Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BENJAMIN H. KAUFMAN,
Respondent,

vs.

ELMA MENNEN WILLIAMS and WILLIAM GERHARD MENNEN,
Appellants,

and

JOSEPH MEYER,
Respondent.

On Appeal from Essex County Circuit Court.

Brief for Respondent Meyer.

Facts.

The respondent Meyer generally approves of the reasoning adopted and the conclusion reached by the counsel of the respondent, Kaufman, and for the sake of brevity, will not recite the history of the subject matter of this litigation, contenting himself with amplifying the proposition asserted by the brief referred to and supplementing the same with several reasons.

He respectfully urges that it has always been the law that where a person succeeds to the title of premises, subject to lease, and accepts rent of the tenant in possession, then by *reason of the acceptance of such rent,* he becomes substituted as the landlord of the tenant, is entitled to receive the rent and to enforce the terms and the conditions of the lease against the tenant, who by Act of Parliament, followed by our statute, is obliged to attorn to the new landlord.

Greason v. *Ketellas,* 14 N. Y., 491, 497;
Hovey v. *Walker,* 51 No. Western, 61; 24 Cyc., p. 926;
Rawle on Covenants, Section 313;
Jones on Landlord and Tenant, Sections 454-455;
Schoellkopf, et al. v. *Coatsworth, et al.,* 55 N. Y. Appellate Division 331; 66 N. Y. Supplement 979;

And we respectfully call the Court's attention particularly to the deliverance found on page 981 as to the grantee becoming liable for the lessors' covenants because of their having "received the benefits accruing under the lease."

Heber v. *Casebert,* 1 Lev., 127;
Sackwell v. *Evans,* C. E. Gr. 171.

Basch, as the original lessor, is still liable by reason of privity of contract between him and the tenant.

Jones v. *Parker,* 163 Mass., 568; 24 Cyc., 927.

BUT THE OBLIGATION IS A RECIPROCAL ONE, devolving upon the new landlord the duty of performing all the covenants and promises of the original landlord. So, therefore, it seems to us it is utterly immaterial whether the Court holds that the phraseology in the lease between Basch and Kaufman referring to the deposit constitutes a so-called "covenant running with the land" or not, because we respectfully insist that by the law regulating landlords and tenants, supplemented by the plain expression of this lease, wherein it is stated, p. 25, l. 14, that "wherever the term landlord is used herein, it shall be construed as meaning the party of the first part ~~as~~ his executor, administrator and assigns," and that "the covenants contained in this lease are binding on the

parties hereto and their successors in interest," it was meant that *every* condition, including the one relating to the deposit, was to be binding upon the successors in interest of the original landlord. We hold that this clause is just as binding upon the successors in interest of the original landlord as is the clause found on p. 20, l. 37, reading as follows:

> "The landlord agrees to furnish steam heat to heat the demised rooms for the five months from November 1 to April 1."

It is equally enforceable as would be an agreement in a lease whereby the landlord agrees to furnish free water, free gas or electricity.

Conditions bound the parties "successors in interest."

This is what this plain English language means. It says not that these successors in interest shall be bound by *some* and *not by other* covenants, but that they are bound by "every covenant," and what authority or reason is there for selecting some covenants and eliminating others?

As a matter of law, however, we say that the legal construction to be placed upon this expression is to fix liability upon the successors or assigns, and on this point we refer the Court to

Hansom v. *Meyer,* 81 Ill., 321, and particularly at bottom of 322 and top of 323, where it is stated: "If the word 'Assigns' had been used, the covenant would have bound the assignee."

24 Cyc., 1108.

Also by analogy the case of

Kauffin v. *Tallman,* 8 N. Y. Court of Appeals, p. 465, where the lease provided that the lessee—*not his assigns* were to be paid the value of improvements. The Court held that the assignee

could not sue the lessor's grantee for the simple reason that the assignee was not named. See bottom of p. 466 and top of 467.

What was the purpose of this deposit?

The lease, p. 23, l. 33, reads:

> "The tenant has deposited with the landlord, * * * $5,000 as security * * * and it is hereby agreed that if the tenant shall pay said rent, and shall faithfully perform all the conditions and covenants of this lease, then upon the *termination thereof* (the italics are ours) the *landlord* will return the $5,000."

We therefore, have this lease stating:

1st—Who is to be considered the landlord (p. 25, l. 14), namely, the party of the first part, "his executors, administrators or *assigns.*"

2nd—L. 20. "That the covenants in this lease are binding on the parties hereto and their successors in interest."

3rd—That "upon the termination thereof," namely, May 1st, 1917, p. 23, l. 37, the *landlord* (viz.: Mennen and Williams, because they are the original landlords, "successors in interest"), will return to the tenant said sum of $5,000.

But was the tenant to be absolutely unsecured for the return of the $5,000? Was he to rely on the solvency of his landlord ten years hence?

Is it reasonable to hold that a tenant would deposit so large a sum for so long a time with no security and possibly no benefit?

Is it reasonable to presume the parties intended to benefit only the landlord?

Is it not reasonable to conclude that the parties intended to protect *all owners* of the property,

and at the same time give Kaufman practically a credit on account of his rent?

Can it be probable that he was in effect making Basch a ten-year loan of $5,000 at five per cent. instead of *"securing"* the rent?

If he *"secured" the rent* to the landlord, no matter who he might be, the tenant must as a logical result, receive a corresponding benefit.

Tbe deposit was for the purpose of *"securing"* the rent—not benefiting Basch—the latter being the ultimate end to which the reasoning of the learned counsel of Mennen and Williams leads.

Such was the intent of the parties, easily ascertained, and if a succeeding landlord failed to actually collect the deposit from his predecessor, the consequences of such carelessness should not fall on the tenant, the payment of whose rent was *"secured"* by the deposit.

The $5,000 were to be held as *"security"* for the *last hours* rent of the full term. The landlord was a bailee charged with the duty of holding the deposit. The bailment *was assignable;* it was assigned by a conveyance and in law the money is in the custody of Mennen and Williams and must be applied to payment of rent, if any due, or returned by Mennen and Williams "as assigns" to Kaufman.

The landlord obligated himself and *his successors in interest* to pay interest at five per cent. semi-annually to the tenant.

The parties knew that the lease was assignable by the landlord by either an express assignment or by his divesting himself of the title, when by operation of law the lease would be assigned to his grantee. Therefore, the clause binding the assignees of Basch expressed as clearly as possible the intention that subsequent

owners should assume, by the acceptance of a conveyance of the property, *all*—not a portion —of the obligations of the original landlord.

Upon what theory is the grantee to be permitted in his own favor to select certain covenants and reject others?

It is not necessary to hold that this covenant is a "covenant running with the land" because it was an expressed covenant running with and forming an integral part of the lease.

The law defines what is a "covenant running with land." It does not leave it to the parties to declare their intention to create such covenant. The court as a matter of law, will declare in the absence of definite and conclusive expression, whether such a covenant is to be inferred from certain facts and language. Here the parties clearly expressed an intention that certain things should be done by the landlord and "his successors in interest," etc., during the *full term* of ten years, and on the last day of the term, viz.: March 1, 1917, the landlord, to wit, being Mennen and Williams, *because they were the successors in interest of Basch, and were especially called by the lease "landlords,"* were to return the $5,000.

The deposit was to secure the last year's rent as much as the first.

It was for the benefit and *"security"* of everyone who should be the landlord and devolves upon *the landlord,* viz., *the landlord on May 1, 1917,* the duty of returning the $5,000 deposit.

This rule works no hardship on Mennen and Williams.

The application of this rule works no hardship against Mennen and Williams, because the undisputed evidence shows that their testatrix, Mrs. Mennen, bought this property with full knowledge of the existence of this lease. She bought it by virtue of a written agreement, wherein it was stated that she was purchasing the same *subject not only to this lease,* but to many other leases; subject to various agreements and easements. (See p. 125, ll. 1-20, and p. 120, l. 30, etc.) and with full knowledge of the $5,000 deposit being expressed in the lease, she paid Mr. Meyer $5,000 upon the signing of the agreement, showing clearly that she was to be charged with the deposit, because if the contrary were true, she would have told Meyer to keep the deposit and credit her with the face of it.

More significant yet, she had this lease in her possession, or the possession of her attorney, under whose advice she was acting, and who was present at all the negotiations (see Case pp. 49, 50, 65, 66), and yet about twelve weeks after the signing of the agreement for purchase, and after paying the $5,000 with full knowledge of all the facts, she paid $32,000 more in cash without asking or suggesting in any way that she should be credited with the $5,000 deposit mentioned in the lease.

It is inconceivable that this intelligent woman, represented at the passing of the title by her attorney and with her son and brother, successful business men, made any mistake regarding this deposit. On the contrary, Mr. Meyer, p. 66, distinctly says that "the deposit in the lease

was discussed on a number of occasions in Mrs. Mennen's presence." *This was not denied by either Mrs. Mennen or her son, her brother or her attorney* when called as witnesses. So therefore, it appears, regardless of what consideration the courts should place upon the wording of the lease, Mrs. Mennen *had received* the $5,000 which she was to hold subject to the right of redemption of Mr. Kaufman.

We also call the Court's attention to the fact that William G. Mennen, one of the defendants in this clause, was the son of Mrs. Mennen, and was present on all the occasions resulting in the passing of the described title to Mrs. Mennen, and he is the same person who on February 9th, 1917, wrote a letter replying to the letter of Mr. Kaufman, on p. 134 of the case, in which Kaufman says: "I hold Mr. Meyer's receipt of May 1st, 1917, wherein he states that he agrees to hold the deposit, subject to conditions of said lease, and I was under the impression that after he sold the building to your estate, that he had turned over this deposit to you the same as Mr. Basch had transferred it to him."

On p. 131, the same Mr. Mennen shows that he was not at all surprised by this statement of Mr. Kaufman, but practically admits its truth, because he says: "Regards the deposit and the monthly installments made, our attorneys hold that this deposit was made for the satisfactory fulfillment of all the covenants of the lease which includes payment to the last month and vacating premises on or before the expiration of lease."

It seems to us that this language bears no interpretation other than that *Mennen intended* to hold the deposit (which his mother had re-

ceived) for "payment to the last month of the lease," namely, May 1st, 1917.

The agreement signed by Meyer on p. 129, and the letter of Meyer on p. 130, does not impose upon him any other obligation than the one cast upon him by virtue of his being a successor in interest of Basch, because in the agreement, he says that he will hold "the said sum as a deposit in accordance with the terms and conditions of the said lease," while in the letter he says: "I will hold the same subject to the conditions in the same lease, and I hereby assume the various agreements on the part of the landlord to be performed."

What was the consideration of the deed of Meyer to Mennen?

It was the sum of $550,000, *subject* to all existing leases and tenancies, including a lease to Kaufman. (See p. 125.) On the same page it says that the purchase price of said premises shall be $550,000; of it $310,000 are in mortgages, leaving an equity of $240,000.

In other words, these partes calculated that after deductng from the value of the property all of the mortgages, leases, easements and agreements enumerated in the lease, there was an equity remaining which they arbitrarily fixed at $240,000.

When Mrs. Mennen bought this property with such a clause in her agreement, she assumed responsibility to account for the deposit, to fulfill all the promises of the original landlord, to observe all the obligations in the leases, in the agreements, including this obligation to return $5,000, and yet after making that assumption, she valued the equity at $240,000.

Cases cited by the appellant.

The cases cited by appellant in support of his position that the language relative to the deposit is not a covenant running with the land, are cases in which there is no language indicating as does the language in the lease in the case at bar, that the successors in interest of Basch were to be chargeable with the duty of accounting to Kaufman for the $5,000.

But even if the decisions in such cases seem to impinge upon our contention, we urge that while such cases are entitled to consideration, they do not make the law in this state, and this Court should declare the law in this jurisdiction to be the expression of justice regardless of the determination of courts of other states.

Refusal to allow amendment.

As to the alleged error of the trial Judge, in refusing the appellant the right to amend his complaint, we would respectfully urge that the power of amendment is discretionary and will not be reviewed unless that discretion is abused. There is no evidence of such abuse. On the contrary, it would have been manifestly unfair to the complainant and to the defendant, Meyer, to have brought this issue at the last moment of the case.

See:

Ten Eyck v. *Delaware, etc., Canal Co.*, 19 N. J. L. (4 Harr.) 5.

Seymour v. *Long Dock Co.*, 17 N. J. Equity (2 C. E. Gr.) 169.

Bruch v. *Carter*, 32 N. J. L. (3 Vr.), 554.

For these reasons we respectfully urge that the judgment should be affirmed.

Respectfully submitted,

JACOB FISCHEL,
WILBUR A. HEISLEY,
Counsel of Defendant Meyer.

INDEX.

TESTIMONY.

EXHIBITS.

Notice of Appeal.

Filed November 30, 1917.

Essex Circuit Court.

BENJAMIN H. KAUFMAN, *Plaintiff,* *vs.* ELMA MENNEN WILLIAMS and WILLIAM G. MENNEN, and JOSEPH MEYER, *Defendants.*	*Action at Law.* *Notice of Appeal.*

To SAMUEL F. LEBER, Attorney of Plaintiff, and JACOB FISCHEL, Attorney of Defendant Joseph Meyer:

Sirs:

TAKE NOTICE that the defendants, Elma Mennen Williams and William G. Mennen appeal to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Dated November 30, 1917.

SCOTT GERMAN,
Attorney for Defendants, Elma Mennen Williams and William G. Mennen.

Service of the within Notice of Appeal is hereby acknowledged this 30th day of November, 1917.

SAMUEL F. LEBER,
Attorney of Plaintiff.

JACOB FISCHEL,
Attorney of Defendant, Joseph Meyer.

Grounds of Appeal.

Filed December 24, 1917.

New Jersey Court of Errors and Appeals

BENJAMIN H. KAUFMAN, *Plaintiff-Respondent,* *vs.* ELMA MENNEN WILLIAMS and WILLIAM GERHARD MENNEN, &c., and JOSEPH MEYER, *Defendants,* ELMA MENNEN WILLIAMS and WILLIAM GERHARD MENNEN, *Appellants.*	*Action at Law.* *Grounds of of Appeal.*

The appellants, Elma Mennen Williams and William Gerhard Mennen, state the following grounds of appeal:

1. That the court denied the defendants, Elma Mennen Williams and William Gerhard Mennen's motion for a non-suit.

2. That the court denied said defendant's motion for the direction of a verdict against the plaintiff and in favor of said defendants.

3. That the court directed a verdict in favor of the plaintiff and against said defendants.

4. That the court directed a verdict in favor of defendant Joseph Meyer and against plaintiff.

5. That the court refused to permit said defendants to prove by the records produced by William K. Thomas, Deputy Register of Essex

County, an official in charge of the records of deeds in the register's office of said county, a deed from said defendants recorded in Book V. 58 of deeds for said county, on page 307, showing that the said defendants had conveyed the lands and premises in question before May 1st, 1917, and that they were not the owners of the said lands on that date, that is to say, by refusing to permit said Thomas to testify as follows:

"Have you the record of the recording of a deed from Elma Mennen Williams and others to Carrie B. Fuld, to property at Market and Washington streets, Newark, recorded in Book V. 58, page 307?"

6. That the court refused to permit said defendants, on motion of their counsel, to amend their answer by adding another defense that they were not the owners of said property on May 1st, 1917.

Dated December 20, 1917.

SCOTT GERMAN,
Attorney for Elma Mennen Williams and William Gerhard Mennen, Defendants-Appellants.

Service of the within Grounds of Appeal is hereby acknowledged this 20th day of December, 1917,

SAMUEL F. LEBER,
Attorney of Benjamin H. Kaufman, Plaintiff-Respondent.

JACOB FISCHEL,
Attorney of Defendant, Joseph Meyer.

Summons.

Filed May 23, 1917.

THE STATE OF NEW JERSEY, *ss.:*

To Elma Mennen Williams and William Gerhard Mennen, individually and as executors under the last will and testament of Elma C. Mennen, deceased, and Joseph Meyer: You are summoned to answer the annexed complaint of Benjamin H. Kaufman, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint 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.

[L. S.]

WITNESS, FREDERIC ADAMS, Judge of the said Circuit Court, at Newark, this nineteenth day of May, nineteen hundred and seventeen.

JOSEPH McDONOUGH,
Clerk.

SAMUEL F. LEBER,
Attorney.

To the within named defendants:

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 must file an answer within twenty days of such service; and that in default thereof judgment will be entered against you.

SAMUEL F. LEBER,
Attorney for Plaintiff.

Complaint.

Essex County Circuit Court.

BENJAMIN H. KAUFMAN, *Plaintiff,* *vs.* ELMA MENNEN WILLIAMS and WILLIAM GERHARD MENNEN, individually and as Executors under the last will and testament of ELMA C. MENNEN, deceased, and JOSEPH MEYER, *Defendants.*	*Action at Law.* *Complaint.*

(1.) The plaintiff is a resident of the City, County and State of New York. All of the defendants reside in the City of Newark, County of Essex, State of New Jersey.

(2.) On the 4th day of December, 1906, one Charles J. Basch by indenture of lease, dated that day, did let and hire to the plaintiff, Benjamin H. Kaufman, the whole of the store on the ground floor of the building situate on the northeasterly corner of Washington and Market streets, known as the Metropolitan Building, and known by the street numbers 109 to 113 Market street, in the City of Newark, New Jersey, for the term of ten years and two months from the 1st day of March, 1907, at the yearly rent or sum of ten thousand dollars ($10,000), to be paid in equal monthly payments in advance on the 1st day of each month. A true copy of said

indenture of lease is hereto annexed, marked Schedule "A," and is made a part hereof as if fully herein set forth.

(3.) In and by said indenture of lease the plaintiff, amongst other things, agreed to deposit with the landlord, Charles J. Basch, upon the delivery of said indenture of lease, the sum of five thousand dollars ($5,000) as security for the faithful performance of all of the covenants and conditions in said lease contained and by him, said plaintiff to be performed. It was further in said indenture of lease agreed that if the plaintiff would pay said rent money and would faithfully perform all the conditions and covenants contained therein and assumed by him to be performed, then upon the termination of the demised term, the landlord would return to the tenant said sum of five thousand dollars ($5,000). It was further in said indenture of lease agreed that interest on said sum of five thousand dollars ($5,000) at the rate of five per cent. (5%) per annum would be paid semi-annually to the plaintiff and that in case of default on the part of the plaintiff in the performance of any of the covenants and conditions on his part, in said indenture of lease contained, then and thereupon the landlord may at his option apply said sum of five thousand dollars ($5,000), together with interest accrued thereon, towards the payment of any rent that may remain unpaid or towards the payment and satisfaction of any other default or damage suffered by the landlord arising out of the covenants, agreements and conditions in said indenture of lease contained; and it was therein agreed that the landlord should have the right to hold and retain the said sum of five thousand dollars ($5,000) or any balance

thereof remaining, until the first day of May, 1917, notwithstanding the fact that said lease may have been terminated by summary or other legal proceedings. It was further understood and agreed in and by said indenture of lease that wherever the term "landlord" is used therein, it shall be construed as meaning the said Charles J. Basch, his executors, administrators or assigns and that wherever the term "tenant" is employed therein it shall be construed as meaning the plaintiff, his executors, administrators or his assigns, and that the covenants contained in said indenture of lease shall be binding on the parties thereto, to wit, the said Charles J. Basch and the plaintiff, Benjamin H. Kaufman and their successors in interest.

(4.) The plaintiff further complains that upon the execution and delivery of the aforesaid indenture of lease he paid unto the said Charles J. Basch the sum of five thousand dollars ($5,000) in accordance with the terms, conditions and requirements so as aforesaid contained in said indenture of lease.

(5.) The plaintiff further complains that by deed dated the 27th day of April, 1911, acknowledged the same date, and recorded on the 29th day of April, 1911, in Book Q. 48 of deeds for Essex County, on pages 575, etc., the said Charles J. Basch and Violet S. Basch, his wife, conveyed unto the defendant, Joseph Meyer, his heirs and assigns, all and singular the lands and premises located in the City of Newark and particularly described as follows:

Beginning at the corner formed by the intersection of the northerly line of Market street in

the easterly line of Washington street; thence running along the line of Market street south sixty-four degrees east forty-two feet five and one-half inches; thence north twenty-six degrees twenty-nine minutes east forty feet five inches; thence north twenty-five degrees fifty-three minutes east fifteen feet; thence south sixty-four degrees east one and one-half inches; thence north twenty-six degrees, fifty-six minutes east thirty-two feet to the line of property formerly belonging to the Central Presbyterian Church; thence along the same north sixty-nine degrees fifty-seven minutes west fifty-two feet one inch to the easterly line of Washington street; thence along the same twenty degrees three minutes west eighty-two feet four and one-half inches to the line of Market street and place of beginning.

The above described lands and premises are otherwise also known by street numbers as 109 to 113 Market street and 238 Washington street and contain the store so as aforesaid let and demised by the said Charles J. Basch to the plaintiff. The said conveyance was made unto the said Joseph Meyer expressly subject to certain mortgage encumbrances in said deed specifically referred to and also subject to the plaintiff's lease, all of which appears by reference to the record thereof, which record or certified copy thereof the plaintiff herein brings into court.

(6.) The plaintiff further complains that simultaneously with the conveyance of the above described lands and premises the said Charles J. Basch paid over unto the said Joseph Meyer the sum of five thousand dollars ($5,000), to-

gether with interest accrued thereon, to the date of said payment, which sum the plaintiff so as aforesaid deposited with the said Charles J. Basch. The said Joseph Meyer then and there undertook to hold said sum of five thousand dollars $(5,000) subject to the covenants and conditions in said indenture contained and undertook to perform all the covenants and agreements in said indenture contained to be performed on the part of said Basch.

(7.) The plaintiff further complains that by deed of conveyance dated the 1st day of July 1912, acknowledged the same date and recorded on the same date in Book X. 50 of deeds for Essex County, on pages 360, etc., the said Joseph Meyer and Edna O. Meyer, his wife, conveyed unto one Elma C. Mennen and to her heirs and assigns forever the above described lands and premises; said conveyance was made expressly subject to the plaintiff's aforesaid lease, all of which appears by reference to the record thereof, which record or a certified copy thereof the plaintiff herein brings into court.

(8.) The plaintiff further complains that as one of the considerations for the conveyance to her by the said Joseph Meyer of the above described lands and premises, the said Elma C. Mennen assumed and agreed with the said Joseph Meyer that she, the said Elma C. Mennen, would repay unto the plaintiff the aforesaid sum of five thousand dollars ($5,000), together with interest accrued thereon to the date of said repayment if and when he, the said plaintiff, would under the agreements, covenants and conditions contained in the aforesaid indenture of lease be entitled thereto. The plain-

tiff further complains that the said Elma C. Mennen received from the said Joseph Meyer at the time when the said conveyance of the above described lands and premises were made to her the said sum of five thousand dollars and interest accrued on said principal sum, and then and there undertook and agreed with the said Joseph Meyer that she, the said Elma C. Mennen, would hold the said sum of five thousand dollars ($5,000) under the terms, covenants, agreements and conditions contained in the aforesaid lease and that she, the said Elma C. Mennen, would repay unto the plaintiff the said sum of five thousand dollars ($5,000) and accrued interest when and if under the agreements, covenants and conditions in said indenture of lease, he, the said plaintiff, would become entitled thereto or to so much thereof as shall remain unappropriated pursuant to the provisions in said indenture of lease contained.

(9.) The plaintiff further complains that on the 25th day of October, 1916, the said Elma C. Mennen departed this life, leaving her last will and testament, which was duly probated with the Surrogate of the County of Essex on the 8th day of November, 1916, and which was recorded in the said Surrogate's office in Book O. 5 of wills for said County, on pages 150, etc. That in and by said last will and testament the said Elma C. Mennen designated and appointed the defendants, Elma Mennen Williams, executrix, and William Gerhard Mennen, executor, respectively, of her said last will and testament. That the said Elma Mennen Williams and William Gerhard Mennen have qualified as such executrix and executor and have entered in and upon their duties and are still acting as executrix

and executor, respectively, of the last will and testament of the said Elma C. Mennen, deceased. The plaintiff further complains that in and by her last will and testament the said Elma C. Mennen, after making sundry bequests, gave, devised and bequeathed unto the said Elma Mennen Williams and the said William Gerhard Mennen all the residue and remainder of her estate, both real, personal and mixed and of whatsoever kind or nature and wheresoever the same may be situated, of which she died seized or possessed or to which she was entitled, to be divided equally between them, the said Elma Mennen Williams and the said William Gerhard Mennen, share and share alike. That a part of the residuary estate consist of the lands and premises located on the northeast corner of Washington and Market streets, in the said City of Newark, which contains the above described demised premises; that the estate of Elma C. Mennen has not been finally settled.

(10.) The plaintiff further complains that on or about the 1st day of March, 1907, he entered into possession of the demised premises and has since then been in possession under the aforesaid indenture of lease until the 1st day of May, 1917, and has in all respects fully performed all the covenants and conditions in said indenture of lease contained to be performed on his part, excepting as hereinafter stated; that the said possession continued during the successive ownerships of the above described lands and premises as above stated and that his last landlords under said lease were the said defendants, Elma Mennen Williams and William Gerhard Mennen, and that since the

death of said Elma C. Mennen he paid them the rent required to be paid under said lease.

(11.) The plaintiff has failed to pay unto the said Elma Mennen Williams and William Gerhard Mennen the rent demanded by the aforesaid indenture of lease for the months of February, March and April, 1917, amounting to twenty-five hundred dollars ($2,500), which amount the said Elma Mennen Williams and William Gerhard Mennen are under the covenants and agreements of the said indenture of lease entitled to deduct from the aforesaid sum of five thousand dollars ($5,000), and which deduction the plaintiff has requested the said Elma Mennen Williams and William Gerhard Mennen to make and has demanded that the balance of the said sum of five thousand dollars ($5,000), together with interest accrued thereon at the rate of five per cent. (5%) per annum from the 15th day of December, 1916, and at six per cent. (6%) per annum on the sum of twenty-five hundred dollars ($2,500) from May 1st, 1917, to be paid to the plaintiff, with which request the said defendants, Elma Mennen Williams and William Gerhard Mennen, as executors of the last will and testament of Elma C. Mennen, deceased, and individually, have refused and still refuse to comply.

(12.) The said Elma Mennen Williams and William Gerhard Mennen, as executors of the last will and testament of Elma C. Mennen, deceased, and individually, have prior to the commencement of this action rejected the aforesaid claim of the plaintiff and assert that the defendant, Joseph Meyer, is liable and bounden in law to pay the said sum of five thousand dollars

($5,000) and interest accrued thereon to the plaintiff. None of said defendants have repaid to the plaintiff the said sum of five thousand dollars ($5,000) or any part thereof.

(13.) The plaintiff demands judgment against the defendants, Elma Mennen Williams and William Gerhard Mennen, as executors of the last will and testament of Elma C. Mennen, deceased, or in the alternative, against them individually, in the sum of twenty-five hundred dollars ($2,500), together with interest on five thousand dollars, from the 15th day of December, 1916, to the 1st day of May, 1917, and at the rate of six per cent. (6%) per annum on the sum of twenty-five hundred dollars ($2,500) from the 1st day of May, 1917, to the date of recovery of judgment, or, in the alternative, the plaintiff demands judgment against the said defendant, Joseph Meyer, for five thousand dollars ($5,000), with interest from the 15th day of December, 1916, to the 1st day of May, 1917, at five per cent. (5%) per annum and interest from the 1st day of May to the date of recovery of judgment at the rate of six per cent. (6%) per annum.

SAMUEL F. LEBER,
Attorney for Plaintiff.

SCHEDULE "A."

THIS INDENTURE, made the fourth day of December, 1906, between CHARLES J. BASCH, of the City of New York, party of the first part, hereinafter called the landlord, and BENJAMIN H. KAUFMAN, of the same place, party of the second part, hereinafter called the tenant, WITNESSETH:

Complaint.

That the landlord has let unto the said tenant, and the tenant has hired the whole of the store on the ground floor of the building situate on the northeasterly corner of Washington and Market streets, known as the Metropolitan Building, and known by the street numbers 109 to 113 Market street, in the City of Newark, New Jersey, for the term of ten (10) years and two (2) months from the first day of March, nineteen hundred and seven, at the yearly rent or sum of ten thousand dollars, to be paid in equal monthly payments in advance on the first day of each month.

It is further agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants or conditions herein contained, the landlord may re-enter and resume possession of the premises either by force, by summary proceedings or otherwise, and the same to have again, repossess and enjoy. In case of such re-entry, or in case the tenant is dispossessed by summary proceedings or other legal proceedings, or in case the premises become vacant, the landlord may re-let the premises or any part thereof for the remainder of the term, or any portion thereof, for the account of the tenant, and receive the rent thereof, applying the same, first to the payment of such expenses as the landlord may be put to in re-entering and then to the payment of rent due by these presents, and the balance, if any, to be paid to the tenant who shall nevertheless remain liable for any deficiency.

It is understood and agreed that if the landlord elects to re-let the premises, the tenant shall be liable for the difference between the amount that would have been payable during

the residue of the original term, if this lease had continued in force and the net rent for such period, realized by the landlord by means of re-letting to other parties, and in such case, the tenant agrees to pay such difference monthly from time to time, as the rent would have fallen due if the lease had continued, deducting from the original amount of each monthly payment the net amount realized during the preceding month by means of re-letting as aforesaid.

The landlord shall not be liable for his failure to re-let the said premises, or in case said premises are re-let, for his failure to collect the rent, and the tenant does further waive for himself, and all persons claiming under him, all right to redeem the premises after a judgment to dispossess shall have been entered, or a warrant or other decree to dispossess the tenant shall have been issued.

The tenant further covenants and agrees to and with the landlord as follows:

That the tenant will during the said term well and truly pay or cause to be paid unto the landlord the said rent reserved on the days hereinbefore prescribed for the payment thereof.

That the tenant will not assign this lease without the written consent of the landlord first had and obtained, and in case of such assignment, the tenant shall nevertheless remain personally liable upon this lease, for the due performance of all the terms, covenants and conditions thereof, such liability to be deemed that of a principal and not that of a surety.

The tenant may underlet the said premises or any part thereof, provided, however, that the said premises or any part shall not be used or permitted to be used at any time during

the said term for a saloon or restaurant, nor for any purpose that may be obnoxious or objectionable to the other tenants of said building, nor for any purpose deemed more hazardous than the business of the tenant, which is that of a hat business, or for any purpose deemed extra-hazardous, nor for any business, of such character as to increase the rate of insurance on said building, without the written consent of the landlord first had and obtained.

The tenant shall not make any alterations in or of the said premises during the said term, without the written consent of the landlord, and that all such alterations shall first be approved by the landlord, and by all the municipal departments of the City of Newark, having jurisdiction over the subject matter, and by the Board of Fire Underwriters having jurisdiction of the premises. All of said alterations shall be made at the cost and expense of the tenant, who shall also keep the said premises in good and tenantable repair during the said term at his own expense. And the said tenant hereby agrees to hold the landlord harmless of and from all mechanic's liens that may be filed against said premises by reason of any of the said alterations or repairs and in case of his failure to satify such liens, the amounts thereof shall be added to and become part of the month's rent next thereafter becoming due, and be collectible therewith, and the landlord may pay said amounts or any of them, in which event, the amounts so paid shall be repaid to the landlord by the tenant, with interest, on demand, but the right of the landlord to recover said sum as part of said rent shall not be dependent upon his payment of the same.

Complaint.

All alterations or improvements made by the said tenant shall belong to the landlord and shall not be removed by the tenant at the end or sooner termination of this lease.

And it is expressly understood and agreed that if any partitions are built in the said premises, they shall be fireproof and in conformity with the condition of the rest of the said building.

If the tenant fails to keep the said premises in good and tenantable repair, the landlord may make the same for account of the tenant and the expense thereof shall be added to the month's rent next thereafter becoming due and be collectible therewith, and the tenant hereby agrees to pay the same to the landlord.

The landlord or his agents or employees shall have the right to enter the said premises at all reasonable hours to examine the same and for the purpose of making such repairs as he may deem necessary for the safety and preservation of the said building, or its fixtures and appurtenances. This clause shall, however, not be deemed or construed as relieving the tenant from his obligation or make the repairs in the demised premises, and to keep the said premises in good and tenantable repair.

The tenant will permit the landlord or his agent to show the premises to persons wishing to hire or purchase the same, and during the three months next preceding the expiration of the term, will permit the usual notice of "To Let" to be placed upon the walls or doors of said premises, and remain thereon without hindrance or molestation.

And it is further agreed that in case the premises hereby leased shall be partially dam-

aged by fire, the same shall be repaired as speedily as possible at the expense of the landlord. In case the damage shall be so extensive as to render the demised premises untenantable, the rent shall cease until such time as the same shall be put in complete repair, but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth, this lease shall cease and come to an end, provided, however, that such damage or destruction be not caused by the carelessness, negligence or improper conduct of the tenant, his agents or servants.

The tenant agrees that he will promptly execute and comply at his own costs and expense, with all laws, rules, orders, ordinances and regulations of the United States, of the State of New Jersey, and of the City of Newark, and of any and all departments and bureaus, municipal or otherwise, applicable to said premises, during the said term, and shall also at the tenant's own cost and expense promptly comply with all rules, orders and regulations of the Board of Fire Underwriters of the Newark Fire Insurance Exchange, for the prevention of fires, and the tenant shall save and keep harmless the landlord from all loss and damage, costs and expenses, from or by reason of the matters aforesaid, and should the tenant fail or neglect to promptly execute and comply with any of the said laws, rules, orders, ordinances or regulations aforesaid, then the landlord shall have the right at his option to comply therewith for the account of the tenant, and the tenant hereby agrees to pay all expenses incurred in executing and complying therewith, which expenses shall

be deemed additional rent and shall be payable with the next instalment of rent falling due under this lease.

The tenant also agrees that he will not obstruct the sidewalk of the said premises and will keep the same unobstructed and free of ice and snow.

The tenant shall have the privilege to have a sign painted upon the easterly wall of the said building containing the demised premises. It is further agreed that no sign, advertisement, or notice shall be inscribed, painted, or affixed on any part of the demised premises, or on any part of the said easterly wall above mentioned, unless approved by the landlord.

The landlord shall not be liable for any damage or injury by water or for any other reason, which may be sustained by the said tenant or any other persons, nor for any other damage or injury resulting from the carelessness, negligence or improper conduct on the part of said tenant, or his employees or any other tenants, or their employees, or by reason of the breakage, leakage, or obstruction of the water or soil pipes, or other leakage, in or about the said building, or by reason of any ice, water or snow upon the said demised premises or any part thereof, or of said building or any part thereof, or the sidewalk in front thereof, and the tenant agrees that he will save harmless and indemnify the landlord from all claims or demands which may at any time be made, upon or against him, by any person or persons, by reason of any injury or damage sustained by him or them in the said demised premises, or by reason of any of the acts, omissions, or occurrences as hereinbefore set forth, or for any reason whatsoever,

during said demised term, upon notice of such claims or demands being given to the said tenant by the landlord, as soon as reasonably may be after said landlord has received notice thereof, and in case of such damage as aforesaid, the rent shall not be withheld or diminished on account thereof.

The tenant agrees to insure and keep insured at his own expense in some good incorporated company or companies for the benefit of the landlord, the plate glass in said demised premises, and to assign the said policies to the landlord, if required by him. In default thereof, the landlord may have the said plate glass insured, and pay the amount thereof, which such amount shall be added to and become part of the month's rent next thereafter to become due and be collectible therewith.

This lease shall be subject to the mortgage or mortgages now a lien upon the plot of ground containing the demised premises and shall be subject to any mortgage or mortgages that may hereafter be placed thereon. The tenant agrees on demand to execute, acknowledge and deliver to the landlord any instrument that may be deemed necessary to subordinate this lease to such new mortgage or mortgages, or he will on demand cancel this lease and execute a new lease for the then unexpired term hereof, which new lease shall in other respects contain all the conditions and provisions contained in this lease.

The landlord agrees to furnish sufficient steam heat to heat the demised premises between the five months from November 1st to April 1st, whenever said steam heat may be necessary.

Complaint.

If by reason of accident, or for repairing or improving the condition or operation of the heating apparatus or boilers in said premises, it may become necessary to omit the operation of said heating apparatus or boilers, the landlord may do so until the necessary repairs or improvements shall have been made and completed, without in any manner or in any respect modifying or affecting the obligations of the covenants of the tenant herein contained, and without any diminution of rent therefor, and the tenant shall make no claim for, nor be entitled to damages by reason thereof. In such case, however, the landlord shall use due expedition and diligence to repair, improve or reconstruct said heating apparatus and boilers, or anything pertaining thereto.

At the expiration of the said term the tenant will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. Any alterations made therein with the written consent of the landlord shall remain.

The landlord covenants that the said tenant on paying the said yearly rent in manner aforesaid, shall and may peaceably and quietly have, hold and enjoy the demised premises for the term aforesaid.

In the event of a sale of this property by the said Charles J. Basch, the said Charles J. Basch shall have the right during the term of this lease, to cancel the same upon giving the tenant written notice of his intention to do so, such notice to be served either personally or by mail, addressed to the tenant at the demised premises. At the expiration of six months

from the date of service of such notice this lease and the term thereby granted, shall cease and come to an end, anything herein contained to the contrary notwithstanding; and thereupon the tenant shall remove from the said premises and deliver up possession thereof to the landlord, and in case of his failure to do so, the landlord may cause him to be removed therefrom by summary proceedings or other legal proceedings as holding over his said term. Thirty days prior to the expiration of said notice, the landlord shall deposit upon the conditions hereinafter stated, with some good trust company in the City of Newark, N. J., or with such other depository as may be mutually agreed upon the sum of thirty-five thousand dollars, if such removal and surrender is to be made at any time within the first five years thereof.

When said premises shall have been vacated by said tenant and possession of the same shall have been delivered to the landlord in pursuance of said notice, the said trust company or other depository shall pay over to the tenant in consideration of such removal and surrender the amount so deposited with it, as aforesaid. The landlord shall be entitled to the interest on said deposit. The rent up to the date of such removal and surrender shall be apportioned and in case any rent shall then be unpaid, the landlord shall be entitled to receive out of said money so deposited such unpaid rent, with interest. This lease and the term thereby granted shall, however, not be terminated by the giving of said six months' notice, unless said landlord shall make the deposit at the time and in the manner hereinabove provided for.

In case the said tenant shall fail to remove from said premises and deliver possession thereof at the expiration of the notice aforesaid, the landlord shall be entitled to receive back from said trust company or depository, the amount so deposited, with interest, and the tenant shall have no further claim thereto. Each of the parties agrees to execute any paper deemed necessary by said depository to carry out this agreement.

In the event of a sale of this property by any subsequent owner thereof, such owner shall have the same right to cancel this lease, upon the same terms and conditions hereinbefore mentioned, except that instead of making the deposit with said trust company or other depository he shall with the service of the notice above provided pay to the tenant one-half of the amount hereinbefore provided to be paid upon such cancellation, and he shall pay the other half thereof not later than one day before the expiration of the said six months aforesaid, and only upon such payments shall said term come to an end. In all other respects, any subsequent owner shall have the same rights and privileges as herein provided for the said Charles J. Basch.

The tenant has deposited with the landlord upon the delivery of this lease, the sum of five thousand dollars as security for the faithful performance of all the covenants and conditions of this lease, and it is hereby agreed that if the said tenant shall pay said rent and shall faithfully perform all the conditions and covenants of this lease, then upon the termination thereof the landlord will return to the tenant said sum of five thousand dollars. Interest on

said sum at the rate of five per cent. per annum shall be paid semi-annually to the tenant. But in case of default on the part of the tenant in the performance of any of the covenants and conditions of this lease on his part, the landlord may at his option apply said sum, together with the interest thereon, toward the payment of any rent that may remain unpaid, or the difference or deficiency arising by reason of his letting the said premises to another tenant, as hereinbefore provided, and to any other damage suffered by him by the default of the tenant in the performance of the covenants of this lease, and except as hereinafter provided, the landlord shall have the right to hold and retain said sum or any balance thereof remaining in his hands, until May 1, 1917, notwithstanding the fact that this lease may have been terminated by summary or other legal proceedings. In case any proceedings are instituted to dispossess the tenant for non-payment of rent, he shall have no right to interpose as a defense thereto that the said deposit is held by the landlord or ask or demand to have the same or any part thereof applied toward the payment of the rent then unpaid. If, however, this lease be cancelled in case of a sale of said premises as hereinbefore provided or this lease be terminated by a total destruction of said demised premises, then said amount so deposited as security or so much thereof as the landlord may not be entitled to retain for rent or for damages aforesaid, shall be paid to said tenant at the time when possession of said premises shall be delivered by him in pursuance of the notice hereinbefore provided for or upon such total destruction as the case may be.

Complaint.

The landlord hereby agrees that the entrance to the basement under the demised premises on the Market street front shall not be altered without the tenant's consent.

The failure of the landlord to insist upon a strict performance of any of the covenants or conditions of this lease shall not be construed as a waiver or relinquishment for the future of any such covenants or conditions, but the same shall remain in full force and effect.

It is understood and agreed that wherever the term "landlord" is used herein it shall be construed as meaning the party of the first part, his executors, administrators or assigns; that wherever the term "tenant" is employed herein, it shall be construed as meaning the party of the second part, his executors, administrators or assigns, and that the covenants contained in this lease are binding on the parties hereto and their successors in interest.

In Witness Whereof the parties hereto have hereunto set their respective hands and seals the day and year first above written.

Charles J. Basch. [L. S.]
Benjamin H. Kaufman. [L. S.]

In the presence of:

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

Be It Remembered, that on this day of April, in the year one thousand nine hundred and seven, before me, Nathaniel H. Kramer, a Commissioner of Deeds in and for the City of New York, personally appeared Charles J. Basch and Benjamin H. Kaufman, who, I am

satisfied, are the grantors named in the within instrument, and I having made known to them the contents thereof, they thereupon acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

NATHANIEL H. KRAMER,
Comm. of Deeds, City of New York.

Answer of Defendants, Elma Mennen Williams and William Gerhard Mennen.

Filed June 9, 1917.

The answer of William G. Mennen, of the City of Newark, Essex County, New Jersey, and Elma Mennen Williams, of the City of Detroit, Wayne County, Michigan, individually and as executors under the last will and testament of Elma C. Mennen, deceased, say:

1. Defendants admit that plaintiff is a resident of the City, County and State of New York, and that this defendant, William G. Mennen, resides in the City of Newark, Essex County, New Jersey, as set forth in the first paragraph of said complaint, but deny that this defendant, Elma Mennen Williams, resides in Newark, but, on the contrary, resides in the City of Detroit and State of Michigan.

2. The defendants admit Paragraph 2 of said complaint.

3. The defendants admit Paragraph 3 of said complaint.

4. The defendants have no knowledge of the allegations contained in Paragraph 4 of said complaint, and leave the plaintiff to his proof.

5. The defendants admit Paragraph 5 of said complaint, except that portion thereof which states that said conveyance was made to said Joseph Meyer expressly subject to certain mortgage encumbrances in said deeds specifically referred to, and also subject to the plaintiff's lease, all of which appear by reference to the record thereof, of which said portion of said paragraph defendants have no knowledge and leave plaintiff to his proof.

6. The defendants have no knowledge of the allegations contained in Paragraph 6 of said complaint, and leave the plaintiff to his proof.

7. The defendants admit Paragraph 7 of said complaint.

8. The defendants deny Paragraph 8 of said complaint, and each and every allegation contained therein.

9. The defendants admit Paragraph 9 of said complaint.

10. The defendants admit that plaintiff entered into possession of said premises on or about March 1, 1907, as set forth in Paragraph 10 of said complaint, and remained in possession under said lease until May 1, 1917, but the defendants deny all the remaining portion of said paragraph and each and every allegation thereof.

11. The defendants admit that plaintiff has failed to pay unto them the rent mentioned in Paragraph 11 of said complaint, but these defendants deny that portion of said paragraph

which states that these defendants are obliged to deduct the sum of twenty-five hundred dollars under the covenants and agreements of the indenture of lease therein mentioned from the sum of five thousand dollars, as set forth in said paragraph, and also deny the remaining portion of said paragraph, except that these defendants admit that they have refused, and still do refuse to acknowledge that said plaintiff has any claim for twenty-five hundred dollars or any other sum against them or either of them.

12. The defendants admit Paragraph 12 of said complaint.

13. These defendants deny that either individually or as executors of the last will and testament of Elma C. Mennen, deceased, they are indebted to the plaintiff in the sum of twenty-five hundred dollars as mentioned in Paragraph 13 of said complaint, or in any other sum.

FIRST DEFENSE.

Plaintiff has not fulfilled the terms of the lease set forth in said complaint in that he did not pay to these defendants, either individually or as executors of the last will and testament of Elma C. Mennen, deceased, the rent of said premises for the months of February, March and April, 1917, amounting to the sum of twenty-five hundred dollars, on the first days of those respective months as provided in said lease, or at any other time, and therefore is not entitled to the return of the deposit of five thousand dollars set forth in said complaint, or any part thereof.

SECOND DEFENSE.

That neither the said Charles J. Basch nor the said Joseph Meyer mentioned in said complaint as prior owners of the lands described in Paragraph 5 of said complaint, and occupied by said plaintiff under the terms of the lease mentioned therein, ever paid or turned over to said Elma C. Mennen or to these defendants, said sum of five thousand dollars or any part thereof; nor did said five thousand dollars or any part thereof form any part of the consideration of the conveyance of said lands from said Joseph Meyer to said Elma C. Mennen as set forth in Paragraph 8 of said complaint.

THIRD DEFENSE.

That Charles J. Basch, the previous owner of said lands at the time of the conveyance of the lands mentioned in said complaint to said Joseph Meyer, under the direction and authority of the said plaintiff, paid to said Joseph Meyer the sum of five thousand dollars, the deposit which the plaintiff claims that he made to the said Charles J. Basch as mentioned and set forth in the lease attached to the plaintiff's complaint, and that thereafter the said Joseph Meyer paid the interest on said sum to the said plaintiff from the time of the conveyance of said lands to him by said Basch, to wit, from April 27, 1911, or thereabouts, to January 1, 1917, and thereafter to the expiration of the plaintiff's said lease, that is to say, until May 1st, 1917.

FOURTH DEFENSE.

That these defendants either individually or as executors of Elma C. Mennen, deceased, are not indebted to the plaintiff for the sum claimed or in any other sum, as these defendants neither

by the lease set forth in said complaint, or in any other manner, became liable to pay the said plaintiff the sum of five thousand dollars, or any part thereof as set forth in said complaint.

FIFTH DEFENSE.

Any covenants or agreements made between plaintiff and said Charles J. Basch in the lease mentioned in the plaintiff's complaint concerning the deposit of Five Thousand Dollars, and each and every allegation in the plaintiff's complaint concerning the same was a personal transaction between the said plaintiff and the said Charles J. Basch, and has no binding or legal effect upon these defendants or either of them.

SCOTT GERMAN,
Attorney of William G. Mennen and Elma Mennen Williams, individually and as executors under the Last Will and Testament of Elma C. Mennen, deceased.

Answer of Defendant Joseph Meyer.

Filed June 30, 1917.

The answer of Joseph Meyer, one of the defendants:

1. This defendant admits that plaintiff is a resident of the City, County and State of New York, and that this defendant resides in the City of Newark, County of Essex and State of New Jersey.

2. This defendant admits paragraph two.

3. This defendant denies that the Indenture of Lease in the third paragraph of plaintiff's complaint set forth contains the terms in said paragraph set forth relating to the deposit of the sum of $5,000 as security for the performance of all the covenants and conditions in said lease so far as this defendant is concerned.

4. This defendant does not possess any knowledge of the matters and things set forth in the fourth paragraph of the complaint, sufficient to enable him to affirm or deny the same, and demands that the plaintiff prove the allegations therein contained.

5. This defendant admits that the said Charles J. Basch and Violet S. Basch, his wife, conveyed the premises described in paragraph five of the complaint to this defendant on April 29, 1911, but denies that the same were conveyed subject to so much of the lease as relates to the deposit of $5,000.

6. This defendant denies paragraph six of the complaint.

7. This defendant admits that he and his wife, Edna O. Meyer, conveyed the premises in paragraph seven of the complaint set forth to Elma C. Mennen and to her heirs and assigns forever, subject to the lease in paragraph three of the complaint, but denies that it was conveyed subject to the $5,000 deposit alleged to have been deposited as security for the faithful performance of said lease.

8. This defendant denies that the said Elma C. Mennen assumed and agreed with the defendant that she would repay unto the plaintiff the aforesaid sum of $5,000 as set forth in para-

graph eight of the plaintiff's complaint, and denies that the said Elma C. Mennen received or agreed to hold said sum of $5,000 under the terms and agreement set forth in said paragraph eight.

9. This defendant does not possess any knowledge of the matters and things set forth in the ninth paragraph of plaintiff's complaint sufficient to enable him to affirm or deny the same and demands that the plaintiff prove the allegations therein contained.

10. This defendant does not possess any knowledge as to when plaintiff entered into possession of the demised premises or how long he was in possession thereof, and as to whether he performed the covenants and conditions in the Indenture of Lease as set in said tenth paragraph set forth during the ownership of the other defendants, and demands that the plaintiff prove the allegations therein contained.

11. This defendant does not possess any knowledge of the matter and things set forth in the eleventh paragraph of the complaint sufficient to enable him to affirm or deny the same, and demands that the plaintiff prove the allegations therein contained.

12. This defendant denies the twelfth paragraph of the complaint.

13. This defendant denies the thirteenth paragraph of the plaintiff's complaint.

First Defense.

1. This defendant did not enter into any contract with the plaintiff, or any one on behalf

of the plaintiff, with reference to the said sum of $5,000 in the complaint set forth.

SECOND DEFENSE.

2. Whatever consideration was paid by the defendants Mennen and Williams or by Elma C. Mennen, and accepted by this defendant in the transfer of said property, was subject to all obligations under which this defendant had purchased the property and was so understood by the defendants Williams and Mennen and said Elma C. Mennen.

JACOB FISCHEL,
Attorney of Plaintiff.

Judgment Record.

Judgment.

Entered November 19, 1917.

ESSEX COUNTY CIRCUIT COURT.

27871

BENJAMIN H. KAUFMAN, *Plaintiff,* *vs.* ELMA MENNEN WILLIAMS and WILLIAM GERHARD MENNEN, individually and as executors under the last will and testament of Elma C. Mennen, deceased, or in the alternative, Joseph Meyer, *Defendants.*	*Action at Law.* *After Verdict.* *Judgment Entered Nov. 19, 1917.*

Damages	*$2678.84*
Costs	*64.58*
Def's	*47.72*
Total	*$2791.14*

Samuel F. Leber, attorney of plaintiff.

Wilbur A. Heisley, attorney of defendant, Joe Meyer.

Judgment after verdict in the above entitled action at law was rendered on the Nineteenth day of November, A. D. Nineteen Hundred and Seventeen, in favor of the said defendant Elma Mennen Williams and William Gerhard Mennen individually for the sum of Twenty-six hundred seventy-eight dollars and eighty-four cents damages and also find by order of the court in favor of the defendant Joseph Meyer and against the plaintiff Benjamin H. Kaufman and the sum of Forty-seven dollars and seventy-two cents costs of suit.

Certificate of Clerk.

Judgment entered and signed November 19th, 1917.

Book 94, page 382.

Certificate of Clerk.

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

I, JOHN H. SCOTT, Clerk of the Circuit Court in and for the County of Essex in the State of New Jersey, Do HEREBY CERTIFY that the foregoing is a true and correct copy of the records and proceedings and judgment record in the matter of Benjamin H. Kaufman *vs.* Elma Mennen Williams and William G. Mennen and Joseph Meyer and the same is taken from and compared with original records and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the official [SEAL] seal of said court and county at Newark, N. J., this 29th day of December, A. D. 1917.

JOHN H. SCOTT,
Clerk.

Opening.

ESSEX CIRCUIT COURT.

Thursday, November 15, 1917.

BENJAMIN H. KAUFMAN, *vs.* ELMA MENNEN WILLIAMS and WILLIAM GERHARD MENNEN, individually and as executors under the last will and testament of Elma C. Mennen, deceased, and Joseph Meyer.	*Action at Law.*

Before Honorable Frederic Adams, *J.*, and a jury.

For plaintiff appeared Samuel F. Leber, Esq., and Sidney W. Stein, Esq., of the New York Bar, who is admitted *pro haec vice* for the purposes of this case.

For the defendants Elma Mennen Williams and William Gerhard Mennen, etc., appears Scott German, Esq.

For the defendant Joseph Meyer appears Jacob Fischel, Esq; Honorable Wilbur A. Heisley, of counsel.

A jury is called and sworn.

Mr. Leber opens for plaintiff.

Mr. Heisley opens for defendant Joseph Meyer.

Mr. German opens for defendants Elma Mennen Williams and William Gerhard Mennen, etc.

CHARLES J. BASCH, sworn in behalf of plaintiff.

Direct examination by Mr. Leber.

Q Mr. Basch, you reside in this city, do you not? A I do.

Q And in 1906 were you the owner of the property located on the northeast corner of Washington and Market streets, Newark? A I was.

Q I show you a paper and ask you whether you recognize your signature upon it (paper shown to witness)? A That is my signature; yes, sir.

Q The first one is your signature? A The first one is mine.

Q And did Mr. Kaufman sign beneath your name? A He did.

Q That is his signature? A That is his signature.

Mr. Leber. I offer this paper in evidence. It is the lease, which, although it is admitted by all the pleadings, I thought ought to be formally in.

Mr. Heisley. We agree to it.

(The paper referred to is marked Ex. P. 1.)

Q Mr. Basch, I call your attention to a provision in this lease, found on the next to the last page, the second paragraph. I shall read it to you. (Reading): "The tenant has deposited with the landlord upon the delivery of this lease the sum of five thousand dollars as security for the faithful performance of all the covenants and conditions of this lease, and it is hereby agreed that, if the said tenant shall pay

said rent and shall faithfully perform all the conditions and covenants of this lease, then upon the termination thereof the landlord will return to the tenant said sum of five thousand dollars. Interest on the said sum at the rate of five per cent. per annum shall be paid semi-annually to the tenant, but in case of default on the part of the tenant in the performance of any of the covenants and conditions of this lease on his part, the landlord may, at his option, apply said sum, together with the interest thereon, toward the payment of any rent that may remain unpaid, or the difference or deficiency arising by reason of his letting the said premises to another tenant, as hereinbefore provided, and to any other damage suffered by him by default of the tenant in the performance of the covenants of this lease, and except as hereinafter provided, the landlord shall have the right to hold and retain said sum or any balance thereof remaining in his hands until May 1, 1917, notwithstanding the fact that this lease may have been terminated by summary or other legal proceedings." Did you receive the $5,000 from Mr. Kaufman? A I did.

Q Pursuant to the terms of this lease? A I did.

Q I show you a letter bearing date December 15, 1906 (paper shown to witness). Does it bear your signature? A It does.

Q And it is addressed to Benjamin A. Kaufman, 82 Nassau street. Is that the same Kaufman named in the lease? A The same Kaufman.

Mr. Leber. This is a receipt from Mr. Basch to Mr. Kaufman for the money.

(Mr. Leber hands the paper referred to to defendants' counsel.)

(The paper referred to is offered in evidence and marked Ex. P-2.)

(Mr. Leber reads Ex. P-2.)

Q I suppose you deposited this check and got the money for it? A Yes.

Q Mr. Basch, you continued to own this property until some time in the month of April, 1911, did you not? A I did.

Q What did you do with it at that time? A I sold it to Joseph Meyer.

Mr. Leber. I offer in evidence a deed dated the 27th day of April, 1911, made by Charles J. Basch and Violet S. Basch, his wife, to Joseph Meyer, for the premises in question, which deed was acknowledged on the 27th day of April, 1911, before S. N. Friedman, a commissioner of deeds of New York City, whose authority to take acknowledgments in the State of New York is certified to by William F. Schneider, clerk of the County of New York, and also clerk of the Supreme Court of said county, under his seal, and which deed has been recorded in the office of the register of the County of Essex on the 29th day of April, 1911, in Book Q-48 of Deeds for said county, on pages 575 to 578.

(The paper referred to is marked Ex. P-3.)

Q Mr. Basch, while you were the owner of this property did you receive your rent through Mr. Kaufman directly or through an agent? A I received the rent direct.

Cross examination by Mr. German.

Q I notice in the lease that Charles J. Basch is named as of the City of New York; is that correct? A At that time I resided in New York.

Q And Mr. Kaufman resided in New York at the same time? A Yes, sir.

Q And this lease, Exhibit P 1, was signed in New York? A Yes, it was signed in New York.

Q And the money was paid in New York? A I don't know whether the money was paid in New York or whether he mailed me a check to Newark here. My business is here and my office is here. It may have been mailed to me.

Q From New York? A From New York, but I received it here.

Q But he mailed it from New York? A From New York.

Q And the agreement was made in New York? A The agreement was made in New York.

Q You paid interest to Mr. Kaufman on this $5,000, did you, at the time you sold this property to Mr. Meyer? A I did.

Q And when you sold the property to Mr. Meyer what did you do with this deposit of $5,000? A I turned it over to Joseph Meyer.

Q And did you receive any paper from Mr. Meyer at that time or was any paper given by Mr. Meyer at that time to Mr. Kaufman or any other person relative to this deposit? A I don't know whether Mr. Meyer gave Mr. Kaufman any paper or not.

Q Well, you know there was a paper given by Mr. Meyer to Mr. Kaufman, do you not? A

I know there was a paper given by Mr. Kaufman to me.

Q What paper is that? A A paper authorizing me to turn the money over to Mr. Meyer.

Q Have you that paper? A I have not.

Q Where is it? A I don't know.

Mr. German. Well, if you gave it to counsel, I shall ask counsel to produce that paper.

Mr. Leber. You are arriving at conclusions. How do you know that he gave me such a paper.

Mr. German. I ask you to produce it now.

Mr. Leber. I have not got any such paper.

Mr. German. I ask Mr. Stein, your associate, to produce it.

Mr. Stein. I have not got any such paper.

Q Well, was the money turned over by you to Mr. Meyer? A The money was turned over by me to Mr. Meyer.

Q And you paid no further interest on it to Mr. Kaufman? A I paid no further interest on it.

Re-direct examination by Mr. Leber.

Q You did not turn any papers over to me referring to this case, did you, Mr. Basch? A No papers whatever.

JOSEPH MEYER, sworn in behalf of plaintiff.

Direct examination by Mr. Leber.

Q Mr. Meyer, you are one of the defendants in this case? A I am.

Q Where do you live? A 1090 Broad street, Newark.

Q Are you engaged in business? A Yes, sir.

Q Where? A In New York.

Q What address? A 220 Fifth avenue.

Q That is a mercantile business? A Yes, sir.

Q You purchased the property on the northeast corner of Washington and Market streets, Newark, from Mr. Basch, did you not? A Yes.

Q That was on the 27th of April or the 29th of April, 1911? A I am not sure of the exact date; the deed will show that.

Q Will this refresh your memory showing you Exhibit P. 3 (paper shown to witness)? A Yes.

Q And how long did you continue to own the property? A About fifteen months.

Q To whom did you convey it? A To Mrs. Elma Mennen.

Q Mrs. Elma C. Mennen? A Mrs. Elma C. Mennen.

Mr. Leber. I offer in evidence, if your Honor please, a certified copy of the deed from Joseph Meyer and Edna O. Meyer to Elma C. Mennen, dated the 1st day of July, 1912, embracing the lands and premises referred to in the lease, which deed was acknowledged on the 1st day of July, 1912, before Jacob Fischel, a Master in Chancery of New Jersey, and recorded in the office

of the Register of the County of Essex, on the 1st day of July, 1912, in Book X 50 of said county, on pages 360 to 363.

(The paper referred to is marked Ex. P 4.)

Q I suppose before you executed this deed you and Mrs. Mennen entered into articles of agreement for the sale and purchase of this property, did you?

Mr. German. I object to that, if your Honor please. If there was such an agreement, the agreement was followed by or satisfied by the giving of the deed.

The Court. Unless it contained articles outside of the scope of the deed.

Mr. German. In what way would that be competent, even so? Because they are claiming under this deed and not under the agreement.

The Court. I do not know that it would be competent.

Mr. German. Well, I object to the question.

The Court. I am merely considering whether it was absolutely conclusive against there being an agreement in evidence that there was a deed. It does not yet appear whether there was an agreement. You may answer the question either yes or no.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen, etc., prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A Yes.

Mr. Leber. Judge Heisley, will you produce that agreement?

Mr. Heisley. Yes, sir. It is here among my papers (handing paper to plaintiff's counsel).

Q Were you present when this paper was signed by all the parties named (paper shown to witness)? A I was.

Q Does this contain your signature? A It does.

Q And who signed the deed beneath your name? A My wife.

Q Edna O. Meyer? A Yes, sir.

Q Is this Mrs. Mennen's signature? A Yes.

Mr. Leber. I offer this agreement.

Mr. German. I object to it on the ground that it is not proper evidence, because, as is stated by counsel and as it has been testified by the witness, the deed was given in pursuance of this agreement, and the deed is in evidence and it is the basis for the cause of action.

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

AFTER RECESS.

The Court. We took our recess on a question about an agreement between Meyer and the Mennens.

(Counsel argue.)

The Court. I think I ought to receive the paper subject to the objections that are

made, and give it whatever effect it seems to be entitled to. Let it be marked.

Mr. Leber. You do not raise objection because we are not proving it by the witness, do you, Mr. German? Because the subscribing witness is here, and we shall call him, if necessary.

Mr. German. I think you had better prove it in the regular way.

Mr. Leber. You want it proved in the regular way?

Mr. German. I think so.

Mr. Leber. Well, I think I have proved it in the regular way. I offer this paper in evidence.

Mr. German. I object to it on the ground that it is not properly proved, and for the reason stated: that the deed swallows up the agreement.

The Court. What proof do you think would be proper?

Mr. German. Calling the attesting witness.

Mr. Heisley. There is a subscribing witness to the paper, and I suppose he should be produced.

Mr. Leber. If your Honor please, I have in mind the rule that it is not necessary to call the subscribing witness except in a suit where the action is founded on the paper. This is an action between Meyer and Mennen. I have had Mr. Meyer identify the signatures, and I think I have proved it as an exception to the rule.

The Court. You rely on it as a part of your general proof, I understand?

Mr. Leber. Yes, sir.

The Court. I think you had better prove it strictly.

(The witness stands aside for the present.)

FREDERICK T. HEY, sworn in behalf of plaintiff.

Direct examination by Mr. Leber.

Q Mr. Hey, you are a lawyer of this state? A Yes, sir.

Q I show you a paper and ask you whether it bears your signature as subscribing witness (paper shown to witness). A This paper does; yes, sir.

Q That is, the paper that I am showing you? A Yes, sir.

Q And the persons whose names appear on that paper signed in your presence? A They did.

Mr. Leber. I offer it in evidence.

Cross examination by Mr. German.

Q Mr. Hey, where was this paper signed? A My recollection is that two of the signatures were made in my office and the lady, Mrs.—— well, she signed it in her house before me.

By Mr. Leber.

Q There were two ladies. Why do you say "the lady?" A I mean the wife of the owner of the property.

Q Mrs. Meyer? A Mrs. Meyer.

Joseph Meyer, direct.

By Mr. German.

Q At that time you were acting for Mrs. Mennen in this transaction, were you not? A Yes, sir.

Q Was the lease, Exhibit P 1, before you, or had it been submitted to Mrs. Mennen, to your knowledge—

Objected to as not cross examination.

Mr. German. I have not finished the question.

The Court. That does not seem to be cross examination. The objection is sustained.

Mr. German. I renew my objection on the ground that the deed swallows up the agreement.

The Court. The objection is overruled.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The paper referred to is marked Ex. P 5.)

JOSEPH MEYER resumes the stand in behalf of plaintiff.

Direct examination by Mr. Leber.

Q Mr. Meyer, I show you a paper and ask you whether it bears your signature (paper shown to witness)? A Yes.

Mr. Leber. I offer the paper for identification.

(The paper referred to is marked P 6 for identification).

Q I show you another paper and ask you whether it bears your signature (paper shown to witness)? A Yes.

Mr. Leber. I offer this paper in evidence.

(The paper referred to is shown to defendants' counsel.)

Mr. Leber. I ask that it be marked P 7. This is a letter dated May 1, 1911, addressed to Mr. B. H. Kaufman, signed by the defendant, Joseph Meyer.

(The paper referred to is marked Ex. P 7.)

(Mr. Leber reads Ex. P 7.)

Q Mr. Meyer, during the time that you were the owner of the property Mr. Kaufman occupied the store in question? A He did.

Q And did you receive the rent from him? A I did.

Q Did you take care of this property yourself or did you have a renting agent, or an agent for the building? A I had an agent that took care of the building.

Q Did he collect the rents? A He did.

Q What is his name? A Abraham D. Marx.

Q Did he have an office in the building? A He did.

Q Where was that title passed to the property in question when you conveyed it to Mrs. Mennen? A In the office of Mrs. Mennen's attorney.

Q Who was he?

The Court. Which conveyance was this?

Joseph Meyer, direct.

Mr. Leber. The conveyance from Mr. Meyer to Mrs. Mennen.

Q Who was he? A Frederick T. Hey.

Q Who were present when this title was passed? A There were several persons present at the time; I don't know as I recall all the people just now.

Q See how many you can recall. A Besides myself, Mrs. Mennen, her son, William D. Mennen; Mr. Korb, a brother of hers, I believe; Mr. Hey, Jacob Fischel, Mr. Marx, Mr. Mendel; I believe that is all.

Q Well, now, Mr. Fischel is this young man sitting over here (indicating)? A Yes, sir.

Q And he is an attorney? A Yes.

Q And he represented you? A He did.

Q Did you have a counterpart of this Kaufman lease in your possession?

The Court. Which is the Kaufman lease?

Mr. Leber. The lease from Basch to Kaufman. I asked the witness whether he had a counterpart of the lease.

The Court. Did you have a counterpart?

A At what time do you speak of?

Q At the time when you conveyed the property to Mrs. Mennen. A The original lease was in the office at the time, in the possession of Mrs. Mennen's attorney.

Q It was? A It was; it was in his—

By the Court.

Q At what time? A At the time of the passing of the title and some time before.

Q Passing which title, from whom to whom? A Passing the title of the property in question from myself to Mrs. Mennen.

Joseph Meyer, cross.

Q It was in the office of Mr. Fischel? A In the office of Mr. Hey, Mrs. Mennen's counsel.

Q Whom do you say Mr. Fischel represented? A He was my counsel.

Q It was in the office of Mr. Hey when the deed from— A From me to Mrs. Mennen.

Q —from Meyer to Mennen was passed; is that it? A Yes, sir.

By Mr. Leber.

Q Did I understand you to say that this lease had been in Mr. Hey's possession for some time before the passing of the title? A I did say so.

Q Was this lease read by Mr. Hey or Mr. Mennen or his mother in your presence? A I don't recollect.

Q But you say that it was there? A It was there some time before and stayed in the possession of Mr. Hey until the passing of title.

Q Well, did you take it away after this title was passed? A I did not.

Q Has it ever again been in your possession? A It has not.

Cross examination by Mr. German.

Q Did you pay interest to Mr. Kaufman on this deposit from the time that you received it? A I did.

Q Up to what time? A I don't remember just what time I stopped.

Q Well, how long after you sold this property to Mrs. Mennen? A Some time thereafter.

Q Well, would you say that you paid it to December 15, 1916? A No.

Q Well, did you pay it by check or by cash? A By check.

Q Are any of the checks in court? A I haven't any checks here; no, sir.

Q (*By the Court.*) What was it that you paid by check? A The interest on the deposit.

Mr. German. The interest on the $5,000 deposit.

Q (*By Mr. German.*) But you say you did not pay interest up to December 15, 1916, or thereabouts? A I said I don't remember when the last interest was paid, but it was paid up to thereabouts, but I don't know just when.

Q Now, I ask you again whether you will deny that the interest was paid up to December 15, 1916, or thereabouts, by you to Mr. Kaufman? A Repeat that question, please.

Q (Question read.) A I neither affirm nor deny; I don't know the date.

Q But you would not say that you did not? A No.

Q Well, when this property was passed to Mrs. Mennen what paper did you take from Mrs. Mennen regarding this $5,000 deposit? A There was no paper taken except the original agreement for the sale.

Q Meaning Exhibit P 5 (paper shown to witness)? A Yes.

Q Why did you not take some other paper? A There was no other paper necessary.

Q Why not? A Because that covered the conditions of the sale; there was nothing else required.

Q Why was it necessary for you to give Mr. Kaufman a paper when you bought the property?

Mr. Heisley. I object to that as being argumentative.

(Question withdrawn.)

Q The fact is, however, that when you bought the property from Mr. Basch you did give Mr. Kaufman Exhibit P 7? A Yes.

Q And when you sold the property to Mrs. Mennen there was no paper given between you and Mrs. Mennen regarding this $5,000 deposit? A Yes.

Q Well, the reason of it was because you did not turn the $5,000 over to Mrs. Mennen, did you? A I did.

Q How did you turn it over to her? A In equity in the property. The conditions of the sale were different.

Q Where are the conditions of the sale? A The conditions of the sale are cited in the agreement there.

Q Just suppose you turn to that part of Exhibit P 5, which says that you turned the $5,000 over to her (paper shown to witness).

The Court. What is Exhibit P 5?

Witness. It is the agreement of sale between Meyer and Mennen. On page 3 of the agreement.

Q Read it; read that part that relates to this matter. A Well, that would require reading some of the previous parts.

Q Read all there is in the agreement which you say refers to this $5,000 deposit.

The Court. On which page do you begin?

Witness. To read that part properly I will have to begin on page 1.

A (Reading): "The party of the first part, in consideration of the premises and of one dollar duly paid by the party of the second part, the receipt whereof is hereby acknowledged, and also in consideration of the conveyance of the property hereinafter mentioned belonging to the party of the second part, doth hereby agree on his part to sell, grant and convey unto the said party of the second part all that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, County of Essex and State of New Jersey." I will skip that.

The Court. You need not read the description.

Witness. (Reading): "Being the same premises which were conveyed to the said Joseph Meyer by Charles J. Basch and wife by deed dated April 27, 1911, and recorded in the office of the register of Essex County in Book Q 48 of Deeds for said county," and so forth—

Q Just come down to that part. A (Reading): "Subject to the state of facts shown in a survey"—

Q Just come down to that part.

Mr. Heisley. He is coming down to it now.

A (Reading): "Subject to the state of facts shown in a survey thereof made by Harrison Van Duyne & Son made June, 1905. Subject further to a mortgage held thereon by Christina Trefz in the sum of one hundred thousand dollars, with interest at four per cent. per annum, due June 30, 1915, and a second mortgage held

thereon by Christina Trefz in the sum of one hundred and twenty thousand dollars, with interest at four and one-half per cent., due June 30, 1915, and a third mortgage thereon held by Charles J. Basch in the sum of ninety thousand dollars, at five per cent. interest per annum, due May 1, 1914. The payment of all of which mortgages is assumed by the party of the second part as part of the consideration for this conveyance. Subject further to the covenants binding upon the parties of the first part and the owners of said premises under an agreement between Julius Vogel and Anna Vogel, his wife, and U. S. Credit System Company, dated April 27, 1894, and an agreement entered into between the U. S. Credit System Company and Julius Vogel dated October 18, 1892, and an agreement between Julius Vogel and the U. S. Credit System Company dated September 2, 1891, two of which said agreements are recorded in the office of the Register of Essex County in Book H 28 of Deeds on pages 359, etc.; Book E of Miscellaneous, on pages 102, etc., and subject further to such easements upon said premises as existed thereon at the time of said conveyance from Christina Trefz, June 30, 1905, and to all stipulations, agreements and covenants which at the time of said conveyances were in existence that affected said premises or the buildings standing thereon or which in any way were or now are obligatory upon the then owner or now owners of said premises, and subject further to all existing leases and tenancies."

Q What part of that long reading that you have just read relates to this, do you say? A "Subject further to all existing leases and tenancies."

Q Now, when you got this property from Mr. Basch you had a similar agreement, did you not? A Not an identical agreement.

Q But something to this effect? A A different agreement than that.

Q But you had an agreement to purchase? A I had an agreement to purchase.

Q And yet, notwithstanding the agreement to purchase, you still gave this Exhibit P 7? A That was part of my agreement for the purchase.

Q I ask you now why you did not take another paper from Mrs. Mennen with regard to the $5,000? A Because it wasn't necessary under this agreement.

Q Why did you continue to pay the interest on the $5,000 up to 1917? A That was an error on the part of my office, that made out, according to the records, a check that was due at regular times, at certain intervals, and was not stopped at the time of the sale.

Q How many errors did your office make? A Probably some of it was not discovered, and this one was discovered.

Q Well, you bought the property from Mr. Basch in what year? A 1911, I believe.

Q And you continued to pay interest until almost January 1, 1917? A Whatever it was, yes.

Q That was about five years. How often were these checks mailed to Mr. Kaufman? A Semi-annually.

Q And five per cent. on $5,000 would be $250? A Yes, sir.

Q And in five years that would be $1,250 that your office made errors on? A The office didn't make an error for five years.

Q How often did you make an error? A I don't know.

By the Court.

Q What was the error that you say was made for five years? A An error in making the semi-annual checks that should have been stopped.

Q What was done that should not have been done? A The interest on the $5,000 was paid semi-annually, and my office records called for a check to be sent at a certain date, semi-annually, and that check was continually sent out at its regular period up to and including the time after the property was sold.

Q Sent to whom? A Sent to Mr. Kaufman.

Q After you had ceased to be the owner? A Yes, sir.

Q Well, how long did it continue? A It continued for some years after; I don't know exactly the time.

Q During that period Mr. Kaufman got the interest from you? A Yes, sir.

By Mr. German.

Q That is the only explanation you can give for the payment of this interest to Mr. Kaufman on this deposit after you sold the property? A That was the only reason for it.

Q Mr. Jacob Fischel, representing you in this cause, was duly authorized by you to file an answer, was he not? A He was.

Q I shall read paragraph 8 of the answer. (Reading.) "This defendant"—that is, yourself —"denies that the said Elma C. Mennen assumed and agreed with this defendant that she

would repay unto the plaintiff the aforesaid sum of $5,000, as set forth in paragraph 8 of the plaintiff's complaint, and denies that the said Elma C. Mennen received or agreed to hold said sum of $5,000 under the terms of the agreement set forth in said paragraph 8." I ask you now to explain that paragraph with your previous testimony, if you can (paper shown to witness). A I don't know unless I know what that is in reply to, what paragraph 8 refers to.

Q Well, suppose you read sufficient of the answer so that you will know. A I have read the whole answer.

Q Well, do you not suppose that the answer is in reply to the complaint filed by Mr. Kaufman, through Mr. Leber, in this case? A I don't know what it replies to unless I see it.

Q Well, it is there, is it not? A Yes, it is there.

Q Now, I ask you if you can make any explanation as to the apparent conflict between that paragraph and your previous testimony? A I don't know that that is in conflict until I know what it is in answer to.

Mr. Heisley. Mr. German, is that answer sworn to by this defendant or is it signed by him in any way?

Mr. German. No, under the law it is not necessary.

Q Now, it says, "The answer of Joseph Meyer, one of the defendants," and then you go on to say that you admit various paragraphs of the complaint, and then you come to paragraph 8 of the complaint, which I shall read to you, if you desire. I shall read paragraph 8 of the complaint. (Reading:) "The plaintiff further

complains that as one of the considerations for the conveyance to her by the said Joseph Meyer of the above described land and premises said Elma C. Mennen assumed and agreed with the said Joseph Meyer that she, the said Elma C. Mennen, would repay unto the plaintiff the aforesaid sum of $5,000, together with interest accrued thereon, to the date of said repayment, if and when he, the said plaintiff, would, under the agreements, covenants and conditions contained in the aforesaid indenture of lease be entitled thereto. The plaintiff further complains that the said Elma C. Mennen received from the said Joseph Meyer at the time when the said conveyance of the above described lands and premises was made to her the said sum of five thousand dollars and interest accrued on said principal sum, and then and there undertook and agreed with the said Joseph Meyer that she, the said Elma C. Mennen, would hold the said sum of five thousand dollars, under the terms, covenants, agreements and conditions contained in the aforesaid lease, and that she, the said Elma C. Mennen, would repay unto the plaintiff the said sum of five thousand dollars and accrued interest when and if under the agreements, covenants and conditions in said indenture of lease, he, the said plaintiff, would become entitled thereto or to so much thereof as shall remain unappropriated pursuant to the provisions in said indenture of lease contained." Now, in reply to that paragraph your duly authorized attorney answered as set forth in paragraph 8 in the answer. That is so, is it not? A Yes, sir.

Q Now, how can you reconcile that with your previous testimony (paper shown to witness)? (No response.)

Q Why do you hesitate so long, Mr. Meyer? A Because I don't know what this answer was put in for; I didn't draw it up.

Q Well, you cannot reconcile the two? A I don't know anything about that.

Q Can you reconcile the two statements? A Not unless the party who drew it up can tell me what he had in mind when he drew it. I don't know what he had in mind, no.

Q Well, you do not mean, Mr. Meyer, of course, that you actually gave Mrs. Mennen $5,000 in cash for this deposit? A I mean that I gave Mrs. Mennen $5,000.

Q How did you give it to her? A In equity and exchange.

Q As set forth in what paragraph of the agreement—so that we will have no misunderstanding? A The paragraph that I read before.

Q Now, at the time that this transaction was closed there was considerable figuring to be done, was there not? A Yes.

Q And there was made up by Mr. Hey, in your presence, what was known as a settlement sheet, was there not? A Yes.

Q And it was submitted to you? A It was drawn up in my presence.

Q I show you an instrument and ask you whether that was the settlement (paper shown to witness)? A There is no way for me to identify this as such.

(The paper referred to is marked DW. 1 for identification.)

Q There is nothing in this Exhibit P. 5 which says anything about your paying interest on this $5,000, is there? A No, not that I recollect.

Q Why did you not have some paper, then, from Mrs. Mennen wherein it was understood that you were to continue to pay this $5,000? A I wasn't supposed to continue the payment.

Q You simply inadvertently paid the $250 a year? A That was in error.

Q Without your knowing of it? A In error; yes, sir.

Q Well, was this oversight of yours of this $250 because you had so much money you did not notice the $250 a year? A Hardly so.

Q Well, how did the error occur? A It was an error of my office.

Q Why did you not discover this error yourself, that your bank account was being depleted $250 a year? A Because there was no way of my telling that. The checks were put before me to sign every day, and there were several hundred a day sometimes.

Q And you signed these checks? A Yes, sir.

Q And you did not know what they were for? A Not necessarily, no.

Q You mean to tell me that you signed checks for amounts of money like this without knowing what it was for? A I usually knew what it was for.

Q Why did you not in this case? A Because it went through in the regular way.

Q Why did you not know in this case what these checks were for? A I did not know.

Q Well, you did know, did you not? A Possibly; I can't say.

Q Well, why do you say it was an error? A It was an error in having the check made out.

Q Well, why did you not— A I didn't discover the error until some time later.

Joseph Meyer, cross.

Q Why not? A Because it was made out at regular periods in the office, and it was pursued right through.

Q Did you not notice that it was interest paid to Mr. Kaufman? A In signing the checks my attention wasn't particularly called to the fact that it was six months' interest on the deposit money.

Q When did you discover the error? A When my lawyers went over my papers and found that it should not be paid.

Q When was that? A About six months ago.

Q What did you do, if anything, to recover the money? A Nothing as yet.

Q Why not? A Because I haven't decided what I would do.

Q Why did you not put in a counter-claim in this suit? A I was advised that that would be an independent suit.

Q Who advised you? A My counsel.

Q What is his name? A My counsel here, Mr. Fischel.

Q When did he so advise you? A I don't know.

Cross examination by Mr. Heisley.

Q Mr. Meyer, about the payment of this interest. You seem to be uncertain as to the time you paid this interest. You sold this property to Mrs. Mennen in 1912, and Mr. German has inferred that you paid the interest for four years on it. Do you recall telling me how many payments you had made, how many semi-annual payments you had made of this interest, before declining to pay any more?

Mr. German. I object to any statement of this, unless Judge Heisley expects to take the stand and testify what he told counsel, as absolutely immaterial in this case, unless brought out on cross examination.

The Court. Who called the witness?

Mr. Heisley. Mr. Leber called the witness.

The Court. The plaintiff called the witness?

Mr. Heisley. Yes, sir.

The Court. Counsel for the defendants can cross examine, therefore.

(Counsel argue.)

The Court. I shall give counsel free rein to cross examine this witness, just as though he were adverse to him.

Q Mr. Meyer, do you recall talking to me about these payments of interest, and my asking you how many payments you had made, and that you said you had only made three semi-annual payments? A I do.

Q Why, then, do you say, or seem to admit, in your answer to Mr. German's interrogations, that you paid it from May, 1912, down to last fall some time, because that would be more than three semi-annual payments? A I don't think I did admit that.

Q What did you say? A I do not think I did admit that; I said I didn't know, sir. He asked me, "Did you pay to December?" I said, "I don't know."

Q Well, when you told me that you paid only three semi-annual payments, was that the truth or not? A That was the truth, as far as my recollection serves me.

Joseph Meyer, cross.

Q Is your best recollection that you only made three semi-annual payments? A It is.

Q You have spoken about the error being committed in your office by their bringing you checks to sign. What business were you in at that time? A Department store, general merchandise, a department store.

Q In Hoboken? A Hoboken.

Q And did you have semi-annual payments of several kinds to be made? A Several of them.

Q And upon whom did you rely for making out the checks? A The bookkeeping department made out the checks, and they were laid on my desk for signature.

Q You have been asked to read certain portions of the agreement between you and Mrs. Mennen where you claim that she received the $5,000 from you. Did you or did you not have in mind in making your answer to that question this portion of the agreement, beginning at the—

Mr. German. If your Honor please, I object to the question so far as being entirely objectionable, and I should like to renew my objection that, even now, as this witness may appear on the record to be the witness of someone else, nevertheless this is Mr. Heisley's own client, and I think that your Honor will agree with me that the line of cross examination of counsel's own client is entirely different.

The Court. He is called by the other side, and I think he is subject to cross examination by the ordinary rules.

Counsel for defendants, Elma Mennen Williams and William Gerhard Mennen

prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

Q —at the bottom line on page 3, reading as follows (reading:) "The purchase price of said premises shall be five hundred and fifty thousand dollars, of which three hundred and ten thousand dollars, as above stated, are in mortgages, leaving an equity of two hundred and forty thousand dollars"—

The Court. What are you reading from?

Mr. Heisley. The agreement, your Honor, between Mr. Meyer and Mrs. Mennen, P. 5.

Q Did you have that also in your mind? A I had that in mind, in addition to what I read. I couldn't find that part.

Q Now, under this agreement with Mrs. Mennen, you evidently agree—you say "leaving an equity of two hundred and forty thousand dollars." Is it not a fact that the $240,000 was paid by her to you in the following manner—without my reading it all: that you took over property on High street from her at a valuation of $160,000? A Yes.

Q And $40,000 in a purchase money mortgage that she gave you? A Yes.

Q And $40,000 in cash that she paid you? A Yes.

Q Did she or the counsel representing her at that time have in their possession the lease between Basch and Kaufman, or a copy of it? A They had the original.

Q And how long had either Mrs. Mennen or her counsel that original, that you know of? A

From before the time of drawing up the contract—that is, for several days before that—up to the present time.

The Court. The original—

Q P. 5, you mean? A P. 5.

Mr. Heisley. That was dated the 4th day of April, 1912.

Witness. P. 5 is the agreement. You are referring to the original lease.

Q She had the lease in her possession— A Several days before Exhibit P. 5 was drawn up; that was drawn up with the lease in their possession.

The Court. I understood you to ask if she had the original lease in her possession—she or her counsel.

Witness. Yes.

Q She did? A She did.

Q And she acquired possession of it several days before the signing of P. 5—the making or signing of P. 5—which was on the 4th day of April? A Yes.

Q (*By the Court.*) Is that right? A Yes, sir; she had it several days before.

Q (*By Mr. Heisley.*) And the deed was passed, as I understand it, on the 1st day of July following? A That is true.

Q Do you know whether she read the lease? A That I can't say.

Q Do you know whether the terms of the lease were discussed in these interviews that you had with her and her counsel? A They were discussed.

Q Do you know whether the question of $5,000 was mentioned? A It had been mentioned on various occasions.

Q Mr. Meyer, to make it plain, do you know whether or not, of your own knowledge, Mrs. Mennen knew of this deposit of $5,000? A Well, that I can't say. It was mentioned in her presence. All I could say was a conclusion that she had read it. I didn't see her read it; I don't know.

Q And in these various interviews was there anybody present in your behalf but Mr. Fischel? A No, sir.

Q Do you see any of the parties in court who were interested and present at the interviews on behalf of Mrs. Mennen? A Mrs. Mennen's counsel.

Q Do you see anybody else here? A Not that I remember.

Q How about at the closing of the title, is there anybody here in court who was present? A Yes, sir.

Q Who? A Her son.

Q Is he here? A He is here. And her brother, Mr. Korb, sitting together in the front seat (indicating).

Q Do you point to these two men sitting here on the front seat (indicating)? A I do.

Q Did they enter into the discussion? A They were present. Everybody had something to say. Just what part they took in it I can't remember now.

Q Were you requested either by her or her counsel or either of these two relatives of hers to turn over to her any part of the $5,000? A No, sir.

Joseph Meyer, cross.

Q She paid you $5,000 at the time of the signing of this agreement, did she not? A She did.

Q Did she suggest to you or did her counsel suggest to you that you had already $5,000 on deposit, which you should credit on account? A They did not.

Q Subsequently, at the time of the delivery of the deed, they paid you $32,000, did they? A They did.

Q At that time did she or her counsel or her brother or her son, or any of them, suggest to you that that $5,000 should be deducted or turned over to her? A They did not.

By Mr. German.

Q You say that neither Mr. Mennen nor Mr. Korb suggested turning over the $5,000, did they? A They did not.

Q And it was not turned over, was it? A It was turned over in equity, yes.

Q According to the settlement sheet that was made that day? A Yes.

Q Well, do you mean to say that this item of the $5,000 deposit was mentioned at the time when the title was passed in Mr. Hey's office? A At the time of passing the title.

Q Yes. A No, sir; it was not; nobody mentioned it that day.

Q Nobody mentioned it that day. How many times before that time did you see Mrs. Mennen? A Several times.

Q Where? A At her own home.

Q When? A In the daytime in each instance.

Q I mean with reference to the time, previous to the closing of the title? A How many days before?

Q How many days, months, years, or whatever time it was? A Several times in the month previous.

Q Did you at any time hand her this lease? A I did not.

Q And you do not know yourself that she ever had the lease in her possession? A I know her counsel had it in his possession.

Q You do not know yourself that she ever had this lease in her possession? A I don't know, no.

Q You do not know that the lease was ever read to her, of your own knowledge? A I answered before I did not, no.

Q You have had a conversation, one or more, with Mr. Kaufman concerning this deposit since January 1, 1917, have you not? A I have not.

Q You have had no conversation with him at all? A I have not.

Q Now, be sure. A I am sure.

Q Did Mrs. Mennen ever refuse to pay this interest on this $5,000 deposit to Mr. Kaufman? A I have no way of telling.

Q Can you say that she did or did not? A I have no way of telling.

Q Did you ever talk to her about it? A I did not.

Q Did you ever talk to Mr. Korb about it? A I did not.

Q Did you ever talk to Mr. Hey about it? A I did not.

Q Did you ever talk to Mr. William G. Mennen about it? A Not as I remember.

Q Of course you did. You do not mean that, do you? A I am under oath here.

Q Do you mean to state now under oath that you have never talked to Mr. Mennen about this interest? A I don't recall it.

Q Do you not remember having a conversation with Mr. Mennen a number of months ago concerning this deposit, or concerning the payment of this interest? A I remember a conversation with Mr. Mennen in his office a short time ago.

Q You do remember that? A Yes, I remember that I had a conversation with him.

Q Did you ever write to Mr. Kaufman saying that Mrs. Mennen had refused to pay this interest?

The Court. If you wish to inquire as to the contents of a letter, the letter is the best evidence.

Q Have you written to Mr. Kaufman since January 1, 1917? A Not that I recollect, no.

Q Have you communicated with him in any way— A No.

Q —concerning this matter of the $5,000 and the interest? A No.

By Mr. Heisley.

Q Mr. Meyer, you say you had a conversation with Mr. Mennen in his office. Did that relate to this $5,000 and the payment of the interest? A I went to see Mr. Mennen on an entirely different matter, and in the course of a conversation about a matter entirely foreign to this there was some mention made by Mr. Mennen as to Mr. Kaufman. This case in particular was talked of very indefinitely and without any referring to the case in question.

Q Well, by "case" do you mean this litigation? A I do.

Q Was it after this litigation had been started against you and the Mennens? A I am not sure.

Q Well, do you recall how long ago it was? A If I knew the date of this first paper, I might be able to tell.

Mr. Leber. The suit was commenced on the 19th day of May, 1917.

Mr. Heisley. Last May.

Witness. I believe it was before that.

Q Much before? A Probably a few months before. I am not sure of that date. The matter was entirely foreign to this, and I am not sure.

Q Who prepared this Exhibit P. 5, your counsel or Mrs. Mennen's counsel? A Mrs. Mennen's counsel.

BENJAMIN H. KAUFMAN, plaintiff, sworn in his own behalf.

Direct examination by Mr. Leber.

Q Mr. Kaufman, you are the plaintiff in this case? A Yes, sir.

Q And you reside in New York? A Yes, sir.

Q You are in the hatting business, are you not? A Yes, sir.

Q After you got the lease from Mr. Basch to the store in the Metropolitan building, on the corner of Market and Washington streets, in this city, did you enter into possession? A Yes, sir.

Q How long did you remain in possession of the store? A Ten years and two months.

Q Until the 1st of May, 1917? A I don't know whether it was May, 1917, or 1916—yes, 1916, I think.

Mr. Heisley. 1917.

Mr. Leber. 1917, I think.

Witness. No, it was 1916, and then I got a renewal of a year from Mr. Mennen.

Q Suppose you look at the lease? A I think it is 1916.

(Plaintiff's counsel hands paper to witness.) Yes, that is right, 1917.

Q Am I right about that? A 1917.

Q And did you remove from the place on or about the 1st of May, 1917? A No, we moved out about two weeks ago.

Q You remained there after the 1st of May? A The lease terminated the 1st of May, and then I got—now I remember it—and then I got a new lease of a year from Mr. Mennen, or from the North Ward Realty Company, who represented them. My lease originally terminated the 1st of May, 1917, and then they gave me a renewal, or a new lease, for one year, from May 1, 1917, to May 1, 1918.

Q Who gave that to you? A The North Ward Realty Company. I don't know whether it was under their name or Mennen's.

Q Well, that is their company—that is the same thing, is it not? A Yes, they represented the Mennens.

Q While you occupied this property under the lease, Exhibit P. 1, did you pay your rent? A I paid the rent to February 1, 1917.

Q And from the 1st of February, 1917, you have not paid any rent? A I have paid no rent up to the 1st of May.

Q So there was $2,500 due the Mennens for rent? A That is true.

Q Is that true? A Yes.

Q (*By the Court.*) Did you or did you not pay rent up to the 1st of May? A I paid no rent from the 1st of February to the 1st of May.

Q (*By Mr. Leber.*) That made three months, or $2,500? A Yes, sir.

Q Why did you not pay that rent? A I had a deposit of $5,000, a cash deposit, guaranteeing the occupancy of the store and paying the rent for the full time of ten years and two months. In January, when I didn't get—

Q What year? A January, 1917. —when I didn't get the semi-annual interest that was due on the 1st of December, or December 15th, on his deposit, I wrote to Mr. Meyer and asked him why—

Q You cannot tell what was in that letter. You wrote to Mr. Meyer? A I first wrote to Mr. Meyer, asking him why he hadn't paid the interest.

Q Well, what did you do after that? A And then Mr. Meyer notified me that he had sold the building to the Mennens.

Q Was that the first time that you knew—that is, that you had actual notice—that Meyer had sold the building to the Mennens— A Never knew it before.

Q To whom had you paid the rent prior to February 1, 1917? A I had always paid it to the same people, the North Ward Realty Company.

Q No. A Yes.

Q To the same agent, do you say? A Yes, the North Ward Realty Company.

Q To the North Ward Realty Company? A Yes.

Q Well, have you received that deposit back from either Mr. Meyer or the Mennens? A No, sir.

Q Or any part of it? A No part of it.

Q How much interest is due on it? A Well, there was six months' interest due up to December 15th, and the interest that is due since December 15th, about ten months now, or eleven months.

Q So that there is interest from— A Seventeen months.

Q Interest from June 15, 1916?

The Court. The interest was due when?

Witness. December 15, 1916, and the interest due since then.

Mr. Heisley. That would be interest due from June, 1916?

Mr. Leber. June 15, 1916, yes.

Q What were you getting, five per cent.? A Five per cent.

Cross examination by Mr. German.

Q You knew that the North Ward Realty Company was collecting the rent there, did you not, for some time prior to January 1st? A Oh, yes, I had been paying it to them for years.

Q Well, you knew that the North Ward Realty Company was not Mr. Meyer? A Well, as a matter fact, I never knew who the North Ward Company was.

Q Well, when Mr. Meyer owned the property you never paid the rent to the North Ward Realty Company, did you? A I think we did.

Q Now, be sure. A I am not sure. This is the only way I can define it. I think Mr. Meyer was represented by agents in the building. One name was Marx, and I think we paid the rent to him for awhile, and subsequently we paid it to the North Ward Realty Company, and Marx

was identified with that, and I naturally assumed they were the same thing.

Q How did you happen to change from Marx to the North Ward Realty Company? A Well, we were notified at one time to pay the rent to the North Ward Realty Company. I don't recall—

Q Why were you notified to do that? A We were never notified that the building was sold; we were never formally notified.

Q Well, you have been asked for this rent by Mr. Mennen since February 1st, have you not? A Not until I first notified Mr. Mennen.

Q You have been asked to pay this back rent to Mr. Mennen? A Yes.

Q He has repeatedly asked you? A Yes, sir.

Q And you said you would not pay it because— A This deposit was due; that is right.

Q You have written letters to Mr. Mennen? A Yes.

Q Among others, on January 24th? A Yes, sir.

Q And another on January 31st ? A Yes.

Q Have you had any conversations with Mr. Meyer relative to this deposit or this interest? A I don't think I have ever spoken to Mr. Meyer, excepting once, I think, several years ago, I rang him up on the 'phone about the interest.

Q I show you your letter of January 24th (paper shown to witness). That is your signature? A Yes, sir.

Q Where did you get the information contained in the letter that Mr. Meyer, as the former owner of the building—

The Court. Has this paper been used before?

Mr. German. No, it has not been used.

(Mr. German hands the paper referred to the plaintiff's counsel.)

Q This is a letter dated January 24, 1917, from yourself to William G. Mennen, or the Mennen Chemical Company, wherein you say, among other things, that "Mr. Joseph Meyer, the former owner of the building, has just informed me that he has turned over the deposit of $5,000 to you which I had made several years ago." Where did you get that information? A Well, if I didn't get a letter from him, if there is no letter, then he must have told me that over the 'phone.

Q Well, he did tell you that, did he not? A Either that or wrote me, either one.

(The paper referred to is marked DW. 2 for identification.)

Q Then I show you another letter, dated January 31st, to "Mr. G. Mennen, North Ward Realty Company, 42 Orange street, Newark N. J." (Paper shown to witness.) Was that letter written by you to Mr. Mennen and signed by you? A Yes.

Q I shall read this portion of your letter: "I hold Mr. Meyer's receipt of May 1, 1911, wherein he states that he agrees to hold the deposit subject to conditions in said lease. I was under the impression that after he sold the building to your estate that he had automatically turned this matter over to you, the same as Mr. Basch had transferred it to him. At any rate, he now claims that this deposit was transferred to you, and when I asked him how it happened that he paid the interest on same, he replied that it was because you refused to pay any interest on the deposit." I

ask you where you received that information, and how, from Mr. Meyer (paper shown to witness)? A I don't remember whether he told me this over the 'phone or wrote it to me. I must have got the information—I don't remember where I got the information from; I am not quite sure.

Q Well, he either told you or he 'phoned you? A Yes, it must have been. I wrote the letter you read.

Q And the letter, to the best of your knowledge, is true? A Yes. I was told that; I don't remember whether he told me over the 'phone or whether he wrote me or somebody else told me.

Q At any rate, he told you words to this effect? A Yes, sir.

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

Q You were a little surprised when you learned that Mr. Meyer had not turned over this $5,000, were you not?

Mr. Leber. I object. Where is there any statement that he did not turn it over?

Mr. Heisley. I object on the ground that we are not responsible for the gentleman's being surprised.

(Question withdrawn.)

Q Were you surprised to learn from Mr. Mennen that this deposit of $5,000 had not been turned over by Mr. Meyer to Mrs. Mennen?

Mr. Heisley. I object.

The Court. The question, which I supposed was founded on these papers, assumes

that the witness had learned from them that Mr. Meyer had not turned over the $5,000 to Mr. Mennen. DW. 2 for identification says that Mr. Meyer just told him that he had turned the $5,000 over, and DW. 3 for identification says: "At any rate, Mr. Meyer claims that this deposit was transferred to you, and when I asked him how it happened that he paid the interest he replied that it was because you refused to pay any interest on the deposit." So that, if this question is founded on these letters, it would seem that the letters do not support it. I do not see anything in them to suggest that Mr. Meyer had not turned over the money.

Mr. German. I did not ask the question with these letters as a basis.

The Court. What is the basis of the question?

(Question withdrawn.)

Q When did you learn from Mr. Mennen that Mr. Meyer had not turned over this $5,000 to Mrs. Mennen?

Mr. Heisley. I object.

Q If you did so learn?

Mr. Heisley. I think he has the right to ask when Mr. Mennen made that claim, but to ask this witness to say when he assumed it to be a fact is asking him to decide the whole question.

The Court. Well, you can slightly alter the form of your question, and ask him, "When were you told?"

Mr. German. All right, put it that way.

Witness. After I had written Mr. Mennen he replied that the deposit had never been turned over to him.

Q Were you surprised to hear that then, that Mr. Meyer had not turned over the deposit to Mrs. Mennen?

Objected to.

The Court. The witness is referring to the contents of a letter.

Mr. German. Well, I shall withdraw all these questions.

The Court. The witness says it was by letter.

Witness. Yes, sir.

The Court. If there was such a letter, let it be produced.

Witness. There is such a letter.

Q Why did you take Exhibit P. 7 from Mr. Meyer, concerning this $5,000 deposit? A What is that?

Q Why did you take that letter from Mr. Meyer, concerning that deposit?

Mr. Heisley. I object on the ground that the paper speaks for itself, and what led up to it is immaterial.

The Court. P. 7 is a letter; it is a receipt for $5,000— "I agree that I will hold the same subject to the lease," and so forth. That is from Meyer to Kaufman. What is the objection?

Mr. Heisley. I object to what this man had in his mind.

The Court. The letter was mailed to you, was it?

Witness. No, it was given to me.

(Question read.)

The Court. I sustain the objection.

Counsel for defendants, Elma C. Mennen and William Gerhard Mennen prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q You still owe your rent for this property in question from February to May 1st? A Well, if you don't owe me my deposit.

Q Yes. A Yes, sir.

Cross examination by Mr. Heisley.

Q Mr. Kaufman, you know William Mennen's handwriting, do you not? A I think I would recognize it.

Q You have received letters from him? A Yes, sir.

Q I show you a letter dated February 9, 1917, and ask you if you identify that signature as that of William Mennen (paper shown to witness)? A Yes, it is.

Mr. Heisley. I would like to offer it in evidence.

The Court. Let it be marked for identification.

Mr. Leber. I shall offer it in evidence, and save you the embarrassment.

(The paper referred to is marked Ex. P. 8.)

Mr. Heisley. It is a letter dated February 9, 1917, at Newark, New Jersey, to Mr. B. H. Kaufman, and from Mr. William Mennen, one of the defendants, and it is written on

the letterhead of the North Ward Realty Company.

(Mr. Heisley reads the paper referred to.)

By Mr. German.

Q You received other letters from Mr. Mennen? A I think I received two or three.

Q And you wrote other letters to Mr. Mennen? A Yes, I wrote several letters.

Q Particularly this one of February 9th (paper shown to witness)? A Yes, sir.

Q And February 12th (paper shown to witness)? A Yes, sir.

Q And March 14, 1917 (paper shown to witness)? A Yes, sir.

(The papers referred to are marked respectively DW. 4, DW. 5 and DW. 6 for identification.)

Mr. Leber. I offer P. 6 for identification in evidence.

(Mr. Leber hands the paper referred to defendants' counsel.)

(The letter referred to is marked Ex. P. 6.)

(Mr. Leber reads Ex. P. 6.)

Mr. Leber. Now, if your Honor please, I have introduced my entire case, and before closing it I would like to ask leave to amend the thirteenth paragraph of the complaint. In this paragraph the plaintiff demands judgment against the defendants, Elma Mennen Williams and William Gerhard Mennen, either as executors or individuals, in the sum of $2,500, together with interest on $5,000 from the 15th day of December, 1916, to the

1st day of May, 1917, at the rate of five per cent. per annum, and on the sum of $2,500 from the 1st day of May, 1917, to the date of recovery of judgment. That ought to be six per cent., not five per cent., and I ask to amend that, because on the 1st day of May, 1917, that money was due and was governed by the legal rate of interest.

My second request for amendment is that I may recover judgment against all of the defendants in the sum of $5,000.

The Court. You have sued in the alternative?

Mr. Leber. I have sued in the alternative. Now, it may possibly be that your Honor's opinion would be that all the defendants are liable to us. If so, we are entitled to a judgment for $5,000, with interest at five per cent. from June 15, 1916, until May 1, 1917, and from that date at the rate of six per cent.

I urge in support of my motion to make these amendments that the whole case is in, and consequently none of the defendants can be prejudiced by amending the prayer, so to speak.

Mr. Heisley. If your Honor please, we do not object to the amendment as to the rate of interest, but we do object to the amendment being allowed in changing the prayer of his complaint, so that he can get a collective judgment, or a judgment against the two adverse defendants interested collectively.

My theory is that, under the law, we cannot be jointly liable. Either in this suit

the Mennens are liable or Mr. Meyer is liable. If the Mennens are liable, as I claim they ought to be, it is as a result of the devolution of the estate on them; they became the substituted landlords, and chargeable with all the covenants and conditions on the part of the landlord contained in the original lease. Meyer was liable for awhile, while he owned the property; but I think the settled law of this case is that, when you become liable by privity of estate, your liability ceases upon your divesting yourself of the title. Therefore, if Mr. Meyer is liable to Mr. Kaufman at all it must be on account of some privity of contract, some individual undertaking between him and Mr. Kaufman, but under no circumstances, as I conceive it, can he be liable jointly with the Mennens. It is not a joint liability.

The Court. I do not understand Mr. Leber to ask for a decision on that question now, but to ask merely that he may claim that. It involves an amendment of his pleading; it is only an application for an amendment. If the amendment would be futile, of course, it would not do him any good.

Mr. Heisley. In other words, it is a matter that your Honor could control when you ultimately come to pass on the law of the case. In other words, if you allow the amendment, you might still, if you adopted our view of the law, decide that a collective judgment could not be entered, and, if you did not agree with us, you would say that we might both be jointly liable, I suppose.

The Court. If the motion is granted, the idea of an alternative remedy would be abandoned, I suppose. Is that right?

Mr. Leber. No, sir.

The Court. Then you wish to claim in the alternative, either that your remedy is in the alternative or that it is collective?

Mr. Leber. Yes, sir.

The Court. That is an expansion of the alternative idea.

Mr. Leber. Yes, sir.

The Court. Have you any particular objection to that claim being made?

Mr. German. I object to it on the ground that there is no authority in law for it. It must be either alternative or not.

The Court. It would be impossible for the Court to adopt more than one of those views, of course.

Mr. Leber. I could not ask that you should grant all that I ask, but I can ask for a great deal and receive a little less.

I offer in evidence a letter dated February 14, 1917, on the letterhead of the North Ward Realty Company, Newark, N. J., signed by William Mennen, secretary, and addressed to Mr. B. Kaufman.

(The paper referred to is marked Ex. P. 9.)

(Mr. Leber reads Ex. P. 9.)

Mr. Leber. That would be my case, with the exception that I ask for these amendments. Otherwise I should rest.

Adjourned until Monday, November 19, 1917, at 10 o'clock A. M.

SECOND DAY.

Monday, November 19, 1917.

Met pursuant to adjournment.

Present, counsel as before stated.

Mr. Leber. If your Honor please, I made an application to amend in two particulars, one of which related to the change of interest from five to six per cent., and the other was in the prayer for judgment, asking for judgment against all of the defendants.

The Court. In addition to the present prayer?

Mr. Leber. In addition to present prayer; yes, sir.

The Court. The present prayer is for judgment against whom?

Mr. Leber. The present prayer asks for a judgment against the defendants, Williams and Mennen, for $2,500. Your Honor understands how we arrive at $2,500—after deducting $2,500 worth of rent that we owe them.

The Court. After giving credit for rent?

Mr. Leber. Yes, sir.

The Court. That is all you claim against anybody?

Mr. Leber. Oh, no. If we were entitled to only a judgment against Meyer, we would be entitled to a $5,000 verdict.

The Court. I wanted to get your point of view. But you say that you are entitled only to judgment for $2,500 against—

Discussion.

Mr. Leber. Williams and Mennen, the defendants Williams and Mennen. Against Meyer I am entitled to a judgment of $5,000.

The Court. And now you say you want a judgment of how much?

Mr. Leber. In the sum of $2,500 against Williams and Mennen or $5,000 against Meyer.

The Court. Or $5,000?

Mr. Leber. Yes, sir.

The Court. Is there any objection?

Mr. Heisley. Yes, sir; if your Honor please.

The Court. The question is not whether it would be a valid claim, but whether there is any objection to making the claim.

Mr. Heisley. Yes, sir. It seems to me the amendment ought not to be made as to changing the prayer of the complaint and asking for a joint judgment, because there is no evidence in this case at all which would support any such judgment. Consequently it seems to me that it would be simply confusing the record. Of course, an amendment ought not to be made which, on the face of the record, could not be ultimately supported in this case. He claims a judgment, first, against the Mennens. He says, "If I do not beat them, then I want a judgment against Meyer;" and now he says, "I want leave to take a judgment against them jointly." Now, I submit that, from the evidence, there is not the slightest evidence of a joint obligation, and if there is not, therefore there cannot be any joint judgment, and the amendment ought not to be made.

Mr. German. And I object to the amendment on the further ground that the statute does not contemplate, when it speaks of the relief in the form of an alternative judgment, that you can combine the two, and ask for an alternative judgment against one or more, and then have a joint judgment against the two. For that reason I object to the amendment.

The Court. Without passing on the validity of such a claim, which would involve more of an inquiry into the testimony in the case than I have yet been able to make, I think it can do no harm to allow the amendment, subject to objection, for the purpose of allowing the claim at least to be made. I shall therefore allow the amendment, Mr. Leber, and shall ask you to actually make it in black and white, so that we can all see it.

Counsel for defendant, Joseph Meyer, prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Counsel for defendants, Elma Mennen Williams and William Gerhard Mennen, prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court. Are you now at an end?

Mr. Leber. I rest my case.

Mr. German. I should like to ask whether Mr. Meyer is in court before you rest. There are one or two questions that I overlooked to ask him when he was on the stand, in

response to cross examination by Judge Heisley.

Mr. Heisley. He will be here. I have no objection to your asking him the questions out of order, so far as that is concerned.

Mr. German. It is quite material and might assist your Honor in deciding the motions that will probably be made. It is quite material in the motion that I desire to make to have Mr. Meyer's testimony in.

JOSEPH MEYER, recalled for

Further cross examination by Mr. German.

Q Mr. Meyer, is the question of the figures for the purchase of this property fresh in your mind? A I think so.

Q (Paper shown to witness.) I show you a paper and ask you whether, under the agreement, the purchase price of the property was not $550,000? A It was $550,000.

Q That is what you were to get? A Yes.

Q Now, you received $5,000 on account when the agreement was signed?

The Court. The witness has been shown a paper without any explanation. Let the paper be marked for identification.

Mr. German. It is DW. 1 for identification. It has been marked, your Honor.

Q You received $5,000 on account when the agreement was signed? A Yes.

Q In cash? A Yes.

Q Or by check? A I did.

Q Now, there were certain items that were figured on at the time of the closing of the

title, such as the interest and water rents and insurance and taxes, and so forth, were there not? A There were.

Q Are you able to state, calculating those items in your favor, how much was due at the time of the closing of the title?

Mr. Heisley. Does the paper show for itself, your Honor?

Q Does not that paper show $551,696.59? A Yes.

Q Did you not make payment, or was not that item paid for as follows: $5,000 paid to you when you signed this agreement? A Yes.

Q And Mrs. Mennen's property, $160,000; is that right? A Yes.

Q And the purchase money mortgage, $40,000? A Yes, sir.

Q And by assuming a mortgage held by Christina Trefz on your property of $100,000; is that right? A Yes.

Q And by assuming another mortgage held by Trefz for $120,000; is that right? A Yes.

Q And by assuming a mortgage held by Charles J. Basch for $90,000? A Yes, sir.

Q And by the item of $541 for water rent due on your property? A Yes.

Q By six months' taxes for 1912, $2,580.70? A Yes.

Q Value of the fire insurance on the High street property, $51.06? A Yes.

Q And further fire insurance of $15. A Yes.

Q And a further item of insurance of $23.48? A Yes.

Q And the interest on the Basch mortgage, $750? A Yes.

Joseph Meyer, further cross.

Q And by your receiving Mrs. Mennen's check, $32,725.35? A Yes.

Q And those items together made $551,696.59? A Yes.

By Mr. Heisley.

Q Mr. Meyer, when Mrs. Mennen paid you the $5,000, on April 4th, did she object to paying it or say anything about your turning over to her the $5,000 deposit?

Mr. German. I object to that as being absolutely immaterial—what was said.

The Court. The witness's statement was $5,000 when he signed the agreement.

Mr. German. Yes.

The Court. Did the agreement provide for the payment of $5,000?

Mr. German. Yes, sir. My objection is that it is immaterial whether Mrs. Mennen made any objection or whether Mr. Meyer made any objection at that time. The fact is that the money was paid over.

The Court. Is there a question which $5,000 this was?

Mr. Heisley. The question would indicate, your Honor. I referred to the $5,000 deposit with the landlord.

The Court. Is it your idea that the $5,000 mentioned in the agreement, to be paid when the agreement was signed, was that $5,000?

Mr. Heisley. No, that is what I want to show, that it was not; it was not the $5,000. I wanted to show that Mrs. Mennen at the time of signing this paper did not expect any accounting for the money that the landlord had. She paid $5,000, and three

months later she paid $35,000. We are talking now about the consideration of this agreement, the items that make up the agreement, and I want to examine on that.

(After further argument the objection is withdrawn.)

The Court. You may answer the question.

(Question read.)

A She did not object to paying the $5,000, as that was part of the agreement.

Mr. German. I ask that the latter part of the answer be stricken out.

The Court. The agreement will speak for itself. Strike out the latter part of the answer.

Q Three months later, when she paid you $35,000, did she make any objection to paying it, urging that you should account for the $5,000 deposit? A She did not pay the full $35,000, but the amount that was due—

Q The balance? A The balance was paid without objection.

Q When she came to execute the $40,000 mortgage to you did she make any protest that you had not accounted for the $5,000 deposit? A No, she did not.

Q When I speak of the $5,000, I mean the $5,000 deposit mentioned in the Kaufman lease. Do you so understand? A I understand that.

PLAINTIFF RESTS.

Mr. German. If your Honor please, I desire to move for a non-suit in this case on the part of the defendants, Elma Mennen

Williams and William G. Mennen, on the following grounds:

If your Honor will refer to the pleadings, particularly the complaint, you will notice by paragraph 8 that one of the allegations of the plaintiff is that as part consideration for the transfer of the property from Mr. Meyer to Mrs. Mennen Mr. Meyer paid over $5,000 to Mrs. Mennen, and that Mrs. Mennen received the $5,000 and agreed to repay to Mr. Kaufman the $5,000. Now, the answer of the defendant Meyer, replying to that allegation, under paragraph 8 of his answer, says, "This defendant denies that the said Elma C. Mennen assumed and agreed with this defendant that she would repay unto the plaintiff the aforesaid sum of $5,000." The defendants Mennen and Williams, in the eighth paragraph of their answer deny this paragraph 8 of the complaint.

Now, referring again to the answer of Meyer, the last paragraph, the second defense: "Whatever consideration was paid by the defendants Mennen and Williams, or by Elma C. Mennen, and accepted by this defendant in the transfer of said property was subject to all obligations under which this defendant had purchased the property, and was so understood by the defendants Williams and Mennen and said Elma C. Mennen."

Then referring again to the answer of the defendants Williams and Mennen, in the first defense, they state that the plaintiff has not paid the rent, in accordance with the terms of the lease, for the months

of February, March and April, 1917. Then their second defense states that the $5,000 was not paid to Mrs. Mennen, nor did this $5,000 form any part of the consideration for the conveyance of the land from Meyer to Mrs. Mennen. The third defense states that Basch, the previous owner of the land, paid this $5,000 deposit to Meyer, and that thereafter Meyer paid the interest on the $5,000 to Kaufman from April 27, 1911, to January 1, 1917, or thereabouts. The fourth defense states that neither one of these defendants, either as executors or individually, became liable to pay to the plaintiff the $5,000 or any part thereof. The fifth defense states that the agreement concerning the $5,000 between the plaintiff and Basch was a personal transaction between the plaintiff and Basch, and has no binding or legal effect upon these defendants, or either of them.

Now, with that preliminary statement, I desire to call your Honor's attention to the fact that that is the issue in this case. The defendant Meyer, by the eighth paragraph of his answer, denies that this $5,000 formed any part of the consideration, and therefore any evidence on his part contrary to that allegation is of no force and effect, because it is a matter of record and a part of the pleadings and a part of the issue in this case that the $5,000 was not paid to him by Mrs. Mennen and had nothing to do with the consideration. That is the issue.

Now, in the first place, Mr. Meyer stated and the agreement shows that the agreement between Kaufman and Basch referring

to the lease was made in New York; it was signed in New York, and the agreement was delivered in New York. It was a New York transaction. There is no dispute about that. Therefore this case is governed by the laws of New York, because the question of the deposit, or the lease, for that matter, relates to personal property, and was governed by the laws of the state where the parties resided, which was in New York. But even so, it would not make any difference, because I claim the law to be, as I shall hereafter state it to your Honor, the same as the New York law; but I do state that the New York law should govern, as this was a New York contract.

Mr. Leber. The New York law was not pleaded, was it, Mr. German?

Mr. German. I do not care anything about that.

The Court. The New York law becomes a question of fact, does it not?

Mr. German. No, your Honor, because I shall cite New York law, and it is for your Honor to decide whether, under the evidence in the case, it was a New York contract, and if it was, I shall cite New York cases, and that will end it, if your Honor believes that the New York cases are correct.

The Court. I shall first hear counsel on the question whether on a motion to nonsuit I can treat the question as to what is the law of the State of New York otherwise than as a question of fact, to be proved like other facts. I may have a wrong idea about it, but that is my impression.

Mr. German. That question that your Honor has mentioned is not in my argument now.

The Court. Well, you were referring to the New York law.

Mr. German. Yes. I say, if your Honor please, that this case should be decided according to the New York law, although it is immaterial under the case whether it is decided according to the New York law, because the contract was made in New York.

The Court. Yes, it appears that it was made in New York; that is true; but, for the purposes of your present argument, it is immaterial to inquire what the law of New York is. So that you may proceed and treat that as an immaterial question.

Mr. German. Yes, sir.

Now, referring to the lease. The first point of the defendants is that this deposit of $5,000 was a personal or collateral undertaking between Basch and Kaufman, and had nothing to do with the main part of the lease; that is, wherein Basch let and rented these premises and Kaufman agreed to pay the rent—that is the main part of this lease; and the secondary, or incidental, part of this was an outside matter, so far as the deposit of $5,000 was concerned, and was what is known under the law as a collateral agreement.

The Court. Well, outside of what? You say it was an outside matter. Outside of what?

Mr. German. Outside of the main terms of the lease, and, so far as the law is con-

cerned, this covenant concerning the deposit did not run with the land and was not an incumbrance upon the property. Where the lease refers to the word "landlord" it means the party of the first part, his executors, administrators or assigns, and the words "assigns" evidently means the deposit of $5,000.

The Court. Say that again, please.

Mr. German. Where the words "the party of the first part, his executors, administrators or assigns" appear, the word "assigns" evidently means the assigns of the $5,000, because it is a collateral matter.

The Court. You are referring to the agreement?

Mr. German. No, to the lease.

The Court. This is the lease from Basch to Kaufman, Basch being the landlord.

Mr. Heisley. I think that is the last paragraph, your Honor.

The Court. "The tenant has deposited with the landlord upon the delivery of this lease $5,000, as security for the faithful performance of all the covenants and conditions of this lease, and it is hereby agreed that if the said tenant shall pay said rent and shall faithfully perform all the conditions and covenants of this lease, then upon the termination thereof the landlord will return to the tenant said sum of five thousand dollars. Interest on said sum at the rate of five per cent. per annum shall be paid semi-annually to the tenant. But in case of default on the part of the tenant in the performance of any of the covenants and

conditions of this lease on his part, the landlord may at his option apply said sum together with the interest thereon, toward the payment of any rent that may remain unpaid, or the difference or deficiency arising by reason of his letting the said premises to another tenant, as hereinbefore provided, and to any other damage suffered by him by the default of the tenant in the performance of the covenants of this lease, and except as hereinafter provided the landlord shall have the right to hold and retain said sum or any balance thereof remaining in his hands, until May 1, 1917, notwithstanding the fact that this lease may have been terminated by summary or other legal proceedings. In case any proceedings are instituted to dispossess the tenant for non-payment of rent, he shall have no right to interpose as a defense thereto that the said deposit is held by the landlord or ask or demand to have the same or any part thereof applied toward the payment of the rent then unpaid. If, however, this lease be cancelled in case of a sale of said premises as hereinbefore provided or this lease be terminated by a total destruction of said demised premises, then said amount so deposited as security or so much thereof as the landlord may not be entitled to retain for rent or for damages aforesaid, shall be paid to said tenant at the time when possession of said premises shall be delivered by him in pursuance of the notice hereinbefore provided for or upon such total destruction as the case may be." Then it goes on, "It is understood and agreed that

wherever the term 'landlord' is used herein it shall be construed as meaning the party of the first part, his executors, administrators or assigns; that wherever the term 'tenant' is employed herein, it shall be construed as meaning the party of the second part, his executors, administrators or assigns, and that the covenants contained in this lease are binding on the parties hereto and their successors in interest." That is what you wanted to refer to?

Mr. German. Yes, sir; my point being that this word "assigns" refers to this $5,000, because it is a collateral matter, and not relating to the main matter of the letting; it refers to the $5,000 deposit.

Now, in the deed from Meyer to Mrs. Mennen there is a stipulation at the end of the description wherein Mrs. Mennen assumes certain mortgages, and then later on it says the property is subject to the following leases, among which is this lease, showing that they distinguished between the assumption of certain liabilities and receiving the property subject to certain encumbrances or liabilities.

The Court. How could they effect Mr. Kaufman's rights by anything they may do themselves?

Mr. German. Well, that is the point I desire to have put on the record, if your Honor please. They cannot. That is just the question that I am coming to. The part of the lease that your Honor has just read, where the words "successors in interest" are mentioned, it means successors in interest of the party that had the $5,000 de-

posit. Meyer was the successor in interest of this money; he kept it and paid interest on it. Kaufman recognized Meyer as the party that had this deposit, because, from the time that he first purchased the property until May 15, 1916, he received interest from him, and Kaufman never recognized Mrs. Mennen nor her successors in interest for the repayment of this money. There was no legal obligation on any grantee, particularly Mrs. Mennen, to demand from her predecessor, or her immediate grantor, the turning over of this deposit. Mrs. Mennen could not compel Meyer to pay her this $5,000 deposit, under the law which I shall cite to your Honor, and the evidence is that he did not turn it over to her. The evidence is that this $5,000 formed no part of the consideration for the transfer of the property from Meyer to Mrs. Mennen. Mrs. Mennen was to have paid $550,000 for the property, which she did pay in the manner indicated by the defendant Meyer, and if she had paid the $5,000, she would have paid $555,000, which is $5,000 more than she agreed to pay.

Now, I say there can be no recovery in this case against Mrs. Mennen, or, for that matter, against anyone, under the pleadings in this case. If the plaintiff desires to recover against anyone, he should add another count to his complaint for this $5,000 under a special agreement concerning the $5,000, or for money had and received by this third person, or by a contract made by and between the two persons for a third party's benefit, and there is no such thing in the

pleadings in this case. It is admitted in this case that the plaintiff has not performed the terms of the lease, particularly that part of the lease which states "That the tenant will, during the said term well and truly pay or cause to be paid unto the landlord the said rent reserved on the days hereinbefore prescribed for the payment thereof."

And, again, the plaintiff has not performed that part of the lease which says that "The tenant has deposited with the landlord upon the delivery of this lease the sum of $5,000 as security for the faithful performance of all the covenants and conditions of this lease." It is admitted that he has not performed the conditions of the lease, in that he has not paid the rent.

(Mr. German cites cases.)

Mr. German. There is a vast difference between a grantee taking property and assuming the payment of an obligation and taking property subject to an obligation. Now, if Mrs. Mennen had assumed this lease, there then might be some question; but even then, I say, that being a collateral agreement, I do not think she would be called upon to return this $5,000. But that question is not before your Honor, because she distinguishes, as I have stated before, in her covenants, wherein she assumes the payment of various mortgages and wherein she accepts this property subject to this lease. Accepting the property subject to the lease meant that she took the property with the lease expiring in a number of years, and that the tenant would pay rent

therefor, but not having anything to do with the deposit of $5,000, as I just said. I say that was a collateral agreement; it had nothing whatever to do with Mrs. Mennen or with any grantor.

For those reasons I ask for a non-suit on the part of the defendants, Elma Mennen Williams and William G. Mennen.

(Counsel argue.)

Mr. Heisley. I am going to make a motion to direct a verdict for Mr. Meyer. I will make it now or after you have disposed of this motion, just as your Honor says.

The Court. I will hear you now.

Mr. Heisley. If your Honor please, I move for the direction of a verdict in favor of the defendant, Meyer, for these three reasons:

First. As there can be no judgment against all of these defendants, and the judgment must be against Mennen and Williams or against Meyer alone, and as Mennen and Williams were the owners of this property at the time of the bringing of this suit, and accepted and recognized Kaufman as their tenant, and have received rents from him as such, they thereby assumed in law the responsibility for accounting to Kaufman for the $5,000, and should be held liable therefor.

Second. When Meyer purchased the property of Basch, and became Kaufman's landlord, he assumed the duty of returning to Basch this money, but that duty ceased when he parted with the title to Mrs. Mennen.

THIRD. The plaintiff prays judgment against Mennen and Williams, or, in the alternative, against Meyer, and, as he is entitled to judgment against Mennen and Williams, there should be no verdict rendered against Meyer.

The Court. I notice, Mr. Leber, that the indorsement of your complaint describes the defendants in this way: "Elma Mennen Williams and William Gerhard Mennen, individually, and as executors." Do you assert any claim against the executors individually, or do you assert your claim against them merely as executors of the estate?

Mr. Leber. By the terms of the Mennen will, the executors became vested with this title, with this property.

The Court. They hold the legal title?

Mr. Leber. They hold the legal title, and have owned it since the time of Mrs. Mennen's death.

The Court. That is what you mean?

Mr. Leber. Yes, sir. I do not think the estate has been settled; I don't know. I do not suppose there ought to be any difficulty, anyway, if we recover against them.

Mr. German. I would like to have the plaintiff declare whether he seeks to hold the defendants as executors under the will or whether he seeks to hold them under a personal contract relating to personal property.

The Court. (After further argument.) Judge Heisley's argument would hold them as assignees.

Mr. Heisley. Yes, sir.

Mr. German. Yes, sir.

The Court. Suppose that is the view that is adopted, does it become a debt of the Mennen's estate?

Mr. German. If that is so, there must be a non-suit, because there must be a specific agreement on the part of this defendant to repay the $5,000, as Mr. Leber stated.

(Counsel argue further.)

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

AFTER RECESS.

The Court. I am asked to non-suit the plaintiff. That motion I deny.

I am asked to direct a verdict in favor of Joseph Meyer, the defendant; that is to say, I am asked to say that the liability on which the plaintiff sues is upon the defendants, Mrs. Williams and Mr. Mennen. That motion I intend to grant, and direct a verdict in favor of the plaintiff against Mrs. Williams and Mr. Mennen as individuals, not as executors, as successors in interest to the title of the land, for $2,500, with whatever interest there is. How the interest is affected by the allowance of three months' rent I have not worked out. I think there is nothing to leave to the jury.

In my view, the rights of the plaintiff and the obligation of the defendants are to be found in the lease itself, and the obligation to return the $5,000, or so much of it as was not absorbed in another way, under the

lease, is upon the person who held the title at the time when the lease expired, which was in the spring of this year, the 1st of May. The persons who held the title at that time were the residuary legatees, or, rather, devisees, under the will of Mrs. Mennen, her daughter, Elma Mennen Williams, and her son, William Gerhard Mennen. I think the plaintiff is entitled to judgment against them for the amount of his claim, and if you can ascertain what the interest is, to be added to the $2,500 for which the verdict is to be rendered, I shall direct a verdict for that amount.

Mr. German. I should like to have it appear on the record, because my motion could not have been addressed to the Court until after the motion to non-suit was decided, that I desire to take an exception to your Honor's ruling in refusing to non-suit the plaintiff.

Counsel for defendants, Elma Mennen Williams and William Gerhard Mennen, prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. German. I desire now to ask for the direction of a verdict in favor of the defendants Williams and Mennen, and against the plaintiff.

The Court. I deny your motion to direct a verdict in favor of Mrs. Williams and Mr. Mennen.

Counsel for defendants, Elma Mennen Williams and William Gerhard Mennen,

prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Leber. If your Honor please, I understood Mr. German's motion to be one of non-suit and not for the direction of a verdict. I did not understand that he closed his case.

Mr. German. No, I didn't have any chance to.

The Court. I did not know whether he had any defense or not.

Mr. German. I did not have any chance to put it in.

Mr. Leber. If the chance has been overlooked, I want you to get your chance of any defense that you have. I think that, Mr. German's motion being only one of nonsuit, if he has any defense, he ought to have an opportunity to put it in.

The Court. (After argument.) You and Mr. Leber seem to agree that the ruling of the Court was premature. It had not occurred to me; in fact, I had not thought particularly about the alternative nature of the suit, although I have been aware all along, of course, that it was a triangular contest. The Court is quite willing to open the door for Mr. Mennen and Mrs. Williams to prove anything that has not been already advanced.

Mr. German. I understood the motion of non-suit was refused and that the judgment was actually directed. Now that ends it, so far as the record appears.

The Court. Yes, I supposed myself that it ended it, but counsel have suggested that it did not end it and that I have been depriving you of some right of proof, and I do not want to do that. If you feel that you have not had your day in court, I now offer it to you.

Mr. Leber. In order to preserve whatever rights we may have on the question of your Honor's ruling with regard to Mr. Meyer's liability in the matter, will your Honor enter our formal objection to the ruling that you have made absolving Meyer? We take an exception to your Honor's ruling on that, for whatever it is worth.

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

Exception noted as ground of appeal.

The Court. I shall set aside everything that I have said that seems to preclude Mr. German's clients from making further proof.

WILLIAM G. MENNEN, sworn in behalf of defendants, Elma Mennen Williams and William Gerhard Mennen.

Direct examination by Mr. German.

Q Mr. Mennen, you are one of the defendants in this cause? A Yes, sir.

Q Mr. Mennen, when did you first know anything about this deposit of $5,000? A In the summer of 1916.

Mr. Heisley. I object to this, if your Honor please, on the ground that he holds his title through his mother, Mrs. Mennen, the testatrix, who unquestionably knew of

the existence of this lease. She knew of it in the agreement which she signed with Mr. Meyer for the purchase, and she knew of it also in the deed from Mr. Meyer to her, where it is expressly mentioned. Therefore it is utterly immaterial when this young man heard of this deposit. He is chargeable with notice to the person through whom he obtained the title.

The Court. I sustain the objection. I think it is entirely unimportant.

Counsel for defendants, Elma Mennen Williams and William Gerhard Mennen, prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Mr. Mennen, did Mr. Kaufman ever make any claim upon you or upon your sister, to your knowledge, for repayment of this deposit prior to the time mentioned in his letter?

Mr. Heisley. I object on the ground that it is utterly immaterial whether he did or not, because the rights of these people are established by the lease, and Mrs. Mennen buying subject to the lease, it is utterly immaterial whether Mr. Kaufman made a demand on her or on this young man for the return of the money.

The Court. Unless this is to lead up to something—

Mr. German. No, sir; I just wanted to ask my questions and have my exceptions noted.

The Court. I was about to say that, unless this question is merely introductory and leads up to some new feature of the

case which I haven't noticed either in the proof or in the pleadings, I should think that it was, like the former question, irrelevant, and assuming that that is the case, I shall make that ruling.

Counsel for defendants, Elma Mennen Williams and William Gerhard Mennen prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Mr. Mennen, I should like to ask what explanation you can make, if you have any, concerning your letter of February 9, 1917, to Mr. Kaufman, Exhibit P. 8 (paper shown to witness)?

Mr. Leber. I object to that question as incompetent and immaterial. I suppose the letter explains itself.

The Court. P. 8 is a letter written by Mr. Mennen to Mr. Kaufman, the plaintiff, under date of February 9, 1917, and it says, among other things, "I cannot allow you to stay in the building after May 1st," and then goes on and speaks about the deposit. Of course, no explanation that the witness can make would alter the terms of the letter, but it is not necessarily improper to make an explanation of a written document, so I do not think I ought to sustain the objection to the question.

(Question read.)

A I intimated in this letter that I anticipated no trouble in the payment, or the repayment, of the deposit, because during the negotiations for the sale of this property to Mrs. Fuld the

matter of the deposit of this lease came up. That being the first of my knowledge of this deposit, I read the lease, and then attempted to get in touch with Mr. Meyer. Mr. Meyer didn't come to see me, but a friend of his, an intermediary—(objected to)—assured me, and on that assurance I wrote this letter—

Mr. Heisley. I object. I do not think this witness ought to be allowed to state that a friend of Mr. Meyer, or an intermediary, did all this.

Q Well, as a result of the intermediary's visit, you wrote this letter? A That was the only intimation or only knowledge I had.

Mr. Leber. Now, I move to strike out the entire answer. It is absolutely immaterial.

The Court. I shall let it stand.

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

Exception noted as ground of appeal.

Q Have you any explanation for writing this letter of February 14, 1917, Exhibit P. 9 (paper shown to witness)?

The Court. That is from Mennen to Kaufman?

Mr. German. Yes, sir.

The Court. You may answer the question.

A There are two portions, or two major paragraphs, in that letter which I have written here: "I have your letter of February 12th. I do not feel that I am called upon to give you the assurances which you ask for relative to the re-

turn of your deposit. I believe you are fully protected in this matter in your lease." Is that the explanation that you want, or the next one? "The question now is if this money is to be paid to you by Joseph Meyer or ourselves, and this matter I intend having settled on or before May 1st, and from present indications I do not anticipate any trouble in this regard."

Q What explanation have you to make regarding that latter part? A That is, I had attempted negotiations with Mr. Meyer to see who was going to pay this deposit back and who assumed this liability, and that that was the assurance that I had in response to that negotiation.

Q Are you and your sister still the owners of this property?

Objected to as immaterial.

(Question withdrawn.)

Q Were you and your sister, Mrs. Williams, the owners of this property on May 1st?

Objected to.

A We were not.

Mr. Leber. I object to that question because it is not pleaded.

Mr. German. Then I move, if your Honor please, if my pleadings do not set up the fact, to amend my pleadings by adding another defense, that on May 1st we were not the owners of the property.

The Court. I think it is too late to allow an amendment. I deny the motion.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen

prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. German. Will your Honor allow the question to be answered?

The Court. You asked the witness whether he and his sister owned the property on a certain date. The matter of title, if it was of any importance, and I think it was, should be proven otherwise than by the statement of the witness on the stand.

Mr. German. I will follow that up by proof from the records. This is only preliminary to the introduction of the records.

The Court. I sustain the objection to the question, because it is not the proper way to prove the subject.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Have you had any conversation with Mr. Kaufman regarding this deposit recently? A On Thursday afternoon, after court was adjourned.

Q Give it to us.

Mr. Leber. I object to that. I do not see how that is material—a conversation between the parties in court and after the commencement of the action.

The Court. It would depend on what the conversation was. The witness said he had a conversation.

Mr. German. Yes, sir.

The Court. What is the question?

Mr. German. What was the conversation?

Mr. Heisley. I do not know that I ought to interpose any objection, if your Honor please, as I understand my client is out of the case, and so I have no right to make any objection. If he is not out of the case, I do not want this witness to tell anything affecting my client without objecting to it. Although the verdict has not been returned, I understand your Honor will direct a verdict in favor of Mr. Meyer. Consequently I shall not interfere and make any objection.

The Court. I shall, unless testimony comes in that changes the aspect of the case. You may answer the question.

A Mr. Kaufman—that was the first time we had met personally—we regretted meeting under those circumstances.

Q What did he say about this deposit? A He said that he felt right along that this deposit had never been turned over to us, and that he likewise regretted that he had ever released Mr. Basch from any responsibility on that deposit.

Q And what did he say, if anything, about having made a mistake—

Objected to as leading.

Q What else did he say, if anything? A That was his mistake, in accepting the responsibility of Mr. Meyer.

Q (*By the Court.*) Was that the conversation? A Yes, sir.

Cross Examination Waived.

WILLIAM K. THOMAS, sworn in behalf of defendants Elma Mennen Williams and William Gerhard Mennen.

Direct examination by Mr. German.

Q Mr. Thomas, what is your business? A Deputy register.

Q Of what county? A This county, Essex County.

Q Have you the record of the recording of a deed from Elma Mennen Williams and others to Carrie B. Fuld to property on Washington and Market streets, Newark—

Mr. Leber. I object to the question

Q —recorded in Book V. 58, page 307?

Mr. Leber. I object to the question on the ground that the defendants Williams and Mennen have not pleaded that they were not the owners of this property at the time when this suit was commenced.

The Court. (After argument.) The question, then, is whether under the general denial of liability in the answer of Mennen and Williams it is admissible in proof, or as evidence tending to show no liability, to offer evidence of title out of themselves before the expiration of the demise, that specific defense not having been set up in the answer whether it can come in under the general allegation of no liability. I will hear counsel on that subject.

(Counsel argue.)

The Court. It seems to me that to open up this line of inquiry would be outside of the pleadings, and would, moreover, be a surprise to the other parties.

Mr. German. May I put my question in that form so that, if your Honor decides against me, I can have the record complete? I offer to prove by the records of Essex County—

The Court. I suggest that you do not state in the form of an offer to prove the details of what you desire to prove. I understand that you want to prove a transfer of the property?

Mr. German. Yes, sir; by the records of Essex County.

The Court. Pending the demise?

Mr. German. Yes, sir; by the records of Essex County, produced here by the official in charge of the records. I want to prove that in V. 58 of Deeds for Essex County, on page 307, there is a conveyance of this property in question—

The Court. That is enough to show your purpose. Now, the question is whether the Court ought to allow the inquiry to be made, if the inquiry is, as it seems to me, outside of your answer and if it is calculated to surprise the other side.

Mr. German. I did not quite finish. —which took effect prior to May 1, 1917.

The Court. Yes, I understand that. I am inclined to think that I ought not to receive this proof, for the reasons already stated: because it is not within the issue as framed, as I look at it, and it is a surprise, or likely to be a surprise, to the other side, who have relied on the pleadings as presenting the situation. I sustain the objection.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

DEFENDANTS ELMA MENNEN WILLIAMS AND WILLIAM GERHARD MENNEN REST.

Mr. German. I move that the Court direct a verdict in favor of the defendants Mennen and Williams and against the plaintiff.

The Court. That motion I deny.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Heisley. Your Honor has already decided as to Mr. Meyer. I renew that motion, if necessary.

The Court. Yes, you had better renew your motion. I meant to have recalled any ruling on the motion that would be embarrassing.

Mr. Heisley. I respectfully ask the Court to direct a verdict in favor of the defendant Meyer and against the plaintiff.

Mr. Leber. For the purpose of getting our position as plainly on the record as possible, I move for the direction of a verdict in favor of the plaintiff and against all of the defendants in this case, and, if that is refused, that I get a judgment in the alternative, as amended.

The Court. I shall take first the motion made by Judge Heisley, which was that the

Court direct a verdict in favor of the defendant Meyer. I grant that motion.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

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

Exception noted as ground of appeal.

The Court. I deny your motion, Mr. Leber.

Mr. Leber. This is only for the purpose of getting the record in proper shape for appeal.

The Court. Whatever your purpose may be, I am obliged to rule according to my view of the law. I deny your motion.

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

Exception noted as ground of appeal.

Mr. German. I renew my motion to nonsuit the plaintiff for the reasons stated by me previously.

The Court. I deny your motion to nonsuit the plaintiff.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Leber. I find that the interest is $178.84.

Verdict.

The Court. I shall make one remark as to an item of proof made by Mr. Mennen, who said substantially, I think, that neither he or his sister had ever received the $5,000 from Mr. Meyer. I think it makes no difference whether they received it or not. The obligation arising out of the lease itself, if the Mennen heirs did not succeed in protecting themselves in the deal with Mr. Meyer, that was unfortunate. But how can that affect the rights of Mr. Kaufman? Therefore my conclusion is that a verdict should be directed in favor of the plaintiff and against the defendants Elma Mennen Williams and William Gerhard Mennen for $2,500, with interest.

Gentlemen of the Jury: The Court takes the responsibility of this, and it is my duty to direct a verdict in favor of the plaintiff and against the defendants Elma Mennen Williams and William Gerhard Mennen for the sum of $2,678.84, as individuals, not as executors.

(Verdict accordingly.)

Mr. German. Will your Honor allow me an exception to the direction of a verdict in favor of the plaintiff?

The Court. Yes.

Counsel for defendants Elma Mennen Williams and William Gerhard Mennen prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Plaintiff's Exhibits 1, 2 and 3.

Exhibits.

PLAINTIFF'S EXHIBIT 1.

LEASE.

Set out in full under Schedule "A" attached to Complaint. See case page 13.

PLAINTIFF'S EXHIBIT 2.

[Letterhead of The Basch & Greenfield Co.]

Newark, N. J., Dec. 15th, 1906.

Mr. Benjamin H. Kaufman,
82 Nassau St., New York.

Dear Sir:

I am in receipt of your letter dated Dec. 10th, enclosing check for $5,000.00, being the deposit called for in your lease for the store on the ground floor of the Metropolitan building, in this city.

Yours truly,
CHAS. J. BASCH.

PLAINTIFF'S EXHIBIT 3.

This Indenture, made the 27th day of April, in the year of our Lord one thousand nine hundred and eleven, between Charles J. Basch and Violet S. Basch, his wife, of the City, County and State of New York, parties of the first part, and Joseph Meyer, of the City of Newark, County of Essex and State of New Jersey, party of the second part.

Witnesseth, That the said parties of the first part, for and in consideration of the sum of One ($1.00) Dollar and other good and valuable considerations, lawful money of the United

Plaintiff's Exhibit 3.

States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the first part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey, and confirm to the said party of the second part, and to his heirs and assigns forever,

All that certain piece or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex, and State of New Jersey, * * * * subject to the state of facts shown in a survey thereof made by HARRISON VAN DUYN & SON, made June 1905; subject further to a mortgage thereon held by CHRISTINA TREFZ in the sum of One Hundred Thousand ($100,000) Dollars, and a second mortgage thereon held by CHRISTINA TREFZ in the sum of One Hundred and Twenty Thousand ($120,000) Dollars the payment of both of which mortgages is assumed by the party of the second part as part of the consideration for this conveyance; subject further to the covenants binding upon the parties of the first part or the owners of said premises under an agreement between JULIUS VOGEL and ANNA VOGEL, his wife, and U. S. CREDIT SYSTEM COMPANY, dated April 27th, 1894, and an agreement entered into between the U. S. CREDIT SYSTEM COMPANY and JULIUS VOGEL, dated October 18th, 1892; and an agreement between JULIUS VOGEL and the U. S. CREDIT SYSTEM COMPANY, dated September 2nd, 1891, two of which said agree-

Plaintiff's Exhibit 4.

ments are recorded in the office of the Register of Essex County in Book H. 28 of Deeds on Pages 359, etc.; Book E. of Miscellaneous on Page 102 etc.; and subject further to such easements upon said premises as existed thereon at the time of said conveyance from CHRISTINA TREFZ above described and to all stipulations, agreements and covenants which at the time of said conveyances were in existence that affected said premises or the building standing thereon, or which in any way were or now are obligatory upon the owner or now owners of said premises; and subject further to the following leases affecting said premises or part thereof to wit; a lease with BENJAMIN H. KAUFMAN, expiring May 1st, 1917,; a lease with SOPHIA, CHARLES A. AND CONRAD LEICK, expiring January 1st, 1916; a lease with J. E. WHEATON & SON, expiring October 21st, 1913; a lease with the INTERSTATE MERCANTILE COMPANY, expiring December 1st, 1911, and existing leases and tenancies covering portions of said premises expiring not later than May 1st, 1911.

Deed acknowledged and recorded April 29, 1911, in Register's office of Essex County in Book Q-48 of Deeds, pages 575-578.

PLAINTIFF'S EXHIBIT 4.

Joseph Meyer & Ux. to Emma C. Mennen:

THIS INDENTURE, made the First day of July, in the year of Our Lord One Thousand Nine Hundred and Twelve,

BETWEEN Joseph Meyer and Edna O. Meyer his wife, of the City of Newark, in the County of Essex and State of New Jersey, of the First Part; And Elma C. Mennen, of the City

Plaintiff's Exhibit 4.

of Newark, in the County of Essex and State of New Jersey, of the Second Part; WITNESSETH, That the said party of the First Part, for and in consideration of One Dollar and other valuable considerations, lawful money of the United States of America, to them in hand well and truly paid by the said party of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the First Part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the Second Part, and to her heirs and assigns forever, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

Describes property in question.

Being the same premises which were conveyed to said Joseph Meyer by Charles J. Basch and wife by deed dated April 27th, 1911, and recorded in the Office of the Register of Essex County in Book Q. 48 of Deeds for said County on pages 575 on April 29th, 1911. Subject to the state of facts shown in a survey thereof made by Harrison Van Duyne and Son made June, 1905. Subject further to a Mortgage held thereon, by Christina Trefz in the sum of One Hundred Thousand Dollars with interest at Four per cent. per annum due June 30th, 1915, and a Second Mortgage thereon held by Christina Trefz, in the sum of One Hundred and Twenty Thousand Dollars with interest at Four and

Plaintiff's Exhibit 4.

One half per cent due June 30th, 1915, and a Third Mortgage thereon held by Charles J. Basch in the sum of Ninety Thousand Dollars at Five per cent interest per annum due May 1st, 1914. The payment of all of which mortgages is assumed by the party of the Second Part as part of the consideration for this conveyance, subject further to the covenants binding upon the parties of the First Part or the owners of said premises under an agreement between Julius Vogel and Anna Vogel, his wife and U. S. Credit System Company dated April 27th, 1894 and an agreement entered into between the U. S. Credit System Company and Julius Vogel, dated October 18th, 1892, and an agreement between Julius Vogel and the U. S. Credit System Company, dated September 2nd, 1891. Two of which said agreements are recorded in the Office of the Register of Essex County in Book H. 28 of Deeds on pages 359 &c., Book E. of Miscellaneous on page 102 &c., and subject further to such easements upon said premises as existed thereon at the time of said conveyance from Christina Trefz June 30 1905 and to all stipulations, agreements and covenants which at the time of said conveyances were in existence that affected said premises or the buildings standing thereon or which in any way were or now are obligatory upon the owner or now owners of said premises, and subject further to all existing leases and tenancies, said leases and tenancies covering portions of said premises above the Second Floor expiring not later than May 1st, 1913. The lease of the Second Floor expiring October 21st, 1913, the lease with Benjamin H. Kaufman for First Floor expiring May 1st, 1917, the lease with

Plaintiff's Exhibit 4.

Sophie, Charles A. & Conrad Leick for basement expiring January 1st, 1916.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining; Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the First Part, of, in and to the same, and of, in and to every part and parcel thereof. To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the Second Part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the Second Part, her heirs and assigns forever; And the said Joseph Meyer does for himself, his heirs, executors and administrators covenant and grant to and with the said party of the Second Part, her heirs and assigns that he, the said Joseph Meyer is the true, lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the Second Part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever, except as aforesaid. And also, that the said party of the First Part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land

Plaintiff's Exhibit 4.

and premises in manner aforesaid. And also, that Joseph Meyer will Warrant, secure and forever defend the said land and premises unto the said Elma C. Mennen, her heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrances whatsoever, except as aforesaid.

In Witness Whereof, the said party of the First Part have hereunto set their hands and seals the day and year first above written.

JOSEPH MEYER. [Seal]
EDNA O. MEYER. [Seal]

Signed, Sealed and Delivered
in the presence of

Jacob Fischel.

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

Be It Remembered, That on this First day of July, in the year of Our Lord One Thousand Nine Hundred and Twelve before me, the subscriber, A Master in Chancery of New Jersey personally appeared Joseph Meyer and Edna O. Meyer, his wife, who I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; And the said Edna O. Meyer, being by me privately examined, separate and apart from her husband, acknowledged that

Plaintiff's Exhibit 5.

she signed, sealed and delivered the same as her voluntary act and deed, Freely, without any fear, threats or compulsion of her said husband.

JACOB FISCHEL,
Master in Chancery of New Jersey.

Received in the Office July 1 A. D. 1912 at 3:13 P. M.

Deed acknowledged and recorded April 29, 1911, in Register's Office of Essex County in Book X. 50, pages 360-363.

PLAINTIFF'S EXHIBIT 5.

THIS AGREEMENT made and entered into the Fourth day of April, Nineteen hundred and twelve, BETWEEN Joseph Meyer of the City of Newark, County of Essex and State of New Jersey, party of the first part, and Elma C. Mennen, of the same place party of the second part—

WITNESSETH—The party of the first party in consideration of the premises and of one dollar duly paid by the party of the second part the receipt whereof is hereby acknowledged and also in consideration of the conveyance of the property hereinafter mentioned belonging to the party of the second part, doth hereby agree on his part to sell, grant and convey unto the said party of the second part all that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, County of Essex and State of New Jersey.

Describes property in question. Same restrictions as in Exhibit P. 4.

Plaintiff's Exhibit 5.

and subject further to all existing leases and tenancies & the party of the first part hereby declares that the said premises are now leased as follows—

Lease to Benjamin H. Kaufman from Charles J. Basch dated Dec. 4th, 1906 leasing the first floor of said premises for a term of ten years and two months from March 1st, 1907, expiring May 1st, 1917 at an annual rental of ten thousand dollars in equal monthly payments in advance. Said lease contains a clause that the same may annuled at any time upon the payment of twenty five thousand dollars after May 1st, 1912.

The purchase price of said premises shall be five hundred and fifty thousand dollars of which three hundred and ten thousand dollars as above stated are in mortgages leaving an equity of two hundred and forty thousand dollars.

And the said party, of the second part in consideration of the premises and of one dollar duly paid by the party of the first part to the said party of the second part the receipt whereof is hereby acknowledged, and in exchange of and for the property and consideration as above mentioned doth likewise agree on her part to sell, grant and convey unto the said party, of the first part all that tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, County of Essex and State of New Jersey:—

Being situate on the north west corner of High and Spruce Street having a frontage of one hundred and seventy feet more or less on High Street and a depth of two hundred and ninety eight feet more or less running to the easterly line of Quitman Street having also a frontage

on Quitman Street of one hundred and seventy feet more or less. Being the same premises conveyed to said party of the second part by the heirs of Andrew Albright, deceased. Together with the buildings thereon erected, and also by the heirs of Bigelow.

The purchase price of said last mentioned premises shall be one hundred and sixty thousand dollars on which there are no encumbrances.

The difference between the values of the respective properties over and above encumbrances being eighty thousand dollars shall be paid by the party of the second part as follows—Five thousand dollars in cash on signing this agreement, the receipt whereof is hereby acknowledged.

Thirty five thousand dollars in cash upon the execution and delivery of the deed aforesaid. Forty thousand dollars by the execution and delivery of her bond in the penal sum of eighty thousand dollars conditioned for the payment of forty thousand dollars in four years from its date with interest on the same at five per cent per annum, payable semi-annually, to be secured by a mortgage on premises to be conveyed by the party of the first part, which said mortgage and bond shall contain a clause that the same may be paid off at any time when interest is paid in sums of not less than five thousand dollars. The said bond and mortgage shall also contain a thirty day interest default clause and a sixty day tax and assessment default clause and a further clause providing that in the event of the failure of the mortgagor or her heirs or assigns paying the interest upon the three prior mortgages now a lien upon said

Plaintiff's Exhibit 5.

premises for thirty days after the same shall respectively be due and payable that then in that event the principal sum of said forty thousand dollar mortgage shall be due and payable at once at the option of the mortgagee or his assigns, anything in the forty thousand dollar bond and mortgage to the contrary notwithstanding.

The parties to these presents mutually agree to execute, acknowledge and deliver each to the other or to their assigns each at their own proper cost and expense a proper warranty deed or deeds for the conveying and assuring each to the other the fee simple of the property of each above agreed to be conveyed free from all encumbrances of any name or nature whatever excepting the encumbrances heretofore stated now a lien on the property of the party of the first part, which deed shall be delivered and exchanged on the 1st day of July, 1912, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon on that day at the office of Frederick T. Hey, 776 Broad Street, Newark, N. J.

It is agreed that all taxes and water rents and fire insurance shall be adjusted to the date of settlement. Taxes to be adjusted as assessed for the year 1912.

The party of the second part further agree to assign all leases now on his premises to the said party of the second part.

In Witness Whereof the parties hereto have in duplicate have hereunto set their hands and seals the day and year first above written.

JOSEPH MEYER. [Seal]
EDNA O. MEYER. [Seal]
ELMA C. MENNEN. [Seal]

Plaintiff's Exhibit 6.

Signed and sealed in the
presence of

FREDERICK T. HEY.

PLAINTIFF'S EXHIBIT 6.

THIS INDENTURE made the 16th day of May, One thousand nine hundred and eleven, between JOSEPH MEYER, of the City of Newark, Essex Co. N. J., party of the first part, and BENJAMIN H. KAUFMAN, of the City, County and State of New York,

WITNESSETH:

WHEREAS on the 4th day of December 1906 the party of the second part entered into an indenture of lease with one, Charles J. Basch, who was the owner of the Metropolitan Building, on the North-easterly corner of Washington and Market Streets, known as street numbers 109-113 Market Street, in the City of Newark, State of New Jersey, wherein and whereby the said Benjamin H. Kaufman leased from the said Charles J. Basch the store on the ground floor of the said premises for a period of ten years, two months, from March 1st 1907; and

WHEREAS subsequent to the date of said lease and on or about May 1st 1911, the said Charles J. Basch did assign and transfer to the said party of the first part the said premises hereinbefore described, the subject to the terms and conditions set forth in said indenture of lease; this agreement

WITNESSETH:

That for and in consideration of the sum of $1.00 and other good and valuable consideration

Plaintiff's Exhibit 6.

the party of the first part hereby assumes the lease of December 4th 1906 as executed by Charles J. Basch and the party of second part, and all of the terms thereof, and hereby acknowledges the receipt of the Five thousand ($5,000.00) Dollars from Charles J. Basch, pursuant to the terms of said lease, and agrees to hold the said sum as a deposit in accordance with the terms and conditions of the said lease.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

JOSEPH MEYER. [L. S.]

City of New York, }
State of New York. } *ss:*

On this day of May, 1911, before me personally appeared Benjamin H. Kaufman, to me known and known to me to be the individual described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

State of New Jersey, }
City of Hoboken. } *ss*

On this 16th day of May, 1911, before me personally came Joseph Meyer, to me known and known to me to be the individual described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

[L. S.]

DANIEL COHN,
Notary Public.

PLAINTIFF'S EXHIBIT 7.

GEISMAR-MEYER CO.
222-224 Washington Street,
HOBOKEN, N. J.

May 1, 1911.

Mr. B. H. Kaufman,
No. 123 W. 42d St.,
New York City.

Dear Sir:—

I hereby acknowledge receipt from Mr. Charles J. Basch of your $5,000.00, deposit on lease dated December 4th, 1906, covering the ground floor of the Metropolitan Building, corner Washington & Market Sts., Newark, N. J., and agree that I will hold the same subject to the conditions in same lease, and I hereby assume the various agreements on the part of the landlord to be performed.

Yours Very Truly,

JOSEPH MEYER.

PLAINTIFF'S EXHIBIT 8.

Tel: Market 9416

NORTH WARD REALTY COMPANY
42 Orange St.

Newark, N. J., Feb. 9, 1917.

Mr. B. H. Kaufman,
123 West 42d St.,
New York City.

Dear Mr. Kaufman:

I wish to acknowledge receipt of your letter of Jan. 31st, and likewise apologise for not

Plaintiff's Exhibit 8.

answering it at an earlier date. This I was unable to do as my sister, who is joint owner of the building with me, was not in the city.

After discussing the matter with her and our attorneys, we have decided that it will not be feasible to allow you to stay in the building later than May 1st, and we would greatly appreciate it if you would make the necessary arrangements to vacate by that time. A general notice to this effect was sent out yesterday to all tenants in the building, copy of which you no doubt received.

As regards the deposit and the monthly installments of rent, our attorneys hold that this deposit was made for the satisfactory fulfilment of all the covenants of the lease, which includes payment to the last month and vacating premises on or before expiration date of lease.

Quite aside from any legal phases of the matter, I believe the transaction will be handled a great deal more simply and cleanly by having the regular monthly installments of rent paid to us and then at the specified time turning over the deposit in full.

I do not anticipate any trouble in this matter and we are to that end losing no time in getting after Mr. Meyer. Mr. Basch informed me of the statements made to you by Mr. Meyer relative to this deposit, and to say the lease, they are quite extraordinary.

Very truly yours,

WILLIAM G. MENNEN,
Treasurer.

WGM:S

Plaintiff's Exhibit 9.

PLAINTIFF'S EXHIBIT 9.

Tel: Market 9416

NORTH WARD REALTY COMPANY
42 Orange St.

Newark, N. J., Feb. 14, 1917.

Mr. B. Kaufman,
123 W. 42d St.,
New York City.

Dear Sir:

I have your letter of February 12th. I do not feel that I am called upon to give you the assurances which you ask for, relative to the return of your deposit. I believe you are fully protected in this matter in your lease.

The question now is if this money is to be paid to you by Joseph Meyer, or ourselves, and this matter I intend having settled on or before May 1st, and from present indications I do not anticipate any trouble in this regard.

Will you please instruct your bookkeeper to forward us rent checks as heretofore.

Very truly yours,

WILLIAM G. MENNEN,
Secretary.

WGM:S

Defendant Mennen's Exhibit 1.

DEFENDANT MENNEN'S EXHIBIT 1.

50 STORES—ALL PRINCIPAL CITIES

KAUFMAN HATS

Main Offices:
123 WEST 42ND STREET
NEW YORK

Jan 24, 1917.

Mennen's Chemical Co.,
42 Orange Street,
Newark, N. J.
Att. Mr. Mennen

Gentlemen:

Some time ago your Mr. Gregory called to see me in reference to renewal of lease, and as I haven't heard anything further from him since then in regard to this matter, I would like to have your decision by return mail as to whether you wish to consider a renewal or not.

Mr. Joseph Meyer, the former owner of the building, has just informed me that he had turned over the deposit of $5,000. to you, which I had made several years ago, and I would like to know if there would be any objection to my withholding the rent for the balance of the term, to apply against this deposit, and then you can repay the balance at the termination of the lease. Please advise.

Yours very truly,

B. H. KAUFMAN.

BHK:B

Defendant Mennen's Exhibit 2.

DEFENDANT MENNEN'S EXHIBIT 2.

50 STORES—ALL PRINCIPAL CITIES

KAUFMAN HATS

Main Offices:
123 WEST 42ND STREET
NEW YORK

Jan. 31, 1917.

Mr. G. Mennen,
North Ward Realty Co.,
42 Orange Street,
Newark, N. J.

Dear Mr. Mennen:

Acknowledging receipt of your notice to vacate premises on May 1st, wish to say that same will be observed, as requested.

I want you to give me permission to continue to occupy the corner store until July 1st, or August 1st, in order that I might have additional time to secure a store, and I await your consent to same.

Relative to deposit of $5000. that I made on the lease, no doubt Mr. Basch, fully explained the circumstances of this deposit at the time he owned the building, and of the subsequent transfer to Jos. Meyer.

I hold Mr. Meyer's receipt of May 1st, 1911, wherein he states that he agrees to hold the deposit, subject to conditions in said lease, and I was under the impression that after he sold the building to your Estate, that he had automatically turned over this deposit to you, the same as Mr. Basch had transferred it to him. At any rate, he claims now that this deposit was transferred to you, and when I asked him how it happened that he paid the interest on same, he

replied that it was because you refused to pay any interest on the deposit.

I have been informed that this deposit has become a lien on the property, inasmuch as this lease was recorded. However that is a matter that will be decided later. I think, in the meantime that you ought to credit me on the deposit, with the rent payable from now until the expiration of the lease.

Yours very truly,

B. H. KAUFMAN.

BHK:B

DEFENDANT MENNEN'S EXHIBIT 3.

50 STORES—ALL PRINCIPAL CITIES

KAUFMAN HATS

Main Offices:
123 WEST 42ND STREET
NEW YORK

Feb. 9, 1917.

Mr. Wm. G. Mennen,
42 Orange St.,
Newark, N. J.

Dear Sir:

I did not receive any reply from you to my last letter in which I inquired about the deposit that I had made on the Newark lease.

While I haven't consulted my lawyer, I am of the opinion that you, as the landlord, must be responsible for this deposit, as it is one of the conditions of the lease, and as far as I can see, you should have had this deposit turned over to you by Mr. Meyer, at the time you took title.

Defendant Mennen's Exhibit 4.

Now I don't know what you intend doing about it, but I would like to get your decision, so that in case you do not hold yourself responsible, that I can take the matter up with my lawyer at once, as I do not want to take any chances of losing this deposit.

Awaiting your reply,

Very truly yours,

B. H. KAUFMAN.

BHK:B

DEFENDANT MENNEN'S EXHIBIT 4.

50 STORES—ALL PRINCIPAL CITIES

KAUFMAN HATS

Main Offices:
123 WEST 42ND STREET
NEW YORK

Feb. 12, 1917.

Mr. Wm. G. Mennen,
42 Orange St.,
Newark, N. J.

Dear Sir:

Since writing you on Friday, I see that your letter of Feb. 9th, crossed mine of the same date.

I don't believe that you are disposed to do anything but what is just in the matter, and inasmuch as the lease states that the landlord is responsible for the deposit which I put up as security, I don't think you will evade the responsibility.

I am perfectly satisfied to pay the rent for the balance of the term if you will give me the assurance that the deposit will be turned over to

me when the term expires, without having recourse to the law.

Yours truly,

B. H. KAUFMAN.

BHK:B

DEFENDANT MENNEN'S EXHIBIT 5.

50 STORES—ALL PRINCIPAL CITIES

KAUFMAN HATS

Main Offices:
123 WEST 42ND STREET
NEW YORK

Mar. 14, 1917.

Mr. Wm. Mennen,
42 Orange St.,
Newark, N. J.

Dear Sir:

In reply to your recent letter, wish to say that I have been withholding the rent for February and March, for the reason intimated to you about a month ago. I wrote to you at the time, that I think my present landlord is responsible for the deposit which I paid as security. If you will send me a letter guaranteeing the return of this deposit at the expiration of my present lease, I am perfectly satisfied to pay the rent in arrears.

Yours very truly,

B. H. KAUFMAN.

BHK:B

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BENJAMIN H. KAUFMAN,
Plaintiff-Respondent,

vs.

ELMA MENNEN WILLIAMS and WILLIAM GERHARD MENNEN, and JOSEPH MEYER,
Defendants,

ELMA MENNEN WILLIAMS and WILLIAM GERHARD MENNEN,
Appellants.

On Appeal from Essex County Circuit Court.

Brief for Appellants.

Abstract of the Case.

On December 4th, 1906, one Charles J. Basch, being the owner of certain lands and building on the northeast corner of Market and Washington streets, Newark, known as the Metropolitan Building, leased the store on the ground floor to Benjamin H. Kaufman, the plaintiff, for a term of ten years and two months from March 1st, 1907, at the yearly rental of $10,000, payable in equal monthly payments in advance on the first of each month. Schedule A, case, page 13.

As security for the faithful performance of all the covenants and conditions of the lease the tenant deposited with the landlord $5,000. It was agreed between them that if the tenant should pay the rent, and faithfully perform all the conditions and covenants of the lease, then upon termination thereof the landlord would return to the tenant said $5,000, and in the meantime 5% interest was to be paid to the tenant semi-annually

on said sum. If the tenant made default in any of the covenants and conditions of the lease on his part, the landlord at his option, might apply said sum, with interest, toward the payment of any rent then unpaid, or to any deficiency, if the landlord was obliged to let the premises to another tenant, and to any damages suffered by him by default of the tenant, if he failed to perform any of the covenants of the lease. The landlord had the right to hold said sum or balance until May 1st, 1917, notwithstanding the tenant's lease might have been terminated by summary or other legal proceedings.

The lease provided that wherever the term "landlord" was used, it should be construed as meaning the party of the first part, his executors, administrators and assigns, and wherever the word "tenant" was mentioned, it should be construed as meaning the party of the second part, his executors, administrators and assigns, and that the covenants in the lease were binding upon the parties thereto, and their successors in interest. Case, p. 25.

Both Kaufman and Basch resided in New York at the time the lease was made, and it was signed there. Case, pp. 13 and 40.

Plaintiff entered into possession of the demised premises, and paid the rent as called for by the lease to Basch, until the latter sold the property on April 27, 1911, to Joseph Meyer, one of the defendants, and after that time he paid rent to said Meyer or to his agent Marx until Meyer sold the property by deed dated July 1, 1912, to Elma C. Mennen, the testatrix of appellants Elma Mennen Williams and William Gerhard Mennen.

That Kaufman thereafter continued to pay rent to Marx for a time, and then paid the rent to North Ward Realty Company, the agents of

Mrs. Mennen until her death on October 25, 1916, and thereafter to that company as agents for the appellants until February 1st, 1917, when he stopped paying rent until it was ascertained who would be responsible to him for the return of the $5,000 deposit.

The appellants denied any knowledge of this deposit or that they or their testatrix had ever received it, and they were not liable for its return.

When Basch sold the property to Meyer he turned over the $5,000 deposit to Meyer, and Kaufman released Basch from his obligation to return the deposit, case, pages 40-41, 128-130; Exhibits 6 and 7, and Meyer entered into an agreement with Kaufman whereby he acknowledged receipt of this $5,000 and agreed to hold it subject to the terms of the lease.

Thereafter, and until May 15, 1916, and for some years after he sold the property to Mrs. Mennen, Meyer continued to pay the interest on the deposit semi-annually to Kaufman. Case, pages 50-51-55-56-60-61-75-76.

Neither of the appellants nor their testatrix ever paid any interest on the deposit to Kaufman, and no demand was made by Kaufman of them.

The conveyance for the sale of the premises in question from Meyer to Mrs. Mennen was by virtue of an agreement made between them, Exhibit 5, case, p. 124, etc., whereby Meyer was to convey the property in question at a price fixed at $550,000 to Mrs. Mennen, subject to certain mortgages, the payment of which Mrs. Mennen was to assume, and also subject to Kaufman's lease and other leases, in exchange for other property belonging to Mrs. Mennen, at an agreed price of $160,000, the difference in values be-

tween the respective properties over and above the encumbrances being $80,000, which Mrs. Mennen agreed to pay as follows: $5,000 in cash when the agreement was signed, which was paid. $35,000 in cash when the deeds were delivered. A purchase money mortgage on the property in question for $40,000. When the deeds were delivered, after certain taxes and insurance premiums, rents, &c., were apportioned, the balance due from Mrs. Mennen to Meyer was $32,725.35 for which she gave him her check. Case, pp. 87-89.

There is no evidence that the lease was recorded, but the evidence shows that Mr. Frederick T. Hey, an attorney who represented Mrs. Mennen had the lease in his possession at the time of the closing of the title, and for some days prior thereto, although there is no evidence that Mrs. Mennen ever read the lease or personally knew its contents.

At the time of the delivery of the deeds, no mention was made of the $5,000 deposit, nor was this deposit paid to her. Case, page 67.

The deed from Meyer to Mrs. Mennen recited that Mrs. Mennen assumed the payment of the mortgages, and took the property subject to the leases, including Kaufman's lease, as provided in the agreement. Exhibit 4, case, p. 121.

Kaufman demanded the return of the $5,000 deposit from the appellants, and they refused to pay it, and Kaufman brought suit in the Essex Circuit Court against appellants and Meyer, and asked judgment against appellants for $2,500 with interest, allowing them for the rent which he admitted he had not paid from February 1st to May 1st, 1917, amounting to $2,500, or in the alternatives, a judgment against Meyer for $5,000 with interest from December 15, 1916.

Plaintiff in paragraph 8 of his complaint, case, pp. 9-10, alleged that as part of the consideration for the conveyance by Meyer to Mrs. Mennen, she assumed and agreed with Meyer that she would repay to plaintiff the $5,000 deposit as provided for in the lease, and he says that Mrs. Mennen received from Meyer at the time of the conveyance said deposit of $5,000 and agreed with Meyer that she would hold it under the terms and conditions of the lease, and that she would repay the same to plaintiff as called for in the lease.

Plaintiff admits in paragraph 11 of his complaint, case, p. 12, that he did not pay the rent as called for by the lease for February, March and April, 1917, amounting to $2,500, because he had a right to deduct that amount from the $5,000 deposit, which he claimed appellants were bound to return to him. See also Kaufman's testimony, pp. 71-72.

Defendant Meyer in paragraph 7 of his answer admits that he conveyed the property to Mrs. Mennen as alleged by the plaintiff, subject to the lease in paragraph 3 of the complaint, but denies it was conveyed subject to the $5,000 deposit, case, page 31, and he denies in paragraph 8 of his answer that Mrs. Mennen assumed and agreed with him that she would repay plaintiff said $5,000 as set forth in paragraph 8 of said complaint, and he denies that Mrs. Mennen received or agreed to hold said sum under the terms and agreement set forth in said paragraph 8 of the complaint. Case, pp. 31-32.

In his first defense Meyer denies he entered into any contract with the plaintiff in regard to the $5,000 deposit, and in his second defense he says whatever consideration was paid by appellants or by Mrs. Mennen and accepted by him for

the transfer of the property was subject to all obligations under which he, Meyer, had purchased the property.

Appellants in paragraph 5 of their answer admit testatrix purchased the property in question subject to plaintiff's lease; they deny paragraph 8 of the complaint, and by their first defense they claim plaintiff has not fulfilled the terms of his lease because he did not pay the rent for February, March and April, 1917, amounting to $2,500, and therefore he is not entitled to the return of the deposit.

In their second defense they say the $5,000 deposit was not paid to their testatrix nor to them, nor did the deposit form any part of the consideration of the conveyance of the lands from Meyer to testatrix as set forth in paragraph 8 of the complaint.

Their third defense says that Basch paid to Meyer said deposit when he conveyed the property to Meyer and that thereafter Meyer paid the interest on said sum to Kaufman from April 27, 1911, to January 1, 1917, and thereafter until May 1st, 1917.

In their fourth defense they deny any liability for the return of the $5,000 deposit.

In their fifth defense they allege that any agreements made by the plaintiff and Basch in the lease concerning the $5,000 deposit, was a personal transaction between plaintiff and Basch, and had no binding force or effect upon appellants.

Judge Adams before whom the case was tried at the Essex Circuit, refused to non-suit the plaintiff on motion of the appellants, and directed a verdict in favor of the plaintiff for $2,678.84 against appellants as individuals, and in favor of defendant Meyer, and against the plaintiff.

Judge Adams stated that his decision was based upon the terms of the lease, and it was immaterial whether the appellants received the $5,000 deposit or not. Case, p. 116.

Exception was taken to the refusal to non-suit, and to the court's refusal to direct a verdict in favor of appellants and against the plaintiff, and to the direction of the verdict against the appellants, and to the direction of a verdict in favor of Meyer and against the plaintiff, and for the refusal by the court to admit certain testimony offered by appellants.

Specification of Grounds of Appeal.

Appellants ask a determination.

1. Whether the Circuit Court committed error in refusing appellants' motion to non-suit. Grounds of Appeal, paragraph 1, case, p. 2.

2. Whether the court below committed error in refusing appellants' motion for the direction of a verdict in their favor and against plaintiff. Grounds of Appeal, paragraph 2, case, p. 2.

3. Whether the court below committed error in directing a verdict in favor of plaintiff and against appellants. Grounds of Appeal, paragraph 3, case, p. 2.

4. Whether the court below committed error in directing a verdict in favor of defendant Meyer and against plaintiff. See Grounds of Appeal, paragraph 4, case, p. 2.

5. Whether the court committed error in refusing to permit appellants to prove by the records of Essex County, produced by William K. Thomas, Deputy Register, an official in charge of said records, a deed from appellants, recorded in Book V 58, page 307, showing they had conveyed the lands in question before May 1,

1917, and that they were not the owners of the lands on that date, that is by refusing to permit said Thomas to testify as follows: "Have you the records of the recording of a deed from Elma Mennen Williams and others to Carrie B. Fuld, for property at Market and Washington streets, Newark, recorded in Book V 58, page 307?" Grounds of Appeal, paragraph 5, case, pp. 2-3.

6. Whether the court below committed error by refusing to permit appellants to amend their answer by adding another defense that they were not the owners of said property on May 1st, 1917. Grounds of Appeal, paragraph 6, case, p. 3.

7. Whether if an amendment is necessary for appellants to introduce such testimony, this court will permit such amendment to be made.

Brief of Argument.

Point I.

THE COURT SHOULD HAVE NON-SUITED THE PLAINTIFF.

a. Because the provisions of the lease concerning the $5,000 deposit (see case, pp. 23-24-25) was a personal covenant between Basch and Kaufman, and was a collateral undertaking between them, and a covenant not running with the land, and did not bind the appellants, and it is immaterial that the lease stated that the word "landlord" meant the party of the first part his executors, administrators and assigns, and that the word "tenant" meant the party of the second part, his executors, administrators or assigns, and that the covenants and conditions of the lease were binding upon the parties thereto,

and their successors in interest, there being no privity of estate between Kaufman and the appellants.

The fact that Meyer continued to pay interest to Kaufman on the deposit from the time he purchased the property from Basch, and after he sold it to Mrs. Mennen until shortly before this action was commenced, and that Kaufman looked upon him as being the person who would return the deposit, as per agreement between them, Exhibits 6-7, case, pp. 128-130, and the testimony of Basch and Kaufman, pp. 40-41; 75-76, is conclusive that the parties considered the agreement in the lease concerning this deposit as a purely personal covenant.

See the leading case of *Spencer,* 5 Coke Rep. 16-a; 1 Smith Leading Cases, 174.

Also *Fallert Brewing Company* v. *Blass,* 103 N. Y. Supp. 865; 119 App. Div. 53, which was an action brought by the assignee of the lessee against original lessor for the return of a deposit made by the lessee with the lessor for the faithful performance of the lessee's covenants, and which lease recited that the lease was binding upon the "heirs and representatives" of the respective parties thereto, Rice, *J.,* says: "The covenant was a personal one between the original lessor and the lessee, and did not run with the land." The Court cited the case of *Vernon* v. *Smith,* 5 Barn. & Ald. 1; 106 English Reports (King's Bench, No. 35), p. 1094, in which Best, *J.,* says.

> "By the terms collateral covenants which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate. This principal will reconcile all the cases."

The court also cites *Vyvyan* v. *Arthur,* 1 Barn. & Cress 410; 107 English Reports, page 152.

The same learned Judge says:

> "The general principle is that if the performance of the covenant be beneficial to the reversioner in respect of the lessor's demands, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor without regard to his continuing the owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue."

Also cites *Bally* v. *Wells,* 3 Wilson 25; 95 Eng. Rep. 24, where it is said:

> "There must always be a privity between the plaintiff and defendant to make the defendant liable to an action of covenant. The covenant must respect the thing granted or demised. When the thing done, or admitted to be done, concerns the land or estate, that is the medium which creates the privity between the plaintiff and defendant."

This latter case cites Spencer's case at length.

See also *Sandford* v. *Zimmern,* 76 N. Y. Misc. Repts. 434, where a tenant deposited money for the performance of his covenants in the lease. The court held it was a personal covenant for the benefit of the landlord, and did not run with the land.

Follows *Fallert Brewing Company* v. *Blass, supra.*

In *Mauro* v. *Alvino,* 90 N. Y. Misc. Rep., p. 328; 152 N. Y. Supp., 963, the court following *Brewing Company* v. *Blass,* in an action brought for the return of a deposit made by a tenant as security for the faithful performance of the lease,

held that the covenant did not run with the land, and the grantee to whom the land was conveyed subject to the lease could not be held liable for its return.

The Court further said:

> "Such a covenant being personal, the grantee cannot compel the landlord to pay over the deposit to him, because the grantor is bound by the covenant to the grantee to personally return it to him at the expiration of the lease."

It has never been held that a covenant, which in its nature or otherwise is personal, is made to run with the land by the mere use of the words "heirs and assigns" and the same is true as to the words of "like imports," that is, if a covenant is of such a character that it cannot run with the land, it cannot be made to so run by any statement or agreement of the parties that it shall do so, as for example—"that it shall run with the land."

> *Brewster on Conveyancing,* pp. 271-272, Section 274, citing *Kettle River Ry. Co.* v. *Eastern Ry. Co.,* 41 Minn. 461; 43 N. W. Rep. 469; 6 L. R. A. 111.

See also 24 Cyc. 919-920 citing many cases among which is *Dolph* v. *White,* 12 N. Y. 296, and *Vernon* v. *Smith, supra.*

The contracting parties may, by the express terms of their contract, provide that the covenant should not run with the land; although if nothing was said it would so run. But however clearly and strongly expressed may be the intent and agreement of the parties that the covenant shall run with the land, yet, if it be of such a character that the law does not permit it to be attached, it cannot be attached by agreement

of the parties, and the assignee will take the estate clear of any such covenant.

Wilmurt v. *McGrame,* 14 N. Y. App. Div. 412-417; 45 N. Y. Supp. 32, citing and approving *Masury* v. *Southworth,* 9 Ohio State 340, where the court on page 352, says:

> "If the covenant cannot or does not run with the land, no words of assignment can create a privity of estate, and if a privity of estate be created, no words of assignment are necessary."

Cited in 11 Cyc. page 1084, where other cases are also cited.

The fact that a covenant runs to the grantee and his heirs and assigns, does not dispense with the necessity of privity of estate in order to carry the covenants with the land, and the mere employment of these words will not make a covenant, which in its nature or otherwise is personal, run with the land.

Mygatt v. *Coe,* 147 N. Y. 456.

In a covenant if the thing to be done is merely collateral to the land, and does not touch or concern the thing demised in any sort, then the assignee shall not be charged, though he may be named in the covenant, as the covenant is merely a pesonal one not affecting the land demised.

Conover v. *Smith,* 17 N. J. Eq., 51.

Cites and approves *Spencer's case,* 3 Coke's Rep. 16, Res. 1 & 2; 1 Smith's leading cases, 22.

See also *Taylor's Landlord and Tenant,* Section 260, and *Bally* v. *Wells, supra.* Also other cases.

See *Jones on Landlord and Tenant,* Sections 454, 320-328, 329, citing Spencer and other cases.

A covenant is personal when it does not extend to or affect the quality, value or mode of enjoying the land conveyed, and is merely collateral to it, or is of such a character that a performance of it will defeat the estate of the party claiming the performance. It does not therefore run with the land. And conversely stated, all covenants that are not prospective, and that do not pass with the land are strictly personal covenants; and such a covenant cannot be made to run with the land, although "to the grantee his heirs and assigns."

7 Ruling Case, p. 1111, &c., Sec. 28. Citing cases in 2 L. R. A. 199; *Logan* v. *Moulder,* 1 Ark. 313; 33 Amer. Dec. 338. Also note in 4 L. R. A. (N. S. 467).

Sec. 29 cites many examples of what are personal covenants.

In Sec. 36 it is stated that only covenantor or his executors and administrators are bound on a personal covenant * * * a grantee's heirs are not bound. The rule applies even though the assignee is expressly named.

b. Because the plaintiff admittedly had not performed all the covenants on his part agreed to be performed, in that he did not pay the rent as agreed, and his action was premature until he paid this rent. (See Complaint, case, pp. 11 and 12, and Kaufman's testimony, p. 79, l. 15.

c. Because there is no proof in the case that the defendants were the owners of the lands on May 1, 1917.

d. Because plaintiff did not prove that appellant's testatrix or appellants received the deposit of $5,000 as alleged in paragraph 8 of said complaint, or that the same formed part of the con-

sideration for the conveyance of the lands from Meyer to Mrs. Mennen. See case, pp. 9-10, and defendant Meyer's answer, pp. 31 and 32; also testimony of Meyer, pp. 87-88-89.

e. Because there was no evidence that the lease had been assigned by Meyer to appellant's testatrix or to them, and it could not be said that there was any implied assumption on the part of the appellants or their testatrix to return this deposit to Kaufman. The deed in which appellants' testatrix took title, and the agreement upon which the deed was founded, expressly recited that she took the lands subject to the lease, and did not assume it, and the fact that she did not intend to assume it was borne out by the covenant on her part in the deed to assume certain mortgages, but to accept the lands subject to the Kaufman lease. Even though it appeared that Meyer had assigned the lease to Mrs. Mennen, there was no evidence that he had assigned his right in the $5,000 deposit to testatrix.

There was nothing in the agreement between Meyer and appellants' testatrix, even though she agreed to purchase the property in question, to compel her to accept the $5,000 deposit or to become a guarantor for the repayment of the same to Kaufman.

A guaranty for the payment of rent, and the performance of the covenants on the part of the lessee of a lease, not being assignable so as to pass a legal title to the assignee, it would therefore follow that the liabilty of Basch, the original owner, could not be assigned to appellant's testatrix.

See *Brant on Suretyship,* Vol. 1, 3rd Ed. Sec. 61, p. 142, citing *Potter* v. *Gronbeck,* 117 Ill. 404; 7 N. E. Rep. 586.

Point II.

The Court should have directed a verdict in favor of appellants against plaintiff, and should not have directed a verdict in favor of plaintiff and against the appellants for the reasons stated under Point I, and for the reasons that the evidence offered or attempted to be offered by the appellants and discussed under Point IV would have shown that they were not the owners of the property in question on May 1, 1917, when Kaufman's lease expired, and under which theory the Court held appellants liable.

Point III.

The Court erred in directing a verdict for defendant Meyer and against plaintiff, as under the evidence that defendant should have been held, and not the appellants (see Exhibits 6-7, case, pp. 128-130), but if Meyer was not bound, the appellants should not be bound, because the liability of a grantee who assumes payment of an obligation on lands conveyed to him, depends upon the personal liability of his immediate grantor; therefore, if a grantor is not so liable, the grantee is not.

Norwood v. *De Hart,* 30 Eq. 412.

Point IV.

The Court erred in refusing appellant William G. Mennen to testify that the appellants were not the owners of the premises in question on May 1, 1917 (see case, pp. 109-110), or to permit William K. Thomas, Deputy Register of Essex County, in charge of the records of said office, to prove that by the records of said office, the appellants had conveyed the lands in question before May 1,

1917, by deed recorded in Book V. 58 of Deeds for Essex County, page 307, as under the theory by which the Court directed the verdict against the appellants it was material as to whether the appellants were really the owners of the property on that day, although as above stated there was no evidence that they were such owners.

The Court should have permitted this evidence, or should have permitted the amendment requested by appellants to amend their answer to set up this defense, provided the same was necessary, and this Court may now make such amendment.

See *Thompson* v. *Peppler,* 102 Atl. 379-380.

It is therefore respectfully submitted that the judgment of the Circuit Court should be reversed, and judgment ordered entered in favor of appellants.

SCOTT GERMAN,
Of Counsel with Elma Mennen Williams
and William Gerhard Mennen,
Defendants-Appellants.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

BENJAMIN H. KAUFMAN, *Respondent,*	
vs.	*On Appeal*
ELMA MENNEN WILLIAMS AND WILLIAM GERHARD MENNEN, *Appellants,*	*from Essex County Circuit Court.*
and	
JOSEPH MEYER, *Respondent.*	

Brief for Respondent Kaufman.

Facts.

On December 4th, 1906, Charles J. Basch was the owner of certain real property located at the northeastern corner of Market and Washington streets, in Newark. On that day he entered into an indenture of lease with the respondent Kaufman, plaintiff below, to a store of the building on said lands, for a period of ten years and two months from March 1st, 1907, at the yearly rent of $10,000 payable in equal monthly instalments.

Under the provisions of the lease, Kaufman deposited $5,000 with Basch, as security that he would faithfully perform the covenants and conditions of the lease undertaken by him. The security was to be held by the landlord until the expiration of the term, to wit, May 1st, 1917, and the landlord was to pay interest on the deposit semi-annually at the rate of five per cent. per annum. The lease provided that if at the end of the term the tenant had performed his part, the deposit was to be returned to him.

The lease also contained the following provisions:

"The tenant has deposited with the landlord upon the delivery of this lease the sum of $5,000 as security for the faithful performance of all the covenants and conditions of this lease, and it is hereby agreed that if the said tenant shall pay said rent and shall faithfully perform all the conditions and covenants of this lease, then upon the termination thereof, the landlord shall return to the tenant the sum of five thousand dollars. Interest on said sum at the rate of five per cent. per annum shall be paid semi-annually to the tenant. But in case of default on the part of the tenant, in the performance of any of the covenants and conditions of this lease on his part, the landlord may, at his option, apply said sum, together with the interest thereon toward the payment of any rent that may remain unpaid or the difference or deficiency arising by reason of his letting the said premises to another tenant as hereinbefore provided, and to any other damage suffered by him by the default of the tenant in the performance of the covenants of this lease, and except as hereinafter provided, the landlord shall have the right to hold and retain said sum or any balance thereof remaining in his hands, until May 1st, 1917, notwithstanding the fact that this lease may have been terminated by summary or other legal proceedings." See Case, page 23, lines 30 to 40; page 24, lines 1 to 23.

"It is understood and agreed that whereever the term 'landlord' is used herein, it shall be construed as meaning the party of

> the first part, his executors, administrators or assigns; that wherever the term 'tenant' is employed herein, it shall be construed as meaning the party of the second part, his executors, administrators or assigns, and that the covenants contained in this lease are binding on the parties hereto and their successors in interest." See case, page 25, lines 15 to 23.

The lease in question was made and executed by the parties thereto in the State of New York.

The plaintiff entered into possession of the demised premises and remained in such possession for the full term of the lease and in every respect performed all the covenants, agreements and conditions in said lease contained, assumed by him to be performed, excepting that he did not pay the rent for the months of February, March and April, 1917, amounting to the sum of $2,500. The failure to pay said rent is explained in this way. The plaintiff was under the impression that the said rent ought to be deducted from the deposit and he ought to receive the balance of the deposit, to wit, twenty-five hundred dollars. There is no doubt that he was in error in this contention and that the landlord was entitled to hold the deposit until the end of the term.

On April 27th, 1911, Basch conveyed the property in question to the respondent Joseph Meyer, and as a part of that transaction, Meyer and Kaufman entered into an agreement which recited the aforesaid lease and whereby Meyer admitted that he received the deposit of $5,000 from Basch, and that he assumed the lease and agreed to hold the said deposit in accordance with the

terms and conditions of the lease. (See Exhibit 6, Case, page 128.) And in addition thereto, Meyer wrote a letter to Kaufman dated May 1st, 1911, which was to the same effect as Exhibit 6. (See Exhibit 7, Case, page 130.)

On the 4th day of April, 1912, Joseph Meyer entered into articles of agreement with Elma C. Mennen, now deceased, by the terms whereof the said Meyer agreed to convey the property in question to Mrs. Mennen or the sum of $550,000, subject to certain mortgages, in said agreement set forth, and expressly subject to the following:

> "Lease to Benjamin H. Kaufman from Charles J. Basch, dated December 4th, 1906, leasing the first floor of said premises for a term of ten years and two months from March 1st, 1907, expiring May 1st, 1917, at an annual rent of $10,000 in equal monthly payments in advance. Said lease contains a clause that the same may be annulled at any time upon the payment of $25,000 after May 1st, 1912."

It was testified to by Meyer that before this agreement was entered into, the Kaufman lease had been turned over to Frederick F. Hey, an attorney at law who represented Mrs. Mennen in this transaction and that the lease was examined by Mrs. Mennen and her attorney. (See Case, pages 49-50-65-66.) Meyer testified that the question of the $5,000 deposit was mentioned on a number of occasions in Mrs. Mennen's presence. (See Case, page 66.) Neither of the two foregoing facts were denied by the defendants or by any other person.

By deed dated July 1st, 1912, Meyer and his wife conveyed the property in question to Elma

C. Mennen. The deed contains the following recital:

> "Subject to * * * lease with Benjamin H. Kaufman for first floor, expiring May 1st, 1917." See Exhibit 4, Case, pages 119 to 124.

During the time that Meyer owned the property and for a part of the time that Mrs. Mennen owned the property, Kaufman paid the rent to one Marx, who was the agent for the respective landlords, and after Marx ceased to be such agent he paid the rent to the North Ward Realty Company, who acted as such agent for the Mennens.

Elma C. Mennen died testate on October 25th, 1916. By her last will and testament she devised the property in question to the appellants.

The interest on the deposit was paid by Meyer, he claims by mistake. (See Case, page 62, etc.) The appellants never paid any interest.

Kaufman did not have actual knowledge that the property had been conveyed to Mrs. Mennen or that the appellants had the title to it, until the 31st day of January, 1917. (See Case, pages 71, etc.) On the last mentioned date he wrote a letter to the North Ward Realty Company, to which they replied on February 9th, 1917. The reply is Exhibit 8. (See Case, pages 130 and 131.) In this letter one of the appellants, William G. Mennen, wrote as follows:

> "As regards the deposit, and the monthly instalments of rent, our attorneys hold that this deposit was made for the satisfactory fulfillment of all the covenants of the lease, which includes payment to the last month and vacating premises on or before expiration date of lease. Quite aside from any legal phases of the matter, I believe the trans-

> action will be handled a great deal more simply and cleanly by having the regular monthly instalments of rent paid to us and then at the specified time turning over the deposit in full."

On February 14th, 1917, the appellant Mennen wrote a letter to Kaufman, in which he said:

> "The question now is if this money is to be paid to you by Joseph Meyer or ourselves, and this matter I intend having settled on or before May 1st, and from present indications I do not anticipate any trouble in this regard." (Exhibit 9, Case, page 132.)

This deposit was not returned to Mr. Kaufman and he was compelled to commence an action at law for its recovery. Being somewhat puzzled as to whether Meyer or the appellants were responsible to him, he took advantage of the provisions of the Practice Act of 1912, and commenced his action against both sets of defendants, praying judgment in the alternative. The plaintiff prayed that if entitled to judgment against the appellants there should be deducted from the $5,000 his arrearage of rent, amounting to $2,500 and that if he was entitled to judgment against Meyer, it should be in the full amount of the deposit plus interest. At the end of the trial upon motion, the Court directed a verdict against the appellants for $2,678.84, which is made up of $2,500 and interest thereon. (See Judgment Record, Case, page 34.)

The question presented to this Court is whether the Court below should have directed a judgment against Meyer or whether the judgment appealed from is correct in law.

Contentions.

The plaintiff sued the appellant Mennen, and the respondent Meyer, asking judgment against either set of the defendants upon the following theories:

(a) Against Meyer because he had received the deposit and had agreed to return it. And if a judgment should go against him then the plaintiff would be entitled to the entire amount, to wit; $5,000 with interest at 5% from the last interest day to May 1st, 1917, and at 6% thereafter to date of judgment.

(b) Against Williams & Mennen because:

First. When Elma C. Mennen purchased the property in question she became bound under the terms of the lease to return the deposit.

Second. She substituted herself in Meyer's place who had taken Basch's place.

Third. She had actual notice of the provisions of the lease.

Fourth. She took title to the property expressly subject to the lease and the terms and obligations of it, and thereby bound herself to return the deposit.

Fifth. The deposit was a part of the consideration she paid for the property.

Sixth. The lease was assigned to her and she received the benefits therefrom; the burden of it also rested on her.

Seventh. When Elma C. Mennen died either her estate or her devisees were saddled with her obligations.

Williams and Mennen are the devisees of the property in question, and since their testatrix's demise received the rent, they are therefore liable to the plaintiff.

EIGHTH. If the appellants are liable, the extent of their liability is the amount of the deposit plus interest less the rent due them which was allowed by the plaintiff.

* * * * * * * * * * * * * *

The answer of the respondent, Meyer, to Kaufman's contentions are these:

FIRST. When he sold the property to Elma C. Mennen, she took with actual knowledge of the lease and the terms, covenants, agreements and conditions therein contained.

SECOND. Elma C. Mennen took the property subject to the lease, and therefore assumed its burdens, one of them being the return of the deposit.

THIRD. The deposit entered into the consideration paid him for the conveyance.

FOURTH. By the provisions of the lease she became responsible to the plaintiff.

Therefore he is absolved from any liability to the plaintiff.

The appellants on the other hand contend that the judgment against them is erroneous because:

FIRST. The covenant for the return of the deposit is personal, does not run with the land.

SECOND. By accepting the conveyance to the property subject to the lease, the grantee assumed no responsibility with regard to the deposit, therefore there is no obligation on their part to the plaintiff.

THIRD. The plaintiff forfeited his right to a return of the deposit, because he failed to pay 3 months' rent.

Points.

I.

In any event the plaintiff was entitled to a judgment; either against Meyer or the appellants, Williams and Mennen.

If the appellants are absolved from liability then the case against Meyer rests upon his express undertaking with Basch and Kaufman.

See exhibits 6 and 7, case pages 128-130.

See also *Mauro* v. *Alvino,* 90 N. Y. Misc. 328; 152 N. Y. Supp. 963.

Meyer's liability rests upon elementary principles of the law of contract, and no authorities need be cited. Meyer's undertaking is either direct with Kaufman and possesses every essential element of a contract and is therefore binding. Or Meyer entered into a contract with Basch for Kaufman's benefit on which Kaufman could successfully maintain an action under the statute.

See P. L. 1903, page 541, section 28 of Practice Act of 1903.

II.

The appellants' brief treats with the question of their liability and in the first point they contend that the obligation to return the deposit is a personal undertaking, that it is not a covenant running with the land and therefore they are not liable to the plaintiff. A number of authorities are cited to sustain the proposition that the covenant in question does not run with the land.

We did not contend below and we do not insist here that it is a covenant running with the land.

The three New York cases cited by appellants, to wit: *Fallert Brewing Co.* v. *Blass, Sandford* v. *Zimmern* and *Mauro* v. *Alvino,* are authorities for the contention that the covenant in question does not run with the land, but is personal between the parties. But these cases and the other authorities relied upon by the appellants do not meet the points raised by us by which we attempt to hold them.

Such examination as we have been able to give the question, has not disclosed to us a single case either in this state or elsewhere, where the precise point here in issue has been passed upon.

We rely on some general elementary propositions of law and some collateral cases in the law of mortgages from the reasoning of which we deduct principles applicable, as we contend to the case at bar.

The liability of the appellants may be treated upon two theories:

First. The contractual obligation derived from the provisions of the lease itself and based upon the facts of the transaction between Meyer and Elma C. Mennen.

Second. The privity of estate and privity of contract that arose between the appellants and Kaufman.

* * * * * *

As to the first point let us first examine all the facts in the case to be employed as a foundation upon which to build the proposition of law.

First, we have the lease which provided as follows:

> "It is understood and agreed that wherever the term 'landlord' is used here-

in it shall be construed as meaning the party of the first part, his executors, administrators or assigns: That wherever the term 'tenant' is employed herein it shall be construed as meaning the party of the second part, his executors, administrators or assigns and that the covenants contained in this lease are binding on the parties hereto and their successors in interest." (See case, page 25, lines 15 to 23.)

Next, we have before us the agreement made between Meyer and Mrs. Mennen, which forms plaintiff's Exhibit 5 (see case, pages 124 to 127), and which recites amongst other things that the conveyance is made subject to all existing leases and tenancies, and the party of the first part (Meyer) hereby declares that the said premises are now leased as follows:

"Lease to Benjamin H. Kaufman from Charles J. Basch, dated December 4, 1906, leasing the first floor of said premises for a term of ten years and two months from March 1st, 1907, expiring May 1st, 1917, at an annual rental of $10,000 in equal monthly payments in advance." Towards the end of the agreement we find the following clause:

"The party of the first part further agrees to assign all leases now on his premises to the said party of the second part."

(NOTE. We call the Court's attention to the misprint contained in this clause in the case on page 127 in which the following appears: "The party of the second part further agrees to assign all leases now on his premises to the said party of the second part." We cite the correct language.)

Then, we have the deed, which forms plaintiff's Exhibit 4 (see case, pages 119 to 124) and in which the following clause appears:

> "And subject further to such easements upon said premises as exist thereon at the time of said conveyance from Christina Trefz, June 30, 1905, and to all stipulations, agreements and covenants, which at the time of said conveyance were in existence that effected said premises or the buildings standing thereon, or which in any way were *or now are obligatory upon the owner or now owners of said premises* and subject further to all existing leases and tenancies, said leases and tenancies covering portions of said premises upon the second floor expiring not later than May 1st, 1913. The lease of the second floor expiring October 21st, 1913, the lease with Benjamin H. Kaufman for first floor expiring May 1st, 1917."

Then we have the evidence given by Meyer that prior to the execution of the agreement for the sale of the property the Kaufman lease was in the hands of Mr. Hey, the attorney for Mrs. Mennen (see case, pages 64 and 65).

> Q Did she or the counsel representing her at that time have in their possession the lease between Basch and Kaufman or a copy of it?
>
> A They had the original.
>
> Q And how long had either Mrs. Mennen or her counsel that original that you know of?
>
> A From before the time of drawing up the contract, that is for several days before, up to the present time.
>
> Q She had the lease in her possession?
>
> A Several days before Exhibit P. 5 was

drawn up; that was drawn up with the lease in their possession.

Then we have the deed of conveyance from Meyer to Mrs. Mennen which was made expressly subject to the lease in question.

And in addition to all of the above facts we have the most important statement made by Mr. Meyer that the five thousand-dollar deposit was a part of the consideration. We have already referred to his testimony on this point in another part of this brief.

All of the above facts are not in any way contradicted.

One of the appellants, Mr. Mennen, was present at the passing of title.

The only claim made by the appellants is that Meyer did not hand over to Mrs. Mennen the sum of $5,000 in a separate parcel and as a separate transaction. The actual handing over of this deposit, however, was unnecessary because as Meyer says it was a part of the consideration for the conveyance of the lands and premises in question.

With all the above facts before us we contend that there arose a contractual obligation on the part of Mrs. Mennen to return the deposit at the end of the term and we rely for this proposition of law upon the following cases:

Tichenor v. *Dodd,* 4 N. J. E. 454.
Heid v. *Vreeland,* 30 N. J. E. 591.
Clark v. *Davis,* 32 N. J. E. 530 at 536.
Mount v. *Van Ness,* 33 N. J. E. 262 at 265.
Thayer v. *Torrey,* 37 N. J. L. 339 at 343.
Twitchell v. *Mears,* 8 Bliss., 211.
Huyler v. *Atwood,* 26 N. J. E. 504 affirmed in Court of Errors and Appeals in 28 N. J. E. 275.

Seaman v. *Hasbrouck,* 35 Barb. 155.
Price v. *Reed,* 38 Mo. App. 489.
Pulser v. *Skinner,* 42 Hun. 322.

The case of *Tichenor* v. *Dodd, supra,* property was sold subject to mortgage and the mortgage was considered as part of the purchase price. The vendee refused to pay the mortgage and the vendor then paid the amount due and filed a bill against the vendee for discovery and relief. The Court of Chancery decreed the complainant was entitled to relief sought. And in his opinion the Chancellor said (page 458):

> "The purchaser agrees to pay a sum of money for the land; but a part of that sum is to be applied to the discharge of the mortgage. Had he paid the whole sum to the mortgagor he would have had the amount with which to pay the mortgage. If he withheld the money until the premises are sold away from him, he has no ground of complaint if the mortgagor asks him to pay the amount remaining due."

In the case of *Heid* v. *Vreeland, supra,* a bill was filed to enforce the payment of a mortgage for $2,000 made by Blackiston to the complainant. The mortgaged premises were later sold to the defendant and the deed contained a covenant that the mortgage of $2,000 was part of the consideration money. Chancellor Runyon in granting the decree said (page 593):

> "There can be no doubt at this day that where the purchaser of land encumbered by a mortgage agrees to pay a particular sum as purchase money and in the execution of the contract of purchase the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, that the purchaser is bound to

> pay the mortgage debt, whether he agreed to do so by express words or not. This obligation results necessarily from the very nature of the transaction * * * his retention of the vendor's money for the payment of the mortgage imposes upon him the duty of protecting the vendee against the mortgage debt."

The same principle was recognized in the Supreme Court of this State in the case of *Thayer* v. *Torrey, supra.*

In the case of *Twitchell* v. *Mears,* 8 Bliss, 211, the Court held that under these facts an action in assumpist will lie against the purchaser. See also *Urquhart* v. *Brayton,* 12 R. I. 169.

In the case of *Carver* v. *Eads.* 65 Ala., 190, the Court held that the promise though not made directly to the complainant (mortgagee) is looked upon as enuring to his benefit and upon his acceptance of it he can sue in his own name either at law or in equity.

The cases of *Seaman* v. *Hasbrouck, supra, Price* v. *Reed, supra, and Pulser* v. *Skinner, supra,* are authorities for the proposition that even where the debt agreed to be paid is a personal obligation of the vendor other than a mortgage the same principle of law will be applied as in the case of a mortgage.

It is our contention that the principle of law applied by the courts in the above cases are likewise applicable to the case at bar and we have been unable to perceive any distinction between a case involving a deposit on a lease and a mortgage debt on real property.

* * * * * * *

As to the second theory we press on the points of privity of estate and privity of contract, we submit the following argument:

A transfer of the reversion creates a privity of estate between the transferee and the lessee. It follows that all rights and liabilities that may be based upon privity of estate exist.

Walker's case, 3 Coke 22a.
Fryer v. *Coombs,* 11 Ad. El. 403.

Fryer v. *Coombs, supra,* was an action in debt by the transferee of the reversion against the assignee of the lease hold.

Outtoun v. *Dulin,* 72 Md. 536.
Howland v. *Coffin,* 12 Pick. 125.

On the point of privity of contract:
See L. R. A. 1915, C., page 210.

The rights that are above accorded to a transferee of a reversion are reciprocal in the lessee against the transferee.

So, it has been held that rent paid in advance of the time stipulated in the lease for its payment and a transfer of the reversion takes place thereafter, but before the stipulated time for its payment, such payment protects the tenant against the claims of the transferee, who purchased with knowledge of the fact.

Bouker v. *Spicer,* 6 N. W. 117 (Mich.)
American Exchange National Bank v. *Smith,* 113 N. Y. Supp. 236.

In the cases of *Bouker* v. *Spicer and American Exchange National Bank* v. *Smith, supra,* it was held that the actual possession and occupancy by the tenant is constructive notice to the transferee of the fact that the tenant has paid rent in advance of the time for such payment under the terms of the lease.

In the case at bar the plaintiff had actual possession of the premises and the appellants were charged with constructive notice of his rights under the lease and of the fact that he had deposited the sum of $5,000 as security for the faithful payment by him of the rent reserved by the lease, and that the landlord had undertaken to return that deposit at the end of the lease. The appellants are also charged with notice that upon failure to pay rent it became their duty to deduct the amount of rent in arrears from the deposit.

Other cases on the question of notice from possession and what notice is implied from that fact are the following:

Havens v. *Bliss,* 26 N. J. E. 363.
Roll v. *Rea,* 50 N. J. L. 264.

The case at bar is much stronger than the cases last above cited because the appellants' testatrix had actual notice of the terms and provisions contained in the lease.

If it can be held that the appellants are not liable to the plaintiff as individuals then they certainly are liable as executors of the estate of Elma C. Mennen, deceased, and if this should be so, the judgment below ought to be amended so as to go against the appellants as executors and not individually. The court below inclined to the view that the appellants were liable as individuals.

III.

The appellants contend in subdivision b. of point I. of their brief that Kaufman forfeited his right to the deposit because on his own admission he failed to pay three months' rent. No authorities are cited by them.

This proposition is not founded on the law of this state.

First. The lease itself does not provide a forfeiture.

Second. See *Hecklau* v. *Hauser,* 42 Vroom 478, in which our Supreme Court held that where a deposit is made by the lessee, in consideration of the making of the lease, to indemnify the lessor against a failure to perform the covenants of the lease, and in case such failure does not occur, to pay the last three months of rent reserved under the lease, at the expiration thereof; if, during the running of the lease, and before the last three months of its term, default be made in the payment of the rent reserved for any month, and the lessee is dispossessed by the lessor, the lessee may recover from the lessor the amount of the deposit in excess of the rent in default, and the water taxes then due by the lease, no other default under the lease being alleged or shown.

In this case the Court on page 479 said:

> "The deposit, under the lease, was a conditional one—first, to make good any default under the lease; that, we suppose, means any default in the doing of any of the things agreed by the lease, and, in default thereof to pay damages; and second, if no default occurred, the said deposit was to pay the rent of the last three months of the term demised.
>
> No allegation is made of any default in the performance of any of the covenants of the lease prior to the plaintiff's dispossession, except the failure to pay the rent for the month of November, 1903. The lease terminated with the dispossession, by the act of the defendant. The last three

months of the term were the three months immediately preceding the dispossession. For those three months, with the exception of the month of November, the rent had been paid, thus leaving due at the expiration of the lease but a single month's rent.

It was, as the New York Court of Appeals says, in Chaude *v.* Shepard, 122 N. Y. (at p. 401) an indemnity merely. The plaintiff's relation as tenant can be terminated before the end of the term only by the act or consent of the defendant, and when he accomplished it and took possession of the premises, the damages with which the plaintiff was chargeable were those only which resulted from the breach of the covenants prior to the entry of the defendant upon the termination by the latter of the plaintiff's tenancy, as there could, in the nature of the case, be no breach of them committed by the plaintiff after the effectual termination of such relation and re-entry by the defendant." *Scott* v. *Mantells,* 109 N. Y. 1.

IV.

The appellants complain that they were not permitted to prove that they parted with the title prior to May 1st, 1917.

They did not plead this fact and when they attempted to prove it, it was a surprise to the plaintiff and the offer to prove was objected to. Had they pleaded the conveyance it would have put the plaintiff on inquiry and notice.

In the case of *Shaw* v. *Bender* recently decided by this court and reported in 100 Atl.

Rept. on pages 196-198, opinion by Chancellor Walker, this court held:

> "The present practise requires that a defendant's answer must specifically state any defense, which if not stated would raise issues not arising out of the complaint. The present case is within this provision. And in a case where defenses are not so pleaded they are not available on appeal."
>
> See *Titus* v. *Pennsylvania R. R. Co.*, 87 N. J. L. 157-161.

The appellants then requested to amend. This request was denied, and they claim that the court erred in denying them the right to amend.

The right to amend during the trial rests in the sound discretion of the court, and to reverse a refusal to amend, the burden rests upon the appellants to prove that the court committed a gross abuse in the exercise of that sound discretion.

It cannot for a single moment be contended that the learned judge below whose eminent fairness is well known to this court abused the exercise of sound discretion. If the amendment had been allowed it would have worked exceeding hardship upon the plaintiff for he would have been unprepared to meet the issue and he would have been compelled to submit to a voluntary non-suit so as to enable him to meet the point at another time.

We therefore contend that the court below committed no error in this respect.

V.

The appellants contend that the plaintiff failed to prove that they were the owners of the property on May 1st, 1917, and therefore there should have been a non-suit.

It was proved that Elma C. Mennen became the owner of the property in 1912. It was pleaded and admitted that she died testate on October 25th, 1916, and that she devised the premises to the appellants. It was proved that in February, 1917, the appellants demanded the rent due.

The presumption of ownership continued to run to May 1st, 1917.

There was no error in refusal to non-suit on this point.

VI.

The appellants contend in sub-division d of point I. of their brief that the plaintiff failed to prove that the deposit of $5,000 was actually turned over to the appellants or that the said sum formed a part of the considertion for the conveyance of the property in question to Mrs. Mennen. The proof on this point is contained in the testimony given by Mr. Meyer. (See case, pages 52, 53, 54.)

"Q And when you sold the property to Mrs. Mennen, there was no paper given between you and Mrs. Mennen regarding this five thousand dollar deposit?

A Yes.

Q Well the reason of it was because you did not turn the five thousand dollars over to Mrs. Mennen, did you?

A I did.

Q How did you turn it over to her?

A In equity in the property. The conditions of the sale were different."

From the testimony of Mr. Meyer it appears that the five thousand dollar deposit was contained in the equity of the property. It, therefore, formed a part of the consideration. There was no contradiction of this fact. The attorney, Mr. Hey, was present in court. He was present when the deal was closed and could have taken the stand to deny Mr. Meyer's contention. This he failed to do.

VII.

The point made by the appellants in sub-division of Point 1 in their brief is answered in Point 2 of this brief.

Conclusion.

It is therefore contended as follows:

If this court is of opinion that Meyer is liable to the plaintiff then the order of this court ought to be to the effect that judgment should be entered against him in the full amount of the deposit, to wit, $5,000 plus interest.

If this court is of opinion that the action of the court below is in keeping with the law then the judgment ought to be affirmed.

If this court is of opinion that the judgment ought to go against the estate of Mrs. Mennen, then we are entitled to a judgment of $5,000 with interest.

Respectfully submitted,

SAMUEL F. LEBER,
Of Counsel with Respondent,
Benjamin H. Kaufman.