be drawn from undisputed facts is not likewise one about which there cannot reasonably be an honest difference, the question is one for the jury,"

but a reading of the case shows that it arose on an exception to the direction of a verdict by the Trial Court in a case where the issue was whether or not a certain bond had been paid, and the evidence showed undisputed facts, and a cancelled mortgage was produced as evidence upon the question of whether or not the bond had been

paid. The Court held that as this situation permitted of various inferences by the jury on the question of fact involved, the determination thereof should have been left to the jury, the possession of the cancelled mortgage being competent evidence from which the jury might find that there had been a payment of the accompanying bond. The Court pointed out that the possession of the cancelled mortgage by the mortgagor was susceptible of two findings of fact by the jury, either that the obligation had been paid, and the payment evidenced by the assent to the cancellation by the mortgagee, or that it had been cancelled under circumstances under which the mortgagee retained his obligation on the bond. The following quotations from the decision show this to be the basis of the Court's ruling in this particular case:

> "* * * that inasmuch as the instrument could not lawfully be cancelled in the absence of one or the other certain statutory prescriptions indicative of the mortgagee's assent, the presumption in the absence of proof to the contrary would be that such acts had been done by the creditor. It is of course true, on the other hand, that a mortgage creditor may surrender his lien and still retain the debt evinced by his bond. This, however, is no more than saying that the cancellation of the mortgage is not conclusive proof of the extinguishment of the debt, still it is some proof tending that way, the persuasive effect of which, in a given case, must depend largely upon the inferences arising from all of the circumstances surrounding the transaction."

The Court concludes its opinion by stating:

> "Bearing this distinction in mind, it is quite sufficient for present purposes to say that the production of the cancelled mortgage in the present case was competent evidence upon the question whether or not the

> bond had been paid. This being so there was upon this question evidence both pro and con, and in such case it is error for the Trial Court to direct a verdict."

In the present case there is not any evidence pro and con upon any subject, and there are no inferences to be drawn from the plaintiff's direct evidence except that the loan by the insolvent debtor was repaid, and this being so, as a matter of law, no subsisting debt existed when the assignee was appointed to the insolvent debtor, and the Court could only direct a verdict in favor of the defendant.

The next case referred to in the brief of plaintiff-appellant is *Clark* v. *Public Service Electric Co.* (86 N. J. L. 144). This was a suit to recover for the death of plaintiff's intestate, resulting from a broken electric wire of defendant company, on the issues of the defendant's negligence being the cause of his death, and his own contributory negligence. Numerous witnesses testified, and the Court held that on the disputed evidence in the case a jury question was presented, as to the liability or non-liability of the defendant, and the Court points out the various facts from which the jury could have found an inference that there was negligence on the part of the defendant. Among the many witnesses who testified was a witness, Walsh, whose testimony was contradicted in part by other witnesses, the Misses Baldwin, and the Court merely points out that in such case the jury would have the right to disregard the testimony of the contradicted witness, if the jury believed that he was falsifying by reason of their greater belief in the testimony of the young ladies who contradicted him. But the decision is based upon the fact that from the evidence in the case, inferences of negligence on

the part of the defendant and of non-negligence on the part of the decedent could be properly drawn, and this was the function of the jury. In disposing of the testimony of the witness, Walsh, the Court points out three reasons for holding that the effect of his testimony should be presented to the jury for its determination; first because two witnesses discredited him in the trial by testifying to matters in contradiction of part of his testimony. The Court held that under those circumstances, the maxim *"falsus in uno, falsus in omnibus,"* could be applied. The Court also points out,

> "The rule seems to be, as stated in 38 Cyc. 1570, namely, that a verdict will not be directed where the only person who could have contradicted the witness is dead."

The Court also points out that Walsh's testimony was,

> "inconsistent with the common principles by which the conduct of mankind is naturally governed,"

for he depicted a man deliberately picking up a flashing, broken wire. Under these circumstances and in view of the other evidence from which the jury could draw inferences of negligence on the part of the defendant and non-negligence on the part of the plaintiff, the Court reversed the direction of verdict for the defendant. Furthermore, the witness in question was called by the party in whose favor the verdict was directed, and the plaintiff was not bound by his evidence, whereas in the present case, the evidence that is sought to be attacked and discredited is the testimony of the plaintiff's own witness, by which it was bound. The situation is in all respects different from that existing in the case now before the Court.

And the case of *McPherson* v. *Hudson & Manhattan R. R. Co.* (100 N. J. L. 262), is likewise entirely distinguishable. The Court itself points out the conflict in proofs in that case in the following language:

> "The probability of the story told by Frasco, and whether or not it outweighed the presumption of the centre door being operated by an employee, were questions for the determination of a jury."

The Court, therefore, held that there was evidence of the door being negligently operated by a servant of the defendant company and that the Trial Court did not err in refusing to direct a verdict.

The next case quoted by the plaintiff-appellant is that of *Gibbons* v. *Potter* (30 N. J. Eq. 204), which is not in any respect pertinent to the question before the Court in this case. It involved a decision of fact presented to the Vice-Chancellor on the counter and contradictory allegations of plaintiff and defendant. The issue was as follows, as stated in the opinion:

> "The defendant says his payment consisted of over $8,000 in money, some notes, and he thinks, a small check, but he is unable to give the precise details, while the complainant says not a penny in money was paid, and nothing was delivered to him but the three papers."

The Court found in favor of the plaintiff on this issue of fact, and the portion of the opinion quoted in the brief is part of the Vice-Chancellor's reasons for deciding the issue in favor of the complainant, and for not believing the defendant, in view of his disbelief of the defendant and of the plaintiff's testimony to the contrary. The case is clearly not in point in any respect.

The last case cited is that of *Fein* v. *Meier* (71 N. J. L. 12), and refers to the question of the burden of proof and not to the question of the correctness of the Court's ruling in directing a verdict for the defendant when upon the plaintiff's own proofs it was shown that no obligation existed, but that on the contrary it affirmatively appeared that a repayment had been made.

It is respectfully urged that the question of whether in this case the burden of proof was on the plaintiff to prove non-payment of the admittedly advanced monies, or on the defendant to prove the repayment therefor, is of no moment. If the plaintiff had rested his case by proving that the obligation was incurred, and no further testimony was offered, this question might be important, but instead of this the plaintiff put on a witness who, although he was the defendant in the case, was called by the plaintiff, and the plaintiff thereby became bound by his answers, which showed *affirmatively* that the money which was received by him several years before *had been repaid* to the insolvent debtor shortly thereafter. Thus there was not only a failure to prove a still existing obligation, but there was complete and uncontradicted evidence that there was no existing obligation. It is a matter of serious doubt as to whether under the circumstances existing in the present case the burden would be upon the defendant to prove repayment, in view of the long time that had elapsed between the time that the obligation was incurred and the time that it was alleged in the suit to still exist. The plaintiff alleged and the defendant admitted in his answer, as well as in his answers to interrogatories before the trial, that his son-in-law had advanced to him four thousand seven hundred dollars ($4,700) to hold for him, back in

1923. The theory and allegations of plaintiff's suit was that this money had never been repaid to Landskroner by the defendant, but was still owing in 1926, when plaintiff was appointed assignee of Landskroner and brought his suit, claiming this sum as part of the assets of Landskroner's estate. The fact that the evidence showed that the money was merely advanced with the understanding that it would be returned from time to time, as called for by Landskroner, indicates that it was a debt that would not ordinarily be presumed to be still due and owing three years later.

In *Fein* v. *Meier, supra,* it is true that it was there held that the burden of proving repayment of an obligation under the circumstances of that case was upon the person alleging it. The plaintiff quotes from and cites the Supreme Court decision, but the *reasoning* behind the same seems to be based on the following modifications of the general language contained in the earlier part of the opinion. The Court says:

> "In the absence of any evidence payment of a debt *recently created* by an instrument in writing *still outstanding* would not be presumed." (Italics ours.)

The Court seems to take into consideration that the possession of the evidence of indebtedness, plus the fact that it was recently created, casts the burden of proving payment upon the defendant, but in the present case there not only no

> "evidence in writing outstanding,"

but the debt was created three years before and by its terms under the proofs was to be repaid as demanded by the lender, and under these circumstances it would seem unreasonable to attach to the transaction a presumption three

years later that such a debt was still unpaid. It would therefore seem that in such a case the burden should be upon the person alleging non-payment as the basis for the claim that it was still due, rather than upon the person alleging he had repaid the same. Furthermore, as the plaintiff sued as an assignee of the alleged insolvent debtor, the very essence of his case was that a present existing obligation was due to his assignor from the defendant at the time he took over his choses in action, and under such circumstances the plaintiff should be obliged to prove all the facts upon which he rests his claim. As is stated in 30 Cyc. pp. 1264-5,

> "Proof of non-payment is ordinarily unnecessary to establish a cause of action, since the burden of proving payment is upon the party pleading it. However, where an allegation of non-payment is essential to the stating of plaintiff's cause of action, a general denial by defendant places the burden of proof upon plaintiff" (citing *Cochran* v. *Reich,* 91 Hun. (N. Y.) 440).
>
> "* * * If there is a presumption of payment either from lapse of time," (citing Wingett's Estate, 122 Pa. St. 486; 15 Atl. 863), "or from the possession of evidence of indebtedness by the debtor, the burden of showing non-payment is on the creditor."

It would therefore seem in this case that the actual burden of proving non-payment was on the plaintiff, and if so, of course, there was a complete failure of proof, but regardless of where the burden of proof lay, the plaintiff himself put in affirmative evidence on this point by the very witness who proved the existence of the debt, that it had been repaid. The plaintiff is bound by this testimony of his own witness, even though he be the defendant, and there was nothing in the case to prove other than that

there was no existing debt due from the defendant to the plaintiff's assignor of which the plaintiff became seized by the assignment.

The characterization by the plaintiff of his witness, the defendant, as being self-contradicting, etc., is unwarranted by an examination of the evidence. This witness, the defendant Klein, had frankly admitted having received money from his son-in-law in 1923, in his answer to the complaint, but denied therein that it had not been repaid. When served with interrogatories (pp. 37 and 38), asking whether he had received such money without consideration and for the use and benefit of Harry Landskroner, he answered that he did. When put upon the stand by the plaintiff he frankly testified that he received the four thousand seven hundred dollars ($4,700) from his son-in-law some time around August, 1923, and that he deposited the amount in his bank (p. 17). He testified that he gave the money back, as his son-in-law requested it from time to time, and that (p. 19) he wrote it down on a piece of paper and that when he gave him the money he threw the paper away, and that he had returned all the money in six months (p. 19). He later said it might have been eight months. He testified (p. 21) that he would give Landskroner various amounts in cash, because he had a cash business and most of the payments were made in defendant's store. The witness when interrogated as to amounts and the exact length of time that it took him to return it to his son-in-law, naturally said he could not remember, and this does not appear to be unreasonable with respect to a transaction that took place three years before, between relatives who trusted each other, and with respect to a matter that constituted only the holding of money by one person

for another, and the returning to the lender of it a portion of it from time to time as needed. No evidence whatever was introduced to contradict this witness. No circumstances were proven to indicate the retention of the money by him. His testimony alone proved the receipt of the money by him, and his testimony alone proved the return of it. Plaintiff having called him as a witness, was entitled to the benefit of the probative effect of his testimony of the receipt of the money, and is likewise bound by his direct testimony of the repayment of the money to Landskroner, the plaintiff's case being based upon the allegation that the money advanced by Landskroner to Klein had never been repaid to him, and was an existing obligation at the time the plaintiff was appointed assignee of Landskroner's estate, and the proof adduced by the plaintiff himself showing that this was not so, but on the contrary that no obligation or debt existed. The Court did not err in directing a verdict for the defendant, and it is respectfully submitted that the judgment directed for the defendant should be affirmed.

JOHN W. McGEEHAN, Jr.,
Attorney for and of Counsel
with Defendant-Appellee.

New Jersey
Court of Errors and Appeals

BENJAMIN POTOKER, Assignee of Harry Landskroner, Plaintiff-Appellant, vs. WIGDOR KLEIN, Defendant-Appellee.	Action at Law On Appeal from Essex Circuit Court.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

PRELIMINARY STATEMENT.

The plaintiff, assignee of the goods and chattels, etc., of Harry Landskroner, an insolvent debtor, brought the present action against the defendant, Wigdor Klein, father-in-law of said insolvent debtor, for the purpose of recovering the sum of $4,700.00. The complaint alleges that this sum was given to the said defendant by the said insolvent debtor, before his insolvency, without legal consideration, and that the said Klein never returned to the said insolvent debtor, the said sum mentioned.

The defendant filed an answer admitting all of the allegations in the complaint mentioned except the one which avers that the said sum of money, so given to the said Wigdor Klein, was not re-

turned or repaid to the said Harry Landskroner. No special defenses were pleaded.

At the conclusion of the plaintiff's case, the defendant rested and moved for the direction of a verdict, which was granted by the Court. The case is now before this Court on appeal from the judgment entered on that verdict.

STATEMENT OF FACTS.

The defendant admitted, in his answers to interrogatories served upon him by the plaintiff, that:

(1) The said Harry Landskroner did give to him, the said defendant, without any consideration, the sum of $4,700.00, then being the money of him, the said Harry Landskroner; and

(2) That the said sum of $4,700.00 was had and received by him, the said Wigdor Klein, for the use and benefit of the said Harry Landskroner. (See interrogatories p. 37 and sworn answers thereto, pp. 38 and 39.)

The plaintiff, after putting those interrogatories and answers in evidence (Ex. P-1 and P-2, pp. 37 and 38), called the said defendant as a witness in his behalf. Defendant testified that some time prior to the latter part of August, 1923, he received said mentioned sum of $4,700.00 from the said Harry Landskroner. Asked whose check it was, he answered, "I don't know," that he did not look at it; that he did not know to whom the check was made payable, but that he deposited this check in the Broad and Market Bank, at the request of his son-in-law, the said Harry Landskroner (p. 17, l. 20 to bottom). He

says that he returned this money to Landskroner in cash sums of $100.00, $200.00 and $300.00; that he never paid him by check; that he never took a receipt for the money; that he could not say how long it took to return the money, but thought it was seven or eight months (pp. 21-22).

Again he said that he repaid him "two or three or four hundred, something, I gave him $1,000.00, because the day before I had cash," but immediately thereafter said that he did not remember how much he ever gave him at a time. He insisted that he always paid cash; that he always paid the money in his market, "sometimes in the house" (p. 23); that he could not remember anyone who was around at the time when he made payments; that he had no idea of how many payments he made; that not only did he return the $4,700.00 to his son-in-law, but he gave him an additional sum, and that he did not know why his son-in-law wanted this money; that the reason why he repaid him in cash was because "Harry" wanted it that way (pp. 24-25).

Defendant testified once that he never kept account of the money that he returned to Harry, and that he could not remember whether he wrote down anywheres how much money he gave him, but immediately contradicted himself by saying that he wrote it down on a piece of paper, but did not keep the paper, but threw it away when he gave him his money (pp. 18-19), and gave other answers as indefinite and evasive as those herein set forth.

Elsie Landskroner, daughter of the said Wigdor Klein, and wife of the insolvent debtor, was called to the stand by the plaintiff. She also claimed to have received some money from her

husband, and testified as indefinitely as her father with respect to repayments. She says she never knew that her husband gave her father, the defendant Klein, the said mentioned sum of $4,-700.00, and never heard that he had repaid that sum until she heard it mentioned in court; that nothing was ever said at home about the matter; that "Harry" never told her that her father returned this money to him, nor did her father tell her that he repaid it to her husband (pp. 30-31).

The above constitutes substantially the testimony produced by the plaintiff. As above stated, the defendant offered no proofs whatsoever, but rested his case and moved for a directed verdict, which was granted.

ARGUMENT OF THE LAW.

The learned Court, in his direction of a verdict, after stating the facts of the appointment of the plaintiff as assignee in the insolvency proceedings, and briefly reviewing the theory of the plaintiff's case, stated that the testimony of the defendant as to payment "stood unshaken," and that if the matter was left to the jury and it brought in a verdict against the defendant Klein, he would set the verdict aside *"on the ground that it was against the weight* of the evidence" (Italics mine).

It is to be here observed that the Court intuitively felt that the real question involved was one of weight of evidence and, manifestly, if that was the only question to be considered, the Court clearly erred in directing a verdict for the defendant. Our respectful insistment is that the

testimony produced by the plaintiff was such as, perhaps, to cause fair-minded men to differ in arriving at a conclusion in the matter.

It is a well-known principle of law that:

> "Where fair-minded men may honestly differ in arriving at conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury." (*Cetofonte* v. *Camden Coke Co.,* 78 N. J. L. 662; *Doyon* v. *Massoline Motor Car Co.,* 98 N. J. L. 540; *Montecalvo* v. *Wahl,* 97 N. J. L. 554.)

The principle above stated finds its counterpart in the law where undisputed facts may admit of different conclusions.

In the case of *Furniture Co.* v. *Board of Education,* 58 N. J. L. 646, the Court, speaking through Justice Garrison, said:

> "If indisputable facts admit of two inferences, one favorable and the other unfavorable to the plaintiff, a question is presented that calls for the opinion of the jury."

In the later case of *Bower* v. *Bower,* 78 N. J. L. 387, Justice Garrison again repeated the principle laid down in the Furniture Co. case, *supra,* and said:

> *"It is not enough to constitute a court question that the facts of a case are not in dispute. If the inference to be drawn from undisputed facts is not likewise one about which there cannot reasonably be an honest difference, the question is one for the jury"* (Italics mine).

In *Clark* v. *P. S. Electric Co.,* 86 N. J. L. 144, the facts were that plaintiff's intestate was found lying dead, with a burn on his hand, on a public highway, and a broken electric wire of defendant lying near him. The controlling testimony was given by a letter carrier who stated that as he was running along the street during a severe storm, he discovered a live wire which was hanging from a pole; that it broke from the pole and was flashing; that he saw the decedent and told him to "look out, there is a live wire," but that decedent replied that it was insulated and would not hurt, whereupon he told decedent, "don't touch it; it is dangerous," notwithstanding which, decedent went over, pulled the wire, was shocked and killed.

Witness further stated that thereafter he spoke to certain ladies, asking them to give him a chair or something so that he could knock the wire out of decedent's hand, and that they gave him such a chair, with which he tried to pry the wire out of decedent's hand, but failed. Plaintiff had no proof to overcome the testimony of the witness, Walsh, but the ladies referred to were called by the plaintiff and denied that any conversation with the witness occurred. At the conclusion of the case, a motion was made to direct a verdict for the defendant, one of the grounds being that decedent came to his death because of his contributory negligence in picking up a live wire, after having been warned of its dangerous character.

The Trial Court, in directing a verdict in favor of the defendant, said:

> "If the testimony of Walsh, given in this case, be true, the plaintiff has no case whatever. There is nothing that I can see that would justify you in any way in discrediting Walsh's testimony," etc.

Our Chancellor, in writing the opinion reversing the judgment, so directed by the Trial Court, said:

> "Now, if the witnesses, the Misses Baldwin, are to be believed—and the jury would have a right to believe them—the letter carrier was either in error or was falsifying as to what occurred between him and them, and if he was in error in this respect, the jury would have a right to believe that he was in error in other respects; and if falsifying in any respect, they would have a right to believe that he was falsifying in all other respects, applying the maxim, '*falsus in uno, falsus in omnibus.*' (*Addis* v. *Rushmore,* 74 N. J. L. 649.)"

The only difference between the case just above cited and the case under consideration is that in the Clarke case, *supra,* the witness, Walsh—the only eye witness to the occurrence—was contradicted in a collateral matter by other witnesses, while in the instant case, it is insisted that the defendant clearly and frequently contradicted himself, and, therefore, the truth of his testimony should have been left to the jury for its determination. A Court is not bound by the statement of a witness, if it bears the earmarks of untruth, even though it be not directly contradicted by any other witnesses.

In the recent case of *McPherson* v. *Hudson & Manhattan R. R. Co.,* 100 N. J. L. 262, the facts were that the plaintiff, a passenger who was waiting on the station platform of the defendant com-

pany for a train, saw the center door of a car opened and entered the same. The door, which was operated by air pressure, was then suddenly closed, pinning the plaintiff between the door and the door-jamb, injuring her. These proofs raised a presumption of negligent operation of the doors and the case, therefore, became one where the defendant was obliged to put in its defense.

The defendant, by its witnesses, gave testimony that the closing of the door which injured the plaintiff, was not the act of a servant of the defendant, but was the unanticipated act of a third person. Two employees gave their testimony. One, Eckley, who occupied a position at the front end of the car which the plaintiff boarded, denied opening or shutting the door in question, and he further testified that there was no guard or trainman stationed at the rear end of that car.

Frasco, another employee who testified, was a platform guard at the station. He testified that he saw the center door of the car, which the plaintiff boarded, open and close; that he then ran to the rear of the car and saw a man fooling with a button (presumably an electric touch button); that he shouted to him and the man entered the car.

With this testimony in the case, the defendant urged that the same was conclusive on the question of the door not having been operated by its servant, and that it was entitled to a directed verdict.

Justice Katzenbach, in writing the opinion for the Supreme Court, in answer to that insistment, said:

"Was the presumption that the door was opened and closed by the servant of the defendant, entirely overcome by the testimony of Eckley and Frasco, so that it was error to have refused to grant the motion to direct a verdict, or was it a question for the jury to determine whether or not the testimony of these two witnesses overcame the presumption of negligent operation arising from the happening of the accident? We incline to the latter view.

"Eckley knew nothing of the alleged operation of the door by the stranger. Frasco was the only witness who gave testimony as to a stranger pressing a button on the rear platform of the car. Frasco does not testify unequivocally that the stranger pushed the button operating the center door, although it might be so inferred from his testimony. *On the other hand, the inference might be drawn that the door was opened by Eckley, notwithstanding his denial.*"

We see, therefore, that the uncontradicted testimony of a witness was not considered conclusive as to the matters testified to by him, and that, as it was said, it was the jury's province to consider whether the *prima facie* case of negligence disclosed by the facts presented by the plaintiff, was overcome by the undisputed facts presented by the defendant.

A case almost precisely in point is that of *Gibbons* v. *Potter*, 30 N. J. E. 204. The question in that case was whether a certain alleged payment on a mortgage was in fact made. The defendant claimed to have paid complainant certain

sums of money. He produced two receipts, both signed by the complainant, in support of his claim. Defendant said his payments consisted of over $8,000.00 in money, some notes, and that he also thought he gave a small check, but he was unable to give the precise details, etc. In arriving at a conclusion in the case, Vice-Chancellor Van Fleet said:

> "A witness who feigns forgetfulness of the circumstances collateral to his main story, and which he must recollect if he has any memory at all, and in respect to which he would be open to contradiction if his testimony is untrue, is unworthy of belief * * *. The evidence furnished by his own conduct in disproof of the payment, is so thoroughly conclusive, that even if that fact could be considered duly proved, his story would still be incapable of belief."

The case from which the above extract is taken bears a striking similarity to the case now under consideration. The defendant, Klein, admitted that he received a large sum of money from the insolvent debtor, Landskroner, for the use and benefit of the said Landskroner, on the date and at the time mentioned.

In his answers to plaintiff's complaint, he simply denied owing the money. His testimony was so incredible, so contradictory and so unbelievable, with respect to the repayment of this money that a jury would have been fully justified in finding and determining that he, the defendant, never returned the money to his son-in-law, Landskroner. Having, therefore, admitted receipt of the money in question from the said Landskroner, to be held for his use and benefit, the duty of

showing its repayment fell upon him, and if he failed to make that proof in a manner satisfactory to a jury, the plaintiff would be entitled to a verdict against him.

In the case of *Fein* v. *Meyer*, 71 N. J. L. 12, the Court said:

> "The principle that he who alleges himself to be the creditor of another, is obliged to prove the fact of agreement upon which his claim is founded when it is contested, and that, *on the other hand, when the obligation is proved, the debtor who alleges that he has discharged it, is obliged to prove the payment, is clearly one of those propositions in which every system of jurisprudence must concur in general.* Whatever particular rules may be adopted as to the mode and form of the allegation, by which the necessity of such proof is to be determined." (Italics mine.)

It is true that in the case just above cited, the obligation was of recent creation, while in the instant case, several years elapsed between the alleged creation of the debt and the action taken by the plaintiff.

Although the syllabus to the case reads:

> "On an inquiry, whether a debt recently created by a writing still outstanding, has been paid, the burden of proof rests upon the debtor,"

the principle contained in the decision of the case is not at all influenced or limited by the statement in the syllabus. Undoubtedly, the legal principle enunciated is to the effect that in *all* cases "When

the obligation is proved, the debtor * * * is obliged to prove the payment," etc.

A *prima facie* case, therefore, having been made out by the plaintiff as to the owing of the debt by the defendant, the burden of proving payment rested upon him, and if his testimony was given in an unsatisfactory manner, or in such a manner that doubt was cast upon it, then it became the right of the jury to say whether the defendant did or did not repay the money which he admitted receiving. A number of cases hereinabove cited, where the Court felt that it was the jury's province to determine the honesty of the witness' statements, are obviously much weaker than the case now under consideration.

In the instant case, although the defendant admitted receiving the money without consideration for the use and benefit of the insolvent debtor, he, although not pleading payment in his answer, attempted to prove the same by testimony which, it is only charitable to say, was of the most unsatisfactory and unconvincing character, and may have left in the minds of the jury, the conviction that it was false from beginning to finish, and that the moneys which the defendant procured from the insolvent debtor, have not as yet been returned to him.

It is plaintiff's contention, respectfully urged, that such a conclusion would be a logical one, and that, therefore, the directed verdict in favor of the defendant was erroneous and should be set aside and a new trial granted.

Respectfully submitted,

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