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Opinion of the Supreme Court.

#52—November Term, 1922.

Filed February 20, 1923.

10

ENOCH L. JOHNSON,
Clerk.

New Jersey Supreme Court

#52, NOV. TERM, 1922.

HENRY ROSINOFF and E. CHARLES
ALTSHUL,
Plaintiffs-Respondent,

vs.

FANNIE K. ALTSHUL, Adminis-
tratrix of Victor I. Altshul,
Deceased,
Defendant-Appellant.

20

JULIUS LICHTENSTEIN, of counsel for plaintiff.

J. RAYMOND TIFFANY, for defendant.

30

Per Curiam—This is a suit on a promissory note for \$10,000, given by Victor I. Altshul, under a trade name. It bears date of June 1, 1918, payable six months after date, to the order of E. C. Altshul, and is endorsed by him and also assigned by a formal assignment after maturity to the plaintiff Rosinoff.

40

Victor I. Altshul died, and the defendant Fannie K. Altshul, his widow, was appointed administratrix. She contests the claim of the plaintiff on the note and at her instance, E. C. Altshul was brought in as a party plaintiff. The note was proved and offered in evidence. There is no serious controversy as to its validity in its inception. An attempt was made to prove payment. This proof consisted of some statements made by E. C. Altshul which were supposed to indicate that his brother owed him \$5,000, instead of \$10,000, and also proof that his brother had turned over to him seven notes, six being for \$2,000 each and one for \$1,000.

Some reliance was placed by the defendant on the alleged suspicious conduct of E. C. Altshul after his brother's death, but this evidence was too hazy and uncertain to have any weight. The only question was whether there was proof of such connection between the seven notes and the \$10,000 note that the case ought to go to the jury. We think not. The presumption is in favor of the holder of such a note and while Rosinoff's title can be no better than that of E. C. Altshul, we think the evidence on the part of the defendant was so meager and uncertain that it cannot justify any inference of payment. It is an attempt to make conjecture do the work of facts.

We think, therefore, the trial judge was right in directing a verdict for the plaintiffs. The judgment is affirmed with costs.

**Rule of Affirmance Entered in Usual
Form.**

Notice of Appeal.

Filed June 15, 1923.

NEW JERSEY SUPREME COURT.

10	HENRY ROSINOFF and E. CHARLES ALTSHUL, Plaintiffs-Appellees, vs. FANNIE ALTSHUL, as administra- trix of Victor I. Altshul, Defendant-Appellant. 	} At Law.
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20 To Gross & Gross, and Julius Lichtenstein, Es-
quires, attorneys for plaintiffs-appellees:

TAKE NOTICE that the defendant-appellant
appeals to the New Jersey Court of Errors and Ap-
peals, in the last resort in all cases, from the whole
of the judgment entered in the New Jersey Supreme
Court in this cause, forming the judgment of the
Hudson County Circuit Court.

30 J. RAYMOND TIFFANY,
Attorney for Appellant.

Reasons on Appeal.

Filed June 15, 1923.

To Gross & Gross, and Julius Lichtenstein, attorneys for plaintiffs-appellees:

Following are the grounds of appeal, viz:

1. The Supreme Court erred in not reversing the judgment of the trial court, because the trial court directed a verdict in favor of the plaintiff and against the defendant, when thereunto moved by counsel for the plaintiffs, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issue.

10

2. The Supreme Court erred in not reversing the judgment of the trial court, because the trial court refused to enter a judgment of non-suit in favor of the defendant, and against the plaintiffs, when thereunto moved by counsel for the defendant.

20

3. The Supreme Court erred in not reversing the judgment of the trial court, because the trial court erroneously directed that judgment be entered in favor of the plaintiffs and against the defendant.

30

J. RAYMOND TIFFANY,
Attorney for Defendant-Appellant.

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Memorandum on the subject of the

19th June 1901

To the Committee on the subject of the

19th June 1901

19th June 1901

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19th June 1901

Summons.

10

(Filed January 14, 1920.)

The State of New Jersey, to Fannie K. Altshul,
Administratrix of the Estate of Victor I. Alt-
shul, deceased.

You are summoned to answer the an-
nexed complaint of Henry Rosinoff, in an
action at law in the Hudson County Cir-
cuit Court. And take notice, that unless 20
you file your answer to said complaint
(L. S.) with the Clerk of the said Hudson County
Circuit Court, at Jersey City, within
twenty (20) 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.

WITNESS, Luther A. Campbell, Esquire, Judge
of our said Hudson County Circuit Court, at 30
Jersey City, this sixth day of January, nineteen
hundred and twenty.

GROSS & GROSS,
Attorneys.

JOHN J. McGOVERN,
Clerk.

40

Complaint.

(Filed January 14, 1920.)

HUDSON COUNTY CIRCUIT COURT.

10

HENRY ROSINOFF,

Plaintiff,

vs.

FANNIE K. ALTSHUL, adminis-
tratrix of the Estate of Victor
I. Altshul, deceased,

Defendant.

Action at Law

20

Plaintiff, residing in the City of Jersey City,
County of Hudson and State of New Jersey, says
that:

30

1. On June 1st, 1918, Victor I. Altshul, trading
under the name and style of Ketchum & Company,
made and delivered his note of that date for Ten
thousand (\$10,000.00) Dollars, payable to E. C.
Altshul, or order, six months from its date, at
24 Cliff Street, New York City, a copy of which
promissory note is hereto annexed.

2. On December 13th, 1918, said Victor I. Alt-
shul, died intestate in the City of Jersey City, and
defendant, Fannie K. Altshul, was, on December
20th, 1918, appointed administratrix of the estate
of the said Victor I. Altshul, deceased, by the Sur-
rogate of the County of Hudson, and the said Fan-
nie K. Altshul, did thereupon assume the burdens
of the administration of the estate of the said Victor
I. Altshul, deceased.

40

3. On or about April 30th, 1919, the said E. C.
Altshul, the then holder and owner of the said

Complaint.

promissory note, served a duly verified claim against the said estate of the said Victor I. Altshul, deceased, by virtue of the said promissory note, upon the said Fannie K. Altshul, administratrix as aforesaid, and thereupon the said administratrix did promise and agree to pay the same.

4. On December 31st, 1919, the said E. C. Altshul endorsed and assigned the said note and all and every his claim therein to the plaintiff. Payment of the said promissory note was demanded by the said E. C. Altshul and the plaintiff, from the said Fannie K. Altshul, administratrix as aforesaid; but she has failed and refused to pay the same or any part thereof, and no part thereof is paid. 10

5. Said note is now the property of plaintiff. 20

Plaintiff demands as damages Ten thousand (\$10,000.00) Dollars with interest from November 15th, 1918.

GROSS & GROSS,
Attorneys of Plaintiff.

\$10,000.00

New York, June 1, 1918.

Six Months.....after date we promise 30
to pay to the order of E. C. Altshul.....
.....Pay \$10000 and 00 Cts.
.....Dollars...at 24 Cliff Street.....
New York City.....

Value received.

No.Due.....

KETCHUM & CO.

Endorsed: E. C. Altshul
Revenue stamps affixed.

40

Copy of Sheriff's Return.

(Filed January 14th, 1920.)

I hereby deputize Edward Overend to serve the within Writ.

Witness my hand and seal this seventh day of
10 January, 1920.

JOHN MAGNER,
Sheriff.

By JOHN M. HANNAN,
Under Sheriff.

Served the within summons and complaint Jan-
uary 9th, 1920, personally on the defendant, Fan-
20 nie K. Altshul as administratrix of the estate of
Victor I. Altshul, deceased, at 845 Montgomery
Street, Jersey City.

JOHN MAGNER,
Sheriff.

By EDWARD OVEREND,
Special Deputy Sheriff.

30

Affidavit of Merits.

(Filed January 12, 1920.)

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

Fannie K. Altshul, being duly sworn, on her oath
according to law, deposes and says, that she, as
40 administratrix of the Estate of Victor I. Altshul,

deceased, is the defendant in the above entitled action; that she has a just and legal defense to the action on the merits of the case.

FANNIE K. ALTSHUL.

Sworn and subscribed to before me this
10th day of January, A. D. 1920.

10

HELEN LINDSAY,
Notary Public of N. J.

Answer.

(Filed February 4, 1920.)

20

Fannie K. Altshul as administratrix of the Estate of Victor I. Altshul, deceased, residing in the city of Jersey City, County of Hudson and State of New Jersey, in answer to the complaint filed in this cause says:

1. She has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 and require that due proof thereof be made.

30

2. She admits paragraph 2.

3. She admits that on or before April 30, 1919, one E. C. Altshul served upon her a claim against the said estate of Victor I. Altshul based upon an alleged promissory note but she denies each and every other allegation mentioned in said paragraph 3.

40

4. She admits that she has not paid said alleged claim upon said note but denies each and every other allegation contained in paragraph 4.

5. She denies paragraph 5.

10

FIRST SEPARATE DEFENSE.

1. The plaintiff is not the owner of said alleged note and is not entitled to receive payment thereof.

SECOND SEPARATE DEFENSE.

1. The said Henry Rosinoff is not the holder of the said alleged note in due course for value and before maturity.

20

2. The said note has been paid.

THIRD SEPARATE DEFENSE.

1. The note mentioned in paragraph 1 of the complaint has been paid.

FOURTH SEPARATE DEFENSE.

30

1. The estate of Victor I. Altshul is not indebted to E. C. Altshul or to the plaintiff, Henry Rosinoff in any sums whatsoever upon said note or otherwise.

J. RAYMOND TIFFANY,
Attorney for Defendant.

40

Reply.

Filed January 14, 1920.

REPLY TO FIRST SEPARATE DEFENSE.

Plaintiff denies the truth of the allegations of the First Separate Defense in defendant's answer.

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REPLY TO SECOND SEPARATE DEFENSE.

Plaintiff denies the truth of the allegations of the Second Separate Defense in defendant's answer.

REPLY TO THIRD SEPARATE DEFENSE.

Plaintiff denies the truth of the allegations of the Third Separate Defense in defendant's answer.

20

GROSS & GROSS,
Attorneys for Plaintiff.

Rule for Judgment.

(Entered March 3, 1922.)

This matter coming on to be heard before Hon-
orable Luther A. Campbell and a jury in the afore-
mentioned court in the presence of Gross & Gross,
Attorneys and Julius Lichtenstein of counsel for
plaintiff, and J. Raymond Tiffany, attorney for de-
fendant, and at the trial of said cause the court
having ordered that the complaint be amended by
the insertion of an allegation that the suit is
brought by the said Henry Rosinoff for the use and
benefit of the said E. Charles Altshul, and the said
E. Charles Altshul having been thereby by the

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40

Rule for Judgment.

court made a party plaintiff to the cause, and the court being of the opinion that the plaintiffs have proved the cause of the action alleged in the complaint, and that the defendant has not adduced any evidence sufficient to be construed by a jury as a defense to said cause of action, and the court having directed a verdict in favor of the plaintiffs and against the defendant in the sum of Eleven thousand nine hundred fifty Dollars (\$11,950.00), and the jury having returned a verdict for said sum in favor of the plaintiffs and against the defendant, in accordance with said direction of the court:

It is hereby on this day of March, 1922, on motion of Gross & Gross, attorneys and Julius Lichtenstein of counsel for plaintiffs,

20 ORDERED that judgment final be entered in favor of the plaintiffs and against the defendant, in the sum of Eleven thousand Nine hundred fifty Dollars, (\$11,950.00), plus interest and costs of suit to be taxed.

LUTHER A. CAMPBELL,
Judge.

30 Rule actually entered this 3d day of March, 1922.

GROSS & GROSS,
Attorneys for Plaintiff.

JULIUS LICHTENSTEIN,
of Counsel.

Notice and Reasons on Appeal.

Filed Oct. 18, 1922.

To Gross & Gross, Esqs., Attorneys for plaintiffs.

Take notice that the defendant, Fannie K. Altshul, as administratrix of the estate of Victor I. Altshul, deceased, appeals to the New Jersey Supreme Court from the whole of the judgment entered in this case upon the following grounds: 10

1. Because the trial court directed a judgment in favor of the plaintiffs and against the defendant when thereunto moved by counsel for the plaintiffs' whereas said court should have denied said motion, and should have submitted to the jury for decision the questions involved in the issue.

2. Because the trial court refused to enter a judgment of non-suit in favor of the defendant and against the plaintiff when thereunto moved by counsel for the defendant. 20

3. Because judgment was entered in favor of the plaintiffs and against the defendant by direction of the court.

J. RAYMOND TIFFANY, 30
Attorney for Defendant.

Testimony.

Tried before Judge Campbell on February 28, 1922.

10 A jury was impanelled and the council for the respective parties opened to the jury.

The Court: I take it, gentlemen, it is not necessary to prove that this note was assigned after maturity, because I think the pleadings so state.

Mr. Lichtenstein: Yes. It is admitted that Mr. I. Altshul traded under the name of Ketchum and Company, and that the note in question, which is signed Ketchum and Company, is really the note that was signed by Mr. I. Altshul.

20 Mr. Tiffany: We do not admit that.

Mr. Lichtenstein: Do not admit that?

The Court: You do not admit any part of that?

Mr. Tiffany: No, sir. We admit that Ketchum and Company was Mr. I. Altshul. As to this note we plead that they must prove it. This is an estate matter.

Miss BERTHA L. MENDELSON, sworn.

30 Direct Examination by Mr. Lichtenstein:

Q. Miss Mendelsohn, you are a sister of Mr. I. Altshul, deceased? A. I am.

Q. And did you know his handwriting during his life time? A. I did.

Q. I show you a note dated June 1, 1918, signed Ketchum and Company. Is that signed in his handwriting? A. That is his handwriting.

40 Q. And did you frequently visit him at his

place of business, in New York? A. I did not, but he visited me.

Q. Visited you. Did you know that he was doing business under the name of Ketchum and Company? A. I did.

Q. From conversations with him? A. From knowing when he started and from the conversations I had with him. 10

Q. And that is his handwriting? A. That is his handwriting.

Q. Ketchum and Company on the face of this note? A. Yes.

Q. I also show you an endorsement. A. Yes.

Q. E. C. Altshul, and ask you whether that is the signature of your other brother, E. Charles Altshul? A. That is my other brother's signature. 20

Mr. Lichtenstein: I offer the note in evidence.

Mr. Tiffany: May I see the note.

Q. I show you a document dated December 31, 1919, signed E. Charles Altshul, and ask you whether that is the signature, E. Charles? A. That is the signature of my brother Charles.

Mr. Lichtenstein: I offer that in evidence, being an assignment of the note in question. 30

Mr. Tiffany: May I see it? I would like to cross examine on the note before the offer.

Cross Examination by Mr. Tiffany:

Q. How many times have you seen the signature of Ketchum and Company? A. Quite a number of times. 40

Q. How many times? A. I can't say.

Q. Where did you see it? A. In different places, at my own home.

Q. Under what circumstances? A. On the letters that he would send me.

10 Q. How many times—is that the only way that you became acquainted with the signature of 'Ketchum and Company? A. Well, he was my brother.

Q. I didn't ask you that, madam. By seeing the signatures he sent you, is that the only way? A. No, I have seen him sign his signature.

Q. How many times? A. I don't know.

Q. Frequently? A. I haven't any idea.

Q. Once? A. Oh, more than once.

20 Q. When was the last time? A. A number of times. His signature, I don't know, the last time I don't remember.

Q. How long before his death? A. I can't state.

Note previously offered in evidence marked Exhibit P 1.

Assignment previously offer in evidence marked Exhibit P 2.

30 Mr. Lichtenstein: I offer in evidence a proof of claim against the estate upon this note.

Mr. Tiffany: No objections.

Paper marked Exhibit P 3.

The Court: Proof of claim of whom?

Mr. Lichtenstein: By E. Charles Altshul.

The Court: Does that show the estate?

Mr. Lichtenstein: Yes. It is addressed to Fannie Altshul, wife of Mr. I. Altshul.

The Court: What is the date of that?

40 Mr. Lichtenstein: Well, sworn to on the 30th of April, 1919.

Motion to Nonsuit.

The Court: Nothing to indicate when it was filed?

Mr. Lichtenstein: No, but the pleadings admit filing and the date of filing.

Mr. Tiffany: Better get than on the record as to the date. On or before April 30, 1919—that it was served on or before April 30, 1919. 10

Mr. Lichtenstein: I also offer the notice of disputed claim by the administratrix.

Mr. Tiffany: No objection.

Paper marked Exhibit P 4.

The Court: And the action on this was brought within the time fixed by the statute?

Mr. Lichtenstein: There is no dispute about that.

Mr. Tiffany: No dispute about that. The estate has not been settled. 20

The Court: The statute says it must be brought on a disputed claim within three months.

Mr. Tiffany: Yes. Insofar as Charles is concerned there is no dispute about it.

The Court: When was the notice dated?

Mr. Lichtenstein: December 23, 1919.

The Court: The assignment bears date December 31, 1919. 30

Mr. Lichtenstein: Yes.

Plaintiff Rests.

Motion to Nonsuit.

Mr. Tiffany: I ask for a nonsuit, if the Court please, on the ground that there is no proof at present that Rosinoff was the 40

present owner of this note. There is no proof that Rosinoff, who became the owner, ever made demand upon the estate for payment.

10 The Court: There has been an assignment of the note put into evidence. Isn't that sufficient?

Mr. Tiffany: No proof that he is the holder of the note.

The Court: Yes; he brings the action and produces the note. He is in possession of it, and he produces an assignment, which is not attacked as far as formality is concerned. Isn't that sufficient to establish his ownership prima facie.

20 Mr. Tiffany: Ordinarily I should say it might be, but there is some intimation in the case of Central Savings Bank vs. Barton, I think it is, in 92 Law that the production and proof of the note by the bank and proof it was unpaid makes a prima facie case.

The Court: Your allegation says it is paid?

Mr. Tiffany: We say it is paid, yes.

30 The Court: I think you will have to show that it was not paid, because on the separate defence on which you have taken issue that question is distinctly raised.

Mr. Lichtenstein: Payment is always a matter of defence. I have never known of a case in which the plaintiff was required to prove payment.

He produces the instrument—

40 The Court: And the presumption is in favor of non-payment, unless the instrument itself is produced?

Mr. Lichtenstein: Always, yes, sir.

The Court: And produced by the party claiming the right to have recovery under it.

Mr. Lichtenstein: I have never known of the rule to be otherwise.

The Court: Have you looked at the Instrument Act under presumption? There is a paragraph I think devoted to that. I don't know if it is entitled presumption or not. I think it is the early part of the act. 10

Mr. Tiffany: The point I make is there is no proof before the court that this man that brings the suit is at the present time the owner of the note. The only proof is—

The Court: The estate has not paid it?

Mr. Tiffany: The estate has not paid it yet, and there is no proof further, that this man has ever made demand upon the estate for payment. 20

The Court: He has by some formal proof which has not yet been attacked, shown transmutation of title of the note; transmutation of title from the payee to himself. It need not be under seal. A note that is assigned may be under seal if they wish to put it so. I take it that is the situation; there is that proof before the Court which will not permit a nonsuit. Perhaps the assignment may be a forgery for all we know. 30

Mr. Tiffany: Exception to your Honor's ruling.

HENRY ROSINOFF, sworn:

Direct Examination by Mr. Tiffany:

Q. You are the plaintiff in this suit? A. Yes, sir.

10 Q. When did you first come into court on this suit? A. What?

Q. When did you first come into court on this suit?

Mr. Lichenstein: I object to the question on the ground that it is incompetent, irrelevant and immaterial, as to when he first came into court on this suit.

Mr. Tiffany: I will connect it.

20 The Court: His physical appearance in court would not make any difference.

Mr. Lichenstein: I will withdraw the objection for the purpose of saving time.

Q. (Repeated as follows: "When did you first come into court on this suit?") A. Yesterday.

Q. Then you came in yesterday morning about 11.15, didn't you? A. What?

30 Q. You came in yesterday morning about 11.15, didn't you? A. Somebody telephoned that the case was up.

Q. You are a dentist by profession? A. Yes, sir.

Q. How long have you known Charlie Altshul? A. For the last twelve years.

Q. And Victor? A. The same.

Q. Your place of business is in Hoboken? A. Yes, sir.

Q. And you live in Jersey City? A. Jersey City.

Q. When did you first obtain possession of this note? A. The 31st of December, 1919.

40 Q. When? A. The 31st of December.

Q. Where? A. In Gross & Gross' office.

Q. They are attorneys for Charlie Altshul? A. Attorneys for me.

Q. How long have they been your attorneys? A. In quite recent times they represented me.

Q. In what action did they represent you? A. What? 10

Q. Did they ever represent you in court? A. No, I didn't have any case in court only an estate matter.

Q. How did you come to go to Gross & Gross' office? A. What?

The Court: Don't you hear him?

A. How did I come to go?

Q. Yes. A. Because I came to him, he is my attorney, and I gave him this case to collect. 20

Q. You gave him this case to collect? A. Yes.

Q. When did you get the case? A. The 31st of December I got it.

Q. That is the day you were in there? A. What? Charlie Altshul was previous to me, offered me the note, and I told him I would take it.

Q. Where was it he offered you the note? A. In my office.

Q. Where? A. 220 Washington Street. 30

Q. Hoboken? A. Hoboken.

Q. You are sure about that? A. I am positive.

Q. And what took place there? A. Didn't take anything place, simply a question.

The Court: Tell us what you recollect took place?

A. Simply told me he needed money, and has a note against the estate, and I knew the estate very well, I knew Victor Altshul and Charlie Altshul, 40

and I knew the estate was good, and he told me, "I will give you a note, I need ten thousand dollars," and I happened to have the money, I thought it would give me seven or eight weeks to collect the money. That is what he told me, and I bought the note.

10 Q. You are sure about that? A. Positive.

Q. Where did you get the money to pay him? A. At my bank.

Q. What bank? A. Jefferson.

Q. By check? A. What?

Q. Did you draw it out by check? A. By check?

Q. Yes. A. Yes.

Q. On what day? A. The 31st of December, I think, he wanted to have cash.

20 Q. You drew a check on the Jefferson Trust Company on the 31st of December, nineteen hundred and what? A. I suppose so.

Q. What year? A. 1919.

Q. To whose order? A. To Charlie's order, Charlie Altshul.

30 Q. What did you do with the check? A. We both came to the window, he wanted to have it cashed, so we got the check certified at the bank, and he wanted cash, and I took over the cash to Gross' office, and I asked if everything was all right and he said, "It is all right," and I gave him the money.

Q. You knew Gross was the attorney for Charles Altshul, didn't you? A. I knew what?

Q. You knew Gross was the attorney for Charlie Altshul, didn't you? A. Not particularly I didn't know it, represented him? A. They may have.

40 Q. You didn't know that Gross represented Charlie Altshul in this matter? A. Not in this case I didn't know anything about it. I didn't know his matters.

Q. So, as I understand the transaction, you went to the Jefferson Trust Company and drew a check before you went there, you drew a check to Mr. Charlie Altshul? A. I agreed before; he saw me several days before, and I had agreed I am going to do it.

Q. And you drew a check with him at the Jefferson Trust Company? A. Yes, sir. 10

Q. He endorsed it and cashed it? A. I cashed it.

The Court: He said he certified it first.

A. He said he wanted cash. I didn't know why he wanted cash, but it didn't make any difference to me, we both went there, and I wanted to know if Gross thought it was all right. He said it was and I paid the money.

Q. What was the amount of that check? A. Ten thousand dollars. 20

Q. Even? A. Even.

Q. And the money was paid? A. Yes, sir.

Q. Where? A. In Gross' office.

Q. And what did you receive? A. Received a note. Gross had it, of course, I gave it to Gross to collect.

Q. You say Gross had it? A. What?

Q. You say Gross had it? 30

The Court: Gross & Gross had the note to collect, is that what you mean?

A. I didn't know whether he had it before, but Charlie gave the note to Gross and I simply wanted Gross to collect the money.

Q. And you received this assignment, is that right? A. Yes, sir.

Q. P-2? A. Yes, sir.

Q. Is that right? A. Yes, sir. 40

Q. What did you do with it? A. (No answer.)

Q. What did you do with it? A. Everything was left to Gross. I left everything to Gross.

Q. What instructions did you give them? A. Simply to collect the money.

10 Q. You yourself never made any effort to collect the money against the estate of Mr. Altshul? A. I never collect money myself. I always give it to my lawyers in these cases.

Q. You knew this was a case— A. What?

Q. —where you would have to collect this money? A. I knew it was a case, but I knew it was good. It was no case at all to me.

Q. You knew that the note had been rejected by the estate? A. I did not know that the note had been rejected by the estate.

20 Q. What made you think it was a case? A. Simply a case to collect the money.

Q. What made you think it was necessary to give it to your lawyers, why didn't you go to Mr. Altshul whom you knew, and say, "I would like this note paid"? A. Myself?

Q. Yes. A. I never go myself.

Q. You knew the note was overdue? A. Yes, sir.

Q. You knew it was due in November or on December 1st, 1919—1918? A. Yes.

30 Q. And you bought it a year after that? A. Yes.

Q. And you knew Charlie Altshul had been dead a year?

The Court: Victor.

Q. Victor had been dead a year? A. Yes, sir.

Q. And you made no inquiry of Mrs. Altshul about the note? A. No, sir.

40 Q. The only persons of whom you made inquiry were Gross & Gross? A. No, I took Charlie's word,

because I knew Charlie for twelve years; I would take the same thing with Victor, because I knew both of them very well.

Q. You knew, did you not, that the endorsement of E. Charles Altshul on the back of the note was sufficient to transfer that note to you, didn't you?

A. Whether I knew that is his signature?

10

Q. Yes. A. I knew that is his signature.

Q. And you knew that signature on the back of it would transfer that note to you, didn't you? A. Would transfer the note? I bought the note, I bought the note.

Q. Why do you say you bought the note? A. Because there was six hundred dollars due for two years, that was the first reason, that was a very big reason, the reason that I wanted to make six hundred and fifty dollars, and I thought it would take me three weeks simply to give it to a lawyer to collect the money, and certainly I knew he needed the money. I would do the same thing for Victor if I had the money.

20

Q. You then realized, did you, that you were buying this note, and that you were going to have no come-back on Charlie Altshul if it was not paid?

A. It never came to my mind that it would not be paid. I knew the estate was good.

Q. You tell this jury that you have no recourse against Charlie Altshul, if the jury should find that the note had been paid?

30

Mr. Lichtenstein: I object to that. The witness has not said that.

Q. Is that so?

Mr. Lichtenstein: The witness has not said so.

Mr. Tiffany: I asked him if that is so.

40

Mr. Lichtenstein: I object to the form of the question.

Mr. Tiffany: Then I will withdraw it.

10 Q. In the event that this suit is lost to you, you consider that you have no recourse against Charlie Alshul? A. I may feel bad, but all right, it is an experience. Many things happen in my life which I make mistakes. I never talk about it.

Q. Then why was it necessary that you should have this P-2 drawn and filed?

Mr. Lichtenstein: I object to the question, if the Court please.

Mr. Tiffany: I withdraw it.

20 Q. At whose suggestion was P-2 drawn?

The Court: The assignment?

A. At my lawyer's suggestion.

Q. Who is paying the expense of this litigation?

A. I suppose I will have to pay it, ha-ha.

Q. I didn't ask you who you supposed—who will?

A. I am.

Q. You are? A. Yes, sir.

30 Q. Did you at any time loan money to Charles Altshul or Mr. Altshul?

Mr. Lichtenstein: The witness has not stated he loaned them money.

Mr. Tiffany: I asked him if he did.

A. Whether I did or not?

Q. Yes. A. Why, several times.

Q. How large an amount? A. What?

40 Q. In how large amounts, what amounts? A. Well, fifteen hundred dollars, one thousand dollars;

I don't remember; I knew the family for so many years.

Q. Is your son in court this morning? A. No.

Q. You agreed to produce him here? A. I didn't say.

Q. Last night? A. I slept in Hoboken.

Q. Weren't you at your home last night with my process-server? A. Yes, sir. 10

Q. Didn't you tell him you would take the subpoena and produce your son if we wanted him? A. He didn't serve me. My son was home.

Q. I didn't ask you that. Didn't you tell the young man you would produce him here this morning if we wanted him? A. Yes, I can produce him; he is in school, attending school; I didn't think it was necessary to take a child of twelve years—

Q. You were told we wanted him? A. He didn't serve me the summons home. 20

Mr. Tiffany: I think that is all.

Cross Examination by Mr. Lichtenstein:

Q. Doctor, your son is in High School, is he? A. Yes, sir.

Q. And attending school today? A. Yes, sir.

Q. You will bring him here if they want him? A. Yes, sir. 30

Q. You are still the owner of this note? A. Yes, sir.

Q. And it has not been paid to you? A. No.

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

Mr. Lichtenstein: That is all.

The Court: Call the next witness.

Mr. Tiffany: Just one moment; I would like to ask a few further questions. 40

Re-direct Examination by Mr. Tiffany:

Q. I show you check dated December 30th, 1919, purporting to be signed by you, and drawn on the Jefferson Trust Company to the order of E. Charles Altshul, and ask you whether this is the check that
10 you referred to? A. Yes, sir.

Q. Certified? A. Yes, sir.

Mr. Tiffany: I offer it in evidence.

The Court: Any objection?

Mr. Lichtenstein: No objection.

Marked Exhibit D-1.

Q. How much has been repaid to you on this ten thousand dollars? A. Nothing.

20 Witness excused.

SAMUEL KOSBEN, sworn:

Direct Examination by Mr. Tiffany:

Q. You are the father of Fannie K. Altshul, the defendant in this action? A. Yes, sir.

30 Q. Do you know Charles Altshul? A. I do.

Q. And were you at the home of Mr. Altshul at about the time of his death? A. Four days before.

Q. And stayed there continually? A. Yes, sir.

Q. When was that? A. I was called over by my daughter on Tuesday morning, telling me that—

Q. When, what day, what month? A. It was about the 10th of December? A. Yes.

Q. 1918? A. A few days before he died.

Q. Did you meet Charlie Altshul there? A. I
40 did.

Q. Did you and Charles talk about the personal effects, papers and so forth, belonging to Victor?

A. Not on that day, the following day.

Q. During the time you were there? A. Yes, for the four days.

Q. Just tell the jury what Charles Altshul said and did in your presence at the house concerning the belongings of Mr. Altshul? A. Well, the first day I came in, as soon as I came in, the first thing I found Charles Altshul and his father and the doctor—this was three or four days before he died. He said, he is very sick, he is going to die. I didn't know what to make of it? I said, "What are you talking about?" and I went upstairs to see him, and he seemed to be very sick, and I spoke to him, I said, "Victor, are you"— 10

Q. Never mind Victor, did you talk to Charles? 20

A. I didn't say anything to him. I stayed upstairs in the bedroom with Victor for a whole day.

Q. Get back to Charles? A. That was the following day, on Wednesday, Charles came up and told me that Victor has to make a will. I said, "For God's sake, don't bother him about wills, let him get well enough, never mind about wills." "No," he said, "It is a dangerous thing. He is going to die." I said, "Don't bother him."

Q. Get down to the time of the papers. A. That was the following day. 30

Q. All right. Get to it. A. He kept annoying me, and I didn't know what he wants, so on the following day he was upstairs, he came in, and he gave him two papers to sign. I don't know what the two papers were, and he said, "Victor, sign," and he did sign. He certainly was very sick, he didn't know what he was doing.

Mr. Tiffany: I ask that that be stricken out. 40

The Court: Strike it out.

Q. Will you get down to the papers, please. A. He signed two papers, and he went in the next room with the papers, next to the bedroom, and I had a suspicion, I didn't know what to say about the papers, I didn't know what it was, so I brought him in the next room, I seen they were picking out
10 of the pockets some keys.

Mr. Lichtenstein: What?

The Witness: They were picking out of his pants pockets.

Q. Whose pocket? A. Victor Altshul.

Q. Charles was taking out of the pocket keys?

A. Something, I don't know exactly what it was.

20 Mr. Lichtenstein: One moment. Let's have some—

Mr. Tiffany: I will clear it up.

Mr. Lichtenstein: One minute—

The Witness: I seen him pick the pocket.

Mr. Lichtenstein: Just a moment. The record will be just a conglomeration.

The Court: If the witness will just control himself and answer the questions.

30 Mr. Tiffany: We don't want to know what you think or what you suppose, we want to know what you saw and what you did.

A. I went into the room, I seen Charles picking the pockets. I said, "What are you going to do?"

Q. You saw who picking the pockets? A. Charles.

Q. Whose pockets? A. Victor Altshul's pants pockets.

Q. Anybody else there? A. Nobody except me and him.

40

Q. Did you see what he took out of the pockets?
A. Yes, sir, I did.

Q. What did he take out? A. He took out of the pants pockets the keys, out of the pockets.

Q. What did he do with them? A. I said, "Charles, what are you doing?" He said, "Never mind, I got the keys, I got to go to the office." I said, "That will never do," and I took away the keys from him, and I took them down to Mrs. Altshul and told her she should not give the keys to anybody, she should keep them. 10

Q. Did you go anywheres with him ? A. Well, yes, I did.

Q. Where did you go? A. He met me to come down to the office.

Q. Whose office? A. To the New York office. He needed papers. 20

Q. At whose office? A. To Victor's office.

Q. Ketchum & Company? A. Yes, sir.

Q. When did you go with him ? A. After two days I went.

Q. You went with him? A. Yes, sir.

Q. What happened. Who was in the office when you got there? A. Well, was a few people there, the manager—

Q. What is his name? A. Charles Bergman.

Q. When you got there with Bergman what did Charles do? A. He opened things, he took out the papers. 30

Q. Opened what thing? A. The safe, and brought out a lot of boxes with papers. He said he needed the papers in Jersey.

Q. Did he take all the papers? A. Mostly all.

Q. How did he get into the safe? A. I gave him the keys.

Q. And did he take out the papers from the safe, too? A. Yes, sir. 40

Q. What did he do with them? A. There was four or five boxes, three boxes.

Q. What did he do with them? A. He took them back to New York, me and him.

Q. To New Jersey? A. To New Jersey, I should say.

10 Q. Both of you? A. Yes, sir, me and him.

Q. To the house? A. Yes, to the house.

Q. Then what happened? A. I came in; Mr. Altshul was dying when I came back, and I was excited, but we took up the two boxes, the three boxes, and put them right in the hall.

Q. Now, after you put them in the hall what happened? A. Then I missed them. I didn't find them any more, they were gone.

20 Q. Now, after that did Charles Altshul say anything to you about the estate owing him money? A. Yes, sir.

Q. What did he say? He said he must have a will, because he owes him five thousand dollars.

The Court: What is that?

The Witness: He must make a will because he owes him five thousand. He compelled Mrs. Altschul to write something, and that lady there—

30 Q. After Victor died? A. Before Victor died.

Q. I know that. I am asking you after Victor died did Charles say anything to you at all about the estate owing him money? A. Before he died.

The Court: You have told us that. Now, after.

The Witness: Not after.

40 Q. Before, he told you they owed him how much?
A. Five thousand dollars.

Q. How long was that before? A. Two or three days before he died.

Q. Did he ever claim or state to you that Victor owed him ten thousand dollars? A. I think after he did, a few days.

Q. When? A. I don't remember when; it might have been six or seven months after I met him. 10

Q. Now, you spoke of two papers being signed; did you go with Charles Altshul down to the Commercial Trust Company? A. The next day, not the same day. The first day he gave him two papers to sign.

Q. Did you go down? A. Yes.

Q. When? A. Friday.

Q. What happened there? A. He wanted to take out money from?

Q. How much money? A. I don't know, whatever was there. 20

Q. He wanted to take Victor's money out of the Commercial Bank? A. Yes, sir.

Q. Did he take it out? A. I would not let him.

Q. Then what happened? A. He said then, if you will not let me, I will put the money in both names, in my name, because he said he needs it for Jersey, some trouble he has in Jersey, and we took out ten thousand dollars and we put it back in the bank in my name and his name. 30

Mr. Tiffany: Cross examine.

Cross Examination by Mr. Lichtenstein:

Q. Mr. Kosben, you are the father of Mrs. Victor Altshul? A. Yes, sir.

Q. And Charles was the brother of Victor? A. Yes, sir.

Q. Charles and Victor both lived in Jersey City? A. Yes, sir, I think so. 40

Q. Victor was in business in New York? A. Yes, sir.

Q. Victor used to run Ketchum & Company, that business there himself? A. Yes, sir.

Q. There were no members of the family connected with Ketchum & Company? A. No, sir.

10 Q. So that they were all strangers in that business of Victor's? A. Yes, sir.

Q. And when Victor died, that business was in the hands of strangers? A. Yes, sir.

Q. When you came to Victor's house several days before Victor's death you say that you were told that Victor was very sick? A. Yes, sir.

Q. And that there was a doctor there? A. Yes; Dr. Mendelsohn.

20 Q. Dr. Mendelsohn is the husband of the lady who was on the stand this morning? A. Yes, sir.

Q. And the lady who was on the stand this morning is a sister of Victor and of Charles? A. Yes, sir.

Q. So that Dr. Mendelsohn was a brother-in-law of Victor's? A. Yes, sir.

Q. And the Doctor was there and told you Victor was very sick? A. Yes, sir.

Q. And was likely to die? A. Yes, sir.

30 Q. He had influenza and double pneumonia? A. Yes, sir.

Q. Now this business of Victor's in New York was a large business? A. Whatever you call a large business.

Q. And Victor had left a widow and how many children? A. Three children.

Q. And Victor, you say, said to you, or at least Charles Altshul said to you a few days before Victor died that Victor ought to have a will? A. He told me that, yes.

Q. What? A. He told me he must have a will; he went to a lawyer here in Jersey City.

Q. Did he tell you what he thought his brother ought to have a will for? A. No.

Q. Didn't he talk about the children? A. No.

Q. Didn't he? A. He acted like—I don't know what to say.

10

The Court: Now, now.

Q. Didn't he talk to you about the children? A. No.

Q. Didn't he say that there ought to be a will so that the children would be protected? A. No, sir.

Q. Now you say that there were some papers signed by Victor? A. Two blank papers he brought down himself.

20

Q. And what do you mean by blank papers? A. No writing on them; he wanted to have power of attorney.

Q. What do you mean by saying they were two blank papers? A. Blank sheets of paper.

Q. What do you mean by blank paper; just tell the jury? A. Like the back of that sheet.

Q. You mean a blank piece of paper without any writing? A. Yes.

30

Q. None at all? A. No.

Q. And he had Victor sign them? A. Victor signed them.

Q. And you saw him sign them? A. Yes, sir.

Q. You saw the blank papers signed? A. Yes, sir.

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

Q. And you stood there and saw Victor in front of you sign two papers where there was nothing written on them? A. Exactly, but I objected.

40

Q. I didn't ask you if you objected. Who else was in the room at the time? A. Me and Charles.

Q. You, Charles and Victor? A. Yes, sir.

Q. And you stood there and saw Victor sign a blank piece of paper? A. Two blank papers.

Q. What were the papers supposed to be? A.
10 Power of attorney.

Q. He told you it was power of attorney? A. He told me that, Charles.

Q. Then, isn't it a fact that there was the power of attorney all written out? A. No, sir, two blank pieces of paper, the same as this, tied together.

Q. There was talk about a power of attorney at the time? A. He told me he has to have power of attorney. I asked him what the paper is for—

Q. Yes. A. And he said he wants power of at-
20 torney. He said, one is signed Ketchum & Com-
pany, and the other is signed Victor Altshul.

Q. What were they, both power of attorney? A. I don't know, he says he wants to have two papers signed; one is Ketchum & Company and the other is Victor Altshul.

Q. But he told you they were power— A. No, sir, he is going to have power of attorney.

Q. But did he tell you what he wanted power of attorney for? A. He said to take care of the
30 business.

Q. To take care of the business? A. Yes, sir.

Q. What business? A. The New York business.

Q. That is, the business of Ketchum & Com-
pany? A. Yes, sir.

Q. Then he did talk about Ketchum & Com-
pany's business at the time A. No, sir.

Q. Didn't he talk to you about Ketchum & Com-
pany's business? A. He says he wants to have
power of attorney to take care of the business.

Q. Didn't he ask you to take care of Ketchum & Company? A. No, sir.

Q. Didn't he ask you to go and take care of the company? A. No, sir.

Q. What is your business? A. I am in the dry goods business.

Q. Were you a chemist? A. No, sir. 10

Q. A druggist? A. No, sir.

Q. Did he ask you to take care of the store? A. No, sir.

Q. Or the business? A. No, sir; never did.

Q. So that the conversation that took place at the time that these papers were signed in blank by Victor was that he needed them to take care of the business of Victor? A. He said he is going to get power of attorney.

Q. Did he say it was necessary in order to take care of the business? A. Yes, he said he needed it for Victor's business; that is what he said. 20

Q. And you said something about going to the bank? A. That was two days after that.

Q. Before Victor died? A. The same day, it was Friday afternoon.

Q. And you remember that there was talk about going to the bank and the reason for going to the bank? A. He said he needs the money.

Q. And did he tell you why he needs the money? A. Yes, he said for Jersey, he needs it for Jersey; I don't know what it was. 30

Q. Didn't you ask him what it was for? A. Yes, he said he needs it for business.

Q. Certainly. A. He didn't want to have the money lying in Jersey state, he wanted it for New York.

Q. Didn't he tell you at the time that the power of attorney was for the purpose of continuing the business in case Victor lived, in order to be able 40

to take care of the business? A. He told me he is dying.

G. But I understand. Didn't he tell you it was necessary to go on with the business, and that he needed the power of attorney? A. What do I want to bother—

10 Q. Just answer the question, please? A. The man was dying and I—

Q. That is not what I am asking you.

The Court: I told you before to listen to the question and only answer the question.
(Question repeated.)

A. He told me he needs the money.

Q. And didn't he tell you what he needed the money for? A. No.

20 Q. Didn't he tell you that there were current bills, and that he had to take care of those bills and the payroll? A. No, sir.

Q. Didn't he say that to you? A. No, sir.

Q. You went down to the bank with him, didn't you? A. Yes, sir.

Q. And you went down to the bank when he handed in the papers to the bank? A. No, sir, I went to New York with him.

30 Q. Didn't you go to the bank with Charles Altshul and see him hand to the bank the papers that Victor had signed? A. No, sir.

Q. Didn't you know that there was power of attorney handed to the bank? A. Not that afternoon. He told me the man from the bank came with a regular blank and he signed it again.

Q. Then you do know that the paper he had signed, the blank papers he signed he took to the bank? A. I don't know where he took them.

40 Q. You say that afterwards a man from the

bank came and wanted a regular power of attorney? A. Yes.

Q. Let me show you a blank, two blanks, if you will, and let me ask you if these were the blank pieces of paper you saw Charles have Victor sign?

A. The first paper was—

Q. Look at them? A. Yes, sir. 10

Q. Have you looked at them yet? A. Yes.

Q. Can you tell us— A. I know a blank paper, I didn't have to look.

Q. Look at the writing— A. There was no writing, nothing.

Q. Was Mrs. Altshul there at the time? A. No, sir; she was downstairs.

Q. Downstairs? A. Yes, sir.

Q. What day did Victor die? A. It was on a Friday. 20

Q. What day of the month? A. December the 13th.

Q. December 13th? A. Yes, sir.

Q. How many days before December 13th was it that these blank pieces of paper were signed by Victor? A. It was two or three days.

Q. Two or three days? A. Yes, sir.

Q. I show you two documents which are endorsed—printed documents—which are endorsed “Power of Attorney”—both of them, and both of them dated December 11th, 1918, one signed Victor I. Altshul and the other signed Ketchum & Company, Victor I. Altshul, proprietor? A. Yes, sir. 30

Q. And ask you whether you saw those two documents signed? A. I did.

Q. You did? A. The second time.

Q. Just one moment, you saw them signed? A. When the man was there.

Q. Did you see them signed? A. Yes, I did.

Q. And I show you a signature here, Fannie Alt- 40

shul, on this document, on this document, and ask you if you recognize that signature? A. Well, she did not sign that.

Q. I ask you if you recognize the signature? A. Yes, sir.

Q. Whose signature is it? A. Fannie Altshul's.

10 Q. That is Victor's wife ? A. Yes, sir.

Q. She signed both of them? A. Yes, sir; this she signed too.

Q. Did you see them signed? A. I did.

Q. You saw Victor sign these documents, did you? A. Yes, sir, I did.

Q. And what did you understand he was signing? A. That was power of attorney, the man from the bank brought them.

20 Q. Well, are those two documents which I show you the papers the bank man brought? A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. No question in your mind about it? A. No, sir.

Mr. Lichtenstein: I ask that they be marked for identification.

(Marked Exhibits D-2 and D-3 for identification.)

30

Q. Were the papers which you see here brought to the house by the bank man? A. The second time.

Q. The second time? A. Yes.

Q. In other words, Charles and the bank man came to Victor's house with these two papers? A. Yes, sir.

Q. These two printed blanks? A. Yes, sir.

Q. And had Victor sign them? A. Yes, sir.

40 Q. And you saw him sign them? A. Yes, sir.

Q. And you and Mrs. Altshul signed them as witnesses?

Q. And you knew they were powers of attorney?

A. Yes, sir.

Q. And you knew what those powers of attorney were signed for? A. He said he needs them; he didn't explain anything, he said he needs them. 10

Q. Didn't explain it to you or to Mrs. Altshul?

A. Didn't explain it to anybody.

Q. Still Mrs. Altshul witnessed it? A. The man came up, he said Charles wants a power of attorney.

Q. Charles was with him? A. Yes, sir.

Q. And this man was from what bank? A. The Commercial Trust Company.

Q. Was it the Commercial or the— A. The Commercial.

Q. Is it not a fact that these two printed papers which I have shown you here are the first papers that were signed? A. No, sir. 20

Mr. Lichtenstein: Please don't answer a question until it is fully asked.

Q. Is it not a fact that these two printed papers which I have shown you here are the first papers that were signed by Victor? A. No, sir.

Q. And don't you know that these were the papers that the bank did not want to take and that afterwards the bank officials came there with a form of their own? A. No, sir. 30

Q. That is not true? A. No, sir.

Q. Now, when the bank man came there Victor signed those, did he? A. Yes.

Q. An they were taken away by the bank official? A. They were taken away by— I don't know by who they were taken away.

Q. You saw the man come there? A. Yes, I seen 40

him; I was upstairs, I was never downstairs, he and Charles went downstairs, I remained upstairs.

Q. Did you hear what the bank man said as to why he wanted another set of them prepared? A. No, sir.

10 Q. Don't you know he said it was because he wanted to see Victor sign it himself because the signature on these was poor? A. I didn't hear that, I don't know anything about that.

Q. But you saw Victor sign another set of them? A. He never came up with any more papers.

Q. Don't you know that Victor signed another set of them? A. I know he came up from the bank and he signed some papers.

Q. And you saw Victor sign these two papers? A. Yes, sir.

20 Q. Then the man took them away? A. I don't know who took them away; I don't know—he went down with them, downstairs, the man with Charles went downstairs.

Q. Now, after these papers were signed by Victor, first the first set, then the second set, was it then that you saw him take the keys? A. I guess it was the following day; I think it was; the same day or the following day.

30 Q. You said it was the same day that—after he came out of the sick room? A. When he signed some papers, I guess it was the same day.

Q. Was it the same day or not? A. I guess it was the time he signed the first blank, he was all by himself, the man was not there.

Q. Who was in the house? A. I was there, Victor was in bed, and Charles.

Q. And Charles went over to Victor's trousers and took the keys out? A. Yes, sir.

40 Q. You saw him take them out? A. Yes, I took them away from him.

Q. Listen to me. He was taking them out of the trousers when you were there? A. No, I came in and saw him picking the pocket.

Q. What do you mean by picking the pocket?

A. Taking the things out of his pocket.

Q. Is that what you mean by picking his pocket?

A. Yes, sir.

10

Q. Putting his hand in and taking the keys out?

A. He took the keys out of his trousers.

Q. You saw him take the keys out? A. I came into the room and I said, "What are you doing?"

Q. You became suspicious then? A. Yes, sir.

Q. And you wanted to know what he was doing?

A. I took away the keys.

Q. Then what did you do? A. I would not let him go out of the room with the keys.

Q. Did you ask him for the keys? A. And he gave me the keys.

20

Q. Just wait a minute. You wanted the keys and he gave them to you? A. Yes, sir.

Q. And then after he gave them to you you gave them to Mrs. Altshul? A. Yes, sir.

Q. And then after he gave them to you and you gave them to Mrs. Altshul, then he told you that he wanted to go down to the store? A. No, sir.

Q. When did he tell you that? A. A day or two after.

30

Q. Was it before Victor died? A. Certainly, before.

Q. And these papers he signed were two days before Victor died? A. Two days before.

Q. So that it was on the day that he took the keys out of Victor's pocket that he told you that they would have to go down to the store? A. He was talking to me but I did not listen to him.

Q. You didn't want to listen to him? A. No.

Q. Didn't he say that it was necessary to go to the store? A. Yes, he did, Friday.

40

Q. Then you took a car— A. A relation of mine has a car.

Q. And you got in that car? A. Yes, sir.

Q. And Charles got in the car? A. Yes, sir.

Q. What were you going in the car for? A. He wanted to go to New York to go down to the office.

10 Q. What for? A. He insisted he needs the papers here in Jersey. He didn't want them in New York.

Q. Why were you going down to the store? A. Because he insisted on me going down. He said he must have the papers in Jersey.

Q. He insisted on your going down? A. Yes.

Q. He insisted on your going down as a member of the family? A. Yes.

Q. Your side of the family? A. Yes.

20 Q. That is what he told you? A. Yes, sir.

Q. And he told you he wanted you to be present? A. He wanted—yes, I would not give him the keys.

Q. He told you that he wanted you as a representative of the wife's side of the family to go down to the store? A. No, sir, nothing of the kind. He told me—I would not give him the keys, I went down with him to get the papers to take up to the house.

30 Q. You went down with him to get the papers to take up to the house? A. Yes, sir.

Q. He told you that the store was in the hands of strangers and if anything happened to Victor it would be better to have the papers in his own house? A. No, sir, the papers were there all the time.

Q. Did he tell you that? A. No, sir.

Q. What were you going down to the store for? A. He wanted the papers in Jersey, and not in New York State.

40 Q. And you went down with the keys in your pos-

session? A. To bring them to Mrs. Altshul's home, and when I came home—

The Court: Now, you have been going along very nicely for the last five minutes. I think counsel had better confine the witness to the question.

10

Q. After you got into the automobile you went down to the store in New York with Charles and got into the store? A. Yes, sir.

Q. And there were some boxes there? A. Yes, sir.

Q. And you collected whatever papers were about? A. Yes, whatever—

Q. Just answer the question? A. Yes, sir.

Q. And you opened the safe, did you? A. No, 20
sir.

Q. Who did? A. We opened the safe and another man.

Q. But you had the key to open it? A. Yes, sir.

Q. And you handed him the key to open the drawers in the safe? A. Yes, sir.

Q. And whatever papers were in the safe were taken out and put in these boxes? A. Whatever he needed.

Q. Didn't he take all of the papers out of the safe? A. Lots of papers were left there. 30

Q. Didn't he take them all out of the safe and put them in the boxes? A. Whatever he needed he took, and he put the others into the private office.

Q. You were there all the time? A. Yes, sir.

Q. And he put them into the boxes? A. Yes, sir.

Q. And put them into the automobile? A. Yes, sir.

Q. And took them home and handed them over to Mrs. Altshul? A. No, sir, I brought them in. 40

Q. You took possession of them? A. Yes, sir.

Q. And you took possession of them for? A. I put them under a bench.

Q. But you took possession of them? A. Yes, sir.

10 Q. And you were going to see to it that you held on to those papers? A. Yes.

Q. You did not want Charles to have anything to do with them? A. Sure not.

Q. You were going to see to it that you held them there, and you were going to control those papers? A. Sure, I wanted for Mrs. Altshul to have those papers.

20 Q. You say that some time before Victor died Charles said to you that Victor owed him money? A. He said he must have a will because he owed him five thousand dollars.

Q. He must have a will because he owed him five thousand dollars? A. He must make a will for Victor, because he owed him five thousand dollars, and—

Q. And afterwards you say that after Victor's death he told you that Victor owed him ten thousand dollars? A. Six or eight months after, he said that Victor owed him ten thousand dollars.

30 Q. Didn't he tell you that right along? A. No, I didn't speak to him for six or seven months.

Q. He was talking to you right after Victor's death? A. No, sir.

Q. Do you mean to say you were not talking with him at all? A. For a whole week, that is all, one week after he died.

Q. You did not talk to him? A. I had a couple of conversations.

40 Q. He told you, didn't he, that Victor owed him ten thousand dollars? A. No, sir, never told me;

after six or seven months or a year I heard he claimed ten thousand dollars.

Q. You heard he claimed ten thousand dollars; didn't he tell you that Victor owed him ten thousand dollars? A. No, sir.

Q. You said he did tell you after his death— A. Five thousand dollars.

10

Q. Ten thousand dollars? A. A year after he made a claim for ten thousand dollars, about a year or a year and half after. I don't know exactly; I heard mention about that.

Mr. Lichtenstein: I would like to reserve the right to further interrogate this witness on certain other documents.

The Court: All right.

20

Re-direct Examination by Mr. Tiffany:

Q. After you had discovered that these papers that you had placed under the bench upon your return from the office of Victor had disappeared, did you afterwards see Charles Altshul going over those papers with some one? A. Yes, sir.

Q. Where? A. Upstairs.

Q. Who was there? A. He, himself.

Q. Anybody else? A. I guess a nurse.

30

Q. And she was a relative of the family? A. A relative of the family, yes, sir.

Q. On their side of the family? A. Yes, sir.

Q. And where were they going over these papers? A. In her room.

Q. In the nurse's room? A. The nurse's room.

Q. Mr. Lichtenstein asked you if you spoke to Mr. Altshul or he speak to you after Victor had died. Did Charles do anything toward the management of the estate after Victor died? A. He dropped everything.

40

Q. What? A. He didn't do anything, no, sir.

Q. Well, did he try to do anything? A. He did not appear—of, to the estate?

Q. Yes. He claimed, I don't know what he claimed, everything, he claimed that Mrs. Altshul was doing something wrong to the estate.

10 Q. Well, did he take it into the Orphans' Court?

A. Yes, he did.

Q. And in the Court of Chancery? A. Yes, sir.

Mr. Tiffany: That is all.

Re-cross Examination by Mr. Lichtenstein:

20 Q. Let's understand something about that. Victor left a widow and how many children? A. Three children.

Q. And Victor's estate amounted to about three hundred thousand dollars, didn't it? A. No, sir.

Q. What? A. No, sir.

Q. Well, didn't it amount to pretty nearly three hundred thousand dollars? A. A whole lot less, a great deal less, about one hundred thousand dollars.

30 Q. Don't you know it was between two hundred thousand dollars and three hundred thousand dollars? A. No, sir, it was not.

Q. Well, when Mrs. Altshul applied for administration—you know that the administration claim made by her was that the estate was worth ten thousand dollars? A. No, sir.

Q. Didn't she make claim that the estate was only worth ten thousand dollars? A. No, sir.

Q. That the grandfather or your father objected— A. No, sir; it is not true.

Q. —that she should give a proper bond? A. No, sir, it is not true; she didn't know about the estate, any more than I did, and I didn't know anything, neither one of us.

Q. Well, she afterwards did give a bond for how many hundred thousand dollars? A. That was a year after he died. 10

Q. A year after he died she was compelled to give a bond for how many thousand dollars? A. I don't know.

Q. A couple of hundred thousand dollars? A. A year after he died.

Mr. Lichtenstein: That is all.

Re-direct Examination by Mr. Tiffany: 20

Q. Charlie Altshul went with Mrs. Altshul to the Surrogate's office? A. Yes, sir.

Q. And were you there? A. Yes, sir.

Q. Was it Charles Altshul that represented to the Surrogate that the estate was worth ten thousand dollars? A. Yes, he did.

Re-cross Examination by Mr. Lichtenstein: 30

Q. And Mrs. Altshul was the one that signed the papers? A. She didn't know a single thing about it.

Witness excused.

C. BERGMAN, sworn.

Direct Examination by Mr. Tiffany:

Q. You are connected with Ketchum & Company? A. I was.

10 Q. How long ago—during the lifetime of Victor Altshul? A. Yes.

Q. How long before he died? A. Since 1916.

Q. Do you remember the day Mr. Charles Altshul and Mr. Kosben came over to your plant? A. I do.

Q. When was it? A. The day Mr. Altshul died.

Q. What happened? A. Why, Mr. Charles Altshul and Mr. Kosben came into Victor I. Altshul's private office and he generally kept his papers
20 scattered all over his desk. He opened the desk and he cleaned out the desk, took the papers and so on; I was there as a representative of Ketchum & Company, but did not try to stop him in any way.

Q. They took out a great many papers? A. Papers and books.

Q. From the desk? A. Took them from the desk, and there were papers on the floor—

Q. Did they take any from the safe? A. That I
30 could not say.

Cross Examination by Mr. Lichtenstein:

Q. Mr. Kosben was present during all the time that this was being done? A. Yes, sir.

Q. Picked up the papers just as they were and put them into boxes? A. Yes.

Mr. Lichtenstein: That is all.

MRS. MENDELSON, recalled.

Direct Examination by Mr. Tiffany:

Q. You are the sister of Charles Altshul? A. Yes, sir.

Q. I show you a check dated November the 12th, 1918, and ask you if that is the signature of Mr. Altshul? A. Yes.

10

Q. I show you a series of six notes—I ask that that check be marked for identification.

(Marked Exhibit D-3 for identification.)

Q. I show you a series of six notes; five notes in the sum of two thousand dollars, and one note in the sum of one thousand dollars, and ask you if the signature, E. C. Altshul, is the signature of Charles Altshul?

20

The Court: Referring to what? The signature as maker or endorser?

Mr. Tiffany: As endorser.

M. Lichtenstein: How many notes are there?

Mr. Tiffany: Six.

30

The Court: Is the signature you refer to that of maker or endorser?

Mr. Tiffany: Endorser. When you refer to the signature it would naturally lead one to believe you meant the maker.

Witness excused.

40

VICTOR M. KAGAN, sworn.

Direct Examination by Mr. Tiffany:

Q. You are connected with Ketchum/ & Company? A. Filling order department.

10 Q. That is the business of chemists, isn't it? A. I am a checker, checking in every order that goes out.

Q. The business is the business of drugs? A. Wholesale druggists.

Q. That is the company that Mr. Altshul in his lifetime was the owner of? A. Yes, sir.

Q. Now a corporation? A. Now a corporation.

Q. Do you know Mr. Tufiar? A. I do.

Q. How long have you been with the company?

20 A. I knew him for twelve years.

Q. During that time was he connected with the company? A. Yes, sir.

Q. Do you know Mr. Bergman? A. I know Mr. Bergman, too.

Q. How long has he been connected with the company? A. Since 1916.

Q. And has been acting as manager of the business? A. I have been acting as manager.

30 Mr. Lichtenstein: I object to the question on the ground that it is incompetent, irrelevant and immaterial, as to whether he has or has not been acting as manager of the business.

The Court: Since when?

Mr. Tiffany: Since the death of Mr. Altshul.

The Witness: I have been managing—

Mr. Lichtenstein: One moment.

The Court: What business?

40 Mr. Lichtenstein: I cannot see what difference it makes whether he has been act-

ing as manager of the company or not, as far as this case is concerned.

The Court: I don't know myself.

Mr. Tiffany: The proposition is simply this, to overcome the inference—Mr. Lichtenstein has attempted to show that it was necessary for Charles Altshul to go over there as manager and take care of it. I am going to show that Mr. Kagan was manager of the company, taking care of the business of Ketchum & Company. 10

Mr. Lichtenstein: I didn't make any such statement that it was necessary for Charles Altshul to go there and take care of the business.

Mr. Tiffany: You made the inference.

The Court: I will overrule the objection. 20
Take your exception.

Q. At whose request did you take over the management of the company? A. At the request of my uncle, Harry Altshul, and at the request of Mr. Kosben.

Q. Harry Altshul is the father of Charles Altshul? A. Yes, sir.

Cross Examination by Mr. Lichtenstein:

30

Q. Charles Altshul also asked you to take care of the business at one time? A. He did not.

Q. Didn't he ask you right after Victor's death to take charge? A. No, sir. He said to me he heard that I was asked to take charge, and he don't mind if I do, as long as he did not care to take charge of it.

Q. And you did not want to take charge of it at first? A. I did not at first want to take charge. 40

Q. You did not make up your mind? A. I did not make up my mind at first.

Q. You are related to both sides of the family?
A. Cousin to both sides—I am not related to Mrs. Altshul except by marriage, but I am related to Mr. Altshul as a cousin.

10

Witness excused.

SAMUEL ADAMSON, sworn:

Direct Examination by Mr. Tiffany:

Q. You are related to Mrs. Altshul? A. By marriage.

20

Q. And to Charles Altshul? A. Same relationship.

Q. Same relationship to each one? A. Yes, sir.

Q. You are a member of the Bar of the State of New York? A. I am.

Q. You knew Victor Altshul in his lifetime? A. I did.

Q. And you were his counsel? A. In a good many matters.

30

Q. Are you familiar with his office in New York?
A. In a general way.

Q. Did you handle a transaction involving—I withdraw the question. I show you notes that have been marked for identification, Exhibits D-4 to 9, inclusive, and ask you if you ever saw those notes before? A. I have.

Q. Did you talk to Charles Altshul in reference to those notes?

40

Mr. Lichtenstein: One moment, when?

Mr. Tiffany: I will fix the time.

Q. Did you talk to him? A. Yes, sir.

Q. When was it? A. It was on an occasion about two months after Victor died, at my office, 15 Wayne Street, New York City.

Q. And who was there? A. Myself and Mr. Charles Altshul.

Q. Relate the conversation to the jury? A. 10
Charles Altshul came to my office to talk over matters generally concerning the differences between him and his family, with Mrs. Fannie Altshul's side of the matter. He spoke to me concerning some differences regarding the General Laboratories Company which had been conducted in Jersey City; about the charges and counter charges that had been made by the different sides of the family, and I said to him, "Now, Charlie, you know the result of Victor's death has left things in a rather unsettled condition, Fannie is a little up in the air about how things stand, and I think that eventually, in time, as things go along matters will be straightened out satisfactorily to all concerned." I said to him, "Here is the situation, Fannie's people have inquired of me if I knew anything about certain notes that had been given by certain persons interested in the Cosmopolitan Drug Company." Apparently referring to the notes you have shown me. They wanted to know what disposition Victor had made of those notes after he received them, and I said to Charlie, "Now, Victor told me at the time that he owed Charles some money, and that he intended to turn these notes, or part of them over to Charles." I said, "Now, that is an instance of how things can be straightened out and matters adjusted." We talked about other matters not involved in this suit. 20 30

Q. What did he say to you concerning those 40

notes? Anything? A. No, he didn't say anything further about it, except he said that he had received those notes.

Q. From Mr. Victor Altshul? A. Yes, sir.

Q. Were you ever paid at the office of Mr. Altshul when Charlie was there? A. I was.

10 Q. When? A. I was there, I met Charlie there, I think, two or three days before Victor died. Charlie telephoned to me, and asked me to come over and see him at Victor's office.

Q. At Victor's office? A. Yes, sir.

Q. Ketchem & Company? A. Yes, sir.

Q. And did you go there? A. I went there.

Q. And what happened there? Did you meet Charles? A. I met Charles, and he said, "Victor is in a very low condition, Sam, and he is not expected to live, and things are very unsettled." He
20 said, he asked me if I knew whether a will had ever been drawn for Victor. I said, "As far as I am concerned I never drew one for him, and I never knew whether he had drawn one or not." I said, possibly some attorneys in Jersey City where he lived may have drawn a will for him. I did not know anything about it. I said, "Have
30 you looked around to see whether a will was found?" He said, "Yes, I have been through the safe, and I have been through the desk, and we cannot locate a will. Then he said to me, "Would you mind coming over to Victor's house and suggesting the drawing of a will?"

Q. Let me interrupt you—were you there when he was going through— A. Yes.

Q. And what did he do with the papers in the safe? A. When I seen him in the office I says to Charlie, "I am rather surprised at the condition of Victor's desk, it is so nice and clean. I never
40 saw it in that condition. It was always in a

mussed condition, papers piled, and if Victor came back and saw the condition of his desk he would be a very much pleased man."

Q. What was the condition of it? A. All the papers cleaned off, and Charles told me, "I have been through all the papers to find out how things stood, and I took them and filed them away, put them in some kind of a regular order." Then he took me over by the safe, and he said, "I have been looking through the safe here, to see if I could find some will, and what papers were in there." 10

Q. What was the condition inside of the safe? A. I could not observe it.

Q. You did not look into it? A. No, sir.

Q. Did you notice whether it was broken or not? A. No. 20

Cross Examination by Mr. Lichtenstein:

Q. You are related to both— A. My wife is a cousin both to Charles' wife and to Mrs. Altshul.

Q. You are not related to Mr. Altshul, you are only related to his wife? A. By marriage.

Q. And Charles was concerned about Victor's children when he was talking to you? A. Yes, he said—he talked a good deal about them.

Q. And that was one of the things very much upon his mind? A. I presume so. 30

Q. And he also talked about his father, the grandfather of the children, and the concern that the grandfather had about these children about that time? A. I presume so. Yes, he mentioned that.

Q. And didn't he talk to you about the will? A. No, sir, the matter of his grandfather and the notes were not discussed as far as the will was concerned. 40

Q. And the notes that have been shown to you, five notes of two thousand dollars and one of one thousand dollars—this is not the complete series of notes is it? A. No, there is one missing.

Q. There was another note of two thousand dollars? A. Yes, sir, two thousand dollars.

10

Mr. Tiffany: Here is the check for it, that paid it, if you want it.

Q. Those notes came back to you did they not?

A. Yes, sir, I held the stock in escrow as security for the payment of those notes.

Q. In other words, what happened was this: Victor sold out an interest that he had in a company— A. Cosmopolitan Drug Company.

20 Q. Then prepared the papers— A. Well, I, in conjunction with the attorney for the Cosmopolitan Drug Company.

Q. And the sale was a sale of a stock interest of Victor's in this company? A. Under an option agreement.

Q. And the stock was left with you in escrow?

A. As security for the payment of those notes.

Q. As security for the payment of six notes— six notes of two thousand dollars and one note of
30 one thousand dollars? A. And also certain checks dated ahead.

Q. Therefore when these notes were paid—they came back to you, you wanted them in order to be able to know whether the conditions of the escrow were complied with? A. It came about through a request from the attorney for the people representing the Cosmopolitan Drug Company.

Q. In other words, you would not turn over the stock to the purchaser until you were assured that
40 these notes had been paid? A. Yes, sir.

Q. Therefore you saw the notes marked paid?

A. The notes were delivered over to me in return for the stock.

Q. Were they delivered to you as each note was paid? A. No, all the notes had to be paid first before I could deliver that stock up.

Q. And after they were delivered to you you kept them in your possession? A. For a short time. 10

Q. And afterwards you turned them over—afterwards you turned them over to Mrs. Altshul?

A. I turned them over to Mr. Kosben, the father, at his request, for the purpose of this case.

Q. Now you say that Kosben came to your office at one time— A. Well, he came on two occasions after Victor's death.

Q. And you said that there was a lot of crimination and recrimination and that you thought if the things were investigated the things would all be satisfactory? A. That is what he said. 20

Q. You mean he told you at the time that he was charged with having stolen these thirteen thousand dollars in notes, isn't that a fact? A. No, sir.

Q. Didn't he tell you that there was an insinuation that he had stolen these thirteen thousand dollars in notes? A. I recall no such conversation. 30

Q. Didn't you tell him that you knew they had not been stolen because you knew they had been turned over to him and turned over to him before the death of his brother and were put in the bank before the death of his brother,— A. The subject of those notes did not come up at the time except as I have already testified, that they wanted to know what had become of those notes. 40

Q. Well, as a matter of fact, Mrs. Altshul, Mrs. Victor Altshul and some other members of her family did come to you to find out what became of those notes, that is, the thirteen thousand dollars in notes? A. Yes, there may have been a telephone conversation.

10 Q. Didn't he tell you or infer to you that Charles had stolen these notes?

Mr. Tiffany: Objected to as incompetent, irrelevant and immaterial what they may have inferred at some previous time.

The Court: I do not see any particular objection to it.

Mr. Tiffany: I withdraw the objection.

20 A. I recall no such charge or any inference being passed at the time to me.

Q. Not at that time? A. No.

Q. What was it you had in mind when you stated in your direct examination that you told Charles that the estate was in a chaotic condition and that when things were straightened out all these conflicts would be straightened out? A. Charlie discussed with me the matter of this general laboratory company. He felt that there were
30 a lot of things not being properly taken care of by Mrs. Altshul as administratrix. He said she was no business woman and that she ought to have invited him to take control of the business of Ketchum and Company in New York because he was a business man and he was more or less familiar with that line of business, and she should have taken him into her confidence and that there ought to be better control on both sides of the family as far as the bringing up and care of those
40 children were concerned.

Q. But what was it that you had in mind that you spoke of the chaotic condition and that when the time came that this crimination and recrimination—I think that is the term you used—when there was an investigation that that would all straighten out? A. The business of Ketchum and Company was rather a large business comparatively, and there were a lot of transactions involved—Mr. Altshul had various investments that he was interested in—I understand that but— A. (continuing) in South Carolina, and this other company, the Brook Chemical Company, and these things all had to be straightened out. 10

Q. What you had in mind when you told him that these criminations and recriminations—I think that is the term you used— A. That there had been suspicion cast by Mr. Altshul of Mrs. Altshul, and she felt she was suspicious of him— 20

Q. Wasn't it because of these thirteen thousand dollars of notes? A. No, sir, that was not involved at the time.

Q. Did he or did he not come to you to find out whether you did not have these notes, and explained to you that he had received these notes long before Victor's death? A. No, sir, not because of these notes—Charles Altshul never took up with me the question of these notes. He never mentioned to me even the ten thousand dollar note that was involved in this suit until yesterday. 30

Q. In other words they were not talked about in his personal affairs? A. I do not understand what you mean "his personal affairs."

Q. He was not discussing with you his personal affairs with Victor? A. No, not in the sense you indicate.

Mr. Lichtenstein: That is all.

40

Witness Excused.

HERBERT GROTH, sworn :

Direct Examination by Mr. Lichtenstein :

Q. You are connected with the Commercial Trust Company? A. Yes, sir.

10 Q. And have you brought here documents which come from the files of the bank in connection with Ketchum & Company and Victor I. Altshul? A. I have.

Q. I show you a document in printed form entitled "Power of Attorney" signed Ketchum & Company and dated December 11, 1918, and I ask you whether that comes from your files? A. Yes, sir, it does.

20 Q. The signature, Ketchum & Company, are you familiar with that or with Mr. Victor I. Altshul's signature? A. Yes, sir.

Q. And is that his signature? A. It is.

Mr. Lichtenstein: I ask that this be marked in evidence.

The Court: Is this in rebuttal?

Mr. Lichtenstein: No.

The Court: Mark it for identification.

Marked Exhibit P-5 for identification.

30 Q. I show you another document entitled "Power of Attorney" dated December 11, 1918, signed Victor I. Altshul and ask you whether you recognize that as the signature of Mr. Altshul? A. I do.

Marked Exhibit P-6 for identification.

Q. I show you this signature— A. Yes, sir, L. Hetrick.

40 Q. As the subscribing witness on both of these documents, Exhibits P-5 and P-6 for identification;

who is Mr. Hetrick? A. Assistant director of the Commercial Trust Company.

Q. And is at the present time? A. Yes.

Q. And this is his signature? A. Yes, sir.

Q. On both of these, he is the subscribing witness, Exhibits P-5 and P-6 for identification? A. Yes, sir.

10

Q. And the acknowledgment, is that in the handwriting of Mr. Hetrick? A. Yes, sir.

Cross Examination by Mr. Tiffany:

Q. You did not see these papers signed? A. No, but I know the signature.

Witness excused.

20

SAMUEL KOSBEN, recalled, for further cross examination:

Further Cross Examination by Mr. Lichtenstein:

Q. Do you recall that you testified in your direct examination that the papers marked Exhibit D-2 and Exhibit D-3 were the second set of power of attorney that were signed by Victor when the man from the bank came there, and you were absolutely certain that that was so. I show you now another set of power of attorney dated on the same day, December 11 and marked Exhibit P-5 and P-6 for identification which are signed by Mr. Hetrick as a witness, and ask you now whether you were not mistaken when you said that the first set that I showed you were the last ones that were signed? A. The first papers I see were blank papers.

30

Q. I asked you if you will not say you were mis- 40

taken, having seen the four powers of attorney now?

A. Probably that was signed when I was not there.

Q. The first papers I showed you when you were first on the stand were witnessed by Charlie Altshul and you said they were the papers that were brought there by the Commercial Bank— A. That

10 is what I thought.

Q. Well, now, I show you papers which have just been brought in—Exhibits P-5 and P-6, from the bank, which are witnessed and acknowledged by Mr. Hetrick and ask you whether you would not say now you were mistaken about what you said before, that these are the ones that were signed secondarily, and not those that you identified this morning? A. I think what?

Q. You think now Exhibits P-5 and P-6 are the ones? A. Yes.

20 Q. So that if Exhibits P-5 and P-6 are the ones that were signed when the bank man was there and Exhibits D-2 and D-3 for identification name signed by Mr. Altshul first, then you were mistaken when you said that he handed Mr. Altshul a blank piece of paper to be signed; aren't you? A. Possibly I am.

Q. Possibly? You would not be able to swear that the paper he handed to Victor and that Victor signed was a blank piece of paper with nothing on it? A. I thought it was a blank piece of paper.

Q. Now you say that your thought was wrong? A. If I am wrong I give in.

Q. And you are giving in now? A. I am not sure, but I thought it was a blank piece of paper.

Q. Didn't you say it was two pieces of blank paper with nothing on? A. I did.

Q. And you saw Victor sign his name? A. That is what I seen; I am telling you.

40 Q. Didn't you say on your direct examination and your cross examination that Charles came over

to Victor and you saw two pieces of paper and that they were absolutely blank, that they had nothing on them and Charles had Victor sign his name to the blank pieces of paper? A. Yes, sir.

Q. Now you are mistaken about this? A. I am not sure, I am telling you, there might have been a third paper; I never seen that.

10

Recess until 2 P. M.

Mr. Lichtenstein: I offer the notes marked for identification as Exhibit P-4, 5, 6, 7, 8 and 9 in evidence. (Marked in evidence.)

SAMUEL ADAMSON, recalled:

Mr. Tiffany: I omitted to ask a question this morning.

20

Re-direct Examination by Mr. Tiffany:

Q. During the conversation with Charles Altshul did he at any time tell you that the estate of Victor Altshul or Victor Altshul in his lifetime was indebted to you in the sum of ten thousand dollars?

Mr. Lichtenstein: Objected to on the ground that it is incompetent, irrelevant and immaterial; he was under no obligation to tell him.

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The Court: I overrule the objection.

Mr. Lichtenstein: Exception.

A. Charles Altshul never spoke to me about this ten thousand dollar note involved in this action.

Mr. Tiffany: That is all.

40

Re-cross Examination by Mr. Lichtenstein:

Q. Didn't talk about what was owing to him by the estate? A. No.

Q. That question didn't come up at all? A. Not except incidentally that these notes were turned over to Charles Altshul on account of some indebtedness that Victor Altshul—

Q. Just wait a minute now you did not say that.

Mr. Tiffany: Yes he did.

Mr. Lichtenstein: I am not talking to counsel, wait a moment.

Q. What was the conversation that you had? A. The conversation at that time was that I told Charles Altshul that Victor had said to me that Charles was indebted to him—that he was indebted to Charles, rather, and that he was turning these notes or part of them over to Charles.

Q. That is what he did say? A. Yes, that is what I said before.

Q. And that is just exactly what you said now again? A. Yes, sir.

Mr. Lichtenstein: That is all.

Witness excused.

Mr. Tiffany: That is our case.

Mr. Lichtenstein: If the court please, before I call Mr. Charles Altshul, Mr. Rosinoff, Jr., is in court if counsel desires to have him as a witness.

Mr. Tiffany: I ask that that be stricken from the record. If counsel desired him he would call for him.

Mr. Lichtenstein: You did ask that we produce him.

The Court: Yes, and now he is produced.

Mr. Tiffany: I will see what their case is before I call him.

E. CHARLES ALTSHUL, sworn:

Direct Examination by Mr. Lichtenstein:

Q. What is your business? A. I am in the coal business.

Q. In Jersey City? A. In Jersey City.

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Q. And were you also a druggist before you were in that business? A. I was.

Q. And your late brother, Victor I. Altshul, he was also a druggist and a chemist? A. Yes, sir.

Q. I show you documents marked Exhibits D-2, 3, 5 and 6 for identification and ask you whether you saw your late brother sign these four documents? A. I did.

Q. It has been testified here that a few days before your brother Victor's death you came to the house and had your brother sign certain documents in blank, is that true? A. It is not.

20

Q. Did you have your brother sign two documents before his death, a few days before? A. Yes, that is—

Q. Did you or did you not? A. These are the documents, yes.

Q. Which documents were they that you had him sign? A. First he signed these two—

Q. Referring to Exhibits D-2 and 3? A. Yes.

30

Q. Was Mr. Altshul also present, his widow there at the time? A. Yes, sir.

Q. And was this man her father there at the time? A. He was.

Q. And did she sign these two papers as witness to the signature of her husband? A. She did.

Q. Both of them? A. Yes.

Q. Exhibits D-2 and 3? A. Yes.

Q. Were they the first documents you presented to him? A. Yes.

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Q. For signature? A. They were.

Q. And was there presented to him afterwards another set of documents to be signed? A. There was.

10 Q. And I show you Exhibits D-5 and 6 for identification and ask you if they were the documents that were afterward signed? A. They were.

Q. And were they witnessed by this man Hetrick? A. They were.

Q. And he was a representative of the bank? A. He was.

Q. And were they signed by your brother in the presence of Mr. Hetrick as subscribing witness representing the bank after you had your brother sign a power of attorney on Exhibits D-2 and three for identification? A. They were.

20 Q. And are these the four documents that he signed? A. They are the four documents that he signed.

Q. And did you take Exhibits D-2 and 3 to the bank? A. I did.

Q. That is, the Commercial Trust Company? A. I did.

30 Q. And was it after you took them to the Commercial Trust Company that the Commercial Trust Company sent Mr. Hetrick to your brother to have a new set of them signed? A. It was.

Q. And the first two papers you had your brother sign were they for the Commercial Trust Company? A. They were.

Mr. Lichtenstein: I offer the four documents in evidence.

Marked in evidence.

40 Q. Can you tell us please in whose handwriting the documents Exhibits D-2 and 3 are in other

than the signature of your brother and that of his wife? A. When I first—

Q. In whose handwriting is it? A. The name is in my handwriting, this was written in the bank.

Q. What was written in the bank? A. This here (indicating).

Q. When you say "this here" you refer to the first line? A. Yes, sir. 10

Q. Victor I Altshul, proprietor of Ketchum & Company? A. Yes.

Q. That was written in the bank? A. Yes.

Q. And— A. And the body of this, this line was written in the bank.

Q. Exhibit D-3, "Victor I Altshul," was written by the bank official? A. Yes.

Q. Was that at the time you received these blanks from them? A. Yes, sir. 20

Q. And these documents were filled out were they before your brother signed them, I mean, that is the E. Charles Altshul and Victor I. Altshul? A. Yes, sir, they were filled out before my brother signed them.

Papers handed to jury.

The Court: I don't know what the importance is of the power of attorney.

Mr. Tiffany: I have no objection to their going in. 30

The Court: I don't see the importance of it.

Mr. Lichtenstein: I don't see myself and I never did.

The Court: I thought it might be suggested that the papers that were said to be signed in blank might be this particular note in this case but I cannot see that. Ad- 40

mittedly, it was now, as I see it, the power of attorney that was signed.

10 Mr. Lichtenstein: If the court please it is necessary that your Honor understand the purpose of Mr. Kosben's testimony as introduced by the other side and the reasons why it is necessary for us to go into it. They put Mr. Kosben on the stand, for the purpose, apparently, because it could not be introduced for many other purpose, to show that this man was doing things that he had no right to do. In other words, for the purpose of arguing that this man—

20 which is their case, and which they have attempted to show—that this note—that this man had stolen this note.

The Court: All right.

Mr. Lichtenstein: And they introduced that evidence for the purpose. It is perfectly apparent. Now, certainly, we should not allow him to pass that aspersion without going into the details.

The Court: I am not discussing that at all. What I was asking was why spend the time on this?

30 Q. Did you have your brother sign any papers in blank? A. No.

Mr. Tiffany: Objected to, it has been asked—

Q. —sheets of paper without anything written on them? A. No, sir.

Q. Were these four documents the only documents you had your brother sign? A. They were.

40 Q. And was Mrs. Altshul, the widow there at the time they were signed? A. She was.

Q. Was Mr. Kosben, her father there? A. He was.

Q. And you took them—

Mr. Tiffany: If the Court please, I would suggest that Mr. Lichtenstein be sworn.

Q. What did you do with the first set of documents after you received them? A. I took them to the bank.

Q. What bank? A. The Commercial Trust Company, Grove Street Branch.

Q. And the next set of documents that the officials of the bank had signed— A. He took them himself.

Q. He took them himself? A. Yes, sir.

Q. Mr. Kosben stated that you on one occasion, either on this same day or the next day, as he terms it “Picked the pocket of your brother” will you tell us what happened Mr. Altshul? A. I didn’t pick my brother’s pocket at no time or at any time.

Q. He said that you took from your brother’s pocket the keys of the store or the keys of his place of business; do you remember anything about the keys? A. Yes, Mrs. Altshul gave me the keys to be able to close the place up and Mr. Kosben came in and he saw me having the keys in my possession and he says “What is that” I said that is the keys, and he took them out of my hand.

Q. And then what happened after that? A. Why, they kept the keys.

Q. Now then, do you recall going down to the store or the place of business of Ketchum & Company? A. I do.

Q. Who went with you? A. Well, Wednesday and Thursday I went down myself just to super-

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10 vise things. Friday I saw my brother was very low and I suggested to Mr. Kosben, being there was already taken away from me the keys, I said to him "You come down with me to the store, there is a lot of strangers there, strange men, Victor is dying, we will take whatever papers and valuables there is over to the house to keep them safe."

Q. That is, to whose house? A. To the widow's house, Mrs. Altshul's house.

Q. Did he go down with you? A. He did.

Q. And did you pack up the papers and gather them altogether? A. Yes, sir.

Q. And was he present at the time? A. Yes, sir.

20 Q. And what did you do with all those papers? A. They were tied up in a couple of boxes with cords around. Mr. Kosben took charge of them, they were put in the machine and we went back again and came to Jersey City, and they were carried in the house. Mr. Kosben had charge of them.

Q. After they were brought to the house did you ever see those papers? A. I did.

Q. And in whose presence? A. In Mrs. Altshul's presence.

30 Q. And what were you doing with the papers in Mrs. Altshul's presence? A. Why, we were going over various matters to see what the situation was, what the various accounts were.

Q. Did you find out how the estate stood? A. Yes, sir.

40 Q. And it has been stated here by Mr. Kosben that he saw you at one time in the room of a nurse, in the presence of the nurse, going over some papers; is that true? A. It is a lie.

Q. Were you and your brother very intimate?
A. Yes, sir.

Q. Were you an elder brother of his? A. He was the elder brother.

Q. Was he your only brother? A. My only brother?

Q. And your father and mother were living at the time? A. Yes. 10

Q. And are still? A. Yes, they are still living.

Q. You have no children of your own, have you?
A. I have three little girls.

Q. No boys? A. No boys.

Q. When you got to the place of business of your deceased brother who had the keys to open the safe or get into the drawers of the safe? A. Why, frankly, I don't know. I came down in the morning and— 20

Q. I mean when you were there with Mr. Kosben? A. That Friday.

Q. Yes. A. Oh, Mr. Kosben had the keys.

Q. Did you open the drawers in his presence?
A. He did.

Q. And all his effects were gathered into these bundles you say? A. These boxes.

Q. Now, Mr. Kosben spoke of your opening an account in your joint names; will you explain that to the jury please, before your brother died? A. After receiving power of attorney from my brother, I wrote out various checks. In the meantime— 30

Q. What do you mean you wrote out various checks? A. Various checks to meet bills that had to be paid; the bookkeeper gave me the checks—

Q. What? A. The bookkeeper drew up the checks for the various accounts and I signed them. Of course I checked them up with the bills and I signed the checks and they were mailed. 40

Q. When you speak of the bookkeeper you mean your brother Victor's bookkeeper in connection with Ketchum & Company.

Q. My brother's bookkeeper in connection with Ketchum & Company.

Q. Bills that had to be paid? A. Yes, sir, then
10 I was informed that my power of attorney was only—

Mr. Tiffany: Objected to what he was informed.

The Court: Never mind telling us what you were informed, tell us why did you do it?

Q. Why did you do it? A. There were certain
20 expenses necessary to meet, current expenses, pay rolls, different things of that description. We didn't know the condition of the estate, so I suggested to Mr. Kosben that very same morning when we went to New York to get the papers, I said, "Victor might be dying any minute, we don't know what condition things are in, I am going to draw out a sufficient sum of money from Victor's account so as to be able to use it for current expenses," but I don't want to be criticised at any
30 future time, so I suggested that this money should be placed in the name of Kosben—who is her father—and myself.

Q. And you drew out how much money? A. First we got a check for five thousand dollars, then we made an inquiry at the bank what the balance was, I don't recall the exact amount, but it was quite a substantial amount, so we decided to draw a second check for sixty-five hundred dollars; altogether I drew out \$11,500.

Q. When you say you drew it you mean it was a check drawn on Victor's account? A. I drew the check Ketchum & Company, E. Charles Altshul, attorney, and I deposited in this account.

Q. Deposited it to the account of E. Charles Altshul and Samuel Kosben? A. Yes, sir.

Q. That is the widow's father? A. Yes, sir. 10

Q. And is this the pass book you received? A. It is.

Mr. Lichtenstein: I offer it in evidence.
Marked Exhibit P-7.

Q. On this account was there any checks drawn?
A. There were.

Q. How many? A. There were drawn two checks.

Q. And amounting to how much? A. \$11,500. 20

Q. And who were they signed by? A. They were signed by myself and Samuel Kosben.

Q. And what was done with that—have you got the checks? A. I have only one, I have not got the other one.

Q. What was done with those funds? A. The five hundred dollar check was drawn and given to Mr. Block to pay according to the expenses, according to the payroll.

Q. Who is Mr. Block? A. Mr. Block has charge of the Block Chemical Company, owned entirely by my brother. That Friday my brother died they had to meet the payroll for the men, so after having a consultation with Mr. Kosben we decided to give him five hundred dollars. 30

Q. Did you draw this check dated December 19, 1918, for five hundred dollars to the order of Mr. Block? A. Yes, sir.

Q. Was this check signed by you and Mr. Kosben? A. After that conversation it was. 40

E. Charles Altshul—Direct Examination.

Mr. Lichtenstein: I offer this check in evidence.

Marked Exhibit P-8.

10 Q. That was five hundred dollars; what became of the balance of the money? A. And the balance of the money, Mrs. Altshul—

Mr. Tiffany: What are you reading from?

The Witness: I have here a receipt—I am not reading from anything.

Mr. Lichtenstein: Just wait a minute.

Mr. Tiffany: Let me see it.

20 Q. What became of the balance of the money?
A. The balance of the money I turned over to Mrs. Altshul.

Q. By check? A. Yes, sir.

Q. You have not got that check? A. No.

Q. In other words there was deposited \$11,500 and you drew out five hundred dollars to pay the payroll, and the balance of the \$11,500 you turned over to the widow? A. Yes, to Mrs. Altshul.

Q. After your brother's death— A. After my brother's death, and she gave me this receipt for it.

30 Mr. Lichtenstein: I offer in evidence receipt dated December 21, 1918.

Mr. Tiffany: No objection.

Marked Exhibit P-9.

Mr. Lichtenstein (reading): December 21, 1918.

40 Received from E. Charles Altshul the sum of eleven thousand five hundred (\$11,500) same being money withdrawn from the account of Ketchum & Company in the Commercial Trust Company of which Victor I.

Altshul was owner, by Victor I. Altshul under the virtue of a power of attorney on December 13, 1918, signed Fannie Altshul, administratrix of Victor I. Altshul, also known as Ketchum & Company.

Q. Mr. Altshul, Mr. Kosben testified that before
your brother's death he didn't mention the time,
but sometime before your brother's death you told
him that your brother Victor owed you five thou-
sand dollars; did you ever tell him that? A. No,
sir. 10

Q. He said that after your brother's death, some
five or six months after, you told him that Victor
owed you ten thousand dollars? A. Why, there
was a claim for ten thousand dollars filed with the
estate. 20

Mr. Tiffany: What was the question?

Q. Did you tell him five or six months after your
brother's death that there was ten thousand dol-
lars due you? A. Five or six months? A. I don't
believe we were on speaking terms five or six
months after my brother's death.

Q. Did you tell him shortly after your brother's
death how much your brother owed you? A. Yes,
sir. 30

Q. How soon after your brother's death? A.
During the week of Schiver; the week my brother
died.

Q. During the week your brother died? A. Yes.

Q. And at the time you told him how much he
owed you— A. Ten thousand dollars.

Q. Did your brother at the time owe you ten
thousand dollars? A. Yes.

Q. Did you ever receive payment of that ten thou-
sand dollars? A. No, sir. 40

Q. Or any part of the ten thousand dollars? A. No, sir.

Q. And did he at the time of his death owe you ten thousand dollars? A. He did.

Q. Had any part of it been paid? A. No, sir, that is why—

10 Q. Of this ten thousand dollars— A. Understand, I was paid for it, but not by the estate.

Q. I am speaking now—when you say you were paid for it do you mean that someone paid you the ten thousand dollars? A. Someone I sold the notes to.

Q. That is a different thing; when you speak of someone paying you, do you refer to your having turned over the notes, sold the notes to Doctor Rosinoff? A. Yes, sir.

20 Q. But did you ever receive payment of the note itself of your brother or the estate of your brother? A. No, sir, not by my brother or the estate of my brother.

Q. Or from anyone else, payment, I am speaking of now. A. Payment, no.

Q. This note at ten thousand dollars, when did you receive it? A. The first part of June, 1918.

30 Q. I show you a letter dated June 4, 1918, and ask you whether that letter—whether you received the note enclosed in an envelope which contained that letter? A. Yes, sir.

Q. Enclosed in that letter? A. Yes.

Mr. Lichtenstein: I offer that letter in evidence.

Mr. Tiffany: May I see it (after reading)?

No objection.

Marked Exhibit P-10.

Letter read to jury.

Q. Is that the signature of Victor I. Altshul—is that your brother's signature? A. It is.

Mr. Lichtenstein: I call upon the defense to produce check for two hundred and forty-two dollars and seventy-five cents, which was enclosed in this letter.

10

Mr. Tiffany: I will produce it if we have it.

Mr. Lichtenstein: I call upon the other side to produce—I don't know if it has been offered or not, check for \$250 to the order of Mr. Altshul.

Mr. Tiffany: That was offered this morning for identification.

Q. The check for \$242.75 mentioned in this letter of June 4th you received? A. I did. 20

Q. And put through your bank? A. I did.

Q. I show you another check dated November 12, 1918, for \$250 and marked Exhibit D-3 for identification and ask you if you received that check from your brother? A. I did.

Mr. Lichtenstein: I offer the check in evidence.

Mr. Tiffany: No objection.

30

Marked in evidence.

Mr. Lichtenstein: Check dated November 12, 1918, \$250, signed Ketchum & Company, to the order of E. Charles Altshul, and on the reverse side of it in typewriting, "Interest on note on \$10,000 dated June 1, 1918, five months, then indorsed E. Charles Altshul and paid through the bank."

Q. Mr. Adamson, on the stand this morning, spoke of a conversation that he had with you at 40

his office some few months after you brother died; do you recall having a conversation with him at his office? A. I don't remember where his office was at the time, I cannot place it.

Q. Do you remember having a conversation with him? A. Yes, I remember it.

10 Q. You cannot remember the place but you remember having a conversation with him? A. Yes, sir.

Q. And what did you go to see him for? A. Why, there were rumors handed over to me that the estate—I was not on friendly terms—

Mr. Tiffany: I object to that and ask that it be stricken out.

20 Q. Did you have a conversation with Mr. Adamson after you got to see him? A. I did.

Q. What did you say to him? A. I don't remember the conversation, but the whole essence of it was how in the world they came to make charges against me for stealing thirteen thousand dollars worth of notes when he knew that the notes were turned over to me and that the notes were in my bank at the time before my brother ever took sick or ever died, and naturally I was very indignant,
30 I don't remember the exact conversation—but I know I was pretty sore about it.

Q. Did you ask him at that time where the notes were; the thirteen thousand dollars' worth of notes? A. I don't remember as to whether I did; that is, not the first time, but later on. We had various conversations. Later on I think I did ask him, but I am not positive just now.

Q. Now this thirteen thousand dollars—there were thirteen thousand dollars' worth of notes that
40 you did receive from your brother? A. There were.

Q. And you have only offered in evidence here six notes, five of them for two thousand dollars and one of one thousand dollars; was there another two thousand dollar note? A. There was a series of notes aggregating thirteen thousand dollars; six two thousand dollar notes and one one thousand dollar note.

10

Q. And were they the notes of M. Carmot? A. They were.

Q. The person who signed these notes which has been offered for identification or in evidence.

The Court: They are in evidence.

Q. Can you tell me please when it was these notes were turned over to you? A. October 28, 1918.

Q. And by whom? A. By my brother.

20

Q. And were these notes turned over to you in payment of that ten thousand dollar note? A. They were not.

Q. Had they anything to do with the ten thousand dollars note? A. They did not.

Q. You say that they were turned over to you about when? A. October 28.

Q. That is 1919? A. 1918, I think it was, on a Monday.

Q. Your brother was alive at that time? A. Yes, sir.

30

Q. And after you received them what did you do with them? A. Why, I took them to my place and put them in the safe.

Q. And how long did you keep them? A. I had them a couple of weeks and I deposited them in the bank for collection.

Q. What bank did you put them in for collection? A. In the First National Bank.

Q. Of Jersey City? A. In Jersey City.

40

Q. Can you tell us when it was that you put them into the bank for collection? A. I don't know, if I can look in my bank book?

Q. Oh you have a bank book that shows that? A. Yes, November 19, 1918.

10 Q. And how many notes did you put into the bank for collection of this series? A. Seven.

Q. The whole seven notes aggregating thirteen thousand dollars? A. Yes, sir.

Q. And that was a little short of three months before your brother died? A. Well, my brother died December the 13th.

Q. And after these notes were paid out did you receive credit for them? A. I did.

Q. One of them went to protest, didn't it? A. Yes.

20 Q. Did you afterwards collect that note? A. I did.

Q. How did you collect it? A. I believe I went over to New York and Mr. Carmot gave me a check for two thousand dollars for it.

30 Q. I show you a check dated August 18, 1919, signed Carmot present and someone else treasurer, payable to the order of the Yonkers National Bank bearing no endorsement; do you know whether that was a check in payment of that note or not? A. I don't know if that was the check or not, but I know I received a check anyway; that is, I know I was paid, but I don't know if that was the check or not.

Q. This thirteen thousand dollars in notes turned over to you by your brother—will you tell us the circumstances under which you received them?

40 Mr. Tiffany: Objected to.
The Court: Why?

Mr. Tiffany: On the ground that this man is, and I now make application to have him made party plaintiff and ask leave to examine him as to the transfer of this original note on which suit is brought.

(Question repeated.)

Mr. Tiffany: I object to it until I have examined the witness. 10

The Court: Do you want to withdraw the questions?

Mr. Lichtenstein: If they object to it I withdraw the question.

Cross Examination by Mr. Tiffany:

Q. Mr. Altshul you have taken quite an interest in this case haven't you? A. In this case? Yes. 20

Q. You have been here every day of last week? A. Not every day.

Q. With the exception of Friday and Saturday, on which there was no court, isn't that right? A. Yes.

Q. Did you come under subpoena? A. No, sir.

Q. You sold this note to the doctor? A. I did.

Q. For ten thousand dollars? A. Yes, sir.

Q. You took him to your attorneys, Gross & Gross? A. I didn't take him to Gross & Gross, my attorneys. 30

Q. Gross & Gross were your attorneys at the time you transferred your notes to Dr. Rosinoff? A. They represented me in various matters, yes.

Q. They represented you in these estate matters? A. They didn't represent me in the estate matters.

Q. They did not? You are sure about that? A. Sure about it. 40

Q. Didn't they represent you and your father in the suit of Harry Altshul against Fannie Altshul? A. They represented Harry Altshul, but I was no party in the suit.

Q. Henry Altshul is your father? A. Henry Altshul is my father.

10 Q. You made affidavit in that suit? A. Possibly.

Q. Possibly? A. I have no recollection at the present time.

Q. I will refresh your recollection. A. All right, refresh my recollection.

Q. You remember this suit? A. I do.

Q. You remember it was not prosecuted?

20 Mr. Lichtenstein: I object to the question if the Court please.

A. I remember that Harold, one of the children in the estate, demanded an execution against my father, and they came in to meet my sister and my father about it.

Q. Harold Altshul is one of the infant children of Victor? A. Yes.

Q. Harris Altshul is your father? A. Yes.

30 Q. Harris Altshul attended the Court of Chancery as the next friend of Harold Altshul, who is his grandson, to have his mother removed as guardian of the children? A. Yes, sir.

Q. He did not consult Harold about it, did he; Harold is an infant?

Mr. Lichtenstein: I object to that if the Court please.

The Court: I don't see where we are getting gentlemen.

40 Mr. Tiffany: I would discontinue this line

of testimony except that I want to examine on his interest in this chancery suit.

Q. Now that you have told us and gotten rid of your feeling in the matter, I will refer you to the affidavit and ask you if you did not make an affidavit in that suit as to the worth of the estate and the business? A. Yes, I believed I signed this affidavit. 10

Q. Certainly you did. This is a copy of it; isn't it? A. As far as I recollect.

Q. You appeared in court? A. I appeared in court?

Q. Yes, in the court of chancery. A. I don't believe I did.

Q. And you say that Gross & Gross were not your attorneys at the time? A. They were not my attorneys in that case. I had no interest in this case, my father engaged Gross & Gross in this case. 20

Q. I see. And at the time you took Dr. Rosinoff down to the office of Gross & Gross and had this assignment, Exhibit P-2, executed, Gross & Gross were not your attorneys, were they? A. In this particular instance Dr. Rosinoff took me down. My understanding was that Gross & Gross represented Dr. Rosinoff in this matter. 30

Q. They were your attorneys, weren't they? A. Not in this particular matter.

Q. Did they have any work of your in their office at the time? A. At that particular time? As far as I recollect, no.

Q. Didn't they appear for you in connection with the sale of the drug business of Ketchum & Company in New York? A. Not for me, they appeared for my father.

Q. Oh, your father was it? Who carried on ne- 40

gotiations between Gross & Gross and your father, you or your father? A. I do not understand the question.

Mr. Tiffany: I withdraw it.

10 Q. Now, in this—you have no interest in this case? A. No, sir; except to see justice done.

Q. Of course, of course, justice. A. I know a lawyer can not understand that.

Q. We will see if the jury does when the case is over. You knew at the time you transferred the notes for ten thousand dollars, Exhibit P-1, to Dr. Rosinoff, that the validity of that note was disputed, didn't you? A. Why—

20 Q. Yes or no. A. I didn't know that the validity was disputed.

Q. You did not? A. Not the validity—

Q. Just a minute—

Mr. Lichtenstein: Well—

Q. You have answered it. You did not know—

Mr. Lichtenstein: One moment, I think the witness ought to be permitted to conclude his testimony. Counsel should not stop him from going any further.

30 Mr. Tiffany: Counsel is entitled to an answer of yes or no.

Mr. Lichtenstein: I think the witness has a perfect right to conclude his answer.

The Court: Repeat the question.

(Question repeated.)

40 Q. You knew that the claim upon which the note was based was disputed by the administratrix on this estate? A. I knew that there was a lot of petty spite in it and that they were going to make trouble for me.

Mr. Tiffany: I ask that that be stricken out, and the witness admonished to answer the question.

The Court: You knew that the claim which is based on this note was disputed by the administratrix.

10

Q. You knew that because of the fact that the administratrix had advised you in writing under date of December 23, 1919, you said so? A. I received a letter from you, that much I recollect.

Q. Didn't you receive the printed notice your counsel offered in evidence as Exhibit P-4? A. Yes.

Q. Certainly you did. Notwithstanding the fact that you knew on the 23rd of December, 1919, that the estate disputed the claim for the ten thousand dollars and interest on that note, P-1, you sold that note to Dr. Rosinoff and signed an assignment known as Exhibit P-2, in which it is provided that the assignment and endorsement of the note by you are to be without recourse, and that you will not be liable to Henry Rosinoff in any respect whatever; you knew that, did you? A. Yes, the attorney drew up the papers and I signed them and got my money for it.

20

30

The Court: How is this of any value except, perhaps, you may ask me after you are through with this witness you have him added as a party plaintiff.

Mr. Tiffany: Absolutely.

Q. So that you who had said you who were seeking justice and want to see justice done, assign a note you knew was disputed, absolutely without

40

recourse, to Dr. Rosinoff, and took ten thousand dollars of his money and did not advise him of the fact that it was disputed? A. It was a just claim.

Q. I didn't ask you that; answer the question.

10 The Court: The gist of the question, as I understand it, Mr. Witness, is, that knowing that you had put in a claim to the estate, and knowing that the estate was disputing the claim, still you turn over this note or sold it to the Doctor without telling him that it was disputed.

 The Witness: If your Honor will pardon me, I can only answer this question by explaining that I considered this merely a family squabble, to make trouble for me, and that was the reason for having that—

20

 Mr. Tiffany: I ask that that be stricken out.

(Question repeated.)

 A. Dr. Rosoff's attorneys knew the circumstances of my father starting the dispute in chancery; he knew of the bitter family feeling, and I left it all to him; that is why I didn't explain anything.

30

 Q. Is that the best answer you can give us? A. That is the true answer.

 Q. Why didn't you bring suit on this note in your own name instead of transferring it? A. Because I sold that note to Dr. Rosinoff for the day I needed money for a certain purpose, and I sold it, it was out of my hands.

40

 Q. What did you need that money for? A. Why,

I was expecting to close a real estate deal that day and I wanted cash that day for that purpose.

Q. Did you close it? A. I did not.

Q. What did you do with the ten thousand dollars? A. What did I do with the ten thousand dollars? I deposited it in my bank.

Q. What bank? A. In this First National Bank. 10

Q. Of what City? A. Why, I deposited a part of it on the day I received the money and another part expecting to close the real estate deal—I had it and I thought cash would be more tempting: I carried it over after banking hours and I deposited it the next banking day.

Q. How much did you deposit the day you expected to close the deal? A. I would have to—

Q. Can you tell us without referring to— A. I would rather refer to the book if I can find it. 20

Q. Just before you refer to the book, close the book a moment—I withdraw the question.

Q. How much cash did you need on this real estate deal? A. Why, I expected by showing the people about four thousand dollars cash, cash in hand, I might be able to close the deal, so I kept four thousand dollars, as far as I recollect.

Q. Now then, tell us what you did with the money, show us how you deposited it; refer to your book? A. I find on the 31st of December, I deposited in the bank \$6,000. 30

Q. And on January 2nd? A. Four thousand nine hundred and seventy-two dollars and twenty-five cents.

Q. And January 6th? A. Four thousand one hundred and fourteen dollars and thirty-two cents.

Q. One hundred and fifteen dollars and thirty-two cents, wasn't it? A. No, my book says four 40

thousand one hundred and fourteen dollars and thirty-two cents.

Q. The bank owes you two thousand dollars. And on the 26th of December, you deposited how much? A. The 26th of December, five hundred and seventy-six dollars and eighteen cents.

10 Q. Let me see your book a minute. You did not have it balanced? A. No.

Q. Can you tell us what your balance was at any one time, on the 29th of December for instance? A. No, I can not.

The Court: What does your bank do, balance your book or send you a monthly statement?

20 The Witness: Send the monthly statement.

Q. You never returned that money to Doctor Rosinoff? A. No, sir.

Q. When you found this suit coming on, you knew there would be a suit, why didn't you go and give this man his money, as long as your need for it had passed?

30 Mr. Lichtenstein: I object as incompetent, irrelevant and immaterial.

Mr. Tiffany: I withdraw it.

Q. Are you quite sure that Mrs. Altshul was in the room when these powers of attorney were signed? A. Yes, sir.

Q. Just let me see if this isn't the fact: Isn't it a fact that Victor signed them, then you took them to Mrs. Altshul and she signed them too? A. Yes.

40

Q. You are quite sure of that? A. Yes.

Q. What makes you so positive in your mind?

A. What makes me so positive in my mind?

Q. Yes. A. Because her father began to watch me, he came in the house and found my brother was very sick, he didn't leave me alone for a minute in my brother's presence or any other place in the house, that is what makes me so sure about it. 10

Q. That is the only reason, is that right? A. Yes, that is the reason.

Q. You say that there were strange men in charge of Ketchum & Company in New York? A. Yes.

Q. You know, don't you, as a matter of fact, that the men in charge of the company, the different departmental heads had been there for a great many years? A. No, sir, I didn't know anything of the kind. 20

Q. Do you know Mr. Tufiar? A. Yes.

Q. Do you know how long he was with the company? A. Mr. Tufiar was the outside salesman.

Q. I didn't ask you that; I asked you how long he has been with the company? A. How long he has been with the company?

Q. Yes. A. A number of years.

Q. You know a Miss Rosenblatt? A. I know a Miss Rosenblatt? 30

Q. Yes. A. She was the nurse.

Q. For Victor? A. Yes.

Q. And she is what relation to you? A. None whatever.

Q. To your wife? A. None whatever.

Q. None whatever? A. None whatever.

Q. Sure? A. Pretty sure.

Q. Do you remember being in a room with her—
A. No, sir.

Q. You were going over various papers in Victor's house? A. No, sir, I did not.

Q. You swear you were doing no such thing? A. Well, I swear I was not.

10 Q. Will you swear you did not go through Victor's papers in a room in which she was present?
A. I went over Victor's papers with Mrs. Altshul; whether Miss Rosenblatt was there or not I do not know.

Q. You say that these notes which have been offered in evidence the Carmot notes were deposited by you on the 18th of November?

20 Mr. Lichtenstein: He didn't say that.
The Court: 19th of November.

A. I did.

Q. Were they deposited with the bank on the 20th of November? A. My book says the 19th, that is what I recollect.

Mr. Tiffany: That is all.

Mr. Lichtenstein: Your bank book shows, does it not, they were deposited on the 19th.

30 A. On the 19th.

Mr. Tiffany: What was the date of Victor's death?

The Witness: December 13, 1918.

(Witness Excused.)

Mr. Lichtenstein: That is our case.

Mr. Tiffany: No further testimony.

The Court: The case is closed.

Motion for Direction of a Verdict.

Mr. Lichtenstein: I ask for a direction of verdict.

Mr. Tiffany: Before you ask for a direction of a verdict, I make a motion to join Charles Altshul as a party plaintiff on the grounds I have already stated.

The Court: I will hold your motion until I have heard the motion for a direction. 10

Mr. Lichtenstein: I ask your Honor to direct a verdict in favor of the plaintiff and against the defendant in the sum of ten thousand dollars on the ground that there has been no proof, no evidence of any kind, or payment of this note. There has been no defense offered of any kind at all.

The Court: What is there to go before the jury? 20

Mr. Tiffany: Why, there is this to go before the jury; the testimony is, on the part of the plaintiff—they produce a note, the defense has proved that this note after maturity has been negotiated.

The Court: Yes.

Mr. Tiffany: That it was negotiated other than in the usual course of business, that it was transferred by assignment without recourse. There is proof that this man died. 30

The Court: That is not so far denied by anybody.

Mr. Tiffany: No. There is proof and there is in evidence check for \$250 showing payment of interest on \$10,000, dated June 1, 1918; a note dated June 1, 1918, for five months. No other part of the note but interest for five months has been paid. Then, coupled with the testimony of Mr. Adamson that Victor has paid off or was going 40

Motion for Direction of a Verdict.

10

to give these notes in payments of the debt to Charles, coupled with the fact that they were deposited about the same date in the Commercial Trust Company in one payment, without showing on the part of Charles the consideration for these notes, is sufficient inference for the jury to find, with all the rest of the testimony, that there was a payment.

Mr. Tiffany: I move the Court that Mr. Altshul be made a party plaintiff to this action.

Mr. Lichtenstein: (After argument.) As far as I am concerned, Mr. Altshul may be joined as a party plaintiff.

20

Mr. Tiffany: Do you move to make him a party?

Mr. Lichtenstein: I say we are willing to make him a party, and I move to make him a party.

The Court: Then I will make him a party plaintiff.

Mr. Tiffany: And I ask that the Court stay the proceedings and give us a chance to amend the pleadings.

30

The Court: No, I may, after judgment, however, give you a reasonable opportunity to bring another action, which is giving you the same benefit and does not delay the present trial.

40

I will, in accordance with the request and as the evidence in the case indicates to me, direct a verdict in favor of the plaintiffs as they now are, and against the defendant and in the sum of ten thousand dollars and whatever the interest is.

Mr. Lichtenstein: Interest from November 1, 1918.

The Court: I take it that is so.

Mr. Lichtenstein: November 1, according to the facts.

Mr. Tiffany: No objection to that.

The Court: Interest from November 1, 1918. 10

Mr. Tiffany: My objection is noted, of course.

The Court: You may have your exception noted to my direction.

You will take a verdict in the sum of \$11,500 in favor of Henry Rosinoff and E. Charles Altshul against Fannie C. Altshul as administratrix of the estate of Victor I. Altshul, being ten thousand dollars and interest thereon from November 1, 1918, to this day. 20

Exhibit P-1.

\$10,000.00

New York, June 1, 1918.

Six months after date we promise to pay to the order of E. C. Altshul—Pay \$10,000 and 00 cts. 30
Dollars at 24 Cliff St., New York City.

Value Received.

KETCHUM & CO.

Exhibit P-2.**KNOW ALL MEN BY THESE PRESENTS.**

10 That I, E. Charles Altshul, of the City of Jersey City, County of Hudson and State of New Jersey, party of the first part, for and in consideration of the sum of Ten Thousand (\$10,000.00) Dollars to me in hand paid at or before the ensembling and delivery of these presents by Henry Rosinoff of the same place, party of the second part, have assigned, transferred and set over and by these presents do hereby assign, set over and transfer unto the said Henry Rosinoff, his executors, administrators and assigns, a certain promisory note made by Victor I. Altshul, trading under the name of Ketchum & Company, dated June 1st, 1918, for the sum of Ten Thousand (\$10,000.00) Dollars and all and
20 every claim, right and demand which I have against the said Victor I. Altshul or his estate or against Fannie K. Altshul, administratrix of the estate of Victor I. Altshul, deceased, or against Fannie K. Altshul, ancillary administratrix of the estate of Victor I. Altshul, deceased, thereon or by virtue thereof.

30 Provided however, that this assignment and the endorsement of said note by me are to be without recourse and that I shall not be liable to the said Henry Rosinoff thereon in any respect whatsoever.

And I do hereby appoint the said Henry Rosinoff my true and lawful attorney in my place and stead to receive, sue for and recover the said moneys and every part thereof with like force and effect as I could or might do if these presents were not made.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31st day of December, 1919.

40

E. CHAS. ALTSHUL. (L. S.)

Exhibit P-3.

To Fannie K. Altshul, Administratrix of Victor I. Altshul, deceased:

The subscriber, E. C. Altshul, claims that there is due to him from the estate of Victor I. Altshul, deceased, the sum of Ten Thousand Dollars (\$10,000.00) and interest thereon at six per cent (6%) from November, 1918, upon a promissory note of which the following is a true copy:

10

\$10,000.00

New York, June 1, 1918.

Six months after date we promise to pay to the order of E. C. Altshul Ten Thousand Dollars and no cents Dollars at 24 Cliff St., New York City.
Value Received.

No..... Due.....

KETCHUM & CO.,

E. C. ALTSHUL.

20

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

E. C. Altshul, being duly sworn according to law upon his oath says, that the foregoing promissory note given by Victor I. Altshul, doing business under the firm name and style of Ketchum & Company, in his lifetime was for a bona fide consideration; and deponent further says that no part of the foregoing has ever been paid, but that the whole sum of Ten Thousand Dollars (\$10,000.00) therein named and interest thereon at six per cent (6%) from November, Nineteen hundred and eighteen (1918), is justly due and owing to him from the estate of the said Victor I Altshul, deceased.

30

E. C. ALTSHUL.

Sworn to and subscribed before me
this 30th day of April, 1919.

40

FRANK J. V. GIMINO,
Master in Chancery of New Jersey.

Exhibit P-4.

In the matter of the
Estate of Victor I.
Altshul, deceased.

Notice of Dispute of Claim.

10 To E. Charles Altshul:

You are hereby notified that I dispute your claim amounting to Ten Thousand (\$10,000.00) Dollars and interest thereon at the rate of six (6%) per cent from November, 1918, against the estate of Victor I. Altshul, deceased, presented by you to me as administratrix of said estate.

20 Dated, Jersey City, N. J.

December 23, 1919.

FANNIE ALTSHUL,
Administratrix.

Exhibit P-5.

30 KNOW ALL MEN BY THESE PRESENT,

THAT I, Victor I. Altshul, have made, constituted and appointed, and by these presents do make, constitute and appoint E. C. Altshul, my true and lawful attorney, for me and in my name, place and stead to make, sign and deliver checks on the COMMERCIAL TRUST COMPANY OF NEW JERSEY, also to endorse for deposit with said Company to my credit any and all checks,
40 notes, drafts, bills of exchange, or other negotiable

Plaintiff's Exhibits.

paper made payable to my order; hereby ratifying and confirming all that my said attorney shall do by virtue hereof.

IN WITNESS WHEREOF, I have herunto set my hand and seal, this 11th day of December, in the year one thousand nine hundred and eighteen. 10
Sealed and delivered in the presence of

(Signed) VICTOR I. ALTSHUL.

S. L. HETRICK (signed).

State of New Jersey, }
County of Hudson. } ss.

20

BE IT REMEMBERED that on this 11th day of December, nineteen hundred and eighteen, before me, the subscriber, personally appeared Victor I. Altshul, who, I am satisfied is the person named in and who executed the foregoing power of attorney, and I having first made known to him the contents thereof he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed.

30

(Signed) S. L. HETRICK,
Notary Public for New Jersey.

(Notary Seal.)

40

Exhibit P-6.

KNOW ALL MEN BY THESE PRESENTS,

10 THAT I, Victor I. Altshul, sole proprietor of and doing business in the name of KETCHUM & CO., have made, constituted and appointed, and by these presents do make, constitute and appoint E. C. ALTSHUL, my true and lawful attorney, for me and in my name, place and stead to make, sign and deliver check on the COMMERCIAL TRUST COMPANY OF NEW JERSEY, also to endorse for deposit with said Company to the credit of Ketchum & Co. any and all checks, notes, drafts, bills of exchange, or other negotiable paper made payable to my order; hereby ratifying and confirming all that my said attorney shall do by virtue hereof.

20 IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 11th day of December, in the year one thousand nine hundred and eighteen.

(Signed) KETCHUM & CO.

Sealed and delivered
in the presence of

S. L. HETRICK (Signed)

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

30 BE IT REMEMBERED that on this 11th day of December, nineteen hundred and eighteen, before me, the subscriber, personally appeared VICTOR I. ALTSHUL, who, I am satisfied is the person named in and who executed the foregoing power of attorney, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed.

40 Signed S. L. HETRICK,
Notary Public for New Jersey.
(Notary Seal)

Exhibit P-7.

BANK BOOK E. C. Altshul and Samuel Kosven.

1918

Dec. 13 G. \$5000.

13 Z. 6500.

12/27/18 and closed 11500.

10

Total credits \$11500.

Vouchers returned

as per list \$11500.

12/27/18 Balance Account Closed.

Exhibit P-8.COMMERCIAL TRUST COMPANY OF
NEW JERSEY

20

Grove Street Branch

Jersey City, Dec. 13, 1918. No. .

Pay to the order of M. J. Block \$500.00.

Five Hundred and 00/100 Dollars.

E. C. Altshul and Samuel Kosven.

Exhibit P-9.

30

Jersey City, N. J., Dec. 21, 1918.

Received from E. C. Altshul the sum of Eleven Thousand Five Hundred Dollars (\$11500.), same being money withdrawn from the account of Ketchum & Co. in the Commercial Trust Co. of which V. I. Altshul was owner by E. C. Altshul under the virtue of a power of attorney on Dec. 13th, 1918.

Fannie Altshul, Admix. of V. I. Altshul
also known as Ketchum & Co. 40

Exhibit P-10.

KETCHUM & CO.
Wholesale Druggists
Chemicals, Drugs, Oils, Proprietary Remedies
24 Cliff Street.

10 New York, June 4th, 1918.

Mr. E. C. Altshul
151 Halliday Street,
Jersey City, N. J.

My dear Charlie:

Enclosed herewith please find note for six months
for \$10,000.00 also check for \$243.75 to cover in-
terest up to June 1st.

20 Trusting you will find same in order, I am

Yours sincerely,

KETCHUM & COMPANY,
Per Victor I. Altshul.

VIA :ES.

Exhibit D-1.

30 Dr. H. Rosinoff
220 Washington St.

Hoboken, N. J., December 30, 1919. No. 7315.
Jefferson Trust Company.

Pay to the order of E. C. Altshul \$10,000.
Ten Thousand 00/100 Dollars.

40 H. ROSINOFF.

Exhibit D-2.

KNOW ALL MEN BY THESE PRESENTS,

THAT I, Victor I. Altshul, Prop. of Ketchum & Co. have made, constituted and appointed and by these presents do make, constitute and appoint E. C. ALTSHUL, my true and lawful attorney, for me and in my name, place and stead to make, sign and deliver checks on the COMMERCIAL TRUST COMPANY OF NEW JERSEY, also to endorse for deposit with said Company to credit of Ketchum & Co., any and all checks, notes, drafts, bills of exchange, or other negotiable paper made payable to my order; hereby ratifying and confirming all that my said attorney shall do by virtue hereof. 10

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 11th day of December, in the year one thousand nine hundred and eighteen.. 20

KETCHUM & CO.

Per Victor I. Altshul, Prop.

Sealed and delivered in
the presence of

Fannie Altshul

30

Exhibit D-3.

KNOW ALL MEN BY THESE PRESENTS,

THAT I, VICTOR I. ALTSHUL, have made, constituted and appointed, and by these presents do make, constitute and appoint E. C. Altshul my true and lawful attorney, for me and in my name, 40

Defendant's Exhibits.

place and stead to make, sign and deliver checks on the COMMERCIAL TRUST COMPANY OF NEW JERSEY, also to endorse for deposit with said Company to my credit any and all checks, notes, drafts, bills of exchange, or other negotiable paper made payable to my order; hereby ratifying and confirming all that my said attorney shall do by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 11th day of December, in the year one thousand nine hundred and eighteen.

VICTOR I. ALTSHUL.

Sealed and delivered in
the presence of

Fannie Altshul.

Exhibit D-4.

New York, September 20, 1918.

\$2000.00

Eight months after date I promise to pay to the order of Victor I. Altshul, Two thousand 00/100 Dollars at The Yonkers Trust Co. of Yonkers, N. Y.

Value received with interest.

M. CAMUT,

No. E 10/18/18 Due May 20

Endorsed M. Camut, A. Tinney (illegible), Pay to the order of E. C. Altshul, Victor I. Altshul, E. C. Altshul.

40c Revenue stamps attached.

Exhibit D-5.

New York, September 20, 1918.

\$2000.00

Nine months after date I promise to pay to the order of Victor I. Altshul, Two thousand 00/100 Dollars at Yonkers National Bank of Yonkers, N. Y. 10

Value received with interest.

M. CAMUT,

No. E 10/18/18. Due June 20

Endorsed M. Camut, A. Tinney (illegible), Pay to the order of E. C. Altshul, Victor I. Altshul, E. C. Altshul.

40c Revenue stamps attached.

20

Exhibit D-6.

New York, September 20, 1918.

\$2000.00

Six months after date I promise to pay to the order of Victor I. Altshul, Two thousand 00/100 Dollars at The Yonkers Trust Co. of Yonkers, N. Y. 30

Value received with interest.

M. CAMUT,

No. E 10/18/18. Due March 20 Y

Endorsed M. Camut, A. Tinney (illegible), Pay to the order of E. C. Altshul, Victor I. Altshul, E. C. Altshul.

40c Revenue stamps attached.

40

Exhibit D-7.

New York, September 20, 1918.

\$2000.00

Seven months after date I promise to pay to the
order of Victor I. Altshul, Two thousand 00/100
10 Dollars at The Yonkers Trust Co. of Yonkers, N. Y.

Value received with interest.

M. CAMUT.

No. E 10/18/18 Due Apr. 20.

Endorsed M. Camut, A. Tinney (illegible), Pay
to the order of E. C. Altshul, Victor I. Altshul,
E. C. Altshul.

20 40c Revenue stamps attached.

Exhibit D-8.

New York, September 20, 1918.

\$2000.00

Ten months after date I promises to pay to the
order of Victor I. Altshul, Two thousand 00/100
30 Dollars at The Yonkers National Bank of Yonkers,
N. Y.

Value received with interest.

M. CAMUT.

No. E 10/18/18 Due July 20.

Endorsed M. Camut, A. Tinney (illegible), Pay
to the order of E. C. Altshul, Victor I. Altshul,
40 E. C. Altshul.

40c Revenue stamps attached.

Exhibit D-9.

New York, September 20, 1918.

\$1000.00

Twelve months after date I promise to pay to the
order of Victor I. Altshul, One thousand 00/100
Dollars, at Yonkers National Bank of Yonkers,
N. .Y

10

Value received with interest.

M. CAMUT.

No. E 10/18/18 Due Sept. 20.

Endorsed M. Camut, A. Tinney (illegible), Pay
to the order of E. C. Altshul, Victor I. Altshul,
E. C. Altshul.

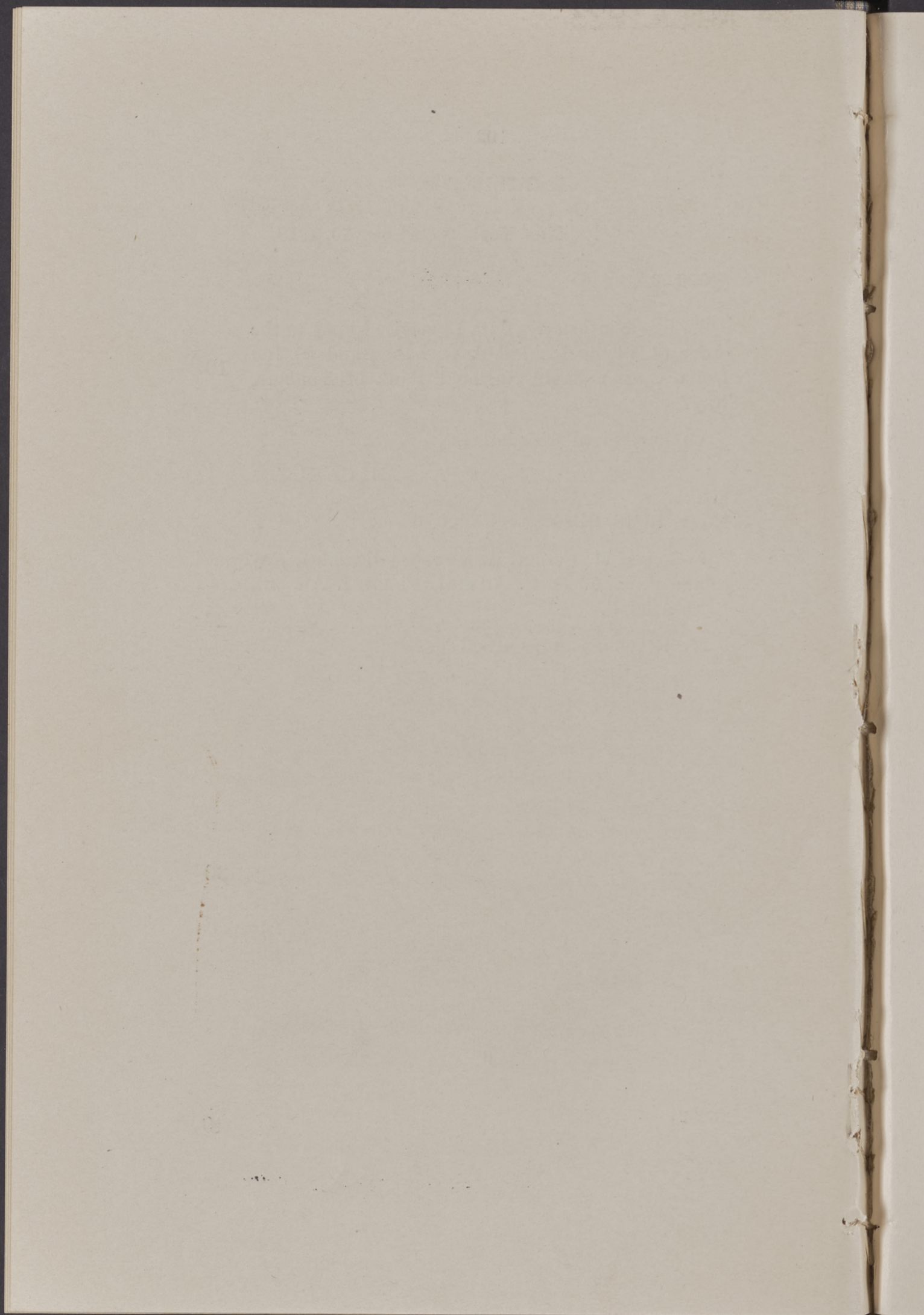
20

20c Revenue stamps attached.

30

36292

40



New Jersey Court of Errors and Appeals

HENRY ROSINOFF and E. CHARLES
ALTSHUL,
Plaintiffs-Appellees,

v.

FANNIE K. ALTSHUL, administra-
trix of the estate of VICTOR
I. ALTSHUL, deceased,
Defendant-Appellant.

Action at
Law.

BRIEF OF PLAINTIFFS-APPELLEES.

This action was brought by Henry Rosinoff, as assignee of a certain promissory note executed by Victor I. Altshul, now deceased, as maker, and made payable to the order of E. C. Altshul. At the conclusion of the trial, the original payee was, on motion of defendant (p. 89, line 3; p. 90, line 13), added as a co-plaintiff.

The defendant in her answer (pp. 5-6) pleaded payment, and that said Henry Rosinoff was not the holder of said note.

The State of the Case shows that Victor I. Altshul, the maker of this note, did business under the name of Ketchum & Company (p. 11, lines 3-4), and under that name he executed and delivered the note sued on to his brother, E. C. Altshul, the payee thereof (p. 11, lines 12-20).

The assignment of the note (Exhibit P-12, p. 92) to the plaintiff, Henry Rosinoff, by endorsement, was proven (p. 11, line 16).

The answer Paragraph 3 (p. 5) admits that the payee, E. Charles Altshul, served upon the administratrix on April 30, 1919, his claim on the note sued on. She further admits, in Paragraph 4 of her answer (p. 6) that she had not paid the same; and her notice of dispute of claim was shown (p. 94).

Mr. Rosinoff procured said note by assignment and endorsement from the payee therein on December 31, 1919 (p. 16, line 40), paying therefor the face value of the note, \$10,000.00 in cash (p. 18 and p. 24, lines 1-10), and he testified that the note had not been paid to him (p. 23, line 33), and E. C. Altshul, the original payee, testified (p. 73, line 40) that he had not received payment of the note. There was no testimony in the case showing that this note had in fact been paid.

At the conclusion of the trial, the Court, on motion of counsel for plaintiff, directed a verdict for the plaintiff for the full sum as called for in said note, with interest (p. 91). There was no question raised or suggested to the Court by counsel, but that if the plaintiff was entitled to a verdict at all, it should be for the amount as directed. From the judgment entered on such direction, the defendant appealed to the Supreme Court where the judgment was affirmed (p. 1a), and hence the defendant has taken this appeal.

No record of the judgment of the Supreme Court appears in the State of the Case.
On the appeal to the Supreme Court, the defendant in her reasons on appeal (p. 9), set forth but three grounds of appeal, to wit:

1. That the Trial Court should have denied plaintiff's motion for direction of a verdict, and should have submitted to the jury for a decision the questions involved in the issue.

2. Because the Trial Court refused defendant's motion for a non-suit.

3. Because judgment was entered in favor of plaintiffs and against defendant by direction of the Court.

In her brief in the Court below, she relied however, on but one ground, which is, that it was error for the Trial Court to direct a verdict for the plaintiff, and that the case should have been submitted to the jury.

Before approaching the points involved in the case, it is well to point out, in view of the charge made in the brief of the appellant on page 23, line 22 thereof, against plaintiffs' counsel, wherefrom it might be inferred that plaintiffs' counsel stands charged with having misled either the Trial Court or the Supreme Court. That the defendant in her brief makes several mis-statements of fact, and sets forth a supposititious case, rather than one shown by the evidence.

The note upon which the action is founded was given for a loan, made by Charles to his brother, Victor, and was accompanied by a letter, Exhibit P-10 (p. 98), and a check for \$243.75 for interest up to June 1, 1918. The note was dated June 1, 1918, and was evidently given for a pre-existing indebtedness.

The business of Ketchum & Company, of which the maker of the note was sole owner, was a large chemical and drug house in New York, carrying on an extensive business.

On October 28, 1918, Victor Altshul turned over to his brother, Charles, seven (7) promissory notes of one M. Camut, six (6) of \$2,000.00 each, and one (1) of \$1,000.00, or in all, aggregating \$13,000.00 (p. 77, from line 1-25). Mr. Charles Altshul swears that the receipt by him of these notes, aggregating \$13,000.00, had nothing whatever to do with the \$10,000.00 note in suit, and when plaintiff offered to prove the circumstances under which these

\$13,000.00 of notes were received by Charles Altshul, the defendant objected to such proof (p. 78, line 34, etc.).

While the defendant was offered the opportunity of making every suitable inquiry concerning these \$13,000.00 of notes, he failed and refused to avail himself thereof, or permit plaintiff to do so.

Victor Altshul, trading as Ketchum & Company, was a man of large business affairs, and undoubtedly kept books and records concerning his transactions, and when appellant says, on page 3, line 28, of his brief "that the liquidation of the note was not consummated in the manner usually adopted by business men dealing at arms' length is readily explained by the relationship, trust and confidence existing between the parties," we maintain that is not, and cannot be so, especially in view of the magnitude of the transaction, and of the dissimilarity in the amount of the note sued on with the amount of the seven (7) notes so given.

On page 4, line 28, of appellant's brief, it is said that Charles Altshul came to Mr. Adamson's office to square himself with respect to the \$13,000.00 Camut notes, and that he gave no explanation of why or how he received them, or even intimated that they were received in connection with some possible transaction other than to take care of the decedent's only indebtedness referred to in the interview, and shown on the trial to be the note in suit. This is, to put it mildly, a misstatement. The witness, Adamson (p. 51 and p. 57), relates the conversation to be that Charles came to his office to talk over matters generally concerning the differences between him and his family. He spoke concerning some differences regarding the General Laboratories Company, and about charges and countercharges that had been made by the

different sides of the family, and by way of suggestion said that the defendant's people had been inquiring of him, Adamson, if he knew anything about the notes given by persons interested in the Cosmopolitan Drug Co., and that Victor had told him, Charles, that the owed him some money, and that he intended to turn these notes, or part of them, over to Charles, and that that was an instance of how things can be straightened out and matters adjusted; and on page 57, that there had been suspicion cast by Mr. Altshul, meaning Charles, of Mrs. Altshul, and that she was suspicious of him, but the question of the \$13,000.00 of notes was not at all involved; nor was there anything said about "decedent's only indebtedness." Nor was there any evidence of any secretiveness, as set forth on page 4, line 36, of defendant's brief. Nor is it true, as stated on page 5, line 35, of defendant's brief, that the witness Kosben, actively aided in the preservation and administration of the estate.

It is a fact testified to by both Kosben (p. 27) and Adamson (p. 52) that Charles did not remove any papers from the safe or desk, except in their presence.

Nor is it true, as stated at the top of page 6 of appellant's brief, that Charles and Kosben were frequently in touch with each other concerning estate matters, for Kosben testified on page 42, line 29, that he did not talk to Charles for six or seven months.

Appellant further states in his brief (p. 7, line 36) that upon the trial, it very clearly appeared that Charles was the real party in interest. No such thing appeared. To the contrary it appeared that he had no interest whatever.

Counsel for the appellant tries, in this Court, to create an atmosphere as he did at the trial, by re-

ferring to two matters in his brief which have no relevancy whatsoever.

On page 6, line 11 and in all of that paragraph, he discusses the withdrawal from Victor's bank account of \$11,500.00 for the purpose of taking care of bills of Ketchum & Company, because of Victor's inability to attend to matters personally. This money was deposited in the joint account of Charles and defendant's father, Kosben, and subsequently withdrawn shortly after Victor's death, and given to the defendant. On page 7 of his brief, defendant's counsel, commencing with line 5, talks about a proceeding brought by Harry Altshul, the father of Charles and of Victor, to have the defendant removed as administratrix of the estate. What these matters have to do with the matter in hand, we fail to understand.

POINT I.

Since the defendant-appellant, at the trial, acquiesced in the amount for which the verdict was directed, and did not raise that point on appeal to the Supreme Court, that question cannot now be raised. In spite of the aspersions attempted to be cast by defendant in his brief upon plaintiff's counsel, we maintain that at the trial, the defendant agreed that if the plaintiff should have a verdict at all, the amount of the verdict should be \$10,000.00 with interest from November 1, 1918. That was in the mind of the Trial Judge and of counsel, and it seems to us is supported by the record.

The entire colloquy between court and counsel, commencing with page 89 of the record, indicates that the defendant never intimated that any question should be left to the jury, as to the amount for which a verdict should be rendered. The only

question raised by the appellant upon the trial was that the Court was not justified in directing a verdict for the plaintiff. If the Court was justified in directing a verdict for the plaintiff for any amount, under the circumstances in this case, the judgment should stand, as the defendant is now estopped from raising the question as to whether the Court directed for the proper amount. The question here involved was decided by this Court in the case of *Rodgers v. Rodrock Co.*, 120 Atl. Rep. 1.

Furthermore, the point was not raised on the appellant's appeal to the Supreme Court, and is waived. See *Philips v. Borough of Longport*, 100 Atl. Rep., 192; *Park Ridge v. Reynolds*, 74 N. J. Law 449; *Frisby v. Thomas Jefferson Council*, 74 N. J. Law, 213 (Err. & App.); *Smith v. Wahl*, 88 N. J. Law, 623.

The fact that it was not argued in the Supreme Court indicates quite clearly that it was not raised on the trial. It seems clear, therefore, that the plaintiff was entitled to a direction of a verdict for some amount, and the exception taken to such direction is without merit.

We will proceed to show that under the evidence, plaintiff was entitled to a verdict.

POINT II.

There is a presumption that the note sued on was supported by a valuable consideration.

The Negotiable Instrument Law, Section 24, provides:

"Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value."

FAILURE OF CONSIDERATION A MATTER OF DEFENSE.

Section 28 of the same law provides:

"Absence or failure of consideration is a matter of defense as against any person not a holder in due course * * *."

POINT III.

The presentation of a note by the plaintiff showing no evidence of payment raises a presumption of a valid subsisting debt.

The note sued on was offered in evidence (p. 91, lines 25 to 35), and showed no endorsement of payment.

In 3 Ruling Case Law, 1285 (Sec. 518), the editor states:

"The fact that the instrument is outstanding in the possession of the indorsee imports *prima facie* a present subsisting debt, and casts the burden of proof upon the maker to establish the fact of its payment."

These principles established by statute and precedent are not, we believe, disputed nor their relevancy to this case denied.

POINT IV.

The burden of proving payment rested on the appellant.

Justice Dixon, in *Fein v. Meier*, 71 N. J. L., 12, held that the burden of showing payment of a mortgage rested on the debtor.

In *Smith v. Burnet*, 17 N. J. Eq., 40, where payment was pleaded as a defense, the Court held that the burden of proof rested on him who asserted it.

In 30 Cyc., 1264, the editor says:

"Proof of non-payment is ordinarily unnecessary to establish a cause of action, since the burden of proving payment is upon the party pleading it.

Under the Negotiable Instruments Law the defendant has the burden, not only of introducing some evidence of payment, but of ultimately establishing it by a preponderance of the evidence.

Brannan, NEGOTIABLE INST. LAW, p. 95;

Pumear v. Brittain, 165 N. C., 401;

22 Col. Law Review, p. 677.

Under Points 2 and 3 of appellant's brief, many cases are cited which deal with the question of when a promissory note or other negotiable instrument is taken as conditional payment, and when it is taken as absolute payment, and also several cases from other jurisdictions holding that where a negotiable instrument is given to one, and it is shown that but one indebtedness existed, the presumption is that it was given to apply on such indebtedness. If those cases represented the law of this State, they would have no application to the facts here proved. Although appellant, throughout his brief, says that the \$10,-100.00 note represented the only indebtedness of Victor to Charles, there is no proof thereof, and it is not the fact.

Charles swears (p. 77, lines 21-25) that they had nothing to do with the \$10,000.00 note indebtedness, and at the bottom of page 78, when the plaintiff offers to show that the \$13,000.00 of notes were given in an entirely independent transaction, he is stopped by the defendant's objection. We maintain that the burden was upon the defendant to show payment, and if the claim was that the

\$13,000 of notes were given as such payment, they might have introduced the decedent's books, or offered to prove it by witnesses, or to have cross examined the witness Charles, who emphatically denies that they were given in payment. Charles may have denied it categorically, but defendant did not permit him to prove it circumstantially, and in detail, nor did he attempt to elicit the circumstances and details by cross examination, but permitted Charles' denial to stand uncontradicted and unimpeached, without any evidence in support of the defense of payment. It will be noted from the cases cited by appellant, under Point 3, that to create the presumption of payment, it must be affirmatively shown *that there was but one and only one indebtedness existing, or that there have been no other dealings*. That must be shown as part of the defense of payment, for otherwise no presumption can arise. The defendant has failed to show any facts from which such presumption could or might arise, and plaintiff has shown the contrary.

On page 17, line 3, of appellant's brief, he contends that the conversation with Mr. Adamson give rise to an implication that the decedent had applied the \$13,000.00 of notes in discharge of the note in suit, and was so intended by the original parties to the transactions. In the first place, Mr. Adamson was merely testifying as to what the decedent had stated to him that he intended to do, and that the matter might be adjusted between both branches of the family. Of course, what the decedent told Mr. Adamson that he intended to do is not evidence from which any inference can or might be drawn, and we maintain that under the circumstances of this conversation, no inference should or can be drawn.

On page 20 of appellant's brief, the case of *Clark*

v. *Public Service Electric Co.* is cited for the purpose that a verdict will not be directed where the only person who could have contradicted the witness is dead. The case cited, we respectfully submit, is not applicable to this case, which is a purely business transaction involving a loan of money by one party to another. The plaintiff is in possession of a solemn document, the possession and presentation of which entitles him to the money promised to be paid thereby. The promissory note speaks and corroborates more strongly than oral testimony.

There is no question of contradiction by decedent, for the execution of the note in this case is admitted. The burden is upon the defendant under the defense of her answer to establish payment. There is no difficulty in the way of her establishing it if it were a fact by the decedent's books and by witnesses who were or might have been present at the time of such payment. The defendant did not even undertake to cross examine the witness, Charles Altshul, as to the circumstances and details concerning the receipt by him of the \$13,000.00 of notes. He could readily have proved that these were received by him in an entirely independent transaction having no connection whatever with the \$10,000.00 note in suit.

On November 12th the decedent acknowledged his indebtedness upon the \$10,000.00 note by sending to Charles a check for five months' interest thereon. Were the rule as contended for by the appellant, a verdict could not be directed against an estate in any case, which, of course, would be contrary to the long established practise in this jurisdiction. A verdict should be directed against an estate as well as against an individual in a proper case.

POINT V.

The direction of a verdict for the plaintiff was proper as there was no conflicting testimony and the evidence clearly showed the right of the plaintiff to a verdict.

Before we discuss the factual inferences and the evidence relating to them, we interpolate here a few of the leading cases on the scope and effect to be given to inferences that we may the more readily appreciate the limits as well as the true position to be given to that class of evidence.

Professor Wigmore says:

“The treatment of the situation, and the operation of the rules of evidence, can best be comprehended by keeping this consideration in mind, namely, that the opportunity to decide finally upon evidential material that may be offered does not fall to the jury as a matter of course; that each party must first with his evidence pass the gauntlet of the Judge; as a part of his function in administering the law is to keep the jury within the bounds of reasonable action. Both parties must first satisfy the Judge that they have a quantity of evidence fit to be considered by the jury and to form a reasonable basis for their verdict. If it is not fulfilled the party in default loses by order of the Judge.” 4 Wigmore on Ev., Sec. 2487.

Manning v. John Hancock Ins. Co., 100 U. S., 693.

Justice Strong, speaking for the unanimous Court, said, at page 697 of the case just cited:

“No direct proof of such receipt was offered, as we have said. None was attempted.
* * * He simply proved, as a fact, that there were life policies in existence, secured through his agency, renewal premiums upon

which fell due before the suit was brought. His evidence stopped there, and he now complains that the jury was not allowed to presume from that fact that the renewal premiums had been paid to the plaintiff. * * *

But was that a conclusion which the jury should have been permitted to draw from the fact proved? It is error to submit to a jury to find a fact of which there is no competent evidence. It does not follow as a necessary or even reasonable sequence from the fact that a debt existed, that it has been paid. Nor is there any presumption of its payment upon which a jury can act. Certainly, none until after the lapse of twenty years. Much less can such a presumption arise in regard to the payment of renewal premiums upon policies of insurance, such premiums not being debts due to the insurers, and not being collectible as debts. We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in *U. S. v. Ross*, 92 U. S., 281, 284, 23 L. ed., 707, 709, we said: 'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in *Starke on Evidence*, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev. 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate

foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglass v. Mitchell*, 35 Pa. St., 440.

"If these principles be applied to the present case, the inadmissibility of the presumption which the defendant contends the court should have permitted the jury to draw becomes apparent. That renewal premiums to a certain amount, upon which he was entitled to commission, had been paid to the company, was the ultimate fact which was necessary to be proved. What the evidence did prove was, that there were policies in force on the 2nd day of June, 1871, the annual premiums upon which were \$87,000; that he would be entitled to commissions upon renewal of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the company, and that these premiums were to be collected by his sub-agents and paid over by them. These were the primary facts. Everything more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed. Built on this presumption was another, namely, that the renewal premiums were paid to the agents; and upon this a further presumption, that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess. The evidences of fact did not go far enough. We think, therefore, the court was not in error in withdrawing it from the consideration of the jury."

Engel v. United Traction Co., 203 N. Y.,
321,

“A fact is admissible as the basis of an inference only when the desired inference is a probable or natural explanation of the fact, and a more probable and natural one than the other explanations of any.”

In 10 Ruling Case Law, page 868, it is stated:

“The general rule is said to be well established that inferences may not be drawn from one transaction to another that are not specifically connected with it, merely because the two resemble each other; but that they must be linked together by a chain of cause and effect in some assignable way, before the inference can be drawn.”

The inferences relied upon by appellant as being such that should have been submitted to the jury are (a) the conduct of Charles Altshul; (b) certain statements of the same party; (c) the existence of another and different obligation of \$13,000 as evidenced by seven notes, six of \$2,000 and one of \$1,000 respectively.

The conduct “arousing the suspicion” of the appellant, consisted in the fact that Charles was anxious that his brother, Victor, should make a will. What bearing or relation this fact has upon the facts of the existence of a debt owing or the amount due thereon is hard to fathom. But if there is any inference to be drawn, is such inference not favorable to the fact that a debt was owing? The making of the will afforded an opportunity for the testator to have discussed or mentioned his obligations, if any, or to have disposed of his extensive holdings in such a way as to have negatived any debt owing as claimed. We can see no theory in this concern of Charles as furnishing any indication or basis that the note was paid or that it was a subsisting obligation, but it is indicative of a concern over the welfare of Victor’s three children, which was the reason given to Samuel Adam-

son (p. 53, line 35), an attorney and witness for defendant, or for the reason so testified to by Mr. Kosben (p. 28, line 19). He said he must have a will because he was owing him money. Other conduct of Charles which appellant claims should have been submitted to the jury is the testimony of the father of defendant, as pointed out by the brief of defendant, that Charles Altshul 'rifled' the private papers of the deceased immediately before and after Victor's death. This evidence of "rifling" is unsupported, for the evidence shows that the examination of the papers of Victor was in the presence of the defendant's father (p. 69, line 21, and p. 88, line 10); Mr. C. Bergman who was in control of the office and papers testified (p. 46, line 36) that Mr. Kosben the defendant's father was present during all the time that the papers were being gone over. But what pertinency to this action does such conduct bear? Does it throw any light on the authenticity of Victor's signature or that payment was made? We fail to see any evidentiary effect to this conduct in any respect.

As to the second inference that there was not a debt of \$10,000 because Mr. Kosben, the father of the defendant, testified that Charles, the payee and the then holder of the note, had told him the decedent owed him \$5,000.

We have heretofore in this brief shown that this point was not raised at the trial, nor on the appeal to the Supreme Court.

Passing for the present the positive denial and the utter improbability of such a statement, it would seem that this inference is barred from consideration because of the familiar and well-established rule that one presumption or inference may not be based upon another presumption or inference.

As was said by Justice Baldwin for the Supreme

Court of Connecticut in *Ward v. Met. Ins. Co.*, 33 Atl. Rep., 902:

"A presumption of a waiver of a known right, cannot be rested on a presumption that the right was known."

The logic of the situation as claimed by appellant is this: Charles knew at the time of this alleged statement that there was a debt of only \$5,000 which must be presumed notwithstanding the proven fact that he then held the decedent's note for \$10,000. But that Charles then knew or believed that there was only a debt of \$5,000, we are to presume, not from facts proven, but from the mere assertion that a certain sum is due that no greater sum could be due. We are bidden then to presume that Charles at or near the dying brother's bedside had clearly in his mind the exact amount of the debt as evidenced by the note, and with the amount of the debt clearly in mind he stated it to be \$5,000. This, as we interpret the law, cannot be done.

This witness, Kosben, first testifies (p. 29, line 3), as follows:

"Q. Did he ever claim or state to you that Victor owed him \$10,000.00? A. I think after he did, a few days.

"Q. When? A. I don't remember when; it might have been six or seven months after I met him.

On page 42, line 25:

"Q. And afterwards you say that after Victor's death he told you that Victor owed him \$10,000.00? A. Six or eight months after he said that Victor owed him \$10,000.00.

"Q. Didn't he tell you that right along? A. No, I did not speak to him for six or seven months.

"Q. He was talking to you right after Victor's death? A. No, sir.

"Q. Do you mean to say you were not talking with him at all? A. For a whole week, that is all, one week after he died.

"Q. You did not talk to him? A. I had a couple of conversations.

"Q. He told you, didn't he, that Victor owed him ten thousand dollars? A. No, sir, never told me; after six or seven months or a year I heard he claimed ten thousand dollars.

"Q. You heard he claimed ten thousand dollars; didn't he tell you that Victor owed him ten thousand dollars? A. No, sir.

"Q. You said he did tell you after his death— A. Five thousand dollars.

"Q. Ten thousand dollars? A. A year after he made a claim for ten thousand dollars, about a year or a year and a half after. I don't know exactly; I heard mention about that."

The testimony of Mr. Kosben is denied by Charles Altshul (p. 73, lines 10 to 40):

"Q. Mr. Altshul, Mr. Kosben testified that before your brother's death he didn't mention the time, but some time before your brother's death you told him that your brother Victor owed you five thousand dollars; did you ever tell him that? A. No, sir.

"Q. He said that after your brother's death, some five or six months after, you told him that Victor owed you ten thousand dollars? A. Why, there was a claim for ten thousand dollars filed with the estate.

"Mr. Tiffany: What was the question?

"Q. Did you tell him five or six months after your brother's death that there was ten thousand dollars due you? A. Five or six months? I don't believe we were on speaking terms five or six months after my brother's death.

"Q. Did you tell him shortly after your brother's death how much your brother owed you? A. Yes, sir.

"Q. How soon after your brother's death?

A. During the week of Schiver, the week my brother died.

"Q. During the week your brother died? A. Yes.

"Q. And at the time you told him how much he owed you— A. Ten thousand dollars.

"Q. Did your brother at the time owe you ten thousand dollars? A. Yes.

"Q. Did you ever receive payment of that ten thousand dollars? A. No, sir.

Mr. Kosben was not only biased but bitter toward Charles Altschul, and his credibility was seriously shaken, as shown by the falsity of his testimony, that Charles had his brother, two days before his death, sign "two blank papers" (p. 31, line 20), "a blank piece of paper without any writing on it" (p. 31, line 30), which testimony was shown (p. 60) to have been the product of a vicious temperament, and his latter disavowal was well-nigh complete (p. 60).

This evidence of an indebtedness owing by Victor to Charles, coming from the lips of such a hostile witness, if not wholly discredited, lends naturally as strong corroborative evidence that the note sued on was, as claimed by plaintiff, the valid obligation of deceased. We repeat the language of the Court of Appeals of New York (*supra*):

"A fact is admissible as the basis of an inference only when the desired inference is a probable or natural explanation of the fact, and a more probable and natural one than the other explanations, if any" (203 N. Y., 231).

The third inference relied on is the fact of the payment of another obligation of \$13,000, as evidenced by seven different notes, as constituting a basis for the jury to consider whether or not such fact had any bearing upon the question of payment of the \$10,000 note sued on, or any other relation to it.

What we have said in discussing the second inference is pertinent to this inference, also. Charles Altschul testified relative to this \$13,000 obligation (p. 77, lines 1 to 40) :

"Q. And you have only offered in evidence here six notes, five of them for two thousand dollars and one of one thousand dollars; was there another two thousand note? A. There was a series of notes aggregating thirteen thousand dollars; six two thousand dollar notes and one one thousand dollar note.

"Q. And were they the notes of M. Carmot? A. They were.

"Q. The person who signed these notes which has been offered for identification or in evidence.

"The Court: They are in evidence.

"Q. Can you tell me, please, when it was these notes were turned over to you? A. October 28, 1918.

"Q. And by whom? A. By my brother.

"Q. And were these notes turned over to you in payment of that ten thousand dollar note? A. They were not.

"Q. Had they anything to do with the ten thousand dollar note? A. They did not.

"Q. You say that they were turned over to you about when? A. October 28.

"Q. That is 1919? A. 1918, I think it was, on a Monday.

"Q. Your brother was alive at that time? A. Yes, sir.

"Q. And after you received them, what did you do with them? A. Why, I took them to my place and put them in the safe.

"Q. And how long did you keep them? A. I had them a couple of weeks, and I deposited them in the bank for collection.

"Q. What bank did you put them in for collection? A. In the First National Bank.

"Q. Of Jersey City? A. In Jersey City."

The evidence that the transactions were separate and distinct is supported by the letter, Ex-

hibit P-10 (p. 98), which letter enclosed a check for \$243.75, interest up to June 1st, 1918, and the further check for \$250, dated November 12, 1918, on reverse side of which was endorsed, "Interest on note on \$10,000, dated June 1st, 1918, five months" (p. 75, lines 30 to 40).

The fact is the \$10,000 note was dated June 1st, 1918, and forwarded to Charles by letter bearing date June 4th, 1918 (p. 98); that later, November 12th, 1918, a check of \$250 was paid as interest on the \$10,000 note for five months. That is, interest was paid up to November 1st, 1918. There is, therefore, a clear recognition of the existence of the \$10,000 obligation on November 12th, 1918. Victor Altshul died a month later, December 13th, 1918.

It is here again found difficult to find any basis for an inference or connection between them.

Counsel for plaintiff sought to go into the circumstances of the giving of the \$13,000 notes (p. 78, lines 34 to 38):

"Q. This thirteen thousand dollars in notes turned over to you by your brother—will you tell us the circumstances under which you received them?"

but objection by counsel for defendant-appellant stopped the inquiry.

It seems odd that defendant now hugs so tenaciously to insinuations when the facts were so easily procurable. But the thin air through which they move does not daunt them.

Plaintiff was ready to demonstrate the fact, as testified to by Mr. Charles Altshul, that the receipt of the \$13,000 series of notes had no connection whatever with the \$10,000 note upon which this action was brought, but defendant objected to his doing so. That must be taken as an admission that the proffered testimony and the testimony of Mr.

Altshul that there was no connection between the two transactions are true. Defendant sought to interpose a defense based upon no evidence or legal proof, but upon mere insinuation and malevolence.

Counsel for the appellant in his brief lays great stress upon the testimony of Samuel Adamson, from which, he says, an inference might be drawn that the note sued upon had been paid. Summarized, the testimony of Mr. Adamson can be stated as follows: That Mr. Charles Altshul voluntarily came to Mr. Adamson's office concerning the differences between him and his family, with the defendant's side of the matter, and about the charges and countercharges that had been made by the different sides of the family, and substantially the following conversation took place:

"Now, Charlie, you know the result of Victor's death has left things in a rather uncertain condition, and that defendant is somewhat uncertain as to how things stands, and that eventually, as things go along, matters will be straightened out satisfactorily to all concerned. Defendant's people have inquired of me if I knew anything about certain notes that had been given by persons interested in the Cosmopolitan Drug Co. They wanted to know from me what disposition Victor had made of those notes after he had received them. Now, Victor told me at the time that he owed you some money, and that he intended to turn these notes, or part of them, over to you. This is an instance how things can be straightened out and matters adjusted."

There is nothing in this testimony, in spite of all that the defendant may claim for it, from which any inference unfavorable to the plaintiff can be drawn. All that Mr. Adamson related was by way of suggestion to straighten matters out. Of course, what Victor, the decedent, had told to Mr. Adam-

son was hearsay, and cannot be considered. (*Demoney v. Walker*, 1 N. J. L., 33.) Mr. Adamson did not even charge Charles with having received these \$13,000 notes in payment of the \$10,000 note sued upon. All that he said was by way of intimation that the parties get together, explain and adjust their differences. He does not even say or identify positively, that Victor, the decedent, had referred to the \$13,000 notes in question. He says, "Apparently referring to the notes you have shown me."

In view of the fact that Charles voluntarily went to Mr. Adamson for the purpose of enlisting his aid to avoid any feeling between the members of the respective families, and in view of the fact that Mr. Adamson merely suggested a manner of straightening out their differences, can it be said that any inference can be drawn from Mr. Adamson's testimony to sustain the defense of payment?

From the authorities cited in the first four points above discussed, it seems clear that plaintiff has established a *prima facie* case. With such a situation shown, the Court was justified in directing a verdict. It is to be noted that this is not an action for negligence, where acts at a given time are so important, but we are concerned here with a written instrument, its validity, payment or discharge. The establishment of a *prima facie* case on a negotiable instrument is much more effective and binding than is the case of an ordinary action for negligence, where so many questions are to be considered not at all present in an action on a note.

Counsel for appellant makes the rather remarkable point at the bottom of page 6 in his brief "that E. Charles Altshul admitted the receipts of these notes, and did not in any particular explain how or for what purpose he had received them," when the record shows (p. 78, lines 35 to 39):

"Q. This \$13,000 in notes turned over to you by your brother—will you tell us the circumstances under which you received them?"

This question was asked by counsel for plaintiff. But Mr. Tiffany, for the defendant, immediately objected, and the question remained unanswered. It hardly lies with the defendant now to complain that this transaction was not gone into.

Elliott, in his work on Evidence, Section 93, says:

"A presumption operates to relieve a party in whose favor it operates from going forward in argument or evidence, and serves the purpose of a *prima facie* case until the other party has gone forward with his evidence, but in itself it is not evidence and involves no rule as to the weight of evidence necessary to meet it."

Professor Wigmore, in 4 Wigmore on Evi., Sec. 2491, says:

"If the opponent does not offer evidence to the contrary, the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. It is, therefore, a fallacy to attribute an artificial probative force to a presumption increasing for the jury the weight of the facts."

If we convert the word "presumption" into its synonym (10 R. C. L., 867), "inference," it is at once apparent that there is nothing upon which defendant can stand.

"Where a party having the burden of going forward with the evidence introduces no further evidence, the court may direct a verdict, and this is proper whether both parties moved for a directed verdict or only one of them, or if neither of them so moved."

22 Col. Law Rev., p. 359.

In *New Jersey Express Co. v. Nichols*, 32 N. J. L., 166, the Court held that it was only when the inferences to be drawn from the facts were uncertain that it became a jury question.

In *Baumann v. Hamburg Co.*, 67 N. J. L., 250, the Court held a directed verdict proper unless the evidence was conflicting and left the mind in a state of doubt.

The appellee insists that the evidence which was given, and the presumptions attendant on the showing made, cast upon the appellant the duty of going forward. This duty he refused and the refusal made it the duty of the Court to direct a verdict. That the alleged inferences which the appellant relies upon were removed from the consideration of the jury by the positive, unequivocal and undisputed testimony that payment was not made, and by the production of a negotiable instrument signed by the deceased. That if the situation revealed by the evidence supports any inferences at all, those inferences are more indicative of non-payment, and a valid obligation, than of payment and no obligation; hence, as Justice Collins said in the *Engle* case (*supra*), "an inference can be inferred only when the desired inference is more probable and natural than other explanations."

Kelly v. Jackson, 21 U. S., 622.

Justice Storey said, at page 632:

"What is *prima facie* evidence of a fact? It is such as in the judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose. * * * In a legal sense, then, such *prima facie* evidence in the absence of all controlling evidence, or discrediting circumstances, becomes

conclusive of the fact that is, it should operate on the minds of the jury as decisive to found their verdict as to the fact."

Justice Green, quoting the above case in *Polhemus v. Pru. Realty Co.*, 74 N. J. L., at p. 582, said of it:

"And we may be permitted to add to the queries of Justice Storey that if *prima facie* proofs, unrebutted, should operate upon the minds of the jurors so decisively, why should not the Judge at the trial so instruct them?"

Justice Reed, in *Baldwin v. Shannan*, 43 N. J. L., 603, said:

"That in every case before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it. * * * The rule is the equivalent as I understand it, of the statement of the opinion of the case of *Hartman v. Alden*, 5 Vroom., 518, that the test is whether the verdict if rendered otherwise than as ordered, would have been set aside. * * * I do not think that under this rule the defendant was entitled to go to the jury."

The above case was quoted and followed by Justice Gummere in *Meyer v. Birch*, 59 N. J. L., 239, and by numerous other cases.

Professor Wigmore, in 4 Wigmore on Evi., Sec. 2495, in discussing the direction of a verdict, says:

"It remains to ask what shall be the form and effect of the ruling of the judge that the proponent's evidence is insufficient to go to the jury. It is commonly said that he ought to withdraw the question from the jury, and direct a non-suit or a verdict for the defendant if the onus is on the plaintiff, or direct

a verdict for the plaintiff if the onus is on the defendant, that is, decide against the proponent having the risk of non-persuasion on that particular issue, whether he be plaintiff or defendant. * * * The question arises: Is there any reason why an order directing a verdict for insufficiency of evidence may not be made? * * * The usual situation is that of a plaintiff who has produced a mass of evidence sufficient to throw upon the defendant the liability of producing some evidence to the contrary, and if this duty is not sustained, it is the judge's function to make the decision."

Quoted and cited with approval in *Crosby v. Wells*, 73 N. J. L., 800.

In *Furniture Co. v. Board of Education*, 58 N. J. L., 646, Justice Garrison said that:

"to warrant a non-suit the inference to be drawn from the facts proven must be indubious, that is, one upon which reasonable men may not differ."

So the plaintiff here insists that these wild inferences sought to be incurred cannot in any true sense support any divergence of opinion as to the conclusion that plaintiff was entitled to a verdict.

Polhemus v. Prudential Realty Co., 74 N. J. L., 570 (Court of Appeals).

An action on a note. Defendant interposed a plea of general issue. Plaintiff made out a *prima facie* case. A motion for a non-suit was then made and held to have been properly refused. Defendant abstained from supporting his plea by evidence, resting his case on the evidence of plaintiff. The Court said, at page 582:

"In our state it may be gathered from (citing several cases) that when a plaintiff has fulfilled the burden of proof laid upon him and no facts in evidence show that the plain-

tiff's testimony cannot be true, the court is warranted in directing a verdict in his favor.
 * * * The foregoing view might be strengthened by invoking the principle of natural presumptions in evidence but it seems unnecessary to do this."

In *Lippincott v. Royal Arcanum*, 64 N. J. L., 309, it was held that it was the duty of the Court to control a jury in its verdict by a binding instruction when the testimony in the case will not support any other verdict than that which is directed. This case was on an insurance policy claimed by defendant to have been breached in its warranty as to health of the insurer.

In *D., L. & W. R. R. Co. v. Shelton*, 55 N. J. L., 345, it was held that if the evidence clearly failed to establish a cause of action or a sufficient defense the Court could properly direct a verdict.

In *Crue v. Caldwell*, 52 N. J. L., 218, it was held that a jury should be controlled in its verdict by a peremptory instruction when the testimony is of such a conclusive character as would compel the Court in the exercise of sound legal discretion to set aside a verdict if one were returned in opposition to such testimony.

In 8 *Corpus Juris*, page 1060, the editor says:

"It is proper to direct a verdict in an action on a note where the uncontroverted evidence shows his right to recover, or if there is no question to submit to the jury."

The principle urged by appellant that a direction of a verdict is error where the only person who could have contradicted the witness is dead, is applied only to actions arising under the Death Act, or similar acts; not to actions where payment is alleged to have been made on negotiable instruments prior to the maker's death.

The reason for such a rule does not exist. In an

action for negligence the rule is applied because the sole witness for the plaintiff as to whether he used care has died, and there is ordinarily no time allowed or occasion presented to explain the decedent's conduct. But where it is claimed that a note was paid prior to the maker's death there were the usual methods by receipt or destruction of the note open to the deceased during his lifetime, or by the production of his books and papers.

In *Ward v. Met. Ins. Co.*, 33 Atl., 902 (Conn.), where an insurance policy provided that statements of or to an agent should not be sufficient to modify the contract where the evidence showed certain statements were made to the agent, the Court held that it was improper to presume that the agent notified the principal. Justice Baldwin, in discussing the force of a presumption, said (p. 905):

"A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known.

"Under these circumstances no verdict could be supported, and there was nothing left to submit to the consideration of the jury. It therefore became the duty of the court to direct a verdict for the defendant."

In *Hamlin v. Lupo*, 101 S. E., 5 (Ga.), it was held the mere fact that there was a conflict in testimony in an action on a note did not render the direction of verdict for plaintiff erroneous, where the conflict was immaterial, and where giving to defendant the most favorable view of the evidence as a whole and the legitimate inferences therefrom the verdict against him was demanded.

In *Jenkins v. Lowrey*, 100 S. E., 37 (Ga.), it was held in a suit on a note wherein defendant admitted a *prima facie* case and pleaded payment and where the evidence wholly failed to show

payment as pleaded, it was not error to direct a verdict for plaintiff.

In *Sutton v. Libby*, 201 S. W., 615 (Mo. App.), it was held in an action on decedent's note that the evidence was insufficient to warrant the submission to the jury of the question whether items in kind were paid by decedent on the note, and whether note transactions, between decedent and payee, were intended as payments on the note.

In *Thigpen v. Thompson*, 93 S. E., 240 (20 Ga. App., 575), it was held, in an action on a note where defendant pleaded payment, that under the evidence it was proper to direct verdict for plaintiff.

In *Gunn v. Wilson Co.*, 92 S. E., 721, it was held in action on a note where there was no evidence to support plea of payment, a directed verdict for the plaintiff was proper.

In *Morey v. Simpson*, 187 Ill. App., 55, it was held in an action on a note, where the evidence in defense is insufficient to overcome the *prima facie* case by proof of the note, it is proper to direct a verdict for plaintiff.

Plaintiff in an action on a note making a *prima facie* case, and the testimony disclosed no legal defense, held verdict should be directed.

Holland Banking Co. v. Haynes, 187 S. W., 632;

Carter v. Brooks, 88 S. E., 209, 144 Ga., 852;

Browne v. Sanitary Groc. Co., 183 S. W., 959.

In *Stiles v. Steele*, 37 Kan., 552, 15 Pac., 561, it was held where the testimony offered had no tendency to establish the sole defense pleaded, of failure of consideration, or any principle essential to the maintainance of a defense, it is proper to direct a verdict for plaintiff.

In *Belfay v. Wheeler*, 84 Wis., 135, that mere inferences could not be projected into a case to give a probative force to them as against opposing evidence.

In 1 Elliot on Evidence, Section 93, the author says:

"It is sometimes said that a presumption will tip the scale when the evidence is balanced, but in truth, nothing tips the scale but evidence, and a presumption being a legal rule or a legal conclusion is not evidence."

In *Fallon v. Swackhauser*, 226 N. Y., 447, the Court said:

"The only evidence in behalf of the plaintiff is the presumption which arises from the ownership of the car, but as has been stated by this court, such presumption continues only so long as there is no substantial evidence to the contrary."

Wigmore says, Section 2494, on the subject of sufficiency of evidence to go to the jury.

"The proposition cannot be, is there evidence? But rather: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?"

The plaintiff confidently asserts that the evidence as presented by the record "would justify men of ordinary reason and fairness in affirming" the direction of a verdict.

POINT VI.

The direction of a verdict for the plaintiff was proper, if he was entitled to recover anything.

At the conclusion of the case (pp. 90 and 91), the following discussion between Court and counsel took place:

"The Court: * * *

"I will, in accordance with the request and as the evidence in the case indicates to me, direct a verdict in favor of the plaintiffs as they now are, and against the defendant and in the sum of \$10,000 and whatever the interest is.

"Mr. Lichtenstein: Interest from Nov. 1, 1918.

"The Court: I take it that is so.

"Mr. Lichtenstein: Nov. 1, according to the facts.

"Mr. Tiffany: No objection to that."

The defendant, therefore, conceded that if plaintiff was entitled to the direction of a verdict at all, the amount for which the Court did direct such verdict was proper. Even considering the testimony of Mr. Kosben to the effect that Charles Altshul had stated to him that decedent owed him \$5,000, plaintiff was nevertheless entitled to the direction of a verdict, because at least that amount was due, and since defendant as above indicated did not dispute the amount for which the verdict should be directed, he cannot now raise that question. If he had not made such concession at the trial, the Court might have directed a verdict for the plaintiff and left it to the jury to assess the amount of his damages. The appellant however, did not take that position.

POINT VII.

It is respectfully submitted that the judgment herein entered should be affirmed, with costs.

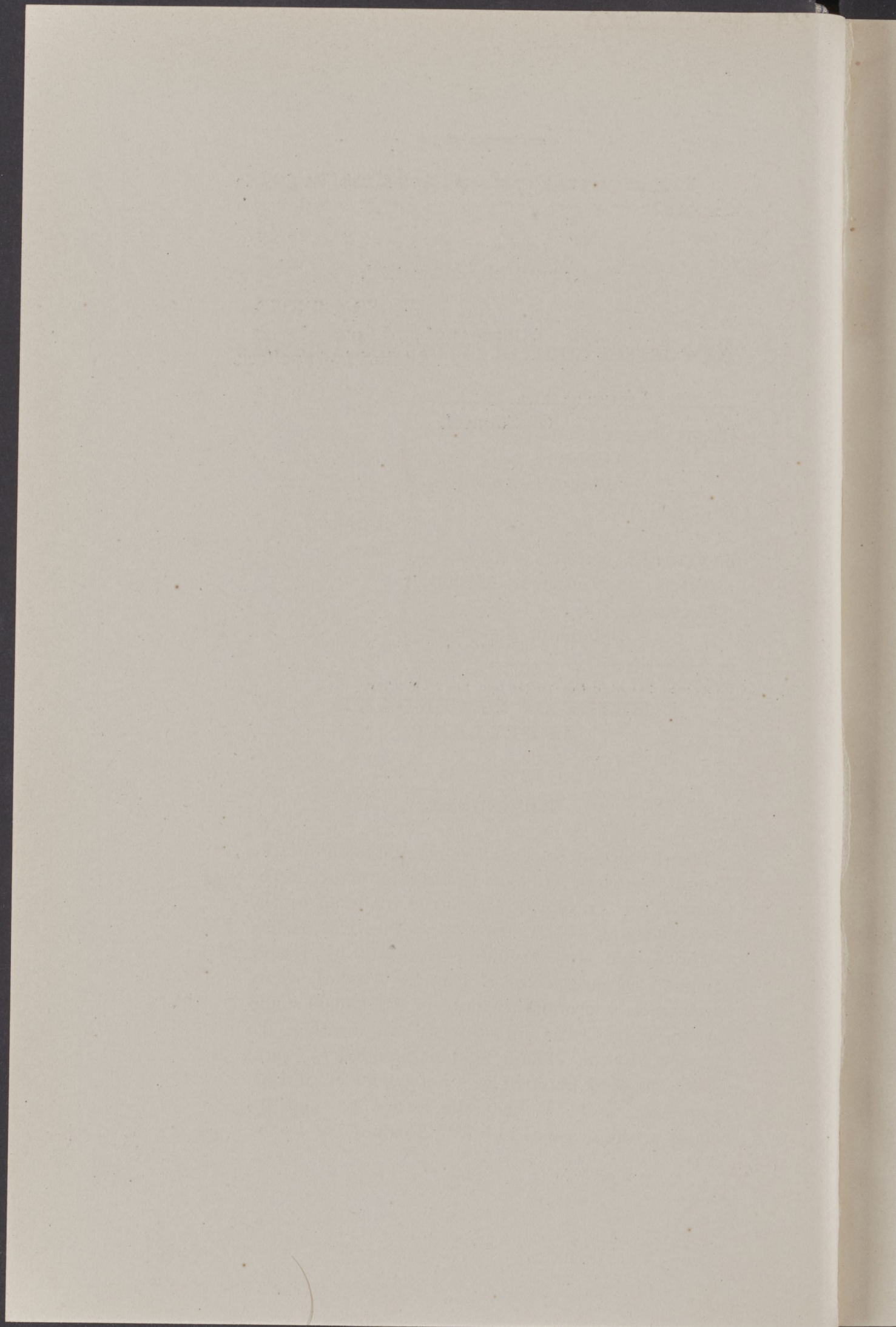
Respectfully submitted,

GROSS & GROSS,
Attorneys of and Counsel with
Plaintiffs-Appellees.

JULIUS LICHTENSTEIN,
Of Counsel.

[361]

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New Jersey Court of Errors and Appeals

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HENRY ROSINOFF and E. CHARLES
ALTSHUL,
Plaintiffs-Appellees,

vs.

FANNIE K. ALTSHUL, Adminis-
tratrix of Victor I. Altshul,
Deceased,
Defendant-Appellant.

Action at
Law.

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BRIEF OF DEFENDANT- APPELLANT.

Statement.

The defendant appeals from a judgment of the Circuit Court of Hudson County in favor of the plaintiff for the sum of \$11,950.00 rendered by the jury pursuant to the direction of the trial Judge. 30

The action was brought originally by Henry Rosinoff, as assignee of E. Charles Altshul, to recover upon a promissory note of \$10,000.00 made by the defendant's intestate to his brother, E. Charles Altshul. The defendant pleaded (1) payment; (2) that plaintiff was not owner of said alleged note, and (3) that the estate was not indebted to the original plaintiff, Rosinoff, or to the 40

said E. Charles Altshul. At the end of the case, after the plaintiff's counsel moved for a direction of a verdict, the said E. Charles Altshul was on motion of the respective counsel for both sides joined as a party plaintiff (Rec., page 90, lines 13-25).

The Evidence.

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Victor I. Altshul, the defendant's intestate, during his lifetime traded under the name and style of Ketchum & Co., at 24 Cliff Street, New York City. On or about June 1, 1918, he made and delivered to his brother, E. Charles Altshul, a promissory note in writing in the sum of \$10,000.00, payable six months thereafter, to wit, on Dec. 1, 1918, at 24 Cliff Street, New York City (Ex. 1 P-1, Rec., page 91). There is no evidence that any other indebtedness of the decedent ever existed in favor of the said E. Charles Altshul, except this note.

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The said Charles Altshul testified on the trial that "about" October 28, 1918, he received from his brother, the decedent, a series of seven endorsed notes aggregating \$13,000.00, each dated September 20, 1918, made by M. Camut to the order of Victor I. Altshul, six of which notes were for \$2,000.00 each and one for \$1,000.00, payable six to twelve months after date, respectively (Exs. D-4, D-9, Rec., pages 100-3). The due dates of these notes were subsequent to the due date of the note in suit. These notes were deposited by E. Charles Altshul in his own bank for collections on November 19, 1918 (Rec., page 77, lines 18-40; page 78, lines 1-10). All of these notes were paid by the makers to the said Charles Altshul in due course and he received credit for the payments in his bank (Rec., page 78, lines 10-20). Of significant importance in the case is the fact also that on November 12, 1918, a week before the said notes were deposited

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by Charles and less than three weeks prior to the due date of the note, Victor Altshul delivered a check to his brother, Charles, for \$250.00, and on the reverse side appears in typewriting "interest of note on \$10,000.00 dated June 1, 1918, *five months*," which was followed by the endorsement of E. Charles Altshul and paid by the bank upon which it was issued (Rec., page 75, lines 23-38). This check paid the interest on the note in suit to November 1, 1918, which was one month before the due date. The attention of the Court is called to the proximity of the date which Charles claims he received the seven notes of \$13,000.00 from his brother and the termination of the interest period represented by this check of \$250.00. A jury would have been justified in finding that these transactions, under the circumstances, were intended to be concurrent. This series of transactions is important because of the bearing it has upon the contention of the defendant, which will hereafter more fully appear, that it represented an accounting and liquidation of the \$10,000.00 note in suit above mentioned, the only indebtedness shown to have existed between the parties involved, and finally discharging the same when part of \$13,000.00 subsequently received by Charles on the Camut notes was sufficient to cover same. That the liquidation of the note was not consummated in the manner usually adopted by business men dealing at arms' length is readily explained by the relationship, trust and confidence existing between the parties.

In additional support of the defense of payment, Mr. Samuel A. Adamson, a member of the New York bar who had been the decedent's attorney during his lifetime and equally related to Charles and the defendant by marriage, testified that Charles Altshul voluntarily came to his office in New York concerning certain differences that had

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arisen between him and the defendant, and in particular with respect to the \$13,000.00 note above referred to, and the unsettled condition of the decedent's estate. Mr. Adamson testified that at that conversation (which took place a year before the claim on the note was assigned to Rosinoff) he said to Charles Altshul, "Here is the situation. Fanny's (the administratrix) people have made an inquiry of me if I knew anything of certain notes" (the \$13,000.00 referred to) * * * "They want to know what disposition Victor had made of these notes after he received them," and I said to Charley, "Now, Victor told me at the time that he owed Charles some money and that he intended to turn these notes, or part of them, over to Charles." I said, "Now that is an instance of how things can be straightened out and matters adjusted" (Rec., pages 50-51; pages 56-57). E. Charles Altshul then admitted he received the \$13,000.00 notes from his brother, but made no mention of having any claim against his brother's estate on the alleged note of \$10,000.00 notwithstanding that the discussion pertained to the general situation of the estate at that time, including a desire on his part to take control of the decedent's New York business (Rec., page 56, lines 32-37). Though he came to Mr. Adamson's office to square himself with respect to the \$13,000.00 Camut notes, Charles gave no explanation of why or how he received them or even intimated that they were received in connection with some possible transaction, other than to take care of the decedent's only indebtedness referred to in the interview and shown on the trial to be the note in suit. This secretiveness was even manifested in dealing with the defendant, her father Kosven (referred to in the record as "Kosben"), when fair dealing would have dictated the fullest disclosures by the decedent's brother in aid-

ing the administration of the estate (Rec., page 42, line 38; page 43, lines 1-5). This silence gives rise to well-recognized presumptions of law and fact which will hereafter be more fully discussed.

Mr. Adamson also testifies that two or three days before Victor died Charles sent for him to come to Victor's office at Ketchum & Company; that Charles then said to him that Victor was in a very low condition and not expected to live and things were very unsettled and wanted to know whether he had ever drawn a will for Victor. Charles told the witness that he had been through the safe and desk and could not find any will and suggested to Mr. Adamson to go over to Victor's house for the purpose of having a will drawn. At that time Charles told the witness that he had been all through the decedent's papers and took them and filed them away and that he had been through the safe to find what papers were in there. At this interview, in which the general affairs of the decedent's business affairs were discussed, no mention was made by Charles of any claim or debt against his brother although more than two weeks had expired after the due date appearing upon note in suit (Rec., page 52, lines 10-40; page 53, lines 1-15).

Evidence was further introduced to the effect that two days prior to the decedent's death, the decedent then suffering from influenza and double pneumonia, Charles told Mr. Samuel Kosven (referred to in the records as Kosben), the father of the defendant, administratrix, that "Victor must make a will because Victor owed him \$5,000.00." Although the witness Kosven actively aided in the preservation and administration of the estate, a fact well known to Charles, no mention was ever made to him by Charles that he had a claim against the estate upon the alleged note of \$10,000.00 until

several months after the decedent's death, notwithstanding he and Kosven were frequently in touch with each other concerning estate matters (page 28, lines 19-43; pages 42-43; page 30, line 29).

10 No evidence was offered by the plaintiff and none appears from the testimony submitted by the defendant that the \$10,000.00 note was ever presented for payment on the due date pursuant to its terms.

It appears also that two days prior to Victor's death, Charles procured the execution of the power of attorney to him as attorney in fact whereby Charles could withdraw from the decedent's bank accounts the sum of \$11,500.00 for the pretended purpose of using the same to take care of the bills of Ketchum & Company because of Victor's inability to attend to matters personally. This sum was thereafter, on the day of the decedent's death,
20 turned over and deposited to the joint account of E. Charles Altshul and Samuel Kosven. No evidence appears that any claims were made for \$10,000.00 when Charles released the \$11,500.00 of the decedent's money then in his control and possession. Payments were made out of this joint account and the same was closed December 27, 1918 (Ex. P-5, 6, 7, Rec., pages 94-97; Exs. D-2 and D-3, pages 99-100; Rec., page 32, lines 37-40; Rec., page 33, lines 10-40).

30 There was no explanation made by Charles for what he had received the seven notes aggregating \$13,000.00 or how the proceeds of the same were to be applied although he categorically denied that they were in payment of the \$10,000.00 note. This denial, it is submitted, was a matter for the jury to have considered. Not having been a party to the suit at the time he testified, he was not excluded from testifying fully on all transactions with the decedent.

40 Snyder vs. Harris, 61 N. J. Eq., 480, 488.

It appears further from the evidence that on more than one occasion Charles Altshul claimed, before and after the decedent's death, only \$5,000.00 was due from his brother, Victor (Rec., pages 28-39-40; page 42, lines 38-39). An abortive attempt was also made by Harry Altshul, the father of Charles, who had no right or claim to participate in the estate, to have the defendant removed as administratrix. These proceedings were instituted by the attorneys for the plaintiffs (Rec., page 79, lines 30-40; pages 80-81, to line 15). 10

Proof of claim upon alleged note was filed with the administratrix on or about April 30, 1919. Charles then made a pretended assignment of the claim upon the note in suit on December 31, 1919 (Rec., page 92, Ex. P-2). Rosinoff, the assignee, although he knew that the claim was rejected and disputed by the administratrix, claimed he paid Charles the full \$10,000.00 in cash as a consideration for the assignment which was consummated in the office of Gross & Gross, the attorneys for the plaintiffs and who had also been the attorneys for E. Charles Altshul in various matters (Rec., page 79, lines 30-35). It is to be noted that notwithstanding such rejection of the claim the plaintiff, Rosinoff, accepted an assignment which contained provision that it was without recourse against the assignor and was without liability in any respect as against the assignor in the event of no recovery against the estate. It was claimed that this \$10,000.00 payment by Rosinoff to Charles was to assist the latter to close a pretended real estate transaction which was admittedly never consummated (Rec., pages 84-85). Upon the trial it very clearly appeared that Charles was the real party in interest, and after testifying for the plaintiff to a number of personal transactions with the decedent, was at the close of the case joined as party plaintiff (Rec., page 90). 20 30 40

10 This appeal is predicated upon error of the trial Court, first in holding that the defendant's evidence was insufficient to submit to the jury the question of payment of the note in its entirety; and second, in directing a verdict for the *full amount* for the plaintiff, whereas the evidence was at least sufficient to have justified the jury on passing on the question of whether under all circumstances, and the admission of E. Charles Altshul that only \$5,000.00 was due him, a *part* payment, at least, had been made on the note in suit.

POINT 1.

General rules of law applicable to this case.

20 (1) On motion to direct a verdict the Court assumes to be true the evidence of the opposite party who is entitled to the most favorable construction that it will properly bear and to the benefit of all reasonable inferences arising therefrom. Only evidence tending to prove his case will be considered. All contradictory or counter-vailing evidence is left out of view.

30 38 Cyc., 1586;
Carr vs. Ry. Co., 78 N. J. L., 692, 696;
Andre vs. Mertens, 88 N. J. L., 626, at 627.

(2) Payment may be proved by presumptive and circumstantial evidence.

8 Corpus Juris, Sec. 1365, page 1056;
Lawson on Presumptive Evidence, page
409 ("G");
Sheldon vs. Heaton, 22 App. Div. (N. Y.),
308, 310,

40 and cases cited in the following points.

(3) The evidence in cases against decedent estates should be carefully scrutinized, particularly where such claims are made by relatives and persons who occupy close and confidential relations with the decedent.

Yates vs. Root, 4 App. Div. (N. Y.), 439,
at 443.

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In Van Slooten vs. Wheeler, 140 N. Y., 624, at page 633, the Court said: "Public policy requires that claims against the estate of the dead should be established by only very satisfactory evidence and the Court should see to it that such estates are very fairly protected against unfounded and rapacious raids."

POINT 2.

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The evidence in this case was amply sufficient to submit to the jury the question of fact as to whether the \$13,000.00 concededly received by E. Charles Altshul upon the seven notes, delivered to him by the decedent, constituted payment of the note in suit.

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Light vs. Stevens, 159 Cal., 288;
Hotchins vs. Secor, 8 Mich., 494, at 499;
Cooper vs. Cooper, 60 Pa. Super. Court,
390;
Bailey vs. Robinson, 233 Ill., 614.

Light vs. Stevens, *supra*, is a case substantially on all fours with the law case at bar. Action was brought by plaintiff on a note of \$3,000.00 made by the defendant's intestate who was the plaintiff's

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brother. The defense set up was payment. It appeared by the defendant's evidence that subsequent to the making of the note the intestate gave certain drafts and certificates of deposit to the plaintiff in different sums aggregating \$4,958.65, the total being in excess of the note in suit. No combination of any of the payments aggregated the amount sued upon. There was no direct evidence that these payments were intended to apply on the note sued upon. At the death of the defendant's intestate his personal effects (other than the note in suit) were taken possession of by the plaintiff and his wife, and the administrator testified that the plaintiff endeavored to induce him to cash three certificates of deposit found among the decedent's personal effects for the purpose of preventing another brother from getting possession thereof. There was no evidence in that case bearing on the question whether there was ever any other indebtedness on the part of the intestate to the plaintiff than the note in suit. The jury found for the plaintiff on the note for the full amount under instructions from the trial Court that if they found for the plaintiff it must be for the full amount. On appeal the judgment was reversed and a new trial granted. The Appellate Court held that this evidence was sufficient to go to the jury on the question of the payment and the amount due and unpaid on the note. In discussing the various rules with respect to burden of proof and presumption in note actions where payment is interposed as a defense, the Court, at page 294, said:

"The real doctrine of those cases is simply that the person upon whom rests this burden of proof of payment must introduce evidence tending to show the money paid was on account of the particular debt rather than on

some other debt or transaction not involved in the action, *sufficient to warrant such inference.*" (Italics by the Court.)

"If such evidence be produced the question of payment is one for the jury. The presumption of non-payment of a note arising from the possession of the note is opposed by the evidence so introduced and the issue is purely one of fact. In *Gabraith vs. Starks*, 117 Ky., 915, where it was held that 'the debtor must show that the money was to be applied on such indebtedness or at least that there was no other indebtedness', it was said, *that the mere passing of money from the debtor to the creditor may be a strong circumstance in determining whether it was intended and accepted as payment on the note* * * *."

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And at page 295:

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"At the same time we think there was enough in the evidence taking it as a whole and considering all the circumstances to support a conclusion that as far as was necessary to accomplish that purpose, the payments were on account of the note and that the excess only was on account of some other obligation or transaction. The relations of the parties and the probable resulting confidence in each other therefrom, the apparent actual confidence in each other, the manner of the payment of the amounts of money actually given by Theodore (defendant's intestate) to plaintiff, the fact that Theodore was financially able to easily discharge this obligation and left several thousand dollars in certificates of deposit at his death are circumstances that might properly influence the jury in arriving at such conclusion."

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It is submitted that the case at bar comes squarely within the reasoning in the Light case, supported as the latter is by the cases in other jurisdictions, such as Bailey vs. Robinson (Ill.), Hotchins case (Mich.), and Cooper vs. Cooper (Pa.), *supra*. These cases are based on well-grounded principles of law more fully discussed in the following points.

POINT 3.

Even in the absence of an express agreement or direct evidence that the \$13,000.00 actually received by E. Charles Altshul on the seven notes was to be applied on the note in suit, it is established law that the money so received was presumptively in payment and discharge of the plaintiff's claim shown to have been the only indebtedness existing.

The Court below predicated its decision on the theory that the defendant failed to produce *direct testimony* that the \$13,000.00 was to be applied on the note in suit. Assuming the absence of direct evidence it is respectfully submitted that the trial Court failed to give due cognizance to well-recognized presumptions of fact and law that arose from the evidence introduced. The presumption is that in the absence of any expressed agreement to the contrary where a single indebtedness is shown as in this case a subsequent payment of money made by the debtor to the creditor is presumptively in discharge of that debt.

In Jones on Evidence (Civil Cases, 2nd Edition), Section 73, on page 73, the rule is summed up as follows:

"Where payments are shown by the maker to the payee of an outstanding note and proof shows that there have been no other dealings, proof of the payment of money by the maker to the payee raises the presumption that payments were to apply on the note."

See also to the same effect:

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Sterry vs. Fitzgerald, 111 Atl. (N. J.), 637;

Matter of Baldwin, 11 App. Div. (N. Y.), 551, at 555;

Warner vs. Warner, 191 N. Y. Supp., 613, at 615;

Marks vs. Kellog, 170 App. Div. (N. Y.), 464, 468.

In Daniels on Negotiable Instruments, Sec. 1268, page 1431 (6th Edition), the rule is stated as follows:

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"In some cases it has been held that an agreement to take a bill or note in absolute payment of a debt must be expressed in order to render it such; *but the better opinion is that such agreement may be implied as well as expressed*, and that all circumstances may be looked into to ascertain what was the actual agreement of the parties."

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The same author on page 1413, in discussing the rule with reference to application of payments, said:

"When neither party appropriates the payment the law will apply it according to equitable principles and *with regard to the probable intention of the parties.*"

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In Norton on Bills and Notes (3rd Edition at pages 19-20) the author, in stating the common rules regarding negotiable instruments as a medium of payment, said:

10 "When a negotiable instrument to which the debtor is not a party (this being the situation at bar) is received for a debt, in the absence of agreement to the contrary a presumption arises in most jurisdictions that the instrument is received in *conditional payment* if the debt is precedent; but that it is received in absolute payment if the debt be contemporaneous" * * * "Whether a payment by bill or note is absolute (that is in extinguishment of the debt only on condition that the bill or note be paid on maturity) is to be determined by the intention of the parties; and if their intention has been expressed or *can be gathered by the circumstances* it will always govern. But, in the *absence of agreement express or implied, certain presumptions as to the intention of the parties have become established.*" * * *

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30 "Certain it is that for lack of a guiding principle the courts have been led into hopeless confusion in their effort to arrive at the presumed intention of debtors and creditors. It is believed, however, that the preponderance, if not the weight of authority, will be found to support the rules stated in the principal text.

40 "Proceeding upon the theory that bills and notes in this respect are not specialties, but simple contracts, and because a simple executory contract is not extinguished by acceptance of another, it is generally held that, in the absence of agreement to that effect, acceptance

of a bill or note of the debtor on account of the debt does not extinguish it. Yet the taking of the bill or note is not without effect upon the right of the creditor to enforce his debt. His remedy for its enforcement is suspended; but, if the bill or note is dishonored, his right to sue on the original debt revives. In other words, the presumption arises that the payment is conditional.” 10

The rule stated in Norton on Negotiable Instruments is substantially reiterated in Daniel's Negotiable Instruments, on pages 1422 and 1424 to 1425, and in Daniels & Douglas on Negotiable Instruments (1903), pages 312-313.

Applying the settled rules of law stated by these well known authorities, no other conclusion can be drawn than that there was presumptively and *prima facie* sufficient evidence to go to the jury on the question of payment. Only one debt was shown to have existed. The notes were presumptively “conditional payment” when delivered, and became “absolute payment” when they were paid. No evidence was given by E. Charles Altshul that the sum so received was to apply on any other transactions, and as a matter of fact no other transactions involving these notes was shown to have existed at any time. The lips of the decedent are sealed. The administratrix is confronted with the situation where on the one side a single debt on the note of \$10,000.00 was shown to have existed in favor of the decedent's brother, and on the other hand he thereafter actually and concededly received a sum in excess of the indebtedness. The wisdom of the law in creating the presumption of payment clearly manifests itself under the circumstances in this case. Otherwise the decedent's estates would be subjected to the “rapacious attacks” referred to in cases mentioned in Point 1. 20 30 40

Upon the evidence as it stands no other presumption or inference could have been drawn with respect to the \$13,000.00 notes than they were when paid to be applied in discharge of the note in suit.

10 So in *Leask vs. Hoagland*, 205 N. Y., 171, the New York Court of Appeals held that in the absence of an explanation, the delivery of a check is presumptively that it was in payment of debt and not as a loan.

20 The entire structure of the plaintiff's case rests (leaving out Charles Altshul's testimony categorically denying payment which it is submitted was for the jury to pass on) upon the production of the note. But it is submitted that the evidence shows the parties were dealing, as brother with brother, occupying a confidential relationship and a trust in each other which would dispense with the formalities of requiring the re-delivery of the note in suit to the maker upon payment, as might have been required by the ordinary methods adopted by business men dealing at arms' length.

Wood vs. Rabe, 96 N. Y., 414, 426;

Goldsmith vs. Goldsmith, 145 N. Y., 313, 318;

Williston on Contracts, Vol. 3, Sec. 2018 (2nd Par.).

30 There is other evidence in this case overcoming the rebuttable presumption arising from the possession of the note in suit which will be more fully discussed in a subsequent point.

40 The silence and secretiveness of E. Charles Altshul with respect to his alleged claim against the estate is in his interviews with Mr. Adamson, the decedent's attorney, and his dealings with Mr. Kosven in connection with matters affecting the estate, is of the utmost significance. These conferences

called for a direct statement from Charles of any rightful claim he may have had against the estate. The conversation with Mr. Adamson gave rise to an implication that the decedent had applied the \$13,000.00 in notes in discharge of the note in suit and was so intended by the original parties to the transactions. This was so understood by Mr. Adamson as elicited on his cross-examination by plaintiff's counsel (Rec., page 62, lines 4-10) ; and a logical inference that may have been drawn by any reasonable mind under the circumstances. The inference was one that Charles, a man of considerable business experience, should not have allowed to prevail without a statement made at the time by him to overcome the implication intended to be conveyed. 10

The attitude taken by Charles on the occasions mentioned, gave rise to presumptions of fact which the jury would have been entitled to take into consideration, with other circumstances proved, in determining whether the note had not in fact been actually paid and whether the plaintiff had any claim against the estate. 20

Watson vs. Newell, 158 App. Div. (N. Y.), 59;

Summer vs. Gardner, 184 Mass., 433, at 436-7;

Donnelly vs. State, 2 Dutcher, 463, 504; 30

Geddes vs. McElroy, 171 Iowa, 633, at 647-8;

16 Cyc., 954-955.

In Watson vs. Newell, 158 App. Div. (N. Y.), 59, the action was against the administrator on a promissory note made by the decedent's intestate. The defense alleged was want of consideration and forgery. The defendant, testifying in his own be- 40

half, was asked by his attorney whether at certain conversations had, after the decedent's death, with the plaintiff, if the plaintiff said anything about having the claim against the decedent or an offset against certain rent. The trial Court excluded the testimony. *Held error.* The Court on page 61 said:

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"We think the ruling was erroneous. From the testimony of the plaintiff it appears that the heirs met at the house and talked over the matter of the appointment of the administrator * * *." "As the conversations had between the plaintiff and the witness related in part, at least, to the rentals of the place (referring to certain real estate of the decedent) and it would have been natural for the plaintiff to have claimed an offset, had he one, and the fact whether or not he made such claim was material and a proper subject for consideration of a jury."

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In *Geddes vs. McElroy*, 171 Iowa, 633, the action was against the administrator on a note. Defense alleged was want of consideration. The Court in a well-considered opinion on page 646 said:

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"But we are of the opinion that there are sufficient evidence of want of consideration to go to the jury upon that issue. When plaintiff urged * * * sons of the decedent to consent to the allowance and payment of the note in suit he undertook to state what the consideration of the note was. The situation was such that he might then be expected to mention everything constituting such consideration."

40

Equally significant is the inconsistent statements made by Charles at the time a will was proposed,

and even after the decedent's death, that the decedent was indebted to him to the extent of only \$5,000.00.

The consequences of such inconsistent claims are summed up in 16 Cyc., pages 954-955, as follows:

"Conduct of a party inconsistent with his present contention may show that the *latter was an after-thought* and proof of such conduct is, therefore, competent *as an admission*. In case of a plaintiff or other claimant it may be shown that he has failed under suitable circumstances to advance the demand upon which he now relies."

In *Western Union Telegraph Co. vs. Stubbs*, 43 (Texas) Civil App., 132, in an action for \$1,000.00 damages, it was held that evidence showing plaintiff had previous to the action only claimed \$25.00 was admissible as an admission against the interest.

The silence of E. Charles Altshul with respect to his failure to disclose the reasons of why his decedent brother had given him a check for \$250.00 in payment of interest of the \$10,000.00 note to November 1, 1918, gives rise to a presumption against him. The note had still another month to run. This payment of interest to a date following so closely on the heels of the delivery of the \$13,000.00 in notes by the decedent called for explanation, the omission of which, counsel submits, would have justified the jury in considering both transactions as one, consummated with the view and intention of liquidating the note in suit.

The testimony of E. Charles Altshul as a witness for the plaintiff categorically denying that the note in suit was paid and that the seven notes received by him had anything to do with the \$10,000.00 note did not justify a direction of a verdict for the plain-

tiff. These statements were mere conclusions in response to leading questions by plaintiff's counsel (Rec., page 77, lines 21-23). His testimony was inherently of a kind to be passed on by the jury and particularly because the lips of the witness's brother were sealed to contradict him.

10 As said in *Clark vs. Public Service Electric Co.*, 86 N. J. L., 151, the Court of Errors on appeal, per Chancellor Walker:

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

20 The contention of plaintiff's counsel that the defendant prevented Charles from testifying more fully has no merit and is utterly without foundation. The record, page 78, lines 35-40; page 79, lines 1-17, clearly demonstrates that the objection by defendant's counsel was conditioned only (Rec., page 79, line 10), and before the Court had an opportunity of passing on the objection, plaintiff's counsel withdrew the question without making any further attempt, at any time thereafter, to have the witness give the testimony he pretended to be able to give.

30 The credibility or bias of the defendant's witnesses was for the jury. The testimony of Samuel Kosven was not discredited as a matter of law upon any material point. His entire cross-examination seems to have been centered upon a purely collateral issue of whether the decedent first signed a blank or completed power of attorney.

It is submitted that the evidence in this case was one that required the submission to the jury.

40 “It is elementary that where fair-minded men might honestly differ as to the conclusions

that may be drawn from facts, the question at issue should be given to the jury."

Munna vs. Easton and Amboy R. R. Co.,
73 N. J. L., 658;
Thomp. Tr. Par., 1664-1666.

Inferences of fact of transactions of *ambiguous character* must be drawn by the jury and not by the Court. 10

Conover *et al.* vs. Middleton Township, 42
N. J. L., 382.

POINT 4.

The trial Court erred in directing a verdict for the full amount assuming that the evidence was insufficient to establish full payment. There was direct evidence by admissions on the part of E. Charles Altshul, before and after his brother's death, that the decedent owed him only \$5,000.00. 20

The denial by Charles at the trial that he only claimed \$5,000.00 is significant because it rebuts any inference that he might have had reference to some other debt when he made the statement. Hence, if we assume for the sake of argument that the \$10,000.00 note in suit was never paid and no showing of any kind having been made that there was any other debt, the jury would have been authorized in finding by such admissions against interest that at least a portion of the seven notes, if not all, had been applied to the note in suit to the extent of \$5,000.00, leaving the balance, if any, claimed to be due by Charles, when he said that 30
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the decedent owed him \$5,000.00. The admission was additional evidence on the question of what was due on the note, which the jury could have passed on, even if the other proof was insufficient to show the note was discharged in full.

10 In *Light vs. Stevens*, 159 Cal., 288, on pages 295 *et seq.* (this is the same case that was referred in "Point 2") where the same question was raised with respect to erroneous instruction of the trial Court in stating to the jury that if they found for the plaintiff on the note in suit it should have been for the *full face value of the note with interest*, the Court of Appeals held that it was for the jury to determine whether a portion of the subsequent payments (more fully set out in Point 2) might have been intended to represent a part payment on the note in suit. It is submitted that the *Light* case
20 also effectually disposes of the point raised and that under the evidence the Court should have at least submitted the question of whether the plaintiff was entitled to the full amount or \$5,000.00 and interest.

Due exception was taken by the defendant's counsel so as to clearly raise this question at the trial (Rec., page 90, lines 30-40; page 91, lines 1-15). On the prior appeal plaintiff's counsel, realizing the weakness of his position on this point, attempted to preclude any questions being raised by making misleading statements and omissions from the record.
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At page 90, lines 35 *et seq.* of the record the following is an accurate statement of what transpired at the trial on this point:

40 "The Court: * * *. I will in accordance with the request and as the evidence in the case indicates to me, direct a verdict in favor of the plaintiffs as they now are and against

defendant in the sum of Ten Thousand Dollars and whatever the interest is.

Mr. Lichtenstein: Interest from November 1, 1918.

The Court: I take that is so.

Mr. Lichtenstein: November 1st, according to the facts.

Mr. Tiffany: No objection to that.

The Court: Interest from November 1, 1918.

Mr. Tiffany: *My objection is noted, of course.*

The Court: *You may have your exception noted to my direction."*

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It will be noted that a statement of the defendant's counsel that "No objection to that" follows and refers specifically to the statements of plaintiff's counsel, immediately preceding, as to the interest only and had no application to the statements of the Court that it intended to grant the motion for the full amount.

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Appellees' counsel cannot avail himself of the method he pursued on the previous appeal to save himself of the effect of the error of the trial Court in directing a verdict for the full amount.

POINT 5.

The production of the note by the plaintiff at the trial raises no presumption in this case that same was unpaid. The presumption, if any, was a rebuttable one.

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Grimes vs. Hilliary, 150 Ill., 141;
8 Corpus Juris, Sec. 1312, pages 1007-8.

The presumption relied on by the plaintiff has no application whether it appears, as it does, in

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10 this case, that the holder had access to the decedent's papers and belongings. The evidence shows that Charles Altshul was, several days prior to the decedent's death, in charge of the decedent's business in New York, was at times in exclusive possession of the papers of the decedent's desk and safe (Rec., page 28, lines 1-28; page 46, lines 12-28; page 52, lines 20-40; page 53, lines 1-4); that he was found going through certain papers and that he went through these papers in the home of the decedent in a room where he would not be liable to be disturbed (Rec., page 33, lines 22-40). He was even seen, at another time, going through the box of his brother to get possession of some papers (Rec., page 26, lines 9-39) also (page 27, lines 1-40).

20 In *Grimes vs. Hilliary*, 150 Ill., 141, the action was on two promissory notes, the defense being payment. It appeared that the defendant in support of his defense of payment, produced the note which he had made to the plaintiff's intestate and claimed that the production by him of the note raised a presumption of payment. It appeared further that the defendant had access to the plaintiff's papers under circumstances similar to the case at bar, and on page 148 the Court said in commenting on this situation:

30 "In view of this evidence, introduced by the plaintiff, the presumption of payment ordinarily arising from the possession of the payor or maker of a promissory note, draft, or the like would not obtain. It is the general rule that where a promissory note, due bill or other instrument is found in the possession of the maker the presumption of payment arises (Sutphen vs. Cushman, 35 Ill., 136; Tendens vs. Schimers, 112 Ill., 263; Lawson on Presumptive Evidence, rule 73). Lawson's rule

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76 is: 'The presumption in rule 75 (being the presumption before stated) does not arise where the debtor has a means of obtaining possession of or of cancelling the obligation other than by payment * * *. But where the maker has access to the papers of the holder and may have acquired the note without payment as with, the presumption of payment does not rise.' "

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See also

Erhart vs. Dietrecht, 118 Mo., 418, on 428.

It is submitted that the same rule applies by analogy to paper that may have been wrongfully obtained by a claimant thereon as in this case, with the same force and effect as against a maker in using the possession of paper for the purpose of an alleged defense of payment as attempted in the Grimes case above cited.

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Not only is the presumption claimed by the plaintiffs because of the possession overcome by the evidence of access to decedent's papers, but also by force of the evidence in this case which would warrant a jury in finding that the note had been actually discharged and paid.

POINT 6.

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This is not a case where the plaintiff, Rosinoff, could claim that he is a bona-fide holder for value before maturity. He took the note in suit subject to all the defense and infirmities existing against the same.

It conclusively appears that the original plaintiff, Rosinoff, came into possession of the note more than a year after the due date specified thereon.

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The circumstances with respect to the alleged assignment of the note to him is set out in the latter apportionment of the statement of facts in this brief. Suffice to say that the jury would have been justified in finding that the alleged assignment was a mere subterfuge adding to the taint of the plaintiff's claim in this action.

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POINT 7.

It is respectfully submitted that the judgment herein be reversed and a new trial granted to the defendant, so that a jury might pass on the questions of fact.

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